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T I T L E I X

T R A I N I N G



T I T L E I X  
C O N S U L T  
L L C



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# K12 Decision-Maker Training

# Overview of Decision-Maker Training



- Introduction to Title IX law and regulations
- Title IX parties and administrators
- Overview of Title IX grievance process
- Title IX Coordinator, Investigator, and Decision-Maker Roles
- Education institution legal obligations, including employees
- Title IX jurisdiction and dismissal of complaints
- Types of Title IX claims and consent
- Burden of proof
- Investigation report and information-sharing with the parties
- Types of evidence
- Avoiding decision-making pitfalls
- Evaluating evidence and reaching a conclusion
- Appeal
- Retaliation



- 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 education program or activity receiving Federal financial assistance.
- Enforced through the Department of Education, Office for Civil Rights (OCR)



# Title IX Covers and Includes



- Prohibition of Sex Discrimination
  - Sexual Harassment
  - Athletics
  - Employment
  - Pregnant Students
  - Recruitment, Admission and Programs





## Legal Obligation

Educational institution must respond in a manner that isn't deliberately indifferent when it has actual knowledge of sexual harassment occurring in the institution's education program or activity against a person in the United States.

**Rescinded** Guidance from OCR  
under Obama administration

2015  
Title IX Coordinator

2011, 2014, 2016

2017  
Q&A on Campus Sexual  
Misconduct

## GUIDANCE ON TITLE IX

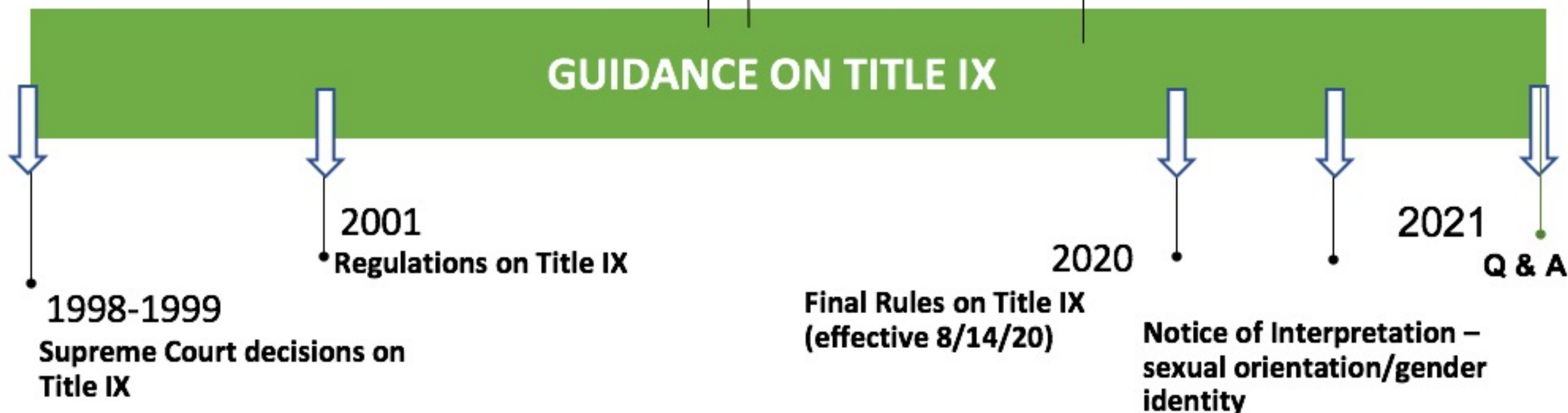
2001  
Regulations on Title IX

1998-1999  
Supreme Court decisions on  
Title IX

2020  
Final Rules on Title IX  
(effective 8/14/20)

2020  
Notice of Interpretation –  
sexual orientation/gender  
identity

2021  
Q & A





# Title IX – Parties and Administrators



## Parties

- Complainant – alleged victim/survivor
- Respondent – respond the allegation

## Administration of Claims

- Title IX Coordinator
- Title IX Investigator
- **Title IX Decision-maker**
- Title IX Appeal Officer
- Title IX Advisor
- Title IX Informal Resolution Officer

# Title IX Coordinator Role



- Responsible for overall compliance program at the school, including claims, supportive measures, investigations, training, etc.
- Name, office address, email address, phone number of “Title IX Coordinator” available
- Distributed to students, employees, applicants for admission and employment, parents and legal guardians, and unions
- Reports by telephone, email, and verbal reports to Title IX Coordinator

# Investigator Role



- Conducts investigation
- Provides all information collected to both parties
- Examines the requests/additional information/potential questions presented by the parties
- Completes a Title IX investigation report
- Provides the report to the parties
- Receives additional questions from parties
- Forwards the report and additional questions to decision-maker

# Decision-Maker Role



- Review all evidence
- Issues decision relying on relevant, credible evidence
  - Policy violation – using policy definitions
  - Sanction/Discipline, if violation found
- Advises of appeal rights
  
- Can be more than one decision-maker
- Can never be Title IX Coordinator, Investigator, Appeal Officer
  
- **REVIEWS ALL EVIDENCE, DECIDES WHAT IS DISPUTE, (RE)EXAMINES THE DISPUTES, AND IN THE CONCLUSION, APPLIES THE STANDARD OF PROOF TO FACTS TO REACH A CONCLUSION ON POLICY VIOLATION AND DISCIPLINE**

# Selecting Decision-Maker



- Attorney required – NO
- Training required – YES
- Understanding policy – YES
  
- Considerations in selection:
  - Willingness to serve
  - Objective and unbiased
  - Ability to connect with employees/students
  - Confidentiality
  - Reflective of campus
  - Diversity

# Overview of Grievance Process



## Initial complaint – Title IX Coordinator

- Report of incident
- Formal complaint process offered
- Supportive measures
- Complaint filed/investigation initiated
- Potential dismissal (**Jurisdiction**, Allegation)
- **Notice of allegations**, includes a presumption of innocence

## Investigation - TIX Investigator

- Interviews
- Documents reviewed
- Sharing information with both parties and reviewing feedback
- Completing investigative report
- Gathering feedback from parties on report

## Decision-making – TIX Decision-Maker

- **Evaluate the evidence**
- **Determine if follow-up questions required**
- **Issue decision on policy violation** and discipline
- **Avoiding bias, conflict of interest, stereotypes**



- Occurring in the institution's education program or activity  
includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Against a person in the United States
- Jurisdiction question example

# Dismissal - Mandatory and Permissive



## **Mandatory dismissal**

- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.

## **Permissive dismissal**

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





# Jurisdiction

Are there questions of jurisdiction?



# Notice of Allegation(s)

Articulate the allegation



# Types of Sexual Harassment

Applicable to the Scenario



## Conduct on the basis of sex:

- Hostile environment sexual harassment is defined as: unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectionably offensive that it effectively denies a person equal access to the school's education program or activity.



- Skipping class to avoid a harasser
- Declining GPA
- Having difficulty concentrating in class
- Crying at night due to sexual harassment
- Quitting a team due to harassment

# Question of Consent



- Age of consent
- Affirmative consent laws
- Important elements of consent
  - Freely given
  - Ongoing
  - Manifested



- Questions and evidence about a complainant's prior sexual behavior are prohibited unless:
  - Offered to prove that someone other than the respondent committed the alleged misconduct, or
  - Offered to prove consent.



- Convey relevant information about the allegations to the parties and their advisors
- The Department of Education takes no position on the elements required in the report beyond what is required by final regulations
- The investigative report must fairly summarize relevant evidence





# Decision-Making Process

# Title IX Report/Information Sharing Requirements



Before report, all evidence shared

Opportunity to question and provide feedback

Report issued and shared

Opportunity to question, provide feedback, and engage in cross-examination

Report and party feedback shared with decision-maker(s)



- Parties may submit unanswered questions to decision-maker
  - Some discretion about submitting
  - Limited follow-up – facilitated cross-examination
  - Articulate and document decisions restricting this process
- Decision-maker may have own questions related to the investigation

# Weighing and Challenging Evidence



- Authentication
- Relevance
- Credibility



- RELEVANCE – Applying to the matter in question; affording something to the purpose (Black’s Law Dictionary)
- NOT permitted:
  - Sexual history of Complainant (see Rape Shield exception)
  - Privileged communications
  - Medical documentation
- Not repetitive

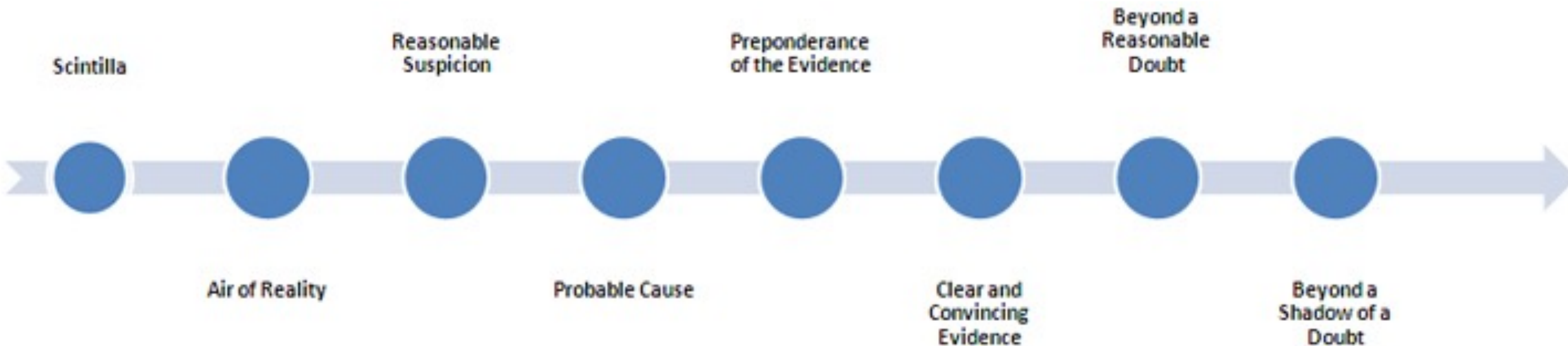


- Corroboration
- Feasibility
- Motivation for truthfulness/untruthfulness
- Consistent
- Reviewed/coached

# Preponderance of the Evidence



## Burdens of Proof



# Final Decision Requirements



Decision-maker must issue a written determination regarding responsibility that has to include

- Findings of fact
- Conclusions as to all allegations
- Rationale for reaching the decision
- Sanctions if the respondent is found responsible for policy violations must be included in the written determination.
- Right to appeal

Others to consider:

- Allegations and Procedural Steps
- Categories that highlight compliance with state law





# Language for Report

# Articulating Your Conclusion in Report



- As to the allegation that \_\_\_\_\_, I find by a [preponderance of the evidence/clear and convincing standard] that \_\_\_\_\_.
  - Address each allegation
  - Reasons why evidence supports the conclusion
  - Address disputed evidence
  - Details any questions raised by parties after reviewing report
- As a result of these determinations of responsibility, disciplinary sanctions will be imposed on Respondent. Specifically,
  - Insert here what discipline will be imposed on Respondent, if any.
- Additionally, remedies designed to restore/preserve equal access to the school's educational program or activity will be provided to Complainant and coordinated by the Title IX Coordinator.
  - No requirement to specify what those remedies are under Title IX.

# Allegation of Hostile Environment Sexual Harassment under Title IX



**Allegation:** On January 8, 2022, Respondent shared sexual photos of Complainant that were on his phone to three students [names] during the brunch period. By sharing of these photos, Respondent created a hostile environment for Complainant at school...

**DEFINITION:** unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectionably offensive that it effectively denies a person equal access to the school's education program or activity.

**As to the allegation that \_\_\_\_\_, I find by a preponderance of the evidence/clear and convincing standard that \_\_\_\_\_.**



- **As to the allegation that \_\_\_\_\_, I find by a preponderance of the evidence that \_\_\_\_\_.**
- CA DEFINITION: unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against in the educational setting, under any of the following conditions:
  - The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment  
*(definition abbreviated)*



# WRITE YOUR CONCLUSION(S) USING Title IX

Apply State law



# Other Considerations

Impartiality, Conflict of Interest, Bias,  
Stereotypes, Trauma



- Conscious/Explicit
  - Discriminatory intent
  - Stated preferences
- Unconscious/Implicit
  - For the most part, most people are unaware of these drivers
  - Developed over a period time and can influence many factors in hearing
  - Short cuts developed by the brain and often play a role in:
    - Immediate response to conflict
    - Often mimics fear responses



# Conflicts of Interest



- Actual
- Perceived
- Can be raised initially or in appeal





- 2020 Regulations reject stereotypes about accusation meaning a party is responsible
- Statements showing favor to complainants or respondents
- Assumptions about who will be truthful



- Impact of trauma on victims
- Ability to recall events and capture memories
- Factor how trauma of parties and/or witnesses may have played a role in the investigation

# REMEMBER: Grounds for Appeal



- **Procedural** irregularity in the Title IX grievance process affected the outcome
- **Newly** discovered evidence that was not reasonably available at the time of the determination of responsibility or dismissal that could affect the outcome
- Due to a **bias or conflict of interest** by the Title IX Coordinator, investigator, or decision-maker that affected the outcome



- ✓ Identification of the allegations
- ✓ A description of all procedural steps taken from the receipt of the formal complaint through the determination,
- ✓ The findings of fact supporting the determination;
- ✓ The conclusions regarding the application of the school's code of conduct/school policy/school policies to the facts;
- ✓ Rationale for the result as to each allegation, including a responsibility and any disciplinary sanctions the school imposes on the respondent
- ✓ Other remedies designed to restore or preserve equal access; and
- ✓ The school's procedures and permissible bases for the complainant and respondent to appeal.



# QUESTIONS?

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