



# TITLE IX COORDINATOR TRAINING

**Day 2**

# INTRODUCTIONS



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# DISCLAIMER

This presentation shall not constitute legal advice, nor create an attorney-client relationship. This presentation is for informational purposes only.

If you have any specific legal questions or require legal advice for specific situations, please contact or refer to your institutional, general, or outside counsel.





# KNOWLEDGE CHECK!



“notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.”

- Does not impose universal mandatory reporting obligations upon all postsecondary institution employees
  - Institutions retain ability to designate which employees must report disclosures, & others who are confidential

**ACTUAL NOTICE or KNOWLEDGE**



# DELIBERATE INDIFFERENCE

- Requires institution with actual knowledge to respond “promptly in a manner that is not *deliberately indifferent*”
- Meaning “not clearly unreasonable in light of the known circumstances”

*What makes a response deliberately indifferent?*

- Inadequate
- Willfully indifferent, or clearly unreasonable
- Causes harm, or denies complainant educational benefits

**Example:** failure to conduct a proper investigation considering actual knowledge of misconduct, failed to provide appropriate support or remedies for the complainant

# REQUIRED RESPONSE TO REPORTS

- Treat parties equitably
- Promptly offer supportive measures
- Explain formal complaint filing
- Follow a compliant grievance process before sanctions
  - Objective evidence evaluation
  - TIX staff are trained & free of bias or conflict
  - Presumption of non-responsibility
  - Reasonably prompt resolution
  - Standard of evidence
  - Appeal
  - Legal privileges



# REASONABLY PROMPT TIMEFRAMES



- Includes appeals & informal resolution
- Temporary delays with notice
  - 129-B: 10 day delay for law enforcement
- How long???
  - Not defined
  - Flexibility
  - 2001 Guidance
- Balance promptness with diligence
- Resource considerations



# **CONFIDENTIALITY & PRIVACY**

- Privacy of reports is expected
- Responsible Employees
- Confidentiality of reports is rare
- 129-B limits sharing & re-disclosure

# FERPA “RECORDS?”



FERPA protects “education records,” which are generally defined as records that are directly related to a student & maintained by an educational agency or institution or by a party acting for the agency or institution.

- For a record to directly relate to a student, the student must be the focus of the record, not simply in the background or incidental to a report.
- The Supreme Court has described education records as “institutional records kept by a single central custodian, such as a registrar ...”
  - In other words, for FERPA to apply, the record in question **must be systematically maintained by the school.**

# CONFLICTS BETWEEN FERPA & TITLE IX

- Interpret statutes in a manner to avoid any conflicts, if possible
- Section 106.6 (Effect of Other Requirements and Preservation of Rights) of the Final Rule states as follows:
  - Effect of Section 444 of General Education Provisions Act (GEPA/FERPA). The obligation to comply with Title IX & the Final Rule is not obviated or alleviated by FERPA.
- When conflict exists, institutions are required to comply with Title IX regulations - this FERPA override is known as “GEPA override”
  - Title IX includes federally protected due process rights - constitutional override
- May not use FERPA as a shield to avoid complying with Title IX



# DISCLOSURE OF EVIDENCE



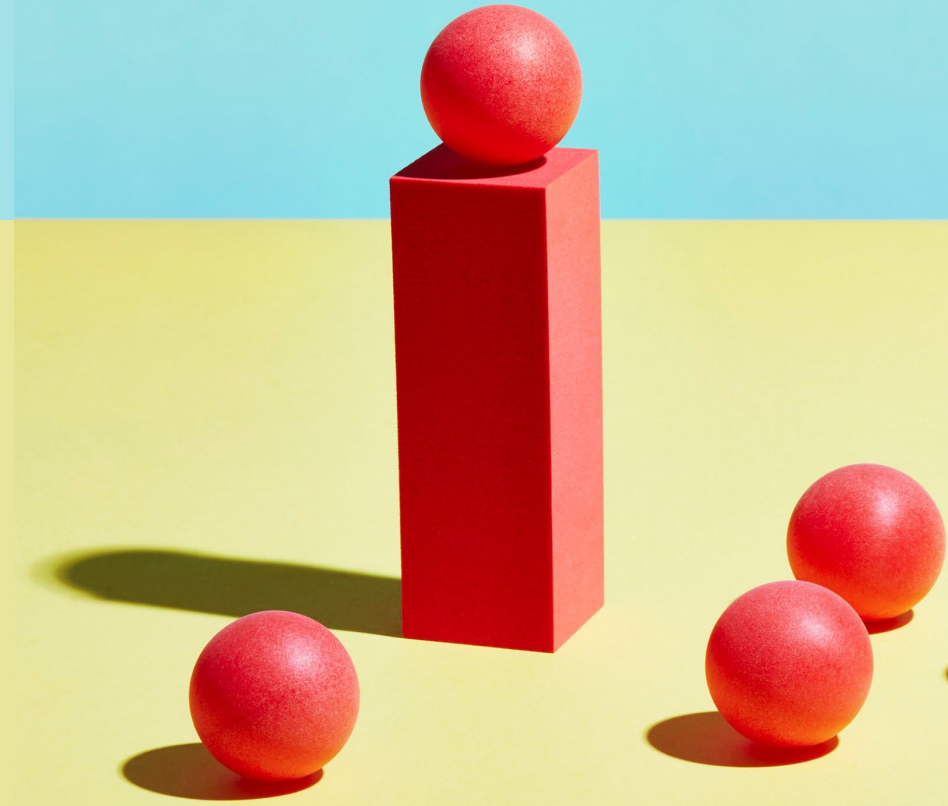
- The Final Rule requires the institution to share relevant evidence with the parties.
- Department has previously recognized that under FERPA, an eligible student:

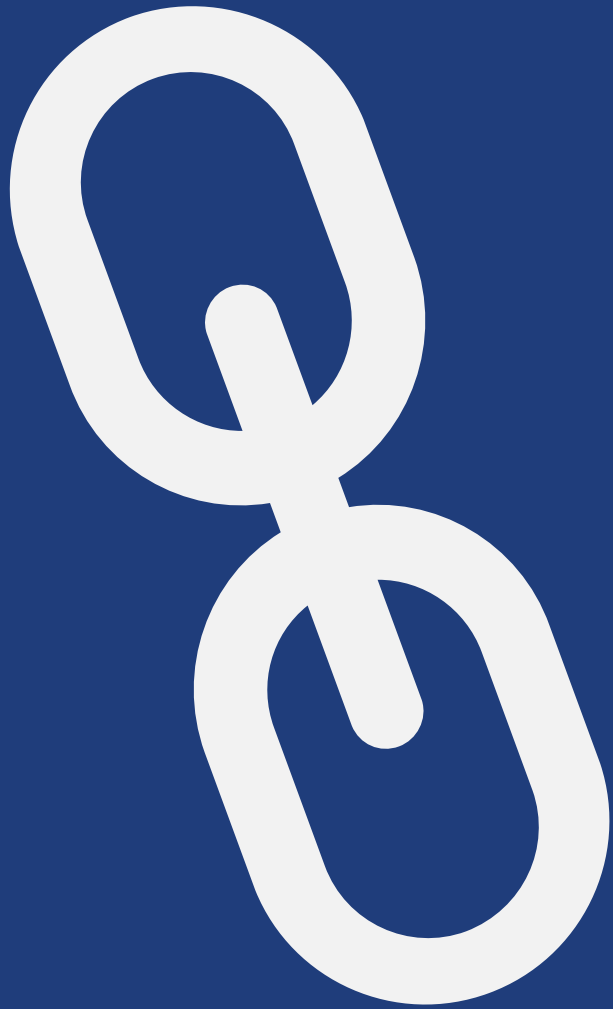
“has a right to inspect & review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated & redacted without destroying its meaning.”

# SUPPORTIVE MEASURES

Under Section 106.44 of the Final Rule, there are certain non-disclosure protections related to supportive measures.

- FERPA does not prevent the institution from disclosing a supportive measure to school officials as necessary to provide the measure.
- Revised to protect the unnecessary disclosure of information related to these measures.
- Even if permitted by FERPA, institution may only inform one party of supportive measures provided to the other party if necessary to restore or preserve access to the party receiving measure.





- The Final Rule permits multiple reports with multiple parties to be consolidated into one, which raises potential privacy concerns.
- The Department stated that this section of the Final Rule must be interpreted consistent with FERPA.
- Regulations provide institutions with the *option* to consolidate but do not *require* it to do so.
- An institution may not choose to consolidate if that consolidation would give rise to FERPA violations.

# CONSOLIDATION & FERPA

# ADVISORS

The Department acknowledges that the presence of an advisor may violate FERPA.

- The right to an advisor is a due process right guaranteed by Title IX.
- Title IX will override the FERPA concerns here.
- GEPA override will allow the sharing of evidence with advisors.
- Institutions are not required to permit more than one advisor to accompany a party & the GEPA override will not apply there.



# COMPLAINANT OUTREACH & INTAKE



DESIGNATING RESPONSIBLE &  
CONFIDENTIAL EMPLOYEES

LIST OF RESPONSIBLE &  
CONFIDENTIAL EMPLOYEES

DISCLOSURE OF STATUS TO  
STUDENTS

TRAINING & FERPA CONSIDERATIONS

INCLUSION IN CAMPUS POLICY

# THE MECHANICS OF INTAKE



INCIDENT INFORMATION

TYPE OF ALLEGED  
HARASSMENT  
CRITICAL INCIDENT RESPONSE

OFFICE VISIT FOLLOW-  
UP/DELAYED REPORT

SUPPORTIVE MEASURES

STUDENT RIGHTS INFORMATION  
REVIEW

**TYPE****SUPPORTIVE MEASURE EXAMPLES**

Safety

Reasonable accommodations

Health

Medical, Mental

Housing

Room lock change, designated emergency space

Restrictions

One-way or Mutual No Contact Order (NCO)

Academic

Course accommodations, course changes, Professor notifications, leave of absence, withdrawal assistance

Work

On/Off Campus employment

Facility based

Gym, library, dining, University events, etc. ...

Recreational

Student group, athletic team, internship program



# TITLE IX SCOPE

Assess scope of report  
Assess jurisdiction  
Review complainant intentions

## JURISDICTION ASSESSMENT



# WHAT ABOUT COMPLAINANT AUTONOMY?

Utilize proper policy/process  
Explore desired level of participation  
Determine if TIXC-initiated complaint  
needed

**Autonomy exists but does not allow  
improper choice of law or due process!**



# TITLE IX COORDINATOR INITIATED COMPLAINT

- Complainant's request not to proceed;
- Complainant's safety concerns about proceeding;
- Risk of additional discrimination;
- Age, relationship, and status (i.e. employee) of the parties;
- Scope of the prohibited conduct
  - is there a pattern? Multiple complaints?
- Severity of the allegations;
- Availability of evidence;
- Whether the school could end the discrimination & prevent its recurrence;
- Whether the conduct as alleged presents an imminent & serious threat to health or safety;
- Whether the conduct alleged prevents the institution from ensuring equal access.

**REMEMBER: THE COMPLAINANT WILL STILL BE THE COMPLAINANT & IS ENTITLED TO THE SAME RIGHTS.**



# INCORPORATING DISABILITY LAW

- Obligation to provide reasonable accommodations
- Good cause delays & extensions
- Mental health considerations
- Overlap with Supportive Measures
- Evidence accessible
- Support persons
- Equitable treatment
- Accused person with disabilities
  - Severe, pervasive, & objectively offensive
  - Sanctioning considerations

# TIME FOR AN ATTENDANCE CHECK

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**ATTENDANCE QUIZ APPEARS DURING THE TRAINING BREAK *FOR A LIMITED TIME.*  
PLEASE TAKE THE QUIZ IMMEDIATELY ONCE IT IS POSTED IN THE CHAT.**

Institutions must investigate all “formal complaints” filed with the Title IX Coordinator

## WHO CAN FILE A FORMAL COMPLAINT?

- Person currently participating in the educational programs or activities of the institution
- Person **attempting** to participate in those programs or activities
- The Title IX Coordinator

Multiple complaints arising from same incidents CAN BE consolidated

STUDENT RIGHTS INFORMATION REVIEW

# THE FORMAL COMPLAINT

## ACTION ITEMS

### PREPARATION

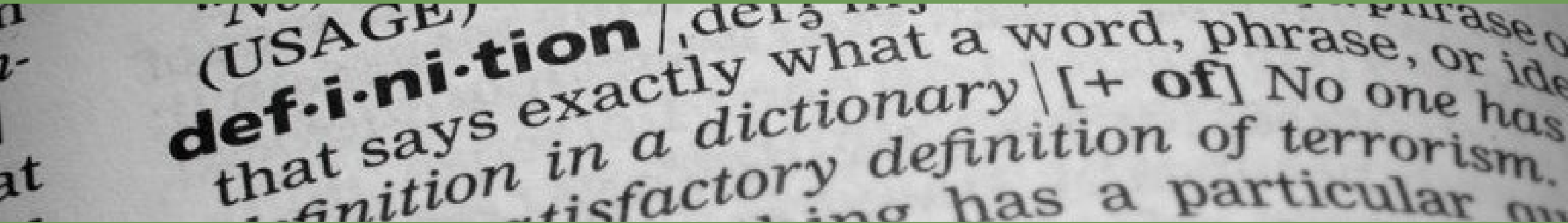
- Varied familiarity of the process
- Delayed report
- Non-responsive

### IF NON-RESPONSIVE

- Determination on next steps



# DEFINITION OF FORMAL COMPLAINT



## A DOCUMENT:


- filed by a complainant or signed by the Title IX Coordinator
- alleging sexual harassment against a respondent &
- requesting that the recipient investigate the allegation of sexual harassment.

## COMPLAINANT:

- alleged victim currently participating or attempting to participate in program or activity of institution

## DOCUMENT:

- document or electronic submission containing complainant's signature

- 
- Burden of proof on institution
  - Confidential treatment records
  - Present witnesses & evidence
  - Freedom to discuss allegations
  - Advisor of choice
  - Notices
  - Inspect & Review Evidence
  - Review investigative report

# INVESTIGATION REQUIREMENTS



If you may have a bias or a conflict, **ACKNOWLEDGE IT**

Remember this is a case made up of individuals

Challenge your own perceptions by examining evidence

Be open & transparent, leave no stone unturned

Ensure everyone has opportunity to be heard, take your time

Base decisions on evidence, facts, & established criteria

# HOW TO SERVE IMPARTIALLY



# CONFLICTS & BIAS

## **FOR OR AGAINST COMPLAINANTS OR RESPONDENTS, GENERALLY**

Example: “All respondents tend to be responsible,” or  
“complainants are always credible”

## **FOR OR AGAINST SPECIFIC PARTIES IN THE CASE**

Example: Decisionmaker heard a case involving the respondent  
prior to this one

## **OVERLAPPING INVESTIGATOR, DECISIONMAKER, OR APPEALS ROLES**

Example: Decisionmaker who found respondent responsible  
continues to hear the appeal for the same case





*“In the intimate setting of a college or university, prior contact between the participants is likely and does not per se indicate bias or partiality.”*

Gorman v. Univ. of Rhode Island,  
837 F.2d 7, 15 (1st Cir. 1988).

**NOT NECESSARILY  
CONFLICTS & BIAS**



**ACTUAL BIAS IS A HIGH LEGAL STANDARD,  
BUT PERCEPTION OF BIAS IS IN THE EYES OF  
THE PARTIES TO THE PROCESS & SHOULD BE  
AVOIDED.**

## **THINGS TO AVOID**

- Truly lop-sided investigations & adjudications, or
- Statements of investigator or panelist showing presumption of responsibility based on stereotypes, or
- Misapplying trauma-informed practice to explain away all inconsistencies in statements





# COMPLAINTS MUST BE DISMISSED IF:

1. If allegations do not constitute sexual harassment as defined under the Final Rule § 106.30 (even if proven)
2. Did not occur in the recipient's education program or activity, or
3. Did not occur against a person in the U.S.



# COMPLAINTS MAY BE DISMISSED IF:

1. Complainant withdraws formal complaint or allegations in writing
2. Respondent is no longer enrolled or employed by the recipient, or
3. Specific circumstances prevent recipient from gathering evidence sufficient to reach a determination



MANDATORY notifications of dismissals (required & permitted) & rationale for the dismissal to all parties simultaneously

## **CONSIDERATIONS FOR DISMISSALS**

Decisions to dismiss complaints may be appealed by either party



# EMERGENCY REMOVAL

- Individualized safety & risk analysis
- Immediate threat to physical health or safety
- Notice & opportunity to challenge decision





Not defined  
More flexible, but not indefinite  
Lodging & compensation  
Policies set by campuses  
Collective bargaining implications  
Student employees

# ADMINISTRATIVE LEAVE





- Clery Act requires institutions supply timely warnings to students, faculty, & staff
- Anytime a crime occurs, or is occurring that poses a serious or ongoing threat to the rest of the campus, there must be a **TIMELY WARNING** sent that is likely to reach every member of the campus community
  - Email announcements, text messages, etc.
- Issued on a case-by-case basis considering all the facts surrounding a crime

# TIMELY WARNING

WHO WRITES & SENDS THESE?  
typically, safety personnel





# MUST INCLUDE:

# NY129B REQ

Date/Time of Formal Complaint & Who Filed the Complaint



References to Policies & Procedures



Conduct Alleged (Including Possible Sanctions if Found Responsible)



Date/Location of the Alleged Conduct



Upcoming Meeting Date/Time/Location



Notice of Advisor of Choice



Presumed NOT RESPONSIBLE Until Determination is Made



Copy Sent to Complainant





# INFORMAL RESOLUTIONS

## WHEN INFORMAL RESOLUTIONS ARE ALLOWED UNDER THE FINAL RULE:

- After a formal complaint is filed
- When all parties & TIX Coordinator consent
- *Any party can withdraw at any time*

## INFORMAL RESOLUTIONS ARE NOT PERMITTED IN CASES INVOLVING EMPLOYEE RESPONDENTS

## TIXC CAN RUN THE PROCESS, BUT THIS IS NOT RECOMMENDED

Examples of informal resolution:

- Administrative resolution
- Restorative justice
- Mediation

# GRIEVANCE PROCESS - KEY PLAYERS

Report Receiver	Intake/Receipt of complaint
UPD/Campus Safety/Police	Safety measures
Title IX Coordinator	Oversight & assistance
Investigator	Investigation
Informal Resolution Facilitator	Facilitation of resolution
Student Conduct Staff	Oversight & assistance
Advisor	Party advisement (Complainant/Respondent)
Hearing/Appeal	Chair, Deliberations, Determinations
Resources Offices/Units	Supportive measures



**TIXC**



# INVESTIGATION PLANNING

- Investigators are naturally curious, absent of conflicts of interest or bias, & diligent
  - Healthy skepticism is valuable & patience a virtue
  - Trained per the Final Rule
- Prepare lines of questioning for all parties, including witnesses
- Prepare documents & forms (NDAs, Non-retaliation agreement, etc.)
- Identify areas of disputed facts from reviewing formal complaint & initial response from respondent
- All testimony & evidence relevant to facts
- Recording strategies, tech, review of transcript



# **WHAT IS THE TITLE IX COORDINATOR'S ROLE DURING AN INVESTIGATION?**

- Checking in, following up with investigators
- Help collect & organize evidence
- Review issues that arise (possible conflicts of interest or bias, scheduling, lines of questioning, etc.)
- Project management
- Track deadlines, facilitate involvement & participation, communicate with stakeholders
- Facilitate end of investigations & responses from parties

# WHO CAN INVESTIGATE?



- Free from conflicts of interest & bias
- Can be the TIXC, but another administrator is preferred, if possible
- Can use trauma-informed interviewing practices
- Should be aware of cultural differences & how it can impact person's testimony or experience



# EVIDENCE



**DIRECT**

**CORROBORATING**



**CIRCUMSTANTIAL**



# ... EVIDENCE THAT MUST BE INCLUDED ...

## EXCULPATORY & INCULPATORY

Exculpatory evidence  
increases the likelihood of  
finding of **non-responsibility**  
or **non-liability**

Inculpatory evidence  
increases the probability of  
a finding of **responsibility**  
or **liability**.

PLEASE NOTE: investigations & findings of **INNOCENCE** and **GUILT** are not applicable to Title IX or student conduct grievances. These processes are administrative processes & are not civil or criminal in nature.



# RELEVANCE, DIRECTLY RELATED TO, & ADMISSIBLE EVIDENCE



- Relevant evidence makes a material fact **MORE OR LESS LIKELY TO BE TRUE**
- Relevant evidence will make a **DIRECT CONNECTION** to the charge(s)
- Irrelevant evidence can be **INCLUDED IN THE APPENDIX**
- Authenticity of evidence?

**TESTIMONY**

**TEXT / EMAIL MESSAGES**

**SOCIAL MEDIA POSTS**

**MEDICAL RECORDS**

**PUBLIC SAFETY / POLICE RECORDS**

**VIDEOS / SURVEILLANCE FOOTAGE**

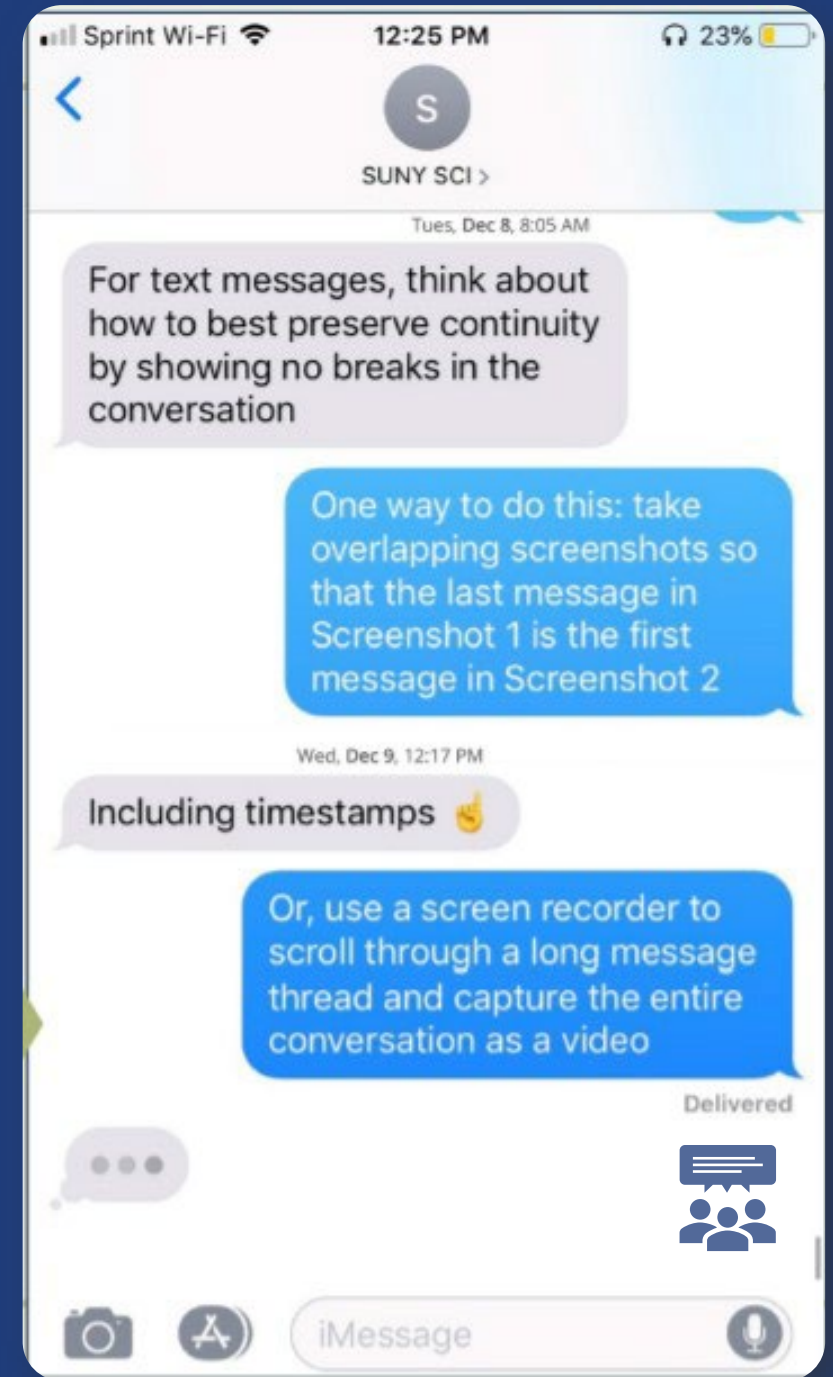
**PICTURES**

**ID CARD DATA / NETWORK USAGE LOGS**

**LOCATION DATA**

**VOICE NOTES**

**POSSIBLE EVIDENCE**



# AUTHENTICITY

**TESTIMONY  
CUSTODY  
ELECTRONIC  
AUTHENTICATION  
ANALYSIS**



# CREDIBILITY

**SPECIFICITY**  
**CONSISTENCY**  
**CONTRADICTION**  
**MOTIVE TO DECEIVE**  
**DEMEANOR &**  
**EVASION**

Credibility judgments may feel subjective - decisionmakers are asked to evaluate whether a person *they don't know* is being honest in an unfamiliar and stressful situation.

Many traditional approaches to assess credibility may **REINFORCE BIASES** rather than promote an effort to get at the truth. The areas on the left can help decisionmakers determine credibility.





Detail your intake of the incident (who, where, when)

Include observable facts & behaviors



Cite any significant quotes from parties involved

Detail incident from reporting individual's perspective



Resolution - detail next steps taken

# INCIDENT REPORT STRUCTURE

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# INVESTIGATIVE REPORT



- Creation & sharing of investigative report summarizing evidence collected (*fairly*)
  - Shared with both parties at least 10 days before hearing
- Include procedural steps taken
- Redact or remove evidence deemed “irrelevant” including exempted evidence
- Parties may correct errors, contest inclusion of certain evidence, address issues of conflicts of interest or bias
- Use of appendix may be used for evidence institution may not wish to rely on for the case
- Should not include responsibility determination (*unless single-investigator model*)

# INVESTIGATIVE REPORT TEMPLATE

- Overview of the investigation
  - Includes parties, applicable policies, allegations of misconduct, brief description of alleged misconduct
- Jurisdiction of educational institution
- Identify investigators
- Objective of the investigation & report
- Allegations, verbatim
- Identification of witnesses
- Description of evidence collected
- Summary of the relevant evidence
- Procedural next steps



# EVIDENCE STORAGE

Secure, retrievable & accessible

May impose rules for sharing material like NDAs

Case management software allowed

Note legally-recognized & un-waived privilege

Opportunities to challenge evidence





- Both parties have equal opportunity to review & respond to evidence gathered prior to investigative report
- Ten days to review “any” relevant information & evidence
- Parties submit written response, which investigator reviews
- Includes chance to determine evidence as “irrelevant” or “not directly related” to allegation
- ED recommends a “privilege log”

# EVIDENCE INSPECTION





Consider impact of trauma:

- Fragmented memory & non-linear event order
- Specific details about sensory events

Trauma-informed approach doesn't substitute for missing info, justification for not doing a full investigation, or cause a biased belief in a party's accuracy

Questioning & word usage

- “Help me understand ...” “What are you able to tell me about what you experienced?”
  - Describing another individual's experience
  - Framing your questions, avoiding why questions



# TRAUMA- INFORMED INTERVIEWING



# CULTURAL AWARENESS

# STUDENT-CENTERED PROCESS

Individuals on hearing boards should be mindful that the participants may come from different backgrounds & cultures than their own

- Race
- Ethnicity
- Gender
- Religion
- Ability/disability
- Language (limited English proficiency)
- Immigration status
- Socioeconomic status
- Sexual orientation,
- Gender identity or expression
- Age





# BIAS & KNOWLEDGE

- ENHANCE CULTURAL COMPETENCY
- ADAPT TO DIVERSE COMMUNICATION STYLES
- ADDRESS CULTURAL PERCEPTIONS OF AUTHORITY
- IMPLEMENT EQUITABLE PRACTICES



# HOW CULTURE CAN IMPACT TITLE IX ADJUDICATION

## **ADJUST COMMUNICATION STYLES**

- Encourage open dialogue
- Ensure students are comfortable sharing perspectives without constraints

## **AVOID OVERINTERPRETING BEHAVIOR**

- Limited eye contact or formality could be indicative of many influences
- Avoid letting cultural differences influence decision-making processes

