



PREK-12 TITLE IX ADMINISTRATOR & INVESTIGATOR TRAINING & CERTIFICATION COURSES

HIDOE
Equity Specialists
September 2019

YOUR FACULTY



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COORDINATOR TRAINING AGENDA



Part 1

- I. History & Overview of Title IX
- II. Extensive Review of Title IX Legal Standards and Case Law
 - I. Case Studies
- III. Overview of Title IX Coordinator Responsibilities
- IV. OCR & Title IX
- V. OCR
 - a. Overview
 - b. 2001 OCR Guidance
 - c. *April 4th, 2011 Dear Colleague Letter -WITHDRAWN*
 - d. *2014 Q&A on Title IX and Sexual Violence - WITHDRAWN*
 - e. 2015 DCL, Letter to Coordinators and Resource Guide
 - f. *2016 DCL on Transgender Students - WITHDRAWN*
- VI. Notice, Reporting, Responsible Employees, Confidentiality

COORDINATOR TRAINING AGENDA



Part 2

- I. Is It a IX Matter? – When Does Title IX Apply?
- II. Title IX & Athletics
 - A. Case Studies
 - i. Donations, Fundraising and Expenditures
 - ii. Retaliation
 - iii. Gender Identity and Politics
 - iv. Sexual Assault
- III. Minors and Title IX
- IV. Training Oversight
 - A. Training District and School Constituencies
 - B. ATIXA Training Checklist
- V. Creator and Implementer of Appropriate Policy
- VI. September 2017 Dear Colleague Letter & “Interim Guide”

COORDINATOR TRAINING AGENDA



Part 3

- I. Three Types of Sexual Harassment
- II. Case Studies
 - I. Bullying
 - II. Sexting
- III. Point Person for Complaints
- IV. Prevention and Remediation
 - a. Stalking
 - b. Bullying/Cyberbullying
 - a. Case Study
 - c. Retaliation
- V. Model Policy Framework
 - I. Case Study
- VI. Oversight of Prompt and Equitable Grievance Procedures

COORDINATOR TRAINING AGENDA



Part 4

- I. Assurance of First Amendment Protections
- II. Section 504 Compliance Oversight
- III. Stop, Prevent, and Remedy
- IV. Supervisor of Investigations
- V. Elements of an Investigation
- VI. Due Process

NOT FOR DISTRIBUTION

TITLE IX



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

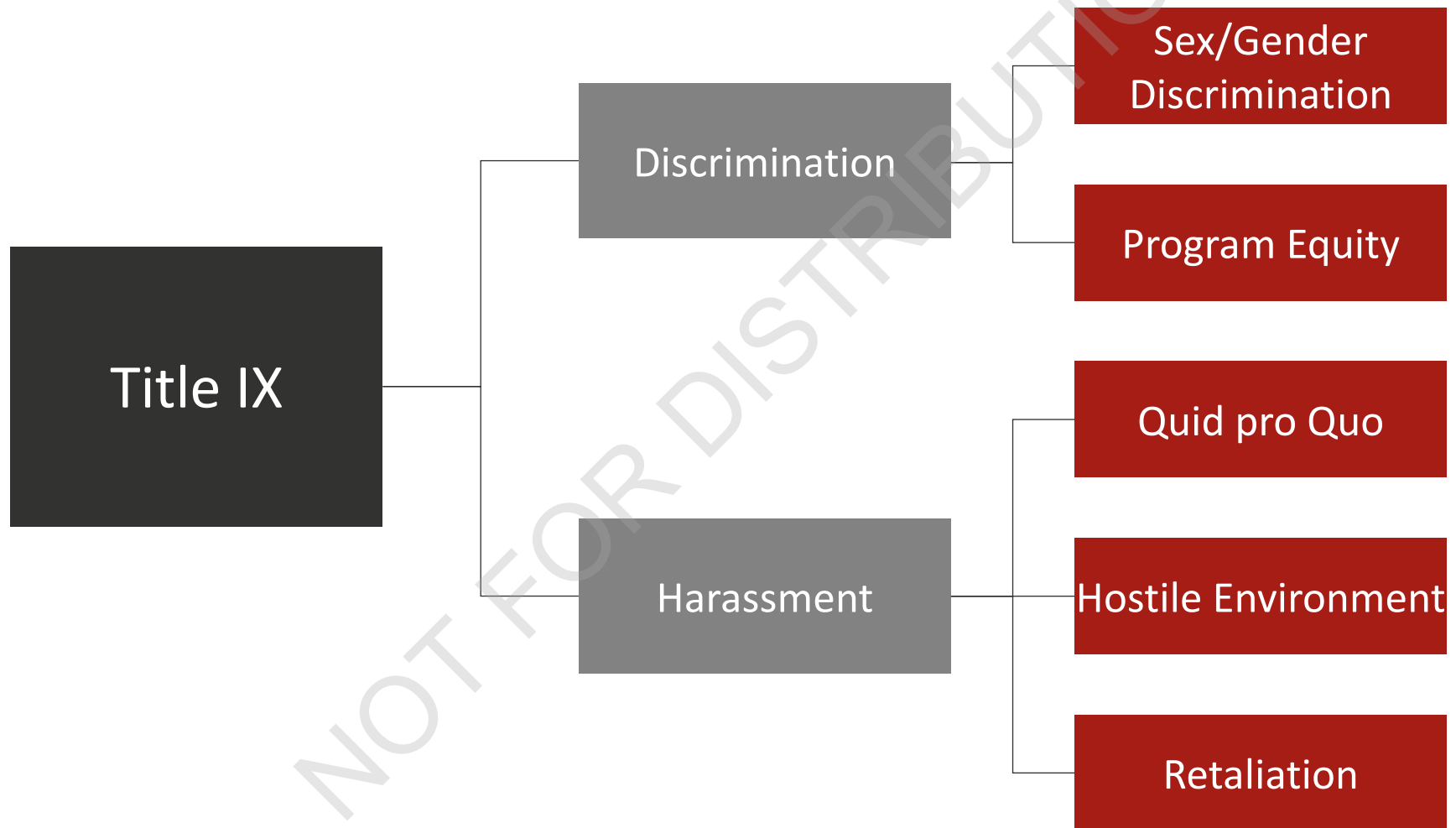
“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”

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.

TITLE IX



KEY TITLE IX-RELATED ISSUES



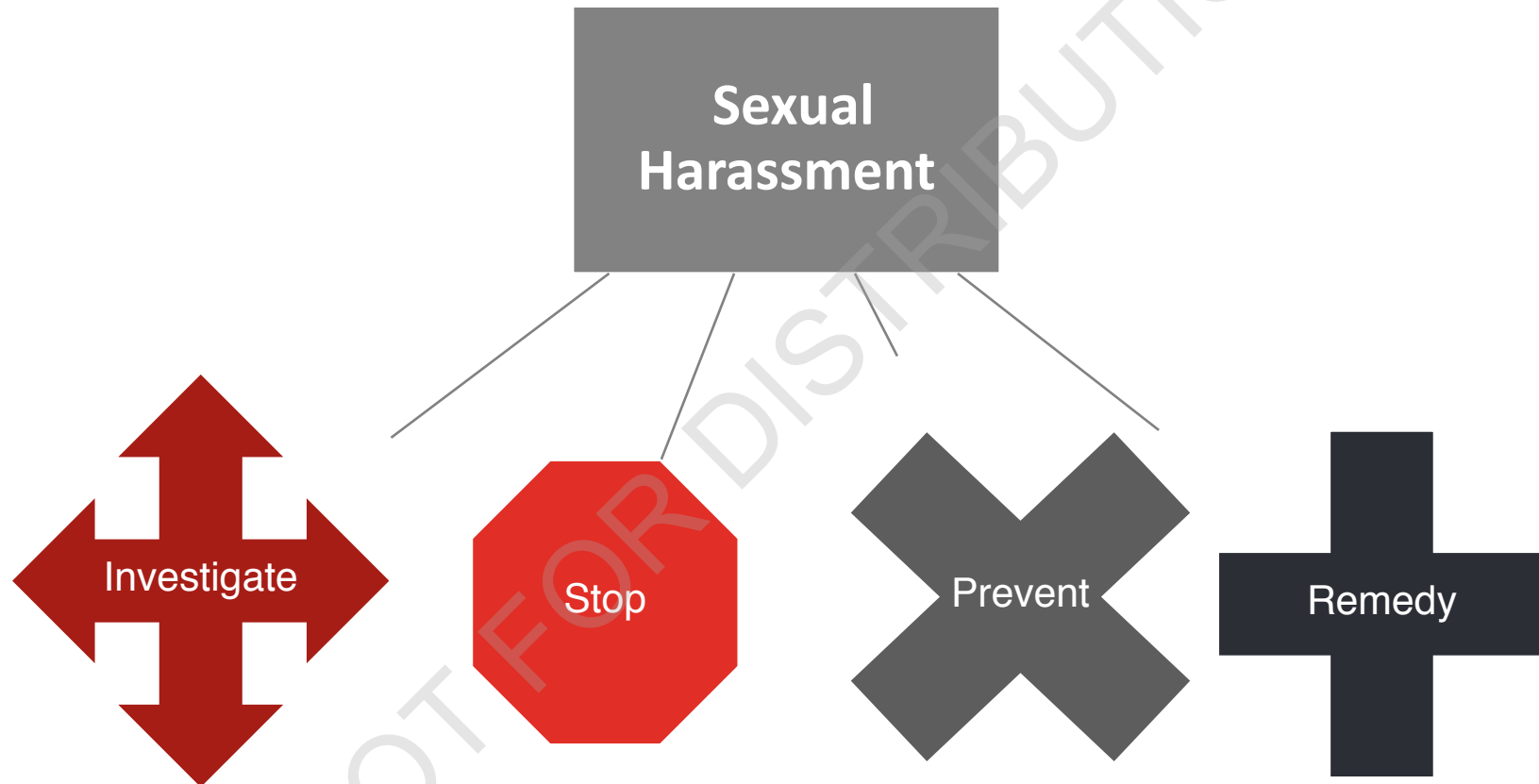
Sex discrimination

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

Sexual Harassment

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

SCHOOL/DISTRICT OBLIGATIONS UNDER TITLE IX



THE IX COMMANDMENTS



Thorough	Reliable	Impartial	Investigation (prompt & fair – VAWA Sec. 304)
Prompt	Effective	Equitable	Process
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

THE TITLE IX COORDINATOR

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 Conduct.
- Some Districts will allocate part-time responsibilities to the coordinator. Others will dedicate a full-time position as recently recommended by OCR.
- We need to see the Title IX coordinator as a profession within the field of civil rights compliance.
- To alleviate the burden on one administrator, Districts and schools should consider identifying multiple deputy coordinators.

THE ROLE OF THE TITLE IX COORDINATOR



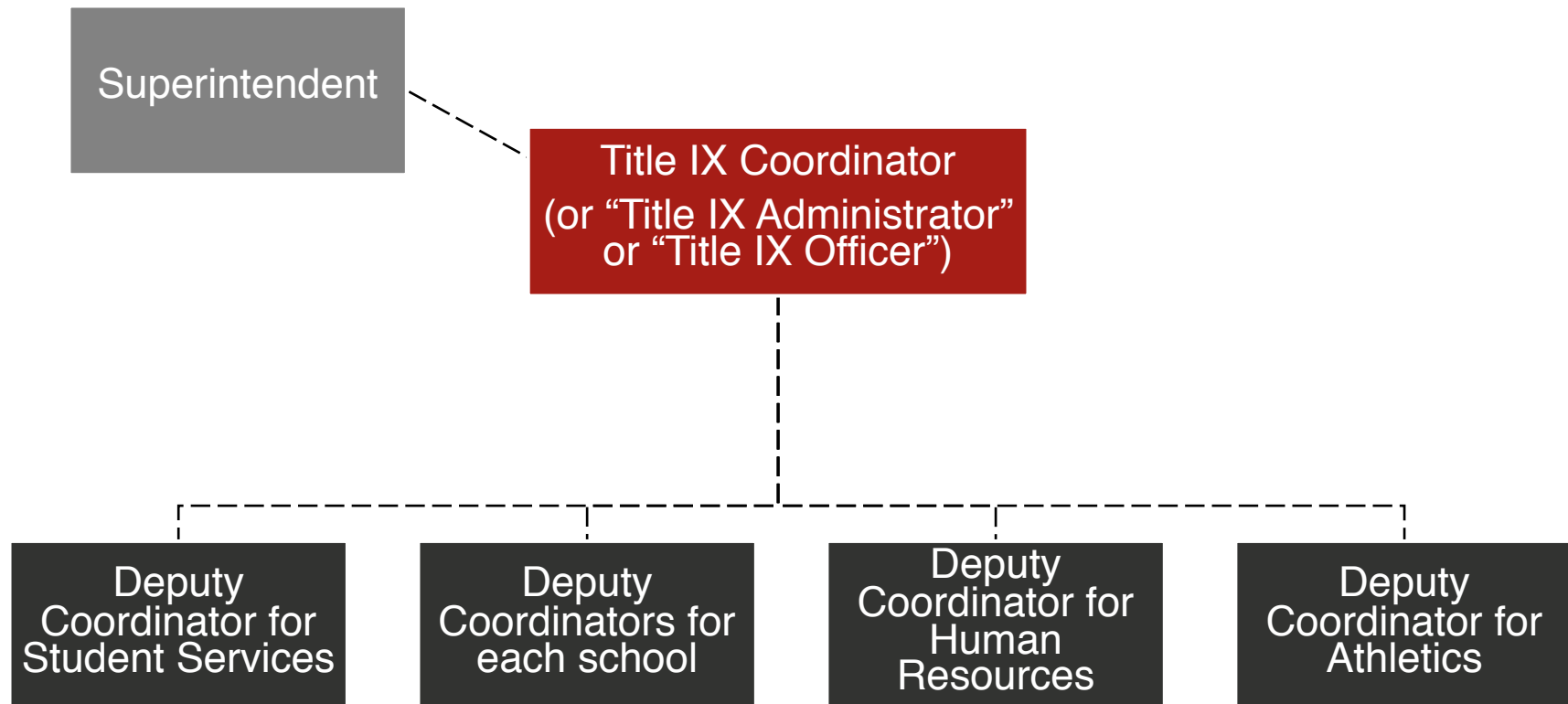
- Prevention and remediation of:
 - Gender Discrimination
 - Sexual Harassment
 - Sexual Assault
 - Stalking
 - Intimate Partner/Relationship Violence
 - Bullying and Cyberbullying
 - Retaliation
- Assurance of compliance with requirement to stop, prevent, remedy.
- Assurance of compliance with final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

SAMPLE TITLE IX TEAM STRUCTURE



POINT PERSON FOR COMPLAINTS



- Assistant Principals, supervisors, the athletic director, and 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.

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



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caglecartoons.com



“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).

“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).

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/>

EQUITY DEFINED



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 STUDIES

- Donations, Fundraising and Expenditures
- Retaliation
- Gender Identity
- Sexual Assault

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.”

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: RETALIATION



- Candace, the women's field hockey coach is really hard on one of the students on the team, Miranda. She repeatedly yells at Miranda and calls her names such as a "fatty," "big jugs," and "thunder thighs." Last night in the midst of another tirade the coach calls the student a "stupid bitch", a "fat whore" and she says she is "so flabby [she] looks pregnant."
- The student reports the incident to the Title IX Coordinator, who meets with the coach to discuss the incident. After a prompt investigation, the coach is placed on probation and has to take anger management and sensitivity training.

CASE STUDY: RETALIATION



- The week following the conclusion of the investigation, Candace benches Miranda, citing her poor play in the previous game. When the team captain challenged this move, Candace benches her, too.
- Now the parents are involved and demand action.
 - What are the Title IX issues?
 - What are the school/district's options?
 - Is this retaliation?

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?

OVERVIEW OF TITLE IX REQUIREMENTS AND RESPONSES

—

IS IT A IX?

When does Title IX apply?

- Jurisdiction
- Covered programs
- Covered individuals
- Subject matter

WHEN DOES TITLE IX APPLY?



Subject Matter

- All unwelcome sex-based and gender-based conduct.
- All unwelcome conduct of a sexual nature.
- All sex discrimination.
- All gender discrimination.
 - Including gender identity discrimination; and
 - Sexual orientation discrimination that implicates gender.
- Pregnant and parenting student (employee?) discrimination.

WHEN DOES TITLE IX APPLY?



Subject Matter

- Hostile environment sexual harassment.
- *Quid Pro Quo*.
- Retaliatory harassment.
- Sexual violence.
- Intimate Partner Violence/Relationship violence.

WHEN DOES TITLE IX APPLY?



Subject Matter

- And, any sex/gender-based:
 - Stalking.
 - Hazing.
 - Bullying.
 - Arson.
 - Vandalism.
 - Theft.
 - And any other policy violation that is sex/gender based that causes a discriminatory effect.

WHEN DOES TITLE IX APPLY?



Subject Matter

- Limitations:
 - Actions/conduct/speech protected by **academic freedom**.
 - Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research.
 - Actions/conduct/speech protected by the **First Amendment**.
 - Merely offensive conduct cannot be disciplined at a public (or CA) school
 - Must be **severe, pervasive (persistent), and objectively offensive**.
 - Subjectively offensive conduct cannot be disciplined at a public (or CA) school unless it is also objectively offensive.
- May still provide support and resources to the responding party and the community as appropriate.

WHEN DOES TITLE IX APPLY?



Jurisdiction

- The *Davis* standard is that Title IX applies and jurisdiction is required when the school/district has:
 - Control over the harasser (discriminator); AND
 - Control over the context of the harassment (discrimination).
- For Sexual Harassment and Discrimination cases.
 - There is an expectation that you should exercise SOME jurisdiction over off-site/off-campus incidents - “Nexus”

WHEN DOES TITLE IX APPLY?



Jurisdiction

- When?
 - Whenever our policy says.
 - “Nexus.”
 - When the behavior occurs on property we own or control.
 - When the behavior occurs in programs/events we sponsor.
 - When the “downstream effects” of purely off-site conduct cause a discriminatory impact at school/on campus.

WHEN DOES TITLE IX APPLY?



Jurisdiction

- If Title IX jurisdiction is not present, the behavior could still violate:
 - School/district harassment/discrimination policies
 - Student Handbook/Conduct policies
 - Employee Handbook/Policies.
 - Professionalism standards

WHEN DOES TITLE IX APPLY?



Jurisdiction

- Jurisdictional Limitations.
 - Geographic.
 - Temporal.
- When is a student a “student”?
- When is an employee and employee?
 - Exempt vs. Non-Exempt Employees

WHEN DOES TITLE IX APPLY?



Covered Programs

- All programs run by a federal funding recipient.
- It does not matter whether some of your programs are explicitly federally funded or not, **all** school/district programs are covered.
- All programs using facilities of the funding recipient
 - (e.g., camps using your fields/stadium).

WHEN DOES TITLE IX APPLY?



Covered Individuals

- Students – In-school/On-campus & online/distance.
- Dual Enrollment students.
- Faculty.
- Staff.
- Campers.
- Subcontractors, vendors.
- Guests/visitors.

(as either reporting or responding party)

WHEN DOES TITLE IX APPLY?



- If Responding Party is a Third-Party, the school/district lacks disciplinary jurisdiction
 - Employee of an outside company (e.g.: vendor, construction worker, etc.)
 - Guest or invitee
 - Prospective student
 - Former Student
 - Former Employee
 - Student athlete from another school/district

WHEN DOES TITLE IX APPLY?

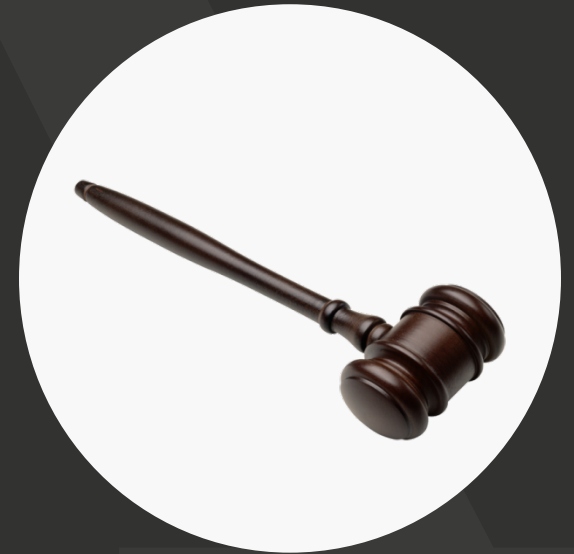


- Examples where school/district lacks disciplinary jurisdiction
 - A student is sexually harassed by a student from another school/district
 - A student withdraws, or an employee resigns in the midst of an investigation
- School/district must still
 - Provide support and resources to the responding party and the community
 - Determine if there are patterns or school/district variables that contributed to the alleged incident
 - Take what action it can (e.g.: trespass the person)



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).



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.: NY’s “Enough is Enough” law)
- 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

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 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)



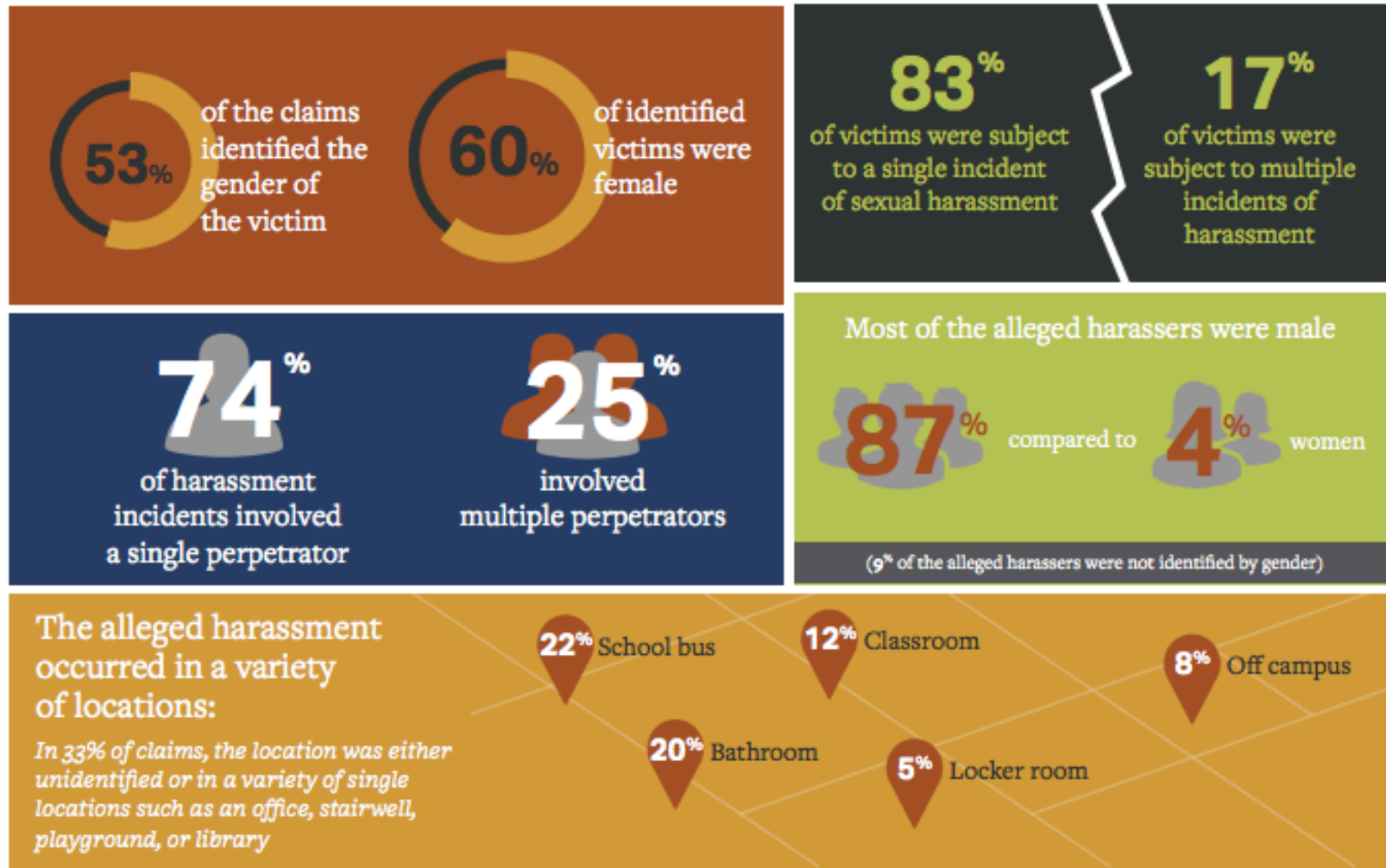
- In May 1993, principal told Davis's mother, "I guess I'll have to threaten him a little harder"; male student not disciplined.
- Davis's grades declined and her father found a suicide note his daughter had written; Davis told her mother she "didn't know how much longer she could keep [the male student]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

TRENDS IN LITIGATION



Source: <https://www.ue.org/uploadedFiles/Title%20IX%20and%20Sexual%20Harassment%20in%20K-12%20Public%20Schools.pdf>

WHAT'S NEXT FOR TITLE IX LITIGATION?



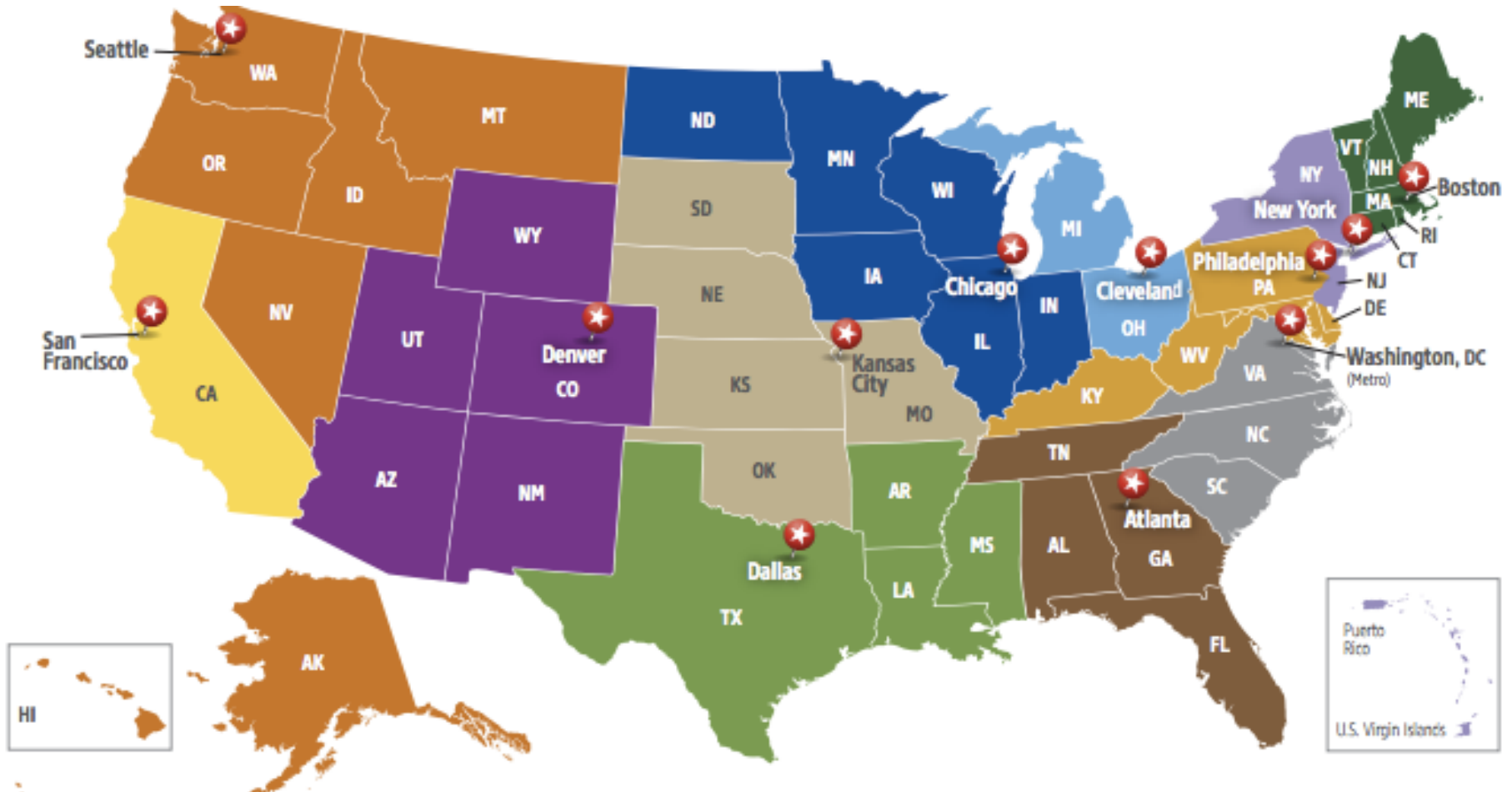
- Title IX increasingly viewed as a viable cause of action.
- Increase in lawsuits by the accused.
- Negligence-based claims.
- Due process-based claims.
- Impact of OCR's Interim Guide
- Breach of contract.
- Good faith and fair dealing.
- Shifting view of what constitutes "notice."
- Impact of VAWA 2013 – Section 304.
- Hospitals and Title IX
- Pending state and federal legislation.

OCR & TITLE IX

- OCR's role
 - Regional offices
 - Enforcement mechanisms
 - OCR complaints
- OCR process Civil lawsuits v. administrative actions



OCR REGIONAL OFFICES



OCR ENFORCEMENT MECHANISMS



- **Complaints**
 - Filed by an individual, a representative, or a group.
- **Compliance Reviews**
 - OCR targets resources on class-wide compliance problems that appear particularly acute.
- **Technical Assistance**
 - To help schools/districts, students, and parents understand their rights and responsibilities.

OCR PROCESS ALTERNATIVES



- **Early Complaint Resolution (ECR)**
 - A form of alternative dispute resolution facilitated by OCR.
 - Reporting party and recipient voluntarily participate in the resolution of the complaint.
- **Investigation and Voluntary Resolution (“302 Letter”)**
 - At any point before the conclusion of an investigation, a recipient may express to OCR that it is interested in resolving the complaint through a voluntary resolution agreement.
- **Investigation and Findings (“303 Letter”)**
 - Compliance determination; agreement if non-compliance.

A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- OCR Guidance
 - 1997 Guidance → 2001 Revised Sexual Harassment Guidance.
 - 2011 Dear Colleague Letter (The “DCL”).*
 - Questions and Answers on Title IX and Sexual Violence (April 2014).*
 - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide.
 - 2016 Guidance on Transgender Students.*
 - 2017 Interim Guide: Q&A on Campus Sexual Violence.
 - ***2018 Proposed Regulations***

RECENT OCR TITLE IX RESOLUTIONS



- Shift in OCR's approach to complaints
 - OCR is resolving cases at a much more rapid rate under the Trump administration than under the Obama administration.
 - Less all-encompassing investigations.
 - Resolving far more by early complaint resolution, administrative closure and insufficient evidence.
 - Continues to take complaints at a fairly rapid rate.
- OCR is far less transparent than they have been previously
 - Not announcing all investigations
 - Not publishing 302 or 303 letters

CIVIL LAW SUITS V. ADMINISTRATIVE ACTION



Lawsuit

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

Administrative Action

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

KEY TITLE IX OCR GUIDANCE

- 2001 Revised Sexual Harassment Guidance
- 2015 Dear Colleague Letter and Resource Guide

2001 REVISED SEXUAL HARASSMENT GUIDANCE



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

2001 REVISED SEXUAL HARASSMENT GUIDANCE



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

2001 REVISED SEXUAL HARASSMENT GUIDANCE



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

2015 LETTER TO TITLE IX COORDINATORS



- Thanks coordinators for their service and efforts.
- Stresses the centrality and import of the Title IX coordinator's work and responsibilities.
 - “you must have the full support of your institution.”
- Introduces the April 2015 Dear Colleague Letter to superintendents and presidents.
- Introduces the Title IX Resource Guide.

2015 DCL: KEY TITLE IX COORDINATOR CONSTRUCTS



- Independence
 - should report to senior leadership (e.g., president or superintendent).
 - Avoid conflicts of interest.
- Full-time?
 - “It is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution.”
- Multiple/Deputies
 - Must have “one lead Title IX coordinator who has ultimate oversight responsibility.”

- Responsibility and Authority
 - Notified of ALL Title IX-related reports and complaints.
 - Coordinate all responses to complaints.
 - Monitor all outcomes.
 - Identify and address patterns.
 - Assess school/district climate.
 - May determine outcome or school/district response to complaint.
 - Must be protected from retaliation.

- Visibility
 - Notice of non-discrimination with Title IX and coordinator information posted and included in virtually all publications, materials, and websites.
 - Encourages Title IX-specific website.

- Training
 - Schools/districts must ensure coordinators are well-trained and up-to-date on all responsibilities and all applicable laws, policies, guidance, regulations, school/district policies, and procedures.

TITLE IX RESOURCE GUIDE (2015)



- Topics addressed (cont.)
 - Key Title IX issues:
 - Recruitment, admissions, and counseling.
 - Financial assistance.
 - Athletics.
 - Sex-based harassment.
 - Pregnant and parenting students.
 - Discipline.
 - Single-sex education.
 - Employment.
 - Retaliation.
 - Information collection and reporting.

OTHER GUIDANCE REGARDING SEXUAL HARASSMENT & VIOLENCE



- OCR Resolution Agreements.
- October 29, 2010 – Bullying.
- January 25, 2013 – Athletics & ADA.
- April 24, 2013 – Retaliation.
- June 25, 2013 – Pregnancy.
- May 13, 2016 – Title IX and Transgender Students.*
- DOJ Title IX Legal Manual.
- *Proposed Regulations (covered in detail later)*

CASE STUDY: SEXUAL ASSAULT



- [Jane Doe] is not a Steubenville High student; she attended a smaller, religion-based school, where she was an honor student and an athlete.
- At the parties, the [Jane Doe] had so much to drink that she was unable to recall much from that night, and nothing past midnight, the police said. The girl began drinking early on, according to an account that the police pieced together from witnesses, including two of the three Steubenville High athletes who testified in court in October. By 10 or 10:30 that night, it was clear that the dark-haired teenager was drunk because she was stumbling and slurring her words, witnesses testified.

Source: New York Times, "Rape Case Unfolds on Web and Splits City", Dec. 16, 2012

CASE STUDY: SEXUAL ASSAULT



- [Jane Doe] woke up long enough to vomit in the street, a witness said, and she remained there alone for several minutes with her top off. Another witness said [two football players] Mays and Richmond were holding her hair back.
- Afterward, they headed to the home of one football player who has now become a witness for the prosecution. That player told the police that he was in the back seat of his Volkswagen Jetta with Mays and the girl when Mays proceeded to flash the [Jane Doe]’s breasts and penetrate her with his fingers, while the player videotaped it on his phone. The player, who shared the video with at least one person, testified that he videotaped Mays and the girl “because he was being stupid, not making the right choices.” He said he later deleted the recording.

Source: New York Times, “Rape Case Unfolds on Web and Splits City”, Dec. 16, 2012

CASE STUDY: SEXUAL ASSAULT



- [Jane Doe] “was just sitting there, not really doing anything,” the player testified. “She was kind of talking, but I couldn’t make out the words that she was saying.”
- At that third party, the girl could not walk on her own and vomited several times before toppling onto her side, several witnesses testified. Mays then tried to coerce the girl into giving him oral sex, but the girl was unresponsive, according to the player who videotaped Mays and the girl.
- The player said he did not try to stop it because “at the time, no one really saw it as being forceful.”
- At one point, [Jane Doe] was on the ground, naked, unmoving and silent, according to two witnesses who testified. Mays, they said, had exposed himself while he was right next to her.
- Richmond was behind her, with his hands between her legs, penetrating her with his fingers, a witness said.

Source: New York Times, “Rape Case Unfolds on Web and Splits City”, Dec. 16, 2012

CASE STUDY: SEXUAL ASSAULT



- “I tried to tell Trent to stop it,” another athlete, who was Mays’s best friend, testified. “You know, I told him, ‘Just wait — wait till she wakes up if you’re going to do any of this stuff. Don’t do anything you’re going to regret.’ ”
- He said Mays answered: “It’s all right. Don’t worry.”
- That boy took a photograph of what Mays and Richmond were doing to [Jane Doe]. He explained in court how he wanted her to know what had happened to her, but he deleted it from his phone, he testified, after showing it to several people.
- The girl slept on a couch in the basement of that home that night, with Mays alongside her before he took a spot on the floor.
- When she awoke, she was unaware of what had happened to her, she has told her parents and the police. But by then, the story of her night was already unfolding on the Internet, on Twitter and via text messages. Compromising and explicit photographs of her were posted and shared.

CASE STUDY: SEXUAL ASSAULT



- What are the possible policy violations?
- What issues of jurisdiction arise?
- How should the Coach and the Athletic Department respond?
- How should the high school respond? The District?
- Are there others besides Mays and Richmond who have violated your policies?
- How do you deal with the fact that Jane Doe was drinking and is underage?
- What other concerns or questions do you have about how to proceed?

Source: New York Times, "Rape Case Unfolds on Web and Splits City", Dec. 16, 2012

GROUP DISCUSSION



The Role of the SRO and Law Enforcement

FROM THE HEADLINES



- Officials at Damascus High School in suburban Maryland waited more than 12 hours to tell police about credible allegations that several junior-varsity football players pinned a teammate in a locker room, pulled his pants down and sexually assaulted him with a broomstick, interviews and documents show.
- The school officials held off despite discussing among themselves in a group text message on Oct. 31...
- Instead of calling police, they launched their own inquiry and on Nov. 1, plucked students one-by-one from class as they questioned suspects, learned the names of three more victims and then took statements from those boys.
- None of the victims was sent for medical care. All went back to classes without their parents being called.

Source: <https://www.baltimoresun.com/news/maryland/crime/bs-md-damascus-rape-tick-tock-20190330-story.html>

FROM THE HEADLINES



- The lag appears glaring for the nationally regarded Montgomery County school system, which operates under a formal agreement with police to report immediately any sexual assaults to the department's special victims unit for investigation.
- The four victims were 14 or 15.
- Their accused attackers, all 15. Each faces a count of rape and three counts of attempted rape, a crime that in Maryland includes nonconsensual acts that use an object.
- The case rocked the high school of 1,300 students and the football-proud community of Damascus, where children flock to youth football teams, go on to the JV squad, and dream of playing for the powerhouse varsity, which had a 51-game winning streak going when the locker room incident broke and a record that included three recent state titles in a row.

Source: <https://www.baltimoresun.com/news/maryland/crime/bs-md-damascus-rape-tick-tock-20190330-story.html>

- What role does the SRO play in your Title IX cases?
- What role does local law enforcement play?
- How do these roles differ from the Deputy TIX Coordinator?
- Where are you having the most difficulty in working with your SRO and/or law enforcement on Title IX cases?
- Application to the Steubenville case.

NOTICE, REPORTING, RESPONSIBLE EMPLOYEES & CONFIDENTIALITY

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

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

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**)

PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



- “Privileged”
 - Granted by laws and professional ethics
 - Attorneys, Licensed professional counselors, Medical professionals, Pastoral counselors
 - To be confidential, these individuals must be:
 - Acting in the capacity for which they are employed
 - Acting within the scope of their license, and
 - Receive the disclosure during the scope of that employment.
 - Key exception is child abuse reporting

PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



- “Confidential”
 - Designated by the district/school
 - Do not have to report harassment or discrimination of which they become aware
 - Allows for provision of services and support without concern of reporting
- “Private”
 - All information is maintained as private as possible.
 - Only those with a need to know will be notified/informed of relevant information
 - Even among those who need to know, not all need to know 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.

CASE STUDY: JANET & ROBERT

- What should the supervisor do with the information?
- What role does or should the school play in this situation?
- How should the Title IX Coordinator decide whether to investigate?



NORTH HAVEN BOARD OF EDUCATION V. BELL



- Involved two cases: North Haven Board of Education and Trumbull Board of Education (both in Connecticut).
- **North Haven Board of Education**
 - Elaine Dove, a tenured teacher in North Haven public school system took a one-year maternity leave. North Haven refused to rehire Dove. In Jan. 1978, Dove filed a complaint with HEW for violation of Title IX.
 - HEW began an investigation, but North Haven refused to cooperate, “Asserting that HEW lacked authority to regulate employment practices under Title IX.”
- **Trumbull Board of Education**
 - Oct. 1977, Linda Potz, a former guidance counselor in Trumbull school district, filed a complaint with HEW alleging sex discrimination “with respect to job assignments, working conditions, and failure to renew her contract.”

NORTH HAVEN BOARD OF EDUCATION V. BELL



- USSC, citing a number of factors including Title IX’s legislative history, post-enactment history, and language of “no person,” the Supreme Court determined that Title IX’s “broad directive that ‘no person’ may be discriminated against on the basis of gender, on its face, includes employees as well as students.”

CASE STUDY: JANET & ROBERT



- A staff member in the cafeteria reports to her supervisor that a colleague, Janet is being physically abused by her partner, Robert, a teacher at the school. The employee indicates that Janet seems noticeably withdrawn lately and that Janet recently came to work late, had red puffy eyes and looked as though she had been crying. The employee says Janet was walking with a limp last week and, when asked about it, told people she twisted her knee after slipping on some ice in her driveway. Later that same day the employee said someone overheard Janet on the phone saying, “But I’m scared of what he would do if I tried to leave him.”

CASE STUDY: JANET & ROBERT



- According to the employee, Janet missed a few days of work last month and returned to work wearing a sling. Janet claimed that she sprained her shoulder while working in the yard. Yesterday Janet showed up over an hour late to work and had some swelling around her eye and her bottom lip. When asked, Janet said she got up to the bathroom last night in the dark and walked right into the edge of her open closet door. The employee says that yesterday afternoon, Robert and Janet got into a loud argument in the parking lot and that Janet was crying in the bathroom afterwards. The employee notes that she has hesitated to raise any concerns or suspicions, but worries that Janet's situation is escalating and that someone needs to step in.

TITLE IX vs. TITLE VII



Title IX

- Applies to students and employees
- Covers sex
- Covers pregnancy
- Hostile Environment, QpQ, Retaliation
- OCR
- “Prompt”
- More directive as to nature of prompt, fair and equitable

Title VII

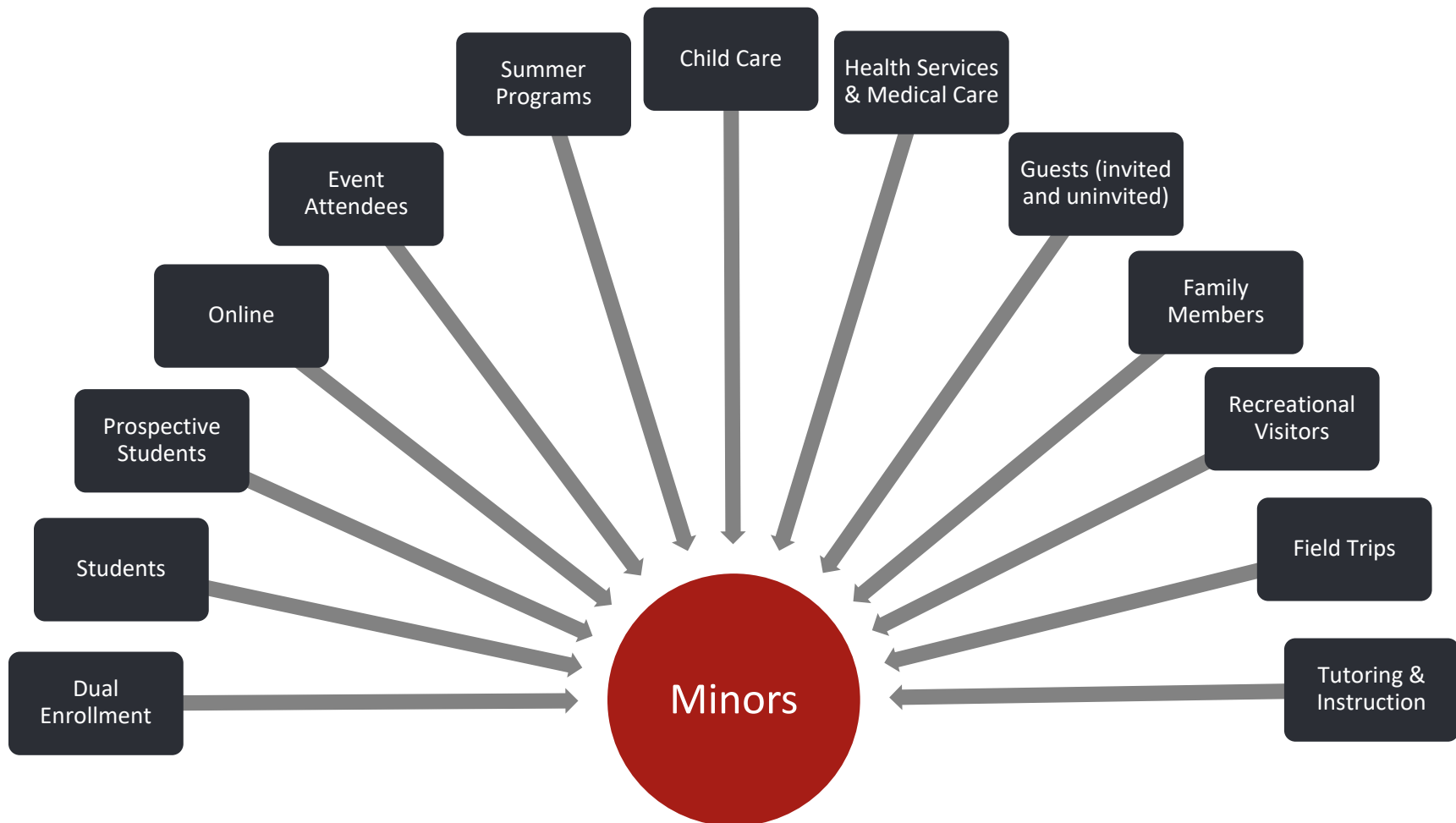
- Applies only employees
- Covers sex, race, color, national origin, religion
- Covers pregnancy
- Hostile environment, QpQ, Retaliation
- EEOC
- No timeframe set.
- Fewer equity-based guarantees in a process for victim

MINORS & TITLE IX

- Operative Questions
- Sample Policy
- Abuse Prevention
- More Concerns



MINORS & TITLE IX



MINORS & TITLE IX



- Minors as students.
 - FERPA rights belong to the parents
- So, when are they the District’s “students?”
 - Dual enrollment.
 - High school on campus.
 - Continuing education.
 - Recruits.

MINORS & TITLE IX: CAMPS EXAMPLE



- When is a camp “ours?”
- What are our responsibilities at each point on the continuum?



Not ours:

- Run by a different entity.
- They hire the staff.
- We rent them space only.

Kind of ours:

- The money comes through a shell or through the school first.
- The employees are our students or temp hires.
- May have our name on it – kind of.

Completely ours:

- The money comes into the school.
- The staff are our employees.
- It has our name on it.

MINORS & TITLE IX



- Additional policy issues:
 - Classifying minors – see state law.
 - Jurisdiction.
 - Acts against or by non-affiliated persons (e.g., third parties, guests, invitees, and minors).
 - Who has access to minors?
 - Employees.
 - Students.
 - Quasi employees.

- Additional policy issues:
 - Facility usage policies.
 - e.g.: Locker rooms, athletic facilities, event facilities, etc.
 - Communication and interaction with parents/guardians.
 - Communication and interaction with minors – who will have it?

MINORS & TITLE IX: MORE CONCERNS



- Additional issues to consider:
 - Infants and nursing mothers (covered more in pregnancy section).
 - Student's children in the classroom.
 - Inadequate supervision.
 - Alcohol and controlled substances.
 - Unplanned time.
 - Restrooms, locker rooms.
 - Issues of statutory rape (state law dependent).
 - Close-in-age exceptions to reporting/statutory.

TRAINING OVERSIGHT

- Employees
- Students
- Boards & Panels
- Investigators
- Appeals Officers

SUPERVISOR OF TRAINING



- General training content categories:
 - Legal Overview: Title IX, Basic Caselaw and regulations.
 - School/district policy.
 - School/district procedures.
 - Reporting.
 - Working with reporting parties & responding parties.
 - Resources, support, and remedies for reporting parties.
 - Resources and support for responding parties
 - Consent in sexual interactions.
 - Rights of parties in complaint, investigation, hearing, and appeals.
 - Sanctions/repercussions.
 - Additional prevention and community education.

SUPERVISOR OF TRAINING



- Trainee Populations:
 - Title IX Compliance Officers
 - E.g.: Coordinator and Deputies, Investigators, decision makers, and others involved in processing, investigating, or resolving complaints.
 - First Responders
 - E.g.: School counselors, sexual assault response coordinators, academic advisors, School Resource Officers, and public safety.
 - All Faculty/Teachers & Staff; ATIXA Mandatory Reporters
 - ATIXA recommends making all teachers and staff mandatory reporters.
 - All Students

TRAINING COORDINATION AND OPERATIONALIZATION



- Centralization and oversight of school/district/campus-wide efforts.
- How?
 - In person? Online? Classroom?
 - Administrator-driven? Peer-driven?
- When/how often?
 - Follow-up is crucial.
 - Ongoing prevention and awareness campaigns.
 - Programs, conversations, speakers, parent programs (K-12), hall and floor meetings, first-year seminar, third-party online training, etc.

INVESTIGATOR/HEARING BOARDS/DECISION-MAKER COMPETENCIES



- The Legal Landscape
- The Conduct/Disciplinary Process
- Due Process & Fairness
- Investigation and Resolution Procedures
- Title IX & VAWA requirements
- Critical Thinking Skills
- Questioning Skills
- Weighing Evidence
- Analyzing Policy
- Standards of Proof
- Sexual Misconduct/ Discrimination
- SANE and Police Reports
- Intimate Partner Violence
- Bias/Prejudice/Impartiality
- The Psychology/Sociology of the Parties
- Stalking/Bullying/Harassment
- Deliberation
- Sanctioning/remedies
- The Appeals Process
- Support and Resources for the Parties

INVESTIGATOR TRAINING



- The school/district's policies and procedures.
- Applicable federal and state law and court decision.
- Investigative techniques including specifically interviewing witnesses.
- Cultural sensitivity; diversity competence.
- Applicable legal standards and framework.
- How to analyze evidence in relation to the standard.
- How to synthesize evidence, write reports, and make findings.

TRAINING FOR STUDENTS



KEY: MUST BE TAILORED TO THE AGE AND UNDERSTANDING OF THE STUDENTS

- Review school/district policies.
- Discussion of consent (use case studies).
- Discussion regarding how to report.
 - Where to find reporting resources.
- Presentation of resources.
- Present statistics and role of drugs and alcohol, and introduce “incapacitation.”
- Discuss privacy and confidentiality.
- Discuss rights of all parties.
- Provide resource/reporting guide.

TRAINING FOR PARENTS/GUARDIANS



- Review school/district policies.
- Discussion of consent
- Discussion regarding how to report.
 - Where to find reporting resources.
- Presentation of resources.
- Present statistics and role of drugs and alcohol, and introduce “incapacitation.”
- Discuss privacy and confidentiality.
- Discuss rights of all parties.
- Provide resource/reporting guide.

SEXUAL HARASSMENT



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).

“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.

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.

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

- Sexting

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?

RETALIATION & QUID PRO QUO

RETALIATION

BASIC LEGAL PRINCIPLES



- The Title IX regulations prohibit recipients from engaging in any adverse action against a person because of that person's participation in a protected activity.
- Protected activity under Title IX:
 - Reporting sex discrimination, including sexual harassment and assault.
 - Filing a discrimination complaint.
 - Assisting someone in reporting discrimination or filing a complaint.
 - Participating in any manner in an investigation of discrimination, for example as a witness.
 - Protesting any form of sex discrimination (including, e.g., lack of equity in athletics).

PREVENTION AND REMEDIATION OF RETALIATION



- Title IX coordinators should ensure that the school/district effectively communicates a message about protection against retaliation and that reporting parties understand their rights.
 - Review existing discrimination policies to ensure that they contain a clear prohibition against retaliation and that resolution procedures are explicitly applicable to retaliation claims.
 - Ensure that training includes information about the prohibition on retaliation.

RETALIATION CLAIM

JACKSON V. BIRMINGHAM BD. OF ED.



- *Jackson v. Birmingham Bd. Of Education*, 544 U.S. 167 (2005).
 - K-12 case.
 - 1999 – Jackson, a high school P.E. teacher and girls’ basketball coach, complained about inequity sports programs’ funding (gender).
 - 2000 – He began to get negative evaluations.
 - 2001 – Dismissed as coach, but retained as teacher.
 - He sued under Title IX’s private right of action.

QUID PRO QUO SEXUAL HARASSMENT



- ***Quid Pro Quo*** harassment is:
 - Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,
 - By a person having power or authority over another constitutes sexual harassment when
 - Submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational [or employment] progress, development, or performance.
 - This includes when submission to such conduct would be a condition for access to receiving the benefits of any educational [or employment] program.

PREVENTION AND REMEDIATION OF STALKING

- **Stalking:**
 - Repetitive and menacing,
 - Pursuit, following, harassing, and/or interfering with the peace and/or safety of another.
- This definition of stalking also allows schools to distinguish stalking from lurking, which is often fixation without menacing or harmful intent, and which is often steady state, whereas stalking often becomes more intrusive over time.

STALKING (CONT.)



- May be a series of legal actions, but school policy is not required to mirror criminal standards in most jurisdictions.
- Can be a form of sexual harassment, too.
- We distinguish the ATIXA model definition of stalking from criminal definitions.

PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING

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

PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING



- 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.

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?

OVERSIGHT OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES

-
- Timeframes
 - Equity Defined
 - Preponderance Standard
 - Evidence Thresholds
 - Barriers and Problems

OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



- **Prompt:**
 - No set number of days, but OCR looks for a “Good faith effort” to be prompt.
 - There is not an exception for summer break, but possible for winter or spring breaks.
 - A forensic collection of evidence by law enforcement will often create a brief delay
 - Pending criminal or civil actions are not reasons for significant delay.
 - What about delays by the reporting party?
 - Notice of extensions.

OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



- How to ensure prompt procedures:
 - The investigation must be conducted according to the timelines in the school/district’s policy.
 - (Be very careful about wording your policy – use “reasonable delays at the discretion of the Title IX administrator,” “barring exigent circumstances”, etc.).
 - Parties/witnesses should be interviewed as soon as possible so that recollections are as fresh as possible and to secure necessary remedies as soon as possible.
 - Document all delays and reasoning therefore.
 - Unresponsive or uncooperative parties reporting party and/or responding party, criminal investigation, holidays etc.

PROMPT & EQUITABLE PROCEDURES: CLEAR TIMEFRAMES



- Timeframe for each stage of process, and process for extensions.
- Parties entitled to periodical status updates (FERPA does not conflict with Title IX).
- Notification of outcomes to parties permitted by FERPA.
 - Title IX rules in a conflict with FERPA.
 - IN WRITING!
- Parties are entitled to status updates on appeals, too, regardless of which party appeals.

EQUITY: PREPONDERANCE STANDARD REQUIRED

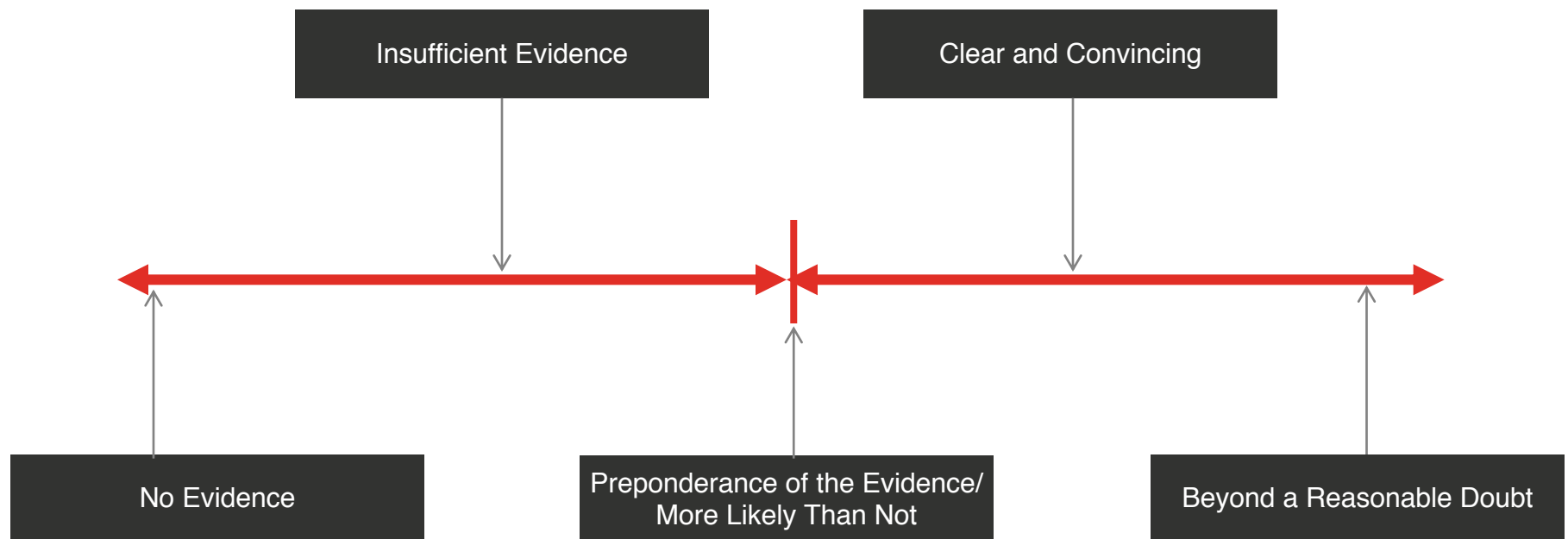


- The only equitable standard.
- Articulate the standard throughout your policy, procedure, investigation, and hearings.
- Educate the parties and their advisors.
- Use language the community understands.
 - 50.1%.
 - “More likely than not.”
 - The “tipped scale.”
 - Try NOT to use just the term “preponderance of the evidence” – it is not common language.

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



FIRST AMENDMENT & TITLE IX



ASSURANCE OF FIRST AMENDMENT PROTECTIONS



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

- An important concern for all public schools/districts and any private schools impacted by state law and constitutions (e.g., California and New Jersey).
- Impacts policy language regarding expression.
- Pay heed to vagueness and over-breadth concerns.
- Avoid incorporating “intent” or “purpose” language.
- Incorporate appropriate standard for context.

TITLE IX & THE FIRST AMENDMENT



- Title IX cannot be enforced or use to infringe on First Amendment protections.
- **Time, place, and manner** limitations on expression must be applied consistent with the forum in question.
 - Content neutral
 - Narrowly tailored to serve a significant state/gov't interest
 - Leave ample alternative channels for communication of the information

TITLE IX & THE FIRST AMENDMENT



- Traditional Public Forum: school green space, public streets through school, and public sidewalks.
- Designated Public Forum: designated “free speech zones” such as green spaces.
- Limited Public Forum: auditoriums, meeting rooms, and athletic facilities.
- Nonpublic Forum: classrooms, residence halls, and offices.

TITLE IX & THE FIRST AMENDMENT



- Protected Speech
 - Offensive language
 - Hate speech
 - Time, Place, Manner restrictions
 - Being a jerk
- Unprotected Speech
 - Fighting Words
 - Obscenity
 - Sexual and Racial Harassment (Hostile environment)
 - Incitement of Imminent Lawless Action
 - True Threat
 - Defamation

TITLE IX & THE FIRST AMENDMENT



- Protests
 - Time, Place, Manner Restrictions
- Disruptions
 - Class
 - Classroom management issues
 - Conduct code issues
 - Workplace/externships/internships
- Online behavior
 - School/district sites and discussion forums
 - Using School/district equipment or networks
 - Private forums (e.g.: Facebook, Twitter)

COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, AND REMEDY

-
- Effective Remedies
 - Common Remedies
 - Preventing Recurrence

ASSURANCE OF COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY



- ***Effective remedies:***

- Title IX requires that remedies for sexual harassment and assault be effective in:
 - Stopping the harassment.
 - Remedying its effects (often not sanction-based).
 - Preventing it from recurring.
 - Consider the effect of “educational” sanctions here.
 - Second victim is both Title IX and negligence concern.

ASSURANCE OF COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY



- Take timely steps to confirm and document that the appropriate remedies were implemented. For example:
 - Was the student provided alternative housing?
 - Was counseling made available?
 - Was a no-contact order issued?
 - Was the grade removed from the student's transcript?
- Make sure the reporting party knows that he or she should report any difficulties obtaining the remedies and any subsequent harassment.

COMMON REMEDIES FOR STUDENTS

* NOT AN EXHAUSTIVE LIST



- ✓ Providing an escort.
- ✓ Ensuring that the reporting party and responding party do not attend the same classes.
- ✓ Relocating to a different residence hall.
- ✓ Providing counseling services.
- ✓ Providing medical services.
- ✓ Offering academic support services, such as tutoring.
- ✓ Arranging transportation accommodations.
- ✓ Arranging for the reporting party to re-take a course/withdraw from a class without penalty.
- ✓ Reviewing any disciplinary actions taken against the reporting party to see if there is a causal connection between the harassment and the misconduct and adverse action.
- ✓ Providing district-wide training and education initiatives.

COMMON REMEDIES FOR EMPLOYEES

* NOT AN EXHAUSTIVE LIST



- ✓ Providing no-contact orders/contact restrictions.
- ✓ Arranging transportation accommodations.
- ✓ Providing referral to counseling services, medical services, and mental health services.
- ✓ Adjusting work schedules, work assignments, supervisory responsibilities, etc.
- ✓ Offering leave with pay.
- ✓ Providing suspension with pay (accused).
- ✓ Sanctions.

ASSURANCE OF COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY



- ***Prevent recurrence:***

- Identify patterns and systemic problems.
- Issue district-wide policy statements, informational campaigns, and other messages that harassment and assault will not be tolerated.
- Provide regular training on sexual misconduct for students and employees.
- Conduct periodic surveys of district/school climate.
- Establish a system for monitoring future incidents and patterns.

CASE STUDY: THE RESTROOM



- A transgender student, Ellie, identifies and expresses as a woman. She has begun hormone treatments, but still has male genitalia. She is an adult education student who attends classes at the high school in the evening. She has been using the women's restrooms for that entire time without incident.
- Recent local news coverage of gender identity legislation in the city and state has raised renewed awareness and strong feelings among students, staff and parents on both sides of the issue.

CASE STUDY: THE RESTROOM



- This afternoon, a female employee wrote an email to the Title IX Coordinator which reads, in part:
 - *I would like to file a Title IX complaint because an adult male student is using the wrong bathroom. The bathroom is not safe for children or for women with him in there. It is creating a hostile environment for me and if it does not get stopped, I will go to the press.*
 - *Last night I was in the bathroom and I saw a man who is dressed like woman walk into the bathroom and into a stall. He said hello, but I was paralyzed by shock and fear. We were the only two in the bathroom and I worried about what he was going to do to me.*

CASE STUDY: THE RESTROOM



- *He entered a stall and I got out my phone and recorded a video of his feet under the stall and when he came out of the stall, I confronted him and demanded to know his name. He said “Ellie.” I was sure to record him washing his hands and leaving the bathroom. I told my husband and he was shocked and told me I should contact the police.*
- *I have taken a personal day because I don’t feel safe in the bathroom or on school grounds. Please help.*

CASE STUDY: THE RESTROOM



- That same afternoon, Ellie, writes an email to the Title IX Coordinator which reads:
 - *Hi Dr. Martinez, it's Ellie. I am writing because today something happened that made me very uncomfortable and I felt like someone was discriminating against me. I walked into the women's restroom last night (as I have done for the last 18 months) and said hello to a woman I didn't know, but I was just being friendly. I then went into a stall and went to the bathroom.*
 - *While I was in the stall, I saw the woman lean her head down and peek at me from under the stall wall. She was holding a phone and pointing it in my direction. This freaked me out so I finished up quickly and exited the stall.*

CASE STUDY: THE RESTROOM



- *The woman looked really angry while holding her phone like she was recording and said, “What the hell are you doing in here? What is your name?!” I told her my name was Ellie, then quickly left.*
- *I am really worried that she has photos or video of me and that I told her my name. I don’t feel safe using the women’s bathrooms anymore. I am also filing a complaint that she took videos or photos of me in the bathroom. That’s not ok. I skipped my classes today because I didn’t feel safe at school. Please help.*

SUPERVISOR OF INVESTIGATIONS



SUPERVISOR OF INVESTIGATIONS



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

SUPERVISOR OF INVESTIGATIONS



- 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.



OCR COMPLIANT PROCEDURES

WHAT IS DUE PROCESS?



- Two overarching forms of due process:
 - **Due Process in Procedure:**
 - Consistent, thorough, and procedurally sound handling of allegations.
 - school/district 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.

OVERVIEW OF PROPOSED REGULATIONS



- November 29, 2018: OCR published proposed amendments to Title IX regulations:
 - Provided 60 days for public comment – open until January 28th
 - OCR will then review comments and finalize the regulations
 - OCR has to respond materially to comments
 - Will amend the Code of Federal Regulations
 - **Will have the force of law once adopted**
 - Proposed amendments are significant, legalistic, and very due process-heavy
 - Will likely go into effect 30 days after final regulations published in Federal Register

OBAMA OCR: (OVER?) ZEALOUS ENFORCEMENT AND EQUITY IMBALANCE



- Dramatically ramped up enforcement; became feared
- Provided extensive sub-regulatory guidance
- Made investigations and outcomes public
- Had a pro-reporting party imbalance to their approach
- Field shifted from an imbalance toward the responding party to an imbalance toward the reporting party
- Resulted in widespread abrogation of due process rights for responding parties

DUE PROCESS CASELAW



- The pro-reporting party imbalance prompted hundreds of lawsuits by responding parties
 - Wave of John Doe cases with unfavorable findings toward schools
 - Rise in lawsuits alleging selective enforcement, negligence, deliberate indifference, etc.
- Courts began requiring heightened levels of due process
- Sixth Circuit leads this revolt
- Trump-era OCR shifting imbalance back toward responding parties, using courts and due process as their rationale
- Balance will not result from proposed new regulations

DELIBERATE INDIFFERENCE STANDARD



- In *Gebser* (1998) and *Davis* (1999), the Supreme Court held that a funding recipient is liable under Title IX for deliberate indifference **only** if:
 - The alleged incident occurred where the funding recipient controlled both the harasser and the context of the harassment;
AND
 - Where the funding recipient received:
 - Actual Notice
 - To a person with the authority to take corrective action
 - Failed to respond in a manner that was clearly unreasonable in light of known circumstances
- OCR has historically used a broader, less stringent standard

UNIFYING STANDARDS?



- Proposed regulations would mostly unify the court and administrative enforcement standards
 - Would raise administrative enforcement standard to match legal standard of deliberate indifference
 - Would significantly limit OCR's authority (and efficacy?)
 - Will likely lead to a wave of litigation by all parties
- In some ways, OCR going beyond court standard. *Davis* notice-based standard vs. formal complaint standard

NOTICE, JURISDICTION, & DELIBERATE INDIFFERENCE

NOTICE TO THE SCHOOL/DISTRICT



- Proposed regulations would not require a Title IX investigation unless the school/district receives actual notice through a “formal complaint”:
 - Actual notice defined as:
 - The reporting party filing a formal, written, signed complaint with TIX Coordinator; or
 - The TIXC may file a formal written complaint on behalf of reporting party
 - Conflict of Interest? Impartiality concern?
 - Eliminates OCR’s constructive notice standard
 - What to do if school/district receives notice in some other way?
 - Industry standards

RESPONSIBLE EMPLOYEE SHIFTING?



- Currently, 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;

RESPONSIBLE EMPLOYEES?



- Proposed regulations shift “actual notice” to:
 - Anyone who has the authority to take action to redress the harassment
 - All pre-K-12 teachers when conduct is student-on-student
- This is ONLY the standard for when OCR would deem a school to be on notice; it is the floor.
- ATIXA has not changed its recommendation to require all non-confidential employees to report harassment or discrimination
- Continue to train employees on obligation to report

- Jurisdiction
 - *Davis* standard – control over the harasser and the context of the harassment
 - “occurs within its education program or activity”
- Geography should not be conflated with the Clery Act – education programs or activities can be off-campus, online
- Proposed regulations specify “harassment...against a person in the United States”
 - Unclear effect on study abroad programs or school-sponsored international trips – “nothing in the proposed regulations would prevent...”
- Open question of student/employee harassment of non-student/employee

- Current requirement to address on-campus effects of off-campus misconduct
 - Even if conduct took place outside education program or activity, schools responsible for addressing effects that manifest in the program/activity
 - Students and/or employee conduct outside program, IPV
- Leaked draft of regulations prior to publication indicated schools “are not responsible” for exclusively off-campus conduct but could be responsible for on-going on-campus /in program effects
- Published proposal eliminated this comment, presume *Davis* standard still applies – “nothing in the proposed regulations would prevent...”

DEFINITIONS

—

DEFINITIONS: SEXUAL HARASSMENT



- Current OCR Definition of Sexual Harassment is “unwelcome conduct of a sexual nature”
 - Includes quid pro quo “requests for sexual favors”
 - When sexual harassment constitutes sex discrimination by causing a hostile environment (discriminatory effect), prohibited by Title IX
- Proposed regulations
 - Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (QpQ)
 - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity (HE)
 - Sexual assault, as defined in 34 CFR 668.46(a)
- No mention of retaliatory harassment in proposed regs

DEFINITIONS: NOTICE



- “Notice” is the benchmark indicating when an school/district is required to stop, prevent, and remedy
- Current OCR definition of notice – “knew or should reasonably have known”
 - Incorporates both actual and constructive notice
- Proposed regulations restrict to actual notice exclusively
 - *Actual knowledge* means notice to Title IX Coordinator or any official with authority to institute corrective measures
 - *Respondeat superior* or constructive notice insufficient
 - PK-12 teachers are “officials” – post-secondary faculty are not
 - Mere ability or obligation to report does not qualify as “official”



DUE PROCESS

DUE PROCESS OVERVIEW



- Proposed regulations place heavy emphasis on due process protections for the responding party
- New standard of proof mandates
- Notice at various investigation stages
- Collection and production of evidence for review
- Mandate for determination and sanction process
- Live hearings with cross-examination
- Schools provide advisor; must allow advisor questioning of parties/witnesses

STANDARD OF PROOF



- Current OCR standard – preponderance of the evidence is standard civil court will use to evaluate school’s response
- Proposed regulations allow preponderance only if same for other conduct code violations, otherwise must use clear & convincing
- Effectively mandates clear & convincing for schools with higher standards for other proceedings (i.e.: unions)
- May create incongruence between school process and court scrutiny (where preponderance will still be the standard)
- ATIXA position – preponderance only equitable standard

WRITTEN, DETAILED NOTICE



- Proposed regulations require several written, detailed notices to the parties
 - Any reasonable delay for good cause
 - Upon receipt of a formal complaint
 - Sufficient details – identity of parties, alleged violations, date, location
 - Sufficient time to prepare a response
 - Informal process requirements, if applicable
 - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare
 - Upon determination of responsibility, including sanctions

INFORMAL RESOLUTION OPTIONS



- Proposed regulations allow informal resolution at any time prior to a final determination, at discretion of TIXC
 - Requires detailed notice to the parties
 - Allegations
 - Requirements of the process
 - Circumstances which would preclude formal resolution
 - Consequences of participation
 - Obtain voluntary, written consent
- Does not preclude certain offenses from informal resolution
- May restrict restorative practices after a determination

SUPPORTIVE MEASURES



- Non-disciplinary, non-punitive individualized services
- Must not unreasonably burden other parties
- Proposed regulations address mutual restrictions, neglect unilateral or individualized restrictions
- Appears to anticipate, but also prohibit, that one party will sometimes be restricted more than the other
- May chill reporting if automatic mutual restrictions limit access to education program

BURDEN OF PROOF ON FUNDING RECIPIENT TO GATHER EVIDENCE



- Burden of proof and burden of gathering evidence on the school, not the parties
- “Sufficient to reach a determination” = appropriately thorough?
- Unclear if all relevant evidence must be collected
- Parties may be able to request certain evidence be obtained
- Evidence collected by law enforcement is admissible
- Who determines what evidence is relevant and sufficient?

“PRESUMPTION OF INNOCENCE”



- Proposed regulations require published grievance procedures include a presumption of innocence for the responding party
- No change from effective procedures – determination has always been based on evidence
- Presumption is a legal framework, may create inequity
- Unclear how presumption will work procedurally
- Should there be an equitable presumption that the reporting party is telling the truth?

CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS



- Existing mandate for impartial resolutions with fair procedures
- Proposed regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party
- Training mandates apply to PK-12 as well as higher ed
- Unclear how prohibition of bias against reporting/responding parties establishes equity under Title IX or falls within OCR's statutory authority
- Due process mandate does not distinguish public v. private

INVESTIGATION AND RESOLUTION MODELS



- Treatment of reporting/responding parties may constitute discrimination
- Must allow advisor to be present at all meetings, interviews, hearings
- If no advisor, school must provide one

PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE



- All relevant evidence considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to inspect all evidence, including evidence not used to support determination
- May chill reporting if irrelevant information must be provided to either party
- Unclear at what point in process evidence must be provided
- No limits on types/amount of evidence offered
- Creates possible equitable limits on evidence for both parties

PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT



- Proposed regulations mandate creation of an investigation report
- Must fairly summarize all relevant evidence
- Provided to parties at least 10 days before hearing or other determination
- Parties may review and submit written responses to report
- Unclear if analysis (including credibility) and findings of fact should be included
- Unclear if a full report or a summary is required

LIVE HEARING



- Proposed regulations mandate live hearing for postsecondary schools/districts, **optional for PK-12**
- Parties must attend hearing, otherwise all testimony submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator or the investigator
- Must allow live cross-examination to be conducted exclusively by each party's advisor (separate rooms still allowed)
- Unclear how irrelevant questions will be screened, but rationale for excluding questions required (verbal or written?)

- Advisor can be anyone – no restrictions in proposed regulations
- If a party does not have an advisor to conduct cross-examination, the school must provide one
- Advisor must be “aligned with the party”
 - “Defense” and “prosecution” advisors?
- No prior training required, no mandate for school to train
- ED presumes no financial impact because all parties retain counsel; not at school/district expense
- Mandate for higher education only – PK-12 may still conduct indirect cross-examination through hearing administrator

APPEALS



- If schools offer appeals (not required), must be made available equitably
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to all parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

IMPACT ON EMPLOYEES



- Proposed regulations often refer exclusively to “students,” but employees are also affected
- Tenured teachers cross-examining students at a live hearing
- Faculty found responsible – sanctions affirmed by committee?
- Union employees – diminished right to an advisor because of union representation?
- Extensive due process protections for at-will employees accused of misconduct
- Potential inequity in employee processes for Title VII-based sexual harassment
 - More due process for sex discrimination than race discrimination

OTHER ELEMENTS IN THE PROPOSED REGS



- Statement that proposed regulations do not restrict or deprive rights under the First, Fifth, and Fourteenth Amendments, FERPA, the Clery Act, or Title VII of the Civil Rights Act.
 - Clery/VAWA and FERPA considerations?
 - Clery Act provisions do not apply to PK-12 – the proposed regulations extend many Clery Act requirements to PK-12

OPERATING OUTSIDE THE TIX FRAMEWORK



- *Ultra vires?*
 - Require signed formal complaint rather than actual notice
 - Prescribed standard of evidence for Title IX procedures
 - Mandated standard of proof for other conduct procedures
 - Extension of Clery/VAWA definitions and requirements to PK-12
 - Require live hearings for Title VII sexual harassment procedures
 - Individualized safety and risk analysis prior to interim suspension on an “emergency basis”
 - Treatment of responding party may constitute discrimination
 - Regulation of due process elements in internal procedures – blanket application to public and private schools/districts
 - Notice requirement upon receipt of formal complaint
 - Mandatory live hearing at public and private higher education institutions
 - Recordkeeping requirements



TITLE IX INVESTIGATION REPORT WRITING

THE GOAL



Stop the Behavior

Reliable

Remedy

Effective

Prevent Recurrence



THE GOAL



Impartial



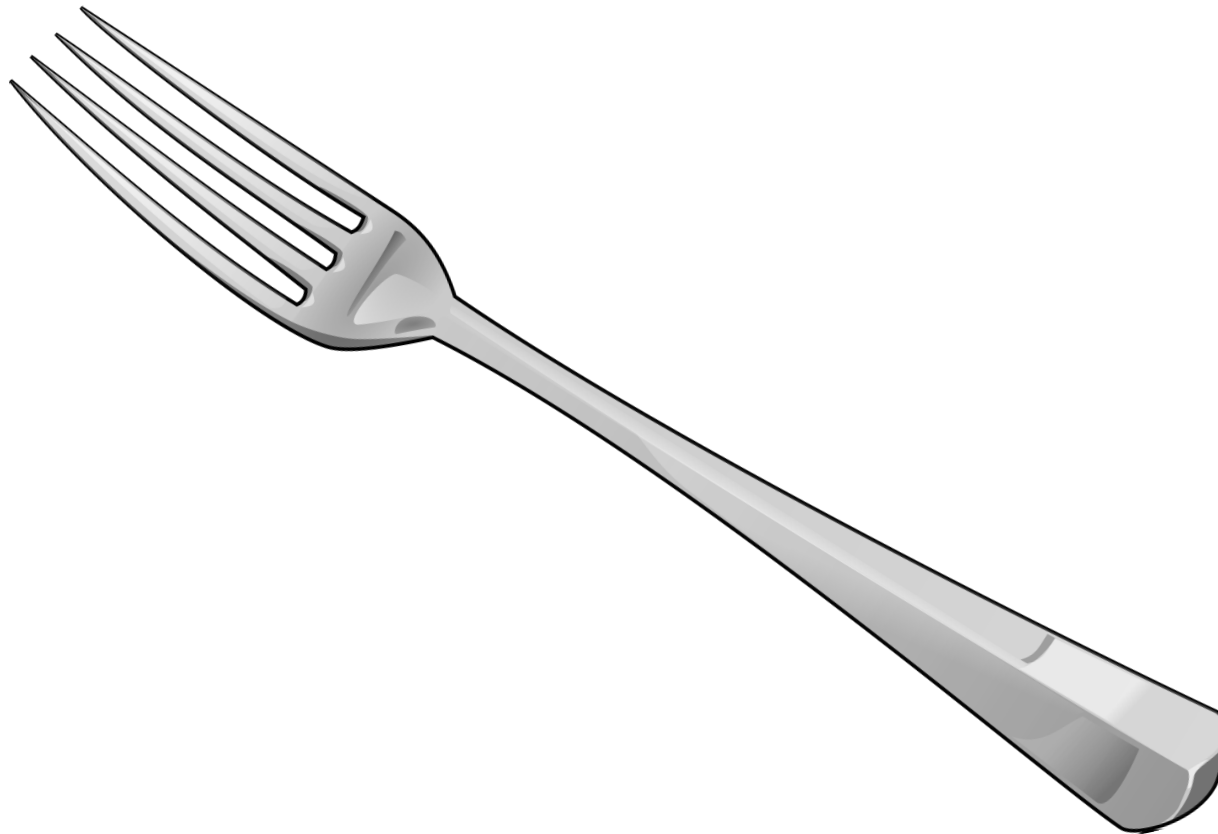
Competent

THE GOAL



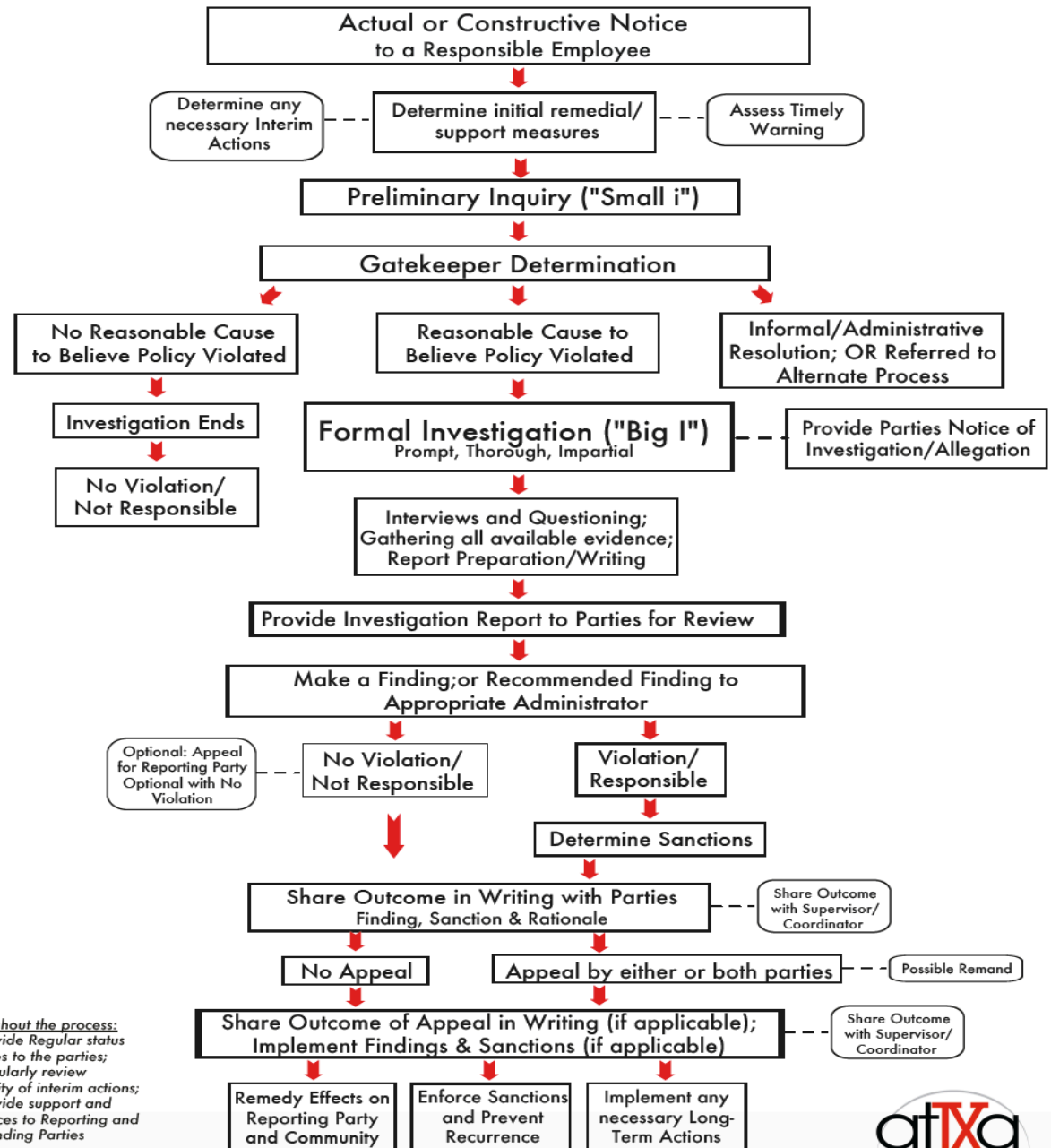
MAKING THE APPROPRIATE DECISION

THE PROCESS



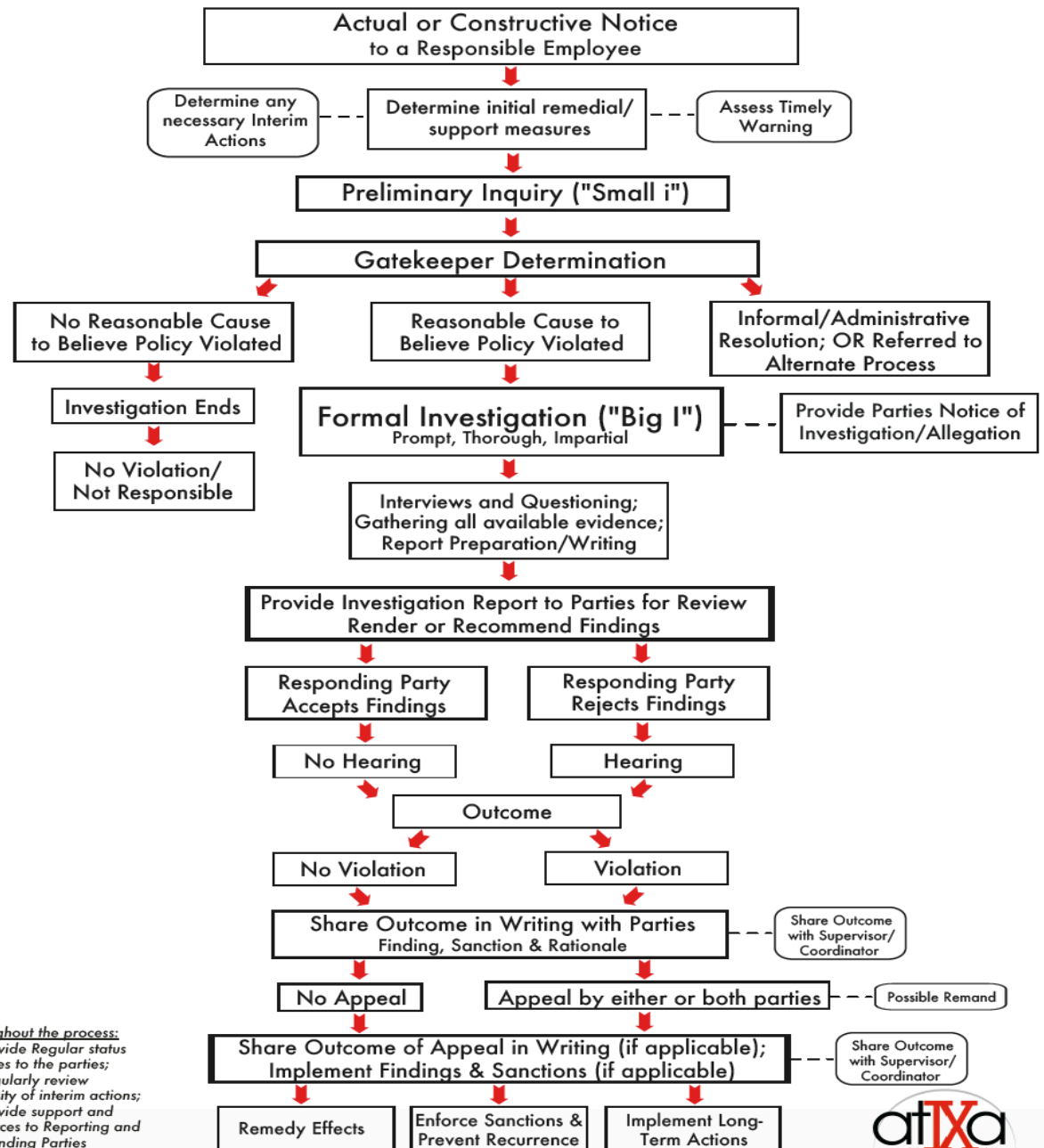
CIVIL RIGHTS INVESTIGATION MODEL

ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



INVESTIGATION AND HEARING PANEL HYBRID MODEL

INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



CONDUCTING INVESTIGATIONS



TITLE IX COORDINATOR OVERSIGHT

- Role of Title IX Coordinator in Investigation Process
 - Supervisor of Investigation Structure
 - Supervisor of Investigation Process
 - Trainer for Investigators

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.

TITLE IX COORDINATOR OVERSIGHT



- Trainer for investigators
 - Frequency of training for investigators.
 - Internal and/or external trainers.
 - Who can be an Investigator?
 - Note: Conflicts of interest in proposed regs
 - External investigations/outourcing oversight.

INTERSECTION OF TITLE IX AND TITLE VII

INTERSECTION OF TITLE IX AND TITLE VII



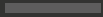
- Title IX consciously modeled on Title VI of the Civil Rights Act of 1964 and borrowed heavily from Title VII.
- Courts generally apply standards established under Title VII for guidance in how to establish a Title IX violation.
- Title IX prohibits against sex-based discrimination to the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention, or treatment of employees.
- Individuals can use both statutes to pursue the same violations.

INTERSECTION OF TITLE IX AND TITLE VII



- Consider:
 - Role of institutional equity/AA/EOP officer.
 - Human resources/faculty.
 - Coordinator of school/campus conduct.
 - Athletics.
 - Public safety/SRO/Law enforcement.
- Oversight of deputy coordinators/investigators.
- Ability to merge/combine investigatory and hearing processes.
- Coordination of remedies in student/employee and employee/student resolution processes.
- What happens when report involves both employee and student?

DUE PROCESS



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.”
- Reiterating the 5th Circuit, it noted that the 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?



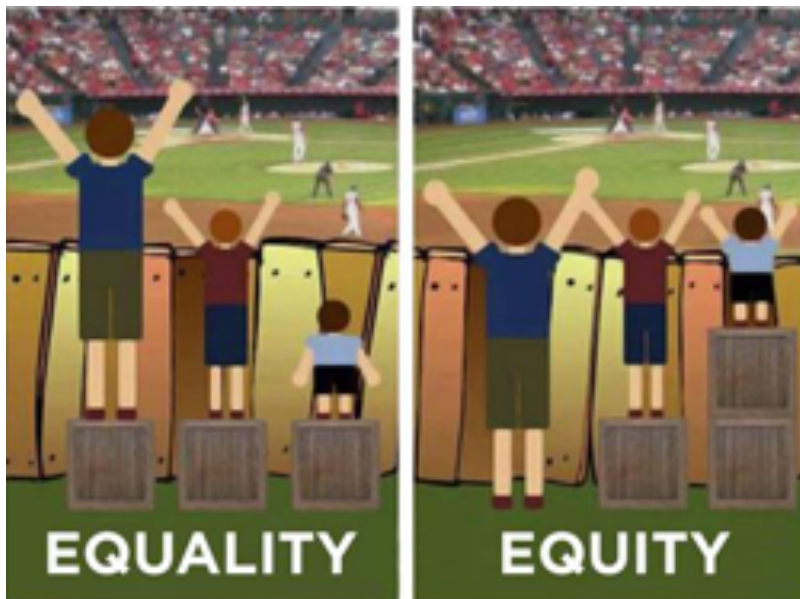
- **Due Process in Procedure** - A school's process should include (at a minimum):
 - Notice — of charges and of the hearing/resolution process.
 - Right to present witnesses.
 - Right to present evidence.
 - Opportunity to be heard and address the allegations and evidence.
 - Right to decision made 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

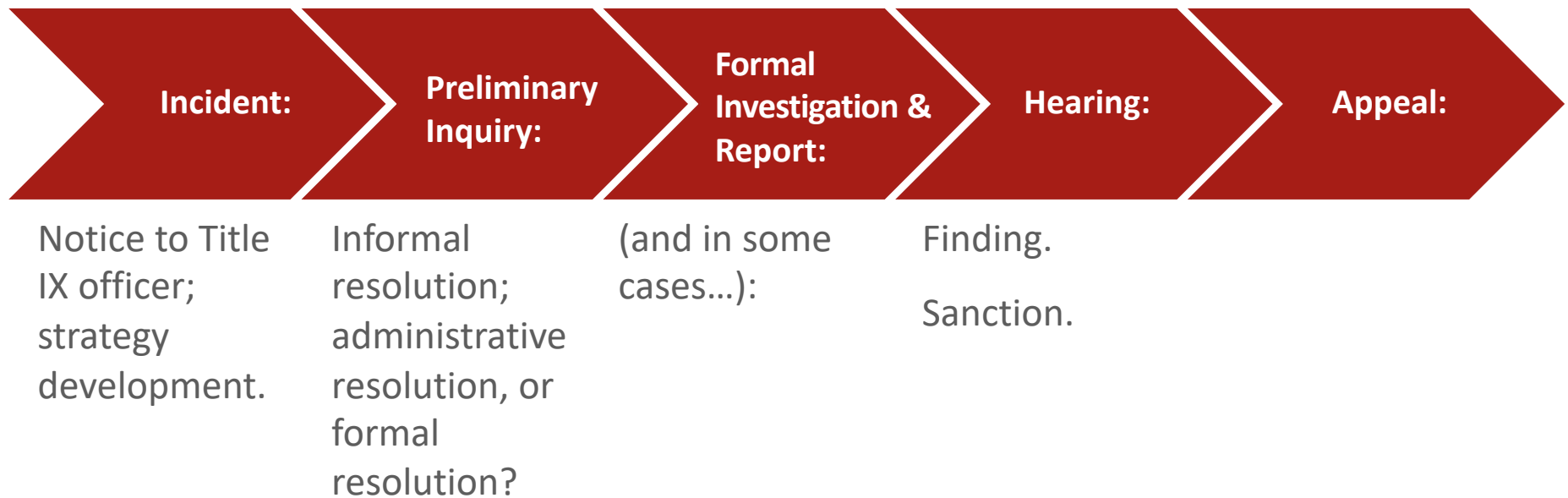


- You will get this right when you can do equity through equity.
- Each party's rights, privileges and opportunities need to be balanced.
- Not exactly parity, but equitable procedures that reach equitable outcomes that impose equitable remedies.
- Equitable = fair under the circumstances.
- What you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

CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

- Civil Rights Investigation Model
- Investigation & Hearing Panel Model
- The Process & Ten Steps
- Jurisdiction
- Who Should Investigate?

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.

CIVIL RIGHTS INVESTIGATION MODEL AND STUDENT CONDUCT MODEL



- How does this model alter the current student conduct model used to address sexual assault, stalking, intimate partner violence, etc.?
 - 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.

WHO SHOULD INVESTIGATE?



- Investigations of sex discrimination must be impartial, thorough, and reliable.
 - Title IX Coordinator.
 - Standing panel of investigators.
 - Human resources or student services.
 - Administrators, faculty.
 - One investigator or two.
 - Outside investigator
 - Coordinating investigation in multiple processes.
 - NOT General Counsel

SHOULD THERE BE MORE THAN ONE INVESTIGATOR?



No specific requirement, but:

- Investigation must be prompt, thorough, and impartial.
- Investigator must collect the maximum amount of relevant information available to make a determination.
- A pool of investigators may help to ensure that your investigation meets these requirements.

- Other benefits:
 - Who investigates may be strategic to each specific case.
 - Ability to brainstorm investigation steps and lines of questioning with co-investigators, and to co-facilitate interviews.
 - Flexibility if there is any conflict with investigators and parties.
 - Documentation.

INVESTIGATION PROCESS



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)

PRELIMINARY INQUIRY

Preliminary Inquiry
Gatekeeping
Interim Actions


PRELIMINARY INQUIRY



- 
- A large, stylized red number '1' is positioned on the left side of the slide. It has a solid red top and a lighter red, semi-transparent bottom section.
- 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.)



- 
- A large, stylized red number '1' with a circular dot above it, serving as a visual indicator for the first point in the list.
- 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.

GATEKEEPING



- 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.

- Coordinator/designee needs to communicate re: advisor option
 - All meetings/interviews
 - District advisors
 - Outside advisors
 - Parents
 - Attorneys
 - Union reps
 - If so, and party has 2 advisors, other party entitled to 2 advisors
 - 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



- 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.
- Transportation options.
- Offering no-contact orders.
- 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.

BEGINNING THE INVESTIGATION



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

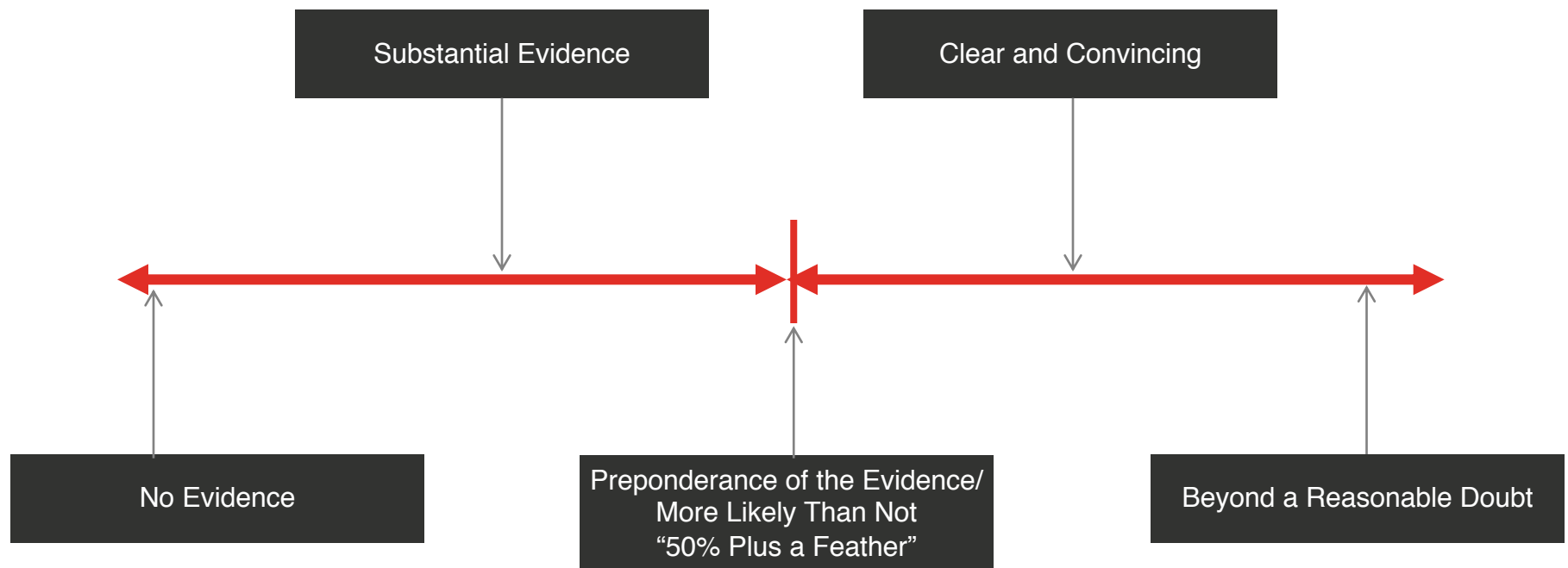


- **Preponderance**
 - Only truly equitable standard
- **Clear and Convincing**
 - Difficult to train, difficult to explain
- **Proposed Regulations**
 - Consider other existing evidentiary thresholds
- Decisions must be made by applying the evidentiary threshold to the evidence gathered, when it is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

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



- 60-90 days to resolution is a good guide for more complex cases.
 - Timeline starts from **notice**, not from the incident itself.
 - No set requirement, other than to have prompt, designated timeframes in your procedures.
 - Goal is to avoid undue delay.
 - For K-12, timeframe is often much shorter
 - What about injunctions? Police involvement?
 - What about Summer break? FMLA? Winter break?

- 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.

CONFIDENTIALITY



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



- “The File”:
 - The responding party’s file.
 - The reporting party’s file.
 - The investigation file (including investigation report).
 - Personal case notes.
 - Witness education records.
- Subpoenas:
 - If you get one, call your general counsel!
- Understand the court process and your role in it.

- 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?

QUESTIONING SKILLS



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



**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.

INTERVIEW SKILLS



- 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.

INTERVIEW SKILLS (CONT.)



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



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.

INTERVIEWING THE REPORTING PARTY (CONT.)



- 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.

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.)



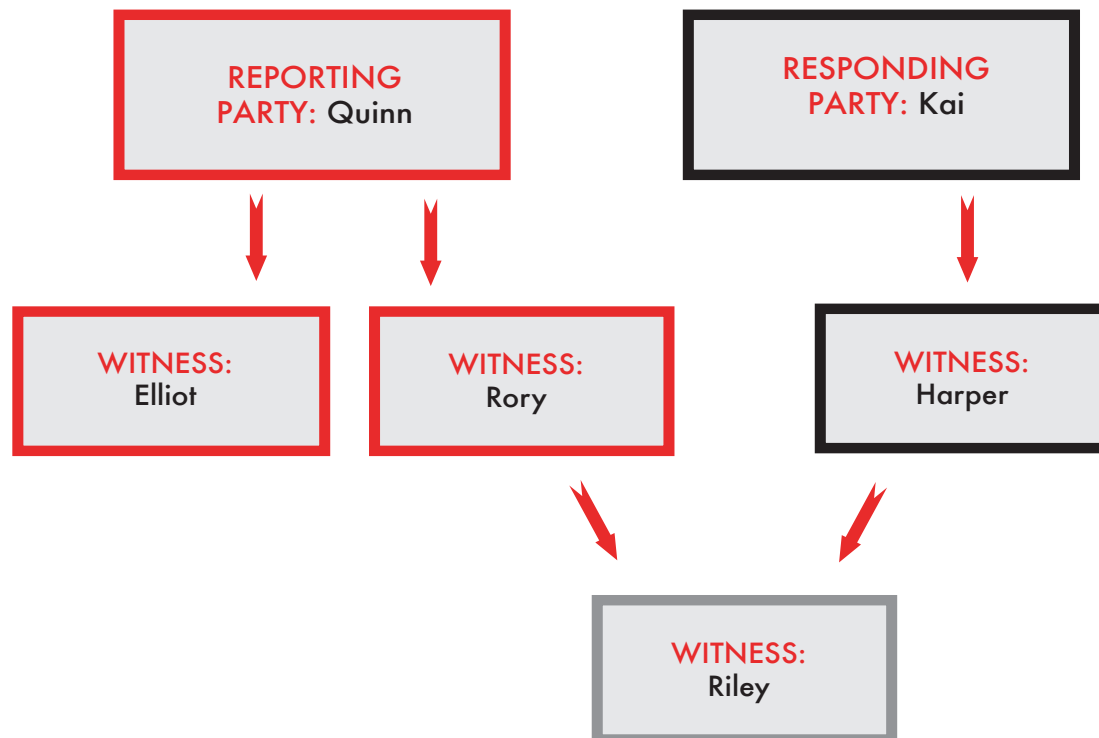
- Timing also highly relevant in cases involving physical evidence such as bruising, bite marks, etc.
- In stalking and/or verbal, online sexual harassment cases, times of communication between parties may be important.
- Establishing a reliable timeline useful when questioning witnesses such as bartenders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

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?

ANALYSIS AND FINDING



- Review the institutional 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 allegations and findings to appropriate administrator for implementation, sanctioning, and/or hearing.

PRIOR ACTS AS EVIDENCE



- Previous conduct violations by the responding party are not generally admissible in conduct proceedings.
- BUT, they are essential (and legally required) considerations in any civil rights investigation.
- Must be considered as evidence of finding, not just of sanction.
- Previous findings must be considered.
- The entire continuum of violence may establish pattern, but the more similarity, the stronger the weight of the evidence.

WHO RENDERS THE FINDING?



- Variations in role of decision process.
 - Investigator renders the finding.
 - Investigator recommends the finding to an administrator or hearing panel.
 - Investigator presents investigation report to administrator or hearing panel with findings.
 - Investigator presents investigation report to administrator or hearing panel without findings.
- Importance of investigation report.
 - How much credibility assessment and analysis to include?

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.

WHAT ABOUT AN IN-PERSON HEARING?



- A formal in-person hearing, whether with a panel or an administrator, is increasingly viewed as necessary by the courts and OCR.
- Hearings facilitate the parties ability to review all available evidence and ask questions of witnesses and each other.
- A well-conducted civil rights investigation can result in an accepted finding and waiver of hearing by the responding party.
- Waivers must be freely decided and non-coerced.
- Hearings can still occur when information is contested.

WHAT ROLE DOES THE INVESTIGATOR PLAY IN AN EVENTUAL HEARING?



- The investigator is often the key witness at any hearing.
- The investigation report is admitted as evidence (redacted).
- Other witnesses can be called, or the investigator may summarize their testimony instead.
- If credibility must be assessed, it needs to be assessed in person by the decision-maker(s).
- The investigator's finding should not influence the hearing, so may be appropriate to withhold/redact that information and allow the decision-maker to be fully objective/impartial.

SANCTIONS & APPEALS

- Sanctioning considerations
- Common sanctions
- Sanctioning in sexual misconduct cases
- Basic overview of appeals

SANCTIONING CONSIDERATIONS



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

- May consider prior misconduct.
- The role of precedent.
- May consider 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, **findings, sanctions** (or remedial actions) **AND THE RATIONALE THEREFORE.**
 - Provide this information in writing and place no conditions on receiving or sharing it.
- FERPA, Clery Act/VAWA, 2017 OCR publication, and OCR 2019 Regs are the primary sources of mandates for outcome notification.
 - FERPA re-disclosure restrictions lifted in 2008.
 - FERPA cannot be construed to conflict with or prevent compliance with Title IX.
 - 2017 OCR publication addressed proceedings in primary/secondary schools and sanctions imposed on responding party.
 - Clery/VAWA – higher ed.

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

- 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

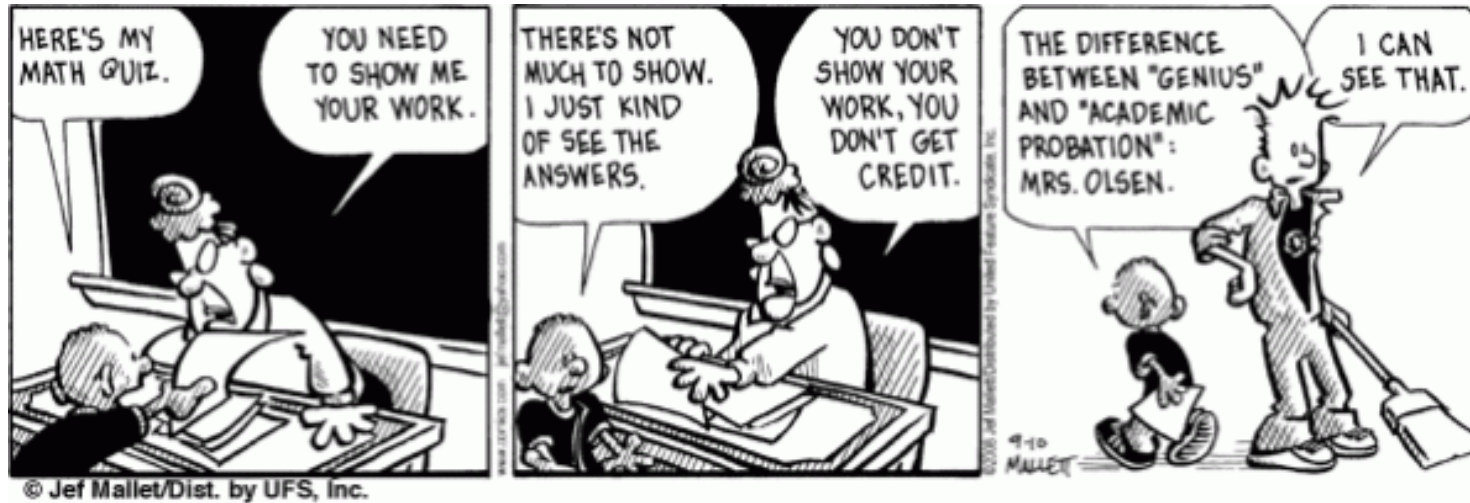
- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them
 - An assessment of credibility must focus on issues such as the reliability, consistency and believability of the parties
 - If, for example, a reporting party's account is inconsistent or variable, 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



THE INVESTIGATION REPORT:

AN OVERVIEW

THE INVESTIGATION REPORT



A black chalkboard with the words 'Show Your Work' written in white chalk in a casual, handwritten style.

Show Your Work

THE INVESTIGATION REPORT (CONT.)



- The investigation report is the **one** comprehensive document summarizing the investigation:
 - Relevant timelines
 - Results of interviews with parties and witnesses.
 - Summary of information collected (i.e., info from police reports including pretext calls, medical exams, video surveillance/ photographs, copies of texts, emails, and social networking messages, etc.).
 - Analysis
 - Credibility determinations
 - Conclusion

THE INVESTIGATION REPORT: CONTENT OVERVIEW



- I. Introduction
- II. Executive Summary
- III. Scope of Investigation
- IV. Jurisdiction
- V. Allegations
- VI. Evidentiary Standard
- VII. Applicable Policies
- VIII. Parties & Witnesses

THE INVESTIGATION REPORT: CONTENT OVERVIEW



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

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*

SAMPLE INVESTIGATION REPORT:

BEGINNING THE REPORT

UK

YOUR UNIVERSITY
LOGO HERE

SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS

This is just one example that may be useful. You should consult with a licensed attorney in your own jurisdiction before adopting this template.

University of Knowledge

Date of Report:

This report addresses alleged violations of the Policy Name(s) of the University of Knowledge. Names of Investigators conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the relevant university policy or policies.

Executive Summary:

(Summarize findings here.)

Procedural History:

Include the date of the incident, the date on which it was reported, how and to whom (generally) it was reported, the date on which investigators were assigned to it, and the date on which the investigation closed.

On Month XX, 20XX, Reporting Party met with Name Here in the Office of Victim Assistance at University of Knowledge along with Name Other Present Parties. Reporting Party reported that General Allegations occurred on Month XX, 20XX. Reporting Party has not reported this matter to law enforcement at this time, although she is aware of this option.

This report was referred to Investigators Name Here and Name Here on Month XX, 20XX. Both investigators were present in person for each interview. They alternated questioning and note-taking roles. This investigation was completed on Month XX, 20XX.

Involved Parties:

Reporting Party is (e.g., a first-year undergraduate female residing in the residence halls).

1. Responding Party is (e.g., a male graduate student and a residence advisor in the residence halls).
2. Witness 1 is (e.g., a freshman female residing in the residence halls and Reporting Party's roommate).
3. Witness 2 is (e.g., a male undergrad living off-campus and a classmate and friend of Reporting Party).
4. Witness 3 is (e.g., an employee of Nearby Bar; employee is not affiliated with the university).

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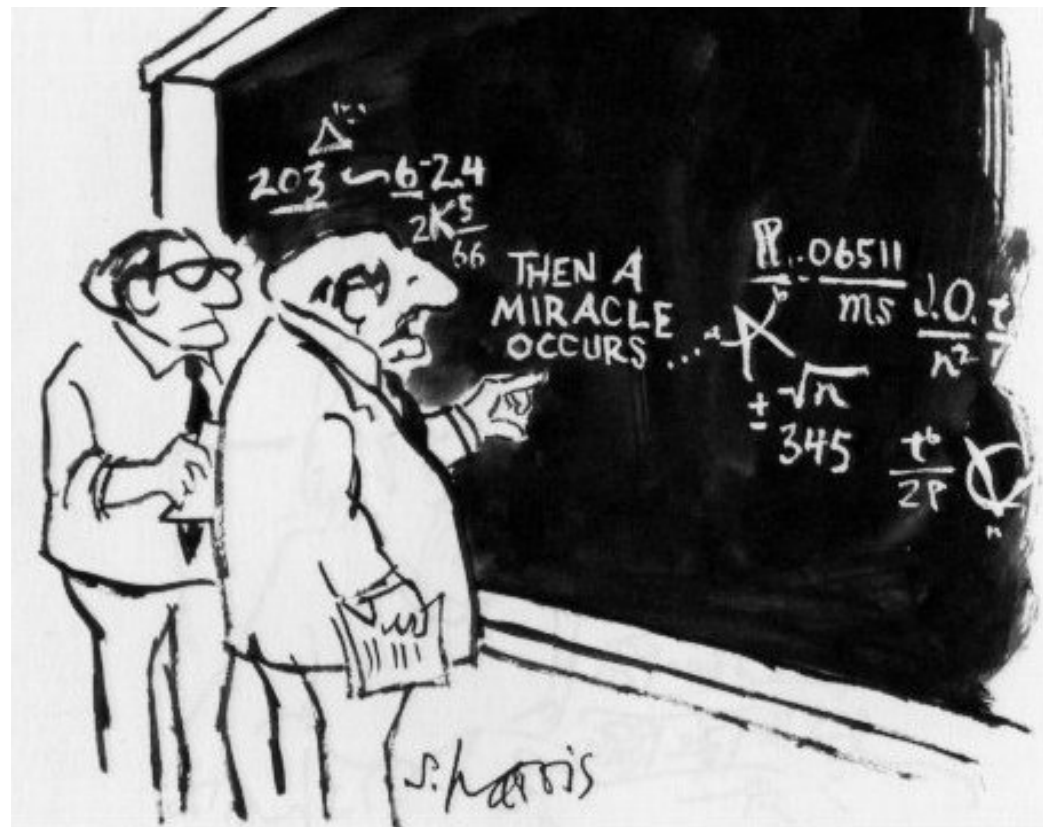
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APPLICABLE POLICIES: SAMPLE TEXT



- 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)

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 10th 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.

RELEVANT PROPOSED REGULATIONS



- *(1) Basic requirements for grievance procedures. Grievance procedures must...*
 - *(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence— and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness;*
 - *(iii) Require that any individual designated by a recipient as a coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent....*
 - *(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;*

RELEVANT PROPOSED REGULATIONS



Review of ALL evidence by the parties

- *(1) Basic requirements for grievance procedures. Grievance procedures must...(cont.)*
 - *(viii) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.*

Sharing the Evidence with the Parties

- *(1) Basic requirements for grievance procedures. Grievance procedures must...(cont.)*
 - *(viii – cont.) Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report.*

Investigation Report

- *(1) Basic requirements for grievance procedures. Grievance procedures must...(cont.)*
 - *(ix) Create an investigative report that fairly summarizes relevant evidence and, at least ten days prior to a hearing (if a hearing is required under this section) or other time of determination regarding responsibility, provide a copy of the report to the parties for their review and written response.*

RELEVANT PROPOSED REGULATIONS: MAKING A DETERMINATION



Separation of roles

- *(4) Determination regarding responsibility.*
 - *(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.*

RELEVANT PROPOSED REGULATIONS: STANDARD OF PROOF



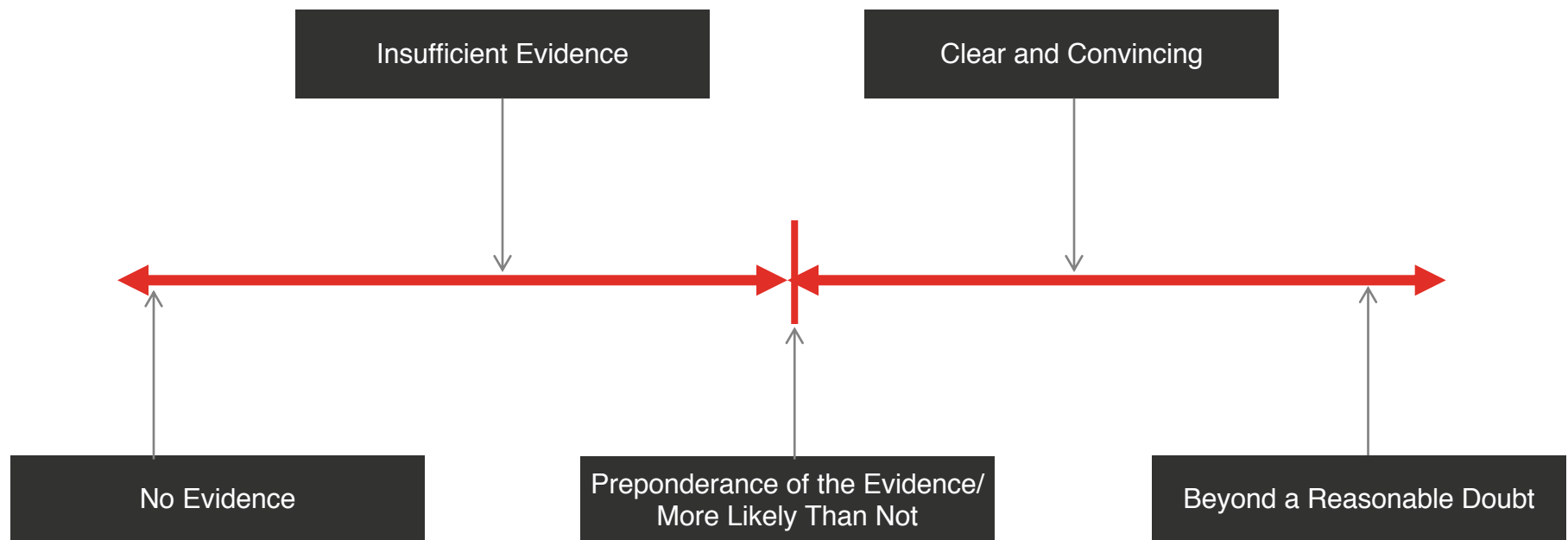
Evidentiary Standard

- *(4) Determination regarding responsibility (cont.)*
 - *To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.*

UNDERSTANDING STANDARDS OF EVIDENCE



EVIDENTIARY STANDARDS



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.

INVESTIGATION, INTERVIEWS, EVIDENCE GATHERING, HEARING



CONSIDERATIONS

- Fair and equitable.
- Confidentiality, privacy, and FERPA.
- Interviewing.
- Advisors (for parties).
- Note-taking.
- Witness lists and flowcharts.
- Evidence is...
- Notices Provided
 - Investigation
 - Charge
- Assessing evidence and credibility.
- Investigation report.
- Hearing (if applicable) – investigator as key witness.
- Making a finding.

INVESTIGATION: STRATEGY IS KEY



- The investigation team, in consultation with the Deputy Coordinator, and/or Title IX Coordinator, strategizes the investigation. This includes:
 - What policy elements are implicated?
 - What are undisputed facts? Which ones are significant to the investigation?
 - What are facts in dispute? Which ones are significant to the investigation?
 - Who do you need to interview?
 - Order of the interviews?
 - Timelines.
 - Timeline of investigation
 - Timeline of incident(s)

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

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.

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.

TIMELINE EXAMPLE



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

TIMELINE EXAMPLE



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

TIMELINE EXAMPLE



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

TIMELINE EXAMPLE



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

TIMELINE EXAMPLE



- **Additional Relevant Timeline**

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

IRRELEVANT EVIDENCE EXAMPLE



- In the course of the investigation, witnesses and the parties provided a great deal of information, some of which was relevant, some of which was not.
- Rather than dismissing evidence as irrelevant *while* gathering evidence, investigators 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 and make a decision based on the preponderance of the relevant evidence, rather than extraneous or irrelevant evidence.

THE INVESTIGATION REPORT



- Develop how prior, similar acts by the responding party are relevant and to what.
- Measure the information gathered against the policies alleged to have been violated, applying the standard of proof (analysis).
- Recommend a finding on whether the policy has been violated, or make the finding, depending on your process.

ELEMENTS OF AN INVESTIGATION REPORT (CONT.)



- Document the purpose (scope) of the investigation.
 - This section must paint a clear picture of the investigation for the person reading the report.
 - Identify clearly which policies are in play.
- Document each of the actions taken throughout the investigation, particularly if there are multiple investigators.
- Index all documentation relevant to the complaint.
 - E.g., research, notes, medical records, police reports, prior complaints, etc.

ELEMENTS OF AN INVESTIGATION REPORT (CONT.)



- 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.
- Incident log.
- Finding and action taken.

REVIEWING TEMPLATES FOR RECORDKEEPING AND REPORT-WRITING



- Format.
- Form.
- Flow.
- Style.
- Use of Appendices.
- Contents/Index.
- Tabs.
- Exhibits/Physical Evidence.

DUE PROCESS CHECKLIST



- Right to receive **COPIES** of all reports
- Right to copy of investigation report prior to finalization or prior to hearing (if there is one)
 - 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”

DUE PROCESS CHECKLIST



- Right to access to other evidence used in determination, reasonably prior to determination (may be redacted).
 - Caselaw is increasingly overwhelming on this point
 - Neither FERPA nor employment laws prohibit providing copies
 - STOP making people come to office to review: NOT best practice.
 - Transparency: important to fairness

DUE PROCESS CHECKLIST



- Right to decision-makers and a decision free of demonstrated bias/conflict of interest
- Advance notice of who those decision-makers will be
 - Not just ANY bias
 - Danger of wearing multiple hats
 - Previous interaction does not disqualify, but be careful
 - Doe v. George Mason Univ.
 - Cannot be both decision-maker and appellate officer

DUE PROCESS CHECKLIST



- Right to have only relevant history/record considered as evidence
 - Disciplinary history of both parties is typically irrelevant, except during sanctioning
 - Sexual history of both parties - typically irrelevant
 - Sexual history between the parties **can** be relevant (e.g. to help determine what patterns exist as to how consent is given or received, etc.)
 - Previous good faith allegations that are substantially similar may be considered (even if found not responsible)
 - Proving pattern v. proving offense. Which are you investigating?

DUE PROCESS CHECKLIST



- The right to have the SCHOOL bear the burden of proving a violation of policy
 - A report does not create a presumption that the policy was violated
 - Not up to either party to prove or disprove the allegation
 - Preponderance of the evidence & equity

DUE PROCESS CHECKLIST



- Right to a finding that is based on the preponderance of the evidence
 - 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

DUE PROCESS CHECKLIST



- Right to a finding that is neither arbitrary nor capricious
 - Arbitrary and capricious decisions are often based on external variables
 - E.g.: personalities, identity, money, influence or status, power imbalance, corruption, discriminatory variables
 - “Picking the plaintiff” is arbitrary and capricious
 - Decisions should be based on evidence, credibility, prompt, thorough, and impartial investigation by trained investigators
 - Bias and partiality are everywhere...

DUE PROCESS CHECKLIST



- Right to the outcome/final determination of the process in writing as per VAWA §304
 - No longer sufficient to simply tell the parties the outcome
 - Must be provided to both parties
 - Need not be identical, but should contain same key elements
 - Must be provided “simultaneously”
 - Must provide each stage that could be “final”
 - Finding, sanction, and rationale (see next slide)

DUE PROCESS CHECKLIST



- Right to a detailed rationale for the finding/sanctions
 - VAWA requires finding, sanction, and rationale
 - Caselaw overwhelmingly supports this requirement
 - Written detailed rationale provided to the parties (allows for appeal)
 - Rationale for decision on any challenged interim measures, findings, appeals, any change in finding or sanction

CONSENT CONSTRUCT

-
- Force
 - Incapacity
 - Consent

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?

FORCE



- 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

- 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?

TIMELINE CONSTRUCT



- 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.

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

BIAS, PREJUDICE & CULTURAL COMPETENCE

—

- Often an issue (esp. for hearing boards/officers)
- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
 - Pre-determined outcome
 - Partisan approach by investigators in questioning, findings, or report
 - Partisan approach by hearing board members in questioning, findings, or sanction
 - Intervention by senior-level institutional officials
 - Not staying in your lane
 - Improper application of institutional procedures
 - Improper application of institutional policies
- The focus of this section, however, is on the cultural competence-based bias and prejudice.

“BIAS” DEFINED



- “Biased”
 - A tendency to believe that some people, ideas, etc., are better than others that usually results in treating some people unfairly
 - An inclination of temperament or outlook; especially a personal and sometimes unreasoned judgment (merriam-webster.com)
- “Biased”
 - To cause partiality or favoritism; influence, especially unfairly (Dictionary.com)

- People do not shed their values, beliefs and life experiences at the hearing room door. Nor should we expect them to
- While bias is inevitable, it does not necessarily undermine the fairness or appropriateness of a hearing board's decision
- The key is recognizing the bias and ensuring it does not impact one's decision because bias that serves as the basis for the outcome of the hearing is improper
- Hearings must be based on evidence, not on personal beliefs about a complaint

“PREJUDICE” DEFINED



- To “pre-judge”
- “Prejudice”
 - Any preconceived opinion or feeling, either favorable or unfavorable (dictionary.com)
 - Often based on things we have previously read, our own experiences
- Prejudice
 - An unfair feeling of dislike for a person or group because of race, sex, religion, etc.
 - A feeling of like or dislike for someone or something especially when it is not reasonable or logical (merriam-webster.com)

MULTI-PARTIALITY



- Multi-partiality: You can never be truly “neutral” or “impartial,” but you can work to neutralize your biases
 - Underrepresented populations
 - Religious concerns
 - Power and privilege
 - Adult and Non-traditional students
 - Sexual orientation
 - Disabilities
 - Race
 - Sex and Gender
 - Who is your community?

BIAS & PREJUDICE



- Conscious vs. Unconscious
- Positive vs. Negative
- Social & Cultural Capital
- Experiential
- Stereotyping
- Cultural Competence
- Multi-partiality
- Social Justice
- Relationships

BIAS & PREJUDICE: AREAS OF CONCERN



- Role of Alcohol
- Student Development...
- **Own experiences...**
- Student-Athletes
- Fraternity/Sorority Life
- Disabilities & Mental Illness
- International Students
- Sex/Gender
- Gender Identity
- Race
- Ethnicity
- Nature of the Violation
- Religion or Religious beliefs
- Academic Field of Study/Major
- Veteran Status
- Socioeconomic Status
- Politics
- Attitude
- Pre-disposition towards one party

EVALUATION OF EVIDENCE AND DECISION-MAKING SKILLS

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

UNDERSTANDING EVIDENCE



- Formal rules of evidence do not apply. If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered
 - 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
- 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?
 - Look for evidence of prior planning

CREDIBILITY



- Credible is not synonymous with truthful
- Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading
- Refrain from focusing on irrelevant inaccuracies and inconsistencies
- Pay attention to the following factors...

FACTORS TO CONSIDER FOR CREDIBILITY



- Demeanor
 - Nonverbal language
 - Demeanor issues should be cue to ask more questions
- Non-cooperation
 - Look for short, abrupt answers or refusal to answer
 - OK to ask, “You seem reluctant to answer these questions – can you tell me why?”
- Logic/consistency
 - Ask yourself, “Does this make sense?”
- Corroborating evidence
- Inherent plausibility – is the evidence more likely than the alternative?

MAKING CREDIBILITY DETERMINATIONS



- Look at consistency of story – substance and chronology of statements
- Consider inherent plausibility of all information given
- Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses, or denials that have no supporting detail
- Pay attention to non-verbal behavior, but don't read too much into it...this isn't Lie to Me

ANALYZING THE INFORMATION



- Examine only actions that have a direct relation to the situation under review or a pattern of incidents
- Explore motivation, attitude, and behavior of reporting party, responding party, and witnesses
- Apply relevant standards:
 - Force, incapacity, and consent
 - Unwelcomeness, reasonable person, and discriminatory effect
- Analyze the broadest, most serious violations first and make a determination of each and every violation alleged, element by element

ANALYZING THE INFORMATION (CONT.)



- Assessing each answer: for each piece of information you have as a result of your analysis and matching your need to assess its evidentiary value. Measure with the following questions:
 - Is the question answered with fact(s)?
 - Is the question answered with opinion(s)?
 - Is the question answered with circumstantial evidence?



Withhold judgment until all the evidence has been considered.

FOCUS ON WHAT YOU DON'T KNOW, RATHER THAN WHAT YOU DO



- Find an opportunity to let your subconscious work on the gaps in information (e.g., yoga, meditation, etc.)
- If you are too busy analyzing what you know, you won't focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them
- Look for evidence that should be there that is not, for some reason

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

PARSING THE POLICY

NON-CONSENSUAL SEXUAL INTERCOURSE



- **Non-consensual sexual intercourse is:**
 - Any sexual intercourse,
 - However slight,
 - With any object,
 - By a person upon another person,
 - That is without consent and/or by force

PARSING THE POLICY INTERCOURSE DEFINED



- **Non-consensual sexual intercourse includes:**
 - Vaginal or anal penetration,
 - By a penis, object, tongue, or finger, and oral copulation (mouth to genital contact),
 - No matter how slight the penetration or contact.

PARSING THE POLICY

NON-CONSENSUAL SEXUAL CONTACT



1. Was there sexual intercourse by one person upon another, no matter how slight, as defined in the policy?
If yes →
2. Was it by force, as defined in policy? If yes, policy was violated. If no →
3. Was it without consent, as consent is defined in the policy? If yes, there is a policy violation. If no, there is no policy violation.

* Questions 2 & 3 are a summary of the 3 Consent Questions pertaining to Force, Incapacitation, and Affirmative Consent addressed earlier on slide 85

PARSING THE POLICY

NON-CONSENSUAL SEXUAL CONTACT



- Non-consensual sexual contact is:
 - Any intentional sexual touching,
 - However slight,
 - With any object,
 - By one person upon another person,
 - That is without consent and/or by force.

PARSING THE POLICY

SEXUAL CONTACT DEFINED



- Sexual contact includes:
 - Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; or
 - Any other intentional bodily contact in a sexual manner

PARSING THE POLICY

NON-CONSENSUAL SEXUAL CONTACT



1. Was there sexual contact by one person upon another, no matter how slight, as defined in the policy? If yes →
2. Was it intentional? If yes →
3. Was it by force, as defined in policy? If yes, policy was violated. If no →
4. Was it without consent, as consent is defined in the policy? If yes, there is a policy violation. If no, there is no policy violation.

DELIBERATIONS

—

Findings, Impact Information, and Sanctions

- Be sure to separate the “Finding” from the “Sanction.”
 - Do not use impact-based rationales for findings (e.g.: intent; impact on the reporting party; impact on the responding party, etc.)
 - Use impact-based rationales for sanctions only.
- Reporting Party and Responding Party should be allowed to deliver an impact statement only if and after the Responding Party is found in violation
- Understand that the question of whether someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful about not heightening the standard for a finding because the sanctions may be more severe

Relevance and Evidence

- Parsing the Policy
 - Look at each element to be assessed in the policy (e.g., intent, sexual contact, voluntary, etc.), separate it out and determine if you have evidence that supports that a violation of that component is more likely than not.
- Deliberate only on evidence that is relevant to the issue and the policy being charged in the hearing
- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report or presented at the hearing
- Decisions must be based on the specific institutional policy alleged to have been violated

COMMUNICATING THE FINDING(S)



Findings Letter

- ii) The written determination must include—
 - (A) Identification of the section(s) of the recipient's code of conduct alleged to have been violated;
 - (B) A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - (C) Findings of fact supporting the determination;

COMMUNICATING THE FINDING(S)



Findings Letter

- ii) The written determination must include (cont.)
 - (D) Conclusions regarding the application of the recipient's code of conduct to the facts;
 - (E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the recipient's education program or activity; and
 - (F) The recipient's procedures and permissible bases for the complainant and respondent to appeal, if the recipient offers an appeal.

CONTACT INFORMATION

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