



K-12 TITLE IX COORDINATOR & ADMINISTRATOR TRAINING & CERTIFICATION LEVEL ONE COURSE

Summer Certification Series | June 8-9, 2020

FACULTY



Daniel C. Swinton, J.D., Ed.D.

President, TNG
Vice President, ATIXA



Kimberly Pacelli, M.Ed., J.D.

Partner, TNG
ATIXA Advisory Board Member



Tanyka M. Barber, J.D.

Senior Associate, TNG
ATIXA Advisory Board Member

LEVEL 1 K-12 TITLE IX COORDINATOR TRAINING



- I. Overview of Title IX
- II. Legal Basis for Title IX Liability
- III. OCR and Title IX
- IV. Due Process Overview
- V. When Does Title IX Apply
 - I. Jurisdictional Issues & Questions
 - II. Definitions of Sexual Harassment
 - III. First Amendment Protections
- VI. Roles & Responsibilities of the Title IX Team
 - I. Title IX Coordinator
 - II. Investigator
 - III. Decision-Makers
 - IV. Informal Resolution Facilitator
- VII. Overview of Investigation & Grievance Process Model
- VIII. Notice/Complaint
 - I. Actual Knowledge
 - II. Formal Complaint
 - III. When Do You Investigate
- IX. Initial Assessment
 - i. Title IX Coordinator's Role
 - ii. Supportive Measures
 - iii. Notice to the Parties
 - iv. Emergency Removal
 - v. Informal Resolution

LEVEL 1 K-12 TITLE IX COORDINATOR TRAINING



- I. Case Study: Sally & Jamie
- II. Formal Comprehensive Investigation
 - i. Title IX Coordinator's Role
 - ii. Standard of Evidence
 - iii. Evidence and Report Review
- III. Decision-Makers: Making a Determination
 - i. Live Hearing?
 - ii. Questioning
 - iii. Standard of Evidence
- IV. Sanctions
- V. Appeals Process
- VI. Record-Keeping & Documentation
- VII. Working With Parents/Guardians
- VIII. Preventing & Addressing Bias
- IX. Sex, Gender, Gender Identity, Gender Expression
- X. Dual Enrollment
- XI. Athletics Gender Equity
- XII. Intersection of Title IX and Title VII
- XIII. Case Studies

OVERVIEW OF TITLE IX

NOT FOR DISTRIBUTION

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

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

A BRIEF HISTORY OF TITLE IX PRE-1972



- Title VI of the Civil Rights Act of 1964 (42U.S.C. §2000d et seq.)
 - “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” (“Sex” added by Executive Order in 1965)
- Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2)
 - Prohibits discrimination in the terms, conditions or privileges of employment on the basis of an individual’s race, color, religion, sex, or national origin.
- 1972: Title IX passed and signed into law by President Nixon
- Department of Health, Education and Welfare (HEW) – Title IX regulations codified in 1975.

KEY TITLE IX-RELATED ISSUES



Sex-Based Discrimination

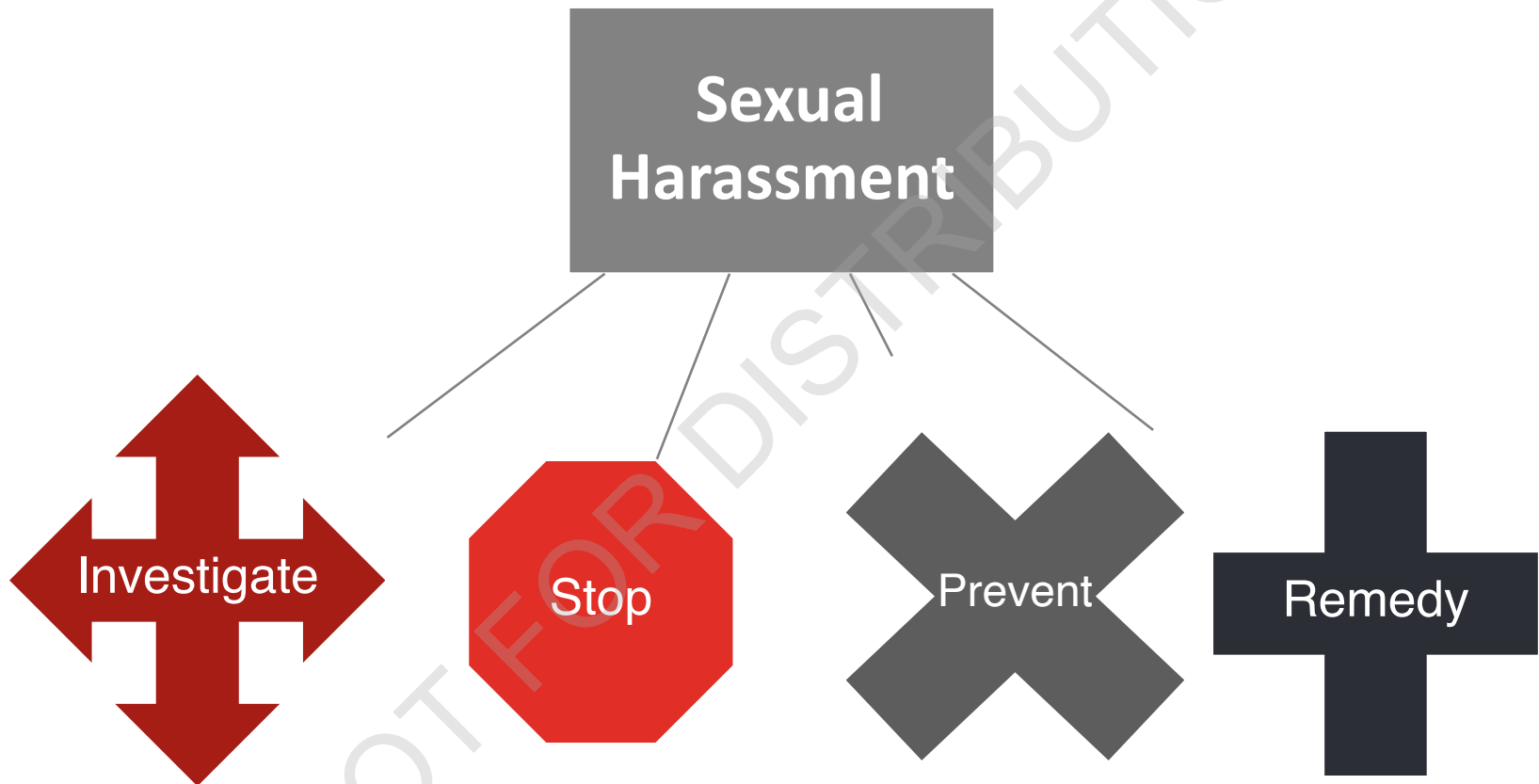
- Program Equity
- Recruitment, Admissions and Access
- Pregnancy
- Athletics
- Employment, Recruitment & Hiring
- Extra-curricular activities
- Housing
- Access to Course Offerings
- Salaries and Benefits
- Financial Assistance
- Facilities
- Funding
- Sex, Gender, Gender Identity

Sexual Harassment

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

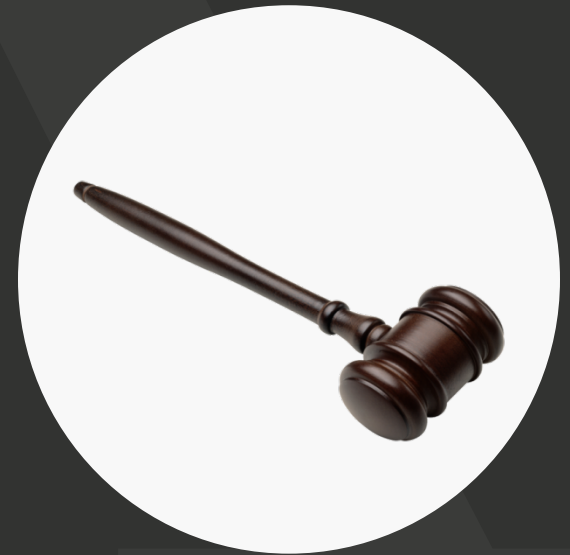
Retaliation

SCHOOL/DISTRICT OBLIGATIONS UNDER TITLE IX



SIGNIFICANT CASES & KEY OCR GUIDANCE

- *Franklin v. Gwinnett County Public Schools*
- *Gebser v. Lago Vista Independent School District*
- *Davis v. Monroe County Bd. of Education*
- *Jackson v. Birmingham Bd. of Education*
- *Fitzgerald et al. v. Barnstable School Committee et al*



FRANKLIN v. GWINNETT PUBLIC SCHOOLS



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

FRANKLIN v. GWINNETT PUBLIC SCHOOLS



- The complaint further alleges that, though the school became aware of and investigated Hill's sexual harassment of Franklin and other female students, teachers and administrators took no action to halt it.
- Hill resigned on the condition that all matters pending against him be dropped. The school thereupon closed its investigation.
- The school also discouraged Franklin from pressing charges.

FRANKLIN v. GWINNETT PUBLIC SCHOOLS



- 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.
- *Franklin* also provided a private right for recovery of monetary damages under Title IX.
- *Franklin* did not address issues concerning the educational institution's liability.

GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



- Alida Gebser was an eighth-grade student at a middle school in respondent Lago Vista Independent School District (Lago Vista); she joined a high school book discussion group led by Frank Waldrop, a high school teacher.
- During the book discussion sessions, Waldrop often made sexually suggestive comments to the students. Gebser entered high school and was assigned to classes taught by Waldrop.
- Waldrop continued his inappropriate remarks to the students, and began to direct more of his suggestive comments toward Gebser, including when they were alone in his classroom.

GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



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

GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



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

GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



- The Supreme Court said you cannot recover monetary damages against the school unless:
 - Three-part standard:
 1. An official of the educational schools/districts must have had “actual notice” of harassment;
 2. The official must have authority to “institute corrective measures” to resolve the harassment problem; AND
 3. The official must have “failed to adequately respond” to the harassment and, in failing to respond, must have acted with “deliberate indifference.”

DAVIS v. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Ongoing behavior by fifth-grade boy toward fellow student LaShonda Davis:
 - Made statements such as “I want to get in bed with you” and “I want to feel your boobs.”
 - Attempted to touch her breasts and genitals
 - Stuck a doorstop in his pants and acted in a sexually suggestive manner towards Davis;
 - He rubbed up against her in suggestive manner;
 - Touched her breasts and genitals.

DAVIS v. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Davis repeatedly reported conduct to teachers; Davis' mother also contacted teachers multiple times;
- Mother was told the principal was aware of the situation. No disciplinary action was taken.
- Davis' 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)



- In May 1993, principal told Davis' mother, "I guess I'll have to threaten him a little harder"; male student not disciplined.
- Davis' 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)



- Finding in favor of Davis, the Supreme Court expanded on the *Gebser* case:
 - The institution must have “**actual notice**” of the harassment; and the institution must have responded to the harassment with “**deliberate indifference.**”
 - Additionally, court held that:
 - 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’Conner added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “**clearly unreasonable in light of the known circumstances.**”

JACKSON v. BIRMINGHAM BD. OF ED.

544 U.S. 167 (2005)



- A deeply divided U.S. Supreme Court decided this landmark case in 2005.
- Involved a claim of retaliation for filing complaints of sex discrimination under Title IX.
- Roderick Jackson, a high school teacher and coach, complained to school officials about the school's inequitable treatment of the girls' basketball team.
- Retaliation-based case.
- The federal district court and appellate court ruled against Jackson.

JACKSON v. BIRMINGHAM BD. OF ED.

544 U.S. 167 (2005)



- The Supreme Court overturned lower courts, stating that:
 - Private parties can seek damages for intentional sex discrimination under Title IX.
 - Retaliation against a person who complains about sex discrimination is in itself a form of “intentional discrimination,” even if plaintiff is not an “actual” recipient of gender-based discrimination.
 - It is discrimination based on gender because it is “an intentional response to the nature of the complaint: an allegation of sex discrimination.”

FITZGERALD v. BARNSTABLE SCHOOL CMTE.

555 U.S. 246 (2009)



- This case represents legal challenge brought against a school district by parents of a kindergarten child subjected to student/student sexual harassment.
- Parents challenged the school did not respond adequately, under Title IX requirements, to daughter's allegations of sexual harassment by older student.
- The parents also brought a §1983 claim against the school superintendent and the school committee.

FITZGERALD v. BARNSTABLE SCHOOL CMTE.

555 U.S. 246 (2009)



- Supreme Court ruled on whether Title IX provides the exclusive remedy for addressing gender discrimination in the school, or if a §1983 action could be brought as a means of enforcing the federal rights.
- It held that Title IX is not the exclusive mechanism for addressing gender discrimination, nor a substitute for a §1983 action.
- It stated that Title IX provides for both an administrative remedy (OCR) and civil damages actions against an institution, but not school officials, teachers, or other individuals.

FITZGERALD v. BARNSTABLE SCHOOL CMTE

555 U.S. 246 (2009)



- However, §1983:
 - Provides means to enforce the rights of aggrieved person against school officials, teachers, or other individuals in their **personal capacity**.
 - Creates the path to hold individuals personally liable, providing for award of damages, injunctive relief, **and attorney fees**.
 - Follows that the courts apply school-focused Title IX case law similarly to colleges and universities.

OCR & TITLE IX



REMEDIES UNDER TITLE IX



- An individual may assert a Title IX claim against the school/district by:
 - **Lawsuit**: Suing the school/district in court and seeking monetary damages or injunctive or declaratory relief.

And/Or

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

CIVIL LAWSUIT 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 notice
 - K-12 employee/appropriate school official with authority to take action
 - Deliberate Indifference.

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 administratively enforces Title IX by:
 - Conducting investigations of complaints filed with the U.S. Dept. of Education.
 - Engaging in “voluntary compliance” investigations.
 - Initiative to combat sexual assault in K-12 public schools (compliance reviews; public awareness and support; data collection and reviews)
- Technical Assistance
 - To help institutions, students, and parents understand their rights and responsibilities.

OCR AND TITLE IX



Key Regulatory and Sub-Regulatory Guidance from OCR

- Withdrawn:
 - 2011 Dear Colleague Letter (DCL)
 - 2014 Q&A on Title IX and Sexual Violence
 - 2016 DCL on Transgender Students
- Still in effect:
 - 2001 OCR Revised Sexual Harassment Guidance (has force and effect of law; conflicts with 2020 regs)
 - 2003 DCL on Title IX and Free Speech
 - 2010 DCL on Harassment and Bullying
 - 2013 DCL on Pregnant and Parenting Students
 - 2015 DCL on the role of Title IX Coordinators
 - 2017 Q&A on Campus Sexual Misconduct issued as interim guidance, still apparently in place
 - 2020 Amendments to Title IX Regulations

DUE PROCESS

- Foundational Case Law
- Current Due Process Issues



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

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

DUE PROCESS: CURRENT ISSUES



- Due Process concerns are at the heart of 2020 regulations:
 - Applies to both public and private recipients, which is a shift in legal paradigm
 - Standard of Evidence
 - Requirements for “Emergency Removal”
 - Detailed Notice of Allegations/Investigation
 - Providing Inv. Report and Evidence for Review/Response
 - Live Hearing with Cross-Examination Mandatory for Higher Ed; optional for K-12
 - Advisor Involvement (including possibly attorneys)
 - Attention to bias by Investigators, Hearing Officers, Appellate Officers
 - Training: Biased Training; Insufficient Training, Transparency

THE IX COMMANDMENTS



Thorough	Reliable	Impartial	Investigation
Prompt	Effective	Equitable	Process
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the student or employee & community	Remedies

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.

WHEN DOES TITLE IX APPLY?

- Jurisdictional Issues and Questions
- Definitions of Sexual Harassment
- First Amendment Protections

JURISDICTIONAL ISSUES AND QUESTIONS

- When Does Title IX Apply?
- Mandatory Dismissal
- Discretionary Dismissal
- Is It A IX?

WHEN DOES TITLE IX APPLY?



- Emphasizes the *Davis* standard
 - Control over the harasser and the context of the harassment
 - “education program or activity” means...
 - locations, events, or circumstances under substantial control
 - any building owned or controlled by an officially recognized student organization
- Regulations specify “harassment ...against a person in the United States”
 - Off-campus/out-of-school conduct, study abroad programs, or school-sponsored international trips – “nothing in the proposed regulations would prevent...”

WHEN DOES TITLE IX APPLY?



- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
 - OCR adopts in the discussion a fairly broad definition of what could constitute “attempting to participate”

WHEN TITLE IX DOES NOT APPLY



- If Title IX jurisdiction is not present, the behavior could still violate:
 - Institutional harassment/discrimination policies.
 - Student Handbook/Conduct policies.
 - Technology/Acceptable Use policies.
 - Employee Handbook/Policies.
 - Professionalism standards.
- District should still take steps to:
 - Provide support and resources to the complainant and school community
 - Address any “downstream effects”
 - Determine if there are patterns or institutional variables that contributed to the alleged incident.
 - Take what action it can (e.g.: trespass the person).

MANDATORY DISMISSAL OF FORMAL COMPLAINT - OCR 2020 REGS



- **The TIXC must dismiss the complaint if:**
 - The conduct alleged in the formal complaint would not constitute sexual harassment as defined (in § 106.30), even if proved;
 - Did not occur in the recipient's education program or activity;
 - Did not occur against a person in the United States; or
 - Complainant was not participating or attempting to participate in recipient's program at time of complaint.
- Written notice of dismissal to parties required
 - Dismissal of formal complaint may be appealed
- **Upon dismissal, the recipient may institute action under another provision of the code of conduct or other policies.**

DISCRETIONARY DISMISSAL OF FORMAL COMPLAINT - OCR 2020 REGS



- TIXC **may** dismiss a complaint or any allegations at any time during the investigation or hearing if:
 - Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein;
 - The Respondent is no longer enrolled or employed by the recipient; or
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein
- Written notice to parties required
- Parties may appeal a dismissal.

CASE STUDY: IS IT A IX?



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

NOT FOR DISTRIBUTION

CASE STUDY: IS IT A IX?



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

CASE STUDY: IS IT A IX?



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

CASE STUDY: IS IT A IX?



- According to the employee, Janet missed a few days of work last month and returned to work wearing a sling. Janet claimed that she sprained her shoulder while working in the yard.
- Yesterday Janet showed up over an hour late to work and had some swelling around her eye and her bottom lip. When asked, Janet said she got up to the bathroom last night in the dark and walked right into the edge of her open closet door.
- The employee says that yesterday afternoon, Robert and Janet got into a loud argument in the parking lot and that Janet was crying in the bathroom afterwards.
- Is this a Title IX issue the employer needs to address?

DEFINITIONS OF SEXUAL HARASSMENT

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

REQUIRED DEFINITIONS – OCR 2020 REGS.



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

HOSTILE ENVIRONMENT: “SEVERE”



“The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.”
—(Q&A: A-3)

(2001 Guidance).

- Physical is more likely to be severe without need for repetition:
 - Non-consensual sexual intercourse or contact are almost always sufficiently severe.
 - Consider the circumstances: E.g., the ability for victim to escape the harassment.
- Assess whether accompanied by threats or violence.

HOSTILE ENVIRONMENT: “PERVASIVE”



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

HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”



- Reasonable person standard in context.
- “I know it when I see it...”
 - Age and relationships of accuser and accused.
 - Number of persons involved.
 - Frequency.
 - Severity.
 - Physically threatening.
 - Humiliation.
 - Intimidation.
 - Ridicule.
 - Abusive.
- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”

SEXUAL ASSAULT: SEX OFFENSES, FORCIBLE



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

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

SEXUAL ASSAULT: SEX OFFENSES, FORCIBLE (CONTD.)



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

SEXUAL ASSAULT: SEX OFFENSES, NONFORCIBLE— NONFORCIBLE SEXUAL INTERCOURSE



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

NOT FOR DISTRIBUTION

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

DOMESTIC VIOLENCE



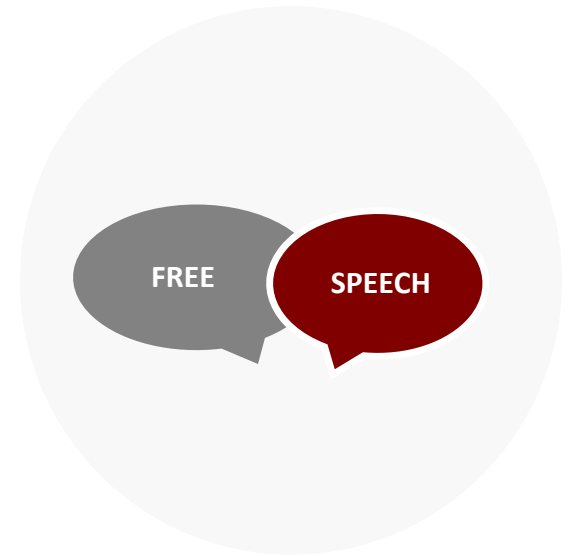
- A felony or misdemeanor crime of violence committed—
 - By a current or former spouse or intimate partner of the Complainant;
 - By a person with whom the Complainant shares a child in common;
 - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
 - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
 - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].
- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

STALKING



- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - Fear for the person’s safety or the safety of others; or
 - Suffer substantial emotional distress.
- For the purposes of this definition, *course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
- Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
- Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- But, Regs insist this definition not be interpreted to violate First Amendment.

NAVIGATING FIRST AMENDMENT PROTECTIONS



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

- An important concern for all public institutions.
- Impacts policy language regarding expression.
 - Pay heed to vagueness and over-breadth concerns.
 - Avoid incorporating “intent” or “purpose” language.
- 2020 Title IX Regulations reaffirms First Amendment protections.

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

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

393 U.S. 503 (1969)

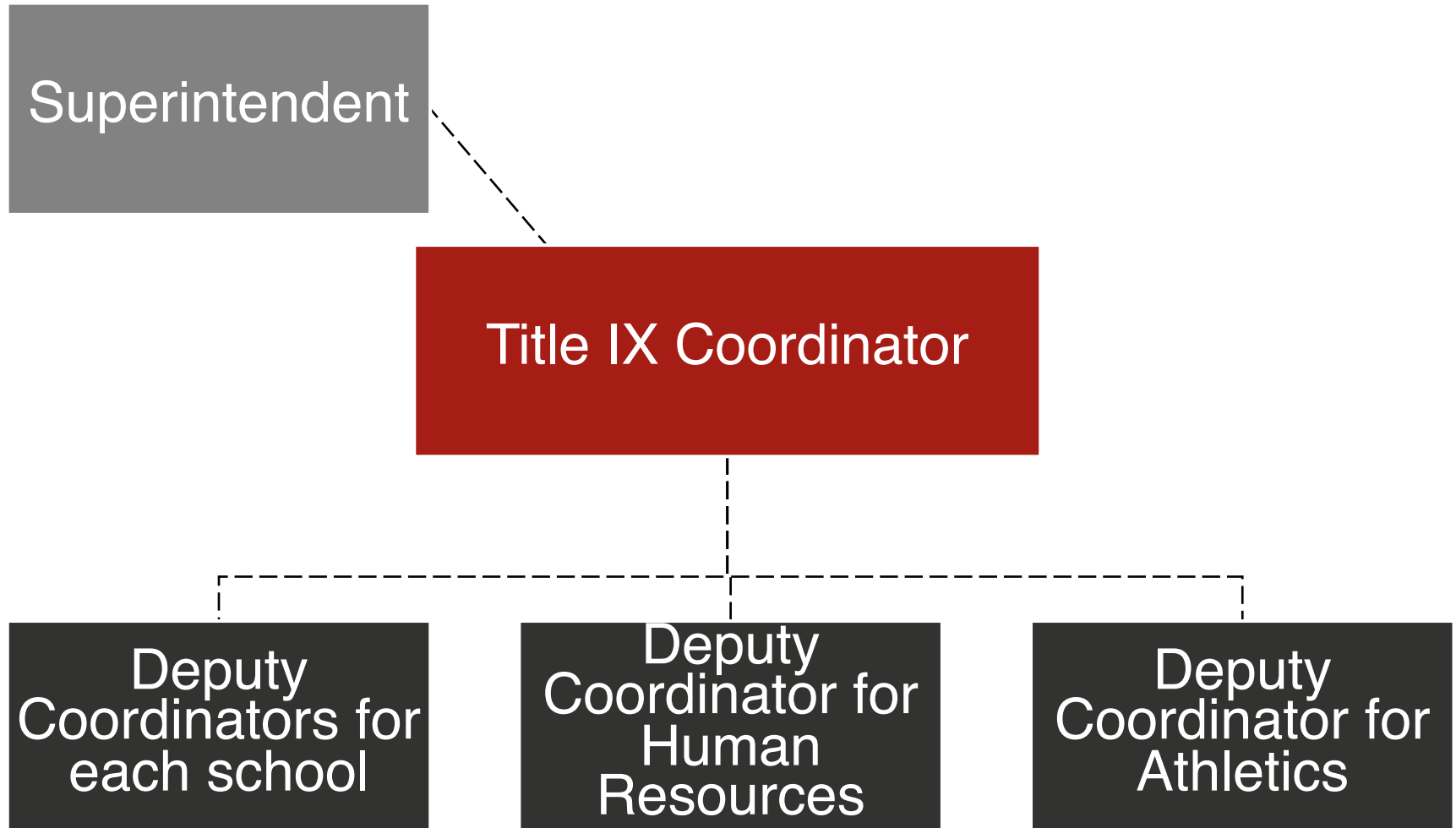


- Free speech rights in public schools
 - Group of students wore black armbands to school in protest of Vietnam war
 - Students suspended after refusing to remove armbands
- Conduct must **“materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”**
 - Actual interference, not based on fear of a potential interference
 - “More than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”
 - Substantial interference with the school’s work
 - Intrusion upon the rights of other students

ROLES AND RESPONSIBILITIES OF THE TITLE IX TEAM

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

SAMPLE TITLE IX TEAM STRUCTURE



WHO IS ON THE TITLE IX TEAM



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

THE TITLE IX COORDINATOR



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

THE ROLE OF THE TITLE IX COORDINATOR



- District-wide oversight and assurance of compliance.
- Prevention and remediation of all sex/gender-based discrimination and harassment.
- Contact for government inquiries.
- Point person for reports.
- Creator and implementer of appropriate policies.
- Training oversight: teachers, staff, students, investigators, decision-makers, appellate officers and parents/guardians.

THE ROLE OF THE TITLE IX COORDINATOR



- Oversight and coordination of prompt and equitable grievance procedures (teacher, student, and staff).
- Oversight of investigation and investigators.
- Assurance of compliance with final sanctions.
- Recordkeeping
- Athletics gender equity.

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

ROLE OF THE INVESTIGATOR



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

ROLE OF THE DECISION-MAKERS



- Determine whether District policy has been violated based upon the applicable standard of evidence
 - Decisions must be based upon an independent assessment of the evidence gathered during the investigation and/or provided during a hearing, to include an assessment of the credibility of the parties and witnesses
 - Decisions must be based on the specific policy alleged to have been violated
 - Decisions must be impartial and free of substantive bias
- Determine appropriate sanctions/discipline when a policy violation is found.
- Draft a written determination that outlines the rationale for the finding(s).

ROLE OF APPELLATE DECISION-MAKER



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

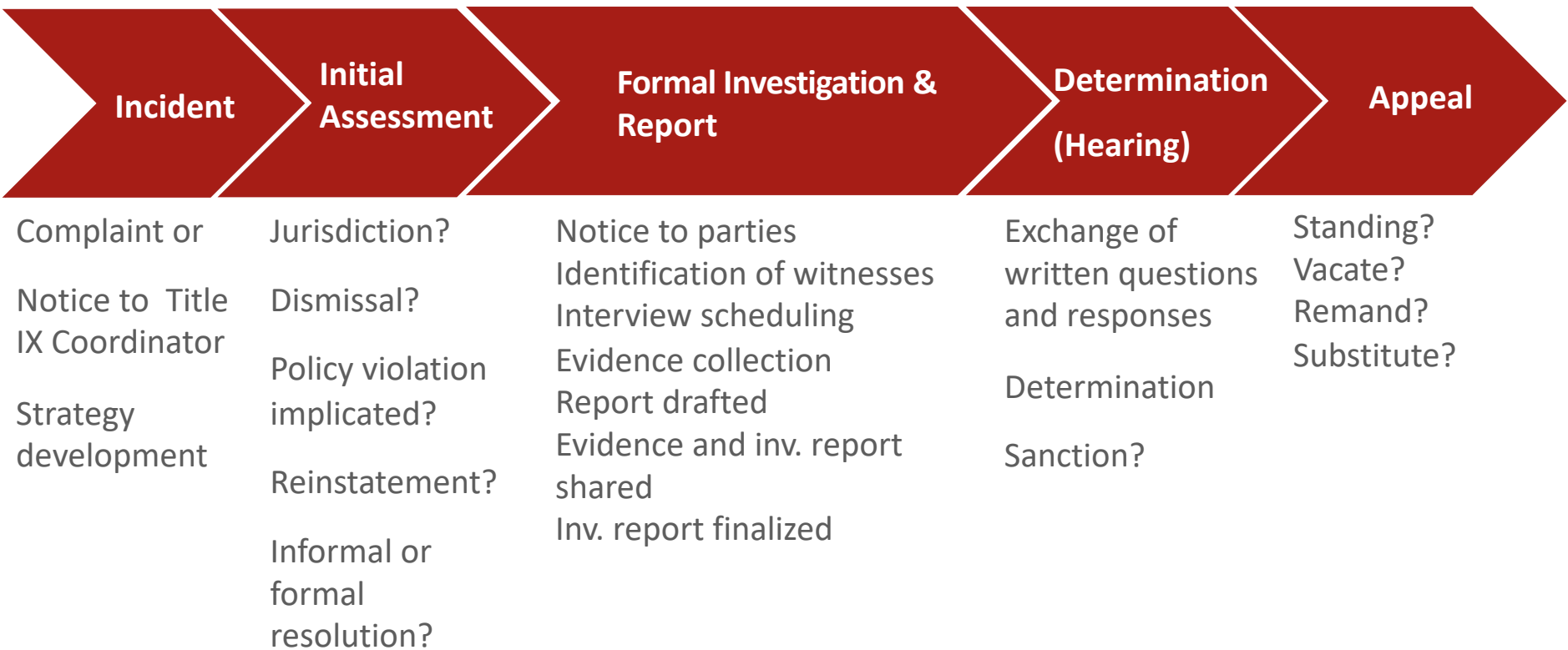
- Robust training mandates
- Coordinators, investigators, decision-makers, appeal officers, informal resolution facilitators
 - Conflicts of interest and bias
 - Definition of sexual harassment
 - Investigation, credibility, evidence
 - Report and rationale-writing
 - Managing questioning process, appeals, informal resolution
 - No sex stereotypes, promote impartiality
- Training materials must be maintained for seven years and posted publicly on recipient's website

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

INVESTIGATION AND GRIEVANCE PROCESS MODEL: AN OVERVIEW

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

THE PROCESS



10 STEPS OF AN INVESTIGATION



1. Receive Notice/Complaint.
2. Initial Assessment and Jurisdiction Determination.
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation to Parties/Notice of Formal Allegation (“Charge”).
5. Establish investigation strategy.
6. Formal comprehensive investigation.
 - Witness interviews.
 - Evidence gathering.
7. Draft investigation report.
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence.
9. Provide all evidence directly related to the allegations to parties and their advisors for inspection and review with 10 days for response.
10. Complete final investigation report.
 - Synthesize and analyze relevant evidence.
 - Send final report to parties for review and written response at least 10 days prior to making a determination of responsibility.

TITLE IX COORDINATOR'S INVESTIGATION AND GRIEVANCE PROCESS OVERSIGHT



- The Title IX Coordinator is responsible for:
 - Point person for receipt of complaint.
 - Conducting initial assessment.
 - Assurance of supportive measures.
 - The appointment and supervision of investigators.
 - Training investigators, decision-makers, appeals decision-makers and informal resolution facilitators.
 - Coordination of investigations.
 - Strategizing investigations.
 - Timeline compliance.
 - Providing institutional memory to investigators.
 - Retaining a record of actions taken in each case.

“REASONABLY PROMPT” TIMEFRAMES FOR GRIEVANCE PROCESS



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

NEUTRALITY, CONFLICT OF INTEREST, OBJECTIVITY



- Grievance process must treat parties “equitably”
 - Must be designed to restore or preserve access to education programs
 - Must include enhanced due process protections before disciplinary sanctions are imposed
- Prohibits conflict-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or against an individual party
- All relevant evidence obtained must be **objectively** evaluated
- Mandates training on appropriate investigation, hearing, evidence, credibility, bias, conflict of interest

ADVISOR OF CHOICE



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

NOTICE TO THE RECIPIENT

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

Actual knowledge

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

- Distinct procedural steps - **actual knowledge** and **formal complaint**
 - Actual knowledge = notice of sexual harassment [or allegations] to appropriate school official
 - Formal complaint = document filed by a complainant or signed by TIXC alleging sexual harassment against a respondent and requesting investigation
 - TIXC is not party when signing formal complaint
- **Actual knowledge** triggers the obligation to offer supportive measures, explain grievance process
- **Formal complaint** triggers the obligation to investigate
- Parent/guardian has “right” to make report/complaint for students in K-12.

“APPROPRIATE SCHOOL OFFICIALS”



- Akin to “Mandatory Reporter” or “Responsible Employee” designations
- New definition
 - Title IX Coordinator
 - Any employee of an elementary and secondary school
 - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
- Likely tracks with your state-law based obligation to report child abuse to state or local authorities
- Train all employees and other “appropriate school officials” to always notify the Title IX Coordinator of all reports.

Formal Complaint

- Document or electronic submission requesting an investigation
- Filed by Complainant or signed by TIX Coordinator
- Alleging Sexual Harassment
- Complainant must be participating or attempting to participate in the recipient's education program or activity
- Initiates mandatory grievance process (investigation and hearing)

“DELIBERATE INDIFFERENCE” STANDARD



- A recipient with **actual knowledge** of sexual harassment in an education program or activity of a recipient in the United States must respond in a manner that is **not deliberately indifferent**.

“NOT DELIBERATELY INDIFFERENT”



- Mandatory steps upon notice (§ 106.44)
 - Promptly contact the Complainant to discuss the availability of supportive measures; may provide to Respondent, too.
 - With or without filing formal complaint, inform Complainant of supportive measures and respect complainant’s wishes
 - Explain to the Complainant the process for filing a formal complaint
- Mandatory steps upon formal complaint (§ 106.45)
 - Follow detailed grievance process requirements
 - Offer informal resolution options
 - Dismiss complaint if no jurisdiction or no *prima facie* sexual harassment allegation

ADDITIONAL REPORTING REQUIREMENTS



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

WHEN DO YOU INVESTIGATE?



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

WHO SHOULD INVESTIGATE?



- Investigations of sexual harassment must be impartial, thorough, and reliable.
 - Title IX Coordinator?
 - Standing panel of investigators?
 - Human resources or student services?
 - Administrators/Staff?
 - Teachers?
 - Coaches?
 - Outside/External investigator?
 - NOT Legal Counsel
 - Well-trained

INITIAL ASSESSMENT

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

INITIAL ASSESSMENT IN SUMMARY



TIXC should be responsible for conducting an initial assessment to determine the following:

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



If proceeding under Title IX:

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

SUPPORTIVE MEASURES



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

COMMON SUPPORTIVE MEASURES



- Referral to counseling, medical and/or other health services.
- Referral to the Employee Assistance Program.
- Visa and immigration assistance.
- Student financial aid counseling.
- Education to the community or community subgroup.
- Altering housing situation (if applicable).
- Altering work arrangements for employees or student-employees.
- Safety planning.
- Providing campus escorts.
- Transportation accommodations.
- Implementing contact limitations (no contact orders) between the parties.
- Academic support, extensions of deadlines, or other course-related adjustments.
- Trespass, Persona Non Grata, or Be on the Lookout (BOLO) orders.
- Timely warnings.
- Class schedule modifications, withdrawals, or leaves of absence.
- Increased security and monitoring of certain areas of campus.
- Other tailored measures appropriate to the circumstances.

Upon receipt of a formal complaint, a recipient must provide written notice to the parties who are known:

- Notice of the grievance process, including any informal resolution process
- Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
 - Identities of the parties involved in the incident, if known
 - Description of conduct
 - Date and location, if known

NOTICE TO THE PARTIES - OCR 2020 REGS (CONTD.)



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

EMERGENCY REMOVALS – OCR 2020 REGS



- On an emergency basis
- Individualized risk and safety analysis
- Immediate threat to health or safety
- Due Process requires opportunity to challenge removal, usually after it is implemented
- Does not apply to non-student employee administrative leave
- May allow equitable participation of Complainant, unless decision does not directly relate to Complainant.

The Title IX regulations include a provision that encourages informal resolution, and we believe it is a worthy practice, when voluntary.

- Following formal complaint.
- Allowed at any time prior to a final determination at discretion of TIXC.
- Voluntary, written consent of the parties and their parent/guardian.
- OCR regs preclude informal resolution of allegations that an employee harassed a student.

INFORMAL RESOLUTION POSSIBILITIES



- Age-appropriate education, facilitated dialogue, and discussion
- Conflict coaching
- Restorative practices methods:
 - Circles
 - Conferences
 - Hearings
- Mediation
- Consider
 - Are policy changes required?
 - Are you providing sufficient staffing and training resources?
- Must still stop, prevent, remedy, and document response

CASE STUDY: SALLY & JAMIE



CASE STUDY: SALLY AND JAMIE



- Sally is a fifteen-year-old ninth-grade student who reported that she was taken into the boys' bathroom and pressured into sexual activity by a male student. Sally stated that she voluntarily entered the boys' bathroom and engaged in consensual kissing with the male student, but she was not expecting to engage in sexual intercourse. Sally reported that the incident was recorded on another student's phone without her knowledge and subsequently shown to other students and posted on social media. Sally's parents notified the principal and school resource officer of the incident and filed a police report. The video continues to circulate at the school and on the internet. Sally reported that she wants to withdraw from school due to the harassment and threats she received as a result of the circulation of the video.

CASE STUDY: SALLY AND JAMIE



- When the principal tells you about Sally's report, you remembered an incident you heard about two weeks ago involving Jamie, a 15-year-old ninth-grade student at the same school. In that incident, it was rumored that Jamie was pulled into an unlocked classroom by a male student where he was forced to sexually touch the male student while a third student lurked in the back of the classroom, unnoticed by Jamie, and recorded the incident. The classroom where it occurred was unsupervised and improperly unlocked. Administrators became aware of the incident involving Jamie when the recording of the incident began circulating on students' phones and on the internet. Jamie never reported the incident, and he has not returned to school. The video of the incident continues to circulate throughout the school and on the internet.

CASE STUDY: SALLY AND JAMIE



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

CASE STUDY: SALLY AND JAMIE



You are the Title IX Coordinator. Please answer the following:

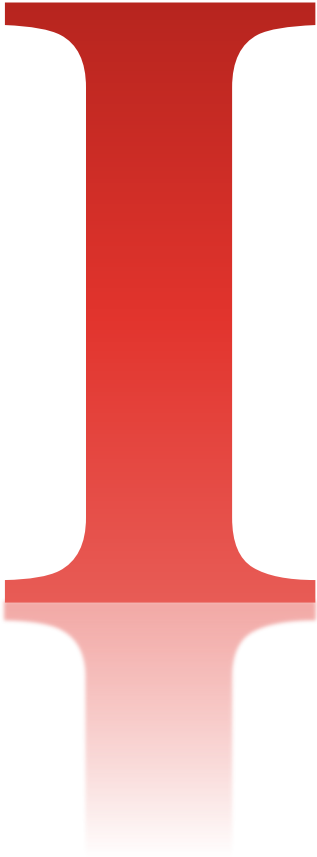
1. What Title IX issues are you able to spot?
2. Outline the actions you would take when responding to Sally's report.
3. What would you do to respond to the incident involving Jamie?
4. What, if any, impact would Jamie's incident have on how you respond to Sally's report?
5. How would you address the three prior incidents of exposing?
6. What, if any, impact would the exposing incidents have on how you respond to Sally's report? Jamie's incident?
7. Of the various incidents described, are there any incidents that you do not believe fall under Title IX? If so, explain why?
8. Talk about your strategy for having the incidents investigated.

FORMAL COMPREHENSIVE INVESTIGATION

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

FORMAL COMPREHENSIVE INVESTIGATION



- 
- A large, stylized red letter 'I' is positioned on the left side of the slide, serving as a decorative element for the list.
- Commence a thorough, reliable, impartial, prompt, and fair investigation.
 - Determine the strategy for the investigation (with oversight from Title IX Coordinator).
 - Witness interviews.
 - Evidence gathering.
 - Intended timeframe to complete the investigation.
 - Finding.
 - Presentation of finding.
 - Complete the investigation promptly, without unreasonable deviation from the timeline.

TITLE IX COORDINATOR'S INVESTIGATION OVERSIGHT



- The Title IX Coordinator should be responsible for:
 - Continued assurance of supportive measures.
 - The appointment of investigators.
 - Coordination/Supervision of investigators and investigations.
 - Strategizing investigations.
 - Facilitating the sending of notices to parties.
 - Facilitating the evidence and report review with parties.
 - Reviewing investigation report.
 - Timeline compliance.
 - Ensuring policies and procedures being followed.
 - Retaining a record of all activities.

BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE



- Procedures should clearly articulate that the burden of proof and burden of gathering evidence rests with the school, not the parties
 - So it's not required that a respondent prove welcomeness or consent, the recipient must prove unwelcomeness or non-consent
- “Sufficient to reach a determination”
- Equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Evidence collected by law enforcement *or any other source*
- Contracted/outsources investigators do not absolve the school of responsibility for this provision

ROLE OF LAW ENFORCEMENT AND ISSUES OF CONCURRENT CRIMINAL ACTION



- Criminal investigations do not relieve the school of its duty to respond promptly and effectively.
- Can law enforcement be the Title IX investigatory arm?
 - Should it be? (not a best practice)
 - Legal standards for criminal investigations are different.
 - Police investigations or reports may not be determinative of whether harassment occurred under Title IX
- What if law enforcement requests you delay your process?
- What if law enforcement is the sole source of evidence collection?
- What if a party files a lawsuit or complaint with OCR?

RIGHTS OF THE PARTIES DURING THE INVESTIGATION, OCR 2020 REGS



- Right to present witnesses, including fact and expert witnesses
- Right to present inculpatory and exculpatory evidence
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence without restriction
- Right to be accompanied to any related meeting or proceeding by advisor of their choice, who may be, but is not required to be, an attorney
- Right to written notice of the date, time, location, participants, and purpose of investigative interviews or other meetings, with sufficient time to prepare
- Right to inspect and review evidence and draft inv. report before finalized

DUE PROCESS: EVIDENCE



- **All** relevant and reasonably available evidence must be considered – inculpatory and exculpatory
- No restrictions on discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered, except must be relevant and respect “rape shield” provision
- Includes all evidence directly related to the investigation, even evidence that determination does not, or will not, rely upon

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1 - OCR 2020 REGS.



Prior to the completion of the report...

- Evidence directly related to allegations must be sent
 - To each party and advisor
 - In electronic format or hard copy
 - Including evidence upon which the Recipient does not intend to rely
 - Including exculpatory and inculpatory evidence
 - Allow 10 days for written response
 - Consider response prior to completion of report
 - Make this evidence available at hearing (if any)

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2 - OCR 2020 REGS.



At least 10 Days Prior to Making a Determination Regarding Responsibility...

- The final Investigation Report summarizing relevant evidence must be sent:
 - To each party and advisor
 - In electronic format or hard copy
 - For the parties' review and written response
 - Best Practice: Provide the investigative report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties
- For K-12 schools with or without a hearing, this review is followed by exchange of relevant written and responses questions facilitated by a decision-maker.

DECISION-MAKERS: MAKING A DETERMINATION

- Live Hearing?
- Questioning
- Standard of Evidence

QUESTIONING BY DECISION-MAKER (AND OPTIONAL HEARINGS)



- Mandated **live hearing not required** for K-12 (unless already required by state law, district policy, board policy, etc.).
- **Live cross-examination not required** for K-12 (unless already required).
 - Questioning may be done indirectly through the decision-maker.
- Parties must be given opportunity to submit written questions, provide each party with the answers, and allowed additional, limited follow-up questions from each party.
- Each party must be permitted to ask the other party and all witnesses all relevant questions and follow-up questions.
 - Including questions challenging credibility.
- Decision-maker may not be the Title IX Coordinator or investigator.

QUESTIONING BY DECISION-MAKER

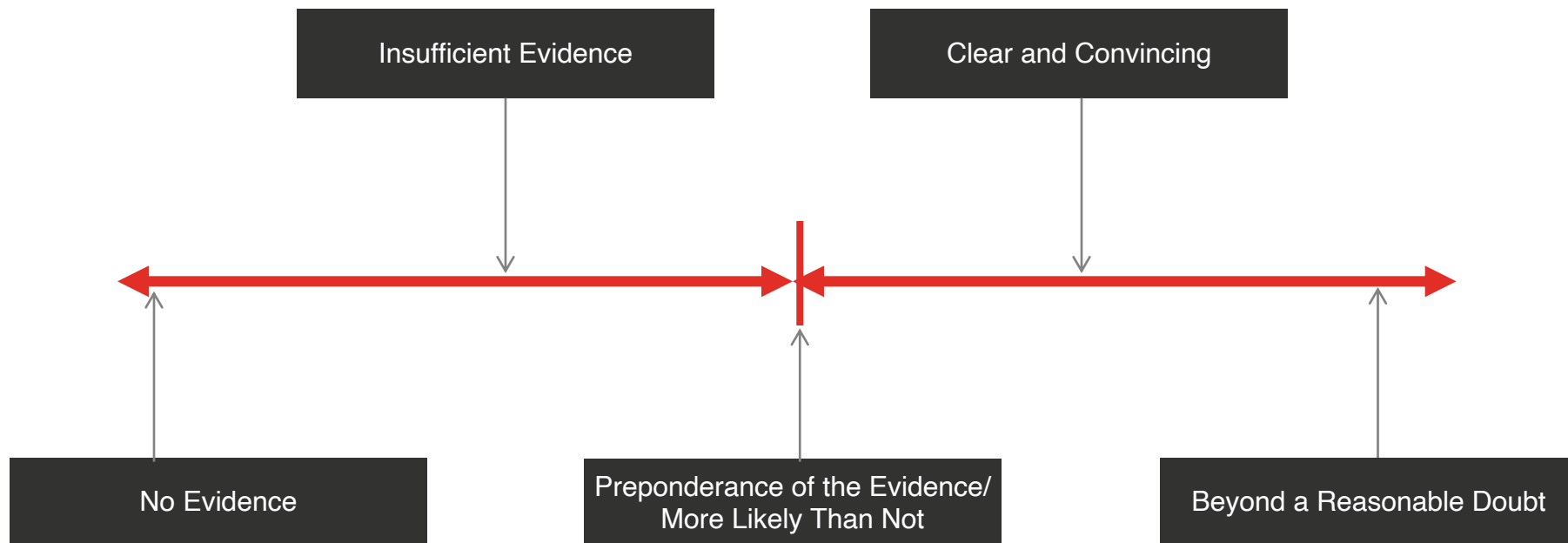


- Questions deemed irrelevant by decision-maker may be excluded with rationale provided.
- Must exclude complainant's prior sexual behavior unless specifically relevant to prove consent or someone else committed the alleged conduct.
- If recipient does offer hearings, must offer option for hearing to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

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



STANDARD OF EVIDENCE



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

SANCTIONS

- Sanctioning Considerations
- Common Sanctions

SANCTIONING IN TITLE IX CASES



- Title IX and case law require:
 - STOP -- Bring an end to the discriminatory conduct.
 - PREVENT -- Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct.
 - REMEDY -- Restore the Complainant as best you can to their pre-deprivation status.
- May clash with solely educational and developmental sanctions of student conduct processes.
- Primary purpose for sanctions related to serious sexual misconduct: stop, prevent, and remedy the misconduct.
 - Developmental goals are not main purpose.

The sanction must be reasonable and proportionate to the severity of the behavior.

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

COMMON STUDENT SANCTIONS



- Warning
- Probation
- Loss of privileges
- Counseling
- No contact
- Limited access to school activities
- Service hours
- Online education
- Parental notification
- Alcohol and drug assessment, and counseling
- Discretionary sanctions
- Alternative Placement
- In-School-Suspension (ISS)
- Out-of-School Suspension (OSS)
- Expulsion

COMMON EMPLOYEE SANCTIONS



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

WRITTEN DETERMINATIONS



- Must issue a written determination regarding responsibility that includes the following:
 - Sections of the policy alleged to have been violated
 - Description of procedural steps taken
 - Statement of and rationale for the result as to each specific allegation
 - Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
 - Sanctions imposed on respondent
 - Any remedies provided to the complainant designed to restore or preserve access to the education program or activity
 - Procedures and bases for any appeal
- Delivered simultaneously to the parties
- FERPA cannot be construed to conflict with or prevent compliance with Title IX.

APPEALS PROCESS

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

THE APPEALS PROCESS



- Appeals are mandatory under OCR's 2020 Regs
- Equitable.
- Clearly communicated to parties.
- One level of appeal is best practice.
- Defined window of time to request appeal.
- Three clear grounds for appeal (though recipients may add others).
- Committee versus individual determination preferred.
- Deference to original hearing authority.
- Remand.

GROUNDINGS FOR APPEAL



- Must offer both parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases:
 - procedural irregularity that affected the outcome of the matter;
 - new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter.
- May offer additional bases for an appeal; must be available to both parties

FINALITY OF DETERMINATION



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

CONSIDERATIONS AFTER A CASE



- Ensure response was not deliberately indifferent.
- Ensure measures taken to restore or preserve equal access to education program or activity.
- Ensure remedies provided to community in addition to complainant.
- Avoid undue delays.
- Ensure that supportive measures are equitable.
- Consider informal resolution as part of grievance process if appropriate.
- Monitor for retaliation; respond immediately to allegations.
- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, industry standards, and state and federal law.

RECORD-KEEPING AND DOCUMENTATION

RECORD-KEEPING AND DOCUMENTATION



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

WORKING WITH PARENTS/GUARDIANS

ISSUES TO CONSIDER WHEN WORKING WITH PARENTS/GUARDIANS



- Transparency and Clarity Regarding Policy and Process
- Parental Notification
- Engaging Parents/Guardians After Receiving a Report
- Setting and Managing Expectations
- Parent/Guardian Participation in the Process
- FERPA Rights/Access to Records
- Difficult Parent Issues
- Ongoing Engagement
- Role of the Title IX Coordinator

FERPA RIGHTS/ACCESS TO RECORDS



- Right to “inspect and review” education records of their child
- What if education records contain information about other students (e.g. surveillance footage, witness statements, etc.)?
 - Only view the specific information directly related to their child unless the information about the other students cannot be segregated/redacted without destroying its meaning
- When possible, ED recommends obtaining consent of parents/guardians of other student(s) whose information will be disclosed

PREVENTING AND ADDRESSING BIAS

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

BIAS AND CONFLICT OF INTEREST



- Conflicts of interest create bias for or against
- Types of conflicts:
 - Wearing too many hats in the process
 - Legal counsel as investigator or decision-maker
 - Decision-makers who are not impartial
 - Biased training materials
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest
- Also, having disciplined a student or employee previously is often not enough to create a conflict of interest

“SEX” v. “GENDER:” GENDER IDENTITY GENDER EXPRESSION

- Transgender Protections Under Title IX?
- Gender Identity/Gender Expression
- OCR View
- Case Law
- State Law

TITLE IX & TRANSGENDER STUDENTS



- In May 2016, OCR released a Dear Colleague Letter specifically addressing Title IX's protections for transgender students.
 - In February 2017, OCR revoked the DCL.
- In February 2017, ATIXA updated and re-released its position statement on Title IX, Gender Identity, and Gender Expression.
 - ATIXA believes that Title IX does protect students on the basis of gender identity.
- Some states are implementing protections under State law
- EEOC and numerous courts have determined gender identity is protected under Title VII. The Supreme Court is expected to soon issue its ruling as to whether sexual orientation and gender identity is covered under Title VII.

TITLE IX & TRANSGENDER STUDENTS



Areas To Consider

- Access to Facilities and Activities
- Name, Identity, Records
- Privacy and Confidentiality

DUAL ENROLLMENT

DUAL ENROLLMENT STUDENTS



- Effective coordination between the Title IX Coordinator at the college/university AND the District Title IX Coordinator
 - What support measures are needed in each setting (if any)?
 - Who has jurisdiction?
 - Under Title IX?
 - Under college/school policy?
 - Who should investigate?
 - Any mandated state reporting required?
 - Note: Higher Ed- FERPA rights belong to the student

PREGNANT AND PARENTING STUDENTS

SIGNIFICANT GUIDANCE DOCUMENTS



“A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.”

34 C.F.R. 106.40

- June 2007 “Dear Colleague Letter”
- June 2013 DCL on Pregnant and Parenting Students
- Regulatory Language

PREGNANCY & TITLE IX: REGULATORY LANGUAGE



- **Pregnancy defined**

- “Pregnancy and related conditions”:

A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.” (34 C.F.R. 106.40)

ATHLETICS GENDER EQUITY

- Title IX Requirements
- Three-Part Test
- Equal Opportunity

ATHLETICS GENDER EQUITY



- Title IX compliance requirements:
 - Effective accommodation of interests and abilities.
 - Financial assistance proportionality.
 - Treatment of student-athletes.
- The oversight of compliance remains the responsibility of the Title IX Coordinator.
 - Need for outside education.

EFFECTIVE ACCOMMODATION OF INTERESTS & ABILITIES



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.

EQUAL OPPORTUNITY



A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the director will consider, among other factors:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice, and competitive facilities;
8. Provision of medical and training facilities and services;
9. Provision of housing and dining facilities and services; and
10. Publicity.

INTERSECTION OF TITLE IX AND TITLE VII

TITLE IX VS. TITLE VII



Title IX

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

Title VII

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

IMPACT ON EMPLOYEES



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

CASE STUDIES



CASE STUDY: SEXTING



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

CASE STUDY: SEXTING



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

CASE STUDY: SEXTING



- Is this a Title IX issue?
- What are the possible violations?
- Who are the complainant(s) and respondent(s)?
- Who should investigate?
- What interaction do you have with law enforcement?
- How do you handle the media?
- How do you handle the parents?
- What other issues do you see?

CASE STUDY: GROOMING- ELEMENTARY SCHOOL

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

CASE STUDY: GROOMING- ELEMENTARY SCHOOL

- Is this a Title IX issue?
- What potential policy violation(s)?
- What additional information would you want to know?
- What, if any, support should be provided to Ana?
- Would your response change if the teacher was a female?

CASE STUDY: GROOMING- HIGH SCHOOL



- Ms. Jones is a physical education teacher and coach of the girls' basketball team, Ms. Jones would supervise a 10th grade study hall period. Sue is a 15-year-old student on the girls' basketball team and also in Ms. Jones's study hall. Sue's parents had been divorced for two years, and Sue struggled emotionally since that time.
- One day after basketball practice, Ms. Jones struck up a conversation with Sue during which Ms. Jones was very complimentary of Sue's athletic ability. The conversation lasted several hours and they talked about many topics including Sue's post-high school plans. The conversation eventually led to a discussion of how Sue was coping with her parent's divorce.

CASE STUDY: GROOMING- HIGH SCHOOL



- The following week, Ms. Jones gave Sue permission to leave study hall and go to a nearby coffee house so she could bring back coffee and pastries for Ms. Jones. Over the following months, their after-practice conversations became routine, as did the special permission to leave study hall.
- Ms. Jones and Sue began meeting on the weekends for extra technique and strength training at a local gym. This progressed to regular lunches afterward. Sue told her mother that Ms. Jones believed she could win a basketball scholarship to college but that it would require more intensive, private training. Sue's mother was happy and relieved to see her daughter's self-esteem and mood improving and encouraged her daughter to invite Ms. Jones over for dinner one evening. After meeting Ms. Jones, Sue's mother began to view her as a welcome friend and tutor to her daughter.

CASE STUDY: GROOMING- HIGH SCHOOL



- Ms. Jones next invited Sue to a sports training seminar that was out of town and required an overnight stay. Sue's mother was not at all concerned when she learned that her daughter and Ms. Jones would be sharing a hotel room.
- The following week, Sue came home with a brand new iPhone that Ms. Jones had given her as a gift. This puzzled Sue's mother, who then called Ms. Jones, mostly with concerns that she should offer to repay Ms. Jones for giving her daughter such an expensive gift. Ms. Jones explained that no payment was necessary, as she had obtained the phone at half price through a college female basketball recruiter she knew.
- Ms. Jones and Sue continued to spend increasing amounts of time together outside of school hours. Sue's mother finally became quite concerned when a friend informed her that her daughter had seen Ms. Jones and Sue embracing each other in an empty classroom.

CASE STUDY: GROOMING- ELEMENTARY SCHOOL

- Is this a Title IX issue?
- What potential policy violation(s)?
- What actions should you take to address this issue?
- Are you concerned with Sue's mother's reaction?
- What remedies would you put in place for Sue and the school community?

QUESTIONS?



CONTACT INFORMATION

Tanyka M. Barber, J.D.

tanyka.barber@tngconsulting.com

Kim Pacelli, M.Ed., J.D.

kim.pacelli@tngconsulting.com

Daniel C. Swinton, J.D. Ed.D.

daniel.swinton@tngconsulting.com

LIMITED LICENSE AND COPYRIGHT. BY PURCHASING, AND/OR RECEIVING, AND/OR USING ATIXA MATERIALS, YOU AGREE TO ACCEPT THIS LIMITED LICENSE AND BECOME A LICENSEE OF PROPRIETARY AND COPYRIGHTED ATIXA-OWNED MATERIALS. THE LICENSEE ACCEPTS ALL TERMS AND CONDITIONS OF THIS LICENSE, AND AGREES TO ABIDE BY ALL PROVISIONS. NO OTHER RIGHTS ARE PROVIDED, AND ALL OTHER RIGHTS ARE RESERVED. THESE MATERIALS ARE PROPRIETARY AND ARE LICENSED TO THE LICENSEE ONLY, FOR ITS USE. THIS LICENSE PERMITS THE LICENSEE TO USE THE MATERIALS PERSONALLY AND/OR INTERNALLY TO THE LICENSEE'S ORGANIZATION FOR TRAINING PURPOSES, ONLY. THESE MATERIALS MAY BE USED TO TRAIN TITLE IX PERSONNEL, AND THUS ARE SUBJECT TO 34 CFR PART 106.45(B)(10), REQUIRING ALL TRAINING MATERIALS TO BE POSTED PUBLICLY ON A WEBSITE. NO PUBLIC DISPLAY, SHARING, OR PUBLICATION OF THESE MATERIALS BY A LICENSEE/PURCHASER IS PERMITTED BY ATIXA. YOU ARE NOT AUTHORIZED TO COPY OR ADAPT THESE MATERIALS WITHOUT EXPLICIT WRITTEN PERMISSION FROM ATIXA. NO ONE MAY REMOVE THIS LICENSE LANGUAGE FROM ANY VERSION OF ATIXA MATERIALS. LICENSEES WILL RECEIVE A LINK TO THEIR MATERIALS FROM ATIXA. THAT LINK, AND THAT LINK ONLY, MAY BE POSTED TO THE LICENSEE'S WEBSITE FOR PURPOSES OF PERMITTING PUBLIC ACCESS OF THE MATERIALS FOR REVIEW/INSPECTION, ONLY. SHOULD ANY LICENSEE POST OR PERMIT SOMEONE TO POST THESE MATERIALS TO A PUBLIC WEBSITE OUTSIDE OF THE AUTHORIZED MATERIALS LINK, ATIXA WILL SEND A LETTER INSTRUCTING THE LICENSEE TO IMMEDIATELY REMOVE THE CONTENT FROM THE PUBLIC WEBSITE UPON PENALTY OF COPYRIGHT VIOLATION. THESE MATERIALS MAY NOT BE USED FOR ANY COMMERCIAL PURPOSE EXCEPT BY ATIXA.