



**SEXUAL HARASSMENT & TITLE IX
TRAINING CONFERENCE**

MARCH 26-27, 2024



Today's Presenter

March 26-27, 2024



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Session 1

The Bible Speaks About Everything Biblical Foundations and the History of Title IX

Biblical Foundations

Cornelius Van Til

“The Bible is authoritative on everything of which it speaks. Moreover, it speaks of everything.”

Christian Community – John 13:34-35 and Romans 12:9-10

“A new commandment I give to you, that you love one another: just as I have loved you, you also are to love one another. By this all people will know that you are my disciples, if you have love for one another.”

“Let love be genuine. Abhor what is evil; hold fast to what is good. Love one another with brotherly affection. Outdo one another in showing honor.”

Support – Galatians 6:2, 9-10 and 1 Thessalonians 5:11

“Bear one another's burdens, and so fulfill the law of Christ . . . And let us not grow weary of doing good, for in due season we will reap, if we do not give up. So then, as we have opportunity, let us do good to everyone, and especially to those who are of the household of faith.”

“Therefore encourage one another and build one another up, just as you are doing.”

Evidence – Deuteronomy 13:12-15

“If you hear in one of your cities, which the Lord your God is giving you to dwell there, that certain worthless fellows have gone out among you and have drawn away the inhabitants of their city, saying, ‘Let us go and serve other gods,’ which you have not known, then you shall inquire and make search and ask diligently. And behold, if it be true and certain that such an abomination has been done among you . . .”

Evidence – Acts 1:3 and 1 Corinthians 15:5-7

“He presented himself alive to them after his suffering by many proofs, appearing to them during forty days and speaking about the kingdom of God.”

“[A]nd that he appeared to Cephas, then to the twelve. Then he appeared to more than five hundred brothers at one time, most of whom are still alive, though some have fallen asleep. Then he appeared to James, then to all the apostles.”

Witness Questioning – Proverbs 18:17

“The one who states his case first seems right, until the other comes and examines him.”

Impartiality – Leviticus 19:15 and Deuteronomy 16:19

“You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor.”

“You shall not pervert justice. You shall not show partiality, and you shall not accept a bribe, for a bribe blinds the eyes of the wise and subverts the cause of the righteous.”

Punishment – Hebrews 12:7-8 and Revelation 3:19

“It is for discipline that you have to endure. God is treating you as sons. For what son is there whom his father does not discipline? If you are left without discipline, in which all have participated, then you are illegitimate children and not sons.”

“Those whom I love, I reprove and discipline, so be zealous and repent.”

Restoration - 2 Corinthians 2:5-7 and 7:10

“Now if anyone has caused pain, he has caused it not to me, but in some measure—not to put it too severely—to all of you. For such a one, this punishment by the majority is enough, so you should rather turn to forgive and comfort him, or he may be overwhelmed by excessive sorrow.”

“For godly grief produces a repentance that leads to salvation without regret, whereas worldly grief produces death.”

Human Sexuality – Genesis 1:27 and 2:24

“So God created man in his own image, in the image of God he created him; male and female he created them.”

“Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh.”

Human Sexuality – Matthew 19:4-6

“He answered, “Have you not read that he who created them from the beginning made them male and female, and said, ‘Therefore a man shall leave his father and his mother and hold fast to his wife, and the two shall become one flesh’? So they are no longer two but one flesh. What therefore God has joined together, let not man separate.”

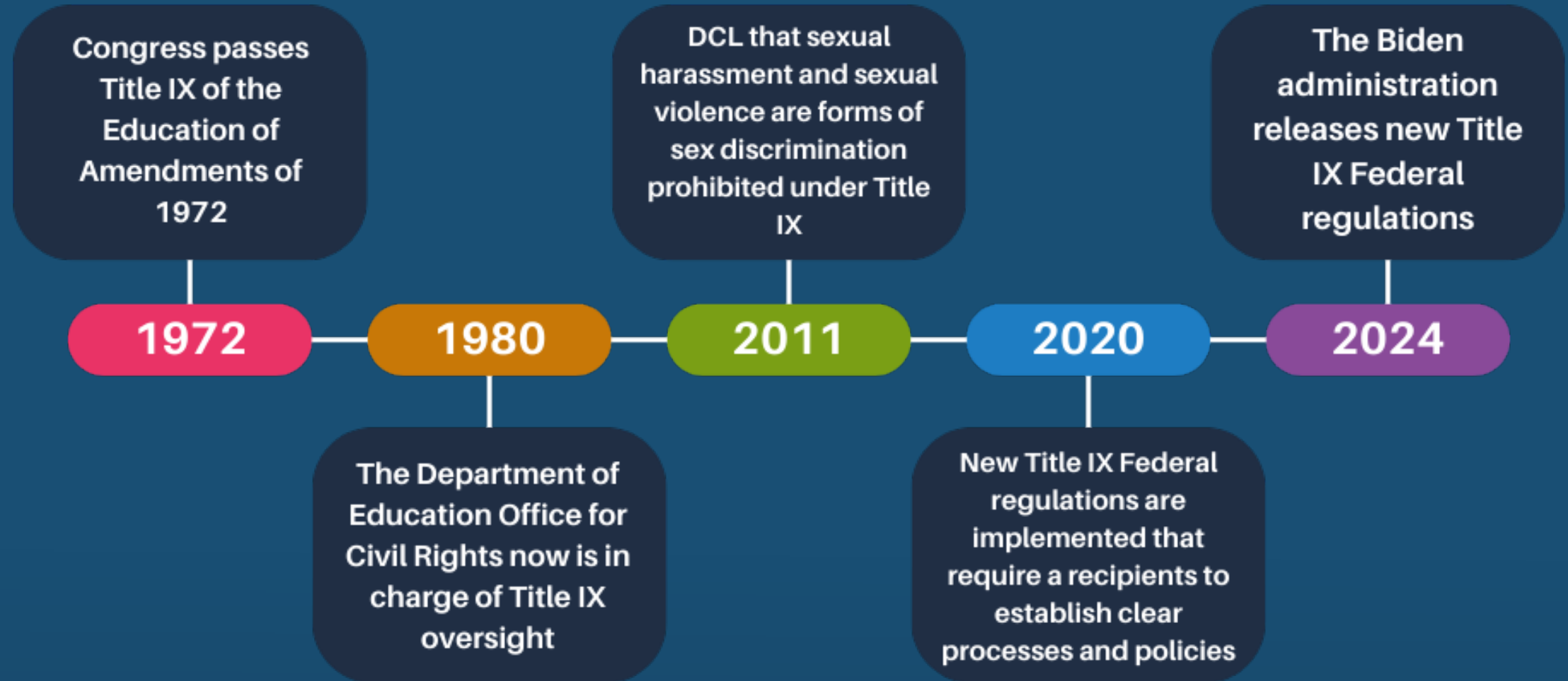
Title IX

“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 U.S.C. § 1681 et seq.

Title IX of the Education Amendments of 1972

HISTORY OF TITLE IX



“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

34 C.F.R. § 106.44(a)

Title VII

“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin”

42 U.S.C. § 2000e et seq.

Title VII of the Civil Rights Act of 1964

Title VII

- Prohibits discrimination based on a protected class
- Prohibits retaliation for making or participating in a report
- Prohibits policies or procedures that have a disparate impact
- Sexual harassment is prohibited under Title VII
- *Bostock v Clayton County*, 590 U.S. 644 (2020)
- Religious exemption and Ministerial exception

The Clery Act and VAWA

The Clery Act

- In 1986, 19-year-old Jeanne Clery was raped and murdered in her campus residence at Lehigh University
- 1990 - The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act - 20 U.S.C. § 1092(f)
- The act was meant to address unreported crimes on college campuses
- Annual Security Report
- Crime Logs
- Timely Warnings and Emergency Notifications

The Clery Act Reportable Crimes

- **Murder/Manslaughter**
- **Sexual assault (rape, fondling, incest, statutory rape)**
- **Domestic Violence, Dating violence, and Stalking**
- **Robbery**
- **Aggravated Assault**
- **Burglary**
- **Motor Vehicle Theft**
- **Arson**
- **Hate Crimes (including theft, simple assault, intimidation, and damage to property, and listed criminal offenses)**
- **Drug, Weapons, and Liquor violations**

- **Violence Against Women Act (1994, most recent reauthorization in 2022)**
- **2013 Reauthorization amended the Clery Act under the Campus Sexual Violence Elimination Act (SaVE Act) provision**
 - **Adds domestic violence, dating violence, and stalking to reportable crime list**
 - **Inform victims of law enforcement options**
 - **Investigation standards**

VAWA and SaVE

State and Local Laws

The Title IX Policy

Title IX Policy

- **Must be written and easily accessible**
- **Must designate a Title IX Coordinator**
- **Establish a grievance procedure that treats Complainants and Respondents equally**
- **TIXC, investigators, decision makers, and informal resolution facilitators must receive training**
- **TIXC, investigators, decision makers, and informal resolution facilitators must not have conflict of interests or biases**

Title IX Policy

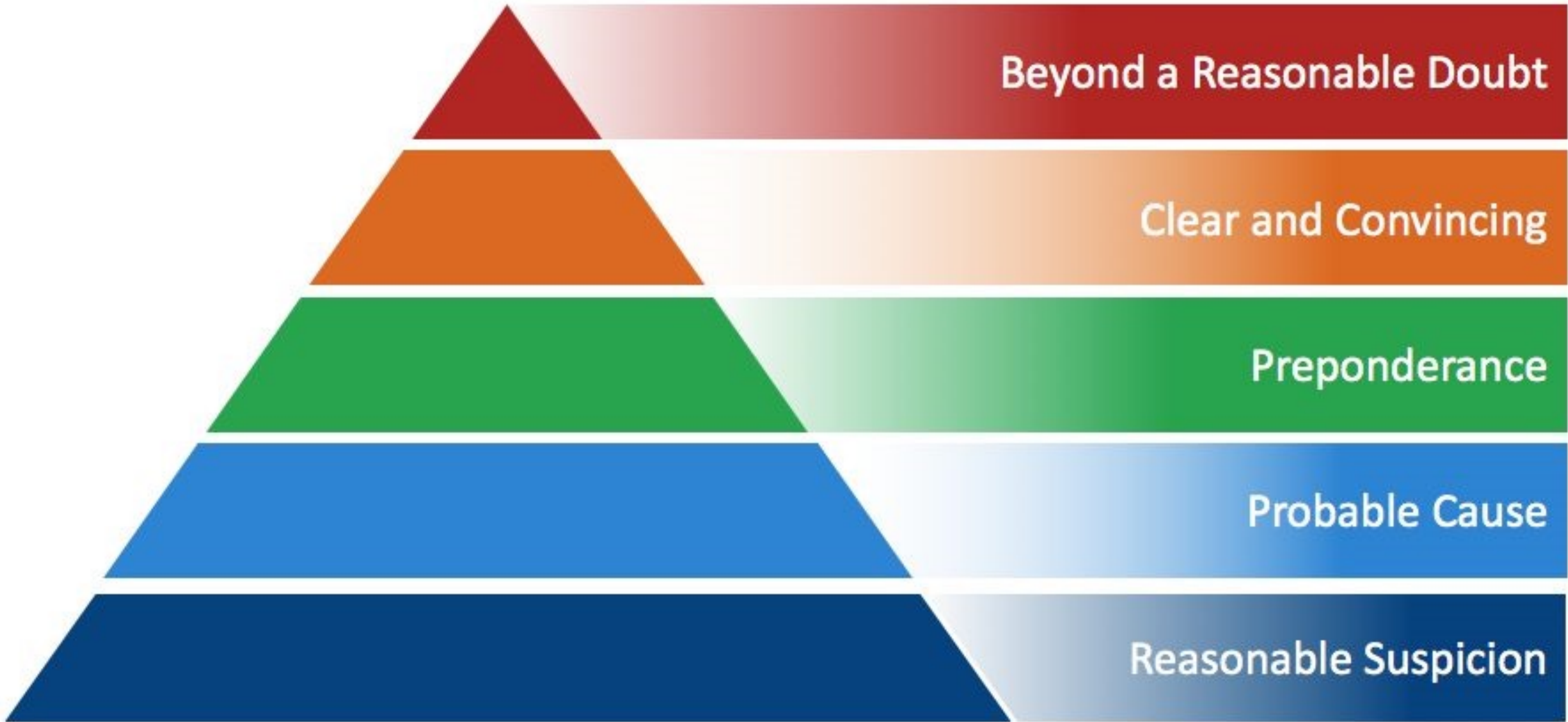
- **Definitions of prohibited conduct (Big 5)**
- **Reporting mechanisms**
- **Describe supportive measures**
- **Informal resolution procedures (if offered)**
- **Investigation time frames**
- **Relevant and privileged evidence**
- **Appeals procedures and time frames**
- **List the range of sanctions and remedies**
- **Standard of Evidence**

The policy should include a purpose section that explains the underlying reasons for the policy. Be sure to highlight the religious mission of the school and the biblical truths that form the foundation for having a policy that protects students from sexual harassment and sexual violence. Although compliance is a valid and important purpose, it should not be the central reasoning of this section.

Title IX Policy

Standard of Evidence

- **Preponderance or Clear and Convincing**
- **Must be applied to students and employees equally**
- **Must be applied to all Formal Complaints under Title IX**
- **Remember to check State law**
- **Preponderance = more likely than not or 50% and a feather**
- **Clear and Convincing = firm belief or conviction, highly probable**



Questions?

Session 2

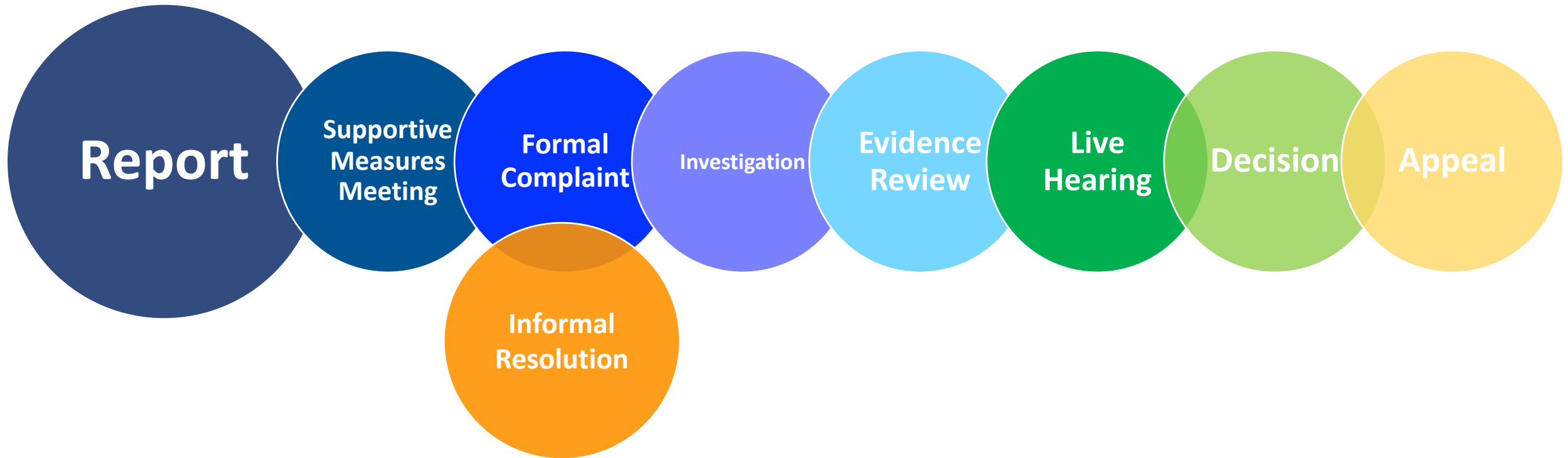
Start As You Want To Finish

Beginning the Process Well in the Report and Intake Phases

Title IX Case and Investigative Process



Title IX Case and Investigative Process



Who Reports?

Reporting

- **Employees with authority to institute corrective measures must report to TIXC (current regulations)**
- **Mandatory/Designated Reports**
- **Confidential Resources**
- **Anonymous Reporting**
- **Avenues to Report**
 - **Online, In-Person, Mail, Telephone, Email**
 - **Contact information for TIXC should be easily accessible in print, website, flyers, posters, etc.**

- **Don't forget your Clery obligations**
- **Provide sufficient detail but identities are not required**
- **Remember Clery geography**
- **It does not matter if the report is provable**
- **The report must meet the definition of the reportable crime**

Clery

Jurisdiction

Jurisdiction

- Who was involved?
- When did the conduct occur?
- Where did the conduct occur?
- What happened?
- Does another department have jurisdiction?
 - What if there is concurrent jurisdiction? (Deconflict)
 - To the Title IX hammer, everything can look like a nail
- Revisit the same questions after the initial meeting!

Title IX and Title VII Sexual Harassment



Quid Pro Quo

Quid Pro Quo sexual harassment laws are effectively the same in both Title IX and Title VII.

In matters of Quid Pro Quo in an institution of higher education, Title IX procedures will take precedence.

Hostile
Environment
Sexual Harassment

Title IX - So severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's Education Programs and Activities (which includes workplace duties)

Title VII – Severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive

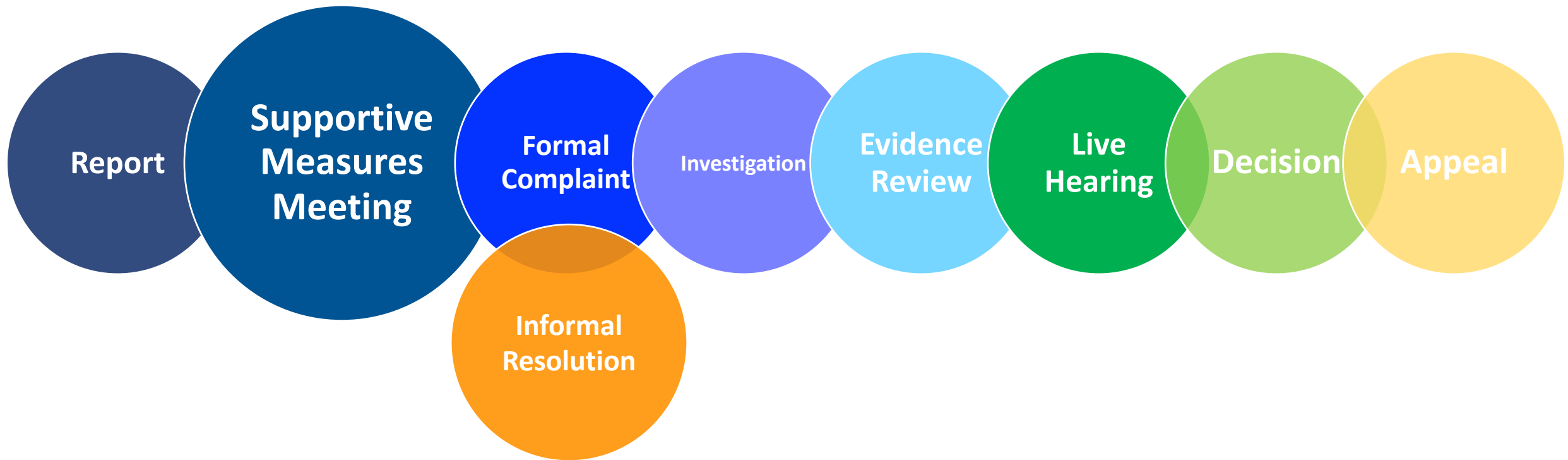
Jurisdiction

- **Is the conduct sexual harassment?**
- **Is the conduct based on sex?**
- **If not Title IX, what department should handle the case?**
 - **Student Life/Development**
 - **Human Resources**
 - **Academic Affairs/Faculty Committee**
 - **Public Safety**
 - **Individual Departments**

Title IX Case and Investigative Process



Title IX Case and Investigative Process



Supportive Measures Meeting

- **Always attempt contact with the Complainant**
 - **Remember the content and context of the report**
- **Must inform the Complainant about the availability of supportive measures whether or not a formal complaint is filed**
- **Consider the Complainant's wishes about supportive measures**
- **Explain the process of filing a formal complaint**
- **Meetings are voluntary**
 - **Just like everything else in Title IX**

Supportive Measures Meeting

- **Allow the Complainant to bring a support person**
- **Inform the Complainant of all rights and processes**
- **Encourage the Complainant to report crimes to the police**
- **Provide the Complainant with a copy of the Title IX policy**
- **This is NOT an investigative interview but still need enough information to provide appropriate support and to determine jurisdiction**
- **Have a plan to follow up with the Complainant**

Other Considerations

- **The tone of your initial contact with the Complainant**
- **The setting of your meeting (seating, desks, room size)**
- **How many people are involved?**
- **How can you make the Complainant at ease?**
 - **Drinks, snacks, tissues**
- **Your body language and demeanor**
- **Open ended questions**

Supportive Measures

Not punitive, disciplinary, or unreasonably burdensome

Referral to counseling, medical, or other healthcare services

Mutual No Contact Orders

Academic Assistance

Safety Planning

Alternative Work Assignments

Meal Replacements

Housing Changes

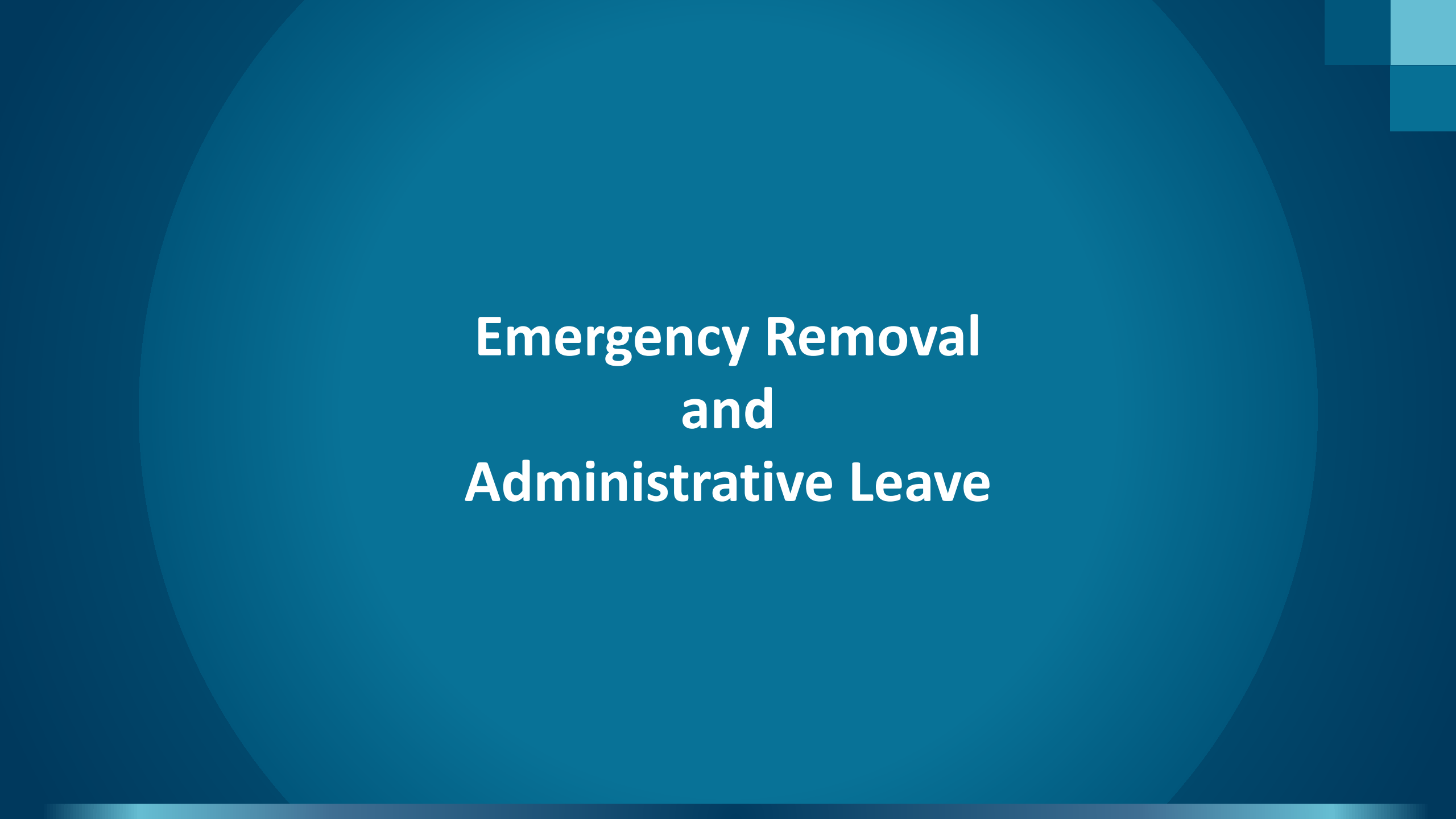
Plus many more to ensure equal access

Jurisdiction

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- **When did the conduct occur?**
- **Where did the conduct occur?**
- **What happened?**
- **Does another department have jurisdiction?**
 - **What if there is concurrent jurisdiction?**
 - **To the Title IX hammer, everything can look like a nail**

Jurisdiction

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Emergency Removal and Administrative Leave

Emergency Removal

- **Based on allegations – whether or not a grievance process is pending**
- **Removal of students and employees on an emergency basis**
- **The Institution must conduct an individualized safety and risk analysis**
- **“Immediate threat to the physical health or safety of any student or other individual arising from the allegations”**
- **Provide the Respondent with notice and the opportunity to challenge immediately following the removal**

Other Emergency Removal Considerations

- **In-Person meeting with the Respondent**
- **Housing and Safety plan for the Respondent**
- **Visa and immigration factors**
- **Collaborate with other departments (Student Life, Legal, Public Safety, Public Relations, Faculty)**
- **Emergency Removal may mean the TIXC files a complaint**
- **Document events and reasoning (Show your work)**
- **Have a process stated in your policy**

Administrative Leave

- Not the same analysis as Emergency Removal
- Only applies to Non-Student Employees
- Administrative leave during the pendency of the grievance process (there must be a grievance process)
- Can be paid or unpaid
- Remember your Employee Handbook, Collective Bargaining Agreements, and state or local laws
- Document and show your work

Bob, a senior undergraduate student reports that Professor Ashley Smith cornered him in the classroom last night and said that if he came over to her house then she would make sure he did well on the final exam. While she was talking, Smith was pressing her body against Bob and grabbed his rear end.

What are some of the issues?

Title IX Case and Investigative Process



Title IX Case and Investigative Process



Formal Complaint

- **Written – delivered in person, electronically, or through mail**
- **Filed by the Complainant or signed by the TIXC**
- **Alleges sexual harassment**
- **Requests that the institution investigate**
- **Institutions must begin the grievance process**
- **Complainant must be participating or attempting to participate in education program or activity**
- **Able to consolidate**

Andrea, a freshman living on campus, stops by the Title IX Office and tells the TIXC that she had been raped by Josh, a senior, over the weekend. She says that she wants him kicked off campus immediately.

Do we have a Formal Complaint?

Keep Records!

Reports Received

Communication with the Parties

Supportive Measure Meeting Notes and Reports

Arrangement of Supportive Measures

Jurisdictional Determinations

Questions?

Session 3

As NOT Seen on TV

The Pivotal Role of the Investigation and the Investigators

Notice of Allegations

Notice of Allegations

- **Written and sent to both parties**
- **Describes the alleged policy violation and sufficient facts to allow for a meaningful response/defense**
- **Names of the parties (if known) – no anonymous complaints**
- **Date and location (if known) of the alleged incident**
- **Describes the grievance procedures (attach a copy of the entire policy)**
- **States the Respondent is presumed not responsible**

Notice of Allegations

- **Determination of responsibility is only made at the end**
- **Right to an advisor of their choice (may be an attorney)**
- **Right to inspect and review evidence**
- **Prohibition against false statements and false information**
- **Informal resolution options, if available**
- **Amend as needed in the future**
- **Other helpful inclusions**
 - **Name and contact information of the investigators**
 - **Retaliation provision**

Title IX Case and Investigative Process



Title IX Case and Investigative Process



Investigators

Investigators

- **Neutral fact finder**
- **Free from bias or conflicts of interest**
- **Independent and Professional**
- **Diligent, exercising due care**
- **Appropriately trained and experienced**
- **Can be the TIXC or internal or external**
- **Best to work in pairs if possible**
- **Consider an Independence Statement**

Investigative Plan

- **Investigators and TIXC collaborate**
- **Opportunity to think and plan**
- **Forward thinking, green document**
- **Allegations from the Formal Complaint**
- **Applicable policy or statutory violations**
- **Elements of proof needed/met for each violation**

Investigative Plan

- **Key issues/challenges anticipated**
- **Documentary and other evidence to be acquired and anticipated date of receipt**
- **Preliminary witness interview plan and other critical investigative steps**
- **Estimated time and resources for completion**

Investigative Plan

Evidence Collection

Evidence Collection

- **Interviews – parties, witnesses, process, experts**
- **Internal Records – class schedules, surveillance videos, fob activity, police reports, emails, class assignments**
- **Public Information – social media posts, FOIA, news media**
- **Information from Individuals – text messages, private emails, pictures, audio recordings**
- **Be careful about certain kinds of evidence – child pornography**
- **Keep records of evidence requests and responses**

Evidence Collection

- All relevant evidence – any tendency to make a fact in question **more or less likely** – inculpatory and exculpatory
- Directly related evidence
- Medical and mental health records – must have voluntary, written consent
- Privileged communications – attorneys, pastors, counselors
- Rape Shield – Prior sexual history of the Complainant is not relevant evidence, Except:
 - To prove that someone else is the perpetrator
 - To prove consent between the Respondent and Complainant

While investigating a rape, the Respondent admits that he and the Complainant had sex on the day in question but maintains that it was consensual. He wants you to interview the Complainant's past boyfriends because he saw on social media that she was kissing one of them two days before the alleged rape.

Interview the old boyfriends?

Investigative Interviews

The Role of Advisors

- The party may choose any Advisor
- Create an Advisor Expectation document
- Advisors do not answer investigator's questions
- The party may confer with Advisors
- Attorneys as Advisors – not representation
- Advisors are allowed at any meeting or proceeding
- For Live Hearing, Advisors are required to ask questions

Interview Purpose

- **Generate admissible evidence that may establish or support charges for actionable violations**
- **Confirm, explain, or supplement allegations or complaints**
- **Determine what a witness heard or observed, or otherwise has knowledge of regarding the conduct at issue**
- **Assist in identifying or explaining documentary or physical evidence**
- **Provide a forum for subjects to admit to misconduct**
- **Identify or generate leads for other evidence, witnesses, or subjects, or new subjects for investigation**

Investigative Interviews

- **Provide adequate notice – written, date, time, location, participants, and purpose**
- **Consider using interview advisements**
- **Allow Advisors to be present**
- **Best practice is to have two investigators**
- **Prepare an interview outline beforehand**
- **Take notes – do not add opinions or extraneous observations**

Interview Outlines

- **Prepare beforehand**
- **Both investigators and TIXC**
- **The roadmap for the interview**
- **Determine what topics to discuss and in what order – begin with general, open-ended and move to specific**
- **Determine what documents, if any, to use**
- **Create a timeline if multiple actions, time, or dates are involved**
- **Begin with background questions**
- **Don't be constrained by the outline**

Investigative Interviews - Setting

- **In-Person v Virtual**
- **Recorded or not recorded – remember to tell participants**
- **Location of the interview**
- **Layout of the room**
- **Desk or no desk; type of chairs; lighting; colors; wall decor**
- **Think – Conversation; Not – Interrogation**
- **Food, drinks, or snacks can be helpful**
- **The setting should put the interviewee at ease and facilitate talking**



Investigative Interviews - Questioning

- **Consider the best technique for each circumstance**
- **The Funnel Technique is best for early stages of an investigation**
- **Establish credibility, trust, and rapport**
- **Be professional, respectful, calm, and conversational**
- **Be Christlike throughout the process**
- **Acknowledge the discomfort or unease involved and give a brief overview of the subject matter**
- **The quality of the questions directly affects the quality of the information obtained**

Interview Questioning

Ask open-
ended
questions

Ask single
questions, not
compound

Don't
interrupt

Be flexible

Ask follow-up
questions

Don't argue

Close out each
subject

Clarify
ambiguous
answers/slang

Who, what,
where, when,
why, and how

Ending the Interview

- Is there anything else you would like to state on the record?
- Is there anyone else that you think I should talk to?
- Do you know of any other information or evidence that would be relevant to our investigation?
- Are there any other questions I should have asked you?
- Invitation to contact the investigator with any additional information

Investigative Interview Reports

- **Critical component of the investigation (tells the story)**
- **Documents adherence to legal obligations**
- **Documents who participated in the interview**
- **Identifies any exhibits**
- **Summarizes information that the interviewee provides**
- **Describes the tone and context of the interview**

Interview Report Purpose

Interview Report – Elements

- **Preliminary Information**
 - **Interviewer Names**
 - **Parties Present – names and identity**
 - **Location**
 - **Date**
 - **Time**
 - **Advisements**

On September 12, 2022, at 1:00 p.m., Title IX Investigators John Smith and Jane Smythe interviewed student Margaret Carter in person in Smith 324. Carter was accompanied by Brandon Jones who was acting as her advisor. There were no other individuals present. At the beginning of the interview, Smith read aloud the interview advisements to Carter, which she acknowledged orally. In summary, Carter stated the following.

Interview Report – Elements

- **Not a verbatim transcript – summary**
- **Include basic, background information**
- **Information provided by the interviewee**
- **Essence and the tone of the interview**
- **Summary of the interview, not just the information**
- **Contains facts: who, what, where, when, why, and how**

Interview Report – Elements

- **The interviewee's opinions when relevant**
- **The participation of others (attorney, advisor, parent)**
- **References to exhibits**
- **Verbatim statements, words, phrases**
 - **Use quotation marks**
 - **Only for critical information**
 - **Must be completely accurate**

Barnes denied having sex with Carter.

When the Title IX Office asked Barnes if he had sex with Carter in the car, Barnes paused and then stated, “What would happen to me if I said that I did?” Barnes then requested a break to confer with his advisor. After the break, Barnes denied having sex with Carter.

Writing Style

- **Narrative Format – straightforward and concise**
- **Third person**
- **Objective and unbiased**
- **Chronological, thematic, or topical**
- **Active voice**
- **Generally, not necessary to write, “_____ stated...”**
- **Generally, the questions do not need to be reported**
- **Clarity over creativity**

Things to Avoid

**Awkward
grammar**

**Excessively
long sentences**

**Too many
pronouns**

Conclusions

**Subjective
opinions**

**Slang,
abbreviations,
colloquialisms**

**Informal
language**

First names

**Misspellings,
poor grammar,
inaccuracies**

Title IX Case and Investigative Process



Title IX Case and Investigative Process



Evidence Review

- **Prior to completing the investigative report:**
 - **Equal opportunity to inspect and review**
 - **Directly related evidence (including evidence the institution does not intend to rely on)**
 - **Inculpatory and exculpatory evidence**
 - **Electronic or hard copy to party and advisors**
 - **At least 10 days to submit a written response**
 - **Investigators must consider any response**

Final Investigative Report

Final Investigative Report

- **The culmination of the investigation**
- **Fairly summarizes relevant evidence**
- **Use a template**
- **Send to each party and advisors**
- **At least 10 days before a Live Hearing**
- **Electronic or hard copy**
- **Review and written response**

- **Who is the audience for the report?**
- **Allegations, relevant Policy sections, and background on the parties**
- **Factual and procedural timelines**
- **Analysis**
 - **Credibility – not a judgment on credibility but an analysis of the evidence pertaining to credibility**
 - **Disputed and undisputed facts**
 - **No conclusions on responsibility**
 - **Recommendations?**

Final Investigative Report

Keep Records!

All evidence and acquisition reports

Interview reports

Final investigative reports

Communication with parties, witnesses, and advisors

Questions?

Session 4

Finish Well

**Ensuring a Fair and Meaningful Adjudication
and Appeal Process**

Title IX Case and Investigative Process



Title IX Case and Investigative Process



Decision Makers

- **Cannot be the investigator or TIXC**
- **Single Decision Maker or panel is allowed**
- **No bias or conflict of interest - impartial**
- **No prior involvement in the case**
- **Trained on technology used at the hearing**
- **Trained on Title IX policy, definitions, process, relevant questions, and evidence**
- **Understands the standard of evidence**

Recommended - Pre-Hearing Conference

Live Hearings

- They must be live but not required to be in person
- Must be recorded– audio/visual or transcript
- Party Advisors must be present and allowed to ask questions
 - Decorum
 - Directly, orally, and in real time
 - Including questions challenging credibility
- Only relevant questions are permitted
- Decision Maker must decide if a question is relevant or not relevant – must explain if excluding

Relevant Evidence and Questions

- **Relevance** – any tendency to make a fact in question **more or less likely** – inculpatory and exculpatory
- **Medical and mental health records** – must have voluntary, written consent
- **Privileged communications** – attorneys, pastors, counselors
- **Rape Shield** – Prior sexual history of the **Complainant** is not relevant evidence, Except:
 - To prove that someone else is the perpetrator
 - To prove consent between the Respondent and Complainant

Live Hearings

- **No exclusionary rule**
- **No negative inference for not appearing**
- **Appearance is voluntary for parties and witnesses**
- **Attorneys are allowed to be **Advisors****
- **Institutions have discretion**
 - **Opening or Closing statements**
 - **Objections**
 - **Redirect or Re-Cross examination**
 - **Decision Maker panels – unanimous or not**

Title IX Case and Investigative Process



Title IX Case and Investigative Process



The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

34 C.F.R. § 106.44(b)(2)

Written Determination

- **Must be in writing**
- **Issued by the Decision Maker**
- **Written Determination must contain**
 - **The allegations**
 - **Procedural timeline beginning at the formal complaint**
 - **Findings of fact**
 - **Rationale/Analysis for the result as to each allegation**
 - **Sanctions and remedies imposed and rationale**
 - **Appeal procedures and bases**

Written Determination

- **Provided to the parties simultaneously**
- **The decision becomes final on:**
 - **Date of appeal decision, or**
 - **Date the appeal was due**
- **TIXC is responsible for remedies**
- **TIXC should dialog with the Decision Maker**
- **Incorporate other departments as needed**
- **Use templates**
- **Consider Impact or Mitigation statements**

Sanctions

- Only allowed after a fair grievance process
- Must provide a rationale for the sanctions
- Sanctions should be listed in the Title IX Policy
- Must be proportionate to the violation
- Compare with past cases

Remedies

- Must provide a rationale for the remedies
- Available for the Complainant
- Designed to restore or preserve equal access to the EPA
- Like supportive measures, but, if finding of responsibility, can be disciplinary, punitive, and burdensome

Written Determination Sections

- **Introduction**
- **Allegations**
- **Jurisdiction**
- **Policies**
- **Procedural Steps**
- **Findings of Fact**
- **Analysis**
- **Conclusion**
- **Sanctions and Remedies**
- **Appeal Procedures**
- **Retaliation**

Writing Style

- **Narrative Format – straightforward and concise**
- **Third person**
- **Objective and unbiased**
- **Active voice**
- **Clarity over creativity**
- **Show your work in reaching conclusions**
- **Focus analysis on the disputed facts and issues**
- **Only use facts and evidence in the record**

Things to Avoid

**Awkward
grammar**

**Excessively
long sentences**

**Too many
pronouns**

**Conclusions
without
analysis**

**Personal
opinions**

**Slang,
abbreviations,
colloquialisms**

**Informal
language**

First names

**Misspellings,
poor grammar,
inaccuracies**

- **What happened?**
- **Narrative of the events**
- **Both uncontested and contested facts**
- **Evidentiary determinations**
- **Credibility determinations**
- **Explain all of your reasoning**
- **The reader cannot read your mind**
- **Assume the reader has not read anything else about the case**
- **Preponderance of the evidence standard**

Findings of Fact

The parties dispute whether Barnes gave Carter alcoholic drinks at the party. The Decision Maker determines by a preponderance of the evidence that he did.

- **Witnesses**
- **Video**
- **Credit card receipts**
- **Text messages**
- **Carter's demeanor, signs of intoxication, hangover**
- **Barnes's recollection or lack thereof**
- **Motive, interest, or bias – credibility**

Analysis

- **Organize by topics or issues**
- **Identify the issue about to be discussed**
- **Add the relevant policy definition**
- **Apply the facts to the policy and discuss whether the facts meet the policy definition**
- **Only use the facts from the evidence**
- **Base the conclusion on that analysis**
- **IRAC – Issue, Rule, Application, Conclusion**

Issue – Was Carter incapacitated when she and Barnes had sex?

Rule – Incapacitation occurs when the person is unable to give knowing, voluntary consent to sexual activity due to drugs or alcohol or mental or physical impairment.

Application – Apply (don't just repeat) facts from the case (alcohol was present, slurred speech, unable to walk, vomiting, couldn't undress herself....utilize "because," "since," "shows."

Conclusion – Based on this analysis, the Decision Maker finds by a preponderance of the evidence that Carter was incapacitated and thus unable to give consent.

Title IX Case and Investigative Process



Title IX Case and Investigative Process



Appeals

- **Must allow for determinations regarding responsibility and for dismissals**
- **Available for both the Complainant and the Respondent**
- **Institution must notify the other party when an appeal is filed**
- **Must have equal procedures for both parties**
- **Both parties must have opportunity to write statement in support of challenging the appeal**
- **Appeal Decision Maker cannot be prior Decision Maker, TIXC, or investigator**

Appeals

- **Single or panel Appeal Decision Maker**
- **Must issue a written decision**
- **The decision must provide the result of the appeal and the rationale for that result**
- **Employs the same analysis methodology as in the Written Decision (IRAC)**
- **Use templates**
- **Must provide training for appeal decision makers**
- **Simultaneous notification**

Title IX Appeal Bases

1. **Procedural irregularity that affected the outcome of the case**
2. **New evidence not reasonably available at the time of the decision that could affect the outcome of the case**
3. **TIXC, investigator, or Decision Maker had a conflict of interest or bias that affected the outcome of the case (general or specific)**
4. **Any other basis as long as it offered to both parties – check State law**

Keep Records!

Final investigative reports

Live Hearing recordings/transcripts

Written Determinations

Appeals – responses and decisions

Communication with parties, witnesses, and advisors

Questions?

Session 5

Change Is in the Air

The 2024 Federal Regulations and Title IX Procedures

The Federal Rulemaking Process



Department publishes Notice of Proposed Rulemaking

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graph TD; A[Department publishes Notice of Proposed Rulemaking] --> B[Public Comment period]; B --> C[Department reviews comments, revises as desired, and responds to the public comments]; C --> D["NPRM goes to Office of Management and Budget (OMB) Office of Information and Regulatory Affairs (OIRA)"]; D --> E["OIRA sends the rules back to the Department for final revisions and publication"];
```

Public Comment period

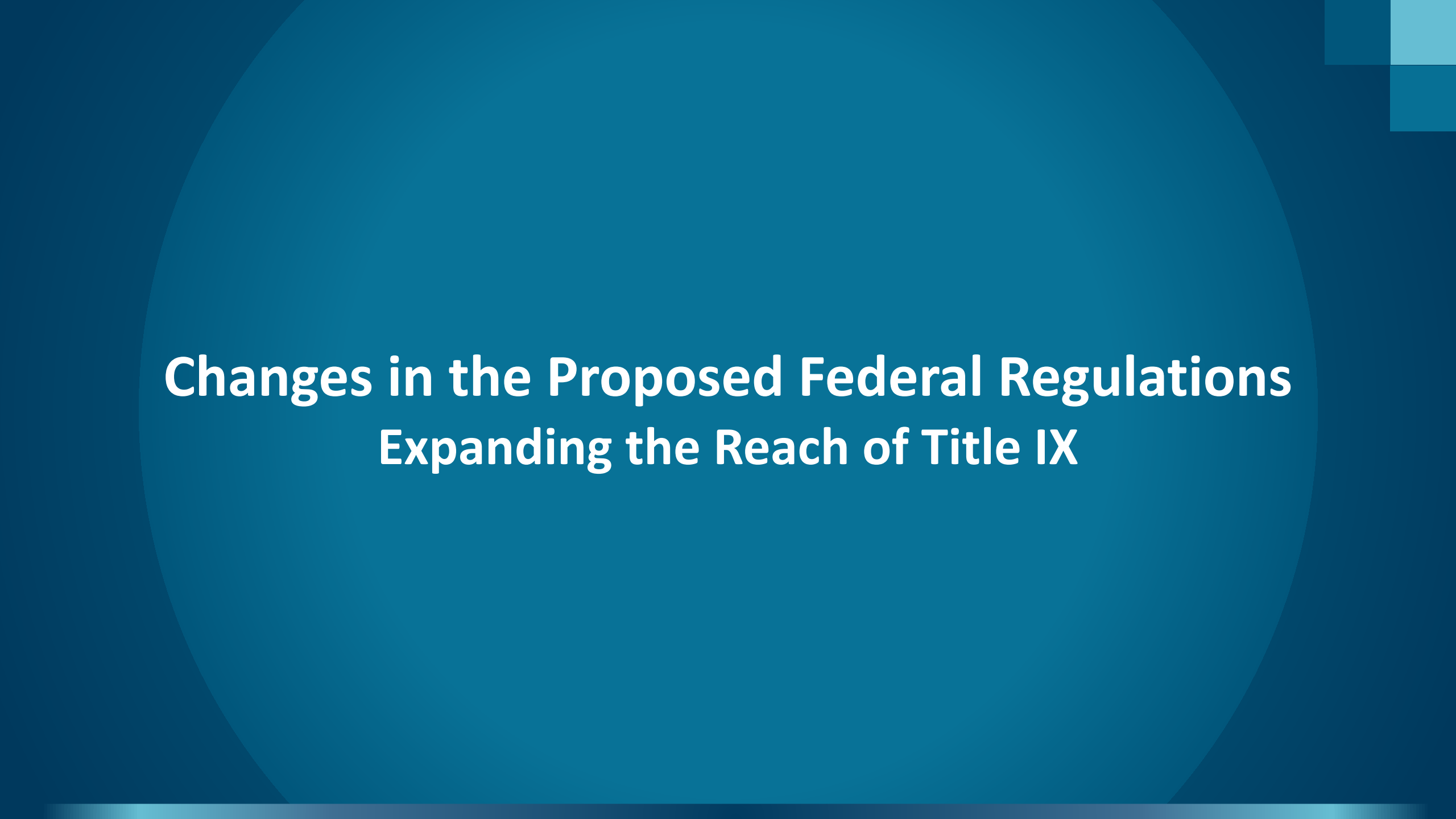
Department reviews comments, revises as desired, and responds to the public comments

**NPRM goes to Office of Management and Budget (OMB)
Office of Information and Regulatory Affairs (OIRA)**

OIRA sends the rules back to the Department for final revisions and publication

Public Comments

- **2020 Regulations - 124,000 public comments**
- **2024 Regulations – 390,000 public comments**
 - **240,000 comments for the main Title IX NPRM**
 - **150,000 comments to the Title IX athletic NPRM**



Changes in the Proposed Federal Regulations Expanding the Reach of Title IX

**Re-Definition
of “Sex”**

“Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”

Proposed § 106.10

Also contained within the new definition of sex-based harassment - Proposed § 106.2

Sexual Harassment

2020 Regulations Quid Pro Quo

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.

Section 106.30

Sex-Based Harassment

2024 Regulations Quid Pro Quo

An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.

Proposed § 106.2

Sexual Harassment

2020 Regulations Hostile Environment

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.

Section 106.30

Sex-Based Harassment

2024 Regulations Hostile Environment

Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).

Proposed § 106.2

Education Programs and Activities

2020 Regulations

- Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution
- Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Does not include incidents outside of the United States

Section § 106.44(a)

Education Programs and Activities

2024 Regulations

- Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution
- Conduct that is subject to the recipient's disciplinary authority
- "A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States."
- Proposed § 106.11

Informal Resolutions

- Available anytime prior to a determination of a policy violation
- Discretion to offer it lies with the institution
- Must be voluntary
- Not allowed when the Respondent is an employee and the Complainant is a student
- No Formal Complaint is required
- May offer whenever an institution receives information about conduct that may constitute sex discrimination or a complaint of sex discrimination is made



2020 Live Hearings

2020 Regulations
Section 106.45

2024 Live Hearings or Individual Hearings

2024 Proposed Regulations
Proposed § 106.46



2020 Live Hearings

Decision Maker **cannot** be the
Investigator or Title IX Coordinator

2024 Live Hearings or Individual Hearings

Decision Maker **can** be the
investigator or Title IX Coordinator

Duty and Notice

“A recipient must take **prompt and effective action** to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.”

Proposed § 106.44(a)

Currently, a recipient that has actual knowledge of sexual harassment must respond only in a manner that is not **deliberately indifferent**.

Duty and Notice

Who Must Report?

1. Employee with authority to institute corrective measures – Report to TIXC (Current regulations)
2. Employee who has responsibility for administrative leadership, teaching, or advising
If student complainant – Report to TIXC
If employee complainant – Report to TIXC or Provide Contact Information
3. All other employees – Report to TIXC or Provide Contact Information

Does not apply to Confidential Resources

Proposed § 106.44(b)

How to Prepare

Assemble a Team

Policy Review and Revision Teams

Who will be most affected by changes?

- **Title IX**
- **Student Life**
- **Human Resources**
- **Faculty**
- **Public Safety**
- **Legal**
- **Counseling**
- **Campus Leadership**

- **Review your current policies and procedures (Students and Employees)**
- **What works well and what doesn't**
- **Changes in State law**
- **Delete unnecessary language**
- **Opportunity for one large revision**

Review Current Policy

Identify Forms and Templates

- **Notification of Report**
- **Summary of Supportive Measures/Intake Meeting**
- **Email Templates**
- **Formal Complaint**
- **Notice of Allegations**
- **Notice of Interview**
- **Notice of Investigative Report or Evidence**
- **Written Determination**
- **Appeal Decision**

How will your institution handle the re-definition of “sex”?

**OCR Notice of Interpretation
June 22, 2021**

OCR will interpret Title IX in the same manner as the Supreme Court interpreted Title VII in *Bostock v Clayton County* to include sexual orientation and gender identity

**The State of Tennessee v. United States
Department of Education**

**Preliminary Injunction for 20 States -
Alabama, Alaska, Arizona, Arkansas, Georgia,
Idaho, Indiana, Kansas, Kentucky, Louisiana,
Mississippi, Missouri, Montana, Nebraska,
Ohio, Oklahoma, Tennessee, South Carolina,
South Dakota, and West Virginia**

How will your institution handle the re-definition of “sex”?

Relent

Retreat

Resist

Questions?

Session 6
That's a Wrap...Almost
Other Important Topics for Consideration

Complaint Dismissals

Dismissal of the Formal Complaint

- **Mandatory dismissal:**
 - **Conduct, even if proved, would not be Title IX sexual harassment**
 - **Conduct did not occur within education program or activity**
 - **Conduct did not occur against a person in the United States**
- **Permissive dismissal:**
 - **The Complainant's wishes in writing**
 - **The Respondent is no longer enrolled or employed**
 - **Circumstances preventing the gathering of sufficient evidence**

Dismissals

- **Must notify the parties in writing simultaneously**
- **State the reasons for the dismissal**
- **Can apply to whole complaint or specific allegations**
- **May refer to other departments or policies as appropriate**
- **Must allow for appeals of the dismissal**

Title IX Case and Investigative Process



Title IX Case and Investigative Process



Informal Resolutions

- **Not a requirement for institutions**
- **Current rules require a Formal Complaint**
- **Must be voluntary by both the Complainant and the Respondent**
- **Not allowed if an employee is the Respondent**
- **Written Notice**
 - **Allegations**
 - **Informal Resolution Process**
 - **Cannot bring the same charges again**
 - **Can withdraw prior to agreement**
- **Written Consent**

- **Informal Resolution Facilitator can be the TIXC**
- **Facilitator must receive training**
- **Cannot have a conflict of interest or bias**
- **Institutions have great discretion on the process**
- **Include the procedures in the Title IX policy**
- **If Informal Resolution fails, continue with the formal grievance process**

Informal Resolution

Record Keeping

Record Keeping

- **Keep everything for at least 7 years**
- **Remember to save handwritten notes and physical evidence**
- **Treat everything as potentially discoverable**
- **Emails, Teams chats, Live Hearing recordings**
- **How do you handle phone calls?**
- **If there isn't a record of it, it will be hard to prove it ever happened**

Pregnancy Accommodations

Pregnancy Accommodations

- **No discrimination based on “pregnancy, childbirth, termination of pregnancy, or recovery therefrom.”**
- **Treat the same as a temporary disability or physical condition**
- **Applies to pregnancy and related conditions not parenting**
- **Lactation space is required under existing laws and in the proposed Title IX regulations**
- **Think through some Code of Conduct issues**

Religious Exemptions

Religious Exemptions

20 U.S.C. 1681(a)(3) and 34 CFR 106.12

This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization

Religious Exemptions

34 CFR 106.12

- **Religious Exemption (claimed not applied for)**
- **Institutions can submit a request for assurance from OCR**
- **Institution must be controlled by a religious organization**
- **Cannot apply to the entirety of Title IX – individual sections or provisions**
- **Must explain how its religious beliefs conflict with the specific section or provision**

Religious Exemptions

34 CFR 106.12 – Controlled by a Religious Organization

- Institution is a school or department of divinity, or
- Faculty, students, or employees are required to be members of the controlling religious organization, or
- Explicit statements in official publications regarding being part of a religious organization, or
- Institution has a doctrinal statement that community members must affirm and adhere to, or
- Institutional mission statement that is based on religious beliefs, or
- Any other evidence to show the institution is controlled by a religious organization

Religious Exemptions Preparation

Official, published statements about religious tenets or affiliation

Student, Staff, and Faculty doctrinal statement affirmations

Student, Staff, and Faculty community covenant affirmations

Explicit statements on biblical, human sexuality

Admissions and hiring criteria includes support for the school's religious beliefs

Policies, handbooks (students and employees), training material should denote the school's religious beliefs

Habits of Grace and Care for the Soul

“And the peace of God, which surpasses all understanding, will guard your hearts and your minds in Christ Jesus. Finally, brothers, whatever is true, whatever is honorable, whatever is just, whatever is pure, whatever is lovely, whatever is commendable, if there is any excellence, if there is anything worthy of praise, think about these things. What you have learned and received and heard and seen in me—practice these things, and the God of peace will be with you.

Philippians 4:7-9

Habits of Grace and Care for the Soul

- **Sympathy v empathy**
 - **Having compassion v sharing the pain**
 - **We are not designed to inhabit every tragic or traumatic experience that come to us**
- **Protect your heart, mind, and soul**
- **Don't become cynical or jaded – hearts of compassion**
- **Maintain independence and impartiality**
- **Habits of grace or spiritual disciplines**
- **Remember your team – choosing the right cases, training**
- **Prayer**

“Empathy is dangerous because if the highest form of love is standing in someone else’s shoes, no one is left standing in a place of objective truth... Sympathy allows someone to stand on the shore, on the solid ground of objective truth where real help might be found.”

Rosaria Butterfield

Five Lies of our Anti-Christian Age

“And it is my prayer that your love may abound more and more, with knowledge and all discernment, so that you may approve what is excellent, and so be pure and blameless for the day of Christ, filled with the fruit of righteousness that comes through Jesus Christ, to the glory and praise of God.”

Philippians 1:9-11

Questions?

Christian Title IX Consortium

<https://forms.office.com/r/dyEUXvGpRx>



- 60+ members
- 40+ Christian colleges and universities
- Started January 2023
- Four meetings so far, including
 - - Greg Baylor – ADF
 - - Rosaria Butterfield
- Encouragement, Training, Prayer

Helpful Links

Moody Bible Institute - Title IX

<https://www.moody.edu/titleix/>

Alliance Defending Freedom

<https://adflegal.org>

Summary of Major Changes in the Proposed Regulations

<https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>

Department of Education's Summary of Religious Exemptions from Title IX

<https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html>

