Why Are We Here?

- Training on the 2020 Title IX Rules
- Not legal advice; keep it hypothetical today—contact me or legal counsel separately for specific issues as they arise
- These materials will be available for posting on your website after our session

Today Is Title IX but...

Complaints of discrimination, harassment, or retaliation based on protected statuses other than sex should be reported to the appropriate District Official, who must address them; they will not be addressed under the Title IX sexual harassment process we are talking about today.
Ice Breakers

Polling Access

Option One
Use this QR code

Option Two
- Go to Pollev.com on any browser
- Accept or dismiss cookies
- Enter THLAW411 as the Username
- Skip when asked to enter your name

My educational institution has trained all Title IX team members at least 8 hours

True
False

My role with Title IX in my District/school is:

- Title IX Coordinator
- Deputy Title IX Coordinator
- Building Title IX Contact
- Title IX Team Member
- None of the Above

Title IX

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.

What is Title IX?

What Conduct Could Fall Under Title IX in My School?

Interscholastic Athletic Programs

Interests and abilities tests
Benefits & Opportunities
- Equipment and supplies
- Scheduling of games and practice times
- Travel and per diem allowances
- Coaching and academic tutoring
- Locker rooms, practice facilities, and competitive facilities
- Medical and training facilities and services
- Housing and dining services
- Publicity
- Recruitment
- Support services

Sticky Issues – Athletics
- Most schools are not in compliance
- Training on athletics is limited and overshadowed
- OCR athletics investigations are lengthy and costly
- Once trust is lost with the community it is hard to regain

Pregnancy & Parenting
- Title IX’s regulations prohibit discrimination based on pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery from any of those conditions
- Also prohibits a school from applying any rule related to a student’s parental, family, or marital status that treats students differently based on sex

Risky Business
- Discrimination and exclusion from the education program or activity, including any class or extracurricular activity, based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. That includes harassment by third parties and actions by teachers and other employees with respect to academic requirements.
- Medical and other benefits and services, meaning treating pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom differently than other temporary disabilities with respect to hospital or medical benefits, services, plans, and policies for students.
Risky Business

- Leave policy, meaning that if other leave is not available, a school must provide leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom for as long as the individual’s physician deems medically necessary.

2022 Fact Sheet

- Issued on the 100th day after the U.S. Supreme Court overturned Roe v. Wade
- Does not provide new law but it is a clear warning to schools that specific actions concerning students and employees seeking or who have received abortions could lead to administrative enforcement from OCR

2022 Fact Sheet

- Title IX requires educational institutions to protect their students and employees from discrimination on the basis of pregnancy, including pregnancy termination and recovery therefrom.
- Schools:
  - Cannot treat students or employees differently because they obtained an abortion.
  - Must treat abortion like any other temporary disability for hospital and medical benefits, services, plans, and policies.
  - Must provide leave to individuals for termination of pregnancy or recovery therefrom for as long as the student or employee’s physician says it is medically necessary.

2022 Fact Sheet

- Schools cannot treat requests for leave related to abortion differently than other temporary disabilities with respect to commencement, duration, and extensions of leave, payment of disability income, accrual of seniority or any other benefit or service, and reinstatement, along with any other employment-based benefits.
What Do The 2020 Rules Require?

**Designate**
- Designate Title IX Coordinator

**Identify**
- Inform individuals of the identity of the Title IX Coordinator

**Post**
- Post the Title IX Coordinator’s name/title, address, email address, and telephone number on the school’s website

*Train*
- Train all Title IX coordinators, investigators, decision-makers (initial complaint and appellate), and informal resolution facilitators (the “Title IX Team”)

*Policy*
- Have and share publicly a Title IX sexual harassment policy and grievance procedure

*Process*
- Use that policy and procedure any time a report or complaint of covered conduct is received

What Do The 2020 Rules Require?

T9SH

**Grievance Process: When & What is Required**

- A K-12 school receiving federal funds
- in which any employee has knowledge
- of “Title IX Sexual Harassment”
- in an “education program or activity”
- against a person in the United States
- must respond using the Title IX Sexual Harassment process

If it is Title IX....

If any school employee is aware of any information about *Title IX Sexual Harassment* in an education program or activity of the school and in the U.S., the school cannot impose punitive or disciplinary consequences on the alleged perpetrator until it has used the Title IX sexual harassment process. You MUST use the Title IX process.

2022 Proposed Rules

- Issued by the Biden administration in proposed form on June 23, 2022
- Comment period ended September 12, 2022
- Department of ED will review and respond to all comments in the final rule
- Purported release date for final rule May 2023, with an effective date in August 2023; this would be extremely fast based on past experience but that’s their story and they’re sticking to it!
- Would change many of the requirements for handling complaints and apply to all sex discrimination, not just sex-based harassment

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Transgender Issues

Transgender FAQs

What we know for certain....

OCR can and will investigate

www.titleIXtips.com

Transgender FAQs

Preferred Name
Preferred Pronouns
Records
Intimate Facilities
Attire
Programs/Activities
Field Trips
Parental Notice/Rights
Harassment/Bullying
Athletics

Transgender FAQs

Not a one-size-fits-all approach
Different boards
Different responses based on age (high school vs. elementary)
Differences in federal and state law
Uncertainty regarding interpretation of "black letter" federal law and federal regulations
The U.S. Supreme Court and Texas federal courts have not specifically ruled on many LGBTQIA student issues

What we know for certain....

The IX protects all students, including transgender students, from discrimination and harassment because of the student’s sex—which includes the student’s deviation from stereotypical gender norms (sex stereotyping, gender stereotyping)

Same-sex sexual harassment is prohibited

OCR can and will investigate

• Discrimination, harassment, and bullying against LGBTQIA students
• Not allowing a student to bring a same-sex date to school events
• Failure to use requested pronouns and preferred names, including on school identification and by other school personnel
• Failure to accommodate—in terms of facilities, including restrooms facilities—although lack of clarity in the law
• Prohibitions on participating in activity—including athletic participation—despite conflicts with state laws
Sticky Issues – Transgender

- State law conflicts (athletics, parental notice)
- Lack of court guidance on certain issues (facilities)
- Fierce community and media scrutiny
- Confusion by employees

Title IX Non-Compliance Penalties

**Most Common**
- OCR Remedial Action
  - Resolution agreement/monitoring
  - Can lead to process to remove federal funds (lengthy process)
  - Involves a hearing
  - Subject to judicial review

34 CFR 106.3(a), 34 CFR 100.7(d), 100.8, 100.9

**Less Common**
- Impact on Grant Funds—even before option to enter resolution agreement
- A reference to the DOJ with a recommendation that it file suit
  34 CFR 106.4(a); 34 CFR 100.8(a)(1)
- Lawsuits filed by alleged victims or perpetrators in Federal court

The Title IX Coordinator’s Role in Addressing Sexual Harassment

- Preventing sexual harassment
- Facilitating reports of sexual harassment
- Responding to reports of sexual harassment

Prevention Efforts

- Education of the school community about sexual harassment and the District’s policies and processes, including working with campus, student services, and human resources personnel to ensure the reporting process is well-publicized
- Campus handbooks
- Faculty & staff handbooks
- Informational material to parents and students
- Training for personnel on how to prevent, identify, report, and respond to sexual harassment in schools
- Training for students and parents on how to identify and report sexual harassment in schools
Facilitating Reports

Any person may report sex discrimination, including sexual harassment, in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during nonbusiness hours) by using the telephone number or electronic mail address, or by mail, to the office address listed for the Title IX Coordinator.

Responding to Reports

- Intake (identifying Title IX sexual harassment)
- Emergency Removal/Administrative Leave
- Supportive Measures/Formal Complaint Meeting
- Implementing Supportive Measures
- Signing a Formal Complaint
- Considering Dismissal
- Overseeing Investigation, Decision, and Appeal
- Implementing Remedies

Identifying Title IX Sexual Harassment

Chanda, a former student who graduated a year ago, reports a sexual relationship with Mx. Robin, who teaches math. The two allegedly were first intimate at Chanda's graduation party and dated over the summer and into the fall. When Mx. Robin broke things off, Chanda looked at the relationship clearly for the first time and fears it was inappropriate. Chanda reported out of concern about other students being similarly taken advantage of.

Chanda was in Mx. Robin’s class during the final semester of Chanda’s last year before graduation. According to Chanda, Mx. Robin regularly touched and hugged students, including Chanda, when they came into class each day. Mx. Robin took great interest in Chanda’s life. Mx. Robin called Shanda “sweetheart” and “sunshine” and told Chanda “I've never had a student mean this much to me.” Chanda’s home life was tumultuous and so Chanda appreciated the attention.

Mx. Robin would regularly ask Chanda to stay after class to “check in.” On those occasions, Mx. Robin would ask Chanda to sit next to Mx. Robin, and Mx. Robin’s leg would brush up against Chanda’s. On at least one occasion, Mx. Robin patted Chanda’s leg while they were talking.
Chanda says that there has been gossip for years that Mx. Robin is not always professional with students. Near the end of the class, right before graduation, Mx. Robin gave a note to Chanda that ended signed with “Love, Mx. Robin.”

Mx. Robin came to Chanda’s graduation party with some friends. Chanda had not invited Mx. Robin but another graduate had. At the party, Mx. Robin stayed longer than anyone else and at the end of the night kissed Chanda. Chanda “gave in” because Mx. Robin had been so persistent. Mx. Robin ended the relationship after a few months. Under state law and relevant policies and contracts, Mx. Robin has no expectation of continued employment.

Is the conduct subject to the Title IX SH grievance procedure?

Yes, because Chanda is not participating now attempting to participate in an education program or activity at the time of the report.

Yes, because the conduct while Chanda was a student was not sufficiently severe, pervasive, and objectively offensive.

Yes, because Mx. Robin’s actions while Chanda was a student could be grooming, a type of Title IX.

No, because Mx. Robin is “at will” and can be terminated without any process.

P/ATP

“At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”

2020 Title IX Rule

Note that this requirement only applies at the time the formal complaint is filed, and is not affected by a complainant’s later decision to remain or leave a school.

OCR Q&A July 2021: Examples of situations of a complainant “attempting to participate” include when they:

1. Withdrew from the school due to alleged sexual harassment but express a desire to re-enroll if the school responds appropriately to the allegations
2. Graduated but intend to apply to a new program or to participate in alumni programs and activities
3. Are on a leave of absence but are still enrolled or intend to re-apply after the leave
4. Have applied for admission

The regs are silent as to what to do if someone files a complaint and is not P/ATP

Not a listed basis for dismissal

In practice, however, a complaint should be dismissed if filed by a student who is not participating or attempting to participate in an education program or activity

Except....
A Title IX Coordinator can and in some cases must file a formal complaint even if the complainant is not P/ATP.

For example, if “a pattern of alleged sexual harassment by a perpetrator in a position of authority” is alleged.

What About the Respondent?

There is no similar rule for respondents to be P/ATP.

Permissive dismissal is allowed if the respondent's "enrollment or employment ends".

Must not be unreasonable in light of the known circumstances ("deliberately indifferent") to dismiss.

Is the conduct subject to the Title IX SH grievance procedure?

No, because Chanda is not participating in an education program or activity at the time of the report.

Yes, because the conduct while Chanda was a student was not sufficiently serious, pervasive, and objectively offensive.

Yes, because Mr. Roberts' actions while Chanda was a student could be grounds for a Title IX violation.

No, because Ms. Bobbi is "at will" and can be terminated without any process.

T9SH Grievance Process: When & What is Required

A K-12 school receiving federal funds in which any employee has actual knowledge of "Title IX Sexual Harassment" in its "education program or activity" and against a person in the United States must respond using Title IX Sexual Harassment process.

Tip

Just because conduct is not Title IX Sexual Harassment does not mean you will ignore it; you can just use a different policy/procedure to address it.

Train staff to take a “yes, and” approach to responding to complaints rather than a “no, but” response.
Grievance Process:
When & What is Required

A K-12 school receiving federal funds

K-12 Schools

- Any K-12 school that receives federal financial assistance from the U.S. Department of Education
  - Includes almost every public school
- Special rules for K-12 schools (as compared to higher education)—that’s what we’re discussing today

A K-12 school receiving federal funds in which any employee has actual knowledge

T9SH Grievance Process: When & What is Required

ANY Notice or Knowledge

- Complaint
- Report
- Reference
- Gossip/Rumor
- Perceive
  (See/Hear/Notice)

to or by ANY K-12 employee

REMEMBER

- Any person may report sex-based discrimination to any employee, including the Title IX Coordinator
- Every employee of the District is required to report any information they know suggesting that sex-based discrimination, including harassment, or retaliation has, is, or may be happening
  - Failure to do so may lead to disciplinary action

Test Yourself

Cleo mentions to Frankie while walking down the hall that a teacher is sexually harassing them. A custodian overhears.
An anonymous report is made through the online reporting system that an unnamed student sexually assaulted Charlie, a student in the District.

Is there actual knowledge?

Yes  No

Test Yourself

A building administrator hears from staff members that a student, Cameron, and Teacher Thompson are having a consensual relationship.

Is there actual knowledge?

Yes  No

Test Yourself

A building principal receives a court order saying one student, Reid, must have no contact with another student, Cody, for "sexual assault."
Title IX Sexual Harassment Is....

- Unwelcome conduct
- Based on sex
- That:
  - Is one of the Title IX “Big Five” or
  - Creates a Title IX “Hostile Environment”

Unwelcome Conduct

- Not solicited or invited, and the target considers it undesirable or offensive
- Acquiescence—even willing participation—or the failure to complain or report the conduct does not always mean the conduct was welcome
- Conduct welcomed on one occasion can be unwelcomed on a subsequent occasion
- Whether conduct is “welcome” can be impacted by age, disability, relationships, culture, and intoxication

Title IX Sexual Harassment Is....

- Unwelcome conduct
- Based on sex
- That:
  - Is one of the Title IX “Big Five” or
  - Creates a Title IX “Hostile Environment”

Unwelcome?

A student, Carson, reports that other students are constantly making sexual jokes, which Carson said makes them uncomfortable. Carson actively participates in the jokes, makes jokes, laughs at jokes, but says they only did so not to make a scene.
Unwelcome?

Carson reports that Robin forcibly kissed Carson on multiple occasions. Robin asked Carson for a kiss. Carson did not say no. Carson reports looking at Robin uncertainly, however, and not kissing Robin back. When asked for details, Carson said they were too afraid to say no because Robin is a “cool kid,” and Carson didn’t want to be an outcast.

Title IX Sexual Harassment Is....

- Unwelcome conduct
- Based on sex
- That:
  - Is one of the Title IX “Big Five” or
  - Creates a Title IX “Hostile Environment”

Based on Sex

- “Sexual”
- Based on gender (e.g., stereotypes of women’s roles), sexual orientation, gender identity
- Otherwise “sex-based” (e.g., involves a private body party)
Based on Sex

The sex/gender, sexual orientation, and gender identity of the parties involved is not determinative

- A boy can harass a boy (even if both are heterosexual)
- A girl can harass a girl (same)
- A cisgender person can harass a cisgender person

**Cisgender ("sis-gender") is a person whose gender identity and expression match the biological sex they were assigned at birth

Title IX Sexual Harassment Is....

- Unwelcome conduct
- Based on sex
- That:
  - Is one of the Title IX “Big Five” or
  - Creates a Title IX “Hostile Environment”

“Title IX Sexual Harassment”

The Title IX “Big 5” or Title IX “Hostile Environment”

“Title IX Sexual Harassment”

The Title IX “Big 5” or Title IX “Hostile Environment”

Title IX “Big 5”

- Employee Quid Pro Quo
- Sexual Assault**
- Domestic Violence**
- Dating Violence**
- Stalking**

** as defined in the federal higher education laws, the Clery Act and the Violence Against Women Act (known as the "big four")
#1 of the “Big 5”
Employee Quid Pro Quo

► An employee of the school conditioning an aid, service, or benefit of the school on an individual’s participation in unwelcome sexual conduct
► Examples include an employee:
  ➢ Requesting sexual favors for a benefit or service
  ➢ Threatening to remove a benefit or service unless a person engages in sexual favors
  ➢ Expecting sexual favors for a benefit or service

#2 of the “Big 5”
Sexual Assault (Clery Definition)

► Rape: Any act of vaginal or anal penetration, however slight, with any body part or object, or oral genital contact without consent
► Fondling: Touching of the private body parts of another person for the purpose of sexual gratification, without consent (above or under clothing)
► Incest
► Statutory Rape

What is Consent?

► “Consent” comes into play in sexual assault cases, including those involving fondling
► Consent is not defined by OCR/the 2020 Title IX rules
► Must be defined in your policies/procedures

#3 of the “Big 5”
Domestic Violence (VAWA Definition)

► Felony or misdemeanor crimes of violence
► By
  ➢ A current or former romantic partner
  ➢ Spouse
  ➢ Former spouse
  ➢ Intimate partner
  ➢ Person who shares a child
  ➢ A person similarly situated to a spouse
  ➢ An adult against a person protected under domestic or family violence laws of the jurisdiction

#4 of the “Big 5”
Dating Violence (VAWA Definition)

► Violence committed by a person who has been in a romantic or intimate social relationship with the victim
► Can include sexual, physical, emotional, or psychological violence
► Consider the complainant’s description of the length of the relationship, the type of relationship, and the frequency of the interaction

#5 of the “Big 5”
Stalking (VAWA Definition)

► A course of conduct based on sex (≥2 times)
► Directed at a specific person
► That would cause a reasonable person to:
  ➢ Suffer substantial emotional distress
  ➢ Can be direct or indirect
In K-12, the **Big Ones in the Big 5** Are:

- Sexual Assault (rape, oral sex without consent)
- Fondling (touching a private body part above or below the clothing without consent for purposes of sexual gratification)
- Dating Violence (physical or mental violence by current or former romantic partner)

**“Title IX Sexual Harassment”**

**The Title IX “Big 5” OR Title IX “Hostile Environment”**

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**Dictionary Definition**

**“Severe”**

- Very bad, serious, or unpleasant; causing a lot of physical pain or suffering; very harsh (Merriam-Webster)
- Strict, austere or intense with disastrous consequences. (Black's Law Dictionary)
“Severe” means something more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and crass.

Simple acts of teasing and name-calling are not enough, even where these comments target differences in gender.

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019), cert. denied, 141 S. Ct. 554, 208 L. Ed. 2d 175 (2020)

Case Law Definitions

A school is not perfectly analogous to a workplace, and minor students are not perfectly analogous to adults. Accordingly, some behaviors that plainly would be out of place in a workplace may be tolerable in a school setting as part of the ordinary social development of the school's students.

At least early on, students are still learning how to interact appropriately with their peers, so it is unsurprising that they may engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting.


Dictionary Definition

“Pervasive”
Spread over a large area, either metaphorically, or in a literal manner. For instance, rumors can be quite pervasive amongst people. (Black's Law Dictionary)

Case Law Definitions

“Pervasive” means "systemic" or "widespread." For sexual harassment under Title IX, it also means multiple incidents of harassment; one incident of harassment is not usually enough.

Most single incidents could be sufficiently severe that it would result in the articulated injury but a single incident would normally fall short of Title IX's requirement of "systemic" harassment.

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019), cert. denied, 141 S. Ct. 554, 208 L. Ed. 2d 175 (2020)
**Dictionary Definition**

"**Objectively Offensive**"

- “Objective”: Existing independently of perception or an individual's conceptions (Reverso)
- “Offensive”: Unpleasant or disgusting, as to the sense (Reverso)

**Case Law Definitions**

- “Objectively offensive” means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively.
- Consider the constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.
- The victim's perceptions are not determinative. The objective offensiveness is to be judged by reference to a reasonable person of the same age at whom the comments or behavior were aimed.

**Effective Denial**

Would a reasonable person in the alleged victim's position be effectively denied equal access to education compared to a similarly situated person who did not suffer the alleged sexual harassment?
Effective Denial

Examples may include:
- Skipping class to avoid a harasser
- A decline in a student’s grade point average
- Difficulty concentrating in class
- A third grader who starts bed-wetting or crying at night due to sexual harassment
- A high school wrestler who quits the team but carries on with other school activities following sexual harassment

Effective Denial of Equal Access

- No concrete injury is required to prove an effective denial of equal access
- A complainant need not have already suffered a loss of education
- Does not require that a person’s total or entire educational access has been denied

Effective Denial of Equal Access

- The key: School officials turning away a complainant by deciding the complainant was “not traumatized enough” would be impermissible
- If you have an allegation of severe, pervasive, and objectively offensive conduct, you likely can assume effective denial

TEST YOURSELF

Is it Title IX Sexual Harassment?
(The “Big Five” or “Hostile Environment”)

Test Yourself

Teacher Thompson notices that basketball players regularly slap each other on the butt during games.
Test Yourself

Two employees begin dating and move in together. One reports that the other has begun hitting them.

Test Yourself

An unknown student airdropped a video in the cafeteria at lunch of a student, Christian, engaging in sexual activity with an unknown person off campus.

Test Yourself

Casey reports that another student, Rowan, put their hand on Casey's chair when Casey was sitting down in class, and when Casey sat down, Rowan's fingers touched Casey's crotch through the clothing.
Teacher Thompson serves as the advisor for the debate team. Chandler tells the teacher how much they want to be on the team for an upcoming meet. The teacher offers to put Chandler on the team if they stay after school to help with projects a few days a week before the meet. When Chandler shows up after school, the teacher asks Chandler for a backrub as one of the “projects.”

Robin, the student editor of the school newspaper, tells Cade, a student photographer, they will publish Cade’s photo on the front page of the paper if Cade goes out with Robin.

Remington was poking Cali in the behind with a pencil as a joke. Cali reports that while the two were horseplaying and wrestling, the pencil went into Cali’s anus through the clothing. Cali says they know it was an accident and don’t think Remington did it for a sexual reason.
Robin was under the table in class trying to look up Cole's shorts. The two students have had an issue since kindergarten, when Robin stabbed Cole in the arm with a pencil. In an email reporting the shorts incident, Cole's parent said they were tired of Robin “sexually harassing” their child.

Carson reports that Robin often takes pictures of Carson at school without permission. Carson also reports that Robin created a webpage “Why I Love You” about Carson and showed it to a classmate, who told Carson about it. Carson is “really freaked out.”

Carson reports that Teacher Thompson regularly tickled students, poked Carson in the stomach under the clothes, grabbed Carson’s phone and said, “You like it when that phone vibrates don’t you,” and gave Carson a note signed “love, Teacher Thompson” at the end.
Title IX Sexual Harassment Is....

► Unwelcome conduct
► Based on sex
► That:
  ➢ Is one of the Title IX “Big Five” or 
  ➢ Creates a Title IX “Hostile Environment”

Educator Misconduct

► Sexual conduct between a school employee and a student cannot be consensual so = sexual assault
► Other sexual harassment between a student and a teacher or other employee can never be welcome
► Such conduct is covered by the Title IX sexual harassment process if it one of the Big Five or severe, pervasive, and objectively offensive that it would effectively deny equal access
► Even if not covered by Title IX, check other rules for professionals

Test Yourself

Carson’s friends report they are worried about Carson. Since beginning to date Robin, Carson has been withdrawn and has seemed afraid whenever around Robin. Carson’s friends noticed Carson has bruises on their wrists, though they don’t know what they are from.

Is it Title IX Sexual Harassment?

Yes, employee quid pro quo
Yes, sexual assault
Yes, domestic violence
Yes, dating violence
Yes, stalking
Yes, severe, pervasive, and objectively offensive
No

Is the conduct subject to the Title IX SH grievance procedure?

No, because Chandra is not participating in an education program or activity at the time of the report.
No, because the conduct alleged by Chandra was not sufficiently severe, pervasive, and objectively offensive.
Yes, because Ms. Robins’ actions while Chandra was a student could be grooming, a type of Title IX
deprivation.
No, because Ms. Robins is “at will” and can be terminated without any process.

A student, Chi, reports being assaulted by Reagan, another student who Chi has been dating for over a year. The conduct allegedly occurred off campus at Reagan’s home.
A K-12 school in which any employee has actual knowledge of Title IX “sexual harassment” in its “education program or activity” is required.

**Education Program or Activity**

The sexual harassment must occur within the school’s educational program or activity:

- Includes situations where conduct occurs as part of the school’s “operations”
- “Includes locations, events, or circumstances over which the [school] exercised substantial control over both the respondent and the context in which the sexual harassment occurs”

**Test Yourself**

Is it in a Program or Activity?

Student Robin allegedly sexually assaulted student Carson in the bathroom at school.

**T9SH Grievance Process:**

When & What is Required

1. Test Yourself

Is the conduct in the school’s educational program or activity?
Test Yourself

Robin allegedly sexually assaulted Carson during free time at the hotel on a school-sponsored debate trip.

Education Program or Activity

- Field trips
- Athletics
- Extracurricular activities

Off-Campus Events & Activities

Factors such as whether the school funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred may be helpful or useful for schools to consider to determine the scope of a school’s program or activity, but no single factor is determinative.

Test Yourself

Robin allegedly sexually assaulted Carson over summer break at a sleepover at Carson’s house.
Test Yourself

Robin allegedly sexually assaulted Carson over summer break at a sleepover at Carson’s house. Carson says students are spreading rumors now about Carson being “fast.”

Test Yourself

A teacher visits a student, Carson’s, home to give the student a book but sexually harasses the student while there.

Test Yourself

Carson reports sexual harassment by Robin while the two are skipping class at a nearby restaurant.

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Carson reports sexual harassment by Robin online. Both students were at home on the weekends using school-issued laptops.

Education Program or Activity
For off-campus conduct ask, did the conduct occur:

- Via school technology
- During remote learning
- During school hours

If so, it may be part of the educational program or activity because of these “hooks”

A student, Chi, reports being assaulted by Reagan, another student who Chi has been dating for over a year. The conduct allegedly occurred off campus at Reagan’s home.
Even if conduct is outside the EP/A

- Support, support, support
- Consider other policies and codes of conduct that may have been violated
- Conduct that begins outside of an education program or activity may continue into the education program or activity (“downstream effects”)

In the United States

- The Title IX rules do not apply extraterritorially (such as study abroad programs or Spring Break abroad)
- As with any other conduct that falls outside Title IX, other code of conduct provisions can be used to address such conduct
- Support, support, support

A K-12 school in which any employee has actual knowledge of Title IX “sexual harassment” in its education program or activity against a person in the United States must respond using the Title IX Sexual Harassment process.
First Amendment Issues

Charlie, an eight-year-old fourth-grade transgender female student, is regularly called “he” and “him” by her peer, Riley. Riley continues to do so even after a meeting with Riley’s parents and warnings about how harmful the actions are; Riley and Riley’s parents say that their religion prohibits them from using female pronouns for someone who is “biologically male.”

Two Views for Protected Speech

- The conduct is severe, but protected by the First Amendment
- The conduct is not severe because it is protected by the First Amendment

Tinker et. al

- A student may express opinions, even on controversial subjects … if they do so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school … and invading the rights of others (Tinker)
- Other limited exceptions [school-sponsored speech (Hazelwood), vulgar or offensive speech (Bethel), speech encouraging illegal drug use (Morse)]
What Is Disruptive?

- Conduct that meets the Title IX tests (severe, pervasive, and objectively offensive) can be addressed under the Tinker test.
- But be careful – just because some may disagree with a viewpoint or it may be hurtful does not make it “severe.”

Charlie, an eight-year-old fourth-grade transgender female student, is regularly called “he” and “him” by her peers. Peers also call Charlie “trannie” and “she-male,” and “it.” The peers often laugh when using these terms or pronouns with Charlie. The peers and their parents say that their religion does not allow them to recognize a gender identity different from the sex assigned at birth.

What if all the communications between Charlie and her peers occur off campus, online, and on the students’ own time?
Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038, 2045 (2021)

- Set forth a new (confusing) test for disciplining off-campus speech
- Identified several types of off-campus behavior that "may call for school regulation"
- Includes "severe bullying or harassment targeting particular individuals" and "threats aimed at teachers or other students"

When Can We Reach Off Campus Speech?

- Until we receive more guidance from the courts, we will fall back on same questions courts asked under the "nexus" approach
  
  E.g., Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).
  
  “…[A] student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ at least when it was similarly foreseeable that the off-campus expression might also reach campus.”

Is the speech protected by the First Amendment?

Yes, because schools can't discipline students for off-campus speech, even if online, on a student's own time

Yes, because the speech is not sufficiently severe to be harassment

Yes, if the conduct has a sufficient "nexus" to the school environment

No, because the speech is harassment & can be disciplined as long as policy allows it

Education Program or Activity

The sexual harassment must occur within the school's educational program or activity

- Includes situations where conduct occurs as part of the school’s \"operations\"
- "Includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs"

When Can We Reach Off Campus Speech?

- Consider how you treat non-sexual harassing conduct off-campus
Coordinator Considerations

First Amendment law is complicated and always changing; encourage team members to rely on the Title IX Coordinator and legal counsel for help making these calls.

Channing is a transgender student in Mx. Ryan’s orchestra class. When directed to use Channing’s preferred pronoun, Mx. Ryan objects, saying that it goes against their religion. The school initially offered an accommodation, allowing Mx. Ryan to use all students’ last names only in the effort to avoid pronouns and first names.

Channing reports that other kids notice Mx. Ryan’s refusal to acknowledge Channing’s gender, however. One student asked Channing why Mx. Ryan wouldn’t just say their name, and Channing felt compelled to “out” themself to the student in explanation. Channing feels tension in the class now, feeling everyone knows why Mx. Ryan only uses last names in this particular class. When the District demands that Mx. Ryan use Channing’s preferred name and pronouns, Mx. Ryan refuses.

Can the school terminate Ms. Ryan’s employment?

No, because the conduct is protected by First Amendment free speech principles.

No, because the conduct is protected as an expression of Mx. Ryan’s religion.

No, because the conduct is not severe.

Yes, after going through the Title IX process.

For non-sex based conduct, my institution responds to off-campus conduct?

- Yes
- No
- Unknown
Kluge v. Brownsburg

- School district had policy of respect for transgender students
- Mr. Kluge’s religious opposition is directly at odds
- Two students were directly affected and alleged emotional harm
- An initial accommodation was offered but the harm continued

Kluge v. Brownsburg

“When you work in a public school, you sign up to follow the law and the policies/practices of that organization and that might mean following practices that are different than your beliefs.”


What About Meriwether?

- Meriwether v. Hartop, 992 F.3d 492 (6th Cir 2021)

- College professors have academic freedom which gives them more autonomy regarding what they say in the classroom
- This was a matter of public concern: Taken in context, his speech ‘concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.’
- In higher education, the interest in “promoting the efficiency of the public services the school performs through him not enough to limit his speech.”

Meriwether v. Hartop

- “At this stage of the litigation, there is no suggestion that Meriwether’s speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits.”
- The school did not even offer him any accommodation (he wanted to put a disclaimer statement on his syllabus)
- “Without such a showing, the school’s actions ‘mandate[ ] orthodoxy, not anti-discrimination,’ and ignore the fact that ‘[t]olerance is a two-way street.’”
Meriwether v. Hartop

- Title IX does not compel a contrary result.
- Meriwether’s actions was not “serious enough to have the systemic effect of denying the victim equal access to an educational program or activity” (citing Davis)
- The Provost even admitted that Meriwether’s conduct “was not so severe and pervasive that it created a hostile educational environment.”

But That’s Not K-12

In the k-12 classroom...

- There is a young and captive audience in the classroom
- Schools have the right to control curriculum
- The role of the educator is to convey the curriculum
- Accordingly, schools can impose viewpoint neutral limits on personal opinions and discussions on issues not related to the curriculum as long as they are not arbitrary

Kluge v. Brownsburg

Takeaways from this and other cases:

- Attempt to accommodate religious requests from employees
- If conduct is severe, pervasive, and objectively offensive, K-12 schools have more leeway to limit the speech in the school environment
- Pay close attention to case law developments in your jurisdiction—things are changing fast

Channing’s school board is considering a policy to require teachers to use preferred pronouns, and Mx. Ryan speaks out against it at a Board meeting.

Can the school terminate Ms. Ryan’s employment?

- No, because the conduct is protected by First Amendment free speech principles
- No, because the conduct is protected as an expression of Ms. Ryan’s religion
- No, because the conduct is not severe
- Yes, after going through the Title IX sexual harassment process
Outside the Classroom

- Speech by a public employee speaking as a private citizen on a matter of public concern is protected.
- Even protected speech may be limited if the employer’s interest in promoting efficiency of its public services outweighs the employee’s free speech interests (balancing).


Coordinator Considerations

- If religious or First Amendment justifications are provided, a progressive and interactive process is best practice.
- Particularly where individual complaints are involved, care should be taken to determine if misgendering has created a hostile environment and, if so, to respond.
- The state law landscape is more varied; make sure you are aware of your state law.

Signing Complaints

Tommy, a student, reports that another student, Charlie, was sexually harassed by a teacher, Ms. Rowan. Tommy also says another student, Casey, was in a similar situation the previous year.

Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.
“Signing” a Formal Complaint

Examples of circumstances where it might be warranted:

- Actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority
- A Title IX Coordinator receives multiple reports of sexual harassment against the same respondent.

Factors to consider:

- Involvement of violence, weapons, or similar factors
- Seriousness of alleged conduct
- The age(s) of the complainant(s)
- Other complaints against the same respondent

Complainant’s Role

- The complainant is always the alleged victim
- The complainant (and parents/guardians of a minor complainant) always must be afforded the rights granted to complainants in the Title IX rules

A staff member comes to you to report an interaction they saw outside the building that was concerning. One student, Roshan, appeared to force another student, Cody, into a French kiss. Cody was squirming and eventually pulled away and ran off.

When you talk to Cody, Cody said that the incident happened. Cody and Roshan had been “hanging out” a lot lately and it was clear Roshan had a crush on Cody. During the incident in question, Roshan and Cody were talking and Cody said they didn’t like Roshan “like that.” Roshan said, “I can tell you do, come on” and pushed Cody back and moved in for a kiss.
Cody confirmed pushing Roshan off and running away. Cody said the two had not talked since and that this was the first time something like this happened. Cody adamantly does not want an investigation or even to be identified to Roshan as having made a report. Cody said the incident has had a horrible effect on them, leading to missed classes, inability to sleep at night, and a general fear of being physically close to others.

Coach Ramsey reports a concern that members of their sports team may be engaging in hazing, including using foreign objects to penetrate students’ anuses over the clothing. Coach Ramsey denies ever having heard about the conduct before, but says a student (Tanner) reported it earlier in the week and that’s the reason for the report now. Coach Ramsey does not know who any specific students are who are involved; the reporting student said they were not.

You contact the reporting student, Tanner, and Tanner says that students have been engaged in this conduct for years. Tanner identifies one student who has been the target this year, Carmen. You talk to Carmen, and Carmen reports that the conduct occurred at school after practice one time.

Tanner does not know who the alleged perpetrators are. Carmen does know but refuses to identify the individuals involved. Carmen also refuses to sign a formal complaint. Carmen is doing great in school, is a star on the team, and reports no effects whatsoever from the incident.
Coordinator Considerations

- Signing formal complaints will be less common in cases involving student-on-student conduct.
- When employees are involved in the allegation, signing formal complaints will be more common.
- The decision—either way—must be reasonable in light of the known circumstances.

Tommy, a student, reports that another student, Charlie, was sexually harassed by a teacher, Mx. Rowan. Tommy also says another student, Casey, was in a similar situation the previous year. Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.

The Title IX Coordinator signs formal complaints in the. Charlie and Casey agree to participate in the process. Neither knows the other exists, however. The incidents happened years apart.
Consolidation

- Where the allegations of sexual harassment arise out of the same facts or circumstances
- Consider defining the phrase in your procedures

**Consolidation**

- Against more than one respondent
- By more than one complainant against one or more respondents
- By one party against the other party

Rory is a teaching assistant. Chris, a student in the class, and Rory, meet through the class and hit it off; they share phone numbers and begin texting. The texts are playful and flirtatious, even though very early on Chris tells Rory they are not interested in a relationship or hooking up because they are dating someone else. Rory regularly compliments Chris's looks, and it is clear that Chris is appreciative of the comments.

At the end of the semester, Chris gets a below-average grade in the class. Chris texts Rory and says, "If you don’t fix this, I’m going to show your texts to the administration." Rory says there is nothing to do. Chris files a formal Title IX complaint against Rory, alleging sexual harassment based on Rory’s position of authority over Chris in the class. Chris also alleges that the low grade was retaliation by Rory for Chris declining Rory’s sexual advances.
Chris and Rory share a friend group at school, and Rory comes to you dismayed because Chris has been telling everyone Rory is a “sexual predator” who has done the same thing to many students. Neither the institution nor Rory is aware of any prior complaints against Rory by other students.

Cross-Complaints
- Do not ignore cross-complaints
  - The “no judgment before decision” rule applies equally to cross-complaints
- Consider consolidation

A Caveat re Minors
- For minor parties, their parents/guardians share all rights with the party
- In the case of disagreement, typically the parent/guardian’s will prevails

Who has a valid Title IX formal complaint?
- Chris, Rory’s complaint is just to deflect attention from Chris’s complaint and should not be allowed
- Rory, Chris’s complaint is clearly false because it was filed only after the bad grade
- Chris and Rory both have valid complaints
- Neither has a valid complaint

The Title IX SH Grievance Process

The Title IX Team
- The same person can do all three of these roles, but it is not recommended
- Must be two new people – cannot be the same person; cannot be the Coordinator or Investigator

Overview: T9 SH Grievance Process
For any Title IX Sexual Harassment in a program or activity and in the United States of which the school has actual knowledge, the Title IX Coordinator or their designee must:

- Step 1: Hold a “supportive measures meeting” with the Complainant (alleged victim) and offer right to file a formal complaint
- Step 2: Consider if emergency removal/administrative leave warranted

Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee:

- Step 3: Notice of Allegations
- Step 4: Consider if dismissal is required or warranted
- Step 5: Informal Resolution (in some cases)

NOTE: ALL STEPS include strict detailed requirements from the Title IX rules

Overview: T9 SH Grievance Process
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So, you received a report ... what can you do?
- Annex Safety: If a student is in immediate danger to self or others, remove the student from the surroundings immediately. Move the student to a safe area with adequate supervision and immediately contact the Title IX Coordinator for what to do next.
- Consider Law Enforcement, Medical, and Parental Contact: If an allegation includes a serious crime, alleged injury, or evidence that needs to be collected (like photographs or an electronic device), follow standard building procedures to contact police, medical, and parental/guardian(s).
- Consider Reporting Abuse, Neglect, or Exploitation: Anyone who has a reasonable cause to believe that a child is or has been abused, neglected, or exploited must report it to EPS. If EPS does not respond, Report to: 1-800-252-5000 or the Texas Abuse Hotline.
- Consider Contacting Social Education: If a party is a student with a IEP and the IEP contact relevant special education administration to ensure compliance with special education placement or services.

Let’s say it again...
- Intake is NOT an investigatory interview.
- It is NOT the time to ask for evidence or witnesses or to look for other information that might help prove or disprove the complaint.
- Instead, this is an opportunity to make sure you know all the conduct that the complainant and their parents/guardians claim occurred so that the school can evaluate whether the conduct should be addressed under Title IX.

What if It’s Not Clear?
- In some cases, a report or complaint is clearly about sexual harassment, but it is not clear if the report or complaint is of Title IX sexual harassment in the schools education program or activity and in the U.S.
- "Intake" is necessary where it is not clear that the complaint falls under Title IX.
- The goal of intake is to collect more information about the allegations to allow evaluation of the complaint.

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Preservation of Evidence

- At this phase, if you become aware of the existence of evidence that could be at risk of loss, you can take steps to preserve evidence.
- Contact law enforcement immediately where knowledge of illegal or illicit evidence (have police collect it!)

Intake Questions

- What happened to you that led to the report/complaint?
- What did you or the Respondent do? What did you or the respondent say?
- If touching occurred, (sensitively) get the details necessary to determine if there was sexual assault, fondling, etc.

Intake Questions

- Where did the conduct occur?
- When did it occur? At what time of the day?
- How often did it occur? Is it ongoing? Get details (sensitively) for all incidents.

Intake Paperwork

- Recommended to complete an intake form; definitely take notes (T&H Guidebook form available)
- Document any steps following the interview (recommend follow up communication to the Complainant and their parents/guardians)
- If intake conducted at building level, share this documentation with the Title IX Coordinator

Overview: T9 SH Grievance Process

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Step #1: Supportive Measures Meeting

- For all Title IX Sexual Harassment in a program or activity and in the United States of which the school/district has “actual knowledge,” the Title IX Coordinator must promptly contact the complainant confidentially (and parents of a minor complainant)
- Recommended to have a meeting because of the sensitivity of the topic, but can be communicated in writing if cannot secure in-person participation

Supportive Measures

- Available before, during, after, and even if there never is a Title IX formal complaint process
- Available for both the Complainant and the Respondent, although the measures offered need not be equal
- Free, individualized services designed to restore or preserve an individual's equal access to education, to protect the individual’s safety, or deter further sexual harassment
- Cannot be punitive or disciplinary
- Cannot unreasonably burden another person

Examples

- Counseling
- Safety plan
- Class schedule, work schedule, or site, or passing time adjustments
- Extensions of deadlines or other course-related adjustments
- Campus escort services
- Mutual restrictions on contact between the parties
- Leaves of absence
- Increased security and monitoring of certain areas of the campus

IDEA and Section 504 Implications

- Some supportive measures, such as provision of counseling or changes to class schedules, could implicate placements and services under IDEA and Section 504
- Title IX Coordinators should reach out to Special Education or Section 504 Staff prior to implementing supportive measures for students with or suspected of having a disability
- May need to hold IEP/Section 504 meeting to determine if changes must be made to student’s IEP/Section 504 Plan
- Bottom line: IEP/Section 504 Committees will need to be involved from the beginning for cases involving a disabled party, and the Title IX staff will need to be trained on identifying and addressing SPED/504 implications
REMEMBER

Before a formal complaint is filed, the District must maintain confidentiality of the Complainant’s name and the details of the report unless necessary to implement supportive measures (confirm in writing!)

Overview: T9 SH Grievance Process

For any Title IX Sexual Harassment in a program or activity and in the United States of which the school has actual knowledge, the Title IX Coordinator or their designee must:

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- Step 2: Consider if emergency removal/administrative leave warranted
- Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee

- Step 3: Notice of Allegations
- Step 4: Consider if dismissal is required or warranted
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NOTE: ALL STEPS include strict detailed requirements from the Title IX rules

Step #2: Emergency Removal

- After a report or notice (no need for Formal Complaint)
- The Title IX Coordinator or designee should consider whether the reported conduct warrants removing an alleged perpetrator (respondent) from a class, an activity, or school or work generally on an emergency basis

Emergency Removal

WHO: A student, employee, or any other Respondent
WHAT: Removal from a program or activity on an emergency basis (class, activity, school generally, work, etc.)
WHEN: After an individualized safety and risk assessment and determination that an immediate threat to the physical health or safety of any student or other individual arises from the allegations of sexual harassment justifying removal (mental health or safety is not enough)
AFTER: Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

Student Discipline Implications

- Before removing a student, consider state discipline laws
- An emergency removal can be tantamount to suspension or expulsion and state laws governing those types of discipline cannot be ignored even if we are calling it an “emergency removal” under Title IX
- Unless some state law method allows for removal without consent, you may not be able to effectuate an emergency removal, even if Title IX authorizes it
- Work with legal counsel to determine how to handle this interplay

Special Education/504 Implications

- Before removing a student with a disability, consult with the special education administrator with responsibility for the student’s IEP/Section 504 Plan
- MDR requirements and procedural safeguards will be triggered if removal is for more than 10 days (it almost always will be)
- Special Ed/Section 504 Committees will need to be involved from the beginning and the Title IX staff will need to be trained on identifying and addressing SPED/504 implications

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Administrative Leave

**WHO:** An employee

**WHAT:** Paid or unpaid administrative removal of an employee from an assignment or position on an emergency basis (usually a removal from work generally)

**WHEN:** “During the pendency of a grievance process that complies with § 106.45”

**LIMIT:** State law, board policies, administrative procedures, contracts, and any other documents governing the employment relationship must allow it

**STOP**

Only move to Step 3 if you have a Formal Complaint
- NO DISCIPLINE WITHOUT A FORMAL COMPLAINT
But support, support, support

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Overview: T9 SH Grievance Process

For any Title IX Sexual Harassment in a program or activity and in the United States of which the school has actual knowledge, the Title IX Coordinator or their designee must:

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Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee:

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- Step 4: Consider if dismissal is required or warranted
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NOTE: ALL STEPS include strict detailed requirements from the Title IX rules

Formal Complaint

- A document
- Filed by a complainant or signed by the Title IX Coordinator
- Alleging sexual harassment against a respondent
- Requesting that the school investigate the allegation of sexual harassment

July 2021 OCR Q&A

Formal Complaint

- If filed by a Complainant, must contain the Complainant’s physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint
- Can be a hard copy document or an electronic document submitted via email or an online portal
- An email from a student (or a minor student’s parent/guardian) to the School Coordinator or Title IX Coordinator that ends with the student/parent/guardian signing their name would suffice

July 2021 Q&A

Step #3: Notice of Allegations

Upon receipt of a formal complaint, a school must provide each known party written notice of:

- The school’s grievance process;
- The allegations of sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview;
- A presumption of non-responsibility;
- The right to inspect and review evidence;
- The right to have an advisor during the process; and
- Any provision in the school’s code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process
All the Details

- The Notice of Allegations (NOA) must include:
  - The identities of the parties involved in the incident, if known
  - The conduct allegedly constituting sexual harassment
  - The date and location of the alleged incident, if known

- See the T&H Guidebook – Documents 19 & 20

Note: This notice is required before you first meet with the Respondent. That means no pulling students out of class to inquire about an incident right after you receive notice!

No More Confidentiality

- Once a formal complaint has been filed or signed, the school must share the Complainant’s name with the Respondent (anonymity is not an option)
- Compare to the status before a formal complaint is filed, when you cannot share the Complainant’s name, including with the Respondent, without permission or unless necessary to implement supportive measures
- Explain this to the complainant (and parents/guardians of a minor complainant) during the supportive measures meeting so they know the consequences of filing a formal complaint

Overview: T9 SH Grievance Process

For any Title IX Sexual Harassment in a program or activity and in the United States of which the school has actual knowledge, the Title IX Coordinator or their designee must

- Step 1: Hold a “supportive measures meeting” with the Complainant (alleged victim) and offer right to file a formal complaint
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NOTE: ALL STEPS include strict detailed requirements from the Title IX rules

Step #4: Consider Dismissal

Responsibilities

- If necessary, review a Formal Complaint to determine if dismissal is warranted
- Usually only required if the initial report comes in the form of a Formal Complaint
- Continue to consider whether dismissal is appropriate throughout the lifespan of the grievance process

Written Notice and Appeal—Dismissals

- If the school dismisses the complaint or allegations in the complaint, it must promptly send written notice of the dismissal and the reason for the dismissal to all parties
- Any party can appeal the dismissal decision
Overview: T9 SH Grievance Process

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Informal Resolution

- Voluntary, structured, informal process, such as mediation
- To resolve allegations in a formal complaint that does not involve a full investigation and an adjudication of the formal complaint

Tommy, a student, reports that another student, Charlie, was sexually harassed by a teacher, Ms. Rowan. Tommy also says another student, Casey, was in a similar situation the previous year. Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.

The complaints are consolidated. Charlie and Rowan want to do informal resolution. Casey does not.

The Title IX Coordinator signs formal complaints in the. Charlie and Casey agree to participate in the process. Neither knows the other exists, however. The incidents happened years apart.
IR Limitations

 Only once formal complaint is filed (explain permissive dismissal to Complainant—see T&H Guidebook – Form 49)
 Only if completely voluntary—consequences must be explained and any party can withdraw before an agreement is reached, ending the IR process
 Only before determination regarding responsibility
 Not in cases involving allegations of employee-on-student conduct
   Can prohibit for other situations, as well

Informal Resolution

 Parties must be allowed to stop at any time prior to an agreement
 If an agreement is reached between the parties, the Title IX Formal Complaint is closed and can never be reopened
 If an agreement is not reached (or IR is not used), move on to Step #6: Investigation

Overview: T9 SH Grievance Process

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- Step 6: Investigation

NOTE: ALL STEPS include strict detailed requirements from the Title IX rules

The Title IX Team

The same person can do all three of these roles, but it is not recommended

Must be two new people—cannot be the same person; cannot be the Coordinator or Investigator
Investigation Rules

Impartial + unbiased
Reasonably prompt timeframes
Burden of proof on school
Preponderance standard
Treat parties fairly
Limits on use of certain records, evidence
No “gag orders”
Equal rights to advisers
Equal right to present evidence
Presumption of respondent non-responsibility

Investigation Steps

Written notice to party before each interview
Directly related evidence shared with parties + 10 days to respond
Written investigative report summarizes “relevant evidence”
Investigative report summarizing all “relevant evidence,” shared with parties + 10 days to respond

Directly Related Evidence

- Term is not defined in the rules
- Statements, notes of interviews, and other evidence collected in the investigation (may include drafts)
- May include audio and video recordings of interviews
- Even evidence the school doesn’t think it will use

Investigation Report

- Summarizes the relevant evidence
- Different from directly related evidence shared in the previous step

Relevance

- Does the evidence apply or relate to a “fact” or “issue” in this matter?
- Is the fact or issue in dispute?
- Does the evidence make the fact or issue more or less likely to be true?

Relevant Evidence Includes

“Inculpatory Evidence”
- Evidence that makes it more likely that a disputed fact or issue is true

“Exculpatory Evidence”
- Evidence that makes it less likely that a disputed fact or issue is true
Overview: T9 SH Grievance Process

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2. Consider if emergency removal/administrative leave warranted

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Step #7: Decision-Making Process

- Oversees a written question-and-answer process in which the parties get to ask written, relevant questions and follow-up questions of other parties and witnesses
- Must provide written explanation to a party if a question is determined not relevant, including the basis for the decision
- After that process, using a preponderance of the evidence standard, issues a written determination with an independent determination of responsibility or non-responsibility for a policy violation and recommends remedies

Written Decision Requirements

- Allegations
- Policy allegedly violated
- Procedural steps taken, from receipt of formal complaint through determination
- Findings of fact
- Application of facts to policy

Remember Exceptions

- Medical treatment records
- Privileged information
- Information about the complainant’s past sexual history or predisposition unless for limited uses authorized by the rule

The Title IX Team

- Title IX Coordinator
- Investigator
- Decision-Maker
- Appeal Decision-Maker

The same person can do all three of these roles, but it is not recommended.

Must be two new people - cannot be the same person; cannot be the Coordinator or Investigator.

Never relevant without consent

Evidence subject to legal privilege

Evidence related to a complainant’s past sexual history unless:

1. The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
2. The evidence relates to the sexual behavior between the complainant and respondent and is offered to prove consent

A party’s records made or maintained by a medical professional or paraprofessional made and maintained in connection with the provision of treatment of the party.

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Written Decision Requirements

- Decision must include a statement of, and rationale for, the result as to each allegation, including:
  - Determination regarding responsibility
  - Any disciplinary sanctions imposed on the respondent
  - Whether remedies designed to restore or preserve equal access to educational program will be provided by the school to the complainant
- Must explain appeal process and permissible grounds for each party to appeal
- Must provide the written determination to the parties simultaneously

Coordinator Considerations

Decision-making disasters

- Not explaining the process to the parties and advisors beforehand
- Party, (Parent) and Advisor Expectations
- Not making clear what “follow-up” means
- Not ensuring procedures match your intended goals
- Not notifying the parties of the outcome

Overview: T9 SH Grievance Process

For any Title IX Sexual Harassment in a program or activity and in the United States of which the school has actual knowledge, the Title IX Coordinator or their designee must

- Step 1: Hold a "supportive measures meeting" with the Complainant (alleged victim) and offer right to file a formal complaint
- Step 2: Consider if emergency removal/administrative leave warranted
- Step 3: Notice of Allegations
- Step 4: Consider if dismissal is required or warranted
- Step 5: Informal Resolution (in some cases)
- Step 6: Investigation
- Step 7: Decision-Making Process
- Step 8: Appeal

NOTE: ALL STEPS include strict detailed requirements from the Title IX rules

The Title IX Team

The same person can do all three of these roles, but it is not recommended

Must be two new people – cannot be the same person; cannot be the Coordinator or Investigator

Step #7: Appeal

- Each party can appeal a (1) dismissal and (2) written determination
- Can appeal on limited, specific bases (unless District agrees to allow appeal for other reasons):
  - Procedural irregularities that affected the outcome
  - New evidence that could affect the outcome
  - Conflict of interest that affected the outcome

Appellate Decision-Maker

- Provides each party notice of the appellate process and the opportunity to respond to the appeal in writing
- Reviews the written determination and other file documents as necessary, including any written response to the appeal
- Issues a written decision including the result and rationale
Coordinator Considerations

Appellate disasters
- Not limiting the initial appeal; makes equal opportunity to respond a challenge
  - See the T&H Guidebook Appeal Form
- Conducting a “de novo” review
- Not providing a thorough rationale

Carey, who receives services as a student with an intellectual disability, is discovered in a bathroom on campus with Riley, a student without a known disability. The two had their clothes off. After being told there would be consequences imposed for the on-campus sexual behavior, Carey’s parent claimed that the conduct was sexual assault, harassment, and abuse. Riley reported that the conduct was a mutual two-sided interaction. Numerous employees reported first-hand knowledge that Carey and Riley had been “a thing” all school year.

Doe v. Dennis-Yarmouth Sch. Dist., 2022 WL 36480 (D. MA 2022)
- Sixteen-year-old Jane Doe, was enrolled in Dennis-Yarmouth’s Wave Program for students with mental disabilities
- After Jane was allowed to go to the bathroom unsupervised, Jane’s assistant discovered her and a male Wave Program student in the boys’ bathroom with their clothes off
- The Does allege that Jane was sexually assaulted, harassed, and abused
- The school did not investigate. The Title IX Coordinator later wrote that the “encounter between [Jane] and the other student had been viewed as a mutual two-sided interaction” that did not warrant investigation

Doe v. Dennis-Yarmouth Sch. Dist., 2022 WL 36480 (D. MA 2022)
- Post-Assault: The Does alleged that the school’s actions following Jane Doe’s assault showed deliberate indifference
- Given Jane’s disability and reduced mental capacity, the alleged determination that the sexual activity between Jane and [the respondent] was “mutual” illustrates an “investigation [that] was so deficient as to be unreasonable.”

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Consider training for disability services professionals/special education administrators on Title IX

Use hypothetical cases to increase ability for issue-spotting in cases involving students with disabilities and sex

Chen and Ricki were together for two years off and on before an acrimonious split. After the breakup, Chen reported that Ricki sexually assaulted Chen once during the relationship.

Scenario 11(a):
Chen reports that on the occasion in question, Ricki told Chen that if they did not have sex, Ricki would share a sex video the two had made previously. Accordingly, Chen agreed to have sex.

Scenario 11(b):
Chen reports that the two often engaged in “rough sex” that involved hitting, choking, and tying each other up. On the occasions in question, while Ricki was choking Chen, Chen became afraid and wanted to stop. Chen tried to protest and hit Ricki, but Ricki said that was often part of the role-playing the two would do during rough sex and so did not stop.

Was there consent?

Yes  No
Remember

- Your grievance procedure should define consent
- Individuals evaluating, investigating, and performing other Title IX team member roles should use the definition as a guide

Carrington, a student, reports that another student, Rowan, engaged in what you determined to be severe, pervasive, and objectively offensive behavior that would effectively deny a reasonable person equal access to your education program or activity. As remedies, Rowan received a short disciplinary consequence, a no contact order was put in place between the students, it was agreed the students would not be in the same classes, and Carrington was offered counseling.

Carrington claims that Rowan repeatedly violated the no contact order, calling Carrington names and spreading rumors about them. Carrington and Rowan also inadvertently were in the same class during one class period this semester. Carrington did not tell anyone about the continued harassment after the plan was put in place.

Does the educational institution risk liability under Title IX based on Rowan’s post-resolution conduct?

- Yes, because Rowan violated the no contact order
- Yes, because the removal efforts were not effective
- Yes, because Carrington did not report the conduct to anyone
- No, because the post-resolution conduct is not sufficiently severe, pervasive, and objectively offensive to trigger Title IX

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- A school district “failed to properly investigate” allegations of continued sexual harassment and violations of a safety plan.
- Teacher observed or were told about the continued conduct.
- Telling a complainant that a safety plan will be implemented does not automatically absolve the educational institution of liability under Title IX. Title IX still requires that an educational institution not unreasonably respond to known student-on-student harassment.
- The District did not actually enact the alleged safety plan, thereby allowing the harassment to continue the rest of the semester. That it allegedly did not follow its own safety plan—after harassment continued for weeks—to allow deliberate indifference, and enough to allege that the District’s response was clearly unreasonable.

The Police are the Beginning, Not the End

"[A] law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct."

"[T]he standards for criminal investigations are different, so police investigations or reports are not determinative of whether sexual harassment or violence violate Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation."

Some Delay Is OK

- The District must conduct its Title IX investigation in a “reasonably prompt” manner but may temporarily delay the investigation for good cause, which may include concurrent law enforcement activity.
- No long or indefinite delay or extension of timeframes, regardless of whether a concurrent law enforcement investigation is still pending.

Notice of Delay

- The District must send written notice to both parties regarding the delay or extension and the reason(s) for the delay or extension.
- Concurrent law enforcement activity is not good cause to delay sending the written notice of allegations or delay to the complainant or respondent.
Police Results as Evidence?
- Police evidence may be useful for fact-gathering
- But the standards for and purposes of criminal investigations are different from school investigations
- Police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX

OCR 2011 DCL and 2020 TITLE IX REGS

When the Police Call
- Document everything!
  - Ask police to put request for delay in writing
  - Reduce verbal (e.g., telephone) conversations in writing
  - Best practice is to respond with summary: "If my summary is incorrect please let me know by [date] or I will assume it is correct."
- Explain in writing the school's obligation to conduct its own Title IX investigation and ask for notification when you can begin your investigation
- Follow up, then follow up again, then again

Recordkeeping
- All records related to the process must be maintained for 7 years
- Provide your final file to the Title IX Coordinator
**Serving Impartially**

The 2020 Title IX regulations require that any individual involved in the Title IX process—Title IX Coordinator, investigator, decisionmaker, appellate decisionmaker, or informal resolution facilitator—not be biased, have a conflict of interest, or prejudge any matter before them.

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**Impartial Approach**

- The preamble to the 2020 Title IX rules call for schools to use an objective, “common sense approach” to evaluating whether bias, conflict of interest, or prejudgment exists.
- Remember that “objective” means whether a reasonable person would believe partiality exists.
- The preamble says not to apply “generalizations” that might unreasonably conclude partiality exists.

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**Impartiality Do’s and Don’t’s**

- Ensure your team is open with the Title IX Coordinator about any concerns.
- Team should follow the process “to the T” and include all relevant evidence in the investigative report, written decision, and appeal decision.
- Do not assume or infer the existence of facts or the outcome, “connect the dots,” speculate, rely on personal experience or beliefs, weigh credibility (unless you are the decision-maker on the initial complaint).

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**Trauma Informed Investigations**

- Science shows trauma can have a neurological effect, particularly on memory.
- Trauma can impact either party.
- There is a difference between being trauma-informed and trauma-lenient – do not use apparent existence of trauma as evidence of alleged conduct.

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**Changes on the Horizon**

- Science shows trauma can have a neurological effect, particularly on memory.
- Trauma can impact either party.
- There is a difference between being trauma-informed and trauma-lenient – do not use apparent existence of trauma as evidence of alleged conduct.
2022 Proposed Rules

- Issued by the Biden administration in proposed form on June 23, 2022
- Department of ED will review and respond to all comments in the final rule
- Purported release date for final rule May/June 2023, with an effective date in August 2022; this would be extremely fast based on past experience
- Would change many of the requirements for handling complaints and apply to all sex discrimination, not just sex-based harassment

Process for complaints

Proposed Rules
- Apply only to complaints of “sexual harassment”
- Very specific process outlined in Policy FFH (LOCAL) – separate from all other complaints of civil rights violations

Current Rules
- Will apply to all complaints of “sex discrimination” (not limited to sex-based harassment)
- School boards likely will be able to use one single process (FFH) for all civil rights violations, not just sex-based
- Will still contain many specific requirements, but fewer than under the current rules

“Based on sex”

Current Rules
- Do not specifically define what conduct is “based on sex”
- Only the Court has long recognized that sex-based norms fall under Title IX

Proposed Rules
- “Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity” (Proposed § 106.10)

“Hostile Environment”

Current Rules
- Defined as 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 recipient’s education program or activity

Proposed Rules
- Defined as unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity

Geography

Current Rules
- Conduct must be both within the “education program or activity” and “against a person in the United States” to be covered by Title IX

Proposed Rules
- Conduct that occurs under a recipient’s education program or activity includes but is not limited to … conduct that is subject to the recipient’s disciplinary authority
- A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States

Supports & Removals

Current Rules
- Supportive measures may not be punitive or disciplinary or unreasonably burden any one party
- Limited emergency removals are allowed to remove a student only if there is an imminent threat to the physical health and safety from the allegations

Proposed Rules
- Supportive measures may include temporary measures against a respondent imposed for a non-punitive, non-disciplinary reason
- Can include voluntary or involuntary changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is a comparable alternative
- Emergency removals can be imposed for an immediate and serious threat to the health or safety from the allegations
First Report of Conduct

Francis Friend confides in their athletics coach, Coach Charlie, that they heard a rumor that Remi Respondent raped Cary Complainant over the summer.

To: Coach Charlie
From: Cary’s Parents
Re: Help for Cary
Cary told me last night that Remi Respondent sexually touched them. I am going to be calling a lawyer. But you had better be doing something about this. I assume Remi has been expelled from the team? That needs to happen right now. When can we meet to discuss this?

Brainstorm – First Report

- What should be your next step?
- What information do you need?
- What information should you provide?
Practice – First Report

Coordinator Notes: First Report - Coordinator Notes.docx
Complainant Script: First Report - Complainant Script Intake.docx
Parent Script: First Report - Parent Script Intake.docx

More Info – First Report

- At first, Remi was flirtatious – asked Cary to “hook up.”
- Cary and Remi went to other room to “make-out.” Remi asked Cary to touch their private body parts; Cary did not answer.
- Remi then touched Cary's crotch over the clothing, and Cary froze, too afraid to say anything.
- Remi then attempted to unbutton Cary’s pants. Cary said no, but Remi continued. Remi touched Cary under their clothing. Remi held Cary down while beginning to undress themself. Cary had to struggle to get away from Remi and left the room.

Second Report of Conduct

A stay away agreement was put in place between Cary and Remi, but Cary reports that Remi is ignoring it. Remi also reports that Remi’s friends are calling Cary names.

Brainstorm – Second Report

- What should be your next step?
- What information do you need to evaluate this report?
- What information should you provide to the parties?

More Info – Second Report

- Cary reports that Remi is ignoring the stay away agreement.
- Remi glares at Cary in the hallways whenever they pass each other.
- Remi also talks about Cary to friends and Cary overhears it.
More Info – Second Report

- According to Cary, Remi’s friends call Cary derogatory names and talk about how Cary is “easy.”
- Cary heard a rumor that Remi and their friends said if Cary doesn’t say they were lying they will jump Cary after school next week.
- Cary and their parents are worried that Cary is going to be hurt and ask that Remi and the friends be removed from school during the investigation.

Brainstorm – Second Report

- Is the alleged conduct Title IX sexual harassment?
  1. Was the conduct “based on sex”?
  2. Was the conduct “unwelcome”?

Brainstorm – Second Report

- Is the alleged conduct Title IX sexual harassment?
  3. Was the conduct quid pro quo by an employee?
  4. Did the conduct involve sexual assault?
  5. Did the conduct involve dating violence?
  6. Did the conduct involve domestic violence?
  7. Did the conduct involve stalking?

Brainstorm – Second Report

- Can the District remove Remi and/or Remi’s friends from school based on the allegation?

Writing Practice – Notice of Allegations

- How would you describe these allegations in the notice of allegations?

Second Report – Notice of Allegations.docx
Third Report of Conduct

Members of the community found out about Cary’s allegations and are angered that the school has “done nothing about it.” You learn of an Instagram account in which individuals are planning a protest across the street from school next week with signs saying “No Rapists Allowed” and “Rapist Free Zone.” A group of parents showed up to this week’s school board meeting and mentioned Remi by name during public comment.

Informal Resolution

Remi asks if the parties can engage in informal resolution. Is it appropriate to do so? What issues should you consider?

Brainstorm

- Is this Title IX Sexual Harassment, if proved?
- What supportive measures can you offer Remi?
- Should you initiate an investigation?

QUESTIONS?
THANK YOU!
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