



# Title IX Decision-Maker Training

NCR Title IX Training Series  
March 20, 2025

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# Title IX Law and Regulation

# Title IX Guidance



- Federal Law
- Regulations
- Other sources of mandatory and recommended guidance
  - State law
  - Case law
  - Advocacy
  - Best Practices

# Title IX

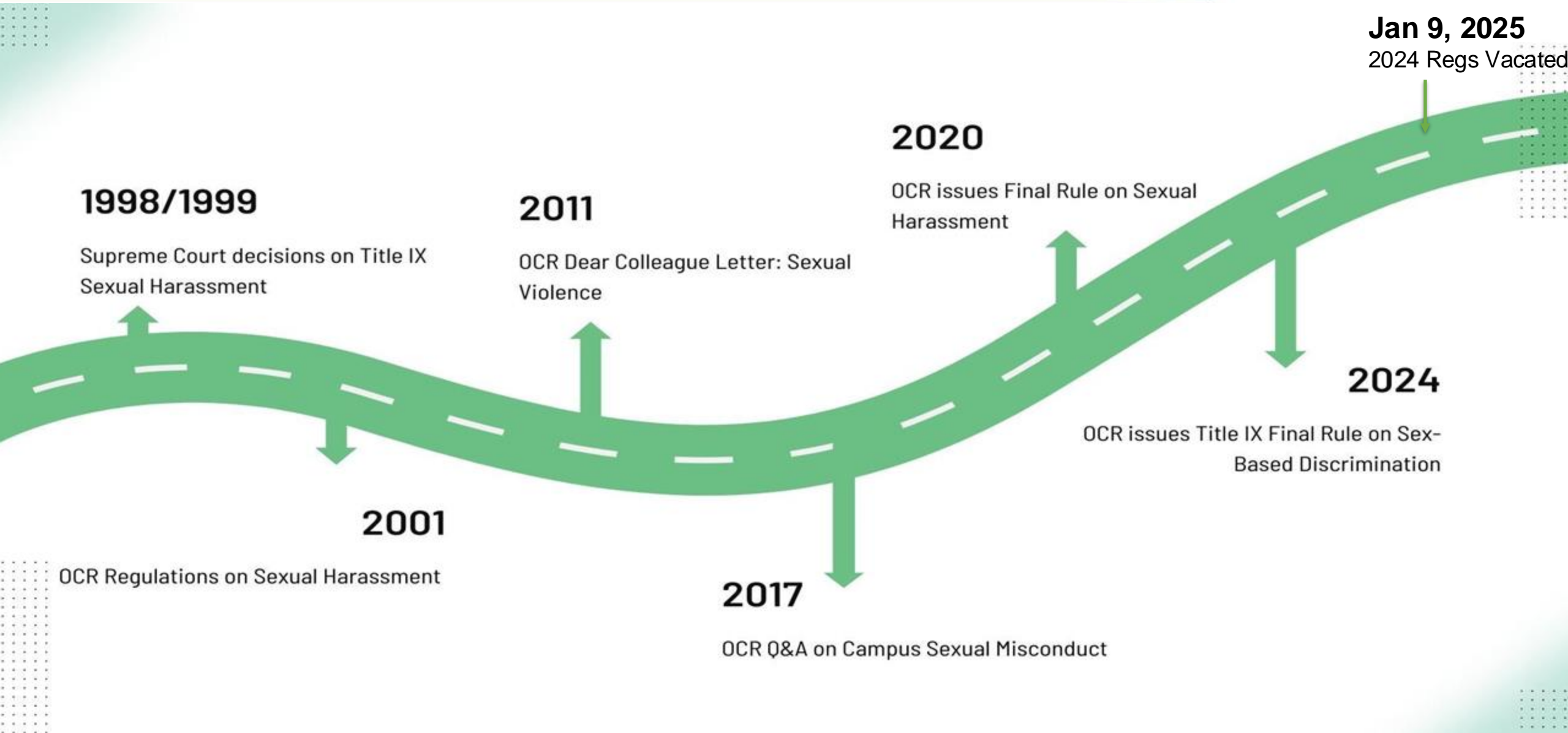
*"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."*

**- Title IX of the Education Amendments of 1972**

Enforced by the Office for Civil Rights (OCR)



# Title IX Law & Regulation Timeline



# Title IX Regulatory Guidance - Report to OCR



- Following a report of sexual harassment to the Office for Civil Rights (OCR)
- OCR initiates an investigation
- OCR may seek an informal resolution
- Negotiated agreement is set forth in a resolution agreement
- OCR may impose fines and penalties against a school if resolution not reached





# Title IX Obligations for K12 School Districts



# Title IX Covers



Title IX protects BOTH students and employees of K12 Schools

**Sex discrimination**

**Sexual Harassment**

**Sexual Assault**

**Athletics**

**Pregnant Students**

**Recruitment/Admissions Programs**

# Legal Obligation

Educational institutions must respond in a manner that is not **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.



# Actual Knowledge of Sexual Harassment



- When sexual harassment or allegations of sexual harassment come to the attention of **ANY EMPLOYEE** of a K-12 district:
  - All employees **MUST** report to the **TITLE IX COORDINATOR**
- Failure to report could lead to an inadequate response
  - Proof of deliberate indifference
  - Legal responsibility for sexual harassment

# Scope of the Education Program or Activity



For Title IX to apply, the behavior must occur in the school’s “education program or activity,” further defined as:

*locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.*

Off-campus activities covered if one (1) of three (3) requirements are met:

1. the off-campus incident occurs as part of the school’s operations;
2. the school exercised substantial control over the respondent and the context of alleged sexual harassment that occurred; or
3. the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a college.



- A licensed mental health professional at the school can maintain confidentiality.
- All other employees are required to report the matter to the Title IX Coordinator.
- In instances of potential sexual harassment, investigators (and other employees) cannot offer to keep the matter confidential.
- A Title IX investigation is completely transparent to both parties:
  - Parties get to know the names of all the people involved, including witnesses.
  - Parties get access to all of the information gathered during the investigation.
  - Parties get the opportunity to request additional investigation and to challenge the investigator prior to the final decision.

# Title IX Enforcement and Federal Constitutional Protections



Under Title IX, schools may not restrict the rights afforded under:

- First Amendment (Free Speech)
- Fifth Amendment (Protection against Self-Incrimination)
- Fourteenth Amendment (Due Process)

# Title IX Prohibits Retaliation



- Prohibition against retaliation for any participant in the Title IX reporting & investigation process
- Requires some level of school action





# Overview of Title IX Grievance Process (TIXGP)

# Title IX – Parties and Administrators



## **Parties**

- Complainant – alleged victim/survivor
- Respondent – responds to the allegation(s)

## **Other Participants**

- Fact Witnesses
- Expert Witnesses

## **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 Grievance Process (TIXGP)



- Respond promptly in a manner that is not deliberately indifferent
- Due process and fundamentally fair procedures to adjudicate the allegations
- Upon notification, supportive measures offered
  - Emergency removal
- Offer of formal process (upon signing of Formal Complaint)
  - Complainant files or Title IX Coordinator may file
- Both parties receive notice of the allegations
- Both parties participate in investigation and can inspect information gathered
- Separate Decision-Maker(s)
- Completed in a prompt time-frame
- Retaliation prohibited - define the retaliation complaint process

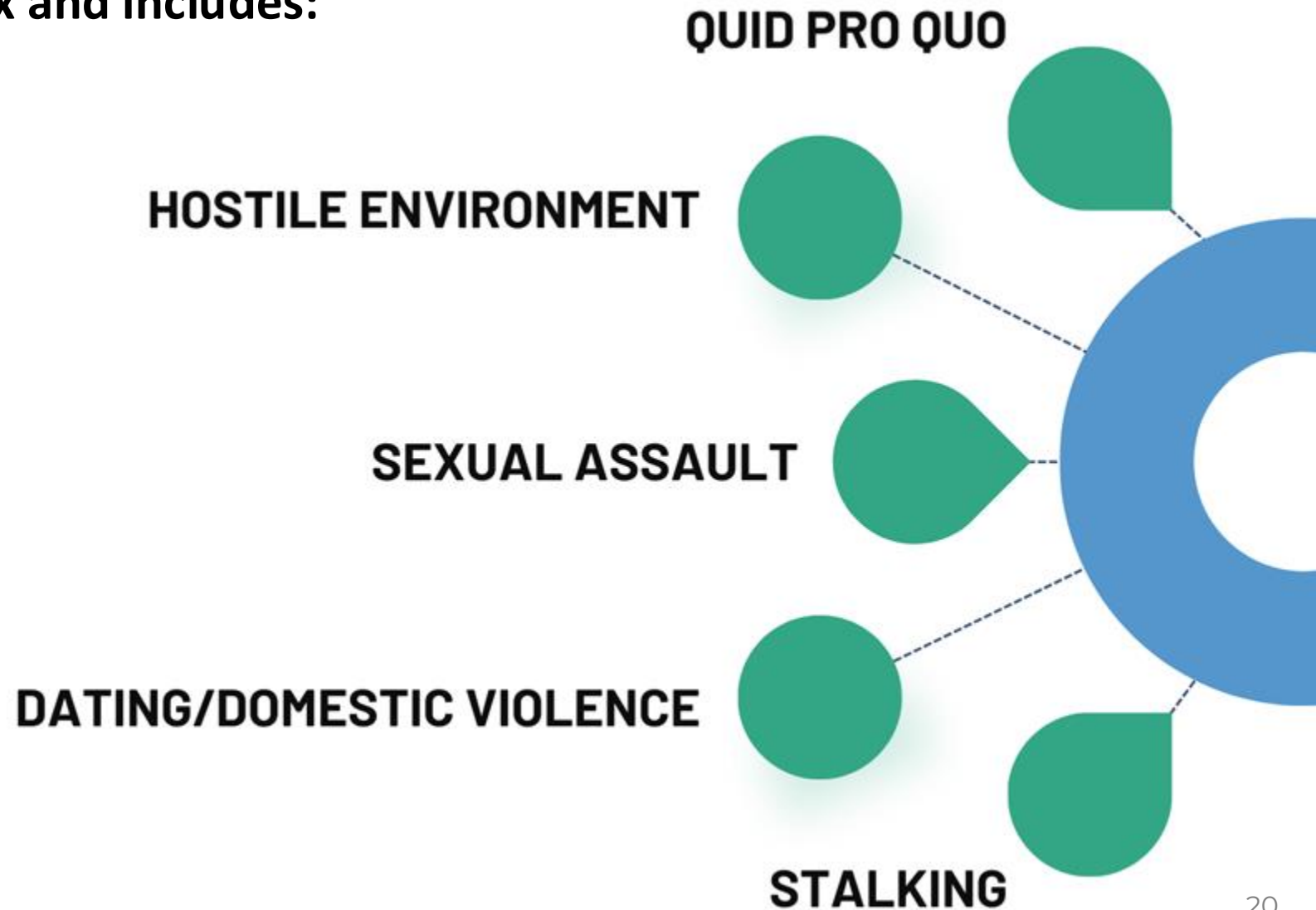


# Title IX Sexual Harassment Definitions

# Title IX (TIX) Definition of Sexual Harassment



Defined conduct on the basis of sex and includes:



# TIX Definition of Sexual Harassment



## **Defines conduct “on the basis of sex” and includes:**

- Quid pro quo - An employee of the school 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 school’s education program or activity;



The definition includes:

- **Sexual Assault** means any sexual act directed against a Complainant without consent. Sexual Assault includes fondling, incest, rape, sexual assault with an object, sodomy, and statutory rape.
- **Dating violence** means violence committed by a person— (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) the length of the relationship. (ii) the type of relationship. (iii) the frequency of interaction between the persons involved in the relationship.





- **Domestic violence** includes felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim
  - It includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior,
  - By a person who— (A) is a current or former spouse or intimate partner of the victim; (B) is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) shares a child in common with the victim; or (D) commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.



- **Stalking** means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - fear for his or her safety or the safety of others; or
  - suffer substantial emotional distress.

# State Laws Prohibiting Sexual Harassment



- Aside from obligations under Title IX, K12 schools must also enforce state laws prohibiting sexual harassment
- Definitions of sexual harassment may be different
- In most instances, an incident will be analyzed under both Title IX and state law



# Title IX Decision-Maker Role and Responsibilities in Title IX Grievance Process (TIXGP)



- Gather all information related to a claim
- Analyze factual findings
  - Relevancy
  - Authenticity
  - Credibility
- Factual findings

# TIXGP: Separate Investigator and Decision-Makers



- Title IX Coordinator may serve as Investigator
- Title IX Coordinator may NOT serve as Decision-Maker to determine policy violation and discipline
- Hearing panels permitted for K-12s but not required



# TIXGP: Investigator Role and Timing



- Conducts investigation
- Provides all information collected to both parties
  - 10 days for review and response by the parties
- Examines the requests/additional information/potential questions presented by the parties
- Drafts the Title IX investigation report
- Provides the report to the parties
  - 10 days for review and response by the parties
- Receives additional questions from parties and makes changes, if necessary
- Finalizes the report and forwards to Decision-Maker



# TIX Decision-Maker: Role and Timing



- Decision-Maker review of final investigation report
  - Decision-Maker outreach to the parties for additional information
    - Paper version of cross-examination
  - 10 days to respond
- Outcome Letter issued by Decision-Maker
  - Details Policy violation and discipline (if necessary)



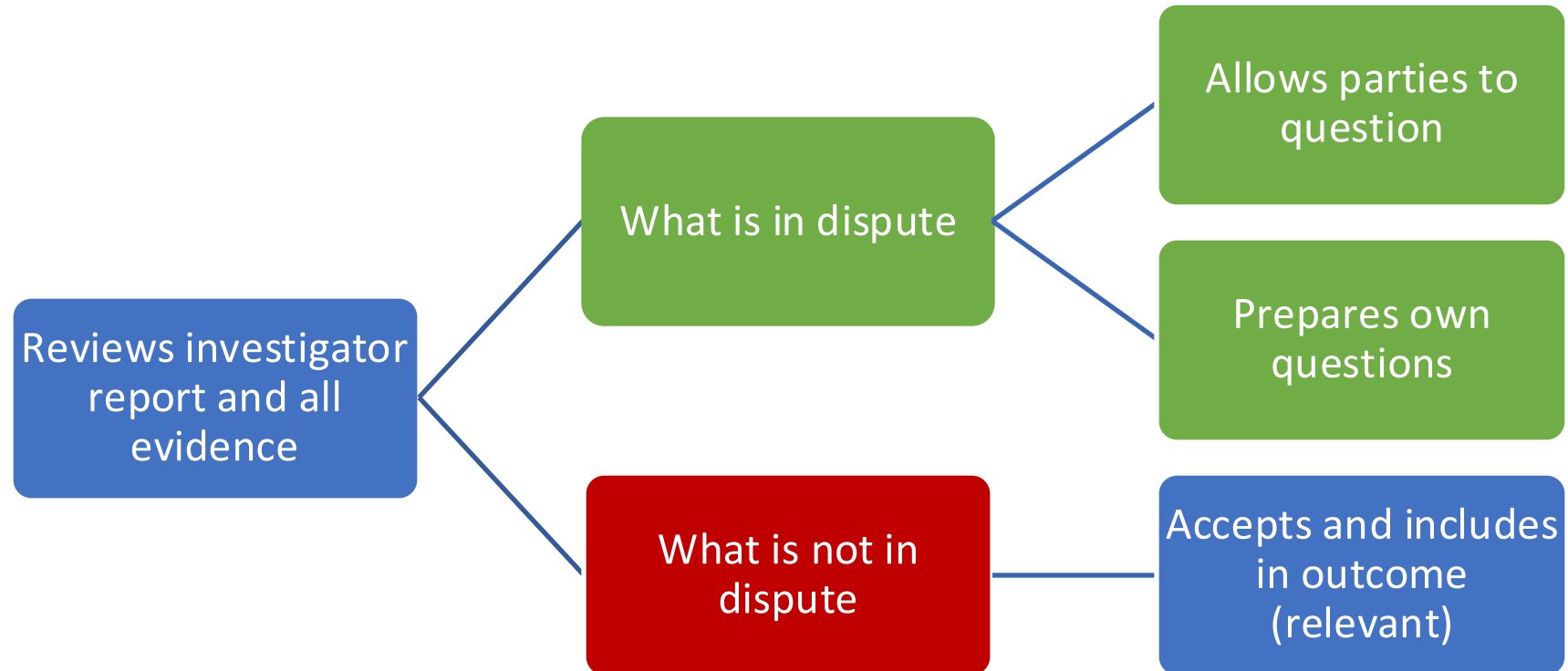


# Decision-Maker Outreach to Parties



- 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

# Initial Analysis for Decision-Maker



# Decision-Maker Locates Disputes in TIXGP



## 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**

# Decision-Maker Jurisdiction Review (if necessary)

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 occurred

Against a person in the United  
States





## **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

# Decision-Maker on Jurisdiction



- Based on the information gathered, could this matter have been dismissed from Title IX on the pleadings?
- If not dismissed initially, Decision-Maker should review whether dismissal from Title IX is appropriate.
  - Scope of activity/program
  - Definitions of Title IX sexual harassment
- Incorporate the dismissal finding in your outcome letter, if appropriate - i.e., when Decision-Maker does dismiss
- Explain the rationale/reasoning





## Detailed allegations against Respondent

- When
- Where
- What is alleged
- By whom

Was the Notice of Allegations sufficient for Respondent to provide a response to the allegations?

# Review of Notice of Allegations



- Appropriate
- Proper notice given
- Adequate information for response



# Evidence Review

# Weighing and Challenging Evidence



- Authentication
- Relevance
- Credibility

# Authentic Evidence



- Parties and witnesses may submit evidence
- Some evidence may be unavailable
- Investigator may have had limited opportunity to check if every piece of information is truly an authentic representation
- At this point in the process, parties have seen ALL evidence and most likely raised any authentication questions
- However, Decision-Maker may ask additional questions to authenticate submitted evidence




- 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

# Credibility Determinations



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



REMEMBER –  
Decision-Maker holds ultimate  
responsibility for credibility  
determinations and can challenge any  
conclusions/recommendations made by  
the Title IX Investigator.



A large, solid teal triangle on the left side of the slide, pointing towards the right.

# Other Title IX Obligations and Considerations



- Be neutral – neither pro-Complainant nor pro-Respondent
- Consider the evidence as presented
- Confront and understand bias and not allow it to impact decision
- Maintain open mind as to the potential conclusions

# Conflicts of Interest



- Relationship to parties or witnesses
- Professional conflicts
- Personal conflicts
- Actual and perceived

# Stereotypes



- “A fixed, over generalized belief about a particular group or class of people.”  
(Cardwell, 1996)
- Stereotypes around sexual assault
- Stereotypes around sexual harassment
- Complainant and Respondent



- Conscious/Explicit bias
  - Discriminatory intent
  - Stated preferences
- Unconscious/Implicit bias
  - For the most part, most people are unaware of these drivers
  - Developed over a period of 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
- Confirmation bias



# Reaching a Conclusion and Issuing Outcome Letter

# Decision-Maker Steps



- Receipt of final investigation report
  - *Is it finalized?*
- Outreach to parties to determine if follow-up questions are requested
  - Some discretion about submitting
  - Limited follow-up – facilitated cross-examination
  - Articulate and document decisions restricting this process
- Decision-Maker discretion regarding about what follow-up is necessary
  - Decision-Maker can ALSO conduct follow-up
- Outreach to parties with follow-up, as designated by Decision-Maker
- Conclusion and outcome letter

# Final Decision Requirements



Under Title IX regulations, 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 (UCP)





# Writing the Outcome Letter

# Findings of Fact



- Assume parties have opposed versions of the factual events
- What facts would be compelling to you as Decision-Maker in reaching a conclusion?
- Could you articulate these reasons in your outcome letter?

# From the Investigation Report...



## **ALLEGATION:**

Detail full allegations

Should match Notice of Allegations letter

## **FACTUAL FINDINGS:**

- Respondent and Complainant ....

# Articulating Your Conclusion in Outcome Letter



- **As to the allegation that \_\_\_\_\_, I (or the Decision-Maker) 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.

# EXAMPLE: Allegation of Hostile Environment Sexual Harassment Under Title IX



**Allegation: [pull directly from Notice of Allegations Letter]**

## DEFINITIONS:

Forcible Fondling – The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will.

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

# ALSO, Analyze: Hostile Environment under State Law



- **As to the allegation that \_\_\_\_\_, I find by a preponderance of the evidence that \_\_\_\_\_.**
- **STATE LAW 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*).

# Allegation of Sexual Harassment – Title IX and State Law Analysis



- **Sexual Harassment under Title IX includes sexual assault (rape, fondling, etc.)**
- **Forcible Fondling** – The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will.

## **Hostile environment, sexual harassment**

- Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the educational setting, under any of the following conditions:
  - ...
  - 3. 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.



## Procedural Review

Procedural irregularity in the Title IX grievance process that materially affected the outcome.

## New Information

Newly discovered evidence that was not reasonably available at the time of the determination of responsibility or dismissal that could materially affect the outcome.

## Conflict of Interest or Bias

Due to a bias or conflict of interest by the Title IX Coordinator, investigator, or decision-maker that materially affected the outcome.





Thank You!

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