

**JacksonLewis**

# **CULINARY INSTITUTE OF AMERICA**

## **Title IX: Refresher & Updates**

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# Agenda

- **Laws Governing Sexual Misconduct**
- **Title IX Refreshers**
- **Administration Updates (Title IX)**
- **Judicial Updates (Title IX)**
- **What's Next?**

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# **Laws Governing Sexual Misconduct**

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# **Laws Governing Sexual Misconduct**

- **Title IX of the Education Amendments Act of 1972**
- **Title VII of the Civil Rights Act of 1964**
- **Campus SaVE Act**
- **New York State Human Rights Law**
- **New York Education Law Section 129-b**

# Title VII

## ***Legal definition of sexual harassment:***

**Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitutes sexual harassment when:**

Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment (quid pro quo)

Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual (quid pro quo)

Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment (hostile work environment)

*Note: What's prohibited? Offensive or disparaging remarks or conduct that is based upon any "protected class" can also create a hostile work environment, including, age, disability, sexual orientation, religion, national origin, pregnancy, etc.*

# Campus SaVE Act

- Amended the Clery Act to mandate extensive “primary prevention and awareness programs” regarding sexual misconduct and related offenses

## ***Note on the Clery Act:***

- Requires CIA to disseminate a public annual security report to employees and students
  - Must include campus crime statistics and efforts taken to improve campus safety
  - Must include policy statement on the response to sexual assault, domestic or dating violence, and stalking
- Geography
  - On-campus; public property within campus bounds/immediately adjacent to campus

# Title IX

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

Title IX of the Education Amendments of 1972

20 U.S.C. § 1681(a)

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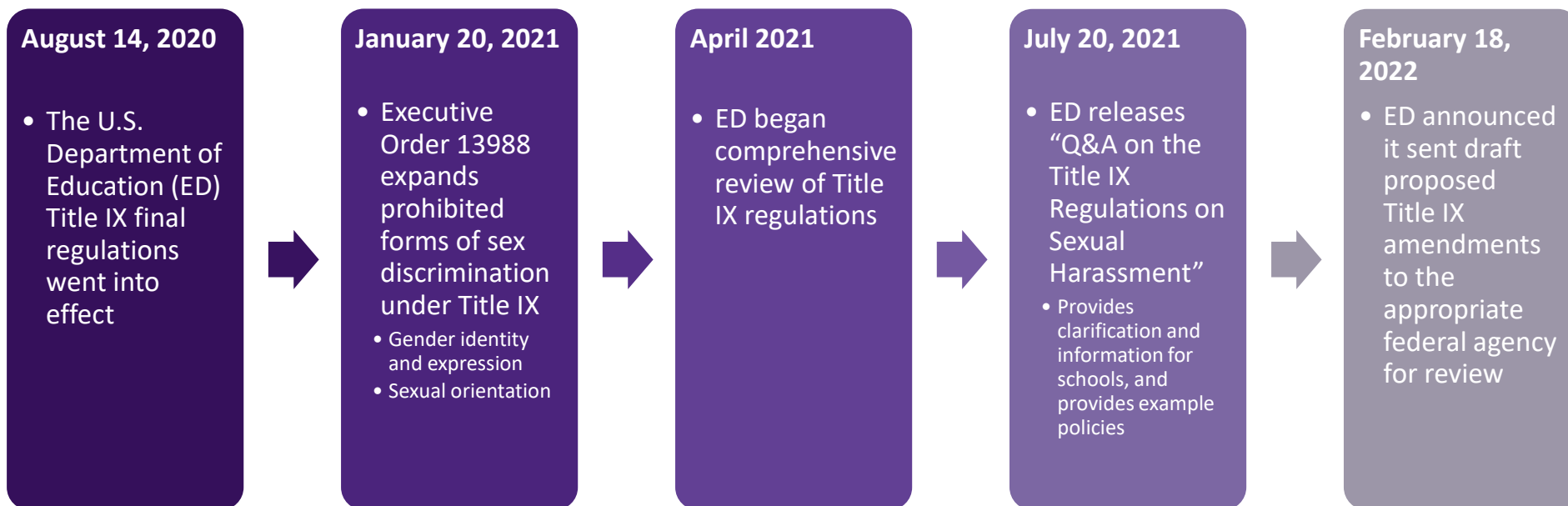
# **Title IX Refreshers**

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# Title IX Refreshers

## Timeline of Recent Developments



# Responding to Title IX Sexual Harassment

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

A recipient is deliberately indifferent only if its response to Sexual Harassment is clearly unreasonable in light of the known circumstances.

## Notice of Alleged Misconduct

- **Title IX: Obligation to respond to allegations of sexual harassment is triggered if there is “Actual Notice”**
  - Actual Notice (aka knowledge) – allegation made to Title IX Coordinator or “official with authority” to take corrective measures.
  - This standard is not met when the only official of the school with actual knowledge is the respondent.
  - Mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the school.

***Note: Under Title VII and state laws, obligation is triggered if the school knew or reasonably should have known***

## Does Title IX Grievance Process Apply?

### Where did the alleged conduct occur?

- In the U.S.
- In the context of a CIA “education program or activity”
  - Locations, events, or circumstances in which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
    - On CIA Campus
    - At CIA sponsored events or activities
    - On CIA technology platforms
    - Any building owned or controlled by a student organization that is officially recognized by the institution

## Title IX Sexual Harassment Defined

**Conduct on the basis of sex that satisfies one or more of the following:**

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct, or
- 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 school's education program or activity, or
- "Sexual assault", "dating violence", "domestic violence", or "stalking"

**\*\*\*Note: Conduct that does not meet one or more of these criteria may still be prohibited under the Policy against Harassment, Sexual Misconduct and Discrimination.**

## Overarching Principles

Treat complainants and respondents equitably.

Parties must be given written notice of any interview, meeting or hearing in which they are to participate, including date, time, location and purpose, with sufficient time to prepare.

Objective evaluation of all relevant evidence.

No bias or conflict of interest.

## Overarching Principles

Presumption that the respondent is not responsible.

Reasonably prompt timeframes, extensions for good cause.

Standard of evidence: Preponderance (more likely than not).

Document everything, including your rationale.

Burden is on the institution.

## Intake and Evaluation

### IS ALLEGED MISCONDUCT COVERED UNDER TITLE IX?

#### YES

- Must offer supportive measures
- Was a Formal Complaint filed?
  - If yes, provide prompt notice to respondent.
    - Link to Title IX Grievance Policy
      - Statement that respondent is presumed not responsible until a determination at the conclusion of the grievance process
      - Statement that parties may have an advisor of their choice
      - Statement that CIA prohibits knowingly making false statements or knowingly submitting false information during the grievance process
    - Notice of allegations: identities of parties (if known); alleged conduct; and date and location of alleged conduct
  - If yes, consider whether informal resolution is appropriate and discuss with parties.

#### NO

- If Formal Complaint filed, dismiss Complaint from Title IX process and provide notice to parties.
- Where appropriate, refer allegations to be addressed under the Procedures for Prohibited Conduct Other than Title IX ED Sexual Harassment.



# Supportive Measures



Non-disciplinary, non-punitive, individualized services



Designed to restore or preserve equal access without unreasonably burdening the other party



To be provided to **both** parties



Use interactive process to determine supportive measures – consider “wishes” of the complainant and any corresponding burdens on respondent, where implicated



Document decisions relating to supportive measures

## Emergency Measures

- **Timely Warning**
- **Emergency Removal of Student Respondent**
  - Undertake an individualized safety and risk analysis
  - Determine that an immediate threat to the physical health or safety of any student or other individual justifies a removal
  - If CIA determines such removal is necessary, the respondent will be provided notice and an opportunity to request review and modification of the decision immediately following the removal.
- **Administrative Leave for Employees**

## Retaliation Is Prohibited

Charging an individual with code of conduct violations that do not involve sexual harassment for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.

Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation. A determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.

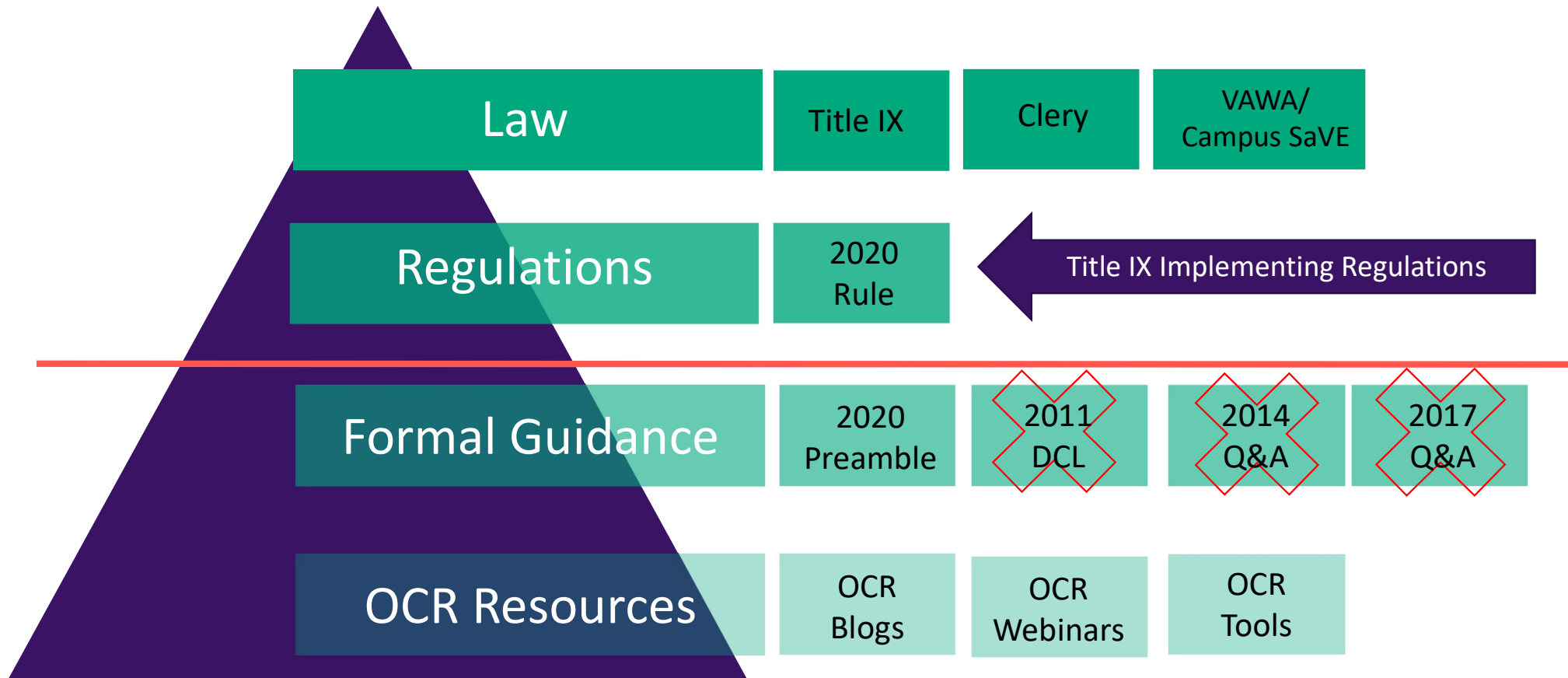
The identity of complainants, respondents, and witnesses must be kept confidential, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.

The exercise of rights protected under the First Amendment does not constitute retaliation.

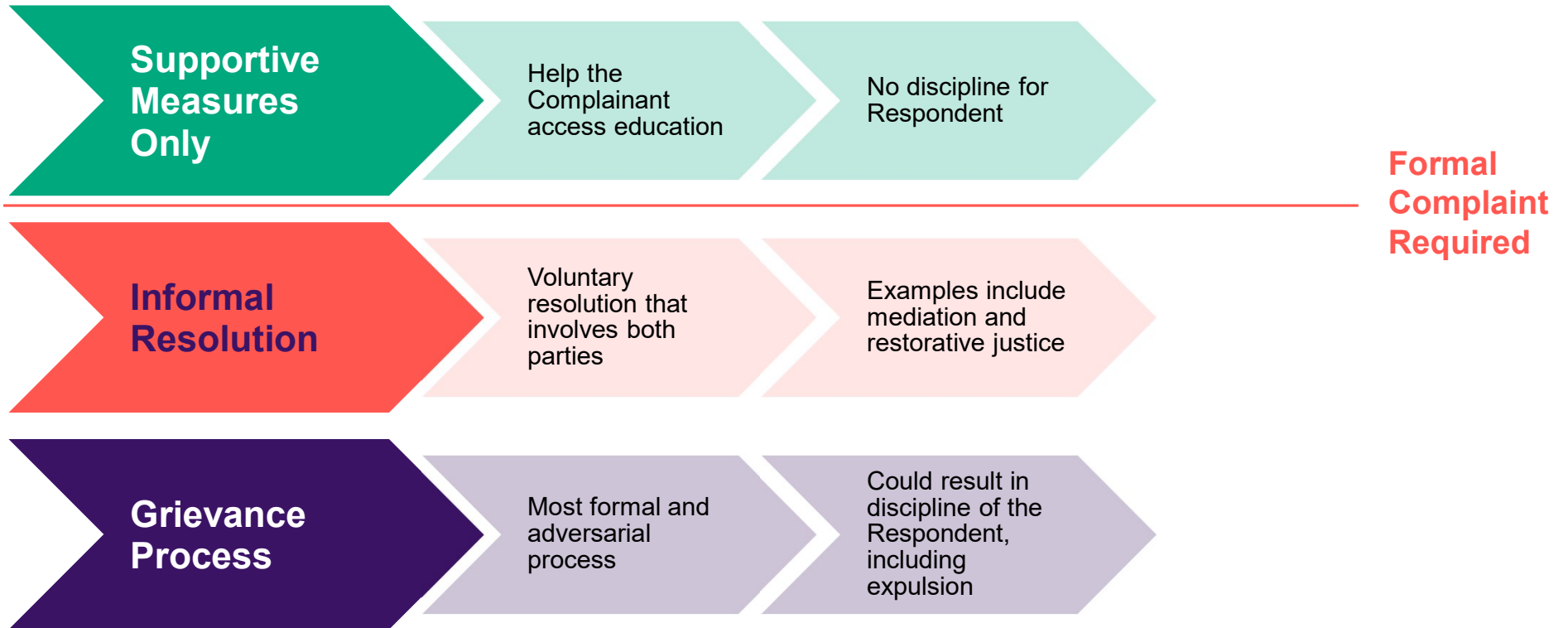
## Record-keeping

- **A school must maintain for a period of seven years records of each sexual harassment investigation including:**
  - any determination regarding responsibility;
  - any audio or audiovisual recording or transcript required;
  - any disciplinary sanctions imposed on the respondent; and
  - any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity
- **Any appeal (and the result)**
- **Any informal resolution (and the result)**

## Title IX Refresher: Hierarchy of ED Directives

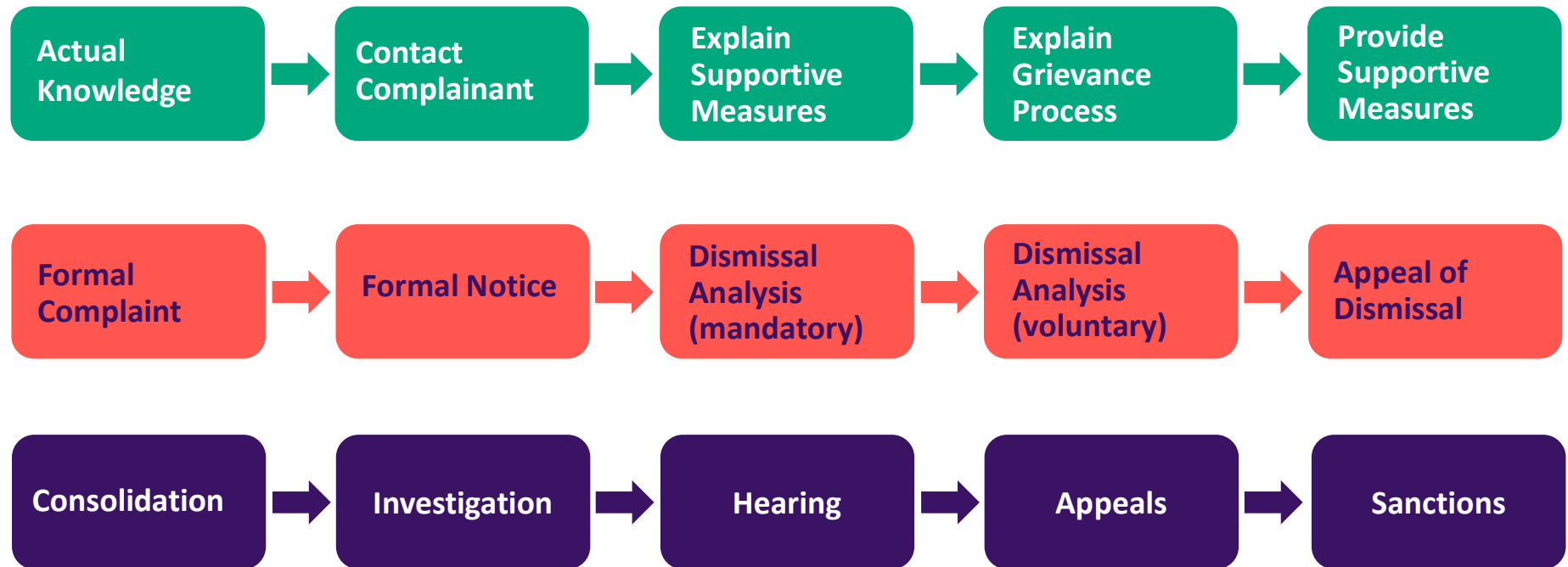


## Three Possible Paths



*Path taken is largely driven by the Complainant*

## Title IX Flow Chart



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# **Administration Updates**

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## ED Guidance (Q&A) for the 2021-22 School Year

The Department of Education's Q & A encourages schools to exercise discretion in the following areas\*:

Undertake prevention methods that best serve the needs and values of your educational community

Develop and enforce codes of conduct as an additional tool for ensuring safe and supportive educational environments

May provide supportive measures to Complainants whose allegations do not fall within Title IX

Implement rules of decorum for conducting the live hearing (rules must apply equally to all parties)

May require additional individuals to report knowledge of sexual harassment to the TIX Coordinator

*\* The discretionary actions must not conflict with the 2020 Title IX regulations*

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# Judicial Updates

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# *Victim Rights Law Center et al. v. Cardona*

(D. Mass. July 28, 2021)

- Federal district court in Massachusetts issued an opinion finding a portion of the Title IX regulations (34 C.F.R. § 106.45(b)(6)(i)) to be arbitrary and capricious (violation of the Administrative Procedure Act)
- The court sent the case to ED for further consideration and explanation of the following provision:
  - *[I]f a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility*
- **Practical Impact**
  - ED released a Letter to Students, Educators, and other Stakeholders regarding *Victims Rights Law Center* and stated that it would **immediately end enforcement of the prohibition against statements not subject to cross-examination at a live hearing**
    - Decision-makers at higher education institutions may now consider statements made by parties and witnesses even if those individuals do not participate in cross-examination at a live hearing

# *Hall v. Millersville Univ.*

(3d Cir. Jan. 11, 2022)

- Federal court of appeals found that a public higher education institution could be held liable for deliberate indifference to known sexual harassment by a third party (non-student guest).
- Facts are particularly gruesome:
  - Female student was murdered in her on-campus dorm room by her boyfriend (non-student)
  - Non-student's pattern of abusive behavior leading up to the murder had been reported to campus individuals who had authority to take corrective action (RA had knowledge and reported to Deputy Title IX Coordinator; campus "Area Coordinator," campus Counseling and campus PD were aware)
  - Deputy Title Coordinator and Area Coordinator received actual notice of sexual harassment but failed to forward the reports to the Title IX Coordinator as required by policy
- Third Circuit reversed the district court's ruling had been deliberately indifferent despite being put on notice.
  - OCR guidance explains that sexual harassment by third parties (non-students) may result in liability for institutions
  - The University apparently knew and intended its Title IX policy to apply to non-student visitors and it had relied on other policies to remove the non-student from campus
- **Main takeaway?**
  - Title IX violation for an institution to act with deliberate indifference to known sexual harassment where the institution exercises **substantial control over the context of sexual harassment and the harasser**

# *Brown v. Arizona*

(9th Cir. Jan. 25, 2022)

- Federal court of appeals court found that a public higher education institution was not liable for a student-on-student sexual assault that occurred in an off-campus apartment.
- Facts:
  - Female student was sexually assaulted (allegedly 10 times) in an off-campus apartment by her boyfriend, a fellow student and football player
  - The University allegedly had notice of the football player's prior misconduct, including misconduct against two other women
  - The football player was criminally charged in connection with the sexual assault
- Ninth Circuit found that the institution did not exercise substantial control over the context of sexual harassment that occurred at a private, off-campus apartment (although it may have had control over the harasser, who was a student)
  - The court noted, "It would be unreasonable to conclude that Title IX imposes liability for what happens between students off campus, unconnected to any school event or activity."
- **Main takeaway?**
  - Title IX liability exists for student-on-student harassment when an institution exercises substantial control over the harasser and the context in which the sexual harassment occurs

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# **What's Next?**

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# What's Next for Title IX?

- **Coming up . . .**

- ED is expected to release draft Title IX regulations (NPRM) in the coming weeks
- NPRM will be published in the *Federal Register*
- Members of the public may provide comments on proposed preamble and regulations

- **Anticipated Developments**

- Inclusion of gender identity/expression and sexual orientation as prohibited forms of sex discrimination

- **In the Meantime . . .**

- Comply with 2020 Title IX regulations
- Refer to the Q&A (July 2021) for additional guidance

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# Questions?

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