

Appeal

VIRTUAL CERTIFIED TITLE IX APPELLATE DECISION-MAKER TRAINING

Fall 2024



ABOUT US

OUR MISSION

To provide the best Care and Support for our clients, Community Partners, employees, contractors, collaborators, vendors, and all others who encounter our company.

GOAL

To assist schools and districts in providing a safe and healthy learning and working environment for students, faculty and staff.

ICS SPECIALISTS



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BEFORE WE GET STARTED...

- ✓ Not legal advice
- ✓ Materials
- ✓ Chat Bar and Questions
- ✓ Level One Training
- ✓ Breaks
- ✓ Posting Link
- ✓ No recording

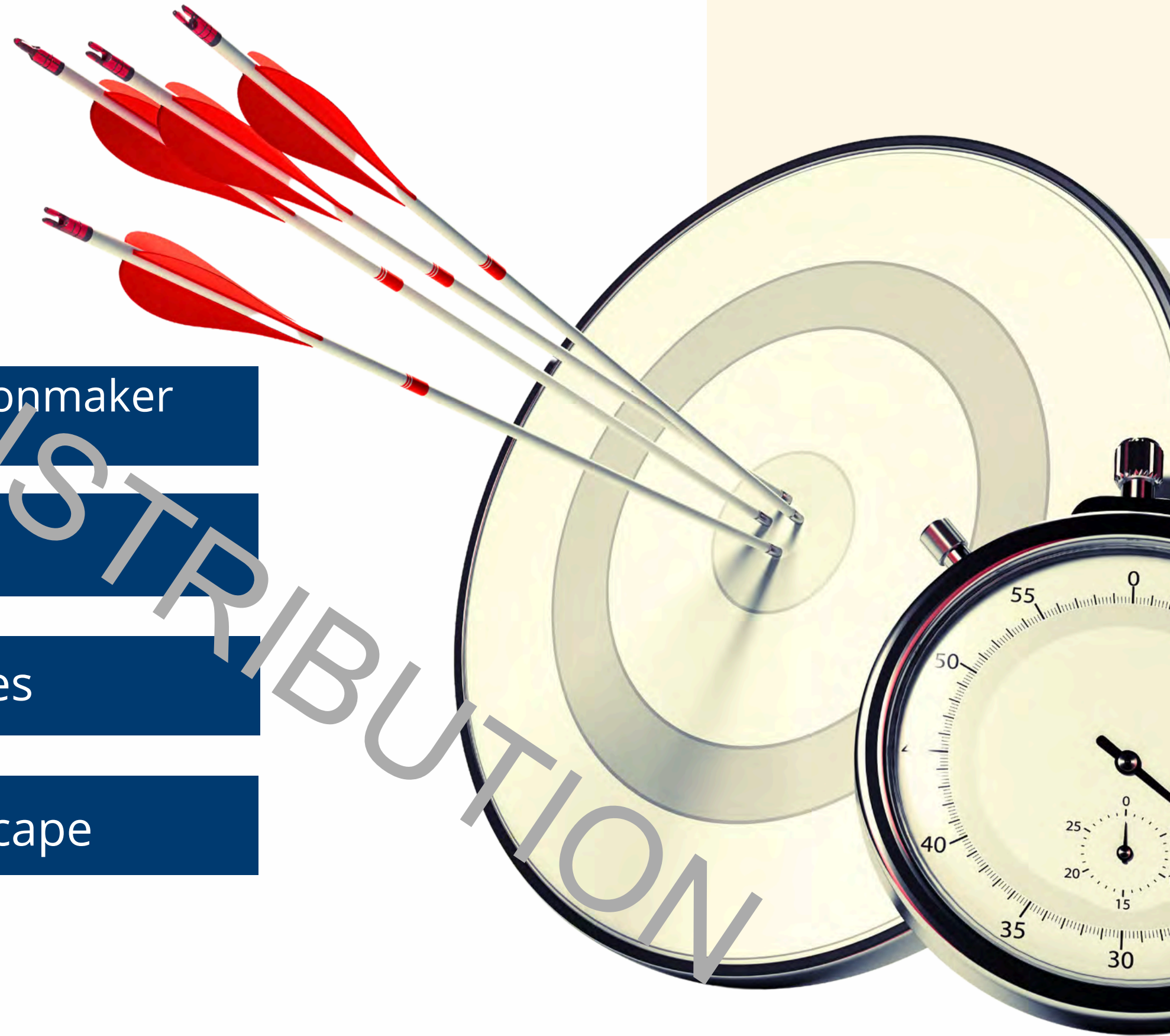
TRAINING OBJECTIVES

Understand role of Title IX Appellate Decisionmaker and your role at your district or institution

Learn best practices for your role

Explain the grievance process/procedures

Learn the current Title IX litigation landscape





INTRODUCTION

Title IX Basics and Regulations Overview



WHAT IS 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.”

A LAW ABOUT ACCESS

ED issued guidance that described sexual harassment as violating Title IX.

Regulations focused on due process rights for Respondents.

1972

Title IX was enacted (athletics).

2001

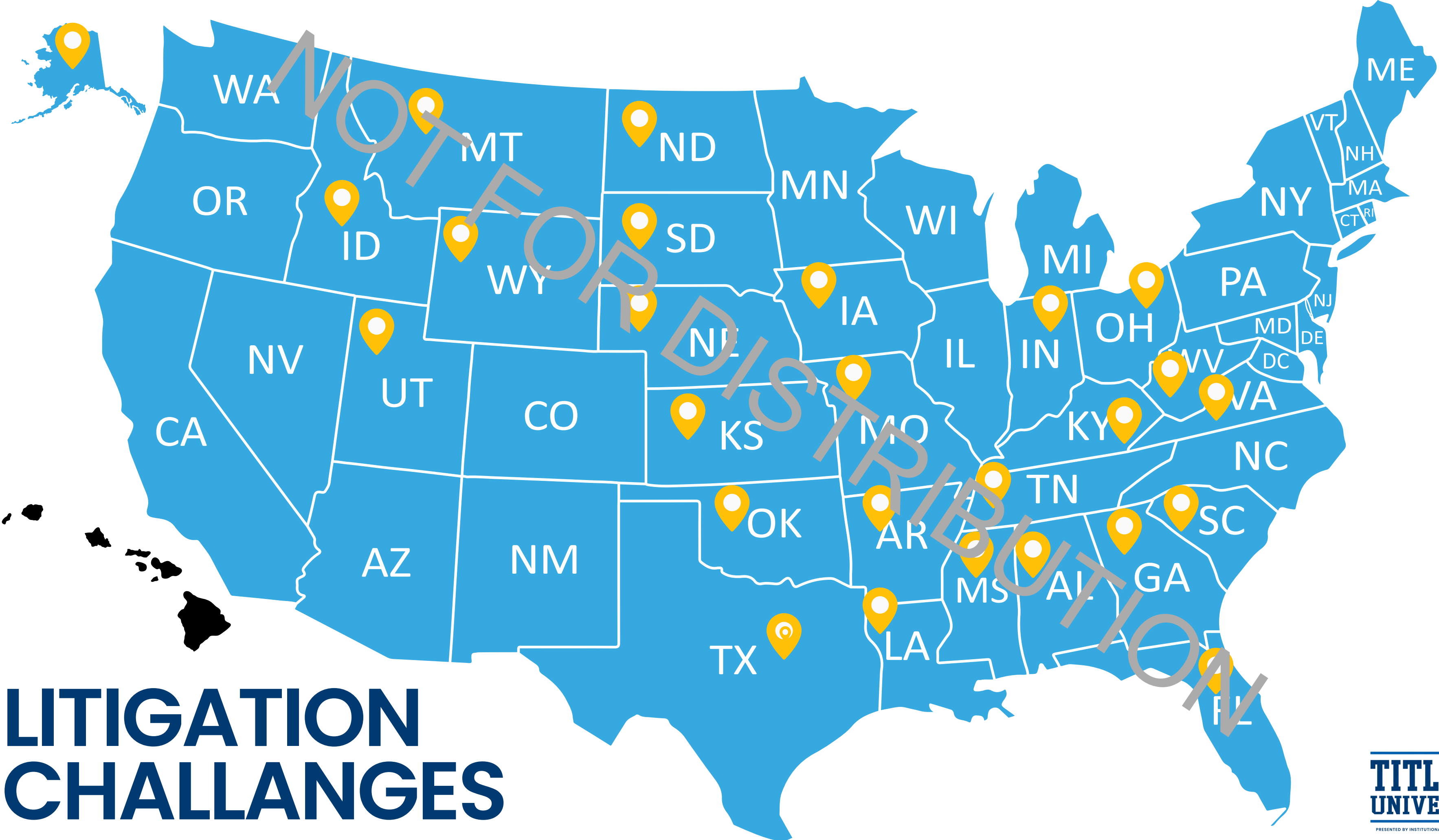
2011 & 2014

ED articulated procedures required by schools in their response to sexual harassment. Significant Complainant focus.

2020

New Regulations released. State specific regarding application. South Carolina is under an injunction.

2024



LITIGATION CHALLENGES

ON THE BASIS OF SEX

This is the big issue surrounding the current litigation, injunctions, and legislation.

2020 - Not Defined in the Regulations (it can be found in guidance).

2024 - This is defined to include:

Discrimination on the basis of sex includes discrimination on the basis of:

- 1. Sex Stereotypes**
- 2. Sex Characteristics**
- 3. Pregnancy or Related Conditions**
- 4. Sexual Orientation**
- 5. Gender Identity**

2020

2024

Report

Notification

Formal Complaint

Complaint

**Formal Grievance
Process**

**Grievance
Procedures**

**Pregnancy
Accommodations**

Modifications

Language Changes



CONDUCT AT ISSUE

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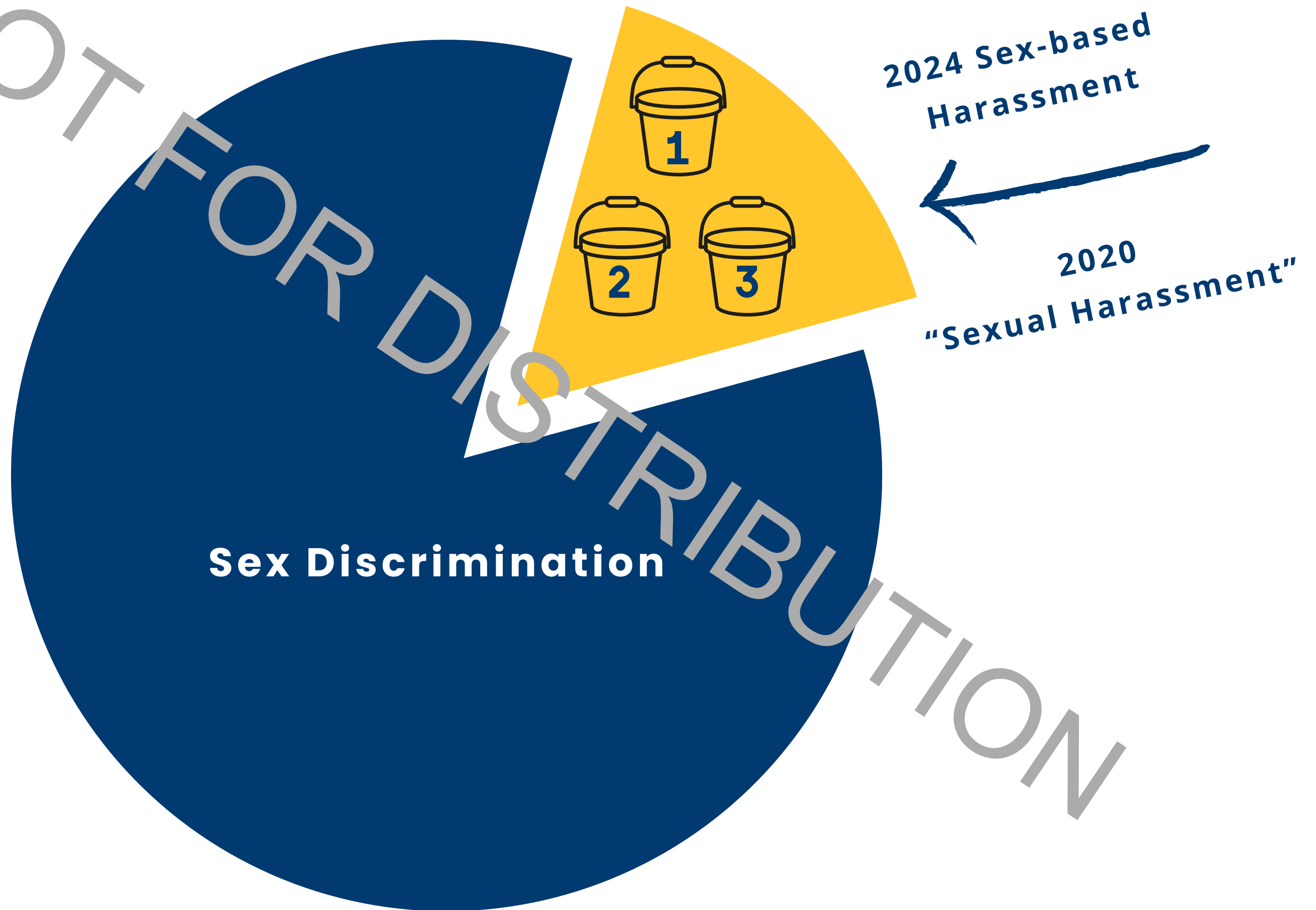
Sex discrimination

Sex-based harassment

Sexual harassment (2020)

**overlapping areas?*

NOT FOR DISTRIBUTION



2020 Sex Based Harassment

A form of sex discrimination. Sexual harassment and other harassment **on the basis of sex** that is:



Quid Pro Quo Harassment: An employee, agent or other person authorized to provide an aid, benefit, or service, under the school's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit or service, on a person's participation in unwelcome sexual conduct.



Hostile Environment Harassment: Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the school's education program or activity.



Specific Offenses

- a. Sexual Assault
- b. Dating Violence
- c. Domestic Violence
- d. Stalking

SEX-BASED HARASSMENT 2024



SEX BASED HARASSMENT 2024

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Hostile Environment Harassment



Hostile Environment Harassment

1. Unwelcome
2. Sex-based Conduct
3. Subjectively AND Objectively Offensive
4. Severe OR Pervasive
5. Limits or Denies Ability to Participate (Access)

Fact Specific Inquiry

1. Degree to which conduct affected access
2. Type, frequency, and duration of conduct
3. Ages, roles, previous interactions, other factors about each party
4. Location of the conduct and context in which it occurred
5. Other sex-based harassment

Subjective:

Related to or based on beliefs attitudes and opinions instead of verifiable evidence. Black's Law Dictionary.

Objective:

Neutral: An unbiased attitude or opinion that is based on factual evidence. Black's Law Dictionary



SEXUAL ASSAULT

Rape: The 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 victim.

Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent.



DATING VIOLENCE:

A CRIME COMMITTED BY A PERSON:

Who is or has been in a social relationship of a romantic or intimate nature with the victim; and

Where the existence of such a relationship shall be determined based on a consideration of the following factors:

- Length of relationship
- Type of relationship
- Frequency of interaction between the persons involved in the relationship



DOMESTIC VIOLENCE:

Felony or misdemeanor crimes committed by a person who.

- Is a current or former spouse of intimate partner of the victim under the family or domestic violence laws of the jurisdiction* of the recipient (school), or a person similarly situated to a spouse of the victim.
- Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner.
- Shares a child in common with the victim OR
- Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.



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



CHECK YOUR DISTRICT/INSTITUTION'S POLICIES AND PROCEDURES



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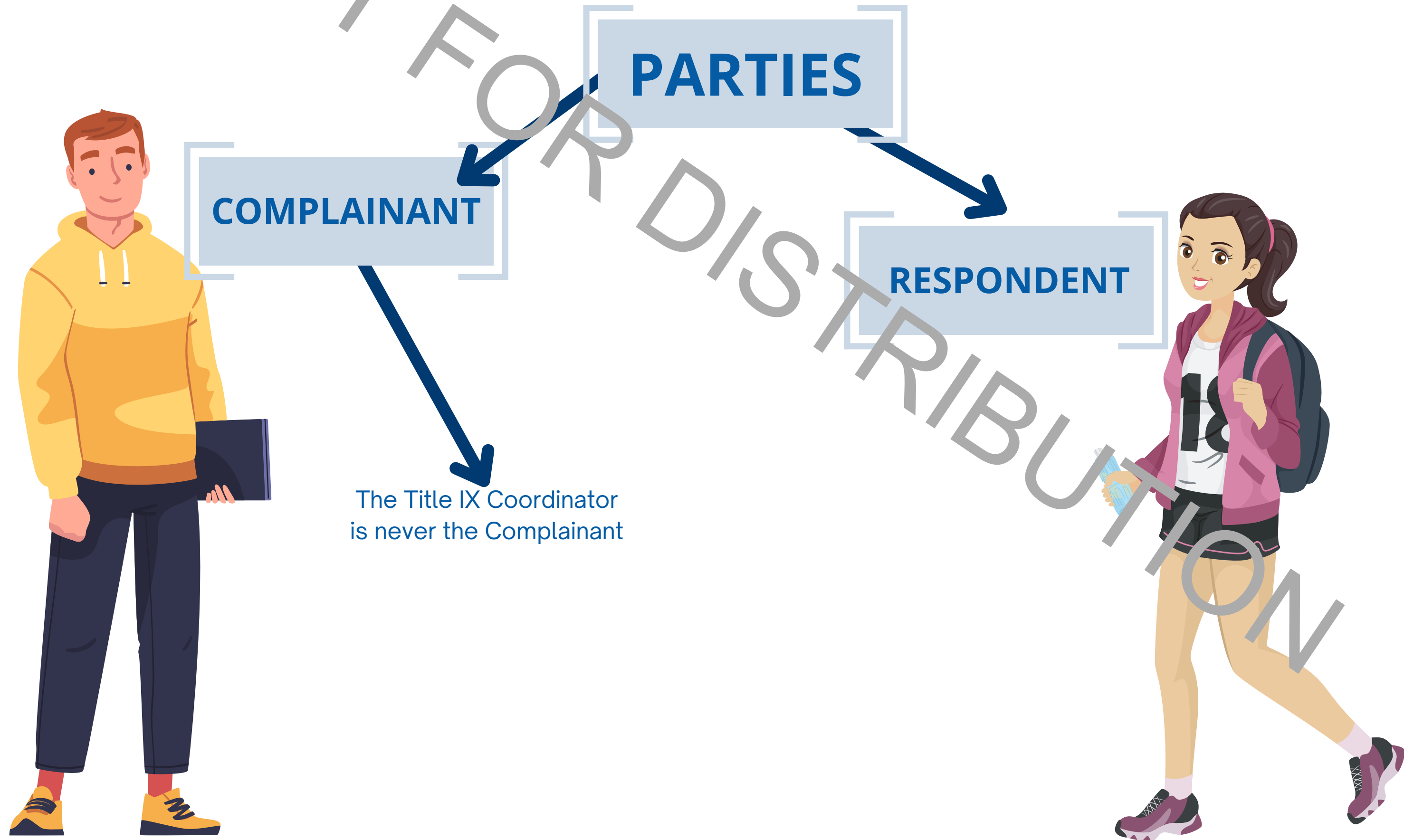
THE “WHO”



CONDUCT THAT INVOLVES...

- Student on Student Sexual Harassment
- Employee on Employee Sexual Harassment
- Employee on Student Sexual Harassment
- Student on Employee Sexual Harassment

PARTIES IN TITLE IX PROCESS



PARTIES 2024



COMPLAINANT:

- A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part (Part 106: Nondiscrimination on the basis of sex in education programs or activities receiving federal financial assistance).
- (2024 new) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.



RESPONDENT:

A person who is alleged to have violated the recipient's prohibition on sex discrimination.



THE "WHERE"

JURISDICTION 2020

EDUCATION PROGRAM OR ACTIVITY



Locations, events, or circumstances (operations) over which the school or district exercised substantial control over both the respondent AND the context in which the sexual harassment occurs.



Includes online sexual harassment, but it must be analyzed to determine if it occurs in education program or activity.



Does not create or apply a geographic test, does not draw a line between "off campus/property" and "on campus/property," & does not create a distinction between sexual harassment occurring in person vs online.

TITLE IX
UNIVERSITY

PRESENTED BY INSTITUTIONAL COMPLIANCE SOLUTIONS

APPLICATION 2024

(JURISDICTION - EXPANDED)

ALL sex discrimination that occurs under the school's education program or activity in the U.S., including but not limited to:

- Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by the school.
- Conduct that is subject to the school's disciplinary authority (What is school's jurisdiction for other policies?).
- Even when some conduct alleged to be contributing to the hostile environment occurs outside of the education program or activity or outside of the US.

Consider: Does the behavior OUTSIDE of education program or activity CONTRIBUTE to a sex-based hostile environment INSIDE the education program or activity?



BASIC TITLE IX POLICY AND PROCEDURE REQUIREMENTS



WHAT CAN BE APPEALED?

- **Dismissal of Formal Complaint (2020)**
- **Dismissal of Complaint (2024)**
- **Determination Re: Responsibility (.46 required)**

BASIC TITLE IX PROCESS-APPEALS 2020



Sexual Harassment
Reported



Formal Complaint by
By Complainant/Parent (K12)
Title IX Coordinator



Dismissal/Appeal?



Notice of
Allegations



Investigation



Resolution

K12: Q&A, Live Hearing Not Required
Higher Ed: Hearing required with
advisors and ability to cross-
examine



Appeal?

BASIC TITLE IX PROCESS-APPEALS 2024



Sex Discrimination
Reported



Complaint initiated by
By Complainant/Parent (K12)/
Title IX Coordinator



Dismissal/Appeal?



Notice of
Allegations



Investigation



Resolution
K12: .45
Higher Ed: .45 or .46



Appeal?

Appeals 2020



- ✓ Offered to both parties.
- ✓ Can appeal dismissal of Formal Complaint or any allegations therein or determination regarding responsibility.
- ✓ On the Following Basis:
 - Procedural irregularity that affected the outcome of the matter.
 - New Evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter.
 - Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.
 - Additional basis if offered equally to both parties.
- ✓ Written decision describing the result and rationale for the result.
- ✓ Notify the other party in writing when an appeal is filed.
- ✓ Provide written decision simultaneously to both parties.
- ✓ Give both parties a reasonable opportunity to submit a written statement in support of or challenging the outcome.



2024 APPEALS

K-12, Employee on Employee or student sex discrimination appeals

MUST offer appeal that AT A MINIMUM is the same as the school offers in ALL OTHER COMPARABLE PROCEEDINGS (including other discrimination complaints)

APPEAL OPTIONS

- Conflict of Interest or Bias by Title IX Coordinator, Investigator(s), Decision-Maker(s)

 - Generally toward Complainants or Respondents or toward specific party

- New Evidence

 - Procedural irregularity that affected the outcome of the matter

- May include additional bases under your policies and procedures

PROCEDURAL IRREGULARITY

Review process

Was it followed?

What was the impact?

REVIEW OF EVIDENCE 2020

-Interviews with parties and witnesses.

- Including Notice with sufficient time to prepare for the meeting/interview.
- Document date of meeting and date notice provided.

-Collect evidence and information.

- Document when and how evidence/information was collected.

-Allow parties and advisors to review "evidence directly related to the allegations" (10 days).

-Write investigation report that "fairly summarizes relevant evidence."

-Provide opportunity for parties and advisors to review the report (10 days).



EVIDENCE

ONLY relevant and not otherwise impermissible.

- Separate folders/digital drive
- Appendix to the report
- One attachment

Consider redactions and protected information

AVOIDING CONFLICTS OF INTEREST AND BIAS

AVOID



Generally toward Complainants/Respondents



In a specific case



Legal Definition of conflict of interest

- 1: a conflict between the private interests and the official or professional responsibilities of a person in a position of trust
- 2: a conflict between competing duties (as in an attorney's representation of clients with adverse interests)

WHO MAY HAVE CONFLICT?

- » Coordinator
- » Investigator
- » Decision-Maker

**You should also analyze to ensure no conflict*





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EXPLICIT BIAS

“Explicit bias” refers to the attitudes and beliefs we have about a person or group on a conscious level.

- Expressed directly
- Aware of bias
- Operates consciously

Example: Statement- "I don't think a woman would make a good CEO... Women are too emotional."



IMPLICIT BIAS

"Implicit bias" refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner

- Expressed indirectly

- Unaware of bias

- Operates subconsciously

Example: Assuming that a woman entering a hospital room is a nurse instead of a doctor because of her gender.

NEW EVIDENCE



New evidence not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter.



NOTE: "COULD AFFECT THE OUTCOME OF THE MATTER"

Ground + Outcome

NO
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DISTRIBUTION
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APPELLATE DECISION MAKERS

Understand District/Institution Specific Process

Review Appeals

Make Timely Decisions and Simultaneous Notifications



NOT YOUR ROLE TO:

- ▶ Re-investigate the matter
 - ▶ Re-interview parties or bring in additional witnesses to interview
 - ▶ Re-hear the matter or to re-do the determination
- *Review is limited to the record



Who will serve as your appellate officer?

- Building Level (not recommended)
- Central/District Office Level
- Superintendent/Director of Schools
- Chancellor/President
- Vice Chancellor/Provost/etc?

ROLE & RESPONSIBILITY OVERLAP (2024)

Coordinator can be investigator/decision-maker
*single investigator model is permitted



Investigator cannot be the informal resolution facilitator

Supportive Measure Review Administrator should not be the Coordinator or their supervisor

Appellate Decisionmaker(s)

Roles

and

Responsibilities

EQUITABLE PROCESS

Equal Appeal Procedures for Both Parties

- Appellate decision-maker cannot be the same as the decision-maker regarding responsibility, or the Title IX Coordinator
- Appellate decision-maker must be trained
- Parties must have a reasonable, equal opportunity to submit written statement in support of or challenging the outcome

EQUITY

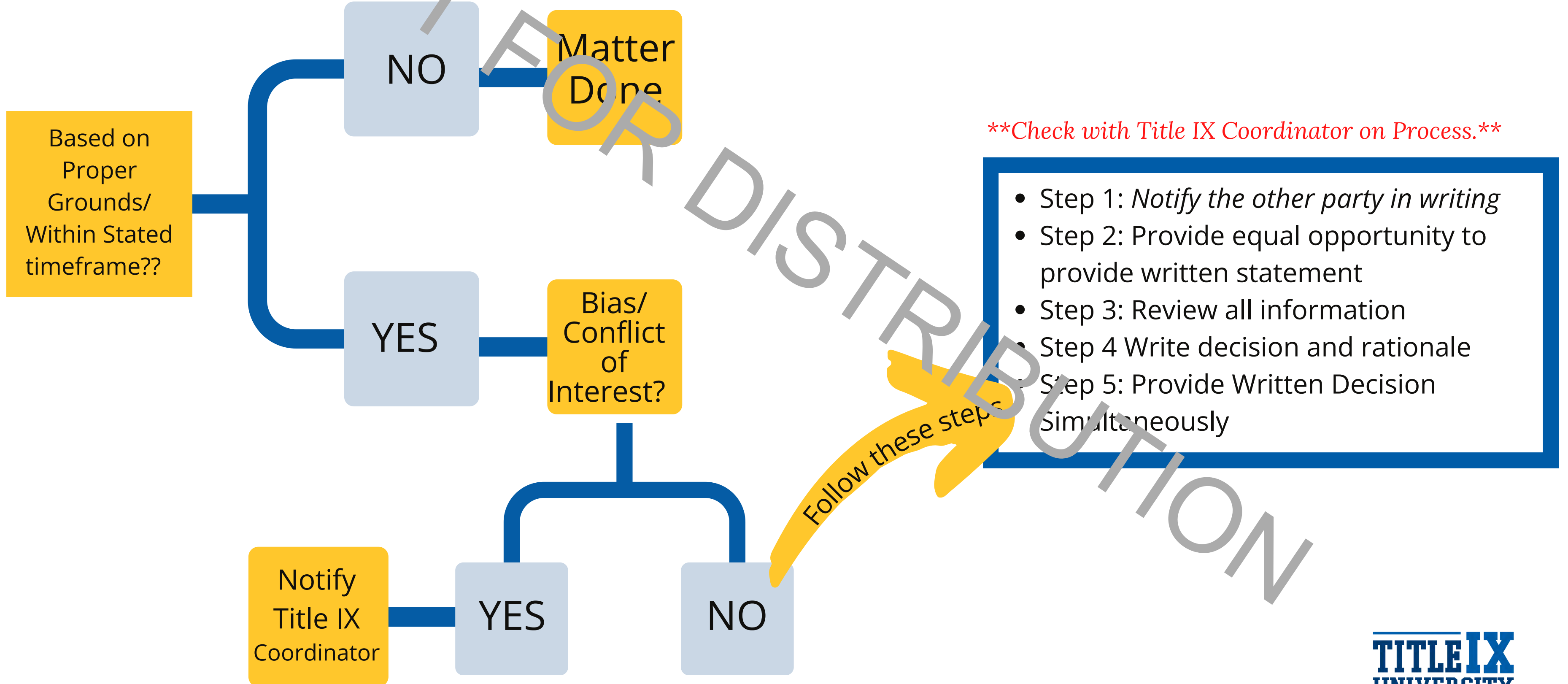
WRITTEN DECISION

- ▶▶ Appellate decision-maker must issue a written decision describing the result of the appeal and the rationale for the result
- ▶▶ Appellate decision-maker must provide the written decision simultaneously to both sides/parties
- ▶▶ Appeal information (and the entire Title IX file) must be maintained for at least 7 years

POSSIBLE OUTCOMES

- Uphold the entire determination made by the Decision-Maker
- Uphold a portion of the determination and overturn/remand a portion
- Overturn the determination made by the Decision-Maker in its entirety and/or remand
- Send the matter back to the Decision-Maker/Investigator/Title IX Coordinator for reconsideration due to new evidence/procedural error/conflict of interest/bias (remand)
- Overturn Formal Complaint Dismissal and remand back to Title IX Coordinator
- Any others dictated by your policy/procedure

ANALYSIS FOR APPEALS



Your Homework:

Get clarity on
your role

Templates/
forms

Bookmark and
Understand
policies/
procedures

Get to know
your Title IX
Coordinator

NOT FOR DISTRIBUTION



ANY QUESTIONS?





Upcoming Trainings

K-12

Higher-Ed

