



PREK-12 TITLE IX ADMINISTRATOR TRAINING & CERTIFICATION COURSE

Denver, CO | August 6, 7, & 8, 2019

YOUR FACULTY



W. SCOTT LEWIS, J.D.

Partner, TNG

ATIXA Advisory Board Member

GOALS, PURPOSE, AND LEARNING OUTCOMES

GOALS, PURPOSE, LEARNING OUTCOMES



- Provide a foundation on Title IX fundamentals.
- Provide new tools to support your work to stop, prevent, and remedy harassment that may occur in your schools.
- Provide an opportunity to practice and collaborate together.
- Collaborate and brainstorm together about how best to support your work, including templates and other tools to facilitate these processes in your school.

CAVEAT REGARDING LANGUAGE



- Our presentation utilizes ATIXA vocabulary, such as:
 - “reporting party”
 - “responding party”
 - “report”
 - “complaint”
- These are terms that we use across all PreK-12 systems and are not intended to be confused with any specific procedure, step, or terminology in the your system or any school procedure.
- Please always ask us for clarification if needed at any time.

KEY STAFF: TITLE IX COORDINATOR & EQUITY SPECIALISTS

Title IX Coordinator role

- Description
- Roles
- Discussion



THE TITLE IX COORDINATOR



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

THE ROLE OF THE TITLE IX COORDINATOR



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

THE ROLE OF THE TITLE IX COORDINATOR



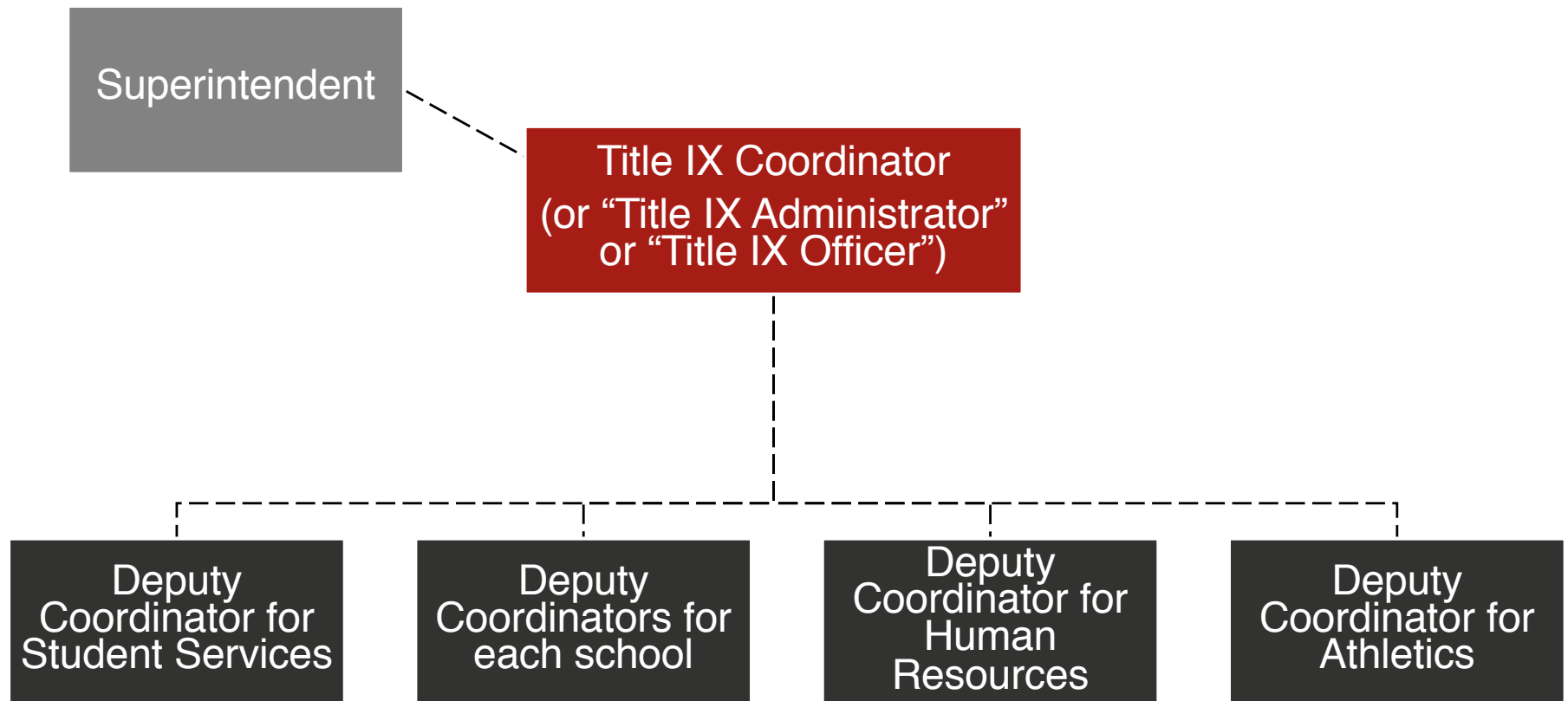
- Contact for government inquiries.
- Point person for complaints.
- Oversight and coordination of prompt and equitable grievance procedures (faculty, student, and staff).
- Creator and implementer of appropriate policies.
- Compliance auditor.
- Training oversight: Faculty, staff, students, investigators,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

POINT PERSON FOR REPORTS



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

SAMPLE TITLE IX TEAM STRUCTURE



SMALL GROUP DISCUSSION



- What are the three biggest concerns you have regarding your role supporting Title IX work (coordinator, deputy, investigator, etc.)?
- Describe and discuss a recent case you heard about or experienced where you have questions or concerns?
- What is one area you hope to learn more about during this training?

OVERVIEW OF TITLE IX



TITLE IX



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

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

LAWS, COURTS, AND REGULATIONS



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

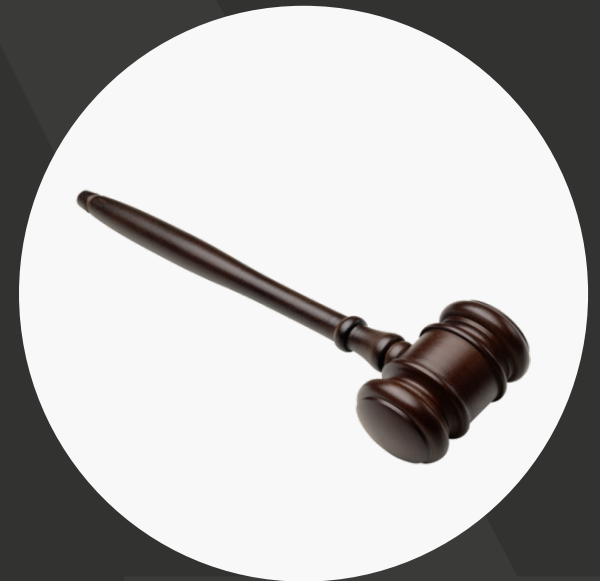
STAY ABOVE THE FLOOR



- Law, Caselaw, and Federal Regulations set the floor
 - OCR Guidance typically elevates the floor
 - States can pass laws that exceed federal requirements (e.g.: New York and California)
- Practicing at the floor = doing the bare minimum
 - Will not address the cycle of inequity and unfairness
- Civil Rights issues demand more than bare minimum
- Industry standards already exceed the floor
 - Regression to the floor increases risk of legal liability

SIGNIFICANT CASES & KEY OCR GUIDANCE

- *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).
- *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).
- *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999).
- 2001 OCR Guidance



A BRIEF HISTORY OF TITLE IX PRE-1972



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

CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



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

CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



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

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

FRANKLIN V. GWINNETT PUBLIC SCHOOLS



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

CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



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

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

CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



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

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

CASE STUDY: SEXUAL ASSAULT - EMPLOYEE



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

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

GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



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

DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



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

DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Davis repeatedly reported conduct to teachers; Davis's mother also contacted teachers multiple times;
- Mother was told the principal was aware of the situation. No disciplinary action was taken.
- Davis's assigned seat was next to the male student throughout the harassing behavior; not allowed to change seats for over three months.

DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- In May 1993, principal told Davis's mother, "I guess I'll have to threaten him a little harder"; male student not disciplined.
- Davis's grades declined and her father found a suicide note his daughter had written; Davis told her mother she "didn't know how much longer she could keep [the male student] off her."
- Others in class also faced harassment; group of students tried to complain to the principal, but were allegedly prevented from doing so and told, "If [the principal] wants you, he'll call you."
- Parents had complained to three teachers and the principal; student had also complained to three teachers.

DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Finding in favor of Davis, the Supreme Court expanded on the *Gebser* ruling:
 - The school/district must have “**actual notice**” of the harassment; and the school/district must have responded to the harassment with “**deliberate indifference.**”
 - Deliberate indifference constitutes a response that is “**clearly unreasonable in light of the known circumstances.**”
 - Additionally, court held that:
 - Harassment must be “**severe, pervasive, and objectively offensive,**” and the indifference “**systemic,**” to the extent that the victim is deprived of educational opportunities or services.

ISSUE SPOTTING



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

OCR & TITLE IX



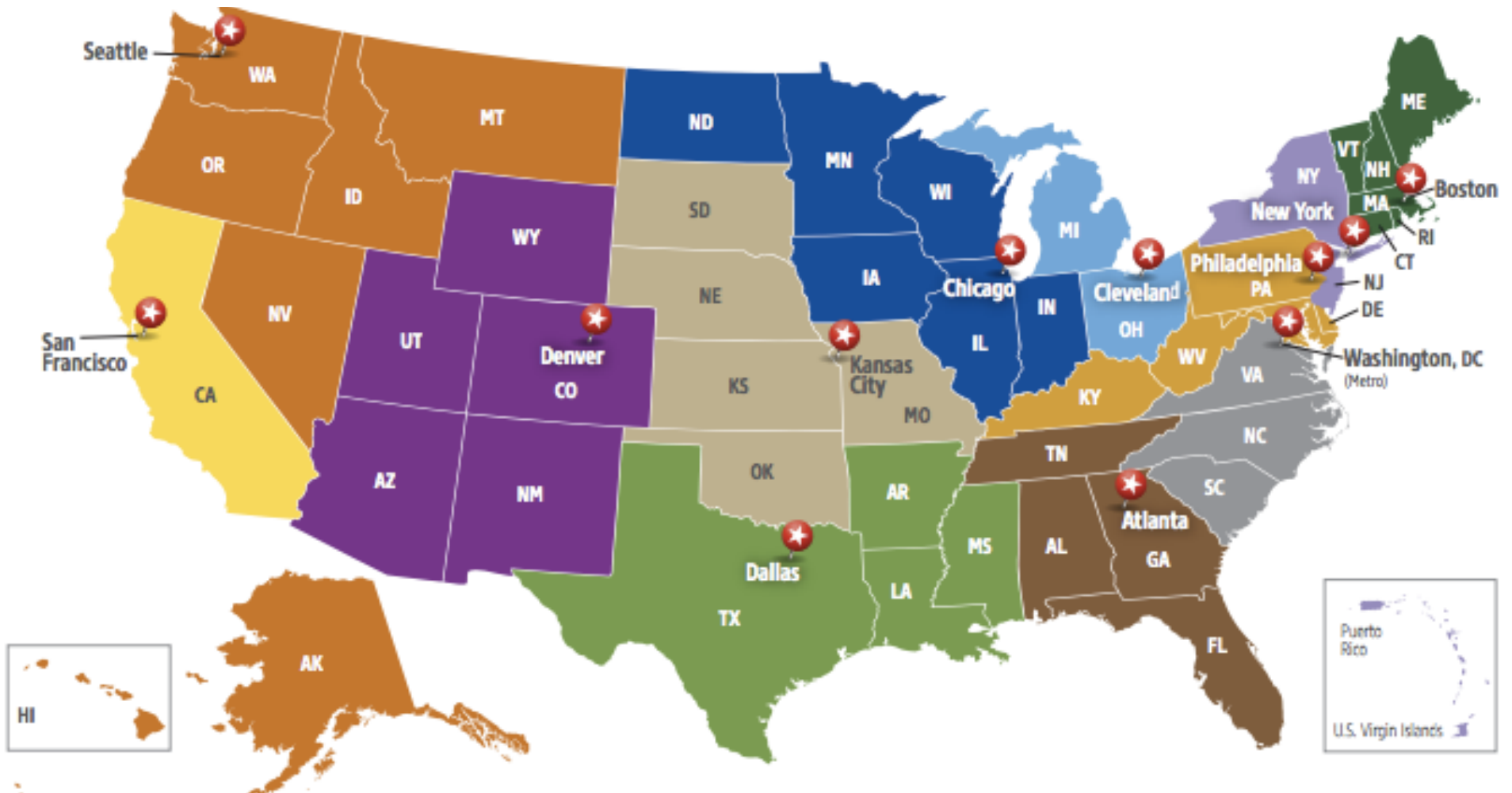
ROLE OF OCR & TITLE IX



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

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

OCR REGIONAL OFFICES



REMEDIES UNDER TITLE IX



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

And/Or

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

CIVIL LAW SUITS V. ADMINISTRATIVE ACTION



Lawsuit

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

Administrative Action

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

2001 REVISED SEXUAL HARASSMENT GUIDANCE



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

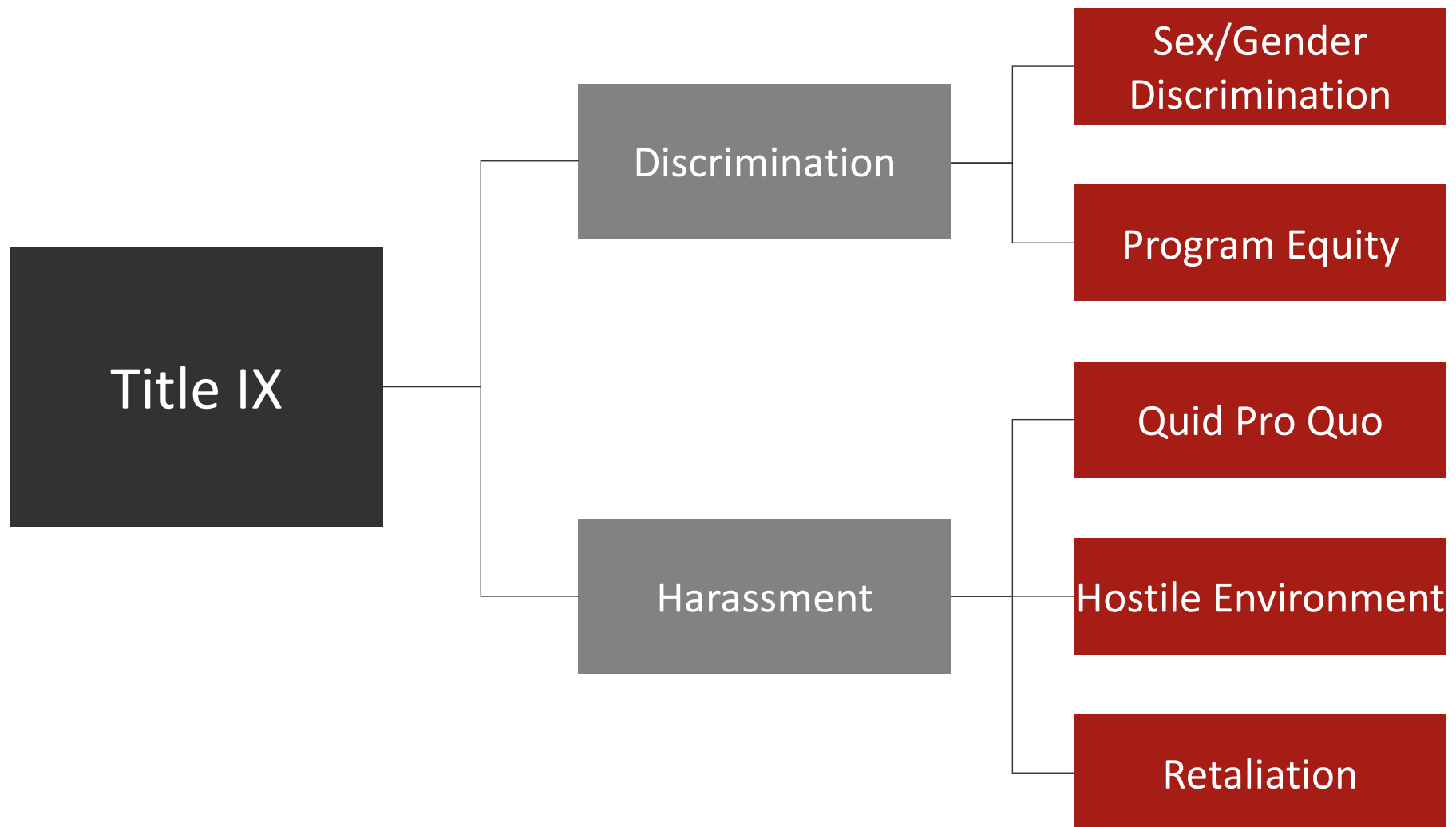
2001 REVISED SEXUAL HARASSMENT GUIDANCE

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

2001 REVISED SEXUAL HARASSMENT GUIDANCE

- Publication of policies and procedures that:
 - Include 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.
 - Designate a Title IX coordinator.

TITLE IX



KEY TITLE IX-RELATED ISSUES



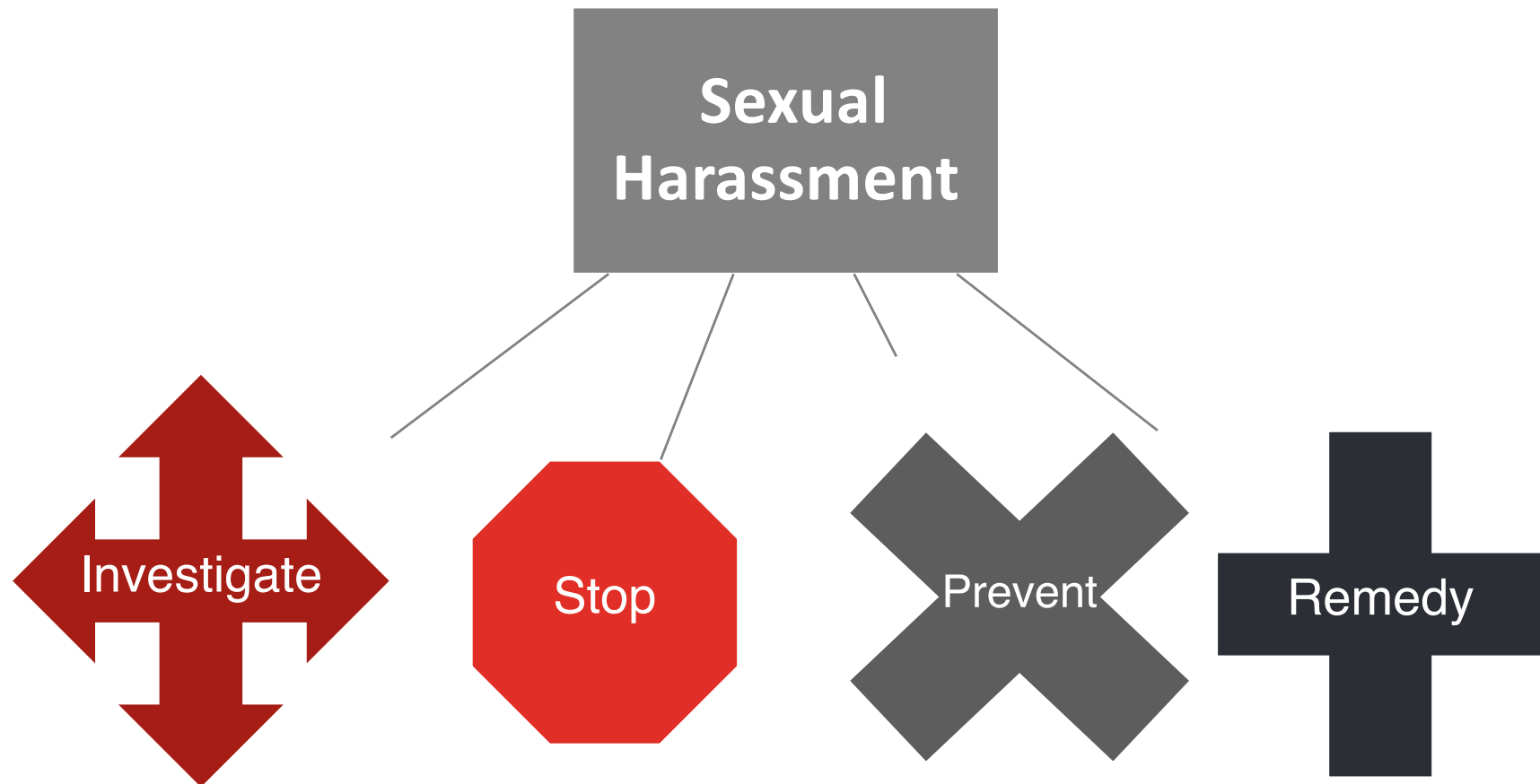
Sex Based Discrimination

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

Sexual Harassment

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

SCHOOL/DISTRICT OBLIGATIONS UNDER TITLE IX



THE IX COMMANDMENTS



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

A large, stylized 'X' graphic composed of two overlapping triangles, rendered in a dark gray color, positioned on the right side of the slide.

DUE PROCESS

—

GOSS V. LOPEZ

419 U.S. 565 (1975)



- Nine high school students were suspended for 10 days for non-academic misconduct.
- The court held that since K–12 education is a fundamental right, students were entitled to at least a modicum of “due process.”
- Minimum due process is notice and an opportunity for a hearing.

GOSS V. LOPEZ

419 U.S. 565 (1975)



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

WHAT IS DUE PROCESS?



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

WHAT IS DUE PROCESS?



- **Due Process in Procedure** - A school's process should include (at a minimum):
 - Notice — of charges and of the hearing/resolution process.
 - Right to present witnesses.
 - Right to present evidence.
 - Opportunity to be heard and address the allegations and evidence.
 - Right to decision made based on substantial compliance and adherence to institutional policies and procedures.
 - Right to a hearing? (TBD)
 - Right to appeal (recommended).

WHAT IS DUE PROCESS?



- **Due Process in Decision** - A decision must:
 - Be based on a fundamentally fair rule or policy.
 - Be made in good faith (i.e., without malice, partiality, or bias).
 - Based on the evidence presented.
 - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
 - Not be arbitrary or capricious.
- Sanctions must be reasonable and constitutionally permissible.

EQUITY DEFINED

EQUALITY VERSUS EQUITY



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



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



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

- Each party's rights, privileges and opportunities need to be balanced.
- Not exactly parity, but equitable procedures that reach equitable outcomes that impose equitable remedies.
- Equitable = fair under the circumstances.
- What you do for one party, consider whether you need to do for the other(s).

NOTICE, REPORTING, RESPONSIBLE EMPLOYEES & CONFIDENTIALITY

- “Responsible employee”
- Actual and constructive notice
- Additional reporting requirements
- When do you investigate?

RESPONSIBLE EMPLOYEE



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



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

Actual Notice

- Individual files a Title IX grievance.
- Individual notifies the Title IX coordinator or other responsible employee.
- Individual complains to school police or security official.
- Staff member witnesses harassment.

Constructive Notice

- Broader standard
- Knew or should have known

ADDITIONAL REPORTING REQUIREMENTS



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

ATIXA'S RECOMMENDED APPROACH



- All employees report
 - Enables school/district to best support those who have experienced harassment or discrimination
 - Better enables tracking patterns
 - Gets information to those trained to handle it

WHY REPORT?



- Focus is often 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 or Deputy).
 - Access to the full range of support and resources
 - Long-range view: ATIXA has seen countless cases where reporting parties do not see the negative effects until months later when they are failing their classes, become ill, miss work, suicidal etc.
- Also key to tracking patterns.

TRAINING RESPONSIBLE EMPLOYEES



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

WHEN DO YOU INVESTIGATE?



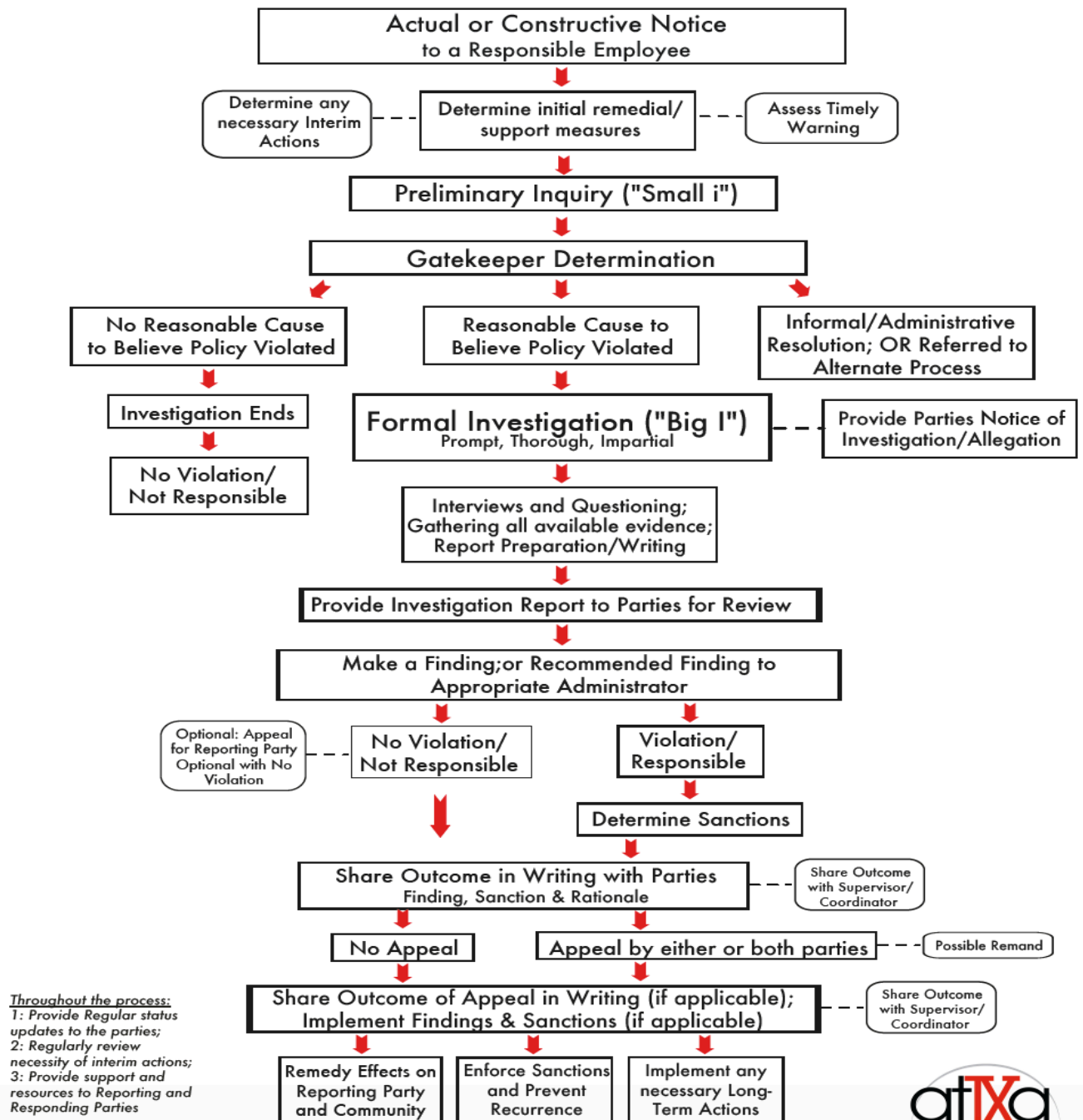
- When you have notice!
- Per proposed regulations
 - Upon receipt of a formal, written, signed complaint.
 - When the Coordinator deems an investigation is warranted.
- Rumors, gossip, social media, etc. can be notice.
 - Investigating on these bases is discretionary (but often recommended), particularly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

CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

- Civil Rights Investigation Model
- The Process
- Ten Steps

CIVIL RIGHTS INVESTIGATION MODEL

ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



THE PROCESS



TEN STEPS



1. Allegation or notice
2. Preliminary inquiry
3. Gatekeeping decision to proceed or not proceed
4. Notice of investigation and/or allegation (NOIA)
5. Strategize investigation (throughout)
6. Formal comprehensive investigation
7. Witness interviews
8. Evidence gathering
9. Analysis
10. Determination

CIVIL RIGHTS INVESTIGATION MODEL



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

SEXUAL HARASSMENT



THREE TYPES OF SEXUAL HARASSMENT



1.
Hostile
Environment

2.
Quid Pro Quo

3.
Retaliatory
Harassment

ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



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

ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
 - The frequency (persistence or pervasiveness), nature, and severity of the conduct.
 - Whether the conduct was physically threatening.
 - Whether the conduct was humiliating.
 - The relationship between the alleged harasser and the subject or subjects of the harassment.
 - The age of the alleged harasser and the subject or subjects of the harassment.
 - The size of the school, location of the incident(s), and context in which conduct occurred.

ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
 - The effect on the reporting party.
 - Whether the conduct was directed at more than one person.
 - Whether the conduct unreasonably interfered with the reporting party's educational or work performance.
 - If statement, whether it was an utterance of an epithet which was offensive, or offended due to discourtesy or rudeness.
 - Whether the speech/conduct deserves protections of academic freedom or the First Amendment protection.
 - “Constellation of surrounding circumstances.”

“SEVERE”



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

(2001 Guidance).

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

“PERVASIVE”



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

“PERSISTENT”



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

“OBJECTIVELY OFFENSIVE”



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

SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



Student-based examples

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

HOSTILE ENVIRONMENT?



SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



Teacher-based examples

- Giving a student a back-rub.
- Require students to watch the movie “8th Grade” and give an assignment to compare their own intimate experiences against those from the film.
- Female faculty teacher repeatedly referring to male students as “stupid.”
- Telling repeated “dirty” jokes in class.

SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



Staff-based examples

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

QUID PRO QUO SEXUAL HARASSMENT



- **Sample Definition**

- *Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,*
- *By a person having power or authority over another, when*
- *Submission to or rejection of such 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.*

RETALIATORY HARASSMENT



- ***Sample Definition***
 - *Any adverse employment or educational action taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct.*
- Also includes retaliation against a reporting party by the responding party or responding party's friends.
- Also can include retaliation directed toward a third party because of that party's participation in a grievance process or for supporting a grievant.

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, sexual orientation, or disability.
 - Involves an imbalance of power, aggression, and a negative repeated behavior.

CASE STUDY: BULLYING



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

CASE STUDY: BULLYING



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

PREVENTION AND REMEDIATION OF BULLYING AND CYBERBULLYING



- Policy development.
 - Student Handbook/Code of Conduct.
 - Employee manuals/CBAs.
 - Teacher Handbooks.
 - State
- Distribution and dissemination of policy information.
- Early intervention (using your BIT, TAT, etc.).
- Training of faculty, staff, and students.
- Cyberbullying is widespread and is often among the most serious and impactful for students and employees.
 - Pervasive and Persistent

PRELIMINARY INQUIRY

Preliminary Inquiry
Gatekeeping
Interim Actions

PRELIMINARY INQUIRY



- This is an initial inquiry to determine if a comprehensive investigation is desired, appropriate, or necessary.
- Checking background, obvious patterns, indicia of predatory, violent, or threatening behavior.
- Push one Domino™ over at a time.
- How much involvement does the Reporting Party want?
- Give the Reporting Party as much control as possible in the process as to their participation.
- Can this be resolved informally or without discipline?
- This may help to determine if there is reasonable cause to move the process forward, and what allegations the Responding Party should be noticed on.

PRELIMINARY INQUIRY (CONT.)



- Establish a preliminary timeline for the investigation.
- Investigate all allegations to determine:
 - The extent of the harassment.
 - The acuity of the threat it may represent to students or employees.
 - What might be necessary to put an end to any behaviors that are harassing.
- Be able to show that a comprehensive civil rights investigation was completed and documented.
- Responding to anonymous reports:
 - Determine if a trend or pattern may be apparent.
 - You may have a duty to attempt some form of remedial response.

- As investigation unfolds, investigators should determine if there is *reasonable cause* to believe that policy has been violated.
- If threshold is reached, investigators should communicate with coordinator to ensure a notice of allegation is issued.
 - Coordinator must make sure parties have an advisor if desired.
 - Have a clear policy on advisor options and rights. This should be communicated to the parties.
- If investigation does not produce sufficient evidence of reasonable cause, the investigation should end prior to the issuance of the notice of allegation and no hearing should be held.

WHAT IS THE GATEKEEPING FUNCTION AND WHY IS IT ESSENTIAL?



- It is inappropriate and unfair for a Responding Party to be dragged through a process without substantiating evidence.
- Significant reputational harm can result from mere allegations of sexual harassment, etc.
- An allegation must be supported by *reasonable cause* to permit its **full** pursuit.
- This protects the integrity of the process.

NOTICE OF INVESTIGATION/ALLEGATION



- Prepare and deliver the notice of investigation and allegation on the basis of the initial inquiry.
 - It should provide the details of the allegation(s), applicable policies, applicable procedures, etc.
 - The NOIA is communicated verbally and in writing to all parties.
 - Usually notice is given in advance (minimum of 2-3 days)
 - The Proposed regulations would limit interviews prior to NOIA.

HOW IS NOTICE OF INVESTIGATION GIVEN TO THE RESPONDING PARTY?



- Who is the responding party?
 - Student.
 - Staff.
 - Teacher.
 - Visitor (e.g., contractor, invitee, non-affiliated, guest, etc.).
- How is notice typically provided?
 - Written (i.e., electronic and/or paper).
 - Email used – Is email checked?
 - Verbal.
 - Parental notification (see slides below)

INTERIM AND SUPPORTIVE MEASURES



- Throughout process:
 - **Investigate.**
 - **Stop** behavior.
 - **Prevent** re-occurrence:
 - Consider what education/training may need to be implemented, changed, etc. to assist the community as well as the parties.

NOTE: Remember to provide support and resources to Reporting and Responding Parties throughout the process.

COMMON INTERIM ACTIONS



- No-contact orders.
- Minimizing interaction between reporting party and responding party (e.g.: shifting classes, work, etc.).
- Relocating to a different classroom, work space, course group, etc.
- Providing counseling services.
- Referring for medical services.
- Providing academic support services, such as tutoring.
- Extending assignment deadline
- Arranging for the reporting and/or responding party to re-take a class/withdraw from a class without penalty.
- Reviewing any disciplinary actions taken with respect to reporting party to assure they are non-retaliatory.
- Holding school-wide training and education initiatives.
- Interim suspension – in or out of school.
- Alternative placement.
- Change supervisor (employees).

- Reporting and Responding parties are allowed to have an advisor of their choice.
 - At all meetings/interviews
 - School-based advisors
 - Outside advisors
 - Parents
 - Attorneys
 - Union reps
 - Role of advisors – should be equal
 - Limits of participation, if any?
 - Communication between advisor and advisee
 - Proposed regs (if implemented) will affect the role of advisors

WORKING WITH PARENTS/GUARDIANS



- Parents may be the source of a report.
- Most districts have a policy/practice to notify parents/guardians during investigation.
- Parent/guardian will often serve in the role of “advisor” to attend and support in meetings or interviews.
 - What if a student prefers a different advisor?
- Parent/guardian (or any advisor) should not impede or disrupt the investigation.

WORKING WITH PARENTS/GUARDIANS



- Try to invite parents to help support your work to investigate, which might include helpful participation in an interview, but not answering questions on behalf of their child.
 - Adjust according to the age of the student
- Remember that under FERPA, parents/guardians have the right to “inspect and review” all education records, including records from investigations that “directly relate” to their student and include personally identifying information.

FOOD FOR THOUGHT: INFORMATION FOR PARENTS/GUARDIANS



- Review District/complex/school policies, procedures, and practices.
- Discuss how to report.
 - Where to find reporting resources.
- Discuss investigation/disciplinary processes, including role as advisor.
- Discuss privacy and confidentiality.
- Discuss rights of all parties.
- Discuss consent as appropriate to the age of the students, including the role of drugs and alcohol.
- Presentation of resources.
- Provide resource/reporting guide.

INVESTIGATION PROCESS

PROCESS OVERVIEW



- The investigation team, in consultation with supervisors and/or Title IX Coordinator, strategizes the investigation.
 - Methodology
 - Order/timeline
 - Goals
 - Prepare preliminary questions but be prepared to deviate
 - Potential obstacles
- Interview all witnesses.
- Gather and assesses all available evidence.
- Write a report.
- Depending on process, make finding/recommendation and sanction (vary by school)

TITLE IX COORDINATOR OVERSIGHT

- Role of Title IX Coordinator in Investigation Process
 - Supervisor of Investigation Structure
 - Supervisor of Investigation Process

TITLE IX COORDINATOR OVERSIGHT



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

TITLE IX COORDINATOR OVERSIGHT




- The Title IX Coordinator (or designee) is responsible for:
 - Notice of investigation.
 - Gatekeeping.
 - Determining extent of investigation.
 - Notice of Investigation and Allegation. (NOIA)
 - Notice of hearing.
 - Notice of outcome.
 - Duty to warn.
 - Assurance of remedies.
 - Recordkeeping of all activities.

BEGINNING THE INVESTIGATION



FORMAL COMPREHENSIVE INVESTIGATION



- 
- A large, stylized red letter 'I' graphic that serves as a visual element on the left side of the slide. It has a thick, solid red top bar and a lighter red, semi-transparent bottom bar.
- Commence a thorough, reliable, impartial, prompt, and fair investigation.
 - Determine the strategy for the investigation.
 - Witness interviews.
 - Evidence gathering.
 - Intended timeframe to complete the investigation.
 - Finding.
 - Presentation of finding.
 - Complete the investigation promptly, without unreasonable deviation from the timeline.

NOTICE TO THE PARTIES



- In a civil rights model, notice has many phases, some or all of which may come to pass (equitably):
 - Notice of investigation and/or initial meeting.
 - Post-gatekeeper phase, the NOIA.
 - Post-investigation, notice of hearing (if applicable).
 - Updates on status of investigation (ongoing).
 - Notice of outcome and sanctions.
 - Notice of appeal.
 - Notice of final determination.

STRATEGIZE THE INVESTIGATION



- Common questions to consider:
 - Which process is appropriate?
 - Whom to interview?
 - When/In what order?
 - What follow up interviews are necessary?
 - What information/evidence can be obtained?
 - How and when do we notify the parties and witnesses?
 - Who needs to be aware of the investigation?
 - When and how do we share evidence/information with the parties?

STRATEGIZE WHEN TO INTERVIEW PARTIES AND WITNESSES



- Parties and witnesses should be interviewed as soon as possible:
 - So recollections are as fresh and accurate as possible.
 - To provide necessary remedies in a timely manner.
- Strategize notifying the responding party of the report:
 - Immediately upon receipt of the report or notice, or...
 - In other circumstances, interviewing witnesses and accumulating evidence first may be better strategy.

WITNESS INTERVIEWS



- Strategize contacting witnesses, ordering witness interviews, and preventing contact between witnesses, where necessary.
- Solicit a witness list from the both parties. Identify them as just “witnesses,” not “his” or “her” witnesses.
- Determine when you are going to question the responding party.
- Sample 1: Reporting party → Reporting party’s witnesses → Neutral witnesses → Responding party’s witnesses → Responding party → Any additional witnesses identified by either party → Round 2 → Round 3.
- Option 2: Reporting party → Responding party → Reporting party’s witnesses → Responding party’s witnesses → Neutral witnesses → Any additional witnesses identified by either party → Round 2 → Round 3.

EVIDENCE GATHERING



- Engage in the **active** accumulation of evidence.
- Ensure timeliness.
- Document receipt of information and other materials as they are obtained in the course of the investigation.
- Verify/authenticate evidence.
- Be thorough in your examination of factual, circumstantial, and hearsay evidence, and ensure that all evidence has been examined, and all leads exhausted.

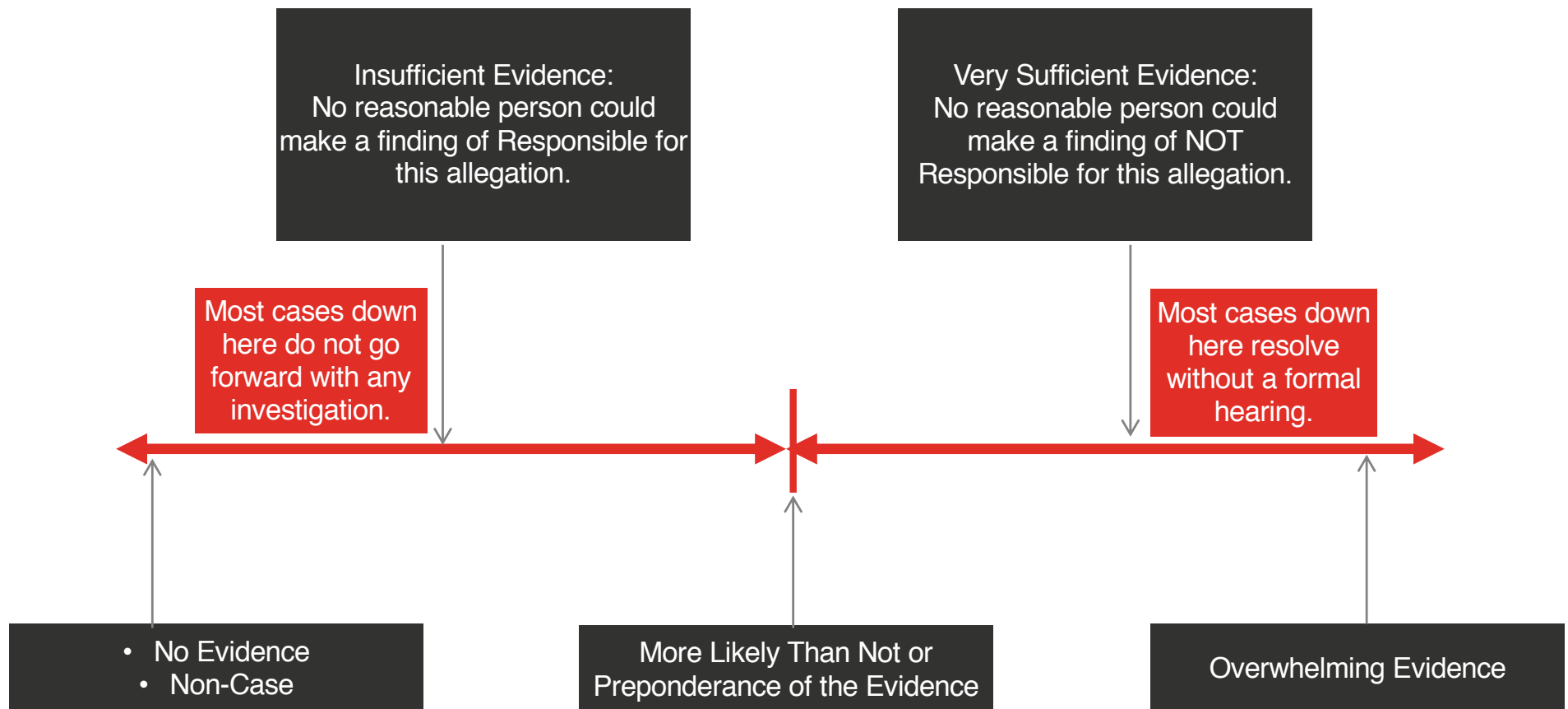


EVIDENTIARY THRESHOLD



- **Preponderance**
 - Only truly equitable standard
- **Clear and Convincing**
 - Difficult to train, difficult to explain
- ***Proposed Regulations**
 - Consider other existing evidentiary thresholds
- Decisions must be made by applying the evidentiary threshold to the evidence gathered, when it is determined that the facts are credible.

STANDARD OF PROOF / EVIDENTIARY STANDARD atIXA



STANDARD OF EVIDENCE



- Right to a finding that is based on the preponderance of the evidence – “more likely than not.”
 - Not based on “gut,” the attitude of the parties, the likeability of the parties, or a presumption of responsibility
 - Credibility determinations may be sufficient to reach the preponderance of the evidence (but not at the expense of the evidence).
 - You must be able to articulate your rationale in writing.
 - Your determination must be a function of credible, probative, and articulable evidence.

- 5 days to resolution is a good guideline for non-complex student cases.
 - Timeline starts from **notice of the incident**, not from the incident itself.
 - No set requirement, other than to have prompt, designated timeframes in your procedures.
 - Goal is to avoid undue delay.
 - What about police, safety/security, or SRO involvement?
 - What about school vacations/breaks?

- Ensure that all steps in the investigation are conducted according to the timelines in the institution's procedures.
 - Procedures should provide some flexibility to timeframes
- Parties and witnesses should be interviewed as soon as possible:
 - So that recollections are as fresh and accurate as possible.
 - To secure necessary remedies as soon as possible.
- Document and communicate unavoidable delays.
- Provide notice of extensions.
- Ensure communication is equitable.

- Recognizing the difference:
 - **Privacy**
 - School's obligation – not parties' obligation
 - **Confidentiality**
 - Confidential resources
 - Limited confidential reporting
 - Consider circumstances of report
- FERPA considerations
- Issue of parties tendency to discuss...
 - Gag orders – disfavored (ATIXA, courts, proposed regs)
 - Suggest conferring with their advisor before talking with others

- Documenting Investigation
 - Process
 - Steps taken
 - Delays – why and how such delays were communicated to appropriate individuals
 - Communication with parties, witnesses, parents, advisors, etc.
 - Evidence (if original or copy or just reviewed by investigators)
 - Interim measures implemented AND offered
- Consider who will/may review
 - Parties and parents/guardian
 - Attorneys and judge
 - Media

INVESTIGATION RECORDS



- “The File”:
 - The responding party’s file.
 - The reporting party’s file.
 - The investigation file (including investigation report).
 - Personal case notes.
 - Witness education records.
- Understand the court processes and your role in them.

- Assess resources and options
 - Team of investigators (One lead asking questions, other taking notes?)
 - Audio recording is increasingly common in complex or high stakes cases.
 - Verification by interviewees
 - Sooner after the interview the better
 - Necessary to have interviewees review/verify even if record/transcribe interviews?

CASE STUDY

- Sexting

CASE STUDY: SEXTING



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

CASE STUDY: SEXTING



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

CASE STUDY: SEXTING



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

QUESTIONING SKILLS



QUESTIONING SKILLS



- What are the goals of questioning?
 - Learn the facts.
 - Establish a timeline.
 - Understand each party's perception.
 - Try to learn what is more likely than not to have happened.
 - Three sides to every story (or more).
- NOT the goals of questioning...
 - Curiosity.
 - Chasing the rabbit into Wonderland.
 - Catch a party in a lie.
- The “Gotcha” moment won’t typically come. Not your role. You are not law enforcement or prosecutor.

QUESTIONING SKILLS (CONT.)



- To consider before asking questions:
 - What are the relevant issues?
 - What do I need to know?
 - Why do I need to know it?
 - What is the best way to ask the question?
 - Am I minimizing potential re-traumatization?
 - Am I avoiding blaming or biased questions?
 - Am I the right person to ask this?

QUESTIONING SKILLS (CONT.)



- Open-ended questions (tell us...who, what, how?)
- Close-ended questions (Did you, were you?)
 - Use infrequently, but when needed to drill down on a specific issue.
- Careful with Compound Questions
 - I have two questions, First..., Second...
- Try not to ask Multiple Choice Questions
 - Were you a), b), or c)
- Avoid gratuitous use of leading questions – (Isn't it the case that...?)

QUESTIONING SKILLS (CONT.)



- Have a purpose for asking every question.
- Be sure to ask a question, not make a speech.
- Ask questions about the allegations and the evidence in relation to the applicable policies
- Don't be accusing or argumentative.
- If your skepticism shows, make sure you intend it to show, otherwise keep your cards close to your vest.
- Don't make questions too long or confusing.
- If you ask a bad question, acknowledge and take it back.

QUESTIONING SKILLS (CONT.)



- Listen carefully and adapt follow-up questions.
- Avoid evaluative responses to a person's answers unless needed to establish rapport, draw someone out, or convey empathy.
 - E.g.: that's too bad; I'm glad you said that.
- Do not moralize.
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "fooled around," and "had a few drinks."
- Do not ask questions that invite a party to second-guess their actions, as this may be perceived as blaming.

QUESTIONING EXERCISE



Please critique the following questions:

- What effect did your actions (or behavior) have on others? On the school? On yourself?
- Explain what you hoped to accomplish through your actions.
- Why did you choose to drink if you knew it was risky?
- I have a couple of questions: First, do you know what incapacitated means?; Second, could you tell she was incapacitated?; and Third, why did you give her another drink when evidence from witnesses indicates she was already really drunk?

QUESTIONING EXERCISE



Please critique the following questions:

- What other options were there for you in this situation?
- What was the purpose of your behavior?
- How would you feel if others were engaged in comparable behavior?
- What would be the consequences for our school if everyone engaged in comparable behavior?
- How does your responsibility for upholding our school's standards apply to your actions in this situation?
- How might you react if such a situation were to come up again?

INTERVIEWING SKILLS



**Remember: As an investigator,
you have no “side” other than
the integrity of the process!**

- Understand the goals of an “interview” versus an “interrogation.”
 - An interview is a conversation designed to elicit information in a non-accusatory manner.
 - Shifting to an interrogation approach should not be done lightly; you cannot go back – not recommended.
- Is person comfortable that you will conduct the interview fairly and objectively?
 - Team or peer-led investigations can help create a rapport much more easily.

ESTABLISH PRE-INTERVIEW GROUND RULES



- Who will attend?
- How will records be kept? Recording? Access.
- Role of Advisors.
- Role of Attorneys.
- Difference between Advisor/Attorney role in interviews vs. in a hearing
- Involvement of Roommates, Parents, Union Reps, etc.
- FERPA/confidentiality.

PROVIDING POLICY AND PROCEDURE COPIES



- Each party should receive a copy of:
 - The specific policies alleged to have been violated (not a link), including any sub-parts or sections.
 - The procedures that will be used to resolve the complaint, including the rights that extend to the parties (not a link).
 - Non-retaliation provision/policy.
- Keep copies of the applicable policies and procedures in the investigation file.

DEMEANOR OF INVESTIGATOR(S)



- Work to establish rapport and a baseline of relaxed conversation.
- Maintain good eye contact.
- Listen carefully to the answers to your questions.
 - Avoid writing while interviewee is talking, if possible.
- Ask questions in a straightforward, non-accusatory manner.
- Nod affirmatively and use active listening skills to prompt or keep party/witness talking.

SETTING UP REASONABLE EXPECTATIONS



- People who conduct investigations with skill rest secure in the knowledge that all those involved, including witnesses, were treated objectively and fairly.
- Be sure reporting and responding parties understand parameters of the policy, what it does and does not cover, how the process plays out, and what the process can and cannot accomplish.
- Provide ample opportunity for the reporting and responding parties to ask questions.
- Keep the reporting party in the loop as to exactly when notice will be given to the responding party.
- Ensure that updates are equitably communicated to the parties.

- General Interview Skills:
 - Outline your interview questions in advance, but be flexible.
 - Plan the order of interviews; may be beneficial to interview responding party last.
 - Most beneficial to conduct interviews in person.
 - Interviews should be conducted in a neutral, quiet, and private setting with a minimal or no likelihood of interruptions.
 - Explain process, your role as a neutral fact-finder, and applicable privacy protections and limitations.

INTERVIEW SKILLS (CONT.)



- Discuss thoroughness and the need for completeness.
- Make sure to explain amnesty policy.
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Ascertain who the individual is and their relation to other parties.
- Document whether individual is cooperative.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.

Take the allegations from start to finish through a process of broad to narrow questions and issues that need to be addressed.

- Ask questions about the allegations, the evidence, and the policy elements.
- Focus on areas of conflicting evidence or gaps of information.
- Drill down on timelines and details.
- Don't leave a question or gap unanswered.

CASE STUDY



CASE STUDY: IVAN & JUANITA



- Juanita Morales, a freshman member of the girls' soccer team, made a Title IX report directly to the Vice Principal.
- On the morning of October 11, her teammate, who was checking her email in the computer lab, yelled for Juanita to come look at something on the computer.
- Juanita saw an email sent from the boy's soccer team generic email address which said "Greetings new freshman, meet the girl next door."
- The email included a photo of Juanita's face photoshopped onto a naked body with huge breasts.

CASE STUDY: IVAN & JUANITA



- Everyone in the room knew it wasn't Juanita, but they all laughed anyways.
- Juanita ran from the room crying, embarrassed that others would think it was her.
- She immediately called Ivan, a member of the boys' soccer team, who she believed sent the email.
- Earlier in the year, Ivan asked her out several times, but she didn't like him.
- She found him really annoying, and while she knows it wasn't nice, she called him a total loser in front of his friends.
- She knows that he sent the email to hurt and embarrass her.

- Preliminary inquiry: Do you have enough to move forward with an investigation?

CASE STUDY: IVAN & JUANITA



- You are beginning your investigation. How do you think about your strategy?
- What first steps would you employ?
- Who would you want to interview at this stage?
- What evidence you would want to look for?

CASE STUDY: IVAN & JUANITA



- You decide to interview Ivan. Ivan believes Juanita is blowing the whole matter out of proportion.
- Ivan says Juanita “always flashes her breasts” at him and told him she wanted breast implants.
- He admits to creating the photo for a class project. He reports:
 - “It was only meant to be a joke. I never put her name on it, so what’s the big deal? This is a work of art that I created for my class, not a porn picture or anything. I only showed my artwork, which by the way is protected by the First Amendment, to a few of my teammates. I know my rights very well, since my dad is a lawyer. In fact, the First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

CASE STUDY: IVAN & JUANITA



- Ivan showed the photo to a couple of teammates but did not send the email.
- The email account is for official team business. The coaches and captain executives have the password; the captain they have shared it broadly with all the seniors on the team.
- You decide to interview John Wang, assistant director of information technology.
- John was able to confirm that someone using the computer lab computer sent the picture from the boy's soccer team email account.

CASE STUDY: IVAN & JUANITA



- The picture was inserted into the email via a flash drive and he was unable to determine which student had logged in.
- John received Ivan's consent to inspect his laptop. The photo was on his hard drive, but was not sent out via email to anyone.
- He said that when he doesn't have his laptop with him, it is typically inside his locker. Ivan also told him that he hasn't given anyone else his laptop password.

CASE STUDY: IVAN & JUANITA



- Who else might you interview?
- Do you have enough to make a determination?
- With these facts, is this sexual harassment?
 - If so, what form of sexual harassment?
- Is Ivan responsible for creating a hostile educational environment for Juanita?
- Other considerations that might inform your assessment?

INTERVIEW SCHEDULING



- Try to anticipate how long each interview will take (e.g. How many times will you interview the witness? How much time can the witness give you?). Schedule your interview slots accordingly.
- Back-to-back interviews should be avoided, if possible. Interviews often take longer than expected and may require you to reschedule interviews.
- Leave open an amount of time for post-interview work, review of notes with your co-investigator and to prepare for the next interview.

INTERVIEWING THE REPORTING PARTY



- Acknowledge difficulty of reporting and thank them.
- Acknowledge that they may have told this story multiple times already.
- Explain why you are taking notes and/or inform them of recording practice, if applicable.
- Provide a copy of relevant policies and procedures.
- Ask them to share a complete account of what occurred.
 - Have them give full narrative without asking questions, then circle back to details.
- Ask about outcry witnesses and possible documentation such as blogs or journals.
 - What will witnesses likely say/know?

INTERVIEWING THE REPORTING PARTY (CONT.)



- Ask about those they spoke to about the incident.
- Ask what the individual hopes to see as a result of reporting.
- Find out if the individual's academics and/or work have been affected.
- Ask how this has affected them emotionally and/or physically.
- Advise that the allegations will be discussed with the responding party and witnesses.
- Let them know next steps and when you will be in touch.

INTERVIEWING THE REPORTING PARTY (CONT.)



- Considerations for Interim Actions:
 - Notify of option to report to police; institution will help facilitate report.
 - Emotional, academic, and/or physical impact.
 - Counseling and advocacy options (on and off school grounds and/or campus).
 - Retaliation – prohibition and to whom to report.
 - No-contact orders.
 - Course adjustments.
 - Interim actions may be implemented at a later date.
 - Etc.

INTERVIEWING THE RESPONDING PARTY



- Acknowledge difficulty of the situation and thank the responding party for meeting with you.
- Provide a copy of relevant policies and procedures.
- Ask the person to share a complete account of what occurred.
- Question them as to the allegations – start with open ended questions and circle back for details/areas of interest.
- Get detailed – do not leave a question unanswered.
- Ask about witnesses and any other relevant information.
 - What will witnesses likely say/know?
- Ask about possible motivation for allegation(s).

INTERVIEWING THE RESPONDING PARTY (CONT.)



- Provide support and resources throughout the process as needed.
- Let the responding party know next steps and when you will be in touch.
- Discuss counseling options if the individual is not already connected.
- Discuss non-retaliation provision and provide examples.
- Discuss any intermediary steps such as no-contact orders and exclusions, if appropriate.
- If interim suspension/action is implemented, review terms and timeframe.
- Encourage the person to maintain privacy of the investigation and consult their advisor before sharing.

FEEDBACK TO WITNESSES



- Witnesses may ask or say:
 - Am I being investigated?
 - What are you really investigating?
 - How will you use the information you are given?
 - Is it confidential?
 - Will I get into trouble by giving you this information?
 - I don't want to cooperate.
 - Do I need my parents/lawyer present during interview?
- Anticipating these questions and/or addressing them in advance can help ensure that you establish good rapport, which should help you get the truth.

INTERVIEWING WITNESSES



- It may be helpful to not label the allegations as “sexual misconduct” or “sexual harassment” but to describe the actual reported behavior, neutrally.
- Ascertain relation to other parties.
- Address the need for complete truthfulness.
- Ask for opinions.
- Ask if either party spoke about the incidents after they happened.
 - Did they see any change in behavior?

INTERVIEWING WITNESSES (CONT.)



- Ask if they have been contacted already by one of the parties.
 - If so, content of that communication?
- Ask if they have made any previous statements, such as to private investigators.
- Ask if there is anything you should know that has not been covered or if there is anyone else they think should be contacted.
- Discuss privacy and FERPA guidelines.
- Ask all interviewees to contact you if they remember anything else or want to add to their interview.

SHARING INFORMATION WITH PARTIES AND WITNESSES DURING INVESTIGATION



- Decide how much information you will share in advance of each interview, and have a rationale for what information will be shared and what will not be shared.
- Start with broad questions, then move to narrow questions.
- Explore facts that are relevant to the issue at hand.
 - Be prepared to delve into additional topics but avoid going down rabbit holes.
- It can be difficult for the responding party to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport building. Be specific in explaining the reported conduct.

TRAUMA-INFORMED INTERVIEWING

- Introduction to Trauma
- Neurobiological Impact of Trauma
- Considerations for Interviewing

MEMORY AND TRAUMA



- Memory is formed in two steps:
 - Encoding: organizing sensory information coming into brain
 - Consolidation: grouping into memories and storing the stimulus
- Trauma can interfere with the encoding and/or the consolidation of memory
- May create fragmented memories
- Inconsistent accounts are common
- Recall can be slow and difficult
- Alcohol may interfere further with memory
- However, sensory information (smell, sound, etc.), may still function properly

INTERVIEWING CONSIDERATIONS



- A non-linear account, with jumping around and scattered memories is not uncommon
- If alcohol is a factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress
- Use open-ended questions where possible
- Don't interrupt or barrage with questions
- Don't define or label a party's experience
- Be patient

- Trauma can negatively impact a party's credibility
- Trauma may help explain:
 - Inconsistencies in a party's statement
 - Lack of linearity in a party's account or statement
 - Memory errors by a party
 - A party's demeanor or affect
 - A party's brief answers, or answers lacking in detail

- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them
 - An assessment of credibility must focus on issues such as the reliability, consistency and believability of the parties
 - If, for example, a reporting party's account is inconsistent or variable, lacking in detail, or has material memory gaps, it typically lacks credibility
 - An understanding of trauma and its impact will provide insight as to why some credibility deficits exist, but a trauma-informed approach should not materially impact a credibility assessment
- Use caution because actual or perceived trauma may have little or nothing to do with consent

HELPFUL INVESTIGATION DOCUMENTS

- Developing a timeline of the incident
- Witness lists and flowcharting

INCIDENT TIMELINE



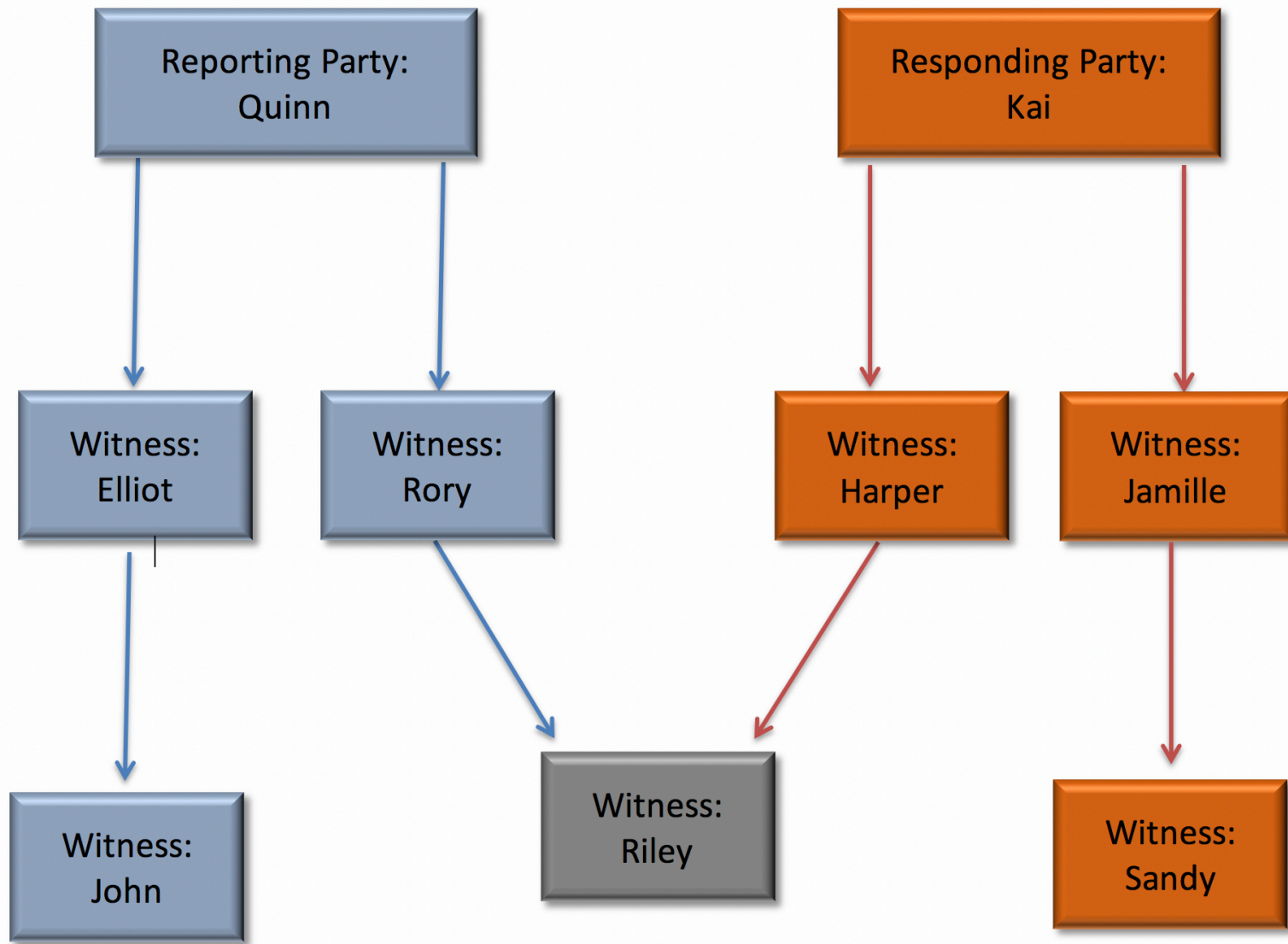
- Discuss timeline of event/s with all parties/witnesses.
- Obtain as much detail as possible.
- Look to establish reference points from phone calls, email, texts, and receipts.
- Identify any “gaps” and circle back – may lead to additional information.
- Timing highly relevant to matters involving alcohol/drug consumption and physical evidence such as bruising, bite marks, etc.
- In stalking and/or verbal, online sexual harassment cases, frequency of communication between parties may be important.
- Establishing a reliable timeline
 - Can assist with credibility assessments
 - Useful when questioning witnesses
 - Valuable when searching for video footage

WITNESS LIST AND FLOWCHARTING BEST PRACTICES



- Keep freshly updated list of your witnesses as you learn of them.
- Identify which parties or witnesses led you to other witnesses.
- Keep track of whether witnesses are neutral, loyal and biased, or loyal but objective. Include reasoning.
- In complex cases, use a flowchart to track witnesses the reporting party leads you to, the witnesses responding party leads you to, and the witnesses who are neutral.
- Note in the flowchart where witnesses intersect in terms of relationships to each other and/or potential loyalties to parties.

WITNESS FLOWCHART SAMPLE



ROLE OF LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS?



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

EVIDENCE COLLECTION AND ISSUES OF CONCURRENT CRIMINAL ACTION



- Active accumulation of evidence.
- What if law enforcement requests you delay your process?
- What if law enforcement is the sole source of evidence collection?
 - And they won't release the evidence to you?
 - Does it matter if they are local law enforcement/public safety?
- What if there is a pending criminal or civil case?
- What if the responding party threatens to call a lawyer or files a lawsuit?
- What if the reporting party files a lawsuit or complaint with OCR?

MAKING A FINDING & THE INVESTIGATION REPORT

- Analysis and finding
- Prior acts as evidence
- Who makes the finding?
- Overview of the investigation report
- A Hearing?

HOW IMPORTANT IS THE CREATION OF AN INVESTIGATION REPORT?



- The investigation report is **THE** comprehensive document of the investigation.
 - Addresses:
 - Reported misconduct
 - Parties involved
 - Interviews conducted (parties & witnesses, any experts)
 - Summary of evidence and information collected
 - Analysis of facts
 - Credibility assessments
 - Conclusions and findings

THE INVESTIGATION REPORT



- The investigation report is the one document that details all of the investigative efforts, including:
 - Results of interviews with parties and witnesses.
 - Unbiased summary and compilation of other information collected
 - E.g.: copies of texts, emails, and social networking messages, information from law enforcement, medical exams, video surveillance and photographs, etc.
 - Parties have the right to review evidence prior to a decision/hearing.
 - “All available evidence” per proposed regulations

THE INVESTIGATION REPORT



INVESTIGATION FILE VS. INVESTIGATION REPORT



- File vs. report: not lockstep
- Consider location – file, report, or appendix?
 - Notes
 - Evidence
- How are files organized?
- Other considerations
 - Personal/Private Notes
 - FERPA – education record
 - Employment record privacy

INVESTIGATION FILE VS. INVESTIGATION REPORT

- Location of investigation file and investigation report?
 - Students? Employees?
- Relevant evidence vs. irrelevant evidence
 - Proposed regulations may influence this, including disclosure to parties
- Open records laws
- Draft reports
- How to provide information to parties
 - Evidence
 - Report
 - *How, When, Where, What*

A black chalkboard with the words 'Show Your Work' written in white chalk in a cursive, handwritten style.

Show Your Work

THE INVESTIGATION REPORT: CONTENT OVERVIEW



- I. Brief Summary Overview
- II. Summary of Allegations
- III. Involved Parties
- IV. Investigation Timeline
- V. Jurisdiction
- VI. Applicable Policies & Definitions
- VII. Evidentiary Standard
- VIII. Summaries of Relevant Evidence, Interviews & Witness Statements
- IX. Credibility Assessment
- X. Discussion and Analysis
- XI. Findings
- XII. Appendix

SAMPLE INVESTIGATION REPORT CONTENT



- DATE OF REPORT and NAME OF INVESTIGATOR
- SUMMARY OVERVIEW
 - This report addresses allegations of the [Policy Name] of the [School Name]. [Name of investigator] conducted the investigation into these allegations.
- OVERVIEW OF THE ALLEGATIONS
 - Provide a description of what the reporting party alleges, and if there is a written complaint or statement, include that as an appendix to your report.
- PARTIES & WITNESSES
 - Provides names and brief description of reporting party, responding party and all witnesses
- TIMELINE OF INVESTIGATION
 - Include the date of the incident, the date it was reported, how and to whom (generally) it was reported, the date in which investigators began, and the date that the investigation concluded.

SAMPLE INVESTIGATION REPORT CONTENT



- JURISDICTION
 - Where: Geographic
 - On-school grounds
 - Off-school grounds
 - If so, on-school ground effect(s)?
 - When: Temporal
 - “Statute of limitations”?
 - Summer or winter break? Spring break?
 - Who: “Person”
 - Who are parties? Staff, student, guest, visitor, camper, visiting teams/athletes, etc.
 - What?
 - Scope of policies: All Title IX? Sexual Misconduct?
 - Concurrent/Ancillary Misconduct?

JURISDICTION: SAMPLE TEXT



- The alleged misconduct occurred between a teacher, Kirby, and two of his 10th grade Algebra 2 students, Caldwell and Bennett. The alleged incidents involving Caldwell occurred throughout Fall 2018, while those with Bennett occurred in both Fall 2018 and Winter 2019.
- In both cases, the alleged conduct occurred both on- and off-school grounds.
- As Kirby is a teacher, and Caldwell and Bennett are his students, and some of the alleged misconduct occurred on school grounds, the school believes that these behaviors are covered by Title IX, could impact its educational program, and exercises jurisdiction accordingly.

JURISDICTION: SAMPLE TEXT



- It was reported by Witness 1 that Kirby has made a number of inappropriate, unprofessional, and sexually harassing comments while teaching his classes, in written feedback to students, and in emails with students. These alleged behaviors fall within the school's Title IX jurisdiction as Kirby is an employee of the school and the reported conduct occurred in the course of Kirby's employment and on the school's premises.

SAMPLE INVESTIGATION REPORT CONTENT



- OVERVIEW OF APPLICABLE POLICIES
 - Provide reference to the applicable policy(ies) that correspond with the allegations.
 - Policy references should match those on the notice of investigation.

APPLICABLE POLICIES: SAMPLE TEXT



- DISTRICT's Sexual Misconduct Policy includes policy prohibitions relevant to Sarah Young's complaint. The policies at issue are:
 - **Sexual Harassment**
- The policy defines sexual harassment as follows:

Sexual Harassment

- Unwelcome,
- Sexual, sex-based and/or gender-based,
- Verbal, written, online and/or physical conduct.

The type of sexual harassment implicated by the reported conduct is a hostile environment, which is defined by the policy as:

- Severe or Persistent or Pervasive AND
- Objectively offensive AND
- A limitation or deprivation of educational or employment participation or benefits

DOCUMENTING INTERVIEWS



- Investigation interview:
 - Name/title of the interviewer(s).
 - Name of the persons interviewed and their role in the investigation – reporting party, responding party, witness, etc.
 - Names of any other people who sat in on the interview and their roles.
 - Location of the interview.
 - Interview date.
 - Detailed notes of interview.

INCLUSION OF INTERVIEW SUMMARY STATEMENTS IN REPORT



- ***Investigator's note:*** Throughout the sections below, everything in quotation marks is a direct quote from the interviewee's verified notes. A complete copy of the verified notes is in the Appendix. All quotes, text messages, emails, and other evidence is provided in original form. Rather than insert "[sic]" in each instance, readers should be aware that there are numerous grammatical, spelling and capitalization errors and abbreviations/acronyms that are left in place as verbatim quotes or original documents.

INTERVIEWEE VERIFICATION: EXAMPLE 1



- Investigators conducted a series of in-person and phone or video-based interviews on January 30, 2019 and February 1-2, 2019, as well as phone interviews on February 5, 2019. At the conclusion of each interview, all interviewees were provided the opportunity to review and verify a printed copy of the detailed notes taken by Investigator 2 during the interview. Interviewees were asked to make any necessary corrections, edits, additions, etc. In the case of the parties, their advisors were provided with a printed copy to review as well. All interviewees verified the notes with their signatures without any material changes to the content.

INTERVIEWEE VERIFICATION: EXAMPLE 2



- All interviewees were provided the opportunity to verify a copy of the notes from the investigation interviews. Investigators emailed each interviewee a copy of the detailed notes made during the interview and asked the interviewee to respond within approximately two business days and to use the track changes function in Microsoft Word to make any needed changes or edits. In the correspondence to the interviewee, investigators noted that if an interviewee did not respond to the verification request, the notes would be deemed appropriate and acceptable. Some interviewees responded with minor changes or revisions. If interviewees did not respond, their notes became finalized and are included as such in the appendices.

EXAMPLE: SOLICITING WITNESSES FROM PARTIES



- The parties were asked to provide a list of relevant witnesses and to provide any evidence they felt was relevant to the investigation and the complaint. Both parties provided a list of potential witnesses, and those deemed relevant to the alleged incident were interviewed. The responding party also provided a few text message exchanges, photos, and other social media posts.

TIMELINE EXAMPLE



- **Sunday, September 4th, 2018**
- 3:45pm – Jimmy and his friends arrive at the house on Philly Ave.
- 4:00pm – Andrea, Erin, Sandy and Jill leave Erin’s house and walk to a party at a house on Philly Ave.
 - Andrea sees Jimmy playing cornhole with Josh and Matt and joins them; Andrea teams up with Jimmy so they are on opposite sides of the game. Andrea stands by Matt and Jimmy stands by Josh.
 - Andrea, Jimmy and a few others hang out for a while talking. Someone comes up to Andrea and hands her a beer, which she drinks.
- 4:45pm – Andrea and Jimmy leave the Philly house and head to a house on Chapel Rd. where Andrea’s friends were hosting a party. Jimmy did not know anyone at the party and they stayed for 10-15 minutes before returning to the house on Philly Ave.

TIMELINE EXAMPLE



- 5:15 – Jimmy and Andrea arrive back at the Philly Ave. house.
- 5:45pm – Erin, Jimmy and Andrea leave the Philly Ave. house and walk to Brown Street to get dinner. Erin goes to Chipotle and Jimmy and Andrea go to Panera.
- 6:00pm – Jimmy and Andrea walk from Panera to the school gym, which they know is open because of a weekend volleyball tournament.
- 6:15pm – Jimmy and Andrea arrive at the gym and eat dinner in the bleachers with Courtney and Chris, who were at the gym already.
- 6:30pm - Sharon arrives during dinner and joins them.
- 7:00pm – Chris, Courtney and Sharon go back to Courtney’s house to watch a movie.

TIMELINE EXAMPLE



- 7:00pm – Jimmy and Andrea enter the student lounge off the gym and lie down on the long couch. No one else is in the lounge.
 - Jimmy and Andrea kiss on the couch. Jimmy gets up to close the door and turn of the light.
 - They engage in sexual intercourse on the couch.
 - They clean themselves up and get dressed and shortly thereafter, Jimmy asks if it is ok if he leaves.
- 7:40pm - Andrea walks Jimmy to the front door of his house and Jimmy leaves.
- Note that Andrea does not recall going to the Chapel Rd. house, but a number of witnesses indicated that Jimmy and Andrea left the Philly Ave. house and returned about 15-20 minutes later.

TIMELINE EXAMPLE



- **Additional Relevant Timeline**
- 8:00 pm – Andrea arrives at Courtney’s house, speaks briefly with Chris in the hallway, then goes to the bathroom. When she returns from the bathroom, she starts talking about the alleged incident with Jimmy and becomes very emotional.
- 8:15 pm – Andrea calls her mother.
- 8:25 pm – Andrea’s mother arrives at Courtney’s house.

TIMELINE EXAMPLE



- **Additional Relevant Timeline**

- 8:35pm – After arriving home, Andrea and her mother call the Police Department, who come to her house and take a statement.
- 9:21 pm – Andrea texts Jimmy “Why did it happen”; Jimmy responds, “What.” Upon receiving no response, Jimmy writes, “Lol okay then.” Then adds “Let’s just forget about it and I’ll just leave you alone and all that.”
- 10:00pm – Andrea’s mother takes Andrea to the Hospital where she has a rape kit performed. Police gather evidence from Andrea’s apartment.
- 10:15pm –Police arrive at Jimmy’s house and he accompanies them to the police station and provides a statement on the alleged incident with Andrea.
- 10:45pm – Principal is notified of the alleged incident.

UNDERSTANDING EVIDENCE



- Formal rules of evidence **do not apply**. If information is considered relevant to prove or disprove a fact at issue, it should be addressed.
 - 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.
- Assess credibility of evidence. If credible -> it should be considered.
- Consider if drugs or alcohol played a role.
 - If so, do you know what you need to know about the role of alcohol on behavior?
 - Timing? Incapacitation? Other considerations
 - Look for evidence of prior planning.

UNDERSTANDING EVIDENCE



- You may consider and 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 objects)
 - Direct or testimonial evidence (e.g., personal observation or experience)
 - Circumstantial evidence (i.e., not eyewitness, but compelling)
 - “Hearsay” evidence (statements heard from another, “second-hand”)
 - Impact statements (typically only relevant in sanctioning)
 - Character evidence (generally of little to no value or relevance)

IRRELEVANT EVIDENCE EXAMPLE



- In the course of the investigation, witnesses and the parties provided a great deal of information, some of which was relevant, some of which was not.
- Rather than dismissing evidence as irrelevant *while* gathering evidence, investigators use a broad approach to ensure as thorough an investigation as needed.
- In a word-against-word investigation, the credibility of the parties and witnesses is critical, and often credibility assessments can be informed by additional evidence, even if that evidence does not ultimately bear on the underlying reported misconduct.
 - Requires investigators to gather information more broadly.

IRRELEVANT EVIDENCE EXAMPLE

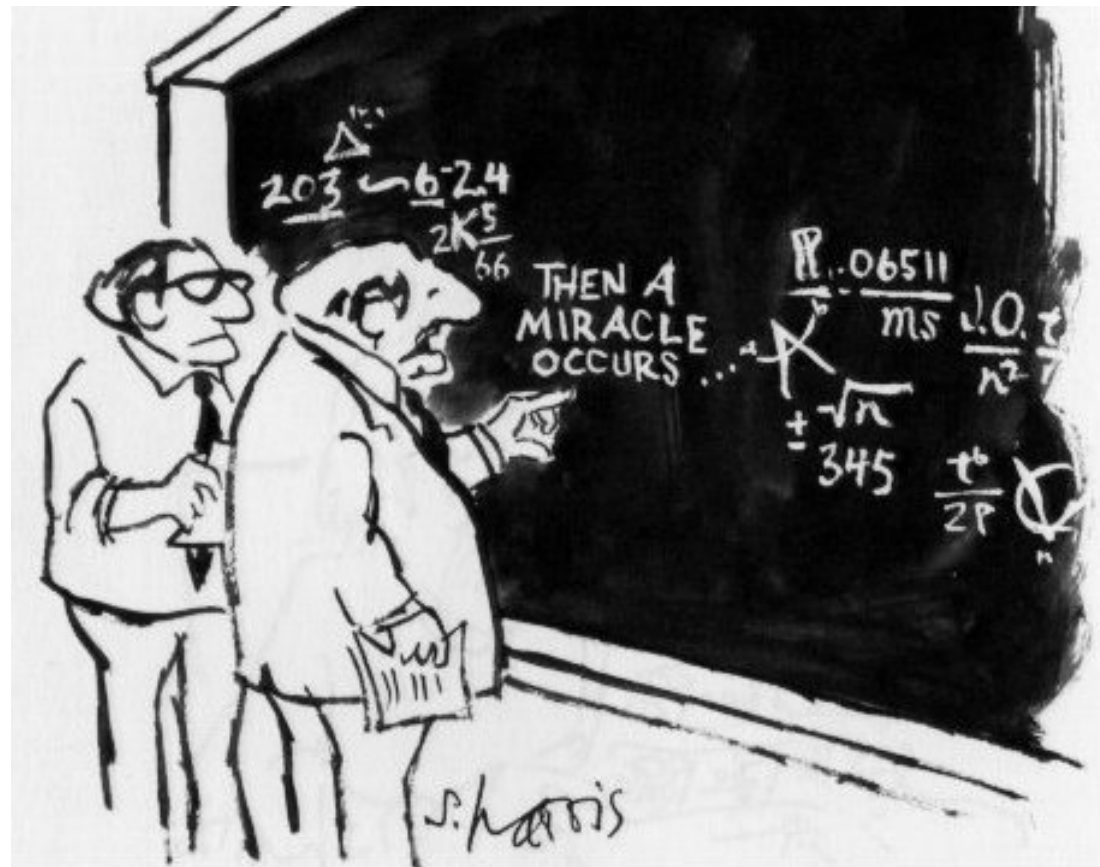


- Examples of information not considered in determining a finding due to a lack of relevance are:
 - Information regarding Andrea’s sexual history, other than her sexual history with Jimmy to the extent it informed the issue of consent;
 - Sharon’s statements about Jimmy’s interest in kink;
 - Chris’ statement that a friend of his finds Jimmy “creepy” without any additional information.
- Conversely, relevant evidence is analyzed in detail in this report.
- The primary role of investigators is to determine what information is relevant to enable the decision-maker to make a decision based on the preponderance of the relevant evidence, rather than extraneous or irrelevant evidence.

EVALUATION OF EVIDENCE AND MAKING A DETERMINATION

- Understanding Evidence
- Credibility
- Analyzing the Information
- Making a Determination

ANALYSIS AND EVALUATION OF EVIDENCE



“I think you should be more explicit here in step two.”

from *What's so Funny about Science?* by Sidney Harris (1977)

ANALYSIS AND FINDING



- Review the policies that apply and the relevant definitions.
- Address the evidence and what it shows (relevance).
- Evaluate evidence and assess credibility of evidence and witness statements as factual, opinion-based, or circumstantial.
- Make determination or recommendation about whether it is more likely than not that a policy violation occurred.
- Cite concrete reasons for the determinations in written report.
- Refer to appropriate administrator to make a finding and determine appropriate sanction(s)

UNDERSTANDING EVIDENCE



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

UNDERSTANDING EVIDENCE



- You may consider and 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 objects).
 - 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, may be introduced in sanctioning phase).
 - Impact statements (typically only relevant in sanctioning).

- Credible is not synonymous with truthful.
- Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading.
- Credibility is largely a function of consistency and corroboration.
- Refrain from focusing on irrelevant inaccuracies and inconsistencies.
- Pay attention to the following factors...

FACTORS TO CONSIDER FOR CREDIBILITY



- Corroborating evidence
- Logic/internal & evidentiary consistency
 - Ask yourself, “Does this make sense?”
 - Be careful of own biases about what is or is not logical
- Inherent plausibility – is the evidence more likely than the alternative?
- Non-cooperation
 - Look for short, abrupt answers or refusal to answer.
 - OK to ask, “You seem reluctant to answer these questions – can you tell me why?”
- Demeanor (careful with this one)
 - Demeanor issues should be cue to ask more questions.

MAKING CREDIBILITY DETERMINATIONS



- Look at consistency of story – substance and chronology of statements.
- Consider inherent plausibility of all information given.
- Is the evidence provided consistent with other credible evidence?
- Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses, or denials that have no supporting detail.
- Pay attention to non-verbal behavior, but do not read too much into it...this is not *Lie to Me*.

OTHER ELEMENTS OF AN INVESTIGATION REPORT



- Document each of the actions taken throughout the investigation, particularly if there are multiple investigators.
 - If short: could be in Procedural History/Timeline
 - If long: could be an appendix.
- Index all documentation relevant to the complaint.
 - E.g., research, notes, medical records, police reports, prior complaints, etc.

REVIEW OF REPORT



- Both parties should be given access to review the investigation report prior to finalization/decision
 - Significant shift in the field
 - Full review of evidence prior to decision being made
 - Serves as a check to ensure report is accurate and thorough
 - Enhances “opportunity to be heard”

IVAN & JUANITA SAMPLE INVESTIGATION REPORT



CONSENT CONSTRUCT

-
- Force
 - Incapacity
 - Consent

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
- Consider the relevant age of consent statute

CONSENT CONCEPTUALIZED



Source: Everyday Feminism

CONSENT IN PROPOSED CH. 19



- “Sexual assault” means the act of committing unwanted physical contact of a sexual nature on a person, whether by an acquaintance or by a stranger. Such contact is unwanted when it occurs without consent of the person, or when the person is incapacitated or otherwise incapable of giving consent. If a student is a subject of sexual assault and is under the age of consent, it shall be deemed that no consent was given. Sexual assault is a form of sexual harassment.

OVERVIEW OF THE 3 CONSENT QUESTIONS



1. Was force used by the Responding Party to obtain sexual or intimate access?
2. Was the Reporting Party *incapacitated*?
 - a) If so, could or should the Responding Party have reasonably known that the Reporting Party was incapacitated (e.g. by alcohol, other drugs, sleep, etc.)? ***Note: The intoxication of the Responding Party can not be used as a reason they did not know of the Reporting Party's incapacity.***
3. What clear *words* or *actions* by the Reporting Party gave the Responding Party permission for each sexual or intimate act as it took place? ***Note: Is the age of the parties a consideration in this case?***

FORCE

There are four types of force to consider:

- **Physical violence** -- hitting, restraint, pushing, kicking, etc.
- **Threats** -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
- **Intimidation** -- an implied threat that menaces and/or causes reasonable fear
- **Coercion** – the application of an *unreasonable* amount of pressure for sexual access.
 - Consider:
 - Isolation
 - Frequency
 - Intensity
 - Duration
 - Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force

INCAPACITY ANALYSIS



- If the reporting party **was not** incapacitated, move on to the consent analysis
- If the reporting party **was** incapacitated, but:
 - The responding party did not know it, **AND**
 - The responding party should not have reasonably known it = policy not violated. Move to consent analysis
- If the reporting party **was** incapacitated, and:
 - The responding party **knew it or caused it** = policy violation. Sanction accordingly
 - The responding party **should have known it** = policy violation. Sanction accordingly

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent
- Incapacitation is a determination that will be made after the incident in light of all the facts available
- Assessing incapacitation is very fact-dependent
- Blackouts are frequent issues
 - Blackout = no working (form of short-term) memory for a consistent period, thus the person is unable to understand who, what, when, where, why, or how
 - But the 2a question must be answered, as blacked out individuals are able to engage in activities that may not make 2a a definitive “yes”
 - Partial blackout or Brownout possibilities must be assessed as well
- What if the responding party was incapacitated as well?

BEHAVIORAL CUES

- Evidence of incapacity may be in the report taken from context clues, such as:
 - Slurred speech
 - The smell of alcohol on the breath in combination with other factors
 - Shaky equilibrium; stumbling
 - Outrageous or unusual behavior*
 - Passing out
 - Throwing up
 - Appearing Disoriented
 - Unconsciousness
 - Known Blackout
 - Although memory is absent in a blackout verbal and motor skills are still functioning.

CREATE A TIMELINE



- First must determine by a “more likely than not” standard if the reporting party was incapacitated
 - This inquiry will likely be needed if reporting party makes statements such as:
 - “The next thing I remembered was...”
 - “I woke up and...”
 - “I don’t remember anything after...”
 - This services as the catalyst for you to assess whether the reporting party was incapacitated (using a preponderance of the evidence standard)
 - Timelines are often extremely useful in such situations

TIMELINE CONSTRUCT



- Begin the timeline from before the reported incident occurred.
- Understand the eating/drinking habits of the reporting party.
- Consider asking:
 - How often do you drink?
 - What – and how much - do you usually drink?
 - What were you drinking when the reported conduct occurred?
 - Volume and quantity of drinks?
 - Were you using any recreational drugs?
 - Are you on any medications?
 - When did you eat? What did you eat?

TIMELINE CONSTRUCT



- **Note:** If reporting party did not have anything to drink, or only reports consuming a small amount, consider whether they were drugged.
- Consider asking:
 - Where were you when you were drinking?
 - Who was with you when you were drinking?
 - Did you leave your drink at any time then resume consuming?
 - Did anyone give you a drink?
- Speak with other witnesses who can provide information about the reporting party's behavior to assess the level of intoxication.

TIMELINE CONSTRUCT



- If possible, speak with other witnesses who can provide insight/information about the reporting party's behavior to assess the level of intoxication.
- You will need to make an assessment, based on the preponderance of the evidence, as to whether the reporting party was more likely than not incapacitated
- If the answer is “No,” then proceed to the consent analysis
- If the answer is “Yes,” then proceed to the second part of the incapacitation analysis

TIMELINE CONSTRUCT



You need to determine whether the responding party knew or should have known that the reporting party was incapacitated

- Determine if responding party knew reporting party previously
- If so, ascertain whether reporting party was acting differently from previous similar situations
- Review what the responding party observed the reporting party consuming (via your timeline)
- Determine if responding party provided any of the alcohol/drugs to the reporting party
- Compare information provided by responding party with other witnesses if possible

CONSENT

Question 3 is the Consent question:

- What clear *words or actions* by the Reporting Party gave the Responding Party permission for each sexual or intimate act *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.).
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

CASE STUDY



- Hugh is a senior and Elizabeth is a sophomore. Hugh comes to a small gathering at Elizabeth's house with some mutual friends to watch a movie. Hugh and Elizabeth, who have never met before, are attracted to each other. After the movie, everyone leaves, and Hugh and Elizabeth are alone. They hit it off, and soon become intimate. They start to make out. Hugh verbally expresses to Elizabeth that he wants to have sex with Elizabeth, but she isn't ready to have sex with him because they just met. At the same time, she likes him and doesn't want to scare him off, so she decides to perform oral sex, hoping they can get to know one another better before engaging in vaginal intercourse. Perceiving the oral sex to be foreplay, Hugh stops Elizabeth, lays her back on the bed, takes off her clothes, and engages in intercourse with her. Elizabeth is unresponsive during the intercourse.

RULES TO REMEMBER



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

MAKING A FINDING



- Review the institutional policies in play
- Parse the policy
 - Relevant definitions
 - Specific findings for each implicated policy and each responding party
- Review the evidence and what it shows (relevance)
- Assess credibility of evidence and statements
 - Provide rationale for your credibility assessments
- Apply relevant policy to facts at hand
- Determine whether it is more likely than not policy has been violated
- Cite concretely the reasons for your conclusions

SANCTIONS

- Sanctioning considerations
- Common sanctions
- Considerations Post-Finding
- Sharing Outcome

SANCTIONING CONSIDERATIONS



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

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

COMMON STUDENT SANCTIONS



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

COMMON EMPLOYEE SANCTIONS



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

SANCTIONING IN SEXUAL MISCONDUCT CASES



- Investigation alone may not be sufficient to overcome a deliberate indifference claim.
- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s).
- What is appropriate?
 - Separation/expulsion.
 - Suspension.
 - Lesser sanctions.
- Engage in strategic education and training as remedies.
- Conduct a risk assessment audit and mitigation process.

SANCTIONING IN SEXUAL MISCONDUCT CASES (CONT.)



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

CONSIDERATIONS POST-FINDING



- Ensure 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 investigation (e.g. no contact orders, etc.).
- Ensure that long-term actions/remedies are equitable.
- Consider restorative justice as part of remedial process if appropriate.
- Monitor for retaliation; respond immediately to allegations.
- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, industry standards, and state and federal case law.

- Title IX requires institutions to apprise parties of the status of investigations **and determinations**.
 - Provide this information in writing
 - This is a shift in the field, but it is here to stay
 - Not truly possible to stop, prevent and remedy without informing BOTH parties of the finding.

SPECIAL TOPICS

Gender Identity/Gender Expression/Transgender
Students

Dual Enrollment

Pregnancy

Athletics

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

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

PROTECTIONS FOR TRANSGENDER PERSONS/GENDER IDENTITY AND EXPRESSION



- Title IX
- Court decisions (case law)
- OCR's regulatory guidance (rescinded, but still helpful guidance)
 - 2016 Guidance on Transgender Students*.
- State laws

TITLE IX & TRANSGENDER STUDENTS



- In May 2016, OCR released a Dear Colleague Letter specifically addressing Title IX's protections for transgender students.
- In February 2017, OCR revoked the DCL.
- In February 2017, ATIXA updated and re-released its position statement on Title IX, Gender Identity, and Gender Expression.
 - ATIXA believes that Title IX does protect students on the basis of gender identity.
- EEOC and numerous courts have determined gender identity is protected under Title VII. The Supreme Court will likely rule on the validity of these decisions in the upcoming Fall 2019 term.

TITLE IX & TRANSGENDER STUDENTS



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

TITLE IX & TRANSGENDER STUDENTS



- Where sex-segregated activities and facilities are provided, transgender students should be allowed to both **participate** and **access facilities** consistent with their gender identity.
- **Restrooms and Locker Rooms**
 - Schools may not:
 - Require transgender students to use facilities inconsistent with their gender identity, nor
 - Require use of individual-user facilities where other students are not made to do so.
 - Individual-user options can be made available to all students voluntarily seeking additional privacy.

DUAL ENROLLMENT



—

DUAL ENROLLMENT STUDENTS



- Best Practice: Effective coordination between the Title IX Coordinator at the college/university AND the Title IX Coordinator at the high school.
 - What remedies are needed in each setting (if any)?
 - Who should investigate?
 - Who has jurisdiction for purposes of discipline (if any, and if applicable)?
 - For minors: mandated state reporting?

STUDENTS ENROLLED IN HIGHER ED COURSES: ISSUES FOR K-12



- Jurisdictional Issues:
 - When is a student a “student?”
 - Upon application to the institution?
 - Once admitted to the institution?
 - Once registered for class(es)?
 - Upon matriculation?
 - Governed by institutional policy.
 - Student must be on notice.
- VAWA/Clery Act considerations.
- FERPA rights belong to the student (not the parent/guardian).

PREGNANT & PARENTING STUDENTS

SIGNIFICANT GUIDANCE DOCUMENTS



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

34 C.F.R. 106.40

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

PREGNANCY, 504 & TITLE IX – 2007 DCL



June 25, 2007 DCL includes:

- Information on how to develop programs to support these students;
- An overview of students' rights under Title IX; and
- Guidance on how to share your complaint if you feel your rights are not being met.

PREGNANCY, 504 & TITLE IX – 2013 DCL



- **June 25, 2013 DCL on pregnancy and parenting students:**
 - Educators must ensure pregnant and parenting students are not discriminated against.
 - Educators must ensure that pregnant and parenting students are fully supported in preparation for graduation and careers.
 - Secondary school administrators, teachers, counselors, and parents must be well-educated on the rights of pregnant and parenting students as provided under Title IX.

PREGNANCY, 504 & TITLE IX: REGULATORY LANGUAGE



- **Pregnancy defined**

- “Pregnancy and related conditions”:

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

PREGNANCY, 504 & TITLE IX: OCR GUIDANCE



- **Doctor's Note to Participate**
 - “Schools cannot require a pregnant student to produce a **doctor's note in order to stay in school or participate in activities**, including interscholastic sports, unless the same requirement to obtain a doctor's note applies to all students being treated by a doctor.”
 - “That is, schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; **schools should not presume that a pregnant student is unable to attend school or participate in school activities.**”

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 8.

PREGNANCY, 504 & TITLE IX: REGULATORY LANGUAGE



- **Physician Certification**

- A recipient may require such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation in the normal education program or **activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.**
- “Thus, for example, a student who has been hospitalized for childbirth must not be required to submit a medical certificate to return to school if a certificate is not required of students who have been hospitalized for other conditions.” (34 C.F.R. 106.40)

PREGNANCY, 504 & TITLE IX: REGULATORY LANGUAGE



- **Pregnancy as a “Temporary Disability”**
 - A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom **in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.” (34 C.F.R. 106.40)

PREGNANCY, 504 & TITLE IX: REGULATORY LANGUAGE



- **Leave Policies**

- In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as **a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.”** 34 C.F.R. 106.40

PREGNANCY, 504 & TITLE IX: OCR GUIDANCE



- “When the student returns to school, **she must be reinstated to the status she held when the leave began**, which should include giving her the opportunity to make up any work missed.”
- “A school may offer the student alternatives to making up missed work, such as:
 - Retaking a semester
 - Taking part in an online course credit recovery program, or
 - Allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave.
- “[S]tudent should be allowed to choose how to make up the work.”

- **Typical Guidance**

- A pregnant student-athlete's physician should make medical decisions regarding sports participation
- A student-athlete with a pregnancy-related condition must be provided with the same types of modifications provided to other student-athletes to allow continued team participation
- Pregnant student-athlete cannot be harassed due to pregnancy

TITLE IX & ATHLETICS

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



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



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



©2003 FLORIDA TODAY
caglecartoons.com
JIT
PARKER

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

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

EQUITY DEFINED



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

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

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



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

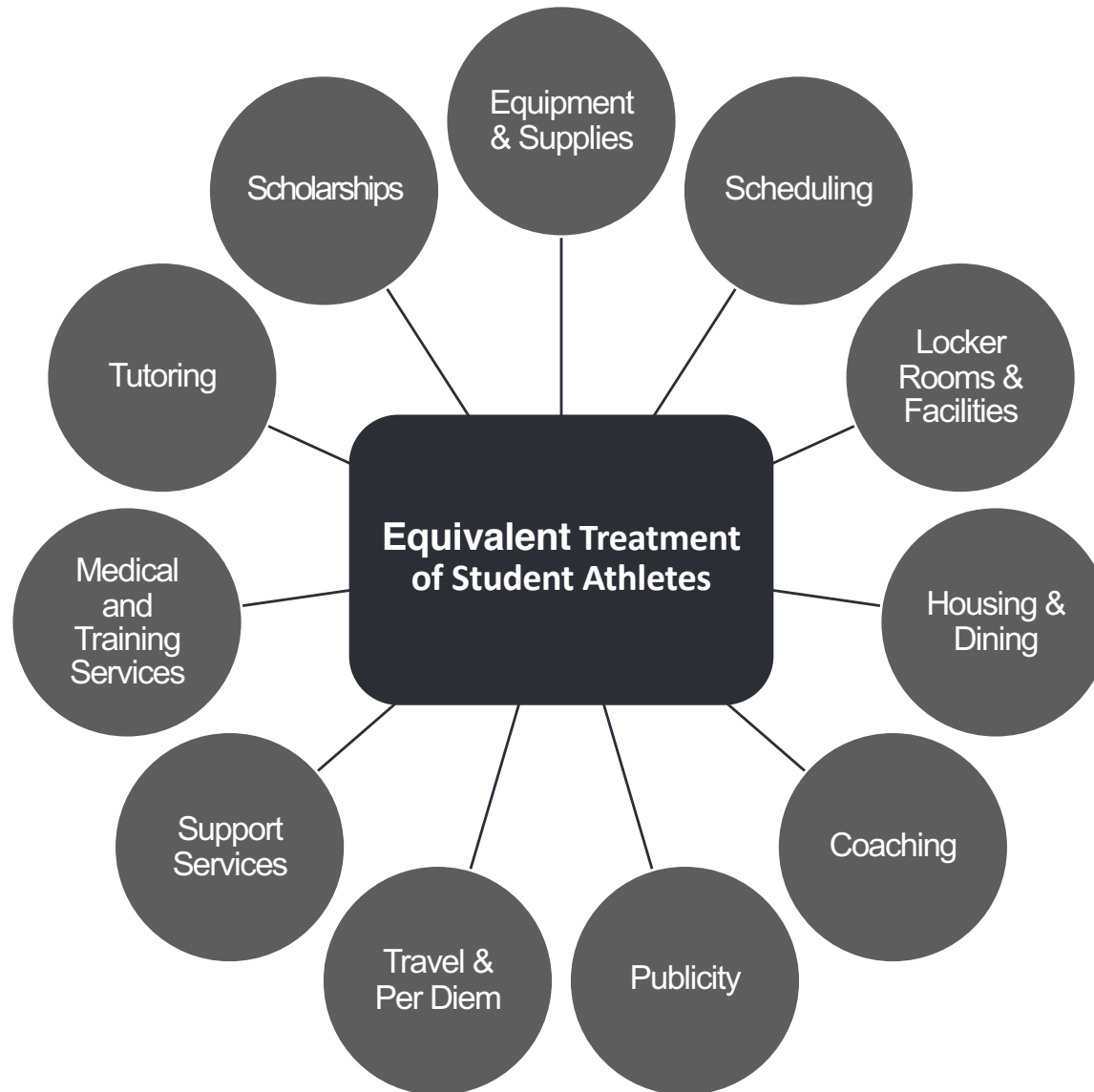
EQUAL OPPORTUNITY REGULATIONS



Equal opportunity:

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

OVERSIGHT OF ATHLETICS GENDER EQUITY



EQUAL OPPORTUNITY REGULATIONS



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

CASE STUDY: DONATIONS, FUNDRAISING AND EXPENDITURES



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

CASE STUDY: DONATIONS, FUNDRAISING AND EXPENDITURES



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

CONTACT INFORMATION

W. Scott Lewis, JD

Scott.Lewis@TNGConsulting.com