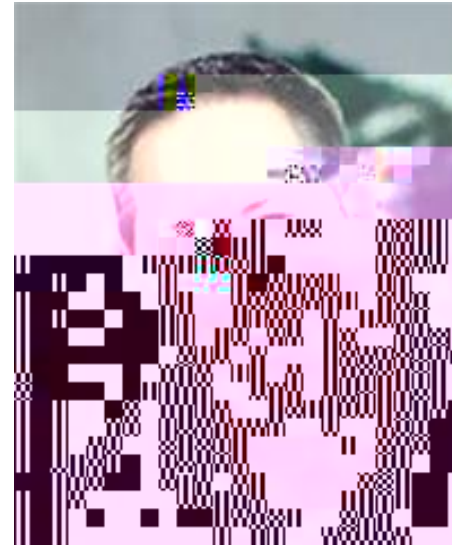


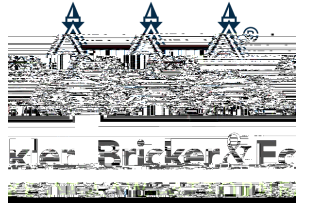
Ready for IX!
Preparing for
Implementation of the
Title IX Regulations

Today's Presenters





Today's Agenda



10:00-11:00 -

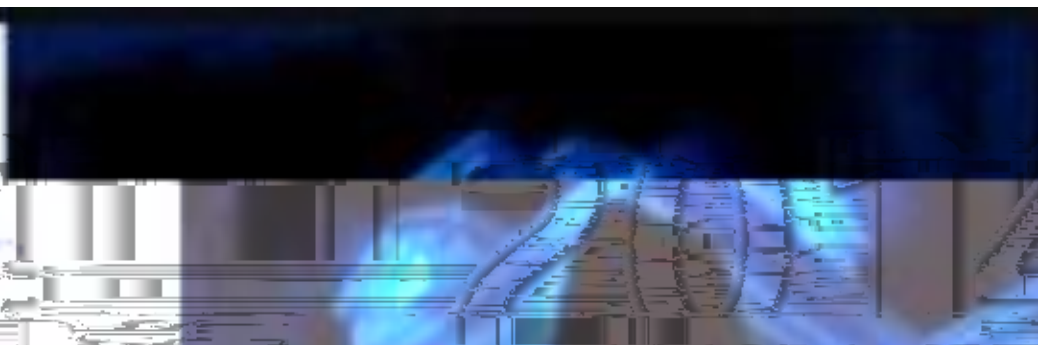
Regulations in their Current Form

11:00-12:00 Practical Considerations for Implementing Policy Changes

12:00-12:30 Break - Lunch

12:30-1:15 Adjudications: Addressing Risk Management and Process Considerations

1:15-2:00 Strategies for Implementing the Final Regulations and Appropriately Communicating to Campus Constituents



TRAPPE

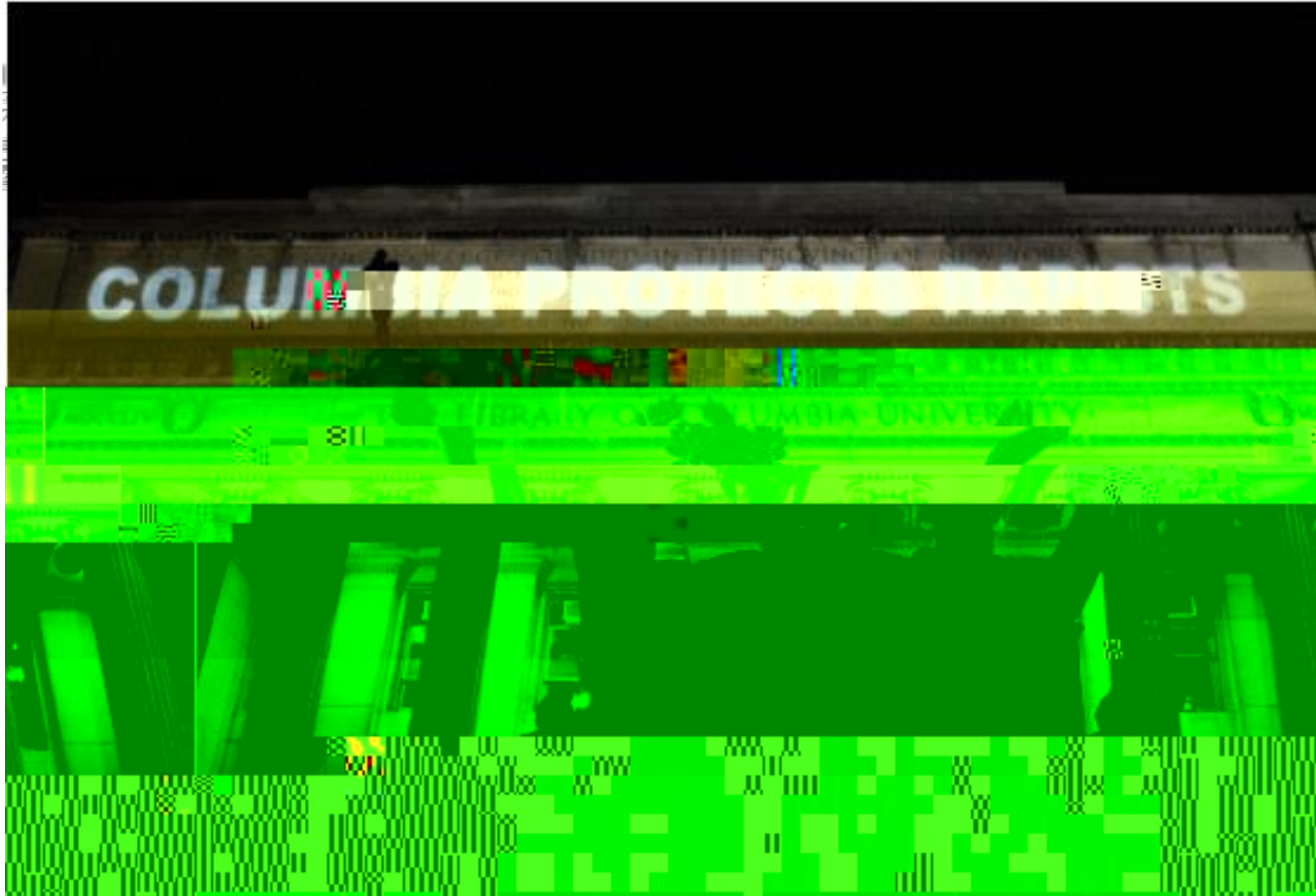


COLUMBIA

ITS

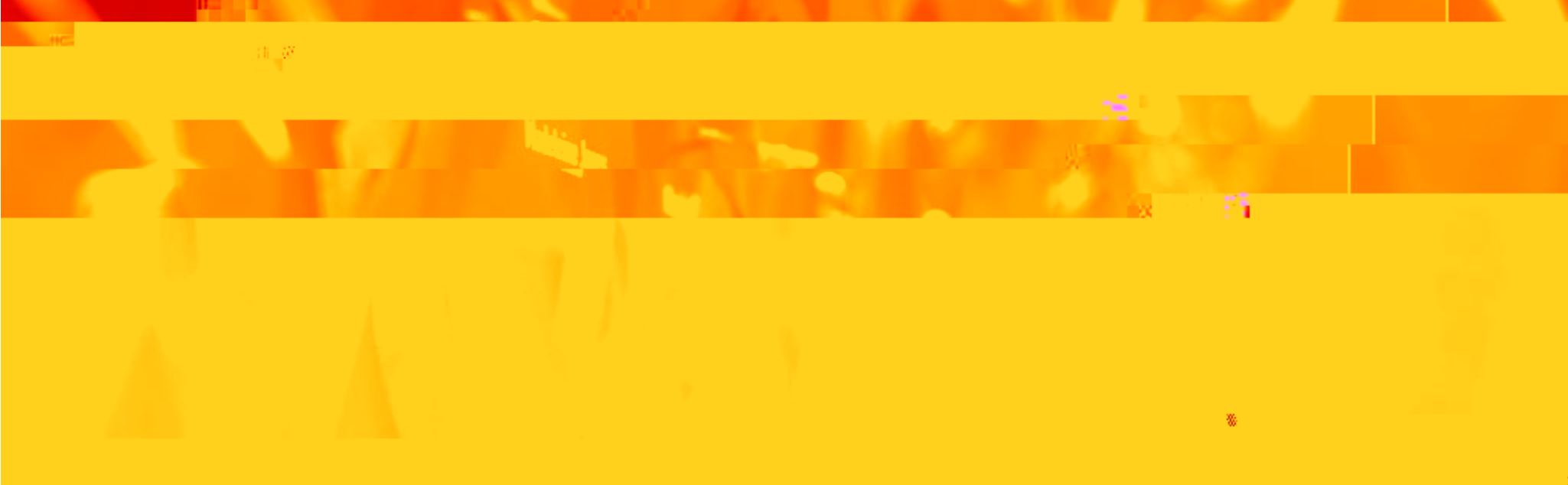
81

LIBRARY OF COLUMBIA UNIVERSITY

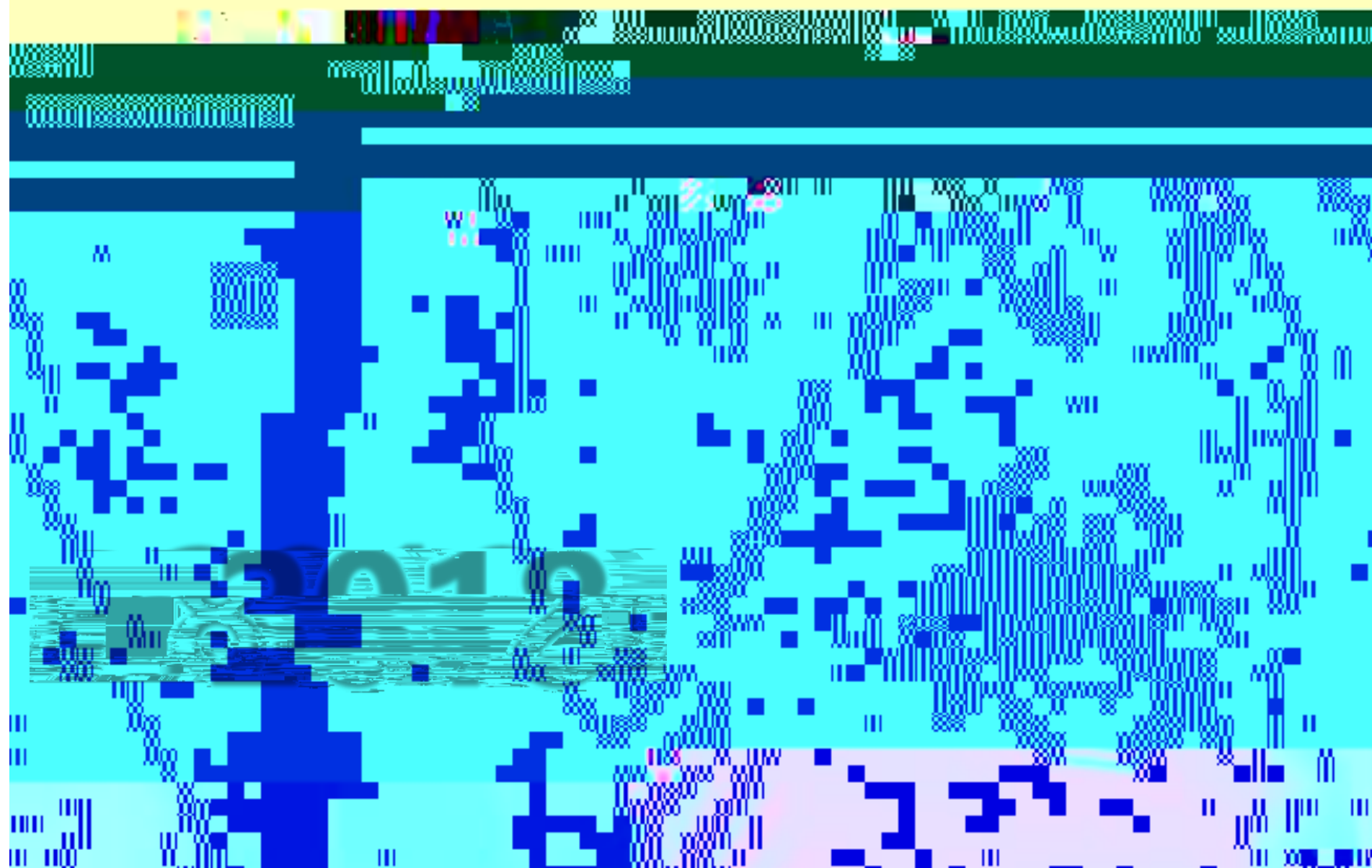


2010

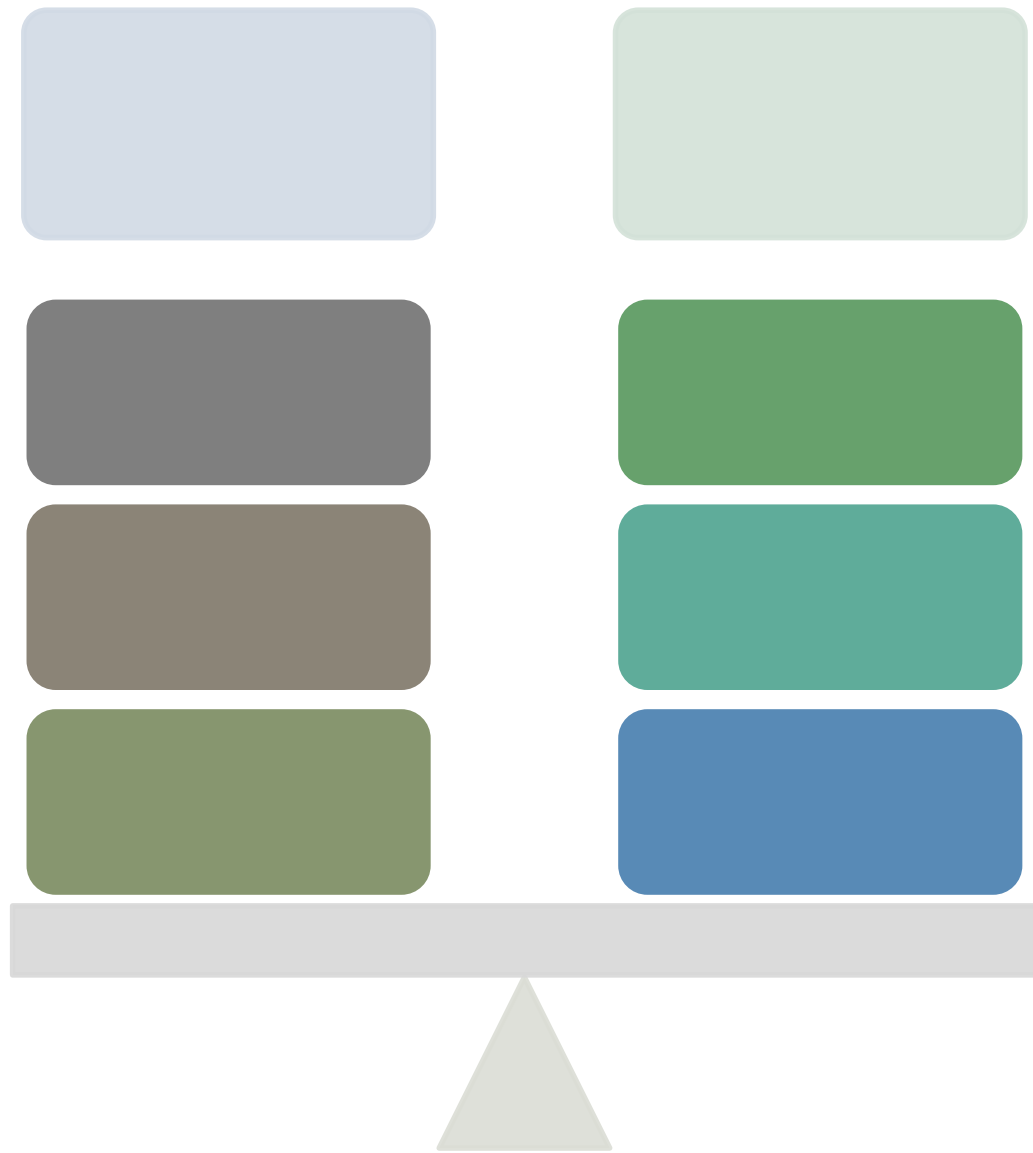




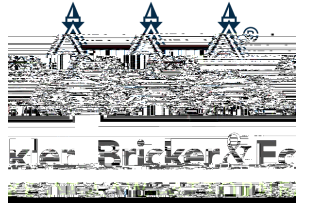
China State investigating sex







Campus Impacts (Already)

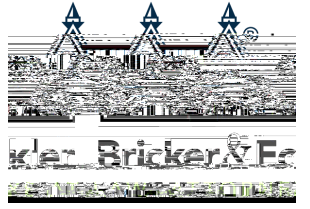


#MeToo reports: Reports of sexual harassment cases involving faculty employees many decades old

Use of social media to organize: Increased speed; pressure on institutional response

Increase in criminal charges and civil litigation: Pressure from prosecutors; threatened litigation during investigations

Available Financial Impacts



Insurance Data (UE): 2011-2015

\$31 Million in claims and defense costs for litigation and OCR claims

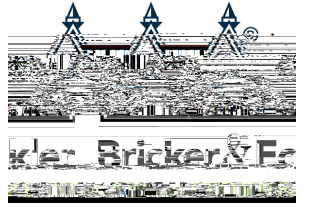
-
-

Types of claims: Title IX (statutory claims), breach of contract, negligence, defamation

Insurance companies imposing increasing reporting requirements on IHEs to access coverage

Insurance companies also requiring insurance coverage from outside investigators

Proposed Regulations



Big Changes Proposed All Subject to Change!

Definitions

Reporting/Formal Complaints

Jurisdiction

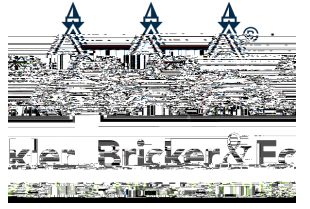
Emergency Removal

Grievance Procedures

Hearings and Cross-Examination

OCR Deference & Safe Harbors

Sexual Harassment Definition

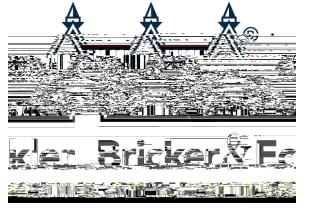


Quid Pro Quo (Employee)

Hostile Environment

Sexual Assault

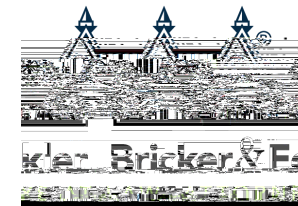
Sexual Harassment Definition



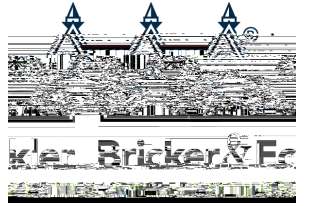
Quid Pro Quo

employee of the recipient conditioning the provision

Sexual Harassment Definition



Sexual Harassment Definition

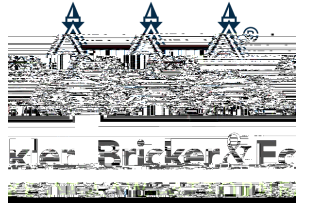


Hostile Environment Potential Conflicts with EEOC

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when ... such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

29 C.F.R. 1604.11 (EEOC Regulation)

Sexual Harassment Definition



Sexual assault refers to Clery Act definition:

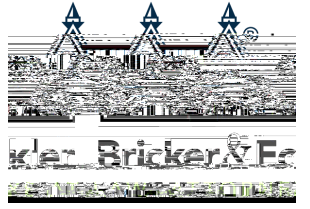
Rape

Fondling

Incest

Statutory rape

Definition – Actual Knowledge

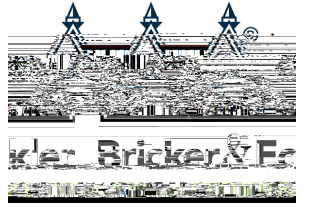


the authority to institute corrective measures on behalf of

Mere ability or obligation of an employee to report sexual

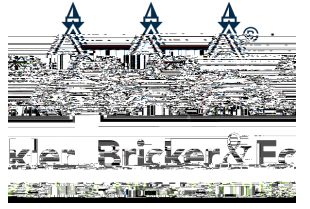
Fact-sensitive analysis

Definition – Supportive Measures



-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge too the complainant or the respondent before or after the fi.h.iv01eofr liant

Definition – Supportive Measures



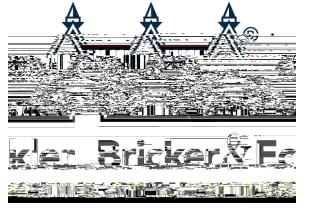
Designed to:

program or activity, without unreasonably burdening the other party;

educational environment; and

Deter sexual harassment

Definition – Supportive Measures



May include:

Counseling

Extensions of deadlines

Course-related adjustments

Modifications of work/class schedules

Campus escort services

Mutual



Definition – Formal Complaint

Document Signed By:

Complainant or

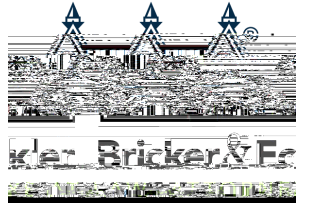
Title IX Coordinator

Alleging sexual harassment against a respondent:

program or activity

Must request initiation of grievance procedure

Jurisdiction



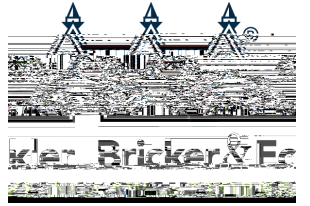
only responsible for responding to conduct

All of the operations of a recipient

Includes academic, extracurricular, research, occupational training

Public lectures, sporting events, campus tours

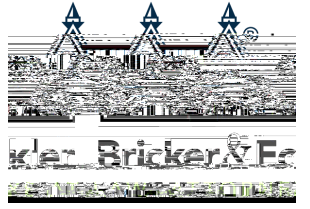
Jurisdiction



the formal complaint or did not occur within the must dismiss

The comments to the proposed regulations stated that the

Emergency Removal



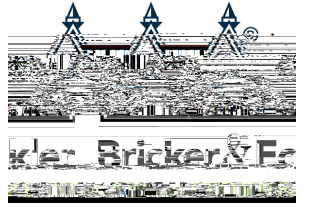
program or activity if:

- Individualized safety/risk analysis

- Determine that immediate threat to the health or safety of students or employees justifies removal

- Provides the respondent with notice and opportunity to challenge the decision immediately following the removal

Informal Resolution



Can be offered if institution provides written notice to parties of:

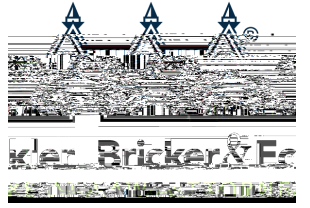
- Allegations

- Informal process

- Consequences of participating in informal process

Must obtain voluntary, written consent from both parties

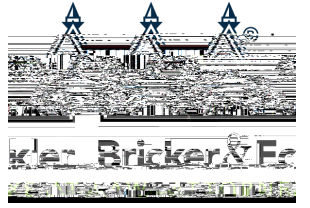
Grievance Procedures



References public versus private distinction in some places but not others

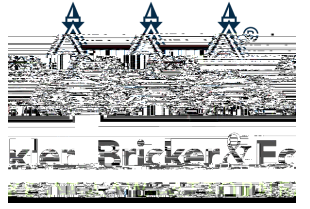
Appears to require same procedures regardless of public/private status

Grievance Procedures



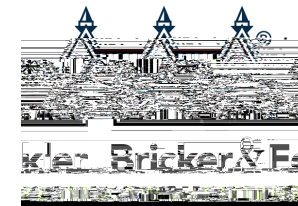
- Number of policy requirements, including
 - Training for administrators
 - Review inculpatory & exculpatory evidence
 - Sanctions/remedies
 - Range of supportive measures
 - Presumption of non-responsibility

Grievance Procedures

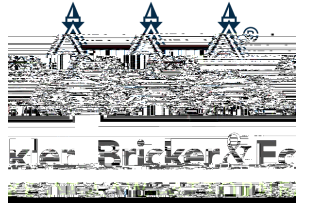


Standard of evidence: Preponderance of the Evidence

Grievance Procedures



Live Hearings

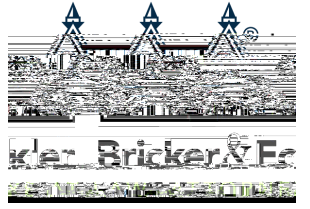


Parties can ask other party and witnesses all relevant questions and follow-up questions, including those challenging credibility

Cross-examination done by advisor of choice

If no advisor, institution assigns someone to be aligned with the party to fill this role

Live Hearings



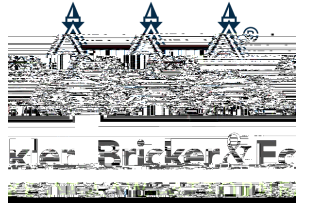
Technology can keep parties in separate rooms

Decision-maker must explain to the advisor why certain questions are excluded as not relevant

statement

What happens if they refuse to answer?

Written Determinations



Must include a number of things, such as:

- Findings of fact supporting the determination

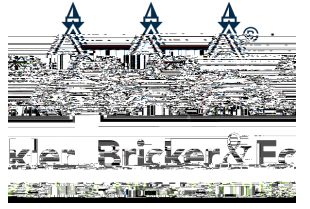
- Conclusions regarding application of policy to facts

- Statement of, and rationale for, the result as to each allegation

- Sanctions

- Appeal procedures (if offered)

Key Takeaways



Proposed regulations would change TIX policies and procedures and likely student conduct policies

Proposed regulations will require hiring/training:

- Investigator

- Title IX Coordinator

- Fact finder/hearing officer

Consider consortiums/shared services where possible

Expand options for informal resolution

Creates uncertainty concern for lawsuits

Session II: Preparing for Implementation

Managing and Identifying Timelines, Policies, Risk Management, and Board Issues

What is this section about?



This is not as simple as it looks, or as one hopes.

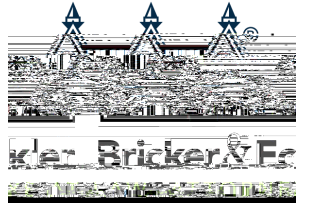
Knowing what your process is for updating your policies is critical.

Knowing whether you will be able to update your policies before Fall 2020 based on your normal practice is critical.

5 Steps:

- 1. Identify Policies that Require Review and Possible Updates.**
- 2. Identify (and find) your Regulations, Bylaws, Policies, and Guidance.**
- 3. Calculate Timelines and Process Milestones.**
- 4. Adjust and Adapt. (COVID-19, Special Meetings, Ratification, Interim Policy?)**
- 5. Communicate Appropriately and Often.**

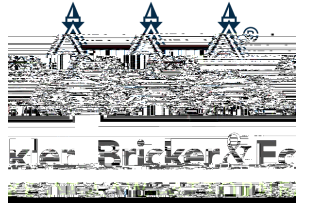
Following Corporate Formalities



Directors, Officers, Trustee have **fiduciary obligations** to
College/University (duty of care, duty of loyalty)

Following Regulations (corporate), Bylaws, Campus Constitutions, and
Policy las0.r2Polic

Step #1 – Identifying your Policies

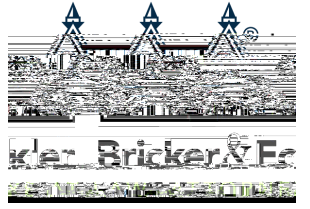


The Title IX Regulations implicate actual and potential changes to the following policies and handbooks:

- Title IX/Sexual Harassment Policy;
- Anti-Discrimination Policy;
- Faculty Handbook;
- Staff/Employee Handbook;
- Student Code of Conduct;
- Others?

Why are these policies implicated?

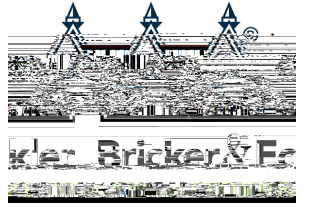
Step #1 – Identifying your Policies



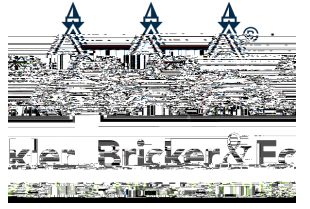
You need to identify every policy that has a disciplinary procedure. These disciplinary procedures may implicate your potential burden or burdens of proof that the institution uses on campus. (More on this in Session III)

Many of your faculty and staff handbooks incorporate by reference your Title IX policy and procedures, or at the very least the definitions from that policy.

Step #2 - Identify your Corporate Regulations, Bylaws, Policies, and Guidance



Step #3 - Calculating Timelines



Identify the TIX Regs Effective Date and work backwards.

Calculate the time frame to accomplish the following:

Identifying all current policies that are implicated for review (Title IX, Code of Conduct, Faculty Handbook, Employee/Staff Handbook, Collective Bargaining Agreements (CBAs), etc.)

Identifying all boards, committees, and constituents that will need to review and approve all changes to these policies and agreements.

Identify the minimum timeframes required for these groups to meet (including if multiple meetings are required to complete review and vote, *see e.g. Board of Trustees*) and approve revisions.

Step #3 - Example



Identify the TIX Regs Effective Date: August 14, 2020 (121 days from Today)

Calculate the time frame to accomplish the following:

Identifying all current policies

Step #4 – Adjust and Adapt!



So, I have calculated your timelines and I'm not unable to complete a policy review and implementation before the beginning of the fall 2020 semester! HELP!

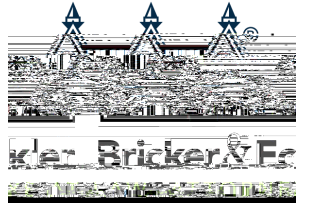
Will/can your Board of Trustees provide a resolution allowing for an alternative process to be used to adopt a policy? Abbreviated Policy Review?

(Board of Trustees, Faculty Council, etc.)

NOTE: Determine whether or not electronic forms of communication are permitted under the Ohio Revised Code (For Non-Profits) and your regulations/bylaws.

Consider TA(2()-JETFB)-3(dop)-9CID 26BDC q0.000013(a15meWöra3(a15fy)-3(Q r3(a

Step #4 – Special Meetings?

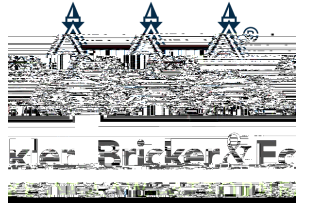


Review your Code of Regulations/Bylaws (BOT).

Public Institutions look to University Rules/ORC for meeting requirements and public records/meetings laws.

Can you take action by unanimous written consent of the Trustees? See R.C. 1702.25 (private nonprofit)

Step #4 – COVID-19 Implications . . .



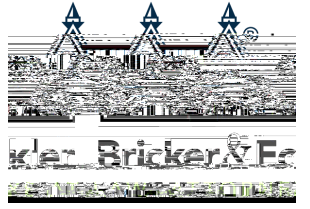
How will you communicate with stakeholders to receive feedback, maintain social distancing, and operate remotely to the greatest extent possible?

Do your policies and procedures permit a shift in procedures when there is an emergency situation?

Can you update your policies and procedures to permit electronic

Are your faculty and staff committees that may need to review the policy changes equipped to operate remotely? Are there any limitations in their own governing documents that might limit this?

Step #5 - Communicate Appropriately



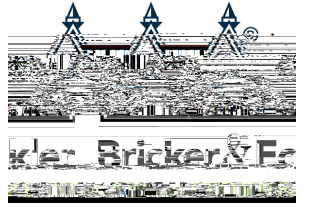
Do you have a statement about the proposed Title IX Regulations?

Many of you have done a great job communicating about the COVID-19 situation, apply those same concepts here.

Will the internal discussions with regard to implementing these changes include reference to the institutional mission, values, and resources?

Anticipate

Step #5 - Communicate Appropriately



What to do about Pending Cases?

It is very likely that the Title IX Regulations will have at least a 60 day implementation window (per Administrative Procedures Act). Most of your cases should be resolved prior to the effective date.

How will you responded to a request by the parties to wait until the Regulations have been issued or your new policies have been updated?

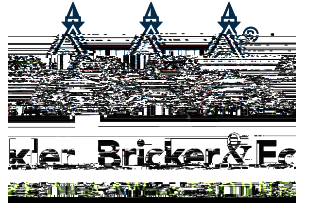
Other considerations?

Section III: Hearings?!?!

Yep!



Adjudication Planning for the Policy and Process

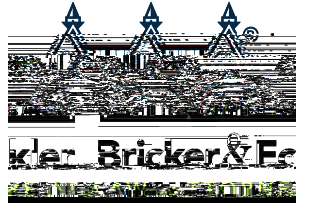


How will this look?

-informed protections?

The Sixth Circuit has already required this of public institutions in its jurisdiction

Adjudication Planning for the Policy and Process



In person?

These can get very heated

Concerns of intimidation and physical threat

Concerns of no-contact orders, AND sometimes court protection orders

Need security

Record?

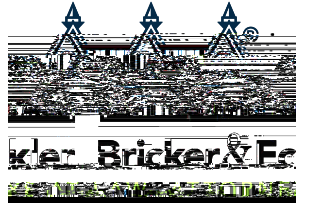
Audio

Video

Adjudicator will be too busy decision-making and referring to consistently take notes

Provides protection for appeal

Adjudication Planning for the Policy and Process



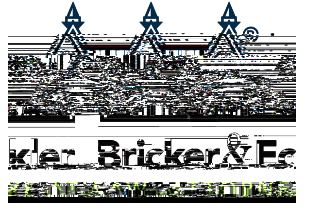
Zoom? Skype? Google?

Can avoid a lot of the in-person issues

If using technology (eg., Zoom, Google, Skype) is it secure? Who runs technology?

Recording hearing easier

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language

Timeframe

- No official number of days given

- You must set one yourself and explain deviations

- Expect attempts to push from Respondents

Number of policy requirements, including:

- Training for administrators

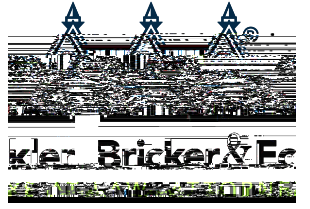
 - inculpatory

- Sanctions/remedies

- Range of supportive measures

- Presumption of non-responsibility

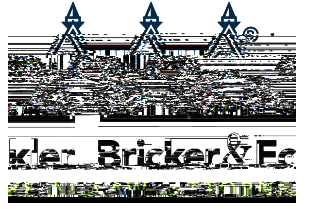
Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Jurisdiction

Expect disputes that the adjudicator will need to address
Be clear in your Title IX policy

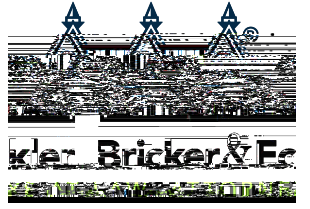
Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Jurisdiction

Hypothetical:

Adjudications of Title IX Sexual Misconduct Matters

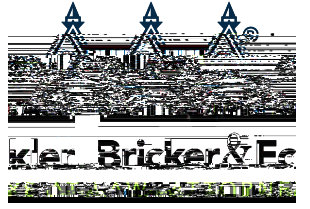


The Policy Language - Jurisdiction

Hypothetical:

Your process denies due process to Respondent because it does not provide live cross examination because you use Zoom and you do not have jurisdiction to hear this!

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Evidence

Expect disputes that the adjudicator will need to address

Be clear in your Title IX policy

Examples to address and define:

- Relevant evidence

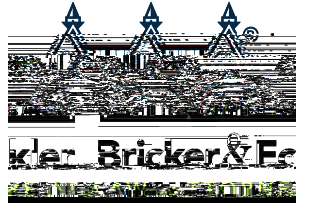
- New evidence

- New witnesses

- Witnesses who did not participate in the investigation but show up at hearing

- Character evidence

Adjudications of Title IX Sexual Misconduct Matters

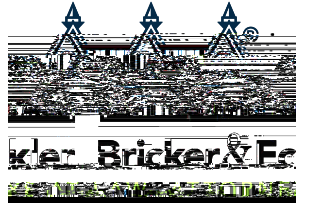


The Policy Language - Evidence

Hypothetical:

Witness was unable to participate during the investigation because she was studying abroad, but now is here and has relevant evidence.

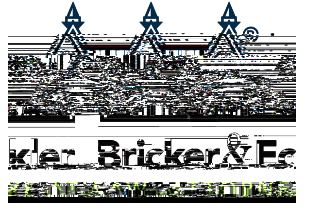
Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Evidence

Hypothetical:

Adjudications of Title IX Sexual Misconduct Matters

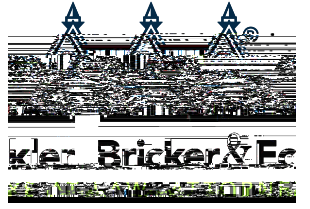


The Policy Language - Evidence

Hypothetical:

Objection! This is unfair to my client
sexual history, but her representative can ask questions about
Respondents?!

Adjudications of Title IX Sexual Misconduct Matters



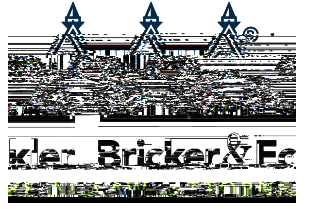
Live Hearings

Parties can ask other party and witnesses all relevant questions and follow-up questions, including those challenging credibility

Cross-examination done by advisor of choice

If no advisor, institution assigns someone to be aligned with the party to fill this role

Adjudications of Title IX Sexual Misconduct Matters



Live Hearings Considerations

Who will serve as a Representative? Who will serve as a Hearing Officer/Adjudicator?

- Volunteer faculty v. angry parent?

- Volunteer faculty v. criminal defense attorney?

- Unauthorized practice of law issue?

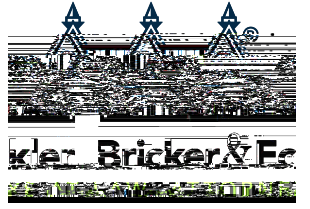
- Liability to institution?

If using attorneys

- Malpractice insurance?

What do contracts look like with outside entity or attorney?

Adjudications of Title IX Sexual



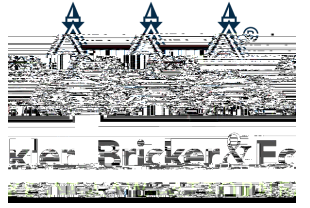
Live Hearings Considerations



Session IV: Communication

Strategies for communication to campus constituents and beyond

What is this section about?



Have to VERSUS **Want to**

What you *have to* communicate

Formal notice requirements under institutional policies, State, and Federal law

What you *want to* communicate

Institutional values and how you have worked to maintain them

Setting the Tone

Getting Community Buy-In

What I have to communicate?



Title IX Statutory/Regulatory - Who will students and staff provide notice to? Who is required to report? Has it changed?

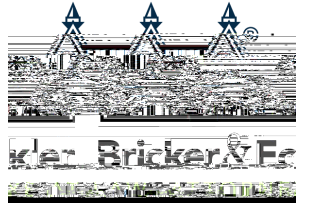
State-Based Requirements Are there changes that I need to make to my education programming or other State reporting requirement changes?

Resolution Agreements Do you have any resolution agreements or other monitoring agreements which require you to provide regulatory bodies of notice of changes in policy?

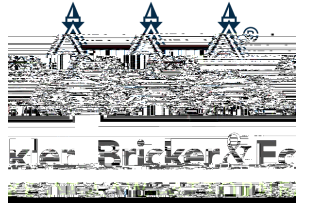
Institutional Policies Are there any notice requirements created by institutional policies?



What I want to communicate?



Setting the Tone

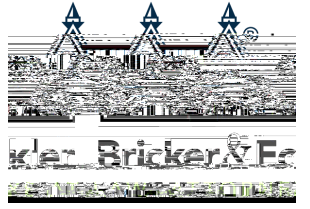


Floor or Ceiling Conversations - Most of the regulations are setting a floor, not a ceiling.

Are there ways you have gone above-and-beyond to protect students, faculty and staff, and to reflect your institutional mission and vision?

Are there ways the changes, or the way you have carried out the changes, reinforce community values?

Obtaining Stakeholder Buy-In



Obvious stakeholders:

Students

Faculty/Staff

forget:

Board/Executives

Title IX Staff

Support Service Providers

Obtaining Stakeholder Buy-In



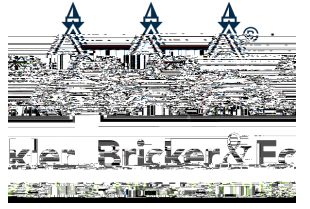
When to start?...ASAP

Consultation as a part of Communication:

Trust Building - Consulting with stakeholders regarding policy revision and implementation will assist in community education regarding reasons for policy implementation

Allies in Implementation - Bringing stakeholders to the table to assist in development gives them a vested interest in the success of policy implementation

Obtaining Stakeholder Buy-In



Who to invite?

Student Government leadership

Faculty Governance leadership

Union leadership

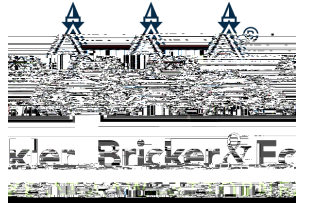
Identity and Affinity Group Leadership

Police/Campus Security

On campus AND Off campus SART, Community Services

Identify Influencers

Concerns in the Age of COVID



Getting buy-in when campus is closed:
Use your network to push involvement
Group connections in Virtual Space
Zoom

Concerns in the Age of COVID

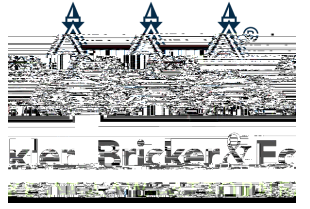


Out of Sight, Out of Mind

The Title IX regulations were a headline item before COVID

Y/e8p 0.A1 0 0 1 50.952 228.55 Tm0.25s(tion11-3(s6of)oVID)rdDC qo8.58(a

Information/Disinformation



Guiding the conversation

Transforming concerns into action:

My attorney told me...

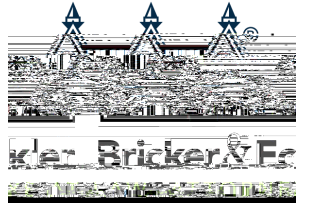
Listen and use concerns to guide:

Communications/Campaigns

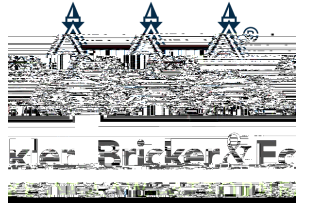
Policy Change

Resource Allocation

Mass Communications



A Case Study



Discussion

Lessons from a Midwes



Register at:
www.bricker.com/events

April 21

COVID 19 Update Webinar 3:00 EDT

April 30

Title IX Investigator Training (Online) All Day

May 5

Webinar: Title IX Litigation Update 12:00 EDT

We will schedule free webinars for practitioners and Board of Trustees members when the Title IX regulations are released.

**Sign up for
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