Title IX Coordinator Foundations Overview

Jeanine Bias

Director, Office of Institutional Diversity and Inclusion / Title IX Coordinator | Sam Houston State University

ACADEMIC IMPRESSIONS

AGENDA

- Title IX Key Concepts
- Title IX Priorities
- Reviewing the Role of the Title IX Coordinator

POLL

How long have you been a Title IX Coordinator?

CHAT

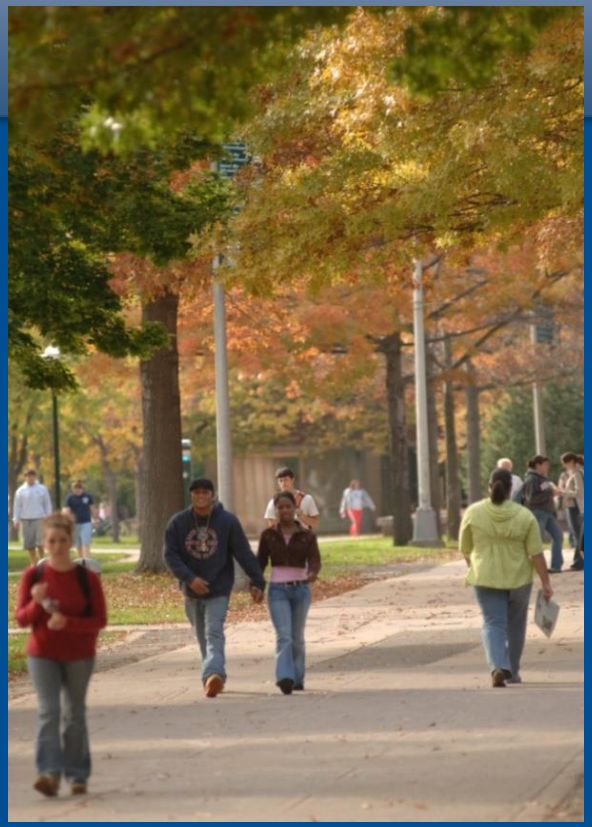
Name one thing you wish you knew before taking the role of the Title IX Coordinator?

TITLE IX KEY CONCEPTS

TITLE IX STATES:

"No person in the United States shall, on the basis of **sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any **education program or activity** receiving Federal financial assistance."

Title IX of the Education Amendments of 1972
Implementing Regulations at:
20 U.S.C. § 1681 & 34 C.F.R. Part 106



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FUNDAMENTALS OF TITLE IX

- Equity
- Impartiality
- Fairness
- Transparency

ACTIVITY

DEFINE

In breakout groups, define the principles of equity, impartiality, fairness, and transparency as they relate to your role as a Title IX Coordinator

WE MUST BE GROUNDED…

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KEY COMPONENTS OF THE "FINAL RULE"

- Actual Notice Standard
- Limited Jurisdiction
- Formalize Complaints
- Live Hearing
- Cross Examination during the Live Hearing
- Role of the Advisor
- Published Training

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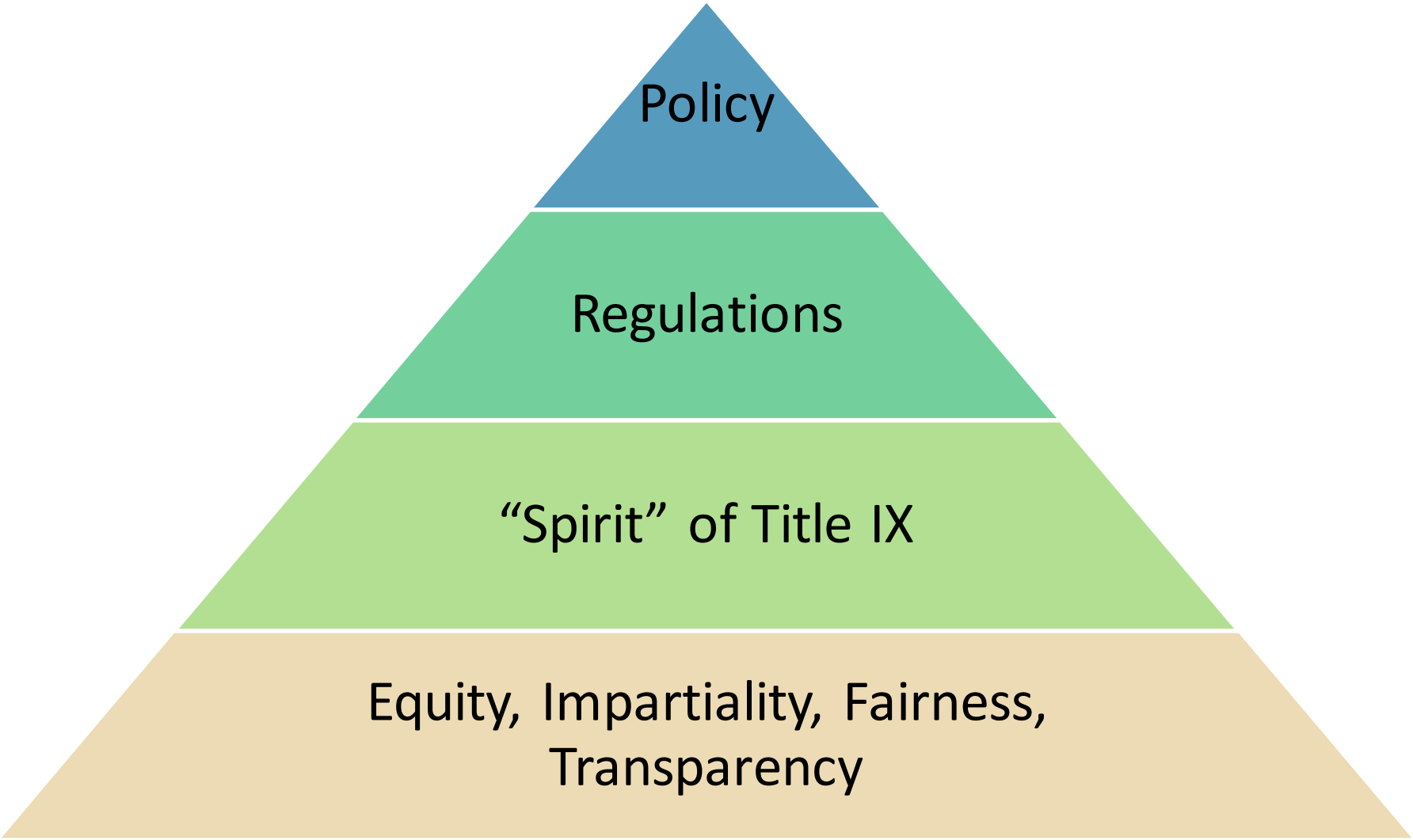
TITLE IX SEXUAL HARASSMENT DEFINED

- **Title IX Sexual Harassment** refers to Sexual Misconduct that meets one or more of these three types of behavior:
  - (i) A Component's Employee conditioning provision of an aid, benefit or service of the Component on an individual's participation in unwelcome sexual conduct ("quid pro quo" harassment which may be express or implied and need not be "severe" or "pervasive" as a single incident is inherently "offensive" and jeopardizes equal educational access;
  - (ii) 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 Component's Education Program or Activity, or
  - (iii) "Sexual Assault," "Dating Violence," "Domestic Violence" or "Stalking" as defined in referenced statutes.

HOW DO YOU EAT AN ELEPHANT?

ONE BITE AT A TIME

REFRAMING THE CONVERSATION



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ROLE OF THE TITLE IX COORDINATOR

- Compliance Oversight
- Investigation Oversight
- Training
- Programming

ROLE OF THE TITLE IX COORDINATOR

- Policy Development/ Implementation
- Collaboration
- Marketing
- Research

SETTING PRIORITIES

WHAT IS MISSING?

- Current Campus Climate
- Process Gaps
- Resources

WHAT ARE WE DOING WELL

- We have come a mighty long way
- Celebrate “wins”

WHAT HAS CHANGED?

- COVID
- Social Media
- Activism

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QUESTIONS

Reinforcing your Infrastructure

Lorna Fink

University Compliance Officer/Title IX Coordinator | Lynn University

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Activity #1: *Select a category and share a best practice you have implemented, or one you are prepared to implement, that fits that category.*

Category 1: Structure and Staffing

Category 2: Reporting and Response

Category 3: Investigations

Category 4: Hearings and Appeals

Category 5: Prevention and Awareness

APPLYING THE SEVEN ELEMENTS OF COMPLIANCE TO BUILD YOUR TITLE IX INFRASTRUCTURE

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7 (Really 8) Elements of Compliance

- Standards of Conduct/Policies and Procedure
- Staffing and Oversight
- Education and Training
- Monitoring and Auditing
- Reporting and Investigating
- Enforcement, Discipline, and Incentives
- Response and Prevention
- Risk Assessment

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Title IX Compliance Plan

1) Standards, Policies, and Procedures
   - Must have published grievance procedures and specific notification and posting requirements
   - What other policies support/conflict with Title IX? What policies will be used to resolve misconduct dismissed from Title IX?
2) Governance and Administration
   - Must designate a Title IX Coordinator
   - Investigation and Resolution staff (Investigators, hearing administrators, etc.)
   - Don't underestimate the administrative support necessary
     - Staff burnout and attrition rate
3) Education and Training
   - New training requirements for administrators
   - Publication requirements
4) Monitoring and Auditing
   - Climate surveys
   - Direct feedback from administrators, participants, etc.
   - Data and Metrics
5) Reporting and Investigation
   - New guidelines about what constitutes a report
   - Specific requirements for investigations and process
6) Enforcement, Discipline, and Incentives
   - New requirements for live hearings
   - Restrictions on interim measures and actions taken before final decision
7) Response and Prevention
   - VAWA Education and Prevention Requirements Still Apply
8) Risk Assessments

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STEPS TO COMPLIANCE

Step 1	Understanding Scope
Step 2	Lay the Foundation
Step 3	Assess and Prioritize
Step 4	Document, Document, Document
Step 5	Spread the Knowledge and the Resources
Step 6	Enforce, Respond, and Reinforce
Step 7	Test and Monitor for Effectiveness
Step 8	See the Change

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UNDERSTANDING THE "WHAT"

Defining the Scope and Requirements of Your Title IX Compliance Program and Getting the Buy-in You Need

Building Your Compliance Checklist

- Why: Purpose, protections, and intent of the regulation in light of institutional mission
- What: Prohibited Conduct and Definitions
- When: Gatekeeping function including scope, jurisdiction, and notice
- How: Resolution procedure requirements including informal and live hearing
- Who: impacted/covered parties; staffing

Communication and Required Training

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RESOURCE

Free Resources to Define Scope and Requirements

DOE Questions and Answers on the Title IX Regulations on Sexual Harassment (2021)
DOE Summary of Major Provisions (2020)
ATIXA Regulation Resource Center
SUNY Student Conduct Institute Joint Guidance
CUPA HR Sexual Harassment Resources

GUIDING QUESTIONS:
What does our current Title IX Compliance Program look like?
- What, if anything, is contrary to the new regulations?
- What can we maintain?
- What must we change?

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Defining and Sharing the "Why"

Customizing Your Program to Get Buy-In and Top Down Support

GUIDING QUESTIONS FOR PURPOSE AND BUY-IN

- How do the new Title IX Regulations fit or challenge your:
  - Ethical Code of Conduct
  - Student Code of Conduct
  - Employee and Faculty Conduct Policies
  - Mission and Values
  - Strategic Plan
  - Campus Culture
- Who do the new Title IX Regulations:
  - Protect?
  - Harm?
  - Challenge?
  - Support?
  - Impact?

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Identifying the "Who"

Structure, Staffing, and Responsibilities

GUIDING QUESTIONS

- What positions are required for compliance?
  - Title IX Coordinator/Deputy Coordinators
  - Investigators
  - Hearing Staff/Panel Members
  - Appeals Staff
  - Advisors
  - Confidential Offices
- What departments are impacted by compliance?
  - General Counsel
  - Human Resources
  - Student Affairs
  - Athletics
  - Student Conduct
- What overlooked departments or staff could assist with compliance?
  - Athletics?
  - Faculty?
  - Counseling/Health?
  - Campus Safety/Law Enforcement?

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Defining the “How”

Assessing Risk and Resources, Prioritizing, and Implementing

Assessing Checklist and Prioritizing Efforts

What are essential compliance steps?	Policy, Staff Training/Preparedness, Intake and Support Protocol
What resources are currently in place?	What resources/staffing do we need?
Where is our policy non-compliant?	Build systems similar to existing infrastructure to extent possible
How can we get support and share resources?	Membership organizations, peer schools, internal administrators, community organizations
What existing issues/red flags need to be addressed?	Prior case issues, statistics, internal concerns

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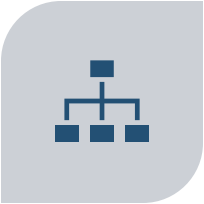
REQUIRED STEPS TOWARDS COMPLIANCE



GOVERNANCE, STAFFING, AND OVERSIGHT

RISK ASSESSMENT

POLICY AND PROCEDURE

TRAINING

COMMUNICATION

SUPPORT

ENFORCEMENT

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QUESTIONS

CASE STUDY (review during break)

Andi, an undergraduate student, visits their Residence Life office asking to speak with someone about "possible sexual harassment" by another student. An RD meets with Andi, who explains that they are concerned about the recent actions of Brett, with whom Andi used to be in a non-exclusive "hook up" relationship.

Andi tells the RD they ended things with Brett several months ago after a "non-consensual sexual encounter" that had happened in a University residence hall – but Andi appears reluctant to go into details about the encounter.

Following the breakup, Brett began posting on social media and texting their mutual friends calling Andi a "dirty slut" and a liar. Meanwhile, Brett also began texting Andi directly, threatening that "[Andi] would regret it" if Andi "did anything to ruin [Brett's] education or reputation."

Andi is clearly shaken and unsure how much they want to share right now, but expresses an interest in learning more about what can be done for themselves and for Brett. Andi works on campus as a COVID tester and dreads the possibility that Brett would come in to be tested during Andi's shift. Andi also wants Brett to leave them alone, and expresses some interest in speaking with a counselor or therapist to work through some other personal concerns.

The RD walks Andi over to meet with the ***Title IX Coordinator****.*

Case Intake and Response

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Tim Love

Executive Director for Equity & Compliance, Title IX Coordinator | Loyola University Chicago

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AGENDA

- General Obligations in Response to Title IX Sexual Harassment
- Reports vs Complaints
- Compliance Checklist: **Report Intake**
- Practical Considerations
- Advanced Considerations

OBLIGATIONS IN RESPONSE TO TITLE IX SEXUAL HARASSMENT

- University response to sex discrimination (of which sexual harassment is one form) must always be **prompt, equitable,** and **not deliberately indifferent**

- University has obligation to respond to ***sexual harassment*** when
  - **Actual knowledge** of alleged sexual harassment
  - Sexual harassment occurred in context of University's **education programs and activities**
  - Sexual harassment was against a person **in the United States**

See 34 CFR 106.44(a)

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GATEKEEPING FUNCTION OF THE TITLE IX COORDINATOR

Jurisdiction

- Location
- Program/Activity
- Control Over Involved Parties

Definitions of Prohibited Conduct

- VAWA Crimes
- Quid Pro Quo
- Severe, Pervasive, and Objectively Offensive

Title IX vs Title VII and application to Employees

What does your policy say?

ACADEMIC IMPRESSIONS

REPORTS VS. FORMAL COMPLAINTS

Reports

- Made to Title IX Coordinator or other official with authority
- Available to anyone
- Can come in many forms (unofficial report, phone call, walk in)
- May be anonymous
- Places University on notice
- No obligation to notify respondent
- Initiates provision of supportive measures, information, and preliminary review

Formal Complaints

- Made to Title IX Coordinator or other official with authority
- Only complainant (or guardian if <18) or Title IX Coordinator may submit
- Must be signed/certified
- Can come in many forms
- May not be anonymous
- Places University on notice
- Respondent must be notified
- Initiates grievance process (and informal resolution options, if applicable)

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RECEIVING AND PROCESSING REPORTS

CASE STUDY (continued)

- You help Andi file a report to open a case on the matter, and review the University's policies about how Title IX sexual harassment is addressed. As you take the report, Andi opens up a bit more about the nature of their previous relationship, which Andi frequently describes as "emotionally abusive" and "manipulative."
- You learn that Andi met Brett at Orientation and the two started hooking up shortly thereafter. They never dated exclusively, but occasionally had consensual sex. After a while, Andi wanted to become more serious and exclusive, but Brett was not interested and instead pressured Andi to continue having casual sex. In particular, Brett often wanted to have oral sex (which Andi never liked), especially in public spaces where the two might be seen/caught by others. Andi was uncomfortable with their sexual arrangement, but "kept giving in" for fear that Brett would end their relationship if Andi stopped.
- Andi again mentions that about a month ago there as a "non-consensual encounter" that prompted Andi to end things with Brett, but declines to share more at this time.
- Andi expresses some interest in working things out directly with Brett, but is unsure how Brett will respond to the University getting involved. Andi is reluctant to do anything that might set Brett off, and doesn't want to ruin Brett's life. However, Andi reports being unable to sleep, study, or feel safe meeting friends on campus, as Andi is constantly worried about running into Brett. Because of this, Andi expresses feeling isolated and unable to enjoy the full extent of campus life and activities.

COMPLIANCE CHECKLIST: REPORT INTAKE

- ❑ Must respond promptly and not in a deliberately indifferent manner
- ❑ Response must treat complainants (or "affected parties") and respondents equitably (i.e., offer complainants supportive measures, and follow grievance process before imposing sanctions or burdensome restrictions on respondent)
- ❑ Must promptly contact complainant to
  - ❑ offer supportive measures, to be made available irrespective of whether a formal complaint is filed
  - ❑ consider complainant's wishes re: supportive measures
  - ❑ explain the process to file a formal complaint
- ❑ Title IX Coordinator may also consider whether to sign a formal complaint on behalf of the University or implement other emergency measures (i.e., preliminary review)

See 34 CFR 106.44(a)

ACADEMIC IMPRESSIONS

MORE ON SUPPORTIVE MEASURES

- Non-disciplinary, non-punitive
- Individualized services
- Offered without fee/cost
- Irrespective of whether a formal complaint is filed
- Designed to restore or preserve complainant's equal access to education program or activity without unreasonably burdening the respondent
- Maintained as confidential to the extent reasonably possible

<u>Examples</u> (not exhaustive): mutual "no contact" directives, counseling, modified course or work schedules, modified living or work arrangements, increased security or monitoring of certain areas, etc.

See 34 CFR 106.30(a)

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MORE ON "PRELIMINARY REVIEW"

- Not technically in the regs, but implicit obligation not to be deliberately indifferent in response to a report
- Prudent to memorialize objective standards
  - Consider articulating risk factors (e.g., predation, pattern, threat, violence, weapons, minors)
  - May warrant referral to Threat Assessment Team or others with expertise
- May implement emergency removal of any respondent, with
  - Individualized safety and risk analysis
  - Determination of an immediate threat to the physical health or safety of another individual
  - Notice and opportunity for the respondent to challenge immediately after implementation
- May place employees on paid administrative leave (follow standard guidelines)

PRACTICAL CONSIDERATIONS: WHO ADMINISTERS SUPPORTIVE MEASURES?

- Health Center/ Advocacy Office
- Office of the Dean of Students
- Student Academic Services
- Title IX Office

Title IX Coordinator is ultimately responsible for supportive measures.

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PRACTICAL CONSIDERATIONS: EMERGENCY REMOVAL AND OTHER INTERIM RESTRICTIONS

- What information should be considered?
- How thorough?
- How to standardize?
- How to document?
- How to preserve privacy to greatest extent? (particularly difficult with employees)
- May require collaboration

ACADEMIC IMPRESSIONS

CHAT

ADVANCED CONSIDERATIONS:

What are some difficult discretionary calls you have had to make about interim restrictions?

QUESTIONS

Processing a Complaint

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ACADEMIC IMPRESSIONS

AGENDA

- Compliance Checklist: **Formal Complaints**
- Practical Considerations
- Advanced Considerations

FORMAL COMPLAINTS

CASE STUDY (continued)

A few days after Andi's initial report, Andi submits a formal Title IX complaint against Brett.

Andi explains in the complaint that after consulting with a campus sexual assault advisor/advocate, Andi feels more confident that the "non-consensual encounter" they had referenced actually constituted sexual assault (rape), and indicates a desire to proceed with a formal investigation and adjudication under the University's Title IX grievance process.

In the complaint, Andi offers additional information about the incident, and describes a night where Brett forced Andi to engage in oral sex in a residence hall lounge while Andi was seriously intoxicated. The incident ended when the two were interrupted by Charlie and Desi, two mutual acquaintances who walked in on Andi and Brett.

Andi now feels strongly that this incident had constituted sexual assault and now formally requests the University to take action to address the matter.

COMPLIANCE CHECKLIST: FORMAL COMPLAINTS

Complaint Requirements:

- ❑ At time of filing, complainant must be participating in or attempting to participate in (e.g., applicant for admission) the school's education program or activity
- ❑ Must be signed or certified as coming from the complainant themselves (or a parent if <18)
- ❑ Title IX Coordinator may also sign complaint on behalf of school; in such an instance, the school does not become a party to the case, and must still follow 106.45 Grievance Process
- ❑ May be submitted to Title IX Coordinator in person, by mail, by email, and via any other designated method (up to school)

Complaint Response:

- ❑ University must investigate all formal complaints (unless dismissed per 106.45(b)(3) or diverted to informal resolution per 106.45(b)(9))
- ❑ Response to formal complaints must conform with 106.45 Grievance Process, notably:
  - ❑ Respondent presumed innocent*
  - ❑ Parties to be treated equitably, without bias for/against complainants or respondents
  - ❑ Evidentiary standards must consistently be either *preponderance* or *clear & convincing*
  - ❑ Supportive measures and disability accommodations must be available throughout
- ❑ Notice must be provided to both parties simultaneously and in writing, consistent with 34 CFR 106.45(b)(2)
  - ❑ Notice must be updated if allegations change

See 34 CFR 106.44(b), 106.45

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COMPLIANCE CHECKLIST: FORMAL COMPLAINTS (continued)

Complaint Dismissal:

- ❑ Title IX Coordinator must dismiss complaint in 3 scenarios:
  - ❑ Conduct alleged, if proved, would not constitute Title IX sexual harassment under 106.30; or
  - ❑ Conduct did not occur in school's education program or activity; or
  - ❑ Conduct did not occur against a person in the United States
- ❑ Title IX Coordinator may dismiss a complaint in 3 scenarios:
  - ❑ Complainant withdraws complaint (in writing); or
  - ❑ Respondent is no longer enrolled or employed by the school; or
  - ❑ Specific circumstances prevent the school from gathering evidence sufficient to reach a determination
- ❑ If complaint dismissed, nothing prevents school from taking action under a different policy (e.g., Code of Conduct)
- ❑ Upon dismissal, school must notify parties (including rationale) and provide parties opportunity to appeal the dismissal

Complaint Consolidation:

- ❑ School may consolidate formal complaints involving multiple complainants or multiple respondents when the allegations arise from the same facts or circumstances

See 34 CFR 106.45(b)(3)-(4)

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PRACTICAL CONSIDERATIONS: NOTICE

Notice of Allegations must be provided to all known parties, and must include:

- Allegations (potential policy violations)
- Known details sufficient to afford parties opportunity to prepare response (e.g., identities, date/location, description of alleged behavior)
- Statement of presumption of innocence
- Right to advisor of choice
- Any policy prohibiting false statements/information

PRACTICAL CONSIDERATIONS: INFORMAL RESOLUTION

Notice may also include information about availability of informal resolution options, if applicable

- Mediation
- Restorative Justice
- Other(?)

Informal Resolution:

- Must be voluntarily agreed to by all parties,
- Must be facilitated by a trained professional,
- Is subject to specific (additional) notice requirements, and
- Is <u>not</u> available to address sexual harassment of a student by an employee.

(See 106.45(b)(9))

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PRACTICAL CONSIDERATIONS: EDUCATION PROGRAMS OR ACTIVITIES

A key consideration on which much depends is whether the alleged sexual harassment occurred within the school's **education program or activities**

"locations, events, or circumstances over which the school 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 a [recognized] student organization"

Let's discuss! Type **YES** or **NO** in the chat box, indicating whether the following circumstances are/are not within the education program or activities…

ACADEMIC IMPRESSIONS

ADVANCED CONSIDERATIONS: INTERIM EMERGENCY REMOVAL & ADMINISTRATIVE LEAVE

Challenge Questions:

- What does an "individualized safety and risk analysis" require?
- What is sufficient enough to establish "immediate threat to the physical health or safety" of a student or other individual?
  - What about self-harm, threat of self-harm?
- What should the "opportunity to challenge" look like?
- Same standards for students (emergency removal) as employees (administrative leave)?

TAKEAWAYS

- ✓ Diligently follow 34 CFR 106.45 (keep handy)
- ✓ When discretion is permitted, **fairness/equity** will usually show you the way
- ✓ Err on the side of caution when restricting individuals (narrowly tailor)
- ✓ Document your rationale (internally) for each decision

Best Practices for Managing Sexual Harassment/Misconduct Investigations

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ACADEMIC IMPRESSIONS

CHANGES TO INVESTIGATIONS FROM 2020 REGS

- Notice requirements and process for getting to formal investigation
- New Scope, Jurisdictions, and Definitions
- Application to Employees
- Distribution and Review of Evidence and Report
  - 10-Day Review Periods
- Training for Investigators
- Removal of Single Investigator Model
- Relevancy
- Witnesses including Character and Expert Witnesses

ACADEMIC IMPRESSIONS

Applying Your Knowledge: Breakout Activity

- Do you have jurisdiction?
- What would you consider in your preliminary review?
- What would you include in the notice?

WHAT ARE WE INVESTIGATING?

Jurisdiction

- Location
- Program/Activity
- Control Over Involved Parties

Definitions of Prohibited Conduct

- VAWA Crimes
- Quid Pro Quo
- Severe, Pervasive, and Objectively Offensive

Title IX vs Title VII and application to Employees

What does your policy say?

ACADEMIC IMPRESSIONS

THINGS TO CONSIDER AS PART OF GATEKEEPING FUNCTION

- What is a formal complaint?
- Jurisdiction and scope
- Title IX Coordinator signing complaint
- Decision on type of resolution
- Informal vs. Formal
- Combined investigations for multiple policy violations
- Dismissal

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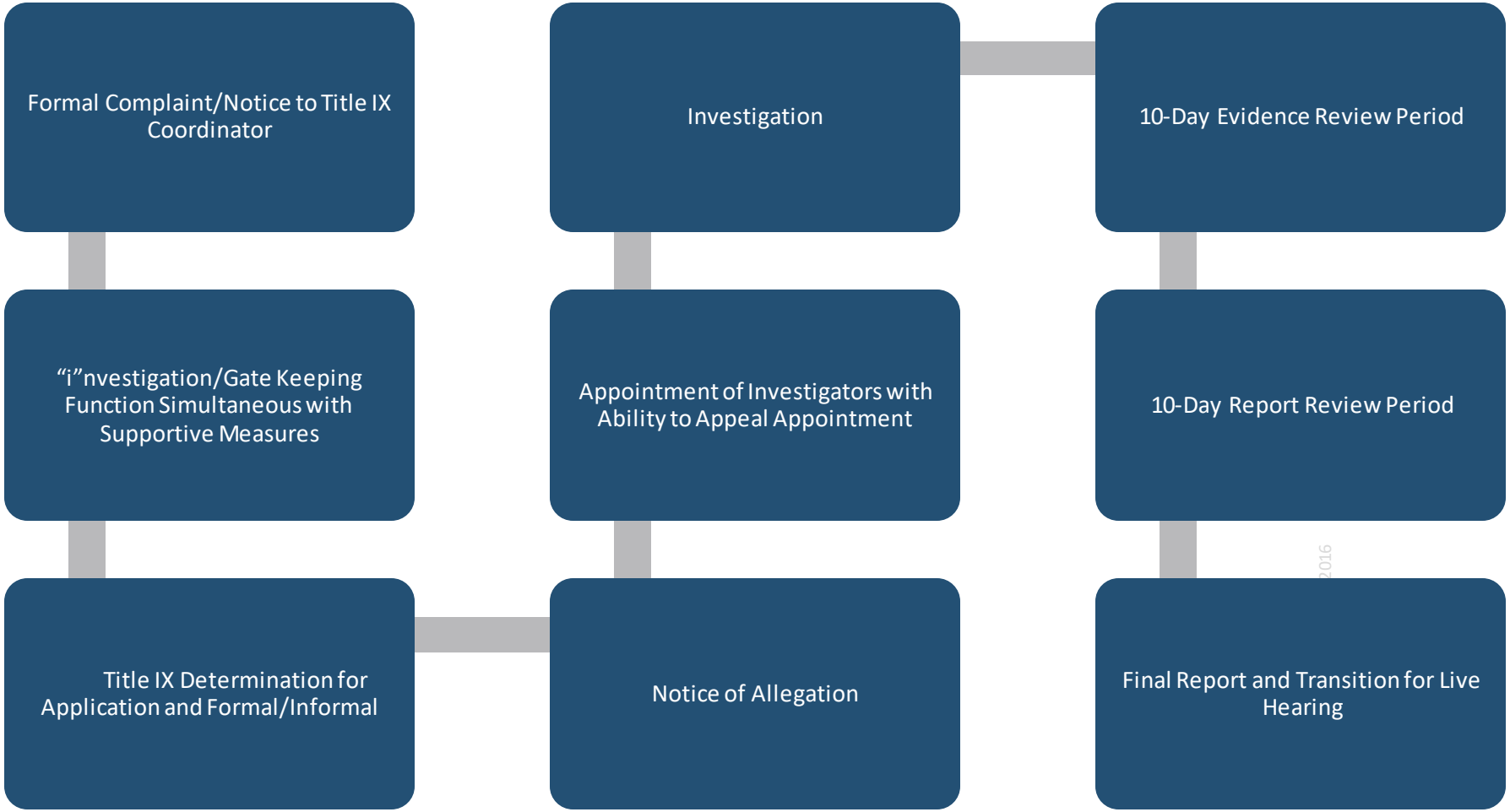
POLL

How is your institution managing complaints that fall outside the Title IX Coordinator's jurisdiction?

OVERVIEW OF AN INVESTIGATION



ROLE OF THE TITLE IX COORDINATOR

- Gatekeeping Function
- Supportive Measures
- Emergency Removal
- Training Oversight
- Actual Notice
- Coordinates Individual Functions of Resolution Process
- Quality Control

ROLE OF THE INVESTIGATOR

- Gather all information regarding an allegation and determine relevancy
- Interview all parties and witnesses, including character and expert witnesses
- Fact gathering vs. fact finding
- Collect and organize evidence and distribute to parties for review and comment
- Identification of new allegations requiring notice
- Write a detailed investigative report

WHO SHOULD/SHOULD NOT SERVE?

- Attorneys?
- Outside Investigator?
- General Counsel?
- Campus Safety/Security?
- Title IX Coordinator/Deputy Title IX Coordinator?
- Faculty?
- Students?
- Human Resources?
- Other members of Title IX or Conduct Team

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POLL

Which standard of proof does your campus use or plan on using for your Title IX cases?

BUILDING YOUR INVESTIGATION TOOLKIT

Policy and Procedures

Planning Documents and Templates

- Prohibited Conduct Breakdown and Elements Worksheet
- Resource/Support Materials and Information
- Communication and Evidence Logs, including naming convention
- Evidence Analysis Chart and Relevancy Buckets
- Pre-investigation Checklist
- Report and Letters

Technology Plan

- Consistent plan for use of technology to support intake and investigation
- Method for evidence collection and distribution
- Confidentiality and record security, including sharing with third party advisors
- Record storage: Electronic "Filing Cabinet"

Other Considerations

- Model and policy for working with advisors
- Understanding of campus data systems: video surveillance, building/door access, attendance records, evaluations, etc.

CONSIDERATIONS FOR THE TITLE IX COORDINATOR'S INVOLVEMENT DURING AN INVESTIGATION

- What role does the Title IX Coordinator play in the review process during investigation and before finalizing the report?
- Coordination amongst Title IX Coordinator and Investigator related to ongoing provision of supportive measures?
- Elevation of safety risk factors that may trigger need for emergency removal considerations?
- Assistance with enforcement of policy deviations or violations?
- Need for amended notification for violations?

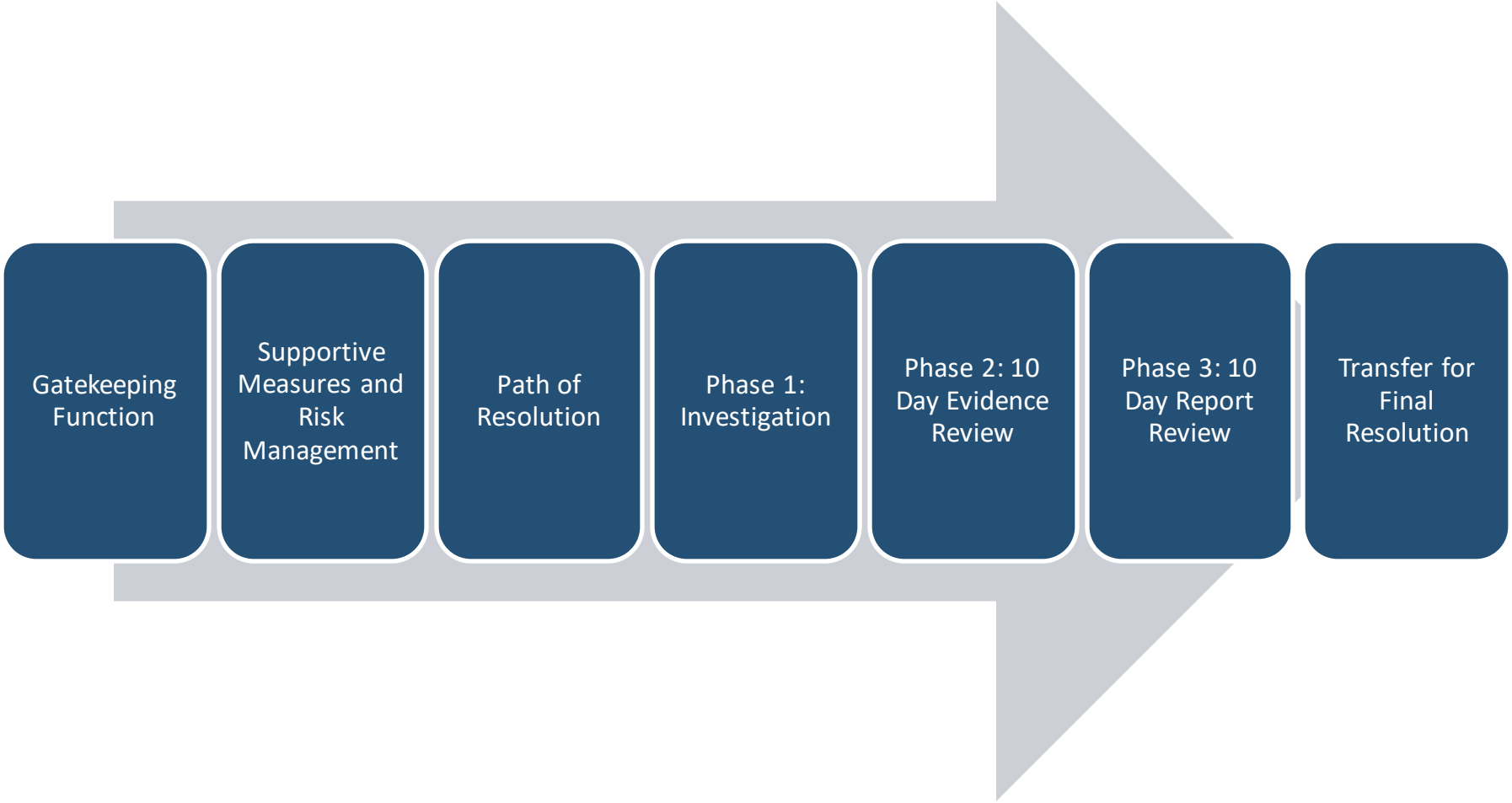
CASE STUDY (Cont.)

- During the course of the investigation, Andi begins to feel more comfortable with the resolution process and shares additional details with the investigator, including the fact that since the filing of the formal complaint, Brett has begun showing up at Andi's residence hall, the on-campus testing site when Andi is working, and other locations such as the dining hall when Andi is present.
- Andi reports that Brett simply stares at Andi in a way that makes Andi feel "scared and intimidate". Andi also reports that Brett has continued to send messages to Andi and Andi's friends, including Charlie and Desi, through text messages and on social media threatening Andi's wellbeing should Andi participate in the investigation and continuing to call Andi sexually explicit names, such as "Slut", "whore" and "bitch" in snapchat messages to their mutual friend group.
- Andi is worried about how Brett will act if Andi continues to participate in the investigation and is concerned that Charlie and Desi may be so impacted by Brett's threats and intimidating behavior that they may choose not to participate, therefore impacting the quality of the evidence in the case.

Applying Your Knowledge: Breakout Activity

- How can you prepare your investigator for a successful investigation?
- How would you strategize the investigation?

SETTING YOUR RESOLUTION TIMELINE



ACADEMIC IMPRESSIONS

DURING THE INTERVIEW: DIFFERENTIATING THE ROLE OF THE INVESTIGATOR FROM COORDINATOR

Introduce yourself and explain your role as an investigator

- You are the fact gatherer, not the fact finder.
- Explain rules and procedure
- Define process for seeking additional supportive measures and how you will communicate with Title IX Coordinator

State that you will be taking notes (or recording) during the interview and explain why this is important

Disclose the information shared during the investigation will be used and who will have access.

Explain the Investigation Process and how information from the investigation will be used at the hearing, including during cross-examination

Explain the role of advisors

Ask the interviewee if they have any questions about the process

- Information will be kept as confidential as possible
- Anti-Retaliation and Intimidation Policy
- Purpose of Investigation
- Amnesty Policy if Applicable

Next Steps

- Follow up with Title IX Coordinator

ACADEMIC IMPRESSIONS

COLLECTING EVIDENCE

How are you storing physical evidence?

Often depends on whether your University has sworn law enforcement

Who is providing the evidence?

Potential Sources of evidence:

- Text messages, social media, phone records, etc.
- Diaries, journals, timelines, etc.
- Law Enforcement
- Campus Records
- Medical Evidence

ACADEMIC IMPRESSIONS

CREDIBILITY ASSESSMENTS, FACT ANALYSIS, AND RECOMMENDATIONS: WHAT GOES IN THE REPORT?

Credibility Observations Without Findings of Fact or Determination

Using Evidence to Support Fact Finding Through Report Organization

Recommendations?

ACADEMIC IMPRESSIONS

ORGANIZING YOUR DIGITAL CASE FILE

UNDERSTANDING OF SYSTEM FOR COLLECTION AND DISTRIBUTION

SORTING AND DISTRIBUTING EVIDENCE AND REPORT APPROPRIATELY

FINALIZING THE OFFICIAL RECORD OF THE INSTITUTION'S RESOLUTION

COMMON CHALLENGES AND NEW BEST PRACTICES

- Tandem investigations and considerations for proper notification of allegations and differing evidentiary standards
- Challenges with remote or digital investigations
- Working with Advisors
- Relevancy and determining what requires redaction
- Amnesty issues
- Tandem Law Enforcement Investigations
- Application to Employees
  - Faculty Unions and Contract
- Respecting Confidentiality while not prohibiting communication
- Working with Witnesses
- Investigator role in the Hearing Process
- Enhanced record protection when distributing reports including storage, redaction, and FERPA considerations

CHAT

SHARE OUT & DISCUSSION!

What have been some of your procedural challenges related to facilitating your investigation process? What have you recently adjusted considering the proposed regs, if any?

QUESTIONS

Best Practices for Managing Hearings and Appeals

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ACADEMIC IMPRESSIONS

AGENDA

- **Hearings**
  - Compliance Checklist
  - Practical Considerations

- **Appeals**
  - Compliance Checklist
  - Practical Considerations

- **Advanced Considerations/Discussion**

Title IX Grievance Process

Hearings

ACTIVITY

CASE STUDY (continued)

With the investigation complete, the case is ready to proceed to a hearing. The case is assigned to a hearing board of three trained administrators, and the investigative report is provided to the parties for their review and written response, if desired. You schedule the hearing for 14 days out.

When you inform the two witnesses, Charlie and Desi, about the hearing, Charlie informs you that they cannot make the hearing at the time requested, due to a scheduling challenge with work.

Desi does not respond to your outreach at all (which you attempt via email and phone, leaving several messages).

COMPLIANCE CHECKLIST: HEARINGS

- Hearing must be live (i.e., synchronous) such that all parties must be able to see and hear the other participants
  - May be virtual or use technology to avoid parties being in the same room
- Facilitated by trained decision-maker(s) who were not previously involved (i.e., different from investigator, not Title IX Coordinator)
  - No bias/conflict of interest
- Parties must be accompanied by one advisor of choice (for limited purpose of cross-examining opposing party and any witnesses)
- Questions of parties/witnesses must be permissible (i.e., relevant and not privileged or protected)
  - Decision-maker must rule on relevance/permissibility in real time, with explanation if disallowing
- Standard of evidence must be either *preponderance of the evidence* or *clear and convincing* (34 CFR 106.45(b)(1)(vii))
- Record of hearing (audio/video recording or transcript) must be retained with case file and made available to parties for inspection/review
- Decision-maker issues written determination (including findings, sanctions, and rationale for each) (34 CFR 106.45(b)(7))

See 34 CFR 106.45(b)(6)

ACADEMIC IMPRESSIONS

MORE ON CROSS-EXAMINATION REQUIREMENTS

- Involved parties – through their advisors only and never directly – are permitted to ask **relevant** questions of the other party and all witnesses, including follow up questions.
- Questioning must be delivered orally and in real time.
- Questions challenging or exploring credibility are relevant.
- Decision-maker must rule on the relevancy of the questions prior to answering of the questions. If the question is determined to be not relevant, the decision-maker must provide reason for the determination on the record.

MORE ON RELEVANCY

Institutions must not adopt rules to exclude certain types of relevant evidence, such as lie detectors, or ban expert witnesses. **If relevant, the question must be permitted**, except for questions about:

- Complainant's sexual history, unless
  - Used to prove someone other than the Respondent is responsible for the alleged misconduct
  - Specific encounters between Complainant and Respondent offered to prove consent
  - Note: the rape shield rule does NOT apply to Respondents; evidence of pattern of inappropriate behavior, even if sexual in nature, is permitted
- Protected by legal privilege (unless voluntarily waived)
- Treatment records (unless voluntarily waived)
- If equally applied, questions asked in a harassing or intimidating manner may be excluded (should be part of rules of decorum).

MORE ON CROSS-EXAMINATION, EXCLUSION OF EVIDENCE NOT SUBJECT TO CROSS

Title IX Final Rule: Decision-makers cannot rely on statements of non-participating party when making a determination.

- Includes statements of a non-participating party included in a SANE or police report
- Exception: when statement is the sexual harassment itself

BREAKING: Cardona decision recently overruled this; OCR revisiting.

TWO KEY TAKEAWAYS:

1. When a **party** does not participate, ensure that an advisor is assigned/provided to conduct cross-examination of other party and witnesses in the party's absence.
2. When a **witness or party** doesn't participate (common) or refuses to answer a question (rare), the decision maker may assign limited weight to the statements of the non-participating witness/party (but the evidence need not be excluded entirely).

ACADEMIC IMPRESSIONS

PRACTICAL CONSIDERATIONS: TITLE IX COORDINATOR'S ROLE IN HEARINGS

Before the hearing

- Explain full resolution process, including hearing, throughout resolution, including intake and during initial investigation interview.
- Coordinate logistics, scheduling, communications to parties and witnesses
- Review of conflicts of interest and bias concerns
- Approval/drafting of templates, including hearing scripts, materials, communications, and written determination
- Arrange for advisors
- Coordinate with community agencies to support a smooth hearing process and participation through testimony (e.g., SANE nurses, law enforcement)

PRACTICAL CONSIDERATIONS: TITLE IX COORDINATOR'S ROLE IN HEARINGS

During the hearing

- May provide logistical and administrative support (e.g., troubleshooting compliance challenges, issues with advisors, policy application, technology issues, etc.)

PRACTICAL CONSIDERATIONS: TITLE IX COORDINATOR'S ROLE IN HEARINGS

After the hearing

- Compliance check of written determination (e.g., ensure thorough analysis, feedback regarding appropriate sanctions and provision of remedies)

PRACTICAL CONSIDERATIONS: DECISION MAKER MODELS

Single Decision-Maker

PROS:
- Easier scheduling, training, and communication
- Decreased administrative burden on Title IX Coordinator

CONS:
- Taking notes and ruling on relevancy
- Requires additional staff for administrative support and logistics
- A lot of responsibility for one individual

Hearing Panel

PROS:
- Divide responsibilities
- Diverse perspectives
- Strength in numbers

CONS:
- Scheduling difficulties
- Heavier administrative burden on Title IX Coordinator
- More personnel involved

PRACTICAL CONSIDERATIONS: HEARING LOGISTICS TIPS

- Harness the power of a **PRE-HEARING CONFERENCE**
  - Opportunity to test tech, accessibility
  - Ease parties into the hearing environment
  - Introduce decision-maker/chairperson (they can even facilitate)
  - Exploring requests (advisors, new evidence, accommodations, witness lists, etc.)
  - Build rapport and manage expectations, including rules of decorum
- Plan carefully and think ahead
  - Schedule/structure the final 10-day report review period to make hearings more efficient
  - Develop/use/refine scripts and templates
  - Written "rules of procedure/decorum"
  - Organized witness lists and scheduling
  - Room set-up and space considerations (or virtual, as applicable)
- Management and contingency planning for advisors
- Schedule more time than you think you need
- Consider a timeline for information needed from parties:
  - Advisors
  - Accommodations
  - Witness Lists
  - Pre-submission of questions (optional)
- Consider utilizing hearing support staff/volunteers
- How will you make evidence available for review in real time?
  - Digital evidence
- What hearing record format is best? (video, audio, transcription)

ACADEMIC IMPRESSIONS

PRACTICAL CONSIDERATIONS: RULES OF DECORUM & PROCEDURE

- Institutions are permitted to implement rules of decorum as long as they apply equally to involved parties, such as:
  - Asking questions or participating in a respectful, neutral manner without intimidation, harassment, or badgering
  - Define clearly the expectations for behavior, consistent with regulations
  - Privacy, especially during digital hearings
  - Define consequences of failure to comply
- May adopt rules of procedure including:
  - Whether the parties may offer opening and closing statements
  - Specify a process for making objections to the relevance of questions & evidence
  - Process for requesting breaks or private consultation with advisor
  - Rules for introduction of new evidence at the hearing

PRACTICAL CONSIDERATIONS: HOW TO STRUCTURE THE HEARING

1. Introduction to people, process, and case (by decision-maker/chairperson)
2. Opening statements (optional)
3. Questioning of parties/witnesses (by decision-makers first, then by advisors)
   a. Investigator (optional)
   b. Complainant
   c. Respondent
   d. Witnesses (in what order?)
4. Closing statements (optional)
   a. Follow-up questioning (optional)
5. Decision-maker/chairperson closes according to script

PRACTICAL CONSIDERATIONS: WRITTEN DETERMINATIONS

The written determination (aka decision letter) must include:

- List of allegations
- Description of procedural steps taken from receipt of formal complaint through hearing (e.g., notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held)
- Findings of fact
- Analysis applying policy to facts
- Determinations of responsibility (for each allegation)
- Rationale for decisions, including any sanctions imposed
- A statement indicating whether or not remedies are to be provided to the complainant (need not name what the remedies are)
- Information about process and grounds to appeal

Both parties must be notified simultaneously and in writing. The written determination must be "issued by" decision-maker(s).

See 34 CFR 106.45(b)(7)

ACADEMIC IMPRESSIONS

Title IX Grievance Process

Appeals

ACTIVITY

Case Study (continued)

[Assume at least Charlie doesn't show up for the hearing, and the case results in finding of "NOT RESPONSIBLE" – for whatever reason]

Andi appeals the outcome of the case on the grounds of "new substantive evidence that was not previously available." Following the hearing, Andi received a text from Desi (provided in the appeal request) apologizing to Andi and explaining that the reason Desi did not participate in the hearing was because Brett had threatened to out Desi as gay to Desi's family if they "did anything to help out their slut friend – including yapping about what went down that night in the lounge." Andi feels this information is relevant as it shows Brett's character, suggests that something did indeed happen that night, and may even constitute retaliation on its own (towards Desi).

APPEALS: COMPLIANCE CHECKLIST

Procedural Requirements

- ❑ Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
- ❑ Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator
- ❑ Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX
- ❑ Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- ❑ Issue a written decision describing the result of the appeal and the rationale for the result
- ❑ Provide the written decision simultaneously to both parties.

Required Grounds for Appeal

1. **Procedural irregularity** that affected the outcome of the matter
2. **New evidence** that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a **conflict of interest or bias** for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(*Note that some states [e.g., Illinois] may have other required grounds for appeal, such as "sanctions not commensurate to violation".)

See 34 CFR 106.45(b)(8)

ACADEMIC IMPRESSIONS

PRACTICAL CONSIDERATIONS: APPEAL STRUCTURE & LOGISTICS

Title IX regulations do not prescribe a defined process for appeals, so the process is largely dependent on each school's policies/procedures.

- No live meetings or "appeal hearings" are required (or recommended)
- We recommend a strict paper/desk appeal, with written communications exchanged as needed for the purpose of clarification or additional information
- Note that if appeal officers do meet with one party to discuss their appeal, then the appeal officers should also meet with the other party to maintain equality
- Proper training required on process prior to appeal (good idea for appeal officers to have a strong understanding of how the entire process works from start to finish)
- Standard prohibitions on bias/conflict of interest apply

Advanced Considerations

ADVANCED CONSIDERATIONS: HEARINGS & APPEALS

- Bias and conflicts of interest
- Advisor management (contingency planning)
- New evidence (not presented during investigation)
- Use of external or internal decision-makers
- Creating buy-in for senior level appeal officers

Overseeing your Campus' Training Efforts

Jeanine Bias

Director, Office of Institutional Diversity and Inclusion / Title IX Coordinator | Sam Houston State University

ACADEMIC IMPRESSIONS

LEARNING OUTCOME

After participating…

Providing oversight and directing training efforts for critical campus partners such as investigators, hearing panel/appellate officers, steering committee members, and campus leaders will be at the forefront of a Title IX Coordinator's strategic planning efforts. You will learn how to review and differentiate training topics and learning outcomes for internal constituents on your campus.

AGENDA

- Programming vs. Training
- Title IX Training Requirements
- Who needs to be trained
- Specialized Content for Internal Constituents
  - Investigators
  - Hearing Boards
  - Appellate Authority
  - Informal Resolution Facilitators
  - Title IX Team
- Training for Special Populations
  - Confidential Resources
  - Residence Life
  - Athletics
  - Other
- Best Practices for Training

TRAINING VS. PROGRAMMING

PROGRAMMING VS. TRAINING

Programming

- Campus-wide
- Prevention/Awareness
- Climate Centered

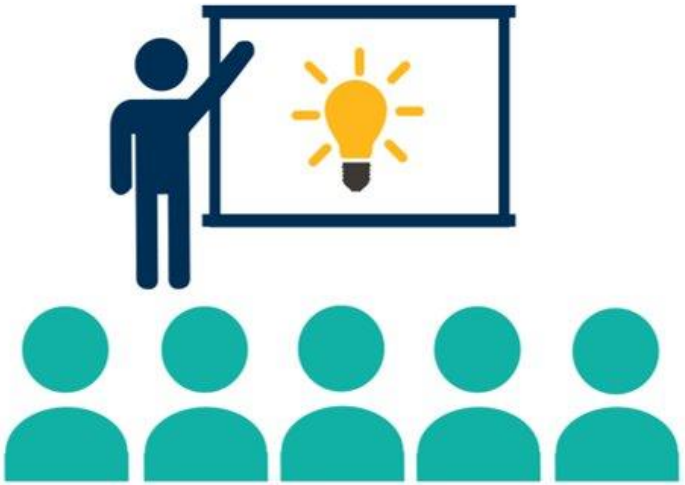
Training

- Specific Populations
- Skill based
- Layered Approach

TITLE IX TRAINING REQUIRMENTS

TRAINING FOR YOUR TITLE IX TEAM

- Critical Content
  - Fundamentals of Equity, Impartiality, Fairness, and Transparency
  - Definition
  - Bias
  - Stereotypes
  - Conflicts of Interest
  - Relevance
  - Credibility
  - Technology



ACADEMIC IMPRESSIONS

WHO SHOULD BE TRAINED?

TITLE IX TEAM

- Title IX Coordinator
- Deputy Coordinators
- Investigators
- Intake Coordinators
- Informal Resolution Facilitators
- Hearing Board Members
- Appellate Authority
- Officials with Authority
- Advisors

TRAINING YOUR TITLE IX TEAM

- Auditing your team's knowledge and skill level
- Identifying training gaps
- Internal training resources
- External training resources
- Cross training your team
- Your role as facilitator
- Self guided resources and training

SPECIALIZED CONTENT FOR INTERNAL CONSTITUENTS

INVESTIGATOR TRAINING

- Introduction
  - Title IX Guidance and New Regulations
  - Sexual Misconduct Policy Overview
  - Role of Title IX Coordinator
  - Incident Reporting
  - Institutional Procedures
- Role of an Investigator
  - Devising and Investigation Plan
  - Strategizing for an Investigation
  - Investigation Timeline
  - Preparing Questions

INVESTIGATOR TRAINING

- Conducting an Investigation
  - Scheduling Interviews
  - Investigation Checklist
  - Building Rapport
  - Questioning Participants
  - Gathering Facts and Collecting Evidence
  - Interview Notes
  - Interview Summary
  - Follow up Interviews
  - Recordkeeping
  - Interview Tips
  - Evidence Review

INVESTIGATOR TRAINING

- Writing an Investigative Report
  - Components of an Investigative Report
  - Conducting a Fact Analysis
  - Use of Definition Elements in an Investigative Report
  - Final Summary
  - Common Mistakes in Report Writing
  - Title IX Coordinator Review

ACADEMIC IMPRESSIONS

DECISION MAKER TRAINING

- Role & Responsibilities
  - Title IX Guidance and New Regulations
  - Sexual Misconduct Policy Overview
  - Investigative Process Overview
  - Role of Decision Makers
  - Role of Hearing Panel Chair
  - Role of Title IX Coordinator during Hearing Process
  - Role of Title IX Investigator during Live Hearing

ACADEMIC IMPRESSIONS

DECISION MAKER TRAINING

- Conducting a Live Hearing
  - Reviewing Investigative Report
  - Scheduling Hearing
  - Live Hearing Requirements
  - Cross Examination (including Role of the Advisor)
  - Determining Relevance
  - Assigning Sanctions
  - Writing Hearing Panel Decision
  - Recordkeeping

APPELLATE AUTHORITY

- Regulation and Policy Overview
- Investigative Process and Live Hearing Overview
- Grounds for Appeal
- Notice of Appeal Request
- Reviewing Appeal
- Writing Appeal Decision

INFORMAL RESOLUTION FACILITATORS

- Mediation
- Restorative Justice

ALL TITLE IX TEAM TRAINING

- Serving as a University Appointed Advisor
- Using Technology to Conduct Title IX Meetings, Investigations and Hearings
- Unconscious Bias

TRAINING FOR OTHER SPECIAL POPULATIONS

- Confidential Resources
- Residence Life
- Athletics
- Other

ADDITIONAL TRAINING CONSIDERATIONS

- Trauma informed investigations in light of new regulations?
- How to conduct remote investigations
- Working with advisors
- Impact of Alcohol and Drugs on Consent
- Allegations involving minors
- Terminology, language
- Social Media

ACADEMIC IMPRESSIONS

BEST PRACTICES

PUTTING IT ALL TOGETHER – BEST PRACTICES FOR TRAINING

- Establish a training timeframe
- Create Scenarios and Case Studies
- Frequency
- Conduct a Mock Hearing
- Quality Assurance

ACADEMIC IMPRESSIONS

QUESTIONS