



Association of
Title IX Administrators

Title IX Overview

Jefferson County Schools
October 2021



Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.



TITLE IX OVERVIEW

TITLE IX

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

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



KEY TITLE IX-RELATED ISSUES

Sex-Based Discrimination

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

Sexual Harassment

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

Retaliation

TITLE IX ESSENTIAL COMPLIANCE ELEMENTS

- For K-12 schools, once any school/district employee 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 is completed (see *Davis*)
 - Take prompt and effective action to:
 - Stop the harassment
 - Prevent the recurrence
 - Remedy the effects

NOTE: This is regardless of whether the Complainant makes a formal complaint or asks the school to take action.

THE IX COMMANDMENTS

INVESTIGATION ➡	Thorough	Reliable	Impartial
PROCESS ➡	Prompt	Effective	Equitable
REMEDIES ➡	Act reasonably to stop discrimination	Act reasonably to prevent recurrence	Act equitably to remedy effects



EQUALITY

*requires a level playing field
that doesn't yet exist*



JUSTICE

eliminates systemic barriers

**The journey
starts by
asking
those
affected
how they
see and are
impacted
by the
conditions,
rules, and
resources.**



EQUITY

*acknowledges systemic
impediments with targeted fixes*



AGENCY

*individuals know that access
is their right*



OCR & TITLE IX

- Role of OCR
- Key OCR Guidance

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.
- OCR administratively enforces Title IX by:
 - Conducting investigations of complaints filed by an individual, a representative, or a group
 - Engaging in compliance reviews
 - Initiatives to combat sexual assault in K-12 public schools (compliance reviews; public awareness and support; data collection and reviews)
- Technical Assistance (The OPEN Center)

OCR GUIDANCE

Key Regulatory and Sub-regulatory Guidance from OCR

- Rescinded:
 - 2001 OCR Revised Sexual Harassment Guidance
 - 2011 Dear Colleague Letter (DCL)
 - 2014 Q&A on Title IX and Sexual Violence
 - 2015 DCL on the Role of Title IX Coordinators; TIX Resource Guide
 - 2016 DCL on Transgender Students
 - 2017 Q&A on Campus Sexual Misconduct

OCR GUIDANCE (CONTD.)

Key Regulatory and Sub-regulatory Guidance from OCR

- Still in effect:
 - 2003 DCL on Title IX and Free Speech
 - 2010 DCL on Harassment and Bullying
 - 2013 DCL on Pregnant and Parenting Students
 - 2020 Amendments to Title IX Regulations
 - 2020 Q&A on Final Title IX Rule
 - 2021 Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*
 - 2021 Q&A on the Title IX Regulations on Sexual Harassment



WHEN DOES TITLE IX APPLY?

- Jurisdictional Issues & Questions
- Definitions of Sexual Harassment
- Is It a IX?

JURISDICTIONAL ISSUES & QUESTIONS

- When Does Title IX Apply?
- When Title IX Does Not Apply

WHEN DOES TITLE IX APPLY?

- ***Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999)**
standard – Title IX applies, and jurisdiction is required, when the Recipient has:
 - Control over the Respondent
 - AND**
 - Control over context of the harassment
- The definition of sexual harassment covers the in-program effects of out-of-program misconduct (though not the misconduct itself)

WHEN DOES TITLE IX APPLY?

Personal Jurisdiction

- 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
- If Respondent is **not** affiliated in the Recipient in any way, the Recipient **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?

Geographic Jurisdiction

- Sexual Harassment and Discrimination cases must be dismissed if did not occur against a person in the U.S., but...
 - Contrary case law
- 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
- Other forms of liability may still apply, and the PPTVWM analysis may come into play here

WHEN DOES TITLE IX APPLY?

Covered Programs

- All education programs and activities run by a federal funding Recipient
- It does not matter whether the program/activity receives federal funding or not, **all** Recipient programs/activities are covered
- All programs using facilities of the funding Recipient
 - (e.g., Camps using your fields/stadium)

WHEN DOES TITLE IX APPLY?

Subject Matter

- Sexual Harassment, as defined in the 2020 Title IX Regulations
- Sex/gender-based:
 - Stalking
 - Hazing
 - Bullying
 - Arson
 - Vandalism
 - Theft
 - Any other policy violation that is sex/gender-based that causes a discriminatory effect

WHEN DOES TITLE IX APPLY?

Subject Matter (Cont.)

- Retaliation
- Sex/Gender discrimination (Equity)
 - OCR recently noted this includes sexual orientation and gender identity following the Supreme Court's *Bostock* decision
- Pregnant and parenting student (employee?) discrimination

WHEN DOES TITLE IX APPLY?

Subject Matter (Cont.)

- 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 school
 - Must be **severe, pervasive, and objectively offensive**

IF TIX JURISDICTION IS NOT PRESENT

- **Behavior may still violate other policies**
 - Harassment/discrimination policies, student/employee handbook and policies, technology use policies, professionalism standards, etc.
- **District/School should still take steps to:**
 - Provide support and resources to the Complainant and school community
 - Address any “downstream effects”
 - Determine if there are patterns or institutional variables that contributed to the alleged incident
 - Take what action it can (e.g., trespass the person)

DEFINITIONS OF SEXUAL HARASSMENT

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



REQUIRED DEFINITIONS – TIX REGULATIONS

Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:

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

SEXUAL ASSAULT

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

- **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.
- **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 (CONTD.)

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

SEXUAL ASSAULT (CONT.)

- **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.

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].

DOMESTIC VIOLENCE (CONT.)

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

STALKING

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

STALKING (CONT.)

- **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.
- The TIX regulations insist this definition not be interpreted to violate First Amendment.

CASE STUDIES

- Is It A IX?

CASE STUDY: IS IT A IX?

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

Does the District have jurisdiction over the sexual assault?

CASE STUDY: IS IT A IX?

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

Does the District have jurisdiction under Title IX?

CASE STUDY: IS IT A IX?

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

CASE STUDY: IS IT A IX? (CONTD.)

- 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. When asked, Janet said she got up to use the bathroom last night in the dark and walked into the edge of her open closet door.

CASE STUDY: IS IT A IX? (CONTD.)

- The employee says that yesterday afternoon, Robert and Janet got into a loud argument in the parking lot and that Janet was crying in the bathroom afterwards.

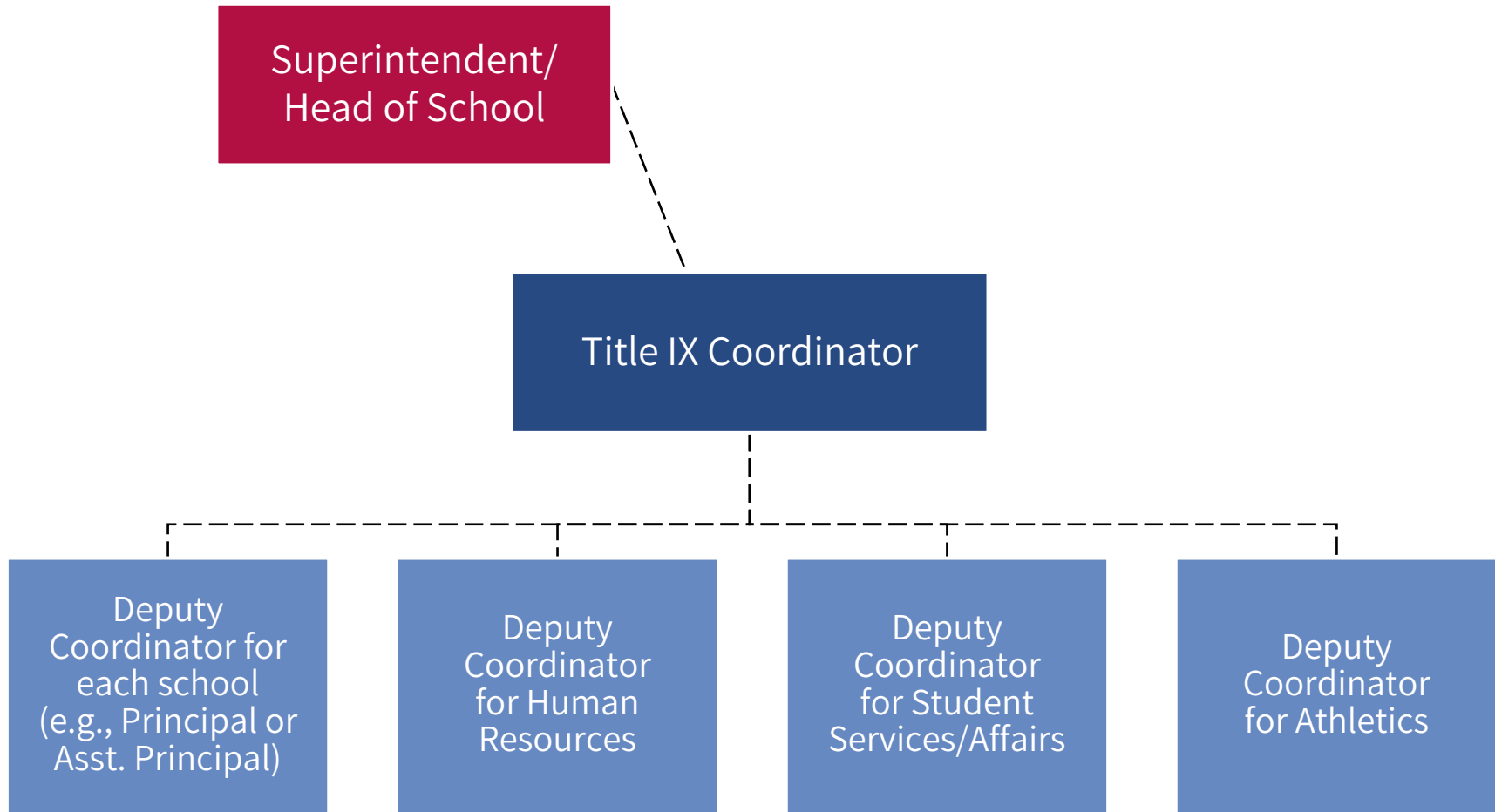
Is this a Title IX issue the employer needs to address?



TITLE IX TEAM ROLES & RESPONSIBILITIES

- Title IX Coordinator
- Investigator
- Decision-Maker
- Informal Resolution Facilitator
- Bias and Conflicts of Interest
- Training

SAMPLE TITLE IX TEAM STRUCTURE



WHO IS ON THE TITLE IX TEAM?

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

TITLE IX COORDINATOR

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

ROLE OF THE TITLE IX COORDINATOR

- District/school-wide Title IX Compliance oversight
- Point person for complaints
- Training oversight (TIX Team, students, employees, parents/guardians, etc.)
- Creator & implementor of appropriate policy
- Contact for government inquiries
- Prevention and remediation of all sex/gender-based discrimination & harassment
- Oversight of prompt & equitable grievance procedures
- Supervisor of investigations and Investigators

ROLE OF THE TITLE IX COORDINATOR (CONT.)

- Assurance of compliance with final sanctions
- Coordinating appeal process
- Compliance with requirements to stop, prevent, and remedy
- Coordinate overlap of various student & employee grievance processes
- Navigating First Amendment protections
- Prevention and remediation of retaliation
- Oversight of athletics gender equity
- Recordkeeping
- Section 504 disability compliance oversight

SCHOOL/DISTRICT TEAM

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

ROLE OF THE INVESTIGATOR


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

ROLE OF THE DECISION-MAKERS

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

ROLE OF APPELLATE DECISION-MAKER

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



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

BIAS AND CONFLICT OF INTEREST

- Title IX Regulations prohibit conflicts-of-interest or bias with Coordinators, Investigators, and Decision-makers against parties generally or an individual party.
 - What creates a conflict?
 - How can you assure that you don't have one?
- Types of conflicts/bias:
 - Wearing too many hats in the process
 - Legal counsel as Investigator or Decision-maker
 - Decision-makers who are not impartial
 - Biased training materials; reliance on sex stereotypes

BIAS AND CONFLICT OF INTEREST (CONT.)

- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.
- Previously disciplining a student or employee is often not enough to create a conflict of interest.

TRAINING

- Robust training mandates
- Coordinators, Investigators, Decision-makers, Appeal Decision-makers, Informal Resolution Facilitators
- Training materials cannot include sex stereotypes; should promote impartiality
- Training materials must be maintained for seven years and posted publicly on Recipient's website
 - Seven years must be maintained, but only the most recent need to be posted

REQUIRED TRAINING TOPICS

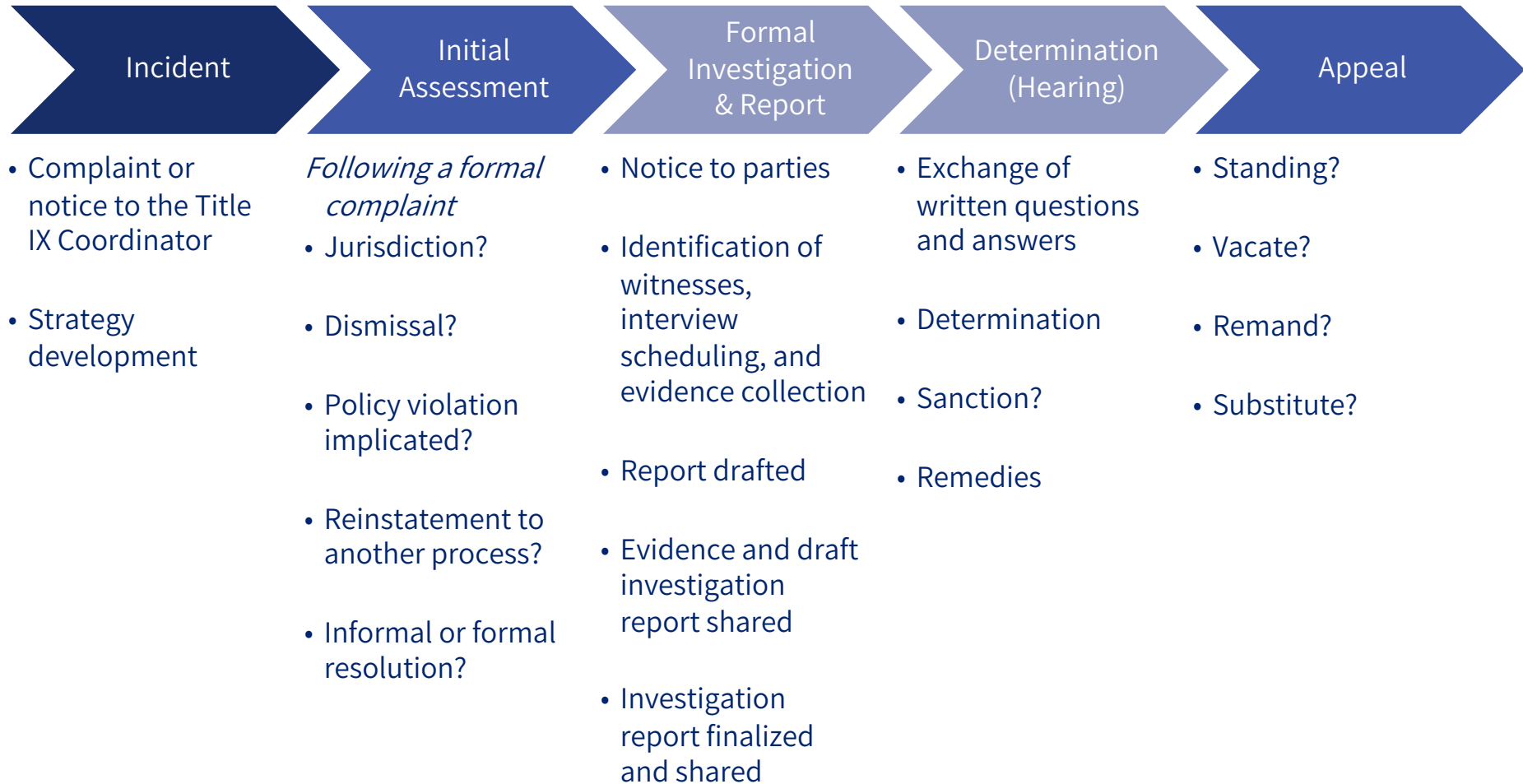
- Definition of sexual harassment
- Scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Use of any technology to be used at a live hearing
- Issues of relevance of questions and evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant
- How to create an investigation report that fairly summarizes relevant evidence



OVERVIEW OF INVESTIGATION & GRIEVANCE PROCESS MODEL

- The Process
- Due Process
- Timeframes
- Neutrality, Conflicts of Interest, Objectivity

THE PROCESS



DUE PROCESS: CURRENT ISSUES

Due Process concerns are at the heart of 2020 regulations:

- Applies to both public and private Recipients, which is a shift in legal paradigm
- Standard of Evidence
- Requirements for “Emergency Removal”
- Detailed Notice of Investigation and Allegations (NOIA) and written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Providing investigation report and evidence for review/response

DUE PROCESS: CURRENT ISSUES (CONTD.)

- Live hearing with cross-examination (optional for K-12)
- Advisor involvement (possibly including attorneys)
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence and witnesses without restriction
- Bias: TIXC, Investigators, Decision-makers, and Informal Resolution Facilitators
- Biased Training or Insufficient Training
- Requirement to publicly post training materials

“REASONABLY PROMPT” TIMEFRAMES FOR GRIEVANCE PROCESS

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



NOTICE TO THE RECIPIENT/COMPLAINT

- Actual Knowledge/Notice
- Report v. Formal Complaint
- Responding to a Formal Complaint

NOTICE/ACTUAL KNOWLEDGE – TIX REGULATIONS

Actual knowledge

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

NOTICE TO K-12 EMPLOYEES

- Notice includes information K-12 employees witness, hear about, or receive a written or verbal complaint about
- Akin to “Mandatory Reporter” or “Responsible Employee” designations
- Likely tracks with your state law-based obligation to report child abuse to state or local authorities
- Train all employees to always notify the Title IX Coordinator of all reports
 - There are no confidential reporting options in K-12

FORMAL COMPLAINT – TIX REGULATIONS

Formal Complaint

- Document or electronic submission
- Filed by Complainant (or parent/guardian) or signed by TIX Coordinator
 - TIXC does not become a party to the complaint
- Alleging Sexual Harassment
- Requesting an investigation
- Complainant must be participating or attempting to participate in the Recipient's education program or activity at the time of filing
- Initiates mandatory grievance process (investigation and determination)

REPORT V. COMPLAINT – TIX REGULATIONS

- Distinguish between a “report” and a “formal complaint”
- Parent/guardian has “right” to make report/complaint for student
- Upon receiving a “report” (either from the would-be Complainant or a third party):
 - Promptly reach out and provide support
 - Offer and provide supportive measures to the person alleged to have experienced the harassment. May also offer to would-be Respondent.
 - Explain process to file a formal complaint.

REPORT V. COMPLAINT (CONT.)

- Upon receiving a “formal complaint:”
 - Conduct initial assessment to determine jurisdiction
 - Dismiss complaint if no jurisdiction or no prima facie sexual harassment allegation
 - Triggers obligation to follow “grievance process” including investigation
 - Offer informal resolution options

SUPPORTIVE MEASURES

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

COMMON SUPPORTIVE MEASURES

- Referral to counseling, medical and/or other health services
- Referral to the Employee Assistance Program
- Visa and immigration assistance
- Education to the community or community subgroup
- Altering housing situation (if applicable)
- Altering work arrangements for employees
- Safety planning
- Providing school safety escorts

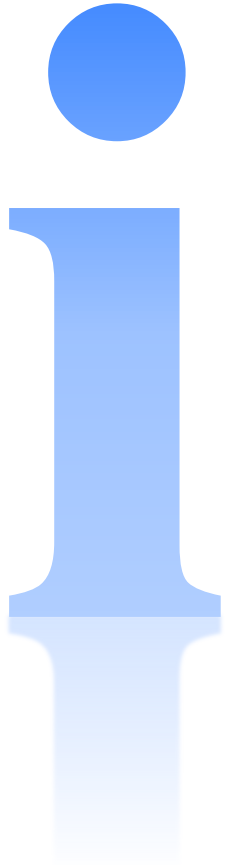
COMMON SUPPORTIVE MEASURES (CONT.)

- Transportation accommodations
 - Implementing contact limitations (no contact orders) between the parties
 - Academic support, extensions of deadlines, or other course-related adjustments
- Trespass or Be on the Lookout (BOLO) orders
 - Emergency notifications
 - Increased security and monitoring of certain areas of school
 - Other tailored measures appropriate to the circumstances

RESPONDING TO A FORMAL COMPLAINT

- Initial Assessment
- Notice to the Parties
- Mandatory Dismissal
- Discretionary Dismissal
- Emergency Removal
- Informal Resolution

INITIAL ASSESSMENT IN SUMMARY



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

NOTICE TO THE PARTIES

- Upon receipt of a formal complaint, a Recipient must provide **written notice** to the parties who are known:
 - Notice of the grievance process, including any informal resolution process
 - Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
 - Identities of the parties involved in the incident, if known
 - Description of conduct
 - Date and location, if known

NOTICE TO THE PARTIES (CONT.)

- **Written notice**

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

MANDATORY DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MUST dismiss the complaint at any time if the alleged conduct:

- Would not constitute sexual harassment as defined (five offenses 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
- The Complainant is not participating or attempting to participate in Recipient's program at time of complaint

DISCRETIONARY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MAY dismiss the complaint if at any time prior to a determination:

- Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations
- Respondent is no longer enrolled or employed by Recipient
- Specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations

WRITTEN NOTICE OF DISMISSAL OF A FORMAL COMPLAINT

- Written notice of dismissal to parties required
 - Dismissal (or non-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

EMERGENCY REMOVAL

A Recipient may remove a student Respondent from the education program or activity on an emergency basis, only after:

1. Undertaking an individualized safety and risk analysis
2. 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
3. Providing the Respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.

EMPLOYEE ADMINISTRATIVE LEAVE

- A Recipient may place a non-student employee Respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act

INFORMAL RESOLUTION

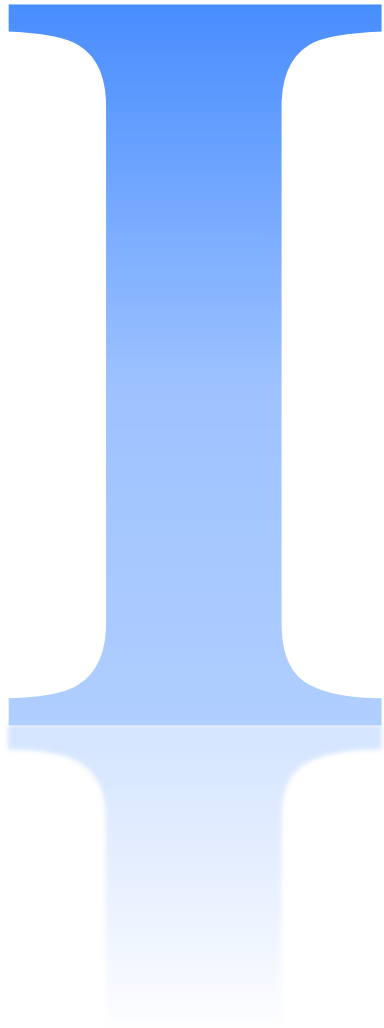
- The Title IX regulations include a provision that encourages informal resolution, and it is a worthy practice, when voluntary.
 - Following formal complaint
 - Allowed at any time prior to a final determination at discretion of TIXC
 - Voluntary, written consent of the parties and their parent/guardian
 - OCR regs preclude informal resolution of allegations that an employee harassed a student
 - Must still stop, prevent, remedy, and document response



TITLE IX INVESTIGATIONS

- Formal Comprehensive Investigation
- Burden of Proof
- Concurrent Criminal Action
- Evidence & Report Review

FORMAL COMPREHENSIVE INVESTIGATION



- Commence a thorough, reliable, impartial, prompt, and fair investigation
 - Determine the strategy for the investigation
 - Witness interviews
 - Evidence gathering
 - Intended timeframe to complete the investigation
 - Evidence review
 - Report writing and review
- Complete the investigation without unreasonable deviation from the timeline

BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE

- Procedures should clearly articulate that the burden of proof and burden of gathering evidence rests with the school, not the parties
 - It is not required that a Respondent prove welcomeness or consent, the Recipient must prove unwelcomeness or non-consent
- “Sufficient to reach a determination”
- Equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence

BURDEN OF PROOF ON SCHOOL TO GATHER EVIDENCE (CONT.)

- Evidence collected by law enforcement or any other source
- Contracted/outsourced Investigators do not absolve the school of responsibility for this provision

ROLE OF LAW ENFORCEMENT AND ISSUES OF CONCURRENT CRIMINAL ACTION

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

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
 - Be sent to each party and Advisor
 - Be in an electronic format or hard copy
 - Include evidence upon which the Recipient does not intend to rely
 - Include exculpatory and inculpatory evidence
 - Be made available at any hearing
- After sending the evidence, the Investigator must:
 - Allow 10 days for written response
 - Consider response prior to completion of report

Source: § 106.45(b)(5)(vi)

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2

At least 10 days prior to making a determination regarding responsibility:

- The final Investigation Report summarizing relevant evidence must be sent:
 - To each party and Advisor
 - In an electronic format or hard copy
 - For the parties' review and written response
 - Best Practice: Provide the investigative report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties
- For K-12 schools, this review is followed by, or in conjunction with, the exchange of relevant written questions and responses facilitated by a Decision-maker.



DECISION-MAKERS: MAKING A DETERMINATION

- Determination and Questioning
- Standard of Evidence
- Sanctioning
- Written Determination

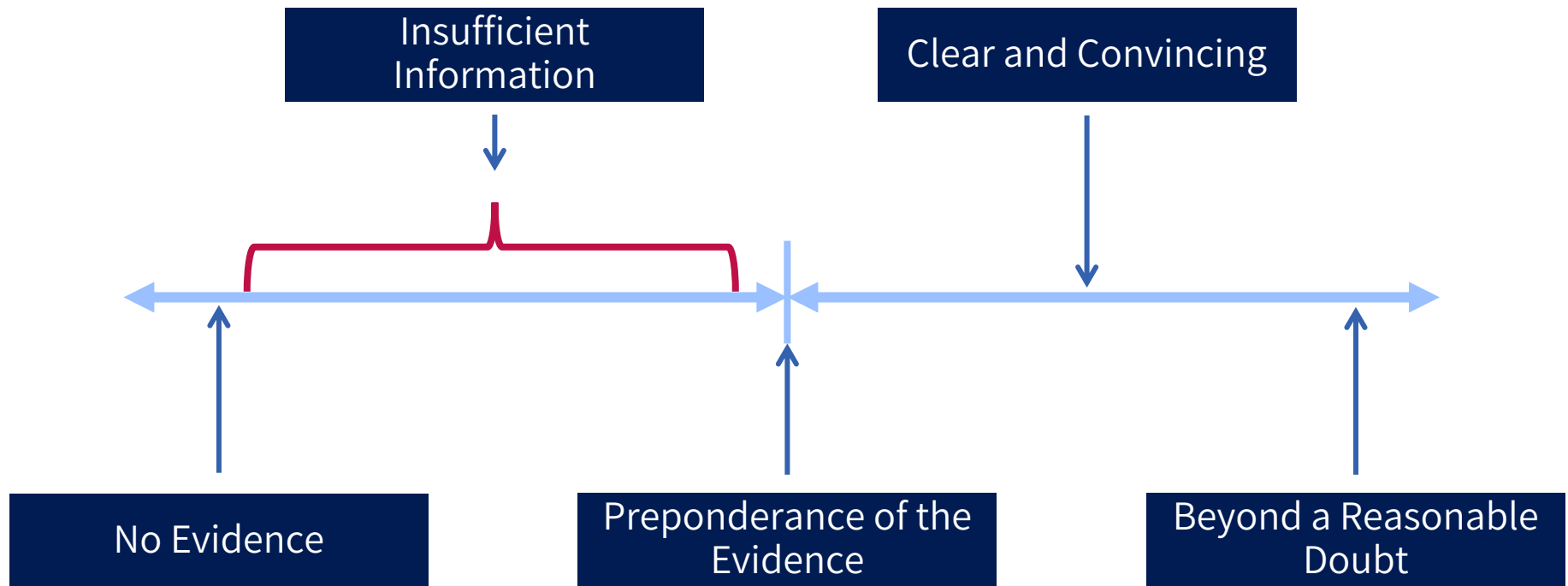
DETERMINATIONS AND QUESTIONING

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

DETERMINATIONS AND QUESTIONING

- Questions deemed irrelevant by Decision-maker may be excluded with rationale provided
- Must exclude Complainant's prior sexual behavior unless specifically relevant to prove consent or someone else committed the alleged conduct
- All relevant evidence obtained must be **objectively** evaluated

EVIDENTIARY STANDARDS



STANDARD OF EVIDENCE

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

SANCTIONING IN SEXUAL HARASSMENT AND SEX/GENDER DISCRIMINATION CASES

Title IX and case law require resolutions which:

- **STOP:** bring an end to the discriminatory conduct
- **PREVENT:** take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct
- **REMEDY:** restore the Complainant as best you can to their pre-deprivation status
- May clash with solely educational and developmental sanctions of student conduct processes

SANCTIONING CONSIDERATIONS

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

COMMON STUDENT SANCTIONS

- Warning
 - Detention
 - Loss of privileges
 - Counseling
 - No contact
 - Limited access to school activities
 - Service hours
- Online education
 - Alcohol and drug assessment and counseling
 - Discretionary sanctions
 - Alternative placement
 - In-School-Suspension
 - Out-of-School Suspension
 - Expulsion

COMMON EMPLOYEE SANCTIONS

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

WRITTEN DETERMINATIONS

Recipient must issue a written determination regarding responsibility that includes the following:

- Sections of the policy alleged to have been violated
- Description of procedural steps taken
- Statement of and rationale for the result for each specific allegation
 - Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
- Sanctions imposed on Respondent

WRITTEN DETERMINATIONS (CONT.)

- Any remedies provided to the Complainant designed to restore or preserve access to the education program or activity
- Procedures and bases for appeal
- Delivered simultaneously to the parties
- **FERPA cannot be construed to conflict with or prevent compliance with Title IX**



DECISION-MAKERS: THE APPEAL PROCESS

- Grounds for Appeal
- Appeal Response
- Other Recommendations
- Appeal Process
- Finality of Determination

GROUNDS FOR APPEAL

- Must offer all parties an opportunity to appeal a determination and a school's dismissal (or non-dismissal) of a formal complaint or any allegations therein, on the following grounds:
 - A procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
 - The Title IX Coordinator, Investigator, or Decision-maker had a conflict of interest or bias that affected the outcome of the matter
- May add additional grounds if available to all parties

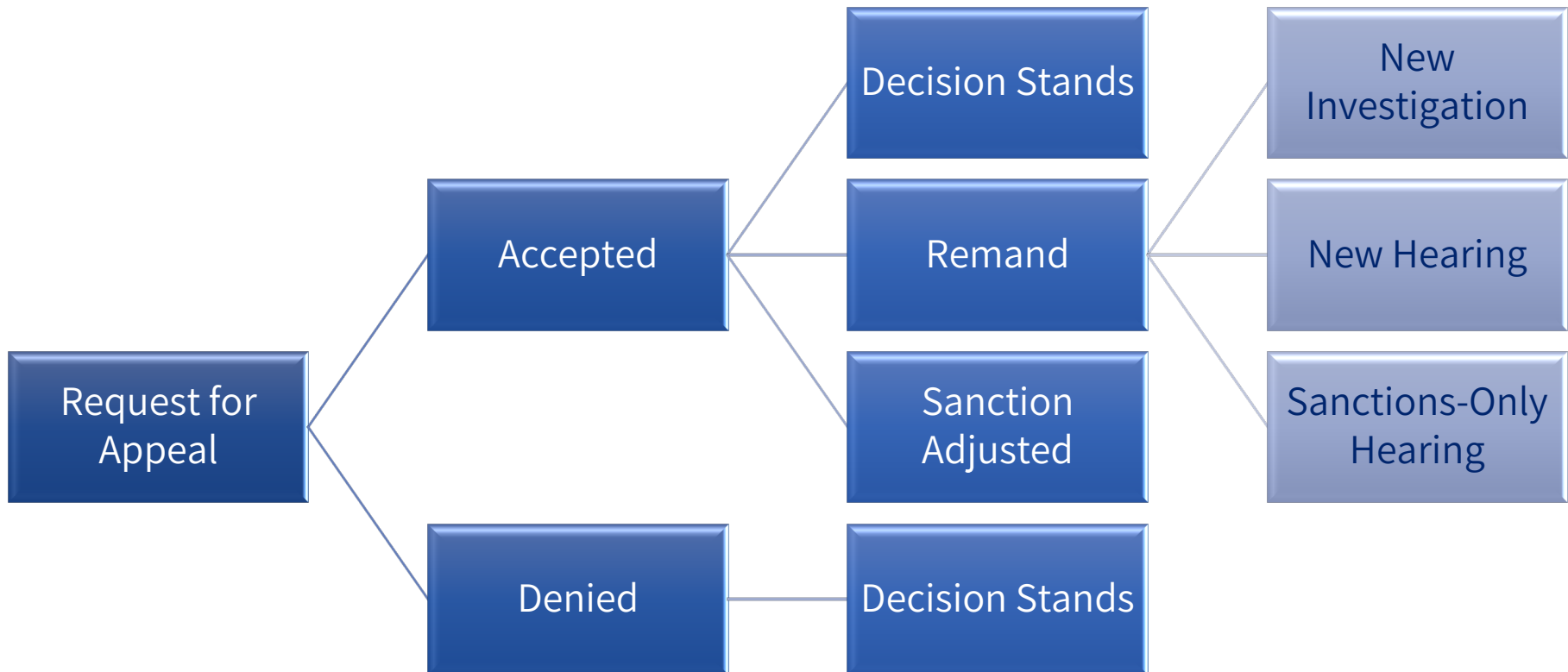
APPEAL RESPONSE

- When an appeal is filed, the Recipient must notify the other party and implement appeal procedures equally for all parties
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- The Chair may be called upon by the Appeal Decision-maker to inform the appeal process
 - Likely a paper exchange; not in-person

APPEALS: OTHER ATIXA RECOMMENDATIONS

- One level of appeal
- Short window to request an appeal
 - May always grant an extension if necessary
- Document-based and recording review
 - NOT de novo
 - In other words, not a “second-bite of the apple”
- Deference to original hearing authority

APPEALS: THE PROCESS



FINALITY OF DETERMINATION

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



RECORDKEEPING AND DOCUMENTATION

RECORDKEEPING AND DOCUMENTATION

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

RECORDKEEPING AND DOCUMENTATION (CONT.)

- For each conclusion, school must document the rationale for its determination
- School must document measures taken to preserve/restore access to education programs/activity



Association of
Title IX Administrators

Questions?



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