

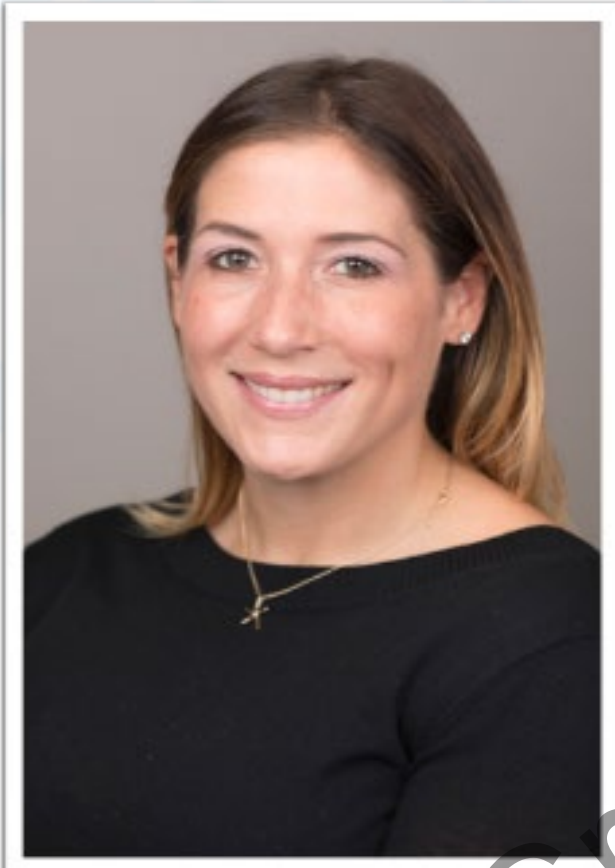
GRAND RIVER | SOLUTIONS

Title IX Overview Session

The University of Pennsylvania

April 2023

Meet Your Facilitator



Chantelle Cleary Botticelli, J.D.

Director of Strategic Partnerships
and Client Relations

Chantelle Cleary Botticelli is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 15 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.

Day One Agenda

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Title IX's Requirements

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**Written Notice and Equal
Opportunity to Present Evidence**

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Procedural Requirements

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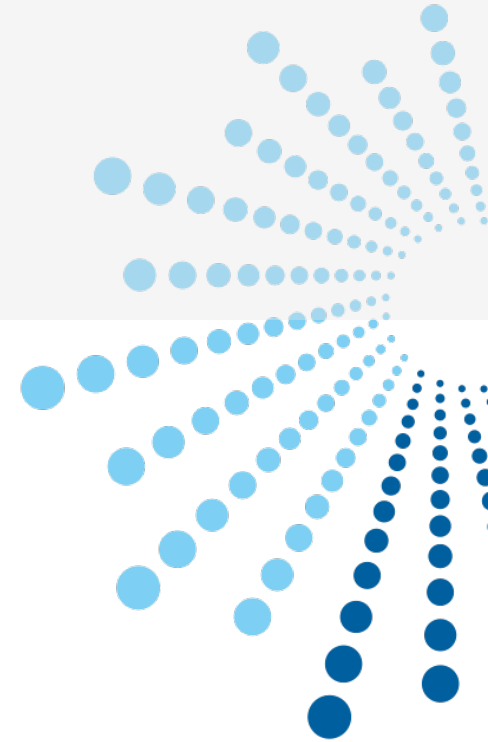
**Intersecting State and Federal
Law**

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Impartiality



Title IX's Requirements



01

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Title IX of the Education Amendments Act of 1972

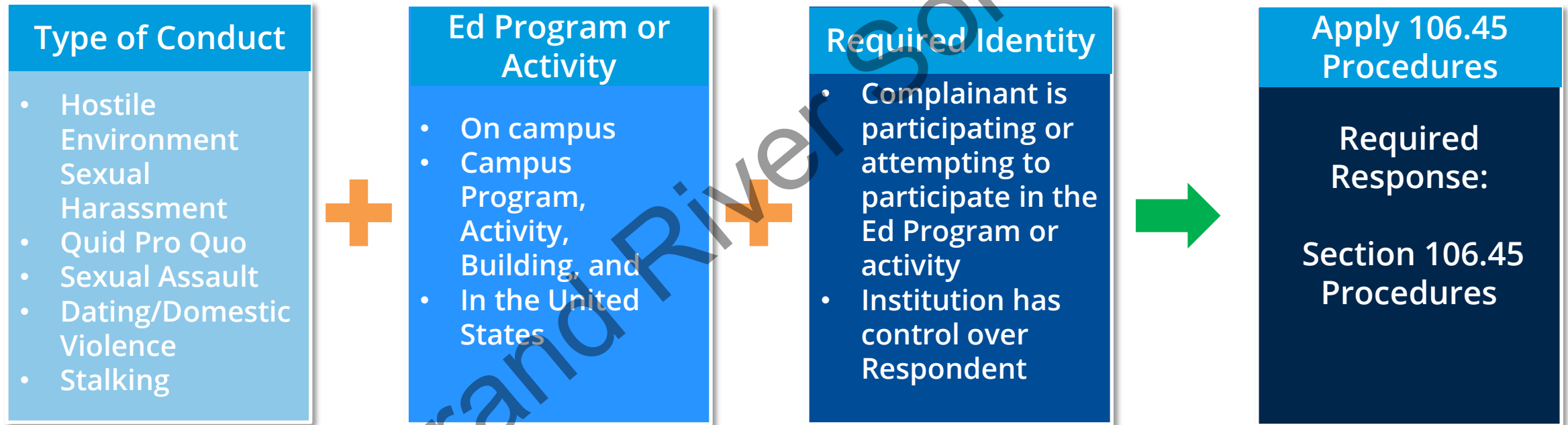
"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1972).

The Title IX Regulations

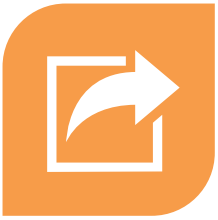
Sexual Harassment Only

1. Narrows the definition of sexual harassment;
2. Narrows the scope of the institution's educational program or activity;
3. Narrows eligibility to file a complaint;
4. Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.

Title IX Application Post May 2020 Regulations



Procedural Requirements for Investigations



Notice TO BOTH
PARTIES



Equal opportunity
to present evidence



An advisor of
choice



Written notification
of meetings, etc.,
and sufficient time
to prepare



Opportunity to
review all directly
related evidence,
and 10 days to
submit a written
response to the
evidence prior to
completion of the
report



Report
summarizing
relevant evidence
and 10 day review
of report prior to
hearing



Notice Requirements

Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:

the identities of the parties involved in the incident, if known,

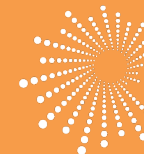
the conduct allegedly constituting sexual harassment under § 106.30,

and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.

The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



Advisor of Choice During the Investigation

The advisor can be anyone, including an attorney or a witness.

Institutions cannot place restrictions on who can serve.

Institutions can create rules and guidelines for participation in the investigation.

No specific training required.



Written Notification of Meetings and Sufficient Time to Prepare





Equal Opportunity to Present Evidence

Evidence Review

Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

10 days to provide a written response.



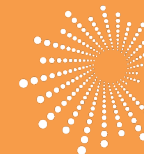
Investigative Report and Review




After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.

That report will be shared with the parties and the parties will have another opportunity to respond in writing.

The hearing must occur at least 10 days after the release of the final report.



A 3D puzzle with blue and white pieces, featuring a prominent red piece. The puzzle is set against a blue background with a white puzzle piece pattern. The red piece is a central focus, standing out from the other pieces. The text "Grand River Solutions" is written diagonally across the puzzle pieces.

“Directly
Related” and
“Relevant
Evidence”

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Directly Related Evidence

Regulations do not define “Directly Related” Evidence.

Preamble states it should be interpreted using its plain and ordinary meaning.

Term is broader than:

- “all relevant evidence” as otherwise used in Title IX regulations, and
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

“Relevant” Evidence

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401
Test for Relevant Evidence:

“Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

Evidence That is Not “Relevant”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

- unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

“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.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition.

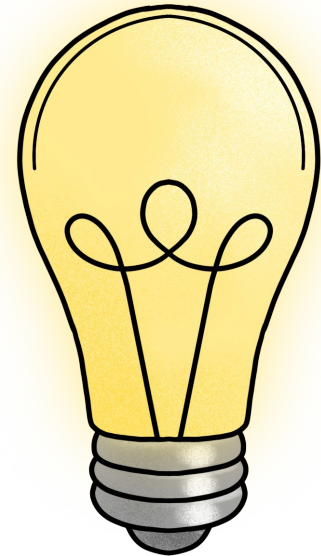
Who Decides?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance at this stage of the process.

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight.

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage.





The Investigator



Can be the Title IX Coordinator, although that is disfavored.



The Investigator may not be a decision maker.



Must be trained in accordance with the requirements in the regulations.



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest.

Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation of parties or witnesses

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or one provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction

Intersecting Federal and State Laws

Title VII

- Applies to conduct in the workplace
- "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."
- Hearing not required

Intersecting Federal and State Laws

PA Human Relations Act

- Applies to workplace conduct
- Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when
 - submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
 - submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
 - such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The Requirement of Impartiality

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Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not have a conflict of interest or bias

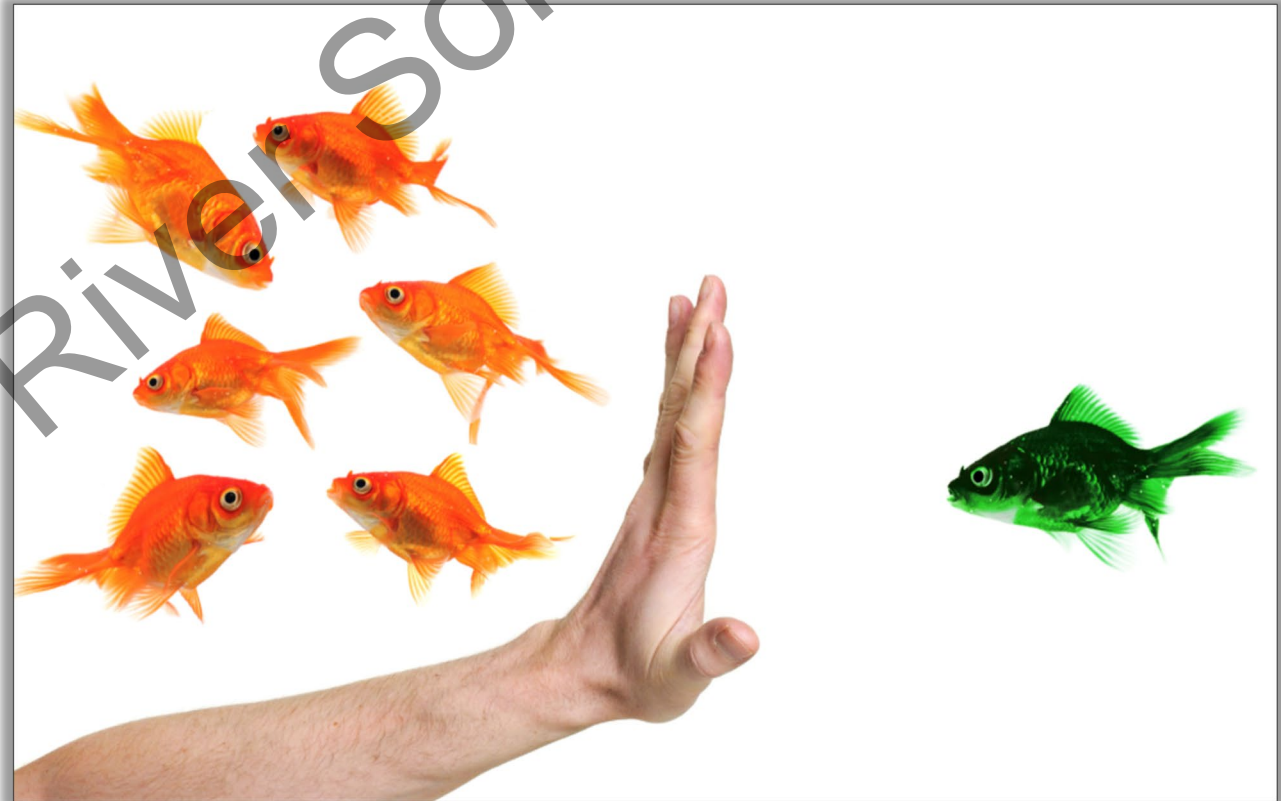
1. For or against complainants or respondents generally, or
2. An individual complainant or respondent

What Constitutes Bias?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts



Impermissible Bias

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.



Conflict of Interest

A black silhouette of a person's head and hand in profile, facing right. The person's index finger is pressed against their lips in a 'shh' or 'thinking' gesture.

Avoiding Prejudgment of the Facts

Requires that the Title IX professional refrain from making a judgement on individual facts, the allegations, or whether a policy violation occurred until they have had the opportunity to consider all of the evidence.

An Impartial Investigation is...

Not influenced by bias or conflict of interest.

Committed to decisions based on an objective view of the facts and evidence as you know them and as they evolve.

Truth seeking, not "your truth" confirming.

Thank You!

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