Spring 2025 CLE Workshop

Discrimination Law

March 26–28, 2025

04A

Title IX: Advising With Compassion

TITLE IX: ADVISING WITH COMPASSION

March 26 - 28, 2025

Written Materials Prepared by:

Elizabeth Conklin, J.D.
Associate Vice President for Institutional Equity, Accessibility, and Belonging
and University Title IX Coordinator
Yale University

Jessica L. Galanos
Partner
Bricker Graydon LLP

Erin Sommer Good
Senior Associate General Counsel
Kansas State University

Introduction

Title IX of the Education Amendments of 1972 was enacted more than fifty years ago.[1] For much of the time since its promulgation, the law sat relatively untouched by political winds and enforcement agencies. However, for the last decade and a half, this expectation of status quo has changed dramatically. In recent years, Title IX has faced increasing political and social scrutiny, culminating in a sort of regulatory and compliance whiplash for institutions of higher education and practitioners in this area of law.

Arguably, the current rollercoaster of Title IX compliance began during the Obama Administration, when the Department of Education released two critical documents that significantly broadened the understanding of an IHE's obligations of responding to allegations of sexual assault.[2] Since then, each transition of federal administration has brought changes in the

[1] 20 U.S.C. §1681 *et seq*., 34 CFR 106 *et seq.* (1972).

[2] Education Department, Dear Colleague Letter (April 4, 2011) (Rescinded); Education Department, Questions and Answers on Title IX and Sexual Violence (April 29, 2014 (Rescinded).

interpretation and enforcement of Title IX—including several rounds of rescinded and new guidance from the Department of Education,[3] and two waves of agency regulations (with the accompanying notice-and-comment rulemaking process).[4] And it is worth noting that during this time the federal courts, too, have been busy interpreting Title IX and adjudicating claims brought under it. In sum, IHEs have spent much of the last fifteen or so years reading, recalibrating, and adjusting policies to comply with ever-changing expectations.

With this recent history in mind, this paper invites readers to step back from the pace of Title IX compliance over the last several years and, instead, reflect on the original intent of the law. And more critically, reflect on the goal of this law to *serve students* (and faculty and staff) impacted by sex-based discrimination and sexual harassment on college campuses. How can IHEs address discrimination and harassment in their educational programs and activities in a manner that meets that original intent? How can they achieve compliance with the current state of the law while also meeting the deeply sensitive and personal nature of the matters that come before their Title IX offices for review? And ultimately—Can Title IX offices approach the matters before them with the objectivity required *and* compassion for the complainants, respondents, and witnesses facing the circumstances that brought them there? This paper submits that not only is the answer "yes," but that such an approach is the most legally sound one, preventing litigation and demonstrating compliance.

To that end, Part I of this paper reflects on the origin and intent of Title IX. Part II summarizes the current state of the law, including suggestions of a compliant and compassionate approach to supportive measures, the investigatory and adjudication process, and the role of informal resolution. Part III recommends specific approaches to meeting with parties in sexual harassment claims, including language and setting, to meet compliance standards in a trauma-informed manner. We end this paper with suggested resources and further reading.

Part I: Remembering Title IX's Origin, and Why it Matters

Title IX was developed as follow-up legislation to the Civil Rights Act of 1964, which did not include protection from discrimination based on sex in educational institutions. In its own words, Title IX provides:

> No person 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.[5]

Around 1980 courts began to clarify that, within the scope of Title IX, sexual harassment is considered a form of sex discrimination.[6] In the late 1990s and early 2000s, the Department of

[3] Bauer-Wolf, Jeremy. (2022, May 17). A look at 13 years of Title IX policy. Higher Ed Dive. https://www.highereddive.com/news/a-look-at-11-years-of-title-ix-policy/623810/

[4] *Id.*

[5] 20 U.S.C. §1681 *et seq.,* 34 CFR 106 (1972).

[6] *See generally Alexander v. Yale*, 631 F.2d 178 (2d Cir. 1980).

Education began offering some limited guidance to acknowledge these court cases and provide information to IHEs about how to effectively respond to reports of sex-based discrimination and sexual harassment.[7] And some years later, in 2011, the Department of Education's Office for Civil Rights stated outright in a Dear Colleague Letter that sexual harassment and sexual assault are within the purview of Title IX and would be enforced by OCR as such.[8] Though this DCL was later rescinded, both the courts and the Department of Education have continued to widely recognize that Title IX includes protections against sexual harassment and sexual assault. This culminated in the Department of Education's 2020 Title IX regulations, which acknowledged expressly that reviewing and adjudicating claims of sexual harassment (including sexual violence) are obligations of IHEs.[9]

Practitioners in higher education are probably used to fielding questions about why addressing sexual harassment, and particularly sexual assault, is an issue for the institution at all. Isn't sexual assault a crime to be investigated and adjudicated in the criminal justice system? Why is higher education involved? The preamble to the 2020 regulations addressed these questions squarely: "The Department is not regulating sex crimes, per se, but rather is addressing a type of discrimination based on sex.... [T]he Department is requiring recipients to adjudicate allegations that sex-based conduct has deprived a complainant of equal access to education and remedy such situations to further Title IX's non-discrimination mandate."[10] In other words, the intent of Title IX is to address the concerns of the complainant and provide for a complainant's autonomy in redressing harm, whereas the central intent of the criminal justice system is to achieve a conviction and punish the perpetrator.[11]

The same is true for a school's student disciplinary conduct process. A quick sampling of university and college conduct codes reveals that those processes are more about setting and maintaining campus conduct standards than addressing those who may be impacted by a fellow student's misconduct.[12] Iowa State University's Office of Student Conduct captures this especially succinctly: "[W]e aim to promote accountability and responsible behavior, ethical decision-making, and a commitment to community standards, fostering an environment where all

---

[7] Education Department, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (March 13, 1997) (Rescinded); Education Department, Revised Sexual Harassment Guidance (January 19, 2001) (Rescinded).

[8] Education Department, Dear Colleague Letter (April 4, 2011) (Rescinded).

[9] *See generally* 34 CFR 106 *et seq*.

[10] 85 Fed. Reg. 30,099 (May 19, 2020).

[11] *See id.*

[12] *See, e.g.*, Roger Williams University. "Purpose of Student Conduct." August 2023, rwu.edu/student-handbook/purpose-student-conduct (stating the purpose of the student conduct code and process is "to support a safe, healthy, and inclusive campus community...."; University of Kansas. "Code of Student Rights & Responsibilities." studentconduct.ku.edu/code-student-rights-responsibilities (stating, "The enforcement of community standards allows KU to maintain and strengthen the ethical climate on campus and to promote the academic integrity of the University."; The University of Arizona. "Student Code of Conduct." deanofstudents.arizona.edu/student-rights-responsibilities/student-code-conduct (stating, "The Student Code of Conduct is in place to create a safe, healthy, and responsible environment....").

students can thrive academically and personally...."[13] Thus, these processes, while valuable in their own right, are intended to achieve accountability, deterrence, and, if possible, an educational experience for the person who committed the misconduct. They generally do not redress any victim.

Title IX is different. Even compared to other civil rights laws, Title IX is unique in the way it seeks to redress victims. When it was passed in 1972, Title IX was part of a series of amendments to the Civil Rights Act of 1964 and was recognized as a close relative of Titles VI and VII in its intent to combat discrimination.[14] But as courts have recognized, Title IX's approach to making victims whole is different than its counterparts. The U.S. Supreme Court noted this distinction in *Gesber v. Lago Vista Independent School District*:

> [W]hereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds.... That might explain why, when the Court first recognized the implied right [to a private cause of action] under Title IX... the opinion referred to injunctive or equitable relief in a private action but not to a damages remedy.[15]

Indeed, Title IX requires the school's response to sexual harassment to focus on the impacted student(s) and providing them remedies to continue their education. The U.S. Supreme Court articulated this in its landmark ruling *Davis v. Monroe County Board of Education*; the focus of a school's response under Title IX is to provide remedies to ensure students have continued, equal access to programs.[16] In declaring that a school must not be deliberately indifferent to sexual harassment, the *Davis* court said that the failure to remedy harassment that interferes with access to a school resource "would fly in the face of Title IX's core principles."[17]

To this end, both the Department of Education and the courts have routinely recognized the Title IX process as giving autonomy to victims (in particular adults, even if young adults). In 2020, the Office of Civil Rights stated in the preamble to the Final Rule (which, as discussed further in this paper, remain the current regulations) that it recognized the complainant's stake in the Title IX process as so high that complainant should have equal appeal rights to respondents.[18] And just last year, the Third Circuit Court of Appeals rejected an argument that an institution's

---

[13] Iowa State University. "Mission, Guiding Principles, and Student Learning Outcomes." studentconduct.dso.iastate.edu/mission-guiding-principles-and-student-learning-outcomes

[14] *See* Pub. L. No. 92-261, § 701-02, 86 Stat. 103, 103-104 (Mar. 24, 1972).

[15] *Gesber v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998).

[16] *See generally Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

[17] *Id.* at 651.

[18] 85 Fed. Reg. 30,276 (May 19, 2020).

failure to act on its own initiative to increase interim measures beyond the victim's stated desire constituted deliberate indifference.[19]

This is not to say that Title IX requires, or even would allow for, an institution to focus exclusively on a complainant's desired outcomes. The *Davis* court rejected such a notion outright,[20] and it is widely accepted as law that institutions have an obligation to prevent recurrence of harassment that might impact the educational access of future victims. Nevertheless, Title IX is unique in that it starts from a place of asking how to assist the *victim*, rather than how to punish the perpetrator.

With this framework in mind, Title IX asks much of those who practice in it. And it should—students and employees who seek out the resources and remedies of a campus Title IX process are likely encountering one of their darkest moments, whether or not a policy violation is ultimately found. Thus, with each potential complainant who enters the office, the origin of Title IX should remain at the forefront: to ensure the victim of harassment is not denied the benefits of any education program or activity.[21]

Part II: The 2020 Title IX Regulations

Title IX compliance expectations have been shifting and evolving steadily since the issuance of the 2011 Dear Colleague Letter under then-President Obama. At the time of this conference (March 2025), the 2020 Title IX Regulations put in place late in President Trump's first term are in effect nationwide,[22] following a January 9, 2025 ruling from the U.S. District Court for the Eastern District of Kentucky vacating the Biden administration's 2024 Title IX regulations, as made explicit in a February 4, 2025 Dear Colleague Letter.[23]

There are several excellent NACUA resources detailing the 2020 Regulations. They include:

- 2020 Foresight through Hindsight: Expert Advice on the New 2020 Regulations[24]
- Nine Months with Nine: Lessons Learned Since May 2020[25]

---

[19] *See McAvoy v. Dickinson Coll.*, 115 F.4th 220, 231-32 (3rd 2024). The *McAvoy* court stated that while a Title IX matter was in process, it was appropriate for the institution "to take into account [the complainant's] views on how various encounters [with the respondent] on campus should be handled." *Id.* at 231.

[20] *See Davis*, 526 U.S. at 648 ("The dissent erroneously imagines that victims of peer harassment how have a Title IX right to make particular remedial demands.")

[21] *See* 20 U.S.C. §1681 et seq., 34 CFR 106 (1972).

[22] *See generally* 34 CFR 106.

[23] Education Department, Dear Colleague Letter (February 4, 2025).

[24] Okubadejo, O. et al. (2020, June 18-26). *2020 Foresight through Hindsight: Expert Advice on the New 2020 Regulations*. NACUA Conference, Virtual https://www.nacua.org/docs/default-source/legacy-doc/conference/june-2020/17_20_15.pdf?sfvrsn=199779be_12

[25] Storch, J. (2021, February 3-5). *Nine Months with IX: Lessons Learned Since May 2020.* NACUA Winter 2021 Virtual CLE Workshop. https://www.nacua.org/docs/default-source/legacy-doc/conference/winter2021/session-09-written-materials.pdf?sfvrsn=af1341be_9

- Title IX Update: Where are we Now, What have we Learned, and Where are we Going?[26]

The 2020 Regulations contain several important provisions that are relevant to the goal of infusing compassion into the Title IX process. This includes the separation of the concepts of supportive measures from investigations and treating parties with fairness and respect. Importantly, the 2020 Regulations additionally permit informal resolution which, in certain cases, is a significantly better experience for the parties.

While OCR has not issued an explicit directive under Title IX that centers solely on "compassion," the overall approach to fairness, support for complainants and respondents, and sensitivity to the impacts of the process can be seen as aligning with the need for compassion. Institutions are encouraged to balance due process with supportive measures that help both parties navigate the process with dignity, resulting in an equitable process for all parties.

1. The Space between Uncomfortable Events and Policy Violations

To be sure, sexual assault is prevalent on college campuses.[27] But the law has long recognized that there is much room between ideal behavior and conduct that rises to the level of actionable harassment pursuant to Title IX.[28] The *Davis* court, relying on a previous Title VII decision, noted that determining "[w]hether gender-oriented conduct rises to the level of actionable 'harassment'… 'depends on a constellation of surrounding circumstances, expectations, and relationships....'"[29] In practice, Title IX coordinators regularly encounter complainants who are processing an unhealthy sexual experience that may not rise to the level of a policy violation.

It is no wonder that young people may arrive on college campuses ill-equipped to navigate healthy sexual relationships. The American Academy of Pediatrics reports that "the majority of sex education programs in the US tend to focus on public health goals of decreasing unintended pregnancies and preventing STIs...." to the exclusion of more comprehensive sex education.[30] Comprehensive sex education focuses on, among other items, "communication, consent, refusal skills/accepting rejection, violence prevention, personal safety, decision making, and bystander intervention."[31] In other words, a college student's first experience with these

---

[26] Ashley, C. *et al*. (2021, June 21-25). *Title IX Update: Where are we now, what have we learned, where are we going?* NACUA 2021 Virtual Conference. https://www.nacua.org/docs/default-source/legacy-doc/conference/june2021/5a_21_8.pdf?sfvrsn=3cc641be_7.

[27] RAINN: "13% of all graduate and undergraduate students experience rape or sexual assault through physical force, violence, or incapacitation." https://rainn.org/education/safe-students-safe-campuses#collegestudents.

[28] *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

[29] *Id.* at 651 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998)).

[30] American Academy of Pediatrics: https://www.aap.org/en/patient-care/adolescent-sexual-health/equitable-access-to-sexual-and-reproductive-health-care-for-all-youth/the-importance-of-access-to-comprehensive-sex-education/.

[31] https://www.aap.org/en/patient-care/adolescent-sexual-health/equitable-access-to-sexual-and-reproductive-health-care-for-all-youth/the-importance-of-access-to-comprehensive-sex-education/.

concepts may be through first-year orientation programming, or even an interaction with their college or university's Title IX office.

A Title IX coordinator, then, may be charged with the task of explaining to a complainant that their claim does not rise to the level of a policy violation even though it felt deeply traumatic to them. Or the same Title IX coordinator (perhaps even in the same matter) may be charged with telling a respondent that though they did not commit a policy violation, their conduct lacked healthy behaviors and communication skills and hurt another individual. Both conversations can be navigated in a manner that both achieves the necessary outcome of the Title IX process in a compliant manner while also validating the impact felt by the complainant and providing an educational opportunity to the respondent. This is an example of a compassionate approach.

2. Informal Resolution of Title IX Complaints

The 2020 Regulations explicitly permit the use of informal resolution to resolve certain Title IX Complaints, provided certain process requirements are met.[32] While informal resolution cannot be used in a case falling under the Title IX Regulations that involves a complaint of a faculty or staff member engaging in sexual harassment of a student, this is a narrow limitation, and there are many cases where informal resolution is permitted.

Informal resolution can help to bridge the wide gap between the receipt of supportive measures only and a full hearing process. It can provide an option for complainants who do not wish to see the respondent "get in trouble," but are seeking understanding by the respondent of the impact of event(s) on them, and an assurance that the behaviors of concern will not be repeated.

Schools have some latitude to determine whether and how to put informal resolution mechanisms into place to balance the need for community safety and rules of conduct with the need for processes that meet the needs of the parties involved. It is important to carefully review the 2020 Regulations' provisions surrounding informal resolution, which do include certain process protections connected to informal resolution in this context, including training for facilitators. To comply with the Title IX regulations concerning informal resolutions, among other things, the parties must receive the written notice, voluntarily decide to attempt an informal resolution process, and have the right to withdraw from the informal process and resume the formal grievance process, pursuant to 34 C.F.R. § 106.[33]

Early information from those that have put such processes into place suggests that this may be a promising potential path forward in appropriate cases, both for the parties and for institutions of higher education.[34] These processes typically are grounded in addressing harms,

---

[32] *See* 34 CFR 106.45(b)(9).

[33] Carol, A. *Title IX Update*, 2020. https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf

[34] *See generally* Orcutt, M. *et al.* "Restorative Justice Approaches to the Informal Resolution of Student Sexual Misconduct (Article Summary)." Journal of University & College Law, Vol. 45 Issue 2, August 2020.

rather than policy violations, and allow for meaningful participation both by complainants and respondents.[35]

Part III: Language and Communication During Intake, Interviews, and Hearings

One of the most direct ways to infuse compassion into the Title IX process is to use language that reflects compassion. This often requires a recognition of how a person may be feeling relative to their personal experience and the Title IX process. Individuals who *report* sexual harassment, sexual assault, dating/domestic violence, and/or stalking often experience self-blame and shame, and are often afraid of judgment, minimization of their experience, and retaliation. Individuals who have been *accused* of engaging in sexual misconduct often report feeling as though they have been prejudged and have no way to vindicate themselves through the Title IX process. For administrators to compassionately communicate with each audience, they must meet the parties where they are and use appropriate and plain language to convey information about next steps, available support, and their rights in their Title IX process. If all the parties involved approach the process with a fear that they will not be believed, a compassionate response must use language during intake, investigation, and the hearing, that explains that the institution is giving them the benefit of the doubt throughout the process.

1. Language Considerations During the Intake and Investigation Process

The 2020 Title IX Regulations require that colleges and universities "respond promptly" to actual knowledge of sexual harassment in an education program or activity "in a manner that is not deliberately indifferent."[36] The regulations further require that Title IX Coordinators "promptly contact the complainant to discuss the availability of supportive measures..., consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint."[37] Most institutions provide parallel outreach to respondents, although that outreach often comes later in the process, after a complainant has filed a formal complaint.

Initial meetings with complainants and respondents provide administrators with a crucial opportunity to offer support, be transparent about the Title IX process, and build rapport. While it may not feel like compassion in the moment, using neutral language during these meetings that is both consistent between parties, and consistent with the institution's Policy and supportive resources, is incredibly important. For example, describing the process in the same way and using terminology directly from the policy can avoid confusion in the moment and claims of bias in the future. Neutrality itself is also a crucial component of being compassionate in the process

---

[35] *See* Yale University. "2024 Public Description of Work for Action Collaborative on Preventing Sexual Harassment in Higher Education." https://www.nationalacademies.org/documents/embed/link/LF2255DA3DD1C41C0A42D3BEF0989ACAECE3053A6A9B/file/D71651938D1D9CE919B22DAF155E6D447A5F1F152816?noSaveAs=1

[36] 34 CFR 106.44(a).

[37] *Id.*

because it reinforces fairness in the process and avoids potential appeals and litigation that can make the process longer and more difficult for both parties.

During this early part of the process, engaging in face-to-face meetings can be a critical component of showing compassion. Title IX administrators who rely solely on written notices, policy definitions, or pre-recorded materials about the process miss an important opportunity to show the humanity of the Title IX staff. Real-time conversations about the process allow for back-and-forth discussion about everything from what a No-Contact Directive looks like, to explanations about what cross-examination actually means during a Hearing. These live exchanges allow participants to ask questions as the questions form in their heads, without having to remember to ask the question later.

Establishing early the humanity of the Title IX office and the availability of its administrators to parties serves another purpose, too. Parties who leave the internal university process feeling that they were *heard* are less likely to seek recourse through external processes, such as filing a lawsuit or a complaint with the Department of Education. Even in cases where a party disagrees with the outcome of the internal process—and by definition, every case will have one party who does—an individual who walks away from a Title IX process feeling that they were listened to, acknowledged, given a thorough explanation, and provided resources, is less likely to become a litigant against the institution.

Much of the available guidance for conducting compassionate intake meetings and investigative interviews with complainants focuses on the need for administrators to be trauma-informed. While there are a wide variety of resources and philosophies on what it means to be trauma-informed, psychologists and law enforcement personnel generally agree that having a basic understanding of the neurobiology of trauma allows investigators to ask better questions, gather better evidence, and avoid unnecessary re-traumatization, if possible. The preamble to the 2020 Title IX Regulations noted that the Department of Education "is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings."[38] Notably, the preamble to the 2020 Title IX Regulations permits institutions to train their Title IX staff on trauma-informed approaches as long as the training is consistent with other provisions of the regulations related to training on impartiality and bias.[39] The preamble to the 2020 Title IX Regulations also notes that, "trauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires

[38] 85 Fed. Reg. 30,069, fn. 303 (May 19, 2020). On this issue, the 2020 Title IX Regulations cite to Jeffrey J. Nolan, *Fair, Equitable Trauma-Informed Investigation Training* (Holland & Knight updated July 19, 2019) (white paper summarizing trauma-informed approaches to sexual misconduct investigations, identifying scientific and media support and opposition to such approaches, and cautioning institutions to apply trauma-informed approaches carefully to ensure impartial investigations).

[39] 85 Fed. Reg. 30,527 (May 19, 2020). For more information about the support and critiques of trauma-informed investigation training, see Nolan, Jeffrey J., *Promoting Fairness in Trauma-Informed Investigation Training,* NACUANOTE Vol. 16, No. 5, February 18, 2018.

taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases."[40]

When meeting with a complainant for the first time, it is important to remember that this may be the very first time they are talking about their experience. Expressing surprise or judgment about something they say may discourage them from talking about their experience with others in the future, including mental health professionals, their family, law enforcement, etc. Additionally, focusing on open-ended questions that seek to uncover the details a complainant *does* remember, rather than focusing on a strict chronological timeline of events that a complainant *may not* remember, can help gather relevant details without creating a sense of shame for an inability to recall events in order.

If a complainant can recall a complete or partial sequence of events, it is important to acknowledge that during intake meetings and interviews. Recall that complainants often experience self-blame and fear of not being believed. The simple act of asking follow-up questions like, "and then what happened?" affirms that the interviewer is listening and invested in their factual account. In working to build rapport, it can be helpful to remind complainants that "I don't know" is an acceptable answer to any question as long as it is truthful. If it is necessary to ask a question about how the complainant reacted to something, intake staff/investigators should consider using language like, "Can you help me understand what you were thinking at the time?" If it is necessary to ask questions about alcohol or drug consumption, transparency about why the questions are necessary can help to create or strengthen trust in the process. It may also be helpful to remind the person that Title IX staff regularly meet with community members who drink or use drugs recreationally, and that while the details may ultimately be relevant to the case, they will not be a basis for any sort of moral judgment in the Title IX process or, where relevant, it will not subject them to discipline under the university's other relevant student conduct codes.[41]

If follow-up interviews are a common part of the investigation process, it is compassionate to let participants know that sooner rather than later, preferably during the initial investigative interview. For complainants in particular, a follow-up interview may be a standard practice in order to give the complainant an opportunity to respond to a divergent factual account provided by the respondent. When discussing this practice it may be helpful to let the complainant know that they will later be presented with the respondent's factual account in order to give them a chance to respond prior to the hearing, and that the meeting is not intended to convey disbelief in their original statement. It may be helpful to be transparent during the first interview by telling complainants that follow-up interviews are sometimes the most difficult part of the process because it is often the first time they hear the respondent's narrative in response to their own.

---

[40] 85 Fed. Reg. 30,323 (May 19, 2020).

[41] Many institutions have opted to formalize this compassionate approach with student amnesty policies that empower students to report conduct like sexual assault without concern of facing institutional discipline for alcohol and drug use. See e.g. Kansas State University, Policy and Procedures Manual [PPM 8550], 1 August 2023, https://www.k-state.edu/policies/ppm/8500/8550.html.

Many of these same principles apply to the use of compassionate language during intake meetings and investigative interviews with respondents. Asking open-ended questions to give respondents space to provide their factual account in their own words, while using affirming questions and phrases like, "what happened next?" and "I think I understand what you're saying. Can you tell me a bit more about what happening at that time?" help to convey that the Title IX office is approaching the case with an open mind. Using neutral, policy-driven terminology like "complainant," instead of "victim" or "survivor," is essential to showing compassion to respondents who may feel as though an *allegation* of sexual misconduct will automatically lead to a *finding* of sexual misconduct. When questioning a respondent about specific facts provided by a complainant, it can be helpful to explain that one of the goals of the investigation is to understand when there is agreement and disagreement between the factual accounts of each party. In other words, explain to the respondent that it is necessary to ask questions that may appear to challenge their factual account because comparing the factual accounts of each party is necessary for resolving Title IX cases.

When speaking with all parties to a Title IX case, the act of giving them autonomy in the process, to the greatest extent possible, is an act of compassion towards individuals who likely feel that their lives are out of control. Beginning intake meetings by asking parties where they would like to sit in the room, where in the sequence of events they would like to begin sharing their factual account, and what types of supportive measures might be needed, signals to the person that they have some control over their circumstances.

2. Support as Distinct from Investigation

It is important here to distinguish between supportive measures and investigations. Throughout this paper, we are focused largely on institutional roles involving investigations and hearings. Supportive measures may be coordinated largely by Title IX staff but may involve any number of additional staff and resources both on and off campus, including but beyond the role of providing an advisor, as required under the 2020 Title IX Regulations, in the hearing process.

It can be difficult for Title IX staff to provide support and to serve as investigators, particularly in the same case. Institutions should give careful thought to determining how best to provide an array of resources that are not solely reliant on support coming from a single individual, particularly if that individual is also a factfinder. This is especially true when the individual providing the support may be viewed by either party as an advocate. For example, if a party requests academic support because of the stress of the investigation, and the investigator reaches out to the academic unit or faculty member to request excused absences or deadline extensions, it can appear to both the requesting party – and the opposing party – that the investigator is advocating for the requesting party. This is not to say that the Title IX staff may not ultimately coordinate and document referrals and resources, but it can be important for complainants, respondents, and some witnesses to have a space to go to in order to process feelings and needs wholly unrelated to the factfinder. This can include resources like counseling and mental health, advisors, residence hall staff, and more. And these resources should be clear internally and in communication with parties about whether they are a confidential resource. Of course, any university staff who are positioned as providing resources should receive regular, updated training on Title IX and best practices for providing support, coordinated by the Title IX office.

3. Language Considerations During the Hearing Process

The 2020 Title IX regulations require institutions to provide opportunities for cross-examination.[42] The preamble to the 2020 Title IX Regulations specifically notes that Title IX decision-makers are not directed to "require that any party... recall details with certain levels of specificity," but are instead called upon to evaluate a party's answers to cross-examination questions "in context, including taking into account that a party may experience stress while trying to answer questions."[43] The preamble further highlights the competing considerations of Title IX decision-makers to protect against any party "being unfairly judged due to [an] inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory."[44]

Like the intake/investigation discussions above, Title IX decision-makers can infuse compassion into a hearing process by using language that conveys approachability, support, transparency, and protection for parties and witnesses. Title IX decision-makers are not judges and should not present themselves as such if they want to convey approachability and compassion. This starts with the setting itself. If the hearing is by remote means and/or the institution engages an external decision-maker, encourage the decision-maker to use an appropriate virtual background that reflects warmth, simplicity, and professionalism. For some institutions, this may mean displaying the school's insignia to make the hearing feel more like a university process, or else displaying a neutral background. Consider a script with opening language that introduces the process and reminds parties at the beginning that institutional resources remain available to them after the hearing, and the Title IX coordinator can assist in obtaining those if desired.

During the substantive portion of the hearing, simple steps like asking parties to refer to decision-makers by their first name, expressing self-deprecation at appropriate times, and taking the time to answer procedural questions in plain language will aid in putting hearing participants at ease. For example, when explaining the rule that each question asked by an advisor must be deemed relevant or not relevant before the party or witness can answer, a Title IX decision-maker may want to explain the rule using very simple terminology, and then warn participants that even the decision-maker can sometimes forget this step in the process during the hearing. Something as simple as acknowledging the unusual rhythm of this question-and-answer process, and letting participants know that even the decision-maker has been known to get it wrong, humanizes the decision-maker and signals to participants that the hearing will be less formal than they might otherwise expect. Certain procedural features of an institution's hearing process can also bring compassion into the process, including mandatory requirements like the appointment

[42] 34 CFR 106.45(b)(6).

[43] 85 Fed. Reg. 30,323 (May 19, 2020).

[44] *Id.*

of an advisor and adherence to the rape shield provisions,[45] as well as discretionary components like holding pre-hearing conferences and allowing ongoing access to support persons throughout the hearing. Taking the time to explain these parts of the process in a neutral and consistent way shows compassion to hearing participants.

It is important to remember that the obligation to provide supportive measures to the parties extends throughout the Title IX process. Similar to the types of supportive measures offered earlier in the process, Title IX Coordinators may need to arrange excused absences for students or employees, remind participants of available mental health resources, and make sure that parties have been connected to their advisors and available support services. Additionally, providing compassionate support during a Title IX hearing may also involve more subtle forms of support like taking breaks when a party becomes emotional, or simply acknowledging that the hearing process can be stressful. The 2020 Title IX regulations explicitly instruct that institutions "must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions."[46] This technology-driven approach is a compassionate one that allows parties to participate from a private location, away from other parties and witnesses. When using this technology, Title IX Coordinators and decision-makers can further demonstrate compassion by instructing all parties how to adjust settings within the program to avoid having to see others during the hearing, which may cause additional stress and impact a party's ability to be thoughtful when answering questions. This simple act of support may have a significant impact on the dynamic of the hearing.

Title IX Coordinators and decision-makers can also show compassion during the hearing process by continuing to be transparent about the process. Explaining the process of cross-examination requires a delicate balance of being truthful about the direct nature of the questioning, without discouraging participation. Again, being neutral and consistent in referring to explanatory language in the policy can be useful, as well as providing examples of what the hearing will *not* look like. Specifically telling parties that the hearing will not look like the courtroom scenes they may have seen in television or movies can be helpful, as that is often the only point of reference they may have for cross-examination. However, it may be transparent and compassionate to alert parties that they may be asked questions that suggest a particular answer, or questions that seek to cast doubt on their prior statements in the case. Without this type of transparency, parties may revert to that initial feeling disbelieved and they may lose trust at one of the most important points in the process.

Title IX decision-makers must also protect all parties from abuse or harassment during the hearing. Typically, this will take the form of warning participants during pre-hearing conferences and/or the hearing itself that rules of decorum will be enforced throughout the process. Such rules may be adopted to prohibit any party advisor from questioning witnesses in an abusive, intimidating, or disrespectful manner.[47] The preamble to the 2020 Title IX Regulations specifically states, "If a party's advisor of choice refuses to comply with a

[45] 34 CFR 106.45(B)(6).

[46] 34 CFR 106.45(b)(6).

[47] See 85 Fed. Reg. 30,319 (May 19, 2020).

recipient's rules of decorum (for example, by insisting on yelling at the other party), the [institution] may require the party to use a different advisor."[48] In practice, these warnings are often sufficient to discourage abuse or harassment during the hearing. However, if that is not the case in a particular hearing, the Title IX decision-maker must warn the advisor of the issue and follow through with removal, if necessary. Title IX decision-makers may also have to direct parties and witnesses not to use abusive or harassing language when answering questions at the hearing, and to direct answers to the decision-maker or advisor and not to the parties who are present. This can be a significant challenge when dealing with parties who are emotional and want to confront the other party during the hearing process, however it is an incredibly important part of making parties feel safe and seen in the process.

Finally, once the hearing has concluded, it may also be important to revisit those face-to-face conversations, or, at a minimum, for staff to make themselves available for such conversations. These post-process conversations may be more difficult than the conversations at the beginning of the process, particularly where the hearing process has resulted in credibility determinations that may have bolstered the confidence of one side, to the detriment of the other. However, these face-to-face communications at the end of the process may be important for the same reasons as the beginning of the process: demonstrating humanity, reinforcing transparency, answering questions in real-time, and providing support.

The most important thing to keep in mind when speaking to parties during the intake, investigation, and hearing process is the scope of the concerns originally identified in this section: complainants who experience self-blame and fear of judgment, minimization of their experience, and retaliation, and respondents who feel prejudged and lacking any way to vindicate themselves through the Title IX process. Speaking to parties through the lens of these concerns, in a consistent and neutral manner, while providing them support and transparency throughout the process, shows compassion to parties who may feel like their life is no longer within their control.

4. Resources Needed to Accomplish a Compassionate Approach

It must also be stated that engaging compassionately as a process matter can be time-consuming and requires self-regulation and organization by staff responsible for administering Title IX processes, particularly in complex or challenging cases and/or when the overall volume of cases is particularly high. One of the most significant ways that counsel can support a compassionate approach to Title IX is to advocate for sufficient levels of resources, including staffing levels and ongoing professional development, to allow the Title IX staff to dedicate the necessary time that each case requires.[49] It can be difficult to provide compassion to parties in an institutional setting that does not feel supportive or compassionate for the staff responsible for

---

[48] 85 Fed. Reg. 30,320 (May 19, 2020).

[49]In an article published on September 5, 2019, the Chronicle of Higher Education's Sarah Brown documented the pressures in ""Life Inside the Title IX Pressure Cooker," an extended article about the competing pressures and time demands on Title IX Coordinators, often leading to short Title IX Coordinator tenures. The intervening time period, from 2020-the present, does not suggest that these pressures have eased for higher education administrators, particularly given the ongoing administrative back and forth and public pressure and scrutiny surrounding these processes.

these processes which often, despite best efforts, result in unhappy parties and litigation, as well as Title IX staff turnover.

Acknowledgment, recognition, and clear communication about challenges are simple, effective ways for counsel to partner with the staff on the ground in these offices. An excellent 2023 NACUA Note lays out the relationship between the Title IX Coordinator and General Counsel and offers additional insights on the different vantage points and roles of the individuals occupying each, and of the importance of this relationship to both, *Shifting Sands - Fostering a Healthy Relationship between Counsel and the Title IX Coordinator*.[50]

IV. Part Four: Selected Resources

Resources are noted throughout this white paper, particularly in the footnotes. In addition, the following might be particularly helpful in considering advising with compassion in Title IX processes.

- **National Association of College and University Attorneys**
    - Mitropoulous, A., *et al.* (2023, June 27-30). *Investigation Insights: Tips, Tricks, and Techniques in Institutional Investigations*. NACUA Annual Conference, Chicago, Illinois. https://www.nacua.org/docs/default-source/legacy-doc/conference/2023ac/07g_23_06_56.pdf?sfvrsn=20ea4fbe_6
    - Storch, J. (2021, February 3-5). *Nine Months with IX: Lessons Learned Since May 2020.* NACUAWinter 2021 Virtual CLE Workshop. https://www.nacua.org/docs/default-source/legacy-doc/conference/winter2021/session-09-written-materials.pdf?sfvrsn=af1341be_9
    - Nolan, J. "Promoting Fairness in Trauma-Informed Investigation Training." NACUANotes, Vol. 16 No. 5 (February 2018). https://www.nacua.org/docs/default-source/legacy-doc/nacuanotes/investigationtraining.pdf?sfvrsn=13576bbe_10
- **National Academies of Sciences, Engineering, and Medicine**
    - *Sexual Harassment of Women: Climate, Culture and Consequences in Academic Sciences, Engineering, and Medicine* (2018). https://pubmed.ncbi.nlm.nih.gov/29894119/
    - *Applying Procedural Justice to Sexual Harassment Policies, Processes, and Practices* (2022). https://www.nationalacademies.org/news/2022/04/applying-procedural-justice-to-sexual-harassment-policies-processes-and-practices
    - *Rubric on Areas of Work for Preventing Sexual Harassment in Higher Education* (2022). https://nap.nationalacademies.org/resource/26741/2022_Rubric_on_Areas_of_Work_for_Preventing_Sexual_Harassment_in_Higher_Education.pdf
- **External Sources**

[50] https://www.nacua.org/docs/default-source/legacy-doc/nacuanotes/titleixcounsel.pdf?sfvrsn=61504fbe_7

- University of Kansas. “Civil Rights Intake Checklist.” Mission, Guiding Principles, and Student Learning Outcomes.” https://civilrights.ku.edu/sites/civilrights/files/files/Intake%20Checklist%20(4).pdf