

K-12 ICS

INSTITUTIONAL
COMPLIANCE SOLUTIONS

**VIRTUAL CERTIFIED
TITLE IX
INVESTIGATOR
TRAINING**



**Introduction, Why Before How,
Legal Reasons, Expectations**

HOUSEKEEPING

- Chat bar
- Breaks
- Understanding



ABOUT US

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TODAY

- THE WHY BEFORE THE HOW
- INVESTIGATIVE TECHNIQUES
- REPORT WRITING
- HYPOS (IF TIME)





Purpose of ICS Trainings

- This is a Level 1 Training
- Not Legal Advice
- Designed to provide you with options so that you can make the decisions that make the most sense for you/your district
- Most decisions will be district specific and the regulations allow for flexibility
- NO ONE HAS DONE THIS BEFORE
- We love when our participants bring information to us and provide their perspectives
- We are all in this together!





Nuts and Bolts of Title IX Compliance

THE LAW

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational programs or activities operated by recipients of Federal financial assistance.





TITLE IX IS:

- **Federal law**
- **Enforced by the Office for Civil Rights (OCR)**
- **Prohibits Discrimination based on sex**
- **Historically viewed as simply requiring gender-equity in athletics**





What Is/Is not Title IX Conduct

Is or May be Title IX

- Discrimination based on gender
- Sexual Harassment
- Pregnancy discrimination
- Retaliation
- Bullying/Cyber-Bullying when it involves sexual misconduct
- Hazing when it involves sexual misconduct

Is **NOT** Title IX

- Disability discrimination (ADA)
- Employment discrimination based on race, religion, or national origin (Title VII)- Note overlap with sex
- Student discrimination based on race, religion, or national origin (Title VI)
- Age Discrimination (ADEA)

REGULATIONS VS. GUIDANCE

[The] final regulations represent the Department's interpretation of a recipient's legally binding obligations, rather than best practices, recommendations, or guidance... [and] focus on precise legal compliance requirements governing recipients. p. 18

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The Impact of the 2020 Election on Title IX Compliance



DEFINED TERMS

- Actual Knowledge
- Complainant/Respondent
- Formal Complaint
- Sexual Harassment
- Supportive Measures





**Title IX
Coordinator**



Investigator(s)



**Decision-
Maker(s)**



**Appellate
Member(s)**



**Informal
Resolution
Facilitators?**



**Responsible
Employees/
Officials with
Authority**

PARTIES IN AN INVESTIGATION



COMPLAINANT



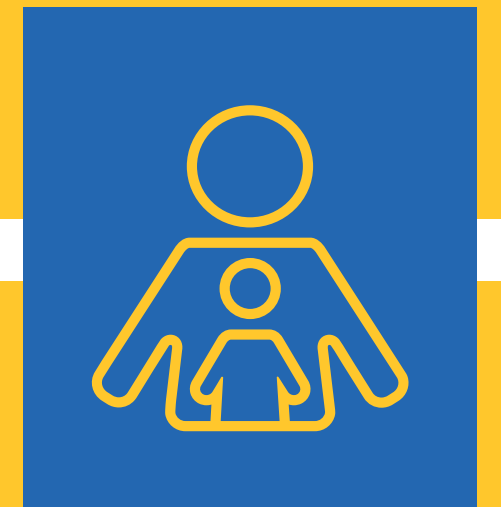
RESPONDENT



ADVISOR



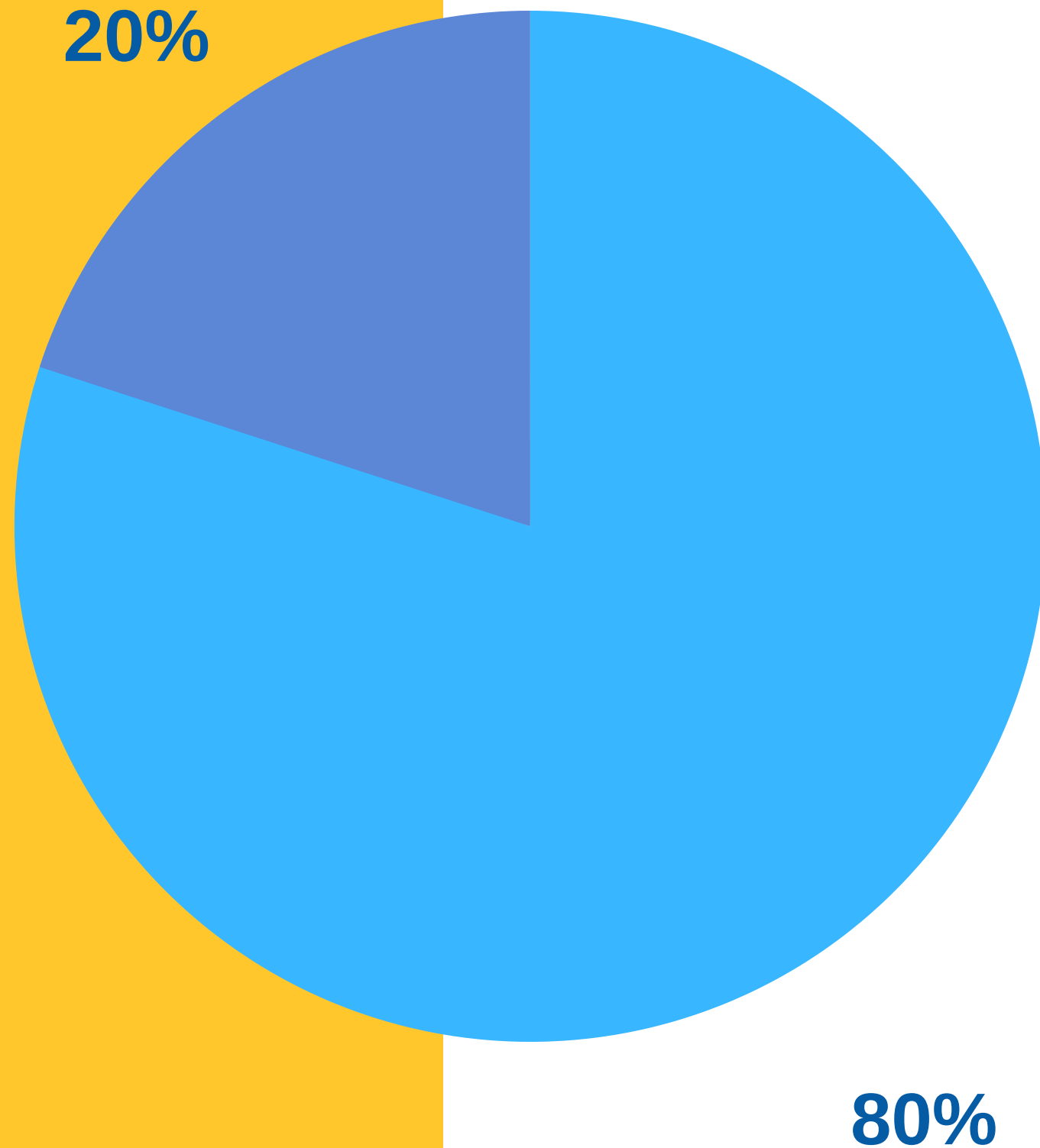
WITNESSES



PARENT/
GUARDIAN



INVESTIGATOR'S ROLE IN COMPLIANCE



80/20 COMPLIANCE RULE

- Handling of a Report
 - Policies, Procedures, Trainings
-

TITLE IX COMPLIANCE LAYERS

- Policy
- Responding to complaints of sexual misconduct
- Education, training, prevention efforts





Sexual Harassment + Education Program or Activity



Sexual Harassment

- **Conduct on the basis of sex that satisfies one or more of the following:**
 - **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," "Dating Violence," "Domestic Violence" or "Stalking" as defined in the Clery Act.**



SEXUAL ASSAULT

Sexual Assault: An offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI's Crime Reporting system.

A sex offense is any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

Rape: The 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, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

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.

*These terms are separated into "forcible and nonforcible" categories in the UCR formal definitions



Consent

Consent:

- OCR does not require recipients to adopt a particular definition of consent with respect to sexual assault.

What does this mean?

- Create/use a definition of consent that makes sense to you and your district. Make sure you can 1) explain it and 2) apply it.
- Make sure to include situations where consent cannot be obtained/given (ie. coercion, incapacitation) and clearly define those situations.

Okay ?
? yes

Domestic Violence

Domestic Violence: A felony or misdemeanor crime of violence committed

- **by a current or former spouse or intimate partner of the victim;**
- **by a person with whom the victim shares a child in common;**
- **by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;**
- **by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or**
- **by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.**

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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. The existence of such a relationship shall be based upon the reporting party's statement with consideration of the following factors:

(i) The length of the relationship

(ii) The type of relationship

(iii) The frequency of interaction between the persons involved in the relationship.

Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

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STALKING

Stalking: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to

- (1) Fear for the person's safety or the safety of others; or
- (2) Suffer substantial emotional distress.

For 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.

Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.



REMINDER:

*Even if your policies do not
have state definitions
written in, you may have to
access them to determine
correct language for alleged
violations*



Officials with Authority

- "Responsible Employee" is gone, actual knowledge only to Title IX Coordinator or "official with authority"
- ALL employees are responsible for reporting at K-12 level
- Actual Knowledge = NOTICE
- Notice without action= deliberate indifference



PARENTS / GUARDIANS

“While elementary and secondary school students retain less control over when disclosure of sexual harassment triggers the school’s mandatory response obligations, these students (with involvement of their parents as appropriate) do retain control over whether to accept supportive measures, and whether to also file a formal complaint.”



ADVISORS

- Of choice
- Can be an attorney, doesn't have to be
- Your policy defines how they can be involved in your process
- Challenges with advisors
- Benefits to advisors

Conduct + Education Program or Activity

IT'S MORE THAN THE BEHAVIOR...
MUST EVALUATE
LOCATION/JURISDICTION AS WELL



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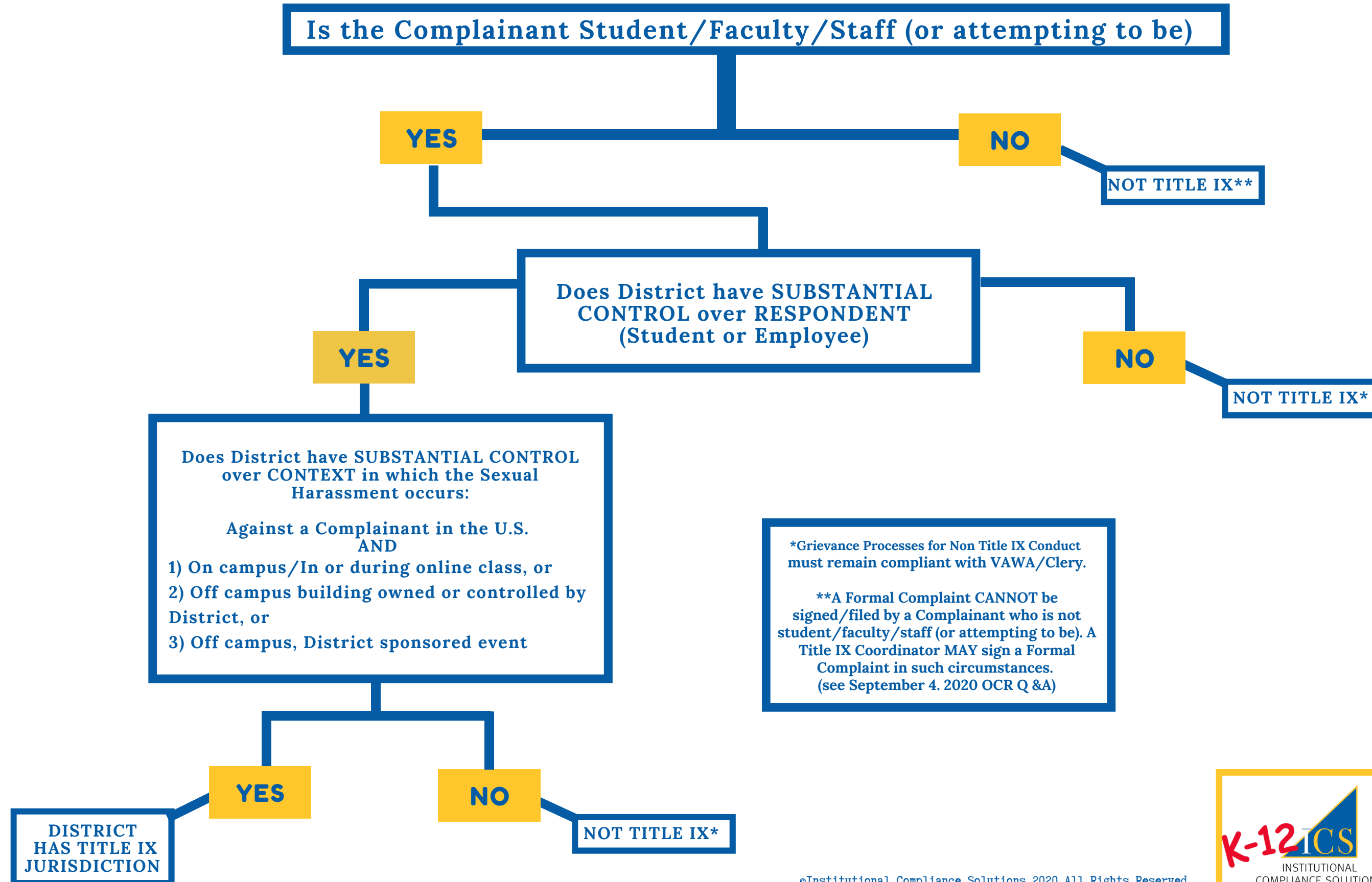


JURISDICTION

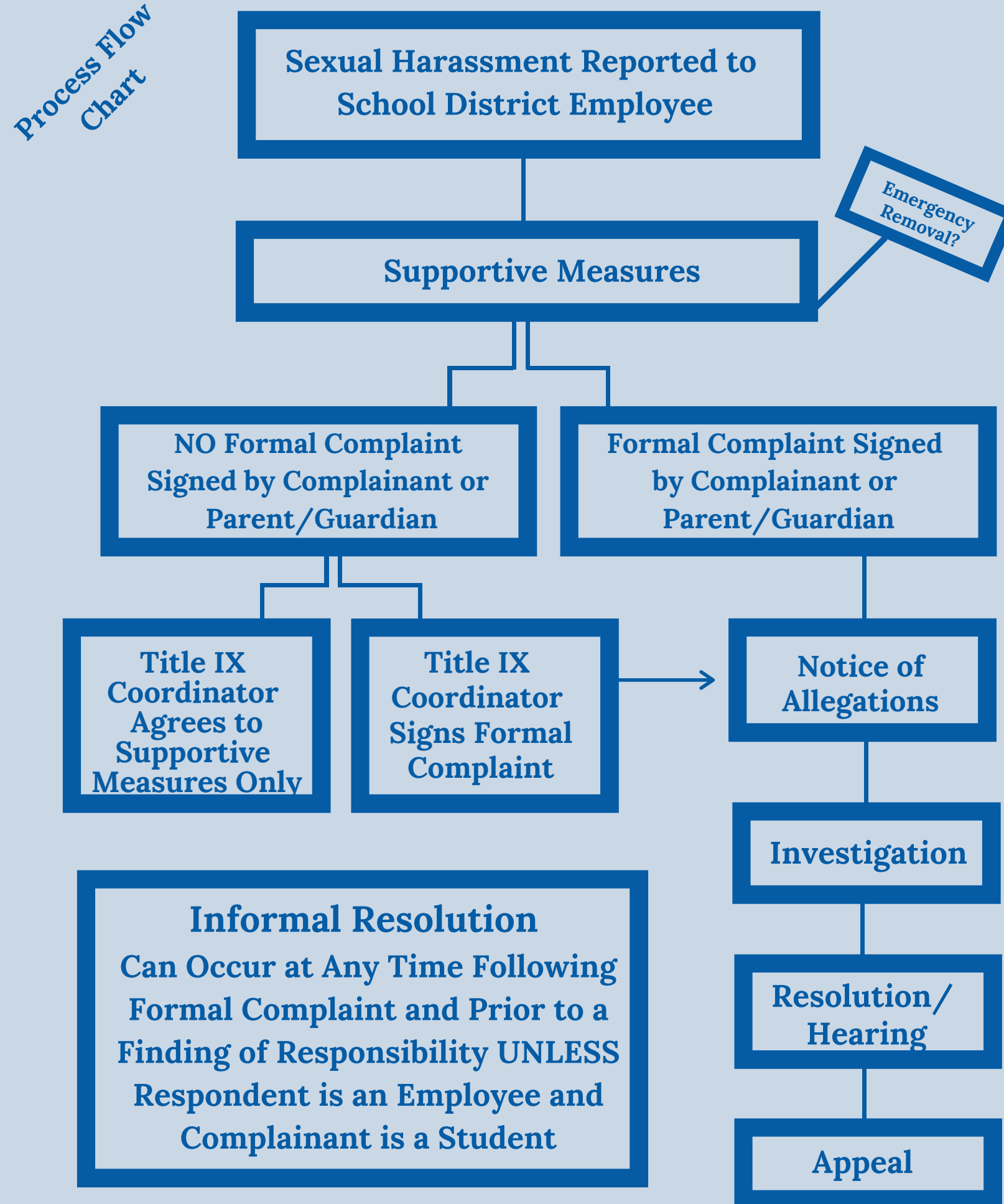
Education Program or Activity

- **Locations, events, or circumstances (operations)**
- **School district exercised substantial control**
 - **over both the respondent AND the context in which the sexual harassment occurs**
- **Includes online sexual harassment but it must be analyzed to determine if it occurs in education program or activity**
- **Does not create or apply a geographic test, does not draw a line between “off school property” and “on school property,” and does not create a distinction between sexual harassment occurring in person versus online.**

Jurisdiction/Education Program or Activity



General K-12 Process Flow Chart



*A Formal Complaint MUST be dismissed if it does NOT meet definition of Sexual Harassment, occur in education program or activity, or in the U.S.

*A Formal Complaint MAY be dismissed at request of Complainant, if Respondent no longer at school district or school district is prevented from gathering evidence.



Questions?

How Can We Help?



1

**COMMUNITY
ACCESS**

2

**TAILORED
TRAINING**

3

**ONGOING
SUPPORT**

Supportive Measures

- Immediately!
- Regardless of whether Formal Complaint



SUPPORTIVE MEASURES

Purpose:

- restoring or preserving equal access
- protecting safety
- deterring sexual harassment

Burden: remains on the district-not the parties

Not: punitive or disciplinary

Confidential: as much as possible

Document: when provided, when not provided and why

Title IX Coordinator: ultimately responsible for effective implementation, but others can also implement

Examples: in section 106.3



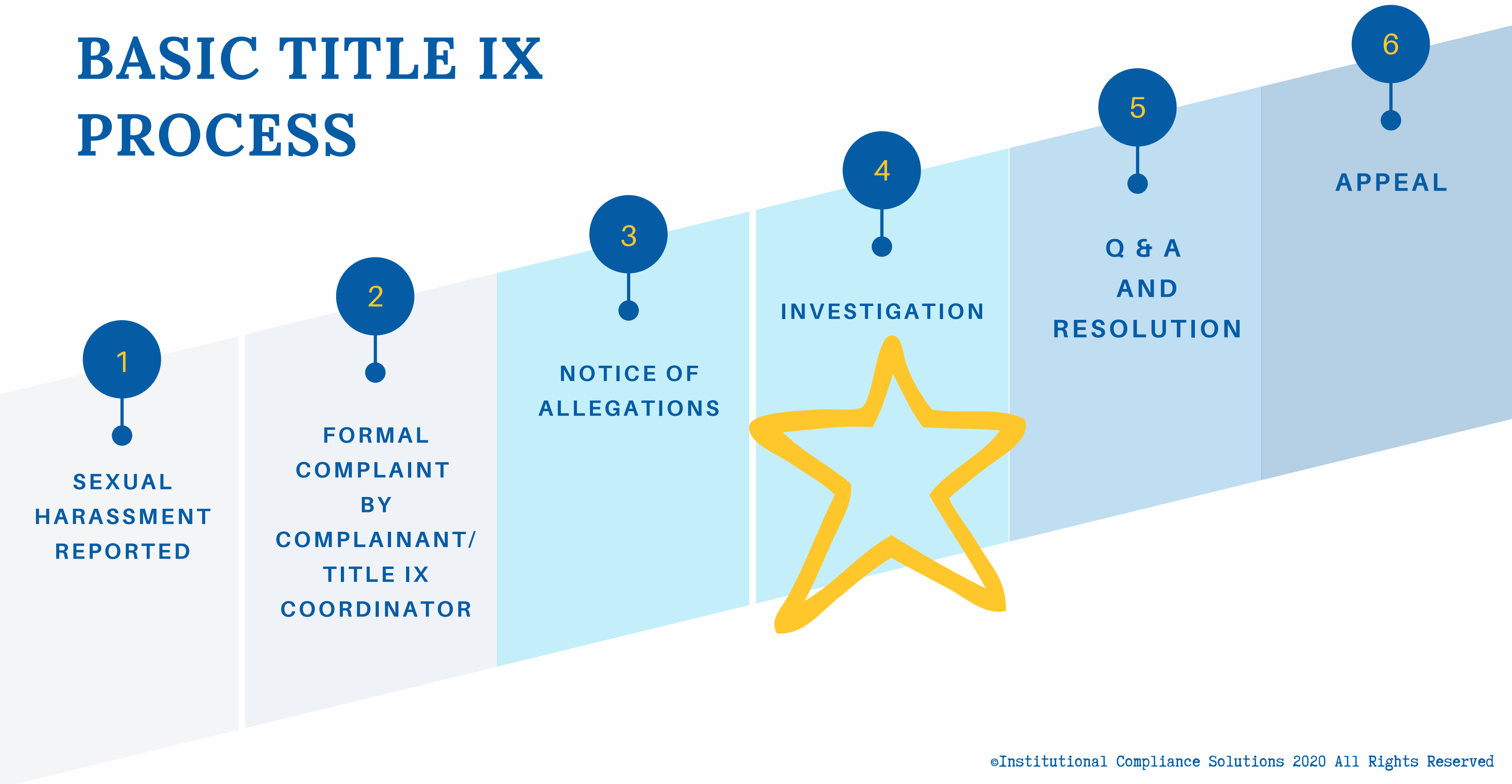
Title IX Grievance Process

- Specific requirements
- Focus on equity
- Opportunities for review
- Need for "forms"

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BASIC TITLE IX PROCESS



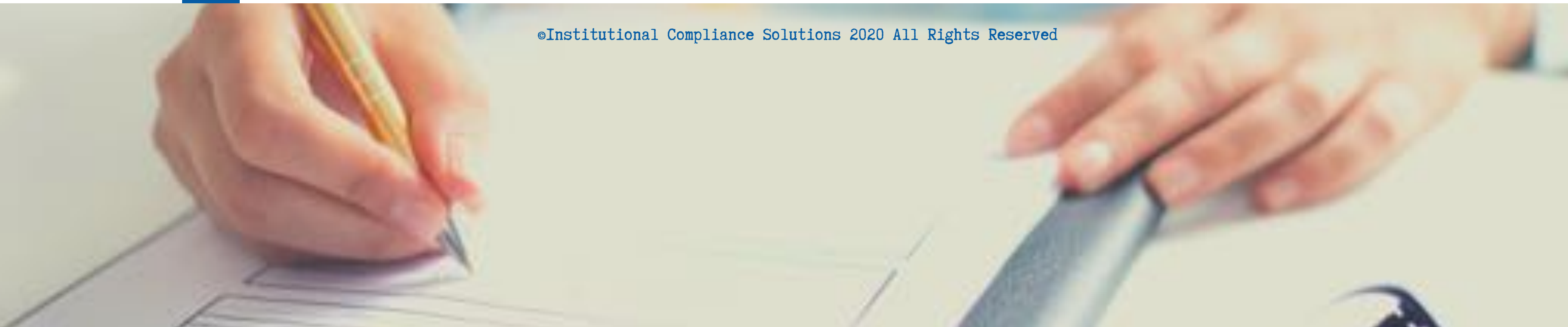
K-12 INVESTIGATION FLOWCHART



Formal Complaint



- Document (paper, email, or online submission)
 - Signed by Complainant/Parent or Guardian (digital signature is okay) or Title IX Coordinator.
 - Alleging sexual harassment, against the Respondent AND requesting that district investigate.
- Complainant must be participating in, or attempting to participate in an education program or activity of the institution/district with which the formal complaint is filed.



DISMISSAL OF A FORMAL COMPLAINT

MUST Dismiss if:

- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.
 - *May act under another provision of code of conduct

May Dismiss if:

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

*Must promptly send written notice of dismissal and reasons for dismissal simultaneously to parties

Response to a Formal Complaint (Grievance Process)

- Treat parties equitably
- Require an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- No conflict of interest or bias by Title IX Coordinator, investigator, decision-maker or facilitator of informal resolution process
- Trained Title IX Team
- Presumption that respondent is not responsible
- Include reasonably prompt time frames for process and appeals with written notice for limited extensions with good cause (may include absence of party, witness, or advisor, law enforcement activity or the need for language/accommodation of disability)
- Describe range of sanctions and remedies
- Standard of evidence (same for students and employees)
- Procedures and permissible bases for appeals
- Notice of Allegations containing specific information as outlined in regulations



Notice of Allegations Checklist

- ☐ Notice of Grievance Process; Including Informal
- ☐ Allegations Potentially Constituting Sexual Harassment
 - Identities of the Parties
 - Conduct Constituting Sexual Harassment
 - Date of Incident
 - Location of Incident
- ☐ Statement: Respondent Presumed Not Responsible/Responsibility Determined After Process
- ☐ Right to Advisor of Choice
- ☐ Code of Conduct Provision Prohibiting False Statements or False Information in Process



Investigation of Formal Complaint

MUST

- Ensure that burden of proof and burden of gathering evidence with district, not parties (no medical or counseling records w/o written consent of party)
- Provide equal opportunity to present witnesses (including EXPERT), and inculpatory/exculpatory evidence
- Not restrict ability of either party to discuss the allegations or to gather/present relevant evidence
- Provide opportunity for both parties to have advisor (can be attorney and can restrict the extent to which advisor can participate in the process)
- Provide written notice of date, time, location, participants and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare to participate
- Provide equal opportunity to inspect and review evidence obtained as part of investigation (even if not relied on)- sent to party AND advisor (electronic or hard copy) with 10 days to respond prior to completion of investigative report.
- Create investigative report that fairly summarizes relevant evidence
- Provide report to parties AND advisors 10 days prior to hearing/resolution for review and written response (before the Q and A).

Decision-Maker

Determination Regarding Responsibility Checklist

☐

Identification of the Allegations

☐

Description of Procedural Steps Taken

- Notifications to the Parties
 - Interviews with Parties and Witnesses
 - Site Visits
 - Methods Used to Gather Other Evidence
 - Hearings Held
-

☐

Findings of Fact Supporting Determination

☐

Conclusions Regarding the Application of the
Code of Conduct to the Facts

☐

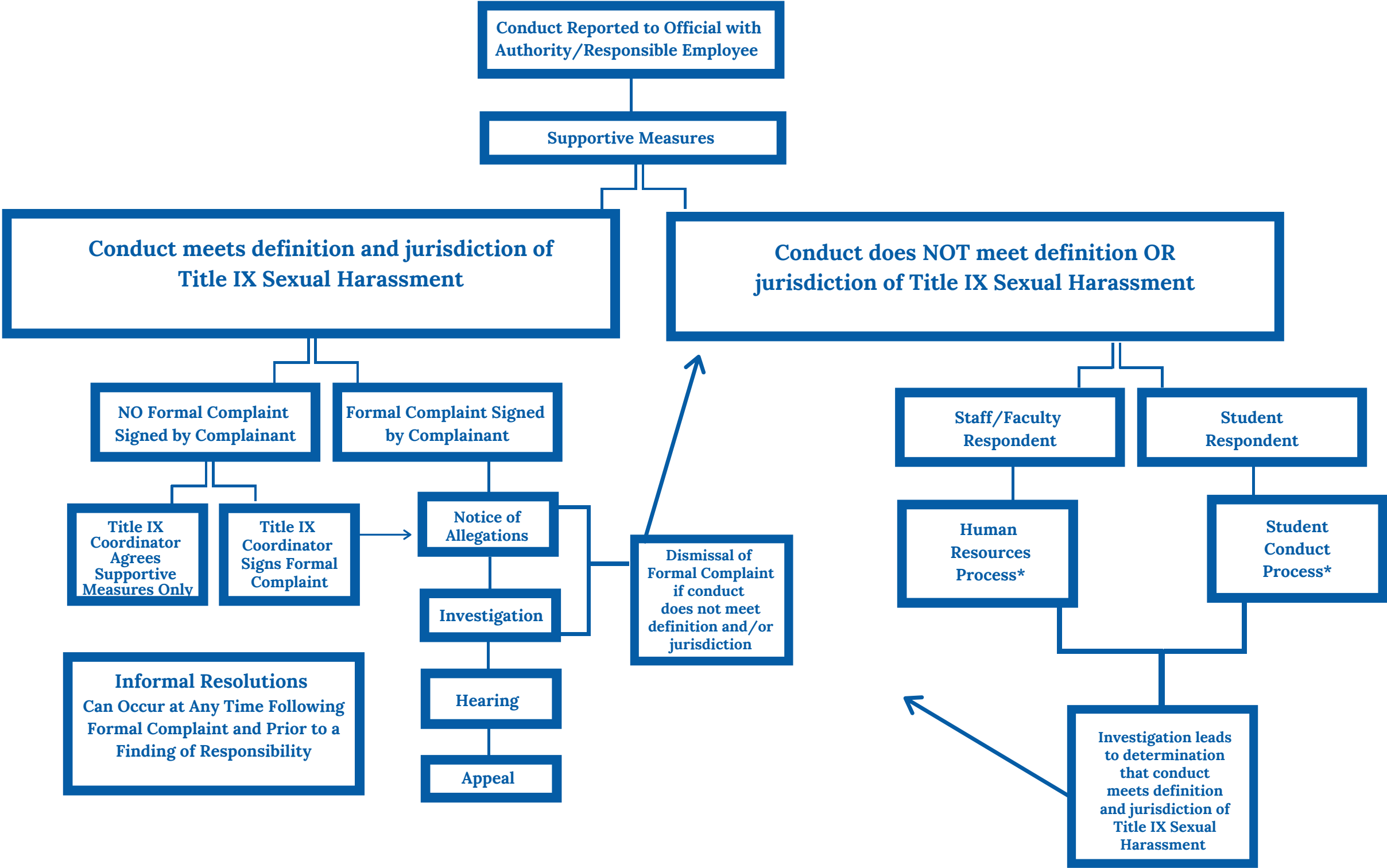
Result of Each Allegation Including Rationale

- Determination Regarding Responsibility
 - Disciplinary Sanctions
 - Whether Remedies Designed to Restore or
Preserve Equal Access to Education Program
or Activity Provided to the Complainant
-

☐

Procedures and Permissible Bases for Appeal

Title IX Process Flow Chart





INFORMAL RESOLUTIONS

May NOT:

- Be required/condition of enrollment or employment
- Be offered unless Formal Complaint is filed
- Be offered or facilitated when allegations of employee sexually harassing student

May:

- Be facilitated at any time after Formal Complaint and prior to determination regarding responsibility
- Expel if agreed to in Informal Resolution
- Provide Informal Resolution Process (NOT REQUIRED TO PROVIDE)

Must:

- Provide information regarding Informal Resolution Process in initial Notice of Allegations
- Provide parties written notice of informal resolution with
 - allegations
 - requirements of process (including what information/documents will be shared)
 - circumstances which presume Formal Complaint arising from same allegations
 - right to withdraw/resume grievance process
 - consequences-including records kept/shared
- Obtain voluntary, written consent
- Have reasonably prompt time frames

GROUNDS FOR APPEAL

- **MUST** offer both parties an appeal re: responsibility, recipient dismissal of formal complaint, or any allegations on following grounds:
 - Procedural irregularity that affected the outcome of the matter
 - New Evidence
 - Conflict of Interest or Bias by Title IX Coordinator, Investigator(s), Decision-Maker(s)- generally toward complainants or respondent or toward specific party
- May include additional grounds
- New, impartial decision-maker
- Cannot be Title IX Coordinator (30577)







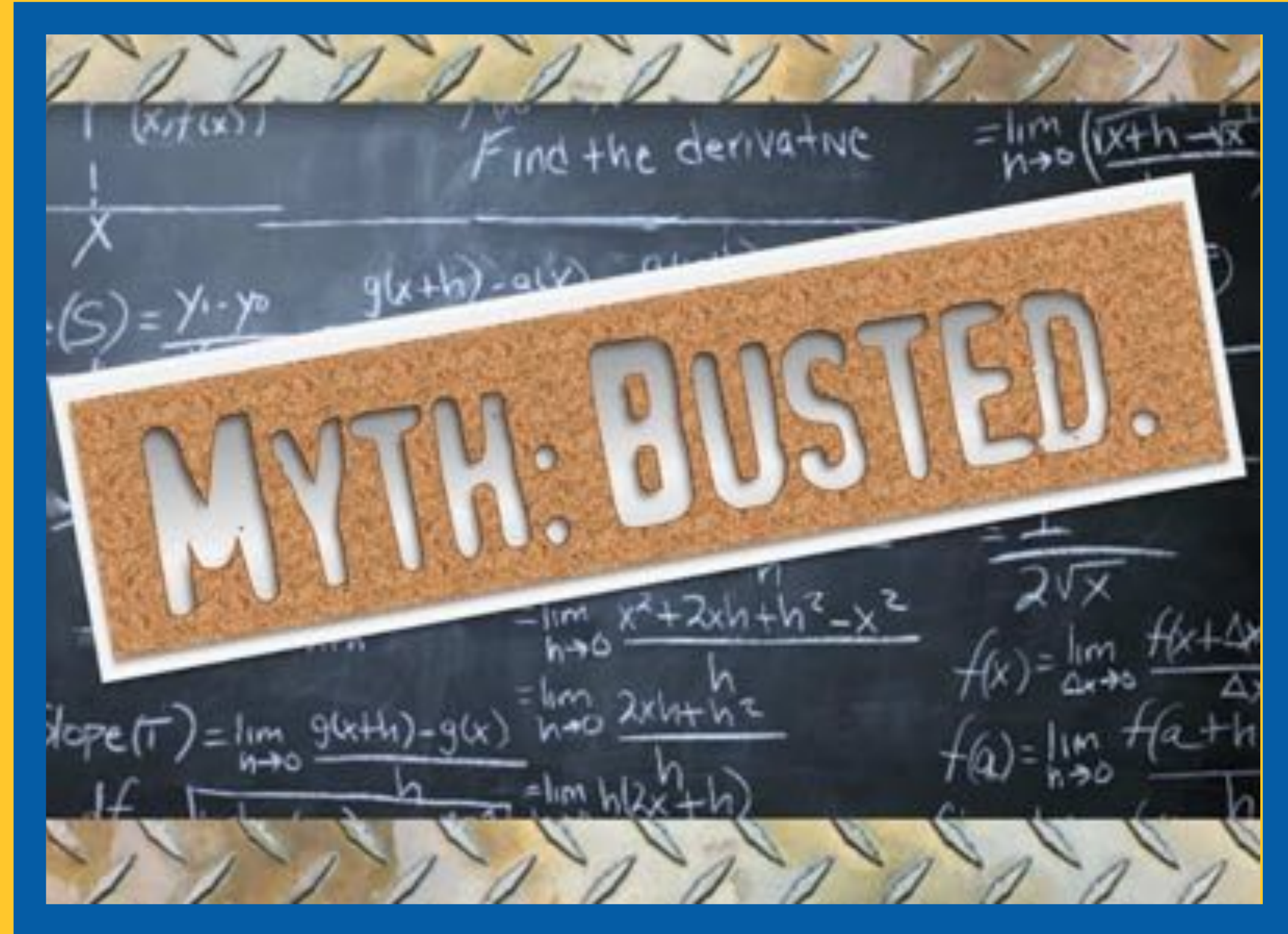
2020 Regulations Require the Following Training for Title IX Investigators

- Definition of Sexual Harassment
- Scope of Education Program/Activity
- Investigation/Grievance Process
 - Hearing
 - Appeals
 - Informal Resolution Process
- How to Serve Impartially
 - Avoiding Prejudgment of the Facts
 - Conflicts of Interest/Bias
- Investigative Report Writing
- Fairly Summarize Relevant Evidence



- There is only one way to conduct an investigation
- You must be an investigator

- There is only one way to conduct an investigation
- You must be an investigator







SERVING IMPARTIALLY- CONFLICTS OF INTEREST, BIAS, RESERVING JUDGMENT



CONFLICTS OF INTEREST/BIAS

- Generally toward Complainants/Respondents
- In a specific case
- Legal Definition of conflict of interest
 - 1: a conflict between the private interests and the official or professional responsibilities of a person in a position of trust
 - 2: a conflict between competing duties (as in an attorney's representation of clients with adverse interests)

Explicit Bias

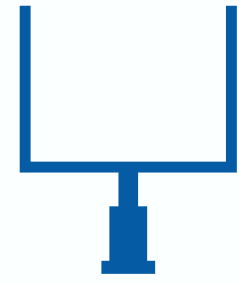
- “Explicit bias” refers to the attitudes and beliefs we have about a person or group on a conscious level.
 - Expressed directly
 - Aware of bias
 - Operates consciously
- Example: Statement- "I don't think a woman would make a good CEO... Women are too emotional."



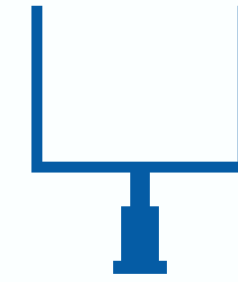


Implicit Bias

- "Implicit bias" refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.
 - Expressed indirectly
 - Unaware of bias
 - Operates subconsciously
- Example: Assuming that a woman entering a hospital room is a nurse instead of a doctor because of her gender.



END GAME



**CIVIL
LAWSUIT**



**CRIMINAL
INVESTIGATION**



**TITLE IX
INVESTIGATION**



During the Investigation: STAY IN YOUR LANE

- Your role as fact gatherer
- Burden on you to gather information- not on parties to provide it
- Investigating violations of specific policy: not law or policies outside of your charge/responsibility
 - Ex: Discovering a management issue while investigating harassment complaint



During the Investigation: SUSPEND YOUR MIND

- Daily Choice
- Reserve judgments until all facts are gathered

RECORDKEEPING

Districts must maintain the following records for seven years:

1. Records and action taken in response to a report or Formal Complaint, including:
 - Supportive measures,
 - The basis for district's conclusion that its response was not deliberately indifferent,
 - Measures taken to restore and preserve equal access to district's Education Program or Activity,
 - Reasons why district's response was not clearly unreasonable in light of the known circumstances if district does not provide a Complainant with supportive measures.
2. Each Sexual Harassment investigation including:
 - Any determination regarding responsibility and all audio or audiovisual recording or transcript,
 - Disciplinary sanctions imposed on the Respondent, and
 - Any remedies provided to the Complainant.
3. Any appeal and result of appeal.
4. Any informal resolution and result therefrom.
5. All materials used to train Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators.

KNOW YOUR POLICIES AND PROCEDURES

- Working knowledge of your policies.
- Use policy consistent language
- Who is the point of contact for complainant/respondent?
- Who is the point of contact re: retaliation?
- What it is the hearing/resolution and/or appeal process?
- Informal resolutions?





Questions?



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Investigative Techniques

**VIRTUAL CERTIFIED
TITLE IX
INVESTIGATOR
TRAINING**





TITLE IX INVESTIGATIVE TECHNIQUES

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THEMES/END GAME



**Fair/Balanced
approach**



**Uncover all relevant
facts/information**

- stone analogy



**Common sense
approach- beware
of rabbit holes**



BE CURIOUS

It is the number one skill for an investigator.



Timeliness

- Policy must designate reasonably prompt timeline
- Interview witnesses as soon as possible
- Unavoidable delays
- Notice of extensions
- Addressing delays in record keeping/report



Organize

- Plan order of interviews/when to interview respondent
- In person vs. virtual vs. phone
- Explaining process and your role
- Reassurance/retaliation

INTERVIEW SKILLS

- Develop rapport
- Observe
- Be professional
- Outline questions/flexibility



Types of Questions

- Who, what, when, where, why
- Open ended
- Repeat, repeat, repeat
- Circling techniques
- Clarity on timelines/who is involved etc.
- Openings
- Closing questions
- Opportunity to provide clarification after interview

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Relevancy

- Regulations do not define relevancy
- Regulations define some things that are not relevant:
 - Treatment unless parties agree
 - Privileged Information
 - Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior unless they are offered to prove that someone other than Respondent committed the sexual harassment, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with the respondent and are offered to prove consent.

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Ir relevant

Relevancy Continued

- Ordinary Meaning (Not a legal term)
- Does the evidence tend to make a fact more or less likely to be true

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Note Taking

- Explain your role as note taker
- Note taker vs. dual investigator
- Use quotations if possible
- Ask for a pause or clarification if necessary

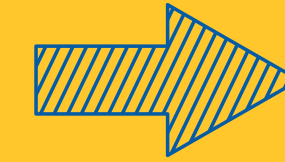
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Types of Information/ Evidence

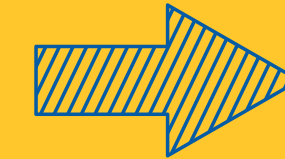


**Direct
Information/Evidence**



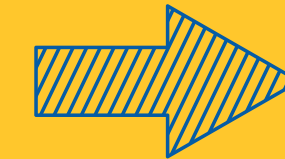
**First person observation of an
incident**

**Circumstantial
Information/Evidence**



**Reported observation of
information that offers
inferences about the facts of the
event**

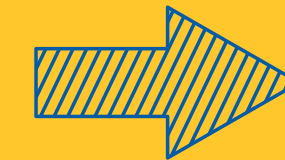
**Documentary
Information/Evidence**



**Written description of an
incident**

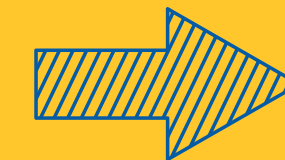
- Police Report
- Write up from staff member

**Hearsay
Information/Evidence**



**Information that is reported
through another party**

**Expert
Information/Evidence**



**Information that is shared from a
person who has an acknowledged
expertise in related subject
matter**



Complainants

- Trauma informed practices
- Managing expectations
- Reluctant complainants and retaliation
- Interim/support measures
- Next Steps
- Bias/Conflict of Interest



Respondents

- Trauma informed practices
- No presumption of responsibility
- Managing expectations
- Interim/support measures
- Simultaneous and ongoing criminal investigations
- Next Steps
- Bias/Conflicts of Interest



ADVISORS

- Of the party's choice
- Attorney? Can be, but doesn't have to be
- Does not have to be trained.
- Must follow rules of decorum if you have them
- Potentially slow down the process

WORKING WITH ADVISORS CONTINUED

- Set expectations for each meeting
- Communicate often
- Communicate clearly
- Create a "guide"
- Allow time for questions
- Be kind, understanding, and patient (this is new for them too)
- Follow up in writing



IDENTIFYING OTHER EVIDENCE

- Videos
- Social Media
- Text Messages
- Physical Evidence
- Applications
- SANE Exam
- Other?



Witnesses

- Eye Witness
- Character Witnesses???
- Hearsay issues
- Witnesses identified by the parties
- Experts

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THE ATMOSPHERE MATTERS

Consider the look and feel of the office/interview location

- not too formal but still professional
- not intimidating



Standard of Proof

- All standards related to sexual harassment must be the same
- Preponderance of the Evidence
 - 50% plus a feather
 - more likely than not
- Clear and Convincing
- School investigation vs. Criminal investigation





Creating and Maintaining Your File

- Be Consistent!
- Allow an extra 15-30 minutes after each meeting to scan, save, and update
- Scan your notes immediately
- Keep an electronic copy
- Add information to your draft report as you investigate...especially timelines



Your Investigative File Continued

- 7 years
- Contingency and Sustainability planning (what will happen to your file if you leave or change roles)
- Anyone should be able to pick up your file and understand what happened



Investigate as Though You Will be Investigated

- Have a clear/organized plan- but remain flexible
- Document Document Document (delays, objections EVERYTHING)
 - Duplication of documentation
 - To record or not to record?
 - Inclusivity vs. Exclusivity



INTRODUCTION:

You are wearing a different hat...

- Everyone must understand your role
- You will ask hard questions
- You will talk about difficult topics
- You will provide breaks if necessary
- You will keep the information as private as possible (privacy vs. confidentiality)
- Expectations for the truth and consequences for failure to tell the truth



INTRODUCTION PRACTICE



Questions?



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Report Writing

VIRTUAL CERTIFIED TITLE IX INVESTIGATOR TRAINING





REPORT CONTENT

- How reported
- Date of Formal Complaint
- Who investigated
- Policy
- Timelines (of events and of investigation)
- Information from parties and witnesses
- Physical Evidence
- Summary of Relevant Information
- Note for your record: Information not included or witnesses not interviewed and why





INSTITUTIONAL
COMPLIANCE SOLUTIONS

Decision-Maker

Determination Regarding Responsibility Checklist

- ☐ Identification of the Allegations

- ☐ Description of Procedural Steps Taken
 - Notifications to the Parties
 - Interviews with Parties and Witnesses
 - Site Visits
 - Methods Used to Gather Other Evidence
 - Hearings Held

- ☐ Findings of Fact Supporting Determination

- ☐ Conclusions Regarding the Application of the Code of Conduct to the Facts

- ☐ Result of Each Allegation Including Rationale
 - Determination Regarding Responsibility
 - Disciplinary Sanctions
 - Whether Remedies Designed to Restore or Preserve Equal Access to Education Program or Activity Provided to the Complainant

- ☐ Procedures and Permissible Bases for Appeal

WHO IS YOUR AUDIENCE?



What is the intent of the report
Who needs to understand/use it
Where/how will it be used

ORGANIZATION IS KEY

- By party/witness?
- By time/chronological?
- By event?





REPORT MUST

- Fairly summarize relevant evidence
- Be provided to parties AND advisors
- Hard copy or electronic

CREDIBILITY DETERMINATIONS

- Only if required by your policy

manager
cred-ible
witnesses.
sible to be
are
cred

Burden

Burden to collect/gather evidence
is on the school district
(investigator)... NOT THE PARTIES

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Document Document Document

- CONSISTENT,
- THOROUGH,
- CLEAR,
- TIMELY



INVESTIGATIVE TIMELINE

1
INVESTIGATE

2
OPPORTUNITY
TO INSPECT AND
REVIEW
EVIDENCE
RELATED TO
ALLEGATIONS
AND PROVIDE
WRITTEN
RESPONSE
10 days

3
INVESTIGATIVE
REPORT

4
OPPORTUNITY
TO REVIEW
FINAL REPORT
AND PROVIDE
WRITTEN
RESPONSE
10 days

5
Q & A
RESOLUTION
/ HEARING

6
APPEAL



Draft Report- Template





INSTITUTIONAL
COMPLIANCE SOLUTIONS

Questions?

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Upcoming ICS Events

<https://icslawyer.com/ics-events/k-12/>

- **2020 Year End Review (FREE)**
1-28-2021 1:00-2:00 Eastern
- **Level 2 Investigator**
1-27-2021 10:00-1:00 Eastern
- **Policy to Practice Series**
Thursdays in February
(DISCOUNT!)
- **Check out other 2021
Professional Development
Opportunities**



How Can We Help?



1

**COMMUNITY
ACCESS**

2

**TAILORED
TRAINING**

3

**ONGOING
SUPPORT**