

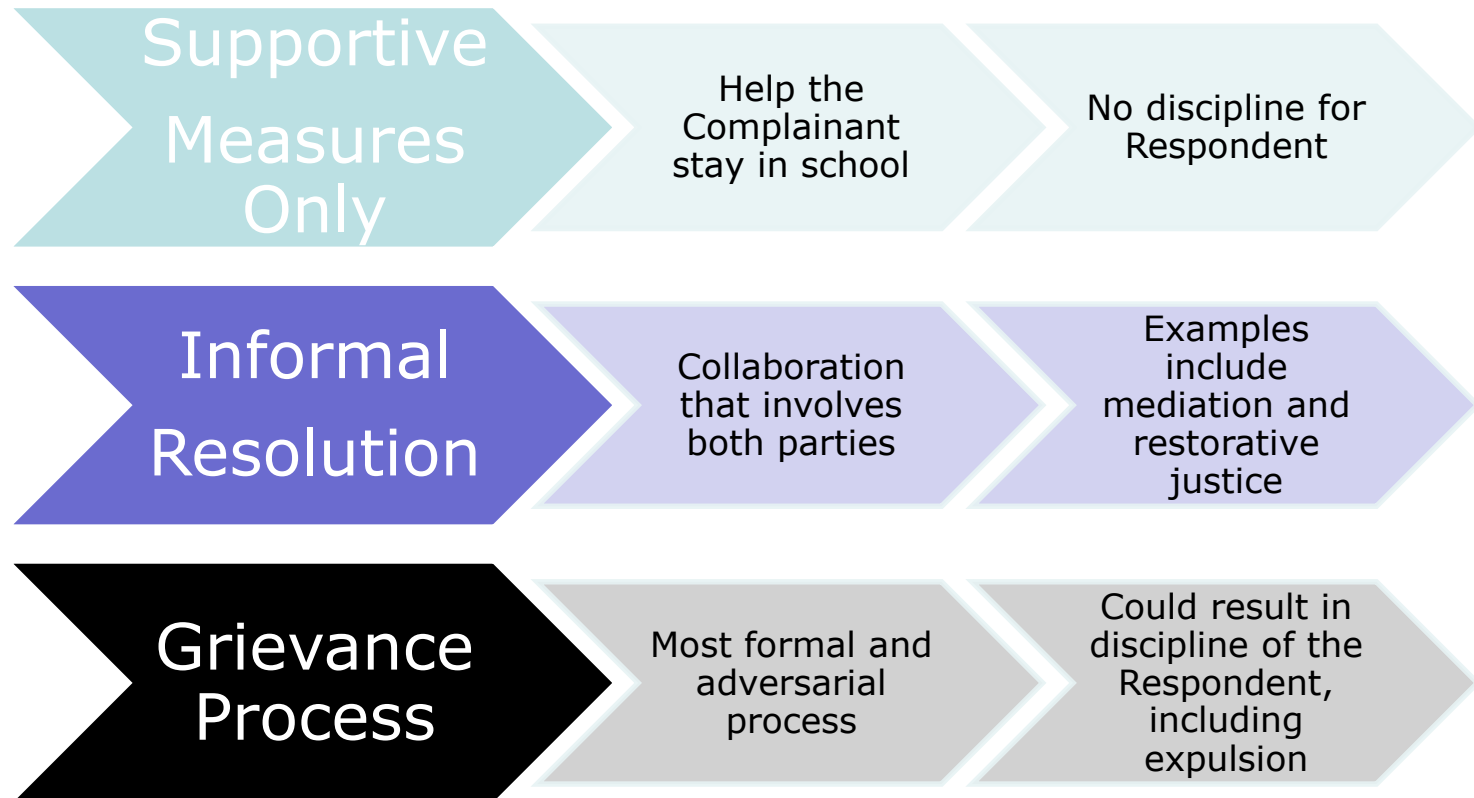
So you have a Title  
IX case, now what?

# Overarching Standard

–School with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

“Deliberately indifferent”= Response that is clearly unreasonable in light of the known circumstances.

# Three Possible Paths



The decision of which path to take is driven primarily by the Complainant

# Initial Obligations

The Title IX Coordinator must promptly:

- 1 Contact the complainant to discuss the availability of supportive measures
- 2 Consider the complainant's wishes with respect to supportive measures
- 3 Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- 4 Explain the process for filing a formal complaint and address informal resolution options

# Appropriate Supportive Measures

## DO

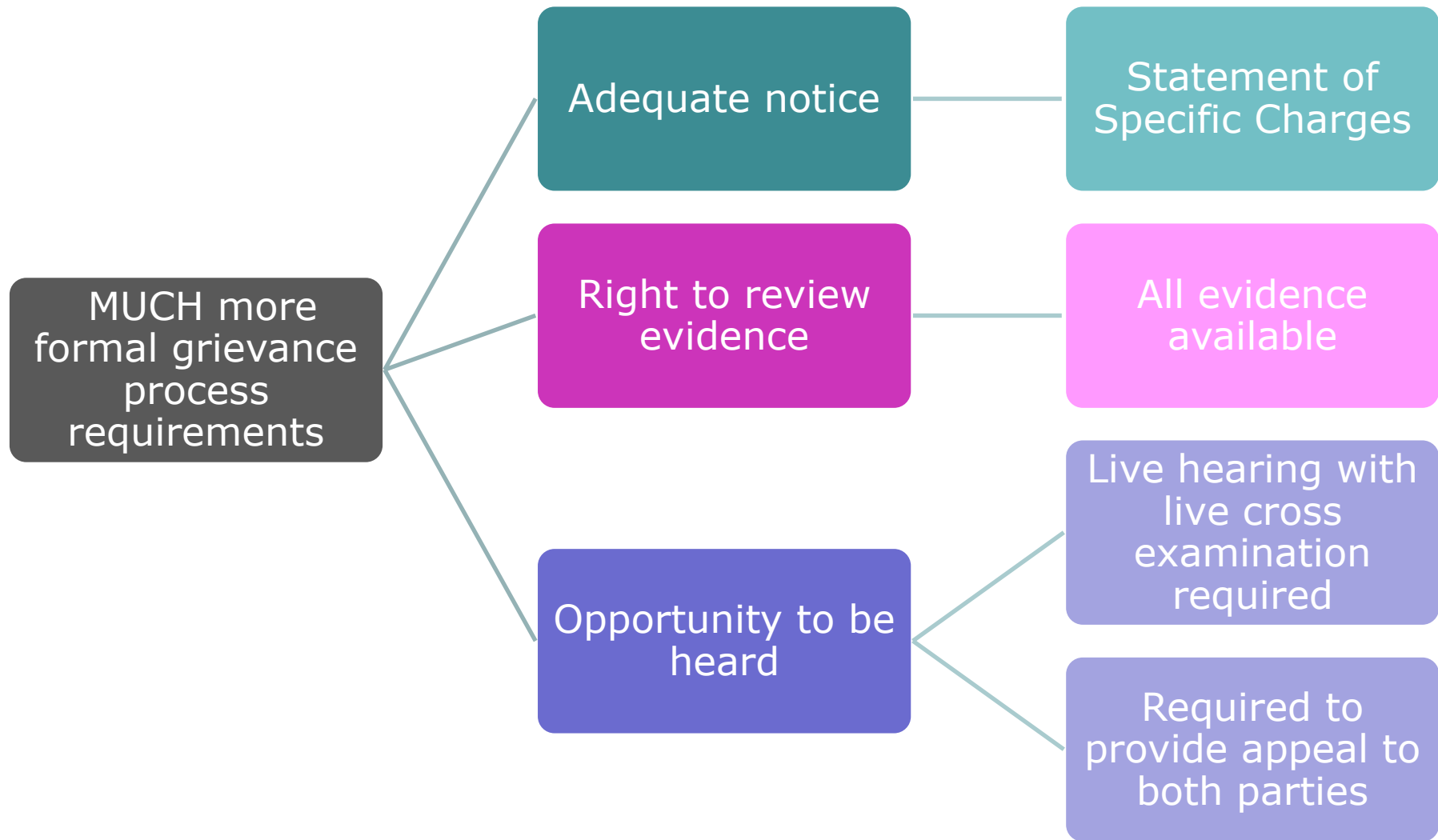
- Ensure educational access
- Protect safety
- Deter sexual harassment

## DON'T

- Punish anyone
  - Serve as a disciplinary consequence
  - Unreasonably burden the other party
- \* Emergency removal and admin. leave available under certain, limited circumstances

# Informal Resolution

- Mediation, restorative justice, etc.
- *May only offer* when formal complaint filed.  
*May not require.*
- Voluntary, written consent from parties after detailed notice. Not allowed for employee on student harassment.
- Opportunity to bridge the gap here but requires significant thoughtfulness/training.



# Written Notice Requirements

- ✓ Notice of allegations potentially constituting sexual harassment
- ✓ Sufficient details known at time and sufficient time to prepare response before any initial interview
- ✓ Statement that respondent is presumed not responsible and that determination regarding responsibility is made
- ✓ Advisor of choice, ability to review evidence, key dates
- ✓ Duty to supplement



# Investigation



- No single investigator/adjudicator model
- Training (published), impartiality, no conflict of interest
- Burden of gathering evidence on school
- Equal opportunity and no gag orders
- Prior to completion of investigative report, send to each party advisor evidence subject to inspection and review. 10 day response.

# Report



- Create investigative report that fairly summarizes relevant evidence. At least 10 days prior to a hearing or other time of determination regarding responsibility, send to each party and advisor.

# Hearings



- Live/virtual
- Recording or transcript required
- Decision maker(s) can't be coordinator or investigator
- As necessary, school must provide advisor (not necessarily attorney) of school's choice at no cost to student

# Cross Examination



- Questioning by advisor (parties may not question each other directly)
- Direct, in real time
- Relevancy requirement, vetting by decision maker(s)
- Rape shield and other protections and limitations
- Refusal to submit to cross=statements disqualified

# Standard of Evidence

Either preponderance of the evidence or clear and convincing evidence



Apply same standard for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment

# Determination of Responsibility

- Written, simultaneous notification
- Identification of the allegations potentially constituting sexual harassment
- Description of procedural steps taken from the receipt of the formal complaint through the determination
- Findings of fact supporting the determination

# Determination of Responsibility

- Conclusions regarding the application of the recipient's code of conduct to the facts
- Statement/rationale for result as to each allegation including determination regarding responsibility, any disciplinary sanctions, any remedial measures.
- Appeal rights

# Appeals

- Required for both parties on at least the following limited grounds:
  1. Procedural irregularity
  2. New evidence
  3. Bias
- Different decision maker
- Prescriptive requirements



# Suggested Next Steps



- Sound the alarm and get necessary buy-in (seriousness/aggressive enforcement, timing, budget and other resources)
- Develop a core team and assign ownership
- Systematically tap into available/free resources/analysis (law firms, trade organizations, etc.)

# Suggested Next Steps



- Consider need for external resources and move quickly
- Consider standardization, pooling, outsourcing, and working groups
- Dig into policy and procedure revision asap (mix of required and discretionary language)
- Develop form documents/templates
- Schedule training with late July/early August target

# Legal Disclaimer

*Portions of this presentation may qualify as “attorney advertising” in some jurisdictions. Parker Poe, however, intends for it to be used only for educational and informational purposes.*

*This presentation is not intended and should not be construed as legal advice.*

*The law is changing rapidly in this area. This presentation is our best attempt to summarize the current state of the law and is subject to change.*

*For questions, contact [parkerpoe@parkerpoe.com](mailto:parkerpoe@parkerpoe.com)*