Title IX K-12 Training

Level 2:
Report Writing for Investigators & Decision-Makers

Bricker Graydon

Disclaimers

Bricker Graydon

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
- We will send a copy of the slides after this presentation to all who registered their email address when signing in
- Feel free to submit questions - we will answer them at the end as time permits

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required by 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 district electronically to post

Additional information available at:

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

Find us on **Twitter** at **@BrickerEdLaw**

Agenda

- Report process/timelines
- Writing the facts
- Jurisdiction
- Bias and conflicts of interest
- Relevancy
- Resolving credibility disputes
- The written decision
- Appeals

What is your role as investigator?

As you write a report keep in mind that you are **NOT** the decision-maker

Report Process and Timelines (1 of 5)

- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
  - **Include the evidence you don't intend to rely on**
  - **Include inculpatory or exculpatory evidence whether obtained from a party or other source**
  - Purpose: allow each party to meaningfully respond to the evidence prior to conclusion of the investigation.

Report Process and Timelines (2 of 5)

- **Prior to completion of the investigative report**, you must send the evidence subject to inspection and review **to each party and the party's advisor**
- You must give the parties at least **10 days to submit a written response**
- **You must consider the responses prior to completion of the investigative report**

Report Process and Timelines (3 of 5)

- You must make all of the evidence subject to the parties' inspection and review available at any hearing

Report Process and Timelines (4 of 5)

- Create an investigative report that fairly summarizes relevant evidence
- Send it to each party and the party's advisor for review and a written response **at least 10 days prior to a hearing** (if there is one) **or other time of determination regarding responsibility**

Report Process and Timelines (5 of 5)

- Before reaching a determination regarding responsibility, the decision-maker(s) **must afford each party**:
  - The opportunity to submit written, relevant questions that a party wants asked of any party or witness
  - The answers to those questions
  - Additional, limited follow-up questions

Writing the Facts

Goals

- Write your interview summaries in narrative form so you can drop them into your report
- Be consistent in terminology
- Be clear as to the source of information – compare:
  - “Bob stated that this happened”
  - “This happened”

Structure of an Interview Summary (1 of 4)

Bricker Graydon

- Who, when, where, via what medium?
- Did they have an advisor?
- Did you discuss your role? Their role?
- Did you discuss the prohibition on retaliation?

Structure of an Interview Summary (2 of 4)

- Background
  - How does this person connect with the parties and witnesses?
  - Age, year in school
  - Length of employment, position

Structure of an Interview Summary (3 of 4)

Bricker Graydon

- Background
  - Monologue
  - Follow-up questions you ask, including responses
  - Evidence requested, evidence provided
  - Witnesses suggested

Structure of an Interview Summary (4 of 4)

Bricker Graydon

- Know your policy and procedures
  - Interview summary is often more complete than what is included in report
  - May include information irrelevant to investigative decision, such as discussions about supportive measures

Complete

- Include screenshots and other reference material directly in summary when possible
- Don’t paraphrase a document when you can use direct quotes

Unambiguous

- Could my mother pick up the report and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

Relevant

- Is there extraneous information that is unnecessary to resolve the charges or credibility disputes?
- Is the extraneous information nevertheless appropriate to include?
- Does your report contain any information you are prohibited from including?
- Will the parties read this, and if so, will they focus on the wrong things?

Sensitive

- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?

Empathetic

- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
  - Clearly/obviously
  - Innocent/guilty
  - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

Specific

- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like

Editing Exercises (1 of 3)

Bricker Graydon

1. Respondent engaged in sexual intercourse with Complainant from behind.
2. Complainant couldn't explain why she was sitting on the couch by herself.
3. Respondent visibly winced when Complainant said "no."
4. John stated that Alice told him to "knock it off."
5. On a scale of 1 to 10, the witness described the Respondent as being a "level 4 kind of drunk."

Editing Exercises (2 of 3)

Bricker Graydon

6. There was no evidence to support Complainant's assertion that the activity was without consent.
7. During the mediation, Respondent admitted to the misconduct and promised not to do it again.
8. Professor Clark indicated that he had never known Respondent to commit sexual misconduct at 2:00 in the morning in the back of a bar before.

Editing Exercises (3 of 3)

Bricker Graydon

9. Respondent stated that Complainant was diagnosed with bipolar disorder and that the complaint was “all in his head.”
10. When Respondent asked if Complainant wanted oral sex and Complainant said, “That’s OK,” that was indication of the Complainant’s consent.
11. Jane insinuated that Respondent changed her grade based on her report.

Just the Facts: Synthesizing Evidence Into an Investigative Report

Disclaimer

Bricker Graydon

"This document is intended to be a summary of evidence and a description of what was learned through an investigation. Please refer to the full record, including [information shared in the hearing, and]* the contents of the [hearing packet] [exhibit packet]."*

Basic Information (1 of 2)

- Complainant
- Respondent
- Investigator
- When was the complaint made?

Basic Information (2 of 2)

- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- Any procedural anomalies that need explained?

Jurisdiction

- Under the new regulations, if you do not have jurisdiction you must dismiss the Title IX complaint
- This does not preclude supportive measures or other Code of Conduct violations

No Jurisdiction If:

- Alleged conduct would not be sexual harassment if proved
- Occurred outside of the US or
- Occurred outside of the District's education program or activity

Definition of "Educational Program or Activity"

"Educational program or activity" includes **locations, events, or circumstances over which** the recipient exercised **substantial control** over **both the respondent and the context** in which the sexual harassment occurs…

Does Your Policy Require Witness Sign-Off?

- “Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary.”
  - Did everyone do so?

Basic Information

- “All relevant information gathered during the course of the investigation has been included in this report/hearing packet.”

Applicable Policy Provisions

- Definition of prohibited conduct alleged
- Related definitions as appropriate (e.g. consent, substantial incapacitation)
- Include verbatim, in entirety

Summary of Information (1 of 3)

- Ways to arrange:
  - Chronologically
  - By witness summary
  - By allegation/topic

Summary of Information (2 of 3)

Bricker Graydon

- Explain your structure
  - Example: “The information in this report is a summary of the facts. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

Summary of Information (3 of 3)

- Tell the story chronologically
  - How did the relationship start?
- Citations to the record – always
  - Be helpful for your fact-finders!
- Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

Make No Assumptions: Being Impartial, Avoiding Conflicts of Interest, and Bias

Being Impartial

- The preamble discussion (pp. 828-829) appears to indicate that being impartial means being free from bias
- “The Department believes that keeping this provision focused on ‘bias’ paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality.” (p. 829)

Conflicts of Interest: Concerns Raised in Comments in Preamble

Bricker Graydon

- Decision-maker and financial and reputational interest aligned with institution (or to protect institution)
- Co-mingling of administrative and adjudicative roles
- Title IX Coordinator supervisor of decision-maker
- Past advocacy for victim's or respondents' rights (example also for bias)
- "Perceived conflict of interest" vs. actual conflict of interest

Preamble Discussion: Bias and Conflict of Interest

- Final regulations "leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient's own employees are expected to perform functions free from conflicts of interest and bias."
- No per se prohibited conflicts of interest under 106.45(b)(1)(iii) in using employees or administrative staff. (p. 826)
- No per se violations of 106.45(b)(1)(iii) for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process. (p. 827)

Discussion Recommendation for Assessing Bias

Bricker Graydon

"Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists…bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve **impartially** and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role."

Avoiding Pre-Judgment of Facts at Issue

- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Each case is unique and different

Avoiding Sex Stereotypes (1 of 3)

Bricker Graydon

- "Must" not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Pp. 831-837 in the preamble
- Examples of sex stereotypes in comments:
  - Women have regret and lie about sexual assaults
  - Men are sexually aggressive or likely to perpetrate sexual assault

Avoiding Sex Stereotypes (2 of 3)

Bricker Graydon

- Discussion – prohibition against sex stereotypes, but not feasible to list them (p. 835)
  - Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
  - Cautions against an approach of “believing” one party over the other and notes 106.45(b)(1)(ii) precludes credibility determinations based on a party’s status as a complainant or respondent

Avoiding Sex Stereotypes (3 of 3)

Bricker Graydon

- Consideration of marginalized groups: people with disabilities, people of color, people who identify in the "LGBTQ" community (pp. 1723-25; 1732-1737) - preamble discusses concerns:
  - From commentators about stereotypes and accommodations for individuals with disabilities under the ADA, and individuals with developmental and cognitive disabilities
  - From people of color for cultural and racial stereotypes
  - Regarding stereotypes of the "LGBTQ" community

Considerations: Potential Responses to Trauma

- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused

Disclaimer

- Do **not** assume that because there are signs of trauma that the respondent caused the trauma and violated the policy
- Do **not** assume that because there are **no** signs of trauma nothing bad happened

More on Issues of Relevancy: *Not* Rules of Evidence

Issues of Relevancy (1 of 4)

- The Rules of Evidence do **NOT** apply and **CANNOT** apply (p. 1135)
- "The Department appreciates the opportunity to clarify here that the final regulations do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence; the decision-maker must consider relevant evidence and must not consider irrelevant evidence."

Issues of Relevancy (2 of 4)

- Relevant unless expressly touched upon in Regulations (p. 980):
  - Information protected by a legally recognized privilege
  - Evidence about complainant's prior sexual history
  - 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*

Issues of Relevancy (3 of 4)

- The process allows both parties to submit all relevant evidence:
  - Similarly 106.45(b)(6)(i)-(ii) directs the decision-maker to allow parties to ask witnesses all relevant questions and follow-up questions (p. 980)
  - A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (p. 981)

Issues of Relevancy (4 of 4)

Bricker Graydon

- "[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties." (p. 981)

BUT

- "[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient's training materials." (p. 978)

Relevancy: Legally Privileged Information (1 of 3)

- 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 (2 of 3)

- 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 (3 of 3)

- Preamble identifies medical and treatment records.
- Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):
  - 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

Summary of Information (1 of 5)

- **Give an overview** of evidence collected
- **Attach as appendices** any statements and important evidence

Summary of Information (2 of 5)

- If you can, synthesize the information from multiple parties and witnesses
- Where the stories diverge:
  - "Information from [Complainant]"
  - "Information from [Respondent]"

Summary of Information (3 of 5)

- Insert into the report screenshots of text messages and pictures where relevant
- If information is attached but not referred to in a summary, may want to drop a footnote explaining why not

Summary of Information (4 of 5)

- Don’t forget to summarize impact on **complainant** if the charges require consideration as an element
  - “The investigator notes that this incident and the process may have had an impact on [Respondent]. However, to determine whether sexual harassment occurred, the decision-maker will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information here focuses solely on [Complainant].”

Summary of Information (5 of 5)

- Undisputed Facts
  - Series of numbered sentences
- Disputed Facts
  - Series of numbered sentences
- Make sure you have facts for each element of each charge

Objectively Evaluating Evidence and Resolving Credibility Disputes

Objectively Evaluating Relevant Evidence

- Preamble indicates that the decision-maker should be looking at consistency, accuracy, memory, credibility (p. 1060), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (p. 1111)
- Again, not making relevancy determinations beyond those expressly included in regulations
- Standard of proof and using it to guide decision

Standard of Proof

- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees (including teachers) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, teacher conduct)
- Must begin with a presumption of no violation by Respondent

Recommended Considerations for Resolving Conflicts (1 of 4)

- Statements by any witnesses to the alleged incident
- Evidence about the relative credibility of the complainant/respondent
  - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
  - Is corroborative evidence lacking where it should logically exist?

Recommended Considerations for Resolving Conflicts (2 of 4)

- Evidence of the complainant's reaction or behavior after the alleged harassment
  - Were there witnesses who saw that the complainant was upset?
  - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
    - May not manifest until later

Recommended Considerations for Resolving Conflicts (3 of 4)

Bricker Graydon

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
  - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Recommended Considerations for Resolving Conflicts (4 of 4)

Bricker Graydon

- Other contemporaneous evidence:
  - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
  - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

1) Keep an Open Mind

- Keep an open mind until all evidence has been heard (and tested at the live hearing if applicable)
- Don’t come to any judgment, opinion, conclusion or belief about any aspect of this matter until you’ve reviewed or heard all of the evidence AND consider only the evidence that can remain

2) Sound, Reasoned Decision

- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

3) Consider All/Only Evidence

- You must make a decision based solely on the relevant evidence obtained in this matter
- You may consider nothing but this evidence

4) Be Reasoned and Impartial

- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any action or perceived conflict of interest

5) Weight of Evidence

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the **weight** of the evidence, or its **strength** in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

6) Evaluate Witness Credibility (1 of 3)

- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (**standard or review/proof**) lies.

6) Evaluate Witness Credibility (2 of 3)

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?
- As indicated above, the Regulations provide consideration of consistency, accuracy, memory, credibility (p. 1060), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (p. 1111)

6) Evaluate Witness Credibility (3 of 3)

- Credibility is determined fact by fact, not witness by witness
  - The most earnest and honest witness may share information that turns out not to be true

7) Draw Reasonable Inferences

- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable.

8) Standard of Evidence (1 of 2)

- Use the standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.
- Preponderance of the evidence (most common standard of evidence): you must determine whether it is more likely than not true that the respondent engaged in the alleged misconduct.
- But may be clearly convincing standard

8) Standard of Evidence (2 of 2)

- Look to all the evidence in total, make judgments about weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

9) Don’t Consider Impact

- Don’t consider the potential impact of your decision on either party when determining if the charges have been proven
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges
- **Do not consider the impact of your decision**

The Written Decision

Written Determination in 106.45(b)(7)(ii) (1 of 3)

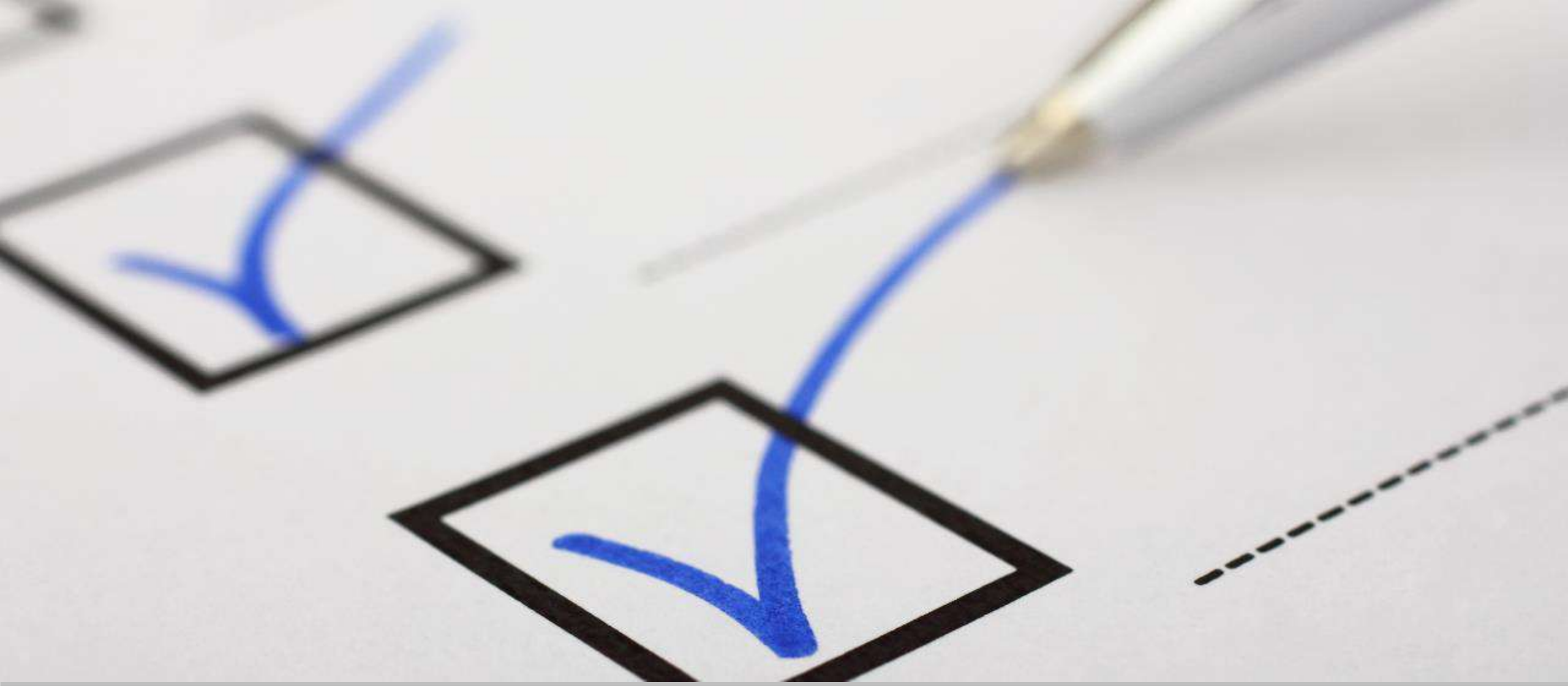
- Written determination **must** include:
  - Identification of the allegations potentially constituting sexual harassment
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held

Written Determination in 106.45(b)(7)(ii) (2 of 3)

- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, **any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant**

Written Determination in 106.45(b)(7)(ii) (3 of 3)

- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))



Final Checklist for the Decision Maker

Final Checklist (1 of 5)

Bricker Graydon

1. Are there any additional procedural anomalies to be explained?

Final Checklist (2 of 5)

2. Is every element of every charge accounted for?

Final Checklist (3 of 5)

3. Is every relevant disputed fact resolved in the analysis?

Final Checklist (4 of 5)

4. Is there a clear connection between the **charges**, the **investigation**, the **evidence**, and the **conclusions**?

Final Checklist (5 of 5)

5. Would an unfamiliar reader be able to connect the dots?

Bases for Appeal

- Procedural irregularity that affected the outcome of the matter
- 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
- 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
- A recipient may offer an appeal equally to both parties on additional bases

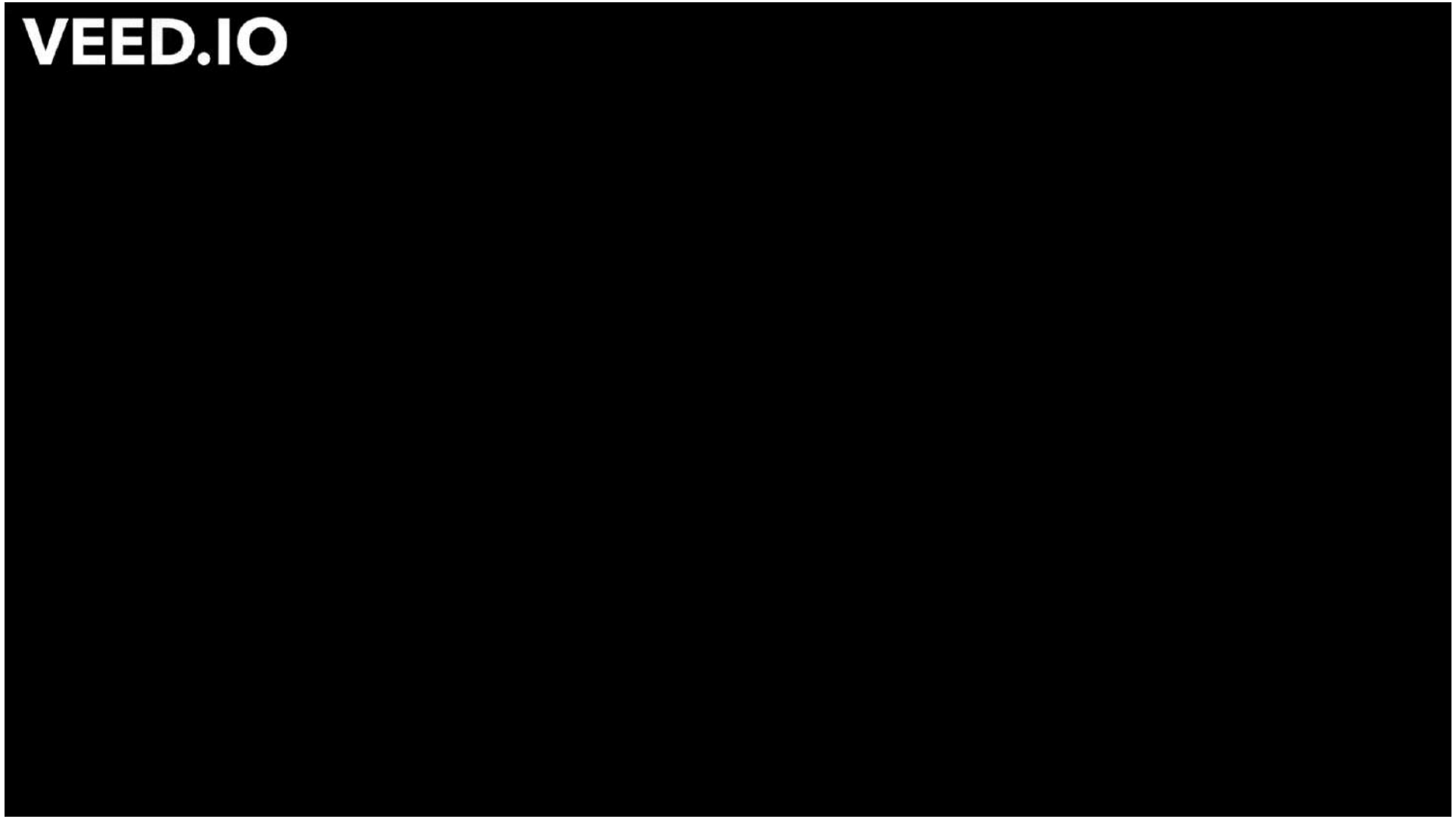
Appeals

- As to all appeals, the recipient must:
  - Issue a written decision describing the result of the appeal and the rationale for the result
  - Provide the written decision simultaneously to both parties.

Questions?

Bricker Graydon's Title IX Toolkit

Available for download: k12tixtoolkit.bricker.com



Bricker Graydon's Title IX for K-12 Training Series

Bricker Graydon

Level 1

- General training for all K-12 staff

Level 2

- Title IX Coordinator/Administrator
- Investigator
- Report Writing for investigators and decision-makers
- Decision-Maker and Appeals Officer
- Informal Resolution Facilitator

Now Added: Level 3 advanced training for your K-12 Title IX Team!

- Title IX Coordinator
- Investigator
- Report Writing
- Informal Resolution Facilitator

View dates and register at **www.bricker.com/titleix**

Thank you for attending!

Remember – additional information available at:

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

Find us on **Twitter** at
@BrickerEdLaw