



PREK-12 TITLE IX ADMINISTRATOR  
TRAINING & CERTIFICATION COURSE

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Westport, MA | July 15-17, 2019

# YOUR FACULTY



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Partner, TNG

ATIXA Advisory Board Member

# COORDINATOR TRAINING AGENDA



## Part 1

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  - c. *April 4th, 2011 Dear Colleague Letter -WITHDRAWN*
  - d. *2014 Q&A on Title IX and Sexual Violence - WITHDRAWN*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  - f. *2016 DCL on Transgender Students - WITHDRAWN*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

# THE TITLE IX COORDINATOR

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## Overview of the Responsibilities

- Description
- Roles
- Discussion





# THE TITLE IX COORDINATOR



- The District's Title IX coordinator is an administrator with significant authority and wide-ranging responsibilities.
- Must be able to effect change across many departments, including Human Resources, Academic Affairs, Athletics, and Student Conduct.
- Some Districts will allocate part-time responsibilities to the coordinator. Others will dedicate a full-time position as recently recommended by OCR.
- We need to see the Title IX coordinator as a profession within the field of civil rights compliance.
- To alleviate the burden on one administrator, Districts and schools should consider identifying multiple deputy coordinators.

# THE ROLE OF THE TITLE IX COORDINATOR



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

# THE ROLE OF THE TITLE IX COORDINATOR



- Contact for government inquiries.
- Point person for complaints.
- Oversight and coordination of prompt and equitable grievance procedures (faculty, student, and staff).
- Creator and implementer of appropriate policies.
- Compliance auditor.
- Training oversight: Faculty, staff, students, investigators, hearing officers, and appellate officers.
- Assurance of First Amendment protections.
- Section 504 disabilities compliance oversight.
- Athletics gender equity.

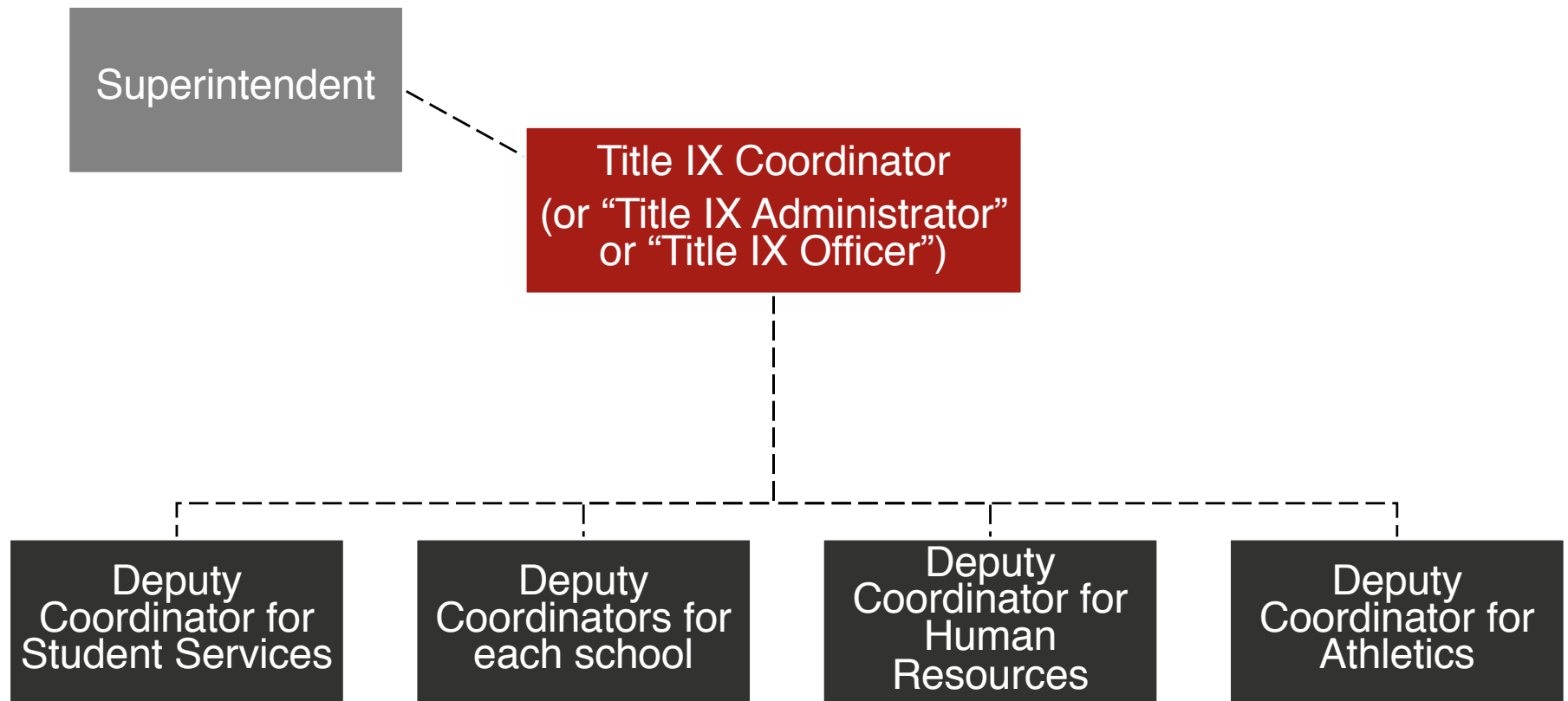
# SMALL GROUP DISCUSSION



- What are the three biggest concerns you have regarding your role as a Title IX administrator (coordinator, deputy, etc.)?
- What are you hoping to take away from this training?
- Describe and discuss a recent or current Title IX case at your school that presented a number of difficulties.



# SAMPLE TITLE IX TEAM STRUCTURE



# A BRIEF HISTORY OF TITLE IX PRE-1972



- Title VI of the Civil Rights Act of 1964
  - “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”
- Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-3(a))
  - Prohibits discrimination in the terms, conditions or privileges of employment on the basis of an employee’s race, sex, color, religion, sex or national origin.
- 1965 - Executive Order 11246
  - Prohibited federal contractors from discriminating on basis of race, color, religion, national origin. “Sex” was added in 1968; renamed Exec. Order 11375.

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

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

# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- Passed in 1972 and signed into law by President Nixon
- Department of Health, Education and Welfare (HEW) – Title IX regulations codified in 1975.
  - “Title IX and Intercollegiate Athletics” (1979).
- 1979 – Supreme Court created a private right of action under Title IX, *Cannon v. U. of Chicago*, 441 U.S. 677 (1979).



# CANNON V. UNIVERSITY OF CHICAGO

## 441 U.S. 677 (1979)



- Basic Facts:
  - In 1975, Geraldine Cannon (age 39) was denied admission to Univ. of Chicago and Northwestern Univ. medical schools.
  - Schools had policy of not admitting candidates older than 30 unless they already had an advanced degree.
  - Cannon argued that the policy was more likely to discriminate against women due to interruptions related to pregnancy and raising families.
  - Filed a Title IX complaint with HEW.

# CANNON V. UNIVERSITY OF CHICAGO

## 441 U.S. 677 (1979)



- Filed sex discrimination lawsuit in federal court, arguing violation of the 14th Amendment, Civil Rights Act of 1871, and Title IX.
  - District and Circuit Courts (7th Cir.) dismissed the Title IX claim, indicating Title IX had neither an express nor implied private right of action.
  - Appealed to Supreme Court.
- Supreme Court Finding: **There is an implied private right of action under Title IX.**
  - Court relied on legislative history, modeling of Title IX after Title VI of the Civil Rights Act of 1964, the underlying purposes of Title IX, and federal interest in discrimination in education to support its finding.

# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- 1979 – Three-part test for Athletics promulgated by HEW
- 1980 – U.S. Department of Education was created.
  - Title IX oversight transferred to Dept. of Ed.’s Office for Civil Rights (OCR).
- Supreme Court holds “Employment discrimination comes within Title IX’s prohibition,” *North Haven Bd. of Education v. Bell*, 452 U.S. 512 (1982).

# NORTH HAVEN BOARD OF EDUCATION V. BELL



- Involved two cases: North Haven Board of Education and Trumbull Board of Education (both in Connecticut).
- **North Haven Board of Education**
  - Elaine Dove, a tenured teacher in North Haven public school system took a one-year maternity leave. North Haven refused to rehire Dove. In Jan. 1978, Dove filed a complaint with HEW for violation of Title IX.
  - HEW began an investigation, but North Haven refused to cooperate, “Asserting that HEW lacked authority to regulate employment practices under Title IX.”
  - HEW notifies North Haven it is considering enforcement proceedings, which could result in loss of federal funding.
  - District Court found in favor of North Haven in summary judgment.



- **Trumbull Board of Education**

- Oct. 1977, Linda Potz, a former guidance counselor in Trumbull school district, filed a complaint with HEW alleging sex discrimination “with respect to job assignments, working conditions, and failure to renew her contract.”
- HEW determined Trumbull had violated Title IX and required Trumbull to engage in a number of corrective actions, including reinstating Potz to her position.
- Trumbull filed a lawsuit in federal court seeking to invalidate the decision and HEW’s authority to address employment under Title IX.
- Same District Court cited its decision in North Haven and found in favor of Trumbull.

# NORTH HAVEN BOARD OF EDUCATION V. BELL

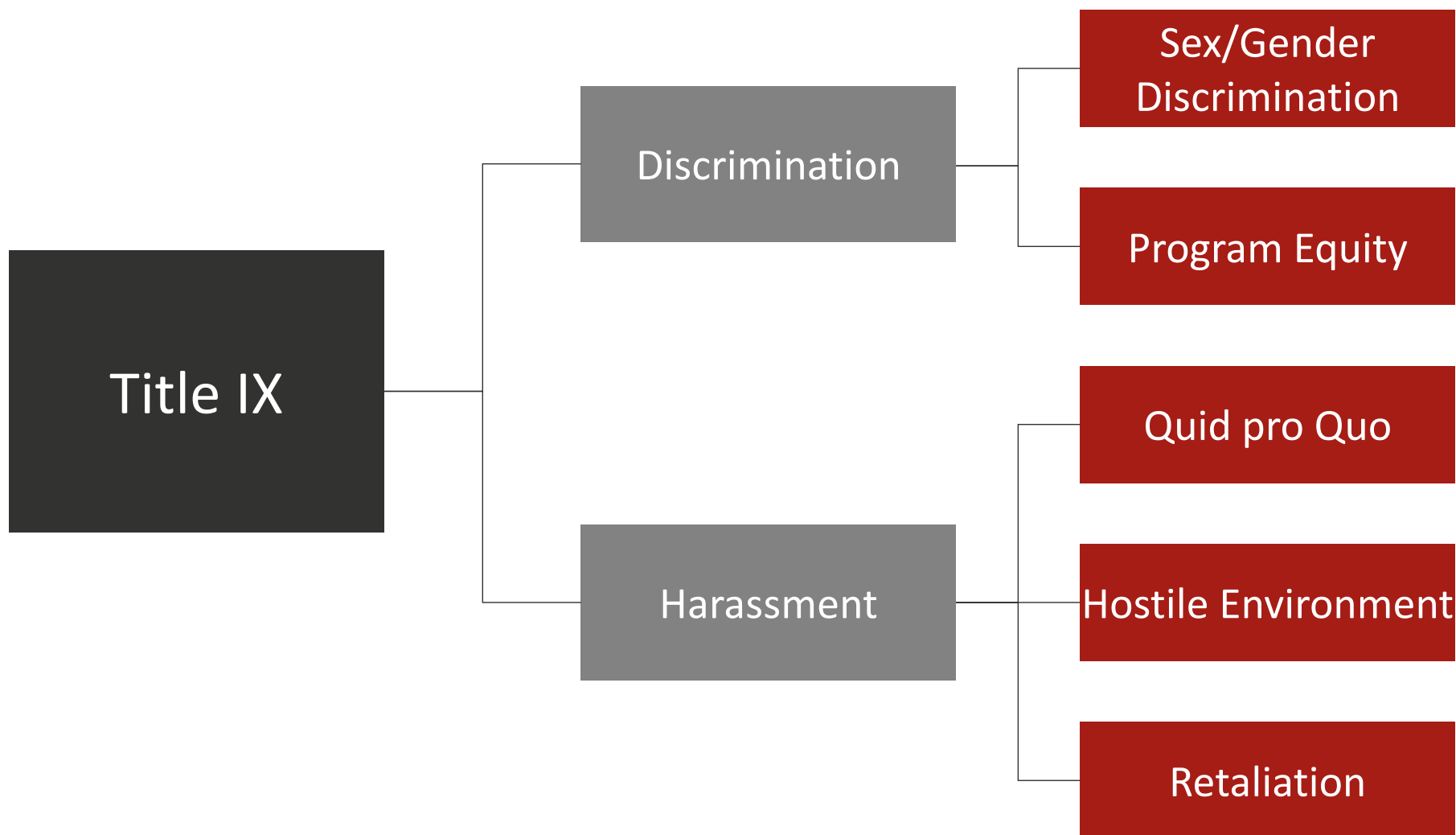


- Cases consolidated on appeal and Second Circuit reversed, thereby indicating HEW has authority under Title IX to address employment discrimination.
  - Court did not render a decision as to whether HEW could terminate funding under Title IX for employment cases.
- Appealed to the Supreme Court.
- USSC, citing a number of factors including Title IX’s legislative history, post-enactment history, and language of “no person,” the Supreme Court determined that Title IX’s **“broad directive that ‘no person’ may be discriminated against on the basis of gender, on its face, includes employees as well as students.”**

# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- OCR Guidance
  - 1997 Guidance → 2001 Revised Sexual Harassment Guidance.
  - 2011 Dear Colleague Letter (The “DCL”).\*
  - Questions and Answers on Title IX and Sexual Violence (April 2014).\*
  - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide.
  - 2016 Guidance on Transgender Students.\*
  - 2017 Interim Guide: Q&A on Campus Sexual Violence.
- “Not Alone” – White House Task Force to Protect Students From Sexual Assault (April 2014).
- Also: The Clery Act, VAWA 2013: Section 304.





# KEY TITLE IX-RELATED ISSUES



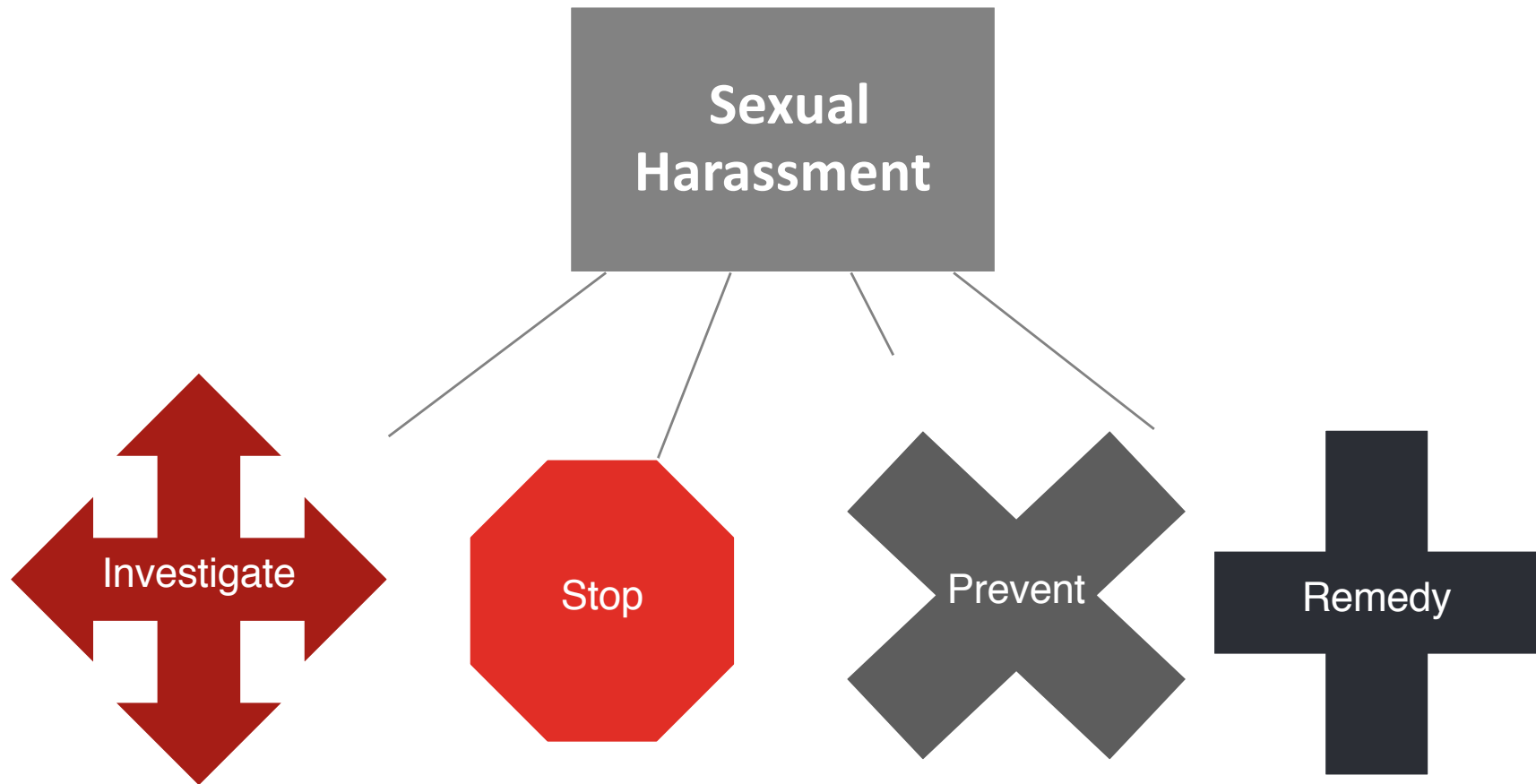
## Sex discrimination

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

## Sexual Harassment

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

# SCHOOL/DISTRICT OBLIGATIONS UNDER TITLE IX



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“Fairness or justness in the way people are treated; justice according to natural law or right; specifically, freedom from bias or favoritism” ([www.merriam-webster.com](http://www.merriam-webster.com)).

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“Equity encompasses fairness, justice, and most precisely, fairness under the circumstances. Fairness under the circumstances is intended to make someone whole, in this context when sex or gender is the basis for some form of deprivation or discrimination” (2014 ATIXA Whitepaper, p.4).

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# EQUITY DEFINED



- The origin of this misinterpretation may start with an understanding of the words equity and equality. Equity involves fairness and impartiality in which people are treated justly. Equality, on the other hand, involves equal quantities. For example, if you have \$500 and you split it evenly so that one person gets \$250 and the other gets \$250, this is equality. Each person is getting equal amounts of money.
- Title IX legislation, however, does not require male and female fundraising or budgets to match equally dollar for dollar. Rather, it means that the quality of fairness and impartiality must be carried out justly. It is impossible to have equal spending on male and female athletic programs based on the dynamics of the sport as well as the equipment needed to operate. As such, equity is the intent of Title IX as it pertains to sports fundraising and finances.

Source: <https://www.nfhs.org/articles/sports-fundraising-and-gender-equity-clearing-up-the-confusion/>

## EQUALITY VERSUS EQUITY



In the first image, it is assumed that everyone will benefit from the same supports. They are being treated equally.



In the second image, individuals are given different supports to make it possible for them to have equal access to the game. They are being treated equitably.



In the third image, all three can see the game without any supports or accommodations because the cause of the inequity was addressed. The systemic barrier has been removed.

# THE IX COMMANDMENTS



Thorough	Reliable	Impartial
Prompt	Effective	Equitable
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community

Investigation  
(prompt & fair –  
VAWA Sec. 304)

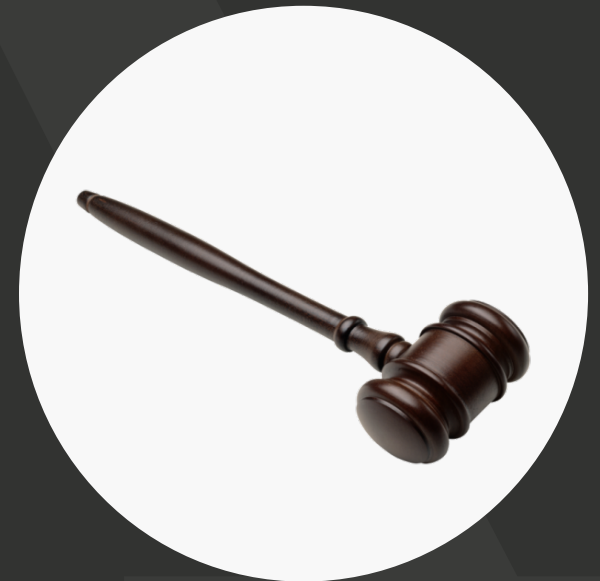
Process

Remedies

# SIGNIFICANT CASES

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- *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).
- *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).
- *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999).



# CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



- Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia....Franklin was subjected to continual sexual harassment beginning in the autumn of her tenth grade year from Andrew Hill, a sports coach and teacher employed by the district.
- Among other allegations, Franklin avers that Hill engaged her in sexually-oriented conversations in which he asked about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man, that Hill forcibly kissed her on the mouth in the school parking lot, that he telephoned her at her home and asked if she would meet him socially; and that, on three occasions in her junior year, Hill interrupted a class, requested that the teacher excuse Franklin, and took her to a private office where he subjected her to coercive intercourse.

Source: Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).



# CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



- On three occasions in her junior year, Hill interrupted a class, requested that the teacher excuse Franklin, and took her to a private office where he subjected her to coercive intercourse.
- The complaint further alleges that, though they became aware of and investigated Hill's sexual harassment of Franklin and other female students, teachers and administrators took no action to halt it, and discouraged Franklin from pressing charges against Hill.
- Hill resigned on the condition that all matters pending against him be dropped. The school thereupon closed its investigation.
- The school also discouraged Franklin from pressing charges.

Source: Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

- Christine Franklin alleged that during her junior year (1986), an economics teacher, Andrew Hill, engaged her in sexually explicit conversations, forced kissing, and coercive sexual intercourse on school grounds.
  - Hill allegedly pulled her out of class on three occasions and engaged in sexual intercourse with her in a private office.
- In 1988 Franklin filed suit against the school district alleging:
  - Sexual harassment under Title IX; and
  - Failure to take appropriate action upon learning of the harassment.
- Hill resigned in exchange for school district closing the investigation.

- District and Circuit Court of Appeals dismissed the case, finding Title IX does not allow for award of monetary damages.
- In 1992, the U.S. Supreme Court decided *Franklin v. Gwinnett County Public Schools*, which established that sexual harassment constituted sex discrimination under Title IX.
- *Gwinnett* also provided a private right for recovery of monetary damages under Title IX.
- *Gwinnett* did not address issues concerning the educational institution's liability.
- What about a statute of limitations?

# CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



- When Alida Gebser was an eighth-grade student at a middle school in respondent Lago Vista Independent School District (Lago Vista), she joined a high school book discussion group led by Frank Waldrop, a teacher at Lago Vista's high school.
- During the book discussion sessions, Waldrop often made sexually suggestive comments to the students. Gebser entered high school in the fall and was assigned to classes taught by Waldrop in both semesters.
- Waldrop continued to make inappropriate remarks to the students, and he began to direct more of his suggestive comments toward Gebser, including during the substantial amount of time that the two were alone in his classroom.

Source: Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

# CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



- Waldrop initiated sexual contact with Gebser in the spring, when, while visiting her home ostensibly to give her a book, he kissed and fondled her.
- The two had sexual intercourse on a number of occasions during the remainder of the school year. Their relationship continued through the summer and into the following school year, and they often had intercourse during class time, although never on school property.
- Gebser did not report the relationship to school officials, testifying that while she realized Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher.

Source: Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

# CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



- In October 1992, the parents of two other students complained to the high school principal about Waldrop's comments in class.
- The principal arranged a meeting, at which, according to the principal, Waldrop indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again.
- The principal also advised Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting, but he did not report the parents' complaint to Lago Vista's superintendent, who was the district's Title IX coordinator.
- A couple of months later, in January 1993, a police officer discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop.

Source: Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

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



- Basic Facts – Faculty/student sexual harassment:
  - In spring of 1991, Alida Star Gebser, 8th grade student in Lago Vista Independent School District (TX), joined a book discussion group led by Frank Waldrup, a teacher. During book group, Waldrup made a number of sexually suggestive comments to the students.
  - In Fall 1991, Gebser (9th grade) was assigned to two of Waldrup’s courses. Waldrup also began tutoring Gebser at her home.
  - In Spring 1992, Waldrup and Gebser began a sexual relationship that continued until spring 1993, when a police officer discovered them having sex in the woods. Gebser and Waldrup often engaged in sex during school hours, though not on school property.
  - No one at the school or in the district knew of the relationship.
  - Upon his arrest, Lago Vista fired Waldrup and Texas Education Agency revoked his teaching license.

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



- Gebser and her mother sued Lago Vista and Waldrup, making a number of state and federal claims, including seeking monetary damages for violation of Title IX.
- Supreme Court created a high standard that a student must meet in order to prevail on a sexual harassment claim against the institution when an employee-student consensual relationship is the basis of the claim.
- The court said you cannot recover monetary damages against the school unless the behavior has been reported to someone with the power to alter the situation (“actual notice”) and a “deliberate indifference” has been demonstrated by the school.



# GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



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

# DAVIS V. MONROE COUNTY BD. OF ED. 526 U.S. 629 (1999)



- Basic Facts:
  - In December 1992, a fifth-grade boy attempted to touch LaShonda Davis’s breasts and genitals and made statements such as “I want to get in bed with you,” and “I want to feel your boobs.” Similar conduct occurred on January 4 and 20, 1993.
  - Each time Davis reported the conduct to her teacher, Davis’s mother also contacted the teacher and was allegedly told the principal was aware of the situation; no disciplinary action was taken.

# DAVIS V. MONROE COUNTY BD. OF ED. 526 U.S. 629 (1999)



- Basic Facts:

- Series of incidents in February-May 1993 in P.E. and other classes, E.g.:
  - The same male student stuck a doorstop in his pants and acted in sexually suggestive manner towards Davis;
  - He rubbed up against her in suggestive manner;
  - Touched her breasts and genitals.
- Davis repeatedly reported incidents to teachers; Davis's mother also contacted teachers multiple times; no disciplinary action was taken.
- Davis's assigned seat was next to the male student throughout the harassing behavior; not allowed to change seats for over three months.

# DAVIS V. MONROE COUNTY BD. OF ED. 526 U.S. 629 (1999)



- Facts (cont.):
  - Davis’s grades declined and her father found a suicide note his daughter had written; Davis told her mother she “didn’t know how much longer she could keep [the male student] off her.”
  - Others in class also faced harassment; group of students tried to complain to the principal, but were allegedly prevented from doing so and told, “If [the principal] wants you, he’ll call you.”
  - Parents had complained to three teachers and the principal; student had also complained to three teachers.

# DAVIS V. MONROE COUNTY BD. OF ED. 526 U.S. 629 (1999)



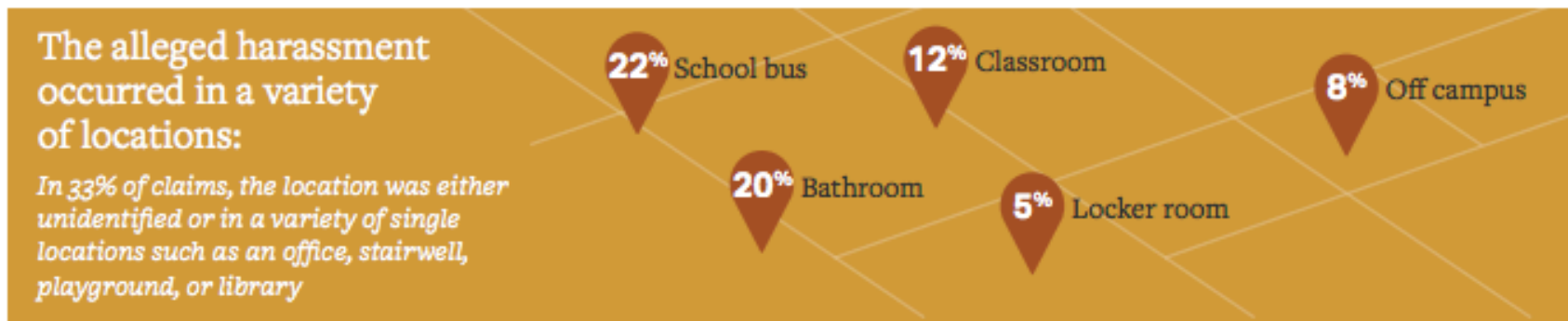
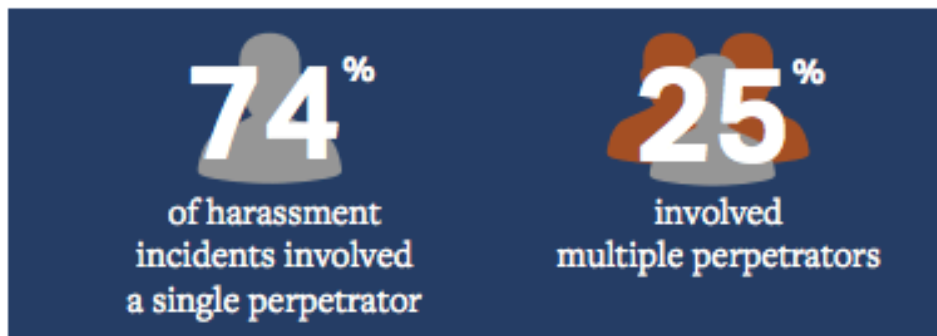
- In May 1993, principal told Davis’s mother, “I guess I’ll have to threaten him a little harder”; male student not disciplined.
- Davis’s parents finally reported the harassment to the local sheriff; male student charged with and plead guilty to sexual battery.
- The abuse finally stopped; male student ultimately moved away.
- Davis’s mother filed a Title IX action, alleged that persistent harassment and deliberate indifference resulted in her daughter’s inability to attend school and participate in activities.

# DAVIS V. MONROE COUNTY BD. OF ED. 526 U.S. 629 (1999)



- Finding in favor of Davis, the Supreme Court applied same standards to find the school/district liable for damages as in the *Gebser* case:
  - The school/district must have “actual notice” of the harassment; and the school/district 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.”

# TRENDS IN LITIGATION



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

# WHAT'S NEXT FOR TITLE IX LITIGATION?



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



# DISCUSSION QUESTIONS



- In small groups, please discuss the following:
  - What did you learn about Title IX's history and legal background that you did not know before?
  - How does Equity differ from Equality?
  - How do the *Gebser* and *Davis* standards fit with your school's/district's policies?
  - At this point in the training, what is your biggest take-away?

# OCR & TITLE IX

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- OCR's role
- Regional offices
- Enforcement mechanisms
- OCR complaints
- Investigation process
- OCR process alternatives
- Remedies under Title IX
- Civil lawsuits v. administrative actions



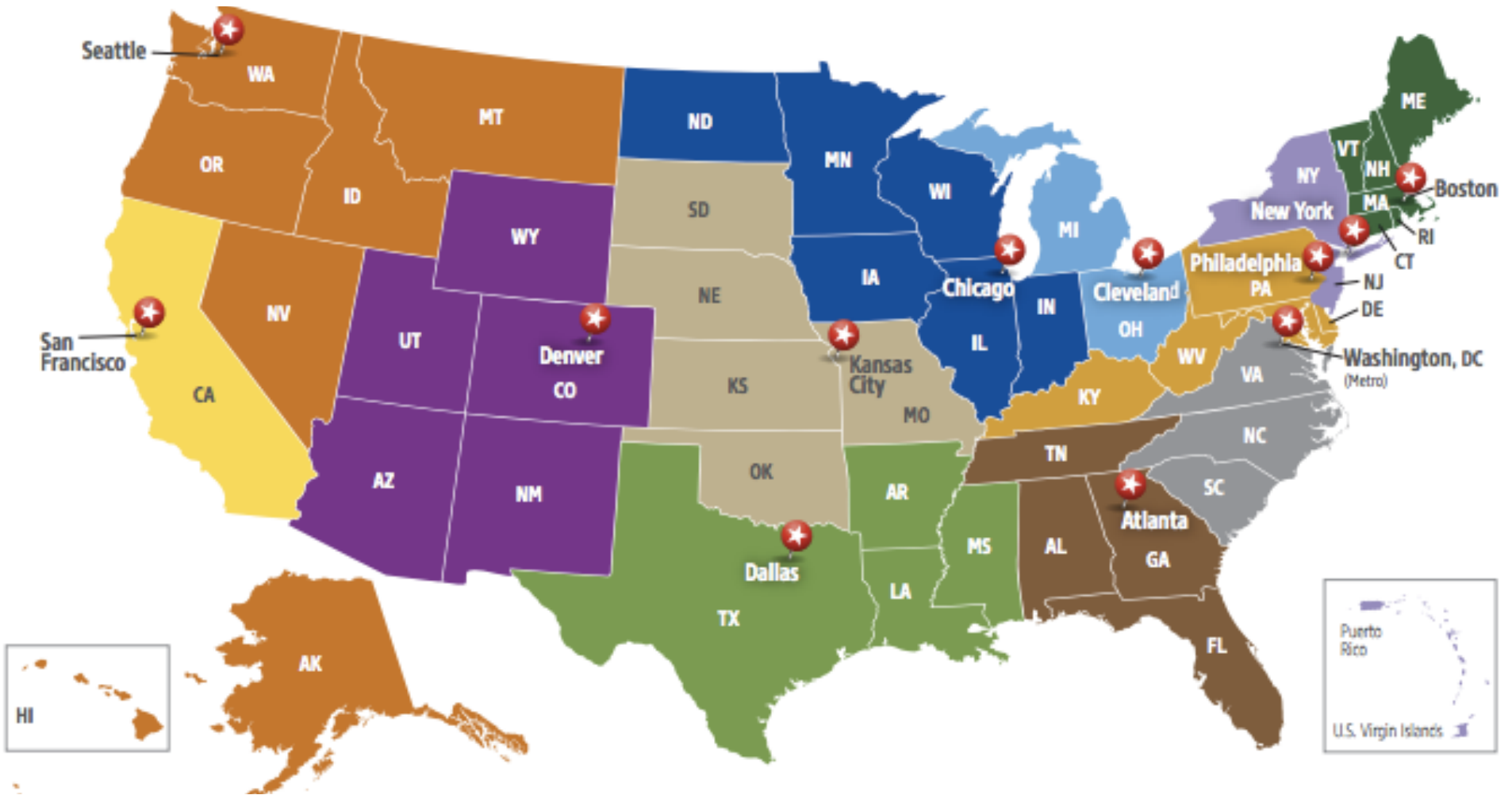
# ROLE OF OCR & TITLE IX



- The Office for Civil Rights (OCR) under the Department of Education is responsible for establishing the **compliance standards to be applied in investigations and enforcement** of Title IX regarding sexual harassment.
  - Provides regulatory and sub-regulatory guidance.
- OCR standard indicates that upon receipt of **notice**, school/district must immediately take immediate and appropriate steps to **investigate** what occurred and take **prompt and effective action to end the harassment, remedy the effects, and prevent the recurrence**.

- The OCR guidelines distinguish the administrative oversight of Title IX from the standards applicable to private litigation for monetary damages.
- OCR standards require the sexual misconduct must rise to the level of **severe, pervasive or persistent**.
- OCR administratively enforces Title IX by:
  - Conducting investigations from complaints filed with the U.S. Dept. of Education.
  - Engaging in “voluntary compliance investigations.

# OCR REGIONAL OFFICES



# OCR ENFORCEMENT MECHANISMS



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

# OCR COMPLAINTS



- When received by an office, the complaint is evaluated.
- OCR will open an investigation if:
  - OCR has jurisdiction over the school/district.
  - The allegation alleges a violation of one of the laws enforced by OCR.
  - The complaint is timely (180 days).
  - The allegation contains sufficient detail to raise an inference of discrimination or retaliation.

# THE OCR INVESTIGATION PROCESS



- OCR is a neutral fact-finder that collects and analyzes relevant information.
- Notification letters:
  - To the reporting party and recipient informing them that OCR is opening an investigation.
  - Normally will be sent to the Superintendent/head of school.
- Data request – written request for documents and narrative responses to questions.
- Scheduling Interviews: telephone or in-person.
- On-site visit.



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

# VOLUNTARY RESOLUTION AGREEMENT THE “302 LETTER”



- At any point before the conclusion of an investigation, a recipient may express to OCR that it is interested in resolving the complaint through a voluntary resolution agreement.
- This does not indicate an admission liability or wrongdoing.
- OCR determines whether the 302 is appropriate.
- OCR ensures that agreement is aligned with the complaint allegations or the information obtained thus far in the investigation, and consistent with applicable regulations.
- Reporting party approval is not required.
- OCR monitors the voluntary resolution agreement until it is fully implemented (3+ years).

# RESOLUTION AGREEMENT THE “303 LETTER”



- Investigative Determinations – made using a preponderance of the evidence standard.
  - Insufficient evidence to support a conclusion of noncompliance.
  - Sufficient evidence to support a conclusion of noncompliance.
    - Typically, OCR shares proposed terms of resolution with the school/district and give a 90-day window to resolve voluntarily.
- OCR will monitor the agreement for compliance (typically 3+ yrs).

# INSUFFICIENT EVIDENCE DETERMINATION



- If OCR determines there is insufficient evidence to support a conclusion of non-compliance:
  - Letters are issued to both parties explaining the issues, factual analysis, and conclusion.
  - Reporting parties may appeal.
  - If an appeal is filed, the recipient is typically not notified unless OCR determines that the investigation should be re-opened.

# RECENT OCR TITLE IX RESOLUTIONS



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

# 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.

And/Or

- **OCR Complaint:** Filing an administrative complaint, a grievance with U.S. Dept. of Ed. Office for Civil Rights (or other applicable federal agency).

## Lawsuit

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

## Administrative Action

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

# KEY TITLE IX OCR GUIDANCE

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- 2001 Revised Sexual Harassment Guidance
- 2011 Dear Colleague Letter\*
- 2014 Q&A on Title IX and Sexual Violence\*
- 2015 Dear Colleague Letter and Resource Guide
- 2017 Interim Guide: Q&A on Campus Sexual Violence\*
- Proposed Title IX Regulations



# 2001 REVISED SEXUAL HARASSMENT GUIDANCE



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

# 2001 REVISED SEXUAL HARASSMENT GUIDANCE



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

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

# 2011 DEAR COLLEAGUE LETTER



Withdrawn by OCR in Sept. 2017, **however**, it provides helpful guideposts that remain viable and appropriate.

- Centrality of the Title IX coordinator.
- Sexual violence is a form of sexual harassment.
- *Preponderance of the evidence.*\*
- Promptness and time frames.
- Equity in process.
- Equity in appeals.
- Possible off-campus jurisdiction.
- Provision of interim and long-term remedies.
- Balancing reporting party requests for confidentiality.
- Training of students, employees, and all involved in TIX resolutions

# 2014 Q&A ON TITLE IX AND SEXUAL VIOLENCE



Withdrawn by OCR in Sept. 2017, **however**, it provides helpful guideposts that remain viable and appropriate.

- Title IX coordinator role and responsibilities.
- Disciplinary processes – robust investigation.
- Interim measures.
- Remedies.
- Appeals.
- Training, education, and prevention – students, employees, all involved in Title IX resolutions

# 2015 LETTER TO TITLE IX COORDINATORS



Remains in full effect. Not impacted by Sept. 2017 action by OCR.

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

# APRIL 2015 DEAR COLLEAGUE LETTER: TITLE IX COORDINATORS



Remains in full effect. Not impacted by Sept. 2017 action by OCR.

- Sent to all K-12 superintendents and all college presidents.
- Specifically applied the 2011 DCL on sexual violence to K-12.
- Targets the responsibilities, functions, and centrality of the Title IX coordinator role.
- Reiterates requirement to designate a Title IX coordinator.
- Must have necessary positional and actual authority to perform their role.

# 2015 DCL: KEY TITLE IX COORDINATOR CONSTRUCTS



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



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

- Visibility
  - Notice of non-discrimination with Title IX and coordinator information posted and included in virtually all publications, materials, and websites.
  - Encourages Title IX-specific website.
  
- Training
  - Schools/districts must ensure coordinators are well-trained and up-to-date on all responsibilities and all applicable laws, policies, guidance, regulations, school/district policies, and procedures.

# TITLE IX RESOURCE GUIDE (2015)



- Broad-ranging, topically-organized summary guide for coordinators.
  - Intended to help coordinators perform their jobs and receive needed support from their schools/districts.
- Topics addressed:
  - Scope of Title IX.
  - Coordinator’s responsibilities.
  - Administrative requirements and oversight.
    - E.g., Grievance procedure requirements and notice of nondiscrimination.

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

# OTHER GUIDANCE REGARDING SEXUAL HARASSMENT & VIOLENCE



- OCR Resolution Agreements.
- October 29, 2010 – Bullying.
- January 25, 2013 – Athletics & ADA.
- April 24, 2013 – Retaliation.
- June 25, 2013 – Pregnancy.
- May 13, 2016 – Title IX and Transgender Students.\*
- Not Alone – White House Task Force to Protect Students From Sexual Assault – April 2014.
- VAWA 2013 Section 304.
- DOJ Title IX Legal Manual.
- *Proposed Regulations (covered in detail later)*

# NOTICE, REPORTING, RESPONSIBLE EMPLOYEES & CONFIDENTIALITY

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

# RESPONSIBLE EMPLOYEE



- A **Responsible Employee** includes any employee who:
  - Has the authority to take action to redress the harassment; or
  - Has the duty to report harassment or other types of misconduct to appropriate officials; or
  - Someone a student could reasonably believe has this authority or responsibility;

**! Schools/districts must ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.**

# ACTUAL NOTICE



- Individual files a Title IX grievance.
- Individual notifies the Title IX coordinator or other responsible employee.
- Individual complains to campus police or security official.
- Staff member witnesses harassment.
- Indirect notice from sources such as flyers posted on campus, media, online postings, or video.



# CONSTRUCTIVE NOTICE



- Pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment.
- Harassment is widespread, openly visible, or well known to students and/or staff.
- OCR can conclude the school/district should have known of incidents of harassment from a report to an employee who had a reporting duty to a supervisor, but failed to do so.

# ADDITIONAL REPORTING REQUIREMENTS



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

# WHEN DO YOU INVESTIGATE?



- Upon receipt of a formal, written, signed complaint
- When the Coordinator deems an investigation is warranted
- Rumors, gossip, social media, etc. can be notice
  - Investigating on these bases is discretionary (but often recommended), particularly in light of the Proposed Regs.
- Once actual notice exists, the duty to investigate is absolute.
  - Small “i” preliminary inquiry.
  - Big “I” comprehensive investigation.

# PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



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

# PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



- “Confidential”
  - Designated by the district/school
  - Do not have to report harassment or discrimination of which they become aware
  - Allows for provision of services and support without concern of reporting
  - Examples: Victims advocate/sexual assault-related services, gender-based resource centers, Advisors during resolution processes, Ombuds

\* ATIXA recommends schools still report aggregate, non-identifiable data for Clery and Title IX purposes.

- “Private”
  - Anyone who does not meet the definition of a Responsible Employee
    - This number will expand significantly under the Proposed Regs given more restrictive Responsible Employee definition
  - Notice to them does not constitute “Actual Knowledge” requiring an investigation
  - May report incidents without identifying the parties
  - Examples: Administrative Assistants, Non-supervisory employees

# ATIXA'S RECOMMENDED APPROACH



- ATIXA recommends that all employees report
  - Enables school/district to best support those who have experienced harassment or discrimination
    - “Private” employees may report non-identifiable information, but this may limit provision of support and resources
  - Better enables tracking patterns
  - Gets information to those trained to handle it

# REQUESTS FOR CONFIDENTIALITY



- If a reporting party requests confidentiality and/or does not want the school/district to investigate:
  - The school/district should take all reasonable steps to respond and investigate consistent with that request
  - So long as doing so does not prevent the school from responding effectively and preventing the harassment of other students or the reporting party.
  - school/district will offer support and resources
  - Proceeding without a reporting party's participation has due process implications for the responding party



# REQUESTS FOR CONFIDENTIALITY



- The school/district should explain to the reporting party that:
  - Its responsive action/remedial abilities may be limited based on the level of confidentiality or privacy requested by reporting party.
  - It cannot guarantee privacy if doing so would jeopardize the safety of the reporting party or others.
  - Only those with a need to know will be informed.
    - Train those who will be informed about confidentiality expectations
  - If the responding party is an employee, the school/district may need to proceed due to Title VII

# RELUCTANCE TO REPORT



- The reporting party should be notified as to their options:
  - That the process will still be available to them, regardless of how long they wait.
  - That the school/district will support them in any way it can (e.g., housing, classes, no contacts, etc.). Engage in ways to limit the effect of the behavior on the reporting party.
  - That, if information is brought to the attention of the of the school/district that may involve a threat to the community, the office may be forced to proceed with an investigation, but that the victim will be notified of this process.

# ANALYZING A REPORTING PARTY REQUEST FOR CONFIDENTIALITY



- School/District may need to proceed if any of the following are present:
  - **PPTVWM**
    - Pattern
    - Predation
    - Threat
    - Violence/Weapon.
    - Minors (will always be reported to proper authorities)

- Pattern, Predation, Threat, Violence, Weapon, or Minors
  - Additional complaints of sexual violence involving the same responding party.
  - Whether the sexual violence was committed by multiple individuals.
  - Whether the responding party has a history of arrests or records from a prior school indicating a history of violence.
  - Whether the student's report reveals a pattern of behavior at a given location or by a particular group.

# ANALYZING A REPORTING PARTY REQUEST FOR CONFIDENTIALITY



- Pattern, Predation, Threat, Violence, or Weapon (cont.)
  - Whether the responding party threatened further sexual violence or violence against the student or others.
  - Whether a weapon facilitated the sexual violence.
  - Age of the reporting party.
  - Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence).
- If school/district proceeds, it should notify the reporting party and utilize appropriate interim measures to protect the reporting party.

# CASE STUDY: JANET & ROBERT

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



# CASE STUDY: JANET & ROBERT



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

# CASE STUDY: JANET & ROBERT



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



# COORDINATOR TRAINING AGENDA



## Part 2

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

# TRAINING RESPONSIBLE EMPLOYEES

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# WHY REPORT?



- Often we focus on the legal obligations and the negative consequences of not reporting.
- More effective if we focus on the real reason reports should be made: Providing support and resources.
  - Provide reporting parties with school-wide assistance through a single individual (TIXC).
  - Access to the full range of support and resources
  - Long-range view: ATIXA has seen countless cases where reporting parties do not see the negative effects until months later when they are failing their classes, become ill, miss work, suicidal etc.
- Also key to tracking patterns.

# TRAINING RESPONSIBLE EMPLOYEES



- Responsible Employee Training should include, at a minimum, the following:
  - Background, overview and purposes of Title IX
  - Scope of Title IX: Applies to students, faculty, staff, visitors, guests, etc.
  - Responsible Employee definition
  - Actual Notice/Knowledge
  - Privilege, Confidentiality, & Privacy
  - Jurisdiction: Geographical, Time, programs, etc.
  - What, How, and When to Report (everything)

- What a Responsible Employee Must Tell Someone Sharing information about Sex or Gender Discrimination or Harassment
  - The faculty member’s obligation to report the information to the Title IX Coordinator.
  - Confidential reporting options
  - Counseling and other support services.
  - The right to file a Title IX-based complaint.
  - The right to report a possible criminal act to school/campus or local law enforcement.

# WHAT TO REPORT AS A RESPONSIBLE EMPLOYEE

- **All** relevant details about the sex or gender discrimination or misconduct that was reported to the Responsible Employee, including
  - Name of the responding party
  - The name of the reporting party
  - Any other individuals involved in the situation (e.g.: witnesses)
  - Relevant facts, including date, time and location of the incident

# IS IT A IX?

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When does Title IX apply?

- Jurisdiction
- Covered programs
- Covered individuals
- Subject matter

# WHEN DOES TITLE IX APPLY?



## Jurisdiction

- Proposed Regs say Title IX does not apply outside the U.S.
- OCR will not enforce extraterritorial complaints.
  - Implications for Study Abroad
- The *Davis* standard is that Title IX applies and jurisdiction is required when the school/district has:
  - Control over the harasser (discriminator); **AND**
  - Control over the context of the harassment (discrimination).



# WHEN DOES TITLE IX APPLY?



## Jurisdiction

- For Sexual Harassment and Discrimination cases.
  - There is an expectation that you should exercise SOME jurisdiction over off-site/off-campus incidents - “Nexus”
- If Title IX jurisdiction is not present, the behavior could still violate:
  - School/district harassment/discrimination policies
  - Student Handbook/Conduct policies
  - Employee Handbook/Policies.
  - Professionalism standards

# WHEN DOES TITLE IX APPLY?



## Jurisdiction

- This means we will be taking discretionary jurisdiction over incidents off-campus or on non-school property.
  - See, e.g., *Simpson v. Colorado*.
- When?
  - Whenever our policy says.
  - “Nexus.”
    - When the behavior occurs on property we own or control.
    - When the behavior occurs in programs/events we sponsor.
    - When the “downstream effects” of purely off-site conduct cause a discriminatory impact at school/on campus.

# WHEN DOES TITLE IX APPLY?



## Jurisdiction

- Jurisdictional Limitations.
  - Geographic.
  - Temporal.
- When is a student a “student”?
  - Upon **application** to the school?
  - Once **admitted** to the school?
  - Once **registered**?
  - Upon **matriculation**?
  - What about winter and summer **breaks**?
- When is an employee and employee?
  - Exempt vs. Non-Exempt Employees

# WHEN DOES TITLE IX APPLY?



## Covered Programs

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

# WHEN DOES TITLE IX APPLY?



## Covered Individuals

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

(as either reporting or responding party)

# WHEN DOES TITLE IX APPLY?



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

# WHEN DOES TITLE IX APPLY?



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

# WHEN DOES TITLE IX APPLY?



## Subject Matter

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



# WHEN DOES TITLE IX APPLY?



## Subject Matter

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

# WHEN DOES TITLE IX APPLY?



## Subject Matter

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

# WHEN DOES TITLE IX APPLY?



## Subject Matter

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

# SMALL GROUP DISCUSSION QUESTIONS



- Does your school/district exercise jurisdiction over off-campus/non-school property incidents? Under what circumstances?
  - For Students? Faculty? Staff?
- When is a student officially a student under your code of conduct and/or Title IX policies?
- What are you doing to address off-campus intimate partner violence?
- What are you doing to address online harassment and discrimination?

# ATHLETICS GENDER EQUITY CONSIDERATIONS

- Title IX Requirements
- Oversight of Athletics
- Equal Treatment Regulations



**TITLE IX**  
40  
YEARS  
OF  
CHANGE  
PAGE 44

**Sports**  
MAY 7, 2012 SL.COM  
**Illustrated**



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

**—JUNE 23, 1972**

# A BRIEF HISTORY OF TITLE IX & ATHLETICS, 1972-PRESENT



- **1975:** Memo to Chief State School Officers: Title IX Obligations in Athletics
- **1979:** Policy Interpretation: Title IX and Intercollegiate Athletics (also covers “interscholastic programs”)
- **1996:** Clarification of Intercollegiate Athletics Policy Guidance: the Three-part Test
- **2003:** Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance
- **2008:** Title IX Athletics Three-Part Test
- **2010:** “Dear Colleague” Letter on Three-part Test.





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PARKER



BIG MAN ON CAMPUS



# OVERSIGHT OF ATHLETICS GENDER EQUITY: 3-PRONG TEST (1979)



- Effective accommodation of interests and abilities:
  - Prong 1:** Opportunities for males and females substantially proportionate to their respective enrollments; OR
  - Prong 2:** Where one sex has been underrepresented, a history and continuing practice of program expansion responsive to the developing interests and abilities of that sex; OR
  - Prong 3:** Where one sex is underrepresented and cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program.

# EQUAL TREATMENT REGULATIONS



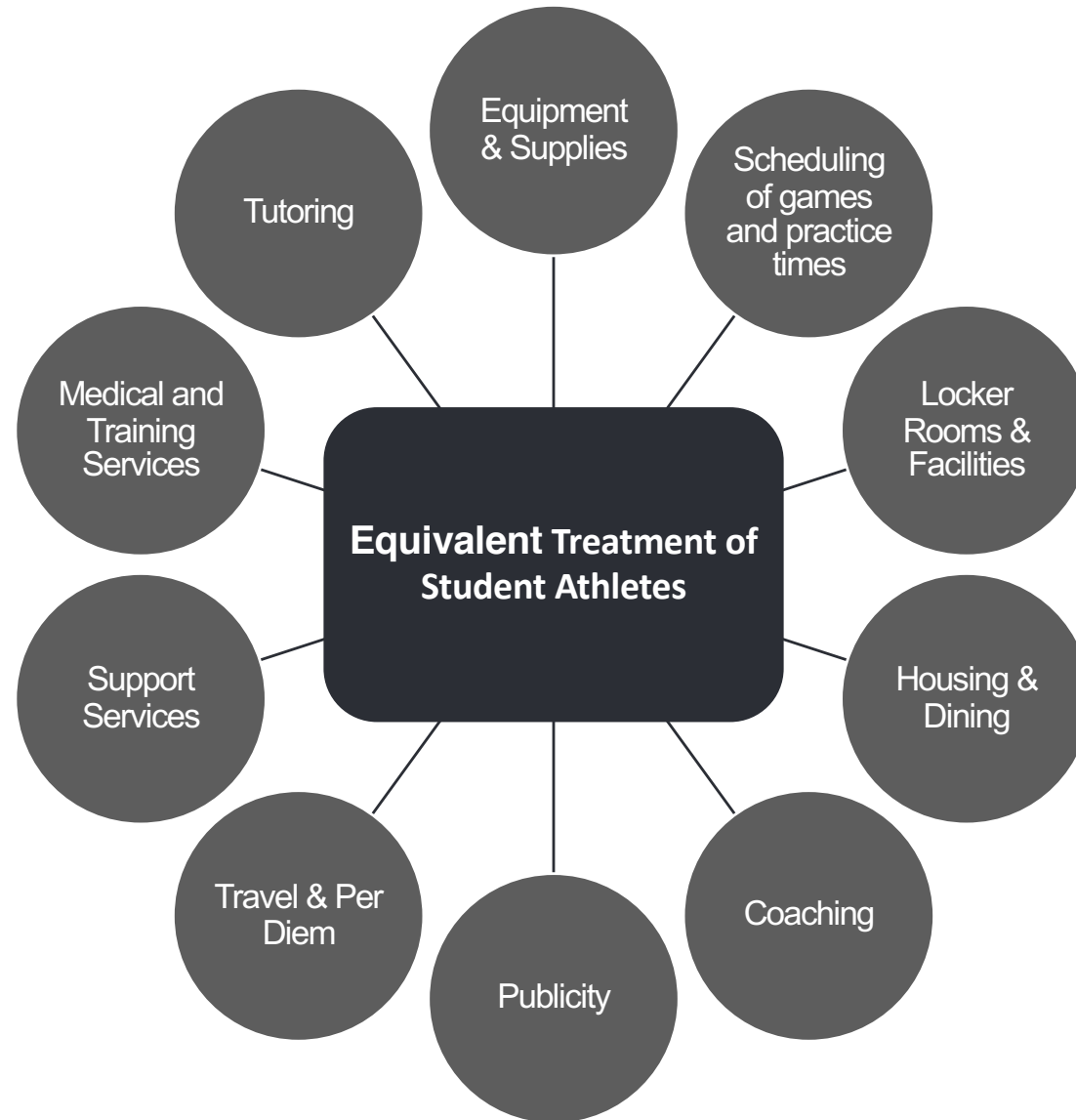
## *Equal opportunity:*

- A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the director will consider, among other factors:
  - 1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
  - 2) The provision of equipment and supplies;
  - 3) Scheduling of games and practice time;
  - 4) Travel and per diem allowance;

## *Equal opportunity (cont.):*

- 5) Opportunity to receive coaching and academic tutoring;
- 6) Assignment and compensation of coaches and tutors;
- 7) Provision of locker rooms, practice, and competitive facilities;
- 8) Provision of medical and training facilities and services;
- 9) Provision of housing and dining facilities and services; and
- 10) Publicity.

# OVERSIGHT OF ATHLETICS GENDER EQUITY



# CASE STUDIES

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

# CASE STUDY: DONATIONS, FUNDRAISING AND EXPENDITURES



- Jose, a former high school football standout, wants to donate \$50,000 to his alma mater's football team. He is determined that the money be used only for the football team and wants to also provide new cleats to the entire football team.
  - What are the Title IX issues?
  - Can the school/district accept the donation?
  - What are the school/district's options?

# CASE STUDY: DONATIONS, FUNDRAISING AND EXPENDITURES



- “Therefore, when an athletic director is placed in an awkward position due to the requests from stakeholders of the school’s athletic programs, there are three key tips to help facilitate a reasonable solution.
  1. Advise the stakeholder of the intent of Title IX law and urge the individual to permit the gift to be used in a nondiscriminatory fashion that benefits both genders.
  2. Create a policy where all outside donations are deposited into a unified athletic fund for all teams instead of those funds being given directly to a specific team of one gender.
  3. Accept the gift and negotiate with the stakeholder a plan to publicize a challenge or matching gift to the community at large.”

<https://www.nfhs.org/articles/sports-fundraising-and-gender-equity-clearing-up-the-confusion/>

# CASE STUDY: DONATIONS, FUNDRAISING AND EXPENDITURES



- The women's softball team and the women's volleyball team just purchased new uniforms and all new equipment. The men's baseball team uniforms remain in good condition though they are two years old and are of similar quality. The men's basketball uniforms, however, are ragged. The women's basketball uniforms remain in good condition.
  - What are the Title IX issues?
  - How would this be analyzed under Title IX?
  - What are the school/district's options?



# CASE STUDY: DONATIONS, FUNDRAISING AND EXPENDITURES



- The School holds a fundraiser pep rally in the school's gym. The band plays a few numbers, the cheerleaders perform and engage the crowd throughout the rally and the Principal gives a speech. Each of the teams are recognized at the rally and the women's softball team is in charge of concessions. At the conclusion of the rally, all the money raised goes to the men's basketball team.
  - What are the Title IX issues?
  - How would this be analyzed under Title IX?
  - What are the school/district's options?

# CASE STUDY: RETALIATION



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

# CASE STUDY: RETALIATION



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

# CASE STUDY: GENDER IDENTITY AND POLITICS



- Ren is a transgender female who has been using the restrooms and locker rooms consistent with her gender identity since school started in August. She has been on hormone therapy for 13 months and is recently joined the girl's basketball team.
- During her first away game, the visiting team locker room did not have any privacy facilities in the locker room so Ren changed with the rest of the team. One of the other players, Lyna, screamed when she saw Ren quickly change her underwear to put on a jockstrap before the game.
- Ren was very embarrassed and Lyna became hysterical. Both students call their parents while others text parents and friends about what happened. Video of Ren running away from the bathroom is quickly posted on social media and the Principal's and Athletic Director's phones begin ringing off the hook.
- Fox News also calls seeking comment.

# CASE STUDY: GENDER IDENTITY AND POLITICS



- Ren was very embarrassed and Lyna became hysterical. Both students call their parents while others text parents and friends about what happened. Video of Ren running away from the bathroom is quickly posted on social media and the Principal's and Athletic Director's phones begin ringing off the hook.
- Fox News calls seeking comment and the supporters on both sides of the issue are calling for action
  - What Title IX issues do you see?
  - What could have been done differently?
  - What do you do now?

# CASE STUDY: SEXUAL ASSAULT



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

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

# CASE STUDY: SEXUAL ASSAULT



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

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

# CASE STUDY: SEXUAL ASSAULT



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

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



# CASE STUDY: SEXUAL ASSAULT



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

# CASE STUDY: SEXUAL ASSAULT



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

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

# PREVALENCE OF VIOLENCE AGAINST WOMEN IN THE ATHLETIC DEPARTMENT



- A donor approaches the high school and indicates a desire to give \$20,000 to the football team for new goalposts and
- When a school accepts money from outside sources such as booster groups, corporate sponsors or even private contributions from alumni, the overall amount of money raised and the source of the funds is not relevant. What is important is if the money from these private sources creates an obvious and flagrant discrepancy and appears that the athletes of one gender are treated unfairly and as inferior, then a Title IX violation is likely.
- If this occurs, the school has the legal duty to correct the possible disparity between the boys and girls athletic programs.

# PREVALENCE OF VIOLENCE AGAINST WOMEN IN THE ATHLETIC DEPARTMENT



- Male athletes are more represented in violence against women statistics vs. their non-athlete counterparts.
- Male student athletes = 3.3% of student population.
  - 19% of sexual violence.
  - 35% of domestic violence.

Source: Benedict and Crossett, et al., Male Student Athletes and Violence Against Women: A Survey of Campus Judicial Offices, Journal of Sport and Social Issues, Vol. 19 No. 2, pp. 126-140, 1995.

# FACTORS THAT INFLUENCE THIS



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

# UNIQUE CHALLENGES



- Athletic department hostile educational environment.
- Student-athlete on student-athlete violence.
- Offender coach involvement.
- Offender and victim coaching pressures.
- Power dynamics or revenue vs. non-revenue sports.

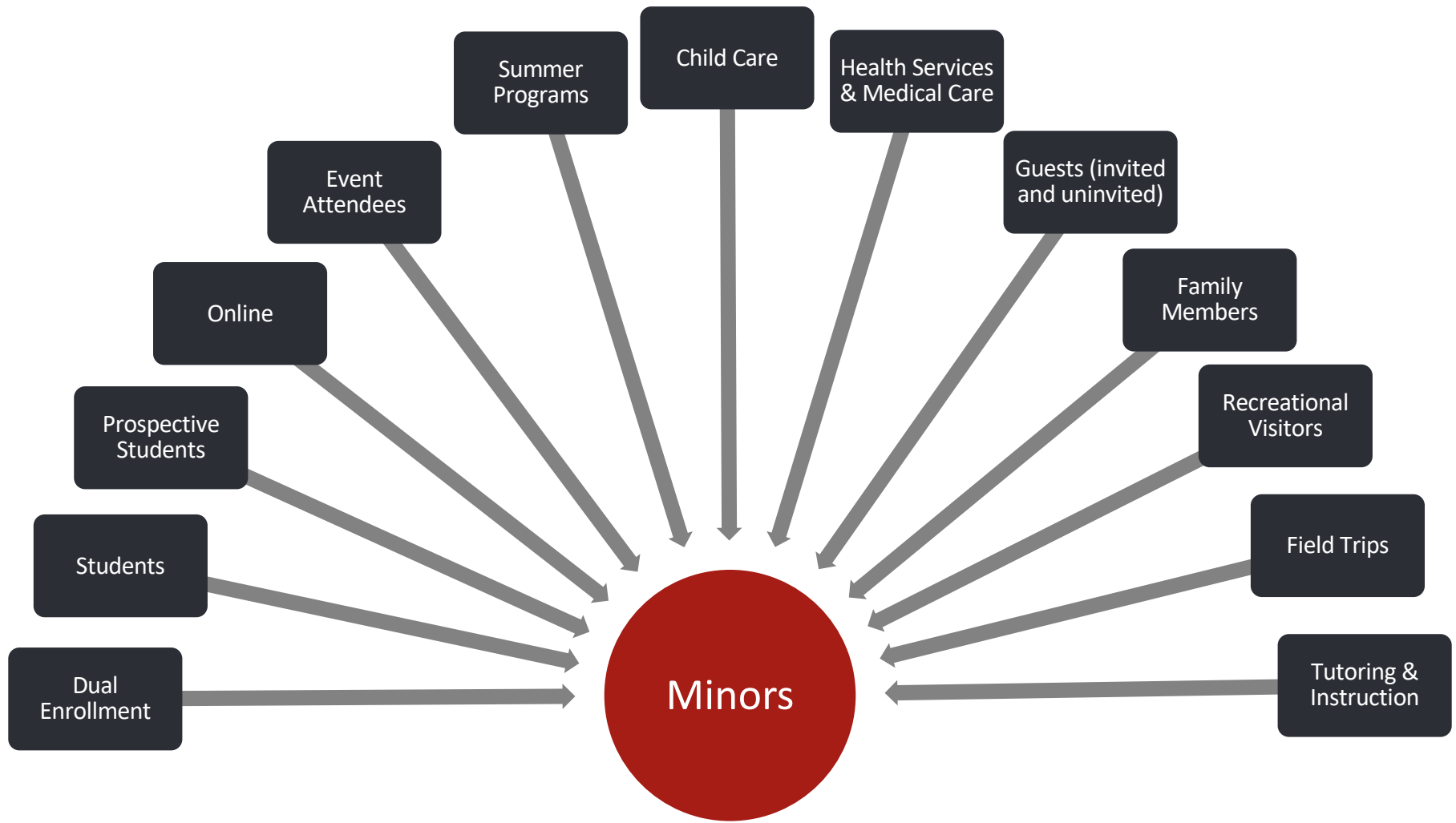
# MINORS & TITLE IX

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



# MINORS & TITLE IX





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

# MINORS & TITLE IX: CAMPS EXAMPLE



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



## Not ours:

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

## Kind of ours:

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

## Completely ours:

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

# MINORS & TITLE IX



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

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

# MINORS & TITLE IX: ABUSE PREVENTION



- Preventing and detection – sexual abuse of minors:
  - Policies.
  - Screening and selection.
  - Training.
  - Monitoring and supervision.
  - Consumer participation – educate parents and guardians.
  - Reporting systems and mechanisms.
  - Response – prompt, effective, and compliant with laws.
  - Administrative practices.

Source: "Managing the Risks of Minors on Campus," Arthur J. Gallagher & Co.

# MINORS & TITLE IX: MORE CONCERNS



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

# TRAINING OVERSIGHT

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

# SUPERVISOR OF TRAINING



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



# SUPERVISOR OF TRAINING



- Trainee Populations:
  - Title IX Compliance Officers
    - E.g.: Coordinator and Deputies, Investigators, decision makers, hearing board members (including appeals), and others involved in processing, investigating, or resolving complaints.
  - First Responders
    - E.g.: School counselors, sexual assault response coordinators, academic advisors, School Resource Officers, and public safety.
  - All Faculty/Teachers & Staff; ATIXA Mandatory Reporters
    - ATIXA recommends making all teachers and staff mandatory reporters.
  - All Students
    - Undergraduate, graduate, primary students, secondary students, professional, distance, and online, etc.

# TRAINING COORDINATION AND OPERATIONALIZATION



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

# TRAINING OVERSIGHT FOR EMPLOYEES, BOARDS, INVESTIGATORS & APPEALS OFFICERS



- Each of these will be different.
- Must identify the compliance elements that constitute required knowledge for each entity.
- Consider most effective approach for training as well as most efficient.
  - For example, investigators will be responsible for completeness, fairness, and equity, their training must be extensive.
  - Appeals officers must have a comprehensive understanding of the process; should be in-person using case studies.
  - Employees need general resource and reporting information and could be trained by video.

# INVESTIGATOR/HEARING BOARDS/DECISION-MAKER COMPETENCIES



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

# INVESTIGATOR TRAINING



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

# TRAINING FOR “RESPONSIBLE EMPLOYEES”/MANDATORY REPORTERS



- Schools/districts should ensure that employees are trained so that:
  - Those with authority to address harassment know how to respond appropriately.
  - Other responsible employees know that they are obligated to report harassment to appropriate officials, what to report, and to whom.
    - Who does this represent at your school? Teachers? Coaches?

# TRAINING FOR “RESPONSIBLE EMPLOYEES”/MANDATORY REPORTERS



- The school/district’s policies and procedures – must also address cross-constituency complaints.
  - Faculty/Teachers.
  - Staff.
  - Students.
- The school/district expectation for reporting incidents of sexual assault and harassment:
  - Who to tell.
  - How to tell.
  - When to tell.
  - Confidentiality.

# BASIC TRAINING TOPICS (CONT.)



- The school's/District's resources for sexual assault/harassment victims including:
  - Title IX administrator or deputy administrator.
  - Local Law enforcement & school safety officers
  - Student conduct.
  - EOP/EEOC officers.
  - Victims' services/advocates.
  - Counseling services.
  - Health services.
  - Remedial measures available (e.g., no-contact orders, course or work adjustments, etc.).



# TRAINING FOR STUDENTS



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

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

# TRAINING FOR PARENTS/GUARDIANS



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

# SMALL GROUP DISCUSSION: TRAINING

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- What are you doing that works?
  - Faculty/Teachers?
  - Staff?
  - Students?
  - Parents/Guardians?
- How do you reach as many as possible?

# CREATOR & IMPLEMENTER OF APPROPRIATE POLICY

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# CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY



- **Policies = The Rules**
  - Policies should clearly define expected/prohibited conduct.
  - Policies should be regularly updated, revised, and assessed.
- **Procedures = How alleged violations of policy are addressed**
  - Procedures should clearly channel the grievant to appropriate resources.
  - Procedures should provide for the equitable remedying of complaints.

# CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY



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

# “SEVERE”



*“The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.”  
—(2001 Guidance)*

- Physical is more likely to be severe without need for repetition: “attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks” (2001 Guidance).
  - Non-consensual sexual intercourse or contact are almost always sufficiently severe.
  - Consider the circumstances: E.g., the ability for victim to escape the harassment.
- Accompanied by threats or violence.

# “PERVASIVE”



- Widespread.
- Openly practiced.
- Well-known among students or employees — reputation of a department etc.
- Occurring in public spaces (more likely to be pervasive).
- “Harassment is pervasive when incidents of harassment occur either in concert or with regularity” (2001 Guidance – Footnote 44).
- Frequency of the conduct is often a pervasiveness variable.
  - Intensity/duration.
- Unreasonable interference.
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986).



# “PERSISTENT”



- Repeated.
  - Intensity.
  - Duration.
  - Welcomeness.
- Defined:
  - Continuing to do something or to try to do something even though other people want you to stop.
  - Continuing beyond the usual, expected, or normal time; not stopping or going away (Merriam-Webster.com).

# “OBJECTIVELY OFFENSIVE”



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

# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



## Student-Based Examples: Do these create a Hostile Environment?

- Female student “sexts” pictures of herself to a male classmate.
- A student draws a penis on the whiteboard at the front of the class. What about a whiteboard on the student’s residence hall door or in a student’s locker?
- “Revenge porn” pictures posted online?
- A student viewing porn on a computer in the library?
- A student calling another a C-nt?

# COORDINATOR TRAINING AGENDA



## Part 3

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

# HOSTILE ENVIRONMENT: SEXUAL HARASSMENT

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# THREE TYPES OF SEXUAL HARASSMENT



1.  
Hostile  
Environment

2.  
*Quid Pro Quo*

3.  
Retaliatory  
Harassment

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- A hostile environment is created when sexual harassment is:
  - *Sufficiently severe, or*
  - *Persistent or pervasive, and*
  - *Objectively offensive that it:*
    - *Unreasonably interferes with, denies, or limits someone’s ability to participate in or benefit from the school’s/district’s educational [and/or employment], social, and/or residential program.*
- From both a subjective (the alleged victim’s) and an objective (reasonable person’s) viewpoint.

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
  - The frequency (persistent or pervasive), nature, and severity of the conduct.
  - Whether the conduct was physically threatening.
  - Whether the conduct was humiliating.
  - The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.
  - The age and sex of the alleged harasser and the subject or subjects of the harassment.
  - The size of the school, location of the incidents, and context in which they occurred.



# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



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

# “SEVERE”



*“The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.”*

—(Q&A: A-3)

- Physical is more likely to be severe without need for repetition: “attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks” (2001 Guidance).
  - Non-consensual sexual intercourse or contact are almost always sufficiently severe.
  - Consider the circumstances: E.g., the ability for victim to escape the harassment.
- Accompanied by threats or violence.

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- Severity.
- Physically threatening.
- Humiliation.
- Intimidation.
- Ridicule.
- Abusive.

# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



## Student-based examples

- Female student “sexts” pictures of herself to a male classmate.
- Graffiti on a wall
- E-mailed pictures that are revealing, but not nude.
- “Revenge” pictures.
- Viewing porn on a school computer.

# HOSTILE ENVIRONMENT?



# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



## Teacher-based examples

- Giving a student a back-rub.
- Require students to read *50 Shades of Grey* and give an assignment to compare their own experiences against those from the book.
- Female faculty teacher repeatedly referring to male students as “penises.”
- Telling repeated “dirty” jokes in class.



# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



## Staff-based examples

- Telling dirty jokes: In common area? Staff meeting? To a single individual?
- Sending porn to a colleague.
- Rolling eyes and making masturbation motion with hand at comments during a staff meeting.
- Repeated staring at a colleague of the opposite sex; accompanied by occasional winking.
- Colleague repeatedly mentions how much they like a person's outfits.

# CASE STUDY

- Sexting

# CASE STUDY: SEXTING



- You have just learned that police arrested three students at the middle school between the ages of 12 and 15 for creating and distributing pornographic images of themselves online, via text message, and snapchat. The images and videos are of the creators themselves (i.e.: nude selfie pictures and videos).
- The local news media just picked up the story and is clamoring for a comment. Parents have also started calling the school and district offices demanding to know what is being done to protect their children.

# CASE STUDY: SEXTING



- The criminal charges are misdemeanors and felonies for child pornography creation and distribution. Police inform the school that they received reports that nude photos of students from the middle school and the high school were shown by the three students to others at the school and were distributed via text and email.
- All the students involved are minors and many of the pictures and videos had the location setting on their phones activated, which means people could have allowed predators to locate the homes of those in the pictures and videos.

# CASE STUDY: SEXTING



- How does your investigation proceed in light of the criminal charges?
- What remedies should you provide and to whom?
- How do you address the PR issues?
- What communication should you have with parents?
- What is an appropriate sanction if the students are found responsible?

# POINT PERSON FOR COMPLAINTS

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# POINT PERSON FOR COMPLAINTS



- The Title IX Coordinator will be the individual designated to ensure the Title IX protocol is implemented and therefore should be the individual to whom all complaints or notice related to sex/gender misconduct and disability discrimination should be directed.
  - However, the District and schools may designate multiple portals for receipt of information.
    - All responsible employees are expected to report notice and complaints to the Title IX Coordinator (or designee).

# POINT PERSON FOR COMPLAINTS



- Assistant Principals, supervisors, the athletic director, and deputy coordinators may also be identified in publications and policies as individuals to whom a complaint may be made.
  - The Title IX coordinator must create a structure of documentation and reporting by these designated individuals to ensure that the Title IX coordinator is aware of the complaint and will either designate the individual to lead the Title IX-based response protocol or will implement that process.



# POINT PERSON FOR COMPLAINTS



- The Title IX coordinator must ensure the school/district is promptly engaging in:
  - Initiation of the preliminary inquiry.
  - Prompt response to stop the harassment/discrimination.
  - Immediate remedial support for the victim.
  - Action to reasonably prevent the recurrence.
- The Title IX coordinator must coordinate all these steps, oftentimes across administrative processes.

# PREVENTION AND REMEDICATION OF STALKING

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

# STALKING (CONT.)



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

# PREVENTION AND REMEDICATION OF BULLYING AND CYBERBULLYING

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

# PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING



- Cyberbullying is:
  - When an individual is bullied using the Internet, interactive, and digital technologies or mobile phones.
- Those who are electronically engaged can be cyberbullied at any time or location, making the effect of cyberbullying ubiquitous and acute.
- Harassment, hazing, and stalking often are used to encompass cyberstalking or cyberbullying policy.

# PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING



- Policy development.
  - Student Handbook/Code of Conduct.
  - Employee manuals/CBAs.
  - Faculty Handbooks.
- Distribution and dissemination of policy information.
- Early intervention (using your BIT, TAT etc.).
- Training of faculty, staff, and students.

# CASE STUDY: BULLYING



- Joe is a junior who is gay and a member of the school cheer team. A group of baseball players repeatedly ridicules Joe about his effeminate mannerisms and clothing, and threatens to harm him if they run into him outside of school.
- Joe reports the incident to the Assistant Principal, who speaks with the players and tells them their conduct is inappropriate and gives them a verbal warning about bullying.
- The next day, the players corner Joe in the locker room and tell him he is a “snitch,” “a little girl” and “a pussy.” They tell him he is a freak and to watch his back, especially if he reports them to the school. He is terrified
- Joe becomes very withdrawn, starts skipping cheer practice and resigns from the team. His parents find out what happen and call the school demanding swift and harsh action.

# CASE STUDY: BULLYING



- Is this a Title IX issue?
- What are the possible violations?
- Who should investigate?
- What could the school have done better?
- What remedies should you provide Joe?
- How do you handle the retaliation issue?
- Should athletics or the coach be involved?
- What other issues do you see?



# PREVENTION AND REMEDICATION OF RETALIATION & QUID PRO QUO

- Basic Legal Principles
- *Jackson v. Birmingham Bd. Of Education*

# RETALIATION BASIC LEGAL PRINCIPLES



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

# PREVENTION AND REMEDIATION OF RETALIATION



- Retaliation is an increasingly common legal claim arising from charges of discrimination.
- The Title IX regulations prohibit schools from “intimidating, coercing or retaliating against” individuals because they engaged in activities protected by Title IX.

# PREVENTION AND REMEDIATION OF RETALIATION



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

# PREVENTION AND REMEDIATION OF RETALIATION



- The Title IX coordinator or designee must engage in the following, for reporting parties and witnesses:
  - Take time to explain that the school/district prohibits retaliation, that the reporting party or witness should immediately report any acts of retaliation, and that the school/district will respond promptly to address it.
  - Check in with reporting parties and witnesses periodically during an investigation to make sure they have not been subjected to retaliation.

# PREVENTION AND REMEDIATION OF RETALIATION



- The Title IX coordinator or designee must engage in the following, for Individuals accused of sexual assault or harassment:
  - Explain that retaliation is prohibited, that any reports of harassment will be addressed promptly and effectively, and that additional sanctions may be imposed for such acts.
  - May hold responding party responsible for retaliation by friends, teammates, and family.
  - Act promptly to take appropriate interim measures to protect the reporting party if notified of retaliation.

# RETALIATION CLAIM

## JACKSON V. BIRMINGHAM BD. OF ED.



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

# RETALIATION CLAIM

## JACKSON V. BIRMINGHAM BD. OF ED.



- Procedure:
  - District Court – School prevailed.
  - 11th Circuit – Upheld District Court finding.
  - Supreme Court – Overturned.
- Question: Does the private right of action for discrimination only apply to the direct victim of the discrimination, or does it also apply to a party who advocated on behalf of the victim?



# QUID PRO QUO SEXUAL HARASSMENT



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

# MODEL POLICY FRAMEWORK

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- Non-Consensual Sexual Intercourse
- Non-Consensual Sexual Contact
- Sexual Exploitation
- Related Misconduct

# ATIXA MODEL DEFINITIONS: NON-CONSENSUAL SEXUAL INTERCOURSE



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

# ATIXA MODEL DEFINITIONS: NON-CONSENSUAL SEXUAL INTERCOURSE



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

# ATIXA MODEL DEFINITIONS: NON-CONSENSUAL SEXUAL CONTACT



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

# ATIXA MODEL DEFINITIONS: SEXUAL CONTACT DEFINED



## – Sexual contact includes:

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

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION



- **Sexual Exploitation**
  - Occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of other sexual misconduct offenses.
- Examples of sexual exploitation include, but are not limited to...

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



- Invasion of sexual privacy.
- Non-consensual digital, video, or audio recording of nudity or sexual activity.
- Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.
- Engaging in voyeurism.
- Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex).



# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



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

# OTHER MISCONDUCT OFFENSES THAT MAY REQUIRE TITLE IX BASED RESPONSE



- Intimate Partner Violence.
- Bullying/cyberbullying.
- Hazing.
- Stalking.
- Threatening or causing physical harm.
- Conduct which threatens or endangers the health or safety of any person.
- Discrimination.
- Intimidation.
- Any rule violated on the basis of the victim's sex/gender, which is severe and/or pervasive/persistent enough to cause a discriminatory effect.

# CASE STUDY: THE RESTROOM



- A transgender student, Ellie, identifies and expresses as a woman. She has begun hormone treatments, but still has male genitalia. She is an adult education student who attends classes at the high school in the evening. She has been using the women's restrooms for that entire time without incident.
- Recent national news coverage of so-called “bathroom bills” in several states has raised renewed awareness and strong feelings among students and staff on both sides of the issue.

# CASE STUDY: THE RESTROOM



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

# CASE STUDY: THE RESTROOM



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

# CASE STUDY: THE RESTROOM



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

# CASE STUDY: THE RESTROOM



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

# OVERSIGHT OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES

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



# OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



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

# OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



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

# PROMPT & EQUITABLE PROCEDURES: CLEAR TIMEFRAMES



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

# EQUITY: PREPONDERANCE STANDARD REQUIRED

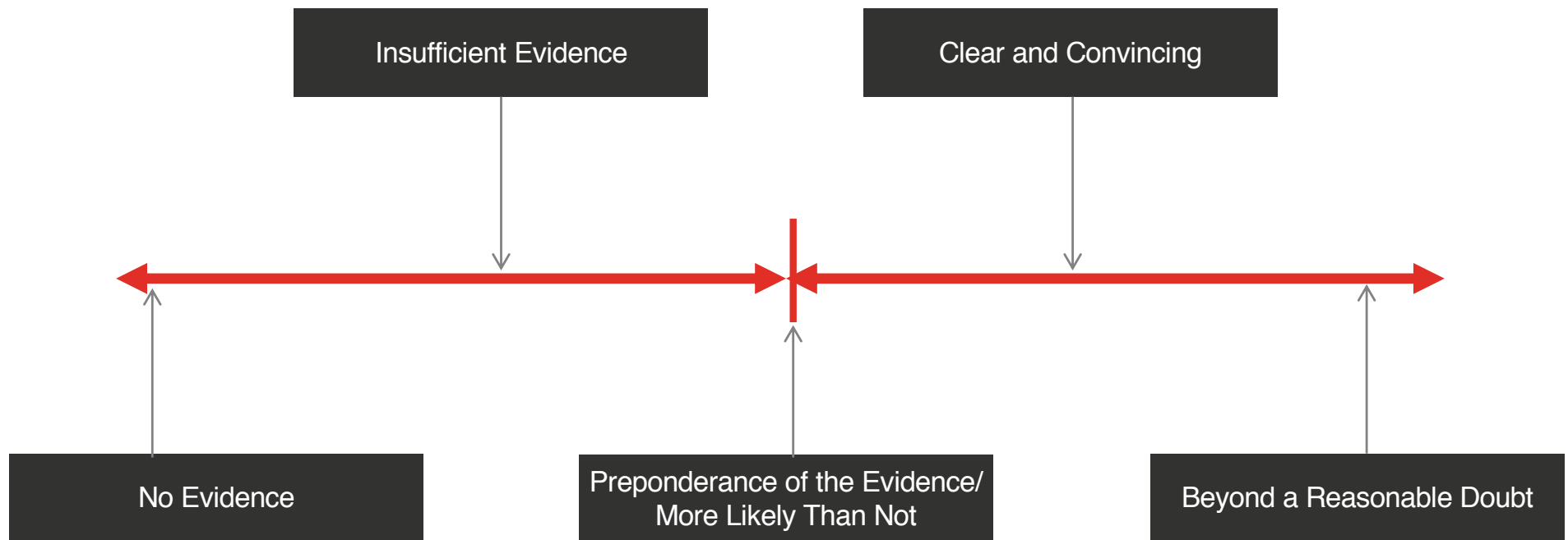


- The only equitable standard.
- Articulate the standard throughout your policy, procedure, investigation, and hearings.
- Educate the parties and their advisors.
- Use language the community understands.
  - 50.1%.
  - “More likely than not.”
  - The “tipped scale.”
  - Try NOT to use just the term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

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



- “Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment.” (2001 Guidance, p. 14).
- “A grievance procedure applicable to sexual harassment complaints **cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint.** Thus, the procedures should be written in language appropriate to the age of the school’s students, easily understood, and widely disseminated” (2001 Guidance, p. 20).

# EQUITY & GRIEVANCE PROCEDURES



- Various forms of notice — policies and procedures, investigation, hearing, outcome (finding and sanction), etc.
- Meetings and opportunities to present witnesses and provide evidence.
- Access to information.
- Advisor or advocate.
- Impartial investigators, investigation, hearing, and panelists.
- Remedies.
- Appeals.

# EQUITY: BARRIERS & PROBLEMS



- You think equality is the same as equity.
- Investigation and resolution mechanisms built into castles of due process.
- School/district policies and procedures are constituency-based, thereby privileging certain constituencies (e.g., faculty, staff, and students) more than others.
- Procedures to remedy different forms of discrimination are widely disparate from each other – race, religion, disability, sex, etc.



# EQUITY & GRIEVANCE PROCEDURES



- Various forms of notice — policies and procedures, investigation, hearing, outcome (finding and sanction), etc.
- Meetings and opportunities to present witnesses and provide evidence.
- Access to information.
- Advisor or advocate.
- Impartial investigators, investigation, hearing, and panelists.
- Remedies.
- Appeals.

# EQUITY: BARRIERS & PROBLEMS



- Your resolution processes are equitable, but your remedies are not.
- Your remedies are equitable, but your resolution procedures are not.
- You impose contact restrictions on victims that are too broad or punitive.
- You think equity should only apply to issues of sexual violence.
- In your school/district, only the responding party is entitled to participate in an appeal, grievance, tenure revocation hearing, or arbitration of a disciplinary action.

# EQUITY: BARRIERS & PROBLEMS



- Victims' rights are an afterthought.
- Your inability to revoke tenure promptly (e.g.: within 60 days) perpetuates discriminatory conduct.
- Your resolution procedures don't recognize patterns and prior misconduct as evidence of present misconduct.
- State laws or education codes inhibit Title IX compliance, and haven't been updated since pre-2011.

# EQUITY REQUIRES TRAINING



- Title IX Coordinator(s).
- Intake staff/faculty.
- School/district law enforcement.
- Investigators.
- Hearing officers.
  - Training on and knowledge of sexual violence.
  - Confidentiality requirements.
  - Due process rights... should not “restrict or unnecessarily delay Title IX protections for complainant.”
- Appeals officers.

# OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



- **The Title IX Coordinator's role:**
  - A sexual harassment grievance procedure is not prompt and equitable unless students and employees **know it exists, how it works, and how to file a complaint.**
  - Ensure that the notice of complaint procedures is published and posted widely.
    - E.g.: In the publications and information sources that are most commonly read and used — and can be easily located.
  - Procedures should be written in a manner that is easily understood (especially for K-12).

# OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



- **The Title IX Coordinator's role (cont.):**
  - Clearly identify the individuals to whom discrimination complaints can be submitted.
  - Periodically review and update grievance procedures to ensure they comply with Title IX requirements.
  - Confirm that new or revised grievance procedures are posted and published promptly and that old procedures are removed from publications and websites.
    - Beware multiple conflicting or varying versions of published policy.

# COORDINATOR TRAINING AGENDA



## Part 4

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

# ASSURANCE OF FIRST AMENDMENT PROTECTIONS

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# ASSURANCE OF FIRST AMENDMENT PROTECTIONS



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

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

# TITLE IX & THE FIRST AMENDMENT



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

# TITLE IX & THE FIRST AMENDMENT



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

# TITLE IX & THE FIRST AMENDMENT



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

# TITLE IX & THE FIRST AMENDMENT



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

# SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT

- 
- About Section 504
  - Administrative Requirements

# SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT



- The Section 504 regulations require that schools/districts:
  - “Designate at least one person to coordinate its efforts to comply.”
  - Adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of discrimination.
  - Must provide oversight of disability program compliance.
  - Must ensure dissemination of notice of the school/district’s non-discrimination policy.
  - Must ensure civil-rights-based grievance procedures are in place to address complaints of discrimination.

# SECTION 504 ADMINISTRATIVE REQUIREMENTS



- Schools must have clearly defined policies and procedures and implement them consistently.
- Schools must have preventive measures in place to position themselves to manage reports of disability-based discrimination.
- Schools must provide notice of:
  - Nondiscrimination.
  - 504/ADA Coordinator.
  - 504/ADA grievance procedures.
  - How to obtain academic adjustments and auxiliary aids.



# ASSURANCE OF COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, AND REMEDY

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- Effective Remedies
- Common Remedies
- Preventing Recurrence

# ASSURANCE OF COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY



- *Effective remedies:*

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

# ASSURANCE OF COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY



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

# COMMON REMEDIES FOR STUDENTS

\* NOT AN EXHAUSTIVE LIST



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

# COMMON REMEDIES FOR EMPLOYEES

\* NOT AN EXHAUSTIVE LIST



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

# ASSURANCE OF COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY



- ***Prevent recurrence:***

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

# SUPERVISOR OF INVESTIGATIONS

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# SUPERVISOR OF INVESTIGATIONS



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



# SUPERVISOR OF INVESTIGATIONS



- The Title IX Coordinator or designee is responsible for:
  - Notice of investigation.
  - Gatekeeping.
  - Determining extent of investigation.
  - Notice of charge/allegation.
  - Notice of hearing.
  - Notice of outcome.
  - Duty to warn.
  - Assurance of remedies.
  - Recordkeeping of all activities.

# ELEMENTS OF AN INVESTIGATION

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- Who Should Investigate?
- More Than One Investigator?
- Law Enforcement Role?
- Title IX Coordinator's Role?
- Gatekeeping
- Understanding Evidence
- Strategy
- Investigation Report
- Credibility
- Making a Finding
- Sanctioning

# WHO SHOULD INVESTIGATE?



- Investigations of sex discrimination must be impartial, thorough, and reliable. So who should it be?
  - Title IX Coordinator?
  - Standing panel of investigators?
  - Human resources or student services?
  - Administrators and faculty?
  - One investigator or two?
  - Outside investigator or legal counsel?
  - Coordinating investigation in multiple processes?

# SHOULD THERE BE MORE THAN ONE INVESTIGATOR?



- No specific requirement, but:
  - Investigation must be prompt, thorough, and impartial.
  - Investigator must collect the maximum amount of relevant information available to make a determination.
  - A pool of investigators may help to ensure that your investigation meets these requirements.
  - Who investigates may be strategic to each specific case.
  - Team = Ability to brainstorm investigation steps and lines of questioning with co-investigators and co-facilitate interviews.
  - Flexibility if there is any conflict with investigators and parties.

# ROLE OF CAMPUS LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS?



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

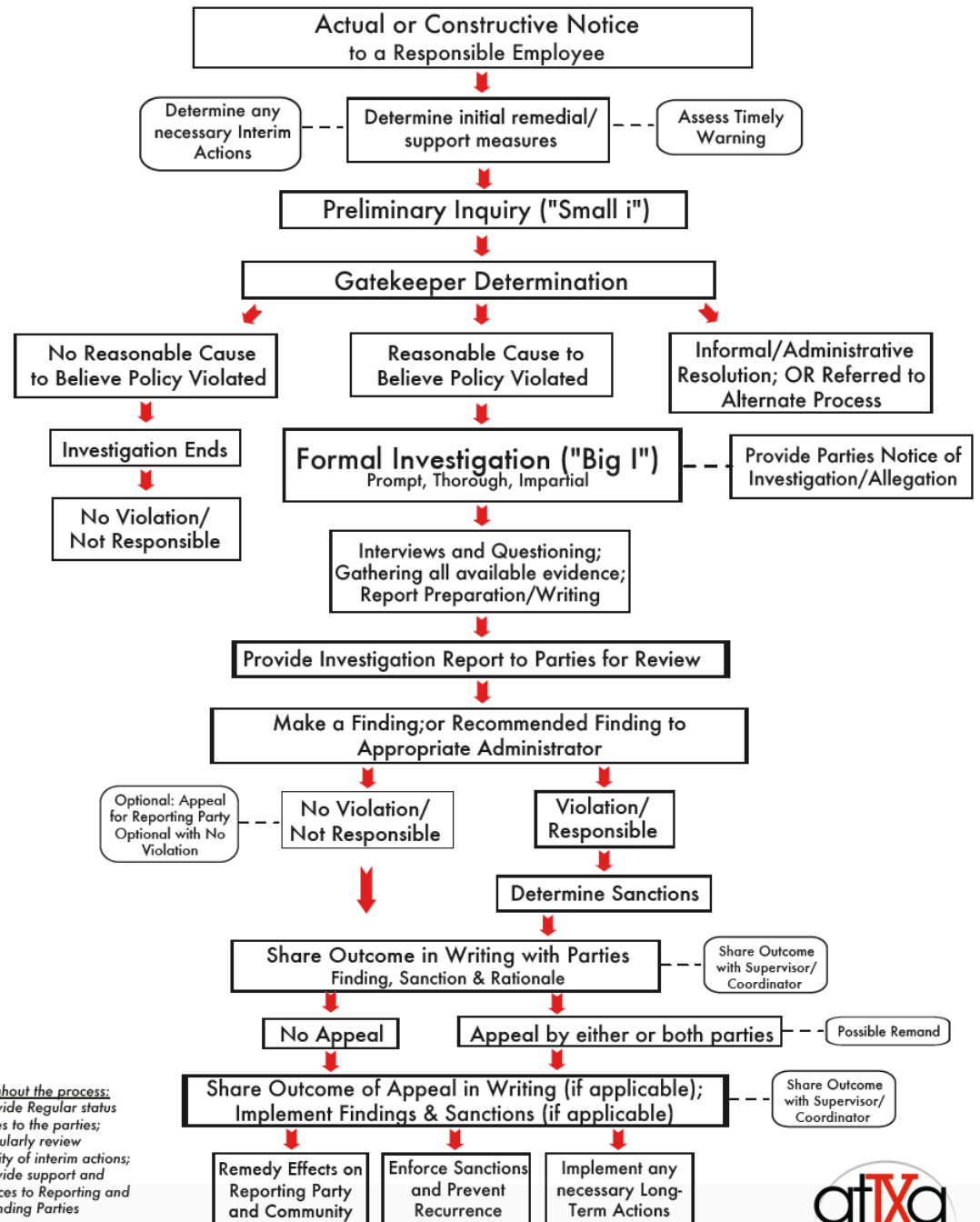
# 11 STEPS



1. Allegation (complaint) or notice.
2. Preliminary inquiry (initial strategy).
3. Gatekeeper determination (earliest point).
4. Notice of investigation and/or allegation (earliest point).
5. Strategize investigation.
6. Formal comprehensive investigation.
7. Witness interviews.
8. Evidence gathering.
9. Analysis.
10. Finding.
11. Appeal.

# CIVIL RIGHTS INVESTIGATION MODEL

## ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



*Throughout the process:*  
 1: Provide Regular status updates to the parties;  
 2: Regularly review necessity of interim actions;  
 3: Provide support and resources to Reporting and Responding Parties



# ROLE OF A TITLE IX COORDINATOR IN INVESTIGATIONS



- What is the proper role of the Title IX coordinator in relation to the investigation and resolution process?
  - Investigator?
  - Gatekeeper?
  - Strategizing the investigation?
  - Ensuring timeline compliance?
  - Writing the investigation report?
  - Making a finding?
  - Determining sanctions?
  - Reviewing the investigation?
  - Appellate officer?
  - Training the investigators, hearing officers, and appellate officers?



- The Gatekeeper of the process determines the extent and development of the investigation, moving it from preliminary to full investigation and identifying timing for charges and strategy development.
  - Equity, due process, essential fairness, and equal dignity all demand substantiating evidence before dragging a reporting party through the entire process.
  - A charge (complaint) must be supported by reasonable cause to permit its **full** pursuit.

# MAJOR GATEKEEPING GUIDEPOSTS



Notice.

Preliminary investigation.

Comprehensive investigation.

Charge/allegation.

Finding.

Sanction.

Appeal.

# UNDERSTANDING EVIDENCE



- You may assign weight to evidence based on:
  - Documentary evidence (e.g., supportive writings or documents).
  - Electronic evidence (e.g., photos, text messages, and videos).
  - Real evidence (i.e., physical object).
  - Direct or testimonial evidence (e.g., personal observation or experience).
  - Circumstantial evidence (i.e., not eyewitness, but compelling).
  - Hearsay evidence (e.g., statement made outside the hearing, but presented as important information).
  - Character evidence (generally of little value or relevance).
  - Impact statements (typically only relevant in sanctioning).

# UNDERSTANDING EVIDENCE



- Formal rules of evidence do not apply. If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered.
  - Evidence is any kind of information presented with the intent to prove what took place.
  - Certain types of evidence may be relevant to the credibility of the witness, but not to the charges.
- Consider if drugs or alcohol played a role.
  - If so, do you know what you need to know about the role of alcohol on behavior? Timing? Incapacitation?
  - Look for evidence of prior planning.

# INVESTIGATION, INTERVIEWS, EVIDENCE GATHERING, HEARING



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

# INVESTIGATION: STRATEGY IS KEY



- The investigation team, in consultation with the Deputy Coordinator, and/or the Title IX Coordinator, strategizes the entire investigation. This includes:
  - What policy elements may have been violated?
  - What are the undisputed facts? Which ones are significant to the investigation?
  - What are the facts in dispute? Which ones are significant to the investigation?
  - Who do you need to interview?
  - What should be the order of the interviews?
  - Timeline.

# HOW IMPORTANT IS THE CREATION OF AN INVESTIGATION REPORT?



- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses.
  - Results of interviews with experts.
  - Summary of other information collected, (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of text, email and social networking messages, etc.).
- Provides conclusions and findings.

- “To assess credibility is to assess the extent to which you can rely on a witness testimony to be accurate and helpful in your understanding of the case.”
  - Credible is not synonymous with truthful.
  - Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading.
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies.
- Pay attention to the following factors...



# FACTORS TO CONSIDER FOR CREDIBILITY



- Demeanor.
  - Nonverbal language.
  - Demeanor issues should be your cue to ask more questions.
- Non-cooperation.
  - Look for short, abrupt answers or refusal to answer.
- Logic/consistency.
  - E.g.: “I’m struggling to develop a timeline based on your statements. Could you clarify...?”
- Corroborating evidence.

# MAKING CREDIBILITY DETERMINATIONS



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

# MAKING A FINDING



- Review the School/district policies that apply.
- **Parse the policy.**
  - Provide specific findings for each violation and for each responding party.
- Review the evidence and what it shows (relevance).
- Assess the credibility of evidence and witness statements as factual, opinion-based, or circumstantial.
- Make a determination as to whether a policy violation is more likely than not.
- Cite concretely the reasons for this conclusion.
- Move to sanctioning.

# SANCTIONING IN SEXUAL MISCONDUCT CASES (CONT.)



- **Title IX and case law require:**
  - Bring an end to the discriminatory conduct (Stop).
  - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (Prevent).
  - Restore the reporting party as best you can to their pre-deprivation status (Remedy).
- Real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

# DUE PROCESS

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- What is Due Process?
- Due Process in Procedure
- Due Process in Decision

# WHAT IS DUE PROCESS?



- The set of rights-based protections that accompany disciplinary action by a School.
- Dictated by District and/or school policies and procedures.

# WHAT IS DUE PROCESS?



- Two overarching forms of due process:
  - **Due Process in Procedure:**
    - Consistent, thorough, and procedurally sound handling of allegations.
    - school/district substantially complied with its written policies and procedures.
    - Policies and procedures afford sufficient Due Process rights and protections.
  - **Due Process in Decision:**
    - Decision reached on the basis of the evidence presented.
    - Decision on finding and sanction appropriately impartial and fair.

# GOSS V. LOPEZ

## 419 U.S. 565 (1975)



- Nine high school students were suspended for 10 days for non-academic misconduct
- The court held that since K–12 education is a fundamental right, students were entitled to at least a modicum of “due process”
- Reiterating the 5th Circuit’s decision in *Dixon v. Alabama State College*, the USSC noted that the minimum due process is notice and an opportunity for a hearing



# GOSS V. LOPEZ

## 419 U.S. 565 (1975)



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



# OCR COMPLIANT PROCEDURES

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# LAWS, COURTS, AND REGULATIONS



- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and OCR
  - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
    - Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2001 Guidance)
    - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2011 DCL)
- **Federal Caselaw** – **Force of law** based on jurisdiction
  - Supreme Court – binding on entire country
  - Circuit Courts of Appeal – binding on Circuit
  - District Court – binding on District
- **State caselaw** – **Force of law**; binding only in that state based on court jurisdiction

# STAY ABOVE THE FLOOR



- Law, Caselaw and Federal Regulations set the floor
  - OCR Guidance typically elevates the floor
  - States can pass laws that exceed federal requirements (e.g.: NY’s “Enough is Enough” law)
- Regressing to the floor = doing the bare minimum
  - Will continue the cycle of inequity and unfairness
- Civil Rights issues demand more than bare minimum
- Industry standards already exceed the floor
  - Regression to the floor increases risk of lawsuit and negligence-based liability

# INDUSTRY STANDARDS



- The field has adopted numerous practices and created industry standards that exceed basic requirements
- Standards stem from Student Services/Affairs, HR, Legal Affairs, OCR Guidance, Courts, Law, Professional Associations
- ATIXA's policy and procedure model – 1P1P – encompasses industry standards
- ATIXA's publications and resources provide guidance where government does not

# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- Key Regulatory and Sub-Regulatory Guidance from OCR
  - 1997 Guidance → 2001 Revised Sexual Harassment Guidance.
  - 2011 Dear Colleague Letter (The "DCL").\*
  - Questions and Answers on Title IX and Sexual Violence (April 2014).\*
  - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide.
  - 2016 Guidance on Transgender Students.\*
  - 2017 Interim Guide: Q&A on Campus Sexual Violence.
- “Not Alone” – White House Task Force to Protect Students From Sexual Assault (April 2014) (disbanded).
- Also: The Clery Act, VAWA 2013: Section 304.
- \*Since rescinded

# OVERVIEW OF OCR SEPT. 2017 ACTION



- Sept. 22, 2017 Dear Colleague Letter
  - Withdrew the April 4, 2011 Dear Colleague Letter
  - Withdrew Q&A on Title IX and Sexual Violence (April 29, 2014)
  - Rulemaking: Called for Notice and Comment on “Title IX responsibilities arising from complaints of sexual misconduct”
  - Provided “Interim Guide” on Campus Sexual Misconduct
- OCR’s stated reasons for withdrawing 2011 DCL/2014 Q&A
  - Released without providing for notice and comment (APA)
  - “Created a system that lacked basic elements of due process”
  - “Created a system that...failed to ensure fundamental fairness”

# OVERVIEW OF PROPOSED REGULATIONS



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



# INTERVENING VARIABLES



- Congress and a newly-installed Democratic House and Committees
- Title IX has become a political football
- Lawsuits & injunctions by:
  - Parties
  - States: Attorneys General
  - Possible enforcement injunctions by Federal judges
- Conflicts between proposed regulations and state laws (e.g.: CA and NY)
- Campus/school protests
- Public perception

# ULTRA VIRES ACTION BY OCR?



- OCR can only enforce within the statutory ambit of Title IX
- Any action exceeding this authority is called *ultra vires*
- Many observers concerned that due process elements in the proposed regulations have no legal basis in Title IX
  - Sex-equity based law – not a due process-based law
  - What is source of OCR authority to require a formal hearing, cross examination by advisors, etc.?
  - Shouldn't due process be up to Congress and the courts?
  - Many due process elements are a best practice, but likely will be up to courts to decide if properly within OCR's regulatory purview
  - Obama's OCR also arguably exceeded Title IX's scope, but only in sub-regulatory guidance, not in regulations.

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



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

# DUE PROCESS CASELAW



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

# DELIBERATE INDIFFERENCE STANDARD



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

# CIVIL LAW SUITS V. OCR ENFORCEMENT & TITLE IX (PRE-2019)



## Lawsuit

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

## Administrative Action

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

# “NOT DELIBERATELY INDIFFERENT”



- Safe Harbors in the Proposed 2019 Regulations:
  - If the school follows procedures (including implementing any appropriate remedy as required), then not deliberately indifferent.
  - If reports by multiple complainants of conduct by the same respondent, Title IX Coordinator must file a formal complaint. If the school follows procedures (including implementing any appropriate remedy as required), not deliberately indifferent.
  - For IHEs, if no formal complaint and school offers and implements supportive measures designed to effectively restore or preserve the reporting party’s access, not deliberately indifferent. Must inform reporting party of right to file formal complaint later.
  - No deliberate indifference merely because OCR would come to different determination based on the evidence. Biases process?

# UNIFYING STANDARDS?



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



# NOTICE, JURISDICTION, & DELIBERATE INDIFFERENCE

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# NOTICE TO THE SCHOOL/DISTRICT



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

# RESPONSIBLE EMPLOYEE SHIFTING?



- Currently, a **responsible employee** includes any employee who:
  - Has the authority to take action to redress the harassment; or
  - Has the duty to report harassment or other types of misconduct to appropriate officials; or
  - Someone a student could reasonably believe has this authority or responsibility;

# RESPONSIBLE EMPLOYEES?

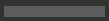


- Proposed regulations shift “actual notice” to:
  - Anyone who has the authority to take action to redress the harassment
  - All pre-K-12 teachers when conduct is student-on-student
- This is ONLY the standard for when OCR would deem a school to be on notice; it is the floor.
- ATIXA has not changed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

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

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

# DEFINITIONS



# DEFINITIONS: SEXUAL HARASSMENT



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



# DEFINITIONS: SEXUAL HARASSMENT



- ATIXA model definitions

- *Quid pro quo* sexual harassment

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature by a person having power or authority over another when submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating, evaluating, or providing a benefit to an individual's educational or employment development or performance.

- *Hostile environment* sexual harassment

Unwelcome sexual, sex-based and/or gender-based verbal, written, online and/or physical conduct that is severe, or persistent or pervasive, and objectively offensive, such that it unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the school/district's education or employment programs.

# DEFINITIONS: SEXUAL HARASSMENT



- ATIXA model definitions (cont.)
  - *Retaliatory* sexual harassment  
When adverse action required by the definition of retaliation takes the form of harassment, the conduct can be both sexual harassment and retaliation. It is also possible that retaliatory actions can take the form of hostile environment harassment.
- Proposed regulations written around a recipient's obligation to respond to sexual harassment
  - Conflate "sexual harassment" with "hostile environment"
- Neglect element of substantial harm within QpQ harassment
- "Unwelcome conduct" lower standard than "hostile environment"

# DEFINITIONS: SEXUAL HARASSMENT



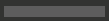
- Confusion regarding “hostile environment” remains
  - Proposed regulations adopt problematic *Davis* definition:
    - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive...
  - Vulnerable to interpretation that conduct must be pervasive **and** severe
  - Neglects the difference between persistent and pervasive
- Industry standard aligns with Title VII caselaw & provides clearer standard
  - Unwelcome *sexual* conduct, *or conduct* on the basis of sex, that is so severe *or* pervasive (*or* persistent) **and** objectively offensive...

# DEFINITIONS: NOTICE



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

# DUE PROCESS



# DUE PROCESS OVERVIEW



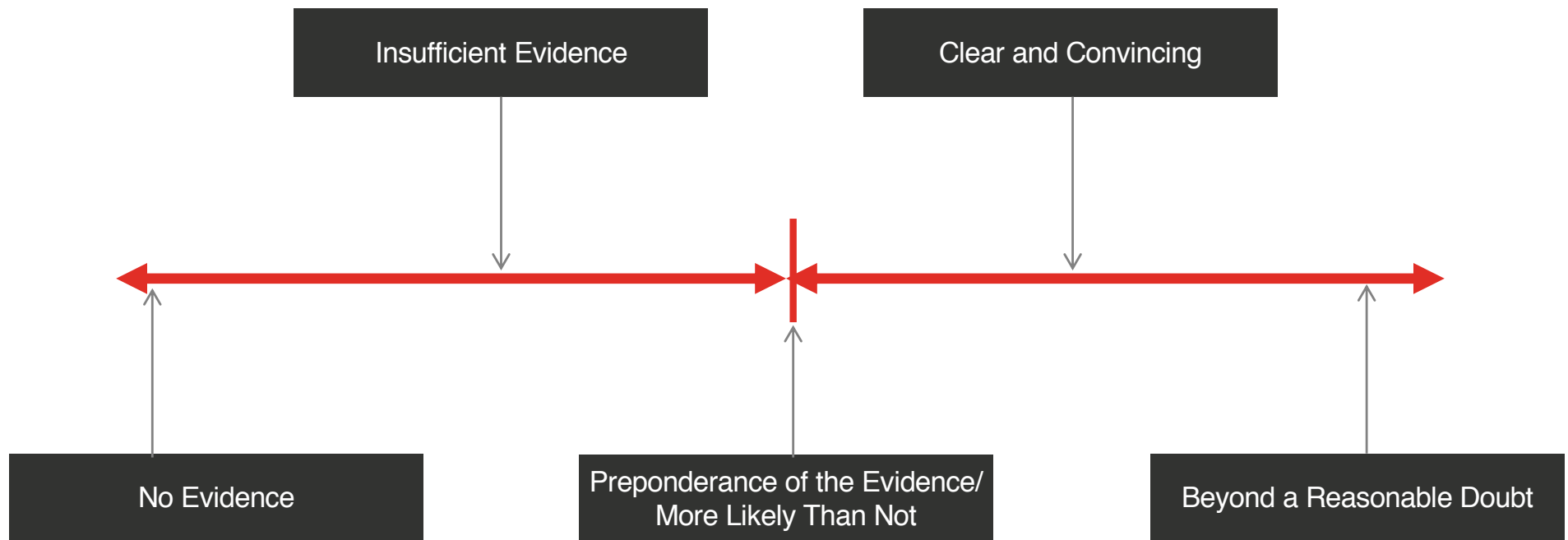
- Proposed regulations place heavy emphasis on due process protections for the responding party
- New standard of proof mandates
- Notice at various investigation stages
- Collection and production of evidence for review
- Mandate for determination and sanction process
- Live hearings with cross-examination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

# STANDARD OF PROOF



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

## EVIDENTIARY STANDARDS





# PROMPT



- Proposed regulations specify “prompt timeframes” written into grievance procedures
- Temporary delays only allowable for “good cause” and with written notice of the delay to parties
- OCR does not appear to contemplate reasonable delays at the earliest points of an investigation
- Responding party may not yet know of investigation or allegations
  - written notice of delay may be first indication

# WRITTEN, DETAILED NOTICE



- Proposed regulations require several written, detailed notices to the parties
  - Any reasonable delay for good cause
  - Upon receipt of a formal complaint
    - Sufficient details – identity of parties, alleged violations, date, location
    - Sufficient time to prepare a response
  - Informal process requirements, if applicable
  - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare
  - Upon determination of responsibility, including sanctions
- Notice requirements may affect industry standard investigative practices
- *Doe v. Timothy P. White, et. al., (2018)*

# INFORMAL RESOLUTION OPTIONS



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

# SUPPORTIVE MEASURES



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

# BURDEN OF PROOF ON FUNDING RECIPIENT TO GATHER EVIDENCE



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

# “PRESUMPTION OF INNOCENCE”



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

# CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS



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

# INVESTIGATION AND RESOLUTION MODELS



- Treatment of reporting/responding parties may constitute discrimination
- The end of the single investigator model – live hearing required for all postsecondary resolution proceedings
- Must allow advisor to be present at all meetings, interviews, hearings
- If no advisor, school must provide one
- Statutory authority exceeded with procedural mandates?



# PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE



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

# PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT



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

# LIVE HEARING



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

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

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

# IMPACT ON EMPLOYEES



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

# OTHER ELEMENTS IN THE PROPOSED REGS



- Remedial action required by OCR for noncompliance with Title IX will not include money damages
  - OCR clarifies that reimbursements or compensation do not fall within the meaning of this provision
- Schools/districts may presume religious exemption
  - If under OCR investigation, may then be required to submit exemption justification in writing
  - Allows schools/districts to avoid public assertion of exemption from certain civil rights protections
  - Problematic for students/employees who deserve to know if certain protections are not honored at their school/district

# OTHER ELEMENTS IN THE PROPOSED REGS



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



# OPERATING OUTSIDE THE TIX FRAMEWORK



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

QUESTIONS?



# CONTACT INFORMATION

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