

MONTH DAY YEAR AM HOUR MIN  
AUG 14 2020 PM 12:00

DESTINATION TIME



# BACK TO THE FUTURE PART II THE 2020 RULES

# Presenters



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## ✓ **Title IX Basics**

- ✓ **Obligation to Address Sex Discrimination**
- ✓ **Sexual Harassment**
- ✓ **Jurisdiction**
- ✓ **Reporting Duties**
- ✓ **Initial Response**

## ✓ **The Grievance Process**

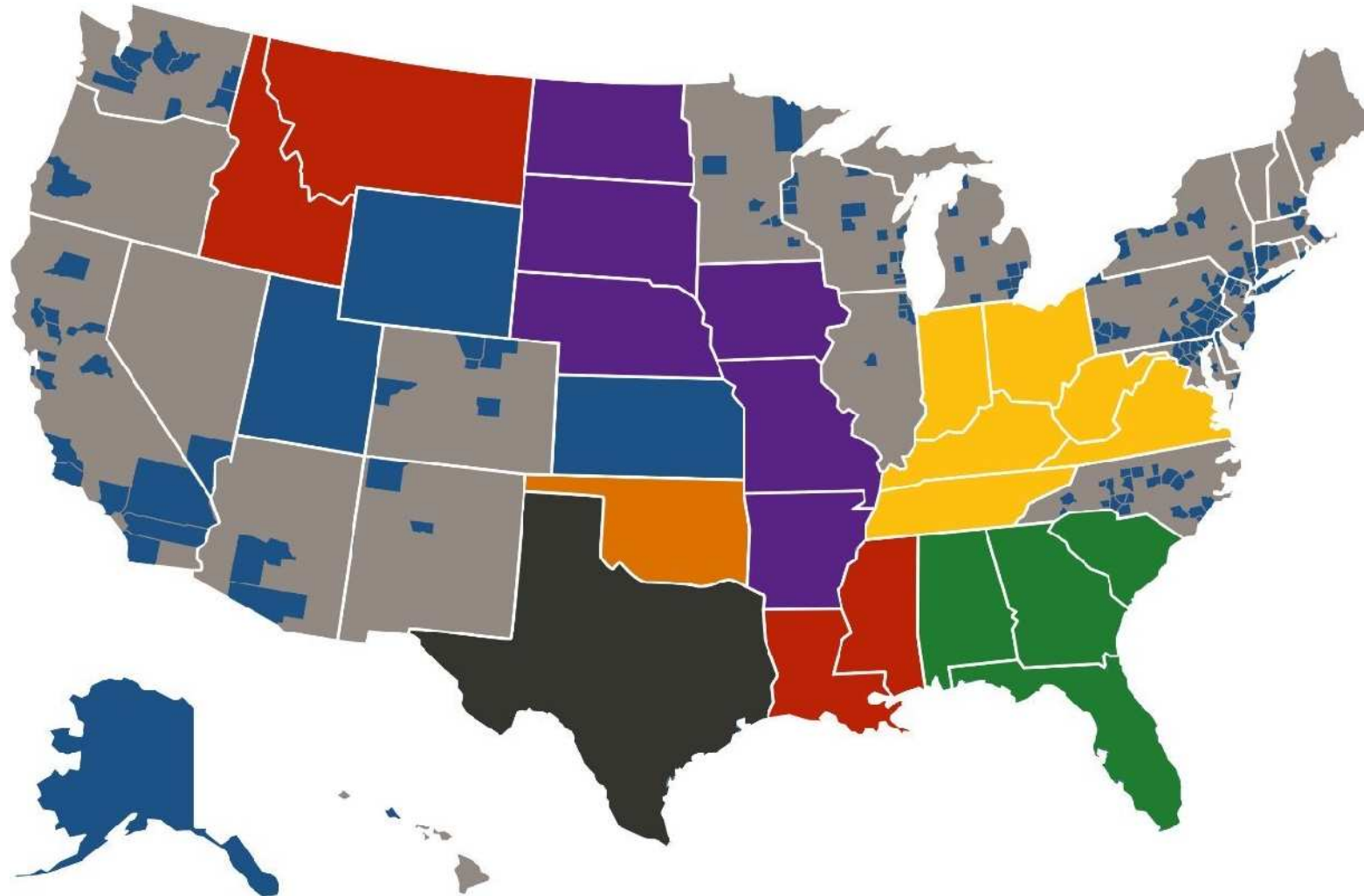
- ✓ **Evaluation**
- ✓ **Investigation**
- ✓ **Determination**
- ✓ **Appeal**

## ✓ **Essential Extras**

- ✓ **Serving Impartially**
- ✓ **Informal Resolution**
- ✓ **Retaliation and Discrimination**



# 2020 Rules in Effect



# Title IX Basics

Obligation to Address Sex Discrimination  
Sexual Harassment Defined  
Jurisdiction  
Reporting Duties  
Initial Response



# Title IX: Nuts & Bolts

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

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)

- **Enacted in 1972. Enforced by U.S. Department of Education.**
- **Prohibits sex discrimination in institutions that receive federal funds**
- **Affects all education programs & activities**
  - Academics
  - Athletics
  - Financial aid
  - Counseling
  - Extracurricular activities
  - Other services



# Responsibility to Respond

The college is responsible for promptly and effectively responding to discrimination and harassment in a manner that complies with regulatory requirements and:



Ends the harassment



Remedies the effects of the harassment



Prevents its recurrence



# Prohibited Conduct:

## Sexual Harassment

relation or from an  
point of view.

**Harassment**

feeling of intense  
annoyance cause  
that disturbs or  
right for what is





# Sexual Harassment

**Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:**

Quid Pro Quo Harassment

Hostile Environment Harassment

The Big 4

- ▶ Sexual Assault
- ▶ Domestic Violence
- ▶ Dating Violence
- ▶ Stalking



# Sexual Harassment

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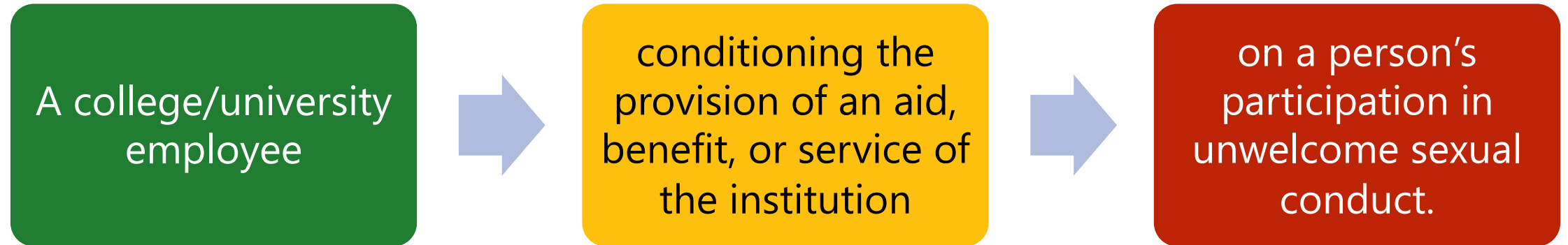
Hostile Environment Harassment

The Big 4

- ▶ Sexual Assault
- ▶ Domestic Violence
- ▶ Dating Violence
- ▶ Stalking



# Quid Pro Quo



# Quid Pro Quo

- Quid pro quo sexual harassment is an abuse of authority or power and is not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access.
- The student's failure to complain, resist, or object to the conduct does not prove that the conduct was welcome.
- Acquiescence to the conduct or the fact that a person may have accepted the conduct does not mean they welcomed it.

# Quid Pro Quo?

- ▶ “Sleep with me and you will receive an A”
- ▶ “Your low grade had nothing to do with your not wanting to have a drink with me”
- ▶ “Come to my room tonight and we can discuss those scholarship opportunities and the recommendation you’ve requested. I’d like to get to know you better.”

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**Hostile Environment Harassment**

The Big 4

- ▶ Sexual Assault
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- ▶ Stalking



# Hostile Environment

Unwelcome conduct, on the basis of sex, 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



**Hostile Environment**

=

Unwelcome Conduct

+

Sex-Based

+

Severe

Effectively Denies

+

Objectively Offensive

+

Pervasive

+





**Hostile Environment**

=

**Unwelcome Conduct**

Effectively Denies

+

+

Sex-Based

Objectively Offensive

+

+

Severe

+

Pervasive

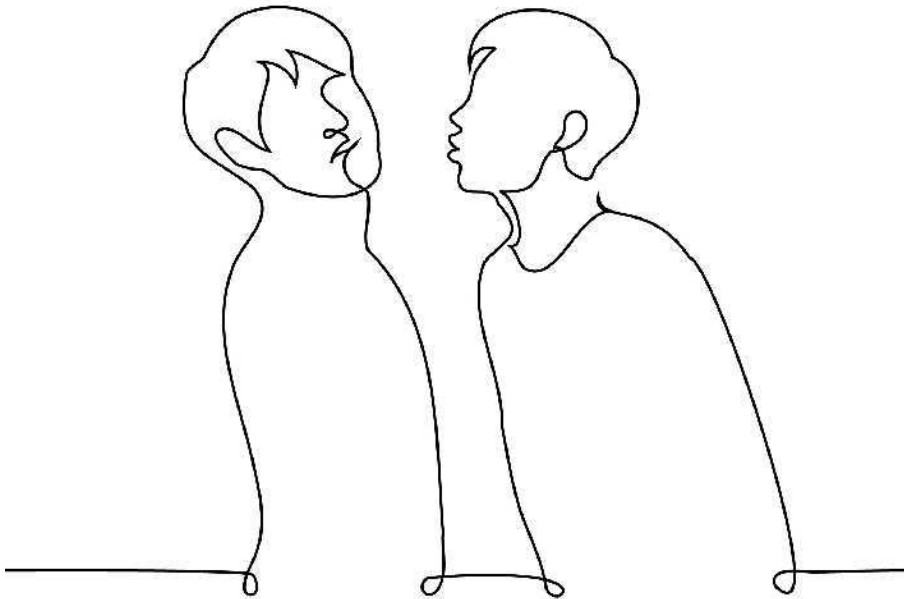


# Unwelcome

- ▶ Not solicited or invited, and the target considers it undesirable or offensive
- ▶ Acquiescence—even willing participation—or the failure to complain or report the conduct does not always mean the conduct was welcome
- ▶ Conduct welcomed on one occasion could be unwelcome on a subsequent occasion
- ▶ Whether conduct is “welcome” can be impacted by age, disability, relationships, culture, and intoxication, among other factors



# Welcome?



Student Cole reports that Ryan asked Cole for a kiss. Cole did not say no. Cole reports looking at Ryan uncertainly, however, and not kissing Ryan back. When asked for details, Cole said they were too afraid to say no because Ryan is the president of the Greek organization that Cole is rushing.



**Hostile Environment**

=

Unwelcome Conduct

Effectively Denies

+

+

**Sex-Based**

Objectively Offensive

+

+

Severe

+

Pervasive



# On the Basis of Sex

The preamble to the 2020 Rules explains that on the basis of sex includes:

- ▶ Conduct that is sexual in nature
- ▶ Conduct that references one sex or another
- ▶ Conduct aimed at a particular sex
- ▶ Sex stereotyping (gender norms)

Any individual, irrespective of sexual orientation or gender identity can be the victim of sexual harassment



**Hostile Environment**

=

Unwelcome Conduct

Effectively Denies

+

+

Sex-Based

Objectively Offensive

+

+

**Severe**

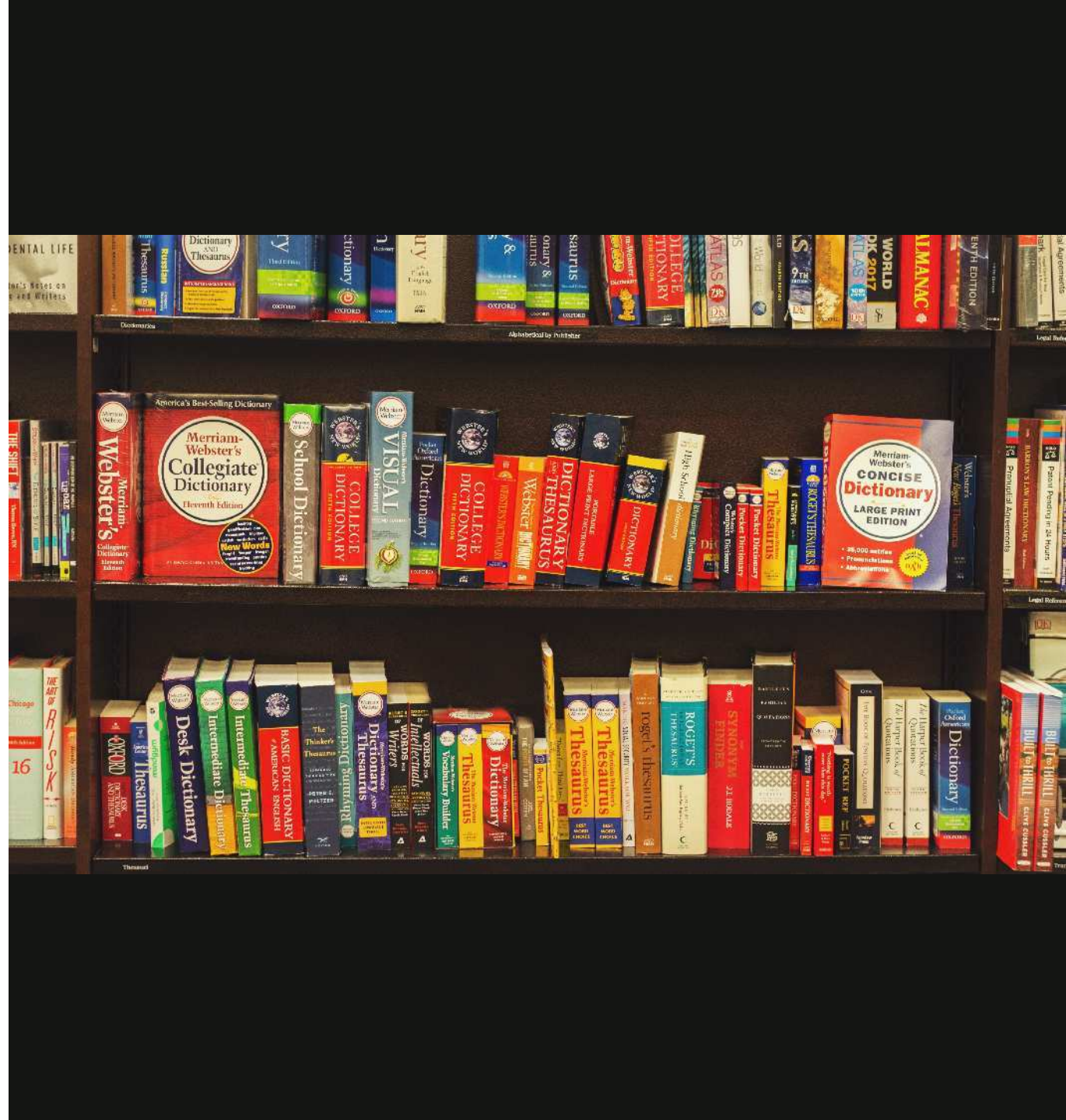
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Pervasive



# Severe

- ▶ Nature and degree of the harassment
- ▶ Severe: "causing very great pain, difficulty, worry, damage, etc.; very serious" (Cambridge Dictionary)
- ▶ Severe: "very bad, serious, or unpleasant"; "causing a lot of physical pain or suffering;" "very harsh" (Britannica Dictionary)



- ▶ Must be extreme, and not merely rude or unpleasant

*Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 944 F.3d 613 (6th Cir. 2019), cert. denied 141 S. Ct. (2020)

- ▶ Goes beyond mere juvenile behavior among students, even if the behavior is antagonistic, non-consensual, and crass

*Jenkins v. Univ. of Minn.*, 131 F. Supp. 3d 860 (D. Minn. 2015), aff'd, 838 F.3d 938 (8th Cir. 2016)





**Hostile Environment**

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Unwelcome Conduct

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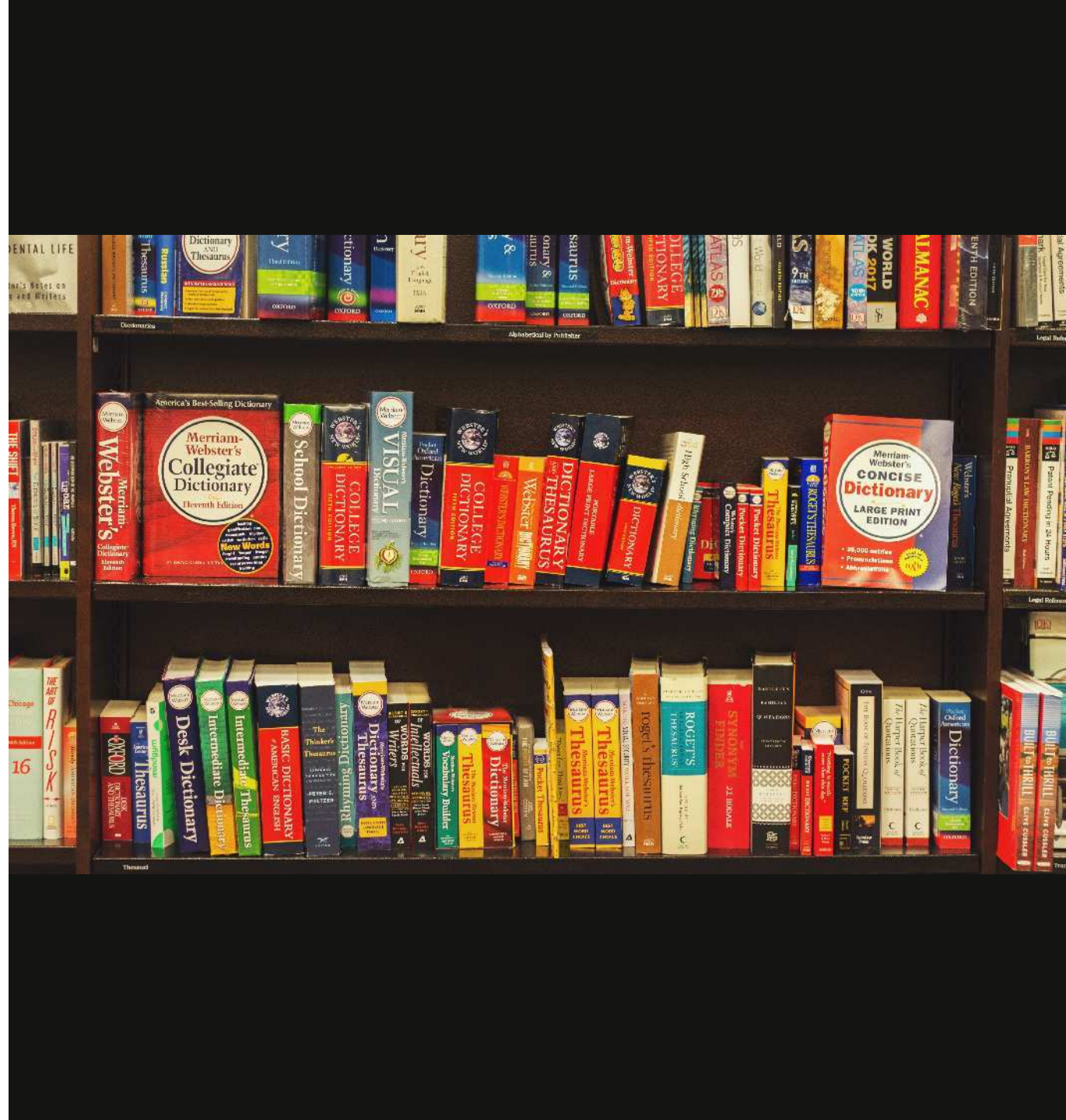
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**Pervasive**



# Pervasive

- ▶ Frequency or duration of harassment; scope or continuousness
- ▶ Systemic or widespread
- ▶ Pervasive: “existing in or spreading through every part of something” (Merriam-Webster Dictionary)
- ▶ Pervasive: “present or noticeable in every part of a thing or place” (Cambridge English Dictionary)



# Pervasive ... The Courts Have Spoken

- ▶ Single or isolated incidents are generally not enough
- ▶ Conduct must be “pervasive” and “widespread” conduct with the “systemic effect of denying the equal access to an educational program or activity”
- ▶ Courts evaluate whether there was a “systemic or ongoing pattern of harassment,” a “series of incidents,” or “numerous acts of objectively offensive” conduct

*E.g., Carmichael v. Galbraith, 574 F.App'x 285 (5th Cir. 2014)*



**Hostile Environment**

=

Unwelcome Conduct

+

Sex-Based

+

Severe

Effectively Denies

+

**Objectively Offensive**

+

Pervasive

+



- ▶ Offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively
- ▶ The objective offensiveness of conduct is to be judged by reference to a reasonable child at whom the conduct were aimed

# Objectively Offensive

**Hostile Environment**

=

Unwelcome Conduct

+

Sex-Based

+

Severe

**Effectively Denies**

+

Objectively Offensive

+

Pervasive

+



# Effective Denies Equal Access to Your Education Programs or Activities

- ▶ The institution must evaluate whether a reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.
- ▶ Examples from guidance on the 2020 Rules: skipping class to avoid the perpetrator, decline in GPA, student quits a team to avoid the perpetrator but carries on with other activities
- ▶ Does not require a complainant to demonstrate any particular harm, such as reduced grades or missed classes.



- ▶ The degree to which the conduct affected the complainant's ability to access the education program or activity
- ▶ The type, frequency, and duration of the conduct
- ▶ The location of the conduct and the context in which the conduct occurred
- ▶ The parties' ages, roles within the education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct
- ▶ Other sex-based harassment in the education program or activity

# **Totality of Circumstances**



# Recognizing Sexual Harassment

- ▶ The Title IX regulations contemplate sex-based harassment occurring in a variety of circumstances
- ▶ Sex-based harassment may manifest itself multiple ways
- ▶ Key is to recognize when conduct may constitute sex-based harassment that needs to be responded to using the Title IX Grievance Process
- ▶ Examples on following slides are instructive and are not an exhaustive or exclusive list of conduct constituting sex-based harassment



# Student-Student Harassment

- Disseminating sexual pictures or videos
- Snapping another person's bra strap
- Blocking or cornering another student in a sexual way
- Forcing another student into a kiss or a sexual act
- Flashing another student
- Touching, grabbing, or pinching another student in a sexual way
- Spreading false and disparaging sexual rumors about another person
- Constantly pressuring for dates or sexual activity despite prior rejections



**Reminder**  
**Consider all circumstances**  
**Is it based on sex?**  
**Is it severe?**  
**Is it pervasive?**



# Employee-Student Harassment

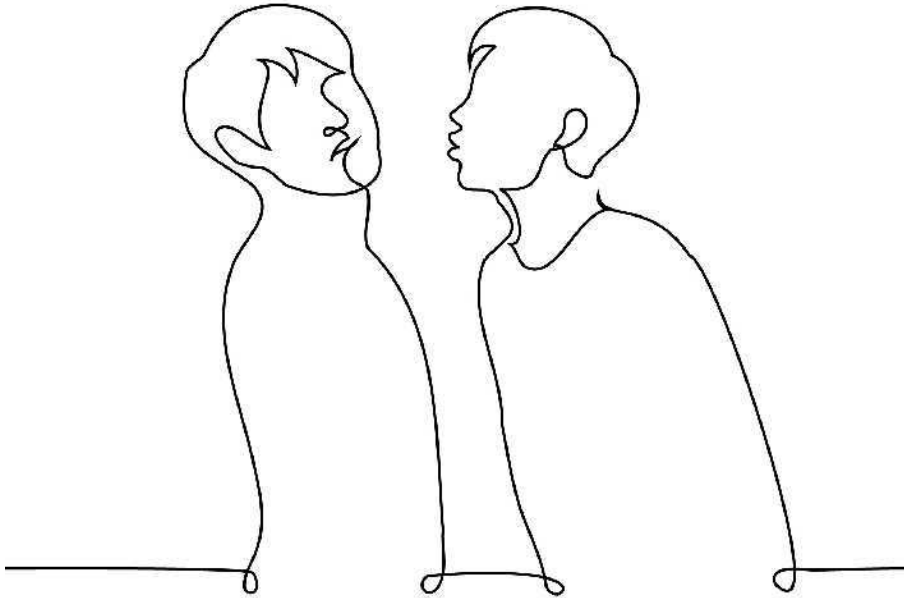
- Dating or becoming romantically involved with students
- Showing pornographic, provocative, or sexually suggestive materials to students not reasonably related to the course
- Regular comments in class discouraging students of a particular sex from choosing a particular career path
- Seeking private encounters with a student outside of school
- Discussing one's sex life with a student
- Gratuitous physical contact
- Commenting on the student's undergarments or physique
- Playing games that involve inappropriate touching
- Kissing or massaging a student



**Consider all circumstances**  
**Is it based on sex?**  
**Is it severe?**  
**Is it pervasive?**



# Hostile Environment?



Let's return to Cole and Ryan. Recall:

Student Cole reports that Ryan asked Cole for a kiss. Cole did not say no. Cole reports looking at Ryan uncertainly, however, and not kissing Ryan back. When asked for details, Cole said they were too afraid to say no because Ryan is the president of the Greek organization that Cole is rushing.



# Sex-Based Harassment?

- ▶ Sam uses AI to create several images of Laura in which she looks like a video game character, Lara Croft. Some of the fake images show Laura naked. Sam circulates the images to several other students, and eventually the professor sees them. He chuckles and says “you should delete those.” Sam doesn’t.
- ▶ The class group chat takes on a sexual tone, and Laura soon realizes why. She is mortified. And then she learns the professor saw the images a month ago.



# Free Speech & Harassment



- The Supreme Court has held in a variety of contexts that the First Amendment protects speech that others may find uncomfortable or offensive.
  - **Example:** A political argument about Title IX's gender identity rules likely would be protected speech even if offensive to others.
- But speech that is threatening or substantially disruptive likely would not be protected.
  - **Example:** In the dating violence context, threatening sexual violence in a manner that induces fear of bodily harm likely is not protected speech.
- Consult legal counsel when exploring how to balance one person's free speech rights against another person's right to avoid a hostile educational environment.



# Sexual Harassment

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- ▶ Stalking



# *Clery Offenses:* Sexual Assault

**Sexual assault** - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI:

- ▶ **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 victim
- ▶ **Fondling** - the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim
- ▶ **Incest** - sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
- ▶ **Statutory Rape** - sexual intercourse with a person who is under the statutory age of consent





# Sexual Assault Examples

- ▶ Forced vaginal or anal penetration with a body part or object
- ▶ Forced oral sex (giving or receiving)
- ▶ Unwelcome touching or groping of the breast, genitalia, or buttocks
- ▶ The use of coercion, threats, force, or intimidation to compel another person to initiate or continue sexual activity against the person's will
- ▶ Sexual activity with a person who is substantially physically or mentally impaired by illness, alcohol, or drugs, or who is physically incapable of communicating, asleep, or unconscious
- ▶ Sexual activity with a person who is unable to consent because of age or ability



A hand is holding a rectangular piece of brown cardboard. On the cardboard, the words "WHAT IS SEXUAL CONSENT?" are written in large, bold, black, sans-serif capital letters. The sign is held against a blurred background of what appears to be a library or bookstore with bookshelves.

# Consent... Generally

The existence of clearly understandable words or actions that manifest a knowing, active, voluntary, and present and ongoing agreement to engage in specific sexual or intimate conduct by one not suffering from incapacitation.



# Consent

- ▶ “Consent” comes into play in sexual assault cases
  - ▶ Rape
  - ▶ Fondling
- ▶ Not defined in Title IX Rules
- ▶ Must be defined in your policies/procedures



# Capacity to Consent

Consent is not present when a person does not have capacity to consent, voluntarily or involuntarily due to:

- ▶ Age
- ▶ Physical condition
  - Due to alcohol or drug consumption
  - Being unconscious
  - Being asleep, or in another state in which the person is unaware that the sexual activity is occurring
- ▶ Disability that impairs the individual's ability to give consent



# Legal Incapacity

- ▶ A student under the age of majority cannot legally consent to sexual conduct with an adult.
- ▶ In criminal cases in Texas, it is an affirmative defense to prosecution that the individuals were teenagers/young adults, and both were 14 or older and the age difference was no greater than three years.
- ▶ How do you evaluate the following?
  - ▶ A 16-year-old dual credit student has sex with an 18-year-old student in the library.
  - ▶ A 15-year-old dual credit student performs oral sex on a 19-year-old in the library. Both confirm that they wanted to participate.



# Capacity



In addition to consent, the factors of age, neurodiversity, and intoxication can also be relevant when considering:

- ▶ Is conduct *for purposes of sexual gratification*? (for purposes of fondling)
- ▶ Is conduct *unwelcome*? (for purposes of hostile environment harassment)
- ▶ Is conduct *subjectively and objectively offensive*? (for purposes of hostile environment harassment)



# *Clery Offenses:* Domestic Violence

**Domestic violence** includes felony or misdemeanor crimes committed by a person who:

- ▶ Is a current or former spouse, intimate partner, or person similarly situated to a spouse of the victim
- ▶ Is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner
- ▶ Shares a child in common with the victim
- ▶ Commits acts against a person who is protected under the family or domestic violence laws of your state or local government



# Domestic Violence Examples

- ▶ Physical abuse (hitting, choking, punching, biting, shooting, etc.)
- ▶ Threats of physical harm to the victim or others
- ▶ Blackmail
- ▶ Restraining a person against their will (locking in a house or room, taking away keys)
- ▶ Forced sexual activity
- ▶ Stalking
- ▶ Trespassing or property destruction
- ▶ Abuse of one's pets





# *Clery Offenses:* Dating Violence

**“Dating violence”** - violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship

Can include sexual, physical, emotional, or psychological violence or threat of sexual or physical abuse



# Dating Violence Examples

- ▶ Physical or sexual abuse
- ▶ Intimidation, name-calling, and put downs to maintain control
- ▶ Maintaining control over the victim's financial or other resources
- ▶ Threats to commit suicide or homicide if the victim ends the relationship
- ▶ Attempts to isolate the victim from friends or family



# *Clery Offenses:* Stalking

**“Stalking”** - 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; covered by Title IX when on the basis of sex.

**Includes  
cyber-  
stalking**



# Stalking

- ▶ Following an individual around or spying on them
- ▶ Sending unwanted and repetitive texts or email
- ▶ Leaving unwanted gifts; leaving notes on their car
- ▶ Showing up uninvited to their home, work, or school
- ▶ Threatening physical harm to an individual, their family, pets, or property
- ▶ Breaking into the victim's home or vehicle
- ▶ Stealing the victim's belongings
- ▶ Checking the victim's electronic devices or social media accounts
- ▶ Reading a person's mail or other private writings or communications



Where Must Sexual  
Harassment Occur?

# Jurisdiction



**Title IX**

# Title IX Jurisdiction

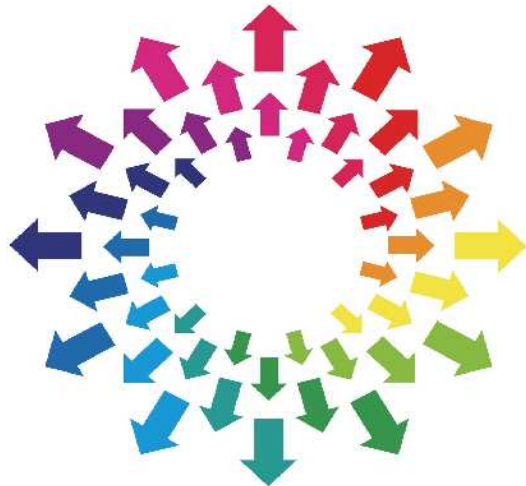


- **Title IX prohibits sex discrimination in any academic, extracurricular, research, occupational training, or other education program or activity.**
  - The statute states that “no person in the United States” shall be subjected to discrimination.
  - “Includes locations, events, or circumstances over which the [school] exercised substantial control over both the respondent and the context in which the sexual harassment occurs”
  - In some situations, off-campus conduct can create a hostile environment in an education program or activity (“downstream effects”)



# It's More than Just Title IX

## Reminder



**In addition to Title IX, the College must follow other laws, including:**

- ▶ **U.S. Constitution** – requires “equal protection” of the laws
- ▶ **Clery Act** – addresses sexual assault, dating violence, domestic violence, stalking
- ▶ **Title VII of Civil Rights Act of 1964 and Texas Labor Code** – prohibits discrimination in employment
- ▶ **State Laws** – often address harassment, athletics, pregnant & parenting students



# Reporting Requirements





# Students Underreport

## Reasons students do not report

- Fear of retaliation, embarrassment, or humiliation
- Fear of punishment or loss of special privileges
- Confusion and worry that no one will believe them
- Unable to process the assault as a sexual assault
- Affections are manipulated, or they feel threatened
- Lack knowledge about how to report

## How you can help

- Communicate to students that they have a right to be free from harassment and a responsibility not to harass
- Let students know where they can go for help if they witness or experience harassment
- Serve as a role model for students by exhibiting non-harassing behavior and addressing any instance of inappropriate conduct
- Make reporting easy, offer a confidential option

# Reporting Requirements



Under Title IX, when the Title IX Coordinator or any **employee with authority** to institute corrective measures has knowledge of sexual harassment or allegations of sexual harassment, the recipient has an obligation to respond.

**All employees** must notify the Title IX Coordinator when the employee has information about conduct or allegations that reasonably may constitute sexual harassment under State law.

Employees can notify the Title IX Coordinator of potential sexual harassment in any manner including:

- Orally (in-person/phone)
- In writing (email or other documentation)
- Any way that ensures the Coordinator receives the information.



Witness

Hear first-  
hand

Hear second-  
hand

Overhear

Otherwise  
learn about

**Source of  
information**

# Reporting Caveats

- ▶ Employees who receive information about an alleged violation should not commence an investigation or begin conducting interviews.
- ▶ The act of receiving information is **intake**. Neutrally receive the information. Ask clarifying questions if necessary.
- ▶ The employee's job is not to determine whether the incident occurred or not.
- ▶ Do not judge or blame ("Why didn't you report it earlier?").
- ▶ Don't take sides. Do not offer predictions about discipline.

# DON'T: Discipline

- ▶ Do not formally or informally discipline either party, including the alleged perpetrator.
- ▶ Instead, provide all relevant information to the Title IX Coordinator or designee, including information on whether there are safety concerns.

# DON'T: Violate Confidentiality

- ▶ Do not tell the alleged perpetrator that the alleged victim spoke to you.
- ▶ The information must first be reviewed by the Title IX Coordinator before it is shared with the alleged perpetrator.
- ▶ Premature disclosure can compromise an investigation or place the reporting party at risk.
- ▶ Do not discuss the case with other employees.



**Initial Response to  
Alleged Sexual Harassment**

# Report or Complaint?



## They're not the same thing.

- ▶ A **report** is information from someone sharing information, orally or in writing, that suggests that sex-based discrimination or harassment has occurred or might be occurring
- ▶ A **formal complaint** is a request that the institution investigate allegation(s)



# Title IX Coordinator Initial Response

## Support

- ▶ Offer & coordinate supportive measures for Complainant once report is made
- ▶ Offer & coordinate supportive measures for Respondent once complaint is made

## Notify

- ▶ Complainant of grievance and informal resolution procedures
- ▶ After complaint made, Respondent of grievance and informal resolution procedures

## Initiate

- ▶ Emergency removal or administrative leave
- ▶ Dismissal, grievance process, or informal resolution (as appropriate)
- ▶ Other steps so that discrimination does not continue/ recur

# Intake Purpose

- ▶ Initial meeting to better understand the allegations and whether they fall within the definition of Title IX sexual harassment
- ▶ Not an investigation or search of evidence
- ▶ Also discuss the grievance process and offer supportive measures



# Intake Questions

- ▶ What happened?
- ▶ Who did it?
- ▶ When did it happen?
- ▶ Where did it happen?
- ▶ Who was there?
- ▶ Did you talk to anyone about it?
- ▶ What do you want to see happen?
- ▶ Anything else you would like to report?



# Supportive Measures Conversation

## Four topics to cover:



The availability of supportive measures



The complainant's wishes with respect to supportive measures



The availability of supportive measures with or without filing a formal complaint



The process for filing a formal complaint

# Supportive Measures

- ▶ Must not **unreasonably** burden either party
- ▶ Must be designed to:
  - ▶ Restore or preserve access to the education program or activity
  - ▶ Protect safety of parties or educational environment
  - ▶ Deter sexual harassment
  - ▶ Provide support during grievance process
- ▶ Nondisciplinary and nonpunitive
- ▶ Confidential



# Supportive Measures

Academic	Emotional/ Wellness	Safety/ Security
<ul style="list-style-type: none"><li>▶ Deadline extensions</li><li>▶ Schedule modification or other course-related adjustments</li><li>▶ Tutoring</li><li>▶ Offers to retake courses or redo assignments</li><li>▶ Changes in extracurricular activities</li></ul>	<ul style="list-style-type: none"><li>▶ Counseling</li><li>▶ Excused absences</li><li>▶ Leave of absence</li><li>▶ Referral to medical or psychological care</li><li>▶ Designation of an employee as a “check-in” for any necessary emotional support</li><li>▶ Training and education programs related to sex-based harassment</li></ul>	<ul style="list-style-type: none"><li>▶ No contact orders (unilateral or mutual)</li><li>▶ Escort between classes</li><li>▶ Changes to class seating</li><li>▶ Assignments to certain routes, bathrooms, or cafeteria locations</li><li>▶ Increased security and monitoring</li><li>▶ Assistance reporting potentially criminal conduct to law enforcement</li></ul>

# Emergency Removal

- ▶ Must be on emergency basis
- ▶ Must conduct an individualized safety and risk analysis
- ▶ Must determine that an **immediate threat to the physical health or safety** of a complainant or any students, employees, or other persons arising from the allegations of sexual harassment justifies removal
- ▶ Does not modify any rights under Section 504 or ADA



# Administrative Leave

- ▶ An employee can be put on administrative leave subject to the educational institution's normal administrative leave policies.
- ▶ Decisions and processes for placing employees on administrative leave with pay must be consistent with the institution's standard procedures regarding employee administrative leave during other investigations.





# When should the Coordinator initiate a complaint if complainant does not?



- ▶ New rules lay out several factors to consider. Factors also are addressed in Texas Education Code 51.285.
- ▶ Ultimate question is whether the alleged conduct either:
  - ▶ Presents an imminent and serious threat of harm to complainant or other person
  - ▶ Prevents the school from ensuring equal access to its education programs or activities

# Factors to Consider

Complainant's request  
not to initiate a  
complaint

Complainant's  
reasonable safety  
concerns

Risk that additional  
acts of sex  
discrimination would  
occur if a complaint is  
not initiated

Severity of the alleged  
sexual harassment,  
including whether  
imposition of a disciplinary  
sanction would be required  
to end the discrimination  
and prevent its recurrence



# More Factors to Consider

Age and relationship of the parties, including whether the respondent is an employee

Whether there is an alleged pattern, ongoing sexual harassment, or sexual harassment affecting multiple individuals

Whether the college could end the alleged sex discrimination and prevent its recurrence without initiating the grievance procedures

Availability of evidence to assist the decisionmaker



Taylor, a student, reports that another student, Charlie, was sexually harassed by a faculty member, Dr. Rowan. Taylor also says another student, Casey, was in a similar situation the previous year. Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.



Faculty member Smith reports a concern that members of the student organization they sponsor may be engaging in hazing of new members, including using foreign objects to penetrate students' anuses over the clothing. Sponsor Smith denies ever having heard about the conduct in prior years, but says a student (Tanner) reported it earlier in the week and that's the reason for the report now. Sponsor Smith does not know who any specific students are who are involved; the reporting student said they were not.



You contact the reporting student, Tanner, and Tanner says that students have been engaged in this conduct against recruits for years. Tanner identifies one student who has been the target this year, Carmen. You talk to Carmen, and Carmen reports that the conduct occurred on campus one time.



Tanner does not know who the alleged perpetrators are. Carmen does know but refuses to identify the individuals involved. Carmen also refuses to sign a formal complaint. Carmen is doing great in school, is engaged in the organization, and reports no effects whatsoever from the incident.



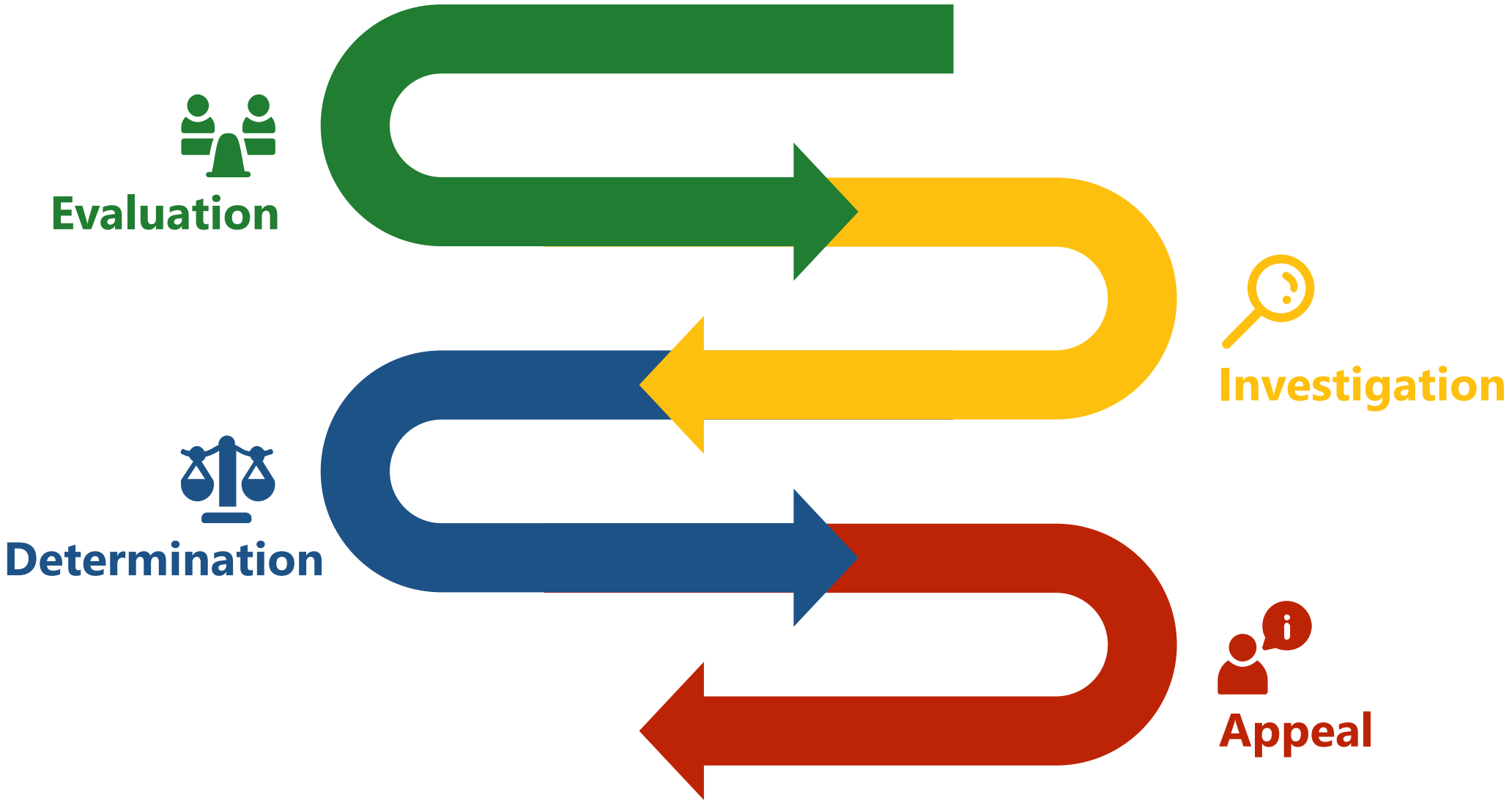
# The Title IX Grievance Process

Evaluation  
Investigation  
Determination  
Appeal





# Four Major Grievance Process Stages



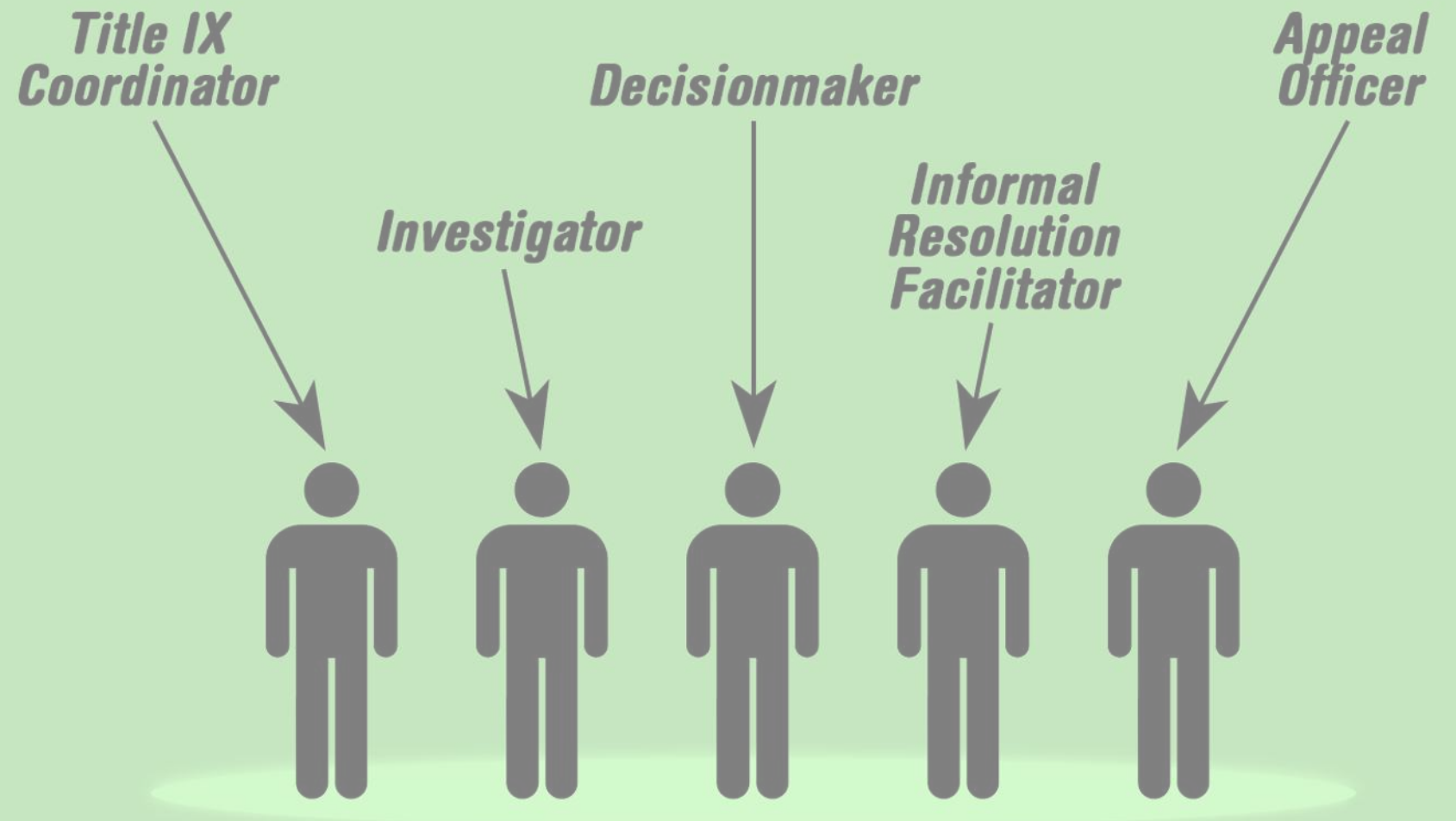


# BASICS

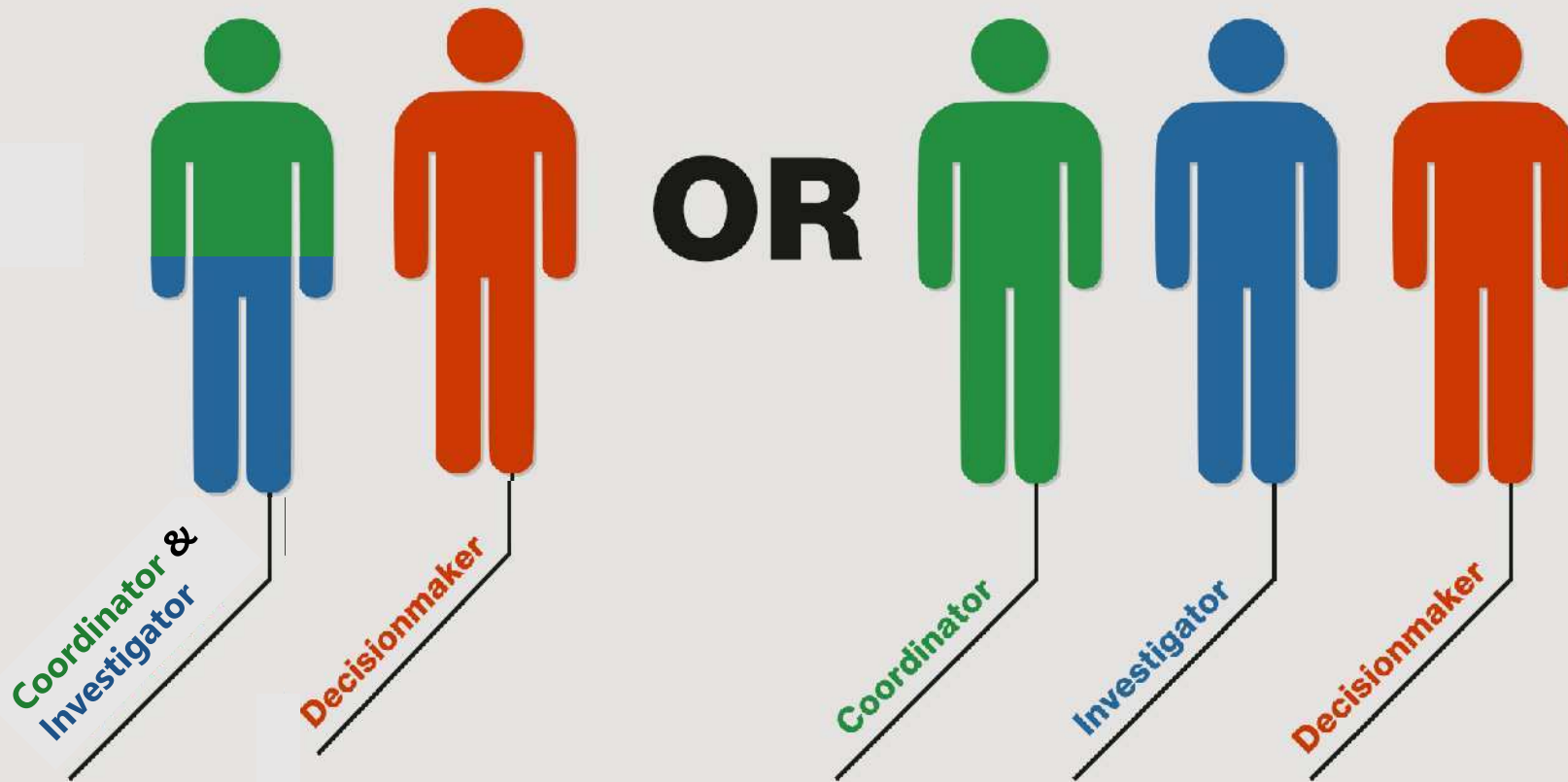
## Grievance Process Requirements & Objectives

1. Treat complainants and respondents equitably
2. Title IX personnel cannot have a conflict of interest or bias
3. Presumption that respondent is not responsible
4. Reasonably prompt timeframes for major stages of grievance procedures
5. Reasonable steps to protect privacy of witnesses and parties but not restrict the ability of parties to obtain and present evidence
6. Objective evaluation of all relevant evidence, both exculpatory or inculpatory
7. Exclusion of certain impermissible evidence
  - Certain privileged medical or psychologist evidence (unless waiver)
  - Evidence relating to the complainant's past sexual interests/conduct (some exceptions)

# Title IX Personnel

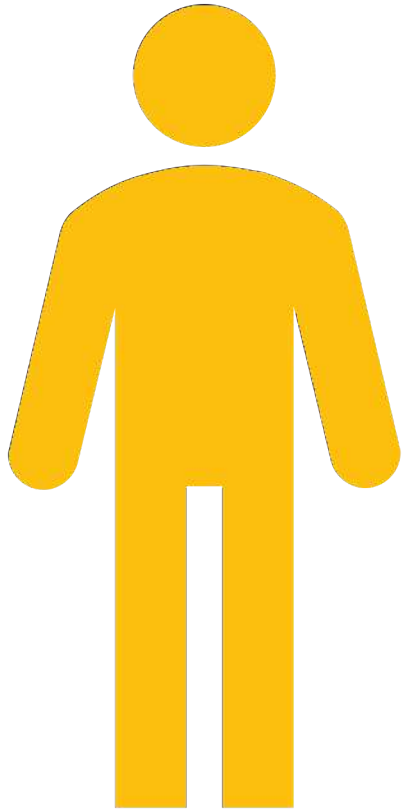


# Investigator-Decisionmaker Casting Options: 2020 Rules



The **decision-maker(s)**, who cannot be the same person(s) as the **Title IX Coordinator** or the **investigator(s)**, must issue a written determination regarding responsibility.

# Appeal Officer

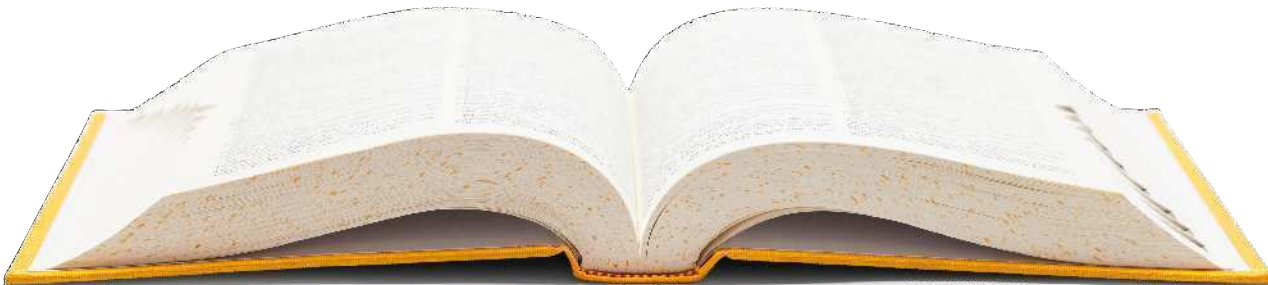


- ▶ Appeal officers are your decisionmakers on appeal
- ▶ Appeal officers cannot have served as the investigator or decisionmaker, or otherwise been involved in the investigation or decisionmaking process
- ▶ They can hear:
  - appeals of dismissal decisions, and
  - appeals of determinations



A student or employee who is alleged to have been subjected to conduct that could constitute sexual harassment under Title IX or this part

- ▶ Even if report made by a third party
- ▶ Even if Title IX Coordinator initiates the grievance process
- ▶ The complainant must be participating or attempting to participate in the recipient's education program or activity at the time the complaint is filed



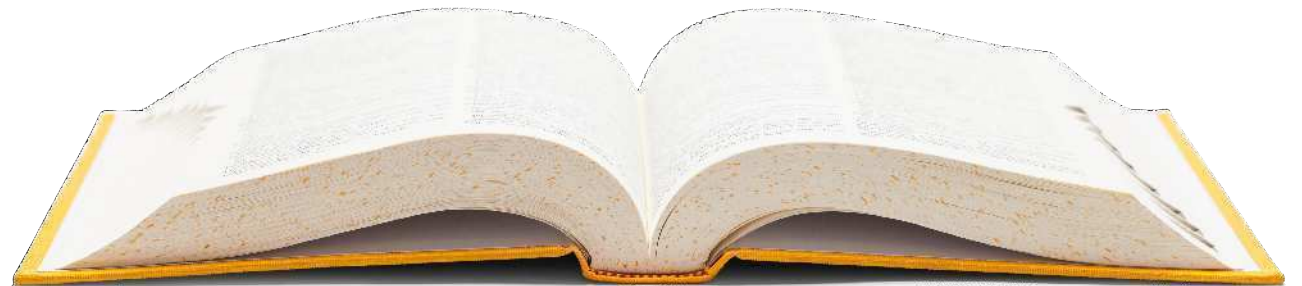
## Key Terms

# Complainant

## Key Terms

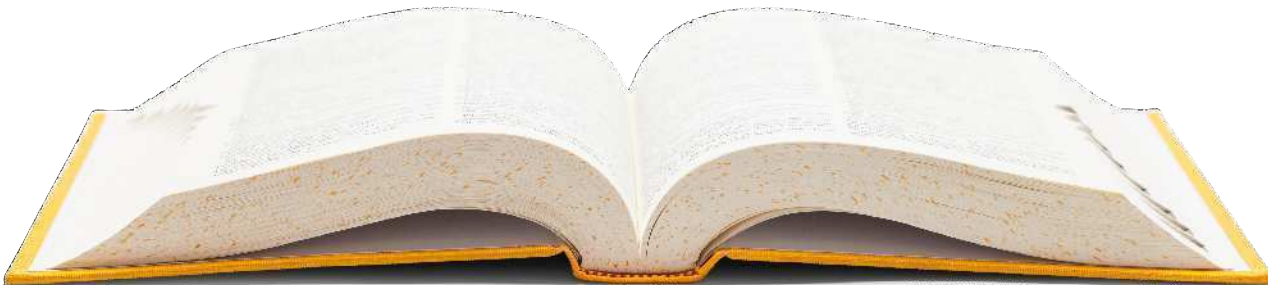
# Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment



A document

- ▶ Filed by a complainant or signed by the Title IX Coordinator
- ▶ Alleging sexual harassment against a respondent
- ▶ Requesting that the school investigate the allegation of sexual harassment

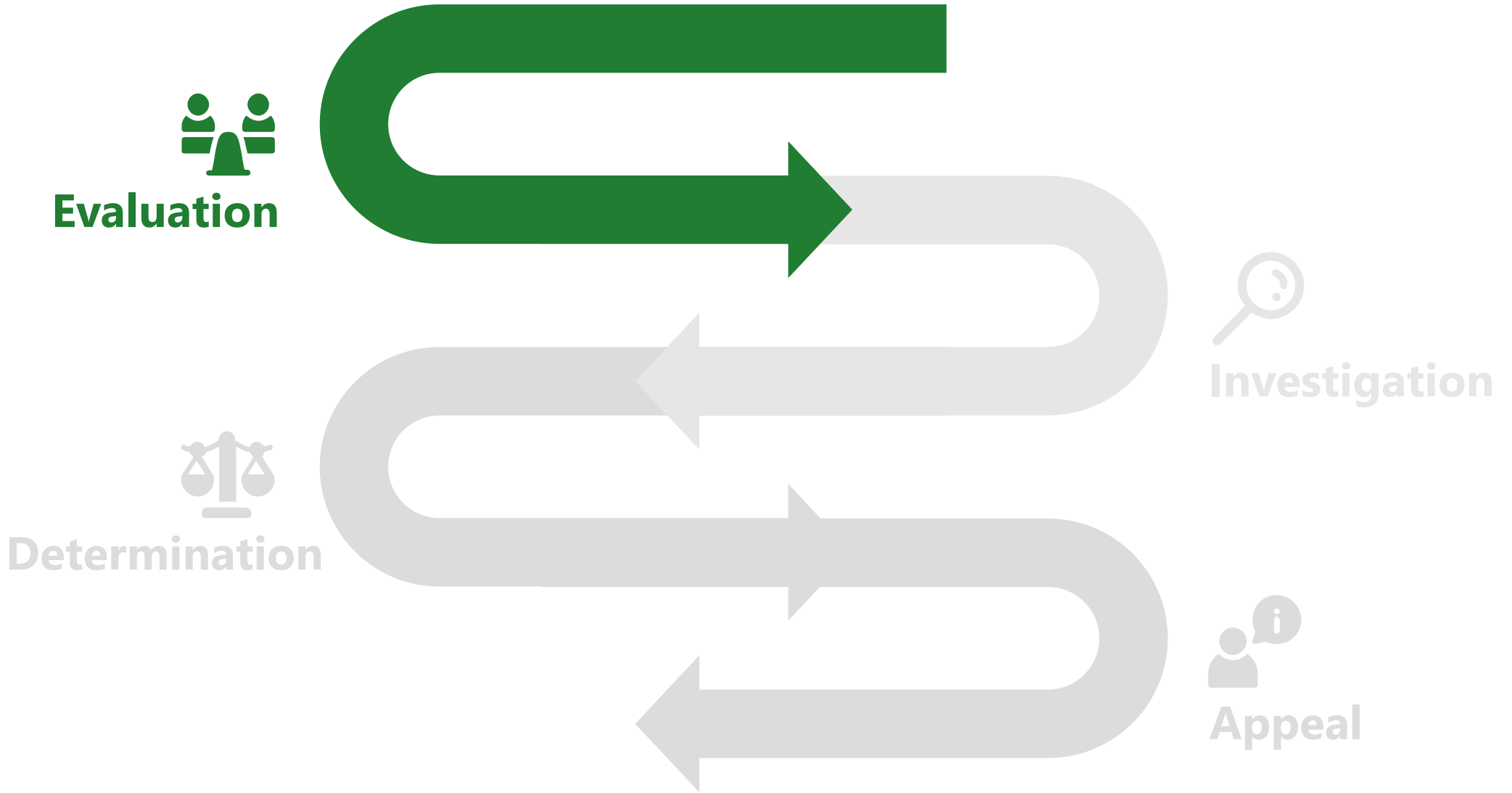


Key Terms

# Formal Complaint



# Stage One: Evaluation





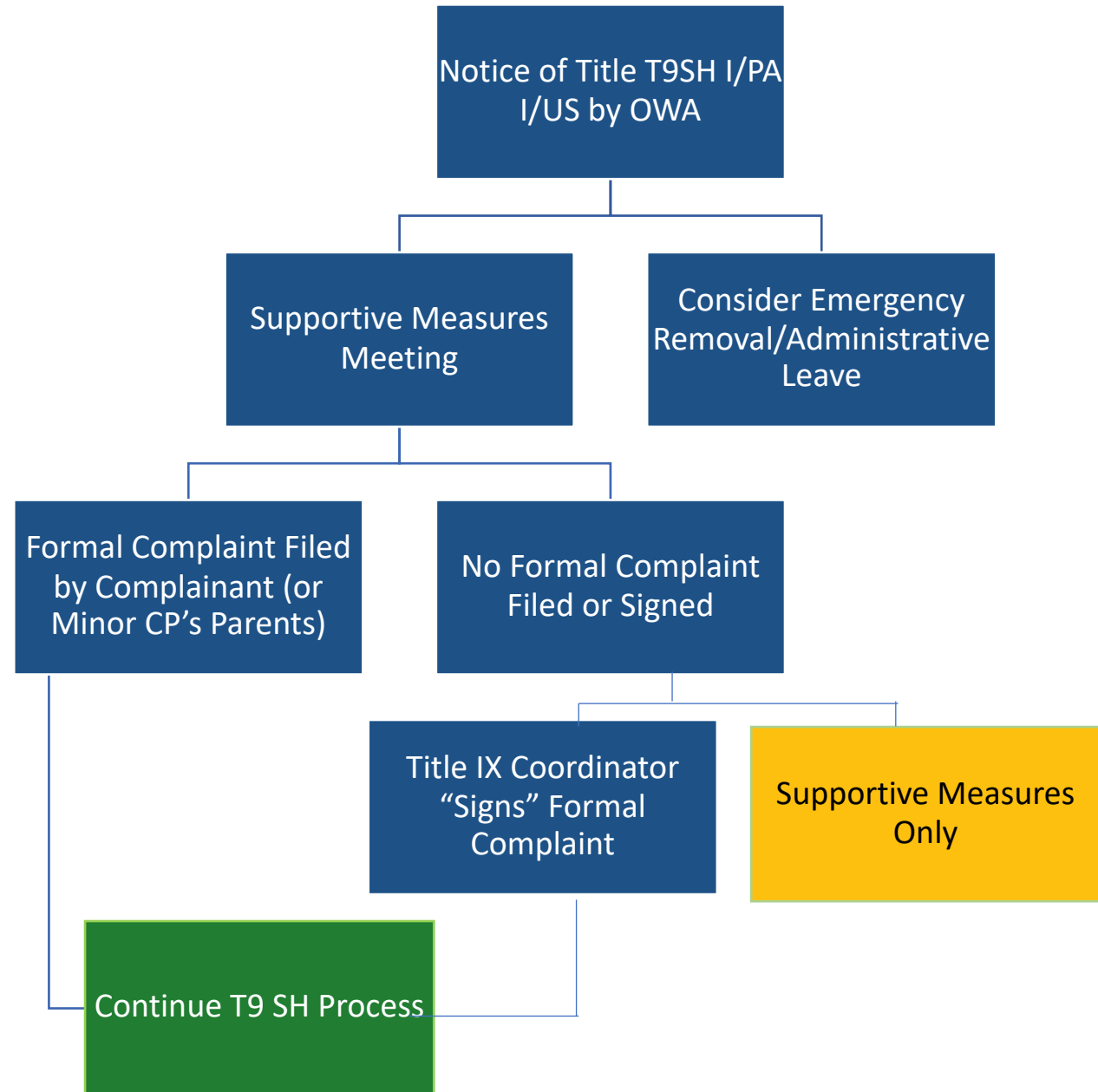
**Only move to Next  
Step if you have a  
Formal Complaint**

**– NO DISCIPLINE  
WITHOUT A FORMAL  
COMPLAINT–**

**But support, support,  
support**



# Do You Keep Going?



# Notice of Allegations

The Notice of Allegations (NOA) must include **all the relevant details**:

- ▶ Identities of the parties involved in the incident, if known
- ▶ Conduct allegedly constituting sexual harassment
- ▶ Date and location of the alleged incident, if known

**This notice is required before you first meet with the Respondent.**



# Notice of Allegations

## Loss of Anonymity for the Complainant Once the Process Starts

- ▶ Once a formal complaint has been filed or signed, the institution must share the Complainant's name with the Respondent (anonymity is not an option)
- ▶ Before a formal complaint is filed, you cannot share the Complainant's name, including with the Respondent, without permission or unless necessary to implement supportive measures
- ▶ Explain this to the Complainant during the supportive measures meeting so they know the consequences of filing a formal complaint



# Notice of Allegations

Must provide each known party written notice of:

- ▶ The institution's grievance process;
- ▶ The allegations of sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview;
- ▶ A presumption of non-responsibility;
- ▶ The right to inspect and review evidence;
- ▶ The right to have an advisor during the process; and
- ▶ Any provision in the institution's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process



# Mandatory Dismissals: Do I use Title IX?



Is it Title IX sexual harassment?



# **Mandatory Dismissals: Do I use Title IX?**



**Is it Title IX sexual harassment?**



**Did the harassment occur in an education program or activity?**





# **Mandatory Dismissals: Do I use Title IX?**



**Is it Title IX sexual harassment?**






**Did the harassment occur in an education program or activity?**



**Was it in the United States?**



# Mandatory Dismissals: Do I use Title IX?

	Is it Title IX sexual harassment?
	Did the harassment occur in an education program or activity?
	Was it in the United States?



**Title IX  
Grievance  
Process**



# Mandatory Dismissals: Do I use Title IX?



Is it Title IX sexual harassment?

**No**

Did the harassment occur in an education program or activity?



Was it in the United States?



# Mandatory Dismissals: Do I use Title IX?



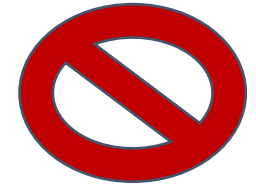
Is it Title IX sexual harassment?

**No**

Did the harassment occur in an education program or activity?



Was it in the United States?



If answer to **any question** is **NO**, it is a **mandatory dismissal**

**Use process for other misconduct**



# What should I do if I receive a report of harassment that does not fit within the Title IX Process?

- ✓ Support
- ✓ Support
- ✓ Support
- ✓ Consider other policies and codes of conduct that may have been violated
- ✓ Remember: conduct that begins outside of the US or outside of your program or activity may continue into the education program or activity (“downstream effects”)

# Permissive Dismissal

1

The complainant withdraws the complaint or allegations in writing

2

The respondent is no longer enrolled or employed by the college

3

Specific circumstances prevent the college from gathering sufficient evidence



# Dismissal: Scenario 1

Veronica files a Title IX formal complaint alleging that she was drugged and raped at a private party over the summer.



# Dismissal: Scenario 2

Title IX Coordinator receives a report from choir/glee club teacher Will Schuester that student Quinn Fabray had come to class with what looked like significant bruising on her arms. Mr. Schuester believed Finn Hudson, who Quinn was dating, may have caused the bruising. When the Title IX Coordinator contacts Quinn for intake, Quinn denies Finn hurt her in any way. But a few days later Quinn files a formal Title IX complaint. The Title IX Coordinator puts supportive measures in place, including a no contact order. A week later, Quinn tells the Title IX Coordinator that she is no longer dating Finn, and the no contact order is effective. Quinn would like to withdraw the complaint.





# Dismissal Scenario 3

- ▶ Kelly Kapowski reports that a male student at Bayside College tried to sexually assault her in the gymnasium after her cheer practice when no one was around. She files a Title IX complaint.
- ▶ When the Title IX Coordinator sends a notice of allegations to the respondent, the email bounces back. The Coordinator pulls up his records and determines that the respondent has withdrawn from Bayside College.
- ▶ What should the Title IX Coordinator do?



# Appeal of Dismissal

## Who

- Any party can appeal a dismissal

## Why?

- Based on
  - procedural irregularity
  - new evidence
  - bias/conflict of interest
- That would change the outcome

## Appeal Decisionmaker

- Cannot be someone involved in the investigation or dismissal of complaint
- Must be trained

## Steps

- Notify parties when appeal is filed
- Implement appeal procedures equally for the parties
- Give parties a reasonable and equal opportunity to make a statement in support of or challenging the dismissal
- Notify all parties of result of appeal and rationale for the outcome

# Impact of Dismissal

## MANDATORY

## PERMISSIVE

Alleged conduct, if proved, would not be Title IX sexual harassment

Complainant asks Title IX Coordinator in writing to withdraw complaint

Alleged conduct, if proved, would not be in an educational program or activity

The respondent's enrollment or employment ends

Alleged conduct, if proved, would not be against a person in the U.S.

Circumstances prevent gathering sufficient evidence to reach a determination (non-cooperation by complainant, length of time between incident and complaint, etc.)

**Can use another policy or code of conduct**

**Cannot use another policy or code of conduct**



# Consolidation

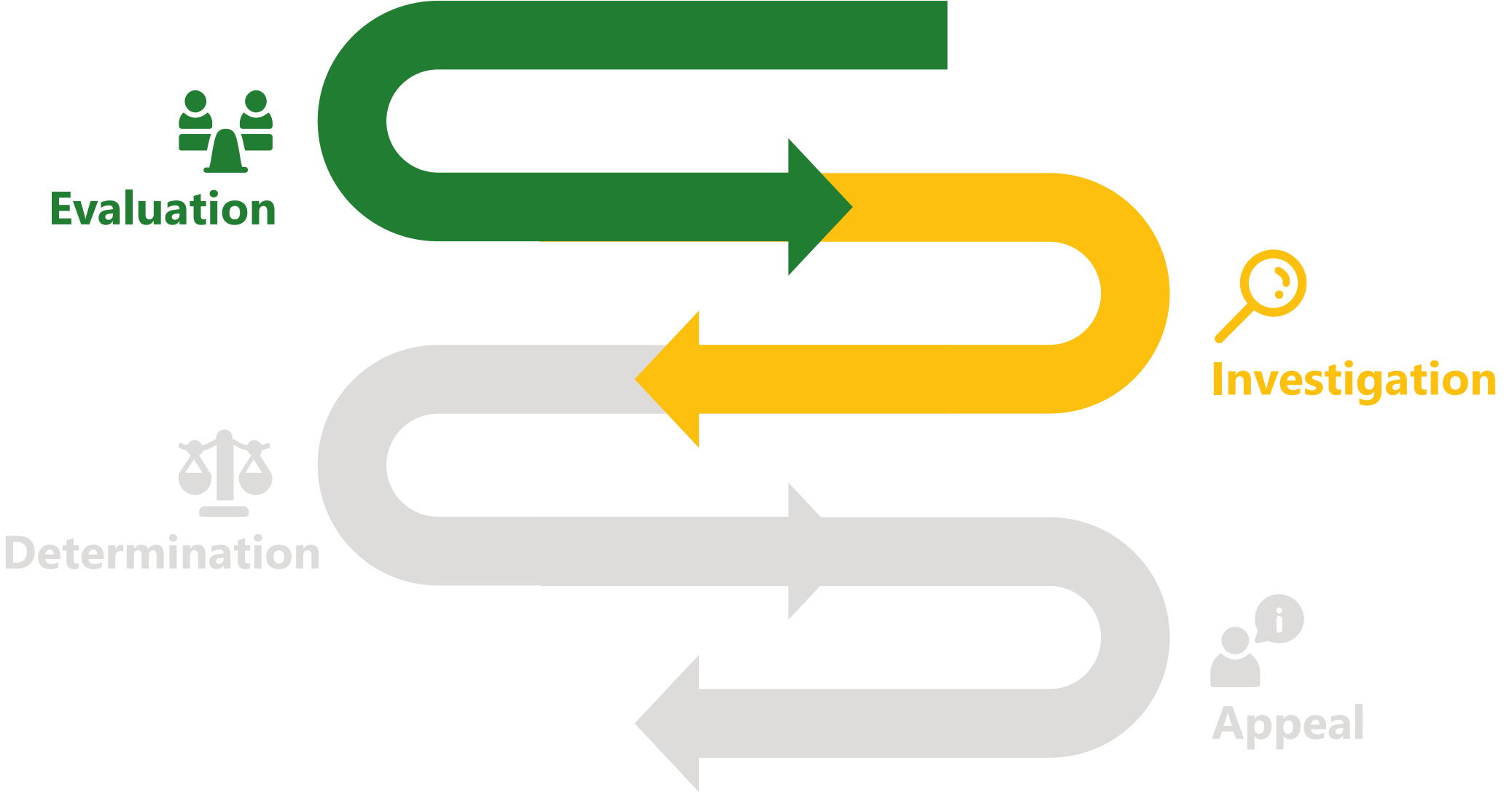
- ▶ Consider consolidation if multiple complaints arise from the same facts or circumstances:
  - Against more than one respondent
  - By more than one complainant against one or more respondents
  - By one party against the other party (cross-complaints)
- ▶ Consider:
  - Burden of separate grievance processes on the parties
  - Risks to the fairness of the investigation or outcome
  - Privacy rights of any student party
- ▶ Alternative: consolidate complaints for investigation but provide individual investigation reports and hearings

Taylor, a student, reports that another student, Charlie, was sexually harassed by a faculty member, Dr. Rowan. Taylor also says another student, Casey, was in a similar situation the previous year. Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.

The Title IX Coordinator signs formal complaints. Charlie and Casey agree to participate in the process. Neither knows the other exists, however. The incidents happened years apart.



# Stage Two: Investigation



# Key Investigation Principles

- ▶ Thorough
- ▶ Prompt
- ▶ Impartial
- ▶ Fair



# Notice of Allegations: Impact on Investigation

- ✓ Notice of Allegations to the Respondent is required before the school meets with the respondent for an interview
- ✓ If there is not a Notice of Allegations, make sure one is sent before you do anything else in the investigation
- ✓ If you learn of new allegations, make sure a supplemental NOA goes out
- ✓ Supportive measures should have been offered to the parties by this time, as well—verify with the Title IX Coordinator so you can help keep an eye on supportive measures during the investigations





# Investigator Tip

- ▶ The Notice of Allegations is your “roadmap” to your investigation
- ▶ Make sure you understand the allegations and the elements necessary to prove them





# Planning the Investigation

- ▶ What are the issues and facts in dispute?
- ▶ Who will you interview and in what order?
- ▶ Is there physical evidence to preserve or obtain?
- ▶ What other evidence might be helpful? How can you get it? Consider: What information do you need to obtain to allow the decisionmaker to answer the key questions and make a reliable determination

# Gather Relevant Evidence

- ▶ Relevant is not defined in the rules
  - Does the evidence apply or relate to a “fact” or “issue” in this matter?
  - Is the fact or issue in dispute?
  - Does the evidence make the fact or issue more or less likely to be true?
  - Includes both inculpatory and exculpatory evidence
- ▶ Statements, notes of interviews, and other evidence collected in the investigation (including drafts)
- ▶ Audio and video recordings of interviews
- ▶ May include evidence the school doesn't think it will use



# Relevant Evidence



## Inculpatory Evidence

- ▶ Favorable to complainant
- ▶ Evidence that shows or tends to support the allegations of sexual harassment and/or the respondent's involvement in the allegations to establish responsibility

## Exculpatory Evidence

- ▶ Favorable to the respondent
- ▶ Evidence that exonerates or tends to show the respondent is not responsible for the allegations of sexual harassment

# Make sure the decisionmaker will have all pieces of the puzzle

- ▶ Burden of proof is on the college
- ▶ Build a chronology. What is the narrative? Are there gaps in that narrative? How will you fill them?
- ▶ How would you decide the disputed issues of fact? Do you have what you need to do so?
- ▶ How would you decide **each element** of the type of sexual harassment alleged? Do you have the information you need to make a reliable determination?



# Not Relevant

- ▶ Evidence protected by a legal privilege
- ▶ Health care treatment records

**MUST OBTAIN WAIVER!**

- ▶ Complainant's sexual predisposition, or prior sexual behavior (unless exception)

Impermissible evidence must not be considered (except to determine exception) and must not be disclosed or used

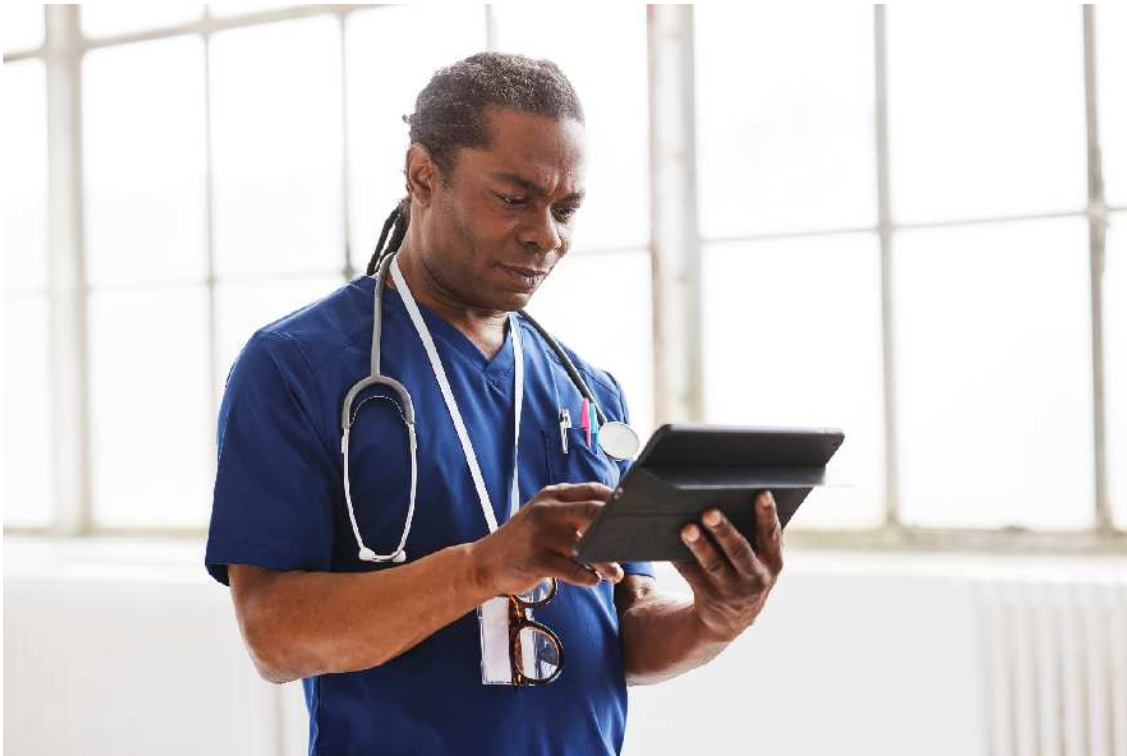


# Privileged Information

- ▶ Information protected by a recognized federal or state law, such as attorney-client privilege, doctor-patient privilege, or spousal privilege may not be sought, used, or relied on
- ▶ Unless the person holding the privilege has waived it



# Healthcare Treatment Records



- ▶ Healthcare treatment records made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment may not be accessed, considered, or used
- ▶ Unless the student provides voluntary written consent
- ▶ Medical records previously provided to the school related to an ADA or pregnancy accommodation become student records and are not impermissible



# Complainant's Sexual Predisposition and Prior Sexual Behavior

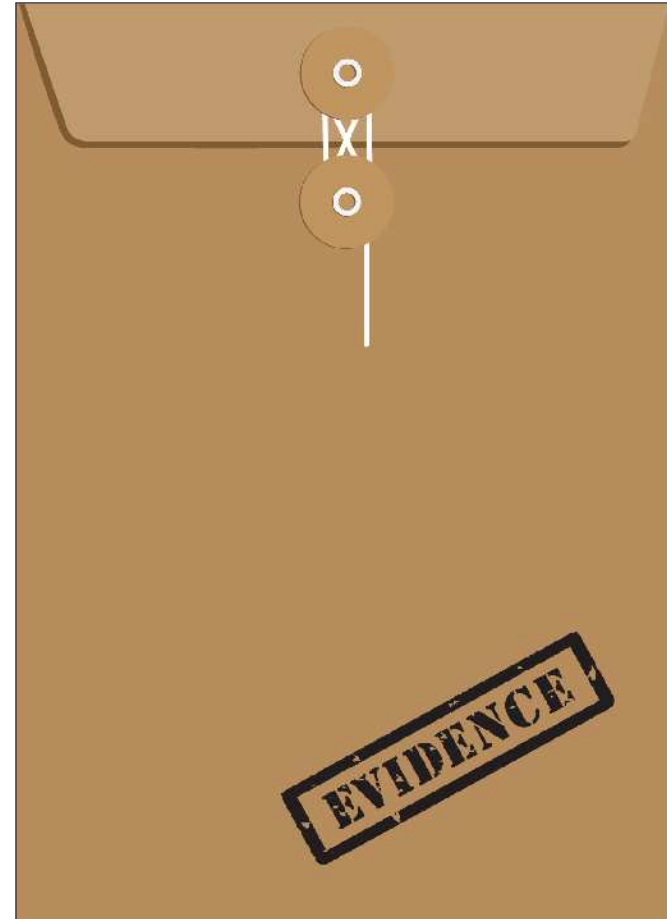
- ▶ Questions and evidence related to a complainant's sexual predisposition or prior sexual behavior are **impermissible** and may not be asked or sought
- ▶ Exceptions: Evidence related to the complainant's prior sexual behavior
  - Offered to show someone other than the respondent committed the alleged conduct
  - Related to the sexual behavior between the complainant and respondent and offered to prove consent
- ▶ **However**, the fact of prior sexual conduct between the parties does not, by itself, demonstrate or imply the complainant's consent to the alleged sex-based harassment



# Types of Evidence

- ▶ Direct Evidence
- ▶ Circumstantial Evidence
- ▶ Hearsay

Rumor / innuendo (NOT evidence)



# Direct Evidence

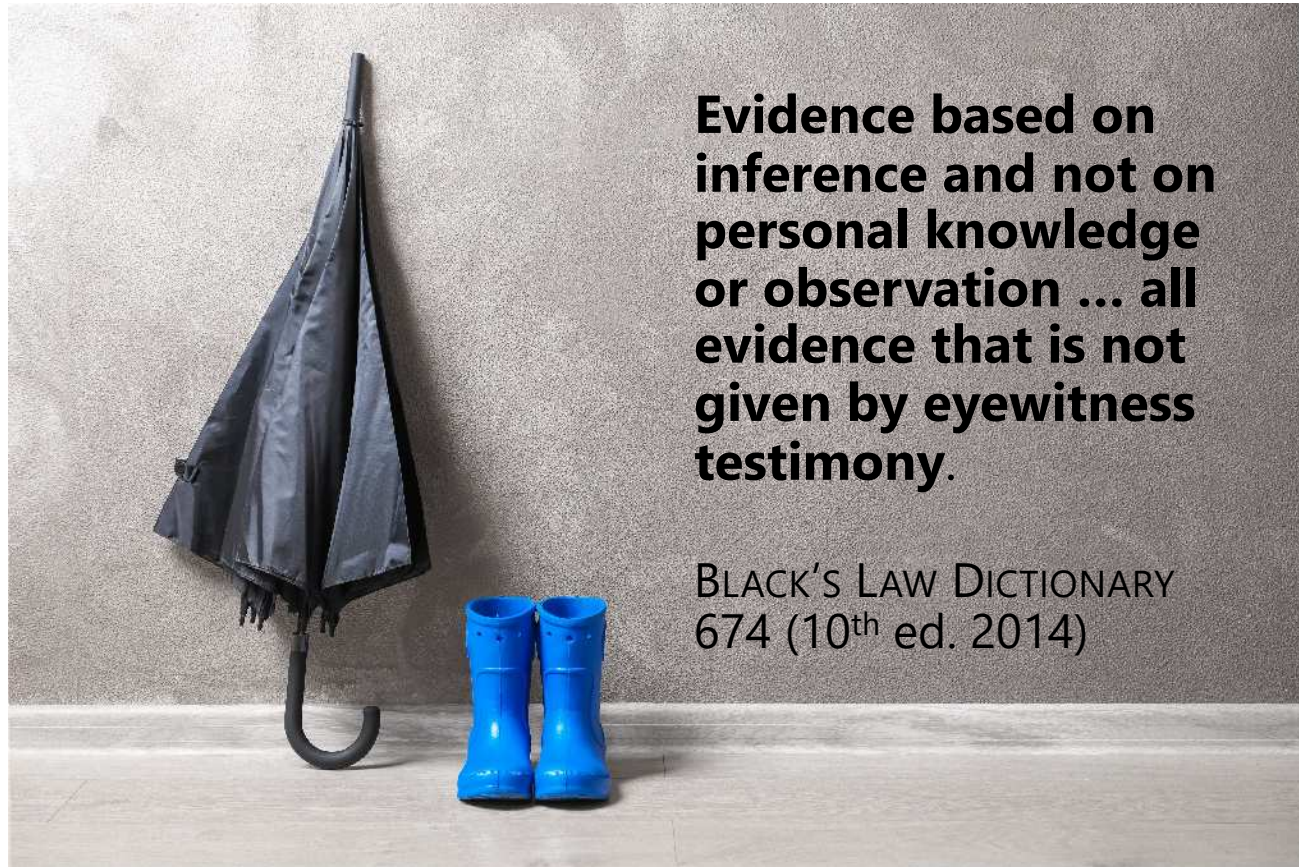
Evidence that is based on personal knowledge or observation and that, if true, proves a fact **without inference or presumption**.

BLACK'S LAW DICTIONARY 675 (10<sup>th</sup> ed. 2014)

- ▶ What a witness directly experienced
- ▶ Eyewitness testimony
- ▶ Admissions—written or oral
- ▶ Surveillance tape or cell phone video captures the incident



# Circumstantial Evidence



**Evidence based on inference and not on personal knowledge or observation ... all evidence that is not given by eyewitness testimony.**

BLACK'S LAW DICTIONARY  
674 (10<sup>th</sup> ed. 2014)



# Hearsay Evidence

"A statement (oral or written) made by someone not while testifying and that is offered to prove the truth of the matter asserted in the statement.

Fed. R. Evid. 801(c)



# Sources of Evidence

- ▶ Testimony
- ▶ Documents
- ▶ Education records
- ▶ Campus files
- ▶ Personnel files
- ▶ Investigation records
- ▶ Student files
- ▶ Police Reports
- ▶ Emails
- ▶ Handwritten notes
- ▶ Calendars
- ▶ Photographs
- ▶ Videos
- ▶ Text & instant messages
- ▶ Social media posts
- ▶ Other electronic files/ cloud storage
- ▶ Journal entries
- ▶ Medical records (ONLY with written consent)
- ▶ **Interviews**



# Before Interviews

College must provide the parties written notice of the date, time, location, participants, and purpose of **all investigative interviews or other meetings** with sufficient time to prepare



# Sharing the Evidence

- The parties must be given at least 10 days to review the directly evidence and submit written responses about the evidence to the investigator
  - Includes evidence the school doesn't think it will use
- The investigator must consider the responses when writing the investigative report





# Response to the Evidence



ASK  
YOURSELF

- ▶ Did either party identify evidence that was absent or not gathered?
- ▶ Did either party identify new witnesses or new evidence?
- ▶ Did either party point out inconsistencies in the evidence?
- ▶ Did either party raise concerns regarding the relevance of the evidence?



# Investigation Report

- ▶ The report must summarize all “relevant evidence”
- ▶ Investigator can (and should) begin drafting the report during the 10-day DRE period
- ▶ The report must be shared with the parties who have 10 days to respond before the hearing



# Prevent Disclosure

- ▶ Take reasonable steps to protect the privacy of parties and witnesses during the grievance process
- ▶ Take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance process



# Except...

- ▶ Do not restrict the ability of parties to obtain evidence, speak to witnesses, or consult family members, advisors, or confidential resources
- ▶ Disclosures for purposes of administrative proceedings or litigation related to the allegations are authorized



# Credibility Determinations



CREDIBILITY

The investigator does not make findings regarding credibility, but the investigator should include information related to credibility in the investigative report to help the decisionmaker assess credibility and reach a reliable determination that the respondent is or is not responsible for the alleged sexual harassment.



# Credibility Factors

**Decisionmaker determines credibility of the parties and witnesses.**

- ▶ **Corroborative evidence**
- ▶ **Contradictory evidence**
- ▶ Motive or interest in outcome
- ▶ Body language and demeanor
- ▶ Specific details
- ▶ Reasonableness of testimony / plausibility
- ▶ Memory (impact of time, outside influence, trauma, intoxicant)
- ▶ Bias or prejudice
- ▶ Internal consistency
- ▶ Other factors of believability



# Police Involvement

- ▶ The college must conduct its Title IX investigation in a “reasonably prompt” manner but may temporarily delay the investigation for good cause, which may include concurrent law enforcement activity
- ▶ No long or indefinite delay or extension of timeframes, regardless of whether a concurrent law enforcement investigation is still pending



# Police Evidence?

- ▶ Police evidence may be useful for *initial* fact-gathering
- ▶ They **are not** a substitute for your own required investigation
- ▶ The standards for and purposes of criminal investigations are different from school investigations
- ▶ Police investigations or reports are not determinative and you need your own evidence-gathering to determine whether there was Title IX sexual harassment or whether the respondent is responsible





# Investigator Dos and Don'ts



## DOs

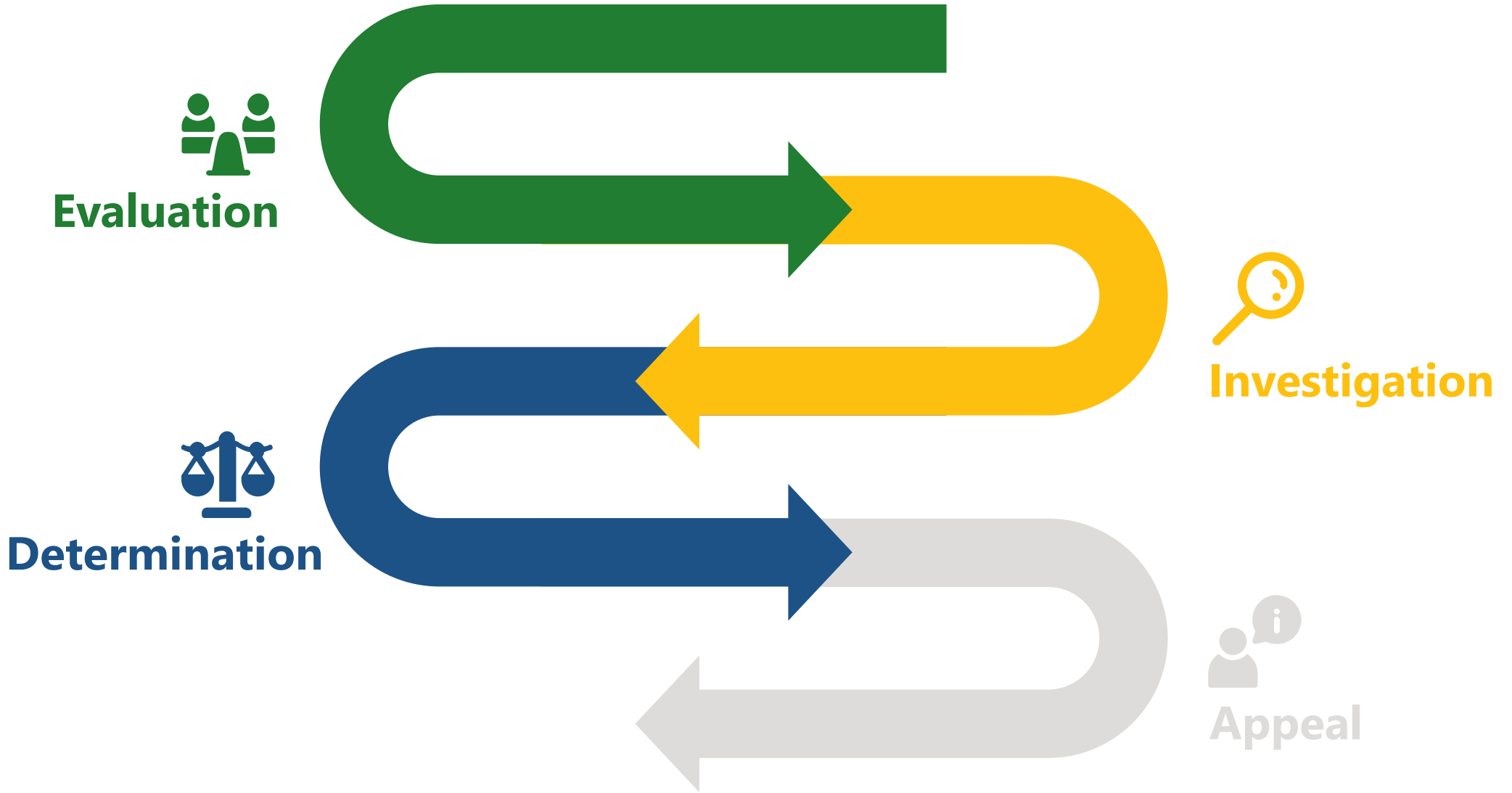
- ✓ Ensure you have no conflict of interest or bias and remain impartial
- ✓ Treat all parties equitably
- ✓ Provide an equal opportunity to the parties to present evidence and witnesses
- ✓ Objectively evaluate all evidence for relevance
- ✓ Know the elements and definitions of the type of alleged sexual harassment and identify the key factual issues
- ✓ Conduct a complete and thorough investigation, identify and address any gaps
- ✓ Ensure your investigation report is thorough and accurate



## DON'Ts

- × Conduct surprise interviews
- × Discriminate in the investigation or rely on stereotypes or preconceived notions
- × Delay or extend the investigation timeline absent good cause
- × Restrict the parties' ability to discuss allegations or gather evidence
- × Shy away from asking tough questions
- × Be accusatory or argumentative
- × Seek or use impermissible evidence, unless there is a waiver or applicable exception
- × Violate the parties' confidentiality

# Stage Three: Determination



# Notice of Hearing



- ▶ Send notice of hearing to the parties including date, time, location, purpose, and individuals who will be present
- ▶ Highly recommended to have a pre-hearing conference to work out logistics and possible early rulings on evidence (provide notice of the prehearing conference)



# Hearing Requirements

- ▶ Must be live
  - Can be in person or virtual
  - If offered in person, must provide videoconference if requested
- ▶ Must include live cross examination by an advisor
  - Must provide advisors to parties without one
  - No direct questioning by parties
- ▶ Ruling on relevance of each question; remember exceptions:
  - Medical treatment records
  - Privileged information
  - Information about the complainant's past sexual history or predisposition
- ▶ Must be audio or audio-visually recorded or transcribed



# Hearing Considerations

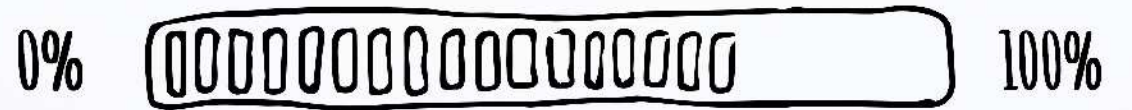
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- ▶ In-Person or Virtual?
- ▶ Hearing steps
  - ▶ Allow direct exam? From advisor or only hearing officer?
  - ▶ Who questions first?
  - ▶ Who does opening/closing statements?
- ▶ Advisor expectations
- ▶ Any other attendees? Institutional representative? Support person(s)?



# Determination

- ▶ If not persuaded by the evidence (under the applicable standard and whatever the quantity of evidence may be) that sexual harassment occurred, the decisionmaker must not determine that sexual harassment occurred



- ✓ Identify the allegations potentially constituting sexual harassment
- ✓ Describe procedural steps taken from the receipt of the formal complaint through the determination
- ✓ Findings of fact supporting the determination

## **Written Determination Requirements #1 - #3**

# Findings of Fact

- ▶ Identify the undisputed facts related to an issue
- ▶ Identify the first disputed fact related to an issue
  - ▶ Explain your conclusion as to what happened with the first disputed fact
  - ▶ Explain your reasoning for reaching that conclusion including credibility determinations
- ▶ Move to the next disputed fact
- ▶ Decide the overall issue
- ▶ Repeat for any other disputed issues







# Standard of Proof

---

- ▶ Preponderance of Evidence:  
**Probability of Truth > 50%**
- ▶ Applies to both findings of fact and the overall question of responsibility
- ▶ For findings of fact, ask if there is sufficient evidence to find that it is more likely than not that a disputed fact is true
- ▶ Once you have “found” all your facts, look at them as a whole to decide if it is more likely than not that a policy violation occurred



**CONCLUSION**

- ✓ Conclusions regarding the application of the educational institution's code of conduct to the facts
- ✓ A statement of, and rationale for, the result as to each allegation
- ✓ Process for Appeal
- ✓ Provide the written determination to the parties simultaneously

## **Written Determination Requirements #4-#7**

# Applying the Code

- ▶ The Title IX Coordinator should have previously determined that the conduct alleged, if true, is covered by Title IX
- ▶ However, the written determination must include the analysis of the conduct established
- ▶ Remember to make findings with respect to each element of the alleged misconduct
- ▶ Refer to definitions in the policy



# Results



- ▶ A determination regarding responsibility
  - ▶ The reasons for the determination
- ▶ A list of sanctions imposed on the respondent
  - ▶ The reasons for the sanctions
- ▶ Whether remedies provided to the complainant (do not list; communicate privately to the complainant)
  - ▶ The reasons for the remedies

# What about FERPA?



- ▶ OCR states that sharing the result as to each allegation including a list of sanctions is permitted by FERPA because sanctions “always directly impact the victim”
- ▶ Remedies do not directly affect the respondent so should be communicated separately to the Complainant



# Decisionmaker Dos and Don'ts



## DOs

- ✓ Explain the process to parties and advisors
- ✓ Assume respondent is not responsible
- ✓ Exercise independent judgment and objectively evaluate all relevant evidence
- ✓ Follow your grievance procedure
- ✓ Make credibility determinations and evaluate the weight of the evidence using preponderance standard
- ✓ Make a clear determination regarding whether the respondent violated the school's policies



## DON'Ts

- × Prejudge the facts or rush to judgment
- × Consider impermissible evidence unless a waiver or exception applies
- × Rely on stereotypes or preconceived notions when making credibility determinations or weighing the evidence
- × Delay or extend the decision timeline absent good cause
- × Neglect to provide the rationale for the determination

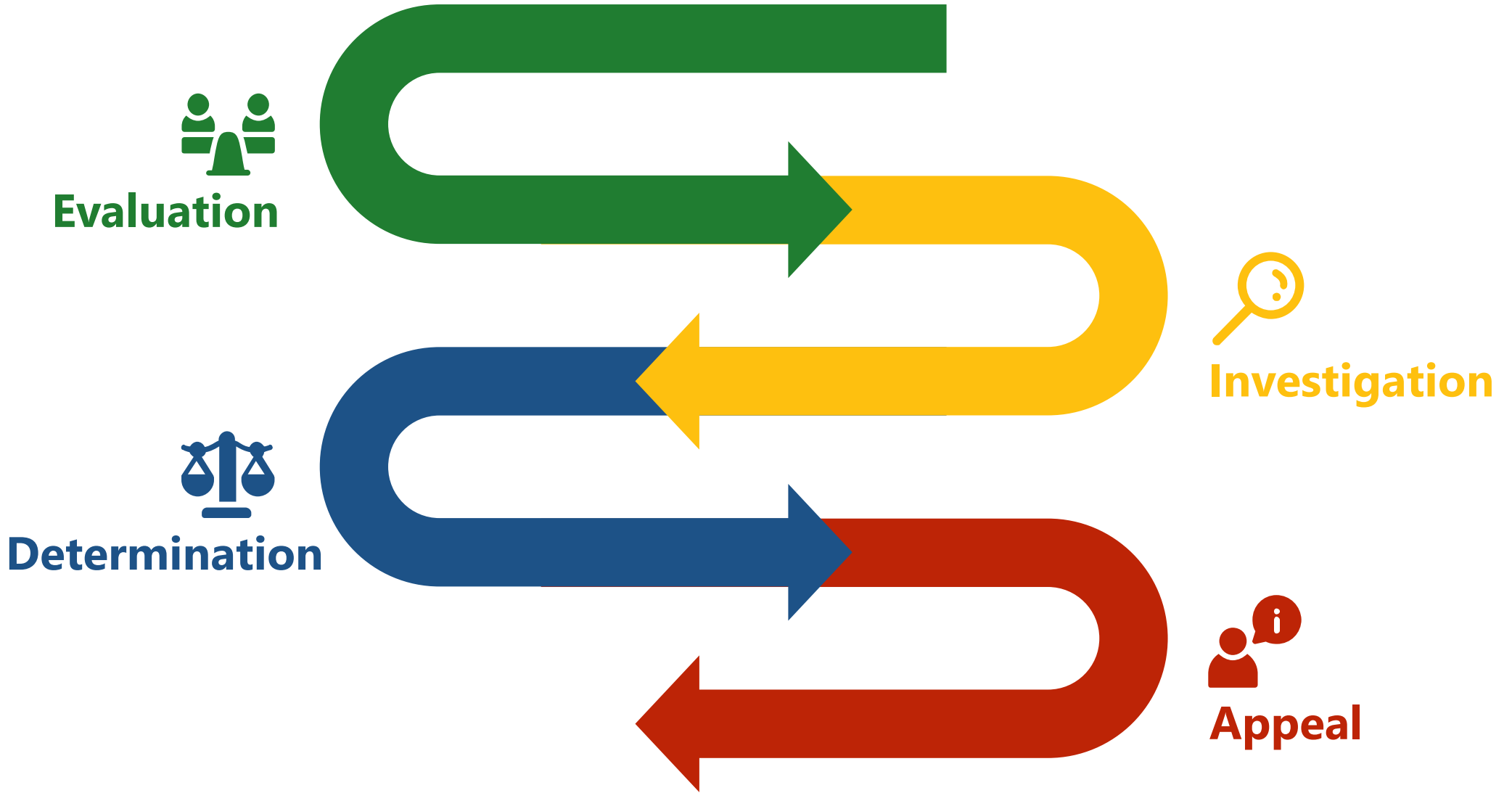
# Determination & Discipline

- ▶ Complete the investigation and determination before the imposition of any disciplinary sanctions against a respondent
- ▶ Do not discipline a party, witness, or others participating in the grievance process for making a false statement or for engaging in consensual sexual conduct based solely on the determination of whether sexual harassment occurred





# Step Four: Appeal



# Appeal of Determination

## Who

- Any party can appeal a determination

## Why?

- Based on
  - procedural irregularity that affected the outcome
  - new evidence not available at the time of the determination that could affect the outcome
  - bias/conflict of interest that affected the outcome

## Appeal Decisionmaker

- Cannot be someone involved in the investigation or determination of complaint
- Must be trained

## Steps

- Notify parties when appeal is filed
- Implement appeal procedures equally for the parties
- Give parties a reasonable and equal opportunity to make a statement in support of or challenging the determination
- Notify all parties of result of appeal and rationale for the outcome

# #1 Review File

- ▶ Review all material provided by the Title IX Coordinator
- ▶ Create a checklist to ensure all steps in the process are met and to document compliance
- ▶ Appeals are not de novo
- ▶ Confine the review to the record + appeal documents



# #2 Verify Impartially

The Title IX regulations require that any individual involved in the Title IX process—Title IX Coordinator, investigator, decisionmaker, appellate decisionmaker, or informal resolution facilitator—not be biased, have a conflict of interest, or prejudge any matter before them



# #3 Determine Validity of Appeal

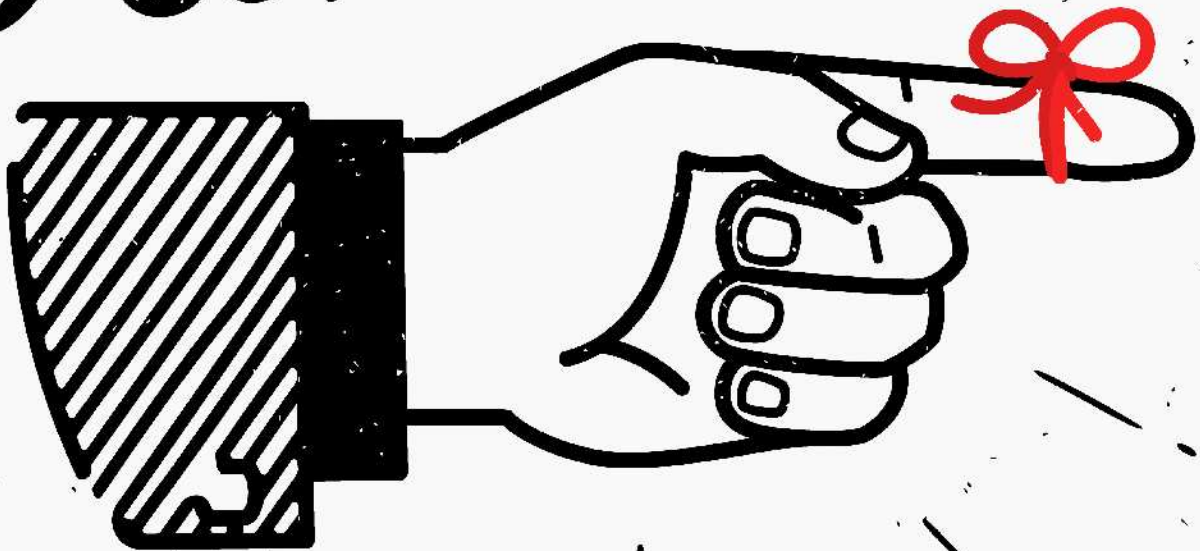
Bases for appeals:

1. A **procedural irregularity** that affected the outcome
2. **Newly discovered evidence** that could affect the outcome
3. Title IX personnel had a **conflict of interest or bias** that affected the outcome
4. Other bases offered by the college (must be offered equally)



# Evaluation

# Reminder



- ▶ Evaluation just considers whether a valid appeal basis is being raised
- ▶ It does not address the “weight” of the argument (how persuasive it is)



# #4 Notify the Parties

- ▶ Must notify both parties of appeal in writing
  - ▶ Can be from the Title IX Coordinator
- ▶ Must provide the parties equal opportunity to submit written statements for or against the appeal
  - ▶ Consider using an appeal form that requests “just the facts”
  - ▶ Then request a written statement from both parties
  - ▶ Avoids the appealing party feeling cheated that they did not get to respond the responding party’s appeal statement



# #5 Stick to Timeframes

- ▶ Grievance process must include reasonably prompt time frames, including for filing and resolving appeals
- ▶ You can temporarily delay time frames for the grievance process temporarily for good cause with written notice – needs to be in process
- ▶ Must provide written notice of delay to all parties (complainants & respondents)
  - ▶ Must include reason for and length of delay
- ▶ When deciding whether to grant a delay or extension, consider the interests of:
  - ▶ Promptness
  - ▶ Fairness to the parties
  - ▶ Accuracy of adjudications





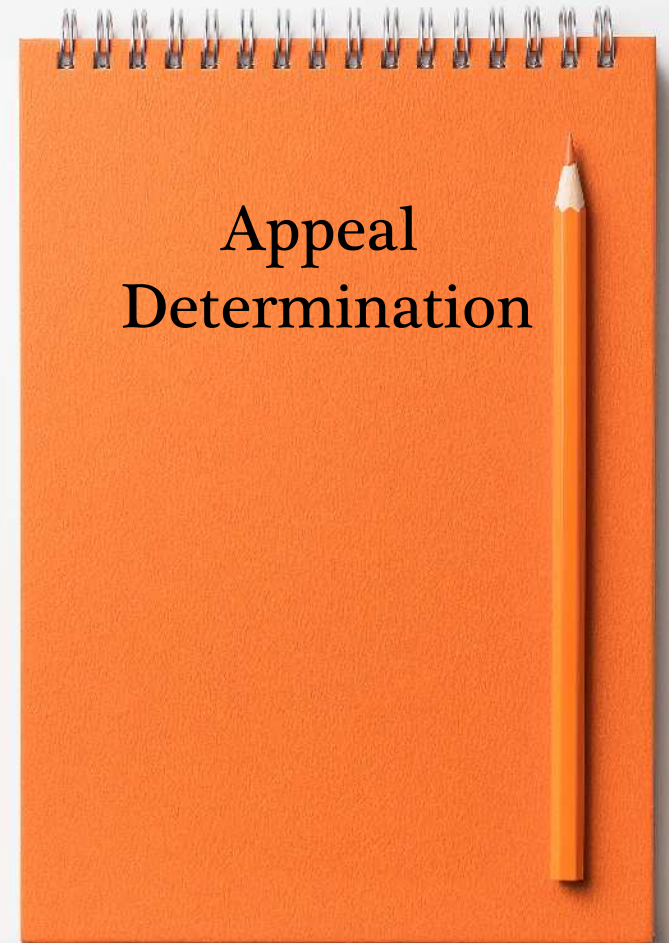
# #6 Analyze Appeal

- ▶ This is where you consider the “weight” of the arguments made in the appeal
- ▶ Make sure to consider arguments raised by both sides
- ▶ Typical appeal issues:
  - ▶ Dismissals
  - ▶ Second-Guessing
  - ▶ New Evidence
  - ▶ Impartiality



# #7 Write Appeal Determination

- ▶ Decision Elements (suggested):
  - ▶ Introduction
  - ▶ Appeal Determination
  - ▶ Relevant Procedural Background (for timeliness)
    - ▶ Dismissal/decision date
    - ▶ Appeal date
    - ▶ Date(s) for responses to appeals
  - ▶ Standard of Review
  - ▶ Summary of Written Determination
  - ▶ Written Statements for/against appeal
  - ▶ Analysis & Decision – consider each appeal basis separately
  - ▶ Conclusion



# Analysis & Decision

- ▶ Consider all factors for/against the appeal basis/argument – SHOW YOUR WORK!
- ▶ Include policy definitions and procedural requirements
- ▶ Assess whether there is sufficient evidence of impact on the outcome
- ▶ Remember the preponderance of the evidence standard



# #8 Affirm, Reverse, or Remand

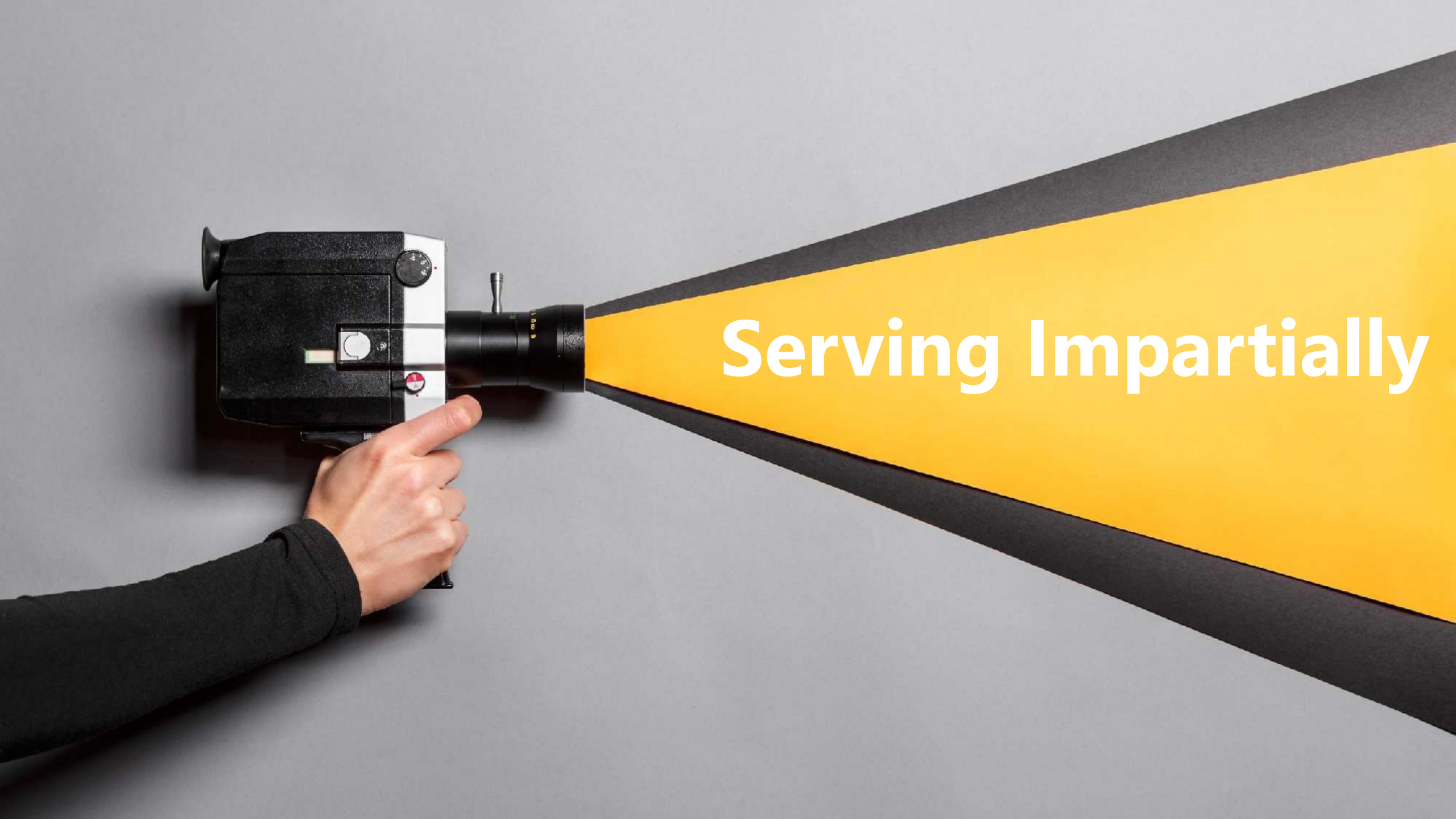
- ▶ Affirm: Where there was no error or the error could not have impacted the outcome
- ▶ Reverse: Where the appeal makes clear the decision was incorrect
- ▶ Remand: Where more information is needed, return to the investigation or determination stage (possibly with a new investigator or decisionmaker)



# Essential Extras

Serving Impartially  
Informal Resolution  
Retaliation and Discrimination  
Record Keeping





**Serving Impartially**

# Serving Impartially

The Title IX regulations require that any individual involved in the Title IX process—Title IX Coordinator, investigator, decisionmaker, appellate decisionmaker, or informal resolution facilitator—not be biased, have a conflict of interest, or prejudge any matter before them



# Bias

- ▶ “[A]n inclination of temperament or outlook, especially a personal and sometimes unreasonable judgment.”
- ▶ “[T]o give a settled and often prejudiced outlook to”...a person’s background biases them against others who are not like them
- ▶ Synonyms – nonobjectivity, one-sidedness, partiality, partisanship, prejudice

(Merriam-Webster)





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- ▶ Sex
- ▶ Race
- ▶ Ethnicity
- ▶ Sexual orientation
- ▶ Gender identity
- ▶ Disability
- ▶ Immigration status
- ▶ Financial ability
- ▶ Other characteristic



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- ▶ Disability
- ▶ Immigration status
- ▶ Financial ability
- ▶ Other characteristic
- ▶ Men are sexually aggressive and likely to sexually assault women
- ▶ Women often regret their sexual experiences and recast them as assault
- ▶ Men cannot be sexually assaulted
- ▶ The #metoo movement has led to many more false sexual assault reports by women

# Conflict of Interest

A situation in which the concerns or aims of two different parties are incompatible.

“A conflict of interest arises when what is in a person’s best interest is not in the best interest of another person or organization to which that individual owes loyalty.”

<https://ethicsunwrapped.utexas.edu/glossary/conflict-of-interest>



# Conflicts of Interest

## Clear Conflicts:

Is related to a party  
Formerly dated a key witness's parent  
Invests in a business with the complainant's parent

## Could be a Conflict:

Is respondent's coach  
Previously disciplined complainant for dishonesty

## Not an Automatic Conflict:

Has a history of speaking out on victim or accused rights  
Has published articles on a topic relevant to the matter

## Not a Conflict:

Is a College employee or attorney  
Previously investigated a Title IX claim and found for or against a complainant or respondent



# Prejudgment

**“To judge before hearing or before full and sufficient examination”**

“[A]n opinion about a situation or a person that is formed before knowing or considering all of the facts.”

*Cambridge Dictionary*

**Synonyms** – preconception, assumption, presumption/presupposition, speculation

*Merriam-Webster*



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Cambridge Dictionary

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Merriam-Webster

- A person was described as clearly upset during their interview, so you presume their recollection is credible
- A person was drinking at the time of the incident, so you presume they don't remember what happened
- A person consented to sexual behavior before, so you presume they consented this time, too





# Impartiality DOs & DON'Ts

- ▶ DO be open with the Title IX Coordinator about any concerns
- ▶ DO follow the process "to the T" and include all relevant evidence in the investigative report, written decision, and appeal decision
- ▶ DON'T not assume or infer the existence of facts or the outcome, "connect the dots," speculate, rely on personal experience or beliefs, weigh credibility (unless you are the decision-maker on the initial complaint)




# Informal Resolution



# What is Informal Resolution?

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**A voluntary, structured interaction between involved parties (complainant and respondent) to resolve the allegations without an investigation, hearing, or appeal.**



# Pros and Cons of Informal Resolution

## Pros

- ▶ Student-centered (student agency)
- ▶ Trauma-informed
- ▶ Trauma healing rather than inducing
- ▶ Reduced administrative burden
- ▶ Shorter timeframe than investigation/hearing
- ▶ Reduced stress for individuals involved
- ▶ Avoids investigation/hearing process
- ▶ Allows the parties to discuss allegations in a controlled environment
- ▶ Parties can express feelings; find closure
- ▶ Allows for creative, individualized outcomes

## Cons

- ▶ Not appropriate in all cases
- ▶ Perception that informal resolution does not provide "justice"
- ▶ An unskilled and untrained facilitator can frustrate the process

# Informal Resolution Procedures

- ▶ Schools have discretion as to how to structure the informal resolution process
- ▶ Consider addressing in written procedures:
  - ▶ When will the Title IX Coordinator offer informal resolution?
  - ▶ How will the facilitator be chosen?
  - ▶ What steps will the process follow?
  - ▶ What records will be maintained and when can they be disclosed?
  - ▶ Potential terms
  - ▶ Prompt timeframe

# Obtain Consent



- ▶ Use a standard form that includes the required notices
- ▶ Obtain signatures from parties (and parents if parties are minors)
- ▶ Make sure that parties understand information in the notice, take time to answer questions

# Institutional Agreement?

- ▶ The Rules do not require the Title IX Coordinator to approve or sign the agreement
- ▶ Practically, some terms will require implementation by the institution, such as:
  - ▶ Changed schedules
  - ▶ Written warnings and discipline
  - ▶ Provision of counseling, mentoring, training
- ▶ And the institution will monitor to ensure compliance with the agreement
- ▶ Consider including approval by the Title IX Coordinator in the IR process

# Informal Resolution Outcomes



## Written Resolution Agreement

- ▶ Final and binding on the parties
- ▶ Allegations addressed are considered resolved
- ▶ No further investigation, adjudication, remediation, discipline, or appeal



## No Resolution Agreement

- ▶ At any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution process – TIXC notifies other party
- ▶ Parties are referred back to the formal Grievance Process for investigation and determination
- ▶ Complainant may decide to withdraw the complaint



**Discrimination and  
Retaliation**



**Since 2020, we have  
been laser-focused on  
Title IX Sexual  
Harassment**



The background features a large graphic of interlocking puzzle pieces. A green piece is on the left, a yellow piece is on the right, and a red piece is at the bottom. The text is centered on the green piece.

# **Sexual Harassment**



# Grievance Process

Since 1975, the Title IX Rules have required every institution to publish a grievance procedure providing for the prompt and equitable resolution of sex discrimination complaints, including:

- ▶ Discrimination (different treatment & disparate impact)
- ▶ Failure to Accommodate, and
- ▶ Retaliation



# **Different Treatment**



# Different Treatment

**Unlawful different treatment discrimination** (sometimes called “disparate treatment”) occurs when an individual, because of their sex, is treated differently from a similarly situated person who is a different sex.

- ▶ Does not require bad faith, ill will, or evil motive
- ▶ Can be proven with direct, circumstantial, or statistical evidence



# Evaluating Differential Treatment

- ▶ Was the aggrieved person treated differently than a **similarly situated** individual who was not a member of the protected class?
- ▶ Was there a **legitimate, non-discriminatory reason** for the different treatment?
- ▶ Is there evidence that the reason is a **pretext** for unlawful discrimination?

# Similarly Situated Students

- Students are similarly situated when they are comparable, even if not identical, in relevant respects.



# Similarly Situated?

- In a class with mostly female students, a faculty member recommends two male students for an internship with a prestigious accounting firm.



- During an out-of-town trip with a student organization, a female faculty member made a male student carry all the luggage, change a flat tire on a rental car, and make a late-night run to a drug store.



# Different Treatment

## **The 2020 Rules do not prohibit all sex discrimination. Notable exceptions:**

- ▶ Separate housing on the basis of sex is allowed but must be comparable.
- ▶ Separate toilets, locker rooms, and shower facilities are allowed but such facilities must be comparable.
- ▶ Title IX does “does not prohibit separation of students by sex within physical education classes or activities” involving bodily contact.
- ▶ A college may operate separate athletic teams where selection is based upon competitive skill or the activity is a contact sport.



# Practice Pointer



As institutions wait for guidance from the courts, college administrators should seek legal guidance as needed when addressing questions involving students and sexual orientation or gender identity.



# **Disparate Impact**



# Disparate Impact

**Disparate impact** discrimination occurs when a facially neutral policy, rule, or practice—applied evenhandedly—has a disproportionate impact or discriminatory outcome on a particular sex.

This type of discrimination is often unintentional. The concern is the *consequences* of the policy or practice rather than one's intent.

- ▶ Is the applicable policy necessary to meet an important educational goal?
- ▶ Is there a comparably effective alternative available that would meet the stated educational goal with less of a burden or adverse impact on the disproportionately affected group?



# Disparate Impact



- A vocational program requires students to be clean-shaven due to certain safety protocols. This starts to affect enrollment by male students.
  - Disparate impact?
  - Disparate treatment?



# **Failure to Accommodate**



# Protections

- ▶ Recipients must adopt a policy against sex discrimination, which should make clear that it covers discrimination against pregnant and parenting students.
- ▶ Recipients must adopt and publish grievance procedures for students to file complaints of sex discrimination, including related to pregnancy and parental status.



# Accommodations

- ▶ Pregnant students are entitled to voluntary reasonable accommodations or modifications following an interactive process similar to the disability accommodation process.
- ▶ Examples may include breaks during class, intermittent absences, access to online or homebound education, changes in schedule or course sequence, extensions of time for work or tests, allowing a student to sit or stand, counseling, and elevator access.
- ▶ Can deny accommodation if it would fundamentally alter the program (i.e., a change that is so significant it alters the essential nature of the education program or activity).





# Leave

- ▶ Must allow pregnant and postpartum students excused absences for as long as the student's doctor says is medically necessary.
- ▶ Students must be allowed to make up any work missed for excused absences.
- ▶ Following time off, student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the leave began.



**Retaliation**



# Retaliation

- ▶ Intimidation, threats, coercion, discrimination, harassment, or other negative treatment
- ▶ Because that person reported discrimination, filed a complaint, served as a witness, supported a party, testified in a proceeding, or did not testify in a proceeding related to alleged discrimination,
- ▶ Can be committed by anyone, including the school, students, employees, and third parties.



# Retaliation Inquiry

- ▶ Did the aggrieved person engage in a protected activity, such as filing a complaint or serving as a witness?
- ▶ Did they suffer an adverse consequence?
- ▶ Is there a **causal connection** between the activity and the consequence?
- ▶ Is there a legitimate, non-retaliatory reason for the adverse conduct?
- ▶ Is there evidence that the reason is pretext for unlawful retaliation?



# Retaliation



- ▶ A charge of a code of conduct violation that arises out of the same facts or circumstances as a report of sex discrimination or sexual harassment can be retaliation if done **for the purpose of interfering** with any right under Title IX.
- ▶ A charge against a student for making a materially false statement is **not** retaliation if the charge is not based solely on the outcome of the Title IX grievance process.





**Record  
Keeping**

# Record Keeping

## Must Maintain for 7 Years

- ▶ For each complaint of sexual harassment
  - Documentation of informal resolution process or grievance procedures and resulting outcome
- ▶ For each incident of conduct that may constitute sexual harassment of which Title IX coordinator was notified, records documenting actions recipient took to meet its obligations
- ▶ All training materials



# What about Informal Resolution Records?

- ▶ The written procedure and notice to the parties must state what information the school will maintain and whether and how it could be disclosed
- ▶ Any final agreement must be maintained (7 years), FERPA applies
- ▶ Consider not maintaining party statements, facilitator notes, offers and counter-offers
- ▶ **Recommended:** Prohibit the disclosure or use of information shared during the informal resolution in the investigation, any hearing, and decisionmaking process if informal resolution is not successful



# Record Keeping



T&H Title IX Tip

Require investigators, decisionmakers, appeal decisionmakers, informal resolution facilitators, and deputies to send their files to the Title IX Coordinator



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