



# Agenda

*Introductions (name, title, investigation experience?), then...*

## ▶ Title IX Overview

- ▶ Definition
- ▶ Who it covers and how
- ▶ Team players
- ▶ Definitions



# Agenda continued

## ▶ The Investigation

- ▶ Steps of the investigation *Who investigates; Should there be a team*
- ▶ Formulating a plan
- ▶ Formulating questions
- ▶ Question 816 0.839 r9aon54lareW\*ñBT6-CID61W\*ñBT6-CIDlareW\*ñBT6-CID61W\*ñ3JD10

# Agenda continued

## ▶ Wrapping the process

- ▶ The hearing
- ▶ The appeal
- ▶ Record keeping



# Who's Covered?

Title IX covers students, employees, third parties – including visitors and





# Equality vs. Equity

**M E**

Requires a playing field that is not yet level, be leveled

It eliminates any systemic barriers

**M E**

Employs targeted fixes for acknowledged systemic impediments



*So, to remedy the effects of discrimination in an equitable manner, we have to know how those affected were impacted ..hence, Investigating*







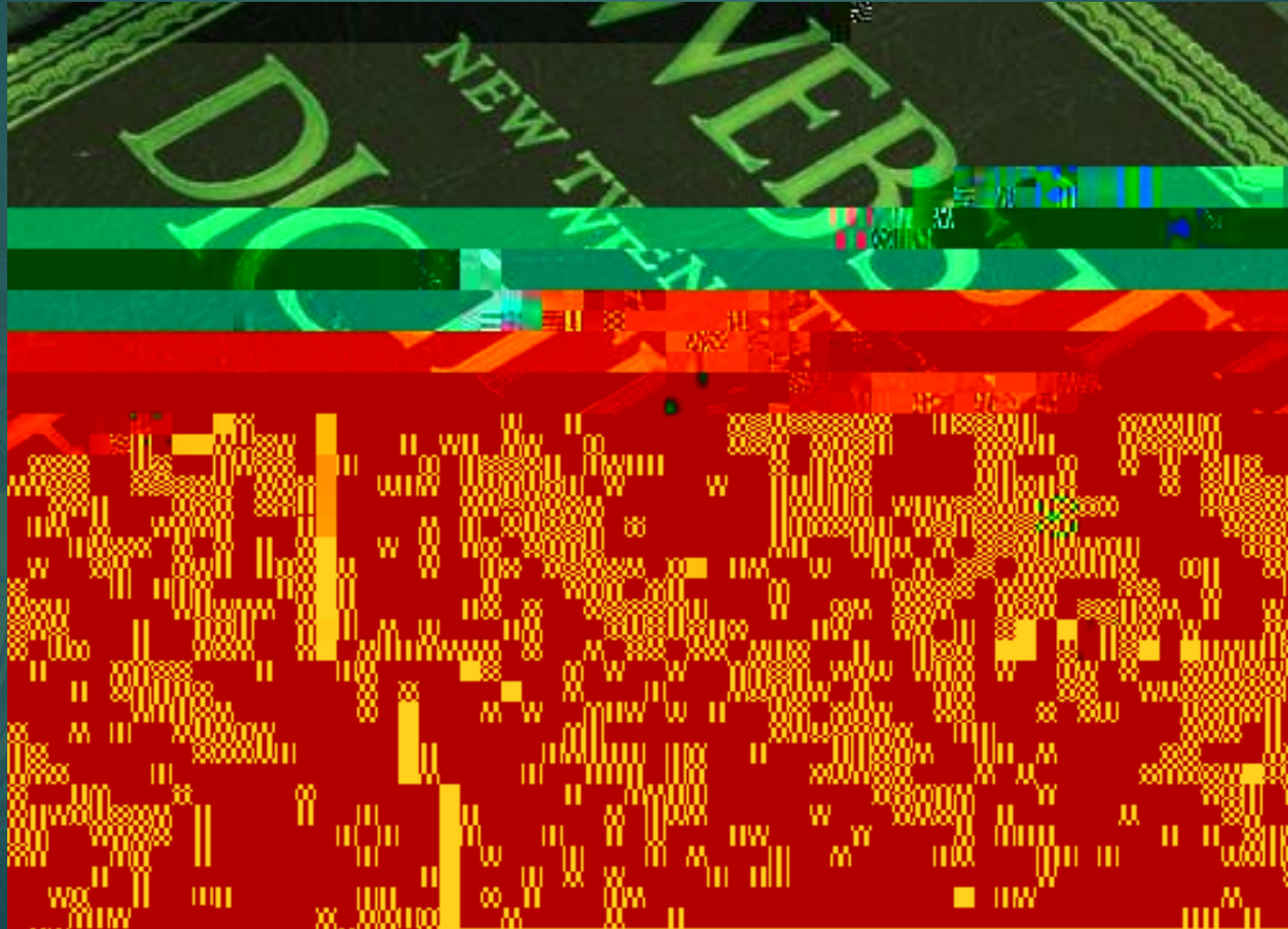
# All the team players

- ▶ Title IX Coordinator





# Definitions





# Complainant

An individual who is alleged to have experienced conduct that violates policy

# Respondent

An individual who is alleged to have engaged in conduct that violates this Policy.

# Privileged employees

Individuals employed by the institution to whom a complainant or alleged victim may talk in confidence, as provided by law. Disclosure to these employees will not automatically trigger an investigation against the complainant or alleged victim's wishes. Privileged Employees include those providing counseling, advocacy, health, mental health, or sexual-assault related services (e.g., sexual assault resource centers, campus health centers, pastoral counselors, and campus mental health centers) or as otherwise provided by applicable law. Exceptions to confidentiality exist where the conduct involves suspected abuse of a minor (in Georgia, under the age of 18) or otherwise provided by law, such as imminent threat of serious harm.

# Responsible employees

Those employees who must promptly and fully report complaints of or information regarding sexual misconduct to the Coordinator. Responsible Employees include any administrator, supervisor, faculty member, or other person in a position of authority who is not a Confidential Employee or Privileged Employee. Student employees who serve in a supervisory, advisory, or managerial role are in a position of authority for purposes of this Policy (e.g., teaching assistants, residential assistants, student managers, orientation leaders).

# Reasonable person

An individual who is objectively reasonable under similar circumstances and with similar identities to the person being evaluated by the institution.

# Reporter

An individual who reports an allegation of conduct that may violate this Policy but who is not a party to the complaint.

# Consent

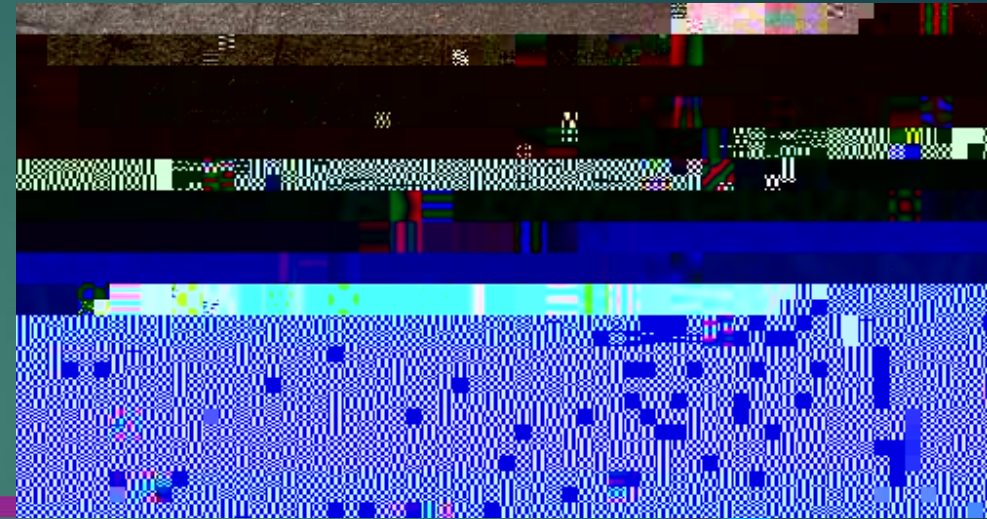


# Incapacitation

The physical and/or mental inability to make informed, rational judgments. It can result from mental disability, sleep or any state of unconsciousness, involuntary physical restraint, status as a minor under the age of 16, or from intentional or unintentional taking of alcohol and/or other drugs. Whether someone is incapacitated is to be judged from the perspective of an objectively reasonable person.



# Prohibited conduct definitions



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# Domestic violence

Violence committed by a current or former spouse or intimate partner of the alleged victim; by a person with whom the alleged victim shares a child in common; by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the alleged victim.

# Sexual exploitation

Taking non-consensual or abusive sexual advantage of another for one's own advantage or benefit, or for the benefit or advantage of anyone other than the one being exploited.

Examples of sexual exploitation may include, but are not limited to, the following:

- ▶ Invasion of sexual privacy;
- ▶ Prostituting another individual;
- ▶ Non-consensual photos, video, or audio of sexual activity;
- ▶ Non-consensual distribution of photo, video, or audio of sexual activity, even if the sexual activity or capturing of the activity was consensual;
- ▶ Intentional observation of nonconsenting individuals who are partially undressed, naked, or engaged in sexual acts;
- ▶ Knowingly transmitting an STD or HIV to another individual through sexual activity;
- ▶ Intentionally and inappropriately exposing one's breasts, buttocks, groin, or genitals in non-consensual circumstances; and/or
- ▶ Sexually-based bullying.

# Sexual harassment

- ▶ Sexual Harassment (Student on Student):

Unwelcome verbal, nonverbal, or physical conduct based on sex (including gender stereotypes), determined by a Reasonable Person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to participate in or to benefit from an institutional education program or activity.



# Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress.

*For the purposes of this definition:*

- ▶ Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with person's property.
- ▶ Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily, require medical or other professional treatment or counseling.

# Nonconsensual sexual contact

Any physical contact with another person of a sexual nature without the person's consent. It includes but is not limited to the touching of a person's intimate parts (for example, genitalia, groin, breasts, or buttocks); touching a person with one's own intimate parts; or forcing



# Nonconsensual sexual penetration

Any penetration of the vagina, anus, or mouth by a penis, object,

# Connecting Consent and Incapacitation

## The Force, Incapacity, Consent Construct | Overview

1. Was force used by the Respondent to engage in sexual activity?
2. Was the Complainant incapacitated?
  - Did the Respondent know?
  - Should the Respondent have known?
3. What clear words and/or actions by the Complainant indicated to the Respondent that the sexual activity was mutually agreed upon?
4. Did the Complainant withdraw consent at anytime during the sexual activity?

# Returning to the definition of Consent

*Words or actions that show a knowing and voluntary willingness to engage in a mutually agreed upon sexual activity*

We have to understand that:

- Past consent does not equal present consent *We've done it before*
- The scope of consent does matter *I agreed to oral, not anal*
- Consent can be invalidated by force, intimidation, incapacitation, coercion, or withdrawal of consent by clear words and/or actions
- No means no, but silence and passivity also means no
- Consent must be given immediately prior to, or contemporaneously with, sexual activity

# Force – how does it factor?

- ▶ Was force used by the respondent to engage in sexual activity?  
If so, there was not consent; consent must be given voluntarily and not obtained through force

Types of force -

- Physical violence (hitting, restraining, etc.)
- Actual threats (saying or doing something that cause a person to do something they would not have otherwise done)
- Intimidation (implied threat that causes reasonable fear)
- Coercion (application of an unreasonable amount of pressure)

# Another look at Incapacitation

- ▶ Incapacitation goes beyond intoxication or drunkenness
- ▶ Incapacitation prevents the ability to make informed rational judgments
  - Could the complainant appreciate the situation and engage consciously? Could they make reasonable decisions?
- ▶ Forms of incapacity
  - Alcohol or other drugs
  - Mental or cognitive impairment
  - Injury
  - Sleep

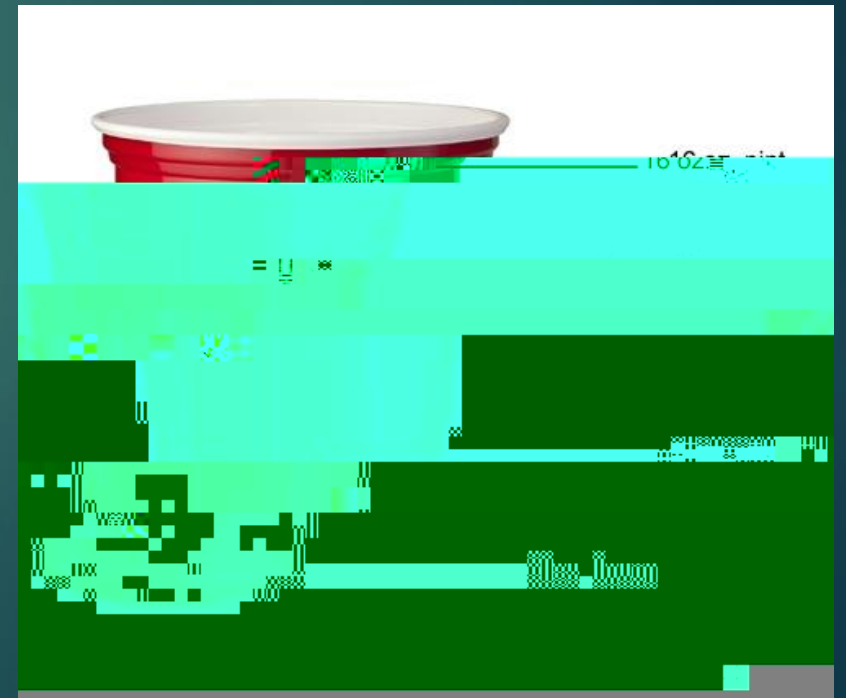
# Possible signs of incapacitation

- ▶ Total or intermittent unconsciousness
- ▶ Incoherent attempts at communicating
- ▶ Lack of awareness or surroundings
- ▶ Inability to stand, walk, or dress etc. without assistance

Parties may use the term incapacitated, but how can we determine if that was likely the case?

# Consider...

- ▶ What did they eat?
  - ▶ When did they eat?
  - ▶ What did they drink?
  - ▶ How much did they drink?
  - ▶ What was the strength of the drink(s)?
  - ▶ Did they take any drugs, prescription or otherwise?
  - ▶ Do they drink or take drugs often?
  - ▶ What is their body type?
  - ▶ How much do they weigh?
- ▶ What is their gender?
  - ▶ Were they fatigued?
  - ▶ Were they dehydrated?











# Interim Measures

- ▶ Title IX Coordinator can implement them at any point, and must be implemented in an equitable manner, protecting involved parties and the institution – cannot be punitive
- ▶ Examples include:
  - Changes to housing
  - No contact orders (directives, issued to all involved parties)
  - Change in classes
  - Change in class format
  - Change in work schedule or location
  - For employees – administrative leave
  - For students -- Interim suspension *only with approval from the system director*

# Legal vs. Administrative

- ▶ Title IX is a legal, federally regulated act. However, the process we follow is often referred to as an administrative process. Title IX

# Intersection between Title VII and Title IX (and its ties to Title VI)

- ▶ *Title VI – protects people from discrimination based on race, color, or national origin in programs or activities that receive federal financial assistance*
- ▶ *Title VII – protects employees and job applicants from employment discrimination based on race, color, religion, sex and national origin*
- ▶ Standards established under Title VII generally guide how Title IX violations are established
- ▶ Both statutes can be used to pursue the same violations
- ▶ Title IX prohibits sex-based discrimination in all activities related to recruiting, evaluating, classifying, pay, retention, or treatment of employees; it offers extensive due process to employees accused of sex based misconduct

# Effects of this intersection

- ▶ Regulation of the sexual harassment definition
- ▶ Coordination of remedies and/or sanctions when employees are involved
- ▶ What if the student involved is also employed by the institution?
- ▶ Can allow for coordinated efforts in investigation between Human Resource and Title IX professionals



# The Investigation— *You've been assigned a case. Now what?*

- ▶ Develop a plan
- ▶ Review available information, specifically the NOIA and initial intake
- ▶ Review the policy
- ▶ Review any relevant investigation procedures
- ▶ Determine the order of interviews; send out meeting requests
- ▶ Develop preliminary questions
- ▶ Gather preliminary evidence





# Retaliation and Amnesty Policies

## ▶ Anti-Retaliation Policy

- Applies to students and employees equally
- Individuals involved in the investigation should be free from any adverse action due to their participation

## ▶ Amnesty Policy

- Only applies to students
- Designed to foster candor during investigations
- Personal use of drugs or alcohol will not be held against them in disciplinary matters

# Questioning parties effectively

-- Questions should be used to determine:

- Who
- What
- When
- Where
- How

Be mindful of how a question could be perceived and develop them with caution

# questioning continued ...

## ▶ What are your goals?

- Learn the facts
- Establish a timeline
- Help decision makers determine what is more likely than not to have occurred [if possible]

## ▶ What are NOT your goals?

- Satisfying your curiosity
- Answering every unknown to get the "Truth"

# Tips for questioning and interviewing

- Prepare preliminary/guiding questions in advance
- Ask open-ended questions to start the conversation—*What are you able to remember about...?—Tell me more about...—Help me understand your thoughts when....*
- LISTEN, ask follow-up questions at the end—Targeted and specific questions
- If you get stuck, recap
- Don't be afraid of silence
- Don't be afraid to ask for clarification
- Take breaks if necessary
- Maintain your professionalism at all times

# You may have to deal with...

## ▶ A Challenging/Reluctant Participant

- Address their concerns
- Remain calm and professional
- Explain the advantages of cooperating

## ▶ A Lying Participant

- Ask them to reconcile inconsistent statements
- Try to determine motivation for lying [fearful, protecting a friend, embarrassed etc.]

# Taking notes

- ▶ Include the date and names of all those present
- ▶ You can hand write notes or type them – *just know they are subject to open records*
- ▶ You can record your interviews
- ▶ Tip ...
  - Schedule time after an interview to review and type narrative summary and send to the interviewee to review and edit

# Gathering evidence

- Think of all the places and sources of information
  - Involved parties, witnesses, physical locations, social media etc.
  - Be timely
- Document who provided what and when
- Verifying the evidence provided when possible – Phone numbers, social media accounts, etc.



# Types of evidence

- Documentary evidence (supportive writings or documents)
- Electronic evidence (photos, text messages, videos)
- Real evidence (physical object)
- Director testimonial evidence (personal observation or experience)
- Circumstantial Evidence (not eyewitness, but compelling)
- Hearsay Evidence (statement made outside the hearing, but presented as important information)

# Understanding the evidence

- Formal rules of evidence do not apply. If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered
- Evidence is any kind of information presented with the intent to prove what took place
- Certain types of evidence may be relevant to the credibility of the witness, but not to the charges

# Weighing the evidence

- ▶ There are impact factors to consider when weighing evidence:

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**E EE**

- Information that can be trusted
- Comes from individuals who are able to have assumed the role they claimed to have or those with actual training or experience to support their claim of expertise

**E**

- Induces others to believe through understanding; tries to convince

# Avoid common pitfalls

- Interview each party and witnesses separately\*
- Apply the correct policy
- Maintain your sensibilities and professionalism
  - Difficult parties
  - Attorneys

# Wrapping the Process

- ▶ The hearing
- ▶ The appeal
- ▶ Record keeping