



K-12 Title IX Coordinator & Administrator Level One Training & Certification Course

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For questions and more information about this document, please contact the following:

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Office of Civil Rights
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The document is a PDF of training materials from the Association of Title IX Administrators. This is one of the training modules Title IX staff members have attended. The training covers definitions under Title IX, when Title IX applies, the grievance process at the K-12 level, and school district requirements when responding to concerns of sexual harassment under Title IX.



Association of
Title IX Administrators

K-12 Title IX Coordinator & Administrator Level One

Training & Certification Course



Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

AGENDA

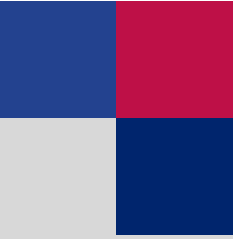
- 1 Title IX Overview
- 2 Significant Cases
- 3 OCR & Title IX
- 4 Due Process Overview
- 5 When Does Title IX Apply?
- 6 Title IX Team Roles & Responsibilities

AGENDA

- 7 Overview of Investigation & Grievance Process Model
- 8 Notice to the Recipient/Complaint
- 9 Initial Assessment
- 10 Case Study: Sally & Jamie
- 11 Supervisor of Investigations
- 12 Decision-makers: Making a Determination

AGENDA

- 13** Assurance of Compliance with Final Sanctions
- 14** Coordinating the Appeals Process
- 15** General Title IX Compliance Oversight
- 16** Case Studies



TITLE IX OVERVIEW

TITLE IX

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

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



A BRIEF HISTORY OF TITLE IX: PRE-1972

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

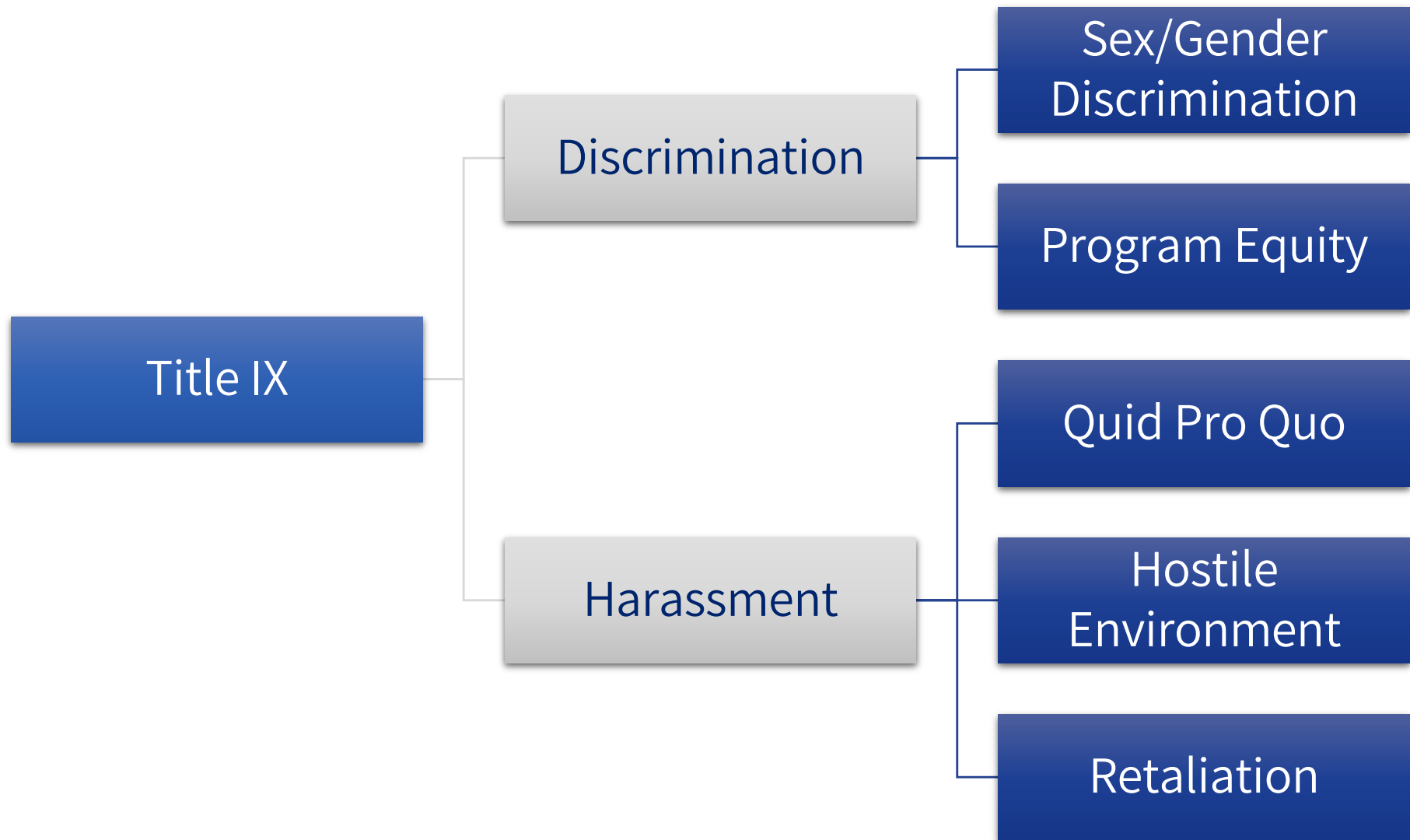
A BRIEF HISTORY OF TITLE IX: POST-1972

- **1975:** Department of Health, Education, and Welfare (HEW) codified Title IX regulations
- **1979:** Supreme Court created a private right of action under Title IX
 - *Cannon v. U. of Chicago, 441 U.S. 677 (1979)*
- **1979:** HEW promulgated three-part test to evaluate equity in athletic participation and access to resources and equitable opportunities

A BRIEF HISTORY OF TITLE IX: POST-1972

- **1980:** U.S. Department of Education created
 - Title IX oversight transferred to Dept. of Ed.'s Office for Civil Rights (OCR)
- **1982:** Supreme Court holds “Employment discrimination comes within Title IX’s prohibition”
 - *North Haven Bd. of Education v. Bell*, 452 U.S. 512.

TITLE IX



KEY TITLE IX-RELATED ISSUES

Sex-Based Discrimination

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

Sexual Harassment

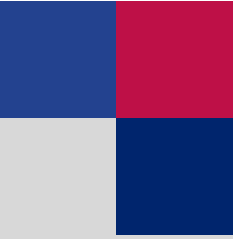
- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

Retaliation

TITLE IX ESSENTIAL COMPLIANCE ELEMENTS

- For K-12 schools, once any school/district employee has actual notice of sexual harassment/sexual misconduct, the school must:
 - Take immediate and appropriate steps to investigate what occurred
 - The obligation to investigate is absolute, even if just an Initial Assessment is completed (see *Davis*)
 - Take prompt and effective action to:
 - Stop the harassment
 - Prevent the recurrence
 - Remedy the effects

NOTE: This is regardless of whether the Complainant makes a formal complaint or asks the school to take action.



SIGNIFICANT CASES

- *Franklin v. Gwinnett County Public Schools*
- *Gebser v. Lago Vista Independent School District*
- *Davis v. Monroe County Bd. of Education*

FRANKLIN V. GWINNETT PUBLIC SCHOOLS

503 U.S. 60 (1992)

- District and Eleventh Circuit dismissed the case, indicating that Title IX does not allow for award of monetary damages
- Supreme Court held:
 - Sexual harassment constitutes sex discrimination under Title IX
 - Private right for recovery of monetary damages under Title IX
- *Franklin* did not address issues concerning the educational institution's liability

GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

The Supreme Court ruled individuals cannot recover monetary damages against the school unless:

- Three-part standard:
 1. An official of the educational institution must have had “**actual notice**” of harassment;
 2. The official must have authority to “**institute corrective measures**” to resolve the harassment problem; **AND**
 3. The official must have “**failed to adequately respond**” to the harassment and, in failing to respond, must have acted with “**deliberate indifference.**”

DAVIS V. MONROE COUNTY BD. OF ED.

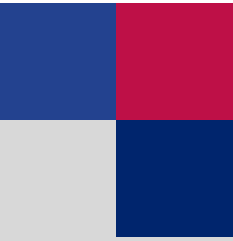
526 U.S. 629 (1999)

Finding in favor of Davis, the Supreme Court expanded on the *Gebser* case:

- The institution must have “**actual notice**” of the harassment; and the institution must have responded to the harassment with “**deliberate indifference.**”

Additionally, court held:

- Harassment must be “**severe, pervasive, and objectively offensive,**” and the indifference “**systemic,**” to the extent that the victim is deprived of educational opportunities or services.
- Justice O’Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “**clearly unreasonable in light of the known circumstances.**”



OCR & TITLE IX

- Remedies
- Role of OCR
- Key OCR Guidance

REMEDIES UNDER TITLE IX

- An individual may assert a Title IX claim against the school/district by:
 - **Lawsuit**: suing the school/district in court and seeking monetary damages or injunctive or declaratory relief
 - **OCR Complaint**: filing an administrative complaint (a grievance) with the U.S. Dept. of Ed. Office for Civil Rights (or other applicable federal agency)

CIVIL LAWSUITS V. ADMINISTRATIVE ACTION

Lawsuit

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

Administrative Action*

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

*Based on the 2020 Regulations, these standards will likely align much more moving forward.

ROLE OF OCR & TITLE IX

- The Office for Civil Rights (OCR) under the Department of Education is responsible for establishing the **compliance standards to be applied in investigations and enforcement** of Title IX regarding sexual harassment.
 - Provides regulatory and sub-regulatory guidance

ROLE OF OCR & TITLE IX (CONTD.)

- OCR administratively enforces Title IX by:
 - Conducting investigations of complaints filed by an individual, a representative, or a group
 - Engaging in compliance reviews
 - Initiatives to combat sexual assault in K-12 public schools (compliance reviews; public awareness and support; data collection and reviews)
- Technical Assistance (The OPEN Center)
 - To help Recipients, students, and parents/guardians understand their rights and responsibilities

OCR AND TITLE IX

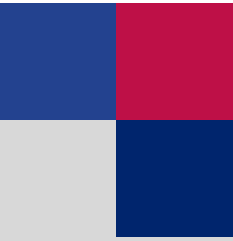
Key Regulatory and Sub-regulatory Guidance from OCR

- Rescinded:
 - 2001 OCR Revised Sexual Harassment Guidance
 - 2011 Dear Colleague Letter (DCL)
 - 2014 Q&A on Title IX and Sexual Violence
 - 2015 DCL on the Role of Title IX Coordinators; TIX Resource Guide
 - 2016 DCL on Transgender Students
 - 2017 Q&A on Campus Sexual Misconduct

OCR AND TITLE IX (CONTD.)

Key Regulatory and Sub-regulatory Guidance from OCR

- Still in effect:
 - 2003 DCL on Title IX and Free Speech
 - 2010 DCL on Harassment and Bullying
 - 2013 DCL on Pregnant and Parenting Students
 - 2020 Amendments to Title IX Regulations
 - 2020 Q&A on Final Title IX Rule
 - 2021 Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*
 - 2021 Q&A on the Title IX Regulations on Sexual Harassment



DUE PROCESS

- Foundational Case Law
- Current Due Process Issues

GOSS V. LOPEZ

419 U.S. 565 (1975)

- Nine high school students were suspended for 10 days for non-academic misconduct.
- The court held that because K–12 education is a fundamental right, students were entitled to at least a modicum of “due process.”
- Minimum due process includes notice and an opportunity for a hearing.
 - Oral or written notice of charges
 - Explanation of the evidence
 - Opportunity to present their version

GOSS V. LOPEZ

419 U.S. 565 (1975)

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

DUE PROCESS: CURRENT ISSUES

Due Process concerns are at the heart of 2020 regulations:

- Applies to both public and private Recipients, which is a shift in legal paradigm
- Standard of Evidence
- Requirements for “Emergency Removal”
- Detailed Notice of Investigation and Allegations (NOIA)
- Providing investigation report and evidence for review/response
- Live hearing with cross-examination (optional for K-12)
- Advisor involvement (possibly including attorneys)

DUE PROCESS: CURRENT ISSUES (CONTD.)

- Bias: TIXC, Investigators, Decision-makers, and Informal Resolution Facilitators
- Biased Training or Insufficient Training
- Requirement to publicly post training materials

THE IX COMMANDMENTS

INVESTIGATION



Thorough

Reliable

Impartial

PROCESS



Prompt

Effective

Equitable

REMEDIES



Act reasonably
to stop
discrimination

Act reasonably
to prevent
recurrence

Act equitably to
remedy effects



EQUALITY
*requires a level playing field
that doesn't yet exist*



JUSTICE
eliminates systemic barriers

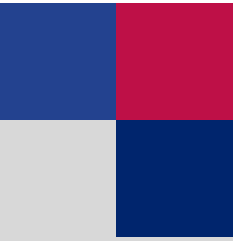
**The journey
starts by
asking
those
affected
how they
see and are
impacted
by the
conditions,
rules, and
resources.**



EQUITY
*acknowledges systemic
impediments with targeted fixes*



AGENCY
*individuals know that access
is their right*



WHEN DOES TITLE IX APPLY?

- Jurisdictional Issues & Questions
- Definitions of Sexual Harassment
- Navigating First Amendment Protections



JURISDICTIONAL ISSUES & QUESTIONS

- Jurisdiction
- Mandatory Dismissal
- Discretionary Dismissal
- When Title IX Does Not Apply
- Is It a IX?

WHEN DOES TITLE IX APPLY?

- **Davis** standard – Title IX applies, and jurisdiction is required, when the Recipient has:
 - Control over the Respondent
AND
 - Control over context of the harassment
- The definition of sexual harassment covers the in-program effects of out-of-program misconduct (though not the misconduct itself)

WHEN DOES TITLE IX APPLY? (CONT.)

- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the education program or activity of the Recipient with which the formal complaint is filed
 - OCR adopts in the discussion a fairly broad definition of what could constitute “attempting to participate”

WHEN DOES TITLE IX APPLY?

Personal Jurisdiction

- If Respondent is **not** affiliated in the Recipient in any way, the Recipient **lacks authority** to take disciplinary action
 - Employee of an outside company (e.g., vendor, construction worker, etc.)
 - Guest or invitee
 - Prospective student
 - Former student
 - Former employee
 - Student from another institution

WHEN DOES TITLE IX APPLY?

Personal Jurisdiction (Cont.)

- Examples where Recipient lacks disciplinary authority:
 - A student is sexually harassed by a student from another institution
 - A student withdraws, or an employee resigns during an investigation

WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction

- Sexual Harassment and Discrimination cases
 - Must be dismissed if did not occur against a person in the U.S., but...
 - Contrary case law
 - May take action under your Code of Conduct or other policies

WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction (Cont.)

- There is NO expectation that you exercise jurisdiction over off-site/off-campus incidents UNLESS
 - The property is owned or controlled by the school **OR**
 - The property is being used for a program or event sponsored by the school or an organization recognized by the school **OR**
 - The property is owned or controlled by an organization recognized by the school
- Other forms of liability may still apply, and the PPTVWM analysis may come into play here (more on this later)

WHEN DOES TITLE IX APPLY?

Covered Programs

- All programs run by a federal funding Recipient
- It does not matter whether the program receives federal funding or not, **all** Recipient programs are covered
- All programs using facilities of the funding Recipient
 - (e.g., Camps using your fields/stadium)

WHEN DOES TITLE IX APPLY?

Subject Matter

- Sexual Harassment, as defined in the 2020 Title IX Regulations
- Sex/gender-based:
 - Stalking
 - Hazing
 - Bullying
 - Arson
 - Vandalism
 - Theft
 - Any other policy violation that is sex/gender-based that causes a discriminatory effect

WHEN DOES TITLE IX APPLY?

Subject Matter (Cont.)

- Retaliation
- Sex/Gender discrimination (Equity)
 - OCR recently noted this includes sexual orientation and gender identity (based on biological sex) following the Supreme Court's *Bostock* decision
- Pregnant and parenting student (employee?) discrimination

WHEN DOES TITLE IX APPLY?

Subject Matter (Cont.)

- Limitations:
 - Actions/conduct/speech protected by **academic freedom**
 - Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research
 - Actions/conduct/speech protected by the **First Amendment**
 - Merely offensive conduct cannot be disciplined at a public school
 - Must be **severe, pervasive, and objectively offensive**

MANDATORY DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MUST dismiss the complaint at any time if the alleged conduct:

- Would not constitute sexual harassment as defined (five offenses in § 106.30), even if proved
- Did not occur in the Recipient's education program or activity
- Did not occur against a person in the United States
- The Complainant is not participating or attempting to participate in Recipient's program at time of complaint

DISCRETIONARY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MAY dismiss the complaint if at any time prior to a determination:

- Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations
- Respondent is no longer enrolled or employed by Recipient
- Specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations

MANDATORY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

- Written notice of dismissal to parties required
 - Dismissal (or non-dismissal) of formal complaint may be appealed

Upon dismissal, the Recipient may institute action under another provision of the code of conduct or other policies

IF TIX JURISDICTION IS NOT PRESENT

Behavior may still violate:

- District/School harassment/discrimination policies
- Student Handbook/Conduct policies
- Technology/Acceptable Use policies
- Employee Handbook/Policies
- Professionalism standards

IF TIX JURISDICTION IS NOT PRESENT (CONT.)

District/School should still take steps to:

- Provide support and resources to the Complainant and school community
 - Address any “downstream effects”
- Determine if there are patterns or institutional variables that contributed to the alleged incident
- Take what action it can (e.g., trespass the person)

CASE STUDY: IS IT A IX?

- A student attends a party at a friend's house over the weekend.
- At the party, the student is sexually assaulted by another person who attended the party.
- The student reports the sexual assault to the local police department and to the school.

Does the District have jurisdiction over the sexual assault?

CASE STUDY: IS IT A IX?

- Several female students express objections to the school's policy not allowing transgender students to use the bathroom according to the gender with which they identify.
- The students are subsequently subjected to offensive and threatening anonymous messages posted on social media.
 - The posts refer to the female students by offensive names and include threats to harm them.
 - One of the posts included a nude photo of one of the female students that has been circulating around school.
- The female students express concern for their safety due to online posts.

Does the District have jurisdiction under Title IX?

CASE STUDY: IS IT A IX?

- An employee reports to her supervisor that a colleague, Janet, is being physically abused by her partner, Robert, a full-time employee in Facilities Management.
- The employee indicates that Janet seems noticeably withdrawn lately and that Janet recently came to work late, had red puffy eyes, and looked as though she had been crying.
- The employee says Janet was walking with a limp last week, and when asked about it, told people she twisted her knee after slipping on some ice in her driveway.

CASE STUDY: IS IT A IX? (CONTD.)

- Later that same day, the employee said someone overheard Janet on the phone saying, “But I’m scared of what he would do if I tried to leave him.”
- According to the employee, Janet missed a few days of work last month and returned to work wearing a sling. Janet claimed that she sprained her shoulder while working in the yard.
- Yesterday Janet showed up over an hour late to work and had some swelling around her eye and her bottom lip. When asked, Janet said she got up to use the bathroom last night in the dark and walked into the edge of her open closet door.

CASE STUDY: IS IT A IX? (CONTD.)

- The employee says that yesterday afternoon, Robert and Janet got into a loud argument in the parking lot and that Janet was crying in the bathroom afterwards.

Is this a Title IX issue the employer needs to address?



DEFINITIONS OF SEXUAL HARASSMENT

- Quid Pro Quo Sexual Harassment
- Hostile Environment Sexual Harassment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

REQUIRED DEFINITIONS – TIX REGULATIONS

Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:

- An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient's education program or activity; or
- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v)
“Dating violence” as defined in 34 U.S.C. 12291(a)(10)
“Domestic violence” as defined in 34 U.S.C. 12291(a)(8)
“Stalking” as defined in 34 U.S.C. 12291(a)(30)

HOSTILE ENVIRONMENT: “UNWELCOME”

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

HOSTILE ENVIRONMENT: “REASONABLE PERSON”

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

HOSTILE ENVIRONMENT: “SEVERE”

- Physical conduct is more likely to be severe
- Accompanied by threats or violence
- Consider the circumstances (e.g., the ability for Complainant to remove themselves from the harassment)

HOSTILE ENVIRONMENT: “PERVASIVE”

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

HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”

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

HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”
- In evaluating the totality of the circumstances, consider:
 - Frequency, nature, and severity of the conduct
 - Whether the conduct was physically threatening
 - Whether the conduct was humiliating
 - Identity of and relationship between the Respondent and the Complainant
 - Age of the Respondent and the Complainant
 - Size of the school, location of the incidents, and context in which they occurred

HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

- Totality of the circumstances to consider:
 - Effect on the Complainant's mental or emotional state
 - Whether the conduct was directed at more than one person
 - Whether the conduct unreasonably interfered with the Complainant's educational or work performance
 - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
 - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection
 - "Constellation of surrounding circumstances."

SEXUAL ASSAULT

Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.

- **Forcible Rape** - Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.
- **Forcible Sodomy** - Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

SEXUAL ASSAULT (CONTD.)

- **Sexual Assault with an Object** - To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- **Forcible Fondling** - The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

SEXUAL ASSAULT (CONT.)

- **Incest** - Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by [insert state] law.
- **Statutory Rape** - Nonforcible sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

DATING VIOLENCE

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition —
 - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 - Dating violence does not include acts covered under the definition of domestic violence.

DOMESTIC VIOLENCE

- A felony or misdemeanor crime of violence committed —
 - By a current or former spouse or intimate partner of the Complainant;
 - By a person with whom the Complainant shares a child in common;
 - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
 - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
 - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

DOMESTIC VIOLENCE (CONT.)

- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

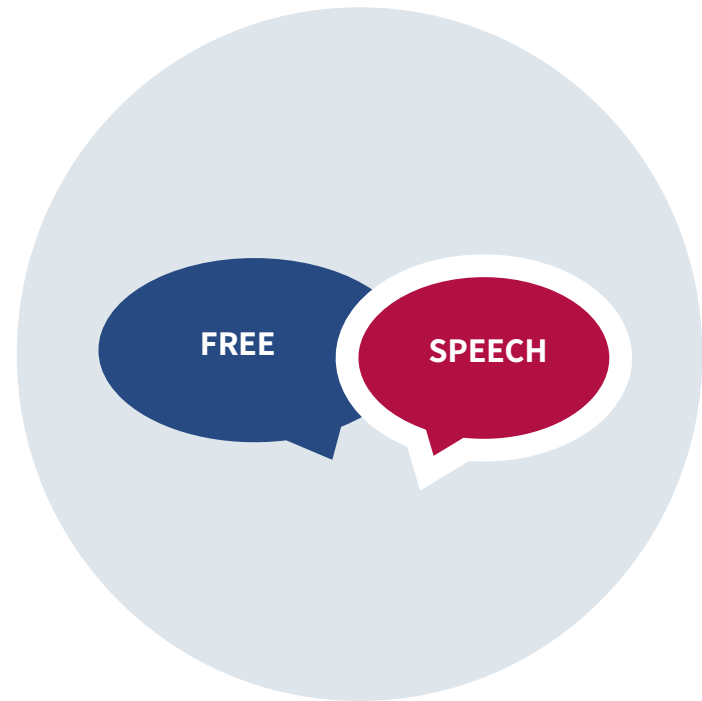
STALKING

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to —
 - Fear for the person's safety or the safety of others; or
 - Suffer substantial emotional distress.
- For the purposes of this definition:
 - **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

STALKING (CONT.)

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- The TIX regulations insist this definition not be interpreted to violate First Amendment.

NAVIGATING FIRST AMENDMENT PROTECTIONS



NAVIGATING FIRST AMENDMENT PROTECTIONS

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

- An important concern for all public schools
- Impacts policy language regarding expression
 - Pay heed to vagueness and over-breadth concerns
 - Avoid incorporating “intent” or “purpose” language
- Title IX Regulations reaffirm First Amendment protections

NAVIGATING FIRST AMENDMENT PROTECTIONS (CONT.)

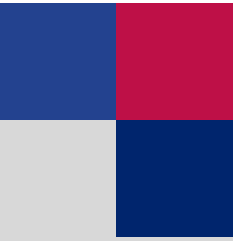
Issues to consider:

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

TINKER v. DES MOINES INDEP. COM. SCH. DIST.

393 U.S. 503 (1969) (CONTD.)

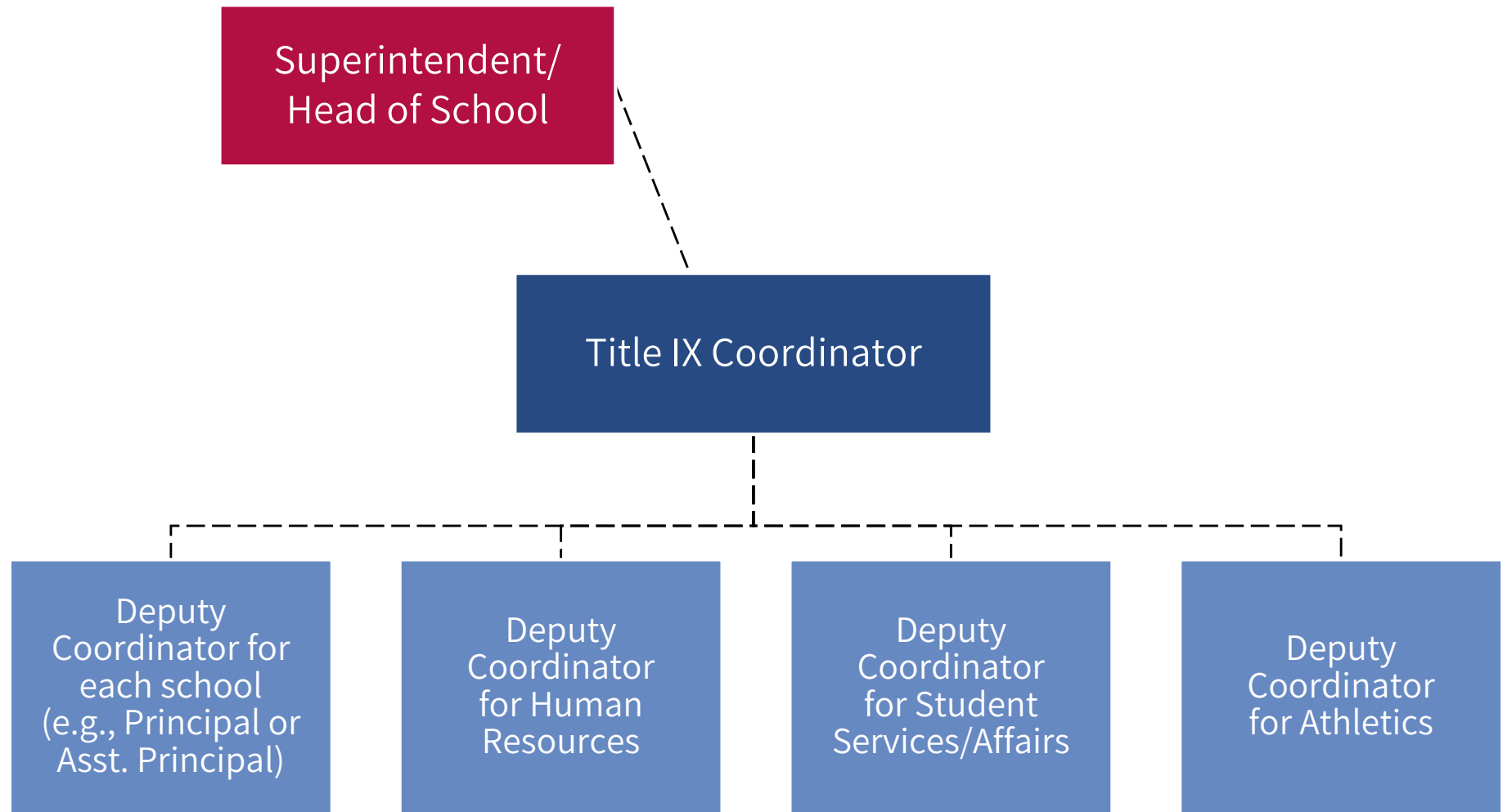
- Free speech rights in public schools
- In order to discipline, the conduct must:
 - **“Materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”**
 - Actual interference, not based on fear of a potential interference
 - “More than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”
 - Substantial interference with the school’s work
 - **Intrude upon the rights of other students**



TITLE IX TEAM ROLES & RESPONSIBILITIES

- Title IX Coordinator
- Investigator
- Decision-Maker
- Informal Resolution Facilitator

SAMPLE TITLE IX TEAM STRUCTURE



WHO IS ON THE TITLE IX TEAM?

- Title IX Coordinator(s)
- Deputy Coordinator(s)
- Investigator(s)
- Decision-Makers
 - Policy violation
 - Appeal
- Informal Resolution Facilitator(s)

TITLE IX COORDINATOR

- Title IX Coordinator is an administrator with significant authority and wide-ranging responsibilities
 - Must have autonomy and independence
 - Should report to Superintendent
 - Must be able to affect change across many departments
- To alleviate the burden on one administrator, Districts and schools may identify multiple Deputy Coordinators – typically one per school/building

ROLE OF THE TITLE IX COORDINATOR

- District/school-wide Title IX Compliance oversight
- Point person for complaints
- Training oversight (TIX Team, students, employees, parents/guardians, etc.)
- Creator & implementor of appropriate policy
- Contact for government inquiries
- Prevention and remediation of all sex/gender-based discrimination & harassment
- Oversight of prompt & equitable grievance procedures
- Supervisor of investigations and Investigators

ROLE OF THE TITLE IX COORDINATOR (CONT.)

- Assurance of compliance with final sanctions
- Coordinating appeal process
- Compliance with requirements to stop, prevent, and remedy
- Coordinate overlap of various student & employee grievance processes
- Navigating First Amendment protections
- Prevention and remediation of retaliation
- Section 504 disability compliance oversight
- Oversight of athletics gender equity
- Recordkeeping

SCHOOL/DISTRICT TEAM

- In coordination with the Title IX Coordinator, school-based administrators, supervisors, and other Deputy Coordinators may also:
 - Be identified in publications and policies as individuals to whom a report may be made
 - The Title IX Coordinator must create a structure of documentation and reporting by these designated individuals to ensure that the Title IX Coordinator is aware of the issue
 - Lead the Title IX-based response protocol
 - Serve as an Investigator
 - Serve as a Decision-maker
 - Facilitate an informal resolution

ROLE OF THE INVESTIGATOR

- Conduct reliable, prompt, fair, and impartial investigations
 - Work with TIXC to develop strategy for investigation
 - Identify and interview parties and witnesses
 - Identify, organize, and compile relevant information
 - Maintain accurate and thorough investigation records and notes
 - Share the evidence with the parties and their Advisors
 - Provide notices to the parties (may be done in conjunction with TIXC)
- Create an investigation report that fairly summarizes relevant evidence

ROLE OF THE DECISION-MAKERS

- Determine whether District policy has been violated based upon the applicable standard of evidence
 - Decisions must be based upon an independent assessment of the evidence gathered during the investigation and/or provided during a hearing, to include an assessment of the credibility of the parties and witnesses
 - Decisions must be based on the specific policy alleged to have been violated
 - Decisions must be impartial and free of substantive bias

ROLE OF THE DECISION-MAKERS (CONT.)

- Determine appropriate sanctions/discipline when a policy violation is found
- Draft a written determination that outlines the rationale for the finding(s)

ROLE OF APPELLATE DECISION-MAKER

- Make determination on a party's request for an appeal
- Review written submissions from parties
- May review investigation report or other evidence gathered during investigation/hearing
- May need to speak with Investigator, Decision-maker, parties, or witnesses
- Review of case should be limited to the grounds noted in the appeal request
 - Not a *de novo* review
- Draft a written determination that outlines the rationale for the outcome

TRAINING

- Robust training mandates
- Coordinators, Investigators, Decision-makers, Appeal Decision-makers, Informal Resolution Facilitators
- Training materials cannot include sex stereotypes; should promote impartiality
- Training materials must be maintained for seven years and posted publicly on Recipient's website
 - Seven years must be maintained, but only the most recent need to be posted

REQUIRED TRAINING TOPICS

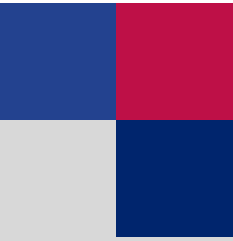
- Definition of sexual harassment
- Scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Use of any technology to be used at a live hearing

REQUIRED TRAINING TOPICS (CONT.)

- Issues of relevance of questions and evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant
- How to create an investigation report that fairly summarizes relevant evidence

DISCUSSION

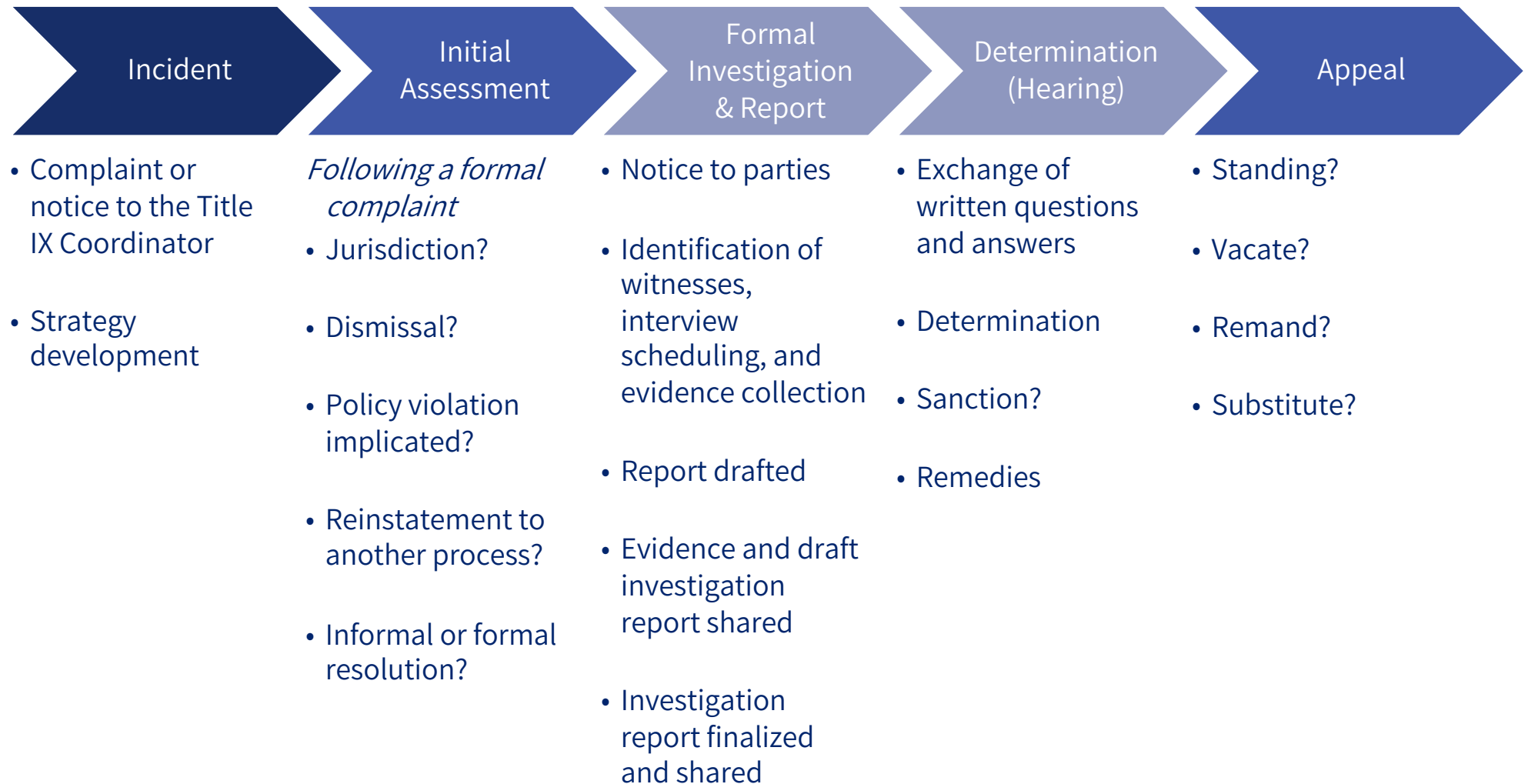
- What is the Title IX structure in place within your District?
- What challenges do you foresee with your ability to implement the Title IX team structure required under the regulations (i.e., Coordinator, Investigator, Decision-makers, etc.)?



OVERVIEW OF INVESTIGATION & GRIEVANCE PROCESS MODEL

- The Process
- Ten Steps of an Investigation
- Title IX Coordinator's Role
- Timeframes
- Neutrality, Conflicts of Interest, Objectivity
- Advisors

THE PROCESS



10 STEPS OF AN INVESTIGATION

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation and Allegations to Parties (NOIA)
5. Establish investigation strategy
6. Formal comprehensive investigation
 - Witness interviews; evidence gathering

10 STEPS OF AN INVESTIGATION

7. Draft investigation report
8. Meet with the Title IX Coordinator (and/or legal counsel) to review draft report and evidence
9. Provide all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
10. Complete the final investigation report
 - Synthesize and analyze relevant evidence
 - Send final investigation report to parties for review and written response at least 10 days prior to making a policy violation determination

TITLE IX COORDINATOR'S INVESTIGATION AND GRIEVANCE PROCESS OVERSIGHT

The Title IX Coordinator is responsible for:

- Point person for receipt of complaint
- Conducting initial assessment
- Assurance of supportive measures
- The appointment and supervision of Investigators
- Training Investigators, Decision-makers, Appeal Decision-makers, and Informal Resolution Facilitators
- Coordination of investigations

TITLE IX COORDINATOR'S INVESTIGATION AND GRIEVANCE PROCESS OVERSIGHT (CONT.)

The Title IX Coordinator is responsible for:

- Strategizing investigations
- Timeline compliance
- Providing institutional memory to Investigators
- Retaining a record of actions taken in each case

“REASONABLY PROMPT” TIMEFRAMES FOR GRIEVANCE PROCESS

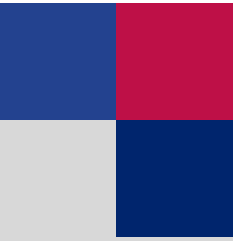
- 20+ days to resolution given procedural requirements in the Title IX regulations
 - No set requirement in the regulations other than to have reasonably prompt timeframes for the conclusion of the process designated in your procedures
 - Timeline starts from notice, not from the incident itself
 - Goal is to avoid undue delay

NEUTRALITY, CONFLICT OF INTEREST, AND OBJECTIVITY

- Grievance process must treat parties “equitably”
 - Must be designed to restore or preserve access to education programs
 - Must include enhanced 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
- Mandatory training on appropriate investigation, hearing, evidence, credibility, bias, and conflict of interest

ADVISOR OF CHOICE

- Parties have the right to have an Advisor of their choice to assist them throughout the process, to include attending any meetings and interviews
- Advisor of choice may be anyone, including an attorney
- Advisor of choice is in addition to the students' parent/guardian
- May restrict participation of Advisors equally
- No requirement for K-12 to provide an Advisor for the parties
- No requirement to train Advisors



NOTICE TO THE RECIPIENT/COMPLAINT

- Actual Knowledge/Notice
- Formal Complaint
- When Do You Investigate?

NOTICE/ACTUAL KNOWLEDGE – TIX REGULATIONS

Actual knowledge

- Notice of sexual harassment or allegations
- In an education program or activity
- Against a person in the US
- To:
 - a Title IX Coordinator;
 - any official with authority to institute corrective measures on behalf of a college or university; or
 - **any employee of an elementary or secondary school**

NOTICE TO K-12 EMPLOYEES

- Notice includes information K-12 employees witness, hear about, or receive a written or verbal complaint about
- Akin to “Mandatory Reporter” or “Responsible Employee” designations
- Likely tracks with your state law-based obligation to report child abuse to state or local authorities
- Train all employees to always notify the Title IX Coordinator of all reports
 - There are no confidential reporting options in K-12

ADDITIONAL REPORTING REQUIREMENTS

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

FORMAL COMPLAINT – TIX REGULATIONS

Formal Complaint

- Document or electronic submission
- Filed by Complainant (or parent/guardian) or signed by TIX Coordinator
 - TIXC does not become a party to the complaint
- Alleging Sexual Harassment
- Requesting an investigation
- Complainant must be participating or attempting to participate in the Recipient's education program or activity at the time of filing
- Initiates mandatory grievance process (investigation and determination)

REPORT V. COMPLAINT – TIX REGULATIONS

- Distinguish between a “report” and a “formal complaint”
- Parent/guardian has “right” to make report/complaint for student
- Upon receiving a “report” (either from the would-be Complainant or a third party):
 - Promptly reach out and provide support
 - Offer and provide supportive measures to the person alleged to have experienced the harassment. May also offer to would-be Respondent.
 - Explain process to file a formal complaint.

REPORT V. COMPLAINT (CONT.)

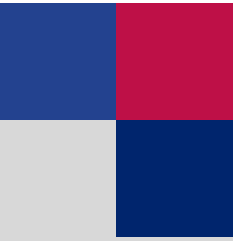
- Upon receiving a “formal complaint:”
 - Conduct initial assessment to determine jurisdiction
 - Dismiss complaint if no jurisdiction or no prima facie sexual harassment allegation
 - Triggers obligation to follow “grievance process” including investigation
 - Offer informal resolution options

WHEN DO YOU INVESTIGATE?

- Upon receipt of a formal complaint, investigation is required
- What about misconduct that is open and obvious?
- What about rumors, gossip, social media, etc.?
 - Discretionary, but often recommended
 - OCR may not think these create an obligation for formal action, but will courts agree?
- Anonymous reports

WHO SHOULD INVESTIGATE?

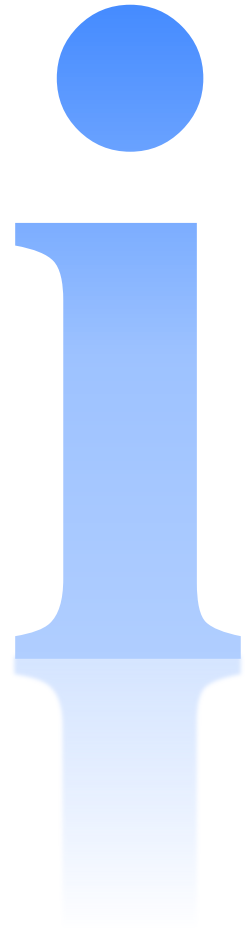
- Investigations of sexual harassment must be impartial, thorough, and reliable. Investigators must be **well-trained**.
 - Title IX Coordinator?
 - Standing panel of Investigators?
 - Human resources?
 - Student services?
 - Administrators/Staff?
 - Teachers/faculty?
- Coaches?
- Outside/External Investigator?
- NOT Legal Counsel



INITIAL ASSESSMENT

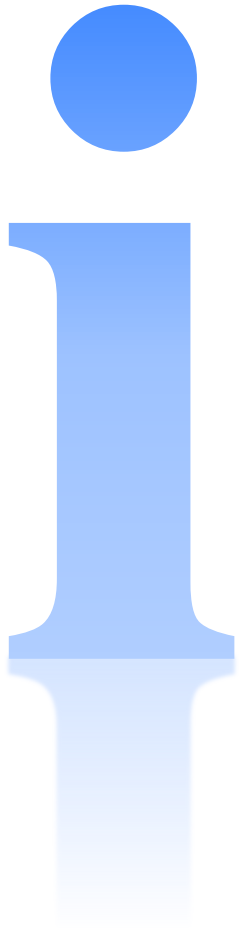
- Title IX Coordinator's Role
- Initial Assessment
- Supportive Measures
- Notice to the Parties
- Emergency Removal
- Informal Resolution

INITIAL ASSESSMENT IN SUMMARY



- TIXC should be responsible for initial assessment to determine the following:
 - Has there been a formal complaint?
 - Does the TIXC need to sign/initiate a formal complaint?
 - Does the alleged conduct meet the required definitions?
 - Does jurisdiction exist?
 - Can/should Recipient remedy informally or without discipline?
 - Mandatory/Discretionary dismissal considerations.
 - If dismissed, should an alternate policy/ process begin?

INITIAL ASSESSMENT



- If proceeding under Title IX:
 - Establish basis of investigation:
 - Incident or pattern, and/or climate/culture
 - Establish a preliminary timeline for the investigation
 - If no formal action, document how Recipient's response was not deliberately indifferent
 - Responding to anonymous reports:
 - Determine if a trend or pattern may be apparent
 - Can you identify parties?
 - Duty to attempt some form of remedial response, even to an anonymous report

PPTVWM

Title IX Coordinator may need to file a formal complaint if any of the following are present:

- Pattern
- Predation
- Threat
- Violence/Weapon
- Minors (will always be reported to proper authorities)

PPTVWM (CONT.)

Pattern, Predation, Threat, Violence, Weapon, or Minors

- Additional complaints of sexual violence involving the same Respondent
- Whether the sexual violence was committed by multiple individuals
- Whether the Respondent has a prior history of violence
- Whether the report reveals a pattern of behavior at a given location or by a particular group
- Whether the Respondent threatened further sexual violence or violence against the Complainant or others

PPTVWM (CONT.)

Pattern, Predation, Threat, Violence, Weapon, or Minors

- Whether a weapon facilitated the sexual violence
- Age of the Complainant
- Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence)

If school proceeds, it should notify the Complainant and utilize appropriate supportive measures to protect them.

SUPPORTIVE MEASURES

- Provided to all parties throughout the process:
 - Non-disciplinary, non-punitive
 - Individualized
 - Restore or preserve equal access
 - Without unreasonably burdening other party
 - Protect safety of parties or environment, or deter sexual harassment
- If supportive measures not provided, document why not

COMMON SUPPORTIVE MEASURES

- Referral to counseling, medical and/or other health services
 - Referral to the Employee Assistance Program
 - Visa and immigration assistance
 - Education to the community or community subgroup
- Altering housing situation (if applicable)
 - Altering work arrangements for employees
 - Safety planning
 - Providing school safety escorts

COMMON SUPPORTIVE MEASURES (CONT.)

- Transportation accommodations
 - Implementing contact limitations (no contact orders) between the parties
 - Academic support, extensions of deadlines, or other course-related adjustments
- Trespass or Be on the Lookout (BOLO) orders
 - Emergency notifications
 - Increased security and monitoring of certain areas of school
 - Other tailored measures appropriate to the circumstances

NOTICE TO THE PARTIES

- Upon receipt of a formal complaint, a Recipient must provide **written notice** to the parties who are known:
 - Notice of the grievance process, including any informal resolution process
 - Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
 - Identities of the parties involved in the incident, if known
 - Description of conduct
 - Date and location, if known

NOTICE TO THE PARTIES (CONT.)

■ **Written notice**

- Respondent is presumed not responsible and a determination regarding responsibility is made at the conclusion of the grievance process
- Parties may have an Advisor of their choice, who may be an attorney
- Parties may inspect and review evidence prior to the completion of the investigation report
- Any provision from code of conduct that prohibits knowingly making false statements or knowingly submitting false information (if any)
- Update notice if additional allegations will be added/investigated

EMERGENCY REMOVAL

A Recipient may remove a student Respondent from the education program or activity on an emergency basis, only after:

1. Undertaking an individualized safety and risk analysis
2. Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
3. Providing the Respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.

EMPLOYEE ADMINISTRATIVE LEAVE

- A Recipient may place a non-student employee Respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act

INFORMAL RESOLUTION

- The Title IX regulations include a provision that encourages informal resolution, and it is a worthy practice, when voluntary.
 - Following formal complaint
 - Allowed at any time prior to a final determination at discretion of TIXC
 - Voluntary, written consent of the parties and their parent/guardian
 - OCR regs preclude informal resolution of allegations that an employee harassed a student
 - Must still stop, prevent, remedy, and document response

INFORMAL RESOLUTION POSSIBILITIES

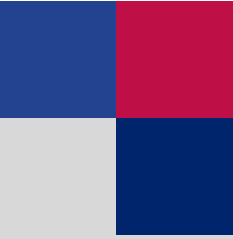
- Age-appropriate education, facilitated dialogue, and discussion
 - Conflict coaching
 - Restorative practice methods:
 - Circles
 - Conferences
 - Hearings
 - Mediation
- ❖ Are policy changes required?
 - ❖ Are you providing sufficient staffing and training resources?

INFORMAL RESOLUTION

- The Title IX Coordinator may look to the following factors to assess whether Informal Resolution is appropriate, or which form of Informal Resolution may be most successful for the parties:
 - Amenability of the parties to Informal Resolution
 - Likelihood of potential resolution, taking into account any power dynamics between the parties
 - Motivation of the parties to participate
 - Civility of the parties
 - Cleared violence risk assessment/ongoing risk analysis
 - Whether an emergency removal is needed

INFORMAL RESOLUTION (CONT.)

- Skill of the Informal Resolution facilitator with this type of complaint
- Complexity of complaint
- Emotional investment/intelligence of the parties
- Rationality of the parties
- Goals of the parties
- Adequate time to invest in Informal Resolution (resources, staff, etc.)



CASE STUDY

Sally & Jamie

CASE STUDY: SALLY AND JAMIE

Sally is a fifteen-year-old ninth-grade student who reported that she was taken into the boys' bathroom and pressured into sexual activity by a male student.

Sally stated that she voluntarily entered the boys' bathroom and engaged in consensual kissing with the male student, but she was not expecting to engage in sexual intercourse.

Sally reported that the incident was recorded on another student's phone without her knowledge and subsequently shown to other students and posted on social media.

Sally's parents notified the principal and school resource officer of the incident and filed a police report. The video continues to circulate at the school and on the internet.

CASE STUDY: SALLY AND JAMIE

Sally reported that she wants to withdraw from school due to the harassment and threats she received as a result of the circulation of the video.

When the principal tells you about Sally's report, you remembered an incident you heard about two weeks ago involving Jamie, a 15-year-old ninth-grade student at the same school. In that incident, it was rumored that Jamie was pulled into an unlocked classroom by a male student where he was forced to sexually touch the male student while a third student lurked in the back of the classroom, unnoticed by Jamie, and recorded the incident.

CASE STUDY: SALLY AND JAMIE

The classroom where it occurred was unsupervised and improperly unlocked. Administrators became aware of the incident involving Jamie when the recording of the incident began circulating on students' phones and on the internet. Jamie never reported the incident, and he has not returned to school. The video of the incident continues to circulate throughout the school and on the internet.

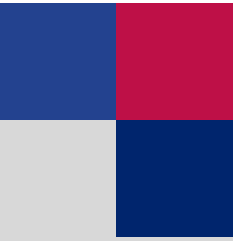
As you talk to the principal, you also learn that school administrators were aware that at least three prior incidences of “exposing” had occurred before the incident with Jamie, one of which took place at the school, one during a school field trip, and one involving a student recording another student at their home.

CASE STUDY DISCUSSION: SALLY AND JAMIE

- You are the Title IX Coordinator. Please respond to the following:
 1. What Title IX issues are you able to spot?
 2. Of the various incidents described, are there any incidents that you do not believe fall under Title IX? If so, explain why?
 3. Outline the actions you would take when responding to Sally's report.
 4. What would you do to respond to the incident involving Jamie?

CASE STUDY DISCUSSION: SALLY AND JAMIE

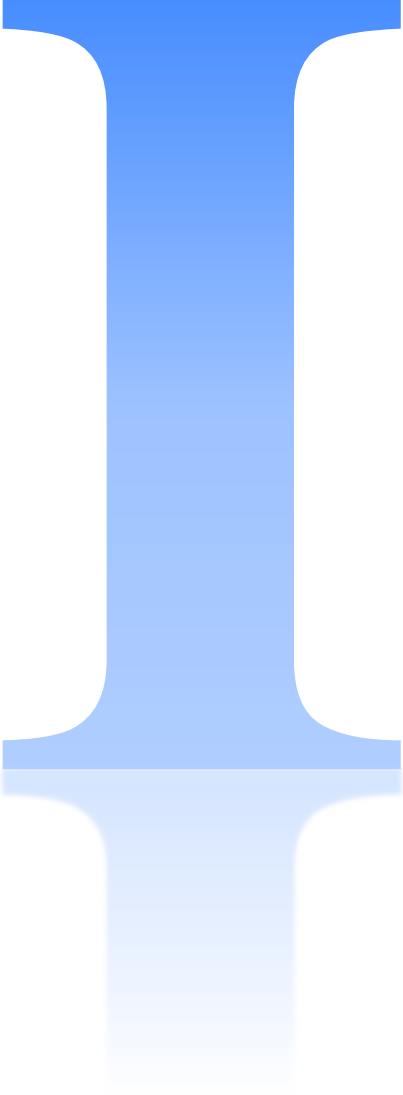
5. What, if any, impact would Jamie's incident have on how you respond to Sally's report?
6. How would you address the three prior incidents of exposing?
7. What, if any, impact would the exposing incidents have on how you respond to Sally's report? Jamie's incident?



TITLE IX COORDINATOR: SUPERVISOR OF INVESTIGATIONS

- Formal Comprehensive Investigation
- Title IX Coordinator's Role
- Standard of Evidence
- Evidence & Report Review

FORMAL COMPREHENSIVE INVESTIGATION

- 
- Commence a thorough, reliable, impartial, prompt, and fair investigation
 - Determine the strategy for the investigation
 - Witness interviews
 - Evidence gathering
 - Intended timeframe to complete the investigation
 - Evidence review
 - Report writing and review
 - Complete the investigation without unreasonable deviation from the timeline

TITLE IX COORDINATOR'S INVESTIGATION OVERSIGHT

The Title IX Coordinator should be responsible for:

- Continued assurance of supportive measures
- Appointment, coordination, and supervision of Investigators and oversight of investigations
- Strategizing investigations
- Facilitating sending notices to parties
- Facilitating the evidence and report review with parties
- Reviewing investigation report

TITLE IX COORDINATOR'S INVESTIGATION OVERSIGHT (CONT.)

The Title IX Coordinator should be responsible for:

- Timeline compliance
- Ensuring policies and procedures being followed
- Retaining a record of all activities

BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE

- Procedures should clearly articulate that the burden of proof and burden of gathering evidence rests with the school, not the parties
 - It is not required that a Respondent prove welcomeness or consent, the Recipient must prove unwelcomeness or non-consent
- “Sufficient to reach a determination”
- Equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence

BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE (CONT.)

- Evidence collected by law enforcement or any other source
- Contracted/outsources Investigators do not absolve the school of responsibility for this provision

ROLE OF LAW ENFORCEMENT AND ISSUES OF CONCURRENT CRIMINAL ACTION

- Criminal investigations do not relieve the school of its duty to respond promptly and effectively
- 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
- What if law enforcement requests you delay your process?
- What if law enforcement is the sole source of evidence collection?
- What if a party files a lawsuit or complaint with OCR?

RIGHTS OF THE PARTIES DURING THE INVESTIGATION – TIX REGULATIONS

- Right to present witnesses, including fact and expert witnesses
- Right to present inculpatory and exculpatory evidence
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence without restriction
- Right to be accompanied to any related meeting or proceeding by advisor of their choice, who may be, but is not required to be, an attorney

RIGHTS OF THE PARTIES DURING THE INVESTIGATION – TIX REGULATIONS (CONT.)

- Right to written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Right to inspect and review directly related evidence and investigation report

DUE PROCESS: EVIDENCE

- **All** relevant and reasonably available evidence must be considered – inculpatory and exculpatory
- No restrictions 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, except must be relevant and respect “rape shield” provision
- Includes all evidence directly related to the investigation, even evidence that determination does not, or will not, rely upon

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
 - Be sent to each party and Advisor
 - Be in an electronic format or hard copy
 - Include evidence upon which the Recipient does not intend to rely
 - Include exculpatory and inculpatory evidence
 - Be made available at any hearing
- After sending the evidence, the Investigator must:
 - Allow 10 days for written response
 - Consider response prior to completion of report

Source: § 106.45(b)(5)(vi)

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2

At least 10 days prior to making a determination regarding responsibility:

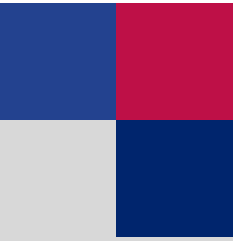
- The final Investigation Report summarizing relevant evidence must be sent:
 - To each party and Advisor
 - In an electronic format or hard copy
 - For the parties' review and written response
 - Best Practice: Provide the investigative report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties

Source: § 106.45(b)(5)(vii) and § 106.45(b)(6)(ii)

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2 (CONT.)

- For K-12 schools, with or without a hearing, this review is followed by, or in conjunction with, the exchange of relevant written questions and responses facilitated by a Decision-maker.

Source: § 106.45(b)(5)(vii) and § 106.45(b)(6)(ii)



DECISION-MAKERS: MAKING A DETERMINATION

- Live Hearing?
- Questioning
- Standard of Evidence

DETERMINATIONS (AND OPTIONAL HEARINGS)

- Mandated **live hearing not required** for K-12 (unless already required by state law, district policy, board policy, etc.)
- **Live cross-examination not required** for K-12 (unless already required)
 - Questioning may be done indirectly through the Decision-maker
- Parties must be given opportunity to submit written questions, provide each party with the answers, and allowed additional, limited follow-up questions from each party.

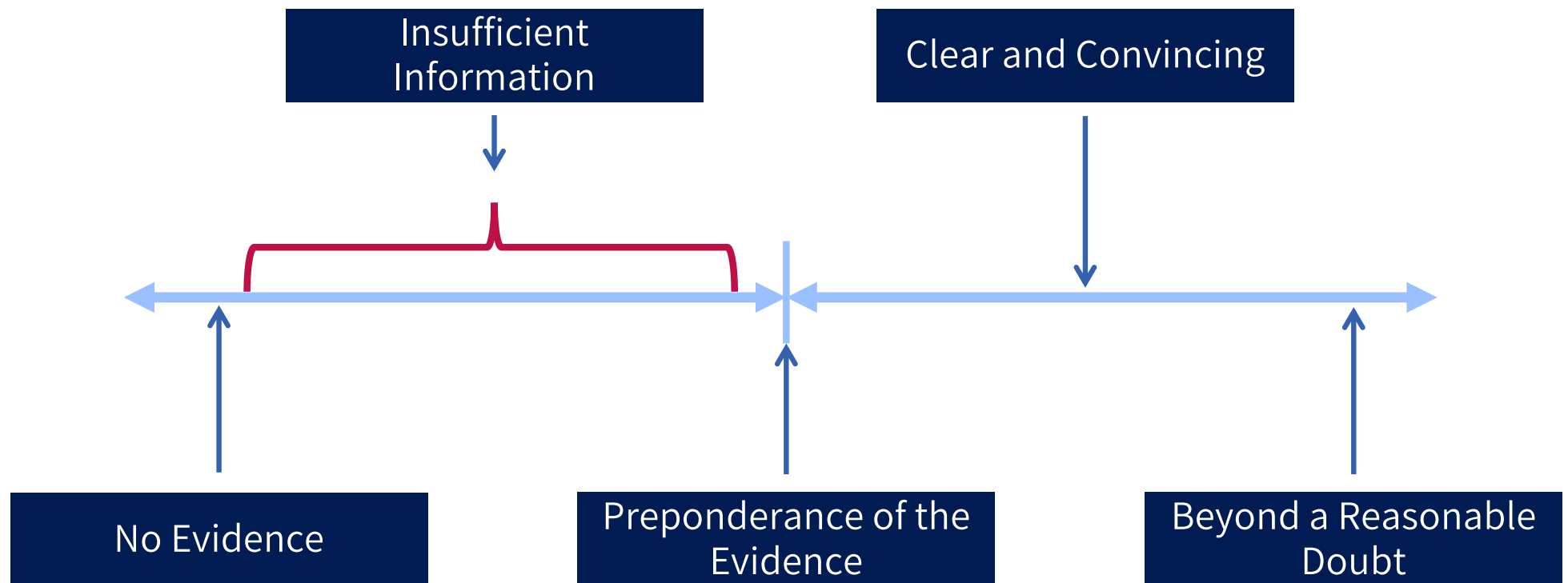
DETERMINATIONS (AND OPTIONAL HEARINGS) (CONT.)

- Each party must be permitted to ask the other party and all witnesses all relevant questions and follow-up questions.
 - Including questions challenging credibility
- Decision-maker may not be the Title IX Coordinator or Investigator

QUESTIONING

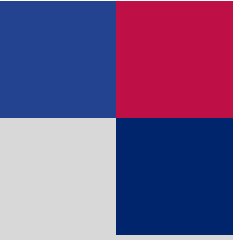
- Questions deemed irrelevant by Decision-maker may be excluded with rationale provided
- Must exclude Complainant's prior sexual behavior unless specifically relevant to prove consent or someone else committed the alleged conduct
- If Recipient offers hearings, it must offer option for hearing to be conducted by video conferencing technology
- Even if Recipient offers hearings, it is still not required to implement live cross-examination or other hearing procedures that are required for higher education institutions

EVIDENTIARY STANDARDS



STANDARD OF EVIDENCE

- Current industry standard is preponderance of the evidence
- Regulations require Recipients to apply either the preponderance of the evidence standard or the clear and convincing evidence standard
- Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority
- Must also apply the same standard of evidence for complaints against students as for complaints against employees, including teachers and administrators



TITLE IX COORDINATOR: ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS

- Sanctioning Considerations
- Common Sanctions

SANCTIONING IN SEXUAL HARASSMENT AND SEX/GENDER DISCRIMINATION CASES

Title IX and case law require resolutions which:

- **STOP:** bring an end to the discriminatory conduct
- **PREVENT:** take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct
- **REMEDY:** restore the Complainant as best you can to their pre-deprivation status
- May clash with solely educational and developmental sanctions of student conduct processes

SANCTIONING CONSIDERATIONS

- The sanction must be reasonable and proportionate to the severity of the behavior.
 - May consider prior misconduct
 - Precedent – importance of consistency
 - Use caution when considering attitude, aggravation, mitigation, contrition, etc.
 - Should be educational, but safety is primary consideration
 - Remedy for loss or injury to school or persons
 - Compliant with laws and regulations (e.g., Title IX)
 - Should consider the impact of education access on the parties

COMMON STUDENT SANCTIONS

- Warning
 - Detention
 - Loss of privileges
 - Counseling
 - No contact
 - Limited access to school activities
 - Service hours
- Online education
 - Alcohol and drug assessment and counseling
 - Discretionary sanctions
 - Alternative placement
 - In-School-Suspension
 - Out-of-School Suspension
 - Expulsion

COMMON EMPLOYEE SANCTIONS

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

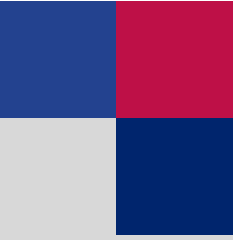
WRITTEN DETERMINATIONS

Recipient must issue a written determination regarding responsibility that includes the following:

- Sections of the policy alleged to have been violated
- Description of procedural steps taken
- Statement of and rationale for the result for each specific allegation
 - Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
- Sanctions imposed on Respondent

WRITTEN DETERMINATIONS (CONT.)

- Any remedies provided to the Complainant designed to restore or preserve access to the education program or activity
- Procedures and bases for appeal
- Delivered simultaneously to the parties
- **FERPA cannot be construed to conflict with or prevent compliance with Title IX**



TITLE IX COORDINATOR: COORDINATING THE APPEAL PROCESS

- Process
- Grounds for Appeal
- Finality of Determination
- Written Determination
- Considerations After a Case

THE APPEAL PROCESS

- Appeals are mandatory under the 2020 Title IX Regulations
- Equitable
- Clearly communicated to parties
 - Process to appeal
 - When an appeal is received and opportunity to respond
- One level of appeal is best practice
- Defined window of time to request appeal
- Three mandatory grounds for appeal; may add others
- Committee versus individual determination preferred
- Deference to original Decision-maker
- Remand

GROUNDINGS FOR APPEAL

- Must offer both parties an appeal of a determination regarding responsibility, and from a school's dismissal (or non-dismissal) of a formal complaint or any allegations therein, on the following bases:
 - A procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter

GROUNDS FOR APPEAL (CONT.)

- The Title IX Coordinator, Investigator, or Decision-maker had a conflict of interest or bias that affected the outcome of the matter
- May offer additional bases for an appeal; must be available to both parties

FINALITY OF DETERMINATION

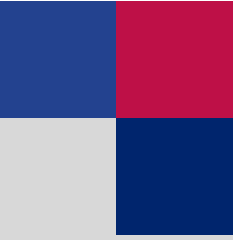
- If an appeal is filed, the determination regarding responsibility becomes final on the date that the Recipient provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.

CONSIDERATIONS AFTER A CASE

- Ensure response was not deliberately indifferent
- Ensure measures taken to restore or preserve equal access to education program or activity
- Ensure remedies provided to the Complainant in addition to the community
- Ensure implementation of any sanctions/disciplinary action
- Monitor for retaliation; respond immediately to allegations

CONSIDERATIONS AFTER A CASE (CONT.)

- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, industry standards, and state and federal law
- Ensure all case materials (intake through appeal) are maintained in a central location (ideally within a case management system) that is accessible by the Title IX Coordinator



TITLE IX COORDINATOR: GENERAL TITLE IX COMPLIANCE OVERSIGHT

- General Compliance Tasks
- Recordkeeping and Documentation
- Preventing and Addressing Bias
- Intersection of Title IX and Title VII

TITLE IX

- Active internal reviews, audits, or assessments.
 - Complaint and resolution processes — investigations, findings, and sanctions
 - Policies and procedures up-to-date and compliant
 - Athletics
 - Training content and requirements
 - Policy and non-discrimination notice dissemination
 - Materials, website, and resource guide
 - Sex/Gender-based equity
- Compliance checklist
 - Self-study audit at regular intervals

TITLE IX

- Case/investigation debriefing
- Active professional development on issues related to compliance; oversight of compliance plan implementation
 - For Title IX Coordinator and/or Deputy Coordinators
- Climate surveys
 - Online, in-person, focus groups, school/district committee feedback, etc.

RECORDKEEPING AND DOCUMENTATION

- Certain records must be created, retained, and available to the parties for at least **seven** years:
 - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
 - Any appeal and related result(s)
 - Any informal resolution implemented
 - Any supportive measures implemented
 - **For each formal complaint, must document the basis for why the District's response was not deliberately indifferent**

RECORDKEEPING AND DOCUMENTATION (CONT.)

- For each conclusion, school must document the rationale for its determination
- School must document measures taken to preserve/restore access to education programs/activity

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



**Title IX administrators
(including Investigators and
Decision-makers), have no
“side” other than the
integrity of the process!**

BIAS AND CONFLICT OF INTEREST

- Title IX Regulations prohibit conflicts-of-interest or bias with Coordinators, Investigators, and Decision-makers against parties generally or an individual party.
 - What creates a conflict?
 - How can you assure that you don't have one?
- Types of conflicts/bias:
 - Wearing too many hats in the process
 - Legal counsel as Investigator or Decision-maker
 - Decision-makers who are not impartial
 - Biased training materials; reliance on sex stereotypes

BIAS AND CONFLICT OF INTEREST (CONT.)

- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.
- Previously disciplining a student or employee is often not enough to create a conflict of interest.

NORTH HAVEN BOARD OF EDUCATION V. BELL

- Cases consolidated on appeal and Second Circuit reversed
- Decided that HEW has authority under Title IX to address employment discrimination
 - Court did not render a decision as to whether HEW could terminate funding under Title IX for employment cases
- Appealed to the Supreme Court
- Supreme Court agreed that Title IX's "broad directive that 'no person' may be discriminated against on the basis of gender on its face, includes employees as well as students."
 - Also looked at Title IX's legislative history and post-enactment history

TITLE IX VS. TITLE VII

Title IX

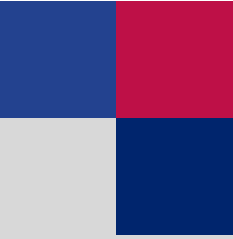
- Applies to students and employees
- Covers sex
- Covers pregnancy
- Hostile Environment, QpQ, Retaliation
- OCR
- “Prompt”
- More directives for prompt, fair, and equitable process for parties

Title VII

- Applies only to employees
- Covers sex, race, color, national origin, religion
- Covers pregnancy
- Hostile environment, QpQ, Retaliation
- EEOC
- No timeframe set
- Fewer equity-based directives in process for parties

IMPACT ON EMPLOYEES

- Employees can use both Title VII and Title IX to pursue a complaint
- Wholesale revision of employee resolution/grievance processes may be necessary
- Union employees – diminished right to an advisor because of union representation?
- Extends significant due process protections for at-will employees accused of misconduct
- Potential inequity in employee processes for Title VII-based sexual harassment



CASE STUDIES

CASE STUDY: SEXTING

You have just learned that police arrested three students at the middle school between the ages of 12 and 15 for creating and distributing pornographic images of themselves online, via text message, and Snapchat. The images and videos are of the creators themselves (i.e., nude selfie pictures and videos).

The local news media just picked up the story and is clamoring for a comment. Parents have also started calling the school and district offices demanding to know what is being done to protect their children.

CASE STUDY: SEXTING

The criminal charges are misdemeanors and felonies for child pornography creation and distribution. Police inform the school that they received reports that nude photos of students from the middle school and the high school were shown by the three students to others at the school and were distributed via text and email.

All involved students are minors and many of the pictures and videos had the location setting on their phones activated, which means people could have allowed predators to locate the homes of those in the pictures and videos.

CASE STUDY DISCUSSION: SEXTING

- Is this a Title IX issue?
- What are the potential policy violation(s)?
- Who are the Complainant(s) and Respondent(s)?
- Who should investigate?
- What interaction do you have with law enforcement?
- How do you handle the media?
- How do you handle the parents?
- What other issues do you see?

CASE STUDY: GROOMING- ELEMENTARY SCHOOL

Karina, a 4th-grader, tells you that she overheard Ana, talking to a group of students about her teacher who often looks at her while she is doing her work in class. Whenever the teacher checks her work, he gets close to her, praising her for her good work, and he once patted her shoulder. She also noticed that whenever the teacher asks for volunteers to distribute materials, Ana always gets chosen. Karina is worried about her friend because she knows that the staring and the one touch are not welcomed by Ana.

CASE STUDY DISCUSSION: GROOMING-ELEMENTARY SCHOOL

- Is this a Title IX issue?
- What are the potential policy violation(s)?
- What additional information would you want to know?
- What supportive measures should be provided? To whom?
- What actions should you take to address this issue?
- Would your responses change if the teacher was a female?

CASE STUDY: GROOMING – HIGH SCHOOL

Ms. Jones is a physical education teacher and coach of the girls' basketball team. Ms. Jones supervises a 10th-grade study hall period. Sue is a 15-year-old student on the girls' basketball team and is also in Ms. Jones's study hall. Sue's parents have been divorced for two years, and Sue has struggled emotionally since that time.

One day after basketball practice, Ms. Jones struck up a conversation with Sue during which Ms. Jones was very complimentary of Sue's athletic ability. The conversation lasted several hours, and they talked about many topics including Sue's post-high school plans. The conversation eventually led to a discussion of how Sue was coping with her parents' divorce.

CASE STUDY: GROOMING – HIGH SCHOOL

The following week, Ms. Jones gave Sue permission to leave study hall and go to a nearby coffee house so she could bring back coffee and pastries for Ms. Jones. Over the following months, their after-practice conversations became routine, as did the special permission to leave study hall.

Ms. Jones and Sue began meeting on the weekends for extra technique and strength training at a local gym. This progressed to regular lunches afterward. Sue told her mother that Ms. Jones believed she could win a basketball scholarship to college but that it would require more intensive, private training.

CASE STUDY: GROOMING – HIGH SCHOOL

Sue's mother was happy and relieved to see her daughter's self-esteem and mood improving and encouraged her daughter to invite Ms. Jones over for dinner one evening. After meeting Ms. Jones, Sue's mother began to view her as a welcome friend and tutor to her daughter.

Ms. Jones next invited Sue to a sports training seminar that was out of town and required an overnight stay. Sue's mother was not at all concerned when she learned that her daughter and Ms. Jones would be sharing a hotel room.

CASE STUDY: GROOMING – HIGH SCHOOL

The following week, Sue came home with a new iPhone that Ms. Jones had given her as a gift. This puzzled Sue's mother, who then called Ms. Jones, mostly with concerns that she should offer to repay Ms. Jones for giving her daughter such an expensive gift. Ms. Jones explained that no payment was necessary, as she had obtained the phone at half price through a college female basketball recruiter she knew.

Ms. Jones and Sue continued to spend increasing amounts of time together outside of school hours. Sue's mother finally became quite concerned when a friend informed her that her daughter had seen Ms. Jones and Sue embracing each other in an empty classroom.

CASE STUDY DISCUSSION: GROOMING – HIGH SCHOOL

- Is this a Title IX issue?
- What are the potential policy violation(s)?
- What actions should you take to address this issue?
- Are you concerned with Sue's mother's reaction?
 - Does this impact how you will respond?
- What supportive measures and/or remedies would you put in place for Sue? For the school community?



Association of
Title IX Administrators

Questions?



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