



## PREK-12 TITLE IX CERTIFICATION COURSE

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Hawaii State Department of Education  
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# YOUR FACULTY



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# TRAINING AGENDA



- I. Overview of Title IX
- II. Expanded Legal Basis for Title IX Liability
  - Foundational Caselaw
  - Due Process Overview
- III. Title IX Coordinator Oversight
- IV. Actual Notice
- V. Overview of Civil Rights Investigation & Resolution Model
- VI. Hostile Environment analysis
- VII. Preliminary Inquiry
  - Gatekeeping
  - Interim Actions
- VIII. Beginning the Investigation
  - Investigation Timeline
  - Standard of Proof
  - Investigation Strategy

# TRAINING AGENDA



- VIII. Questioning Skills
  - The Goals of Questioning
  - Questioning Skills
  - Questioning Exercise
- IX. Interviewing Skills
  - Interview Skills
  - Interviewing Reporting Party
  - Interviewing Responding Party
- X. Helpful Investigation Documents
- XI. Making a Finding & The Investigation Report
- XII. Sanctions & Appeals
- XIII. Trauma Informed Interviewing
- XIV. Consent: Force, Incapacity, Affirmative Consent
- XV. Special Topics:
  - Dual Enrollment
  - Pregnancy
  - Bullying and Cyberbullying
  - Athletics

# GOALS, PURPOSE, AND LEARNING OUTCOMES

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# GOALS, PURPOSE, LEARNING OUTCOMES



- Provide a foundation on Title IX fundamentals.
- Provide new tools to support your work to stopping, preventing, and remedying harassment that may occur in your schools.
- Give you an opportunity to practice and collaborate together.
- Collaborate and brainstorm together about how best to support your work, including templates or other tools to facilitate these processes in your school.

# OVERVIEW OF TITLE IX

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*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
  - “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 in 1968
- Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-3(a))
  - Prohibits discrimination in the terms, conditions or privileges of employment on the basis of an employee’s race, sex, color, religion, sex or national origin.
- 1965 - Executive Order 11246
  - Prohibited federal contractors from discriminating on basis of race, color, religion, national origin. “Sex” was added in 1968; renamed Exec. Order 11375.
- 1972: Title IX passed and signed into law by President Nixon
- Department of Health, Education and Welfare (HEW) – Title IX regulations codified in 1975.

# 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

# STAY ABOVE THE FLOOR



- Law, Caselaw and Federal Regulations set the floor
  - OCR Guidance typically elevates the floor
  - States can pass laws that exceed federal requirements (e.g.: New York and California)
- Regressing to the floor = doing the bare minimum
  - Will continue the cycle of inequity and unfairness
- Civil Rights issues demand more than bare minimum
- Industry standards already exceed the floor
  - Regression to the floor increases risk of lawsuit and negligence-based liability

# SIGNIFICANT CASES

- *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).



# CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



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

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

# CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



- On three occasions in her junior year, Hill interrupted a class, requested that the teacher excuse Franklin, and took her to a private office where he subjected her to coercive intercourse.
- The complaint further alleges that, though they became aware of and investigated Hill's sexual harassment of Franklin and other female students, teachers and administrators took no action to halt it, and discouraged Franklin from pressing charges against Hill.
- 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?

# CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



- When 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 teacher at Lago Vista's high school.
- During the book discussion sessions, Waldrop often made sexually suggestive comments to the students. Gebser entered high school in the fall and was assigned to classes taught by Waldrop in both semesters.
- Waldrop continued to make inappropriate remarks to the students, and he began to direct more of his suggestive comments toward Gebser, including during the substantial amount of time that the two were alone in his classroom.

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

# CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



- 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 school year, and they often had intercourse during class time, although never on school property.
- Gebser did not report the relationship to school officials, testifying that while she realized Waldrop's conduct was improper, 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).

# CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



- In October 1992, the parents of two other students complained to the high school principal about Waldrop's comments in class.
- The principal arranged a meeting, at which, according to the principal, Waldrop indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again.
- The principal also 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 said you 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)



- In December 1992, a fifth-grade boy attempted to touch LaShonda Davis's breasts and genitals and made statements such as "I want to get in bed with you," and "I want to feel your boobs." Similar conduct occurred on January 4 and 20, 1993.
- Series of incidents in February-May 1993 in P.E. and other classes, E.g.:
  - The same male student stuck a doorstop in his pants and acted in 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)



- Each time Davis reported the conduct to her teacher, Davis's mother also contacted the teacher and was allegedly told the principal was aware of the situation; no disciplinary action was taken.
- Davis repeatedly reported incidents to teachers; Davis's mother also contacted teachers multiple times; 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)



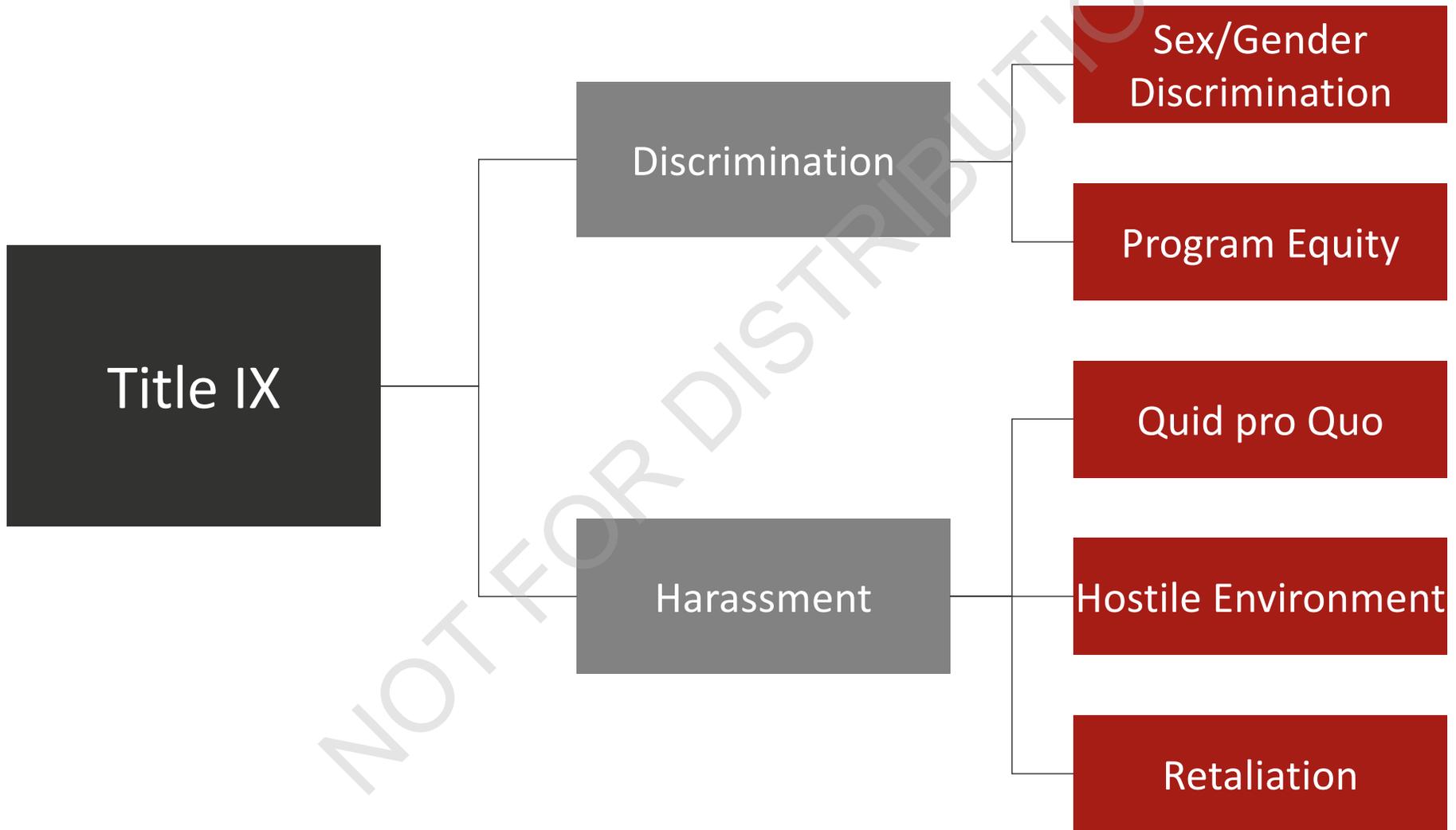
- In May 1993, principal told Davis's mother, "I guess I'll have to threaten him a little harder"; male student not disciplined.
- Davis's grades declined and her father found a suicide note his daughter had written; Davis told her mother she "didn't know how much longer she could keep [the male student] 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.



# KEY TITLE IX-RELATED ISSUES



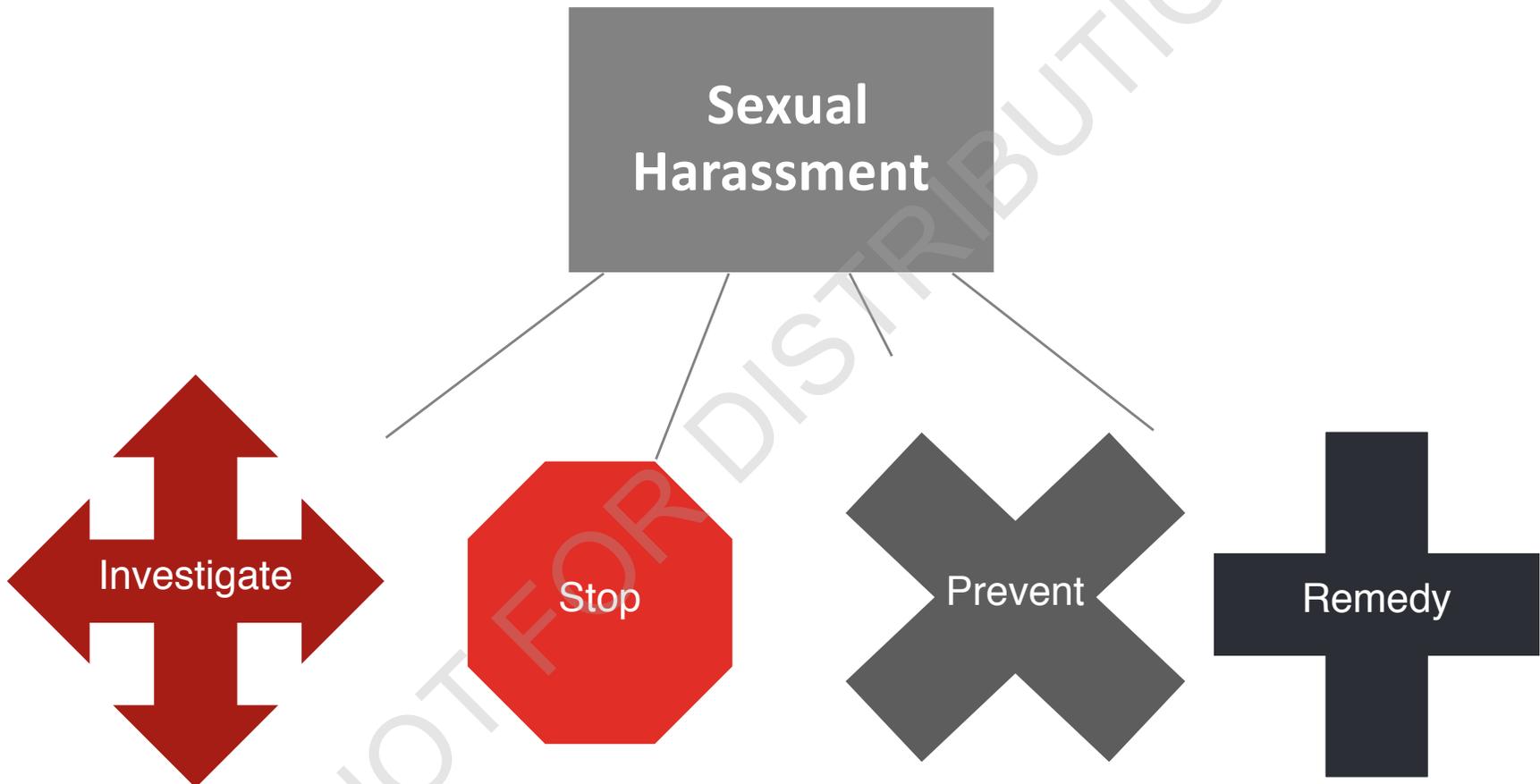
## Sex Discrimination

- Program Equity
- Recruitment, Admissions and Access
- 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



# THE IX COMMANDMENTS



<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>	<b>Investigation</b> (prompt & fair – VAWA Sec. 304)
<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>

DUE PROCESS

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# **GOSS V. LOPEZ**

## **419 U.S. 565 (1975)**



- Nine high school students were suspended for 10 days for non-academic misconduct.
- The court held that since K–12 education is a fundamental right, students were entitled to at least a modicum of “due process.”
- Minimum due process is notice and an opportunity for a hearing.

# **GOSS V. LOPEZ**

## **419 U.S. 565 (1975)**



- The court further stated that the hearing could be informal and need not provide students with an opportunity to obtain private counsel, cross-examine witnesses, or present witnesses on their behalf.
- Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests.

# WHAT IS DUE PROCESS?



- Two overarching forms of due process:
  - **Due Process in Procedure:**
    - Consistent, thorough, and procedurally sound handling of allegations.
    - Institution substantially complied with its written policies and procedures.
    - Policies and procedures afford sufficient Due Process rights and protections.
  - **Due Process in Decision:**
    - Decision reached on the basis of the evidence presented.
    - Decision on finding and sanction appropriately impartial and fair.

# WHAT IS DUE PROCESS?



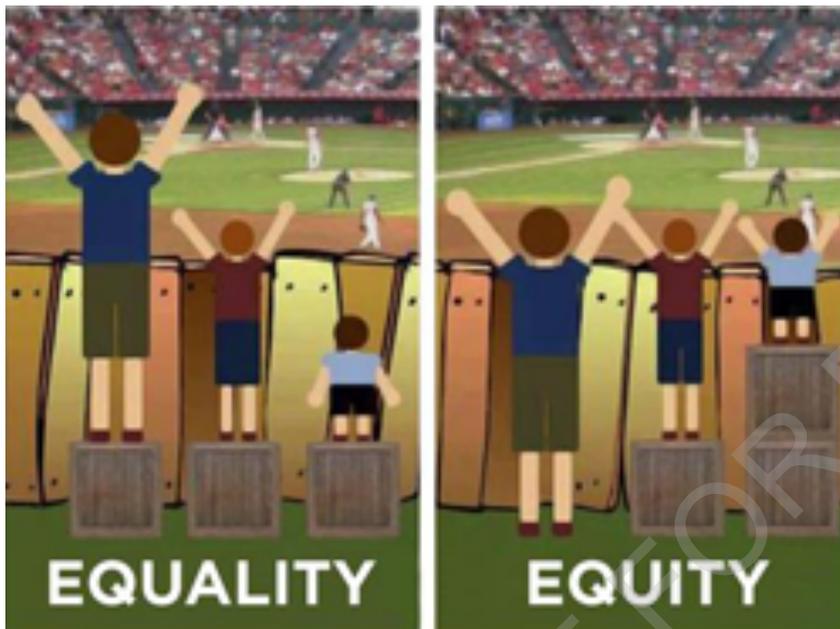
- **Due Process in Procedure** - A school's process should include (at a minimum):
  - Notice — of charges and of the hearing/resolution process.
  - Right to present witnesses.
  - Right to present evidence.
  - Opportunity to be heard and address the allegations and evidence.
  - Right to decision made based on substantial compliance and adherence to institutional policies and procedures.
  - Right to a hearing? (TBD)
  - Right to appeal (recommended).

# WHAT IS DUE PROCESS?



- **Due Process in Decision** - A decision must:
  - Be based on a fundamentally fair rule or policy.
  - Be made in good faith (i.e., without malice, partiality, or bias).
  - Based on the evidence presented.
  - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
  - Not be arbitrary or capricious.
- Sanctions must be reasonable and constitutionally permissible.

# EQUITY BY AND THROUGH THE PROCESS



- You will get this right when you can do equity through equity.
- Each party's rights, privileges and opportunities need to be balanced.
- Not exactly parity, but equitable procedures that reach equitable outcomes that impose equitable remedies.
- Equitable = fair under the circumstances.
- What you do for one party, ask whether you need to do for the other(s).

# THE TITLE IX COORDINATOR

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## Overview of the Responsibilities

- Description
- Roles
- Discussion



# THE TITLE IX COORDINATOR



- The District's Title IX coordinator is an administrator with significant authority and wide-ranging responsibilities.
- Must be able to effect change across many departments, including Human Resources, Academic Affairs, Athletics, and Student Discipline.
- To alleviate the burden on one administrator, Districts and schools identify multiple deputy coordinators – typically one per school.

# THE ROLE OF THE TITLE IX COORDINATOR



- Prevention and remediation of:
  - Gender Discrimination
  - Sexual Harassment
  - Sexual Assault
  - Stalking
  - Intimate Partner/Relationship Violence
  - Bullying and Cyberbullying
  - Retaliation
- Assurance of compliance with requirement to stop, prevent, remedy.
- Assurance of compliance with final sanctions.

# THE ROLE OF THE TITLE IX COORDINATOR



- Contact for government inquiries.
- Point person for complaints.
- Oversight and coordination of prompt and equitable grievance procedures (faculty, student, and staff).
- Creator and implementer of appropriate policies.
- Compliance auditor.
- Training oversight: Faculty, staff, students, investigators, hearing officers, and appellate officers.
- Assurance of First Amendment protections.
- Section 504 disabilities compliance oversight.
- Athletics gender equity.

# POINT PERSON FOR COMPLAINTS



- Vice Principals, supervisors, and other deputy coordinators may also be identified in publications and policies as individuals to whom a complaint may be made.
  - The Title IX coordinator must create a structure of documentation and reporting by these designated individuals to ensure that the Title IX coordinator is aware of the complaint and will either designate the individual to lead the Title IX-based response protocol or will implement that process.

# SMALL GROUP DISCUSSION



- What are the three biggest concerns you have regarding your role as a Title IX administrator (coordinator, deputy, etc.)?
- What are you hoping to take away from this training?
- Describe and discuss a recent or current Title IX case at your school that presented a number of difficulties.

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# NOTICE, REPORTING, RESPONSIBLE EMPLOYEES & CONFIDENTIALITY

- “Responsible employee”
- When do you investigate?
- Examples of actual and constructive notice
- Additional reporting requirements

# 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.**

# ACTUAL NOTICE



- Individual files a Title IX grievance.
- Individual notifies the Title IX coordinator or other responsible employee.
- Individual complains to campus police or security official.
- Staff member witnesses harassment.
- Indirect notice from sources such as flyers posted on campus, media, online postings, or video.

# 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



- ATIXA recommends that 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

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# WHY REPORT?



- Often we focus on the legal obligations and the negative consequences of not reporting.
- More effective if we focus on the real reason reports should be made: Providing support and resources.
  - Provide reporting parties with school-wide assistance through a single individual (TIXC or Deputy).
  - Access to the full range of support and resources
  - Long-range view: ATIXA has seen countless cases where reporting parties do not see the negative effects until months later when they are failing their classes, become ill, miss work, suicidal etc.
- Also key to tracking patterns.

# TRAINING RESPONSIBLE EMPLOYEES



- Responsible Employee Training should include, at a minimum, the following:
  - Background, overview and purposes of Title IX
  - Scope of Title IX: Applies to students, faculty, staff, visitors, guests, etc.
  - Responsible Employee definition
  - Actual Notice/Knowledge
  - Privilege, Confidentiality, & Privacy
  - Jurisdiction: Geographical, Time, programs, etc.
  - How, and When to Report
  - What to report (**everything**)

# WHEN DO YOU INVESTIGATE?

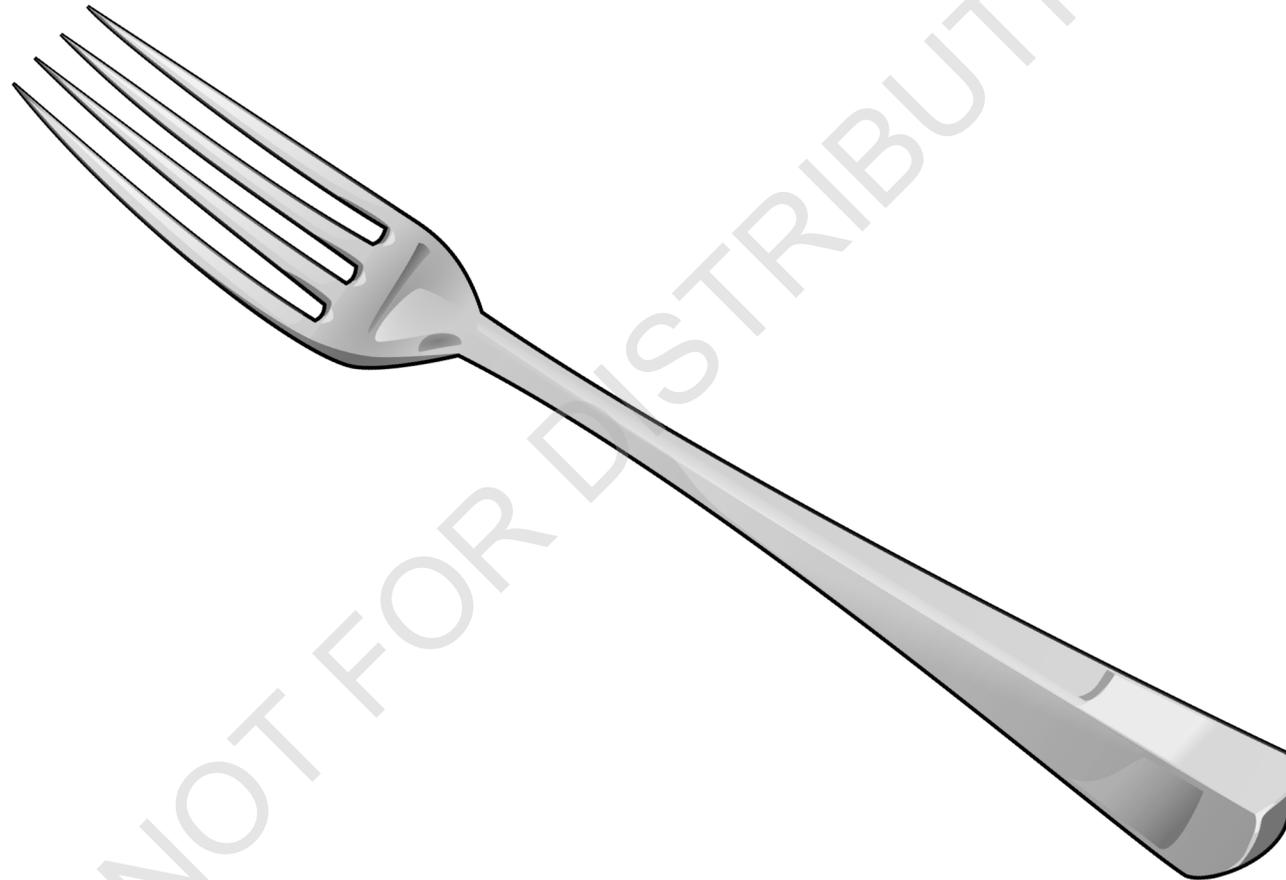


- Upon receipt of a formal, written, signed complaint.
- When the Coordinator deems an investigation is warranted.
- Rumors, gossip, social media, etc. can be notice.
  - Investigating on these bases is discretionary (but often recommended), particularly in light of the Proposed Regs.
- Once actual notice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

# CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

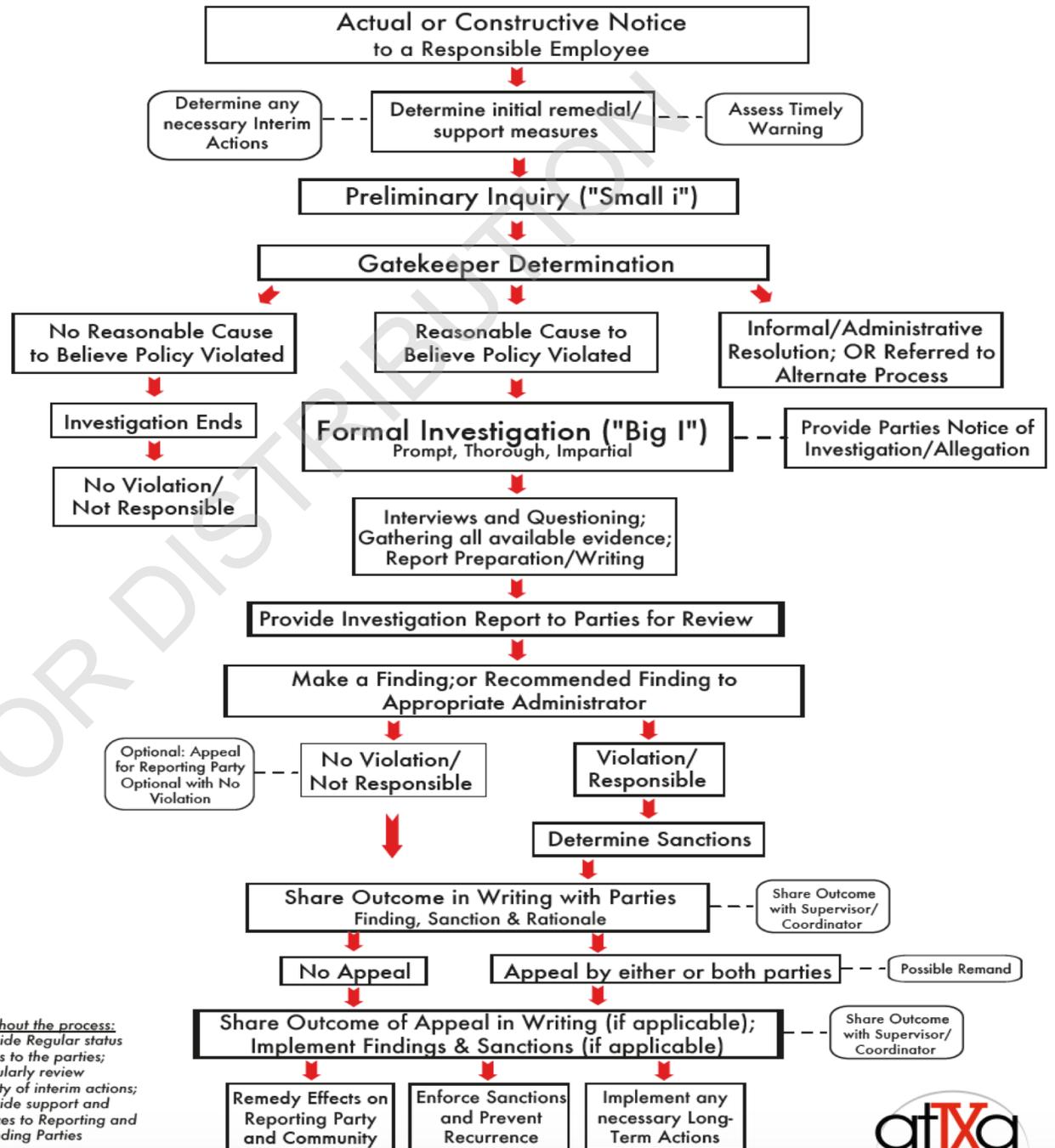
- Civil Rights Investigation Model
- Investigation & Hearing Panel Model
- The Process & Ten Steps

# THE PROCESS



# CIVIL RIGHTS INVESTIGATION MODEL

## ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



*Throughout the process:*  
 1: Provide Regular status updates to the parties;  
 2: Regularly review necessity of interim actions;  
 3: Provide support and resources to Reporting and Responding Parties



# THE PROCESS



# TEN STEPS



1. Allegation (complaint) or notice.
2. Preliminary inquiry (initial strategy).
3. Gatekeeper determination (earliest point).
4. Notice of investigation and/or allegation (earliest point).
5. Strategize investigation.
6. Formal comprehensive investigation.
7. Witness interviews.
8. Evidence gathering.
9. Analysis.
10. Finding.

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# CIVIL RIGHTS INVESTIGATION MODEL AND STUDENT CONDUCT MODEL



- An active gathering of information by the investigator or investigators; not intended to “build a case.”
- Does not impact the implementation of informal or alternative dispute resolution approaches.
- Characterized by an intentional effort to make procedural and support mechanisms equitable.
- Typically provides a right of appeal for all parties to the report, not just the responding party.

# SEXUAL HARASSMENT

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# THREE TYPES OF SEXUAL HARASSMENT



1.  
Hostile  
Environment

2.  
*Quid Pro Quo*

3.  
Retaliatory  
Harassment

# 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 alleged victim's) and an objective (reasonable person's) viewpoint.

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
  - The frequency (persistent or pervasive), nature, and severity of the conduct.
  - Whether the conduct was physically threatening.
  - Whether the conduct was humiliating.
  - The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.
  - The age and sex of the alleged harasser and the subject or subjects of the harassment.
  - The size of the school, location of the incidents, and context in which they occurred.

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
  - The effect on the alleged victim’s mental or emotional state.
  - Whether the conduct was directed at more than one person.
  - Whether the conduct unreasonably interfered with the alleged victim’s educational or work performance.
  - Whether the statement was an utterance of an epithet which was offensive, or offended by discourtesy or rudeness.
  - Whether the speech or conduct deserves the 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)

- Physical is more likely to be severe without need for repetition: “attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks” (2001 Guidance).
  - Non-consensual sexual intercourse or contact are almost always sufficiently severe.
  - Consider the circumstances: E.g., the ability for victim to escape the harassment.
- Accompanied by threats or violence.

# “PERVASIVE”



- Widespread.
- Openly practiced.
- Well-known among students or employees – reputation of a department 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 pervasiveness variable.
  - Intensity/duration.
- Unreasonable interference.
- 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).

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# “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.

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# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



## Student-based examples

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

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# HOSTILE ENVIRONMENT?



# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



## Teacher-based examples

- Giving a student a back-rub.
- Require students to read *50 Shades of Grey* and give an assignment to compare their own experiences against those from the book.
- Female faculty teacher repeatedly referring to male students as “penises.”
- 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.

# 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.
- 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. He is terrified
- 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?
- What remedies should you provide Joe?
- How do you handle the retaliation issue?
- Should athletics or the coach be involved?
- What other issues do you see?

# PRELIMINARY INQUIRY

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Preliminary Inquiry

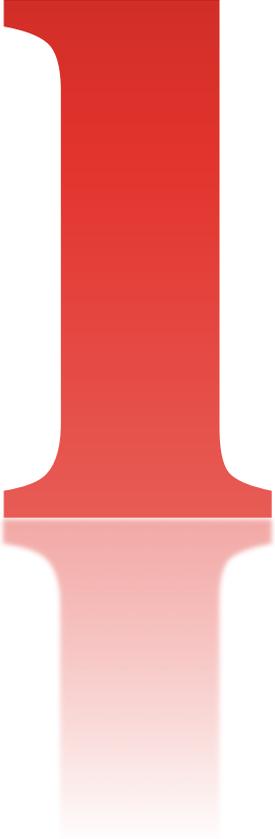
Gatekeeping

Interim Actions

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# PRELIMINARY INQUIRY



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- This is an initial inquiry to determine if a comprehensive investigation is desired or necessary.
  - Checking background, obvious patterns, indicia of predatory, violent, or threatening behavior.
  - Push one Domino™ over at a time.
  - How much involvement does reporting party want?
  - Can we remedy informally or without discipline?
  - Give reporting party as much control as possible in the process.
  - May help to determine if there is reasonable cause to move process forward, and what policy violations should the responding party 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 represents to students or employees.
  - What might be necessary to put an end to it.
- 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, even to an anonymous report.

- As the investigation unfolds, the investigators should determine if there is *reasonable cause* to believe that policy has been violated.
- If that threshold is reached, the investigators should communicate with the coordinator to ensure a notice of allegation is issued.
  - Coordinator must make sure parties have advisor if desired.
    - Clear policy on advisor options and rights should be communicated to parties.
- If investigation cannot 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.

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



- Whether your goal is equity, due process, essential fairness, equal dignity, or a process infused with the humanity of the participants, it is unfair for a responding party to be dragged through a process without substantiating evidence.
- Significant reputational harm can result from allegations of sexual harassment, etc.
- An allegation must be supported by *reasonable cause* to permit its **full** pursuit.
- While it is not common, there are those who would weaponize a Title IX complaint, and we are obligated to protect the integrity of our process from that type of abuse.

# NOTICE OF INVESTIGATION/ALLEGATION



- Prepare and deliver the notice of investigation (and possibly notice of allegation, if appropriate) on the basis of the initial inquiry.
  - Should provide the details of the allegation(s), applicable policies, applicable procedures, etc.
  - Notice of investigation should be shared verbally and sent in writing to all parties.
  - Notice of allegation (charge) should also be shared with all parties.
  - Usually notice is given in advance (minimum of 2-3 days), and proposed regs would limit surprise interviews.

# HOW IS NOTICE OF INVESTIGATION GIVEN TO THE RESPONDING PARTY?



- Who is the responding party?
  - Student.
  - Staff.
  - Teacher.
  - Visitor (e.g., contractor, invitee, etc.).
  - Visitor (e.g., non-affiliated, guest, etc.).
- How is notice typically provided?
  - Written (i.e., electronic and/or paper).
  - Verbal.

- Both parties are allowed to have an advisor
  - All meetings/interviews
  - District advisors
  - Outside advisors
    - Parents
    - Attorneys
    - Union reps
  - Role of advisors
    - Limits of participation, if any?
    - Communication between advisor and advisee
  - How proposed regs (if implemented) affect role of advisors

# INTERIM ACTIONS AND REMEDIES



- Throughout process:
  - Investigate.
  - Stop behavior.
  - Prevent re-occurrence:
    - Consider the effect of “educational” sanctions...typically insufficient for more serious violations
    - Consider what education/training needs to be implemented, changed, etc.
- Remediate impact (often not sanction-based).
- *NOTE: Remember to provide support and resources to reporting and responding parties throughout the process, and don't forget to remedy on behalf of community, not just parties.*

# 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.
- Arranging for the reporting and/or responding party to re-take a course/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/Alternative placement
- Change supervisor.

# INVESTIGATION PROCESS

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# PROCESS OVERVIEW



- The investigation team, in consultation with their supervisors, and/or the Title IX Coordinator, strategizes the investigation.
  - Methodology
  - Order/timeline
  - Goals
    - Prepare preliminary questions but be prepared to deviate
  - Potential obstacles
- Interview all witnesses.
- Gather and assesses all available evidence.
- Write a report.
- Depending on process, make finding/recommendation and sanction (vary by school)

# TITLE IX COORDINATOR OVERSIGHT

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- Role of Title IX Coordinator in Investigation Process
  - Supervisor of Investigation Structure
  - Supervisor of Investigation Process

# TITLE IX COORDINATOR OVERSIGHT



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

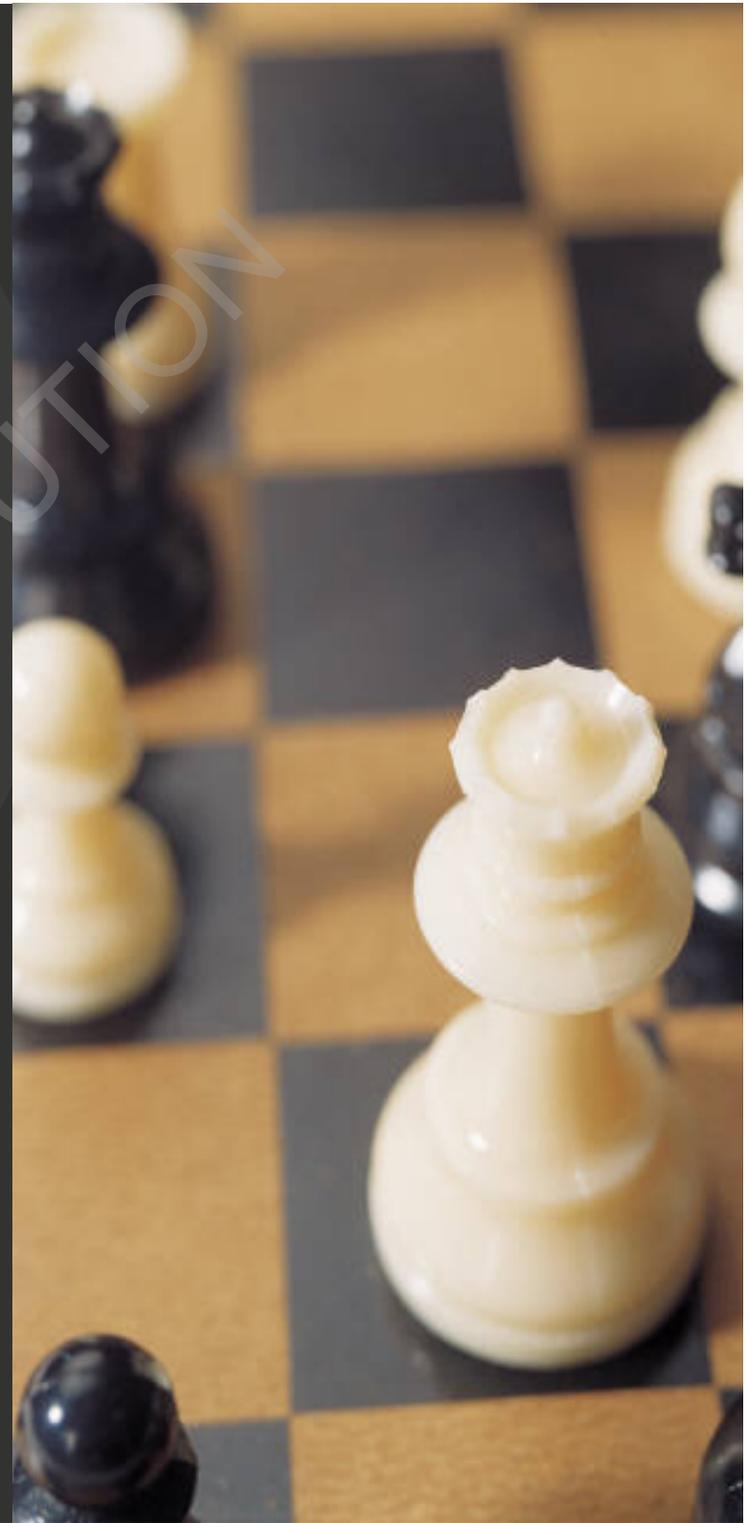
# TITLE IX COORDINATOR OVERSIGHT



- The Title IX Coordinator (or designee) is responsible for:
  - Notice of investigation.
  - Gatekeeping.
  - Determining extent of investigation.
  - Notice of charge/allegation.
  - Notice of hearing.
  - Notice of outcome.
  - Duty to warn.
  - Assurance of remedies.
  - Recordkeeping of all activities.

# BEGINNING THE INVESTIGATION

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# 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, and without unreasonable deviation from the timeline.

# NOTICE TO THE PARTIES



- In a civil rights model, notice has many phases, some or all of which may come to pass (equitably):
  - Notice of investigation and/or initial meeting.
  - Post-gatekeeper phase, notice of allegation (charge).
  - Post-investigation, notice of hearing (if applicable).
  - Updates on status of investigation (ongoing).
  - Notice of outcome and sanctions.
  - Notice of appeal.
  - Notice of final determination.

# STRATEGIZE THE INVESTIGATION



- Common questions to consider:
  - Which process is appropriate?
  - Whom to interview?
  - When/In what order?
  - What information/evidence can be obtained?
  - How and when do we notify the parties and witnesses?
  - Who needs to be aware of the investigation?
  - When and how do we share evidence/information with the parties?

# STRATEGIZE WHEN TO INTERVIEW PARTIES AND WITNESSES



- Parties and witnesses should be interviewed as soon as possible:
  - So that recollections are as fresh and accurate as possible.
  - To secure 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 reporting party.
- Solicit a witness list from the responding party.
- Determine when you are going to question responding party.
- **Suggested default order:**\* Reporting party → Reporting party's witnesses → Neutral witnesses → Responding party's witnesses → Responding party → Any additional witnesses identified by Responding party → Round 2 → Round 3.

\*Every case is different

# EVIDENCE GATHERING



- Engage in the **active** accumulation of evidence.
- 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.



# EVIDENTIARY THRESHOLD

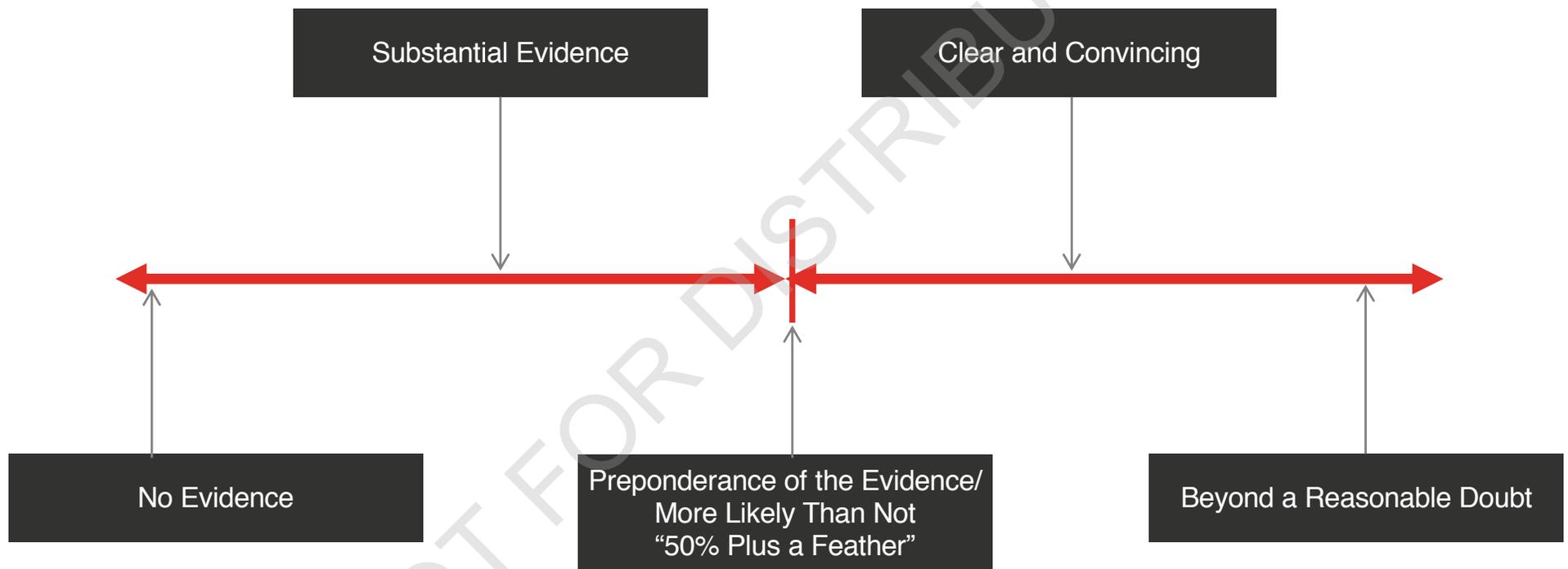


- **Preponderance**
  - Only truly equitable standard
- **Clear and Convincing**
  - Difficult to train, difficult to explain
- **Proposed Regulations**
  - Consider other existing evidentiary thresholds
- Decisions must be made by applying the evidentiary threshold to the evidence gathered, when it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

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



# STANDARD OF PROOF



- 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 preponderance of the evidence (but not at the expense of the evidence)
  - Must be able to articulate rationale
  - Is a function of credible, probative, and articulable evidence

- 5 days to resolution is a good guideline for 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 involvement?
  - What about Summer break? 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
- Parties and witnesses should be interviewed as soon as possible:
  - So that recollections are as fresh and accurate as possible.
  - To secure necessary remedies as soon as possible.
- Document and communicate unavoidable delays.
- Provide notice of extensions.

- 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 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
  - Attorneys and judge
  - Media

# INVESTIGATION RECORDS



- “The File”:
  - The responding party’s file.
  - The reporting party’s file.
  - The investigation file (including investigation report).
  - Personal case notes.
  - Witness education records.
- Understand court processes and your role in it.

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- Assess resources and options
  - Team of investigators (One lead asking questions, other taking notes?)
  - Audio recording
    - Transcription services
  - Verification by interviewees
    - Sooner after the interview the better
    - Necessary to have interviewees review/verify even if record/transcribe interviews?

# CASE STUDY

- Sexting

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# CASE STUDY: SEXTING



- You have just learned that police arrested three students at the middle school between the ages of 12 and 15 for creating and distributing pornographic images of themselves online, via text message, and snapchat. The images and videos are of the creators themselves (i.e.: nude selfie pictures and videos).
- The local news media just picked up the story and is clamoring for a comment. Parents have also started calling the school and district offices demanding to know what is being done to protect their children.

# CASE STUDY: SEXTING



- The criminal charges are misdemeanors and felonies for child pornography creation and distribution. Police inform the school that they received reports that nude photos of students from the middle school and the high school were shown by the three students to others at the school and were distributed via text and email.
- All the students involved are minors and many of the pictures and videos had the location setting on their phones activated, which means people could have allowed predators to locate the homes of those in the pictures and videos.

# CASE STUDY: SEXTING



- How does your investigation proceed in light of the criminal charges?
- What remedies should you provide and to whom?
- How do you address the PR issues?
- What communication should you have with parents?
- What is an appropriate sanction if the students are found responsible?
- Other next steps?

# QUESTIONING SKILLS



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# QUESTIONING SKILLS



- 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
    - Three sides to every story (or more).
- 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.

# QUESTIONING SKILLS (CONT.)



- 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 (CONT.)



- 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), c)
- Avoid gratuitous use of leading questions – (Isn't it the case that...?)

# QUESTIONING SKILLS (CONT.)



- Have a purpose for asking every question.
- Be sure to ask a question, not make a speech.
- Ask questions about the allegations and the evidence and the policy elements.
- Don't be accusing or argumentative.
- If your skepticism shows, make sure you intend it to show, otherwise keep your cards close to your vest.
- Don't make questions too long or confusing.
- If you ask a bad question, take it back.

# QUESTIONING SKILLS (CONT.)



- Listen carefully and adapt follow-up questions.
- 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.
- Do not moralize.
- 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."
- Do not ask questions that invite a reporting party to second-guess their actions, as this may be perceived as blaming.

# QUESTIONING EXERCISE



## Please critique the following questions:

- What effect did your actions (or behavior) have on others? On the community? On yourself?
- Explain what you hoped to accomplish through your actions.
- Why did you choose to drink so much if you knew it was risky?
- 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?

# QUESTIONING EXERCISE



## Please critique the following questions:

- What other options were there for you in this situation?
- What was the purpose of your behavior?
- How would you feel if others were engaged in comparable behavior?
- What would be the consequences to the community if everyone engaged in comparable behavior?
- How does your responsibility for living within community standards apply to your actions in this situation?
- How might you react if such a situation were to come up again?

# INTERVIEWING SKILLS

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**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 investigation 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).
- Consider providing parties with your non-retaliation provision/policy.
- Keep copies of the applicable policies and procedures in the investigation file.

# DEMEANOR OF INVESTIGATOR(S)



- Work to establish a baseline of relaxed conversation.
- Maintain good eye contact.
- Listen carefully to the answers to your questions.
  - Avoid writing while party/witness is talking, if possible.
  - Do not be thinking about your next question while party/witness is talking.
- Ask questions in a straightforward, non-accusatory manner.
- Nod affirmatively and use active listening skills to prompt or keep party/witness talking.

# SETTING UP REASONABLE EXPECTATIONS



- People who conduct investigations with skill rest secure in the knowledge that all those involved, including witnesses, were treated objectively and fairly.
- Be sure reporting and responding parties understand parameters of the policy, what it does and does not cover, how the process plays out, and what the process can and cannot accomplish.
- Provide ample opportunity for the reporting party and the responding party to ask questions.
- Keep the reporting party in the loop as to exactly when notice will be given to the responding party.

- General Interview Skills:
  - Outline your interview questions in advance, but be flexible.
  - Plan the order of interviews; may be beneficial to interview responding party last.
  - Most beneficial to conduct interviews in person.
  - Interviews should be conducted in a neutral, quiet, and private setting with a minimal or no likelihood of interruptions.
  - Explain process, your role as a neutral fact-finder, and applicable privacy protections and limitations.

# INTERVIEW SKILLS (CONT.)



- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out because they are afraid of getting into trouble for alcohol/drug use, etc.; Explain amnesty policy.
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Ascertain who the individual is and their relation to the other parties in the case.
- Document whether individual is cooperative or resistant.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.

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.

# FEEDBACK TO WITNESSES



- Witnesses may ask or say:
  - Am I being investigated?
  - What are you really investigating?
  - How will you use the information you are given?
  - Is it confidential?
  - Will I get into trouble by giving you this information?
  - I don't want to cooperate.
  - Do I need my parents/lawyer present during interview?
- Anticipating these questions and/or covering them in advance can help to ensure that you establish good rapport, which should help you get the truth.

# 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.
- 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.

# CASE STUDY: IVAN & JUANITA



- 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 did this to hurt and embarrass her.

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

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# 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?
- Are there types of evidence you would want to look for?

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# 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 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 brothers. 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.”
- 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.

# CASE STUDY: IVAN & JUANITA



- 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.
- 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 locked in his bedroom, and he signs out. No one else knows his 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?
- Is Ivan responsible for creating a hostile educational environment for Juanita?

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# 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 roughly equivalent to the length of the interview for post-interview teamwork, review of notes with your co-investigator and to prepare for the next interview.

# INTERVIEWING THE REPORTING PARTY



- Acknowledge difficulty of reporting and thank them.
- Acknowledge that they may have told this story multiple times already.
- Explain why you are taking notes and/or ask for permission to record, if applicable.
- Provide a copy of your policies and procedures.
- Ask them to share a complete account of what occurred.
  - Have them give full narrative without asking questions, then drill down on details.
- Ask about outcry witnesses and possible documentation such as blogs or journals.
  - What will witnesses likely say/know?

# INTERVIEWING THE REPORTING PARTY (CONT.)



- Ask about those they spoke to and told about the incident.
- Ask what the reporting party's motivation is for reporting and what that individual hopes to see as a result.
- Find out if the individual's academics and/or work have been affected.
- Ask how this has affected the reporting party emotionally and/or physically.
- Advise that the allegations will be discussed with the responding party and witnesses.
- Let the reporting party know next steps and when you will be in touch.

- Considerations for Interim Actions:
  - Notify of their option to report to police; institution will help facilitate report.
  - Emotional, academic, and/or physical impact.
  - Counseling and advocacy options (on and off school grounds and/or campus).
  - Retaliation – prohibition and to whom to report.
  - No-contact orders.
  - Course adjustments.
  - Housing adjustments.
  - Etc.

# INTERVIEWING THE RESPONDING PARTY



- Acknowledge difficulty of the situation and thank the responding party for meeting with you.
- Provide a copy of your policies and procedures.
- Ask the person to share a complete account of what occurred.
- Question the responding party as to the allegations – ask a combination of open-ended and closed-ended questions.
- 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).

# INTERVIEWING THE RESPONDING PARTY (CONT.)



- Provide support and resources throughout the process as needed.
- Let the responding party know next steps and when you will be in touch.
- Discuss counseling options if the individual is not already connected.
- Discuss non-retaliation and any intermediary steps such as no-contact orders, housing moves, and exclusions.
- If interim suspension/action is employed, review the terms and provide a timeframe.
- Encourage the person to maintain privacy of the investigation or 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 behavior, neutrally.
- Ascertain relation to the other parties in the matter.
- Ask questions, and address the need for complete truthfulness.
- Ask for opinions.
- Ask if either party spoke about the incidents after they happened.
  - Did they see any change in behavior?

# INTERVIEWING WITNESSES (CONT.)



- Ask if they have been contacted already by one of the parties.
- Ask if they have made any previous statements, such as to private investigators.
- Ask if there is anything you should know that has not been covered or if there is anyone else they think should be contacted.
- Discuss non-retaliation and give examples.
- Discuss privacy and FERPA guidelines.
- Ask all interviewees to contact you if they remember anything else or want to add to their interview.

# SHARING INFORMATION WITH PARTIES AND WITNESSES DURING INVESTIGATION



- Decide how much information you will share in advance of each interview, and have a rationale for what information will be shared and what will not be shared.
- Explore only those facts that are relevant to the issue at hand.
- Start with broad questions, then move to narrow, more pin-point questions.
- It can be difficult for the responding party to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport building. Be specific in terms of explaining the allegations.

# HELPFUL INVESTIGATION DOCUMENTS

- Developing a timeline of the incident
- Witness lists and flowcharting

# INCIDENT TIMELINE



- Discuss timeline of event/s with all parties/witnesses.
- Obtain as much detail as possible.
- What times can be established from phone calls, email, texts, and receipts.
- Identify any “gaps” and address them – may lead to information not previously shared.
- Timing highly relevant to alcohol/drug consumption.

# INCIDENT TIMELINE (CONT.)



- Timing also highly relevant in cases involving physical evidence such as bruising, bite marks, etc.
- In stalking and/or verbal, online sexual harassment cases, times of communication between parties may be important.
- Establishing a reliable timeline useful when questioning witnesses and when searching for video footage.

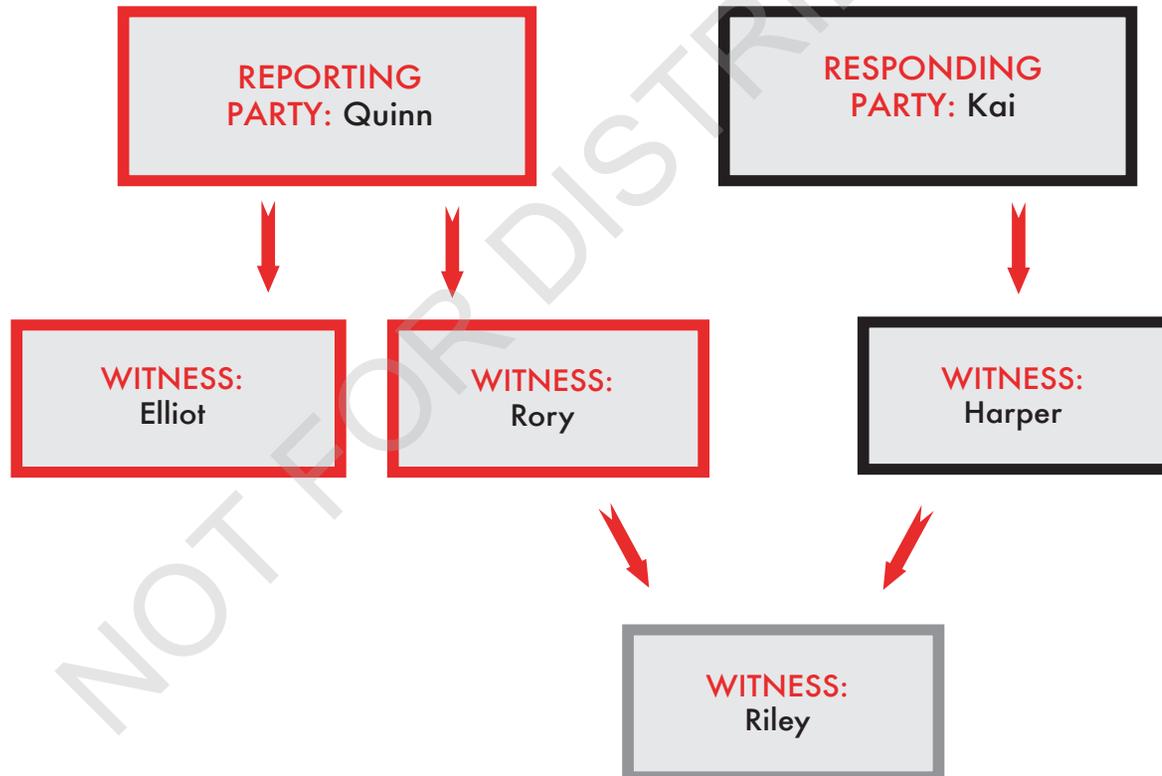
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# WITNESS LIST AND FLOWCHARTING BEST PRACTICES



- Keep freshly updated list of your witnesses as you learn of them.
- Identify which parties or witnesses led you to other witnesses.
- Keep track of whether witnesses are neutral, loyal and biased, or loyal but objective. Include reasoning.
- In complex cases, use a flowchart to track witnesses the reporting party leads you to, the witnesses responding party leads you to, and the witnesses who are neutral.
- Note in the flowchart where witnesses intersect in terms of relationships to each other and/or potential loyalties to parties.

# WITNESS FLOWCHART SAMPLE



# EVIDENCE COLLECTION AND ISSUES OF CONCURRENT CRIMINAL ACTION



- Active accumulation of evidence.
- 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?

# MAKING A FINDING & THE INVESTIGATION REPORT

- Analysis and finding
- Prior acts as evidence
- Who makes the finding?
- Overview of the investigation report
- A Hearing?

# HOW IMPORTANT IS THE CREATION OF AN INVESTIGATION REPORT?



- The investigation report is **THE** comprehensive document of the investigation.
  - Addresses:
    - Reported misconduct
    - Parties involved
    - Interviews conducted (parties & witnesses, any experts)
    - Summary of evidence and information collected
    - Analysis of facts
    - Credibility assessments
  - Provides conclusions and findings

# THE INVESTIGATION REPORT



- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses.
  - Unbiased summary or 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.
    - Remember that the parties have the right to review ALL available evidence prior to a decision/hearing.

# THE INVESTIGATION REPORT



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# INVESTIGATION FILE VS. INVESTIGATION REPORT



- What goes in the file vs. the report is not lockstep
- Report: much more robust
- Consider location – file, report, or appendix?
  - Notes
  - Evidence
- How are files organized?
- Other considerations
  - Personal/Private Notes
  - FERPA – education record
  - Employment record privacy

# INVESTIGATION FILE VS. INVESTIGATION REPORT

- Location of investigation file and investigation report?
  - Students? Employees?
- Relevant evidence vs. irrelevant evidence
  - Proposed Regs. may influence this, including disclosure to parties
- Open Records Laws
- Draft Reports
- How to provide information to parties
  - Evidence
  - Report
  - *How, When, Where, What*



# THE INVESTIGATION REPORT: CONTENT OVERVIEW



- I. Introduction
- II. Brief Summary Overview
- III. Investigation History
- IV. Parties & Witnesses
- V. Jurisdiction
- VI. Allegations
- VII. Applicable Policies
- VIII. Evidentiary Standard

# THE INVESTIGATION REPORT: CONTENT OVERVIEW



- IX.** List of Relevant Evidence & Witness Statements
- X.** Summary of Relevant Evidence & Witness Statements
- XI.** Discussion and Analysis
- XII.** Credibility Analysis
- XIII.** Findings
- XIV.** Conclusion
- XV.** Appendix

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# SAMPLE REPORT INTRODUCTION: HOW TO BEGIN



- DATE OF REPORT
- INTRODUCTION
  - This report addresses allegations of the [Policy Name] of the [School Name]. [Name of investigator] conducted the investigation into these allegations.
- 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.
- PARTIES & WITNESSES
  - Reporting party
  - Responding party
  - Witness 1
  - Witness 2

# 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 EXAMPLE



- The alleged Title IX-based 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 Title IX-based 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 EXAMPLE



- Kirby is alleged to have 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 clearly within the School's Title IX jurisdiction.

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## 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.

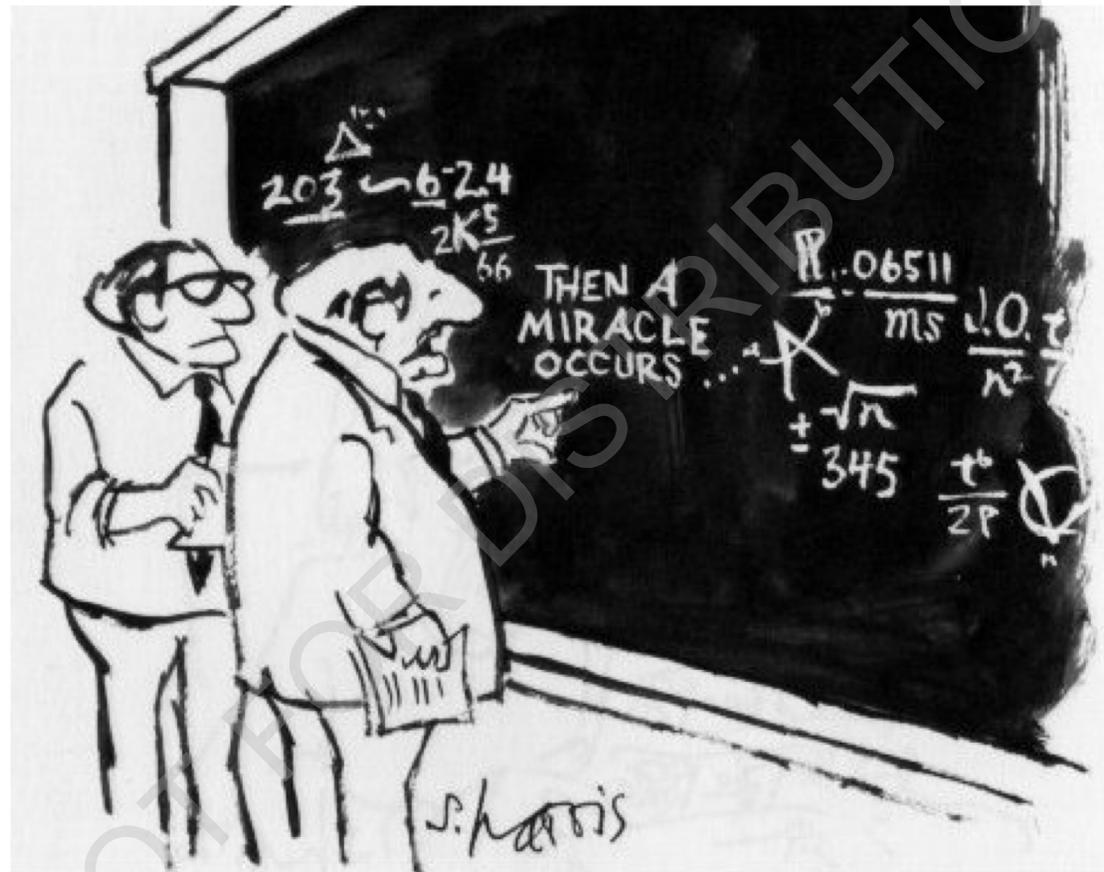
## Overview of the Applicable Policies

- Provide reference to the applicable policy(ies) that correspond with the allegations.
- Policy references should match those on the notice of investigation.

# 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 articulates the following elements required to establish a policy violation:
  - **Sexual Harassment**
    - Unwelcome,
    - Sexual, sex-based and/or gender-based,
    - Verbal, written, online and/or physical conduct.
    - Hostile Environment
      - Severe or Persistent or Pervasive AND
      - Objectively offensive AND
      - A limitation or deprivation of educational or employment participation or benefits



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

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

# ANALYSIS AND FINDING



- Review the policies that apply.
- List the evidence and what it shows (relevance).
- Evaluate evidence/assess credibility of evidence and witness statements as factual, opinion-based, or circumstantial.
- Make determination or recommendation based on preponderance of the evidence, whether a policy violation is more likely than not.
- Cite concrete reasons for the conclusion(s) in written report.
- Refer to appropriate administrator to make a finding and determine appropriate sanction(s)

# UNDERSTANDING EVIDENCE



- You may consider and 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 objects).
  - 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).

# 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 included.
  - 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.

# 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 Skype-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, though a few did not and the draft notes then became finalized.

# EXAMPLE: SOLICITING WITNESSES FROM PARTIES



- Both/All 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 parties and witnesses also provided a few text message exchanges, photos and other communications.

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# 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.

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# 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 used 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, requiring 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 sexual preferences and kinks;
  - Chris’ statement that a friend of his finds Jimmy “creepy;”
- 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.

# 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.

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# 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 Procedural History/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.

# REVIEW OF REPORT



- Both parties have a right to copy of investigation report prior to finalization/decision
  - This is another significant shift in the field
  - Full review of all evidence prior to decision being made
  - Serves as a check to ensure report is accurate and thorough
  - Enhances “opportunity to be heard”

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# SANCTIONS

- Sanctioning considerations
- Common sanctions
- Sanctioning in sexual misconduct cases

# SANCTIONING CONSIDERATIONS



The sanction must be reasonable and proportionate to the severity of the behavior.

- May consider prior misconduct.
- The role of precedent.
- Use caution when considering attitude, aggravation, mitigation, contrition, etc.
- Should be educational, but safety is primary consideration.
- Remedy for loss or injury to school or persons.
- Compliant with laws and regulations (e.g.: Title IX).
- Should consider the education impact on the parties.

# COMMON STUDENT SANCTIONS



- Warning
- Probation
- Loss of privileges
- Counseling
- No contact
- Limited access to school activities
- Service hours
- Online education
- Parental notification
- Alcohol and drug assessment, and counseling
- Discretionary sanctions
- Alternative Placement
- In-School-Suspension (ISS)
- Out-of-School Suspension (OSS)
- Expulsion

# COMMON EMPLOYEE SANCTIONS



- Warning – verbal; written.
- Probation.
- Performance improvement/management process.
- Training (e.g. sensitivity training).
- Counseling.
- Loss of privileges.
- Reduction in pay.
- Loss of annual raise.
- Discretionary sanctions.
- Loss of supervisory or oversight responsibilities.
- Paid or unpaid leave.
- Suspension.
- Termination.

# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Investigation alone may not be sufficient to overcome a deliberate indifference claim.
- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s).
- What is appropriate?
  - Separation/expulsion.
  - Suspension.
  - Lesser sanctions.
- Engage in strategic education and training as remedies.
- Conduct a risk assessment audit and mitigation process.

# SANCTIONING IN SEXUAL MISCONDUCT CASES (CONT.)



- **Title IX and case law require:**
  - STOP -- Bring an end to the discriminatory conduct.
  - PREVENT -- Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct.
  - REMEDY -- Restore the reporting party as best you can to their pre-deprivation status.
- Can be real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

# CONSIDERATIONS POST-FINDING



- Ensure remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- Take immediate steps to protect reporting parties even before the final outcome of investigation (e.g. no contact orders, etc.).
- Ensure that long-term actions/remedies are equitable.
- Consider restorative justice as part of remedial process.
- Monitor for retaliation; respond immediately to allegations.
- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, industry standards, and state and federal case law.

# SHARING OF OUTCOMES



- Title IX requires institutions to apprise parties of the status of investigations **and findings**.
  - Provide this information in writing
  - This is a shift in the field, but it is here to stay
  - Not truly possible to stop, prevent and remedy without informing BOTH parties of the finding.

# NEUROBIOLOGY OF TRAUMA

- 
- Introduction to Trauma
  - Neurobiological Impact of Trauma
  - Considerations for Interviewing

# MEMORY AND TRAUMA



- Memory is formed in two steps:
  - Encoding: organizing sensory information coming into brain
  - Consolidation: grouping into memories and storing the stimulus
- Trauma can interfere with the encoding and/or the consolidation of memory
- May create fragmented memories
- Inconsistent accounts are common
- Recall can be slow and difficult
- Alcohol may interfere further with memory
- However, sensory information (smell, sound, etc.), may still function properly

# INTERVIEWING CONSIDERATIONS



- A non-linear account, with jumping around and scattered memories is not uncommon
- If alcohol is an additional factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress
- Use open-ended questions where possible
- Don't interrupt or barrage with questions
- Be patient

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- Trauma can negatively impact a reporting party's credibility
- Trauma may help explain:
  - Inconsistencies in a reporting party's statement
  - Lack of linearity in a reporting party's account or statement
  - Reporting party's lack of memory about an incident
  - Memory errors by the reporting party
  - Reporting party's demeanor or affect
  - Reporting party's brief answers, or answers lacking in detail

- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them
  - An assessment of credibility must focus on issues such as the reliability, consistency and believability of the parties
  - If, for example, a reporting party's account is inconsistent or variable, lacking in detail, or has material memory gaps, it typically lacks credibility
  - An understanding of trauma and its impact will provide insight as to why some credibility deficits exist, but a trauma-informed understanding should not materially impact a credibility assessment
- Use caution because actual or perceived trauma may have little or nothing to do with consent

# CONSENT CONSTRUCT

- 
- Force
  - Incapacity
  - Consent

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# 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 relevant age of consent statute

# OVERVIEW OF CONSENT QUESTIONS



1. Was force used by the responding party to obtain sexual access?
2. Was the reporting party incapacitated?
  - a. Did the responding party know, or
  - b. Should they have known that the alleged victim was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the reporting party gave the responding party permission for the specific sexual activity that took place?
4. Is age of parties a consideration?

- Was force used by the individual to obtain sexual access?
- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force
- Types of force to consider:
  - Physical violence: hitting, restraint, pushing, kicking, etc.
  - Threats: anything that gets others to do something they wouldn't ordinarily have done absent the threat

- Types of force to consider (cont.)
  - Intimidation: an implied threat that menaces and/or causes reasonable fear
  - Coercion: the application of an unreasonable amount of pressure for sexual access
    - Consider:
      - Frequency
      - Intensity
      - Duration
      - Isolation

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- 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
  - Blackout ≠ incapacitation, automatically
  - Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how
  - Partial blackout must be assessed as well
- What if the responding party was drunk too?

- First, **was the reporting party incapacitated** at the time of sex?
  - Could the person make rational, reasonable decisions?
  - Could the reporting party appreciate the situation and address it consciously such that any consent was informed –
    - **Knowing who, what, when, where, why, and how**
- Second, **did the responding party know** of the incapacity (fact)?
- Or, **should the responding party have known** from all the circumstances (reasonable person)?

# 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 would 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

# CREATE A TIMELINE



- First must determine by a “more likely than not” standard if the reporting party was incapacitated
  - This inquiry will likely be triggered by statements such as: “The next thing I remembered was.....”  
“I woke up and.....”  
“I don’t remember anything after.....”
  - That is your cue to start a timeline of the events during the incident to make the first-level analysis of whether the reporting party was incapacitated (using a preponderance of the evidence standard)

# TIMELINE CONSTRUCT



- Begin the timeline at the time the incident began, starting at the time the reporting party began consuming alcohol/engaging in recreational drug use. Ask:
  - What were you drinking (e.g., wine, beer, or hard liquor)?
  - How much were you drinking (e.g., shot, 12 oz., or large cup)?
  - How many drinks did you have?
  - Were you using any recreational drugs?
  - When did you eat? What did you eat?
  - Are you on any personal medications?

- Continue the first five questions up until the point in time that reporting party indicates he/she cannot remember anything
- **Note:** If reporting party did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. You will need to ask:
  - Where were you when you were drinking?
  - Did you leave your drink at any time then resume consuming?
  - Did anyone provide drinks for you?

# TIMELINE CONSTRUCT



- You will need to make an assessment if, based on the preponderance of the evidence, the reporting party was more likely than not incapacitated
- If the answer is “No,” then you would proceed to the Consent analysis
- If the answer is “Yes,” then go to part two of your analysis
- Conduct the same timeline for the responding party, superimposed on the reporting party’s timeline

# TIMELINE CONSTRUCT



*You need to determine whether it was reasonable that the responding party knew the reporting party was incapacitated.*

- Determine if responding party knew reporting party previously
- If so, ask if reporting party was acting differently from previous similar situations
- Review what the responding party observed the reporting party consuming (via your timeline)
- Determine if responding party provided any of the alcohol / drugs for the reporting party

# CONSENT



- Consent question: What clear words or actions by the reporting party gave the responding party permission for the specific sexual activity that 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.)
- Always obtain ages of parties to assess whether consent is implicated by nature of age.

# CASE STUDY



- Hugh is a senior and Elizabeth is a sophomore. Hugh comes to a small gathering at Elizabeth's house with some mutual friends 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 are 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 satisfy him orally, hoping they can get to know one another better before engaging in 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. Is this a policy violation?

# 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

# MAKING A FINDING



- Review the institutional policies in play
- Parse the policy
  - Specific findings for each policy and each responding party
- Pose key questions
- Review the evidence and what it shows (relevance)
- Assess credibility of evidence and statements as factual, opinion-based, or circumstantial
- Determine whether it is more likely than not policy has been violated
- Cite concretely the reasons for your conclusions

# SPECIAL TOPICS

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Dual Enrollment

Pregnancy

Bullying and Cyberbullying

Athletics

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# DUAL ENROLLMENT

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# DUAL ENROLLMENT STUDENTS



- Best Practice: Effective coordination between the Title IX Coordinator at the college/university AND the Title IX Coordinator at the high school.
  - What remedies are needed in each setting (if any)?
  - Who should investigate?
  - Who has jurisdiction for purposes of discipline (if any, and if applicable)?
  - For minors: mandated state reporting?

# STUDENTS ENROLLED IN HIGHER ED COURSES: ISSUES FOR K-12



- Jurisdictional Issues:
  - When is a student a “student?”
    - Upon application to the institution?
    - Once admitted to the institution?
    - Once registered for class(es)?
    - Upon matriculation?
  - Governed by institutional policy.
  - Student must be on notice.
- VAWA/Clery Act considerations.
- FERPA rights belong to the student (not the parent/guardian).

# PREGNANT & PARENTING STUDENTS

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# SIGNIFICANT GUIDANCE DOCUMENTS



*“A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.”*

34 C.F.R. 106.40

- June 2007 “Dear Colleague Letter”
- June 2013 DCL on Pregnant and Parenting Students
- Regulatory Language

# PREGNANCY, 504 & TITLE IX – 2007 DCL



- The June 25, 2007 DCL also includes:
  - Information on how to develop programs to support these students;
  - An overview of students’ rights under Title IX; and
  - Guidance on how to share your complaint if you feel your rights are not being met.
- Although the pamphlet is focused on secondary education, the DCL states that “legal principles apply to all recipients of federal financial assistance, including postsecondary education.”

- **June 25, 2013 DCL on pregnancy and parenting students:**
  - Educators must ensure pregnant and parenting students are not discriminated against.
  - Educators must ensure that pregnant and parenting students are fully supported in preparation for graduation and careers.
  - Secondary school administrators, teachers, counselors, and parents must be well-educated on the rights of pregnant and parenting students as provided under Title IX.

## Pregnancy defined

- “Pregnancy and related conditions”:  
A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.”

34 C.F.R. 106.40

## Doctor's Note to Participate

- **“Schools cannot require a pregnant student to produce a doctor’s note in order to stay in school or participate in activities, including interscholastic sports, unless the same requirement to obtain a doctor’s note applies to all students being treated by a doctor.”**
- **“That is, schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; schools should not presume that a pregnant student is unable to attend school or participate in school activities.”**

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 8.

## Physician Certification

- A recipient may require such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation in the normal education program or **activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.**”
- “Thus, for example, a student who has been hospitalized for childbirth must not be required to submit a medical certificate to return to school if a certificate is not required of students who have been hospitalized for other conditions.” (34 C.F.R. 106.40)

## Pregnancy as Temporary Disability

- A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom **in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.”

34 C.F.R. 106.40

## Leave Policies

- In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as **a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.** 34 C.F.R. 106.40

# PREGNANCY, 504 & TITLE IX: OCR GUIDANCE



- “When the student returns to school, **she must be reinstated to the status she held when the leave began**, which should include giving her the opportunity to make up any work missed.”
- “A school may offer the student alternatives to making up missed work, such as:
  - Retaking a semester
  - Taking part in an online course credit recovery program, or
  - Allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave.
- The student should be allowed to choose how to make up the work.”

- **Typical Guidance**

- A pregnant student-athlete's physician should make medical decisions regarding sports participation
- A student-athlete with a pregnancy-related condition must be provided with the same types of modifications provided to other student-athletes to allow continued team participation
- Pregnant student-athlete cannot be harassed due to pregnancy

# BULLYING AND CYBERBULLYING

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# PREVENTION AND REMEDICATION OF BULLYING AND CYBERBULLYING

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- 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



- Cyberbullying is:
  - When an individual is bullied using the Internet, interactive, and digital technologies or mobile phones.
- Those who are electronically engaged can be cyberbullied at any time or location, making the effect of cyberbullying ubiquitous and acute.
- Harassment, hazing, and stalking often are used to encompass cyberstalking or cyberbullying policy.

# PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING



- Policy development.
  - Student Handbook/Code of Conduct.
  - Employee manuals/CBAs.
  - Faculty Handbooks.
- Distribution and dissemination of policy information.
- Early intervention (using your BIT, TAT etc.).
- Training of faculty, staff, and students.

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# TITLE IX & ATHLETICS

- Title IX Requirements
- Oversight of Athletics
- Equal Treatment Regulations



# TITLE IX

40  
YEARS  
OF  
CHANGE  
PAGE 44

# Sports Illustrated

MAY 7, 2012

SL.COM



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 education program or activity receiving Federal financial assistance....”

—JUNE 23, 1972

# A BRIEF HISTORY OF TITLE IX & ATHLETICS, 1972-PRESENT



- **1975:** Memo to Chief State School Officers: Title IX Obligations in Athletics
- **1979:** Policy Interpretation: Title IX and Intercollegiate Athletics (also covers “interscholastic programs”)
- **1996:** Clarification of Intercollegiate Athletics Policy Guidance: the Three-part Test
- **2003:** Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance
- **2008:** Title IX Athletics Three-Part Test
- **2010:** “Dear Colleague” Letter on Three-part Test.

# EQUITY



BIG MAN ON CAMPUS

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“Fairness or justness in the way people are treated; justice according to natural law or right; specifically, freedom from bias or favoritism” ([www.merriam-webster.com](http://www.merriam-webster.com)).

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“Equity encompasses fairness, justice, and most precisely, fairness under the circumstances. Fairness under the circumstances is intended to make someone whole, in this context when sex or gender is the basis for some form of deprivation or discrimination” (2014 ATIXA Whitepaper, p.4).

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# EQUITY DEFINED



- The origin of this misinterpretation may start with an understanding of the words equity and equality. Equity involves fairness and impartiality in which people are treated justly. Equality, on the other hand, involves equal quantities. For example, if you have \$500 and you split it evenly so that one person gets \$250 and the other gets \$250, this is equality. Each person is getting equal amounts of money.
- Title IX legislation, however, does not require male and female fundraising or budgets to match equally dollar for dollar. Rather, it means that the quality of fairness and impartiality must be carried out justly. It is impossible to have equal spending on male and female athletic programs based on the dynamics of the sport as well as the equipment needed to operate. As such, equity is the intent of Title IX as it pertains to sports fundraising and finances.

Source: <https://www.nfhs.org/articles/sports-fundraising-and-gender-equity-clearing-up-the-confusion/>

## 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.

# OVERSIGHT OF ATHLETICS

## GENDER EQUITY: 3-PRONG TEST (1979)



- Effective accommodation of interests and abilities:
  - Part 1:** Opportunities for males and females substantially proportionate to their respective enrollments; OR
  - Part 2:** Where one sex has been underrepresented, a history and continuing practice of program expansion responsive to the developing interests and abilities of that sex; OR
  - Part 3:** Where one sex is underrepresented and cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program.

# EQUAL TREATMENT REGULATIONS



## *Equal opportunity:*

- A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the director will consider, among other factors:
  - 1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
  - 2) The provision of equipment and supplies;
  - 3) Scheduling of games and practice time;
  - 4) Travel and per diem allowance;

# EQUAL TREATMENT REGULATIONS



## *Equal opportunity (cont.):*

- 5) Opportunity to receive coaching and academic tutoring;
- 6) Assignment and compensation of coaches and tutors;
- 7) Provision of locker rooms, practice, and competitive facilities;
- 8) Provision of medical and training facilities and services;
- 9) Provision of housing and dining facilities and services; and
- 10) Publicity.

# CASE STUDY: DONATIONS, FUNDRAISING AND EXPENDITURES



- Jose, a former high school football standout, wants to donate \$50,000 to his alma mater's football team. He is determined that the money be used only for the football team and wants to also provide new cleats to the entire football team.
  - What are the Title IX issues?
  - Can the school/district accept the donation?
  - What are the school/district's options?

# CASE STUDY: DONATIONS, FUNDRAISING AND EXPENDITURES



- “Therefore, when an athletic director is placed in an awkward position due to the requests from stakeholders of the school’s athletic programs, there are three key tips to help facilitate a reasonable solution.
  1. Advise the stakeholder of the intent of Title IX law and urge the individual to permit the gift to be used in a nondiscriminatory fashion that benefits both genders.
  2. Create a policy where all outside donations are deposited into a unified athletic fund for all teams instead of those funds being given directly to a specific team of one gender.
  3. Accept the gift and negotiate with the stakeholder a plan to publicize a challenge or matching gift to the community at large.”

<https://www.nfhs.org/articles/sports-fundraising-and-gender-equity-clearing-up-the-confusion/>

# CASE STUDY: DONATIONS, FUNDRAISING AND EXPENDITURES



- The women's softball team and the women's volleyball team just purchased new uniforms and all new equipment. The men's baseball team uniforms remain in good condition though they are two years old and are of similar quality. The men's basketball uniforms, however, are ragged. The women's basketball uniforms remain in good condition.
  - What are the Title IX issues?
  - How would this be analyzed under Title IX?
  - What are the school/district's options?

# CASE STUDY: DONATIONS, FUNDRAISING AND EXPENDITURES



- The School holds a fundraiser pep rally in the school's gym. The band plays a few numbers, the cheerleaders perform and engage the crowd throughout the rally and the Principal gives a speech. Each of the teams are recognized at the rally and the women's softball team is in charge of concessions. At the conclusion of the rally, all the money raised goes to the men's basketball team.
  - What are the Title IX issues?
  - How would this be analyzed under Title IX?
  - What are the school/district's options?

# CASE STUDY: GENDER IDENTITY



- Ren is a transgender female who has been using the restrooms and locker rooms consistent with her gender identity since school started in August. She has been on hormone therapy for 13 months and is recently joined the girl's basketball team.
- During her first away game, the visiting team locker room did not have any privacy facilities in the locker room so Ren changed with the rest of the team. One of the other players, Lyna, screamed when she saw Ren quickly change her underwear to put on a jockstrap before the game.

# CASE STUDY: GENDER IDENTITY



- Ren was very embarrassed and Lyna became hysterical. Both students call their parents while others text parents and friends about what happened. Video of Ren running away from the bathroom is quickly posted on social media and the Principal's and Athletic Director's phones begin ringing off the hook.
- Fox News calls seeking comment and the supporters on both sides of the issue are calling for action
  - What Title IX issues do you see?
  - What could have been done differently?
  - What do you do now?

# QUESTIONS?

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