

T I T L E I X



C O N S U L T
LLC

Disclaimer

- The information contained herein was developed by Title IX Consult, LLC for the exclusive use of Title IX Consult, LLC. Use of these documents by non-Title IX, LLC employee and/or outside the education environment requires explicit permission of Title IX Consult, LLC.
- ©Title IX Consult, LLC, 2020. Copyrighted material. Express permission to post training materials for those who attended a training provided by Title IX Consult, LLC is granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). These training materials are intended for use by licensees only. Use of this material for any other reason without permission is prohibited.
- This training is intended for educational purposes only and does not contain sample forms for use in Title IX investigation and/or decision-making process.



Overview of Decision-Maker Training

- Introduction to Title IX law and regulations
- Title IX parties and administrators
- Overview of Title IX grievance process
- Title IX Coordinator, Investigator, and Decision-Maker Roles
- Title IX jurisdiction and dismissal of complaints
- Types of Title IX claims and consent
- Burden of proof
- Reviewing investigation report and information-sharing with the parties
- Types of evidence
- Evaluating evidence and reaching a conclusion
- Avoiding bias, conflict of interest, and stereotypes in decision-making
- Appeal



Title IX Law

- 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.
- Enforced through the Department of Education, Office for Civil Rights (OCR)



Title IX Covers and Includes

- Prohibition of Sex Discrimination
 - Sexual Harassment
 - Athletics
 - Employment
 - Pregnant Students
 - Recruitment, Admission and Programs



LEGAL OBLIGATION

Educational institution must respond in a manner that isn't 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.



Rescinded Guidance from OCR
under Obama administration

2015

Title IX Coordinator

2011, 2014, 2016

2017

Q&A on Campus Sexual
Misconduct

GUIDANCE ON TITLE IX

2001

Regulations on Title IX

2020

Final Rules on Title IX
(effective 8/14/20)

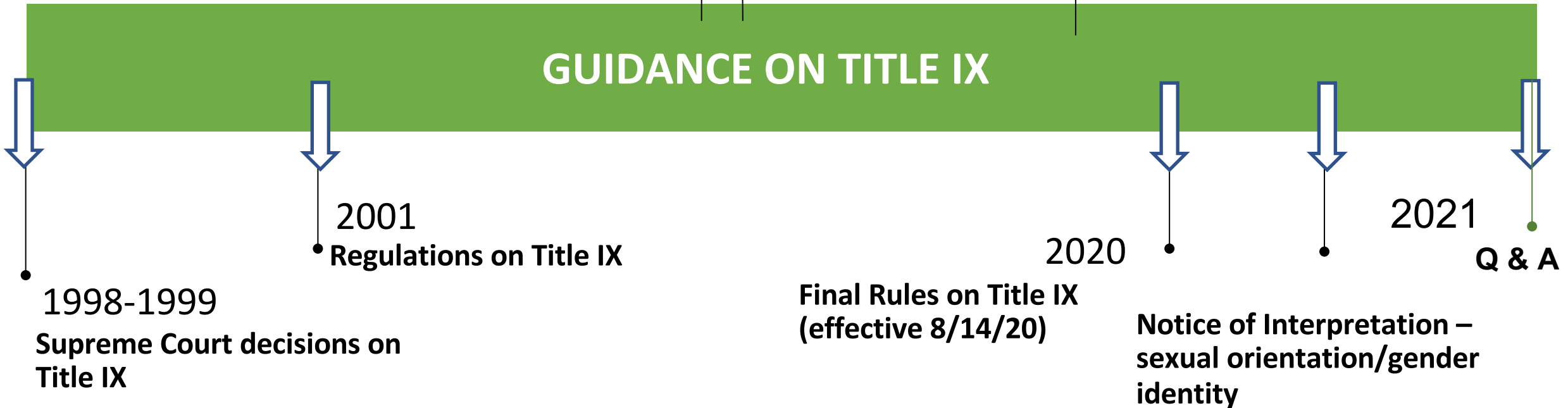
2021

Q & A

1998-1999

Supreme Court decisions on
Title IX

Notice of Interpretation –
sexual orientation/gender
identity



Title IX – Parties and Administrators

Administration of Claims

Parties

- Complainant – alleged victim/survivor
 - Respondent – respond the allegation
- Title IX Coordinator
 - Title IX Investigator
 - Title IX Decision-maker
 - Title IX Appeal Officer
 - Title IX Advisor
 - Title IX Informal Resolution Officer



Title IX Coordinator Role

- Responsible for overall compliance program at the school, including claims, supportive measures, investigations, training, etc.
- Name, office address, email address, phone number of “Title IX Coordinator” available
- Distributed to students, employees, applicants for admission and employment, parents and legal guardians, and unions
- Reports by telephone, email, and verbal reports to Title IX Coordinator



Investigator Role

- Conducts investigation
- Provides all information collected to both parties
- Examines the requests/additional information/potential questions presented by the parties
- Completes a Title IX investigation report
- Provides the report to the parties
- Receives additional questions from parties
- Forwards the report and additional questions to decision-maker



Decision-Maker Role

- Review all evidence
- Issues decision relying on relevant, credible evidence
 - Policy violation – using policy definitions
 - Sanction/Discipline, if violation found
- Advises of appeal rights
- Can be more than one decision-maker
- Can never be Title IX Coordinator, Investigator, Appeal Officer
- **REVIEWS ALL EVIDENCE, DECIDES WHAT IS DISPUTE, (RE)EXAMINES THE DISPUTES, AND IN THE CONCLUSION, APPLIES THE STANDARD OF PROOF TO FACTS TO REACH A CONCLUSION ON**



Selecting Decision-Maker

- Attorney required – NO
- Training required – YES
- Understanding policy – YES
- Considerations in selection:
 - Willingness to serve
 - Objective and unbiased
 - Ability to connect with employees/students
 - Confidentiality
 - Reflective of campus
 - Diversity



Overview of Grievance 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



Jurisdiction Issues

- **Occurring in the institution's education program or activity**
includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Against a person in the United States
- Jurisdiction question example



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



Types of Sexual Harassment

Applicable to the Scenario



Title IX Hostile Environment Sexual Harassment

Conduct on the basis of sex:

- **Hostile environment sexual harassment is defined as: unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectionably offensive that it effectively denies a person equal access to the school's education program or activity.**



2021 Questions and Answers – Loss of Equal Access

- Skipping class to avoid a harasser
- Declining GPA
- Having difficulty concentrating in class
- Crying at night due to sexual harassment
- Quitting a team due to harassment



Question of Consent

- Age of consent
- Affirmative consent laws
- Important elements of consent
 - Freely given
 - Ongoing
 - Manifested



Rape Shield Protections

- Questions and evidence about a complainant's prior sexual behavior are prohibited unless:
 - offered to prove that someone other than the respondent committed the alleged misconduct, or
 - offered to prove consent.



Investigation Report

- Convey relevant information about the allegations to the parties and their advisors
- The Department of Education takes no position on the elements required in the report beyond what is required by final regulations
- The investigative report must fairly summarize relevant evidence



Decision-Making Process



Title IX Report/Information Sharing Requirements

Before report, all evidence shared



Opportunity to question and provide feedback



Report issued and shared



Opportunity to question, provide feedback, and engage in cross-examination



Report and party feedback shared with decision-maker(s)



Opportunity to question

- **Parties may submit unanswered questions to decision-maker**
 - Some discretion about submitting
 - Limited follow-up – facilitated cross-examination
 - Articulate and document decisions restricting this process
- **Decision-maker may have own questions related to the investigation**



Weighing and Challenging Evidence

- Authentication
- Relevance
- Credibility



Evidentiary Review

- RELEVANCE – Applying to the matter in question; affording something to the purpose (Black's Law Dictionary)
- NOT permitted:
 - Sexual history of Complainant (see Rape Shield exception)
 - Privileged communications
 - Medical documentation
- Not repetitive



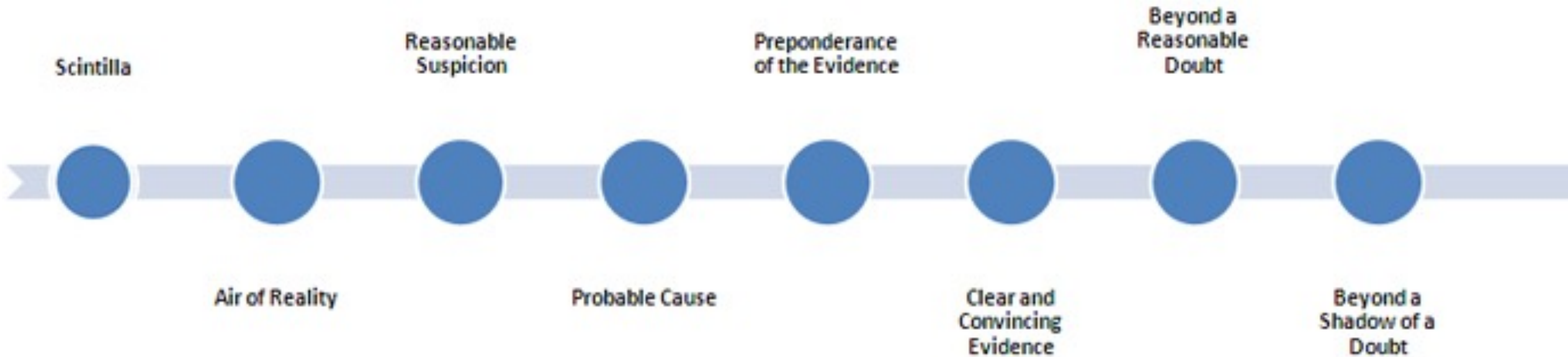
Credibility

- Corroboration
- Feasibility
- Motivation for truthfulness/untruthfulness
- Consistent
- Reviewed/coached



Preponderance of the Evidence

Burdens of Proof



Final Decision Requirements

Decision-maker must issue a written determination regarding responsibility that has to include

- Findings of fact
- Conclusions as to all allegations
- Rationale for reaching the decision
- Sanctions if the respondent is found responsible for policy violations must be included in the written determination.
- Right to appeal

Others to consider:

- Allegations and Procedural Steps
- Categories that highlight compliance with state law



Language for Report



Articulating Your Conclusion in Report

- **As to the allegation that _____, I find by a [preponderance of the evidence/clear and convincing standard] that _____.**
 - Address each allegation
 - Reasons why evidence supports the conclusion
 - Address disputed evidence
 - Detail any questions raised by parties after reviewing report
- As a result of these determinations of responsibility, disciplinary sanctions will be imposed on Respondent. Specifically,
 - Insert here what discipline will be imposed on Respondent, if any.
- Additionally, remedies designed to restore/preserve equal access to the school's educational program or activity will be provided to Complainant and coordinated by the Title IX Coordinator.
 - No requirement to specify what those remedies are under Title IX.



Allegation of Hostile Environment Sexual Harassment under Title IX

As to the allegation that _____, I find by a preponderance of the evidence/clear and convincing standard that _____.

- **DEFINITION:** unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectionably offensive that it effectively denies a person equal access to the school's education program or activity.



Allegations of Hostile Environment under State Law

- **As to the allegation that _____, I find by a preponderance of the evidence that _____.**
- **CA DEFINITION:** unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against in the educational setting, under any of the following conditions:
 - The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment
(definition abbreviated)



WRITE YOUR CONCLUSION(S) USING Title IX

Apply State law



Other Considerations

Impartiality, Conflict of Interest, Bias, Stereotypes, Trauma



Bias

- 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



Conflicts of Interest

- Actual
- Perceived
- Can be raised initially or in appeal



Stereotypes

- 2020 Regulations reject stereotypes about accusation meaning a party is responsible
- Statements showing favor to complainants or respondents
- Assumptions about who will be truthful



Trauma

- Impact of trauma on victims
- Ability to recall events and capture memories
- Factor how trauma of parties and/or witnesses may have played a role in the investigation



REMEMBER: Grounds for Appeal

- Procedural irregularity in the Title IX grievance process affected the outcome
- Newly discovered evidence that was not reasonably available at the time of the determination of responsibility or dismissal that could affect the outcome
- Due to a bias or conflict of interest by the Title IX Coordinator, investigator, or decision-maker that affected the outcome



Final Decision

- ✓ Identification of the allegations
- ✓ A description of all procedural steps taken from the receipt of the formal complaint through the determination,
- ✓ The findings of fact supporting the determination;
- ✓ The conclusions regarding the application of the school's code of conduct/school policy/school policies to the facts;
- ✓ Rationale for the result as to each allegation, including a responsibility and any disciplinary sanctions the school imposes on the respondent
- ✓ Other remedies designed to restore or preserve equal access; and
- ✓ The school's procedures and permissible bases for the complainant and respondent to appeal.



QUESTIONS?

megan@titleixconsult.com

