



K-12 TITLE IX COORDINATOR & ADMINISTRATOR ADVANCED TRAINING & CERTIFICATION COURSE

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OVERVIEW OF TITLE IX REQUIREMENTS AND RESPONSES

- The Spectrum of Title-IX Based Issues
- Legal Basis for Title IX Liability
- Advanced Jurisdictional Topics
- OCR Proposed Regulations / Regulatory Changes
- Recent Updates / Lessons from Cases and OCR resolutions

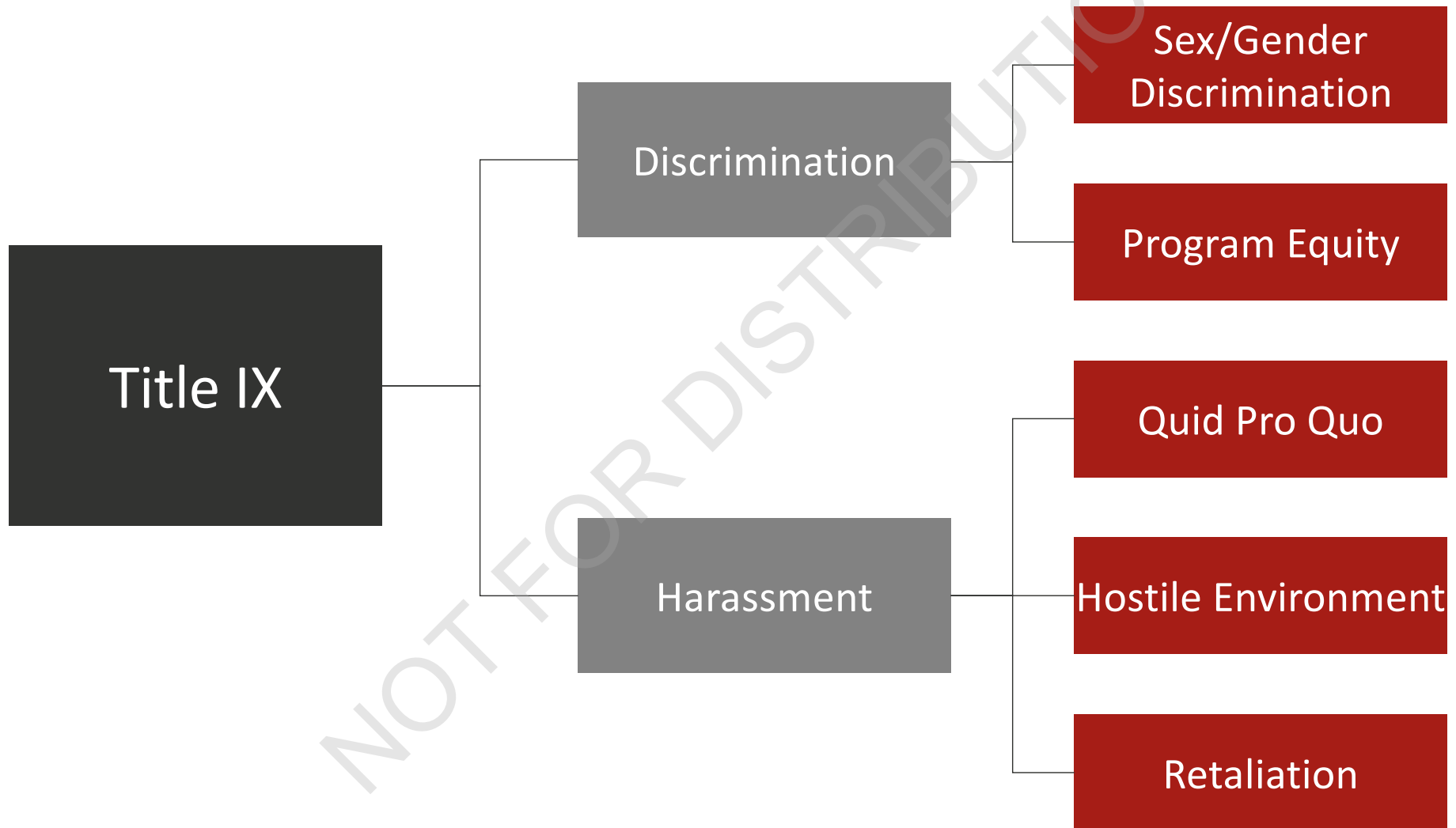
TITLE IX



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.”

TITLE IX



THE SPECTRUM OF TITLE IX-BASED ISSUES



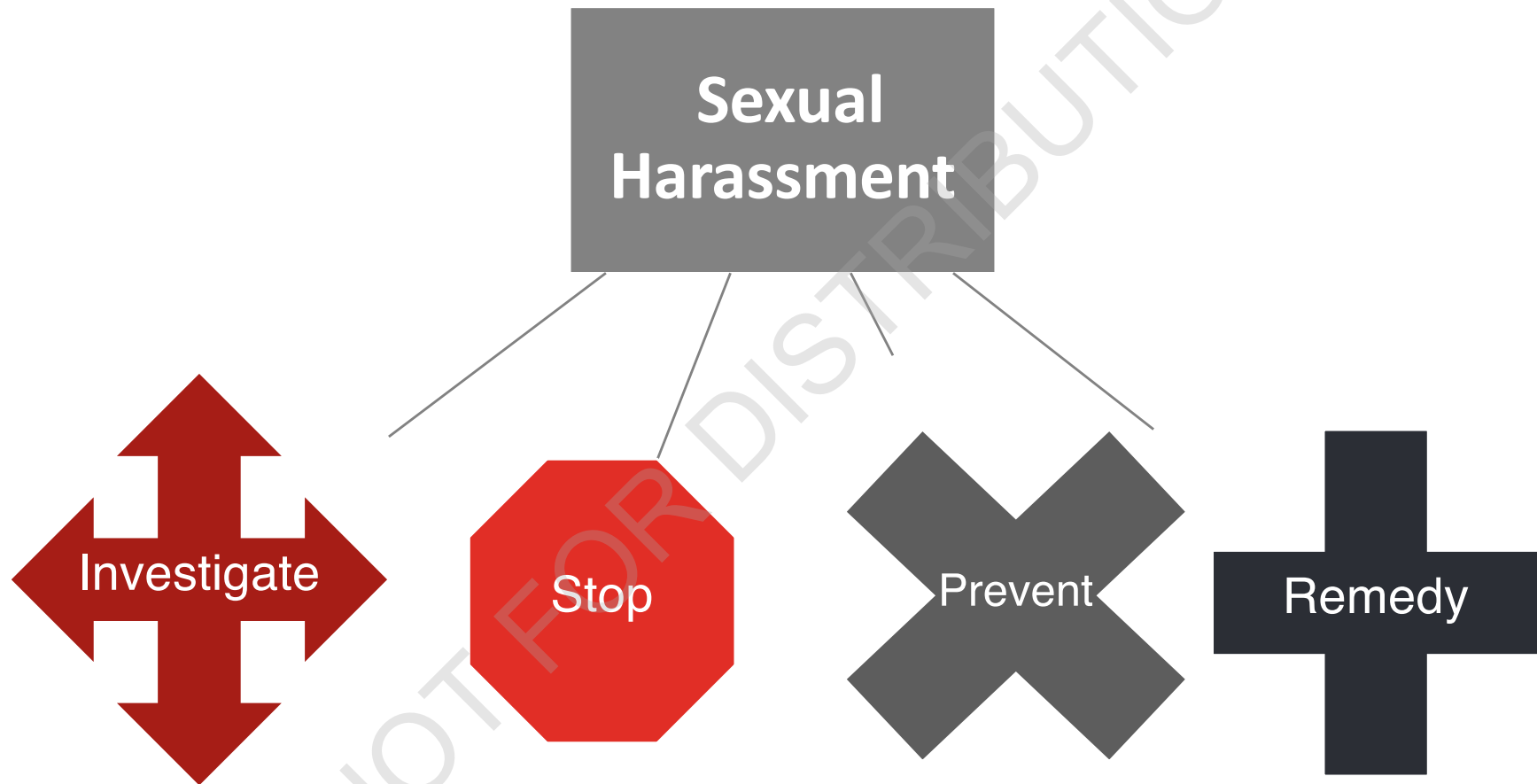
Sex Based Discrimination

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

Sexual Harassment

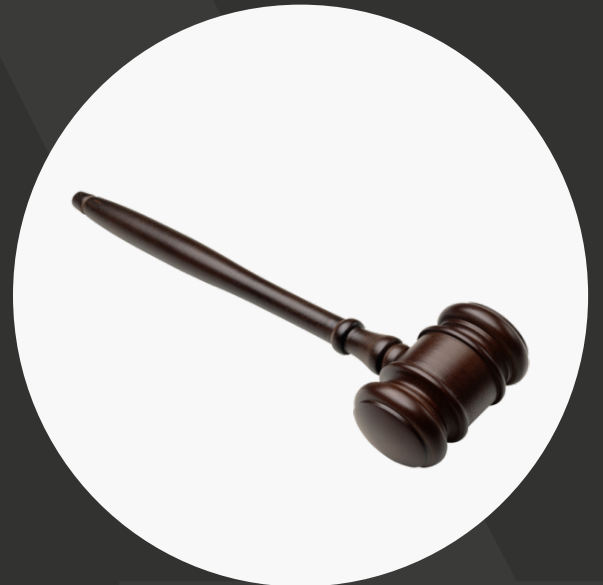
- Stalking
- Domestic Violence
- Dating Violence
- Sexual Assault
- Sexual Violence
- Sexual Exploitation
- Sexual Intimidation
- Sexual Misconduct
- Bullying and Cyberbullying
- Retaliation

SCHOOL/DISTRICT OBLIGATIONS UNDER TITLE IX

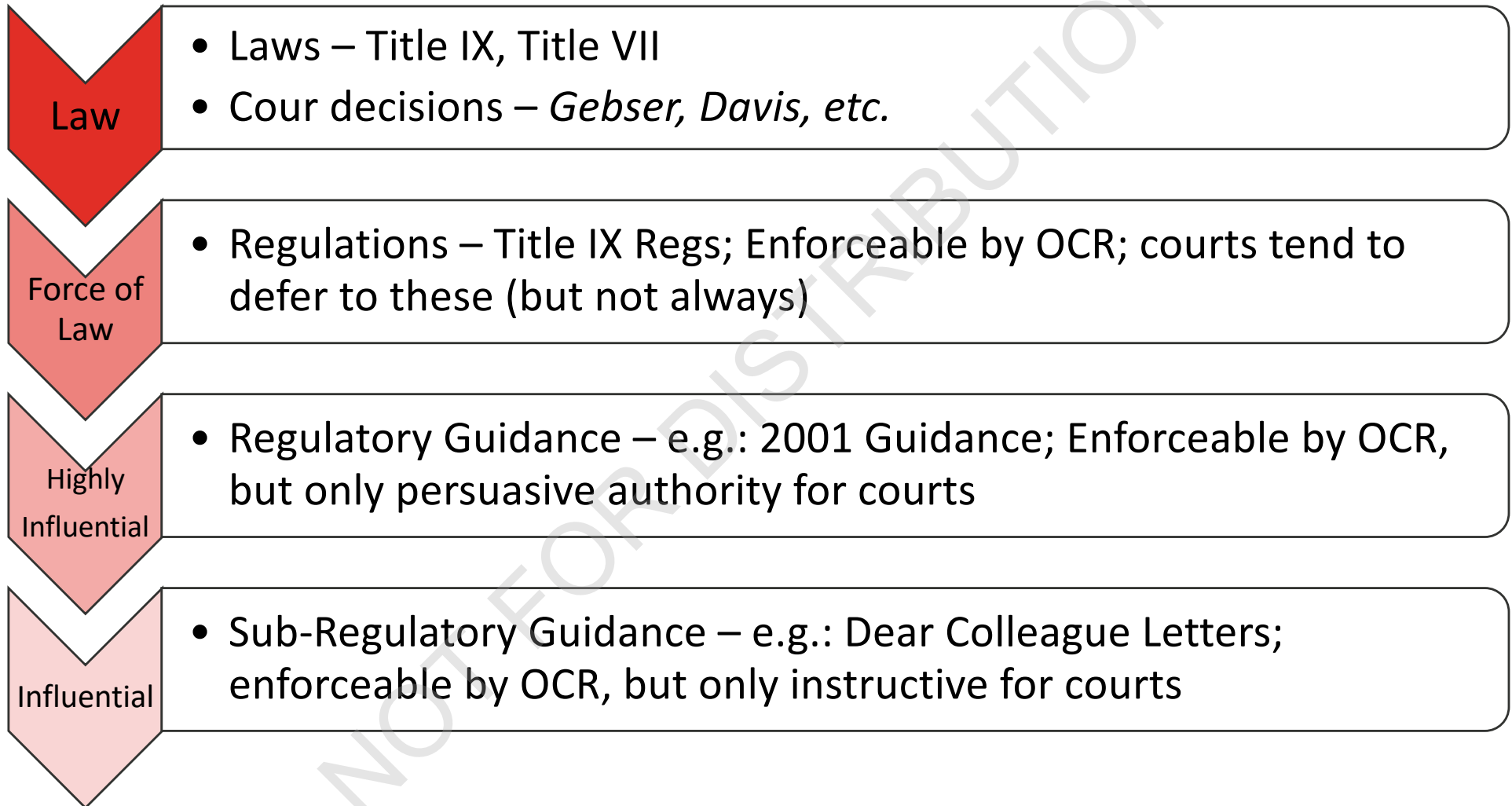


EXPANDED LEGAL BASIS FOR TITLE IX LIABILITY

- *Caselaw Refresher*



HIERARCHY AND ENFORCEABILITY OF LAWS AND REGULATIONS



FRANKLIN V. GWINNETT PUBLIC SCHOOLS, **503 U.S. 60 (1992).**



- **Facts:** A high school student was subjected to continual sexual harassment and assaults from a sports coach and teacher employed by the district. The school investigated but took no action to halt the conduct. He resigned on the condition that all matters pending against him be dropped. The school then closed its investigation.
- **Issue:** Does sexual harassment constitute discrimination under Title IX?
- **Analysis:** Sexual harassment constitutes sex discrimination under Title IX. An individual may bring a lawsuit (a “private right for recovery of monetary damages”) under Title IX.

GEBSER V. LAGO VISTA INDEP. SCHOOL, 524 U.S. 274 (1998).



- **Facts:** An eighth-grade student was engaged in a months-long pattern of sexual assaults by a teacher unknown to her parents and school officials. They were eventually caught during an encounter. The teacher had a prior pattern of inappropriate sexual language with students, which the school knew and warned him about.
- **Issue:** What is the standard for recovering monetary damages against the school in a sexual harassment case?
- **Analysis:** Three-part standard established.
 - An official of the school/district must have “actual notice” of harassment;
 - The official had authority to “institute corrective measures” to resolve the harassment problem; AND
 - The official “failed to adequately respond” to the harassment and acted with “deliberate indifference.”

DAVIS V. MONROE COUNTY BD. OF EDUC., 526 U.S. 629 (1999).



- **Facts:** A fifth-grade student was continually harassed by a peer over a sixth-month period. The student reported the behavior multiple times to her teachers, and the parents notified school officials multiple times, as well. The harassment continued and negatively impacted her ability to receive an education.
- **Issue:** Can a school be held responsible under Title IX for student-on-student sexual harassment?
- **Analysis:** In a 5-4 decision, the Supreme Court found in favor of Davis. When the school has actual knowledge of the harassment, and fails to properly take corrective action, the school is deliberately indifferent. The conduct was sufficiently severe, pervasive, and objectionably offensive.

ADVANCED JURISDICTIONAL TOPICS

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NOT FOR DISTRIBUTION

WHEN DOES TITLE IX APPLY?



- In ***Davis***, the U.S. Supreme Court set the standard for Title IX jurisdiction.
- Title IX applies when the school has:
 - **Control over the harasser** (the person alleged to be discriminating); AND
 - **Control over the context** of the harassment (the discrimination).

“IS IT A IX?”



Subject Matter

**Covered Programs
and Activities**

Covered Individuals

Location

Time Issues

**Special
Considerations**

COVERED PROGRAMS AND ACTIVITIES



- Includes:
 - **All programs** run by a federal funding recipient (typically the LEA).
 - All programs **using facilities** of the funding recipient.
 - E.g. camps using your fields/stadium.
- It does not matter whether the specific program receives federal funding or not, **all** institutional programs are covered.
- Includes all federal funding, even funding that flows through state or local government.

COVERED PROGRAMS AND ACTIVITIES



- Examples:
 - All academic, instructional, special education programs
 - Co-curricular and enrichment programming
 - Before/after school programming
 - Extra-curricular programs and student activities
 - Athletics
 - All school-sponsored trips
 - School-sponsored transportation

COVERED INDIVIDUALS



- Students – In-school/On-campus & online/distance.
- Employees.
 - Teachers.
 - Other instructional staff.
 - Coaches.
 - Staff/Administrators.
- Volunteers.
- Visitors.
- Participants in camps/other programs.

COVERED INDIVIDUALS



- Everyone, however...
- If Responding Party is not affiliated with the school in any way, the school may lack authority to take disciplinary action, but can take responsive or remedial action.
 - Third-party vendors.
 - Parent/guardian.
 - Guest or invitee.
 - Former student or former employee.
 - Student from another school.

LOCATION



- Property owned or controlled by the school.
- School transportation.
- Off-campus property during a school-sponsored trip or activity.
 - Field trip or athletic trip.
 - School-sponsored international travel (best practice, but not required by OCR)
- Off-campus behavior that has “downstream effects” in the school setting.
 - Title IX only requires remedial and supportive measures for the downstream effects.

ANALYZING “DOWNSTREAM EFFECTS”



- In some circumstances you will exercise jurisdiction for off-campus behavior that does not begin in a school-sponsored activity (“discretionary jurisdiction”).
 - Does your policy specify jurisdiction?
- Look for “nexus” to the school setting.
 - When the downstream effects of purely off-site conduct cause a discriminatory impact at school/on campus.
- Even if no Title IX jurisdiction consider if the behavior violates other school policies.

EXAMPLES: “DOWNSTREAM EFFECTS”



- Social media or electronic communication posts spillover to bullying or cyberbullying at school.
- A student experiences a sexual assault over the weekend and is unwilling to return to school on Monday morning.
- Employee is a victim of intimate partner violence and misses work repeatedly as a result.
- One student sexts a revealing photo to a peer; the peer shares it with a group of friends without permission.

TIME CONSIDERATIONS



- Examples where school lacks disciplinary authority:
 - 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.
- Institution must still:
 - Provide support and resources to the reporting party and the community.
 - Determine if there are patterns or institutional variables that contributed to the alleged incident.
 - Take what action it can (e.g.: trespass the person).
- For Summers/Breaks: consider downstream effects.

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



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

SPECIAL CONSIDERATIONS: FREE SPEECH



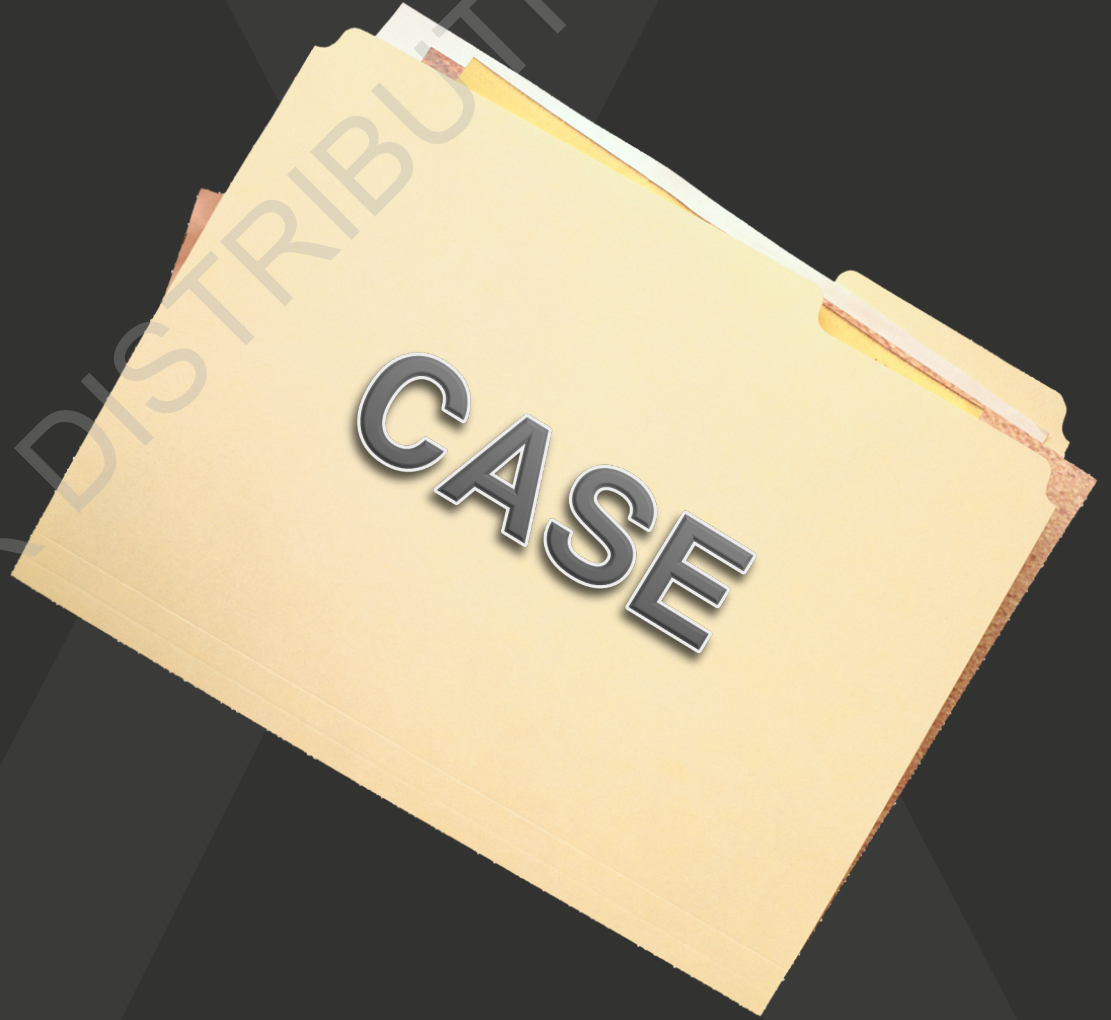
- Is the speech/conduct protected by **academic freedom**?
 - Pedagogically appropriate, germane to the subject matter of the class, and not disruptive to the school environment.
- Is the speech/conduct protected by the **First Amendment**?
 - To be subject to discipline:
 - **Offensive/harassing speech** must be:
 - severe, pervasive (persistent), and objectively offensive, and/or
 - **Disruptive speech** must:
 - Materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.
- Still provide support and resources as appropriate.

ALWAYS REMEMBER...



- If Title IX jurisdiction is not present, consider whether the behavior could still violate:
 - Institutional harassment/discrimination policies.
 - Student Handbook/Conduct policies.
 - Technology/Acceptable Use policies.
 - Employee Handbook/Policies.
 - Professionalism standards.

CASE STUDY



RECENT NOTABLE OCR RESOLUTION AGREEMENT

- Chicago Public Schools – Sept. 2019

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Resolution Agreement resolves complaints filed in March 2015 and November 2016.
- Agreement signed on September 10, 2019
- OCR expanded its review to conduct a “systemic, district-wide investigation” of the District’s response to Title IX allegations.
- Chicago Public Schools District found in violation of Title IX
- Is an excellent insight into OCR’s current interpretations for PK-12 and Title IX policies and procedures.

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- For years, the District's management, handling, and oversight of complaints of student on student and adult on student sexual harassment have been in a state of disarray, to the great detriment of the students the District is responsible for educating.
- The District's investigations were poorly managed and were often conducted by staff who were not properly trained in effective investigative techniques or the specific requirements that Title IX imposes on recipients in addressing instances of sexual harassment.
- Investigations were conducted by a patchwork of both school-level personnel and District personnel without any District-wide coordination of efforts and results.

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- This patchwork structure compromised the ability of students to learn in a safe educational environment.
- Finally, the District's lack of organizational strategies to ensure adequate and reliable investigations and coordinated efforts to address and prevent sexual harassment was exacerbated by poor record-keeping.
- Documentation concerning complaint investigations was very often incomplete, and much of it was maintained in schools, rather than in a centralized location where it could be easily reviewed by high-level administrators.

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- OCR found the District's procedures lacking:
 - Failed to “ensure that students who reported sexual harassment received **interim services and appropriate remedies** in substantiated cases”
 - Failure to “have an obligation to **prepare an investigation report summarizing the results of the investigation**”,
 - Failure to “**notify the parties of the outcome of an investigation**, including whether the investigation substantiated the allegations and determined that harassment occurred.”
 - Failure to articulate “**reasonably prompt timeframes** in the Title IX Policy for completing its investigations.”

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Provide notice to students, parents, and employees of the Title IX Policy and Grievance Procedures, including **where complaints may be filed**, that is written in language appropriate to District students, **easily understood**, and **widely disseminated**;
- **Prohibit retaliation** against persons who report sex discrimination, including sexual harassment, or participate in related proceedings;
- Title IX policies and procedures “apply to complaints alleging sex **discrimination carried out by employees, other students, or third parties**”

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Include formal complaint procedures providing for:
 - designated, reasonably prompt **timeframes** for the major stages of the investigation and for completion of the investigation of a complaint;
 - investigations that are **adequate, reliable and impartial**;
 - an equal opportunity for both parties to **present witnesses and other evidence**;

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Include formal complaint procedures providing for:
 - a **written report** summarizing the relevant inculpatory and exculpatory evidence;
 - **timely and equal access to all parties of information** that will be used during disciplinary meetings and hearings;
 - **written notice of the determination to be provided to the parties**; and
 - if applicable, a requirement explaining who may appeal the District's determination and the basis for deciding an appeal.

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Also required the District to revise its policies and procedures to:
 - “Ensure that the Title IX Coordinator has the **appropriate authority** to effectively coordinate all of the District’s efforts to comply with Title IX.”
 - “Ensure that it has a comprehensive process for responding to all complaints of sex discrimination and that it fully documents responsive actions taken.”

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



- Also required the District to revise its policies and procedures to:
 - Widely distribute its policies and procedures
 - Train administrators, students and parents
 - “Develop and implement a **record-keeping system** that captures all required documentation in connection with all complaints of possible sexual harassment and sex discrimination.”
 - Provide **equitable remedies** to both parties

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Training Personnel

- Training for those “responsible for processing, investigating, adjudicating and/or resolving complaints of sexual harassment:
 - The District’s Title IX Policy and Grievance Procedure;
 - **How to respond** to complaints of sexual harassment;
 - **How to identify** what constitutes sexual harassment, including a hostile environment;
 - **How to conduct and document** adequate, reliable, and impartial investigations of sexual harassment;

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Training Personnel

- Training for those “responsible for processing, investigating, adjudicating and/or resolving complaints of sexual harassment:
 - **Resources** for reporting parties
 - **Record retention** requirements
 - Available **interim measures and resources** for the affected parties
 - Title IX prohibitions on retaliation
 - **Notice to all parties of the outcome of the investigation.**

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Student and Parent Training

- Annual age-appropriate training for students and parents covering:
 - The District’s revised Title IX Policy and Grievance Procedures
 - Including where to locate them on the District’s website
 - The existence of OCR and its authority to enforce Title IX
 - The District’s Title IX Coordinator, (including contact information), as well as school administrators and their Title IX-related roles

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Student and Parent Training

- Annual age-appropriate training for students and parents covering:
 - What constitutes sexual harassment,
 - The District's prohibition against sex discrimination, including sexual harassment
 - What students should do if they believe they or other students have been subjected to sexual harassment.

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Records Maintenance

- A. Track electronically all Title IX complaints, including
 - Relevant information related to the complaint
 - Information related to the complainant and respondent
 - All identified witnesses of the harassment
 - The person receiving the complaint
 - The date/time/nature/location of the incident
The date the District became aware of the incident
 - The date the Title IX Coordinator received notice of the incident;

OCR RESOLUTION AGREEMENT: CHICAGO PUBLIC SCHOOLS (SEPT 2019)



Documentation and Personnel Files

- “Document actions [the District] takes in response to all Title IX complaints at each stage of its investigation and grievance process, including when imposing sanctions against a District-affiliated adult or disciplining a student.”
- “The District will require that all final Title IX determinations against staff, faculty, or administrators (hereinafter respondents) be noted in the respondent’s personnel file, consistent with state and local laws, District policies, and applicable collective bargaining agreements. The notation shall provide a summary of the nature of the allegations, indicate whether a finding of violation was made and, if so, the sanctions imposed.”

PROPOSED TITLE IX REGULATIONS

- Key Changes Ahead for K-12 Settings

OVERVIEW OF PROPOSED REGULATIONS



- November 29, 2018: OCR published proposed amendments to Title IX regulations:
 - OCR has reviewed all comments and is working to finalize the regulations.
 - OCR must 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.
 - Many intervening variables; will they ever be finalized/enacted?

GRIEVANCE PROCEDURES



- Must include:
 - Presumption that responding party is not responsible until determination is reached
 - “Reasonably prompt” timeframes
 - Range of possible sanctions and remedies
 - Description of standard of evidence
 - Bases and procedures for appeal
 - Range of supportive measures available to both parties

PROMPTNESS



- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if your school offers an appeal.
- Concurrent law enforcement investigation does **not** relieve the burden on the school to investigate.
- Temporary delays for “good cause” and with written notice of the delay to parties:
 - Complexity of the investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Delays for administrative needs are insufficient

JURISDICTIONAL ISSUES



- Emphasizes the *Davis* standard:
 - Control over the harasser and the context of the harassment
 - “Occurs within its education program or activity”
- Regulations specify “harassment ... against a person *in the United States.*”
 - OCR does not intend to enforce Title IX regarding international incidents.
 - However, courts are still likely to enforce Title IX if it “occurs within the educational program or activity,” such as study abroad programs, or school-sponsored international trips
 - Also consider “downstream effects”

REGS ADOPT “DELIBERATE INDIFFERENCE” STANDARD



- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is **not deliberately indifferent**
- If the conduct alleged by the reporting party would not constitute sexual harassment even if proved or did not occur within the recipient's program or activity, the recipient must terminate its grievance process with regard to that conduct

NOTICE: RESPONSIBLE EMPLOYEE DEFINITION



- 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.
- Proposed regulations also specify all **K-12 teachers** when conduct is student-on-student.
- Report must go to Title IX Coordinator or any official who has the authority to institute corrective measures.

DEFINITION OF SEXUAL HARASSMENT



- Revised Definition of Sexual Harassment:
 - Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (Quid Pro Quo).
 - 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 (Hostile Environment)
 - Sexual assault, as defined in 34 CFR 668.46(a) [Clery Act]
- Regulations are silent on retaliatory harassment.

DIVISION OF ROLES



- Under the regulations, there must be a clear division of roles.
- Be attentive to these four roles:
 - **Title IX Coordinator.**
 - **Investigator** (could be Coordinator or separate distinct person(s)).
 - **Decision-maker** (person/people who determines whether student/employee is “responsible” for violating school/district policy).
 - May not be the Coordinator or the investigator.
 - **Appellate decision-maker** must be a distinct different person/people.

NEUTRALITY, CONFLICT OF INTEREST, OBJECTIVITY



- Grievance procedures must treat parties “equitably”
 - Must be designed to restore or preserve access to education programs
 - Must include due process protections before disciplinary sanctions are imposed
- Prohibits conflict-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or against an individual party
- All relevant evidence obtained must be **objectively** evaluated

SUPPORTIVE MEASURES



- New term for “interim measures.”
- Non-disciplinary, non-punitive individualized services.
- Must not unreasonably burden other party.
- Proposed regulations contemplate *mutual* restrictions.
 - Silent on unilateral or individualized restrictions.
 - Appears to anticipate, but also prohibit, that one party will sometimes be restricted more than the other.
- Interim suspensions (“emergency removals”) are still permissible but only after risk analysis.

EMERGENCY REMOVAL



- May remove a responding party on an emergency basis, provided that the school:
 - Undertakes an individualized safety and risk analysis,
 - Determines that an immediate threat to the health or safety of students or employees justifies removal,
 - Provides the responding party with notice and an opportunity to challenge the decision immediately following the removal,
 - Also follows special education regulations (if applicable).
- May place a non-student employee responding party on administrative leave during the pendency of an investigation.

INFORMAL RESOLUTION OPTIONS



- 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 that would preclude formal resolution
 - Consequences of participation
 - Obtain voluntary, written consent
- Does not preclude certain offenses from informal resolution.
- May restrict use of restorative practices after a determination.

WRITTEN, DETAILED NOTICE BEFORE ANY INTERVIEWS



- Require that the responding party receive advanced written notice of the allegations with “sufficient time to prepare a response before any initial interview.”
 - Will change typical practice of initiating “investigation” immediately.
- Upon receipt of a formal complaint.
 - Details: identity of parties, alleged violations, date, location.
 - Sufficient time to prepare a response.
 - Will provide further guidance about “receipt” standard.
- All hearings, interviews, and meetings requiring attendance with sufficient time to prepare.
 - Formalistic requirements may not reflect fluidity of K-12 settings.

“ADVISOR OF CHOICE”



- Advisor can be anyone.
 - Parent/guardian, attorney, coach, union rep, peer.
- Advisors may be present at any interviews or meetings.
- No discussion of how “choice” conflicts with existing protocols regarding parent/guardian notification.
 - What if the student wishes an advisor different than their parent/guardian?
 - How does an elementary student “choose” an advisor?
- If a student does not choose an advisor, the school must appoint one who is “aligned with the party.”
 - “Defense” and “prosecution” advisors?
- No prior training required, no mandate to train.

BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE



- Burden is on the school, not the parties.
- “Sufficient to reach a determination.”
 - Is your investigation appropriately thorough?
- Anticipate requests that the school attempt to obtain certain evidence.
- Evidence collected by law enforcement is admissible in our school processes.
- Who determines what evidence is relevant and sufficient?

PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT



- 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.

PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE



- Both parties permitted to inspect and review evidence directly related to the allegations.
 - At least 10 days prior to the finalization of the investigative report.
- Available in an electronic format, with restrictions on the ability to download and distribute it.
- All relevant evidence (inculpatory and exculpatory).
 - Will need to decide “relevance.”
- Equal opportunity to inspect all evidence, including evidence not used to support determination.
- Unclear *when* evidence must be provided.
- No limits on types/amount of evidence offered.

LIVE HEARINGS/QUESTIONING



- Proposed regulations mandate live hearing for higher education; **optional for K-12.**
- Parties must attend hearing.
 - If not, all testimony submitted by absent party must be excluded.
- Decision-maker may not be Title IX Coordinator or the investigator.
- If no hearing, must provide opportunity for questioning.
 - Allow parties to submit questions to be asked of the other party and the witnesses.
 - Decision-maker can be the one to ask questions.
 - Used in place of a hearing.
 - Unclear how irrelevant questions will be screened, but rationale for excluding questions required (verbal or written?).

LIVE HEARING



- If live hearing occurs:
 - Parties must attend hearing, otherwise **all testimony** submitted by absent party must be excluded.
 - **Must allow live cross-examination** to be conducted exclusively by each party's advisor (separate rooms or partition permitted).
 - Questions not deemed relevant by hearing administrator may be excluded with rationale provided.
- Must exclude reporting party's prior sexual behavior unless specifically relevant.

DUE PROCESS: EVIDENCE

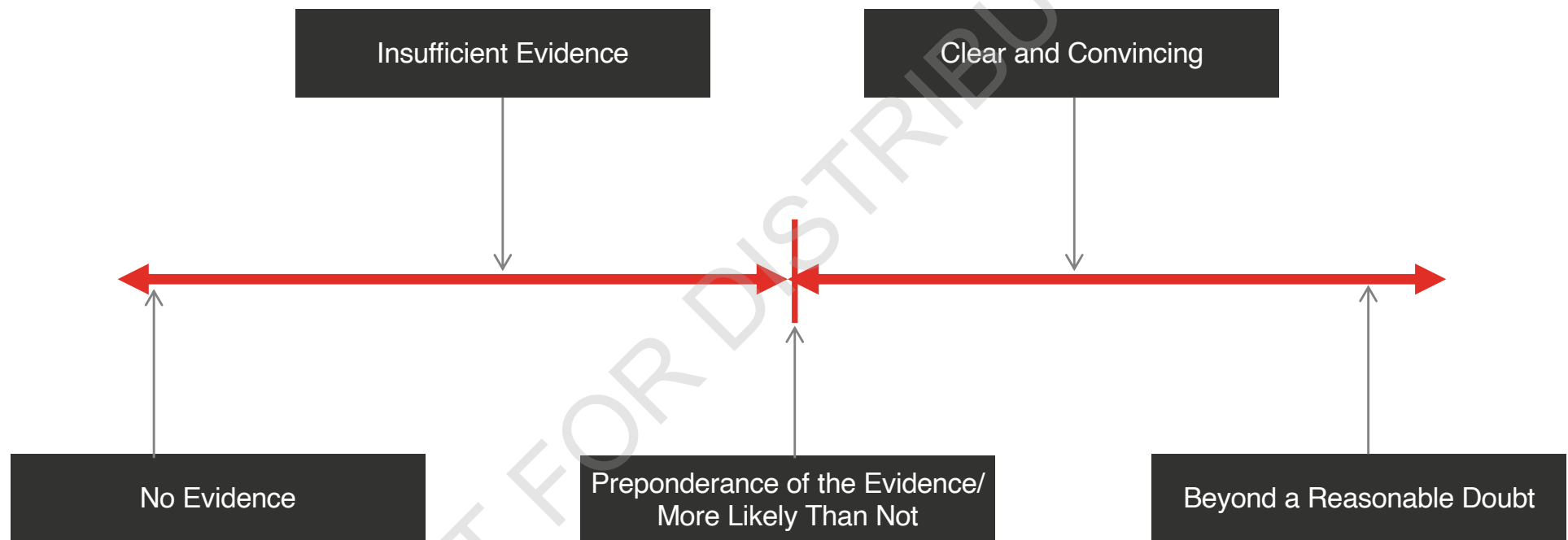


- **All** relevant and reasonably available evidence must be considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered
- Includes all evidence directly related to the investigation, even evidence that determination does not, or will not, rely upon

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



STANDARD OF EVIDENCE



- Current best practice is preponderance of the evidence.
 - Is the same standard a court will use to evaluate school's response.
- Proposed regulations allow preponderance only if same for other conduct code violations, otherwise must use “clear and convincing.”
 - Effectively mandates clear and convincing for schools with higher standards for other proceedings (i.e. standards used in employment hearings).
 - May create incongruence between school process and court scrutiny (where preponderance will still be the standard).

REQUIREMENTS FOR WRITTEN DETERMINATIONS OF “RESPONSIBLE”



- Several required elements:
 - Statement of and rationale for the result as to each specific allegation.
 - Sanctions imposed on the responding party.
 - Any remedies provided to the reporting party designed to restore or preserve access to the education program or activity.
 - Provided to both parties simultaneously.
- More formulaic and formalistic than existing K-12 procedures for “lower-level” infractions.
- Expanded disclosures to reporting party about sanctions is a change from most current K-12 practices.

APPEALS



- If school offers appeals, 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 both parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

- Training mandates are very slim in the proposed regs.
- Training materials may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment.
- Training for investigators and decision-makers on policy definitions, conflicts of issues, and bias issues.
- Training mandates apply to K-12.
- Training materials must be maintained for three years and made available for inspection by the parties.

POLICY DEVELOPMENT CONSIDERATIONS

- Taking Inventory of Existing Policies
- Policy Needs Assessment
- ATIXA Model Policy Definitions
- Advanced Policy Topics

CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY



- The Title IX Coordinator typically leads and oversees efforts to create, revise, and implement policies.
- **Policies = The Rules**
 - Policies should clearly define expected/prohibited conduct.
 - Policies should be regularly updated, revised, and assessed.
- **Procedures/"Process"** = How alleged violations of policy are addressed
 - Procedures should clearly channel the parties to appropriate resources.
 - Procedures should provide for the equitable remedying of complaints.

CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY



- The Title IX Coordinator must be an integral part of the policy development and review process.
- Ensure all policies related to sex/gender misconduct and discrimination are legally accurate and complete.
- If the institution has multiple policies (for teachers, staff, students) and procedures, must ensure that these policies are not conflicting, or contain conflicting definitions.
 - A strong argument to consider a single policy!
 - ATIXA's One Policy, One Process Model (1P1P) (More on this later)

SOURCES OF POLICY REQUIREMENTS



- Federal statutes
- Federal regulations
- State statutes
- State regulations
- Collective Bargaining Agreements
- OCR Resolution Agreements
- Best Practices/Risk Management requirements

GETTING A HANDLE ON YOUR DISTRICT'S "POLICY"



- Board-level Policy
 - E.g., Equal Opportunity/Non-Discrimination Policy
- Board-level Administrative Procedure
 - E.g., Harassment Grievance Procedures
- Employment/Human Resources Policy and Procedures
- Employee/Staff Handbooks
- School-level Policy and/or procedures
 - E.g., Conduct Code
- Student/Parent Handbooks
- Informal protocols
 - E.g., interaction with SROs, search processes

TAKING “INVENTORY”



- Are all of these “policy sources” consistent with each other?
 - Anti-bullying/cyberbullying policy (often required under state law)
 - Harassment and Discrimination policies (required by Title IX, often required under state law)
 - Harassment and Discrimination procedures
 - Transgender and Gender Expansive Students
 - Staff conduct code
 - Staff conduct with students
 - Use of social media by school employees
 - Hazing
 - Student conduct code (including on buses)
 - Disciplinary policies (including removal) of students with disabilities
 - Weapons, violence, and school safety
 - Conduct processes (often defined by state law)
 - Child abuse reporting (and procedures) (often defined by state law)

TAKING “INVENTORY” (CONT.)



- Are all of these “policy sources” consistent with each other?
 - Abuse of students by employees
 - Computer, Network, and Technology Acceptable Use
 - Student use of cellular telephones and other electronic devices
 - Student dress code
 - School-sponsored travel
 - Parental involvement
 - Education records (defined by FERPA and sometimes state law)
 - Personnel records (often defined by state law)
 - Wellness policy (required under federal law; only applicable if district chooses to include sex- and gender-based wellness items)
 - Security camera policy (including buses)
 - Questioning and searches of students
 - Speaker policy
 - Public right to know-freedom of access issues
 - Visitors to the schools

POLICY COLLEAGUES



- May need “orientation” to Title IX requirements, intersection with existing policies, need to implement new policies or procedures:
 - Superintendent
 - Assistant Superintendent
 - Board’s Policy Committee
 - General Counsel (if applicable)
 - Risk Management (if applicable)
 - Principals/Vice-principals
 - Are statements in student/parent handbooks consistent with Board-level and other District-level policies?
 - What about school-level websites?
 - Are descriptions of procedures accurate and up-to-date?
 - Beware of inadvertently creating new “policy” through handbook language

NOTICE OF NON-DISCRIMINATION REQUIREMENT



- Title IX regulations **require** that schools provide notice to students, parents, and others that they do not discriminate on the basis of race, color, national origin, sex, disability, and age, and if applicable, that they provide equal access to the Boy Scouts of America and other designated youth groups. 34 C.F.R. Section 106.9.
- Notification must state that the requirement of non-discrimination in educational programs and activities extends to employment and admissions, and that questions may be referred to the Title IX Coordinator, or to the Office for Civil Rights at the U.S. Department of Education.
- Methodology may include posting notices, publishing in local newspapers and magazines, distributing memos or other written communications to students and employees.
- Include a statement in all publications, application forms, or recruitment materials.

<https://www2.ed.gov/about/offices/list/ocr/docs/nondisc.pdf>

OCR'S SAMPLE NON-DISCRIMINATION NOTICE LANGUAGE



- The [School District] does not discriminate on the basis of race, color, national origin, sex*, disability, or age in its programs and activities and provides equal access to the Boy Scouts and other designated youth groups.
- The following person has been designated to handle inquiries regarding the non-discrimination policies:
 - Name and/or Title
 - Address
 - Telephone No.
 - Name and/or Title2
 - Address
 - Telephone No.
- For further information on notice of nondiscrimination, visit <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm> for the address and phone number of the office that serves your area, or call 1-800-421-3481.

*Add sexual orientation, gender identity, and/or gender expression if applicable under your state law and/or district policy.

<https://www2.ed.gov/about/offices/list/ocr/docs/nondisc.pdf>

EMPLOYEE BASED- ISSUES

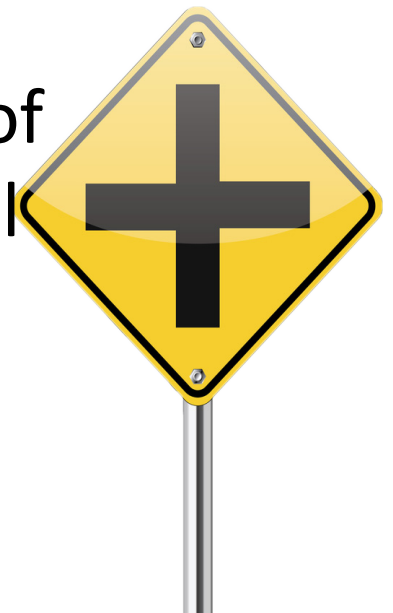
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INTERSECTION OF TITLE VII AND TITLE IX



- **Title VII of the Civil Rights Act of 1964:** prohibits discrimination on the basis of race, color, religion, sex, national origin in employment
- **Title IX:** prohibits discrimination on the basis of sex in programs and activities receiving federal financial assistance
 - Applies to students and employees



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

INTERSECTION OF TITLE VII AND TITLE IX



- Title IX consciously modeled on Title VI and borrowed heavily from Title VII.
- Courts generally apply standards established under Title VII for guidance in how to establish a Title IX violation.
- Employees can use both Title VII and Title IX to pursue the same violations.



TITLE VII AND TITLE IX IN INVESTIGATIONS



- Consider:
 - Role of institutional equity/AA/EOP officer.
 - Human resources/faculty/teachers.
 - Coordinator of school/campus conduct.
- Oversight of deputy coordinators/investigators.
- Ability to merge/combine investigatory and hearing processes.
- Additional rights afforded to employees under Title IX

ATIXA MODEL POLICIES

- Sexual Harassment
- Non-Consensual Sexual Contact
- Non-Consensual Sexual Intercourse
- Sexual Exploitation
- Stalking
- Relationship Violence
- Bullying
- Hazing
- Other Misconduct Offenses

SEXUAL HARASSMENT



Sexual harassment is:

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

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THREE TYPES OF SEXUAL HARASSMENT



1.
Hostile
Environment

2.
Quid Pro Quo

3.
Retaliatory
Harassment

QUID PRO QUO SEXUAL HARASSMENT



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

RETALIATORY HARASSMENT



- Any adverse employment or educational action taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct.
- Also includes retaliation against a reporting party by the responding party or that person's friends or others who are sympathetic to the responding party.
- Also can include retaliation directed toward a third party because of that party's participation in a grievance process or for supporting a grievant.

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 educational [and/or employment], social and/or residential program.

TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



- **Increasing problem of conflating discomfort or being offended with the higher standard of hostile environment**
- The frequency (persistent or pervasive), nature, and severity of the conduct.
- Whether the conduct was physically threatening.
- Whether the conduct was humiliating.
- The effect on reporting party's mental or emotional state.

TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



- Whether conduct was directed at more than one person.
- Whether the conduct **unreasonably** interfered with the reporting party's educational or work performance.
- Whether the statement is an utterance of an epithet which is offensive, or offends by discourtesy or rudeness.
- Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment.

NON-CONSENSUAL SEXUAL CONTACT



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

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.

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.

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INTERCOURSE DEFINED



- **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.

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SEXUAL EXPLOITATION



- **Sexual Exploitation:**

- When an individual(s) takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, that behavior does not otherwise constitute one of the other sexual misconduct offenses. Examples of sexual exploitation include, but are not limited to...

SEXUAL EXPLOITATION



- Examples
 - Invasion of sexual privacy.
 - Non-consensual digital, video, or audio recording of nudity or sexual activity. (“exposing”)
 - Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.
 - Engaging in voyeurism.
 - Going beyond boundaries of consent (e.g. letting friends hide in the closet to watch you having consensual sex).

SEXUAL EXPLOITATION



- Examples (cont.)
 - Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.
 - Prostituting another person.
 - Intentionally/recklessly exposing one's genitals in non-consensual circumstances; inducing others to expose theirs.
 - Sexually-based stalking and/or bullying may also be forms of sexual exploitation.

- **Stalking:**

- Repetitive and menacing,
- Pursuit, following, harassing, and/or interfering with the peace and/or safety of another.

- Note: 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.

INTIMATE PARTNER VIOLENCE (IPV)



- Violence or emotional abuse between those who are in or have been in an intimate or romantic relationship to each other.
 - Examples include:
 - Physical abuse by a spouse or partner such as hitting, slapping, pushing, or strangling.
 - Sexual violence by a spouse or partner.
 - Extreme verbal abuse by a spouse or partner.
- Other terms include interpersonal violence, relationship violence, dating violence, and domestic violence.
- Typically involves another code violation.
- If based on gender/sex, would fall within Title IX.

BULLYING



- Defined as:
 - 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.
- Often includes comments about race, color, national origin, sex, sexual orientation, or disability.
- Often involves an imbalance of power, aggression, and a negative, repeated behavior.
- Bullying falls within Title IX when gender-based.

- **Hazing:**
 - Acts likely to cause physical or psychological harm or social ostracism to any person within the school community, when related to the admission, initiation, pledging, joining, or any other group-affiliation activity (as defined further in the hazing policy).
- When sexual in nature (sex or gender-based is not applicable here because of the fraternity/sorority exception under Title IX).

OTHER MISCONDUCT OFFENSES



- Threatening or causing physical harm, extreme verbal abuse, or other conduct which threatens or endangers the health or safety of any person.
- Discrimination: actions that deprive other members of the community of educational or employment access, benefits, or opportunities on the basis of sex or gender.
- Intimidation, defined as implied threats or acts that cause an unreasonable fear of harm in another.
- Any rule violated on the basis of the reporting party's sex/gender, which is severe enough to cause a discriminatory effect.

ADVANCED POLICY TOPICS

- Amnesty
- Communicating Outcomes to Parties
- Documentation and Recordkeeping Practices

FOOD FOR THOUGHT: AMNESTY POLICY



- What is an “amnesty policy?”
 - A formal policy extending amnesty to parties, witnesses, or bystanders for minor policy violations that occur in conjunction with incidents of sexual misconduct or sex/gender discrimination to encourage reporting of those incidents, helpful intervention by engaged bystanders, and cooperative participation in the investigation.
- Typically only applies to **minor (“low-level”)** violations. For example:
 - Alcohol consumption
 - Marijuana consumption
 - Truancy
 - Improper social media/technology use

SAMPLE LANGUAGE



- The [School] community encourages the reporting of misconduct and crimes by reporting parties and witnesses. Sometimes, reporting parties or witnesses are hesitant to report to School officials or participate in resolution processes because they fear that they themselves may be in violation of certain policies, such as underage drinking or use of illicit drugs at the time of the incident.
- It is in the best interests of the School community that reporting parties choose to report to School officials, and that witnesses come forward to share what they know. To encourage reporting, School maintains a policy of offering reporting parties and witnesses amnesty from minor policy violations – such as underage consumption of alcohol or the use of illicit drugs - related to the incident. Amnesty does not apply to more serious allegations such as physical abuse of another or illicit drug distribution. [In this situation, the School will provide educational options, rather than discipline, to reporting parties and witnesses.]

SAMPLE LANGUAGE (CONT.)



- **Students:** Sometimes, students are hesitant to assist or support others for fear that they may get in trouble themselves (for example, a student who has been drinking at a party might hesitate to seek help for a fellow student who has experienced sexual misconduct to the police). The School maintains a policy of amnesty for students who offer help to others in need. While policy violations cannot be overlooked, the School will provide educational options, rather than discipline, to those who offer their assistance to others in need.
- **Optional re: Employees:** Sometimes, employees are hesitant to report harassment or discrimination they have experienced for fear that they may get in trouble themselves. For example, an employee who has violated the consensual relationship policy and is then assaulted in the course of that relationship might hesitate to report the incident to School officials. The School may, at its discretion, offer employee reporting parties amnesty from such policy violations (typically more minor policy violations) related to the incident. Amnesty may also be granted to employee witnesses on a case-by-case basis.

FOOD FOR THOUGHT: COMMUNICATING OUTCOMES TO REPORTING PARTIES



- What do you tell a reporting party about the outcome of a investigation and/or disciplinary process involving a responding party?
- Higher education institutions are currently obliged by the Clery Act to make simultaneous written notification to both parties in cases of sexual assault, stalking, or interpersonal violence.
 - Includes initial, interim, and final decision by any official or entity authorized to resolve disciplinary matters within the institution.
 - “Result” = Finding, Sanction, and Rationale.
 - Procedures for appeal (if any), any changes to the results, and when final.

FOOD FOR THOUGHT: COMMUNICATING OUTCOMES TO REPORTING PARTIES



- Proposed regs “adopt” the Clery standard and apply it to all funding recipients, including K-12 schools.
- Extends the notification requirement to include all Title IX matters:
 - Including sexual harassment in addition to sexual assault, stalking, and IPV.
- Section 106.6(e) of the proposed regulations:
 - “The obligation to comply with [Title IX] is not obviated or alleviated by the FERPA statute or the regulations.”

FOOD FOR THOUGHT: COMMUNICATING OUTCOMES TO REPORTING PARTIES



- “Notice of determination” given to BOTH parties:
 - Sections of the code/policy alleged to have been violated
 - Procedural steps taken from receiving the complaint through determination
 - Findings of fact supporting the determination
 - Conclusions regarding application of the code of conduct to the facts
 - A statement of, and the recipient’s rationale for, the result including a determination regarding responsibility
 - Any sanctions
 - Information regarding the appeals process, including procedures and permissible bases for either party to appeal
- Given simultaneously to the parties. Consider:
 - Two separate but simultaneous meetings
 - Telephonically
 - Electronically

COMMUNICATING OUTCOMES TO PARTIES: WHAT ABOUT FERPA?



- 2001 OCR *Revised Sexual Harassment Guide*:
 - “FERPA generally forbids disclosure of information from a student’s “education record” without the consent of the student (or the student’s parent). Thus, FERPA may be relevant when the person found to have engaged in harassment is another student, because written information about the complaint, investigation, and outcome is part of the harassing student’s education record. Title IX is also relevant because it is an important part of taking effective responsive action for the school to inform the harassed student of the results of its investigation and whether it counseled, disciplined, or otherwise sanctioned the harasser. This information can assure the harassed student that the school has taken the student’s complaint seriously and has taken steps to eliminate the hostile environment and prevent the harassment from recurring....

COMMUNICATING OUTCOMES TO PARTIES: WHAT ABOUT FERPA?



- 2001 OCR *Revised Sexual Harassment Guide*:
 - “...The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information **directly relates to the victim**. . . . The Department interprets this provision to mean that FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.”

COMMUNICATING OUTCOMES TO PARTIES: PROPOSED OCR REGULATIONS



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

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DOCUMENTATION AND RECORD-KEEPING PRACTICES



- Documentation of all steps throughout the process is essential. Includes, but is not limited to, the following:
 - Notices
 - Interim and support measures
 - Interview transcripts
 - Investigation report and evidence gathered
 - Outcome
 - Sanctions/Remedies
 - Implementation of sanctions/remedies
- Title IX Coordinator should be the final repository for all case documents
- Know your institution's record retention policies/practices
- Case management system to track cases, actions taken, & patterns

DOCUMENTATION AND RECORD-KEEPING PRACTICES – PROPOSED REGULATIONS



- A recipient must create and maintain for a period of **three years** records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity.
- Check with local counsel about whether there is a longer recordkeeping standard under your state archives rules and/or district policy.

ADVANCED SKILLS IN TITLE IX

- Working Collaboratively with Parents and Guardians
- Working Collaboratively with SROs / Law Enforcement
- Special Considerations When Interviewing Children
- Consent Construct in Investigations

WORKING COLLABORATIVELY WITH PARENTS AND GUARDIANS

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ISSUES TO CONSIDER WHEN WORKING WITH PARENTS AND GUARDIANS



- Transparency and Clarity Regarding Policy and Process
- Parental Notification
- Engaging Parents/Guardians After Receiving a Report
- Setting and Managing Expectations
- Parent/Guardian Participation in the Process
- FERPA Rights/Access to Records
- Difficult Parent Issues
- Ongoing Engagement
- Role of the Title IX Coordinator

TRANSPARENCY AND CLARITY REGARDING POLICY AND PROCESS



- Engage parents early; Don't wait for an incident to happen
- Helps parents to know what to expect if/when an incident occurs
- Shows district/school commitment to Title IX
- Helps to invite parents to be allies in the process

TRANSPARENCY AND CLARITY REGARDING POLICY AND PROCESS



What?

- Overview of Title IX and what is covered
- District/school policy and procedures
- Title IX Coordinator/Deputy Coordinator(s) information
 - Name, Location, Phone, and Email
- Other reporting options (within district, state and federal)
- Interim and supportive measures
- Investigation/disciplinary processes
- In-school and community resources
- Rights of the parties
- Privacy and confidentiality

TRANSPARENCY AND CLARITY REGARDING POLICY AND PROCESS



How?

- Plain language
- Avoid “legalese”
- Accessible to non-English speakers
 - Offering translation services – may be required by state laws
- Use descriptive language in addition to “Title IX”
 - E.g., discrimination, bullying, harassment
- Clear information portal
- Online and printed materials
 - E.g., online training module, resource sheets, etc.
- Widely disseminated

TRANSPARENCY AND CLARITY REGARDING POLICY AND PROCESS



When?

- Upon student enrollment
- Beginning of each school year
- Orientation sessions/back to school nights
- Available online throughout school year
- In conjunction with “key” notices
 - E.g., with report card, standardized test results, etc.
- Parent volunteer training/orientation
- PTA meetings
- Other

NOTIFYING PARENTS/GUARDIANS OF A REPORTED INCIDENT



- When do you call parents/guardians?
 - Not required under Title IX
 - State law
 - District policy
 - School-specific policy
 - Practice/custom
- No uniform standard
 - Trend to notify parents/guardians early in the process, and especially for younger students
- Pros & cons of standardized notification

NOTIFYING PARENTS/GUARDIANS OF A REPORTED INCIDENT



- Other considerations
 - Concurrent/potential criminal investigation
 - Abuse in household
 - Privacy considerations (E.g., transgender students)
 - Severity of incident
 - Wishes of student
 - Potential disciplinary consequences for responding party
- What about witnesses?
 - Not entitled to an “advisor” like the parties
 - Some of the other considerations above may be applicable

ENGAGING PARENTS/GUARDIANS AFTER A RECEIVING A REPORT



- Review policies, procedures, and key staff who will be involved in resolving report
- Investigation/interview/resolution process including appeal process (if applicable)
- Review effects of any interim measures
- Amnesty/Immunity policy (if applicable)
- Rights and responsibilities of all parties
- Privacy and confidentiality
- Resources at school and in community
- Consider written information sheet tailored to reporting and responding party parents/guardians

SETTING AND MANAGING EXPECTATIONS



- Emphasize obligation to stop, prevent, and remedy
- Discuss the role parents/guardians may play in the process
- Parents/guardians do not have right to demand a particular remedy
- Discuss behavioral expectations
 - Don't be disruptive
 - Can't impede process
 - Can't speak on behalf of their child; adjust according to age of student
- Other

PARENT/GUARDIAN PARTICIPATION



- Possible formal role as “advisor”
- Attend interviews/meetings/hearings
 - Recognize any potential impact on student (e.g. willingness to participate; fear of being forthcoming, etc.)
 - Consider if parent/guardian is a “witness” to events
- Review interview notes, report, evidence, and submit questions
- Participation in any informal resolution process
 - Parent/Guardian approval needed?
- State law versus district/school policy

PARENT/GUARDIAN PARTICIPATION



- Special considerations
 - Age-appropriateness
 - Role in special education processes
 - IEP development and revision
 - Manifestation determination process
 - Due process hearing requests
 - FERPA considerations (more on next slide)

FERPA RIGHTS/ACCESS TO RECORDS



- Right to “inspect and review” education records of their child
- What if education records contain information about other students (e.g. surveillance footage, witness statements, etc.)?
 - Only view the specific information directly related to their child unless the information about the other students cannot be segregated/redacted without destroying its meaning
- When possible, ED recommends obtaining consent of parents/guardians of other student(s) whose information will be disclosed

NAVIGATING DIFFICULT PARENT ISSUES



- Circumvention or undercutting
- Parent as the alleged harasser
- Retaliation
- “Well-connected” parent
- Social media activity

ONGOING ENGAGEMENT WITH PARENTS/GUARDIANS



- Prevention and awareness
- Partner regarding appropriate behavior and physical contact
- Encourage reporting
- Enable various reporting methods

ROLE OF TITLE IX COORDINATOR



- Point person for questions/concerns
- Check-in with parents throughout the process
- Help resolve difficult parent issues
- Send/facilitate sending of notices
- Ensure parent/guardian training
- Facilitate partnerships with parent/guardian groups
- Documentation

WORKING
COLLABORATIVELY
WITH SCHOOL
RESOURCE OFFICERS/
LAW ENFORCEMENT

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ROLE OF LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS?



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

EVIDENCE COLLECTION AND ISSUES OF CONCURRENT CRIMINAL/CIVIL ACTION



- Active accumulation of evidence.
- What if law enforcement requests you delay your process?
- What if law enforcement is the sole source of evidence collection?
 - And they won't release the evidence to you?
- 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?

K-12 MEMORANDA OF UNDERSTANDING CHECKLIST



- Dual Enrollment
- Summer Camps
- Investigation
 - By whom
 - Sharing of Information and Evidence
 - Sharing of Outcomes
- Training
- Parental Involvement
- Police Notification

CASE STUDY



INVESTIGATING CONSENT-BASED CASES

- 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.

OVERVIEW OF THE 3 QUESTIONS



1. Was force used by the accused individual to obtain sexual access?
2. Was the reporting party incapacitated?
 - a. Did the accused individual know, or
 - b. Should s/he 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 accused individual permission for the specific sexual activity that took place?

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 are frequent issues.
 - 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?

- What was the form of incapacity?
 - Alcohol or other drugs.
 - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence.
 - Incapacity = an extreme form of intoxication.
 - Administered voluntarily or without reporting party's knowledge.
 - Rape drugs.
 - Mental/cognitive impairment.
 - Injury.
 - Asleep or unconscious.

- 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)?

SOME FACTS ABOUT ALCOHOL



- Most commonly used date rape drug.
- Time – the **only** sobering tool.
 - One “drink” per hour.
 - “Myth of puking.”
- Pace of consumption.
- Food in the stomach.
- Carbonation and alcohol.
- Medications and alcohol.

COMMON INTOXICATION FACTORS



- Rate of consumption.
- Strength of drink.
- Food in the stomach.
- Body weight.
- Body type – body fat percentage.
- Gender:
 - E.g. enzymes, hormones, body fat, and water in body.
- Functional tolerance.
- Medications.
- Illness and dehydration.
- Fatigue.
- Caffeine.
- Genetics.
- Ethnicity.

BAC/BAL

- One “drink” \approx .025 BAL.
 - 12 oz.
 - 5 oz. wine.
 - 1.5 oz. liquor (a typical “shot”).
- Metabolic rate – one drink per hour.
 - .015/hr. (avg.).
 - Dependent on age, gender, height, weight, medications, genetics, experience with drinking, etc.



- .05-.07: Buzzed; feeling of well-being; minor memory and coordination impairment.
- .07-.09: Slight impairment of coordination, vision, reaction time; judgment and self-control reduced.
- .10 -.125: Significant impairment of coordination, reaction times, and judgment; possible slurred speech.
- .13-.15: Severe motor impairment; blurred vision, loss of balance; judgment and perception severely impaired.

- .16-.19: “Sloppy drunk;” increased negative feelings; possible nausea; blackout possible.
- .20: Dazed and disoriented; possible difficulty standing or walking; possible nausea and vomiting; blackouts possible.
- .25: Severe mental, physical, and sensory impairment; nausea and vomiting – asphyxiation concerns; blackouts possible.
- .35: Possible coma; level of surgical anesthesia.
- .40: Coma possible; death possible due to respiratory arrest.

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



- Ask the responding party if reporting party was:
 - Slurring words?
 - Stumbling?
 - Acting unusual (e.g. not making sense, appearing drunk, etc.)?
 - Falling asleep?
 - Throwing up?
 - Disoriented?
 - And, if responding party knows reporting party, was s/he acting different from the way s/he usually acts?

CONSENT



- Question 3 is the “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.).

RULES TO REMEMBER



- No means no, but nothing also means no. Silence and passivity do not equal permission.
- 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.

SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN

—

NOT FOR DISTRIBUTION

SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



Forensic Interview Model – Key Phases

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

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

SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



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

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

SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



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

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

SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



Getting child to talk about the incident

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

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

SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



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

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

SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



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

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

SPECIAL CONSIDERATIONS WHEN INTERVIEWING CHILDREN



Ending the interview

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

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

ADVANCED TOPICS

- Working With Students Across The Gender Spectrum
- Athletics
- Dual Enrollment
- Pregnancy

WORKING WITH STUDENTS ACROSS THE GENDER SPECTRUM

- Data on heightened risk
- Vocabulary
- Recent Title IX case law
- Names and pronouns
- Access to restrooms, facilities, and athletics
- Reporting considerations for LGBTQIA students

TITLE IX & TRANSGENDER STUDENTS



- Transgender students are disproportionately subjected to harassment and discrimination.
- 2015 national survey:
 - The majority of respondents who were out or perceived as transgender while in school (K–12) experienced some form of mistreatment, including being verbally harassed (54%), physically attacked (24%), and sexually assaulted (13%) because they were transgender. Further, 17% experienced such severe mistreatment that they left a school as a result.
 - U.S. Transgender Survey, National Center for Transgender Equality

TERMINOLOGY



- **Sex:** References chromosomes, hormones, reproductive organs, and genitalia.
- **Gender:** Refers to the attitudes, feelings, and behaviors that a given culture associates with biological sex.
- **Gender Identity:** Internal sense of gender.
- **Gender Expression:** Outward expression of gender, often through clothing, behavior, posture, mannerisms, speech patterns, and activities.
- **Sexual Orientation:** Attracted to sexually or romantically, on a continuum (e.g. gay, lesbian, bisexual, heterosexual, asexual, and pansexual).

TERMINOLOGY (CONT.)



- **Queer:** An umbrella term referring to LGBTQI individuals, and/or a nonbinary term used to reflect a fluid gender identity than societal gender “norms”.
- **Cisgender:** Gender identity is consistent with the sex they were assigned at birth.
- **Transgender:** Umbrella term referring to a wide range of persons whose gender identity or expression may not match the gender assigned at birth.
- **Bisexual:** Attracted to people of the same as well as other genders.

TERMINOLOGY (CONT.)



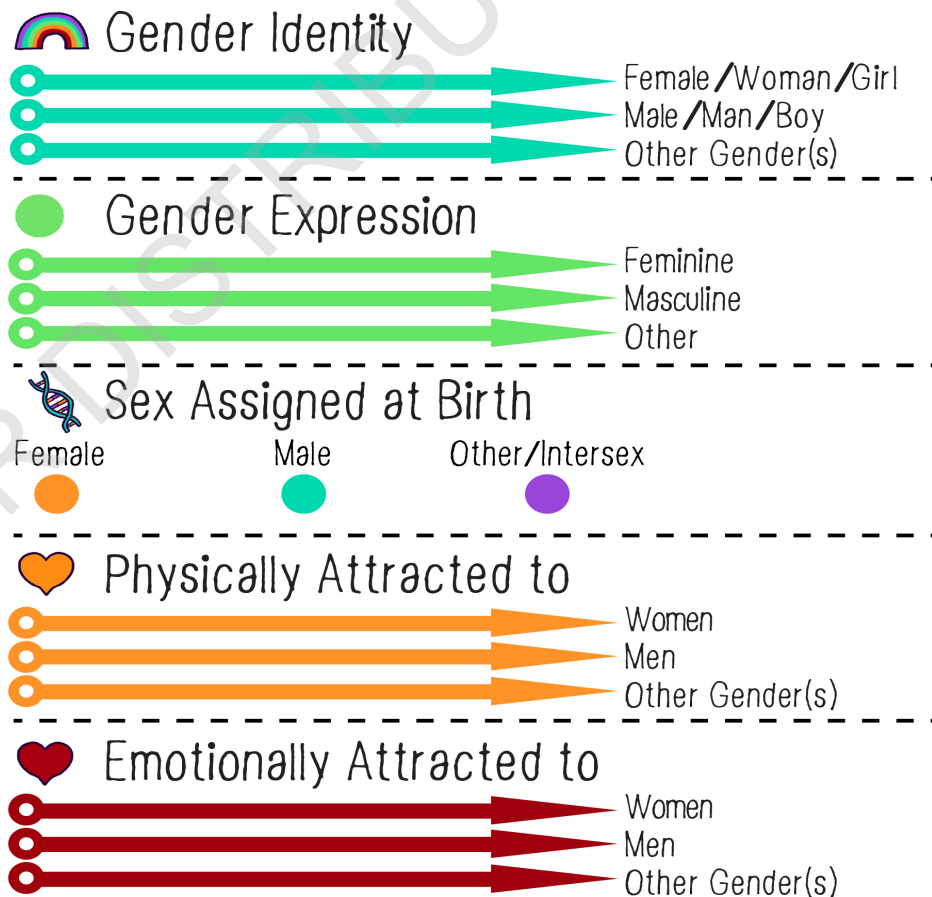
- **Heterosexual:** Attracted to people of a gender other than their own.
- **Asexual:** Minimal or no sexual attraction to others.
- **Intersex:** Born with genitalia, reproductive systems, and/or sex chromosomes of both males and females.
- **Pansexual:** Attracted to people regardless of gender.

TITLE IX & TRANSGENDER STUDENTS



The Gender Unicorn

Graphic by:
TSER
Trans Student Educational Resources



To learn more, go to:
www.transstudent.org/gender

Design by Landyn Pan and Anna Moore

TITLE IX & TRANSGENDER STUDENTS



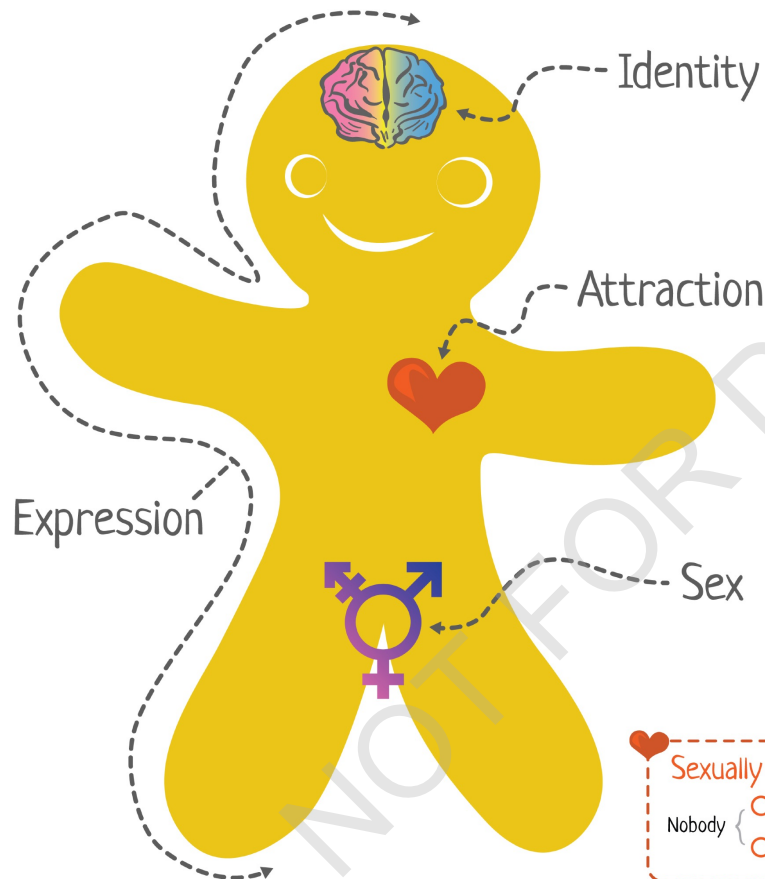
The Genderbread Person v3.3

Gender is one of those things everyone thinks they understand, but most people don't. Like *Inception*. Gender isn't binary. It's not either/or. In many cases it's both/and. A bit of this, a dash of that. This tasty little guide is meant to be an appetizer for gender understanding. It's okay if you're hungry for more. In fact, that's the idea.

by its pronounced **METROsexual**.com

Plot a point on both continua in each category to represent your identity, combine all ingredients to form your Genderbread

4 (of infinite) possible plot and label combos



Gender Identity

How you, in your head, define your gender, based on how much you align (or don't align) with what you understand to be the options for gender.

Indicates a lack of what's on the right

Woman-ness

Man-ness

"woman"

"man"

"two-spirit"

"genderqueer"

Gender Expression

The ways you present gender, through your actions, dress, and demeanor, and how those presentations are interpreted based on gender norms.

Feminine

Masculine

"butch"

"femme"

"androgynous"

"gender neutral"

Biological Sex

The physical sex characteristics you're born with and develop, including genitalia, body shape, voice pitch, body hair, hormones, chromosomes, etc.

Female-ness

Male-ness

"male"

"female"

"intersex"

"MtF Female"

Sexually Attracted to

Nobody

(Women/Females/Femininity)

(Men/Males/Masculinity)

Romantically Attracted to

Nobody

(Women/Females/Femininity)

(Men/Males/Masculinity)

In each grouping, circle all that apply to you and plot a point, depicting the aspects of gender toward which you experience attraction.

For a bigger bite, read more at <http://bit.ly/genderbread>

PROTECTIONS FOR TRANSGENDER PERSONS/GENDER IDENTITY AND EXPRESSION



- Title IX
 - Additional federal legislation?
 - Equality Act passed by U.S. House
- Court decisions (case law)
- OCR's regulatory guidance
 - 2016 Guidance on Transgender Students
 - Rescinded, but still helpful guidance
- State/municipal laws
- District policy

Facts

- Gavin Grimm was assigned the sex “female” at birth. Gavin enrolled at Gloucester High School in Virginia as a girl.
- During his freshman year, Grimm came out to his parents as transgender. He began to see a therapist and was diagnosed with gender dysphoria. Grimm’s therapist provided medical documentation that he should present as male in his daily life and be permitted to use restrooms consistent with his gender identity.
- Grimm legally changed his first name and began using male restrooms in public.

Facts (cont.)

- Grimm and his guidance counselor initially agreed he would use the restroom in the nurse's office. Over time, this situation proved unworkable and he felt anxious, stigmatized and embarrassed.
- Grimm was permitted to use the male restrooms and did so without incident for seven weeks.
- The administration began receiving complaints from members of the community. One student personally complained to the principal and the school board eventually passed a policy requiring students to use restrooms that correspond to their biological sex.
- The board also announced construction of single-stall, unisex restrooms for all students. Grimm was informed that he would face discipline if he continued to use the male restrooms.

Facts (cont.)

- Grimm began hormone therapy and began to present as predominately male before the unisex restrooms were complete. Grimm also encountered times when he could not access a suitable restroom for various reasons. Grimm also had chest reconstruction surgery.
- Grimm changed his license and birth certificate to reflect his male identity. The school refused to change his sex/gender designation on his transcript. Grimm was also admitted to the hospital with suicidal thoughts.

GRIMM V. GLOUCESTER CTY. SCH. BD., 400 F.SUPP.3D 44 (E.D. VA. 2019).



Decision

- Grimm’s litigation has been underway for years. It was bound for the U.S Supreme Court when the Trump administration rescinded the Department of Education’s 2016 transgender guidance that had previously provided the legal basis for his case.
- The Fourth Circuit Court of Appeals, in deciding in an earlier decision in Grimm’s case, said “a plaintiff must demonstrate exclusion from an educational program . . . because of sex . . .”. And, that the school’s discrimination harmed the plaintiff.
- In this 2019 decision, therefore, the district court was forced to confront the legal question of whether “on the basis of sex” in Title IX applies to the allegations that the school discriminated against him on the basis of his gender identity and gender expression.

Decision (cont.)

- The court reasoned that Title IX does protect a student in Grimm's circumstances:
 - “[T]here is no question that the Board's policy discriminates against transgender students on the basis of their gender nonconformity. Under the policy, all students except for transgender students may use restrooms corresponding with their gender identity. Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go.”
- Not updating Grimm's student records was also discrimination under Title IX.
- The Board tried to advance an argument based on concept of physical privacy, but the court was not persuaded.

GRIMM V. GLOUCESTER CTY. SCH. BD., 400 F.SUPP.3D 44 (E.D. VA. 2019).



Takeaways

- The court interpreted the term “on the basis of sex” in the text of the Title IX statute and did not rely on agency guidance making this a significant ruling in favor of transgender equity.
 - The U.S. Supreme Court heard oral argument on analogous cases in Title VII in October 2019.
- Although other bathroom cases are pending, this case echoes a growing number of decisions that construe Title IX to apply to transgender individuals.
- A best practice is to allow students to use facilities consistent with their gender identity.
- Allow students to utilize their preferred name, including changing formal records to conform to official state documents, such as birth certificates or licenses.

TITLE IX & TRANSGENDER STUDENTS



- Common Concerns and Current Challenges
 - State-based legislation.
 - Waffling OCR.
 - Conflict between Title VII (EEOC) and Title IX (OCR).
 - Possible federal legislation.
 - Discomfort and the claim of reverse discrimination.
 - Educating communities and constituencies.
 - Religious concerns
 - Religious Institutions, club or group membership and/or leadership, sharing of restrooms etc.

TITLE IX & TRANSGENDER STUDENTS



- Preferred Name & Pronouns

- Education records
- Databases and record systems
- Identification documents
- Classroom
- The need to educate our communities

- Maintaining student privacy

- Maintain privacy in relation to gender identity to the extent possible.
- Students' sex, including transgender status, should not be included as "directory information."

NAME, IDENTITY, RECORDS



- Accept a student's consistent and sincerely-held gender identity
- Meet with student to discuss supports and preferences
- Legal name v. preferred name
- Use preferred name and pronouns on informal documents
 - ID cards, class rosters, yearbooks
- State law governs changing legal name and sex for official school records and standardized tests
- Parents/guardians have FERPA rights
- Train all staff and volunteers (e.g., substitute teachers)

PRIVACY AND CONFIDENTIALITY



- Information should be kept private
 - Legal identity
 - Transgender status
 - Sex assigned at birth
- All staff should be trained to avoid inadvertent disclosures
- Be transparent regarding records system limitations
- Parents/guardians have access to education records under FERPA
- State law may provide for heightened privacy vis-à-vis parent/guardian information

TITLE IX & TRANSGENDER STUDENTS



- Where sex-segregated activities and facilities are provided, transgender students should be allowed to both **participate** and **access facilities** consistent with their gender identity.
- **Restrooms and Locker Rooms**
 - Schools may not:
 - Require transgender students to use facilities inconsistent with their gender identity, or
 - Require use of individual-user facilities where other students are not made to do so.
 - Individual-user options can be made available to all students voluntarily seeking additional privacy.

TITLE IX & TRANSGENDER STUDENTS



TITLE IX & TRANSGENDER STUDENTS

- **Athletics**

- Beware of requirements that rely upon overly broad generalizations or stereotypes.
- Discomfort with transgender students.
- Athletic conferences and other organizations have specific policies regarding participation.

- **Single-Sex Classes**

- Transgender students are to be allowed to participate consistent with their gender identity.

TITLE IX & TRANSGENDER STUDENTS



- **Housing and Overnight Accommodations**
 - Schools must allow transgender students access to housing consistent with their gender identity.
 - Schools may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students.
 - Schools can choose to honor a student's voluntary request for single-occupancy accommodations.
 - Consider summer camps, etc.

CONSIDER RELUCTANCE TO REPORT INCIDENTS OF HARASSMENT



- Concern about a biased response.
- Concern about preconception that sexual assault and intimate partner violence cannot occur between same-sex partners.
- Fear of exposing LGBTQIA community to negative stereotypes.
- Fear of the impact a report may have on a small, sometimes close-knit community at the school.
- Fear of reaction of family and friends.
- Fear of institution not understanding their identity, expression, or orientation.

CONSIDER RELUCTANCE TO REPORT INCIDENTS OF HARASSMENT



- Fear of being outed and implications for medical treatment.
- Concern about how “systems” will respond, especially law enforcement.
- Previous negative experiences with school staff, the law, or community members.
- Fear that male-on-male sexual violence in connection with hazing/bullying will be reduced to “boys being boys.”

CONSIDERATIONS FOR INVESTIGATIONS



- Educate yourself and your community
 - Do not expect parties to “educate you.” Stick to the facts.
 - Ask Title IX Coordinator for additional education or training if needed.
- Be mindful of how power dynamics and targeting can come into play.
- Assume nothing and allow for self-identification.
- Provide a safe, non-judgmental, and respectful environment.

CONSIDERATIONS FOR INVESTIGATIONS



- A visible reaction may negatively impact rapport.
- Use inclusive language; avoid heteronormativity.
- Reflect language used by the parties during interviews and in all communication.
- Anticipate heightened confidentiality concerns.
- Use your school/campus/district/community-based experts.
- Be aware of your biases.

ATHLETICS

- Athletics Compliance Responsibilities
- Unique Challenges
- Hazing and Title IX

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



- Title IX compliance requirements:
 - Effective accommodation of interests and abilities.
 - Financial assistance proportionality.
 - Treatment of student-athletes.
- **Compliance** may be delegated to an Athletic Director or Deputy Title IX Coordinator in Athletics.
- The oversight of compliance remains the responsibility of the Title IX Coordinator.
 - Need for outside education.

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.

OVERSIGHT OF ATHLETICS GENDER EQUITY



EQUIPMENT AND SUPPLIES



Key factors in examining equivalence:

- The quality of equipment and suppliers
- The amount of equipment and supplies
- The suitability of equipment and supplies
- The maintenance and replacement of the equipment and supplies
- The availability of equipment and supplies

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

SCHEDULING OF GAMES AND PRACTICE TIMES



Key factors in examining equivalence:

- The number of competitive events per sport
- The number and length of practice opportunities
- The time of day competitive events are scheduled
- The time of day practice opportunities are scheduled
- The opportunities to engage in available pre-season and post-season competition

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

TRAVEL AND PER DIEM ALLOWANCES



Key factors in examining equivalence:

- Modes of transportation
- Housing furnished during travel
- Length of stay before and after competitive events
- Per diem allowances
- Dining arrangements

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

Key factors in examining coaching:

- Opportunity to receive coaching
 - Relative availability of full-time coaches
 - Relative availability of part-time and assistant coaches
 - Relative availability of graduate assistants
- Assignment of coaches
 - Training, experience, and other professional qualifications
 - Professional standing

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

Key factors in examining coaching:

- Compensation of coaches
 - Rate of compensation (per sport, per season)
 - Duration of contracts
 - Conditions relating to contract renewal
 - Experience
 - Nature of coaching duties performed
 - Working conditions
 - Other terms and conditions of employment

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES



Key factors in examining equivalence:

- Quality and availability of the facilities provided for practice and competitive events;
- Exclusivity of use of facilities provided for practice and competitive events;
- Availability of locker rooms;
- Quality of locker rooms;
- Maintenance of practice and competitive facilities; and
- Preparation of facilities for practice and competitive events.

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

MEDICAL AND TRAINING FACILITIES AND SERVICES



Key factors in examining equivalence:

- Availability of medical personnel and assistance.
- Health, accident and injury insurance coverage.
- Availability and quality of weight and training facilities.
- Availability and quality of conditioning facilities.
- Availability and qualifications of athletic trainers.

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

Key factors in examining equivalence:

- Availability and quality of sports information personnel;
- Access to other publicity resources for girl's and boy's programs; and
- Quantity and quality of publications and other promotional devices featuring boy's and girl's programs.

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

OTHER CONSIDERATIONS



- Transgender athletes
 - Title IX and Equal Protection Clause
 - Current state of federal regulations
 - Withdrawal of Obama-era protections
 - State laws
- Consider:
 - Sex-segregated sports teams
 - Locker rooms/bathroom
 - Institution-wide policies

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

UNIQUE CHALLENGES: TITLE IX AND STUDENT ATHLETICS



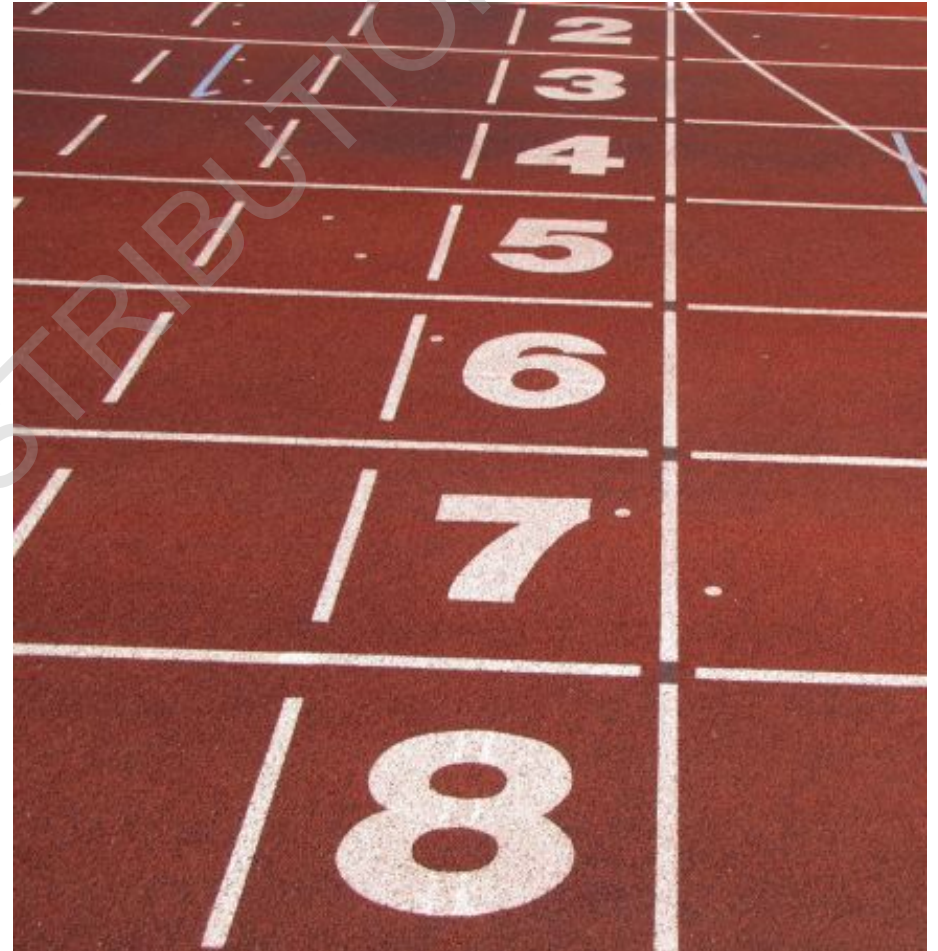
- Athletic department hostile educational environment.
- Insularity of teams and the athletic department
- Protectionism of teams and athletic department
- Coach-Athlete dynamic
 - Power-based
 - Trust-based
 - Recruitment
 - Performance meetings
- Coach-coach dynamic



UNIQUE CHALLENGES: TITLE IX AND STUDENT ATHLETICS



- Male privilege
- Body Image and focus on the body (especially women)
- Student-athlete on student-athlete violence
- Power dynamics
- Revenue vs. non-revenue sports
- Must-win mentality



UNIQUE CHALLENGES: TITLE IX AND STUDENT ATHLETICS



- Culture of violence and aggressive behavior in sports.
- Male bonding and group loyalty.
- Sexualization and subordination of women in male team sports.
- Approval of sexist language and attitudes.
- Perception of “groupie culture.”
- Celebrity sense.
- Entitlement.

MANAGING DATING RELATIONSHIPS AMONG TEAMMATES



Frame intra-team dating as part of broader relationship management issues that can distract a team from their competitive goals, such as:

- Best friends on a team being cliquey or having a big falling out
- Two women on a team dating the same guy on a men's team
- One teammate getting dumped by her boyfriend and then he starts dating one of her teammates
- Heterosexual dating on a mixed team
- Heterosexual dating on men's and women's teams that practice together and travel to competitions together
- Same-sex teammates dating on a men's or on a women's team
- Conflicts between white and black teammates
- Conflicts between gay and straight teammates

Source: Pat Griffin, UM-Amherst

- Conflicts between Christian and non-Christian teammates

MANAGING DATING RELATIONSHIPS AMONG TEAMMATES



- Develop policy that applies to all relationship management issues rather than focusing on same-sex teammates dating
- Make policies about dating apply to all dating relationships not just same-sex dating
- Range of possible policies on intra-team dating:
 - Prohibit intra-team dating (Not recommended)
 - Ignore intra-team dating (Not recommended)
 - Proactively set expectations for intra-team dating and other dating relationships and interpersonal conflict on the team (Recommended)

Source: Pat Griffin, UM-Amherst

Facts

- Doe and Roe, freshmen members of the varsity basketball squad, traveled with the team to Gatlinburg, TN for a tournament and stayed together in a cabin for four days and nights.
- During the trip, Doe and Roe were hazed and sexually assaulted. Teammates used billiard sticks to penetrate their anuses and yelled, “don’t be a pussy” and “take it like a man.”
- Prior to the trip, upperclassmen hazed freshman by “racking,” which consisted of upperclassmen beating freshman players with the lights out.
 - More than once, their coach walked into the locker room during this conduct; he told the students to “knock off the horseplay” and turned on the lights.

Facts (cont.)

- In Gatlinburg, upperclassmen prodded Doe's anus so hard over his clothes that the fabric ripped and the billiard stick directly penetrated his anus.
- Doe was hospitalized with a perforated rectum and bladder and had to undergo emergency surgery. His recovery took months. Doe never returned to the school.
- Roe returned to school but was subjected to harassment from his assailant's friends and transferred to another school.
- Roe and Doe sued the school, teachers, and administrators for Title IX, § 1983, and state tort law claims.

Holding

- The court found the school had control over both the harasser(s) and the context in which the conduct occurred.
- The trip was organized by the school and its purpose was to promote the team and facilitate its competition in a tournament.
- Court assessed “constellation of surrounding circumstances” including, but not limited to, comments made by the harassers during the assault

Holding

- Court found that a jury could reasonably infer:
 - The assault was motivated by the victims' gender, and
 - The harassment at issue was “so severe, pervasive, and objectively unreasonable...that it undermined and detracted from the victims' educational experience” and
 - The students were effectively denied equal access to the school's resources and opportunities.
- Court cited Doe's lengthy hospitalization and recovery which prevented him from attending school and participating in basketball.
- For Roe, the court referenced how he felt he had to transfer after the incident due to the harassment he faced from other students.

Holding

- Court determined that the team's head coach, who was also a teacher and acted as a caretaker and guardian of the students on the Gatlinburg trip was an "appropriate person" under *Gebser*.
- Court determined that a reasonable factfinder could find that the coach had actual knowledge of the conduct.
 - Court referenced the coach's acknowledgment that he could hear the students' conversations through the cabin's thin walls. The attacks occurred daily, during which upperclassmen yelled at the freshmen, and multiple individuals screamed.

***DOE V. HAMILTON BOARD OF EDUCATION, 329
F.SUPP.3D 543 (E.D. TENN. 2018).***



Holding

- Because a jury could reasonably determine that the coach had actual knowledge, the school could have acted with deliberate indifference prior to the assault.
- Court found that because the school acted swiftly to separate the harassers and discipline them, it did not act with deliberate indifference post-assault.
- Court dismissed the §1983 claims against individuals and declined jurisdiction on the state tort claims.
- Court did, however, find that the school may be liable under §1983 for failure to adequately train employees and staff.

Takeaways

- For Title IX to apply, conduct must discriminate on basis of sex. Hazing may or may not be based on sex -- careful assessment of conduct is needed to determine whether it falls under the Title IX umbrella.
- Although certainly fact-specific, coaches and staff, while traveling for games and tournaments, who know or should know of sexual harassment will likely be considered to have put the school on actual notice of the conduct.
- Training specific to groups where harassment may be prevalent through hazing activities (Greek, Sport, ROTC, Band, etc.) is recommended.
- Schools must properly train their Title IX Coordinators and those who may be considered “appropriate persons” per *Gebser*. Failure to report conduct up the chain will leave schools open to significant legal liability, including under §1983.

PREGNANCY

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

34 C.F.R. 106.40

OCR, TITLE IX, AND PREGNANCY



- Academics
 - Coursework Accommodation and Completion
 - Excused Absences
- Extra-curricular Activities
- Athletics
- Employment
 - Hiring
 - Benefits and bonuses
 - Leave and job protection upon return from leave
- Health Insurance Coverage

PREGNANCY & TITLE IX



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

PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



Pregnancy defined

- “Pregnancy and related conditions:
 1. A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.” 34 C.F.R. 106.40

PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



Physician Certification

- “Pregnancy and related conditions (cont.):
 2. A recipient **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation in the normal education program or **activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.”**

34 C.F.R. 106.40

PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



Pregnancy as Temporary Disability

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

34 C.F.R. 106.40

PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



Leave Policies

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

PREGNANCY & TITLE IX: OCR GUIDANCE



- “A school **may require** a pregnant student or student who has given birth **to submit medical certification** for school participation **only if the school also requires such certification from all students with physical or emotional conditions requiring the attention of a physician.**”
- “Thus, for example, a student who has been hospitalized for childbirth must not be required to submit a medical certificate to return to school if a certificate is not required of students who have been hospitalized for other conditions.”

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 6.

PREGNANCY & TITLE IX: OCR GUIDANCE



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

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

PREGNANCY & TITLE IX: OCR GUIDANCE



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

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 10.

PREGNANCY – SPECIAL TOPICS



- Nursing rooms, mothers' lounges, etc.
- Children at school and in the classroom...No.
- Labs, chemicals, exposure to diseases, etc.
 - Reasonable restrictions for health and safety (as deemed by a physician) are permitted.

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 10.

PREGNANCY – SUPPORTING STUDENTS



- Develop support networks for students
 - E.g.: Pregnant and parenting student organizations (all-comers)
 - Classes: Pre-natal classes, parenting, life-skills, etc.
 - Work with student government
 - Harness knowledge and experience from employee programs
- Supporting partners or spouses
 - Leave and/or excused absences
 - Treat with equal dignity and understanding
 - Stop asking “what do we have to do?” and instead shift to “what can we do?”

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 10.

TRAINING OVERSIGHT

- Employees
- Students
- Hearing Panels/Decision-Makers
- Investigators
- Appeals Officers

TITLE IX COORDINATOR: SUPERVISOR OF TRAINING



- General training content categories:
 - Legal Overview: Title IX, Clery, caselaw, and regulations.
 - Institutional policy.
 - Institutional 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, hearing board members (including appeals), and others involved in processing, investigating, or resolving complaints.
 - **First Responders.**
 - E.g.: teachers, school nurses, counselors, coaches, School Resource Officers.
 - **All Faculty/Teachers & Staff; ATIXA Responsible Employees.**
 - ATIXA recommends making all staff responsible employees.
 - Sync with child abuse and other state-mandated reporting obligations.
 - **All Students.**

TRAINING COORDINATION AND OPERATIONALIZATION



- Centralization and oversight of school-specific and district-wide efforts.
- How?
 - In person? Online? Classroom?
 - Administrator-driven? Peer-driven?
- When/how often?
 - “Orientation” for students – summer/fall start-up
 - “Orientation” for staff
 - Follow-up is crucial.
 - Ongoing prevention and awareness campaigns.
 - Programs, conversations, speakers, parent programs, team and club meetings, etc.

TRAINING OVERSIGHT FOR EMPLOYEES, BOARDS, INVESTIGATORS & APPEALS OFFICERS



- Each of these groups will be different.
- Must identify the elements that constitute required knowledge for each entity.
- Must ensure training materials are not biased in favor of reporting or responding parties.
- Consider most effective approach for training, as well as most efficient.
 - For example, investigators will be responsible for thoroughness, fairness, and equity in the investigation. Their training must be extensive.
 - Decision-makers/Appeals officers must have a comprehensive understanding of the process; should be in-person using case studies.
 - Employees need general resource and reporting information and could be trained by video.

INVESTIGATOR/DECISION-MAKER COMPETENCIES



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

*Note - not a comprehensive list.

INVESTIGATOR TRAINING



- The institution's policies and procedures.
- Applicable federal and state law and court decision.
- Applicable legal standards and framework.
- Investigative techniques, including specifically interviewing witnesses.
- Cultural sensitivity; diversity competence.
- How to analyze evidence.
- How to synthesize evidence, write reports, and make findings.
- Documentation requirements.

TRAINING FOR STUDENTS & EMPLOYEES



- Review school and district policies.
- Age-appropriate discussion of consent (use case studies).
- Discussion regarding how to report.
 - Where to find reporting resources.
- Presentation of resources at school and in the community.
- Discussion of privacy and confidentiality.
- Discussion of rights of all parties.
- Provide a resource/reporting guide/website.

SMALL GROUP DISCUSSION: TRAINING



- What are you doing that works?
 - Faculty?
 - Staff?
 - Students?
 - Responsible Employees?
- What has not worked?
- How do you reach as many as possible?
- How do you ensure impartial training?

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