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Association of  
Title IX Administrators

August 7, 2023

# Spartanburg Community College Title IX Training

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Strategic Risk  
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

# CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

# AGENDA

**1** Title IX Overview & History

**2** Significant Cases

**3** When Does Title IX Apply?

**4** Policy Definitions

**5** Oversight & Coordinating Prompt & Equitable Grievance Procedures

**6** Coordinating Overlap in Various Grievance Processes

# AGENDA

7 Reports & Complaints

8 Managing Disruptive Behavior in the Classroom



# **TITLE IX NOTICES OF PROPOSED RULEMAKING 2022 & 2023**

# TITLE IX REGULATIONS

- **1972:** Congress passed Title IX of the Education Amendments
- **1980:** the Department of Education's Office for Civil Rights (OCR) given primary responsibility for enforcing Title IX
- **November 2018:** OCR proposed the most detailed and comprehensive Title IX regulations to date, which focused on sexual harassment response
- **August 2020:** Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- **June 2022:** OCR published a Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations focused on sexual harassment response and pregnancy and related conditions

# NPRM PROCESS TIMELINE

- **July 2022:** NPRM published in the Federal Register and the 60-day public comment period began
- **September 2022:** Review and comment period ended
  - Received 240,000+ comments
- **April 2023:** OCR published a separate NPRM outlining proposed changes to the Title IX regulations focused on gender identity and athletic participation; 30-day public comment period
  - Received 150,000+ comments
- **October 2023:** Anticipated publication of both the sexual harassment and athletics Title IX Final Rules
- **OCR has not yet announced an implementation deadline or timeline for either set of new regulations.**

# PREPARING FOR IMPLEMENTATION

- Continue to fulfill obligations under the current regulations for the start of the 2023-2024 academic year.

## Steps to Take Now:

- Educate yourself on the proposed regulations
- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach



# TITLE IX OVERVIEW & HISTORY

- Text of the Law
- Key Title IX-Related Issues
- Essential Compliance Elements
- The IX Commandments

# TITLE IX

*20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)*

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



# KEY TITLE IX-RELATED ISSUES

## Sex-Based Discrimination

- Program Equity
- Recruitment, Admissions, & Access
- Pregnancy
- Athletics
- Employment, Recruitment, & Hiring
- Extra-curricular activities
- Housing
- Access to Course Offerings
- Salaries & Benefits
- Financial Assistance
- Facilities
- Funding
- Sex, Sexual Orientation, & Gender Identity

## Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

## Retaliation

# TITLE IX ESSENTIAL COMPLIANCE ELEMENTS

**Once an official with authority has actual notice of sexual harassment/sexual misconduct, the institution must:**

- Take immediate and appropriate steps to **investigate** what occurred
  - The obligation to investigate is absolute, even if just an Initial Assessment is completed (see *Davis*)
- Take prompt and effective action to:
  - **Stop** the harassment
  - **Prevent** the recurrence
  - **Remedy** the effects

**NOTE:** This is regardless of whether the Complainant makes a formal complaint or asks the school to take action

# THE IX COMMANDMENTS

## INVESTIGATION

(plus **prompt** & **fair** per VAWA Sec. 304)



**Thorough**

**Reliable**

**Impartial**

## PROCESS



**Prompt**

**Effective**

**Equitable**

## REMEDIES



Act reasonably to stop discrimination

Act reasonably to prevent recurrence

Act equitably to remedy effects



# SIGNIFICANT CASES

- *Franklin v. Gwinnett County Public Schools*,  
503 U.S. 60 (1992)
- *Gebser v. Lago Vista Independent School District*,  
524 U.S. 274 (1998)
- *Davis v. Monroe County Bd. of Education*,  
526 U.S. 629 (1999)

# FRANKLIN V. GWINNETT PUBLIC SCHOOLS

503 U.S. 60 (1992)

- District and Eleventh Circuit dismissed the case, indicating that Title IX does not allow for award of monetary damages
- Supreme Court held:
  - Sexual harassment constitutes sex discrimination under Title IX
  - Private right for recovery of monetary damages under Title IX
- *Franklin* did not address issues concerning the educational institution's liability

# GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

**The Supreme Court ruled individuals cannot recover monetary damages against the school unless:**

- Three-part standard:
  1. An official of the educational institution must have had **“actual notice”** of harassment;
  2. The official must have authority to **“institute corrective measures”** to resolve the harassment problem; **AND**
  3. The official must have **“failed to adequately respond”** to the harassment and, in failing to respond, must have acted with **“deliberate indifference.”**

# DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)

## Finding in favor of Davis, the Supreme Court expanded on the *Gebser* case:

- The institution must have “**actual notice**” of the harassment; and the institution must have responded to the harassment with “**deliberate indifference.**”

## Additionally, court held:

- Harassment must be “**severe, pervasive, and objectively offensive,**” and the indifference “**systemic,**” to the extent that the victim is deprived of educational opportunities or services.
- Justice O’Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “**clearly unreasonable in light of the known circumstances.**”



# WHEN DOES TITLE IX APPLY?

- Personal Jurisdiction
- Covered Programs
- Geographic Jurisdiction
- Subject Matter Jurisdiction
- When Title IX Does Not Apply
- Group Discussion

# WHEN DOES TITLE IX APPLY?

- Regulations emphasize the *Davis* standard - Title IX applies, and jurisdiction is required, when the Recipient has:
  - Control over the harasser (Respondent) AND control over the context of the harassment
  - “Education program or activity” means...
    - locations, events, or circumstances under substantial control
    - any building owned or controlled by an officially recognized student organization

# WHEN DOES TITLE IX APPLY?

## Personal Jurisdiction

- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the Recipient's education program or activity.
  - The OCR adopts a fairly broad definition of what could constitute “attempting to participate”
  - Can include dual enrollment students, alumni, prospective students/employees, medical residents, etc.

# WHEN DOES TITLE IX APPLY?

## Personal Jurisdiction (Cont.)

- When is a student a “student”?
  - Upon **application**? Once **admitted**? Once **registered**?  
Upon **matriculation**?
  - What about winter and summer **breaks**?
- When is an employee an employee?
  - Exempt vs. Non-Exempt Employees
- What if a student withdraws or employee quits?

# WHEN DOES TITLE IX APPLY?

## Personal Jurisdiction (Cont.)

- If Respondent is **not** affiliated with the institution in any way, the institution **lacks authority** to take disciplinary action
  - E.g.: Employee of an outside company (e.g., vendor, construction worker); guest or invitee; prospective student; former student; former employee; student from another institution

# WHEN DOES TITLE IX APPLY?

## Covered Programs

- All programs run by a federal funding Recipient
- It does not matter whether the program receives federal funding, all institutional programs are covered
- All programs using facilities of the funding Recipient
  - e.g., camps using Recipient fields/stadium
- Includes hospitals, residency programs, branch or satellite campuses
- What about virtual learning and employment settings?

# WHEN DOES TITLE IX APPLY?

## Geographic Jurisdiction

- Sexual Harassment and Discrimination cases
  - Must be dismissed if did not occur against a person in the United States, but...
    - Contrary case law
  - There is NO expectation that you exercise jurisdiction over off-site/off-campus incidents UNLESS
    - The property is owned or controlled by the school OR
    - The property is being used for a program or event sponsored by the school or an organization recognized by the school OR
    - The property is owned or controlled by an organization recognized by the school

# WHEN DOES TITLE IX APPLY?

## Geographic Jurisdiction (Cont.)

- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- Other forms of liability may still apply and the PPTVWM analysis may come into play here
- The Recipient may still be taking discretionary jurisdiction over incidents off-campus or on non-school property, but under other policies, not Title IX

# WHEN DOES TITLE IX APPLY?

## Subject Matter

- Sexual Harassment as defined in the 2020 Title IX regulations
- Sex/Gender discrimination (Equity)
  - OCR recently noted this includes sexual orientation and gender identity (based on biological sex) following Supreme Court's *Bostock* case
- Any other policy violation that is sex/gender-based that causes a discriminatory effect (e.g., hazing, bullying, arson, vandalism, theft)
- Pregnant and parenting discrimination
- Retaliation

# WHEN DOES TITLE IX APPLY?

## Subject Matter (Cont.)

- Limitations:
  - Actions/conduct/speech protected by **academic freedom**
    - Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research
  - Actions/conduct/speech protected by the **First Amendment**.
    - Merely offensive conduct cannot be disciplined at a public school
    - Must be **severe, pervasive, and objectively offensive**

# IF TIX JURISDICTION IS NOT PRESENT

- Behavior could still violate and be addressed under:
  - Institutional harassment/discrimination policies
  - Student Handbook/conduct policies
  - Technology/Acceptable Use policies
  - Employee Handbook/conduct policies
  - Professionalism standards
- Institution should still take steps to:
  - Provide support and resources to the Complainant and campus community
    - Address any “downstream effects”
  - Determine if there are patterns or institutional variables that contributed to the alleged incident
  - Take what action it can (e.g., trespass the person)

# GROUP DISCUSSION QUESTIONS

- Does your institution exercise jurisdiction over off-campus/non-school property incidents?
  - Under what circumstances?
  - For Students? Faculty? Staff?
- When is a student officially a student under your code of conduct and/or Title IX policies?
- What are you doing to address off-campus intimate partner violence?
- What are you doing to address online harassment and discrimination?



# **CREATING & IMPLEMENTING APPROPRIATE POLICY & PROCEDURES**

- Required Definitions
- ATIXA Definitions
- Consent Construct

# CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES

- **Policies** = The Rules
  - Should clearly define expected/prohibited conduct
  - Should be regularly updated, revised, and assessed
- **Procedures/“Process”** = How alleged policy violations are addressed
  - Should clearly channel the parties to appropriate resources
  - Should provide for the equitable remedying of complaints
- **The 2020 Regulations have likely required substantial changes to existing policies and procedures.**

# DEFINITIONS OF SEXUAL HARASSMENT

- Quid Pro Quo Sexual Harassment
- Hostile Environment Sexual Harassment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

# REQUIRED DEFINITIONS – TIX REGULATIONS

**Sexual Harassment** is conduct on the basis of sex meeting one of the following conditions:

- An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct;
- 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 Recipient's education program or activity; or
- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v)  
“Dating violence” as defined in 34 U.S.C. 12291(a)(10)  
“Domestic violence” as defined in 34 U.S.C. 12291(a)(8)  
“Stalking” as defined in 34 U.S.C. 12291(a)(30)

# HOSTILE ENVIRONMENT: “UNWELCOME”

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

# HOSTILE ENVIRONMENT: “REASONABLE PERSON”

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

# HOSTILE ENVIRONMENT: “SEVERE”

- Physical conduct is more likely to be severe
- Accompanied by threats or violence
- Consider the circumstances (e.g., the ability for Complainant to remove themselves from the harassment)

# HOSTILE ENVIRONMENT: “PERVASIVE”

- Widespread
- Openly practiced
- Well-known among students or employees – reputation of a department, person, etc.
- Occurring in public spaces (more likely to be pervasive)
- Frequency of the conduct is often a variable in assessing pervasiveness (look to intensity and duration)
- Unreasonable interference with school or job
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986)

# HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”

- Reasonable person standard in context
  - “I know it when I see it...”
  - Age and relationships of Complainant and Respondent
  - Number of persons involved
  - Frequency
  - Severity
- Physically threatening
  - Humiliating
  - Intimidating
  - Ridiculing
  - Abusive

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”
- Totality of the circumstances to consider:
  - Frequency, nature, and severity of the conduct (see factors previously discussed)
  - Identity of and relationship between the parties
  - Age of the parties
  - Size of the school, location of the incidents, and context in which they occurred

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

- Totality of the circumstances to consider:
  - Whether the conduct unreasonably interfered with the Complainant's educational/work performance
  - Effect on the Complainant's mental or emotional state
  - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
  - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection
  - “Constellation of surrounding circumstances.”

# IS THIS A HOSTILE ENVIRONMENT?

- For the past three months, Taylor has been spreading rumors about Andy being gay.
- About a month ago, Taylor used gay slurs directed at Andy in front of Andy and others, on multiple occasions.
- Andy suspects Taylor uses slurs behind his back, as well.
- This week, Taylor has started to run into Andy with his shoulder whenever they pass in hallways. The force of the contact has knocked Andy into the lockers or caused Andy to drop his books.
- Today, Andy discovered that someone had etched penises into his notebooks and into his desk. Andy saw Taylor laughing with a friend and pointing at the desk.

# SEXUAL ASSAULT\*

- **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 Complainant.
- **Fondling** – The touching of the private body parts of the Complainant (buttocks, groin, breasts) **for the purpose of sexual gratification**, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental incapacity.
- **Incest** – Sexual intercourse between persons who are related to each other, within the degrees wherein marriage is prohibited by [insert state] law.

# SEXUAL ASSAULT\* (CONT.)

- **Statutory Rape** – Sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

**Note:** Sexual Assault also includes having another person touch you sexually, forcibly, and/or without their consent.

\* This definition set is not taken from the FBI Uniform Crime Reporting (UCR) system verbatim. ATIXA has substituted Complainant for “victim,” has removed references to his/her throughout, and has defined “private body parts.” These are liberties ATIXA thinks are important to take with respect to the federal definitions, but practitioners should consult legal counsel before adopting them.

# DATING VIOLENCE

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition —
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.

# DOMESTIC VIOLENCE

- A felony or misdemeanor crime of violence committed —
  - By a current or former spouse or intimate partner of the Complainant;
  - By a person with whom the Complainant shares a child in common;
  - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
  - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

# DOMESTIC VIOLENCE (CONT.)

- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

# STALKING

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to —
  - Fear for the person’s 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 a person’s property.

# STALKING (CONT.)

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- The TIX regulations insist this definition not be interpreted to violate First Amendment.

# OTHER POLICY DEFINITIONS

- Retaliation
- Sexual Exploitation

# RETALIATION – REGULATION DEFINITION

## § 106.71 Retaliation

- *Retaliation prohibited.* No Recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...

# RETALIATION – REGULATION DEFINITION

(Cont.)...Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

# RETALIATION

## § 106.71 Retaliation.

- The Recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any Complainant, any individual who has been reported to be the perpetrator of sex discrimination, any Respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder...

# RETALIATION

(Cont.)...Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

- *Specific circumstances.*

(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION

## **Sexual Exploitation (non-Title IX sexual harassment)**

- Occurs when one person takes non-consensual or abusive sexual advantage of another for their own benefit or for the benefit of anyone other than the person being exploited, and that conduct does not otherwise constitute one of other sexual harassment offenses.
- Examples of sexual exploitation include, but are not limited to:
  - Sexual voyeurism (such as observing or allowing others to observe a person undressing or using the bathroom or engaging in sexual acts, without the consent of the person being observed)
  - Invasion of sexual privacy (e.g., doxxing)

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Examples (continued):
  - Knowingly making an unwelcome disclosure of (or threatening to disclose) an individual's sexual orientation, gender identity, or gender expression
  - Taking pictures, video, or audio recording of another in a sexual act, or in any other sexually related activity when there is a reasonable expectation of privacy during the activity, without the consent of all involved in the activity; or exceeding the boundaries of consent (such as allowing another person to hide in a closet and observe sexual activity; or disseminating sexual pictures without the photographed person's consent), including the making or posting of non-consensual pornography
  - Prostituting another person

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Examples (continued):
  - Engaging in sexual activity with another person while knowingly infected with human immunodeficiency virus (HIV) or a sexually transmitted disease (STD) or infection (STI), without informing the other person of the virus, disease, or infection
  - Misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual connections (e.g., spoofing)
  - Forcing a person to take an action against that person's will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Examples (continued):
  - Knowingly soliciting a minor for sexual activity
  - Engaging in sex trafficking
  - Knowingly creating, possessing, or disseminating child pornography

# CONSENT CONSTRUCT

- Force
- Incapacity
- Consent

# CONSENT

- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Creates mutually understandable permission regarding the conditions of sexual activity
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- Given immediately prior to or contemporaneously with the sexual or intimate activity
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally

# CONSENT (CONT.)

- Cannot be obtained by use of:
  - Physical force, threats, intimidation, or coercion
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated
- **NOTE:** Some states have affirmative consent laws

**Does consensual sex that violates policy fall under Title IX?**

# OVERVIEW OF THE THREE QUESTIONS

1. Was force used by the Respondent to obtain sexual or intimate access?
2. Was the Complainant incapacitated?
  - a. If so, did the Respondent know, or
  - b. Should the Respondent have known that the Complainant was incapacitated?

**Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity.**

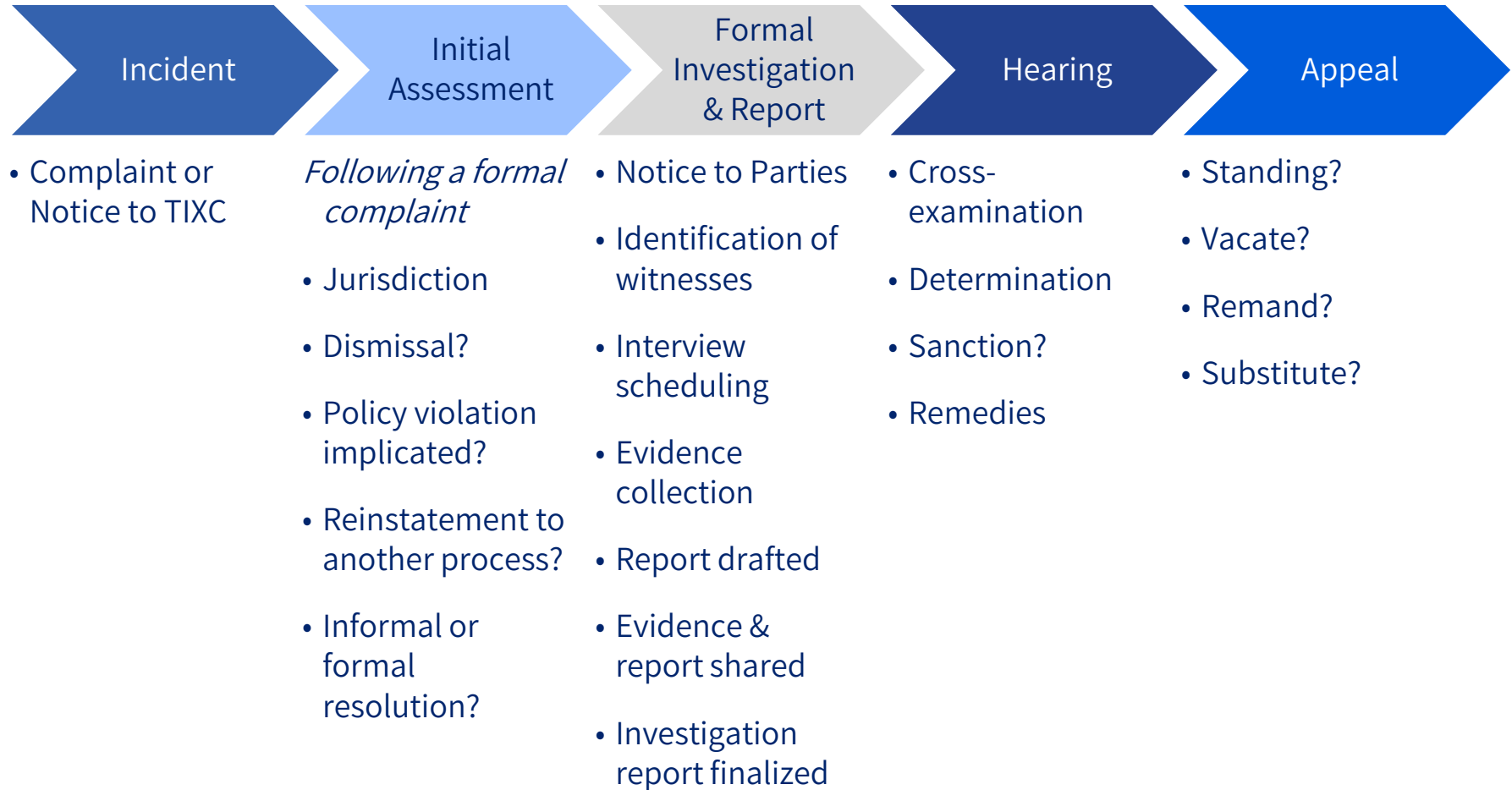
3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?



# **OVERSIGHT AND COORDINATING PROMPT & EQUITABLE GRIEVANCE PROCEDURES**

- The Process
- Promptness
- Equity
- Clery Act: VAWA Section 304

# THE PROCESS



# PROMPTNESS

- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Concurrent law enforcement investigation does not relieve the burden of the institution to investigate
- Temporary delays for “good cause” and with written notice of the delay to parties
  - Complexity of the investigation
  - Concurrent law enforcement investigation with time-dependent release of evidence (we recommend a one-to two-week delay)
  - Delays for administrative needs are insufficient

# OVERSIGHT AND COORDINATING PROMPT AND EQUITABLE GRIEVANCE PROCEDURES

- Institutions are required to make a “good faith effort” to resolve allegations promptly
  - 60 days to resolution is a good guide; varies based on situation
  - What about breaks?
  - Pending criminal or civil actions are not reasons for lengthy delays
    - Injunctions?
  - What about delays by the Complainant?

# OVERSIGHT AND COORDINATING PROMPT AND EQUITABLE GRIEVANCE PROCEDURES (CONT.)

- The grievance process must be conducted according to the timelines in the Recipient's policy
  - Policy wording: Use “reasonable delays at the discretion of the Title IX administrator,” “barring exigent circumstances,” etc.
- Document all delays/extension and rationale therefore
  - e.g., unresponsive or uncooperative parties, criminal investigation, holidays, etc.
- Periodically update the parties throughout the process

# EQUITY REQUIREMENTS

- Various forms of notice — policies and procedures, investigation, hearing, outcome (finding and sanction), etc.
  - Notification of outcomes to parties permitted by FERPA and required by Clery (outcome and sanctions)
  - Title IX rules preempt FERPA
  - IN WRITING!
- Opportunities to present witnesses and provide evidence
- Ability to discuss the allegations without restriction
- Ability to inspect and review evidence and investigation report
- Provide the same rights for an Advisor

# EQUITY REQUIREMENTS (CONT.)

- Impartial Investigators, investigation, hearing, and Decision-makers
- Remedies
- All parties entitled to appeal

# CLERY: VAWA SECTION 304 (2013)

- Institutional disciplinary procedures shall “provide a prompt, fair, and impartial process from the initial investigation to the final result.”
  - Accuser and accused are entitled to the **same opportunities** to have a support person/Advisor **of their choice** at any proceeding or related meeting.

# CLERY: VAWA SECTION 304 (CONT.)

- Accuser and accused must be simultaneously informed in writing of:
  - The outcome that arises from an allegation of Dating Violence, Domestic Violence, Sexual Assault, Stalking
    - **Outcome = Finding, sanction, and rationale**
  - The institution's procedures for appeal
  - Any change to the results that occurs prior to the time that such results become final
  - When such results become final

# EQUITY CONCERNS

- Participants/stakeholders believe “equity” = “equality”
- Institutional policies and procedures that are constituency-based and thereby privilege certain groups more than others (e.g., faculty, staff, or students)
- Widely disparate procedures to remedy different forms of discrimination (e.g., race, religion, disability, sex/gender)
- Ensuring that remedies are equitable (in addition to resolution processes)
- Contact restrictions on the parties that are too broad or punitive

# EQUITY CONCERNS (CONT.)

- Appeal processes, or other processes, where only one party is entitled to participate
- Conflicts among federal regulations/guidance and state laws or education codes



# **COORDINATING OVERLAP OF VARIOUS STUDENT & EMPLOYEE GRIEVANCE PROCESSES**

- Potential Processes
- Title IX And Title VII

# COORDINATING THE OVERLAP OF VARIOUS GRIEVANCE PROCESSES

- The Title IX Coordinator must coordinate across multiple constituency groups and procedures as necessary
- Potential processes:
  - Generalized sexual harassment procedures
  - General student grievance procedures
  - Faculty and Employee grievance procedures
  - Student conduct/discipline process
  - Faculty and Employee discipline processes
  - Academic appeal process
  - Athletic department polices/processes and “team rules”
  - Collective bargaining agreements

# TITLE IX AND TITLE VII

- Must understand distinctions between Title IX and Title VII in responding and investigating
- Must be very familiar with all the processes
- Must have the ability to merge/combine/pick the investigatory and hearing processes and explain these to the parties
  - e.g., The difference between a student-employee and an employee-student



# REPORTS AND COMPLAINTS

- Notice, Reporting, & Confidentiality
- Initial Assessment
- Supportive Measures

# POINT PERSON FOR REPORTS AND COMPLAINTS

- The Title IX Coordinator must ensure the institution is promptly engaging in:
  - Initiation of the initial assessment
  - Implementation of response to stop the alleged harassment/discrimination
  - Provision of supportive measures to the parties
  - Provision of information about how to make a formal complaint
  - Action to reasonably prevent the recurrence
- The Title IX Coordinator must **coordinate** all of these steps, often across administrative processes and institutional silos
- Importance of a centralized database

# NOTICE, REPORTING, & CONFIDENTIALITY

- Notice to the Institution
- Mandatory Reporters
- Clery: Campus Security Authorities
- Additional Reporting Requirements
- Privileged, Confidential & Private

# NOTICE TO THE INSTITUTION

- **“Actual Knowledge”** is defined as a report being received by:
  - The TIX Coordinator; or
  - Any official who has authority to institute corrective measures on behalf of the Recipient (Often called “Officials With Authority” or “OWA”)
- This is only the standard for when OCR would deem a higher education institution to have received actual notice AND MUST investigate; it is the bare minimum requirement
  - What if Recipient receives notice in some other way?
  - Other types of liability may still exist for failure to act with constructive notice (e.g., tort)

# MANDATORY REPORTERS

- ATIXA recommends that all employees\* report because this:
  - Enables institution to best support those who have experienced harassment or discrimination
  - Better enables tracking patterns
  - Ensures information gets to those trained to respond
  - Provides for simpler, uniform, and universal training and Reporting mechanisms
    - Institutions must ensure that all employees are trained regarding their obligation to report harassment to appropriate administrators as mandatory reporters

\*Can still have a small set of designated, trained employees who are not “mandatory reporters”

# THE CLERY ACT: CAMPUS SECURITY AUTHORITY (CSA)

## CSA mandatory reporting:

- 4-part definition of a CSA noted in the Clery Act Appendix for FSA Handbook
- CSAs must share all reports of any allegations that would fall into the Clery crime categories made to them in their capacity as a CSA to their institutional chief CSA (typically campus police)
- Does not include indirect notification: classroom discussions, overhearing something in the hallway, speeches (e.g., Take-Back-The-Night events), etc.

# CSA VS. MANDATORY REPORTER

- Mandatory reporter under Title IX is a broader/more encompassing designation.
- All CSAs are Mandatory reporters, but not all Mandatory Reporters are CSAs.

# OTHER LAWS THAT DETAIL REPORTING REQUIREMENTS

- Supervisors and Managers (per Title VII)
  - Mandated to report harassment or other misconduct of which they are aware.
- Abuse or Suspected Abuse of Minors
  - All employees are required to report abuse or suspected abuse of minors consistent with state law. This generally includes immediately reporting to law enforcement and to the state's child welfare agency.
- Additional state reporting requirements (e.g., elder abuse and felony reporting)

# PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

## Privilege

- Granted by laws and professional ethics
- Attorneys, licensed professional counselors, medical professionals, pastoral counselors
  - To have privilege, these individuals must be:
    - Acting in the capacity for which they are employed,
    - Acting within the scope of their license, and
    - Receive the disclosure during the scope of that employment
  - Key exception is child abuse reporting

# PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

## Confidentiality

- Designated by the institution
- Do not have to report harassment or discrimination of which they become aware
- Allows for provision of services and support without concern of reporting
- Examples: Victim advocates/sexual assault-related services, gender-based resource centers, Advisors during resolution processes, ombudspersons
- Must still follow state reporting laws

**ATIXA recommends confidential employees report aggregate, non-identifiable data for Clery and Title IX statistical purposes**

# PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

## Privacy

- Anyone who does not meet the institution's definition of a "Mandatory Reporter" can maintain privacy.
  - If using the OWA standard, then notice to those deemed "Private" does not constitute "Actual Knowledge" for OCR enforcement.
- May report incidents without identifying the parties
- Common Examples: Administrative Assistants, Non-supervisory employees
- Must still follow state reporting laws

# INITIAL ASSESSMENT

- Title IX Coordinator's Role
- Report vs. Formal Complaint
- Requests for Confidentiality
- Supportive Measures
- Mandatory and Permissive Dismissal
- Emergency Removal
- Timely Warning & Emergency Notification
- Notice to the Parties

# INITIAL ASSESSMENT

**Upon receipt of notice, the TIXC should be responsible for conducting an initial assessment to determine the following:**

- Has there been a formal complaint?
- Does the TIXC need to sign/initiate a formal complaint?
- Does the alleged conduct meet the required definitions?
- Does jurisdiction exist?
- Can/should Recipient remedy informally or without discipline?
- Mandatory/Discretionary dismissal considerations
- If dismissed, does an alternate policy/process apply?

# INITIAL ASSESSMENT (CONT.)

- If proceeding under Title IX:
  - Establish basis of investigation:
    - Incident or pattern, and/or climate/culture
  - Establish a preliminary timeline for the investigation
- If no formal action, document how Recipient's response was not deliberately indifferent
- Responding to anonymous reports:
  - Determine if a trend or pattern may be apparent
  - Can you identify parties?
  - Duty to attempt some form of remedial response, even to an anonymous report

# REPORT VS. COMPLAINT

- Distinguish between a “report” and a “formal complaint”
- Upon receiving a “report” (either from the would-be Complainant or a third party):
  - Reach out and provide support.
  - Provide supportive and interim measures to the person alleged to have experienced the harassment. May also offer to the would-be Respondent.
  - Explain process to make a formal complaint.
    - Must be in writing and signed by the Complainant but can be made in any format (on paper or electronic) and made at any time
    - Also explain option to report to law enforcement (VAWA requirement)

# REPORT VS. COMPLAINT (CONT.)

- Upon receiving a “formal complaint:”
  - Conduct initial assessment to determine jurisdiction
  - Triggers obligation to follow “grievance process” including investigation and hearing

# FORMAL COMPLAINT

## Formal Complaint

- Document or electronic submission
- Filed by Complainant or signed by TIX Coordinator
  - TIXC does not become a party to the complaint
- Alleging sexual harassment
- Requesting an investigation
- Complainant must be participating or attempting to participate in the Recipient's education program or activity at the time of filing
- Initiates mandatory grievance process (investigation and hearing)

# REQUESTS FOR CONFIDENTIALITY

## **If a Complainant requests confidentiality and/or does not want the institution to investigate:**

- The Complainant should be notified of the following:
  - The process will still be available to them, regardless of how long they wait
  - The institution can provide resources and supportive measures to limit the effect of the behavior on the Complainant
  - If information is brought to the attention of the institution that may involve a threat to the community, the institution may be forced to proceed with an investigation, but that the Complainant will be notified of this process

# REQUESTS FOR CONFIDENTIALITY (CONT.)

- The institution's responsive action/remedial abilities may be limited based on the level of confidentiality or privacy requested by the Complainant
- Privacy cannot be guaranteed if doing so would jeopardize the safety of the Complainant or others
- Only those with a need to know will be informed
- If the Respondent is an employee, the institution may need to proceed due to Title VII

# REQUESTS FOR CONFIDENTIALITY (CONT.)

- The institution should take all reasonable steps to respond consistent with the Complainant's request
  - Provided that doing so does not prevent the Recipient from responding effectively and preventing the harassment of other students or the Complainant
- Use the PPTVWM analysis to determine whether to honor a Complainant's request for confidentiality
- Proceeding without a Complainant's participation has due process implications for the Respondent

# PPTVWM

- Title IX Coordinator may need to file a formal complaint if any of the following are present:
  - **PPTVWM**
    - Pattern
    - Predation
    - Threat
    - Violence/Weapon
    - Minors (will always be reported to proper authorities)

# PPTVWM (CONT.)

- Factors to consider:
  - Additional complaints of sexual harassment involving the same Respondent
  - Whether the sexual harassment was committed by multiple individuals
  - Whether the Respondent has a prior history of violence
  - Whether the report reveals a pattern of behavior at a given location or by a particular group
  - Whether the Respondent threatened further sexual harassment or violence against the Complainant or others
  - Whether a weapon facilitated the sexual harassment
  - Age of the Complainant (incidents involving minors will always be reported to proper authorities)

# PPTVWM (CONT.)

- Factors to consider:
  - Whether the Recipient possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence)
- If the Recipient proceeds, it should notify the Complainant and utilize appropriate supportive measures to protect them

# SUPPORTIVE MEASURES

- Provided to all parties throughout the process:
  - Non-disciplinary, non-punitive
  - Individualized
  - Restore or preserve equal access
  - Without unreasonably burdening other party
  - Protect safety of parties or environment, or deter sexual harassment
- If supportive measures not provided, document why not.

# COMMON SUPPORTIVE MEASURES

- Referral to counseling and/or medical/health services
- Referral to the Employee Assistance Program
- Visa and immigration assistance
- Community or community subgroup education
- Altering housing situation (if applicable)
- Altering work arrangements for employees
- Safety planning
- Providing school safety escorts
- Transportation assistance
- Contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course-related adjustments
- Trespass or Be on the Lookout (BOLO) orders
- Emergency notifications
- Increased security and monitoring of certain areas

# DISRUPTIVE VS. DANGEROUS BEHAVIOR

- Identifying types of behaviors

# IDENTIFYING THE PROBLEM



# THE STUDENT CODE FOR SPARTANBURG COMMUNITY COLLEGE

## II. Student Responsibilities

- C. Students are expected to comply with all course requirements as specified by instructors in course syllabi and to meet the standards of acceptable classroom behavior set by instructors. Instructors will announce these standards during the first week of classes. Ordinarily, if a student's behavior disrupts class, the instructor will provide a warning about said behavior. However, if the unacceptable conduct/disruption jeopardizes the health, safety, or well-being of the student or others, or is otherwise severe or pervasive, the instructor may immediately dismiss the student for the remainder of the class. Any disruption may result in a written referral to the Chief Student Services Officer. This written referral may result in the initiation of disciplinary action against the student. The college reserves the right to review syllabi in connection with this provision.

# THE STUDENT CODE FOR SPARTANBURG COMMUNITY COLLEGE

## III. Student Conduct Regulations

### D. Actions which Endanger Student and the College Community

4. Using, or threatening to use, physical force to restrict the freedom of action or movement of others or to harm others.
5. Endangering the health, safety, or wellbeing of others through the use of physical, written, or verbal abuse, threats, intimidation, harassment, and coercion.

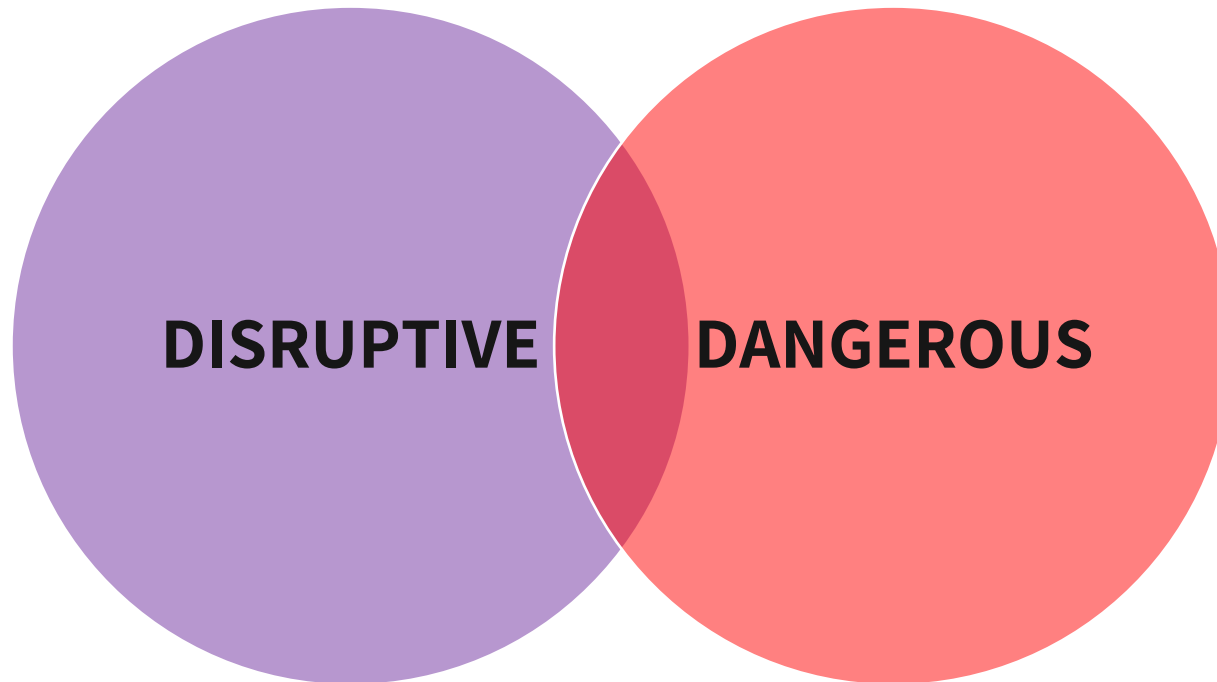
### E. Infringement of Rights of Others

4. Bullying or harassing conduct, including verbal acts and name calling; graphic and written statements, which may include the use of cell phones, the internet, or other electronic devices; and other conduct that may be physically harmful, threatening, or humiliating....
5. Engaging in any activity that disrupts the educational process of the college, interferes with the rights of others, or adversely interferes with other normal functions and services.



**WHAT KIND OF  
BEHAVIORS HAVE YOU  
EXPERIENCED IN YOUR  
DEPARTMENT?**

# DISRUPTIVE OR DANGEROUS?



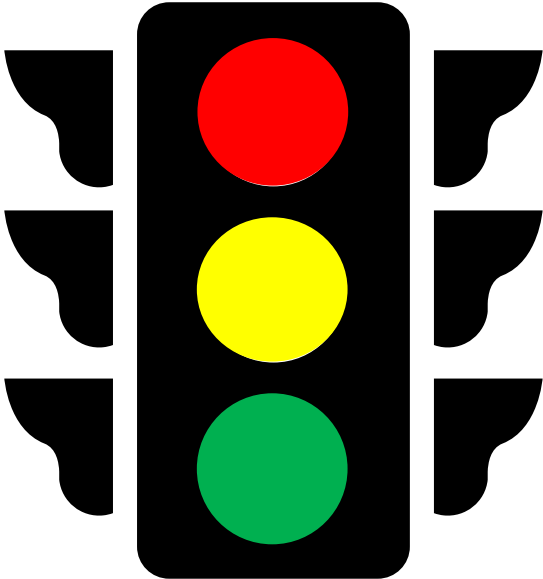
# EXAMPLES OF DISRUPTIVE BEHAVIOR

- Misuse of technology in the classroom
- Body odor or passing gas
- Intoxication or use of alcohol, marijuana, or other substances
- Getting up frequently or disturbing other desks
- Interrupting class by making statements and/or asking non-relevant, off-topic questions, after being told directly to stop
- Having side conversations while instructor is speaking
- Raising voice at classmates or instructor
- Emotional outbursts or other extreme communications that significantly affects others

# EXAMPLES OF DANGEROUS BEHAVIOR

- Physical assault
- Direct communicated threat
- Throwing objects or slamming doors
- Posturing or bullying behavior
- Comments solely intended to upset
- Psychotic, delusional or incoherent speech
- Objectifying language that depersonalizes
- Inciting others to action

# RESPONDING TO DISRUPTIVE AND DANGEROUS BEHAVIOR



## **Red light behavior: Behavior that is actively, physically, dangerous.**

- Stop and call for help
- Increase safety – ask student to leave, remove yourself and others, stay calm
- Fill out BIT referral

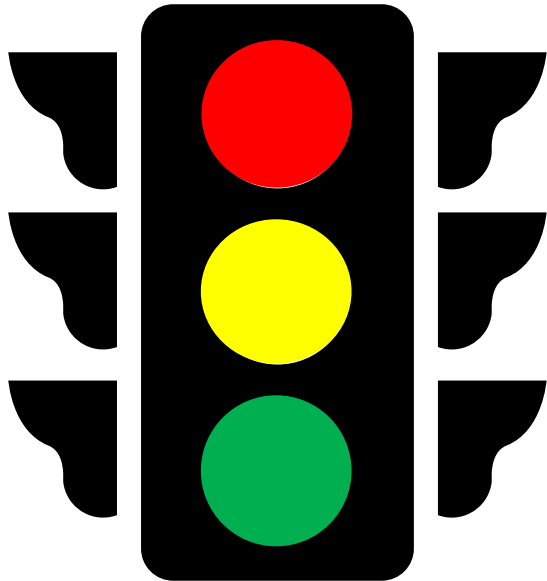
## **Yellow light behavior: Significantly disruptive or potentially risky.**

- Pause and address the situation either in the moment or in private after class
- Offer assistance and resources as appropriate
- Make a referral to BIT

## **Green light behavior: Mildly disruptive.**

- Pause and address the situation either in the moment or in private after class
- Make a referral to BIT if the behavior does not resolve

# WHAT TYPE OF BEHAVIOR IS THIS?

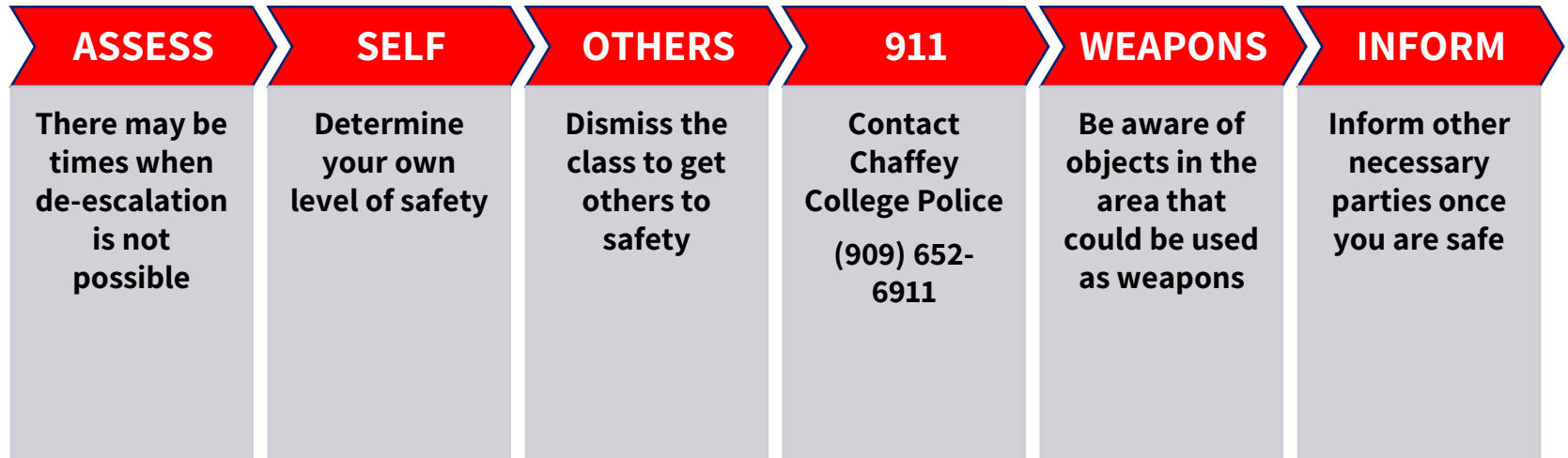


Sandra frequently interrupts other students in class and loudly challenges you on your grading scale and expertise.

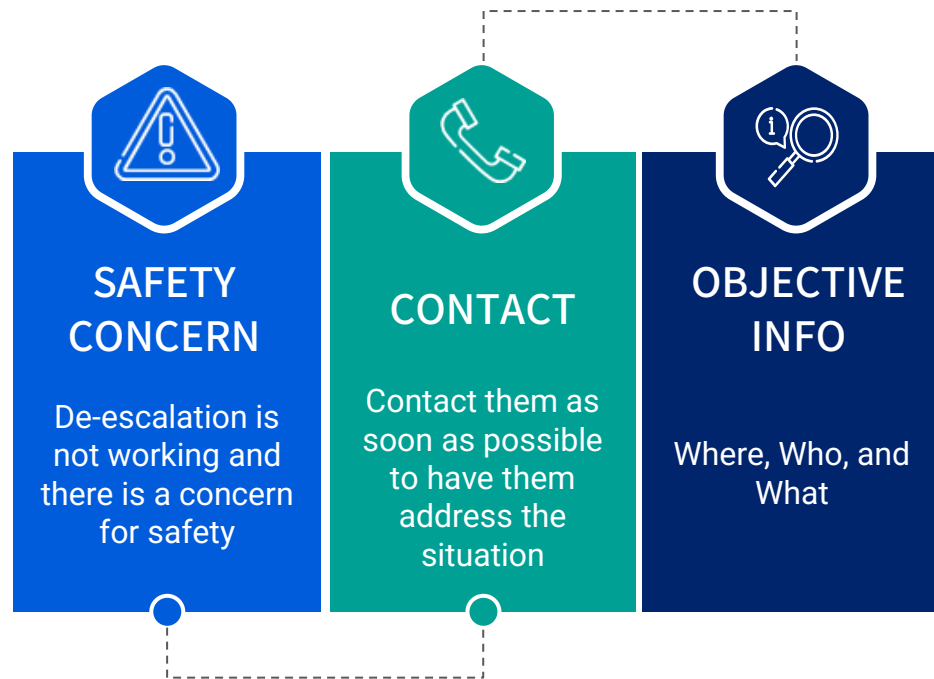
Scott is wearing headphones and rapping during an in-class assignment. The lyrics are violent and misogynistic.

Brett is typically quiet in lectures. Today, he takes his shirt off, stands on a chair, and demands everyone listen to him before he “does something to make them listen”.

# ADDRESSING “RED LIGHT” BEHAVIOR



# CONTACTING CAMPUS POLICE



# SETTING EXPECTATIONS



# EXPECTATIONS

- Provide, explain, and review
  - Determine how you want to be addressed and how you will address others
  - Addressing others in the class - names and pronouns
  - Participation
  - Attendance
  - Tardiness
  - Discussion/Debate
  - Missed/Late assignments
- Discuss consequences for non-compliance
- Share your thoughts or process for exemptions

# De-Escalation Techniques

# De-escalation Techniques

When do you need to de-escalate the situation?

Disruptive,  
argumentative

Angry, cursing,  
yelling

Asking  
questions and  
not letting you  
answer

Accusatory,  
aggressive,  
“tuned out”



**What sets you off?**

**How do you respond?**

# DON'T ESCALATE THE ISSUE!

*Seven common de-escalation mistakes*



Arguing with them



Passing them along to others



Getting angry



Offering them a bad plan



Giving up on helping them

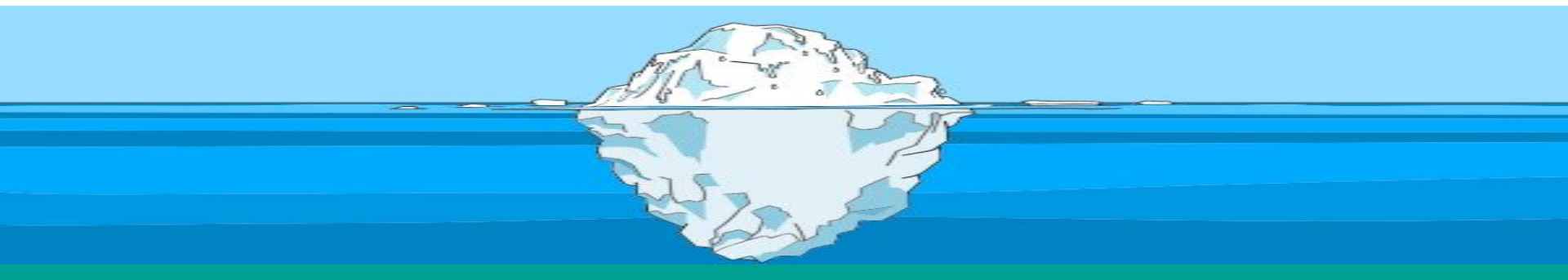


No longer seeing them as a person



Failing to listen

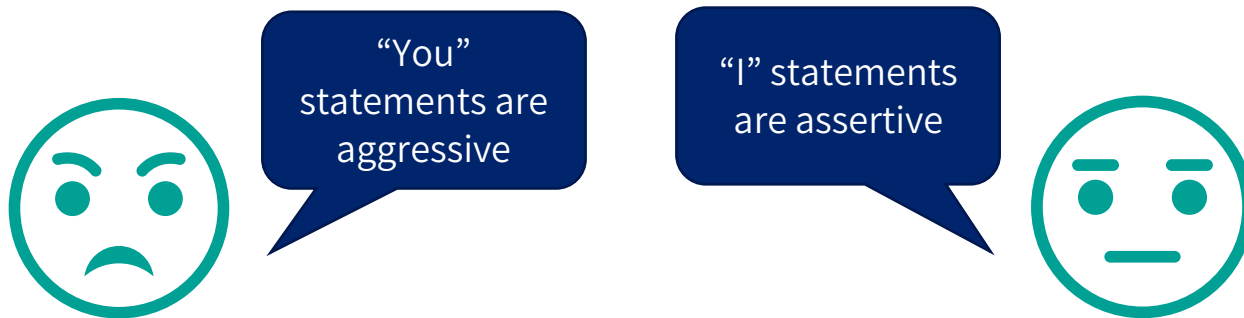
# Understanding the underlying problem



**Usually there is an underlying emotion or challenge causing the disruption or escalation**

**Paying attention to the motivation for the crisis or conflict can help build connection, demonstrate understanding, and de-escalate.**

# “I” Statements



“I” statements help you....

- Avoid blaming others
- Express your thoughts and feelings honestly
- Take ownership of your thoughts and feelings
- Prevent escalation

# “I” Statements

An “I” Statement Has Three Main Parts:

1

Statement of how you feel

2

Description of the behavior that made you feel that way

3

Explanation of how the behavior effected you

# “I” Statements

An “I” Statement Has Three Main Parts:

1

I feel....

2

When....

3

Because....

# “I” Statements

An “I” Statement Has Three Main Parts:

1

I feel frustrated

2

When you yell at me while we are talking

3

Because we aren’t able to have a helpful conversation.

# De-Escalation Techniques

- Remember active listening
- Demonstrate empathy
- Stay calm and model appropriate tone, behavior, language, etc.
- Find common ground where you can
- Understand the problem
- Explore solutions that are appealing to the individual and also attainable.



**Is anyone willing to share a real-life example they have encountered?**

# RESPOND APPROPRIATELY

- Match the challenge the individual is presenting
- Do not ignore inappropriate behavior
- Address behavior in a timely fashion
- Respond to the individual in front of you, not the “ghosts” of previous students
- Avoid stereotypes and generalizations of students based on their age/era, in the same way you should avoid judging them on gender, race, ethnicity, or sexual orientation



**QUESTIONS?**

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**Thanks for joining us today.**

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Association of  
Title IX Administrators

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