

T I T L E I X



C O N S U L T  
L L C

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# Overview of Training

- Overview of Title IX
- Title IX Investigation Process
- Important Considerations
- Case Study



# 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)



**Rescinded** Guidance from OCR  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

1998-1999  
Supreme Court decisions on  
Title IX

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

2020

Notice of Interpretation –  
sexual orientation/gender  
identity

2021  
Q & A

## 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.

In K-12 institutions, **ALL EMPLOYEES** have obligation to report



# Title IX – Parties and Administrators

## Administration of Claims

### Parties

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



# Investigator Responsibility

- Serve objectively, impartially, without bias
  - Conflicts
  - Stereotypes
- Gather all information related to a claim
- Analyze
  - Relevancy
  - Authenticity
  - Credibility
- Connect to parties and witnesses
- Assist in maintaining legitimacy of the process
- Policy should define the INVESTIGATOR role





# Impartiality

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



# Conflicts of Interest

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



# Stereotypes

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

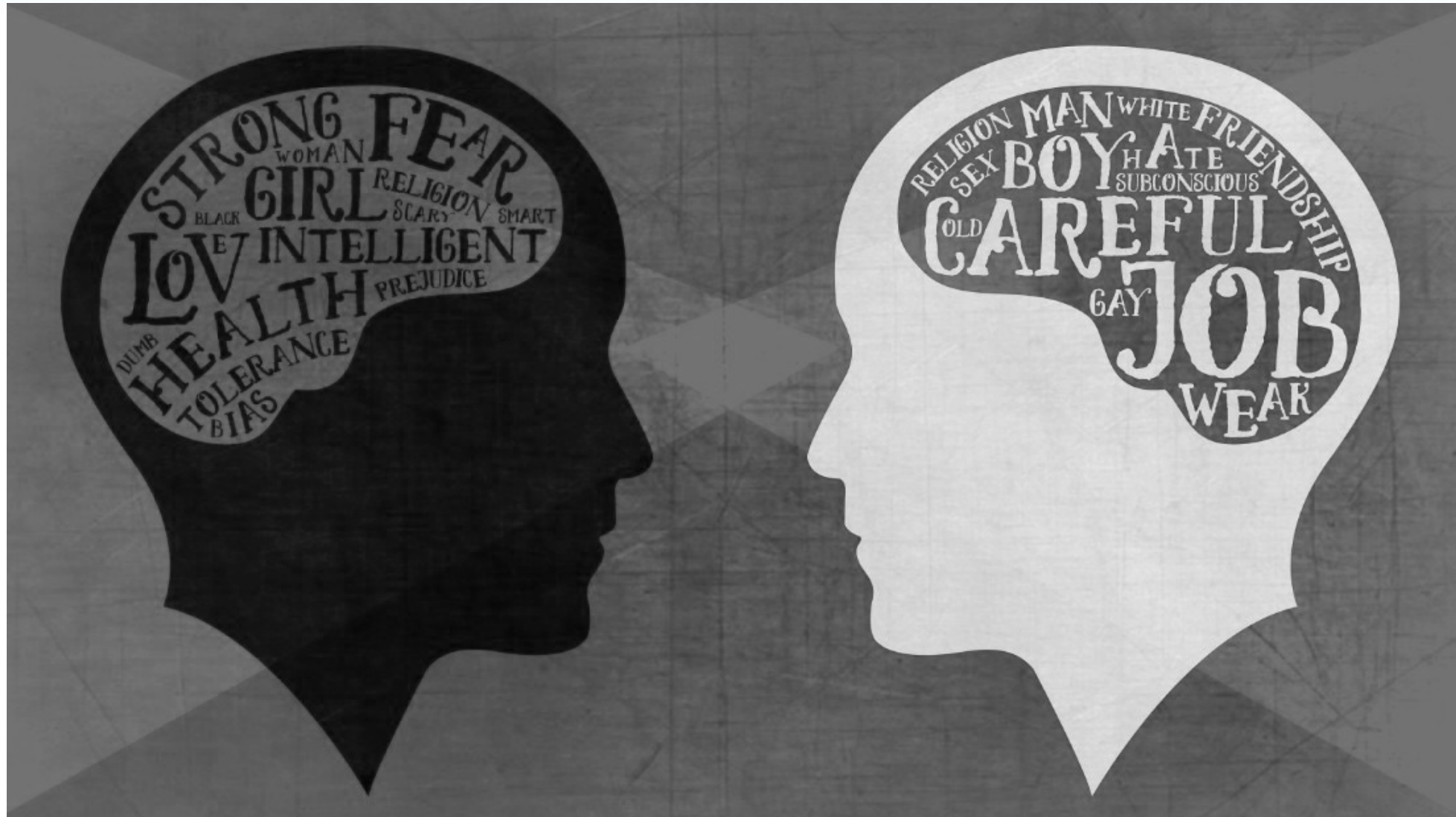


# Bias

- 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
- Poll 1



# Displaying Bias



# Types of Claims Under Title IX

- Athletics, access, parity
- Sex discrimination
- Sexual harassment
- Covers students and employees



# Types of Sexual Harassment

Under new regulations





# Definition of Sexual Harassment

## Conduct on the basis of sex:

- **Quid pro quo** - An employee who conditions the receipt of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.
- **Hostile environment** sexual harassment, 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 (emphasis added).





# Definition of Sexual Harassment, continued

## Sexual Assault

- Rape
- Fondling
- Incest
- Statutory Rape

## Dating/Domestic Violence

## Stalking



# Question of Consent

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



# 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



# 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



# 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
- Does not require “entire denial of access”
- Poll 2



# Overview of Grievance Process

**OBLIGATION: Respond promptly in a manner that is not deliberately indifferent**

## Initial complaint

- Notice
- Formal complaint
- Supportive measures
- Notice of allegations
- Presumption of innocence

## Investigation

- Interviews
- Document review
- Sharing information and reviewing feedback
- Investigative report

## Decision-maker

- Evaluate the evidence
- Determine if follow-up questions required
- Issue decision on policy violation and discipline



# Actual Knowledge

When sexual harassment or allegations of sexual harassment  
come to the attention of  
**ANY EMPLOYEE**  
of a K-12 district

All employees **MUST** report



# Formal Complaint

- Schools are required to investigate formal complaints - filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation
  - a complainant must be participating in or attempting to participate in the education program or activity of the school to file formal complaint
- If the complainant does not file a formal complaint, the wishes of the complainant should be respected.
  - Unless the Title IX Coordinator decides to initiate the complaint and it is “is clearly not unreasonable in light of the known circumstances”
  - Title IX Coordinator may file and sign a formal complaint
  - Title IX Coordinator does NOT become complainant





# Supportive Measures

- Mandatory obligations include offering “**supportive measures**” to complainant that must be non-punitive, non-disciplinary, and not unreasonably burdensome on the other party
  - GOAL - provide both parties with equal access to their education, protect safety, and deter sexual harassment.
- No action can be considered “disciplinary” against a respondent at this stage.
- Appropriate supportive measures counter allegations of deliberate indifference
- Supportive measures must be revisited frequently and properly documented



# Student Removal

Safety Review



# Notice of Allegations

- Notice of the allegations of sexual harassment including sufficient details known at the time including the identities of parties, the conduct alleged, and date and location of the incident
- Provided before Respondent's interview
- Allow for sufficient time to prepare a response before any initial interview
- Includes policies alleged to have been violated and must be supplemented if additional allegations arise
- Notice of informal resolution process
- Must include:
  - Respondent is presumed not responsible for the allegation
  - Parties may have an advisor of their choice



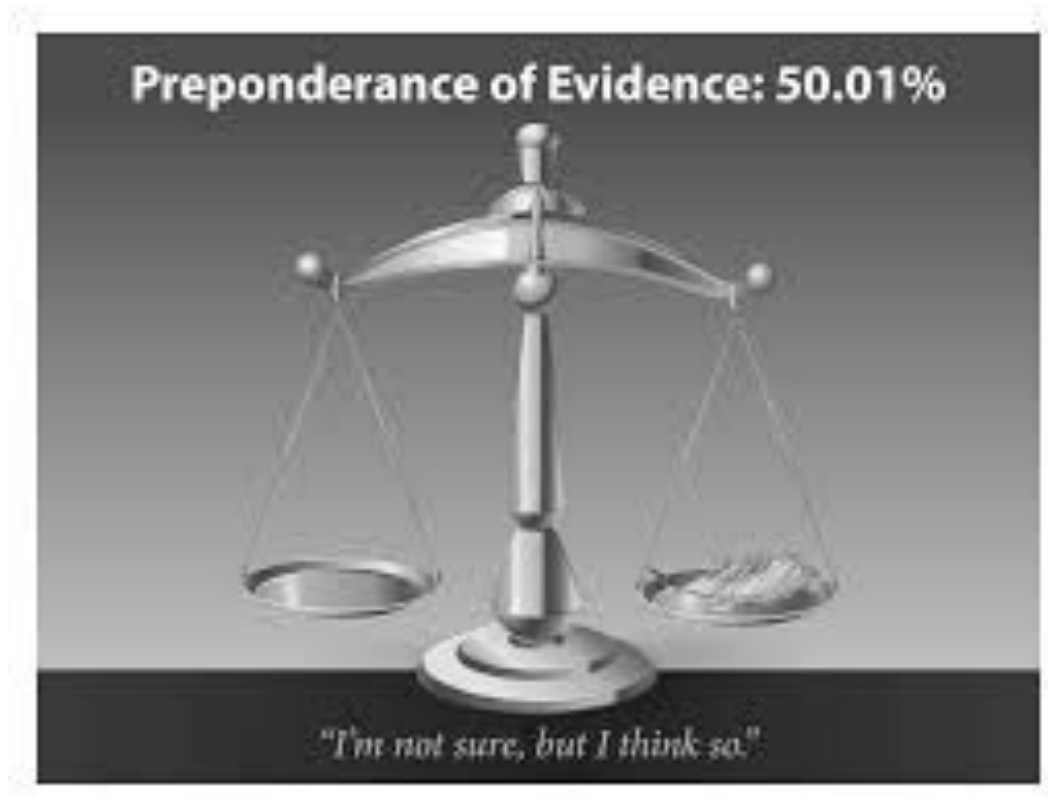
# Presumptions

- Not responsible until proven to be responsible
- Stereotypes and bias



# Burden of Proof

- Preponderance of the evidence
- Clear and convincing



# Conducting Investigations

Basics



# Information Gathering

- Types of information
- Background
- Request information from parties
- Proactively seek information
- Requests and refusals
- Information sharing





# Initial Review

- Formal complaint
- Notice to both parties
- Supportive measures
- Timelines
- Parties (and parents) understand the process
- Other complaints?
  - Criminal matters
  - Similar complaints – consolidation
- Concurrent or parallel investigations
- Record-keeping requirements
- **Documentation at every step!!**





# Preliminary Information Gathering

- Documents shared with the parties
- Other records



# What Is Next?

Organizing the Investigation



# Conducting Interviews

- Introduction
- Questioning – time, space, and effect of silence
- Open-ended versus leading questions
- Direct versus indirect evidence
- Sensory recollection
- Note-taking versus audio/video-recording
- Advisors' role
- Investigator should maintain the control the interview
  - Decorum
  - Responses
  - Concluding the interviews
  - “Anything else”



# Gathering Documents and Other Evidence

- Emails, texts, photos
- Legal implications
- Support or contradict testimony
- Character evidence



# 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



# 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.



# Question of Consent

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





# Credibility

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



# Impact of Trauma

- Many Title IX causes of action involve trauma
- Investigators and decision-makers must understand the impact of trauma on:
  - Reaction to trauma
  - Ability to capture memories
  - Recollection of memories
- Expectations around trauma victim



# Writing the Report



# 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



# Final Report 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.



# Organizing the Report

- Covering required categories
- Providing the relevant information
- Including applicable policy provisions
- Staying within the parameters of the investigation report (as set forth in policy)
- 20-20 Hindsight



# Title IX Report and Information Sharing

Before investigation report issued, all evidence shared



Opportunity to question and provide feedback



Investigation report issued and shared



Opportunity to question and provide feedback on investigation report



Final outcome letter issued by decision-maker(s)



# Decision-Maker Role

- Review all materials in investigation report
  - Consider challenges/questions submitted by parties
- Question investigation and report
- Respond to questions on report itself from parties
  - Relevancy
- Conclude whether policy violation occurred and determine discipline, if necessary





# Other Considerations

Appeal and Non-retaliation



# 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; or
- Due to a bias or conflict of interest by the Title IX Coordinator, investigator, or decision-maker that affected the outcome.



# Other Important Provisions

- Non-retaliation
- Record-keeping



# VT State Law Definition of Sexual Harassment

Sexual harassment means unwelcome conduct of a sexual nature, that includes sexual violence/sexual assault, sexual advances, requests for sexual favors, and other verbal, written, visual or physical conduct of a sexual nature, and includes situations when one or both of the following occur:

- (i) Submission to that conduct is made either explicitly or implicitly a term or condition of a student's education, academic status, or progress; or
- (ii) Submission to or rejection of such conduct by a student is used as a component of the basis for decisions affecting that student.

Sexual harassment may also include student-on-student conduct or conduct of a non-employee third party that creates a hostile environment. A hostile environment exists where the harassing conduct is severe, persistent or pervasive so as to deny or limit the student's ability to participate in or benefit from the educational program on the basis of sex.



# Allegation of Sexual Harassment – VT State Law Example

**Title IX hostile environment sexual harassment** - 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 (emphasis added).

## **VT State Law - Hostile Environment**

Sexual harassment may also include student-on-student conduct of a non-employee third party that creates a hostile environment. A hostile environment exists where the harassing conduct is severe, persistent or pervasive so as to deny or limit the student's ability to participate in or benefit from the educational program on the basis of sex.



# QUESTIONS?

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