



TAKE TWO

**THE 2024
TITLE IX RULES**

PRESENTED BY THOMPSON & HORTON

T&H

Title IX Workshop

YES Prep Public Schools
June 25, 2024



Thompson & Horton

HOUSTON • DALLAS • AUSTIN • FORT WORTH

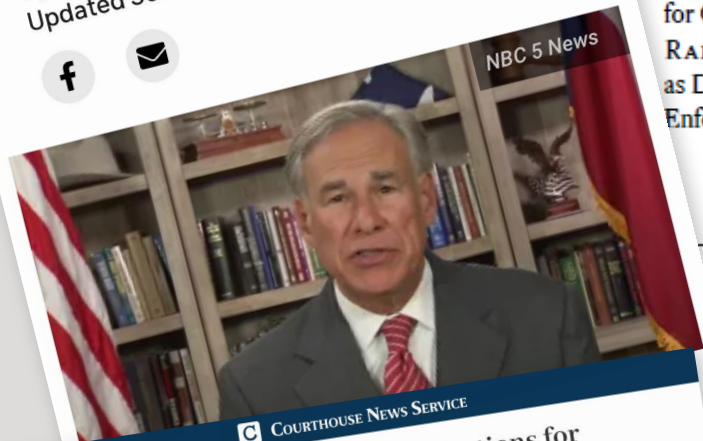
Litigation
is
Anticipated
Here



Gov. Abbott orders TEA to ignore Biden's Title IX revisions protecting LGBTQ+ students

Texas governor and attorney general respond after the U.S. Department of Education issued new Title IX regulations

By **NBCDFW Staff** • Published 31 mins ago • Updated 30 mins ago



Texas challenges Title IX protections for LGBTQ students

In addition to filing a federal lawsuit seeking to block new rules protecting LGBTQ people, Texas Governor Greg Abbott has ordered the state education agency not to abide.

KIRK MCDANIEL / April 29, 2024

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS AMARILLO DIVISION

STATE OF TEXAS,

Plaintiff,

v.

THE UNITED STATES OF AMERICA;
MIGUEL CARDONA, in his official capacity as Secretary of Education;
UNITED STATES DEPARTMENT OF EDUCATION; CATHERINE LHAMON, in her official capacity as Assistant Secretary for Civil Rights, Department of Education;
RANDOLPH WILLS, in his official capacity as Deputy Assistant Secretary for Enforcement, Department of Education,

Defendants.

State of Texas's Original Complaint

News | Policy | Business | Health | Opinion

GAZA CEASEFIRE TITLE IX

LGBTQ

Texas AG sues Biden administration over Title IX rules that expand transgender student protections

BY BROOKE MIGDON - 04/29/24 1:53 PM ET

No.

Five Republican-led states sue over Biden's new Title IX transgender protections

The new rules prohibit schools from banning transgender students and teachers from using restrooms that align with their gender identities, among other policies.



Transgender rights activists hold signs as they march through the University of Montana campus on May 3, 2023 in Missoula, Mont. Justin Sullivan / Getty Images file

Posts

Replies

Media

Likes



Greg Abbott @GregAbbott_TX · 5h
Congress wrote Title IX to protect women. Biden, with no authority to do so, rewrote Title IX to protect men who identify as women.

This tramples Texas laws that prohibit men in women's sports.

I am instructing the Texas Education Agency to ignore Biden's illegal dictate.



Texas Attorney Gen...
4.8K posts

Posts

Replies

Media



Texas Attorney General @TXAG
BREAKING: Attorney General Ken Paxton Partners with @America1stLegal to Sue Biden Administration for Unlawfully Using Title IX to Mandate Radical Gender Ideology Violating Constitution and Putting Women At Risk:



KEN PAXTON
ATTORNEY GENERAL of TEXAS

Attorney General Ken Paxton Sues Biden Ad...
From texasattorneygeneral.gov

129

12,608

1.7K

348K



SHARE



POST



What if my state has a lawsuit?



- ▶ Unless and until there is an injunction, prepare to implement the new Title IX regulations August 1
- ▶ If there is an injunction, do not implement the new Title IX regulations, but do **keep preparing for implementation**
- ▶ Consult your legal counsel

Here's Our Agenda:

- ✓ **Title IX Basics**
 - ✓ Who does it protect?
 - ✓ When does the Title IX grievance process apply?
 - ✓ Reporting Obligations
- ✓ **Grievance Process Overview**
 - ✓ Evaluation
 - ✓ Investigation
 - ✓ Determination
 - ✓ Appeal
- ✓ **Serving Impartially**



Let's Meet Our Cast!

Icebreakers



Polling Access



Option One

Use this QR code

Option Two

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How much experience do you have with Title IX?

I am an expert in the 2020 Title IX Rules (A) 100%

I was an expert even before the 2020 Title IX Rules (B) 0%

I have some familiarity with Title IX (C) 0%

I am new to Title IX (D) 0%



Discrimination and harassment can:

- ▶ Impair student learning
- ▶ Impact student safety and sense of safety
- ▶ Lead to increased absenteeism
- ▶ Lead to negative health consequences
- ▶ Affect staff morale and impair productivity
- ▶ Impact FAPE
- ▶ Lead to legal disputes that are embarrassing, difficult, time-consuming, and expensive to resolve

Responsibility to Respond

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

☐

Ends the harassment

☐

Remedies the effects of the harassment

☐

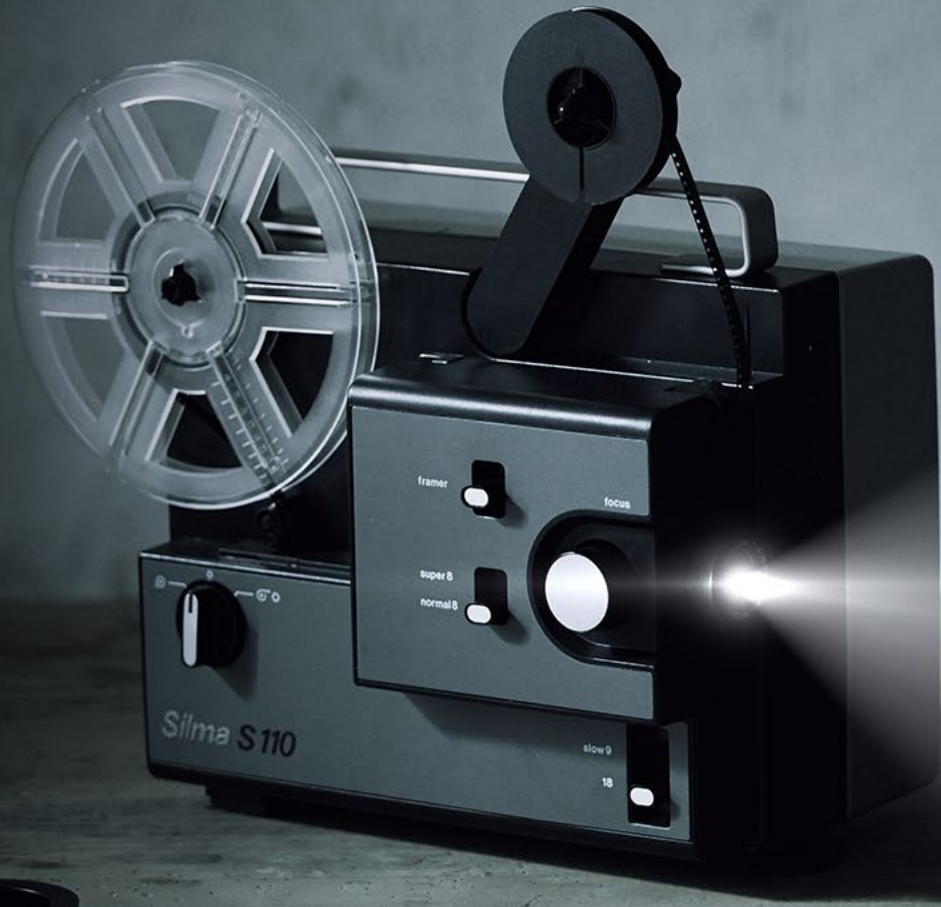
Prevents its recurrence

Let's Dive In!



Title IX Basics

Who Does it Protect?
When Does the Title IX
Grievance Process Apply?





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

20 U.S.C. § 1681(a)



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Title IX

Title IX prohibits discrimination **on the basis of sex** with respect to:

- Recruitment, admissions, and counseling
- Financial assistance
- Athletics
- Sexual harassment
- Treatment of pregnant and parenting students
- Discipline
- Single-sex education
- Employment
- Retaliation



Title IX Basics

1

Conditions the receipt of federal money on a promise not to discriminate

2

Guarantees equal educational opportunity in federally funded educational programs and activities

3

Purpose was to remove barriers that prevent women from participating in educational opportunities and careers based on sex—but the law applies equally regardless of sex or gender

4

Applies to all aspects of educational institutions programs and activities including admissions, all aspect of operations, and employment



The background features a large yellow triangle pointing to the right, set against a black background. To the right of the triangle is a black and white geometric pattern consisting of a series of interlocking triangles and squares, creating a complex, crystalline structure.

Interplay Between Title VII and Title IX

Title IX v. Title VII

- ▶ Title VII prohibits employers from discriminating against any individual “because of such individual’s . . . sex . . .” 42 U.S.C. § 2000e-2(a).
- ▶ Before the 2020 Title IX rules, most educational institutions used Title VII, not Title IX, for complaints by an employee
- ▶ However, the 2024 rules are explicit that sex-based discrimination against an employee is also covered by Title IX



Some Key Differences

Issue	Title IX	Title VII
Definition of sexual harassment	Subjectively and objectively offensive, and severe or pervasive. Limits or denies a person's ability to participate	Severe or pervasive Affects a term, condition, or privilege of employment
Notice required for employer responsibility	Actual knowledge (actual notice)	Actual or constructive (should have known)
Country Jurisdiction	Can cover outside of the U.S.	Can cover outside of the U.S.
Who Investigates	Same person may investigate and decide responsibility	Same person often investigates and decides responsibility
Investigation Information Shared	Must share description of all relevant, not otherwise inadmissible, evidence (or copy if requested)	Neither required
Right to Confront Other Party	Parties have an opportunity to respond to the relevant, not otherwise inadmissible evidence	Not required

Which Process Applies?

Employee Complainant, Student Respondent(s)

▶ Always Title IX

▶ Examples:

- Students constantly making inappropriate remarks to a young, attractive teacher such that the teacher feels sexually harassed
- Students using AI to generate sexually explicit photos of teachers



Which Process Applies?

Employee Complainant, Employee Respondent(s)

- ▶ May invoke both Title IX and your employment discrimination processes
- ▶ Requires the Title IX Coordinator to coordinate with the school's EEO compliance manager or other individual who handles employment discrimination complaints
- ▶ If it limits or denies participation → Title IX grievance process
- ▶ If not, but it affects a term, condition, or privilege of employment → other employee discrimination process



Which Process Applies?

Employee Complainant, Employee Respondent(s)

- ▶ Even if the employee complainant chooses not to proceed under Title IX, the Coordinator should still offer supportive measures as with any other complainant who declines the Title IX process
- ▶ The Coordinator should also consider the complaint when reviewing the school's overall climate for sex-based discrimination and potential prevention programs



What About Retaliation?

- ▶ Both Title VII and Title IX prohibit retaliation
- ▶ Title VII: opposing unlawful employment practices or for participating in a charge or investigation
- ▶ Title IX: interferes with any Title IX rights or privileges, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in the Title IX grievance process



Scope of Title IX: What is “on the basis of sex”?



Sex Based

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graph TD; A[Sex Based] --> B[Sex Characteristics]; A --> C[Sex Stereotypes]; A --> D[Pregnancy and Related Conditions]; A --> E[Sexual Orientation]; A --> F[Gender Identity];
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**Sex
Characteristics**

**Sex
Stereotypes**

**Pregnancy
and
Related
Conditions**

**Sexual
Orientation**

**Gender
Identity**





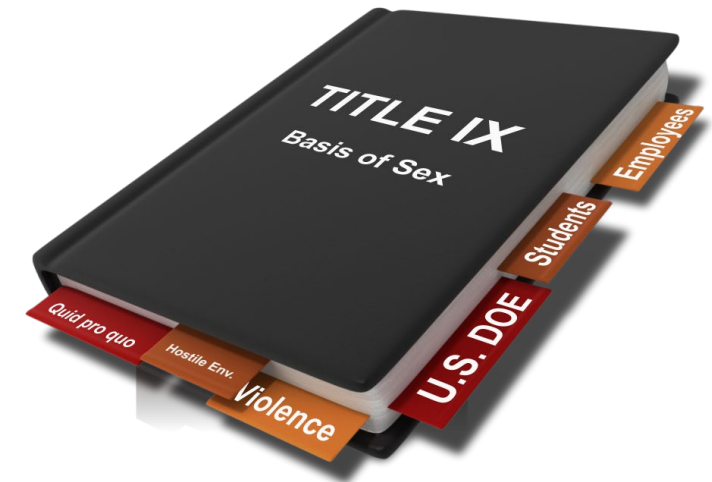
Specific “Bases” of Discrimination

- ▶ Codifies LGBTQI+ protections
 - First time Title IX regulations have expressly defined discrimination on the basis of sex to include sex stereotypes, sex characteristics, sexual orientation, and gender identity
- ▶ Aligns with OCR’s recent interpretation
- ▶ Preamble states it aligns with *most* recent court decisions
- ▶ Reflects increased focus on pregnancy discrimination

Sex Discrimination in Education Programs or Activities

34 C.F.R. § 106.31(a)(2)

"In the limited circumstances in which Title IX or this part permits different treatment on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than **de minimis harm** except as permitted by [certain provisions of the Title IX regulations]. **Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.**"





What Is De Minimis Harm?

- ▶ The rules do not define or explain this
- ▶ It is an objective standard
- ▶ Harm "must be genuine and objectively non-trivial and assessed from the perspective of a reasonable person in the individual's position"
- ▶ Preamble: "there are injuries, including stigmatic injuries, associated with treating individuals differently on the basis of sex, and in such circumstances, no additional showing of a more 'material' harm is required under Title IX"

Where Does the De Minimis Harm Standard Apply?

- ▶ Any circumstance in which a recipient engages in permissible sex separation or differentiation, unless subject to an exception
- ▶ Restrooms
- ▶ Locker rooms
- ▶ Access to classes and activities
- ▶ Dress and grooming codes



Where Does the De Minimis Harm Standard **NOT** Apply?

- ▶ Institutions controlled by religious organizations (with a religious exemption)
- ▶ Military and merchant marine educational institutions
- ▶ Membership practices of social fraternities and sororities, and voluntary youth service organizations
- ▶ Admission to certain classes
- ▶ Sex-separate housing
- ▶ Sex-separate athletic teams



Prohibited Conduct:

Sex Discrimination





**Sex-Based
Harassment**

**Different
Treatment**

**Failure to
Accommodate**

Retaliation

**Disparate
Impact**

Different Treatment

Different treatment discrimination occurs when an individual or group of individuals is treated differently because of their sex.

Different treatment discrimination is generally intentional—the person or entity intended to treat the individuals differently on the basis of sex. But it does not require bad faith, ill will, or evil motive.



Different Treatment Test

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



Similarly Situated

- Students are similarly situated when they are comparable, even if not identical, in relevant respects.
- The “relevant respects” will vary by situation.





What is Pre-Text?

- Does the asserted reason explain the actions?
- Does evidence contradict a stated reason for a disparity, exposing it as false?
- Were similarly situated individuals treated differently?
- Were the actions within the bounds of policies, procedures, and past practices?



Different Discipline



Mr. & Mrs. Bender complain that their son, John, received a 1-week DAEP placement, while a female student, Claire Standish, received a 1-day in-school suspension "for basically the same thing."



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Different Discipline

Upon investigation, you learn Claire's ISS was for yelling at her teacher and being disruptive in class, while John's discipline was for a fight in the hall.



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Different Discipline

John and Claire are both caught smoking in the restroom.

Claire receives a 1-hour after school detention

John gets an all-day Saturday detention.

It is Claire's first offense. It is John's third offense.

What if the administrator who disciplined them has been heard saying they'd never send a female student to detention because those kids are just too rough?





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Different Facilities

A student complains that the boys' restroom is more run down than the girls' restroom.

"We don't have none of this stuff in the boy's room! Wait a minute! We don't got none of this... we don't got doors on the stalls in the boy's room, we don't have, what is this? What's this? We don't have a candy machine in the boy's room!"

Duckie, Pretty in Pink





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Disparate Impact

Disparate impact discrimination occurs when a facially neutral policy, rule, or practice—*applied evenhandedly*—has a disproportionate impact or discriminatory outcome on a particular sex. It is *often unintentional*. The focus is on the *consequences* of the policy or practice rather than the intent of its creation or implementation.

- Consider whether the District has a substantial and legitimate justification for using the policy, rule, or practice
- Generally, there is no respondent

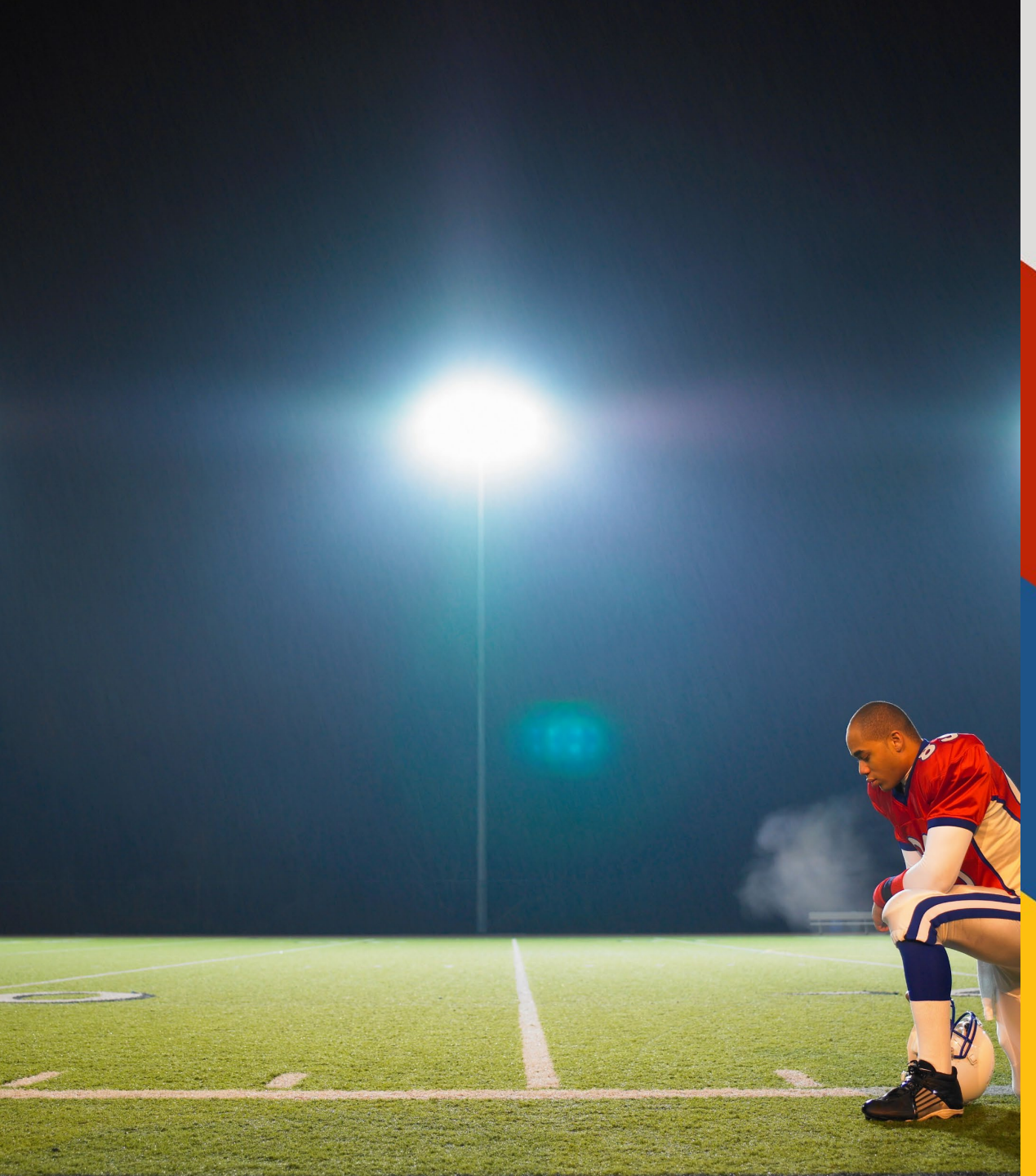


Disparate Impact Test

- ▶ Does a neutral policy result in an adverse impact on students of a particular sex, gender, sexual orientation, or gender identity?
- ▶ Is the applicable policy necessary to meet an important educational goal?
- ▶ Is there a comparably effective alternative available that would meet the stated educational role with less of a burden or adverse impact on the disproportionately affected group?

Disparate Impact

- ▶ West Canaan High School allows booster clubs to raise money for the Coyotes athletics teams
- ▶ The football booster club regularly raises more money for their team than all of the other sports combined





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Disparate Impact

- ▶ A gym teacher at Bronson Alcott High School requires students to perform burpees if they do not dress out for class.
- ▶ Every infraction results in an escalated number of burpees – 25 for 1st infraction, 50 for 2nd, 100 for 3rd, etc.
- ▶ Five girls allegedly went to nurse. One female student developed rhabdo and was hospitalized for 3 weeks.

Disparate Impact

- ▶ Female students claim the exercises had a disparate impact on them because they were at menstruation age, so they may not have felt as comfortable dressing out for the gym, and biologically had issues that made exercise impact them harder.





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Prohibited Conduct:

Sex-Based Harassment

relation or from an
point of view.
Harassment
feeling of intense
annoyance cause
that disturbs or
right for what is

Sex-Based Harassment

“Sex-based harassment . . . is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex,” including sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ The Big 4 – Sexual Assault, Domestic Violence, Dating Violence, & Stalking



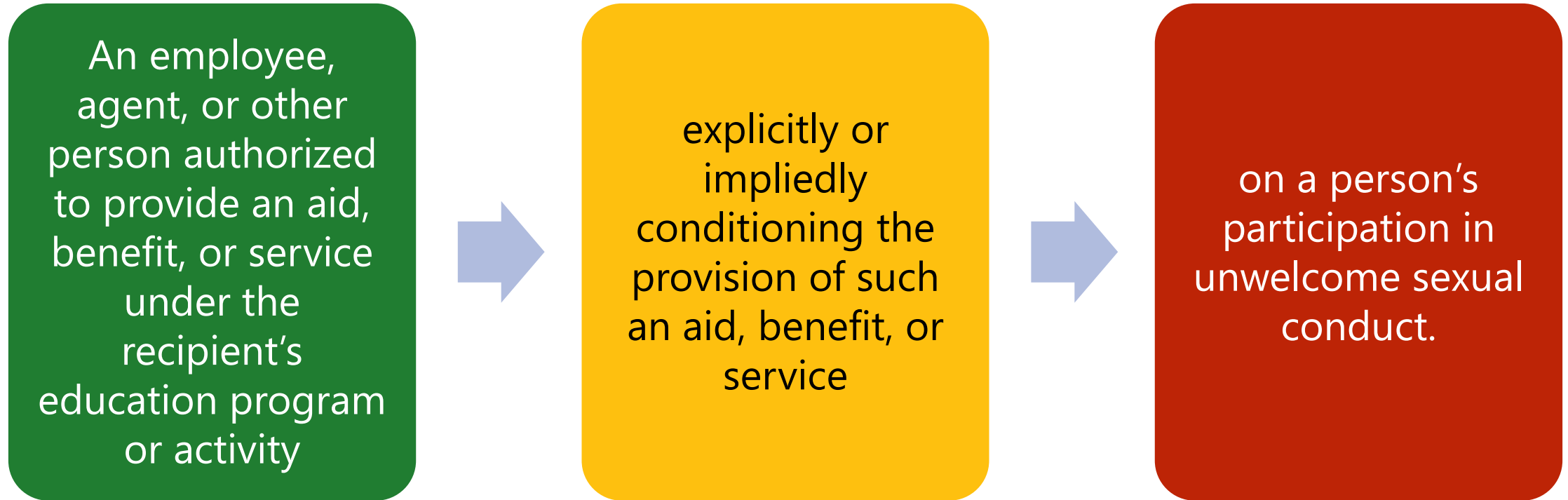
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- ▶ **Quid Pro Quo Harassment**
- ▶ Hostile Environment Harassment
- ▶ Specific Offenses – Sexual Assault, Domestic Violence, Dating Violence, & Stalking



Quid Pro Quo



Quid Pro Quo

- ▶ It is **presumed** the sexual conduct is unwelcome
- ▶ It is **presumed** the conduct deprived a student of educational opportunity
- ▶ The individual (usually an employee) does not have to make the condition explicit—i.e., state “this for that”—the condition may be implied from the circumstances
- ▶ The age and situation/position of the Complaint is relevant to the determination of whether a condition is implied





Quid Pro Quo

- Callahan, a volunteer mentor for debate students at Harvard High School, and a Partner at a Pearson Hardman, asks to see student Elle Woods alone in his office. First, Mr. Callahan praises Elle's debate skills, saying she will be a great lawyer for following her instincts, then asks if she has considered her career path. Elle says she has not but that she knows getting a summer job is competitive. Callahan explains that competition is really about "knowing exactly what you want and how far you will go to get it. How far will Elle go?" before putting his hand on her thigh. Elle throws off his hand and storms off.



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Quid Pro Quo

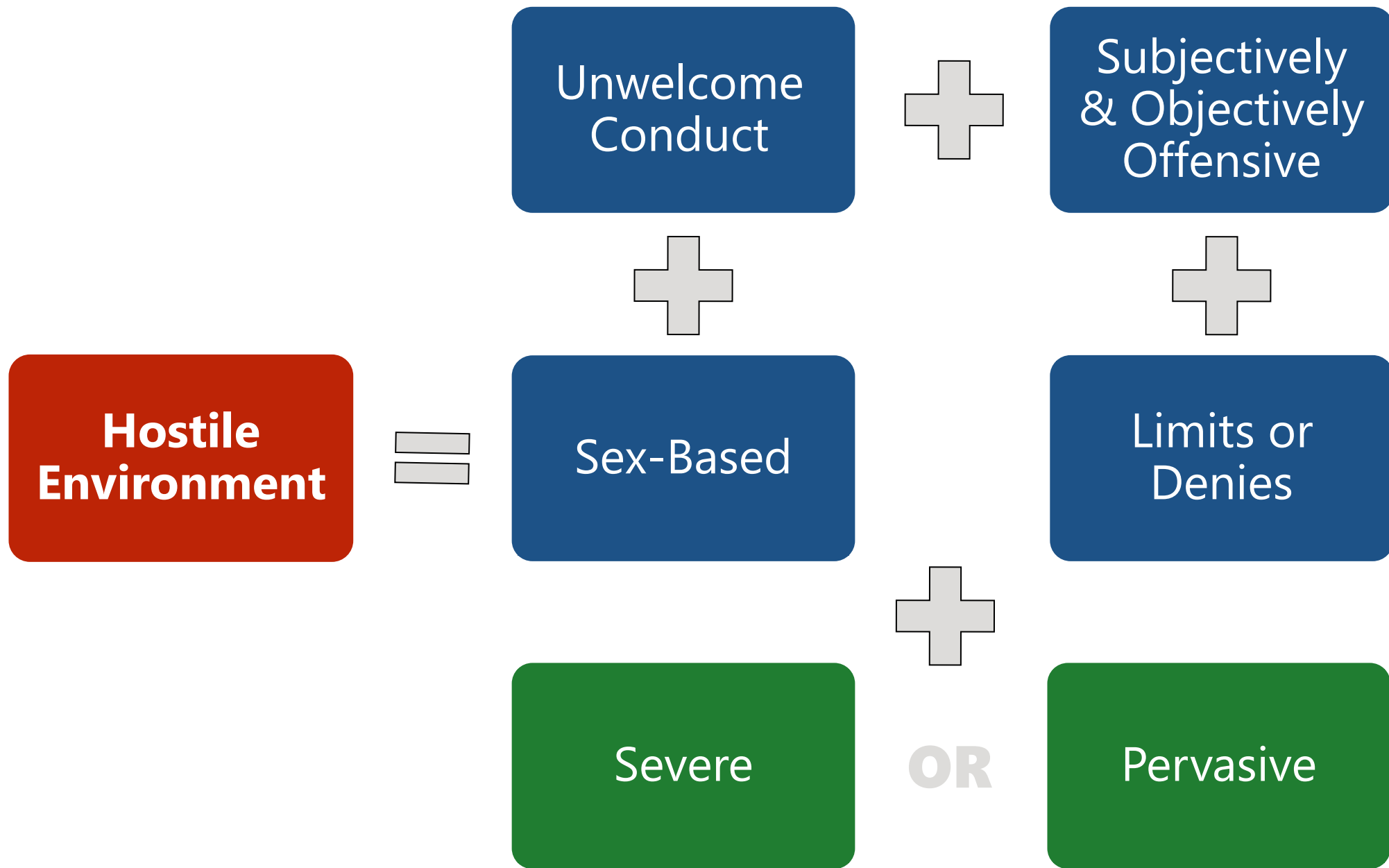
- ▶ Not limited to employees; others can be the perpetrators of quid pro quo harassment
- ▶ Includes "other persons authorized" by the District "to provide an aid, benefit, or service" under the education program or activity
- ▶ Specifically includes that it can be explicit or implied

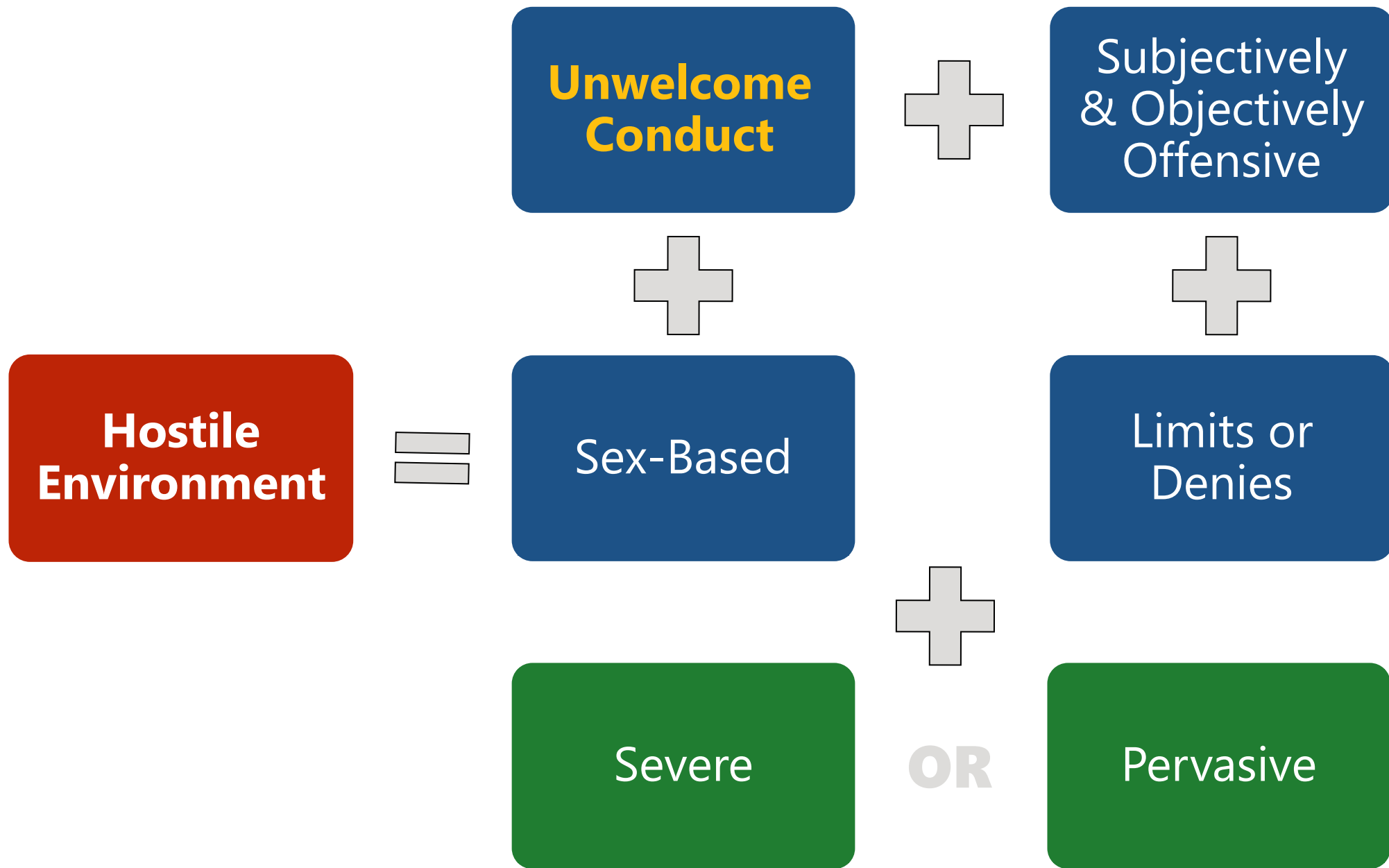
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- ▶ Quid Pro Quo Harassment
- ▶ **Hostile Environment Harassment**
- ▶ The Big 4 – Sexual Assault, Domestic Violence, Dating Violence, & Stalking







Unwelcome

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



Welcome?



- ▶ A student, Cole, reports that other students are constantly making sexual jokes, which Cole said makes them uncomfortable. Cole acknowledges actively participating in the jokes, laughing at the jokes and even joining in, saying they wanted to avoid causing a scene



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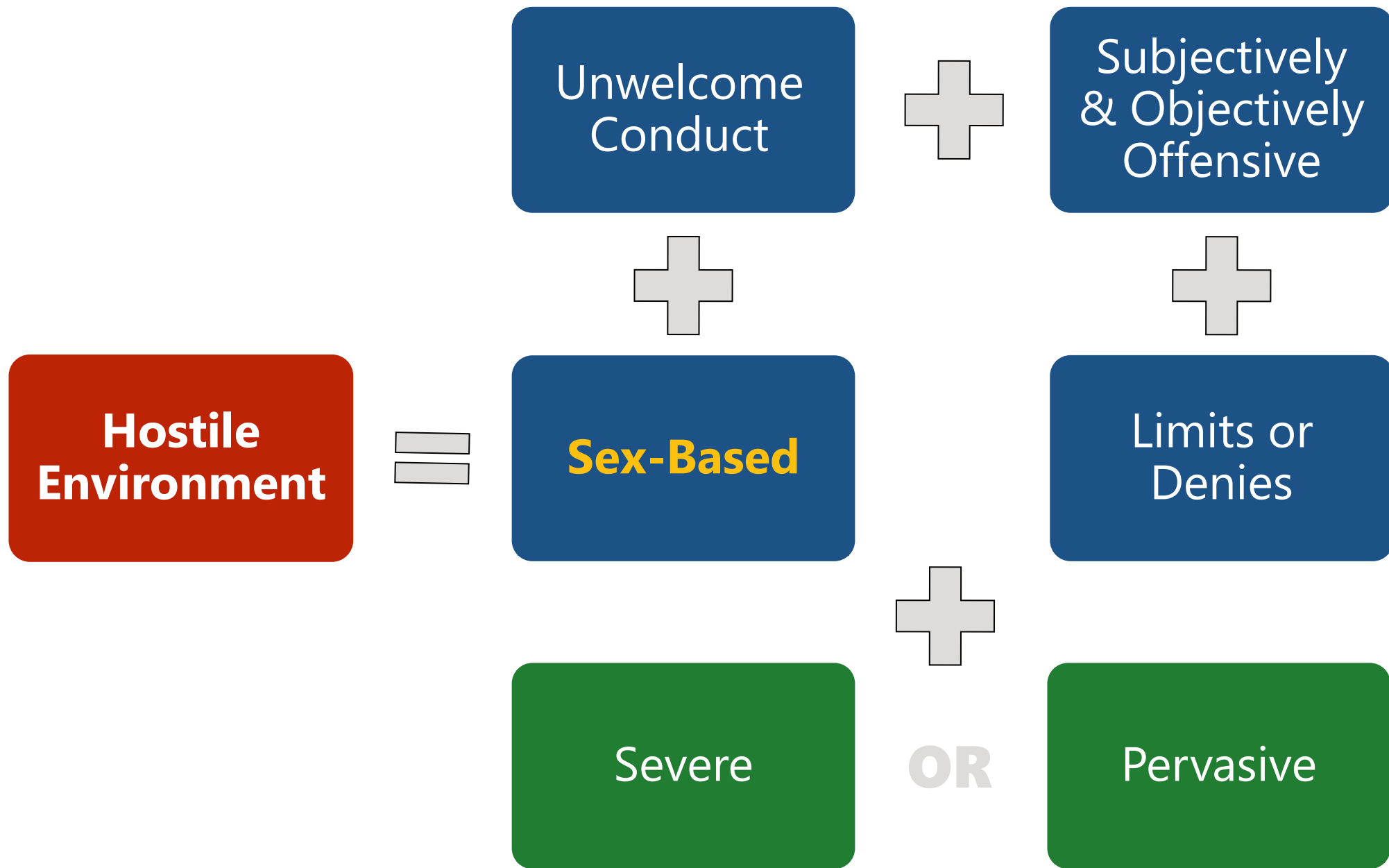
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YES Prep Scenario 1

High School Student to Student



- YES Prep sponsored a college tour trip for high school students. The college tour took place in Florida. Throughout the trip the alleged perpetrator touched the alleged victim's inner thigh and rubbed their chest area. Initially the alleged victim welcomed the touching from the alleged perpetrator, but after a couple touches, he began to feel uncomfortable. The alleged victim then told the alleged aggressor to stop. The alleged aggressor got upset and grabbed his genitals and forcefully kissed him. The alleged victim felt uncomfortable and reported it to the chaperone.



Sex-Based

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graph TD; A[Sex-Based] --> B[Sex Characteristics]; A --> C[Sex Stereotypes]; A --> D[Pregnancy and Related Conditions]; A --> E[Sexual Orientation]; A --> F[Gender Identity];
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**Sex
Characteristics**

**Sex
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**Pregnancy
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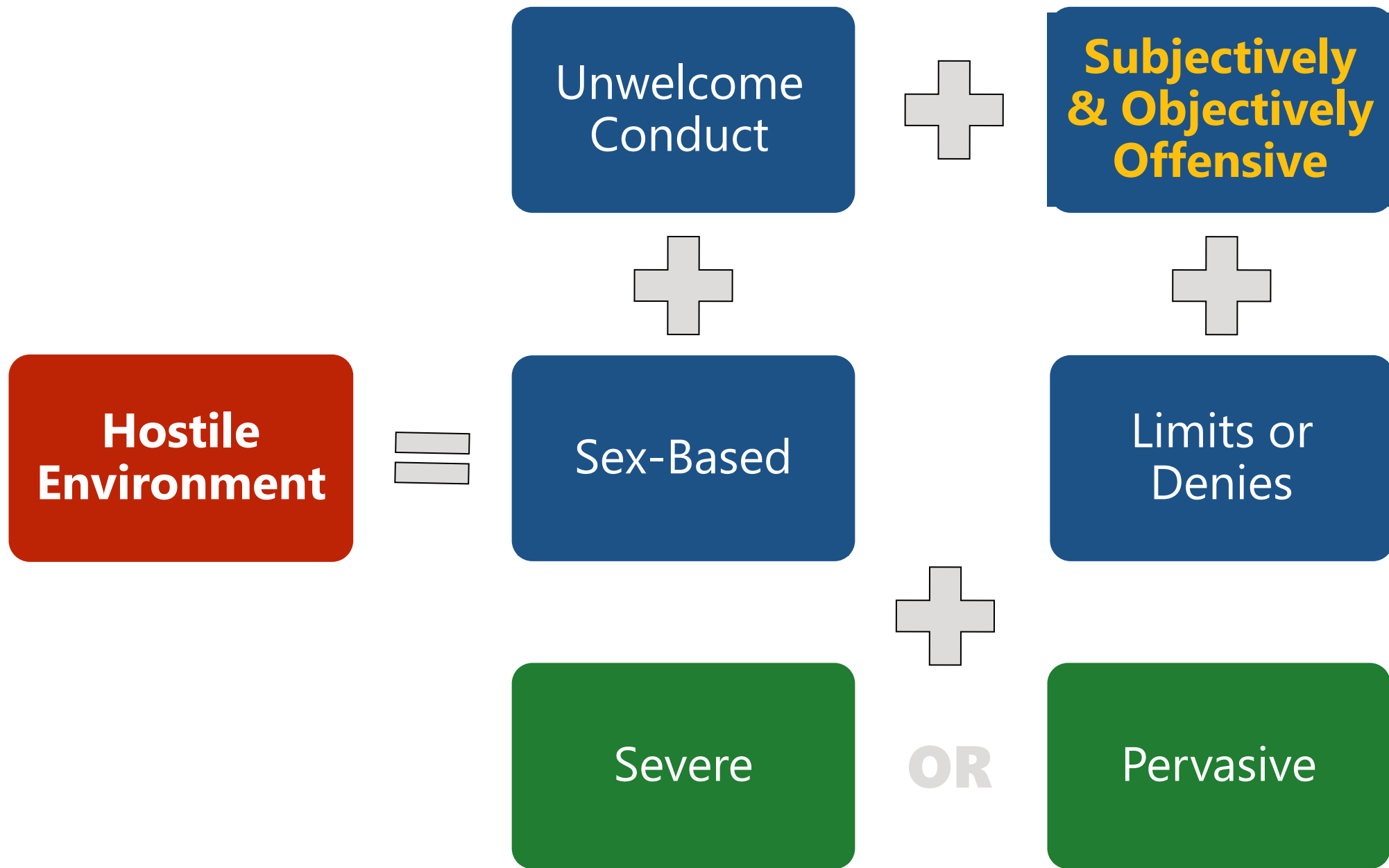


Hostile
Environment

Sex-Based Harassment Includes

- ▶ “Sexual” harassment
- ▶ Otherwise “sex based” harassment(e.g., involving a sexual body part, even if not “sexual”)
- ▶ Harassment based on gender (e.g., stereotypes of women’s roles)
- ▶ Harassment based on sexual orientation
- ▶ Harassment based on gender identity







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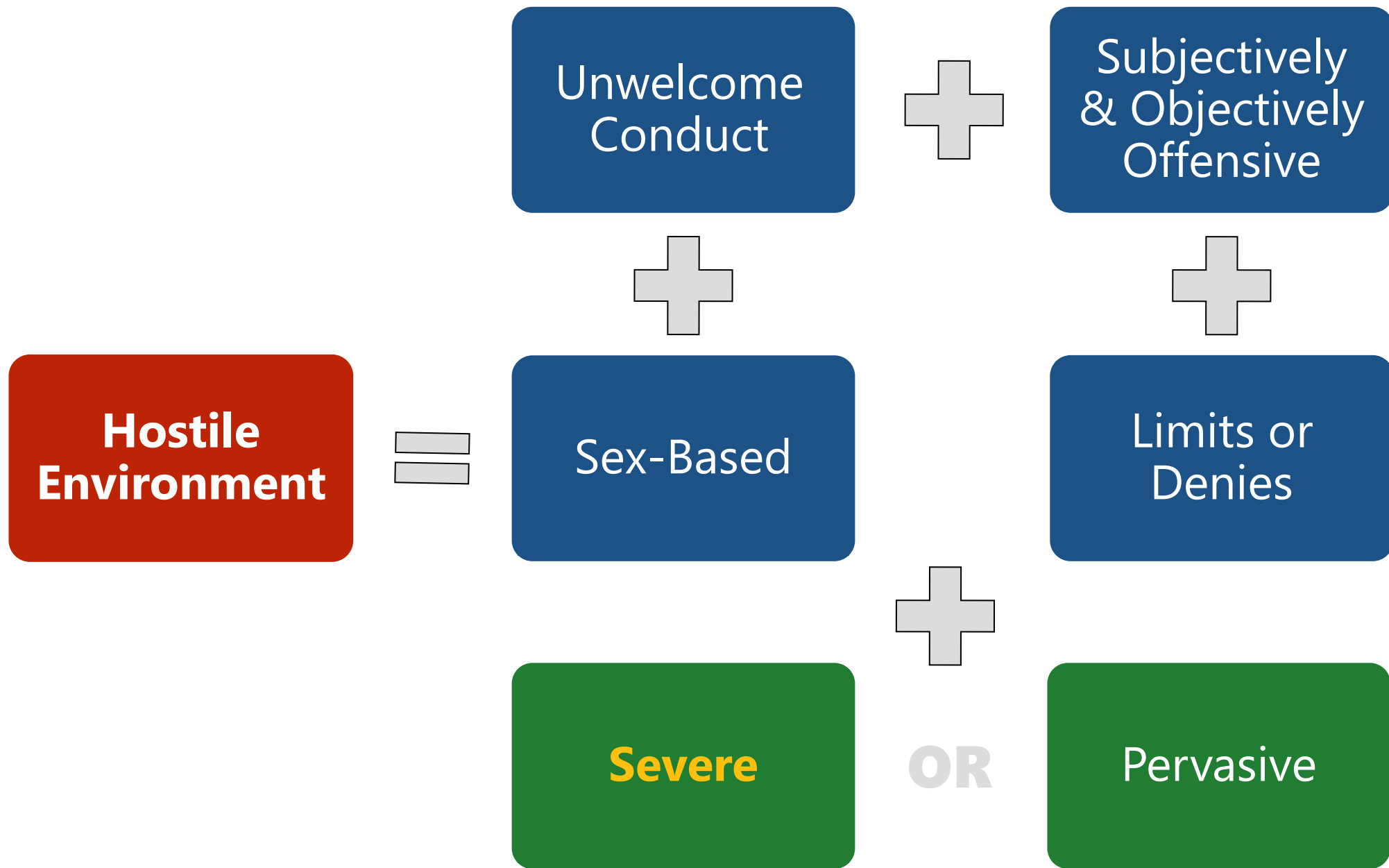
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- ▶ Offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively
- ▶ The objective offensiveness of conduct is to be judged by reference to a reasonable child at whom the conduct were aimed

Objectively Offensive





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Severe

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



- ▶ “Courts [] must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable to adults ... Indeed, at least early on, students are still learning how to interact appropriately with peers.”
- ▶ Simple acts of teasing and name-calling among school children are not enough, even where the comments target differences in gender

Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999)



Severe ... The Courts Have Spoken

- ▶ Must be more than the sort of teasing and bullying that generally takes place in schools

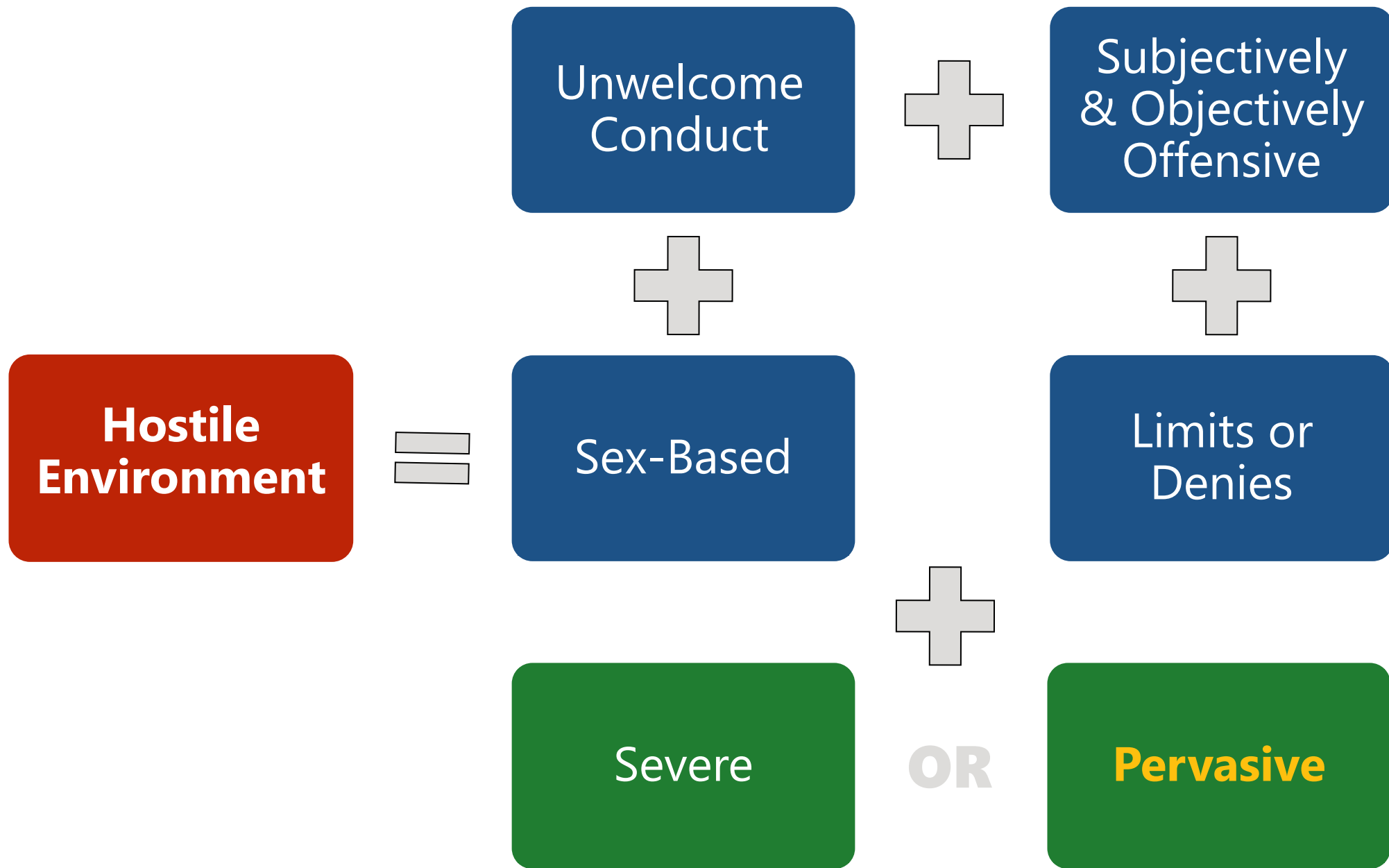
Sanchez v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156 (5th Cir. 2011)

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

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

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

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





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Pervasive

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



Pervasive ... The Courts Have Spoken

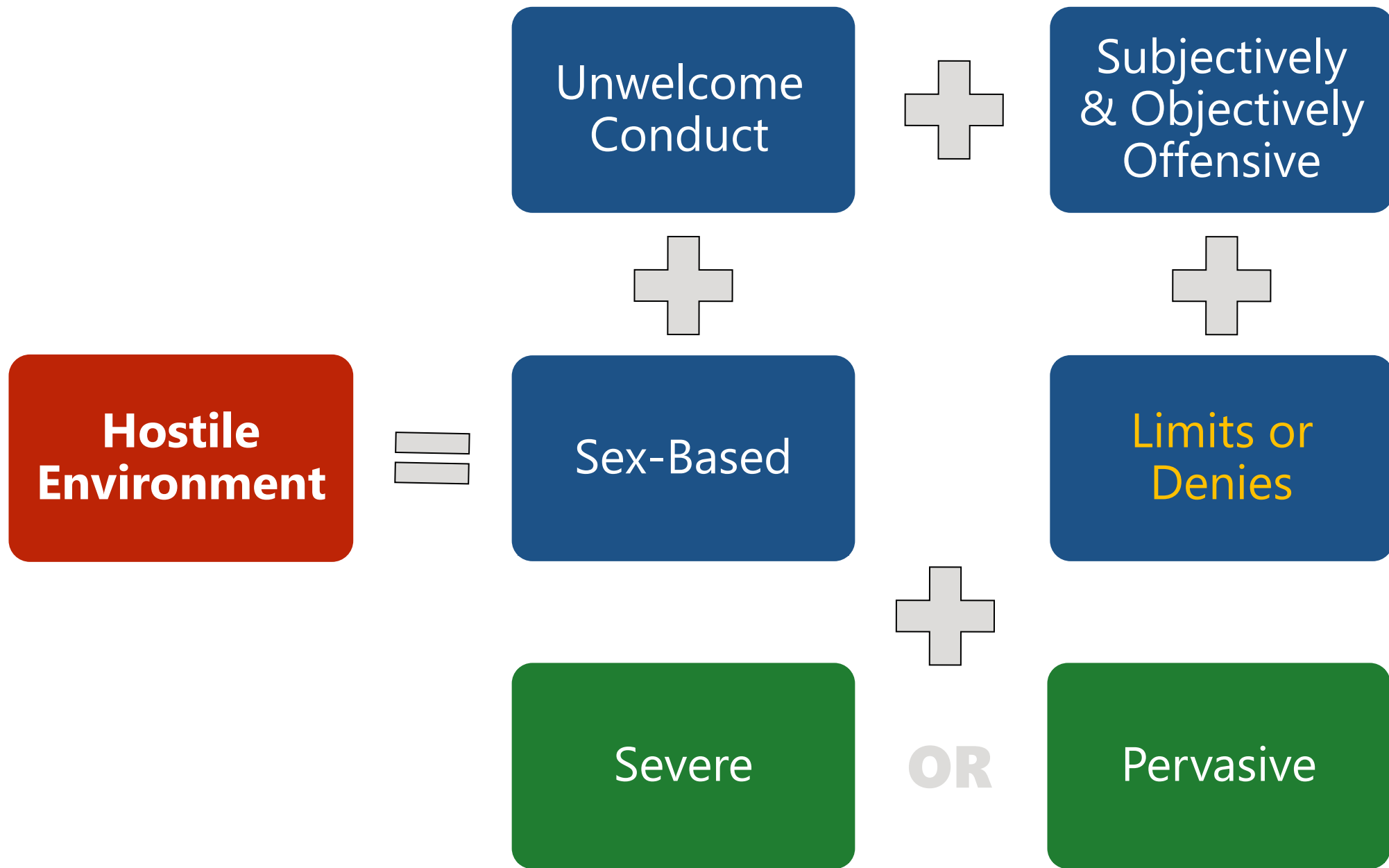
- ▶ Single or isolated incidents are generally not enough
- ▶ But the Court in *Davis* noted a single incident could **hypothetically** be sufficiently severe to meet the standard
- ▶ *Davis* limited student-on-student harassment to encompass only “pervasive” and “widespread” conduct with the “systemic effect of denying the equal access to an educational program or activity”
- ▶ Courts evaluate whether there was a “systemic or ongoing pattern of harassment,” a “series of incidents,” or “numerous acts of objectively offensive” conduct

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



THINGS TO CONSIDER

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



Limits or Denies Access to Your Education Programs or Activities

- ▶ Complainant must demonstrate some impact on their ability to participate or benefit from the education program or activity, but the definition does not specify any particular limits or denials
- ▶ Does not require a complainant to demonstrate any particular harm, such as reduced grades or missed classes.



Recognizing Sex-Based Harassment

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

Recognizing Sex-Based Harassment

Student-on-Student Sex-Based Harassment

Any sexually inappropriate action by a student against another student, including:

- Exposing one's genitalia;
- Inappropriately touching another student; and,
- Making sexual comments to other students or about other students.



Examples of Student-Student Sex-Based Harassment

- Rating other students
- Snapping bra straps of other students
- Disseminating sexual pictures, photographs, illustrations, messages, e-mails or notes
- Making sexual comments, jokes, gestures, or looks
- Writing sexual messages/graffiti concerning other students on bathroom walls, locker rooms, etc.
- Intentionally brushing up against another student in a sexual way
- Blocking or cornering another student in a sexual way
- Forcing another student into a kiss or a sexual act
- Flashing another student
- Spreading sexual jokes or rumors about another student
- Touching, grabbing, or pinching another student in a sexual way
- Telephoning or emailing students, except for professional purposes
- Degrading, shaming, belittling, or humiliating students
- Giving personal or intimate gifts to students
- Commenting on others' bodies and physical attributes
- Touching the bottoms, chests or genital areas of students



YES Prep Scenario 2

Middle School Multiple Students to Student

- A group of middle school female students were in the restroom and while they were in the restroom they decided to take videos and pictures of another female over the bathroom stall. Unbeknownst to the female student, the group of students took a picture of her without her consent. The picture clearly showed her private area. The group of students decided to airdrop the pictures at school.

Recognizing Sex-Based Harassment

Employee-on-Student Sex-Based Harassment

An inappropriate relationship between an employee and a student. Includes

- Sex between a student or employee no matter the age; and,
- Any inappropriate communications with students, especially through social media.



Examples of Employee-Student Sex-Based Harassment

- Entering into personal relationships with students
- Engaging in a sexual relationship with a student
- Using language of a flirtatious, profane, or sexual nature around students
- Dating or becoming romantically involved with students
- Showing pornographic, provocative, or sexually suggestive materials to students
- Meeting with students alone outside of school
- Meeting alone with students in isolated places
- Showing favoritism to students
- Having physical contact with students, except for inoffensive contact
- Wearing provocative or revealing clothing or exposing inappropriate body parts
- Patting others on any body area except shoulders, arms and upper back
- Tickling or wrestling with students
- Playing games that involve inappropriate touching
- Giving compliments that relate to physique or body development
- Kissing students
- Giving massages to students



YES Prep Scenario 3

Staff to Student

- A soccer coach had a close relationship with one of his female students. The female student is 15 years old. The coach would give her rides home without her parents' consent. The coach and the female student were also friends on Instagram. At first, they would send funny messages to one another.
- However, over time the coach would ask her personal questions about their dating life and if they could hang out outside of school without telling her parents. She agreed and the coach picked her up at a nearby park. While in the car the coach asked the student to touch his genitals, perform oral sex, and have sexual intercourse. The student agreed because she grew a romantic interest in the coach. The student's parents discovered this incident while looking through their daughter's phone. The cops were contacted, and the coach was arrested.

Sex-Based Harassment

“Sex-based harassment . . . is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex,” including sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ **The Big 4 – Sexual Assault, Domestic Violence, Dating Violence, & Stalking**



Specific Offenses

#1 Sexual assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation:

- Rape - penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person without the consent of the victim
- Fondling - the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical 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



Specific Offenses

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

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



Specific Offenses

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

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



Specific Offenses

#4 “Stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. It is covered by Title IX when on the basis of sex.

Examples:


- Following an individual around or spying on an individual
- Sending unwanted texts, email, or other communications
- Calling an individual often or leaving unwanted gifts
- Showing up to locations uninvited
- Threatening physical harm to an individual, their family, pets, or property

Includes cyber-stalking




Consent

- ▶ Title IX generally prohibits “unwelcome” conduct
- ▶ “Unwelcomeness” is presumed with respect to educator-on-student sexual harassment
- ▶ “Consent” comes into play in student-on-student sexual assault cases (rape, sodomy, fondling, etc.)
- ▶ Not defined in Title IX Rules
- ▶ Must be defined in your policies/procedures



WHAT IS
SEXUAL
CONSENT?



WHAT IS
SEXUAL
CONSENT?

Consent... Generally

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

Capacity to Consent

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

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



Age of Consent

- ▶ In Texas, 17 is the age of consent
- ▶ Exception: parties 18 years and under and less than 3 years apart
- ▶ **But remember...**public school employees are prohibited from engaging in sexual or romantic relationships with students regardless of the student's age



Incapacitation

Key Question: Should a reasonable person in the same circumstances have known the other party could or could not consent to the sexual activity?



Prohibited Conduct:

Failure to Accomodate



Pregnancy or Related Conditions

Includes

- ▶ Pregnancy, childbirth, termination of pregnancy, or lactation
- ▶ Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
- ▶ Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions



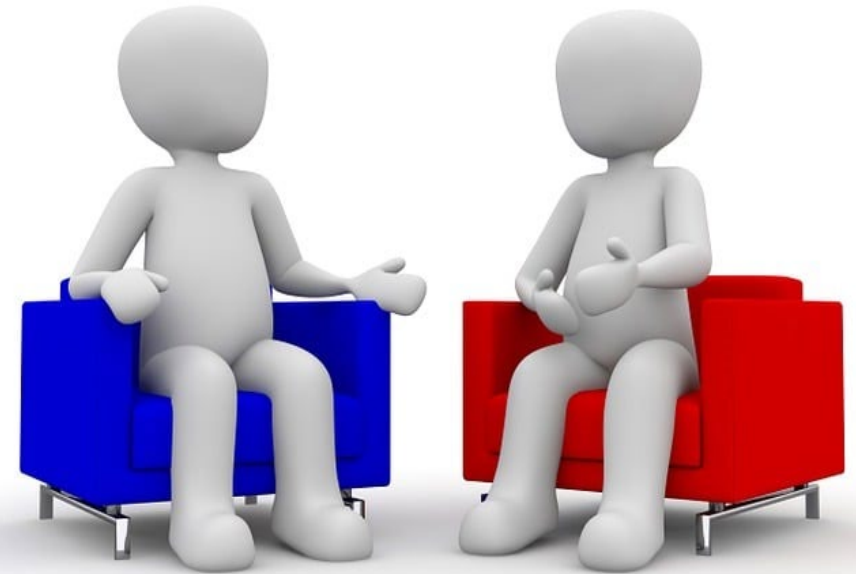


Notice

When ***any*** employee is informed of a student's pregnancy or related conditions by a student or a person who has a legal right to act on behalf of the student, the employee must promptly inform that person of the Title IX Coordinator's contact information and that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination, unless the person reasonably believes the Title IX Coordinator has already been notified.

Accommodations

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



Supporting Documents

- ▶ Cannot require supporting documents unless the documentation is necessary and reasonable to determine the reasonable modifications to make or whether to take additional specific actions.
- ▶ Examples of situations when requiring supporting documentation is **not** necessary
 - ▶ When need is obvious such as needing a bigger uniform.
 - ▶ When student has previously provided supporting documentation.
 - ▶ When modification is to carry or keep water, use a bigger desk, sit or stand, take breaks to eat or drink or use restroom, or lactation needs.
 - ▶ When modification is available to any student.



Certification to Participate

- ▶ May not require a student who is pregnant or has related conditions to provide certification from a healthcare provider that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless:
 - ▶ The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
 - ▶ the recipient requires such certification of all students participating in the class, program, or extracurricular activity; and
 - ▶ the information obtained is not used as a basis for discrimination prohibited by the regulations.



Alternative Programs

- ▶ Students cannot be mandated to participate in alternate programs or special services for pregnant and parenting students as a condition of enrollment, but schools and colleges may offer these programs and services as an option to students.
- ▶ Participation must be voluntary on the part of the student, and the programs and classes must be comparable to those offered to other students.



Leave - Students

- ▶ Must allow pregnant and postpartum students to take leave of their academic obligations without penalty because of medically necessary absences associated with pregnancy, childbirth, or postpartum recovery.
- ▶ To the extent that a school maintains a leave policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead if the student so chooses.
- ▶ Following time off, student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the leave began.



Protections

- ▶ Must not adopt or implement any policy, practice or procedure concerning current, potential, or past parental, family, or marital status, which treats persons differently.
- ▶ Must not discriminate in education programs or activities against any student, applicant, or employee based on the person's current, potential, or past pregnancy or related conditions.
- ▶ Must treat pregnancy or related conditions in the same manner as other medical conditions.
- ▶ Must not make pre-admission or pre-employment inquiries about marital status – such as whether someone is “Miss” or “Mrs.”



Lactation Space

- ▶ Must provide reasonable break time for an employee to express breast milk or breastfeed as needed.
- ▶ Time must be sufficient for the employee to travel to the space, express breast milk or breastfeed, wash, store, and return to work.
- ▶ Ensure access to a lactation space for students and employees, which must be a space other than a bathroom that is clean, shielded from view, and free from intrusion from others.
- ▶ Other protections, such as the PUMP Act and PWFA, may require more.



Pregnancy Accommodations



- ▶ Juno reports to Teacher A that she is pregnant. Teacher A is extremely supportive, allowing the student to sit at a table in the classroom instead of a small desk and re-opening closed assignments and tests for her to complete.
- ▶ Teacher B noticed that Juno looked pregnant, but Juno didn't feel comfortable talking to Teacher B about it.
- ▶ Neither Teacher A nor Teacher B referred Juno to the Title IX Coordinator.
- ▶ Juno's grades began to suffer in Teacher B's class, in part due to pregnancy-related attendance issues due to complications with her pregnancy.



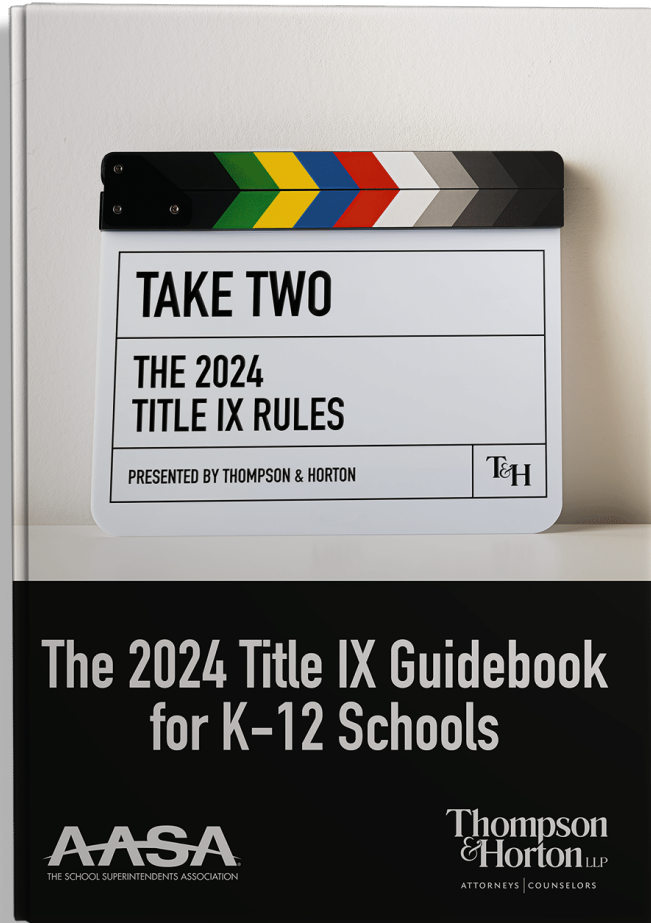
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- Try reloading this page again.
- Check our [system status](#) and see if we've reported downtime issues.
- [Go Back to the previous page](#).

Guidebook Resources



E Series of Forms

E01 - Title IX Coordinator Notice to Students Who Are Pregnant or Have a Related Condition

E02 - Pregnancy or Related Condition Student Request for Modifications Form

An Information Card for Employees to Give to Pregnant Students

Prohibited Conduct:

Retaliation



Retaliation

- ▶ Intimidation, threats, coercion, discrimination, harassment, or other negative treatment
- ▶ Because that person reported discrimination or otherwise participated in a process related to alleged discrimination, including as an alleged perpetrator or witness
- ▶ Can be committed by anyone, including the school, students, employees, and third parties.





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Where Must Sex Discrimination
Occur?

Jurisdiction





Jurisdictional Issues

- ▶ Conduct within the District's operations
- ▶ Off-campus conduct
 - ▶ Settings operated or overseen by the District
 - ▶ Student organizations' properties
 - ▶ Conduct subject to the District's ***disciplinary authority***
- ▶ External conduct that contributes to a hostile environment ***within*** the education program or activity



Conduct within the District's Operations



- Classroom
- Hallway
- Restroom
- Lunchroom
- Lockers
- Parking Lot
- Computer
- Field Trip
- Gym
- Playing Field
- Bus
- Before/After School
- Cell Phone

Off-Campus Settings

- Events operated or overseen by the District (i.e., field trips)





Scenario: Study Abroad

- ▶ Student A reports that Student B raped her during the school's study abroad program.
- ▶ Once back on campus, Student B taunts Student A with sexually suggestive comments about the prior assault.
- ▶ School must respond to hostile environment based on sex with its education program or activity within the United States.





Study Abroad II

- ▶ Student C complains that while he was in the school's study abroad program, a professor subjected him to differential treatment in grading based on sex.
- ▶ As a result, Student C lost his scholarship.
- ▶ The school must address the complaint under its Title IX regulations.



School Disciplinary Authority



- ▶ Chapter 37 of the Texas Education Code requires all school districts to discipline students based on certain off-campus misconduct
- ▶ Schools must treat off-campus sexual misconduct similarly to other off-campus misconduct
- ▶ Off-campus sexual assaults or other sex-based criminal conduct will need to go through Title IX grievance process if it could subject a student to school-based discipline



- ▶ Off-campus sex-based harassment that contributes to a hostile environment on campus
- ▶ Fact-specific inquiry

***Internal* Hostile
Environment
Caused by
External Conduct**



Scenario: Off-Campus Assault

- ▶ Student D reports she was sexually assaulted in an off-campus nightclub by a third party who does not live in the area or attend the school
- ▶ Student D is experiencing emotional distress and is unable to attend classes
- ▶ Title IX rules do not apply



Off-Campus Conduct

Steff McKee exhibits predatory and harassing behavior, especially toward Andie Walsh. During a school-sponsored trip to Paris, France, Steff makes repeated unwanted sexual advances and derogatory remarks towards Andie. His actions continued upon their return, including at Trax Record Store, where Andie works.

Although much of Steff's misconduct occurred outside the country or away from the school, the repercussions of his behavior are felt strongly within the school environment as she faces social ostracism and bullying by Steff and his friends. The hostility is affecting her daily school life and interactions.





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MONITORING BARRIERS TO REPORTING SEX-BASED DISCRIMINATION



Students Underreport

Reasons students do not report

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

How you can help

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

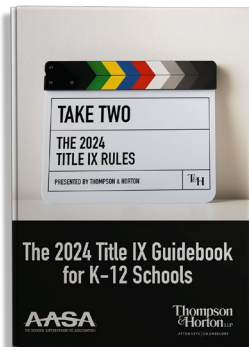


T&H Title IX Tip

If the Title IX Coordinator cannot determine the cause for a lack of reporting, consider a staff and/or student survey to determine what barriers may exist.

Addressing Barriers

- ▶ Increased training for campus personnel
- ▶ Increased training for students
- ▶ Multiple ways to report, including an online anonymous reporting system
- ▶ Publicizing information about the prohibition on sex discrimination and how to contact the Title IX Coordinator easily accessible for your school community, such as placing physical signs at campuses



General Forms –An Information Card for Employees Regarding How to Report Sex Discrimination

Who Reports, and to Whom?



Reporting Requirements



All employees who are not confidential employees must **notify the Title IX Coordinator** when the employee has information about conduct that **reasonably may constitute sex discrimination** under Title IX.

Employees can notify the Title IX Coordinator of potential sex discrimination in any manner including:

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



Confidential Employees

- ▶ We do not recommend K-12 schools designate any "confidential employees"
- ▶ K-12 schools generally do not have employees whose communications are privileged or confidential for information received within the scope of their duties

“Confidential” Employee Duties



Confidential employees do not have a duty to report. **BUT** they **must**:

- ▶ Explain their confidential status, including circumstances in which the employee is not required to report
- ▶ Explain how to contact the Title IX Coordinator and how to make a complaint of sex discrimination
- ▶ Explain that Title IX Coordinator may be able to offer supportive measures or initiate an informal resolution process or investigation



Role of “Confidential” Employee



Confidential employees may help complainants in various ways:

- ▶ Safety planning
- ▶ Explaining the complainants' rights and legal options
- ▶ Helping complainants regain a sense of control over next steps
- ▶ Providing referrals to on- and off-campus resources



Witness

Hear first-
hand

Hear second-
hand

Overhear

Otherwise
learn about

**Source of
information**

Reporting Requirements

Employees' duties to report may not end at notifying the Title IX Coordinator. Employees must immediately report any conduct that could constitute child abuse or neglect under Texas law to the appropriate DFPS or a law enforcement agency.

If the alleged conduct could constitute criminal conduct, employees should contact law enforcement—either ISD PD or local law enforcement officials.



The Police are the Beginning, and Not the End!

“Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.”

2011 DCL Letter, p. 10



What to do When You First Hear from the Police

- ✓ Document everything!
- ✓ All communications should be in writing (reduce telephone conversations to writing)
- ✓ Ask police to put request to delay investigation in writing
- ✓ Respond to police agreeing to wait, but noting obligation to conduct Title IX investigation and asking police to notify you ASAP when you can begin your investigation



Don't Forget About It!!



Send police periodic requests for updates, if you don't hear back from them

What to do When the Police Tell You that You May Start Your Investigation



- ✓ Determine whether you need to conduct any additional investigation
- ✓ You may have done enough before the police got involved
- ✓ The police may share their information with you, potentially obviating the need for additional investigation

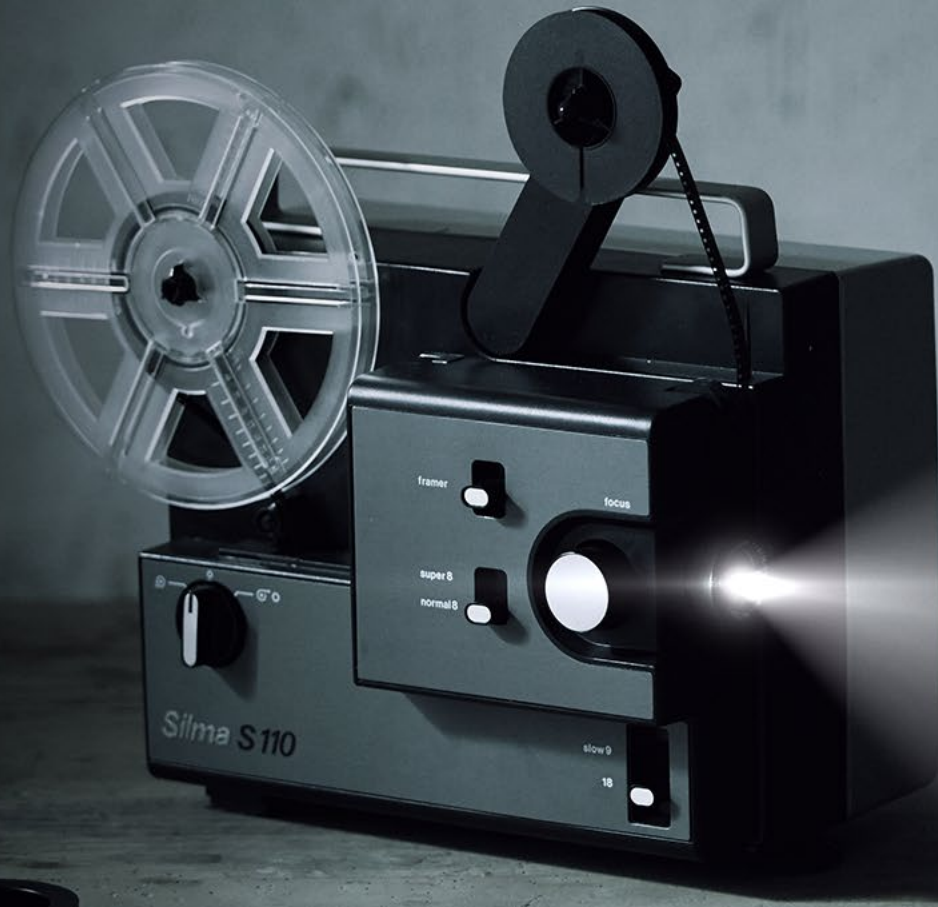


LUNCH BREAK

(30 Minutes)

The Title IX Grievance Process

When & How Must Your District
Respond to Sex Discrimination?





Initial Response to Alleged Sex Discrimination

Initial Response to Report of Alleged Sexual Harassment



DOs



DON'Ts

The “DOs”

**Assess
Safety**

Make Contact

Law Enforcement
Medical
Parent

**Required
Reporting**

**Special
Education?**

DO: Assess Safety

- ▶ If the student is in immediate danger, or is an immediate danger to self or others, remove the student from the environment immediately
- ▶ Move the student to a safe area with adequate supervision
- ▶ Immediately contact the Title IX Coordinator for what to do next

DO: Make Necessary Contacts

- ▶ **Law enforcement**: If the allegations include a serious crime or evidence needs to be collected (like information on an electronic device)
- ▶ **Medical Personnel**: If the allegations involve an injury
- ▶ **Parent(s)/guardian(s)**: Follow standard policy/practice
 - Board policies FFH (Local) and FFF (Local) require prompt notification of parents of any student alleged to have experienced prohibited conduct by a District employee or another adult

DO: Required Reporting

Law Enforcement or Child Protective Services (CPS)

- ▶ Any person who has cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect shall immediately make a report as required by law
- ▶ Submit oral or written report within 48 hours of learning of facts giving rise to the suspicion

DO: Consider Special Education

- ▶ If a party is a student with a 504 plan or an IEP, contact the relevant special education administrator to consider impacts on special education placement and services

The “DONTs”

What NOT to Do Until the Title IX Coordinator Decides if Title IX Applies

Investigate

Discipline

**Violate
Confidentiality**

DON'T: Investigate

- ▶ Do not conduct investigation interviews
 - Only conduct intake meetings with the reporting party and the complainant/family
- ▶ Do not ask for or collect evidence (there is a *caveat*)
- ▶ An intake meeting should ask what is alleged to have happened, not ask for evidence to support the allegations

DON'T: Discipline

- ▶ Do not discipline either party, including the alleged perpetrator
- ▶ While you can “assess safety” for immediate steps to take to keep your community safe, discipline is not permissible at this stage
- ▶ Contact the Title IX Coordinator, who will evaluate potential emergency removal from school or activities

DON'T: Violate Confidentiality

- ▶ Do not tell the alleged perpetrator the alleged victim's name or that a report has been made
- ▶ The school cannot share such information until the Title IX Coordinator says Title IX is not implicated, a Title IX Formal Complaint is filed, or the alleged victim and their parent(s)/guardian(s) allow such disclosure

Title IX Coordinator Initial Response

Support

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

Notify

- ▶ Complainant (or reporter) of grievance and informal resolution procedures
- ▶ After complaint made, Respondent of grievance and informal resolution procedures

Initiate

- ▶ Emergency removal or administrative leave
- ▶ Grievance process or informal resolution
- ▶ Other steps to ensure discrimination does not continue/ recur

Supportive Measures

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



Supportive Measures

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

Supportive Measures

- ▶ For ***discrimination*** complaints, not required to alter alleged discriminatory conduct as a supportive measure
- ▶ Complainants and Respondents may seek modification of any decision to provide, modify, or terminate supportive measures from a neutral party other than the one who made initial decision
- ▶ Up to District to determine whether to modify or terminate after grievance process or informal resolution
- ▶ Supportive measures must be confidential

Students with Disabilities



FAPE

The Title IX Coordinator **must** consult with "one or more members, as appropriate," of the IEP or 504 team "to determine how to comply with the requirements of the IDEA and Section 504 in the implementation of **supportive measures**"

YES Prep Scenario 4

Student to Student (SPED)

- Two male SpEd students were left unsupervised in the restroom. When the TA returned to the restroom 5 minutes later, he discovered that both male students had their pants down exposing themselves. The DSS and DOS asked the two students what happened, but because one of the students is non-verbal, they were not able to get his statement to make a fair determination who was the alleged aggressor; whether if there was any physical touching or if both students agreed to expose their genitals.

Emergency Removal

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





Notice of Non-Discrimination

People Entitled to Notice

- ▶ Students
- ▶ Parents, guardians, or other authorized legal representatives of elementary and secondary school students
- ▶ Employees
- ▶ Applicants for admission and employment
- ▶ All unions and professional organizations with collective bargaining or professional agreements with the recipients



Contents of Notice



- ▶ Statement that recipient does not discriminate on basis of sex and prohibits sex discrimination in any education program or activity it operates
- ▶ Statement that inquiries may be referred to Title IX coordinator, to OCR, or both
- ▶ Name and contact info for Title IX coordinator
- ▶ How to locate nondiscrimination policy
- ▶ How to report info about conduct that may constitute sex discrimination, how to make a complaint, and how to locate grievance procedures

Publication of Notice

- ▶ Website
- ▶ Each handbook, catalog, announcement, bulletin, and application form to persons entitled to notice or which are used in connection with recruitment of students or employees
- ▶ If needed because of format or size of publication, may simply include a statement of prohibition of sex discrimination in education programs or activities, and that individuals may report concerns to the Title IX coordinator, and provide the location of the notice on the website



Informal Resolution

- ▶ The District may offer informal resolution with a trained facilitator
- ▶ The District can decide when it's appropriate and when it's not based on allegations, but may not offer it for allegations of harassment by an employee against a student
- ▶ Parties may elect to participate
- ▶ The District must provide notice of its availability with notice to complainant and respondent of grievance procedures
- ▶ Title IX Coordinator still must take other appropriate prompt and effective steps to ensure that sex discrimination does not continue/recur



Informal Resolution



Informal resolution not available when complaint is employee-on-student sex-based harassment



Informal resolution not available when there is a conflict with local, state, or federal law



Does not require a formal complaint being filed first



Informal resolution may be offered at any time before final written determination is made

Pros and Cons of Informal Resolution

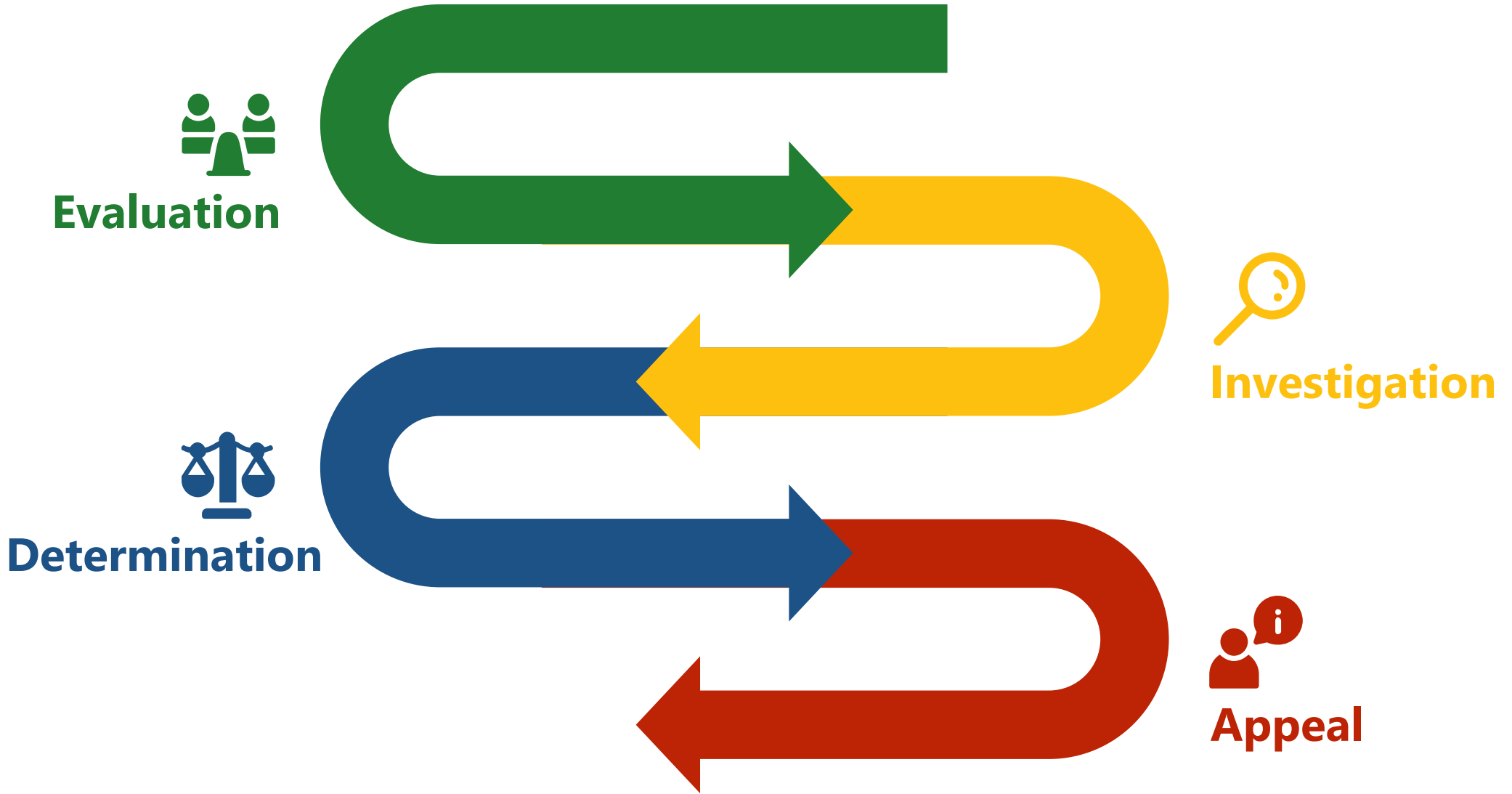
Pros

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

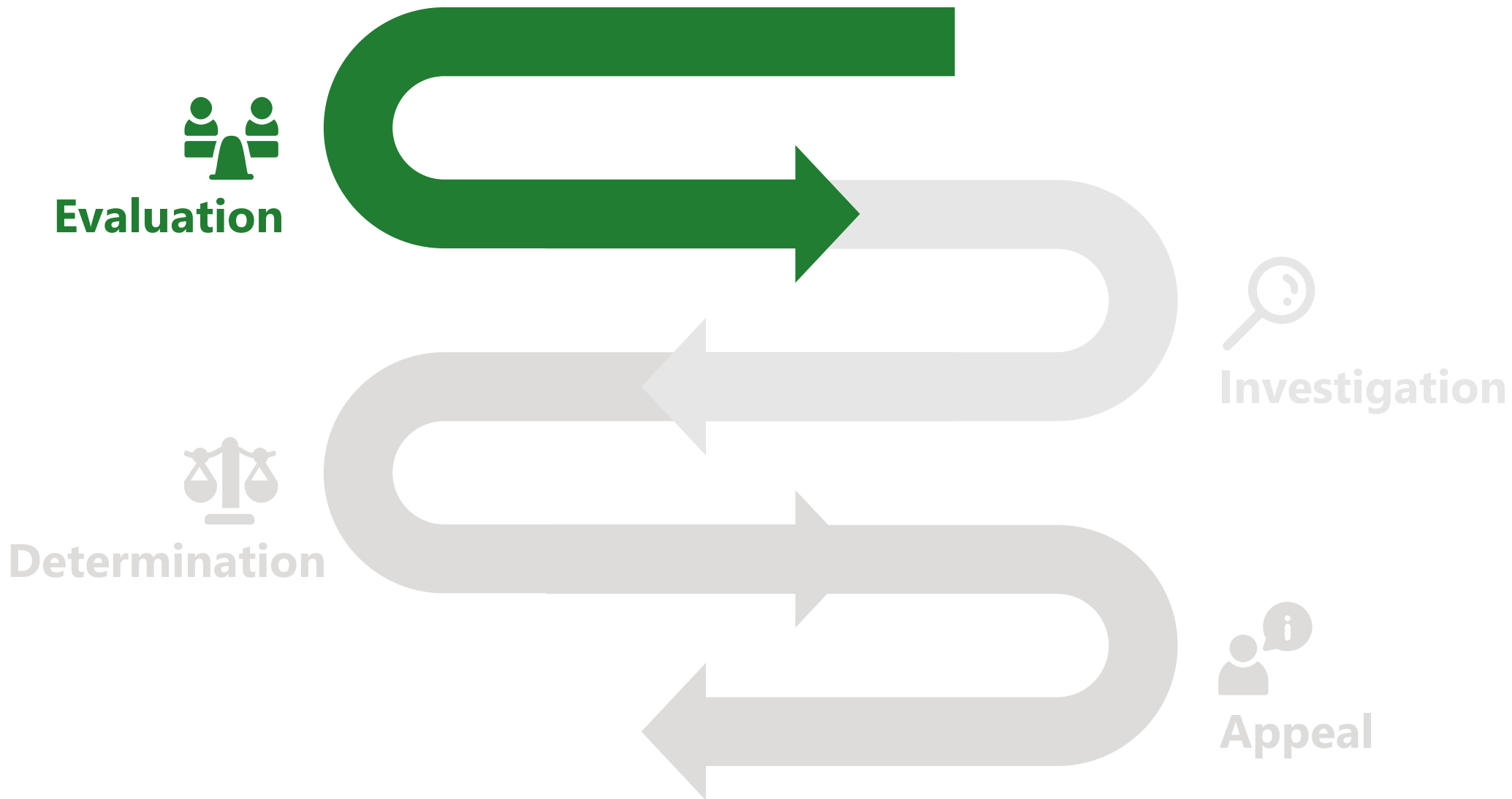
Cons

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

Four Major Grievance Process Stages



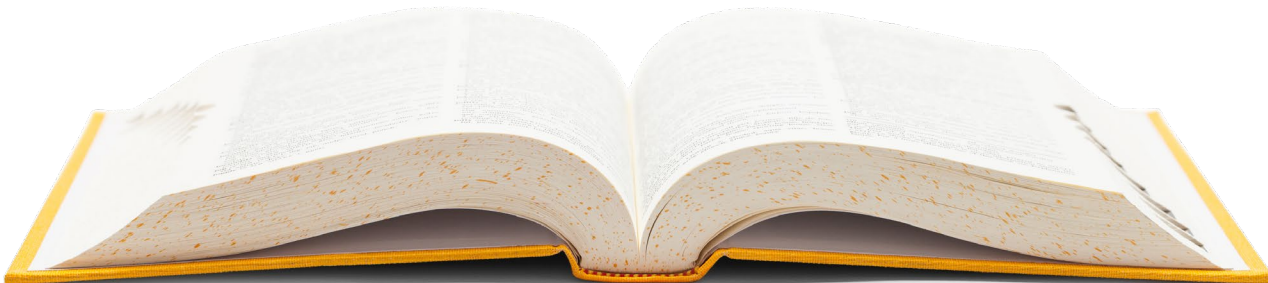
Stage One: Evaluation



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

A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.

- ▶ Even if report made by parent/guardian or third party
- ▶ Even if Title IX Coordinator initiates the grievance process



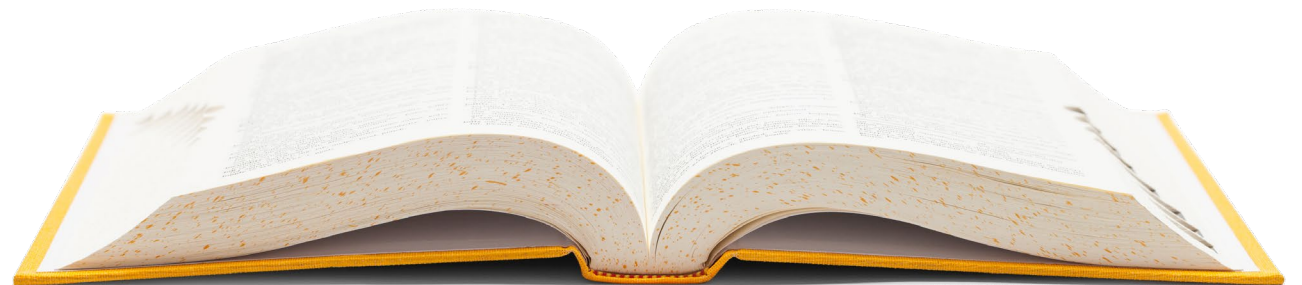
Key Terms

Complainant

Key Terms

Respondent

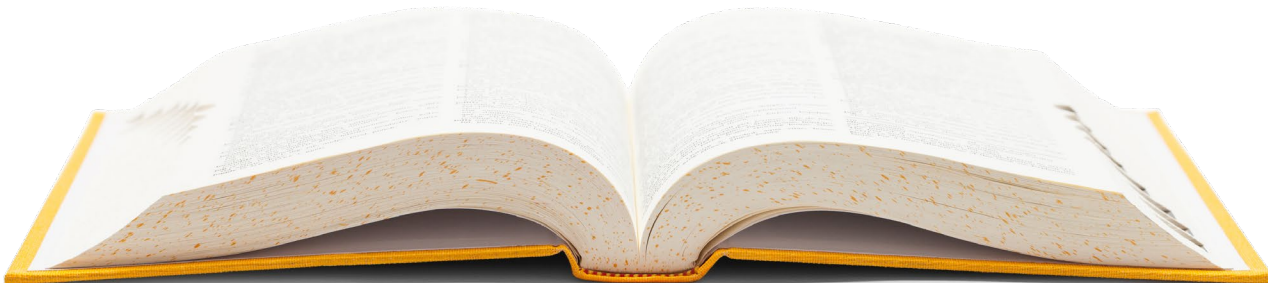
An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment



An **oral or written** request to the District that **objectively can be understood** as a request for the District to investigate and make a determination about alleged discrimination

The District must ensure

- ▶ Oral reports and complaints are tracked and addressed
- ▶ The Title IX Coordinator is made aware of all oral and written complaints



Key Terms

Complaint

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



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



When to initiate a complaint

Consider the following factors:

- ▶ Complainant's request not to initiate a complaint
- ▶ Complainant's reasonable safety concerns
- ▶ Risk that additional acts of sex discrimination would occur if a complaint is not initiated
- ▶ Severity of the alleged sex discrimination, including whether (if discrimination were established) the removal of a respondent or imposition of other disciplinary sanction would be required to end the discrimination and prevent its recurrence
- ▶ including whether the respondent is an employee
- ▶ Whether there is an alleged pattern, ongoing sex discrimination, or sex discrimination affecting multiple individuals
- ▶ Availability of evidence to assist the decisionmaker
- ▶ Whether the district could end the alleged sex discrimination and prevent its recurrence without initiating the grievance procedures



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Students with Disabilities:

“Throughout the Grievance Process”

Consult a member of the IEP / 504 Team:

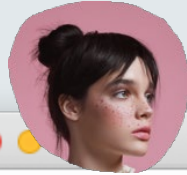
- ▶ Supportive measures
- ▶ Emergency removals
- ▶ Disciplinary sanctions
- ▶ Interview accommodations
- ▶ FAPE considerations
- ▶ **Don't forget**, an MDR is required when a change of placement is proposed



Jake

Jake, a gen ed student, is alleged to have sexually assaulted Caroline. The Title IX Coordinator wants to do an emergency removal.

Early in the Title IX process, the special education



Samantha LSSP

To: Long Duk Dong, Sped Director

7:00 PM

Oops

I probably should have noticed this sooner. Before the school year started – maybe in mid-August – Jake’s mom brought me an outside evaluation diagnosing him with autism and asking for support from the school. I forgot about it until a few moments ago and realized that I uploaded it to his twin brother’s cum folder. I remember from my special ed training with our T&H lawyers that I should consider a child referral when getting this kind of info. I know we may need to consider compensatory services due to my error, but I’d like to go ahead and start the referral process. Is that cool?

Can the Title IX Coordinator remove Jake on an emergency basis?

No, because the conduct is not "severe or pervasive" under the rules.

0%

Yes, because Jake is a gen ed student and the conduct is serious enough under the rules.

0%

Yes, but only after they complete the special ed evaluation.

0%

Yes, but only if they hold the MDR first.

0%



BASICS

Eight Basic Requirements for Grievance Process

1. Treat complainants and respondents equitably
2. Title IX personnel cannot have a conflict of interest or bias
3. Presumption that respondent is not responsible
4. Reasonably prompt timeframes for “major stages of grievance procedures”
5. Reasonable steps to protect privacy of witnesses and parties but must not restrict the ability of parties to obtain and present evidence
6. Objective evaluation of all relevant evidence
7. Exclusion of certain impermissible evidence
8. If the District adopts grievance procedures that apply to the resolution of some, but not all, complaints, articulate consistent principles for how to determine which procedures apply

Notice of Allegations

- ▶ Provide notice of the District's Title IX grievance procedures
- ▶ Sufficient information ***available at the time*** to allow the parties to respond
 - Identity of parties involved
 - Conduct alleged to constitute sex discrimination
 - Date and location of alleged incident
- ▶ Statement that retaliation is prohibited
- ▶ Statement that the parties are entitled to an equal opportunity to access the relevant evidence or an accurate description (with option to request the evidence)

Permissive Dismissal

- ▶ Unable to identify the respondent after taking reasonable steps to do so
- ▶ Respondent is not participating in the District's education program or activity and is not employed by the District
- ▶ The complainant voluntarily withdraws any or all allegations and without the withdrawn allegations, the remaining conduct would not constitute Title IX sex discrimination if proven (and Title IX Coordinator declines to initiate a complaint)
- ▶ The alleged conduct, even if proven, would not constitute Title IX sex discrimination
 - Prior to dismissal, you must take reasonable steps to clarify the allegations with the complainant



***REMEMBER* ... Supportive Measures**



**DON'T
FORGET!**

If you dismiss, you must “at a minimum”

- ▶ Offer supportive measures to complainant
- ▶ If respondent has been notified of allegations, offer supportive measures to respondent
- ▶ Take appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur

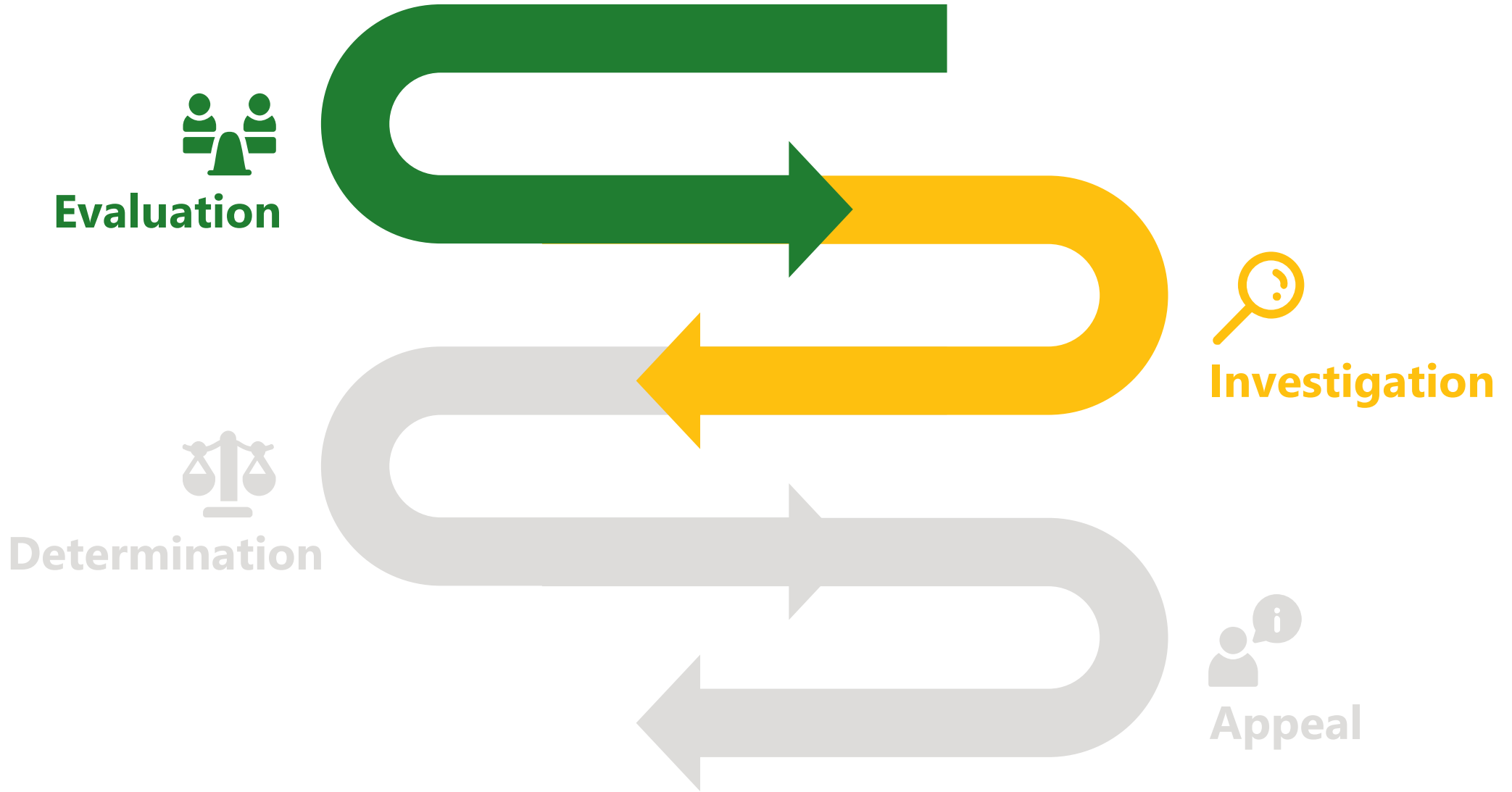


Appeal of Dismissal

- ▶ Any party can appeal dismissal
- ▶ Notify parties when appeal is filed
- ▶ Implement appeal procedures equally for the parties
- ▶ Appeal decisionmaker cannot be someone involved in the investigation or dismissal of complaint
- ▶ Appeal decisionmaker must be trained
- ▶ Parties must have reasonable and equal opportunity to make a statement in support of or challenging the dismissal
- ▶ Notify all parties of result of appeal and rationale for the outcome



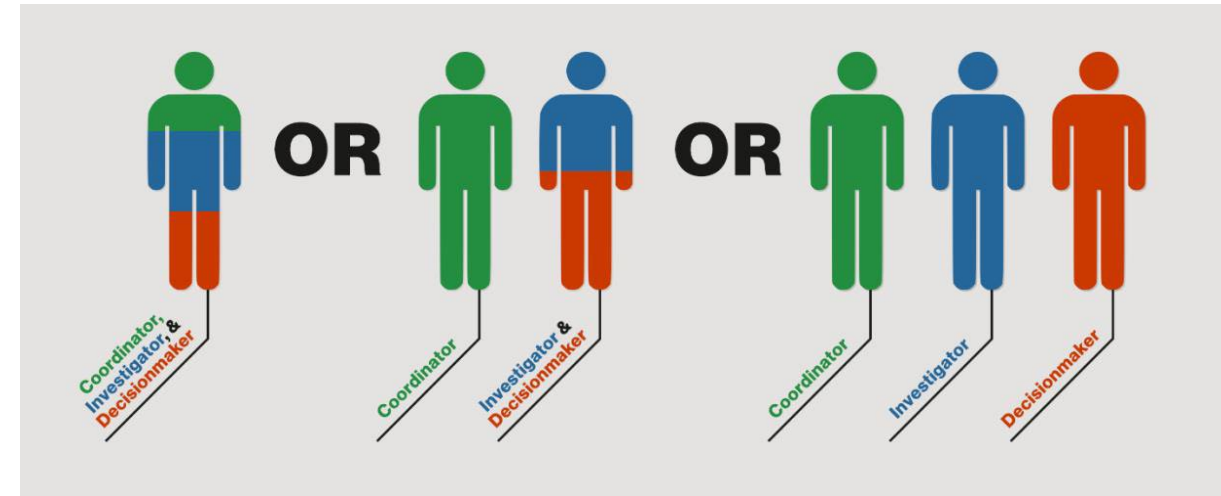
Stage Two: Investigation





Streamlined Grievance Process

- Investigation and determination stage of the grievance process can generally be consolidated
- Investigator and Decisionmaker can be the same person
- Investigation Report no longer required
- Unified Investigator/ Decisionmaker takes care of the credibility issue.





Streamlined Grievance Process

No provision of "directly-related evidence" and 10 days to respond

Key Investigation Principals

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



Notice of Allegations – Impact on Investigation

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



A close-up photograph of a red pushpin stuck into a map. The pushpin is in sharp focus, while the background shows other pins (blue and yellow) and map details (roads, text) that are blurred. The map appears to be a road map with various colored lines and text.

Investigator Tip

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

Investigation Plan

- ▶ What questions need to be answered for a thorough and impartial investigation?
- ▶ What evidence do you need to collect?
- ▶ Who should you interview?
- ▶ In what order will you conduct witness interviews?
- ▶ Prepare interview outlines
- ▶ Think: What information do you need to obtain to allow you/ decisionmaker to answer the key questions and make a reliable determination

What will you ask?



- ▶ Think back to the Title IX definitions of “Title IX sexual harassment” “in an educational program or activity” and “against a person in the U.S.”
- ▶ Look at the allegations and consider what the elements for each claim are
- ▶ Consider information needed to craft a remedy if a violation is found



Fondling/Sexual Contact



- ▶ Was there touching of the private body parts of another?
- ▶ Was it without consent?
- ▶ Was it for purposes of sexual gratification?
- ▶ Was it in an "educational program or activity" of your school district?



Hostile Environment



- ▶ Was the conduct unwelcome?
- ▶ Was it based on sex?
- ▶ Was it subjectively offensive?
- ▶ Was it objectively offensive?
- ▶ Was it severe? OR Was it pervasive?



Impact



- ▶ **Limits or Denies:** What were the effects on the Complainant, if any?
 - ▶ Grades?
 - ▶ Socially?
- ▶ What were the effects on the larger school community, if any?
- ▶ What issues may need to be addressed with the Respondent, if any?



Evidence Gathering

- ▶ Burden on the District to conduct an investigation that gathers sufficient evidence
- ▶ Provide equal opportunity for parties to present relevant fact witnesses and other inculpatory and exculpatory evidence
- ▶ Review all evidence gathered and determine what evidence is relevant and what evidence is impermissible
- ▶ Provide parties with an equal opportunity to access either the relevant and not impermissible evidence or an accurate description of this evidence

If you provide a description of the evidence, you must provide access to the evidence upon request of any party

- ▶ Provide a reasonable opportunity to respond



“Relevant”

Related to the allegations of sex discrimination under investigation as part of the grievance procedures.

Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and **evidence** is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.





Impermissible Evidence

- ▶ Evidence protected by a legal privilege
- ▶ Evidence provided to a confidential employee
- ▶ Health care treatment records

MUST OBTAIN WAIVER!



Impermissible Evidence

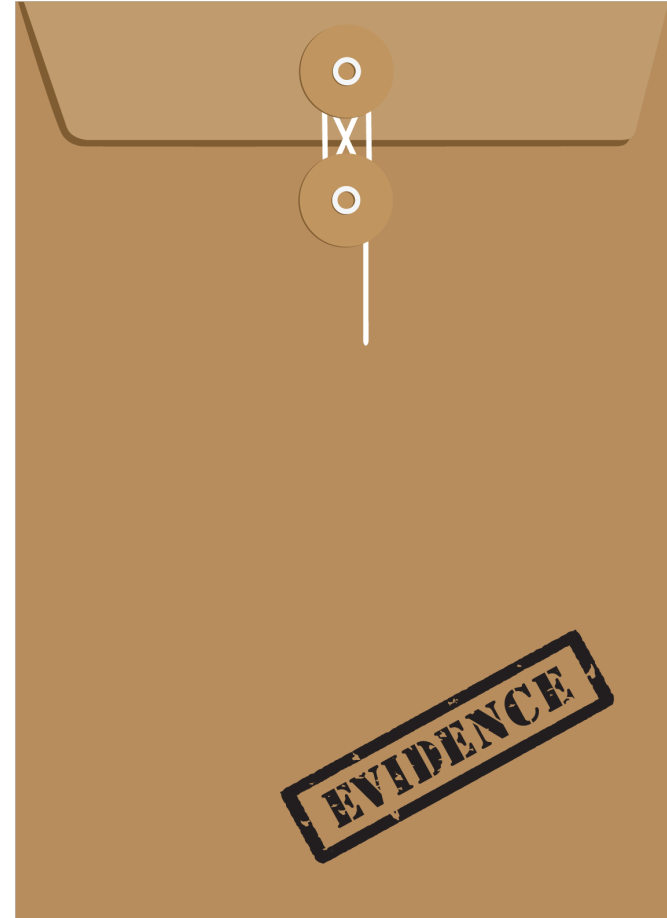
- ▶ Complainant's sexual interests, or prior sexual conduct (unless exception)
- ▶ Exceptions in two narrow circumstances:
 1. The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
 2. The evidence relates to the sexual behavior between the complainant and respondent and is offered to prove consent

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

Types of Evidence

- ▶ Direct Evidence
- ▶ Circumstantial Evidence
- ▶ Hearsay

Rumor / innuendo (NOT evidence)



Direct Evidence

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

Black’s Law Dictionary 675 (10th ed. 2014)

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



Circumstantial Evidence

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

Black's Law
Dictionary 674 (10th
ed. 2014)



Hearsay Evidence

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

Fed. R. Evid. 801(c)



Sources of Evidence

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



When Consent Is at Issue and Relevant

- ▶ The burden of proving consent (or lack thereof) rests on the District
- ▶ If the records maintained by a physician, psychologist or other recognized professional in connection with the provision of treatment (e.g., medical records) are relevant to consent, may only be used with the party's **voluntary, written consent**



What if it's They Said-They Said?



They Said/They Said

- ▶ Sexual harassment often occurs behind closed doors
- ▶ There are often no witnesses to the alleged harassment
- ▶ Many cases are going to involve the complainant making certain allegations, the respondent denying them, with no other witness
- ▶ **The fact that there are no witnesses to the alleged harassment does not mean it is automatically a “50/50”**
- ▶ A thorough investigation and a complete summary of all relevant evidence can help you/the decisionmaker assess credibility and reach a reliable determination





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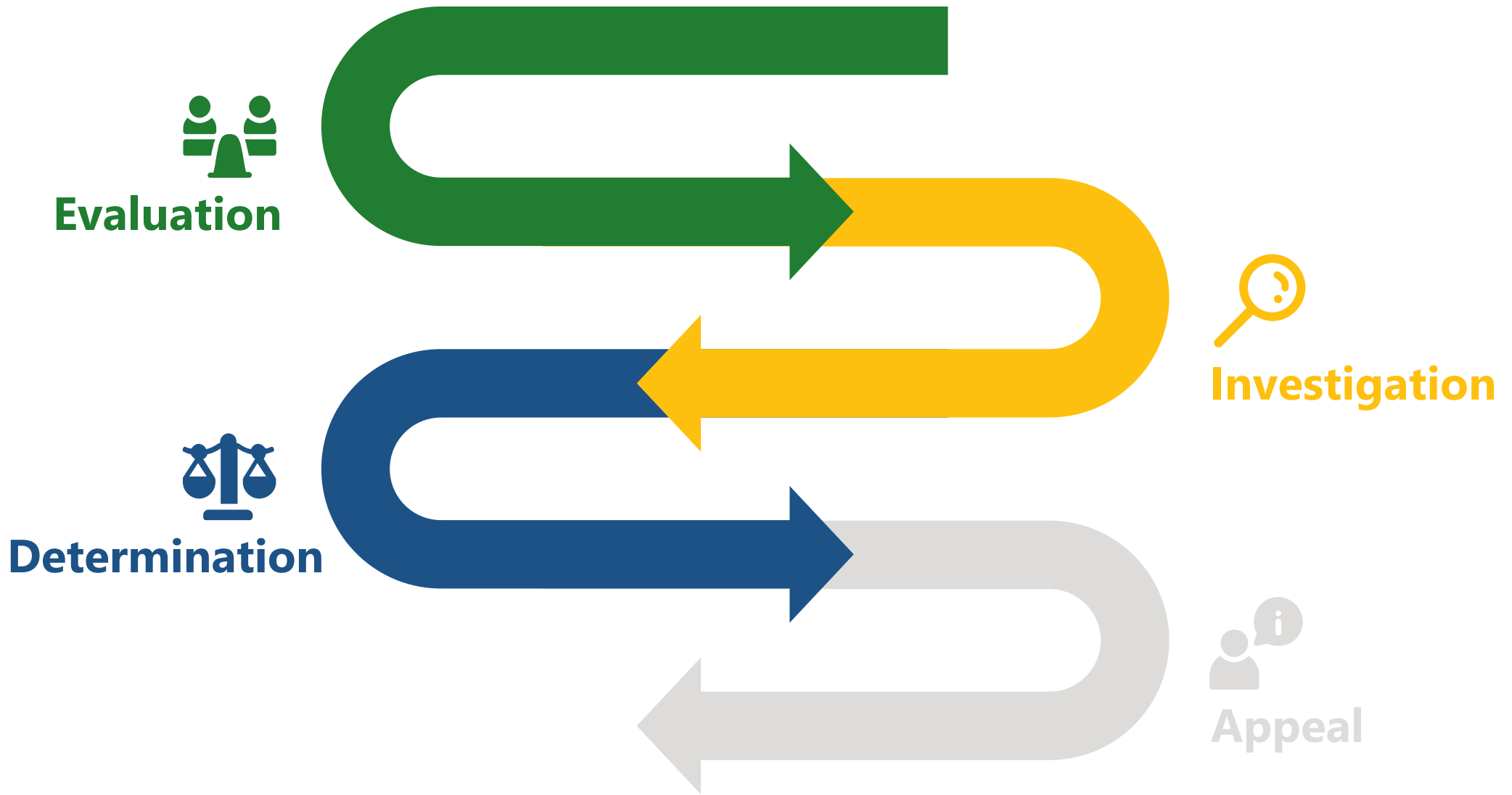
At the end of the investigation.....

NO REPORT!

(If you use the unified
investigator/decisionmaker
process)



Stage Three: Determination



Standard of Proof

“Preponderance of the Evidence”

More likely than not.

(50% + a feather)



They Said-They Said

- ▶ Very few cases end in 50/50
- ▶ More common for a particular disputed fact to end in 50/50, but even that happens less than one might think
- ▶ What tips the scale one way or another?



CREDIBILITY



When Credibility Is at Issue and Relevant



The District must have a process that enables the decisionmaker to question parties and witnesses to adequately assess their credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination



Relevance vs. Credibility

- ▶ Relevant evidence tips the scale (even a feather).
- ▶ Credibility determines how much the scale is tipped – a feather or an elephant.



Relevance vs. Credibility

- ▶ Corroborative Evidence
 - ▶ This is the gold standard evidence for credibility—does other evidence also say what the evidence you are assessing says
 - ▶ Conflicting evidence is the flip-side and can be equally valuable
- ▶ Inherent Plausibility
 - ▶ Is the testimony believable on its face? Does it make sense? Are there more likely alternatives based on the evidence?



Relevance vs. Credibility

- ▶ Motive to Falsify (or embellish)
 - ▶ Friendships
 - ▶ Negative History
 - ▶ Impact on Witness
- ▶ Witness Knowledge
 - ▶ If it was firsthand, could the individual have seen/heard what they claim from where they were?
 - ▶ If they obtained the information from someone else, who? How did that person obtain the information? Could that individual have seen/heard what they claim from where they were?



Relevance vs. Credibility

- ▶ Body Language & Demeanor
- ▶ Specific Details
- ▶ Internal Consistency





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Determination

- ▶ Decisionmaker evaluates relevant, not impermissible evidence for its persuasiveness
- ▶ If not persuaded under the standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sex discrimination occurred



Notice of Determination

- ▶ Notify the parties in writing of the determination of whether sex discrimination occurred and the rationale for the determination
 - Decision
 - rationale for decision, and
 - list of the permissible bases for appeal
- ▶ Notify the parties of the procedures and permissible bases for appeal, if applicable



Post-Determination Actions

- ▶ If there is a determination that sex discrimination occurred, as appropriate, the Title IX Coordinator must:
 - ▶ Coordinate the provision and implementation of **remedies** to a complainant or other persons identified as having had equal access to the education program or activity limited or denied by sex discrimination
 - ▶ Coordinate the imposition of any **disciplinary sanctions** on a respondent, including notification to the complainant of any such disciplinary sanctions
 - ▶ Take **other appropriate prompt and effective steps** to ensure that sex discrimination does not continue or recur within the education program or activity



Determination & Discipline

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



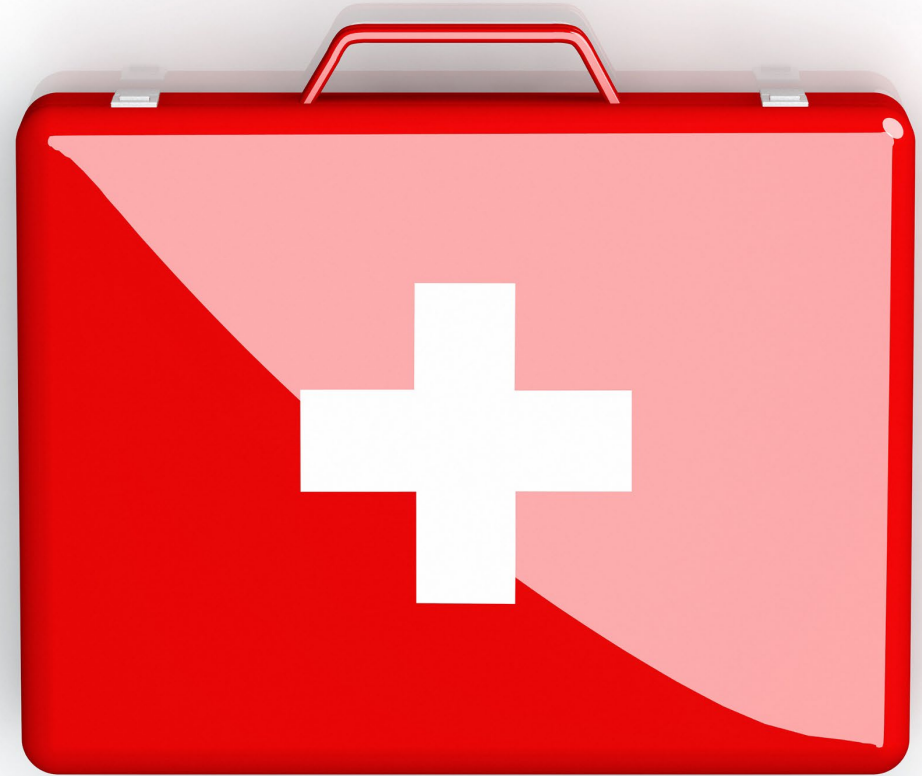
Disciplinary Sanctions

- ▶ Disciplinary:
 - ▶ Suspension
 - ▶ Expulsion
 - ▶ Probation
 - ▶ Loss of privileges
- ▶ Rehabilitative:
 - ▶ Counseling
 - ▶ Training
 - ▶ Community service

[illegible]

Remedies

- ▶ Remedies must be individualized to restore a complainant's equal access to the education program or activity
- ▶ Remedies can also be more wide-spread when multiple people were impacted by the sex-based discrimination, especially when the allegations related to a policy, procedure, or practice of the school district

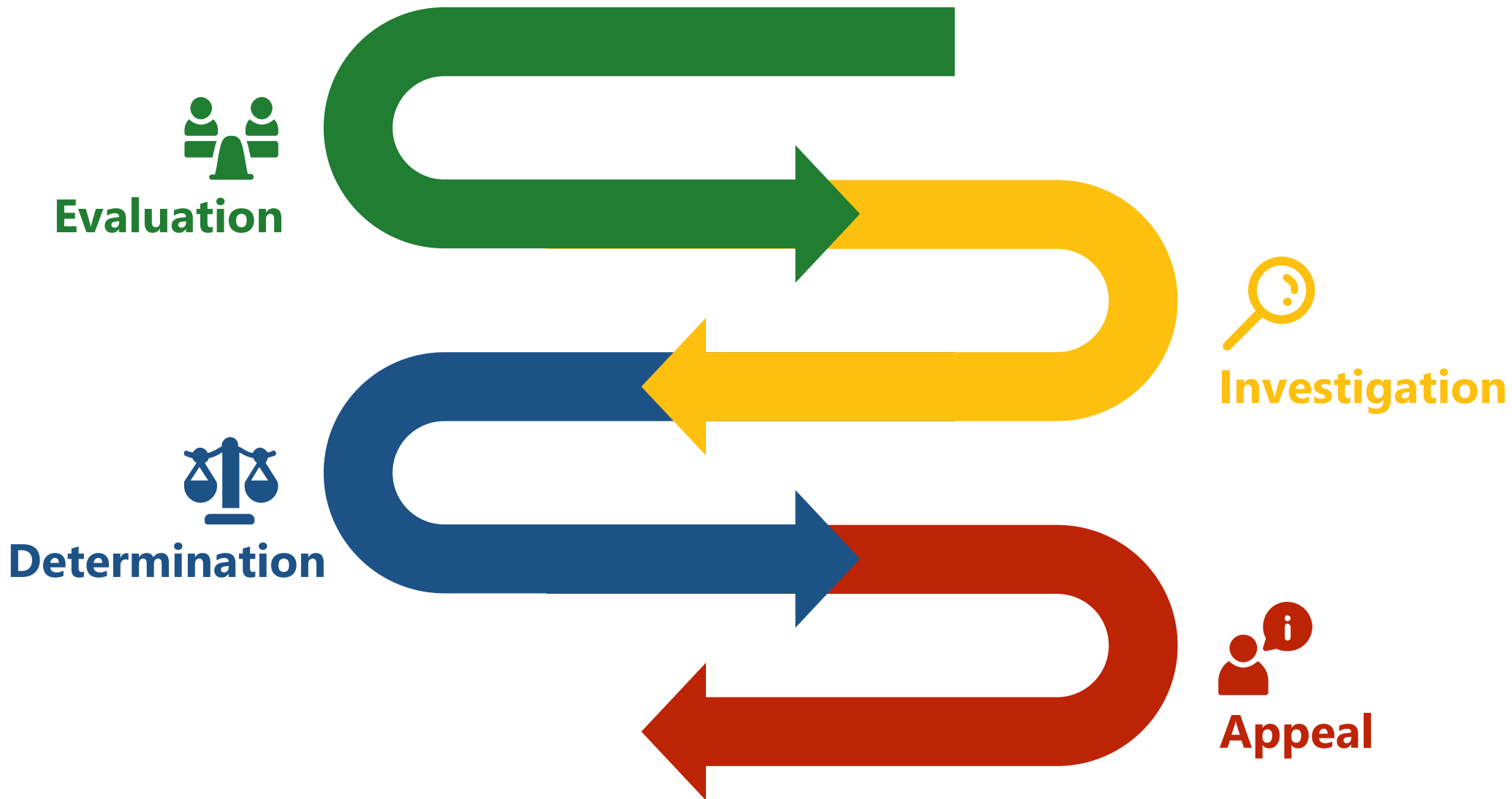


Remedies

- ✓ Providing a campus escort for the complainant
- ✓ Allowing the complainant to park in the employees' parking lot
- ✓ Changing class schedules or extracurricular activities to ensure the complainant and respondent are separated
- ✓ Providing academic resources, modifications, and support
- ✓ Implementing or extending no-contact orders or "stay away agreements"
- ✓ Providing or coordinating health services and counseling
- ✓ Providing training or educational programs to individuals, school groups, personnel, or the school community
- ✓ Modifications to policies, procedures, or practices



Step Four: Appeal



Appeals



The District must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints





Response to Known Retaliation

- ▶ When the District has “information about conduct that reasonably may constitute” Title IX retaliation, the school must respond as it is required to respond to sex discrimination
- ▶ If the District receives a complaint alleging retaliation, it must initiate its grievance process (generally, its process for complaints of sex discrimination) or an informal resolution process

Other District Procedures

Even if Title IX does not apply, consider whether District policy—such as FFH (Local), FFI (Local), DH (Local), or the Student Code of Conduct—require other investigation or action



Record Keeping

- ▶ Title IX Records must be maintained for at least **7 years**
 - ▶ Reports to the Title IX Coordinator regarding misconduct that reasonably may constitute sex discrimination
 - ▶ Complaints
 - ▶ Informal Resolution documentation
 - ▶ Documentation of the grievance process (including any emergency removal, dismissal, or appeal)
 - ▶ Determination
 - ▶ Actions to respond (including supportive measures, disciplinary sanctions, remedies)
 - ▶ Decisionmaking (whether to initiate a complaint, impose a disciplinary removal, offer informal resolution, etc.)
 - ▶ Training records

Serving Impartially

How to serve without bias and
avoid conflicts of interests



Serving Impartially

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



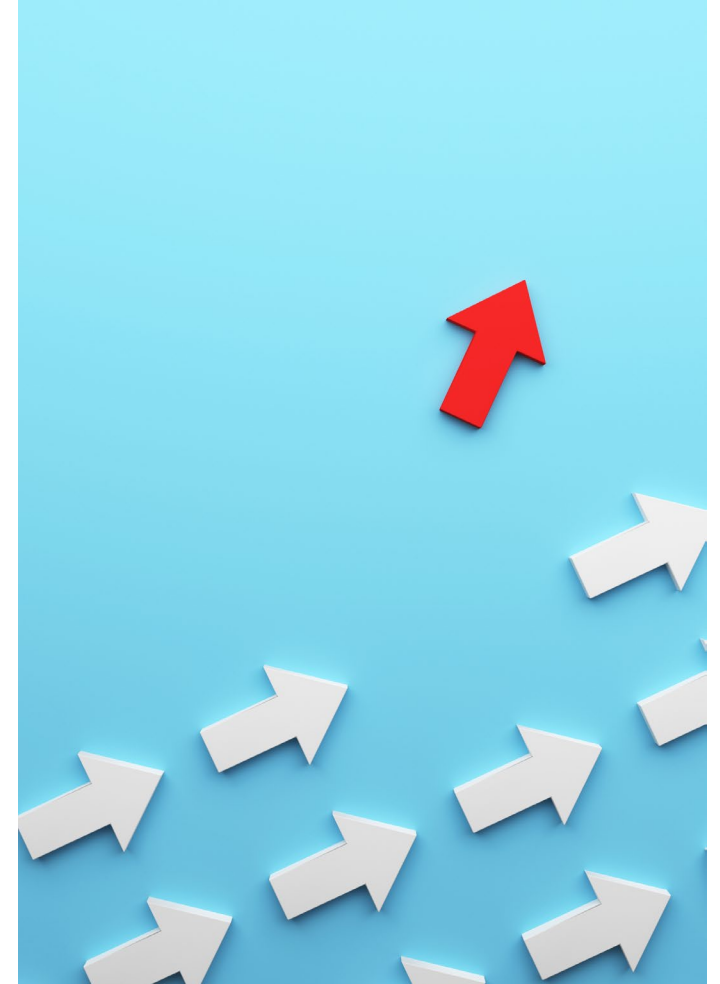
Bias

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



Bias

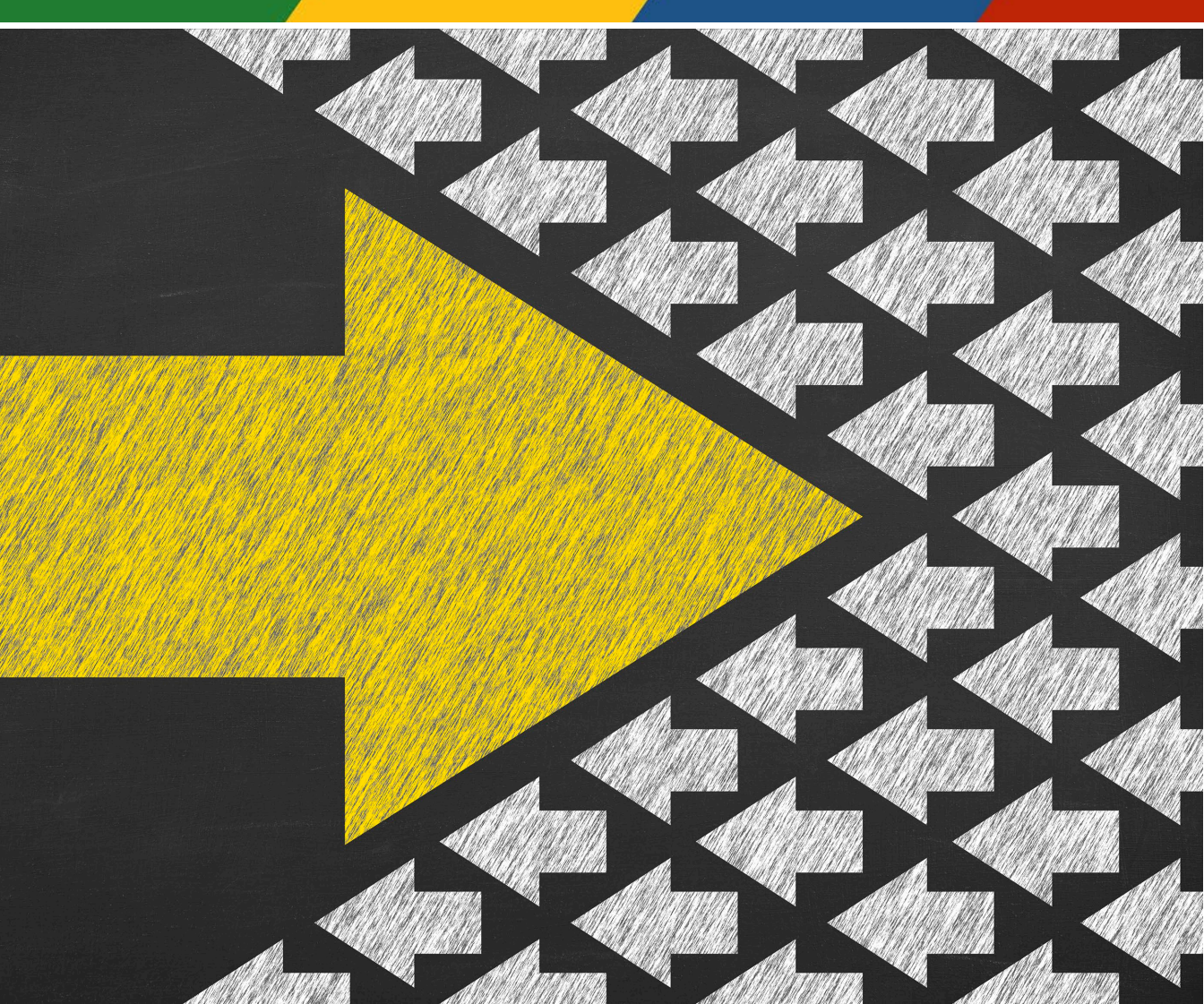
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- ▶ Sex
- ▶ Race
- ▶ Ethnicity
- ▶ Sexual orientation
- ▶ Gender identity
- ▶ Disability
- ▶ Immigration status
- ▶ Financial ability
- ▶ Other characteristic



Bias

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

Conflict of Interest



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

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

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

Prejudgment

"To judge before hearing or before full and sufficient examination"

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

Cambridge Dictionary

Synonyms – preconception, assumption, presumption/presupposition, speculation

Merriam-Webster



Prejudgment

"To judge before hearing or before full and sufficient examination"

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

Cambridge Dictionary

Synonyms – preconception, assumption, presumption/presupposition, speculation

Merriam-Webster

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



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Conflict of Interest

Clearest Conflicts:

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

Could be Conflicts:

Is Respondent's Coach
Has previously disciplined
Complainant for dishonesty

Less Risk of Conflict:

Has a history of speaking out on victim or
accused rights
Has other responsibilities, e.g. 504
Coordinator, that cover parties

Not a Conflict:

Is an employee or attorney
Has been trained on trauma
informed practices



Impartiality DOs & DON'Ts

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

August 1, 2024



Incidents Occurring Before

August 1, 2024

The 2024 Title IX Rules apply only to **conduct that occurs on or after August 1, 2024**, regardless of when that conduct was reported.

Conduct that occurred prior to this date must be addressed under your school district's prior policies that comply with the 2020 Title IX Rules.

Accordingly, it is essential to review complaints carefully to ensure the proper procedures are followed. Because the 2020 Title IX Rules will apply to these older incidents, schools should continue to maintain an *accessible* copy of all policies and procedures implementing the 2020 Rules.

Thank You



Celena Vinson
Counsel
cvinson@thompsonhorton.com



Chris Gilbert
Partner
cgilbert@thompsonhorton.com



Blog

Title IX Tips

► titleixtips.com



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