



TITLE IX TRAINING SERIES

Legal Obligations and Roles©

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW

PREVIEW

1

Section One:
Title IX
Fundamentals

2

Section Two:
NCSBA Model
Policies

3

Section Three:
Title IX
Personnel

4

Section Four:
Additional
Compliance

5

Section Five:
Responding to
Allegations

6

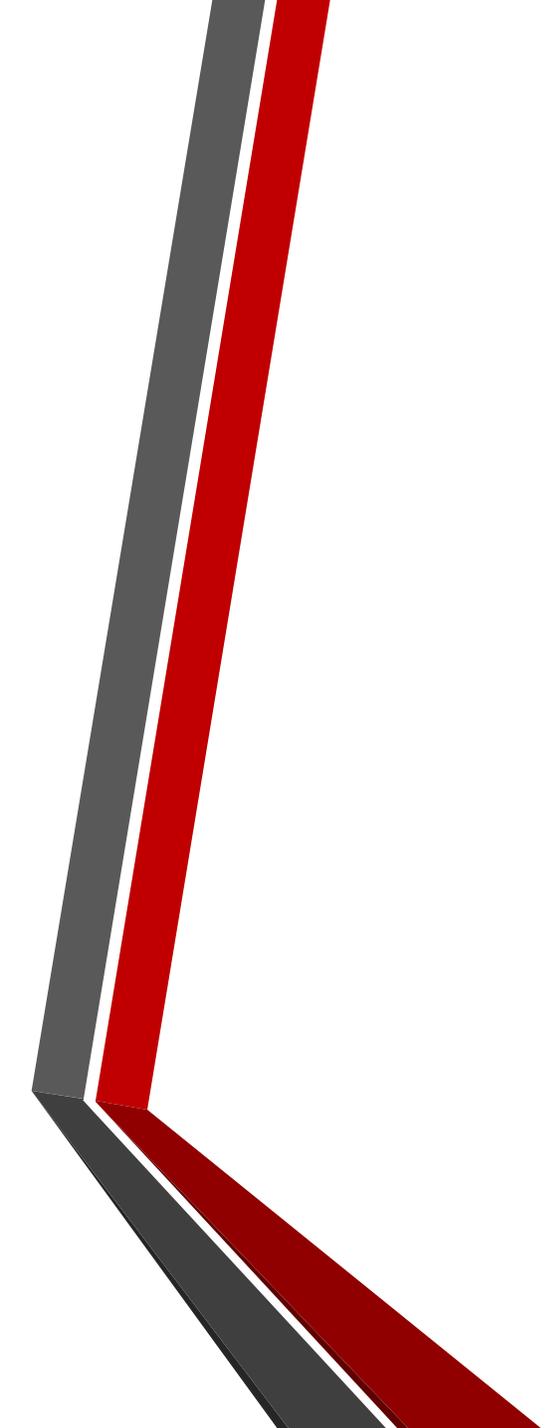
Section Six:
Investigations

7

Section Seven:
Hearings

8

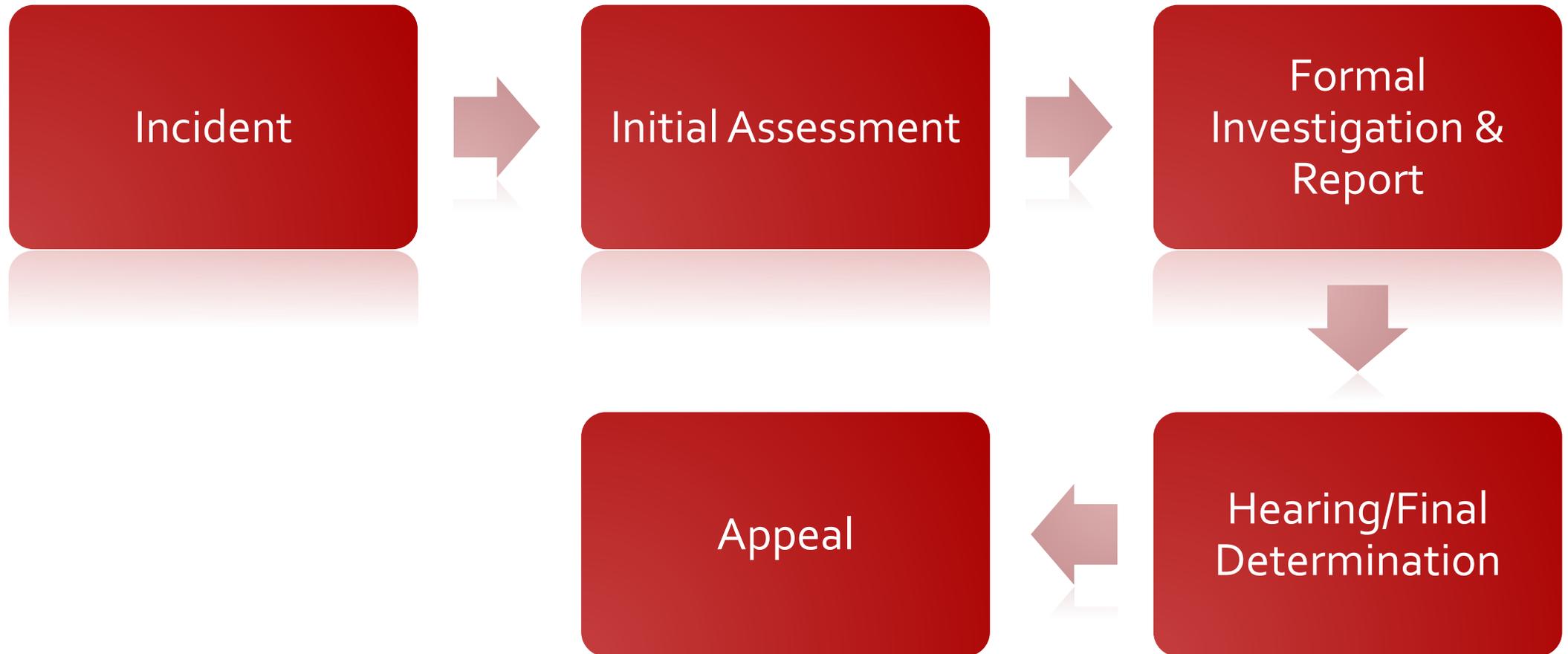
Section Eight:
Determinations
and Appeals



SECTION ONE

TITLE IX FUNDAMENTALS

THE PROCESS



TITLE IX OVERVIEW

- Title IX of the Education Amendments of 1972 is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities.
- All public and private elementary and secondary schools, colleges and universities receiving any federal financial assistance must comply with Title IX.
- The United States Department of Education Office for Civil Rights (OCR) is the entity responsible for monitoring compliance with Title IX.

SEX-BASED DISCRIMINATION

- What is sex-based discrimination?
 - The term is not defined in Title IX.
 - “The Department follows the Supreme Court’s approach in interpreting conduct ‘on the basis of sex’ to include conduct of a sexual nature or conduct referencing or aimed at a particular sex.”

A BRIEF HISTORY OF GUIDANCE

- OCR periodically explains its interpretation of Title IX, by issuing official guidance documents, Q&As, and “Dear Colleague” letters.
- Timeline of recent guidance:
 - January 2001: Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties
 - July 2003: First Amendment: Dear Colleague
 - January 2006: Dear Colleague – Sexual Harassment Issues
 - April 2011: Dear Colleague – Sexual Violence
 - April 2014: Q&A Title IX Sexual Violence
 - September 2017: Q&A Campus Sexual Misconduct

REGULATIONS V. GUIDANCE

- Timeline of recent guidance:
 - January 2001: Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties
 - July 2003: Dear Colleague – First Amendment
 - January 2006: Dear Colleague – Sexual Harassment Issues
 - ~~April 2011: Dear Colleague – Sexual Violence~~
 - ~~April 2014: Q&A Title IX Sexual Violence~~
 - ~~September 2017: Q&A Campus Sexual Misconduct~~
 - May 2020: Regulations/Final Rule
 - September 2020: Q&A Regarding the Final Rule

TITLE IX'S FINAL RULE

- November 29, 2018 – Secretary DeVos announces intention to restructure Title IX
- November 29 – January 30 – Public comment period
- May 6, 2020 – Final Title IX rules announced
- August 14, 2020 – Effective/implementation date

WHAT CONDUCT IS COVERED?

- Allegations of *sexual harassment* that occur in an *education program or activity* located within the United States and of which the recipient has *actual knowledge*.
- If a person alleges misconduct that fits in the above description, institutions have a duty to respond. The Title IX Final Rule sets out your legal obligations in responding to such allegations.



KEY DEFINITIONS

- *Actual Knowledge* – notice of allegations of sexual harassment by the Title IX Coordinator or any other school employee.
- *Sexual Harassment - quid pro quo* harassment; unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity, including conduct based on sex stereotyping; or any instance of sexual assault, dating violence, domestic violence, or stalking.
- *Education Program or Activity* – any locations, events, or circumstances over which the school exercised substantial control over a Respondent and the context in which the alleged sexual harassment occurs, including any building owned or controlled by a recognized student organization.

SEXUAL HARASSMENT DEFINITION

- Quid pro quo harassment – conditioning the provision of an aid, benefit, or service of the school on a person’s participation in unwelcome sexual conduct
- Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity, including conduct based on sex stereotyping
- Sexual assault, as defined in federal law, or dating violence, domestic violence, or stalking as defined in federal law

SEXUAL HARASSMENT DEFINITION

Does *quid pro quo* harassment need to be severe, pervasive, and objectively offensive? How about criminal offenses?

- No. Only the “unwelcome conduct” prong of the sexual harassment definition must be severe, pervasive, and objectively offensive.

SCOPE: EDUCATION PROGRAM OR ACTIVITY

- “Education Program or Activity”
 - All locations, events or circumstances over which the district exercised substantial control over both the Respondent and the context in which the harassment occurs
 - Includes: Field trips, virtual learning, school buses, athletic events

ADDITIONAL DEFINITION S

- Report
 - A verbal or written notification that a person is an alleged perpetrator or victim of sexual harassment.
- Formal Complaint
 - A document signed by a Complainant or Title IX Coordinator alleging sexual harassment and requesting that school officials investigate the allegations.
- Complainant
 - The person who is alleged to be the victim of sexual harassment.
- Respondent
 - The person who has been reported to be the perpetrator of alleged sexual harassment.

HYPOTHETICAL

- An anonymous student writes “Teacher Doe likes female students” on the mirror of the girl’s bathroom in your middle school. Jane sees the message, takes a photo of it, and posts the picture on her private Facebook account. Sue sees the photo on Facebook and shows her mom, who is an elementary school teacher in the same district. Sue also says the bathroom message repeats a rumor going around the middle school that Teacher Doe has had inappropriate sexual relationships with multiple students.
- **Does the district have actual knowledge of alleged sexual harassment under Title IX?**

HYPOTHETICAL

- A male student sends sexually explicit text messages to a female student using his personal cell phone and school-issued laptop. Both students are participating in “remote” learning due to the 2020 pandemic and the social media exchanges occur during class time and outside of school hours. The female student initially responds but then starts to feel uncomfortable and tells the male student to stop texting her.
- The female student reports the male student’s conduct to her teacher one week later. The teacher remembers that one month ago, two other female students reported similar behavior about the same male student, and he goes to the Assistant Principal for advice on how to handle the matter.
- **What should the Assistant Principal do?**
- **Does this situation occur in an education program or activity under Title IX?**

WHAT ABOUT ONLINE CONDUCT?

“Education program or activity” encompasses all of a recipient’s operations, which may include internet networks, digital platforms, and computer equipment owned or controlled by the recipient. Sexually harassing conduct is not contingent on the method by which the conduct is perpetrated.

RETALIATION IS PROHIBITED

- Individuals, schools, and districts may not intimidate, threaten, coerce, or discriminate against an individual
 - for the purpose of interfering with their Title IX rights; or
 - because the individual filed a complaint, testified, participated, or refused to participate in a Title IX proceeding.
- The exercise of First Amendment rights does not constitute retaliation.

MISCONDUCT
THAT
MAY BE IN
OTHER
BOARD
POLICIES

- Bullying/Cyberbullying
- Hazing
- Threatening Physical Harm
- Discrimination and Harassment in the Workplace

HYPOTHETICAL

- Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages. One of the student's teachers and an athletic coach witnessed the name calling and identified it as hazing that new students sometimes experience. They also noticed the new student's anxiety and declining class participation.
- **How should the school attempt to resolve the situation?**

COVERED GROUPS

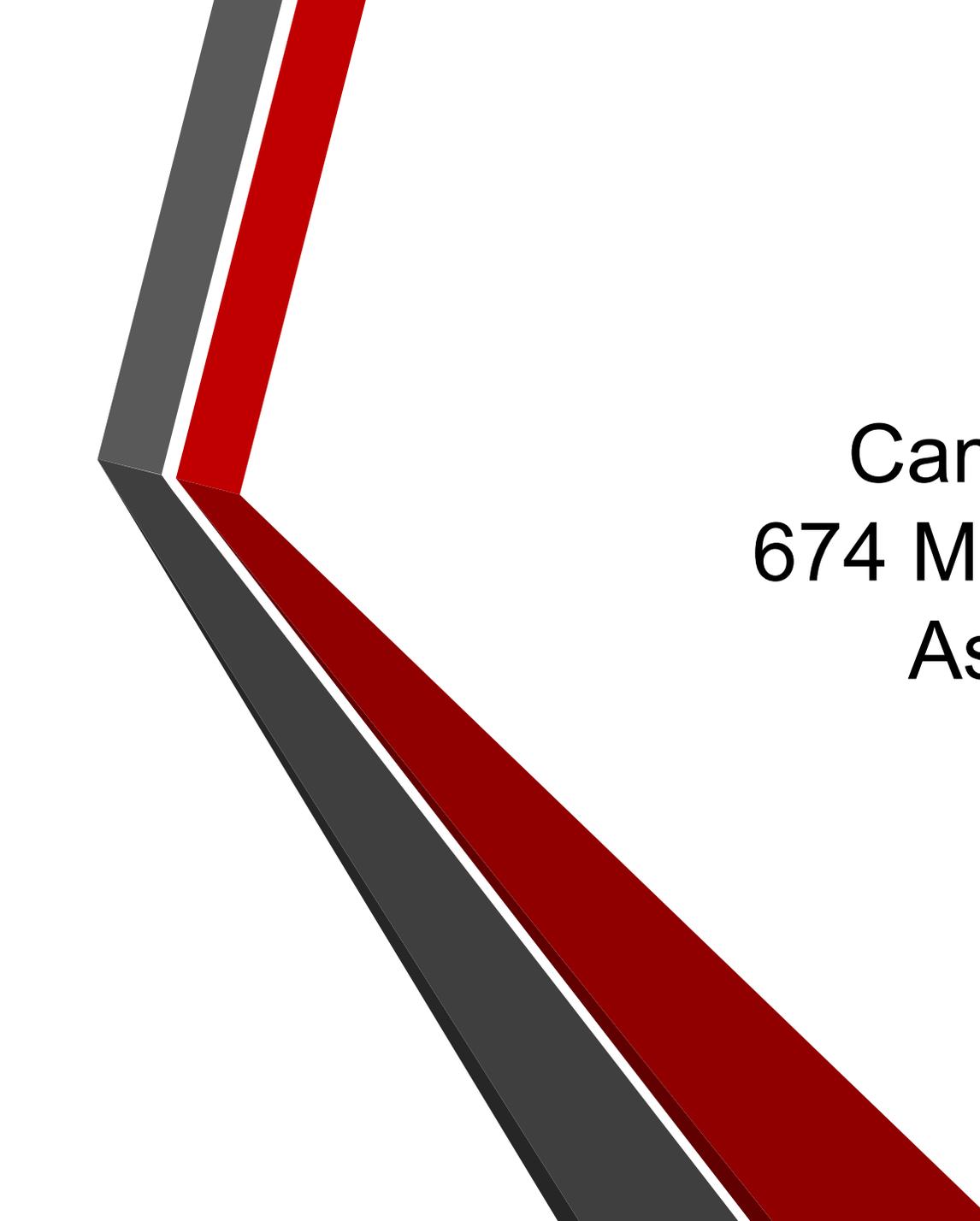
- What groups are covered under Title IX?
 - Student-on-Student
 - Employee-on-Student
 - Employee-on-Employee
 - Applicants for admission and employment
 - Student organizations
 - Third parties participating in an education program or activity
- A school's obligation to respond appropriately to Title IX complaints is the same irrespective of the sex of the parties involved.

DOES IT MATTER IF THE PERSONS ARE THE SAME SEX?

- No
- Title IX and Title VII protect all covered persons from discrimination based on sex regardless of the sex, gender identity, or sexual orientation of the individuals involved.
- Claims of discrimination based on gender identity are investigated by OCR.

DO STUDENTS WITH DISABILITIES NEED SPECIAL CONSIDERATION?

- Yes
- Reasonable accommodations may need to be made in the event of an informal resolution or formal grievance process.



Campbell Shatley, PLLC
674 Merrimon Ave., Suite 210
Asheville, NC 28804
(828) 398-2776

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW



TITLE IX TRAINING SERIES

Legal Obligations and Roles©

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW

PREVIEW

1

Section One:
Title IX
Fundamentals

2

Section Two:
NCSBA Model
Policies

3

Section Three:
Title IX
Personnel

4

Section Four:
Additional
Compliance

5

Section Five:
Responding to
Allegations

6

Section Six:
Investigations

7

Section Seven:
Hearings

8

Section Eight:
Determinations
and Appeals



SECTION TWO

NCSBA MODEL POLICIES

NEW POLICIES AND REGULATIONS

- Discrimination and Harassment Prohibited by Federal Law (1710/4020/7230)
- Title IX Nondiscrimination on the Basis of Sex (1720/4030/7235)
- **Title IX Sexual Harassment – Prohibited Conduct and Reporting Process (1725/4035/7236)**
- Title IX Sexual Harassment – Definitions (1725/4035/7236-R)
- **Title IX Sexual Harassment Grievance Process (1726/4036/7237)**
- Bullying and Harassing Behavior Prohibited (4329/7311)
- Discrimination and Harassment in the Workplace (7232)



RATIONALE FOR NEW POLICIES

- Three of the new policies implement Title IX obligations
- Two of the new policies address the Board's obligations under other federal nondiscrimination laws
- One policy addresses the Board's obligation to prohibit bullying and harassment under state law

New Policy	Policy Title	Notes
1710/4020/7230	Discrimination and Harassment Prohibited by Federal Law	Prohibits discrimination and harassment based on characteristics protected by federal law, including race, color, national origin, religion, and disability, but excluding sex. Provides a reporting and investigative process for complaints of policy violations
1720/4030/7235	Title IX Nondiscrimination on the Basis of Sex	Declares the Board's policy of nondiscrimination on the basis of sex in the programs and activities of the school system. Certain elements of this policy must be posted online and included in student and employee handbooks
1725/4035/7236	Title IX Sexual Harassment – Prohibited Conduct and Reporting Process	Required to comply with the Board's obligation not to discriminate on the basis of sex. Prohibits sexual harassment and provides a reporting process and response protocol to meet the Title IX Final Rule requirements
1726/4036/7237	Title IX Sexual Harassment Grievance Process	Provides a grievance process for resolving formal complaints of sexual harassment that complies with the Title IX Final Rule requirements
4329/7311	Bullying and Harassing Behavior Prohibited	Satisfies the Board's obligation under G.S. 115C-407.16 to have a policy prohibiting bullying and harassing behavior. Some conduct overlaps with conduct prohibited by the other new policies; in such circumstances, school officials must first evaluate the conduct under the more specific policies that address federal law before applying this policy
7232	Discrimination and Harassment in the Workplace	Addresses federal laws that prohibit discrimination in employment. Some conduct that does not violate Title IX may violate this policy

UPDATED AND REPEALED POLICIES

- Nondiscrimination on the Basis of Disabilities (1730/4022/7231)
- Staff-Student Relations (4040/7310)
- Assaults, Threats, ~~and Harassment~~ (4331)
- School-Level Investigations (4340)
- ~~Prohibition against Discrimination, Harassment, and Bullying~~
(1710/4021/7230)
- ~~Discrimination, Harassment, and Bullying Complaint Procedure~~
(1720/4015/7225)

UPDATED POLICY	POLICY TITLE	NOTES
1730/4022/7231	Nondiscrimination on the Basis of Disabilities	Updated to refer to new policies and cross references
4040/7310	Staff-Student Relations	Updated to refer to new policies and cross references
4331	Assaults, Threats, and Harassment	Removes harassment and cyberbullying provisions because those topics are more thoroughly addressed in new Board policies
4340	School-Level Investigations	Makes necessary changes to be consistent with new Title IX policies
1710/4021/7230	Prohibition against Discrimination, Harassment, and Bullying	Superseded by new policies
1720/4015/7225	Discrimination, Harassment, and Bullying Complaint Procedure	Superseded by new policies

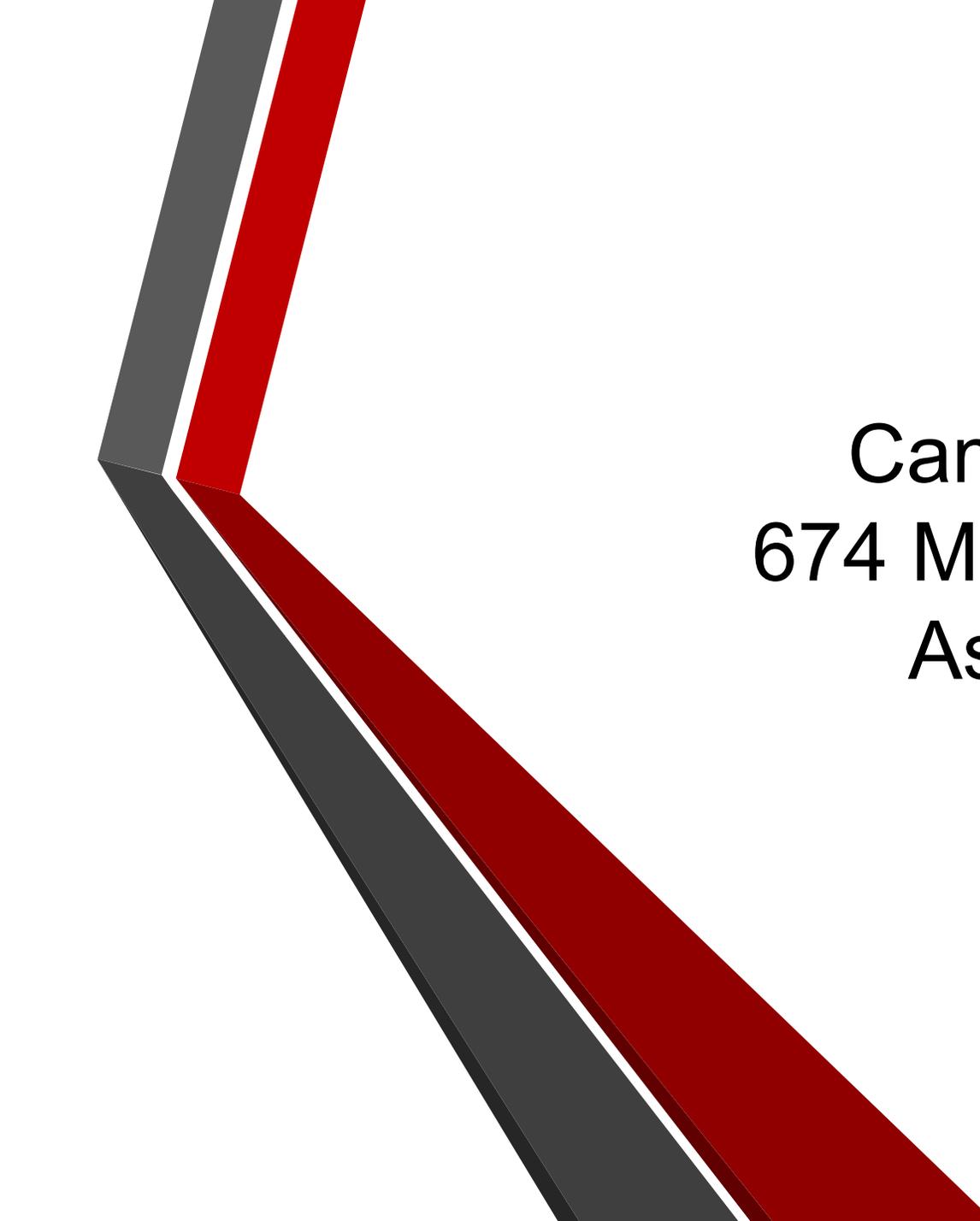
PRACTICAL EFFECTS OF POLICY CHANGES

- A uniform process for reporting, investigating, and decision-making for all forms of discrimination, harassment, and bullying is no longer possible.
- The Title IX grievance process for investigating and resolving formal complaints may only be used for complaints of sexual harassment that meet the Title IX standard.
- The definition of sexual harassment under Title IX is different than under the federal law that prohibits sexual harassment in employment – some conduct that does not violate Title IX may constitute sexual harassment under Title VII.

New Policy	Whose Conduct is Prohibited?	Who is Protected?	Who can make a Report?	Who can file a Complaint?	What triggers an Investigation?	Appeals	Notes
Discrimination & Harassment Prohibited by Federal Law 1710/4020/7230	Students, employees, and others are prohibited from discrimination and harassment based on race, color, national origin, religion, or disability	Anyone participating in an education program of activity	Anyone	<ul style="list-style-type: none"> Students Employees should use policy 7232 Visitor complaints should use policy 1742/5060 	<ul style="list-style-type: none"> Written complaints must be investigated A preliminary inquiry is required for reports; reports may be investigated if warranted 	<ul style="list-style-type: none"> Alleged victims may appeal to the Superintendent Student victims may appeal Superintendent's decision to the Board under Policy 1740/4010 	Superintendents must establish training on this Policy and maintain records of training conducted
Title IX Sexual Harassment – Prohibited Conduct and Reporting Process 1725/4035/7236	Students, employees, and others are prohibited from harassment based on sex	Anyone participating in an education program of activity	Anyone	N/A – complaints are filed under 1726/4036/7237	Investigation of reports is not permitted	N/A	<ul style="list-style-type: none"> Discipline may not be imposed based on a report Must provide supportive measures in response to a report
Title IX Sexual Harassment Grievance Process 1726/4036/7237	This policy provides a process for policy 1725/4035/7236	Anyone participating in an education program of activity	N/A	<ul style="list-style-type: none"> Victims who are attempting to/participating in an education program or activity Title IX Coordinator 	A formal written complaint	Parties may appeal Title IX Coordinator's dismissal of complaint or decision-maker's determination to the Board	Superintendents must ensure Principals provide a copy of this policy to students, parents, employees, and applicants
Bullying and Harassing Behavior Prohibited 4329/7311	Students, employees, and others are prohibited from engaging in bullying or harassing behavior	<ul style="list-style-type: none"> Students Employees are protected from some conduct 	Anyone	Anyone	Serious violations and complaints – what is "serious" is at the school officials' discretion	No appeal right in policy	Policy must be provided to employees, students, and parents at each school year AND be included in Student Codes of Conduct and student/employee handbooks. Employee training programs must include information about this policy
Discrimination and Harassment in the Workplace 7232	Employees are prohibited from discrimination and harassment based on race, color, national origin, religion, disability, military affiliation, genetic information, age, or certain state law grounds	Employees and applicants for employment	Employees and applicants	Employees and applicants	Written complaints must be investigated; reports may be investigated	No appeal right in policy	The definition of sexual harassment in this policy is different than in policy 1725/4035/7236

NCSBA MODEL POLICY 1726/4036/7237

- Title IX does not require “live” hearings in K-12 settings.
- Provides parties an opportunity to request a Title IX “live” hearing in cases where the respondent is a student.
- Campbell Shatley revisions to policy 1726/4036/7237 do not provide for a Title IX hearing.



Campbell Shatley, PLLC
674 Merrimon Ave., Suite 210
Asheville, NC 28804
(828) 398-2776

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW



TITLE IX TRAINING SERIES

Legal Obligations and Roles©

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW

PREVIEW

1

Section One:
Title IX
Fundamentals

2

Section Two:
NCSBA Model
Policies

3

Section Three:
Title IX
Personnel

4

Section Four:
Additional
Compliance

5

Section Five:
Responding to
Allegations

6

Section Six:
Investigations

7

Section Seven:
Hearings

8

Section Eight:
Determinations
and Appeals



SECTION THREE

KEY TITLE IX PERSONNEL

KEY TITLE IX PERSONNEL

- Title IX Coordinator
- Investigators
- Advisors
- Decision-makers
- Appeal decision-makers
- Informal Resolution Facilitators

TITLE IX COORDINATOR

- Title IX Coordinator
 - A Title IX Coordinator's core responsibilities include overseeing the district's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints.
 - **This means that the Title IX Coordinator must have knowledge of the requirements of Title IX, of the district's own policies and procedures on sex discrimination and of all complaints raising Title IX issues throughout the district.**

TITLE IX COORDINATOR

- Coordinate the district's duty to PREVENT / INVESTIGATE / REMEDY
 - ensure policy / grievance procedures are updated
 - ensure notices are given to staff and students
 - ensure formal complaints are investigated
 - ensure appropriate steps to prevent immediate harm
 - ensure investigators are appointed and trained
 - ensure decision-makers are appointed and trained
 - ensure that appeals officers are appointed and trained
 - ensure proper record keeping
 - ensure proper interaction with law enforcement

INVESTIGATOR S

Can be anyone, but must not be someone with a conflict of interest, bias, or preconceived notion of the issue and/or parties

NCSBA Model Policy: Principal or HR

Must be trained in how to conduct a Title IX investigation

Must be trained in how to create an investigation report, including issues of relevance

DECISION-MAKERS

- Again, can be anyone, but must not be someone with a conflict of interest, bias, or preconceived notion of the issue and/or parties
 - NCSBA Model Policy: Superintendent or designee
- Must be trained in issues of relevance of questions and evidence

APPEAL DECISION-MAKERS

- Model Policy provides that the Board (or a panel of the Board) is the Appeal Decision-Maker.
- Appeal decision-makers should be well-versed in the district's Title IX policy, including the bases for appeal and the available options on appeal.

ADDITIONAL TITLE IX PERSONNEL

Advisors

- Can be anyone
- May attend/be present at all stages of a formal grievance process or informal resolution
- May only participate during a hearing if your district provides Title IX live hearings
- District does not have to provide Advisors, but may do so.

Facilitators of Informal Resolutions

- Can be anyone, except other Title IX personnel
- Does not have to be a district employee
- Should have good negotiating skills
- Should have a basic understanding of the Title IX framework

BIAS, CONFLICTS OF INTEREST, AND RECUSALS

- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
 - Pre-determined outcome
 - Partisan approach by investigators in questioning, findings, or report
 - Partisan approach by decision-maker in questioning, findings, or sanction
 - Intervention by senior-level officials
 - Improper application of policies or procedures
 - Confirmation bias
 - Implicit bias
 - Animus of any kind

TRAINING FOR EMPLOYEES

- Who is the Title IX Coordinator?
- Training for those employees who participate in Title IX matters (Key Title IX personnel).
- All employees should know where to direct students or employees who want to make a Title IX report or complaint.

TITLE IX TRAINING FOR TITLE IX PERSONNEL

- Annual training must be provided to Title IX Coordinators, investigators, decision-makers, and those involved in informal resolution.
- Training in the following topics is mandatory:
 - The definition of sexual harassment for Title IX purposes
 - The scope of education programs and activities
 - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution
 - How to serve impartially
 - Technology to be used at hearings
 - Issues of relevance of questions and evidence at hearings
 - Issues of relevance in creating investigation reports



COMPLIANCE REQUIREMENTS

All training materials must be posted on district websites.



SECTION FOUR

TITLE IX ADDITIONAL COMPLIANCE REQUIREMENTS

MAINTAINING RECORDS

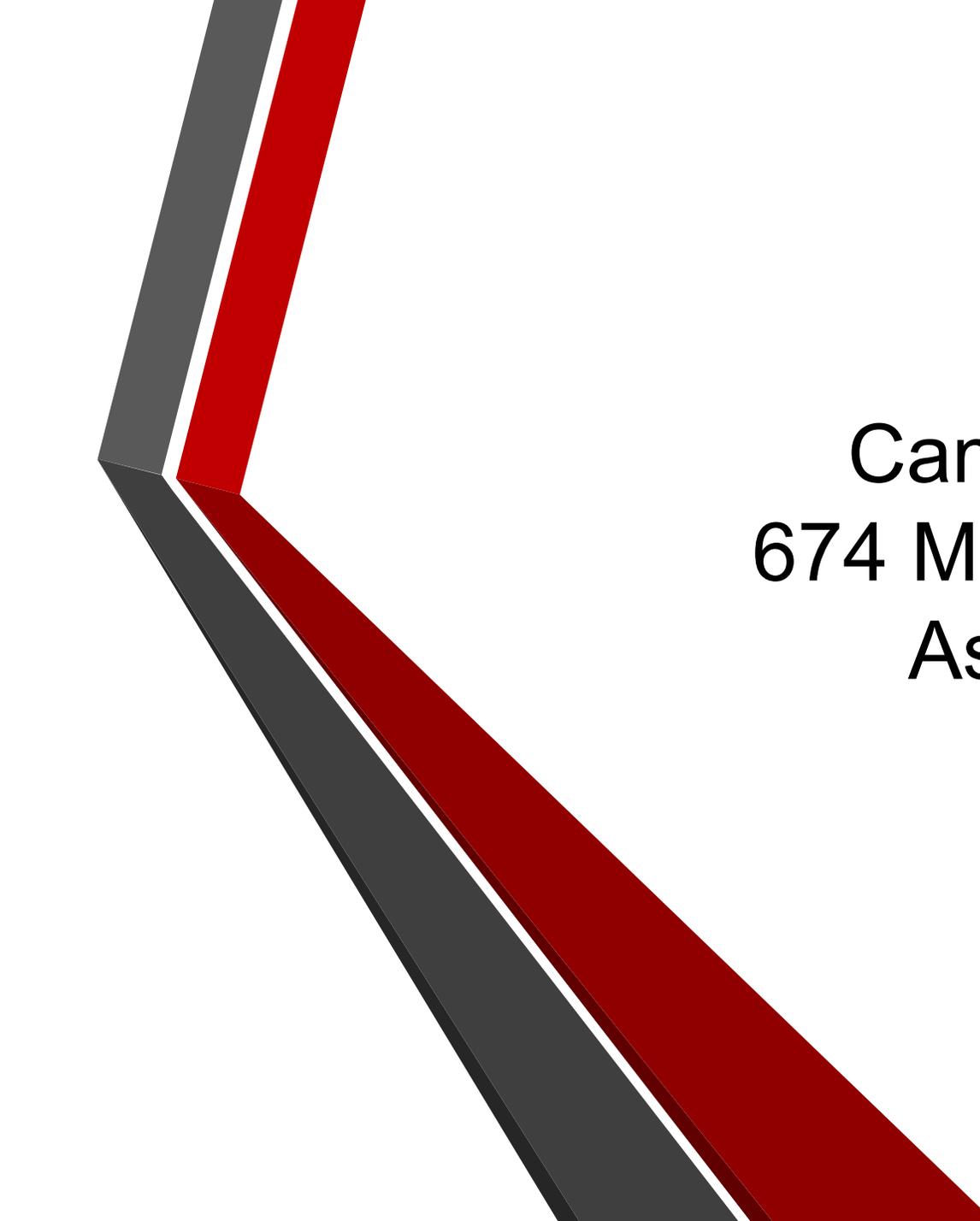
- Reports and Formal complaints, including the basis for why the institutional response was not deliberately indifferent;
- Any actions taken in response to the report or formal complaint, including any supportive measures implemented;
 - If supportive measures were not provided, reasons for why that was not clearly unreasonable in light of the known circumstances and
 - Records must show measures taken are designed to restore or preserve equal access to education programs and activities
- Investigation records, such as investigator notes, documentary evidence collected, and the investigative report;
- Written determinations, sanctions, and remedies;
- Any recordings or transcripts from any live hearings;
- Appeals;
- Informal resolutions; and
- Training materials.

WHERE CAN STUDENTS/PARENTS FIND THIS INFORMATION?

- District Policy
- District website and all student and employee handbooks:
 - A statement of the district's policy of nondiscrimination on the basis of sex
 - Title IX Coordinator's contact information
 - A statement that Title IX inquiries may be referred to the Title IX Coordinator or to the Assistant Secretary for Civil Rights

DISTRICT WEBSITE

- The district does not discriminate on the basis of sex in its education programs or activities and is required by Title IX of the Education Amendments Act of 1972 and federal regulations to not discriminate in such a manner. This requirement extends to admission and employment.
- Inquiries about the application of Title IX and its implementing federal regulations may be referred to the Title IX Coordinator and/or the Assistant Secretary for Civil Rights in the Office for Civil Rights at the U.S. Department of Education.
- The Title IX Coordinator's contact information is: _____.
- All training materials.



Campbell Shatley, PLLC
674 Merrimon Ave., Suite 210
Asheville, NC 28804
(828) 398-2776

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW



TITLE IX TRAINING SERIES

Legal Obligations and Roles©

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW

PREVIEW

1

Section One:
Title IX
Fundamentals

2

Section Two:
NCSBA Model
Policies

3

Section Three:
Title IX
Personnel

4

Section Four:
Additional
Compliance

5

Section Five:
Responding to
Allegations

6

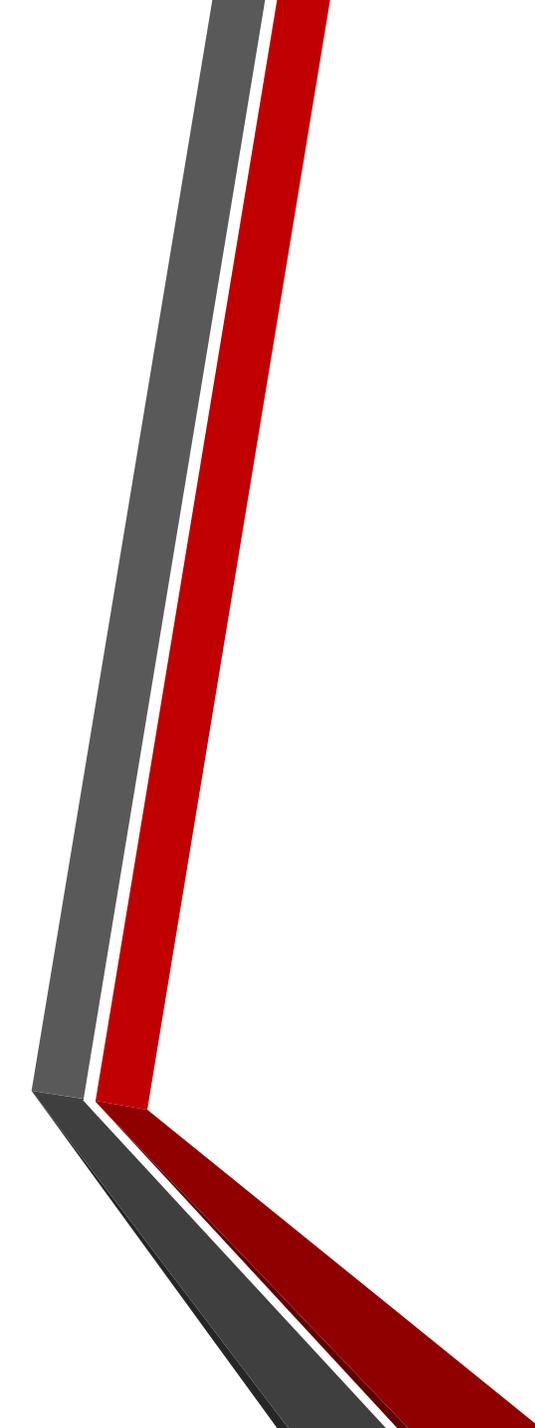
Section Six:
Investigations

7

Section Seven:
Hearings

8

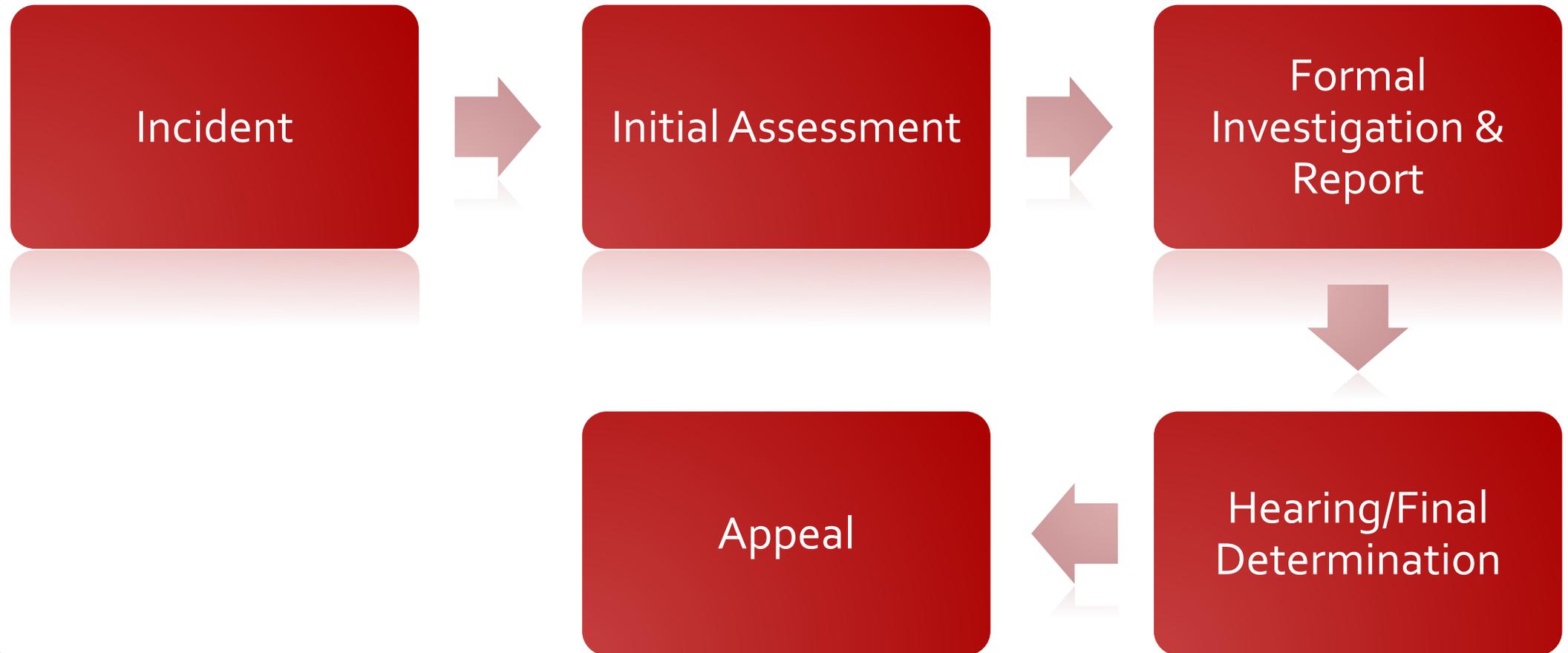
Section Eight:
Determinations
and Appeals



SECTION FIVE

RESPONDING TO ALLEGATIONS

THE PROCESS



WHEN TO ACT

- When a district has “actual knowledge” of possible sexual harassment, it must undertake immediate and appropriate steps to offer supportive measures and determine if an investigation is required or requested.
- The district will be deemed to have actual knowledge if the Title IX Coordinator or any school employee has notice of allegations of sexual harassment.
- District must not be “deliberately indifferent.”

WHEN TO ACT: MANDATORY REPORTING

- **All employees must report incidents or reports of sexual harassment**
- Who should report be made to?
 - Student: Principal, and/or directly to the Title IX Coordinator
 - Employee: HR Director, and/or directly to the Title IX Coordinator
- How long?
 - Immediately upon receiving a report of sexual harassment
- What about school counselors?

WHEN TO ACT

- Other sources of notice:
 - Community: social media, print/television, community members.
 - “Credible reports” of sexual harassment, particularly a pattern of acts against multiple students.
 - “Widespread, openly practiced, or well-known” among students/employees.

HYPOTHETICAL #1

Mr. Doe is a high school teacher. After class one of Mr. Doe's students approaches him and begins to explain that another student in the classroom has repeatedly made sexual comments to her in his classroom, during swim practice and through snapchat online after school that make her feel uncomfortable and bullied. She asks Mr. Doe to keep this information confidential because the swim team has a big meet coming up.

Does the school district have actual knowledge under Title IX?

What should the teacher do in this situation?



ACTING v. INVESTIGATING

- Title IX Coordinator's Immediate Steps (within three days of report):
 - Communicate with individual who reported conduct/complainant
 - Notify Principal and if necessary, HR
 - Offer and implement supportive measures
 - Share district policy and procedure and explain formal grievance process
 - Determine whether allegations fall within Title IX Policy
 - Document, document, document!

HYPOTHETICAL #2

- A Principal learns that a male student has complained that a female student has been sending sexually explicit text messages to him. The male student reported that the text messages make him feel uncomfortable and he doesn't want to come to class because the female student is in the same class.
- The Principal talks to the female student, who admits the conduct, and the Principal suspends the female student for two school days.
- One week later, the male student's parent contacts the Principal and states the school has not done enough under Title IX to remedy the situation. The parent wants to file a Formal Complaint on behalf of her son.

As the Principal, what should you do?

SUPPORTIVE MEASURES

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint, or where no formal complaint has been filed.

- Counseling
- Mental health services referral
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Escort services
- Mutual restrictions on contact between the parties
- Changes in work locations
- Leaves of absence
- Increased security and monitoring

WHEN TO INVESTIGATE

- Do the allegations as stated constitute a violation of district policy? (including whether the alleged conduct occurred in an education program or activity, located within the US, of which the district has actual knowledge)
 - If yes, does Complainant want to pursue a formal investigation?
 - If yes Investigate.
 - If no Are the allegations of the type that the district must investigate regardless of Complainant's wishes?

WHEN TO INVESTIGATE

- Factors to consider if a Complainant does not want an investigation:
 - The more serious the conduct, the higher need to investigate (e.g., one instance of rape).
 - The more frequent the conduct, the higher the need to investigate (e.g., widespread behavior against multiple victims).

FORMAL COMPLAINTS

- May only be initiated/submitted by Complainant or Title IX Coordinator.
- Should include:
 - Name and address of Complainant and parent/guardian
 - Description of alleged sexual harassment
 - Request to investigate
 - Signature of Complainant or parent/guardian

CONSOLIDATION OF FORMAL COMPLAINTS

- Provided the allegations arise out of the same facts or circumstances, schools are permitted to consolidate formal complaints that are:
 - Against more than one respondent
 - By more than one complainant against one or more respondents
 - By one party against the other party

EMERGENCY REMOVAL

- District is permitted to remove a Respondent from school on an emergency basis, provided the district's threat assessment team:
 - Undertakes an individualized safety and risk analysis;
 - Determines the Respondent poses an immediate health or safety threat to any person arising from the allegations; and
 - Provides the Respondent with notice and an opportunity to challenge the decision immediately following the removal.
- District is permitted to place an Employee-Respondent on administrative leave during the pendency of its grievance process.

EMERGENCY REMOVAL

- What constitutes an Emergency Removal?
 - Suspension of any length of time.
 - A transfer of a student to an alternative education program.
 - A schedule change, if not considered a supportive measure.
 - Removing a student from an extracurricular activity, if not considered a supportive measure.

EMERGENCY REMOVAL

- **Does there need to be a Formal Complaint for the district to remove a student under Title IX policy?**
 - No. Emergency removal may take place regardless of whether a Formal Complaint has been filed.
- BUT. Emergency removals must be consistent with other laws, including laws protecting the rights of individuals with disabilities.
- AND. The respondent must receive notice of the removal and an opportunity to challenge the decision in an informal hearing immediately following the decision.

HYPOTHETICAL #3

Last Friday three teachers all met up at a local bar/restaurant after chaperoning a school dance. On Monday morning one of the teachers called out sick from work. On Tuesday, the same teacher contacted the district's Title IX Coordinator and reported that they were sexually assaulted by another teacher in the group late into the evening on Friday. The teacher indicated that a report was made with local law enforcement.

**How should the school district respond to the report?
Can/should the teacher accused of misconduct be removed from their duties?**

CLOSING A REPORT OR COMPLAINT

MANDATORY

- Allegations, even if proven, would not constitute a violation of Title IX Policy
- Alleged sexual harassment did not occur in an education program or activity or in the U.S.

PERMISSIVE

- Complainant requests withdrawal of formal complaint
- Respondent is no longer enrolled or employed by the district
- District is prevented from gathering sufficient evidence

PROCEDURE TO CLOSE A REPORT OR COMPLAINT

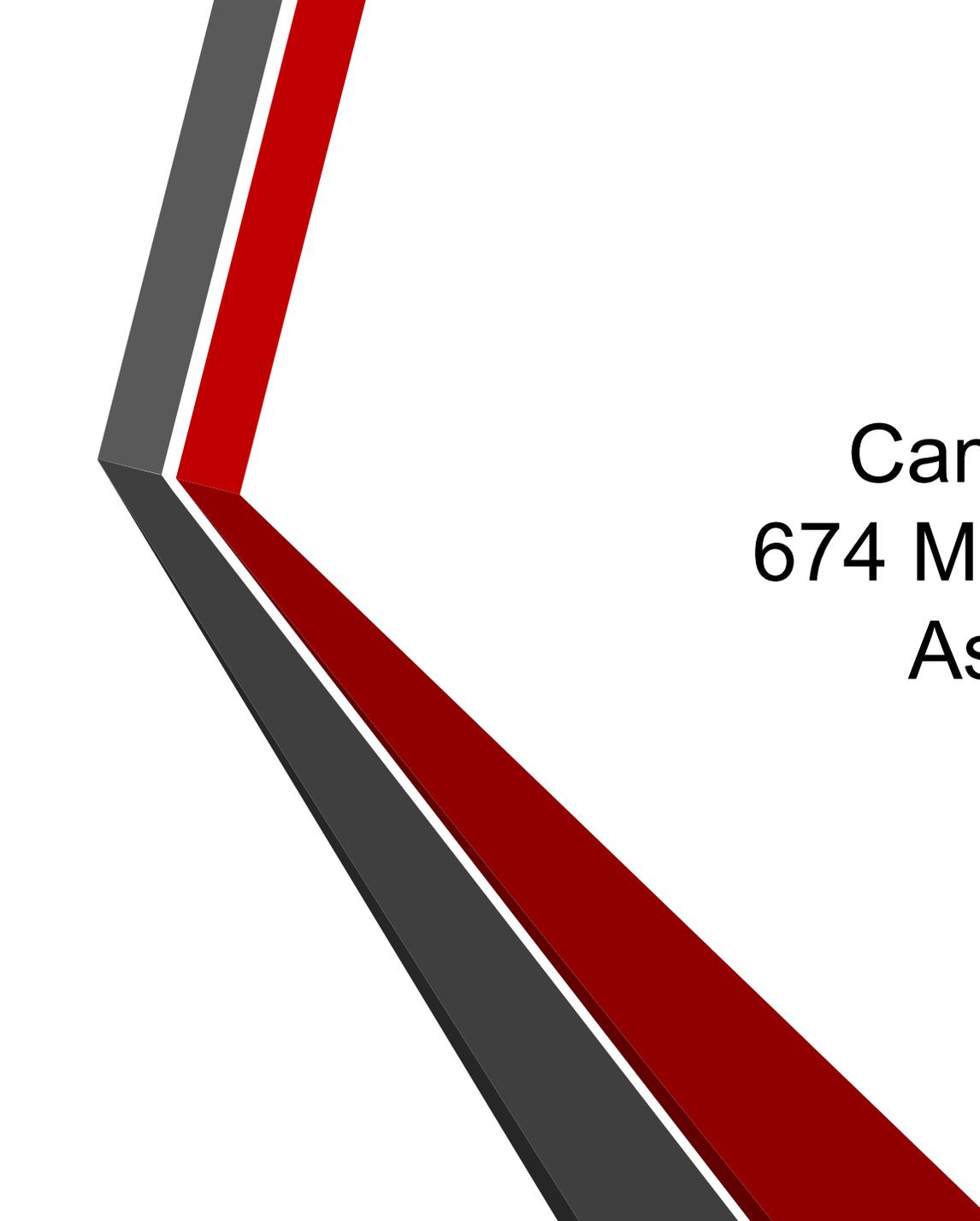
- Title IX Coordinator must notify parties, including:
 - The reason(s) for closure;
 - Parties' rights to appeal; and
 - Directions to an appropriate district office or department to resolve the report or complaint, if any.

INFORMAL RESOLUTION

- Informal resolution may not be used for a student's allegations against a district employee.
- Voluntary – parties must provide written consent.
- Independent, neutral person facilitates informal resolution (not the Title IX Coordinator).
- Process may end at any time prior to resolution agreement.

INFORMAL RESOLUTION

- Title IX Coordinator provides notice to parties of:
 - Allegations of sexual harassment;
 - Requirements of the informal resolution process; and
 - Potential outcomes resulting from participating in the informal resolution process.
- Resolution is concluded only when all parties have signed a written agreement.
 - Agreement is non-revocable and non-appealable.



Campbell Shatley, PLLC
674 Merrimon Ave., Suite 210
Asheville, NC 28804
(828) 398-2776

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW



TITLE IX TRAINING SERIES

Legal Obligations and Roles©

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW

PREVIEW

1

Section One:
Title IX
Fundamentals

2

Section Two:
NCSBA Model
Policies

3

Section Three:
Title IX
Personnel

4

Section Four:
Additional
Compliance

5

Section Five:
Responding to
Allegations

6

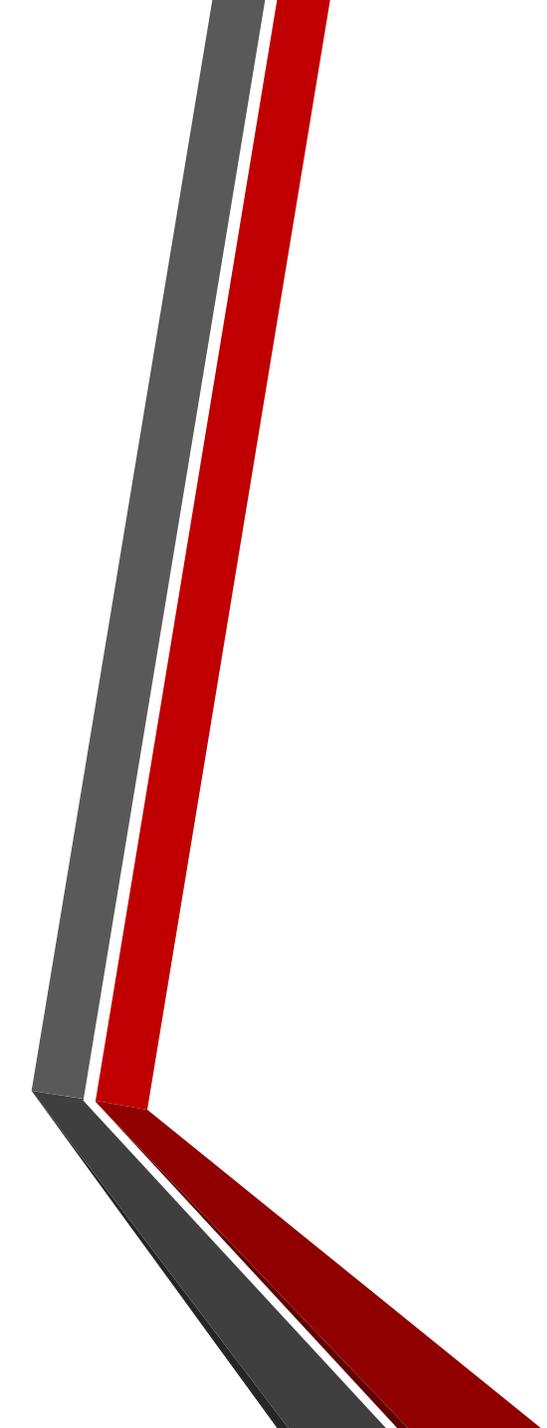
Section Six:
Investigations

7

Section Seven:
Hearings

8

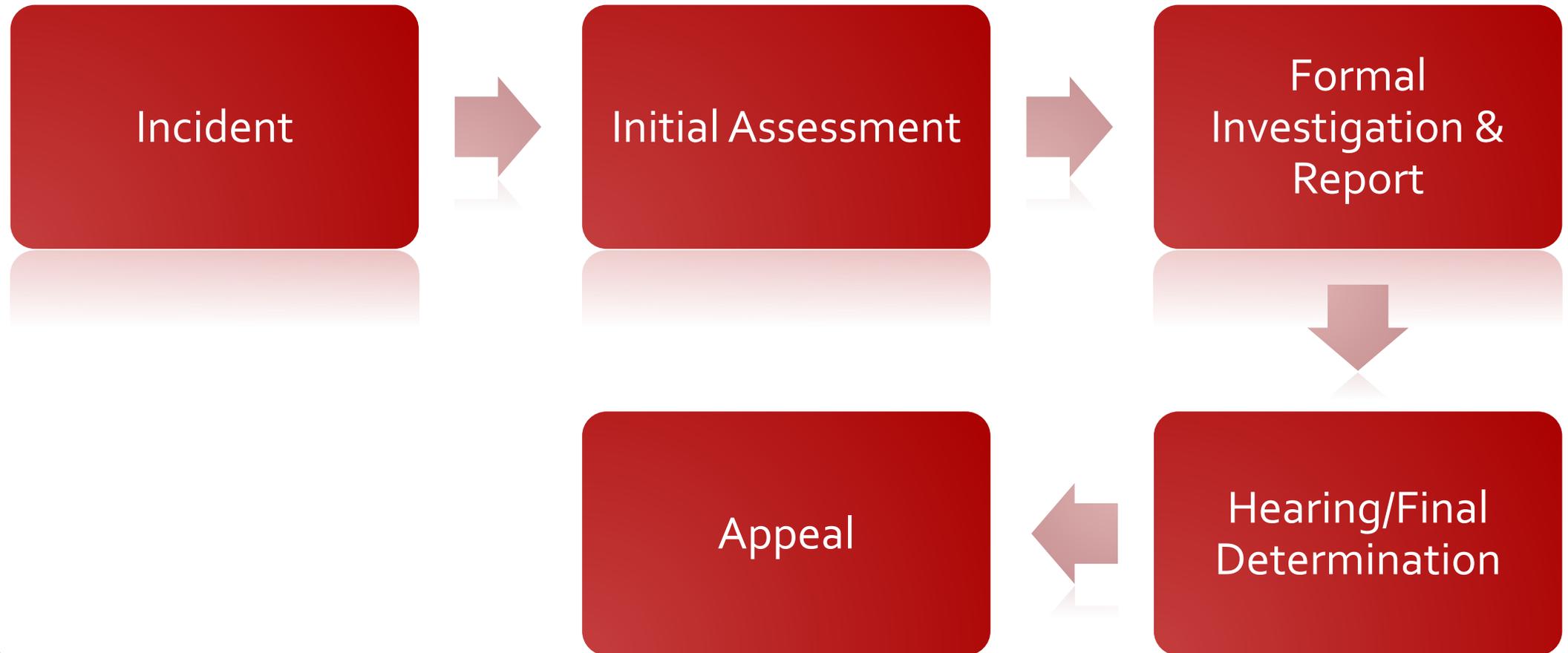
Section Eight:
Determinations
and Appeals



SECTION SIX

INVESTIGATIONS

THE PROCESS



OVERVIEW

- General Equitable Principles
- *When* to Investigate?
- *Who* Investigates?
- Elements of an Investigation
- Intersections with Criminal Investigations/Proceedings
- Notice of Allegations
- Conducting the Investigation
- Advisors
- Evidence
- Investigative Reports

GENERAL EQUITABLE PRINCIPLES

Evidence must be evaluated objectively.

Both parties have opportunity to have advisor present in any meeting, interview, or decision-making process.

Keep participants' identities confidential to the extent allowed by law.

Respondent is presumed not responsible for alleged conduct.

Written notice of any meeting, interview, or other proceeding must be provided to parties.

Burden of proof and gathering of evidence rests on the district.

STANDARDS OF EVIDENCE

Standard of Evidence	Level of Proof
Beyond a Reasonable Doubt	Highest standard of evidence; used in criminal law; facts of the case lead to only one reasonable conclusion
Clear and Convincing	Hybrid; proof that a particular fact or event was highly and substantially more likely than not to have occurred
Preponderance of Evidence	Civil standard; proof that a fact or event was more likely than not to have occurred

ELEMENTS OF INVESTIGATION

- Purpose: A fact-finding process to determine
 - 1) whether the Respondent violated district policies prohibiting sexual harassment; and if so,
 - 2) what steps the district will take to end the sexual harassment/violence, eliminate the hostile environment, and prevent its recurrence.
- Investigations must be prompt, thorough and equitable.
- Investigation may include (but is not limited to):
 - Conducting interviews with the parties and witnesses.
 - Reviewing law enforcement investigation documents.
 - Reviewing student and/or personnel files.
 - Gathering and examining relevant documents and evidence.

WHEN TO INVESTIGATE

- Who investigates?
 - NCSBA Model Policy:
 - Respondent is a student □ Investigator is the Principal.
 - Respondent is an applicant/employee □ Investigator is the senior human resources official.
 - Title IX Coordinator must still oversee the process. Title IX Coordinator must be completely informed of any complaints.
 - Conflicts of interest? Title IX Coordinator must choose neutral investigator.

INVESTIGATING ALLEGED MISCONDUCT

- G.S. § 115C-288(g) requires principals to report IMMEDIATELY to law enforcement the following acts occurring on school grounds:

- assault resulting in serious personal injury;
- sexual assault;
- sexual offense;
- rape;
- indecent liberties with a minor;
- kidnapping;



- assault involving the use of a weapon;
- possession of a firearm in violation of the law;
- possession of a weapon in violation of the law; and
- possession of a controlled substance in violation of the law.



INTERSECTION WITH CRIMINAL INVESTIGATIONS

- Title IX does not require the district to report alleged criminal incidents to law enforcement (but state law does)!
- District should inform alleged victim of right to make a criminal report and not dissuade alleged victim from making a criminal report.
- Evidence obtained in a criminal investigation may be used by the district as source of fact-finding.



INTERSECTION WITH CRIMINAL INVESTIGATIONS

- District may not wait for the conclusion of a criminal investigation to act under Title IX.
- However, the district may need to delay an investigation during the law enforcement/criminal investigation.
 - If the district does delay, the district still must offer supportive measures to the parties.
 - The district should update the parties on the status of the matter during any delay.



INTERSECTION WITH CRIMINAL INVESTIGATIONS

- OCR Advice: The district should seek a Memorandum of Understanding (MOU) with local law enforcement regarding concurrent criminal and Title IX investigations.
 - The MOU must allow the district to meet Title IX requirements.
 - The MOU must also recognize student FERPA-based rights (i.e., no sharing of student information from the district to law enforcement unless properly subpoenaed).

WRITTEN NOTICE OF ALLEGATIONS

Within five business days of a Formal Complaint, Title IX Coordinator must provide the parties a written Notice of Allegations that includes:

- Sufficient details to allow parties to respond and prepare for initial interviews;
- Identity of the parties involved;
- Conduct alleged to be sexual harassment;
- Date and location of alleged incidents;
- **Statement that Respondent is presumed not responsible and responsibility determination is made at conclusion of process;**
- Parties' right to an Advisor;
- Parties' right to review evidence;
- Notice that the district prohibits making knowingly false statements or submitting false information; and
- A copy of the district's grievance policy.

CONDUCTING THE INVESTIGATION

- Investigations must be prompt, thorough, and equitable.
- NCSBA Model Policy: District aims to bring all investigations to resolution within **90 business days** from the date the Title IX Coordinator determines an investigation should commence.
- Extensions of this timeframe allowed for “good cause”:
 - Complexity or number of allegations;
 - Severity and extent of alleged misconduct;
 - Number of parties, witnesses and other evidence involved;
 - Availability of the parties;
 - A request by a party to delay an investigation;
 - Effect of a concurrent criminal investigation or proceeding;
 - Intervening holidays, district breaks, or other closures;
 - Good faith efforts to reach a resolution; or
 - Other unforeseen circumstances

CONDUCTING THE INVESTIGATION

- Conducting Interviews
 - Typically the Complainant, Respondent, and any witnesses
 - A party's Advisor may be present during an interview
 - Written Notice
- Recordings
 - Interviews may be recorded by the district
- What if a party or a witness refuses to participate?
- Follow-up Interviews

ADVISORS

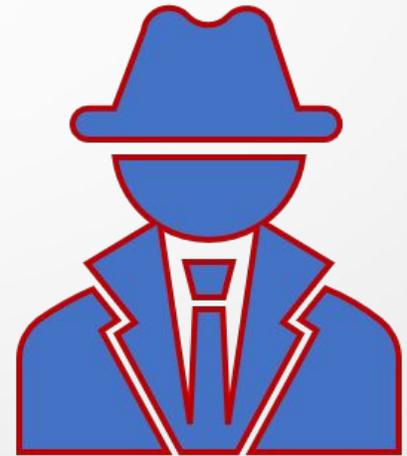
- During investigation
 - Role limited to advice, guidance and support for a party
 - May be present at all stages of investigation but may not participate/ advocate in the interview
 - Must maintain privacy of records shared
 - Expected to refrain from interfering with investigation

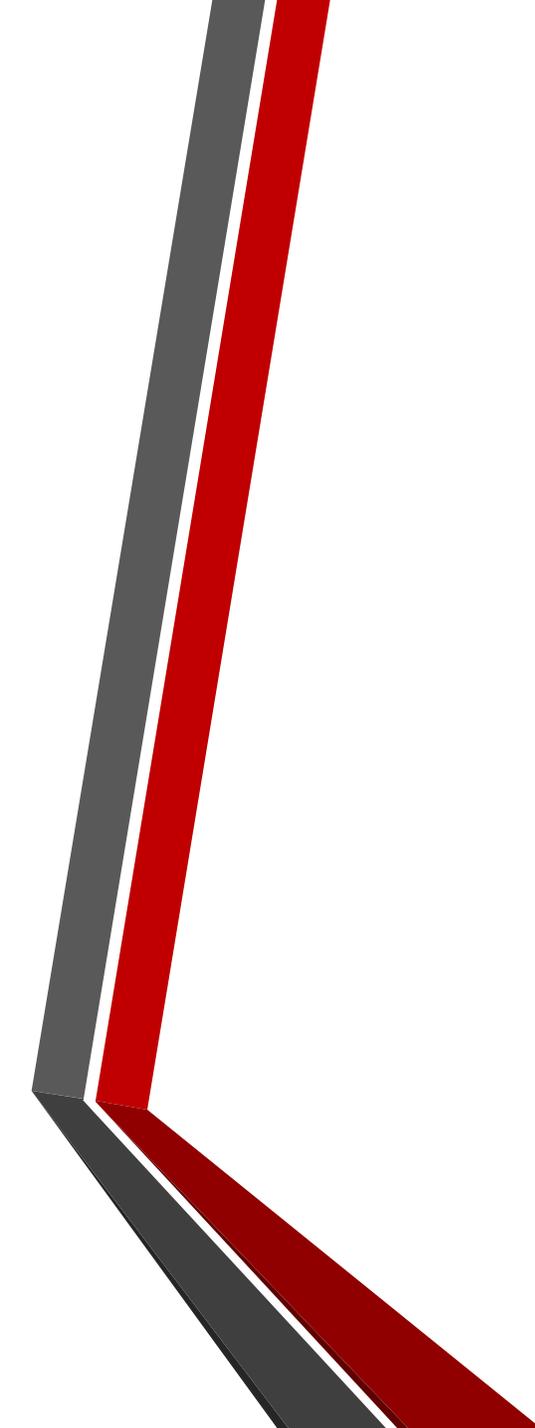
HYPOTHETICAL – ADVISORS

- The school district's investigator is preparing to interview the Complainant during a Title IX investigation. The investigator receives an email from the Complainant's parent that she would like her neighbor to serve as her Advisor. The Title IX Coordinator receives an email from the Respondent requesting that the school district appoint an attorney to serve as his Advisor during the investigation.
- **Can the Complainant's neighbor serve as an Advisor during the interview?**
- **Does the school district have to appoint an attorney to serve as the Respondent's Advisor?**

EVIDENCE

Investigator should objectively evaluate all physical, documentary, or other evidence as appropriate and available.





Evidence is generally considered relevant if it has value in proving or disproving a fact at issue:

Alleged policy violation

A party or witness' credibility

The investigator makes initial relevance "decisions" by including a summary of evidence in the investigation report

But relevance is ultimately up to the decision-maker, who is not bound by the investigator's judgment

EVIDENCE

- No person acting on behalf of the district may rely upon or otherwise use questions or evidence that seek disclosure of information protected under a legally recognized privilege, unless the privilege is waived.
 - Attorney-Client
 - School Counselor-Student (G.S. 8-53.4)
 - Healthcare Provider-Patient (G.S. 8-53, -53.3, -53.5, -53.13)
 - Agents of rape crisis centers and domestic violence programs-Victim (G.S. 8-53.12)

WHAT IS CREDIBILITY?

- Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness
- Accuracy and reliability of information
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility

HYPOTHETICALS- ISSUES OF RELEVANCY

- The Investigator interviews one of the witnesses to the alleged incident identified by the Respondent. At the end of the interview the Witness reads back through their text messages with the Respondent on the evening of the incident. **Are these text messages relevant? What should the investigator do?**
- During an investigation, the Complainant shows the Investigator copies of social media posts made by the Respondent on the evening of the alleged incident that have since been deleted by the Respondent. **Are these posts relevant? What should the investigator do?**

WHAT NEXT?

- Typically, there is going to be a menu of options that will be available to the investigator:
 - Option 1: Respondent committed some or all of the alleged sexual violence/misconduct.
 - Option 2: Respondent did not commit any of the alleged sexual violence/misconduct.
 - Option 3: Evidence is inconclusive (In other words: “I can’t figure out who is being truthful.”)
 - May prevent a remedy but does not prevent the district supporting the Complainant.

BUT WAIT!

- Before completing the investigative report, the investigator must send to each party all the evidence collected that is directly related to the allegations raised in the Formal Complaint.
- The parties have ten days to submit a written response before the investigator finalizes the investigative report.

INVESTIGATIVE REPORT

- Investigator must submit investigative report that “fairly summarizes relevant evidence,” including:
 - A summary of the allegations and responses;
 - A summary of investigative steps taken;
 - A summary of the evidence relevant to a determination; and
 - A recommendation on the question of responsibility and any recommended disciplinary sanction.

- Investigator provides a copy of the report to all parties, and the parties have ten days to submit a written response to the report, in addition to any written questions to other parties/witnesses.

Soft report
writing

Omitting
credibility
assessments

Serving as a
cross-examine
r

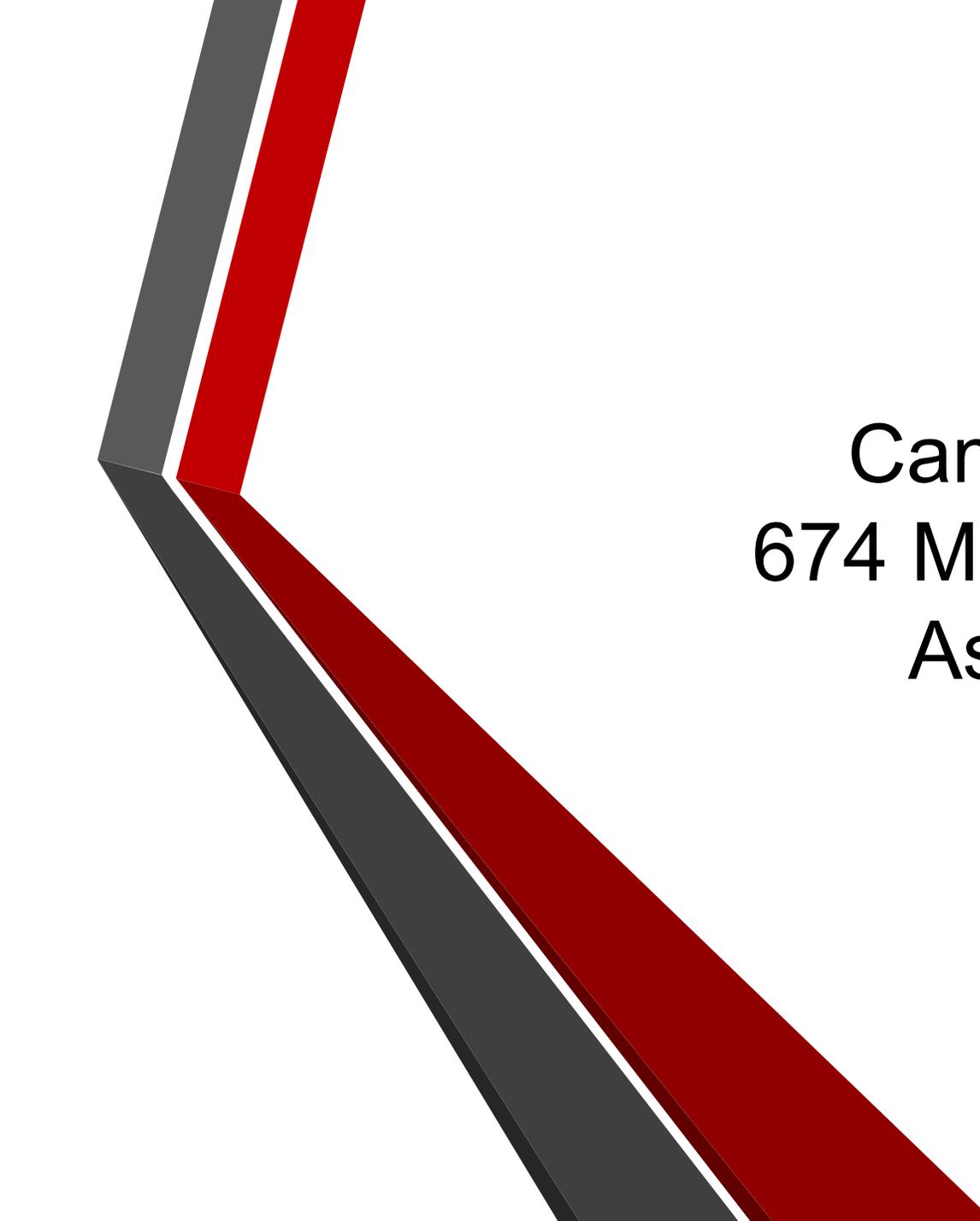
Incomplete
policy analysis



TIPS TO
AVOID
COMMON
REPORT
WRITING
ERRORS

HAND OFF

- Investigator provides Decision-maker with:
 - Copy of the investigative report
 - All relevant evidence
 - Parties' written responses to report and initial sets of written questions
 - A description of the procedural steps taken, starting with the receipt of the Formal Complaint and continuing through the preparation of the investigative report, including any notifications to the parties, interviews, site visits, and methods used to gather evidence.



Campbell Shatley, PLLC
674 Merrimon Ave., Suite 210
Asheville, NC 28804
(828) 398-2776

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW



TITLE IX TRAINING SERIES

Legal Obligations and Roles©

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW

PREVIEW

1

Section One:
Title IX
Fundamentals

2

Section Two:
NCSBA Model
Policies

3

Section Three:
Title IX
Personnel

4

Section Four:
Additional
Compliance

5

Section Five:
Responding to
Allegations

6

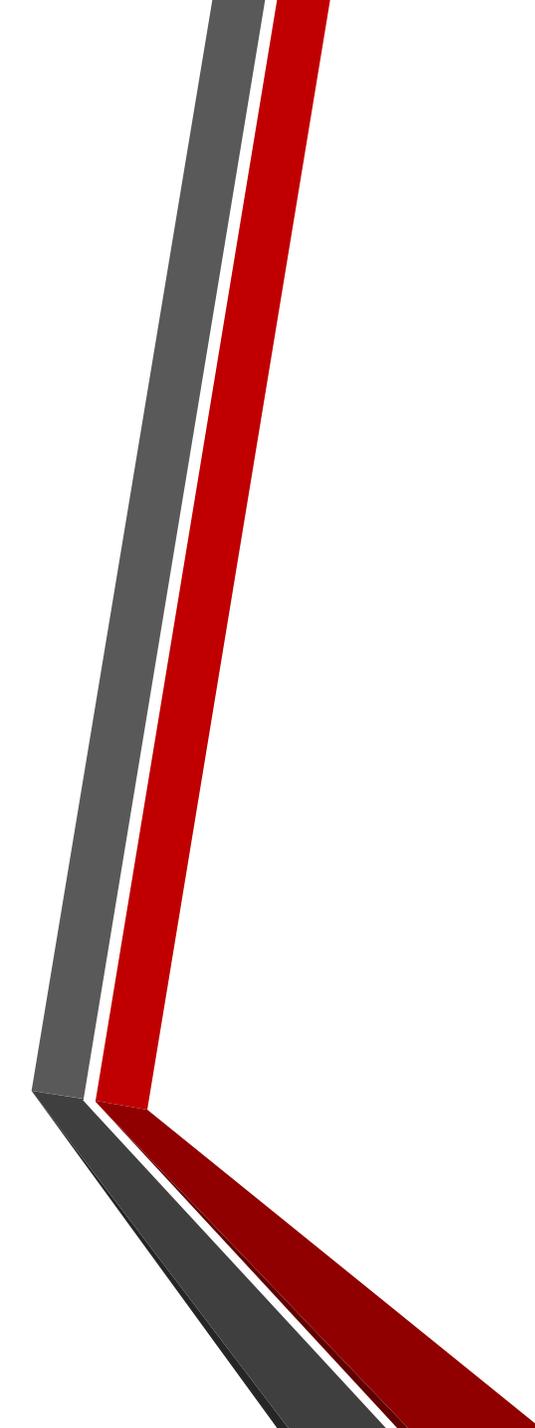
Section Six:
Investigations

7

Section Seven:
Hearings

8

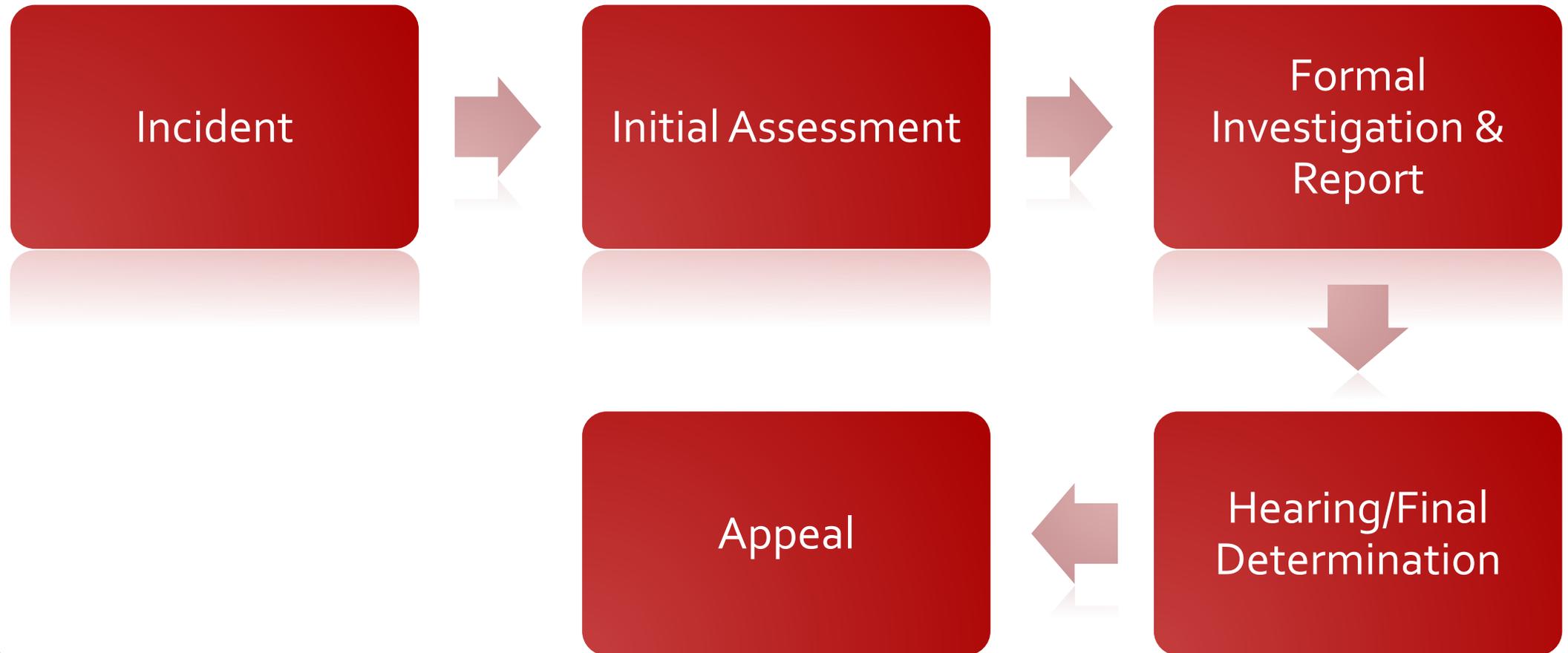
Section Eight:
Determinations
and Appeals



SECTION SEVEN

TITLE IX HEARINGS

THE PROCESS



NCSBA MODEL POLICY 1726/4036/7237

- In cases where the respondent is a student, provides parties an opportunity to request a hearing within three school business days of receiving the investigative report.
 - “In cases where the respondent is a student, after the investigative report has been sent to the parties, both parties shall have three school business days to request a hearing.”
- Campbell Shatley revisions to policy 1726/4036/7237 do not provide for a hearing except when required by state law, and then at the end of the grievance process.

- So what happens after the investigator completes their investigative report?
 - District must choose a separate, independent “decision-maker” (cannot be the investigator or the Title IX Coordinator).
 - NCSBA Model Policy: Superintendent or designee serves as decision-maker.

HEARINGS?

DECISION-MAKERS

Decision-makers have no side other than the integrity of the process. And decision-makers represent the process.

Remember that the burden of proof and the burden of gathering evidence sufficient to reach a determination rests on the district and not on the parties.

WITH OR WITHOUT A HEARING...

- Parties have opportunity to submit to the decision-maker written, relevant questions the party wants asked of any other party or witness.
- Decision-maker must provide each party with the answers and allow for additional, limited follow-up questions from each party.

PRE-HEARING PREPARATION

Should include:

- “Motions” hearing
- Meeting of panel, if any
- Review of investigation report
- Review of evidence
- Preparation of questions

Must include:

- Conflicts check
- Notice to parties

What About?

- Meeting with investigators?
- Ensuring rules of the hearing are followed?

PRE-HEARING PREPARATION

Always Review:

- Written notice of allegations
- Policy(-ies) alleged to have been violated
- Investigative report

Always Think:

- What do I need to know?
- Why do I need to know it?
- Who is the best person to get this information from?

STANDARDS OF EVIDENCE

Standard of Evidence	Level of Proof
Beyond a Reasonable Doubt	Highest standard of evidence; used in criminal law; facts of the case lead to only one reasonable conclusion
Clear and Convincing	Hybrid; proof that a particular fact or event was highly and substantially more likely than not to have occurred
Preponderance of Evidence	Civil standard; proof that a fact or event was more likely than not to have occurred

HEARINGS!

Hearing – in-person or virtual

Title IX Requirements:

- All parties must be able to see and hear questioning.
- All parties must be able to present witnesses.
- Parties' must have opportunity to have advisor present.
- District must provide either an audio recording, audiovisual recording, or transcript of the hearing to all parties.
- Legal Rules of Evidence do not apply at hearings.

HEARINGS!

SBA Model Policy 4370

Student Discipline Hearing Procedures:

- Students have a right to be accompanied by their parents and be represented by an attorney or non-attorney advocate.
- Students must be given opportunity to cross-examine any witnesses.
- Students have a right to make their own audio recording of hearings.
- Legal Rules of Evidence do not apply.

HEARINGS: GENERAL LOGISTICS

- Recording
 - How, by whom, etc.
- Attendance by parties and witnesses
- Location and room set-up
 - Comfort items
 - Privacy concerns
- Seating arrangements
- Access to administrative support if needed
 - Phones, copiers
- Advisors
- Parties and witnesses waiting to testify
- Breaks
- Use of A/V

Materials

RULES FOR HEARINGS

- So long as all rules comply with the final regulations and apply equally to both parties, districts can adopt rules concerning:
 - Rules of decorum.
 - Timing and length of breaks.
 - Prohibition on disturbing the hearings.
 - Prohibition on badgering witnesses.

HEARING PROCEDURES

- Introductions
- Recap
- Allegations
- Evidentiary Standard
- Conflict of Interest and Bias Check
- Opening Statements
- Presentation of Evidence
- Closing Statements



TIPS FOR DECISION-MAKERS

- Recognize the need for flexibility with the order of statements and questioning.
- If a procedural question arises that must be addressed immediately, take a break to seek clarification.
- Will you have legal counsel available by phone/text/in person?



HEARING TESTIMON Y

Determine

Determine the relevance and appropriateness of questions.
Pause after each question to “rule” on relevance.
State your rationale for the record.

Provide

When necessary, provide directives to disregard a question or information deemed irrelevant, abusive, or repetitive.

Manage

Manage advisors as necessary.

Recognize

Recognize your authority and maintain professionalism.

QUESTIONING SKILLS AND GUIDELINES

- Your goal is to ensure you understand information contained in the Investigation Report:
 - Relevant facts about what happened
 - Any related events
 - Any corroborating information
- Use questions to elicit details, eliminate vagueness, or fill in the gaps
- Your goal is not:
 - Satisfying your curiosity
 - Chasing the rabbit into Wonderland
- Do not expect a “Gotcha” moment. You are not prosecutorial.

IF YOU THINK YOU HAVE TO ASK A QUESTION, ASK YOURSELF

- **Is the answer already in the report or documentation I have been provided?**
 - If not, why not? (Ask the Investigator!)
- **What do I need to know?**
 - Who is the best person to ask? Usually it will be the Investigator, first, and then the original source, if available
- **Why do I need to know it?**
 - If it is not going to help you decide whether a policy was violated or determine credibility, then it is not a good question
- **What is the best way to ask the question?**

Are you the best person to ask this question?

ASKING GOOD QUESTIONS

- Generally use open-ended questions (tell us... who, what, how...)
- Try to avoid close-ended questions (did you... were you...)
- Don't ask compound questions
- Don't ask multiple choice questions
- Avoid suggesting an answer in your question



- Evidence of a Complainant's prior sexual behavior or predisposition is **not relevant** except when:
 - Offered to prove that someone other than the Respondent committed the alleged conduct, or
 - It concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition



SPECIFIC EVIDENCE ISSUES



ADDITIONAL EVIDENCE RESTRICTIONS

- Specific, written permission required in advance of a hearing for records made or maintained by a physician, psychiatrist, or psychologist.

QUESTIONING & CROSS-EXAMINATION

What is an Advisor's/Advocate's role during a live hearing?

Who can serve as an Advisor/Advocate?

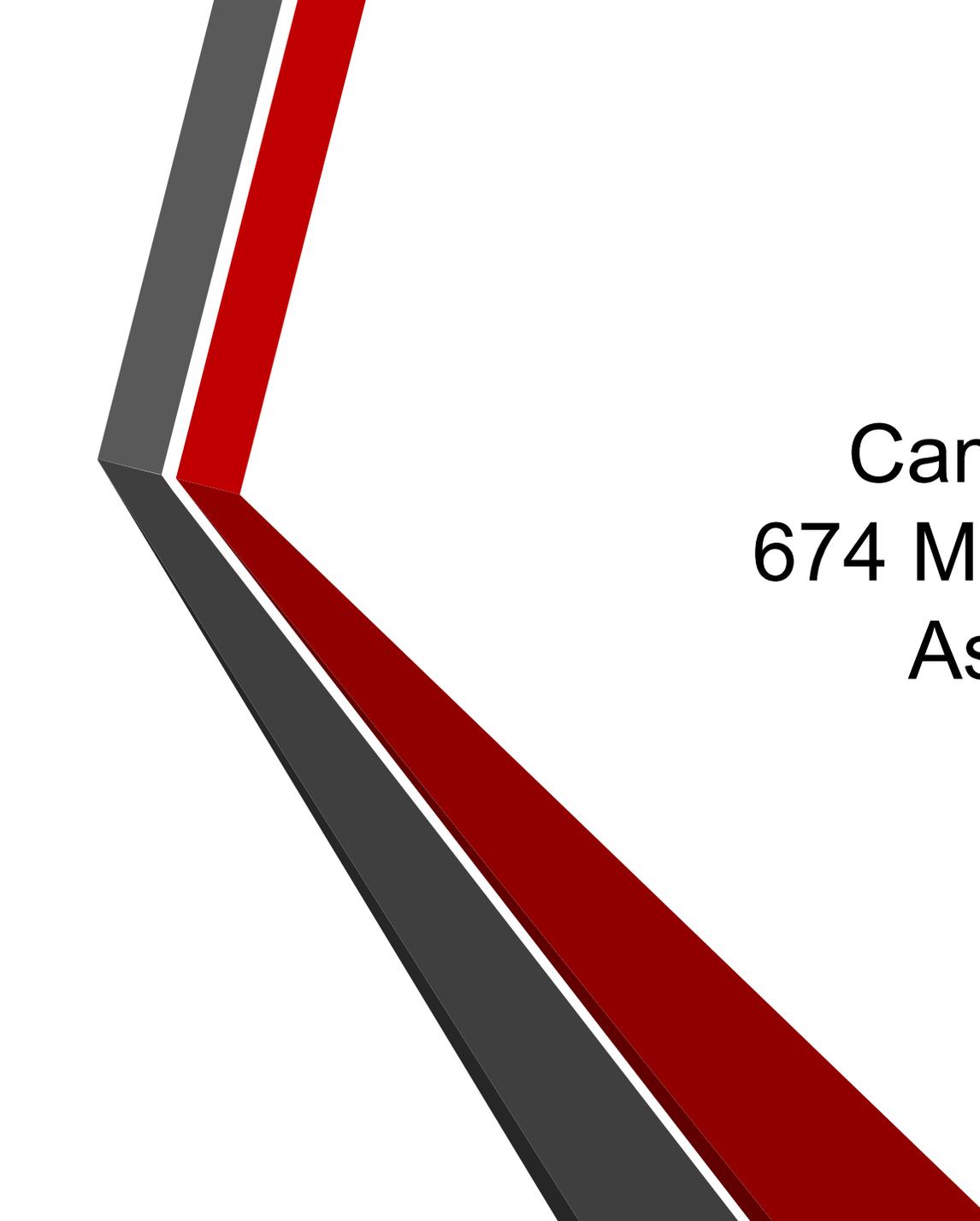
Does a district need to appoint an Advisor for a party that does not have their own?

QUESTIONING & CROSS-EXAMINATION

- The district and the parties may “examine the witnesses presented by the other side.”
- Superintendent may limit questioning by any person if the questioning is unproductive, unnecessarily lengthy, repetitive, or irrelevant.

NOW WHAT?

- After a hearing, the decision-maker must decide the question regarding responsibility, any disciplinary action, and any other measures deemed appropriate.



Campbell Shatley, PLLC
674 Merrimon Ave., Suite 210
Asheville, NC 28804
(828) 398-2776

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW



TITLE IX TRAINING SERIES

Legal Obligations and Roles©

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW

PREVIEW

1

Section One:
Title IX
Fundamentals

2

Section Two:
NCSBA Model
Policies

3

Section Three:
Title IX
Personnel

4

Section Four:
Additional
Compliance

5

Section Five:
Responding to
Allegations

6

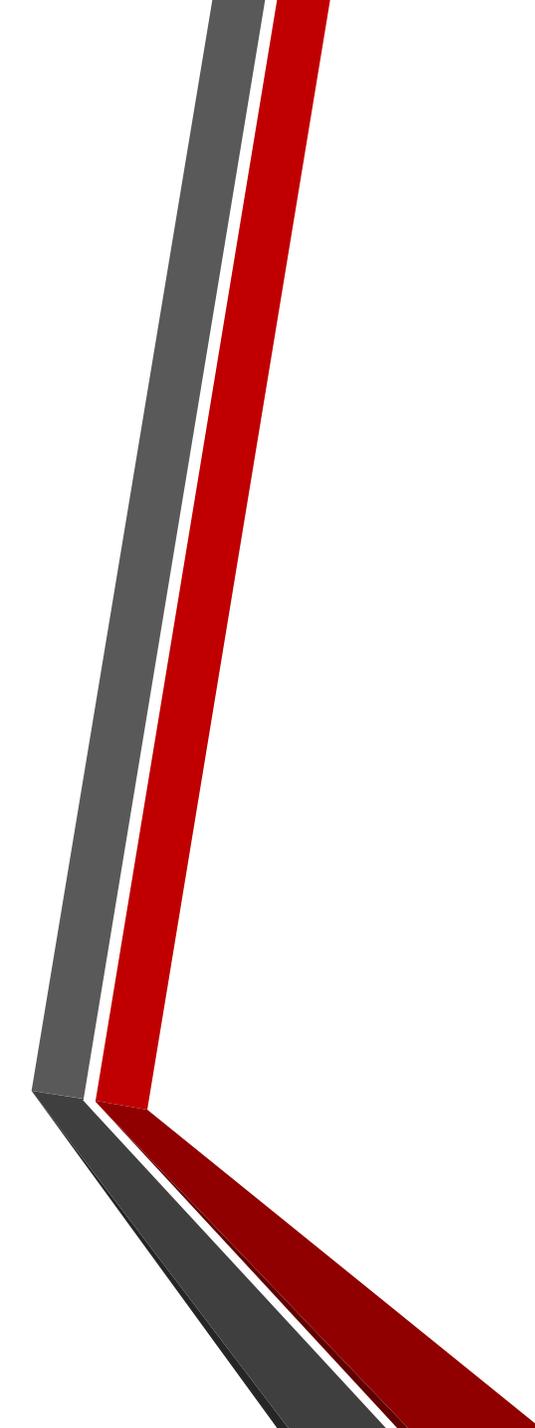
Section Six:
Investigations

7

Section Seven:
Hearings

8

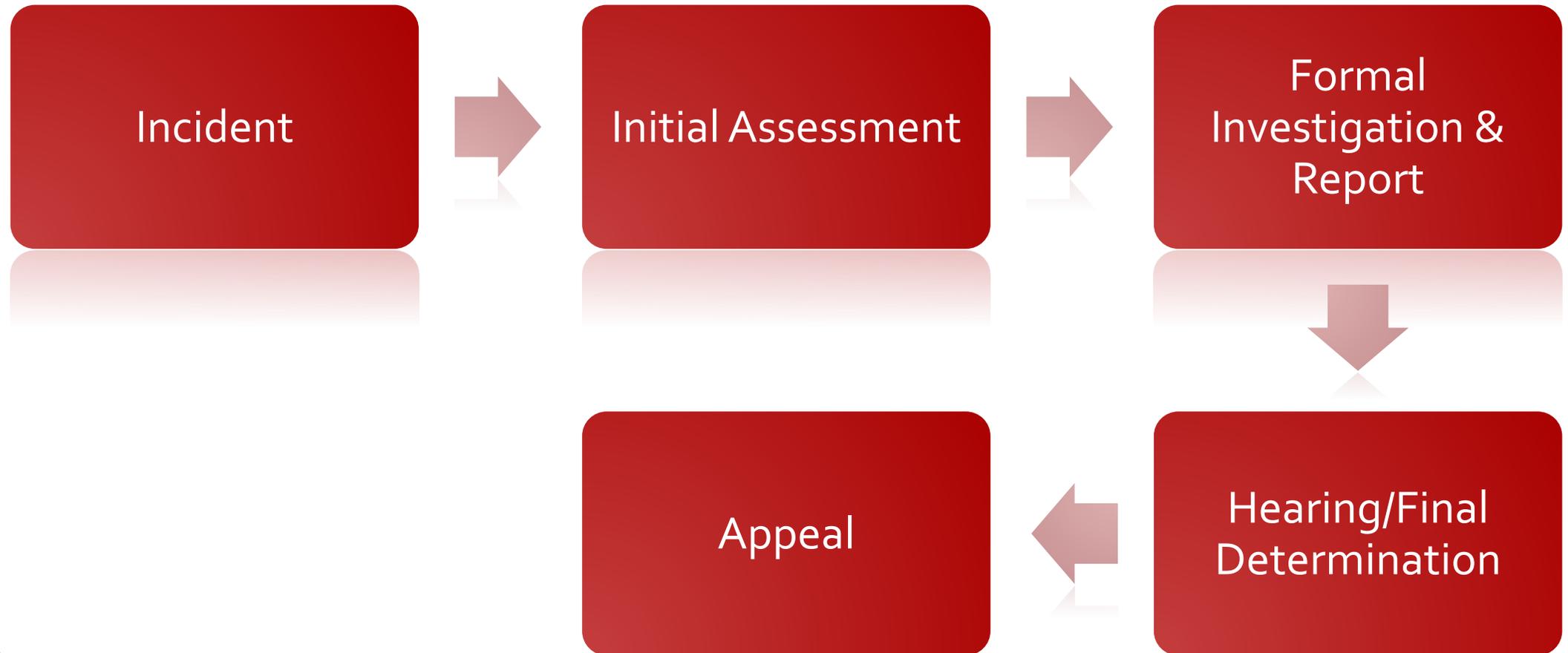
Section Eight:
Determinations
and Appeals



SECTION EIGHT

TITLE IX DETERMINATIONS AND APPEALS

THE PROCESS



DECISION-MAKERS

Decision-makers have no side other than the integrity of the process. And decision-makers represent the process.

Remember that the burden of proof and the burden of gathering evidence sufficient to reach a determination rests on the district and not on the parties.

PRE-DECISION PREPARATION

Always Review:

- Written notice of allegations
- Policy(-ies) alleged to have been violated
- Standard of evidence

Always Think:

- What do I need to know?
- Why do I need to know it?
- Who is the best person to get this information from?

STANDARD OF EVIDENCE

What is the preponderance of the evidence standard mean?

- Proof that a particular fact or event was more likely than not to have occurred.

What does the clear and convincing standard mean?

- Proof that a particular fact or event was highly and substantially more likely to be true than untrue.

No hearing required, but...

Requirements:

- All parties must have opportunity to submit written, relevant questions they want asked of other party and witnesses
- Decision-maker must provide parties with answers to their questions, and opportunity for limited follow-up questions
- Decision-maker must then issue a written determination of responsibility

DECISION-MAKING PROCESS

DECISION-
MAKING
SKILLS

Understanding evidence

Relevance

Reliability/credibility

Analyzing information

UNDERSTANDING EVIDENCE

- If information helps to prove or disprove a fact at issue, it should be admitted.
- If credible, it should be considered.
 - Evidence is any kind of information presented with the intent to prove what took place.
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly.

RELEVANC E

Evidence is generally considered relevant if it has value in proving or disproving a fact at issue:

Alleged policy violation

A party or witness' credibility

The investigator will have made initial relevance "decisions" by including evidence in the investigation report...

But relevance is ultimately up to the decision-maker, who is not bound by the investigator's judgment.

UNDERSTANDING EVIDENCE

- No restriction on parties discussing case or gathering evidence.
- Equal opportunity to:
 - Present witnesses, including experts
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered except that it must be relevant.

UNDERSTANDING EVIDENCE

- Decision-maker may consider and assign weight to different types of evidence:
 - Documentary (diary, journal)
 - Electronic (photos, text messages)
 - Real/physical (clothes)
 - Direct or testimonial (personal observation)
 - Circumstantial (not eyewitness, but compelling)

- Evidence of a Complainant's prior sexual behavior or predisposition is **not relevant** except when:
 - Offered to prove that someone other than the Respondent committed the alleged conduct, or
 - It concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition



SPECIFIC EVIDENCE ISSUES



ADDITIONAL EVIDENCE RESTRICTIONS

- Specific, written permission required in advance for records made or maintained by a physician, psychiatrist, or psychologist.
- Decision-maker must explain to party proposing question any determination to exclude question as not relevant.

WHAT IS CREDIBILITY?

- Accuracy and reliability of information
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness

WHAT IS CREDIBILITY?

- Inherent plausibility
 - Does this make sense?
 - Be careful of bias influencing sense of “logical”
- Motive to falsify
 - Do they have a reason to lie?
- Corroboration
 - Independent, objective authentication
- Past record
 - Is there a history of similar behavior?
- Demeanor
 - **BUT BE CAREFUL**



WHAT IS (NOT) CREDIBILITY?

- Clothing
 - “Just look at what she was wearing.”
- Appearance
 - “She is so unattractive. I don’t believe anyone would do that to her.”
- Flirting behavior
 - “She’s always flirting, what did she expect?”
- Male accuser
 - “He should have realized she meant it as a compliment.”
- Sexual orientation of accuser
 - “He came out of the closet and told everyone – he should have expected people would act like this.”



Character witnesses

"I've known him for 15 years, he wouldn't do that."



Popularity

"Everybody likes him, I just don't believe he would do that."



No history of past problems

"She's never been in trouble before."



Academic performance

"But he's a really good student."



Importance to a team or program

"She's our best tutor."

WHAT IS (NOT) CREDIBILITY?

ANALYZING INFORMATION

- First, narrow to the contested facts, and then make a credibility analysis by the standard of proof for each.
- Then, weigh the overall credibility based on the sum total of each contested fact.
- When you write the final, written determination, focus on what facts, opinion, and/or circumstantial evidence supports your conclusion. Offer a cogent and detailed rationale.

ANALYZING INFORMATION

- Parse the Policy again, remind yourself of the elements that compose each allegation.
- Determine whether it is more likely than not that Policy has been violated or determine whether highly probable if clear & convincing standard applies.
- Do not turn to “outside” evidence.

DETERMINATION OF RESPONSIBILITY

- The decision-maker must issue a written determination of responsibility, including:
 - Summary of allegations;
 - Procedural steps taken by district to investigate;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of policy to the facts;
 - Rationale for the result as to each allegation;
 - Any disciplinary sanctions recommended or imposed on the Respondent;
 - Whether remedies will be provided to the Complainant;
 - The district's appeal procedures; and
 - Any other notices required by state law.

DETERMINATION OF RESPONSIBILITY

- Consider including information regarding:
 - What information is considered confidential and why
 - What information may be shared without disclosing personally identifiable information



FERPA cannot be construed to conflict with or prevent compliance with Title IX.

DETERMINATION OF
RESPONSIBILITY:
LOGISTICS

SANCTIONING IN TITLE IX CASES

- If the sanction involves a long-term suspension...
 - North Carolina law still applies!
 - The student's parent must be given written notice; and
 - The student must be given the opportunity for a formal hearing.
- If the sanction includes a recommendation to expel...
 - North Carolina law still applies!
 - The board must conduct a hearing to determine whether the student's continued presence constitutes a clear threat to the safety of others.

COMMON SANCTIONS

- Warning
- Probation
- Loss of privileges
- Counseling
- No contact
- Limited access to areas of school
- Service hours
- Online education
- Alcohol and drug assessment
- Suspension
- Expulsion
- Termination

POSSIBLE REMEDIES

- For the Complainant:
 - Escort on campus.
 - Separating Complainant and Respondent in classes or activities.
 - Mental health services referral.
 - “Providing comprehensive, *holistic* victim services including medical, counseling, and academic support services, such as tutoring.”
 - Allowing Complainant to have additional time to complete or re-take a class.
 - Change in work locations and/or reasonable leave, if Complainant is employee.

MORE POSSIBLE REMEDIES

- For the district:
 - Training (or retraining) on how to address sexual violence and misconduct.
 - Designating a counselor who is trained to provide comprehensive services to victims of sexual violence.
 - Developing material on sexual violence and misconduct to distribute to students (and staff!).
 - Issuing policy statements to students and staff.
 - Conducting a climate survey.
 - Targeted training for groups, clubs or areas where there is a hostile environment.
 - Developing a protocol to work with law enforcement.

APPEALS

- District must offer all parties the opportunity to appeal responsibility determination (and district's dismissal of a formal complaint) on these grounds:
 - Procedural irregularity that affected the outcome;
 - New evidence that was not reasonably available at the time the determination was made that could have affected the outcome;
 - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome;
 - The disciplinary sanction is inappropriate or unreasonable; and/or
 - Any other basis provided by state law or Board policy.

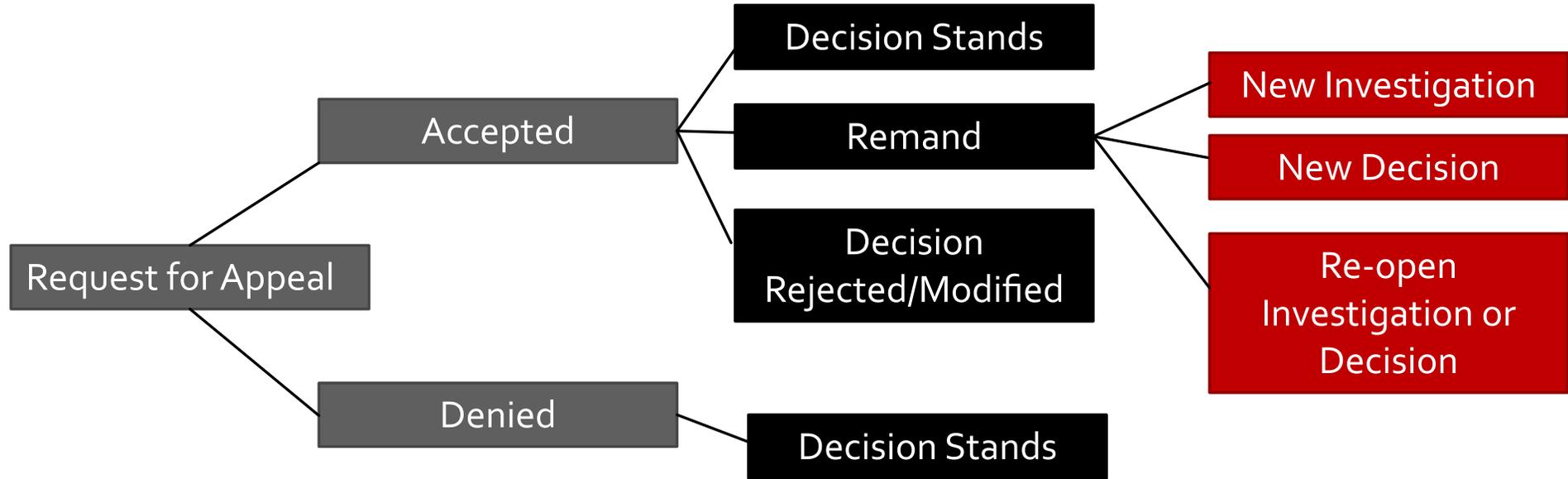
APPEALS

- District must provide written notice to the other party when appeal is filed.
- District must provide both parties opportunity (10 days) to submit a written statement supporting or challenging the outcome.
- Appeal decision-maker must be a different person from the Title IX Coordinator, investigator, or (initial) decision-maker.
 - NCSBA Model Policy: Board (or Panel of Board) is appeal decision-maker.

APPEALS

- Appeal is a “record review”.
- Other policies to consider:
 - Hearings Before the Board, policy 2500
 - Student Discipline Hearing Procedures, policy 4370
 - Classified Personnel: Suspension and Dismissal, policy 7940
 - Professional Employees: Demotion and Dismissal, policy 7930
- A written, final decision that describes the appeal result and its rationale must be provided to both parties within 30 days of receiving the appeal.

APPEAL PROCESS





Show deference to initial decision.



Document-based and record review.



Appeals should not be automatic.



Standard of evidence for decision.

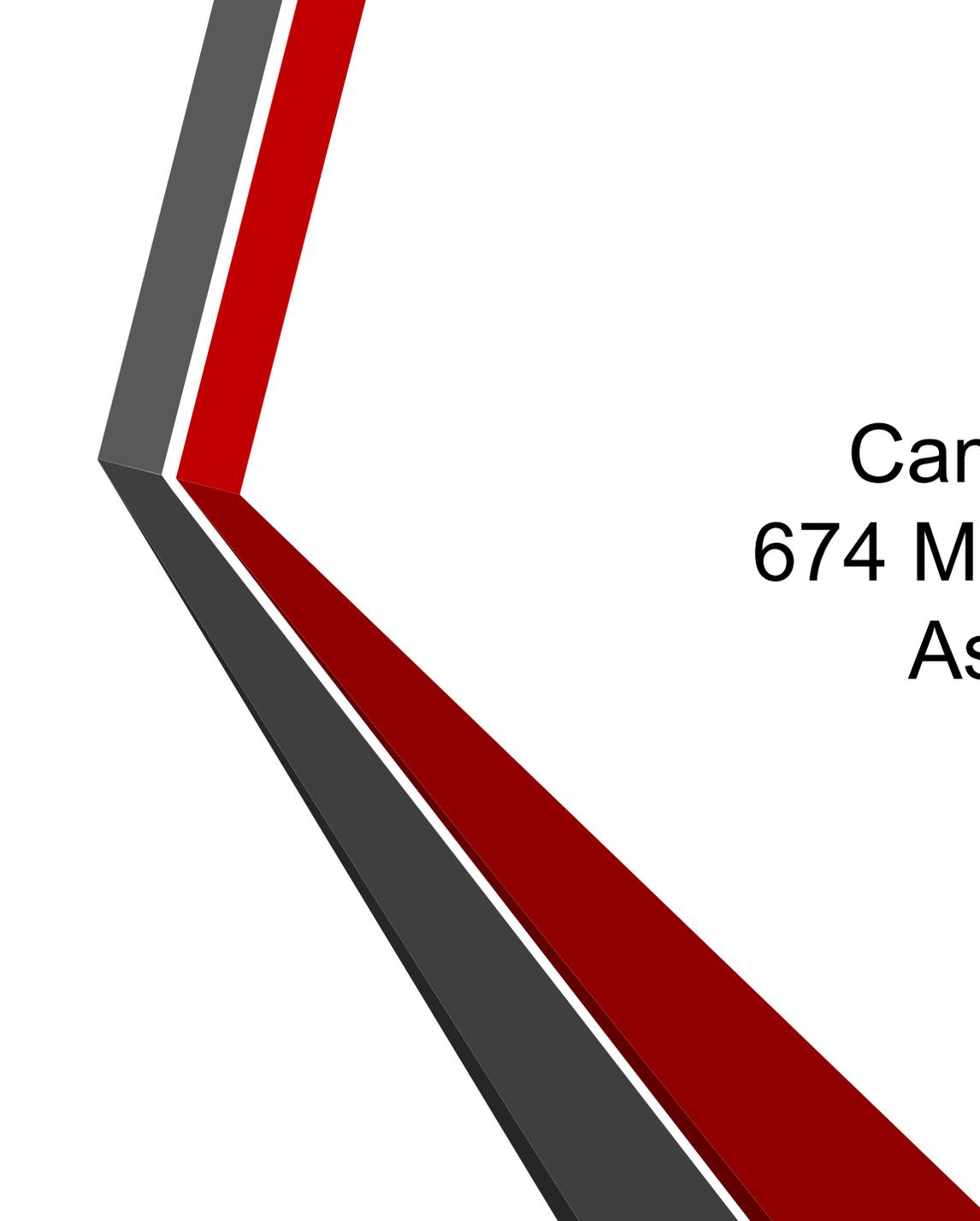
APPEALS
– KEY
ELEMENTS

APPEALS – BEST PRACTICES

- Remand. Your judgment is not better than that of others in the process. If there is a problem and you can send it back, do so.
- Problems with investigations can be repaired by re-opening investigations, or in rare cases, by re-investigating.
- Problems with hearings can often be fixed by limited re-hearing. Re-dos should be rare.

TITLE IX & FERPA

- 2001 Guidance-
 - If there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with Title IX's purpose of eliminating sex-based discrimination, the requirements of Title IX override any conflicting FERPA provisions.



Campbell Shatley, PLLC
674 Merrimon Ave., Suite 210
Asheville, NC 28804
(828) 398-2776

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW