



AICUO

Ready for IX!
Preparing for
Implementation of the
Title IX Regulations



Bricker & Eckler
ATTORNEYS AT LAW

Today's Presenters



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Disclaimers

Because hey, we're lawyers!

- No, we don't know when the regulations will be released.
 - (Maybe today. Really. Or not.)
- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use the chat function to ask general questions and hypotheticals.
- We have both public and private institutions here today, plus lawyers that work with educational institutions, so remember your audience.

Today's Agenda



- 10:00-11:00 - Overview of Today's Program and Review of Title IX Regulations in their Current Form
- 11:00-12:00 – Practical Considerations for Implementing Policy Changes
- 12:00-12:30 – Break - Lunch
- 12:30-1:15 – Adjudications: Addressing Risk Management and Process Considerations
- 1:15-2:00 – Strategies for Implementing the Final Regulations and Appropriately Communicating to Campus Constituents

A RAPE ON CAMPUS

She was just starting her freshman year at the University of Wisconsin when she was brutally assaulted by seven men at a frat party. When she tried to hold them accountable, a whole new kind of abuse began.

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BY SABRINA RUBIN ERDELY ILLUSTRATIONS BY JOHN BETTER

2014



2015



2016





2017

MSU students spark a movement

Go Teal campaign supports survivors
and seeks to transform campus culture

Ohio State investigating sex allegations against ex-trainer

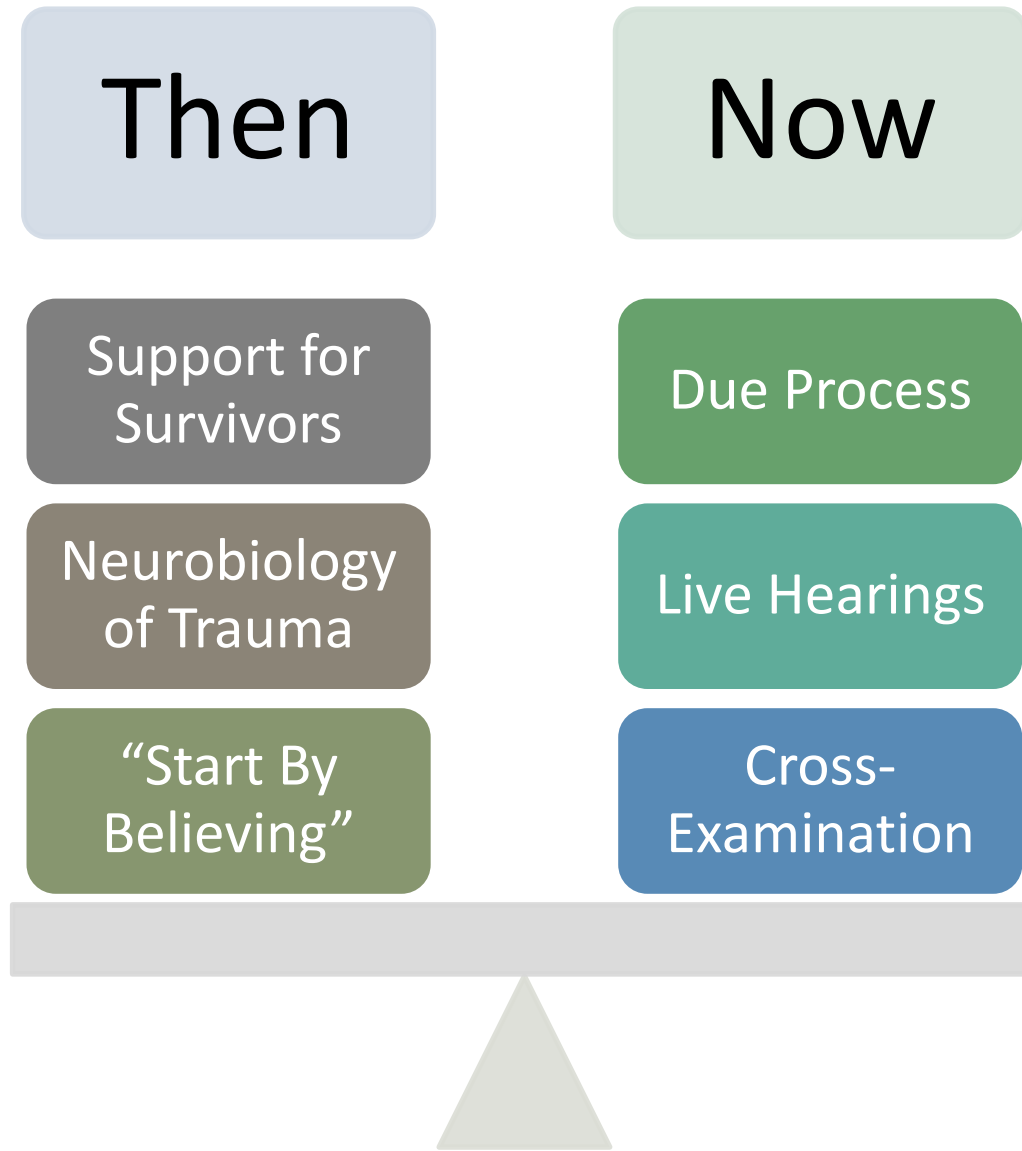
By Associated Press

April 6, 2018 | 1:01am





#MeToo



Now: The Conversation Seeks Balance – But Is It Truly Balanced?

Campus Impacts (Already)

- #MeToo reports: Reports of sexual harassment cases involving faculty employees – many decades old
- Use of social media to organize: Increased speed; pressure on institutional response
- Increase in criminal charges and civil litigation: Pressure from prosecutors; threatened litigation during investigations
- Pressure on Title IX response: Collaborative consortiums; shared institutional response; top down leadership
- Protest Policies: Increased awareness of private colleges' regulation of campus speech
- Training, training, training: NCAA requirements, annual training requirements from VAWA, focus on team building

Available Financial Impacts



- Insurance Data (UE): 2011-2015
 - \$31 Million in claims and defense costs for litigation and OCR claims
 - \$22 Million for “alleged victims”
 - \$9 Million for “alleged respondents”
 - Types of claims: Title IX (statutory claims), breach of contract, negligence, defamation
- Insurance companies imposing increasing reporting requirements on IHEs to access coverage
- Insurance companies also requiring insurance coverage from outside investigators

Proposed Regulations

- Big Changes Proposed – All Subject to Change!
 - Definitions
 - Reporting/Formal Complaints
 - Jurisdiction
 - Emergency Removal
 - Grievance Procedures
 - Hearings and Cross-Examination
 - OCR Deference & Safe Harbors

Sexual Harassment Definition



- Quid Pro Quo (Employee)
- Hostile Environment
- Sexual Assault

Sexual Harassment Definition



- Quid Pro Quo
 - “An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct”

Sexual Harassment Definition



- Hostile Environment
 - “Unwelcome conduct on the basis of sex that is so severe, persistent, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity”

Sexual Harassment Definition



- Hostile Environment – Potential Conflicts with EEOC

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when ... such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

29 C.F.R. 1604.11 (EEOC Regulation)

Sexual Harassment Definition

- Sexual assault – refers to Clery Act definition:
 - Rape
 - Fondling
 - Incest
 - Statutory rape

Definition – Actual Knowledge



- Notice to the TIXC “or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient”
 - Mere ability or obligation of an employee to report sexual harassment isn’t enough
 - Fact-sensitive analysis

Definition – Supportive Measures



- “Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge too the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed”

Definition – Supportive Measures



- Designed to:
 - Restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party;
 - Protect the safety of all parties and the recipient's educational environment; and
 - Deter sexual harassment

Definition – Supportive Measures

- May include:
 - Counseling
 - Extensions of deadlines
 - Course-related adjustments
 - Modifications of work/class schedules
 - Campus escort services
 - Mutual restrictions on contact between the parties
 - Changes in work/housing locations
 - Leaves of absence
 - Increased security/monitoring of certain areas of the campus

Definition – Formal Complaint

- Document Signed By:
 - Complainant or
 - Title IX Coordinator
- Alleging sexual harassment against a respondent:
 - Must be about conduct within the recipient's education program or activity
 - Must request initiation of grievance procedure

Jurisdiction

- “A recipient is only responsible for responding to conduct that occurs within its ‘educational program or activity’.”
 - All of the operations of a recipient
 - Includes academic, extracurricular, research, occupational training
 - Public lectures, sporting events, campus tours

Jurisdiction

- “If the conduct alleged ... would not constitute sexual harassment ... even if proved or did not occur within the recipient’s program or activity, the recipient must dismiss the formal complaint with regard to that conduct.”
- The comments to the proposed regulations stated that the use of the student conduct process is permitted.

Emergency Removal



- Can remove a respondent from the recipient's education program or activity if:
 - Individualized safety/risk analysis
 - Determine that immediate threat to the health or safety of students or employees justifies removal
 - Provides the respondent with notice and opportunity to challenge the decision immediately following the removal

Informal Resolution

- Can be offered if institution provides written notice to parties of:
 - Allegations
 - Informal process
 - Consequences of participating in informal process
- Must obtain voluntary, written consent from both parties

Grievance Procedures



- Must provide “due process”
 - References public versus private distinction in some places but not others
 - Appears to require same procedures regardless of public/private status

Grievance Procedures

- Number of policy requirements, including
 - Training for administrators
 - Review inculpatory & exculpatory evidence
 - Sanctions/remedies
 - Range of supportive measures
 - Presumption of non-responsibility

Grievance Procedures



- Standard of evidence: Preponderance of the Evidence (PE) or Clear and Convincing
 - If you use PE, it must be consistent for all types of misconduct for all employees, faculty, and students
 - NOTE: Look to Faculty Handbooks, Academic Misconduct Policies, and Collective Bargaining Agreements

Grievance Procedures



- Must create an investigative report that “fairly summarizes relevant evidence”
- Copy of the report must be provided at least ten days prior to hearing

Live Hearings

- Parties can ask other party and witnesses all relevant questions and follow-up questions, including those challenging credibility
- Cross-examination done by advisor of choice
- If no advisor, institution assigns someone to be aligned with the party to fill this role

Live Hearings

- “Rape shield” protections re: sexual history
- Technology can keep parties in separate rooms
- Decision-maker must explain to the advisor why certain questions are excluded as not relevant
- If the person isn’t subject to cross, can’t consider their statement
 - What happens if they refuse to answer?
 - Does this mean you can’t consider their texts? Emails?

Written Determinations

- Must include a number of things, such as:
 - Findings of fact supporting the determination
 - Conclusions regarding application of policy to facts
 - Statement of, and rationale for, the result as to each allegation
 - Sanctions
 - Appeal procedures (if offered)

Key Takeaways

- Proposed regulations would change TIX policies and procedures – and likely student conduct policies
- Proposed regulations will require hiring/training:
 - Investigator
 - Title IX Coordinator
 - Fact finder/hearing officer
- Consider consortiums/shared services where possible
- Expand options for informal resolution
- Creates uncertainty – concern for lawsuits

Session II: Preparing for Implementation



Managing and Identifying Timelines, Policies, Risk Management, and Board Issues

What is this section about?

- This is not as simple as it looks, or as one hopes.
- Knowing what your process is for updating your policies is critical.
- Knowing whether you will be able to update your policies before Fall 2020 based on your normal practice is critical.
- 5 Steps:
 1. Identify Policies that Require Review and Possible Updates.
 2. Identify (and find) your Regulations, Bylaws, Policies, and Guidance.
 3. Calculate Timelines and Process Milestones.
 4. Adjust and Adapt. (COVID-19, Special Meetings, Ratification, Interim Policy?)
 5. Communicate Appropriately and Often.

Following Corporate Formalities



- Directors, Officers, Trustee have **fiduciary obligations** to College/University (duty of care, duty of loyalty)
- Following Regulations (corporate), Bylaws, Campus Constitutions, and Policy language is **important**.
 - **AVOID:** Void or *ultra vires* actions and challenges to adopted policies and procedures in litigation;
 - **AVOID:** Complaints or concerns from campus constituents that process was not followed;
 - **AVOID:** Concerns from accreditors about locus of control issues;
 - **AVOID:** Giving legal counsel heartburn.

Step #1 – Identifying your Policies



The Title IX Regulations implicate actual and potential changes to the following policies and handbooks:

- Title IX/Sexual Harassment Policy;
- Anti-Discrimination Policy;
- Faculty Handbook;
- Staff/Employee Handbook;
- Student Code of Conduct;
- Others?

Why are these policies implicated?

Step #1 – Identifying your Policies



- You need to identify every policy that has a disciplinary procedure. These disciplinary procedures may implicate your potential burden or burdens of proof that the institution uses on campus. (More on this in Session III)
- Many of your faculty and staff handbooks incorporate by reference your Title IX policy and procedures, or at the very least the definitions from that policy.

Step #2 – Identify your Corporate Regulations, Bylaws, Policies, and Guidance



- The threshold question is *what policies or procedures govern the adoption of a policy on campus?*
 - There are differences between corporate regulations/bylaws and internal policies and guidance.
- Where do I find these documents?
- What if I can't find a copy of them or don't know if there's the most recent version, what do I do?

Step #3 – Calculating Timelines

- ❑ Identify the TIX Regs Effective Date and work backwards.
- ❑ Calculate the time frame to accomplish the following:
 - ❑ Identifying all current policies that are implicated for review (Title IX, Code of Conduct, Faculty Handbook, Employee/Staff Handbook, Collective Bargaining Agreements (CBAs), etc.)
 - ❑ Identifying all boards, committees, and constituents that will need to review and approve all changes to these policies and agreements.
 - ❑ Identify the minimum timeframes required for these groups to meet (including if multiple meetings are required to complete review and vote, *see e.g. Board of Trustees*) and approve revisions.

Step #3 – Example

- ✓ Identify the TIX Regs Effective Date: August 14, 2020 (121 days from Today)
- ✓ Calculate the time frame to accomplish the following:
 - ✓ Identifying all current policies

Policy	Required Review?	Timing Considerations
Title IX and Sexual Harassment Policy	Student Gov., Faculty Council, and Board of Tr'ees	- Min. # of meetings to approve? (2 Meetings) - How many meetings left? When?
Faculty Handbook	Faculty Council, Board of Tr'ees	- Are changes required to go through committees? - Special Meetings?
Student Conduct Policy	Student Gov., Faculty, and Board	- Same as above
Employee Manual	President Approval	- Immediate? Consider review from HR and Employees

Step #3 – Example

- ✓ Identify the TIX Regs Effective Date: **August 14, 2020**
121 Days from today (April 17, 2020)
- How many days are left in the semester? _____
- When are your Board of Trustee Meetings? _____, _____, _____
 - When is Notice Required to be sent for a meeting?
- When are your remaining Faculty Meetings? _____, _____, _____
 - When is Notice Required to be sent for a meeting?
- When are your remaining Student Gov. Meetings? _____, _____, etc.
 - When is Notice Required to be sent for a meeting?

Step #4 – Adjust and Adapt!

So, I have calculated your timelines and I'm not unable to complete a policy review and implementation before the beginning of the fall 2020 semester! HELP!

- Will/can your Board of Trustees provide a resolution allowing for an alternative process to be used to adopt a policy? Abbreviated Policy Review?
- Be aware that you may be able to call “special meetings” of your corporate bodies (Board of Trustees, Faculty Council, etc.)
 - NOTE: Determine whether or not electronic forms of communication are permitted under the Ohio Revised Code (For Non-Profits) and your regulations/bylaws.
- Consider a Board Resolution ratifying prior work than by a subcommittee dedicated to updating your policy prior to the beginning of the semester.

Step #4 – Special Meetings?



- ❑ **Review your Code of Regulations/Bylaws (BOT).**
 - ❑ “Special Meetings” typically require a short notice window, quorum, etc.
 - ❑ Public Institutions – look to University Rules/ORC for meeting requirements and public records/meetings laws.

- ❑ **Can you take action by unanimous written consent of the Trustees? See R.C. 1702.25 (private nonprofit)**
 - ❑ Private College = yes if College’s Articles or Regulations do not prohibit it.

Step #4 – COVID-19 Implications . . .



- How will you communicate with stakeholders to receive feedback, maintain social distancing, and operate remotely to the greatest extent possible?
- Do your policies and procedures permit a shift in procedures when there is an emergency situation?
- Can you update your policies and procedures to permit electronic voting, if it doesn't exist currently?
- Are your faculty and staff committees that may need to review the policy changes equipped to operate remotely? Are there any limitations in their own governing documents that might limit this?

Step #5 – Communicate Appropriately

- Do you have a statement about the proposed Title IX Regulations?
 - Many of you have done a great job communicating about the COVID-19 situation, apply those same concepts here.
- Will the internal discussions with regard to implementing these changes include reference to the institutional mission, values, and resources?
- Anticipate reactions from students and other campus constituents that might believe that you have a choice and when these Regulations came out.
- How will you allay concerns and confusion? Students? Employees? Board of Trustees? Public ?

Step #5 – Communicate Appropriately

What to do about Pending Cases?

- It is very likely that the Title IX Regulations will have at least a 60 day implementation window (per Administrative Procedures Act). Most of your cases should be resolved prior to the effective date.

How will you responded to a request by the parties to wait until the Regulations have been issued or your new policies have been updated?

Other considerations?

Section III: Hearings?!?!

Yep!



Adjudication Planning for the Policy and Process



How will this look?

- How will you balance “due process” and trauma-informed protections?
- The Sixth Circuit has already required this of public institutions in its jurisdiction

Adjudication Planning for the Policy and Process



In person?

- These can get very heated
- Concerns of intimidation and physical threat
- Concerns of no-contact orders, AND sometimes court protection orders
- Need security
- Record?
 - Audio
 - Video
 - Adjudicator will be too busy decision-making and referring to consistently take notes
 - Provides protection for appeal

Adjudication Planning for the Policy and Process



Zoom? Skype? Google?

- Can avoid a lot of the in-person issues—but expect a fight over “due process”
- If using technology (eg., Zoom, Google, Skype) is it secure? Who runs technology?
- Recording hearing easier

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language

- Timeframe
 - No official number of days given
 - You must set one yourself and explain deviations
 - Expect attempts to push from Respondents
- Number of policy requirements, including:
 - Training for administrators
 - Review “inculpatory” & “exculpatory” evidence
 - Sanctions/remedies
 - Range of supportive measures
 - Presumption of non-responsibility

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Jurisdiction

- Expect disputes that the adjudicator will need to address
- Be clear in your Title IX policy

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Jurisdiction

- Hypothetical:
- Respondent's representative states that the College or University lacks jurisdiction over Claimant's sexual assault claim because Respondent was sober and said the consensual sex happened at his off campus apartment and Claimant is lying that it happened on campus. This must be dismissed!

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Jurisdiction

- Hypothetical:
- Your process denies due process to Respondent because it does not provide live cross examination because you use Zoom and you do not have jurisdiction to hear this!

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Evidence

- Expect disputes that the adjudicator will need to address
- Be clear in your Title IX policy
- Examples to address and define:
 - Relevant evidence
 - New evidence
 - New witnesses
 - Witnesses who did not participate in the investigation but show up at hearing
 - Character evidence

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Evidence

Examples continued:

- Pattern evidence
- Sexual history of Claimant v. sexual history of Respondent
- Alcoholism/drug problem

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Evidence

Hypothetical:

Witness was unable to participate during the investigation because she was studying abroad, but now is here and has relevant evidence.

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Evidence

Hypothetical:

Witness was unable to participate during the investigation because she was Respondent's then-girlfriend and was too traumatized to participate. She is here now and wants to provide evidence against Respondent.

Adjudications of Title IX Sexual Misconduct Matters



The Policy Language - Evidence

Hypothetical:

Objection! This is unfair to my client—I can't ask questions about Claimant's sexual history, but her representative can ask questions about Respondents?!

Adjudications of Title IX Sexual Misconduct Matters



Live Hearings

- Parties can ask other party and witnesses all relevant questions and follow-up questions, including those challenging credibility
- Cross-examination done by advisor of choice
- If no advisor, institution assigns someone to be aligned with the party to fill this role

Adjudications of Title IX Sexual Misconduct Matters



Live Hearings Considerations

- Who will serve as a Representative? Who will serve as a Hearing Officer/Adjudicator?
 - Volunteer faculty v. angry parent?
 - Volunteer faculty v. criminal defense attorney?
 - Unauthorized practice of law issue?
 - Liability to institution?
- If using attorneys
 - Malpractice insurance?
- What do contracts look like with outside entity or attorney?

Adjudications of Title IX Sexual Misconduct Matters



Live Hearings Considerations

- Disruptive or abusive behavior
- Questioning order and witnesses (no one is compelled)
- Use of taking over and “teaching” to reset tone and line of questioning
- Use of breaks
- Use of threat to end hearing

Session IV: Communication



Strategies for communication to campus constituents and beyond

What is this section about?

Have to VERSUS Want to

- **What you *have to* communicate**
 - Formal notice requirements under institutional policies, State, and Federal law
- **What you *want to* communicate**
 - Institutional values and how you have worked to maintain them

Setting the Tone

Getting Community Buy-In

Concerns in the Age of COVID

Information/Disinformation

Mass Communication

CASE STUDY

What I have to communicate?



- Title IX Statutory/Regulatory - Who will students and staff provide notice to? Who is required to report? Has it changed?
- State-Based Requirements – Are there changes that I need to make to my education programming or other State reporting requirement changes?
- Resolution Agreements – Do you have any resolution agreements or other monitoring agreements which require you to provide regulatory bodies of notice of changes in policy?
- Institutional Policies – Are there any notice requirements created by institutional policies?

What I have to communicate?



Common Institutional Policy Notice Requirements

- Notice requirements within your Title IX Policy itself
- Student Conduct Policies
- Faculty and Staff Handbooks
- Collective Bargaining Agreements

What I want to communicate?



How does this change reinforce institutional values?

How has your institution provided additional services and support to counteract what some may perceive as a roll-back in protection?

How does this change fall in line with the institution's commitment to ending discrimination and harassment?

Setting the Tone



Floor or Ceiling Conversations - Most of the regulations are setting a floor, not a ceiling.

- Are there ways you have gone above-and-beyond to protect students, faculty and staff, and to reflect your institutional mission and vision?
- Are there ways the changes, or the way you have carried out the changes, reinforce community values?

Obtaining Stakeholder Buy-In



How do you get it to “stick?”

Obvious stakeholders:

- Students
- Faculty/Staff

But don't forget:

- Board/Executives
- Title IX Staff
- Support Service Providers

Obtaining Stakeholder Buy-In



When to start?...ASAP

Consultation as a part of Communication:

- Trust Building - Consulting with stakeholders regarding policy revision and implementation will assist in community education regarding reasons for policy implementation
- Allies in Implementation - Bringing stakeholders to the table to assist in development gives them a vested interest in the success of policy implementation

Obtaining Stakeholder Buy-In



Who to invite?

- Student Government leadership
- Faculty Governance leadership
- Union leadership
- Identity and Affinity Group Leadership
- Police/Campus Security

On campus AND Off campus – SART, Community Services

Identify Influencers

Concerns in the Age of COVID



Getting buy-in when campus is closed:

- Use your network to push involvement
- Group connections in Virtual Space
 - Zoom
 - Document Sharing Platforms

Upside? Captive audience may be more engaged

Concerns in the Age of COVID



Out of Sight, Out of Mind – Don't forget:

- The Title IX regulations were a headline item before COVID
- Your Title IX Coordinator and support team will need significant support to implement these changes
- Failure to comply is not an option

Information/Disinformation

Guiding the conversation

Transforming concerns into action:

- My Friend told me...
- My attorney told me...
- I read on Twitter...

Listen and use concerns to guide:

- Communications/Campaigns
- Policy Change
- Resource Allocation

Mass Communications



Leverage Media Relationships to encourage publication from the institution's vantage point

- External - Propose story topics regarding changes to local media outlets, President/Chancellor op eds.
- Internal - Student newspapers, department newsletters, human resource newsletters

Create a campus campaign

Be wary of the check-box compliance communication trap

A Case Study



Discussion

Lessons from a Midwest state public



Register at:
www.bricker.com/events

April 21

COVID 19 Update Webinar –3:00 EDT

April 30

Title IX Investigator Training (Online) – All Day

May 5

Webinar: Title IX Litigation Update – 12:00 EDT

We will schedule free webinars for practitioners and Board of Trustees members when the Title IX regulations are released.

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to 555888.**