

PCHE SUMMER 2020 TITLE IX TRAINING

Pamela W. Connelly

Shareholder, Strassburger McKenna Gutnick & Gefsky

pconnelly@smgglaw.com



**Strassburger McKenna
Gutnick & Gefsky**

ATTORNEYS AT LAW | SINCE 1919



Recognition & Agenda

- This is a significant investment of your time
- Your participation is appreciated
- Many different institutions, same goal

9:00 Setting the Stage
Fundamental Shared Principles
Regulation Core Concepts
Regulation Definitions

10:15 Break

10:30 Bringing It All Together in Practice



An overhead view of five people sitting around a round white table in a meeting. The table is cluttered with various items: two laptops, several open books, stacks of papers, sticky notes in yellow and teal, and two smartphones. One person is pointing at a document, another is writing in a book, and others are looking at the materials. The scene is brightly lit, and the background is a grey concrete floor.

SETTING THE STAGE

Setting the Stage

So much is happening right now

- Pandemic challenges
- National demands for civil rights and justice
- Demands for due process through specific procedures
- Demands for justice for those impacted by sexual misconduct
- Changing laws and regulations

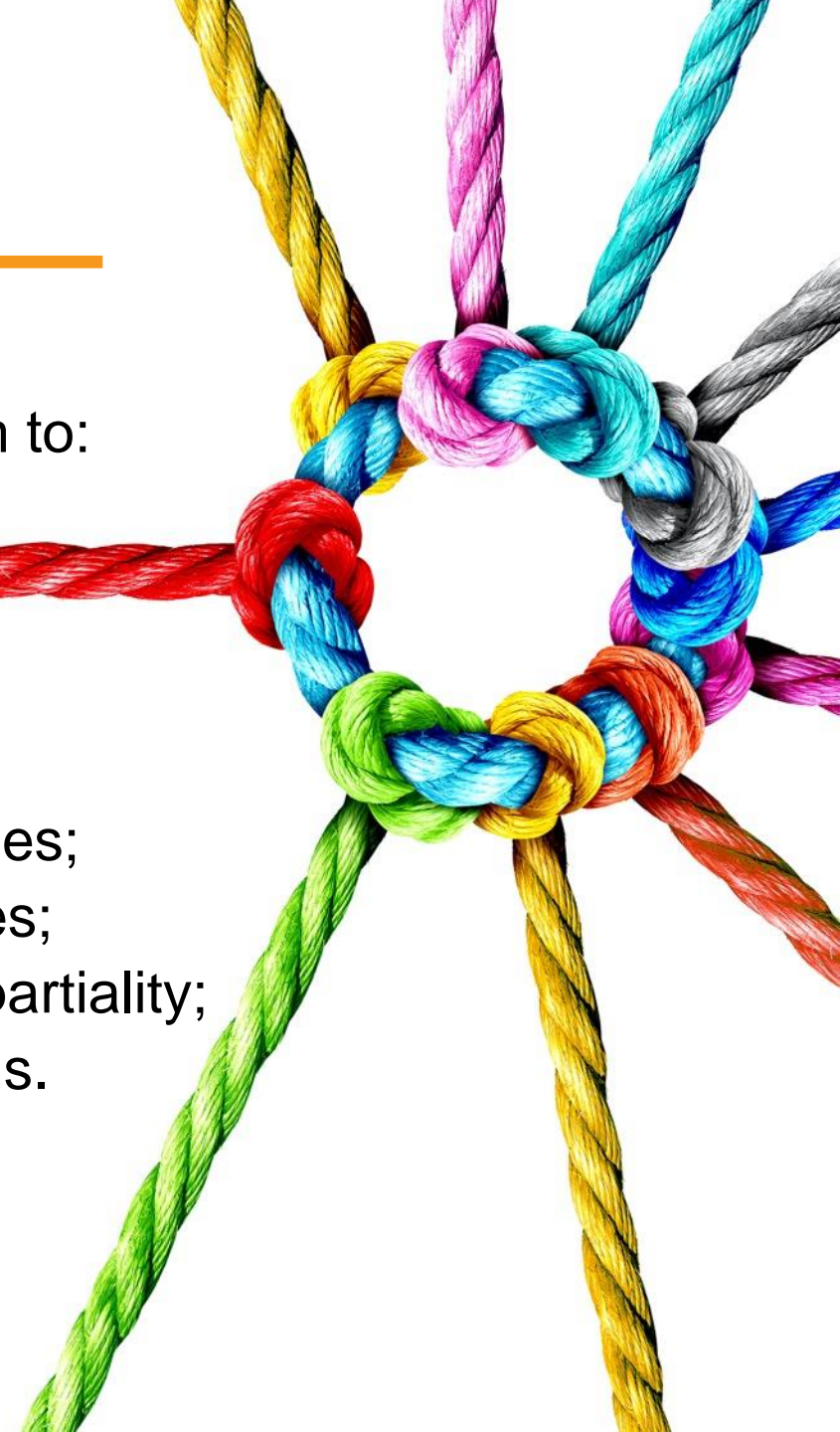
Because of new regulations, schools must focus on Title IX and balance it all

Setting our Objectives

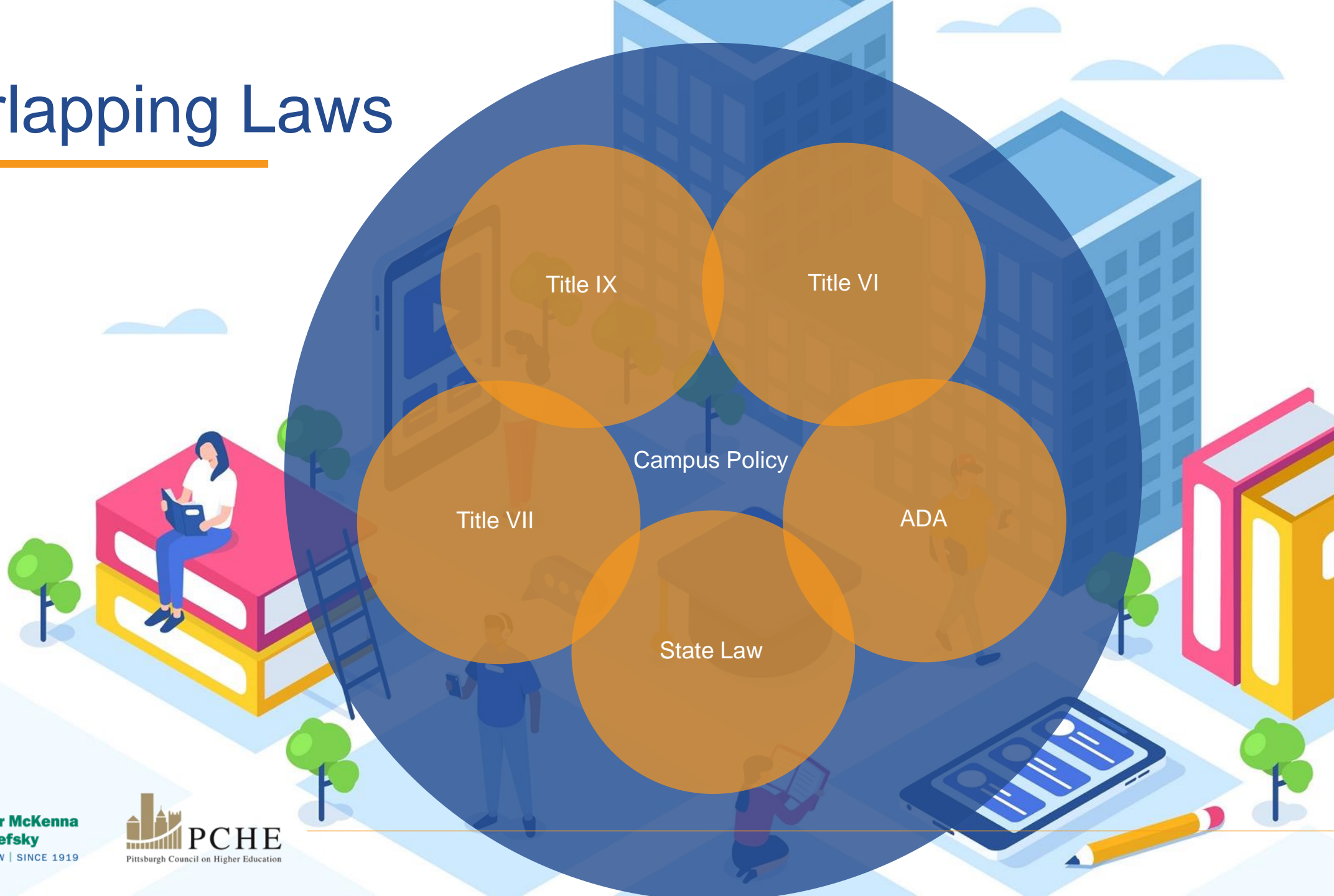
To prepare you, as members of your school's Title IX, team to:

- remain true to your institution's core mission;
- effectively respond to sexual misconduct;
- ensure fair, equitable and non-discriminatory processes;
- develop shared language relating to Title IX processes;
- understand evidence, relevance, bias, conflicts & impartiality;
- comply with the federal and state laws and regulations.

These objectives are complementary, not competing



Overlapping Laws



What is Title IX?

“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.”

20 USCA Sec. 1681(a), June 23, 1972

The New Title IX Regulations: Background

- Draft regulations published in November 2018
- Over 124,000 written comments submitted
- Final regulations published May 6, 2020 – Effective August 14, 2020

Fun Fact
the preamble is more than 2,000 pages long – with over 17,000 times more words than the law itself

The New Title IX Regulations: Background

Estimated financial impact of the new regulations

- Government originally estimated that the regulations would **save** schools between \$286-367 million
- It revised that estimate to reflect a projected **cost** to schools of between \$48-62 million

The regulations are primarily focused on **one type** of sexual discrimination

- Sexual harassment by or involving all faculty, students, staff, and volunteers
- The regulations do not cover other types of sex or gender based discrimination

A young man and woman are walking and talking on a university campus. The man is wearing a white t-shirt and black pants, and the woman is wearing a white button-down shirt and blue jeans. They are both smiling and appear to be engaged in a conversation. In the background, other students are walking, and there are buildings and greenery. A semi-transparent white box with a blue border is overlaid on the image, containing the text "FUNDAMENTAL SHARED PRINCIPLES".

FUNDAMENTAL SHARED PRINCIPLES

You Share the Same Fundamental Principles

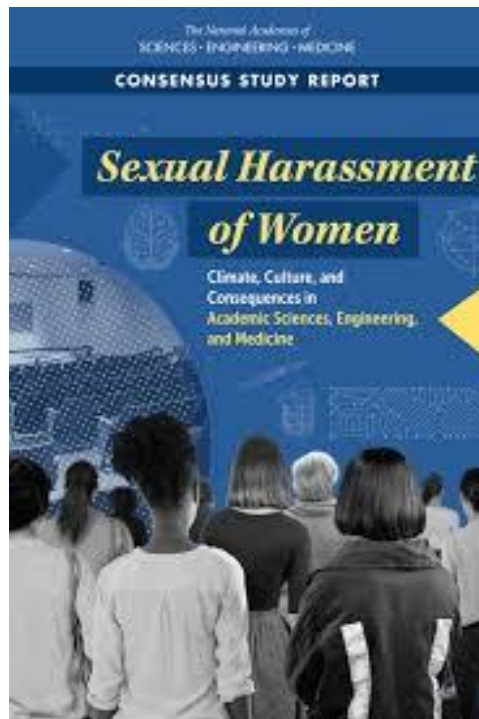
Higher Education institutions share these core principles:



Principle #1: Commitment to Combatting Sexual Misconduct

PRINCIPLE

01



Culture of Respect

Ending Campus Sexual Violence

A NASPA Initiative

Principle #2: Commitment to Combatting Discrimination

PRINCIPLE

02

For Higher Education, it is much more than a legal obligation, and encompasses far more than gender

Diversity, equity, inclusion, and combatting discrimination are central to the mission

- This commitment benefits everyone
- No one should be subjected to discrimination based on disability, race, color, religion, national origin, ancestry, genetic information, marital status, familial status, sex, age, sexual orientation, veteran status, or gender identity and expression

Principle #3: Commitment to Fairness and Due Process

PRINCIPLE

03

- Schools strive to ensure that their processes are fair and are designed to achieve just outcomes
- The participants in our processes are valued members of our community, worthy of dignity and respect
- Schools strive to instill confidence in their systems
- There are often legal obligations for fairness and due process
 - Sources of those obligations for both public and private institutions can include constitutional requirements, state and local laws, and contracts

Principle #4: Commitment to Academic Freedom and Free Speech

PRINCIPLE

04

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools . . .”

United States Supreme Court, Healy v. James

Freedom of speech is a fundamental American freedom and a human right, and there’s no place that this right should be more valued and protected than America’s colleges and universities

thefire.org

Free Speech is not just essential, it's the law.

PRINCIPLE

04

- Students do not shed their rights of free speech at the schoolhouse gate
- Fear of disturbance is not enough to overcome the right of freedom of expression
- Speech is **not** protected when it materially disrupts classwork, or involves substantial disorder or invasion of the rights of others

Tinker v. DesMoines



Principle #5: Commitment to fostering education and student development

PRINCIPLE
05

A central mission of Higher Education is to educate with a deliberate focus on the development of students

Through internal student processes, schools apply NASPA principles of Good Practice in Student Affairs, such as:

- Engaging students in active learning
- Helping students develop coherent values and ethical standards
- Building supportive and inclusive communities

Because schools are not courts, where it is appropriate, they adopt an educational, not punitive, philosophy



REGULATION CORE CONCEPTS

Sex Discrimination is Prohibited

Title IX is broad and includes harassment, sexual violence, and any other sex discrimination:

- These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities

As you learned in the OCR webinar you attended, OCR believes that the Title IX regulations provide Complainants with strong protections from sexual harassment and set clear expectations for when and how a school must respond to restore or preserve Complainants' equal educational access

This aligns with Principle #1: Commitment to combatting sexual misconduct

Free Speech

The phrases “Free speech,” “Freedom of speech,” and “First Amendment” appear 291 times in the Preamble

This is unusual because:

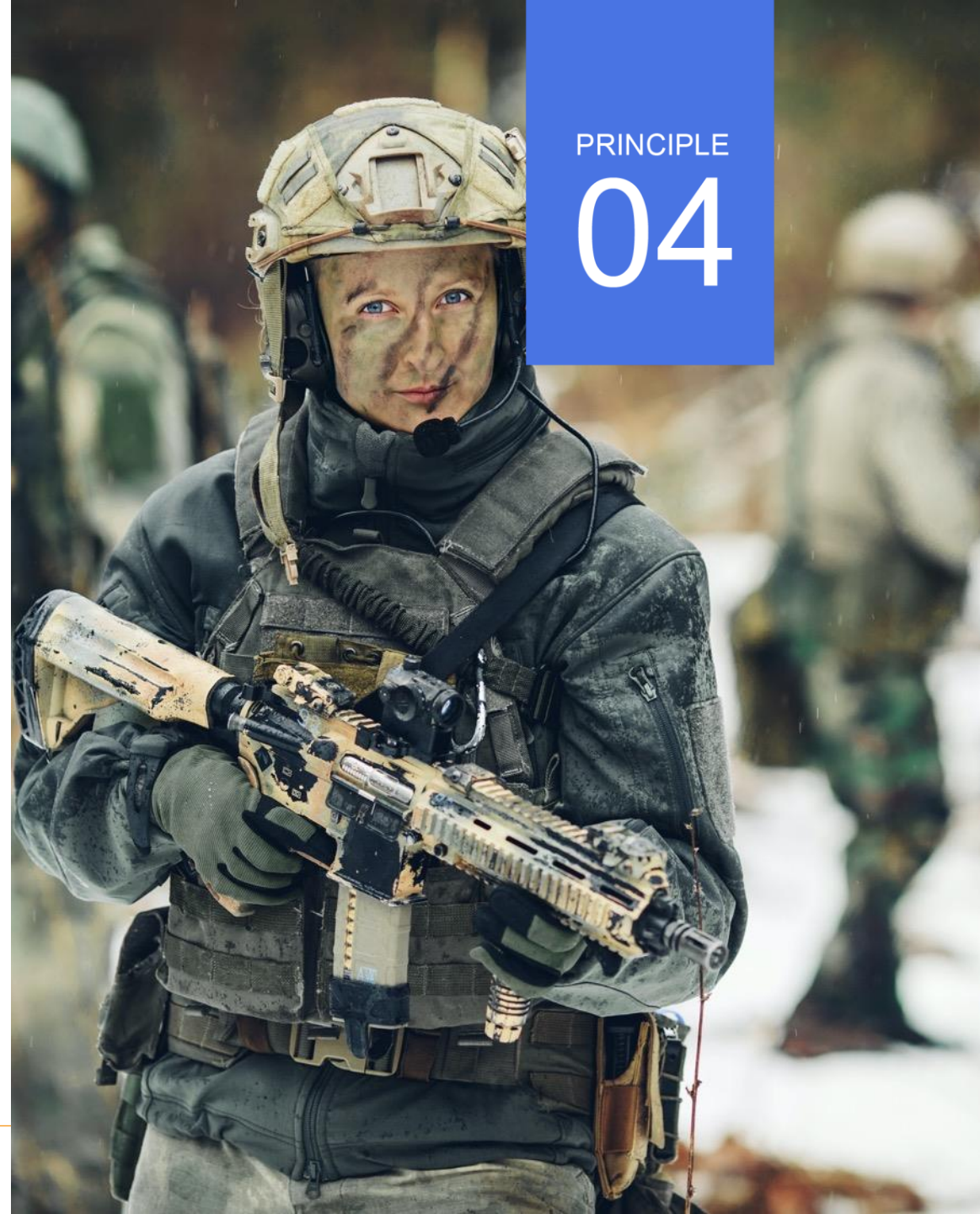
- Constitutional protections do not need validation through regulations
- Title VI regulations (prohibiting race discrimination in schools) do not mention any of these concepts

This aligns with Principle #4: Commitment to free speech and academic freedom

Free Speech

How might Free Speech/Academic Freedom issues arise in a Title IX case?

- Teaching a class on obscenity law, religion, political science
- Military strategy case - debating if women should be in combat
- SnapChat cheerleader case – off campus speech as grounds for discipline



Fairness & Due Process

The default mindset should be:

- Treat the parties equally, unless specifically permitted
- What is good for one party should be good for the other

PRACTICE POINTER:
Review policies, practices, webpages, etc. for fairness

The emphasis on free speech lines up with



The New “Title IX Team”

Focus is on multiple layers of responsibility and separation of duties

The Team can be internal and/or external, and may include:

- Title IX Coordinator(s) (“TIX-C”)
- Advisors
- Informal resolution facilitators, if any
- Investigators
- Hearing Decision-maker(s)
- Appeal Decision-maker(s)

The New “Title IX Team”

TIX Team Action Items:

Specify team roles

- TIX-C cannot be a decision-maker

Decide whether you will use panels

- Consider the increased opportunity for conflicts of interest
- Weigh the personnel, logistical, and administrative burden

Plan for conflicts of interest

- Line up alternative or external resources in advance

Map out annual training plan

Title IX Coordinator Duties

Disseminating broad notice to the community about sex discrimination

- There are many granular notice requirements (to employees, for example)

Accepting reports of sexual harassment

- Reports can be made by anyone, through numerous means

Offering and facilitating supportive measures (discussed later)

Complying with regulations

Effectuating of remedies and sanctions, if any

Ensuring a compliant record retention system

This role is NOT responsible for determinations of policy violation



REGULATION DEFINITIONS

Let's Start With The Easy Ones

Complainant: person alleged to be the victim of potential sexual harassment

- This may be a change from your past practice, where a third party could be a Complainant.

Respondent: person reported to have engaged in potential Title IX sexual harassment

Consent: not defined by the OCR

- Schools may define consent for themselves

Title IX Sexual Harassment

Conduct, on the basis of sex, that satisfies one or more of the following:

- An employee conditions a benefit, aid, or service on participation in unwanted sexual conduct (quid pro quo)
- Unwelcome sexual conduct that is so severe, pervasive, **and** objectively offensive that it denies equal access
 - This is **different** from the standard for employees under Title VII, which remains the law
- Sexual assault, dating violence, domestic violence, and stalking as defined by specific federal statutes

Title IX Sexual Harassment

Some finer points on the definition:

OCR acknowledged that it adopted a narrower definition for Title IX sexual harassment than the existing Title VII definition, which prohibits sexual harassment in the employment environment.

- Conduct that would violate Title VII may not violate Title IX
- OCR asserts, for the first time, that more sexualized conduct should be tolerated in the academic environment than in the non-academic workplace

PRACTICE POINTER:

Where the criminal definitions do not quite fit (sexual battery example), you may analyze under the second definitional prong

Actual Notice

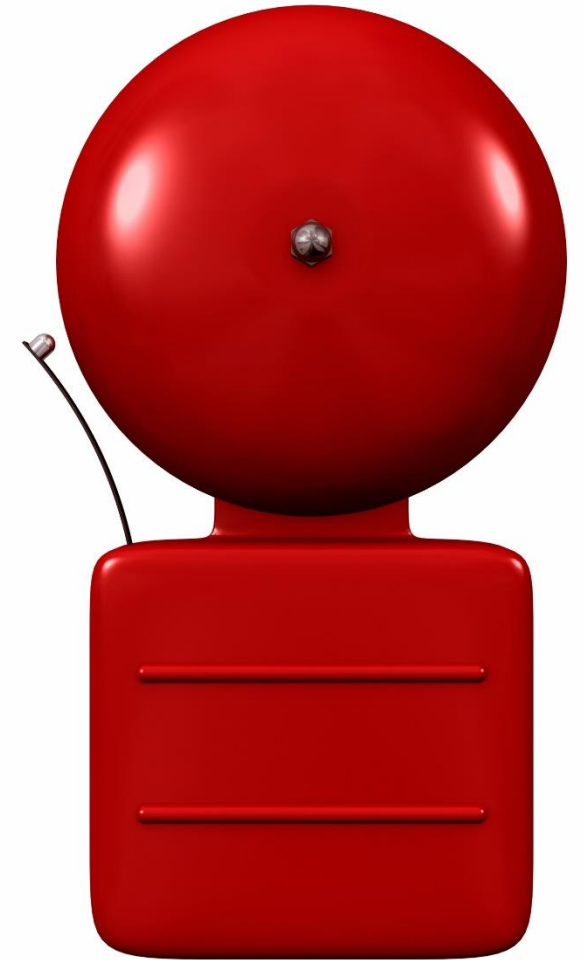
A school has response duties only where there is “Actual Notice” of alleged sexual harassment received by:

- The Title IX Coordinator; or
- Anyone who has “authority to institute corrective measures”

This is a substantial narrowing of the notice concept for schools:

- Under Title IX, schools are not responsible for “constructive notice,” meaning notice because the school should have known
- While this sounds helpful, this is a divergence from other civil rights laws
- Schools may still be liable for constructive notice under other civil rights laws

Cited reason – Academic Freedom and Free Speech



Actual Notice

The response duty arises where there is actual notice by a person with “authority to take corrective measures” - an **undefined** concept

Meaning will turn on those who have the power to remove or mitigate the harm

- Leaders
- Supervisors
- Administrators
- Coaches
- Faculty

This will be a fact-specific analysis

Difficult to draw lines where people wear several hats on campus

Actual Notice

Training all employees on sexual misconduct, and even designating them as mandatory reporters, does **not** transform them into persons with “actual notice” under the new Title IX regulations

“The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures.”

Decision Point: Should you have a Responsible Employee (“RE”) Program?

Many schools have RE programs designating all employees as mandatory reporters

Some schools have chosen not to have a RE program

New regulations permit schools to choose whether to do this

PRACTICE POINTER: Understand and anticipate a vocal minority opposition to a RE Program, and assess leadership’s perspective

Decision Point: Should you have a Responsible Employee (“RE”) Program?

Benefits of RE Program to consider:

- Cultivate a culture of reporting
- Provide clarity to the community
- Ensure consistent institutional responses to carry out Title IX and Title VII obligations, as well as NASA and NSF obligations, if applicable
- Prevent a wide variety of ad hoc (or no) responses that may result in not treating all reports fairly or equitably
- Prevent misconduct from continuing unchecked without providing the opportunity to respond and take corrective action as appropriate
- Protect school from legal liability for failure to respond or for future acts

Educational Program or Activity

What is **unchanged**:

- The existing, broad definition of “educational program or activity” as “**all of the operations of**” a university, college, or school

What is **new**:

- A requirement that the alleged sexual harassment occur **in** the program and activity
- Express inclusion of situations where the school exercised substantial control over the Respondent **and** the context in which the sexual harassment occurred, and any building owned or controlled by a recognized student organization
- A statement that Title IX is applicable **only** in the United States

Educational Program or Activity

Some common scenarios

- Study abroad
- Off campus apartment
- Athletics away game
- Academic conferences

This is a threshold and fact-specific issue



Formal Complaint

A document filed by a Complainant or the Title IX Coordinator

- Alleging sexual harassment
- Seeking a formal investigation
- Where the Complainant is participating (or attempting to) in the educational program or activity
- This is a new, highly specific, definition

Title IX Coordinator can be the person to file:

- When there is a danger to the community
- The TIX-C does NOT become the Complainant
- There may be challenges to proceeding in this manner

Supportive Measures

New Definition, but familiar ground, as it codifies best practices:

- Available to both Complainants and Respondents
- Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment, or deter sexual harassment
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures
- Fact specific inquiry – no **unreasonable** burden (some burden ok)

Supportive Measures

Formerly called Interim Measures, these are school-provided services that are:

- Available at any time after a report of sexual harassment
- Non-disciplinary
- Non-punitive
- Not “unreasonably burdensome” to the other party
- Individualized
- Provided at no cost

PRACTICE POINTER: Do a word search for “Interim” on your webpages

Supportive Measures

Familiar Supportive Measures include:

- Work or class schedule modifications
- Counseling
- Mutual no contact orders
- Changes in housing or work locations
- Leaves of absence
- Extensions of deadlines

Must be documented, and kept as confidential as possible

PRACTICE POINTER:

Removal from teams, clubs, etc., are not Supportive Measures. Use your emergency removal process

A man with a backpack is seen from behind, looking at a map. He is standing on a cobblestone path in front of a large, ornate building with many windows. The scene is brightly lit, suggesting a sunny day. A semi-transparent white box is overlaid on the image, containing the text "BRINGING IT ALL TOGETHER" in blue, uppercase letters. Below the text is a horizontal orange line.

BRINGING IT ALL TOGETHER

Bringing It all Together In Practice

Now let's weave together the

- Fundamental Shared Principles;
- Regulatory Core Concepts; and
- Regulatory Definitions
 - to begin to apply this knowledge to our processes

Step 1 - Education on fairness, impartiality and evidence

Step 2 - Learn about the nuts and bolts of how this will work in practice

Fairness, Equity, and Impartiality

The Title IX Team must identify and avoid:

- Bias against individuals or types of people
- Pre-judgment based on gender, race, sex, religion, disability, etc.
- Pre-judgment based on status as a Complainant or Respondent
- Conflicts of interest
- Profiling and predictive behaviors

When in doubt, remember to treat parties the same

What is Bias?

Bias is a predisposition to think about a specific group and its individual members in a preconceived way

- Explicit: fully and clearly expressed or demonstrated; leaving nothing merely implied; unequivocal
- Implicit: implied, rather than expressly stated; unconscious

Examples:

- All men do X
- All women do Y
- People from ___ are sexually ___
- Can be reflected in language like he/her

Avoiding Bias

- Learn about, be alert for, and avoid, stereotypes such as sex stereotypes
 - Explore the Harvard IAT Test
- Do not prejudge. Beware of making judgments or assumptions about the validity of the allegations even before you start your work or even mid-process
- Review and analyze all relevant evidence gathered
- Avoid leading questions
- Focus on the elements needed for proof
- Remember your middle school math teacher's words: you might not get credit for the right answer if you don't show your work (be prepared to justify your conclusions with the information you have gathered)

What is a Conflict of Interest (“COI”)?

A conflict between the private interests and the official responsibilities of a person in a position of trust (Merriam-Webster)

COI must be avoided to:

- Protect process participants
- Ensure fairness
- Maintain the trust, integrity, and credibility of the Title IX process
- Comply with Title IX
- Avoid litigation and minimize appeals

Avoiding COI

Examples of potential COI:

- Appeal Decision-Maker's spouse was a witness in the investigation
- Investigator accepts 50 yard-line tickets from Athletic Director
- Title IX Team member publishes a blog that stereotypes based upon gender

PRACTICE POINTER: In scanning for COI, consider where there may be influence unrelated to the evidence in the case, such as personal relationships, financial relationships, or power dynamics

Bias and COI Response Best Practices

- Design a way for the parties and Title IX Team members to report bias and COI
- Encourage Title IX Team member to disclose potential bias and COIs
- Create written guidelines for assessing bias and COI stating that a determination will be based on **objective** facts, and not on generalizations, stereotypes, suspicions, or conclusions
- Use an objective standard for determinations like whether “based on objective facts, a reasonable person would believe that a COI exists”
- State that disagreement with an outcome is generally insufficient to demonstrate bias or a COI
- Analysis should be case-specific and should not be unreasonably assumed, such as based solely on the person’s research or advocacy background

The Standard of Proof

The amount of proof needed to find that a Respondent is responsible for a policy violation

Schools can choose between:

1. Preponderance of the Evidence: meaning more likely than not, or a greater than 50% chance that the claim is true
 - The standard of proof for all civil rights claims.
2. Clear and Convincing Evidence: meaning that the evidence being presented must be highly and substantially more probable to be true rather than untrue

A school's standard must be the same for all sexual misconduct complaints

The Burden of Proof

This is the “who” as opposed to the “how much”

The burden of proof is the burden of producing evidence sufficient to meet the standard of proof on each disputed assertion or charge of the policy violation

- Under the new Title IX regulations, the **school** bears the burden of proof
- Investigators are required to gather the relevant evidence
- Parties and witnesses are requested to provide evidence

The “Presumed Not Responsible” Requirement

The new regulations require Title IX sexual harassment policies to include a provision that the Respondent is “presumed not responsible” until the end of the process, and that no disciplinary measures can be imposed unless and until a policy violation is found

Contrary to some media reports

- This does not change the burden of proof or the standard of proof
- This is not a presumption of innocence, as innocence is a criminal court concept

To date, OCR has not required such a presumption in any other types of complaints

The “Presumed Not Responsible” Requirement

ORC tells us that this presumption was included to establish impartiality, **not** to create a prejudgment:

“The presumption does not imply that the alleged harassment did not occur; the presumption ensures that recipients [schools] do not take action against a respondent *as though* the harassment occurred prior to the allegation being proved . . .” *Preamble page 851*

“The presumption does not imply that a respondent is truthful or that a complainant is lying . . .” *Preamble page 853*

PRACTICE POINTER: This is worth explaining to the parties in writing

What Is Evidence and What Do We Do With It?

Broadly construed, evidence is anything that relates to an assertion in a complaint

Comes in many forms: digital, documentary, physical, oral, images, photos, videos, records, physical objects, clothes, etc.

- Can be direct or circumstantial (post-event attendance records)
- Includes inculpatory or exculpatory evidence
- A gut feeling or personal view is not evidence

We must objectively evaluate all evidence

- Be impartial and unbiased



Relevant Evidence

Only **relevant** evidence can impact a finding of a policy violation

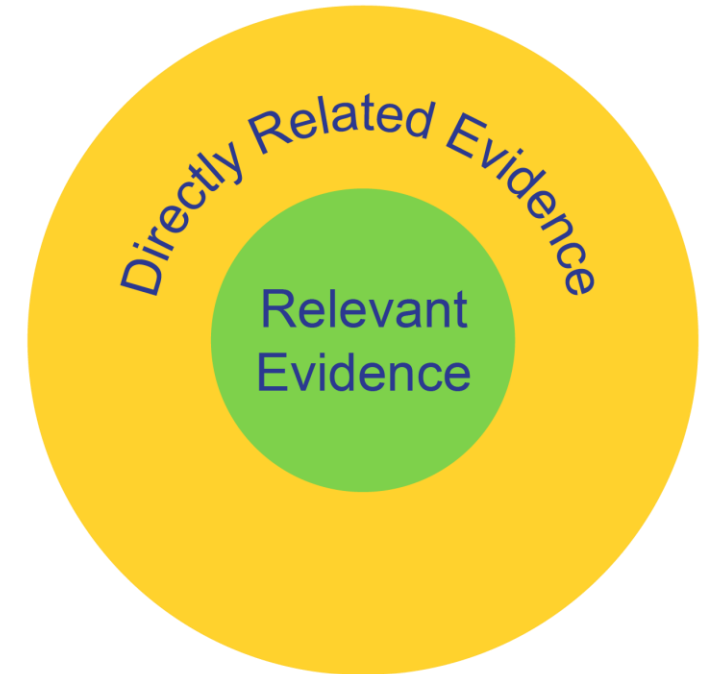
OCR declined to define “relevance” and suggested that it be interpreted according to “plain and ordinary meaning”

Examples:

- Having a significant and demonstrable bearing on the matter at hand
- Tending to prove or disprove the matter at hand

Parties may provide evidence that is not relevant but is directly related to the complaint (“directly related” is broader than “relevant”)

Example: Both parties are Pirates fans and watched the game



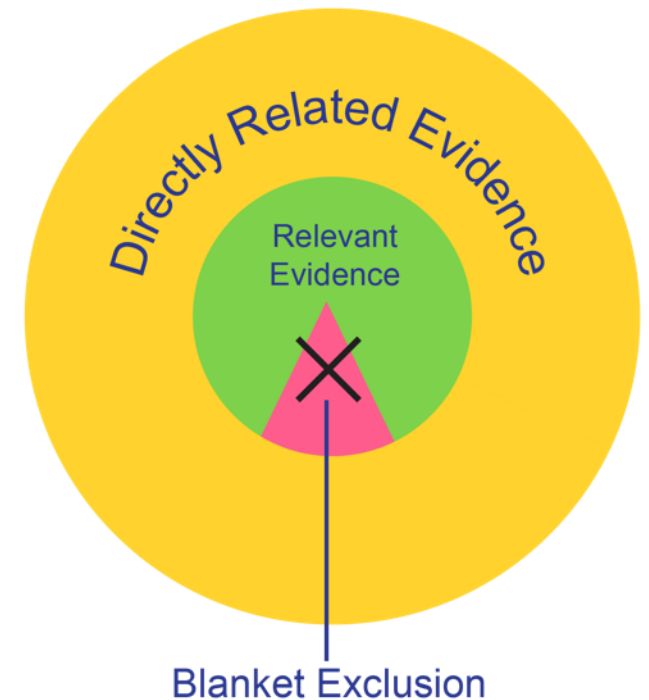
Relevance and Blanket Exclusionary Rules

Schools are not courtrooms and the legal evidence rules do not apply to these internal policy-related proceedings

The regulations provide that schools retain the flexibility to adopt rules on how to evaluate evidence and conduct the grievance process

- **Do** consider rules about weighing evidence, so long as they apply equally
- **Do not** adopt blanket rules excluding relevant evidence because such evidence “may be unduly prejudicial, concern prior bad acts, or constitute character evidence”

Example: Consider a rule applicable to all participants that polygraph tests are unreliable and will be given little weight



Relevance and Issues of Privilege

Certain evidence, even if relevant, is “privileged” under the law and the holder of the privilege cannot generally be compelled to disclose it

Privileges include:

- The Attorney-Client privilege
- Medical provider/records privilege
- Spousal privilege

You may not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally privilege, unless the person holding the privilege has waived it in writing



PRACTICE POINTER: Secure written waivers

Relevance and the Rape Shield Bar

What is it?

- A modified version of a legal rule that bars the consideration of evidence, offered as substantive evidence **or for impeachment**, of past sexual history or predisposition

What is the purpose?

- To safeguard against the invasion of privacy, embarrassment, and sexual stereotyping
- To encourage victims to come forward

Who does it cover?

- Complainants only



Relevance and the Rape Shield Bar

There are two exceptions to this bar, where the evidence is offered to prove:

1. Someone other than the Respondent committed the conduct alleged by the Complainant
2. Consent, if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent

Examples: past use of contraceptives, past STIs

PRACTICE POINTER: When faced with an unclear Rape Shield issue, pause, take a break, and call your counsel

Credibility and Assessment

If there are conflicting versions of relevant events, decision-makers will have to weigh each party's credibility

Credibility assessments can be critical in determining whether the alleged policy violation in fact occurred

The duty is not to “believe one story over the other” but to assess each piece of evidence, independently, and as part of the bigger picture, to determine whether the preponderance of the evidence supports a finding of responsible or not responsible for a policy violation

PRACTICE POINTER: Decide whether investigators will address credibility (regulations permit this, but they also make clear that investigators **cannot** be decision-makers)

Credibility and Assessment

Credibility assessment factors to consider include:

- **Inherent plausibility:** Is the information believable on its face? Does it make sense?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation, video, entry logs) that corroborates the party's testimony?
- **Past record:** Did the Respondent have a history of past similar behavior?
- **Demeanor:** Did the person seem to be telling the truth or lying? Use caution here as you likely do not know the process participants.

Credibility and Assessment

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the Complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

Quoted from the EEOC's [Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors](#) dated June 18, 1999:

Credibility and Assessment

Show your work

- Explain your determination with well-reasoned conclusions supported by evidence
- Articulate **why** one party or statement was more or less credible than the other
- Do not state a conclusion about credibility without explaining how you got there

Note: Additional education on the possible impact of trauma on some individuals, which may be one factor in your analysis, will be addressed in session #3 of the PCHE Program

PRACTICE POINTER:

Write your report as if a stranger to the complaint will be reading it

Nuts and Bolts

The new regulations are oftentimes prescriptive in their requirements.

Next, we will learn about many of those requirements against the overlay of all that we have learned so far.

The Required Response to Sexual Harassment

Where a school has: (1) had actual notice; (2) of sexual harassment; (3) in a program or activity; (4) in the U.S., it must respond:

- Promptly (to include undefined timeframes for all steps)
- In a manner that is not “deliberately indifferent”
- Equitably, including explaining and providing supportive measures
- By adopting and following new procedures to include a “Formal complaint” process, prior to issuing any discipline
- By adopting a grievance process that includes a presumption that the Respondent is “not responsible for the alleged conduct” until a determination is made regarding responsibility at the end of the process

What is Deliberate Indifference?

A school is deliberately indifferent **ONLY** where:

- Its response to sexual harassment is **clearly unreasonable** under the known circumstances
- If the school follows the procedural requirements, the OCR will not find deliberate indifference solely because it would have come to a different conclusion

PRACTICE POINTER: You should **not** be striving to merely satisfy the “deliberate indifference” standard

The Required Response to Reports of Sexual Harassment

In its Title IX Sexual Harassment process, a school must:

- Conduct an objective evaluation of all evidence
- Provide credibility determinations **not** based on status
- Ensure that all on the Title IX Team (Title IX coordinators, investigators, decision-makers and informal resolution facilitators, if any) do not have a conflict of interest or bias
- Describe the range of possible disciplinary sanctions
- State the standard of evidence
- Describe appeal process and grounds

Emergency Removals for Students

Schools must: (1) undertake an individualized safety and risk analysis; and (2) determine that an immediate threat to the physical health or safety of any person arising from the allegations of sexual harassment justifies removal

- Where this occurs, a school must provide the Respondent with notice and an opportunity to challenge the decision **immediately** following the removal
- What about an employee? A student/employee?

PRACTICE POINTER: Create a process now for your school, and consider whether it needs to be in policy



Formal Title IX Harassment Complaint

A Formal Complaint is a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the allegation be investigated

- The Complainant must be participating in or attempting to participate in the “educational program or activity”
 - What happens if not? We will get to that
- Once a Formal Complaint is filed, a school **must** provide notice to the parties
- A Formal Complaint **must** be investigated

Notice of Formal Complaint

Once a Formal Complaint is filed, a school must provide written notice to the parties. This is important, and must include:

1. The policy and complaint grievance process
2. The allegations, with detail sufficient to prepare a response before any initial interview (names, dates, locations, conduct at issue); if new allegations arise later, the school must supplement
3. The presumption that the Respondent is not responsible, unless and until a determination at the end of the process
4. The right to an advisor of choice, including an attorney
5. The right to inspect and review evidence

Notice of Formal Complaint

6. Information on available resources (on and off campus)
7. Information on resolution options
8. Information on supportive measures
9. Information on other processes that may potentially apply

PRACTICE POINTER:

- Create a good form to send to all parties. Test it in advance of a real case.
- Because you must update this Notice if new allegations become a part of the investigation, consider building checkpoints into your process

Advisors and Their Role

- Parties are entitled to an advisor of choice throughout the process
- May be an attorney, a parent, witness, or anyone else
- Their role is generally to provide advice and guidance
- Advisors are permitted to review all evidence “directly related to the allegations” that is not privileged
- School must provide an advisor at a hearing if a Party does not have one, at no fee or charge
 - May you use internal or external people? Yes
 - Must you provide advisor training? No
 - Must you provide a lawyer as an advisor? No

Advisors and Their Role

School can and should create rules for advisors, so long as they apply equally to the parties

- Can prohibit openings/closings/questions of own party
- Can require respectful behavior

The rules cannot restrict the advisors' ability to:

1. Review non-privileged evidence directly related to allegations
2. Question witnesses (other than the party being advised) during the hearing directly in real time (except if questions are deemed irrelevant or violate the rape shield law)

**PRACTICE
POINTER:**
Create rules
for advisors
explaining
their role and
its limits

When **MUST** Schools Dismiss Formal Complaints?

A Formal Complaint **must** be dismissed if the conduct:

- Would not be sexual harassment even if true;
- Did not occur in a program or activity; and/or
- Did not occur in the United States

But, for Title IX adjacent misconduct, schools can use other processes, such as Non-Discrimination and Student Code of Conduct processes

- Title IX established a floor, not a ceiling
- Bifurcated processes - we will tackle this issue in detail later

PRACTICE POINTER:

Consider building in checkpoints in the process for assessing whether a complaint must be dismissed

When **MAY** Schools Dismiss Formal Complaints?

A Formal Complaint **may** be dismissed where:

- At any time, the Title IX Coordinator receives a written request from the Complainant seeking dismissal;
- The Respondent is no longer enrolled or employed by the school; and/or
- Specific circumstances prevent the gathering of sufficient evidence to reach a conclusion

Whenever there is a dismissal, whether mandatory or permissive, written notice of the reason and right to appeal must be sent to both parties

Informal Resolutions

Under the regulations, schools are permitted, with limitations, to offer informal resolution (“IR”) processes. A school:

- may not offer IR unless a Formal Complaint is filed
- may not require a waiver of a right to an investigation and adjudication of formal complaints
- may not require parties to participate in an IR process
- may not offer or facilitate an IR process to resolve allegations that an employee sexually harassed a student
- must provide written notice of the IR process
- must obtain the parties’ voluntary, written consent to the IR process

Informal Resolutions

Because under many IR models, there can be some limited fact-finding, training such as this is recommended for facilitators

Additional advice on IR derived from the Preamble:

- IR may result in discipline, if the parties had notice of this possibility
- Even if parties agree to an IR resolution, the Title IX Coordinator can move forward with a Formal Complaint, if the parties had notice of this
- An IR facilitator can be a witness in a subsequent investigation or hearing, if the parties had notice of this

PRACTICE POINTER: Decide on your IR process, and disclose, in writing, in advance

Investigations

The regulations make clear that:

- The school bears the burden of proof, not the parties, and must gather the evidence
- Schools must avoid bias and COI
- Parties must be afforded **equal opportunity to present** evidence and witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence

Investigations

The regulations make clear that:

- Parties are equally permitted an advisor of choice
- Participation restrictions, with one caveat, are permissible if such restrictions apply to all parties
- Parties cannot be restricted in discussing the allegations or gathering and presenting relevant evidence
 - Impact on confidentiality

PRACTICE POINTERS:

Search existing policies, procedures and forms on the issue of restricting speech

Although speech cannot generally be restricted, it can give rise to retaliation

Investigations - Sharing the Evidence

Once the evidence is gathered, the investigator must provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is **directly related to the allegations** raised in a formal complaint so that each can meaningfully respond to the evidence prior to conclusion of the investigation

Allowing parties the opportunity to inspect this evidence will further each party's own interests by identifying evidence either overlooked by the investigator or erroneously deemed relevant or irrelevant

PRACTICE POINTER:

Consider establishing rules on copying and disseminating evidence



Investigations - Sharing the Evidence

The investigator must send evidence directly related to the allegations to each party and their advisor in an electronic format or a hard copy

Then the parties must have at least **10 days to submit a written response, which the investigator will consider** prior to completion of the investigative report

PRACTICE POINTER: Consider the format - electronic or paper?

- Will you invest in a document system or database?
- Consider security, cost, accessibility, and the ability to easily forward

Determining Relevance In an Investigation

To make relevance determinations:

- Review the allegations
- Compare evidence to the elements of the alleged policy violation to see if evidence impacts the elements
- Assess whether the evidence makes the allegations more or less likely
- Investigators, as well as hearing and appeal decision-makers, should heed this advice

PRACTICE POINTER:

Carefully consider the parties' response to the evidence when you are determining relevance

Drafting a Fair Investigation Report

The regulations require investigators to “fairly” summarize the “relevant evidence” in a report

There is no requirement to summarize the broader universe of “all evidence directly related to the allegations”

PRACTICE POINTER:

- In your policy, consider defining “fair” as “equitable, objective, and free from favor toward either or any side”
- Expressly state that “fair” does not equate happiness or agreement with the content

Drafting a Fair Report

Map out the key elements of proof

Summarize the evidence in a factual, objective manner

Show your work/logic

Rely on facts, not gut, opinions, or conclusions

- Avoid generalizations or prejudice
- Avoid characterizations and conclusions

The advice on drafting a fair investigation report is equally helpful to Hearing and Appeal Decision-Makers

PRACTICE POINTER:

Make the report useful to the Hearing Decision-Maker (include procedural steps)

Drafting a Fair Report

Once the report is ready, you must send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response, **at least 10 days prior** to the hearing.

This allows the parties to “effectively provide context to the evidence included in the report” and to “advance their own interests for consideration by the decision-maker” at the hearing.

PRACTICE POINTER: You are permitted to require Parties not to disseminate and to only use the evidence in the Title IX proceedings

PRACTICE POINTER: Consider whether the written response impacted your report

Hearings

Hearing Decision-Makers have an **independent obligation** to objectively evaluate relevant evidence

The regulations require:

- Hearings (no single investigator model)
- The Hearing Decision-Maker cannot be the Investigator or TIX-C
- Parties **must** have an advisor of choice at the hearing, and school must provide if needed
- Video or audio recorded

The physical set-up:

- Separate rooms must be available upon request
- Technology allowing the parties to see and hear in real time
- Can be remote

Hearings

Best Practices for conducting hearings:

Consider using one Hearing Decision-Maker

- Reduces overall staffing needs
- Avoids split decisions on relevance and/or final determinations

Consider adopting hearing decorum and procedural rules (re: questions, openings/closings, time limits, objections, etc.)

- Lay out process as clearly as possible
- State that the Hearing Decision-Maker will ask questions first (before advisors)
- Consider limiting or prohibiting objections

Hearings

Best Practices for conducting hearings:

- Require parties to provide advance written notice of the attendance of advisors, so that there is time to appoint an advisor if necessary
- Consider having a pre-hearing meeting to discuss the process
 - Provide the Rules for Advisors, even if you did this already
 - Inform the parties and advisors that you will need time to evaluate questions for relevance before they are answered
- Avoid the use of overly-legalistic or alarming language
- Secure an on-call legal advisor for the Hearing Decision-Maker
- For confidentiality, limit attendees to parties, witnesses (only when providing information, and other participants required by the regulations or by other law)

Hearings - Questioning by Advisors

Parties' advisors (including lawyers, but never the Parties) have the right to ask questions:

- Of the other Party and the witnesses
- Directly, orally, and in real time
- Only relevant questions may be asked

If a Party or witness does not answer questions, the Hearing Decision-Maker must not rely on their statements

However, there can be no **inference** about responsibility solely from the failure of a person to answer questions

PRACTICE POINTER: Encourage witnesses attendance



Tips On Handling Questioning of Witnesses

Hearing Decision-Makers must make real-time evidentiary rulings

- **Before** any witness answers
- Where a question is not allowed, the Hearing Decision-Maker must explain why

Examples of the required level of detail in the explanation:

- “The question will not be answered as it violates the rape shield rule and does not fit into one of the exceptions”
- “The question is not relevant as it is redundant”

PRACTICE POINTER: Take it slow - you can call for a break to confer with counsel

The Hearing Determination

The Hearing Decision-Maker must objectively evaluate the relevant evidence and issue a written determination about responsibility which must be provided to the Parties simultaneously

Remember (and apply) our earlier discussion about fairly summarizing the evidence and assessing credibility

PRACTICE POINTER: Like Investigators, Decision-Makers should show their work. If your investigation report template is aligned with your hearing determination template, this will be very helpful.

The Hearing Determination

The written Hearing Determination must include:

- Identification of the allegations – perhaps from the Investigation Report
- Description of all procedural steps taken - same
- Findings of fact
- Conclusions and a determination regarding responsibility
- A rationale for all conclusions
- Determination/description of disciplinary sanctions, if any
- Indication of whether there are remedial measures to Complainant
- Appeal process and grounds

Appeals

Parties have the right to appeal from a determination, or a dismissal of a Formal Complaint or any part thereof, on three specified grounds:

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
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

Schools may add additional grounds.

Appeals

- Party/advisors must be permitted to make written submissions to the Appeal Decision-Maker
- There is no right to another hearing before an Appeal Decision-Maker
- The Appeal Decision-Maker must come to a final written appeal decision (which must include the determination, remedies, discipline, and rationale)
- Written, simultaneous notice of appeal outcome must be provided to the parties

Appeals

The Appeal Decision-Maker must not have previously been involved in the case and must be trained and unbiased

PRACTICE POINTERS:

1. Consider having one Appeal Decision-Maker on a case as opposed to a panel, but who this is may depend on the Respondent's status (for example, Provost for Faculty, Dean of Students for students, Head of HR for staff)
2. Consider making clear that the appeal process is on the paper only
3. Consider spelling out the appeal remedy options (your policy can allow the appeal to affirm or reverse the decision, to send it back for more investigation, to change the sanctions, etc.)

Appeals

In the final written decision, the first task is not to agree or disagree with the finding, but to see whether there are grounds for the appeal. To do this:

- Carefully consider the arguments and evidence in support (see above)
- Carefully consider the investigation report and determination
- Require objective and specific facts to support an allegation that there was a procedural irregularity, new evidence, bias or a COI
- If there is evidence of grounds for appeal, determine whether the error impacted the outcome of the matter
- If the error impacted the outcome, determine the appropriate remedy

Retaliation

Prohibited Retaliation:

*No recipient or other person **may intimidate, threaten, coerce, or discriminate** against any individual for the purpose of interfering with any **right or privilege secured by Title IX** or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.*

Retaliation

Bringing a code of conduct complaint based on the same set of facts “**for the purpose of interfering** with any right or privilege secured by Title IX” is retaliation

Litigation bait: where there is Title IX adjacent conduct referred to another process as permitted by the regs, will the Respondent allege that the school purposefully avoid the TIX process?

PRACTICE POINTER: When referring a complaint to another process, make your referral purpose crystal clear

Retaliation

Insights on Retaliation and Speech from the regulations and preamble:

The exercise of rights protected under the First Amendment does not constitute retaliation, but threatening to publish to deter reporting could be

Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation

Challenge: Non-Title IX Sexual Misconduct

Regulations require “dismissal” if allegations

- Could not constitute “sexual harassment”
- Did not occur in education program or activity or
- Did not occur in the US

However, “dismissal does not preclude action under another provision of the recipient’s code of conduct”

So, how do you address Non-Title IX Sexual Misconduct?

Challenge: Non-Title IX Sexual Misconduct

Possible Solutions

1. Do not address policies and procedures and leave it to other authorities (or other code sections that may apply)
2. Move all sexual misconduct through the newly required grievance process under regulations
3. Create bifurcated policies/procedures for Title IX sexual misconduct and Non-Title IX sexual misconduct

Challenge: Non-Title IX Sexual Misconduct

Option 1: Do not address in policies and procedures and leave it to other authorities (or other code sections that may apply)

In theory, this would be less work for the institution, but:

- May fail to meet constituency expectations
- May not align with institution's mission
- Litigation risk - erroneously failing to respond at all

Challenge: Non-Title IX Sexual Misconduct

Option 2: Move all sexual misconduct / discrimination through the newly required grievance process under regulations

- One process, albeit it complex, for all such allegations
- Creates clarity and certainty for all parties
- Onerous process including cross examination may serve to chill potential Complainants, as predicted by the preamble
- May fail to meet constituency expectations
- May not align with institution's mission
- Litigation risk - treating discrimination based on sex differently than other types of discrimination

Challenge: Non-Title IX Sexual Misconduct

Option 3: Create bifurcated policies and procedures for Title IX sexual misconduct and non-Title IX sexual misconduct

- May be more aligned with mission and constituency expectations
- May be less chilling for allegations not meeting new reg requirements
- Confusing to have multiple processes
- Must permit parties to appeal “dismissal” from Title IX process
- Potential lack of certainty for all parties
- Potential that the track may shift as process proceeds
- Litigation risk - incorrectly categorizing Title IX vs. Non-Title IX process

Challenge: Non-Title IX Sexual Misconduct

Next Steps: Review your student code of conduct, collective bargaining agreements, staff and faculty handbooks, and reporting systems

- Consider pros and cons of process options
- If using multiple processes, try to synthesize as much as possible and create clear criteria for deciding which process to use
- Amend processes as necessary
- Consider use of “interim” policies while obtaining constituency input before creating final policies
- Review State law
- Create a communications plan

Next Steps

- Review and revise your Title IX policy
- Create your Title IX Team training plan
- Ensure consistency across other processes, revise as necessary
- Review websites and trainings for compliance
- Review materials on confidentiality and gag orders
- Communicate with stakeholders – identify and share your plan to address the regulations
- Create and execute a plan to educate your community

Next Steps

Once Policy decisions are made, create forms for documentation, such as:

- Formal Complaint Form
- Written notices of Supportive Measures
- Written notice of allegations
- Notice of dismissal – including reason and appeal rights
- Investigation Report template
- Determination template and appeal notices
- Rules for Advisors
- Rules and guidelines around COIs and bias

Documentation, Database Maintenance, and Recordkeeping

Retain all documents, evidence and recordings for seven years from reports, Formal Complaints, hearings, informal resolutions and appeals

Keep, and make publicly available, all Title IX Team training materials

Consider a document/case management system

Retain records of supportive measures

Final Thoughts

- This will be the law, come August 14, 2020
- There are already legal challenges (ACLU case), but a mid-year ruling would be difficult
- The new regulations are sure to generate new litigation risks

Looking forward to Part 3 of the PCHE Program, featuring community partners

Use of This Material

This educational program covers key ground under Title IX and its regulations, based on what we know today:

- More OCR guidance is expected
- More legal cases will be decided
- Continuing education is important

What this program does not cover:

- Your school-specific process
- Your school-specific hearing technology

Finally, this educational program is not legal advice

THANK YOU

Pamela W. Connelly

Shareholder, Strassburger McKenna Gutnick & Gefsky

pconnelly@smgglaw.com



**Strassburger McKenna
Gutnick & Gefsky**

ATTORNEYS AT LAW | SINCE 1919

