

Title IX for Decision Makers

Presented by: Susan Scott, CTECS Legal Director



Required Training for Decision Makers

- Required reporting of sex discrimination and sexual harassment
- Definitions of sex discrimination and sexual harassment
- Scope of CTECS' education program and activity
- How to conduct an investigation
- How to serve impartially
- Issues of relevance
- Preponderance of evidence as the burden of proof

To Complete This Training

- Review Attorney Gwaina Wauldon's PowerPoint for Title IX Investigations
- Read CTECS Title IX Policy, entitled "Student Grievance Procedures for Sexual Harassment Pursuant to Title IX"
- Review the Checklist
- Review the Title IX Regulations, 34 C.F.R. Part 106

Reporting Sex Discrimination and Sexual Harassment

Title IX states:

“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.”

School Employees Must Report Bullying, Discrimination and Harassment

Any CTECS employee, independent contractor, or school volunteer who witnesses, receives a student report of, or otherwise becomes aware or has a reasonable belief that **bullying, discrimination, harassment, or retaliation** in violation of CTECS policies has occurred or may have occurred **must promptly notify the principal in writing.**

CTECS Employees Must Report Sexual Harassment

- Any CTECS employee with **knowledge** of sexual harassment allegations shall immediately report such information to the building principal and equity coordinator.
- If the employee does not work in a school building, reports shall be made to the District's Title IX Coordinator.
- **“Knowledge”** means that the employee has notice of sexual harassment or allegations of sexual harassment through means such as witnessing, receiving a report, or hearing about allegations.

Deliberate Indifference

- Once a school district has actual knowledge of sexual harassment, it must take steps to address it promptly and act in a way that is not deliberately indifferent to the alleged harassment
- A school district acts with deliberate indifference when the response to allegations of sexual harassment is clearly unreasonable in light of the known circumstances

Definitions of Sex Discrimination
and Sexual Harassment
and
the Scope of CTECS
Programs and Activities

Sex Discrimination is ...

Treating an individual or group differently **because of their sex** in a way that **interferes with or limits their ability to participate** in or benefit from a **program or activity of the school**.

Sex Discrimination and Scope of Education Programs and Activities

- admissions
- recruitment
- academic programs
- student treatment and services
- counseling and guidance
- discipline
- grading
- classroom assignment
- vocational education
- recreation
- physical education
- athletics

Sexual harassment is
a type of sex discrimination



Title IX Definition of Sexual Harassment

Conduct on the basis of sex that satisfies one of the following:

1. An employee of the district conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct
2. 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 district's education program or activity
3. Sexual assault, dating violence, domestic violence and/or stalking as defined by law. (See Appendix A of Student Grievance Procedures for Title IX Sexual Harassment)

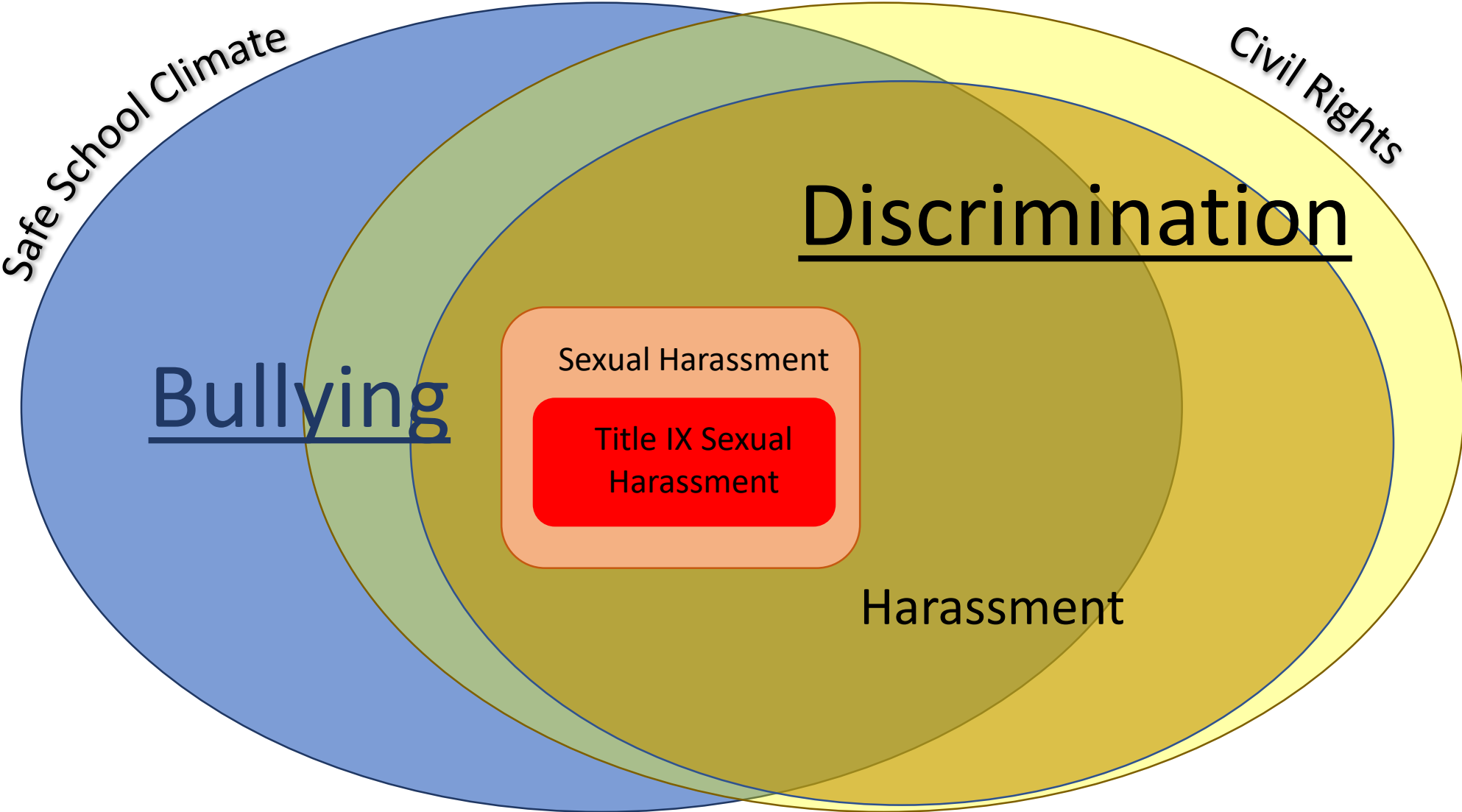
Defined in Appendix A of Policy

- Sexual Assault
 - Rape
 - Sodomy
 - Sexual assault with object
 - Fondling
 - Incest
 - Statutory Rape
- Dating Violence
- Domestic Violence
- Stalking
- Affirmative Consent

Scope of Education Program or Activity in context of Title IX Sexual Harassment

Locations, events or circumstances over which CTECS exercises **substantial control** over the respondent and the context in which the sexual harassment occurs.

Bullying, Discrimination and Harassment



Comparison of Definitions

Bullying	Discrimination	Sexual Harassment per Title IX	Sexual Harassment per State Law	Sexual Misconduct per CTECS Student Conduct Policy
<p>“Bullying” means an act that is direct or indirect and severe, persistent or pervasive, which</p> <p>(A) causes physical or emotional harm to an individual (B) places an individual in reasonable fear of physical or emotional harm, or (C) infringes on the rights or opportunities of an individual at school.</p> <p>“Bullying” shall include, but need not be limited to, a written, oral or electronic communication or physical act or gesture based on any actual or perceived differentiating characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression, socioeconomic status, academic status, physical appearance, or mental, physical, developmental or sensory disability, or by association with an individual or group who has or is perceived to have one or more of such characteristics</p>	<p>Treating an individual or group differently because of their protected status (e.g., race, disability, sex, etc.) in a way that interferes with or limits their ability to participate in or benefit from a program or activity of the school.</p> <p>Programs and activities include admissions, recruitment, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, athletics,” etc.</p>	<p>Conduct on the basis of sex that satisfies one of the following:</p> <ol style="list-style-type: none"> 1. An employee of the district conditioning the provision of an aid, benefit, or service on the individual’s participation in unwelcome sexual conduct. 2. 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 district’s education program or activity. 3. Sexual assault, dating violence, domestic violence and/or stalking. 	<p>Any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when</p> <ol style="list-style-type: none"> 1. submission to such conduct is made either explicitly or implicitly a term or condition of a student’s education, or participation in a CTECS program or activity, 2. submission to or rejection of such conduct is by an individual is used as the basis for decisions affecting such student’s education or participation in a CTECS program or activity, or 3. such conduct has the purpose or effect of substantially interfering with the student’s education or academic performance or of creating an intimidating, hostile or offensive educational environment. 	<p>Sexual Harassment/Sexual Battery/Other Sexual Misconduct including consensual sex on campus and dating violence on or off campus.</p> <p>Dating violence includes bullying, harassment and intimidation and any act of physical, emotional or sexual abuse, including stalking, harassing and threatening, that occurs between two students who are currently in or who have recently been in a dating relationship.</p> <p>Sexual harassment includes unwelcome sexual conduct that has the purpose or effect of creating a hostile working or learning environment;</p> <p>conduct that does not satisfy the definition of sexual harassment pursuant to Title IX may still qualify as sexual misconduct, bullying or discrimination under this policy;</p>

Conducting a Title IX Investigation

Things to Keep in Mind

- Make sure ALL staff aware of the responsibility to report sexual harassment
- Underlying principles: equitable, impartial, thorough, prompt
- Only a formal complaint is investigated
- Supportive measures provided to both Complainant and Respondent
- Once formal complaint filed, you cannot restrict either party from discussing the allegations freely with others
- Maintain confidentiality as much as possible but do not guarantee complete confidentiality
- Always notify CTECS' Title IX Coordinator, Christine Spak of sexual harassment allegations

Presumption of Non-Responsibility

- Respondent is presumed not responsible until process completed
- This means that you cannot discipline the Respondent for the alleged sexual harassment until the investigation is completed
- Removal: a Respondent may be removed from school if there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment. This requires notice and an opportunity to challenge
- If formal complaint is dismissed, you may address the alleged behavior in any manner deemed appropriate under the student code of conduct

Title IX Grievance Procedures Overview

- Report of sexual harassment is received and Equity or Title IX Coordinator explains process to Complainant
- Supportive measures
- District Title IX Coordinator
- Formal complaint
- Informal Resolution
- Investigation
- Decision
- Appeal

Supportive Measures

- Equity Coordinator must discuss the availability of supportive measures whether or not there is a formal complaint
- **Non-disciplinary**, non-punitive individualized services offered without fee to either the Complainant or Respondent
- Designed to restore or preserve equal access to the education program or activity without unreasonably burdening other party, including measures designed to protect the safety of all parties or to the school environment or to deter sexual harassment
- Document measures taken, offered, and accepted/rejected

Supportive Measures Include:

- Counseling
- Additional time to make up missed assignments due to harassment
- Ability to retake tests/assignments impacted by harassment
- Removal of negative grades
- Withdrawal from class without penalty
- Allowing a student to retake a test or class
- Modification to schedules
- Academic support or tutoring
- Separating the parties as much as possible during school day
- Increased supervision, security, monitoring

Notify the Title IX Coordinator

Title IX Coordinator will provide assistance in compliance with the procedures. Preliminary discussions may include:

- Does the Title IX policy apply to this conduct?
 - Program or activity over which we exercise substantial control over both the Respondent and the context in which the sexual harassment occurs?
 - Conduct occur in the US?
 - Complainant participating (or attempting to) in a CTECS program or activity?
- Does the alleged conduct fall within the definition of sexual harassment per Title IX?

Formal Complaint

- A document filed by a Complainant, the Complainant's parent or guardian or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the administration investigate the allegation of sexual harassment
- A “document filed by a Complainant” means a document or electronic submission that contains the Complainant's physical or digital signature, or otherwise indicates that the Complainant is the person filing the formal complaint
- Only a formal written complaint can lead to a Title IX investigation
- Minimum requirements of formal complaint incorporated into form

Title IX Coordinator and Formal Complaint

- The district's Title IX Coordinator is the only person empowered to sign a formal complaint without the Complainant's permission
- If the Title IX Coordinator signs a complaint over the objection of the individual subject to the alleged harassment
 - Student allegedly harassed becomes the Complainant
 - Complainant cannot be forced to participate in the investigation
 - All rules regarding access to information apply (so Respondent would be given the name of the Complainant)

Title IX Coordinator's Decision to Sign Complaint

- The Title IX Coordinator's decision to sign or not sign the formal complaint is subject to the deliberate indifference standard
- Title IX Coordinator's decision to sign a formal complaint is a means to ensure that school is not deliberately indifferent in response to sexual harassment
- Consideration should be given to the consequences of not signing a formal complaint, such as:
 - Alleged harassment may continue for the Complainant or others
 - Alleged harasser cannot be disciplined for a Title IX violation
 - Alleged harassment may be part of a more widespread problem

Dismissal of Formal Complaint by Title IX Coordinator

- Title IX Coordinator MUST dismiss formal complaint if:
 - Not constitute sexual harassment even if proved, or
 - Conduct did not occur in CTECS education program or activity, or
 - Conduct did not occur in the United States
- Title IX Coordinator MAY dismiss formal complaint if:
 - Receives written notice from Complainant of the desire to withdraw complaint
 - Respondent no longer enrolled or employed by CTECS
 - Specific circumstances prevent CTECS from gathering evidence sufficient to reach a determination as the allegations in the formal complaint

Timeframes

- Any timeframe in the procedures may be temporarily delayed or extended for good cause.
- Good cause may include, but is not limited to, considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity or the Department of Children and Families; or the need for language assistance or accommodation of disabilities.
- If any timeframe is altered on a showing of good cause, written notice will be provided to each party with the reasons for the action.

Informal Resolution

- CTECS can offer an informal resolution process for issues between students or between employees
- Before informal resolution, CTECS must provide the parties with a written notice disclosing:
 - The allegations
 - The requirements of the informal process including circumstances under which it would preclude a party from resuming the formal complaint process from the same allegations
 - Any party has a right to withdraw from the informal resolution at any time, and
 - Any consequences from engaging in the informal resolution process including whether records from it will be maintained and/or shared in the formal complaint process.
- Informal resolution process is NOT available for complaints that an employee harassed a student.

Investigation Elements

- Notice of Allegations
- Gathering evidence
- Reviewing evidence
- Investigation Report

Notice of Allegations

- Within ten (10) school days of receiving a formal complaint, the District will provide the known parties with **written notice** of the allegations of sexual harassment and a copy of the grievance process
- The written notice of allegations must be provided to the Respondent **at least a day prior to interviewing the Respondent**

Written notice must include the following:

- The identities of the parties involved in the incident, if known;
- The conduct allegedly constituting sexual harassment as defined above;
- The date and the location of the alleged incident, if known;
- A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process;
- A statement that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence;
- A statement of any provision in the District's Student Conduct and Discipline policy or any other policy that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Additional Notice

- If, in the course of an investigation, the district decides to investigate allegations about the Complainant or Respondent that are not included in the notice, the district must provide **notice of the additional allegations to the parties**

Gathering Evidence

- School has the burden to gather sufficient evidence to reach a determination (not the parties)
- Parties given equal opportunity to present witnesses and evidence. This opportunity includes presenting witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- School may not restrict the ability of parties to discuss allegations or gather relevant evidence
- Advisors may be present with party during interviews
- Parties entitled to written notice and time to prepare for meetings

Opportunity to Review Evidence

- Prior to the completion of investigative report, must provide Complainant and Respondent (and advisors) equal opportunity to inspect and review any evidence that is directly related to the allegations
 - Electronic or paper copy
 - Includes inculpatory and exculpatory evidence, from all sources
 - Parties must have at least 10 days to submit a written response
 - The investigator must consider the written responses prior to completion of investigative report

Investigation Report

- Investigator creates report that fairly summarizes relevant evidence
 - Summarize the facts (both disputed and undisputed)
 - Do not make determinations
 - Investigator may provide credibility determinations although the Decision Maker is not bound by those determinations
- The Complainant and the Respondent must have opportunity to review and respond to the investigation report

The Decision Maker

- The individual designated to issue a written determination regarding responsibility (decision) in a formal complaint following an investigation
- Usually the school Principal. If the Principal is not available, the Superintendent will appoint another district employee or third party contractor
- Cannot be the Investigator, Equity Coordinator or Title IX Coordinator
- Should not interfere with the investigator's investigation

Questions for Decision Maker

- Decision Maker receives the report from the investigator
- The Decision Maker must give each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers;
- Allow for additional, limited follow-up questions from each party

Decision Maker's Decision

Decision Maker simultaneously provides the parties (and their advisors) with a formal written determination regarding responsibility that must at a minimum:

- Identify the allegations of sexual harassment
- Describe the procedural steps taken to investigate
- Findings of fact
- Make conclusions re: the application of the Title IX policy to the facts
- State the rationale for the result as to each allegation
 - Determination regarding responsibility
 - Identify any disciplinary sanctions to be imposed
 - Identify whether remedies will be provided to the Complainant
- Inform the parties of the appeal process

Appeal

- Available to both parties
- Must be decided by a different Decision Maker
- Only bases for appeal:
 - 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; and
 - The Title IX Coordinator, Equity Coordinator, Investigator(s) or Decision Maker(s) 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.

How to Serve Impartially

Serving Impartially

Investigators, **Decision Makers**, Title IX coordinators, equity coordinators, informal resolution facilitators and appeals officers must:

- Be free from conflict of interest
- Be free from bias; and
- Be trained to serve impartially and without prejudging facts

Conflict of Interest

- A conflict of interest occurs when personal or private interests may compromise one's judgment, decisions, or actions.
- Conflicts of interests may arise from family, friendships, faculty/staff relationships, or other social factors.
- A conflict of interest that prevents you from participating impartially disqualifies you from the Title IX process
- Just knowing a party does not mean there is a conflict of interest
- Previously disciplining a party does not automatically mean there is a conflict of interest

Bias

- A bias is a tendency, inclination, or prejudice toward/against something or someone
- Bias can be conscious or unconscious, based upon stereotypes, societal norms or cultural perspective
- May relate to categories
 - A belief that female students are often subjected to sexual harassment that it's more likely that the female student is telling the truth
- May relate to specific student
 - The more you know about the Complainant or Respondent, the more you are likely to believe they behaved in keeping with how you perceive them to be
- May result from pressure from school community
 - Respondent is lead in the school play that is about to open
 - Respondent is star of the school football team
- To combat bias you must pay attention to your language, avoid generalizations, question your thinking, challenge your assumptions and listen

Facts are Friends



Avoid Prejudgment

- Keep an open mind throughout the process
- Wait to hear all of the facts - there are two or more sides to every story
- Seek out additional facts and/or witnesses if you feel yourself jumping to conclusions
- **Facts** are your friends
- Consider avoiding the use of phrases such as:
 - Just ignore it
 - It's just a joke
 - This is just part of growing up
 - It's just a prank
 - Nobody else ever complained about it
 - Boys will be boys or Girls will be girls
 - If we investigated every student that said a bad word, we would never be able to get any teaching done

Issues of Relevance

Relevant Evidence

- Is logically connected and tends to prove or disprove a matter in issue
- Has appreciable probative value – rationally tends to persuade people of the probability or possibility of some alleged fact
- Has the tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action
- Are facts that potentially describe or explain an event or incident alleged

Relevance in Investigation

- Rules of evidence do not apply in the investigation
- Investigator must evaluate all relevant evidence, whether inculpatory or exculpatory
- Material that is not relevant to the allegations in the complaint should not be included in the investigation report

Relevance in Decision

- The Decision Maker must give each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness
- Irrelevant evidence are facts that do not have the potential to describe or explain an incident alleged
- Irrelevant evidence includes sexual predisposition or prior sexual behavior of the Complainant
- Decision Maker must explain to the party submitting a question any decision to exclude a question as not relevant

Relevance of Sexual Predisposition or Prior Sexual Behavior (Rape Shield Protections)

Questions and/or evidence about the Complainant's sexual predisposition or prior sexual behavior are presumptively not relevant, unless they are offered under two limited exceptions:

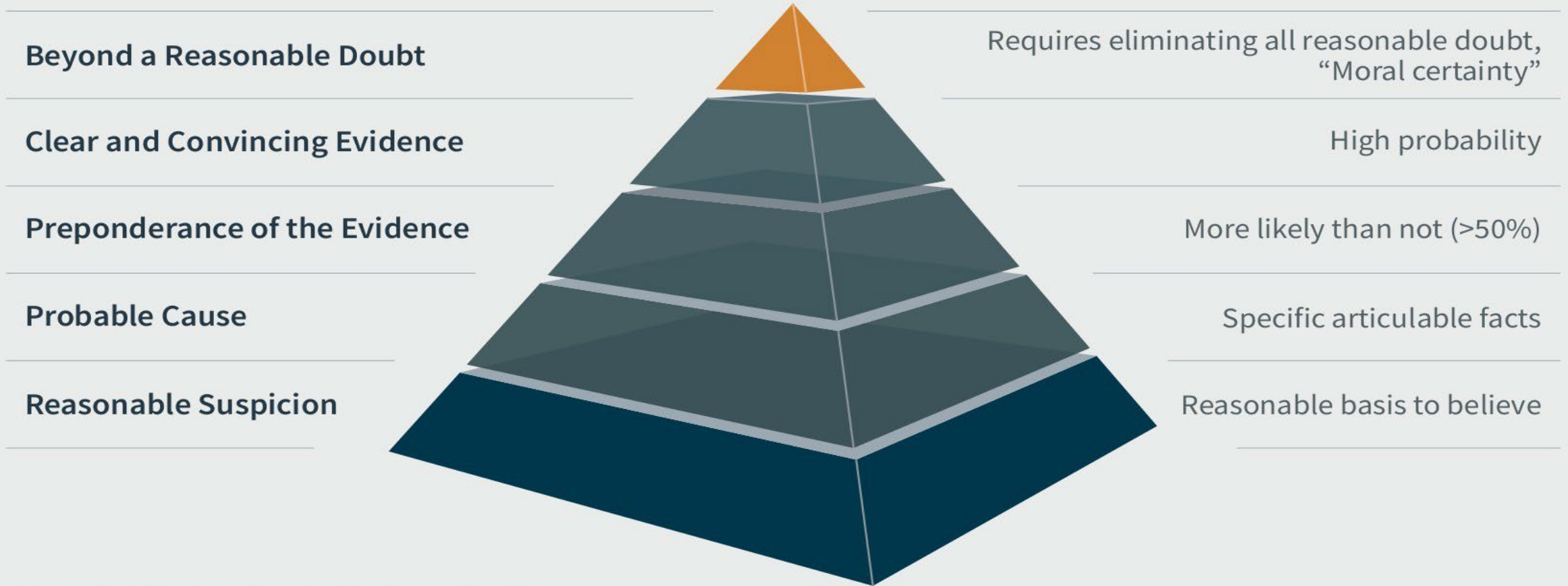
- The questions and evidence are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
- The questions and evidence relate to specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent
- These “rape shield” protections do not apply to the Respondent

Preponderance of Evidence as Burden of Proof

Preponderance of Evidence

- The standard of evidence used in determining responsibility (concluding whether CTECS Title IX policy was violated) is the preponderance of evidence
- A preponderance of evidence is described as “more likely than not” or “50% plus a feather”

BURDENS OF PROOF STANDARDS



Standards Vary by Type of Legal Matter

The more serious the consequences, the higher the standard of proof with fewer cases that meet the level of proof.

