



K-12 TITLE IX INVESTIGATOR  
TRAINING & CERTIFICATION COURSE

January 28-29, 2020 | Orlando, FL

# YOUR FACULTY



**TANYKA M. BARBER, J.D.**

Senior Associate, TNG

# GOALS, PURPOSE, LEARNING OUTCOMES



- Provide a foundation on Title IX fundamentals.
- Provide new tools to support your work to stop, prevent, and remedy harassment that may occur in your schools.
- Provide an opportunity to practice and collaborate together.

NOT FOR DISTRIBUTION

# CAVEAT REGARDING LANGUAGE



- Our presentation utilizes ATIXA vocabulary, such as:
  - “reporting party”
  - “responding party”
  - “report”
  - “complaint”
- These are terms that we use across all PreK-12 systems and are not intended to be confused with any specific procedure, step, or terminology in the your system or any school procedure.
- Please always ask us for clarification if needed at any time.

# ISSUE SPOTTING



- A male student physically pulled a minor female freshman student into a school restroom.
- She did not understand or expect that sexual activity was going to occur.
- Feeling pressured, she began sexual activity but stopped before completion.
- Without her knowledge and consent, the male student filmed the encounter on his phone.
- About a month and a half later, another student posted the video on Instagram and “tagged” the female student.
- The female student’s mother alerted the school to the situation, including the bullying she was now facing at school.
- The female student finished her exams at home and left the school for the remainder of the school year.

# OVERVIEW OF TITLE IX

—

NOT FOR DISTRIBUTION

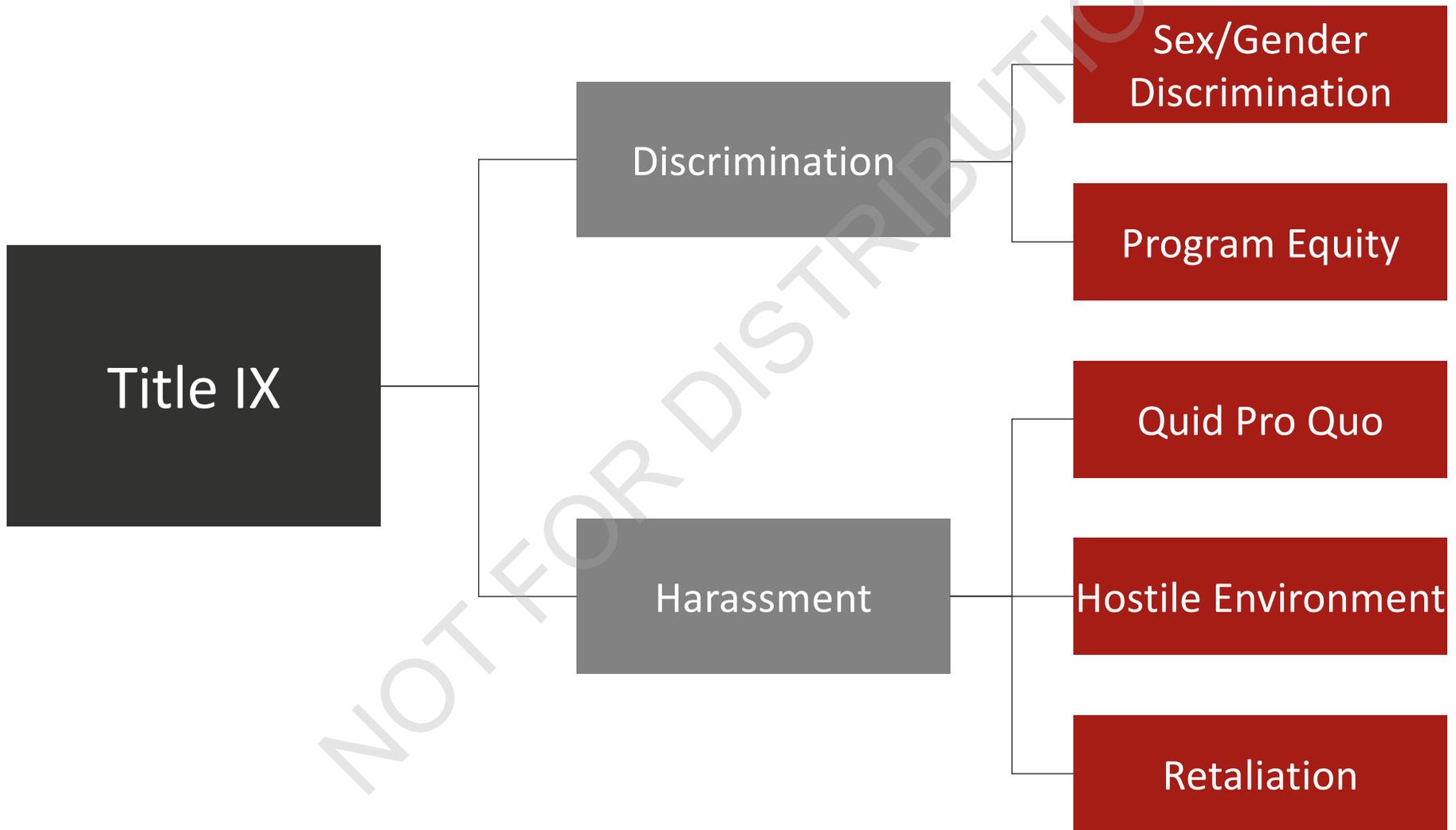
*20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)*

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”

# A BRIEF HISTORY OF TITLE IX PRE-1972



- Title VI of the Civil Rights Act of 1964 (42U.S.C. §2000d et seq.)
  - “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” (“Sex” added by Executive Order in 1965)
- Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2)
  - Prohibits discrimination in the terms, conditions or privileges of employment on the basis of an individual’s race, color, religion, sex, or national origin.
- 1972: Title IX passed and signed into law by President Nixon
- Department of Health, Education and Welfare (HEW) – Title IX regulations codified in 1975.



# KEY TITLE IX-RELATED ISSUES



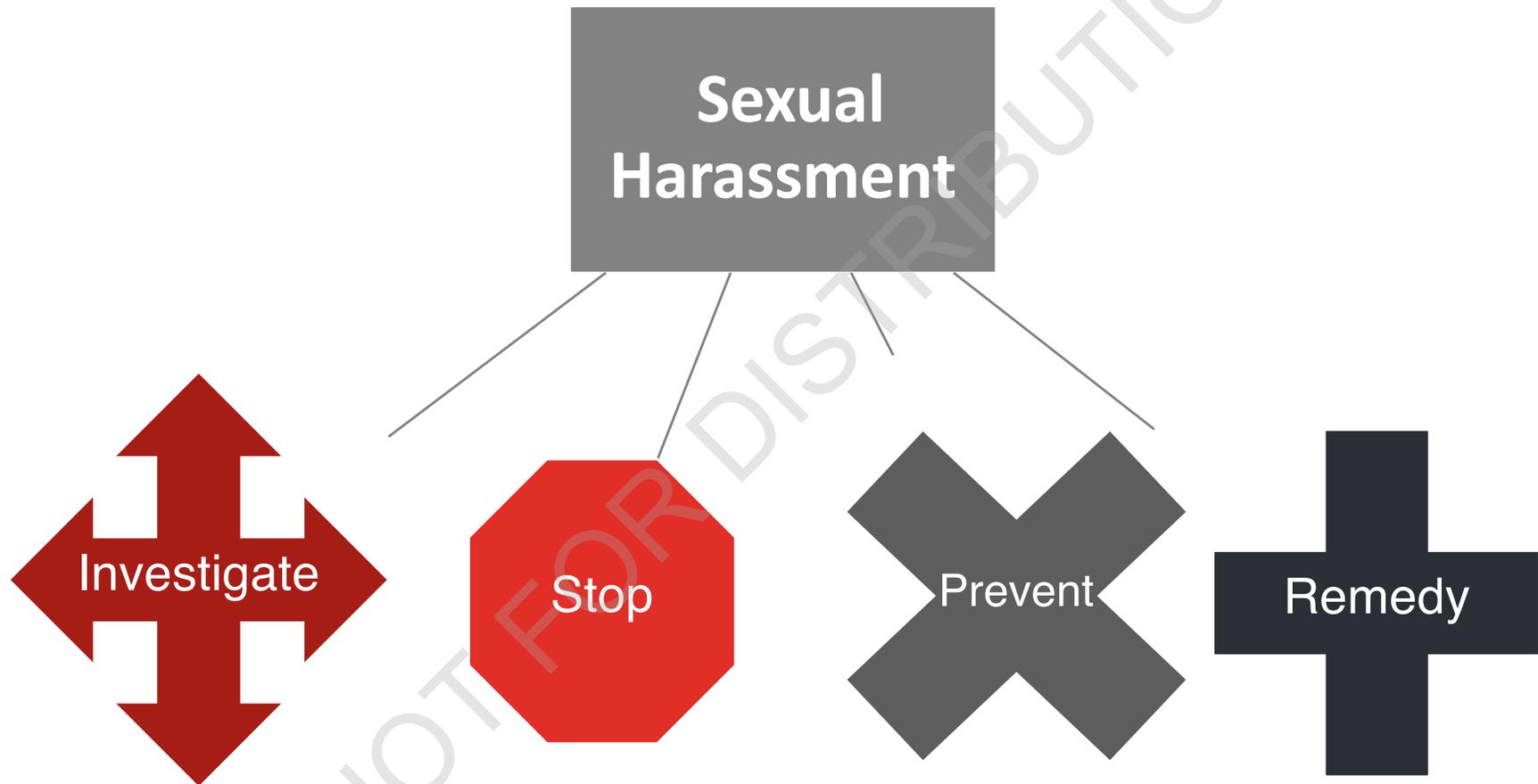
## Sex Based Discrimination

- Program Equity
- Recruitment, Admissions and Access
- Pregnancy
- Athletics
- Employment, Recruitment & Hiring
- Extra-curricular activities
- Housing
- Access to Course Offerings
- Salaries and Benefits
- Financial Assistance
- Facilities
- Funding
- Sex, Gender, Gender Identity

## Sexual Harassment

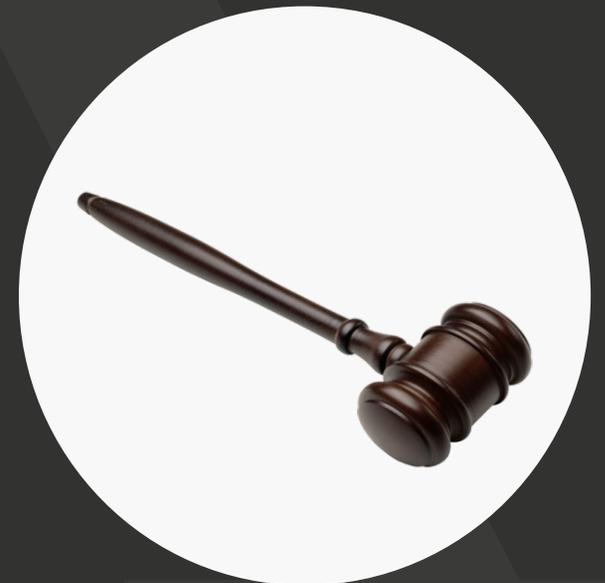
- Stalking
- Domestic Violence
- Dating Violence
- Sexual Assault
- Sexual Violence
- Sexual Exploitation
- Sexual Intimidation
- Sexual Misconduct
- Bullying and Cyberbullying
- Retaliation

# SCHOOL/DISTRICT OBLIGATIONS UNDER TITLE IX



# SIGNIFICANT CASES & KEY OCR GUIDANCE

- *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).
- *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).
- *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999).
- 2001 OCR Guidance



# LAWS, COURTS, AND REGULATIONS



- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and OCR
  - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
    - Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2001 Guidance)
    - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2011 DCL)
- **Federal Caselaw** – **Force of law** based on jurisdiction
  - Supreme Court – binding on entire country
  - Circuit Courts of Appeal – binding on Circuit
  - District Court – binding on District
- **State caselaw** – **Force of law**; binding only in that state based on court jurisdiction

- Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia.
- Franklin was subjected to continual sexual harassment beginning in her tenth grade year from Andrew Hill, a sports coach and teacher employed by the district.
- Franklin asserted that Hill:
  - engaged her in sexually-oriented conversations (asked about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man);
  - forcibly kissed her on the mouth in the school parking lot;
  - telephoned her at her home and asked if she would meet him socially; and
  - on three occasions, Hill interrupted a class, requested the teacher excuse Franklin, and took her to an office where he engaged in forcible intercourse.

# FRANKLIN V. GWINNETT PUBLIC SCHOOLS



- The complaint further alleges that, though the school became aware of and investigated Hill's sexual harassment of Franklin and other female students, teachers and administrators took no action to halt it.
- Hill resigned on the condition that all matters pending against him be dropped. The school thereupon closed its investigation.
- The school also discouraged Franklin from pressing charges.

Source: Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

# FRANKLIN V. GWINNETT PUBLIC SCHOOLS



- In 1992, the U.S. Supreme Court decided *Franklin v. Gwinnett County Public Schools*, which established that sexual harassment constituted sex discrimination under Title IX.
- *Gwinnett* also provided a private right for recovery of monetary damages under Title IX.
- *Gwinnett* did not address issues concerning the educational institution's liability.
- What about a statute of limitations?

# GEBSER V. LAGO VISTA INDEP. SCHOOL

## 524 U.S. 274 (1998)



- Alida Gebser was an eighth-grade student at a middle school in respondent Lago Vista Independent School District (Lago Vista); she joined a high school book discussion group led by Frank Waldrop, a high school teacher.
- During the book discussion sessions, Waldrop often made sexually suggestive comments to the students. Gebser entered high school and was assigned to classes taught by Waldrop.
- Waldrop continued his inappropriate remarks to the students, and began to direct more of his suggestive comments toward Gebser, including when they were alone in his classroom.

Source: Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

# GEBSER V. LAGO VISTA INDEP. SCHOOL

## 524 U.S. 274 (1998)



- Waldrop initiated sexual contact with Gebser in the spring, when, while visiting her home ostensibly to give her a book, he kissed and fondled her.
- The two had sexual intercourse on a number of occasions during the remainder of the school year. Their relationship continued through the summer and into the following year, and they often had intercourse during class time, although never on school property.
- Gebser did not report the relationship to school officials; she realized Waldrop's conduct was improper but she was uncertain how to react and she wanted to continue having him as a teacher.

Source: Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

# GEBSER V. LAGO VISTA INDEP. SCHOOL

## 524 U.S. 274 (1998)



- In October 1992, the parents of two other students complained to the high school principal about Waldrop's comments in class.
- The principal met with Waldrop, who indicated he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again.
- The principal advised Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting, but he did not report the parents' complaint to Lago Vista's superintendent, who was the district's Title IX coordinator.
- A couple of months later, in January 1993, a police officer discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop.

Source: Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

# GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



- The Supreme Court held that a reporting party cannot recover monetary damages against the school unless:
  - Three-part standard:
    1. An official of the educational schools/districts must have had “actual notice” of harassment;
    2. The official must have authority to “institute corrective measures” to resolve the harassment problem; AND
    3. The official must have “failed to adequately respond” to the harassment and, in failing to respond, must have acted with “deliberate indifference.”

# DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Ongoing behavior by fifth-grade boy toward fellow student LaShonda Davis:
  - Made statements such as “I want to get in bed with you” and “I want to feel your boobs.”
  - Attempted to touch her breasts and genitals
  - Stuck a doorstop in his pants and acted in a sexually suggestive manner towards Davis;
  - He rubbed up against her in suggestive manner;
  - Touched her breasts and genitals.

# DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Davis repeatedly reported conduct to teachers; Davis's mother also contacted teachers multiple times;
- Mother was told the principal was aware of the situation. No disciplinary action was taken.
- Davis's assigned seat was next to the male student throughout the harassing behavior; not allowed to change seats for over three months.

# DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- In May 1993, principal told Davis's mother, "I guess I'll have to threaten him a little harder"; male student not disciplined.
- Davis's grades declined and her father found a suicide note his daughter had written; Davis told her mother she "didn't know how much longer she could keep [the male student] off her."
- Others in class also faced harassment; group of students tried to complain to the principal, but were allegedly prevented from doing so and told, "If [the principal] wants you, he'll call you."
- Parents had complained to three teachers and the principal; student had also complained to three teachers.

# DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Finding in favor of Davis, the Supreme Court expanded on the *Gebser* ruling:
  - The school/district must have “actual notice” of the harassment; and the school/district must have responded to the harassment with “deliberate indifference.”
    - Deliberate indifference constitutes a response that is “clearly unreasonable in light of the known circumstances.”
  - Additionally, court held that:
    - Harassment must be “severe, pervasive, and objectively offensive,” and the indifference “systemic,” to the extent that the victim is deprived of educational opportunities or services.

# REMEDIES UNDER TITLE IX



- An individual may assert a Title IX claim against the school/district by:
  - **Lawsuit**: Suing the school/district in court and seeking monetary damages or injunctive or declaratory relief.

And/Or

- **OCR Complaint**: Filing an administrative complaint, a grievance with U.S. Dept. of Ed. Office for Civil Rights (or other applicable federal agency).

# CIVIL LAW SUITS V. ADMINISTRATIVE ACTION



## Lawsuit

- File in federal court.
- Monetary damages, injunction.
- Requires:
  - Actual notice.
  - Employee with authority to take action.
  - Deliberate Indifference.

## Administrative Action

- Initiated by OCR.
- Voluntary compliance or findings
- Requires:
  - Actual OR constructive notice (“knew or should have known”).
  - Investigate.
  - End harassment.
  - Remedy impact.
  - Prevent recurrence.

# 2001 REVISED SEXUAL HARASSMENT GUIDANCE



- **The current primary Title IX regulatory compliance document.**
- “Sexual harassment is unwelcome conduct of a sexual nature.”
- “Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”
- “Sexual harassment of a student can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program.”
- “Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.”

# 2001 REVISED SEXUAL HARASSMENT GUIDANCE



- The "education program or activity" = all of the school's operations.
- "All academic, educational, extra-curricular, athletic, and other programs of the school" regardless of location.
- Addresses sexual harassment and sex discrimination by the school/district, teachers, employees, students, and third parties.
- Prompt and effective action required upon notice of the harassment/discrimination.

- Publication of policies and procedures that:
  - Include non-discrimination statement.
  - Offer effective reporting and response protocol.
  - Have appropriate grievance procedures.
  - Ensure fair and equitable investigations.
  - Include equitable remedies.
  - Prevent recurrence.
  - Incorporate preventive training.
  - Designate a Title IX coordinator.

# THE IX COMMANDMENTS



<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>	<b>Investigation</b>
<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>	<b>Process</b>
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	<b>Remedies</b>

## EQUALITY VERSUS EQUITY



In the first image, it is assumed that everyone will benefit from the same supports. They are being treated equally.



In the second image, individuals are given different supports to make it possible for them to have equal access to the game. They are being treated equitably.



In the third image, all three can see the game without any supports or accommodations because the cause of the inequity was addressed. The systemic barrier has been removed.

# WHEN DOES TITLE IX APPLY?



- The *Davis* standard is that Title IX applies and jurisdiction is required when the school has:
  - Control over the harasser (discriminator); AND
  - Control over the context of the harassment (discrimination).
    - When is a student a “student”?
    - When is an employee and employee?
- If Title IX jurisdiction is not present, the behavior could still violate:
  - Institutional harassment/discrimination policies.
  - Student Handbook/Conduct policies.
  - Technology/Acceptable Use policies.
  - Employee Handbook/Policies.
  - Professionalism standards.

# WHEN DOES TITLE IX APPLY?



## Jurisdiction for Off-Campus Incidents:

- For Sexual Harassment and Discrimination cases.
  - There is an expectation that you should exercise SOME discretionary jurisdiction over off-site/off-campus incidents
- When?
  - Whenever your policy says.
  - Nexus.
    - When the behavior occurs on property you own or control.
    - When the behavior occurs in programs/events you sponsor.
    - When the downstream effects of purely off-site conduct cause a discriminatory impact at school/on campus.

# TYPES OF SEXUAL HARASSMENT

- Hostile Environment
- Quid Pro Quo
- Retaliatory Harassment

# THREE TYPES OF SEXUAL HARASSMENT



1.  
Hostile  
Environment

2.  
Quid Pro Quo

3.  
Retaliatory  
Harassment

# UNDERSTANDING THE THREE TYPES OF SEXUAL HARASSMENT



## Sexual Harassment is:

Unwelcome conduct of a sexual nature or that is sex or gender-based

Based on power differentials  
(*quid pro quo*),

The creation of a *hostile environment*, or

*Retaliation*

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- A hostile environment is created when sexual harassment is:
  - Sufficiently *severe*, or
  - *Persistent or pervasive*, and
  - *Objectively offensive* that it:
    - *Unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the school's/district's educational [and/or employment], social, and/or residential program.*
- From both a subjective (the reporting party's) and an objective (reasonable person's) viewpoint.

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
  - The frequency (persistence or pervasiveness), nature, and severity of the conduct.
  - Whether the conduct was physically threatening.
  - Whether the conduct was humiliating.
  - The relationship between the alleged harasser and the subject or subjects of the harassment.
  - The age of the alleged harasser and the subject or subjects of the harassment.
  - The size of the school, location of the incident(s), and context in which conduct occurred.

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
  - The effect on the reporting party.
  - Whether the conduct was directed at more than one person.
  - Whether the conduct unreasonably interfered with the reporting party's educational or work performance.
  - If statement, whether it was an utterance of an epithet which was offensive, or offended due to discourtesy or rudeness.
  - Whether the speech/conduct deserves protections of academic freedom or the First Amendment protection.
  - “Constellation of surrounding circumstances.”

# “SEVERE”



*“The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.”*  
—(Q&A: A-3)

(2001 Guidance).

- Physical is more likely to be severe without need for repetition:
  - Non-consensual sexual intercourse or contact are almost always sufficiently severe.
  - Consider the circumstances: E.g., the ability for victim to escape the harassment.
- Assess whether accompanied by threats or violence.

# “PERVASIVE”



- Widespread.
- Openly practiced.
- Well-known among students or employees – reputation of a department, person, etc.
- Occurring in public spaces (more likely to be pervasive).
- “Harassment is pervasive when incidents of harassment occur either in concert or with regularity” (2001 Guidance: Footnote 44).
- Frequency of the conduct is often a variable in assessing pervasiveness. (look to intensity and duration)
- Unreasonable interference with school or job.
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986).

# “PERSISTENT”



- Repeated.
  - Intensity.
  - Duration.
  - Welcomeness.
- Defined:
  - Continuing to do something or to try to do something even though other people want you to stop.
  - Continuing beyond the usual, expected, or normal time; not stopping or going away (Merriam-webster.com).

# “OBJECTIVELY OFFENSIVE”



- Reasonable person standard in context.
- “I know it when I see it...”
  - Age and relationships of accuser and accused.
  - Number of persons involved.
  - Frequency.
  - Severity.
  - Physically threatening.
  - Humiliation.
  - Intimidation.
  - Ridicule.
  - Abusive.

NOT FOR DISTRIBUTION

# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



## Student-based examples

- Female student “sexts” pictures of herself to a male classmate.
- Sexually explicit graffiti on a wall.
- E-mailed pictures that are revealing, but not nude.
- “Revenge” pictures.
- Viewing porn on a school computer.

NOT FOR DISTRIBUTION

# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



## Teacher-based examples

- Giving a student a back-rub.
- Require students to read the book “Fifty Shades of Gray” and give an assignment to compare their own intimate experiences against those from the film.
- Female faculty teacher repeatedly referring to male students as “stupid.”
- Telling repeated “dirty” jokes in class.

# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



## Staff-based examples

- Telling dirty jokes: In common area? Staff meeting? To a single individual?
- Sending porn to a colleague.
- Rolling eyes and making masturbation motion with hand at comments during a staff meeting.
- Repeated staring at a colleague of the opposite sex; accompanied by occasional winking.
- Colleague repeatedly mentions how much they like a person's outfits.

- **Sample Definition**

- *Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,*
- *By a person having power or authority over another, when*
- *Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational [or employment] progress, development, or performance.*

# RETALIATORY HARASSMENT



- **Sample Definition**

- *Any adverse employment or educational action taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct.*

- Also includes retaliation against a reporting party by the responding party or responding party's friends.
- Also can include retaliation directed toward a third party because of that party's participation in a grievance process or for supporting a grievant.

# BULLYING AND CYBERBULLYING

---

- Bullying is:
  - Repeated and/or severe
  - Aggressive behavior
  - Likely to intimidate or intentionally hurt, control, or diminish another person, physically, or mentally,
  - That is not speech or conduct otherwise protected by the First Amendment.
- It often:
  - Includes repetitive comments about race, color, national origin, sex, sexual orientation, or disability.
  - Involves an imbalance of power, aggression, and a negative repeated behavior.

# PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING



- Policy development.
  - Student Handbook/Code of Conduct.
  - Employee manuals/CBAs.
  - Teacher Handbooks.
  - State
- Distribution and dissemination of policy information.
- Early intervention (using your BIT, TAT, etc.).
- Training of faculty, staff, and students.
- Cyberbullying is widespread and is often among the most serious and impactful for students and employees.
  - Pervasive and Persistent

# CASE STUDY: BULLYING



- Joe is a junior who is gay and a member of the school cheer team. A group of baseball players repeatedly ridicules Joe about his effeminate mannerisms and clothing, and threatens to harm him if they run into him outside of school. This is done both in person and via group text (Joe is included in the group)
- Joe reports the incident to the Assistant Principal, who speaks with the players and tells them their conduct is inappropriate and gives them a verbal warning about bullying.
- The next day, the players corner Joe in the locker room and tell him he is a “snitch,” “a little girl” and “a pussy.” They tell him he is a freak and to watch his back, especially if he reports them to the school.
- Joe becomes very withdrawn, starts skipping cheer practice and resigns from the team. His parents find out what happen and call the school demanding swift and harsh action.

# CASE STUDY: BULLYING



- Is this a Title IX issue?
- What are the possible violations?
- Who should investigate?
- What could the school have done better, if anything, and when?
- What remedies should the school provide Joe?
- Is there retaliation? If so, how should the school handle the retaliation?
- Should athletics or the coach be involved? How?
- What other issues do you see?

# NAVIGATING FIRST AMENDMENT PROTECTIONS

NOT FOR DISTRIBUTION



*“Congress shall make no law...abridging the freedom of speech...”*

- An important concern for all public institutions.
- Impacts policy language regarding expression.
  - Pay heed to vagueness and over-breadth concerns.
  - Avoid incorporating “intent” or “purpose” language.
- ED reaffirms First Amendment protections in Proposed Regs.

- Issues to consider:
  - Time, place, and manner.
  - Type of forum (open, limited open, closed)
  - Confluence with academic freedom (faculty/teachers).
  - Unprotected speech.
    - Incitement of disruption and breach of peace.
    - Defamation.
    - True threat.
    - Obscenity.
  - Outside speakers.
  - Hate speech.

# TINKER v. DES MOINES INDEP. COM. SCH. DIST. 393 U.S. 503 (1969)



- Free speech rights in public schools
  - Group of students wore black armbands to school in protest of Vietnam war
  - Students suspended after refusing to remove armbands
- Conduct must **“materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”**
  - Actual interference, not based on fear of a potential interference
  - “More than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”
  - Substantial interference with the school’s work
  - Intrusion upon the rights of other students something

# ROLES AND RESPONSIBILITIES IN INVESTIGATIONS

- When Do You Investigate
- Notice
- Title IX Coordinator Oversight
- District-level v. School-level

# WHEN DO YOU INVESTIGATE?



- When you have notice!
- Per proposed Title IX regulations
  - Upon receipt of a formal, written, signed complaint.
  - When the Coordinator deems an investigation is warranted.
- Rumors, gossip, social media, etc. can be notice.
  - Investigating on these bases is discretionary (but often recommended), particularly in light of the proposed regs.
- Once actual notice exists, the duty to investigate is absolute.
  - Small “i” preliminary inquiry.
  - Big “I” comprehensive investigation.

## Actual Notice

- Individual files a Title IX grievance.
- Individual notifies the Title IX coordinator or other responsible employee.
- Individual complains to school police or security official.
- Staff member witnesses harassment.

## Constructive Notice

- Broader standard.
- Knew or should have known.

# RESPONSIBLE EMPLOYEE



- A **Responsible Employee** includes any employee who:
  - Has the authority to take action to redress the harassment; or
  - Has the duty to report harassment or other types of misconduct to appropriate officials; or
  - Someone a student could reasonably believe has this authority or responsibility;



**Schools/districts must ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.**

# ADDITIONAL REPORTING REQUIREMENTS



- Supervisors and Managers (per Title VII)
  - Mandated to report harassment or other misconduct of which they are aware.
- Abuse or Suspected Abuse of Minors
  - All employees are required to report abuse or suspected abuse of minors consistent with the law of the state. This generally includes reporting immediately to law enforcement and to the state's child welfare agency.
- Additional state reporting requirements (e.g., elder abuse and felony reporting)

# ATIXA'S RECOMMENDED APPROACH



- All employees report
  - Enables school/district to best support those who have experienced harassment or discrimination
  - Better enables tracking patterns
  - Gets information to those trained to handle it

# COORDINATION AMONG DISTRICT-LEVEL STAFF AND SCHOOL-LEVEL STAFF



- The Title IX Coordinator is typically a district-level position.
  - Deputies may be appointed in individual schools or units.
- The Title IX Coordinator is responsible for ensuring overall compliance with the district's obligation to stop, prevent, and remedy.
  - Possible direct oversight over some or all investigations.
  - Possible resource role for school-level investigations.

# TITLE IX COORDINATOR'S INVESTIGATION OVERSIGHT



- The Title IX Coordinator is responsible for:
  - The appointment of investigators.
  - Training investigators, decision-makers, and appeals decision-makers.
  - Supervision of investigators and investigations.
  - Strategizing investigations.
  - Assurance of initial actions.
  - Timeline compliance.
  - Communication and coordination of investigation teams.
  - Providing institutional memory to investigators.
  - Retaining a record of all activities.

# SHOULD INVESTIGATIONS OCCUR AT THE DISTRICT OR SCHOOL LEVEL?



- There is no “rule” about whether investigations should occur at the district-level or at the school-level.
- Many districts utilize a hybrid model that considers staffing, volume, “promptness,” and culture.
  - Student-on-student investigations.
  - Employee-on-employee investigations.
  - Employee-on-student investigations.
  - Investigations involving visitors, guests, volunteers, or vendors.

# CONSIDERATIONS



- For school-based investigations, the Title IX Coordinator (or district-level equity staff) should still have the following roles:
  - Oversight of investigation and compliance with obligation to stop, prevent, and remedy.
  - Aggregate data and understand trends across schools and district-at-large.
  - Serve as a resource for gatekeeping decisions, strategy development, investigation planning, and problem solving.
  - Support synthesizing of Title IX processes with special education due process requirements.
  - Consider keeping uniform records at the district-level even for school-level investigations.

# SMALL GROUP DISCUSSION



- What are the three biggest concerns you have regarding your role supporting Title IX investigations?
- Describe and discuss a recent case you heard about or experienced where you have questions or concerns?
- What is one area you hope to learn more about during this training?

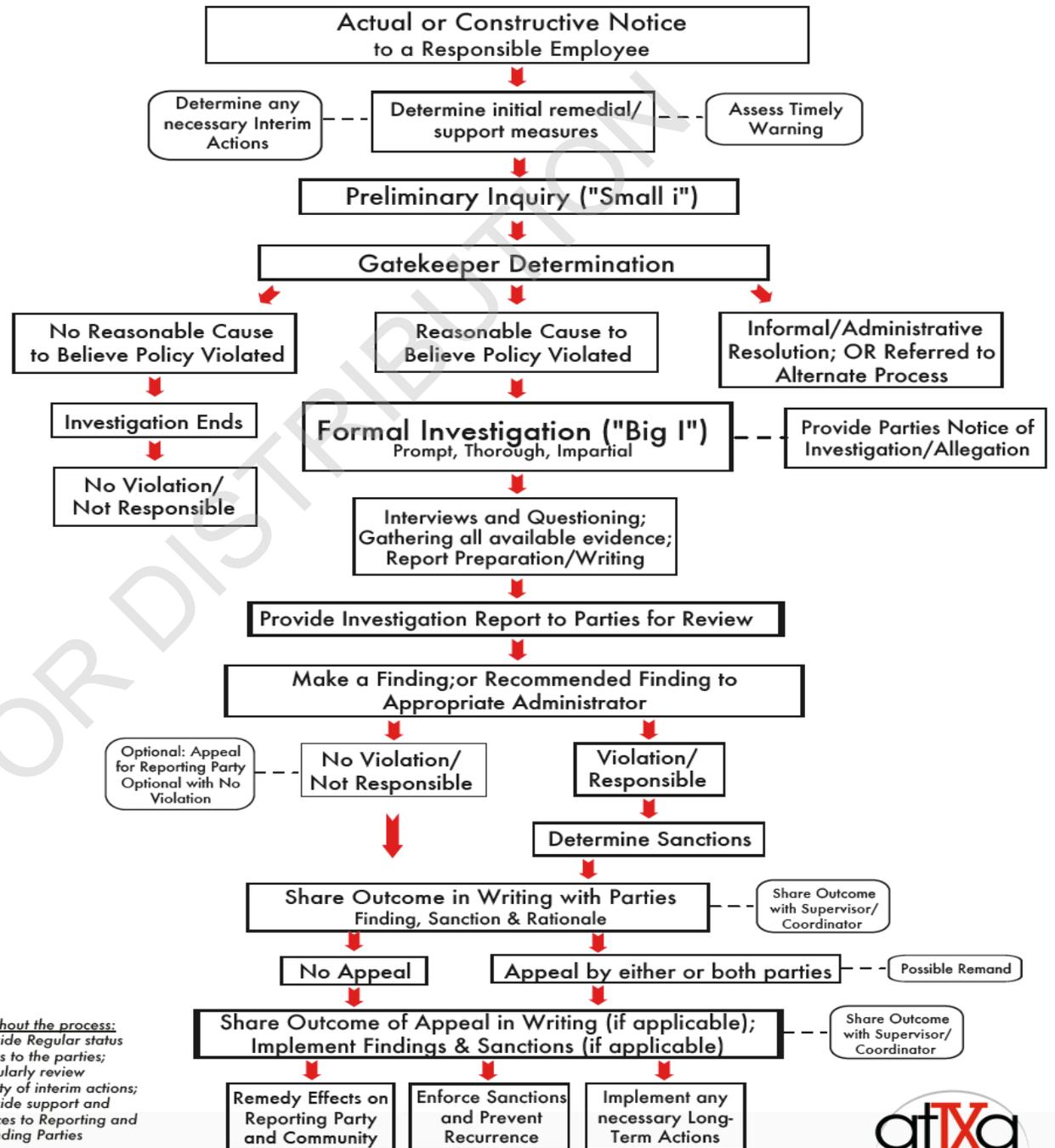
NOT FOR DISTRIBUTION

# CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

- Civil Rights Investigation Model
- The Process
- Ten Steps

# CIVIL RIGHTS INVESTIGATION MODEL

## ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



# THE PROCESS



# TEN STEPS



1. Allegation or notice
2. Preliminary inquiry
3. Gatekeeping decision to proceed or not proceed
4. Notice of investigation and/or allegation (NOIA)
5. Strategize investigation (throughout)
6. Formal comprehensive investigation
7. Witness interviews
8. Evidence gathering
9. Analysis
10. Determination

# CIVIL RIGHTS INVESTIGATION MODEL



- A civil rights investigation model is different from other student conduct work.
- An active gathering of information by the investigator(s)
  - Not intended to “build a case.”
- Does not impact the implementation of informal or alternative dispute resolution approaches.
- Characterized by an intentional effort to provide equitable procedural and support mechanisms.

# PRELIMINARY INQUIRY

---

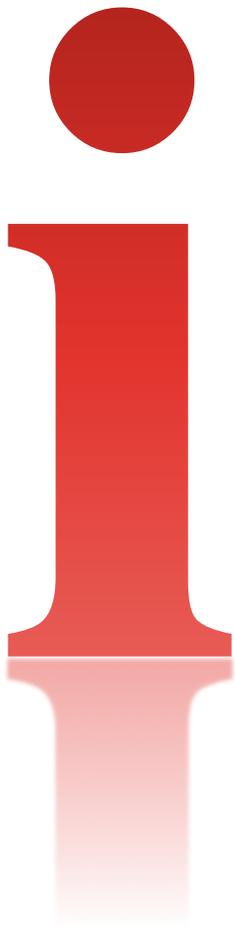
Preliminary Inquiry

Gatekeeping

Interim Actions

NOT FOR DISTRIBUTION

# PRELIMINARY INQUIRY

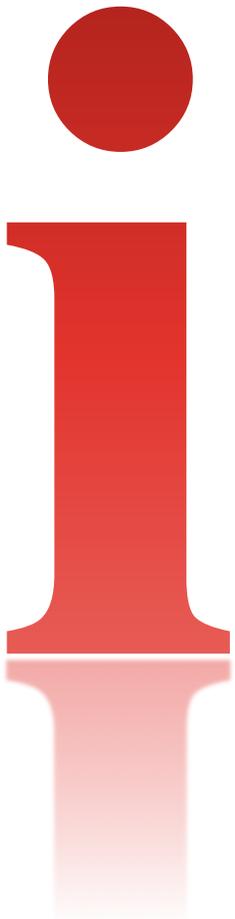


- This is an initial inquiry to determine if a comprehensive investigation is desired, appropriate, or necessary.
- Checking background, obvious patterns, indicia of predatory, violent, or threatening behavior.
- Push one Domino™ over at a time.
- How much involvement does the Reporting Party want?
- Give the Reporting Party as much control as possible in the process as to their participation.
- Can this be resolved informally or without discipline?
- This may help to determine if there is reasonable cause to move the process forward, and what allegations the Responding Party should be noticed on.

# PRELIMINARY INQUIRY (CONT.)



- Establish a preliminary timeline for the investigation.
- Investigate all allegations to determine:
  - The extent of the harassment.
  - The acuity of the threat it may represent to students or employees.
  - What might be necessary to put an end to any behaviors that are harassing.
- Be able to show that a comprehensive civil rights investigation was completed and documented.
- Responding to anonymous reports:
  - Determine if a trend or pattern may be apparent.
  - You may have a duty to attempt some form of remedial response.



# GATEKEEPING



- As investigation unfolds, investigators should determine if there is *reasonable cause* to believe that policy has been violated.
- If threshold is reached, investigators should communicate with coordinator to ensure a notice of allegation is issued.
  - Coordinator must make sure parties have an advisor if desired.
    - Have a clear policy on advisor options and rights. This should be communicated to the parties.
- If investigation does not produce sufficient evidence of reasonable cause, the investigation should end prior to the issuance of the notice of allegation and no hearing should be held.
  - Still may provide interim and supportive measures to reporting party.

# WHAT IS THE GATEKEEPING FUNCTION AND WHY IS IT ESSENTIAL?



- It is inappropriate and unfair for a Responding Party to be dragged through a process without substantiating evidence.
- Significant reputational harm can result from mere allegations of sexual harassment, etc.
- An allegation must be supported by *reasonable cause* to permit its **full** pursuit.
- This protects the integrity of the process.

# NOTICE OF INVESTIGATION/ALLEGATION



- Prepare and deliver the notice of investigation and allegation on the basis of the initial inquiry.
  - It should provide the details of the allegation(s), applicable policies, applicable procedures, etc.
  - The NOIA is communicated verbally and in writing to all parties.
  - Usually notice is given in advance (minimum of 2-3 days)
    - The Proposed regulations would limit interviews prior to NOIA.

# INTERIM AND SUPPORTIVE MEASURES



- Throughout process:
  - **Investigate.**
  - **Stop** behavior.
  - **Prevent** re-occurrence:
    - Consider what education/training may need to be implemented, changed, etc. to assist the community as well as the parties.

*NOTE: Remember to provide support and resources to Reporting and Responding Parties throughout the process.*

# COMMON INTERIM ACTIONS



- No-contact orders.
- Minimizing interaction between reporting party and responding party (e.g.: shifting classes, work, etc.).
- Relocating to a different classroom, work space, course group, etc.
- Providing counseling services.
- Referring for medical services.
- Providing academic support services, such as tutoring.
- Extending assignment deadline
- Arranging for the reporting and/or responding party to re-take a class/withdraw from a class without penalty.
- Reviewing any disciplinary actions taken with respect to reporting party to assure they are non-retaliatory.
- Holding school-wide training and education initiatives.
- Interim suspension – in or out of school.
- Alternative placement.
- Change supervisor (employees).

- Reporting and Responding parties are allowed to have an advisor of their choice.
  - At all meetings/interviews
  - School-based advisors
  - Outside advisors
    - Parents
    - Attorneys
    - Union reps
  - Role of advisors – should be equal
    - Limits of participation, if any?
    - Communication between advisor and advisee
  - Proposed regs (if implemented) will affect the role of advisors

# WORKING WITH PARENTS/GUARDIANS



- Parents may be the source of a report.
- Most districts have a policy/practice to notify parents/guardians during investigation.
- Parent/guardian will often serve in the role of “advisor” to attend and support in meetings or interviews.
  - What if a student prefers a different advisor?
- Parent/guardian (or any advisor) should not impede or disrupt the investigation.

# WORKING WITH PARENTS/GUARDIANS



- Try to invite parents to help support your work to investigate, which might include helpful participation in an interview, but not answering questions on behalf of their child.
  - Adjust according to the age of the student
- Remember that under FERPA, parents/guardians have the right to “inspect and review” all education records, including records from investigations that “directly relate” to their student and include personally identifying information.

# FOOD FOR THOUGHT: INFORMATION FOR PARENTS/GUARDIANS



- Review District/complex/school policies, procedures, and practices.
- Discuss how to report.
  - Where to find reporting resources.
- Discuss investigation/disciplinary processes, including role as advisor.
- Discuss privacy and confidentiality.
- Discuss rights of all parties.
- Discuss consent as appropriate to the age of the students, including the role of drugs and alcohol.
- Presentation of resources.
- Provide resource/reporting guide.

# BEGINNING THE INVESTIGATION

NOT FOR DISTRIBUTION

# FORMAL COMPREHENSIVE INVESTIGATION



- Commence a thorough, reliable, impartial, prompt, and fair investigation.
- Determine the strategy for the investigation.
  - Witness interviews.
  - Evidence gathering.
  - Intended timeframe to complete the investigation.
  - Finding.
  - Presentation of finding.
- Complete the investigation promptly, without unreasonable deviation from the timeline.

# EVIDENCE GATHERING



- Engage in the **active** accumulation of evidence.
- Ensure timeliness.
- Document receipt of information and other materials as they are obtained in the course of the investigation.
- Verify/authenticate evidence.
- Be thorough in your examination of factual, circumstantial, and hearsay evidence, and ensure that all evidence has been examined, and all leads exhausted.



# STRATEGIZE WHEN TO INTERVIEW PARTIES AND WITNESSES



- Parties and witnesses should be interviewed as soon as possible:
  - So recollections are as fresh and accurate as possible.
  - To provide necessary remedies in a timely manner.
- Strategize notifying the responding party of the report:
  - Immediately upon receipt of the report or notice, or...
  - In other circumstances, interviewing witnesses and accumulating evidence first may be better strategy.

# WITNESS INTERVIEWS



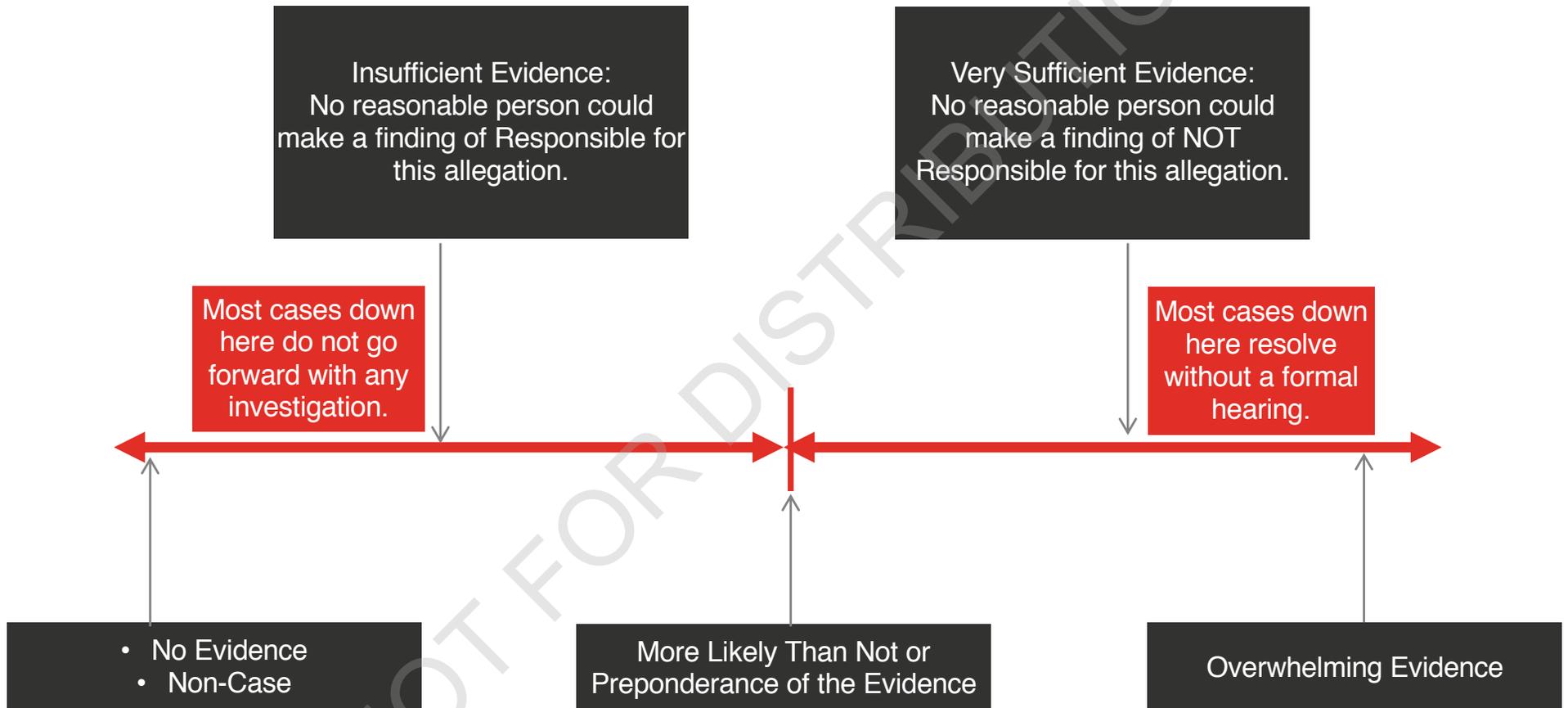
- Strategize contacting witnesses, ordering witness interviews, and preventing contact between witnesses, where necessary.
- Solicit a witness list from the both parties. Identify them as just “witnesses,” not “his” or “her” witnesses.
- Determine when you are going to question the responding party.
- Sample 1: Reporting party → Reporting party’s witnesses → Neutral witnesses → Responding party’s witnesses → Responding party → Any additional witnesses identified by either party → Round 2 → Round 3.
- Sample 2: Reporting party → Responding party → Reporting party’s witnesses → Responding party’s witnesses → Neutral witnesses → Any additional witnesses identified by either party → Round 2 → Round 3.

# EVIDENTIARY THRESHOLD



- **Preponderance**
  - Only truly equitable standard
- **Clear and Convincing**
  - Difficult to train, difficult to explain
- \*Proposed Regulations
  - Consider other existing evidentiary thresholds
- Decisions must be made by applying the evidentiary threshold to the evidence gathered, when it is determined that the facts are credible.

# STANDARD OF PROOF / EVIDENTIARY STANDARD



# STANDARD OF EVIDENCE



- Right to a finding that is based on the preponderance of the evidence – “more likely than not.”
  - Not based on “gut,” the attitude of the parties, the likeability of the parties, or a presumption of responsibility
  - Credibility determinations may be sufficient to reach the preponderance of the evidence (but not at the expense of the evidence).
  - You must be able to articulate your rationale in writing.
  - Your determination must be a function of credible, probative, and articulable evidence.

- 5 days to resolution is a good guideline for non-complex student cases.
  - Timeline starts from **notice of the incident**, not from the incident itself.
  - No set requirement, other than to have prompt, designated timeframes in your procedures.
  - Goal is to avoid undue delay.
  - What about police, safety/security, or SRO involvement?
  - What about school vacations/breaks?

- Ensure that all steps in the investigation are conducted according to the timelines in the institution's procedures.
  - Procedures should provide some flexibility to timeframes
- Document and communicate unavoidable delays.
- Provide notice of extensions.
- Ensure communication is equitable.

NOT FOR DISTRIBUTION

# CONFIDENTIALITY



- Recognizing the difference:
  - **Privacy**
    - School's obligation – not parties' obligation
  - **Confidentiality**
    - Confidential resources
    - Limited confidential reporting
      - Consider circumstances of report
- FERPA considerations
- Issue of parties tendency to discuss...
  - Gag orders – disfavored (ATIXA, courts, proposed regs)
  - Suggest conferring with their advisor before talking with others

# DOCUMENTATION



- Documenting Investigation
  - Process
  - Steps taken
  - Delays – why and how such delays were communicated to appropriate individuals
  - Communication with parties, witnesses, parents, advisors, etc.
  - Evidence (if original or copy or just reviewed by investigators)
  - Interim measures implemented AND offered
- Consider who will/may review
  - Parties and parents/guardian
  - Attorneys and judge
  - Media

- Assess resources and options
  - Team of investigators (One lead asking questions, other taking notes?)
  - Audio recording is increasingly common in complex or high stakes cases.
  - Verification by interviewees
    - Sooner after the interview the better
    - Necessary to have interviewees review/verify even if record/transcribe interviews?

# BIAS & IMPARTIALITY

---

NOT FOR DISTRIBUTION

# BIAS AND IMPARTIALITY



## Key Issues

- Conscious vs. unconscious.
- Positive vs. negative.
- Social & cultural capital.
- Stereotyping.
- Cultural competence.
- Multi-partiality.
- Social justice.

NOT FOR DISTRIBUTION

# BIAS ISSUES IN RECENT CASELAW



- Bias in Procedure
  - Exclusion of evidence
  - “Believe First” or “I believe you”
  - Failure to follow procedures
  - Placing burden of proof on the responding party
- Insufficient Training
- Bias due to internal and external pressures (e.g. politics, identity of the parties or parents, lawsuits and attorneys, etc.)
- Conflicts of interest

# QUESTIONING SKILLS

- 
- Goals of Questioning
  - Questioning Skills

NOT FOR DISTRIBUTION

# GOALS OF QUESTIONING



- What are the goals of questioning?
  - Learn the facts.
  - Establish a timeline.
  - Understand each party’s perception:
    - Of the event and of the process.
  - Try to learn what is more likely than not to have happened
- NOT the goals of questioning...
  - Curiosity.
  - Chasing the rabbit into Wonderland.
- The “Gotcha” moment won’t typically come. Not your role. You are not law enforcement or prosecutors.

# GOALS OF QUESTIONING



- To consider before asking questions:
  - What are the relevant issues?
  - What do I need to know?
  - Why do I need to know it?
  - What is the best way to ask the question?
  - Am I minimizing the re-traumatization potential?
  - Am I avoiding blaming or biased questions?
  - Am I the right person to ask this?

# QUESTIONING SKILLS



- Open-ended questions (tell us...who, what, how?)
- Close-ended questions (Did you, were you?)
  - Use infrequently, but when needed to drill down on a specific issue.
- Careful with Compound Questions
  - I have two questions, First..., Second...
- Try not to ask Multiple Choice Questions
  - Were you a), b), or c)
- Avoid gratuitous use of leading questions – (Isn't it the case that...?)

# QUESTIONING SKILLS



- Take the allegations from start to finish through a process of broad to narrow questions and issues that need to be addressed.
- Ask questions about the allegations, the evidence, and the policy elements.
- Focus on areas of conflicting evidence or gaps of information.
- Drill down on timelines and details.
- Don't leave a question or gap unanswered.
- Pay attention to alcohol/drug consumption and timing of consumption, if relevant.

# QUESTIONING SKILLS



- Have a purpose for asking every question.
- Listen carefully and adapt follow-up questions.
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “fooled around,” and “had a few drinks.”
- Be cognizant of the difference between what is “believed” (conjecture) and what was “witnessed” (facts).
- Avoid evaluative responses to a person’s answers unless needed to establish rapport, draw someone out, or convey empathy.
  - E.g.: that’s too bad; I’m glad you said that.

# QUESTIONING SKILLS



- Do not ask questions that invite a reporting party to second-guess their actions, as this may be perceived as blaming.
- Be sure to ask a question, not make a speech.
- Don't be accusing or argumentative.
- Don't allow your skepticism to show; keep your cards close to your vest.
- If you ask a bad question, take it back.

# QUESTIONING EXERCISE



- What effect did your actions have on others?
- Explain what you hoped to accomplish through your actions.
- Why did you choose to drink so much if you knew it was risky?
- Did you sign the Student Conduct Code at the start of the school year?
- I have a couple of questions: First, do you know what incapacitated means?; Second, could you tell she was incapacitated?; and Third, why did you give her another drink when evidence from witnesses indicates she was already really drunk?
- What other options were there for you in this situation?

# INTERVIEWING SKILLS

---

NOT FOR DISTRIBUTION

**Remember: As an investigator,  
you have no “side” other than  
the integrity of the process!**

- Understand the goals of an “interview” versus an “interrogation.”
  - An interview is a conversation designed to elicit information in a non-accusatory manner.
  - Shifting to an interrogation approach should not be done lightly; you cannot go back – not recommended.
- Is person comfortable that you will conduct the interview fairly and objectively?
  - Team or peer-led investigations can help create a rapport much more easily.

# ESTABLISH PRE-INTERVIEW GROUND RULES



- Who will attend?
- How will records be kept? Recording? Access.
- Role of Advisors.
- Role of Attorneys.
- Difference between Advisor/Attorney role in interviews vs. in a hearing
- Involvement of Roommates, Parents, Union Reps, etc.
- FERPA/confidentiality.

# PROVIDING POLICY AND PROCEDURE COPIES



- Each party should receive a copy of:
  - The specific policies alleged to have been violated (not a link), including any sub-parts or sections.
  - The procedures that will be used to resolve the complaint, including the rights that extend to the parties (not a link).
  - Non-retaliation provision/policy.
- Keep copies of the applicable policies and procedures in the investigation file.

# DEMEANOR OF INVESTIGATOR(S)



- Work to establish rapport and a baseline of relaxed conversation.
- Maintain good eye contact.
- Listen carefully to the answers to your questions.
  - Avoid writing while interviewee is talking, if possible.
- Ask questions in a straightforward, non-accusatory manner.
- Nod affirmatively and use active listening skills to prompt or keep party/witness talking.

# INTERVIEW SKILLS



- Outline your interview questions in advance, but be flexible.
- Conduct interviews in person, whenever possible.
- Choose a neutral, quiet, and private setting with minimal likelihood of interruptions.
- Explain process, your role as a neutral fact-finder, and applicable privacy protections and limitations.
- Discuss thoroughness and the need for completeness.
- Explain amnesty policy (if applicable).

# INTERVIEW SKILLS (CONT.)



- Create comfort with language and sensitive subjects.
- Ascertain who the individual is and their relation to other parties.
- Document whether individual is cooperative.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.

NOT FOR DISTRIBUTION

# INTERVIEW SCHEDULING



- Try to anticipate how long each interview will take (e.g. How many times will you interview the witness? How much time can the witness give you?). Schedule your interview slots accordingly.
- Back-to-back interviews should be avoided, if possible. Interviews often take longer than expected and may require you to reschedule interviews.
- Leave open an amount of time for post-interview work, review of notes with your co-investigator and to prepare for the next interview.

# INTERVIEWING THE PARTIES



- Acknowledge difficulty of reporting/responding and thank them.
- Acknowledge that they may have told this story multiple times already.
- Explain why you are taking notes and/or inform them of recording practice, if applicable.

NOT FOR DISTRIBUTION

# REPORTING PARTY TIPS



- Ask them to share a complete account of what occurred.
  - Have them give full narrative without asking questions, then circle back to details.
- Ask about outcry witnesses and possible documentation such as blogs or journals.
  - What will witnesses likely say/know?
- Ask what the individual hopes to see as a result of reporting.
- Advise that the allegations will be discussed with the responding party and witnesses.
- Let them know next steps and when you will be in touch.

# RESPONDING PARTY TIPS



- Ask the person to share a complete account of what occurred.
- Question them as to the allegations – start with open ended questions and circle back for details/areas of interest.
- Get detailed – do not leave a question unanswered.
- Ask about witnesses and any other relevant information.
  - What will witnesses likely say/know?
- Ask about possible motivation for allegation(s).
- Remind regarding retaliation policy.
- Encourage the person to maintain privacy of the investigation and consult their advisor before sharing.

# INTERVIEWING WITNESSES



- It may be helpful to not label the allegations as “sexual misconduct” or “sexual harassment” but to describe the actual reported behavior, neutrally.
- Ascertain relation to other parties.
- Address the need for complete truthfulness.
- Ask if either party spoke about the incidents after they happened.
  - Did they see any change in behavior?
- Remind about retaliation policy.
- Remind of amnesty policy (if applicable)

# HELPFUL DOCUMENT: INCIDENT TIMELINE



- Discuss timeline of event with all parties/witnesses.
- Obtain as much detail as possible.
- Look to establish reference points from phone calls, email, texts, and receipts.
- Identify any “gaps” and circle back – may lead to additional information.
- Timing highly relevant to matters involving alcohol/drug consumption and physical evidence such as bruising, bite marks, etc.
- In stalking and/or verbal, online sexual harassment cases, frequency of communication between parties may be important.
- Establishing a reliable timeline
  - Can assist with credibility assessments
  - Useful when questioning witnesses
  - Valuable when searching for video footage

# ROLE OF LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS?



- Can law enforcement be the Title IX investigatory arm?
  - Should it be? (not a best practice)
  - Legal standards for criminal investigations are different.
  - Police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.
  - What about School Resource Officers?
- Establish MOUs with local law enforcement and update annually.
  - The power of the tabletop exercise.

# EVIDENCE COLLECTION AND ISSUES OF CONCURRENT CRIMINAL ACTION



- Active accumulation of evidence.
- What if law enforcement requests you delay your process?
- What if law enforcement is the sole source of evidence collection?
  - And they won't release the evidence to you?
  - Does it matter if they are local law enforcement/public safety?
- What if there is a pending criminal or civil case?
- What if the responding party threatens to call a lawyer or files a lawsuit?
- What if the reporting party files a lawsuit or complaint with OCR?

# CASE STUDY



# CASE STUDY: IVAN & JUANITA



- Juanita Morales, a freshman member of the girls' soccer team, made a Title IX report directly to the Vice Principal.
- On the morning of October 11, her teammate, who was checking her email in the computer lab, yelled for Juanita to come look at something on the computer.
- Juanita saw an email sent from the boy's soccer team generic email address which said "Greetings new freshman, meet the girl next door."
- The email included a photo of Juanita's face photoshopped onto a naked body with huge breasts.

# CASE STUDY: IVAN & JUANITA



- Everyone in the room knew it wasn't Juanita, but they all laughed anyways.
- Juanita ran from the room crying, embarrassed that others would think it was her.
- She immediately called Ivan, a member of the boys' soccer team, who she believed sent the email.
- Earlier in the year, Ivan asked her out several times, but she didn't like him.
- She found him really annoying, and while she knows it wasn't nice, she called him a total loser in front of his friends.
- She knows that he sent the email to hurt and embarrass her.

- Preliminary inquiry: Do you have enough to move forward with an investigation?

NOT FOR DISTRIBUTION

# CASE STUDY: IVAN & JUANITA



- You are beginning your investigation. How do you think about your strategy?
- What first steps would you employ?
- Who would you want to interview at this stage?
- What evidence you would want to look for?

NOT FOR DISTRIBUTION

# CASE STUDY: IVAN & JUANITA



- You decide to interview Ivan. Ivan believes Juanita is blowing the whole matter out of proportion.
- Ivan says Juanita “always flashes her breasts” at him and told him she wanted breast implants.
- He admits to creating the photo for a class project. He reports:
  - “It was only meant to be a joke. I never put her name on it, so what’s the big deal? This is a work of art that I created for my class, not a porn picture or anything. I only showed my artwork, which by the way is protected by the First Amendment, to a few of my teammates. I know my rights very well, since my dad is a lawyer. In fact, the First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

# CASE STUDY: IVAN & JUANITA



- Ivan showed the photo to a couple of teammates but did not send the email.
- The email account is for official team business. The coaches and captain executives have the password; the captain they have shared it broadly with all the seniors on the team.
- You decide to interview John Wang, assistant director of information technology.
- John was able to confirm that someone using the computer lab computer sent the picture from the boy's soccer team email account.

# CASE STUDY: IVAN & JUANITA



- The picture was inserted into the email via a flash drive and he was unable to determine which student had logged in.
- John received Ivan's consent to inspect his laptop. The photo was on his hard drive, but was not sent out via email to anyone.
- He said that when he doesn't have his laptop with him, it is typically inside his locker. Ivan also told him that he hasn't given anyone else his laptop password.

# CASE STUDY: IVAN & JUANITA



- Who else might you interview?
- Do you have enough to make a determination?
- With these facts, is this sexual harassment?
  - If so, what form of sexual harassment?
- Is Ivan responsible for creating a hostile educational environment for Juanita?
- Other considerations that might inform your assessment?

# SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



## Forensic Interview Model – Key Phases

- Rapport-building Phase
  - Introductions
  - Set expectations (e.g. overview of process, encourage truth-telling)
  - Practice narrative telling
    - “Tell me something about yourself.”
    - “What do you like to do for fun?”
- Substantive Phase
  - Discussion of incident with details and clarification
- Closure Phase
  - Address socio-emotional needs of child
  - Connect with support and resources
  - Field questions from child

Source: C. Newlin, L. Cordisco, A. Chamberlin et. al, *Child Forensic Interviewing: Best Practices*, DOJ Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin, (September 2015)

# SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



- Impact of past and/or current trauma
- Coordination with law enforcement, CPS, etc.
  - Limit number of interviews and impact on child
  - Multiple interviews may be necessary for a child to feel comfortable enough to provide a complete narrative
- Child-specific considerations that impact memory, recall, perception of an experience, ability to communicate, comprehension, attention span, etc.
  - Age
  - Physical or mental disabilities
  - Cultural/language barriers
  - Emotional needs
  - Socioeconomic status

Source: C. Newlin, L. Cordisco, A. Chamberlin et. al, *Child Forensic Interviewing: Best Practices*, DOJ Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin, (September 2015)

# SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



- Reluctance to disclose
  - Age of child
  - Relationship to responding party
  - Family relationships/level of parental support
  - Fear
  - Social and/or community influences
- Environment
  - Child-friendly, comfortable, neutral setting
  - Consider access to paper and markers for younger children
- Who is present during interview
  - Team investigator approach may not be ideal
  - Potential influence and/or disruption by others present

Source: C. Newlin, L. Cordisco, A. Chamberlin et. al, *Child Forensic Interviewing: Best Practices*, DOJ Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin, (September 2015)

# SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



## Getting child to talk about the incident

- Ask an open-ended, non-leading question that allows child to give you their narrative without interrupting
  - “Tell me why you came to talk to me today?”
  - “Do you know why I’m here to talk to you today?”
- If child acknowledges incident, follow-up with:
  - “Tell me everything that happened.”
- If child doesn’t acknowledge incident, may need to ask more closed-ended, targeted questions
  - Utilize information you have as part of allegations
  - Incremental approach (talk about unrelated issues then ease into allegations)
  - Interview aids (e.g. Human figure drawings, dolls, etc.)

Source: C. Newby, L. Conroy, A. Chan, et al., *Child Forensic Interviewing: Best Practices*, DOJ Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin, (September 2015)

# SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



- Ask follow-up questions to get more detailed narrative
  - “Describe what happened from beginning to end.”
  - “Tell me more about....”
  - “And then what happened?”
  - “Tell me everything that happened after...”
  - “Tell me everything that happened from the time you....to the time you....”
  - “What happened right before...”
  - “How did that make you feel?”

Source: C. Newlin, L. Cordisco, A. Chamberlin et. al, *Child Forensic Interviewing: Best Practices*, DOJ Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin, (September 2015)

# SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



- Use reflection and paraphrasing
- Assess whether multiple incidents occurred
  - “Did this happen one time or more than one time?”
  - Use prompts to differentiate instances (e.g. first time, last time, etc.)
- Silence/hesitation is okay
- Assess any possible coaching
  - Ask about any previous conversations
    - “Have you talked to anyone else about what happened?”
  - Ask about source of information
    - “How did you find out about that?”

Source: C. Newlin, L. Cordisco, A. Chamberlin et. al, *Child Forensic Interviewing: Best Practices*, DOJ Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin, (September 2015)

# SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



## Ending the interview

- “Is there anything else you want to share?”
- “Is there anything else I need to know?”
- “Do you have anything you want to ask me?”
- Thank child for speaking with you
- Assess and offer support and resources
  - In-school and community-based
  - Counselors, social workers, psychologists, etc.
  - Academic support
  - Safety planning
  - Etc.

Source: C. Newlin, L. Cordisco, A. Chamberlin et. al, *Child Forensic Interviewing: Best Practices*, DOJ Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin, (September 2015)

# THE INVESTIGATION REPORT

- Overview of the investigation report
- Elements and Sample Outline

# THE INVESTIGATION REPORT



- The investigation report is the one document that details all of the investigative efforts, including:
  - Results of interviews with parties and witnesses.
  - Unbiased summary and compilation of other information collected
    - E.g.: copies of texts, emails, and social networking messages, information from law enforcement, medical exams, video surveillance and photographs, etc.
    - Parties have the right to review evidence prior to a decision/hearing.
      - “All available evidence” per proposed regulations

# THE INVESTIGATION REPORT



© Jef Mallett/Dist. by UFS, Inc.



# THE INVESTIGATION REPORT: CONTENT OVERVIEW



- I. Brief Summary Overview
- II. Summary of Allegations
- III. Involved Parties
- IV. Investigation Timeline
- V. Jurisdiction
- VI. Applicable Policies & Definitions
- VII. Evidentiary Standard
- VIII. Summaries of Relevant Evidence, Interviews & Witness Statements
- IX. Credibility Assessment
- X. Discussion and Analysis
- XI. Findings
- XII. Appendix

# SAMPLE INVESTIGATION REPORT CONTENT



- DATE OF REPORT and NAME OF INVESTIGATOR
- SUMMARY OVERVIEW
  - This report addresses allegations of the [Policy Name] of the [School Name]. [Name of investigator] conducted the investigation into these allegations.
- OVERVIEW OF THE ALLEGATIONS
  - Provide a description of what the reporting party alleges, and if there is a written complaint or statement, include that as an appendix to your report.
- PARTIES & WITNESSES
  - Provides names and brief description of reporting party, responding party and all witnesses
- TIMELINE OF INVESTIGATION
  - Include the date of the incident, the date it was reported, how and to whom (generally) it was reported, the date in which investigators began, and the date that the investigation concluded.

# SAMPLE INVESTIGATION REPORT CONTENT



- JURISDICTION
  - Where: Geographic
    - On-school grounds
    - Off-school grounds
      - If so, on-school ground effect(s)?
  - When: Temporal
    - “Statute of limitations”?
    - Summer or winter break? Spring break?
  - Who: “Person”
    - Who are parties? Staff, student, guest, visitor, camper, visiting teams/athletes, etc.
  - What?
    - Scope of policies: All Title IX? Sexual Misconduct?
    - Concurrent/Ancillary Misconduct?

# JURISDICTION: SAMPLE TEXT



- The alleged misconduct occurred between a teacher, Kirby, and two of his 10<sup>th</sup> grade Algebra 2 students, Caldwell and Bennett. The alleged incidents involving Caldwell occurred throughout Fall 2018, while those with Bennett occurred in both Fall 2018 and Winter 2019.
- In both cases, the alleged conduct occurred both on- and off-school grounds.
- As Kirby is a teacher, and Caldwell and Bennett are his students, and some of the alleged misconduct occurred on school grounds, the school believes that these behaviors are covered by Title IX, could impact its educational program, and exercises jurisdiction accordingly.

# JURISDICTION: SAMPLE TEXT



- It was reported by Witness 1 that Kirby has made a number of inappropriate, unprofessional, and sexually harassing comments while teaching his classes, in written feedback to students, and in emails with students. These alleged behaviors fall within the school's Title IX jurisdiction as Kirby is an employee of the school and the reported conduct occurred in the course of Kirby's employment and on the school's premises.

# SAMPLE INVESTIGATION REPORT CONTENT



- OVERVIEW OF APPLICABLE POLICIES
  - Provide reference to the applicable policies that correspond with the allegations.
  - Policy references should match those on the notice of investigation.

NOT FOR DISTRIBUTION

# APPLICABLE POLICIES: SAMPLE TEXT



- DISTRICT's Sexual Misconduct Policy includes policy prohibitions relevant to Sarah Young's complaint. The policies at issue are:

- **Sexual Harassment**

- The policy defines sexual harassment as follows:

## **Sexual Harassment**

- Unwelcome,
- Sexual, sex-based and/or gender-based,
- Verbal, written, online and/or physical conduct.

The type of sexual harassment implicated by the reported conduct is a hostile environment, which is defined by the policy as:

- Severe or Persistent or Pervasive AND
- Objectively offensive AND
- A limitation or deprivation of educational or employment participation or benefits

# DOCUMENTING INTERVIEWS



- Investigation interview:
  - Name/title of the interviewer(s).
  - Name of the persons interviewed and their role in the investigation – reporting party, responding party, witness, etc.
  - Names of any other people who sat in on the interview and their roles.
  - Location of the interview.
  - Interview date.
  - Detailed notes of interview.

NOT FOR DISTRIBUTION

# INCLUSION OF INTERVIEW SUMMARY STATEMENTS IN REPORT



- ***Investigator’s note:*** *Throughout the sections below, everything in quotation marks is a direct quote from the interviewee’s verified notes. A complete copy of the verified notes is in the Appendix. All quotes, text messages, emails, and other evidence is provided in original form. Rather than insert “[sic]” in each instance, readers should be aware that there are numerous grammatical, spelling and capitalization errors and abbreviations/acronyms that are left in place as verbatim quotes or original documents.*

# INTERVIEWEE VERIFICATION: EXAMPLE 1



- Investigators conducted a series of in-person and phone or video-based interviews on January 30, 2019 and February 1-2, 2019, as well as phone interviews on February 5, 2019. At the conclusion of each interview, all interviewees were provided the opportunity to review and verify a printed copy of the detailed notes taken by Investigator 2 during the interview. Interviewees were asked to make any necessary corrections, edits, additions, etc. In the case of the parties, their advisors were provided with a printed copy to review as well. All interviewees verified the notes with their signatures without any material changes to the content.

## INTERVIEWEE VERIFICATION: EXAMPLE 2



- All interviewees were provided the opportunity to verify a copy of the notes from the investigation interviews. Investigators emailed each interviewee a copy of the detailed notes made during the interview and asked the interviewee to respond within approximately two business days and to use the track changes function in Microsoft Word to make any needed changes or edits. In the correspondence to the interviewee, investigators noted that if an interviewee did not respond to the verification request, the notes would be deemed appropriate and acceptable. Some interviewees responded with minor changes or revisions. If interviewees did not respond, their notes became finalized and are included as such in the appendices.

# EXAMPLE: SOLICITING WITNESSES FROM PARTIES



- The parties were asked to provide a list of relevant witnesses and to provide any evidence they felt was relevant to the investigation and the complaint. Both parties provided a list of potential witnesses, and those deemed relevant to the alleged incident were interviewed. The responding party also provided a few text message exchanges, photos, and other social media posts.

NOT FOR DISTRIBUTION

# TIMELINE EXAMPLE



- **Sunday, September 4<sup>th</sup>, 2018**
- 3:45pm – Jimmy and his friends arrive at the house on Philly Ave.
- 4:00pm – Andrea, Erin, Sandy and Jill leave Erin’s house and walk to a party at a house on Philly Ave.
  - Andrea sees Jimmy playing cornhole with Josh and Matt and joins them; Andrea teams up with Jimmy so they are on opposite sides of the game. Andrea stands by Matt and Jimmy stands by Josh.
  - Andrea, Jimmy and a few others hang out for a while talking. Someone comes up to Andrea and hands her a beer, which she drinks.
- 4:45pm – Andrea and Jimmy leave the Philly house and head to a house on Chapel Rd. where Andrea’s friends were hosting a party. Jimmy did not know anyone at the party and they stayed for 10-15 minutes before returning to the house on Philly Ave.

# TIMELINE EXAMPLE



- 5:15 – Jimmy and Andrea arrive back at the Philly Ave. house.
- 5:45pm – Erin, Jimmy and Andrea leave the Philly Ave. house and walk to Brown Street to get dinner. Erin goes to Chipotle and Jimmy and Andrea go to Panera.
- 6:00pm – Jimmy and Andrea walk from Panera to the school gym, which they know is open because of a weekend volleyball tournament.
- 6:15pm – Jimmy and Andrea arrive at the gym and eat dinner in the bleachers with Courtney and Chris, who were at the gym already.
- 6:30pm - Sharon arrives during dinner and joins them.
- 7:00pm – Chris, Courtney and Sharon go back to Courtney’s house to watch a movie.

# TIMELINE EXAMPLE



- 7:00pm – Jimmy and Andrea enter the student lounge off the gym and lie down on the long couch. No one else is in the lounge.
  - Jimmy and Andrea kiss on the couch. Jimmy gets up to close the door and turn off the light.
  - They engage in sexual intercourse on the couch.
  - They clean themselves up and get dressed and shortly thereafter, Jimmy asks if it is ok if he leaves.
- 7:40pm - Andrea walks Jimmy to the front door of his house and Jimmy leaves.
- Note that Andrea does not recall going to the Chapel Rd. house, but a number of witnesses indicated that Jimmy and Andrea left the Philly Ave. house and returned about 15-20 minutes later.

# TIMELINE EXAMPLE



- **Additional Relevant Timeline**

- 8:00 pm – Andrea arrives at Courtney’s house, speaks briefly with Chris in the hallway, then goes to the bathroom. When she returns from the bathroom, she starts talking about the alleged incident with Jimmy and becomes very emotional.
- 8:15 pm – Andrea calls her mother.
- 8:25 pm – Andrea’s mother arrives at Courtney’s house.

# TIMELINE EXAMPLE



## • Additional Relevant Timeline

- 8:35pm – After arriving home, Andrea and her mother call the Police Department, who come to her house and take a statement.
- 9:21 pm – Andrea texts Jimmy “Why did it happen”; Jimmy responds, “What.” Upon receiving no response, Jimmy writes, “Lol okay then.” Then adds “Let’s just forget about it and I’ll just leave you alone and all that.”
- 10:00pm – Andrea’s mother takes Andrea to the Hospital where she has a rape kit performed. Police gather evidence from Andrea’s apartment.
- 10:15pm –Police arrive at Jimmy’s house and he accompanies them to the police station and provides a statement on the alleged incident with Andrea.
- 10:45pm – Principal is notified of the alleged incident.

# IRRELEVANT EVIDENCE EXAMPLE



- In the course of the investigation, witnesses and the parties provided a great deal of information, some of which was relevant, some of which was not.
- Rather than dismissing evidence as irrelevant *while* gathering evidence, investigators use a broad approach to ensure as thorough an investigation as needed.
- In a word-against-word investigation, the credibility of the parties and witnesses is critical, and often credibility assessments can be informed by additional evidence, even if that evidence does not ultimately bear on the underlying reported misconduct.
  - Requires investigators to gather information more broadly.

# IRRELEVANT EVIDENCE EXAMPLE



- Examples of information not considered in determining a finding due to a lack of relevance are:
  - Information regarding Andrea’s sexual history, other than her sexual history with Jimmy to the extent it informed the issue of consent;
  - Sharon’s statements about Jimmy’s interest in kink;
  - Chris’ statement that a friend of his finds Jimmy “creepy” without any additional information.
- Conversely, relevant evidence is analyzed in detail in this report.
- The primary role of investigators is to determine what information is relevant to enable the decision-maker to make a decision based on the preponderance of the relevant evidence, rather than extraneous or irrelevant evidence.

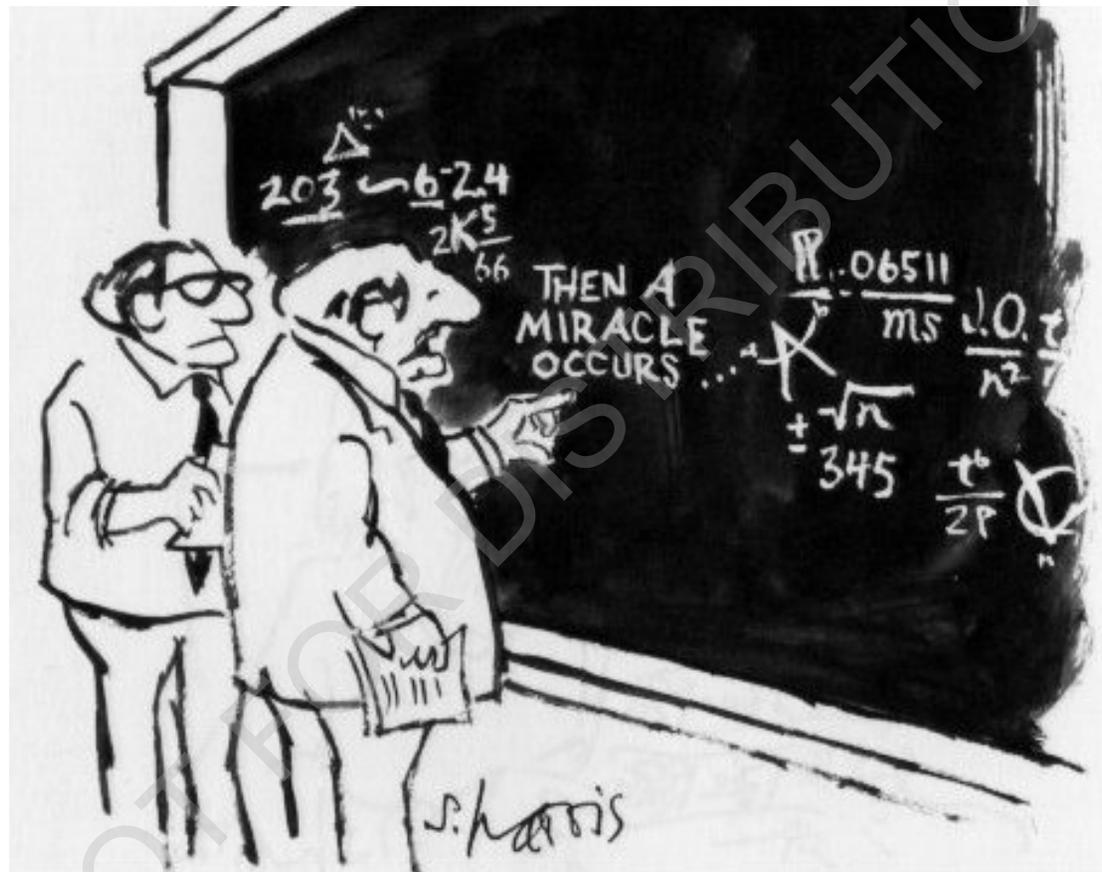
# OTHER ELEMENTS OF AN INVESTIGATION REPORT



- Document each of the actions taken throughout the investigation, particularly if there are multiple investigators.
  - If short: could be in Investigation Timeline
  - If long: could be an appendix.
- Index all documentation relevant to the complaint.
  - E.g., research, notes, medical records, police reports, prior complaints, etc.

# EVALUATION OF EVIDENCE AND MAKING A DETERMINATION

- 
- Understanding Evidence
  - Credibility
  - Analyzing the Information
  - Making a Determination



**"I think you should be more explicit here in step two."**

from *What's so Funny about Science?* by Sidney Harris (1977)

# UNDERSTANDING EVIDENCE



- Formal rules of evidence **do not apply**. If information is considered relevant to prove or disprove a fact at issue, it should be addressed.
  - Evidence is any kind of information presented with the intent to prove what took place.
  - Certain types of evidence may be relevant to the credibility of the witness, but not to the charges.
- Assess credibility of evidence. If credible -> it should be considered.
- Consider if drugs or alcohol played a role.
  - If so, do you know what you need to know about the role of alcohol on behavior?
    - Timing? Incapacitation? Other considerations
  - Look for evidence of prior planning.

# UNDERSTANDING EVIDENCE



- You may assign weight to evidence based on:
  - Documentary evidence (e.g. supportive writings or documents).
  - Electronic evidence (e.g. photos, text messages, and videos).
  - Real evidence (i.e. physical object).
  - Direct or testimonial evidence (e.g. personal observation or experience).
  - Circumstantial evidence (i.e. not eyewitness, but compelling).
  - Hearsay evidence (e.g. statement made outside the hearing, but presented as important information).
  - Character evidence (generally of little value or relevance).
  - Impact statements (typically only relevant in sanctioning).

- Credibility is largely a function of corroboration and consistency.
- To assess credibility is to assess the extent to which you can rely on a witness testimony to be accurate and helpful in your understanding of the case.
  - Credible is not synonymous with truthful.
  - Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading.
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies.

# FACTORS TO CONSIDER FOR CREDIBILITY



- Non-cooperation.
  - Look for short, abrupt answers or refusal to answer.
  - OK to ask, “You seem reluctant to answer these questions – can you tell me why?”
- Logic
  - Does this make sense; inherent plausibility
  - E.g.: “I’m struggling to develop a timeline based on your statements. Could you clarify...?”
- Consistency
  - Consistency of accounts over time
  - Consistency of story — substance and chronology of statements.

# FACTORS TO CONSIDER FOR CREDIBILITY



- Corroborating evidence.
  - Is evidence supported by other evidence?
  - Look for the amount of detail (facts) provided. Factual details should be assessed against general allegations, accusations, excuses, or denials that have no supporting details.
- Demeanor. (careful with this one)
  - Pay attention to non-verbal behavior
  - Demeanor issues should be your cue to ask more questions.
  - Rarely should be relied upon to draw any conclusions

# MAKING A FINDING



- Review the institutional policies in play
- Parse the policy
  - Relevant definitions
- Review the evidence and what it shows (relevance)
- Assess credibility of evidence and statements
  - Provide rationale for your credibility assessments
- Apply relevant policy to facts at hand
- Determine whether it is more likely than not policy has been violated
  - Specific finding for each implicated policy and each responding party
- Cite concretely the reasons for your conclusions

# REVIEW OF REPORT



- Proposed Title IX regulations require sharing of report with the parties.
- Increasingly common best practice is for both parties to be given access to review the investigation report prior to finalization/decision
  - Significant shift in the field
  - Full review of evidence prior to decision being made
  - Serves as a check to ensure report is accurate and thorough
  - Enhances “opportunity to be heard”

**IVAN & JUANITA  
SAMPLE  
INVESTIGATION  
REPORT**



# CONSENT CONSTRUCT

- 
- Force
  - Incapacity
  - Consent

NOT FOR DISTRIBUTION

# CONSENT IS...



- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Affirmative action through clear words or actions
- That create mutually understandable permission regarding the conditions of sexual activity
- Cannot be obtained by use of:
  - Physical force, compelling threats, intimidating behavior, or coercion
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated
- Consider the relevant age of consent statute

# RULES TO REMEMBER



- No means no, but nothing also means no. Silence and passivity do not equal consent
- To be valid, consent must be given prior to or contemporaneously with the sexual activity
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it

# OVERVIEW OF THE 3 CONSENT QUESTIONS



1. Was force used by the Responding Party to obtain sexual or intimate access?
2. Was the Reporting Party *incapacitated*?
  - a) If so, could or should the Responding Party have reasonably known that the Reporting Party was incapacitated (e.g. by alcohol, other drugs, sleep, etc.)? **Note: The intoxication of the Responding Party can not be used as a reason they did not know of the Reporting Party's incapacity.**
3. What clear *words* or *actions* by the Reporting Party gave the Responding Party permission for each sexual or intimate act as it took place? **Note: Is the age of the parties a consideration in this case?**

# FORCE

There are four types of force to consider:

- **Physical violence** -- hitting, restraint, pushing, kicking, etc.
- **Threats** -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
- **Intimidation** -- an implied threat that menaces and/or causes reasonable fear
- **Coercion** – the application of an *unreasonable* amount of pressure for sexual access.
  - Consider:
    - Isolation
    - Frequency
    - Intensity
    - Duration
  - Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force

# INCAPACITY ANALYSIS



- If the reporting party **was not** incapacitated, move on to the consent analysis
- If the reporting party **was** incapacitated, but:
  - The responding party did not know it, **AND**
  - The responding party should not have reasonably known it = policy not violated. Move to consent analysis
- If the reporting party **was** incapacitated, and:
  - The responding party **knew it or caused it** = policy violation. Sanction accordingly
  - The responding party **should have known it** = policy violation. Sanction accordingly

# INCAPACITY



- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent
- Incapacitation is a determination that will be made after the incident in light of all the facts available
- Assessing incapacitation is very fact-dependent
- Blackouts are frequent issues
  - Blackout = no working (form of short-term) memory for a consistent period, thus the person is unable to understand who, what, when, where, why, or how
    - But the 2a question must be answered, as blacked out individuals are able to engage in activities that may not make 2a a definitive “yes”
  - Partial blackout or Brownout possibilities must be assessed as well
- What if the responding party was incapacitated as well?

# BEHAVIORAL CUES



- Evidence of incapacity may be in the report taken from context clues, such as:
  - Slurred speech
  - The smell of alcohol on the breath in combination with other factors
  - Shaky equilibrium; stumbling
  - Outrageous or unusual behavior\*
  - Passing out
  - Throwing up
  - Appearing Disoriented
  - Unconsciousness
  - Known Blackout
    - Although memory is absent in a blackout verbal and motor skills are still functioning.

Question 3 is the Consent question:

- What clear *words or actions* by the Reporting Party gave the Responding Party permission for each sexual or intimate act *as it took place*?
- Equity demands a pure consent-based policy, defining what consent is rather than defining it by what it is not (e.g. force, resistance, against someone's will, unwanted, someone unable to consent, etc.).
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

# CASE STUDY

—

Consent

NOT FOR DISTRIBUTION

# CASE STUDY: CONSENT



- Hugh is a senior on the debate team and Elizabeth is a sophomore on the team. The team travels out of town for a team building event. Some members of the team come to Elizabeth's hotel room to watch a movie. Hugh and Elizabeth, who have never met before, are attracted to each other. After the movie, everyone leaves, and Hugh and Elizabeth are alone. They hit it off, and soon become intimate. They start to make out. Hugh verbally expresses to Elizabeth that he wants to have sex with Elizabeth, but she isn't ready to have sex with him because they just met. At the same time, she likes him and doesn't want to scare him off, so she decides to perform oral sex, hoping they can get to know one another better before engaging in vaginal intercourse. Perceiving the oral sex to be foreplay, Hugh stops Elizabeth, lays her back on the bed, takes off her clothes, and engages in intercourse with her. Elizabeth is unresponsive during the intercourse.

# CONTACT INFORMATION

---

Tanyka M. Barber, J.D.

[tanyka.barber@tngconsulting.com](mailto:tanyka.barber@tngconsulting.com)