



## New Title IX Regulations and Implications for Colleges and Universities

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- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- Use the chat function to ask general questions and hypotheticals
- There are a variety of stakeholders listening, so please be courteous and keep that in mind as you submit your questions
- Yes, we will send out a copy of the slides after this presentation to all who registered their email address when signing in.

# Agenda



## What they said – what they did – what's next?

- Big Picture
- Conduct/Jurisdiction
- Sexual Harassment Definitions – Employees, Students, etc.
- Hearing Requirements
- Safe Harbor
- What's Next – A Roundtable
- Preview of Next Week's Board Member Webinar

# Resource Link



We've Compiled It All For You

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## **The Big Picture: Josh Nolan and Melissa Carleton**

# How Do I Read This Thing?



Good Question – We are still reading and unpacking too!

- Start with the SUNY comparison chart – <https://system.suny.edu/sci/tix2020/>
- Open the regulations document and go to the final 30-40 pages to read the actual, final regulations
- Go to the table of contents and review commentary on each individual regulation to get more detail
- The preamble gives a sense of overall approach
- We will reference page numbers in the unofficial version on ED's website

# Themes



## It's the Same, But Different

- We are still reading and unpacking
- Thematic focus unchanged – definitional changes, supportive measures, informal resolutions, and more formal procedural protections
- Closer alignment of regulatory enforcement and deliberate indifferent standard
- There are multiple ambiguities, so remember your institutional ethic of care



## Jurisdictional Issues: Josh Nolan and Joe Hall



# Jurisdiction Issues



## Jurisdiction is...

- ***When does your jurisdiction kick in?***
- ***How do the Regs define “educational program or activity?”***
  - Discussion of new definition of “educational program or activity”
  - Application to common campus scenarios
- ***What about my trusty Code of Conduct?***
  - When can/should I use non-Title IX-related disciplinary procedures?

# Jurisdictional Issues



## Actual Knowledge

- a recipient with actual knowledge of sexual harassment in an **educational 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 only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

# Jurisdictional Issues



## Definition of “educational program or activity”

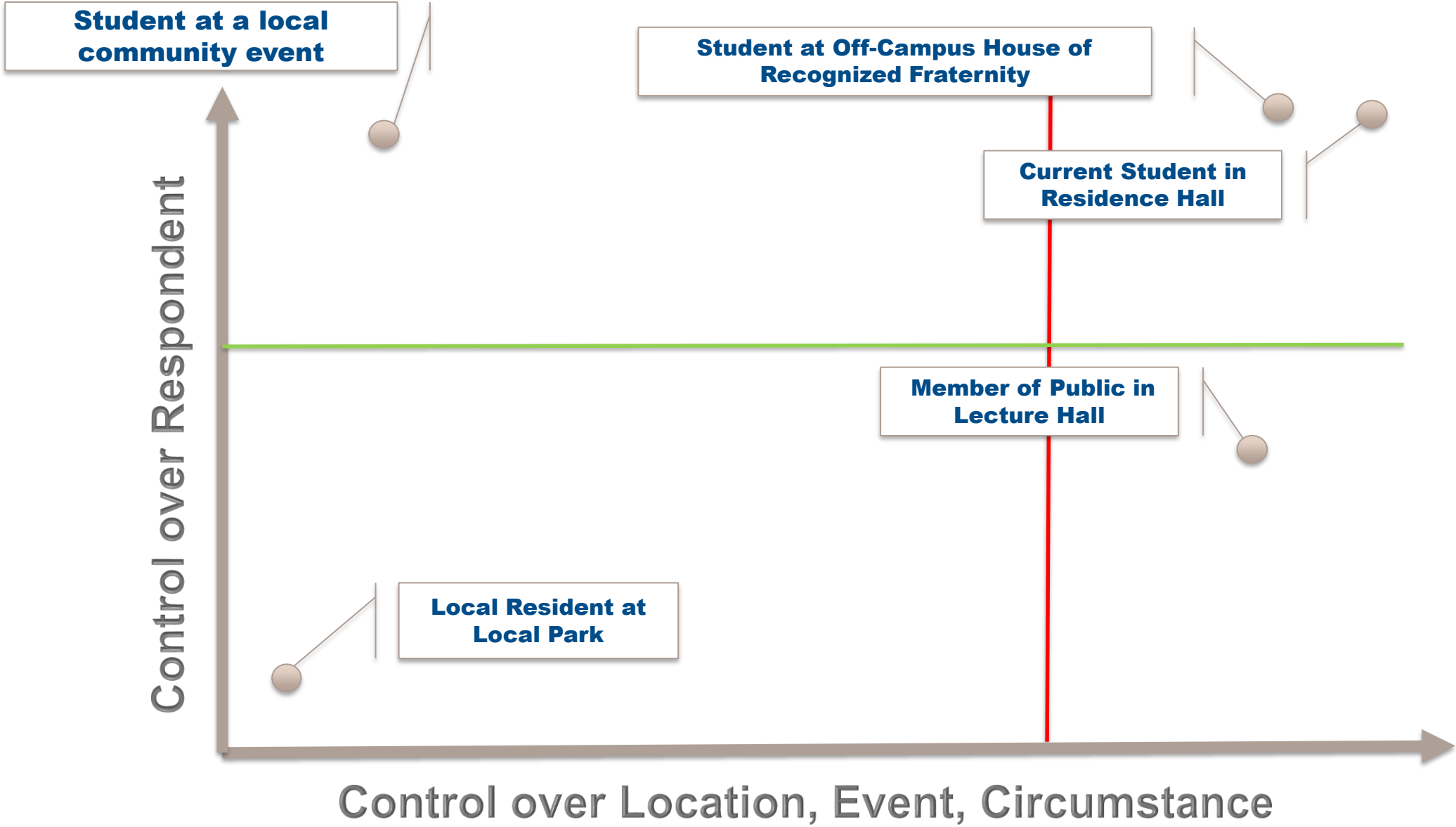
- “education program or activity” includes *locations, events, or circumstances* over which the recipient exercised *substantial control* over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

# Jurisdictional Issues



## But First: Definition of “educational program or activity”

- *locations, events, or circumstances* over which the recipient exercised *substantial control*
- over both the respondent and the context in which the sexual harassment occurs, and
- also includes *any building owned or controlled* by a student organization that is officially recognized by a postsecondary institution.



# Further Considerations



“includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs”

- How should we interpret language such as *circumstances* and *substantial control*?
- Think beyond campus locations, facilities, and College events (Public lectures, sporting events, community service projects)
- Substantial control over Respondent(s) (e.g., high school students or community members)
- Institutional response measures (Persona Non Grata)

# When can you use the Code?



The Code can be use when:

***Dismissal of a formal complaint***—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; ***such a dismissal does not preclude action under another provision of the recipient’s code of conduct.***

# When can you use the Code?

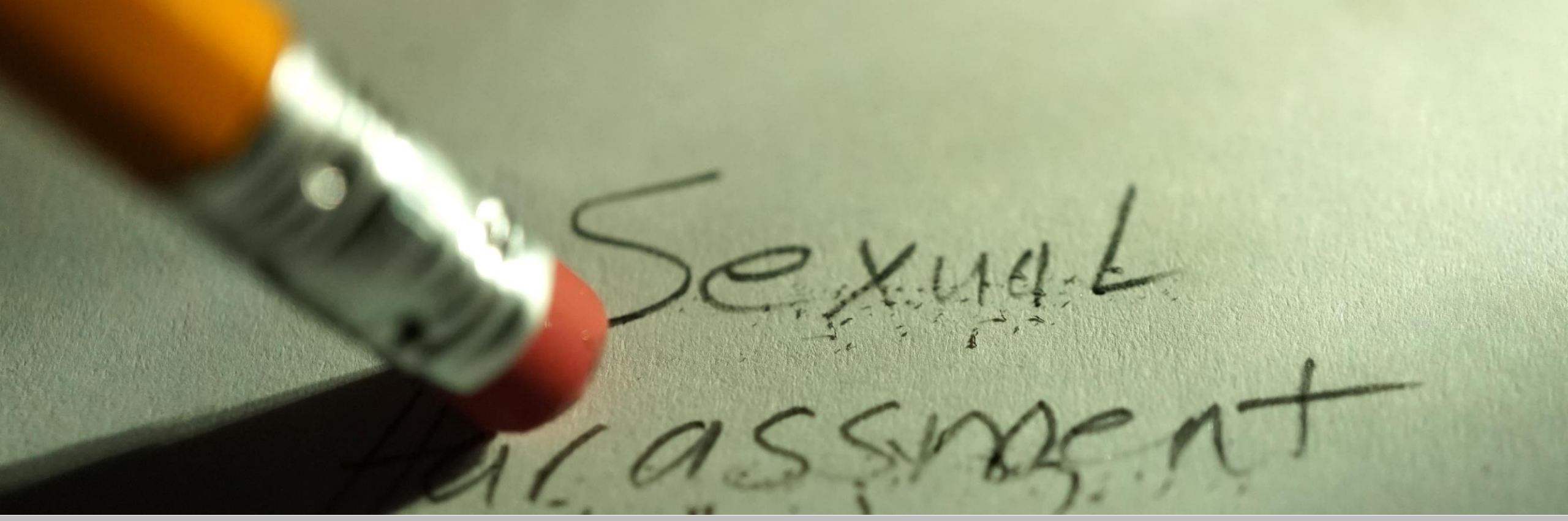


But if you charge under the Code, is it retaliation?

Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.

§ 106.71 (definition of retaliation)





**Sexual Harassment Definitions:  
Jessica Galanos and Melissa Carleton**

# New Definition of Sexual Harassment



*We'll parse this out in a minute*

- *Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following:
  - *[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;
  - *[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; or
  - *[Clery crimes]* Sexual assault, dating violence, domestic violence, or stalking [Clery regulatory definition cites omitted]

# Final Regs Apply to Employees



*Title VII ≠ Title IX, but...*

- In the beginning...
  - Commentary notes that “severe *or* pervasive” definition (Title VII) shouldn’t apply because elementary, secondary, and postsecondary schools are unlike the adult workplace. (Pages 43-44)
    - *Davis* – 5<sup>th</sup> grade students
    - Instead - “severe, pervasive, *and* objectively offensive”

# Final Regs Apply to Employees



*Title VII ≠ Title IX, but...*

- In the beginning...
  - “The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments, whereas both the Supreme Court and Congress have noted the unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments.” (Page 45).

# Final Regs Apply to Employees



*Title VII ≠ Title IX, but...*

- Flash forward...
  - “The Department appreciates support for its final regulations, which apply to employees.” (Page 1510)
  - No “inherent conflict” between Title VII and Title IX (Page 1511)
  - Due Process protections found in § 106.45 (live hearing, advisors, cross-examination) apply to employees, not just students

# Final Regs Apply to Employees



*Title VII ≠ Title IX, but...*

- Flash forward...
  - Recipients that are subject to both Title VII and Title IX must comply with both
  - “Deliberate Indifference” standard applies (Page 1515)
    - Because Title IX recipients are “in the business of education”
    - “Marketplace of ideas”

# Final Regs Apply to Employees



*Title VII ≠ Title IX, but...*

- Conflicts noted by Commenters:
  - Formal complaint requirement
  - Notice requirement
  - Deliberate Indifference Standard
  - Definition of Sexual Harassment
  - Live hearing

# Final Regs Apply to Employees



*Title VII ≠ Title IX, but...*

- Department Response:
  - Nothing in Title VII forbids the *additional* process now required (Page 1524) - Thus, no direct conflict with Title VII
  - But what about existing processes in collective bargaining agreements and employment contracts?
    - Ex: Post-termination grievance procedure
    - Renegotiate or refuse federal funds



# Final Regs Apply to Employees



*Title VII ≠ Title IX, but...*

- Miscellaneous:
  - Employee v. Independent Contractor – depends on state law (Page 1533)
  - Jurisdictional limitations apply (participating in or attempting to participate in an education program or activity at the time of the formal complaint) (Page 1534)
  - No informal resolution option for cases involving alleged sexual harassment of a student by an employee
    - “...the power dynamic and differential between an employee and a student may cause the student to feel coerced into resolving the allegations.” (Page 1536)

# Final Regs Apply to Employees



## *What about that Quid Pro Quo thing?*

- Now: “...conduct on the basis of sex [where] an employee of the recipient [conditions] the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct” - 34 CFR 106.30
  - Patterned in part after language in 2001 Guidance
  - Power differentials that do not involve an *employee respondent* would not qualify as “quid pro quo”

# Clery Crimes = Sexual Harassment



## *What about that Quid Pro Quo thing?*

- Sexual assault and dating violence are now “per se” sexual harassment
- Recognition that stalking does not always relate to sex and therefore do not always fall under Title IX
  - Definition appears to limit to “conduct on the basis of sex”
  - See footnote 772 – “Stalking that does not constitute sexual harassment because it is not ‘on the basis of sex’ may be prohibited and addressed under a recipient’s non-Title IX codes of conduct”
  - No similar recognition for non-sex-based domestic violence?



**Pre-Hearing & Hearing Requirements:  
Devin Jacobs, Erin Butcher, and Jeff Knight**

# Pre-Hearing Requirements: Access to Evidence



## “Equal Opportunity”

- Must provide both parties **ANY** evidence obtained during the investigation related to the allegations, “including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility...”
  - Regulations require you send evidence to party and advisor
- Both parties must be afforded at least 10 days to submit a written response on any of the evidence
- Recipient must make all evidence reviewed by the parties available at a hearing to allow references and cross-examination

# Pre-Hearing Requirements: Access to Evidence



## Practical Notes

- New regulations on access to evidence would allow both parties to review medical or psychiatry records only if the party who the records belonged to consented to the recipient gathering the records in the first place (Pg. 1016)
- The discussion on the review of evidence before the investigative report is drafted talks about how the review allows the parties to discuss what is relevant rather than investigator making unilateral decision. This may not be a reality until after review of what the investigator deemed relevant in the investigative report (Pg. 1015)

# Pre-Hearing Requirements: Investigative Report



## “Fairly Summarizes Relevant Evidence”

- Investigator must consider the responses to all of the evidence before completing the investigative report.
  - Investigator note: document your review of these responses and how it impacted the investigative report
- Then create an investigative report that fairly summarizes relevant evidence.
- Must be distributed to all parties **and** advisors for their review and response at least 10 days prior to a hearing or other determination
  - Discussion suggests that parties can request for report not be sent to advisor
  - Parties may also argue to decision-maker about relevance of evidence not included in report

# Live Cross-Examination



## The New Regulations Consider Live Cross-Examination Key to the Decision-Making Process

- Decision-maker cannot be the investigator, biased or have a conflict of interest
- Decision-maker must be able to determine whether each question is relevant before the questioned person answers the question and be able to explain why relevant or not
- No direct questioning by parties, must be through advisor
- Advisors of choice and recipient's requirement to provide
- Sexual history of Complainant
- Must video, audio record or provide a transcript of hearing (can be virtual)
- Standard of proof consistent across policies and presumption of no violation



# Live Cross-Examination (con't)



*Ok, but how do I know what is relevant?*

- The decision-maker must
  - (1) determine whether the question is relevant **before** the questioned individual responds, and
  - (2) explain to the party's advisor asking cross-examination questions any decision to exclude

# Advisors



## *Advisor choice and requirement of recipients to provide if party does not have one at the hearing*

- Cross-examination is to be done by the party’s “advisor of choice and never by a party personally.”
- If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient’s choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
- An advisor of choice may be an attorney or a parent.

# Changes on Sexual History



*You absolutely can't ask that ... unless you can*

Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**

- its use is to prove that someone other than the respondent committed the conduct, OR
- it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

"The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be."

# Technology



*Help technology help you*

- “live at the hearing”
  - If requested by either party, cross-examination may occur with parties in separate rooms, with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.
  - And/or at the discretion of the recipient, can be virtual

# Standard of Proof



## *Consistency and presumption of no violation by Respondent*

- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
  - Must use same standard for formal Title IX complaints against both students and employees (including faculty) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, faculty conduct)
  - Must begin with a presumption of no violation by Respondent.



## Safe Harbor and Other Thoughts: Rob Kent

# Safe Harbor and Other Thoughts

## *Safe Harbors – CLOSED*

Cancellation of Safe Harbor provisions for:

1. Following formal complaint process, or;
2. In absence of formal complaint, if you provide effective support measures and give notice of ability to file formal complaint



# Safe Harbor and Other Thoughts: Retaliation



## *NEW – Definition of Retaliation*

Retaliation section added, 106.71

- Retaliation defined
- Participant confidentiality
- Filed through TIX grievance procedures
- Specific circumstances addressed:
  - First Amendment
  - False Reporting





**What's Next – A Roundtable**



Jessica Galanos



Joseph Hall



Rob Kent



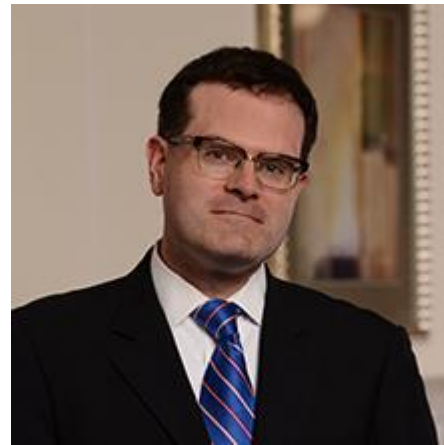
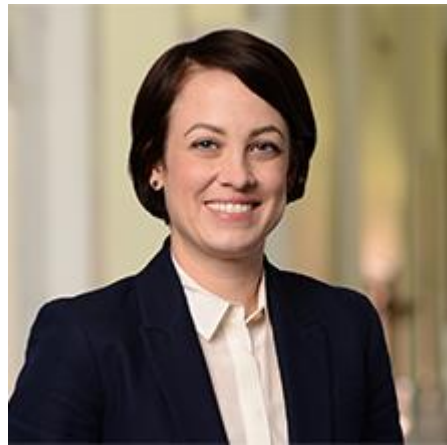
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## **Preview of Next Week's Board Member Webinar**

# Make your Board Members' Lives Easier



*Keep them informed. Involve them as appropriate.*

- Have you communicated to your community about the plan for change?
- Have you communicated to your Board about when they will be presented with a policy to approve (if that is necessary at your institution)?
- Does your Board have talking points if they are asked questions about the changes by alumni, donors, and community members?
- Are there questions you need help from your Board to answer?

# Upcoming Events



[www.bricker.com/events](http://www.bricker.com/events)

**May 13<sup>th</sup> – Wednesday – 12:00 EDT**

- K-12 version of this webinar

**May 14<sup>th</sup> – Thursday – 3:00 EDT**

- Overview of Title IX Final Regulations for Board Members
- This will be recorded, and the recording will be available on our website for a few weeks if your Board Members miss the live session.

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authored by  
our attorneys.**



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to 555888.**