

JacksonLewis

Sexual Misconduct Training for Title IX Coordinators

Legal Requirements and Practical Considerations

Academic Year 2021-22



Agenda

1. Where We Are: Context and Framework
2. Phase 1: Reporting → Supportive Measures
3. Phase 2: Formal Complaint → Jurisdictional Analysis
4. Phase 3: Investigation → Resolution
5. Other Important Considerations

TITLE IX

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.



Title IX removes barriers

- Prohibitions on participation
- Unequal funding of athletics
- Pregnancy Discrimination
- Sexual Harassment
 - Sexual Assault
 - Stalking
 - Domestic/Dating Violence
 - Verbal/Expressive



Law Title IX Clery VAWA/
Campus SaVE

Regulations 2020 Rule ← Title IX Implementing Regulations

Formal Guidance 2020 Preamble ~~2011 DCL~~ ~~2014 Q&A~~ ~~2017 Q&A~~

OCR Resources OCR Blogs OCR Webinars OCR Tools

Directives

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Industries Practices & Services People Offices About Us

Publications

Biden Administration to Review Title IX Policies and Regulations and Establish Gender Policy Council

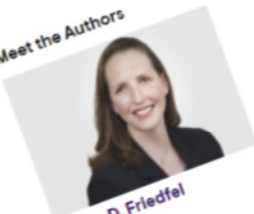
By Susan D. Friedfel, Monica H. Khetarpal, Joshua D. Whitlock, Crystal L. Tyler and Amanda Brody

March 9, 2021

Department of Education has been directed to review all gender discrimination (including sexual harassment) under [Executive Order](#) issued by the Biden Administration, such as Title IX of



Meet the Authors



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Department of Education: Moving to Amend 2020 Title IX Regulations on Sexual Harassment

By Susan D. Friedfel, Carol R. Ashley and Tara A. Ahrens



Meet the Authors



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Carol R. Ashley

Education's Office for Civil Rights (OCR) has announced a comprehensive review of its regulations under the Education Amendments of 1972, starting with the issues of sexual harassment in school, sexual violence, and discrimination based on gender identity. It also anticipates taking steps to amend the Title IX regulations.

These steps are part of the Biden Administration's March 8 [Executive Order](#) on Combating Sex Discrimination on the Basis of Gender.

Secretary DeVos reiterates the Department's position on the basis of sex in federally funded programs and activities.

Late-Breaking DOE Guidance for the 2021-22 School Year

Q & A: 37 pages

Appendix: 18
pages of sample
policy provisions

Q & A on the Title IX Regulations on Sexual Harassment

Released: July 20, 2021

Comprehensive
review of Title IX
regulations ongoing

New regulations
expected
May 2022

<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Guided by:

- *Executive Order on Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
- *Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation*

Potential **Mistakes** Addressed by the **DOE's Q & A**

Casting too narrow of a net with regard to a school's "education program or activity" (Q & A #9, #10)

Equating presumption of non-responsibility with presumption that Complainant is lying or that alleged Sexual Harassment did not occur (Q & A #36)

Determining that a Complainant is "not traumatized enough" to have been denied equal access (Q & A #8)

Applying rules of the 2020 Amendments to conduct that occurred prior to August 14, 2020 (Q & A #13)

Hey, if you want to, you can do this...

The Department of Education's Q & A encourages schools to exercise discretion in the following areas*:

Undertake prevention methods that best serve the needs and values of your educational community
(Q & A #3)

Develop and enforce codes of conduct as an additional tool for ensuring safe and supportive educational environments
(Q & A #7)

May provide supportive measures to Complainants whose allegations do not fall within Title IX
(Q & A #7, 9)

Implement rules of decorum for conducting the live hearing (rules must apply equally to all parties)
(Q & A #43, 44, 49)

May require additional individuals to report knowledge of sexual harassment to the TIX Coordinator
(Q & A #19)

** The discretionary actions must not conflict with the 2020 Title IX regulations*

What's Next? Hints of Future Rule Changes?

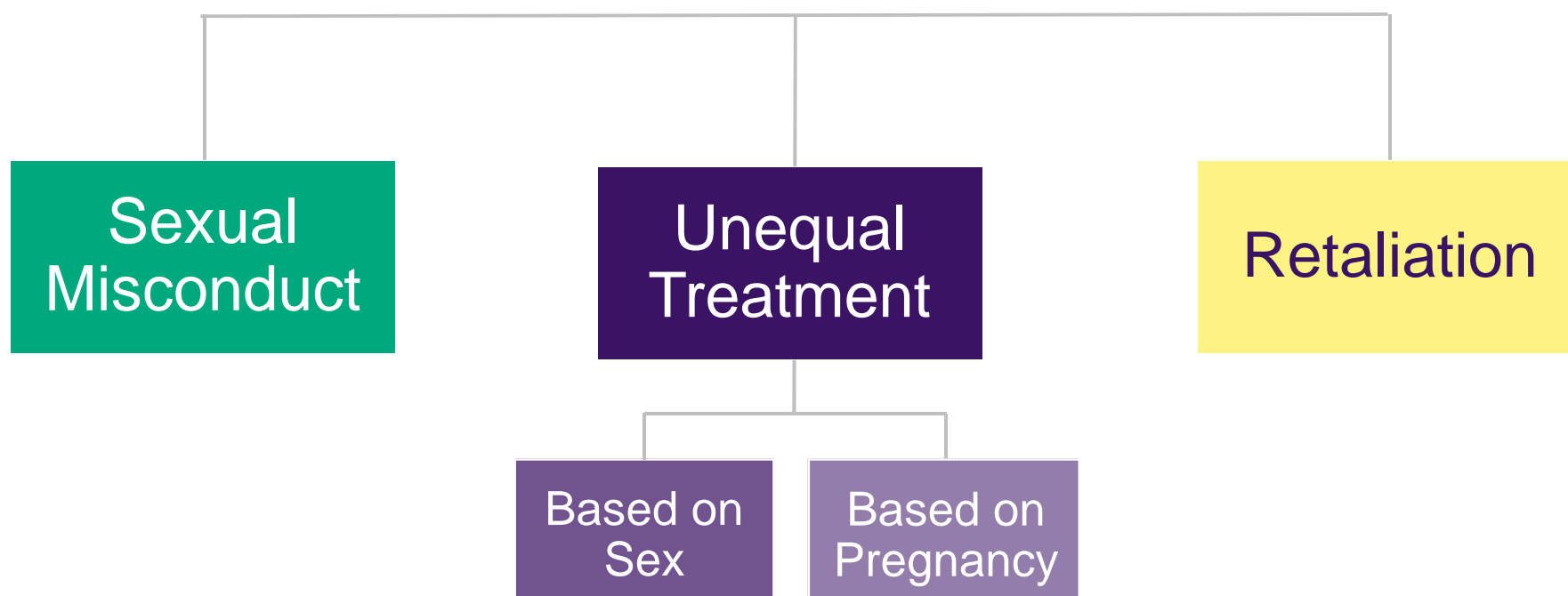
Institute 60-day timeframe for concluding the grievance process for Formal Complaints
(Q & A #37)

Publicize list of officials with authority (OWA) to institute corrective measures on a school's behalf
(Q & A #19)

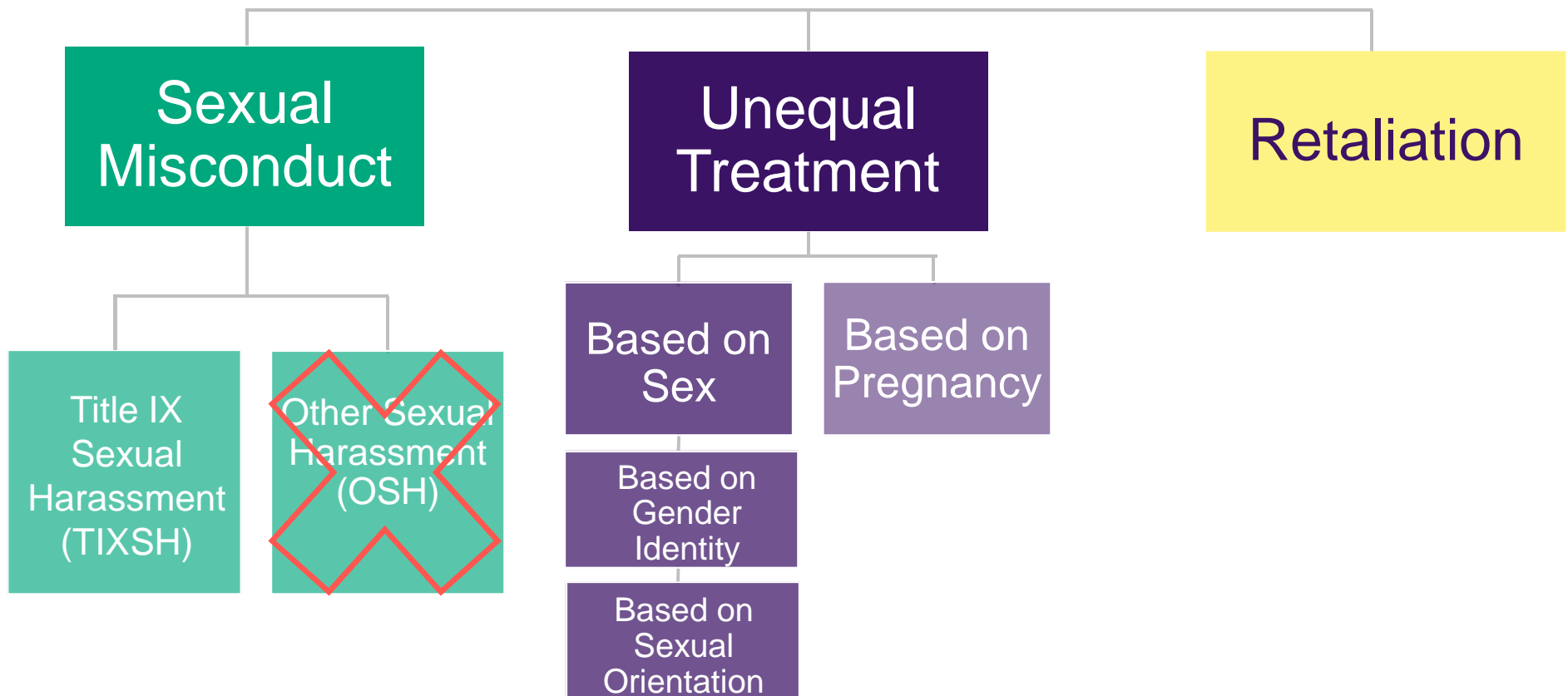
And following District of Massachusetts ruling on 7/28/21...

Will Department of Education defend requirement that all his/her/their statements be disqualified if witness is not available for cross examination?

Sex Discrimination Prohibited by Title IX **Before** 2020 Regulations



Sex Discrimination Prohibited by Title IX **After** 2020 Regulations



Two Buckets



Title IX Sexual Harassment (TIXSH)

Forms of harassment on the basis of sex that fall within the Final Rule's definition of Sexual Harassment and jurisdictional scope. These cases must be handled in accordance with the 2020 Regulations.

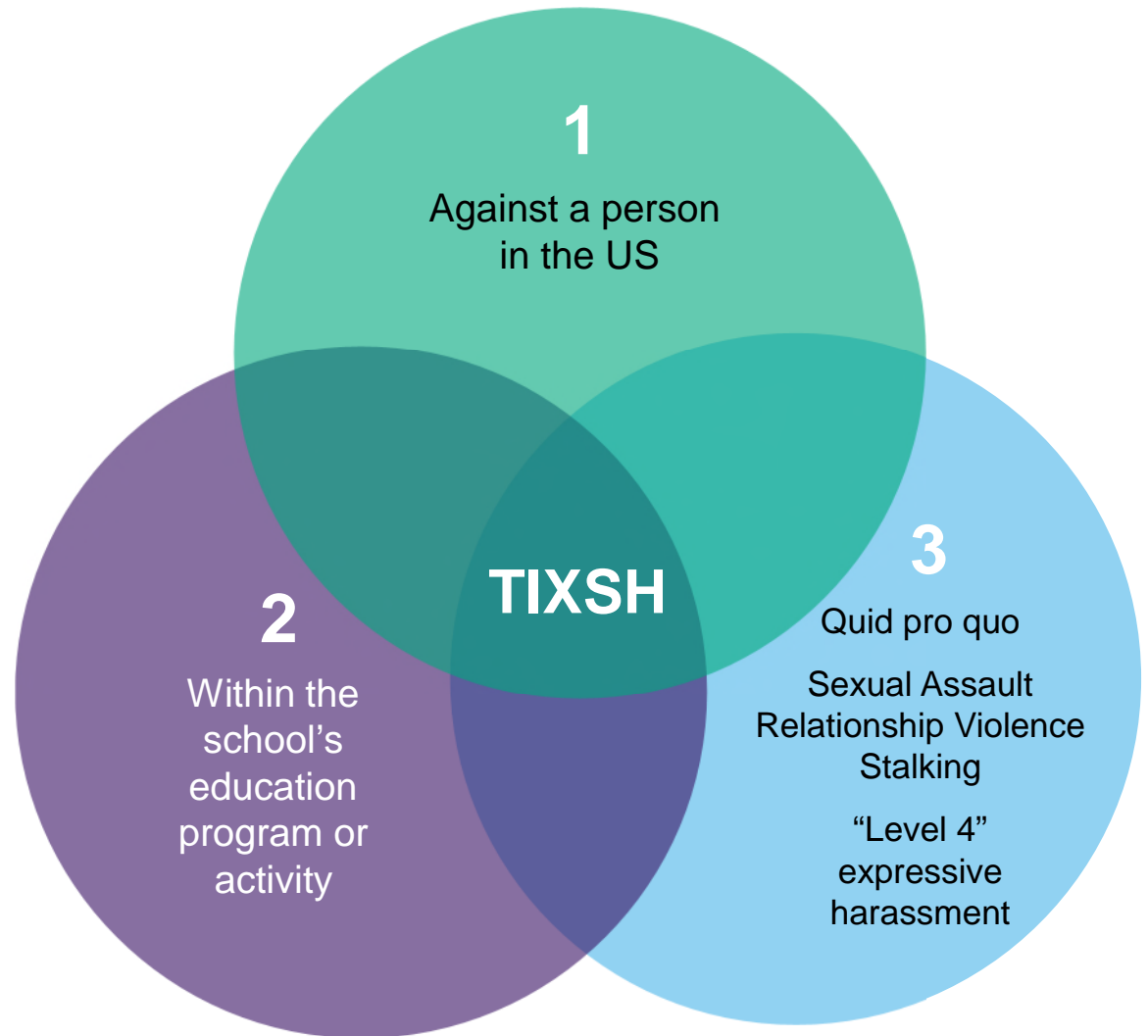


Other Sexual Harassment (OSH)

Forms of harassment on the basis of sex that do not fall within the Final Rule's definition of Sexual Harassment and/or jurisdictional scope.

The 2020 Title IX regulations don't tell schools how to handle OSH cases.

What kind of Sexual Harassment falls under Title IX?



Question 1 of 3

Against a person in the US?

Yes

No



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.



Question 2 of 3

Within the school's program or activity?

Yes



No



What falls within your education program or activity?



Anything on Campus

Recognized Student Organizations

Labs & Clinics

Academics

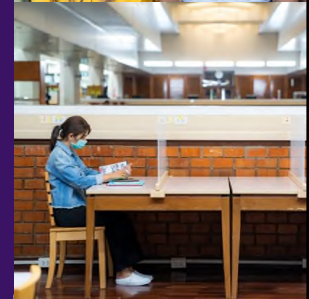
Sponsored Performances

Athletics

Residence Life

Admissions & Hiring

Work Study



On Campus?

“[All] of the operations’ of a recipient (per existing statutory and regulatory provisions), and the additional ‘substantial control’ language in these final regulations, clearly include all incidents of Sexual Harassment occurring on a recipient’s campus.”

Translation: If it happened on campus, it falls within your education program or activity.

Off Campus?

“[A] recipient’s Title IX obligations extend to Sexual Harassment incidents off campus if **any of three** conditions are met”

Incident occurs as
part of school’s
operations

School exercises
substantial control
over the context
and the
Respondent

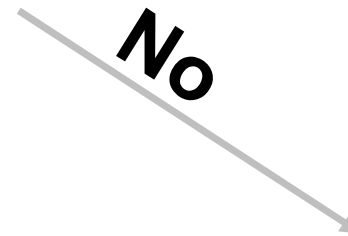
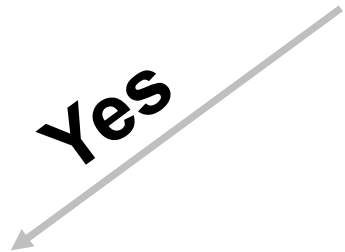
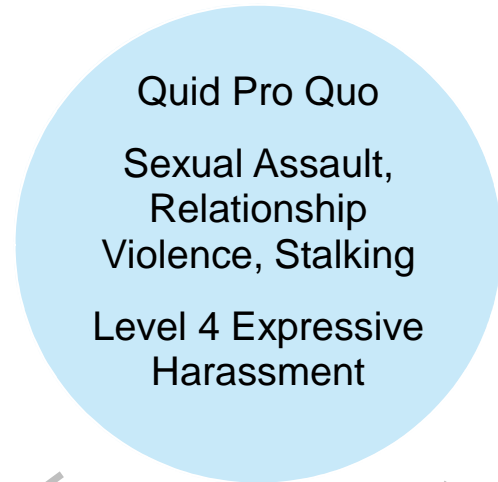
Incident occurs
at recognized
student
organization’s
building

When is an online interaction within the education program or activity?

- Physical location of parties
- Hardware
- Platform/Network
- Event/Activity



Question 3 of 3




Three broad types of sexual misconduct fall within the jurisdiction of Title IX under the 2020 Regulations

1. Sexual Assault
Dating and Domestic Violence
Stalking




Clery Act Conduct

2. A school employee conditioning the provision of an aid, benefit, or service on participation in unwelcome sexual conduct



Quid Pro Quo

3. Unwelcome conduct*
(Expressive: verbal, written, electronic, body language)




Level 4 Expressive 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

Sexual Assault

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest and Statutory Rape



Non-consensual sexual contact including where the victim is incapable of consenting due to age or incapacity

Intimate Partner Violence

- Domestic violence
- Dating violence

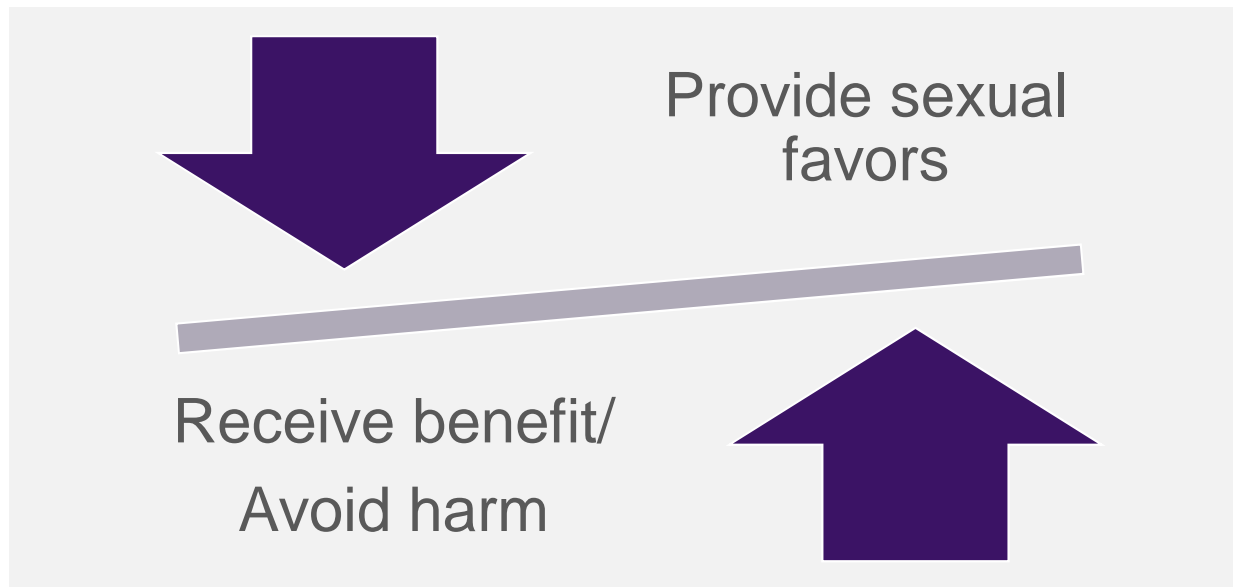
Stalking

A (sex based) course of conduct directed at a specific person that would cause a reasonable person to:

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

Quid Pro Quo

- An employee of the institution
- Conditioning the provision of an aid, benefit, or service
- On participation in unwelcome sexual conduct

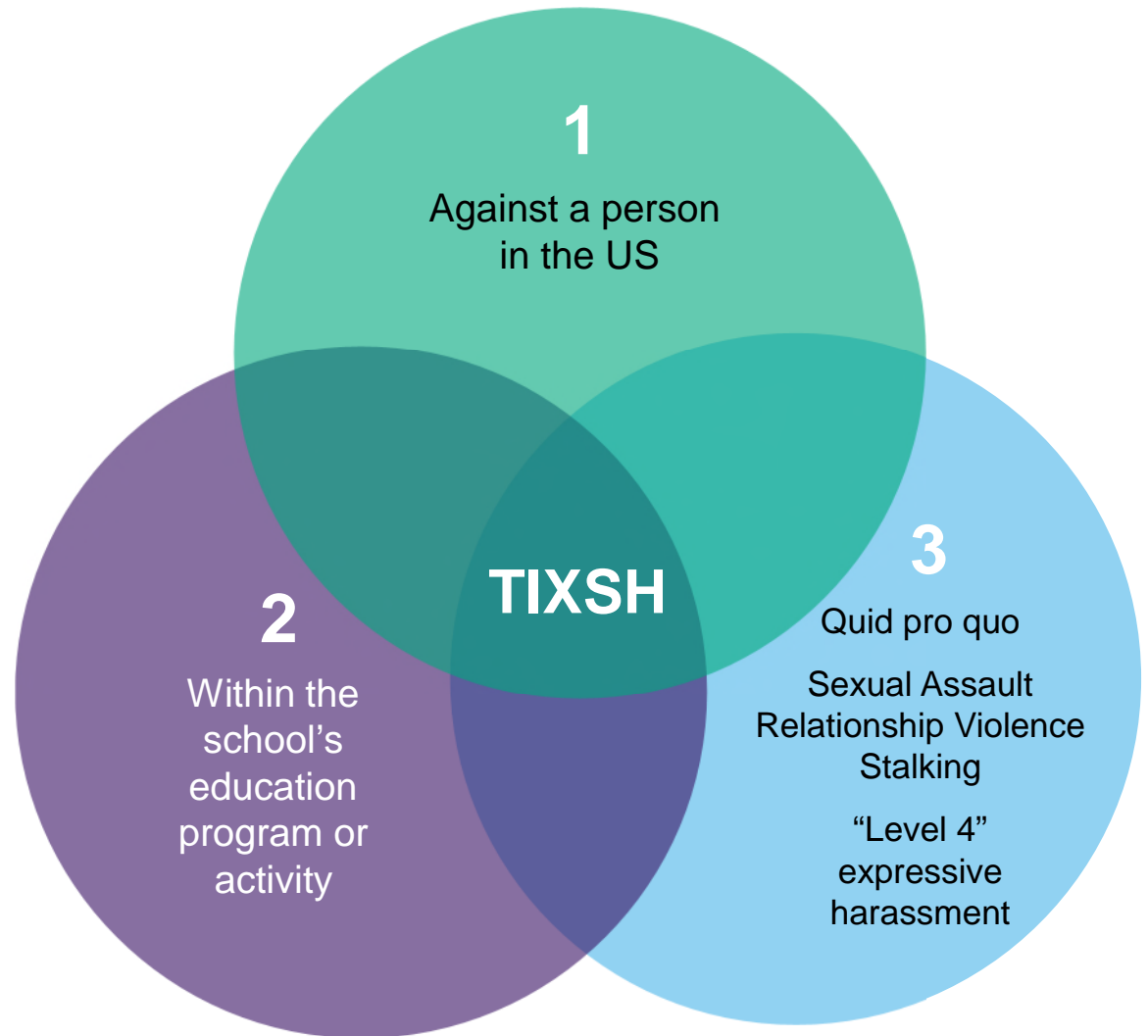


“Level 4” Expressive Conduct

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

- Title IX is not a “civility code” prohibiting all unwelcome conduct
- High bar due to interest in free speech, especially in the academic context
- Serious enough to warrant the label “abuse”
- Equal access is measured against access of person who has not been harassed
 - No concrete injury required!

What kind of Sexual Harassment falls under Title IX?



Two Buckets



Title IX Sexual Harassment (TIXSH)

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Other Sexual Harassment (OSH)

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The 2020 Title IX regulations don't tell schools how to handle OSH cases.

Responding to TIXSH

A recipient with actual knowledge of **Sexual Harassment** in an **education program or activity** of the recipient **against a person in the United States**, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to Sexual Harassment is clearly unreasonable in light of the known circumstances.

Responding to OSH

A school may address Sexual Harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.

– Department of Education's Summary of Major Provisions of the Title IX Final Rule

**Take no
action?**

**Handle like
TIXSH case?**



**Hand off
to Student Conduct
or HR?**

**Handle like a
Title IX case
before
the 2020
Regs?**

Two Categories



Two Sets of Procedures?



Title IX

Sexual Harassment



Other

Sexual Harassment

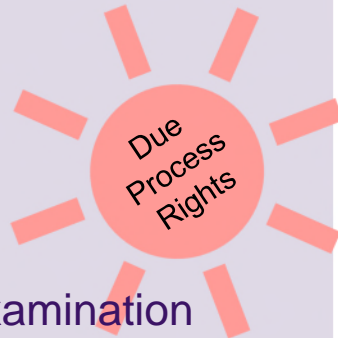
Title IX Formal Grievance Process

Required documents:

- Complaint
- Notice
- Investigative Report
- Determination
- Appeal

Official hearing with cross examination

Advisors/Lawyers



No Title IX Requirements

BUT:

- Campus SaVE Act
- Title VII
- State laws
- School Policies



Policies and Procedures

Overarching Sex Discrimination Policy

Grievance Procedures for prompt and equitable resolution of any (non-harassment) sex discrimination complaint

Grievance Process for Formal Complaints of Title IX Sexual Harassment (TIXSH)

Grievance Procedures for resolution of Other Sexual Harassment (OSH)

Coordinate with HR so that Title VII employment policies are consistent with and dovetail with Title IX



Plan
for what
to do
with **OSH**
cases



Ensure that Codes/Handbooks cover all OSH that you wish to be able to address

Determine which office will be responsible for handling which type of OSH

Determine (if relevant) how cases will be transferred from one office to another

Determine which procedures the relevant office will use in addressing OSH

Determine whether/how supportive measures will be provided to OSH alleged victims

Providing Notice

Location

- In all catalogues & handbooks
- On the website
- Provided to
 - Applicants for admission
 - Applicants for employment
 - Employees
 - Unions/Prof. Organizations

Content

- The institution does not discriminate on the basis of sex in the education program or activity that it operates;
- It is required by Title IX not to do so;
- Inquiries regarding Title IX, Sexual Harassment, and other discrimination on the basis of sex may be referred to the Title IX Coordinator or the Department of Education; and
- Where to file Sexual Harassment and broader sex discrimination allegations and how the institution will respond.

Note: Make sure your policies and procedures address how to handle sex discrimination that is **not** Sexual Harassment.

Training

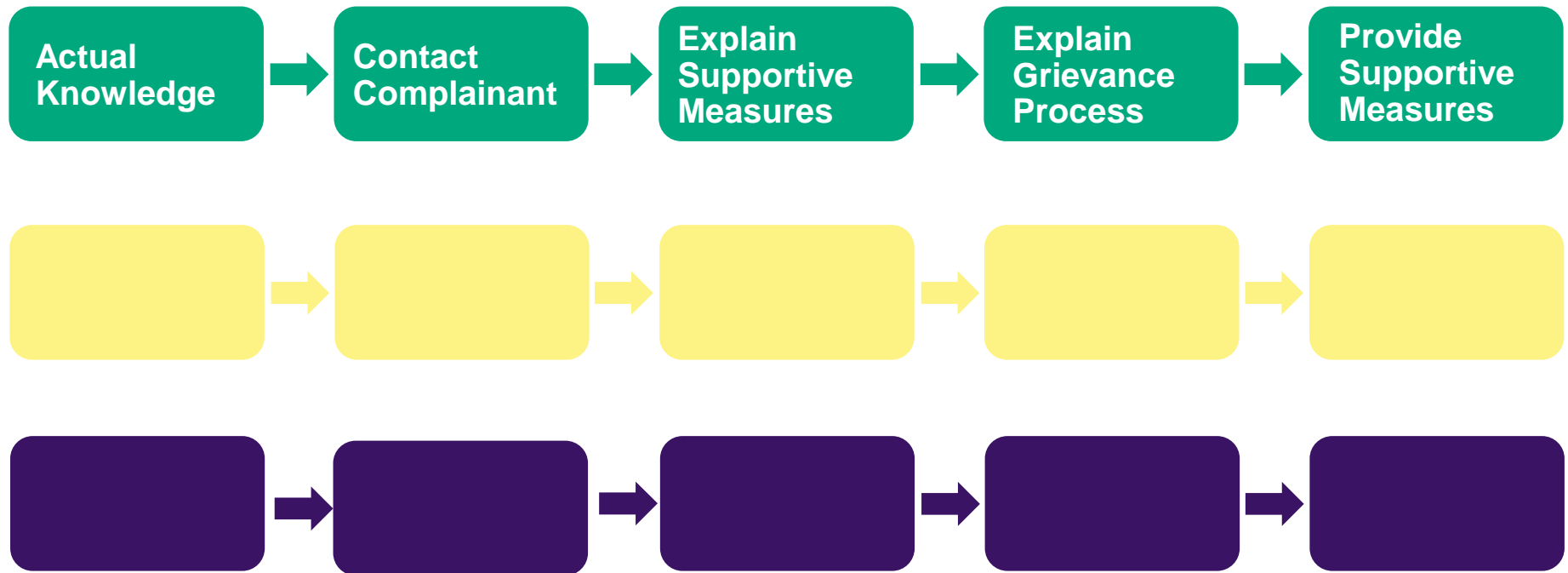
Under 2020 Title IX Regs

- Training required for Coordinators, investigators, decision makers (hearings & appeals), and informal resolution facilitators (if any)
- Required topics: **definition of Sexual Harassment, scope of “program or activity, ”conduct of process, relevancy determinations, impartiality, technology for live hearing**
- Training materials must be posted to website
- No required training for students or all employees, BUT...

VAWA/Clery Training Requirements

- Disciplinary proceedings must be conducted by officials who, at a minimum, **receive annual training** on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.
- Institutions are required to provide to students and employees, on an introductory and ongoing basis, prevention and awareness programs on the crimes covered above. These programs must include material on bystander intervention and risk reduction aimed at recognizing the warning signs of these crimes.

Coordinator Flow Chart



When is a school required to do something?

When an individual with authority to institute corrective measures on behalf of the school has actual knowledge of Sexual Harassment in an education program or activity against a person in the United States.

- 1 individual with authority** = designation based on administrative structure and the roles/duties of each official
- 2 actual knowledge** = notice of Sexual Harassment or *allegations* of sexual harassment (observation, report, newspaper account)
- 3 Sexual Harassment in an education program or activity against a person in the United States** = TIXSH

Officials with Authority

Institution has designation discretion based on its administrative structure and the roles and duties held by officials in its operations

Examples

- Title IX Coordinator
- Institution President / Chancellor
- Institution Vice Presidents
- College Deans
- Dean of Students
- Human Resources Director
- Executive Directors
- Deputy Title IX Coordinator(s)
- General Counsel
- Law Enforcement
- Athletic Director
- Professional staff in specific areas:
 - Student Conduct, Title IX Office, Housing



Title VII Alert

Managers and Supervisors have responsibilities to address Sexual Harassment of employees if they know or should have known about it.



Check it off!

Make sure that your school's "Officials with Authority to Institute Corrective Measures" are

- Designated in writing (at least internally)
- Aware of their obligations



There are zero special requirements for reporting Sexual Harassment

Who can report?

- Student, Employee
- Victim, Friend, Witness, Parent
- Anonymous
- Other

How can a report be made?

In person. Via email. Over the phone.
Through your website.

When can a report be made?

Anytime. No deadlines.

Knowledge



Officials with Authority

Action!

School **must** respond, so these individuals should run to Title IX Coordinator

Knowledge



Everyone Else

Action?

School **must** respond **if** they report. You decide whether to require reporting.

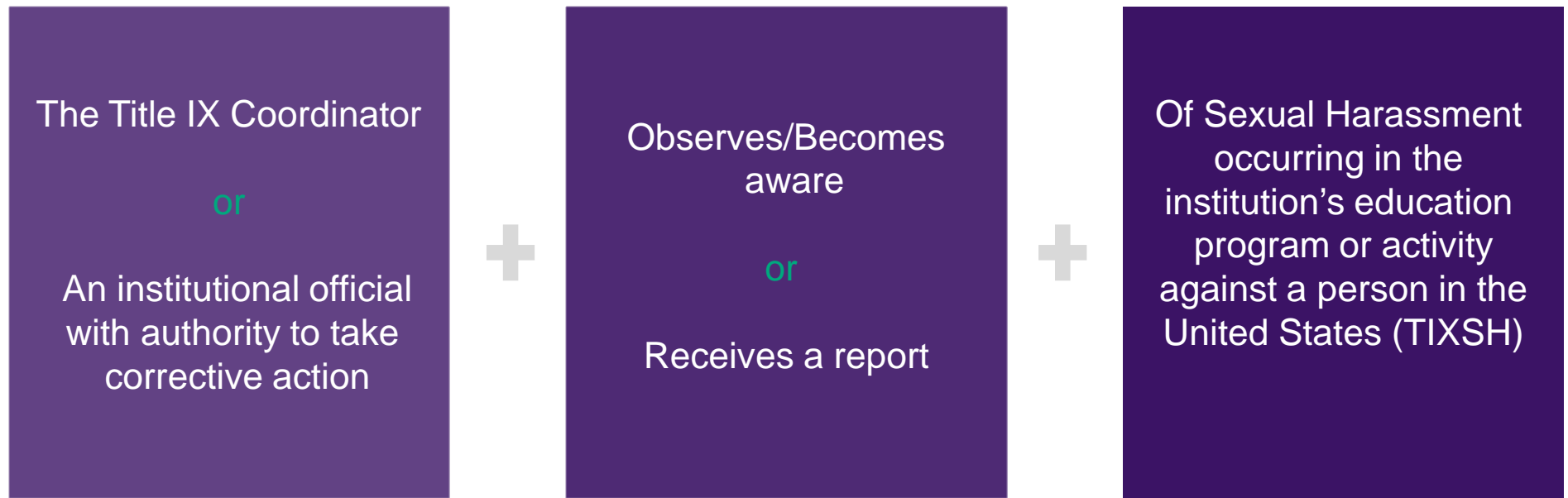
- Responsible employees?
- With victim's permission?
- Confidential resources?
- In employee's discretion?

Other Reporting Obligations

- **State law:** Abuse or suspected abuse of minors
- **Title VII:** Supervisors must report harassment
- **Clery:** Campus Security Authorities
- **NCAA:** Coaches and athletic staff must report

Actual knowledge

“Actual knowledge” occurs when...



SMALL GROUP DISCUSSION

Reporting



Final Rule § 106.44

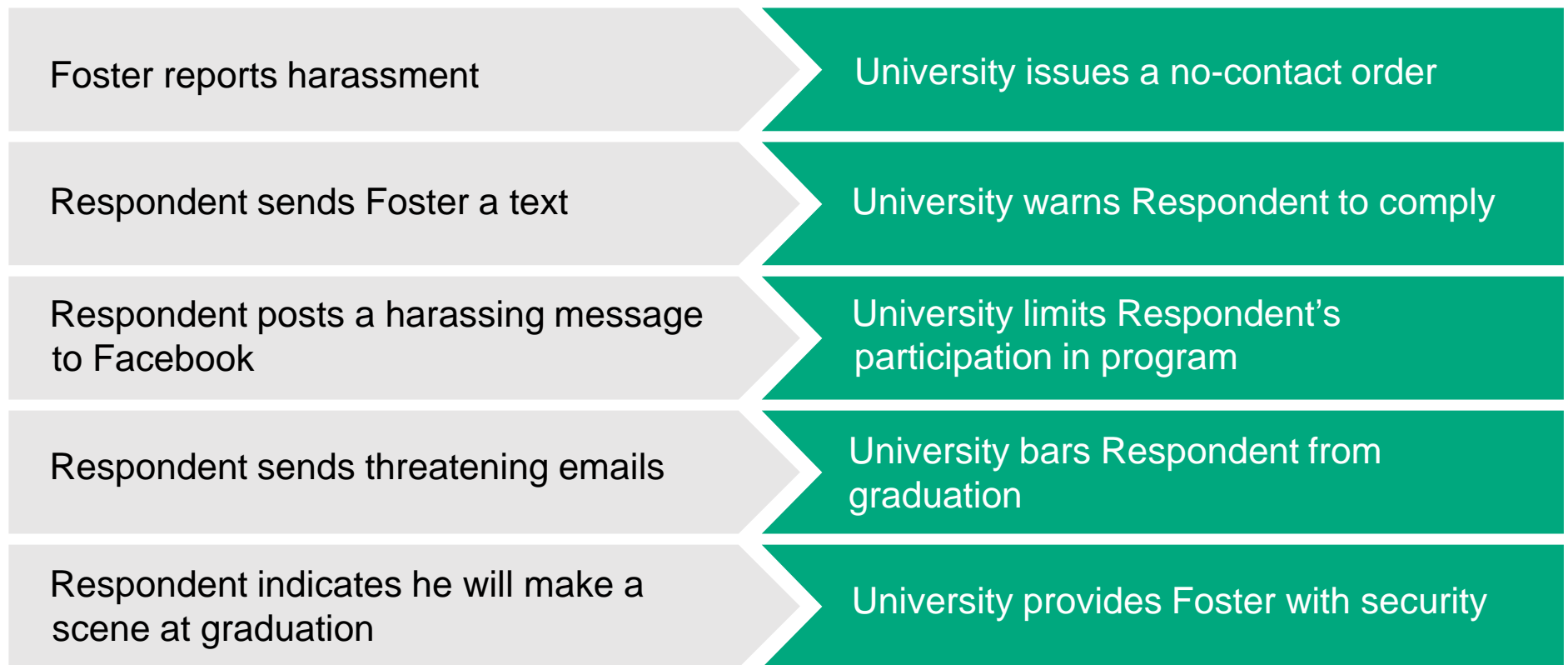
A recipient with actual knowledge of Sexual Harassment in an education program or activity of the recipient against a person in the United States, must **respond promptly** in a manner that is **not deliberately indifferent**. A recipient is deliberately indifferent only if its response to Sexual Harassment is **clearly unreasonable** in light of the known circumstances.

What does deliberate indifference look like?

- Ignoring the situation all together
- Not investigating a situation when presented with incomplete information
- Disregarding new acts by the Respondent
- Discouraging the Complainant from reporting or pursuing the process
- Repeating the same ineffective directives while the behavior continues unabated
- Not taking into account the Respondent's position of authority or history of misconduct
- Failing to follow your own policies and procedures
- Allowing a Respondent to violate a no-contact order with impunity
- Failing to file a Formal Complaint (when the Complainant doesn't) when necessary to protect the community
- **Failing to contact the Complainant to offer supportive measures and explain how to file a Formal Complaint**

Deliberate Indifference?

Foster v. Univ. of Michigan (Dec. 2020)





Reach Out

Contact the
Complainant

Discuss the availability of supportive measures

Consider the Complainant's wishes w/r/t supportive measures

Inform that support is available regardless of Formal Complaint

Explain the process for filing a Formal Complaint

What are you trying to accomplish with this approach?

- 1 When possible, allow the Complainant to choose which path is best for them
- 2 Restore/preserve the Complainant's access to your education program
- 3 Refrain from imposing discipline on the Respondent without due process

How do you talk to a Complainant?

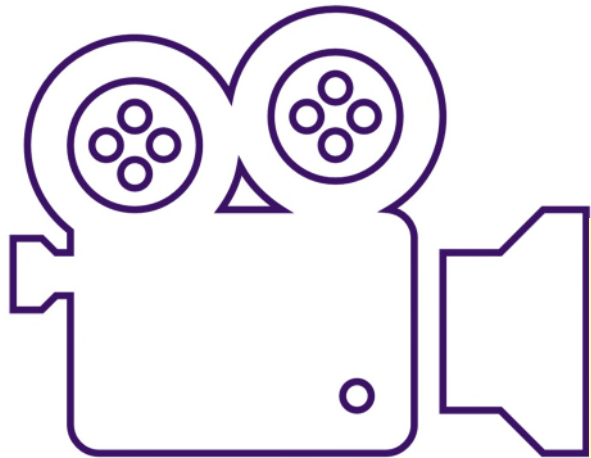
**It's OK to be
kind**

**Take time to
explain**

**Stay
professional**

**Don't
overpromise**

Let's watch...



Coordinators in Action



Reach Out

Contact the
Complainant

Discuss the availability of supportive measures

Consider the Complainant's wishes w/r/t supportive measures

Inform that support is available regardless of Formal Complaint

Explain the process for filing a Formal Complaint

Non-Exhaustive List of Possible Supportive Measures

Academic accommodations
(e.g. extended deadlines)

Modification of class schedule

Campus escort services

Leaves of absence

Counseling/other health services

Change in work schedule or location

Change in housing

Increased security/monitoring

Mutual no-contact orders

Transportation assistance

Trespass/be on the lookout orders

Education to the community/sub-group

Referral to EAP, immigration services, etc.

Law enforcement notification



Nuts & Bolts of Supportive Measures

- Appropriate
- Individualized
- Reasonably available
- No fees or charges
- Can be provided *before* Formal Complaint is filed, *after* Formal Complaint is filed, **and** in cases where no Formal Complaint will ever be filed
- Information about options must be provided in writing (Clery)
- May be offered to Respondents, as well
- Must maintain confidentiality to the greatest extent possible
- Coordinator manages effective implementation

Supportive Measures Pop **Q****U****I****Z**

1

Isabel

QUIZ

You meet with Isabel, a sophomore in the College of Fine Arts whose relationship with her boyfriend has been volatile and occasionally violent.

Isabel is in the Honors Program, but over the last quarter, her grades have suffered due to stress, and she missed a significant number of classes while trying to get a restraining order.

Academic accommodations might help. You give Isabel the email address of the academic advisor assigned to the Fine Arts department and say, “I strongly encourage you to contact Ms. Park. And if she has any questions, she can feel free to call me. I wish you all the best, and if you ever have another situation like this again, please remember that our door is always open.”

Supportive Measures Pop **Q****U****I****Z**

2

Connor

QUIZ

Following a sexually abusive hazing incident, Connor, a first-year student is deeply depressed and close to failing multiple classes in his demanding architecture program.

Knowing the situation is dire, you call the chair of the program directly.

“Look,” you say, “this kid was sodomized with a broom handle in front of twenty people and then forced to lick his own excrement off it. He’s having nightmares and panic attacks and can’t maintain an erection with his girlfriend. Connor deserves all the help he can get, and I need you to waive some program requirements until the anti-anxiety meds that his psychiatrist has prescribed can kick in and get him stabilized.”

Supportive Measures Pop QUIZ

3

Jamie

QUIZ

Jamie, a continuing education student, is disturbed that a fellow student whom they briefly dated keeps popping up at their classes and other campus locations that they frequent.

They want a no-contact order put in place.

“There are lots of things we can do right now to support you,” you explain. “I will instruct our campus safety personnel to check in on you regularly. And if you ever decide to file a Formal Complaint, we absolutely can issue a no-contact order. But I can’t do anything that restricts another student’s rights if no formal allegations have been made against them. Please take all the time you need to think about it and let me know what you decide.”



- The purpose of supportive measures is always to:
 - **Preserve** access to education, or
 - **Protect** the educational environment, or
 - **Deter** Sexual Harassment
- The purpose of supportive measures may NOT be to discipline the Respondent
 - Respondent **cannot be sanctioned** unless and until found responsible
 - Respondent **cannot be unreasonably burdened** by supportive measures

Potentially Reasonable Burdens

- Counseling the Respondent about appropriate behavior
- Issuing a mutual no-contact order
- Placing the Respondent on paid leave from campus job to separate parties
- Changing the Respondent's class schedule, *e.g.* from one section to another to separate parties

Emergency Removal? Administrative Leave?

Emergency Removal = Yes, if...

- Individualized safety and risk analysis
- Immediate threat to physical health or safety
- Notice and opportunity to challenge decision immediately following removal

Administrative Leave = Yes

- For non-student employee Respondents
- During the pendency of the grievance process
- Much more lenient standard

Watch out for

- *Section 504/ADA*
- *Collective Bargaining Agreements*
- *Tenure protections*



Documentation of Initial Steps

- The initial report of Sexual Harassment
- Any actions taken in response to the report
- Efforts to reach Complainant
- Date/time/location of meeting(s) with Complainant
- Any supportive measures taken
- If no supportive measures taken: “The reason this response was reasonable...”
- Conclusion: “Our response was not deliberately indifferent because we...”





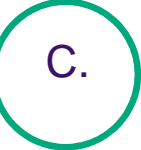

Choose Your Own Course

Student A alleges that Student B sexually assaulted her following a party for the men's soccer team, of which he is a member.

After you explain the concept of supportive measures to Student A, Student A says that the only supportive measure that is important at the moment is that Student B be removed from campus and from all college activities immediately so that she won't have to see or interact with Student B or even worry about him being anywhere nearby.

Student A particularly wants to see Student B taken off the soccer team so that he is not practicing and playing games while the case is investigated and adjudicated.

Should You

-  Grant the request because the alleged actions are serious and Student A clearly will be traumatized by seeing Student B;
-  Deny the request and tell Student A that the College can't take any action against Student B until after a hearing;
-  C. Explain the limitations on disciplinary action at this phase of the process and suggest a mutual no-contact order as an appropriate alternative approach to Student A's concerns; or
-  Suggest a mutual no-contact order *and* contact the Athletic Director and Soccer Coach about benching Student B during the investigation because representing the school as an athlete is a privilege rather than a right?



Choose Your Own Course

You implement a mutual no-contact order, but the complaint investigation and resolution process runs through the end of one semester and into the next.

Student A and Student B are scheduled for an in-person class together which both need in order to graduate.

Student A requests that Student B either be removed from the class or required to participate online.

Student A receives an already-in-place disability accommodation that requires in-person class attendance, and the class is well-suited for online participation, an option which multiple students already are using.

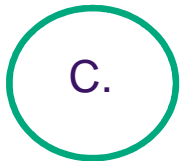
Should You



Deny the request because you can't implement a supportive measure that would burden Student B in this way given that he has yet to be found responsible for anything;



Respond that you will ask Student B if he is willing to participate in the class online but that you cannot require him to do so if he prefers to take it in person;



C. Require student B to participate in the class online for the duration of the investigation/resolution process as a supportive measure that is not unreasonably burdensome; or



Talk to the provost and require the professor to teach two sections of the class so that both Student A and Student B can attend in person without having contact with one another?



Choose Your Own Course

After an initial period of compliance, Student B begins to violate the terms of the no-contact order.

He contacts Student A through Snapchat with a message that says, "Pls let's just talk about this." He also tries to speak with her on multiple occasions around campus, always approaching with a demeanor that is respectful and contrite. Finally, he sends Student A an email apologizing for his past "obnoxious" behavior and saying that he hopes she will forgive him so that they can be friends again.

Student A reports all of these communications to you. She is stressed out by the repeated contact, but also feels sorry for Student B because he seems so sad.

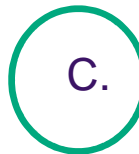
Should You



Remind Student B of his obligations under the no contact order but let the past contacts slide because of their apologetic nature;



Defer to Student A as to whether Student B's violations of the no contact order should be disciplined or allowed to slide because of their apologetic nature;



C. Take immediate disciplinary action against Student B in conjunction with Student Conduct for violating the no contact order; or



Refrain from taking immediate disciplinary action since there has been no finding of responsibility, but add Student B's violations of the no contact order to the existing Title IX case so that everything can be adjudicated at the same time?

SMALL GROUP DISCUSSION

No Contact Orders

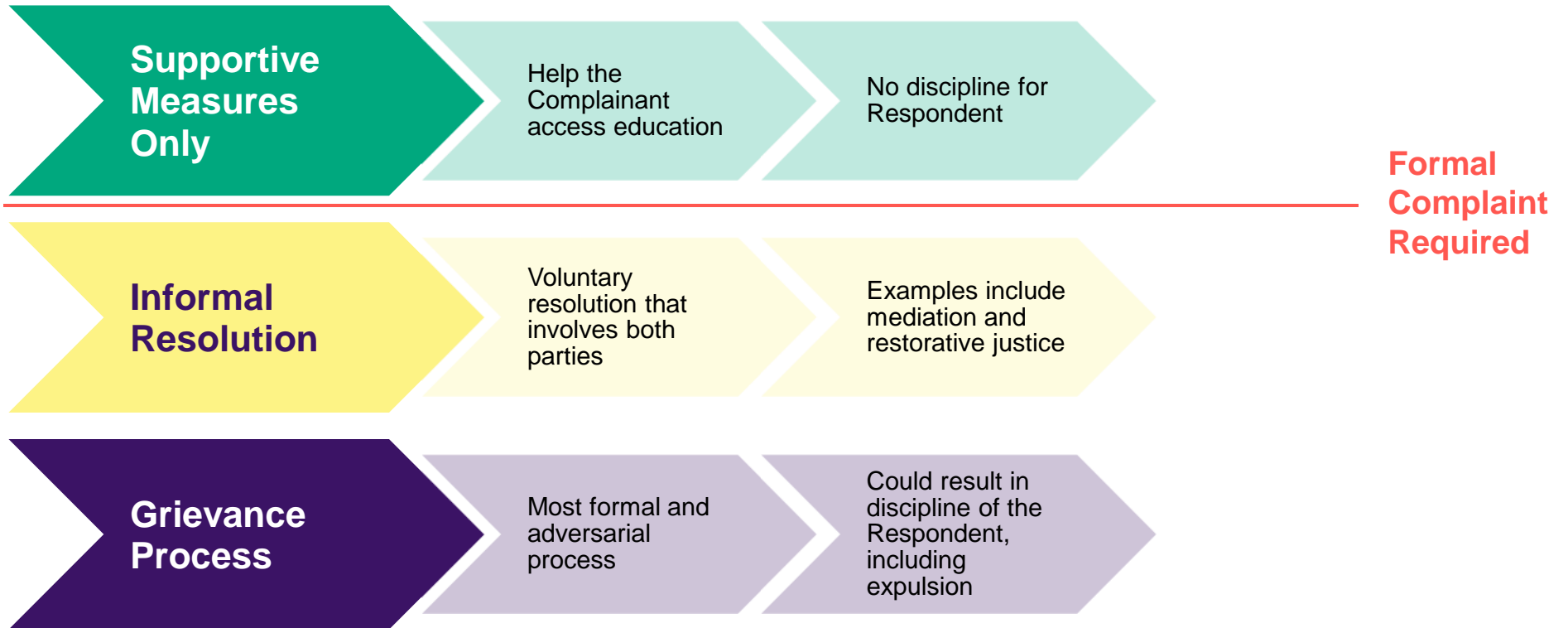
Kayla & Trevin

Kayla & Trevin

Questions

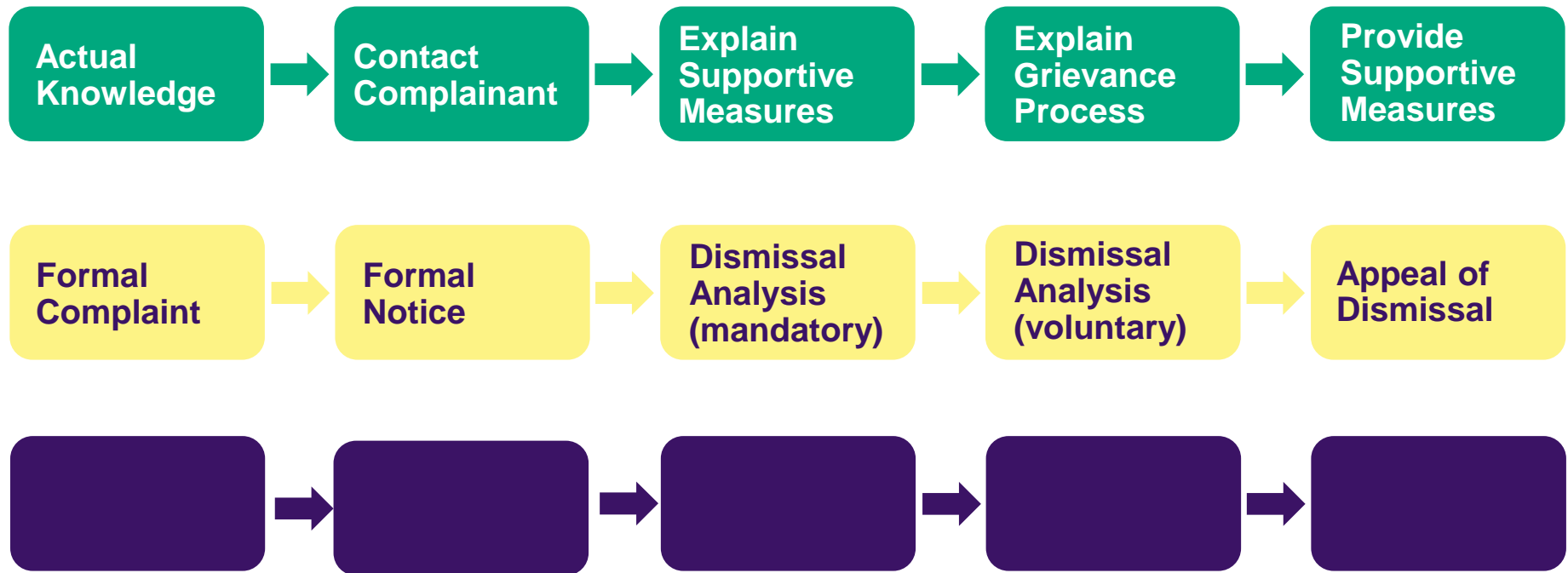
1. What provisions would you include in the mutual no-contact order to ensure its fair implementation? What additional actions might be appropriate at this time?
2. Do you have any concerns about implementing a mutual no-contact order in a situation where the Complainant does not wish to file a Formal Complaint against the Respondent?
3. How would you ensure the mutual no-contact order is not disciplinary, punitive, or unreasonably burdensome to either the Complainant or Respondent?
4. How can the mutual no-contact order be designed to restore or preserve equal access to an education program or activity given the small academic program both parties are in?
5. Is it possible for the mutual no-contact order to be maintained as a confidential supportive measure given the nature of the small academic program both parties are involved in?

Three Possible Paths



The decision of which path to take is driven primarily by the Complainant.

Coordinator Flow Chart



A Formal Complaint



Is the one and only way to start the grievance process



Can be filed only by the Complainant (alleged victim) or the Title IX Coordinator in their discretion


- The Complainant wants to file, but is ineligible
- The Complainant is eligible to file, but declines to do so




Must

- Be in writing (document or electronic)
- Allege Sexual Harassment and request investigation
- Be signed (physically or digitally)

Double Checking in Both Directions



If the Complainant **wants** to file a complaint, you have to make sure they are eligible to do so



If the Complainant **doesn't want** to file a complaint, you have to make sure you shouldn't file one anyway

Formal Complaint

Threshold Question 1

Is the Complainant eligible to file?

Complainant must be **participating in** or **attempting to participate in** the institution's education program or activity:

Student, employee, third party

Applied for admission and has been admitted

Graduated but intends to apply to another program

Graduated but intends to remain involved with alumni programs and activities

Is on a leave of absence but is still enrolled as a student **or** intends to re-apply after the leave of absence

Left the institution due to alleged Sexual Harassment but expresses a desire to re-enroll if the institution appropriately responds to the Sexual Harassment

Formal Complaint

Threshold Question 2

Does the Complainant wish to file a Formal Complaint?

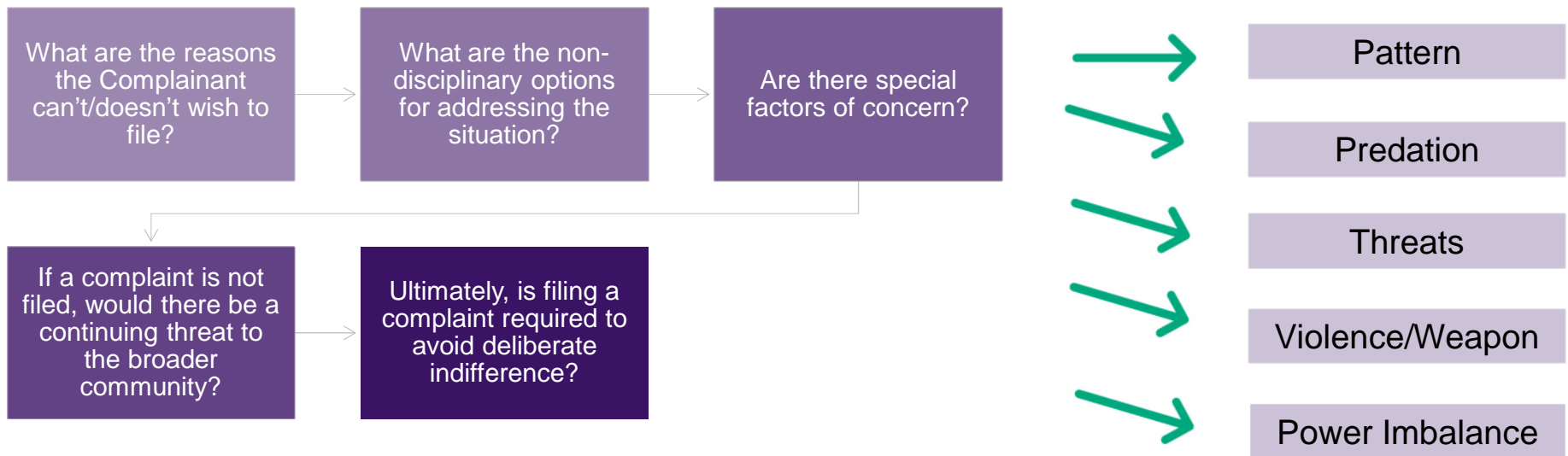
Threshold Question 3

If the Complainant is ineligible or does not wish to file a Formal Complaint, should the Title IX Coordinator sign a Formal Complaint (so that it can proceed through the investigation and resolution process)?

To Sign or Not to Sign? That is the Question.

A Coordinator-Signed Complaint...

- Is signed on behalf of the institution, rather than on behalf of Complainant
- Does not convert Title IX Coordinator into the Complainant; the Coordinator remains unbiased
- Should be signed if not doing so would be deliberately indifferent



Time for a Coordinator-Filed Complaint?



Student A was groped by a member of her study group in her dorm room after they got drunk together. Student A doesn't want her friends or boyfriend to know what happened. She just wants her professor to put her in a different study group.

NO

Three first year students report that their Resident Assistant answers her door naked, uses her key to walk in on students who have a date in their rooms, and bends the rules for students who flirt with her. They are afraid to file a complaint because the RA has a reputation for holding a grudge.

YES

Student B has been experiencing escalating dating violence in her relationship. The most recent incident required medical attention. She does not want to file a complaint because she is terrified that her boyfriend might kill her.

YES

Student C recently graduated and broke up with his girlfriend, who remains a student. He alleges that she was emotionally and physically abusive at various points during the relationship and wants you to file a complaint since he is no longer a student.

NO

SMALL GROUP DISCUSSION

Coordinator-Filed Complaints

Macy & Valerie

Macy & Valerie

Questions

1. What factors might cause you to lean toward filing a Formal Complaint under Title IX as the Coordinator despite the Complainant's decision not to do so?
2. What factors might cause you to lean against filing a Formal Complaint?
3. What factors, if any, from the above scenario are irrelevant to your analysis?
4. What other facts would you like to know before making a determination on this issue, and how specifically would you go about obtaining them?
5. Based on what you know here and now, what is your determination?
6. How would your view of the case differ if you had not spoken to the Human Resources Director? Under what circumstances should you seek additional information when a Complainant decides not to file a Formal Complaint?

Formal Notice to All Parties

- Explanation of grievance process and informal resolution
- Sufficient details of allegations (who, what, when, where)
- Presumption of non-responsibility; determination made at conclusion of process
- May have an advisor of choice who may be an attorney
- May inspect and review evidence
- Note any “false statement” rule in code of conduct
 - Materially false statement made in bad faith
 - By itself, an adverse determination does not support a charge of making false statements

*If additional allegations will be investigated, supplemental notice must be given

No
Surprises

Reach out re:
supportive
measures

How do you talk to a Respondent?

**It's OK to be
kind**

**Take time to
explain**

**Stay
professional**

**Don't
overpromise**

Notice of Allegations to Respondent

September 3, 2021

Pat Respondent
100 Campus Lane, Apt. 123
Charlotte, NC

Re: Notice of Allegations in Formal Complaint

Dear Pat Respondent,

On August 30, 2021, the University received a Formal Complaint of Sexual Harassment pursuant to the University's Title IX Policy (University Policy 14.01), which prohibits discrimination on the basis of sex. A copy of this Policy is enclosed and is also available at [Title IX Office hyperlink].

As the University's Title IX Coordinator, I am opening an investigation to determine whether **the allegations that occurred on the night of August 14, 2021** constitute Sexual Harassment in violation of the Policy referenced above.

The investigation will involve multiple interviews. Your interview will take place at noon on September 4, 2021 in this office. **Based on the nature of the allegations, the Title IX team will likely interview other witnesses who may or may not** have been referenced in the Formal Complaint. To ensure the effectiveness of the investigation, we will treat you and the Complainant equitably and **limit both of your abilities to inspect or review any evidence** gathered prior to the conclusion of the investigation. Throughout this process, you may be accompanied by an advisor of your choice, so long as the individual designated as your **advisor is not an attorney**. All parties and their advisors will be permitted to review the investigative report and will have 10 days to submit a written response, which will be considered before the investigative report is finalized.

The University's Title IX Policy prohibits retaliation against anyone who files a complaint or participates in an investigation of alleged Sexual Harassment. Please email or call me immediately using the contact information below **if you experience** harassment, coercion, intimidation, threats, or discrimination by an employee or student because of your participation in this investigation.

Please contact me with any questions or concerns.

Sincerely,

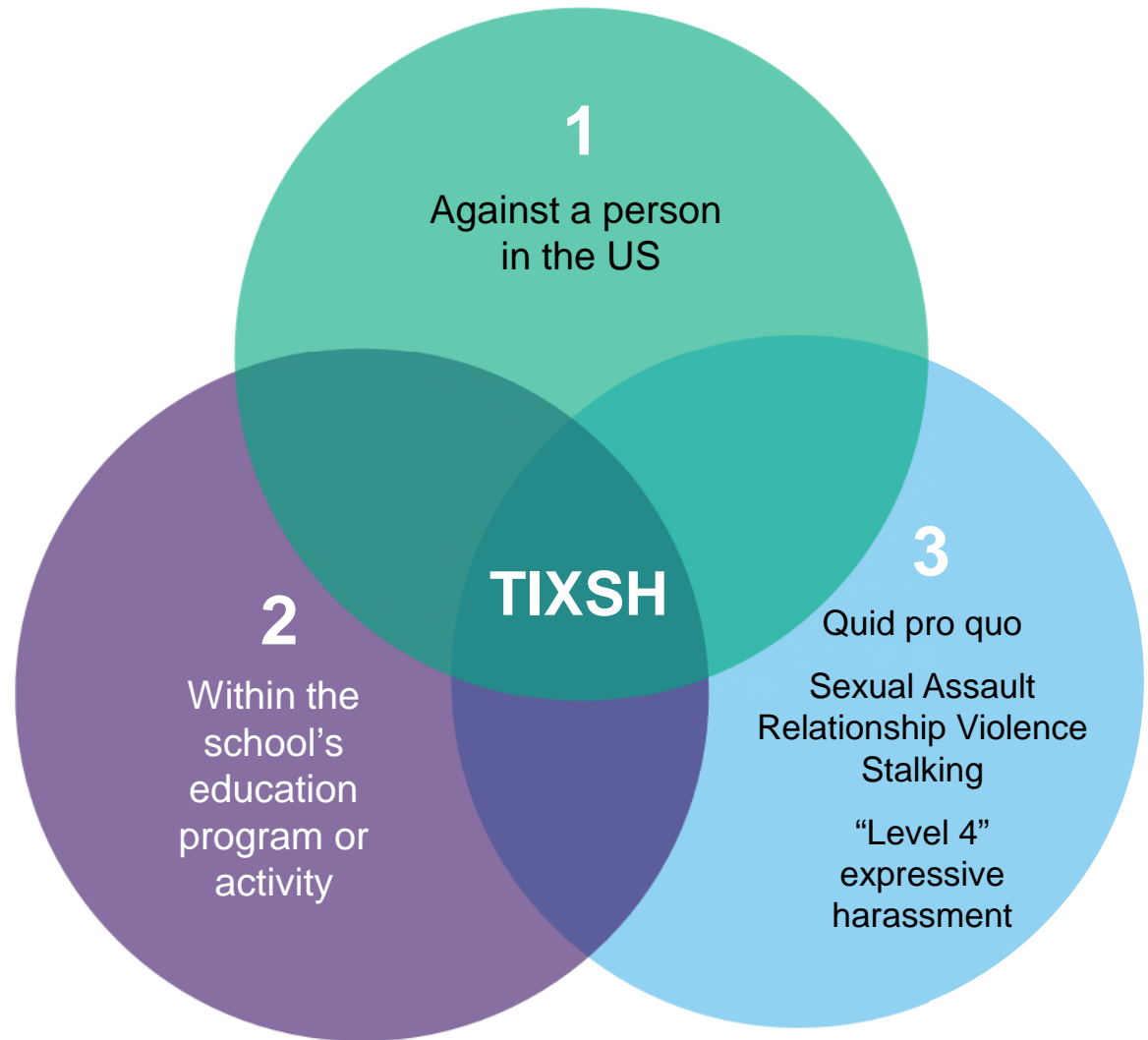
Catie Coordinator
Title IX Coordinator
catie.coordinator@university.edu
(555) 000-1234

Can you spot the errors?

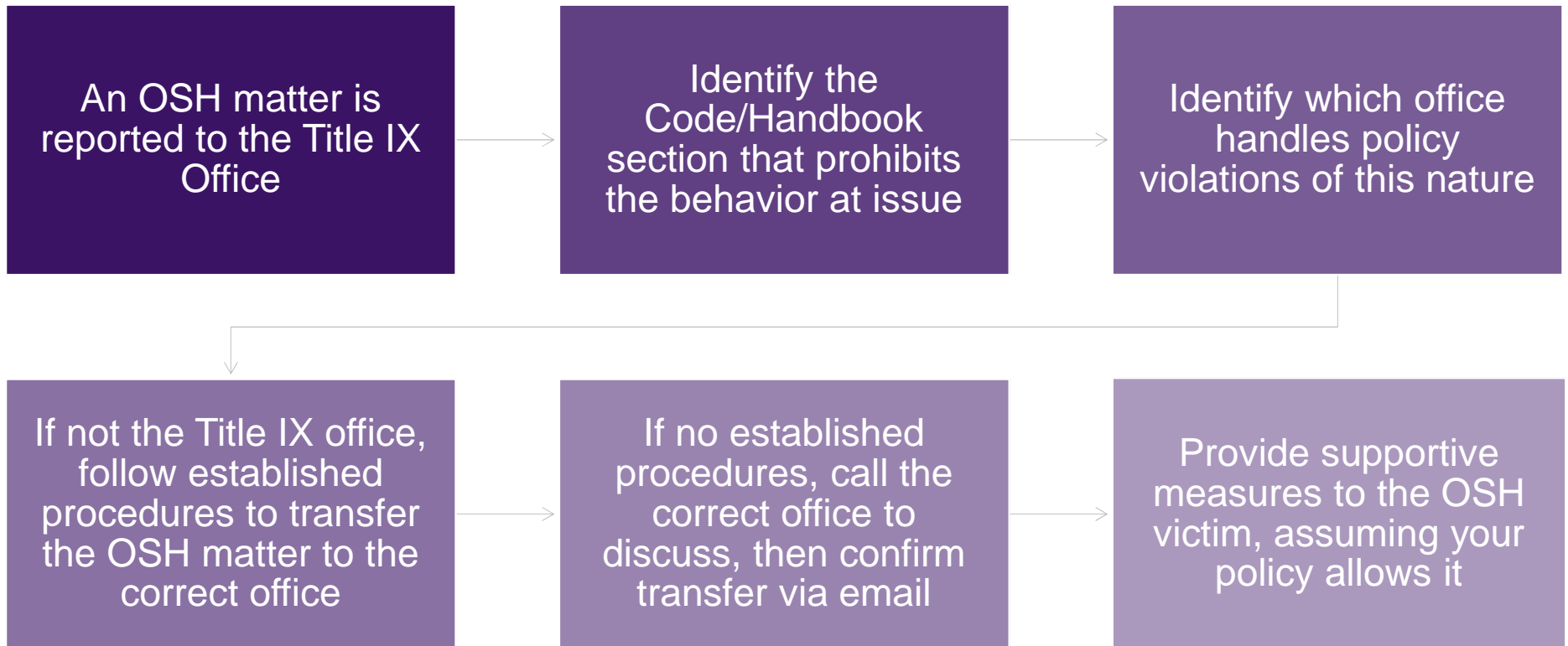
1. Insufficient details re: allegations, including behavior and identity of Complainant
2. Insufficient description of process and initial interview is set too soon
3. Entitled to inspect and review evidence
4. Advisor may be an attorney
5. Retaliation provision should warn Respondent not to retaliate against others
6. Missing a statement that Respondent is presumed not responsible
7. Missing a statement that the Code of Conduct prohibits making knowingly false statements, if applicable

Mandatory Dismissal (& Referral)

- If the Formal Complaint lacks any one of these three elements, it must be dismissed as a Title IX matter
- Dismissal Notice must explain right of appeal
- The conduct may be investigated and disciplined as the violation of some other rule as the school sees fit. The Dismissal Notice should state if the complaint is being referred to another office.
- The tone and content of the Dismissal Notice should make clear to both parties that dismissal as a Title IX matter is not the same as exoneration



What to Do with a Dismissed OSH Case



Voluntary Dismissal*

* In your discretion

- 1 Complainant no longer wishes to proceed
- 2 Respondent no longer works at/attends the school
- 3 Not enough information available to pursue case

In the event of a voluntary dismissal...





- Promptly send written notice of the dismissal (and reasons therefore) to the parties simultaneously
- Explain procedures for filing an appeal



Choose Your Own Course

A Respondent accused of dating violence and stalking voluntarily withdraws from your community college after finalization of the investigative report but before the hearing. The lawyer hired by his family makes clear that if the school continues with the process and reaches an adverse determination, it should expect litigation. The Complainant is happy that Respondent is gone and hopeful that the hearing will be canceled so that they won't have to testify.

Should You





-  Move forward with the hearing in the interests of reaching a clear determination as to whether the Respondent is responsible for dating violence and stalking;
-  Dismiss the case on the grounds that the Respondent no longer attends the school;
-  Dismiss the case and bar the Respondent from re-admission due to his withdrawal in the midst of an investigatory process; or
-  D. Dismiss the case, but inform the parties in writing that if and when Respondent wishes to return to the institution, the case may be re-opened for resolution?



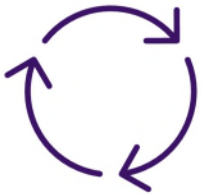
Choose Your Own Course

You dismiss the case without further action, but reserve the right to address the allegations again should the Respondent ever apply for re-admission. Two years later, the Respondent does apply for re-admission. By that time, the Complainant has finished their certification program and is no longer at the school. The Respondent is in good academic and financial standing and has no disciplinary record other than the Title IX allegations that were not adjudicated due to his prior withdrawal.

Should You

-  Grant readmission without further analysis because the Complainant no longer is at the institution;
-  Deny admission on the grounds that the Respondent withdrew from school previously in order to circumvent the disciplinary process;
-  Re-engage the grievance process and proceed to a hearing and finding on responsibility, then address the admissions application in light of the finding; or
-  **D.** Carefully determine whether to re-engage the grievance process taking into account such factors as the former Complainant's willingness to participate in the process, the nature of the original allegations, the Respondent's explanation for withdrawal and re-application, and any risk to the school community?

Appeal of a Dismissal



- Required for both parties on these grounds:
 1. Procedural irregularity
 2. New evidence
 3. Bias that affected the outcome
 4. Any other ground school allows
- Different decision maker than decided dismissal (and not Coordinator or Investigator)
- Both parties may submit written statement
- Written decision must give result & rationale

Dismissal Pop Quiz



Complainant beaten by boyfriend during an argument at his off-campus apartment.

**MANDATORY
DISMISSAL**

One student offers another, "I'll help you on your chemistry final if you go out with me."

**MANDATORY
DISMISSAL**

The scathing and near-constant verbal and electronic harassment of an ex-girlfriend drive a student to the verge of suicide.

KEEP

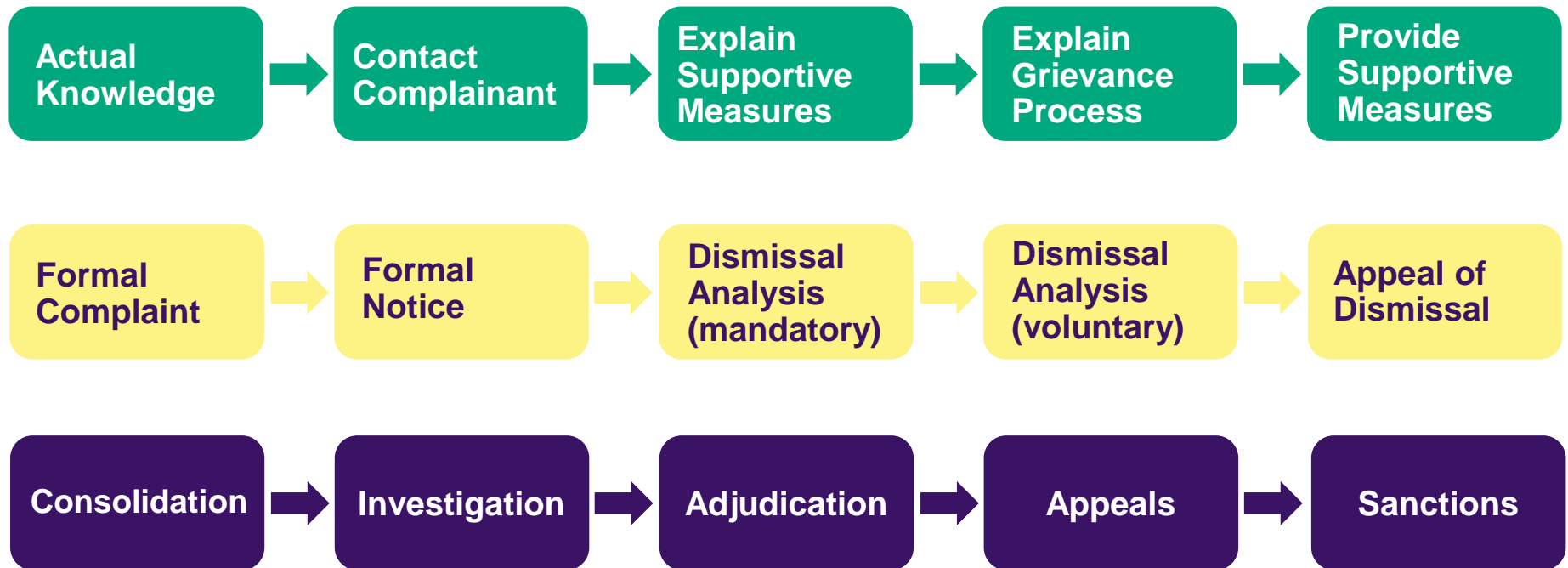
On a single occasion, a student fondles the breasts of his roommate's girlfriend while she is asleep in their dorm room.

KEEP

The Complainant withdraws and refuses to take your calls. He sends you a one-line email stating that he never wants to hear from the college again and will not participate in any hearing.

**VOLUNTARY
DISMISSAL**

Coordinator Flow Chart





Consolidation

- Complainant's allegations against multiple Respondents
- Multiple Complainants' allegations against one or more Respondents
- The parties' allegations against each other

Note: In each case the allegations must arise out of the same facts or circumstances

Consolidation Pop Quiz

QUIZ

Student A alleges that Student B sexually assaulted her. Student B says it was the other way around, and Student A is the one who committed sexual assault.

YES

Student alleges that during a football game, he was lured under the bleachers by his suitemate, then groped, slapped, and subjected to anti-gay slurs by three of the suitemate's friends.

YES

Five students on a band trip allege that they were sexually hazed by the band president while on the bus.

YES

Two students allege that in separate private conversations with the same professor, each of them was made to feel uncomfortable and offered opportunities to boost their grades if they went to the professor's lake house for the weekend.

NO

Coordinator's Role in Overseeing the Investigation and Adjudication Process

In an ideal world, the Coordinator focuses on coordinating and does not investigate or adjudicate. If necessary, the Coordinator may investigate, but the rules prohibit the Coordinator from serving as an adjudicator.

Screen investigators and adjudicators for bias

Monitor fidelity to written procedures

Send required notices and maintain documentation

Ensure fairness and that all rules are being applied equally to both parties

Supervise compliance with timeline; approve extensions for good cause

Serve as point of contact for advisors

Timeframes



- Establish a “reasonably prompt” timeframe
- Commit to your timeframe by including it in policy
- Make clear that individual deadlines and the overall timeframe may be extended for good cause
- When extending a deadline, inform parties in writing and provide the reason

Reasonably Prompt Timeline Sample

Example

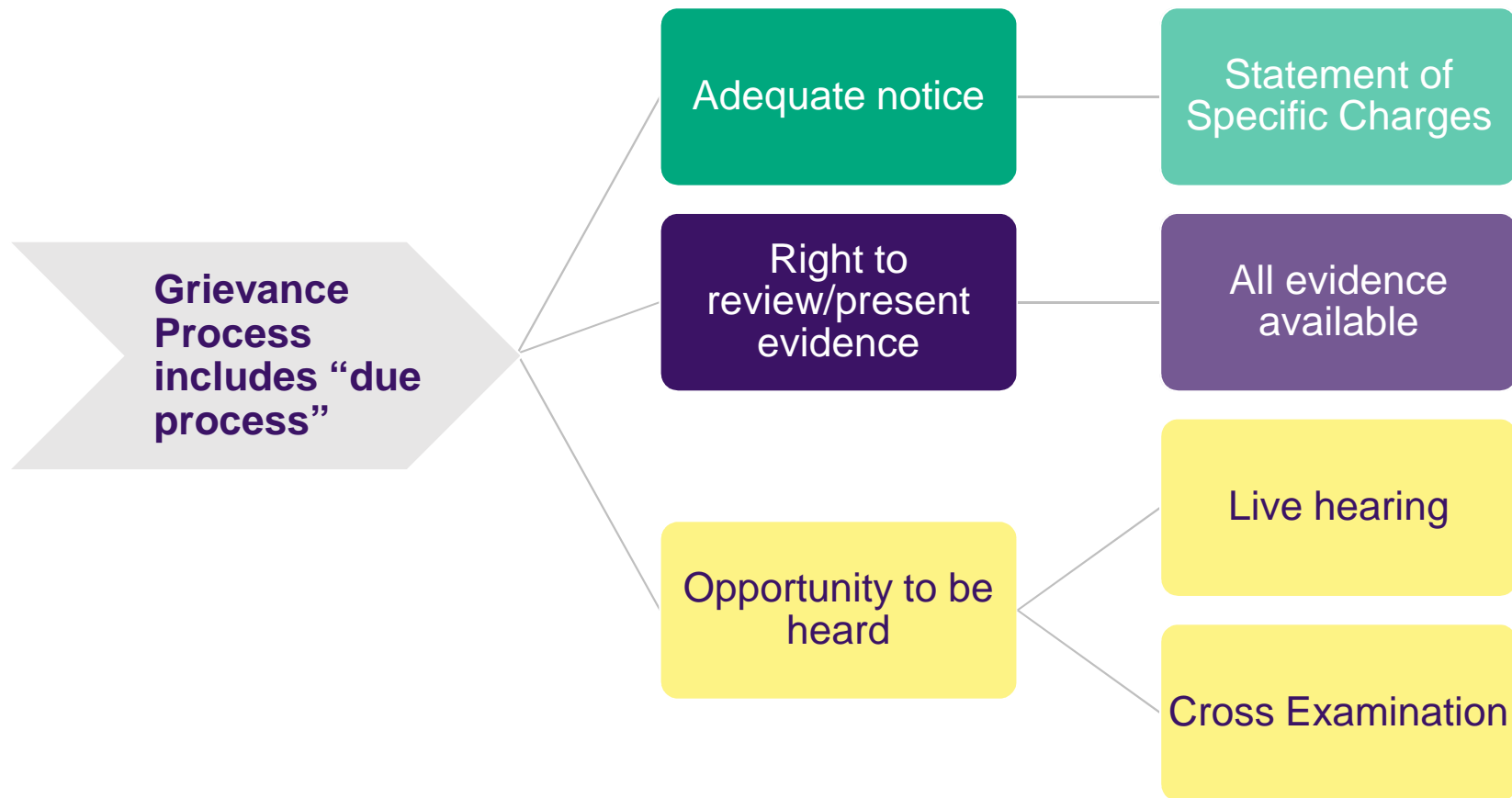
The institution will strive to complete its investigation and resolution of a Formal Complaint (not including an appeal, if applicable) within 90 calendar days of receipt of a Formal Complaint, absent extenuating circumstances.



Interacting with Advisors

You Must...	You May...
Allow each party to use their advisor of choice	Limit each party to one advisor
Allow the advisor to be present at all meetings, interviews, etc.	Place limits on the advisor's role as long as they apply equally to both advisors
Have the advisors conduct the live questioning at the hearing	Require that questions be relevant, respectful, and non-abusive
Ensure that each party has an advisor at the hearing	For the hearing, provide an advisor of your choice to a party that doesn't have one

Ensuring Fairness and Equal Application of the Rules





Fundamentals of Investigation

- In any given case, the investigator(s) and adjudicator(s) must be different people
- Parties must receive advance notice of investigatory interviews, etc.
- Burden of gathering evidence is on the school, but the parties are entitled to provide, review, and respond to evidence
- No gag orders or other limits which could interfere with the parties' collection of evidence may be imposed
- Investigators must be able to spot jurisdictional issues (dismissal) and additional potential violations (notice)
- Parties are entitled to review evidence (10-day response period) prior to finalization of investigative report
- The finalized investigative report must be provided to the parties and their advisors at least 10 days prior to the hearing



Fundamentals of Adjudication

- Hearings may be virtual, but they must be live such that everyone can see and hear each other
- Hearings must either be recorded or transcribed
- There must be opportunity for live cross examination conducted by advisors, but parties may not question one another directly
- Cross examination questions are subject to a relevancy requirement, rape shield principles, and other limitations
- If a witness cannot be cross examined, all other statements from that witness, including written statements, must be excluded
- Adjudicators must apply the same standard of evidence to all formal complaints of TIXSH: Either preponderance of the evidence **or** clear and convincing



Fundamentals of Determinations

The parties should simultaneously receive a written notice of the determination of responsibility, which includes:

- Identification of the allegations
- Description of all procedural steps
- Findings of fact supporting each determination
- Conclusions regarding the application of the recipient's code of conduct to the facts
- Statement/rationale for result as to each allegation including determination regarding responsibility
- Any disciplinary sanctions imposed on Respondent and whether remedies will be provided to the Complainant
- Instructions about the procedures and permissible bases for appeal



Fundamentals of Appeals

Required for both parties on these grounds:

1. Procedural irregularity that affected the outcome
2. New evidence that was not reasonably available and that could affect the outcome
3. Bias (general or targeted) that affected the outcome

Any other ground the school allows must apply equally to both parties

- Appeal must be decided by trained decision-maker who is not the Coordinator, the Investigator(s), or the original Adjudicator(s)
- Each party must have a reasonable opportunity to submit a written statement in support of or challenging the outcome
- A written decision provided simultaneously to both parties must describe the result of the appeal and the rationale



Fundamentals of Sanctions

- Full range of sanctions must be described in grievance process
- Ensure that any sanctions are fulfilled (deadlines!)
 - Completion of mandatory training
 - Completion of service hours
 - Completion of reflection paper
- Documentation
 - Personnel or Student Conduct file
 - Notation on transcript?
- Procedure for handling failure to comply with sanctions
 - Student conduct charges
 - Additional penalties

Other Important Considerations

- 1 Informal Resolution
- 2 Retaliation
- 3 Disciplinary Records
- 4 Minors
- 5 Employees

Informal Resolution Process(es)



- Puts parties in control
- Reduces likelihood of litigation
- Opens up more creative resolutions
- Can be better experience for participants



- Initial investment in creation and training
- Possibility of attempt, then formal hearing
- Risk of serious misconduct going unsanctioned*

Informal Resolution Process(es)

Structure

- Functionally no restrictions (or guidance)
- Possible to have more than one kind



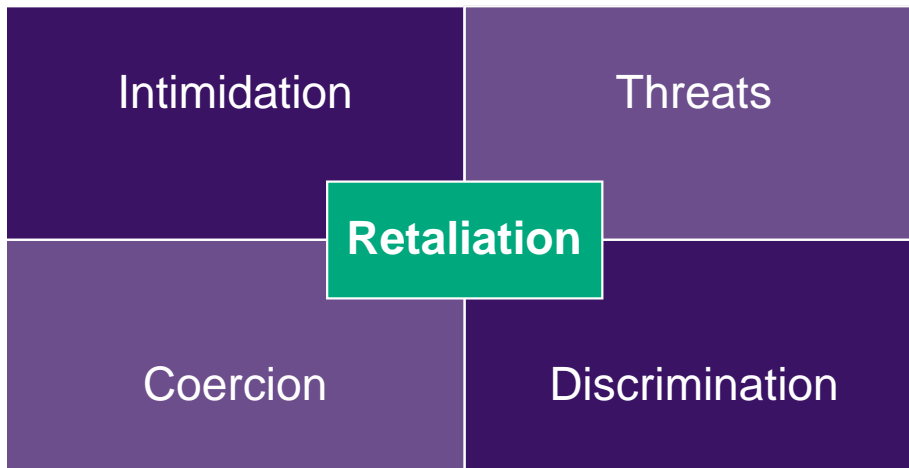
Threshold Requirements

- Formal Complaint must be filed first
- Both parties must consent in writing
- Can't be used where the allegation is that an employee sexually harassed a student

Written Disclosures

- Allegations
- Requirements of the process
- When parties are precluded from resuming Formal Complaint (only after agreeing to a resolution)
- Consequences of participation – records that will be maintained
 - handling of information that is shared

Retaliation



- For making a report or complaint
- For testifying or assisting in an investigation or hearing
- For refusing to participate

Includes an institution charging an individual with non-sexual code of conduct violations for the purpose of interfering with rights conferred by the 2020 Regs.

Complaints of retaliation may be filed under the grievance procedures for sex **discrimination**. Unless the retaliation is itself a form of Sexual Harassment, it should not be handled under the TIXSH grievance process.

The exercise of First Amendment rights does not constitute prohibited retaliation.

Retaliation Pop Quiz

Following a bad breakup that deteriorated into physical violence, Student A tells Student B, "My life is already horrible. If you report me for hitting you, I will kill myself."

YES

Following a huge annual party at which three women report having been violently assaulted, every member of the XXX Fraternity refuses to be interviewed by investigators. The Dean of Students announces that if the lack of cooperation continues, the fraternity's charter will be revoked.

YES

Student X accuses Student Y of sexual assault. After Student Y is found not responsible, Complainant has a t-shirt made that says "Student Y is a rapist," and wears it around campus.

NO

After a member of the swim team is charged with Sexual Harassment, the coach tells the players that, "I expect everyone who is a member of this team and expects to stay a member of this team to support their fellow swimmer."

YES



Records must be created, retained, and available to the parties for **seven years**



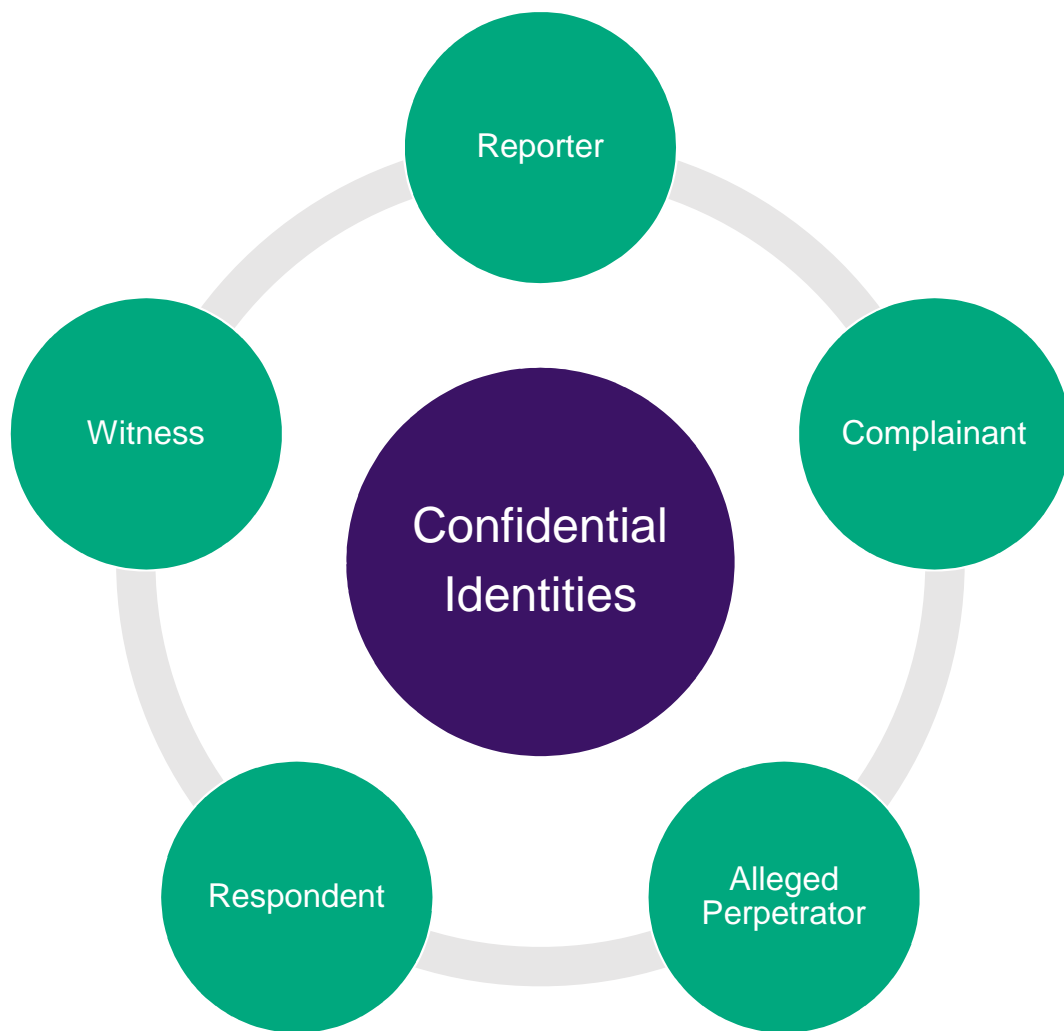
Records of any actions taken in response to a report, including supportive measures or why not providing supportive measures was not clearly unreasonable.

Document basis for conclusion that school's response was not deliberately indifferent.



Records of each investigation, including:

- Any informal resolution process and result
- Determination of responsibility
- Recording/transcript of hearing
- Any sanctions imposed on Respondent
- Any remedies provided to Complainant
- Any appeal and the result




3 Exceptions


1. As required by law
2. To carry out Title IX proceedings
3. As permitted by FERPA:
 - Other school officials
 - In accordance with transcript/disciplinary record sharing

Disciplinary Records

Institutional Policy, Procedures, Practices, Practicalities



Who at the institution (office, specific administrator) responds to disciplinary record requests, and what process do they follow in doing so?




How do Title IX-related records factor into that response, and what role does the Title IX Coordinator play?




Is the policy consistently applied?

Transcript Notations


Institutional Policy, Procedures, Practices, Practicalities



What is the institution's threshold for a disciplinary-related transcript notation, and how specifically do Title IX Sexual Harassment findings factor in?



Who administers the policy and makes the notations, and what process do they follow in doing so?



Is the policy consistently applied?

Students under 18

Major Issues Involving Minors

- If any school employee observes or becomes aware of potential Sexual Harassment of a minor, the issue should be reported to the Title IX Coordinator immediately.
- All employees should consider themselves “mandatory reporters” with regard to students under 18 years of age. In most cases, the concern may also need to be reported to the local Department of Social Services or other appropriate entity under state law.
- School should have an MOU with intersecting K-12 programs (e.g. Early College, summer, and weekend programs).

Minors

When a parent may act on behalf of a student

- Schools must respect the legal right of a parent or guardian to act on behalf of their child if they are legally entitled to do so.
- A parent of a minor may:
 - Discuss and make decisions regarding supportive measures
 - Decide whether to file a Formal Complaint
 - Participate in the grievance process
 - Be present at meetings, interviews, and hearings

Student remains
the Complainant

Student still
has the right to a
separate advisor

Employees as Respondents

Two Laws, One Conundrum

Title VII of the Civil Rights Act

Title IX of the Education Amendments Act

Conduct covered	May be severe or pervasive	Must be severe and pervasive
Notice Standard	Knew or reasonably should have known	Actual notice
Respondent (and witnesses) participation in investigation	Employment may be terminated for lack of cooperation	May refuse to participate

Employees as Respondents

Two Laws, One Conundrum

Title VII of the Civil Rights Act

Title IX of the Education Amendments Act

Respondent's entitlement to see evidence	Not entitled	Entitled
Hearing with cross examination	Not required in order to impose discipline	Required before imposition of discipline
Standard of proof	No explicit standard of proof	Must be "clear and convincing" or "preponderance of the evidence" for all cases

Employee Rights

Collective
Bargaining
Agreements

Faculty
Handbook
Tenure Rights

Some employees
are entitled to
additional process

JacksonLewis

Thank **you.**

Your Jackson Lewis Title IX Team



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