



TITLE IX OVERVIEW FOR
K-12 SCHOOLS AND DISTRICTS

Naperville Community School District
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GOALS AND LEARNING OUTCOMES

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GOALS AND LEARNING OUTCOMES



- Provide an overview of Title IX fundamentals.
- Gain an understanding of the what the District's obligations are under the new 2020 Title IX regulations.
- Offer new tools to support your work to investigate, stop, prevent, and remedy harassment that may occur in your schools.
- Provide an opportunity to (virtually) practice and collaborate together.

CAVEAT REGARDING LANGUAGE



- Recipient = The District
- Complainant = person alleging they experienced harassment/discrimination
- Respondent = person against who a complaint is filed
- Grievance Process = process used to resolve Title IX reports/complaints
- These terms mirror those used by OCR in the new Title IX regulations.
- Please always ask us for clarification if needed at any time.

ISSUE SPOTTING



- A male student physically pulled a minor female freshman student into a school restroom.
- She did not understand or expect that sexual activity was going to occur.
- Feeling pressured, she began sexual activity but stopped before completion.
- Without her knowledge and consent, the male student filmed the encounter on his phone.
- About a month and a half later, another student posted the video on Instagram and “tagged” the female student.
- The female student’s mother alerted the school to the situation, including the bullying she was now facing at school.
- The female student finished her exams at home and left the school for the remainder of the school year.

OVERVIEW OF TITLE IX

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TITLE IX



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

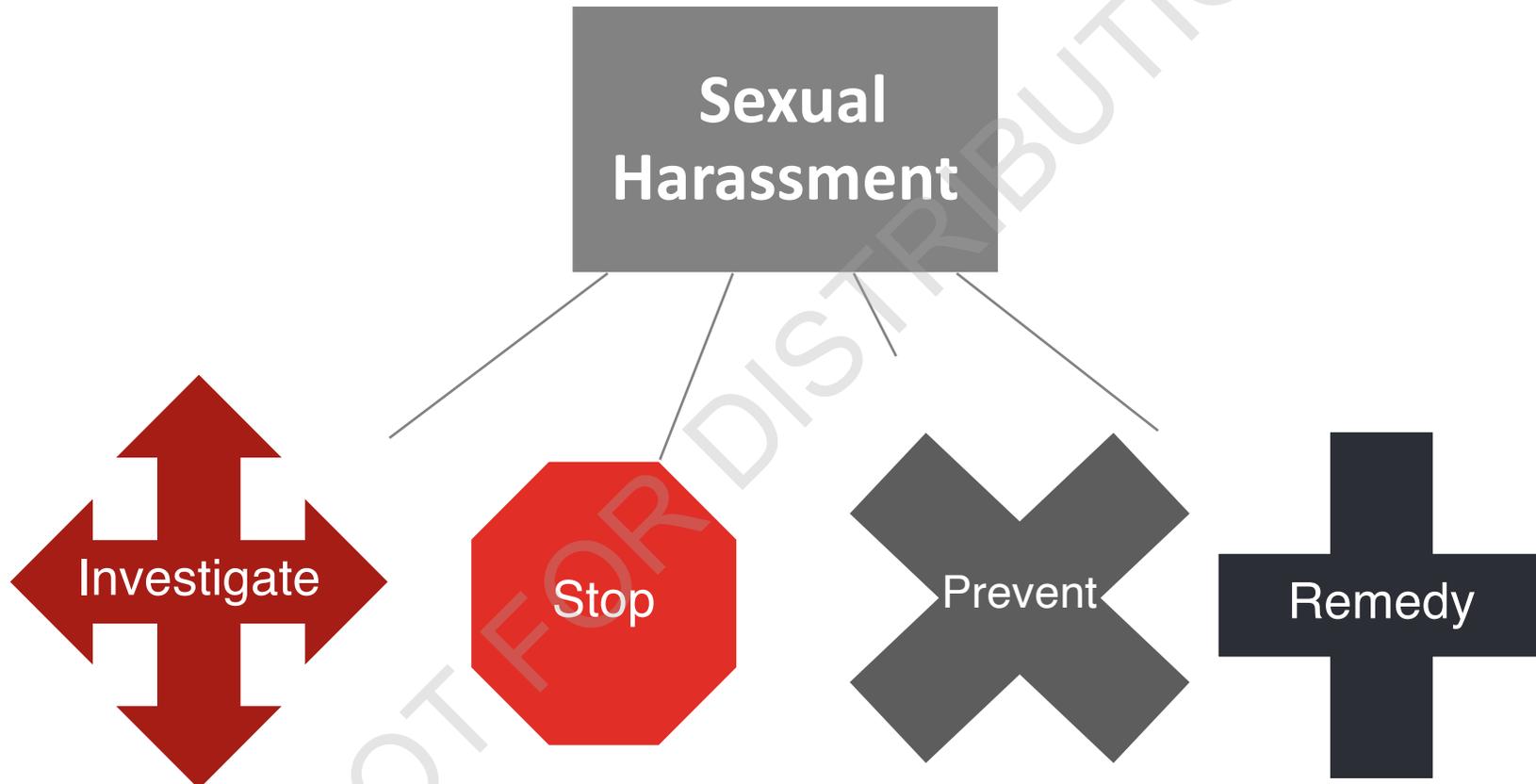
“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”

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.

SCHOOL/DISTRICT OBLIGATIONS UNDER TITLE IX



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

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

DEFINITION OF SEXUAL HARASSMENT



- 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), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

MANDATORY DISMISSAL



- Mandatory dismissal
 - Does not constitute sexual harassment (§ 106.30)
 - Does not fall within jurisdiction
 - Within the United States
 - Within an education program or activity
 - Complainant participating in or attempting to participate in education program or activity

DISCRETIONARY DISMISSAL



- May dismiss a complaint or any allegations at any time during the investigation or hearing if:
 - The complainant notified the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations
 - The respondent is no longer enrolled or employed by the recipient
 - There specific circumstances that prevent the recipient from gathering evidence sufficient to reach a determination

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).

CASE STUDY: IS IT A IX?



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

CASE STUDY: IS IT A IX?



- Several female students express objections to the school's policy to not allow transgender students to use the bathroom according to the gender in 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.”

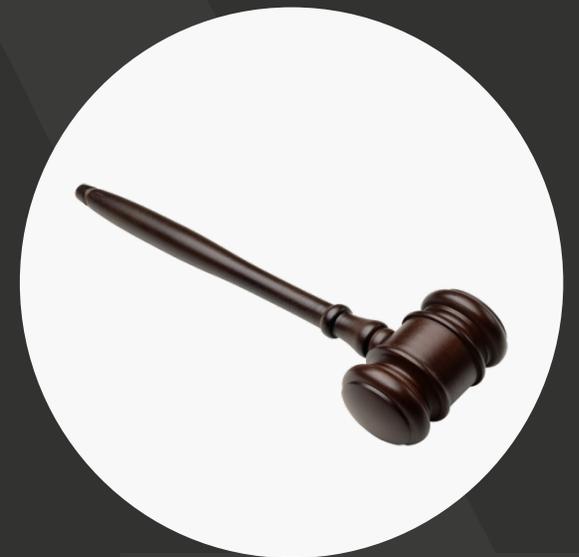
CASE STUDY: IS IT A IX?



- 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?

SIGNIFICANT CASES & KEY OCR GUIDANCE

- *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).
- 2001 OCR Guidance
- 2020 Title IX Regulations



- 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.

- 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.

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

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.

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

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.

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

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's mother also contacted teachers multiple times;
- Mother was told the principal was aware of the situation. 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)



- 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 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* ruling:
 - The school/district must have “actual notice” of the harassment; and the school/district must have responded to the harassment with “deliberate indifference.”
 - Deliberate indifference constitutes a response that is “clearly unreasonable in light of the known circumstances.”
 - 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.

OCR & TITLE IX



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REMEDIES UNDER TITLE IX



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

OCR AND TITLE IX



- OCR is responsible for establishing the compliance standards to be applied in investigations and enforcement of Title IX regarding sexual harassment
- Key Regulatory and Sub-Regulatory Guidance from OCR
 - 1997 Guidance on Sexual Harassment.
 - 2001 Revised Sexual Harassment Guidance.
 - 2011 Dear Colleague Letter (The "DCL").*
 - Q&A on Title IX and Sexual Violence (April 2014).*
 - 2015 DCL, Dear Coordinator Letter & Resource Guide.
 - 2016 Guidance on Transgender Students.*
 - 2017 Interim Guide: Q&A on Campus Sexual Violence.
 - 2018 Proposed Title IX Regulations
 - **2020 Final Title IX Regulations**

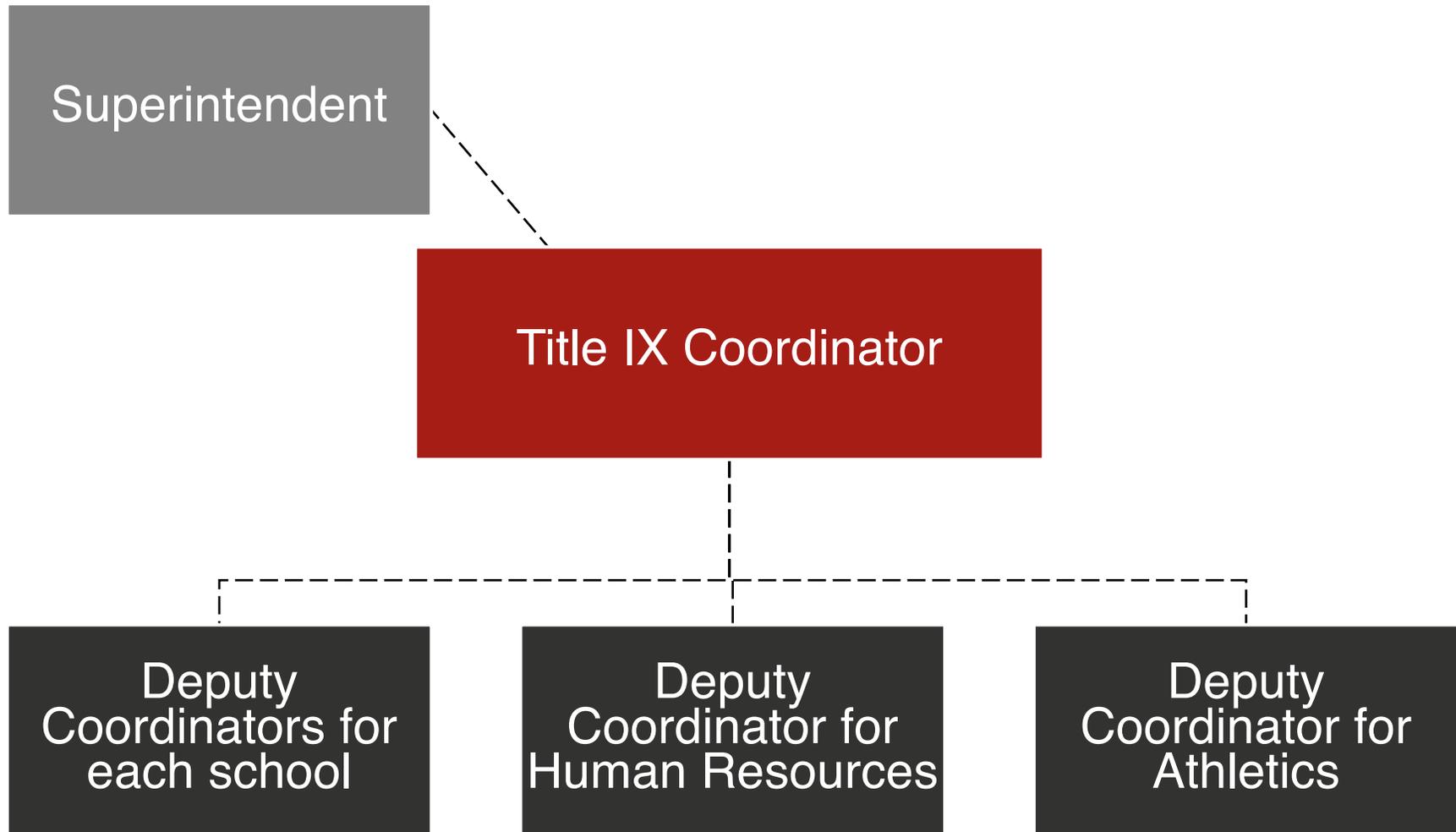
*Since rescinded

TITLE IX TEAM

- Sample Team Structure
- Who's Who
- Roles

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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 be able to effect change across many departments
- To alleviate the burden on one administrator, Districts and schools may identify multiple deputy coordinators – typically one per school.

ROLE OF THE TITLE IX COORDINATOR



- Assurance of compliance with requirement to investigate, stop, prevent, remedy.
- Prevention and remediation of all sex/gender-based discrimination and harassment.
- Oversight and coordination of prompt and equitable grievance procedures.
- Supervisor of investigations.
- Assurance of compliance with final sanctions.
- Contact for government inquiries.
- Point person for reports.
- Creator and implementer of appropriate policies.
- Compliance auditor/oversight.
- Training oversight: Title IX tea, teachers, staff, students, parents/guardians.
- Athletics gender equity.

POINT PERSON FOR REPORTS



- 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 and will either designate the individual to lead the Title IX-based response protocol or will implement that process.

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.

TRAINING



- 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

NOTICE & REPORTING

- Actual and constructive notice
- “Appropriate school official”
- Additional reporting requirements
- When do you investigate?

Actual Notice (actual knowledge)

- Title IX Standard
- Prompts obligations under Title IX

Constructive Notice (respondeat superior)

- Broader standard - Knew or should have known
- Insufficient under Title IX, but can be acted upon at the discretion of the recipient

NOTICE



- 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.

“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
 - 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?



- When you have notice!
- Per Title IX regulations
 - Upon receipt of a formal complaint.
 - When the Coordinator deems an investigation is warranted.
- What about rumors, gossip, social media, etc.
 - Investigating on these bases may be discretionary under the regs (but often recommended).
- Once actual notice exists, the duty to investigate is absolute.
 - Small “i” preliminary inquiry.
 - Big “I” comprehensive investigation.

CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

CIVIL RIGHTS INVESTIGATION MODEL



- A civil rights investigation model is different from other student conduct work.
- An active gathering of information by the investigator(s)
 - Not intended to “build a case.”
- Does not impact the implementation of informal or alternative dispute resolution approaches.
- Characterized by an intentional effort to provide equitable procedural and support mechanisms.

THE IX COMMANDMENTS



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

GRIEVANCE PROCEDURES



- Must include:
 - Presumption that respondent is not responsible until determination is reached
 - “Reasonably prompt” timeframes
 - Requirement to set specific timelines for major stages of the grievance process now gone
 - Range of possible sanctions and remedies
 - Description of standard of evidence
 - Bases and procedures for appeal
 - Appeal now required, equitably, on three grounds
 - Range of supportive measures available to all parties
 - Note shift from “interim measures” terminology

PROMPTNESS



- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Temporary delays for “good cause” and with written notice of the delay to parties
 - Complexity of the investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Absence of parties or witnesses
 - Need to provide accommodations for a disability
 - **Delays for administrative needs are insufficient**

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

THE PROCESS



10 STEPS OF AN INVESTIGATION



1. Receive Notice of Allegation.
2. Preliminary Inquiry (initial assessment of complaint and issue-spotting).
3. Gatekeeper determination.
4. Notice of Investigation/Notice of Formal Allegation to parties.
5. Issue spotting by investigators (will continue as new information is added).
6. Preliminary investigation strategy.
7. Formal comprehensive investigation.
8. Meet with Title IX Coordinator to review draft report & 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 report.
 - Synthesize and analyze relevant evidence, including making recommended findings (may vary by District).
 - Send final report to parties for review and written response at least 10 days prior to a determination being made.

TITLE IX COORDINATOR OVERSIGHT



- The Title IX Coordinator is responsible for:
 - The appointment of investigators.
 - Training investigators, decision-makers, and informal resolution facilitators.
 - Coordination/supervision of investigators and investigations.
 - Strategizing investigations.
 - Assurance of supportive measures.
 - Assurance of remedies and sanctions.
 - Timeline compliance.
 - Providing institutional memory to investigators.
 - Retaining a record of all activities.

PRELIMINARY INQUIRY



PRELIMINARY INQUIRY



- Title IX Coordinator assess report/complaint to determine the following:
 - Has a formal complaint been filed?
 - Has the respondent received notice of the complaint?
 - Does one of the four mandatory dismissal provisions require the complaint to be dismissed under Title IX?
 - Are any of the three discretionary dismissal provisions present?
 - Is informal resolution appropriate and/or desired?
 - If dismissed for a mandatory or discretionary reason, should an alternate policy/process be used to resolve the complaint?
 - Is there a potential immediate threat to health or safety such that an emergency removal may be needed?
 - What supportive measures should be offered and provided to the parties?

NOTICE TO PARTIES



- Upon receipt of formal complaint, must provide written notice to the parties:
 - Relevant grievance procedures
 - Allegations with sufficient details: identity of parties, implicated policies, date, location if known
 - Statement that the respondent is presumed not responsible
 - Parties may request to inspect and review relevant evidence
 - Sufficient time to prepare a response
- Ongoing notice
 - Any reasonable delay for good cause
 - Any additional allegations
 - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare

SUPPORTIVE MEASURES



- Previously referred to by OCR as “interim measures”
- Non-disciplinary, non-punitive individualized services for all parties
- Must not unreasonably burden parties, protect the safety of parties and educational environment, and deter harassment
- Must be offered to complainant upon notice of harassment
- Must be available before, after, or in lieu of formal complaint
- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, etc.

EMERGENCY REMOVAL



- May remove a respondent from a recipient's education program or activity on an emergency basis, provided that the school:
 - Undertakes an individualized safety and risk analysis,
 - Determines that an immediate threat to the *physical* health or safety of students or employees justifies removal, and
 - Provides the responding party with notice and an opportunity to challenge the decision immediately following the removal
 - Removal must comply with the requirements of the IDEA, Section 504, and the ADA
- May place a non-student employee respondent on administrative leave during the pendency of an investigation under current procedures for doing so

FORMAL INVESTIGATION



ADVISOR OF CHOICE



- All parties are entitled to have an advisor **of their choice** to assist them throughout the process
- The advisor is in addition to a student's parent/guardian
- Advisor may be anyone
 - May not restrict who may serve as advisor
- Must allow advisor to be present at all meetings, interviews, and hearing (if one is provided)
- May restrict role/participation of advisor as long as applied equally to all parties

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/outsourced 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?

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

PARTY ACCESS TO EVIDENCE/REPORT



- Regulations mandate creation of an investigation report
 - Report fairly summarizes all relevant evidence
- Two 10-day review and comment periods
 - Prior to the completion of the report, all evidence directly related to allegations must be provided to parties and advisors (in electronic or hard copy)
 - Parties must have at least 10 days to review and submit written responses
 - Once investigation report is finalized
 - Parties must receive finalized report to review and submit written responses 10 days prior to the time of the “determination of responsibility”

DECISION-MAKERS: MAKING A DETERMINATION

- Questioning
- Standard of Evidence
- Written Determinations
- Appeals

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 req'd)
 - 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

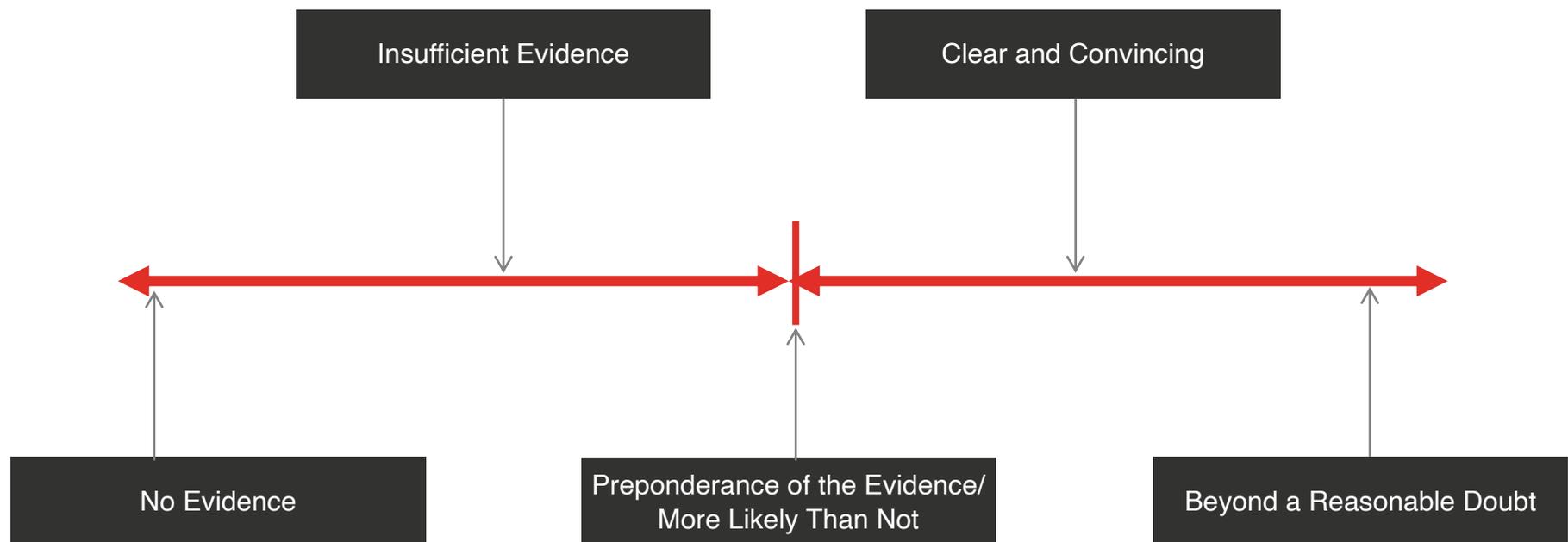


- Questions deemed irrelevant by decision-maker may be excluded with rationale provided.
- Must exclude complainant's prior sexual behavior unless specifically relevant to prove consent or someone else committed the alleged conduct.
- If recipient does offer hearings, must offer option for hearing to 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

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

APPEALS



- Appeal is required and must be made available equitably
- Three required grounds for appeal (see next slide)
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to both parties
- “Reasonably prompt” timeframe for producing appeal decision
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- Appeal process may need to be coordinated with other Board policy or State law particularly in cases involving suspension or expulsion

GROUNDS 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

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

SPECIAL TOPICS

- Informal Resolution
- Impact on Employees
- Gender Identity/Gender Expression/Transgender Students
- Dual Enrollment
- Pregnant and Parenting Students
- Athletics
- Working with Parents/Guardians

INFORMAL RESOLUTION

- Considerations
- Requirements

INFORMAL RESOLUTION OPTIONS



- School and parties will determine when informal resolution is appropriate
 - “[I]n responding to sexual harassment, it is important to take into account the needs of the parties involved in each individual case, some of whom may prefer not to go through a formal complaint process.”
- Does not preclude certain offenses from informal resolution
- DOES preclude informal resolution for allegations that an employee harassed a student, so presumably, employee-on employee informal resolution is permissible.

FACTORS TO CONSIDER FOR INFORMAL RESOLUTION



- Age of the parties
- Developmental levels of the parties
- Other capabilities of the parties
- Knowledge, skills and experience of those facilitating/conducting the informal resolution process
- Severity of the alleged misconduct
- Likelihood of recurrence of the misconduct

REQUIREMENTS OF INFORMAL RESOLUTION OPTIONS



- Informal resolution allowed at any time prior to a final determination at discretion of TIXC
 - Formal complaint is required
- Must provide detailed notice to the parties:
 - Allegations
 - Requirements of the process
 - Circumstances that would preclude formal resolution
 - Consequences of participation
- Must obtain voluntary, written consent

IMPACT ON EMPLOYEES



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

“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



- Transgender students are disproportionately subjected to harassment and discrimination.
- 2015 national survey:
 - The majority of respondents who were out or perceived as transgender while in school (K–12) experienced some form of mistreatment, including being verbally harassed (54%), physically attacked (24%), and sexually assaulted (13%) because they were transgender. Further, 17% experienced such severe mistreatment that they left a school as a result.
 - U.S. Transgender Survey, National Center for Transgender Equality

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 AND TRANSGENDER STUDENTS



- Whitaker By Whitaker v Kenosha Unified Sch. Dist. No 1 Bd. of Educ., 858 F. 3d 1034 (7th Cir. 2017)
 - Discrimination on the basis of gender identity is a form of sex discrimination under Title IX
- Illinois Human Rights Act
 - Gender identity nondiscrimination in places of public accommodation; covers schools
- Illinois State Board of Education - *Supporting Transgender, Nonbinary and Gender Nonconforming Students*, March 1, 2020 (non-regulatory guidance)

TITLE IX & TRANSGENDER STUDENTS



Areas To Consider

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

ACCESS TO FACILITIES AND ACTIVITIES



- Where sex-segregated activities and facilities are provided, students should be allowed to both participate and access facilities consistent with their gender identity.
 - Bathrooms
 - Locker rooms
- Provide access to alternative accommodations for any students who desire additional privacy
- Students may participate in activities that correspond with their gender identity
 - Physical education classes
 - Athletic conference eligibility policy
 - Overnight trips
- Make all-gender restrooms available for all students

NAME, IDENTITY, RECORDS



- Accept a student's consistent and sincerely-held gender identity
- Meet with student to discuss supports and preferences
- Legal name v. preferred name
- Use preferred name and pronouns on informal documents
 - ID cards, class rosters, yearbooks
- State law governs changing legal name and sex for official school records and standardized tests
- Parents/guardians have FERPA rights
- Train all staff and volunteers (e.g., substitute teachers)

PRIVACY AND CONFIDENTIALITY



- Information should be kept private
 - Legal identity
 - Transgender status
 - Sex assigned at birth
- Be mindful of when/if disclosures are made to parents/guardians
- All staff should be trained to avoid inadvertent disclosures
- Parents/guardians have access to education records under FERPA
- Be transparent regarding records system limitations
- Be transparent about potential of disclosures by others

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.

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
- 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

CASE STUDIES

- Bullying
- Sexting
- Grooming



CASE STUDY: BULLYING



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

CASE STUDY: BULLYING



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

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- HIGH 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?

CONTACT INFORMATION

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