

GRAND RIVER | SOLUTIONS

From One Coordinator to Another

Independent Colleges and
Universities of Texas

Jody Shipper
July 2021



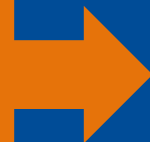
Vision

We exist to help create safe and equitable work and educational environments.



Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.



Core Values

- ❖ Responsive Partnership
- ❖ Innovation
- ❖ Accountability
- ❖ Transformation
- ❖ Integrity



Your Facilitator



Jody Shipper, J.D.

Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor's degree from Georgetown University's School of Foreign Service.

Today's Agenda

01

Regulatory Overview

05

Building a Foundation of Success

02

The Hearing

06

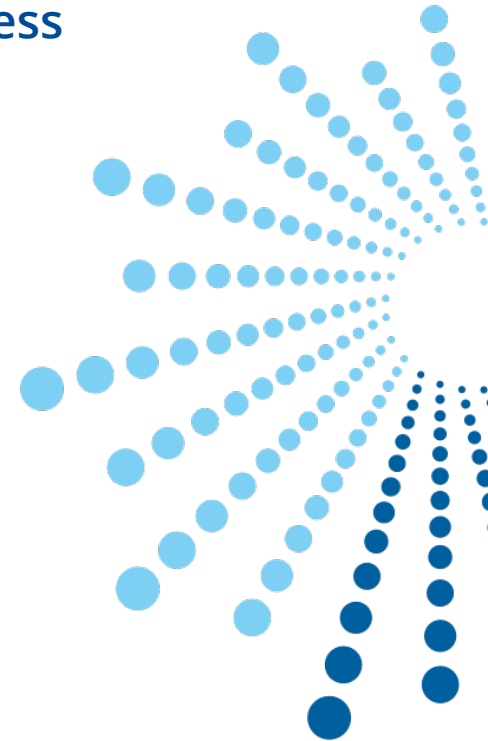
Training and Education

03

Hearing Logistics

04

After the Hearing



July 7, 2021

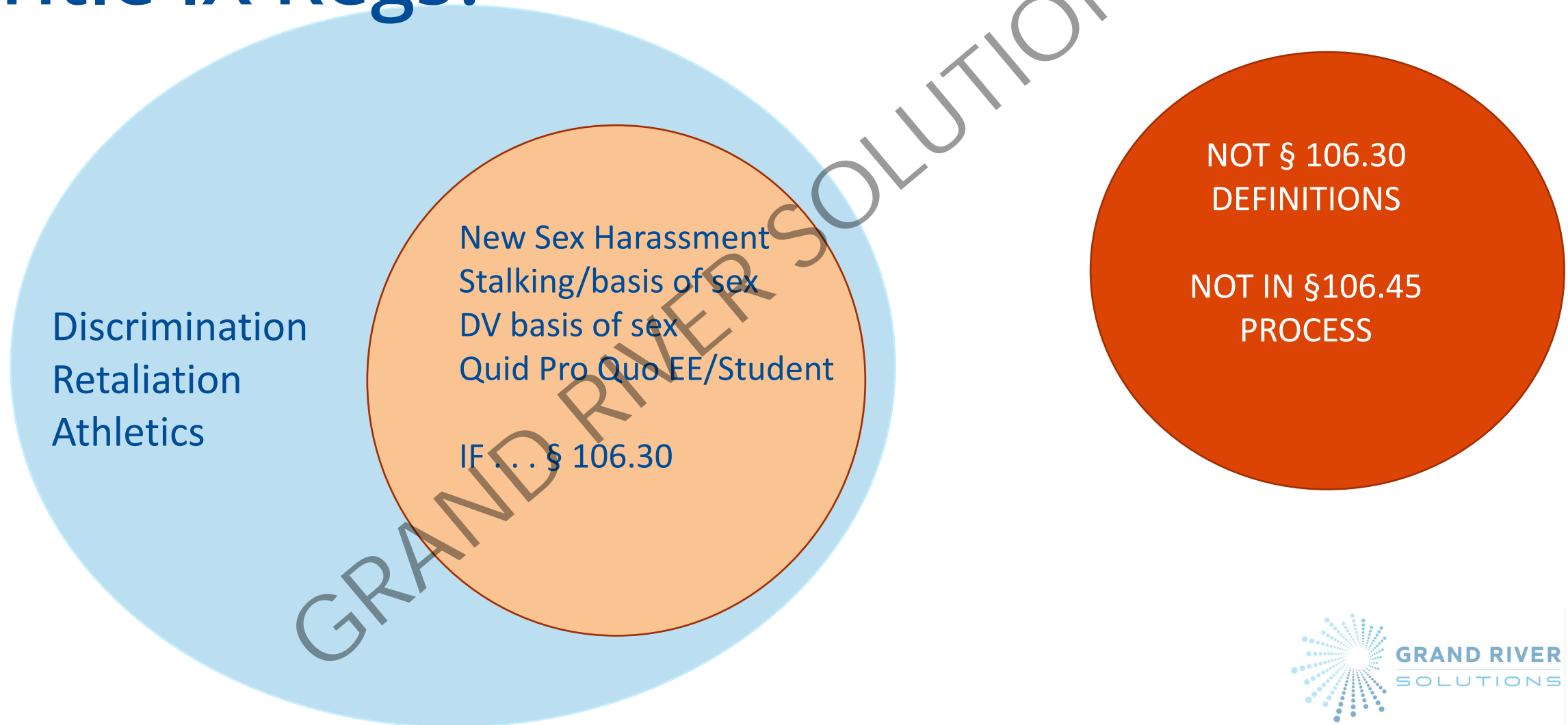


Regulatory Overview

Narrowed jurisdiction and expansive procedural requirements

01

To Start: What Is Covered by the New Title IX Regs?



What are
the §106.30
(Regulatory)
definitions?

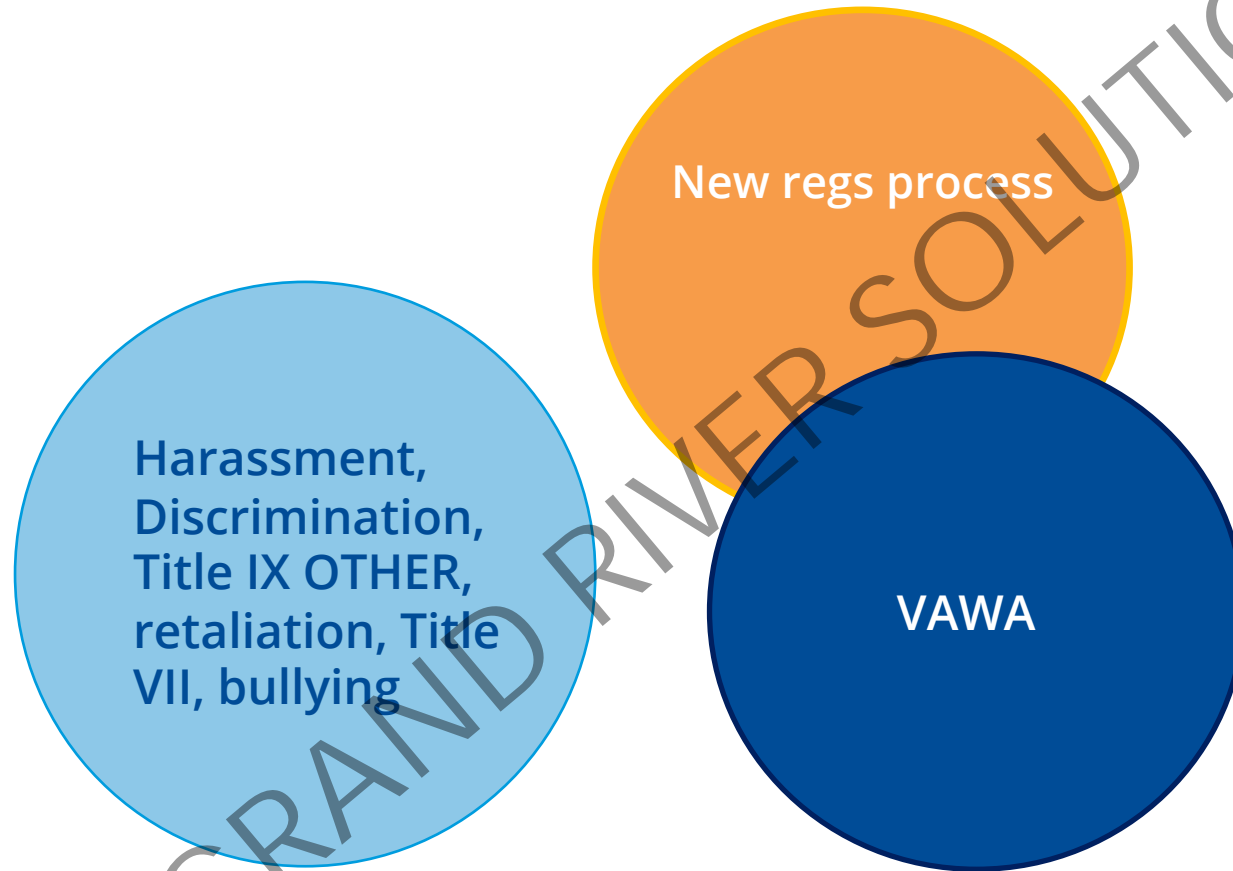


Definitions of Sexual Harassment

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

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

Note: They Do Not Match Up



What is Covered by Title IX

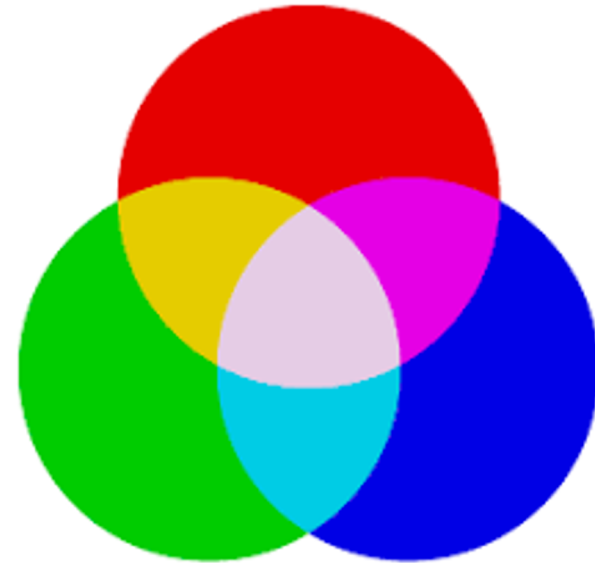
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities

Hint: Not in Regs

What (Mis)Conduct is Covered by the 2020 Title IX Regulations' Processes?

- Sexual Harassment*
 - Hostile Environment*
- Quid Pro Quo (by an employee)*
- Sexual Assault*
- Dating Violence (on basis of sex)*
- Domestic Violence (on basis of sex)*
- Stalking (on basis of sex)*

* Using 106.30 definitions



It Was Bad, But Not (New) Title IX Bad

**Sexual harassment, DV, Stalking,
Discrimination Retaliation: If it does
not meet § 106.30 definition, then not
mandated to use §106.45 process**

A Sample Decision-Tree

1. Nature of Complaint:

A complaint of sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;

A complaint of Dating Violence, Domestic Violence, Stalking, or Sexual Assault;

A complaint of quid pro quo sexual harassment by an employee against a student.

If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

3

2. Location:

The incident(s) occurred at school, within the United States;

The incident e incident(s) occurred in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and within the United States;

The incident(s) was part of one of the school's programs or activities, such as part of a field trip or team athletic event, and within the United States.

If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

3. The institution has substantial control over the respondent, meaning the Respondent is a student (whether applicant, admitted, or currently enrolled) or employee (applicant, hired but not yet working, or employed). In addition, the institution may have control over a respondent who is a contractor, an alum, or a vendor under certain circumstances.

If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

4. Complainant is a student (whether applicant, admitted, or currently enrolled) or employee (applicant, hired but not yet working, or employed), or otherwise still accessing or attempting to access a university program or activity, within the United States.

If yes to one of the above, continue. If no, please see (go to basic sex harassment policy).

Mandatory Response to Each Report



- All reports, or those within scope of the Regs?
- Actual knowledge
- What about responsible employees?

Mandatory Response

1. Discuss support measures

2. Explain that support measures are available without filing formal complaint

3. Explain options for resolution and how to file

Outreach

Rights, resources, options

Mandatory response is floor, not ceiling

Still have VAWA response requirements

Determinations on threat levels may be appropriate here

Supportive Measures

Interim, not
forever

Interim also
includes “before
investigation”

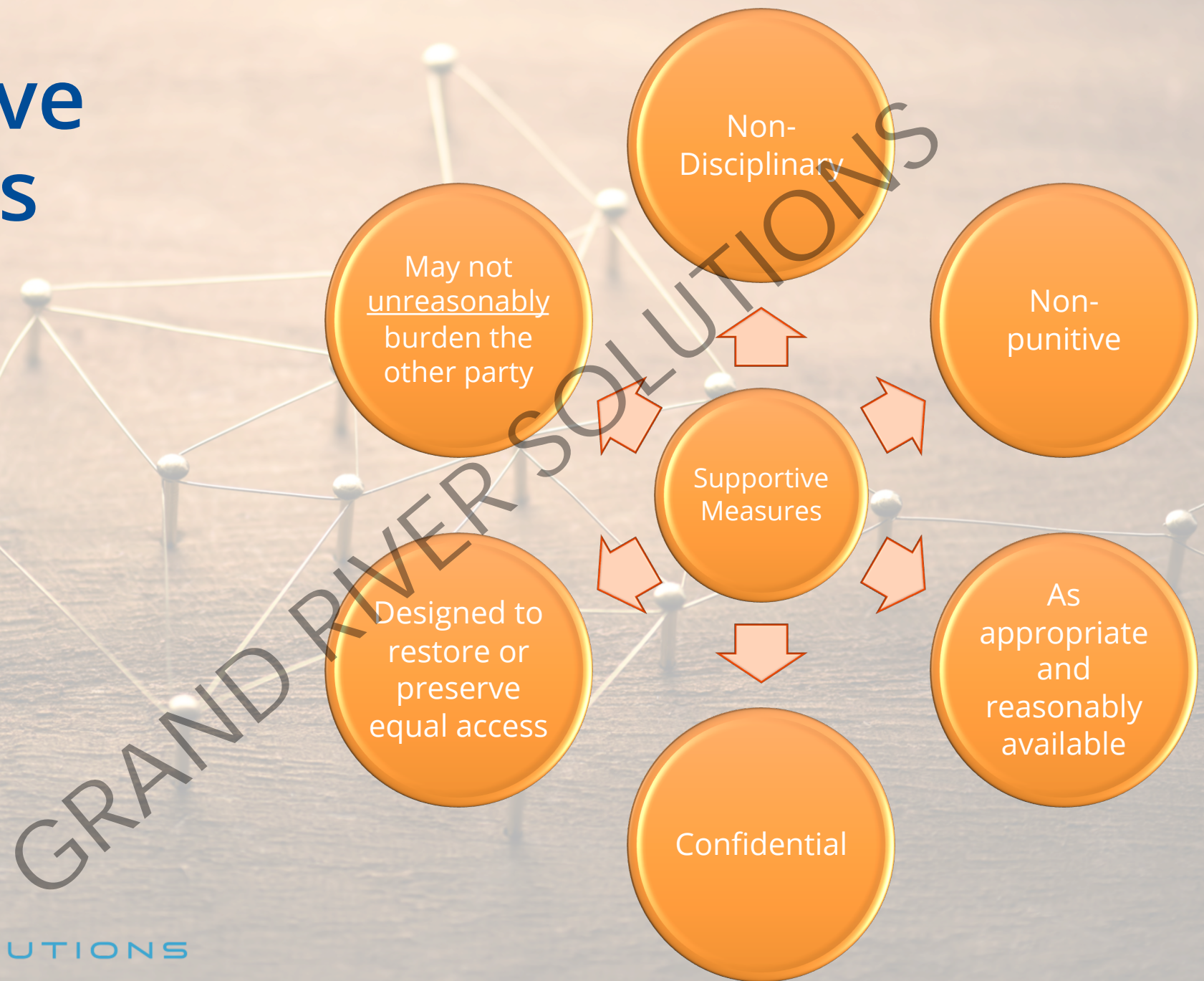
Equitable ≠
Equal

Not Intended to be Punitive

- No default
- Case by case
- Document the connection to preserving equal access
- Document reason for any requested measures not implemented



Supportive Measures



Emergency Removal of Student

- High threshold
- Not a determination of responsibility
- Whether or not grievance is underway
- Individualized
- Immediate threat (physical)
- Opportunity to challenge



But is it a **FORMAL** Complaint?



Mandatory Investigation

Complaint filed,
SIGNED, requests
investigation

Coordinator SIGNS,
starts investigation

But Do You **START** the Investigation?

Does it meet the
elements? If not,
DISMISS

Trying to do some
pre-investigation
to identify
respondent

Dismissing Complaints

MANDATORY

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info



Overview of Formal Resolution Process

Signed

Not anonymous

Requests investigation

States covered conduct

**Any
Process
Requires
Formal
Complaint**

Informal Resolution

FORMAL COMPLAINT REQUIRED

Voluntary

Request in writing

Title IX Coordinator may determine not appropriateness

Full written notice

At any time before conclusion of hearing

Completes the process – cannot have a do-over

Written Notice Requirements

The allegations

The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations

Voluntary

Right to withdraw

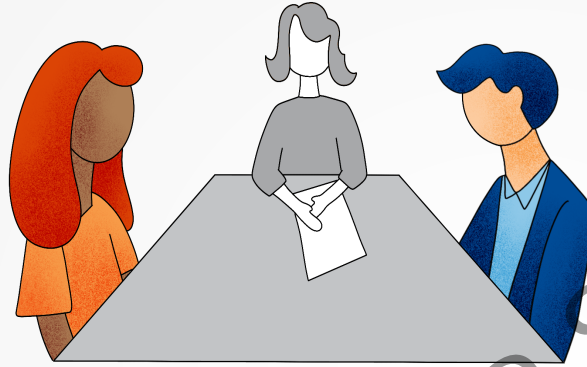
Consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

How to Proceed?



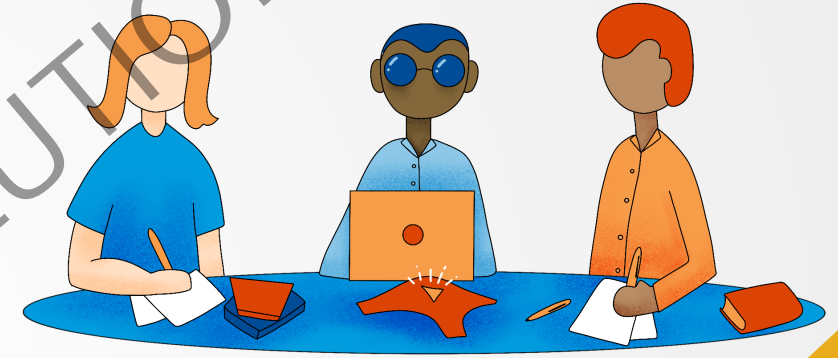
Remedies-based

No formal process



Alternative/Informal

Signed agreement;
Voluntary;
What records?



Formal: Investigation/ Hearing

All requirements of 106.45

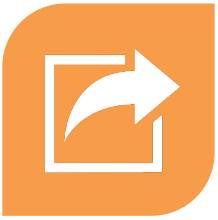


Overview of Investigation

- Trained investigator collects information
- Investigator shares evidence “directly related” to allegations with parties
- Parties have 10 days to respond
- Investigator creates summary of “relevant” evidence and shares with parties
- Parties have 10 days to respond



Procedural Requirements for Investigations



Notice TO BOTH
PARTIES



Equal opportunity
to present evidence



An advisor of
choice



Written notification
of meetings, etc.,
and sufficient time
to prepare



Opportunity to
review ALL
evidence, and 10
days to submit a
written response to
the evidence prior
to completion of
the report



Report
summarizing
relevant evidence
and 10 day review
of report prior to
hearing





Notice Requirements

Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:

- the identities of the parties involved in the incident, if known,
- the conduct allegedly constituting sexual harassment under § 106.30,
- and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.

The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

Advisor of Choice

The advisor can be anyone, including an attorney;

Institutions cannot place restrictions on who can serve;

No training required;

Institution must provide advisor for the purposes of cross examination, only.





- ➔ Written notification of meetings and sufficient time to prepare
- ➔ Equal opportunity to present evidence
- ➔ Evidence review
- ➔ Review draft report

The background features a collage of light blue puzzle pieces. One central piece shows a line drawing of a lit lightbulb. Other pieces around it contain question marks. A diagonal watermark reading "GRAND RIVER SOLUTIONS" is visible across the image. At the bottom, there is a solid orange horizontal bar.

“Directly Related” and “Relevant Evidence”

What is Directly Related Evidence?

Directly Related

- “All relevant evidence”
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



Not Permitted

- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
 - unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
- “require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”
- Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

The Investigator



Must be trained in accordance with the requirements in the regulations



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest

After Evidence Review



Additional investigation?



Evidence Review 2?



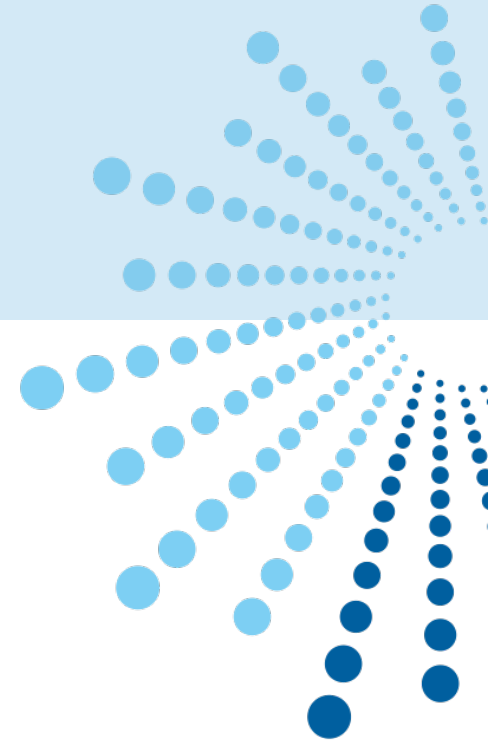
Summary of Relevant Evidence Report



02

The Hearing

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The Parties and their Advisors, and the Witnesses

Pre-hearing instructions

- Via conference or meeting
- In writing

Set expectations

- Format
- Roles of the parties
- Participation
- Evidence
- Decorum
- Impact of not following rules

Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Participation cannot be compelled

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or advisor provided by the institution

Decision maker determines relevancy of questions and evidence offered

Exclusion of evidence if no cross examination

Written decision must be issued that includes finding, rationale, and sanction, as well as information on right to appeal

Other Considerations

Time Limits

Breaks

Formality,
Order and
Gate-Keeping

Handling
disruptions and
interruptions

Poor behavior?

Recording

Purpose of the Hearing

Why does it matter?

Review and
Assess
Facts



Make
Findings of
Fact



Determine
Responsibility
/ Findings of
Responsibility



Determine
Sanction
and
Remedy

The Essential Elements of All Hearings

Clear Procedures

Due/Fair Process

Fair, Equitable, and Neutral

Consistency

Trauma Informed

Well Trained Personnel

Hearing Elements

Providing advisors

Live cross examination by advisors

Exclusions of evidence if no cross-examination

No compelling attendance

Only ONE communication about hearing and sanction

You Need to Determine:

The Process

- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

The Players

- The roles of all participants

The Evidence

- Relevancy, exclusions, timing of submission, how to submit, and WHO DECIDES?

The Outcome

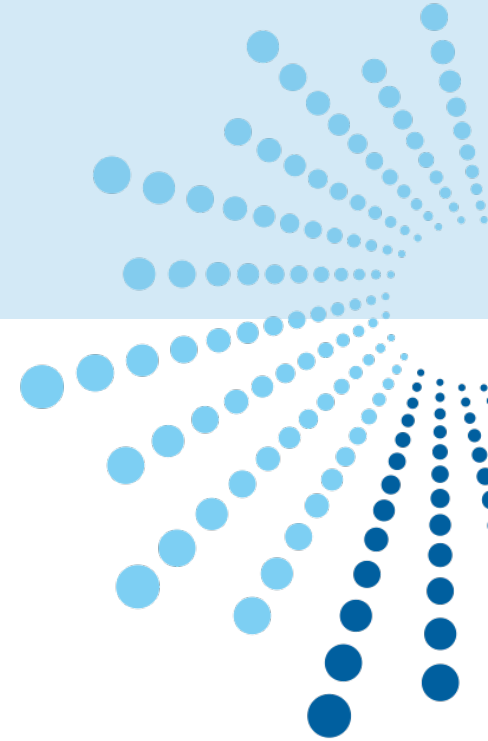
- Deliberations; Notice; manner and method communicated.



Hearing Logistics

03

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Opening Instructions by the Chair

- Set the stage
- Reiterate charges
- Reiterate rules and expectations
- Reiterate logistics for the day

This should be scripted and used consistently.



Opening Statements

- Permitted, but not required
- Policy should include purpose and scope
- If permitted, consider
 - Requiring submission prior to hearing
 - Word limit
 - Time limit





Testimony

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A man in a brown jacket and sunglasses is shouting into a white megaphone. The image is overlaid with a semi-transparent teal background and a large, diagonal watermark that reads "GRAND RIVER SOLUTIONS".

Testimony

Procedures should be clear about:

- Order of/parties and witnesses
 - Could simply leave this up to the decision maker
- Order of examination
 - Questioning by the decision maker
 - Cross examination by the advisor
 - Will the advisor be permitted to question their own party?
 - Will there be a second round of questioning?
- Consistency is essential. Consider putting this all in your procedures.

Cross Examination

Who does it?

Must be conducted
by the advisor

If party does not
appear or does not
participate, advisor
can appear and cross

If party does not
have an advisor,
institution must
provide one

Cross Examination

Permissible Questions

Questions must be relevant

Not relevant

- Duplicative questions
- Questions that attempt to elicit information about
 - Complainant's prior sexual history
 - Privileged information
 - Mental health

Cross Examination

Role of the Decision Maker

Rulings by
Decision Maker
required after
each question is
asked by the
advisor

Explanation only required where question
not permitted

Can allow advisors to make case as to why
question should be asked, but not
required

Cross Examination

Impact of Not Appearing

Exclusion of all
statements of that
party

Exception- DOE Blog

What if a party or
witness appears,
but does not answer
all questions

Common Challenges

Non-appearance by a party or witness

Non-appearance by an advisor

Party or witness appears but declines to answer some (or all) questions

Disruptions

Maintaining Decorum

New evidence

Being Trauma-Informed

Training your panel/adjudicators

- Asking questions
- Asking “why”
- Filtering questions of the parties

Preparing parties

- Reviewing the investigation report
- Sharing their story again
- Answering questions again

Other Decisions



Will you include Opening, Closing, or Impact Statements? NOT required, but you need to decide.



How will questioning take place? Direct cross examination, indirect?



How will questions be submitted?



Will there be any restrictions on questions that can be asked, such as due to relevancy, already asked and answered, unduly harassing?



If done remotely, how will the technology be set up?



If in person, room set-up and who is in the room?

Options

Report contains
only facts gathered

Report contains
factual findings

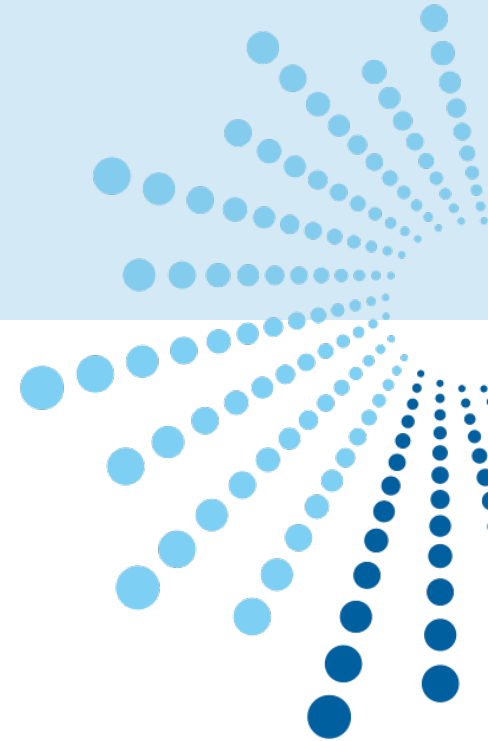
Report contains
factual findings and
recommendation
regarding policy



After the Hearing

04

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Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



Preponderance of the Evidence

More likely than not

Does not mean 100% true
or accurate

A finding = There was
sufficient reliable, credible
evidence to support a
finding, by a preponderance
of the evidence, that the
policy was violated



Mandatory Grounds for Appeal

- i. Procedural irregularity that affected the outcome;
- ii. New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome;
- iii. The Title IX Coordinator, investigator, or decision-maker(s) had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome.

Impartiality

WHAT DOES THIS *REALLY* MEAN?



Impartiality: Avoiding Prejudgment and Bias

“The Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.”

Impartiality: Avoiding Prejudgment and Bias

Practical
application of
these
concepts in
investigations

Do not rely on cultural “rape myths” that essentially blame complainants

Do not rely on cultural stereotypes about how men or women purportedly behave

Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence

Avoid any perception of bias in favor of or against complainants or respondents generally

Employ interview and investigation approaches that demonstrate a commitment to impartiality

Impartiality: Avoiding Bias

Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience

"Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased" WHILE

"exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"

Impartiality: Avoiding Conflicts of Interest

Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors

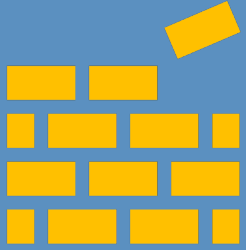
Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents

Department’s response: Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest

Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

Bottom line

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party



Building a Foundation of Success

05

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Final Rule, Section 106.8(a)

The institution must notify applicants and all members of the community of the Title IX Coordinator's

1. Name or Title
2. Office address
3. Email address
4. Phone number

Any person may report , at any time, sex discrimination, including sexual harassment in person, by mail, by telephone, by email, or any other means using the contact information listed

“Responsibilities Required Under Title IX and the Regulations”

- Serve as the primary pathway for receipt of reports of sex discrimination and sexual harassment;
- Upon receipt of a report, promptly contact the complainant to discuss the availability of supportive measures and to explain the process of filing a formal complaint;
- Coordinate the effective implementation of supportive measures;
- Where a report is made, but a formal complaint is not filed by the complainant, determine whether a formal complaint should be filed and sign that formal complaint;
- Effective implementation of any remedies imposed by a decision maker at the conclusion of a grievance process.



Responsibilities Often Delegated to the Title IX Coordinator

- Ensuring that the institutional policies and procedures are compliant with Title IX
- Ensuring dissemination of the policy
- Overseeing the grievance process to ensure it is compliant
- Coordinating a compliant grievance process
- Staffing various roles
- Ensuring training requirements are met
- Record keeping
- Compliance with intersecting federal and state laws
- Education and prevention efforts



The Three Essential Functions of Title IX Compliance



01

Response

02

Education & Prevention

03

Compliance

A Successful Title IX Coordinator...

C

Understands the Importance of Consistency

A

Adheres to policies and procedures

R

Records or documents everything

E

Engages meaningfully with the community

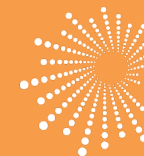
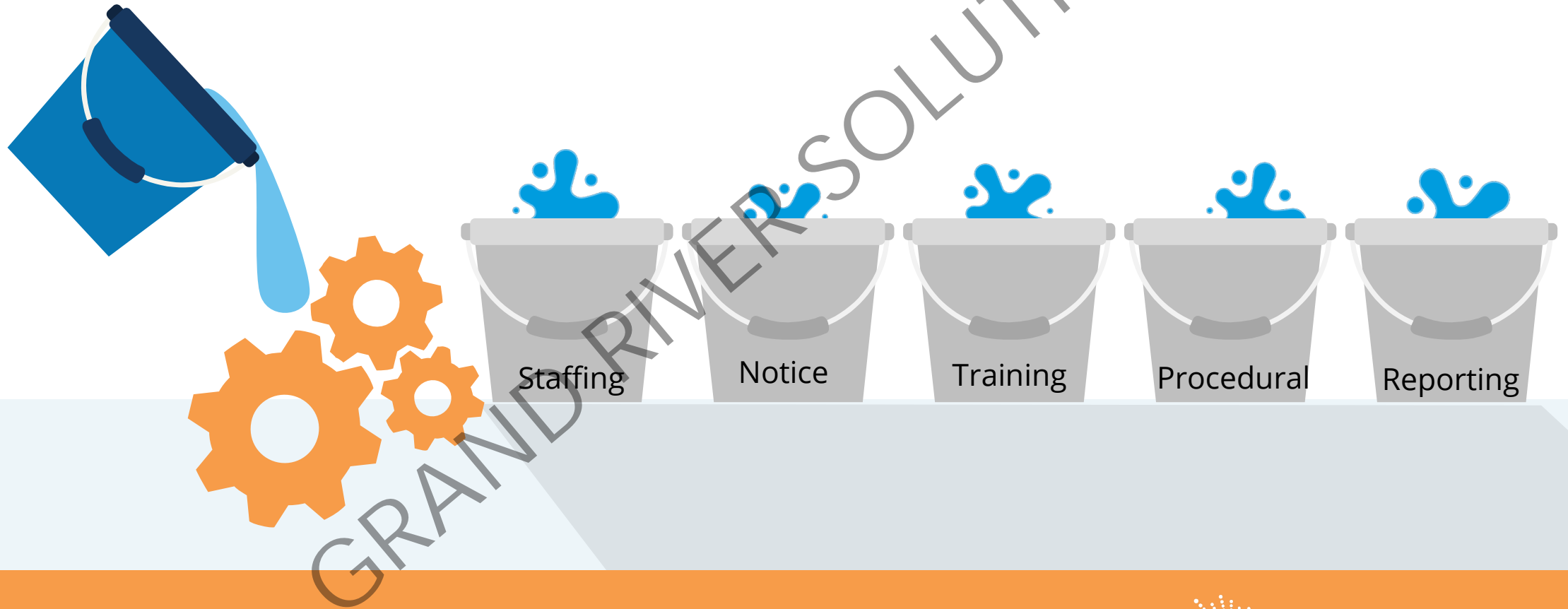
S

Strategically plans for success

Title IX Compliance Obligations

Designate	Designate a Title IX Coordinator
Disseminate	Disseminate Policy <ul style="list-style-type: none">•Notification•Publications
Respond	Promptly respond to instances of sex discrimination in a manner that is not deliberately indifferent.
Respond	Promptly respond to instances of sexual harassment occurring within the educational program or activity of which the institution has actual knowledge in a manner that is not deliberately indifferent;
Provide	Provide supportive measures in accordance with the requirements of section 160.30
Utilize	For reports of sexual harassment utilize grievance procedures that comply with section 160.45
Require	Require that individuals participating in the grievance process do so impartially and that they are trained in accordance with the 160.45(b)(1)(iii).
Maintain	Maintain records response to sexual harassment in accordance with 160.45 (10)
Comply	Comply with 160.71 prohibition against retaliation

Categories of Compliance Requirements



Infrastructure for Reporting





Title IX Coordinator's Role

In the Investigation

- Title IX Coordinator is permitted to conduct the investigation, though this is not favored
- If conducting the investigation, do so in accordance with the applicable institutional policy
- If not conducting the investigation, may serve as a support to the investigators
- May serve as a resource to the parties

Title IX Coordinator's Role

In the Adjudication

- Title IX Coordinator may not serve as the decision maker
- May serve to support the decision maker(s)
- May participate in the hearing to provide logistical support to decision makers
- Responsible for effective implementation of remedies imposed





Title IX Coordinator's Role

In the Appeal

- Title IX Coordinator may not serve as an appellate reviewer
- May serve to support the appellate reviewer/panel
- May provide logistical support
- May coordinate implementation of appellate findings, where appropriate.
- Responsible for effective implementation of remedies imposed



Training & Education

Educating ourselves and our communities in a post-regulatory world

06

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Training and Education

Two Areas of Focus

1

Response to Sex
Discrimination

2

Prevention
Education



Title IX Staff

- Coordinators
- Investigators
- Decision Makers (hearings and appeals)
- Facilitators of Informal Resolution
- "Those who are charged with ensuring a prompt, fair, and impartial investigation and result." (VAWA)

Students

- New Students
- Existing Students
- Specialized populations
- Student staff

Faculty

- New faculty
- Existing faculty
- Adjunct Faculty
- Supervising faculty

Staff

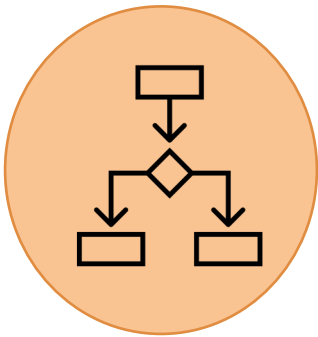
- Senior leadership
- Public Safety/campus law enforcement
- Health care workers

Who Must
Receive
Training?

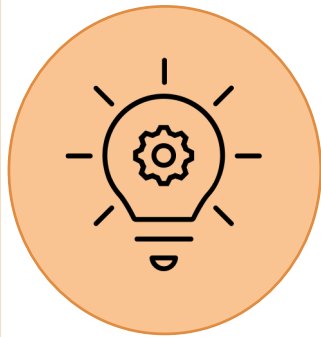
Training for Title IX Staff



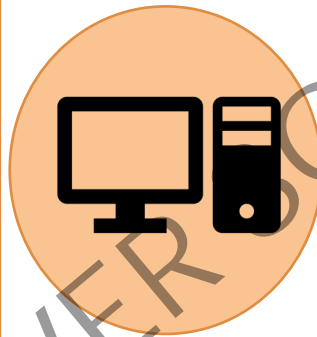
The scope of the institution's education program or activity (i.e., its Title IX "jurisdiction")



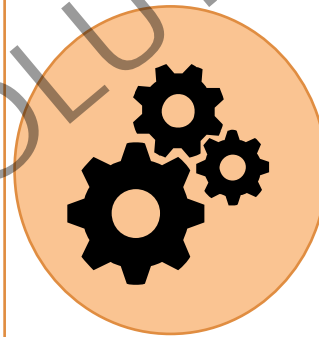
How to conduct the grievance process



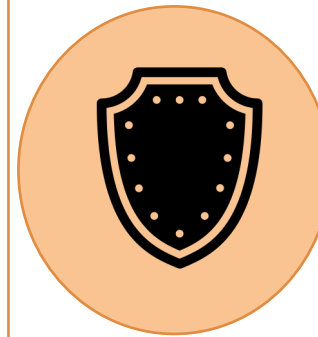
How to serve impartially



The technology to be used at a live hearing



Issues of relevance of questions and evidence



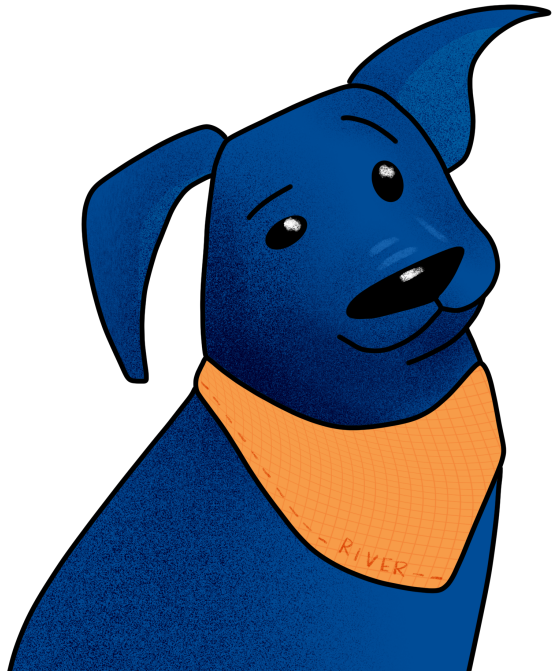
Rape shield protections; and,



Issues of relevance in creating an investigative report.



Questions?



Leave Us Feedback:



Email Us:

Jody@grandriversolutions.com
info@grandriversolutions.com



@GrandRiverSols



Grand River Solutions



Deadline to join the Grand River
Solutions' ICUT Collective is
Thursday July 15th

Learn more here:

grandriversolutions.com/icut



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