

# WELCOME!

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Association of  
Title IX Administrators

# K-12 Title IX Coordinator & Administrator Two

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 Recap
- 2 Structuring Your Title IX Team
- 3 Conducting the Initial Assessment
- 4 Case Study
- 5 Coordination and Supervision of Investigations
- 6 Coordination of the Decision-Making Process

# AGENDA

- 7 Assurance of Compliance with Final Sanctions
- 8 Coordination of the Appeal Process
- 9 General Title IX Compliance Oversight
- 10 Prevention and Remediation of Retaliation
- 11 Navigating First Amendment Protections
- 12 Navigating Employee Cases



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

NOT FOR DISTRIBUTION

# 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 RECAP

- The Law
- Key Title IX-Related Issues
- Obligations Under Title IX

# 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-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



# STRUCTURING YOUR TITLE IX TEAM

- Structuring Your Team
- Role of Title IX Coordinator
- Evaluating Your Team
- Leveraging and Empowering TIXC Authority

# STRUCTURING YOUR TEAM

- Title IX Coordinator(s)
- Deputy Coordinator(s)
- Investigator(s)
- Decision-Makers—can be a single Decision-maker or a panel of 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



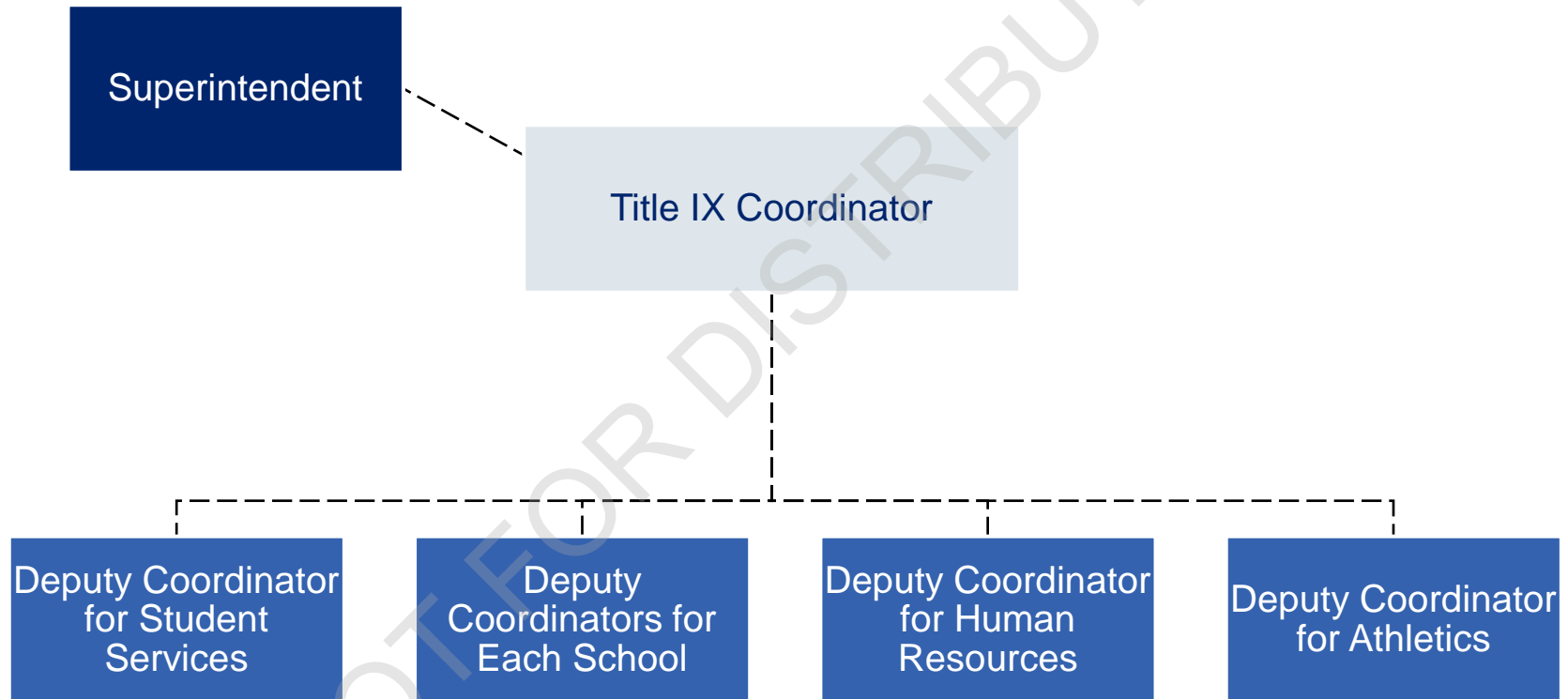
# ROLE OF THE TITLE IX COORDINATOR

- 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

# SAMPLE TITLE IX COMPLIANCE TEAM STRUCTURE – K-12



# FACTORS TO CONSIDER WHEN STRUCTURING YOUR TEAM

- Does not have to go “up” the chain of command
  - Exception may be for *Goss* hearings where long-term suspension or expulsion is recommended
- Individuals’ normal workload and availability
  - Heavy workload = less availability
  - Consider individuals who have more availability
  - Ability to be trained
- Inherent conflict of interest or bias
  - Nature of their expertise
  - Primary role at the school
  - External activities
    - Social media postings
    - Social group memberships
    - Volunteer affiliations and organizations

# TITLE IX TEAM STRUCTURE: ADDITIONAL CONSIDERATIONS

- Job responsibilities of Deputy Coordinators
  - Tailor scope and roles based on culture of Recipient
  - Delegation!
- Multiple campuses/locations
- Camps, before/after care programs
- Evening/weekend learning programs
- Dual-enrollment oversight
- Athletics oversight (district vs. school level)

# TITLE IX EXTENDED TEAM

- Include key constituencies not represented on core team
  - Legal Counsel
  - School Resource Officers
  - School Counselors
  - Student Health
  - Residence Life (if applicable)
  - Others
- Regular meetings and coordination
- Training and programming
- Interaction with behavioral intervention team (BIT)

# EVALUATING YOUR TEAM

- Mental health check-ins
- Have they been reliable?
- Have they remained impartial and free from conflicts of interest?
- Confidentiality and privacy:
  - Have you heard “water cooler” chats about complaints?
  - Complaints of breaches of privacy
- Have you been able to trust and count on them?
- Have you received allegations against them?
- Have they attended required trainings?

# EVALUATING YOUR TEAM (CONT.)

- Do they engage in training or professional development that is not required?
- Are their investigation reports thorough, well-written, and free of biased language and evaluation of information?
- Are their decision rationales complete and appropriate?
- Are they knowledgeable about a variety of intersectional issues that may impact complaint resolution?
- What are other ways to evaluate your Title IX team members?



# LEVERAGING AND EMPOWERING TIXC AUTHORITY: VISIBILITY

## Students

- Attend activities
- Connect with student leaders
- Include students in program planning and trainings
- Establish trust
- Communicate honestly, openly, and clearly
- Never make promises
- Steer away from “principal office” mentality

## Staff

- Attend meetings
- Connect with teacher/faculty leaders
- Schedule focus groups
- Keep open door policy
- Establish trust
- Partner and collaborate

# LEVERAGING AND EMPOWERING TIXC AUTHORITY: COLLABORATION

## **District-Level/ Senior Administrators**

- Resource allocation (human and fiscal)
- Training attendance/completion enforcement
- Support services
- Incorporating aspects of TIX education into curriculum
- Access to Superintendent/Head of School and Board
- May serve on TIX team

## **Parents/Guardians**

- Offer education opportunities
- Policy for parent/guardian notification during process
- Establish open lines of communication
- Engage PTA

# LEVERAGING AND EMPOWERING TIXC AUTHORITY: COLLABORATION (CONT.)

## Legal Counsel

- Policy
- Procedures
- Review reports/complaint documents
- Response to subpoenas, lawsuits, OCR complaints
- MOUs with law enforcement and other entities

## School-Based Administrators

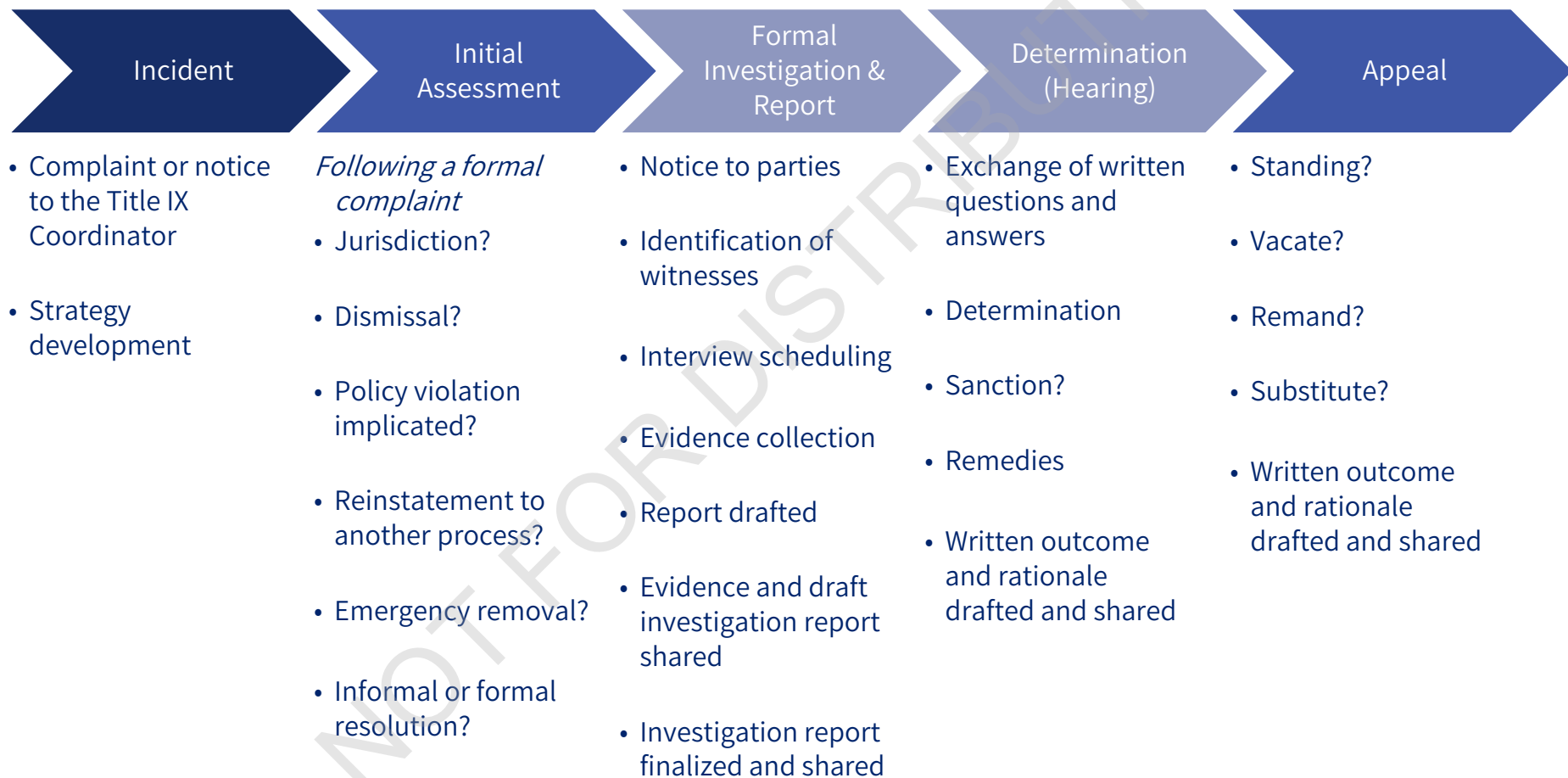
- Teacher and student programming
- Can help enforce training attendance/completion
- Provide additional resources
- Classroom presentations
- Inclusive library collections
- Support services
- May serve on TIX team



# **TITLE IX COORDINATOR: CONDUCTING THE INITIAL ASSESSMENT**

- The Process
- Initial Assessment
- When Should the TIXC File a Formal Complaint?
- Emergency Removal
- Informal Resolution
- Case Study

# THE PROCESS



# 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?
  - Mandatory/Discretionary dismissal considerations.
  - If dismissed, should an alternate policy/process begin?

# INITIAL ASSESSMENT (CONT.)

- Is an emergency removal needed?
- Can/should Recipient remedy informally or without discipline?
- If no formal action, document how Recipient's response was not deliberately indifferent

# WHEN SHOULD THE TITLE IX COORDINATOR FILE A FORMAL COMPLAINT?

- Formal Complaint
- PPTVWM
- Requests for Confidentiality



# 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)

**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 harassment involving the same Respondent
- Whether the sexual harassment 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 harassment or violence against the Complainant or others

# PPTVWM (CONT.)

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

- Whether a weapon facilitated the sexual harassment
- Age of the Complainant
- Whether the allegations involve adult-on-student conduct
- 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.**

# REQUESTS FOR CONFIDENTIALITY

## **If a Complainant requests confidentiality and/or does not want the school/district to investigate:**

- The Complainant should be notified of the following:
  - The process will still be available to them, regardless of how long they wait
  - The school/district can provide resources and supportive measures to limit the effect of the behavior on the Complainant
  - If information is brought to the attention of the school/district that may involve a threat to the community, the school/district may be forced to proceed with an investigation, but that the Complainant will be notified of this process

# REQUESTS FOR CONFIDENTIALITY (CONT.)

- The school/district's responsive action/remedial abilities may be limited based on the level of confidentiality or privacy requested by the Complainant
- Privacy cannot be guaranteed if doing so would jeopardize the safety of the Complainant or others
- Only those with a need to know will be informed
- If the Respondent is an employee, the school/district may need to proceed due to Title VII

# REQUESTS FOR CONFIDENTIALITY (CONT.)

- The school/district should take all reasonable steps to respond consistent with the Complainant's request
  - Provided that doing so does not prevent the Recipient from responding effectively and preventing the harassment of others or the Complainant
- Use the PPTVWM analysis to determine whether to honor a Complainant's request for confidentiality
- Proceeding without a Complainant's participation has due process implications for the Respondent

# EMERGENCY REMOVAL

- Requirements Under the 2020 Regulations
- Emergency Removal Considerations



# 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

# EMERGENCY REMOVAL CONSIDERATIONS

- Get school-based administrators to “slow down”
- Who should conduct the safety and risk analysis?
  - TIX Team, BIT, mental health providers, social workers, counselors
  - Any conflicts of interest?
- Incorporate manifestation determination when needed
- Develop a process for Respondent to challenge the decision
  - Should this include the same individual(s) who conducted the analysis?
  - Complainant challenge and/or participation?

# EMERGENCY REMOVAL CONSIDERATIONS (CONT.)

- Be mindful of the timeframe for completion of the process
- Navigating demands to remove Respondent when not supported by safety and risk analysis
- Can use administrative leave to remove an employee Respondent

# INFORMAL RESOLUTION

- Requirements Under the 2020 Regulations
- Informal Resolution Possibilities
- Informal Resolution Considerations

# INFORMAL RESOLUTION – TIX REGULATIONS

- 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
  - Office for Civil Rights (OCR) regulations 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 CONSIDERATIONS

- 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 CONSIDERATIONS (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 AND JAMIE**

- Review of Sexual Harassment Definition
- Sally & Jamie

# 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
- "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)

# CASE STUDY: SALLY AND JAMIE

Sally is a fourteen-year-old 9th 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.

# CASE STUDY: SALLY AND JAMIE (CONT.)

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.

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, they remembered an incident they heard about two weeks ago involving Jamie, a 16-year-old 11th grade student at the same school.

# CASE STUDY: SALLY AND JAMIE (CONT.)

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.

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.

# CASE STUDY DISCUSSION: SALLY AND JAMIE

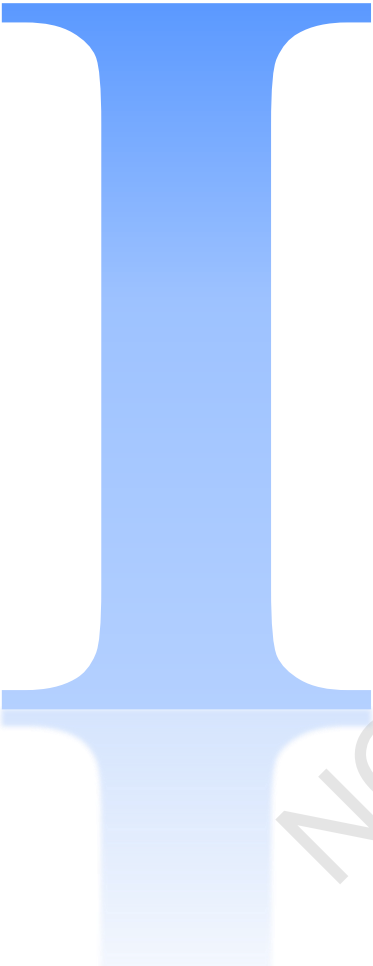
- Is this a Title IX issue?
- Should the Title IX Coordinator file a formal complaint?
- Who are the Complainant(s) and Respondent(s)?
- What are the potential policy violation(s)?
- Is an emergency removal needed? If so, for whom?
- What interaction should you have with law enforcement?
- What additional actions should you take to respond to these incidents?



# **TITLE IX COORDINATOR: COORDINATION AND SUPERVISION 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
- Establish basis of investigation
  - Incident, pattern, climate/culture
- Strategizing investigations
- Facilitating sending notices to parties (e.g., NOIA, delays, meetings)
- Ensure due process protections are provided

# TITLE IX COORDINATOR'S INVESTIGATION OVERSIGHT (CONT.)

- Facilitating the evidence and report review with parties and Advisors
- Reviewing investigation report
- Timeline compliance
- Ensuring policies and procedures are being followed
- Troubleshooting with Investigator
- Retaining a record of all activities

# ESTABLISHING THE BASIS OF THE INVESTIGATION

- The Title IX Coordinator may have information that will help determine the scope of the investigation
  - **Incident:** allegations of an incident(s) between specific Complainant(s) and Respondent(s)
  - **Pattern:** allegations involving repetitive incidents of a similar nature involving the same Respondent(s); may involve multiple Complainants
  - **Culture/Climate:** allegations related to conduct within a group/environment that potentially creates a hostile environment
- Importance of a case-tracking system
- The scope may change during the investigation

# RIGHTS OF THE PARTIES DURING THE INVESTIGATION – TIX REGULATIONS

- Right to receive a detailed Notice of Investigation and Allegations (NOIA)
  - Including identity of the parties and description of the allegations
- 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

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

- 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
- 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



# **TITLE IX COORDINATOR: COORDINATION OF THE DECISION-MAKING PROCESS**

- Title IX Coordinator's Role
- Live Hearing?
- Questioning
- Standard of Evidence

# TIXC COORDINATION WITH DECISION-MAKER

## **The Title IX Coordinator should be responsible for:**

- Identification and appointment of Decision-maker(s)
- Facilitating transfer of evidence and investigation report from Investigator to Decision-maker
- Ensuring the appropriate standard of evidence is included in policies and procedures
- Ensuring timeline compliance
- Ensuring due process protections are provided

# TIXC COORDINATION WITH DECISION-MAKER (CONT.)

- Coordination of written determination (TIXC does not write)
  - Providing template
  - Reviewing for spelling/grammar and compliance
  - Facilitating sending to parties and Advisors
- Providing any relevant information for consideration during sanctioning
- Retaining a record of all activities



# 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 allow additional, limited follow-up questions from each party.

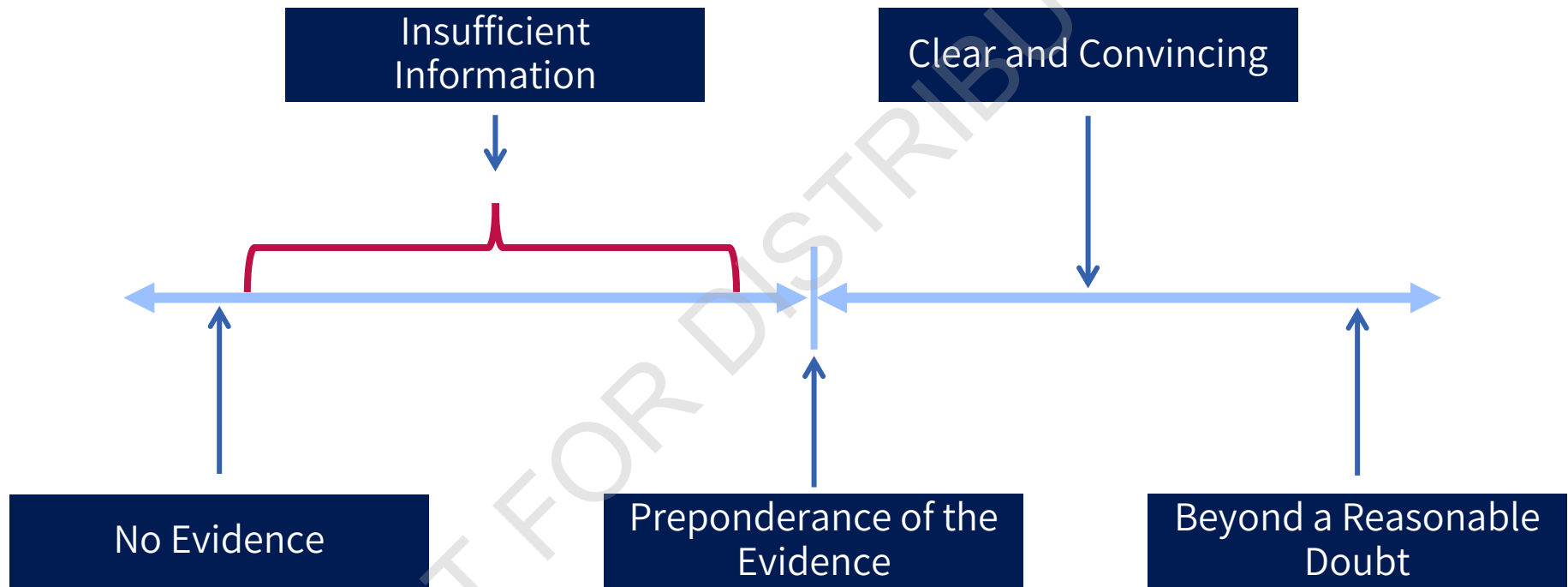
# QUESTIONING

- Questions deemed irrelevant by Decision-maker may be excluded with rationale provided
- Must exclude Complainant's sexual predisposition
- 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

# STANDARD OF EVIDENCE

- Regulations require Recipients to apply either the preponderance of the evidence standard or the clear and convincing evidence standard
- **Current industry standard is preponderance of the evidence**
- 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

# EVIDENTIARY STANDARDS





# **TITLE IX COORDINATOR: ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS**

- Sanctioning Considerations
- Common Sanctions
- Sanctioning Pitfalls
- Sanctioning Exercise
- Written Determinations

# SANCTIONING IN TITLE IX CASES

- **Duty is to act reasonably when striving to:**
  - Bring an end to the discriminatory conduct (**Stop**)
  - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (**Prevent**)
  - Restore the Complainant as best you can to their pre-deprivation status (**Remedy**)
- May clash with the typically educational and developmental sanctions of student conduct processes
- Incorporate *Goss* hearing when long-term suspension or expulsion is recommended (for public schools)
- The Title IX Coordinator must monitor to ensure that the sanctions issued are actually implemented

# SANCTIONING CONSIDERATIONS

- Investigation alone is not sufficient to overcome a deliberate indifference claim. Must also remedy if the Respondent is found in violation of policy.
- Should be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s)
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the Complainant and the community

# SANCTIONING CONSIDERATIONS (CONT.)

- What is appropriate?
  - Separation/expulsion
  - Suspension
  - Lesser sanctions
- Incorporate strategic education and training requirements
- Conduct a risk assessment and mitigation process



# SANCTIONING CONSIDERATIONS

## **The sanction must be reasonable and reflect the severity of the behavior**

- May consider:
  - prior misconduct
  - precedent
  - attitude (BE CAREFUL!)
  - collateral and/or multiple violations
- What best compensates for loss or injury to school or persons?
- Compliant with laws and regulations (e.g., Title IX)
- Should consider the educational impact on the Complainant and Respondent

# 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

# SANCTIONING PITFALLS

- Conflating finding and sanctioning processes
- Timing of impact and/or mitigation statements
- Not targeted to stop, prevent, and remedy
- Unwillingness to suspend, expel, or terminate
- Failure to address mitigating circumstances
- Lock-step or automatic sanctioning – failure to address incident-specific circumstances
- Likeability of parties: + & -
- Disparate sanctions for same behavior
- Others?

# 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: COORDINATION OF THE APPEAL PROCESS**

- Title IX Coordinator's Role
- Appeals
- Who Should Be an Appeal Decision-Maker?
- Grounds for Appeal
- Appeal Process
- Finality of Determination

# TIXC COORDINATION WITH APPEAL DECISION-MAKER

## **The Title IX Coordinator should be responsible for:**

- Identification and appointment of Appeal Decision-Maker(s)
- Developing appeal process and including process in policy and procedures
- Ensuring timeline compliance
- Ensuring due process protections are provided
- Coordination of written determination (TIXC does not write)
  - Providing template
  - Reviewing for spelling/grammar and compliance
  - Facilitating sending to parties and Advisors
- Retaining a record of all activities



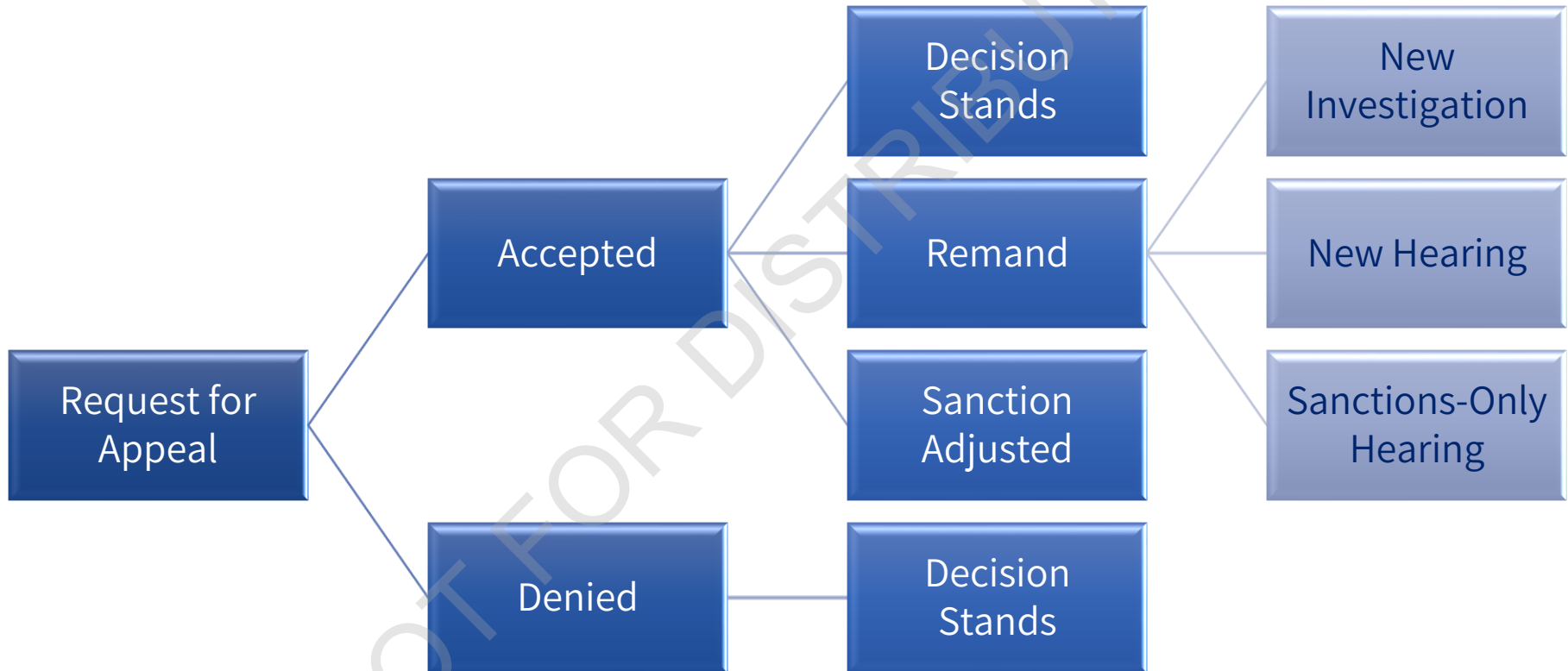
# APPEALS

- 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
- Defined window of time to request appeal
- Three mandatory grounds for appeal; may add others
- One level of appeal is best practice
- Document-based
  - NOT de novo; no “second-bite of the apple”
- Deference to original Decision-maker

# 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

# APPEALS: THE PROCESS



# FINALITY OF DETERMINATION

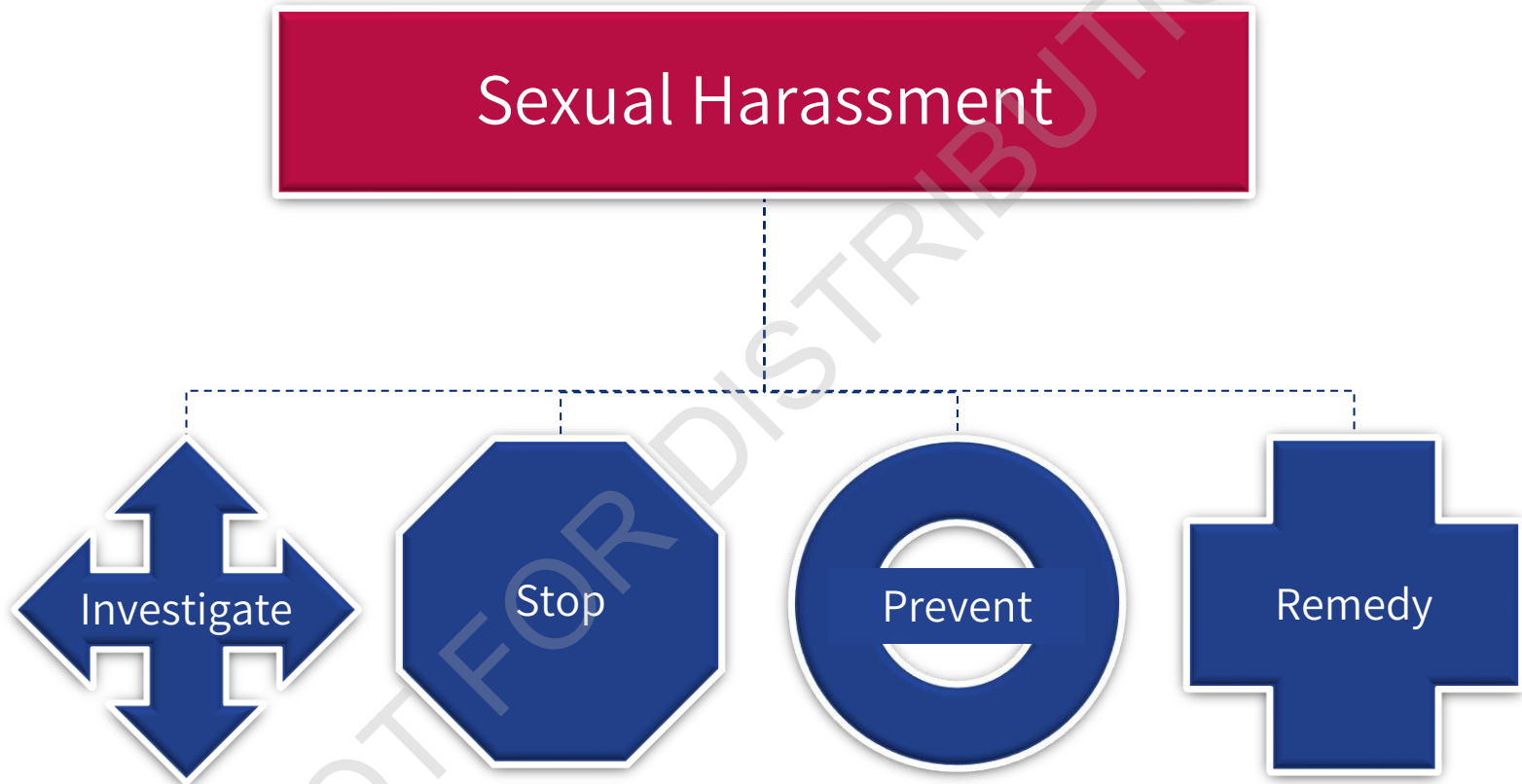
- If an appeal is filed, the determination regarding responsibility becomes final on the date that the Recipient provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which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



# **TITLE IX COORDINATOR: GENERAL TITLE IX COMPLIANCE OVERSIGHT**

- Stop, Prevent, and Remedy
- Considerations After a Case Closure
- Assessing Compliance
- Recordkeeping and Documentation

# INSTITUTIONAL OBLIGATIONS UNDER TITLE IX



# ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, AND REMEDY

## **Stop The Discriminatory Conduct:**

- Take timely steps to identify and implement appropriate supportive measures for the parties
- Confirm and document that the appropriate supportive measures were implemented. For example:
  - Was the student assigned to a different seat or class?
  - Was the employee provided an alternate supervisor/work assignment/workspace?
  - Was counseling made available?
  - Was a no-contact order issued?

# ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, AND REMEDY (CONT.)

## **Stop The Discriminatory Conduct (Cont.):**

- Regularly re-evaluate the need for any continuing supportive measures (particularly when emergency removal is implemented)
- Enforce any violations (e.g., no contact order)
- Make sure the parties know they should report any difficulties with measures provided



# ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, AND REMEDY (CONT.)

## **Prevent Recurrence:**

- Identify patterns and systemic problems
- Issue school-wide policy statements, informational campaigns, and other messages that harassment and assault will not be tolerated
- Provide regular training on sex/gender-based misconduct for students, employees, and parents/guardians
- Conduct periodic surveys of school climate
- Establish a system for monitoring future incidents and patterns
- Provide technical assistance to school/local law enforcement on Title IX compliance

# ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, AND REMEDY (CONT.)

## **Prevent Recurrence (Cont.):**

- Consider the effect of educational sanctions
- The potential next Complainant is potentially both a Title IX and negligence concern

# ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, AND REMEDY (CONT.)

## Remedy the Effects:

- Designed to make Complainant whole and return them to the pre-deprivation status
- Take timely steps to confirm and document that the appropriate remedies were implemented
- Make sure the Complainant knows that they should report any difficulties obtaining the remedies and any subsequent harassment
- Determine what, if any, remedies may need to be provided to the school community as a whole

# CONSIDERATIONS AFTER A CASE CLOSURE

- 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 CLOSURE (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

# ASSESSING COMPLIANCE

- Active, internal reviews/audits/assessments
  - Reporting and resolution processes
  - 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
  - Departmental self-study audit at regular intervals
- Case/investigation debriefing

# ASSESSING COMPLIANCE (CONT.)

- 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 school/district's response was not deliberately indifferent**



# RECORDKEEPING AND DOCUMENTATION (CONT.)

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



# **TITLE IX COORDINATOR: PREVENTION AND REMEDIATION OF RETALIATION**

- Retaliation Under the 2020 Regulations
- Title IX Coordinator's Role

# RETALIATION – REGULATION DEFINITION

## § 106.71 Retaliation

- *Retaliation prohibited.* No Recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...

# RETALIATION – REGULATION DEFINITION (CONT.)

(Cont.)...Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

# RETALIATION – REGULATION DEFINITION (CONT.)

## § 106.71 Retaliation.

- The Recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any Complainant, any individual who has been reported to be the perpetrator of sex discrimination, any Respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder...

# RETALIATION – REGULATION DEFINITION (CONT.)

(Cont.)...Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

- *Specific circumstances.*
  - (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.
  - (2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

# TITLE IX COORDINATOR'S ROLE

- Ensure retaliation is expressly prohibited under your policy
- Inform parties and witnesses of protection from retaliation
- Monitor for any retaliation
- Have a process to resolve retaliation complaints
- Ensure Investigators and other applicable Title IX team members are trained on how to analyze retaliation claims

# TITLE IX COORDINATOR: NAVIGATING FIRST AMENDMENT PROTECTIONS

- First Amendment Protections
- Case Law
- On-Campus vs. Off-Campus Speech





# NAVIGATING FIRST AMENDMENT PROTECTIONS

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

- The Department of Education reaffirms First Amendment protections in the Title IX Regulations
- 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
  - Incorporate appropriate standard for context

# 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)

- 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**

# ADDRESSING ON- VS. OFF-CAMPUS SPEECH

- Schools have broader ability to discipline students for on-campus speech
- Case law varies by jurisdiction and is evolving as it relates to ability of public schools to discipline students for off-campus speech
  - This includes conduct via social media
- Articulate clearly how off-campus speech impacts and disrupts the educational program or mission or a court may not uphold the discipline imposed

# B.L. V. MAHANOY AREA SCHOOL DISTRICT

594 U.S. \_\_\_\_ (2021)

- Student suspended from JV cheerleading team for posting profane statements and gestures on Snapchat after being rejected for the varsity cheerleading team
- Relying upon the *Tinker* standard, the Supreme Court upheld the Third Circuit's decision finding that student engaged protected speech as it did not target a specific person or cause significant disruption
- Court also recognized that public schools have a special interest in regulating off-campus speech when the speech concerns bullying, harassment, and online-based learning



# **TITLE IX COORDINATOR: NAVIGATING EMPLOYEE CASES**

- Case Law
- Intersection of Title IX and Title VII
- Impact on Employees
- Considerations for Employee Cases

# NORTH HAVEN BOARD OF EDUCATION V. BELL

456 U.S. 512 (1982)

- Cases consolidated on appeal and Second Circuit reversed
- Decided that HEW<sup>1</sup> 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

<sup>1</sup> U.S. Department of Health, Education, and Welfare; precursor to the Department of Education

# INTERSECTION OF TITLE VII AND TITLE IX

- **Title VII of the Civil Rights Act of 1964:** prohibits discrimination on the basis of race, color, religion, sex, or national origin in employment
- **Title IX:** prohibits discrimination on the basis of sex in education programs and activities receiving federal financial assistance
- Title IX consciously modeled on Title VI and borrowed heavily from Title VII
- Courts generally apply standards established under Title VII for guidance in how to establish a Title IX violation
- Employees can use both Title VII and Title IX to pursue the same allegations



# 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
- Equal Employment Opportunity Commission
- 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
- Potential conflicts with collective bargaining agreements
- 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

# CONSIDERATIONS FOR EMPLOYEE CASES

**When an employee is a party in a Title IX complaint, the following should be considered:**

- Role of school equity/AA/EEO officer
- Role of Human Resources
- Oversight of Deputy Coordinators/Investigators
- Ability to merge/combine investigation and hearing processes
- Required disclosure of employee information (e.g., outcome and any discipline taken) that would typically remain confidential
- Additional rights afforded to employees under Title IX



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**Questions?**

**Thanks for joining us today.**



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