



# TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION LEVEL ONE COURSE

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# COORDINATOR TRAINING AGENDA



## Day 1

**I** Overview of Title IX Coordinator Responsibilities

**II** History & Overview of Title IX

**III** Extensive Review of Title IX Legal Standards and Case Law

**IV** OCR & Title IX

**V** Major OCR Guidance

**A.** 2001 OCR Guidance

**B.** April 4th, 2011 Dear Colleague Letter

**C.** 2014 Q&A on Title IX and Sexual Violence

**D.** 2015 DCL, Letter to Coordinators and Resource Guide

**E.** 2017 Interim Guide: Q&A on Campus Sexual Violence

**VI** Notice, Reporting, Responsible Employees, Confidentiality

**VII** Reluctance to Report



# THE TITLE IX COORDINATOR

## Overview of the Responsibilities

- Description
- Roles
- Discussion



# THE TITLE IX COORDINATOR



- The 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 institutions 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, institutions 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 institution that presented a number of difficulties.

# HISTORY & OVERVIEW

- The Road to Title IX
- Text of the Law
- Where We are Today



# 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.

# TITLE IX



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

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

- Title IX of the Education Amendments of 1972 is a federal law intended to end sex discrimination in **all areas of education**.
  - Applies to **non-discrimination based on sex/gender** to all recipients of federal funds, both public and private institutions
  - Applies to issues of **program equity**, such as in athletics, and also to **sexual harassment and sexual assault**.
- In addition to the implementing regulations, the guidelines for compliance with Title IX are provided by the U.S. Department of Education, Office of Civil Rights:  
*[www2.ed.gov/about/offices/list/ocr/docs/shguide.html](http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html)*

# 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.

# NORTH HAVEN BOARD OF EDUCATION V. BELL



- **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.”**

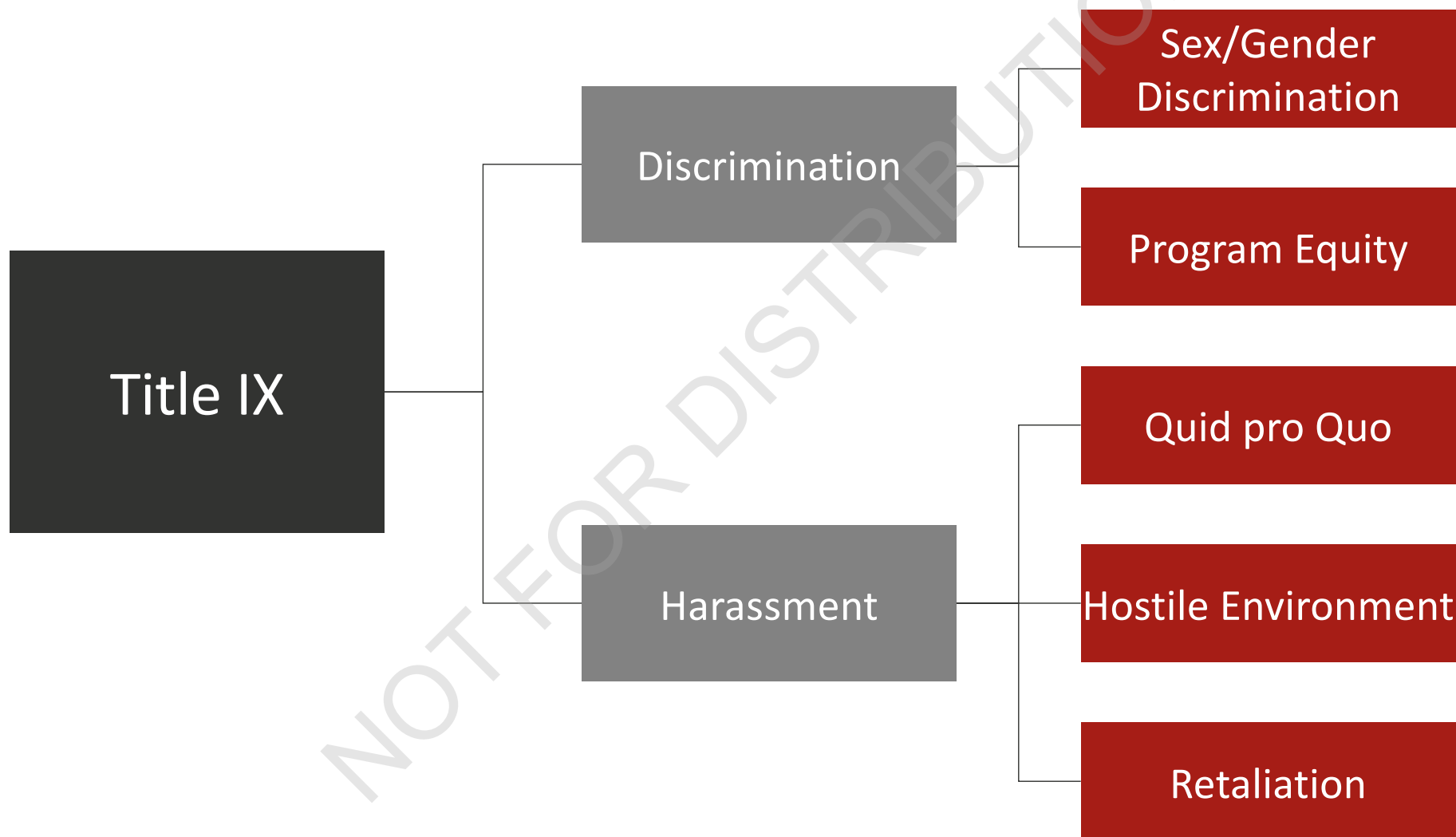


# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- 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.

# TITLE IX



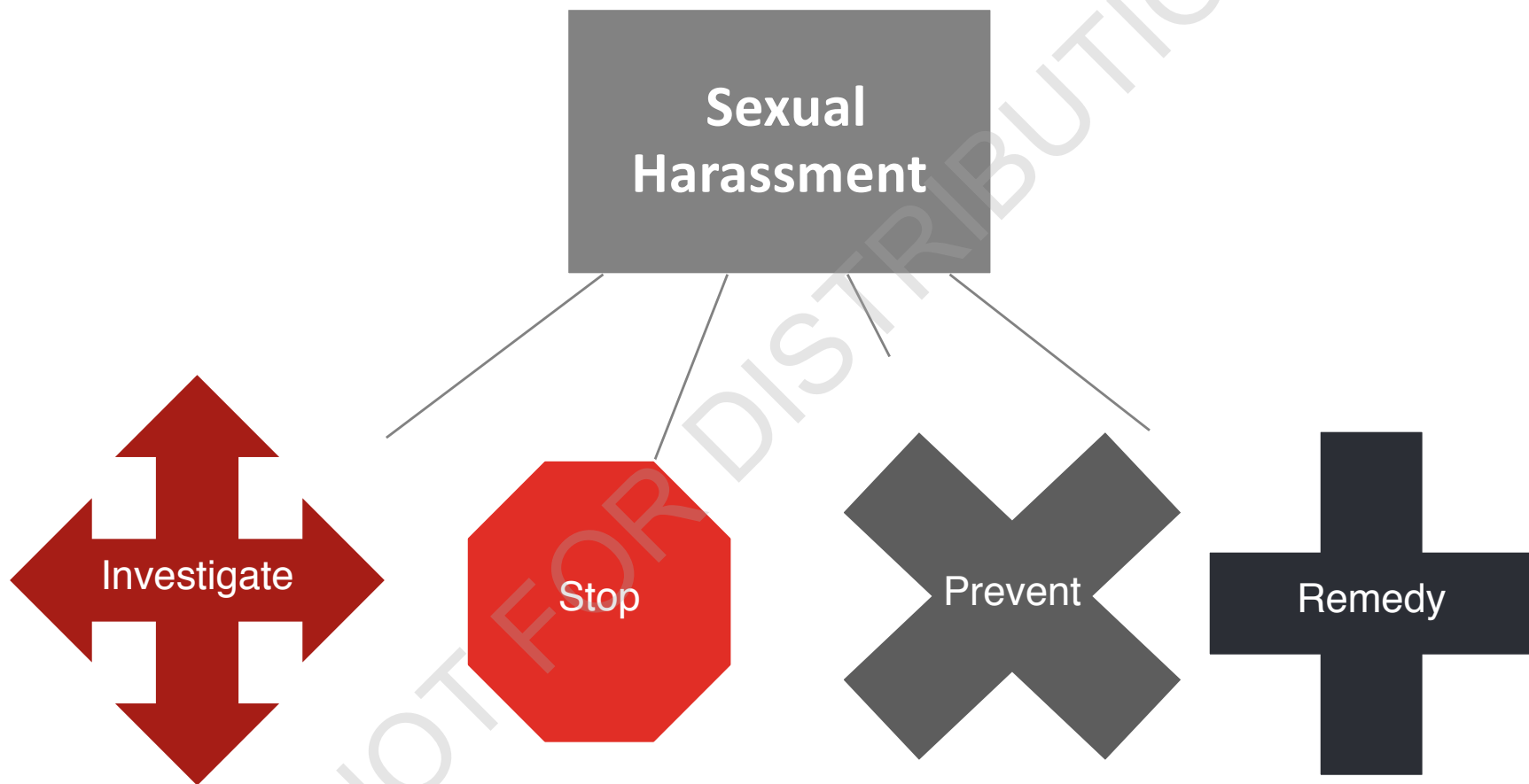
# TITLE IX ESSENTIAL COMPLIANCE ELEMENTS



- Once a “responsible employee” has either actual or constructive notice of sexual harassment/ sexual misconduct, the school must:
  - Take immediate and appropriate steps to **investigate** what occurred.
    - The obligation to investigate is absolute, even if just a preliminary inquiry (see **Davis**).
  - Take prompt and effective action to:
    - **Stop** the harassment;
    - **Prevent** the recurrence; and
    - **Remedy** the effects

**NOTE:** This is regardless of whether or not the victim makes a complaint or asks the school to take action.

# INSTITUTIONAL OBLIGATIONS UNDER TITLE IX



# THE IX COMMANDMENTS



Thorough	Reliable	Impartial	Investigation (prompt & fair – VAWA Sec. 304)
Prompt	Effective	Equitable	Process
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

# EQUITY DEFINED



- “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*).
- “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).



# EQUITY DEFINED

## EQUALITY VERSUS EQUITY



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



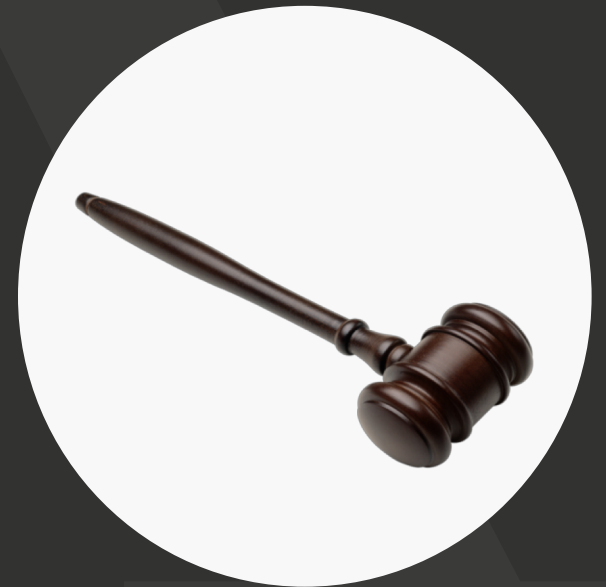
In the second image, individuals are given different supports to make it possible for them to have equal access to the game. They are being treated equitably.



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.

# SIGNIFICANT CASES

- *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).



# FRANKLIN V. GWINNETT PUBLIC SCHOOLS



- 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.

# FRANKLIN V. GWINNETT PUBLIC SCHOOLS



- 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?

# 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 institution must have had “actual notice” of harassment;
  2. The official must have authority to “institute corrective measures” to resolve the harassment problem; AND
  3. The official must have “failed to adequately respond” to the harassment and, in failing to respond, must have acted with “deliberate indifference.”

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



- 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 institution liable for damages as in the *Gebser* case:
  - The institution must have “actual notice” of the harassment; and the institution must have responded to the harassment with “deliberate indifference.” Additionally, court held:
    - Harassment must be “severe, pervasive, and objectively offensive,” and the indifference “systemic,” to the extent that the victim is deprived of educational opportunities or services.
    - Justice O’Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “clearly unreasonable in light of the known circumstances.”

# WHAT'S NEXT FOR TITLE IX LITIGATION?



- Title IX increasingly viewed as a viable cause of action.
- Due process-based claims
- Attorney involvement in the process.
- Impact of proposed regulations
- Increase in lawsuits by the accused.
- Hospitals and Title IX.
- Negligence-based claims.
- Breach of contract.
- Shifting view of what constitutes “notice.”
- Impact of VAWA 2013 – Section 304.
- 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 institution's policies?
  - At this point in the training, what is your biggest take-away?

# OCR & TITLE IX

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



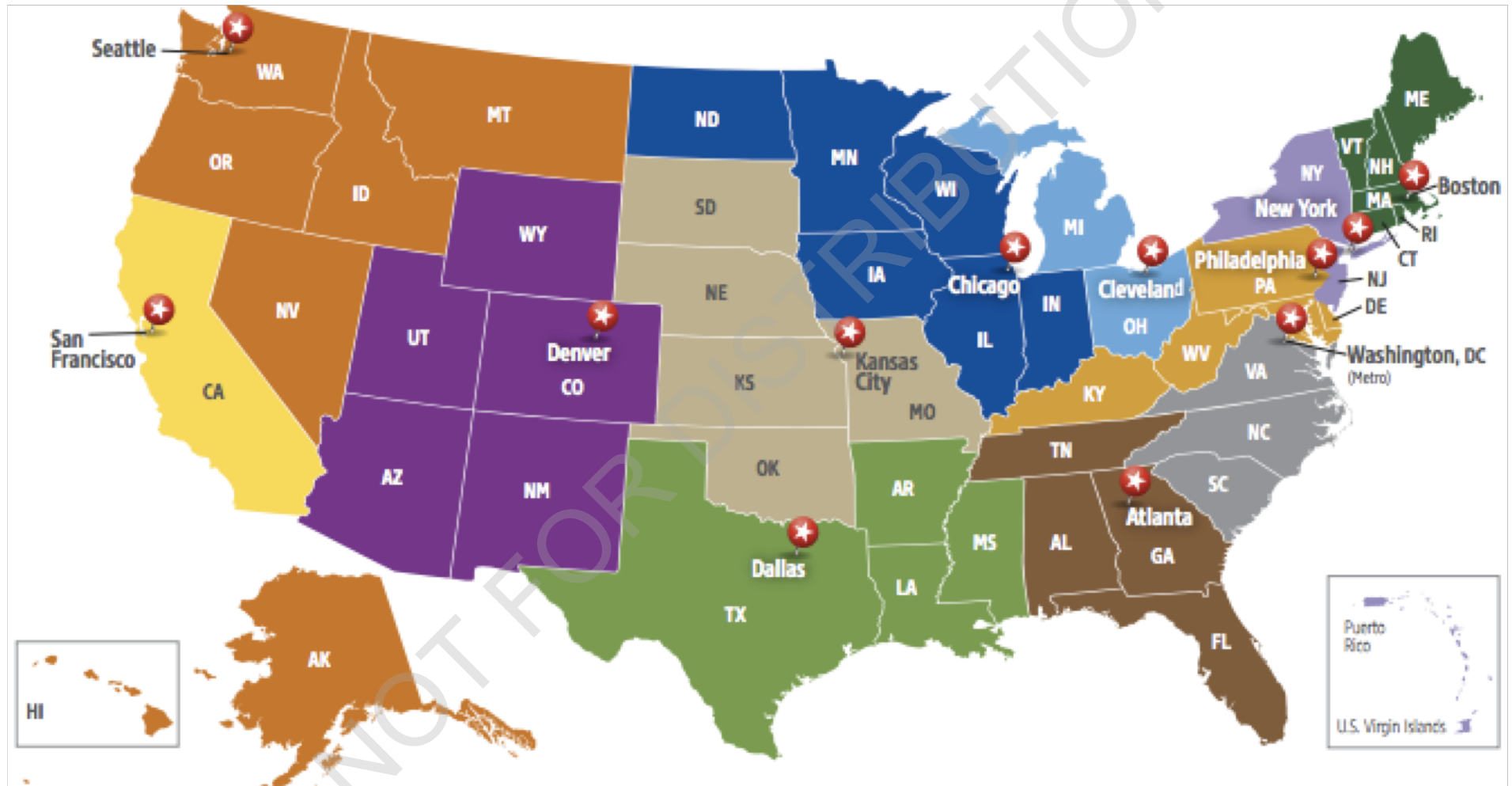
# ROLE OF OCR & TITLE IX



- 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**, institution 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 institutions, 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 institution.
  - 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 college president or chancellor.
- Data request – written request for documents and narrative responses to questions.
- Scheduling Interviews: telephone or in-person.
- On-site visit.



# OCR PROCESS ALTERNATIVES



- 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 institution and give a 90-day window to resolve voluntarily.
- OCR will monitor the agreement for compliance (typically 3+ years).

# RESOLUTION AGREEMENTS



- Must be:
  - Signed by a person with authority to bind the recipient;
  - Approved by the Chief Attorney or designee;
  - Approved by the Office Director or designee; and
  
- Must include:
  - Specific acts or steps the recipient will take to resolve compliance issues;
  - Dates for implementing each act or step;
  - Dates for submission of reports and documentation verifying implementation; and
  - A statement indicating OCR may initiate enforcement action or judicial proceedings, but OCR will give 60 days' notice to cure the alleged breach.

# 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

# ADDITIONAL RESOURCES ABOUT OCR



- About OCR:
  - <http://www.ed.gov/about/offices/list/ocr/index.html>
- Updated OCR Case Processing Manual (November 2018):
  - <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>
- Chronicle of Higher Education's Title IX Tracker
  - <http://projects.chronicle.com/titleix/>
  - Is not as up-to-date since April 2018 when OCR stopped publishing case information

# REMEDIES UNDER TITLE IX



- An individual may assert a Title IX claim against the institution by:
  - **Lawsuit**: Suing the institution 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).



# CIVIL LAW SUITS V. ADMINISTRATIVE ACTION



## 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.

\*Based on the Proposed Regs, these standards will likely align much more moving forward.

# DISCUSSION QUESTIONS



- In small groups, please discuss the following:
  - What questions do you have regarding OCR and its investigation and resolution processes?
  - What is the difference between a “302 Letter” Resolution Agreement and a “303 Letter” Resolution Agreement?
  - Discuss the interactions (if any) you or your institution have had with OCR.
  - Discuss the differences between a lawsuit and an OCR complaint.

# 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 institution, teachers, employees, students, and third parties.
- Prompt and effective action required upon receipt of notice of the harassment/discrimination.

# 2001 REVISED SEXUAL HARASSMENT GUIDANCE



- 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 institutional climate.
  - May determine outcome or institutional 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**
  - Institutions must ensure Coordinators are well-trained and up-to-date on all responsibilities and all applicable laws, policies, guidance, regulations, institutional 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 institutions.
- Topics addressed:
  - Scope of Title IX.
  - Coordinator's responsibilities.
  - Administrative requirements and oversight.
    - E.g., Grievance procedure requirements and notice of nondiscrimination.

# TITLE IX RESOURCE GUIDE (2015)



- 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)*



# COORDINATOR TRAINING AGENDA



## Day 2

I Notice and Reporting

II Is It a IX Matter? — When Does Title IX Apply?

III VAWA 2013 — Section 304 & Clery

IV Case Study

V Consent Construct

VI Job Responsibilities of the Title IX Coordinator

- A. Training Oversight
  - i. Training School/Campus Constituencies
  - ii. ATIXA Training Checklist
- B. Creator and Implementer of Appropriate Policy
  - i. Three Forms of Harassment

# NOTICE, REPORTING, RESPONSIBLE EMPLOYEES & CONFIDENTIALITY

- “Responsible Employee”
- When Do You Investigate?
- Examples of Actual and Constructive Notice
- Clery: Campus Security Authorities
- Additional Reporting Requirements
- Timely Warnings and Emergency Notifications

# RESPONSIBLE EMPLOYEE



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

**Institutions must ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.**

# RESPONSIBLE EMPLOYEE



- Proposed Regs shift Responsible Employee definition 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 received actual notice AND MUST investigate; it is the bare minimum requirement.
- ATIXA still recommends institutions require all employees to report harassment or discrimination
- ATIXA's recommendation that institutions use discretion to investigate a broader range of cases than is required.

# NOTICE TO THE INSTITUTION



- Proposed Regs would not require a Title IX investigation unless the institution receives actual notice through a “formal complaint”:
  - **“Actual Knowledge”** 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 institution receives notice in some other way?
    - Industry standards

# 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.

# ACTUAL NOTICE



- Individual files a Title IX complaint.
- Individual notifies the Title IX coordinator or other Responsible Employee.
  - In pre-K-12, this includes all teachers
- Individual reports to school/campus police or security official/SRO.

# THE CLERY ACT: CAMPUS SECURITY AUTHORITY



- Clery identifies a Campus Security Authority (CSA) as:
  - Campus police.
  - Non-police security staff responsible for monitoring campus property.
  - Individuals and offices designated by the campus security policies as those to whom crimes should be reported.
  - Officials of the institution with significant responsibility for student and campus activities.



# THE CLERY ACT: CAMPUS SECURITY AUTHORITY



- CSA Mandatory reporting:
  - All CSAs must report all alleged Clery-designated criminal incidents (primary and hate crimes) that are reported to them in their capacity as a CSA to chief campus CSA.
  - Does not include indirect notification: classroom discussions, overhearing something in the hallway, speeches (e.g.: TBTN), etc.
- CSA vs. Responsible Employee
  - “Responsible Employee” is a broader/more encompassing designation.
  - All CSAs are Responsible Employees, but not all Responsible Employees are CSAs.

# THE CLERY ACT: TIMELY WARNING



- In order to keep the campus community informed about safety and security issues on an ongoing basis, an institution must alert the campus community of certain crimes in a manner that is timely and will aid in the prevention of similar crimes. These are crimes that are:
  - Reported to campus security authorities or local police agencies; **and**
  - Are considered by the institution to represent a **serious or continuing threat** to students and employees.

# THE CLERY ACT: EMERGENCY NOTIFICATION



- Triggered by a broad range of potential threats.
  - Any significant emergency or dangerous situation.
  - Involving an immediate threat to the health or safety of students or employees on the campus.
  - Issued without delay once designated campus Clery authorities have confirmed the emergency.
- Includes both Clery and non-Clery incidents.
  - Clery-based example: campus shooting.
  - Non-Clery-based examples: outbreak of communicable disease or impending weather emergency.

# 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).

# CASE STUDY: REPORTING



- On April 27th, Amy Craft, a student knocks on her teacher's door. Gabriela Suarez, her teacher, opens the door and can immediately see that Amy is very upset and looks exhausted. Gabriela asks if everything is ok and Amy asks if she can close the door.
- Gabriela gets up, closes the door, sits back down and Amy blurts out, I think I was raped last weekend by another student, a friend of a friend named Todd.
- Stunned and very concerned, Gabriela asks what happened. What follows is Amy's account as provided to the Gabriela.

# CASE STUDY: REPORTING



- On Friday, April, 23rd I went to a party at a friend's house. I was doing a lot of drinking and dancing and getting to know people. I had at least four drinks in the first few hours I was there. Then, I met Todd.
- I remember that he came up to me on the dance floor, and started to dance with me. He was really good looking, and so was the other guy he was with, Jeff, whom I had met at a different party the week before.
- We danced and had a lot of fun, and I remember drinking some more and Todd getting me some Jell-O shots, which were really strong and nasty.

# CASE STUDY: REPORTING



- I wasn't feeling well and went into the bathroom, feeling like I might throw up. The bathroom was really crowded, and I went outside for some fresh air instead.
- I sat on the stoop, feeling nauseated. I went over to the bushes and got sick. Todd came over and helped me out.
- I remember him requesting a Lyft car, and throwing up again at some point after that, but nothing else.
- When I woke up the next day, I was in a room I did not know, I was only wearing a long t-shirt and my panties, and Todd was lying next to me wearing only his boxers.

# CASE STUDY: REPORTING



- I got up to dress and Todd woke up and asked where I was going. I told him I wanted to go home and asked him to tell me what happened.
- I remembered most of what he said about the party, but when he told me that we came to his room and had sex, I started to cry. I didn't remember any of it, and was afraid I might be pregnant.
- Todd assured me he wore a condom, and asked me to come back to bed. Instead, I finished getting dressed, and called my friend Sarah to come and pick me up.
- She suggested I talk with you. Please don't tell anyone...



# CASE STUDY: REPORTING



- What to do?
  - What are Gabriela's Title IX obligations?
  - For those at a college or university, what are Gabriela's Clery obligations?
  - What training should Gabriela receive?
- Now assume Amy told her athletic coach as well
  - What are your school's reporting protocols within athletics?
  - What training are you providing to your athletic administrators and coaches?
- What if Amy is taking a class from a school counselor and tells the counselor about it after class?
  - Does context matter?
- Let's discuss...

# 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 institution
  - 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.

# PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



- “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 institution 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 institution to investigate:
  - The institution 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
  - Institution will offer support and resources
  - Proceeding without a reporting party's participation has due process implications for the responding party

# REQUESTS FOR CONFIDENTIALITY



- The college or university 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 institution 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 institution 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 institution 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



- Institution 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 institution proceeds, it should notify the reporting party and utilize appropriate interim measures to protect the reporting party.

# 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 TO SAY AS A RESPONSIBLE EMPLOYEE



- 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 institution 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:
  - Institutional 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.
    - “Downstream effects”

# WHEN DOES TITLE IX APPLY?



## Jurisdiction

- Jurisdictional Limitations.
  - Geographic.
  - Temporal.
- When is a student a “student”?
  - Upon **application** to the institution?
  - Once **admitted** to the institution?
  - 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** institutional 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 institution 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 institution



# WHEN DOES TITLE IX APPLY?



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

# 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) university.
      - Must be **severe, pervasive (persistent), and objectively offensive**.
    - Subjectively offensive conduct cannot be disciplined at a public (or CA) university 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 institution 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?

# VAWA 2013 – SECTION 304 & CLERY

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# THE CLERY ACT & APPLICABILITY



- The Clery Act applies only to Post-Secondary Schools, Colleges, and Universities.
  - There is, however, is increasing traction within Congress to developing a similar mechanism within K-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are universal and instructive for all educational institutions, such as:
  - Policy best practices
  - Reporting
  - Transparency
  - Equitable resolution mechanisms
  - Due Process
  - Support for victims, etc.



# THE CLERY ACT



## Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)

- Crime reporting.
- Campus crime log.
- Campus Sexual Assault Victims Bill of Rights (1992).
- Primary crimes (7+3).
- Hate crimes (8 categories).
- Policy and procedure disclosures.
- Timely Warnings & Emergency Notifications.
- Sex offender information dissemination.
- Enforcement and fines.
- Violence Against Women Reauthorization Act of 2013 (VAWA) – Section 304.



# THE CLERY ACT: CAMPUS SECURITY AUTHORITY



The Clery Act requires “Campus Security Authorities” (CSAs) to report certain incidents to the campus’s Clery Coordinator

- Dean of Students.
- Campus Public Safety/Campus Police.
- Director of Athletics, all athletic coaches – including part-time and graduate assistants.
- Faculty Advisor to student groups.
- RAs.
- Greek Life personnel.
- Title IX Coordinator.
- Most District Officials.
- Director of Campus Health or Counseling Center.
- Victim Advocates or others performing advocacy-based services.
- Ombuds.
- SART members.
- Local law enforcement contracted with the institution to provide campus/school-safety related services.

# RECENT CLERY AMENDMENT: VAWA REAUTHORIZATION & SECTION 304



## VAWA Section 304:

- Section 304 significantly amended the Clery Act.
- Created **extensive** new policy, procedure, training, education, and prevention requirements for:
  - Sexual assault.
  - Stalking.
  - Dating violence.
  - Domestic violence.
- Prohibits retaliation.

The “Big 4”

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: SEXUAL ASSAULT



- **Sexual Assault:** Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.
  - **Rape:** the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.
  - **Fondling:** the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: SEXUAL ASSAULT



- **Sexual Assault:** *Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.*
  - Includes:
    - Rape
    - Fondling
    - Incest
    - Statutory Rape

- **Rape**

- *The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.*

- **Statutory Rape:**

- *Sexual intercourse with a person who is under the statutory age of consent.*

- **Fondling**

- *The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.*

- **Incest**

- *Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.*

# VAWA 2013 – SEC. 304: UCR DEFINITIONS: DATING VIOLENCE



- **Dating Violence**

- *Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.*



# VAWA 2013 – SEC. 304: UCR DEFINITIONS: DOMESTIC VIOLENCE



- **Domestic Violence**

- *By a current or former spouse or intimate partner of the victim;*
- *By a person with whom the victim shares a child in common;*
- *By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;*
- *By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred;*
- *By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.*

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: STALKING



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

# CLERY: VAWA 2013 SECTION 304



- **Clery Handbook** dramatically updated in June 2016, primarily to incorporate all the VAWA-based elements and additions.
  - <https://www2.ed.gov/admins/lead/safety/handbook.pdf>
- **Key Elements of the 2016 Updates:**
  - Designation of a Clery Coordinator.
  - **Significant** focus on providing detailed written information to victims regarding on- and off-campus resources, remedies, interim measures, and resolution mechanisms and options.
  - Detailed listing of policy and procedural elements required in the ASR.
  - Listing of key training elements and requirements.
  - Extensive description of required educational programs and campaigns targeting VAWA-based crimes.

# CONSENT CONSTRUCT

- Force
- Incapacity
- Consent
- Case Study

# CONSENT IS...



- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual activity.
- Cannot be obtained by use of:
  - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated.

# CONSENT



- Lack of protest or resistance  $\neq$  consent.
- Consent should not be assumed.
- Must be present through the entire incident; consent can be withdrawn at any time.
- The inability to give consent may be a result of, but not limited to, the following individuals:
  - Persons who are asleep or unconscious.
  - Persons who are incapacitated due to the influence of drugs, alcohol, or medication.
  - Persons who are unable to communicate consent due to a mental or physical condition, including minors.

# OVERVIEW OF THE 3 QUESTIONS



1. Was force used by the accused individual to obtain sexual access?
2. Was the reporting party incapacitated?
  - a. Did the accused individual know the responding party was incapacitated, or
  - b. Should the responding party have known that the alleged victim was incapacitated (e.g. by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the reporting party gave the accused individual permission for the specific sexual activity that took place?

# FORCE



- Was force used by the individual to obtain sexual access?
- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force.
- Types of force to consider:
  - Physical violence: hitting, restraint, pushing, kicking, etc.
  - Threats: anything that gets others to do something they wouldn't ordinarily have done absent the threat.



- Types of force to consider (cont.)
  - Intimidation: an implied threat that menaces and/or causes reasonable fear.
  - Coercion: the application of an unreasonable amount of pressure for sexual access.
    - Consider:
      - Frequency.
      - Intensity.
      - Duration.
      - Isolation.

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

- First, was the alleged victim incapacitated at the time of sex?
  - Could s/he make rational, reasonable decisions?
  - Could s/he appreciate the situation and address it consciously such that any consent was informed?
    - Knowing who, what, when, where, why, **and** how.
- Second, did the accused individual know of the incapacity (fact)?
- Or, should the accused individual have known from all the circumstances (reasonable person)?

# EVIDENCE OF INCAPACITY



- Evidence of incapacity will come from context clues, such as:
  - A witness for the accused may know how much the other party consumed.
  - Slurred speech.
  - Bloodshot eyes.
  - The smell of alcohol on the breath.
  - Shaky equilibrium.
  - Vomiting.
  - Outrageous or unusual behavior.
  - Unconsciousness (including blackout).

- Incapacity is dependent on many or all of the following factors:
  - Body weight, height, and size.
  - Tolerance for alcohol and other drugs.
  - Amount, pace, and type of alcohol or other drugs consumed.
  - Amount of food intake prior to consumption.
  - Voluntariness of consumption.
  - Vomiting.
  - Propensity for blacking-out (mentally or physically).
  - Genetics.

# CONSENT



- Question 3 is the consent question:
  - *What clear words or actions by the reporting party gave the accused individual permission for the specific sexual activity that took place?*
- Equity demands a “pure” consent-based policy, defining what consent is rather than defining it by what it is not (e.g., force, resistance, against someone’s will, unwanted, someone unable to consent, etc.).

# CONSENT IS...



- Informed (knowing).
- Voluntary (freely given).
- Active (not passive).
- Clear words or actions.
- Indicates permission to engage in mutually agreed-upon (sexual) activity.
- What does “affirmative consent” mean...?
- The “cup of tea” metaphor.
- Concept of Contemporaneous Validation

# CONSENT IS...



<http://rockstardinosaurpirateprincess.com/2015/03/02/consent-not-actually-that-complicated/>



# CONSENT: RULES TO REMEMBER



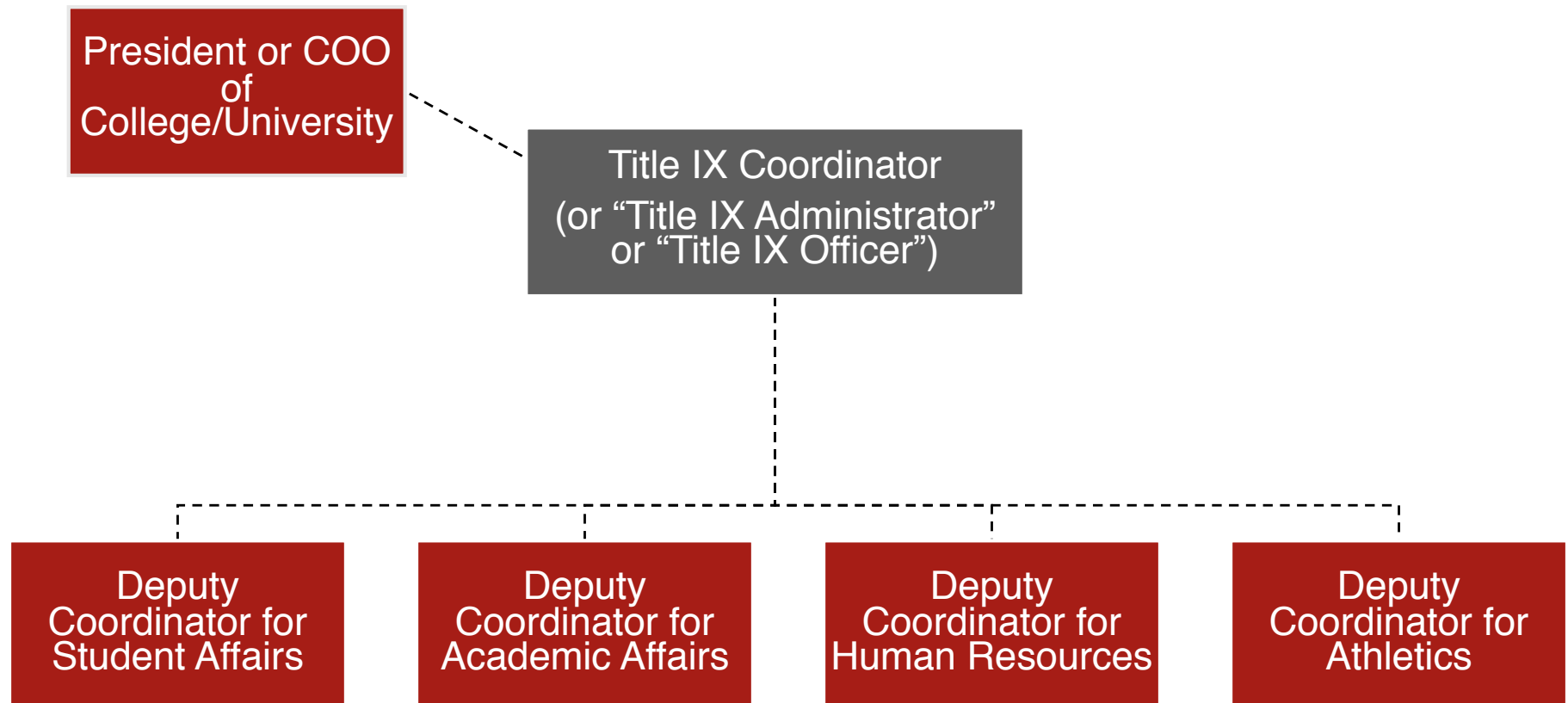
- “No” means “no,” but nothing also means “no.” Silence and passivity do not equal permission.
- To be valid, consent must be given prior to or contemporaneously with the sexual activity.
- Ongoing or continuous.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.

# THE TITLE IX COORDINATOR

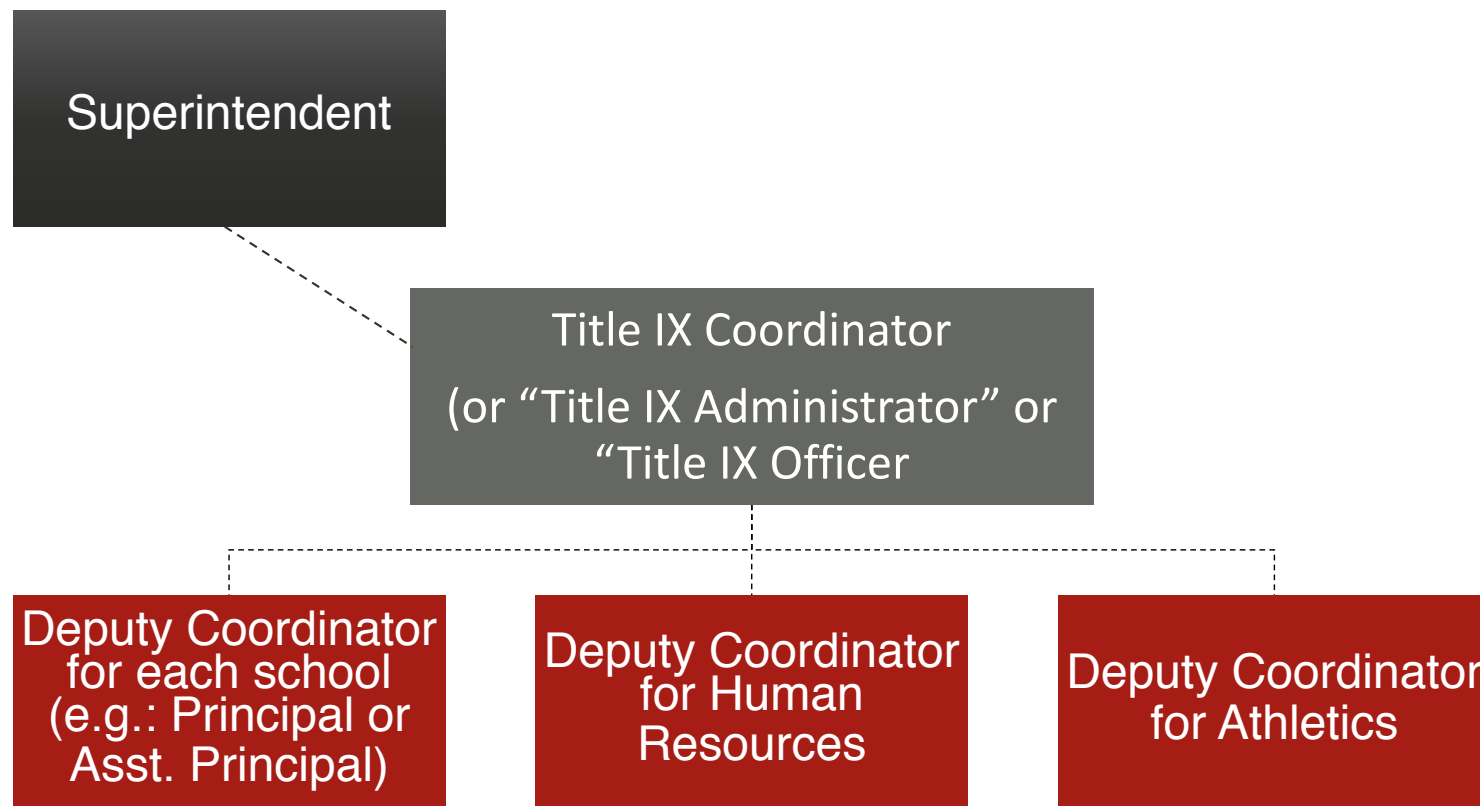
Detailed Review of the Responsibilities



# SAMPLE TITLE IX TEAM STRUCTURE FOR HIGHER EDUCATION



# SAMPLE TITLE IX TEAM STRUCTURE FOR K-12



# TITLE IX TEAM STRUCTURE: ADDITIONAL ISSUES



- Job responsibilities of Deputy Coordinators?
  - Tailor scope and roles based on school/campus culture.
  - Delegation.
- Multiple campuses/locations.
  - Campuses within a larger system (e.g. SUNY schools).
  - Extension campuses.
  - Online communities.
  - District-level (K-12 and Community Colleges).
- Co-Coordinator?
- Dual-enrollment oversight?
- Investigator oversight.
- How is your campus/district/school structured?

# 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.
  - Institutional policy.
  - Institutional procedures.
  - Reporting.
  - Working with reporting parties & responding parties.
  - Resources, support, and remedies for reporting parties.
  - Resources and support for responding parties
  - Consent in sexual interactions.
  - Rights of parties in complaint, investigation, hearing, and appeals.
  - Sanctions/repercussions.
  - Additional prevention and community education.

# SUPERVISOR OF TRAINING



- Trainee Populations:
  - Title IX Compliance Officers
    - E.g.: Coordinator and Deputies, Investigators, decision makers, hearing board members (including appeals), and others involved in processing, investigating, or resolving complaints.
  - First Responders
    - E.g.: RAs, health center employees, counselors, sexual assault response coordinators, academic advisors, School Resource Officers, and public safety.
  - All Faculty/Teachers & Staff; ATIXA Mandatory Reporters
    - ATIXA recommends making all faculty 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?
  - Orientation: summer orientation, orientation (student, faculty, and staff).
    - 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 institution'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.

# VAWA 2013 – SEC. 304 REQUIRED TRAINING



- VAWA 304 requires certain training elements:
  - Annual training for those involved in disciplinary proceedings (e.g., investigators, hearing officers, and appellate officers) on:
    - Domestic violence, dating violence, sexual assault, and stalking.
    - How to conduct “an **investigation** and a **hearing process** that protects the safety of victims and promotes accountability.”
    - Relevant evidence and how to analyze it.
    - Questioning techniques.
    - Institution’s procedures.
    - Avoiding actual or perceived conflicts of interest.
    - Appeals.

# TRAINING FOR STUDENTS & EMPLOYEES



- The school's resources for sexual assault/harassment victims including:
  - Title IX Administrator or Deputy Administrator.
  - Law enforcement/School Resource Officer — campus and local.
  - Student conduct/student discipline.
  - 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



- Review institutional 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.”
- Discussion of privacy and confidentiality.
- Discussion of rights of all parties.
- Provision of resource/reporting guide.

# SMALL GROUP DISCUSSION: TRAINING



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



# 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 institution 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)

# THREE TYPES OF SEXUAL HARASSMENT



1.  
Hostile  
Environment

2.  
*Quid Pro Quo*

3.  
Retaliatory  
Harassment

# UNDERSTANDING THE THREE FORMS OF SEXUAL HARASSMENT



## Sexual Harassment is:

Unwelcome conduct of a sexual nature or that is sex or gender-based

Based on power differentials  
(*quid pro quo*),

The creation of a *hostile environment*, or

*Retaliation*

# 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 university'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 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?

# HOSTILE ENVIRONMENT?



Hostile Environment?

# HOSTILE ENVIRONMENT?



Hostile Environment?

# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



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

- 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 member repeatedly referring to male students as “penises.”
- Repeatedly telling “dirty” jokes in class.
- Calling a colleague a “bitch” in a meeting.



# 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?
- A supervisor repeatedly mentioning how much they like a supervisee's outfits?

# ATIXA MODEL DEFINITIONS: 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.

# ATIXA MODEL DEFINITIONS: RETALIATION



- Retaliation is defined as:
  - *any adverse action taken against a person participating in a protected activity because of the person's participation in that protected activity.*
- Also includes retaliation against the victim by the accused or by the accused's friends or others who are sympathetic to the accused.
- Also can include retaliation directed toward third parties because of their participation in a grievance process or for supporting a grievant.

# ATIXA MODEL DEFINITIONS: RETALIATION



- Common definition of adverse action:
  - Significantly disadvantages or restricts the reporting party as to their status as a student or employee, or their ability to gain the benefits or opportunities of the program; or
  - Precluded from their discrimination claims; or
  - Reasonably acted or could act as a deterrent to further protected activity.
  - The U.S. Supreme Court and the federal courts have defined adverse action **very broadly**.

# COORDINATOR TRAINING AGENDA



## Day 3

**I** Creator and Implementer of Appropriate Policy (cont.)

**II** Contact for Government Inquiries

Prevention and Remediation

- III**
- A. Gender Discrimination
  - B. Sexual Harassment
  - C. Sexual Assault
  - D. Stalking
  - E. Intimate Partner/Relationship Violence
  - F. Bullying/Cyberbullying

**IV** Oversight of Prompt and Equitable Grievance Procedures

- A. Supervisor of Investigations

# 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.

# CONTACT FOR GOVERNMENT INQUIRIES

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# CONTACT FOR GOVERNMENT INQUIRIES



- Clearly and widely identify your Title IX Coordinator in public policies and procedures (so the government knows who to contact) — have single point of contact.
- Various government inquiries:
  - Department of Education's Office for Civil Rights (OCR).
    - Title IX, Section 504 disability complaints and Title II disability complaints, and Title VI (race, color, and national origin).
    - Generally initiated by OCR's Regional Offices.
      - Voluntary review.
      - Complaint-instigated investigation.



# CONTACT FOR GOVERNMENT INQUIRIES



- A person may make a complaint with OCR and file a lawsuit under Title IX, 504, and Title VI.
  - Government permission to sue is not required for Title IX complaints (as it is with Title VII)
- Equal Employment Opportunity Commission (EEOC) will investigate Title VII (employment) complaints.
  - EEOC does not conduct voluntary reviews.
  - A person filing a Title VII complaint must go through the administrative process (via EEOC or state Civil Rights Commission) prior to being provided a “right to sue” letter from the government.
  - OCR will typically refer employee-employee complaints to EEOC.

# CONTACT FOR GOVERNMENT INQUIRIES



- If a complaint is filed against the institution, or your school is selected for a voluntary compliance review, OCR will likely contact Title IX Coordinator or President.
  - Contact Legal Counsel if the complaint is filed or a voluntary compliance review is initiated.
  - Coordinator will be expected to produce all documents requested by OCR. Generally this is a substantial amount of information.
    - If you have them, you must produce them.
    - FERPA does not apply to such OCR requests – no redaction

# CONTACT FOR GOVERNMENT INQUIRIES



- Cooperation with OCR is key.
- Institution's timely response is essential.
- Expect substantial delays on the part of OCR (don't be alarmed by this).
- Often, the OCR investigation will take 6-24 months.
- OCR will likely want to interview individuals. Sometimes this is done via conference calls, sometimes in person.
  - The Title IX Coordinator will be (should be...) the point person on all of this.

# CONTACT FOR GOVERNMENT INQUIRIES



- Even if OCR is investigating based on a complaint, it will seek voluntary compliance on the part of the institution before making a finding.
- Voluntary Compliance Resolution (or Resolution Agreements) are really not voluntary on the part of the institution; they are an opportunity for the institution to come into compliance before a finding is made.
- Generally compliance agreements require between three and five years of monitoring by and documentation to OCR.

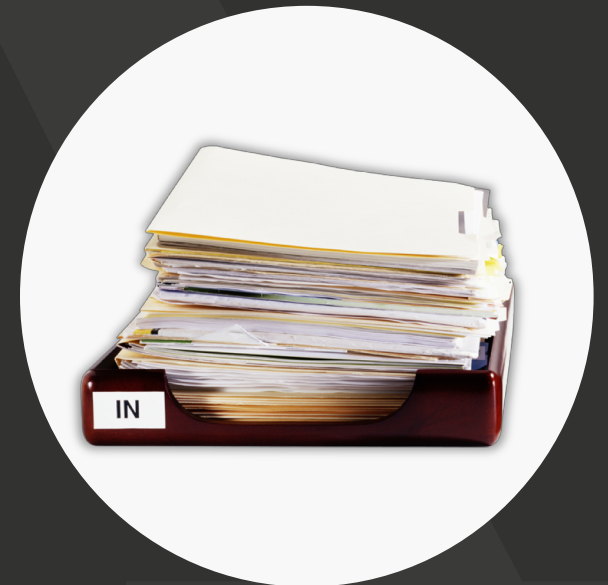
# CONTACT FOR GOVERNMENT INQUIRIES



- The Title IX Coordinator is responsible for the implementation and oversight of all compliance elements in the voluntary resolution agreement.
- It's always a good idea to review recent voluntary resolution agreements sent to other institutions.
- However, recognize that while there may be similarities, each regional office will have unique priorities for compliance.

# 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 institution may designate multiple portals for receipt of information (e.g.: Deputy Coordinators).
    - All responsible employees are expected to report notice and complaints to the Title IX Coordinator.
    - Designation of deputies is particularly important in each school in K-12

# POINT PERSON FOR COMPLAINTS



- Institutions may also identify others, such as deans, assistant principals, teachers, supervisors, the athletic director, and deputy coordinators, 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 awareness 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 institution is promptly engaging in:
  - Initiation of the preliminary inquiry.
  - Prompt response to stop the harassment/discrimination.
  - Immediate support for the reporting party.
  - Action to reasonably prevent the recurrence.
  - Necessary support also provided to the responding party
- The Title IX Coordinator must **coordinate** all these steps, often across administrative processes and institutional silos.
- Importance of a centralized database.

# POINT PERSON FOR COMPLAINTS



- Law Enforcement Information Sharing:
  - The Title IX Coordinator should establish a **reporting and information-sharing structure** with school/campus law enforcement.
  - All campus law enforcement officers and School Resource Officers (whether sworn or public safety/security) are considered “responsible employees” and have an obligation to report to the Title IX Coordinator.
  - Institutions with sworn law enforcement officers may need to negotiate timing and information-sharing based on the law enforcement’s role with criminal investigations and state laws.

# PREVENTION AND REMEDIATION

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- Gender Discrimination
- Sexual Harassment
- Sexual Assault
- Stalking
- Intimate Partner/Relationship Violence
- Bullying/Cyberbullying

# PREVENTION AND REMEDIATION OF GENDER DISCRIMINATION



- Prohibition of:
  - Sexual misconduct.
  - Gender discrimination.
  - Sexual harassment.
  - Retaliation.
  - Intimate partner/relationship violence.
  - Stalking.
- Applies to other behaviors when gender-based.
- Obligation to recognize and respond consistent with Title IX.

# PREVENTION AND REMEDIATION OF GENDER DISCRIMINATION



- Equity in programs and operations.
  - Access and admissions.
  - Academic programs.
  - Recruitment, promotion, and hiring.
  - Compensation and benefits.
  - Discipline and discharge.
  - Athletics (more on this later).
    - Including, intercollegiate, interscholastic, intramural, and sports clubs.
  - All student organizations and activities.
    - Fraternities and sororities are exempted from membership equity.

# PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT



- Ensure appropriate sexual harassment language in institutional policy.
- Remediation may include:
  - Mediation (not for physical harassment/assault);
  - Educational Programs
  - Policy revision;
  - Training
  - Course or work adjustments
  - In addition to remedies for other forms of sexual misconduct.

# PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT



- Training and prevention efforts are increasingly expected and needed to prevent and remedy.
- Title IX Coordinator should oversee and assure school/district/system prevention efforts (similar to training oversight)
  - Design of prevention strategy.
  - Funding of prevention strategy.
  - Implementation of prevention strategy.
  - Assessment of learning outcomes.
  - Assessment of behavior change.

# PREVENTION AND REMEDIATION OF STALKING



- 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 a fixation without menacing or harmful intent, and which is often a steady state, whereas stalking often becomes more intrusive over time.
- We distinguish the ATIXA model definition of stalking (as we do with Domestic Violence/Dating Violence) from the VAWA definitions, which do not reflect best practices, and are used only for the reporting of crime statistics.



# PREVENTION AND REMEDIATION OF STALKING



- 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.
- Gender-based stalking is a form of sex discrimination.
- Increasingly involves technology.
- Definition and prohibition should be reflected in policy.
- Response consistent with Title IX requirements.
- Increase in cases of students on the Autism Spectrum.

# PREVENTION AND REMEDIATION OF INTIMATE PARTNER AND RELATIONSHIP VIOLENCE



- **Intimate Partner Violence:**
  - *Violence between those in an intimate relationship to each other.*
- Other terms include relationship violence, interpersonal violence, domestic violence, dating violence.
- IPV almost always involves another code violation (e.g., physical abuse of another).
- If based on gender/sex, it would fall within Title IX.

# PREVENTION AND REMEDIATION OF INTIMATE PARTNER AND RELATIONSHIP VIOLENCE



- Ensure remedies consistent with Title IX.
  - Consider no-contact order implications.
  - Trespassing someone from campus or school.
  - Consider importance of advocacy.
  - Also use community/off-site resources.
- Recognize complexities before incident.
- VAWA Sec. 304 specifically targets and highlights issues of “domestic violence” and “dating violence.”
- Caution regarding PPTVW analysis (see ATIXA’s 2015 Whitepaper)

# VAWA 2013 – SEC. 304: PREVENTION PROGRAM REQUIREMENTS



- The institution's prevention programming (both for incoming students/employees and ongoing campaigns) must include:
  - The applicable jurisdiction's “definition of consent in reference to sexual activity.”
  - “A statement that the institution...prohibits the crimes of...”
    - Dating violence, Domestic Violence, Sexual assault, Stalking.
  - Definitions of consent, dating violence, domestic violence, sexual assault, and stalking “in the applicable jurisdiction.”
  - “A description of safe and positive options for bystander intervention.”

# CASE STUDY: INTIMATE PARTNER VIOLENCE



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

# CASE STUDY: INTIMATE PARTNER VIOLENCE



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

# CASE STUDY: INTIMATE PARTNER VIOLENCE



- 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.

# CASE STUDY: INTIMATE PARTNER VIOLENCE



- What are the school's next steps?
- Is this a Title IX issue?
- What special considerations should apply in this case?
- How should you proceed?
- How do you train employees on Intimate Partner Violence?



# PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING



- 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, gender**, 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.
  - Does it make the bullying more pervasive or persistent?
- Harassment, hazing, and stalking are often 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.

# OVERSIGHT OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES

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

# OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



- Prompt:
  - Institutions are required to make a “good faith effort” to resolve allegations promptly
    - There is not an exception for summer break, but possible for winter or spring breaks.
    - A forensic collection of evidence by law enforcement may warrant a reasonable, temporary delay in the institution’s investigation (we recommend 1-2 weeks)
    - Pending criminal or civil actions are not reasons for lengthy delays.
      - 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 institution’s policy.
    - (Policy wording: 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 swiftly secure necessary remedies.
  - Document all delays and reasoning therefore.
    - E.g.: unresponsive or uncooperative parties, criminal investigation, holidays etc.
    - Communicate regularly with the parties

# PROMPT & EQUITABLE PROCEDURES: CLEAR TIMEFRAMES



- Timeframe for each stage of process, and process for extensions.
- Parties are entitled to periodic status updates
- 60 days to resolution is a good guide; varies based on situation.
- Notification of outcomes to parties permitted by FERPA, and required by Clery (outcome and sanctions).
  - Title IX rules in conflict with FERPA.
  - IN WRITING!
- Entitled to status updates on appeals, too, regardless of which party appeals.

# EQUITY: PREPONDERANCE STANDARD REQUIRED



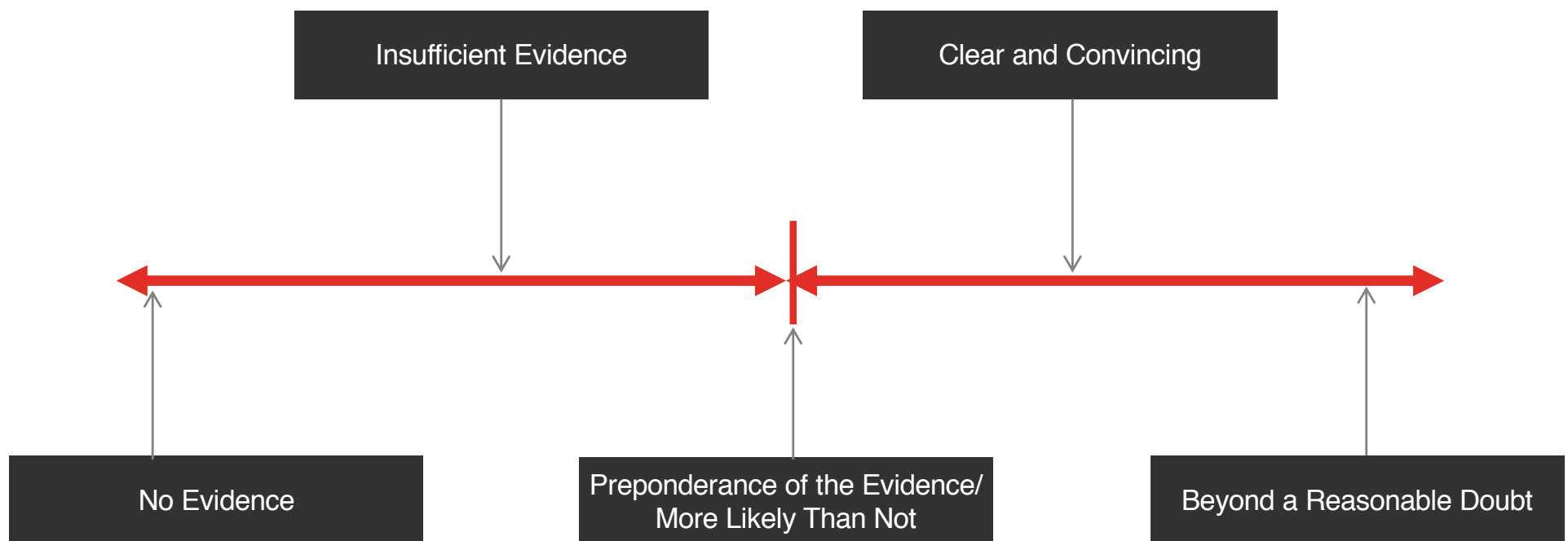
- The only equitable standard.
- ATIXA maintains that preponderance of the evidence is the appropriate standard
- Articulate the standard throughout your policy, procedures, investigation, and hearings.
- Educate the parties and their advisors.
- Use language the community understands.
  - 50.1%.
  - “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.
- Provide the same rights for an advisor
- Impartial investigators, investigation, hearing, and panelists.
- Remedies.
- Appeals.

# EQUITY: BARRIERS & PROBLEMS



- You think equality is the same as equity.
- Investigation and resolution mechanisms are built into castles of due process.
- Institutional 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 — race, religion, disability, sex, etc. — are widely disparate from each other.

# 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.
- At your school, 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 often haven't been updated in since pre-2011.

# EQUITY REQUIRES TRAINING



- Title IX Coordinator(s).
- Intake staff/faculty.
- School/Campus 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 pre-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.

# CLERY: VAWA 2013 SECTION 304



- Institutional disciplinary procedures shall “provide a prompt, fair, and impartial process from the initial investigation to the final result.”
  - Accuser and accused are entitled to the **same opportunities** to have a support person/advisor **of their choice** at **any** proceeding or related meeting.
  - Accuser and accused must be simultaneously informed in writing of:
    - The outcome that arises from an allegation of Dating Violence, Domestic Violence, Sexual Assault, Stalking.
      - **Outcome = Finding, sanction, and rationale.**
    - The institution’s procedures for appeal.
    - Any change to the results that occurs prior to the time that such results become final.
    - When such results become final.

# 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 institutional 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
  - Legal counsel? (no)
  - 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 SCHOOL/CAMPUS LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS?



- Can school/campus 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 in pre-K-12?**
- Establish MOUs with school/campus police and other local enforcement and update annually.
  - The power of the tabletop exercise.

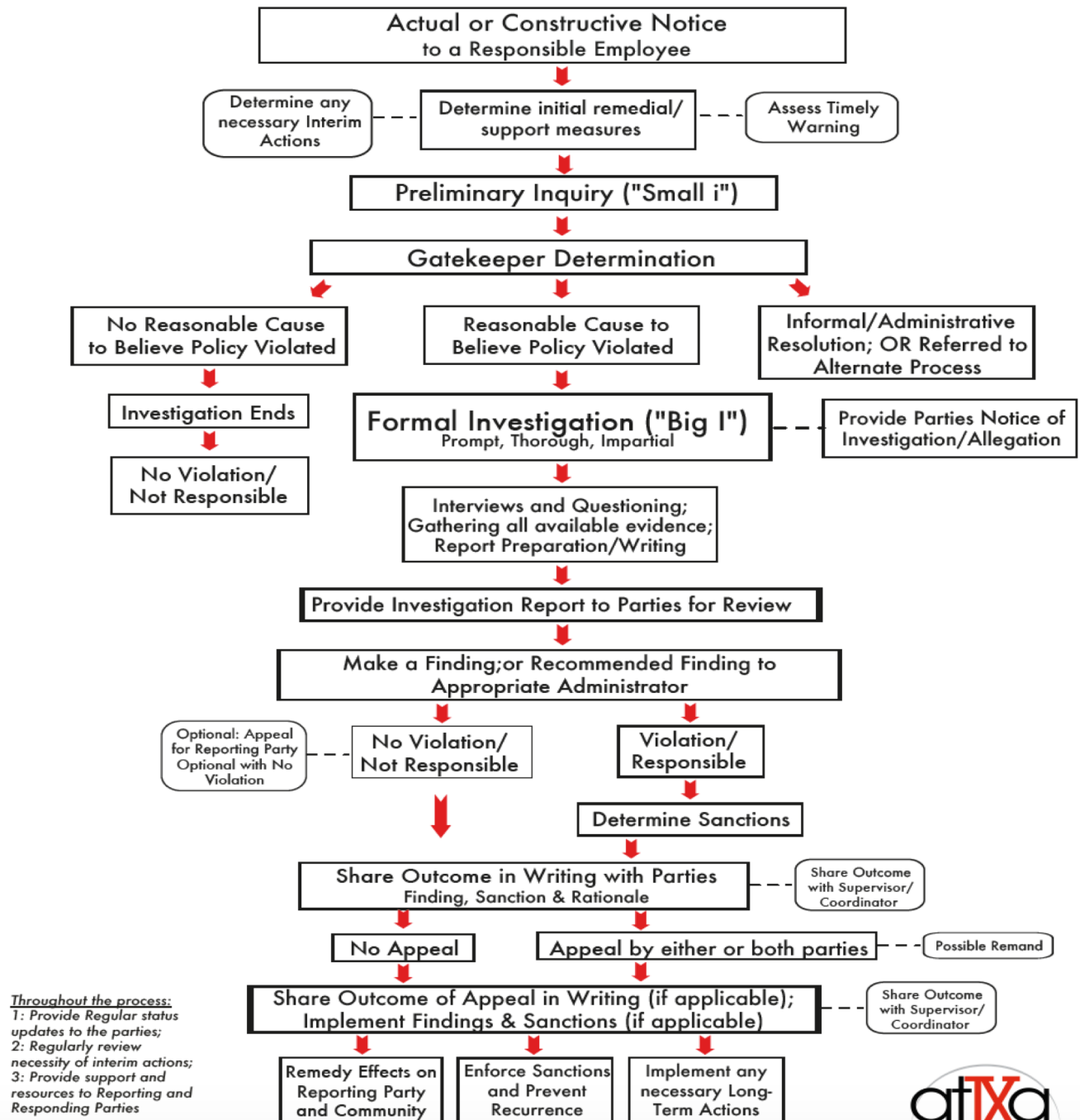
# 10 STEPS



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. Begin formal comprehensive investigation.
7. Witness interviews.
8. Evidence gathering.
9. Synthesize information
10. Write report

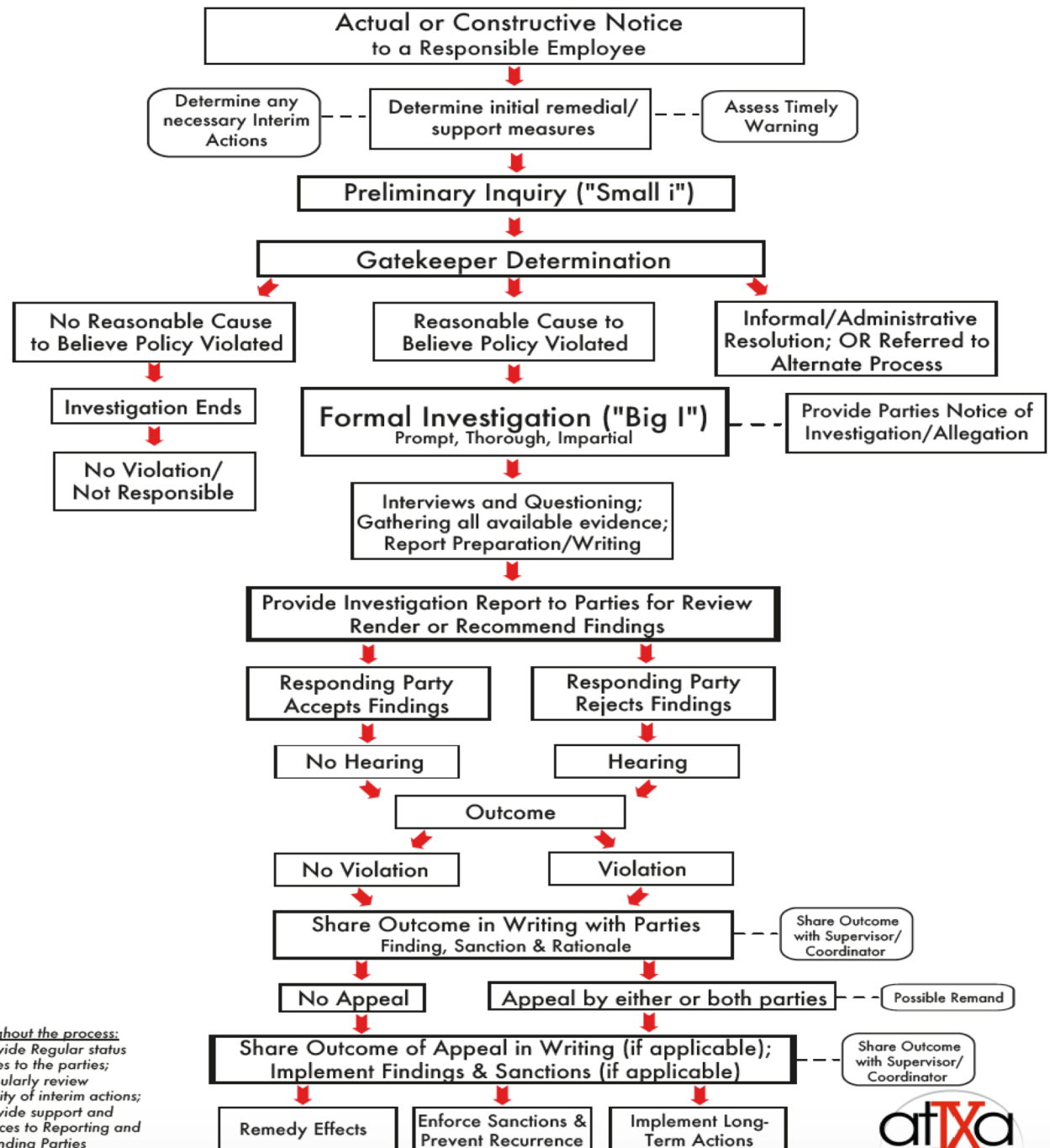
## ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART

# CIVIL RIGHTS INVESTIGATION MODEL



# INVESTIGATION AND HEARING PANEL HYBRID MODEL

## INVESTIGATION AND HEARING PANEL HYBRID 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?

# GATEKEEPING IN INVESTIGATIONS



- 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.

# 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.

# THE 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.).
- Can provide analysis, credibility determinations, findings, recommendations, etc.

- Credibility is largely a function of corroboration and consistency
- 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.
  - Demeanor issues should be your cue to ask more questions.
  - Rarely should be relied upon to draw any conclusions
- 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 institutional 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.



# COORDINATOR TRAINING AGENDA



## Day 4

- I** Coordinator of Multiple Grievance Procedures
- II** Title IX Compliance Auditor
- III** Assurance of First Amendment Protections
- IV** Prevention and Remediation of Retaliation
- V** Section 504 Disabilities Compliance Oversight
- VI** Oversight of Athletics Gender Equity
- VII** Assurance of Compliance with Requirements to Stop, Prevent, and Remedy
- VIII** Assurance of Compliance with Final Sanctions
- IX** Appeals

# COORDINATOR OF THE INTERACTION OF MULTIPLE STUDENT & EMPLOYEE GRIEVANCE PROCESSES

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- Potential Processes
- Interaction Of Title IX And Title VII
- One Policy-One Process

# COORDINATOR OF THE INTERACTION OF MULTIPLE STUDENT AND EMPLOYEE GRIEVANCE PROCESSES



- Potential processes:
  - Generalized sexual harassment procedures.
  - General student grievance procedures.
  - Employee grievance procedures.
  - Faculty grievance procedures.
  - Student conduct/discipline process.
  - Employee discipline process.
  - Faculty discipline process.
  - Various Elementary, Middle and High School processes.
  - Academic appeal process.
  - Athletics department policies/processes and “team rules.”
  - Collective bargaining agreements.

# COORDINATOR OF THE INTERACTION OF MULTIPLE STUDENT AND EMPLOYEE GRIEVANCE PROCESSES

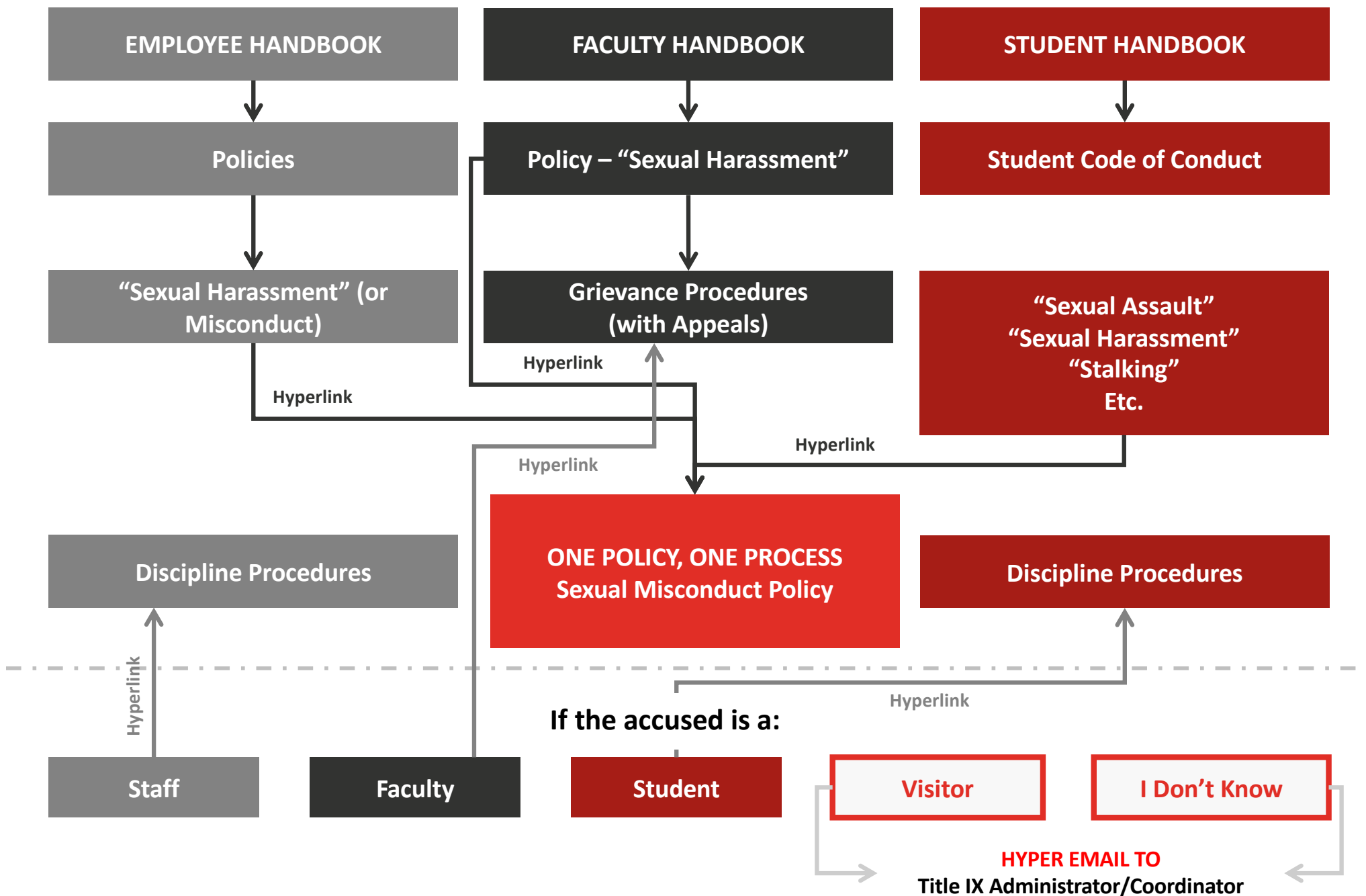


- The Title IX Coordinator:
  - Must have ability to coordinate across multiple constituency groups and procedures as necessary.
    - Institutional equity/AA/EOP officer.
    - Academic Affairs
    - Coordinator of school discipline/conduct.
    - Student Affairs administrators.
    - Athletics.

## COORDINATOR OF THE INTERACTION OF MULTIPLE STUDENT AND EMPLOYEE GRIEVANCE PROCESSES



- Supervisor of the interaction between Title IX and VII.
  - Must understand distinctions between Title IX and Title VII in responding and investigating.
  - Must be very familiar with all the processes.
  - Must have the ability to merge/combine/pick the investigatory and hearing processes and explain these to the parties.
    - E.g.: The difference between a student-employee and an employee-student.



## COORDINATOR OF THE INTERACTION OF MULTIPLE STUDENT AND EMPLOYEE GRIEVANCE PROCESSES



- One Policy, One Process: simplifying the multiple process conundrum.
  - ATIXA promotes the idea of using “One Policy, One Process” (1P,1P) to resolve all harassment and discrimination complaints (i.e., sex/gender, disability, age, race, gender, ethnicity, etc.).
    - One institution-wide policy.
    - One stand-alone resolution process.
    - Applied to all complaints involving faculty, students, and staff.

# ONE POLICY-ONE PROCESS



- A community-based policy that addresses all forms of harassment, discrimination, and sexual misconduct applicable to all members of the institution community promotes equity, minimizes confusion, and supports institutional mission.
  - Recommended by the ED and DOJ
  - Provides easier training focus.
  - Allows for commonality in documentation and investigation.



# TITLE IX COMPLIANCE OVERSIGHT

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- Active internal review, audits, or assessments.
  - Complaint and resolution processes — investigations, findings, and sanctions.
  - Policies and procedures up-to-date and compliant.
  - Athletics.
  - Training content and requirements.
  - Policy and non-discrimination notice dissemination.
  - Materials, website, and resource guide.

- Compliance checklist.
  - Departmental self-study audit at regular intervals.
- Case/investigation debriefing.
- Active professional development on issues related to compliance; oversight of compliance plan implementation.
  - For Title IX Coordinator and/or Deputy Coordinators.
- Climate surveys.
  - Online, in-person, focus groups, campus/school/district/system committee feedback, etc.

# ASSURANCE OF FIRST AMENDMENT PROTECTIONS

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# ASSURANCE OF FIRST AMENDMENT PROTECTIONS



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

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- An important concern for all public institutions and any private campuses 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.
- ED reaffirms First Amendment protections in Proposed Regs.

# ASSURANCE OF FIRST AMENDMENT PROTECTIONS



- Issues to consider:
  - Time, place, and manner.
  - Open forum, limited open forum, and closed forum.
  - Confluence with academic freedom (faculty).
  - Unprotected speech.
    - Incitement of disruption and breach of peace; defamation; true threat; and obscenity.
  - Outside speakers.
  - Hate speech.

# PREVENTION AND REMEDIATION OF RETALIATION

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- Basic Legal Principles
- *Jackson v. Birmingham Bd. of Education*
- Investigating Retaliation

# RETALIATION



- 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 (e.g. as a witness).
  - Protesting any form of sex discrimination (including, for instance, lack of equity in athletics).



# PREVENTION AND REMEDIATION OF RETALIATION



- Retaliation is an increasingly common legal claim
- The Title IX regulations prohibit colleges and universities from “intimidating, coercing, or retaliating against” individuals
- Title IX Coordinators should ensure that the institution effectively communicates a message about protection against retaliation and that reporting parties understand their rights.
  - Ensure policies clearly prohibit retaliation
  - Ensure 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 institution prohibits retaliation, that the reporting party or witness should immediately report any acts of retaliation, and that the institution 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 must ensure parties know that:
  - Retaliation is prohibited
  - Any reports of harassment will be addressed promptly and effectively,
  - Additional sanctions may be imposed for such acts.
  - May hold responding parties responsible for retaliation by friends, colleagues, 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 in sports programs' funding (gender).
  - 2000 — He began to get negative evaluations.
  - 2001 — He was 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?

# INVESTIGATING RETALIATION CLAIMS

## KEYS TO UNDERSTANDING



- Establishing retaliation, unlike establishing sexual harassment, requires proving motive — the intent to retaliate.
- Since someone's intention is rarely displayed openly, the legal framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

# PRELIMINARY ELEMENTS OF A RETALIATION CLAIM



The following elements establish an *inference of retaliation*:

1. Did the reporting party engage in protected activity?
  - Usually straightforward.
  - Unless there is a question of reasonableness of belief or manner.
2. Was the reporting party subsequently subjected to adverse action?
3. Do the circumstances suggest a connection between the protected activity and adverse action?
  - Did the individual accused of retaliation know about the activity?
  - How soon after the protected activity did the adverse action occur?

If these three elements are not shown, the claim fails.

# INVESTIGATING RETALIATION CLAIMS: REBUTTING THE INFERENCE



- What is the stated non-retaliatory reason for the adverse action?
  - Is the explanation for the action legitimate on its face?
- Is there evidence that the stated legitimate reason is a pretext?
  - This is the heart of the case — is the explanation the true reason?
- The preponderance of the evidence must establish that the adverse action was motivated by retaliation.



# INVESTIGATING RETALIATION CLAIMS: IS THE EXPLANATION LEGITIMATE?



## Factors to Consider:

- The explanation makes sense.
- The action was consistent with established policy or practice.
- No adverse action was taken against others who engaged in protected activity.
- The reporting party was treated the same as other individuals.

# INVESTIGATING RETALIATION CLAIMS: EVIDENCE OF PRETEXT?



## Factors to Consider:

- The explanation given is not credible.
- Other actions by the same individual are inconsistent with the explanation.
- The explanation is not consistent with past policy or practice.
- There is evidence of other individuals treated differently in similar situations.

# SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT

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- About Section 504
- Administrative Requirements

# SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT



- The Section 504 regulations require that colleges:
  - “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 institution’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.

# OVERSIGHT OF ATHLETICS GENDER EQUITY

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- Title IX Requirements
- Three-Part Test



# OVERSIGHT OF ATHLETICS GENDER EQUITY



- Title IX compliance requirements:
  - Effective accommodation of interests and abilities.
  - Financial assistance proportionality.
  - Treatment of student-athletes.
- **Compliance** may be delegated to the Senior Woman Administrator (SWA) or compliance officer in athletics.
- The oversight of compliance remains the responsibility of the Title IX Coordinator.
  - Need for outside education.
- The dangers of being both.

# OVERSIGHT OF ATHLETICS GENDER EQUITY



Effective Accommodation of Interests and Abilities: 1979 Test – 3

## Part-Test:

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



# COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, 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 the employee provided an alternate supervisor during the resolution process?
  - Was the student assigned to a different seat or class?
  - 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 they should report any difficulties obtaining the remedies and any subsequent harassment.

# COMMON INTERIM AND LONG-TERM ACTIONS FOR STUDENTS



- ✓ Providing a campus 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 institution-wide training and education initiatives.

# COMMON INTERIM AND LONG-TERM ACTIONS FOR EMPLOYEES



- ✓ Providing no-contact orders/contact restrictions.
- ✓ Providing an escort.
- ✓ 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 (responding party).
- ✓ Sanctions.

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



- **Prevent Recurrence:**
  - Identify patterns and systemic problems.
  - Issue school/campus-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 campus climate.
  - Establish a system for monitoring future incidents and patterns.
  - Provide technical assistance to school/campus law enforcement on Title IX compliance.

# ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS

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- Sanctioning In Sexual Misconduct Cases
- Considerations
- Common Sanctions
- What Sanctions?

# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Title IX and case law requires:
  - Stop: Bringing an end to the discriminatory conduct.
  - Prevent: Taking steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct.
  - Remedy: Restoring the victim as best you can to pre-deprivation status.
- Clash with the “educational” and “developmental” sanctions of student conduct processes



# SANCTIONING CONSIDERATIONS



- The sanction must be reasonable and reflect the severity of the behavior.
  - May consider prior misconduct.
  - The role of precedent.
  - May consider attitude.
  - Should be educational (i.e.: targeted to stop and prevent)
  - What best compensates for loss or injury to college or persons?
  - Compliant with laws and regulations (e.g. Title IX).

# SANCTIONING



- Investigation alone is not sufficient to overcome a deliberate indifference claim.
- There must be a nexus between the sanctions and the discriminatory conduct that led to the sanction(s).
- What is appropriate?
  - Separation/expulsion.
  - Suspension.
  - Lesser sanctions.
- Engage in strategic education and training requirements.
- Conduct a risk assessment audit and mitigation process.
- ED says institutions should consider impact on the responding party's education when determining a sanction.

# SANCTIONING



- Ensure that remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- Take immediate steps to protect reporting parties even before the final outcome of investigations (e.g., through no-contact orders, etc.).
- Ensure that remedies are equitable.
- Consider restorative justice as part of your remedial process.
- Monitor for retaliation and respond immediately to allegations.
- Review policies, procedures, and practices regularly to ensure they are in accordance with best practices, and state, and federal case law.

# COMMON STUDENT SANCTIONS



- Warning.
- Probation.
- Loss of privileges.
- Counseling.
- No contact.
- Residence hall relocation, suspension, or expulsion.
- Limited access to school/campus.
- Service hours.
- Online education.
- Parental notification.
- Alcohol and drug assessment, and counseling.
- Discretionary sanctions.
- In-School Suspension (K-12)
- Suspension.
- Expulsion.

# COMMON EMPLOYEE SANCTIONS



- Warning – verbal or written.
- Probation.
- Performance improvement/management process.
- Training (e.g., sensitivity training).
- Counseling.
- Loss of privileges.
- Reduction in pay.
- Loss of annual raise.
- Discretionary sanctions.
- Loss of supervisory or oversight responsibilities.
- Paid or unpaid leave.
- Suspension.
- Termination.

# ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS



- Take steps to confirm and document that all sanctions were enforced.
  - Did the harasser attend training?
  - Is the harasser complying with the no-contact order?
  - Were the necessary documents placed in the harasser's personnel or conduct file?
  - Was the notation placed on the harasser's transcript or in personnel file?
- Possible consequences of failure to ensure compliance with sanctions:
  - Persistence of the behavior/hostile environment, recurrence, retaliation, and claims of deliberate indifference.

# WHAT SANCTIONS?



- A female staff member continues to make overt and tacit sexual advances towards a female colleague, even though the recipient of the behavior has repeatedly told the staff member that the advances are unwelcome.
  - The advances are verbal as well as in emails and text messages.
  - Some of the more subtle advances have been in the company of others.
  - The victim complained because it is starting to impact her ability to focus at work.

# WHAT SANCTIONS?



- Responding student is found responsible for non-consensual intercourse involving a student-victim who the panel determines was incapacitated and whose incapacity should have been known to the accused.
  - The panel felt that part of the problem was the students' inexperience with sexual matters and poor communication.
  - The responding party is an excellent student and is well liked by the campus community.
  - The victim also indicates that she does not want him to get suspended or expelled.



# WHAT SANCTIONS?



- A male tenured faculty member is found responsible for non-consensual intercourse involving a female student who is not in any of the faculty member's classes.
  - The investigator determines that the student was incapacitated and the accused faculty member should have known of that incapacity.
  - The faculty member is a full professor holding a prestigious endowed chair position.
  - The student and the faculty member engaged in consensual sex five times after the non-consensual incident.
  - The student brought the allegation shortly after the faculty member began sleeping with the student's friend.

# WHAT SANCTIONS?



- A severely intoxicated student who lives on the sixth floor gets off the residence hall elevator on the fourth floor at the same time with a female student who lives on the floor. As the female student attempts to enter her room, the male student hugs and tackles her, holds her down, reaches up her skirt, moves aside her underwear, and rubs his fingers along her clitoris and penetrates her digitally. The female student is able to free herself and rushes into her room, locking the door. The panel finds him responsible.

# WHAT SANCTIONS?



- Five members of the boy's soccer team (Students A, B, C, D, and E) subject the ninth-grade students to various hazing-related rituals, including paddling and pouring hot sauce on the ninth-grade students' genitals.
  - Four students (A, B, C, and D) engaged in the paddling.
  - Two students (A and B) poured hot sauce on the genitals of first-year students.
  - One student (E) was present throughout, but did not paddle or pour hot sauce on the first-year students.

# APPEALS

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- Appeals Exercise
- Key Elements
- Grounds for Appeal
- Process
- Outcomes
- Flowchart

# APPEALS: KEY ELEMENTS



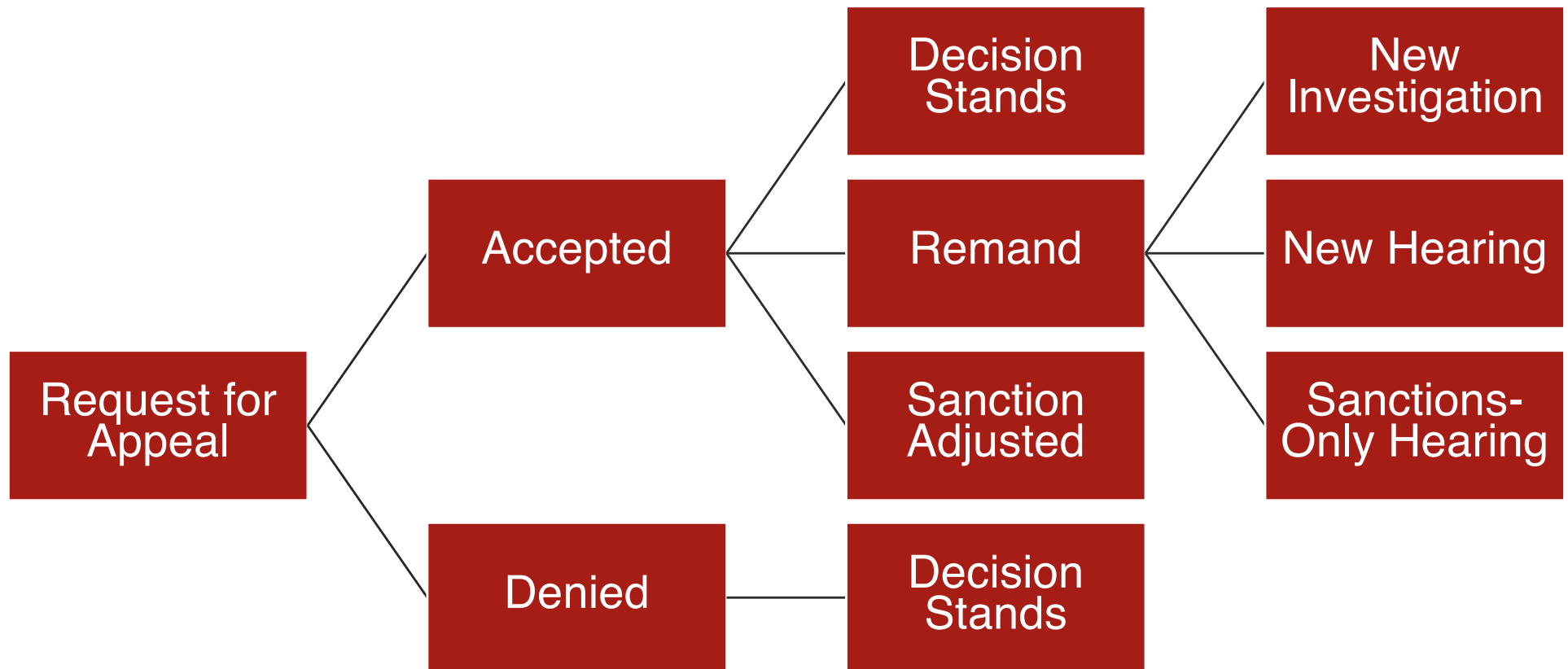
- One level of appeal.
- Limited grounds for appeal (see next slide).
- Deference to original hearing authority.
- Short window to request an appeal.
  - Can always grant an extension if necessary.
- Document-based review.
  - NOT *de novo*.
- Request for an appeal.

# APPEALS: GROUNDS FOR APPEAL



- A procedural error or omission occurred that significantly impacted the outcome of the hearing.
  - E.g.: Insufficient evidence to warrant the finding, substantiated bias, material deviation from established procedures, etc.
- To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction.
  - A summary of this new evidence and its potential impact must be included.
- The sanctions imposed are substantially disproportionate to the severity of the violation (or the sanctions fall outside the range of sanctions the university/college has designated for this offense).

# APPEALS: THE PROCESS



# Q&A AND WRAP-UP

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# CONTACT INFORMATION

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