

Training for Campus Leadership: A Bottom-Line Take on the New Title IX Rules

Fall 2020

Disclaimer

This training video provides general legal advice about certain topics related to the U.S. Department of Education's regulation and enforcement of Title IX of the Education Amendments Act of 1972 and specifically with respect to the Title IX regulatory changes released on May 6, 2020 and effective on August 14, 2020. This is a quickly-evolving area, and substantial changes to applicable law, rules, regulations, and enforcement policies in the near term seem likely. We assume no responsibility to update this training video notwithstanding changes in the law. Please note that this presentation does not address state or local laws, rules, or regulations which may be material in evaluating the subject matter of this training video. Finally, this presentation offers general guidance about its topic and does not offer specific legal advice about any particular circumstance, investigation, hearing, or matter.

Agenda

I. Background and Context

II. Overview of Changes

III. Five Key Decisions

IV. When to Call the Calvary

TITLE IX

No person in the United States 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.

Title IX's Purpose

Prohibitions or Limitations
on Participation Based on
Sex

Unequal Funding of Men's
and Women's Athletics

Pregnancy Discrimination

Sexual Harassment
- Sexual Assault
- Stalking
- Domestic/Dating Violence
- Verbal/expressive



The 2011 and 2014 Guidance



Focused attention and resources on the problem of sexual harassment

Raised concerns that Respondents were being treated unfairly

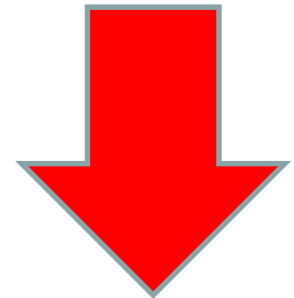


It did not change the law.

The Final Rule is More than Guidance

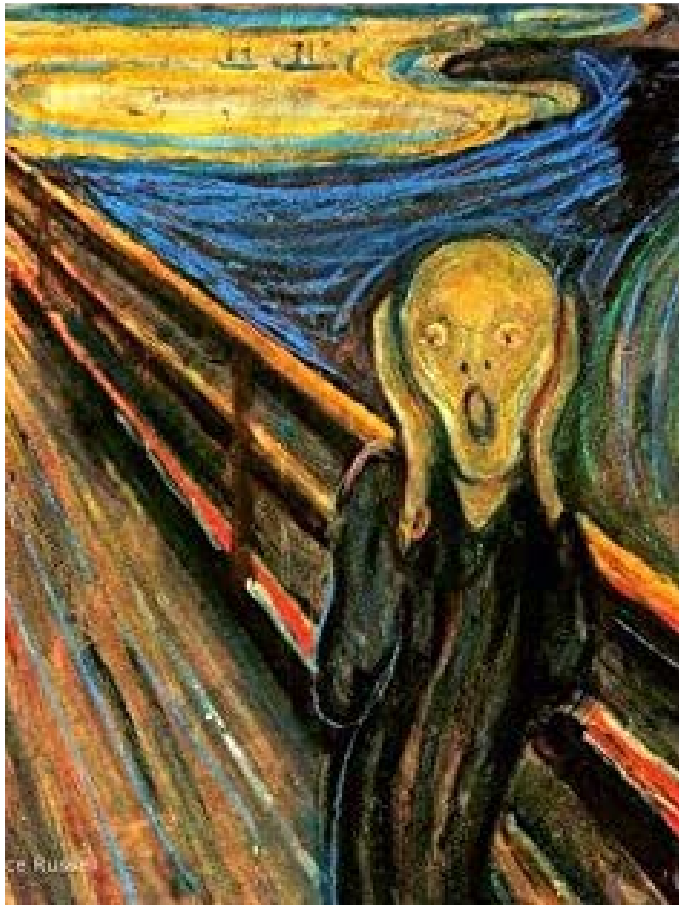
- The Title IX process is now legally mandated.
- A Final Rule is not easily made or unmade.

Final Rule released: May 6, 2020



Compliance deadline: August 14, 2020

Your Title IX Team Needs Your Support



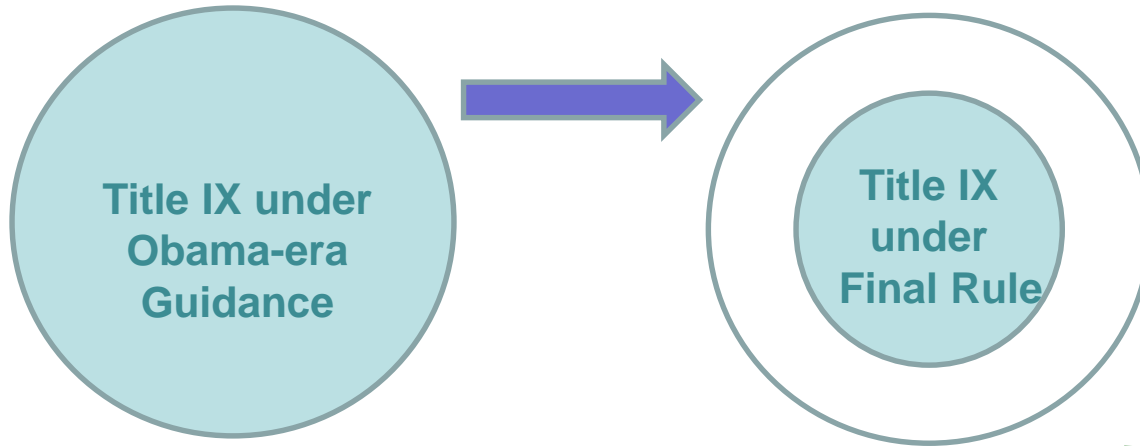
- Time
- Back up
- Resources
- Moral support
- Messaging

Key Message for Your Community

More is staying the same
than is changing.

Important side note: You retain control over whether to change or maintain significant elements of your current Title IX program.

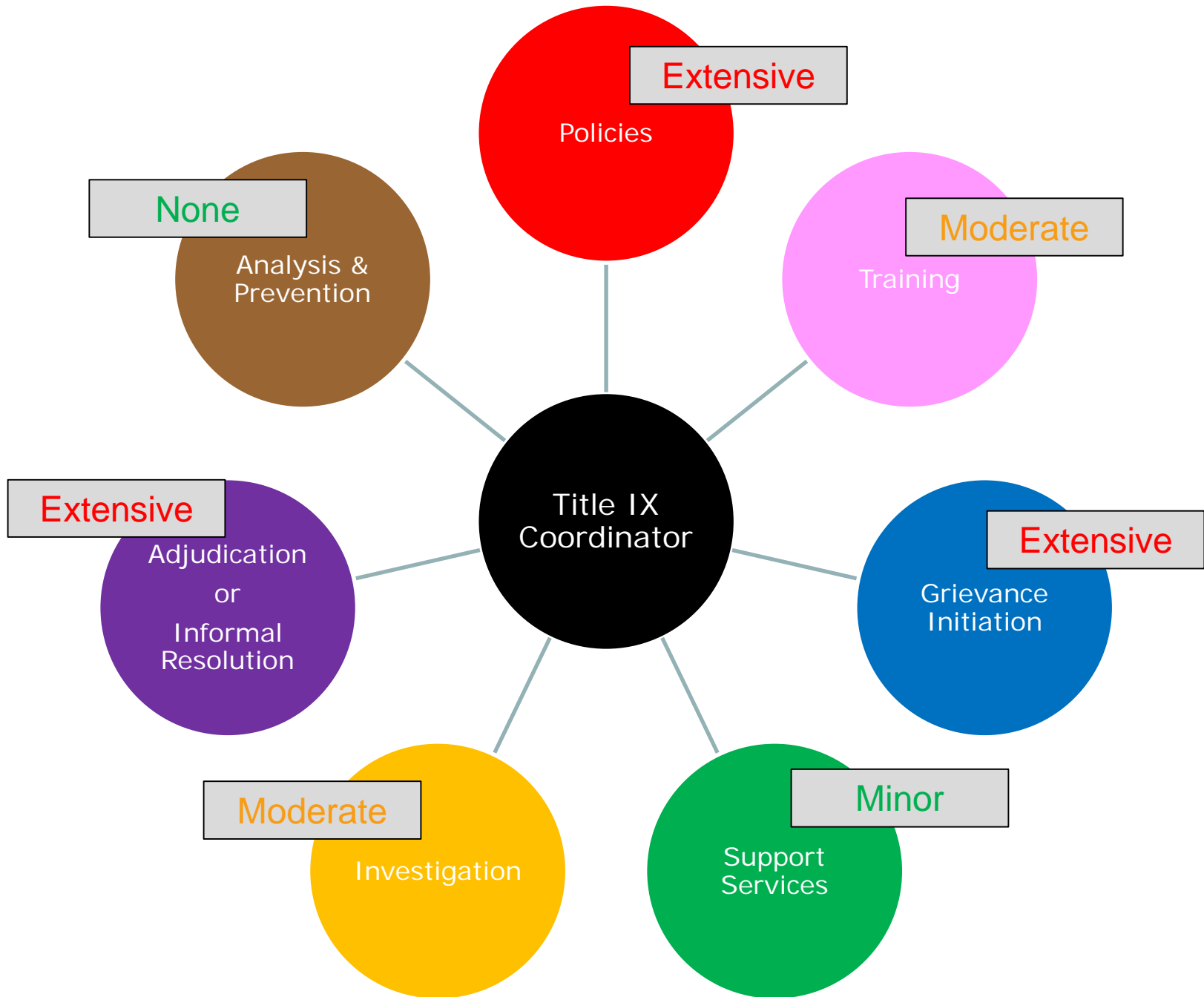
Overarching Goals of Final Rule



1. Narrow the scope of incidents that fall within the law

2. Recalibrate the procedural balance between complainants and respondents





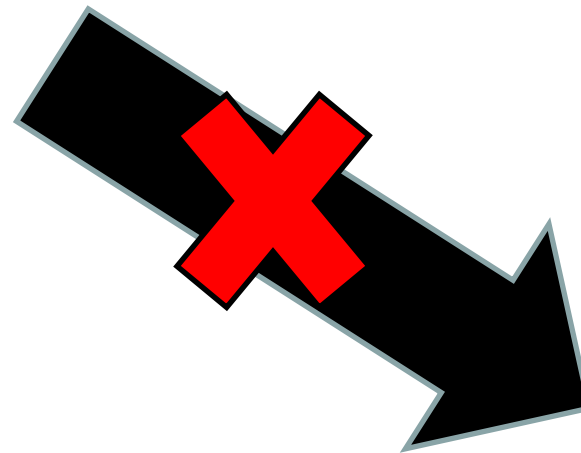
~~Study abroad programs~~

~~Off-campus harassment~~

~~Off-campus sexual assault~~

~~Severe harassment that is not pervasive~~

~~Pervasive harassment that is not severe~~



FIVE KEY QUESTIONS

OR

HEAVY LIES THE HEAD THAT WEARS THE CROWN

1

2

3

4

5

1

STANDARD OF SUCCESS

Prior Guidance

School must stop harassment, prevent its reoccurrence, and remedy its effects

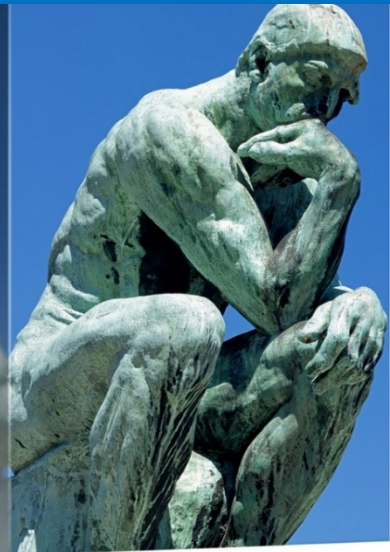


New Rule

School must respond promptly in a manner that is not deliberately indifferent



Should you continue
to strive to stop,
prevent, and remedy
sexual harassment?



YES

- Maintains consistency
- Community expectations
- More protective of your students, faculty, and staff

NO

- Risk of overzealous enforcement
- Lack of resources
- Outside your mission

2

MANDATORY REPORTING

Prior Guidance

School was responsible for actual and constructive knowledge of most employees

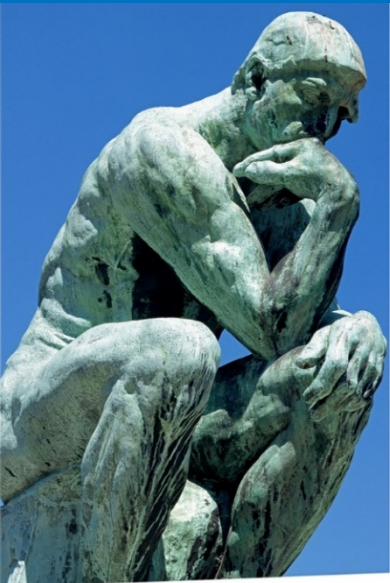


New Rule

School is responsible for actual knowledge of small number of senior administrators



Should you continue
to mandate that all
employees report
sexual harassment?



YES

- Maintains consistency
- May be required under other laws
- Helps to root out bad conduct

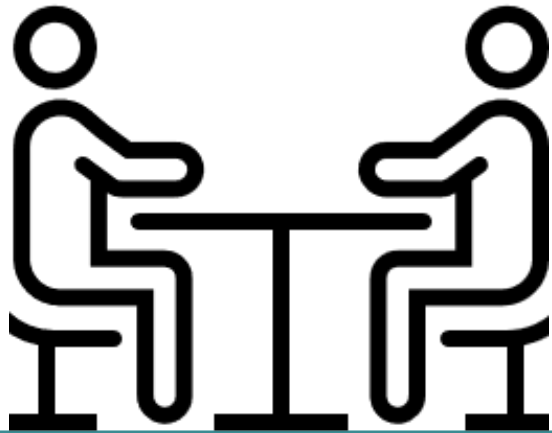
NO

- Limits confidential conversations
- You may be held to the higher standard that you set
- Requires continued training

3 INFORMAL RESOLUTION PROCESS

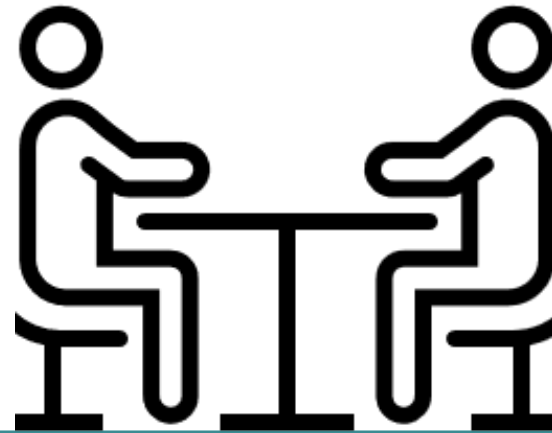
Prior Guidance

Allowed, but not emphasized, and could not be utilized for sexual assault cases.



New Rule

Viewed favorably and may be used for all cases *except* employee-on-student incidents.



Should you prioritize
standing up an
informal resolution
process?



YES

- Gaining in popularity
- Diversity of approaches for diversity of cases
- Alternative to burdensome formal process

NO

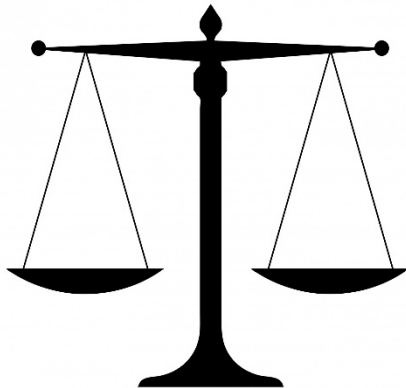
- Risk of power imbalance/pressure
- Very little guidance available
- No bandwidth to do it

4

EVIDENTIARY STANDARD

Prior Guidance

Must use
“preponderance of
the evidence”
standard

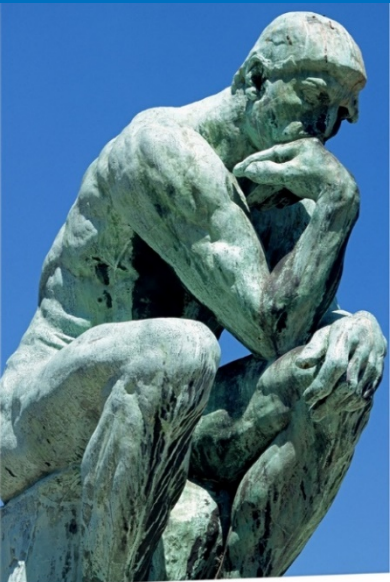


New Rule

May use
“preponderance” or
“clear and convincing”



Should you keep
“preponderance” as
evidentiary
standard?



YES

- Maintains consistency
- Treats both parties equally

NO

- Less protective of the accused
- Less certainty when making finding of responsible

UH-OH

- Same standard must be used in **all** Title IX sexual harassment (TIXSH) cases.

5

“OTHER” SEXUAL HARASSMENT

Prior Guidance

- Regardless of location, conduct that had an impact on education
- All unwelcome conduct



New Rule

- Only conduct that occurs within education program or activity
- Only conduct that meets narrowed definition

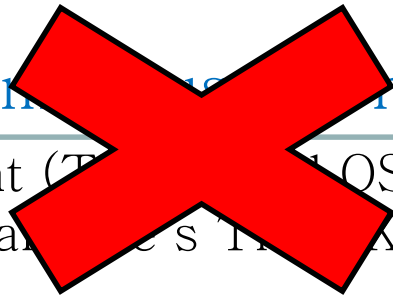


POSSIBLE APPROACHES TO OTHER CASES

Option A

Maximize use of new Title IX procedures

- Keep all sexual harassment (TIXSH and OSH) in the Title IX Office and handle them under the Final Rule's Title IX procedures.



Option B

Push to HR & Student Conduct

- Send all OSH cases out of the Title IX office. Limit the Title IX office to handling TIXSH cases under the Final Rule's Title IX procedures.

Option C

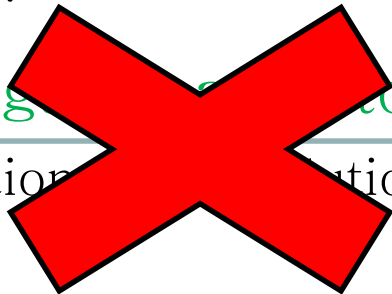
Use existing Title IX procedures

- Keep all sexual harassment (TIXSH and OSH) in the Title IX Office. Handle TIXSH cases under the new Final Rule and OSH cases under existing Title IX procedures.

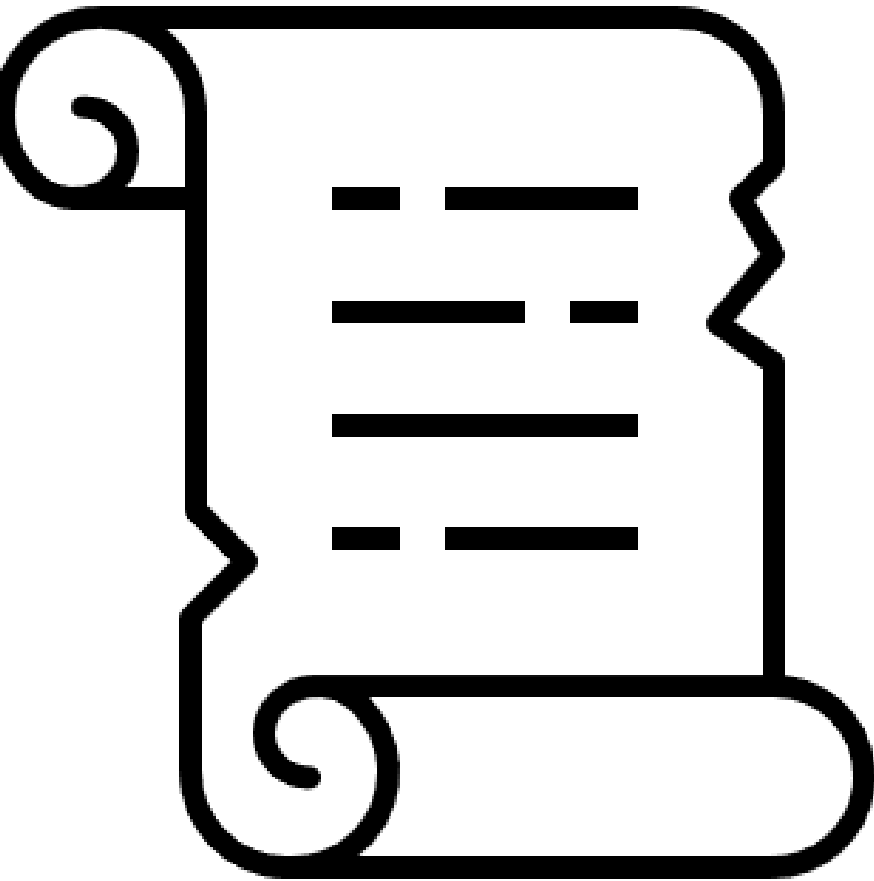
Option D

Disregard Title IX to degree possible

- If no law requires investigation or reporting, then conduct is allowable



CREATING A NEW POLICY



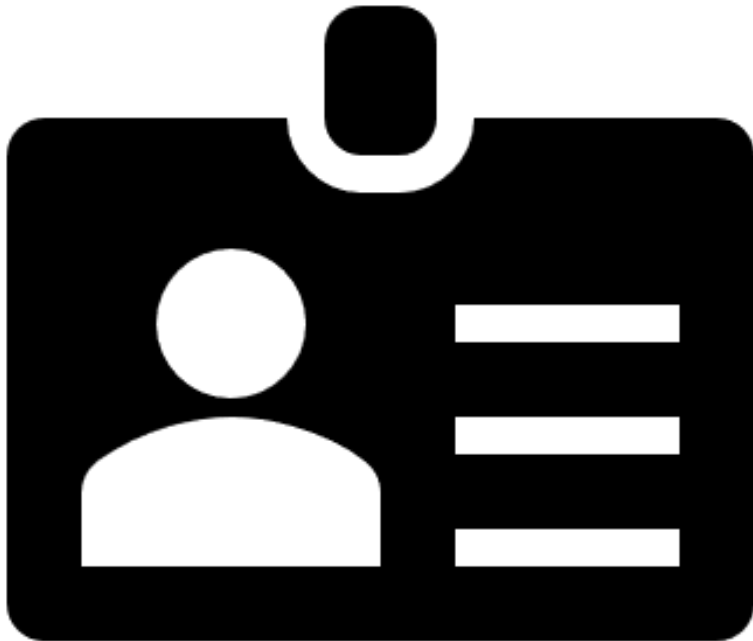
- Changes are extensive, detailed, and nuanced
- Too cumbersome to create via revision
- Foundation must be put in place quickly

INVESTIGATION AND ADJUDICATION OF TIXSH



- Parties entitled to attorneys throughout process
- Relevancy determinations must be made in real time
- Investigative reports and rulings are complex legal documents

EMPLOYEE AS RESPONDENT MATTERS



- Rule creates thorny problems
- Conflict between Title IX and Title VII
- Protections for tenured faculty applied to all parties

Your Parker Poe Title IX Team



For Title IX assistance, contact Team Lead Josh Whitlock at joshwhitlock@parkerpoe.com or 704-335-6622