

**Title IX Training for Administrators,  
Investigators, and Decision-Makers**



**Bobby Truhe  
Tyler Coverdale**

(402) 804-8000

/KSBSchoollaw

@btruhe  
@TylerCoverdale1

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2

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**Agenda**

- Title IX overview
- The players under the new regs
- Actual Knowledge
- Definitions of sexual harassment
- Investigation best practices
- Decision making best practices

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## Title IX

- Prohibits discrimination “on the basis of sex” in education programs or activities that receive federal financial assistance.
  - 20 U.S.C. § 1681(a)
- Title IX applies to the entire school district.
  - 20 U.S.C. § 1687(2).

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## Title IX Over the Years

- Enacted in 1972.
- *Franklin v. Gwinnett County Pub. Schs.* (U.S. 1992)
  - An implied private right of action for money damages could be sustained where a teacher allegedly sexually abused a student.

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## Title IX Over the Years

- *Gebser v. Lago Vista Indep. Sch. Dist.* (U.S. 1998)
  - Damages for sexual harassment of a student by a teacher can only be recovered where:
    - An official who has authority to institute corrective measures on the district’s behalf
    - Has actual notice of the teacher’s misconduct, and
    - Acts deliberately indifferent to such misconduct

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## Title IX Over the Years

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
  - A private damages actions may be sustained against a school board in the case of student-on-student harassment, BUT only where:
    - The District acts with deliberate indifference to known acts of harassment in its programs or activities; AND
    - The harassment is so severe, pervasive, AND objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

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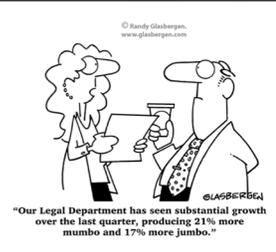
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## The New Regulations



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## The New Regulations

- Effective August 14, 2020
- Focus on schools' response to allegations of sexual harassment
- Provide specific procedures and require specific personnel
  - BUT not all alleged Title IX violations are subject to new procedures

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## What hasn't changed?

- Athletic opportunities
- Response obligations when allegations do NOT include "sex harassment"
  - Gender identity and sexual orientation
  - Third-party misconduct
  - Unequal treatment allegations against the institution (though these could amount to harassment, as well)

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## The Players

- Complainant
  - An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- Respondent
  - An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

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11

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## The Players

- Title IX Coordinator (TixC)
- Investigator
- Decision-Maker (D-M)
- Appellate Decision-Maker (ADM)
- Informal Mediator

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12

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## General Notice Obligations

- TixC must be designated formally by district
- Must notify the following of the name or title, office address, email address, and telephone number of the employee or employees designated as the TixC:
  - applicants for admission and employment
  - students
  - parents or legal guardians of elementary and secondary school students
  - employees
  - all unions or professional organizations holding collective bargaining or professional agreements with the recipient

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## General Notice Obligations

- TixC contact info must be posted clearly on website and in student/employee handbooks\*\*
- Updated policy with grievance procedure must be posted to website as well as in handbooks

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14

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## General Notice Obligations

- Notice to persons above must state the district does not discriminate on the basis of sex in the education program or activity that it operates, and that the district is required by Title IX not to discriminate in such a manner
- The notice must also state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator

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15

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## General Notice Obligations

- District must also provide to persons above notice of the grievance procedures and grievance process discussed below, including:
  - how to report or file a complaint of sex discrimination,
  - how to report or file a formal complaint of sexual harassment, and
  - how the district will respond

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16

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## Question 1

- What are the proper terms for the parties involved in a Title IX investigation?
- a. Victim and Perpetrator
  - b. Accuser and Accused
  - c. Victim and Defendant
  - d. Survivor and Assailant
  - e. Complainant and Respondent

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17

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## Responses Under the New Regulations

- Three Categories of Complaints/Allegations
  - Sex discrimination NOT involving sexual harassment
  - Sex harassment WITHOUT formal complaint
  - Sex harassment WITH formal complaint

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18

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 **General Response to ALL Allegations of Sexual Harassment**  
(with or without formal complaint)

- If the district has:
  - actual knowledge
  - of sexual harassment
  - in an education program or activity
  - against a person in the United States
- The district must respond
  - promptly
  - in a manner that is not deliberately indifferent

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 **General Response to ALL Allegations of Sexual Harassment**  
(with or without formal complaint)

- District is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances
- Rejects the “known or reasonably should have known” standard imposed by rescinded guidance

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 **General Response to ALL Allegations of Sexual Harassment**  
(with or without formal complaint)

- Must respond to any allegations where they are part of the district’s “education program or activity”
- Includes locations, events, or circumstances over which the district exercised
- Electronic or in person
- Does not say “on campus” or “off campus”

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### What is the "educational program or activity"

- "All the operations of" the district
- Anything that happens on campus
- Can also be off-campus if:
  - Part of the school's operations (athletic trips, field trips, etc.)
  - School has control over both the respondent and the context in which the harassment occurred

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22

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### General Response to ALL Allegations of Sexual Harassment (with or without formal complaint)

- Equitable Treatment
  - Supportive Measures
    - TixC should document supportive measures given, or
    - Must document reasoning for not providing supportive measures if they are not provided and show why it wasn't "clearly unreasonable" to do so
  - Follow Grievance Process that complies with procedural requirements BEFORE imposition of ANY disciplinary sanction

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23

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### Question Two:

- Which of the following COULD NOT be considered sexual harassment under Title IX?
- a. Student A is sexually assaulted in the school parking lot by Student B after hours
  - b. Student A is sexually assaulted on a church trip by Student B
  - c. Student A sends dozens of sexually explicit messages to Student B during remote learning using a district computer
  - d. Teacher A receives many sexually explicit messages from Teacher B

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24

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## Formal Complaint

- A document filed by a **complainant** or signed by the Title IX Coordinator alleging **sexual harassment** against a **respondent** and requesting that the district investigate the allegation of **sexual harassment**

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## Formal Complaint

- At the time of filing, a **complainant** must be participating in or attempting to participate in the district's education program or activity
- May be filed with the Title IX Coordinator in person, by mail, by email, and "by any additional method designated" by the district

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26

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## Formal Complaint

- A Title IX Coordinator who signs the **complaint** IS NOT a **complainant** or a party

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## Response to Formal Complaint of Sexual Harassment

- Very specific procedures
- Tasks for Title IX Coordinator
- Investigation
- Determination of Responsibility (or not) by Decision-Maker
- Appeal
- Informal Resolution

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28

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## Response to Formal Complaint of Sexual Harassment

- Equitable Treatment
- Presumption of Non-Responsibility
- All members of Title IX Team are TRAINED\* and do not have a conflict of interest or bias

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29

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## Response to Formal Complaint of Sexual Harassment

- Title IX Coordinator
  - More Notices...
    - Grievance Process
    - Allegations
    - Presumptions
    - Etc.
  - Consider dismissal?

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30

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### Response to Formal Complaint of Sexual Harassment

- District **must** dismiss the complaint if the allegations:
  - Would not constitute sexual harassment even if proved
  - Did not occur in the district’s education program or activity
  - Did not occur against a person in the United States

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### Response to Formal Complaint of Sexual Harassment

- District **may** dismiss if
  - Complainant requests (in writing to TixC) to withdraw the formal complaint\*\*;
  - Respondent is no longer enrolled or employed by the district
  - Specific circumstances prevent district from gathering evidence sufficient to reach a determination

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32

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### Response to Formal Complaint of Sexual Harassment

- If the district dismisses, must provide notice of dismissal to both parties
- Notice must contain rationale for dismissal
- Whether it was mandatory or permissive

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### Question Three:

- Certain circumstances require districts to dismiss complaints. Which of the following **WOULD NOT** require dismissal?
- A. Student A brings a formal complaint one year after the incident
- B. Student A alleges he was assaulted on a sponsored trip to Paris, France.
- C. Student A alleges she was assaulted at a home basketball game by one of the visiting team's players

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34

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### Actual Knowledge

- Notice of **sexual harassment** or allegations of **sexual harassment** to:
  - Title IX Coordinator
  - Any official of the respondent who has authority to institute corrective measures
  - **Any employee**
    - **This is why all staff must be training on identifying SH and reporting**

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35

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### Actual Knowledge

- **Actual knowledge** will not be imputed to the district *based solely* on vicarious liability or constructive notice.
- No **Actual Knowledge** when the only district employee with **actual knowledge** is the **respondent**

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36

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### Question Four:

Districts are responsible for responding to sexual harassment if they have "actual knowledge" of it occurring. Under which the following circumstances would the district have "actual knowledge?"

- a. A custodian witnesses a sexual assault on school grounds during after school hours
- b. A student comes to the guidance counselor and informs the counselor that the student was sexually assaulted in school
- c. A grade-school student tells a bus driver that another student is constantly touching her inappropriately
- d. A substitute teacher informs the classroom teacher she was subbing for that a high school senior has been repeatedly sending her lewd emails.

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37

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### Sexual Harassment

▪ "Quid Pro Quo" – district employee conditioning the provision of a district aid, benefit, or service on an individual's participation in unwelcome sexual conduct

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38

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### Sexual Harassment

#### ▪ Sexual Assault

- an offense classified as a forcible or non-forcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation

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39

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 **Sexual Harassment:  
Sexual Assault**

- **Sex Offenses, Forcible**
  - Any sexual act directed against another person, without the **consent** of the victim including instances where the victim is incapable of giving consent

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 **Consent**

- No definition under the regs
- The willingness in fact for conduct to occur.
- An individual may be incapable of providing consent to some or all sexual conduct or activity.
  - E.g., Age, incapacity, disability, lack of information, or other circumstances.

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 **Consent**

- Verbal or physical resistance is not required to show a lack of consent.
- Consider the totality of the circumstances in determining whether there was consent for any specific conduct.
- Consent may be revoked or withdrawn at any time.

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### Sexual Harassment: Sexual Assault, Sex Offenses Forcible

▪ **Rape** (Except Statutory Rape)

- The carnal knowledge of a person,
- Without the consent of the victim,
  - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

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43

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### Sexual Harassment: Sexual Assault, Sex Offenses Forcible

▪ **Sodomy**

- Oral or anal sexual intercourse with another person
- Without the consent of the victim,
  - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

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44

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### Sexual Harassment: Sexual Assault, Sex Offenses Forcible

▪ **Sexual Assault With An Object**

- To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person
- Without the consent of the victim
  - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

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45

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### Sexual Harassment: Sexual Assault, Sex Offenses Forcible

▪ **Fondling**

- The touching of the private body parts of **another person**
- For the purpose of sexual gratification
- Without the consent of the victim
  - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

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46

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### Sexual Harassment: Sexual Assault, Sex Offenses Forcible

▪ **Fondling?**

- *Gabrielle M. v. Park Forest-Chicago Heights* (7th Cir. 2003)
  - Kindergartners touching classmates' private parts
  - Unaware of sexual nature of conduct
  - Probably not for the purpose of sexual gratification
  - Probably not sexual assault

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47

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### Sexual Harassment: Sexual Assault, Sex Offenses Forcible

▪ **Fondling?**

- *Doe v. Dardanelle Sch. Dist.* (8th Cir. 2019)
  - High school setting
  - Reaching up girl's shorts and touched outside of her "private parts."
  - Grabbing girl's breast over her shirt.
  - Probably for purposes of sexual gratification
  - Probably sex assault
  - Notice different outcome from prior standard

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48

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 **Sexual Harassment:  
Sexual Assault**

▪ **Sex Offenses, Non-Forcible** (Except Prostitution Offenses)

- Unlawful, non-forcible sexual intercourse.

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 **Sexual Harassment:  
Sexual Assault, Sex Offenses Non-Forcible**

▪ **Incest**

- Non-Forcible sexual intercourse
- Between persons who are related to each other within the degrees wherein marriage is prohibited by law

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 **Sexual Harassment:  
Sexual Assault, Sex Offenses Non-Forcible**

▪ **Statutory Rape**

- Non-Forcible sexual intercourse with a person
- Who is under the statutory age of consent

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### Sexual Harassment: Dating Violence

- Violence committed by a person—
  - who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship.
    - The type of relationship.
    - The frequency of interaction between the persons involved in the relationship.

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52

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### Sexual Harassment: Domestic Violence

- Includes felony or misdemeanor crimes of violence committed by a
  - Current or former spouse or intimate partner of the victim,
  - Person with whom the victim shares a child in common,
  - Person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,

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53

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### Sexual Harassment: Domestic Violence

- Includes felony or misdemeanor crimes of violence committed by
  - A person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
  - Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

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### Sexual Harassment: Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - Fear for his or her safety or the safety of others; or
  - Suffer substantial emotional distress.

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### Question Five:

- Which of the following would trigger a district's obligations under Title IX? Select any that apply.
- a. A high school freshman informs her teacher that she is in a sexual relationship with a college freshman.
  - b. A para-educator witnesses an 8th grade boy grab a 7th grade girl's breast.
  - c. A 16-year-old boy tells his coach that his girlfriend regularly slaps him when he makes mistakes.
  - d. A high school chemistry teacher tells a coworker that their spouse, an insurance adjuster, struck them in the face the previous night.
  - e. A fifth-grade girl tells her teacher via zoom that she is scared to return from remote learning because of the messages she gets from a classmate.

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### Sexual Harassment

- 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 (*Gebser/Davis*)

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57

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### Sexual Harassment: Severe, Pervasive, and Objectively Offensive

- *Doe v. Univ. of Kentucky* (6th Cir. 2020)
  - Severe = something more than just juvenile behavior;
  - Pervasive = multiple incidents of harassment; and
  - Objectively offensive = behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively

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58

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### Sexual Harassment: Severe, Pervasive, and Objectively Offensive

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
  - Fifth-grade classmates in elementary school
  - Dec. 1992: G.F. attempted to touch another student's breasts and genital area
    - "I want to get in bed with you"
    - "I want to feel your boobs."
  - Jan. 1993: Similar conduct on two more occasions

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59

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### Sexual Harassment: Severe, Pervasive, and Objectively Offensive

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
  - Feb. 1993: G.F. placed a door stop in his pants and acted in a sexually suggestive manner to the same student during PE
  - One week later, more harassing behavior
  - Apr. 1993: G.F. rubs his body against the other student in the school hallway in what she considered sexually suggestive manner.
  - May 1993: G.F. is charged with and pleads guilty to sexual battery

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**Sexual Harassment:  
Severe, Pervasive, and Objectively Offensive**

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
  - G.F.'s misconduct over five months was severe, pervasive, and objectively offensive

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**Sexual Harassment:  
Severe, Pervasive, and Objectively Offensive**

- *Gabrielle M. v. Park Forest-Chicago Heights* (7th Cir. 2003)
  - Kindergarten
  - Student A jumped on Student B's back at recess
  - Student A leaned against Student B with his hands on his crotch.
  - Student A unzipped his pants and showed other students his underwear while the teacher's back was turned.

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62

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**Sexual Harassment:  
Severe, Pervasive, and Objectively Offensive**

- *Gabrielle M. v. Park Forest-Chicago Heights*
  - Two days later, Student A again unzipped his pants.
  - Five days later, Student A and another classmate, Student C, had their hands down each others' pants during story-time.
  - Five children (including Student A and Student B) meet with school psychologist and share that during the previous week they had kissed and jumped on top of each other at recess

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63

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### Sexual Harassment: Severe, Pervasive, and Objectively Offensive

- *Gabrielle M. v. Park Forest-Chicago Heights*
  - School Psychologists Notes:
    - It was “becoming apparent that these Kindergartners were not fully aware of the seriousness of their actions.”

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64

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### Sexual Harassment: Severe, Pervasive, and Objectively Offensive

- *Gabrielle M. v. Park Forest-Chicago Heights*
  - Court found that children were unaware of the sexual nature of their behavior.
  - The children were not engaging in “knowingly sexual acts.”
    - Detracts from the severity and offensiveness of their actions.
  - Gabrielle was not denied access to education
    - Grades remained steady. Absenteeism did not increase

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### Sexual Harassment: Severe, Pervasive, and Objectively Offensive

- *Doe v. Dardanelle Sch. Dist.* (8th Cir. 2019)
  - Jane Doe claims R.C. sexually assaulted her twice:
    - October 2014. During kickball,
      - Jane is standing on second base.
      - R.C. runs into Jane, bumps Jane’s breast with upper arm, calls Jane a bitch.

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### Sexual Harassment: Severe, Pervasive, and Objectively Offensive

- *Doe v. Dardanelle Sch. Dist.* (8th Cir. 2019)
  - Jane claims R.C. sexually assaulted her twice:
    - October 2015. Seated next to each other while watching a movie with lights off in Home Economics class.
      - R.C. reached up Jane’s shorts and touched outside of her “private parts.”
      - Jane pushed R.C. away.
      - R.C. attempted to force Jane to touch his groin.
      - Jane pulled her arm away.
      - R.C. grabbed Jane’s breast over her shirt.

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67

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### Sexual Harassment: Severe, Pervasive, and Objectively Offensive

- *Doe v. Dardanelle Sch. Dist.* (8th Cir. 2019)
  - NOT severe, pervasive, and objectively offensive such that it deprived Jane of access to education or benefits of the school.
    - Jane’s GPA increased in both her junior and senior years
    - Jane graduated on time

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### Question Six:

- Which of the following could constitute sexual harassment:
- a. A middle school boy calls his classmate a slut three times in a week
  - b. A teacher compliments a female student’s clothing everyday and tells her he can’t wait to see what she’ll wear tomorrow
  - c. A 16 year old girl is rubs herself against a male classmate every day in a suggestive manner despite him asking her to stop
  - d. A fifth grade student tells a female classmate every day that she looks very nice

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## Reporting Sexual Harassment

- Remember
  - ALL of the definitions of sexual harassment
  - Education program or activity IS NOT limited to on-campus conduct
  - You do not have to prove the case—It is most important to get the information to the Title IX Coordinator for review

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## Reporting Sexual Harassment

- Remember
  - If any employee has knowledge, then the DISTRICT has actual knowledge
    - And MUST respond in accordance with new regulations and in a way that is not deliberately indifferent

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## Investigations Generally



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### Sexual harassment happens— What's next?

- TixC has notice of sexual harassment
  - Complainant comes directly to TixC
  - Staff member reports to TixC

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### Sexual harassment happens— What's next?

- First questions:
  - Supportive measures necessary?
  - Does TixC need to file formal complaint?

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### Sexual harassment happens— What's next?

- Second Question: To whom do I owe notice?
  - Must provide initial notice to both complainant and respondent

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### Sexual harassment happens— What's next?

- Third Question: Do we dismiss?
  - Must we dismiss?
  - May we dismiss? Should we?
  - If we dismiss, what else do we need to do?
- If no dismissal, investigation proceeds

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### Sexual harassment happens— What's next?

- Rationale for careful dismissal deliberation
- Fairness to complainant
  - Dismissals of actual harassment are demeaning
  - No consequences can incentivize bad behavior of respondent in future
- Fairness to respondent
  - (damage of false accusations)

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### Question Seven:

- A middle school student complains that a boy is constantly teasing her and using sexual language. She says she doesn't want to file a formal complaint though. What do you do?

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78

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## Investigation Best Practices

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"After closer investigation, it's become clear that we need to enter more than one value."

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## Time Frames

- From the time of complaint, investigation will take at least **ten days** (and probably more) prior to submitting report to D-M

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## Avoiding credibility determinations

- Credibility determinations need to be left to the D-M
- Investigator can report facts regarding physical behavior during interviews, but cannot make credibility determinations during investigation
- Need to be thorough with documenting physical behavior in order to assist D-M with their determination

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## Avoiding credibility determinations

- Things you can (and should) put into notes and subsequent report:
  - "The complainant's eyes were moving constantly while he spoke."
  - "The respondent made several hand gestures when he was done speaking."
  - "Complainant's voice shook and faltered while she told the story."
  - "Respondent would respond with a raised voice when questioned."
- Things you CANNOT put into notes and subsequent report
  - "The complainant did not appear truthful"
  - "The respondent was believable"

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## Avoiding decision making

- Similar to avoiding credibility determinations
- Should include in notes facts that would bear towards responsibility or non-responsibility, but notes and report should not state any inferences to be drawn from those facts

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## Avoiding decision making

- Include:
  - "The respondent alleges he was in his biology class when the alleged assault occurred in the parking lot. Several witnesses including his teacher corroborate his statements."
  - "Several witnesses saw the respondent enter the locker room where the complainant alleges the assault occurred. Their statements indicate the respondent looked angry."
- NOT:
  - "It was impossible for the respondent to have committed the assault because he was on the other side of the school in his biology class."
  - "The complainant is probably telling the truth because several people saw the respondent follow her."

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## Party Interviews

- Interviews of parties
  - Provide written notice of the date, time, location, participants, and purpose of all interviews, or other meetings, with **sufficient time** for the party to prepare
- Interviews should be somewhere private with limited interruptions
- Explain the prohibition against retaliation
- Explain purpose of interview and how information will be used

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## Party Interviews

- Take notes during the interview—may slow down the interview but this is not necessarily a negative as it can help detect deception if party is nervous about your note taking
  - Should take place throughout interview, not just at incriminating or deceptive moments
- Review your notes before the interview concludes; clarify anything you are unclear about

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## Party Interviews

- Notes should be complete and detailed
  - Important for assessing credibility
  - Decision may turn on small details
- Where possible, include verbatim statements on critical issues – paraphrasing can later become problematic

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## Party Interviews

- Do's and don'ts:
  - Do employ empathy while maintaining professionalism
  - Don't shy away from uncomfortable questions
  - Do use open ended questions;
  - Don't use leading questions
  - Do question with empathy and understanding, it's not an interrogation
  - Don't make unrealistic promises about outcomes or confidentiality

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## Parties' rights during investigation

- Parties must have the opportunity to present witnesses during investigation
  - Can be both fact and expert witnesses if they wish
- Must have the opportunity to present both exculpatory evidence (tending to show non-responsibility) and inculpatory evidence (tending toward responsibility)

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## Parties' rights during investigation

- Parties must be able to discuss allegations with anyone
  - Limited to the allegations themselves
  - Can place limits on discussion of the evidence outside of the Tix process
  - Can have NDAs if no formal complaint is filed
- Exceptions
  - No contact directives as part of supportive measures

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### Parties' rights during investigation

- Parties must have the opportunity to have others present during the grievance process
  - Can be an "advisor of their choice" who can be a lawyer but doesn't need to be
  - Can limit how much the advisor can participate as long as the limitations are applied equally

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### Parties' rights during investigation

- Review of all compiled evidence
  - Once the investigator has compiled the evidence, ALL of the evidence, including that which he doesn't plan to use, must be disclosed to both parties
  - Parties must then have the chance to meaningfully respond to the evidence before the investigator drafts final report
  - Can be submitted electronically
  - Parties must have **at least ten days** to submit a written response to evidence, which investigator must consider prior to drafting report

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### Question 8

- You get a report of a sexual assault and the complainant wishes to file a formal complaint. The respondent is also a student, but upon first communication says he won't speak to you in any way without his lawyer present. What's next?

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### Question 9

▪ You get a report of a sexual assault in the school. The investigator begins his investigation by interviewing the complainant that same day, and she believes there was a camera that was able to view the assault. Upon checking the footage, it is clear that the assault occurred and that the respondent was the person who committed it. What's next?

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### Burden of Proof

- School is the party responsible for figuring out what happened.
  - Not complainant's job to prove the claims
  - Not the respondent's job to exonerate themselves

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### How much needs to be proved?

- Regs allow for two different standards
  - Preponderance of the evidence
    - More likely than not
  - Clear and convincing evidence
    - "It is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegation sought to be established." *Brown v. Warner*, 107 NW 2d 1 (S.D. 1961).
    - In other words, something highly and substantially more probable to be true than not
- What to use and why?

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## Report Writing

- Report "must fairly summarize the relevant evidence"
- Outline can be useful
  - Statement of Jurisdiction (control over respondent, control over context of allegations, reasons for no mandatory dismissal)
  - Burden of proof (preponderance of the evidence or clear and convincing)
- Use their words as much as possible
- Should describe the allegations and the circumstances in which they were brought
- Should describe any prior relationships between the parties

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## Report Writing

- What evidence to put in report?
- Relevant Evidence
  - Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
  - Who, what, when, how of allegations in the complaint
  - Motive or bias of witnesses
- Relevant evidence can be both inculpatory (showing responsibility) and exculpatory (showing non-responsibility)

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## What evidence NOT to consider?

- Privileged information
  - Doctor/patient, attorney/client, spousal privilege
- Sexual predisposition of complainant
  - UNLESS
    - They're offered to show mistaken identity or;
    - Consent to the specific acts, through showing specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

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### Question 10

- You're done with your investigation and are ready to draft your report. You're pretty certain of a few facts. What of the following should be in your report?
  - "The respondent does not seem trustworthy."
  - "The complainant had several sexual partners that evening."
  - "The respondent's alibi seems dubious."
  - "The complainant began to cry during her interview. This is common for assault victims."

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### Decision Making



"And that's Daddy, before the new regs and before Title IX crushed all his hopes and dreams."

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### Review—how case gets to D-M

- Complaint filed
- TixC evaluates for dismissal
- Investigation
  - Gathers evidence
  - Interviews parties and witnesses
  - Submits evidence to parties
  - Parties have 10 days to respond
  - Drafts investigative report and submits it to D-M and parties

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102

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## Now what?

- Now you have to make a decision
- Decision Process
  - After the investigation → "Hearing" (not required for K-12)
  - K-12 districts MUST allow exchange of written questions
    - AFTER Investigative Report, BEFORE determination of responsibility
    - Allow for additional, limited follow-up
    - Can put "reasonable restrictions" on this step
  - Written Determination (specific contents)

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## Written Questions

- D-M should inform parties upon receipt of the investigative report that they have the right to submit written questions
- Method of communication should be specified (email, hard copy, etc.)

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## Written Questions

- Questions can be of any party or witness
- Each question must be relevant
  - Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
  - NOT relevant if it is regarding sexual predisposition
  - Who, what, when, how of allegations in the complaint
  - Motive or bias of witnesses
- Relevant evidence can be both inculpatory (showing responsibility) and exculpatory (showing non-responsibility)

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## Written Questions

- What not to consider?
- Sexual predisposition of complainant
  - UNLESS
    - They're offered to show mistaken identity or;
    - Consent to the specific acts, through showing specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

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## Written Questions

- D-Ms can only obtain answers for relevant questions
- If not relevant, must tell parties why
  - Could be appealable issue if decision is incorrect

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## Written Questions

- If relevant, decision maker must attempt to obtain the answer
- A party's refusal to answer cannot be held against them
  - Retaliation

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## Written Questions

- Timeline
  - Must wait at least **ten days** from receipt of investigative report before issuing decision

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## Question 11

- You've reviewed the investigative report and have received your first round of questions from the parties. Which of the below should you require answers for? Why and why not?
  - From Complainant: "Please inquire with Jessica, Allison, and Mandy, as they all have said to me in the past that Respondent has assaulted them."
  - From Respondent: "Please ask the complainant how much she had to drink that evening."

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## Drafting the Written Decision

- Findings of Fact
  - Determinations of credibility
  - Use information obtained from interviews to make objective determinations

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### Drafting the Written Decision

1. Identify and describe the allegations
2. Describe the procedural steps from time of complaint to time of drafting decision
3. Make findings of fact
  - a) A list of factual statements in chronological order
  - b) Resolve disputed facts (he said/she said)

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### Drafting the Written Decision

4. State conclusions of how code of conduct was or wasn't violated
5. State rationale for resolution of each allegation
  - a) Responsibility or not
  - b) Disciplinary actions as a result
  - c) Remedies available to complainant
6. Describe appeal process

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### Remedies

- Once responsibility is found (AND ONLY THEN), district can institute remedies
- Can be similar to supportive measures, but can be punitive as well
- Goal should be to "restore or preserve equal access to the recipient's education program or activity"

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**Appeals**

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**When can a decision be appealed?**

- Three grounds:
  - Procedural issue
  - New evidence
  - Bias/conflict of interest

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**When can a decision be appealed?**

- Procedural issues
  - Party appealing must show how the procedural irregularity affected the outcome
- Examples
  - "Investigative report was issued 5 days after the complaint and we would have asked question x,y,z to show why a witness wasn't credible."

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### When can a decision be appealed?

- New evidence
  - Must have been able to alter the outcome
- Example
  - John came forward with testimony that he saw respondent somewhere else at the time of the alleged assault

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### When can a decision be appealed?

- Bias/conflict of interest
- Must have affected outcome
- Example
  - Complainant becomes aware after decision that respondent is related to the TixC

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### Question 12

- The decision has been drafted and sent to the parties. The respondent was found not responsible. Three days later, you receive a request for an appeal from the complainant with the following justifications. Which one(s) justify an appeal?
  - The investigator submitted his report eight days after the complaint was filed.
  - A witness came forward to me saying they may have possibly seen the Respondent somewhere other than where he said he was the night of the complaint.
  - The TixC is in rotary club with the respondent's mother.

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## Appeal Procedure

- Policy allows for up to ten days to bring appeal
- Must notify other party when appeal is brought
- Each party must have an opportunity to submit a written statement either in support of or against the decision

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121

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## Appeal Decision-Maker

- Cannot be the TixC, investigator, or D-M
- Must be free of bias and conflicts of interest
- Must issue written decision and submit it to both parties simultaneously

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122

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## Drafting the Appeal Decision

1. Identify and describe the arguments for appeal
2. Describe the procedural steps from time of complaint to time of drafting decision
3. Summarize decision and its rationale
4. Analyze whether outcome was affected by claimed error:
  - If not, appeal can be dismissed
5. Grant or reject appeal and state rationale for doing so

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 **Informal Resolution**



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 **Informal Resolution**

- Cannot force parties to waive right to formal process through conditioning any sort of benefit upon that waiver
- Can only be offered once a formal complaint is filed
- Can be offered to parties (if they wish) at any time prior to the final determination

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 **Informal Resolution**

- Must provide written notice disclosing:
  - Description of allegations
  - Requirements of the informal resolution process (where it precludes the parties from resuming formal complaint)
  - State that parties have the right to resume formal complaint process before they agree to resolution
  - Any information gained through the process could be used if the formal process resumes
- Must obtain the parties' voluntary, written consent to the informal resolution process
- Can't offer in a situation where it's alleged an employee sexually harassed a student

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## Recordkeeping

- District must maintain for a period of seven years records of each Tix investigation, including:
  - any determination regarding responsibility and date entered
  - any disciplinary sanctions imposed on the respondent and date(s) enforced
  - any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity
- All appeals must also be kept on record for seven years
- Any informal resolutions as well
- Must also maintain all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
  - These materials must be publicly available on its website

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## Avoiding Biases and Conflicts of Interests



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## Avoiding Biases

- All members of the Tix team must be free from biases
- Per the regulations, Tix team cannot be biased for or against respondents/complainants generally
- Nor can they be biased for or against any individual party
- The more evidence you consider, the less likely you are to use "hunches" which are easily tainted by subconscious or implicit bias

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129

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## Avoiding Biases

- Be as aware as possible of implicit bias
  - Biases we are not aware we even have
  - <https://implicit.harvard.edu/implicit/selectatest.html>
- Taking these tests is a simple but effective tool to expose your biases

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## Avoiding conflicts of interest

- What is a conflict of interest?
  - Regs don't specify
- Best practice: If you think there might be a conflict with anyone on the TIX team, replace that person with someone else

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## Title IX Training for Administrators, Investigators, and Decision-Makers



### Bobby Truhe Tyler Coverdale

(402) 804-8000

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