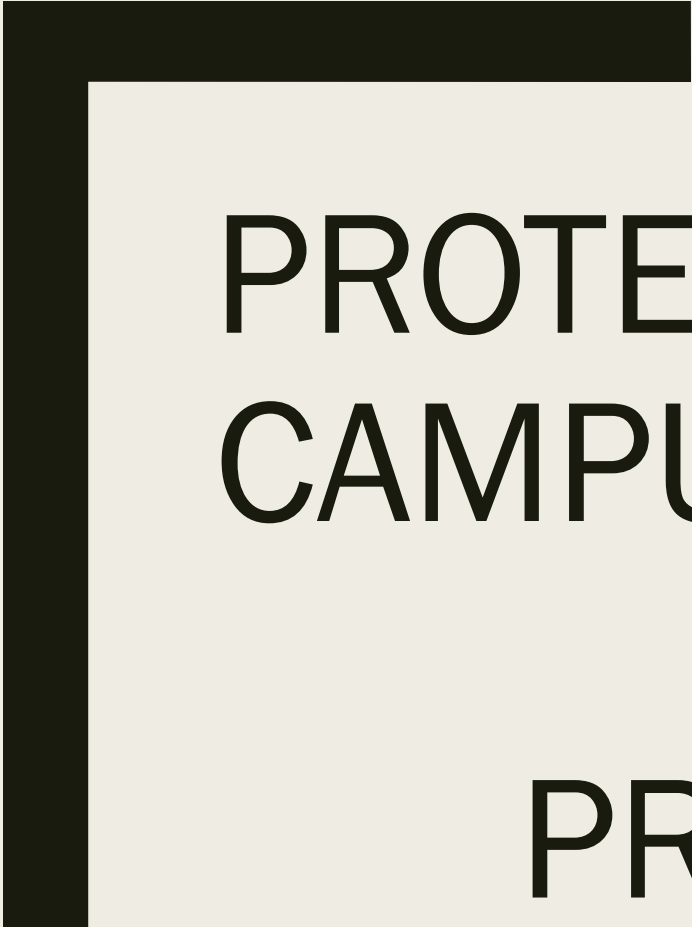




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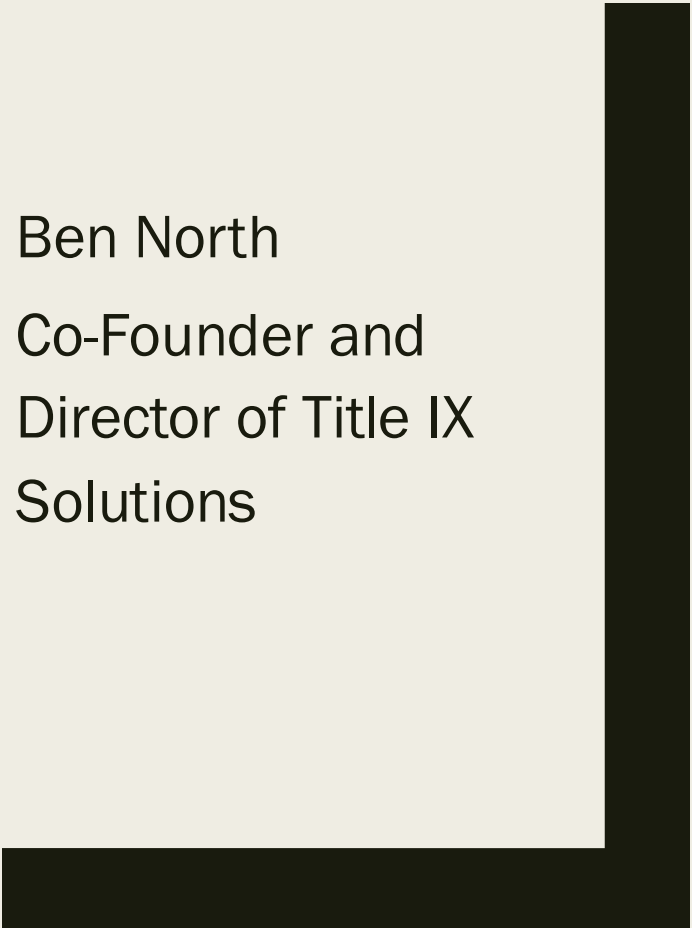
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PROTECT YOUR CAMPUS: TITLE IX BEST PRACTICES



Ben North
Co-Founder and
Director of Title IX
Solutions



Roadmap

- Background
- The Basics and Landscape of Title IX
- Liability Standards
- The Title IX Process
 - *Notice*
 - *Investigation*
 - *Hearing*
 - *Appeal*
- Practical considerations/Q&A



Our Background

Prior to founding PhoenIX, my partner and I were (and still are) Title IX litigators and Title IX Advisors in our private practice



Litigated cases across the country in state and federal trial and appeals courts



We have a passion for equality and fairness



We saw repeat errors that helped us as litigators against Universities



We can help schools and the Parties avoid litigation in the first place

The Very Basics

Title IX is a federal statute that generally prohibits educational institutions receiving federal funding from discriminating against "persons in the United States" on the basis of sex. 20 U.S.C. §1681.

Since 1998, it has been interpreted to require a response to student-on-student and faculty-on-student sexual harassment.

Title IX Liability Standards

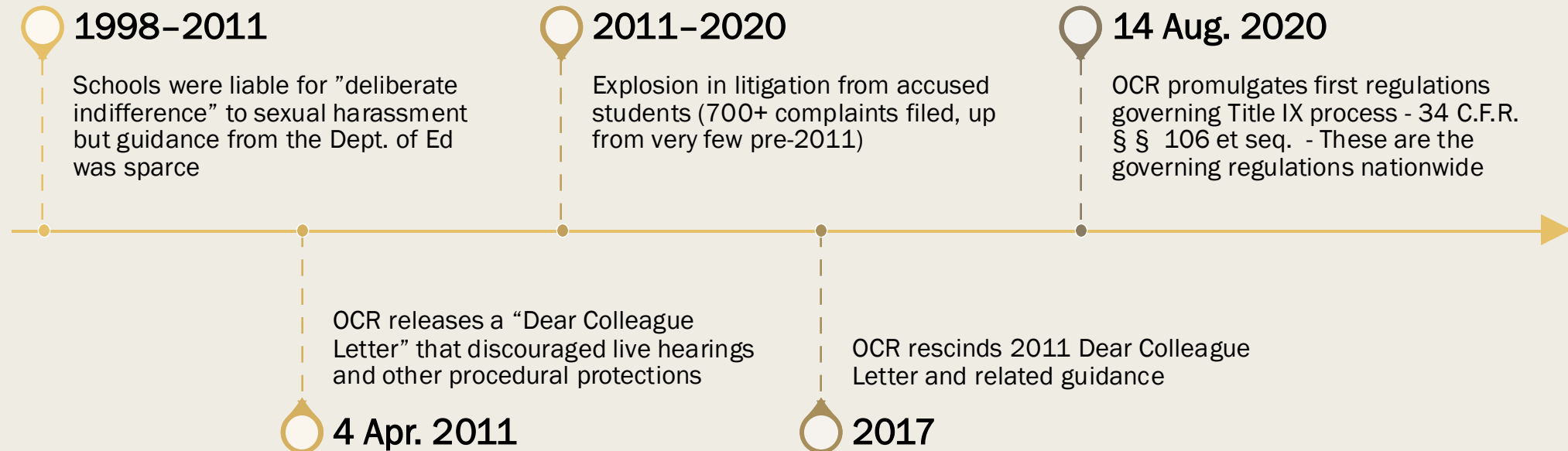
Standard for a school's liability in court

- From Respondent: Showing by a totality of the circumstances that sex was a cause of the discipline
- From Complainant: Showing that the school received actual knowledge of sexual harassment and responded in a way clearly unreasonable under the circumstances (deliberate indifference)

Standard for a finding of a violation by OCR

- Violation of the regulations (34 C.F.R. Part 106) themselves

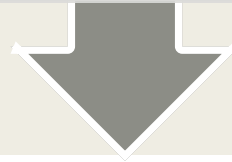
A (Basic) History of the Title IX Process



The Title IX Process

Per 34 C.F.R. §106.44(a) - schools must respond to formal complaints of sexual harassment with a process that complies with 34 C.F.R. §106.45

Even without a formal complaint, schools must comply with 34 C.F.R. §106.44, which prohibits deliberate indifference.



Result = Title IX and non-Title IX process. See *Doe v. Rensselaer Polytechnic Inst.*, No. 1:20-CV-1185, 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020))

Title IX Process Cont.



Four main phases:

Notice of Allegations

Investigation

Hearing

Appeal



**Informal Process - not available
for employee/student cases**

Phase 1: The Notice of Allegations (“NOA”)

- To initiate the Title IX process, a formal complaint alleging “sexual harassment” must be “filed” by the complainant or “signed” by the Title IX Coordinator. 34 C.F.R. §106.45(b)(2)(i). It must allege some form of sexual harassment.
- “Sexual harassment” is an umbrella term - includes quid pro quo and hostile environment sexual harassment, also includes “sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).
- Retaliation also triggers the Title IX process. 34 C.F.R. §106.71. Be cautious regarding First Amendment protected activity if a public institution.

Phase 1: NOA Cont.

- Hostile environment sexual harassment is the most complex
 - *The complaint must allege “unwelcome conduct [on the basis of sex] determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity” 34 C.F.R. §106.30.*
- There are several elements here - (1) unwelcome, (2) conduct on the basis of sex, that is (3) severe, (4) pervasive, and (5) objectively offensive, that causes a (6) denial of educational benefits.

Phase 1: NOA Cont.

- Tips
 - *Ensure that each element is alleged - particularly for hostile environment sexual harassment - including the “harm” element*
 - *Little guidance exists for what constitutes “on the basis of sex.” Be reasonably liberal in your application. See Doe v. UMD.*
 - *If you dismiss under Title IX, proceed with non-Title IX process if applicable*

Phase 2: The Investigation

- Be efficient!! If your institution has an established time frame (which I do not recommend), make every effort to meet that time limit, and send out notices if you are going to exceed it.
- The burden is on the investigator to gather all “directly related evidence”
- The investigator must then allow the parties at least 10 days to review, then compile an investigative report that includes all “relevant” evidence
 - “*Directly related*” > “*Relevant*”
- Be thorough - unless there is a compelling reason not to do so, interview all witnesses suggested by either party.
- Establish whether any evidence (text messages, etc.) were deleted by either party.

Phase 3: The Hearing

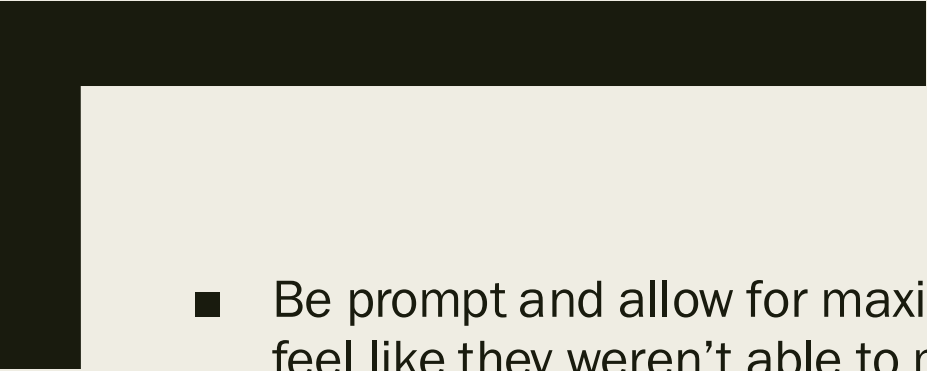
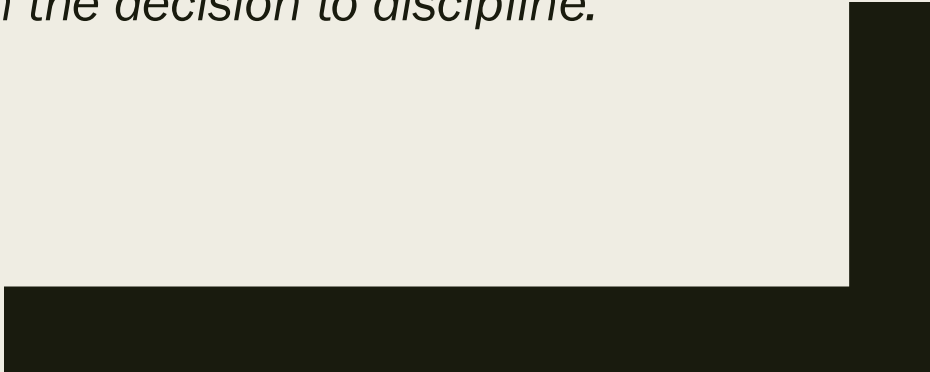
- Postsecondary schools must hold a live hearing with live cross examination
 - *BUT may hold remotely at request of one of the parties*
- Universities must permit cross examination by advisors but never by a party personally
 - *If possible, open communication on preliminary matters between the Hearing Officer and the advisors can be useful*
- Hearing Officer should seek the attendance of the witnesses interviewed during the investigation, unless a compelling reason exists not to do so.
- Following the VRLC v. Cardona decision - a Hearing Officer may rely on prior statements by a witness that does not submit to cross examination.

Phase 3: the Hearing cont.

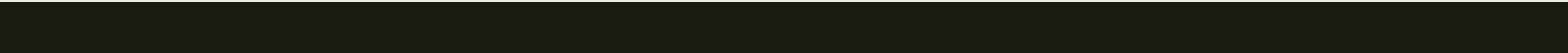
- Parties give openings and closings - important to get the parties' own statements on the record
- The one major rule (barring rare exceptions) is that only evidence that is relevant is permitted. Regulations do not define "relevant."
- State that the presumption of "not responsible" applies at the beginning of the hearing.
- Be lenient with questions where appropriate but be sensitive to harassing or inappropriate questions
- Advisor participation can be helpful to decorum if the advisors are attorneys and familiar with the process; otherwise, advisor participation should be limited to cross examination.

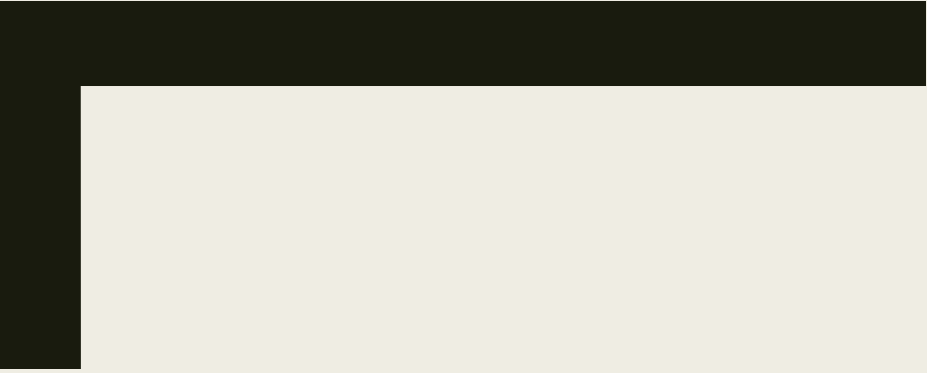
Phase 4: The Appeal

- Appeals are generally limited to three grounds (34 C.F.R. §106.45(b)(8)(i)).
 - *(A) Procedural irregularity that affected the outcome of the matter;*
 - *(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and*
 - *(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.*
- Ensure that appeals are decided according to the grounds for appeal above, and by written decision or opinion rather than a boilerplate letter.

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- Be prompt and allow for maximum party participation - you do not want either side to feel like they weren't able to make an important point.
 - Both sides will want to build their case for litigation
 - *While complainants will need to show that the school acted “clearly unreasonably in light of the known circumstances,” respondents will need to show that sex was at least a motivating factor in the decision to discipline.*
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Practice Tips

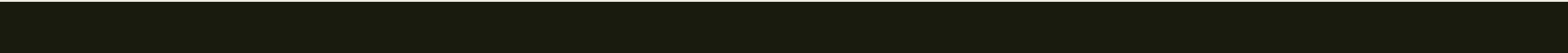


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- Happy to answer any questions!
 - Email me at ben@phoenixpros.com
 - Check us out - phoenixpros.com

Our Services - Tailored to Your Needs!

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Q & A





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