



PRESSURES, POLITICS, SANCTIONS, MINORS & MOUs:  
TITLE IX COORDINATOR AND ADMINISTRATOR  
LEVEL TWO TRAINING & CERTIFICATION

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June 4th – 5th, 2019 | Minneapolis, MN

# FACULTY



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# COURSE AGENDA



## Day 1

- I. Structuring Your Title IX Team
- II. Leveraging and Empowering Title IX Coordinator Authority
- III. Adjudication Process
- IV. Athletics & Title IX
- V. Pregnancy & Title IX
- VI. Title IX & Transgender Students
- VII. Minors & Title IX
- VIII. Section 504

## Day 2

- I. Sanctioning Best Practices
- II. Appeals
- III. Managing Politics and Pressure
- IV. Managing the Media
- V. MOUs
  - A. Local Law Enforcement
  - B. Advocacy Organizations
  - C. Local Schools (PreK-12)

\* Please note PreK-12 refers only to PreK programs as part of school systems.

# A NOTE ABOUT TERMINOLOGY



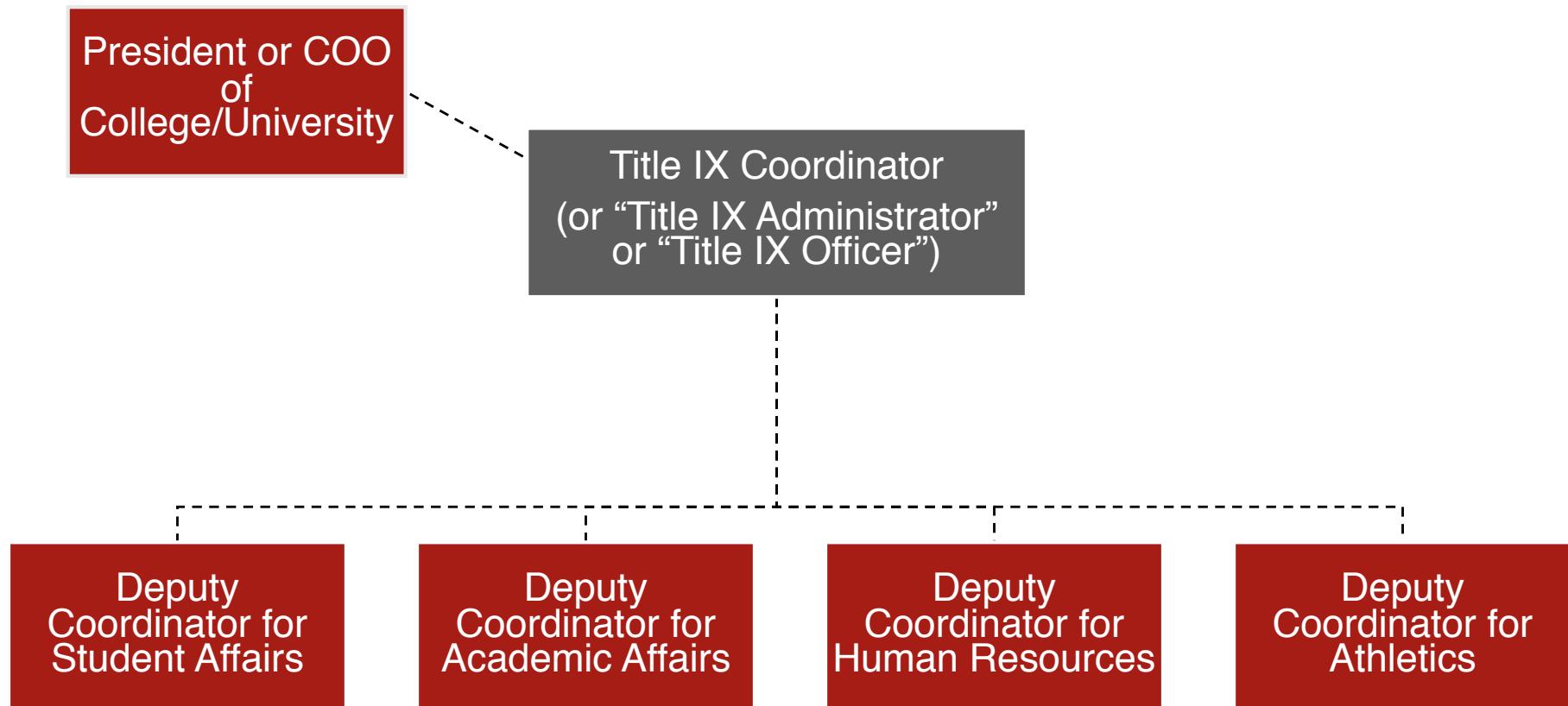
- “Victim” versus “survivor.”
  - Complainant, accuser, and **reporting party**.
- Gender pronouns.
- Rape, sexual assault, sexual violence, and sexual misconduct.
  - Any nonconsensual contact between two or more people, regardless of gender, act, or gratuitous violence.
  - Law vs. campus policy.
- Relationship/Interpersonal violence.
  - Dating violence and domestic violence/abuse.
- Accused, respondent, perpetrator, and responding party.

# STRUCTURING YOUR TITLE IX TEAM

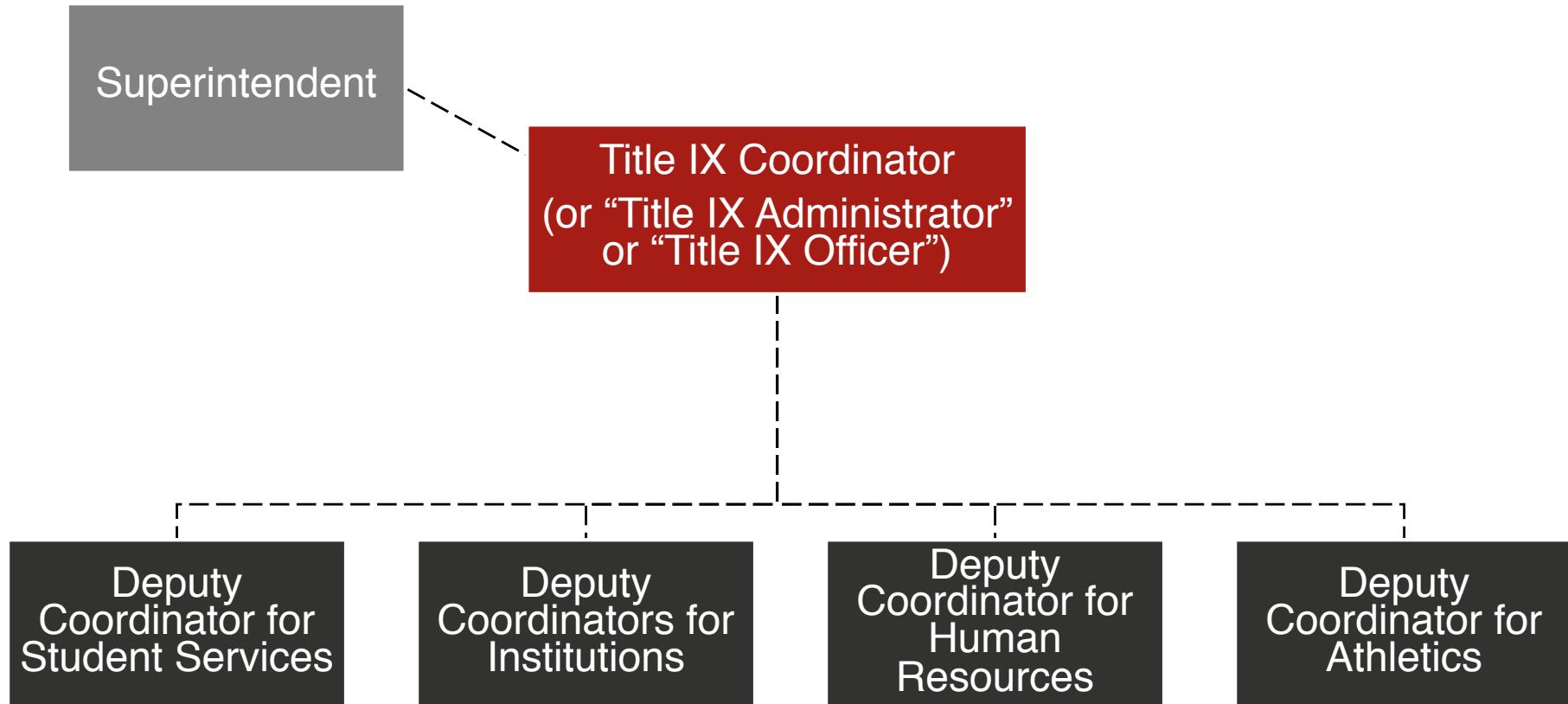
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- Sample Core Team Structure
- Extended Team
- Discussion Questions

# SAMPLE TITLE IX TEAM STRUCTURE - HIGHER EDUCATION



# SAMPLE TITLE IX TEAM STRUCTURE – PREK-12



# TITLE IX TEAM STRUCTURE: ADDITIONAL ISSUES



- Job responsibilities of Deputy Coordinators?
  - Tailor scope and roles based on campus culture.
  - Delegation.
- Multiple campuses/locations.
  - Campuses within a larger system (e.g. SUNY schools).
  - Extension campuses.
  - Online communities.
  - District-level (PreK-12 and Community Colleges).
- Co-Coordinators?
- Dual-enrollment oversight?
- Investigator oversight.
- How is your campus/district/school structured?

# TITLE IX EXTENDED TEAM



- Include key constituencies not represented on core team.
  - General Counsel
  - Residence Life
  - Greek Life
  - Public Safety
  - School Resource Officer
  - School Counselors
  - Others
- Regular meetings and coordination.
- Training and programming.
- Interaction with BIT.

# TITLE IX TEAM DISCUSSION QUESTIONS



- What does your core team look like?
  - Structure.
  - Roles and functions.
- What does your extended team look like (if applicable)?
- What is working?
- What is not working?
- What would improve your team/s and its/their functioning?

# THE COORDINATOR: ADVANCED QUESTIONS CONFLICTS OF INTEREST?



- What does this mean?

*However, when designating a Title IX coordinator, a recipient should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest. For example, designating a disciplinary board member, general counsel, dean of students, superintendent, principal, or athletics director as the Title IX coordinator may pose a conflict of interest (2015 DCL on Title IX Coordinators, p. 3).*

# THE COORDINATOR: ADVANCED QUESTIONS FULL-TIME COORDINATOR?



- *Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role's responsibilities. If a recipient designates one employee to coordinate the recipient's compliance with Title IX and other related laws, it is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution, including those raising Title IX issues (2015 DCL on Title IX Coordinators, p. 3).*

# THE COORDINATOR: ADVANCED QUESTIONS MULTIPLE COORDINATORS?



- *Although not required by Title IX, it may be a good practice for some recipients, particularly larger school districts, colleges, and universities, to designate multiple Title IX coordinators. For example, some recipients have found that designating a Title IX coordinator for each building, school, or campus provides students and staff with more familiarity with the Title IX coordinator. This familiarity may result in more effective training of the school community on their rights and obligations under Title IX and improved reporting of incidents under Title IX. A recipient that designates multiple coordinators should designate one lead Title IX coordinator who has ultimate oversight responsibility. A recipient should encourage all of its Title IX coordinators to work together to ensure consistent enforcement of its policies and Title IX (2015 DCL on Title IX Coordinators, p. 3).*

# LEVERAGING & EMPOWERING TIX COORDINATOR AUTHORITY

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- 2015 OCR Guidance & Resources
- Discussion

# 2015 LETTER TO TITLE IX COORDINATORS



- Thanks coordinators for their service and efforts.
- Stresses the centrality and import of the Title IX coordinator's work and responsibilities.
  - “You must have the full support of your institution.”
- Introduces the April 2015 “Dear Colleague Letter” to superintendents and presidents.
- Introduces the Title IX Resource Guide.

# APRIL 2015 DEAR COLLEAGUE LETTER: TITLE IX COORDINATORS



- Sent to all PreK-12 superintendents and all college presidents.
- Specifically applied the 2011 DCL on sexual violence to PreK-12.
- Targets the responsibilities, function, and centrality of the Title IX coordinator role.
- Reiterates requirement to designate a Title IX coordinator.
- Must have necessary positional and actual authority to perform their role.

# 2015 DCL: KEY TITLE IX COORDINATOR CONSTRUCTS



- Independence.
  - Coordinator should report to senior leadership (e.g. president or superintendent).
  - Avoid conflicts of interest.
- Full-time?
  - “it is critical that the employee has the qualifications, training, authority, and **time** to address all complaints throughout the institution.”
- Multiple/deputies.
  - Must have “**one lead** Title IX Coordinator who has ultimate oversight responsibility.”

# 2015 DCL TITLE IX COORDINATOR



- Responsibility and authority.
  - Notified of **ALL** Title IX-related reports and complaints.
  - Coordinate all responses to complaints.
  - Monitor all outcomes.
  - Identify and address patterns.
  - Assess campus climate.
  - May determine outcome or institutional response to complaint.
  - Must be protected from retaliation.

# 2015 DCL TITLE IX COORDINATOR



- **Visibility.**
  - Notice of non-discrimination with Title IX and Coordinator information posted and included in virtually all publications, materials, and websites.
  - Encourages Title IX-specific website.
- **Training.**
  - Institutions must ensure coordinators are well-trained and up-to-date on all responsibilities and all applicable laws, policies, guidance, regulations, institutional policies, and procedures.

# TITLE IX RESOURCE GUIDE (2015)



- Broad-ranging, topically-organized summary guide for coordinators.
  - Intended to help coordinators perform their jobs and receive needed support from their institutions.
- Topics addressed:
  - Scope of Title IX.
  - Coordinator's responsibilities.
  - Administrative requirements and oversight.
    - E.g.: Grievance procedure requirements and notice of nondiscrimination.

# TITLE IX RESOURCE GUIDE (2015)



- Topics addressed (cont.):
  - Key Title IX issues:
    - Recruitment, admissions, and counseling.
    - Financial assistance.
    - Athletics.
    - Sex-based harassment.
    - Pregnant and parenting students.
    - Discipline.
    - Single-sex education.
    - Employment.
    - Retaliation.
  - Information collection and reporting.

# DISCUSSION LEVERAGING YOUR AUTHORITY



- What have you or your institution done to:
  - Leverage your authority and/or empower your position?
  - Enhance your institutional profile?
  - Get buy-in from senior leadership?
  - Get more resources:
    - For resolution-based efforts? (e.g. investigators)
    - For programming and education efforts?
    - For training efforts?
- What are you struggling with most?
- What has not worked?

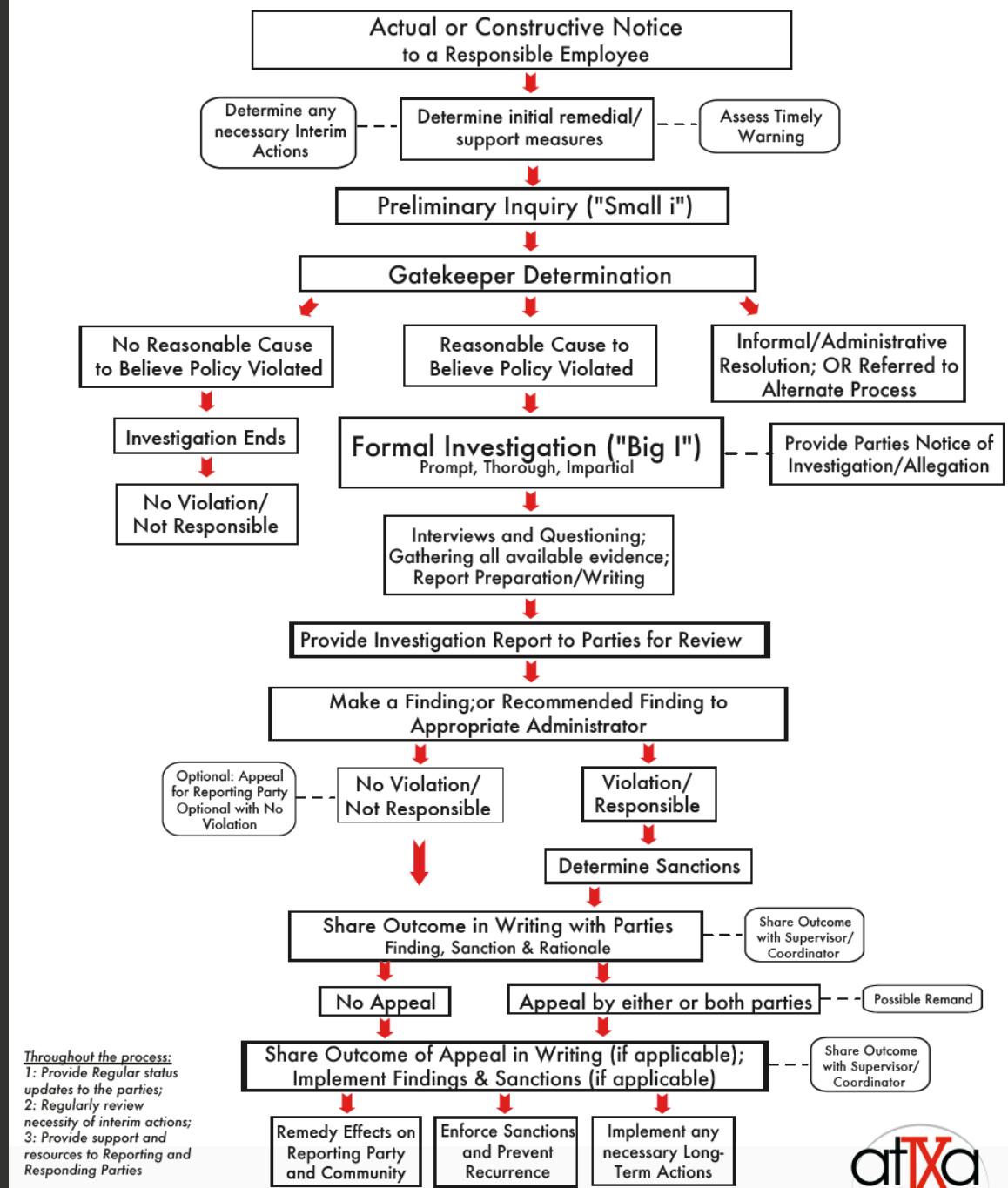
# ADJUDICATION PROCESS DISCUSSION

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- Flowcharts

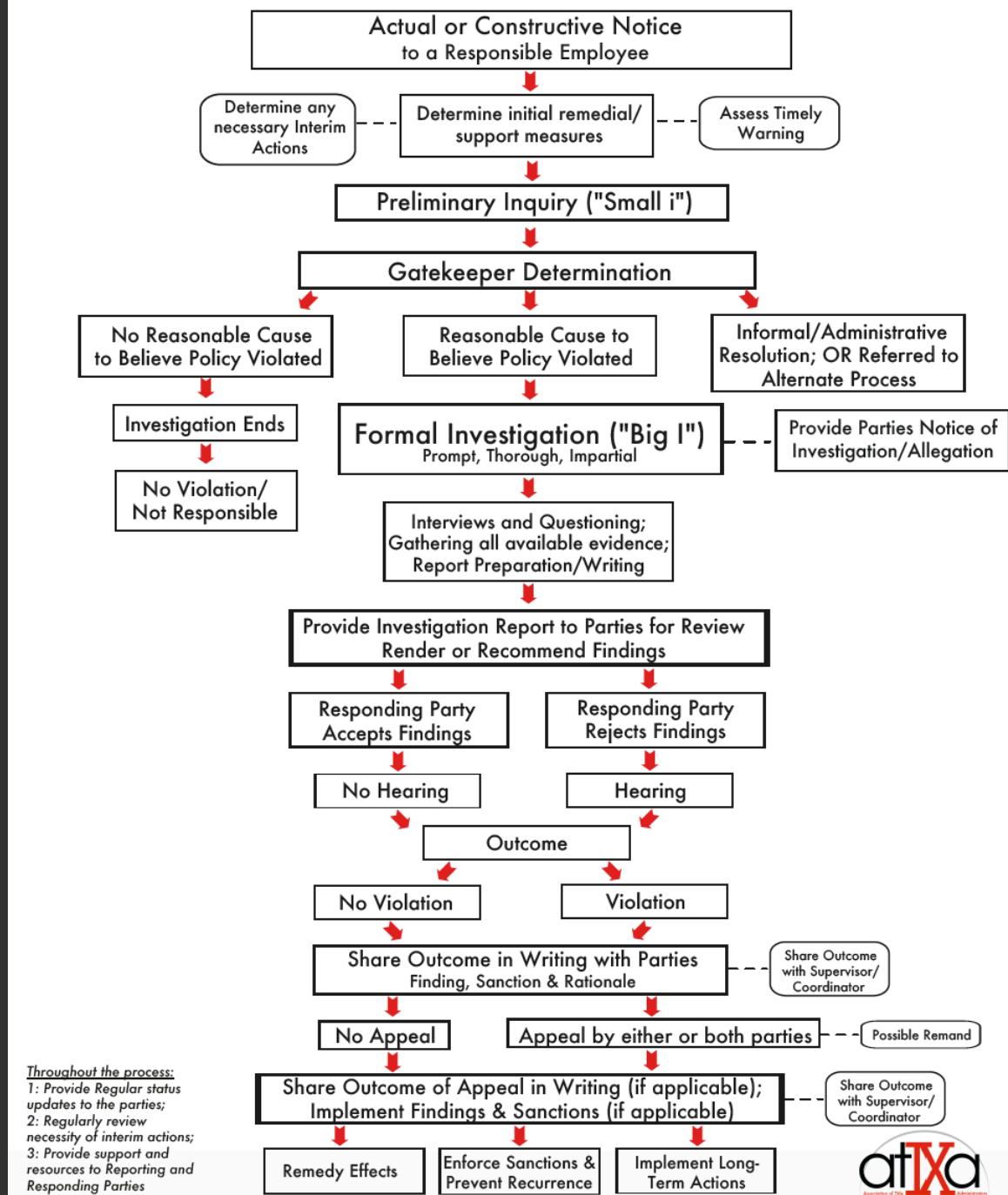
# CIVIL RIGHTS INVESTIGATION MODEL

## ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



## INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART

# INVESTIGATION AND HEARING PANEL HYBRID MODEL



# WHO RENDERS THE FINDING?



- Variations in role of decision process.
  - Investigator renders the finding.
  - Investigator recommends the finding to an administrator or hearing panel.
  - Investigator presents investigation report to administrator or hearing panel with findings.
  - Investigator presents investigation report to administrator or hearing panel without findings.
- Importance of investigation report.
  - How much credibility assessment and analysis to include?

# WHAT ABOUT AN IN-PERSON HEARING?



- A formal in-person hearing, whether with a panel or an administrator, is increasingly viewed as necessary by the courts and OCR.
- Hearings facilitate the parties ability to review all available evidence and ask questions of witnesses and each other.
- A well-conducted civil rights investigation can result in an accepted finding and waiver of hearing by the responding party.
- Waivers must be freely decided and non-coerced.
- Hearings can still occur when information is contested.

# WHAT ROLE DOES THE INVESTIGATOR PLAY IN AN EVENTUAL HEARING?



- The investigator is often the key witness at any hearing.
- The investigation report is admitted as evidence (redacted).
- Other witnesses can be called, or the investigator may summarize their testimony instead.
- If credibility must be assessed, it needs to be assessed in person by the decision-maker(s).
- The investigator's finding should not influence the hearing, so may be appropriate to withhold/redact that information and allow the decision-maker to be fully objective/impartial.

# DISCUSSION OF YOUR PROCESS...



- How is your process structured?
- What is working well?
- What is not working well?
- What are your biggest concerns?
- How do your student and employee processes differ?
- What questions do you have regarding your process for your colleagues and the presenters?

# ATHLETICS GENDER EQUITY CONSIDERATIONS

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- Title IX Requirements
- Oversight of Athletics
- Equal Treatment Regulations



# OVERSIGHT OF ATHLETICS GENDER EQUITY



- Title IX compliance requirements:
  - Effective accommodation of interests and abilities.
  - Financial assistance proportionality.
  - Treatment of student-athletes.
- **Compliance** may be delegated to the senior women's administrator or compliance officer in athletics.
- The oversight of compliance remains the responsibility of the Title IX coordinator.
  - Need for outside education.
- The dangers of being both.

# TITLE IX & ATHLETICS



- Applies to:
  - Intercollegiate athletics
  - Interscholastic athletics
  - Intramurals
  - Club teams/sports
- However, 3-Part Test and the 13 program components are typically not as problematic for Intramurals and Clubs because those programs are typically self-initiated and benefits provided by the institution are far fewer.

# TITLE IX & ATHLETICS



- Title IX DOES require an institution to:
  - Provide an equal opportunity for female and male students to become intercollegiate, interscholastic athletes etc.
    - Analyzed by means of the three-part test
  - Provide equivalent treatment of participants in the overall women's program as compared to the overall men's program.
    - Analyzed according to 13 different program components.

Source: Valerie McMurtrie Bonnette (2004), Title IX and Intercollegiate Athletics, p.7.

# TITLE IX & ATHLETICS



- Title IX does not require an institution to:
  - Provide the same funding to the overall women's and men's programs
  - Provide the same funding to men's and women's teams on the same sport
  - Provide specific benefits to teams
  - Offer the same number of teams for men and women
  - Offer the same sports for men and women
  - Provide the same benefits to men's and women's teams in the same sport
  - Compete at a specific level

Source: Valerie McMurtrie Bonnette (2004), Title IX and Intercollegiate Athletics, p.7.

# OVERSIGHT OF ATHLETICS

## GENDER EQUITY: THREE-PART TEST (1979)



### Effective accommodation of interests and abilities:

- **Part 1:** Opportunities for males and females substantially proportionate to their respective enrollments; OR
- **Part 2:** Where one sex has been underrepresented, a history and continuing practice of program expansion responsive to the developing interests and abilities of that sex; OR
- **Part 3:** Where one sex is underrepresented and cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program.

# COUNTING PARTICIPANTS



- For purposes of Title IX compliance, a “participant” is defined as those athletes who:
  - Regularly receive institutionally-sponsored support normally provided to athletes
  - Regularly participate in organized practices or team meetings and activities during the season
  - Are listed on the eligibility or squad list
  - Are injured, but continue to receive financial aid on the basis of athletic ability

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

# COUNTING PARTICIPANTS



- “Participants” also include those who:
  - Are listed on a team's squad or eligibility list AND are on the team as of the team's first competitive event
  - Join the team during the season\*
  - Are a walk-on
  - Are a member of the JV, freshman, “B” team, etc.
  - Quit or were cut after the first competitive event
  - Are a Redshirt athlete
  - Are a mid-year transfer eligible to participate in the spring

\*Season begins on the date of a team's first intercollegiate competitive event and concludes on the date of the final intercollegiate competitive event.

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation; OCR (1996). Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test; Bonnette, pp. 91-92.

# COUNTING PARTICIPANTS



- The following are not participants:
  - Unfilled team slots or positions
  - Club, intramural, and recreation program participants
  - Cheerleaders\*
  - Athletes who quit or are cut BEFORE first competitive event of the season
  - Sport participants out of season (e.g.: spring football)
  - Scrimmage or practice squads
  - Student managers,\* student coaches,\* student trainers\*
  - Students who are academically ineligible
  - Mid-year transfers, if no spring season

\*Even if they receive scholarships

Source: HEW (1979). *Intercollegiate Athletics Policy Interpretation*; OCR (1996). *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*; Bonnette, pp. 91-92.

# PART 1: PROPORTIONALITY



- Opportunities for males and females substantially proportionate to their respective enrollments
  - Substantially proportionate accounts for natural fluctuations in enrollment and participation rates, but institutions must adjust if shifted enrollment or participation shifts persist
  - OCR uses a case-by-case analysis, rather than a rigid statistical requirement (e.g.: within 1% of student body)
  - OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team

Source: OCR (1996). *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*.

## PART 2: PROGRAM EXPANSION



- History and continuing practice of program expansion responsive to the developing interests and abilities of the underrepresented sex
  - In analyzing a history of program expansion, OCR considers:
    - An institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
    - An institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
    - An institution's affirmative responses to requests by students or others for addition or elevation of sports.

Source: OCR (1996). *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.*

## PART 2: PROGRAM EXPANSION



- History and continuing practice of program expansion responsive to the developing interests and abilities of the underrepresented sex
  - In analyzing a continuing practice of program expansion, OCR considers:
    - An institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
    - An institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

Source: OCR (1996). Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.

# PART 3: FULL ACCOMMODATION



- Whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program
  - OCR will consider whether:
    - There is sufficient unmet interest to support an intercollegiate team.
    - There is sufficient ability to sustain an intercollegiate team.
    - There is a reasonable expectation of competition for the team.

Source: OCR (1996). Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.

# LEVELS OF COMPETITION



## OCR assesses compliance by examining:

1. Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; OR
2. Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

# FINANCIAL ASSISTANCE



- Must provide reasonable opportunities for financial assistance to members of each sex in proportion to the participation rate of each sex in intercollegiate athletics.
  - Does NOT require same number of scholarships for men and women or scholarship of equal value.
- Total amount awarded must be “substantially proportionate to the participation rates” of men and women in the institution’s athletic programs
- Disparities could be non-discriminatory in origin
  - E.g.: in-state vs. out-of-state recruits; reasonable professional decisions
- Also applies to work-related aid programs or loans

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

# EQUAL TREATMENT REGULATIONS

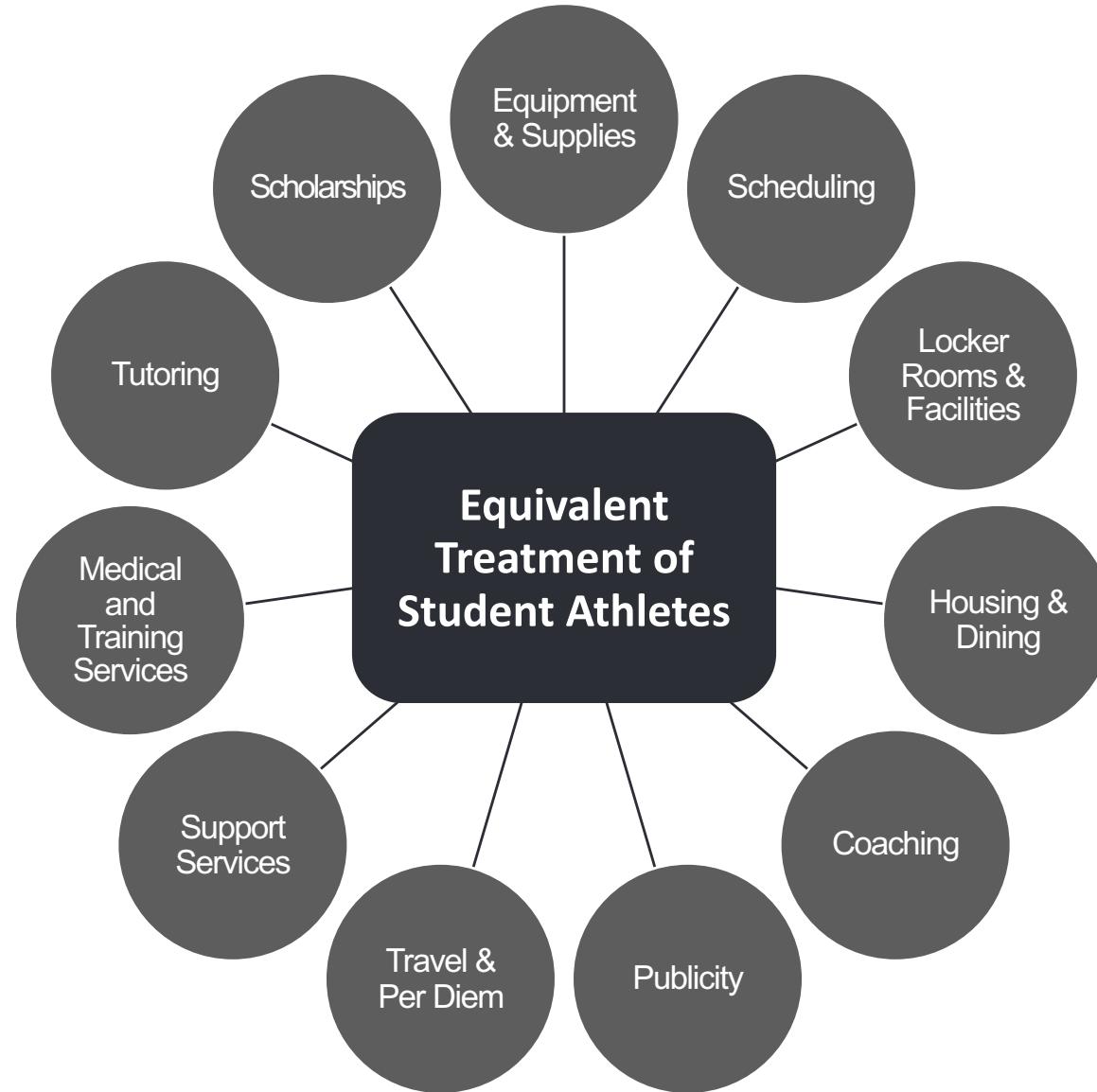


## Equal opportunity:

A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the director will consider, among other factors:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice, and competitive facilities;
8. Provision of medical and training facilities and services;
9. Provision of housing and dining facilities and services; and
10. Publicity.

# OVERSIGHT OF ATHLETICS GENDER EQUITY



# ATHLETICS: SEXUAL HARASSMENT CONSIDERATIONS

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- Lessons from Cases
- Violence Against Women in the Athletic Department
- Unique Challenges

# LESSONS FROM CASES: REVISITED



- ***Simpson v. Univ. of Colorado Boulder.*** 500 F.3d 1170 (10th Cir. 2007).
  - Recruiting visits.
  - Off-campus parties.
  - Climate.
- ***Williams v. Bd of Regents of Univ. of Georgia.*** 477 F.3d 128 (11th Cir. 2007).
  - Recruit histories.
- ***Jennings v. UNC Chapel Hill.*** 482 F.3d 686 (4th Cir. 2007).
  - Climate in locker room.
  - Player evaluation meetings.

# PREVALENCE OF VIOLENCE AGAINST WOMEN IN THE ATHLETIC DEPARTMENT



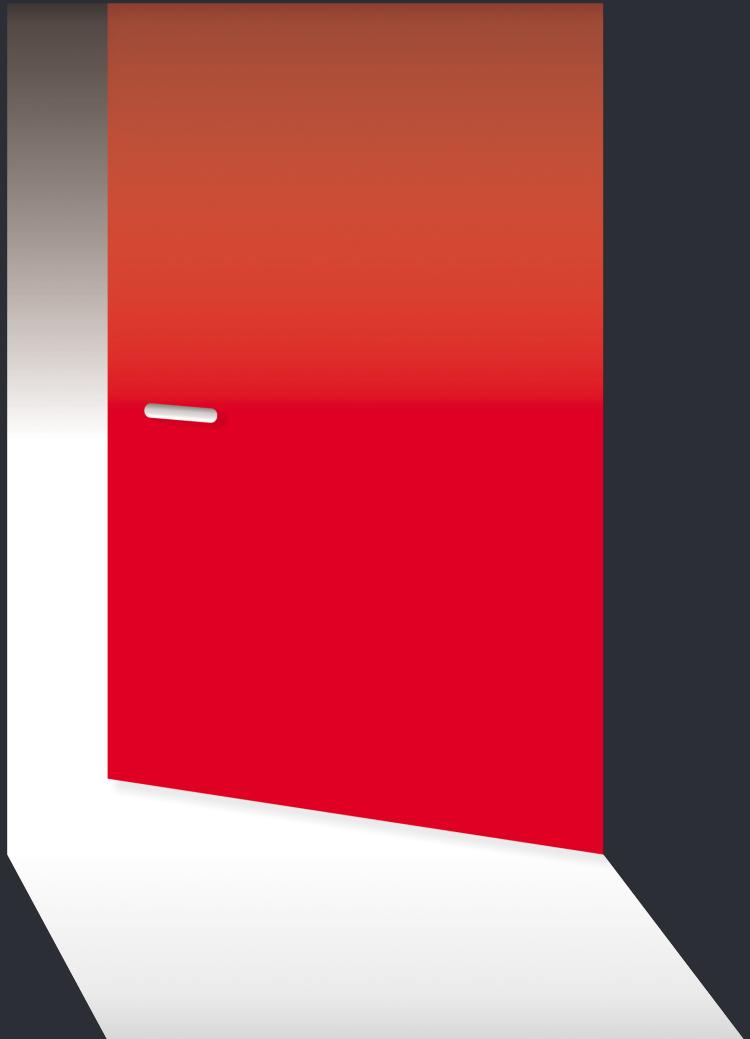
- Male athletes are more represented in violence against women statistics vs. their non-athlete counterparts.
- Male student athletes = 3.3% of student population.
  - 19% of sexual violence.
  - 35% of domestic violence.

Source: Benedict and Crossett, et al., Male Student Athletes and Violence Against Women: A Survey of Campus Judicial Offices, Journal of Sport and Social Issues, Vol. 19 No. 2, pp. 126-140, 1995.

# UNIQUE CHALLENGES



- Athletic department hostile educational environment.
- Student-athlete on student-athlete violence.
- Offender coach involvement.
- Offender and victim coaching pressures.
- Power dynamics or revenue vs. non-revenue sports.
- Focus on body.
- Male privilege.
- The power of a coach.
- Insular.



## **How to get in the door with compliance in the athletic department:**

Building the necessary relationships for  
future compliance

# PREGNANCY & TITLE IX

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*“A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.”*

*34 C.F.R. 106.40*

- June 2007 “Dear Colleague Letter”
- June 2013 DCL on Pregnant and Parenting Students
- Regulatory Language
- Case Discussion

# OCR, TITLE IX, AND PREGNANCY



- Admissions
- Academics
  - Registration
  - Coursework Accommodation and Completion
- Residence Halls
- Extra-curricular Activities
- Athletics
- Health Insurance Coverage
- Employment
  - Hiring
  - Benefits and bonuses
  - Leave and job protection upon return from leave

# PREGNANCY & TITLE IX: CULTURAL VARIABLES AND CHALLENGES



- Pervasive and systemic discrimination against women
- Male-as-breadwinner: Historical context
- Power and privilege
- Body integrity and choices
- Degree completion percentages
- The “Mommy Track”
- Academic and institutional deadlines, timeframes, and requirements that do not account for pregnancy
- Fear of women “abusing” accommodations or exceptions
- Accommodations often require more work on our part

# PREGNANCY & TITLE IX: CULTURAL VARIABLES AND CHALLENGES



- Admissions and hiring barriers
- Blaming women for their pregnancy
- Belief that pregnancy weakens a person
- The “inconvenience” created by a pregnant student or employee
- Conflicting valuation of priorities
- Perception of “special treatment”
- Religious beliefs on birth control, pregnancy, abortion, etc.
- Confluence of pregnancy with racial, ethnic, and other cultural variables
- What else?

# PREGNANCY & TITLE IX: LEGAL FRAMEWORK

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# OCR, TITLE IX, AND PREGNANCY



## June 25, 2007 “Dear Colleague Letter”

- Affirms the application of the pregnancy-related portions of the regulations to athletics departments, and summarized a school's obligations to pregnant student-athletes.
- The June 25, 2007 DCL also includes:
  - Information on how to develop programs to support these students;
  - An overview of students' rights under Title IX; and
  - Guidance on how to share your complaint if you feel your rights are not being met.
- While the pamphlet is focused on secondary education, the DCL states that “legal principles apply to all recipients of federal financial assistance, including postsecondary education.”

# PREGNANCY & TITLE IX



- June 25, 2013 DCL on pregnancy and parenting students:
  - Educators must ensure pregnant and parenting students are not discriminated against.
  - Educators must ensure that pregnant and parenting students are fully supported in preparation for graduation and careers.
  - Secondary school administrators, teachers, counselors, and parents must be well educated on the rights of pregnant and parenting students as provided under Title IX.

# PREGNANCY & TITLE IX: REGULATORY LANGUAGE

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*“A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.”*

*34 C.F.R. 106.40*

# PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



## Pregnancy defined

- “Pregnancy and related conditions:

A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.” 34 C.F.R. 106.40

# PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



## Physician Certification

- “Pregnancy and related conditions (cont.):

A recipient **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation in the normal education program or **activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.**” 34 C.F.R. 106.40

# PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



## Pregnancy as Temporary Disability

- “Pregnancy and related conditions (cont.):

A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom **in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.” 34 C.F.R. 106.40

# PREGNANCY & TITLE IX: TITLE IX REGULATORY LANGUAGE



## Leave Policies

- “Pregnancy and related conditions (cont.):

In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as **a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.**”

34 C.F.R. 106.40

# PREGNANCY & TITLE IX: OCR GUIDANCE



- “A school **may require** a pregnant student or student who has given birth **to submit medical certification** for school participation **only if the school also requires such certification from all students with physical or emotional conditions requiring the attention of a physician.**”
- “Thus, for example, a student who has been hospitalized for childbirth must not be required to submit a medical certificate to return to school if a certificate is not required of students who have been hospitalized for other conditions.”

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 6.

# PREGNANCY & TITLE IX: OCR GUIDANCE



- “Schools cannot require a pregnant student to produce a doctor’s note in order to stay in school or participate in activities, including interscholastic sports, unless the same requirement to obtain a doctor’s note applies to all students being treated by a doctor.”
- “That is, schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; schools should not presume that a pregnant student is unable to attend school or participate in school activities.”

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 8.

# PREGNANCY & TITLE IX: OCR GUIDANCE



- “When the student returns to school, **she must be reinstated to the status she held when the leave began**, which should include giving her the opportunity to make up any work missed.”
- “A school may offer the student alternatives to making up missed work, such as:
  - Retaking a semester.
  - Taking part in an online course credit recovery program, or
  - Allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave.
- The student should be allowed to choose how to make up the work.”

Source: Department of Education (June 2013), Supporting the Academic Success of Pregnant and Parenting Students, p. 10.

# ATHLETICS, PREGNANCY & TITLE IX



- NCAA Guidance
  - A pregnant student-athlete's physician should make medical decisions regarding sports participation.
  - A student-athlete with a pregnancy-related condition must be provided with the same types of modifications provided to other student-athletes to allow continued team participation.
  - Pregnant student-athlete cannot be harassed due to pregnancy.
  - A student-athlete whose athletic career is interrupted due to a pregnancy-related condition will typically be entitled to a waiver to extend her athletic career.

Source: NCAA, Pregnant and Parenting Student-Athletes

# SPECIAL TOPICS



- Nursing rooms, mothers' lounges, etc.
- Children at school and in the classroom...No.
- Residence halls
  - Cannot remove prior to birth of child
  - Refund
  - Help
- Labs, chemicals, exposure to diseases, etc.
  - Reasonable restrictions for health and safety (as deemed by a physician) are permitted.
- Cohort programs
- Licensure requirements

# SUPPORTING STUDENTS



- Develop support networks for students
  - E.g.: Pregnant and parenting student organizations (all-comers)
  - Classes: Pre-natal classes, parenting, life-skills, etc.
  - Work with student government
  - Harness knowledge and experience from employee programs
- Supporting partners or spouses
  - Leave and/or excused absences
  - Treat with equal dignity and understanding
  - Stop asking “what do we have to do?” and instead shift to “what can we do?”

# STRATEGIES FOR COMPLIANCE



- Detailed institutional policies
- Institutional enforcement procedures
- Centralized grievance process
- Title IX Coordinator's central role
- Develop a Resource Guide
- **Train and educate** students, faculty, staff, administrators, coaches
- Flexibility (when possible) with course tracks
- Posters in residence halls and student spaces
- Work with Case Manager
- Focus on supportive services

# TRAINING FOR STUDENTS



- Title IX's requirements and protections
- How to file a complaint
- Who is the TIX Coordinator (and deputies)?
- Online resources and tools
- Online reporting mechanism
- Empower to approach faculty, coaches, and administrators
- Train students to support each other
- Develop and support programming that targets barriers and problematic social context

# TRAINING FOR FACULTY



- Faculty are typically the biggest area of institutional non-compliance with Title IX and pregnancy
- Title IX's requirements
  - Faculty should know that compliance often does require more effort on the part of faculty
  - Referral to Title IX Coordinator
- Provide faculty with a resource handout they can provide to students
- Blaming the student is NEVER acceptable
- Title IX Coordinator should:
  - Train all faculty on requirements
  - Develop working relationships with Deans' offices and Department Chairs (when possible)

# PREGNANCY & TITLE IX CASE DISCUSSION



- January 2018: Jill, a student, has had a difficult pregnancy and is six months pregnant. She has been able to maintain solid grades up to this point, but has just been informed by her doctor that she must stay in bed for the remainder of her pregnancy. She approaches her advisor and asks him what her options are with her coursework.



# PREGNANCY & TITLE IX CASE DISCUSSION



- Sasha is an elementary education teacher who has fulfilled all of her course requirements and is one-third of the way through her required student teaching experience when she has a baby. She faced medical complications with the birth and her doctor tells her she will miss at least a month of her student-teaching. If her graduation date is delayed, she will miss that year's hiring cycle.
- What are some possible approaches?



# TITLE IX & TRANSGENDER STUDENTS

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- OCR...?
- Common Concerns and Current Challenges
- Specific Issues
  - Sexual violence
  - Pronouns, preferred name
  - Athletics
  - Restrooms and locker rooms
  - Fraternities and sororities
  - Housing

# TERMINOLOGY



- **Sex:** References chromosomes, hormones, reproductive organs, and genitalia.
- **Gender:** Refers to the attitudes, feelings, and behaviors that a given culture associates with biological sex.
- **Gender Identity:** Internal sense of gender.
- **Gender Expression:** Outward expression of gender, often through clothing, behavior, posture, mannerisms, speech patterns, and activities.
- **Sexual Orientation:** Attracted to sexually or romantically, on a continuum (e.g. gay, lesbian, bisexual, heterosexual, asexual, and pansexual).

# TERMINOLOGY (CONT.)



- **Queer:** An umbrella term referring to LGBTQI individuals, and/or a nonbinary term used to reflect a fluid gender identity than societal gender “norms”
- **Cisgender:** Gender identity is consistent with the sex they were assigned at birth.
- **Transgender:** Umbrella term referring to a wide range of persons whose gender identity or expression may not match the gender assigned at birth.
- **Bisexual:** Attracted to people of the same as well as other genders.

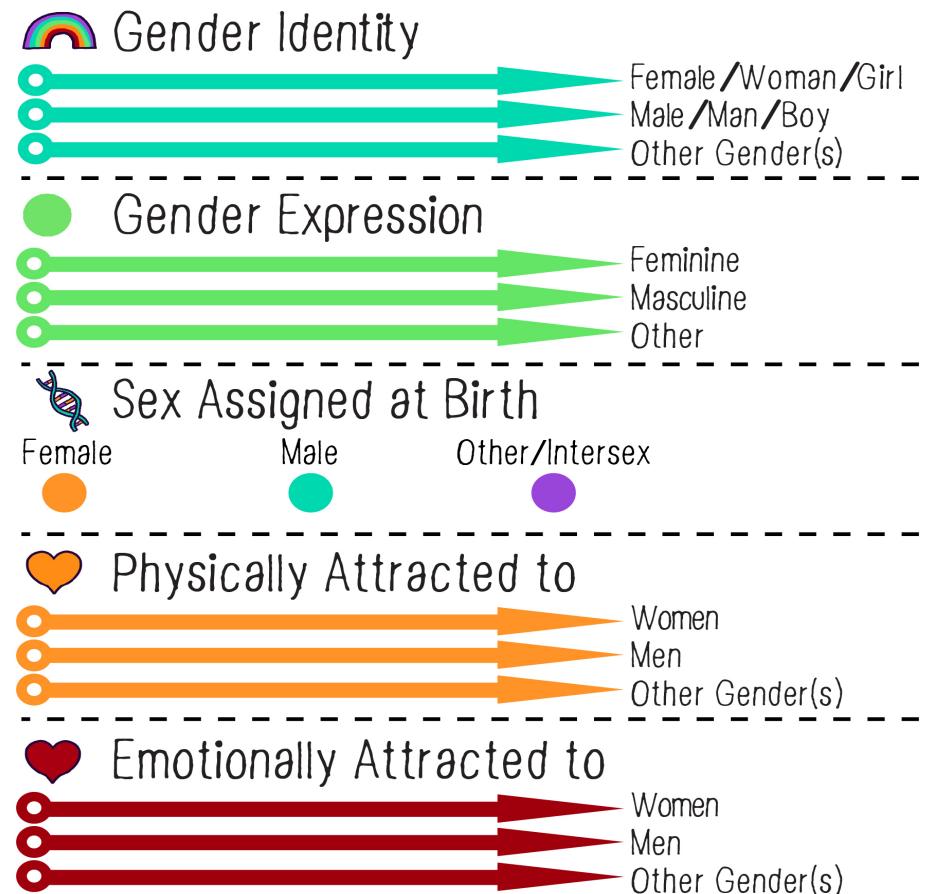
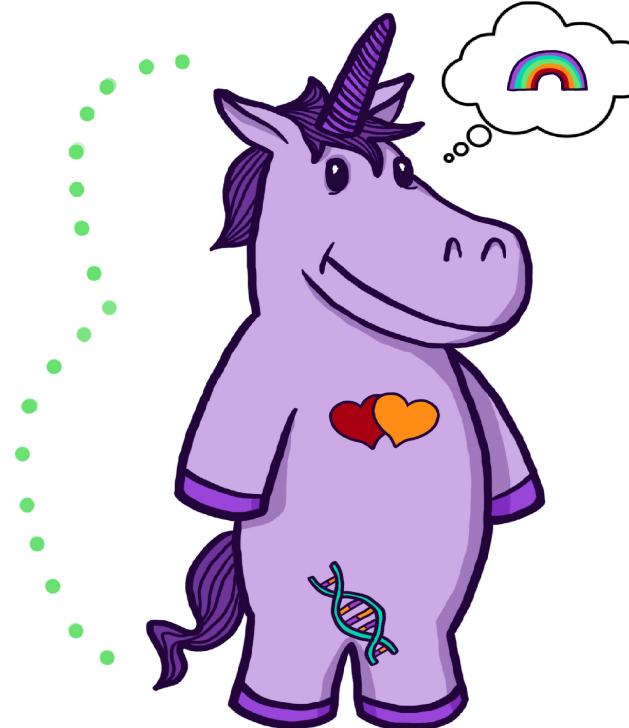
## TERMINOLOGY (CONT.)



- **Heterosexual:** Attracted to people of a gender other than their own.
- **Asexual:** Minimal or no sexual attraction to others.
- **Intersex:** Born with genitalia, reproductive systems, and/or sex chromosomes of both males and females.
- **Pansexual:** Attracted to people regardless of gender.

# The Gender Unicorn

Graphic by:  
**TSER**  
Trans Student Educational Resources



To learn more, go to:  
[www.transstudent.org/gender](http://www.transstudent.org/gender)

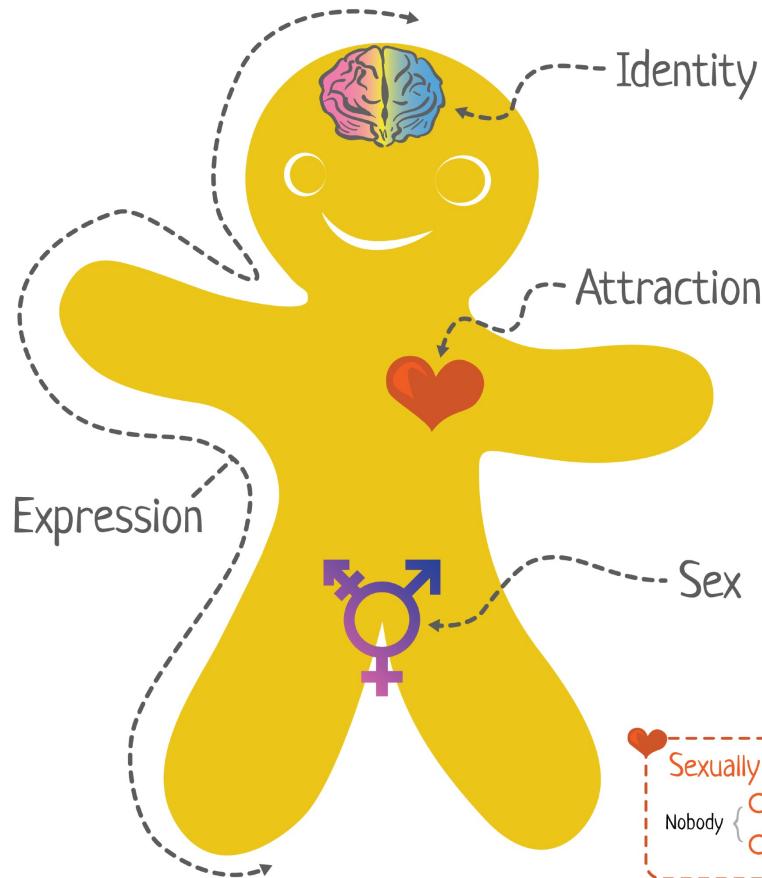
Design by Landyn Pøn and Anna Moore

# TITLE IX & TRANSGENDER STUDENTS



## The Genderbread Person v3.3

Gender is one of those things everyone thinks they understand, but most people don't. Like *Inception*. Gender isn't binary. It's not either/or. In many cases it's both/and. A bit of this, a dash of that. This tasty little guide is meant to be an appetizer for gender understanding. It's okay if you're hungry for more. In fact, that's the idea.

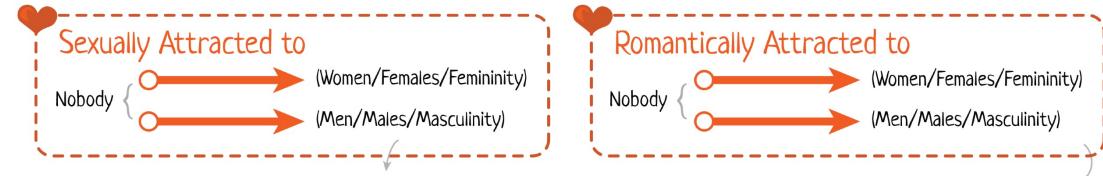
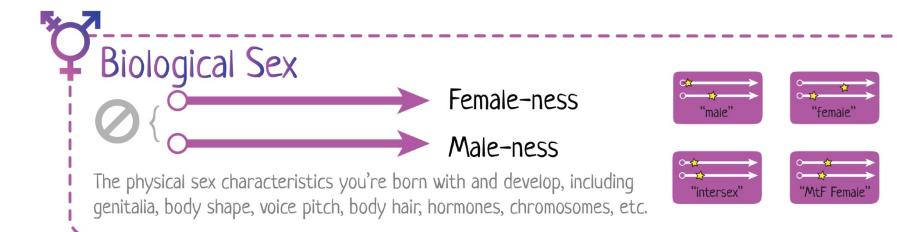
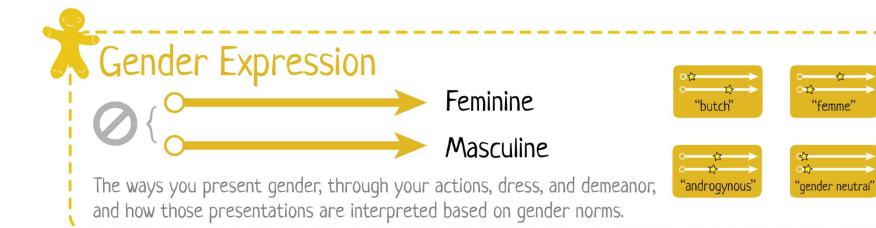
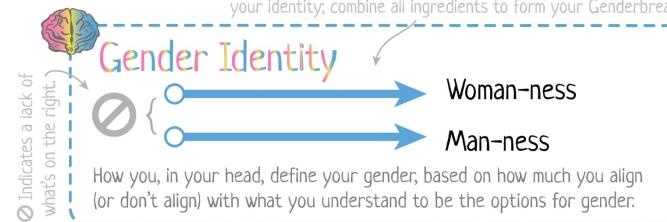


For a bigger bite, read more at <http://bit.ly/genderbread>

by it's pronounced METROsexual.com

Plot a point on both continua in each category to represent your identity; combine all ingredients to form your Genderbread

4 (of infinite) possible plot and label combos



# TITLE IX & TRANSGENDER STUDENTS



- In May 2016, OCR released a Dear Colleague Letter specifically addressing Title IX's protections for transgender students.
- In February 2017, OCR revoked the DCL.
- In February 2017, ATIXA updated and re-released its position statement on Title IX, Gender Identity, and Gender Expression.
  - ATIXA believes that Title IX does protect students on the basis of gender identity.
- EEOC and numerous courts have determined gender identity is protected under Title VII.
- Sex and gender stereotypes and “gender non-conformity”

# TITLE IX & TRANSGENDER STUDENTS



- Transgender students are disproportionately subjected to harassment and discrimination.
- Sexual violence statistics from the AAU's 2015 Climate Survey of 150,000 students:
  - Those identifying as TGQN have rates comparable, or in many cases slightly higher, than females.
  - Sexual misconduct involving penetration by force or incapacitation
    - Undergraduates identifying as TGQN had the highest rates (12.4%), followed by undergraduate females (10.8%) and graduate TGQN students (8.3%).

# TITLE IX & TRANSGENDER STUDENTS



- Common Concerns and Current Challenges
  - State-based legislation.
  - Waffling OCR.
  - Conflict between Title VII (EEOC) and Title IX (OCR).
  - Possible federal legislation.
  - Discomfort and the claim of reverse discrimination.
  - Educating campus communities and constituencies.
  - Religious concerns
    - Religious Institutions, club or group membership and/or leadership, sharing of restrooms etc.

# TITLE IX & TRANSGENDER STUDENTS



- Preferred Name & Pronouns
  - Education records
  - Databases and record systems
  - Identification documents
  - Classroom
  - The need to educate our communities
- Maintaining student privacy
  - Maintain privacy in relation to gender identity to the extent possible.
  - Students' sex, gender, including transgender status, should not be included as directory information.

# TITLE IX & TRANSGENDER STUDENTS



- Where sex-segregated activities and facilities are provided, transgender students should be allowed to both **participate and access facilities** consistent with their gender identity.
- **Restrooms and Locker Rooms**
  - Schools may not:
    - Require transgender students to use facilities inconsistent with their gender identity, nor
    - Require use of individual-user facilities where other students are not made to do so.
  - Individual-user options can be made available to all students voluntarily seeking additional privacy.

# TITLE IX & TRANSGENDER STUDENTS



# TRANSGENDER ATHLETES



- **PreK-12** is decentralized and regulated largely by state or district-level policies.
- **Two-year/Community Colleges: NJCAA**
  - A trans-male (female to male) student-athlete who has received a medical exception for treatment with testosterone for gender transition may compete on a men's team but is no longer eligible to compete on a women's team.
  - A trans-female (male to female) being treated with testosterone suppression medication for gender transition may continue to compete on a men's team but may not compete on a women's team until completing one calendar year of documented testosterone suppression treatment.

# TRANSGENDER ATHLETES



## • Four-Year Colleges: NCAA

- 1. A trans male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.
- 2. A trans female (MTF) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for the purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.

# DCL ON TRANSGENDER STUDENTS



- **Athletics**
  - Beware of requirements that rely upon overly broad generalizations or stereotypes.
  - Discomfort with transgender students.
  - NCAA and other organizations have specific policies regarding participation.
- **Single-Sex Classes**
  - Transgender students are to be allowed to participate consistent with their gender identity.

# DCL ON TRANSGENDER STUDENTS



- Single-Sex Schools
  - Where Title IX does not apply, schools are not prohibited from inclusivity (i.e. a private undergraduate women's college may choose to admit transgender women).
- Social Fraternities and Sororities
  - Exempt from Title IX, but may choose to be inclusive (i.e. a fraternity choosing to admit transgender men or a sorority choosing to admit transgender women).

# DCL ON TRANSGENDER STUDENTS



- **Housing and Overnight Accommodations**
  - Schools must allow transgender students access to housing consistent with their gender identity.
  - Schools may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students.
  - Schools can choose to honor a student's voluntary request for single-occupancy accommodations.
  - Consider summer camps, etc.

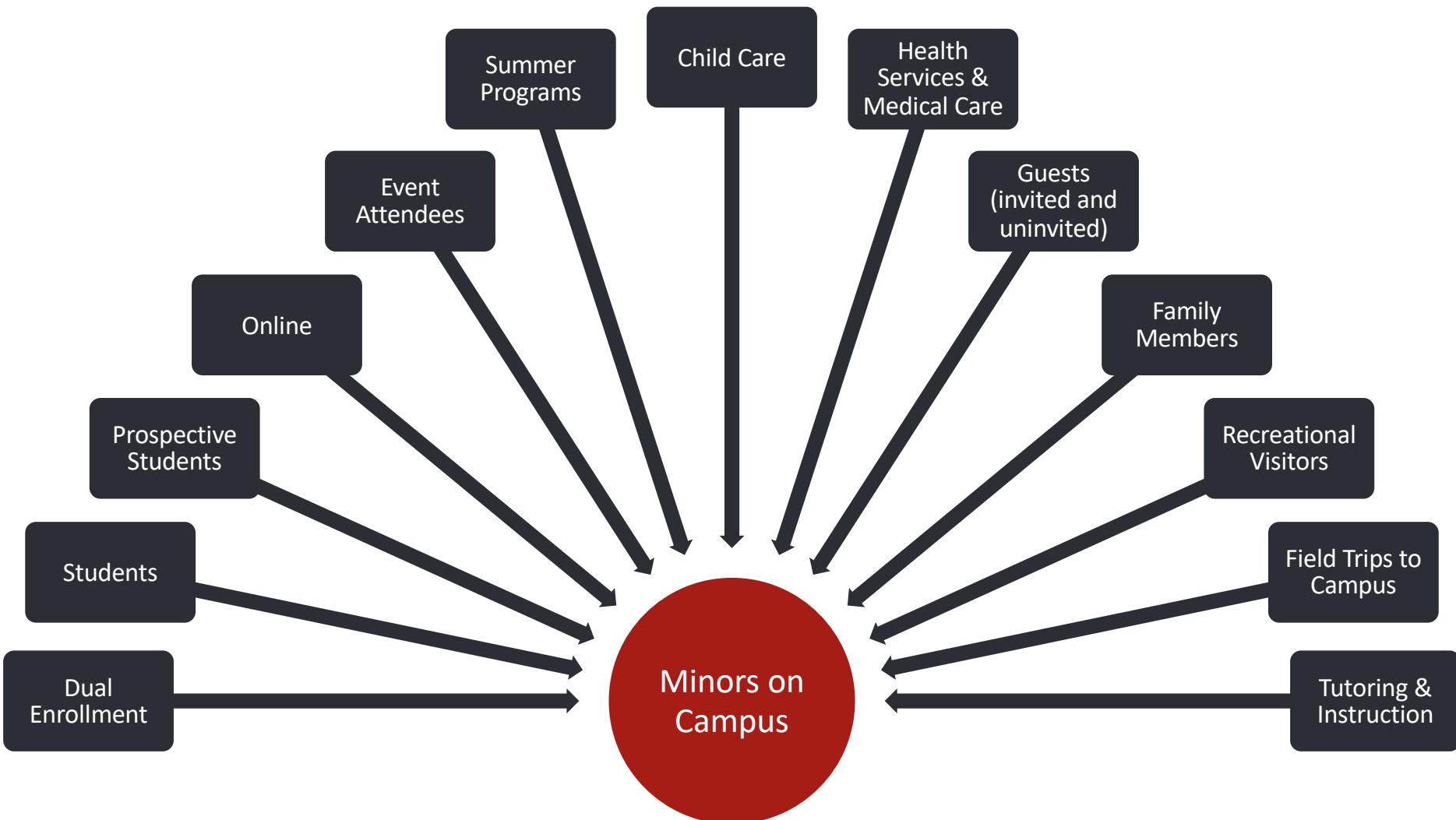
# MINORS & TITLE IX

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- Minors on Campus
- Operative Questions
- Sample Policy
- Abuse Prevention
- More Concerns



# MINORS & TITLE IX



# MINORS & TITLE IX



- Minors as students.
  - Students under the age of 18 may enroll full- or part-time in college. When they do, FERPA rights shift from their parents to them, and privacy protections attach to their education records.
- So, when are they “students?”
  - Dual enrollment.
  - High school on campus.
  - Continuing education.
  - Recruits.

# MINORS AND TITLE IX: SOME OPERATIVE QUESTIONS



- How many minors are on your campus each day?
- Who knows they are there?
- Who is responsible for them?
- Do those parties know the different responsibilities in terms of:
  - Reporting/referring.
  - BIT>Title IX/Clery.
  - Parental notification.
- Are those parties trained/checkered?
  - By whom?

# MINORS & TITLE IX: CAMPS EXAMPLE



- When is a camp “ours?”
- What are our responsibilities at each point on the continuum?



## Not ours:

- Run by a different entity.
- They hire the staff.
- We rent them space only.

## Kind of ours:

- The money comes through a shell or through the school first.
- The employees are our students or temp hires.
- May have our name on it – kind of.

## Completely ours:

- The money comes into the school.
- The staff are our employees.
- It has our name on it.

- Additional policy issues:
  - Classifying minors – see state law.
  - Jurisdiction.
    - Acts against or by non-affiliated persons (e.g. third parties, guests, invitees, and minors).
  - Who has access to minors?
    - Employees.
    - Students.
    - Quasi-employees.

# MINORS & TITLE IX



- Additional policy issues:
  - Facility usage policies.
    - e.g.: Recreation center, overnight visitation, conference facilities, athletic facilities, event facilities, etc.
  - Communication and interaction with parents/guardians.
  - Communication and interaction with minors – who will have it?

# MINORS & TITLE IX: SAMPLE POLICY



- Abuse involving minors – model policy language:
  - In addition to having students who are minors enrolled, [College] hosts minors as guests and as campers. [State] law narrowly imposes duties on mental health professionals, counselors, clergy, and law enforcement to report certain crimes involving minors, and abuse, to appropriate officials. [College]’s protocol is that **all employees will report all suspected child abuse, sexual abuse of minors, and criminal acts by minors to [the Security Office] without delay.** Clery Act reporting of offenses for statistical purposes occurs whether victims are minors or adults.

Source: NCG Model Code Project.

# MINORS & TITLE IX: ABUSE PREVENTION



- Preventing and detection – sexual abuse of minors:
  - Policies.
  - Screening and selection.
  - Training.
  - Monitoring and supervision.
  - Consumer participation – educate parents and guardians.
  - Reporting systems and mechanisms.
  - Response – prompt, effective, and compliant with laws.
  - Administrative practices.

Source: "Managing the Risks of Minors on Campus," Arthur J. Gallagher & Co.

# MINORS & TITLE IX: MORE CONCERNS



- Additional issues to consider:
  - Infants and nursing mothers (covered more in pregnancy section).
  - Student's children in the classroom.
  - Inadequate supervision.
  - Alcohol and controlled substances.
  - Unplanned time.
  - Restrooms, locker rooms, and residential facilities.
  - Issues of statutory rape (state law dependent).
    - Close-in-age exceptions to reporting/statutory.

# AMERICANS WITH DISABILITIES ACT

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- ADA/Section 504
- Qualified Individual with a Disability
- Animals on Campus

# LEGAL LANDSCAPE OF DISABILITY LAW



- Titles II and III of the Americans with Disabilities Act of 1990 (ADA).
- Section 504 of the Rehabilitation Act of 1973.
- Fair Housing Act (FHA).
- State laws.

# WHY IS IT IMPORTANT TO UNDERSTAND DIFFERENT LAWS?



- Laws apply differently to housing than to the campus in general, including classrooms and dining facilities.
- Laws apply different definitions and standards as it relates to service vs. assistance/emotional support animals (ESAs).
- Laws may impose different standards or response protocols.

# SECTION 504 OF THE REHABILITATION ACT, 1973



- A federal civil rights law, prohibits discrimination on the basis of disability in **all programs or activities that receive federal financial assistance**.
- Forbids institutions from excluding or denying individuals with disabilities an **equal opportunity** to receive program benefits and services.
- Codified at 29 U.S.C. § 701.
- Enforced by the U.S. Department of Education.
  - Compliance guidelines by OCR.
- Covers “any program or activity.”
- Individuals with disabilities are also protected from discriminatory harassment directed at them because of their disability.

# SECTION 504 SCOPE OF COVERED PROGRAMS



- All of the college's operations, programs, and activities are subject to Section 504 requirements, including:
  - Academics.
  - Athletics.
  - Employment.
  - Housing.
  - Events.
  - Web-based educational services.

# SECTION 504/ADA GENERAL COMPLIANCE REQUIREMENTS



- If the institution accepts federal funds or employs more than 50 people the institution **must designate an employee to coordinate all efforts to comply** with and carry out its responsibilities, including:
  - Ensuring dissemination of notice of the institution's non-discrimination policy.
  - Adopting civil rights grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints of discrimination.
  - Conducting investigations of complaints regarding noncompliance with the legal mandates of ADA or 504.
  - Providing notice of the name, office address, and telephone number of the employee or employees designated to oversee 504/ADA compliance.
- This does not mean the 504/ADA Coordinator is to hold the position of disability coordinator!

# TYPICAL 504/ADA COORDINATOR ADMINISTRATIVE REQUIREMENTS



- The Section 504/ADA Coordinator is, at a minimum, responsible for:
  - Coordinating and monitoring compliance with Section 504 and Title I, II or Title III of the ADA;
  - Overseeing state civil rights requirements regarding discrimination and harassment based on disability;
  - Overseeing prevention efforts to avoid Section 504 and ADA violations from occurring;
  - Implementing the institution's discrimination complaint procedures with respect to allegations of Section 504/ADA violations, discrimination based on disability, and disability harassment

# TITLE II & III ADA, 1990



- **Title II:**
  - Prohibits discrimination on the basis of disability by public entities, including state colleges and universities, regardless of whether they receive federal financial assistance.
- **Title III:**
  - Prohibits discrimination on the basis of disability in private education facilities and in the activities of places of public accommodation (businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA).

The language of the ADA tracks Section 504 and explains that the remedies, procedures, and rights under the ADA are the same as under the Rehabilitation Act.

# WHO IS PROTECTED UNDER SEC 504 & ADA?



- Under this law, **qualified individuals with disabilities** are defined as:
  - Persons with a physical or mental impairment which substantially limits one or more major life activities;
  - Persons who have a record of having a physical or mental impairment; or
  - Persons who are regarded as having a physical or mental impairment that substantially limits one or more major life activities.

# WHAT DOES IT MEAN TO BE A “QUALIFIED INDIVIDUAL WITH A DISABILITY”?



- A qualified individual with a disability is someone who, with or without **reasonable modifications** to rules, policies, or practices or provision of auxiliary aids and services, meets the **essential eligibility requirements** to be able to receive the receipt of services or to participate in programs or activities of the educational entity.
- All qualified individuals with a disability must be provided with aids, benefits, or services that provide an **equal opportunity** to achieve the same result or level of achievement as others.

# WHAT IS A “PHYSICAL OR MENTAL IMPAIRMENT”?



## A “Physical Impairment”

- Is any physiological disorder or condition, cosmetic disfigurement or anatomical loss that affects one or more of the body systems, such as:

Neurological	Reproductive	Bladder
Musculoskeletal	Digestive	Circulatory
Special sense organs	Genitourinary	Immune
Respiratory (including speech)	Lymphatic	Normal cell growth
Cardiovascular	Skin & Endocrine	Bowel

## A “Mental Impairment”

- Is a mental or psychological disorder includes mental retardation, emotional or mental illness, and specific learning disorders

# EXAMPLES OF A “MAJOR LIFE ACTIVITY”



- Major life activities include caring for one's self, performing manual tasks such as:
  - Walking
  - Seeing
  - Hearing
  - Speaking
  - Breathing
  - Working
  - Learning
  - Concentrating
  - Eating
  - Sleeping
  - Standing
  - Lifting
  - Bending
  - Reading
  - Thinking
  - Communicating
- Non-exhaustive list; greatly expanded under the ADAAA

# FAIR HOUSING ACT



- FHA applies to residential “dwellings,” a term that likely encompasses campus housing, including residence halls.
- FHA makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a **dwelling, or in the provision of services or facilities in connection with such a dwelling because of a handicap...**”
- FHA requires allowance for “**assistance animals**” for a qualified individual with a disability in all dwellings.
- Enforced by the Department of Housing and Urban Development, Fair Housing Act.

# HUD ASSISTANCE ANIMAL REQUIREMENTS



- Those seeking to have their assistance animal must have a qualifying disability.
- There must be an identifiable relationship or nexus between the disability and the assistance the animal provides.
- The animal that the individual with a disability wishes to accompany them must be necessary to afford the person with an equal opportunity to use and enjoy a dwelling.
- The assistance animal must meet reasonable standards for the housing environment.

# HUD GUIDELINES REGARDING ASSISTANCE ANIMALS



- As long as the animal alleviates the “effects” of the disability and the animal is reasonably supported, it is acceptable.
- Species other than dogs, with or without training, and animals that provide emotional support are recognized as “assistance animals.” Courts have also upheld that animals need not be trained, nor do they need to be dogs to qualify as “reasonable accommodations.”
- Animals who pose a direct threat to the health and safety of others; **who cause substantial physical damage** to the property of others; who pose an undue financial and/or administrative burden; or would fundamentally alter the nature of the provider’s operations may be excluded.

# ACCOMMODATION PROCESS



- If an individual needs an accommodation, they have the initial obligation to provide notice to the institution of a qualifying disability and need for an accommodation.
- Institutions may establish reasonable standards for documentation.
- Institutions should engage in an “interactive process” to determine appropriate accommodations that meet the individual’s needs.
- Aids and adjustments must be provided in a timely manner.

# CONSIDERATIONS FOR PROVIDING “EQUALITY” IN OPPORTUNITIES



- What can the institution do to provide students with disabilities equal access to the educational benefits or opportunities provided through technology?
- How do the educational opportunities and benefits provided to students with disabilities compare to those provided to students without disabilities?
  - Are they equally available?
  - Are they available in a timely manner, similar to those provided to students without disabilities?
  - Will it be more difficult for students with disabilities to obtain the educational opportunities than for non-disabled students?

# SANCTIONING

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- Sanctioning in Sexual Misconduct Cases
- Considerations
- Common Sanctions
- Sanctioning Pitfalls

# SANCTIONING IN TITLE IX CASES



- Title IX and case law require:
  - Bring an end to the discriminatory conduct (Stop).
  - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (Prevent).
  - Restore the reporting party as best you can to their pre-deprivation status (Remedy).
- Real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

# SANCTIONING CONSIDERATIONS



The sanction must be reasonable and reflect the severity of the behavior.

- May consider prior misconduct.
- The role of precedent.
- May consider attitude.
- Should be educational, but safety is primary consideration.
- What best compensates for loss or injury to school or persons.
- Compliant with laws and regulations (e.g.: Title IX).
- Should consider the education impact on the responding and reporting parties.

# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Investigation alone is not sufficient to overcome a deliberate indifference claim.
- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s).
- What is appropriate?
  - Separation/expulsion.
  - Suspension.
  - Lesser sanctions.
- Engage in strategic education and training requirements.
- Conduct a risk assessment audit and mitigation process.

# CONSIDERATIONS POST-FINDING



- Ensure remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- Take immediate steps to protect reporting parties even before the final outcome of investigation (e.g. no contact orders, etc.).
- Ensure that remedies are equitable.
- Consider restorative justice as part of remedial process.
- Monitor for retaliation and respond immediately to allegations.
- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, and state and federal case law.

# COMMON STUDENT SANCTIONS



- Warning.
- Probation.
- Loss of privileges.
- Counseling.
- No contact.
- Residence hall relocation, suspension, or expulsion.
- Limited access to campus.
- Service hours.
- Online education.
- Parental notification.
- Alcohol and drug assessment and counseling.
- Discretionary sanctions.
- College suspension.
- College expulsion.

# COMMON EMPLOYEE SANCTIONS



- Warning – verbal; written.
- Probation.
- Performance improvement/  
management process.
- Training (e.g., sensitivity training).
- Counseling.
- Loss of privileges.
- Reduction in pay.
- Loss of annual raise.
- Discretionary sanctions.
- Loss of supervisory or oversight  
responsibilities.
- Paid or unpaid leave.
- Suspension.
- Termination.

# SANCTIONING PITFALLS



- Conflating finding and sanctioning processes.
- Timing of impact statements.
- Not targeted to stop, prevent, and remedy.
- Unwillingness to suspend or expel.
- Failure to address mitigating circumstances.
- Lock-step or automatic sanctioning – failure to address incident-specific circumstances.
- Holding sanctions in abeyance during appeal.

# SANCTIONING PITFALLS



- Assumption that sanctioning is always the primary remedy.
- Likeability of parties: + & -
- Taking things personally as investigator/hearing officer.
- Bad precedent.
- Deviating dramatically from norms.
- Progressive sanctioning.
- Developmental? Remedial? Protective?

# SANCTIONING PITFALLS



- Weak sanctions for retaliation.
- Weak sanctions for breach of no-contact orders.
- Weak sanctions for sexual violence.
- Disparate sanctions for same behavior.
- Abiding by the wishes of the victim(s).
- Privacy of sanctioning information.
  - Informing victims of sanctions.
  - Making an example.
- Others?

# WHAT SANCTIONS?



- A female staff member continues to make overt and tacit sexual advances towards a female colleague, even though the recipient of the behavior has repeatedly told the staff member that the advances are unwelcome.
  - The advances are verbal, as well as in emails and text messages.
  - Some of the more subtle advances have been in the company of others.
  - The victim complained because it is starting to impact her ability to focus at work.

# WHAT SANCTIONS?



- A male tenured faculty member is found responsible for non-consensual intercourse involving a female student who is not in any of the faculty member's classes.
  - The investigator determines that the student was incapacitated and the accused faculty member should have known of that incapacity.
  - The faculty member is a full professor holding a prestigious endowed chair position.
  - The student and the faculty member engaged in consensual sex five times after the non-consensual incident.
  - The student brought the allegation shortly after the faculty member began sleeping with the student's friend.

# WHAT SANCTIONS?



- A severely intoxicated male student who lives on the sixth floor gets off the residence hall elevator on the fourth floor at the same time as a female student who lives on that floor. As the female student attempts to enter her room, the male student hugs and tackles her, holds her down, reaches up her skirt, moves aside her underwear, rubs his fingers along her clitoris and penetrates her digitally. The female student is able to free herself and rushes into her room, locking the door. The panel finds him responsible.

# WHAT SANCTIONS?



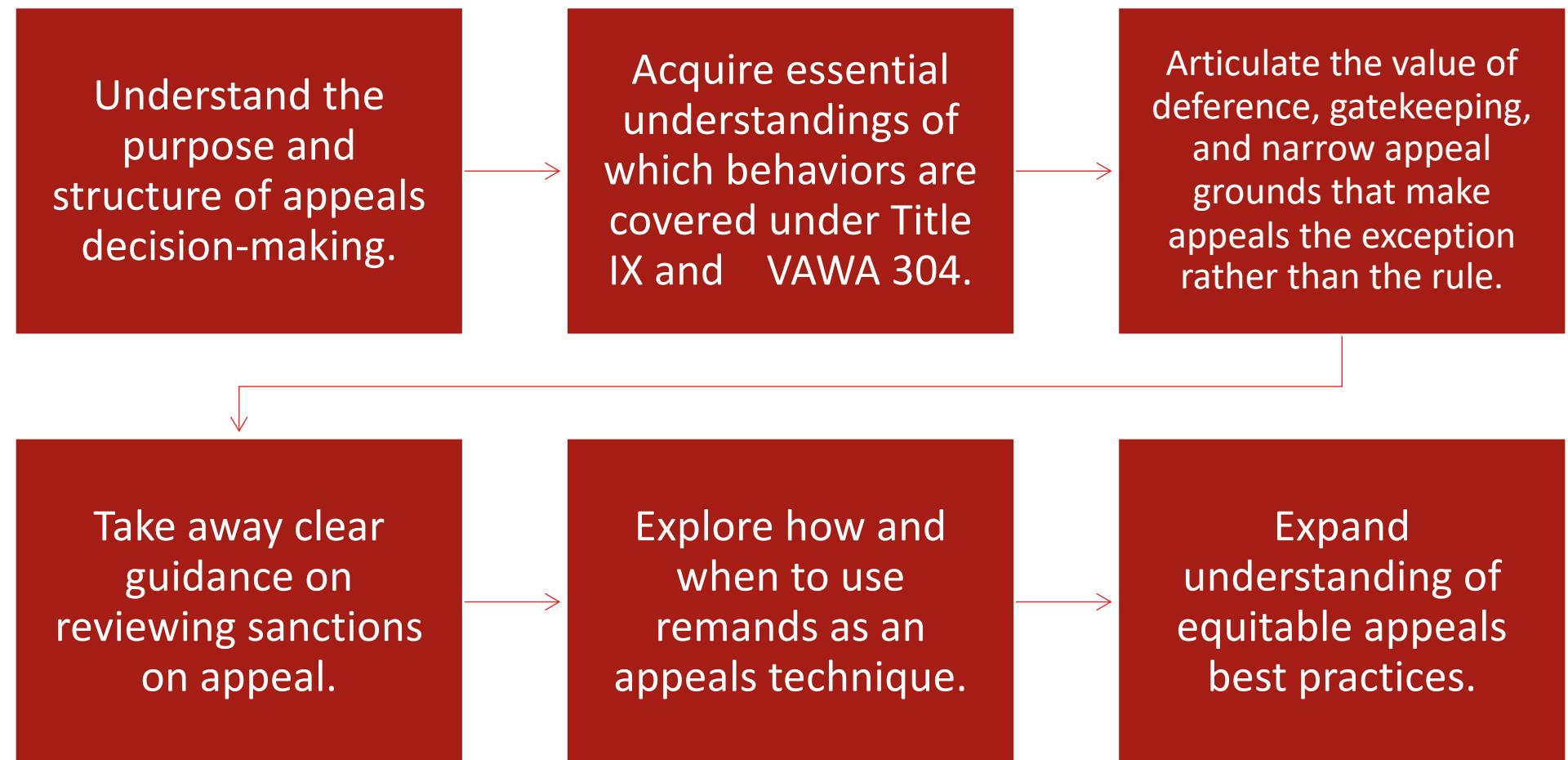
- Five members of the men's soccer team (Students A,B,C,D, and E) subject the first-year students to various hazing-related rituals, including paddling and pouring hot sauce on the first-year students' genitals.
  - Four students (A,B,C, and D) engage in the paddling.
  - Two students (A and B) poured hot sauce on the genitals of first-year students.
  - One student (E) was present throughout, but did not paddle or pour hot sauce on the first-year students.

# APPEALS

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- Objectives
- Key Elements
- Philosophical Basis for Appeals
- When Appeals Go Off the Rails
- Best Practices
- Possible Outcomes
- The Process
- Appeals and Case Law: John Doe v. The Rectors and Visitors of George Mason University

# OBJECTIVES



# INTRODUCTION



- Title IX, VAWA Section 304, and appeals best practices.
- Appeals are not required by federal law.

If we provide them,  
they must be provided  
equitably.

Each party can request  
an appeal.

Each party can participate  
in an appeal to the same  
extent  
as all parties.

Grievance processes that  
function as final appeals  
are inequitable if the  
reporting party is not a  
participant.

# APPEALS: KEY ELEMENTS



- One level of appeal is all you need
- Limit the grounds for appeal
- Show deference to initial decision
  - Clear error in finding; compelling justification to change sanctions
- Sanctions usually take effect immediately
- Short window to request an appeal (3-7 days is common)
  - Can always grant an extension if needed
- Document-based and recording review
  - Limited interviews; NOT *de novo*
- Appeals should not be automatic; based on request.
- Preponderance of evidence is standard for decision.

# THE PHILOSOPHICAL BASIS FOR APPEALS



- Making sure the procedures were followed to a fair result.
- That result may not be how you would have decided it, but the goal is to show deference on appeal unless there is clear error.
- Initial investigation and decision should be presumptively sufficient until evidence shows otherwise.
- Under Title IX, many appeals now implicate sufficiency of investigation, a new concern.

# THE PHILOSOPHICAL BASIS FOR APPEALS



- With the investigation now under a microscope on appeal, a layer of Title IX Coordinator sign-off after investigation is critical to the integrity of the investigation process (Facebook example).
- You may disagree with sanction, but there must be a compelling justification to change it, not mere disagreement.
- Sanctions must bring an end to discrimination and reasonably prevent its reoccurrence (Title IX).
- Remedies must repair the harm; make whole the victim and the community.

# APPEALS BEST PRACTICES



- Remand. Your judgment is not better than that of others in the process. If there is a problem and you can send it back, do so.
- Problems with investigation can be repaired by re-opening the investigation, or in rare cases, by re-investigating.
- Problems with hearings can often be fixed by limited re-hearing. Re-dos should be rare.
- Between 80 and 90 percent of appeals should be denied. Of the remaining 10-20 percent, almost all should be remanded.

# APPEALS BEST PRACTICES



- Joinder. Title IX sets up the potential for appeals of appeals.
- To avoid this (and you want to avoid it), you'll need a one-level appeal process (more levels are just bureaucracy and are not needed), where all parties are joined in the appeal regardless of whether they petition for it, and irrespective of what grounds are asserted.
- All viable grounds should be joined in one reconsideration with all parties participating.

# APPEALS BEST PRACTICES



- Appeals are typically in writing.
- Review the investigation report, the hearing record, and all available documents.
- Interview the investigators, coordinator, and/or hearing officers/panelists.
- You may conduct limited interviews with the parties or witnesses as necessary, but avoid a full re-hearing. If needed, remand.
- Make an independent and impartial determination.
- Grounds for appeal or changes must be shown by evidence that is “more likely than not” under Title IX.

# APPEALS BEST PRACTICES



- Letters of outcome, including finding, any sanctions, and rationale therefore, are applicable to appeals decisions under VAWA Section 304.
- Rights to advisors of the parties' choosing are as applicable to appeals as to any other stage in the process.
- If you are not eligible to hear appeals (provost, president, etc.), refer the angry parent on the phone to the proper official.

# APPEALS BEST PRACTICES



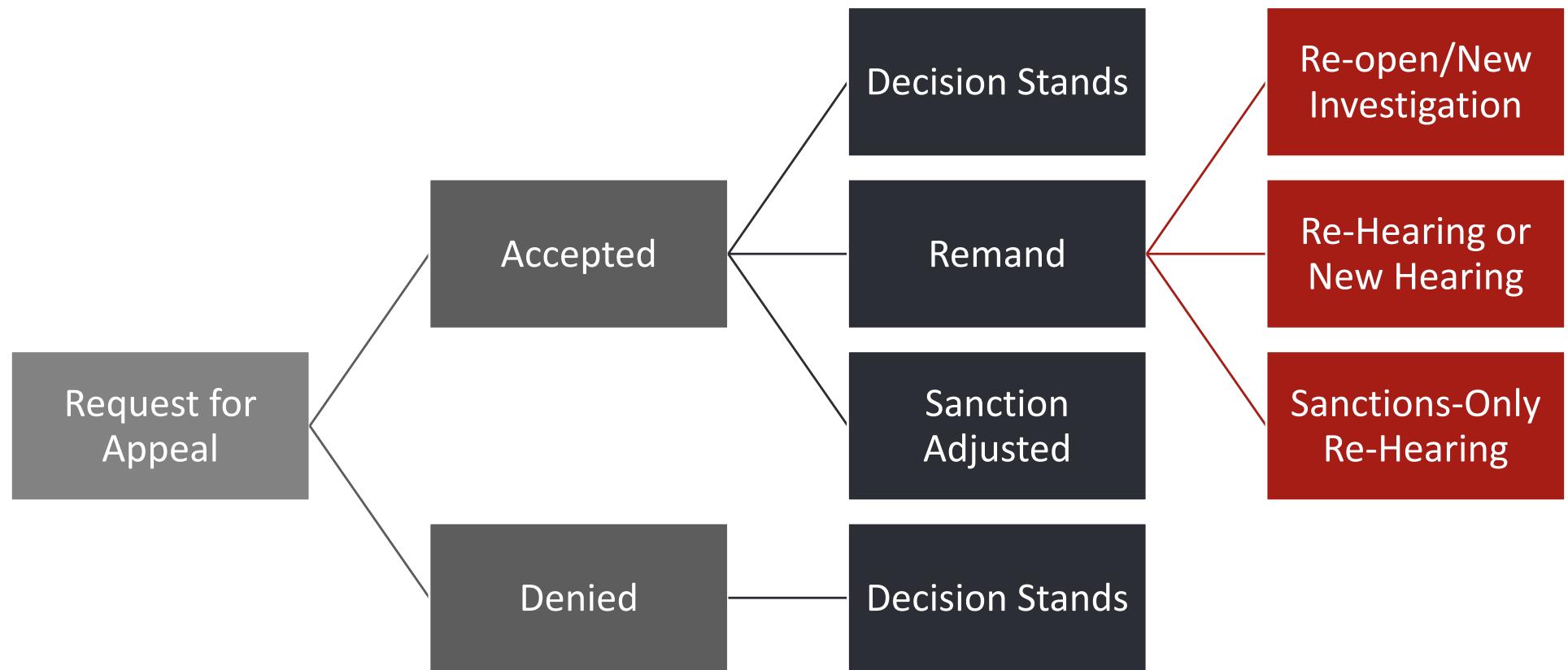
- If the initial decision is presumptively correct, implement the sanctions immediately, not pending appeal.
- Coordinators or other administrators should have discretion to stay implementation of sanctions on a case-by-case basis, but the default should be that they go into effect immediately.
- Otherwise, we are saying the sanctions are presumptively incorrect until the appeal says they are OK.
- If that is the case, why not just skip the hearing and go right to the appeal?

# APPEALS: GROUNDS FOR APPEAL



- A procedural error or omission occurred that significantly impacted the outcome of the hearing.
  - E.g.: Insufficient evidence to warrant the finding, substantiated bias, material deviation from established procedures, etc.
- To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction.
  - A summary of this new evidence and its potential impact must be included.
- The sanctions imposed are substantially disproportionate to the severity of the violation (or: the sanctions fall outside the range of sanctions the university/college has designated for this offense).

# THE APPEALS PROCESS



## Petition for Appeal: Reviewed by Single Administrator

Initial review of appeal to determine whether it states grounds upon which relief can be granted.

Petition denied or accepted.

If petition for appeal is accepted:

Two Models:  
Single Administrator  
or Panel

Single trained administrator

E.g.: VPSA, director of HR, associate provost, coordinator.

Trained appeals panel

- Three panelists from pool who have not yet otherwise participated or had knowledge of the facts.

# COMMUNICATION PROTOCOLS



When one party requests an appeal, the other party(ies) should be notified, and joined, either on the same basis that the appeal has been requested, or on other bases that they wish to assert as grounds.

Exchange the appeals documents and requests between the parties, with an opportunity to respond.

The status of the appeal is part of the status of the investigation. The reporting party is entitled to regular updates on this status.

# POSSIBLE OUTCOMES



- Request for appeal is denied.
  - Decision stands.
- Request for appeal is granted.
  - Decision stands.
    - This should be the norm.
  - Remand.
    - To correct a procedural error or address new evidence.
      - Re-open investigation (full redo uncommon).
      - Re-hearing (usually partial, unless full re-hearing required).
    - To adjust the sanction.
  - Remand or sanction adjustment by appellate body.

# WHEN APPEALS GO OFF THE RAILS



- Interventionist appeals officers who believe it is their job to second-guess.
- Granting appeals for the chance at an educational conversation/to teach a lesson.
- The liability risk of a too strong appellate authority.
- Hierarchs as appeals officers – a common practice and is often a mistake.
- Failure of adequate training.
- Too much deference can also bite you (if the initial decision is wrong, or results from lack of training, you do have to set things right).

# APPEALS: LESSONS FROM CASE LAW



- The first and the second appellate officers held ex parte, off-the-record meetings with the accuser. Those meetings informed their appellate decisions, yet John Doe was not apprised of what took place in those meetings.
- The court wrote, “the failure to provide [John Doe], at a minimum, of a report of what transpired during the ex parte meetings such that [Doe] could defend himself against [the accuser’s] allegations in this meetings fell short of constitutionally adequate due process” (*Doe v. George Mason*, p. 20).

# APPEALS: LESSONS FROM CASE LAW



- The appellate officer had frequent and extensive ex parte contact with the reporting party regarding her allegations in the summer prior to the investigation and hearing, yet assigned himself as the appeal officer. The court held that these actions, especially at an institution with 5,000 employees, was a conflict of interest.
- **Key takeaway:** It is important that appellate officers are a step removed from the parties, the case, and the investigation. Especially at institutions with thousands of employees where a non-conflicted party could easily be trained and appointed.

- Fall 2012: “John Doe” was a first-year student at GMU and began a romantic and sexual BDSM relationship with “Jane Roe,” a student at another university.
- On Oct. 27, 2013, Jane alleged that she and Doe had a sexual encounter in Doe’s residence hall room, where:
  - Jane pushed Doe away, but he continued the sexual activity.
  - Doe asked later if she wanted to continue sexual activity and Jane said, “I don’t know.”
  - Doe continued with the sexual activity because Doe never used the agreed upon safe word (“Red”).

- Jane ended the relationship in January 2014.
- In March 2014, Doe sent Jane a text message that he would “shoot himself” if she did not contact him by the following day.
- In April 2014, Jane reported incidents of harassment and abusive behavior to her university.
- In May 2014, Jane reported to GMU police, who reported the incident to GMU student affairs.

- Following the report to GMU, GMU Asst. Dean has frequent contact with Jane over the summer regarding the report.
- In August, GMU Asst. Dean sent an email to Doe, indicating that he was accused of four violations of GMU's sexual misconduct policy.
- On Sept. 5, a hearing was held before a specially trained panel of three faculty and staff.
- On Sept. 12, 2014, the panel found Doe "not responsible" for each of the four alleged violations.
- On Sept. 19, 2014, Jane filed an appeal on the basis of "procedural irregularities" with the hearing.

- The deciding official for the appeal was the Asst. Dean who had frequent contact with Jane and who initially notified Doe of the accusations against him.
- Prior to rendering a decision on appeal, the Asst. Dean met with Jane and never told Doe about the meeting or informed him of what was discussed.
- Asst. Dean met with Doe as well, but after the Asst. Dean admitted he had already made up his mind.

- On appeal, the Asst. Dean reversed the hearing panel's decision and found Doe responsible for:
  - (i) penetration of another person without consent, and
  - (ii) communication that may cause injury, distress, or emotional and physical discomfort.
- The Asst. Dean provided no rationale for the decision.
- Doe appealed to the Dean of Students.
- DOS affirmed the decision, only stating that the sanctions were consistent with past practice.

- Doe sued GMU, who filed a motion to dismiss all four allegations made by Doe.
  - 14th Amendment right to due process.
  - Free speech.
  - Disparate impact (Title IX) and (dismissed).
  - Intentional discrimination (dismissed).
- The district court then addressed cross-motions for summary judgment on the two claims remaining following motion to dismiss.

- Court found that GMU violated Doe's due process by:
  - Failing to provide **notice** of all allegations used to make a decision.
  - **Deviating substantially** from its appellate procedures by having off-the-record meetings with Jane.
  - **Re-hearing the case on appeal** without providing Doe adequate opportunity to “mount an effective defense.”
  - Failing to provide a detailed **rationale** for the appellate decisions.
  - **Pre-determining the outcome.**
  - Creating a significant **conflict of interest**.
    - Citing the Asst. Dean/Appellate officer’s repeated contact with Jane prior to and while considering the appeal.

# MANAGING POLITICS & PRESSURE

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- Case Study
- Risks & Pressures
- Intangibles of Crisis
- Common Missteps



# CASE STUDY



- Your institution has an award-winning diving program. In fact, the captain of the team (Cory) qualified for the upcoming Olympic Games next month, and represents the U.S.A.'s best hope for a gold medal. He is charming and charismatic and well-liked. You just received a call from a school in your league sharing with you that last weekend during an away meet, Cory allegedly engaged in a sexual encounter with a high school athlete who is 15 years of age.



# CASE STUDY



- The high school student's father learned about it when he discovered pictures and text messages between his son and Cory and the son told him Cory coerced him into sex. The father reported this to the local police and plans to hold an interview with the press unless your school agrees to suspend Cory.
- Your president and board are encouraging you to hold off on the investigation for a few weeks, until after the Olympics — after all, the victim doesn't go to your school and it happened off-campus.

# CASE STUDY



- The President reminded you that your school is on the national stage right now because of this great athlete and already alumni funding has increased, as well as admission applications. This would be devastating to your school if it leaked. The President reminds you that you are an employee at will.

## Discussion questions:

- What are the issues presented?
- What action do you take? In what order?
- What are your concerns?

# RISKS & PRESSURES



- Negligence claims still top the list.
- Discrimination claims (aggregate) are on the upswing.
- PR/reputational harm (specific campuses).
  - Social media and online environment greatly enhance these risks.
- Compliance risks (lower cost; higher profile).
  - OCR, DOJ, EEOC, etc.
- Donor dissatisfaction (endowment and capital project losses).

# “INTERNAL” POLITICS & PRESSURES



- Board.
- Faculty leadership.
- Tenure.
- Unions.
- Student advocacy.
- Athletics.
- Colleges/schools.
- Silos.
- Graduate/professional vs. undergraduate.
- Departmental conflicts.
- Student publications (e.g., newspaper).
- Etc.

# EXTERNAL POLITICS & PRESSURES



- Federal government.
  - Legislation – codified and pending.
  - Regulatory – OCR, DOJ, EEOC, etc.
- Federal courts.
- State government.
  - Funding.
  - Legislation.
- Student activists (e.g., victims' advocacy; accused advocacy).
- Attorneys.
- Media.
  - Social, print, and online.
  - Local and national.
- NCAA.
- AAUP.
- FIRE.
- Parents.
- Etc.

# INTANGIBLES OF CRISIS



- Crises are an enormous time suck.
- Time spent on crisis management, response, and post-vention is time spent off-task and off-mission.
- Investments in prevention cost less than the resource drain, mission creep, and distraction of actual losses.
- Wise to budget for prevention, training, compliance, and professional development as investments or hedges,
  - It's cliché, but an ounce of prevention is worth a pound of cure.

# COMMON MISSTEPS



- Underestimating the seriousness of a situation or assuming it won't go public.
- Letting a situation fester or assuming it will resolve on its own.
- Failing to follow policies and procedures.
  - Knee-jerk reactions.
- Failing to consult legal counsel as early as the concerns arise and/or preventively.
- Failure to communicate internally, establish clear crisis communication protocols, and elaborate a disciplined approach to spokespersons.

# FROM THE HEADLINES DISCUSSION: WHAT CAN WE LEARN?



## Title IX

- Baylor University
  - Title IX, external investigation, athletics, leadership, and fall-out
- Columbia University
  - Sexual violence, the Mattress, activism, and lawsuits
- Penn State University
  - Sexual violence, reporting, athletics, external investigation, and lawsuits

## Not Title IX, but instructive

- University of Oklahoma
  - Fraternity chant, racism, social media, due process
- University of Missouri
  - Protests & activism, race, media, First Amendment, leadership

# MANAGING THE MEDIA

- Case Study Continued



# CASE STUDY

- You met with Cory and he admitted engaging in a sexual encounter at the swim meet last week, but stated that the other guy told him he was a student at the university. Cory is very upset because of the allegations. He says that neither his family nor his friends know he is “struggling with” his sexual orientation. He denies that the sexual encounter was in any way non-consensual. He asks you to do whatever you need to do to prevent the student’s father from doing an interview.



# CASE STUDY



- It would harm him in many ways and tomorrow he's scheduled to be featured in a Sports Illustrated pictorial article. The article was published and a day later the student's dad held his own press conference. Now ESPN, your local TV station, and newspaper are calling you and sitting in your office. Thoughts?

## Discussion questions:

- What does FERPA allow you to say?
- What are the issues regarding Cory?
- Are you conducting an investigation?

# MOUS

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- Local Law Enforcement
- Advocacy Organizations
- Local Schools (PreK-12)



# MOU: LOCAL LAW ENFORCEMENT



- Who should be at the table?
- Interaction with Campus Police/Public Safety
- Scope
  - What crimes/type of incidents are covered
- Communication
  - Reporting – When, How, What, To Whom
  - Progress Updates
- Jurisdiction
  - Patrols, Response, Dual Jurisdiction, Arrests, Referrals, Maps

# MOU: LOCAL LAW ENFORCEMENT



- Investigation
  - Timing; Sharing of Evidence/Information
  - Concurrent Investigations
- Remedies
  - Interim
  - Long-term
- Prevention
- Cross-Training
- Point of Contact

# MOU: LOCAL LAW ENFORCEMENT



- Relevant Legislation
  - The Clery Act/ VAWA Sec. 304
  - Title IX
  - FERPA
  - Title IV
  - ADA/504
- Relevant Guidance
  - 2001 Guidance
  - 2011 DCL
  - 2014 Q&A on Title IX and Sexual Violence

# MOU: ADVOCACY ORGANIZATIONS

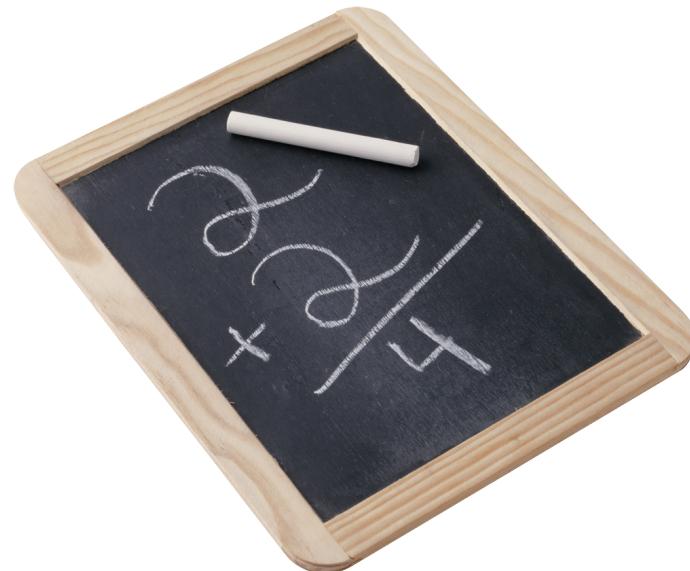


- Scope
- Crisis Intervention
- Victim Advocacy
- Assistance with legal orders or protection, TROs, etc.
- Counseling
- Cross-Training
- Prevention & Educational Efforts
- Point of Contact

# MOU: PREK-12



- Dual Enrollment
- Summer Camps
- Investigation
  - By whom
  - Sharing of Information and Evidence
  - Sharing of Outcomes
- Training
- Parental Involvement
- Police Notification



# QUESTIONS?

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# CONTACT INFORMATION

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