

Risk Management and Litigation Analysis

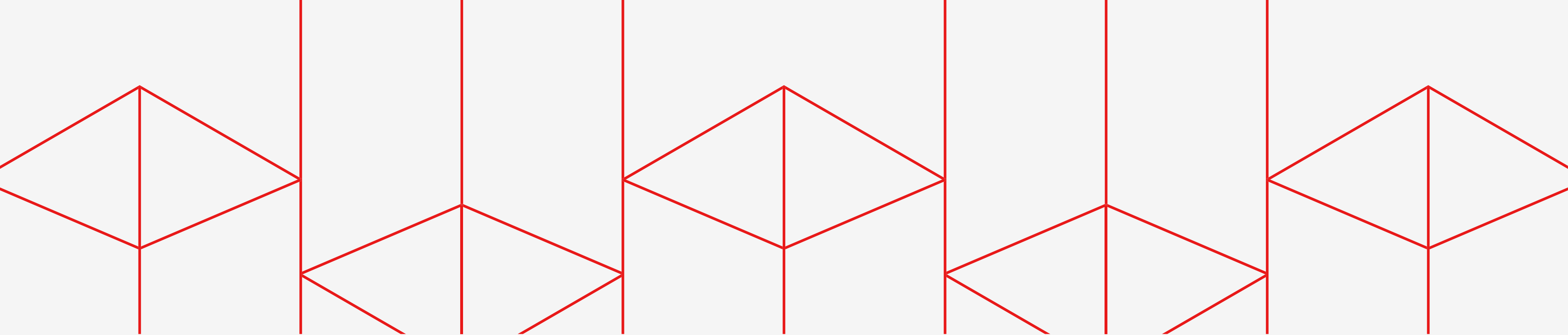
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Our Speaker

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LEARNING OBJECTIVES

IDENTIFY

potential exposures to risk which may be created by confusing or poorly-written policy

EXPLORE

risk-reduction strategies aimed at creating compliant policies and procedures

STUDY

case studies and scenarios to illustrate potential litigation which may arise from ignored or unanticipated risks


Agenda

Let's explore Title IX risk areas

- Failure to Focus on Policy and Procedure
- Incomplete Investigation
- Unreasonable Delays
- Imbalanced Investigation – Due Process
- Failure to Communicate
- Retaliation

Best practices to reduce risks

- Policy
 - Procedure
 - Understanding Rights and Responsibilities – training and more!
 - Above all – communicate!
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- What did COVID teach us in the Title IX context?
 - Case Studies and Litigation Trends



“If you don’t deal with sexual violence, you are going to get sued. If you deal with sexual violence, you are going to be sued.”

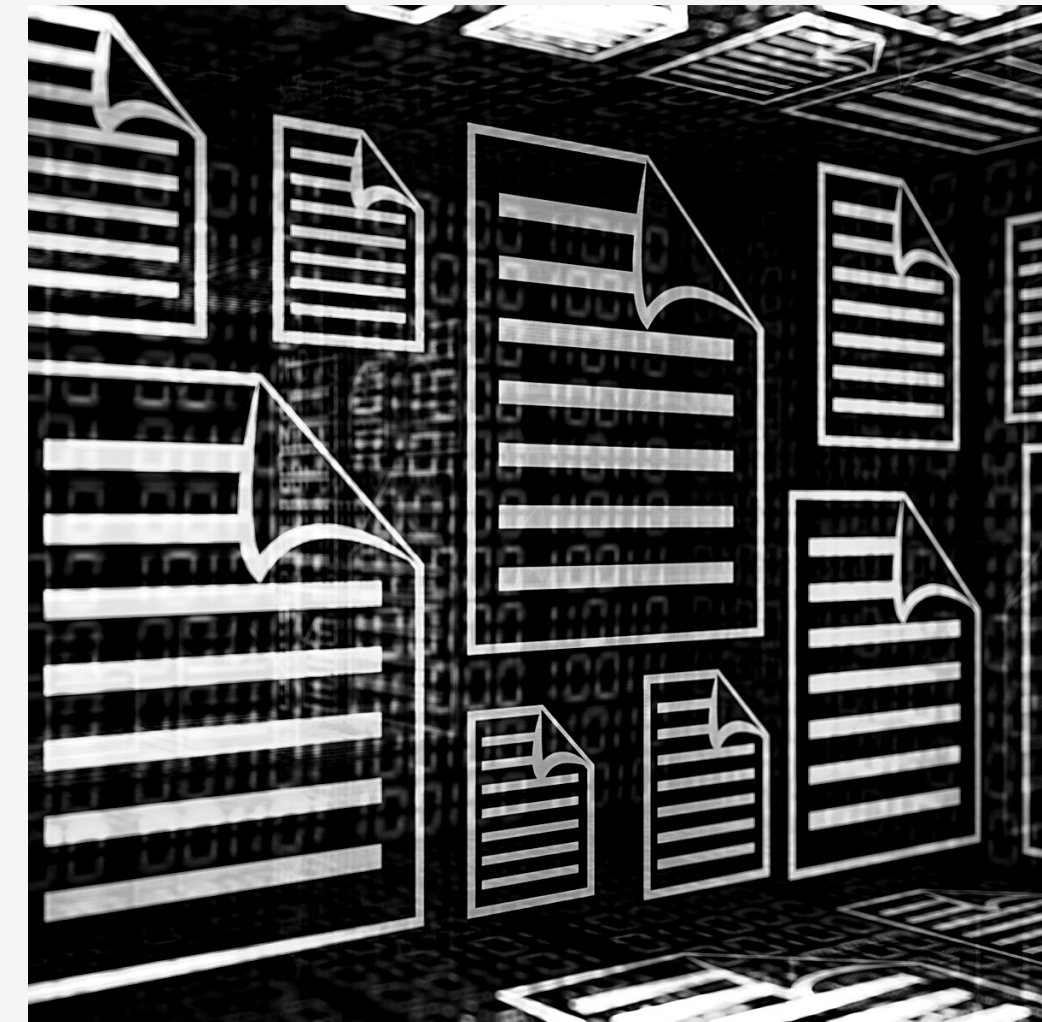
Peter Lake, Director of Stetson University's Center for Excellence in Higher Education Law and Policy

Title IX Risks

- Failing to draft comprehensive Title IX Policy and Procedure.
 - Set clear expectations
 - Strong line of defense
- Failing to understand, follow, and enforce your Title IX Policy.
- Failing to understand the roles each individual plays in a Title IX matter.
 - Coordinator, Investigator, Decision Maker
- The goal of any investigation procedure should be promptness, thoroughness, and impartiality.
 - Anything less is a risk
- Conduct a thorough investigation before reaching any conclusions.
- DO NOT promise confidentiality but be mindful of restrictions!

Title IX Risks

- Failure to honor due process or fairness in the process.
- RETALIATION, real or perceived.
- Not investigating when you had the chance.
- Failing to thoroughly and properly document the process.
- Going too far... crossing the line into invasion of privacy, intimidation, false imprisonment, etc.



Best Practices to Minimize Risk

- Familiarity with the Title IX Policy is key! Everyone in the process must commit to this. Enforcement and compliance with your policies and procedures is part of your obligation and best practice to avoid liability.
- Familiarity with any FERPA policy and confidentiality considerations that may prohibit you from sharing student's information.
- **TRAINING!** Not just your Title IX team. Educate as many people as possible, as often as possible.



Best Practices to Minimize Risk

- Be thorough and patient, while being as prompt as possible. Don't leave leads unchecked or make assumptions before seeing evidence or meeting witnesses.
- Communicate with parties about how long you expect the investigation to take and when you will get back to him or her so as to set reasonable expectations. And DO it!
- Make sure you ask all witnesses for any physical evidence that might exist, including texts, photos, documents, emails, or voicemail messages.



Best Practices to Minimize Risk

- Ask the parties regarding desired interim measures and other support needed.
- Document any unsuccessful attempts to interview potential witnesses.
- Inform all parties and witnesses that retaliation directed at anyone who participates in the investigation should be reported immediately and appropriate action will be taken if retaliation is demonstrated.



Best Practices to Minimize Risk

- Don't prevent an interviewee from leaving the meeting if he or she chooses to leave.
- Avoid leading questions that suggest an answer to the witness or suggest impartiality.
- Avoid ask questions that call for a legal conclusion.
- Understand and honor due process or fairness rights of both parties.





Title IX Enforcement and Litigation Trends

- Per OCR's 2020 Annual Report OCR resolved 10,185 complaints, with more than 2,000 of these resolutions requiring the school to make substantive changes to better protect their students' civil rights.
- Litigation Trends: students are increasingly claiming flawed hearings or unfair disciplinary sanctions as a result of procedural failings at their universities; courts are also addressing deliberate indifference claims for failure to respond (see case notes).
- In 2018 United Educators reported that sexual assault was the top liability for colleges and universities.

“A lot of criminal defense lawyers are specifically advertising that they represent the accused in Title IX cases...Pick any university in the country and go five miles from there, and you will find lawyers who advertise defending the accused. That wasn't the case 10 years ago.”



Case Notes: Due Process



- Claims of violation of due process rights. Due process requires fair notice and an opportunity to be heard.
 - Regulations and caselaw outline the requirements.
- Due process arguments come up in many Title IX cases.
 - Cross-examination
 - Notice of charges and grounds
 - Adequate, in-person hearing (free of bias, well-trained panel)
 - Public v. Private actors – what are students entitled to with respect to due process

Case Notes: Due Process/Unfair Treatment

- While COVID slowed the filing of cases they did not stop.
 - What due process issues did COVID present?
- Due process claims are here to stay – some commentators are concerned that the proposed regulations will undermine critical due process protections for students accused of sexual misconduct.
 - Hearings
 - Single-investigator model
- In response to the proposed regulations some observers, predict the proposed regulation changes will result in a legal environment where precedent set by courts will shape different rules and outcomes based on where colleges fall geographically. Therefore, it is important to know how the courts are addressing these cases and issues!

Case Notes: Due Process/Unfair Treatment

Let's discuss a few scenarios





John J. Hall, et al. v. Millersville University, et al. and similar cases in higher education and K-12:

–Third Circuit’s decision serves as a reminder for schools and universities to respond promptly to any and all reports of sexual harassment, regardless of the status of the respondent, and to make sure to follow the Title IX regulations and your own policies and procedures in responding to and addressing allegations of sexual misconduct.

–Failure to react, failure to follow policies and procedure, failure to meet expectations = liability!

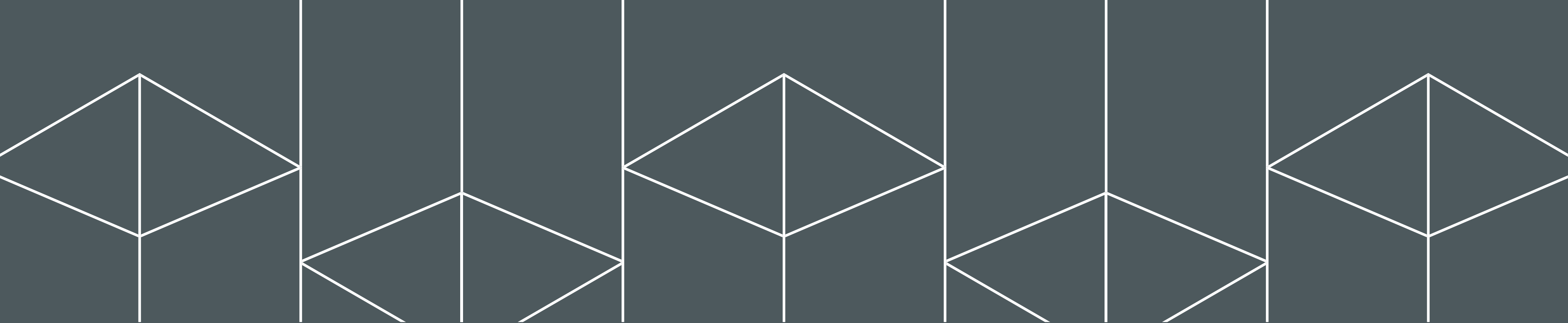
Case Notes: Deliberate Indifference



Let's discuss a
few more

Practical Takeaways

- Carefully draft policy and procedures – make sure updates are incorporated and in line with the regulations, decide whether you want to go beyond the regulations in light of potential liabilities discussed.
- TRAIN on your policy – Title IX process participants – Coordinators, hearing board members, advisors, mandatory reporters, etc. Ask who else might benefit from training?
- Share the policy – complainants, respondents, witnesses, hearing board members, etc.
- FOLLOW the policy – in each case. Do not deviate from the policy and procedure!
- COMMUNICATE! Manage expectations, be clear, keep parties informed, but be mindful of restrictions.



Thank you!

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