



Navigating Title IX

Presented By:

Cory Kirby

Pereira, Kirby, Kinsinger & Nguyen, LLP

ckirby@pkknlaw.com

What does Title IX Actually Say?

- ▶ 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

The United States Supreme Court on Title IX

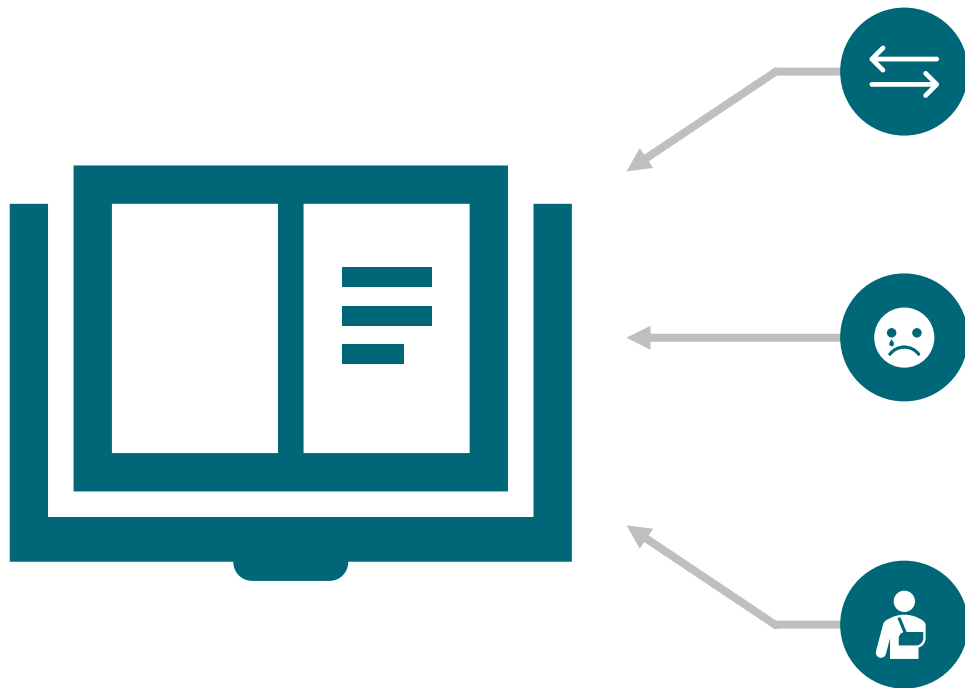
- 1) Cannon v University of Chicago (1979), private right of action exists under Title IX
- 2) Franklin v. Gwinnett County Pub. Sch. (1992), recognizing an implied cause of action for monetary damages under Title IX against education institutions receiving federal funds
- 3) Gebser v. Lago Vista Indep. Sch. Dist. (1998), the plaintiff must establish that **an official with authority to institute corrective measures** (a) had **actual notice** of the teacher's misconduct and (b) was **deliberately indifferent** in responding to it.
- 4) Davis v. Monroe County Board of Education (1999), the conduct of the perpetrator must be so severe, pervasive and objectively offensive that it denies the victim equal access to educational opportunities or benefits

Important Terms

Actual Knowledge:

Notice of sexual harassment or allegations of sexual harassment to a school's Title IX Coordinator or any official of the school who has authority to institute corrective measures, **or to any employee of an elementary and secondary school.**

| Sexual Harassment



Quid Pro Quo: An employee of the recipient conditioning the provision of aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct

Hostile Environment: Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectionably offensive that it effectively denies a person equal access to the recipient's educational program or activity

Clery Act/Violence Against Women Act: sexual assault – example: seduction, incest, indecent exposure

Domestic Violence

Committed by:

- Current/former spouse
- Current/former intimate partner
- Current/former cohabitation person
- Person similarly situated as a spouse
- Any other person

Dating Violence

Committed by a person:

- Is or was in social relationship of romantic/intimate nature AND
- Existence of relationship determined by various factors (length, type, frequency)

Stalking

Conduct directed at a person that would cause a reasonable person to:

- Fear for own safety or others safety OR
- Suffer substantial emotional distress

Complainant

Means an individual who is alleged to be the victim of conduct that could constitute sexual harassment

- In K-12 also means parent or guardian of student
- Any person can report sexual harassment and trigger recipient's obligation to respond
 - Victim, bystander, witness, friend, or any other person

Respondent

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

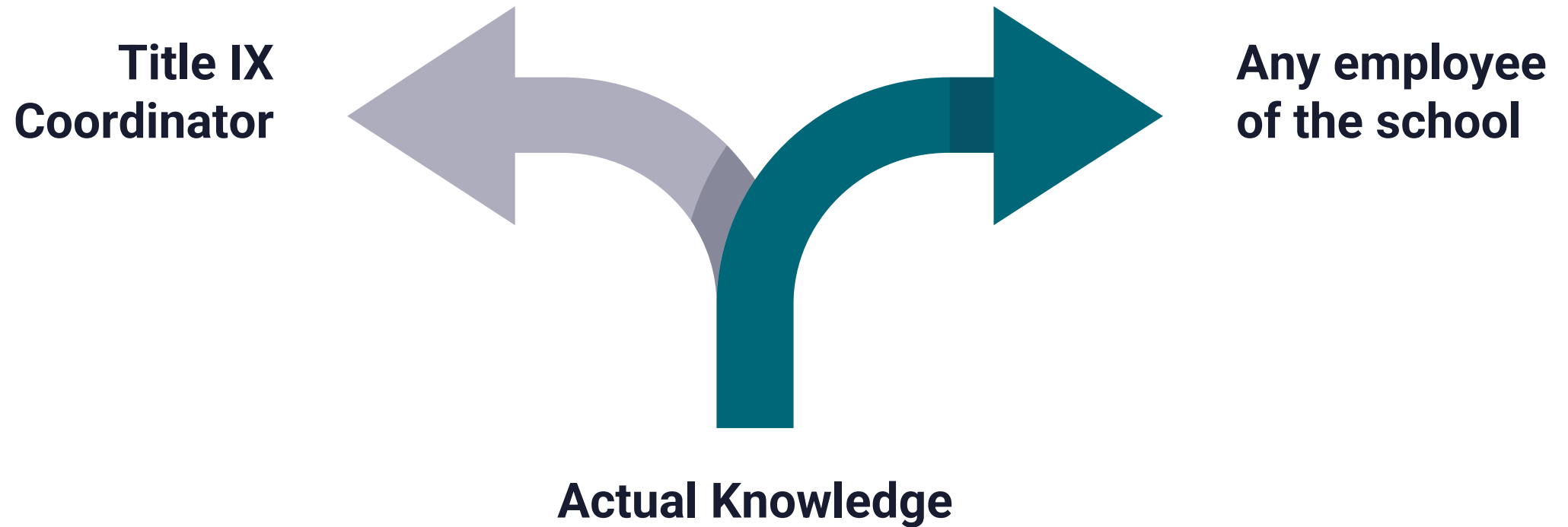
The Obligation to Respond

- A school is obligated to respond when:
 1. The school has actual knowledge of sexual harassment;
 2. The act occurred within the school's own "education program or activity";
 3. Against a "person in the United States."
- A school must respond meaningfully to every report of sexual harassment.

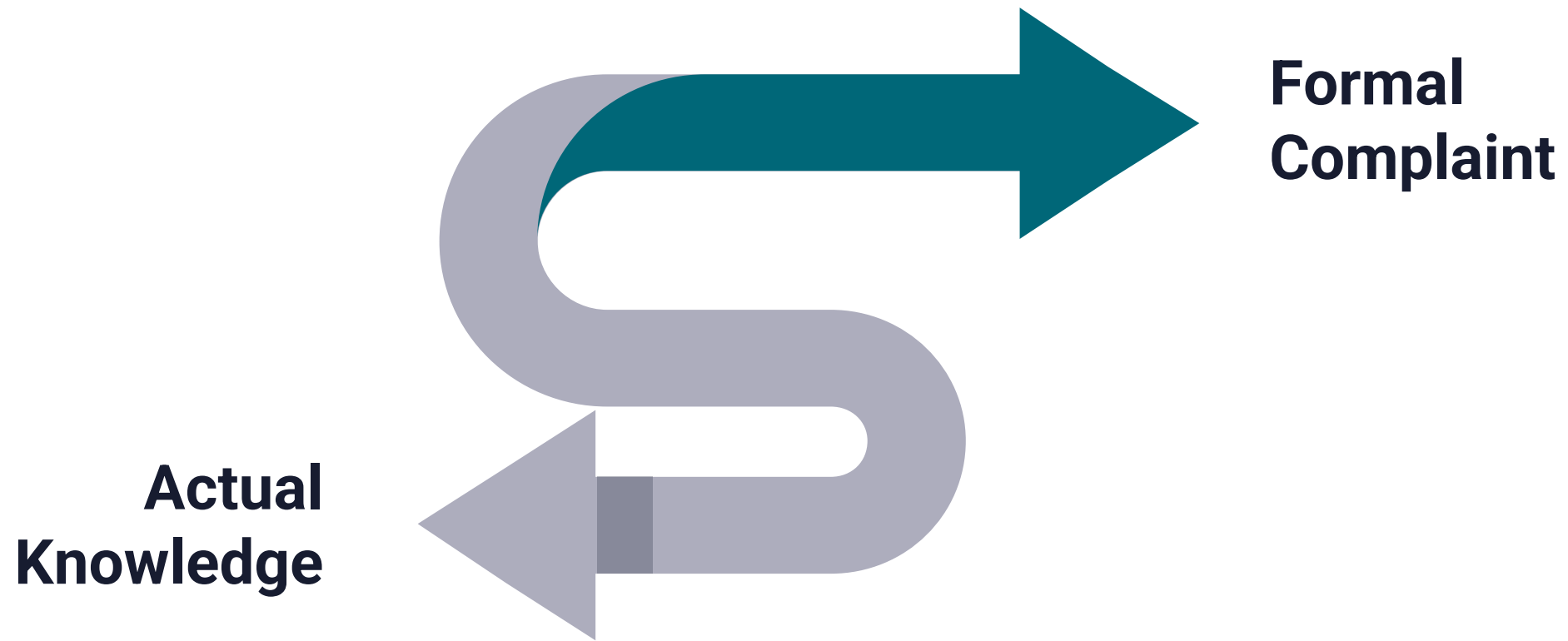
Program or Activity

- “all of the operators” of elementary and secondary school
- Includes locations, events or circumstances over which the recipient exercised substantial control over both the respondent and context in which the harassment occurs
- What about online?

Who has to have Actual Knowledge?



How Are Districts Supposed to Respond?



Regardless, District **MUST** respond:

1. Promptly
2. Offer supportive measures to complainant and respondent

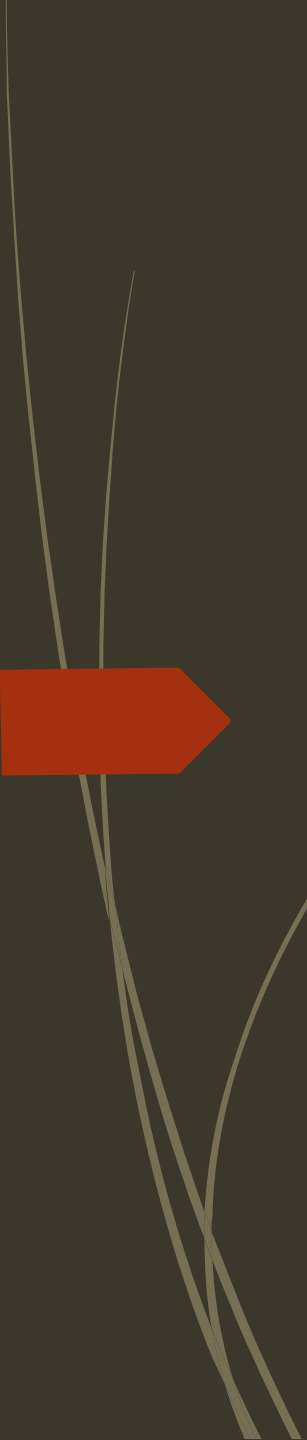
In addition, Title IX Coordinator must contact complainant to:

- discuss supportive measures
 - wishes
 - with or without formal complaint
 - explain process of filing formal complaint

What are Supportive Measures?

Non-disciplinary, non-punitive individual services designed to restore or preserve equal access to educational program or activity without unreasonably burdening the other party

- Without fee or charge
- i.e. counseling, deadline extensions, modification of class/work schedules, restricting contact between parties, revised seating or assignments, increased monitoring, emergency removals



Suppose These Facts:

- Father of Girl tells administrator that Boy has been harassing his daughter, specifically points to an incident a week ago that she just told parents about
- Girl alleges that during class, Boy touched her butt on several occasions when she leaned over to talk to a friend and tried to reach down her pants; also claims he touched her between her legs over her clothing when she got up to leave
- Female student claims that another girl witnessed the incident
- Investigation begins and every student is asked to write a statement
- Teacher told to move girls to back of class

Suppose these facts:

- Girl tells story consistent with Dad's report
- Witness 1 says she saw everything, confronted Boy about it personally and texted him about it that night, produces texts; also claims at football game she called Boy to save her a seat and all during game he touched and tried to touch her outside her pants, front and back, she identifies two others
- Witness 2 says Boy has touched her multiple times and identifies another girl
- Witness 3 says she has never been touched
- Boy denies everything, but he is removed from class, parents of Girl seem fine as long as he is removed from class

Assume these facts:

- At some point, administrators accused of not reporting child abuse and GBI gets involved
- Girl chooses to go virtual, but claims she is being harassed on social media
- Boy charged by police with sexual battery, a misdemeanor in juvenile court
- Boy's Dad claims that son is being harassed at school by others; other students claim Boy is talking and bragging about it
- WHAT ARE THE OPTIONS FOR PROCEEDING?
- HOW WOULD AN INVESTIGATION GO UNDER TITLE IX?
- HOW IS IT DIFFERENT IF THERE IS A FORMAL COMPLAINT?

Focus on the Process

1. Treat both complainant and respondent equal
2. Evaluate all relevant evidence objectively
3. Title IX Coordinator, Investigator, and decision-maker are to be free from conflict of interest and trained to be impartial
4. Presume innocence of respondent
5. Prompt time frames for process
6. Range of remedies and sanctions which may be imposed
7. Standard of proof –preponderance of evidence
8. Appeal procedures
9. Privileged (with waiver)

Focus on Due Process

- A presumption of innocence throughout the grievance process;
- Written notice of allegations against the accused;
- An equal opportunity for both parties to present and review all the evidence;
- Opportunity to submit written questions to challenge credibility of both parties

| Formal Complaint

Upon receipt, recipient must provide written notice to the known parties that includes:

1. Notice of grievance process and informal resolution
2. Notice of allegations in sufficient detail and time to allow preparation of response prior to initial interview
3. Identities of known parties, alleged conduct, date and location of conduct, if known
4. Statement that respondent is not responsible for alleged conduct; determination made at conclusion of process
5. Notice that parties may inspect and review evidence
6. Notice of any provision in student code of conduct regarding making false statement

| Investigation

- Decision-maker must be someone other than Title IX Coordinator or Investigator
- Burden of gathering evidence and determination of responsibility is on recipient
- Certain evidence is protected unless waiver signed
- Give all parties same opportunity to present witnesses and evidence
- Can't restrict parties' obligation to discuss allegations or gather and present relevant evidence
- Provide parties with written notice of day, time, location, participants and purpose of each investigation interview with sufficient time for party to prepare
- Provide complainant and respondent with at least 10 days to review evidence prior to investigative written report, and opportunity to respond

| Determination of Responsibility

- Decision maker can't be Title IX Coordinator or investigator
- Must issue written determination that includes:
 - Allegations
 - Description of procedural steps taken, making notification to and interview of parties and witnesses
 - Finding of facts
 - Application of code of conduct
 - Statement of and rationale for result as to each allegation; must include:
 - Determination of responsibility
 - Discipline sanctions, whether remedies to restore/preserve, equal access to educational program/activity will be provided by recipient to complainant

| Appeals

Must offer to both parties for:

1. Determination of responsibility
2. Dismissal
 - As to the following bases:
 - a) Procedural irregularity that affects the outcome
 - b) New evidence not reasonably available at time of determination
 - c) Conflict of interest on part of Title IX Coordinator, Investigator or decision-maker

Title IX Sexual Harassment Timeline

