



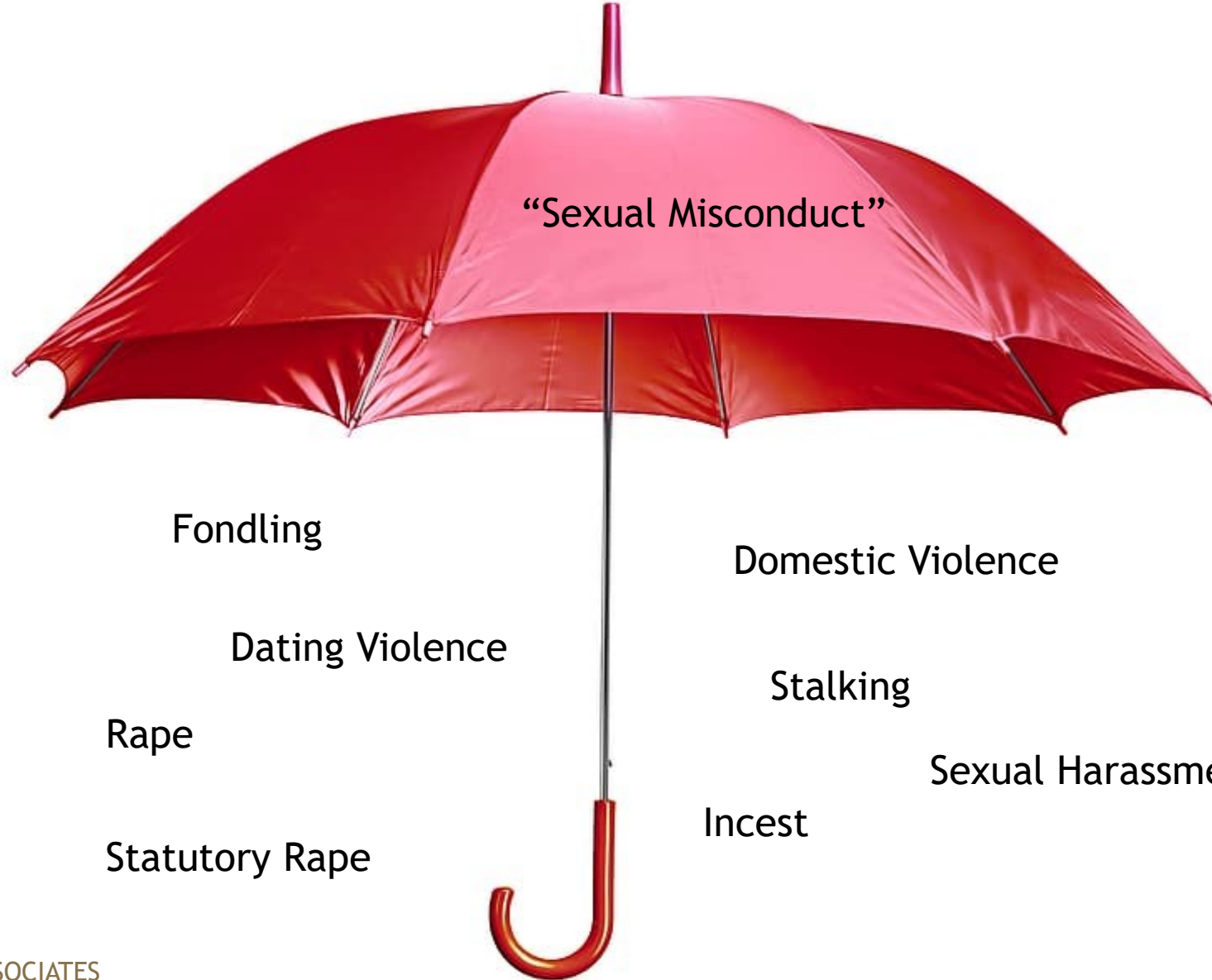
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**Overview of the Title IX Regulations,
Intersections with the Clery Act, Texas State Law and
Practical Implications**

Texas Tech University System-Senior Leadership Session

Presented by Adrienne Murray

February 23, 2022



“Sexual Misconduct”

Fondling

Domestic Violence

Dating Violence

Stalking

Rape

Sexual Harassment

Statutory Rape

Incest

Agenda



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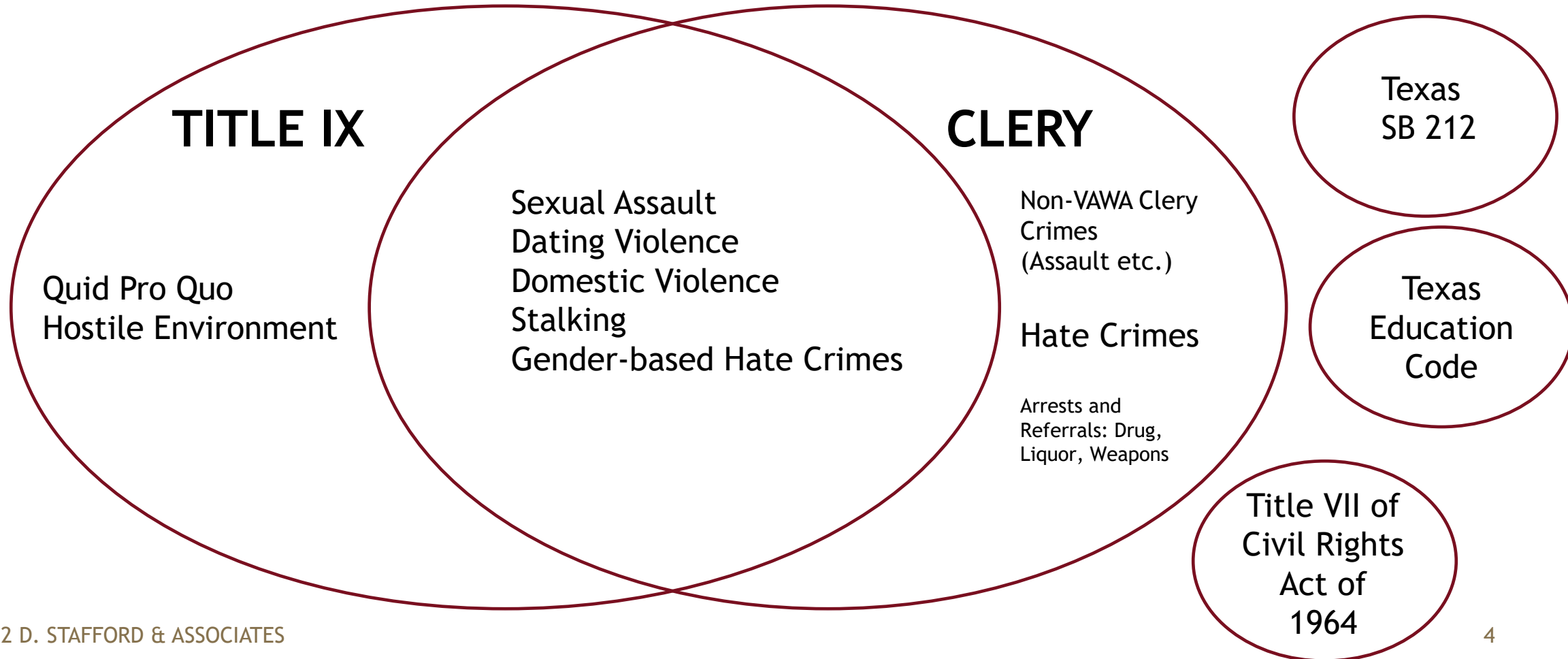
- Title IX of the Education Amendments of 1972 codified at 20 U.S.C. §§ 1681–1688
- The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), codified at 20 U.S.C. § 1092 (f), with implementing regulations in the U.S. Code of Federal Regulations at 34 C.F.R. 668.46.
- Texas Education Code § 51.251 (3)
- Texas Education Code § 51.253
- Administrative Regulations 19 Texas Admin. Code, Chapter 3
- Texas SB 212



Intersectional Implications



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Two Federal Laws- Two Sets of Requirements



Title IX is an anti-discrimination law

The Clery Act is a consumer reporting law



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Key Requirements of the Clery Act



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Collect, Classify, and Count Crime Reports/Statistics



Public Disclosures-Timely Warning Notices and Emergency Notifications



Publish Annual Security Report




Submit Crime Statistics to the Department


Key Requirements (cont.)



 Provide Educational Programs and Campaigns on Dating/Domestic Violence, Sexual Assault, & Stalking

 Have Procedures for Institutional Disciplinary Action for DV/DV/SA/S

 If you have a campus police or security department: Publish Daily Crime Log

 If you have residential facilities: Fire Log, Fire Safety Report, Missing Persons Procedures

Clery Act-Three Part Test



1. Was the crime reported to a Campus Security Authority?
2. Is the crime a Clery Act crime?
3. Did the crime occur on or within the institution's reportable Clery geography?

Clery Act: Employee Reporting Considerations



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Clery Act--CSAs

- Campus police department
- Those responsible for security
- Individuals to whom crimes should be reported
- “Officials with significant responsibility for student and campus activities”
- Local law enforcement



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Clery Reportable Crime Categories



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- Murder/Non-negligent Manslaughter*
- Negligent Manslaughter*
- Sex Assault*
 - Rape
 - Fondling
 - Incest
 - Statutory Rape)
- Robbery*
- Aggravated Assault*
- Burglary*
- Motor Vehicle Theft*
- Arson*
- Arrests and Disciplinary Referrals for:
 - Liquor
 - Drugs
 - Weapons
- Domestic Violence
- Dating Violence
- Stalking
- Hate Crimes for *, plus
 - Larceny-Theft
 - Simple Assault
 - Intimidation
 - Destruction/Damage/Vandalism of Property

TWN vs. EN



	Timely Warning Notices (TWN)	Emergency Notification (EN)
Legal Standard:	Potential ongoing or serious threat	Immediate threat to health and safety
Circumstances:	Clery-reportable crimes that have been reported (occurred in past)	Clery-reportable crimes as well as other types of emergencies (happening right now or about to happen)
Audience:	Community-wide	Can send to a segment of the community, if appropriate
When Issued:	As soon as pertinent information is available	Upon confirmation of emergency (when possible)
Follow-Up:	Not Required	Required

Title IX of the Education Amendment of 1972

“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 educational program or activity receiving federal financial assistance.”

Title IX Regs Give Flexibility for Employee Reporting



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Title IX Coordinator

Officials with Authority to Institute Corrective Measures on Behalf of the Recipient

***Other Employees as Designated by the Institution (pulls in requirements of Texas State law)**

Who is an Employee?

Tex. Educ. Code § 51.251 (3): Employee does not include a student enrolled at the institution.

Administrative Regulations 19 Tex. Adm. Code, Chapter 3

- Rule §3.3 (b): Course and Scope of Employment – means an employee performing duties in the furtherance of the institution's interests.
- Rule §3.5 (a)(2): The employee is required to report an incident regardless of when or where the incident occurred.

Texas Education Code (SB212)



- Sec. 51.252. REPORTING REQUIRED FOR CERTAIN INCIDENTS. (a) An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institution's Title IX coordinator or deputy Title IX coordinator.
- (b) Except as provided by Subsection (c), the report must include all information concerning the incident known to the reporting person that is relevant to the investigation and, if applicable, redress of the incident, including whether an alleged victim has expressed a desire for confidentiality in reporting the incident.
- (c) An employee of a postsecondary educational institution designated by the institution as a person with whom students may speak confidentially concerning sexual harassment, sexual assault, dating violence, or stalking or who receives information regarding such an incident under circumstances that render the employee's communications confidential or privileged under other law shall, in making a report under this section, state only the type of incident reported and may not include any information that would violate a student's expectation of privacy. This subsection does not affect the employee's duty to report an incident under any other law.

State Reporting Requirements

Texas Education Code SB 212



What should be reported?

Anything reported to you on or after 1-1-2020, regardless of when or where it occurred and falls under:

- Sexual harassment
- Sexual assault
- Dating violence
- Stalking

Committed by or against a student enrolled or an individual employed by the institution at the time of the incident



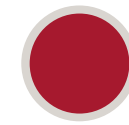
Who is required to report?

ALL System employees who become aware of an incident

- Exclusions include the victim themselves, public awareness events, duplicate reports previously received by the institution

During the course or scope of an employee's job

Employees must provide their name when reporting (no anonymous reporting)



Who to report incidents to?

Reports *should be made* to the Title IX Coordinator **promptly** after becoming aware. Institutions should make all options on how to report available to employees.

Administrative Reporting Requirements

Reporting Requirements in the Tex. Edu. Code §51.253

- The institution must designate confidential resources for students
- Employees must inform Title IX if the victim requests confidentiality



• Title IX Coordinator Report Requirement

• President Report Requirement to the Board of Trustees

• President reports annually to the TX Higher Education Coordinating Board

Report Number	Date Received	Alleged Conduct Reported by Employees Under § 51.252	Investigation Status	Disciplinary Status
2019XXXXXX	01.18.2020	Sexual Assault	Administrative closure; resource referral	No disciplinary action; Not applicable.
2019XXXXXX	01.22.2020	Dating Violence	Formal Investigation, protective measures; resource referral	Final Result: Student Disciplinary Suspension
2019XXXXXX	02.15.2020	Sexual Harassment; Stalking	Informal resolution completed; protective measures.	No disciplinary action; Not applicable.
2019XXXXXX	02.21.2020	Stalking	Insufficient complaint information.	No disciplinary action; Not applicable.
2019XXXXXX	03.12.2020	Sexual Harassment	Administrative closure	No disciplinary action; Not applicable.
2019XXXXXX	03.22.2020	Stalking	Administrative closure; resource referral	Alleged not College-affiliated
2020-CRXXX	03.30.2020	Stalking	Confidential employee reporting	No disciplinary action; Not applicable.

Above report submitted on 4-1-2020 reflected 79 reports

Failure to Report or False Reporting

Required consequences

- Conduct an investigation through the school's faculty/staff disciplinary process to determine whether the employee committed the offense of failure to report.
- If it is determined that the employee did in fact commit this offense, **termination is required.**

Possible additional consequences under State law

- **Class B misdemeanor** if a person who “is required to make a report under Section 51.252 and **knowingly fails** to make the report” or “with the intent to harm or deceive, knowingly makes a report . . . that is **false.**”
 - Punishable by a maximum of 180 days in jail and/or a maximum fine of \$2,000
- **Class A misdemeanor** if the offense is escalated “if it is shown on the trial of the offense that the actor intended to conceal the incident.”
 - Punishable by up to one year in jail and/or a maximum fine of \$4,000

2020 Title IX Regulations (Discrimination on the Basis of Sex)

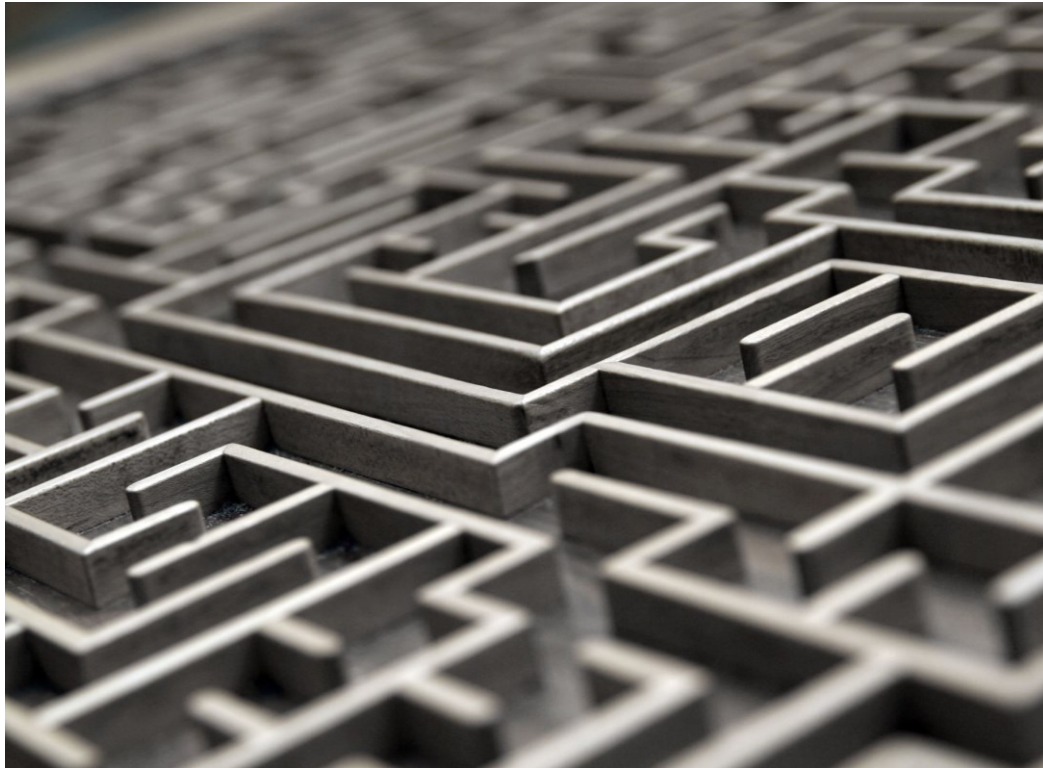


The goal of the Title IX Regulations is to require Title IV funded institutions to “promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures; follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation, or a Title IX Coordinator decides on the recipient's behalf that an investigation is necessary; and provide remedies to victims of sexual harassment.” *(Summary of the Major Provisions of This Regulatory Action; Federal Register)*

*On February 17, 2022, ED sent their draft of the proposed amendments to OIRA. Next step-NPRM (which at this stage, is internal only.) It will then be published and the public will be able to comment. (See OCR blog post, February 18, 2022 entitled “An Update on the Rulemaking Process for Title IX”)



Major Changes Under Federal Regulations

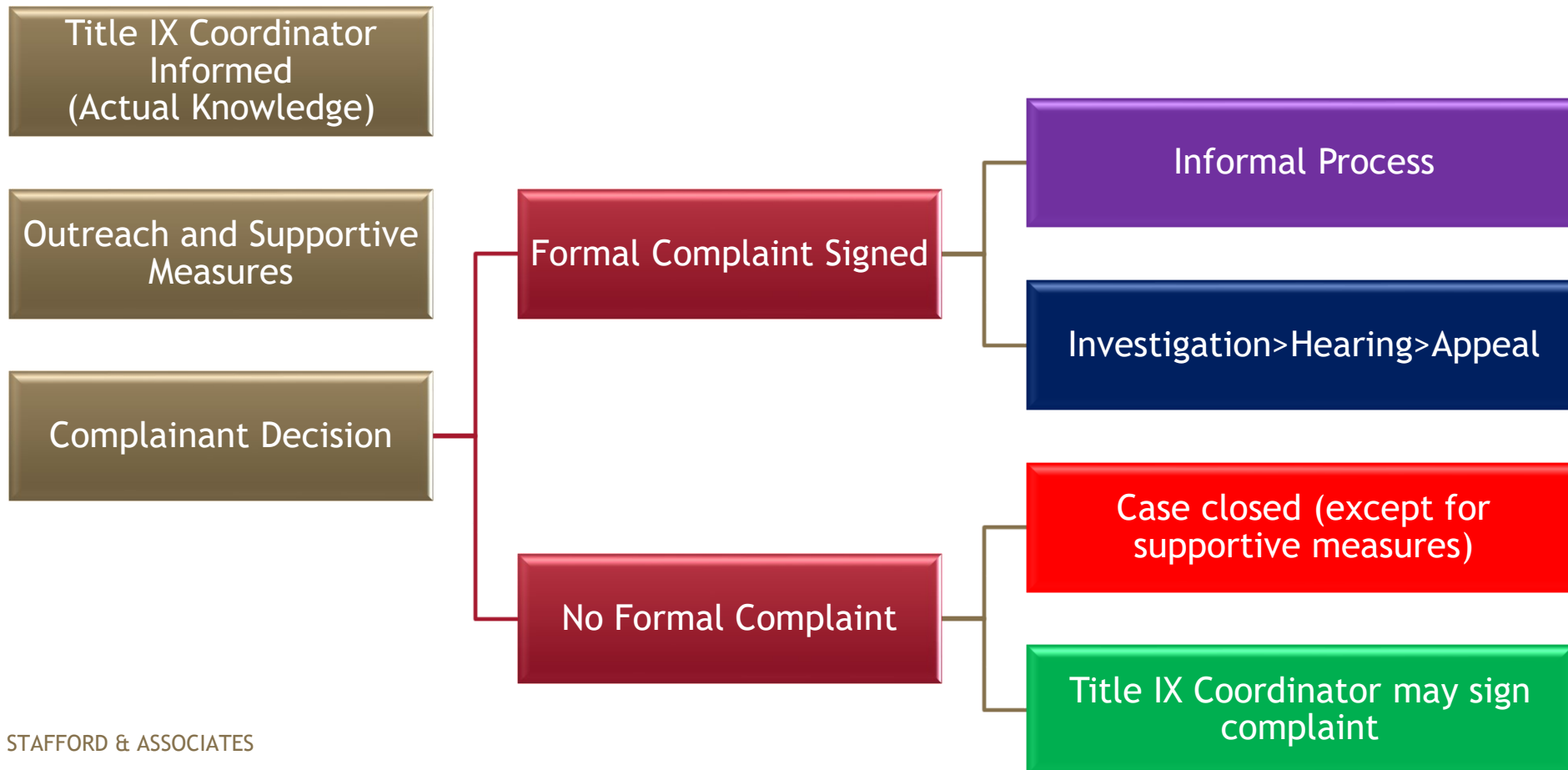


- Jurisdiction
- Definitions
- Responsible employees
- Duty to respond
- Report vs signed formal complaints
- Role of advisor of choice
- Supportive measures
- Separation of duties
- Live hearings
- Notice requirements

Title IX Case Flowchart



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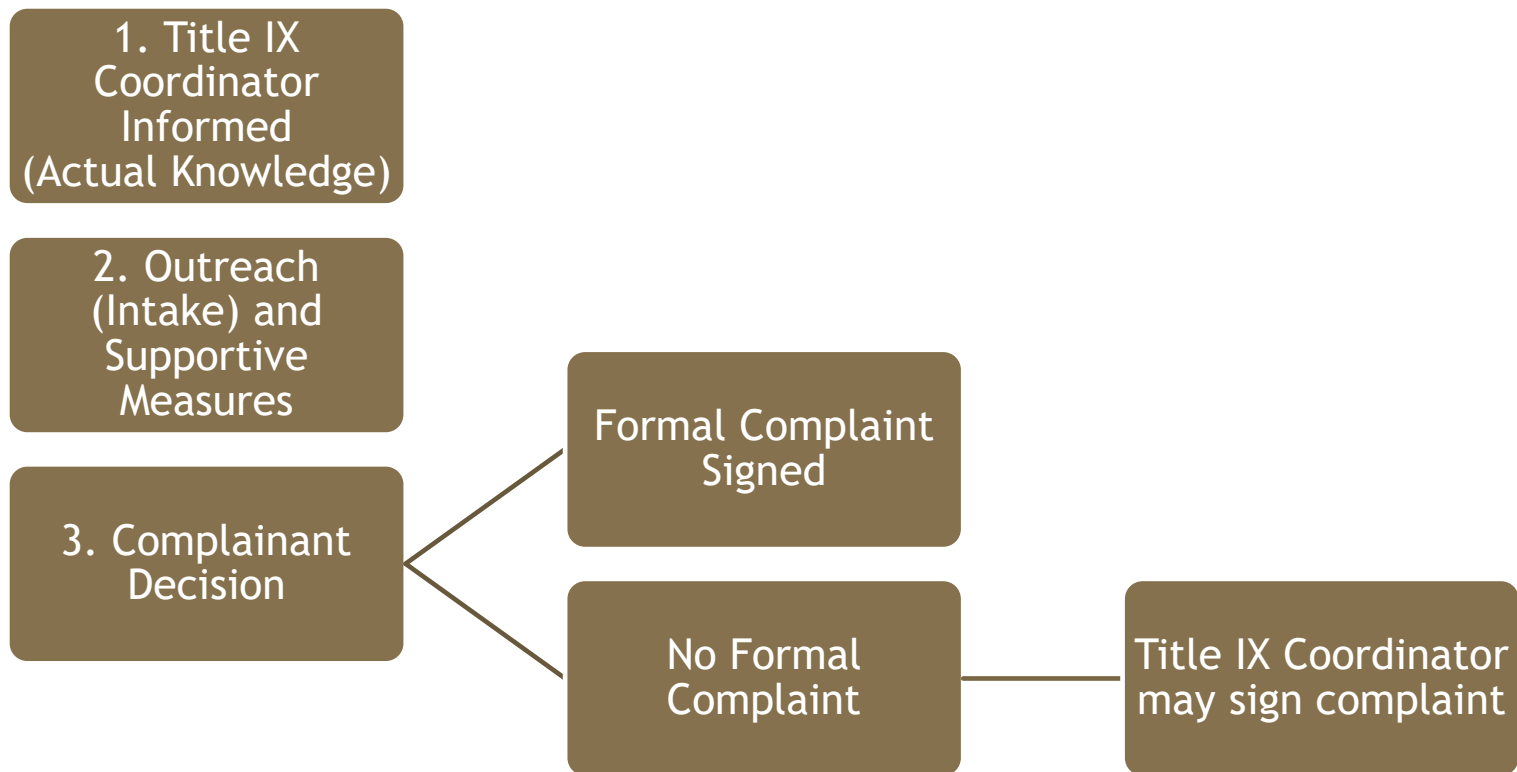
“Report” versus “Signed Formal Complaint”



What is the difference between a report and a signed formal complaint?



Title IX Case Flowchart



Supportive Measures



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- Change in class
- Change in housing
- Increased security
- Dual no contact directives
- Academic accommodations
- Withdrawal without penalty
- Modified activities or campus access (as long as not punitive to respondent)

Written Explanation of Student or Employee's Rights-Clery Act Requirement



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(b)(11)(vii) “When a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section. . . .”

Written Explanation of Rights and Options



- 1. The importance of preserving evidence that may assist in proving that the alleged criminal offense occurred or may be helpful in obtaining a protection order**
 - Not required but recommended: Where to obtain forensic exams, contact info, does not require police report and can have exam now, decide later
- 2. How and to whom the alleged offense should be reported**
 - List any person or organization that can assist the victim
 - Recommended: Also include community organizations

Written Explanation of Rights and Options



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3. **Notification of the victim's option to**
 - Notify proper law enforcement authorities, including on-campus and local police;
 - Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
 - Decline to notify such authorities
4. **The rights of victims and the institution's responsibilities for**
 - Orders of protection;
 - "No contact" orders;
 - Restraining orders; or
 - Similar lawful orders issued by a criminal, civil, tribal, or institutional

Written Explanation of Rights and Options



5. To students AND employees about existing:

- Counseling
- Health
- Mental Health
- Victim Advocacy
- Legal Assistance
- Visa and Immigration Assistance
- Student Financial Aid
- Other services available for victims

6. Options for, available assistance in, and how to request changes to (if requested and reasonably available)

- Academic, Living, Transportation, Working



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Written Explanation of Rights and Options



7. Confidentiality

- Publicly available recordkeeping has no personally identifying information about the victim. (not required for respondent but best practice in most cases)
- Accommodations and protective measures are confidential (to the extent they can be without impairing the ability to provide them)

8. Disciplinary Procedures

- An explanation of the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as required by paragraph (k)



Determining Jurisdiction to Proceed



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1. Offense Meets
Definition

2. Jurisdiction of
Persons

3. Jurisdiction of
Program of Activity

1. Definition of Offense-Sexual Harassment under Title IX



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

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

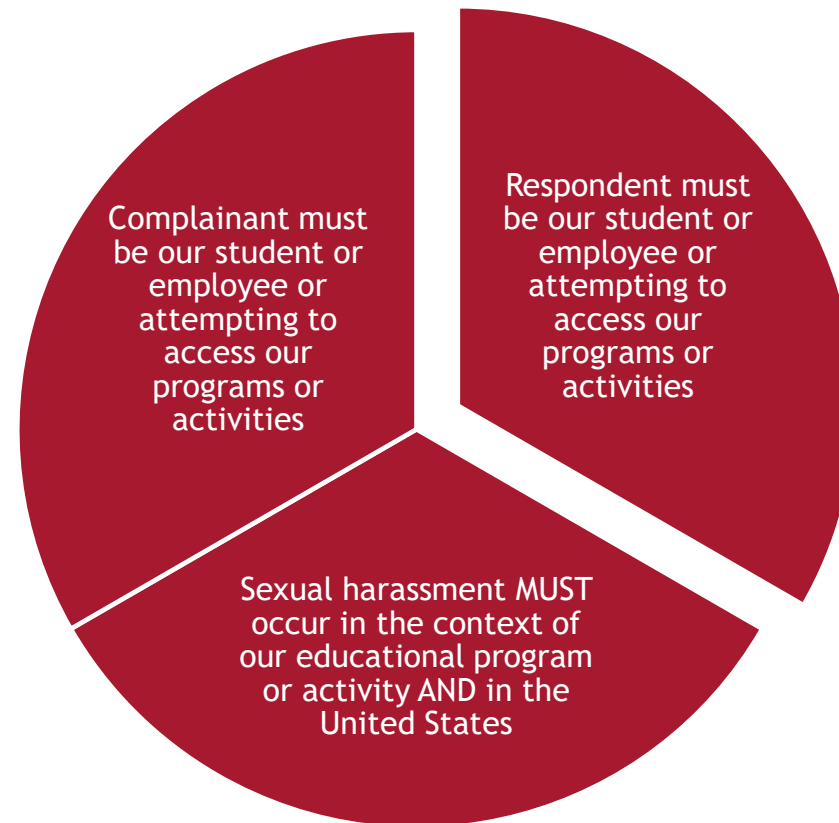
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;

3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

2-3. Definition of Persons and Programs/Activities



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Employees must have same process



- Not just for students anymore
- Expectation that recipients handle any formal complaint that occurs through education program or activity in the United States through the Title IX compliant grievance process

Dismissal of Formal Complaints



Must Dismiss

Behavior does not constitute sexual harassment
Did not occur in educational program or activity, not in the United States



May Dismiss

Complainant withdraws formal complaint
Respondent no longer enrolled/employed
Insufficient evidence



Notification and appeal

Dismissed-You Cannot Policy Shop



- If dismissed because the complainant doesn't want to proceed, it is STILL a Title IX complaint and cannot be remanded to a different policy or procedure.
- If dismissed because it did not rise to the level of a sexual harassment as defined by Title IX, the complaint may be referred to another policy/procedure.
 - Student Conduct
 - HR-Title VII
 - Other school specific?



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Determine Emergency Removal



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Individualized safety and risk analysis



Immediate threat to physical harm



Notice and opportunity to challenge

Proceeding with “Multiples”- Consolidation of Complaints



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Multiple
Respondents

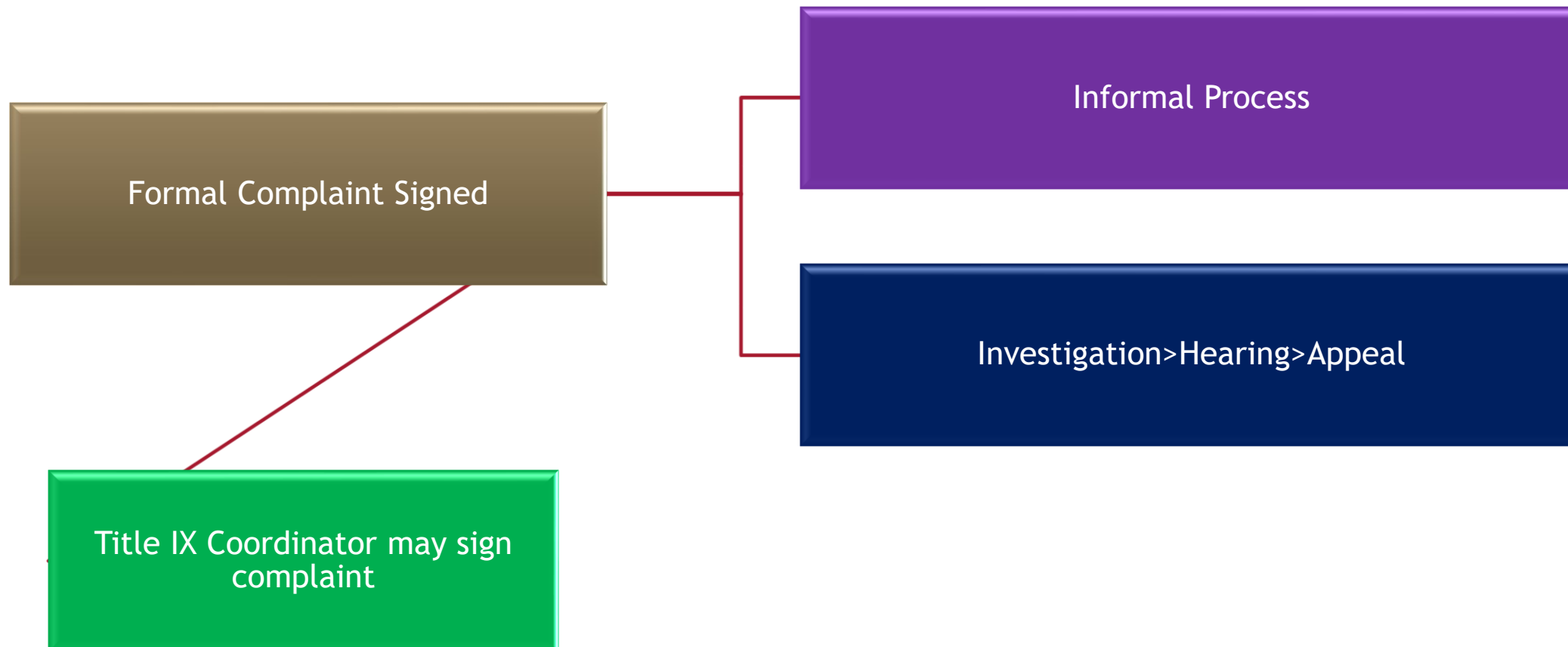
More than one
complaint against
one or more
respondents

One party against
another party

Title IX Case Flowchart



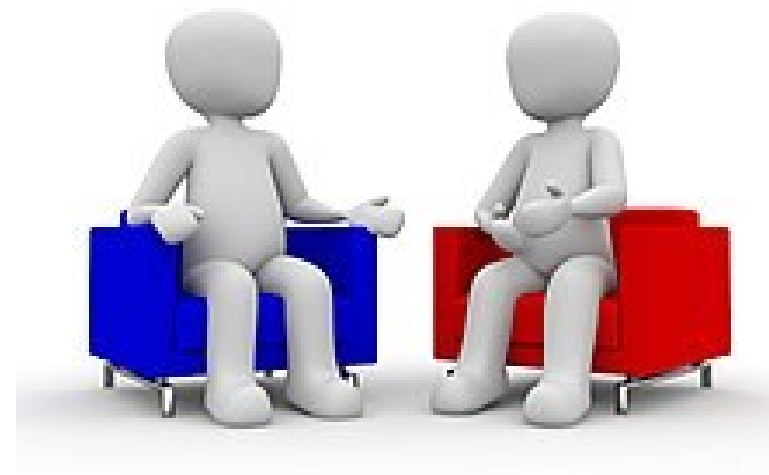
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Informal Resolution



1. School must determine that informal resolution is the appropriate means to resolve
2. Both parties must agree
3. Cannot resolve employee on student complaints in this way (must go formal)
4. Either party can stop at any time prior to written agreement
5. Parties who have proceeded to formal process can change their minds and shift back to informal any time prior to conclusion of hearing



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Notice Requirements



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Grievance
process

Sufficient details
and sufficient
time to prepare

Identities of the
parties, alleged
conduct

Date and
location of
incident

Presumed not
responsible

Advisor of choice

False statements

Updates as
needed

Other:
Accommodations
Retaliation
Police too!

Investigations and Evidence Gathering



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- Burden of proof
- Witnesses and facts
- “Gag orders”
- Advisor
- Notice
- Inspect evidence
- Investigative report

Evidentiary Standard



Clear and Convincing

- Substantially more likely than not to have occurred
- High probability that a particular fact is true
- Higher than preponderance, but not as high as “beyond a reasonable doubt”

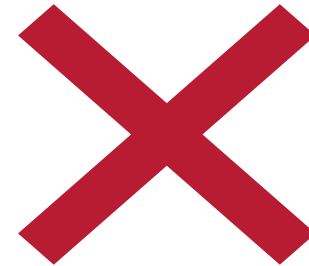
Preponderance of the Evidence

- More likely than not
- 50% and a feather

Hearings



Live hearing



Cross-examination

Live Hearing



- Required element for all post-secondary grievance procedures
- “Single investigator” now prohibited
- In person or virtual
- Must be recorded or transcribed, with recording or transcript available to parties for inspection and review

Cross-Examination



Advisor

Relevancy

Participation

Decision-Maker's Written Determination



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- Decision-maker(s) must issue written determination that
 - Identifies allegations
 - Describes procedural steps
 - Includes findings of fact
 - Includes conclusions applying facts to code of conduct
 - Includes rationale for conclusion regarding each allegation
 - Describes appeal procedures



Appeals



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MUST have

- Procedure...
- New evidence...
- Conflict or bias...
that impacted outcome

Additional grounds
permitted

Appeal decision-
maker must have
had no other role

Must be done in a
reasonably prompt
time frame

Other Challenges / Considerations...



- Privacy versus Confidentiality;
- Retaliation;
- #METOO complaints;
- Safety (Including Open Carry);
- Intersection of BIT and Title IX;
- Employee wellness with Accepting Disclosures;
- Self-Care for Title IX Personnel (and Police);
and
- Spirit of the law versus letter of the law....





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Are you fulfilling your Employee Reporting Requirements under State Law?

Are you fulfilling all Federal training requirements for students and employees?

Are you conducting required training for Title IX Personnel?

Is your Title IX function staffed and funded appropriately?

Is there collaboration between the Clery compliance function and the Title IX function to ensure requirements of both laws are being met?

Is your Clery compliance function staffed and funded properly?

Are all VAWA (Clery) requirements being met in your Title IX process and all Title IX pieces met in your ASR?

