

A photograph of the Chicago skyline at night, featuring several illuminated skyscrapers against a dark blue sky. The text "GLEN ELLYN SCHOOL DISTRICT 41" is overlaid in a dark blue, sans-serif font.

GLEN ELLYN SCHOOL DISTRICT 41

Sexual Harassment

A photograph of the Chicago River at night, with city lights reflecting on the water. The text "Presented by Jackie Gharapour Wernz, Partner" is overlaid in a bold, black, sans-serif font.

Presented by Jackie Gharapour Wernz, Partner

The word "FRANCZEK" in a blue, sans-serif font, enclosed within a thin blue rectangular border.

FRANCZEK

A close-up photograph of a person's hand holding a small, white, rectangular card. The card has the words "GROUND" and "RULES" printed on it in a bold, sans-serif font. "GROUND" is in red, and "RULES" is in black. The hand is positioned in the center-right of the frame, with the fingers gripping the card. The background is dark and out of focus, showing some blurred vertical lines, possibly from a crowd or a stage setting.

**GROUND
RULES**

The background of the slide features several black silhouettes of human hands and forearms raised against a white background. The hands are positioned at various heights and angles, creating a sense of movement and participation. A solid blue horizontal bar is located at the bottom of the image, spanning the width of the slide.

Ask Questions

Put away
those cell
phones
(unless I ask
you to use
them!)



**TURN OFF
CELL PHONES**



Know the
Rules

SEXUAL HARASSMENT
complaint form

A close-up, high-resolution photograph of a human eye. The eye is light-colored, possibly hazel or light brown, with a visible iris and pupil. The eyelids are slightly open, and the eyelashes are visible. The skin around the eye is fair and has a natural texture. Overlaid on the center of the eye is the text "Recognize Sexual Harassment" in a bold, white, sans-serif font. The text is centered both horizontally and vertically within the frame of the eye.

**Recognize
Sexual Harassment**



But not just any action, the right action for
the conduct at issue!

Why is this so
important?



Twitter Moments ✓

@TwitterMoments

Follow

People who have been sexually assaulted are saying **#MeToo** to show how widespread the problem is.

twitter.com/i/moments/9196...

6:05 PM - Oct 15, 2017



How 'me too' is showing the magnitude of sexual assault

World news

People who have been sexually assaulted or harassed are tweeting

Moments

226

2,328

3,815





“Since April 2017, more than 250 powerful people – celebrities, politicians, CEOs, and others – have been the subject of sexual harassment, assault, or other misconduct allegations.”

According to a **2017 report from the Justice Department**, only

23 percent

of all sexual assaults are reported to the police.

THIS DOESN'T ADD UP:

79% of public schools reported **zero incidents** of sexual harassment or bullying.



AAUW research has shown that nearly half of students in grades 7-12 reported experiencing some form of sexual harassment, yet more than three-fourths of schools reported zero incidents for the 2015-16 school year.

81%

Believe sexual
harassment
occurs in most
American
workplaces today

90%

Believe it's not a
problem in their
workplace

*Harassment
and assault can have
long lasting,
detrimental effects on
victims*

Effects on Individuals

Poor performance in
school

Stress

Disengagement

Fear

Distraction

Anger

Mistrust

Conflict

Lost Opportunities

Acting out

Absenteeism

Drop-out

Suicide

ANXIETY

PTSD

DEPRESSION

Effects on Teams

Decreased focus

Lost productivity

Withdrawal

Neglect

Absenteeism

Malingering

Lack of trust in leadership

Turnover



*Unfair processes can
have
long lasting,
detrimental effects on
the accused*

Mattress Protest and Its Aftermath

Case of alleged rape at Columbia first yielded much sympathy for the accuser and protest, but ends with the university apologizing to the accused. The case has had on the discussion of sexual assault on campus.

By **Jeremy Bauer-Wolf** // July 24, 2017





Harassment Is Illegal

Including Sexual Harassment



ou could be per
responsible.

YOU'RE FIRED

The background of the slide is a close-up photograph of a wooden plank wall. The planks are arranged horizontally and have a natural wood grain texture. A semi-transparent blue color overlay is applied to the entire image, creating a cool, icy aesthetic. Centered on this background is the text "Ice Breakers" in a white, bold, sans-serif font.

Ice Breakers

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

I have been directly involved in investigating or otherwise responding to a SH Harassment complaint at D41

Never

Once

More than once

What is sexual harassment?? I thought you were here to teach me that!!

In the Zoom Chat

What is the most important question you would like answered today?

**What is sexual
harassment?**



Remember your
policies

**The definition of sexual harassment that D41 uses is found
in**

District policy

Title VII

Title IX

The Illinois Human Rights Act

All of the above

None of the above

State and Federal Laws

Employment

- Illinois Human Rights Act
- Title VII
- Title IX

Students

- Illinois Human Rights Act
- Title IX

Illinois Human Rights Act

You have a right to be free of sexual harassment in the workplace, housing, educational or business environment.

In employment, sexual harassment is any unwelcome sexual advances, requests for sexual favors, or any conduct of a sexual nature when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
- submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
- such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Illinois Human Rights Act

You have a right to be free of sexual harassment in the workplace, housing, educational or business environment.

In education, sexual harassment is any unwelcome sexual advances or requests for sexual favors made to a student by an executive, administrative staff or faculty member, or any conduct of a sexual nature that substantially interferes with the student's educational performance or creates an intimidating, hostile, or offensive educational environment.

Title VII of the Civil Rights Act of 1964

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

IHRA & Title VII – Victims

- All persons can be victims of sexual harassment regardless of the victim's **gender identity** or the perpetrator's gender identity.
- All persons can be victims of sexual harassment regardless of the victim's **sexual orientation** or the perpetrator's sexual orientation.
- Victims of sexual harassment can include not only the target of the sexual harassment, but also **third parties or bystanders**.

Title VII & IHRA – Types of SH



Quid Pro Quo



Hostile Work Environment



Retaliation

Quid Pro Quo

Quid = Something

Pro = For

Quo = Something

Quid (This)

Something Sexual

- Sexual acts
- Date
- Touching / groping
- Nudity
- Putting up with advances

Pro (For)

Quo (That)

Something job-related

- Promotion
- Good review
- Not fired
- Pay increase
- Assignments
- No blackballing



Hostile
Environment

Hostile Work Environment

1. Unwelcome conduct
2. Based on a Protected Category
3. That has the purpose or effect
4. Of either:
 - substantially interfering with the individual's work performance; OR
 - Creating an intimidating, hostile, or offensive working environment

~~They were asking for it!~~



How would a
reasonable
person feel in
the other
person's shoes?

I didn't mean it!

It was just a joke.

That's not how I intended it!

I wasn't trying to hurt anyone's feelings.

They know I wasn't serious.

I'm not a _____ [*racist / sexist / etc.*]!

I didn't mean it!

It was just a joke.

That's not how I intended it!

I wasn't trying to hurt anyone's feelings.

They know I wasn't serious.

I'm not a _____ [*racist / sexist / etc.*]!

Not An Excuse!



**Harm can be
hidden**

Was the conduct unwelcome?

Yes

No

I need more
information

In the Zoom Chat

What other information might you want to know?

Which of these equal "welcomeness"

Not Complaining

Laughing

Participating

Dress/Appearance

None of the above

Which of these is a sign of unwelcomeness

The complainant did not solicit the conduct

The complainant did not invite the conduct

The complainant at first seemed ok but then said "don't do" or "don't say that"

All of the above

Jordan and Peyton



Is this welcome?

Yes

No

Charlie and Ali



Is this welcome?

Yes

No

Reese and Alex



Is this welcome?

Yes

No

**When you visualized our scenarios, how many of the
"victims" were female?**

All
None
Some

Check Your Biases

Any Conduct

- Comments
- Jokes
- E-mail, messages
- Social media posting
- Visual displays – digital or analogue
- Physical contact
- Gestures
- Etc., etc.

Not limited to conduct in
the workplace.

Based on Protected Category

- Race
- Sex
- Religion
- National origin
- Age
- Disability
- Sexual orientation
- Gender identity /
expression
- Etc.

Purpose or Effect
Hostile or Intimidating

Purpose

Was the conduct
intended to cause
harm??

Effect

*Did the conduct
cause harm??
(Intended or not)*

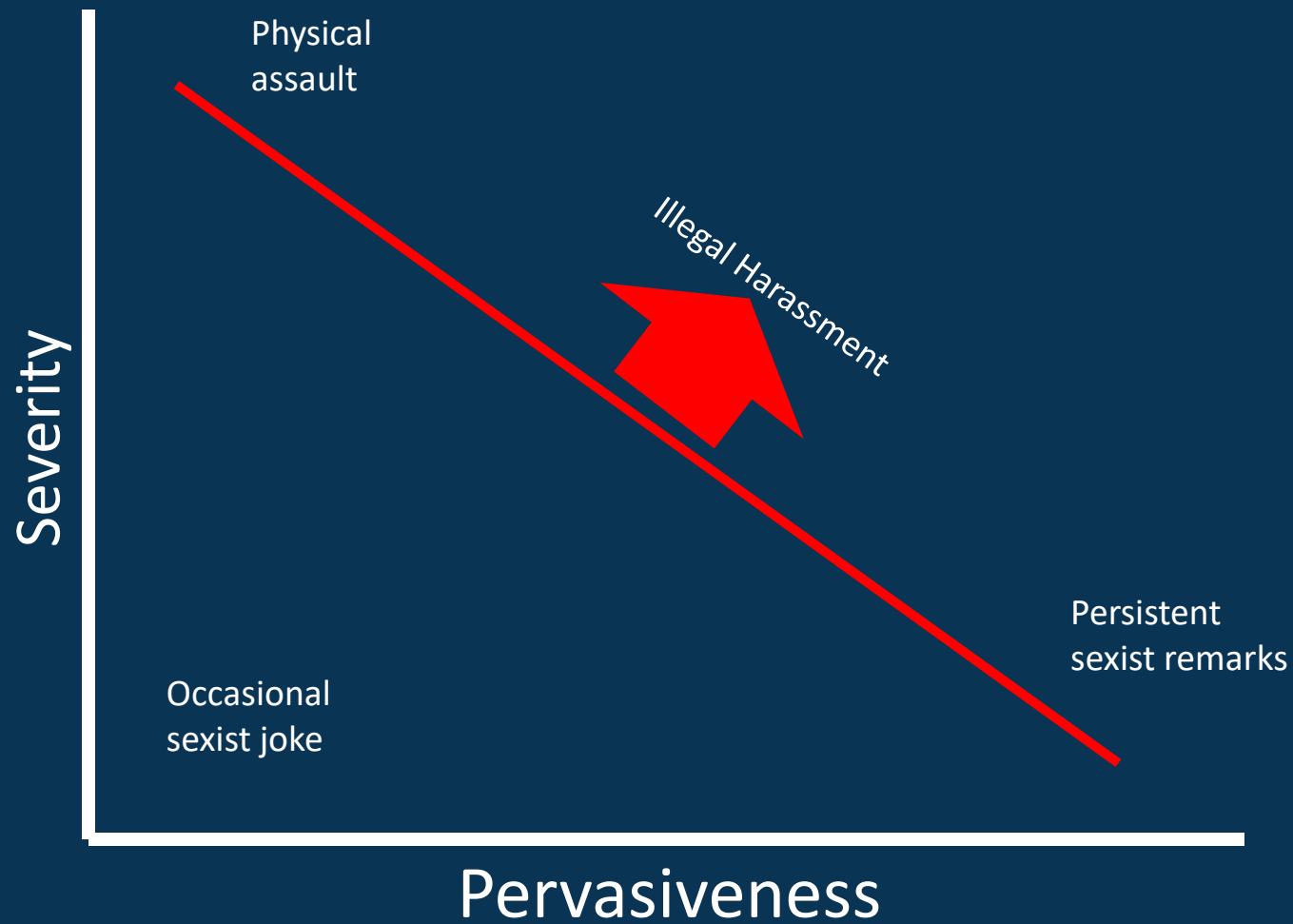
Severe or Pervasive

Severe

Once may
be enough

Pervasive

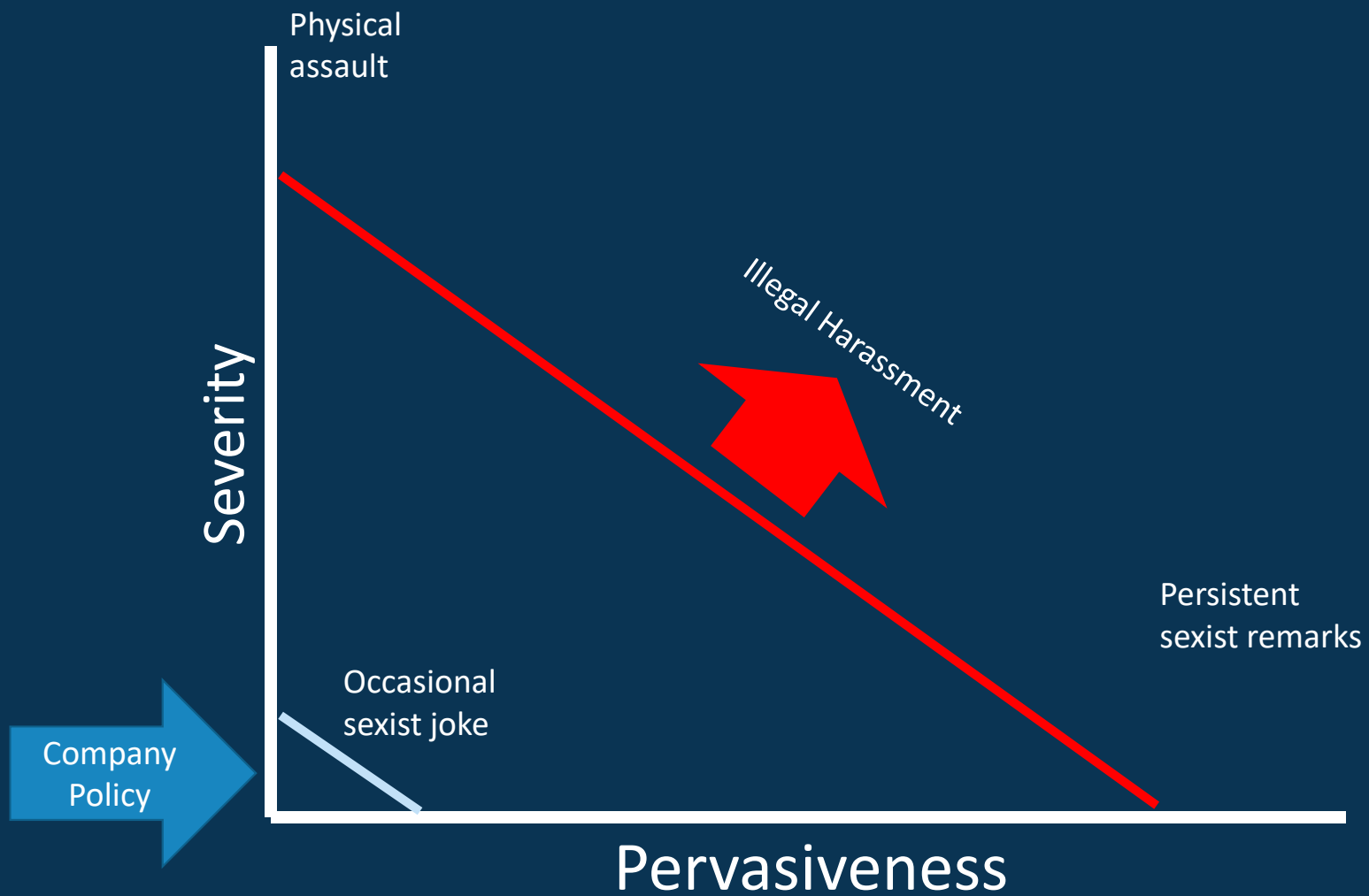
Small acts
Add up over
time





It doesn't have to get this
bad to be harassment!

https://commons.wikimedia.org/wiki/File:An_angel_leading_a_soul_into_hell,_Oil_painting_by_a_follower_of_Pieter_Bruegel_the_Elder.jpg



Retaliation

Retaliation

1. Any action
2. That would dissuade a reasonable employee
3. From engaging in protected conduct

Any action

Firing

Discipline

Refusal to hire or promote

Loss of pay or benefits

Material change in working conditions

Harassment

Etc.

Protected Conduct

Objecting to unlawful harassment

Making a good faith report of harassment

Participating in an investigation

Filing or participating in a charge or lawsuit

**What do I do if I
learn of sexual
harassment?**





YOU HAVE THE RIGHT TO BE FREE FROM JOB DISCRIMINATION AND SEXUAL HARASSMENT.



The Illinois Human Rights Act states that you have **the right to be free from unlawful discrimination and sexual harassment**. This means that employers may not treat people differently based on race, age, gender, pregnancy, disability, sexual orientation or any other protected class named in the Act. This applies to all employer actions, including hiring, promotion, discipline and discharge.

REASONABLE ACCOMMODATIONS

You also have the right to reasonable accommodations based on pregnancy and disability. This means you can ask for reasonable changes to your job if needed because you are pregnant or disabled.



RETALIATION

It is also unlawful for employers to treat people differently because they have reported discrimination, participated in an investigation, or helped others exercise their right to complain about discrimination.

REPORT DISCRIMINATION

To report discrimination, you may:

1. Contact your employer's human resources or personnel department.
2. Contact the Illinois Department of Human Rights (IDHR) to file a charge.
3. Call the Illinois Sexual Harassment and Discrimination Helpline at 1-877-236-7703 to talk to someone about your concerns.

Chicago:
James R. Thompson Center
100 West Randolph Street, Suite 10-100
Chicago, IL 60601
(312) 814-6200
(866) 740-3953 (TTY)
(312) 814-6251 (Fax)

Springfield:
535 W. Jefferson Street
1st Floor
Springfield, IL 62702
(217) 785-5100
(866) 740-3953 (TTY)
(217) 785-5106 (Fax)

Website: www.illinois.gov/dhr
Email: IDHR.Intake@illinois.gov

Employers shall make this poster available and display it where employees can readily see it.

This notice is available for download at: www.illinois.gov/dhr

Printed by the Authority of the State of Illinois . 9/18 . web version . IOC119-0181



Equal Employment Opportunity is **THE LAW**

Private Employers, State and Local Governments, Educational Institutions, Employment Agencies and Labor Organizations

Applicants to and employees of most private employers, state and local governments, educational institutions, employment agencies and labor organizations are protected under Federal law from discrimination on the following bases:

RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN

Title VII of the Civil Rights Act of 1964, as amended, protects applicants and employees from discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment, on the basis of race, color, religion, sex (including pregnancy), or national origin. Religious discrimination includes failing to reasonably accommodate an employee's religious practices where the accommodation does not impose undue hardship.

DISABILITY

Title I and Title V of the Americans with Disabilities Act of 1990, as amended, protect qualified individuals from discrimination on the basis of disability in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. Disability discrimination includes not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, barring undue hardship.

AGE

The Age Discrimination in Employment Act of 1967, as amended, protects applicants and employees 40 years of age or older from discrimination based on age in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment.

SEX (WAGES)

In addition to sex discrimination prohibited by Title VII of the Civil Rights Act, as amended, the Equal Pay Act of 1963, as amended, prohibits sex discrimination in the payment of wages to women and men performing substantially equal work, in jobs that require equal skill, effort, and responsibility, under similar working conditions, in the same establishment.

GENETICS

Title II of the Genetic Information Nondiscrimination Act of 2008 protects applicants and employees from discrimination based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. GINA also restricts employers' acquisition of genetic information and strictly limits disclosure of genetic information. Genetic information includes information about genetic tests of applicants, employees, or their family members; the manifestation of diseases or disorders in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members.

RETALIATION

All of these Federal laws prohibit covered entities from retaliating against a person who files a charge of discrimination, participates in a discrimination proceeding, or otherwise opposes an unlawful employment practice.

WHAT TO DO IF YOU BELIEVE DISCRIMINATION HAS OCCURRED

There are strict time limits for filing charges of employment discrimination. To preserve the ability of EEOC to act on your behalf and to protect your right to file a private lawsuit, should you ultimately need to, you should contact EEOC promptly when discrimination is suspected:

The U.S. Equal Employment Opportunity Commission (EEOC), 1-800-669-4000 (toll-free) or 1-800-669-6820 (toll-free TTY number for individuals with hearing impairments). EEOC field office information is available at www.eeoc.gov or in most telephone directories in the U.S. Government or Federal Government section. Additional information about EEOC, including information about charge filing, is available at www.eeoc.gov.

Employer Liability

- Supervisor harassment:
 - Illinois law – strict liability
 - Federal law – Liable unless employee fails to take advantage of reasonable preventive measures
- Non-supervisor harassment:
 - Employer is aware of harassment
 - Fails to take corrective measures

Employer Responsibilities

- Taking reasonable steps to prevent harassment
- Promptly investigating reports of harassment
- If harassment occurs:
 - Putting a stop to it
 - Preventing it from happening again
 - Addressing harm caused

Prevention



- Policy
- Training
- Communication on How to Report
- Managers/Supervisors Monitor Environment
- Managers/Supervisors Lead by Example
- Managers/Supervisors Conduct Climate Checks

Investigation



Corrective Measures



Discipline, up to Termination, for Violation



Consider Counseling, Training, and Closer Supervision If Concerning But No Violation



Take Reasonable Action Within the Organization to Reduce Recurrence



Follow Up with Complainant Regularly

Possible Legal Remedies for Harassment, Discrimination, Retaliation

- Cease and Desist Order
- Actual Damages
- Restoration of lost employment / benefits (reinstatement, back pay, value of lost benefits, promotion, hiring, etc.)
- Attorneys' fees and costs
- Punitive damages
- Other relief

Now ... A Break

Then ... Title IX



Title IX

My role is (or will soon be) in Title IX investigations

Reporter (to Title IX Coordinator when I learn of Title IX)

Title IX Coordinator or Deputy

Investigator

Decisionmaker (Complaint)

Decisionmarker (Appeal)

A and B

A and C

A and D

A and E

I'm so confused, I have no idea what you're talking about!



THE HILL

New Title IX regulations
expand rights to
those accused of sexual
assault on campus |...



THE Inside Higher Ed

New Title IX regulation
sets location-based
boundaries for sexual
harassment...



FOX NEWS

Department of Education
releases new Title IX
regulations

Title IX – What is Sexual Harassment?

Old Definition

Unwelcome conduct determined by a reasonable person to be severe, pervasive or persistent and to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities

New Definition (8/14)

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity

PLUS quid pro quo by an employee AND VAWA & Clery Act "big four"

Title IX Quid Pro Quo

Codified: Severity and harm presumed

New: Only an employee (not a volunteer, another student, etc.)

Definition: An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct

VAWA “Big Four”

Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Domestic Violence 34 U.S.C. 12291(a)(8)

Dating Violence 34 U.S.C. 12291(a)(10)

Stalking 34 U.S.C. 12291(a)(30)



“In a Program
or Activity”






Program or Activity: Any location, events, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred

Online & Off Campus

Substantial control over the context?



A map of the United States is shown in the background, with various cities labeled. A large white circle is overlaid on the map, containing the text. The text is in a bold, black, sans-serif font. The words "in the United States" are italicized. There are several orange dashed lines and one solid orange circle on the map, primarily in the western and southern regions.

**Schools need only
address sex
discrimination
occurring against a
person *in the United
States* under Title IX**



DISMISSALS

Mandatory if conduct alleged:

Not sexual harassment if true
Did not occur in the school's program or activity
Did not occur in the United states

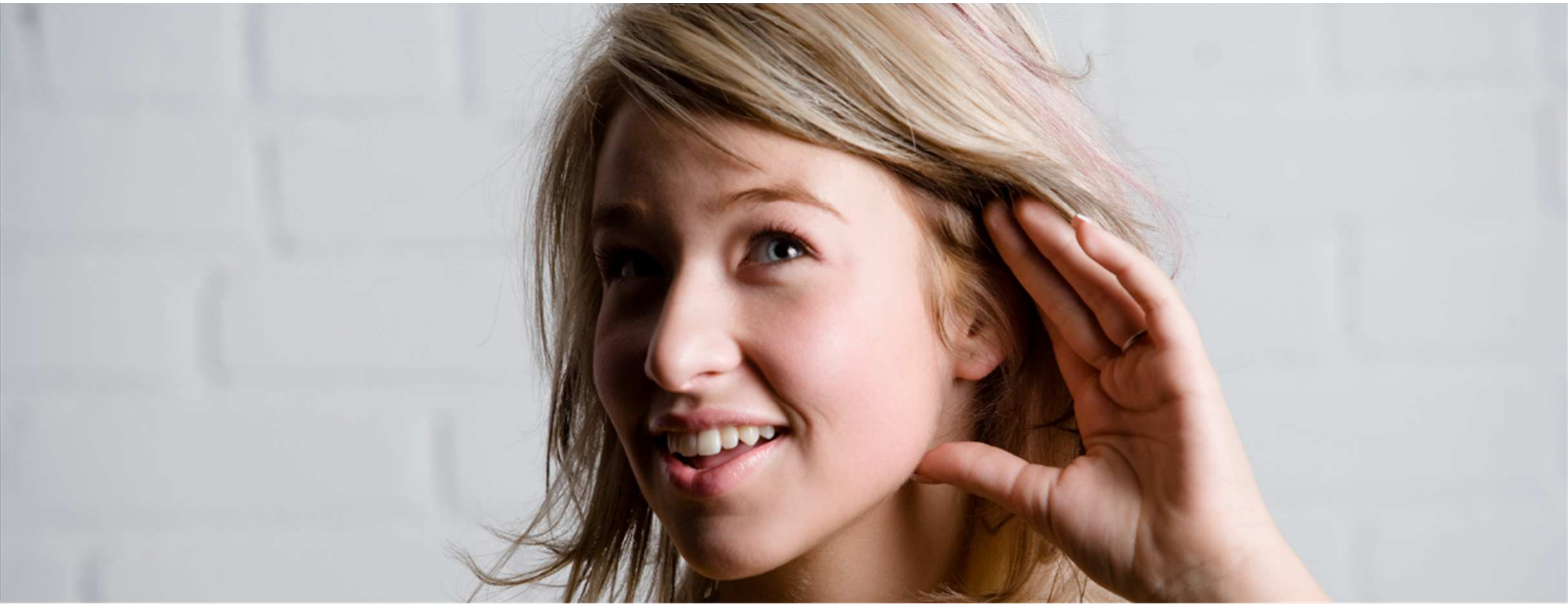
**can still address under non-Title IX policy

Permissive if:

Complainant requests to withdraw
Respondent's enrollment or employment ends
Specific circumstances prevent recipient from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant)

When must a school respond to sexual harassment?

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



Actual Knowledge: Notice (senses or report) of sexual harassment or allegations of sexual harassment to:

1. A recipient's Title IX coordinator
2. Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
3. Any employee of an elementary and secondary school

Reporting Sexual Harassment: Who, How and When?

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator
- Or by any means that results in the Title IX Coordinator receiving the person's report
- Such a report may be made at any time, including during non business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator

How Must You Respond?

- Response after actual knowledge (senses or report)
- Response after “Formal Complaint”
- Can’t be deliberately indifferent



Deliberate Indifference: “[T]he response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation.”


Title IX Coordinator must promptly, even if no formal complaint is filed:

- Contact the complainant to discuss the availability of “supportive measures”
- Consider the complainant’s wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a formal complaint

New:
Initial
Response

34 C.F.R. 106.30(a), .44(a)

Apply to parties in both *reports* and *formal complaints* of sexual harassment



Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment

NOT a third party who reports alleged sexual harassment perpetrated against someone else

NOT the Title IX Coordinator, even if the TIXC "signs" a formal complaint



Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

**Terminology:
Complainant,
Respondent**

Supportive Measures

What Changed?

OLD TERM (OCR Guidance)

- Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access
- Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents

NEW TERM

(Final Rule)

- **Non-punitive**, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).
- **Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party**



Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervision

A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for "emergency removals" for students and "administrative leaves" for employees

Emergency Removal/ Admin Leave

Immediate emergency removal

(34 C.F.R. 106.44(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat to physical health or safety**
- **Notice, opportunity to challenge** provided “immediately” provided the removal
- Consider other laws, e.g., “change in placement” under IDEA

Employee administrative leave

(34 C.F.R. 106.44(d))

- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements


Formal Complaint

Defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).

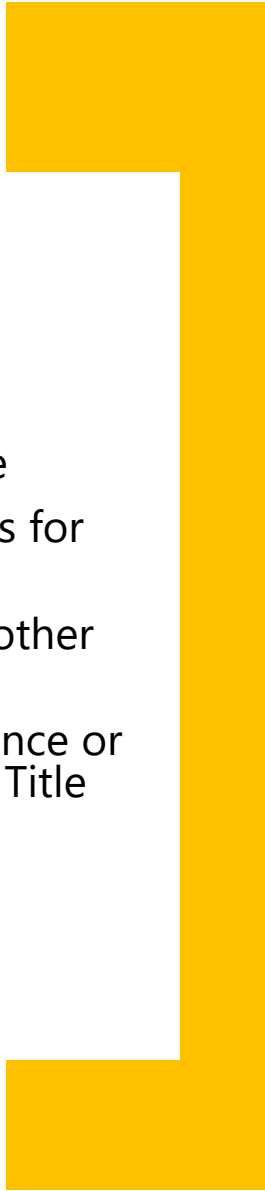
New:
Formal
Complaint
Response

34 C.F.R. 106.45(b)

- Requires a number of specific steps for investigating, dismissing, and determining responsibility in formal complaint
- Major shift from previous more deferential stance toward specific policies and practices for complaint resolution



Basic Required Elements 34 C.F.R. 106.45(b)(1)

- Treat parties equitably
 - Objective evaluation of all evidence
 - No conflict of interest for investigator or decisionmakers
 - Presumption respondent not responsible
 - Reasonably prompt time frame + process for delays with written notice/explanation
 - Description or list of possible discipline/other remedies
 - Statement of standard used (Preponderance or clear/convincing – must use same for all Title IX, including employees and students)
 - Appeal procedures and bases
 - Range of supportive measures available
 - No breach of privilege without waiver
- 

- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any **initial** interview
- Must include:
 - Notice of grievance process, including any informal resolution process
 - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)

More Steps: Written Notice

34 C.F.R. 106.45(b)(2)

- Must include:
 - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process
 - Notice of parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence
 - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process
- Must be supplemented if new allegations opened for investigation

More Steps: Written Notice

34 C.F.R. 106.45(b)(2)



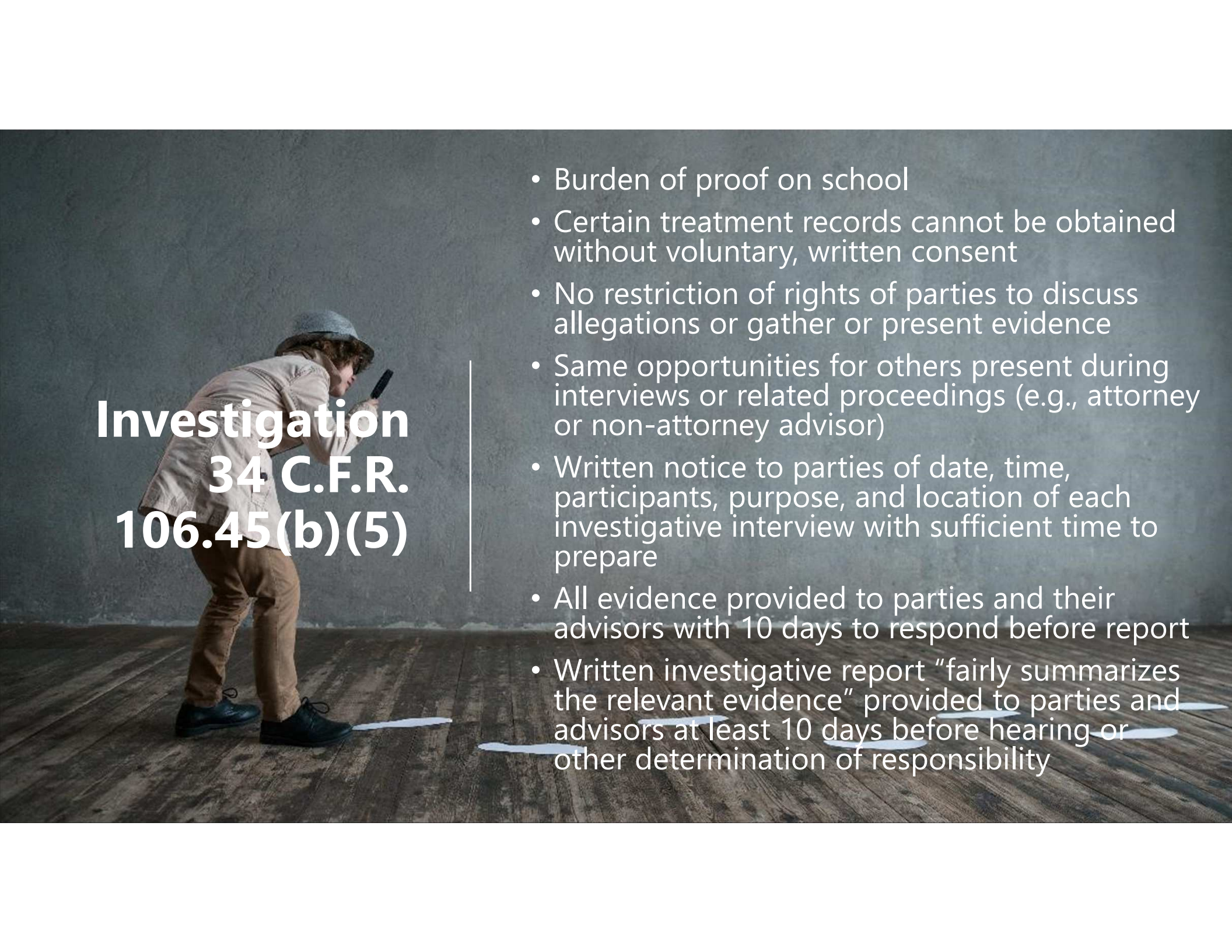
Written Notices: Required

- Dismissal notice (CP only)
- Notice at start of investigation
- Interview notices
- Report
- Notice why proposed questions not asked on cross and why
- Written determination and notice of appeal rights
- Informal resolution notice



Written Notices: Recommended

- Document information to complainant at initial meeting, including supportive measures requested/provided
- Document that review of evidence provided to both parties
- Document opportunity to ask questions, answers, follow-up questions, etc.



Investigation 34 C.F.R. 106.45(b)(5)

- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All evidence provided to parties and their advisors with 10 days to respond before report
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility

Anatomy of an Investigation

Choosing an Appropriate Investigator

Intake & Evaluation of the Complaint

Investigation Plan

Interviews

Other Evidence

Determination

Documentation (Notes, Files, & Report)

Notification of Results



Choosing an Appropriate Investigator

Who should investigate?

- Trained, unbiased investigator
 - No actual or perceived conflict of interest
 - Check “institutional interests”
 - No presumption for or against any party

Who should investigate?

- No “one size fits all” approach
- May need to designate

What are reasons for concern re bias/conflict of interests?

Your friendship or other relationship
with the accused or their family

Your sex/gender identity

Your status as a survivor

Personality conflicts

All of the above

Coordinator
+
Board
Attorney



Report Writing

- Fairly summarizes the relevant evidence
- Provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility



Determination of Responsibility

Live Hearings

- Required in higher education + advocate cross
- Hearing optional in K-12
- K-12: written cross after report

Determinations of Responsibility 34 C.F.R. 106.45(b)(6)

- Live hearing with live cross by party advisors required for higher ed, **not K-12**
- Hearings permitted for K-12, with each party allowed to submit written, relevant questions to be asked of another party or witness to the decisionmaker, who will provide each party with the answers and the opportunity for follow-up questions
- Questions about a complainant's prior sexual behavior or sexual predisposition only possible to establish that another person committed the alleged conduct or that the conduct was consensual

Determinations of Responsibility

34 C.F.R. 106.45(b)(7)

- Decisionmaker cannot be the investigator or the Title IX Coordinator
- Must issue written determination addressing:
 - Allegations
 - Procedural steps taken
 - Findings of fact
 - Application of code of conduct to facts
 - Statement of and rational for result **as to each allegation** including
 - Determination of responsibility
 - Any disciplinary sanctions
 - Whether remedies to restore or preserve equal access to the educational program or activity will be provided

Written Determination

- Policies violated
- Procedural steps taken
- Findings of fact
- Conclusions of policy
- Rationale for determination of responsibility
- Disciplinary sanctions + remedies
- Rationale for remedies + how will restore access
- Statement of procedures, right to appeal, and permissible bases for appeal

Appeals

What Changed?

OLD REQUIREMENTS (OCR Guidance)

- Not required
- Must be provided equally to both parties, if provided
- No limitation on basis for appeals, if provided
- No requirement that the decisionmaker on appeal be different from investigators/ decisionmakers in other phases of the process

NEW REQUIREMENTS (Final Rule)

- Must offer to both parties for dismissals and final determinations in the following circumstances:
 - Procedural irregularity
 - New evidence not reasonably available
 - Conflict of interest against Title IX Coordinator, investigator, decisionmaker
- Can offer for other reasons on equal terms
- Different decisionmaker

Informal Resolution 34 C.F.R. 106.45(b)(9)

Prohibited unless formal complaint is filed



Allowed at any time during formal complaint process if:

Both parties provided
written notice of rights

Both parties' written,
voluntary consent
obtained

Not for a complaint
alleging that an employee
harassed a student

Retaliation

34 C.F.R.

106.71



Other Requirements: Title IX Coordinator

- Must be called Title IX Coordinator
- Must be designated + “authorized” to coordinate compliance efforts

Other Requirements: Policy and Notice Requirements



Title IX Coordinator's name
or title and contact
information (including email
address)



Nondiscrimination
policy



Grievance procedures
including how to file or
report sexual harassment
and how the school will
respond



Other Requirements: Recordkeeping 106.45(b)(10)

- Records related to alleged sexual harassment must be maintained for a minimum of 7 years
 - Investigation records
 - Disciplinary sanctions
 - Remedies
 - Appeals
 - Records of any actions taken, including supportive measures
- Must document for every instance:
 - Why response was not deliberately indifferent
 - That measures were taken to restore or preserve equal access to the educational program or activity
 - If no supportive measures provided, why that was not deliberately indifferent



Other Requirements: Training



Required for all staff (identify and report sexual harassment)



Required for Title IX Coordinator, investigators, and decisionmakers (both decision and appeal)



Maintain records for 7 years and post materials on website (or otherwise make available to public if do not have a website)

What about copyright?!

Other Requirements: First Amendment

- Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX
 - OCR: It is not enough to be offended by content of speech
 - OCR will never view attempts to suppress free speech as an appropriate response to sexual harassment
 - A school can never rely on restricting First Amendment protected speech as a way to show that the school was not deliberately indifferent to sexual harassment
- The exercise of rights protected under the First Amendment does not constitute retaliation.



Title IX Matters in HR



Consequences
Just Ahead



Unintended Consequences

Department of Education

- Title IX says “no person” – employees are persons
- These final regulations may apply to reports and formal complaints by employees against students and other employees
- A complainant, whether an employee or a third party or a student, must be participating in or attempting to participate in the education program or activity of the recipient when a complaint is filed



Wait, isn't Title VII for employee complaints?

Department of Education

- Employers must fulfill their obligations under Title VII and Title IX
- No “inherent conflict” between Title VII and Title IX”
- ED will construe Title IX and the regulations in a manner to avoid an actual conflict

Department of Education

- The grievance process in the Title IX regulations applies irrespective of whether the complainant or respondent is a student or employee
- ED is aware Title VII imposes different obligations, including using a different definition

Employment At Will

- Any reason other than an illegal reason
- No process required
- Now, if “sexual harassment” definition and other requirements of Title IX are met, employee due process under Title IX

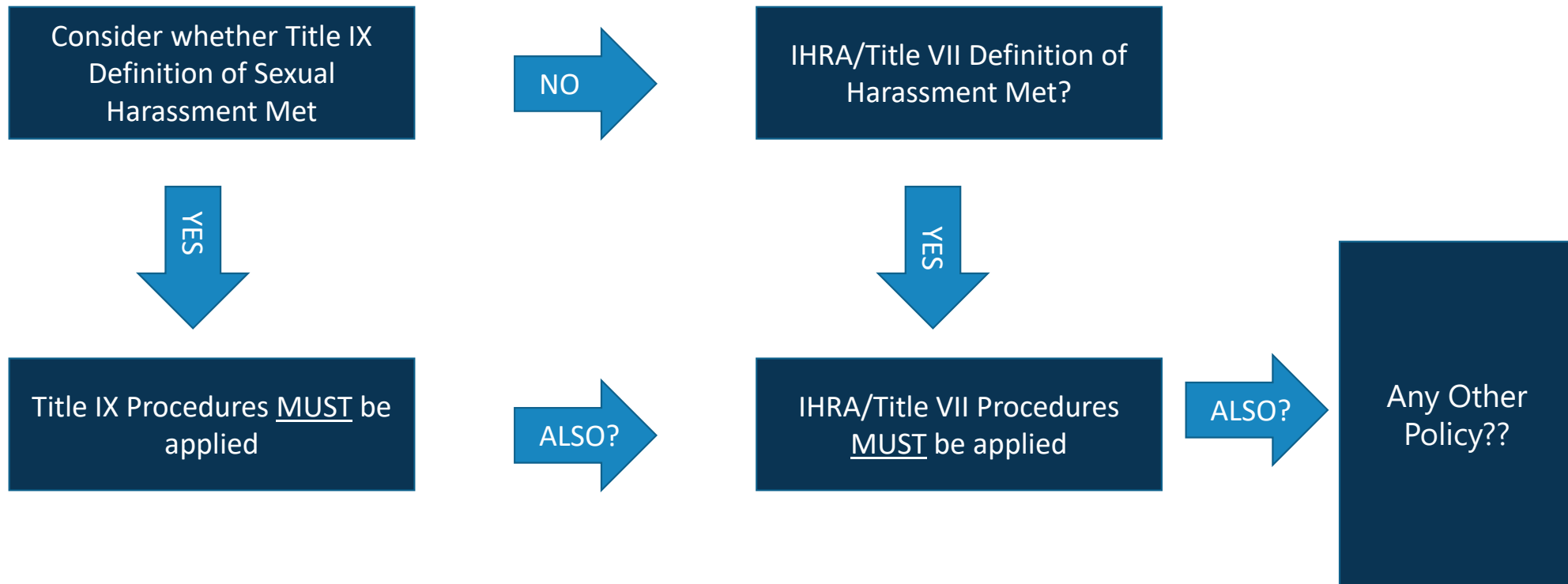
Employment Contracts & CBAs

- Procedures required may conflict with existing employment contracts, CBAs, and employee handbooks
- Additional rights can be created but “must conform to Federal law, as a condition of receipt of Federal funds”

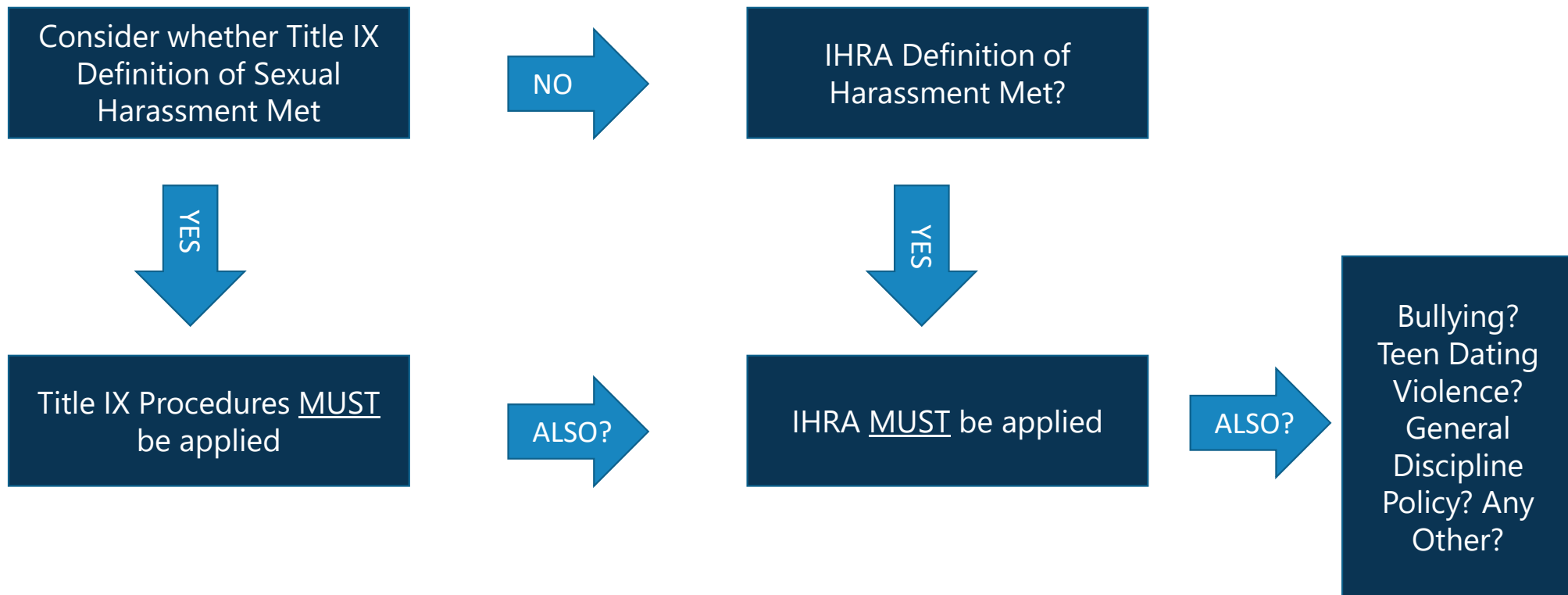
Title VII

- Lower standard for definition of “sexual harassment”
 - ❖ “severe or pervasive”
 - ❖ known or should have known
- No formal complaint required
- No specific processes required

Misconduct Involving Employee



Misconduct Involving Student



FRANCZEK

Sexual Harassment Training



Jackie Gharapour Wernz



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