

TITLE IX

Appeals

What do you need to know?

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Introductions

- 42-year educator: 36 years active, 7 years in consulting
- ATIXA fully certified in Title IX, Title VI, and Title VII to serve as interim coordinator, investigator, decision-maker, advisor, and informal facilitator
- Has conducted, participated in, or advised in over 50 Title VI, Title VII, and Title IX investigations and decision-making
- Served as IU Executive Director, interim superintendent, and consultant to charter schools and school districts



Title IX

The Basics

What is Title IX?

Title IX of the Education Amendments of 1972 is a **federal civil rights law** which prohibits discrimination on the basis of sex in all federally-funded educational institutions.

Title IX applies to **all K-12 schools and postsecondary educational institutions** which receive any kind of federal financial assistance

Text of Title IX

Title IX states

- *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. (28 U.S.C.A. §1681)*

Applies to an entire school, not just programs receiving funding.

❖ Exceptions – Military and private religious schools



Title IX Enforcement

- Governed by Title IX statute and the 2020 Title IX regulations
 - Department of Education's Office of Civil Rights (OCR)
 - Case Law
- Guidance* from
 - Dear colleague letters
 - Executive orders
 - OCR resolutions

*Tolerance for risk

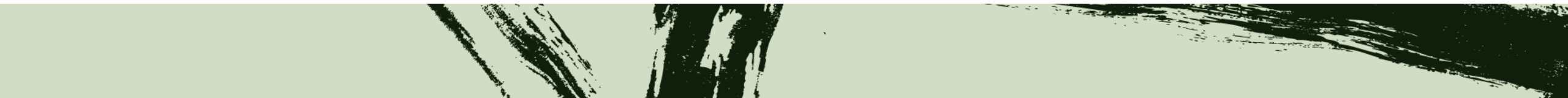


Title IX is a Gender Equity Law

Seeks to remedy the inequities sex-based harassment and discrimination create

STOP PREVENT REMEDY

Ability to appeal dismissals and determinations helps to ensure equity



Two Paths of Enforcing Title IX



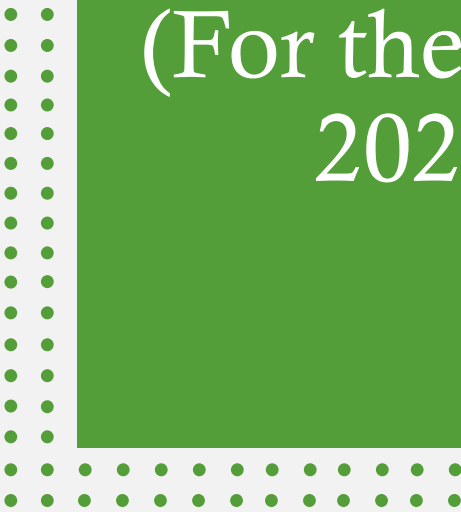
Judicially – In Court*

- Lawsuit in federal court against educational institution
- Plaintiff(s) must show that a school official had actual knowledge and was deliberately indifferent

Administratively - Agency

- By reporting to the school's Title IX Coordinator and following its Title IX grievance procedures
- By reporting to the Office for Civil Rights (OCR), subsidiary of DOE

*Some courts will require plaintiffs to exhaust administrative agency remedies first.



THE STANDARD OF LIABILITY (For the institution: 2020 Regs)

A School Entity with actual knowledge of sexual harassment in an education program or activity of the School Entity against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

Agenda – Focus on Title IX

- Scope of education program/activity
- Definition of sexual harassment
- Title IX Policy and Procedures
- Serving impartially
- Conflict of interest and bias
- Conducting the grievance process
- Conducting appeals
- Appeal grounds
- Meaning of the term “relevant”
- Impermissible evidence
- Making an appeal determination
- Appeal outcomes
- Rationale
- Standard of Evidence

Title IX

Pre-Appeal Topics

Scope of Education and Activity

“...Any beneficiary of a program or facility offered or provided by the College...”

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.

Definition of Title IX Sexual Discrimination/Harassment

Discrimination: adverse treatment of an individual on the basis of sex

- Usually at the institution level – Disparate Treatment/Impact

Sexual Harassment (a form of discrimination):

1. Conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct (Quid Pro Quo)
2. Unwelcome conduct determined by a *reasonable* person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the College's education program or activity
3. "Sexual assault," "dating violence," "domestic violence," or "stalking"

Know your Title IX definitions

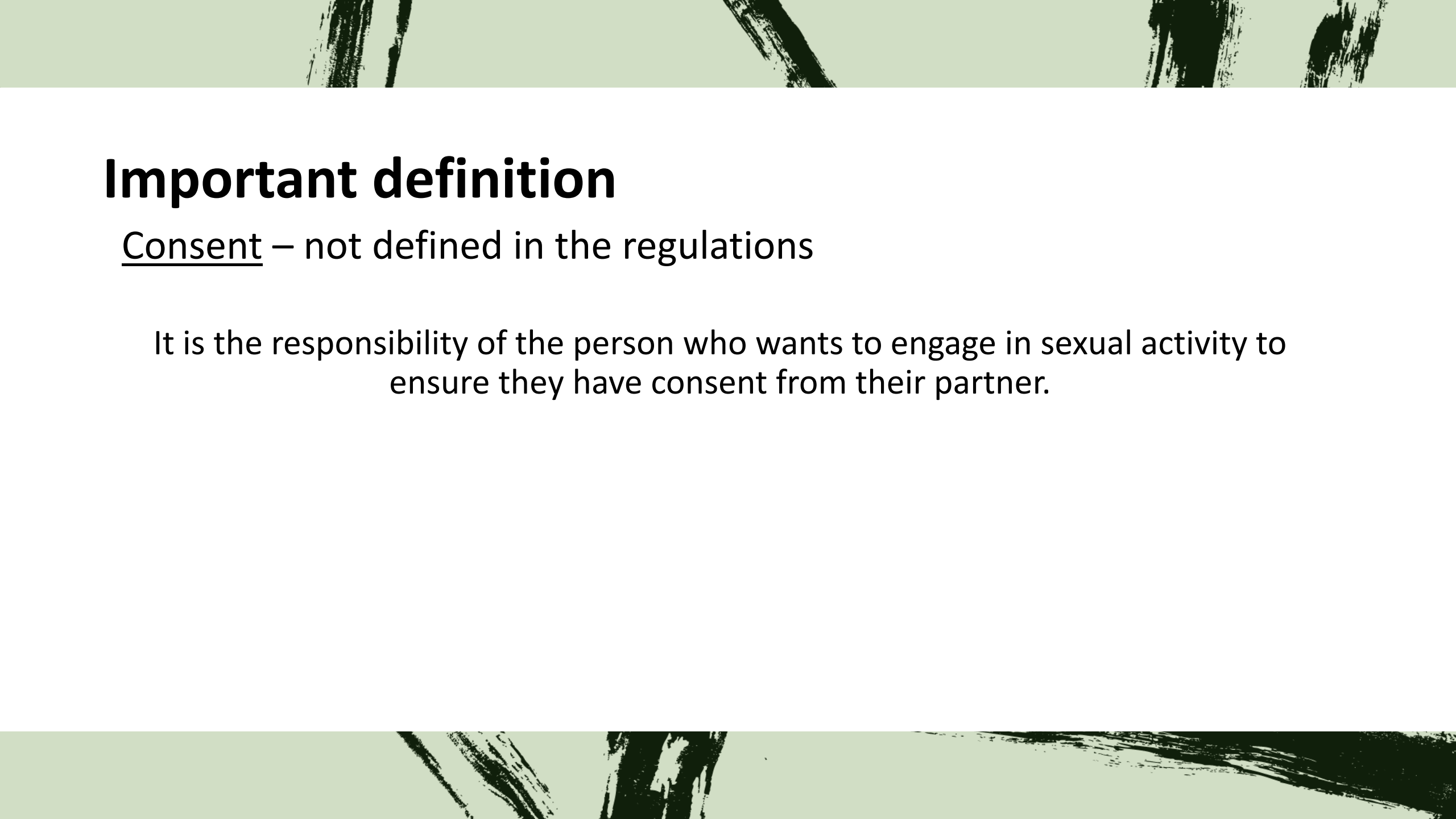
- Severe
 - the impact or nature of the conduct, suggesting it is extreme or egregious. A single, intensely abusive incident can be considered severe
- Pervasive
 - the frequency and persistence of the conduct. It means the behavior is not an isolated event but is repeated or ongoing.
- Objectively Offensive
 - a reasonable person, in the same or similar circumstances, would find the conduct offensive, regardless of their personal opinions

Important definition

Hostile Environment

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe, pervasive and objectively offensive (SPOO)
- That it effectively denies a person equal access to the school's education program or activity

May be identified as an additional allegation.



Important definition

Consent – not defined in the regulations

It is the responsibility of the person who wants to engage in sexual activity to ensure they have consent from their partner.

Important definition

Consent

- **Affirmative and active:** Consent must be a *clear "yes" through words or actions*, not a "maybe" or "no." It can never be assumed and *must be ongoing throughout sexual activity*.
- **Freely and voluntarily given:** Consent must be a choice made *without coercion, pressure, or manipulation*.
- **Knowing and informed:** A person *must be aware* of what they are agreeing to and *be able to make a rational decision*.
- **Mutual and ongoing:** Both parties must give consent, *and it can be withdrawn at any time before or during the activity*.
- **Specific:** *Consent to one act does not imply consent to another*. Previous relationships do not grant consent to future sexual acts.

Important definition

Consent is not possible when:

Incapacitation: A person cannot give consent if they *are incapacitated due to alcohol or drugs, asleep, or unconscious.*

Coercion or manipulation: Consent given under pressure is not valid

Lack of capacity: A person who is mentally disabled or a minor (depending on state laws and specific Title IX definitions) *may not be able* to give consent.

Parse the Policy

Did the alleged conduct occur?

If the alleged conduct occurred, was it sex-based?

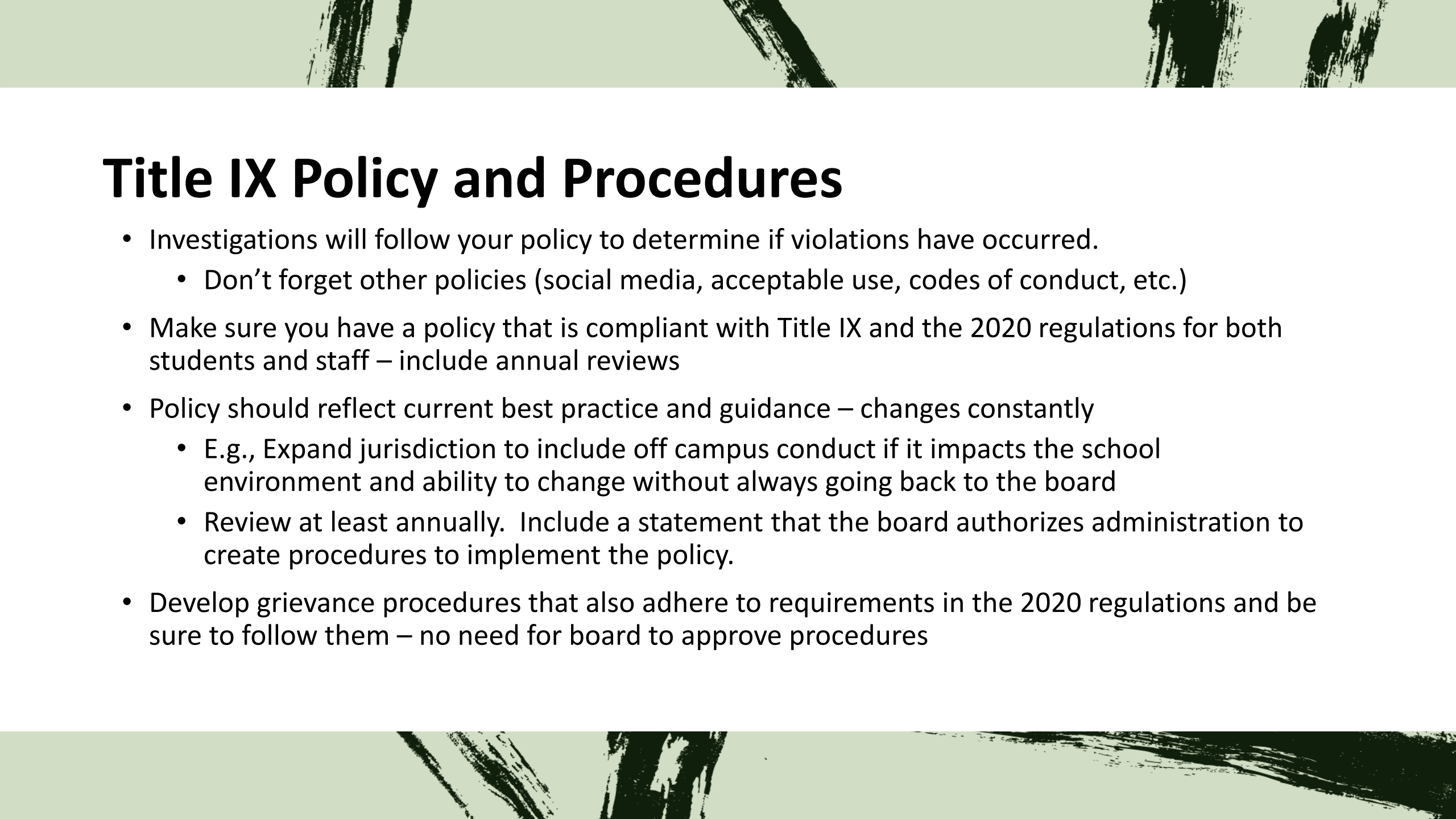
If the alleged conduct occurred, was it severe, pervasive, and objectively offensive?

Parse the Policy

Definition:

Stalking means to engage in a course of conduct on the basis of sex directed at a specific person that would cause a reasonable person to either: (1) fear for their safety or the safety of others (2) suffer substantial emotional distress.

1. Did the respondent(s) engage in a specific “course of conduct?” If so, what was it?
2. Was the course of conduct carried out on the basis of sex?
3. Was the conduct directed at a specific person(s)?
4. Would the conduct cause a reasonable person to either (1) fear for their safety or the safety of others OR (2) suffer substantial emotional distress?



Title IX Policy and Procedures

- Investigations will follow your policy to determine if violations have occurred.
 - Don't forget other policies (social media, acceptable use, codes of conduct, etc.)
- Make sure you have a policy that is compliant with Title IX and the 2020 regulations for both students and staff – include annual reviews
- Policy should reflect current best practice and guidance – changes constantly
 - E.g., Expand jurisdiction to include off campus conduct if it impacts the school environment and ability to change without always going back to the board
 - Review at least annually. Include a statement that the board authorizes administration to create procedures to implement the policy.
- Develop grievance procedures that also adhere to requirements in the 2020 regulations and be sure to follow them – no need for board to approve procedures

Serving Impartially

Title IX Team members (internal or external third-party members) must not have a conflict of interest or bias against:

- Complainants, generally
- Respondents, generally
- The parties involved in the current complaint
- The subject matter or details of the Complaint

Conflict of interest or bias on the part of those involved in the Complaint is one basis for appeal.

Serving Impartially

Conflict of Interest – What is it?

- An actual (or perceived) clash
- Between the role the person is playing in the process and a current or previous relationship with one of the parties
- That prevents neutrality or objectivity on the part of the team member

Serving Impartially

Bias – What is it?

- Prejudice for or against a person or group, or an unwillingness/inability to be influenced by factual evidence

Serving Impartially

If you believe you have a conflict of interest or bias, discuss with the TIXC.

Bias must be substantiated bias, not perceived bias.

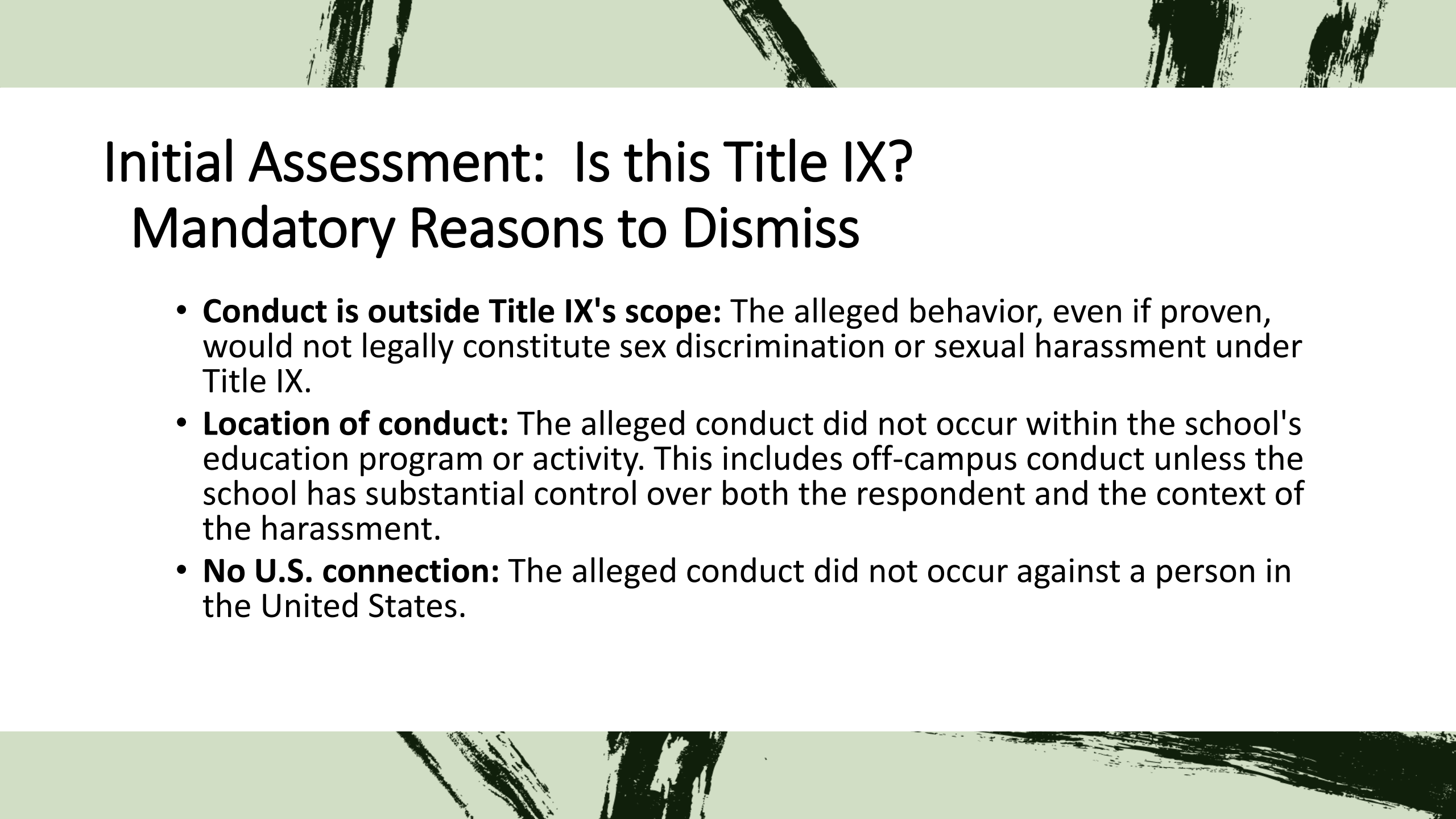
Recuse yourself if there is any questions of your ability to serve impartially.

The Grievance Process

Written Procedures govern the process.

Generally 5 steps:

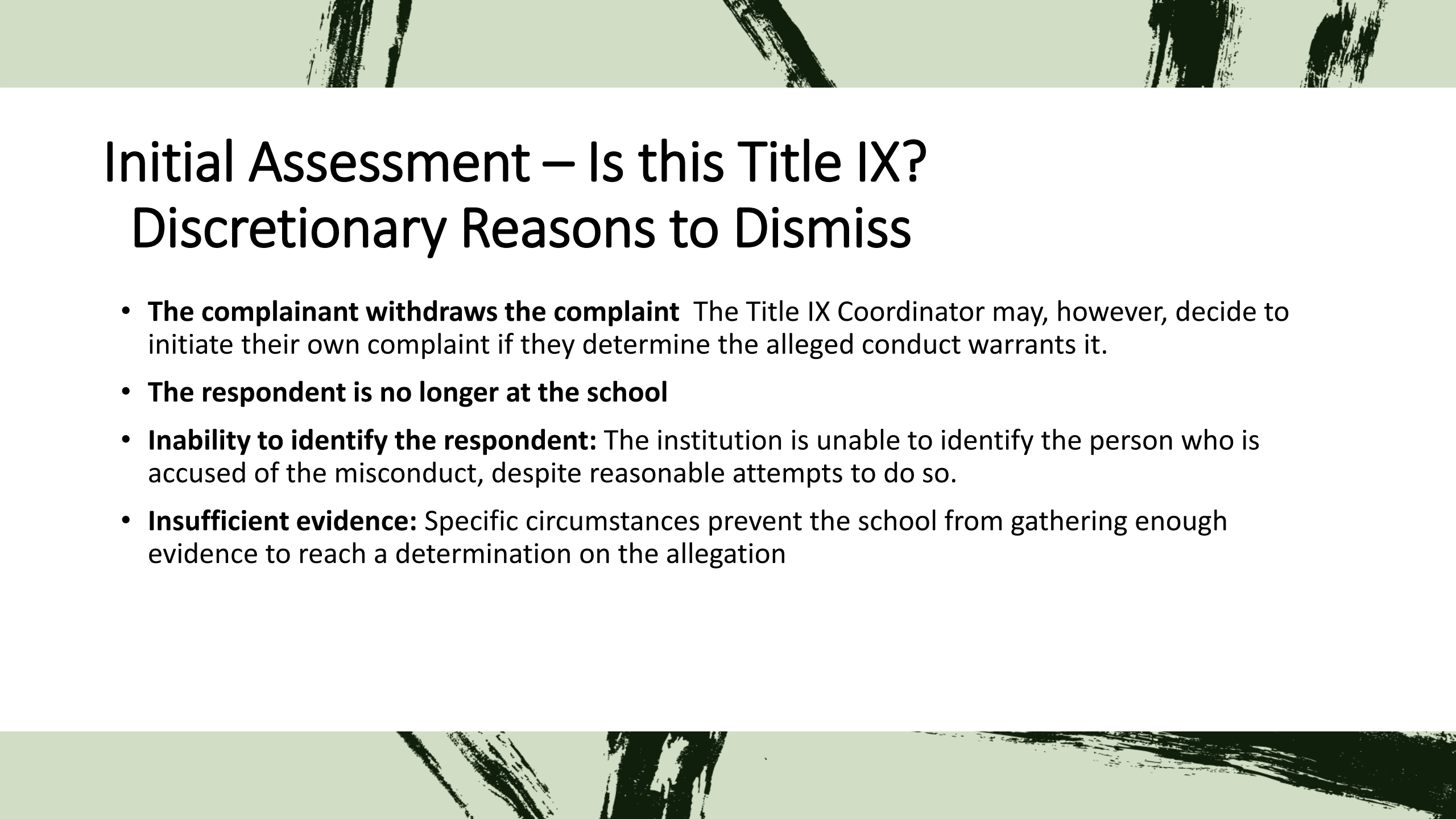
1. Incident
2. Initial Assessment – Is this Title IX?
3. Formal Investigation/Alternate Resolution (Must have signed formal complaint)
4. Hearing/Determination – Live hearing required for Higher Education only
5. **Appeal**



Initial Assessment: Is this Title IX?

Mandatory Reasons to Dismiss

- **Conduct is outside Title IX's scope:** The alleged behavior, even if proven, would not legally constitute sex discrimination or sexual harassment under Title IX.
- **Location of conduct:** The alleged conduct did not occur within the school's education program or activity. This includes off-campus conduct unless the school has substantial control over both the respondent and the context of the harassment.
- **No U.S. connection:** The alleged conduct did not occur against a person in the United States.



Initial Assessment – Is this Title IX?

Discretionary Reasons to Dismiss

- **The complainant withdraws the complaint** The Title IX Coordinator may, however, decide to initiate their own complaint if they determine the alleged conduct warrants it.
- **The respondent is no longer at the school**
- **Inability to identify the respondent:** The institution is unable to identify the person who is accused of the misconduct, despite reasonable attempts to do so.
- **Insufficient evidence:** Specific circumstances prevent the school from gathering enough evidence to reach a determination on the allegation

Dismissing a Complaint...

- Written notice to the Complainant(s) AND Respondent(s) stating the reason for the dismissal under Title IX
- **The notice will state they have a right to appeal the dismissal or claim the complaint should have been dismissed and include the bases under which they may appeal:**
 - Procedural error (Complaint wasn't dismissed, e.g.)
 - New evidence that was not available at the time of the dismissal
 - Conflict of Interest or Bias
 - Other – excluded evidence should have been included, e.g. (discretionary)

Formal Investigation - Procedural Requirements

- **IMPORTANT:** Notice of Allegations and Investigation (NOIA) to the parties – **Critical**
 - **Allegations - detailed description**
 - Parties involved
 - **Right to an advisor**
 - **Incident Details – Date and location of incident**
 - Grievance Process
 - **Presumption of Non-Responsibility***
 - **Supportive Measures available**
 - Contact Information for Title IX Coordinator
- Other – check written procedures if they are used as basis for appeal

Hearing (Higher Ed Only)/Determination

- Will follow written live hearing procedures
- Requires lots of work and coordination
- Similar to a court hearing but with significant differences
- Hearing panel will serve as decision-makers
- Decision/determination will be made by the panel
- **Parties have right to appeal the determination**

Standard of Evidence

Preponderance of the evidence is the industry standard

- whether it is more probable than not that the alleged conduct occurred and constituted a violation of policy. Under Pennsylvania law, a preponderance of the evidence standard is defined as “the greater weight of the evidence” with the criteria that such evidence **“tip a scale”** slightly. *Raker v. Raker*, 2004 PA Super 107, 87 A.2d 720, 724 (2004).

51%

“Relevant” Evidence

- Tends to prove or disprove a fact
- Is pertinent to the allegations
- Can be inculpatory or exculpatory

“Relevant” Evidence

Evidence about a complainant's prior sexual history is generally irrelevant and not permissible UNLESS

1. it's offered to show another person committed the act **OR**
2. to prove lack of consent in a specific instance with the respondent

Title IX

Appeals

Serving Impartially

Title IX Appeal Decision-makers (the ADM) must not have a conflict of interest or bias against:

- Complainants, generally
- Respondents, generally
- The parties involved in the current complaint
- The subject matter or details of the Complaint

General Information

- Right of appeal is included in the written determination to the parties, along with the grounds on which they can appeal
- If an appeal is received it will go to the TIXC, who will notify the other party
- The TIXC will identify a *trained* appeal decision-maker, who can and is willing to serve this role without conflict of interest or bias
- **Purpose is to identify if an error occurred THAT WOULD HAVE AFFECTED THE OUTCOME OF THE MATTER**
- Review is very narrow in scope

Three Mandatory Grounds for Appeal

1. Procedural irregularity THAT AFFECTED THE OUTCOME OF THE MATTER.
2. New evidence that was not reasonably available at the time of the determination THAT COULD HAVE AFFECTED THE OUTCOME OF THE MATTER.
3. Conflict of Interest or bias by the TIXC, Investigator, Decision-Maker THAT AFFECTED THE OUTCOME OF THE MATTER.

*discretion to add appeal grounds locally

Appeal Determinations

- Is the appeal timely?
- Does the appeal contain sufficient detail?
 - Does it clearly state ground(s) on which the appeal is being made?
 - Does it clearly state the procedural irregularity in question, the new evidence that was not available at the time of the determination and when it became available, and/or the substantiated, specific conflict of interest or bias on the part of one of the Title IX team?
- For each, does the appeal state the reason why the outcome would have been different given the detail they have provided?
- No specific format is required but a form for parties to fill out will assist the parties to provide the needed information.

Considerations

- If appeal is rejected as untimely, written notice to parties.
 - Decision is final.
- If appeal is timely
 - All other parties must be notified in writing and given an opportunity to respond in writing to the appeal
- An ADM can solicit information from the parties, investigators, the hearing panel/decision-makers or TIXC as appropriate to clarify information or missing information (keep questions and contact factual)
- Ask questions of the parties –should be in writing; meet with them if bias is raised
- ADM should review the entire record, including all evidence and the hearing transcript

Appeal Determination

- Did an error occur according to the standard of evidence?
- If it did, did it affect or could it have affected the outcome?
- If it did affect or could have affected the outcome, what is the remedy?

Generally constrained to respond to what is in the appeal

Must provide a rationale for your determination

Appeal Outcomes

- Deny appeal; original determination upheld
- Remand to original or new investigator for new or further investigation
- Remand to original or new decision-maker for additional consideration or new determination/hearing

Not recommended for appeal decision-maker to modify the original determination

Appeal Outcomes

- If an error is determined to have occurred and issue is remanded for action, provide guidance and detail on what should be addressed
- Written appeal determination must go to the parties simultaneously
 - Grounds ADM considered or rejected (see original appeal)
 - Any steps the ADM took during the appeal (spoke to a party re: claim of bias, e.g.)
 - The decision and rationale

ADM decision is final (on that appeal!)

Appeal Determination Structure

- Introduction
- Allegations
- The Appeal Process
- Determination (summary)
- Applicable Policy (doesn't have to be entire policy)
- Procedural History
- Basis for Appeal
- Reasoning and Analysis Supporting Determination
- Conclusions and Recommendations
- Signature and Copies

Title IX Coordinator is responsible for implementing the appeal determination!

Keep good records as required by law

Seven years is the standard

- Preserve evidence, including videos, text messages, emails, screen shots, etc.
- Documents, including NOIA's, invitations for interviews, emails, other letters, etc.
- Retain the investigation report and decision-maker report **and any appeal documents.**

QUESTIONS?

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