



# 100 Days to Comply: Your Institution's Title IX Challenge



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# Disclaimers

*We can't help ourselves. We're lawyers.*

- We are not giving you legal advice
- Consult with competent 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 – public questions are part of the recording
- Yes, we will send out a copy of the slides and a link to the recording after this presentation to all who registered their email address when signing in.
- Feel free to share the slides and recording with your fellow Board members and others at your institution

# Agenda

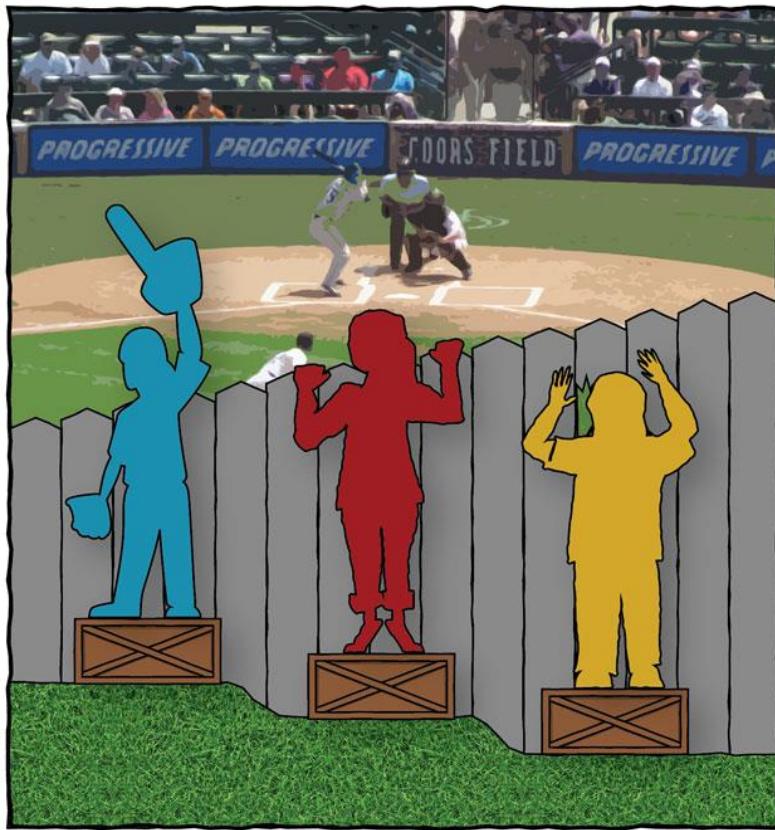
*What just happened and why – and what do you need to do about it?*

- Themes in the Final Regulations
- Key Areas Where Policy Changes Are Likely Needed
  - Understanding Concerns through the Eyes of Your Campus Community
  - Identifying Resources Needed
- What, as a Board member, do you need to be doing to fulfill your fiduciary duties and keep your campus on track?
- [www.bricker.com/titleix](http://www.bricker.com/titleix)

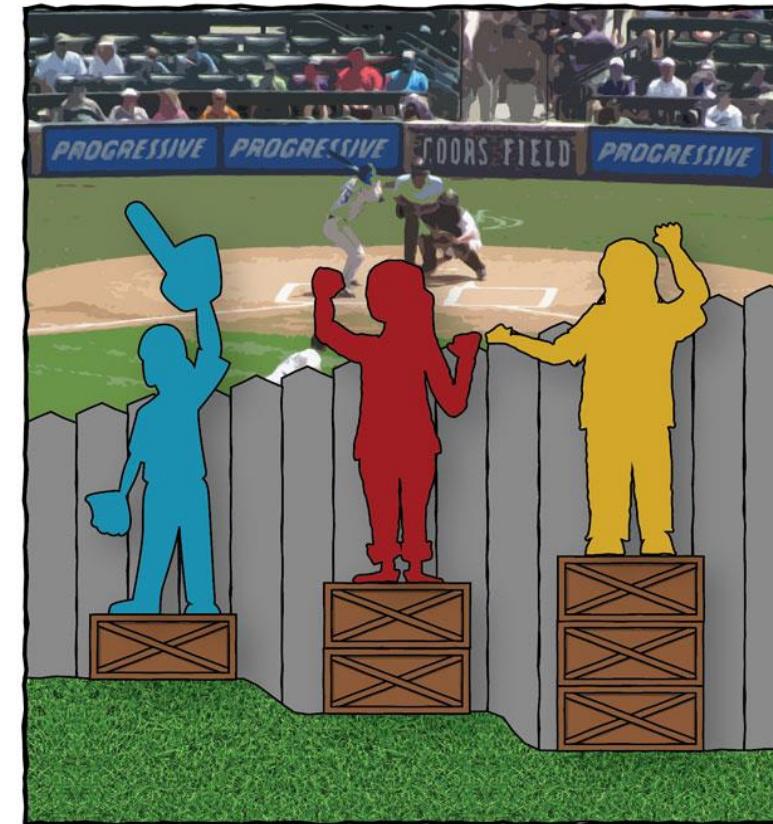
“No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....”

- 20 U.S.C. 1681(a)

Title IX is an *equity* statute – meant to make sure that our community members have equitable access to our programs and activities.



EQUALITY

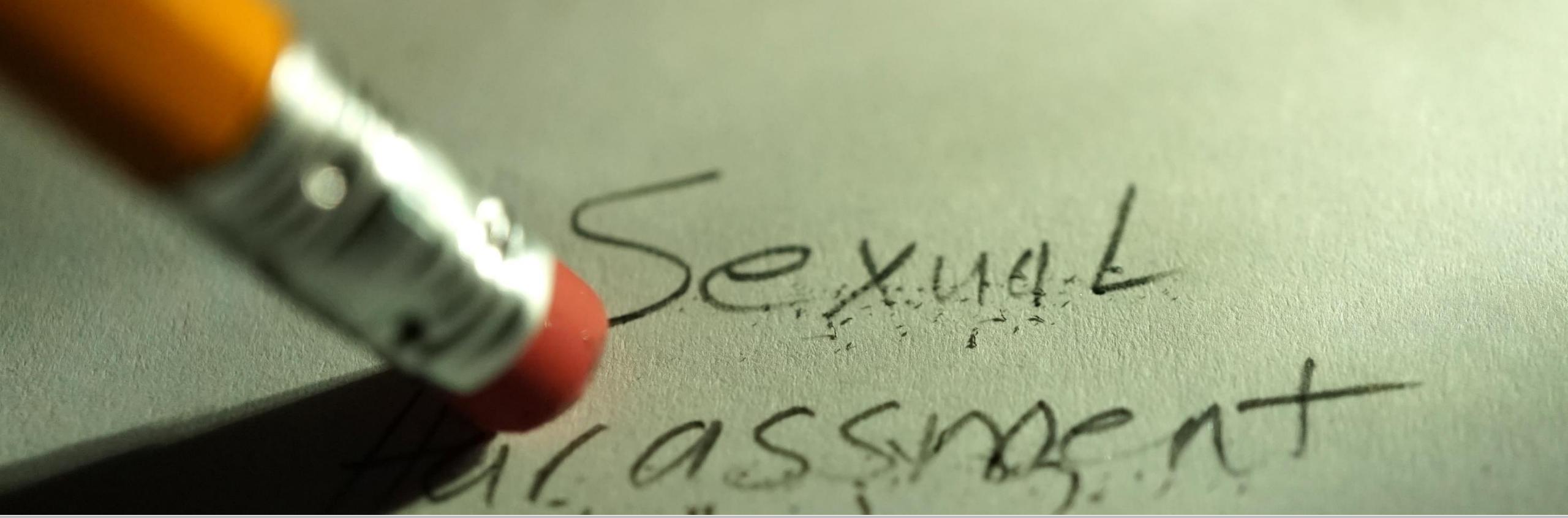


EQUITY

# Themes

## *Narrower Jurisdiction, More Process*

- More focus on the distinction between “sexual harassment” as it will now be defined and other code of conduct violations
- More emphasis on supportive measures and informal resolution options
- More process for formal resolutions – more investigative requirements, live hearings with cross-examination for both public and private institutions
- Closer alignment of regulatory enforcement and deliberate indifferent standard
- There are multiple ambiguities, so remember your institutional ethic of care



Sexual  
Harassment

## Sexual Harassment Definitions

# 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]

# Community Concerns

## *The Definition Has Narrowed*

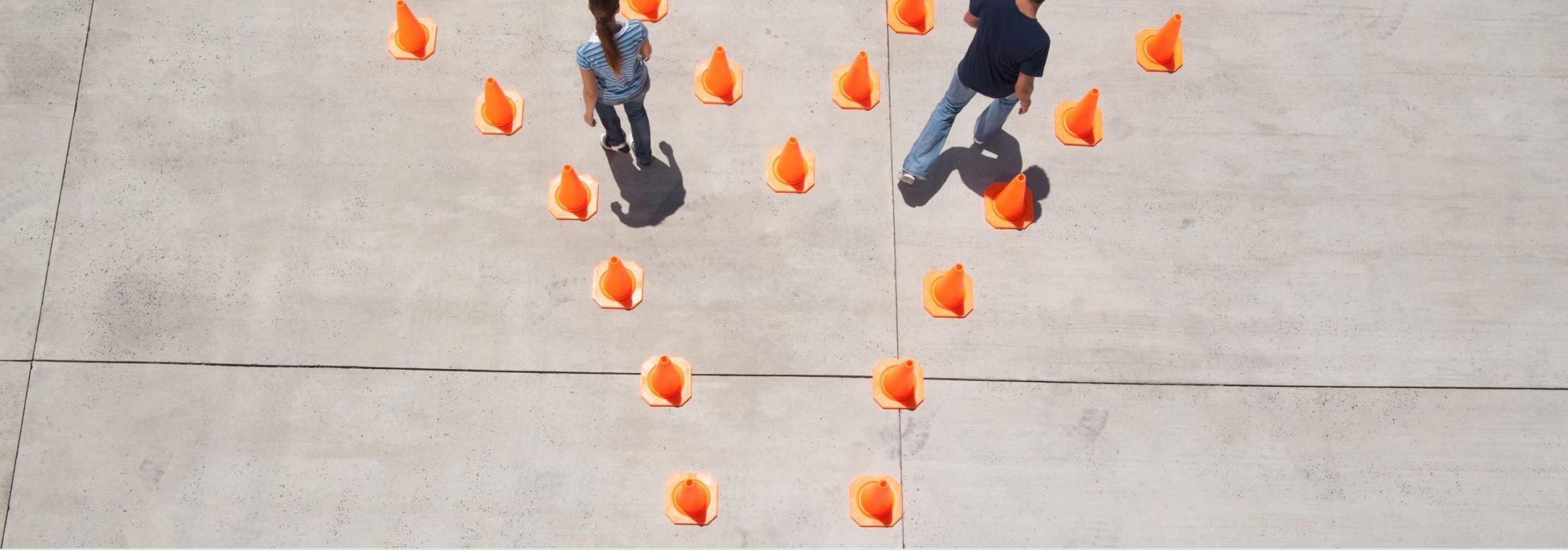
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- Quid Pro Quo no longer recognizes power differentials that do not involve employees
- Hostile environment definition is a higher bar than the Title VII definition used to protect employees, creating a mismatch
- The definition is important because if it doesn't qualify as "sexual harassment," you must dismiss the formal Title IX complaint

# Questions to Consider

*How will your campus handle the following?*

- Will you continue to address conduct that previously fell under your Title IX process and, if so, using what process?
  - Student conduct
  - HR
  - Law enforcement
- How will your institution make decisions about when something does or does not meet the definition of “sexual harassment”?



## Notice and Jurisdictional Issues



# Jurisdictional Issues

## Key Concepts

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- When and where will the Title IX Policy Apply? Will it apply to off-campus and on-campus conduct?
- New Regs identify individuals who can receive reports that put the IHE on notice.
- When can we use the student code of conduct to address conduct?



# Jurisdictional Issues

## When Does an Institution have 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.
- Title IX Coordinator(s) and persons with “authority to institute corrective measures” on behalf of the university.



# 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.

Control over Respondent

Student at a local community event

Student at Off-Campus House of Recognized Fraternity

Student at Off-Campus Apartment

Current Student in Residence Hall

Member of Public in Lecture Hall

Local Resident at Local Park

Control over Location, Event, Circumstance



# When can you use the Code?

The Code can be used 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)

# Community Concerns

*What about all that other conduct?*

- Will we continue to address conduct that no longer falls under our Title IX jurisdiction, and if so, how?
- When can/should we use non-Title IX-related disciplinary procedures?
  - If this decision denies someone access to more robust procedural rights, what then?
- Are our other offices (HR, Student Conduct) prepared to handle these cases?

# Questions to Consider

*How will your campus handle the following?*

- Should we use a similarly robust process for “Title IX-adjacent” cases?
- How can we determine whether we have substantial control over the locations, events, and circumstances where sexual harassment may occur?



## Pre-Hearing & Hearing Requirements

# Access to Evidence

## *“Equal Opportunity”*

### File Review

Parties and advisors review all evidence collected for 10 days and provide written response

### Report Review

Investigative report is provided to parties (not necessarily advisor) for 10 days for review and written response

### Hearing

Hearing occurs before a decision-maker that is not the Coordinator or the investigator

# Hearings & 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
- No cross-examination: no statements ("no-hearsay rule")
- Must video, audio record or provide a transcript of hearing (can be virtual)
- Standard of proof consistent across policies and presumption of no violation



# 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.
  - Beware of unauthorized practice of law in a given state
  - An advisor of choice may be an attorney or a parent.



# Managing No-Shows

If they don't show up, their statement is out

- What if a party or witness gave a statement during the investigation but is not participating in cross-examination?
  - “Must not rely on any statement of that party or witness in reaching a determination”

The commentary broadens the idea of a “statement” to include things like text messages, emails (SANE exams?)

# 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.

# Community Concerns

## *How will this affect me?*

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- Will adding or changing a hearing process make complainants less likely to come forward or participate?
- Will it make things more fair for the respondents?
- Will it be better at finding the truth and appropriately addressing misconduct?
- Who will be able to function in the role as a decision-maker?

# Questions to Consider

*How will your campus handle the following?*

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- Will your decision-maker will be internal or external?
- Will your hearings be in-person or through technology?
- What standard of proof will we use?
- How will we provide advisors when necessary?
- How can you provide assurance to all parties that the process is consistent with your institution's ethic of care?



## Retaliation

# 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



## Communicating with Stakeholders

# Engaging Stakeholders

*Support your Campus Administrators in Engagement*

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- Identify your stakeholders and cast a wide net.
- Identify your Title IX team and they key players.
- Consider various touchpoints across your institution.

# Policy Logistics

*Enact your policy properly*

- Consider how policies and procedures are updated at your institution and how trainings are going to be implemented.
  - Will summer board meetings be necessary?
  - COVID considerations will continue.

I can't  
do it

How do we get there?

# Questions to Consider

## *Does your institution have a plan?*

- Has your institution communicated to your community about the plan to address the new regulations?
- Has your Board received information from your Title IX Coordinator about when a new policy is expected to be put into place (including whether your Board will need to approve it)?
- Does your Board have talking points if they are asked questions about the changes by alumni, donors, and campus community members?
- Does your Title IX team need resources or help from your Board to prepare policies and procedures?



# What You Can Do

*Support your Title IX Team!*

- Support your Title IX Coordinator with resources and understanding
- Defer to administrators when official statements are sought, unless otherwise authorized by your Board
- Watch the news for information about legal challenges to the regulations – but assume that you will need to comply by the deadline

# Final Thoughts

## *Your Institutional Ethic of Care is Key*

- This is a significant lift (at 636,609 words, the preamble and the final regs are 17,206 times longer than the Title IX statute)
- The process is complicated and could increase litigation risk – seeking competent legal counsel is important
- We need a process that is equitable, transparent, and compliant – we must also be transparent in adopting new policies and processes.
- ***Focus on compliance*** before 8-14 (policy update, training, staffing, etc.); the process can be modified to fit institutional culture



# Upcoming Title IX Related Events

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

## *Fundamentals Training for Decision-Makers in Live Cross-Examination Hearings Under the New Title IX Regulations*

This Zoom training will cover the necessary training for decision-makers according to the new Title IX regulations, as well as provide practice making relevancy determinations. This training will satisfy annual Clery Act training requirements and new Title IX training requirements. ***Registration will be limited. Institutional discounts available. (Friday, June 12 and Monday, June 15)***

Questions?



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