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Association of  
Title IX Administrators

# K-12 Title IX Coordinator & Administrator One: Foundations

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.

# CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

# AGENDA

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

# AGENDA

7

Overview of the Grievance Process

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Notice to the Recipient/Complaint

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Responding to a Complaint

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Overview of the Investigation Process

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Overview of the Decision-making Process

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Overview of the Appeal Process

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Recordkeeping and Documentation



# **TITLE IX NOTICE OF PROPOSED RULEMAKING 2022**

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# TITLE IX REGULATIONS

- Congress passed Title IX of the Education Amendments in 1972
- Since 1980, the Department of Education's Office for Civil Rights (OCR) has had primary responsibility for enforcing Title IX
- November 2018: OCR proposed the most detailed and comprehensive Title IX regulations to date<sup>1</sup>
- August 2020: Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- June 2022: OCR published the Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations
- On July 12, 2022, the NPRM was published in the Federal Register and the 60-day comment period began

<sup>1</sup> U.S. Office of the Federal Register, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>



# NPRM PROCESS TIMELINE

- Official publication in the Federal Register July 12, 2022
- Review and comment period
  - 60-day comment period ended September 12, 2022
  - Submit comments to the Department of Education's Office for Civil Rights (OCR)
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023
- Watch for ATIXA webinars and other opportunities 😊
- There will be a separate NPRM for Athletics

# PREPARING FOR IMPLEMENTATION

- Must continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new Title IX regulations before the start of the 2023-2024 academic year.

## **Steps to Take Now:**

- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach



# TITLE IX OVERVIEW

- The Law
- Key Title IX-Related Issues
- Essential Compliance Elements
- The IX Commandments
- Equity

# 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.”



# KEY TITLE IX-RELATED ISSUES

## Sex/Gender-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, 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.

# THE IX COMMANDMENTS

<b>INVESTIGATION</b> ➡	<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>
<b>PROCESS</b> ➡	<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>
<b>REMEDIES</b> ➡	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*



## EQUITY

*acknowledges systemic  
impediments with targeted fixes*



## JUSTICE

*eliminates systemic barriers*



## AGENCY

*individuals know that access  
is their right*

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





# SIGNIFICANT CASES

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

# 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 (ED) 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
- OCR administratively enforces Title IX by:
  - Conducting investigations of complaints filed by an individual, a representative, or a group
  - Engaging in compliance 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 (CONT.)

## Key Regulatory and Sub-regulatory Guidance from OCR

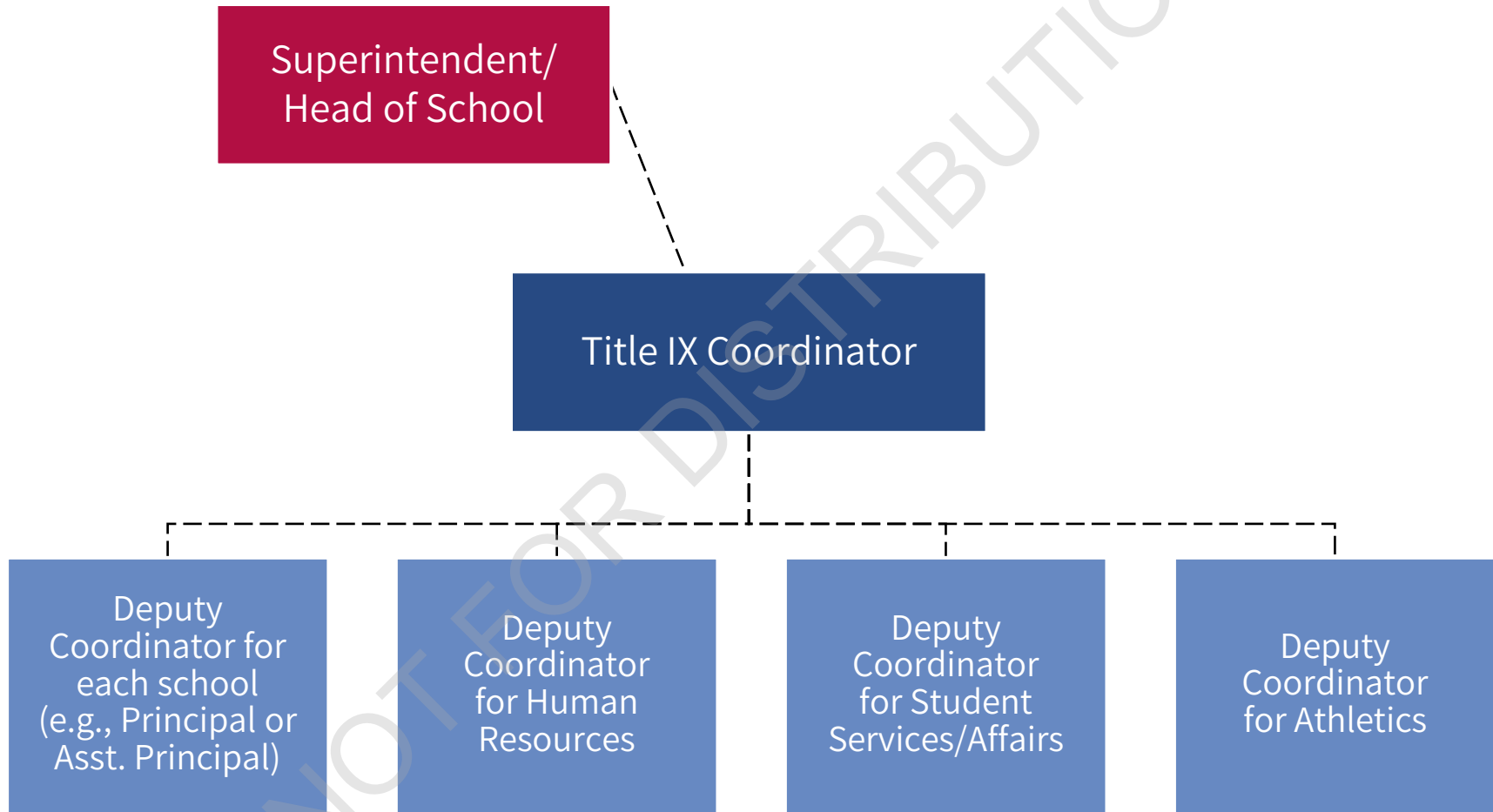
- Still in effect:
  - 2003 DCL on Title IX and Free Speech
  - 2010 DCL on Harassment and Bullying
  - 2013 DCL on Pregnant and Parenting Students
  - 2020 Amendments to Title IX Regulations
  - 2020 Q&A on Final Title IX Rule
  - 2021 Notice of Interpretation: Enforcement of Title IX of the Education 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



# **TITLE IX TEAM ROLES & RESPONSIBILITIES**

- Title IX Coordinator
- Investigator
- Decision-Makers
- Bias and Conflicts of Interest
- Required Training

# 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
- Contact for government inquiries
- Creator and implementor of appropriate policy
- Oversight of prompt and equitable grievance procedures
- Coordination and supervision of investigation process
- Coordinating decision-making and appeal processes
- Assurance of compliance with final sanctions
- Training oversight (TIX Team, students, employees, parents/guardians, etc.)

# ROLE OF THE TITLE IX COORDINATOR (CONT.)

- Compliance with requirements to stop, prevent, and remedy all sex/gender-based discrimination and harassment
- Prevention and remediation of retaliation
- Coordinate overlap of various student and employee grievance processes
- Navigating First Amendment protections
- Oversight of athletics gender equity
- Section 504 disability compliance oversight
- 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
- May be the Title IX Coordinator. Should it be?

# ROLE OF THE DECISION-MAKER

- 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, to include an assessment of the credibility of the parties and witnesses
    - Based on the specific policy alleged to have been violated
    - Impartial and free of substantive bias
- Determine appropriate sanctions/discipline when a policy violation is found
- Draft a written determination that outlines the rationale for the finding(s)
- May not be the Title IX Coordinator or Investigator

# 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 the investigation
- 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 outlining the outcome rationale
- May not be the Title IX Coordinator, Investigator, or initial Decision-maker



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

# BIAS AND CONFLICTS 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

# 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 school/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)?



# 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)
- Involvement of an Advisor of Choice (this could be an attorney)

# DUE PROCESS: CURRENT ISSUES (CONT.)

- Presumption of non-responsibility for Respondent
- Limited ability to take any punitive or disciplinary actions prior to completion of grievance process
- Parties may discuss the allegations under investigation without restriction
- Required opportunity to appeal for all parties
- Bias: TIXC, Investigators, Decision-makers, and Informal Resolution Facilitators
- Biased training or insufficient training
- Requirement to publicly post training materials



# WHEN DOES TITLE IX APPLY?

- Jurisdictional Issues & Questions
- Definitions of Sexual Harassment
- Is it a IX?



# JURISDICTIONAL ISSUES & QUESTIONS

- When Does Title IX Apply?
- When Title IX Jurisdiction Is Not Present

# 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 a fairly broad definition of what could constitute “attempting to participate”

# WHEN DOES TITLE IX APPLY? (CONT.)

## Personal Jurisdiction

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

# WHEN DOES TITLE IX APPLY? (CONT.)

## 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? (CONT.)

## Geographic Jurisdiction

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

# WHEN DOES TITLE IX APPLY? (CONT.)

## 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 in Coordinator Two)

# WHEN DOES TITLE IX APPLY? (CONT.)

## Covered Programs

- Recipient's educational program or activity
  - Locations, events, or circumstances under the Recipient's substantial control
- 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? (CONT.)

## 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? (CONT.)

## 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? (CONT.)

## Subject Matter (Cont.)

- Limitations:
  - Actions/conduct/speech protected by **academic freedom**
    - Pedagogically appropriate and germane to the subject matter of course that instructor is 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**

# IF TIX JURISDICTION IS NOT PRESENT

## **Behavior may still violate:**

- School/District 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)

# 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 that satisfies one or more of the following:

- 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)

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# 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
- Humiliating
- Intimidating
- Ridiculing
- 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:
  - Severe, pervasive, and objectively offensive factors
  - Size of the school, location of the incidents, and context in which they occurred
  - 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.**

- **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 their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.
- **Sodomy** - Oral or anal sexual intercourse with another person, 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.)

- **Sexual Assault with an Object** – The use of 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 (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.
- **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.



# IS IT A IX?

# 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, who is a full-time employee in Facilities Management.
- The employee indicates that Janet missed a few days of work last month and seems withdrawn lately.
- The employee also said Janet was walking with a limp last week, and when asked about it, told people she twisted her knee after slipping on some ice in her driveway.
- Later that same day, the employee said someone overheard Janet on the phone saying, “But I’m scared of what he would do if I tried to leave him.”

# CASE STUDY: IS IT A IX? (CONT.)

- According to the employee, 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 walked into the edge of her open closet door while at home.
- The employee says that this afternoon, Robert and Janet got into a loud argument in the parking lot and that Janet was crying in the bathroom afterwards.

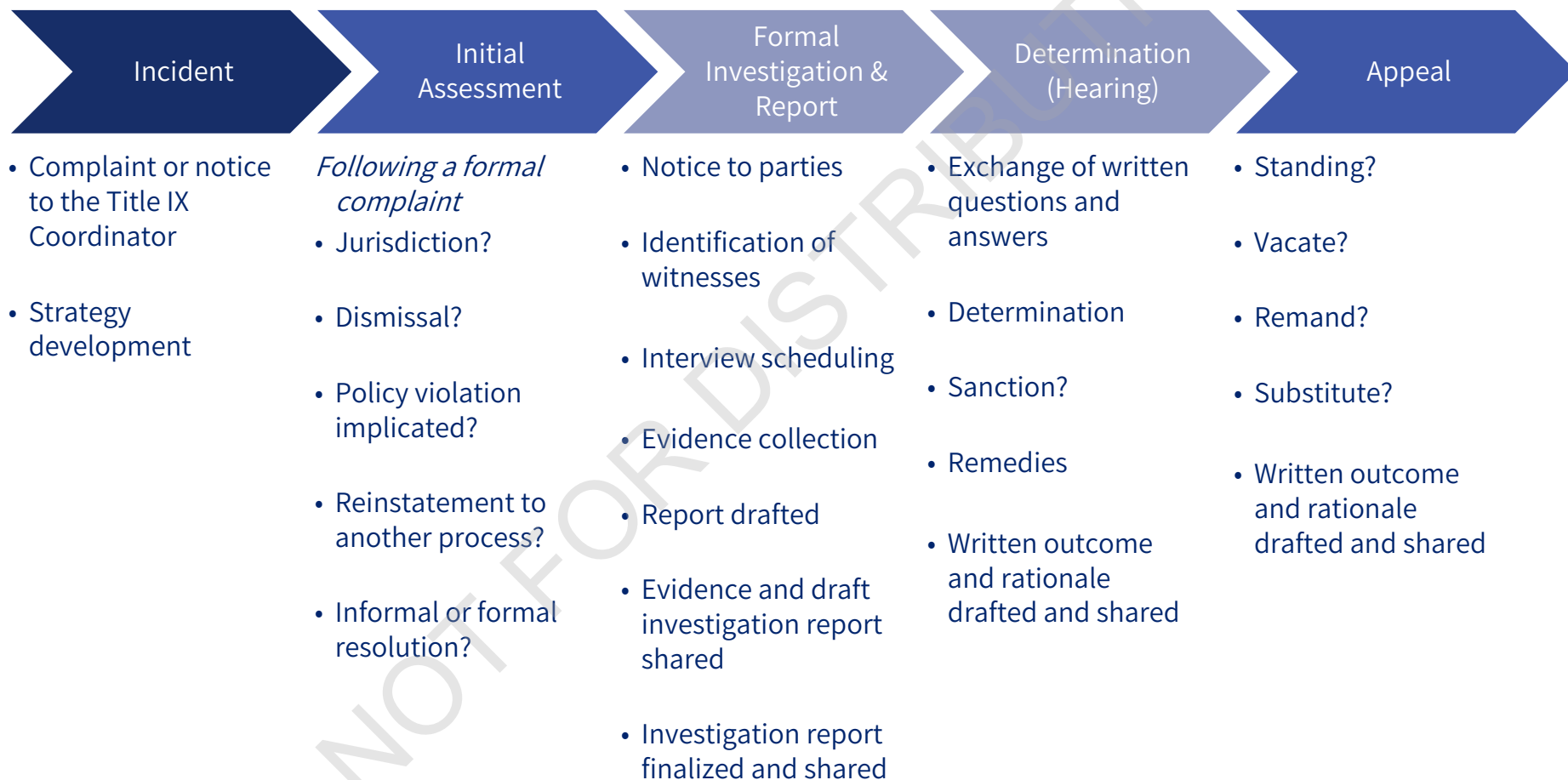
**Is this a Title IX issue the employer needs to address?**



# OVERVIEW OF THE GRIEVANCE PROCESS

- The Process
- Timeframes
- Neutrality, Conflicts of Interest, Objectivity
- Title IX Coordinator's Role

# THE PROCESS



# “REASONABLY PROMPT” TIMEFRAMES FOR GRIEVANCE PROCESS

- 30+ 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
- All relevant evidence obtained must be **objectively** evaluated
- Prohibits conflicts of interest or bias against parties generally or against an individual party for Coordinators, Investigators, and Decision-makers
- Mandatory training on appropriate investigation, hearing, evidence, credibility, bias, and conflicts of interest

# TITLE IX COORDINATOR'S GRIEVANCE PROCESS OVERSIGHT

## **The Title IX Coordinator is responsible for:**

- Point person for receipt of complaint
- Point of contact for parties, parents/guardians, Advisors
- Conducting initial assessment
- Assurance of supportive measures
- Appointment and supervision of Investigators
- Investigation strategy
- Reviewing draft and final investigation report

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

## **The Title IX Coordinator is responsible for:**

- Appointment and coordination of Decision-makers
- Reviewing Decision-makers' written determinations
- Timeline compliance
- Providing institutional memory to Investigators and Decision-makers





# NOTICE TO THE RECIPIENT/COMPLAINT

- Notice/Actual Knowledge
- Formal Complaint
- Report vs. Complaint

# NOTICE/ACTUAL KNOWLEDGE – TIX REGULATIONS

## Actual knowledge

- Notice of sexual harassment or allegations
- In an education program or activity
- Against a person in the United States
- 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 state law. This generally includes immediately reporting 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 VS. 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 VS. COMPLAINT – TIX REGULATIONS (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

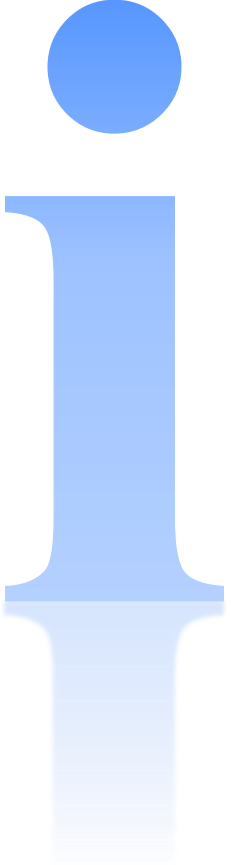


# RESPONDING TO A COMPLAINT

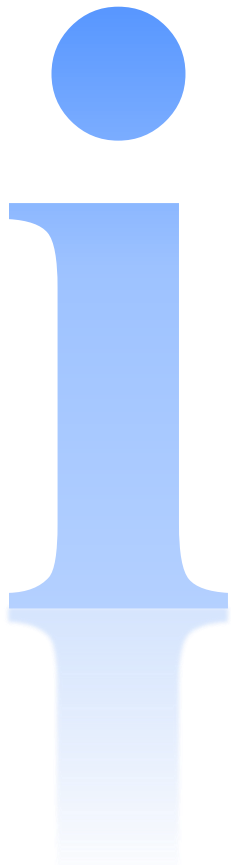
- Initial Assessment
- Mandatory or Discretionary Dismissal
- When Should the Title IX Coordinator File a Formal Complaint?
- Supportive Measures
- Notice to the Parties
- Emergency Removal
- Informal Resolution



# INITIAL ASSESSMENT

- 
- TIXC should be responsible for initial assessment to evaluate 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

# MANDATORY DISMISSAL – FOUR GROUNDS

**The Title IX Coordinator MUST dismiss a complaint at any time during the investigation or hearing:**

1. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX regulations even if proved, and/or
2. If the conduct did not occur in the Recipient's education program or activity, or
3. If the conduct did not occur against a person in the United States, or
4. If at the time of filing a Formal Complaint, a Complainant is not participating in or attempting to participate in the Recipient's education program or activity, and based on the available information, the Title IX Coordinator has determined that they do not need to sign a Formal Complaint on behalf of the Recipient

# 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 regarding 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**

# 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
- A formal complaint is not required in order to provide supportive measures

# 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 assistance
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course-related adjustments
- Trespass 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 the TIXC's discretion
  - Voluntary, written consent of the parties and their parent/guardian
  - OCR regulations preclude informal resolution of allegations that an employee harassed a student
  - Must still stop, prevent, remedy, and document response



# OVERVIEW OF THE INVESTIGATION PROCESS

- When Do You Investigate?
- Role of Law Enforcement and Concurrent Criminal Action
- 10 Steps of an Investigation
- Evidence and Report Review

# 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

# 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?



# 10 STEPS OF AN INVESTIGATION

1. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
2. Notice of Investigation/Notice of Formal Allegation(s) to Parties (NOIA)
3. Establish investigation strategy
4. Formal comprehensive investigation
  - Witness interviews
  - Evidence gathering
5. Draft investigation report
  - Gather evidence
  - Assess credibility and evidence
  - Synthesize areas of dispute/agreement and all questions asked

# 10 STEPS OF AN INVESTIGATION (CONT.)

6. Meet with Title IX Coordinator (and/or legal counsel) to review draft report and evidence
7. Provide all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
8. Revise (as needed) and finalize the investigation report
  - Gather, assess, and synthesize relevant evidence
9. Meet with Title IX Coordinator (and/or legal counsel) to review final investigation report
10. Send final report to Decision-maker and parties/Advisors for review and written response at least 10 days prior to Decision-maker making their determination of responsibility

# 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
- **Best practice:** Provide the draft investigation report at the same time.
- After sending the evidence, the investigator must:
  - Allow 10 days for written response
  - Consider response prior to completion of report

# 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 investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties
- 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



# OVERVIEW OF THE DECISION-MAKING PROCESS

- Determinations (and Optional Hearings)
- Written Determinations

# 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.
  - This is facilitated by the Decision-maker

# 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**





# OVERVIEW OF THE APPEAL PROCESS

- Grounds for Appeal
- Appeal Process

# GROUNDS FOR APPEAL

- Must offer all 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
  - The Title IX Coordinator, Investigator, or Decision-maker had a conflict of interest or bias that affected the outcome of the matter

# APPEAL PROCESS

- May offer additional bases for an appeal; must be available to both parties
- Appeal process should be clearly communicated to parties
- Other party should be provided an opportunity to respond when an appeal is received
- 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



# **RECORDKEEPING AND DOCUMENTATION**

NOT FOR DISTRIBUTION

# 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

NOT FOR DISTRIBUTION

# 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)?
  - 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



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**Questions?**



**Thanks for joining us today.**





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