

T I T L E I X



C O N S U L T  
L L C

# Aberdeen School District

Decision-Maker Training



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# Overview of Decision-Maker Training

- Introduction to Title IX law and regulations
- Title IX Coordinator role
- Education institution legal obligations, including employees
- Title IX jurisdiction and dismissal of complaints
- Types of Title IX claims and consent
- Title IX parties and administrators
- Overview of Title IX grievance process
- Burden of proof
- Investigation report and information-sharing with the parties
- Decision-maker role
- Types of evidence
- Avoiding decision-making pitfalls
- Evaluating evidence and reaching a conclusion
- Appeal
- Retaliation



# 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



**Rescinded** Guidance from OCR  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)

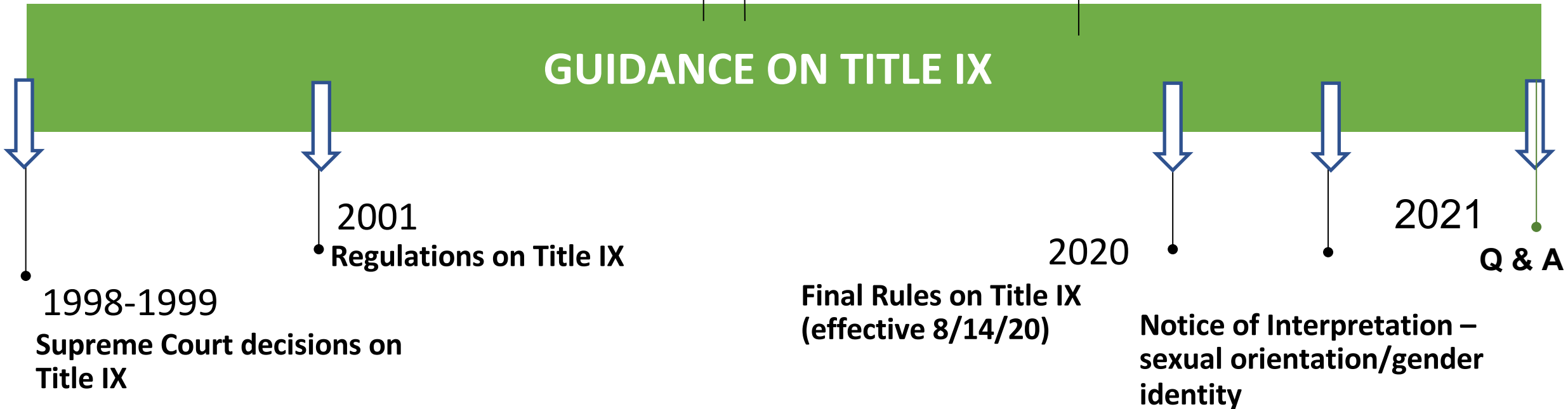
2021

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





## 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.



# 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



# 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



# Title IX Coordinator's Role

- 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



# Types of Sexual Harassment

Applicable to the Scenario



# Definition of Hostile Environment Sexual Harassment

Conduct on the basis of sex:

- **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.**



# 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.



# Notice of Allegation(s)

Articulate the allegation





# 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

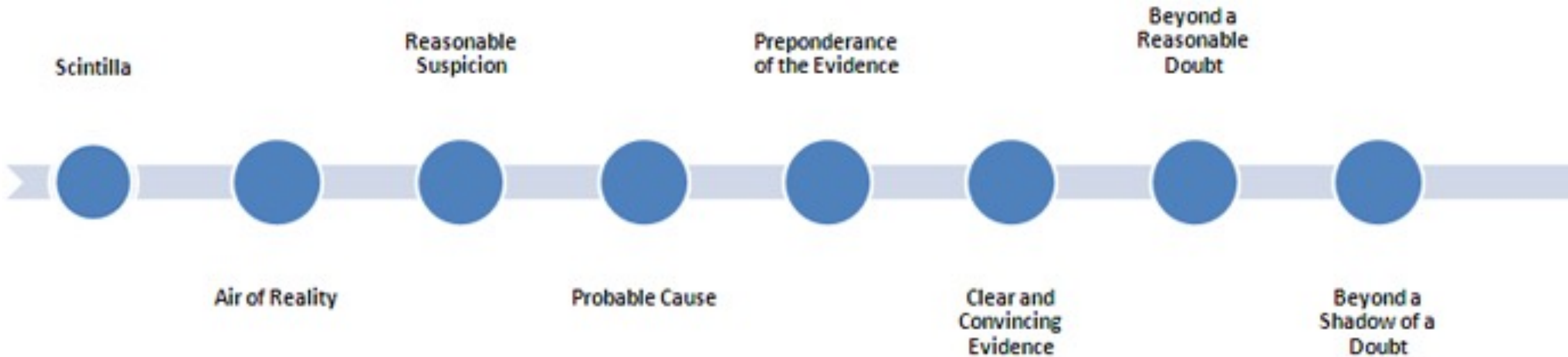
- Corroboration
- Feasibility
- Motivation for truthfulness/untruthfulness
- Consistent
- Reviewed/coached





# 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.



# Language for Report



# Report Writing

- Articulating Your Conclusions
- Allegation of [type] of sexual harassment under Title IX
- Allegations under state law
- Discipline



# 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



# 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?

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