



# Title IX Informal Resolution Training

2023-2024

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- Training requirements for Title IX informal resolution facilitators:
  - Definition of Sexual Harassment
  - Scope of a school's "education programs and activities"
  - How to conduct an informal resolution process
  - How to service impartially, without conflict of interest or bias

# Overview of Today's Discussion

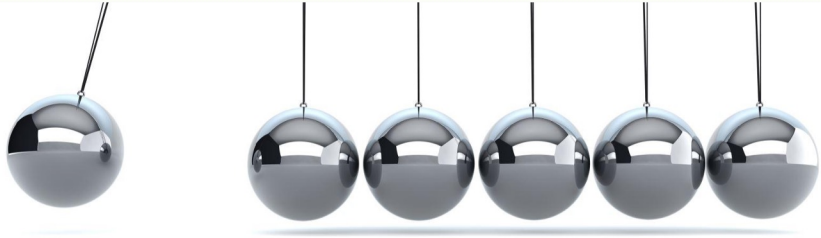


- Title IX law and regulation
- Title IX obligations for educational institutions
  - Scope of program
  - Confidentiality
- Title IX definitions of Sexual Harassment
- Title IX procedure and requirements to start informal resolution process



# Title IX Law and Regulation

# Title IX Guidance



- Federal Law
- Regulations
- Other sources of mandatory and recommended guidance
  - State law
  - Case law
  - Advocacy
  - Best Practices



# 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 of the Education Amendments of 1972**

Enforced by the Office for Civil Rights (OCR)



# Title IX Law & Regulation Timeline



**2011**

OCR issues Dear Colleague Letter changing how campuses handle Title IX

**2017**

Department of Ed withdraws guidance and issues Q&As and starts NPRM process

**2022**

Guidance and new NPRM process announced

**2014**

OCR issues additional guidance in response to outcry from schools

**2020**

New regulations issued and effective August 2020 amidst COVID



# Title IX Regulatory Guidance



- Regulations 2001
- Dear Colleague Letters
  - 2011 Dear Colleague Letter: Sexual Violence, Background, Summary and Fast Facts
  - 2014 Questions and Answers on Title IX and Sexual Violence
  - 2015 Dear Colleague Letter on Title IX Coordinators
  - 2016 Dear Colleague Letter on Transgender Students
  - 2017 Questions and Answers on Sexual Misconduct
- Regulations 2020
  - March 8, 2022 - Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals
- New regulations will be released in October 2023

# Title IX Regulatory Guidance - Report to OCR



- Following a report of sexual harassment to the Office for Civil Rights (OCR)
- OCR initiates an investigation
- OCR may seek an informal resolution
- Negotiated agreement is set forth in a resolution agreement
- OCR may impose fines and penalties against a school if resolution not reached



- Litigation has clarified some of OCR's guidance and in some instances, overturned guidance
  - Examples include use of hearings, cross examination, and exclusion of evidence
- State law addressing specific, and, in some instances, controversial topics related to Title IX enforcement
  - Hearings
  - Transgender rights



# Title IX Obligations for K12 School Districts

# Legal Obligation

Educational institutions must respond in a manner that is not **deliberately indifferent** when it has actual knowledge of sexual harassment occurring in the institution's education program or activity against a person in the United States.



# Scope of the Education Program or Activity



For Title IX to apply, the behavior must occur in the school's "education program or activity," further defined as:

*locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.*

Off-campus activities covered if one (1) of three (3) requirements are met:

1. the off-campus incident occurs as part of the school's operations;
2. the school exercised substantial control over the respondent and the context of alleged sexual harassment that occurred; or
3. the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a college



# TIXGP: Dismissal - Mandatory and Permissive



## **Mandatory dismissal**

- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.

## **Permissive dismissal**

- Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw formal complaint or allegations
- Respondent is no longer enrolled or employed by school district
- Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination



- A licensed mental health professional at the school can maintain confidentiality.
- All other employees are required to report the matter to the Title IX Coordinator.
- In instances of potential sexual harassment, investigators (and other employees) cannot offer to keep the matter confidential.
- A Title IX investigation is completely transparent to both parties:
  - Parties get to know the names of all the people involved, including witnesses.
  - Parties get access to all of the information gathered during the investigation.
  - Parties get the opportunity to request additional investigation and to challenge the investigator prior to the final decision.



- Court mediation/arbitration programs
- Sharing of information for purposes of settlement
- What understanding do parties have before they enter into information resolution about:
  - The information that they share
  - Concessions that they make
  - Admissions

# Title IX Enforcement and Federal Constitutional Protections



Under Title IX, schools may not restrict the rights afforded under:

- First Amendment (Free Speech)
- Fifth Amendment (Protection against Self-Incrimination)
- Fourteenth Amendment (Due Process)

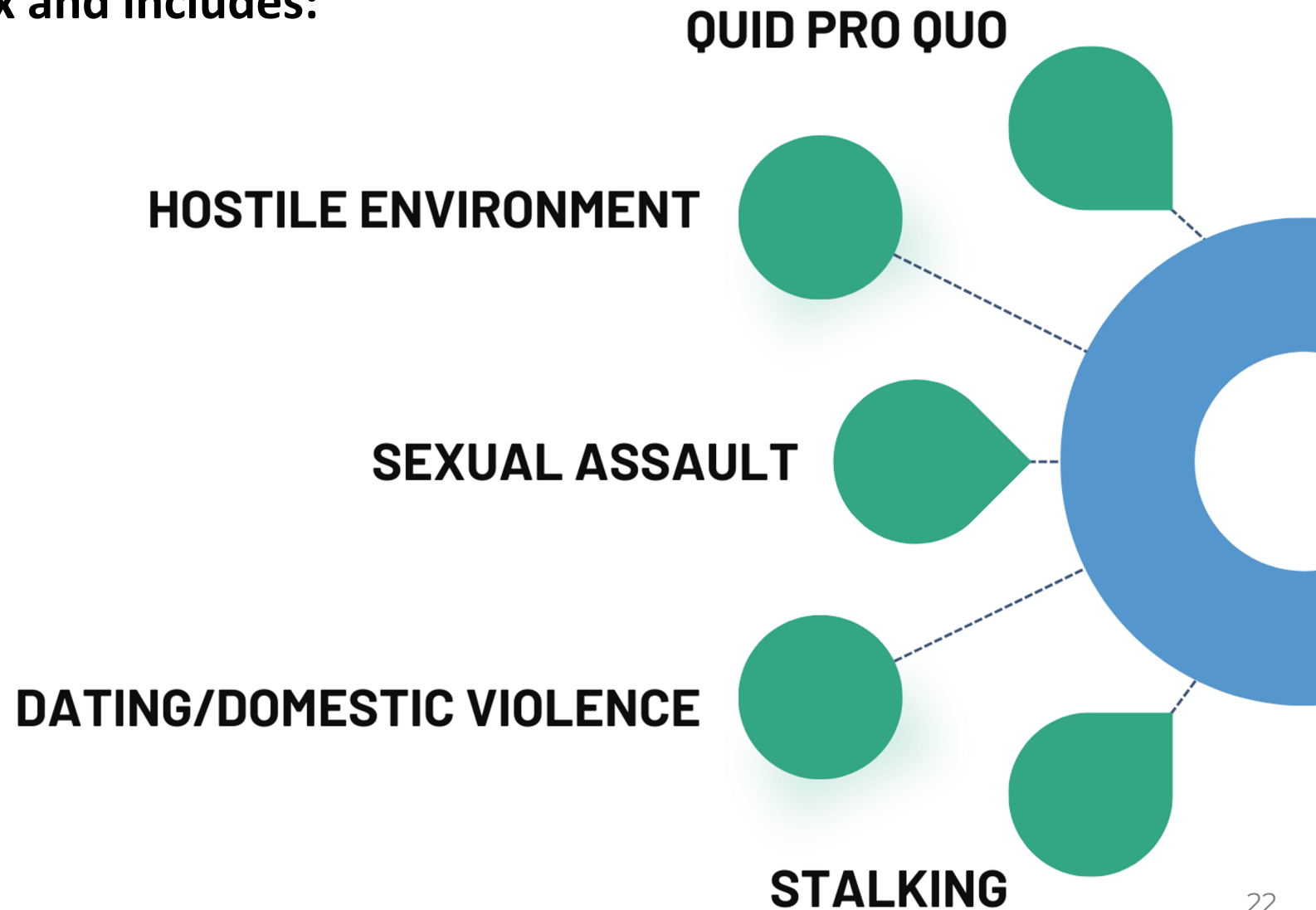


# Title IX Sexual Harassment Definitions

# Title IX (TIX) Definition of Sexual Harassment



Defined conduct on the basis of sex and includes:





# TIX Definition of Sexual Harassment



## **Defines conduct “on the basis of sex” and includes:**

- Quid pro quo - An employee of the school conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- Hostile environment - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school’s education program or activity.

# TIX Definition of Sexual Harassment, continued



The definition includes:

- **Sexual Assault** means any sexual act directed against a Complainant without consent. Sexual Assault includes fondling, incest, rape, sexual assault with an object, sodomy, and statutory rape.
- **Dating violence** means violence committed by a person— (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) the length of the relationship. (ii) the type of relationship. (iii) the frequency of interaction between the persons involved in the relationship.



- **Domestic violence** includes felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim
  - It includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior,
  - By a person who— (A) is a current or former spouse or intimate partner of the victim; (B) is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) shares a child in common with the victim; or (D) commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.



- **Stalking** means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - fear for his or her safety or the safety of others; or
  - suffer substantial emotional distress.

# State Laws Prohibiting Sexual Harassment



- Aside from obligations under Title IX, K12 schools must also enforce state laws prohibiting sexual harassment
- Definitions of sexual harassment may be different
- In most instances, an incident will be analyzed under both Title IX and state law
- FOR INFORMAL RESOLUTIONS, state law may allow and/or prohibit informal resolution completely or types of informal resolution, like mediation



# Overview of Title IX Grievance Procedure (TIXGP) and Informal Resolution Process



# Title IX – Parties and Administrators



## **Parties**

- Complainant – alleged victim/survivor
- Respondent – responds to the allegation(s)

## **Other Participants**

- Fact Witnesses
- Expert Witnesses

## **Administration of Claims**

- Title IX Coordinator
- Title IX Investigator
- Title IX Decision-Maker
- Title IX Appeal Officer
- Title IX Advisor
- **Title IX Informal Resolution Officer**

# TIXGP Formal Process



## Initial complaint – Title IX Coordinator

- Report of incident
- Formal complaint process offered
- Supportive measures
- Complaint filed/investigation initiated
- Potential dismissal (Jurisdiction, Allegation)
- Notice of allegations, includes a presumption of innocence

## Investigation – TIX Investigator

- Interviews
- Documents reviewed
- Sharing information with both parties and reviewing feedback
- Completing investigative report
- Gathering feedback from parties on report

## Decision-Making – TIX Decision-Maker

- Evaluate the evidence
- Determine if follow-up questions required
- Issue decision on policy violation and discipline
- Avoiding bias, conflict of interest, stereotypes

# Procedural Requirements for Informal Resolution



- Formal complaint must be filed
- Never available when Complainant is student and Respondent is an employee
  - Power differential
- Cannot be a condition of continued enrollment or continued employment
  - Or require waiver of another right
- Parties must be able to withdraw from informal and return to formal process
- Informal resolution does NOT have to be offered as a path to resolution

# Written, Informed Consent to Enter the Informal Process



- From both parties in writing
- Disclosure of allegations
- What the informal process looks like
- Confirming that parties can withdraw from the informal process
  - Set forth HOW to withdraw
- Consequences for participation
- Explaining withdrawal from informal process and what happens next

# What Must Be Shared



Allegations in the case

- Has notice of allegations been sent?

Requirements of the informal resolution process

- In policy; negotiated beforehand?

When the informal resolution would resolve the matter fully

- prevent the matter from moving forward formally

Records that will be maintained

- parties' voluntary, written consent to the informal resolution.



# Options for Informal Resolution Process



# Types of Informal Resolution



- Mediation
- Restorative Justice
- Other

# Role of the Facilitator



- Flexible in responsibilities
- Keep matter moving
- Design the format
- Provide questions for consideration
- Clarify the interests of the parties
- Offer seen and potentially unseen resolutions
- Explore feasibility of resolutions
- Provide sufficient information for parties to make informed decisions
- Assist with venue change – informal to formal process
- Document resolution



- Traditionally, parties meet; not necessarily required
- No assumption of responsibility required
- Open to all options for resolution
  - Resolution options not available in the formal investigation and decision-making process
- Regulations permit agreement on imposition of penalties and/or sanctions



## Pros

- Flexible format
- Can be very time-efficient
- Resolution options are as broad as what will be accepted by the parties

## Cons

- Seen as too informal for serious matters
- Explicitly prohibited in some jurisdictions
- Power differential



- Tenants require an acknowledgement of harm
- Harms are not only with the parties but with the community
- Significant amount of pre-work with individuals
- Parties are not required to meet but they can
- Parties define resolution on their own terms
- Regulations permit agreement on imposition of penalties and/or sanctions



## Pros

- Most parties leave with a great understanding of the impact of the situation
- Involvement of peripheral members of the community

## Cons

- Time-consuming
- Expertise necessary
- Expensive

# Other Informal Resolution Options



- Arbitration-like proceedings
- Hybrid approach
- Creative options



# Title IX - Protecting the Process



# Impartiality



- Be neutral – neither pro-Complainant nor pro-Respondent
- Confront and understand bias and not allow it to impact decision
- Maintain open mind as to the potential conclusions

# Conflicts of Interest



- Relationship to parties or witnesses
- Professional conflicts
- Personal conflicts
- Actual and perceived

# Stereotypes



- “A fixed, over generalized belief about a particular group or class of people.”  
(Cardwell, 1996)
- Stereotypes around sexual assault
- Stereotypes around sexual harassment
- Complainant and Respondent



- Conscious/Explicit
  - Discriminatory intent
  - Stated preferences
- Unconscious/Implicit
- For the most part, most people are unaware of these drivers
- Developed over a period time and can influence many factors in hearing
- Short cuts developed by the brain and often play a role in:
  - Immediate response to conflict
  - Often mimics fear responses



# Other Considerations

# Informal Resolution



- Might not be appropriate for all cases
- Emotions may run high in the process
- With minors, challenges presented when parent serves as advisor
- Process can be time-consuming
- When to schedule breaks?
- When to resume?
- Resolution documentation prepared
- Timeline is important



# Final Points

1. Your certificate of completion will be sent to you this week, along with all the other resources shared during the program.
2. Keep and post a copy of slides from the training on your website.
3. Reach out with any follow-up questions:  
[office@titleixconsult.com](mailto:office@titleixconsult.com)



Thank You!

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