The District's Response to Sexual Harassment: New Federal Requirements Under Title IX

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Legal History of Title IX

Jennifer White

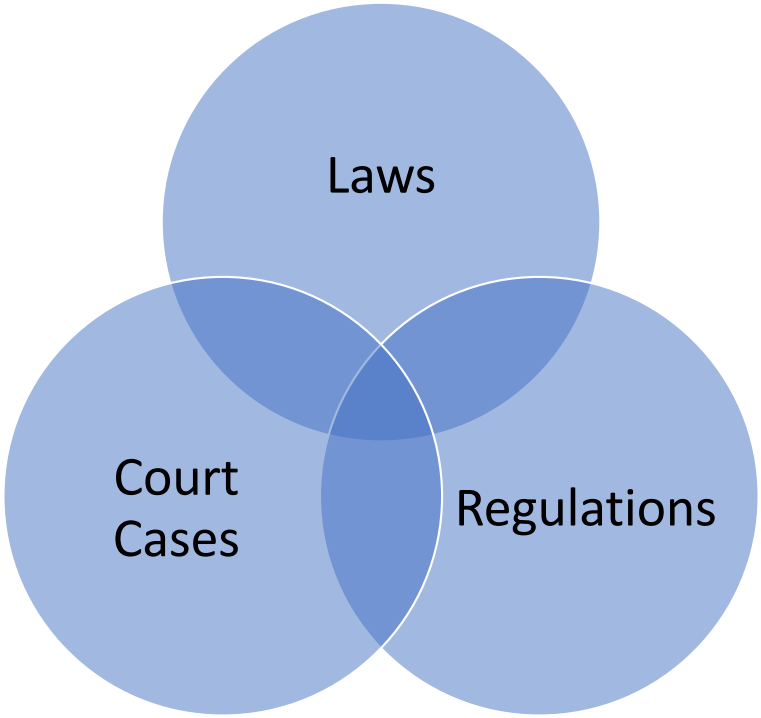
What does the law say?

- “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 of activity receiving Federal financial assistance.” – 20 U.S. Code §, 1681

Who does Title IX apply to?

Covers conduct by employees AND students

How Does the Legal Landscape Change?



How do we get from laws to regulations?

Other Information from Dept. of Ed.

GUIDANCE DOCUMENTS

DEAR COLLEAGUE LETTERS

OCR AGREEMENTS

What weight should we give to guidance from the U.S. Dept. of Ed. and how might that change what is required?

Title IX Timeline

1972
Title IX Enacted

1974
Title IX Regulations Issued

1980
Title IX enforcement given to OCR

1992
Student right to monetary damages established (*Franklin*)

1997
OCR guidance recognizes responsibility to respond

1998
Gesber sets "deliberate indifference" standard

1999
Davis adds narrows definition of "sexual harassment"

Gesber v. Lago Vista Independent School District (1998)

- K-12 school board can be liable for money damages under Title IX for teacher-on-student sexual harassment
- Standard
  - An official of the school district who at a minimum has authority to institute corrective measures on the district's behalf*
  - Has actual notice of the teacher's misconduct*
  - Is deliberately indifferent to the teacher's misconduct

Davis v. Monroe County Board of Education (1999)

- Under Title IX, a board can be liable for money damages for student-on-student sexual harassment IF:
  - The *Gesber* standards of notice and deliberate indifference are met.
  - The school has substantial control over the context in which the harassment occurs and over the harasser
  - The sexual harassment is "so severe, pervasive, and objectively offensive" that it "effectively denie[s] equal access to an institution's resources or opportunities."

Key Terms, Standards & Rules in the New Regulations

Sexual Harassment Defined

A school district employee conditioning an aid, benefit, or service of an education program or activity 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 education program or activity; or

"Sexual assault" as defined in 20 USCA 1092(f)(6)(A)(v), "dating violence" as defined in 34 USCA 12291(a)(10), "domestic violence" as defined in 34 USCA 12291(a)(8), or "stalking" as defined in 34 USCA 12291(a)(30).

Quid Pro Quo

- Definition: An employee of the recipient condition an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct.
- New: only an employee (not a volunteer, another student, etc.)

“Sexual Harassment”- What Changed?

Old Definition (OCR Guidance)

- 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 (Final Rule)

- Unwelcome conduct
- Determined by a reasonable person
- To be severe, pervasive, **and** objectively offensive that it **effectively denies** a person’s equal access to the recipient’s education program or activity

“In a Program or Activity”

- What if the conduct does not occur on school grounds?
- What if the conduct does not occur in the U.S.?

“Actual Knowledge” – What Changed?

Old Definition (OCR Guidance)

- A school has a responsibility to respond promptly and effectively if a school **knows or should have known** about sexual harassment

New Definition (Final Rule)

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the U.S. must respond promptly and in a manner that is not deliberately indifferent

“Deliberate Indifference” – What Changed?

Old Definition (OCR Guidance)

- The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.

New Definition (Final Rule)

- Failure to respond reasonably in light of known circumstances.

Break

Complaint/Grievance/Investigation Process

Chris McCarty

Complaint, Grievance & Investigative Process

with Chris W. McCarty

Lewis Thomason / Knoxville

Title IX – Complaints

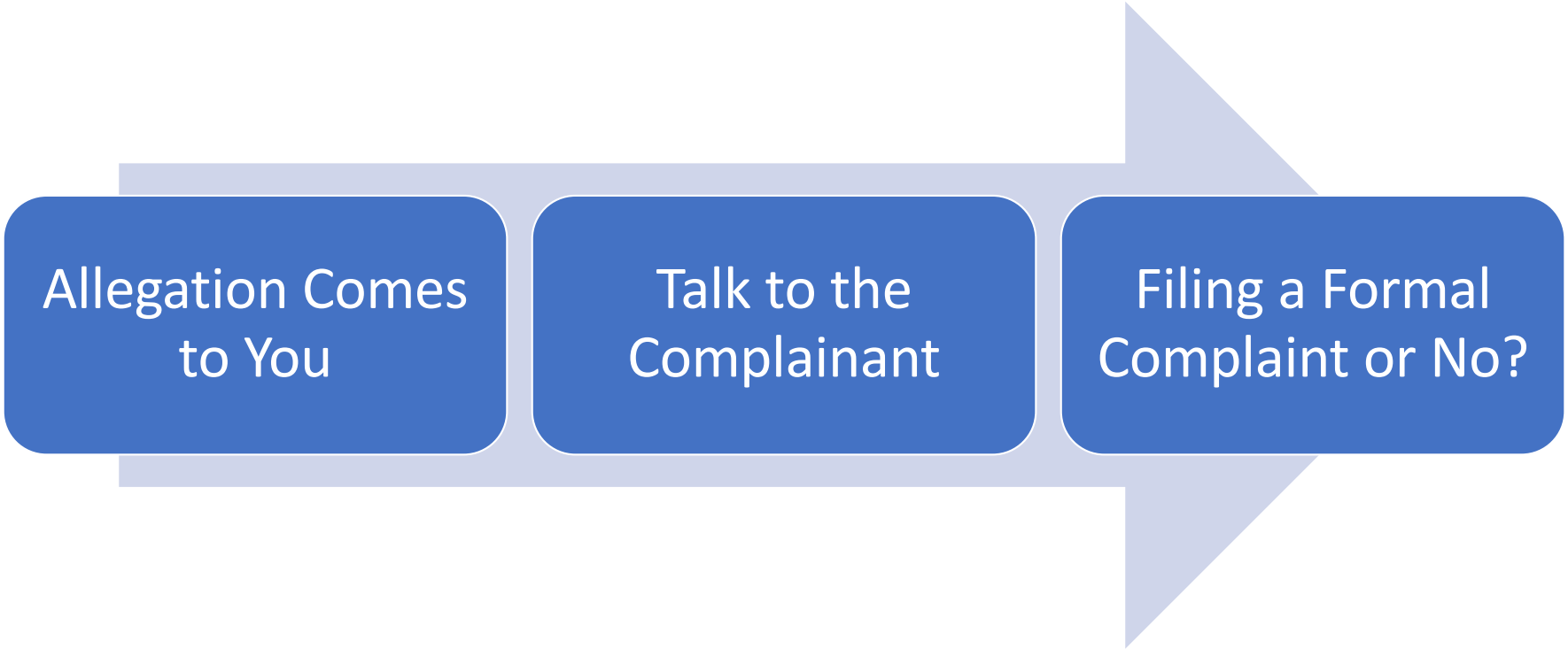
Anyone with knowledge of the relevant actions/behaviors may report those issues and trigger our need to respond.

Title IX – Complaints / Grievances

Who is the Complainant?

- The complainant is the individual who is eligible to file a complaint to report a violation of Title IX.
- It also includes any person who is reported to have experienced a violation in cases where some other person made the first report on that person's behalf.

Title IX – Complaints / Grievances



Title IX – Complaints / Grievances

What if the initial allegations could be considered as child abuse and/or child sexual abuse?

Title IX – Complaints / Grievances

Upon receiving a formal complaint:

1. Provide written notice of the allegations, and the grievance process to all known parties to give the respondent time to prepare a response before an initial interview;
2. Inform the parties of the prohibition against making a false statement or knowingly submitting false information;
3. Inform the parties that they may have an advisor present during any subsequent meetings; AND
4. Offer supportive measures in an equitable manner to both parties.

Title IX – Complaints / Grievances

Supportive Measures

Non-punitive, individualized, and offered as appropriate and without charge to a complainant or a respondent.

Example Measures

~ Schedule changes;

~ Student counseling;

~ Actual monitoring;

~ Academic accommodations.

Title IX – Complaints / Grievances

What if there is a possible *immediate threat* to the physical health/safety of a student arising from the allegations?

What can you do with the accused student?	What can you do with the accused employee?

Title IX – Investigations

After a formal complaint has been filed, an investigator needs to be assigned.

- *Has he/she been properly trained?*
- *Does he/she have any conflicts?*

Title IX – Investigations

All investigations must…

Provide an equal opportunity for all parties to present/identify witnesses and evidence.	**Provide the parties with the freedom to discuss the allegations and/or gather relevant evidence.**	**Provide for the parties to have others – parents, advisors, attorneys – present during the grievance process.**
Provide for the parties to have dates, times, locations, etc. related to investigative interviews, and with time to prepare for the same.	**Provide for the parties to have equal access to inspect/review evidence directly related to the complaint.**	**Provide the parties with a draft of the investigative report with 10 days to submit a written response, which must be taken into account by the decider.**

Title IX – Investigations

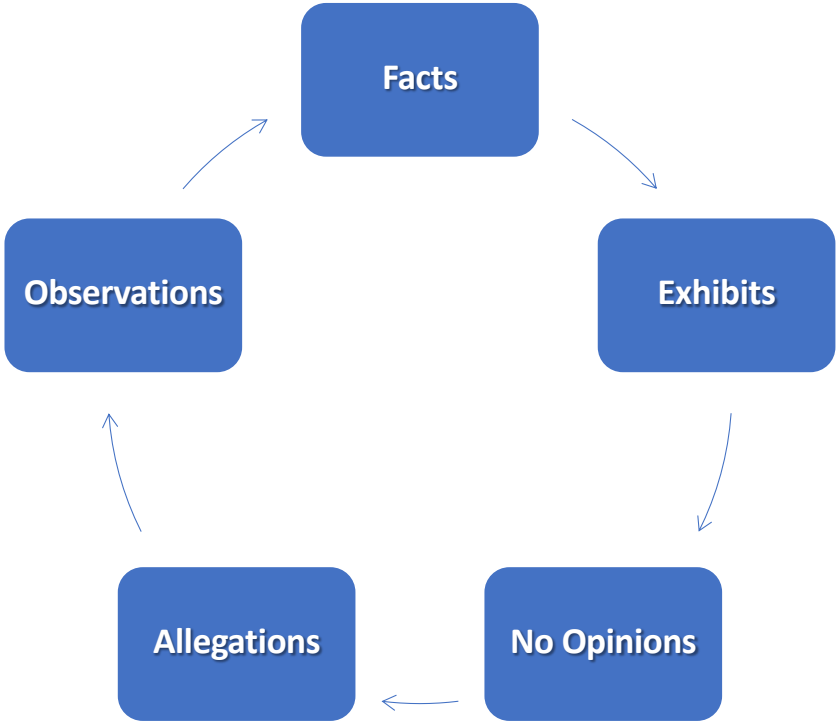
Questions to Complainants	Questions to Respondents
• Who, what, when, where, and how: ✓ Who committed the alleged harassment? ✓ What exactly occurred or was said? ✓ When did it occur and is it still ongoing? ✓ Where did it occur? ✓ How often did it occur? ✓ How did it affect you? • Are there any persons who have relevant information? • Was anyone present when the alleged harassment occurred? • Did you tell anyone about it? • Are there any notes, e-mails, texts, pictures, videos or other items related to the incident(s)?	• (Briefly summarize what has been alleged.) ✓ What is your response to those allegations? • Why would the Complainant lie? • Are there any persons who have relevant information? • Are there any notes, e-mails, texts, pictures, videos or other items related to the incident(s)? • Do you know of any other relevant information that you think I should be aware of? ***Remember: You will have to share evidence – including interview notes/write-ups – with both parties and/or their advisors.***

Title IX – Investigations

Investigative Reports:

Remember :

All Title IX complaint/grievance documentation must be stored for 7 years.



Title IX – Investigations

Investigative Report Samples

Good	Bad
9/8/20 – Interview of Sam Smith I met with Sam, a 7th grader, at 9:00 AM at SHS, and I was accompanied by a guidance counselor, Ms. Anderson. Sam remained respectful and calm during the interview. He did not hesitate when answering questions. Though Sam could not provide specific dates, he had seen the Respondent slap the Complainant's rear end in the hallway "several" times.	*9/8/20 – Interview of Sam Smith* Met with Sam in morning. Joined by another adult. I had Sam in 8th grade as a teacher, and always found him to be a poor student. His father is in jail, which also makes me question anything Sam says. Sam told us that he saw a few slaps on the behind, but he had no idea when, and I find it hard to believe anything this kid says anyway.

Any Questions?

Lunch

Decision / Appellate Process

Ben Torres & Jennifer White

Key Points

- Respondent is presumed not responsible for the alleged conduct until the determination of responsibility.

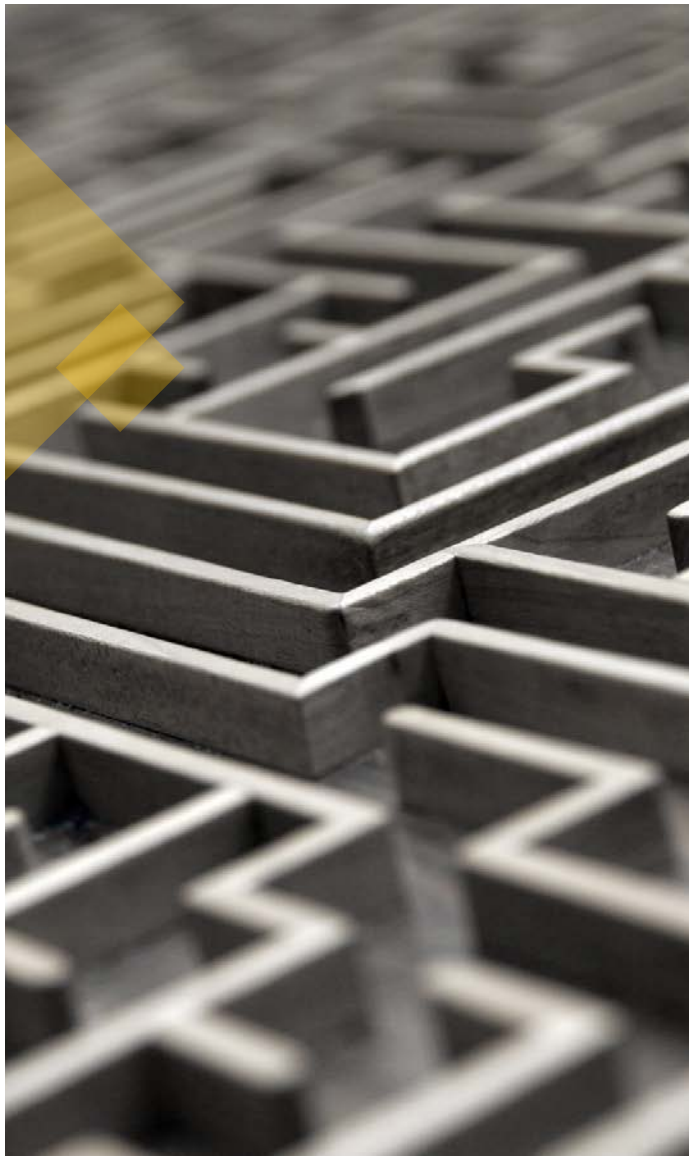
- Districts must choose:
  - Evidentiary standard;
  - Who acts as decision-maker; and
  - Who handles appeals.

WHAT IS AN EVIDENTIARY STANDARD?

Evidentiary standard =
the amount of proof required

Evidentiary Standards

Clear & Convincing	Preponderance of the Evidence
• This standard is met if the decision-maker is substantially certain that the respondent is responsible. In other words, the question is "based on the evidence, are you more than 75% certain that this individual is responsible?"	• This standard is met if the decision-maker believes that the respondent is more likely than not responsible. In other words, the question is "are you more than 50% certain that this individual is responsible?"



Which standards are districts choosing?

- Districts are currently split on this.
  - Roughly 50/50

Is an in-person hearing required?

- No. The federal regulations do not require this at the K-12 level.

Who is the decision-maker?

- Cannot be the investigator or the Title IX Coordinator
- Options some districts have chosen:
  - Director of Schools
  - Having different decision makers when employee conduct is at issue (i.e. someone from HR for employees versus Head of Student Services for students.

What does the decision-maker do?

Receives the final report of the investigation.

Allows each party the opportunity to submit written questions that he/she wants asked of any party or witness.

Issues determination of responsibility.

What are the responsibilities of a decision-maker?

- Keep an open mind
- Make reasoned decisions based on the strength of the relevant evidence
  - “The decision-maker must consider relevant evidence and must not consider irrelevant evidence.”
- Be impartial

When must relevant evidence NOT be considered?

- When it is legally privileged.
- Section 106.45(b)(1)(x):
  - A recipient's grievance process must…not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Other types of privileged information include, but are not limited to:

- Medical records;
- Attorney-client communications;
- Implicating oneself in a crime (as in the 5th Amendment);
- Confessions to a clergy member or other religious figures; and
- Spousal testimony in criminal matters.

The Decision-making Process

1
- What facts do the parties agree on?
- What facts do the parties disagree on?

2
- How do these facts line up with the elements of the offense at issue?
- What disputed facts must be resolved?

3
- Evaluate the evidence for each disputed fact.
- Resolve disputed facts

What does the determination of responsibility look like?

- Must issue a written determination addressing:
  - Allegations;
  - Procedural steps taken;
  - Findings of fact;
  - Application of code of conduct to facts; and
  - Statement of and rationale for result **as to each allegation**.*

Statement of and rational for result must include:

- Determination of responsibility;
- Any disciplinary sanctions; and
- Whether remedies to restore or preserve equal access to the educational program will be provided.

Determination of responsibility is final:

When the result of any appeal is released; OR

If an appeal is not filed, the date on which the right to appeal expires.

Who handles appeals?

- LEAs must decide.

- Options include, but are not limited to:
  - Board;
  - Impartial hearing officer; or
  - Director of Schools.

What happens next?

- Either party could file an appeal

Bases for appeals

- Procedural irregularity that affected the outcome
- New evidence that was not reasonably available at the time
- Title IX Coordinator, investigator, or decision-makers had a conflict of interest or bias for or against the complainant or respondent that affected the outcome of the matter.

Appeal Reason #1

- Procedural irregularity that affected the outcome
- Example: Not being given reasonable notice of complaint, report, etc. Could also arise from other problems with the grievance process. For example, if the investigator and decision-maker are the same individual.

Appeal Reason #2

- New evidence that was not reasonably available at the time.
- Example: Evidence that would establish the respondent was in another location or the respondent was not the person who committed the offense.

Appeal Reason #3

- Title IX Coordinator, investigator, or decision-makers had a conflict of interest or bias for or against the complainant or respondent that affected the outcome of the matter.
- Example: Past comments showing bias toward one party.

Is an appeal possible in each instance. If so, on what grounds?

- Throughout the process school personnel communicate with respondent in a manner indicating guilt (i.e. “why did you do this?” “you know you messed up”).
- Decision-maker indicates that he/she has not read the report.
- Investigator publishes an opinion piece in a local paper stating the he always believes complainants and would have a very difficult time finding a respondent was innocent.
- Investigator uses evidence to prove pre-conceived ideas about the outcome rather than letting the evidence guide the process.

For all appeals the district MUST:

1. Notify the other party in writing of the appeal
2. Ensure decision-maker for appeal is not individual that issued the original decision
3. Ensure that the person is appropriately trained;
4. Give parties opportunity to submit a written statement*
5. Issue a written decision describing the results and rationale
6. Provide the written decision simultaneously to both parties

Practical Exercises

SCENARIO NO. 1

- **Personnel**: Your group consists of a Title IX Coordinator, at least one investigator, and a decider.
- **Facts**: Principal Pat, an administrator at one of your middle schools, is stopped by a well-known local, Stan, during a high school football game. According to Stan, who may or may not have been under the influence, his niece, Jessie, has been "gettin' the rundown from a boy" at Pat's school. Stan thinks the boy's name is Earl, or it could be Luke. Either way, Stan says Jessie has been crying herself to sleep for weeks.
- *What should Pat do with this information?*
- *What should the Title IX Coordinator do now?*

SCENARIO NO. 1

- **Facts**: After an administrator talked to Jessie, she admitted there is an ex-boyfriend, Luke, who just will not leave her alone. He follows her between classes. He brushes by her at her locker, sometimes lingering with his hand near her rear-end. He SnapChats her constantly with things like, "You can't go, I won't let you." She and her friends have told Luke to stop, as has Coach Smith, one of the gym teachers. Jessie's parents do not understand, as her mom keeps saying, "Boys will be boys." Making matters worse, Jessie and Luke have three classes together (math, social studies, science).
- *Do these allegations trigger a sexual harassment complaint?*
- *What should next be discussed with Jessie and her parents?*
- *What if Jessie's parents do not want to file a complaint?*
- *How do you approach or offer supportive measures?*

SCENARIO NO. 1

- **Facts**: After receiving a formal complaint, you begin the Title IX grievance/investigative process.
- *What should you do first: draft a summary of the allegations or immediately go interview Luke?*
- *What if Luke refuses to be interviewed?*
- **Facts**: Upon now hearing from both Jessie and Luke, both of them have mentioned mutual friends who are aware of the situation. Luke says Jessie still likes him, and her parents forced her to breakup. He says all those friends will back up his account, including Josh (7th grade) and LeAnn (8th grade).
- *What must the investigator do before interviewing any witnesses?*
- *What types of questions might you want to ask those witnesses?*
- *How do you document those interview results?*

SCENARIO NO. 1

- **Facts**: After the investigator concluded the investigation and issued an investigative report (with exhibits), you – as the decider – have learned that:
  - **Luke has anger issues, having been in three fights at school this year alone.**
  - **Jessie never saved any electronic messages, and no one could specifically recall what has been said.**
  - **Coach Smith could not recall any issues or complaints, but he has talked to Luke a lot about his anger in the past.**
  - **Luke appeared calm when interviewed, even candid.**
  - **Josh could not remember anything of note, other than that Luke and Jessie dated "a bit."**
  - **LeAnn did confirm that Jessie has been crying a lot in the bathroom, wishing Luke would leave her alone. But LeAnn never saw Luke touch or even get near Jessie.**
  - *Is there anything else you should review other than the investigative report?*
  - *What do you think: did sexual harassment occur?*

SCENARIO NO. 2

Facts: Marty, a 10th grade student who likes to skateboard and play guitar, comes into Principal Pat's office one day unannounced. Marty is shaking and he just needs to "get something off" his chest. After a few more minutes of coaxing, Marty opens his phone and shows Principal Pat some text messages with a teacher at the school, Ms. Rankins. For the most part, the texts are about schoolwork, but a recent exchange catches Pat's eye:

Marty: You are the coolest teacher.

Ms. Rankins: We should hang out sometime?

Marty: Like eat lunch together?

Ms. Rankins: More like dinner … my house. You drive, right?

What is the first thing Pat should do with that phone?

What should Pat's next move be?

SCENARIO NO. 2

Facts: After turning this matter over to the SRO, Pat calls the Title IX Coordinator. It soon becomes known that two detectives are coming to the school that day to interview Marty.

What should the Coordinator do next?

Since Ms. Rankins is now the subject of a criminal investigation, what should the school system do about her employment status?

SCENARIO NO. 2

Facts: After a few days and one weekend, one of the detectives calls you. Though they were suspicious of some of the text messages and conversations between Marty and Ms. Rankins, they could not find enough to pursue anything criminal. But, ending the call, the detective says: "Y'all need to watch her."

What else should he requested or sought from the detective at this point?

Do you just let this die since they found no evidence of a crime? Why or why not?

What should your next steps be?

SCENARIO NO. 2

Facts: After the investigator pulls and reviews the police file, and interviews Marty, Ms. Rankins, and a few named witnesses, you – the decider – learn the following:

- **Ms. Rankins was recently divorced.**
- **Marty has made a similar claim before in 8th grade against his band teacher, Ms. Thomas.**
- **Neither Marty nor Ms. Rankins would admit that Marty ever came to her house.**
- **About the text exchange Pat saw, Ms. Rankins responded: "I shouldn't have invited him over. But he's a funny kid. And a good kid. I'm lonely, there's no doubt about that."**
- **One of Ms. Rankins co-workers, Mr. Randolph, spotted Ms. Rankins pass Marty a note in the hallway one day, then give the boy a hug. When asked about that, Marty and Ms. Rankins both denied that it happened.**
- *What do you think: did sexual harassment occur?*
- *How would you address this with Ms. Rankins?*

WILD CARDS

In Scenario No. 1:

What if Jessie and her parents did not want to file a formal complaint?

What is Luke hired an attorney and wanted her to be present for all interviews?

What if the investigation had uncovered the following electronic messages between Luke and Jessie:

Luke: You can't break up with me.

Jessie: I already did. You know that.

Luke: I'll never leave you alone. Easy walk to your house.

WILD CARDS

In Scenario No. 2:

What if one of Marty's friends, Alex, brought the investigator the following text exchange with Marty:

- **Marty: Screw her, man.**
- **Alex: It's just one test. Shake it off.**
- **Marty: Hell no, I'll get her back.**
- **Alex: What does that even mean?**
- **Marty: You'll see ….**

Questions?