

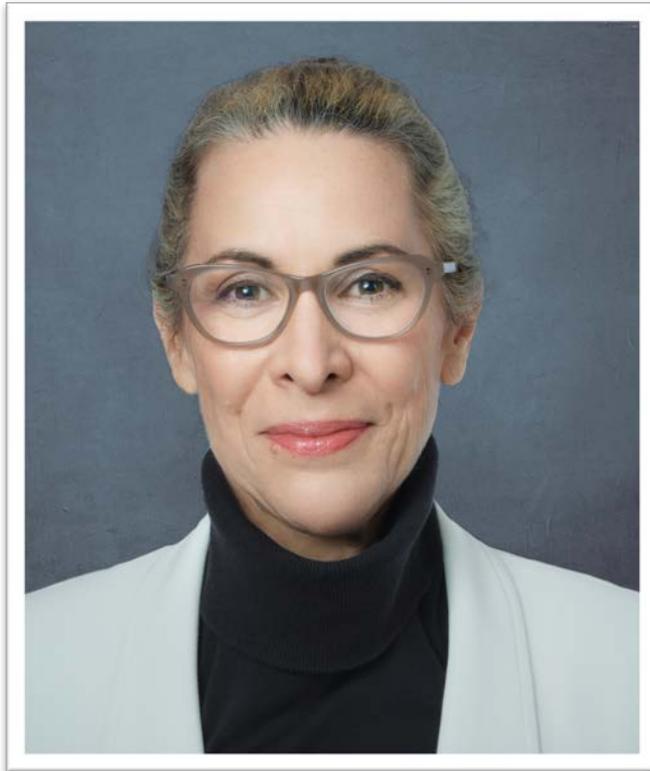


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# Decision-Makers: A Deep Dive into Serving in this Critical Role Day 1

Jody Shipper  
Managing Director  
December 2020

## Your Facilitator



**Jody Shipper, J.D.**

Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor's degree from Georgetown University's School of Foreign Service.



# Overview of the Morning

01

Regulatory Overview

2C

What to Ask Complainant

02

Let's Practice!

2D

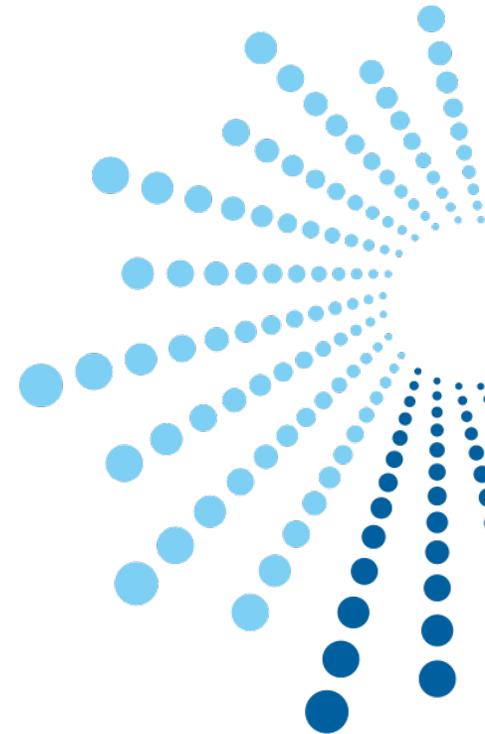
What to Ask Respondent

2A

Breaking Down Policy Elements

2B

Developing a Plain



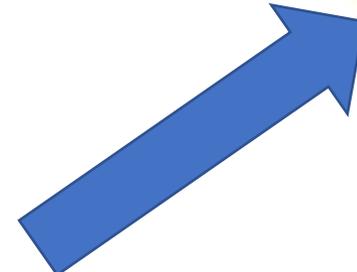
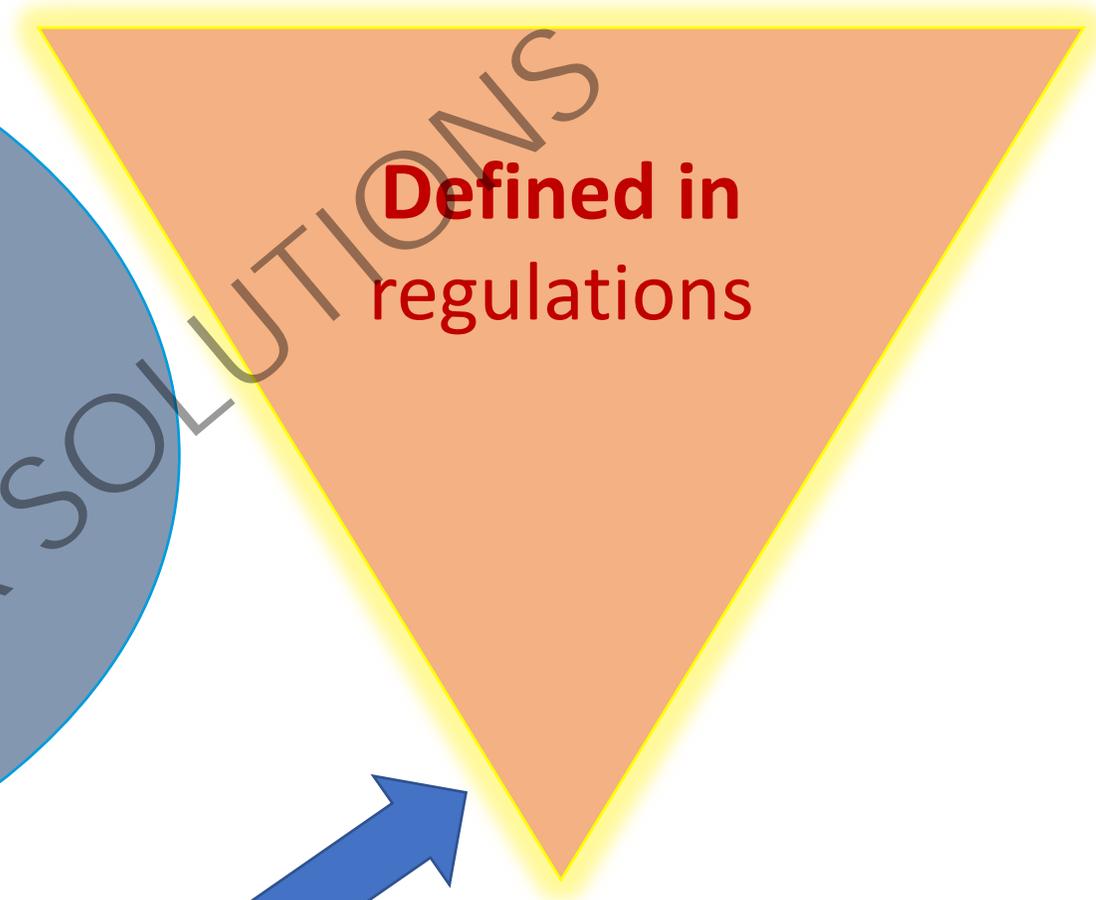
# May 2020 Final Title IX Regulations

New definitions

Jurisdictional requirements

Highly specified procedures for:

- Mandatory response
- Support measures
- Notice
- Evidence review, draft reports
- Hearings



Only THESE get the new processes

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# Section 106.30: 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).

# Mandatory Response to Each Report

Discuss/implement support measures

Can have support without filing formal complaint

Options for resolution and how to file

# Overview of Investigation

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Notice

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Trained investigator collects information

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Investigator shares evidence “directly related” to allegations with parties

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Parties have 10 days to respond

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Investigator creates summary of “relevant” evidence and shares with parties

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Parties have 10 days to respond



# 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, &
- “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

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



Can You Have a General Rule About Evidence In Title IX Investigations?

NO

# Evidence That Will Not Be Considered



Rape Shield Protections



Privileged Information

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# The Essential Elements of All Hearings

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Clear Procedures

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Due/Fair Process

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Fair, Equitable, and Neutral

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Consistency

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Trauma Informed

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Well Trained Personnel

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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



# Other Decisions

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Will you include Opening, Closing, or Impact Statements? NOT required, but you need to decide.

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How will questioning take place?

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How will questions be submitted?

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Will there be any restrictions on questions that can be asked, such as due to relevancy, already asked and answered, unduly harassing?

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If done remotely, how will the technology be set up?

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If in person, room set-up and who is in the room?

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# Cross Examination

Who does it?



MUST BE  
CONDUCTED BY  
THE ADVISOR



IF PARTY DOES NOT  
APPEAR OR DOES NOT  
PARTICIPATE, ADVISOR  
WILL APPEAR & CROSS



IF PARTY DOES NOT HAVE  
AN ADVISOR,  
INSTITUTION MUST  
PROVIDE ONE

# Cross Examination

## Courtroom Rules Do Not Apply

- Questions must be relevant
- Not relevant
  - Duplicative questions
  - Questions that attempt to elicit information about
    - Complainants prior sexual history
    - Privileged information
    - Mental health

# Decorum at the Hearing

- ❖ A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant
- ❖ A postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings
- ❖ Schools “retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.”

# Cross Examination

## Impact of Not Appearing



Exclusion of all statements of that party

Exception- DOE Blog



What if a party or witness appears, but does not answer all questions

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# Let's Practice!

First...



Break a policy down to its elements



Everyone take policy (see next page), sketch out the elements



Report back

# Sexual Harassment: *Section 106.30*

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# Example: Sexual Harassment

What was the conduct?

- Unwelcome conduct (subjective)
- Sexual or based on sex
- Severe
- Pervasive
- Objectively offensive
- Denial of equal access

# Break Out!

#1

Say hi!

Pick a scribe

Discuss

- Given the elements you need to cover, list each element and the party or witness who has information specific to that element

Come back prepared to discuss

- I will call on each group one by one



# Report Out

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# Did You Also Cover . . . ?

- On campus?
- Program or Activity?
- In a building owned or controlled by a recognized student organization
- Substantial control over respondent and context
- Complainant was attempting to access program/activity

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# Break Out!

## #2

Say hi again

Pick a scribe

Discuss

- Identify as many specific questions as possible for Complainant
- Try to put them in some sort of order, if you have time

Prepare to report back



# Report Out

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# Break Out!

#3

Say hi again

Pick a scribe

Discuss

- Identify as many specific questions as possible for Respondent
- Try to put them in some sort of order, if you have time

Prepare to report back



# Report Out

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# Questions?



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