# Training for Title IX Coordinators:

# What You Need to Know Right Now About the New Final Rule

Fall 2020





This training provides general legal advice about certain topics related to the U.S. Department of Education's regulation and enforcement of Title IX of the Education Amendments Act of 1972 and specifically with respect to the Title IX regulatory changes released on May 6, 2020 and effective on August 14, 2020.

This is a quickly-evolving area, and substantial changes to applicable law, rules, regulations, and enforcement policies in the near term seem likely. We assume no responsibility to update this training video notwithstanding changes in the law.

Please note that this presentation does not address state or local laws, rules, or regulations which may be material in evaluating the subject matter of this training. Finally, this presentation offers general guidance about its topic and does not offer specific legal advice about any particular circumstance, investigation, hearing, or matter.



- Where we are: Context and Framework
- II. Overview of Required Changes-BREAK –
- III. Intake and Jurisdictional Analysis-BREAK –
- IV. Investigation & Adjudication Procedures
  - V. Handling Cases the New Rule Leaves Out



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.







Prohibitions or Limitations on Participation Based on Sex

Unequal Funding of Men's and Women's Athletics

Pregnancy Discrimination

- Sexual Harassment
- Sexual Assault
- Stalking
- Domestic/Dating Violence
- Verbal/expressive





### Key Dates in the Evolution of Title IX

Discrimination based on sex should be prohibited in education

1972

Sexual
Harassment is
a form of
prohibited sex
discrimination

1997

Dear Colleague, address sexual assault or else

2011

You must use these policies and procedures

2020



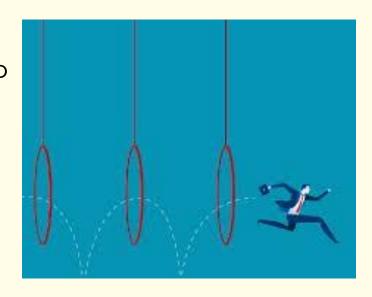


- Focus attention on the issue of sexual violence
- Raise the profile of Title IX Coordinators
- Result in a near-universal adoption of the "preponderance" standard
- Encourage more students to report incidents of sexual misconduct
- Raise concerns that Respondents were being treated unfairly
- Not change the actual law of the land



### The Final Rule is More than Guidance

- The Title IX process is now legally mandated.
- The scope has formally expanded to include intimate partner violence and stalking.
- A Final Rule is not easily made or unmade.
- The Final Rule is about how to implement Title IX's prohibition of sexual harassment.





## More is staying the same than changing

And an important postscript for leadership:

In many instances, we have real control – freely granted by the Department of Education – over what kind of change does happen.



### Overarching Goals of Final Rule

Title IX under Obama-era Guidance

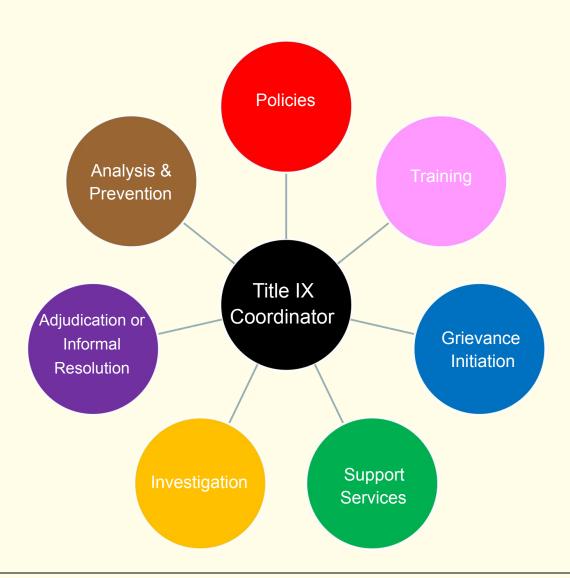
Title IX under Final Rule

1. Narrow the scope of incidents that fall within the law

2. Recalibrate the procedural balance between complainants and respondents











### REQUIRED CHANGES: EXTENSIVE

- Single policy applies to employees and students alike
- "Stop, prevent, remedy" 
  ☐ non-deliberate indifference"
- Many definitions standardized, but consent left up to each school
- Definition of sexual harassment narrowed
- Any discretionary elements must apply equally to complainants and respondents



#### 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 cass must be handled in accordance with the Final Rule.



### 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.

Schools may decide for themselves how to handle OSH cases.



Training

#### REQUIRED CHANGES: MODERATE

- No required training for students
- No required training for all employees
- 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



#### REQUIRED CHANGES: EXTENSIVE

- Anyone can report sexual harassment, but few are required to (by this law)
- If coordinator has actual knowledge of TIXSH, must reach out to complainant
- Coordinator must explain supportive measures and option to file a formal complaint
- Investigation required only if complainant (or coordinator) files a formal complaint
- All formal complaints must undergo dismissal analysis



#### REQUIRED CHANGES: MINOR

- Supportive measures should be provided regardless of whether formal complaint is filed
- Coordinator should engage in interactive process with complainant and document outcome
- Coordinator should also assess whether respondent needs supportive measures
- Support services are non-punitive and should not unreasonably burden the other party
- No discipline can take place prior to resolution except emergency removal/administrative leave



#### REQUIRED CHANGES: MODERATE

- Cannot use the "single investigator" model
- Parties must receive advance notice of the charges, investigatory interviews, etc.
- Parties must have opportunities to provide, review, and respond to evidence
- Relevant evidence must be summarized in an investigative report
- Investigators must be able to spot jurisdictional issues (dismissal) and additional potential violations (notice)



### Adjudication or Informal Resolution

Adjudication or Informal Resolution

#### REQUIRED CHANGES: EXTENSIVE

- Hearings may be virtual, but they must be live such that everyone can see and hear each other
- There must be opportunity for cross examination conducted by advisors (who may be attorneys)
- The parties must receive a written rationale for the final outcome
- Informal resolution can be an option if both parties agree to it
- At any point before reaching agreement, either party can choose to resume the formal process

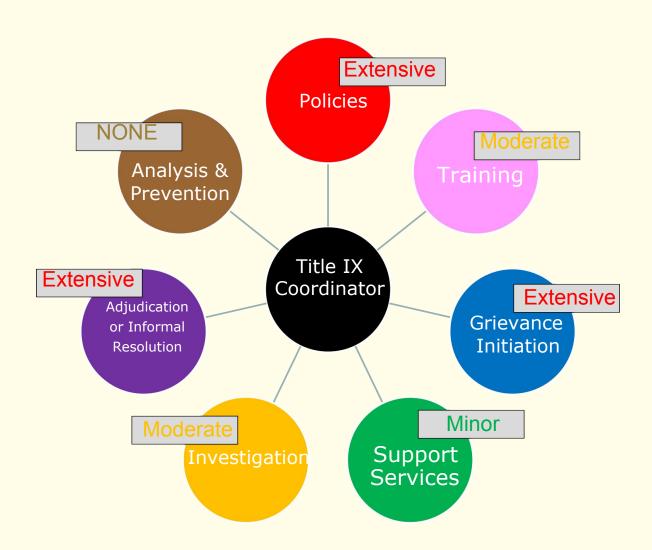


Analysis and Intervention

#### REQUIRED CHANGES: NONE

Final Rule does not address prevention efforts













### When are you required to respond?

#### **Obama Era Guidance:**

Whenever a Responsible Person knew of a possible incident.

(Any employee who a student might reasonably perceive to have authority to address situation or responsibility to report it.)

 Whenever a Responsible Person knew or reasonably should have known about a possible incident







### When are you required to respond?

#### **Final Rule:**

- Whenever the Title IX Coordinator or an official with authority to institute corrective measures knows of a possible incident. (Schools have wide discretion to designate who these officials are.)
- Only whenever one of these officials actually knows of a possible incident.
- And if one of them is the harasser, that doesn't count





### What's the Difference?

A student tells Professor Torrico that she was assaulted over the weekend and can't concentrate on schoolwork. Professor Torrico gives her an extension on the upcoming paper, and promises he won't mention it to anyone.

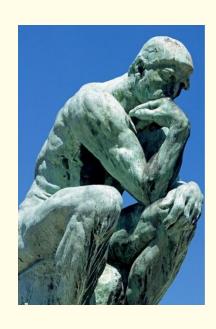
Obama era? Final Rule era?

Same scenario as before except that this time, Professor Torrico remembers his Title IX training and calls you after the student leaves his office.

Obama era? Final Rule era?



### Policy Point and Counterpoint



### Final Rule pro:

More fair to schools. And no forced divulgence.

#### Final Rule con:

Abuse goes undiscovered and undeterred?

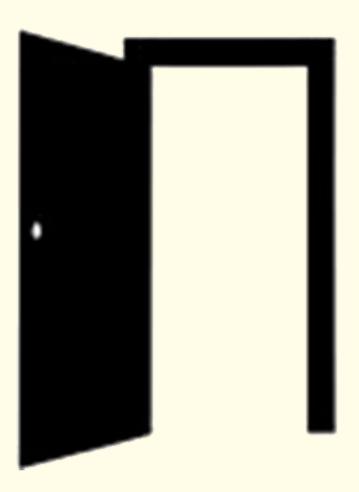
#### Good news:

Your school can set the balance\*

#### Practical note:

Don't make "untraining" a top priority





#### WHO CAN REPORT?

Anyone. At any time. In any manner.

#### WHO MUST REPORT?

A small group of administrators who have authority to institute corrective measures on behalf of the school.





Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond



### OBLIGATION TO RESPOND POP



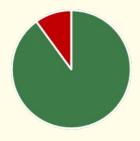
- A student informs you verbally that she is feeling pressured to date a campus security guard. YES
- A student emails you that she suspects her roommate is being sexually harassed by an ex-boyfriend. YES
- The mother of a 20-year-old student leaves a voicemail that her son is being stalked. YES
- A anonymous note shoved under your door complains that Professor Adams tells dirty jokes in class on a regular basis. YES











#### TEN PERCENT PROBLEMS





Complainant is not a current student or employee



Complainant is not named



### Contacting the Complainant

- Inform the Complainant that supportive measures are available (regardless of whether they choose to file a formal complaint or not).
- Consider the Complainant's wishes with respect to supportive measures. Document
- Explain: 3.
  - The process for filing a formal complaint,
  - The grievance process, and
  - Any informal resolution options.









#### WHAT?

Individualized services offered as appropriate, as reasonably available, and without fee or charge

#### WHEN?

Before or after filing of a formal complaint (or when no complaint is filed)

#### WHY?

To restore or preserve access to education, protect safety, or deter sexual harassment

#### HOW?

May not be punitive or unreasonably burden the other party



### **ALERT: DEPT OF EDUCATION**

### PRIORITY

No disciplinary sanctions against respondent until grievance process is completed.





### PHEW – AN EXCEPTION!



### **Emergency Removal**

- Individualized safety and risk analysis
- Immediate threat of physical health or safety
- Immediate opportunity to challenge decision

#### Administrative Leave

- For non-student employee respondents
- During the pendency of the grievance process

\*Watch out for IDEA/Section 504/ADA



### SUPPORTIVE MEASURES POP



- Facilitate the complainant receiving counseling YES
- Assist the complainant with academic accommodations YES
- Put a hold on the respondent representing the school in athletic events or other competitions until the case is resolved NO
- Issue a mutual no-contact order preventing the parties from interacting with each other YES

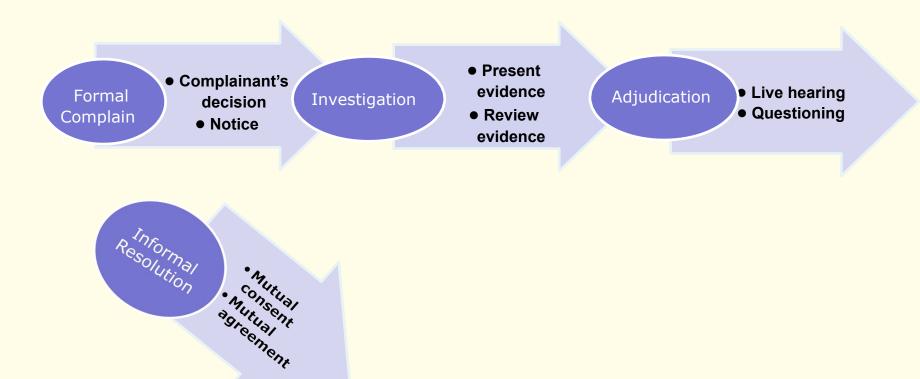


#### **Coordinator Flow Chart**

Actual Knowledge Complainant Contact Complainant Explain Supportive Measures Explain Grievance Process

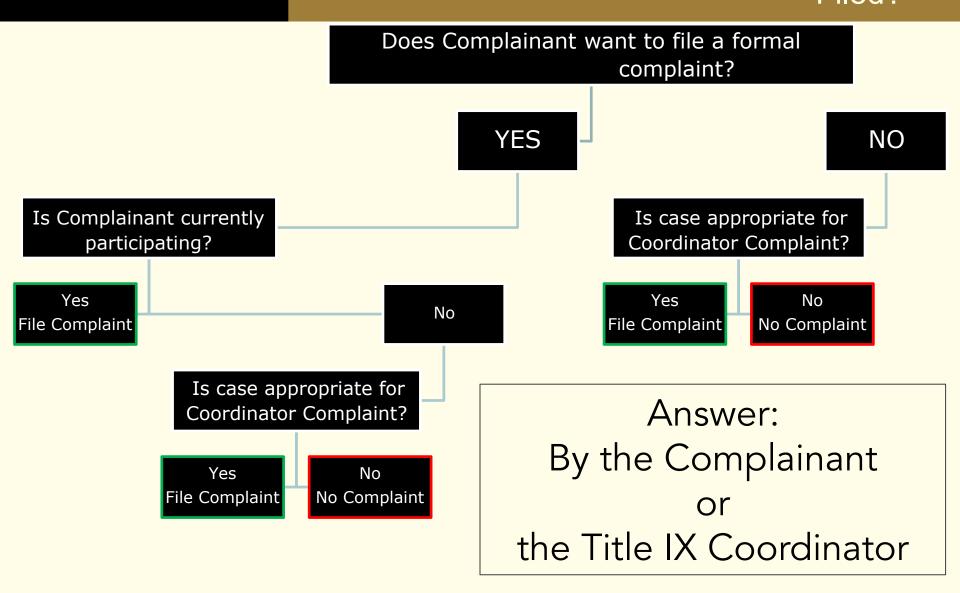


#### What is the Grievance Process?





# How does a Formal Complaint get Filed?





# IS CASE APPROPRIATE FOR A COORDINATOR COMPLAINT?



# If overriding complainant wish...

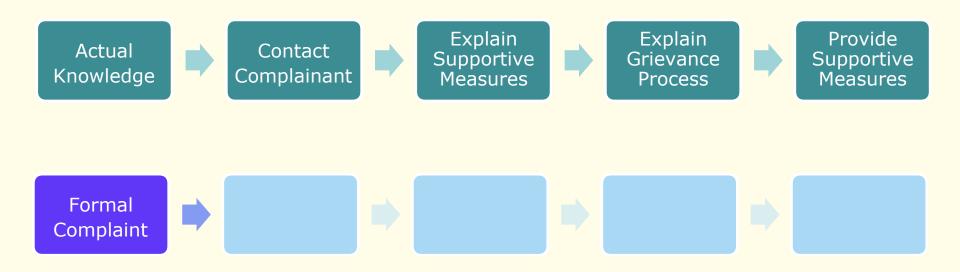
Violence, threats, indications of predation, ability to prove case without complainant cooperation.

# If overriding eligibility problem...

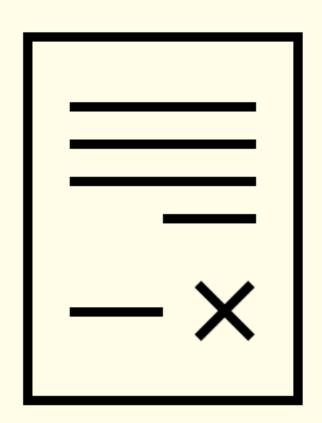
Continuing risk to current students/employees or educational environment



#### Coordinator Flow Chart





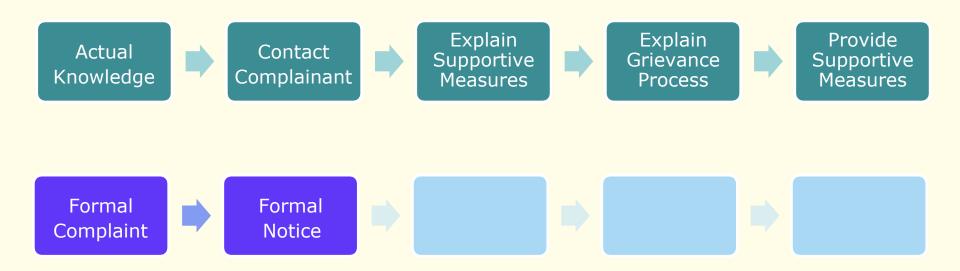


Must be in writing (document or electronic)

- Must allege sexual harassment and request investigation
- Must be signed (physically or digitally)



#### Coordinator Flow Chart





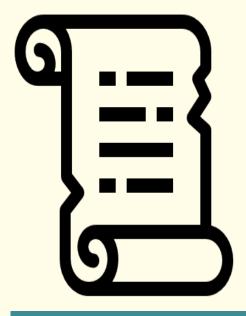
#### **ALERT: DEPT OF EDUCATION PRIORITY**

No secrets from the respondent or last-minute surprises.





#### Formal Notice to all Parties



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

- 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



## Your Policy on False Statements



- Materially false statement
- Made in bad faith
- By itself, adverse determination on responsibility is not enough to support a charge





Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond



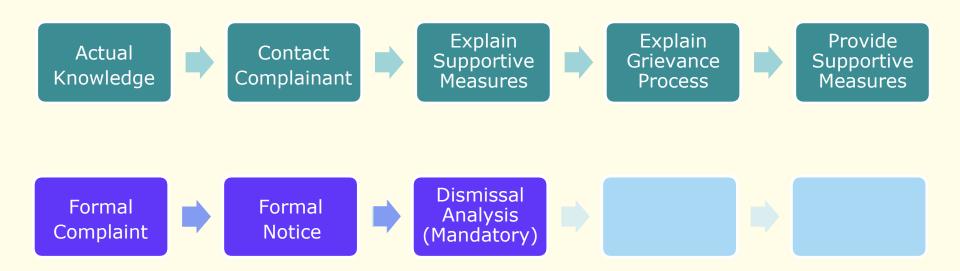
Check Code of Conduct re false statement provision



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
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	Provide an advisor of your choice



#### Coordinator Flow Chart





## Overarching Goals of Final Rule

Title IX under Obama-era Guidance

Title IX under Final Rule

1. Narrow the scope of incidents that fall within the law

2. Recalibrate the procedural balance between complainants and respondents







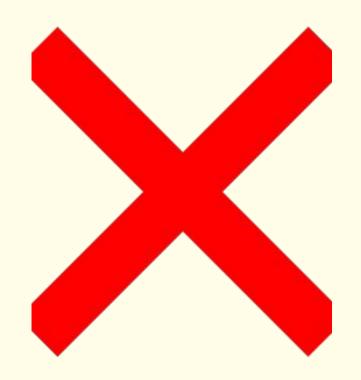
- 1. Who is the complainant?
- 2. Where did the incident(s) take place?
- **3.** What type of conduct occurred?



# WAS THE COMPLAINANT "A PERSON IN THE U.S." AT THE TIME OF THE INCIDENT?

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.





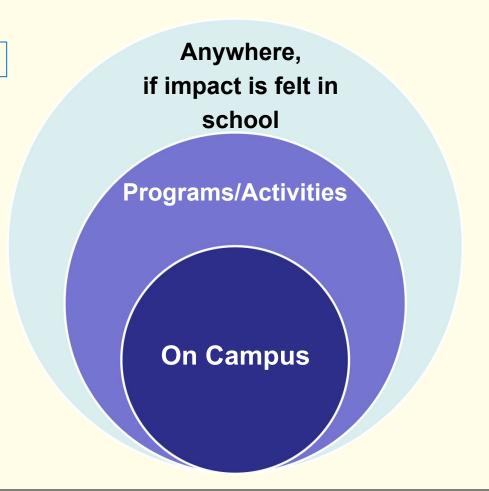
If the complainant was not in the United States at the time of the incident...

the school must dismiss that portion of the formal complaint as a Title IX matter.



#### WHERE DID THE INCIDENT(S) TAKE PLACE?

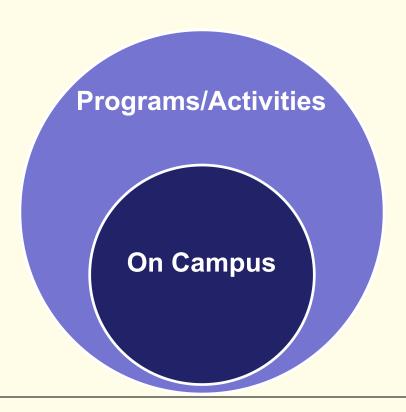
Obama Era





#### WHERE DID THE INCIDENT(S) TAKE PLACE?

Final Rule





# Substantial Control over Context (Where)



Your education programs & activities

Locations Residence halls Classrooms Campus grounds Greek

houses

**Events** 

School sporting events School

festivals

Circumstances Athletics

Extracurriculars

Clinics/Internships



#### **Everything Else**

- Private off-campus housing
- Off-campus bars or restaurants
- Off-campus parties
- Personal travel



# When do e-interactions take place in our education program or activity?



- Physical Location of Parties
- Hardware
- Platform/Network
- Event/Activity



#### E-INTERACTIONS POP



- Working from home on a school-issued laptop, a professor sends pornography to colleague
   HARDWARE PLATFORM/NETWORK
- Students are listening to a Zoom lecture from home on personal devices. One sends another a harassing note in the private chat.
   PLATFORM/NETWORK EVENT/ACTIVITY

 A student uses an iPhone to send nude photos of their ex to three friends. One of the friends is on campus.
 PHYSICAL LOCATION



# Did this e-interaction take place in our education program or activity?



One student keeps texting another explicit messages despite being asked to stop.

Physical Location of Parties? Both off campus

Hardware?

Both using personal cell phones

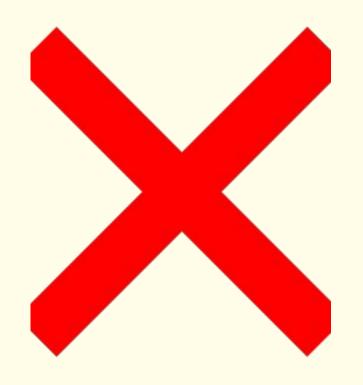
Platform/Network?

Both on cellular or home networks

**Event/Activity?** 

Always happens late at night

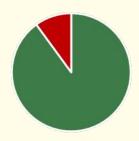




If the incident did not take place within the school's education program or activity...

the school must dismiss that portion of the formal complaint as a Title IX matter.





### TEN PERCENT PROBLEMS





Partnership in which your institution participates





- 1. Who is the complainant?
- 2. Where did the incident(s) take place?
- **3.** What type of conduct occurred?



#### WHAT TYPE OF CONDUCT OCCURRED?

Sexual Assault

Dating and Domestic
Violence
Stalking

- **Clery Act Conduct**
- A school employee conditioning the provision of an aid, benefit, or service on participation in unwelcome sexual conduct

Unwelcome conduct\*

**Level 4 Expressive Conduct** 

(Expressive: verbal, written, electronic, body language)

\* 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



#### WHAT CONSTITUTES SEXUAL HARASSMENT?

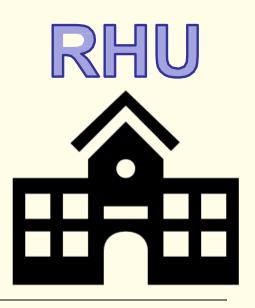
OBAMA ERA: "Unwelcome conduct of a sexual nature," that includes "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."

FINAL RULE: "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"

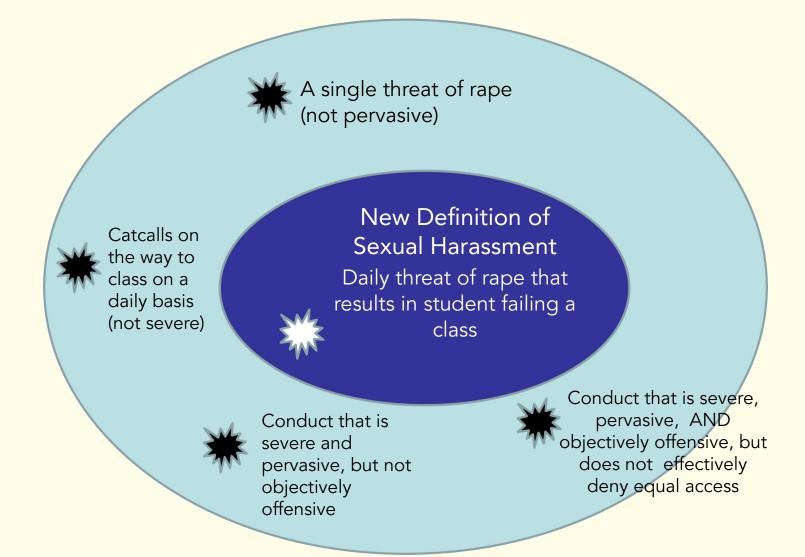


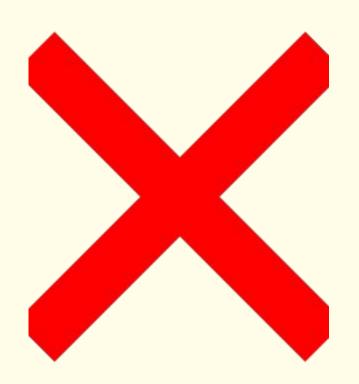
## **ALERT: DEPT OF EDUCATION PRIORITY**

Title IX is not a "civility code" prohibiting all unwelcome conduct









If the incident does not fall within one of the three prongs of Title IX Sexual Harassment (TIXSH)...

the school must dismiss that portion of the formal complaint as a Title IX matter.



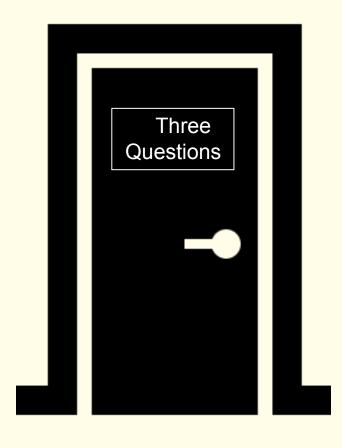
#### MANDATORY DISMISSAL POP



- Complainant sexually assaulted by fellow student at his off-campus apartment. DISMISS
- Complainant propositioned by professor and offered higher grade at University's study abroad program in Luxembourg.
   DISMISS
- Student in clinical nursing program sexually harassed by patient at hospital. KEEP
- Student pushed to the ground on athletic field by angry boyfriend just one occasion. KEEP
- Professor tells student that he is her type and she could give him the climax of his life. DISMISS



# Your Analysis of the Formal Complaint



What happens if the answer to any of the three questions

Who

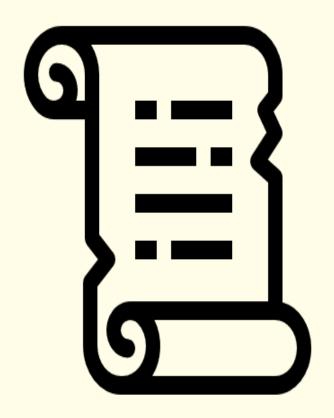
<u>or</u>

Where

<u>or</u>

What

doesn't take the case over the Title IX threshold?

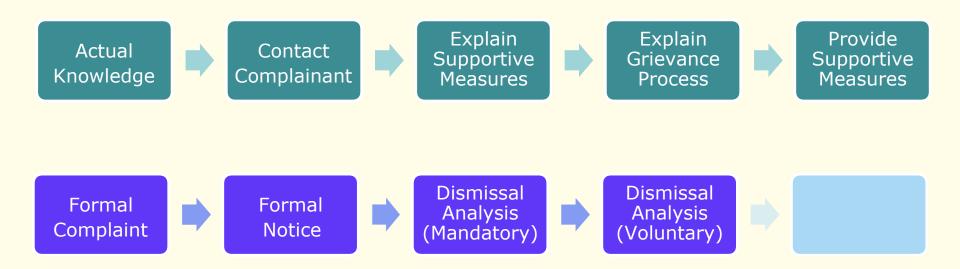


The school must dismiss that portion of the formal complaint as a Title IX matter.

Promptly send written notice of the dismissal (and reasons therefore) to the parties simultaneously.



#### Coordinator Flow Chart



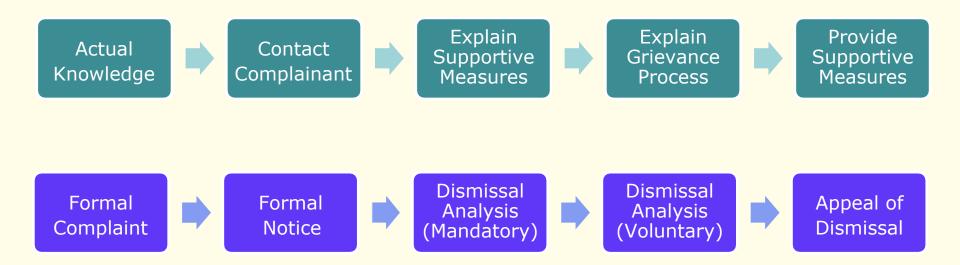


- 1. Complainant no longer wishes to proceed
- Respondent no longer works at/attends the school
- 3. Not enough information available to pursue case

Promptly send notice written notice of the dismissal (and reasons therefore) to the parties simultaneously



#### Coordinator Flow Chart





- 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





Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond



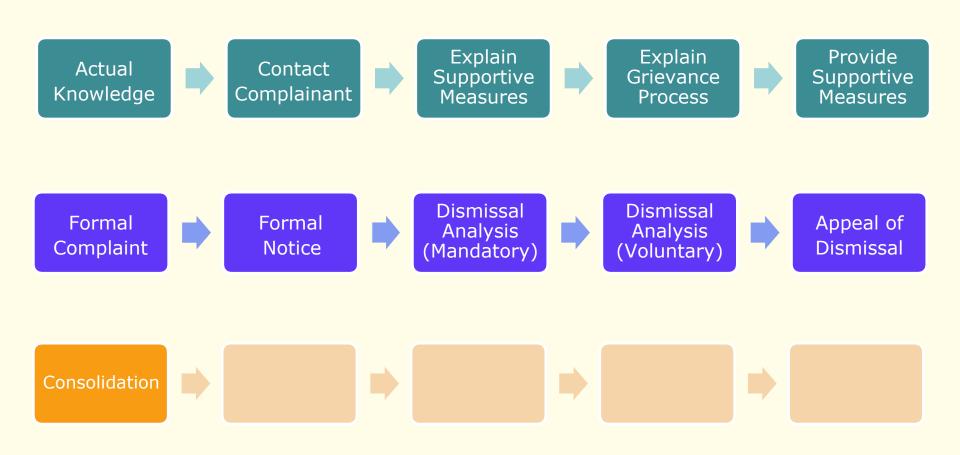
Check Code of Conduct re false statement provision



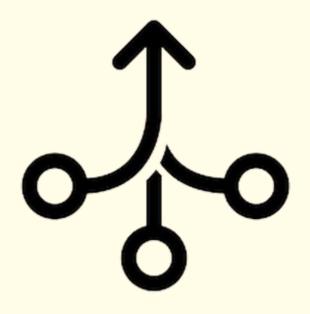
Consider adding grounds for appeal of dismissal



#### Coordinator Flow Chart







- 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



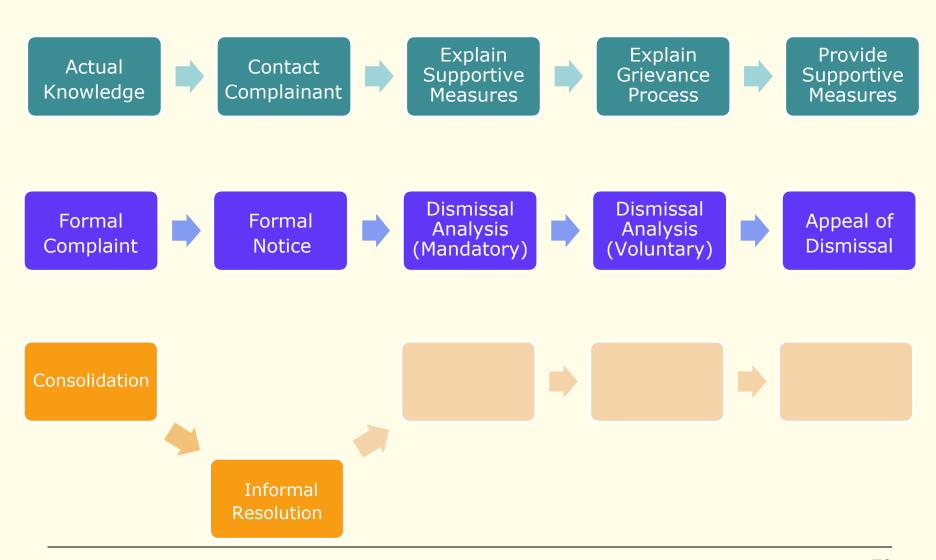
#### **CONSOLIDATION POP**



- Student A alleges ex-girlfriend hit her; ex-girlfriend alleges
   Student A stalked her. YES
- Five students who attended a fraternity party allege they were groped by a gauntlet of members. YES
- Student alleges that after assault by soccer player, she was repeatedly sexually harassed by player's teammates. YES
- Three students allege that they were "roofied" and sexually assaulted by the same respondent, one in March, one in April, and one in May. NO



#### Coordinator Flow Chart





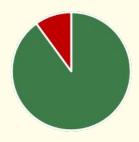
#### Informal Resolution Process(es)

### Mediation



- Parties must opt in (in writing)
- Either party may opt out and resume formal process at any point prior to agreement
- Must be clear with parties about when return to formal process is foreclosed
- Must be clear about records that could be maintained or shared
- Can't use if complainant is student and respondent is employee





#### TEN PERCENT PROBLEMS





What if the respondent is a student employee?





Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond



Check Code of Conduct re false statement provision



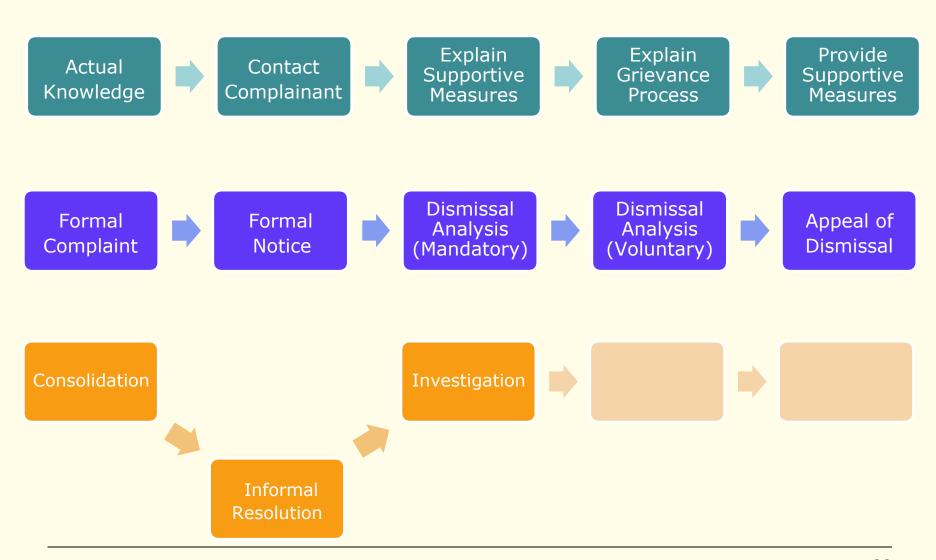
Consider adding grounds for appeal of dismissal



Create/reform informal resolution process

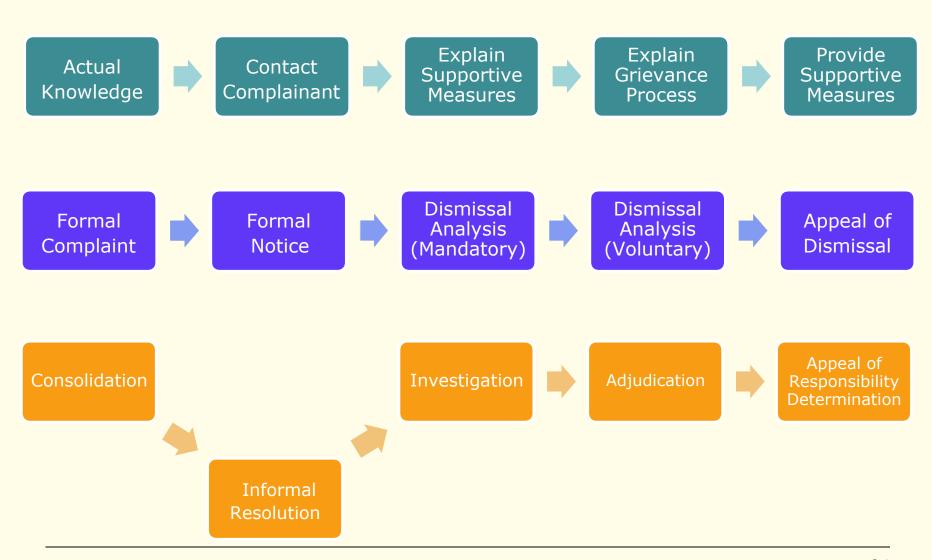


#### Coordinator Flow Chart





#### Coordinator Flow Chart





# So you have a Title IX case, now what?





Supportive Measures Only

Help the Complainant stay in school

No discipline for Respondent

-----Formal Complaint Required

Informal Resolution

Voluntary resolution that involves both parties

Examples include mediation and restorative justice

Grievance Process Most formal and adversarial process

Could result in discipline of the Respondent, including expulsion

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



#### Overarching Goals of Final Rule

Title IX under Obama-era Guidance

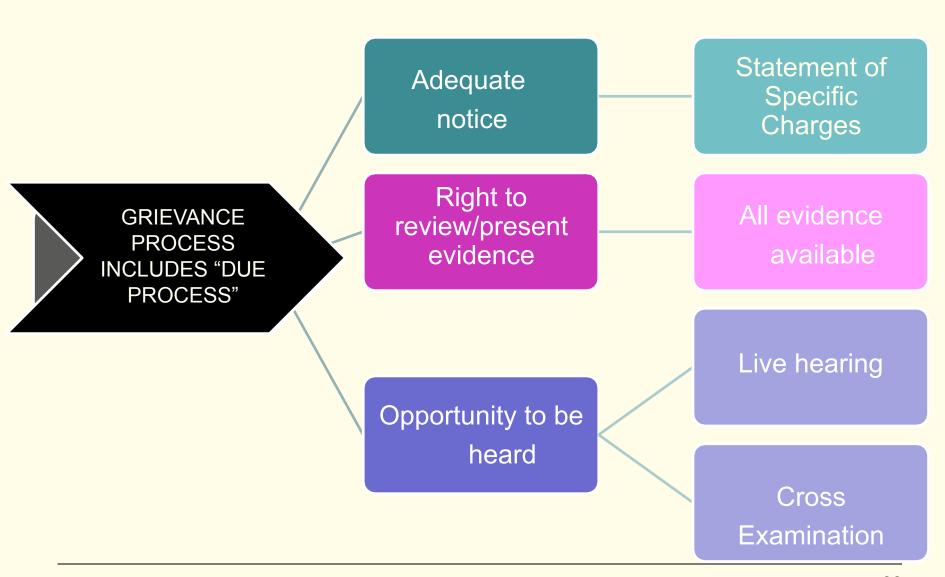
Title IX under Final Rule

1. Narrow the scope of incidents that fall within the law

2. Recalibrate the procedural balance between complainants and respondents









- No use of the single investigator/adjudicator model
- Training required for investigators (published)
- Investigators must be impartial
- Burden of gathering evidence is on school
- Parties entitled to equal opportunity to present evidence
- No gag orders
- Parties entitled to review evidence (10-day response period) prior to finalization of investigative report





- Investigator(s) must create an investigative report that fairly summarizes the relevant evidence.
- At least 10 days prior to the hearing, the report must be provided to each party and advisor.





- May be virtual, but must be live
- Recording or transcript required
- Decision maker(s) can't be coordinator or investigator
- If party does not have an advisor, school must provide an advisor (not necessarily attorney) of school's choice at no cost to student



- Questioning done by advisor (parties may not question each other directly)
- Direct, in real time, with audio & visual
- Relevancy requirement, vetting by decision maker(s)
- Rape shield and other and limitations
- Refusal to submit to cross exam = all other statements (including documents) disqualified
  - Even if witness unavailable
  - Even statements against interest



• Either preponderance of the evidence <u>or</u> clear and convincing

 Apply the same standard of evidence to all formal complaints of TIXSH

 Apply the same standard for formal complaints by/against students as for formal complaints by/against employees, including faculty





Designate the individuals (those who have authority to institute corrective measures) whose knowledge of a possible incident triggers an obligation to respond



Check Code of Conduct re false statement provision



Consider adding grounds for appeal of dismissal



Create/reform informal resolution process



Select standard of proof, taking into account that it must be applied in all TIXSH cases





#### Determination of Responsibility

#### Written, simultaneous notification to both parties:

- Identification of the allegations
- Description of all procedural steps
- Findings of fact supporting the 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, and any disciplinary sanctions or remedial measures
- Appeal rights



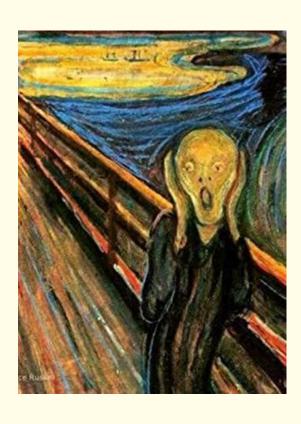


#### Appeal of a Determination

- 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 (and not Coordinator or Investigator)
- Each parties may submit a written statement
- Written decision must describe result and rationale



#### HOLD ON - LET'S GET BACK TO ...



- One student raping another in an off-campus apartment
- A professor making regular inappropriate remarks that aren't "severe"
- Level 4 harassment on social media of student who is taking online class from outside the country



# SO WE CAN'T DO ANYTHING ABOUT THOSE INCIDENTS????

Yes You Can

"Dismissal does not preclude action under another provision of the school's code of conduct."



#### 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 Final Rule.



#### 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.

Schools my decide for themselves how to handle OSH cases.





Student complains that a public safety employee makes flirty remarks to him whenever he sees him, about once a week.

Not Level 4 – not severe

Professor complains that the Dept. Chair told her, "women don't belong in this field, but I sure do like to watch you coming and going."

Not Level 4 – not pervasive

Student complains she was sexually assaulted by two older students in the restroom of a local bar.

Not in school's program or activity

Student complains that his ex-girlfriend, also a student, has been following him home every time he leaves campus and sitting outside his house in her car for hours.

Not in school's program or activity

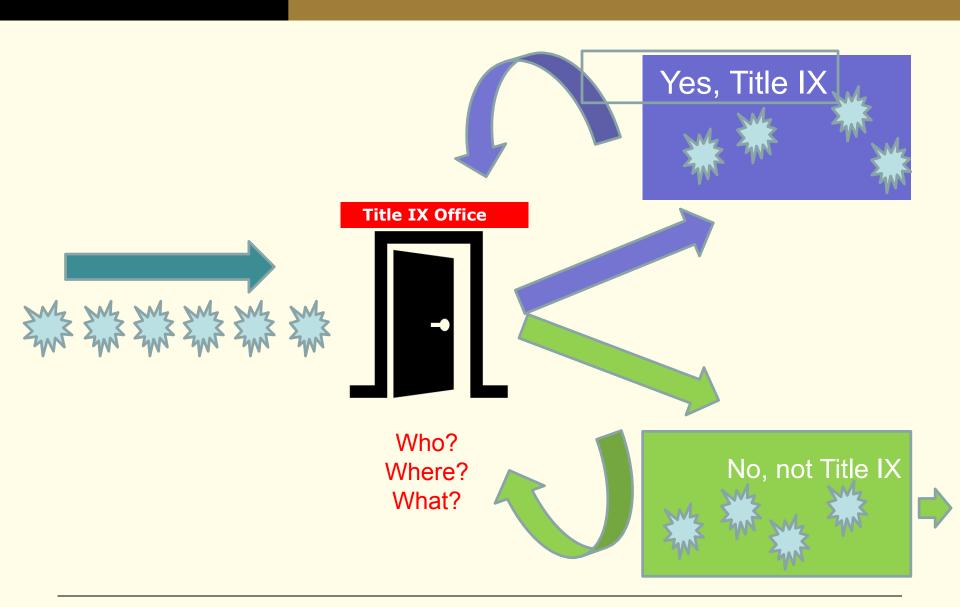


A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.

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







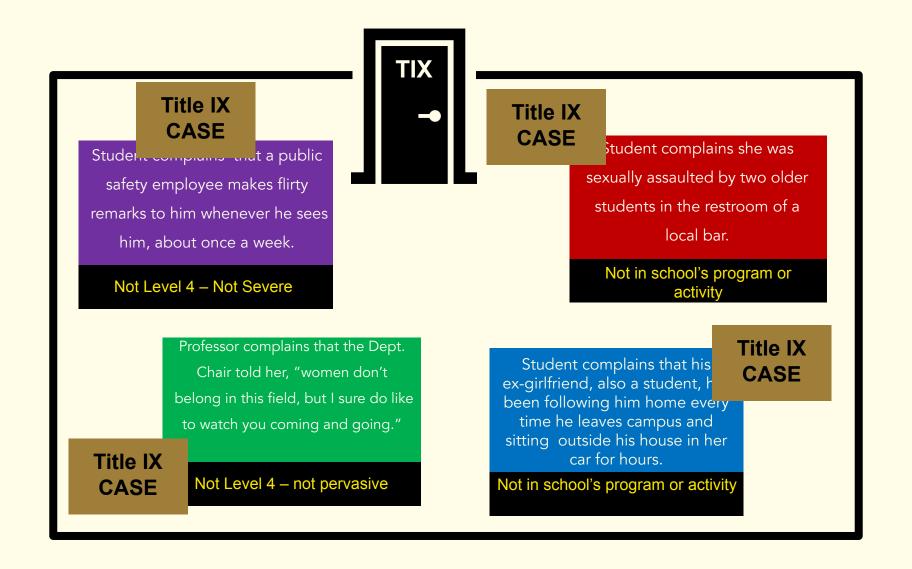


#### WAIT, ARE YOU TELLING ME THAT DOE WILL LET US...

- Refer OSH cases to other offices for investigation and discipline?
   YES
- Use the same procedures and personnel we will be using for Title IX cases to investigate and discipline OSH cases? YES
- Use our current Obama-era procedures (or our old pre-Obama procedures) to investigate and discipline OSH cases? YES
- Run simultaneous parallel procedures for different aspects of the same course of conduct? YES
- Just ignore non-Title IX cases and do nothing about them? MAYBE
- Charge an individual with non-Title IX code of conduct violations so that we don't have to deal with Title IX at all? NO

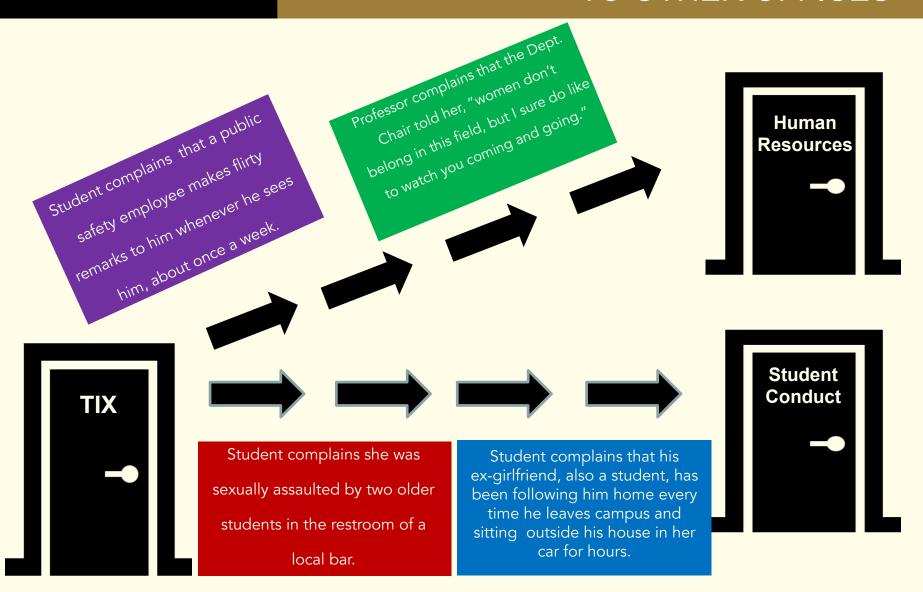


## YOU CAN KEEP OSH CASES IN THE TITLE IX OFFICE



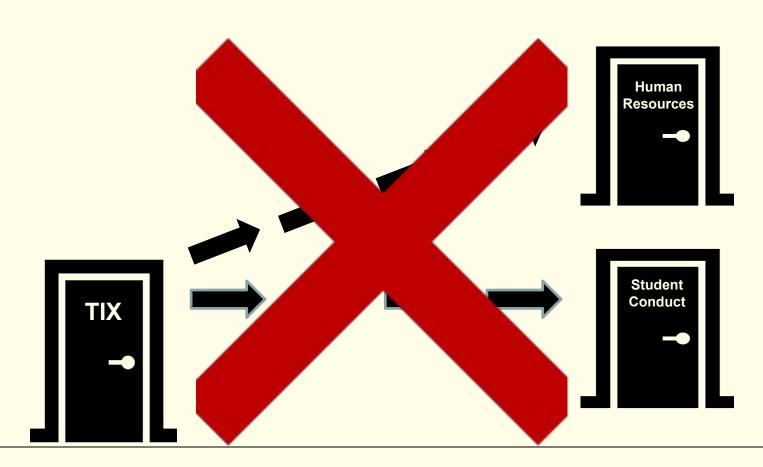


# YOU CAN FARM OUT OSH CASES TO OTHER OFFICES



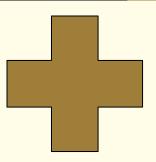


#### YOU CAN IGNORE (SOME) OSH CASES





## Handling OSH Cases using Title IX Procedures



- Reduced need for jurisdictional sorting
- Increased consistency and reduced confusion about procedures
- Feels less arbitrary & reduced risk of due process suits

Stuck with onerous
 Title IX procedures for handling every case



#### Possible Approaches to OSH Cases

### Option A

#### Maximize use of new TIX procedures

 Keep all sexual harassment (TIXSH and OSH) in the Title IX Office and handle them under the Final Rule's Title IX procedures.

### Option B

#### Push to HR & Student Conduct

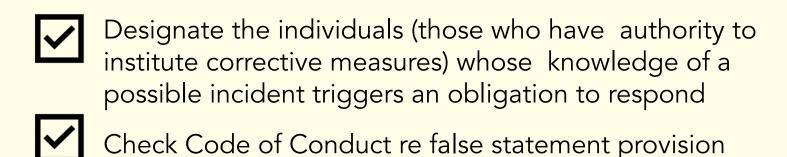
 Send all OSH cases out of the Title IX office. Limit the Title IX office to handling TIXSH cases under the Final Rule's Title IX procedures.

### Option C

#### Use existing Title IX procedures

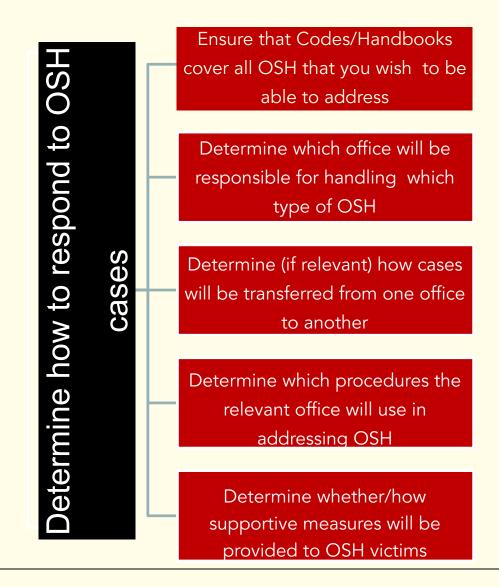
Keep all sexual harassment (TIXSH and OSH) in the Title IX Office.
 Handle TIXSH cases under the new Final Rule and OSH cases under existing Title IX procedures.



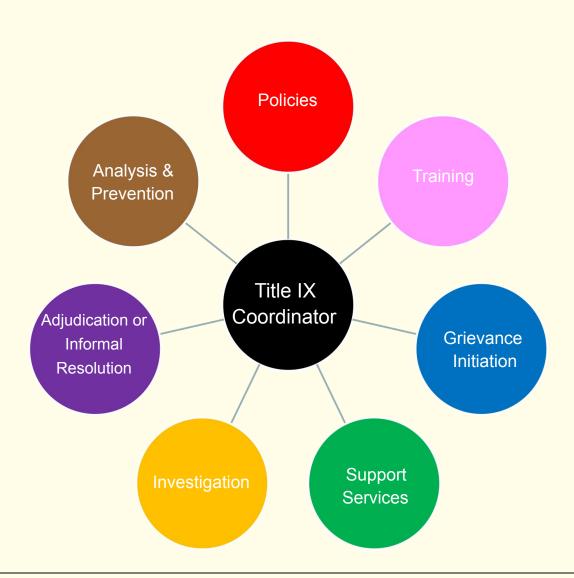


- Consider adding grounds for appeal of dismissal
- Create/reform informal resolution process
- Select standard of proof, taking into account that it must be applied in all TIXSH cases
- ✓ Determine how to handle OSH cases











#### Your Parker Poe Title IX Team









For Title IX assistance, contact Team Lead Josh Whitlock at <u>ioshwhitlock@parkerpoe.com</u> or 704-335-6622



Portions of this presentation may qualify as "attorney advertising" in some jurisdictions. Parker Poe, however, intends for it to be used only for educational and informational purposes.

This presentation is not intended and should not be construed as legal advice.

Understanding of the law is evolving rapidly in this area. This presentation is our best attempt to summarize the current state of the law and is subject to change.