



ODHE Basic Title IX Investigator Training

May 18 and 19, 2021





Jessica L. Galanos

Bricker & Eckler, Attorneys at Law, Columbus, Ohio

Former Deputy Title IX Coordinator and litigator

Contact:

Bricker & Eckler

100 South Third Street

Columbus, OH 43215 -4291

614.227.2341

jgalanos@bricker.com



Erin E. Butcher

Bricker & Eckler, Attorneys at Law, Columbus, Ohio
Former Assistant Attorney General, OAG

Contact:

Bricker & Eckler
100 South Third Street
Columbus, OH 43215 -4291
614.227.2303
ebutcher@bricker.com





Questions are encouraged!

Be aware of your own responses and experiences

Follow-up with someone if you have questions and concerns

Take breaks as needed



Yes!

Your Title IX Coordinator is required by 34 C.F.R.

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 institution electronically to post



Definition of sexual harassment

program or activity

How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy

How to serve impartially

- Avoiding prejudgment of the facts
- Conflicts of interest
- Bias (use reasonable person/
- Not relying on sex stereotypes



-
- 1:00-2:30** Introduction, Title IX Overview (Definitions, Processes, and Jurisdiction), Changes to the Role
- 2:30-3:30** Avoiding bias, conflicts of interest, and prejudgment of the facts
- 3:30-3:40** Break
- 3:40-5:00** Relevance and Relevance Hypotheticals



-
- 1:00-2:00** Continue Relevance Hypotheticals, Investigative Techniques
- 2:00-3:00** Live Presentation and Discussion with Bricker Attorneys
- 3:00-3:15** Break
- 3:15-5:00** Investigative Techniques, Writing the Report, Q&A



New Title IX Regulations

-

Formal Rulemaking

- Preamble and guidance versus the regulations

New Definitions

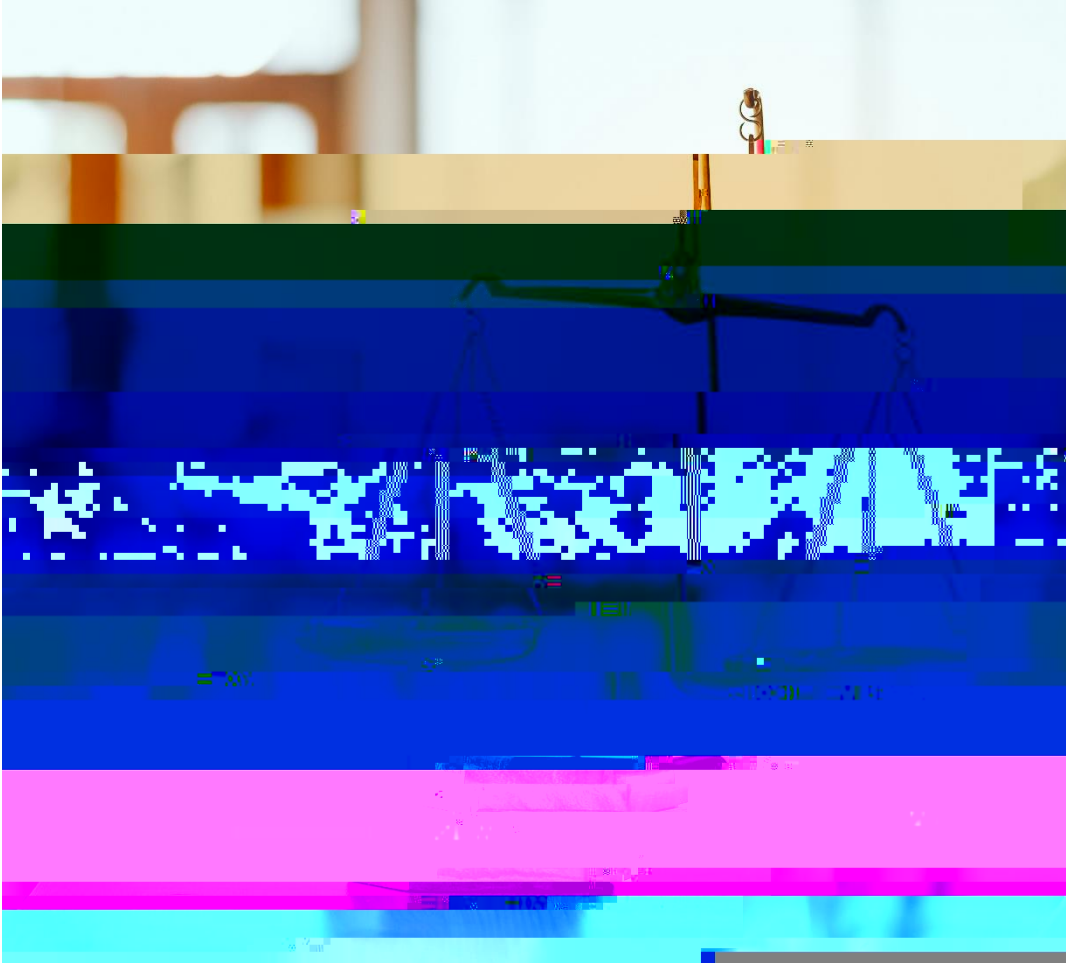
New Required Processes

New Training Requirements

Changes to Jurisdiction

-
- Complainant must be in the United States
- Mandatory Dismissal from the Title IX process

IX discipline



The right of every survivor to be taken seriously, and

The right of every person accused to know that guilt is not predetermined



Preamble/Guidance and the Regulations

Preamble/Guidance:

Dept. of Ed. Interpretation

May rely on legal precedent

Entitled to deference

Potential for change based on

Dept. of Ed. leadership

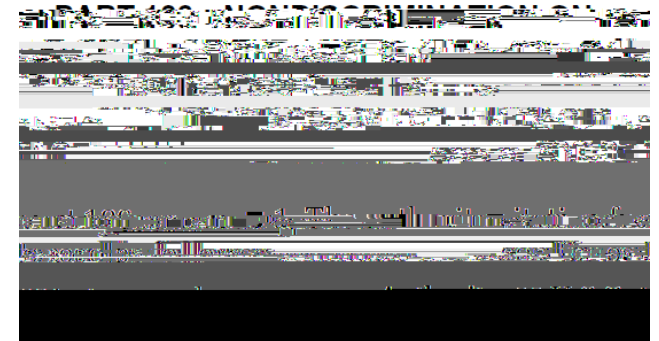
Ex: 2011 Dear Colleague Letter

The Regulations:

34 C.F.R. 106

Force and effect of law

Will require notice and comment
rulemaking in order to amend



Actual knowledge

Complainant

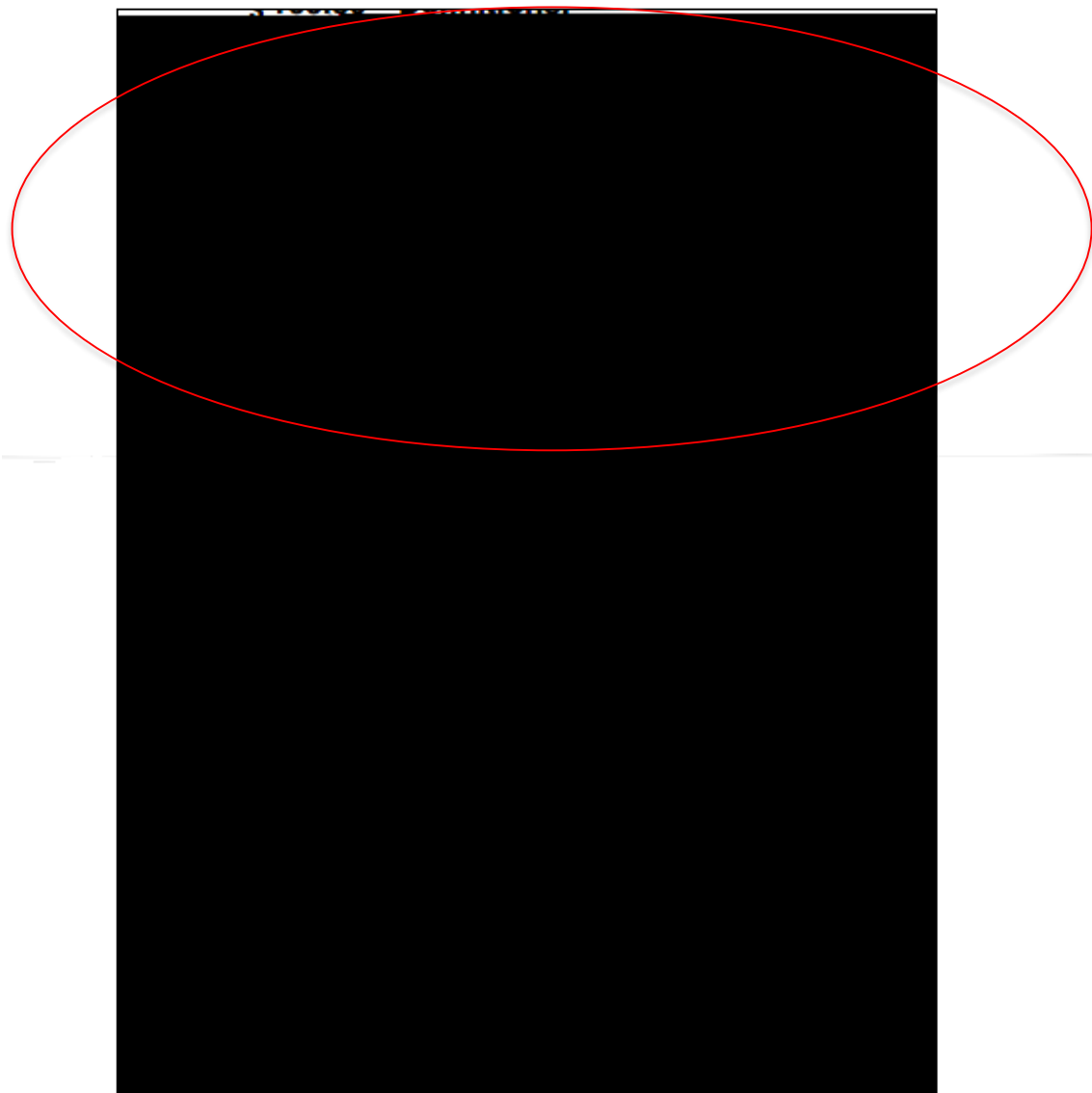
Consent**

Formal complaint

Respondent

Sexual harassment

Supportive measures





Notice of sexual harassment or allegations of sexual harassment

To one of the following:

- Title IX Coordinator, or
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient



Triggers the need for a recipient to respond by following a grievance process

Title IX Coordinator must offer the Complainant supportive measures **regardless** of whether a formal complaint is filed

Required for both a formal grievance process (investigation and hearing) as well as an informal resolution process

New Definition of Sexual Harassment

34 C.F.R. 106.30(a)

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on a demand for sexual favors; or (2) A person's participation in a sexual activity that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(1)(A)(i).



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

- **Quid pro quo**

Refers to certain statutory definitions for sexual assault, dating violence, domestic violence and stalking

- **Sexual assault** is defined as forcible and non-forcible sex offenses as can find in the National Incident-Based Reporting System (NIBRS) manual
- **Dating violence, domestic violence,** and **stalking** definitions are from Clery statute (not regulations) as amended by VAWA

Remember must be on the basis of sex to be Title IX Sexual Harassment



Remember, this is definition used by the FBI for crime reporting

Strict construction of the references in the regulations define Sexual Assault to include the following:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape



The **carnal knowledge** of a person,

- without the consent of the victim,
- including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Carnal knowledge is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).



-
- Oral or anal sexual intercourse** with another person,
- without the consent of the victim,
 - including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.



The **touching of the private body parts** of another person for the **purpose of sexual gratification**,

- without the consent of the victim,
- including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.



Sexual intercourse



Sexual intercourse with a person who is **under the statutory age of consent.**

In Ohio:

Under 13

Under 16



Act of **violence** committed 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.





Engaging in a **course of conduct**

directed at a **specific person**

that would cause a **reasonable person with similar characteristics** under similar circumstances to:

Fear

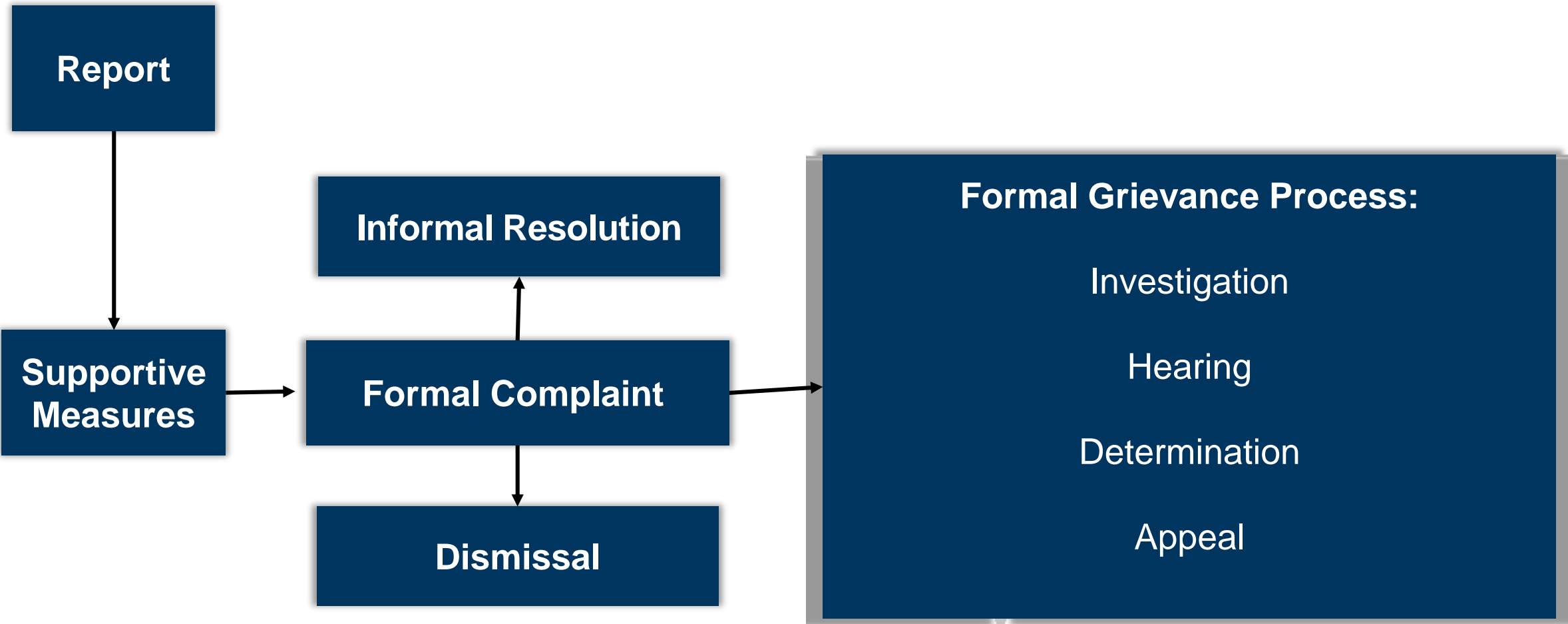
Suffer substantial emotional distress.

It must be sex-based stalking to fall under the Title IX definition (Preamble, p. 30172 fn. 772)



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.





Time for parties/advisors to
review evidence (10 days) to
submit a written response,





Where and When do cases “exit” your process?

Where do your exit ramps take you and when are they available with regard to:

- Cases that *were* covered by your policy but are not covered by the new TIX regs? (e.g., off campus sexual assault)
- Conduct that *was* the new definition of Sexual Harassment? (e.g., sexual exploitation, stalking that is *not* based on sex)





34 CFR 106.45(b)(3)(i)

The recipient **must** investigate the allegations in a formal complaint

(BUT) If the conduct alleged in the formal complaint

would not constitute sexual harassment as defined in 106.30 even if proved,

education program or activity

or **did not occur against a person in the United States,**

then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**



34 CFR 106.45(b)(3)(i)

MAY dismiss if:

Complainant notifies TIXC in writing they would like to withdraw the formal complaint

Respondent is no longer enrolled or employed by the recipient

Specific circumstances prevent the recipient from gathering sufficient evidence



Preamble, p. 30214

opinion of the merits

Permitting recipient to dismiss because they deem allegation meritless or frivolous without following grievance procedure would defeat the purpose of the regulations





Changes to the Investigator's Role





The role of investigator and decision-maker **MUST** be separate.

The investigator does not make decisions to help prevent from the investigation process that is otherwise not relevant to the decision.



The investigator has the burden of asking the parties for and collecting all **relevant** evidence

Relevance may be institution-determined, but we will discuss it further later today





Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts



We will discuss each of these individually and provide examples, but some of the factors for each overlap.

For example, being impartial is greatly aided by not prejudging facts.

(Preamble, p. 30249-30257; 30496)



Be neutral

Do not be partial to a complainant or a respondent,
or complainants and respondents generally





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

Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)



recipients *should* have **objective rules** for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the **Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias**



Examples:

- Financial and reputational interests of Title IX employee aligns with institution
-
-

No *per se* bias based on these issues alone

Will always be a fact-specific analysis



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



Example: it is **not** a ***per se* bias** or **conflict of interest** to hire professionals with **histories of working in the field of sexual violence** (Preamble, p. 30252)

Cautions against using generalizations to identify bias and conflict of interest and instead **recommends** using a **reasonable-person test** to determine whether bias exists.





This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience (Preamble, p. 30252)



An investigator who used to supervise one of the parties;

with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

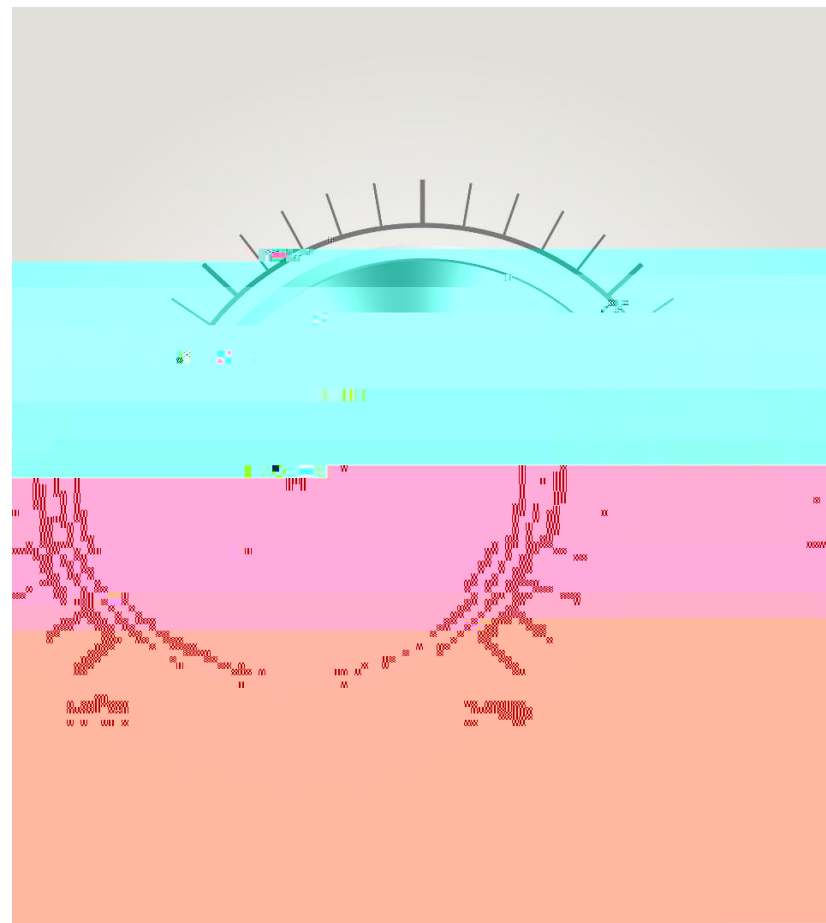


A good way to ensure impartiality and avoid bias:



Issues of Relevance







The Rules of Evidence do



Cannot *per se* exclude certain types of evidence:

A recipient may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (Preamble, p. 30294)





Information protected by a legally recognized privilege





Preamble identifies medical and treatment records

Jurisdiction-dependent

- Attorney-client communications
- Implicating oneself in a crime
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets



There are more considerations for decision-makers regarding relevancy than investigators

cross-examination at the hearing, the decision-maker cannot consider that statement





Focus of Investigations (according to the Preamble):

recipients to **summarize** and evaluate **relevant evidence**, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to section 106.45, appropriately direct **recipients** to **focus investigations** and adjudications **on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true** (i.e., on that is



Participation in an investigation is **voluntary**

When parties elect not to participate, a recipient cannot retaliate against them (Preamble, p. 30322)

It is the right of any party or witness not to participate in the investigation



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.



The following hypotheticals are all based upon the
will go through it together now before we go through the
hypotheticals.

You are the investigator who has been handed this
information from the Title IX Coordinator.



Corona College Email

To: Title IX Coordinator
From: Cody Craft
Date: February 16, 2021

~~Cody Craft and I'm not sure how to make a report to this office, but I need to report that two students, Rachel Rex and Rebecca Rex, have been harassing me and stalking me. They are twin sisters and are friends with my ex-girlfriend, Wendy Watson. I think they may have been harassing me for some time. I have been thinking about reporting them to the Title IX office, but I am not sure how to do so. I would appreciate any advice you can provide.~~

~~I am not sure how to make a report to the Title IX office, but I need to report that two students, Rachel Rex and Rebecca Rex, have been harassing me and stalking me. They are twin sisters and are friends with my ex-girlfriend, Wendy Watson. I think they may have been harassing me for some time. I have been thinking about reporting them to the Title IX office, but I am not sure how to do so. I would appreciate any advice you can provide.~~



You sit down to interview Cody. Cody tells you that he heard



In your interview with Rebecca, Rebecca tells you that she has hired a constitutional law expert who will provide a report

Cody violated the First Amendment.

Is this relevant?



In your interview with Cody, Cody disclosed to you that he has proof that he has post-traumatic stress disorder from medical treatment records to prove this, but does not want to provide them to you.

Is this relevant?





In your interview with Rachel, she discloses that she had a class with Cody last spring from he abruptly disappeared after midterms. Rachel heard a rumor that Cody was removed from the course because he cheated on the midterm exam.

Is this relevant?



In your interview with Rebecca, Rebecca tells you that she has consulted with a domestic violence expert who is willing

precursors to physical violence in dating relationships.

Is this relevant?



During the investigation, you learn that Cody is distantly related to Rachel and Rebecca. In your interview with Cody, he asks that you contact his great aunt Judy because she family has been in the past. Great Aunt Judy also has



Rebecca tells you that she has been unable to sleep since Cody filed the report and would like to provide treatment

Rebecca is willing to sign a waiver.

Is this relevant?



Introduction to Investigative Techniques



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



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



Refer to the policy

Consider what information they are likely to have related to each element

Consider what information they are likely to have that may assist the decision-maker in determining credibility

Be flexible



What should you have with you?

Intake Report

Written notice with allegations

Investigation log

Investigation notes cover sheet

Pre-prepared questions

Evidence you may need to reference or show witness

Policy or Handbook



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

Interview notes are now required to be produced as part of the record



To ensure burden of proof and burden of gathering evidence is not on the parties (106.45(b)(5)(i))

To provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory or exculpatory evidence (106.45(b)(5)(ii))

Not restrict the ability of either party to discuss the allegations under investigation or to gather or present relevant evidence (106.45(b)(5)(iii))



Identify yourself, your role, and a general outline of what

Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate

times, in at least 2 different methods



You must now provide any party whose participation you seek, with

Date

Time

Location

Participants

Purpose of interview or meeting

(106.45(b)(5)(v))



Make introductions

Be hospitable

Give overview of why they are being interviewed

Explain retaliation policy

Invite questions





details

- What could they see? Feel? Smell? Taste? Hear?



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?



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





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



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



Consider whether there are additional allegations that you need to bring to the Title IX Coordinator

Ensure you are not leaving the burden of proof on any party or witness alone (106.45(b)(5)(i))



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



Must provide parties the same opportunity to be accompanied by the advisor of their choice

Nothing in the preamble prohibits support persons in the interview process (this is different at the hearing)

Allowed to limit participation of advisor in process

Whatever rules your institution selects, apply them equally to both parties

(106.45(b)(5)(iv))



Provide ALL Evidence to both parties and advisors

expect decision-maker to rely on it

Allow 10 days to review

Allow written response

Follow up where necessary

Consider responses when preparing report

(106.45(b)(5)(vi))



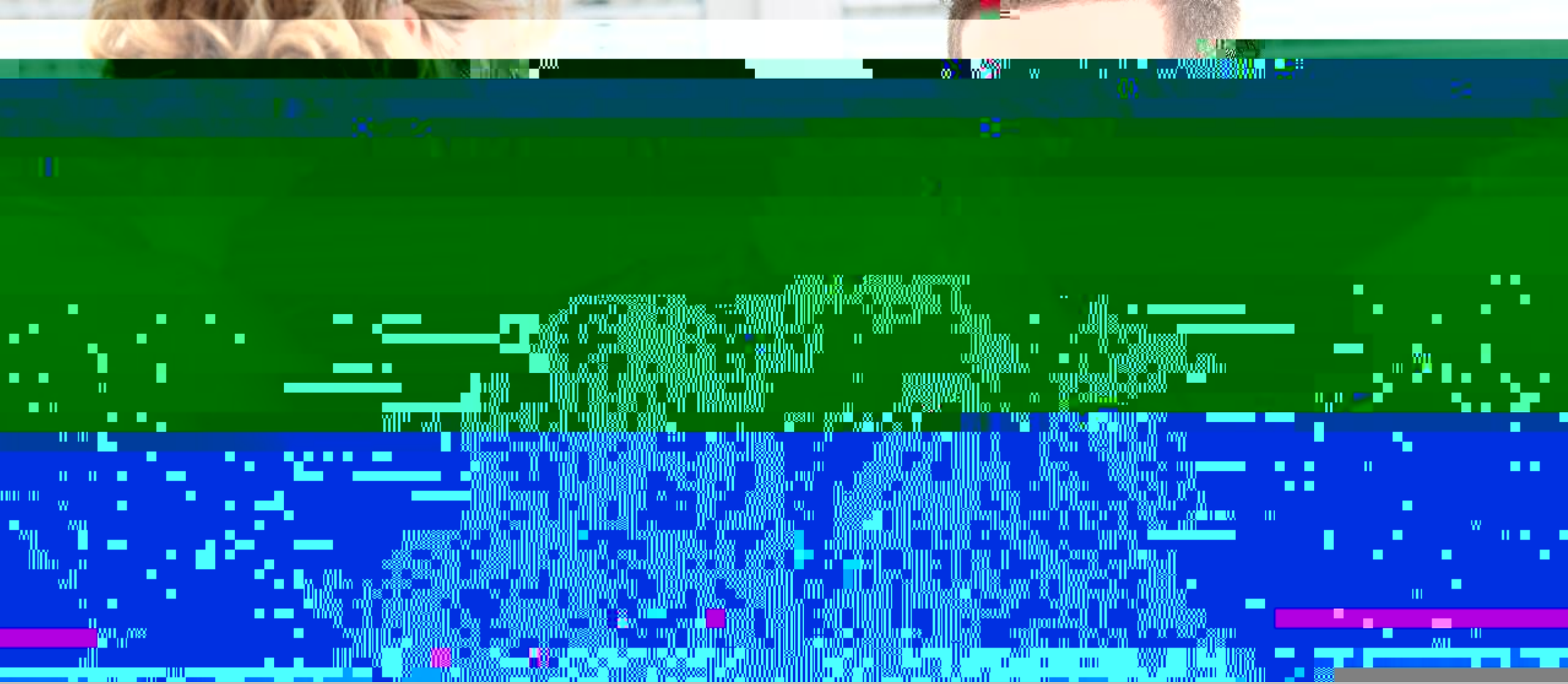
Summarize **facts**

No determination

Provide to parties and advisors

Allow 10 days to review prior to hearing

We will discuss report writing later today



Live Presentation



Study your updated grievance procedures



Make sure you understand potential biases (actual or perceived)

Trauma may affect how someone responds to an incident

Prepare for your interview with questions and statements

Start with open-ended questions

Obtain any documentary evidence that you can



Your second role, after gathering all relevant evidence, is to organize all relevant evidence for the parties and the decision-maker.

Here are some tools for how to best organize all the relevant evidence.



The new Regulations provide that the investigator must create a report that:

Fairly summarizes relevant evidence

(106.45(b)(5)(vii))

What does this mean?



Identify with just factual information:

Complainant

Respondent

Investigator

Witnesses

Perhaps organize by fact v. expert witnesses or by party whom requested the witness



Natural and neutral organization suggestions:

Chronological order

By topic or allegation

Perhaps by chronology within each topic or allegation

By chronology of how the information came in to the investigation

By witness summary



Explain your structure. Example:

agreed upon by the parties and the witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically



Basic description of charges

How did the complaint make its way to an investigation?

Witnesses Interviewed

Witnesses Not Interviewed (and why)

The procedure followed, step-by-step

Any procedural anomalies that need explained?



If this is your practice:

of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of

Did everyone do so?



Identify if you thought something was not relevant and why consider still including in attachment for decision-maker

Provide a table or list of all relevant evidence gathered and attach that evidence



Definition of prohibited conduct alleged from applicable policy

Related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together

Include verbatim, in entirety



and

Attach as appendices any statements
and important evidence



Citations to the record always

- oBe helpful for your fact-finders!

Hearing packet or exhibits helpful to number the pages sequentially for easy citation



Insert into the report screenshots of text messages and pictures where relevant

If information is attached but not referred to in a summary, may want to drop a footnote explaining



The specific type of evidence deemed not relevant in the Regulations:

Information protected by a legally recognized privilege

voluntary written consent

Rape Shield protection for Complainant



If you determined evidence was not relevant because of matters outside of the specific reasons identified in the regulations i.e. because you did not think it was probative of material fact explain and consider attaching in an Appendix

-



If you can, synthesize the information from multiple parties
and witnesses

Where the stories diverge:



complainant if the charges require consideration as an element

impact on [Respondent]. However, to determine whether sexual harassment occurred, the hearing panel will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information



Undisputed Facts

Series of numbered sentences

Disputed Facts

Series of numbered sentences

Make sure you have facts for each element of each charge



Bad vs. neutral and clear writing examples



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.



Bad example: Complainant was very believable when they said they had been attacked by Respondent.

Neutral and clear correction: Complainant stated they were attacked by Respondent on Saturday. Complainant provided the names of witnesses and contact information for those witnesses.



had witnessed anything, but that I should check with her.

Neutral and clear correction: Complainant stated that Complainant did not believe that her roommate, Rebecca, had witnessed anything. Complainant asked the investigator to follow up with Rebecca to verify what, if anything, Rebecca witnessed.



Bad example: Respondent seemed nervous at the interview

Neutral and clear correction: Respondent provided the following information at the interview: that Respondent was at the party from 7-8, that Respondent was not at the party at 7:30, and that Respondent may not have been at the party.



Bad example: Respondent requested that I follow up with her roommate, but I did not because the evidence seemed redundant.

Neutral and clear correction: Respondent requested the investigator follow up with her roommate. The investigator scheduled an interview with the roommate to follow up on any additional information the roommate may have. The

and 2 on the date of the allegation. The roommate was not present outside of that time frame and had no additional information.



Additional information available at:

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

Find us on **Twitter** at
@BrickerHigherEd



Questions?