Title IX at Cedar Cliff Local Schools

2020 Regulations Refresher, Team Training, and New Regs Preview

with **Beverly Meyer** **August 7, 2024**

Bricker Graydon

Beverly Meyer

bmeyer@brickergraydon.com

937.224.1849

Bricker Graydon

Disclaimers

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

- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- Feel free to ask questions

© 2024 Bricker Graydon LLP

Today's Agenda

- General Title IX Refresher
- Serving as Title IX Coordinator
- Grievance Procedure
- Informal Resolution
- Serving as Investigator
- Serving as Decision-Maker
- Report Writing
- Preview of the (Currently) Enjoined 2024 Title IX Regulations

Additional information available at:

Title IX Resource Center at www.bricker.com/titleix

Find us on **Twitter** at **@BrickerEdLaw**

Bricker Graydon

Title IX Refresher

Sex Discrimination and Harassment

Title VII and Title IX

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…"

Sex Discrimination under Title IX

34 C.F.R. § 106.31(b)

- Treat one person **differently** from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service
- Provide **different** aid, benefits, or services, or provide aid, benefits, or services in a different manner
- Deny any person such aid, benefit, or service
- Subject any person to separate or **different** rules of behavior, sanctions, or other treatment

Sex Discrimination under Title IX

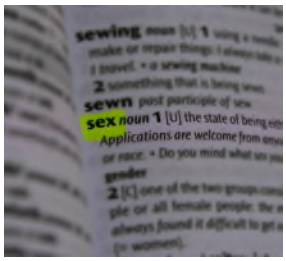
34 C.F.R. § 106.31(b)

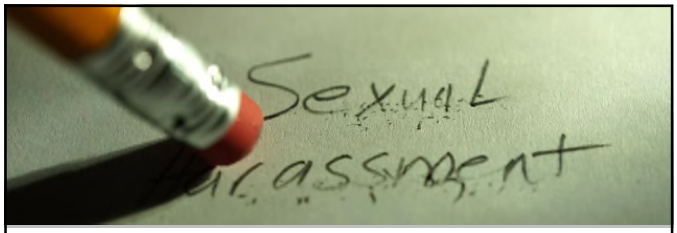
- Apply any rule concerning the domicile or residence of a student or applicant
- Aid or perpetuate discrimination against any person by **providing significant assistance to any agency, organization, or person which discriminates on the basis of sex** in providing any benefit or service to students or employees
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity

© 2024 Bricker Graydon LLP

What does "sex" mean?

- Biological sex
- Gender
- Sex stereotyping
- Sexual orientation**
- "Sex" as a verb





Sexual Harassment Definitions under the 2020 Title IX Regulations

When does a school have notice of a complaint?

Actual knowledge = notice of sexual harassment or allegations of sexual harassment to a recipient's:

- Title IX Coordinator, or
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or
- **To any employee of an elementary or secondary school**

34 C.F.R. § 106.30(a)

© 2024 Bricker Graydon LLP

The School's Obligation

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.

Definitions of Sexual Harassment under Title IX

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;
- **Clery crimes** – Sexual assault, dating violence, domestic violence, or stalking [Clery regulatory definition cites omitted]

TIX Regulations Apply to Employees

- Recipients that are subject to both Title VII (employment) and Title IX (education programs and activities, including employment) must comply with both
- "**Deliberate indifference**" standard applies
  - Because Title IX recipients are "in the business of education"
  - "Marketplace of ideas"

© 2024 Bricker Graydon LLP

Quid Pro Quo

- They do/won't do this, so…
- They will/won't put up with this, so…
- If you do/don't… I will/won't…

Quid Pro Quo

- May involve a power differential
- "Everyone knows that so-and-so…"
- Voluntary conduct between some may put observers in the position of believing that something sexual is necessary to get something favorable

Hostile Environment – What does this look like?

Be aware of things that are **not** elements:

- "Happened more than once"**
- "Parties weren't dating at the time"
- "Must involve two people of compatible sexual orientations"
- "Must occur on school property" ** (but remember state law restrictions)
- "Must have bad intent"

© 2024 Bricker Graydon LLP

Jurisdiction is Important

From 34 C.F.R. § 106.44:

"If the conduct alleged in the formal complaint would not constitute sexual harassment… 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."

Hypothetical #1

- Chuck and Mary Sue are bus drivers
- Chuck asks Mary Sue out on a date
- Mary Sue says no

Hypothetical #1 – continued

- Chuck brings flowers and asks again
- Mary Sue says no again

© 2024 Bricker Graydon LLP

Hypothetical #1 - continued

- Chuck asks Mary Sue out over the radio, and Mary Sue says no again
- The transportation supervisor warns them both informally not to discuss personal matters on the radio

Hypothetical #1 - continued

- Chuck corners Mary Sue in the break room before the morning route to ask her why she won't date him and won't let her leave until she says yes
- The transportation supervisor writes both of them up for starting their routes late

Hypothetical #2

- Mr. Smith is a well-loved teacher
- He is always commenting on how pretty his female students look
- Josie, a student, is his helper and comes to his room during fourth period class to grade papers
- Josie's mother brings you text messages that Mr. Smith has been sending to Josie (not sexual in nature)

© 2024 Bricker Graydon LLP

Hypothetical #3

- A student approaches a trusted teacher after class and mentions that she was at a party last Friday night
- The student tells the teacher she was kissing another student at the party and then he reached down her pants and touched her in a way that made her uncomfortable after she told him to stop
- The student asks the teacher not to tell anyone, saying she "doesn't want to make a big deal out of it"

Mandatory Reporting

- Child Abuse
- Felonies
- If a school employee engages in sexual conduct with a student, it must be reported
  - Even if the student is 18
- ODEW Conduct Reporting

Retaliation

Section added to 2020 Title IX regs

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

34 C.F.R. § 106.71

© 2024 Bricker Graydon LLP

Retaliation

- Report this **immediately** to the Title IX Coordinator
- Is there already a no-contact order and, if not, do you want one?
- Adverse action against an individual
- Abuse, violence, threats, and intimidation
- More than just someone expressing their opinion

District Obligations

- Update district policies
- Address complainant and provide supportive measures
- Mandatory reporting
- TIXC

- Formal grievance process:
  - Notice
  - Investigation
  - Report
  - Decision
  - Appeal
  - Informal Resolution

Employee Obligations

- Know who the District Title IX Coordinator is (their information will be posted on the school's website)
- Recognize a potential Title IX violation
- Report any potential Title IX violation to the Title IX Coordinator **the same day** you receive notice of it
- Review your district's anti-discrimination and anti-harassment policies as soon as they are updated

© 2024 Bricker Graydon LLP

How does an employee make a report on their own behalf?

- Promptly report incidents of unlawful discrimination and/or retaliation to your District's Title IX Coordinator so that the District may address the conduct
- Remember – retaliation is prohibited

How does an employee make a report on their own behalf?

- The Title IX Coordinator can describe for you the difference between formal and informal complaints, discuss the criminal reporting process, determine appropriate supportive measures, and identify other available resources
- You can then choose how you wish to proceed (i.e., a formal or informal resolution process)

How does an employee make a report on their own behalf?

- If you make a report, the Title IX Coordinator should discuss **supportive measures** with you
- May include counseling, extensions of deadlines, modifications of work or class schedules, escort services, mutual no-contact orders, changes in work locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures

© 2024 Bricker Graydon LLP

Key Takeaways for Staff

- Understand the definition of sexual harassment
- Know to whom you should report any complaints of sexual harassment (whether witnessed yourself, or reported to you by someone else)
- Recognize or know responsibility to report any acts of retaliation
- Understand supportive measures you may need to help implement

Key Takeaways for Administrators

- Everything listed in the previous slide for staff
- Follow notice and posting requirements for anti-discrimination, Title IX policies, and training materials

Training Requirements for the Title IX Team

- The definition of sexual harassment as defined in 34 C.F.R. § 106.30
- The scope of the district's education program or activities
- How to conduct an investigation
- How to consistently apply definitions used by the district with respect to consent (or the absence/negation of consent)
- The grievance process, including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially and avoid prejudgment of facts at issue, conflicts of interest, and bias

© 2024 Bricker Graydon LLP

Serving as Title IX Coordinator

Designate Title IX Coordinator
34 C.F.R. § 106.8(a)

- Designate at least one employee – Title IX Coordinator – to coordinate compliance
- Inform the following persons of the identity of the Title IX Coordinator:
  - Applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding CBAs or professional agreements with the recipient (i.e., the District)

What must notice include?
§106.8(a)

- Notice of the TIXC **must** include, for the employee or employees designated as the Title IX Coordinator:
  - The name or title
  - Office address
  - Electronic mail address
  - Telephone number

© 2024 Bricker Graydon LLP

Revise/Adopt TIX Grievance Procedures §106.8(c)

- Implementation Date for the "2020 regs" – August 14, 2020
- Engage relevant parties
  - HR, unions, key administrators (e.g., principals, SPED director)
- Identify the TIX Team
  - Investigators, decision-makers, appeal entities, informal resolution facilitators

Revise/Adopt TIX Grievance Procedures §106.8(c)

- Ensure that the Code of Conduct and Handbooks are reconciled with the new procedure
  - How will the District address conflicts arising between the grievance procedure and established staff/student disciplinary frameworks?
  - Does the Code of Conduct require an update?

Additional Steps

- Disseminate the policy, grievance procedure, and contact information for the TIX Coordinator (§106.8(b))
- May want to facilitate and/or schedule training for **all** District employees
- Will need to facilitate and/or schedule specific and targeted training for the TIX Team Members (§ 106.45(b)(1)(iii))

© 2024 Bricker Graydon LLP

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts

Section 106.45 **requires** that **Title IX Coordinators** (and investigators, decision-makers, appeals officers, and informal resolution officers)

- be free from **conflict of interest**, **bias**, and
- be trained **to serve impartially** and **without prejudging facts**

(85 Fed. Reg. 30053)

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(85 Fed. Reg. 30249-30257; 30496)

Impartiality

- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and judging is contrary to your neutral role] (85 Fed. Reg. 30323)

© 2024 Bricker Graydon LLP

Bias: Concerns raised in comments in preamble

- Neutrality of paid staff in Title IX positions
- Tweets and public comments
- Identifying as a feminist

How the Department Tried to Prevent Bias

No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker must not have been the same person who served as the Title IX Coordinator or investigator (85 Fed. Reg. 30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (85 Fed. Reg. 30370)
- The institution may consider external or internal investigator or decision-maker (85 Fed. Reg. 30370)

Conflict of Interest: Concerns Raised in Comments in Preamble

- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

© 2024 Bricker Graydon LLP

Training, Bias, and Past Professional Experience

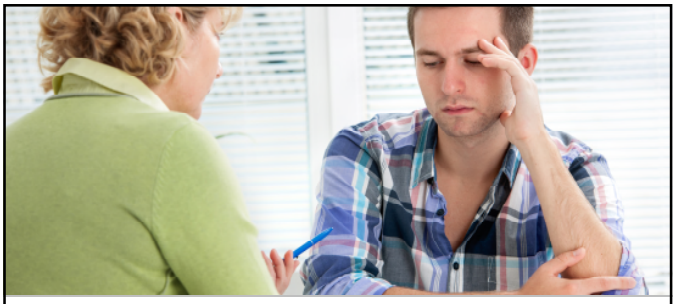
This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(85 Fed. Reg. 30252)

Avoiding Prejudgment of Facts at Issue

A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different



Process and Implementation Considerations

© 2024 Bricker Graydon LLP

"Actual Notice"
§ 106.30(a)

- TIX Coordinator responsible for receiving reports of conduct that **could** constitute sex discrimination or harassment
- Also responsible for receiving **formal** complaints that are signed by complainant
- Actual notice imputed not just when TIX Coordinator is notified, **but also** when someone with authority to correct the harassment is notified, **or** when **any** elementary/secondary school employee has knowledge

District's Response to Sexual Harassment
§ 106.44(a) and (b)

- **District must respond promptly in a manner that is not deliberately indifferent**
- District must treat complainants and respondents equitably by offering supportive measures
- In response to formal complaint, District must follow a grievance process

Specific Required Responses
§ 106.44(a)

- The TIX Coordinator has certain **specific required responses** to sexual harassment
  - Promptly contact complainant to discuss availability of supportive measures
  - Consider complainant's wishes with respect to supportive measures
  - Inform complainant of availability of supportive measures with or without the filing of a formal complaint
  - Explain to complainant the process for filing formal complaint

© 2024 Bricker Graydon LLP

Voluntary Informal Resolution
§ 106.45(b)(9)

- TIX Coordinator may need to facilitate scheduling and participation, if elected by complainant
- Informal resolution may occur, provided the district gives written notice to the parties of the allegations, and that they can withdraw at any time and resume formal grievance process
- **May not** be used to resolve employee-student harassment allegations
- Could include mediation, restorative justice practices

Jurisdictional Determinations
§ 106.45(b)(3)

- **Mandatory Dismissals**
  - Would not constitute sexual harassment even if proved
    - Quid pro quo, hostile environment, Clery crimes
  - Did not occur in the recipient's education program or activity
  - Did not occur against a person in the United States

Jurisdictional Determinations
§ 106.45(b)(3)

- **Discretionary Dismissals**
  - Complainant notifies TIX Coordinator in writing they would like to withdraw the formal complaint
  - Respondent is no longer enrolled or employed by the recipient
  - Specific circumstances prevent the recipient from gathering sufficient evidence

© 2024 Bricker Graydon LLP

Jurisdictional Determinations
§ 106.45(b)(3)

- Preamble: Permitting district to dismiss because they deem allegation meritless or frivolous without following grievance procedure would defeat the purpose of the regulations
- Must promptly send written notice of dismissal/reasons simultaneously to the parties
- Jurisdictional issues can arise at any time, even during the investigation

Notice of Allegations to Parties
§ 106.45(b)(2)

- Must include sufficient details known at the time, and with sufficient time to prepare a response before any initial interview
- Sufficient details include:
  - Identities of the parties
  - Conduct allegedly constituting sexual harassment
  - Date/location of alleged incident

Notice of Allegations to Parties
§ 106.45(b)(2)

- Needs to be supplemented if new allegations are to be included
- Must include statement that respondent is presumed not responsible for alleged conduct and that determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence

© 2024 Bricker Graydon LLP

Implement Supportive Measures
§ 106.30(a)

- TIX Coordinator "is responsible for coordinating effective implementation of supportive measures" to the parties
- **Preamble**: TIXC "must serve as the point of contact for the affected student to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements does not fall on the student receiving the supportive measures."

Supportive Measures
§ 106.30(a)

- **Elements**: Non-disciplinary, non-punitive, individualized services offered as appropriate, as reasonable available, without fee/charge to parties
- **Availability**? Before or after filing formal complaint, or where no formal complaint is filed
- **Purpose**:
  - Designed to restore or preserve equal access to recipient's program/activity
  - Protect safety of all parties or recipient's educational environment, or deter sexual harassment

Supportive Measures Defined within Regulations

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work/housing locations
- Leaves of absence
- Increased security/ monitoring of certain areas on campus

© 2024 Bricker Graydon LLP

Supportive Measures – More Requirements and Some Best Practices

- Must consider the complainant's wishes
- The school should follow up with both parties regarding the efficacy of the supportive measures
- Supportive measures may be appropriate to offer regardless of whether the allegation has been substantiated or fully investigated because it preserves access and deters harassment
- If OCR doesn't discuss supportive measures in non-TIX guidance, should we provide them for non-TIX cases?

Supportive Measures – Confidentiality & Recordkeeping

- Requirement to maintain as confidential any supportive measures provided §106.30
- Requirement to create and maintain records, for period of seven years, regarding any actions taken in response to report or formal complaint of sexual harassment **includes supportive measures** §106.45(b)(10)(ii)
- If recipient does not provide complainant with supportive measures, it must document the reasons why this was not clearly unreasonable in light of known circumstances

Emergency Removal
§ 106.44(c)

- District can issue emergency removals, provided that it:
  - Undertakes **individualized** safety and risk analysis
  - Determines that an **immediate threat** to **physical** health or safety of **any student/individual** arising from the allegations justifies removal
  - Provides respondent with **notice and opportunity to challenge decision immediately**
- Does not modify IDEA, Section 504, or ADA rights

© 2024 Bricker Graydon LLP

Emergency Removal
§ 106.44(c)

- **Notice and opportunity to challenge determination after removal**
  - No requirement of written notice, but recommended
  - Notice must describe reasons for finding a threat
  - District has discretion to
    - Determine who conducts hearing
    - Establish hearing procedures
- **Timeline for challenge**
  - Immediately after removal (without delay / as soon as possible given the circumstances)

Emergency Removal
§ 106.44(c)

- **Removal v. Supportive Measure**
  - Consider if it the action is disciplinary or punitive
  - Would it cause an unreasonable burden on the respondent?
  - Fact specific analysis
- **Consider scope of removal** (all or part of program)

Emergency Removal – Employees
§ 106.44(d)

- Administrative leave for employees remains available
- Nothing in the regulations dictates whether such leave is paid or unpaid

© 2024 Bricker Graydon LLP

Providing Written Investigative Report
§ 106.45(b)(5)(vii)

- After **completion** of investigation, TIX Coordinator (or Investigator) **may** be responsible for providing the parties a copy of the written investigative report
- Parties are to be sent the report **at least 10 days** in advance of reaching a determination of responsibility
- Review process and exchange of written questions may also be coordinated by TIX Coordinator

Determination and Remedies
§ 106.45(b)(7)(iii), (b)(7)(iv)

- TIX Coordinator (or possibly the decision-maker) will need to disseminate the written determination to the parties simultaneously
- TIX Coordinator is responsible for effective implementation of any remedies
- TIX Coordinator will want to offer both parties an equal opportunity to appeal determination regarding responsibility, or dismissal of formal complaint or any allegations therein

Offer Opportunity to Appeal
§ 106.45(b)(8)

- TIX Coordinator will want to offer both parties an equal opportunity to appeal determination regarding responsibility, or dismissal of formal complaint or any allegations therein
  - Procedural irregularity that would affect the outcome
  - New evidence that was not available at the time of the determination that would affect the determination
  - Member of TIX Team had conflict of interest or bias that affected the outcome

© 2024 Bricker Graydon LLP

Other Title IX Coordinator Responsibilities

TIXC May File Formal Complaint
§ 106.30(a)

- After receiving multiple reports about same respondent
- Must remain free from conflicts of interest and bias, and must serve impartially
- Is not acting as complainant
  - Not participating in the investigation
  - Not submitting questions or cross examining on behalf of the complainant

Recordkeeping
§ 106.45(b)(10)(i)(A), (B), (D)

- TIX Coordinator will want to develop a process for required recordkeeping, including:
  - Maintaining all investigatory and appeal records for a period of seven years
  - Collecting and publicly posting on its website **all** materials used to train TIX Team

© 2024 Bricker Graydon LLP

Intersection of Employee Issues with Title VII

- USDOE states Title IX and Title VII have "no inherent conflict" (i.e., employees have same rights as students), **but**…
- Title VII "severe **or** pervasive" vs. Title IX "severe, pervasive, **and** objectively offensive"
- Title VII doesn't require 10 days to review evidence and 10 days to respond to report
- And what about student employees?

Intersection of Employee Issues with Title VII

- USDOE states that complaint and/or disciplinary measures in CBAs or employee handbooks may need to be revisited/renegotiated to comply with Title IX
- Board Policy may also need to be revisited

Hypothetical – Employee-Student Allegations

- Teacher's suggestive statements make student so uncomfortable she wants to drop the class
- Her parent complains to the superintendent
- Student is insistent that she wants nothing more than to drop the class

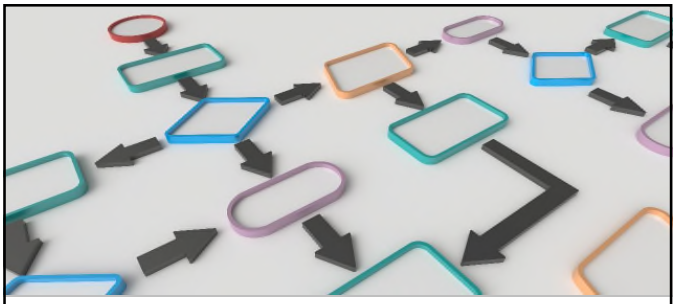
© 2024 Bricker Graydon LLP

Hypothetical – Employee-Student Allegations

- If TIX issue, informal resolutions not available
- **Make sure the student is safe** – remedy any effects – remove teacher, possibly run TIX investigation **and** parallel conduct investigation (unprofessional behavior, boundary violations)
- Professional misconduct report?

Prohibition Against Retaliation
§ 106.71

- Retaliation prohibited, including intimidation, threatening, coercion, or discrimination against any individual:
  - For purpose of interfering with any right or privilege secured by Title IX
  - Because an individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing
  - Includes charges for code of conduct violations that do not involve sex discrimination/harassment but arise out of the same facts/circumstances



Title IX Grievance Procedure

© 2024 Bricker Graydon LLP

Formal Complaint

- **Formal Complaint** – "a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment"
- **Complainant** – "an individual who is alleged to be the victim of conduct that could constitute sexual harassment"

General Requirements: Due Process/ Fundamental Fairness (1 of 2)

- Treat complainants/respondents equitably; no sanctions until process complete
- No conflict of interest or bias; trained staff
- Presumption that respondent is not responsible
- Reasonably prompt timeframes
- Range of possible sanctions/remedies

General Requirements: Due Process/ Fundamental Fairness (2 of 2)

- Evidentiary Standard – Preponderance or Clear and Convincing
  - Same standard applicable to complaints against students and employees
  - Same standard applicable to all complaints of sexual harassment
- Describe supportive measures
- Exclude privileged information

© 2024 Bricker Graydon LLP

Notice to Parties

- Grievance Process
- Allegations
  - Sufficient details known at the time
    - Identity of parties; date and location of alleged incident; alleged conduct
  - Sufficient time to prepare response
- Statement that respondent is presumed not responsible and that determination will be made at conclusion of grievance process
- May have advisor of choice
- May inspect/review evidence
- Inform of Code of Conduct prohibiting false statements
- Notice of any additional allegations that may arise

Dismissal and Consolidation

Dismissal of Formal Complaints

- Mandatory
  - Alleged conduct, even if proved, would not fall within the scope of Title IX
  - Does not preclude action under other Code of Conduct provision
- Permissive
  - Complainant withdraws formal complaint
  - Respondent is no longer enrolled/employed
  - Specific circumstances prohibit gathering sufficient evidence
- Must provide notice of dismissal to parties

Consolidation of Formal Complaints

- Permissive – where allegations arise out of same facts/circumstances

Investigation Process (1 of 2)

- Burden of proof and burden of gathering evidence is on recipient
- Equal opportunity to present witnesses
- May not prohibit parties from discussing allegations or gathering/presenting evidence
- Provide same opportunity to have others present including advisor of choice
- Written notice of any hearings/interviews/meetings

© 2024 Bricker Graydon LLP

Investigation Process (2 of 2)

Provide All Evidence to Parties

- Allow 10 days to review
- Allow parties to submit a written response before completion of Investigative Report

Prepare Investigative Report

- Fairly summarizes relevant evidence
- Provide to parties 10 days prior to determination of responsibility
- Allow parties to submit written response

Hearings and Cross Examination

Live Hearings

- Optional for K-12 (Career Center Adult Ed Programs must have hearings)
- Hearing does not have to provide the right to cross examination

With or Without Hearing

- Allow parties to submit written questions of other parties/witnesses
- After distribution of Investigative Report; before determination regarding responsibility
- Provide answers and allow limited follow up
- Questions and evidence regarding complainant's sexual predisposition or prior sexual behavior prohibited (very limited exceptions)

Written Determination of Responsibility

- Note: Decision maker cannot be Investigator or Title IX Coordinator
- Identification of the allegations
- Description of procedural steps
- Findings of fact
- Conclusions
- Statement of result as to each allegation, including determination, sanctions, and remedies
- Procedures and bases for appeal
- Provided to parties simultaneously

© 2024 Bricker Graydon LLP

Appeals

Required bases:

- Procedural irregularity that affected the outcome
- New evidence not reasonably available at time determination was made that could affect the outcome
- Conflict of interest/bias

Additional bases permitted - Offered to both parties equally

Appeals process:

- Notify other party in writing when appeal is filed
- New decision maker
- Allow opportunity for both parties to submit written statement
- Written decision with result and rationale
- Provided to both parties simultaneously

Informal Resolution

Procedures may include informal resolution process

- May not be mandatory
- May not be offered unless formal complaint is filed
- May not be offered in allegation by student against employee

Requirements

- Written notice of: allegations; requirements of process; right to withdraw from process and resume formal grievance process; consequences of participation including the records that will be maintained or could be shared
- Obtain voluntary, written consent from both parties

Recordkeeping – Maintain for 7 Years

- Investigation Records (including determination, recordings, transcripts, sanctions, remedies)
- Appeal Records
- Record of any Informal Resolution
- Training materials – posted on website/available upon request
- Documentation of recipient's response to all reports and formal complaints

© 2024 Bricker Graydon LLP

Informal Resolution: Theory and Practice

Informal Resolution: Reasons Parties May Prefer It to Formal Resolution

- Parties to disputes may be more satisfied with outcomes they reach themselves
- They can control the outcome
- They have the ability to tailor solutions to their needs

Less Adversarial Resolution

"Informal resolution may present a way to resolve sexual harassment allegations **in a less adversarial manner** than the investigation and adjudication procedures that comprise the 106.45 grievance process."

(85 Fed. Reg. 30098 FN 463)

© 2024 Bricker Graydon LLP

When: Threshold

- **Only** available to the parties **if** a ***formal complaint*** is filed
- **Never** available to resolve allegations that an employee sexually harassed a student

When: Prior to Determination

Available at ***any time*** **prior to** reaching a **determination**

Caution in Approach (1 of 3)

A school district may **NOT** require:

- As a condition of enrollment or continuing enrollment
- As a condition of employment or continuing employment

© 2024 Bricker Graydon LLP

Caution in Approach (2 of 3)

A school district may **NOT** require:

- As a condition of enjoyment of *any other right*
- The waiver of the right to an investigation and adjudication of formal complaints of sexual harassment

Caution in Approach (3 of 3)

A school district may **NOT** require:

- The parties to participate in an informal resolution process
- Pressure either or any party to participate
- **This is a voluntary process for both (or all) parties!**

What Can Be Offered?

An "informal resolution process, such as mediation, that does not involve a full investigation and adjudication"

© 2024 Bricker Graydon LLP

What Does This Mean?

The regulations don't provide more detail on what this means, but the preamble gives examples of the processes, such as:

- Mediation
- Restorative justice (85 Fed. Reg. 30098 FN 463)

Mediation (1 of 2)

The regulations don't provide more detail on what this means

- "Mediation" may have legal meaning in your jurisdiction that invokes certain requirements
  - Ohio does

Mediation (2 of 2)

- In Ohio, the Supreme Court and state law have provisions governing mediation and a Uniform Mediation Act
- See ORC 2710.01 through 2710.10

© 2024 Bricker Graydon LLP

Ohio Law – Uniform Mediation Act (ORC §2710.01-.10)

- **Defines "Mediation"** – "any process in which a **mediator** facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute"
- **Defines "Mediator"** – an "individual who conducts a mediation"
- **Defines "Mediation Party"** – a person "whose agreement is necessary to resolve the dispute"
- The Act provides that if the mediation is conducted by a primary or secondary school ***and*** the all of the parties are students (i.e., peer mediations) the Act does ***not*** apply
- As long as a parent is involved in the process, or the mediation is between adult District employees, the Act does apply

Mediation or, Perhaps Better–Facilitated Resolution

- There are many definitions of mediation out there, but the TIX Regulations anticipate a **third-party** (the informal resolution officer) **facilitated resolution** of a dispute between parties
- Facilitated Resolution is what you will be doing

Facilitated Resolution (1 of 2)

Written agreement required?

- Regulations are silent about whether required.
- But – other provisions require ***documentation*** of the grievance process from formal complaint to resolution

© 2024 Bricker Graydon LLP

Facilitated Resolution (2 of 2)

What is a resolution of the dispute?

- Do parties need to reach an agreement about what occurred between them?
- Is it sufficient to find a way to move forward so both parties can have equal access to educational opportunities?

Facilitating Informal Resolutions

Initial Consideration: Separation of the Parties

- When issues are very emotional, as they often are in Title IX disputes, keeping parties separate during the facilitating may be the best way for the parties to move forward.
- "Shuttle Diplomacy"

© 2024 Bricker Graydon LLP

Overview of the Process with the Parties

Whether beginning together or separately, the facilitator should begin by providing an overview with the parties of the expectations and process for the resolution

Provide Opportunity for Each Party to Tell Their Story

- Whether beginning together or separately, the facilitator should provide space for each party to tell their "story" and present their perspective on the underlying dispute
- If haven't separated at this point, separate parties after this point

Determine What Each Party Wants

- Often referred to as the "WIFM" – what's in it for me?
- Ask each party what they want out of the process
- Ask each party what they want from the other party
- Make a list of each WIFM and try to identify the top three for each party
- Go through the list with the party
- Be clear with each party what you can share from the list with the other party

© 2024 Bricker Graydon LLP

Questions Facilitator May Ask of a Party

- What would make you feel safe?
- What do you want your day at school to look like after this?
- What could the school do to make you feel safer?
- What could the other party do to make you feel safer?
- What do you need and what do you want, and are those different?
- What could you live with?

Have Ready a List of Supportive Measures That Can Be Easily Offered

- Adjusting course schedules
- Online alternatives for courses
- Increased adult supervision
- Counseling
- Training
- Apology letters (not necessarily admitting wrongdoing, but acknowledging feelings)

Review the WIFMs for Each Party and Look for Overlap

- Sometimes the parties want a lot of the same things
- Sometimes the parties do not have any overlap
- Identify with each party what they may be willing to share with the other party and that sharing may help resolve

© 2024 Bricker Graydon LLP

Go Back and Forth Until a Resolution Agreement Can Be Reached

- This may not happen. Not everyone can reach a resolution agreement in every case
- Make sure you can get both parties to agree to the same terms and then make sure you have their agreement

If Agreement Reached…

- Document it in some fashion
- Have the parties sign that the documentation accurately reflects their understanding
- Try to finish it before the parties leave so it doesn't fall apart

If No Agreement Reached…

- Parties may want time to think about the resolution – this will be up to the school on how to proceed
- May provide a certain deadline by which to have signed
- May provide certain provision that it will go back to formal process by deadline
- May choose to offer further facilitated resolution on the dispute of it the parties think it would be helpful

© 2024 Bricker Graydon LLP

Informal Resolution: Best Practices

Informal Resolution Officer Goals

Help parties find ways to **move forward** (for as long as their time together is before they graduate) with **equal access to educational opportunities**

What Should Our Process Look Like? Requires a Prompt Timeframe

The recipient (the school) should decide what "prompt" timeframe to set to resolve the informal resolution

© 2024 Bricker Graydon LLP

Prompt Timeframe Considerations

- Stop the clock for exams or breaks so that students are not required to participate during exams or breaks or have that time count against resolving
- Have the ability to extend timeframe if close to resolving but need a few extra days

Contact the Parties

The informal resolution officer should contact each party individually to initiate and explain the process.

A written notice shall be provided disclosing:

- The allegations
- The informal resolution process requirements
- Any consequences

Determine Setup

- In person in same room?
- In person but in separate rooms with informal resolution officer going between (sometimes called shuttle mediation)?

© 2024 Bricker Graydon LLP

Setup Considerations

- Each matter is different, so providing multiple methods for conducting a resolution may be helpful
- Should the parties communicate directly with each other?
- Are there attorneys or parents involved?

Assess Needs & Wants

- Meet with each party individually to find out:
  - What they **want**
  - What they **need**
- What are they willing to accept as a resolution?
- What are they not willing to accept?

Finding Out What the Parties Want

Example:

- A complainant may tell you they want the respondent to admit wrongdoing
- However, the complainant may be willing to accept that respondent sees the underlying interaction differently but apologizes for the resulting harm to the complainant

© 2024 Bricker Graydon LLP

Identify Overlap

Identify any overlap between what the parties:

- Want
- Need
- Are willing to accept

Support to Parties

Identify supportive measures you could propose to the parties individually that also protect their individual access to educational activities

Reality Checking

A helpful tool, but be cautious

- It may be helpful to remind one or both parties the limitation of informal resolution requires agreement to complete
- It may be helpful to remind one or both parties that the alternative may be a return to the formal process
- It may be helpful to remind one or both parties that they can control the outcome in the informal process, but not the formal process

© 2024 Bricker Graydon LLP

Reality Checking – Caution

BUT…

Be careful to remain neutral and not push a party to do something the party does not really want to do

Reality Checking – Neutral

Example of a neutral reality check:

"If this goes back to the formal process, you will not have control over the outcome, and there is a possibility that a decision-maker could find you in violation of policy"

Reality Checking – Bias?

Example of a biased/pushy reality check:

"I've seen cases like yours and it's not looking good for you. You should take the informal resolution option offered by the other party."

© 2024 Bricker Graydon LLP

Resolution Documentation

- If the parties reach a resolution, memorialize the terms
- Have both parties review the terms
- Have both parties acknowledge the terms of the resolution document
- If it involves minor students, have the parents sign document

Recordkeeping

- Maintain a copy of documentation in the Title IX office for seven years
- If the resolution is not successful, maintain any records of the process and its result for seven years

Documenting Informal Resolution Agreement

© 2024 Bricker Graydon LLP

Why Document Agreement in Writing?

While some jurisdictions will not allow discussions or documents from mediation to be relied upon outside of mediation, many do allow a carve out for a written agreement (signed by the parties) as final memorialization of an agreement

Why Document The Resolution In Writing?

- Important to have the terms of any resolution agreed upon in writing, in case of later disagreements
- Documentation is important if DOE reviews the informal resolutions

What About Confidentiality? (1 of 2)

- The terms of the resolution should be on a need-to-know basis
- The resolution may include penalties for a party or recipient for publishing or sharing the agreement
- Resolutions relating to students are student records protected by FERPA; kept in student file

© 2024 Bricker Graydon LLP

What About Confidentiality? (2 of 2)

- For employees, these may have different considerations and more than likely are a public record
- May be contained in a separate file from the employee's personnel file

The Problem with "Gag" Orders or Non-Disparagement Agreements (1 of 2)

- Could be contrary to the First Amendment
- Could be contrary to academic freedom if it involves teaching staff
- Could be contrary to public records laws

The Problem with "Gag" Orders or Non-Disparagement Agreements (2 of 2)

What happens if a party breaks the order?

- How will you enforce it?
- What if it's years later?
- What if it's a conversation with a family member vs. journalist?
- What if it seems like the school is trying to bury information?

© 2024 Bricker Graydon LLP

What Resolution Documentation Should Include

- Names of any parties, representatives, and informal resolution officer
- The specific terms of agreement, with as much specificity as possible
- Acknowledgement of all the terms by signature of the parties (parents) and the consequences of signing

What Any Resolution Documentation Should Include

- How to resolve any future disputes arising out of the underlying facts or the resolution itself
- Who to contact with questions or concerns about the terms

Final Thoughts

- Share with parties that the TIX Coordinator will check in on how the resolution is going
- **Pros**: Helps the school monitor the effectiveness of the solution
- **Cons**: Might poke a sleeping bear

© 2024 Bricker Graydon LLP

Serving as Title IX Investigator

Being Impartial, Unbiased, without Conflict of Interest, and Avoiding Pre-Judgment of Facts

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.
- Discussed in preamble on pp. 821-843; 1720-1726

Being Impartial

- The preamble discussion (pp. 828-829) appears to indicate that being impartial means being free from bias
- "The Department believes that keeping this provision focused on 'bias' paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality." (p. 829)

© 2024 Bricker Graydon LLP

Bias: Concerns Raised in Comments in Preamble

- Preamble concerns about all paid staff members being biased in favor of institution
- Institutional bias: cover-ups
- Past tweets that appear to support complainants or respondents
- Being a feminist
- "Appearance of bias" v. actual bias

Conflict of Interest: Concerns Raised in Comments in Preamble

- Decision-maker and financial and reputational interest aligned with institution (or to protect institution)
- Co-mingling of administrative and adjudicative roles
- Title IX Coordinator supervisor of decision-maker
- Past advocacy for victim's or respondents' rights (example also for bias)
- "Perceived conflict of interest" v. actual conflict of interest

Preamble Discussion: Bias and Conflict of Interest (1 of 2)

- Final regulations "leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient's own employees are expected to perform functions free from conflicts of interest and bias."
- No *per se* prohibited conflicts of interest under 106.45(b)(1)(iii) in using employees or administrative staff. (p. 826)
- No *per se* violations of 106.45(b)(1)(iii) for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process. (p. 827)

© 2024 Bricker Graydon LLP

Discussion Recommendation for Assessing Bias

"Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists…bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve **impartially** and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role."

Examples in Discussion for Unreasonable Conclusion that Bias Exists (1 of 2)

"For example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"

Examples in Discussion for Unreasonable Conclusion that Bias Exists (2 of 2)

- Department also cautioned parties and recipients from concluding bias or possible bias "based solely on the outcomes of grievance processes decided under the final regulations"
- Explained that this means, the "mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias"

© 2024 Bricker Graydon LLP

Avoiding Pre-Judgment of Facts at Issue

- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Keep an open mind as a decision-maker and actively listen to all the facts presented as subjected to cross-examination*
- Each case is unique and different

Avoiding Sex Stereotypes (1 of 2)

- "Must" not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Pp. 831-837 in the preamble
- Comments include examples of sex stereotypes in comments (e.g., Women have regret about sex and lie about sexual assaults, men are sexually aggressive or likely to perpetrate sexual assault)
- Discussion – prohibition against sex stereotypes, but not feasible to list them (p. 835)
  - Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
  - Cautions against an approach of "believing" one party over the other and notes 106.45(b)(1)(ii) precludes credibility determinations based on a party's status as a complainant or respondent

Avoiding Sex Stereotypes (2 of 2)

Consideration of marginalized groups: people with disabilities, people of color, people who identify in the "LGBTQ" community (pp. 1723-25; 1732-1737)

- Preamble discusses concerns by commentators about stereotypes and accommodations for individuals with disabilities under the ADA, and individuals with developmental and cognitive disabilities
- Preamble discusses concerns from people of color for cultural and racial stereotypes
- Preamble discusses concerns regarding stereotypes of the "LGBTQ" community

© 2024 Bricker Graydon LLP

Considerations: Potential Responses to Trauma

- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused

Disclaimer (1 of 2)

- This section uses the terms "rape," "victim," and "perpetrator" – CRIMINAL, not POLICY
- This section is about rape myths and trauma as **context for what may or may not be someone's internal dialogue**, to help you ask sensitive questions
- Both parties may be traumatized – and the trauma may be **completely unrelated** to the incident you're investigating

Disclaimer (2 of 2)

- Do **not** assume that because there are signs of trauma, the trauma was caused by the respondent and therefore the respondent violated the policy
- Do **not** assume that because there are not signs of trauma, therefore nothing bad happened

© 2024 Bricker Graydon LLP

Stories We Tell Ourselves

Know the Facts (1 of 2)

- Most rapes are committed by perpetrators that know their victims
- Rapes can happen in a committed relationship
- Rapes can happen between individuals of any gender
- Victims of intimate partner violence may return to their perpetrator for a variety of reasons that may not seem rational to outsiders looking in

Know the Facts (2 of 2)

- Drug-facilitated sexual assault is common, and the most common drug used is alcohol
- Being drunk doesn't excuse a perpetrator's own behavior
- A wide variety of responses are normal for a victim of trauma (e.g., calm, hysterical, angry, in denial, detached, withdrawn, or in shock) – don't make assumptions about how they "should act"

© 2024 Bricker Graydon LLP

Trauma and the Brain

- Trauma affects the way the brain **encodes and decodes memories** of what occurred
- Fight, flight, or freeze

Why Don't People Tell Right Away?

- Fear of retaliation
- Fear of not being believed

Why Is Being Trauma Informed Important?

How you handle a person in your first meeting can make the difference between:

- Cooperation in the investigation **vs.** refusal to cooperate
- Retraumatization **vs.** supportive environment
- Putting off other potential complainants or witnesses from coming forward **vs.** encouraging future reports
- Lawsuit or OCR complaint (or both) **vs.** supportive and cooperative relationship

© 2024 Bricker Graydon LLP

Words Have Power

- Victim vs. survivor vs. complainant
- **Stick with policy language** to the extent possible

Culture Affects Response (1 of 2)

- Age of consent
- Dating vs. arranged marriages
- Attitudes towards homosexuality
- Attitudes towards intimate partner violence
- Cooperating with investigations
- Sharing personal information
- Reactions toward authority figures
- Reactions toward male vs. female

Culture Affects Response (2 of 2)

- I won't report it if it doesn't feel wrong
- I'll admit it because I don't understand it's prohibited
- I won't report it if I would be a snitch
- It's impolite to look you in the eye, so I'll look down the whole time
- I deserved it, it's normal
- Reporting this would result in serious consequences at home

© 2024 Bricker Graydon LLP

The Bottom Line

Be Human & Be a Blank Slate

Issues of Relevancy (NOT Rules of Evidence)

- The Rules of Evidence do **NOT** apply and **CANNOT** apply (p. 1135)
- "The Department appreciates the opportunity to clarify here that the final regulations do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence; the decision-maker must consider relevant evidence and must not consider irrelevant evidence."

Issues of Relevancy

Relevant unless expressly touched upon in Regulations (p. 980):

- Information protected by a legally recognized privilege
- Evidence about complainant's prior sexual history – unless such questions/ evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct or if the questions/evidence concern specific incidents of the complaint's prior sexual behavior with respect to the respondent and are offered to prove consent.
- Party's medical, psychological, and similar records unless voluntary written consent

© 2024 Bricker Graydon LLP

Issues of Relevancy

The process allows both parties to submit all relevant evidence:

- Similarly 106.45(b)(6)(i)-(ii) directs the decision-maker to allow parties to ask witnesses all relevant questions and follow-up questions (p. 980)
- A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (p. 981)

Consent: Left to Schools to Define

- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis
- We will use standard language for discussion purposes

Who Can *Never* Give Consent?

- Under age 13 (varies by state)
- Between the ages of 13 and 16, if the other person is over 18 (varies by state)
- A student if the offender is a teacher, administrator, coach, or other person in authority employed by or serving in their school
- Severely cognitively disabled persons
- Those who are incapacitated
- Those who are by law unable to give consent

© 2024 Bricker Graydon LLP

Consent: Some Policies Require…

- **Clear** – verbal (or non-verbal?) communication
- **Knowing** – Mutually understood as willingness to participate in a sexual activity and the conditions of that sexual activity
- **Voluntary** – Freely and actively given

Consent: Some Policies Include…

- May be withdrawn with clear communication
- Consent for one activity is not consent for everything
- Silence or failure to resist does not constitute consent
- Previous consent does not constitute consent for future activities

When Does Consent *Not* Exist?

- Use of physical force, threats of physical force, physically intimidating behavior, or coercion
- Individual from whom consent is required is incapacitated

© 2024 Bricker Graydon LLP

Evidence of Consent? (1 of 3)

- What words or actions did complainant use to convey consent/non-consent?
  - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

Evidence of Consent? (2 of 3)

- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- "They gave consent" = What did you say to them, and what did they say to you?

Evidence of Consent? (3 of 3)

- [Ask the respondent] What did complainant say to you and/or what actions did they take to show consent?
  - "How did you know they wanted to have sex?"
- If applicable, what role, if any, did respondent play in complainant's intoxication/incapacitation?

© 2024 Bricker Graydon LLP

Introduction to Investigative Techniques

Initial Review

- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
  - What elements do you think will be disputed?
  - Agreed upon?

Begin Evidence List

- If there is a criminal investigation, work with law enforcement to collect and preserve evidence

Types of evidence

- Electronic communications
- Security information
- Pictures, videos, audio
- Police reports
- Personnel files
- Prior complaints against respondent

© 2024 Bricker Graydon LLP

Begin Witness List

- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

Craft Questions for Each Witness

- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible

Organizing for the Interview

- What should you have with you?
  - Allegations
  - Investigation log
  - Investigation notes cover sheet
  - Pre-prepared questions
  - Evidence you may need to reference or show witness
  - Policy or Handbook

© 2024 Bricker Graydon LLP

Note-taking Tips

- Use predictable symbols in the margin to easily skim during the interview:
  - **?** ← Follow-up questions
  - ***** ← Potential evidence
  - **W** ← Potential witness
- Try to record exact quotes when possible

Setting Up the Interview

- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods

Set the Stage

- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

© 2024 Bricker Graydon LLP

Begin Broadly

- Elicit a monologue about the incident
  - What happened earlier that day before the incident?
  - What happened with regard to the incident?
  - What happened next?

Freeze Frames

- Ask the witness to “freeze” on the moment and describe details
  - What could they see? Feel? Smell? Taste? Hear?
  - Where was the other person? How were they positioned?
  - Where were you? How positioned?
  - What did you say to the other person? Them to you?
  - Describe other person’s tone, demeanor, body language

Ask Follow-Up Questions

- Re-review your notes
- Re-review the elements of each charge
  - Have you elicited all of the information this witness might have about each element?
  - Do you have an understanding of how the witness obtained the information they shared?

© 2024 Bricker Graydon LLP

Credibility

- Gather facts to assist **decision-maker**
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

When Consent is at Issue

- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent
- Apply definition of consent consistently and impartially

Closing the Interview

- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

© 2024 Bricker Graydon LLP

After the Witness Leaves

- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

Physical Evidence

- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log

Inspection and Review of Evidence

Provide ALL Evidence to both parties and advisors

- Include everything directly related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

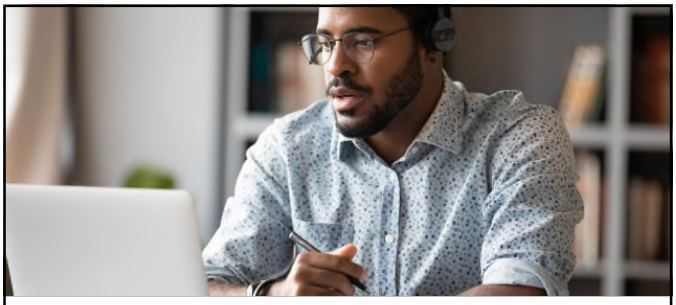
© 2024 Bricker Graydon LLP

Create Investigative Report

Fairly Summarizes the Relevant Evidence

- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review

(Need help? Report-writing training available!)



Serving as Title IX Decision-Maker

A Note About Hearings

- K-12 is not required to hold live hearings (Career Center Adult Ed program is required to hold live hearing)
- The regulations provide little structure for live hearings at the K-12 level
- This training presumes that you do not elect to offer live hearings prior to making a determination as to whether a policy violation occurred
- This does not excuse you from holding subsequent suspension/expulsion hearings as may be applicable

© 2024 Bricker Graydon LLP

Role as a Decision-Maker

What is your role as decision-maker? (1 of 3)

- Conduct an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence [34 C.F.R. § 106.45(b)(1)(ii)]
- Mandatorily dismiss Title IX complaint that do not rise to the level of "sexual harassment," did not occur in the recipient's education program or activity, or did not occur against a person in the USA [34 C.F.R. § 106.45(b)(3)(i)]

What is your role as decision-maker? (2 of 3)

- Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party. [34 C.F.R. § 106.45(b)(6)(ii)]
- Explain to the party proposing the questions any decision to exclude a question as not relevant [34 C.F.R. § 106.45(b)(6)(ii)]

© 2024 Bricker Graydon LLP

What is your role as decision-maker? (3 of 3)

- Issue a written determination regarding responsibility by applying the standard of evidence chosen by the recipient (either "preponderance of the evidence" or "clear and convincing") [34 C.F.R. § 106.45(b)(7)]
- Consider appeals (appellate decision maker)

1) Keep an Open Mind

- Keep an open mind until all relevant evidence has been heard (and tested at the live hearing, if applicable)
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that is permissible and relevant

2) Make Sound, Reasoned Decisions

- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

© 2024 Bricker Graydon LLP

3) Consider All/Only Evidence

- You must make a decision based solely on the relevant evidence obtained in this matter
- You may consider nothing but this evidence

4) Be Impartial

- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

5) Weight of Evidence

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the **weight** of the evidence, or its **strength,** in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

© 2024 Bricker Graydon LLP

6) Evaluate Witness Credibility (1 of 3)

- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (**standard of review/proof**) lies.

6) Evaluate Witness Credibility (2 of 3)

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?
- The Regulations' commentary provides consideration of consistency, accuracy, memory, credibility (85 Fed. Reg. 30315), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (85 Fed. Reg. 30330)

6) Evaluate Witness Credibility (3 of 3)

- Credibility is determined fact by fact, not witness by witness
  - The most earnest and honest witness may share information that turns out not to be true

© 2024 Bricker Graydon LLP

7) Draw Reasonable Inferences

- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you considered.
- Inferences only as warranted and reasonable.

8) Standard of Evidence (1 of 2)

- Use the standard of evidence as defined by your policy when evaluating whether someone is responsible for a policy violation
  - ALWAYS start with presumption of no violation.
- Preponderance of the evidence (most common standard of evidence): Is it more likely than not true that the respondent engaged in the alleged misconduct?
- But may choose clear and convincing standard

8) Standard of Evidence (2 of 2)

- Look to all the evidence in total, make judgments about weight and credibility, and then determine whether or not the burden has been met.
- Whenever you make a decision, apply your standard of evidence

© 2024 Bricker Graydon LLP

9) Don't Consider Impact

- Don't consider the potential impact of your decision on either party when determining if the charges have been proven
- Focus only on the allegations and whether the evidence presented is sufficient to persuade you that the respondent is responsible for a policy violation

The Questioning Phase

After the Investigation Report (1 of 3)

- After the school sends the investigative report to the parties, they have 10 days to provide a written response. [34 C.F.R. § 106.45(b)(5)(vii)]

After the Investigation Report (2 of 3)

- Before reaching a determination regarding responsibility, the decision maker must:
  - Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness
  - The decision-maker must explain to the party proposing the question any decision to exclude a question as not relevant. [34 C.F.R. § 106.45(b)(6)(ii)]

After the Investigation Report (3 of 3)

- Questions go to the decision-maker for review prior to being given to parties/witnesses.
- Allow for additional, limited follow-up questions from each party
  - School can to set reasonable limits [85 Fed. Reg. 30364]
  - The 10-day response period can overlap with the period for follow-up questions, so schools do not need to extend timelines [85 Fed. Reg. 30365]

Analyzing the Elements of Prohibited Conduct

© 2024 Bricker Graydon LLP

Analyzing the Elements (1 of 3)

- To find a policy violation, there must be evidence to show, using the standard of evidence in your policy (preponderance of the evidence or clear and convincing), that each and every element of a policy violation has been met
- How do you do this?

Analyzing the Elements (2 of 3)

- Review the definition
- Break down the definition into elements by making a checklist
- Re-read the definition. Have you accounted for all of the language in the definition?
- Are there any definitions that should be included in your element checklist? (e.g. state law definition of domestic violence)
- Sort evidence according to element

Analyzing the Elements (3 of 3)

- If you have a preponderance of the evidence* that each element is present, you have a policy violation
- If you do not have a preponderance of the evidence that each element is present, you do **not** have a policy violation
- If you have a preponderance of the evidence that one or more elements is **not** present, you do **not** have a policy violation

*If you use clear and convincing as your standard of evidence, substitute that here

© 2024 Bricker Graydon LLP

Example: Quid Pro Quo

- ❑ Conduct on the basis of sex
- ❑ By an employee of the recipient
- ❑ That conduct conditions the provision of an aid, benefit, or service of the recipient on an individual's participation in sexual conduct
- ❑ That sexual conduct is unwelcome

[34 C.F.R. § 106.30(a)]

Example: Hostile Environment

- ❑ Conduct on the basis of sex
- ❑ That is unwelcome
- ❑ That a reasonable person has determined is so severe, pervasive, and objectively offensive…
- ❑ That it effectively denies a person equal access to the recipient's education program or activity

[34 C.F.R. § 106.30(a)]

Example: Sexual Assault (1 of 2)

- ❑ Conduct on the basis of sex
- ❑ Qualifies as one of the following:
  - ❑ Rape (male on female penetration only)
  - ❑ Sodomy (oral/anal penetration)
  - ❑ Sexual Assault With An Object (other than genitalia)
  - ❑ Fondling (sexual gratification)
  - ❑ Incest
  - ❑ Statutory Rape

© 2024 Bricker Graydon LLP

Example: Sexual Assault (2 of 2)

- In cases of rape, sodomy, sexual assault with an object, or fondling, there was either:
  - No consent, or
  - Victim was incapable of giving consent because of age or temporary/permanent mental or physical incapacity

[34 C.F.R. § 106.30(a); 20 U.S.C. § 1092(f)(6)(A)(v); FBI UCR National Incident-Based Reporting System User Manual]

Example: Dating Violence

- Conduct on the basis of sex
- Violence committed by a person
- Who has been in a social relationship of a romantic or intimate nature with the victim
- Where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - Length of the relationship
  - Type of relationship
  - Frequency of interaction between the persons involved in the relationship

[34 C.F.R. § 106.30(a); 34 U.S.C. § 12291(a)(10)]

Example: Domestic Violence

- Conduct **on the basis of sex**
- Felony or misdemeanor crime of violence committed:
  - By current/former spouse or intimate partner of the victim
  - By a person with whom the victim shares a child in common
  - By a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner
  - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction
  - By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction

[34 C.F.R. § 106.30(a); 34 U.S.C. § 12291(a)(8)]

© 2024 Bricker Graydon LLP

Example: Stalking

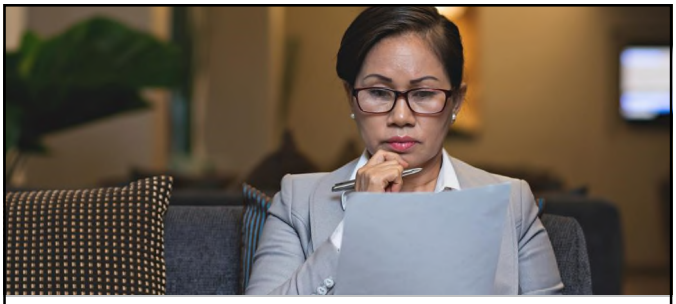
- ❑ Conduct **on the basis of sex**
- ❑ Course of conduct
- ❑ Directed at a specific person
- ❑ Would cause a reasonable person to either:
  - ❑ Fear for his or her safety or the safety of others; or
  - ❑ Suffer substantial emotional distress.

[34 C.F.R. § 106.30(a); 34 U.S.C. § 12291(a)(30)]

Scope of Education Program/Activity

Remember that the behavior addressed must occur in the recipient's "education program or activity"

- "Education program or activity" means all of the operations of the recipient [34 C.F.R. § 106.2(h)(2)(i)]
- In the Title IX grievance context, "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." [34 C.F.R. § 106.44(a)]



Relevancy: What Can You Consider?

Issues of Relevancy (1 of 4)

- The Rules of Evidence do **NOT** apply and **CANNOT** apply 85 Fed. Reg. 30337
- "The Department appreciates the opportunity to clarify here that the final regulations **do not allow** a recipient to impose rules of evidence that **result in the exclusion of relevant evidence**; the decision-maker must consider relevant evidence and must not consider irrelevant evidence." 85 Fed. Reg. 30336-37

Issues of Relevancy (2 of 4)

- Not generally permissible unless expressly touched upon in Regulations (85 Fed. Reg. 30294):
  - Information protected by a legally recognized **privilege**
  - Evidence about complainant's **prior sexual history**
  - Party's **medical, psychological, and similar records** unless voluntary written consent
  - Party or witness statements that have not been subjected to **cross-examination at a live hearing** (if your policy allows hearings – otherwise this restriction does not apply)

Issues of Relevancy (3 of 4)

- The process allows both parties to submit all relevant evidence:
  - Similarly § 106.45(b)(6)(i)-(ii) directs the decision-maker to allow parties to ask witnesses all relevant questions and follow-up questions
  - A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (85 Fed. Reg. 30294)

© 2024 Bricker Graydon LLP

Issues of Relevancy (4 of 4)

- "[D]oes not prescribe rules governing how admissible, relevant evidence must be **evaluated for weight or credibility** by recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties." (85 Fed. Reg. 30294)

BUT

- "[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient's training materials." (85 Fed. Reg. 30293)

Relevancy: Legally Privileged Information (1 of 3)

- Section § 106.45(b)(5)(i): when **investigating** a formal complaint, recipient:
  - "[C]annot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section."

Relevancy: Legally Privileged Information (2 of 3)

- Section § 106.45(b)(1)(x):
  - A recipient's grievance process must…not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

© 2024 Bricker Graydon LLP

Relevancy: Legally Privileged Information (3 of 3)

- Preamble identifies medical and treatment records.
- Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):
  - Attorney-client communications
  - Implicating oneself in a crime (as in the 5th Amendment)
  - Confessions to a clergy member or other religious figures
  - Spousal testimony in criminal matters
  - Some confidentiality/trade secrets

Rules of Relevancy

"Any rules adopted by a recipient regarding issues of relevance should be reflected in the recipient's training materials." 85 Fed. Reg. 30294

Fact-Finding when Facts are Disputed

The Fact Finding Process

1. • List undisputed facts – what do parties agree on? = **findings of fact**
   • List disputed facts – what do parties disagree on?
2. • What undisputed facts address each element?
   • What disputed facts must be resolved for each element?
3. • Weigh the evidence for each **relevant** disputed fact
   • Resolve disputed facts = **findings of fact**

Credibility Analysis

Objectively Evaluating Relevant Evidence

- Preamble indicates that the decision-maker should be looking at consistency, accuracy, memory, credibility (85 Fed. Reg. 30315), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (85 Fed. Reg. 30330)
- Again, not making relevancy determinations beyond those expressly included in regulations (as specified by policy)
- Use standard of proof in decision-making

© 2024 Bricker Graydon LLP

Standard of Proof

- 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 teachers) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, teacher conduct)
- Must begin with a **presumption of no violation** by Respondent

Recommended Considerations for Resolving Conflicts (1 of 4)

- Statements by any witnesses to the alleged incident
- Evidence about the relative credibility of the complainant/respondent
  - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
  - Is corroborative evidence lacking where it should logically exist?

Recommended Considerations for Resolving Conflicts (2 of 4)

- Evidence of the complainant's reaction or behavior after the alleged harassment
  - Were there witnesses who saw that the complainant was upset?
  - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
    - Reminder: May not manifest until later

© 2024 Bricker Graydon LLP

Recommended Considerations for Resolving Conflicts (3 of 4)

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
  - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Recommended Considerations for Resolving Conflicts (4 of 4)

- Other contemporaneous evidence:
  - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
  - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

Approaches to Counterintuitive Response

© 2024 Bricker Graydon LLP

Not Everyone Thinks Like You

- Differences in:
  - Cultural backgrounds
  - Learned responses
  - Age, gender, race, religion, height/weight, strength
  - Adverse childhood experiences
  - Trauma in the moment or prior to the encounter

Considerations: Potential Responses to Trauma (1 of 2)

- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused

Considerations: Potential Responses to Trauma (2 of 2)

- Trauma isn't just something to consider from the complainant's perspective. The respondent may be dealing with trauma, as may be the witnesses.
- Trauma may cause counterintuitive responses – from your perspective. Stop and consider carefully before you decide someone is lying because they responded in a way different from how *you* would have responded.

© 2024 Bricker Graydon LLP

Disclaimer

- Do **not** assume that because there are signs of trauma that the respondent **therefore** caused the trauma and violated the policy
- Do **not** assume that because there are **no** signs of trauma, nothing bad happened

Credibility Factors

- Revisit the credibility factors we just discussed
- Focus on your evidence
- Draw reasonable inferences from that evidence
- Focus on your parties and witnesses, and take them as they are
- Check yourself: am I reaching my decision because of any bias that I may hold?

Weighing the Evidence

© 2024 Bricker Graydon LLP

Regulatory Definitions

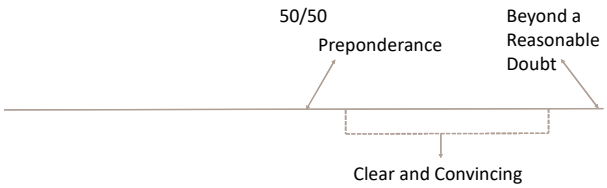
- Preponderance of the Evidence – "Concluding that a fact is more likely than not to be true"
- Clear and convincing – "concluding that a fact is highly probable to be true"

85 Fed. Reg. 30373 at FN 1409

Recipients cannot use "beyond a reasonable doubt" standard, which is used in criminal cases, regardless of allegations as issue. 85 Fed. Reg. 30373.

Standards of Evidence

What are our choices?



Applies to *Every Fact* and *Every Decision*

- When you make a determination as to a disputed fact, use your standard of evidence
- When you make a determination as to whether an element exists, use your standard of evidence
- If you are using "preponderance of the evidence" and the evidence is exactly 50/50, you do not have a preponderance, so you have *insufficient evidence* to support the existence of the fact/element

© 2024 Bricker Graydon LLP

Written Determination - § 106.45(b)(7)(ii) (1 of 3)

- Written determination **must** include:
  - Identification of the allegations potentially constituting sexual harassment
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held

Written Determination - § 106.45(b)(7)(ii) (2 of 3)

- A statement of, and rationale for, the results as to each allegation, including **determination** regarding responsibility, any disciplinary **sanctions** the recipient imposes on the respondent, and whether **remedies** designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant

Written Determination - § 106.45(b)(7)(ii) (3 of 3)

- Institution's procedures and permissible bases for complainant and respondent to **appeal**
- Provided to both parties in writing contemporaneously (34 C.F.R. § 106.45(b)(7)(ii))

© 2024 Bricker Graydon LLP

After the Decision

Disciplinary Sanctions (1 of 2)

- Ensure policy/code of conduct contains relevant language
- If there has been a finding of responsibility (including retaliation), follow due process procedures in state law and Board Policy
  - Written notice of possible discipline (suspension/expulsion)
  - Opportunity to respond to the allegations/proposed discipline
  - Appeal rights

Disciplinary Sanctions (2 of 2)

- Note that under 34 C.F.R. § 106.45(b)(8), if schools permit appeals regarding sanctions, they must offer this right to the complainant and respondent. [85 Fed. Reg. 30399]
- Before any sanction that would constitute a change of placement for a child with a disability, ensure compliance with IDEA and Section 504 (manifestation determination, continuation of services as applicable, etc.)

© 2024 Bricker Graydon LLP

Handling Appeals

Identity of the Appeals Officer

- You cannot hear an appeal of your own decisions
  - The Appeals Officer cannot be the same investigator, Title IX Coordinator, or decision-maker that worked on the case
- The Appeals Officer must be trained in the same manner as the Decision-Maker

Bases for Appeal

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator/investigator/decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
- A recipient may offer an appeal equally to both parties on additional bases

© 2024 Bricker Graydon LLP

Appeals

- As to all appeals, the recipient must:
  - Offer the appeal to either party
  - Let both parties know when an appeal has been filed
  - Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the appealed decision
  - Issue a written decision describing the result of the appeal and the rationale for the result
  - Provide the written decision simultaneously to both parties.

Report Writing for Investigators and Decision-Makers

Goals

- Write interview summaries (investigators) in narrative form so you can drop them into your investigation report
- Be objective
- Be consistent in terminology
- Be clear as to the source of information – compare:
  - "Bob stated that this happened"
  - "This happened"

© 2024 Bricker Graydon LLP

Structure of an Interview Summary (1 of 4)

- Who, when, where, via what medium?
- Did they have an advisor?
- Did you discuss your role? Their role?
- Did you discuss the prohibition on retaliation?

Structure of an Interview Summary (2 of 4)

- Background
  - How does this person connect with the parties and witnesses?
  - Age, year in school
  - Length of employment, position

Structure of an Interview Summary (3 of 4)

- Background
  - Monologue
  - Follow-up questions you ask, including responses
  - Evidence requested, evidence provided
  - Witnesses suggested

© 2024 Bricker Graydon LLP

Structure of an Interview Summary (4 of 4)

- Know your policy and procedures
  - Interview summary is often more complete than what is included in report
  - May include information irrelevant to investigative decision, such as discussions about supportive measures

Complete

- Include screenshots and other reference material directly in summary when possible
- Don't paraphrase a document when you can use direct quotes

Unambiguous

- Could my mother pick up the report and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

© 2024 Bricker Graydon LLP

Relevant

- Is there extraneous information that is unnecessary to resolve the charges or credibility disputes?
- Is the extraneous information nevertheless appropriate to include?
- Does your report contain any information you are prohibited from including?
- Will the parties read this, and if so, will they focus on the wrong things?

Sensitive

- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?

Empathetic

- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
  - Clearly/obviously
  - Innocent/guilty
  - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

© 2024 Bricker Graydon LLP

Specific

- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like

Editing Exercises (1 of 3)

1. Respondent touched Complainant's chest.
2. Complainant couldn't explain why she was sitting on the couch by herself.
3. Respondent visibly winced when Complainant said "no."
4. John stated that Alice told him to "knock it off."
5. On a scale of 1 to 10, the witness described the Respondent as being a "level 4 kind of drunk."

Editing Exercises (2 of 3)

6. There was no evidence to support Complainant's assertion that the activity was without consent.
7. During the mediation, Respondent admitted to the misconduct and promised not to do it again.
8. Professor Clark indicated that he had never known Respondent to commit sexual misconduct at 2:00 in the morning in the back of a bar before.

© 2024 Bricker Graydon LLP

Editing Exercises (3 of 3)

9. Respondent stated that Complainant was diagnosed with bipolar disorder and that the complaint was "all in his head."
10. Respondent asked if Complainant wanted oral sex and Complainant said, "That's OK…"
11. Jane insinuated that Respondent changed her grade based on her report.

Synthesizing Evidence

Begin with a Disclaimer

Example: "This document is intended to be a summary of evidence and a description of what was learned through an investigation. Please refer to the full record, including [information shared in the investigation file]* and the contents of the [exhibit packet]."*

© 2024 Bricker Graydon LLP

Basic Information (1 of 2)

- Complainant
- Respondent
- Investigator
- When was the complaint made?

Basic Information (2 of 2)

- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- Any procedural anomalies that need explained?

Jurisdiction

- Under the 2020 regulations, if you do not have jurisdiction you must dismiss the Title IX complaint
- This does not preclude supportive measures or other Code of Conduct violations

© 2024 Bricker Graydon LLP

No Jurisdiction If:

- Alleged conduct would not be sexual harassment if proved
- Occurred outside of the US or
- Occurred outside of the District's education program or activity

Definition of "Educational Program or Activity"

"Educational 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…

Does Your Policy Require Witness Sign-Off?

- "Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary."
  - Did everyone do so?

© 2024 Bricker Graydon LLP

Basic Information

- "All relevant information gathered during the course of the investigation has been included in this report/hearing packet."

Applicable Policy Provisions

- Definition of prohibited conduct alleged
- Related definitions as appropriate (e.g. consent, substantial incapacitation)
- Include verbatim, in entirety

Summary of Information (1 of 3)

- Ways to arrange:
  - Chronologically
  - By witness summary
  - By allegation/topic

© 2024 Bricker Graydon LLP

Summary of Information (2 of 3)

- Explain your structure
  - Example: "The information in this report is a summary of the facts. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate."

Summary of Information (3 of 3)

- Tell the story chronologically
  - How did the relationship start?
- Citations to the record – always
  - Be helpful to the decision maker!
- Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

Relevancy ≠ Rules of Evidence

© 2024 Bricker Graydon LLP

Reminder Regarding Issues of Relevancy

- Relevant unless expressly touched upon in Regulations (p. 980):
  - Information protected by a legally recognized privilege
  - Evidence about complainant's prior sexual history
  - Party's medical, psychological, and similar records unless voluntary written consent
  - Party or witness statements that have not been subjected to cross-examination at a live hearing, if one is required*

Create a Summary of Information (1 of 5)

- **Give an overview** of evidence collected
- **Attach as appendices** any statements and important evidence

Summary of Information (2 of 5)

- If you can, synthesize the information from multiple parties and witnesses
- Where the stories diverge:
  - "Information from [Complainant]"
  - "Information from [Respondent]"

© 2024 Bricker Graydon LLP

Summary of Information (3 of 5)

- Insert into the report screenshots of text messages and pictures where relevant
- If information is attached but not referred to in a summary, may want to drop a footnote explaining why not

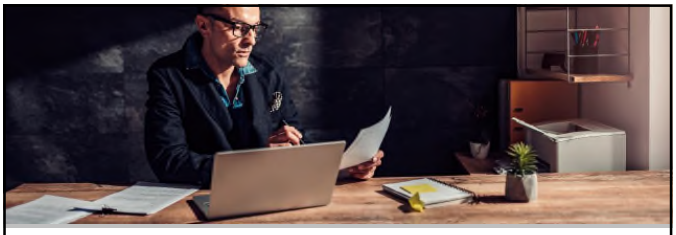
Summary of Information (4 of 5)

- Don't forget to summarize impact on **complainant** if the charges require consideration as an element
  - "The investigator notes that this incident and the process may have had an impact on [Respondent]. However, to determine whether sexual harassment occurred, the decision-maker will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information here focuses solely on [Complainant]."

Summary of Information (5 of 5)

- Undisputed Facts
  - Series of numbered sentences
- Disputed Facts
  - Series of numbered sentences
- Make sure you have facts for each element of each charge

© 2024 Bricker Graydon LLP



Objectively Evaluating Evidence and Resolving Credibility Disputes – Decision Makers Only

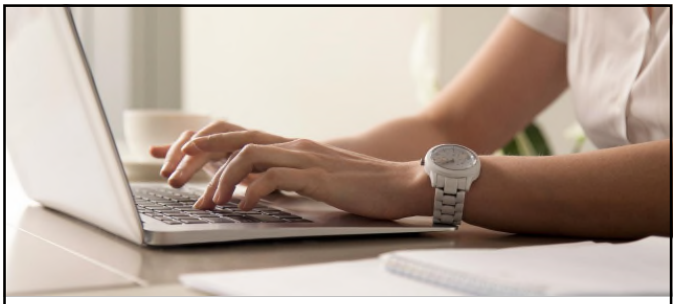
Objectively Evaluating Relevant Evidence

- Preamble indicates that the decision-maker should be looking at consistency, accuracy, memory, credibility (p. 1060), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (p. 1111)
- Again, avoid making relevancy determinations beyond those expressly included in regulations
- Apply the standard of proof to reach your decision

Standard of Proof

- 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 teachers) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, teacher conduct)
- Must begin with a presumption of no violation by Respondent

© 2024 Bricker Graydon LLP



The Written Decision

Written Determination - § 106.45(b)(7)(ii) (1 of 3)

- Written determination **must** include:
  - Identification of the allegations potentially constituting sexual harassment
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held

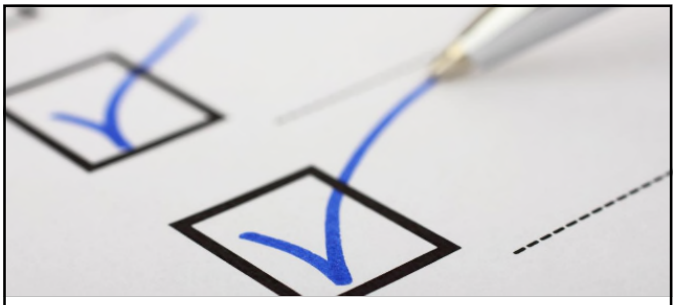
Written Determination - § 106.45(b)(7)(ii) (2 of 3)

- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, **any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant**

© 2024 Bricker Graydon LLP

Written Determination - § 106.45(b)(7)(ii) (3 of 3)

- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))



Final Checklist for the Decision Maker

Final Checklist (1 of 5)

1. Are there any additional procedural anomalies to be explained?

Final Checklist (2 of 5)

2. Is every element of every charge accounted for?

Final Checklist (3 of 5)

3. Is every relevant disputed fact resolved in the analysis?

Final Checklist (4 of 5)

4. Is there a clear connection between the **charges**, the **investigation**, the **evidence**, and the **conclusions**?

© 2024 Bricker Graydon LLP

Final Checklist (5 of 5)

5. Would an unfamiliar reader be able to connect the dots?

Bases for Appeal (to be included at the end of the decision)

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
- A recipient may offer an appeal equally to both parties on additional bases

Appeals

- As to all appeals, the recipient must:
  - Issue a written decision describing the result of the appeal and the rationale for the result
  - Provide the written decision simultaneously to both parties.

© 2024 Bricker Graydon LLP

Preview of the Enjoined 2024 Regulations

Disclaimer

- The final 2024 Title IX regulations are **currently enjoined** in Ohio
- The following slides are a preview of major changes that will only be applicable **if/when** the 2024 regs become enforceable in Ohio
- In the meantime, districts must still comply with the Title IX regulations (and district policies) **currently in place**

Things You Could Stop Doing Under the 2024 Regs:

Posting training these materials (though they still must be available for inspection upon request)

Requiring a Formal Complaint before engaging in Informal Resolution

Employing Investigators **&** Decisionmakers

Providing 10 day review periods

Permitting advisors

© 2024 Bricker Graydon LLP

Preview of Major Changes: What Qualifies?

- Definitions of **discrimination** and "**on the basis of sex**" expanded
- Definition of **quid pro quo** harassment amended
- Severe, pervasive, ***and*** objectively offensive → severe ***or*** pervasive
- Jurisdiction expanded to certain **off-campus conduct**
- No more mandatory dismissal

Preview of Major Changes: District Response

- **Actual knowledge** requirement eliminated; replaced with requirement to take prompt and effective action to end any **sex discrimination that has occurred**
- Supportive measures could include "temporary **measures that burden a respondent**"
- Types of threats subject to **emergency removal** under Title IX amended
- **Informal resolution** could be offered **before** complaint is filed

Preview of Major Changes: Grievance Process

- **Grievance process** applies to **all** complaints of sex discrimination, not just sexual harassment
- **No more "formal complaints"** – could be oral or written
- **Single investigator/decision-maker model is back** – decision-maker could be Title IX Coordinator or Investigator

© 2024 Bricker Graydon LLP

Preview of Major Changes: Investigative Process

- No written notice prior to interview
- No right to have advisor present
- No more 10 day review periods
- Can provide either evidence or summary (but allow access upon request)
- Both parties get opportunity to provide **fact** witnesses

Preview of Major Changes: Determinations

- Detailed components of determination **eliminated**
- Preponderance of the evidence standard **required** unless your district uses "clear and convincing" in **all** other comparable proceedings

Thank you for attending!

Remember – additional information available at:

Title IX Resource Center at www.bricker.com/titleix

Bricker Graydon

© 2024 Bricker Graydon LLP