



**ODHE Advanced Title IX Investigator Training
May 25, and June 10, 2021**



Bricker & Eckler
ATTORNEYS AT LAW

Presenters - Jessica

Jessica L. Galanos

- Bricker & Eckler, Attorneys at Law, Columbus, Ohio
- Former Deputy Title IX Coordinator and litigator
- Contact:

Bricker & Eckler
100 South Third Street
Columbus, OH 43215 -4291
614.227.2341
jgalanos@bricker.com



Presenters - Erin



Erin E. Butcher

- Bricker & Eckler, Attorneys at Law, Columbus, Ohio
- Former Assistant Attorney General, OAG
- Contact:

Bricker & Eckler
100 South Third Street
Columbus, OH 43215 -4291
614.227.2303
ebutcher@bricker.com



Presenters - Joe



Joseph Hall

- Bricker & Eckler, Attorneys at Law, Cleveland, Ohio
- Former Assistant Dean of Students
- Certified Title IX Investigator
- Contact:

Bricker & Eckler
1001 Lakeside Avenue
Cleveland, OH 44114-1142
216.523.5481
jhall@bricker.com



Disclaimers



- **We can't help ourselves – we're lawyers**
- We are not giving you legal advice – consult with your legal counsel regarding how best to address a specific situation
- This training does not cover institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance

Presentation Rules

- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution electronically to post

Training Requirements for All TIX Team Members



- Definition of sexual harassment
 - Scope of the institution's program or activity
 - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy
- How to serve impartially
 - Avoiding prejudgment of the facts
 - Conflicts of interest
 - Bias (use reasonable person/ "common sense" approach)
 - Not relying on sex stereotypes

Additional Training Requirements for Investigators

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence



Aspirational Agenda



- 1:00-2:15** Introduction, Discussion of Stereotypes, Best Practices for Conducting Difficult Interviews
- 2:15-3:00** Review of Relevance & Prep for Facilitated Practice Session
- 3:00-3:15** Break
- 3:15-4:00** Practice Session in Facilitated Groups
- 4:00-5:00** Debrief of Practice Session, Capturing Feedback from Parties and Advisors, Managing the Evidence Review and Feedback Process

Non-Negotiable Principles

Preamble, p. 30059



- The right of every survivor to be taken seriously, and
- The right of every person accused to know that guilt is not predetermined

The Investigator's Roles



1. The **gatherer** of all relevant evidence
2. The **organizer** of all relevant evidence



Myths and Stereotypes



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The Things People Say

- “Why wasn’t she hysterical?”
- “It can’t have been rape. She went back to him the next day!”
- “Of course he did it.”
- “If she hadn’t been drunk...”

Know Better

KNOW THE FACTS

- “Why wasn’t she hysterical?”
- “Why didn’t she fight back?”
- “Why didn’t she yell for help?”
- “Why didn’t she fight back?”
- “Why didn’t she report?”
- “He’s not a rapist, he bought her!”
- “Of course he did it.”



Most rapes are committed
by perpetrators that know
their victims

Rape can happen in a
committed relationship





Rape can happen
between individuals of any
gender identity

Victims of intimate partner violence
may return to their perpetrator
for reasons that may not seem
rational to others



Drug-facilitated sexual assault is common, and the most common drug used is alcohol





Being drunk doesn't excuse
a perpetrator's own behavior



A wide variety of responses are normal for victims: people are different and react differently—don't make assumptions about how they “should act”



How people mentally process what happened to them affects the way the brain encodes and decodes memories of what occurred

**Why it is
Important to
NOT make
assumptions?**



Why Don't People Tell Right Away

- The Regulations tell us:
 - Fear of retaliation
 - Fear of not being believed



Why Don't People Always Remember

- A party should not be “unfairly judged due to 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” (Preamble, p. 30323)

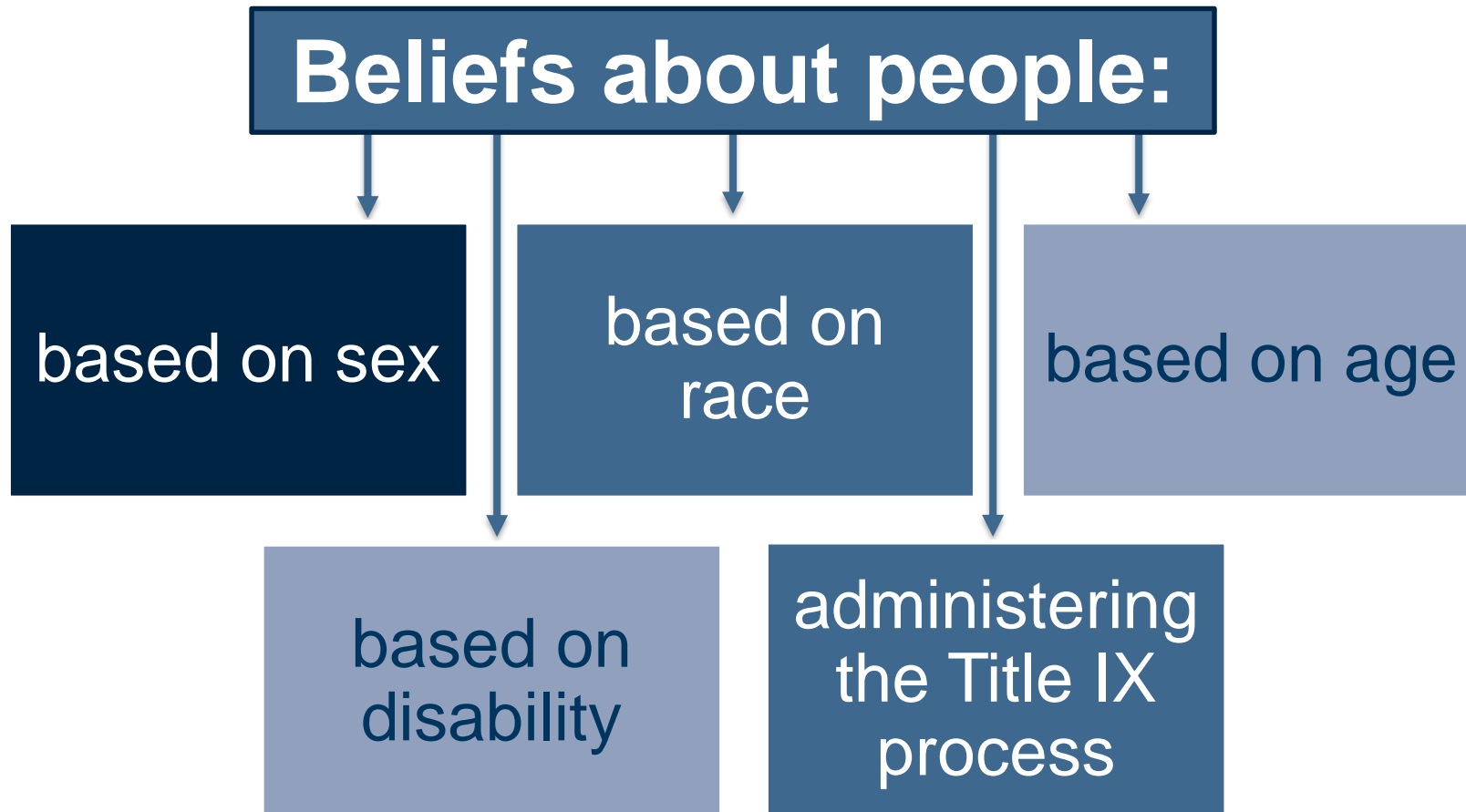


A Note About Trauma



- Assume all parties and witnesses may be dealing with trauma – from this or other incidents
- Meet them where they are
- Help them tell their story as part of the process
- Signs of trauma ≠ policy violation
- No signs of trauma ≠ no policy violation

Stereotypes Affect Response



Avoiding Sex Stereotypes



- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments (Preamble, p. 30253):
 - Women have regret sex and lie about sexual assaults
 - Men are sexually aggressive or likely to perpetrate sexual assault

Analyzing Sex Stereotypes



- Age of consent
- Dating vs. arranged marriages
- Attitudes towards homosexuality
- Attitudes towards intimate partner violence
- Cooperating with investigations
- Sharing personal information
- Reactions toward authority figures
- Reactions toward male vs. female

Culture Affects Response



- I won't report it if it doesn't feel wrong.
- I'll admit it because I don't understand it's prohibited.
- I won't report it if I would be a snitch.
- It's impolite to look you in the eye, so I'll look down the whole time.
- I deserved it. It's normal.
- Reporting this would result in serious consequences at home.

Process YOUR Response

(1 of 2)



- Is your assessment based on your culture, or theirs, or both? (It shouldn't be.)
- Is your assessment based on stereotypes you hold based on sex? Race? Culture? Yours or theirs? (It shouldn't be.)
- Is your assessment based on their role (Complainant or Respondent)? (It shouldn't be.)

Process YOUR Response

(2 of 2)



- Is your assessment based on a person you like or someone you identify with? (It shouldn't be.)
- Is your assessment based on a person "acting guiltily" by not making eye contact or fidgeting? (It shouldn't be.)
- Would you have done things differently?
- If so, SO WHAT?

Counterintuitive Response



- If they didn't act they way you might have, that doesn't mean it isn't true.
- Stop and consider carefully before you decide someone is lying because they responded in a way different from how you would have responded.
- Counterintuitive response has to be measured to another's perspective. Be careful to use a valid measurement.



Difficult Interviews



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Difficult Interviews

(1 of 7)



- Emotionally charged
 - Safety first
 - Build trust
 - Give options/control
 - Simple things – where to sit
 - Big things – whether to participate
 - Find common ground to build on
 - Proceed with caution and take breaks when needed

Difficult Interviews

(2 of 7)



- Challenging Questions
 - Ask the question, then show the evidence
 - Lay out the contradiction for them
 - “Help me understand...”
 - Think about the circumstances under which their story has changed. What else do you need to know to assist the decision-maker in assessing credibility?

Difficult Interviews

(3 of 7)



- Fear of Retaliation
 - Reminder of the prohibition
 - Strategies for addressing retaliation if it occurs
 - If they are concerned they are the one to talk first, allay that fear if possible by sharing other information

- Threatening behavior
 - Is it truly threatening behavior, or just uncomfortable behavior?
 - Does your campus have a behavioral threat assessment team?
 - Encourage the person to seek resources – early and often
 - Contact security or police for emergency situations
 - Bring a buddy so you can monitor emotional temperature

Difficult Interviews

(5 of 7)



- Dissatisfaction with the Process
 - Talk through next steps
 - Explain the policy reasons behind the process in generalities
 - Discuss ways for them to engage and control their experience
 - Make sure your counselors are on the same page about the process
 - Evaluate supportive measures – is this the disconnect?

Difficult Interviews

(6 of 7)



- Advisor-Controlled
 - Review the role of the advisor in your policy
 - You need to hear the information in the party's own voice to help with credibility analysis
 - Let's take a break so you can speak freely with your client
 - If you continue to disrupt the interview, we're going to have to reschedule
 - Consult with your Title IX Coordinator

Difficult Interviews

(7 of 7)



- Refusal to participate
 - Be a blank slate when talking with people
 - If you can share information about the reason for the interview, do so
 - Tell them the process is voluntary
 - Tell them they can leave if they want
 - Take whatever participation you can get – interview, written statement



Review of Relevance for Investigators

What is Relevant?



From the Regulations...

- No definition of relevance

But What *is* Relevant?

From the Preamble...

- The preamble discussion indicates relevance may include: evidence that is “**probative of any material fact concerning the allegations.**” (Preamble, p. 30343)
- “[E]vidence pertinent to proving whether **facts material to the allegations** under investigation are **more or less likely to be true** (*i.e.*, on what is relevant)” (Preamble, p. 30294)

Relevancy Visuals



Issues of Relevance (Review)



- The Rules of Evidence do **NOT** apply and **CANNOT** apply
- Cannot *per se* exclude certain types of evidence (lie detector tests, expert witnesses)

What isn't relevant?

- Information protected by a legally recognized privilege
- Party's medical, psychological, and similar records unless voluntary written consent
- Party or witness statements that have not been subjected to cross-examination at a live hearing

Relevancy: Medical treatment and Investigations



Section 106.45(b)(5)(i): when investigating a formal complaint, recipient:

- “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, **unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section.**”

Relevancy: Legally Privileged Information



Section 106.45(b)(1)(x):

- A **recipient's** grievance process **must...not 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.

Relevancy: Legally Privileged Information – What does this include?



- Preamble identifies medical and treatment records
- Jurisdiction-dependent
 - Attorney-client communications
 - Implicating oneself in a crime
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

Issues of Relevancy: What isn't relevant?

– Rape Shield Provision



- Evidence about **complainant's** prior sexual history (must exclude) unless such questions/ evidence:
 - are offered to prove that someone other than the respondent committed the conduct, or
 - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Rape Shield Provisions (Cont.)



- Rape shield protections do not apply to Respondents
 - Plain language of the regulations concerns “complainant’s sexual predisposition or prior sexual behavior” only (34 CFR 106.45(b)(6))
 - “The Department reiterates that the rape shield language...does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser **must be judged for relevance as any other evidence must be.**” (Preamble, p. 30353)

Additional information for Investigators regarding relevancy



- There are more considerations for decision-makers regarding relevancy than investigators
- Of note, if a party or witness's statement is not subject to cross-examination at the hearing, the decision-maker cannot consider that statement

Relevance and the Investigator

The gatherer of all relevant evidence

- **Recipient** must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (Preamble, p. 30331)

Relevance and the Investigation and Report



Focus of Investigations (according to the Preamble):

- “The requirement for **recipients** to **summarize** and evaluate **relevant evidence**, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to section 106.45, appropriately direct **recipients** to **focus investigations** and adjudications **on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true** (i.e., on that is relevant.)” (Preamble, p. 30294)

practice...

practice...

practice...

Preparation for Practice Session

Witness Interview of Wendy

- Remember – two reports to the Title IX Office
 - (1) Wendy and Cody
 - (2) Cody and Rachel/Rebecca
- Assume for purposes of this exercise that the report re: Wendy and Cody has been referred to Corona's Office of Student Conduct and Community Responsibilities
- You are investigating Cody's complaint against Rachel & Rebecca

Hypothetical Report from Cody



Corona College Email

To: Title IX Coordinator

From: Cody Craft

Date: February 16, 2021

Hi, my name is Cody Craft and I'm not sure how to make a report to this office, but I need to report that two students, Rachel Rex and Rebecca Rex, have been harassing me and stalking me in recent weeks. They are twin sisters and are friends with my ex-girlfriend, Wendy Watson. I think they may be acting this way because they were told to do so by Wendy. I recently received a No Contact Order from the University and have tried to keep my distance from Wendy, but she's allowed to send her friends to follow me and harass me?

Wendy Watson is my ex-girlfriend and I believe she may have recently filed a complaint against me for private disagreements in our relationship. I don't think she should be able to that because I didn't do anything wrong and I never "abused" her. I haven't received notice of her complaint but I've been told that I might get kicked out of school over it. First, can you tell me whether this is true and whether I need to get a lawyer?

When a Party Requests an Interview



- All of the parties have requested that you interview Wendy
 - Cody wants Wendy to explain that he was never violent and never assaulted her
 - Rachel & Rebecca want Wendy to explain her relationship with Cody and the things Wendy has told them about Cody
- Is this information relevant to the investigation?

Difficult Interview of Wendy

Your mission – should you choose to accept it:

- Interview Wendy about:
 - Violence/assault in her relationship with Cody
 - Conversations with Rachel and Rebecca about Cody
- Be sensitive – You know Wendy is going through some things
- Be transparent – Tell Wendy what you need and gently re-direct



Debrief of Practice Session



Capturing Feedback

Opportunities for Feedback (1 of 2)



- Discretionary opportunities
 - After interviews
 - Not required, but may address issues earlier in the process and can help build trust
 - Be consistent
 - Within individual cases (“What we do for one, we do for the other”)
 - Across your caseload

Opportunities for Feedback (2 of 2)



- Mandatory opportunities per Title IX regs
 - Time for parties/advisors to **review evidence**
 - **10 days** to submit a written response, “which the investigator will consider prior to completion of the investigative report”
 - Time for parties/advisors to **review the investigative report** and respond in writing
 - At least **10 days** prior to hearing

(34 C.F.R. §106.45(b)(5)(vi) and (vii))

Sending & Receiving Documents for Feedback



Sending:

- Allow for track changes?
- Send as PDFs?
Watermarks?

Receiving:

- Track changes
- Edits via text
- A separate document or email

Capturing Feedback

- Just change the interview summary or report?
 - Be careful
 - Depends on the feedback
 - Minor clarifications v.
 - Additional or revised information v.
 - A different account entirely
 - Document your edits and reasons therefor within the summary or report

Capturing Feedback

(1 of 2)



- Track changes
 - See prior slide for caveats
 - Save red-line version as a pdf?
 - Incorporate by reference
- Text message
 - Take a Screenshot and save to the file
 - Incorporate by reference

Capturing Feedback

(2 of 2)



- A separate document or email
 - Save document or email as a pdf
 - Incorporate into your version via footnotes?
 - Make sure to incorporate by reference – so add a note to the summary or report – don't just attach it without referencing
 - Don't let this separate document get lost in your file! It may be critically important at the hearing.

Considering Feedback



- Remember...
 - **“Prior to completion of the investigation report,** the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, **which the investigator will consider prior to completion of the investigative report.”**
- Make sure the investigation report reflects your consideration
 - Don’t just go through the motions

Managing the Evidence Review & Feedback Process

(1 of 5)



- Do you have a system in place to share evidence and the report? Do you like it?
 - Electronic format or hard copy
 - Method to limit ability to copy, print, save, download?

Managing the Evidence Review & Feedback Process

(2 of 5)



- **Scheduling**

- Is this your job? Your Coordinator's job?
- How do cases flow through your process, timing-wise?
 - Pre-hearing conferences
 - Other steps specific to your process?
- Create a flowchart or calendar for yourself

Managing the Evidence Review & Feedback Process

(3 of 5)



- **New information and requests for further investigation**
 - Will be a fact-specific analysis
 - Work with your TIXC and maybe legal counsel
 - If this involves issues of relevance – make sure you are at the table

Managing the Evidence Review & Feedback Process

(4 of 5)



- **New information and requests for further investigation (Cont.)**
 - Balancing the concerns of a thorough investigation against concerns of timing and process
 - No easy answers
 - Document your decisions
 - Be transparent and “show your work” in the report

Managing the Evidence Review & Feedback Process

(5 of 5)



- Tie up as many loose ends as possible before the hearing
 - Remember – you may have blind spots that already require some attention in the hearing
 - Issues of credibility should be saved for the hearing, but
 - Remember that you are the **gatherer** of all relevant evidence
 - Don't leave the “gathering” part to your Decision-Maker

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Find us on **Twitter** at
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Questions?