A School District's Response to Sexual Harassment

Federal Requirements under Title IX

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The Roles and Responsibilities of Title IX Administrators



Know and Understand the Laws, Rules, and Regulations that apply



Recognize when Title IX Applies



Take the right action for the conduct at issue



Training Title IX Personnel

Training of Title IX personnel must include training on:

- The definition of sexual harassment in the Final Rule,
- The scope of the school's education program or activity,
- How to conduct an investigation and grievance process including appeals, and informal resolution processes, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias



About Title IX

Title IX is a federal law that applies to all public schools.

It states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance.”

WHAT DOES TITLE IX COVER?

SEXUAL HARASSMENT



EQUITY IN PROGRAMMING

PREGNANCY DISCRIMINATION



CAN OVERLAP WITH OTHER CIVIL RIGHTS LAWS!



The District's Jurisdiction

- Under 2020 regulations, the district must dismiss Title IX complaints if no jurisdiction.
- The school district would not have jurisdiction if alleged conduct:
  - Would not be considered sexual harassment if proven;
  - Occurred outside of U.S.; or
  - Occurred outside of district's education program or activities.



Defining Educational Program or Activity

"Educational program or activity" includes *locations, events, or circumstances* over which the school district exercised substantial control *over both the respondent and the context* in which the sexual harassment occurs…

What does “Sex” Mean?

- Biological sex
- Gender
- Sex stereotyping
- Sexual misconduct

Key Terms and Standards



“Actual Knowledge”

A school with actual knowledge of sexual harassment in a program or activity against a person must respond promptly and in a manner that is not deliberately indifferent.



“Sexual Harassment”

Defined as unwelcome conduct determined by a reasonable person to be severe, pervasive, and objectively offensive that it effectively denies a person’s equal access to the school district’s education program or activity.
Also includes, sexual assault, dating violence, stalking, and domestic violence.



“Deliberate Indifference”

The school district fails to respond reasonably in light of known circumstances. Title IX regulations require each district to develop an institutional grievance process that allows for a “prompt” and “equitable” response.

Defining Sexual Harassment

- What is “actual knowledge”?
- Defining Sexual Harassment
- Understand through Application

What is “actual knowledge”?

- The previous standard pre-2020 was that the school “knew, or should have known” about the harassment.
- Under the 2020 Final Rule, a K-12 school district must respond whenever *any* employee has notice of sexual harassment, including allegations of sexual harassment.
  - Note, school district employees must also follow all required child abuse reporting requirements outlined in State law and Board policy.



Regulation Requirements: Mandatory Reporting

A report of sexual harassment can be made by anyone, not only the alleged victim, and can be made anytime by phone, e-mail, or mail.

The district must ensure that all students, employees, and parents are notified regarding how to report sexual harassment allegations to their designated Title IX Coordinators. The district must provide the following responses:

- K–12 schools must respond whenever any employee receives notice of a sexual harassment allegation.
- School districts must designate at least one employee to coordinate the school's efforts to comply with Title IX responsibilities. This person must be referred to as the Title IX Coordinator, so their role is clear.
- The Title IX Coordinator's name and contact information must be prominently displayed on the district's website.

DEFINING SEXUAL HARASSMENT



QUID PRO QUO HARASSMENT

A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct.



SEVERE, PERVASIVE, OBJECTIVELY OFFENSIVE

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity.



VIOLENCE AGAINST WOMEN ACT DEFINITIONS

Any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

DEFINE & ANALYZE

HYPOTHETICAL

A 5th-grade student, Lilly, tells her mother that her P.E. teacher, Mr. Thompson, gives "weird hugs" and sometimes pats girls on the back or shoulder in a way that makes her uncomfortable. Her mother emails the school principal, who refers the report to the Director of Schools and the Human Resources Director. The mother is requesting that the child not participate in P.E. and that the principal look into the behavior reported.

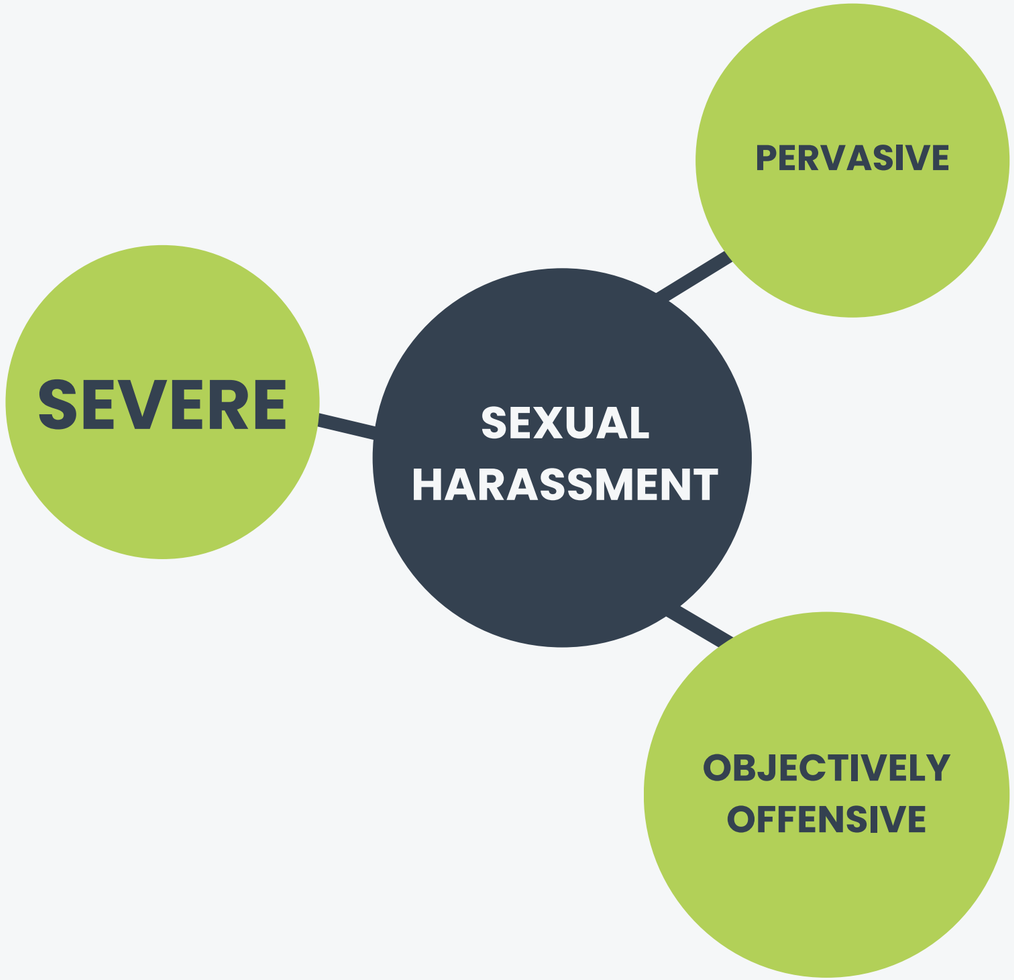
- Does this behavior fall under Title IX?
- If so, does the school district have actual notice?



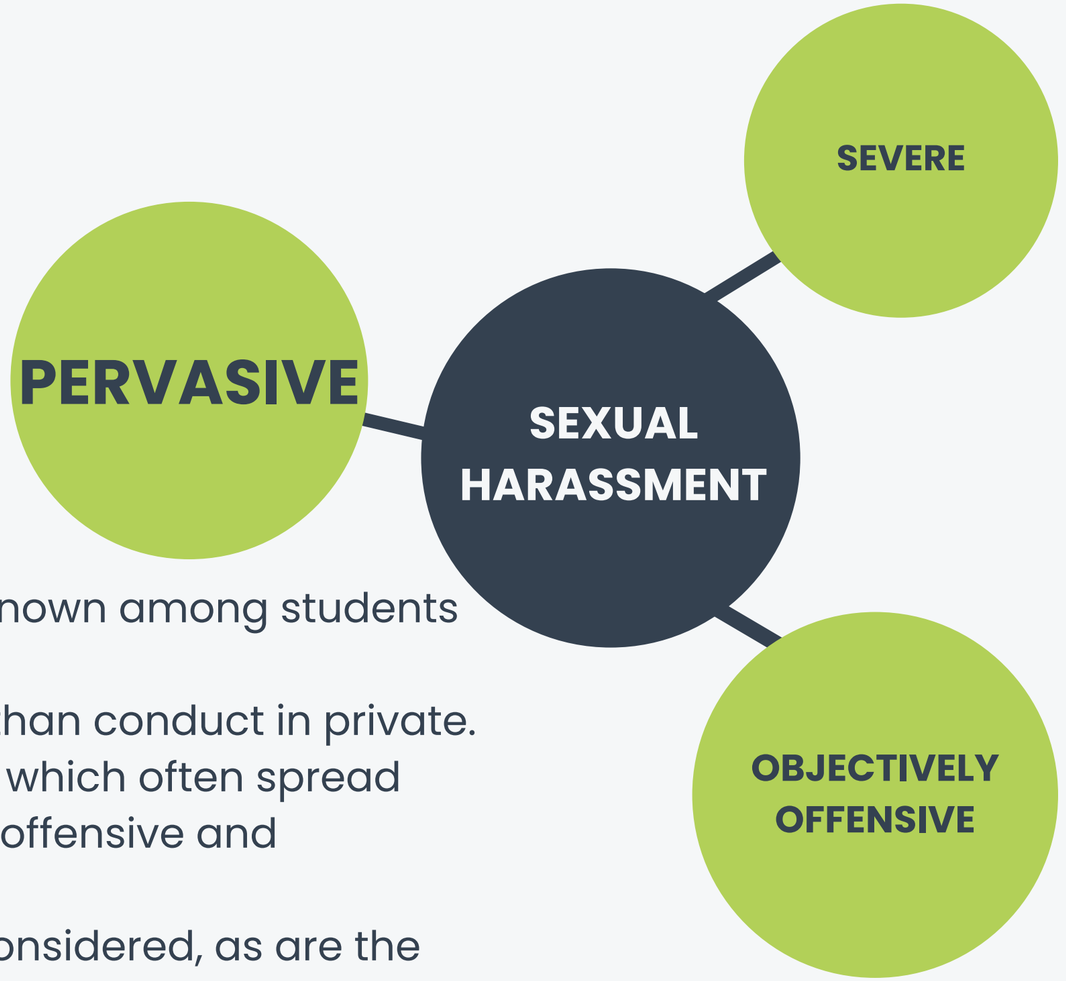
ELEMENTS OF SEXUAL HARASSMENT: SEVERE

The severity of an incident depends largely on the nature and scope of the conduct as alleged, although you can also look at its impact.

- **<u>Physical conduct of a sexual nature often qualifies as severe</u>**
- Treatment that is humiliating, threatening, or violent heightens the severity of the incident.
- Comments, jokes, photographs, etc. are usually not sufficiently severe to create a hostile environment.
- Typically, conduct that is mean, hateful, rude, or insulting does not rise to the level of being severe and does not result in a Title IX violation



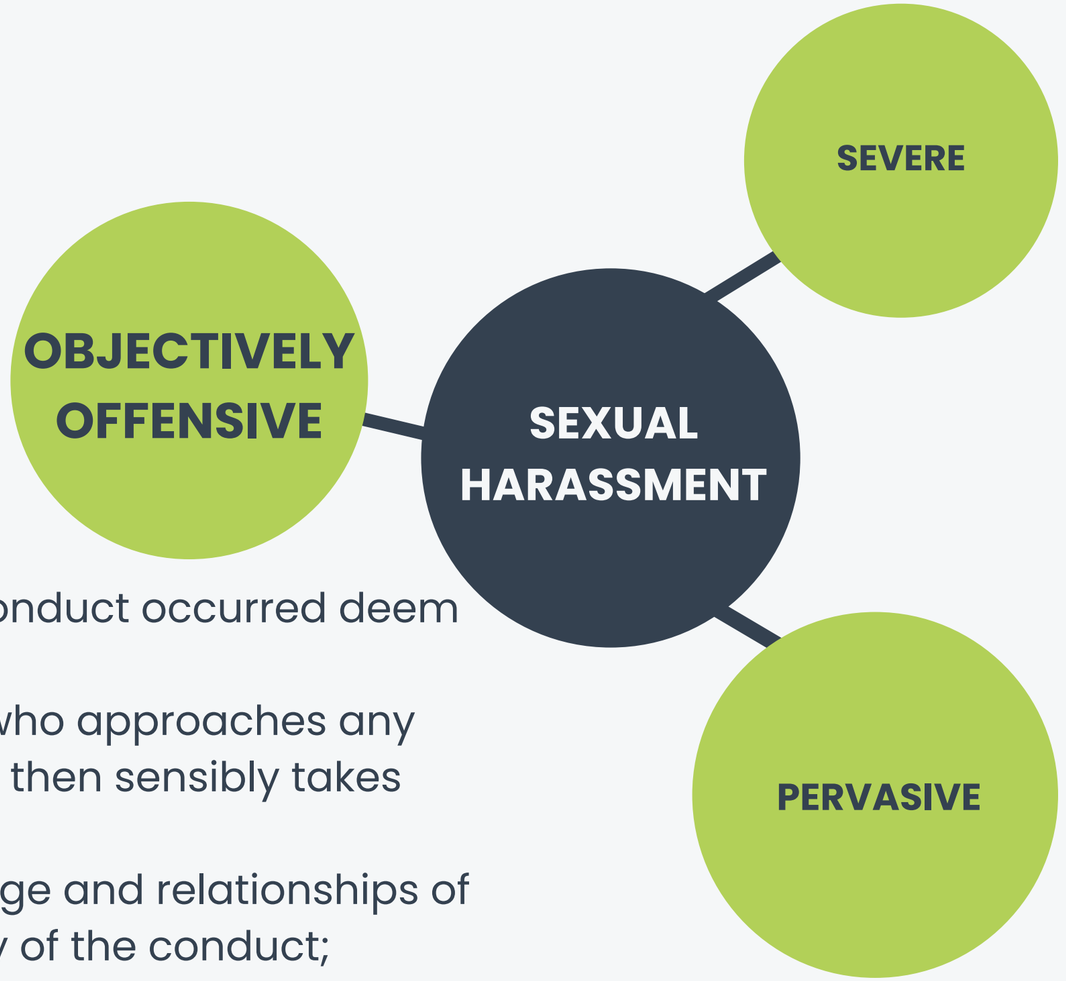
ELEMENTS OF SEXUAL HARASSMENT: PERVASIVE



Pervasiveness hinges on how widespread, openly-practiced, prevalent, and/or distributed the conduct is.

- Unwelcome sex- or gender-based conduct that is well-known among students or employees can qualify as pervasive.
- Conduct that occurs in public spaces is more pervasive than conduct in private.
- Online, electronic, or social media postings and conduct, which often spread rapidly and widely, heighten the pervasiveness by which offensive and unwelcome content can be disseminated.
- The frequency of the conduct, or its persistence, is also considered, as are the relative intensity and duration of the conduct.
- The more severe the conduct, the less pervasive it must be to create a hostile environment.
- The longer an action or incident lasts, or the more often conduct is repeated, the more likely it will be deemed persistent.

ELEMENTS OF SEXUAL HARASSMENT: OBJECTIVELY OFFENSIVE



This standard requires application of the “reasonable person” standard, and context matters.

- Would a reasonable person in the context in which the conduct occurred deem the conduct to be objectively offensive?
  - The “reasonable person” is a hypothetical individual who approaches any situation with the appropriate amount of caution and then sensibly takes action.
- Elements to examine include, but are not limited to: the age and relationships of those involved; the frequency of the conduct; the severity of the conduct; whether the conduct is physically threatening, humiliating, ridiculing, intimidating, or abusive; and the number of persons involved.
- Critical to remember is that just because conduct offends, is mean, or is hateful, does not mean it creates a hostile environment.

CONDUCT UNDER VAWA/CLERY ACT

1

SEXUAL ASSAULT

Includes fondling, incest, rape, and statutory rape.

2

STALKING

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

- Fear for their safety or safety of others or
- Suffer substantial emotional distress

3

DATING VIOLENCE

Violence committed by a person who is or has been in a social relationship of romantic/intimate nature with the victim. Relationship determined by length, type, frequency of interaction between the parties.

4

DOMESTIC VIOLENCE

Crime of violence committed by a current/former spouse, cohabitating person, person with whom the victim shares a child, person similarly situated to a spouse of the victim.

Regulation Requirements: Prompt Response and Equitable Grievance Procedure



Prompt Response

The school district must “promptly respond” to all sexual harassment allegations in a reasonable, commonsense manner given the available information.
This response must include reaching out to complainant as soon as possible and offering supportive measures, making complainant aware of grievance process and procedures, and ensuring both parties equal access to their education.



Grievance Procedure

The regulations call for an institutional grievance process following the filing of a “formal complaint”. The process must treat complainants and respondents equitably by providing an objective investigation, clearly defined evidence standard, reasonably prompt time frames for concluding the process, and a presumption that the respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the grievance process.

Action after Allegation

- Timeline after Allegation
- Investigations and Reports
- Appeals
- Retaliation

DEFINE & ANALYZE

HYPOTHETICAL

After receiving permission to proceed with questioning, the principal speaks with Lilly in relation to her statement to her mother. The principal also asks the school counselor to meet with Lilly. Lilly's statement remains the same with the school principal, but she tells the school counselor that the PE teacher has "friended" her on TikTok and has been sending her messages. She states that the messages asked her about what she does after school and asked if she would want to be on his AAU basketball team and that he would like to "get to know her better"?

- Does this behavior fall under Title IX?
- If so, what are next steps?



Title IX Timeline

The following timeline is provided for student sex-related misconduct.

- If the misconduct is alleged to have occurred between a student and employee OR employee and employee, the misconduct will also need to be reported to the Director of Schools, as it could result in the suspension of the employee during the investigation.
- **DCS and local law enforcement may need to be contacted immediately depending on the nature of the allegations.**

01 School administrator is informed about sex-related misconduct and investigates.

02 If fact-finding indicates that sex-related misconduct occured that could implicate Title IX, the administrator contacts the Coordinator.

03 The Title IX Coordinator will then contact the complainant and offer overview of process, including supportive measures.

04 Title IX Coordinator coordinates the implementation of supportive measures for complainant

05 If formal complaint is filed, provide written notice to each party involved and assign an investigator.

06 Investigator will begin the investigation process.



Regulation Requirements: Supportive Measures

Supportive measures must be made available to both parties to restore or preserve access to the education program or activity. These supportive measures cannot unreasonably burden either party or come with a monetary cost for the parties. Examples include:

- Counseling
- Mutual Contact Restriction
- Classroom Reassignments
- Parallel Safety Plans



Overlap of Investigations

To the greatest extent possible, and subject to Title IX, the school district will make reasonable accommodations in an investigation to avoid potential retraumatization of a child and to avoid any potential interference with an investigation by the Department of Children Services or a law enforcement agency.

DEFINE & ANALYZE

HYPOTHETICAL

DCS and MPD screen out the case and the district gets permission to proceed with its investigation. After meeting with the Title IX coordinator, the mother files a formal written Title IX complaint.

The mother specifically requests that the teacher be removed from the building while the investigation is ongoing.

- What are the Title IX Coordinator’s next steps?
- What if the employee resigns after the complaint has been made?





Receiving a Formal Complaint

- The Title IX Coordinator will assign an impartial investigator that has been formally trained in Title IX regulations under the 2020 Final Rule.
- Provide written notice of the allegations and the grievance process to all known parties and allow the respondent time to prepare a response before an initial interview
- Inform the parties that they may have an advisor present during any subsequent meetings, but define role of advisors .
- Offer supportive measures in an equitable manner to both parties.

ASSIGNING ROLES IN AN INVESTIGATION



TITLE IX COORDINATOR

This individual must be named in the school district's Title IX policy. This person must be trained in Title IX 2020 Regulations. This person can also act as the Title IX investigator (if no conflict exists), but cannot be the Title IX decision-maker.



TITLE IX INVESTIGATOR

The Title IX investigator can be the Title IX Coordinator or can assigned by the Title IX Coordinator. The investigator must be trained in the Title IX 2020 Regulations. The investigator drafts the investigative report.



DECISION-MAKER

The decision-maker must be trained in the Title IX 2020 Regulations. The decision-maker reviews the investigative report and applies the evidentiary standard to the facts established by the investigator. After reviewing all of the information, the decision-maker will issue the determination of responsibility.

Refer to students or individuals as “complainant” and “respondent” through the investigation and reporting phases of the grievance process.

Regulation Requirements: Complainant and Respondent

- The 2020 Final Rule defines “complainant” as an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
  - The Final rule clarifies that any 3rd party as well as the complainant may report sexual harassment.
  - While parents/guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties in Title IX matters.
- The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

THE INVESTIGATIVE PROCESS

- Investigator must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Investigator must not restrict the ability of the parties to discuss the allegations or gather evidence.
- Investigator must send written notice of any investigative interviews.
- Investigator must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence.
- Investigators must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond.

Investigator interviews and gathers evidence as needed.

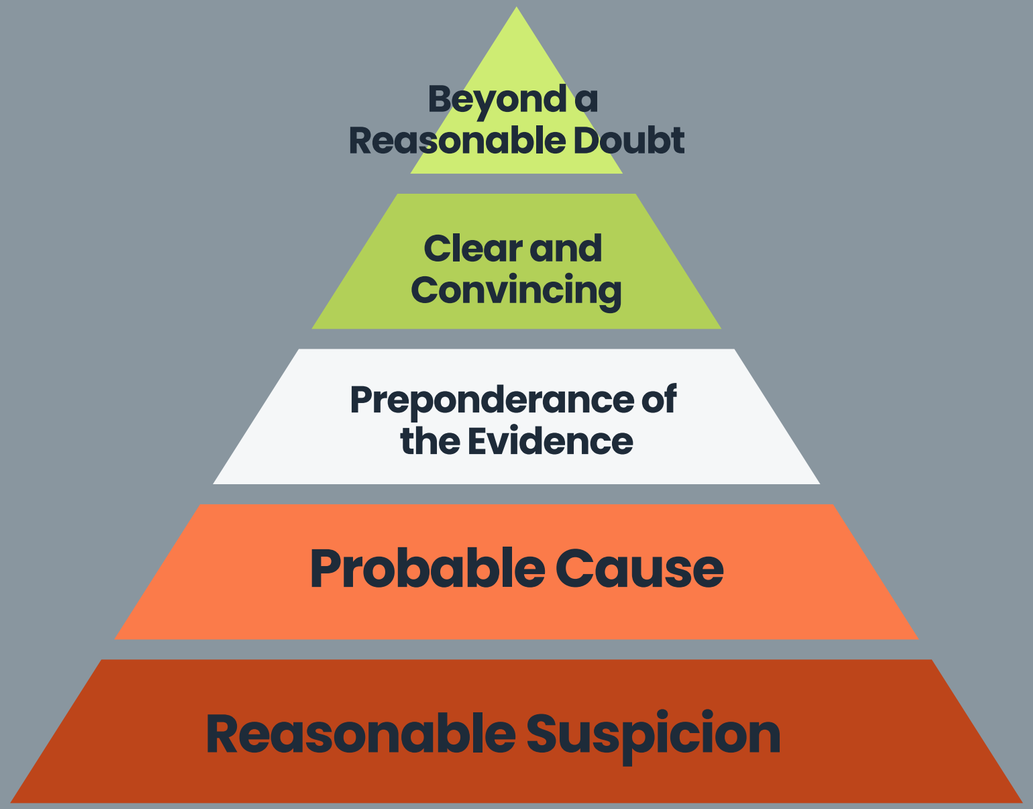
Investigator allows parties to inspect/review all evidence collected.

Both parties are allowed to respond to the evidence collected within 10 days.

Investigator drafts an investigative report based on evidence gathered.

Investigator delivers report to all parties as well as decision-maker.

Understanding the Burden of Proof



Preponderance of the Evidence Standard

Burden of showing something by a preponderance of evidence simply requires the decision-maker to believe that existence of fact is more probable than its nonexistence.
Metro. Sevedore Co. v. Rambo,
521 U.S. 121 (1997).

This standard is not met if the decision-maker believes that the respondent is more likely than not responsible. Consider, are you more than 50% certain that this individual is responsible?

Written Determination of Responsibility

- The determination of responsibility is drafted by the decision-maker more than 10 days after the investigative report is received by complainant/respondent.
- It must include:
  - Allegations;
  - Procedural steps taken;
  - Findings of facts;
  - Application of code of conduct to facts;
  - Statement of and rationale for results as to each allegation; and
  - A determination of responsibility as to each specific allegation, any disciplinary sanctions associated with each determination, and whether remedies to restore or preserve equal access to education program will be provided to the complainant.
  - Procedures and bases for appeal
- It must be provided to parties simultaneously.

APPEALS PROCESS

EITHER PARTY CAN APPEAL FOR THE FOLLOWING REASONS:



PROCEDURE

A procedural irregularity that affected the outcome of the investigation and determination.



EVIDENCE

New evidence that was not reasonably available at the time of the determination of responsibility that could affect the outcome.



CONFLICT OF INTEREST

Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against the complainant or respondent that affected the outcome.

APPEALS PROCESS

1. Appeals must be submitted to Title IX Coordinator within 10 days of the determination. Within 5 days of receipt of appeal, the Coordinator assigns an impartial hearing officer.

2. Both parties are notified of the appeal in writing and given the opportunity to respond to the appeal in writing.

3. Within 10 calendar days, hearing officer issues written decision describing results of appeal and rationale. Hearing officer provides written decision simultaneously.

Recordkeeping- Maintain for 7 Years

- Investigation Records (including determination, recordings, transcripts, sanctions, remedies)
- Appeal Records
- Record of any Informal Resolution Training materials – posted on website/available upon request
- Documentation of recipient's response to all reports and formal complaints

Retaliation Prohibited

- **<u>The Final Rule expressly prohibits retaliation.</u>**
  - Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.
  - The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.
  - Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.
  - The exercise of rights protected under the First Amendment does not constitute retaliation.
  - Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.

Questions?

