



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

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June 4th-7th, 2019 | Minneapolis, MN

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# COORDINATOR TRAINING AGENDA



- Overview of Title IX Coordinator Responsibilities
- History & Overview of Title IX
- Extensive Review of Title IX Legal Standards
- Significant Cases
- OCR & Title IX
- Major OCR Guidance
  - 2001 OCR Guidance
  - *April 4<sup>th</sup>, 2011 Dear Colleague Letter\**
  - *2014 Q&A on Title IX and Sexual Violence\**
  - 2015 Dear Colleague Letter to Coordinators and Resource Guide
  - *2017 Interim Guide: Q&A on Campus Sexual Violence\**
- Clery Act and VAWA Section 304 Amendments

# COORDINATOR TRAINING AGENDA



- Notice, Reporting, Responsible Employees & Confidentiality
- Training Responsible Employees
- Is it a IX? When Does Title IX Apply?
- Consent Construct
- The Title IX Coordinator: Roles and Responsibilities
  - Point Person for Complaints
  - Training Oversight
  - Creator & Implementor of Appropriate Policy
  - Contact for Government Inquiries
  - Prevention and Remediation

# COORDINATOR TRAINING AGENDA



- The Title IX Coordinator: Roles and Responsibilities (cont.)
  - Oversight of Prompt & Equitable Grievance Procedures
  - Supervisor of Investigations
  - Assurance of Compliance with Final Sanctions
  - Coordinating Appeals Process
  - Compliance with Requirements to Stop, Prevent, and Remedy
  - Coordinate Overlap of Various Student & Employee Grievance Processes
  - General Title IX Compliance Oversight
  - Navigating First Amendment Protections
  - Prevention and Remediation of Retaliation
  - Section 504 Disabilities Compliance Oversight
  - Oversight of Athletics Gender Equity

# THE TITLE IX COORDINATOR

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## Overview of the Responsibilities

- Description
- Roles
- Discussion



# THE TITLE IX COORDINATOR



- Administrator with significant authority and wide-ranging responsibilities.
- Affect change across many departments, including Human Resources, Academic Affairs, Athletics, and Student Conduct.
- Some institutions will allocate part-time responsibilities to the Coordinator. Others will dedicate a full-time position as recently recommended by OCR.
- Title IX Coordinator has become a profession within the field of civil rights compliance.
- To alleviate the burden on one administrator, institutions should consider identifying multiple deputy coordinators.



# THE ROLE OF THE TITLE IX COORDINATOR



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

# THE ROLE OF THE TITLE IX COORDINATOR



- Contact for government inquiries.
- Point person for complaints.
- Oversight and coordination of prompt and equitable grievance procedures (faculty, student, and staff).
- Develop, revise and implement of appropriate policies.
- Compliance auditor.
- Training oversight: faculty, staff, students, investigators, hearing officers, and appellate officers.
- Coordination with overlapping or adjacent compliance issues:
  - Navigating First Amendment protections/speech issues.
  - Section 504 disabilities compliance oversight.
  - Athletics gender equity.

# SMALL GROUP DISCUSSION



- What are the three biggest concerns you have regarding your role as a Title IX administrator (Coordinator, deputy, etc.)?
- What are you hoping to take away from this training?

# HISTORY & OVERVIEW

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

# A BRIEF HISTORY OF TITLE IX PRE-1972



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

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

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

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

# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



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



# *CANNON v. UNIVERSITY OF CHICAGO*

## 441 U.S. 677 (1979)



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

# CANNON v. UNIVERSITY OF CHICAGO

## 441 U.S. 677 (1979)



- Filed sex discrimination lawsuit in federal court, arguing violation of the 14th Amendment, Civil Rights Act of 1871, and Title IX.
  - District and Seventh Circuit dismissed the Title IX claim, holding that Title IX had neither an express nor implied private right of action.
  - Appealed to Supreme Court.
- Supreme Court reverses, and holds that there is an implied private right of action under Title IX.
  - Plain language: Individuals can bring a lawsuit under Title IX.
  - Court relied on legislative history, modeling of Title IX after Title VI of the Civil Rights Act of 1964, the underlying purposes of Title IX, and federal interest in preventing discrimination in education.

# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- 1979: HEW promulgates three-part test for athletics to evaluate equity in athletic participation and access to resources and equitable opportunities.
- 1980: U.S. Department of Education was created.
  - Title IX oversight transferred to Dept. of Ed.’s Office for Civil Rights (OCR).
- 1982: Supreme Court holds “Employment discrimination comes within Title IX’s prohibition,” *North Haven Bd. of Education v. Bell*, 452 U.S. 512.

# ***NORTH HAVEN BOARD OF EDUCATION v. BELL*** **456 U.S. 512 (1982)**



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

# *NORTH HAVEN BOARD OF EDUCATION v. BELL* 456 U.S. 512 (1982)



- Trumbull Board of Education

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

# *NORTH HAVEN BOARD OF EDUCATION v. BELL* 456 U.S. 512 (1982)



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

# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



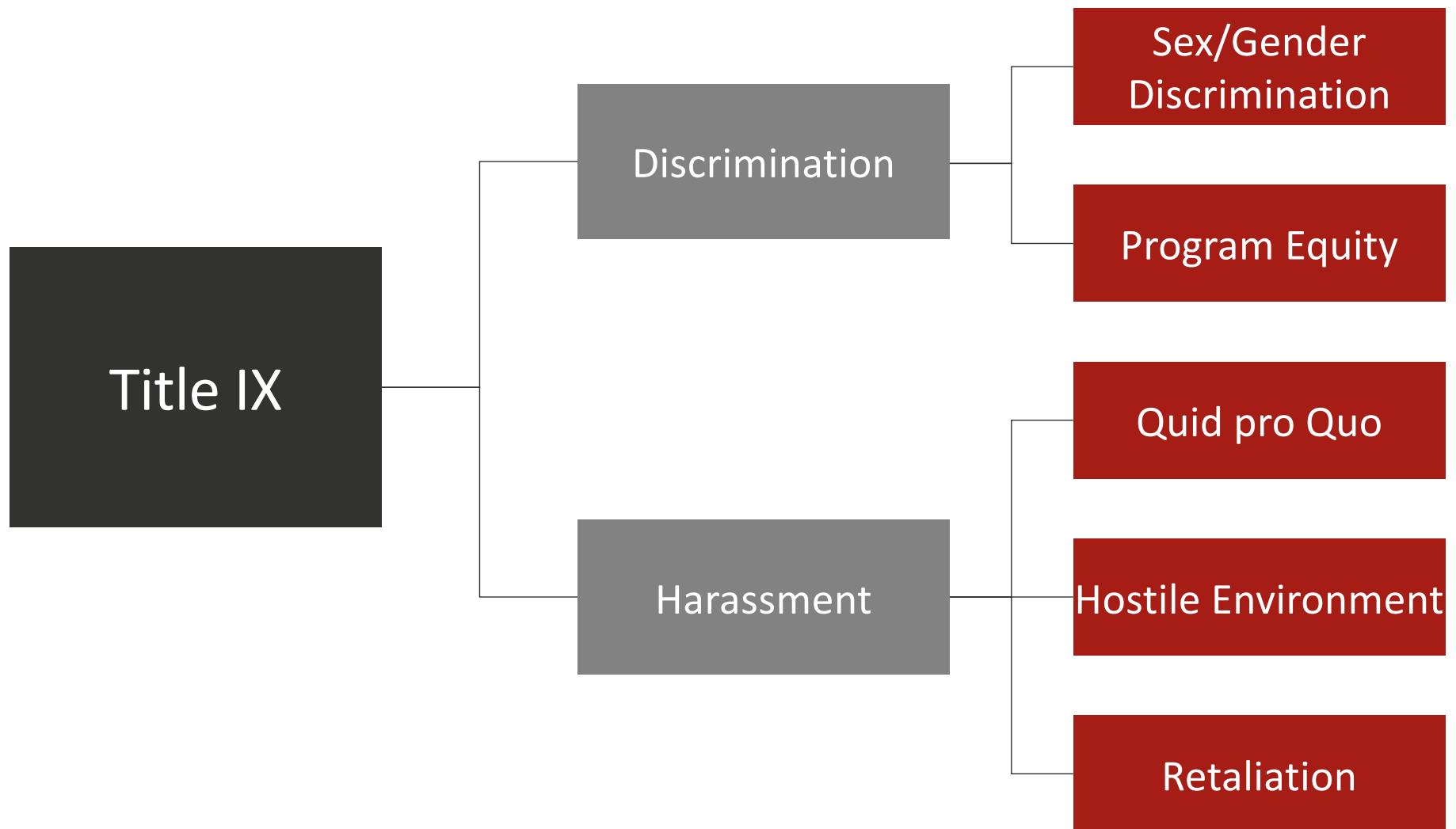
- OCR Guidance (\* = rescinded in September 2017)
  - 1997 Guidance → 2001 Revised Sexual Harassment Guidance.
  - *2011 Dear Colleague Letter (The “DCL”).\**
  - *Questions and Answers on Title IX and Sexual Violence (April 2014).\**
  - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource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

# THE CLERY ACT & APPLICABILITY



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





# TITLE IX ESSENTIAL COMPLIANCE ELEMENTS



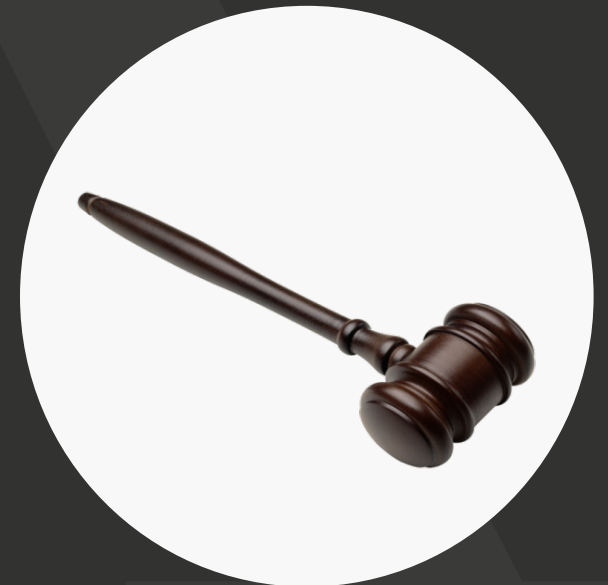
- Once a “responsible employee” has either actual or constructive notice of sexual harassment/ sexual misconduct, the school must:
  - Take immediate and appropriate steps to **investigate** what occurred.
    - The obligation to investigate is absolute, even if just a preliminary inquiry (see **Davis**).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

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

# SIGNIFICANT CASES

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



# FRANKLIN v. GWINNETT PUBLIC SCHOOLS

503 U.S. 60 (1992)



- Christine Franklin alleged that during her junior year (1986), an economics teacher, Andrew Hill, engaged her in sexually explicit conversations, forced kissing, and coercive sexual intercourse on school grounds.
  - Hill allegedly pulled her out of class on three occasions and engaged in sexual intercourse with her in a private office.
  - School learned of the harassment against Franklin and other students, investigated; however, it took no action and discouraged her from pressing charges against Hill.
  - Hill eventually resigned in exchange for school district closing the investigation.
- Franklin filed suit against the school district alleging:
  - Sexual harassment under Title IX; and
  - Failure to take appropriate action upon learning of the harassment.

# FRANKLIN v. GWINNETT PUBLIC SCHOOLS

503 U.S. 60 (1992)



- District and Eleventh Circuit dismissed the case, indicating that Title IX does not allow for award of monetary damages.
- Supreme Court held:
  - Sexual harassment constituted sex discrimination under Title IX.
  - Private right for recovery of monetary damages under Title IX.
- *Gwinnett* did not address issues concerning the educational institution's liability.
- What about a statute of limitations?

# GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



- **Basic Facts – Faculty/student sexual harassment:**
  - In spring of 1991, Alida Star Gebser, 8th grade student in Lago Vista Independent School District (TX), joined a book discussion group led by Frank Waldrup, a teacher.
  - During book group, Waldrup made a number of sexually suggestive comments to the students.
  - In Fall 1991, Gebser (9th grade) was assigned to two of Waldrup's courses. Waldrup also began tutoring Gebser at her home.

# GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



- Basic Facts (cont.)
  - In Spring 1992, Waldrup and Gebser began a sexual relationship that continued until spring 1993, when a police officer discovered them having sex in the woods. They often engaged in sex during school hours, though not on school property.
  - No one at the school or in the district knew of the relationship.
  - Upon his arrest, district fired Waldrup and the state revoked his teaching license.

# GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



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



# GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



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

# DAVIS v. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Facts:

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

# DAVIS v. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Facts (cont.):
  - Additional incidents in February-May 1993 in P.E. and other classes, E.g.:
    - The same male student stuck a doorstop in his pants and acted in sexually suggestive manner towards Davis;
    - He rubbed up against her in suggestive manner;
    - Touched her breasts and genitals.
  - Davis or her mother continued to report incidents to teachers; no disciplinary action was taken.
  - Davis’s assigned seat was next to the male student throughout the harassing behavior; not allowed to change seats for over three months.

# DAVIS v. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



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

# DAVIS v. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



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

# DAVIS v. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



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

# WHAT'S NEXT FOR TITLE IX LITIGATION?



- Title IX increasingly viewed as a viable cause of action.
- Increase in lawsuits by the accused.
- Due process-based claims.
- Negligence-based claims.
- Breach of contract.
- Attorney involvement in the process.
- Hospitals and Title IX.
- Shifting view of what constitutes “notice.”
- Impact of proposed regulations.
- Impact of VAWA 2013 – Section 304.
- Pending state and federal legislation.

# DISCUSSION QUESTIONS



- In small groups, please discuss the following:
  - Describe the legal framework created by *Franklin, Gebser, and Davis*?
  - How does your campus or school receive actual or constructive notice?
  - What do you think is causing the increase in Title IX litigation? How is your campus or school responding, if at all?



# OCR & TITLE IX

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



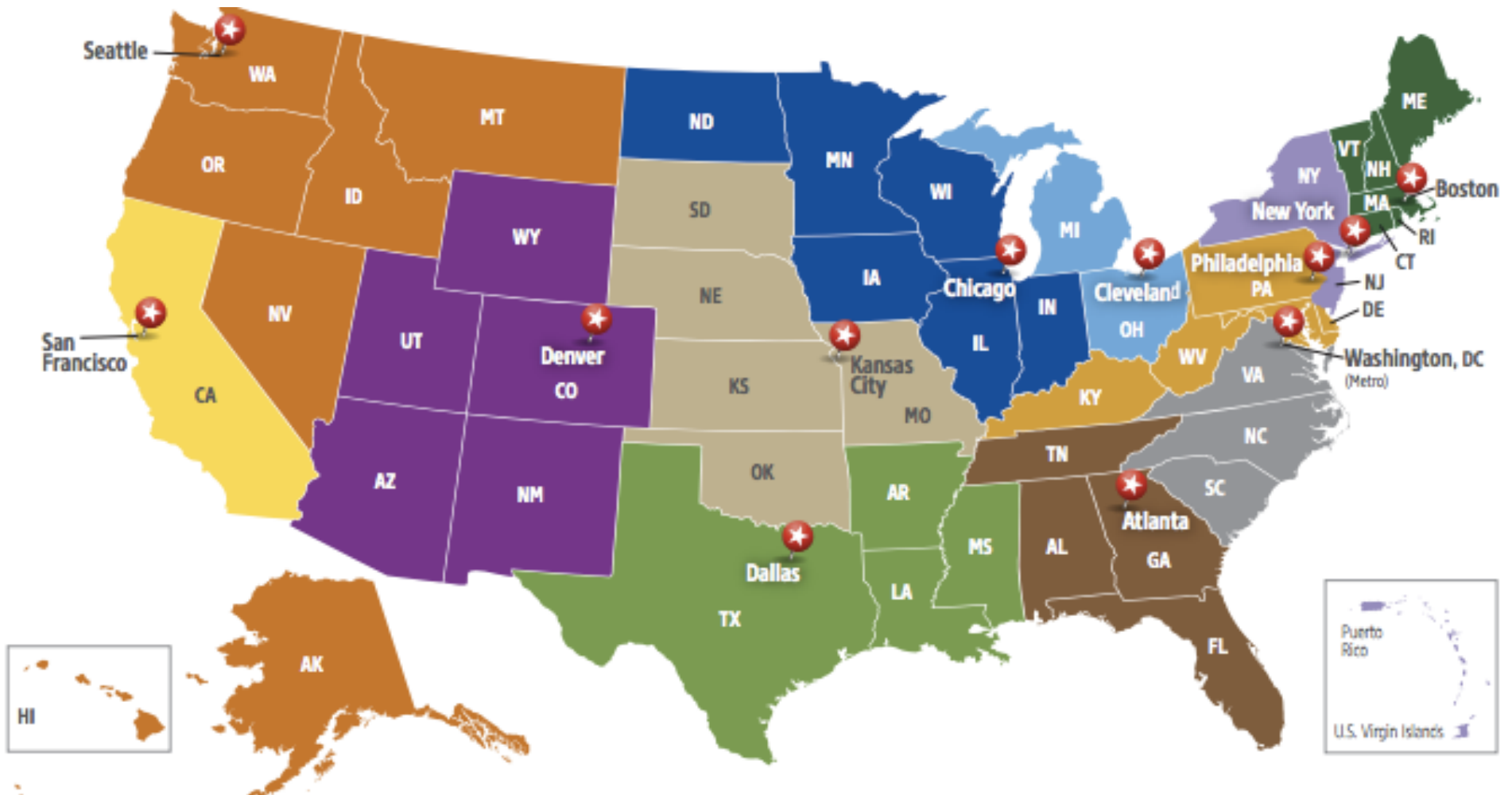
# ROLE OF OCR & TITLE IX



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

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

# OCR REGIONAL OFFICES



# OCR ENFORCEMENT MECHANISMS



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

# OCR COMPLAINTS



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

# THE OCR INVESTIGATION PROCESS



- OCR is a neutral fact-finder that collects and analyzes relevant information.
- Notification letters:
  - To the person who files the complaint (could be Reporting Party or a Responding Party) and recipient informing them that OCR is opening an investigation.
  - Normally will be sent to the president or superintendent.
- Data request:
  - Written request for documents and narrative responses.
- Scheduling interviews:
  - Telephone or in-person.
- On-site visit.

# OCR PROCESS ALTERNATIVES



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



# VOLUNTARY RESOLUTION AGREEMENT: THE “302 LETTER”



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

# RESOLUTION AGREEMENT: THE “303 LETTER”



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

# RESOLUTION AGREEMENTS



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

# INSUFFICIENT EVIDENCE DETERMINATION



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

# RECENT OCR TITLE IX RESOLUTIONS



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

# ADDITIONAL RESOURCES ABOUT OCR



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

# SEEKING RESOLUTION UNDER TITLE IX



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

**And/Or**

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

# CIVIL LAWSUITS VERSUS ADMINISTRATIVE ACTION



## Lawsuit

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

## Administrative Action\*

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

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



# DISCUSSION QUESTIONS



- In small groups, please discuss the following:
  - What questions do you have regarding OCR and its investigation and resolution processes?
  - Discuss the interactions (if any) you or your institution have had with OCR.

# KEY TITLE IX OCR GUIDANCE

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

\* = rescinded in September 2017

**Is currently the primary Title IX regulatory compliance document.**

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

# 2001 REVISED SEXUAL HARASSMENT GUIDANCE



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

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

# 2011 DEAR COLLEAGUE LETTER



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

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

# 2014 Q&A ON TITLE IX AND SEXUAL VIOLENCE



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

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

# 2015 DEAR COLLEAGUE LETTER & RESOURCE GUIDE



## **Remain in full effect. Not impacted by OCR 2017 action.**

- Thanks Title IX Coordinators for their vitally-important work.
- Reiterates requirement to designate a Title IX Coordinator.
- Invites superintendents and presidents to ensure support:
  - “[Y]ou must have the full support of your institution.”
- Must have necessary positional and actual authority to perform their role.
- Significant oversight:
  - Notified of ALL Title-IX reports and complaints; coordinate all responses; monitor all outcomes; identify and address patterns; assess institutional climate.



# 2015 DEAR COLLEAGUE LETTER



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

# 2015 DEAR COLLEAGUE LETTER



- **Visibility**

- Notice of non-discrimination with Title IX and Coordinator information posted and included in virtually all publications, materials, and websites.
- Encourages Title IX-specific website.

- **Training**

- Institutions must ensure Coordinators are well-trained and up-to-date on all responsibilities and all applicable laws, policies, guidance, regulations, institutional policies, and procedures.

- Broad-ranging, topically-organized summary guide.
  - Grievance procedure requirements and notice of nondiscrimination.
  - Recruitment, admissions, and counseling.
  - Financial assistance.
  - Athletics.
  - Sex-based harassment.
  - Pregnant and parenting students.
  - Discipline.
  - Single-sex education.
  - Employment.
  - Retaliation.

# OTHER GUIDANCE REGARDING SEXUAL HARASSMENT & VIOLENCE



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

# CLERY ACT: VAWA 2013 — SECTION 304

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# THE CLERY ACT



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

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



# CLERY ACT AMENDMENT: VAWA REAUTHORIZATION & SECTION 304



## VAWA Section 304:

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

The “Big 4”

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: SEXUAL ASSAULT



- **Sexual Assault**

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



# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: RAPE & STATUTORY RAPE



- **Rape**

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

- **Statutory Rape**

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

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: FONDLING & INCEST



- **Fondling**

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

- **Incest**

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

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



- **Dating Violence**

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

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



- **Domestic Violence**

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

# VAWA 2013 – SEC. 304

## UCR DEFINITIONS: STALKING



- **Stalking**

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

# CLERY ACT: VAWA 2013 SECTION 304



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

# NOTICE, REPORTING, RESPONSIBLE EMPLOYEES & CONFIDENTIALITY

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

# RESPONSIBLE EMPLOYEE



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

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

**Some institutions or schools use the term “mandatory reporters.”**



# RESPONSIBLE EMPLOYEE



- Proposed Regs shift Responsible Employee definition to:
  - Anyone who has the authority to take action to redress the harassment.
  - All PreK-12 teachers when conduct is student-on-student.
- ATIXA still recommends institutions require all employees to report harassment or discrimination.
- This is only the standard for when OCR would deem a school received actual notice AND MUST investigate; it is the bare minimum requirement.
- ATIXA recommends that institutions use discretion to investigate a broader range of cases than is required.

# NOTICE TO THE INSTITUTION



- Proposed Regs would not require a Title IX investigation unless the institution receives actual notice through a “formal complaint:”
  - “Actual Knowledge” defined as:
    - The reporting party filing a formal, written, signed complaint with TIX Coordinator; or
    - The TIXC may file a formal written complaint on behalf of reporting party
      - Conflict of Interest? Impartiality concern?
  - Eliminates OCR’s constructive notice standard.
  - What if institution receives notice in some other way?
    - Typical best practice in both higher education and PreK-12 is to consider other forms of informal notice as “actual notice” to the school.

# ACTUAL NOTICE



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

# WHEN DO YOU INVESTIGATE?



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

# THE CLERY ACT: CAMPUS SECURITY AUTHORITY



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

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

# THE CLERY ACT: CAMPUS SECURITY AUTHORITY



- CSA mandatory reporting:
  - CSAs must share all reports of any allegations that would fall into the “Clery crime categories made to them in their capacity as a CSA with their campus chief CSA (typically campus police).
  - Does not include indirect notification: classroom discussions, overhearing something in the hallway, speeches (e.g.: Take-Back-The-Night events), etc.
- CSA vs. Responsible Employee
  - “Responsible Employee” is a broader/more encompassing designation.
  - All CSAs are Responsible Employees, but not all Responsible Employees are CSAs.

# THE CLERY ACT: TIMELY WARNING



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

# THE CLERY ACT: EMERGENCY NOTIFICATION



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



# OTHER LAWS THAT DETAIL REPORTING REQUIREMENTS



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

# CASE STUDY



# PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



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

# PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



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

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

# PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



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

# ATIXA'S RECOMMENDED APPROACH



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

# REQUESTS FOR CONFIDENTIALITY



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

# REQUESTS FOR CONFIDENTIALITY



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



# RELUCTANCE TO REPORT



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

# ANALYZING A REPORTING PARTY REQUEST FOR CONFIDENTIALITY



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

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

# ANALYZING A REPORTING PARTY REQUEST FOR CONFIDENTIALITY



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

# TRAINING RESPONSIBLE EMPLOYEES

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# WHY REPORT?



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

# TRAINING RESPONSIBLE EMPLOYEES



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

# WHAT TO SAY AS A RESPONSIBLE EMPLOYEE



- What a Responsible Employee should say to a person who has shared information about sex/gender discrimination or harassment:
  - The staff/faculty member’s obligation to report the information to the Title IX Coordinator.
  - Confidential reporting options.
  - Counseling and other support services.
  - The right to file a Title IX-based complaint.
  - The right to report a possible criminal act to school/campus or local law enforcement.



# WHAT TO REPORT AS A RESPONSIBLE EMPLOYEE

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

# IS IT A IX?

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When does Title IX apply?

- Jurisdiction
- Covered Programs
- Covered Individuals
- Subject Matter

# WHEN DOES TITLE IX APPLY?



## Jurisdiction

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

# WHEN DOES TITLE IX APPLY?



## Jurisdiction for Off-Campus Incidents:

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

# WHEN DOES TITLE IX APPLY?



## Jurisdiction for Off-Campus Incidents:

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

# WHEN DOES TITLE IX APPLY?



## Covered Programs

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

# WHEN DOES TITLE IX APPLY?



Jurisdiction over incidents outside of the United States:

- The *Davis* standard is that Title IX applies and jurisdiction is required when the institution has:
  - Control over the harasser (discriminator); AND
  - Control over the context of the harassment (discrimination).
  - *King v. Eastern Mich. Univ.*, 221 F. Supp. 2d 783 (2002).
- Campus policy may clearly exercise jurisdiction.
- Current OCR may not enforce extraterritorial complaints (under proposed regs).

# WHEN DOES TITLE IX APPLY?



## Covered Individuals

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

(as either Reporting or Responding Party)



# WHEN DOES TITLE IX APPLY?



- If Responding Party is a not affiliated in the institution in any way, the institution lacks authority to take disciplinary action.
  - Employee of an outside company (e.g.: vendor, construction worker, etc.).
  - Guest or invitee.
  - Prospective student.
  - Former student.
  - Former employee
  - Student from another institution.

# WHEN DOES TITLE IX APPLY?



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

# WHEN DOES TITLE IX APPLY?



## Subject Matter

- Unwelcome sex-based and gender-based conduct.\*
- Unwelcome conduct of a sexual nature.\*
- Sex discrimination.
- Gender discrimination.
  - Including gender identity discrimination; and
  - Sexual orientation discrimination that implicates gender.
- Pregnant and parenting student (employee?) discrimination.

\*Unwelcome conduct must create a discriminatory effect and create a hostile environment, Quid pro Quo, or retaliation

# WHEN DOES TITLE IX APPLY?



## Subject Matter

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

# WHEN DOES TITLE IX APPLY?



## Subject Matter

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

# WHEN DOES TITLE IX APPLY?



## Subject Matter

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

# SMALL GROUP DISCUSSION QUESTIONS



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

# THE TITLE IX COORDINATOR



Roles

Responsibilities



# TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES



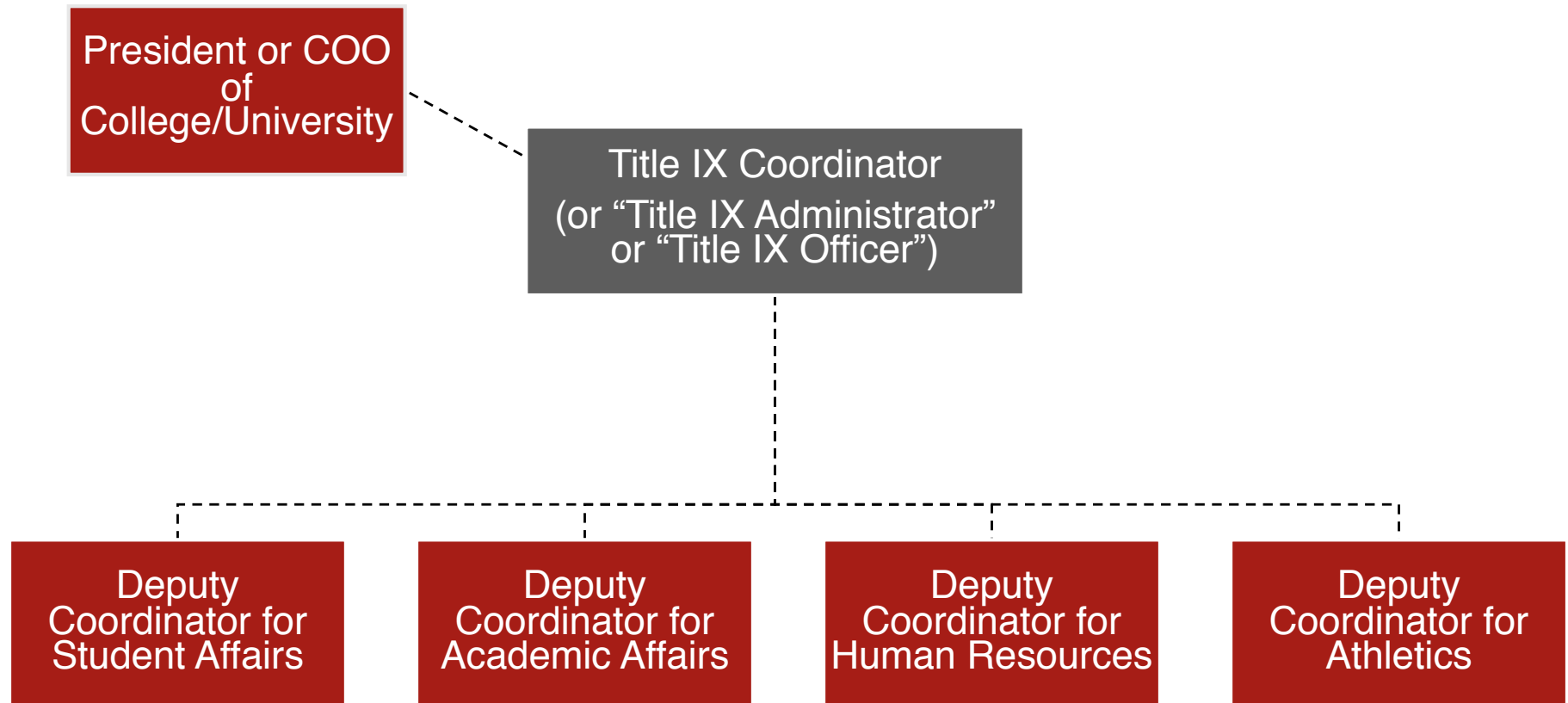
- Point Person for Complaints.
- Training Oversight.
- Creator & Implementor of Appropriate Policy.
- Contact for Government Inquiries.
- Prevention and Remediation.
- Oversight of Prompt & Equitable Grievance Procedures.
- Supervisor of Investigations.
- Assurance of Compliance with Final Sanctions.
- Coordinating Appeals Process.

# TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES

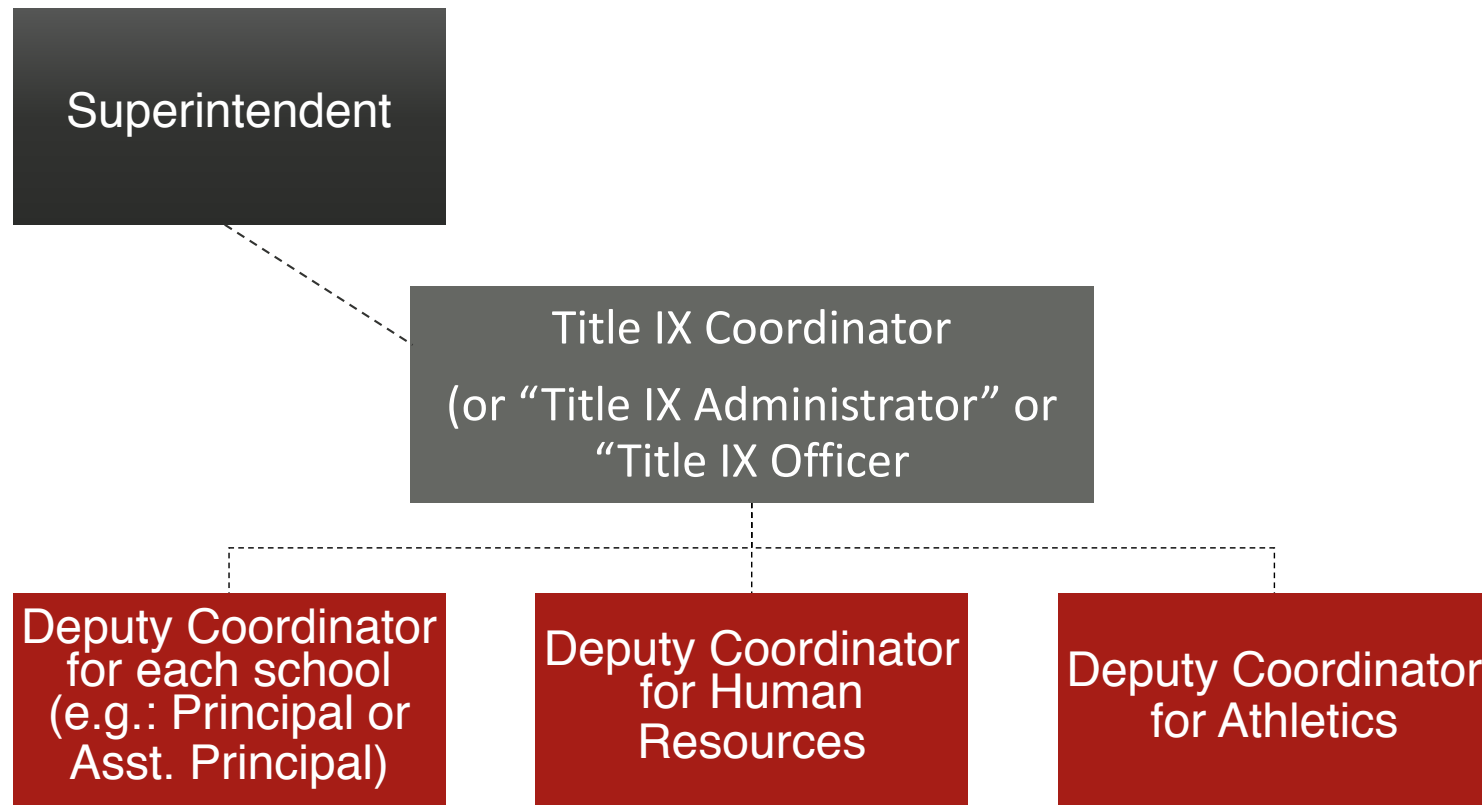


- Compliance with Requirements to Stop, Prevent, and Remedy.
- Coordinate Overlap of Various Student & Employee Grievance Processes.
- General Title IX Compliance Oversight.
- Navigating First Amendment Protections.
- Prevention and Remediation of Retaliation.
- Section 504 Disabilities Compliance Oversight.
- Oversight of Athletics Gender Equity.

# SAMPLE TITLE IX TEAM STRUCTURE FOR HIGHER EDUCATION



# SAMPLE TITLE IX TEAM STRUCTURE FOR PREK-12



# TITLE IX TEAM STRUCTURE: ADDITIONAL ISSUES



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

TITLE IX COORDINATOR:  
POINT PERSON FOR  
COMPLAINTS

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# POINT PERSON FOR COMPLAINTS



- The Title IX Coordinator will be the individual designated to ensure the Title IX protocol is implemented and therefore should be the individual to whom all complaints or notice related to sex/gender harassment, misconduct, and discrimination should be directed.
  - However, the institution may designate multiple portals for receipt of information (e.g.: Deputy Coordinators).
    - All responsible employees are expected to report notice and complaints to the Title IX Coordinator.
    - Deputies are particularly important in each school in a PreK-12 district.

# POINT PERSON FOR COMPLAINTS



- Institutions may also identify (in publications, policies) other individuals to whom complaints can be made.
  - E.g.:
    - Deans, assistant principals, teachers, supervisors, athletic directors, and deputy coordinators, in publications and policies as individuals to whom a complaint may be made.
- The Title IX Coordinator must create a **structure of documentation and reporting** by these designated individuals,



# POINT PERSON FOR COMPLAINTS



- The Title IX Coordinator must ensure the institution is promptly engaging in:
  - Initiation of the preliminary inquiry.
  - Implementation of response to stop the alleged harassment/discrimination.
  - Provision of support to the parties (e.g. interim and protective measures).
  - Action to reasonably prevent the recurrence.
- The Title IX Coordinator must **coordinate** all these steps, often across administrative processes and institutional silos.
- Importance of a centralized database.

# POINT PERSON FOR COMPLAINTS



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

# TITLE IX COORDINATOR: TRAINING OVERSIGHT

- 
- Employees
  - Students
  - Hearing Panels/Decision-Makers
  - Investigators
  - Appeals Officers

# SUPERVISOR OF TRAINING



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

# SUPERVISOR OF TRAINING



- Trainee Populations:

- **Title IX Compliance Officers.**

- E.g.: Coordinator and Deputies, Investigators, decision makers, hearing board members (including appeals), and others involved in processing, investigating, or resolving complaints.

- **First Responders.**

- E.g.: RAs, health center employees, counselors, sexual assault response coordinators, academic advisors, School Resource Officers, and public safety.

- **All Faculty/Teachers & Staff; ATIXA Responsible Employees.**

- ATIXA recommends making all faculty and staff responsible employees.

- **All Students.**

- Undergraduate, graduate, primary students, secondary students, professional, distance, and online, etc.

# TRAINING COORDINATION AND OPERATIONALIZATION



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

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



- Each of these groups will be different.
- Must identify the compliance elements that constitute required knowledge for each entity.
- Must ensure training materials are not biased in favor of reporting or responding parties.
- Consider most effective approach for training, as well as most efficient.
  - For example, investigators will be responsible for thoroughness, fairness, and equity in the investigation Their training must be extensive.
  - Appeals officers must have a comprehensive understanding of the process; should be in-person using case studies.
  - Employees need general resource and reporting information and could be trained by video.

# CLERY ACT (VAWA 2013 – SEC. 304) REQUIRED TRAINING



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



# INVESTIGATOR/HEARING BOARDS/DECISION-MAKER COMPETENCIES



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

\*Note this is not a comprehensive list.

# INVESTIGATOR TRAINING



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

# TRAINING FOR STUDENTS & EMPLOYEES



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

# TRAINING FOR STUDENTS & EMPLOYEES



- The school's resources for sexual assault/harassment victims including:
  - Title IX Administrator or Deputy Administrator.
  - Law enforcement/School Resource Officer — campus and local.
  - Student conduct/student discipline.
  - EOP/EEO officers.
  - Victims' services/advocates.
  - Counseling services.
  - Health services.
  - Remedial measures available (e.g. no-contact orders, course or work adjustments, etc.).

# SMALL GROUP DISCUSSION: TRAINING



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

TITLE IX COORDINATOR:

CREATOR &  
IMPLEMENTER OF  
APPROPRIATE POLICY

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# CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY



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

# CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY



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



# THREE TYPES OF SEXUAL HARASSMENT



1.  
Hostile  
Environment

2.  
*Quid Pro Quo*

3.  
Retaliatory  
Harassment

# UNDERSTANDING THE THREE FORMS OF SEXUAL HARASSMENT



## Sexual Harassment is:

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

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

The creation of a *hostile environment*, or

*Retaliation*

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



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

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
  - The frequency (persistent or pervasive), nature, and severity of the conduct.
  - Whether the conduct was physically threatening.
  - Whether the conduct was humiliating.
  - The identity of and relationship between the Responding Party and the Reporting Party.
  - The age and sex of the Responding Party and the Reporting Party.
  - The size of the school, location of the incidents, and context in which they occurred.
- *See OCR's 2001 Revised Sexual Harassment Guidance.*

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
  - The effect on the Reporting Party’s mental or emotional state.
  - Whether the conduct was directed at more than one person.
  - Whether the conduct unreasonably interfered with the Reporting Party’s educational or work performance.
  - Whether the statement was an utterance of an epithet which was offensive, or offended by discourtesy or rudeness.
  - Whether the speech or conduct deserves the protections of academic freedom or the First Amendment protection.
  - “Constellation of surrounding circumstances.”
- *See OCR’s 2001 Revised Sexual Harassment Guidance.*

# “SEVERE”



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

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

# “PERVASIVE”



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

# “PERSISTENT”



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



# “OBJECTIVELY OFFENSIVE”



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

# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



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

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

# HOSTILE ENVIRONMENT?



Hostile Environment?

# HOSTILE ENVIRONMENT?



Hostile Environment?

# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



- Faculty-Based Examples: Do these create a Hostile Environment?
  - Giving a student a back-rub.
  - Require students to read *50 Shades of Grey* and give an assignment to compare their own experiences against those from the book.
  - Female faculty member repeatedly referring to male students as “penises.”
  - Repeatedly telling “dirty” jokes in class.
  - Calling a colleague a “bitch” in a meeting.

# SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



- Staff-Based Examples: Do these create a Hostile Environment?
  - Telling dirty jokes: In common area? Staff meeting? To a single individual?
  - Sending porn to a colleague?
  - Rolling eyes and making masturbation motion with hand at comments during a staff meeting?
  - Repeated staring at a colleague of the opposite sex; accompanied by occasional winking?
  - A supervisor repeatedly mentioning how much they like a supervisee's outfits?

Staff-Based Examples

# ATIXA MODEL DEFINITIONS: QUID PRO QUO SEXUAL HARASSMENT



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

# ATIXA MODEL DEFINITIONS: RETALIATION



- **Retaliation** is defined as:
  - *any adverse action taken against a person participating in a protected activity because of the person’s participation in that protected activity.*
- Also includes retaliation against the Reporting Party by the Responding Party. Could also include by the Responding Party’s friends or others.
- Also can include retaliation directed toward third parties because of their participation in the process or for supporting the parties.



# ATIXA MODEL DEFINITIONS: RETALIATION



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

CREATOR & IMPLEMENTER  
OF APPROPRIATE POLICY:

## MODEL POLICY FRAMEWORK

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

# ATIXA MODEL DEFINITIONS: NON-CONSENSUAL SEXUAL INTERCOURSE



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

# ATIXA MODEL DEFINITIONS: NON-CONSENSUAL SEXUAL INTERCOURSE



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

# ATIXA MODEL DEFINITIONS: NON-CONSENSUAL SEXUAL CONTACT



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

# ATIXA MODEL DEFINITIONS: SEXUAL CONTACT DEFINED



## – Sexual contact includes:

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

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION



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

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



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



# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



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

# OTHER MISCONDUCT OFFENSES THAT MAY REQUIRE TITLE IX BASED RESPONSE



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

# CONSENT CONSTRUCT

- 
- Force
  - Incapacity
  - Consent
  - Case Study

# CONSENT IS...



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

# CONSENT



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

# OVERVIEW OF THE 3 QUESTIONS



1. Was force used by the Responding Party to obtain physical or intimate access?
2. Was the Reporting Party incapacitated?
  - a. Did the Responding Party know the Reporting Party was incapacitated, or
  - b. Should the Responding Party have known that the reporting party was incapacitated (e.g. by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the Reporting Party gave the Responding Party permission for each specific sexual or intimate act that took place as it took place?

# FORCE



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

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



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

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

# EVIDENCE OF INCAPACITY



- Evidence of incapacity will come from context clues, such as:
  - A witness may know how much the Reporting Party consumed.
  - Slurred speech.
  - Bloodshot eyes.
  - The smell of alcohol on the breath.
  - Shaky equilibrium.
  - Vomiting.
  - Unconsciousness (including blackout).
  - Outrageous or unusual behavior.\*
    - \*individualized assessment based on actually knowing the person.

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

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

# CONSENT IS...



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

# CONSENT IS...



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

# CONSENT: RULES TO REMEMBER



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



TITLE IX COORDINATOR:

CONTACT FOR  
GOVERNMENT  
INQUIRIES

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# CONTACT FOR GOVERNMENT INQUIRIES



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

# CONTACT FOR GOVERNMENT INQUIRIES



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

# CONTACT FOR GOVERNMENT INQUIRIES



- If a complaint is filed against your institution or you are selected for a voluntary compliance review, OCR will likely contact the Title IX Coordinator, President, or Superintendent.
  - Contact Legal Counsel if the complaint is filed or a voluntary compliance review is initiated.
  - Coordinator will be expected to produce all documents requested by OCR. Generally this is a substantial amount of information.
    - If you have them, you must produce them.
    - FERPA does not apply to such OCR requests – no redaction.
  - The institution should ask OCR to share the filed complaint
    - May be required to make a Freedom of Information Act (FOIA) request to receive a redacted copy.

# CONTACT FOR GOVERNMENT INQUIRIES



- Cooperation with OCR is key.
- Institution's timely response is essential.
- Expect substantial delays on the part of OCR (don't be alarmed by this).
- Often, an OCR investigation will take 6 months to 3 years.
- OCR will likely want to interview individuals.
  - Sometimes this is done via conference calls, sometimes in person.
  - The Title IX Coordinator will be (should be...) the point person on all of this.

# CONTACT FOR GOVERNMENT INQUIRIES



- The Title IX Coordinator is responsible for the implementation and oversight of all compliance elements in the voluntary resolution agreement.
- However, recognize that while there may be similarities, each regional office will have unique priorities for compliance.

# TITLE IX COORDINATOR:

## PREVENTION AND REMEDICATION

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

# PREVENTION AND REMEDIATION OF GENDER DISCRIMINATION



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



# PREVENTION AND REMEDIATION OF GENDER DISCRIMINATION



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

# PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT



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

# PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT



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

# PREVENTION AND REMEDIATION OF STALKING



- Stalking:
  - *Repetitive and menacing,*
  - *Pursuit, following, harassing, and/or interfering with the peace and/or safety of another.*
- This definition of stalking also allows schools to **distinguish stalking from lurking**, which is often a fixation without menacing or harmful intent, and which is often a steady state, whereas stalking often becomes more intrusive over time.
- We distinguish the ATIXA model definition of stalking (as we do with Domestic Violence/Dating Violence) from the VAWA definitions, which do not reflect best practices, and are used only for the reporting of crime statistics.

# PREVENTION AND REMEDIATION OF STALKING



- May be a series of legal actions, but school policy is not required to mirror criminal standards in most jurisdictions.
- Can be a form of sexual harassment, too.
- Gender-based stalking is a form of sex discrimination.
- Increasingly involves technology.
- Definition and prohibition should be reflected in policy.
- Response consistent with Title IX requirements.
- Increase in cases of students on the Autism Spectrum.

# PREVENTION AND REMEDIATION OF INTIMATE PARTNER AND RELATIONSHIP VIOLENCE



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

# PREVENTION AND REMEDIATION OF INTIMATE PARTNER AND RELATIONSHIP VIOLENCE



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

# CLERY ACT (VAWA 2013 – SEC. 304): PREVENTION PROGRAM REQUIREMENTS



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



# CASE STUDY: INTIMATE PARTNER VIOLENCE



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

# CASE STUDY: INTIMATE PARTNER VIOLENCE



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

# CASE STUDY: INTIMATE PARTNER VIOLENCE



- When asked, Janet said she got up to the bathroom last night in the dark and walked right into the edge of her open closet door.
- The employee says that yesterday afternoon, Robert and Janet got into a loud argument in the parking lot and that Janet was crying in the bathroom afterwards.
- The employee notes that she has hesitated to raise any concerns or suspicions, but worries that Janet's situation is escalating and that someone needs to step in.

# CASE STUDY: INTIMATE PARTNER VIOLENCE



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

# PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING



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

# PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING



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

# PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING



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

# TITLE IX COORDINATOR:

## OVERSIGHT OF PROMPT & EQUITABLE GRIEVANCE PROCEDURES

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



# PROMPT AND EQUITABLE



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

# CLERY: VAWA 2013 SECTION 304



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

# OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



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

# OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



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

# OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



- Prompt:
  - Institutions are required to make a “good faith effort” to resolve allegations promptly
    - There is not an exception for summer break, but possible for winter or spring breaks.
    - A forensic collection of evidence by law enforcement may warrant a reasonable, temporary delay in the institution’s investigation (we recommend 1-2 weeks)
    - Pending criminal or civil actions are not reasons for lengthy delays.
      - What about delays by the reporting party?
    - Injunctions.
    - Notice of extensions.

# OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



- How to ensure prompt procedures:
  - The investigation must be conducted according to the timelines in the institution’s policy.
    - Policy wording: Use “reasonable delays at the discretion of the Title IX administrator,” “barring exigent circumstances,” etc.
  - Parties/witnesses should be interviewed as soon as possible so that recollections are as fresh as possible and to swiftly secure necessary remedies.
  - Document all delays and reasoning therefore.
    - E.g.: unresponsive or uncooperative parties, criminal investigation, holidays, etc.
    - Communicate regularly with the parties

# PROMPT & EQUITABLE PROCEDURES: CLEAR TIMEFRAMES



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

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



## 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.

# EQUITY: PREPONDERANCE STANDARD REQUIRED

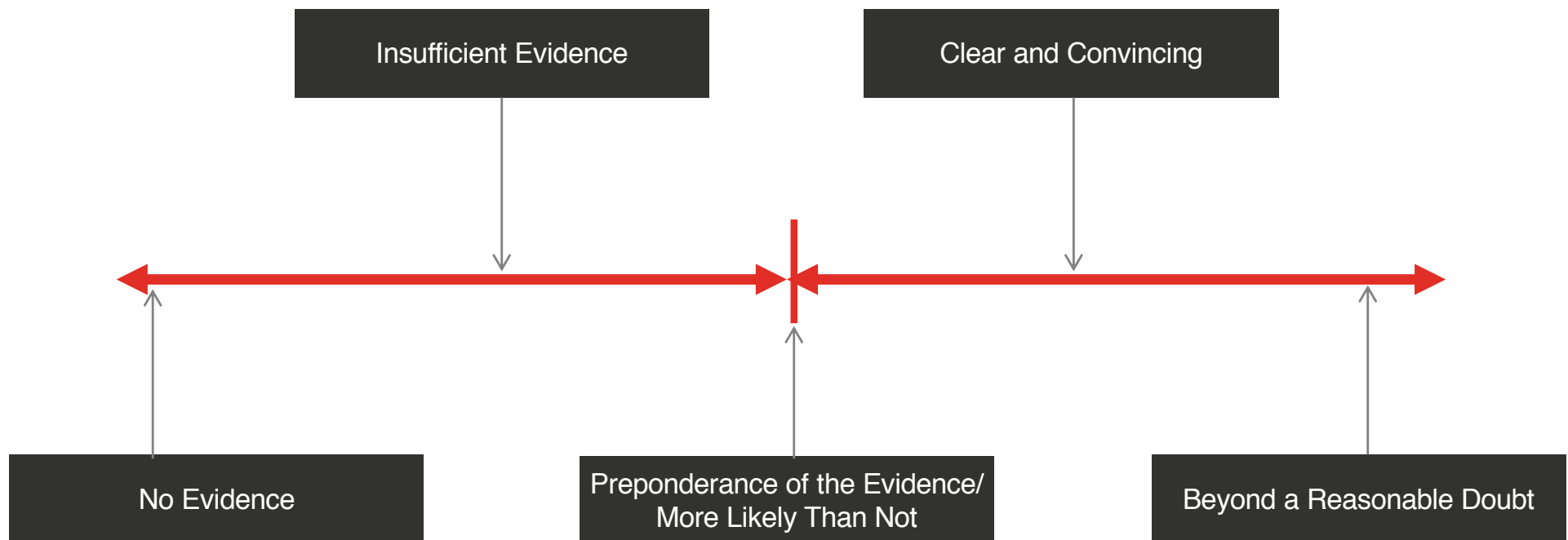


- The only equitable standard.
- ATIXA maintains that preponderance of the evidence is the appropriate standard
- Articulate the standard throughout your policy, procedures, investigation, and hearings.
- Educate the parties and their advisors.
- Use language the community understands.
  - 50.1%.
  -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

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



# EQUITY & GRIEVANCE PROCEDURES



- Various forms of notice — policies and procedures, investigation, hearing, outcome (finding and sanction), etc.
- Meetings and opportunities to present witnesses and provide evidence.
- Access to information.
- Provide the same rights for an advisor.
- Impartial investigators, investigation, hearing, and panelists.
- Remedies.
- Appeals.

# EQUITY CONCERNS



- Participants/stakeholders believe “equity” = “equality.”
- Institutional policies and procedures that are constituency-based and thereby privilege certain groups more than others (e.g. faculty, staff, or students).
- Widely disparate procedures to remedy different forms of discrimination (e.g. race, religion, disability, sex/gender).

# EQUITY CONCERNS



- Ensuring that remedies are equitable (in addition to resolution processes).
- Contact restrictions on Reporting Parties that are too broad or punitive.
- Appeal processes, or other processes, where only the Responding Party is entitled to participate.
- Conflicts among federal regulations/guidance and state laws or education codes.

TITLE IX COORDINATOR:

SUPERVISOR OF  
INVESTIGATIONS

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# SUPERVISOR OF INVESTIGATIONS



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



# SUPERVISOR OF INVESTIGATIONS



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

# SUPERVISOR OF INVESTIGATIONS:

## ELEMENTS OF AN INVESTIGATION

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

# WHO SHOULD INVESTIGATE?



- Investigations of sex discrimination must be impartial, thorough, and reliable. So who should it be?
  - Title IX Coordinator?
  - Standing panel of investigators?
  - Human resources or student services?
  - Administrators and faculty?
  - One investigator or two?
  - Outside investigator
  - Legal counsel? (no)
  - Coordinating investigation in multiple processes

# SHOULD THERE BE MORE THAN ONE INVESTIGATOR?



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

# ROLE OF SCHOOL/CAMPUS LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS



- Can school/campus law enforcement be the Title IX investigatory arm?
  - Should it be? (not a best practice).
  - Legal standards for criminal investigations are different.
  - Police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.
  - **What about School Resource Officers in PreK-12?**
- Establish MOUs with school/campus police and other local enforcement and update annually.
  - The power of the tabletop exercise.

# ROLE OF A TITLE IX COORDINATOR IN INVESTIGATIONS



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

# 10 STEPS OF AN INVESTIGATION



1. Receive Notice or Allegation.
2. Preliminary Inquiry (initial issue-spotting).
3. Gatekeeper determination.
4. Notice of Investigation to Responding Party and Notice of Formal Allegation (“Charge”).
5. Issue spotting by investigators (will continue as new information is added).
6. Preliminary investigation strategy.

# 10 STEPS OF AN INVESTIGATION

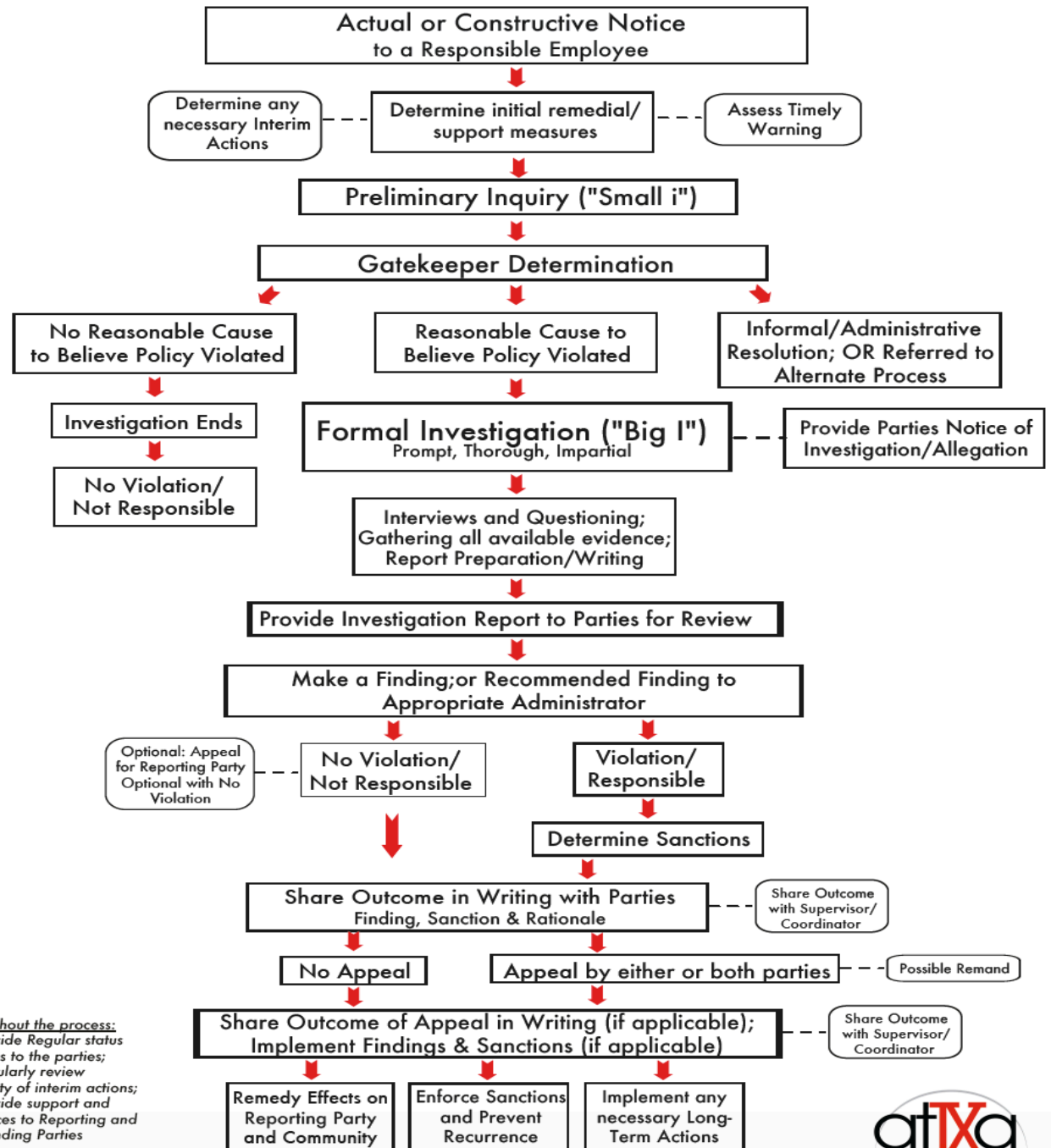


7. Formal comprehensive investigation.
  - Witness interviews
  - Evidence gathering.
8. Write report.
9. Meet with Title IX Coordinator, and then parties, to review report & evidence (follow-up as needed).
10. Synthesize and analyze evidence, including making recommended findings (may vary by institution).



# ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART

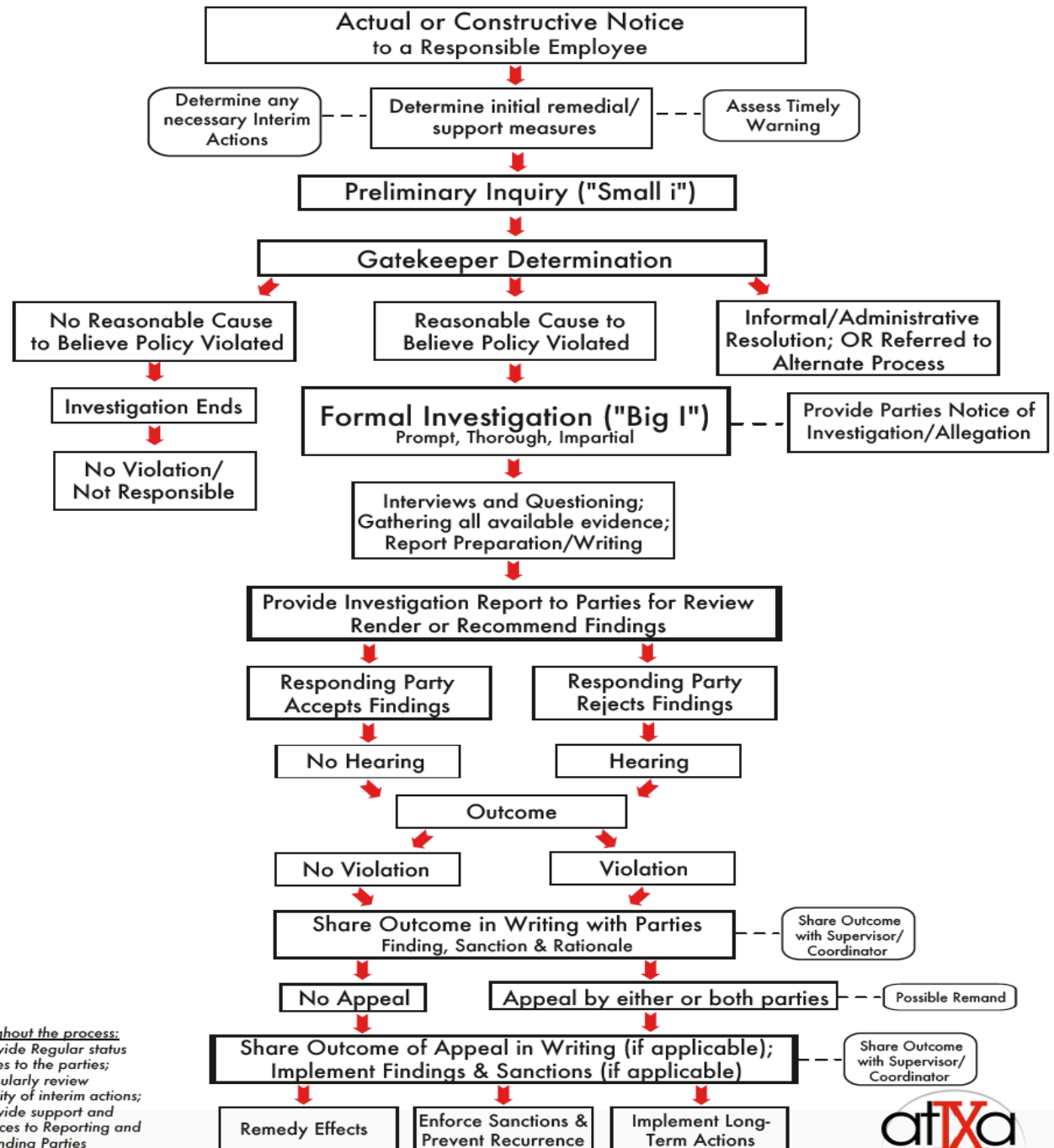
## CIVIL RIGHTS INVESTIGATION MODEL



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

# INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART

## INVESTIGATION AND HEARING PANEL HYBRID MODEL



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

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

# MAJOR GATEKEEPING GUIDEPOSTS



Notice.

Preliminary investigation.

Comprehensive investigation.

Charge/allegation.

Finding.

Sanction.

Appeal.

# INVESTIGATION: STRATEGY IS KEY



- The investigation team, in consultation with the Title IX Coordinator, and/or the Deputy Coordinator, strategizes the entire investigation. This includes, but is not limited to:
  - What policy elements may have been violated?
  - What are the undisputed facts? Which ones are significant to the investigation?
  - What are the facts in dispute? Which ones are significant to the investigation?
  - Who do you need to interview?
  - What should be the order of the interviews?
  - What evidence do you need to gather?
  - Timeline.

# UNDERSTANDING EVIDENCE



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

# UNDERSTANDING EVIDENCE



- Formal rules of evidence do not apply.
- If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered.
  - Evidence is any kind of information presented with the intent to prove what took place.
  - Certain types of evidence may be relevant to the credibility of the witness, but not to the charges.

# THE INVESTIGATION REPORT



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



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

# FACTORS TO CONSIDER FOR CREDIBILITY



- Non-cooperation.
  - Look for short, abrupt answers or refusal to answer.
- Logic
  - E.g.: “I’m struggling to develop a timeline based on your statements. Could you clarify...?”
- Consistency
  - Consistency of accounts over time
- Corroborating evidence.
  - Is evidence supported by other evidence?
- Demeanor.
  - Demeanor issues should be your cue to ask more questions.
  - Rarely should be relied upon to draw any conclusions

# MAKING CREDIBILITY DETERMINATIONS



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

# DECISION-MAKERS IN TITLE IX PROCESSES



- The Title IX Coordinator should not typically be the “decision-maker,” but may need to coordinate and collaborate with decision-makers:
  - Coordinating hearings, Hearing Panel/Decision-Maker
  - Overseeing appeals processes
- In some systems:
  - Making findings of responsibility/determinations of policy violations
  - Sanctions
  - Remedies
- Proposed regulations have specific requirements regarding separation of roles: Title IX Coordinator, investigator, decision-maker, appeals decision-maker.

# MAKING A FINDING



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

TITLE IX COORDINATOR:

# ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS

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

# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Title IX and case law requires:
  - Stop: Bringing an end to the discriminatory conduct.
  - Prevent: Taking steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct.
  - Remedy: Restoring the Reporting Party as best you can to pre-deprivation status.
- Tension between “educational” and “developmental” sanctions of student conduct processes.
- Title IX Coordinator is typically not sanctioning, but oversees process.
- Proposed regs would *require* that Coordinator and decision-maker be separate persons.

# SANCTIONING CONSIDERATIONS



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



# SANCTIONING



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

# SANCTIONING



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

# COMMON STUDENT SANCTIONS



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

# COMMON EMPLOYEE SANCTIONS



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

# ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS



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

# CASE STUDY: WHAT SANCTIONS?



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

# CASE STUDY: WHAT SANCTIONS?



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

# CASE STUDY: WHAT SANCTIONS?



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



# CASE STUDY: WHAT SANCTIONS?



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

## CASE STUDY: WHAT SANCTIONS?



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

TITLE IX COORDINATOR:

# COORDINATING APPEALS PROCESS

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

# APPEALS: KEY ELEMENTS



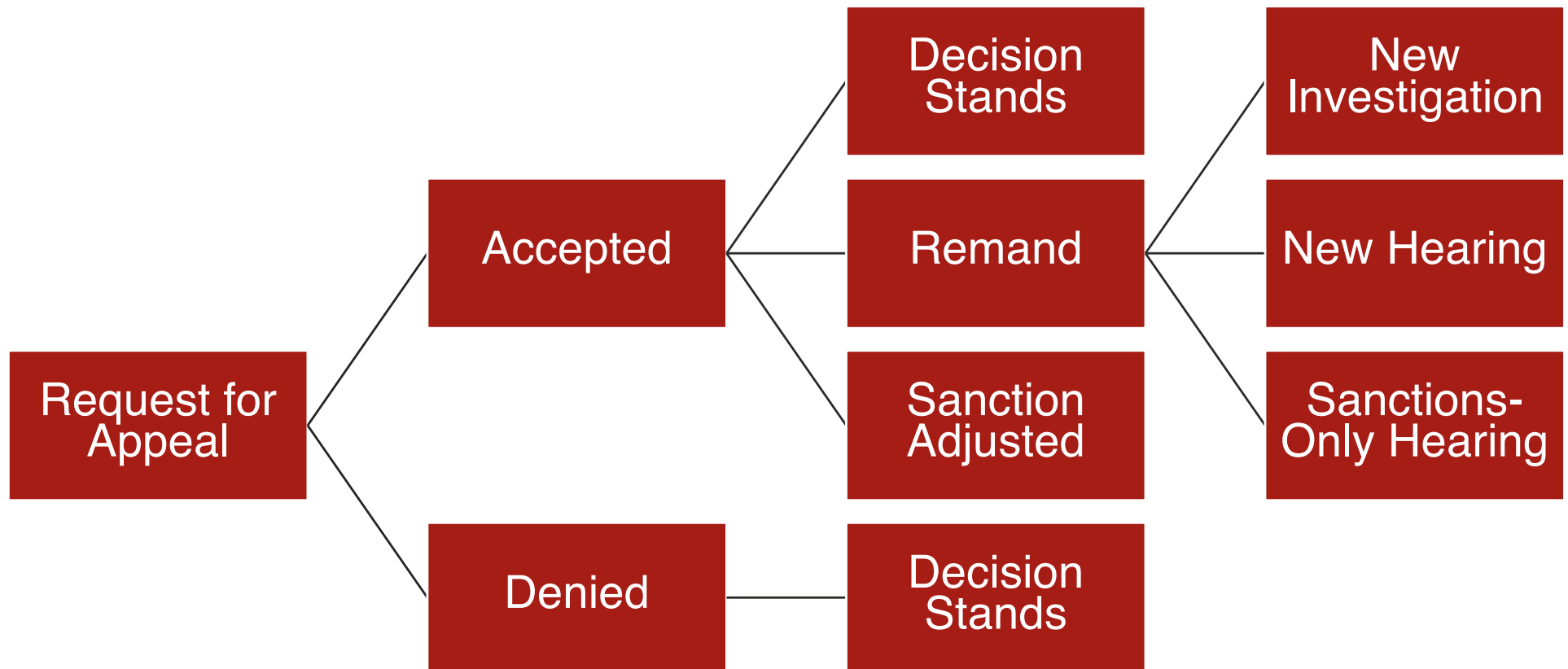
- One level of appeal.
- Limited grounds for appeal (see next slide).
- Deference to original hearing authority.
- Short window to request an appeal.
  - Can always grant an extension if necessary.
- Document-based review.
  - NOT *de novo*.
- Request for an appeal.

# APPEALS: GROUNDS FOR APPEAL



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

# APPEALS: THE PROCESS



# TITLE IX COORDINATOR:

## COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

- 
- Effective Remedies
  - Common Remedies
  - Preventing Recurrence

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



## • Stop The Discriminatory Conduct:

- Take timely steps to identify and implement appropriate interim and supportive measures for the parties.
- Confirm and document that the appropriate interim and supportive measures were implemented. For example:
  - Was the student provided alternative housing?
  - Was the employee provided an alternate supervisor?
  - Was the student assigned to a different seat or class?
  - Was counseling made available?
  - Was a no-contact order issued?
- Regularly re-evaluate the need for any continuing interim and supportive measure (particularly when interim suspension is implemented)
- Enforce any violations (e.g. with no contact order)
- Make sure the parties know they should report any difficulties with measures provided



# COMMON INTERIM AND LONG-TERM ACTIONS FOR STUDENTS



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

# COMMON INTERIM AND LONG-TERM ACTIONS FOR EMPLOYEES



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

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



- **Prevent Recurrence:**

- Identify patterns and systemic problems.
- Issue school/campus-wide policy statements, informational campaigns, and other messages that harassment and assault will not be tolerated.
- Provide regular training on sexual misconduct for students and employees.
- Conduct periodic surveys of campus climate.
- Establish a system for monitoring future incidents and patterns.
- Provide technical assistance to school/campus law enforcement on Title IX compliance.
- Consider the effect of “educational” sanctions here.
- The potential “next” Reporting Party is both a Title IX and negligence concern.

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



- **Remedy The Effects:**

- Designed to make Reporting Party “whole” and place in the status they would have been if the discrimination/harassment did not occur
  - Often not sanction-based
- Take timely steps to confirm and document that the appropriate remedies were implemented.
- Make sure the Reporting Party knows that they should report any difficulties obtaining the remedies and any subsequent harassment.

TITLE IX COORDINATOR:

## COORDINATE OVERLAP OF VARIOUS STUDENT & EMPLOYEE GRIEVANCE PROCESSES

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

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

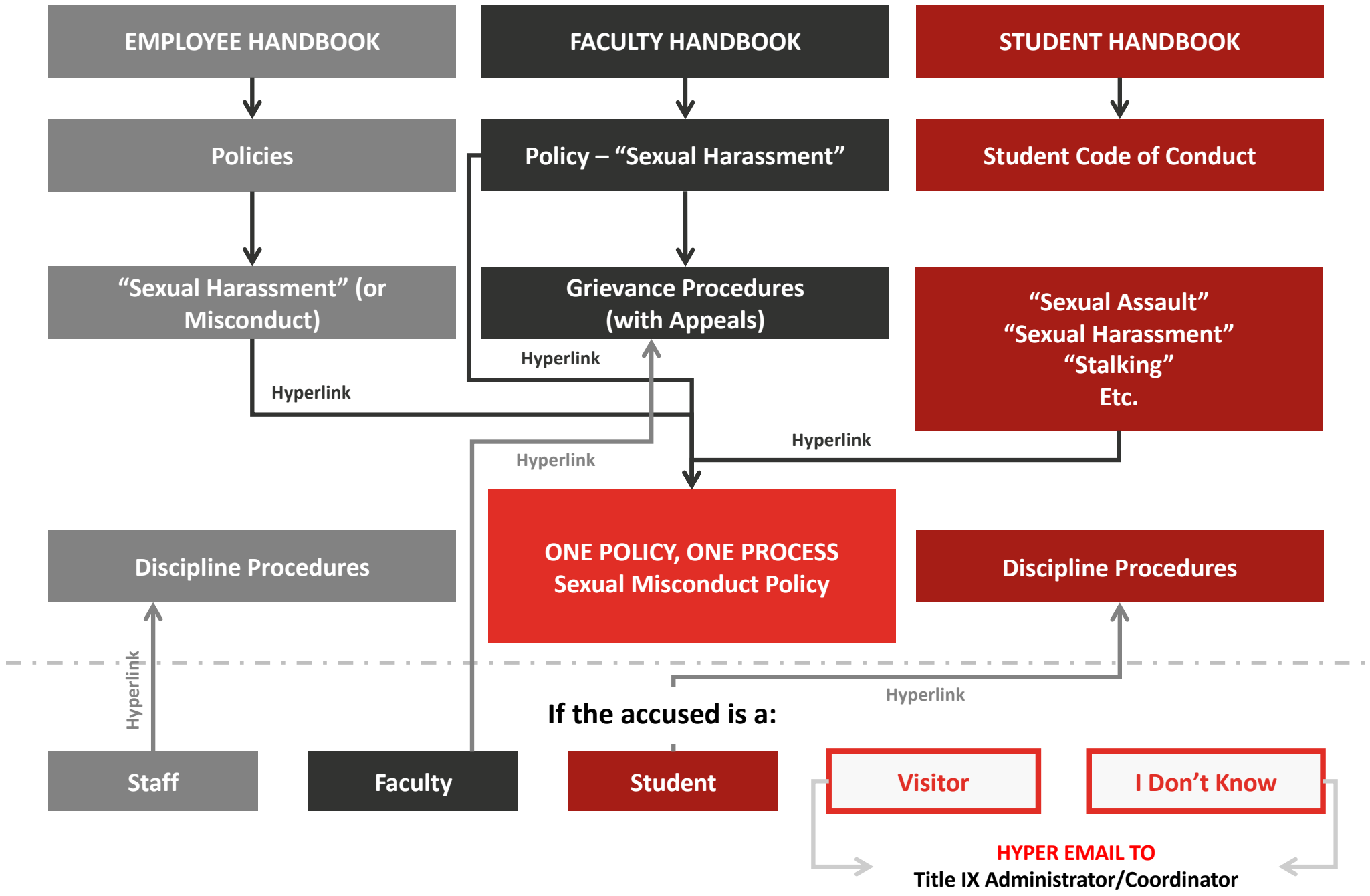


- Potential processes:
  - Generalized sexual harassment procedures.
  - General student grievance procedures.
  - Employee grievance procedures.
  - Faculty grievance procedures.
  - Student conduct/discipline process.
  - Employee discipline process.
  - Faculty discipline process.
  - Various Elementary, Middle and High School processes.
    - Incl. disciplinary processes for students with disabilities (i.e. “manifestation determinations”).
  - Academic appeal process.
  - Athletics department polices/processes and “team rules.”
  - Collective bargaining agreements.

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

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





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

# ONE POLICY-ONE PROCESS



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

TITLE IX COORDINATOR:

# GENERAL TITLE IX COMPLIANCE OVERSIGHT

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

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

TITLE IX COORDINATOR:

# NAVIGATING FIRST AMENDMENT PROTECTIONS

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

- An important concern for all public institutions and any private campuses impacted by state law and constitutions (e.g. California and New Jersey).
- Impacts policy language regarding expression.
- Pay heed to vagueness and over-breadth concerns.
- Avoid incorporating “intent” or “purpose” language.
- Incorporate appropriate standard for context.
- ED reaffirms First Amendment protections in Proposed Regs.



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

# TITLE IX COORDINATOR: PREVENTION AND REMEDICATION OF RETALIATION

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

# RETALIATION



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

# PREVENTION AND REMEDIATION OF RETALIATION



- Retaliation is an increasingly common legal claim.
- The Title IX regulations prohibit institutions from “intimidating, coercing, or retaliating against” individuals.
- Title IX Coordinators should ensure that the institution effectively communicates a message about protection against retaliation.
  - Ensure policies clearly prohibit retaliation.
  - Ensure resolution procedures are explicitly applicable to retaliation claims.
  - Ensure that training includes information about the prohibition on retaliation.

# PREVENTION AND REMEDIATION OF RETALIATION



- The Title IX Coordinator must:
  - Ensure parties and witnesses know:
    - Retaliation is prohibited.
    - How to report any retaliation.
    - Any retaliation will be addressed promptly and effectively.
    - Additional sanctions may be imposed for such acts.
    - Responding Party may be held responsible for retaliation by third parties (e.g. friends, colleagues, and family).
  - Act promptly to take appropriate interim measures to protect the Reporting Party/witness if notified of retaliation.
  - Check-in periodically throughout the resolution process and afterwards to make sure no retaliation is occurring.

# RETALIATION CLAIM

## JACKSON v. BIRMINGHAM BD. OF ED.



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

# RETALIATION CLAIM

## JACKSON v. BIRMINGHAM BD. OF ED.



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

# INVESTIGATING RETALIATION CLAIMS

## KEYS TO UNDERSTANDING



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



# PRELIMINARY ELEMENTS OF A RETALIATION CLAIM



The following elements establish an *inference of retaliation*:

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

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

# INVESTIGATING RETALIATION CLAIMS: REBUTTING THE INFERENCE



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

# INVESTIGATING RETALIATION CLAIMS: IS THE EXPLANATION LEGITIMATE?



## Factors to Consider:

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

# INVESTIGATING RETALIATION CLAIMS: EVIDENCE OF PRETEXT?



## Factors to Consider:

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

TITLE IX COORDINATOR:

# SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT

- 
- About Section 504
  - Administrative Requirements

# SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT



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

# SECTION 504 ADMINISTRATIVE REQUIREMENTS



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

# TITLE IX COORDINATOR: OVERSIGHT OF ATHLETICS GENDER EQUITY

- Title IX Requirements
- Three-Part Test





# OVERSIGHT OF ATHLETICS GENDER EQUITY



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

# OVERSIGHT OF ATHLETICS GENDER EQUITY



## Effective Accommodation of Interests and Abilities: 1979 Test – 3

### Part-Test:

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

# RECOMMENDED READING/RESOURCES FOR TITLE IX COORDINATORS



- *Title IX Today* (<https://titleix.today>)
- ATIXA Member Library ([atixa.org](http://atixa.org))
- OCR Guidance documents (OCR Reading Room)
- Voluntary Resolution Agreements (ATIXA makes them available when we receive them).

# Q&A AND WRAP-UP

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# CONTACT INFORMATION

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