



GRAND RIVER | SOLUTIONS

Conducting Fair, Thorough, Legally Compliant Investigations

The University of Alabama at Birmingham

Chantelle Cleary Botticelli, J.D.

August 2021

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.



Vision

We exist to help create safe and equitable work and educational environments.



Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.



Core Values

- ❖ Responsive Partnership
- ❖ Innovation
- ❖ Accountability
- ❖ Transformation
- ❖ Integrity

Agenda

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02

Developing an Investigative Strategy

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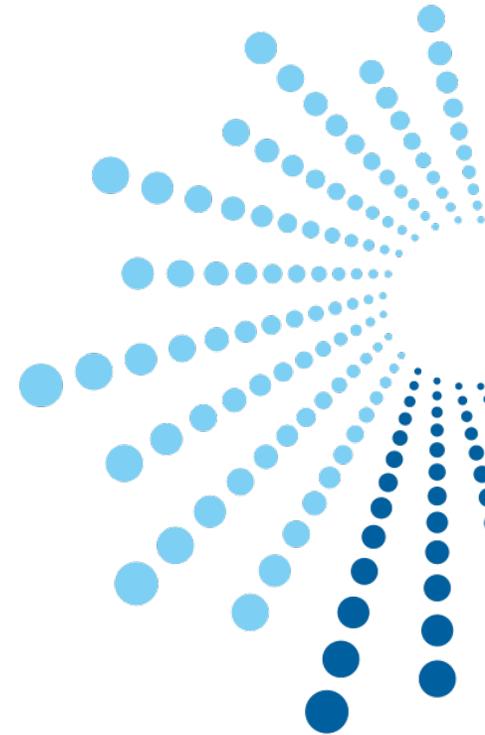
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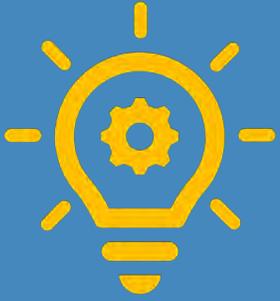
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Evidence Collection and Assessment

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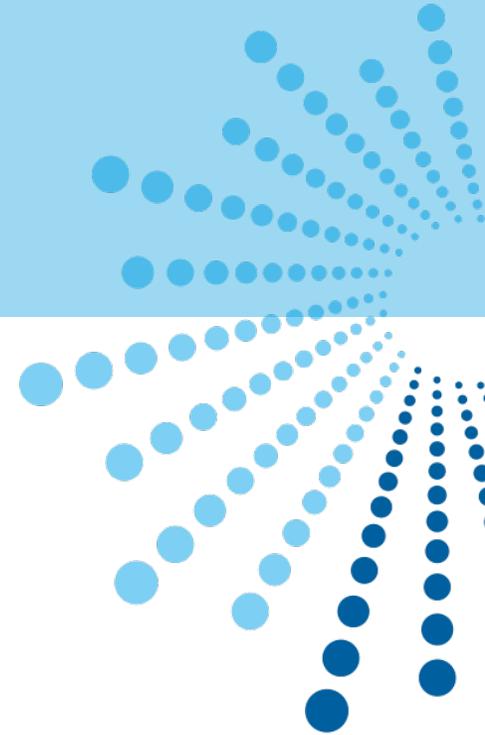


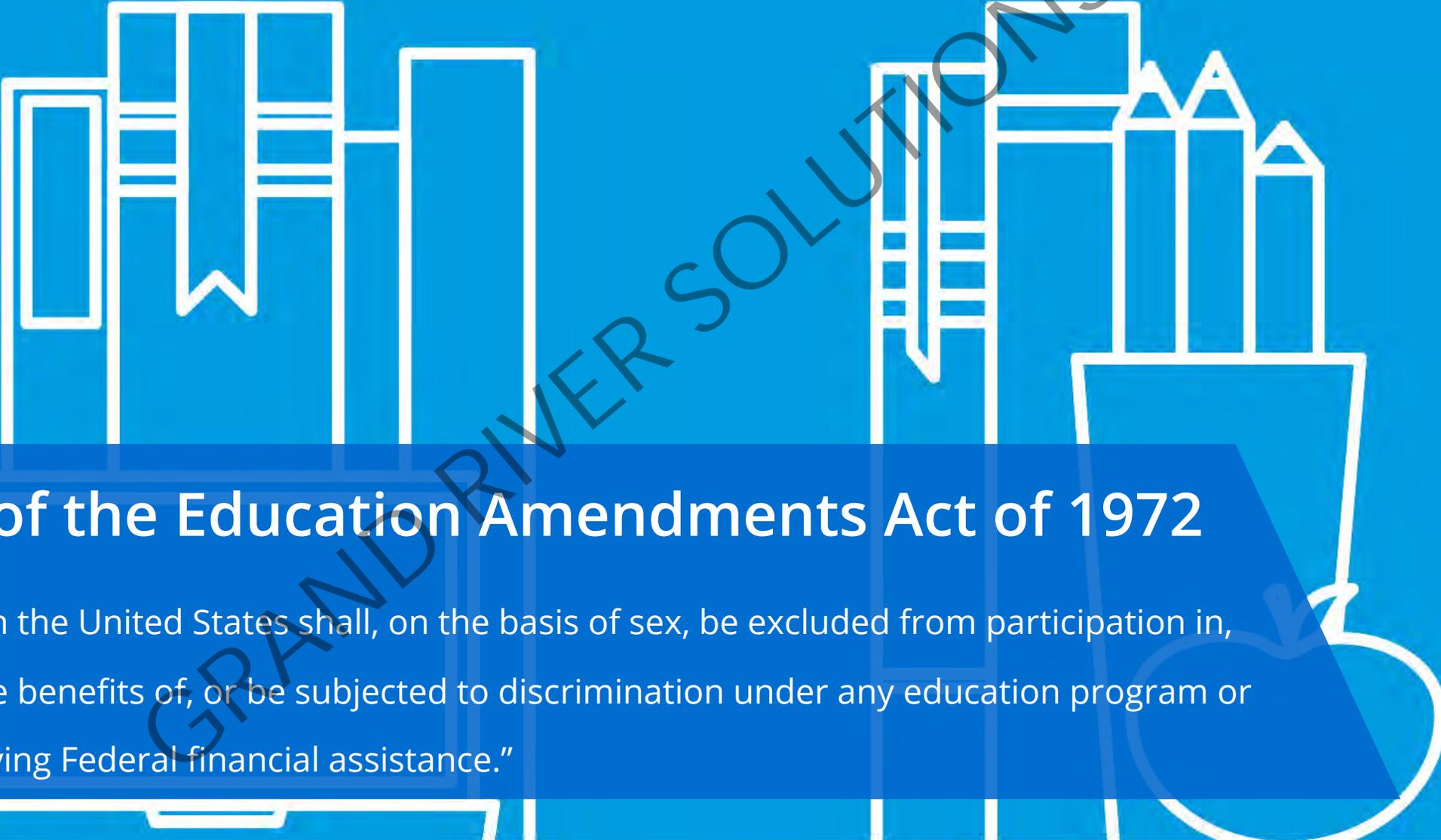


Title IX's Requirements

01

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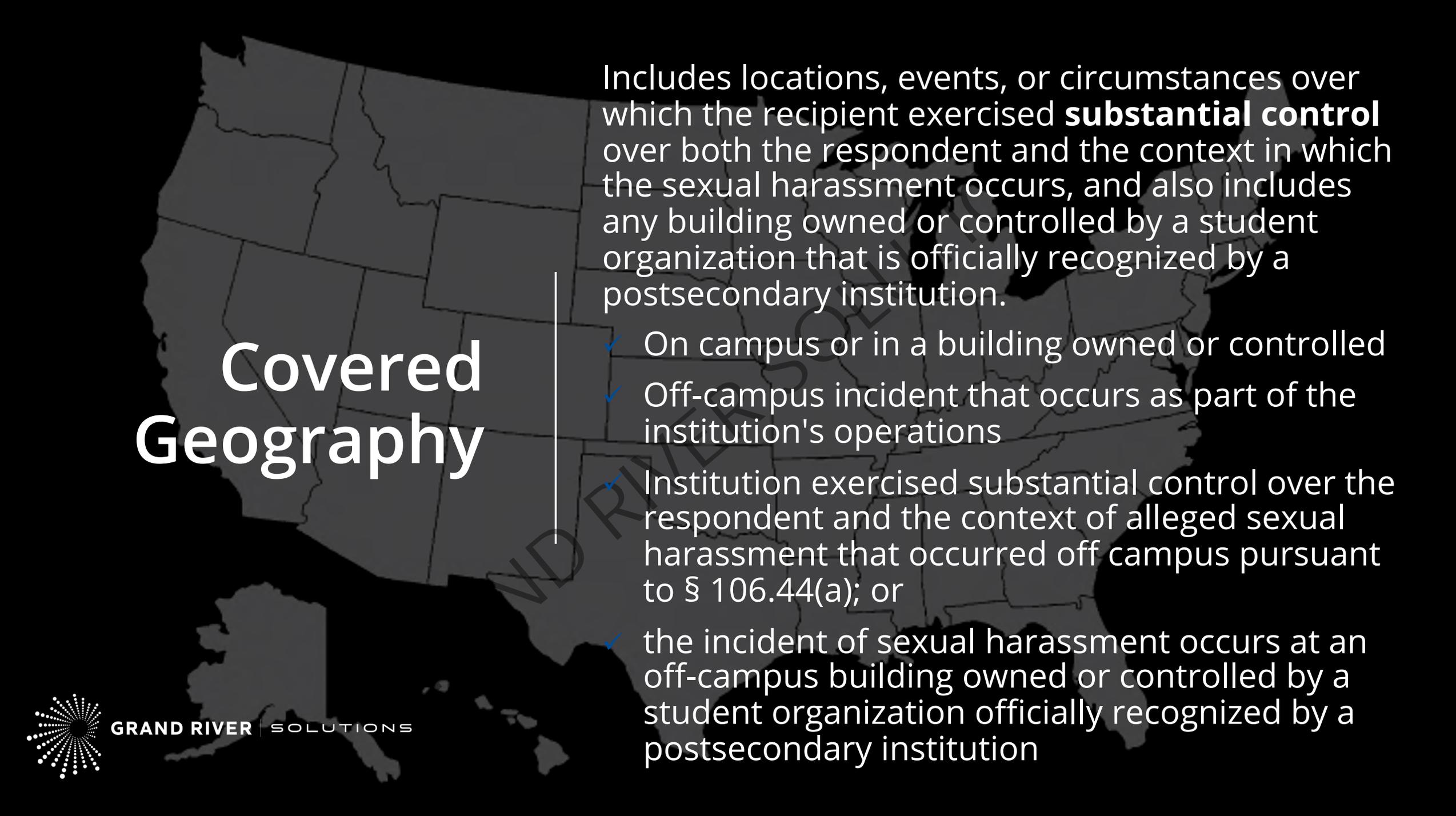
Title IX of the Education Amendments Act of 1972

"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."

Sexual Harassment: *Section 106.30*

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

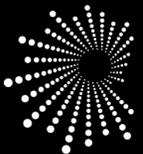
- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively 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).

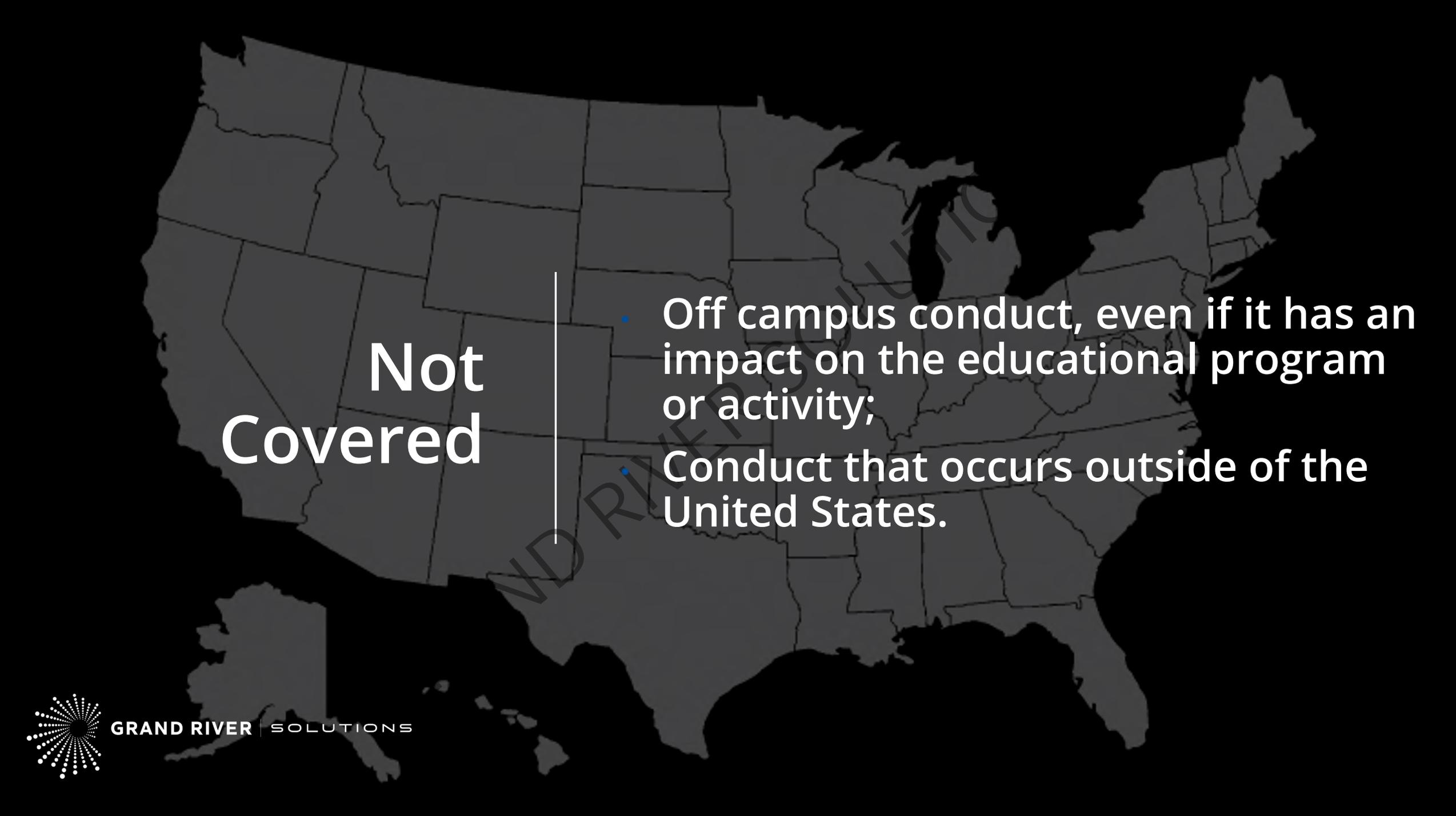


Covered Geography

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, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

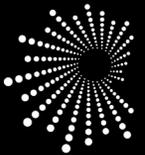
- ✓ On campus or in a building owned or controlled
- ✓ Off-campus incident that occurs as part of the institution's operations
- ✓ Institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
- ✓ the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution





**Not
Covered**

- Off campus conduct, even if it has an impact on the educational program or activity;
- Conduct that occurs outside of the United States.



Covered Individuals

Eligibility for Title IX's Protections

“At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.” 34 C.F.R. § 106.30

Applicant

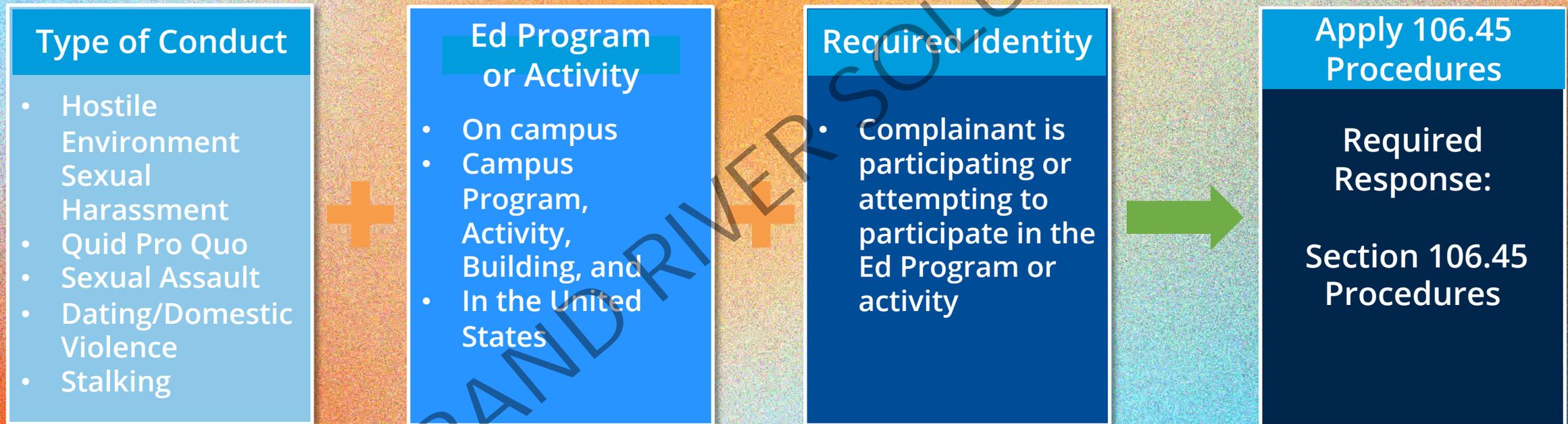
Accepted/Hired

Enrolled/Employed



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Title IX Application Post May 2020 Regulations



Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are compliant with VAWA/Clery, other intersecting federal and state laws



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 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

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Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling participation

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 provided by the institution

Decision maker determines relevancy of questions and evidence offered

Exclusion of Evidence if no cross examination

Written decision must be issued that includes finding and sanction



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“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?

- 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.

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

The Investigator



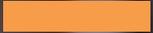
Can be the Title IX Coordinator, although that is disfavored



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



UAB's Investigative Procedures

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Initiation of an Investigation

Investigations begin with the filing of a formal complaint and the issuance of a notice of investigation and allegations.



Notice of Investigation

The Notice of Investigation will include:

- Notice of of the alleged conduct at issue, including the identities of the parties involved when a Formal Complaint is filed by a Complainant and the identities of the parties (if known) when the Formal Complaint is filed by the Title IX Coordinator;
- Notice of the specific section(s) of the Title IX Policy allegedly violated, and the date and location of the incident(s);
- Notice of the grievance process, including information about Voluntary Informal Resolution;
- 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;
- Notification of the provision of the Title IX policy prohibiting knowingly making false statements or knowingly submitting false information during the grievance process;
- Range of potential violations under the Title IX Policy;
- On and off campus resources;
- Rights of the Respondent, including the right to an advisor of their choice who may be an attorney;
- Range of potential sanctions; and
- Notification that expulsion is a potential sanction and that expulsion precludes matriculation (where appropriate).

Advisor of Choice During the Investigation

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

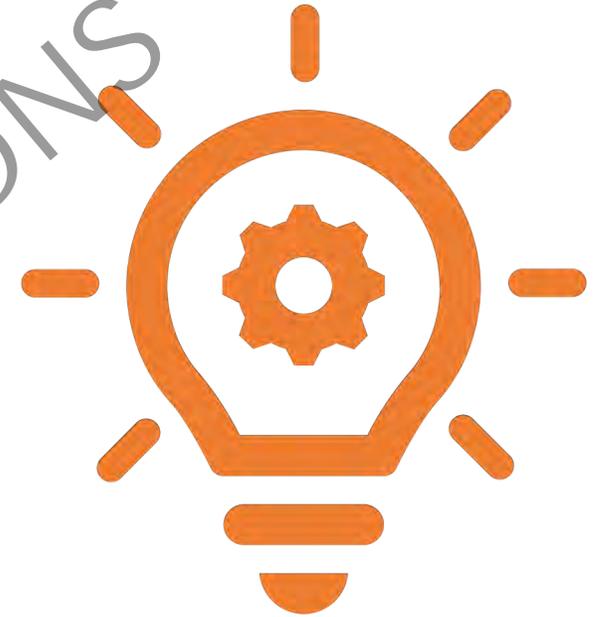
UAB does not place restrictions on who can serve.

The advisor may not actively participate in the investigation.



During the Investigation

- Complainant and Respondent will have an opportunity to be heard, to submit information, to identify witnesses;
- The investigator will collect available physical and documentary evidence;
- The investigator will not access, consider, disclose, or use information deemed irrelevant under the law, including information protected by a legally recognized privilege and Complainant's prior sexual history.



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Evidence Review

Complainant and Respondent and their advisors, if any, will receive evidence directly related to the allegations in the Formal Complaint, including inculpatory and exculpatory evidence whether obtained from a party or another source, and evidence that the University do not intend to rely in reaching a determination of responsibility.

The evidence will be provided with any redactions.

The parties will receive a copy of the evidence electronically but as a precondition of receiving a copy of the evidence, all parties, and their respective advisors (if any) must sign and agree to abide by a non-disclosure agreement.

A Complainant and Respondent may submit any additional evidence, comment, or information to the Investigator(s) within ten (10) business days.

information discoverable through the exercise of due diligence that is not provided to the Investigator within ten (10) business days of receipt of the evidence will not be considered by the Investigator(s) or Hearing Officer.

Investigative Report Review

The parties and their advisors will simultaneously receive a copy of the Final Investigation Report (which is also subject to the non-disclosure agreement) at least ten (10) business days prior to an adjudication hearing.

The Complainant and Respondent will each have an opportunity to review and respond in writing to the Final Investigation Report. Any such response by the parties must be submitted to the Title IX Coordinator within five (5) business days of transmission of the Final Investigation Report. The Title IX Coordinator will provide any statement(s) with the Final Investigation Report to the Hearing Officer.

Investigation Timeline

The University will seek to conclude the investigation within (60) business days.

The timeframe can be extended for good cause

Any extension of the timeframes, and the reason for the extension, will be shared with the parties in writing.

Best efforts will be made to complete the process in a timely manner by balancing principles of thoroughness and fundamental fairness with promptness.

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 to have a conflict of interest or bias

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

Impermissible Bias

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

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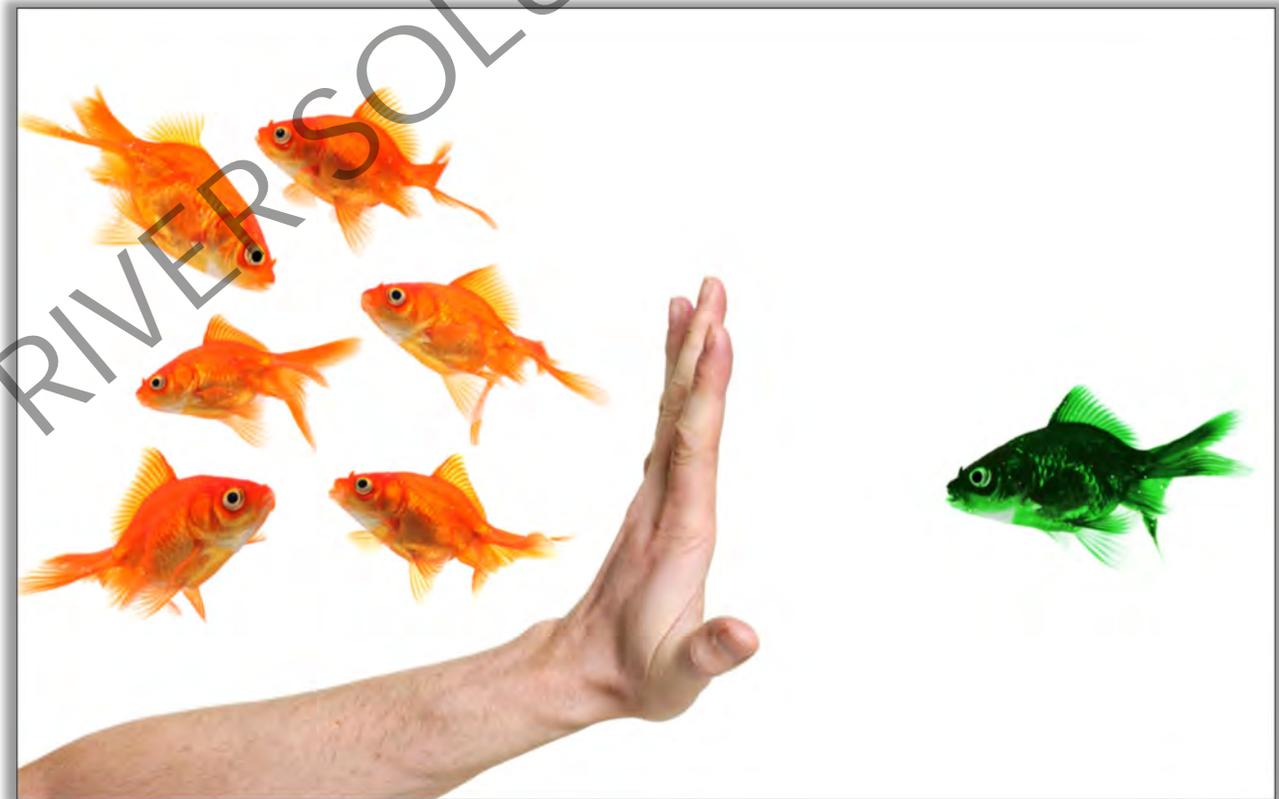
STIS

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





Conflict of Interest





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

Trauma-Informed Practices

In the preamble, the Department permits the use of trauma-informed practices and recognizes that trauma-informed practices can be used in an impartial and non-biased manner.

Trauma-informed practices must be applied equally to all genders.

Trauma-informed practices provide tools/techniques for interviewing and engaging with the Complainant, Respondent, and Witnesses.



Format/Structure of the Interview



Format of Questions



Approach to Clarification

Misapplication of Trauma-Informed Practices

It is a misapplication of trauma-informed principles to allow potential evidence of trauma to:

1. Influence the interpretation of a specific item of evidence;
2. Substitute for missing evidence;
3. To serve as a justification for not doing a full and thorough investigation;
4. Cause a biased belief in the veracity of one or more party.



Developing an Investigative Strategy

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Essential Steps of an Investigation



Notice of Formal Investigation



Initial Interviews



Evidence Collection



Evidence Review



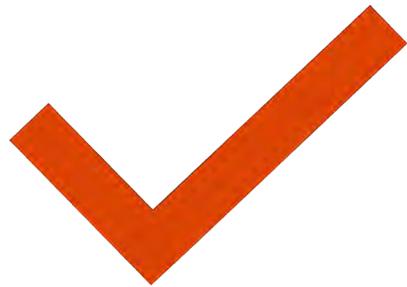
Additional Evidence Collection/Follow-Up Interviews



Report Writing

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Understand the Scope of the Investigation



Review the formal complaint



Ask questions if unsure

The Process

Developing an Investigative Strategy



Investigation Timeline

Prior History

- Between the Parties
- Of the Parties

Incident

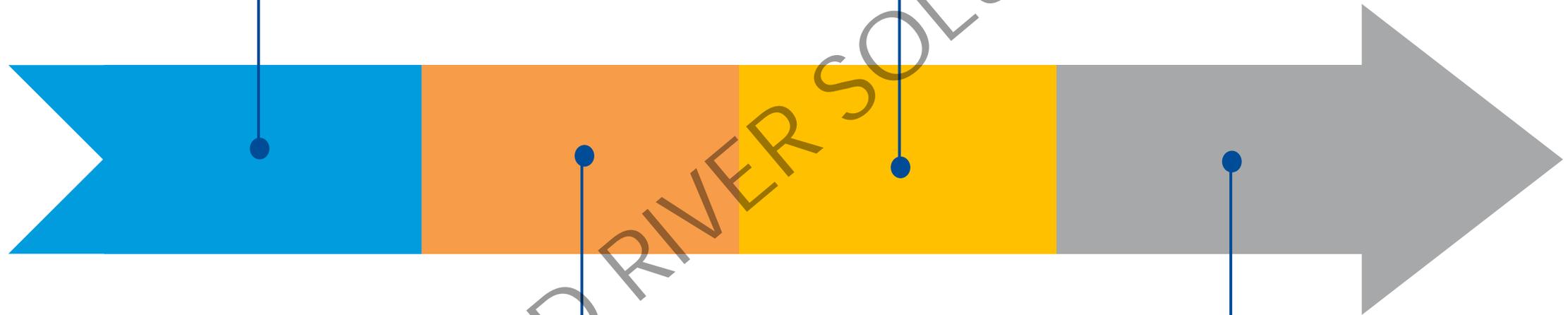
- Consent
- Type of Contact
- Injuries

Pre-Incident

- Communications
- Interactions
- Conduct

Post Incident

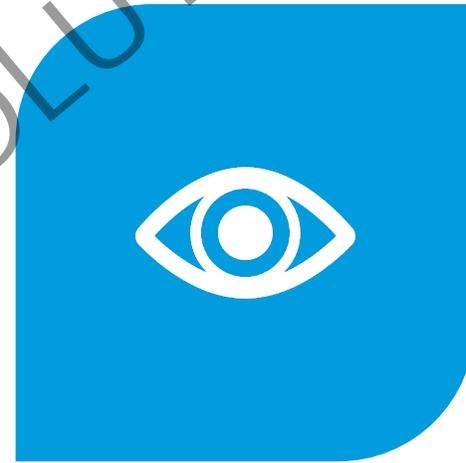
- Behaviors
- Communications



Title IX Hearing Requirements: The Impact on Investigations



EVIDENCE COLLECTION



INVESTIGATE THE EVIDENCE

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Considerations for Evidence Collection in a Post-Regulatory World

Testimony

Text
Messages

Social Media
Posts

Medical
Records

Public
Safety/Police
Records



The Importance of Organization

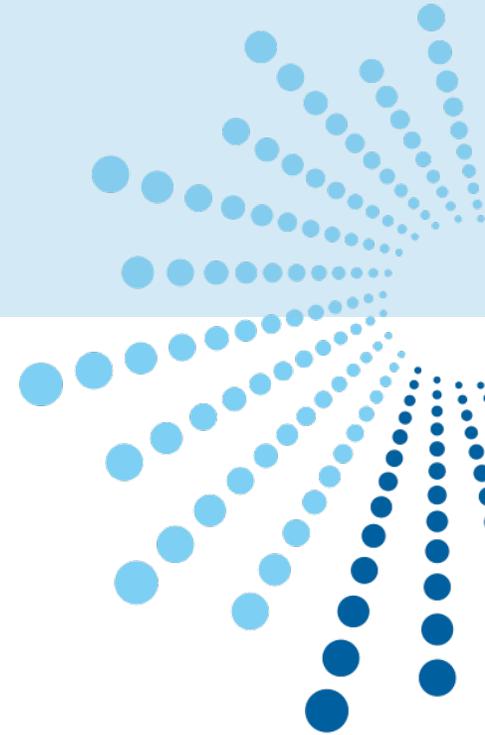
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Investigative Interviews

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Interview Objectives



Connect

Build rapport
Build trust
Empower



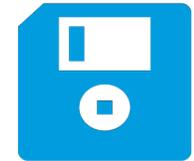
Listen

Allow interviewee to
share their experience



Clarify

Understand what you
have heard
Seek additional
information



Evidence Preservation

Text Messages
Photographs
Names and contact info
for witnesses



Prior to the Interview



Secure an appropriate meeting location



Allow for enough time to conclude the meeting



If interviewing a party, inform them of their right to have an advisor present.



Prepare for the meeting

Areas of focus?

Other evidence?

Go back review what you have



Provide Written Notice of the Meeting

Advise the parties/witnesses that you will be collecting evidence

Set Expectations

What they should expect of you

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions
- Patience, respect, and appreciation
- This will not be their only opportunity to speak with you

What you expect of them

- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

The Importance of Empowerment and the Power of Empathy



How do we...



Build Rapport
and Trust?



Empower?



Investigative Interviews



Start the interview by eliciting a narrative...

Where would you like to begin?

Start where you are comfortable and share what you are able to remember.

Allow the person to speak uninterrupted. This takes patience.

What are you able to tell me about your experience?



Next, ask questions that are intended to clarify and more deeply explore the information and details provided by the person in their narrative.

Do Ask:

- Interview for clarification
- Help me understand
- Can you tell me more about...?
- Is there anything else you can share about...?

Avoid:

- Interrogation
- Questions that blame
- Questions that imply doubt
- Leading questions