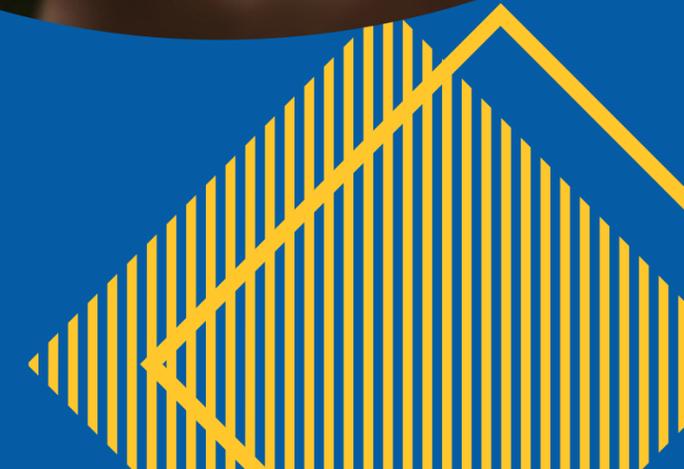




AN OVERVIEW OF THE NEW TITLE IX REGULATIONS AND THEIR IMPLICATIONS FOR COLLEGES AND UNIVERSITIES

May 12, 2020



INTRO/ HOUSEKEEPING/ DISCLAIMER

Courtney Bullard

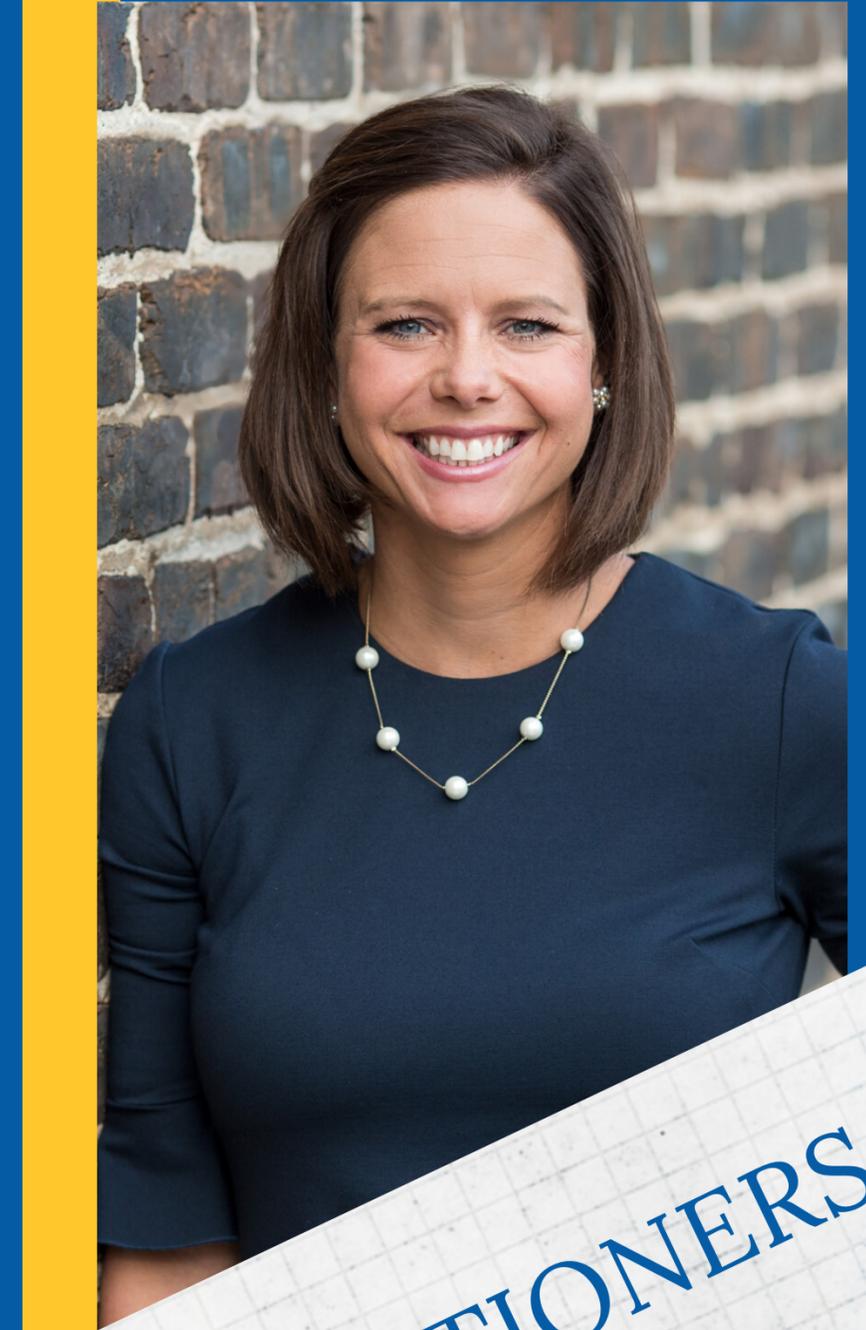
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PRACTITIONERS



REGULATIONS VS. GUIDANCE

[The] final regulations represent the Department's interpretation of a recipient's legally binding obligations, rather than best practices, recommendations, or guidance... [and] focus on precise legal compliance requirements governing recipients. p. 18



How to Read the Regulations

- Preamble vs. Regulations

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DEFINED TERMS

- Actual Knowledge
- Complainant/Respondent
- Formal Complaint
- Sexual Harassment
- Supportive Measures
- Elementary and Secondary School
- Postsecondary Institution

THEMES

- Supportive Measures
- Training
- Conflicts of Interest
- Due Process Guardrails
- Formal Process/Informal Process
- Hearings
- Jurisdiction
- Advisors





Role of Title IX Coordinator

Like 2001 Guidance, the final regulations incentivize institutions to train employees

- no mandate to train all employees
- require robust, specific training for Title IX Coordinator



Sexual Harassment

- **Conduct on the basis of sex that satisfies one or more of the following:**
 - **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;**
 - **Unwelcome conduct determined by a reasonable person to be so severe, pervasive AND objectionably offensive that it effectively denies a person equal access to the recipient's education program or activity; or**
 - **"Sexual Assault," "Dating Violence," "Domestic Violence" or "Stalking" as defined in the Clery Act.**

Actual Knowledge

Actual knowledge means 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

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RESPONSIBLE EMPLOYEES

- **NOT defined in the regulations-replaced with Title IX Coordinator**
- **Official authority to institute corrective measures**
- **Discretion to give authority outside of the Title IX Coordinator**
- **CSA's ONLY a responsible employee if designated as an official with authority**
- **Obligation to report or inform on how to report, or having been trained to do so, does not qualify someone has having ability to institute corrective measures**
- **Discretion to decide which employees MUST, MAY, or only with student's consent report sexual harassment to Title IX Coordinator**





JURISDICTION

Education Program or Activity

- **Locations, events, or circumstances (operations)**
- **institution exercised substantial control**
 - **over both the respondent AND the context in which the sexual harassment occurs**
- **Includes any building owned or controlled by student organization that is OFFICIALLY RECOGNIZED by institution**
- **Includes online sexual harassment but it must be analyzed to determine if it occurs in education program or activity**
- **Does not create or apply a geographic test, does not draw a line between “off campus” and “on campus,” and does not create a distinction between sexual harassment occurring in person versus online.**

Jurisdiction Continued

- No single factor to determine exercise of substantial control
- Distinguishable from Clery definitions of non-campus building or property
- May require organization to abide by Title IX policies and procedures
- May have to bifurcate conduct

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Supportive Measures

What

- defined term and intentional deviation from "interim measures" individualized services provided to a complainant or respondent that are non-punitive, non-disciplinary, and do not unreasonably burden the other party yet are designed to restore or preserve a person's equal access to education
- Non-disciplinary
- non punitive
- individualized services
- interactive process

Offered

- to complainant and respondent (can be refused)
- as appropriate
- as reasonably available
- without fee or charge

When

- promptly
- before or after the filing of formal complaint **OR**
- where no formal complaint has been filed



SUPPORTIVE MEASURES CONTINUED

Purpose:

- restoring or preserving equal access
- protecting safety
- deterring sexual harassment

Burden: remains on the institution not the parties

Not: punitive or disciplinary

Confidential: as much as possible

Document: when provided, when not provided and why

Title IX Coordinator: ultimately responsible for effective implementation, but others can also implement

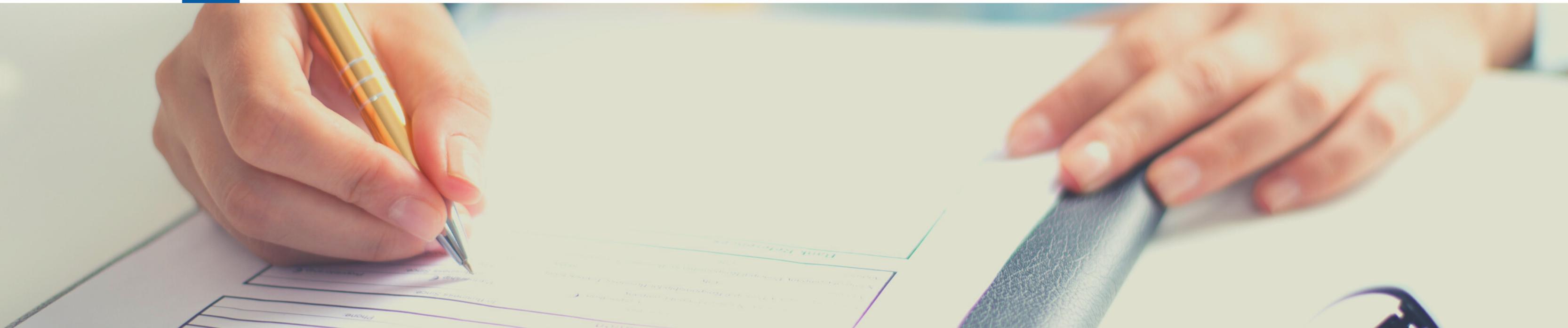
Examples: in section 106.3



Formal Complaint

- Document (paper, email, or online submission)
 - Signed by Complainant (digital signature is okay) or Title IX Coordinator
 - Alleging sexual harassment, against the respondent AND requesting that institution investigate.
- Complainant must be participating in, or attempting to participate in an education program or activity of the institution/district with which the formal complaint is filed.

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DISMISSAL OF A FORMAL COMPLAINT

MUST Dismiss if:

- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.
 - *May act under another provision of code of conduct

May Dismiss if:

- Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw formal complainant or allegations
- Respondent is no longer enrolled or employed by institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

*Must promptly send written notice of dismissal and reasons for dismissal simultaneously to parties

Response to a Formal Complaint (Grievance Process)

- Treat parties equitably
- Require an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- No conflict of interest or bias by Title IX Coordinator, investigator, decision-maker or facilitator of informal resolution process
- Trained Title IX Team
- Presumption that respondent is not responsible
- Include reasonably prompt time frames for process and appeals with written notice for limited extensions with good cause (may include absence of party, witness, or advisor, law enforcement activity or the need for language/accommodation of disability)
- Describe range of sanctions and remedies
- Standard of evidence (same for students and employees)
- Procedures and permissible bases for appeals
- Notice of Allegations containing specific information as outlined in regulations



Investigation of Formal Complaint

MUST

- Ensure that burden of proof and burden of gathering evidence with institution, not parties (no medical or counseling records w/o written consent of party)
- Provide equal opportunity to present witnesses (including EXPERT), and inculpatory/exculpatory evidence
- Not restrict ability of either party to discuss the allegations or to gather/present relevant evidence
- Provide opportunity for both parties to have advisor (can be attorney and can restrict the extent to which advisor can participate in the process)
- Provide written notice of date, time, location, participants and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare to participate
- Provide equal opportunity to inspect and review evidence obtained as part of investigation (even if not relied on)- sent to party AND advisor (electronic or hard copy) with 10 days to respond prior to completion of investigative report.
- Create investigative report that fairly summarizes relevant evidence
- Provide report to parties AND advisors 10 days prior to hearing for review and written response.



Hearings

- **Live Hearing (in same room or using technology in separate rooms- not only via telephone)**
 - **Permit ADVISOR to ask the other party and witnesses RELEVANT questions (including those challenging credibility)**
- **Cross-Examination**
 - **Directly, orally, in real time by ADVISOR**
 - **If a party or witness does not submit to cross-examination, the decision-maker(s) must not rely on any statement of that party or witness**
- **Recording (audio, visual, or transcript) made available to parties for inspection and review**
- **Written determination regarding responsibility and sanctions with rationale**
- **Decision provided to parties simultaneously**
- **Effective implementation of remedies (Title IX Coordinator)**



DECISION-MAKERS AT HEARING

- **RELEVANCY-** Must determine and articulate the relevancy of the questions and explanation of any decision to exclude a question as not relevant
 - Evidentiary Gatekeeper
 - BEFORE THE QUESTION IS ANSWERED
 - Not based on Rules of Evidence/ Legal Standard

APPEALS

- **MUST offer both parties an appeal re: responsibility, recipient dismissal of formal complaint, or any allegations on following bases:**
 - **Procedural irregularity that affected the outcome of the matter**
 - **New Evidence**
 - **Conflict of Interest or Bias by Title IX Coordinator, Investigator(s), Decision-Maker(s)- generally toward complainants or respondent or toward specific party**
 - **May include additional bases**





Burden of Proof

- **Discretion of Institution**
- **Must be Consistent Throughout ALL Processes ie. Faculty, Staff and Students**
- **Campus/District Specific**



Advisors

- Permitted for all parties
- May participate in process with limitations as set by institution
- If a party does not have an advisor present at the live hearing, the institution **MUST** provide advisor of the institution's choice (without fee or charge to the party) who may, but does not have to be an attorney
- Conduct cross-examination
- Removed the Alignment language



INFORMAL RESOLUTIONS

May NOT:

- Be required/condition of enrollment or employment
- Be offered unless Formal Complaint is filed
- Be offered or facilitated when allegations of employee sexually harassing student

May:

- Be facilitated at any time after Formal Complaint and prior to determination regarding responsibility
- Expel if agreed to in Informal Resolution
- Provide Informal Resolution Process (NOT REQUIRED TO PROVIDE)

Must:

- Provide information regarding Informal Resolution Process in initial Notice of Allegations
- Provide parties written notice of informal resolution with
 - allegations
 - requirements of process (including what information/documents will be shared)
 - circumstances which presume Formal Complaint arising from same allegations
 - right to withdraw/resume grievance process
 - consequences-including records kept/shared
- Obtain voluntary, written consent
- Have reasonably prompt time frames

INFORMAL RESOLUTIONS CONTINUED

Facilitators

- MUST be trained and free from conflicts of interest/bias
- MAY be Title IX Coordinator

Types:

- Arbitration
- Mediation
- Restorative justice
- Other?

Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities





Deliberate Indifference

"Clearly unreasonable in light of the circumstances"

- **Must promptly offer supportive measures**
- **Cannot impose discipline without a formal process**
- **Must investigate allegations in a formal complaint**

Training, Training, Training

REQUIRED

- Title IX Coordinator (robust), Investigators, Decision-Makers, Informal Resolution Facilitators, Appellate Decision-Makers
- Decision-Makers- training on technology issues
- At least 8 hours (assumed) of training with additional each subsequent year
- Publish trainings on website (if have one)
- Maintain training materials for 7 years

NOT REQUIRED:

- Training for Advisors (but assess competency of employees who you want to appoint as advisors)
- Live Training (can be virtual/online)
- Un-training of responsible employees

May

- Train on trauma informed techniques
- Train advisors on cross-examination
- Train others involved in process





**Title IX
Coordinator**



Investigator(s)



**Decision-
Maker(s)**



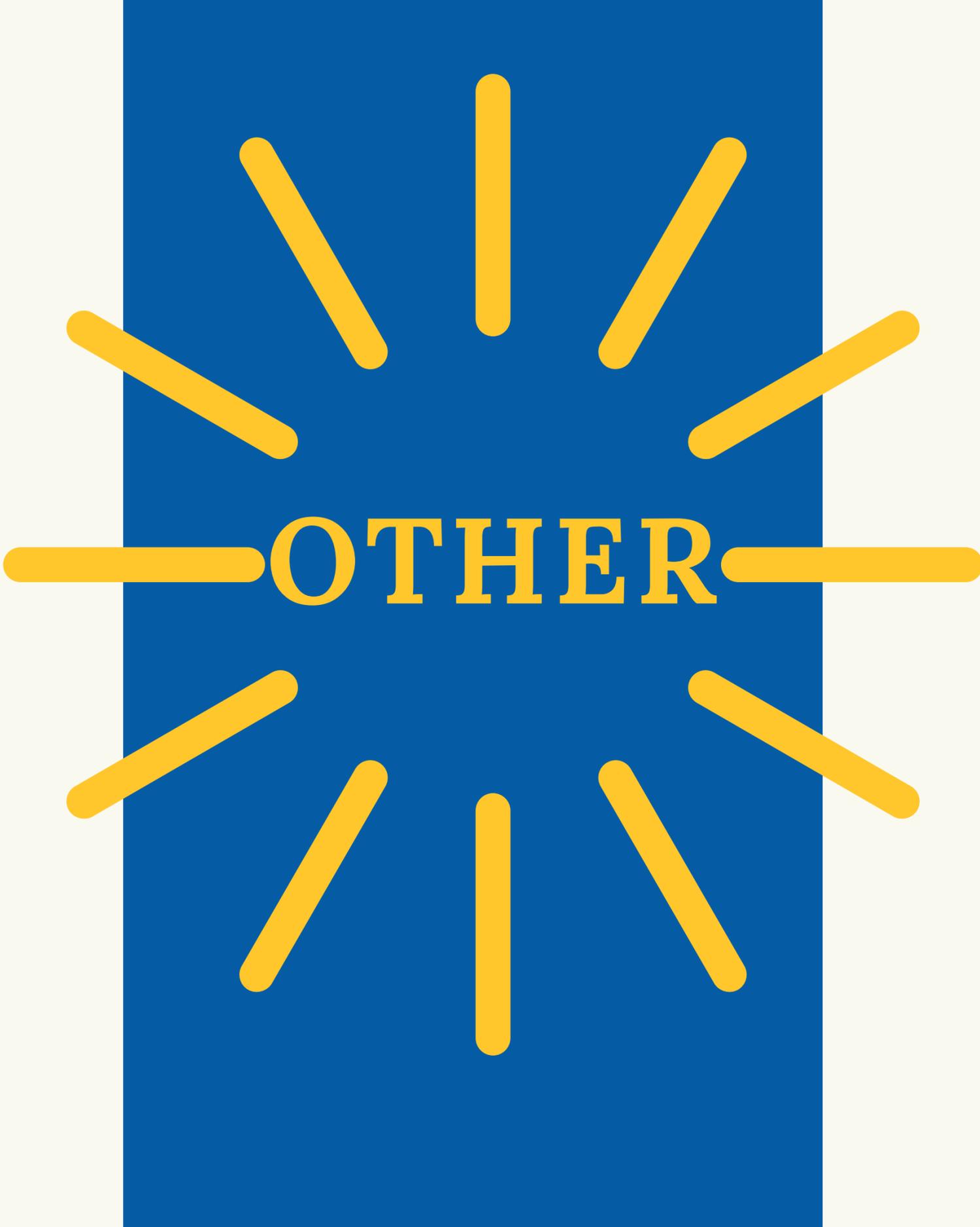
**Appellate
Member(s)**



**Informal
Resolution
Facilitators?**



**Responsible
Employees**



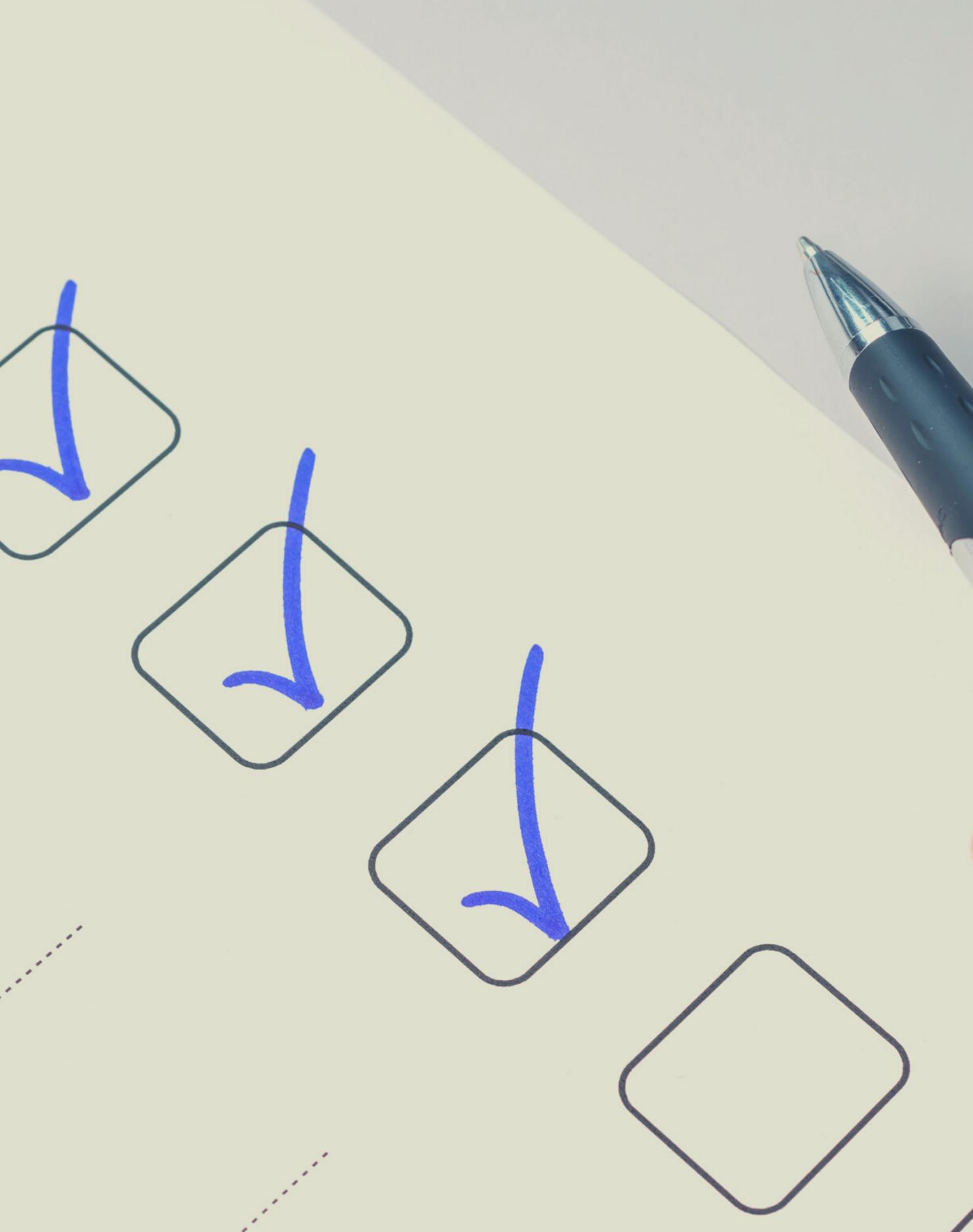
OTHER

- **Retaliation**
- **Emergency Removal**
- **ADA and Title IX**
- **Delay of Investigations Due to Law Enforcement**
- **Recordkeeping**
- **Confidentiality/Gag Orders**
- **Title VII and Title IX**
- **Current Open Investigations**
- **Online Harassment**
- **Due Process**
- **First Amendment/Academic Freedom**
- **Removal of Safe Harbor**



Positives

- **Flexibility**
- **"Will not Second Guess"**
- **Deliberate Indifference standard that will place institutions/school districts in violation is higher and clearer**

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ACTION ITEMS

- Acknowledge New Regulations to campus community
- Meetings with leadership to explain needs and next step
- Begin identifying process and people
- Publication
- Training and implementation





Be Patient

There is a lot of work to be done, but it is most important that it is done correctly. Right NOT Rushed.





UPCOMING ICS EVENTS



SAVE
THE
DATE

- Breakdown and Implementation of the New Title IX Regulations
(May 27 AND June 9)
- Investigator
 - Level 1 (June 23-24)
 - Level 2 (May 21 and July 7)
- Decision Maker/Adjudicator
 - Level 1 (June 11-12)
 - Level 2 (June 18)