

# **Best Practices for Responding to Claims of Sex Discrimination and Sex-Based Harassment**

Presented to San Jacinto College  
July 29 and 30, 2024

**Thompson & Horton LLP**

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# Presenters



**Morgan Beam**  
Senior Associate  
mbeam@  
thompsonhorton.com



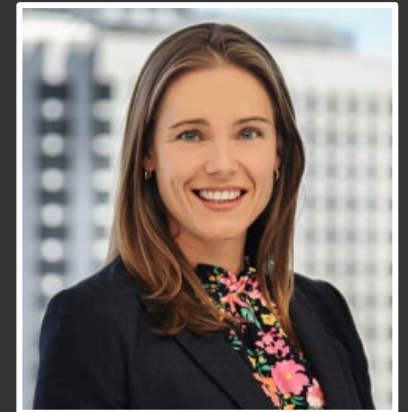
**Lisa A. Brown**  
Partner  
lbrown@  
thompsonhorton.com



**Stephanie Hamm**  
Partner  
shamm@  
thompsonhorton.com



**Melissa Mihalick**  
Counsel  
mmihalick@  
thompsonhorton.com



**Kendra Yoch**  
Counsel  
kyoch@  
thompsonhorton.com

# Agenda



## **Overview – The Legal Landscape**

- ▶ State and federal laws addressing sex discrimination and harassment
- ▶ Update on injunctions to block the 2024 Title IX regulations



## **Prohibited Conduct**



## **Employee Duty To Report**



## **Grievance Process Under the Law & College Policy**

- ▶ Investigations – Fundamental Skills
- ▶ Decisionmaking and Adjudication – Best Practices



## **New Protections for Pregnant Students**



## **Case Handling Workshop**

- ▶ Scenarios and interactive group discussion



# The Legal Landscape



# Title IX: Nuts & Bolts

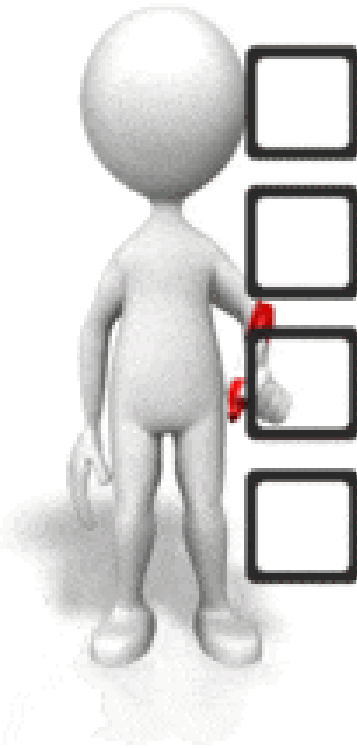
“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.”

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)

- **Enacted in 1972. Enforced by U.S. Department of Education.**
- **Prohibits sex discrimination in institutions that receive federal funds**
- **Affects all education programs & activities**
  - Academics
  - Athletics
  - Financial aid
  - Counseling
  - Extracurricular activities
  - Other services

# Title IX Coordinator

Under federal law, each institution "must designate and authorize at least one employee to **coordinate its efforts to comply with its responsibilities under this part**, which employee must be referred to as the "**Title IX Coordinator**."



## Role in Addressing Sexual Discrimination

- Coordinating prevention activities
- Evaluating reports and complaints and coordinating supportive measures
- Responding to reports of sexual harassment and facilitating grievance and appeal processes

# Title IX: Nuts & Bolts



**For the last two decades, Title IX obligations have significantly increased, with a special emphasis on sexual harassment and violence.**

- ***More*** procedural requirements
- ***More*** training requirements
- ***More*** detailed school policies
- ***More*** scrutiny from the Department of Education
- Increased concerns about legal liability

# Title IX: Nuts & Bolts

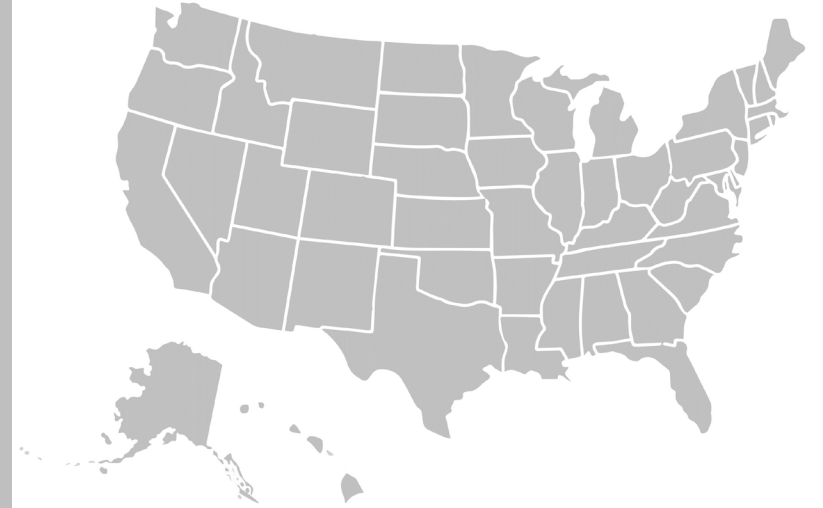


- **May 2020:** Trump Administration released new Title IX regulations on handling sexual harassment complaints.
- **April 2024:** Biden Administration amended the 2020 regulations regarding sexual harassment and created new rules on sexual discrimination. **Effective date on August 1, 2024 in most states.**



# 2024 Title IX Injunctions

- Multiple states sued to block the 2024 Title IX rules.
- **Primary complaint** is the definition of “sex discrimination” which was amended to include **gender identity** and **sexual orientation**.
- Several courts have blocked enforcement of the rules in more than 20 states, including Texas.
- Appeals are pending that could affect whether portions of the 2024 rules take effect this year.



# 2024 Title IX Injunctions

## SO WHICH RULES APPLY?

- The **2024** Title IX rules have been put on hold for Texas public colleges.
- The **2020** Title IX rules will continue to apply for now.
- But other laws also affect the College's response to sexual discrimination and harassment.
- Today's training focuses on **essential knowledge** and **fundamental skills** for addressing sex discrimination and harassment claims.

# San Jacinto College Policies

## Policy III.3006.D

[T]his Policy prohibits sexual harassment, sexual assault, dating violence, domestic violence, and stalking against any student or employee by any person under the control of the College. ... This policy applies regardless of the sex, **sexual identity, or sexual orientation** of the parties.

## Discrimination and Harassment Complaints

*(Excludes Sexual Harassment and Sexual Misconduct)*

### Complaint Procedure 300

#### 300.1 General Statement of Purpose

It is the policy of San Jacinto College to provide an educational, employment and business environment free of discrimination based on race, creed, color, national origin, citizenship status, age, disability, pregnancy, religion, gender, sexual orientation, gender expression or identity, genetic information, marital status or veteran status. Trustees, administrators, faculty, staff and other agents of the College will not engage in conduct constituting unlawful harassment or discrimination.

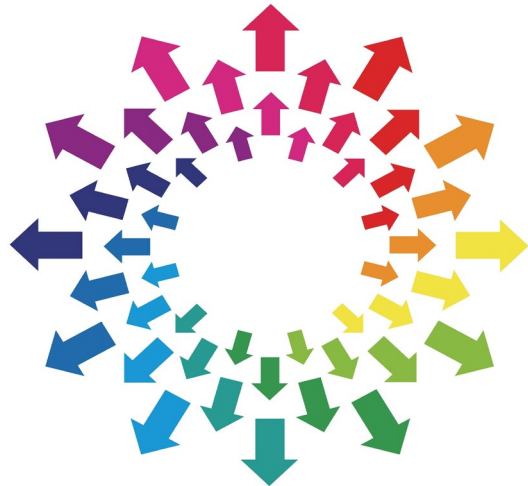
## Policy IV.4002.G

Prohibits "discrimination based on race, creed, color, national origin, citizenship status, age, disability, pregnancy and pregnancy-related conditions, religion, **gender/sex, sexual orientation, gender expression or identity**, genetic information, marital status, or veteran status."

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**Other Laws that Address  
Sex Discrimination and  
Sexual Violence**

# It's More than Just Title IX Reminder



**In addition to Title IX, the College must follow other laws, including:**

- ▶ **Texas Education Code** – addresses harassment, athletics, pregnant & parenting students
- ▶ **U.S. Constitution** – requires “equal protection” of the laws
- ▶ **Clery Act** – addresses sexual assault, dating violence, domestic violence, stalking
- ▶ **Title VII of Civil Rights Act of 1964 and Texas Labor Code** – prohibits discrimination in employment

# Texas Education Code

## Key Requirements



## Policies & Reporting

- ▶ Requires adoption of a policy addressing sexual harassment, sexual assault, dating violence, and stalking
- ▶ Requires training for freshmen and transfer students
- ▶ Requires **all employees** to report incidents of sexual harassment, sexual assault, dating violence, or stalking to the Title IX Coordinator
  - *Termination for failure to report*
- ▶ Requires reporting harassment data to the Higher Education Coordinating Board
  - *Financial penalties for non-compliance*

# Texas Education Code

## Key Requirements



## Prevention

- ▶ **Requires “a comprehensive prevention and outreach program on sexual harassment, sexual assault, dating violence, and stalking”**
  - ▶ Must include “a victim empowerment program, a public awareness campaign, primary prevention, bystander intervention, and risk reduction”
  - ▶ Must email every student every semester the protocol for filing a complaint with the Title IX Coordinator
  - ▶ Imposes rules and standards relating to confidentiality and requests not to investigate

# Texas Education Code

## Key Requirements



## Student Conduct Rules

- ▶ Requires “a prompt and equitable opportunity to present witnesses and other evidence”
- ▶ Requires that the parties have “reasonable and equitable access to all evidence relevant to the alleged violation,” including any statements by the alleged victim or by other persons, electronic communications, and other evidence
- ▶ Requires completion of a discipline process ***even if respondent withdraws after a charge is filed***



# Texas Education Code

## Key Requirements



## Other Student Rights

- ▶ **New Discrimination Laws**
  - ▶ New rules on accommodations for pregnant students and leaves of absence for pregnant or parenting students
  - ▶ Senate Bill 15 prohibits student participation in intercollegiate athletics except based on “biological sex”
    - ▶ Exception for females who want to play on a male team where there is no female equivalent sport

# U.S. Constitution 14th Amendment



## Equal Protection

- ▶ Requires public entities treat similarly situated persons in a like fashion
- ▶ Generally prohibits **special benefits or special detriments** based on sex unless the treatment directly serves an important governmental interest and is substantially related to achievement of the objective
  - ▶ **Example:** The Supreme Court held that a male-only military academy could not exclude females and that a female-only nursing school could not exclude males
- ▶ Courts have held that discrimination based on sexual orientation or gender identity violates equal protection unless rationally related to a legitimate governmental objective
  - ▶ **Example:** Assault rules in the code of student conduct must be applied equally to all students

# Clery Act

## Violence Against Women Act



## Crime Data

- ▶ Requirements include (i) designating **campus security authorities** to report certain campus-related crimes, (ii) issuing timely warnings, and (ii) publishing an annual security report.
- ▶ In 2013, VAWA amendments to the Clery Act increased crime reporting obligations & imposed new discipline processes for sex-related offenses.
- ▶ Institutions of higher education must collect data on **sexual assault, dating violence, domestic violence, and stalking** and must provide information on prevention programs in their annual security reports.
- ▶ Clery reporting applies to crimes based on the victim's "actual or perceived race, gender, religion, national origin, sexual orientation, and gender identity."

# Clery Act

## Violence Against Women Act



## Campus Programs

An institution's annual security report must describe the **primary prevention and awareness programs** provided to incoming students and new employees, including:

- Definitions of dating violence, domestic violence, sexual assault, and stalking
- Definition of “consent” under state law
- Safe and positive options for bystander intervention and risk reduction
- Information on confidentiality, sanctions, interim protective measures, evidence preservation in the event of sexual violence, reporting procedures, and options for notifying law enforcement.

# Clery Act

## Violence Against Women Act

- According to the Department of Education, campus programs “should focus on changing the social norms and stereotypes that create conditions in which sexual violence occurs.”
- Programs “must be tailored” and “culturally relevant and inclusive of, and responsive to, all parts of a school’s community.”



## Training

# Clery Act

## Violence Against Women Act

- School officials with disciplinary authority must receive annual training on investigations and hearing process.
- Discipline process must provide the accused and accuser with the same opportunities for participation and the same opportunities for the assistance of an advisor.
- Discipline process must require simultaneous notification, in writing, to the accused and the accuser of the outcome of a disciplinary process.



## Student Conduct

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**Prohibited Conduct  
Under Title IX**

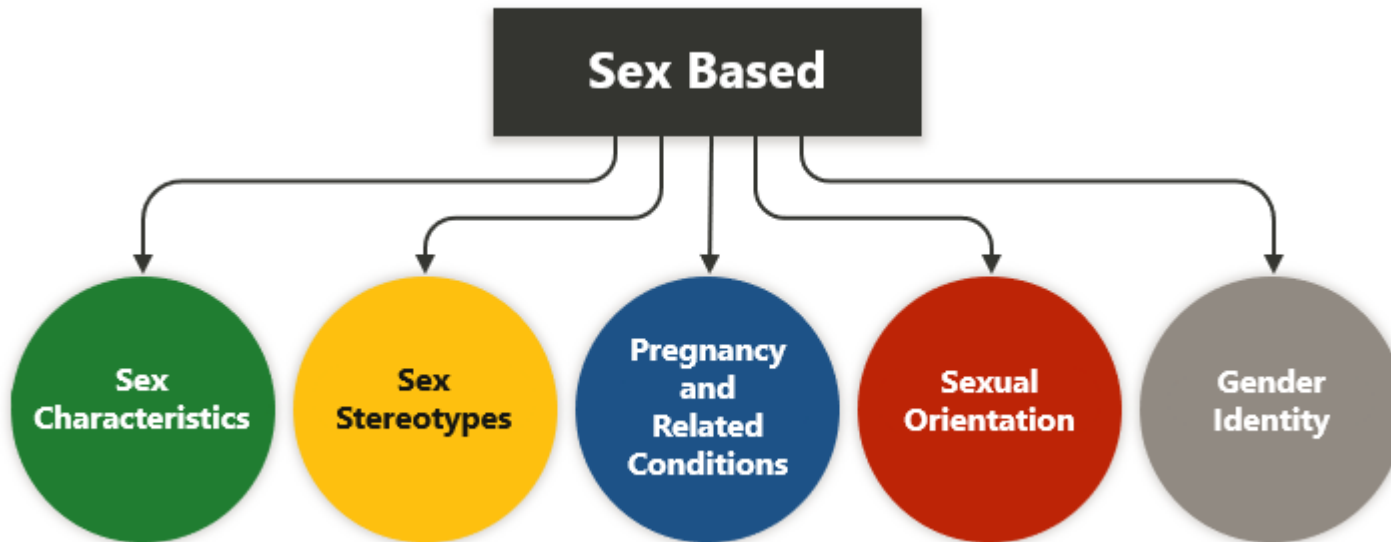


- Title IX prohibits discrimination “on the basis of sex.”
- The 2020 Rules do not define “sex.”
- Over the years, federal courts and the Department of Education have interpreted “sex discrimination” to apply to a variety of acts, including harassment and retaliation.



# “Sex” and the 2024 Rules

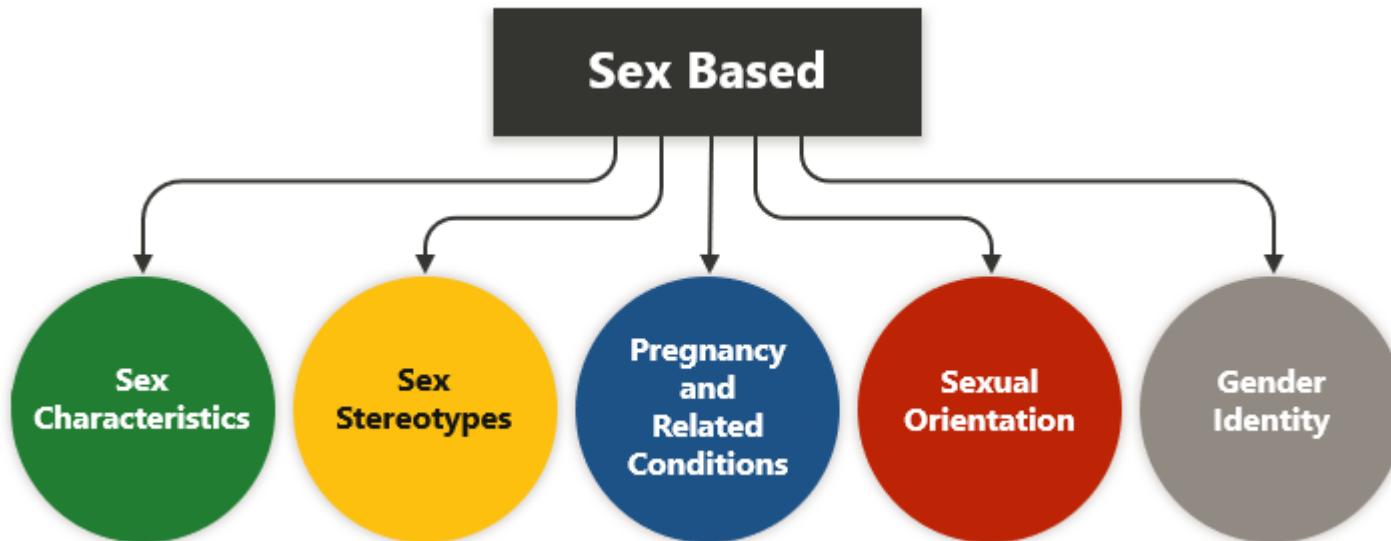
- The **2024 Rules** define sex discrimination to include discrimination on the basis of sex stereotypes, sex characteristics, sexual orientation, gender identity, and pregnancy & related conditions.



The definition is based in part on a Supreme Court case which held that Title VII, an employment law, prohibits discrimination on the basis of “sexual orientation” and “gender identity.”

# “Sex” and the 2024 Rules

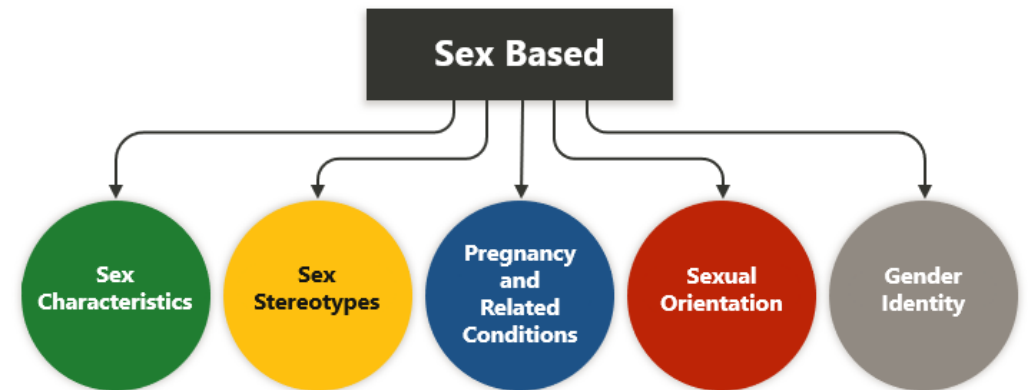
- The lawsuits seeking to block the 2024 Rules object to the inclusion of “sexual orientation” and “gender identity” in the definition of sex.



- The lawsuits contend that Title IX is different from Title VII and that Title IX’s definition of “sex” refers only to biological sex.

# “Sex” and the 2024 Rules

- The litigation over the 2024 Rules does not affect a school’s obligation to enforce its harassment procedures as to all students. Under the 2020 Title IX Rules, anti-harassment procedures apply to all students regardless of their “race or ethnicity, age, sexual orientation, or gender identity...” 85 FED. REG. 30026, 30064, 30177-78 (May 20, 2020).



# Title IX Jurisdiction



- **Title IX prohibits sex discrimination in any academic, extracurricular, research, occupational training, or other education program or activity.**
  - The statute states that “no person in the United States” shall be subjected to discrimination.
  - “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”
  - In some situations, off-campus conduct can create a hostile environment in an education program or activity (“downstream effects”)



# Education Program or Activity

- ▶ **2024 Rules**
- ▶ Conduct within the District's operations
- ▶ Off-campus conduct
  - ▶ Settings operated or overseen by the District
  - ▶ Student organizations' properties
  - ▶ Conduct subject to the District's ***disciplinary authority***
- ▶ External conduct that contributes to a hostile environment ***within*** the education program or activity

# School Disciplinary Authority



- ▶ Schools must treat off-campus sex-based misconduct similarly to other off-campus misconduct
- ▶ Off-campus sexual assaults or other sex-based criminal conduct will need to go through Title IX grievance process if it could subject a student to school-based discipline

# Title IX Jurisdiction

- ▶ **Whether one applies the 2020 or 2024 rules, every claim has a two-part threshold inquiry:**
  - 1) Did the conduct occur in an education program or activity?**
  - 2) Was the conduct based on sex (sex discrimination or harassment)?**



# Different Treatment



# Different Treatment

**Unlawful different treatment discrimination** (sometimes called “disparate treatment”) occurs when an individual, because of their sex, is treated differently from a similarly situated person who is a different sex.

- Does not require bad faith, ill will, or evil motive
- Can be proven with direct, circumstantial, or statistical evidence

# Similarly Situated Students

- Students are similarly situated when they are comparable, even if not identical, in relevant respects.



# Similarly Situated?

- In a class with mostly female students, a faculty member recommends two male students for an internship with a prestigious accounting firm.



- During an out-of-town trip with a student organization, a female faculty member made a male student carry all the luggage, change a flat tire on a rental car, and make a late-night run to a drug store.

# Evaluating Differential Treatment

- ▶ Was the aggrieved person treated differently than a **similarly situated** individual who was not a member of the protected class?
- ▶ Was there a **legitimate, non-discriminatory reason** for the different treatment?
- ▶ Is there evidence that the reason is a **pretext** for unlawful discrimination?

# Different Treatment

## **The 2020 Rules do not prohibit all sex discrimination. Notable exceptions:**

- Separate housing on the basis of sex is allowed but must be comparable.
- Separate toilets, locker rooms, and shower facilities are allowed but such facilities must be comparable.
- Title IX does “does not prohibit separation of students by sex within physical education classes or activities” involving bodily contact.
- A college may operate separate athletic teams where selection is based upon competitive skill or the activity is a contact sport.



We will discuss in a moment how the 2024 Rules impact these standards.

# Sex-Separate Programs

- Under the 2024 Rules, which are currently enjoined in Texas, different treatment or separation on the basis of sex generally cannot subject “a person to more than **de minimis harm**.”
- **Preventing a person from participating in an education program or activity “consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.”**

# Sex Separation & *De Minimus* Harm



- ▶ The rules do not define or explain the term.
- ▶ **ED interpretive guidance:** The harm “must be genuine and objectively non-trivial and assessed from the perspective of a reasonable person in the individual’s position”
- ▶ There are injuries, including stigmatic injuries, associated with treating individuals differently on the basis of sex, and in such circumstances, no additional showing of a more ‘material’ harm is required.”

# When Does the *De Minimis* Harm Standard Apply?

- ▶ **2024 Rules:** Any circumstance in which a recipient engages in permissible sex separation or differentiation, unless subject to an exception
  - ▶ Restrooms
  - ▶ Locker rooms
  - ▶ Access to classes and activities
  - ▶ Dress and grooming codes





# Where Does the *De Minimis* Harm Standard **Not** Apply?

## ▶ **Sex-separate athletic teams**

- ▶ Department of Education has proposed a rule that would create a new test for athletic team participation based on gender identity, but this rule has not been finalized.
  - ▶ Texas law requires participation based on biological sex

## ▶ **Certain classes**

- ▶ Contact sports & ability groupings in physical education classes
- ▶ Human sexuality classes
- ▶ Choruses (*if* based on vocal range or quality only)

## ▶ **Sex-separate housing**



# Practice Pointer



- As institutions wait for guidance from the courts, college administrators should seek legal guidance as needed when addressing questions involving students and sexual orientation or gender identity.



# **Disparate Impact**

# Disparate Impact

**Disparate impact** discrimination occurs when a facially neutral policy, rule, or practice—applied evenhandedly—has a disproportionate impact or discriminatory outcome on a particular sex.

This type of discrimination is often unintentional. The concern is the *consequences* of the policy or practice rather than one's intent.

- ▶ Is the applicable policy necessary to meet an important educational goal?
- ▶ Is there a comparably effective alternative available that would meet the stated educational goal with less of a burden or adverse impact on the disproportionately affected group?

# Disparate Impact



- A vocational program requires students to be clean-shaven due to certain safety protocols. This starts to affect enrollment by male students.
  - Disparate impact?
  - Disparate treatment?



# **Sex-Based Harassment**

# Sex-Based Harassment

- **Harassment is a form of sex discrimination.**
- **Both the 2020 and 2024 Rules address:**
  - **Sexual harassment:** “quid pro quo” and hostile environment
  - **Major offenses:** sexual assault, dating violence, domestic violence, and stalking (the “big four”)
- **Texas law also addresses sexual harassment, dating violence sexual assault, and stalking.**

# “Quid Pro Quo”

- **2020 Rule:** A college employee conditions the provision of an aid, benefit, or service of the college on the student’s participation in unwelcome sexual conduct
- **2024 Rule:** An employee, *agent, or other person authorized by the college* to provide an aid, benefit, or service under the college’s education program or activity explicitly or impliedly conditioning the provision of an aid, benefit, or service on a person’s participation in unwelcome sexual conduct.

“Quid pro quo”  
=  
“this for that”



# “Quid Pro Quo”

- Quid pro quo sexual harassment is an abuse of authority or power and is not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access.
- The student’s failure to complain, resist, or object to the conduct does not prove that the conduct was welcome.
- Acquiescence to the conduct or the fact that a person may have accepted the conduct does not mean they welcomed it.

# Quid Pro Quo?

- ▶ “Sleep with me and you will receive an A”
- ▶ “Your low grade had nothing to do with your not wanting to have a drink with me”
- ▶ “Come to my room tonight and we can discuss those scholarship opportunities and the recommendation you’ve requested. I’d like to get to know you better.”

# Hostile Environment

**2020 Rule:** 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 institution education program or activity

**2024 Rule:** Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the institution's education program or activity (i.e., creates a hostile environment).

**Texas Education Code:** Unwelcome, sex-based verbal or physical conduct that, "in the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student's ability to participate in or benefit from educational programs or activities" of the institution.

# Hostile Environment

- **Similar or common elements among the definitions**

- **“Unwelcome” conduct** (2020 & 2024 Rules and Texas law)

- **“Objectively offensive”** (2020 & 2024 Rules)

- **Educational impact** (2020, 2024, and Texas law)

- **2020** – “effectively denies” equal access to an education program or activity

- **2024** – “limits or denies” a student’s ability to participate in or benefit from an education program or activity

- **Texas** – “interferes with” a student's ability to participate in or benefit from an educational program or activity



# Unwelcome

- ▶ Not solicited or invited, and the target considers it undesirable or offensive
- ▶ Acquiescence—even willing participation—or the failure to complain or report the conduct does not always mean the conduct was welcome
- ▶ Conduct welcomed on one occasion could be unwelcome on a subsequent occasion
- ▶ Whether conduct is “welcome” can be impacted by age, disability, relationships, culture, and intoxication, among other factors



# Objectively Offensive

- ▶ Offensive to a reasonable person under the circumstances, not merely offensive to the alleged victim, personally or subjectively
- ▶ The objective offensiveness of conduct is to be judged by reference to a reasonable person at whom the conduct was aimed

# Educational Impact

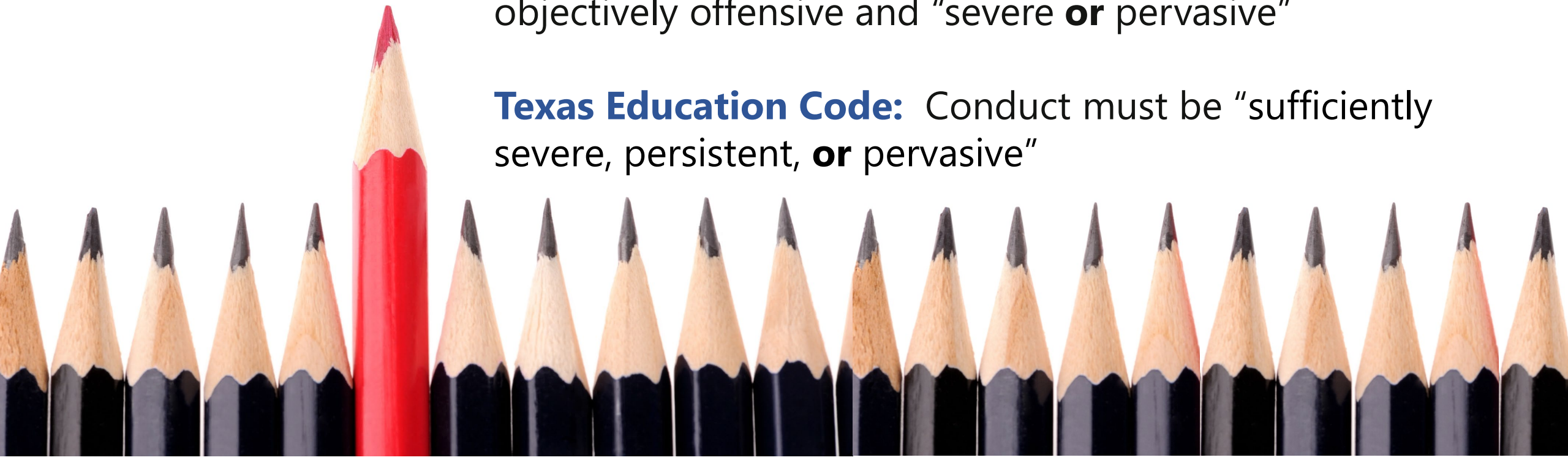
- ▶ Examples from guidance on the 2020 Rules
  - ▶ Skipping class to avoid the perpetrator, decline in GPA, student quits a team to avoid the perpetrator but carries on with other activities
- ▶ Under the 2024 Rules, the complainant must demonstrate some impact on their ability to participate or benefit from the education program or activity, but the definition does not specify any particular limits or denials
  - ▶ Does not require a complainant to demonstrate any particular harm, such as reduced grades or missed classes.

# Key Difference

**2020 Rule:** Conduct must be “severe, pervasive, **and** objectively offensive”

**2024 Rule:** Conduct must be subjectively and objectively offensive and “severe **or** pervasive”

**Texas Education Code:** Conduct must be “sufficiently severe, persistent, **or** pervasive”





# Severe

- ▶ Nature and degree of the harassment
- ▶ Severe: “causing very great pain, difficulty, worry, damage, etc.; very serious” (Cambridge Dictionary)
- ▶ Severe: “very bad, serious, or unpleasant”; “causing a lot of physical pain or suffering;” “very harsh” (Britannica Dictionary)



# Pervasive

- ▶ Frequency or duration of harassment; scope or continuousness
- ▶ Systemic or widespread
- ▶ Pervasive: “existing in or spreading through every part of something” (Merriam-Webster Dictionary)
- ▶ Pervasive: “present or noticeable in every part of a thing or place” (Cambridge English Dictionary)




# Pervasive

- ▶ Single or isolated incidents are generally not enough
- ▶ Conduct must be “pervasive” and “widespread” conduct with the “systemic effect of denying the equal access to an educational program or activity”
- ▶ Courts evaluate whether there was a “systemic or ongoing pattern of harassment,” a “series of incidents,” or “numerous acts of objectively offensive” conduct

*Carmichael v. Galbraith*, 574 F. App'x 285 (5th Cir. 2014)



# So what is the standard?

- 
- While the Texas injunction is pending, college personnel will apply the 2020 definition **when assessing conduct under Title IX.**
  - However, even if conduct does not satisfy the 2020 definition, college personnel will evaluate whether the conduct violates the Texas Education Code definition (“severe, persistent, **or** pervasive”). College policy prohibits harassing conduct even if it does not rise to the level of a federal Title IX violation.
  - The College may discipline a student or employee even if the conduct is not a concern under Title IX.

# Free Speech & Harassment

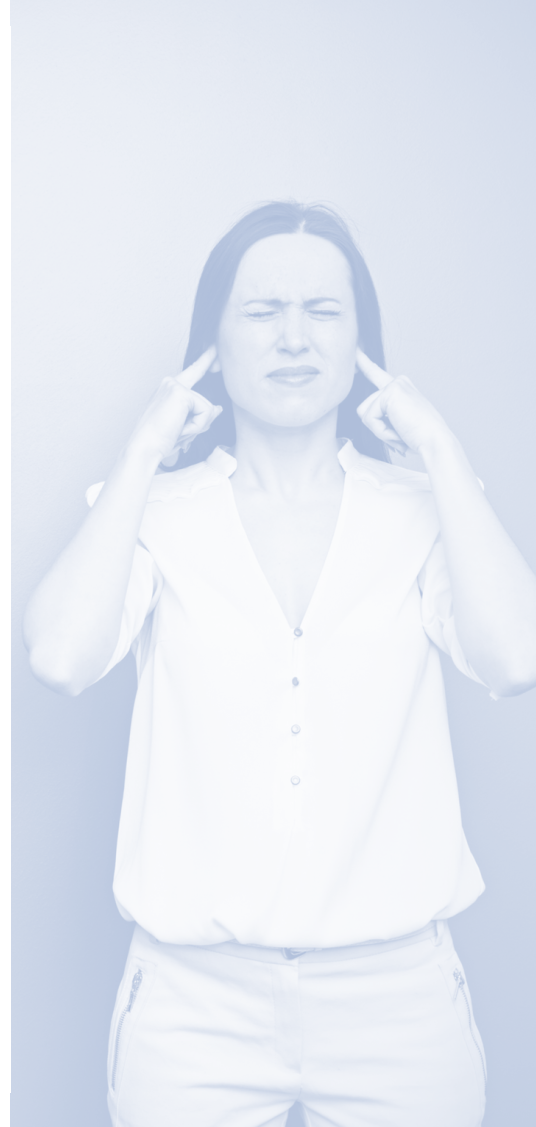
- **Some pending lawsuits argue that the harassment definition in the 2024 Rules violates the First Amendment.**
  - The lawsuits allege that the rule chills free speech.
  - No clear consensus in the courts on how to draw the line between *harassing speech that is protected* and *harassing speech that is not protected*.
  - The 2024 Title IX Rules state that they do not require restricting “any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution.”



# Free Speech & Harassment



- The Supreme Court has held in a variety of contexts that the First Amendment protects speech that others may find uncomfortable or offensive.
  - **Example:** A political argument about Title IX's gender identity rules likely would be protected speech even if offensive to others.
- But speech that is threatening or substantially disruptive likely would not be protected.
  - **Example:** In the dating violence context, threatening sexual violence in a manner that induces fear of bodily harm likely is not protected speech.
- Consult legal counsel when exploring how to balance one person's free speech rights against another person's right to avoid a hostile educational environment.



# Student-Student Harassment

- Disseminating sexual pictures or videos
- Snapping another person's bra strap
- Blocking or cornering another student in a sexual way
- Forcing another student into a kiss or a sexual act
- Flashing another student
- Touching, grabbing, or pinching another student in a sexual way
- Spreading false and disparaging sexual rumors about another person
- Constantly pressuring for dates or sexual activity despite prior rejections

Look at all the facts and the context.

Severe? Pervasive?  
Persistent? Just a misunderstanding?

# Employee-Student Harassment

- Dating or becoming romantically involved with students
- Showing pornographic, provocative, or sexually suggestive materials to students not reasonably related to the course
- Discouraging students of a particular sex from choosing a particular career path
- Seeking private encounters with a student outside of school
- Discussing one's sex life with a student
- Gratuitous physical contact
- Commenting on the student's undergarments or physique
- Playing games that involve inappropriate touching
- Kissing or massaging a student



# Sex-Based Harassment?

- ▶ Sam uses AI to create several images of Laura in which she looks like a video game character, Lara Croft. Some of the fake images show Laura naked. Sam circulates the images to several other students, and eventually the professor sees them. He chuckles and says "you should delete those." Sam doesn't.
- ▶ The class group chat takes on a sexual tone, and Laura soon realizes why. She is mortified. And then she learns the professor saw the images a month ago.



# Sex-Based Harassment

## The “Big Four” Sexual Offenses

- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

**Knowing the definitions is essential.** These incidents are redressable under the 2020 and 2024 Title IX Rules *and* are reportable under the Clery Act. The Texas Education Code also imposes reporting duties.

# *Specific Offenses:* Sexual Assault

**Sexual assault** - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI:

- ▶ **Rape** - penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person without the consent of the victim
- ▶ **Fondling** - the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim
- ▶ **Incest** - sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
- ▶ **Statutory Rape** - sexual intercourse with a person who is under the statutory age of consent

# Sexual Assault

- ▶ Forced vaginal or anal penetration with a body part or object
- ▶ Forced oral sex (giving or receiving)
- ▶ Unwelcome touching or groping of the breast, genitalia, or buttocks
- ▶ The use of coercion, threats, force, or intimidation to compel another person to initiate or continue sexual activity against the person's will
- ▶ Sexual activity with a person who is substantially physically or mentally impaired by illness, alcohol, or drugs, or who is physically incapable of communicating, asleep, or unconscious
- ▶ Sexual activity with a person who is unable to consent because of age or ability

# *Specific Offenses:* Domestic Violence

**Domestic violence** includes felony or misdemeanor crimes committed by a person who:

- ▶ Is a current or former spouse, intimate partner, or person similarly situated to a spouse of the victim
- ▶ Is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner
- ▶ Shares a child in common with the victim
- ▶ Commits acts against a person who is protected under the family or domestic violence laws of your state or local government

# Domestic Violence

- ▶ Physical abuse (hitting, choking, punching, biting, shooting, etc.)
- ▶ Threats of physical harm to the victim or others
- ▶ Blackmail
- ▶ Restraining a person against their will (locking in a house or room, taking away keys)
- ▶ Forced sexual activity
- ▶ Stalking
- ▶ Trespassing or property destruction
- ▶ Abuse of one's pets

# *Specific Offenses:* Dating Violence

**“Dating violence”** - violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship

Can include sexual, physical, emotional, or psychological violence or threat of sexual or physical abuse

# Dating Violence

- ▶ Physical or sexual abuse
- ▶ Intimidation, name-calling, and put downs to maintain control
- ▶ Maintaining control over the victim's financial or other resources
- ▶ Threats to commit suicide or homicide if the victim ends the relationship
- ▶ Attempts to isolate the victim from friends or family



# *Specific Offenses:* Stalking

**“Stalking”** - engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress; covered by Title IX when on the basis of sex.

## **Examples:**

- ▶ Following an individual around or spying on them
- ▶ Sending unwanted and repetitive texts or email
- ▶ Leaving unwanted gifts; leaving notes on their car
- ▶ Showing up uninvited to their home, work, or school
- ▶ Threatening physical harm to an individual, their family, pets, or property

**Includes  
cyber-  
stalking**

# Stalking

- ▶ Breaking into the victim's home or vehicle
- ▶ Stealing the victim's belongings
- ▶ Checking the victim's electronic devices or social media accounts
- ▶ Reading a person's mail or other private writings or communications

# Consent

A hand holding a piece of brown cardboard with the words "WHAT IS SEXUAL CONSENT?" written on it in large, bold, black letters. The background is blurred, showing what appears to be a library or a store with bookshelves.

- ▶ Same concept under 2020 and 2024 Title IX Rules
- ▶ “Unwelcome” and lack of consent are not the same; used in different contexts
- ▶ “Unwelcome” conduct is part of hostile environment harassment
- ▶ “Consent” is relevant in assault cases  
Not defined in Title IX Rules
- ▶ Must be defined in a college’s policy

A hand holding a piece of brown cardboard with the words "WHAT IS SEXUAL CONSENT?" written on it in large, bold, black, hand-painted letters. The background is blurred, showing what appears to be a library or a store with bookshelves.

WHAT IS  
SEXUAL  
CONSENT?

# Consent... Generally

The existence of clearly understandable words or actions that manifest a knowing, active, voluntary, and present and ongoing agreement to engage in specific sexual or intimate conduct by one not suffering from incapacitation.

# Capacity to Consent

Consent is not present when a person does not have capacity to consent, voluntarily or involuntarily due to:

- ▶ Age
- ▶ Physical condition
  - Due to alcohol or drug consumption
  - Being unconscious
  - Being asleep, or in another state in which the person is unaware that the sexual activity is occurring
- ▶ Disability that impairs the individual's ability to give consent

**Individuals  
Who Are Young,  
Incapacitated,  
or  
Neurodivergent**



# When These Issues Come Into Play



- ▶ Is conduct *consensual*?
- ▶ Is conduct *for purposes of sexual gratification*?
- ▶ Is conduct *unwelcome*? (for purposes of hostile environment harassment)
- ▶ Is conduct *subjectively and objectively offensive*? (for purposes of hostile environment harassment)

# Legal Incapacity

- ▶ A student under the age of majority cannot legally consent to sexual conduct with an adult.
- ▶ In criminal cases, it is an affirmative defense to prosecution that the individuals were teenagers/young adults, and both were 14 or older and the age difference was no greater than three years.
- ▶ How do you evaluate the following?
  - ▶ A 16-year-old dual credit student has sex with an 18-year-old student in the library.
  - ▶ A 15-year-old dual credit student performs oral sex on a 19-year-old in the library. Both confirm that they wanted to participate.



# Incapacitation

- ▶ When a person lacks the capacity to consent to conduct due to physical restraints, mental status, a developmental disability, or ingestion of alcohol or drugs.
- ▶ The individual may not understand that the conduct is sexual or that it is even occurring.
- ▶ What if the alleged victim *voluntarily* ingests the incapacitating drugs or alcohol? It does not matter.

# Incapacitation

The key inquiry is whether a reasonable person in the same circumstances have known the other party could or could not consent to the sexual activity.



# Retaliation

# Retaliation



Both the 2020 and 2024 Rules prohibit retaliation.

Students and employees cannot be punished or subjected to an adverse action for filing a complaint, serving as a witness, supporting a party, testifying in a proceeding, or not testifying in a proceeding. “Retaliation” includes acts that have the purpose of interfering with a right or privilege under Title IX.

# Retaliation

- ▶ A charge of a code of conduct violation that arises out of the same facts or circumstances as a report of sex discrimination or sexual harassment can be retaliation if done **for the purpose of interfering** with any right under Title IX.
- ▶ A charge against a student for making a materially false statement is **not** retaliation if the charge is not based solely on the outcome of the Title IX grievance process.



# Retaliation

The definition of “retaliation” does not prevent a college from requiring an employee to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.



# Retaliation Inquiry

- ▶ Did the aggrieved person engage in a protected activity, such as filing a complaint or serving as a witness?
- ▶ Did they suffer an adverse consequence?
- ▶ Is there a **causal connection** between the activity and the consequence?
- ▶ Is there a legitimate, non-retaliatory reason for the adverse conduct?
- ▶ Is there evidence that the reason is pretext for unlawful retaliation?

# Retaliation

Complaints involving retaliation must go through the grievance procedures, just like sex-based harassment complaints.







# **Employee Reporting**

# Employee Duty to Report

## Texas Education Code – Section 51.252

- Applies to all employees except certain “confidential” employees
- Applies any time the employee witnesses or receives information **in the course and scope of their employment** and the information pertains to an incident that the employee **reasonably believes** constitutes **sexual harassment, sexual assault, dating violence, or stalking**
- The employee must reasonably believe that the incident was **“by or against a person who was a student enrolled at or an employee of the institution at the time of the incident”**
- Must “promptly report” to the Title IX coordinator or designee
- Must report all known information that is relevant to the investigation, including whether the complainant desires confidentiality

# Employee Duty to Report

## Texas Education Code – Section 51.252

- Applies to **all** employees except certain “confidential” employees
  - A confidential employee is a person who has been designated by the institution as a person with whom students may speak confidentially or whose communications are confidential or privileged under other law (e.g., licensed professional counselor)
    - *Only required to report the general type of incident*
  - When an alleged victim makes a report to a campus peace officer and the alleged victim completes a pseudonym form under the Code of Criminal Procedure, the peace officer is required only to inform the Title IX Coordinator of the general type of incident. Peace officer must provide the Title IX Coordinator’s contact information to the alleged victim.

# Employee Duty to Report

## Texas Education Code – Section 51.252

- Applies any time the employee witnesses or receives information **in the course and scope of their employment** and the information pertains to an incident that the employee **reasonably believes** constitutes **sexual harassment, sexual assault, dating violence, or stalking**
  - The Texas law does **not** apply to reports of “sex discrimination” or domestic violence.
  - The Texas law does **not** apply when the employee receives a report off-duty, but nothing precludes the employee from making a report and, in many situations, it would be prudent to do so.

# Employee Duty to Report

## Texas Education Code – Section 51.252

- A knowing failure to make a required report, if substantiated, will result in termination in accordance with applicable college procedures.
- Reporting under Section 51.252 also is separate from a reporting obligation that the employee may have under the Clery Act.

# Employee Duty to Report

## Texas Education Code – Mandatory Termination

- The employee must reasonably believe that the incident was “by or against a person who was a student enrolled at or an employee of the institution **at the time of the incident**”
  - Not restricted to recent reports. If the employee learns about an incident from a prior school year, it must be reported.
- Must “**promptly report**” to the Title IX coordinator or designee
  - But not required to report if the employee learns of the incident during a college investigation or grievance regarding the incident, if the employee learned about the incident after the conclusion of a grievance process involving the incident, or the employee has confirmed with the Title IX Coordinator that the incident was previously reported.

# Employee Duty to Report

## Title IX Duty To Report

- **2020 Title IX Rules** – Reporting obligation arises when the institution has “**actual knowledge of sexual harassment** in an education program or activity” in the U.S. “Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to an institution’s Title IX Coordinator “or any official of the recipient who has authority to institute corrective measures.”
- **2024 Title IX Rules** – Greatly expands reporting obligations, but these obligations are very similar to the Texas Education Code requirements.
  - However, *unlike the Texas law*, the 2024 Title IX Rule extends the reporting duty to **sex discrimination** and **domestic violence**.

# Employee Duty to Report

## Title IX Duty To Report

- **2024 Title IX Rules** – All employees, except confidential employees, who receive information from any person about conduct that **reasonably may constitute** sex discrimination, sexual harassment, or sex-based harassment (including sexual assault, dating violence, domestic violence, or stalking) must promptly notify the Title IX Coordinator and/or provide the individual with the contact information for the Title IX Coordinator.
- Whether the employee must notify the Title IX Coordinator or provide contact information depends on the employee's job duties/authority.



# Employee Duty to Report

## Title IX Mandatory Reporters (2024 Rules)

- ▶ Must provide all known information to the Title IX Coordinator.
- ▶ This category applies to:
  - ▶ "officials with authority to take corrective measures"; and
  - ▶ Officials with "responsibility for **administrative leadership, teaching, or advising**"
- ▶ **Excludes** "confidential employees"

## All Other Employees (Excluding Confidential Employees)

- ▶ Must notify Title IX Coordinator, **or**
- ▶ Provide the reporting person:
  - Contact information for Title IX coordinator, **and**
  - Information on how to file a complaint

# Employee Duty to Report

## Confidential Employees under 2024 Title IX Rules

- ▶ Employee whose communications are privileged under federal or state law (such as licensed professional counselor). Similar to “confidential employee” under Texas law.
- ▶ Employee must explain to the reporting person the employee’s confidential status (including possible duty to report under other laws) and limits on reporting requirements.
  - Employee must explain how to contact Title IX Coordinator and explain that the Title IX Coordinator can implement supportive measures and may be able to offer informal resolution or an investigation.
- ▶ **But** if the confidential employee receives information in a non-confidential capacity (such as personal observation in a public place), the employee **must report** all known information to the Title IX Coordinator.



## Notice Requirements Pregnancy & Related Conditions

- Under the 2024 Rules, when *any* employee is informed of a student's pregnancy or related conditions by a student or a person who has a legal right to act on behalf of the student, the employee must promptly inform that person of the Title IX Coordinator's contact information and that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination, unless the person reasonably believes the Title IX Coordinator has already been notified.
- This is a **duty to provide information** to the student, not a duty to report to the Title IX Coordinator.

# Reporting Caveats

- ▶ Employees who receive information about an alleged violation should not commence an investigation or begin conducting interviews.
- ▶ The act of receiving information is **intake**. Neutrally receive the information. Ask clarifying questions if necessary.
- ▶ The employee's job is not to determine whether the incident occurred or not.
- ▶ Do not judge or blame ("Why didn't you report it earlier?").
- ▶ Don't take sides. Do not offer predictions about discipline.

# DON'T: Discipline

- ▶ Do not formally or informally discipline either party, including the alleged perpetrator.
- ▶ Instead, provide all relevant information to the Title IX Coordinator or designee, including information on whether there are safety concerns.

# DON'T: Violate Confidentiality

- ▶ Do not tell the alleged perpetrator that the alleged victim spoke to you.
- ▶ The information must first be reviewed by the Title IX Coordinator before it is shared with the alleged perpetrator.
- ▶ Premature disclosure can compromise an investigation or place the reporting party at risk.
- ▶ Do not discuss the case with other employees.



# **Response to Reports**





# BASICS

## Grievance Process Requirements & Objectives

1. Treat complainants and respondents equitably
2. Title IX personnel cannot have a conflict of interest or bias
3. Presumption that respondent is not responsible
4. Reasonably prompt timeframes for major stages of grievance procedures
5. Reasonable steps to protect privacy of witnesses and parties but not restrict the ability of parties to obtain and present evidence
6. Objective evaluation of all relevant evidence, both exculpatory or inculpatory
7. Exclusion of certain impermissible evidence
  - Certain privileged medical or psychologist evidence (unless waiver)
  - Evidence relating to the complainant's past sexual interests/conduct (some exceptions)



**Initial Response**

**Evaluation**

**Investigation**

**Decisionmaking**

**Appeal**



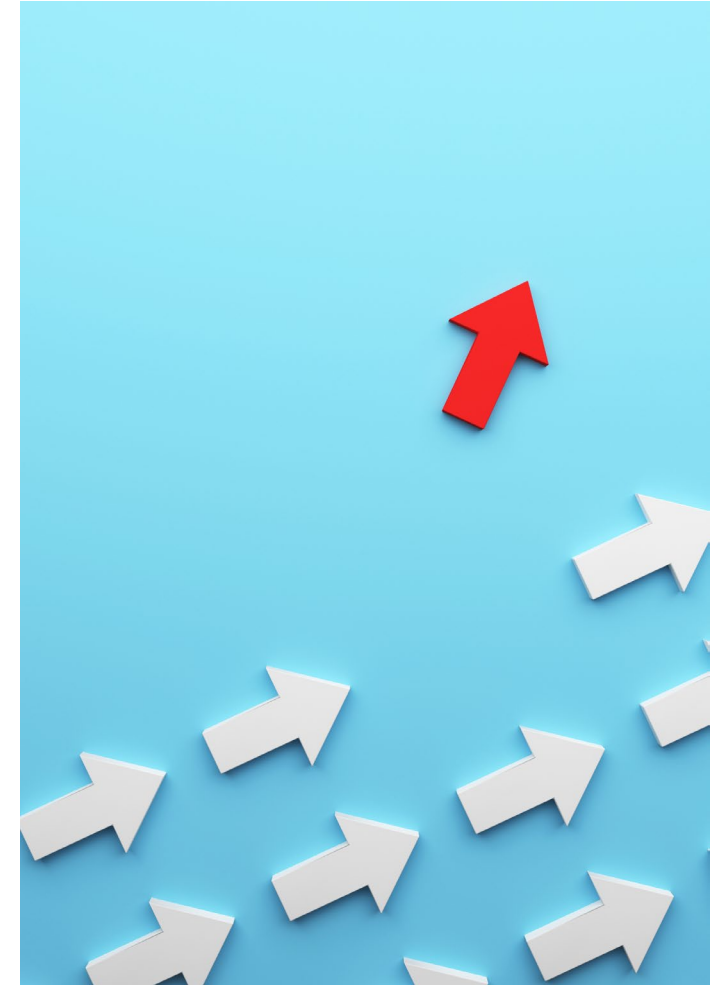
# Serving Impartially

The Title IX regulations require that any individual involved in the Title IX process—Title IX Coordinator, investigator, decisionmaker, appellate decisionmaker, or informal resolution facilitator—not be biased, have a conflict of interest, or prejudge any matter before them



# Bias

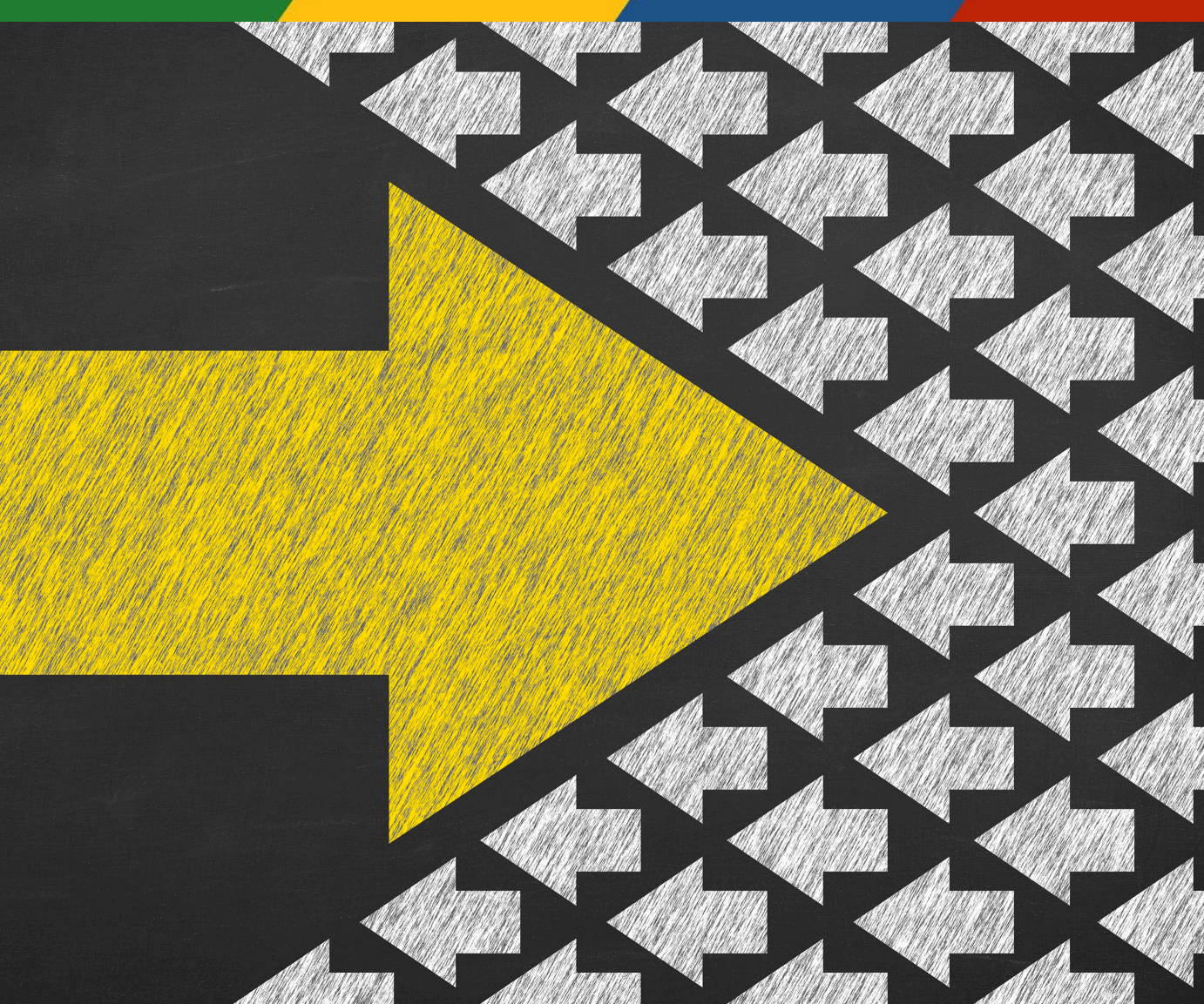
- ▶ Employees cannot be biased for or against complainants or respondents or for or against students or employees.
- ▶ Employees cannot be biased for or against a party or witness based on:
  - ▶ Sex
  - ▶ Race
  - ▶ Ethnicity
  - ▶ Disability
  - ▶ Sexual orientation or gender identity
  - ▶ Religious affiliation (or lack thereof)
  - ▶ Other characteristic



# Bias

- ▶ Assuming that men are sexually aggressive and likely to sexually assault women
- ▶ Assuming that women often regret their sexual experiences and recast them as assault
- ▶ Assuming that men cannot be sexually assaulted
- ▶ Assuming that women who drink alcohol are basically asking to be assaulted
- ▶ Assuming that individuals from a particular culture, religion, or national origin are more likely to behave a particular way
- ▶ Assuming that people in certain professions are more likely or less likely to tell the truth

# Conflict of Interest



A situation in which the concerns or aims of two different parties are incompatible.

“A conflict of interest arises when what is in a person’s best interest is not in the best interest of another person or organization to which that individual owes loyalty.”

<https://ethicsunwrapped.utexas.edu/glossary/conflict-of-interest>

# Conflicts of Interest

## Clear Conflicts:

Is related to a party  
Formerly dated a key witness's parent  
Invests in a business with the complainant's parent

## Could be a Conflict:

Is respondent's coach  
Previously disciplined complainant for dishonesty

## Not an Automatic Conflict:

Has a history of speaking out on victim or accused rights  
Has published articles on a topic relevant to the matter

## Not a Conflict:

Is a College employee or attorney  
Previously investigated a Title IX claim and found for or against a complainant or respondent

# Prejudgment

**“To judge before hearing or before full and sufficient examination”**

“[A]n opinion about a situation or a person that is formed before knowing or considering all of the facts.”

*Cambridge Dictionary*

**Synonyms** – preconception, assumption, presumption/presupposition, speculation

*Merriam-Webster*



# Prejudgment

- A person was described as clearly upset during their interview, so you presume their recollection is credible
- A person was drinking at the time of the incident, so you presume they don't remember what happened
- A person consented to sexual behavior with the respondent in the past, so you presume they consented this time, too



# Report or Complaint?



## They're not the same thing.

- ▶ A **report** is information from someone sharing information, orally or in writing, that suggests that sex-based discrimination or harassment has occurred or might be occurring
- ▶ A **formal complaint** is a request that the institution investigate allegation(s)

# Complaint 2020 Rules

Must be **in writing** and contain the Complainant's **physical or digital signature** or otherwise indicate that the complainant is the person filing the formal complaint

A complainant must be participating in or attempting to participate in the education program or activity of the school **at the time of filing a formal complaint**



# Complaint 2024 Rules

A complaint may be **oral or in writing**, so long as it objectively may be understood to request an investigation and determination

The complainant need only be participating or attempting to participate in the education program or activity **at the time the sex discrimination occurred**. This means a former employee or former student can be a complainant.

# Initial Response

- ▶ Although the technical details may differ, both the 2020 and 2024 rules involve:
  - ▶ Obtaining and understanding the allegations
  - ▶ Informing the complainant about the right to file a complaint
  - ▶ Offering supportive measures
  - ▶ Considering emergency removal or administrative leave

# Initial Response

- ▶ The 2020 Rules outline a specific type of grievance process that applies only to sexual harassment complaints.
  - ▶ The Rules also require every institution to maintain a grievance procedure to address sexual discrimination complaints, but the Rules did not impose specific requirements.
- ▶ The 2024 Rules, for the first time, impose particular procedures to process sex discrimination and retaliation claims.
  - ▶ Because the 2024 Rules are enjoined, San Jacinto College will continue to follow its existing procedures for sex discrimination and retaliation complaints.

# Intake Questions

- ▶ What happened?
- ▶ Who did it?
- ▶ When did it happen?
- ▶ Where did it happen?
- ▶ Who was there?
- ▶ Did you talk to anyone about it?
- ▶ What do you want to see happen?
- ▶ Anything else you would like to report?



# Supportive Measures

Academic	Emotional/ Wellness	Safety/ Security
<ul style="list-style-type: none"><li>▶ Deadline extensions</li><li>▶ Schedule modification or other course-related adjustments</li><li>▶ Tutoring</li><li>▶ Offers to retake courses or redo assignments</li><li>▶ Changes in extracurricular activities</li></ul>	<ul style="list-style-type: none"><li>▶ Counseling</li><li>▶ Excused absences</li><li>▶ Leave of absence</li><li>▶ Referral to medical or psychological care</li><li>▶ Designation of an employee as a “check-in” for any necessary emotional support</li><li>▶ Training and education programs related to sex-based harassment</li></ul>	<ul style="list-style-type: none"><li>▶ No contact orders</li><li>▶ Escort between classes</li><li>▶ Changes to class seating</li><li>▶ Assignments to certain routes, bathrooms, or cafeteria locations</li><li>▶ Increased security and monitoring</li><li>▶ Assistance reporting potentially criminal conduct to law enforcement</li></ul>

# Supportive Measures Conversation

## Four topics to cover:



The availability of supportive measures



The complainant's wishes with respect to supportive measures



The availability of supportive measures with or without filing a formal complaint



The process for filing a formal complaint

# Supportive Measures

## 2020 Rules

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent
- Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or deter sexual harassment
- **2024 Rules** add provisions for modifying or terminating supportive measures. 2024 Rules allow unilateral no-contact orders.





# Emergency Removal

- ▶ **Emergency Removal of Student**
- ▶ Must conduct an individualized safety and risk analysis
- ▶ **2020 Rules:** Must determine that there is an immediate threat to the physical health or safety of any student or other individual and must provide respondent with notice and an opportunity to challenge the decision
- ▶ **2024 Rules:** Must determine that there is an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons
- ▶ Always document the safety and risk analysis.



# Administrative Leave

- ▶ An employee can be put on administrative leave subject to the educational institution's normal administrative leave policies.
- ▶ Decisions and processes for placing employees on administrative leave with pay must be consistent with the institution's standard procedures regarding employee administrative leave during other investigations.



# Initial Evaluation Questions

## ▶ **Common Issues Under the 2020 and 2024 Rules**

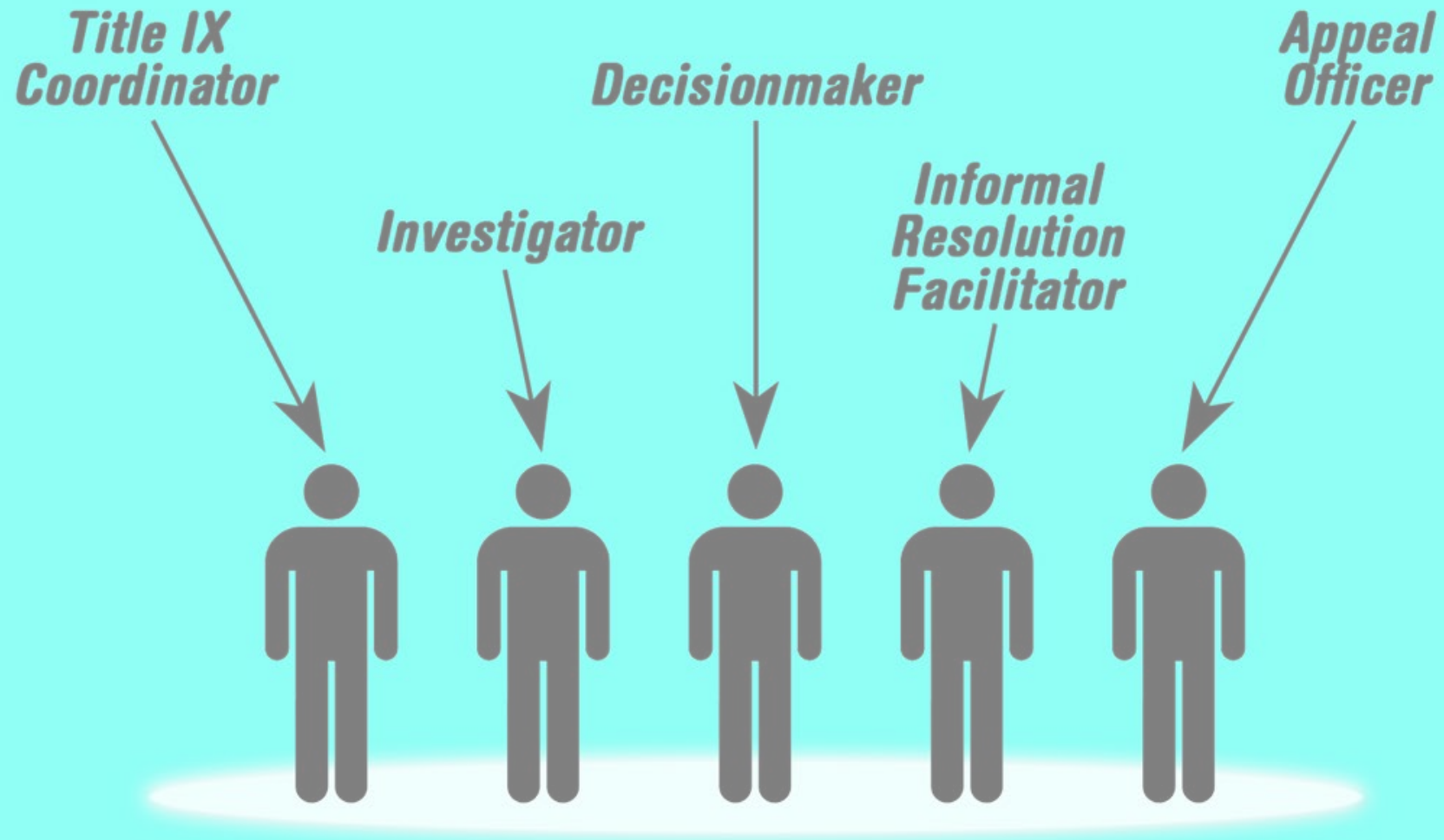
- ▶ Whether the allegations, if true, state a claim under policy or whether some other policy applies and, if not, whether the claim is subject to dismissal.
- ▶ Whether the complainant desires privacy and is reluctant to file a complaint and, if so, whether the Title IX Coordinator should initiate a complaint due to concerns about community safety.



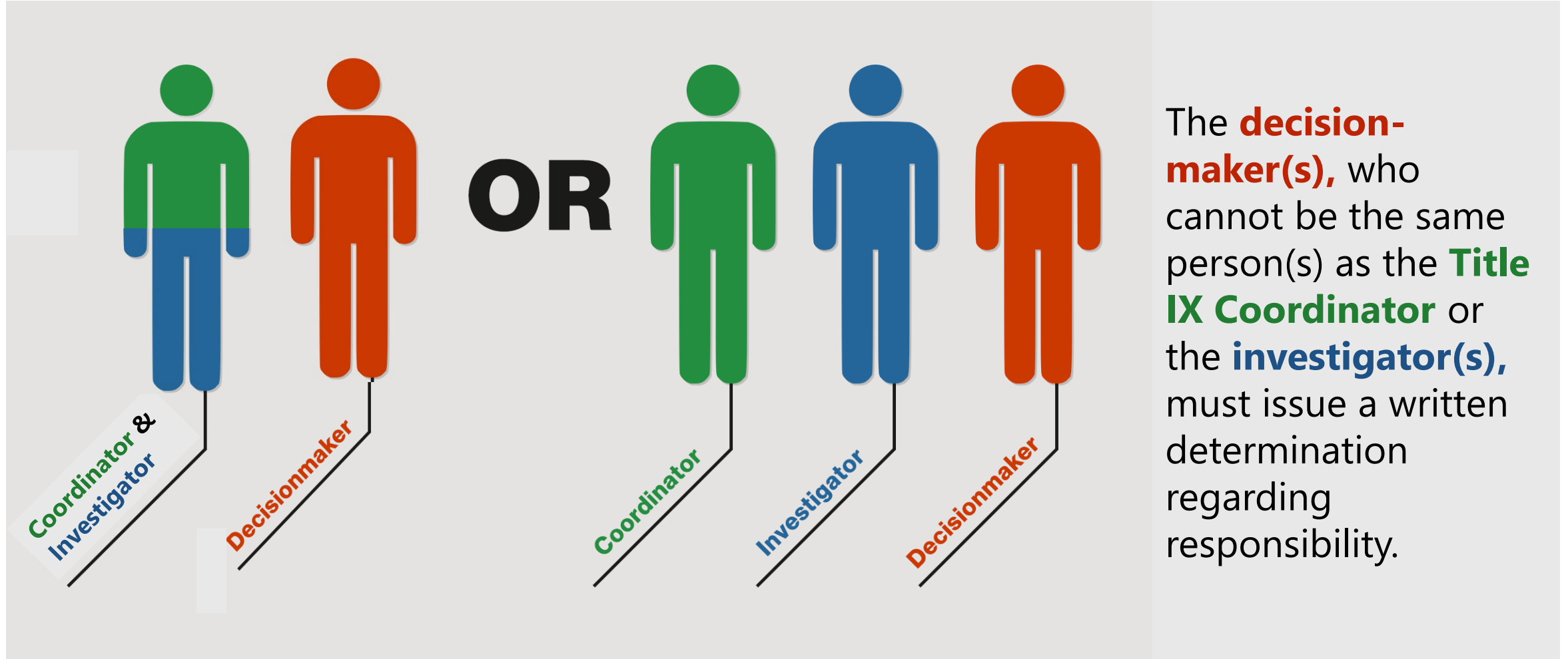
# **Overview of Grievance Process**



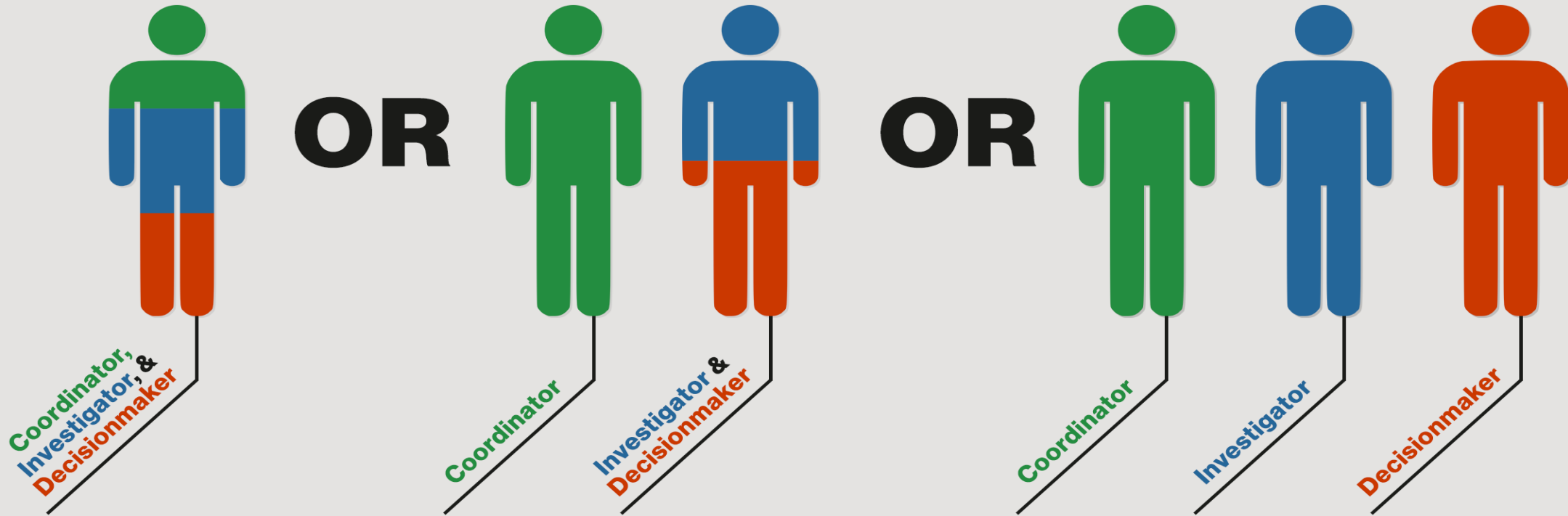
# Title IX Personnel



# Investigator-Decisionmaker Options: 2020 Rules

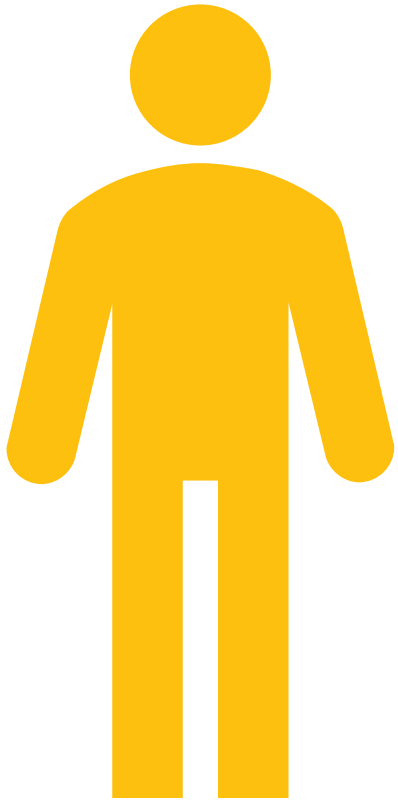


# Investigator-Decisionmaker Options: 2024 Rules



The **decisionmaker** may be the same person as the **Title IX Coordinator** or **investigator**.

# Appeal Officer



- ▶ Appeal officers are your decisionmakers on appeal
- ▶ Appeal officers cannot have served as the investigator or decisionmaker, or otherwise been involved in the investigation or decisionmaking process
- ▶ They can hear:
  - appeals of dismissal decisions, and
  - appeals of determinations



# 2020 Title IX Grievance Process

## 1.) Initial Response

- Intake Meeting
- Hold a “supportive measures meeting” with the Complainant and offer right to file a formal complaint
- Consider if emergency removal/administrative leave warranted
- Consider whether to Sign Formal Complaint

## 2.) Evaluation

- Notice of Allegations
- Consider if dismissal is required or warranted
- Consider consolidation

## 3.) Investigation

- Gather facts & evidence
- Share evidence with parties
- Prepare report fairly summarizing evidence

## 4.) Decisionmaking

- Live Hearing
- Written determination

## 5.) Appeal

- Written responses
- Written decision



# When should the Coordinator initiate a complaint if complainant does not?

- ▶ New rules lay out several factors to consider. Factors also are addressed in Texas Education Code 51.285.
- ▶ Ultimate question is whether the alleged conduct either:
  - ▶ Presents an imminent and serious threat of harm to complainant or other person
  - ▶ Prevents the school from ensuring equal access to its education programs or activities

# Factors to Consider

Complainant's request  
not to initiate a  
complaint

Complainant's  
reasonable safety  
concerns

Risk that additional  
acts of sex  
discrimination would  
occur if a complaint is  
not initiated

Severity of the alleged sex  
discrimination, including  
whether imposition of a  
disciplinary sanction  
would be required to end  
the discrimination and  
prevent its recurrence

# More Factors to Consider

Age and relationship of the parties, including whether the respondent is an employee

Whether there is an alleged pattern, ongoing sex discrimination, or sex discrimination affecting multiple individuals

Whether the college could end the alleged sex discrimination and prevent its recurrence without initiating the grievance procedures

Availability of evidence to assist the decisionmaker



**Under the 2020 Rules,  
you must have a Formal  
Complaint to move to  
the next step.**

**NO DISCIPLINE  
WITHOUT A FORMAL  
COMPLAINT.**

**But you can provide  
support.**

# Notice of Allegations

Must provide each known party written notice of:

- ▶ The institution's grievance process;
- ▶ The allegations of sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview;
- ▶ A presumption of non-responsibility;
- ▶ The right to inspect and review evidence;
- ▶ The right to have an advisor during the process; and
- ▶ Any provision in the institution's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process

# Notice of Allegations

The Notice of Allegations (NOA) must include **all the relevant details**:

- ▶ Identities of the parties involved in the incident, if known
- ▶ Conduct allegedly constituting sexual harassment
- ▶ Date and location of the alleged incident, if known

**This notice is required before you first meet with the Respondent.**



# Notice of Allegations

## Loss of Anonymity for the Complainant Once the Process Starts

- ▶ Once a formal complaint has been filed or signed, the institution must share the Complainant's name with the Respondent (anonymity is not an option)
- ▶ Before a formal complaint is filed, you cannot share the Complainant's name, including with the Respondent, without permission or unless necessary to implement supportive measures
- ▶ Explain this to the Complainant during the supportive measures meeting so they know the consequences of filing a formal complaint



# Dismissals

Under the 2020 Rules, dismissal of a formal complaint is either mandatory or permissive. Under the 2024 Rules, dismissals are no longer mandatory

**MANDATORY**

**PERMISSIVE**

# Impact of Dismissal

**MANDATORY**

**PERMISSIVE**

Alleged conduct, if proved, would not be Title IX sexual harassment

Complainant asks Title IX Coordinator in writing to withdraw complaint

Alleged conduct, if proved, would not be in an educational program or activity

The respondent's enrollment or employment ends

Alleged conduct, if proved, would not be against a person in the U.S.

Circumstances prevent gathering sufficient evidence to reach a determination (non-cooperation by complainant, length of time between incident and complaint, etc.)

Can use another policy or code of conduct

TEC 51.287 may require continuation of the discipline process

**Cannot use another policy or code of conduct**

# Appeal of Dismissal

## Who

- Any party can appeal a dismissal

## Why?

- Based on
  - procedural irregularity
  - new evidence
  - bias/conflict of interest
- That would change the outcome

## Appeal Decisionmaker

- Cannot be someone involved in the investigation or dismissal of complaint
- Must be trained

## Steps

- Notify parties when appeal is filed
- Implement appeal procedures equally for the parties
- Give parties a reasonable and equal opportunity to make a statement in support of or challenging the dismissal
- Notify all parties of result of appeal and rationale for the outcome

# Consolidation

- ▶ Consider consolidation if multiple complaints arise from the same conduct or incident:
  - Against more than one respondent
  - By more than one complainant against one or more respondents
  - By one party against the other party (cross-complaints)
- ▶ Consider:
  - Burden of separate grievance processes on the parties
  - Risks to the fairness of the investigation or outcome
  - Privacy rights of any student party
- ▶ Alternative: consolidate complaints for investigation but provide individual investigation summaries and determinations

# PRINCIPLES

## Investigations

**Impartial + unbiased**

**Reasonably prompt timeframes**

**Burden of proof on institution**

**Preponderance standard**

**Treat parties fairly**

**Limits on certain evidence**

**No "gag orders"**

**Equal rights to advisors**

**Equal right to present evidence**

**Presumption of non-responsibility**



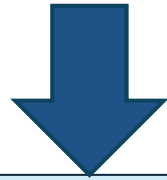
# Planning the Investigation

- What are the issues and facts in dispute?
- Who will you interview and in what order?
- Is there physical evidence to preserve or obtain?
- What other evidence might be helpful? How can you get it? Consider: What information do you need to obtain to allow the decisionmaker to answer the key questions and make a reliable determination

# Gather Relevant Evidence

- ▶ Relevant is not defined in the rules
  - Does the evidence apply or relate to a “fact” or “issue” in this matter?
  - Is the fact or issue in dispute?
  - Does the evidence make the fact or issue more or less likely to be true?
  - Includes both evidence that favors the complainant (inculpatory) and evidence that favors the respondent (exculpatory)
- ▶ Statements, notes of interviews, and other evidence collected in the investigation (including drafts)
- ▶ Audio and video recordings of interviews
- ▶ May include evidence the school doesn't think it will use

# Relevant Evidence



## Inculpatory Evidence

- ▶ Favorable to complainant
- ▶ Evidence that shows or tends to support the allegations of sexual harassment and/or the respondent's involvement in the allegations to establish responsibility



## Exculpatory Evidence

- ▶ Favorable to the respondent
- ▶ Evidence that exonerates or tends to show the respondent is not responsible for the allegations of sexual harassment



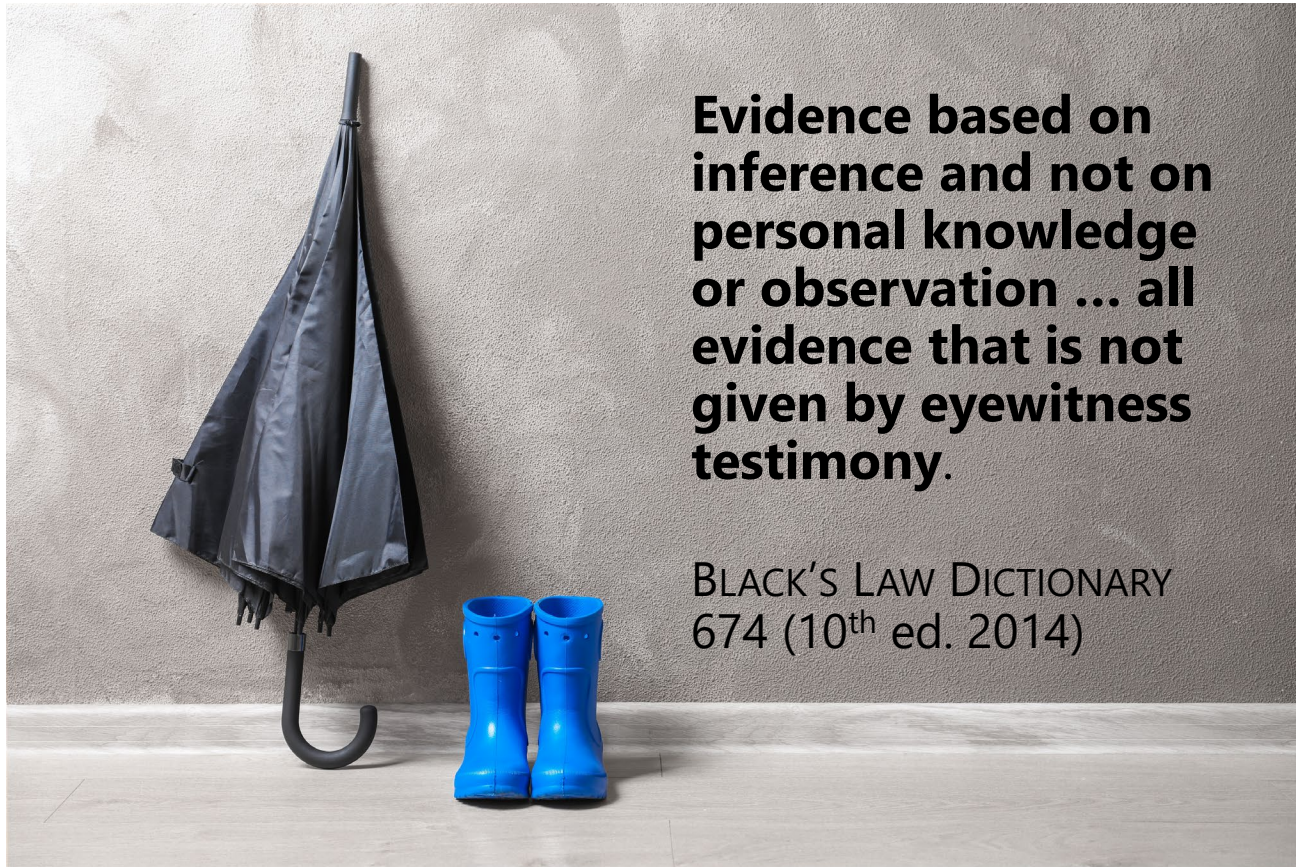
# Direct Evidence

Evidence that is based on personal knowledge or observation and that, if true, proves a fact **without inference or presumption**.

BLACK'S LAW DICTIONARY 675 (10<sup>th</sup> ed. 2014)

- ▶ What a witness directly experienced
- ▶ Eyewitness testimony
- ▶ Admissions—written or oral
- ▶ Surveillance tape or cell phone video captures the incident

# Circumstantial Evidence



# Sources of Evidence

- Testimony
- Documents
- Education records
- Campus files
- Personnel files
- Investigation records
- Student files
- Police Reports
- Emails
- Handwritten notes
- Calendars
- Photographs
- Videos
- Text & instant messages
- Other electronic files/ cloud storage
- Journal entries
- Medical records (ONLY with written consent)
- Interviews

# Impermissible Evidence

Evidence subject to legal privilege

Evidence related to a complainant's past sexual history unless:

1. The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
2. The evidence relates to the sexual behavior between the complainant and respondent and is offered to prove consent

A party's records made or maintained by a medical professional or paraprofessional made and maintained in connection with the provision of treatment of the party

# Sharing the Report

## 2020 v. 2024

- ▶ The 2020 Rules require that parties be permitted to review the “directly related evidence,” consideration of any responses, and review of the investigative report fairly summarizing the relevant evidence. Rigid timelines for review.
- ▶ The 2024 Rules require only one review period and do not specify the time. The investigator can provide an accurate description of the relevant (and not impermissible) evidence or the evidence itself. If a party requests the evidence, it must be provided to both parties. No separate investigation report is required if access to the evidence is provided.

# Response to the Evidence

- ▶ Did either party identify evidence that was absent or not gathered?
- ▶ Did either party identify new witnesses or new evidence?
- ▶ Did either party point out inconsistencies in the evidence?
- ▶ Did either party raise concerns regarding the relevance of the evidence?
- ▶ Did either party choose not to respond at all?

# Hearing Requirements

- ▶ Must be live
  - Can be in person or virtual
  - If offered in person, must provide videoconference if requested
- ▶ Must include live cross examination by an advisor
  - Must provide advisors to parties without one
  - No direct questioning by parties
- ▶ Ruling on relevance of each question; remember exceptions:
  - Medical treatment records
  - Privileged information
  - Information about the complainant's past sexual history or predisposition
- ▶ Must be audio or audio-visually recorded or transcribed

# Notice of Hearing



- Send notice of hearing to the parties including date, time, location, purpose, and individuals who will be present
- Highly recommended to have a pre-hearing conference to work out logistics and possible early rulings on evidence (provide notice of the prehearing conference)





# Standard of Proof

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- Preponderance of Evidence:  
**Probability of Truth > 50%**
- Applies to both findings of fact and the overall question of responsibility
- For findings of fact, ask if there is sufficient evidence to find that it is more likely than not that a disputed fact is true
- Once you have “found” all your facts, look at them as a whole to decide if it is more likely than not that a policy violation occurred

# Credibility Determinations

A hand is shown drawing a staircase on a green chalkboard. The word "CREDIBILITY" is written in white chalk along the diagonal line of the staircase, which starts from the bottom left and goes up to the top right. The hand is holding a piece of white chalk and is in the process of drawing the top step of the staircase.

CREDIBILITY

The investigator does not make findings regarding credibility, but the investigator should include information related to credibility in the investigative report to help the decisionmaker assess credibility and reach a reliable determination that the respondent is or is not responsible for the alleged sexual harassment.

*Under the 2024 rules, with the single-investigator model, the investigator also is the decisionmaker and can make credibility determinations.*

# Credibility Factors

Decisionmaker determines credibility of the parties and witnesses.

- ▶ **Corroborative evidence**
- ▶ **Contradictory evidence**
- ▶ Motive or interest in outcome
- ▶ Body language and demeanor
- ▶ Specific details
- ▶ Reasonableness of testimony / plausibility
- ▶ Memory (impact of time, outside influence, trauma, intoxicant)
- ▶ Bias or prejudice
- ▶ Internal consistency
- ▶ Other factors of believability

# Written Determination Requirements

- Allegations
- Policy allegedly violated
- Procedural steps taken, from receipt of formal complaint through determination
- Findings of fact
- Application of facts to policy

# Written Determination Requirements

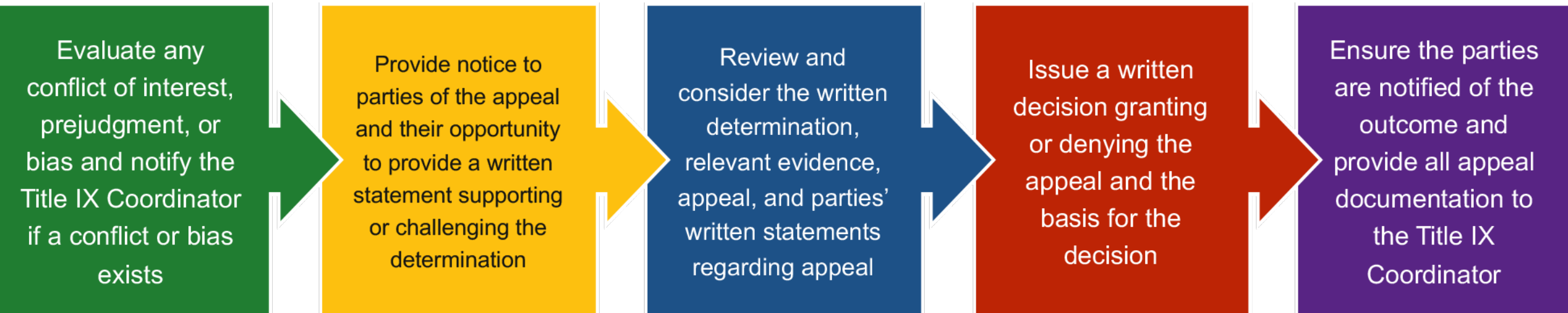
- Statement of, and rationale for, the result as to each allegation, including:
  - Determination regarding responsibility
  - Any disciplinary sanctions imposed on the respondent
  - Whether remedies designed to restore or preserve equal access to educational program will be provided by the school to the complainant
- Appeal process and permissible grounds for each party to appeal
- Must provide the written determination to the parties simultaneously

# The Determination

## 2020 versus 2024 Rules

- ▶ The 2020 Rules require a detailed written determination, including: allegations, procedural steps, findings of fact, conclusions regarding the application of the code of conduct to the facts, a determination and rationale for each allegation, any disciplinary sanctions, whether remedies will be provided, and procedures for appeal.
- ▶ The 2024 Rules require a written determination including: whether sex discrimination occurred and the rationale, procedures for appeal.

# Appeal



# Appeal Officer



1. Cannot be the same person as the Title IX Coordinator or the Title IX Coordinator's designee(s), the investigator(s), or the initial decisionmaker(s) assigned to the case
2. Is not recommended to be the same person as the informal resolution facilitator on the case
3. Must be impartial (no bias, conflict of interest, or prejudice)



# Appeal Bases

## Bases for appeals:

1. A **procedural irregularity** that affected the outcome
2. **Newly discovered evidence** that could affect the outcome
3. Title IX personnel had a **conflict of interest or bias** that affected the outcome
4. Other bases offered by the college (must be offered equally)



# Appeal Procedural Requirements

- Must notify both parties of appeal in writing - can be from the Title IX Coordinator
- Must provide the parties equal opportunity to submit written statements for or against the appeal
- Must issue a written determination to both parties





# Appeal Process

- ▶ The 2020 Rules provide three bases for appeal (procedural irregularity, new evidence, bias/conflict – that affected the outcome).
- ▶ The 2024 Rules provide for the institution to use its existing appeals processes.

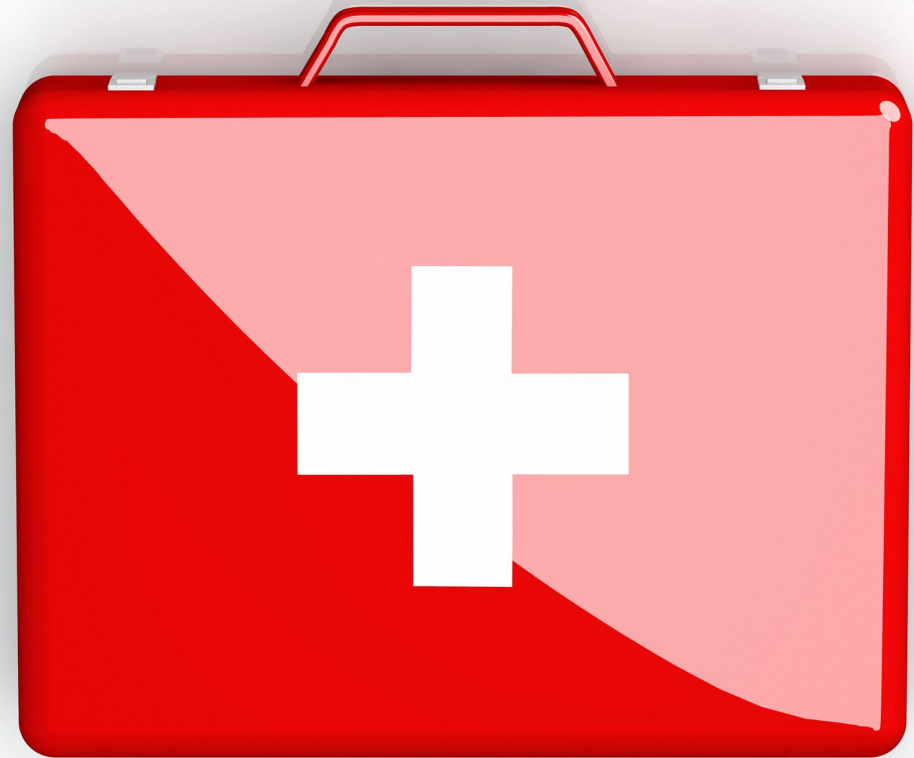
# Post-Determination Actions

If there is a determination that sex discrimination occurred, the Title IX Coordinator will, as appropriate:

- ▶ Coordinate the provision and implementation of **remedies** to a complainant or other persons identified as having had equal access to the education program or activity limited or denied by sex discrimination
- ▶ Coordinate the imposition of any **disciplinary sanctions** on a respondent, including notification to the complainant of any such disciplinary sanctions
- ▶ Take **other appropriate prompt and effective steps** to ensure that sex discrimination does not continue or recur within the education program or activity

# Remedies

- ▶ Remedies must be individualized to restore a complainant's equal access to the education program or activity
- ▶ Remedies can also be more widespread when multiple people were impacted by the sex-based discrimination, especially when the allegations related to a policy, procedure, or practice of the school district



# Remedies

- ✓ Providing a campus escort for the complainant
- ✓ Allowing the complainant to park in the employees' parking lot
- ✓ Changing class schedules or extracurricular activities to ensure the complainant and respondent are separated
- ✓ Providing academic resources, modifications, and support
- ✓ Implementing or extending no-contact orders or "stay away agreements"
- ✓ Providing or coordinating health services and counseling
- ✓ Providing training or educational programs to individuals, school groups, personnel, or the school community
- ✓ Modifications to policies, procedures, or practices

## *Reminder*

# Remedies vs. Disciplinary Sanctions

- ▶ Remedies are confidential—you do not notify the respondent of any remedies afforded to complainant unless the respondent's knowledge is necessary for the remedy to be successfully implemented
- ▶ In contrast, the school must notify the complainant of any disciplinary sanctions imposed on the respondent

# Record Keeping

1. Must maintain records documenting the actions the school took to meet its obligations for a period of 7 years.
2. Includes, but is not limited to, documentation demonstrating the implementation of reasonable modifications and provision of lactation space for students because of pregnancy or related conditions under proposed, and the provision of lactation time and space for employees.





# Record Keeping

## Must Maintain for 7 Years

- ▶ For each complaint of sex discrimination
  - Documentation of informal resolution process or grievance procedures and resulting outcome
- ▶ For each incident of conduct that may constitute sex discrimination of which Title IX coordinator was notified, records documenting actions recipient took to meet is obligations
- ▶ All training materials



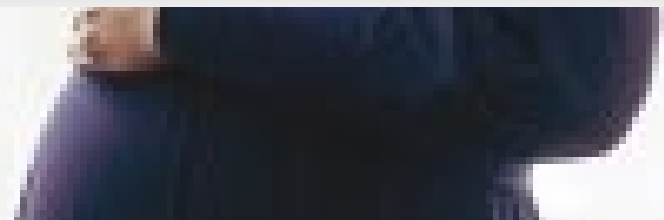
# Record Keeping



Require investigators, decisionmakers, appeal decisionmakers, informal resolution facilitators, and deputies to send their files to the Title IX Coordinator



# **Pregnancy & Related Conditions**



# Pregnancy & Related Conditions

- ▶ The rules have long provided protections to pregnant students. The 2024 Rules expand upon these protections.
- ▶ Under the 2020 Rules, a college shall not discriminate on the basis of a student's "pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom."
- ▶ The entity must treat these conditions "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."

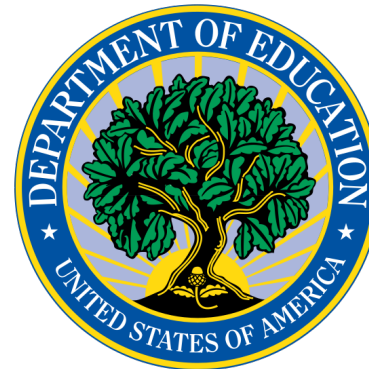
# Pregnancy & Related Conditions

- ▶ **The 2024 Rules define “pregnancy and related conditions” to mean:**
  - ▶ Pregnancy, childbirth, termination of pregnancy, or lactation.
  - ▶ Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
  - ▶ Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions

The Department of Education interprets termination of pregnancy to include abortion. Litigation is pending over this interpretation. Under the 2024 Rules, a student may request an accommodation, such as an excused absence, relating to an abortion or recovery therefrom.

# Title IX Protections in General

- ▶ **2024 Rules:** A school or college must not adopt or implement any policy, practice or procedure concerning current, potential, or past parental, family, or marital status, which treats persons differently on the basis of sex.
- ▶ Must not discriminate in education programs or activities against any student or applicant based on the person's current, potential, or past pregnancy or related conditions.
- ▶ Must treat pregnancy or related conditions in the same manner as other temporary medical conditions.
- ▶ Must not make pre-admission or pre-employment inquiries about marital status – such as whether someone is “Miss” or “Mrs.”



# New Employee Notification Rule

- ▶ **2024 Rules:** When *any* employee is informed of a student's pregnancy or related conditions by the student or a person who has a legal right to act on behalf of the student, the employee must:
  - ▶ promptly inform that person of the Title IX Coordinator's contact information; and
  - ▶ explain that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination.

The employee does not have to provide the information if the employee reasonably believes the Title IX Coordinator has already been notified. **Best practice:** When in doubt, employees should err on the side of providing the contact information to the student (or their representative).

# Requests for Modification

- ▶ **2024 Rules:** Pregnant students are entitled to voluntary reasonable accommodations (called “modifications” in the Title IX regulation) following an interactive process similar to the disability accommodation process.
- ▶ Can deny a modification if it would fundamentally alter the program (*i.e.*, a change that is so significant it alters the essential nature of the education program or activity).





# Requests for Modification

- In the Section 504 context, which also utilizes the “fundamental alteration” standard, the Department of Education has opined that academic requirements that are essential to the instruction or are related directly to licensing requirements are not regarded as discriminatory. OCR Complaint Reference No. 08-22-2021 (June 14, 2022).
  - Section 504 states that academic requirements that the college or school can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory. 34 C.F.R. 104.44(a).

# Requests for Modification

- ▶ **Examples of modifications:**  
Breaks during class, allowing the student to carry a water bottle, intermittent absences for medical appointments, changes in schedule or course sequence, extensions of time for work or tests, allowing a student to sit or stand, counseling, elevator access, access to online/virtual or homebound education.



# Requests for Modification

- ▶ **Modification of grading policies.** Instructors cannot refuse to allow a student to submit work after missing a deadline due to pregnancy or childbirth.
- ▶ If grading is based on attendance or participation, the student is allowed to earn the missed credits. U.S. Dep't of Education, "Discrimination Based on Pregnancy and Related Conditions (October 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-pregnancy-resource.pdf>

# Interactive Process

- ▶ Title IX Coordinators, deputies, and accessibility services/Section 504 counselors need training on assisting pregnant students and determining what constitutes a reasonable modification and a fundamental program alteration.
- ▶ Interactive process requires dialogue that promptly addresses the options available to the student. Communications and decision-making must be documented.
- ▶ If a faculty member, chair, dean, or other administrator believes that a modification constitutes a fundamental alteration, this will require a fact-based review of the reasons why they have reached this conclusion.



# Interactive Process: *Case Study*

## ► **OCR Complaint No. 04-21-2060, Troy Univ. (Jan. 26, 2023)**

- In this pre-2024 case, a pregnant student sought accommodations after missing classes due to pregnancy. Was allowed to attend virtually but still had pregnancy-related absences and needed to make up work.
- Student emailed that she was hospitalized and asked about a make-up test. Professor agreed to some accommodations was worried that other students were noticing her absences and there were “questions of fairness.” Professor asked the student to ask the Title IX Coordinator to excuse the absences. Student continued to be penalized.



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# Interactive Process: *Case Study*

- ▶ **OCR Complaint No. 04-21-2060 (*continued*)**
  - After further emails and conversations with the professor, the student gave birth. Professor asked Title IX Coordinator for guidance due to student's grades, attendance, and failure to take exams or make up projects.
  - OCR found a failure to make reasonable and responsive adjustments or to provide information on how to obtain pregnancy-related accommodations. Title IX officials did not "consistently" or "promptly" intervene. Interactive process was inadequate. The accommodations that were given were "ad hoc and uncoordinated" and depended on each professor's independent understanding of Title IX.

# Supporting Documents

- ▶ Cannot require supporting documents unless the documentation is necessary and reasonable to determine a reasonable modification or whether to take additional specific actions.
- ▶ Examples of situations in which supporting documentation is **not** reasonable:
  - ▶ When the need is obvious such (e.g., student needs a larger uniform).
  - ▶ When the student previously provided supporting documentation.
  - ▶ When the modification is to carry or keep water, use a bigger desk, sit or stand, take breaks to eat or drink or use restroom, or lactation needs.
  - ▶ When modification would be available to a student who is not pregnant.



# Limits on Certifying Fitness

- **2020 Rules:** A college may require a student to obtain the certification of a physician that the student “is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.”
- **2024 Rules:** A college may not require a student who is pregnant or has related conditions to provide a certification from a healthcare provider that the student is physically able to participate in the recipient’s class, program, or extracurricular activity *unless*:
  - the certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
  - the recipient requires such certification of all students participating in the class, program, or extracurricular activity; and
  - the information obtained is not used as a basis for discrimination prohibited by the regulations.



# Alternative Programs



- ▶ Students cannot be mandated to participate in alternate programs or special services for pregnant and parenting students as a condition of enrollment, but schools and colleges may offer these programs and services as an option to students.
- ▶ Participation must be voluntary on the part of the student, and the programs and classes must be comparable to those offered to other students.

# Leave of Absence

- ▶ Must allow pregnant and postpartum students to take leave of their academic obligations without penalty because of medically necessary absences associated with pregnancy, childbirth, or postpartum recovery.
- ▶ To the extent that a school or college maintains a leave policy for students that allows a greater period of time than the medically necessary period, the school or college must permit the student to take leave under that policy instead if the student so chooses.
- ▶ Following time off, the student must be reinstated to the academic status and, "as practicable," to the extracurricular status that the student held when the leave began.

# Lactation and Breastfeeding

Under the 2024 Rule (but not the 2020 Rule), every school or college must “ensure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.”

Student should receive sufficient time to travel to the space, pump, wash, store, and return to class.



# New Texas Coordinating Board Rules

## 19 Texas Admin. Code, Chapter 4 Effective May 16, 2024



- “An institution **shall excuse absences** related to a student's pregnancy or childbirth **without a doctor's certification** that such absence is necessary for the greater of three school days in a term or semester or the maximum number of excused absences that the institution would grant to another student enrolled in the same course for any reason.”
  - However, “an institution may ensure that the total number of excused absences does not result in a fundamental alteration to an essential program requirement or conflict with federal law or accreditation standards.”

# New Texas Coordinating Board Rules

- An institution shall allow a student a reasonable time to make up or complete any assignments or assessments missed due to such an excused absence consistent with the institution's policy regarding excused absences and make up work.
- An institution shall provide a student with access to all course materials that are made available to a student with a temporary medical condition.
- An institution shall provide any other reasonable accommodations to a pregnant student, including accommodations that:
  - (A) would be provided to a student with a temporary medical condition; or
  - (B) are related to the health and safety of the student and the student's unborn child.



# New Texas Coordinating Board Rules

## Parental Leave



- Must permit but not require a parenting or pregnant student to take a leave of absence related to a student's pregnancy or parenting status for a minimum of one semester without a showing of medical need.
- Must make every reasonable effort to facilitate leave for pregnant and parenting students within their degree program's curriculum and accreditation requirements
- Must implement policies and procedures to ensure that the student is informed of possible impacts to their financial aid or scholarships.
- Shall ensure that a student in good academic standing at the time a leave of absence commences may return to their degree or certificate program in good academic standing, not be required to reapply for admission so long as the program still exists at the institution and the program would still meet accreditation standards.

# Grievance Process

- The 2020 Title IX Rules require every institution to publish a grievance procedure providing for the prompt and equitable resolution of sex discrimination complaints.
  - The 2020 Rules do not prescribe a *specific* procedure, but the college's procedures must be sufficient to enable students to grieve failure to accommodate, discrimination, or harassment.
  - The 2024 Rules prescribe a specific process that schools must follow.



# Grievance Process

- **San Jacinto College Policy & Procedure**
  - Policy VI.6004.D, *Pregnancy and Parenting*
  - Procedure VI.6004.D.a, *Pregnancy and Parenting Accommodations*
  - Procedure VI.6004.D.b, *Student Lactation Access*
  - Complaint Procedure 300 in the Student Handbook <https://publications.sanjac.edu/student-handbook/complaint-procedures/discrimination-harassment-complaints/>
  - Students may start an interactive process with the Title IX Coordinator or Deputy Coordinators by visiting the Title IX webpage or the Accessibility Services webpage, by emailing either TitleIX@sjcd.edu or accessibility.services@sjcd.edu or by calling 281-478-2756.



# 1

# Scenario



- Brittney is a leader in student government. She is 20, unmarried, and six months pregnant. Brittney and other leaders will be attending a student government conference out of state. The faculty sponsor is concerned about Brittney serving as a representative of the college at the conference. The faculty sponsor also would like Brittney to complete a form certifying her fitness before traveling. The male student who is the father also will be attending the conference.
- What are the college's obligations?

# 2

## Scenario

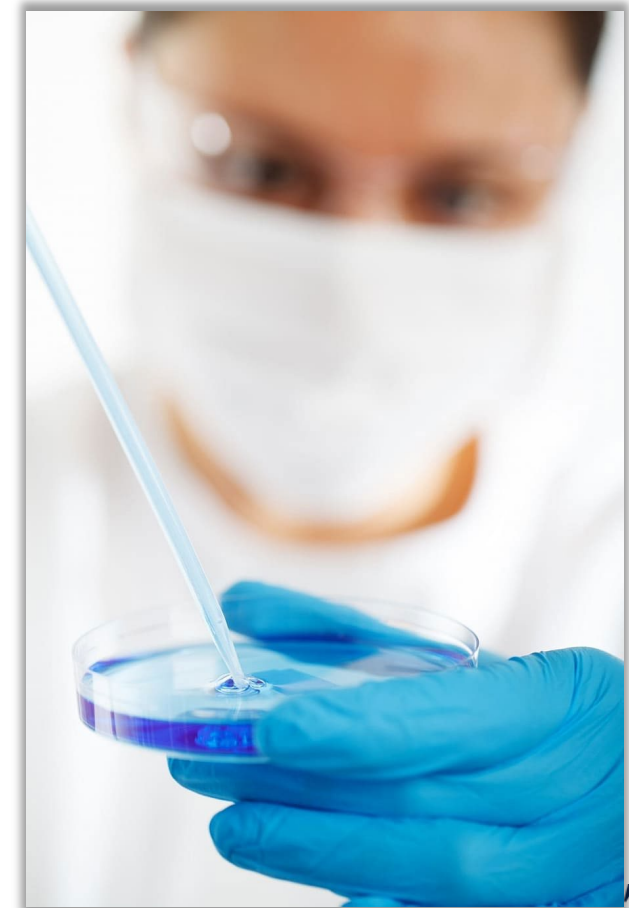


- Annie is a student nurse. In her clinical program, she is required to lift, turn, and handle patients of different sizes and, in one clinic, she is required to handle certain heavy medical equipment. Annie presents a note from her ob-gyn that she cannot lift more than 20 pounds through the remainder of her pregnancy.
- What are the college's obligations?

# 3

## Scenario

- Blake plans to have an IVF procedure to become pregnant. She knows that her political science professor is opposed on religious grounds to IVF. The procedure will require that Blake miss a couple of days of class, including an exam. Blake doesn't want the professor to know the reason for her absence.
- What would you advise Blake in this situation?



# 4

## Scenario



- Kate plays softball. She recently shared that she is pregnant. She has missed a few practices and fell asleep on the team bus. She seems unfocused. Coach would like Kate to submit a doctor's certification. The coach also believes it would be best if she steps back a season for her own health.
- What are the school's obligations in this situation?

# 5

## Scenario

- Marcy is pregnant with twins. It's a high-risk pregnancy for multiple reasons. She is just two months away from completing her degree. Her ob-gyn informs her that she needs to go on immediate bed rest. This will prevent her from completing her student teaching at a local elementary school and graduating on time. She's distraught.
- What are the school's obligations in this situation?





# **Additional Issues**



# Police Involvement

- ▶ The rules require a college to conduct its Title IX investigation in a “reasonably prompt” manner but may temporarily delay the investigation for good cause, which may include concurrent law enforcement activity
- ▶ No long or indefinite delay or extension of timeframes, regardless of whether a concurrent law enforcement investigation is still pending



# Police Requests



- ▶ Ask police to put request for delay in writing
- ▶ Reduce verbal conversations to writing
- ▶ Best practice is to respond with a summary and state: "If my summary is incorrect please let me know by [date] or I will assume it is correct."
- ▶ Explain in writing the college's obligation to conduct its own Title IX investigation and ask for notification when you can begin your investigation
- ▶ Follow up, then follow up again, then again
- ▶ Notify the parties of any delay
- ▶ Document everything!



# Police Reports



- ▶ Police reports may be useful for *initial* fact-gathering
  - ▶ **Not** a substitute for the college's own investigation
- ▶ The standards for, and purposes of, criminal investigations are different from a college investigation
- ▶ Police investigations or reports are not determinative. The college will need its own evidence-gathering to determine whether there was unlawful sex discrimination or whether the respondent is responsible

# Dual Credit Students

- **Some colleges enroll “dual credit” or dual enrollment students – high school students who are simultaneously enrolled at the college and a local high school.**
  - Some programs send college instructors to a high school.
  - In some programs, high school students take classes on the college campus.
- **Case examples**
  - Dual credit student *at the college* reports harassment by a college instructor or a college student.
  - High school student takes a dual credit class *at the college* and is allegedly harassed by another high school student in the dual credit class.
  - A high school student takes a dual credit class *at the high school* taught by a college instructor and reports harassment by the college instructor.
  - The high school student might file a complaint with the school district, the college, or both institutions.

Is a dual credit program  
an “education program” of the college?

# Dual Credit and Title IX Jurisdiction



# Dual Credit and Title IX Jurisdiction

## Is a dual credit program an “education program” of the college?

- When an entity has an affiliation with another entity reflected in a written agreement and the entities share staff or exchange funds, courts have held that the program may qualify as an education program for purposes of Title IX.
- The Department of Education has advised that each institution has its **own independent obligation** to comply with Title IX and address sex-based discrimination in its respective program.



# Dual Credit Issues

- The school district and college should confer and cooperate regarding investigations, supportive measures, and information-sharing so that both institutions can comply with their Title IX obligations.
- Coordination may reduce duplication of effort and services during an investigation and may minimize inconvenience and trauma for the parties.



**Duty to report child abuse:** When allegations suggest sexual assault or other criminal offenses against a minor, college personnel will have a duty to make a report to law enforcement or CPS under the Texas Family Code.

- *This reporting duty is in addition to any reporting duties under Title IX, Education Code, or the Clery Act.*

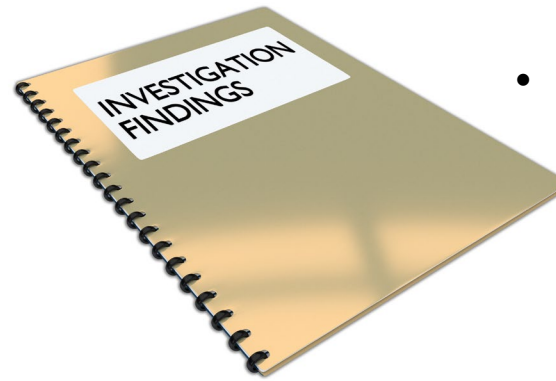
# Dual Credit Parents



- **Your Title IX investigator finishes a report regarding a dispute between 18-year-old Susana and 16-year-old Jeremy. Both sets of parents demand to see the report. Do they have a right to review it?**



# Dual Credit Parents



- **Your Title IX investigator finishes a report regarding a dispute between 18-year-old Susana and 16-year-old Jeremy. Both sets of parents demand to see the report. Do they have a right to review it?**
- Under FERPA, when a student of any age attends an institution of higher education, the rights under FERPA belong to the student.
  - In K-12 schools, FERPA rights also transfer to students when they turn 18.
- If the college gave a copy of its report to the school district, the student's parent could request to review the school's copy.
- The student could consent to release of the report to their parent.
- FERPA regulations allow the college to provide education records to parents without the student's consent if the student is a dependent for tax purposes under IRS rules.
- The Texas Education Agency advises that procedures for handling these types of requests should be included in local policy or in the agreement between the school district and institution of higher education.



# **Case Scenarios**



# 1

## Scenario: Ella



- Students from the college culinary program visit Italy. Against college policy, a group of students and two instructors drink wine at dinner. Ella (18) becomes very drunk. In a taxi ride back to the hotel, she sits between Matteo (faculty) and Shannon Student. The mood is festive. Matteo's arm is stretched out behind Ella. He whispers closely in her ear, and she giggles. Shannon exits the taxi. Before Ella can scoot out, Matteo kisses her on the cheek and says "you're special." Ella says: "So are you! This is a cool trip!"
- The next day, Shannon notices that Matteo is working closely with Ella in a cooking class.

# 1

## Scenario: Ella



- The next evening, Matteo invites three students, including Ella, to drink wine in his hotel room. All of the students become tipsy. Ella is drunk and eventually falls asleep in a chair. “She’ll sleep it off,” Matteo says. The other students leave.
- The next day, Ella wakes up in the chair in which she fell asleep. Her clothes are askew.
- Two months later, back in Houston, Ella learns she is pregnant.

# 1

## Scenario: Ella



- Ella tells Shannon she's pregnant and doesn't know how this could be.
- Shannon responds: "Ella, remember Italy? Chef Matteo? The red wine? You must've been raped." Ella cries.
- Ella tells Matteo she is pregnant. He looks at her quizzically. "Are you needing academic accommodations? I am not sure why you are telling me this."
- Ella emails the Title IX Coordinator: "Professor Matteo raped me on a class trip to Italy."

# 1

## Ella/Initial Steps



- Intake & Initial Evaluation**
  - What questions will you ask Ella?
    - What if she says more than once, “I just don’t know. I was drinking. Everyone was drinking.”
  - What do you tell Ella?
  - When do you tell Matteo?
  - Do you tell anyone at the college? Perhaps the dean over the culinary program?
  - Can you ask Ella to take a pregnancy test?
- Incident occurred outside the U.S. Does that matter?**
- Do you offer Supportive Measures? When?**
- Administrative Leave?**

# 1

## Ella/Initial Steps



- What if Ella says she doesn't want to file a complaint?
- Would it matter that Matteo received a reprimand two years earlier for making alcohol available to students on the same trip?
- Would it matter if Ella and Shannon exchanged text messages about how cute Matteo is?

# 1

# Ella/Filing a Complaint



- What if Ella changes her mind and says she does want to file a complaint?
- What would you put in the notice of allegations to Matteo?

# 1

# Ella/Filing a Complaint



- ❑ What would you do if, one week after filing a complaint, Ella tells you over the phone that she just learned she is not pregnant after all and will withdraw the complaint. What do you do with this information?

# 1

## Matteo



- ❑ Matteo files a complaint against Ella for making false statements about him. He states that his colleagues are shunning him and that the false allegation has hurt his marriage. What do you do?



# 2

## Scenario: Adrianna & Jo



- Adrianna and Jo complain that Dr. Smith has recommended only male students for lucrative accounting internships. Adrianna also has a recording of him saying, “At my house, I manage the finances. My wife, not so much. But she’s a fantastic cook.”
- Adrianna and Jo would like to proceed anonymously. What do you advise them?
- How would you investigate this matter?

# 3

## Scenario: Carson

Carson is in a program with a small number of students. Carson and several other students have had issues with Jordan for several months. Jordan told a racial joke about a political candidate, made fun of Carson and others for being overweight, and accused Carson of “lacking the *cohonos*” to stand up to his boss. Carson’s email to the Title IX Coordinator states, “I can’t take this hostile environment.”

How do you respond?



# 4

## Scenario: Russell

- Russell was studying in a quiet study room in the Interactive Learning Center. Henry (age 20) entered the room and offered Russell \$20 for a “blow job.” Russell said: “Get the hell out of here.” During the next month, Russell saw Henry approach other people (2 male and 2 female), all of whom appeared to quickly reject the offer. Russell tells a librarian: “Hey there’s this creepy dude going around asking for blow jobs. He might be a student, and it’s making me not want to use the library.”
- Step by step, what should happen?



# 4

## Scenario: Russell

- How can you find out who the “dude” is? What are your options if you cannot locate him?
- Should you track down the other alleged victims? How?
- What if Henry, the offender, is a 20-year-old student?
- What if all five alleged victims refuse to file a complaint? What should the Title IX Coordinator do?



# 4

## Scenario: Russell

- Russell decides to file a complaint even if the other students will not. Henry quietly withdraws from the college. What are your responsibilities, if any?



# 5

## Scenario: Janna



- Janna played on the college's softball team. Janna graduated six years ago. She is recently married with a baby. She emails the Athletic Director and reports that, back in the day, the softball coach – who is still the coach – forced her into a sexual relationship in her last year. She heard from a group text that the coach may be continuing this pattern. Janna states that she does not want it to happen to other athletes.
- What are your next steps?

# 6

## Scenario: Ciara & Damon

- Ciara (22) was jealous and repeatedly called Damon (21) a “man whore” and a “loser” if he spent time with other women. They broke up. On the days he had classes, Ciara would sit on a bench and watch him from afar. Ciara would drive by his house and sometimes would leave apology notes.
- They got together for coffee, and she cried how much she loved him. They began dating again and engaged in consensual sex. Things seemed okay for a few weeks. Then in the middle of night, Damon’s phone illuminated with a text message from a person with a female name. Ciara screamed and punched Damon and called him a “heartless cheating bastard.” They broke up the next day.



# 6

## Scenario: Ciara & Damon

- Ciara texted him two weeks later and said she thought it would be great if their two dogs who were “best buds” could go to the dog park like old times. Ciara and Damon went to the dog park, and the dogs had fun. Ciara knew from Facebook that Damon had to go out of town for his sister’s wedding. Ciara begged to babysit Damon’s dog, Buddy, while he was out of town. When Damon returned, Buddy was dead after eating something poisonous in the backyard. Damon was overcome with emotion and slapped Ciara’s face. “Get out of my life forever!”
- Ciara texted him that night: “I tried to love you and gave it my all. I never want to see you again.”
- Ciara had a bruised cheek and lip. Her math instructor privately asked her if she was okay. Ciara sobbed, “I’ve been in an abusive relationship. He beat me on Sunday. I left him for good.”





# 6

## Scenario: Ciara & Damon

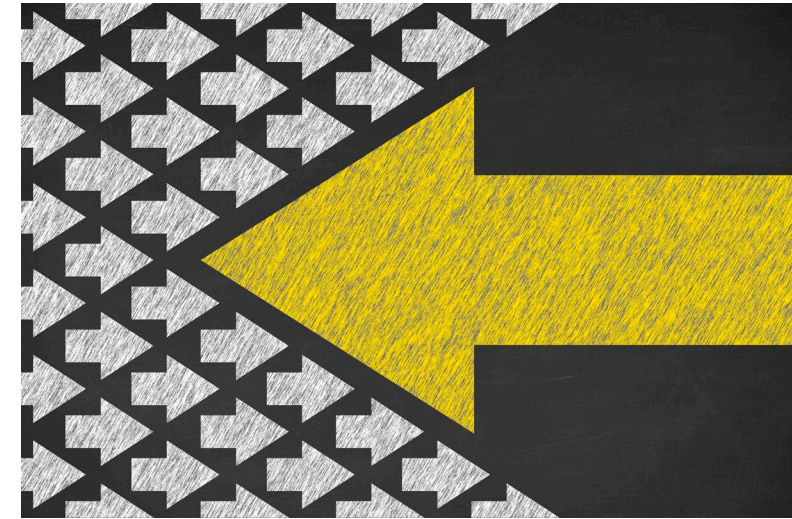
- Ciara shows the instructor the text message that said “I tried to love you and gave it my all. I never want to see you again.”
- The instructor notifies the Title IX Coordinator.
- What should the Title IX Coordinator do?
- What is the education program or activity?
- If Ciara asks to file a complaint, what should the notice of allegations say?
- When should the Title IX Coordinator reach out to Damon?

*I tried to love you and  
gave it my all. I never  
want to see you again.*

# 6

## Scenario: Ciara & Damon

- Damon files a counter complaint.
- What should the notice of allegations to Ciara say?
- When should the Title IX Coordinator reach out to Damon?
- During the investigation, Damon produces his text messages that he sent the week prior to Ciara's "I tried to love you" text message. He claims that they prove she was trying to set him up.
- The investigator asks Ciara why she did not produce the earlier messages, and Ciara said, "You didn't ask for them."



# 7

## Scenario: Tory



- Tory is 16 and a dual-credit student. She met David in the library. He just turned 20. Tory wore a summer dress to campus on Thursday. She found David and invited him to the stairwell where they had sex.
- Tory soon has a gynecological problem and needs to tell her mother. The mother wants to know about “David.” Tory insists that it was consensual and does not want to complain. The mother seeks information from the dual-credit coordinator who puts her in touch with the Title IX Coordinator. What should you do?
- The school district’s Title IX coordinator calls you. They want to interview David. What do you say?



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