



Balancing Fairness & Exercising Discretion in Student Conduct Policies on Sexual Assault, Dating and Domestic Violence, and Stalking

March 2023



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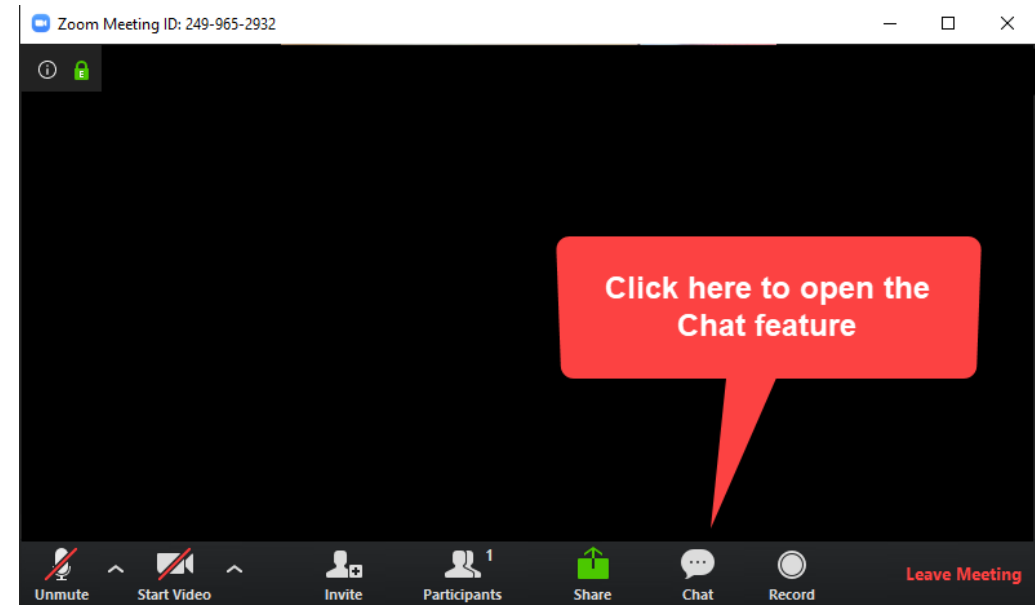
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Chat With Us!

Using the chat box,
please indicate a
question you'd like
answered in this
session.



Training Objectives

- ❖ Recognize the role of conduct in trauma-informed campus systems
- ❖ Identify trauma-informed practices to incorporate into policy and procedures
- ❖ Assess your institutional policy through the lens of equity and fairness

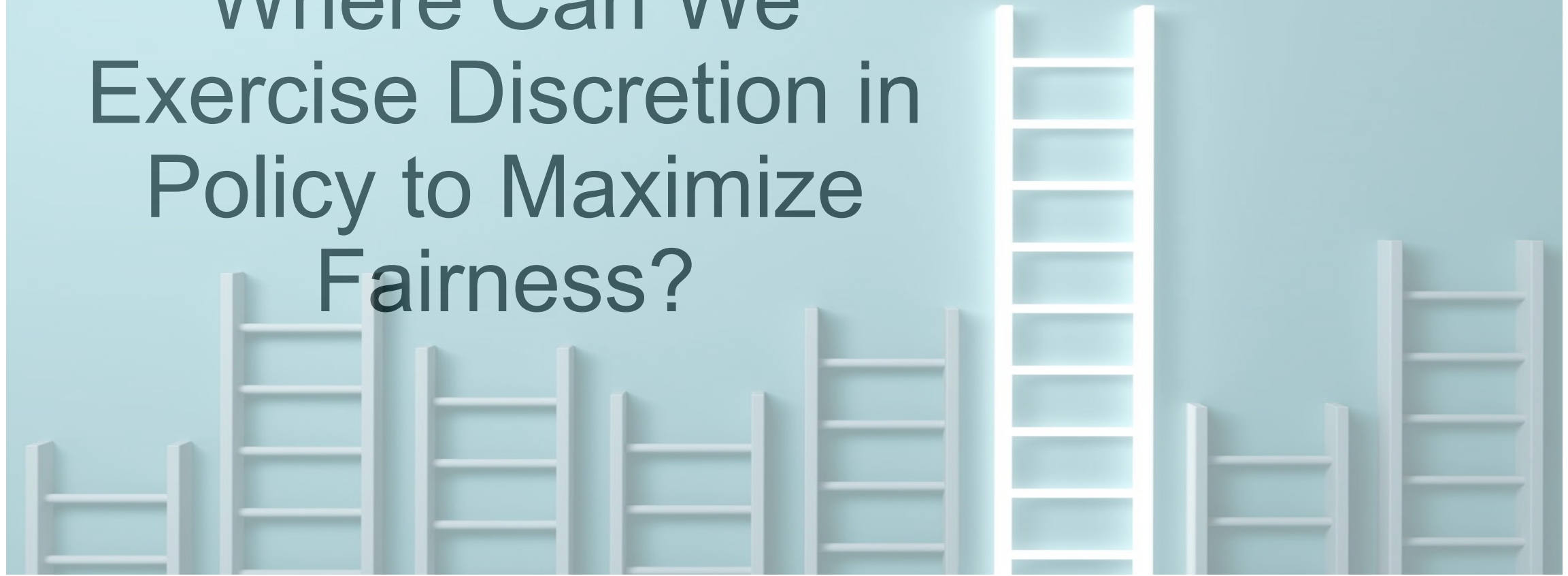
Foundational Principles

- Being trauma-informed extends beyond working with individual trauma.
- All aspects of a campus' response protocols, policy, and procedures are opportunities to incorporate trauma-informed practices.
- Policies and procedures are evolving documents and can always be improved.





Where Can We Exercise Discretion in Policy to Maximize Fairness?

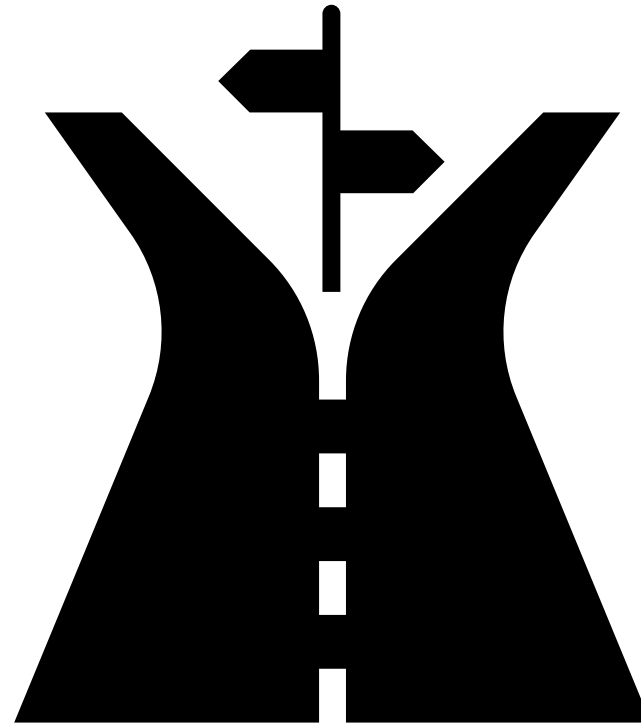


Yes, even with the constraints of Title IX

- ✓ Narrow Definitions
- ✓ Narrow Jurisdiction
- ✓ Specific Grievance Process
- ✓ Specific Trainings Required
- ✓ Live Hearing with Cross-Examination
- ✓ Parties Must Have Advisor



There is a path forward!



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Poll: Share with us!

Does your institution adjudicate allegations of DDVSAS off campus?

- A) No, we only adjudicate on-campus DDVSAS
- B) Yes, we adjudicate off-campus DDVSAS
- C) I don't know



Discussion: Hypo

What: Back to School Hockey Party

Where: Off-Campus Hockey House

Who: First-Year Students and Hockey Team

When: This Past Weekend

Report: Members of the hockey team bought and provided alcohol to first year students.

Do you address this conduct?

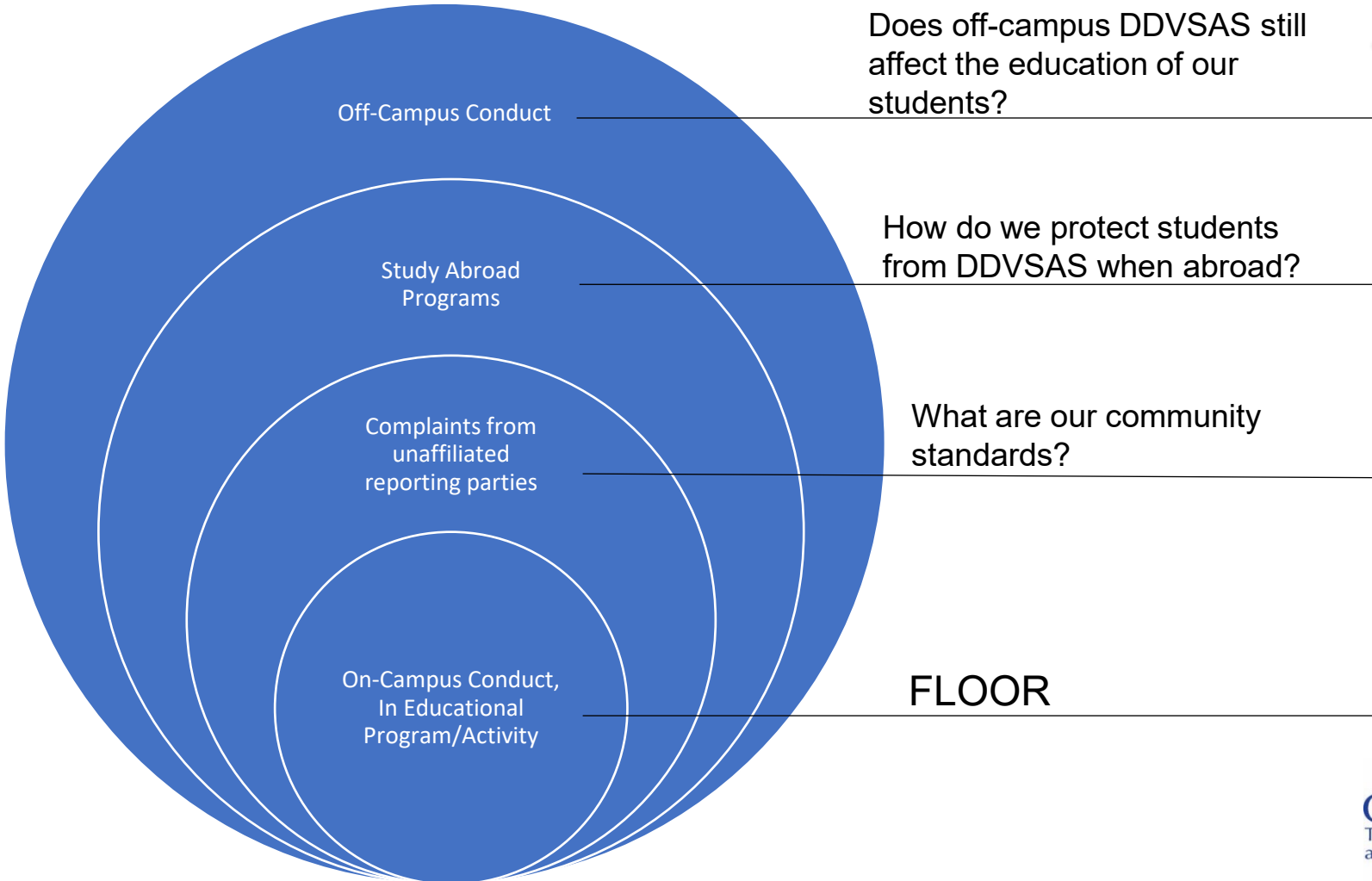


Jurisdiction

Regs Language	Trauma-Informed Practice
<p>§ 106.44(a): A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.</p>	<p>Commit to adjudicating conduct outside of Title IX</p> <p>Generally two approaches:</p> <ol style="list-style-type: none">1) One policy and one process covers all2) Two policies/procedures, one specifically covering Title IX



Jurisdiction



How do we effectively address the DDVSAS that our campus community experiences?

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Discretionary Dismissals

Regs Language	Trauma-Informed Practice
<p>§ 106.45(b)(3)(ii): The recipient may dismiss the formal complaint ... if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw ...; the respondent is no longer enrolled or employed ...; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination...</p>	<p>Make internal determinations about what institution will do when a complainant requests to withdraw, a respondent is no longer enrolled or employed, or the institution is unable to gather evidence. This should be reflected in policy and discussed with the complainant at the onset of a process. Do not leave this to be determined on a case-by-case basis.</p>



Discretionary Dismissals Cnt'd

Hypo: Student reports sexual assault to Title IX in February of their senior year. Respondent is also a senior. Given the complexity of the complaint, the volume of investigations, and the status of the students, it is possible there will not be a finding before graduation. What do you do?

- a) What does your policy say?
- b) How do you communicate that to the complainant?
- c) Do you have an appeal framework prepared for discretionary dismissals?



Definition of Sexual Harassment

Regs Language	Trauma-Informed Practice
<p>§ 106.30(a) Sexual harassment:</p> <ul style="list-style-type: none">(1) Quid pro quo sexual harassment;(2) Unwelcome conduct so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;or(3) "Sexual assault", "dating violence", "domestic violence" or "stalking" as defined by Clery.	<p>Incorporate sexual exploitation as prohibited conduct in institutional policy.</p> <p>Define sexual exploitation broadly.</p>



Supportive Measures

Regs Language	Trauma-Informed Practice
<p>§ 106.30: Supportive Measures are:</p> <ul style="list-style-type: none">✓ Non-Disciplinary✓ Non-Punitive✓ Individualized✓ Reasonably Available✓ Designed to Restore or Preserve Equal Access to Education Program/Activity✓ Cannot Unreasonably Burden Other Party✓ Confidential (with some exceptions)	<p>1) Incorporate a safety planning framework when discussing supportive measures.</p>

Incorporate a Safety Planning Framework in Provision of Supportive Measures

Tailored

Safety planning = listening to student's needs and priorities

- Students may not be able to make specific requests, but may be able to answer questions about what they are afraid of or are concerned about

Ongoing

Supportive measures can be changed

- A student's needs may shift based on the circumstances at school or dealing with the lingering effects of the assault.

Detailed in Policy

Resources should be included in policy with detail

- Instead just listing contact information, include how they can help.
- Ex: how can law enforcement assist and what to request from them

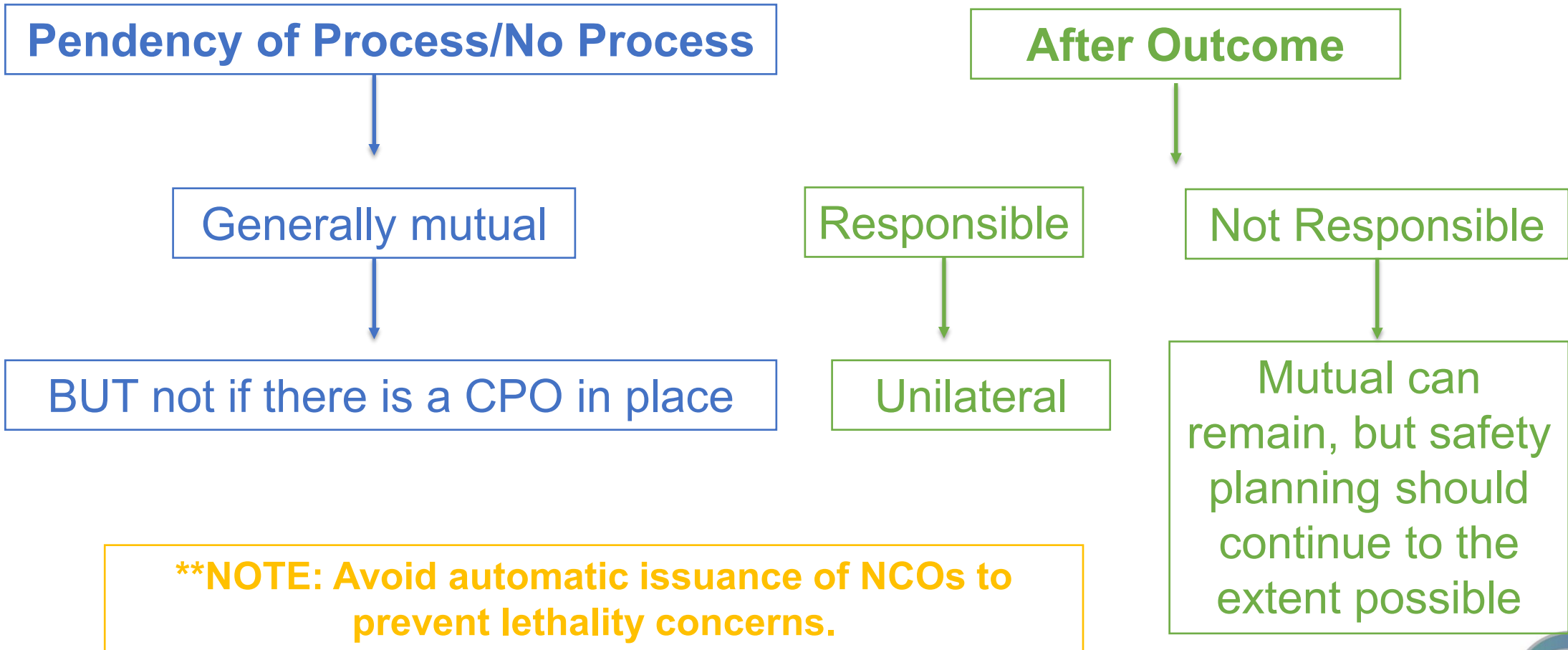


Supportive Measures cnt'd

Regs Language	Trauma-Informed Practice
<p>§ 106.30: Supportive Measures are:</p> <ul style="list-style-type: none">✓ Non-Disciplinary✓ Non-Punitive✓ Individualized✓ Reasonably Available✓ Designed to Restore or Preserve Equal Access to Education Program/Activity✓ Cannot Unreasonably Burden Other Party✓ Confidential (with some exceptions)	<p>2) NCOs:</p> <p>NCOs in general, and unilateral NCOs in specific, should be listed as a remedy and a supportive measure in institutional policy. They should not be listed as a sanction.</p>



No Contact Orders



****NOTE: Avoid automatic issuance of NCOs to prevent lethality concerns.**



Title IX Coordinator

Regs Language

§ 106.30: Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

§ 106.45(b)(7)(i): Title IX Coordinator cannot be the decisionmaker.

§ 106.45(b)(1)(iii). Title IX Coordinator cannot have a conflict of interest or bias.

Trauma-Informed Practice

Title IX Coordinators should have a robust group of administrators, faculty, and staff who can support the coordination of supportive measures.

Title IX Coordinator should explain in detail to complainants the applicable policy/policies related to allegations and any considerations the complainant should take into account when deciding what avenue to pursue.



Title IX Coordinator

- Ensure Title IX Coordinators have robust group of administrators who support coordination of supportive measures.
- If possible, prevent Title IX from having multiple jobs





DISCUSSION BREAK

What are some ways you can build in safety planning for students?

What groups make up your campus and what are their specific safety needs?

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Live Hearing Required

Regs Language

§ 106.45(b)(6)(i): Hearings. For postsecondary institutions, the recipient's grievance process must provide for a live hearing ...

Trauma-Informed Practice

Options for making Complainant more comfortable:

- ✓ Continue to permit virtual hearings even when students are back on campus.
- ✓ Allow decision-makers to determine order of questioning and statements.
- ✓ Offer trainings for pool of advisors on how to assist parties before and during
- ✓ Decision-maker questions before cross-examination so repeat questions are deemed duplicative.



Live Hearing: Cultivate Safety and Comfort

- Indicate there are options to limit party interaction.
 - For virtual proceedings, specifically state the complainant may turn off their screen so they do not have to see the respondent.
- Decision-Maker(s) questions Complainant prior to any cross-examination or questions by Respondent's advisor.
- Consider allowing direct examination for each party by their own advisor prior to cross-examination.

Live Hearing Required cnt'd

Regs Language	Trauma-Informed Practice
<p>§ 106.45(b)(6)(i): Hearings. For postsecondary institutions, the recipient's grievance process must provide for a live hearing ...</p>	<p>Rules of Decorum:</p> <ul style="list-style-type: none">✓ Set of rules about how questioning can be conducted and train decision-makers on these rules.✓ Train decision-makers to request a question be rephrased if badgering or hostile.✓ Clearly instruct advisors at the outset of the hearing that questions that have been deemed irrelevant by the investigator due to rape shield will not be tolerated.



Rules of Hearing

- Institute a set of rules governing the hearing.
- Train decision-makers and communicate decorum rules verbally and in writing to advisors.
- Clearly instruct participants that questions barred by rape shield will not be tolerated.



Cross-Examination

Regs Language

§ 106.45(b)(6)(i): Each party's advisor permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally...

Trauma-Informed Practice

- Revamp restrictions around advisor participation during the hearing writ large, not just around cross-examination.
- Allow advisors to directly examine advisees before cross.

Cross-Examination Poll

Have you updated your policy to remove the exclusionary rule?

- A) Yes, it's been updated.
- B) No, we have retained the exclusionary rule
- C) Our policy is currently being updated
- D) I don't know

Exclusionary Rule: Federal Status



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

August 24, 2021

Dear Students, Educators, and other Stakeholders,

I write with an important update regarding the Department of Education's regulations implementing Title IX of the Education Amendments of 1972, as amended in 2020. On July 28, 2021, a federal district court in Massachusetts issued a decision in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021). This case was brought by several organizations and individuals challenging the 2020 amendments to the Title IX regulations.

The court upheld most of the provisions of the 2020 amendments that the plaintiffs challenged, but it found one part of 34 C.F.R. § 106.45(b)(6)(i) (live hearing requirement for the Title IX grievance process at postsecondary institutions only) to be arbitrary and capricious, vacated that part of the provision, and remanded it to the Department for further consideration. In a subsequent order issued on August 10, 2021, the court clarified that its decision applied nationwide. The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility...." Please note that all other provisions in the 2020 amendments, including all other parts of 34 C.F.R. § 106.45(b)(6)(i), remain in effect. The affected provision at 34 C.F.R. § 106.45(b)(6)(i) is only applicable to postsecondary institutions and does not apply to elementary or secondary schools, which are not required to provide for a live hearing with cross-examination.

In accordance with the court's order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.

In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other

In August 2021, the Department of Education issued a letter indicating it would "immediately cease enforcement of [the exclusionary rule of the Title IX Regulations]." This means that decision-makers can consider statements by parties and witnesses even if they do not participate in cross-examination at a live hearing.



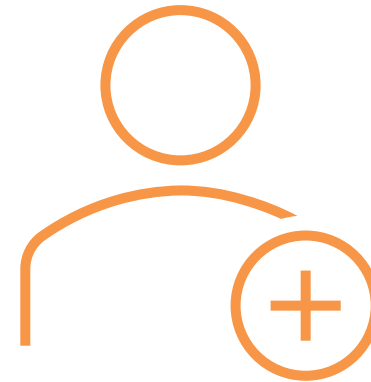
Advisors

Regs Language	Trauma-Informed Practice
<p>§ 106.45(b)(6)(i): If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.</p>	<ul style="list-style-type: none">• Remember: Advisor can have a conflict of interest with either party.• Do not include confidential advocates or counselors in your pool of advisors.• Train internal advisors on: relevance, rape shield, rules of decorum, evaluating evidence related to relevance, privacy, the grievance process.



Advisors

- Per Clery, must give option for advisor of choice. Conflicts of interest cannot exclude an advisor.
- If you have a pool of advisors, make sure you are clear about the risks of using a confidential advisor as an advisor of choice.



Wrap Up!



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Your feedback is important. Please take a moment to provide us with some feedback about this session using the session evaluation. Thank you.

Su opinión es importante. Por favor, dedique un momento para enviarnos sus comentarios sobre la presentación utilizando la sesión de evaluación. Gracias.

