



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

**Summer Certification Series | June 8-9, 2020**

# YOUR FACULTY



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If you have any questions, please use the Q&A function, **not** the chat bar.

You can also email us questions at:

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**OR**

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In the subject line of the email, please **ONLY** put the word “**TODAY**” – we will keep the sender anonymous.



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# COORDINATOR TRAINING AGENDA



- Overview of Title IX Coordinator Responsibilities
- History & Overview of Title IX
- Review of Title IX Legal Standards
- Significant Cases
- OCR & Title IX
- Major OCR Guidance
- Clery Act and VAWA Section 304 Amendments

# COORDINATOR TRAINING AGENDA



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



# COORDINATOR TRAINING AGENDA



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

# NEW TITLE IX REGULATIONS



- Released May 6, 2020
- Implementation Deadline of August 14, 2020
- New definitions for “Sexual Harassment”
- Many new mandatory due process procedural requirements
  - Feature is required live hearing for higher education institutions
  - Emphasis on neutrality, presumption of innocence
  - Division of roles among Title IX team
- Allows for informal resolution processes
- Already facing litigation
- Will 2020 elections have an impact?

# THE TITLE IX COORDINATOR

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## Overview of the Responsibilities

- Description
- Roles
- Discussion



# THE TITLE IX COORDINATOR



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

# GROUP DISCUSSION



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



# HISTORY & OVERVIEW

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

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

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

# A BRIEF HISTORY OF TITLE IX PRE-1972



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

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

# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



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



# CANNON v. UNIVERSITY OF CHICAGO

## 441 U.S. 677 (1979)



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

# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



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

# ***NORTH HAVEN BOARD OF EDUCATION v. BELL***



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

# THE CLERY ACT & APPLICABILITY

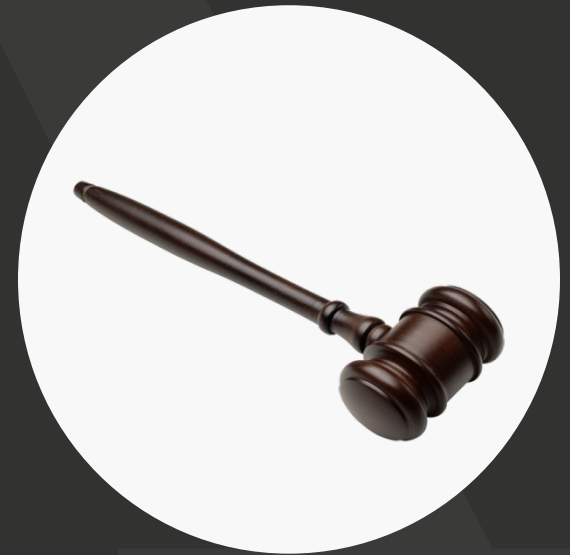


- The Clery Act applies only to Post-Secondary Schools, Colleges, and Universities.
  - There is, however, is increasing traction within Congress to developing a similar mechanism within K-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are universal and instructive for all educational institutions,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

# SIGNIFICANT CASES

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





# FRANKLIN v. GWINNETT COUNTY PUBLIC SCHOOLS



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

# GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998).



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

# DAVIS v. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999).



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

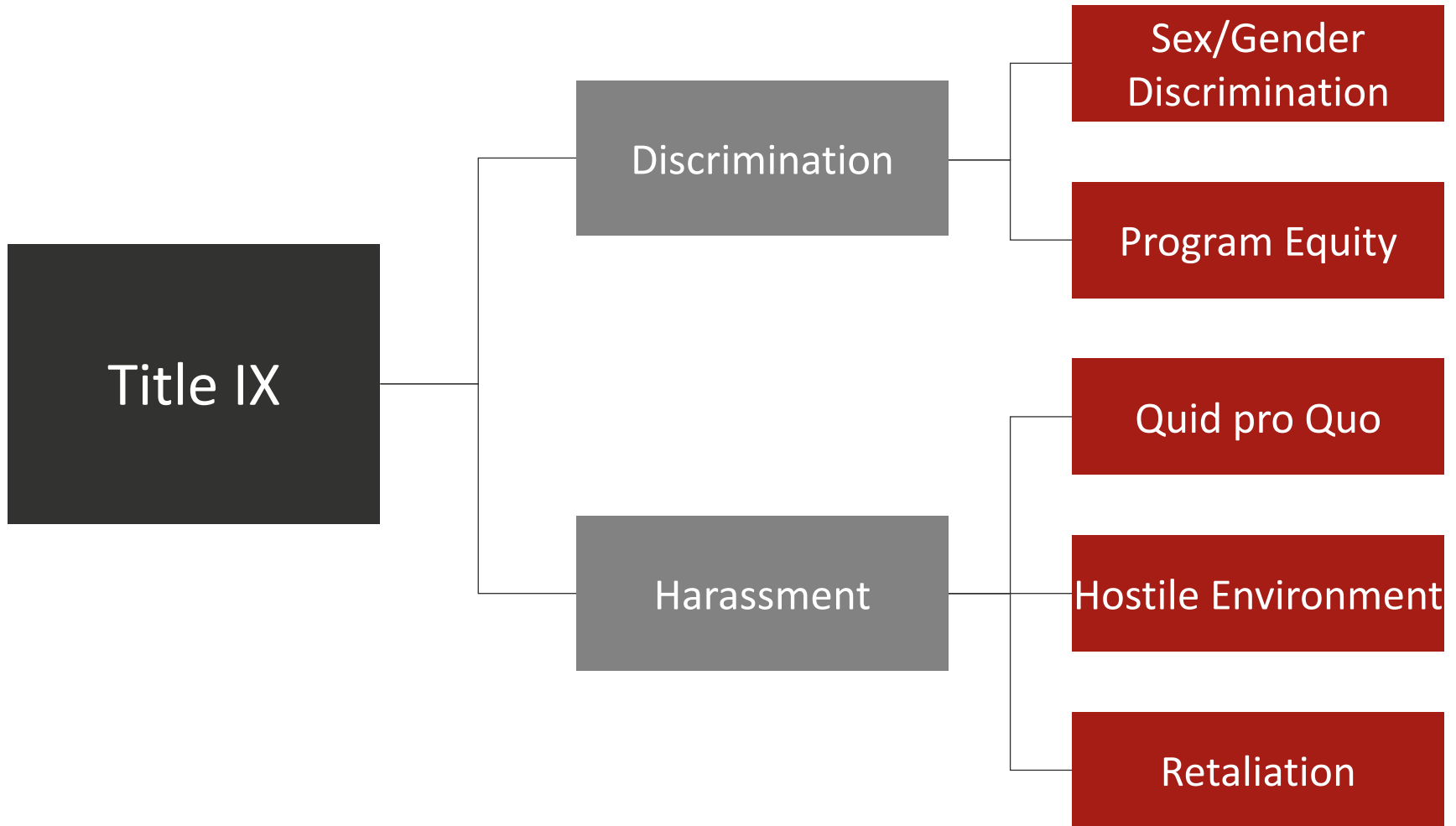
# TITLE IX ESSENTIAL COMPLIANCE ELEMENTS



- Once an official with authority has actual notice of sexual harassment/sexual misconduct, the school must:
  - Take immediate and appropriate steps to **investigate** what occurred.
    - The obligation to investigate is absolute, even if just an Initial Assessment (see *Davis*).
  - Take prompt and effective action to:
    - **Stop** the harassment;
    - **Prevent** the recurrence; and
    - **Remedy** the effects.

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

# TITLE IX





# OCR & TITLE IX

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

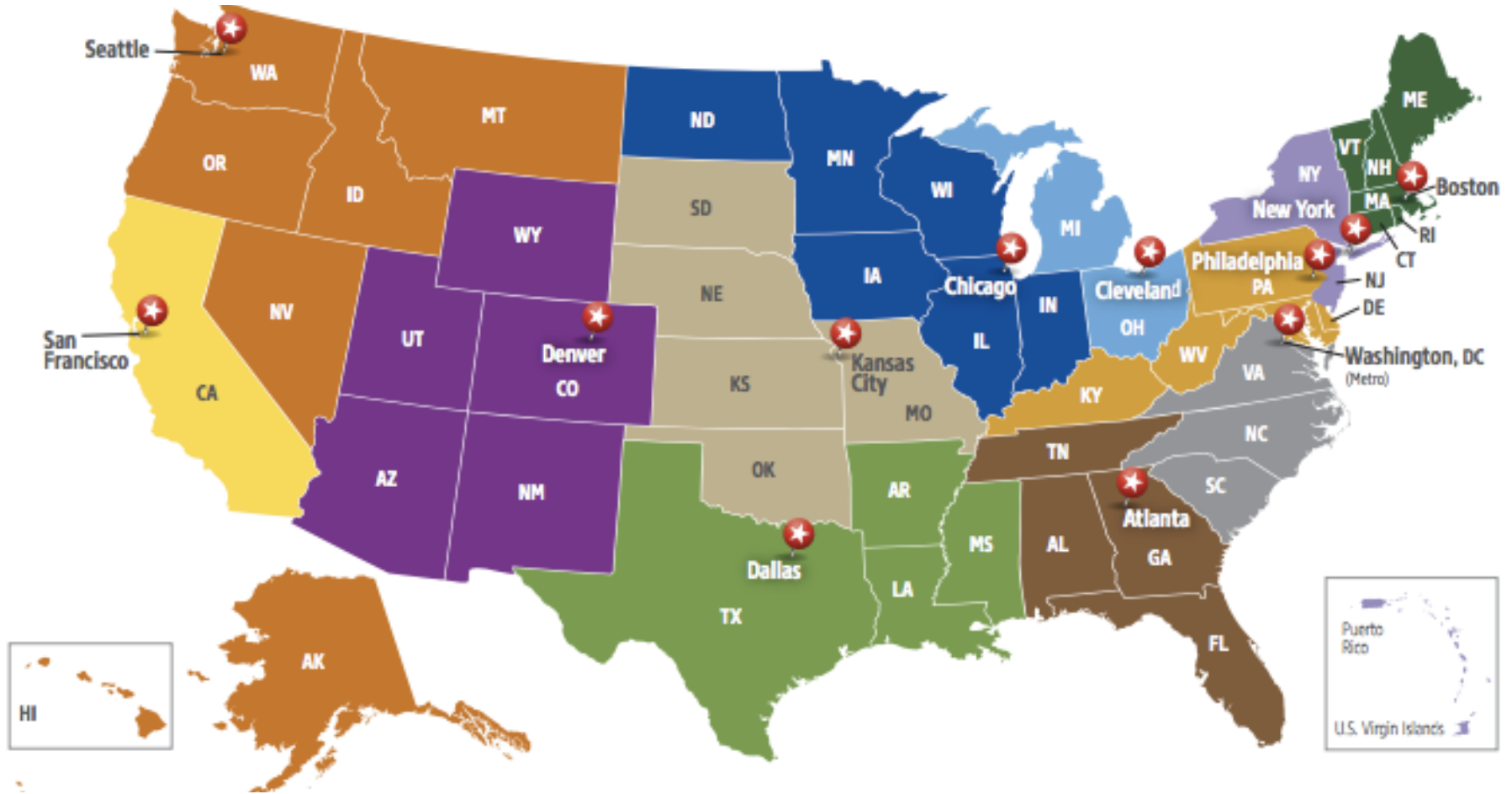


# ROLE OF OCR & TITLE IX



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

# OCR REGIONAL OFFICES



# OCR ENFORCEMENT MECHANISMS



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

# OCR PROCESS ALTERNATIVES



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

# CIVIL LAWSUITS VERSUS ADMINISTRATIVE ACTION



## Lawsuit

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

## Administrative Action\*

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

\*Based on the 2020 Regs, these standards will likely align much more moving forward.

# ADDITIONAL RESOURCES ABOUT OCR



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

# KEY TITLE IX OCR GUIDANCE

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# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



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

# OTHER GUIDANCE REGARDING SEXUAL HARASSMENT & VIOLENCE



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

CLERY ACT:  
VAWA 2013 – SECTION  
304

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# THE CLERY ACT



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

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



# CLERY ACT AMENDMENT: VAWA REAUTHORIZATION & SECTION 304



## VAWA Section 304:

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

The “Big 4”

# CLERY ACT: VAWA 2013 SECTION 304



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

# NOTICE, REPORTING, RESPONSIBLE EMPLOYEES & CONFIDENTIALITY

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

# RESPONSIBLE EMPLOYEE



- The new Regs shift the notice definition to “Official with Authority”:
  - Title IX Coordinator
  - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
  - Any employee of an elementary and secondary school
- This is only the standard for when OCR would deem a school to have received actual notice AND MUST investigate; it is the bare minimum requirement.
- ATIXA still recommends institutions require all employees to report harassment or discrimination and keep the “Responsible Employee” standard.



# RESPONSIBLE EMPLOYEE



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

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

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

# NOTICE TO THE INSTITUTION



- “Actual Knowledge” under the Regs is defined as:
  - The Complainant notifying the TIX Coordinator; or
  - Any employee learning of the harassment in K-12
  - The Complainant notifies an Official with Authority
  - Complainant reports to school/campus police or security official/SRO.
- What if institution receives notice in some other way?
- Other types of liability may still exist for failure to act with constructive notice (e.g. tort).

# WHEN DO YOU INVESTIGATE?



- Upon receipt of a formal, written, signed complaint.
- When the Coordinator deems an investigation is warranted (and signs the formal written complaint).
- Rumors, gossip, social media, etc. can be notice, but not under the OCR Regs.
  - Investigating on these bases is discretionary particularly in light of the Regs.
- Once a formal complaint is filed, the duty to investigate is absolute.
  - At a minimum, an initial assessment (formerly preliminary inquiry) must be completed

# THE CLERY ACT: CAMPUS SECURITY AUTHORITY



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

# THE CLERY ACT: TIMELY WARNING



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

# THE CLERY ACT: EMERGENCY NOTIFICATION



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

# OTHER LAWS THAT DETAIL REPORTING REQUIREMENTS



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

# PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



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



# PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



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

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

- “Private”
  - Anyone who does not meet the definition of a “Responsible Employee.”
    - This number could expand significantly under the Regs given the more restrictive “Official with Authority” definition.
    - Notice to them does not constitute “Actual Knowledge” requiring an investigation (K-12 excepted).
  - May report incidents without identifying the parties.
  - Examples: Administrative Assistants, Non-supervisory employees.

# ATIXA'S RECOMMENDED APPROACH



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

# 2020 REGS: REPORT V. COMPLAINT



- Distinguish between a “report” and a “formal complaint.”
- Upon receiving a “report” (either from the would-be Complainant or a third party):
  - Reach out and provide support.
  - Provide supportive and interim measures to the person alleged to have experienced the harassment. May also offer to would-be Respondent.
  - Explain process to make a formal complaint.
    - Must be in writing and signed by the Complainant but can be made in any format (on paper or electronic) and made at any time.
    - Also explain option to report to law enforcement (VAWA requirement).
- Upon receiving a “formal complaint:”
  - Conduct initial assessment to determine jurisdiction.
  - Triggers obligation to follow “grievance process” including investigation and hearing.

# REQUESTS FOR CONFIDENTIALITY



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

# REQUESTS FOR CONFIDENTIALITY



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

# RELUCTANCE TO REPORT



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

# ANALYZING A COMPLAINANT REQUEST FOR CONFIDENTIALITY



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



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

# ANALYZING A COMPLAINANT REQUEST FOR CONFIDENTIALITY



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

# 2020 REGS: EMERGENCY REMOVAL



- Remove a student respondent from the recipient's education program or activity on an emergency basis, only after:
  - Undertaking an individualized safety and risk analysis, and
  - Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
  - Providing the respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the IDEA, ADA, and 504, as applicable.
- May place a non-student employee respondent on administrative leave during the pendency of a grievance procedures.

# IS IT A IX?

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When does Title IX apply?

- Jurisdiction
- Covered Programs
- Covered Individuals
- Subject Matter

# WHEN DOES TITLE IX APPLY?



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

# WHEN DOES TITLE IX APPLY?



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

# WHEN DOES TITLE IX APPLY?



Individuals who may be “participating or attempting to participate:”

- Students – In-school/On-campus & online/distance.
- Dual Enrollment students.
- Faculty.
- Staff.
- Medical Residents.
- Alumni.
- Prospective students or employees.

(as either Complainant or Respondent)

# WHEN DOES TITLE IX APPLY?



## Personal Jurisdiction

- When is a student a “student”?
  - Upon **application** to the institution?
    - What is “attempting to participate in a program?”
  - Once **admitted** to the institution?
  - Once **registered**?
  - Upon **matriculation**?
  - What about winter and summer **breaks**?
- When is an employee an employee?
  - Exempt vs. Non-Exempt Employees



# WHEN DOES TITLE IX APPLY?



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

# WHEN DOES TITLE IX APPLY?



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

# WHEN DOES TITLE IX APPLY?



## Geographic Jurisdiction

- For Sexual Harassment and Discrimination cases.
  - There is NO expectation that you exercise jurisdiction over off-site/off-campus incidents UNLESS the property is owned or controlled by the school OR
  - The property is being used for a program or event sponsored by the school or an organization recognized by the school OR
  - The property is owned or controlled by an organization recognized by the school (e.g. Fraternity house)
- Other forms of liability may still apply and the PPTVWM analysis may come into play here.

# WHEN DOES TITLE IX APPLY?



## Geographic Jurisdiction

- If Title IX jurisdiction is not present, the behavior could still violate:
  - Institutional harassment/discrimination policies.
  - Student Handbook/Conduct policies.
  - Technology/Acceptable Use policies.
  - Employee Handbook/Policies.
  - Professionalism standards.
- This means you may still be taking discretionary jurisdiction over incidents off-campus or on non-school property, but under other policies, not Title IX.

# WHEN DOES TITLE IX APPLY?



## Jurisdiction over incidents outside of the United States:

- The *Davis* standard is that Title IX applies, and jurisdiction is required when the institution has:
  - Control over the harasser (discriminator); AND
  - Control over the context of the harassment (discrimination).
  - *King v. Eastern Mich. Univ.*, 221 F. Supp. 2d 783 (2002).
- OCR Regs will not enforce regarding complaints of conduct that occurred outside the United States.
- Other campus policies may clearly exercise jurisdiction.

# WHEN DOES TITLE IX APPLY?



## Covered Programs

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

# WHEN DOES TITLE IX APPLY?



## Subject Matter

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

# WHEN DOES TITLE IX APPLY?



## Subject Matter

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



# WHEN DOES TITLE IX APPLY?



## Subject Matter

- Retaliation
- Gender discrimination (Equity)
- Pregnant and parenting student (employee?) discrimination
- NOT COVERED UNDER TITLE IX (by OCR)
  - Gender identity discrimination; and
  - Sexual orientation discrimination that implicates gender.
  - BUT these may be covered under other state laws and/or institutional policies.

# WHEN DOES TITLE IX APPLY?



## Subject Matter

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

# GROUP DISCUSSION QUESTIONS



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

# THE TITLE IX COORDINATOR

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Roles

Responsibilities

# TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES



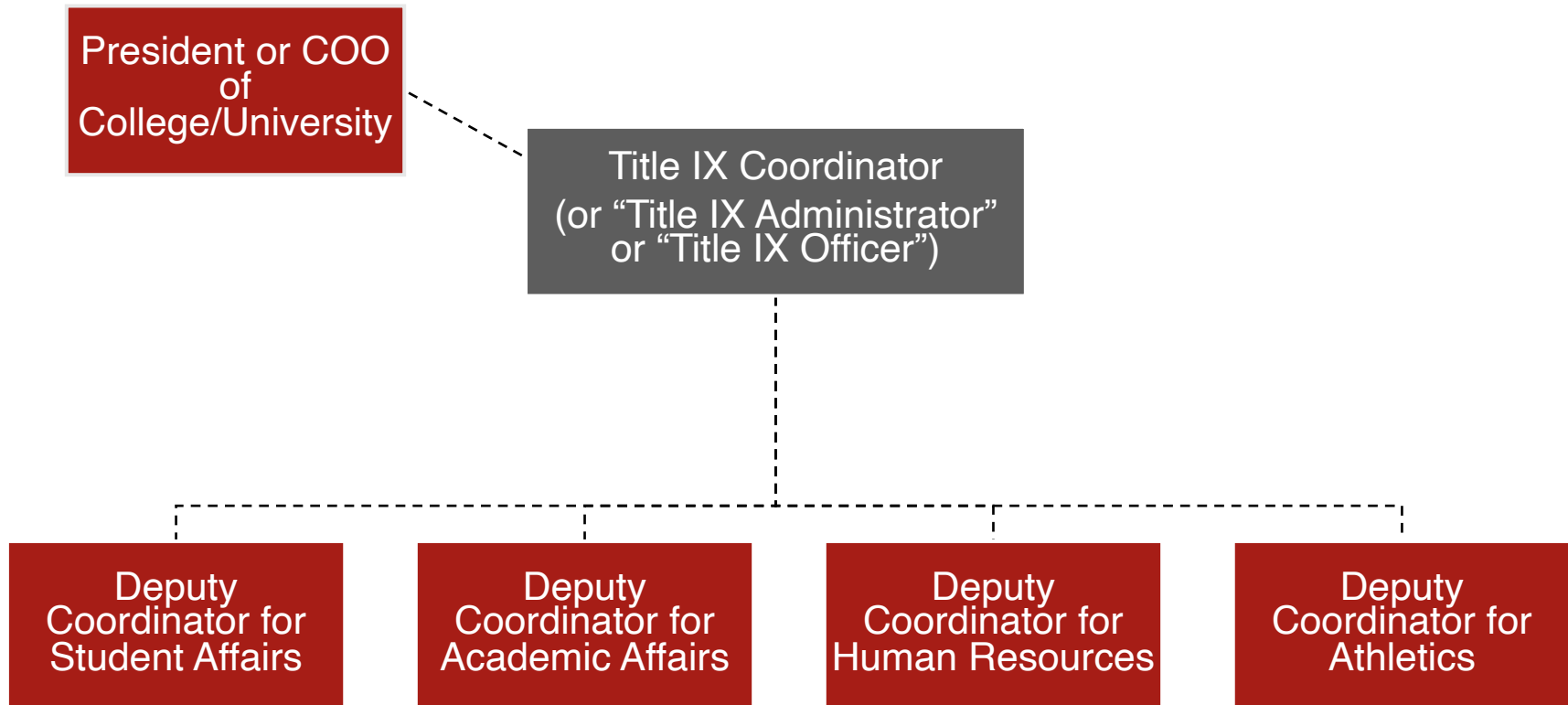
- Point Person for Complaints.
- Training Oversight.
- Creator & Implementor of Appropriate Policy.
- Contact for Government Inquiries.
- Prevention and Remediation.
- Oversight of Prompt & Equitable Grievance Procedures.
- Supervisor of Investigations.
- Assurance of Compliance with Final Sanctions.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

# TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES

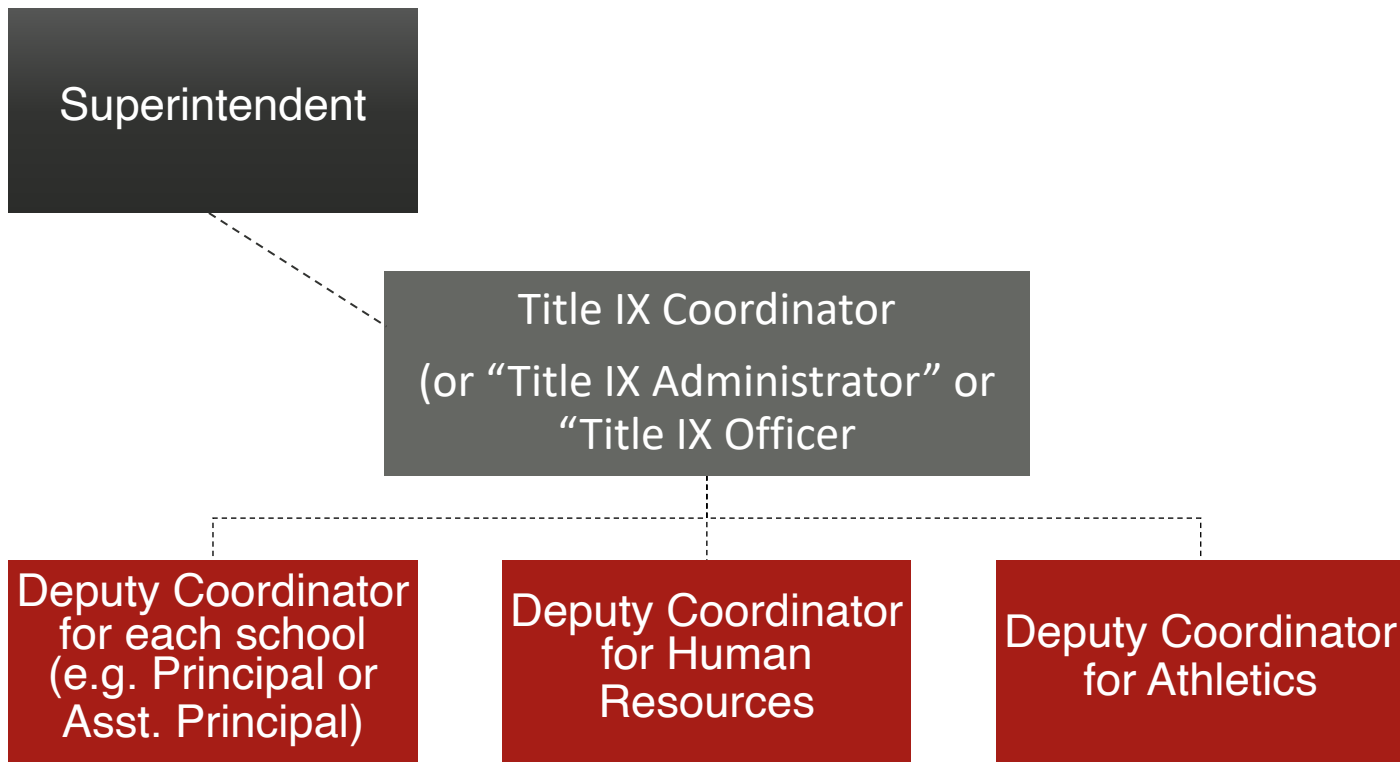


- Compliance with Requirements to Stop, Prevent, and Remedy.
- Coordinate Overlap of Various Student & Employee Grievance Processes.
- General Title IX Compliance Oversight.
- Navigating First Amendment Protections.
- Prevention and Remediation of Retaliation.
- Section 504 Disabilities Compliance Oversight.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

# SAMPLE TITLE IX TEAM STRUCTURE FOR HIGHER EDUCATION



# SAMPLE TITLE IX TEAM STRUCTURE FOR K-12





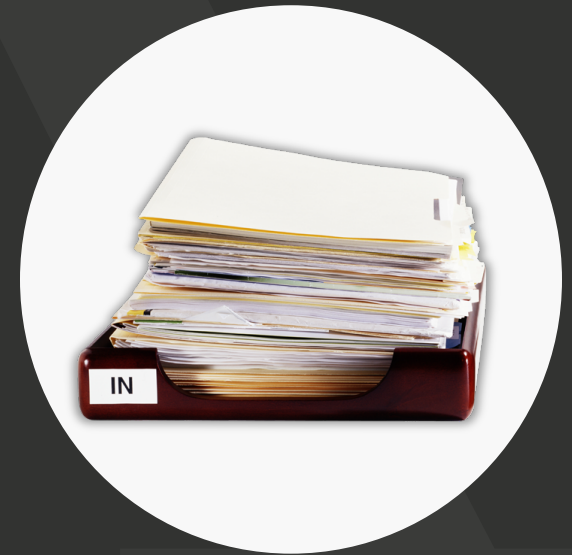
# TITLE IX TEAM STRUCTURE: ADDITIONAL ISSUES



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

TITLE IX COORDINATOR:  
POINT PERSON FOR  
REPORTS AND  
COMPLAINTS

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# POINT PERSON FOR REPORTS AND COMPLAINTS

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

# POINT PERSON FOR REPORTS AND COMPLAINTS

- Institutions may also identify (in publications, policies) other individuals to whom reports can be made.
  - E.g.:
    - Deans, assistant principals, teachers, supervisors, athletic directors, and deputy coordinators, 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

# POINT PERSON FOR REPORTS AND COMPLAINTS

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

# POINT PERSON FOR REPORTS AND COMPLAINTS

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

# TITLE IX COORDINATOR: TRAINING OVERSIGHT

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- Employees
- Students
- Hearing Panels/Decision-Makers
- Investigators
- Appeals Officers
- Informal Resolution Facilitators

# SUPERVISOR OF TRAINING



- General training content categories:
  - Legal Overview: Title IX, Clery, case law, and regulations.
  - Institutional policy, including “§ 106.30 definition” of sexual harassment.
  - Institutional procedures.
  - Reporting v. making a formal complaint.
  - Working with Complainants & Respondents.
  - Resources, support, and remedies for Complainants.
  - Resources and support for Respondents.
  - Consent in sexual interactions.
  - Rights of parties in complaint, investigation, hearing, and appeals.
  - Sanctions/repercussions.
  - Additional prevention and community education.
  - How to serve in Title IX roles impartially and without conflict of interest or bias.



# SUPERVISOR OF TRAINING



- Trainee Populations:
  - **Title IX Compliance Officers.**
    - E.g.: Coordinator and Deputies, Investigators, decision-makers (including appeals), informal resolution facilitators, and others involved in processing, investigating, or resolving complaints.
  - **First Responders.**
    - E.g.: RAs, health center employees, counselors, sexual assault response coordinators, academic advisors, SROs, and public safety.
  - **Officials with Authority**
  - **All Faculty/Teachers & Staff; ATIXA Responsible Employees.**
    - ATIXA recommends all faculty and staff are responsible employees.
  - **All Students.**
    - Undergraduate, graduate, primary students, secondary students, professional, distance, and online, etc.

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



- Each of these groups will be different.
- Must identify the compliance elements that constitute required knowledge for each entity.
- Must ensure all training materials are not biased in favor of Complainant or Respondents. Must promote impartial procedures.
- Consider most effective approach for training, as well as most efficient.
  - For example, investigators will be responsible for thoroughness, fairness, and equity in the investigation. Their training must be extensive.
  - Decision-makers and appeals officers must have a comprehensive understanding of the process; should be in-person using case studies.
  - Informal resolution facilitators are also required to be trained.
  - Employees need general resource and reporting information and may be trained by video.

# TRAINING COORDINATION AND OPERATIONALIZATION



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

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



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

# INVESTIGATOR/HEARING BOARDS/DECISION-MAKER COMPETENCIES



- The Legal Landscape
  - The Conduct/Disciplinary Process
  - Due Process & Fairness
  - Investigation and Resolution Procedures
  - Title IX & VAWA requirements
  - Critical Thinking Skills
  - Questioning Skills
  - Weighing Evidence & Relevance
  - Analyzing Policy
  - Standards of Evidence
  - Documentation
  - Sexual Misconduct/ Discrimination
  - SANE and Police Reports
  - Intimate Partner Violence
  - Bias/Prejudice/Impartiality
  - Stalking/Bullying/Harassment
  - Credibility Assessment
  - Deliberation
  - Sanctioning/Remedies
  - The Appeals Process
  - Support and Resources for the Parties
  - Cultural Competence
  - Technology used in live hearings.
- \*Note this is not a comprehensive list.

- All of the prior and:
  - The institution’s policies and procedures
  - Definition of sexual harassment.
  - Applicable federal and state law and court decision.
  - Applicable legal standards and framework.
  - Investigative techniques, including specifically interviewing parties and witnesses.
  - Cultural competence.
  - How to analyze evidence in relation to the legal standard.
  - How to synthesize relevant evidence, write reports, and make findings.
  - Documentation requirements.

# 2020 REGS: PUBLICATION OF TRAINING RECORDS



- Make all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process publicly available on the recipient's website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.
  - The most recent materials used to train the Title IX Team should be posted.
  - Although seven year of materials need to be maintained, only most recent need to be posted.
  - This requirement is not retroactive, so seven years starts August 14, 2020.

# TRAINING FOR STUDENTS & EMPLOYEES



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



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

# TRAINING RESPONSIBLE EMPLOYEES AND OFFICIALS WITH AUTHORITY

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# WHY REPORT?



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

# TRAINING RESPONSIBLE EMPLOYEES/ OFFICIALS WITH AUTHORITY



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

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

# WHAT TO REPORT AS A RESPONSIBLE EMPLOYEE/OFFICIAL WITH AUTHORITY



- **All** relevant details about the sex or gender discrimination or misconduct that was reported to the Responsible Employee/Official with Authority, including:
  - The name of the Respondent (if known).
  - The name of the Complainant.
  - Any other individuals involved (if known) in the situation (e.g. witnesses).
  - Relevant facts (if known), including date, time, and location of the incident.
- *NOTE: It is NOT the responsibility of the Responsible Employee/Official with Authority to investigate the matter, so questions to the parties should be kept to a minimum.*

# GROUP DISCUSSION: TRAINING



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

TITLE IX COORDINATOR:

CREATOR &  
IMPLEMENTER OF  
APPROPRIATE POLICY

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# CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY



- **Policies = The Rules**
  - Policies should clearly define expected/prohibited conduct.
  - Policies should be regularly updated, revised, and assessed.
- **Procedures/”Process” = How alleged violations of policy are addressed**
  - Procedures should clearly channel the parties to appropriate resources.
  - Procedures should provide for the equitable remedying of complaints.
- **The 2020 Regs will likely require substantial changes to your existing policies and procedures.**

# CREATOR AND IMPLEMENTER OF APPROPRIATE POLICY



- Must be an integral part of the policy development and review process.
- Ensure all policies related to sex/gender misconduct and discrimination are legally accurate and complete.
- If the institution has multiple policies (for faculty, staff, students) and procedures, must ensure that these policies are not conflicting, or contain conflicting definitions.
  - A strong argument for a single policy!
  - ATIXA's One Policy, One Process Model (1P1P) (New Model coming out by July 2020)

# THREE TYPES OF SEXUAL HARASSMENT



1.  
Hostile  
Environment

2.  
*Quid Pro Quo*

3.  
Retaliatory  
Harassment

# UNDERSTANDING THE THREE FORMS OF SEXUAL HARASSMENT



## Sexual Harassment is:

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

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

The creation of a *hostile environment*, or

*Retaliation*

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- A hostile environment is created when the unwelcome conduct is:
  - determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



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

# ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



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

# “SEVERE”



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

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



# “PERVASIVE”



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

# “OBJECTIVELY OFFENSIVE”



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

# SEVERE? PERVASIVE? OBJECTIVELY OFFENSIVE?



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

# HOSTILE ENVIRONMENT?



Hostile Environment?

# HOSTILE ENVIRONMENT?



Hostile Environment?

# SEVERE? PERVASIVE? OBJECTIVELY OFFENSIVE?



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

# SEVERE? PERVASIVE? OBJECTIVELY OFFENSIVE?



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

# ATIXA MODEL DEFINITIONS: QUID PRO QUO SEXUAL HARASSMENT



- **Quid Pro Quo** harassment is:
  - “An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct”
- In other words:
  - *Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,*
  - *By a person having power or authority over another constitutes sexual harassment when:*
    - *Submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual’s educational [or employment] progress, development, or performance.*
  - This includes when submission to such conduct would be a condition for access to receiving the benefits of any educational [or employment] program.



# OCR DEFINITION: RETALIATION



- § 106.71 Retaliation.

- *Retaliation prohibited.* No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

# OCR DEFINITION: RETALIATION



- § 106.71 Retaliation.

- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

# OCR DEFINITION: RETALIATION



- § 106.71 Retaliation.
- *Specific circumstances.*
  - (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.
  - (2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

# ATIXA MODEL DEFINITIONS: RETALIATION



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

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

CREATOR & IMPLEMENTER  
OF APPROPRIATE POLICY:

MODEL POLICY  
FRAMEWORK

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# § 106.30 DEFINITIONS – SEXUAL HARASSMENT

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

## § 106.30 – SEXUAL HARASSMENT



Acts of sexual harassment may be committed by any person upon any other person, regardless of the sex, sexual orientation, and/or gender identity of those involved. Sexual Harassment as an umbrella category includes the offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking, defined as:

Conduct on the basis of sex that satisfies one or more of the following:



# § 106.30 – SEXUAL HARASSMENT



- Quid Pro Quo
  - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- “Hostile Environment”
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity;

# § 106.30 – SEXUAL HARASSMENT



Sexual assault, defined as:

- Sex Offenses, Forcible: Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.
  - Forcible Rape: Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.

## § 106.30 – SEXUAL HARASSMENT



- **Forcible Sodomy:** Oral or anal sexual intercourse with another person, forcibly and/or against that person’s will or not forcibly or against the person’s will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- **Sexual Assault With An Object:** To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person’s will or not forcibly or against the person’s will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

## § 106.30 – SEXUAL HARASSMENT



- **Forcible Fondling:** The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person’s will (non-consensually) or not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# § 106.30 – SEXUAL HARASSMENT



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

## Dating Violence

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

# § 106.30 – SEXUAL HARASSMENT



## Domestic Violence

- A felony or misdemeanor crime of violence committed—
  - By a current or former spouse or intimate partner of the Complainant;
  - By a person with whom the Complainant shares a child in common;
  - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
  - By any other person against an adult or youth Complainant who is protected from that person’s acts under the domestic or family violence laws of [insert your state here].

\*To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

## § 106.30 – SEXUAL HARASSMENT



Stalking: engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

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



# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION



- **Sexual Exploitation (not a “Title IX policy?”)**
  - Occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of other sexual misconduct offenses.
- Examples of sexual exploitation include, but are not limited to...
  - Invasion of sexual privacy.
  - Non-consensual digital, video, or audio recording of nudity or sexual activity.

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



- Examples (continued):
  - Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.
  - Engaging in voyeurism.
  - Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex).
  - Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.
  - Intentionally or recklessly exposing one's genitals in non-consensual circumstances, or inducing another to expose their genitals.
  - Sexually-based stalking and/or bullying may also be forms of sexual exploitation.

# OTHER MISCONDUCT OFFENSES THAT MAY REQUIRE A RESPONSE WITH APPROPRIATE DUE PROCESS



- Bullying/Cyberbullying.
- Hazing.
- Threatening or causing physical harm.
- Conduct which threatens or endangers the health or safety of any person.
- Discrimination.
- Intimidation.
- Any policy violated on the basis of the Complainant's protected class, which is severe and/or pervasive/persistent enough to cause a discriminatory effect.

# CONSENT CONSTRUCT

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- Force
- Incapacity
- Consent
- Case Study

# CONSENT IS...



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

# CONSENT



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

# OVERVIEW OF THE 3 QUESTIONS



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

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



- Types of force to consider (cont.)
  - Coercion: the application of an unreasonable amount of pressure for sexual access.
    - Consider:
      - Frequency.
      - Intensity.
      - Duration.
      - Isolation.

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

- First, was the Complainant incapacitated at the time of sex?
  - Could s/he/they make rational, reasonable decisions?
  - Could s/he/they appreciate the situation and address it consciously such that any consent was informed?
- Second, *did* the Respondent know of the incapacity (fact)?
  - Or, *should* the Respondent have known from all the circumstances (reasonable person)?
  - *NOTE: the intoxication of the Respondent is NOT a defense for failing to know the Complainant was incapacitated.*

# EVIDENCE OF INCAPACITY



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

\*individualized assessment based on actually knowing the person.

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

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

# CONSENT: RULES TO REMEMBER



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

TITLE IX COORDINATOR:

CONTACT FOR  
GOVERNMENT  
INQUIRIES

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# CONTACT FOR GOVERNMENT INQUIRIES



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

# TITLE IX COORDINATOR:

## PREVENTION AND REMEDICATION

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- Gender Discrimination
- Sexual Harassment
- Sexual Assault
- Stalking
- Intimate Partner/Domestic/Dating Violence
- Bullying/Cyber-bullying

# PREVENTION AND REMEDIATION OF GENDER DISCRIMINATION



- Prohibition of:
  - Sexual Assault.
  - Gender discrimination.
  - Sexual harassment.
  - Retaliation.
  - Intimate partner/Dating/Domestic violence.
  - Stalking.
- May apply to other behaviors when gender-based.
- Obligation to recognize and respond consistent with Title IX.

# PREVENTION AND REMEDIATION OF GENDER DISCRIMINATION



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

# PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT



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

# PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT



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

# PREVENTION AND REMEDIATION OF STALKING



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

# PREVENTION AND REMEDIATION OF DATING AND DOMESTIC VIOLENCE



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



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



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

# CASE STUDY: INTIMATE PARTNER VIOLENCE



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

# CASE STUDY: INTIMATE PARTNER VIOLENCE



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

# CASE STUDY: INTIMATE PARTNER VIOLENCE



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

# CASE STUDY: INTIMATE PARTNER VIOLENCE



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

TITLE IX COORDINATOR:

OVERSIGHT OF PROMPT &  
EQUITABLE GRIEVANCE  
PROCEDURES

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

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



# PROMPTNESS (2020 REGS)



- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Concurrent law enforcement investigation does **not** relieve the burden of the school to investigate
- Temporary delays for “good cause” and with written notice of the delay to parties
  - Complexity of the investigation
  - Concurrent law enforcement investigation with time-dependent release of evidence
  - Delays for administrative needs are insufficient

# OVERSIGHT AND COORDINATION OF PROMPT AND EQUITABLE GRIEVANCE PROCEDURES



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

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

# PROMPT & EQUITABLE PROCEDURES: CLEAR TIMEFRAMES



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

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

# 2020: ADVISOR OF CHOICE



- Parties have the right to have an advisor of their choice to assist them throughout the process, to include attending any meetings and interviews
- Advisor of choice may be anyone, including attorney
- If party does not have an advisor, must be provided by the recipient for the cross-examination component of a live hearing
  - Provided at no-cost to the party.
- May restrict participation of advisors equally (except for cross-examination).
- No requirement for K-12 to provide an advisor for the parties.
- No requirement to train advisors.

- “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, out of print).

## 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.



# STANDARD OF EVIDENCE



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

# EQUITY: PREPONDERANCE STANDARD

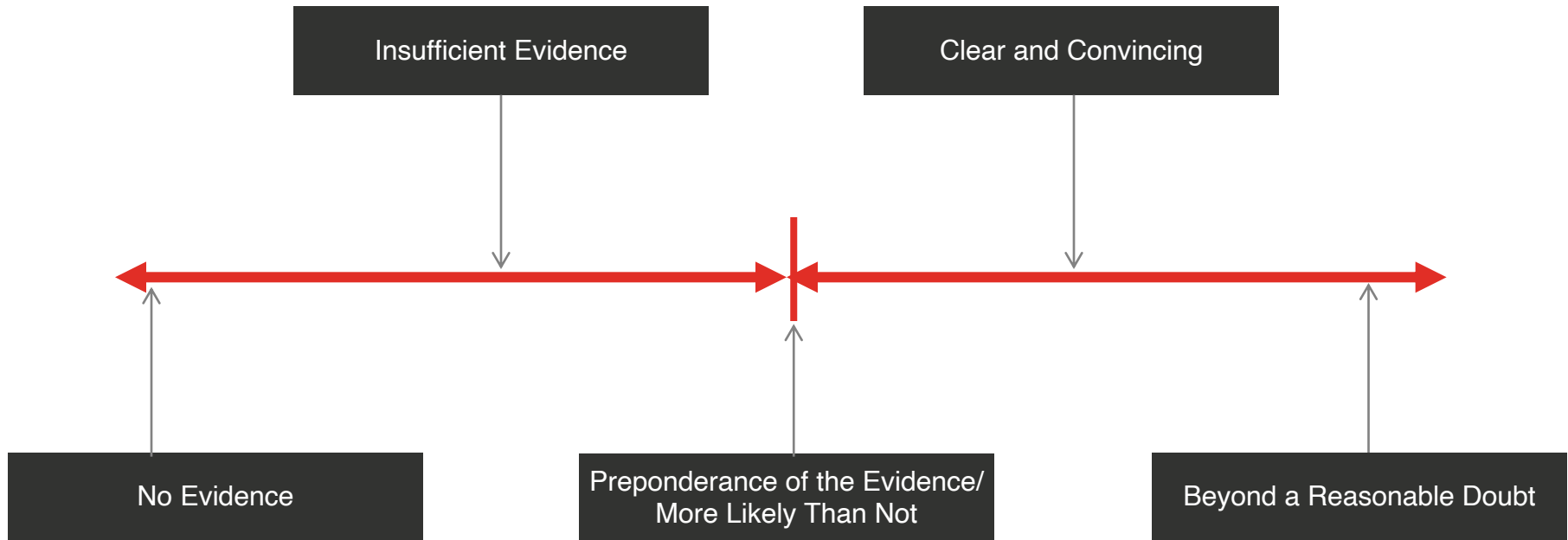


- The only equitable standard.
- ATIXA maintains that preponderance of the evidence is the appropriate standard
- Articulate the standard throughout your policy, procedures, investigation, and hearings.
- Educate the parties and their advisors.
- Use language the community understands.
  - 50.1%.
  -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

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



# EQUITY & GRIEVANCE PROCEDURES



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

# EQUITY CONCERNS



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

# EQUITY CONCERNS



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

TITLE IX COORDINATOR:

## COORDINATE OVERLAP OF VARIOUS STUDENT & EMPLOYEE GRIEVANCE PROCESSES

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

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



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



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

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

# ONE POLICY-ONE PROCESS



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

TITLE IX COORDINATOR:

SUPERVISOR OF  
INVESTIGATIONS

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# SUPERVISOR OF INVESTIGATIONS



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

# SUPERVISOR OF INVESTIGATIONS



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

# SUPERVISOR OF INVESTIGATIONS:

## ELEMENTS OF AN INVESTIGATION

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

# WHO SHOULD INVESTIGATE?



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



# SHOULD THERE BE MORE THAN ONE INVESTIGATOR?



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

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



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

# 10 STEPS OF AN INVESTIGATION



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

# MANDATORY DISMISSAL OF FORMAL COMPLAINT - OCR 2020 REGS



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

# DISCRETIONARY DISMISSAL OF FORMAL COMPLAINT - OCR 2020 REGS



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

# MAJOR PROCESS GUIDEPOSTS



Notice to School/Formal Complaint.

Initial Assessment

NOIA

Comprehensive investigation.

Hearing/Finding.

Sanction.

Appeal.

# INVESTIGATION: STRATEGY IS KEY



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

# THE INVESTIGATION REPORT



- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses.
  - Results of interviews with experts (if any).
  - Summary of other information collected, (i.e. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of text, email and social networking messages, etc.).
- G.A.S. framework.
- The supplemental “bucket” to the report.



- 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 allegations.

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

# MAKING CREDIBILITY DETERMINATIONS



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

# DECISION-MAKERS IN TITLE IX PROCESSES



- The Title IX Coordinator should not typically be the decision-maker, but may need to coordinate with decision-makers:
  - Coordinating hearings, Hearing Panel/Decision-Maker
  - Overseeing appeals processes
  - Sanctions
  - Remedies
- The separation of roles: Title IX Coordinator, investigator, decision-maker, appellate decision-maker.

# DECISION-MAKERS: MAKING A FINDING/DETERMINATION



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

# TITLE IX COORDINATOR:

## COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

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- Effective Remedies
- Common Remedies
- Preventing Recurrence

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



- **Stop The Discriminatory Conduct:**

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

# COMMON INTERIM AND LONG-TERM ACTIONS



- Providing a campus escort.
- Ensuring that the Complainant and Respondent do not attend the same classes.
- No-contact orders/contact restrictions.
- Relocation to a different residence hall.
- Providing counseling services.
- Providing medical services.
- Offering academic support services, such as tutoring.
- Arranging transportation accommodations.
- Arranging for the party to re-take a course/withdraw from a class without penalty.
- Reviewing any disciplinary actions taken against the Respondent to see if there is a pattern of harassing behaviors.
- Providing institution-wide or individual or group training and education initiatives.
- Administrative leave with pay (employees).



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



- **Prevent Recurrence:**

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

- **Remedy The Effects:**

- Designed to make Complainant whole and return them to the pre-deprivation status
- Take timely steps to confirm and document that the appropriate remedies were implemented.
- Make sure the Complainant knows that they should report any difficulties obtaining the remedies and any subsequent harassment.

# TITLE IX COORDINATOR:

## ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS

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

# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Title IX and case law requires:
  - Stop: Bringing an end to the discriminatory conduct.
  - Prevent: Taking steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct.
  - Remedy: Restoring the Complainant as best you can to pre-deprivation status.
- The tension between educational and developmental sanctions of student conduct processes.
- Title IX Coordinator does not issue sanctions but oversees the process.

# SANCTIONING CONSIDERATIONS



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

# SANCTIONING



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

# SANCTIONING



- Ensure that remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- The school may have already taken steps to protect Complainants even before the final outcome of investigations (e.g. through no-contact orders, etc.) – these may be continued in the final sanctions.
- Ensure that remedies are equitable.
- Monitor for retaliation and respond immediately to formal complaints.
- Review policies, procedures, and practices regularly to ensure they are in accordance with best practices, and state, and federal case law.

# COMMON STUDENT SANCTIONS



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



# COMMON EMPLOYEE SANCTIONS



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

# ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS



- Take steps to confirm and document that all sanctions were enforced.
  - Did the Respondent attend mandatory training?
  - Is the Respondent complying with the no-contact order?
  - Were the necessary documents placed in the Respondent’s personnel or conduct file?
  - Was the notation placed on the Respondent’s transcript or personnel file?
- Possible consequences of failure to ensure compliance with sanctions:
  - Failure to comply
  - Additional sanctions

TITLE IX COORDINATOR:

# COORDINATING APPEALS PROCESS

- 
- Key Elements
  - Grounds for Appeal
  - Process
  - Flowchart

# APPEALS (2020 REGS)



- Must offer equitable appeal based on determination or dismissal of any allegations.
- All parties receive notification of any appeal.
- Opportunity for all parties to support or oppose outcome.
- Written decision with rationale delivered simultaneously to the parties.
- Appeal decision-maker cannot have had any other role in the investigation or resolution process.
- “Reasonably prompt” timeframe for producing appeal decision.

# APPEALS: KEY ELEMENTS



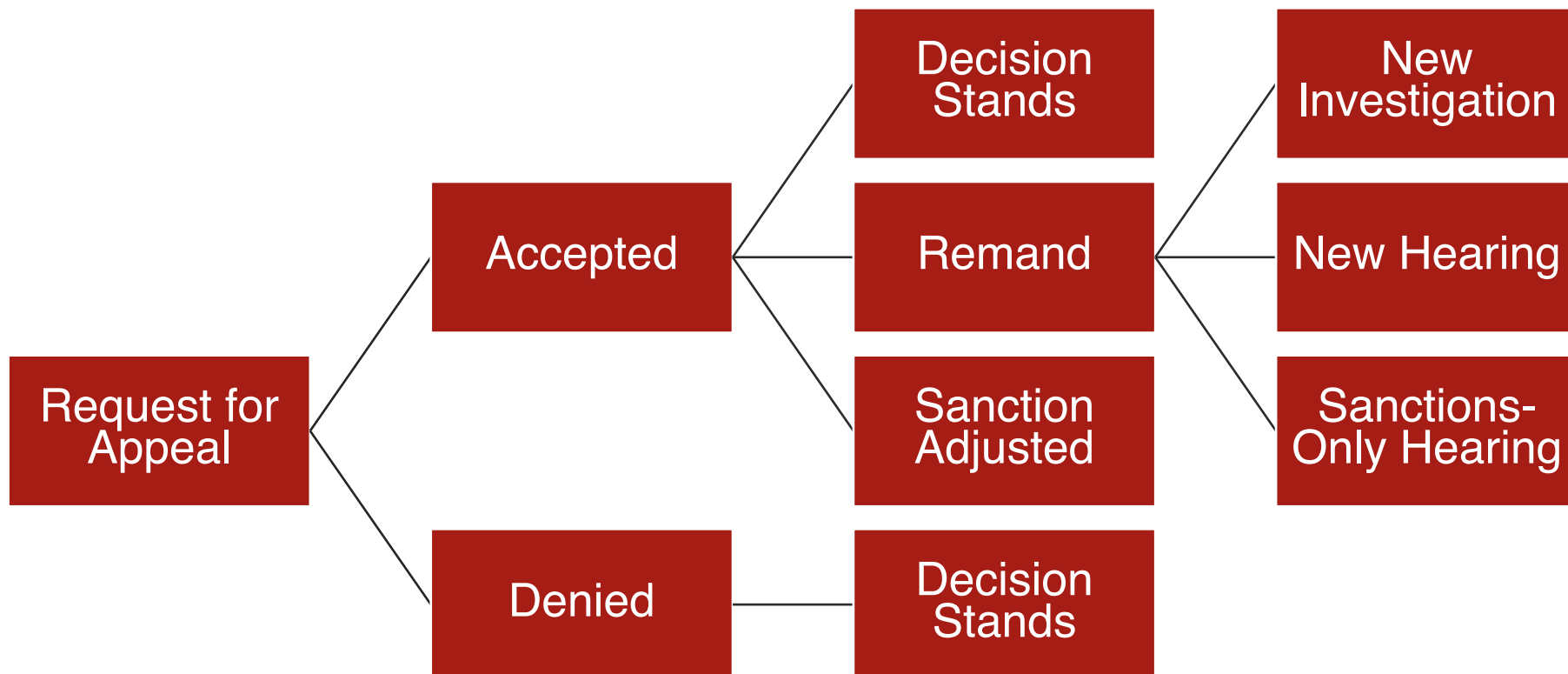
- One level of appeal.
- Limited grounds for appeal (see next slide).
- Deference to original hearing authority.
- Short window to request an appeal.
  - Can always grant an extension if necessary.
- Document-based review.
  - NOT *de novo*.
- Request for an appeal.

# APPEALS GROUNDS (2020 REGS)



- A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

# APPEALS: THE PROCESS



TITLE IX COORDINATOR:

GENERAL TITLE IX  
COMPLIANCE  
OVERSIGHT

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

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

# RECORD-KEEPING AND DOCUMENTATION



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

TITLE IX COORDINATOR:

# NAVIGATING FIRST AMENDMENT PROTECTIONS

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

- An important concern for all public institutions and any private campuses impacted by state law and constitutions (e.g. California and New Jersey).
- Impacts policy language regarding expression.
- Pay heed to vagueness and over-breadth concerns.
- Avoid incorporating “intent” or “purpose” language.
- Incorporate appropriate standard for context.
- ED reaffirms First Amendment protections in 2020 Regs.

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

TITLE IX COORDINATOR:

# PREVENTION AND REMEDICATION OF RETALIATION

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

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



# PREVENTION AND REMEDIATION OF RETALIATION



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

# PREVENTION AND REMEDIATION OF RETALIATION



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

# RETALIATION CLAIM

## JACKSON v. BIRMINGHAM BD. OF ED.



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

# RETALIATION CLAIM

## JACKSON v. BIRMINGHAM BD. OF ED.



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

TITLE IX COORDINATOR:

SECTION 504  
DISABILITIES  
COMPLIANCE  
OVERSIGHT

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- About Section 504
- Administrative Requirements

# SECTION 504 DISABILITIES COMPLIANCE OVERSIGHT



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

# SECTION 504 ADMINISTRATIVE REQUIREMENTS



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

# TITLE IX COORDINATOR: OVERSIGHT OF ATHLETICS GENDER EQUITY

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- Title IX Requirements





# OVERSIGHT OF ATHLETICS GENDER EQUITY



- The oversight of compliance in athletics remains the responsibility of the Title IX Coordinator.
- There should be a compliance officer in the athletics department already – get to know them.
- The 2 sides of athletics compliance are:
  - Equity in offering and experience (also referred to as “The Prongs” and the “Laundry List”)
  - Sexual Misconduct and Climate and Culture
- These are taught in the Athletics Training in more detail!

# RESOURCES AND WHAT'S NEXT?

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# RECOMMENDED READING/RESOURCES FOR TITLE IX COORDINATORS



- *Title IX Today* (<https://titleix.today>)
- R<sup>3</sup> site – ([atixa.org/r3](https://atixa.org/r3))
- ATIXA Member Library ([atixa.org](https://atixa.org))
- OCR Regs and other documents (OCR Reading Room)
- Voluntary Resolution Agreements (ATIXA makes them available when we receive them).

# WHAT'S NEXT FOR TITLE IX LITIGATION?



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

# Q&A AND WRAP-UP

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# CONTACT INFORMATION

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