

Title IX Coordinator Training Online Course

Class Two: Conducting a Title IX Investigation

Marjory Fisher

Associate Vice President & Title IX Coordinator, Columbia University

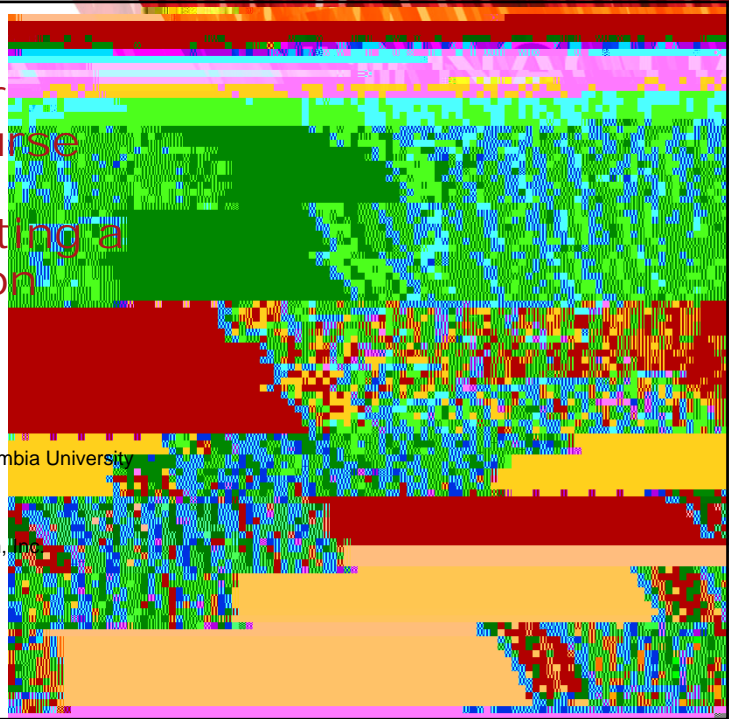
Melinda Grier

Attorney, Melinda Grier Consulting & Novus Law Firm, Inc.

Janet P. Judge

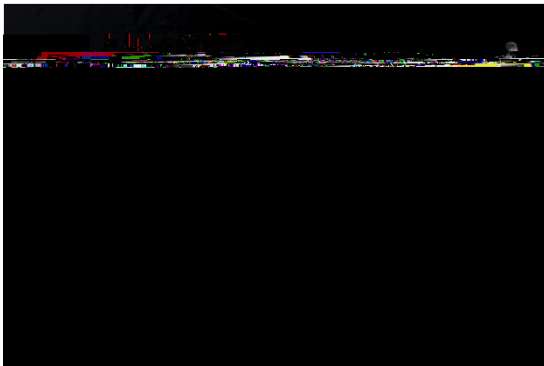
Partner, Holland & Knight LLP

Training Course Does Not Constitute Legal Advice



1

Class Overview:



- Questions from Class One
- President Biden's March 8 Executive Order
- Investigations Involving Employees
- Investigating a Formal Complaint
- Impartiality/Conflicts of Interest
- Relevance
- Violations of Other Policies

2



Questions from Class One

Jurisdiction & Complaints

- 1) What level of connection or control by an institution must be established before considering allegations of harassment that occurs exclusively online?
- 2) If a student were sexually assaulted in their home during a virtual lesson, would [Title IX] apply?
- 3) Would you consider a property rented for a weekend by a registered student group to be within the control of the group for that weekend and therefore within Title IX jurisdiction?
- 4) Besides a signed statement, what are other ways that the statement can be "attributed" to the complainant?
- 5) If there are multiple complaints against a respondent by different individuals can those complaints be consolidated against the respondent? If yes, how does that work during the investigation/ hearing process?

3

Questions from Class One (cont'd)

Actual Knowledge & Notice of Allegations

- 1) To be clear, actual knowledge (when a report is shared with an OWA) puts the school on notice, but does not require the complainant to file/sign a formal complaint? The school is on notice (and needs to offer supportive measures and take all other steps required by law) but it's possible the complainant may NOT want to file a formal complaint (even after they've made a disclosure/report) and they have the right not to?
- 2) Could someone please touch on the interaction between Title IX and law enforcement? I just received an anonymous report of students filming sexual intercourse with other students and sending the videos around. It seems to me that law enforcement's ability to subpoena phone records etc. could lead to a much more thorough investigation. Please know I'm not suggesting we ignore Title IX policy and procedure. Just curious about timing/best practice.
- 3) What level of detail about the allegations is needed in the notice? (E.g., is it sufficient to provide notice of a report of "sexual harassment by respondent against complainant on X date at X location?" Or, do you think details about the reported sexual harassment must be included?)

4

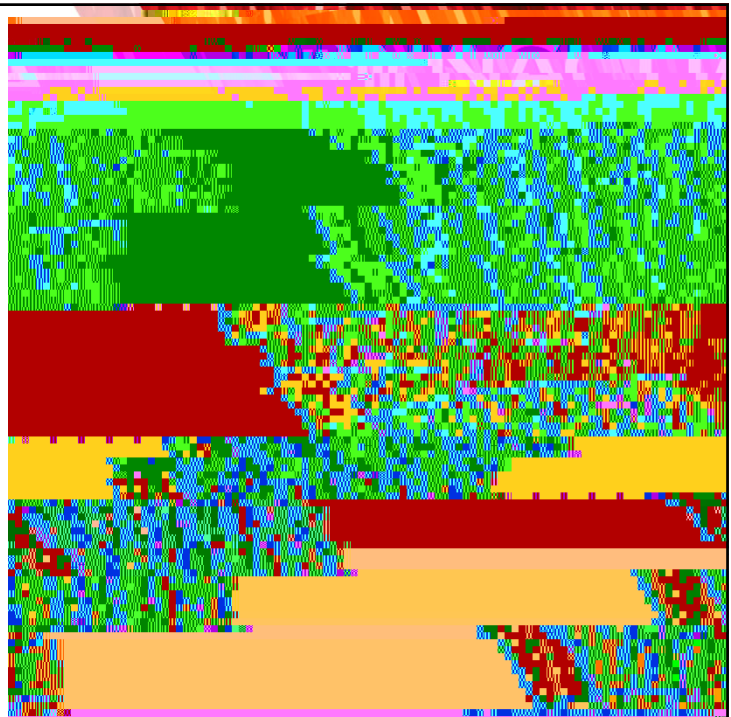
Questions from Class One (cont'd)

The Process

- 1) For mandatory dismissal, if conduct would not constitute sexual harassment if proved – is the Title IX Coordinator making that determination that the conduct was not severe/pervasive/objectively offensive?
- 2) Can the Title IX Coordinator be the facilitator/mediator of the informal resolution?
- 3) At what time do they have a right to inspect and review all the evidence collected?

5

March 8
Executive
Order



6

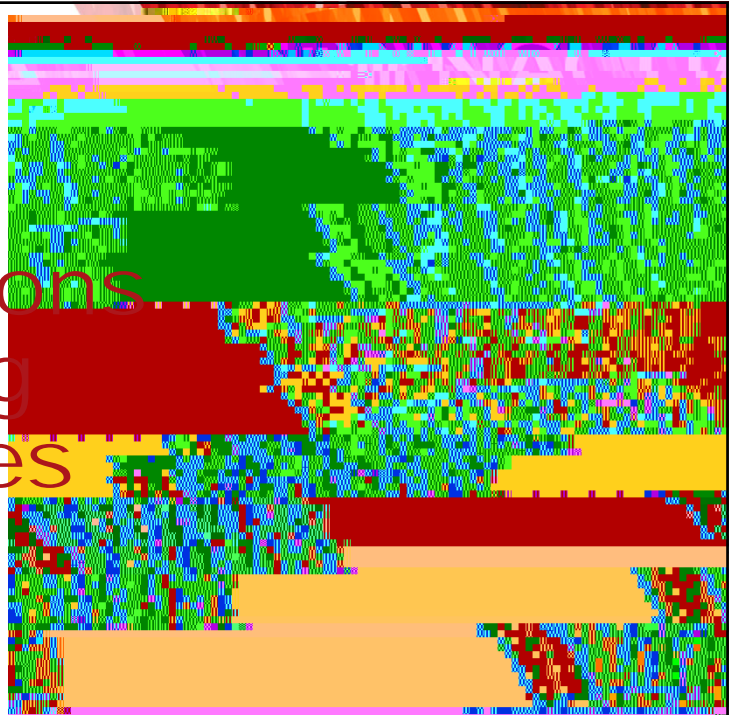
The President's Executive Order on *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*

- **Section 1. Policy.** It is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.

“OCR will fully enforce Title IX to prohibit discrimination based sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department.” Letter to Educators on Title IX’s 49th Anniversary, June 23, 2021

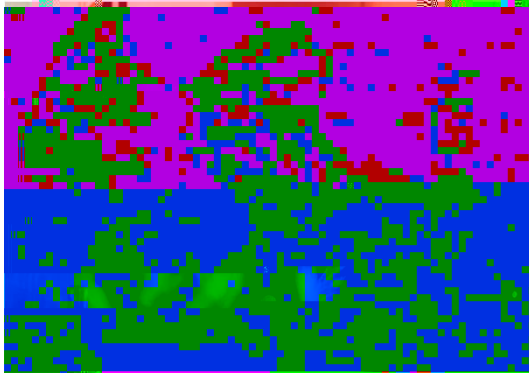


Investigations
Involving
Employees





Title VII Requirements

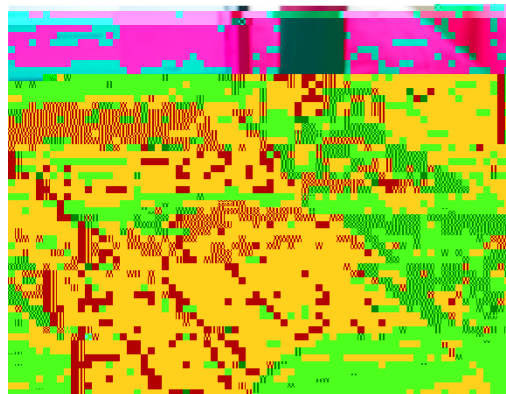


- Standards
 - Submission becomes a term or condition
 - Unreasonably interferes with work performance or creates a hostile environment
 - Employer knew or should have known
- Immediate and appropriate corrective action
 - End the harassment and prevent recurrence

11

Special Considerations

- Collective bargaining rights
- Administrative leave
- “Reasonably prompt timelines” (Title IX)
vs.
“Immediate and appropriate corrective action” (Title VII)



12

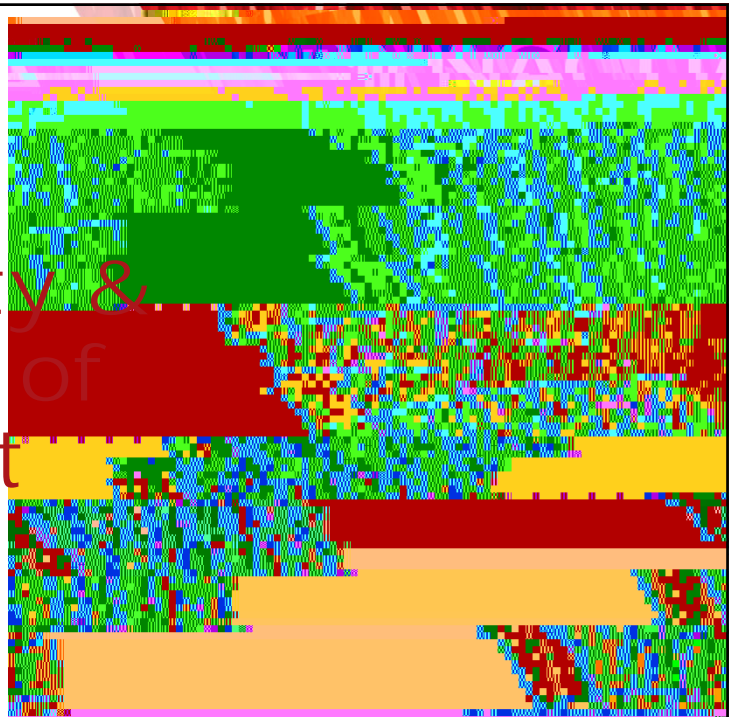
Investigative Report



- Complete an Investigative Report that fairly summarizes relevant evidence.
- Provide to parties and their advisors for review and response at least 10 days before hearing.

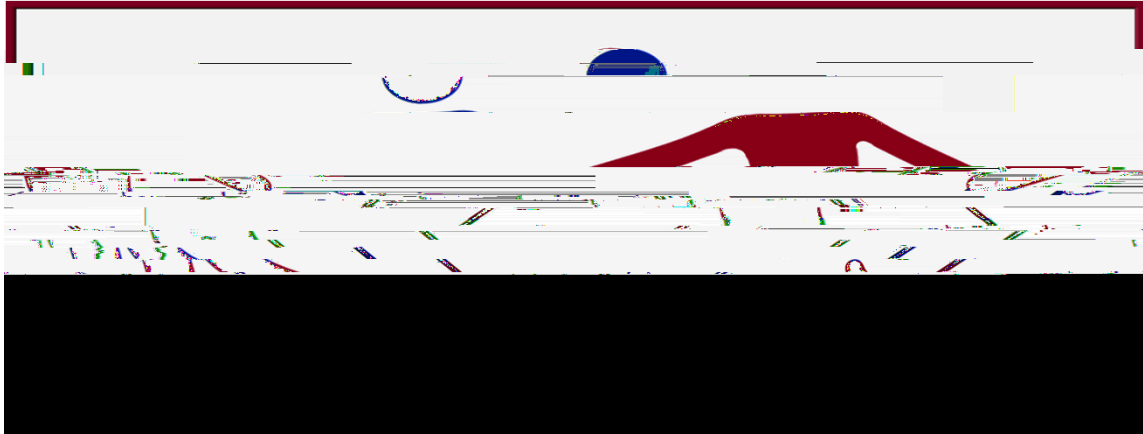
17

Impartiality & Conflicts of Interest



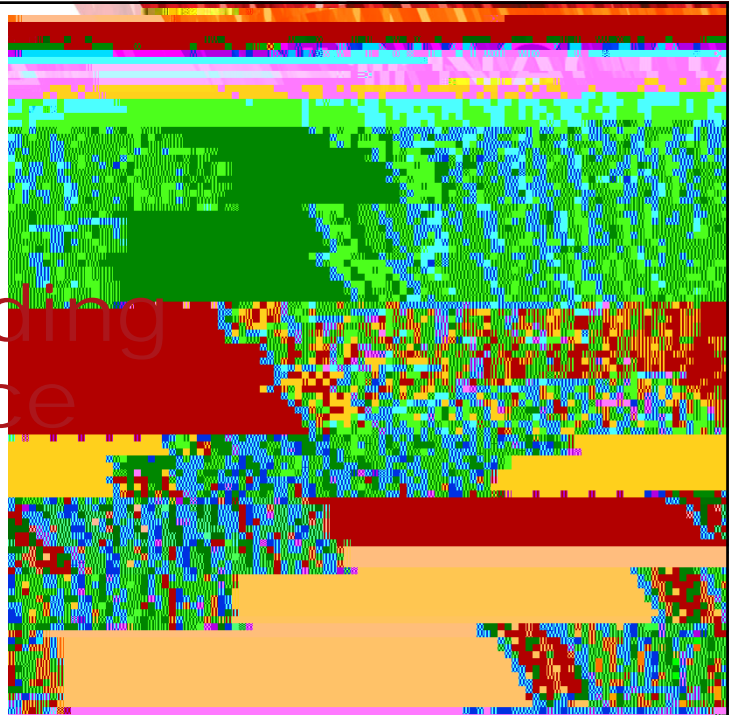
18

Impartiality, Bias, Prejudgment & Conflict of Interest



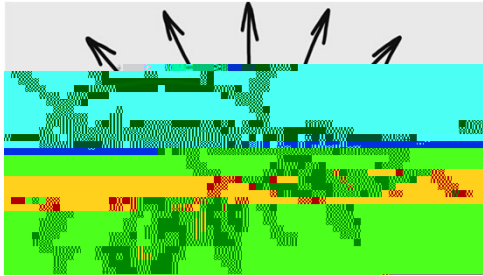
19

Understanding Relevance



20

How is Relevance Defined?



- September 4, 2020 Guidance
- Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX.
- “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
- A school may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A school may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

21

Relevant Evidence



- Evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence; *and*
 - The fact is of consequence in proving or disproving the allegations.
- Does the evidence tend to prove or disprove the allegations?
- A determination regarding relevancy can rely on logic, experience or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/rules/fre/rule_401

22



National Association of Colleges and University Authorities

Defining Relevance in Policy



- **September 4, 2020 Guidance**
- “An IHE may **not** adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is **not** either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege).”
- Hmmm ... let’s break it down.



All Relevant Information Is Not Created Equal



- May weigh evidence
- Considerations:
 - Is it corroborated?
 - Is there a reason the source might not be reliable?
 - Is it logical given other established facts?
- The Regs require the decision-maker to objectively evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility.
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.



Violations of Other Policies

27

Violations of Other Policies

- Knowingly making false statements or submitting false information
- Sexual Harassment not covered in the regulations but violating campus policies
 - Violations occurring in programs or at locations outside the current definition
 - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards



Update notice with later-discovered allegations.

28

Questions?

29

Note

The content of this presentation is to provide news and information on legal issues and all content is provided for informational purposes only and should not be considered legal advice.

The transmission of information in this presentation does not establish an attorney client relationship with the recipient. The recipient should not act on the information contained in this presentation without first consulting retained legal counsel.

If you desire legal advice for a particular situation, you should consult an attorney.

30