



Relationships



Communication



Budgeting
and Staffing



Know-How



Results



Title IX Training

Steptoe & Johnson PLLC

Susan Deniker

susan.deniker@steptoe-johnson.com

304.933.8154

Jim Newberry

jim.newberry@steptoe-johnson.com

502.423.2052



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Overview

- Title IX's Statutory Requirements
- A Historical Perspective
- New Title IX Regulations Effective August 14, 2020
- Hondros' Sexual Misconduct Policy
- Questions





Relationships



Communication



Budgeting
and Staffing



Know-How



Results

A brief history and explanation.

TITLE IX IN GENERAL



Courtesy of Gwendolyn Mink/Patsy Takemoto Mink papers, Library of Congress



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

What is Title IX?

- Federal civil rights law that protects from discrimination based on sex in education programs or activities that receive federal funding assistance
- “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.”
- OCR enforces Title IX to ensure that institutions that receive federal financial assistance from ED comply with the law

Pre-TIX Claims

- No federal statutory prohibitions on sexual misconduct
- Victims relegated to filing:
 - Criminal complaints
 - Civil claims
 - Assault
 - Intentional Infliction of Emotional Distress
 - Other



Relationships



Communication



Budgeting
and Staffing



Know-How



Results



Relationships



Communication



Budgeting
and Staffing



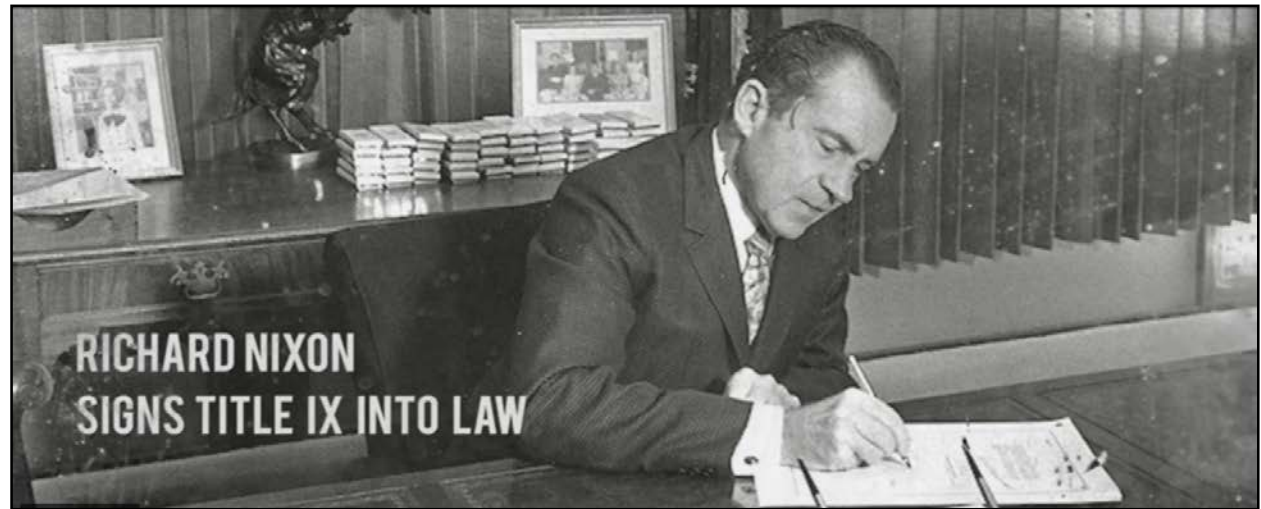
Know-How



Results

TIX & TIX Regulations

- TIX passed in 1972
- Simple statutory language: 20 USC §1681
- Simple regulations: 34 CFR §106
- Primary emphasis in 1970s: Gender equity in athletics



Source: Richard Nixon Foundation



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

VAWA & VAWA Regulations

- Far more specific statutory language – 20 USC §1092(f)(8)
- Far more specific regulations – 34 CFR §668.46
- Targets cases of sexual assault, dating violence, domestic violence, or stalking



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

VAWA & VAWA Regulations

- Profound impact on campuses
 - Training requirements for coordinators, investigators, and adjudicators
 - Advisor participation
 - Conflicts of interest prohibition for all involved in proceeding
 - Prohibition on retaliation





Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Sub-Regulatory Guidance

- 2001 Revised Sexual Harassment Guidance
- 2011 Dear Colleague Letter
- 2014 Q&A
- 2015 Role of TIX Coordinator
- 2016 Transgender Guidance
- Impact – “The Bad Boy List”



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Respondent Litigation

- Defamation
- Title IX violations
 - Deliberate indifference
 - Hostile environment
 - Erroneous outcome
 - Selective enforcement
- Negligence
- Fraud





Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Respondent Litigation

- Negligent misrepresentation
- Intentional infliction of emotional distress
- Negligent infliction of emotional distress
- Breach of the implied covenants of good faith and fair dealing
- Invasion of privacy
- **BREACH OF CONTRACT**



Relationships



Communication



Budgeting
and Staffing



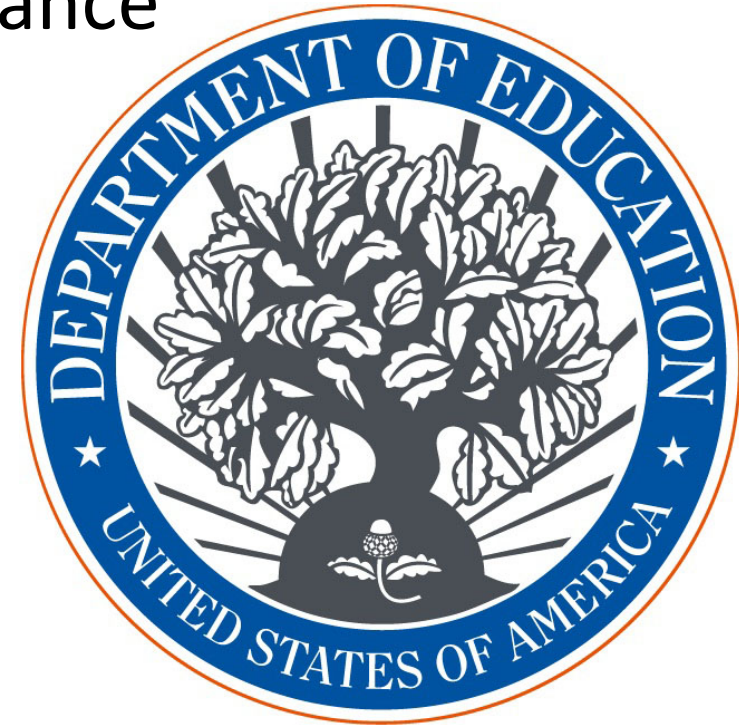
Know-How



Results

Trump Administration Impact

- 2017 repeal of 2016 transgender guidance
- 2017 repeal of 2011 and 2014 guidance/
reinstatement of 2001 guidance
- 2017 Q&A
- 2018 Notice of proposed
rulemaking
- Publication - May 19, 2020
- Effective August 14, 2020



Significant Definitions and Distinctions



Relationships



Communication



Budgeting
and Staffing



Know-How



Results



Standard of Liability Under New TIX Regulations

- Deliberately indifferent - School's response to sexual harassment that is clearly unreasonable in light of known circumstances
- Choice between preponderance or clear and convincing evidence.
 - Clear and convincing raises the bar for what constitutes a violation
 - Choice of evidentiary standard can be without regard to standard employed in other campus disciplinary proceedings



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Sexual Harassment

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

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Program or Activity

- Includes locations, events, or circumstances the School exercises substantial control over both the respondent and the context in which the sexual harassment occurs
- Also any building owned or controlled by a student organization that is officially recognized by the School
 - Fraternities/sororities
 - Does not include study abroad



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment to a School's Title IX Coordinator or any official who has *authority to institute corrective measures*
- Knowledge based on vicarious liability or constructive notice is insufficient to constitute actual knowledge
- Obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.



Relationships



Communication



Budgeting
and Staffing



Know-How



Results



Relationships



Communication



Budgeting
and Staffing

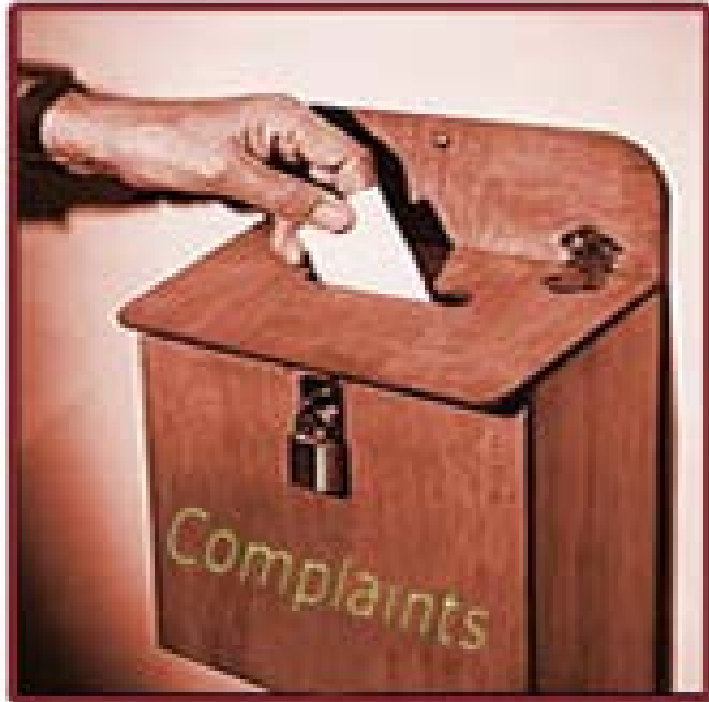


Know-How



Results

Respondent vs. Complainant



- Complainant: an individual who is alleged to be the victim of conduct that could constitute sexual harassment
- Respondent: individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Report vs. Formal Complaint

- Report: informal
- Formal complaint: a document that is filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against respondent and requesting that the School investigate the allegation
- School has obligations in response to both reports and formal complaints

Supportive Measures

- Title IX Coordinator responsibility
- Free, individualized services designed to restore or preserve equal access to education, protect safety, or deter sexual harassment.
- Examples:
 - Counseling
 - Extensions of deadlines
 - Modifications of work or class schedules
 - Changes in housing
 - Campus escort services
 - Increase monitoring of parts of campus
 - Mutual restrictions on contact between individuals



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Examples of Supportive Measures

- Counseling
- Extensions of deadlines
- Modifications of work or class schedules
- Changes in housing
- Campus escort services
- Increase monitoring of parts of campus
- Mutual restrictions on contact between individuals



Relationships



Communication



Budgeting
and Staffing



Know-How



Results



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Obligations

Confidentiality, Publication of Policy and Recordkeeping





Relationships



Communication



Budgeting
and Staffing



Know-How



Results

- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness
- The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures

Recordkeeping

- Must maintain records of the following for seven years:
 - Sexual harassment investigation
 - Audio or audiovisual recording
 - Transcript
 - Disciplinary sanctions imposed
 - Remedies provided
 - Any appeal and result of appeal
 - Informal resolution process and result
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates the informal resolution process



Relationships



Communication



Budgeting
and Staffing



Know-How



Results



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Recordkeeping Continued

- For each of the School's responses to sexual harassment, the School must also create and maintain for seven years records of:
 - Any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment
 - Basis for its conclusion that its response was not deliberately indifferent
 - That it has taken measures designed to restore or preserve equal access to School's education program or activity
 - If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Publication

- Prominently display the contact information required to be listed for the Title IX Coordinator
- Publish grievance procedures
- Training materials publicly available on website



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

TITLE IX PROCEDURES

School's duty to respond, informal resolution,
and the grievance process.



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Initiation of Title IX Procedures

- Any person may report sex discrimination
- Reports trigger duty to respond and provide supportive measures, with or without formal complaint
- Must follow grievance process before disciplinary sanctions or other actions that are not supportive measures are implemented against a respondent



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Emergency Procedures

- Emergency removal of students is allowed
 - Requires safety and risk analysis
 - Determines an immediate threat to the physical health and safety of others
 - Provides respondent with an opportunity to challenge the decision immediately after removal
- Administrative leave for non-student employees is permitted



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Response to a Formal Complaint

- Triggered when a school has actual knowledge of sexual harassment in an education program or activity against a person in the United States
 - Must respond promptly
 - In a manner that is not deliberately indifferent
- Temporary delays are only permitted for good cause, such as
 - Law enforcement activities
 - Absence of party or witness
 - Absence of advisor of choice
 - Need to provide language assistance
 - Disability accommodations



Relationships



Communication



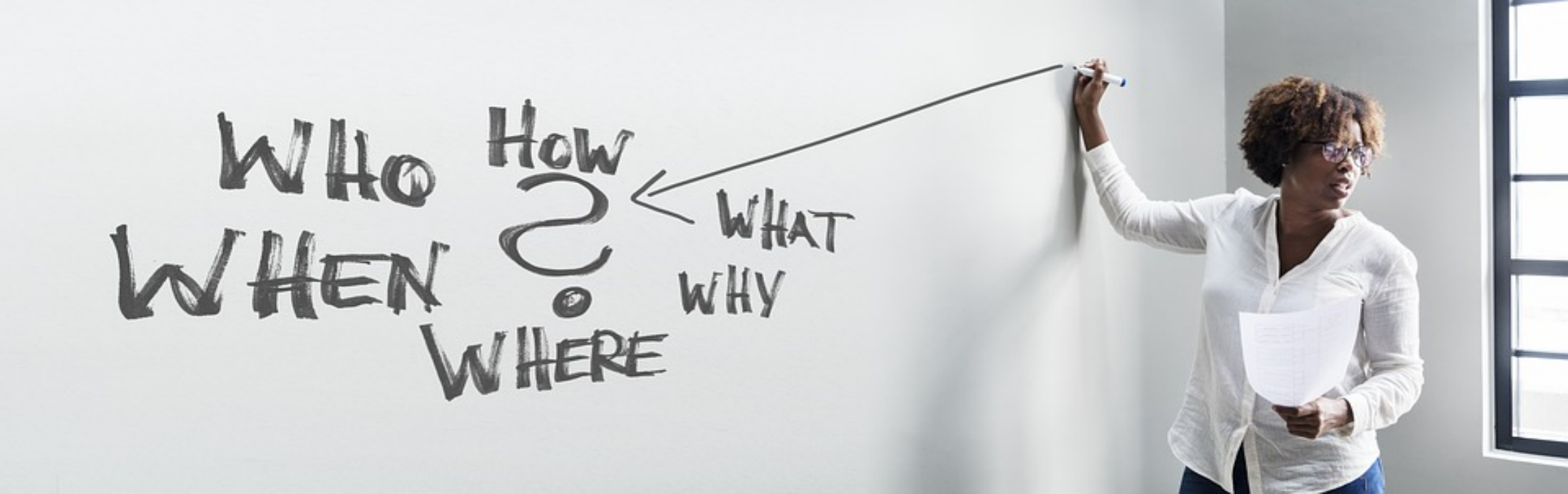
Budgeting
and Staffing



Know-How



Results



INFORMAL RESOLUTION

An Option in Response to a Formal Complaint.



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

- Only available after filing formal complaint
- Not available where the respondent is an employee and complainant is a student
- Must be completely voluntary
- Prior to engaging need to obtain parties' voluntary written consent
- Provide parties in writing of:
 - Allegations
 - Rights
 - Requirements of informal resolution process
 - What will be confidential
- No conditions based on engaging or not engaging in informal resolution process
- Facilitator free of bias, conflicts of interest, and who has received special training
- At any time, parties can revert to formal complaint process



Relationships



Communication



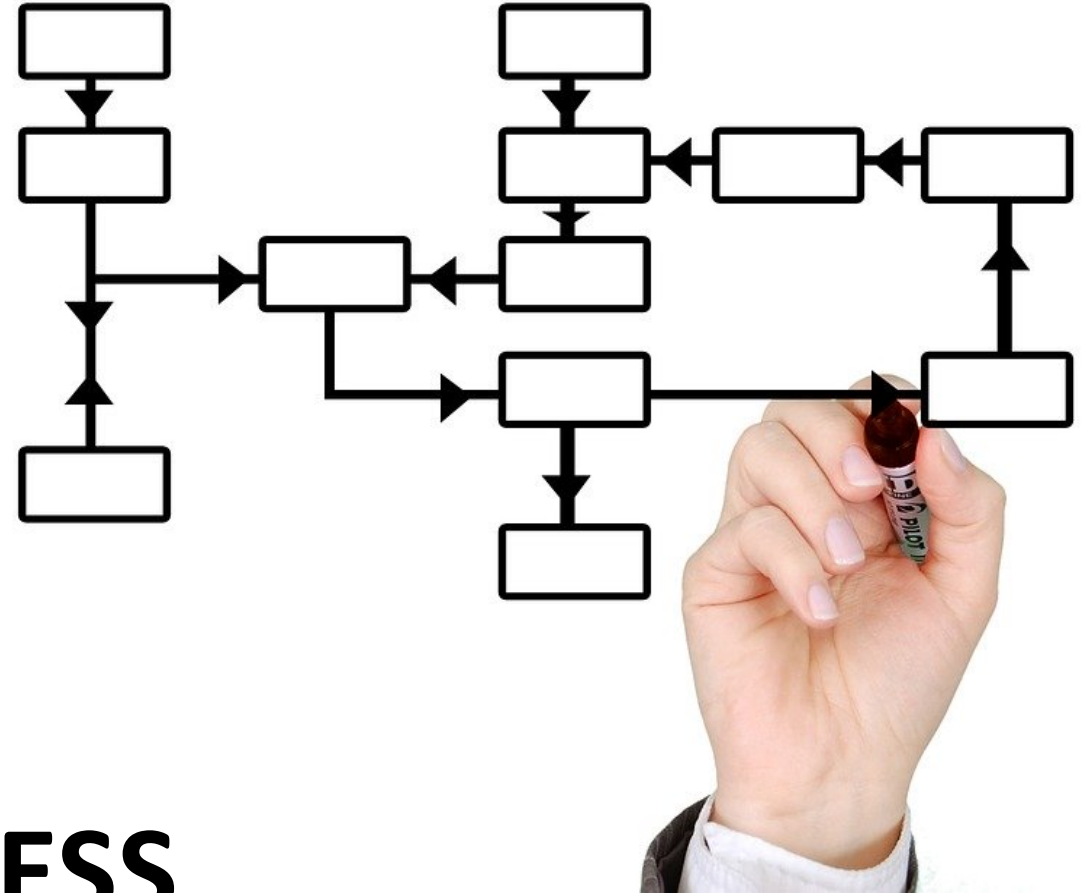
Budgeting and Staffing



Know-How



Results



GRIEVANCE PROCESS

Actions a School Must Take in Response to a Formal Complaint.



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Grievance Procedures

- Process that is initiated by a formal complaint by an individual or Title IX Coordinator
- Complainants and respondents must be treated equitably
- Presumption that respondent is not responsible for alleged conduct
 - Respondent does not need to prove innocence

Beginning of Investigation-Written Notice to Parties

- Notice of the recipient's grievance process, including any informal resolution process
- Notice of the allegations of sexual harassment potentially constituting sexual harassment
- Subsequently, additional notice if investigation expands beyond allegations in original notice



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Investigation

- Written notice of complaint provided to both parties
- Right to select advisor
- Institution bears the burden of gathering evidence
- Must still provide equal opportunity for parties to present witnesses and evidence
 - Expert witnesses
 - Inculpatory or exculpatory evidence
- Cannot restrict the ability of either party to discuss allegations under investigation or to gather and present relevant evidence



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Investigative Report

- Report must summarize all relevant evidence
- Prepared in advance of hearing
- Sent to parties at same time
- Give parties at least 10 days to respond
 - Parties must have equal opportunity to respond in writing to the report
 - School must consider responses before finalizing investigative report
- Final investigative report must be circulated 10 days before any determination of responsibility or 10 days before hearing
- Title IX Coordinator can serve as investigator, but cannot be the ultimate decision-maker



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Relevant Evidence



- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Exception: 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



Relationships



Communication



Budgeting
and Staffing



Know-How



Results



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

- Privacy of medical and psychiatric records
- School cannot access, consider, disclose party records that are maintained by a physician, psychiatrist, psychologist, or other professional for the purpose of treatment to that party without consent
- No information protected by legal privilege may be used during an investigation



Hearings

- Written notice of date, time, location, participants, and purpose of all hearings, interviews, or meetings, with sufficient time for the parties to prepare
- Must provide live hearings
- Schools must provide parties with an advisor if they do not have one, but advisors do not have to be lawyers
- Advisors must be allowed to conduct live cross-examinations of other parties and witnesses
- Comply with disability laws so that individuals with disabilities who participate in the grievance process are accommodated



Relationships



Communication



Budgeting
and Staffing



Know-How



Results



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Live Hearings

- Hearings must have all parties physically present in the same geographic location or, at the School's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other
- Upon a party's request, entire hearing must be held with the parties located in separate rooms, with technology enabling everyone to see and hear each other in real time



Cross Examination

- Cross-examination at the live hearing must be conducted directly, orally in real time by the party's advisor of choice and never by a party personally
- School has discretion to otherwise restrict the extent to which advisors may participate in the proceedings
- Questions must be relevant
- Decision-maker must decide if a question is relevant before the party or witness has to answer it and must explain any decision to exclude a question as not relevant



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Participation in Hearing or Cross-Examination

- If a party or witness chooses not to appear at the live hearing, or not to answer cross-examination, the decision-maker must exclude that party's or witness's statements and evaluate any evidence that doesn't involve those statements
- Decision-maker must not make inferences about the determination regarding responsibility based on the absence of a party or witness in the hearing or cross-examination



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Recording the Hearing

- Schools must create an:
 - Audio;
 - Audiovisual recording; or
 - Transcript of any live hearing
- Recording must be made available for parties to inspect and review



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Avoiding Decision-Maker Conflicts of Interest and Bias

- Must use independent judgment
- Cannot be the same person who conducted the investigation and cannot be the Title IX Coordinator
- Free from conflicts of interest or bias for or against complainants or respondents
- Must be impartial



Relationships



Communication



Budgeting
and Staffing



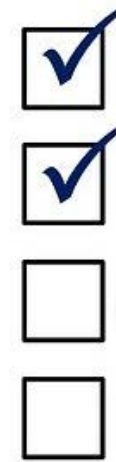
Know-How



Results

Decision-Maker's Responsibilities

- Objectively evaluate all relevant evidence
- Weigh relevant evidence and decide whether it reaches the School's standard of evidence for sexual harassment allegations
- Reach conclusions about whether the respondent is responsible for the alleged sexual harassment
- Submit a written decision



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Written Decision



After the decision-maker weighs the relevant evidence, the determination must be written and include:

- Portion of School's policy that was violated
- Description of procedural steps that were taken by the school on the way to get to that point
- Finding of fact section
- Section that draws conclusions after applying the facts to the portion of the School's policy that applies



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Written Decision – Cont'd

After the decision-maker weighs the relevant evidence, the determination must be written and include:

- Statement and rationale for the ultimate determination of responsibility
- Any disciplinary sanctions that the school will impose on respondent
- Statement about whether the school will provide remedies to the complainant
- Statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access
- Statement of recipient's procedures
- Statement of parties' right to appeal the initial determination regarding responsibility and permissible bases for appeal



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Decision-Making

- School must send parties the written determination simultaneously with information regarding appeals
- Can set deadline for when appeal must be filed
- Title IX Coordinator is responsible for carrying out the remedies contained in the written decision



Relationships



Communication



Budgeting
and Staffing



Know-How



Results



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Mandatory Dismissals

- Must dismiss for lack of jurisdiction
 - Conduct does not meet definition of sexual harassment
 - Alleges sexual harassment that did not occur in the school's education program or activity
 - Alleges sexual harassment that did not occur in the United States



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Discretionary Dismissals

- School may dismiss a complaint:
 - At the request of the complainant
 - When respondent is no longer enrolled/employed
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination regarding actions alleged in the formal complaint



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Dismissal Procedures

- Both parties simultaneously and promptly notified whenever school dismisses formal complaint or any allegations
- Does not preclude action under another provision of School's code of conduct or other policies





Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Appeals

- Must offer both parties an opportunity to appeal
- Can appeal:
 - After dismissal (whether mandatory or discretionary) before the grievance process
 - At the end of grievance process

Grounds for Appeals

- Procedural irregularity affected the outcome of the matter
- New evidence discovered not reasonably available at the time of the determination on responsibility or dismissal
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against one of the parties that affected the outcome of the matter
- Institution may offer additional grounds for appeals so long as the grounds apply on an equal basis to the parties



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Appeal Decision-Maker

- The decision-maker for the appeal cannot be:
 - The same person as the decision-maker who reached the determination regarding responsibility or dismissal
 - The Title IX Coordinator
 - The investigator
- Same standards that applied to the decision-maker in the initial determination apply to the decision-maker for appeals



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Appeal Procedures

- School must
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the outcome
- The decision-maker must issue a written decision describing the result of the appeal and the rationale for the result and provide the written decision simultaneously to both parties
- The determination about whether the respondent is responsible for the sexual harassment allegations becomes final after appeal



Relationships



Communication



Budgeting
and Staffing



Know-How



Results



Relationships



Communication



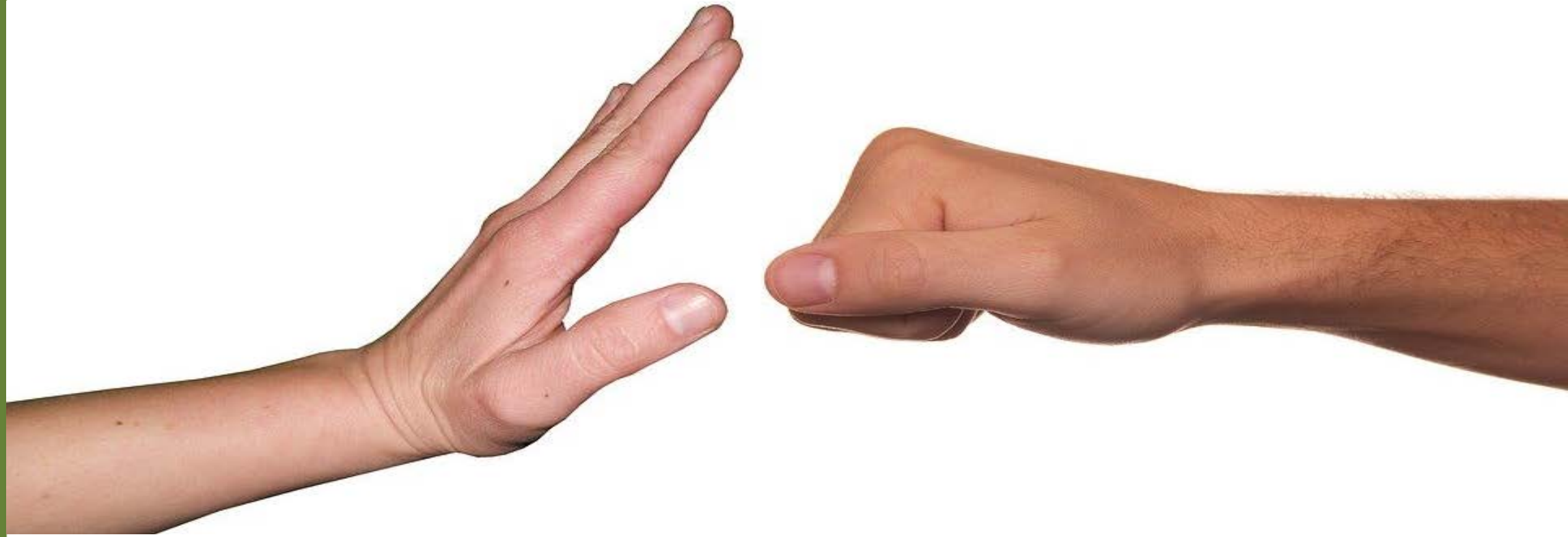
Budgeting
and Staffing



Know-How



Results



RETALIATION

Clear Prohibition Against Retaliation



Relationships



Communication



Budgeting
and Staffing



Know-How



Results

Retaliation

- No school or person may retaliate against anyone for exercising rights under Title IX
- Any person retaliated against can file a complaint with the School
 - The School must have procedures in place for prompt and equitable resolution of such complaints
 - Identities of the parties and witnesses must be kept confidential, unless required under other laws or in cases where disclosure is necessary to conduct grievance process
- Not retaliation for School to punish someone for making bad-faith, materially false statement during grievance process
- Engaging in protected speech under the First Amendment never constitutes retaliation

Hondros College of Nursing Sexual Misconduct Policy

- Effective August 14, 2020
- Incorporates new regulatory requirements
- Implementation and dissemination steps



Relationships



Communication



Budgeting
and Staffing



Know-How



Results