



Association of  
Title IX Administrators

June 2021

# K-12 Civil Rights Investigator Foundations

Training & Certification Course



Strategic Risk  
Management Solutions



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

# AGENDA

- 1 Title IX Overview
- 2 Legal Basis for Title IX Liability
- 3 When Does Title IX Apply?
- 4 Grievance Process Model Overview
- 5 What Happens Before the Formal Investigation?
- 6 Beginning the Investigation
- 7 Rights of the Parties

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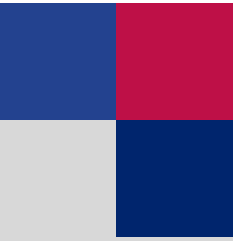
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What Happens After the Formal Investigation?



# **TITLE IX OVERVIEW**

- Text of the Law
- The IX Commandments
- Equity

# TITLE IX

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

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



# THE IX COMMANDMENTS

<b>INVESTIGATION</b> ➔	<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>
<b>PROCESS</b> ➔	<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>
<b>REMEDIES</b> ➔	To act reasonably to stop discrimination	To act reasonably to prevent recurrence	To act equitably to remedy effects





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



**JUSTICE**  
*eliminates systemic barriers*

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

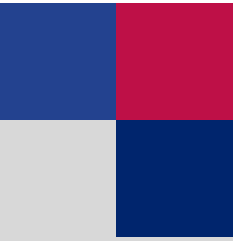


**EQUITY**  
*acknowledges systemic  
impediments with targeted fixes*



**AGENCY**  
*individuals know that access  
is their right*





# LEGAL BASIS FOR TITLE IX LIABILITY

- *Gebser*
- *Davis*

# GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

- Case involved teacher/student sexual harassment.
- Supreme Court created high standard that students must meet to prevail on a sexual harassment claim against recipients when an employee/student consensual relationship is basis of claim.
- Court said you cannot recover monetary damages against the school **unless** the behavior has been reported to someone with power to alter the situation (“actual notice”) and “**deliberate indifference**” has been demonstrated by the school.

# GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

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

# DAVIS V. MONROE COUNTY BD. OF ED.

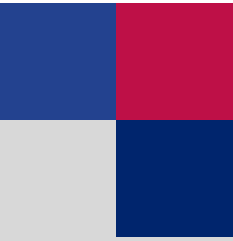
526 U.S. 629 (1999)

- Prolonged pattern of student/student sexual harassment of a fifth-grade girl by a classmate.
- Parents complained to three teachers and principal.
- The school took no action until the boy was charged with, and pled guilty to, sexual battery.
- Filed Title IX action, alleging that persistent harassment and deliberate indifference resulted in her inability to attend school and participate in activities.

# DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)

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



# WHEN DOES TITLE IX APPLY?

- Jurisdiction
- Definitions of Sexual Harassment
- First Amendment Protections

# WHEN DOES TITLE IX APPLY?

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



# WHEN DOES TITLE IX APPLY?

- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
  - OCR adopts in the discussion a fairly broad definition of what could constitute “attempting to participate”
- **Note:** The Title IX Coordinator makes the determination about jurisdiction before a case is assigned to the investigator



# DEFINITIONS OF SEXUAL HARASSMENT

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

# REQUIRED DEFINITIONS – TIX REGULATIONS

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

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

# HOSTILE ENVIRONMENT: “UNWELCOME”

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

# HOSTILE ENVIRONMENT: “REASONABLE PERSON”

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

# HOSTILE ENVIRONMENT: “SEVERE”

- Physical conduct is more likely to be severe
- Accompanied by threats or violence
- Consider the circumstances (e.g., the ability for Complainant to remove themselves from the harassment)

# HOSTILE ENVIRONMENT: “PERVASIVE”

- Widespread
- Openly practiced
- Well-known among students or employees – reputation of a department, person, etc.
- Occurring in public spaces (more likely to be pervasive)
- Frequency of the conduct is often a variable in assessing pervasiveness (look to intensity and duration)
- Unreasonable interference with school or job
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986)



# HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”

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

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”
- In evaluating the totality of the circumstances, consider:
  - Frequency, nature, and severity of the conduct
  - Whether the conduct was physically threatening
  - Whether the conduct was humiliating
  - Identity of and relationship between the Respondent and the Complainant
  - Age and sex of the Respondent and the Complainant
  - Size of the school, location of the incidents, and context in which they occurred

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES ( CONT.)

- Totality of the circumstances to consider:
  - Effect on the Complainant's mental or emotional state
  - Whether the conduct was directed at more than one person
  - Whether the conduct unreasonably interfered with the Complainant's educational or work performance
  - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
  - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection
  - "Constellation of surrounding circumstances."

# SEXUAL ASSAULT

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

- **Forcible Rape** - Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.
- **Forcible Sodomy** - Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# SEXUAL ASSAULT (CONTD.)

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

# SEXUAL ASSAULT (CONTD.)

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

# DATING VIOLENCE

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



# DOMESTIC VIOLENCE

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

# DOMESTIC VIOLENCE (CONTD.)

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

# STALKING

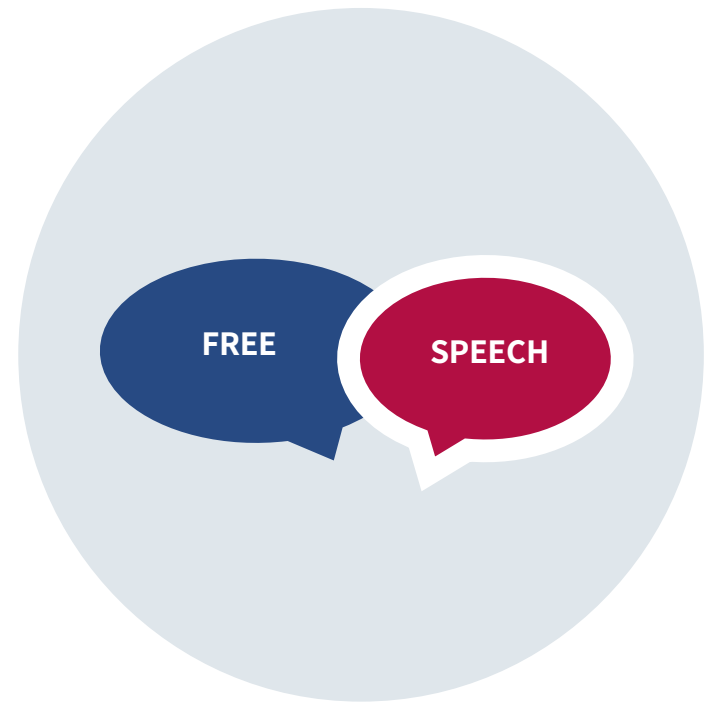
- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to —
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress.
- For the purposes of this definition:
  - **Course of conduct** means two or more acts, including,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

# STALKING (CONTD.)

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- The TIX regulations insist this definition not be interpreted to violate First Amendment.

# NAVIGATING FIRST AMENDMENT PROTECTIONS

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



# TINKER V. DES MOINES INDEP. COM. SCH. DIST.

393 U.S. 503 (1969)

## Free speech rights in public schools

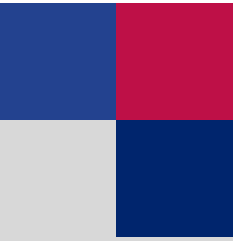
- Group of students wore black armbands to school in protest of Vietnam war
- Students suspended after refusing to remove armbands
- 2020 Title IX regulations reaffirm First Amendment protections

# TINKER V. DES MOINES INDEP. COM. SCH. DIST.

393 U.S. 503 (1969)

- Conduct must “**materially and substantially interfere with the requirements of appropriate discipline in the operation of the school**”
  - Actual interference, not based on fear of a potential interference
  - “More than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”
  - Substantial interference with the school’s work
  - Intrusion upon the rights of other students

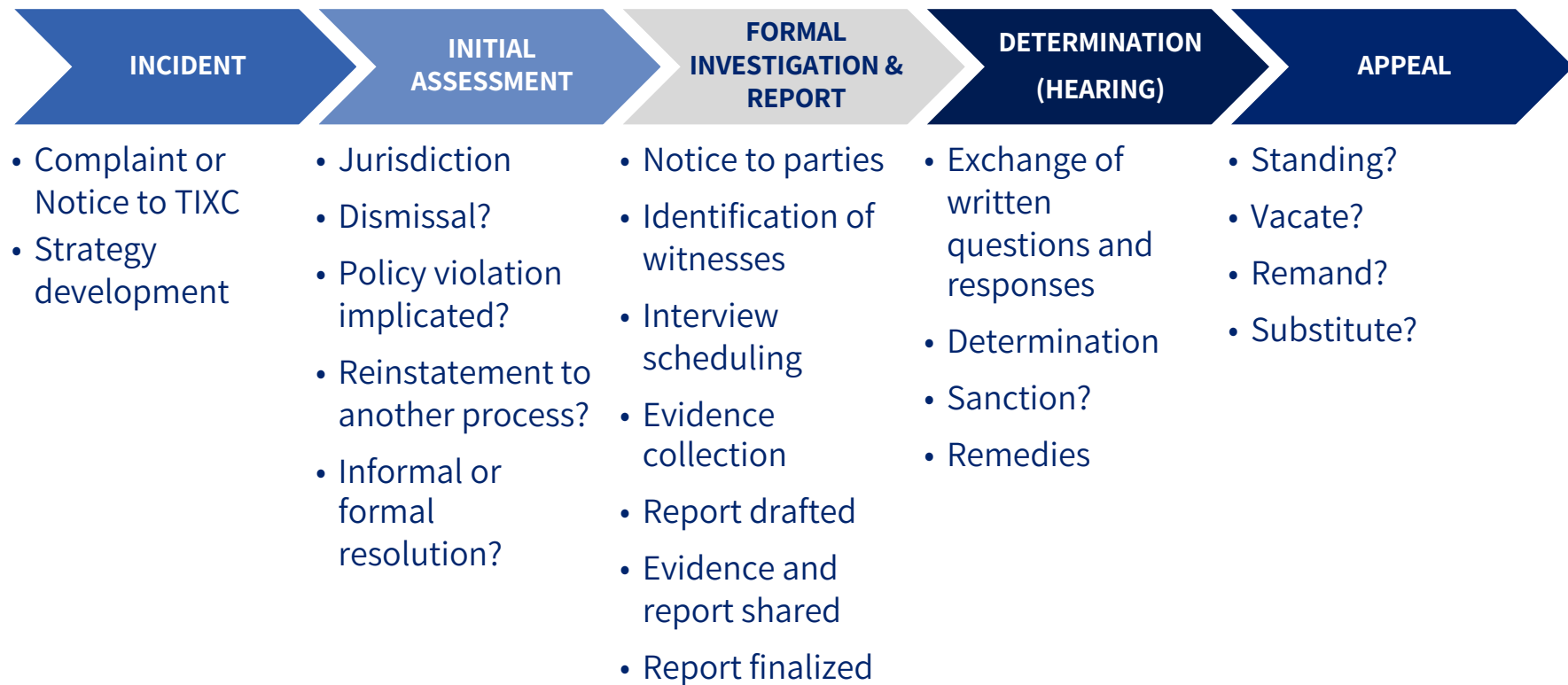




# **GRIEVANCE PROCESS MODEL: AN OVERVIEW**

- The Process
- Due Process
- Title IX Coordinator Oversight
- Title IX Team
- Bias & Conflict of Interest

# THE PROCESS



# “REASONABLY PROMPT” TIMEFRAMES FOR GRIEVANCE PROCESS

- 20+ days to resolution given procedural requirements in the 2020 Title IX regulations
  - No set requirement in the regulations, other than to have “reasonably prompt timeframes” for the conclusion of the process designated in your procedures
  - Timeline starts from notice, not from the incident itself
  - Goal is to avoid undue delay
    - Document delays

# CIVIL RIGHTS INVESTIGATION MODEL AND STUDENT CONDUCT MODEL

- How does this model alter the traditional student conduct model?
  - An active gathering of information by the Investigator; not intended to “build a case”
  - Does not impact the implementation of informal or alternative dispute resolution approaches
  - Characterized by an intentional effort to enhance due process protections for the parties and make procedural and support mechanisms equitable
  - Provides a right of appeal for all parties to the report, not just the Respondent

# DUE PROCESS – TIX REGULATIONS

## **Due Process concerns are at the heart of 2020 regulations:**

- Applies to both public and private Recipients, which is a shift in legal paradigm
- Standard of Evidence
- Requirements for “Emergency Removal”
- Detailed Notice of Investigation and Allegations (NOIA)
- Providing investigation report and evidence for review/response
- Live hearing with cross-examination (optional for K-12)
- Advisor involvement (possibly including attorneys)

# DUE PROCESS – TIX REGULATIONS (CONTD.)

- Bias: TIXC, Investigators, Decision-makers, and Informal Resolution Facilitators
- Biased Training or Insufficient Training
- Requirement to publicly post training materials

# TITLE IX COORDINATOR OVERSIGHT

- Role of the Title IX Coordinator in the Investigation Process
- Supervisor of the Investigation Structure
- Supervisor of the Investigation Process
- Trainer for Investigators

# THE TITLE IX TEAM

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



# TIXC AS SUPERVISOR OF THE INVESTIGATION STRUCTURE

- The Title IX Coordinator is responsible for:
  - The appointment/engagement of investigators
  - Training Investigators and Decision-makers
  - Supervision of Investigators and investigations
  - Helping investigators develop investigation strategy
  - Coordinating supportive measures
  - Timeline compliance
  - Communication and coordination of investigation teams
  - Providing institutional memory to investigators
  - Retaining a record of all activities
- The Title IX Coordinator may serve as an Investigator but may not be a Decision-maker.

# TIXC AS SUPERVISOR OF THE INVESTIGATION PROCESS

- The Title IX Coordinator or designee is responsible for:
  - Documenting complaint
  - Initial assessment
  - Determining extent/footing/nature of investigation
  - Notice of allegations and investigation
  - Notice of hearing (if applicable)
  - Reviewing/transmitting the written determination of the Decision-maker
  - Coordinating any duty to warn
  - Assurance of supportive measures and/or remedies
  - Recordkeeping of all activities

# ROLE OF THE INVESTIGATOR

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

# REQUIRED TRAINING TOPICS FOR INVESTIGATORS

- The definition of sexual harassment
- The scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Issues of relevance of questions and evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant
- Understanding "relevant evidence" in order to create an investigation report that fairly summarizes all relevant evidence

# BIAS

- Conflicts of interest and bias are expressly prohibited in the 2020 Title IX regulations
- The Title IX Coordinator, Investigator(s), Decision-maker(s), or any person designated by a Recipient to facilitate an informal resolution process must not:
  - Have a conflict of interest or bias for or against Complainants or Respondents generally, or
  - For or against an individual Complainant or Respondent.
- **Bias and conflict of interest by Investigators that impact the outcome are grounds for appeal.**

# BIAS (CONT.)

- Among the most significant problems for Title IX team members
- Bias can represent any variable that improperly influences an investigation or decision

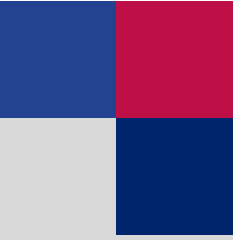
# BIAS (CONT.)

- There are many forms of bias and prejudice that can impact investigations, decisions, and sanctions:
  - Pre-determined outcome
  - Partisan approach by Investigators in questioning, findings, or report
  - Partisan approach by Decision-makers in questioning, findings, or sanction
  - Intervention by senior-level administrators
  - Not staying in your lane
  - Improper application of district procedures
  - Improper application of district policies
  - Confirmation bias
  - Implicit bias
  - Animus of any kind

# BIAS AND CONFLICT OF INTEREST

- Types of conflicts/bias:
  - Wearing too many hats in the process
  - Legal counsel as investigator or decision-maker
  - Investigators or Decision-makers who are not impartial
  - Biased training materials; reliance on sex stereotypes
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised
- Previously disciplining a student or employee is often not enough to create a conflict of interest





# WHAT HAPPENS BEFORE THE FORMAL INVESTIGATION?

- Notice to the Recipient
- Initial Assessment



# NOTICE TO THE RECIPIENT

- Actual Knowledge/Notice
- Formal Complaint

# NOTICE/ACTUAL KNOWLEDGE – TIX REGULATIONS

## Actual Knowledge

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

# FORMAL COMPLAINT – TIX REGULATIONS

## Formal Complaint

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

# INITIAL ASSESSMENT

- Initial Assessment
- Supportive Measures

# INITIAL ASSESSMENT IN SUMMARY

- Upon receipt of a report or complaint, the TIXC should conduct an initial assessment to determine the following:
  - Has there been a formal complaint?
  - Does the TIXC need to sign/initiate a formal complaint?
  - Does the alleged conduct meet the required definitions?
  - Does jurisdiction exist?
  - Is informal resolution an option?
- If the TIXC determines that the complaint will proceed under Title IX, the TIXC will:
  - Establish basis of investigation:
    - Incident or pattern, and/or climate/culture
  - Establish a preliminary timeline for the investigation
  - Assign the complaint for investigation

# SUPPORTIVE MEASURES

- Throughout process:
  - Provided to Complainant and Respondent
  - Non-disciplinary, non-punitive
  - Individualized
  - Restore or preserve equal access
  - Without unreasonably burdening other party
  - Protect safety of parties or environment, or deter sexual harassment

# COMMON SUPPORTIVE MEASURES

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



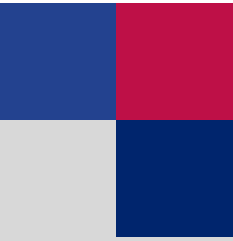
# COMMON SUPPORTIVE MEASURES (CONT.)

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

# INFORMAL RESOLUTION

The Title IX regulations include a provision that encourages informal resolution, and it is a worthy practice, when voluntary

- Following formal complaint
- Allowed at any time prior to a final determination at discretion of TIXC
- Voluntary, written consent of the parties and their parent/guardian
- Regulations preclude informal resolution of allegations that an employee harassed a student



# BEGINNING THE INVESTIGATION

- When Do You Investigate
- Formal Comprehensive Investigation
- 10 Steps of an Investigation
- Notice to the Parties
- Strategize the Investigation

# WHEN DO YOU INVESTIGATE?

- Upon receipt of a formal complaint, investigation is required
- What about misconduct that is open and obvious?
- What about rumors, gossip, social media, etc.?
  - Discretionary, but often recommended
  - OCR may not think these create an obligation for formal action, but will courts agree?
- Anonymous reports

# FORMAL COMPREHENSIVE INVESTIGATION

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

# 10 STEPS OF AN INVESTIGATION

1. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
2. Notice of Investigation/Notice of Formal Allegation(s) to Parties (NOIA)
3. Establish investigation strategy
4. Formal comprehensive investigation
  - Witness interviews
  - Evidence gathering
5. Draft investigation report
  - Gather evidence
  - Assess credibility and evidence
  - Synthesize areas of dispute/agreement and all questions asked

# 10 STEPS OF AN INVESTIGATION

6. Meet with Title IX Coordinator (and/or legal counsel) to review draft report and evidence
7. Provide all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
8. Revise (as needed) and finalize investigation report
  - Gather, assess, and synthesize relevant evidence
9. Meet with Title IX Coordinator (and/or legal counsel) to review final investigation report
10. Send final report to Decision-maker and parties/Advisors for review and written response at least 10 days prior to Decision-maker making their determination of responsibility

# NOTICE TO THE PARTIES – TIX REGULATIONS

Upon receipt of a formal complaint, a recipient must provide written notice to the parties who are known:

- Notice of the grievance process, including any informal resolution process
- Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
  - Identities of the parties involved in the incident, if known
  - Description of conduct
  - Date and location, if known



# NOTICE TO THE PARTIES – TIX REGULATIONS (CONT.)

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

# STRATEGIZE THE INVESTIGATION

- Common questions to consider:
  - Was notice already sent to the parties?
  - What is the investigation timeline?
  - Whom to interview?
  - When/In what order?
  - What information/evidence can be obtained?
  - How do we maximize the quantity/quality of evidence?
  - How and when do we notify witnesses?
  - Who needs to be aware of the investigation?
  - When and how do we share evidence/information with the parties?

# TIMELINES

- Ensure that all steps in the investigation are conducted according to the timelines in the Recipient's procedures
  - Procedures should provide some flexibility at the discretion of the TIXC
- Parties and witnesses should be interviewed as soon as possible:
  - So that recollections are as fresh and accurate as possible
  - To secure necessary remedies as soon as possible
  - But not before Notice of Allegations/Investigation is sent
- Provide notice of extensions

# TEMPORARY DELAYS/EXTENSIONS

- For good cause:
  - Absence of a party
  - Absence of a party's Advisor
  - Concurrent law enforcement activity
  - Language assistance
  - Accommodation of disabilities
- What about breaks? Injunctions?
- Provide written notice of delays and extensions to all parties

# ROLE OF LAW ENFORCEMENT AND ISSUES OF CONCURRENT CRIMINAL ACTION

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

# WHO SHOULD INVESTIGATE?

- Investigations of sexual harassment must be impartial, thorough, and reliable. Investigators must be **well-trained**.
  - Title IX Coordinator?
  - Standing panel of Investigators?
  - Human resources?
  - Student services?
  - Administrators/Staff?
  - Teachers/faculty?
- Coaches?
- Outside/External Investigator?
- NOT Legal Counsel

# SHOULD THERE BE MORE THAN ONE INVESTIGATOR?

No specific requirement, but:

- Investigation must be prompt, thorough, and impartial
  - A pool of Investigators may help to ensure that your investigation meets these requirements
  - Always have alternates available in case of recusal, illness, etc.
- Investigator must collect the maximum amount of relevant information available to help Decision-maker make a determination
- ATIXA prefers a team approach when possible

# TEAM INVESTIGATIONS

Other benefits:

- Allows for strategic selection of Investigators based on case elements and parties
- Ability to brainstorm investigation steps and lines of questioning
- Co-facilitate interviews
- Flexibility if there is any conflict with Investigators and parties
- Share the heavy lift of required documentation and recordkeeping



# PREPARE FOR EACH INTERVIEW

- Outline your interview questions in advance but be flexible. If you need to deviate from your script and insert a logical follow-up question, be prepared to do so.
- Plan the order of interviews
- Most beneficial to conduct interviews in person, if conditions permit
- Interviews should be conducted in a neutral, quiet, and private setting with no or minimal likelihood of interruptions

# WHEN TO INTERVIEW PARTIES AND WITNESSES

- Notifying the Respondent of the complaint:
  - “Upon receipt of formal complaint”
  - Any allowance for interviewing witnesses and accumulating evidence?
- Must provide parties with written notice of the date, time, location, participants, and purpose of all hearings, investigation interviews, or other meetings, with sufficient time for the party to prepare to participate

# WHEN TO INTERVIEW PARTIES AND WITNESSES (CONT.)

- Strategize contacting witnesses, ordering witness interviews, and preventing contact between witnesses, where necessary
- Solicit a witness list from the Complainant
- Solicit a witness list from the Respondent
- Determine when you are going to question Respondent
- **Example order\*:**  
Complainant → Complainant's witnesses → Neutral witnesses → Respondent's witnesses → Respondent → Any additional witnesses identified by Respondent → Round 2 → Round 3.  
\*Every case is different

# INTERVIEW SCHEDULING

- Try to anticipate how long each interview will take (e.g., How many times will you interview the witness? How much time can the witness give you?). Schedule your interview slots accordingly.
- Back-to-back interviews should be avoided, if possible. Interviews often take longer than expected and may require you to reschedule interviews.
- Leave open an amount of time roughly equivalent to the length of the interview for post-interview teamwork, review of notes with your co-Investigator, and to prepare for the next interview.

# ESTABLISH PRE-INTERVIEW GROUND RULES

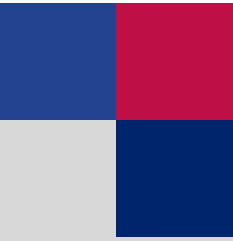
- Who will attend?
- How will records be kept? Recording? Access?
- Role of Advisors (who may be Attorneys)
- Involvement of Parents/Guardians, Union Reps, Friends, etc.
- FERPA (students)/Employment records/confidentiality

# SHARING INFORMATION WITH PARTIES AND WITNESSES DURING INVESTIGATION

- Decide how much information you will share in advance of each interview and have a rationale for what information will be shared and what will not be shared
  - Remember that prior to a decision, the parties must have an opportunity to review all “directly-related” evidence
  - You may be challenged on a decision not to share, so have a rationale
  - When in doubt, provide the parties with evidence

# PROVIDING POLICY AND PROCEDURE COPIES

- Each party should receive a copy of:
  - The specific policies alleged to have been violated (not a link), including any sub-parts or sections
  - The procedures that will be used to resolve the complaint, including the rights that extend to the parties (not a link)
- Consider providing parties with your non-retaliation provision/policy
- Keep copies of the applicable policies and procedures in the investigation file



# RIGHTS OF THE PARTIES

- Rights of the Parties
- Advisor of Choice
- Working with Advisors



# RIGHTS OF THE PARTIES DURING THE INVESTIGATION – TIX REGULATIONS

- Right to present witnesses, including fact and expert witnesses
- Right to present inculpatory and exculpatory evidence
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence without restriction
- Right to be accompanied to any related meeting or proceeding by Advisor of their choice, who may be, but is not required to be, an attorney

# RIGHTS OF THE PARTIES DURING THE INVESTIGATION – TIX REGULATIONS (CONT.)

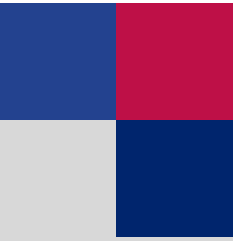
- Right to written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Right to inspect and review directly related evidence and investigation report

# ADVISOR OF CHOICE

- Parties have the right to have an Advisor of their choice to assist them throughout the process, to include attending any meetings and interviews
- Advisor of choice may be anyone, including attorney
- Advisor of choice is in addition to the student's parent/guardian
- May restrict participation of Advisors equally

# WORKING WITH ADVISORS

- The Advisor does not control the process. The Advisor is there to assist the party.
- Develop expectations for Advisor role that are applied equitably to the parties
  - Should be communicated to parties and Advisor at the outset
- The parties should answer questions directly for themselves
- The level of participation of an Advisor will vary based upon the age of parties and if the party has a disability
- Involvement of attorneys may necessitate the involvement of your legal counsel



# EVIDENCE

- Philosophy of the Investigation
- Evidence Gathering
- Relevance
- Understanding Evidence
- Specific Evidence Issues
- Three Buckets of Evidence

# PHILOSOPHY OF THE INVESTIGATION

- The burden of proof and burden of gathering evidence rests with the school, not the parties
  - It is not required that a Respondent prove welcomeness or consent, the Recipient must prove unwelcomeness or non-consent
- “Sufficient to reach a determination”
- Evidence collected by law enforcement or any other source
- Contracted/outsources Investigators do not absolve the school of responsibility for this provision

# EVIDENCE

- **All** relevant and reasonably available evidence must be considered – inculpatory and exculpatory
  - Includes all evidence directly related to the allegations, even evidence that will not be relied upon to make a determination
- Credibility assessments/determinations may not be based on a person's status as a Complainant, Respondent, or witness
- No restrictions on discussing case or gathering evidence

# EVIDENCE (CONT.)

- Equal opportunity to:
  - Present witnesses, including fact and expert witnesses
  - Present evidence, including inculpatory and exculpatory evidence
  - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered, except must be relevant and respect “rape shield” laws and privilege provisions



# EVIDENCE GATHERING

- Engage in the active accumulation of evidence
- Timeliness
- Document receipt of information and other materials as they are obtained in the course of the investigation
- Verify/authenticate evidence
- Be thorough in the examination of factual, circumstantial, and hearsay evidence, and ensure that all evidence has been examined, and all leads exhausted

# RELEVANCE

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
  - Regarding alleged policy violation
  - Regarding a party or witness's credibility
- The Investigator(s) will have made initial relevance “decisions” by including evidence in the investigation report...
- But relevance is ultimately up to the Decision-maker, who is not bound by the Investigator's judgment
- **All** relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory

# RELEVANCE (CONT.)

- If the Investigator indicates an opinion on credibility, outcome, whether policy was violated, how evidence should be weighed, etc., that opinion or recommendation is not binding on the Decision-maker
- The Decision-maker may consider it, but must be objective and independent, and is free to accept or reject any recommendation of the Investigator (or ask them not to make one)
  - Should you ask for it or ask the Investigator to clarify their recommendations?

# UNDERSTANDING EVIDENCE

- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible:
  - Documentary evidence (e.g., supportive writings or documents)
  - Electronic evidence (e.g., photos, text messages, and videos)
  - Real evidence (i.e., physical objects)
  - Direct or testimonial evidence (e.g., personal observation or experience)
  - Circumstantial evidence (i.e., not eyewitness, but compelling)
  - Hearsay evidence (e.g., statement made not from personal observation or experience but presented as important information)

# UNDERSTANDING EVIDENCE

- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible (Cont.):
  - Character evidence
  - Impact statements (typically only considered relevant in sanctioning)

# SPECIFIC EVIDENCE ISSUES UNDER THE 2020 TIX REGULATIONS

- Evidence of the Complainant's prior sexual behavior or predisposition is explicitly and categorically not relevant except for two limited exceptions:
  - Offered to prove that someone other than the Respondent committed the conduct alleged, or
  - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition

# SPECIFIC EVIDENCE ISSUES UNDER THE 2020 TIX REGULATIONS (CONT.)

## **Additional permissions required for:**

- Records made or maintained by a:
  - Physician
  - Psychiatrist
  - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission
  - This is complex in practice because you won't know to ask for permission unless you ask about the records first

# BUCKET 1: RELEVANT EVIDENCE



- Evidence is relevant when it tends to prove or disprove an issue in the complaint
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 2 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers within the investigation report via secure technology



# BUCKET 2: DIRECTLY RELATED, BUT NOT RELEVANT EVIDENCE

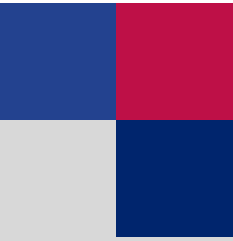


- Evidence is directly related when it is connected to the complaint but is neither inculpatory nor exculpatory and will not be relied upon in the investigation report
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 1 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers in a separate file via secure technology

# BUCKET 3: NEITHER RELEVANT NOR DIRECTLY-RELATED EVIDENCE



- Evidence should be maintained by the Investigator(s) but disregarded for purposes of the process
- Parties/Advisors/Decision-makers don't get to know about it



# INVESTIGATION SKILLS

- Questioning Skills
- Interviewing Skills
- Trauma-Informed Interviewing
- Working with Challenging Witnesses



# QUESTIONING SKILLS

- Goals of Questioning
- Types of Questions
- Questioning Exercise

# QUESTIONING

- What are the goals of questioning?
  - Learn the facts
  - Establish a timeline
  - Understand each party's perception:
    - Of the event and of the process
  - Try to learn what is more likely than not to have happened
    - Three sides to every story (or more)
- NOT the goals of questioning...
  - Curiosity
  - Chasing the rabbit into Wonderland
- Know your role. You are not law enforcement or prosecutors. This is a neutral inquiry, not an interrogation or inquisition.

# QUESTIONING (CONT.)

## **Consider before asking questions:**

- What are the relevant issues?
- What do I need to know?
- Why do I need to know it?
- What is the best way to ask the question?
- Am I minimizing the re-traumatization potential for all parties?
- Am I avoiding blaming or biased questions?
- Am I the right person to ask this?

# QUESTIONING (CONT.)

- Open-ended questions (tell us...who, what, how?)
- Closed-ended questions (Did you, were you?)
  - Use infrequently, but when needed to drill down on a specific issue
- Careful with Compound Questions
  - I have two questions. First..., Second...
- Avoid asking Multiple Choice Questions
  - Were you a), b), c)
- Avoid gratuitous use of leading questions – (Isn't it the case that...?)

# QUESTIONING (CONT.)

- Start with broad questions, then move to narrow, more pin-point questions
- It can be difficult for the Respondent to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport-building
- Have a purpose for asking every question
- Be sure to ask a question, not make a speech
- Ask questions about the allegations, the evidence, and the policy elements
- Don't be accusatory or argumentative. You don't decide the allegations and should have no real stake in their outcome.



# QUESTIONING (CONT.)

- Don't make questions too long or confusing
- If you ask a bad or blaming question, take it back
- If you say something inappropriate, apologize
- Listen carefully and adapt follow-up questions
- Avoid evaluative responses to a person's answers unless needed to establish rapport, draw someone out, or convey empathy
  - E.g.: "That's too bad;" or "I'm glad you said that"
- Do not moralize

# QUESTIONING (CONT.)

- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “fooled around,” “had a few drinks,” “was acting weird.”
- Be cautious with questions that invite parties to second-guess their actions, as this may be perceived as blaming. The questions may be fair game, but it’s all in how you ask them.

# QUESTIONING EXERCISE

## **Please critique the following questions:**

- When you did (X), what effect do you think that had on the other party?
- What was the purpose of your behavior?
- Did you sign the student handbook form at the beginning of the school year?
- First, do you know what consent means? Second, why did you continue to touch him when he seemed like he didn't want you to?
- What could you have done differently in this situation?
- How would you like it if someone did that to you?
- Do you think you have any responsibility for what happened?

# INTERVIEWING SKILLS

- Demeanor of Investigator(s)
- Interview Skills
- Rapport Building
- Setting Up Reasonable Expectations
- Feedback to Witnesses



**Remember: As an  
Investigator or  
Decision-maker,  
you have no “side”  
other than the  
integrity of the  
process!**

# DEMEANOR OF INVESTIGATOR(S)

- Work to establish a baseline of relaxed conversation
- Maintain good eye contact
- Listen carefully to the answers to your questions
  - Avoid writing while party/witness is talking, if possible
  - Do not be thinking about your next question while a party/witness is talking
- Ask questions in a straightforward, non-accusatory manner
- Nod affirmatively and use active listening skills to prompt or keep the party/witness talking

# INTERVIEW SKILLS

- Explain the process, your role as a neutral fact-finder, and applicable privacy protections and limitations.
- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out (i.e., alcohol/drug use). Explain amnesty policy (if applicable).
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Ascertain who the individual is and their relation to the other parties in the case.
- Document whether individual is cooperative or resistant.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.

# INTERVIEW SKILLS (CONT.)

- Take the allegations from start to finish through a process of broad to narrow questions and issues that need to be addressed
- Ask questions about the allegations, the evidence, and the policy elements
- Focus on areas of conflicting evidence or gaps in the information
- Drill down on timelines and details
- Don't leave a question or gap unanswered
- Pay attention to alcohol/drug consumption and timing of consumption, if relevant



# INTERVIEW SKILLS (CONT.)

- Be cognizant of the difference between what is “believed” (conjecture) and what was “witnessed” (facts)
- Ask who else you should talk to and ask for any relevant documentation (i.e., texts, emails, etc.)
- Let parties/witnesses know you may need to follow up with them as the investigation progresses

# RAPPORT BUILDING

- Dependent on age of the interviewees
- Understand the goals of an “interview” versus an “interrogation”
  - An interview is a conversation designed to elicit information in a non-accusatory manner
  - Shifting to an interrogation approach should not be done lightly; you cannot go back – not recommended
- Is person comfortable that you will conduct the investigation fairly and objectively?
  - Team or peer-led investigations can help create a rapport much more easily

# SETTING UP REASONABLE EXPECTATIONS

- People who conduct investigations with skill rest secure in the knowledge that all those involved, including witnesses, were treated objectively and fairly
- Be sure Complainant and Respondent understand parameters of the policy, what it does and does not cover, how the process plays out, and what the process can and cannot accomplish
- Provide ample opportunity for the Complainant and the Respondent to ask questions
- Keep parties informed of steps in process

# FEEDBACK TO WITNESSES

- Witnesses may ask or say:
  - Am I being investigated?
  - What are you really investigating?
  - How will you use the information you are given?
  - Is it confidential?
  - Will I get into trouble by giving you this information?
  - I don't want to cooperate.
  - I don't want to get anyone else in trouble.
  - Do I need my parents/lawyer present during interview?
- Anticipating these questions and/or covering them in advance can help to ensure that you establish good rapport, which should help you get the truth.



# CASE STUDY: IVAN & JUANITA

# CASE STUDY: IVAN & JUANITA

- Juanita, a freshman member of the girls' soccer team, made a Title IX report directly to the Vice Principal.
- On the morning of October 11, her teammate, who was checking her email in the school computer lab, yelled for Juanita and the other teammates to come look at something on the computer.
- Juanita saw an email sent from the boys' soccer team email address, boyssoccer@school.com, which said "Greetings new freshman, meet the girl next door."
- The email included a photo of Juanita's face photoshopped onto an image of a naked woman's body with huge breasts.

# CASE STUDY: IVAN & JUANITA

- Everyone in the room laughed and Juanita ran from the room crying, embarrassed that others would think it was her.
- She immediately contacted Ivan, a member of the boys' soccer team, who she believed sent the email.
- Earlier in the year, Ivan asked her out several times, but she didn't like him.
- She found him really annoying, and while she knows it wasn't nice, she called him a total loser in front of his friends.
- She knows that he sent the email to hurt and embarrass her.

# CASE STUDY: IVAN & JUANITA

## **You are beginning your formal investigation:**

- What are the Title IX allegation(s)?
- What key things should you consider as part of your investigation strategy?
- Who would you want to interview at this stage?
- What evidence do you want to gather?



# CASE STUDY: IVAN & JUANITA

- You decide to interview Ivan. Ivan believes Juanita is blowing the whole matter out of proportion.
- He admits to creating the photo for a class project. He reports:
  - “It was only meant to be a joke. I never put her name on it, so what’s the big deal? This is a work of art that I created for my class. I only showed my artwork, which by the way is protected by the First Amendment, to a few of my teammates. I know my rights very well, since my dad is a lawyer.”
  - The email account is for official team business.
  - The coaches and team captains have the password. The captains have shared the password with other seniors on the team.

# CASE STUDY: IVAN & JUANITA

- Ivan says Juanita “always flashes her breasts” at him and told him she wanted breast implants.

# CASE STUDY: IVAN & JUANITA

- You also decide to interview John, assistant director of information technology.
- John was able to confirm that someone using the school computer lab sent the picture from the boys' soccer team email account.
- The picture was inserted into the email via a flash drive, but he was unable to determine which student had logged into the computer.
- John received Ivan's consent to inspect his personal laptop. The photo was on Ivan's hard drive but was not sent out via email to anyone.
- John said Ivan told him when he doesn't have his laptop with him, it is typically inside his locker and he hasn't given anyone else his laptop password.

# CASE STUDY: IVAN & JUANITA

- Who else might you interview?
- What other evidence do you want to gather?
- How will you address Ivan's First Amendment argument?
- Is there any evidence that you gathered that is not relevant? If so, why?

# CASE STUDY: IVAN & JUANITA

- After you've shared the evidence you gathered with Ivan and Juanita and given them 10 days to review and respond, the following occurs:
  - Juanita tells you that she read what Ivan said in his interview about having created the photo for his art class and she knows Ivan is not telling the truth because she took the same class last year and she never had an assignment like that for class.
  - Ivan's Advisor tells you that he has a new witness he wants you to interview. Ivan's Advisor wants you to interview Ivan's friend Alan who will tell you that Juanita really is not bothered by the photo because she flashed her breasts at Ivan a few times before and told him that she wanted breast implants.

# CASE STUDY: IVAN & JUANITA

- How do you respond to Juanita?
- How do you respond to Ivan's Advisor?

# INTERVIEWING SKILLS

- Interviewing the Complainant
- Interviewing the Respondent
- Interviewing Witnesses

# INTERVIEWING THE COMPLAINANT

- Acknowledge difficulty of reporting and thank them
- Acknowledge that they may have told this story multiple times already
- Explain why you are taking notes and/or ask for permission to record, if applicable
- Provide a copy of your policies and procedures
- Ask them to share a complete account of what occurred
  - Have them give full narrative without asking questions, then drill down on details
- Ask about outcry witnesses and possible documentation such as blogs or journals
  - What will witnesses likely say/know?



# INTERVIEWING THE COMPLAINANT (CONT.)

- Ask about those they spoke to about the incident
- Ask what the Complainant's motivation is for reporting and what they hope to see as a result
- Find out if their academics and/or work have been affected
- Ask how this has affected them emotionally and/or physically
- Advise that the allegations will be discussed with the Respondent and witnesses
- Let the Complainant know next steps and when you will be in touch

# INTERVIEWING THE RESPONDENT

- Acknowledge difficulty of the situation and thank the Respondent for meeting with you.
- Explain why you are taking notes and/or ask for permission to record, if applicable
- Provide a copy of your policies and procedures
- Ask them to share a complete account of what occurred
- Question the Respondent as to the allegations – ask a combination of open-ended and closed-ended questions
- Get detailed – do not leave a question unanswered
- Ask about witnesses and any other relevant information
  - What will witnesses likely say/know?
- Ask about possible motivation for the allegation(s)

# INTERVIEWING THE RESPONDENT (CONT.)

- Provide support and resources throughout the process as needed
  - Discuss counseling options and other supportive measures if they are not already connected
- Discuss non-retaliation and any steps regarding any supportive measures that have been put into place (e.g., no-contact orders, housing moves, etc. (if applicable))
- If emergency removal is employed, review the terms and provide a timeframe
- Let the Respondent know next steps and when you will be in touch

# INTERVIEWING WITNESSES

- It may be helpful to not label the allegations as “sexual misconduct” or “sexual harassment” but to describe the behavior neutrally
- Ascertain relation to the other parties in the matter
- Address the need for complete truthfulness
- Ask relevant questions
- Ask for opinions
- Ask if either party spoke about the reported incident(s) after they occurred
  - Did they see any change in behavior in one or more parties after the reported incident(s)?

# INTERVIEWING WITNESSES (CONT.)

- Ask if they have been contacted already by one of the parties
- Ask if they have made any previous statements, such as to law enforcement
- Ask if there is anything you should know that has not been covered or if there is anyone else they think should be contacted
- Discuss non-retaliation and give examples
- Discuss privacy and FERPA guidelines – specifically inform them that what they share will be disclosed to the parties
- Ask all interviewees to contact you if they remember anything else or want to add to their interview

# INTERVIEWING WITNESSES (CONT.)

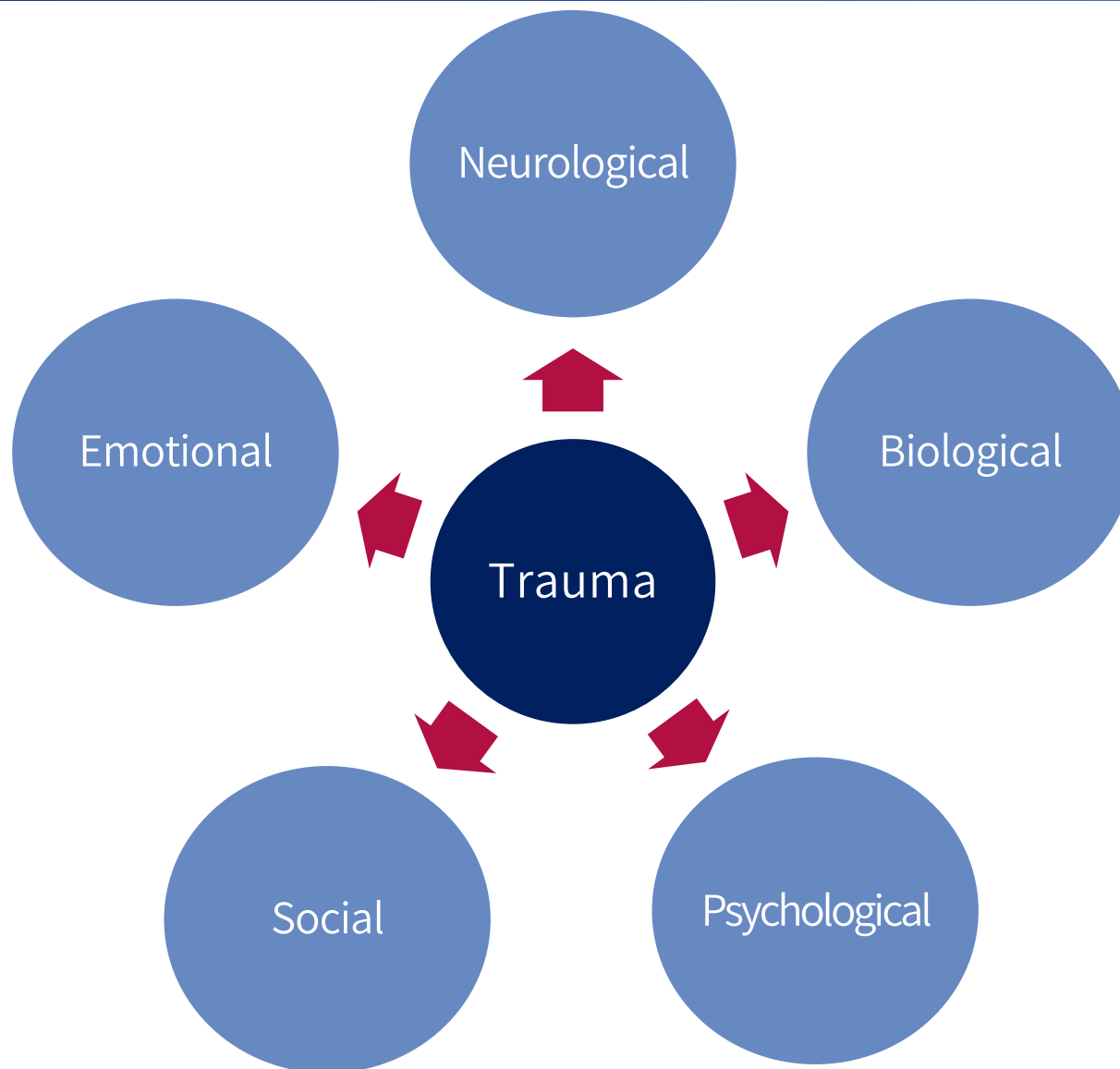
- Let all interviewees know you may follow-up with them if needed



# TRAUMA- INFORMED INTERVIEWING

- Considerations for Interviewing

# IMPACT OF TRAUMA ON FUNCTIONING





# THE BRAIN'S RESPONSE TO TRAUMA

In response to the anticipated trauma of sexual assault or other violence, hormones can be released into the body that may impact ones:

- Ability to react physically
- Ability to think rationally
- Ability to consolidate or group memories

**This is a neurobiological response, not a choice.**

# TRAUMA-INFORMED INTERVIEWING

- Prioritize developing rapport and building trust
- Emphasize transparency and predictability
- Physical aspects of interview (light, access, comfort, etc.)
- Be cognizant of why someone may have responded in a “counterintuitive” manner
- Be mindful that recall is often difficult and slow following trauma
- Use non-judgmental/non-blaming language
- Avoid re-traumatization (but must still ask necessary questions)

# TRAUMA-INFORMED INTERVIEWING (CONT.)

- Use Cognitive Interviewing to aid recall (learn more about this in Level Four Certification)
- It does NOT mean that you cannot or do not gather evidence that may call into question the credibility of the interviewee

# TRAUMA-INFORMED INTERVIEWING

## **Avoid:**

- Unsupportive responses
- Taking control more than you have to
- Escalating the situation
- Defining or labeling a party's experience
- Asking why questions (i.e., “Why did you . . . ?”)
- Verbalizing judgment in the moment
- Using trauma as a substitute for evidence or basis to assess credibility
  - Trauma doesn't prove anything in terms of a policy violation



# CHALLENGING WITNESSES

- Difficult Witnesses
- Lying Witnesses
- Resistant and/or Quiet Witnesses

# DIFFICULT WITNESSES

## Set the tone:

- Thank them for meeting with you
- Review your role as a neutral fact-finder
- Put them at ease – ask about them without being phony
- Acknowledge any hesitation/awkwardness as normal
- Review retaliation against a witness
- Review amnesty
- Review confidentiality
- Review expectation of truthfulness

# LYING WITNESSES

- In a non-accusatory way, explain how their statements don't "make sense."
- Allow opportunity for witness to restate.
- Try to gauge why they are lying – Fearful? Embarrassed? Protective? Try to address their motivation individually, with understanding.
- If they continue to lie, confront and explain the repercussions for lying in an investigation.
- Calmly bring them back to the questions.
- If needed, leave the door open for follow up.

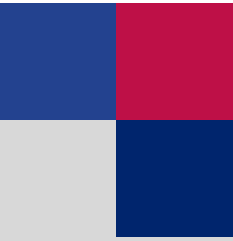
# RESISTANT AND QUIET WITNESSES

- Gauge their resistance or hesitation and try to individually address their motivation
- Answer their questions about the process
- Back up when needed
- If they open up, be responsive
- Explain expectations of the school and rationale for the duty to participate, if applicable
- Advance preparation will help when open-ended questions don't work



# OTHER CONSIDERATIONS

- Carefully consider who should lead the interview
- Ask open-ended questions first
- Allow time
- Use breaks
- Remain calm and professional
- If you ask a bad question, simply apologize, restate, correct, etc.
- Allow for flexibility



# HELPFUL INVESTIGATION DOCUMENTS

- Incident Timeline
- Documenting Questions
- Post-interview Documents
- Witness Lists and Flowcharting

# INCIDENT TIMELINE

- Discuss timeline of event/s with all parties/witnesses
- Obtain as much detail as possible
- Indicate which times can be corroborated by phone calls, email, texts, receipts, etc.
- Identify any “gaps” and address them – may lead to information not previously shared
- Timing highly relevant in cases involving
  - Alcohol/drug consumption
  - Physical evidence such as bruising, bite marks, etc.
  - Stalking and/or verbal, online sexual harassment cases where times of communication between parties may be important

# INCIDENT TIMELINE (CONT.)

- Establishing a reliable timeline can be useful when questioning witnesses and searching for video footage

# DOCUMENTING QUESTIONS

- Questions the Investigator(s) asked the parties and witnesses should be documented and included as an appendix to the investigation report
  - Did any interviewees decline to answer any specific questions?
- Questions suggested by parties should be documented and included as an appendix:
  - Were they asked “as is”?
  - Were they re-phrased? If so, why?
  - Were they rejected? If so, why?

# DOCUMENTS YOU MAY WANT TO CREATE POST-INTERVIEW

1. Interview Transcript in Final Form (to be verified by interviewee)
  - Interview transcripts go into the report, as appendices, and also into the file
2. Future Pointers Document
  - New witnesses
  - New evidence
  - Future questions to ask
  - Witnesses to go back to with new information
    - Kept in the file, as a final checklist of investigation completeness

# DOCUMENTS YOU MAY WANT TO CREATE POST-INTERVIEW (CONT.)

## 3. Bulleted Key Takeaways from the Interview

- Included in the report; no need to keep that document, but it can be kept in the file

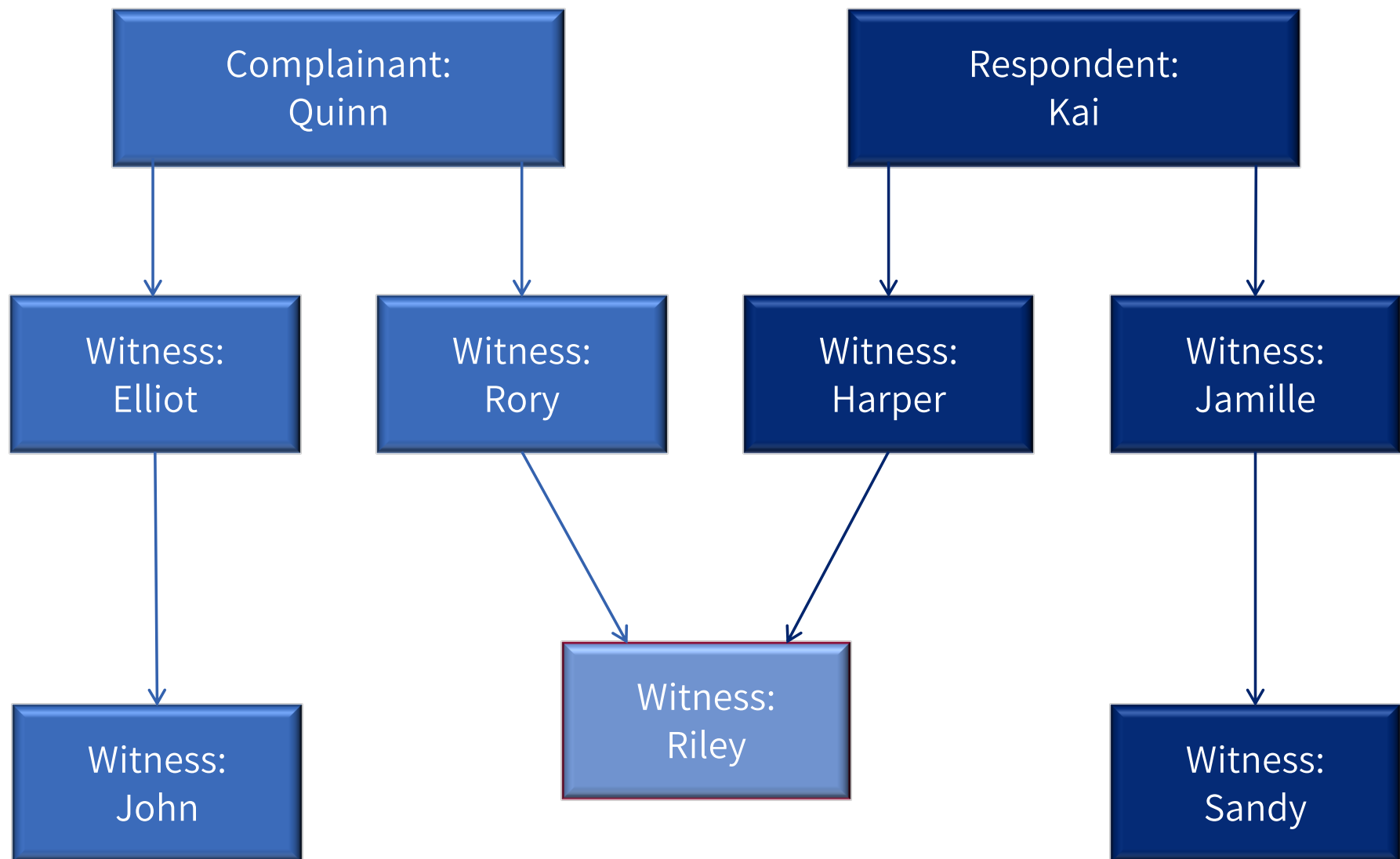
Note: Consider the record retention requirements in the 2020 Title IX regulations

# WITNESS LIST AND FLOWCHARTING BEST PRACTICES

- Keep freshly updated list of your witnesses as you learn of them
- Identify which parties or witnesses led you to other witnesses
- Keep track of whether witnesses are neutral, loyal and biased, or loyal but objective. Include reasoning
- In complex cases, use a flowchart to track witnesses the Complainant leads you to, the witnesses Respondent leads you to, and the witnesses who are neutral
- Note in the flowchart where witnesses intersect in terms of relationships to each other and/or potential loyalties to parties

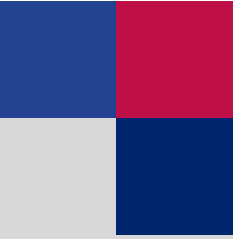


# WITNESS FLOWCHART SAMPLE



# INVESTIGATION RECORDS AS SMOKING GUNS IN LITIGATION

- “The File”:
  - The Respondent’s file
  - The Complainant’s file
  - The investigation file (including investigation report)
  - Personal case notes
  - Witness education records
- Subpoenas:
  - If you get one, call your general counsel!
- Understand the court process and your role in it. The documentation of your investigation is largely admissible in court, and you’re a witness to it.



# THE INVESTIGATION REPORT

- G.A.S. Framework
- Sharing the Evidence & Report

# THE INVESTIGATION REPORT

- Under the 2020 Title IX regulations, investigators may or may not assess credibility with or without rendering conclusions or making findings related to credibility but will help to roadmap where Decision-makers should look for information critical to a determination
  - ATIXA advises that Investigators make credibility assessments instead of credibility determinations
- The regulations also allow Investigators to include a recommended finding of responsibility in the investigation report
  - ATIXA advises against Investigators including a recommended finding in the investigation report

# THE INVESTIGATION REPORT

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

# G.A.S. FRAMEWORK

To draw a clear line between investigation and decision-making functions, Investigators should follow the G.A.S. Framework for investigations and reports:

- **Gather** evidence
- **Assess** credibility and evidence
- **Synthesize** areas of dispute/agreement and all questions asked

# GATHER THE EVIDENCE

- Collect the evidence from all sources
- Organize it according to the investigation strategy and allegations
  - Chronology
  - Geography
  - Policy prohibitions
  - Alleged violations
- Summarize evidence in a written report
- This the fact-gathering function. It's a function all investigators have performed since at least 2011, and it's not new or different as a result of regulations.

# ASSESS CREDIBILITY

- Accuracy and reliability of information
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading may impact
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Trauma-informed approach should be consistent



# CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

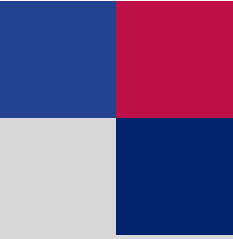
- Indicate where the Decision-maker should look without rendering conclusions or making findings related to credibility
- NOT GOOD  
~~“The Decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons...”~~
- GOOD  
“Mark’s testimony about X contrasts with Mariana’s testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana’s testimony, not Mark’s, during the investigation.”

# SYNTHESIZE AREAS OF DISPUTE

- Examine only actions that have a direct relation to the situation under review or a pattern of incidents
- Narrow the scope to areas in dispute or disagreement between the parties
  - Two lists: contested and uncontested facts
- Use evidentiary and report review periods to clarify disputed facts
- Present evidence in report organized around facts relating to alleged policy violations
- Contested facts will form the bulk of the Decision-maker's work in making a determination

# IMPORTANCE OF THE REPORT

- Decision process:
  - Investigator refers the investigation report to the Decision-maker(s) **without** determination
  - Investigator ≠ Decision-maker
- Importance of investigation report
  - Highlight the relationships between different pieces of evidence
    - Contradictory, corroborating, (in)consistencies, etc.
  - The Investigator's opinion is not controlling, but they want to point the Decision-makers toward decisive or corroborating evidence without telling them how to interpret it



# **SHARING EVIDENCE & THE INVESTIGATION REPORT**

# PARTY ACCESS TO EVIDENCE/REPORT

- Regulations mandate creation of an investigation report
  - Report fairly summarizes all relevant evidence
- Two 10-day review and comment periods

# EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1

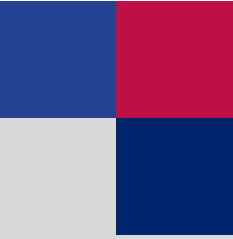
## Prior to the completion of the Investigation Report:

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

# EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2

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

- The final Investigation Report summarizing relevant evidence must be sent:
  - To each party and Advisor
  - In an electronic format or hard copy
  - For the parties' review and written response
- **Best Practice:** Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties
- For K-12 schools, with or without a hearing, this review is followed by, or in conjunction with, the exchange of relevant written questions and responses facilitated by a Decision-maker



# WHAT HAPPENS AFTER THE FORMAL INVESTIGATION?

- Determination of Responsibility
- Sanctions & Remedies
- Appeals
- Finality of Determination
- Communicating Outcomes





# MAKING A DETERMINATION

- Questioning
- Standard of Evidence
- Written Determinations

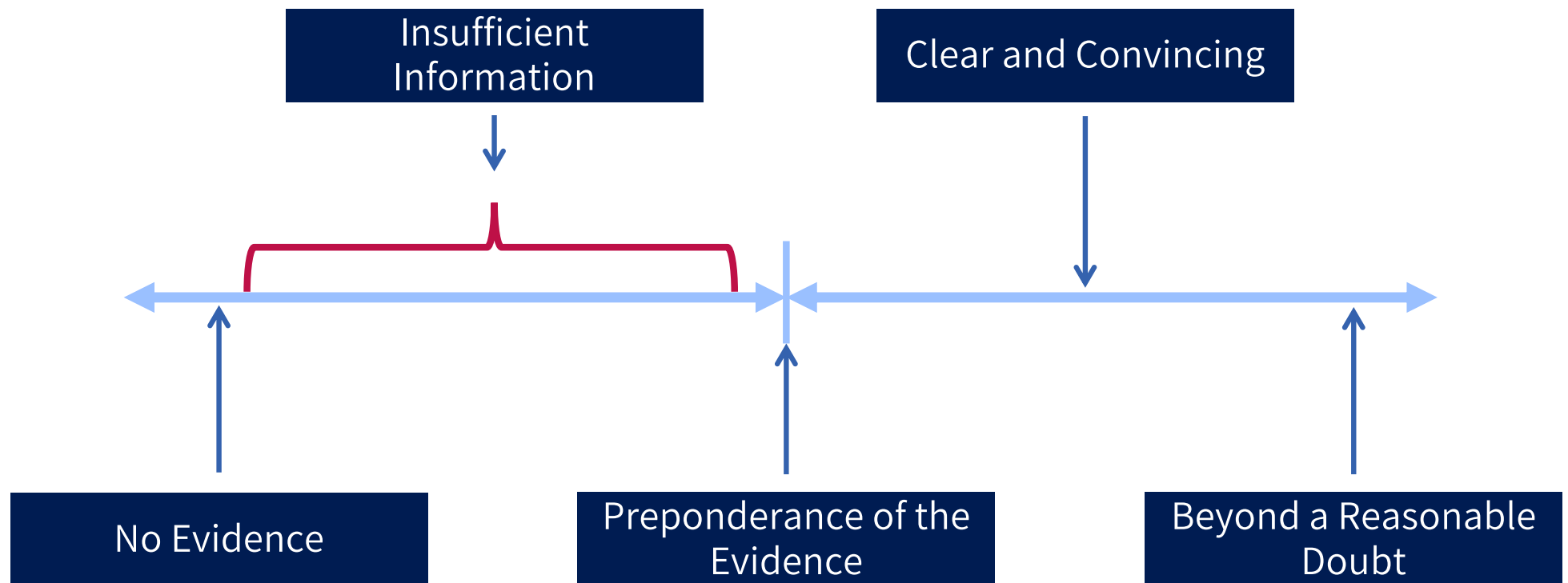
# WHO RENDERS THE DETERMINATION?

- Decision process:
  - Investigator refers investigation report to Decision-maker without determination
  - Investigator ≠ Decision-maker
  - Coordinator ≠ Decision-maker
- Importance of investigation report
  - How much credibility assessment and analysis to include?
    - Goal is balance; serve the content up on a silver platter, but the Investigator is just composing ingredients; the chef prepares the final dish.
  - Investigator's opinion is not controlling, but they want to point the Decision-maker toward decisive or corroborating evidence without telling them how to interpret it

# STANDARD OF EVIDENCE

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

# EVIDENTIARY STANDARDS



# QUESTIONING BY DECISION-MAKER (AND OPTIONAL HEARING)

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

# QUESTIONING BY DECISION-MAKER (AND OPTIONAL HEARING) (CONT.)

- Investigator should avoid off-line discussions of case with any of the Decision-makers, as it could give the perception of bias/conflict (although the OCR says this is not prohibited)

# SANCTIONS AND REMEDIES UPON DETERMINATION OF RESPONSIBILITY

- Disciplinary sanctions for Respondent
- “Remedies” to Complainant
- Any sanction must be reasonable and proportionate to the severity of the behavior



# APPEALS

- Basic Overview of Appeals
- Finality of Determination
- Communicating Outcomes



# THE APPEAL PROCESS

- Appeals are mandatory under the Title IX regulations
  - Three required grounds for appeal, although Recipients may add additional grounds
- Equitable
- Clearly communicated to parties
- One level of appeal is best practice
- Defined window of time to request appeal
- Committee versus individual determination preferred
- Deference to original Decision-maker

# THE APPEAL PROCESS (CONT.)

- The Appeal Decision-maker(s) may remand a matter to the Investigator or consult with the Investigator on the appealability of certain elements of the file, report, or testimony

# FINALITY OF DETERMINATION

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

# COMMUNICATING OUTCOMES

## **Title IX regulations require Recipients to apprise parties of the:**

- status of investigations
- outcome of the determination, any sanctions and remedies provided and the supporting rationale
- outcome of any appeal with the supporting rationale
- Recipient must provide this information in writing and place no conditions on receiving or sharing it
- FERPA cannot be construed to conflict with or prevent compliance with Title IX



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# Questions?



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