

**K-12 TITLE IX COORDINATOR
FOUNDATIONS & PRACTICUM**




Holly McIntush Partner
hmcintush@thlaw.com

Jackie Gharapour Wernz Partner
jwernz@thlaw.com

Thompson & Horton LLP
© Thompson & Horton LLP September 2022. Marketing materials. Not legal advice.



1



2



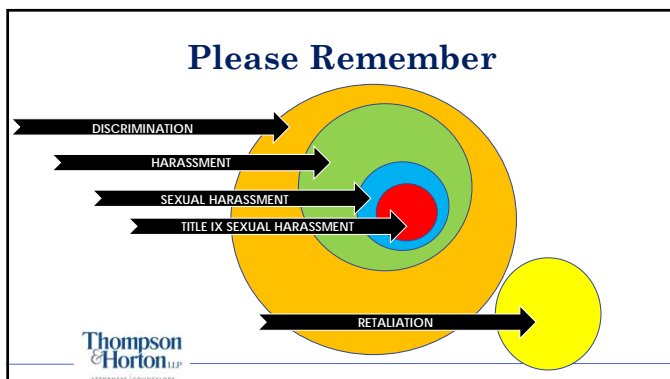
3

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




4



5

Today Is Title IX but...

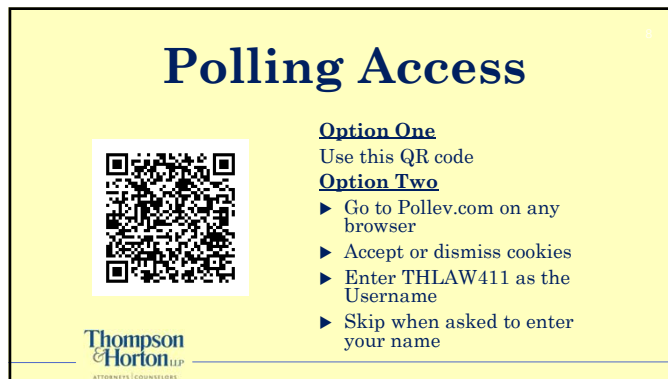
Complaints of discrimination, harassment, or retaliation based on protected statuses other than sex **should be reported** to the appropriate District Official, who must address them; they will **not** be addressed under the Title IX sexual harassment process we are talking about today



6



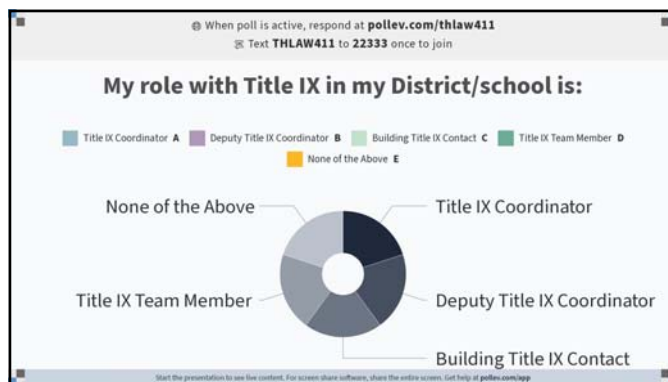
7



8



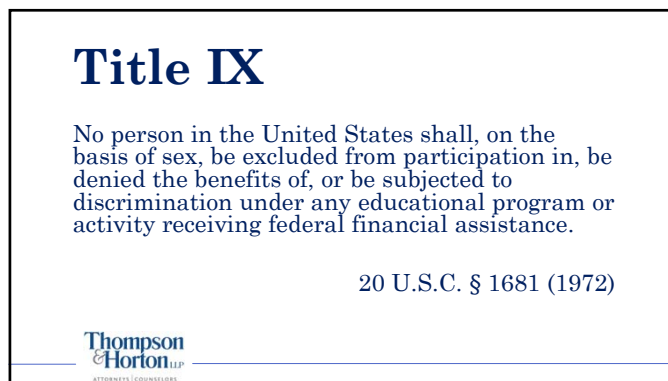
9



10



11



12

What is Title IX?

13

14

What Conduct Could Fall Under Title IX in My School?

Different Treatment

Different Impact

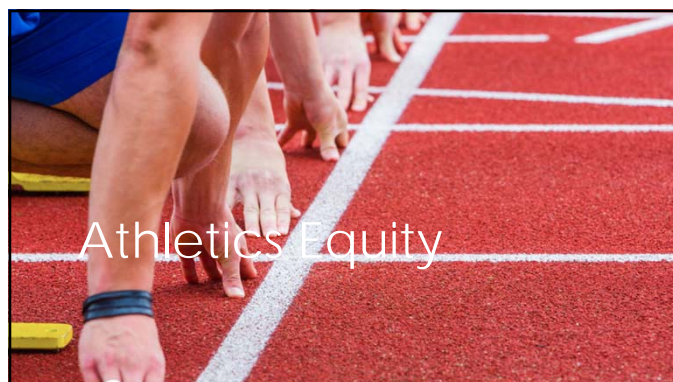
Pregnancy & Parenting

Sexual Misconduct

Sexual Harassment/Bullying

Thompson & Horton LLP
ATTORNEYS AT LAW

15



16

Interscholastic Athletic Programs

Title IX regulations require that a school provide equal athletic opportunity for male and female students with respect to:

1. Athletic participation opportunities to accommodate student interests and abilities
2. Other athletic benefits and opportunities

Thompson & Horton LLP
ATTORNEYS AT LAW

17

Interests and abilities tests

18

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



Thompson & Horton LLP
ATTORNEYS AT LAW

19

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

Thompson & Horton LLP
ATTORNEYS AT LAW

20



21

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

Thompson & Horton LLP
ATTORNEYS AT LAW

22

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

23

Risky Business

- ▶ 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.

Thompson & Horton LLP
ATTORNEYS AT LAW

24

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.



25

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



26

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.



27

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.



28



29

2020 Title IX Rules


- Issued by the Trump administration's Office for Civil Rights
- Effective August 14, 2020
- Will be in effect at least until the end of the current academic year
- Include significant requirements for handling complaints of sexual harassment under Title IX



30

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



31

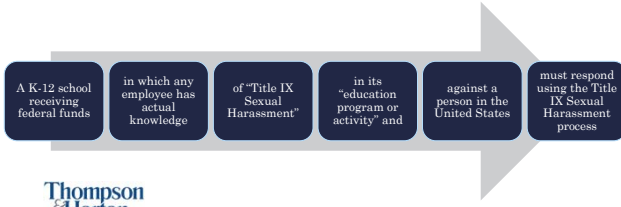

What Do The 2020 Rules Require?

- 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



32


T9SH Grievance Process: When & What is Required

33

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.



34

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



35

When poll is active, respond at pollev.com/thlaw411
 Text **THLAW411** to **22333** once to join

My educational institution has already started thinking about implementing the 2022 Title IX regs

Yes

No




36

How to Make—and Keep—a Resolution to Prepare for the New Title IX Rules

© JANUARY 14, 2023

IN THE NEWS, POLICES AND PROCEDURES, PROPOSED REGULATIONS, TRAINING

www.titleIXtips.com



We are barely into 2023, and it's shaping up to be the biggest year yet for Title IX. From transgender bathroom bills and athletic participation battles to growing scrutiny on general athletics equity and support and opening students' Title IX will continue to have its moment in the sun in 2023 as it has for the past few years. Of course, the biggest news for Title IX in 2023 will undoubtedly be the issuance of the Biden administration's new Title IX rule. The Department of Education recently [announced](#) that it intends to host the new regulation on schools in May 2023. Schools, colleges, and universities will once again have to comply with an entirely new grievance structure quickly over the summer.

Thompson & Horton LLP
ATTORNEYS AT LAW

37



38

Transgender FAQs

Preferred Name	Preferred Pronouns	Records	Intimate Facilities • Bathrooms • Showers • Locker room	Attire
Programs / Activities	Field Trips	Parental Notice/ Rights	Harassment/ Bullying	Athletics

Thompson & Horton LLP
ATTORNEYS AT LAW

39

Unclear Answers

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

Thompson & Horton LLP
ATTORNEYS AT LAW

40

What we know for certain....

- Title 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

Thompson & Horton LLP
ATTORNEYS AT LAW

41

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 students/teachers
- Failure to accommodate – in terms of facilities, including intimate facilities – although lack of clarity in the law
- Prohibitions on participating in activity – including athletic participation – despite conflicts with state laws

Thompson & Horton LLP
ATTORNEYS AT LAW

42


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




43

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




44

Title IX Non-Compliance Penalties

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




45




46

The Title IX Coordinator’s Role in Addressing Sexual Harassment




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



47

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



48

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.



49

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



50



51

SCENARIO #1

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.

52

SCENARIO #1

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 Chanda "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.

53


SCENARIO #1

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.

54

SCENARIO #1


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.”



55

SCENARIO #1

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 later 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.



56

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

- No, because Chanda is not participating in or attempting to participate in an education program or activity at the time of the report
- No, 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 T9SH
- No, because Mx. Robin is “at will” and can be terminated without any process


57

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



58

P/ATP


- ▶ 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



59

P/ATP

- ▶ 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....




60

P/ATP

OCR Q&A July 2021


- ▶ 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



61

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



62


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

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

No, 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 T9SH

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



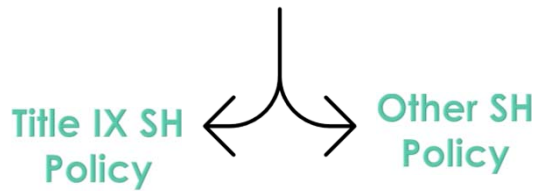

63

T9SH Grievance Process: When & What is Required

64


Sexual Misconduct

65

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.



66

**T9SH
Grievance
Process:
When &
What is
Required**

A K-12 school receiving federal funds

Thompson & Horton LLP

67

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

Thompson & Horton LLP

68

**T9SH
Grievance
Process:
When &
What is
Required**

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

Thompson & Horton LLP

69

ANY Notice or Knowledge

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

to or by ANY K-12 employee

Thompson & Horton LLP

70

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

Thompson & Horton LLP

71

Test Yourself

Cleo mentions to Frankie while walking down the hall that a teacher is sexually harassing them. A custodian overhears.



Thompson & Horton LLP

72

Is there actual knowledge?


Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollen.com/app

73

Test Yourself

An anonymous report is made through the online reporting system that an unnamed student sexually assaulted Charlie, a student in the District



Thompson & Horton LLP
ATTORNEYS AT LAW

74

When poll is active, respond at pollen.com/thlaw411
Text **THLAW411** to **22333** once to join

Is there actual knowledge?

Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollen.com/app

75

Test Yourself

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



Thompson & Horton LLP
ATTORNEYS AT LAW

76

When poll is active, respond at pollen.com/thlaw411
Text **THLAW411** to **22333** once to join

Is there actual knowledge?

Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollen.com/app

77

Test Yourself

A building principal receives a court order saying one student, Reid, must have no contact with another student, Cody, for "sexual assault"

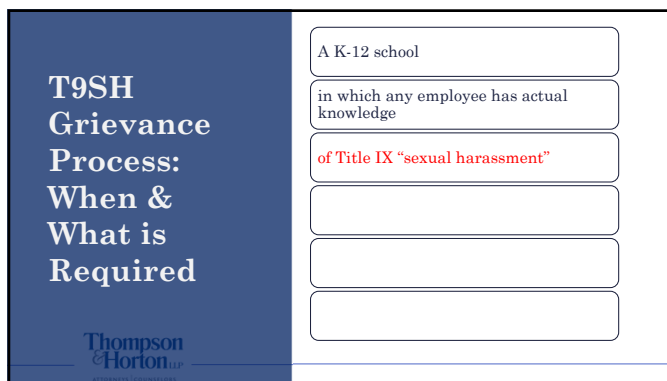


Thompson & Horton LLP
ATTORNEYS AT LAW

78



79



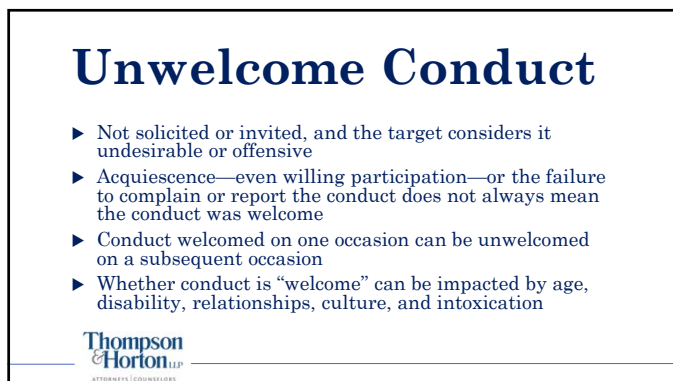
80



81



82



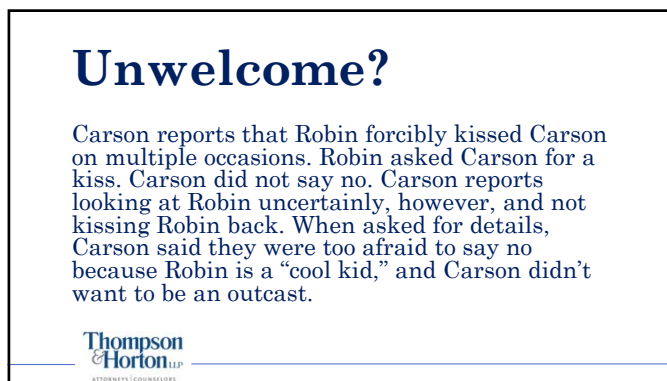
83



84



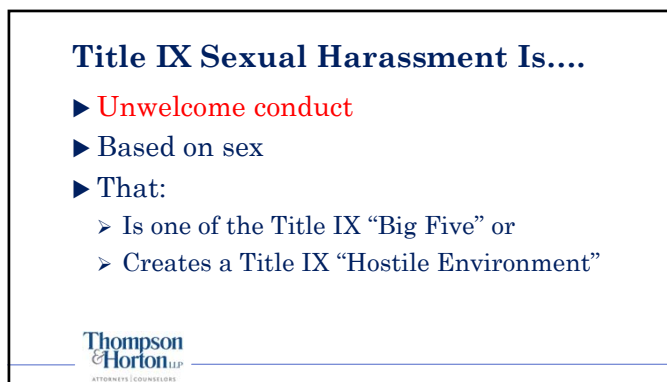
85



86



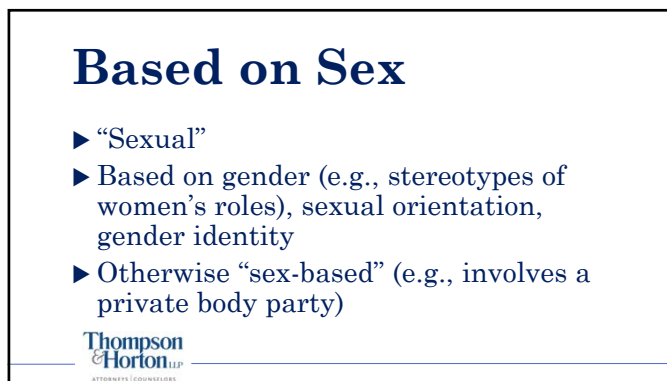
87



88



89



90

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**



91

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"



92

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"



93

"Title IX Sexual Harassment"


The Title IX "Big 5" OR Title IX "Hostile Environment"



94

"Title IX Sexual Harassment"


The Title IX "Big 5" OR Title IX "Hostile Environment"




95

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")**



96

#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

Thompson
& Horton
LLP
ATTORNEYS AT LAW

97

#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**

Thompson
& Horton
LLP
ATTORNEYS AT LAW

98

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

Thompson
& Horton
LLP
ATTORNEYS AT LAW

99

#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

Thompson
& Horton
LLP
ATTORNEYS AT LAW

100

#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

Thompson
& Horton
LLP
ATTORNEYS AT LAW

101

#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:
 - Fear for the person’s safety or
 - Fear for the safety of others or
 - Suffer substantial emotional distress
- ▶ Can be direct or indirect

Thompson
& Horton
LLP
ATTORNEYS AT LAW

102

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)



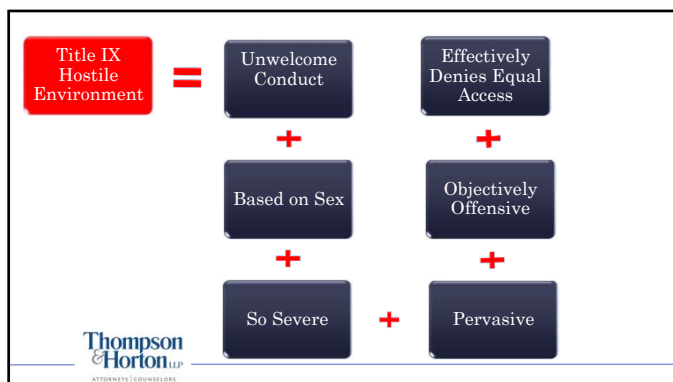
103

“Title IX Sexual Harassment”

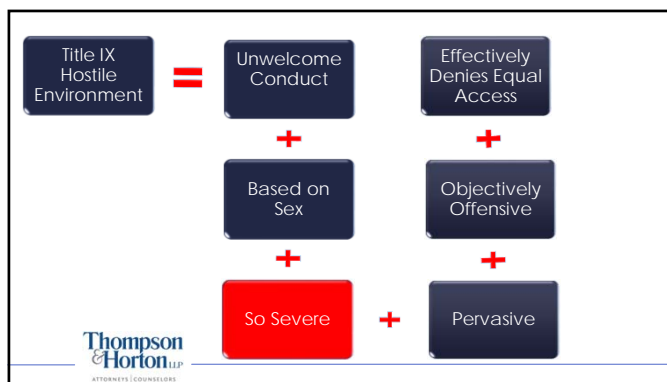
The Title IX “Big 5” OR Title IX “Hostile Environment”



104




105



106

What does "severe" mean (one word)?




107

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)




108

Case Law Definitions

- ▶ “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)




109

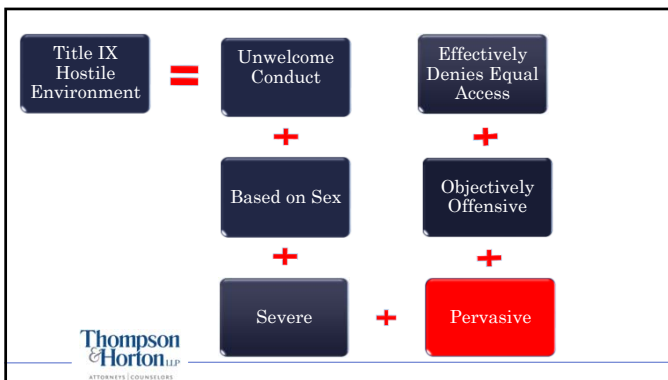
Case Law Definitions

- ▶ 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.

T.C. on Behalf of S.C. v. Metro. Gov't of Nashville, 378 F. Supp. 3d 651, 674 (M.D. Tenn. 2019)



110



111

What does "pervasive" mean (one word)?


Start the presentation to see the content. For screen share software, share the entire screen. Get help at goopen.com/help

112

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)




113

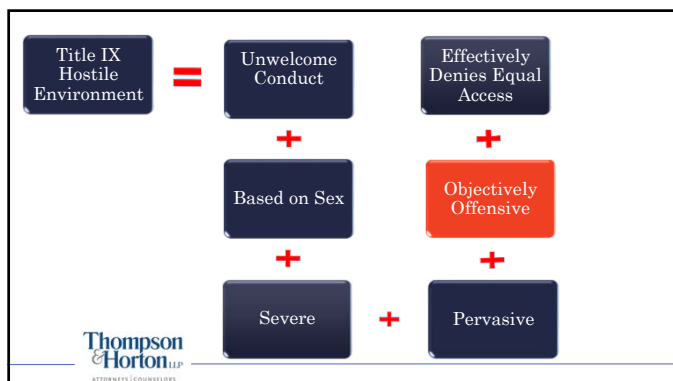
Case Law Definitions

- ▶ “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)



114



115



116

Dictionary Definition

“Objectively Offensive”

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

Thompson & Horton LLP logo at the bottom.

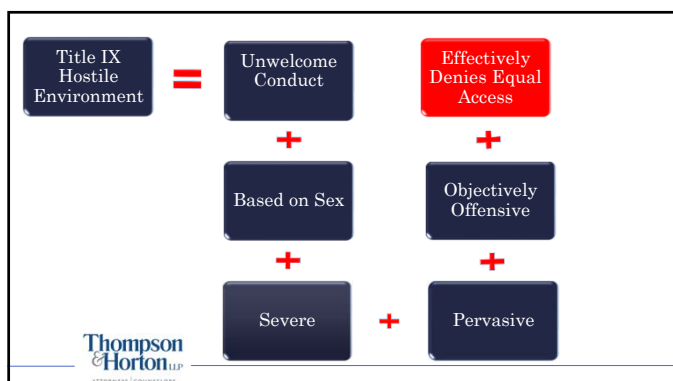
117

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.

Thompson & Horton LLP logo at the bottom.

118



119

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


Thompson & Horton LLP logo at the bottom.

120

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



121

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



122

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

123

TEST YOURSELF

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

124

Test Yourself

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




125

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to 22333 once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

126

Test Yourself

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




127

When poll is active, respond at pollev.com/thlaw411
Text THLAW411 to 22333 once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

128

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.




129

When poll is active, respond at pollev.com/thlaw411
Text THLAW411 to 22333 once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

130

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.




131

When poll is active, respond at pollev.com/thlaw411
Text THLAW411 to 22333 once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

132

Test Yourself

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."




133

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

134

Test Yourself

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.




135

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

136

Test Yourself

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.




137

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

138

Test Yourself

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.




139

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

140

Test Yourself

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."




141

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

142

Test Yourself

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.




143

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

144

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.



Thompson & Horton LLP
ATTORNEYS AT LAW

145

When poll is active, respond at polllev.com/thlaw411
Text THLAW411 to 22333 once to join

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

Start the presentation to see live content. For screen share software, share the entire screen. Get help at polllev.com/help

146

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"

Thompson & Horton LLP
ATTORNEYS AT LAW

147

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

- No, because Chanda is not participating in or attempting to participate in an education program or activity at the time of the report
- No, 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 T9SH
- No, because Mx. Robin is "at will" and can be terminated without any process

148

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

Thompson & Horton LLP
ATTORNEYS AT LAW

149

SCENARIO #2

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

150

When poll is active, respond at poll.com/thlaw411
 Text THLAW411 to 22333 once to join

Does the alleged conduct fall under the school's Title IX jurisdiction?

- No, because the conduct occurred off campus
- No, because the school has no control over the Respondent's home
- No, as long as Chi is not an athlete covered by an off-campus code provision

Start the presentation to see live content. For screen share software, share the entire screen. Get help at poll.com/help

151

T9SH Grievance Process: When & What is Required

Thompson & Horton LLP


- A K-12 school
- in which any employee has actual knowledge
- of Title IX "sexual harassment"
- in its "education program or activity"

152

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"




Thompson & Horton LLP
ATTORNEYS AT LAW

153

TEST YOURSELF

Is it in a Program or Activity?



Thompson & Horton LLP
ATTORNEYS AT LAW

154

Test Yourself

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



Thompson & Horton LLP
ATTORNEYS AT LAW

155

When poll is active, respond at poll.com/thlaw411

Is the conduct in the school's educational program or activity?

Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at poll.com/help

156

Test Yourself

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




157

When poll is active, respond at pollev.com/thlaw411

Is the conduct in the school's educational program or activity?



Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

158

Education Program or Activity


- ▶ Field trips
- ▶ Athletics
- ▶ Extracurricular activities

159

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



160

Test Yourself

Robin allegedly sexually assaulted Carson over summer break at a sleepover at Carson's house.




161

When poll is active, respond at pollev.com/thlaw411

Is the conduct in the school's educational program or activity?

Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

162

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."



Thompson & Horton LLP
ATTORNEYS AT LAW

163

When poll is active, respond at pollev.com/thlaw411
Text THLAW411 to 22333 once to join

Is the conduct in the school's education program or activity?

Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

164

Test Yourself

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



Thompson & Horton LLP
ATTORNEYS AT LAW

165

When poll is active, respond at pollev.com/thlaw411

Is the conduct in the school's educational program or activity?

Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

166

Test Yourself

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



Thompson & Horton LLP
ATTORNEYS AT LAW

167

When poll is active, respond at pollev.com/thlaw411

Is the conduct in the school's educational program or activity?

Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

168

Test Yourself

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




169

When poll is active, respond at polllev.com/thlaw411

Is the conduct in the school's educational program or activity?

Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at polllev.com/app


170

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"



171

Test Yourself

Carson reports sexual harassment by Robin online. Both students were at home on the weekends when the conduct occurred, and it occurred through personal devices. No harassment is alleged to have occurred at school, but Carson is having difficulty concentrating at school.




172

When poll is active, respond at polllev.com/thlaw411

Is the conduct in the school's educational program or activity?

Yes No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at polllev.com/app

173

SCENARIO #2

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.



174



175

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”)

Thompson & Horton LLP
ATTORNEYS AT LAW

176

T9SH Grievance Process: When & What is Required

Thompson & Horton LLP

- 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

177

In the United States

Thompson & Horton LLP
ATTORNEYS AT LAW

178

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

Thompson & Horton LLP
ATTORNEYS AT LAW

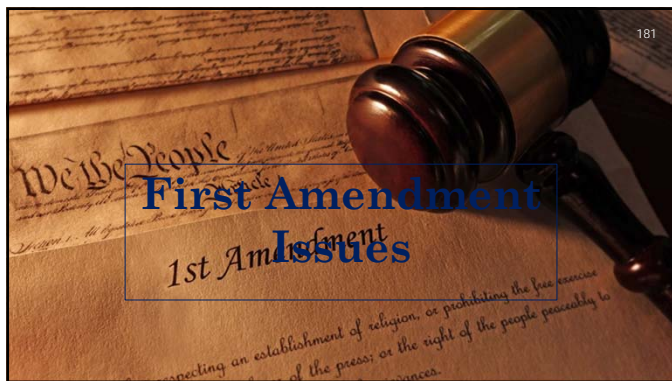
179

T9SH Grievance Process: When & What is Required

Thompson & Horton LLP

- 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

180



181



182

SCENARIO #3

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.”

Thompson & Horton LLP
ATTORNEYS AT LAW

183

When poll is active, respond at polllev.com/thlaw411
Text THLAW411 to 22333 once to join

Is the conduct subject to the Title IX sexual harassment grievance process?

- No, because the conduct is not severe
- No, because the conduct is not pervasive
- No, because the conduct is not objectively offensive
- No, because the conduct is protected by the First Amendment
- Yes, this severe, pervasive, objectively offensive conduct is not protected by the First Amendment

Start the presentation to see live content. For screen share software, share the entire screen. Get help at polllev.com/help

184

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

Thompson & Horton LLP
ATTORNEYS AT LAW

185

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*)]

Thompson & Horton LLP
ATTORNEYS AT LAW

186

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”

Thompson & Horton LLP
ATTORNEYS AT LAW

187

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

Is the conduct subject to the Title IX sexual harassment grievance process?

- No, because the conduct is not severe
- No, because the conduct is not pervasive
- No, because the conduct is not objectively offensive
- No, because the conduct is protected by the First Amendment
- Yes, this severe, pervasive, objectively offensive conduct is not protected by the First Amendment

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

188

SCENARIO #4

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

189

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

Is the conduct subject to the Title IX sexual harassment grievance process?

- No, because the conduct is not severe
- No, because the conduct is not pervasive
- No, because the conduct is not objectively offensive
- No, because the conduct is protected by the First Amendment
- Yes, this severe, pervasive, objectively offensive conduct is not protected by the First Amendment

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

190

SCENARIO #4.5

What if all the communications between Charlie and her peers occur off campus, online, and on the students’ own time?

Thompson & Horton LLP
ATTORNEYS AT LAW

191

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

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 it can be disciplined as long as policy allows it

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

192

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”



193

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.”




194

When poll is active, respond at polllev.com/thlaw411
Text **THLAW411** to **22333** once to join

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 it can be disciplined as long as policy allows it



195

When poll is active, respond at polllev.com/thlaw411
Text **THLAW411** to **22333** once to join

Is the conduct in the school's educational program or activity

Yes No





196

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”

197

When Can We Reach Off Campus Speech?

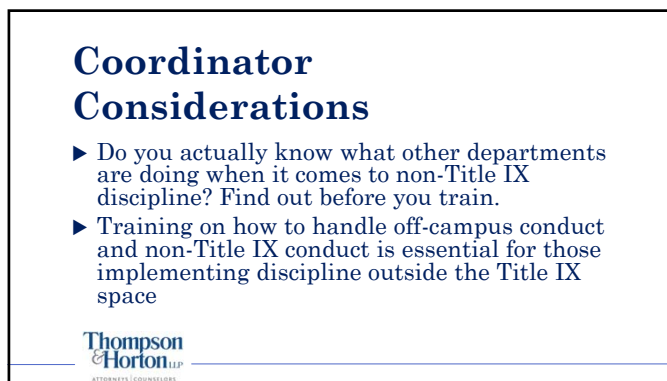
- ▶ Consider how you treat non-sexual harassing conduct off-campus



198



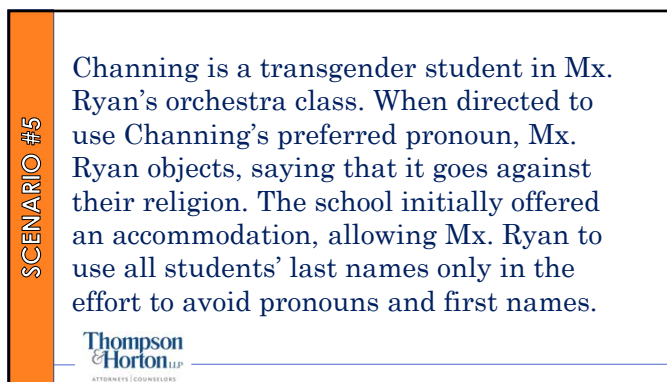
199



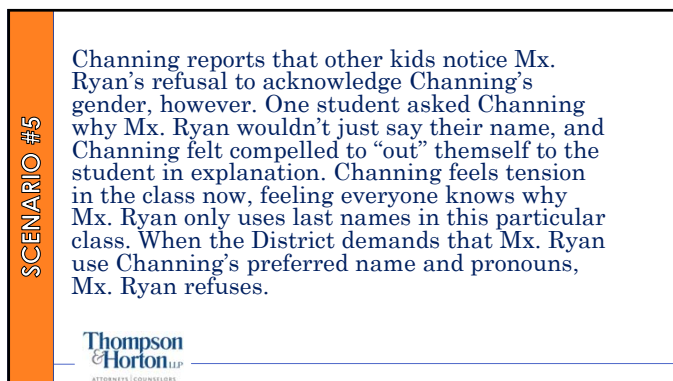
200



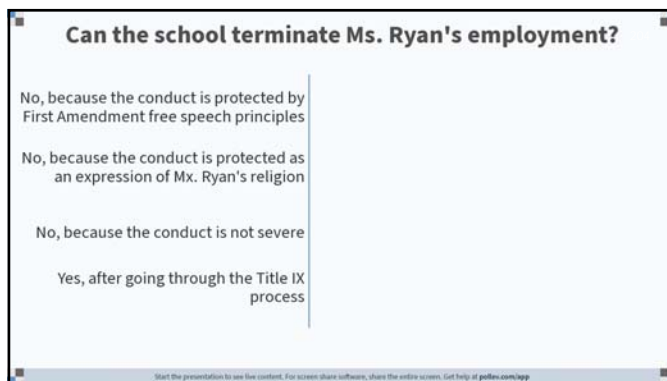
201



202



203



204

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

Thompson
& Horton LLP
ATTORNEYS AT LAW

205

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.”

Kluge v. Brownsburg Cmty. Sch. Corp., No. 1:19-CV-2462-JMS-DLP, 2021 WL 2915023 (S.D. Ind. July 12, 2021)

Thompson
& Horton LLP
ATTORNEYS AT LAW

206

What About Meriwether?

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

Thompson
& Horton LLP
ATTORNEYS AT LAW

207

SLATE

JURISPRUDENCE

Trump Judge: Professor Has a First Amendment Right to Misgender a Trans Student in the Classroom

BY MARK JOSEPH STERN
MARCH 29, 2021 • 2:47 PM

Thompson
& Horton LLP
ATTORNEYS AT LAW

208

Meriwether v. Hartop

- ▶ 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.

Thompson
& Horton LLP
ATTORNEYS AT LAW

209

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.’”

Thompson
& Horton LLP
ATTORNEYS AT LAW

210

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.”




211

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**




212

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



213


SCENARIO #5.5


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.



214

SCENARIO #5.5





215

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 sexual harassment process

Start the presentation to see live content. For screen share software, share the entire screen. Get help at gotham.com/app

216

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)

Garcetti v. Ceballos, 547 U.S. 410 (2006); **Connick v. Myers**, 461 U.S. 138 (1983); **Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205**, 391 U.S. 563 (1968)

Thompson & Horton LLP
ATTORNEYS AT LAW

217

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

Thompson & Horton LLP
ATTORNEYS AT LAW

218

Coordinator Considerations

- ▶ Human resources needs to be brought into the fold with Title IX training even if they aren't technically involved
- ▶ Gold standard is training for all individuals involved in implementing discipline for students and employees; not just leadership

Thompson & Horton LLP
ATTORNEYS AT LAW

219



220

SCENARIO #6

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

221

Ⓜ When poll is active, respond at pollev.com/thlaw411
Ⓜ Text **THLAW411** to **22333** once to join

Should the Title IX Coordinator sign a formal complaint?

No, it will be easier to address the conduct through a non-Title IX procedure, so it should be done that way

No, the Title IX coordinator should respect the autonomy of the complainants and not override their decision

Yes, the conduct alleged involves an employee using a position of authority to engage in sexual misconduct

Yes, any time there is a pattern of behavior by the same alleged perpetrator the T9C should sign a formal complaint


Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

222

“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.




223

“Signing” a Formal Complaint

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




224

When poll is active, respond at polllev.com/thlaw411
 Text THLAW411 to 22333 once to join

What are the rights of Casey and Charlie in the Title IX grievance process?


- Because they did not sign the formal complaint they are treated as witnesses
- Because they did not sign the formal complaint the T9C should give them the option to have the rights of complainants in the process
- Because the T9C signed the formal complaint, they must be treated as complainants



225

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



226

SCENARIO #7


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.



227

SCENARIO #7

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.



228

SCENARIO #7

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

229

© When poll is active, respond at polllev.com/thlaw411
Text **THLAW411** to 22333 once to join

Should the Title IX Coordinator Sign a Formal Complaint?

No, because the conduct is not Title IX "sexual harassment"

No, because Cody does not want to sign a complaint

Yes, because of the horrible effect on Cody

Yes, because the conduct is so serious

Start the presentation to see live content. For screen share software, share the entire screen. Get help at polllev.com/help

230

If no formal complaint is signed or filed, what can the Title IX Coordinator do

Nothing--without a formal complaint, the educational institution cannot respond

Offer Cody supportive measures but cannot impose disciplinary or punitive consequences on the respondent

Offer Cody supportive measures and then send the matter to your non-sexual harassment process

Start the presentation to see live content. For screen share software, share the entire screen. Get help at polllev.com/help

231

SCENARIO #8

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

232

SCENARIO #8

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

233

SCENARIO #8

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

234

What should the Title IX Coordinator do next?

- Not pervasive; use non-T9 process
- No effective denial; use non-T9 process
- Explain to Carmen that no investigation can occur, offer supportive measures
- Explain to Carmen that without the Respondent's name, you can't sign a formal complaint; provide supportive measures
- Sign a formal complaint

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pdifen.com/egp

235

Carmen does not participate in the investigation, which finds no witnesses and no named alleged perpetrators.

What happens next?

- The Title IX Coordinator can dismiss the formal complaint because there is no way the allegations can be proved
- The Title IX Coordinator can dismiss the formal complaint because there is no one to impose consequences against
- The matter should continue to the decision-making process but only if Carmen agrees to participate as a witness
- The matter should continue to the decision-making process because the conduct alleged, if proved, would be sexual assault

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pdifen.com/egp

236

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

Thompson & Horton LLP
ATTORNEYS AT LAW

237



238

SCENARIO #6 (Again)

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

239

SCENARIO #6 (Again)

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

240

Should the Complaints be Consolidated?

Yes, because the respondent is the same in each case

Yes, because they involve the same type of behavior

No, because it will be unfair to Mx. Rowan to consolidate the cases

No, because the circumstances and facts of the allegations are not the same

Start the presentation to see live content. For screen share software, click the poll icon. Get help at pollen.com/help

241

Consolidation

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

Thompson & Horton LLP
ATTORNEYS AT LAW

242

Consolidation

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

Thompson & Horton LLP
ATTORNEYS AT LAW

243

When poll is active, respond at pollen.com/thlaw411

If the complaints are consolidated, Charlie and Casey can have the same advisor

True False

244

SCENARIO #9

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

245

SCENARIO #9


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.

Thompson & Horton LLP
ATTORNEYS AT LAW

246

SCENARIO #9

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.



247


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



248

Cross-Complaints

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



249



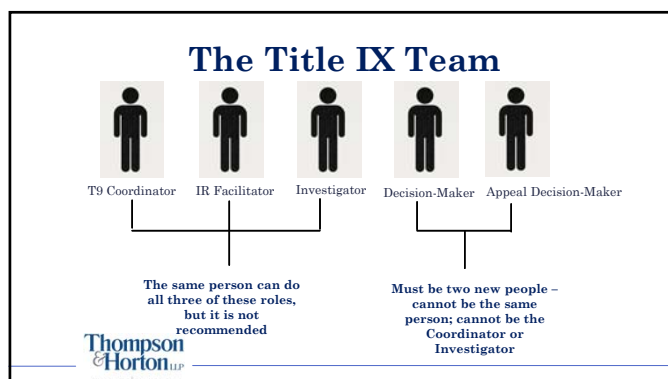
250

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



251



252

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)
- **Step 6:** Investigation
- **Step 7:** Decision-Making Process
- **Step 8:** Appeal

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



253

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)
- **Step 6:** Investigation
- **Step 7:** Decision-Making Process
- **Step 8:** Appeal

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



254

So, you received a report ... what *can* you do?

<p>Assess Safety: If a student is in immediate danger or is an immediate danger to self or others, remove the student from the environment immediately. Move the student to a safe area with adequate supervision and immediately contact the Title IX Coordinator for what to do next.</p>	<p>Consider Law Enforcement, Medical, and Parental Contact: If allegations include a serious crime, alleged injury, or evidence that needs to be collected (like photographs on an electronic device), follow standard building procedures to contact police, medical, and parent(s)/ guardian(s).</p>	<p>Consider Reporting Abuse, Neglect, or Exploitation: Anyone who has a reasonable cause to believe a child, a person 65 years or older, or an adult with disabilities is being abused, neglected, or exploited must report it to DFPS. If in doubt, report. Report at 1-800-252-5400 or the Texas Abuse Hotline.</p>	<p>Consider Contacting Special Education: If a party is a student with a 504 plan or an IEP, contact relevant special education administration to consider impacts on special education placement and services.</p>
--	---	---	--



255

So, you received a report ... what *can't* you do?

⊖ What NOT to Do Until the Title IX Coordinator Decides if Title IX Applies ⊖


<p>Do not conduct investigation interviews (asking for or collecting evidence)—only conduct intake meetings with the reporting party and the complainant/family. An intake meeting means asking what is alleged to have happened, not asking for evidence to support the allegations.</p>	<p>Do not discipline either party, including the alleged perpetrator. See the step above "assessing safety" for immediate steps to take to keep your community safe. Contact the Title IX Coordinator to authorize suspensions or other removals from school or activities.</p>	<p>Do not violate the confidentiality of the alleged victim by telling the alleged perpetrator the alleged victim's name or that a report has been made. We cannot share such information until the Title IX Coordinator says Title IX is not implicated, a Title IX formal complaint is filed, or the alleged victim and their parent(s)/guardian(s) allow it.</p>
---	---	---



256

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



257

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



258

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!)

Thompson
& Horton LLP
ATTORNEYS AT LAW

259

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.

Thompson
& Horton LLP
ATTORNEYS AT LAW

260

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.

Thompson
& Horton LLP
ATTORNEYS AT LAW

261

Intake Questions

- ▶ Are you alleging any other violations of policy/sexual harassment?
- ▶ Go over what happened—ask “Anything else?”

Thompson
& Horton LLP
ATTORNEYS AT LAW

262

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

Thompson
& Horton LLP
ATTORNEYS AT LAW

263

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)
- ▶ **Step 6:** Investigation
- ▶ **Step 7:** Decision-Making Process
- ▶ **Step 8:** Appeal

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

Thompson
& Horton LLP
ATTORNEYS AT LAW

264



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



265

Four topics must be covered:

-  The availability of supportive measures
-  The complainant's wishes with respect to supportive measures
-  The availability of supportive measures with or without filing a formal complaint
-  The process for filing a formal complaint



266

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**



267

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



268

Supportive Measures

- ▶ Building-level administrators may implement Supportive Measures (with oversight from the District Coordinator)
 - For an employee party, coordinate with HR
- ▶ If necessary to share information to implement measures, obtain Complainant's written consent (or confirm in writing)
- ▶ Follow up regularly with the parties to make sure the measures are working
- ▶ Increase the severity of measures or take new measures if initial measures are ineffective



269


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**




270

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!)



271

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)
- **Step 6:** Investigation
- **Step 7:** Decision-Making Process
- **Step 8:** Appeal


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



272

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



273


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




274

Emergency 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**




275

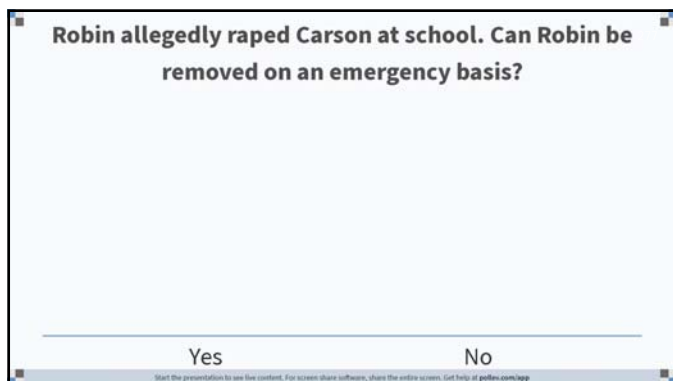
Emergency Removal

Special Education/504 Implications

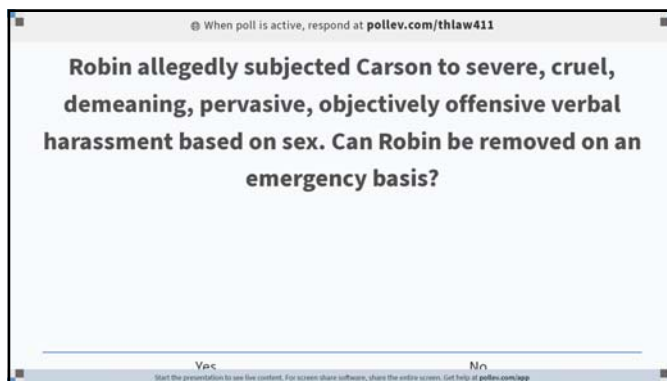
- ▶ Before removing a student with a disability, consult with the special education administrator with responsibility for the student's IEP/Section 504 Plan
- ▶ MDR requirements and procedural safeguards will be triggered if removal is for **more than 10 days** (it almost always will be)
- ▶ **Special 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**



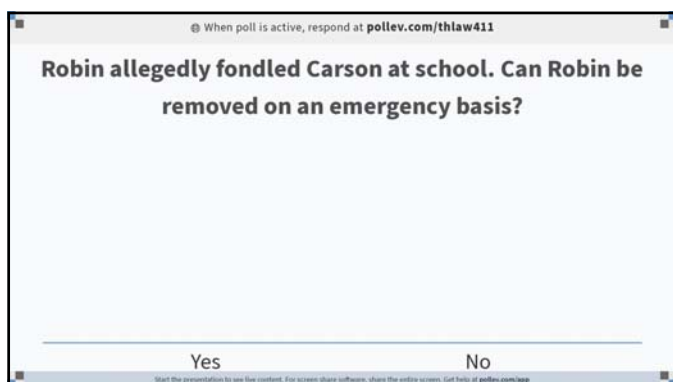
276



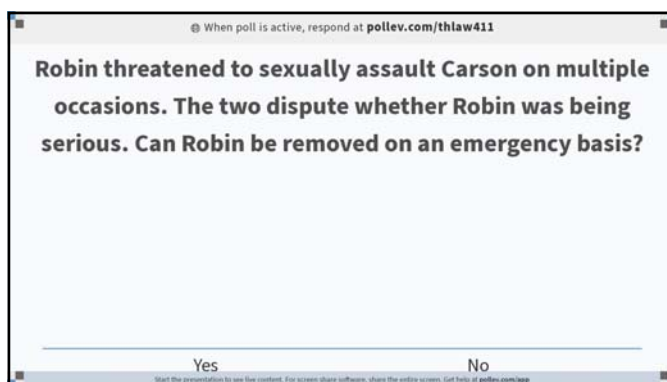
277



278



279



280

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

Thompson & Horton LLP
ATTORNEYS AT LAW

281



Only move to Step 3 if you have a Formal Complaint

- NO DISCIPLINE WITHOUT A FORMAL COMPLAINT-

But support, support, support

Thompson & Horton LLP
ATTORNEYS AT LAW

282

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)
- **Step 6:** Investigation
- **Step 7:** Decision-Making Process
- **Step 8:** Appeal

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




283

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




284

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



285

Formal Complaint

- ▶ A third party cannot file a formal complaint of Title IX sexual harassment
- ▶ May have rights under other policies and procedures/code of conduct provisions



286

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)
- **Step 6:** Investigation
- **Step 7:** Decision-Making Process
- **Step 8:** Appeal

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




287

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




288

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!



289

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**




290

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

<ul style="list-style-type: none"> ➢ Step 1: Hold a "supportive measures meeting" with the Complainant (alleged victim) and offer right to file a formal complaint <p style="color: red; font-size: small;">Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee</p> <ul style="list-style-type: none"> ➢ Step 3: Notice of Allegations ➢ Step 4: Consider if dismissal is required or warranted ➢ Step 5: Informal Resolution (in some cases) 	<ul style="list-style-type: none"> ➢ Step 2: Consider if emergency removal/administrative leave warranted <ul style="list-style-type: none"> ➢ Step 6: Investigation ➢ Step 7: Decision-Making Process ➢ Step 8: Appeal <p style="color: red; font-size: small;">NOTE: ALL STEPS include strict detailed requirements from the Title IX rules</p>
--	--




291

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




292

Step #4: Consider Dismissal


Mandatory Dismissals	Permissive Dismissals
Alleged conduct, if proved, would not be sexual harassment	Complainant asks Title IX Coordinator in writing to withdraw complaint
Alleged conduct, if proved, would not be in an educational program or activity	The respondent's enrollment or employment ends
Alleged conduct, if proved, would not be against a person in the U.S.	Circumstances prevent gathering sufficient evidence to reach a determination (non-cooperation by CP, length of time between incident and complaint, etc.)



Can use another policy or code of conduct




Cannot use another policy or code of conduct




293

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





294

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)**
- **Step 6:** Investigation
- **Step 7:** Decision-Making Process
- **Step 8:** Appeal

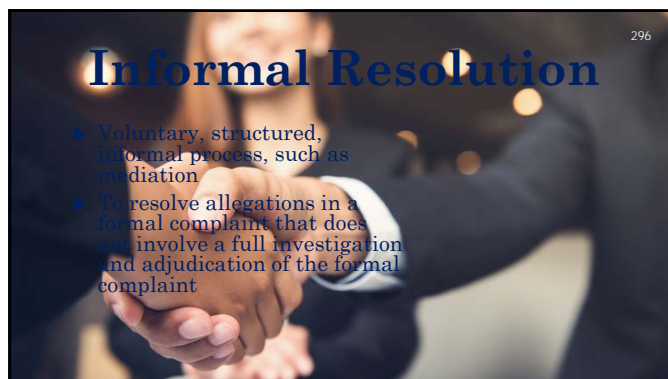
NOTE: ALL STEPS include strict detailed requirements from the Title IX rules



295

Informal Resolution


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



296

SCENARIO #6 (Again)


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.



297

SCENARIO #6 (Again)


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.



298

SCENARIO #6 (Again)

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



299

When poll is active, respond at poller.com/thlaw411
Text **THLAW411** to **22333** once to join

Can IR proceed between Charlie and Rowan?


- Yes, but only if Casey agrees to participate too, because all parties to a complaint must agree to IR for it to proceed
- Yes, as long as your policy allows IR in this circumstance
- Yes, but only if Charlie and Rowan agree that information from The IR can be used in Casey's case
- No, because Rowan is an employee

Start the presentation to see live content. For screen share software, share the entire screen. Get help at poller.com/app

300

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



301

What if a party violates an IR agreement?

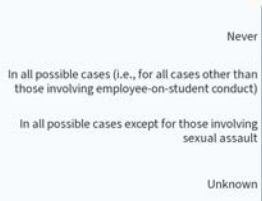
- The institution can impose consequences even if not in the agreement
- The institution can impose consequences if parties agreed to it in the agreement
- The institution can reopen the Title IX process
- The institution cannot respond as the Title IX process is over



302

When poll is active, respond at polllev.com/thlaw411
Text **THLAW411** to **22333** once to join

My institution is using informal resolution in Title IX sexual harassment cases...




303

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**



304

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

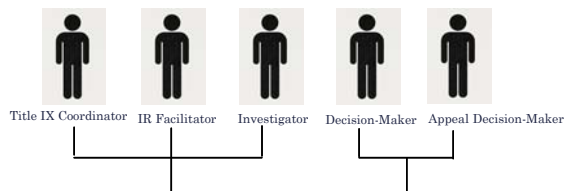

- ▶ **Step 3:** Notice of Allegations
- ▶ **Step 4:** Consider if dismissal is required or warranted
- ▶ **Step 5:** Informal Resolution (in some cases)
- ▶ **Step 6: Investigation**
- ▶ **Step 7:** Decision-Making Process
- ▶ **Step 8:** Appeal

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




305

The Title IX Team

306

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 advisors
- Equal right to present evidence
- Presumption of respondent non-responsibility

Thompson & Horton LLP
ATTORNEYS AT LAW

307

Investigation Steps



Thompson & Horton LLP
ATTORNEYS AT LAW

308

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

Thompson & Horton LLP
ATTORNEYS AT LAW

309

Investigation Report

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



Thompson & Horton LLP
ATTORNEYS AT LAW

310

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?

Thompson & Horton LLP
ATTORNEYS AT LAW

311


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



Thompson & Horton LLP
ATTORNEYS AT LAW

312


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



313

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

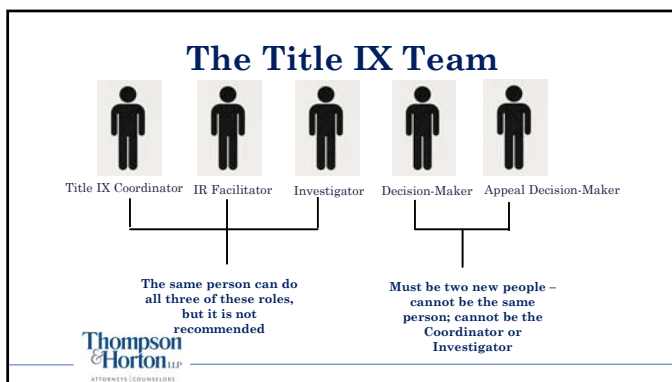
Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee

- **Step 3:** Notice of Allegations
- **Step 4:** Consider if dismissal is required or warranted
- **Step 5:** Informal Resolution (in some cases)
- **Step 6:** Investigation
- **Step 7: Decision-Making Process**
- **Step 8:** Appeal

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




314



315

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



316

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



317

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



318

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




319

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



320

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

<ul style="list-style-type: none"> ➢ Step 1: Hold a “supportive measures meeting” with the Complainant (alleged victim) and offer right to file a formal complaint 	<ul style="list-style-type: none"> ➢ 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

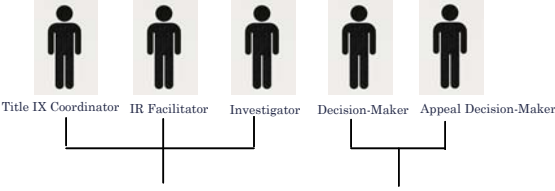
<ul style="list-style-type: none"> ➢ Step 3: Notice of Allegations ➢ Step 4: Consider if dismissal is required or warranted ➢ Step 5: Informal Resolution (in some cases) 	<ul style="list-style-type: none"> ➢ Step 6: Investigation ➢ Step 7: Decision-Making Process ➢ Step 8: Appeal
---	---

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




321

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



322

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



323

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




324

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



325




Students with Disabilities



326

SCENARIO #10

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.



327

When poll is active, respond at polllev.com/thlaw411
 Text **THLAW411** to **22333** once to join

Does the incident trigger the Title IX sexual harassment process?


- No, because Carey only alleged the conduct was sexual assault after being confronted with consequences for the mutual behavior
- No, because multiple employees reported that Carey and Riley had been “a thing” all year
- Yes, because Carey claims the conduct was sexual assault

Start the presentation to see how content. For screen share software, share the entire screen. Get help at polllev.com/help

328

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



329

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.”



330

Coordinator Considerations

- ▶ 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

Thompson & Horton LLP
ATTORNEYS AT LAW

331



332

SCENARIO #11

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

333

SCENARIO #11

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

334

When poll is active, respond at polllev.com/thlaw411

Was there consent?

Yes No

Start the presentation to see live content. For screen share software, close the entire screen. Get help at polllev.com/help

335

SCENARIO #11

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

336



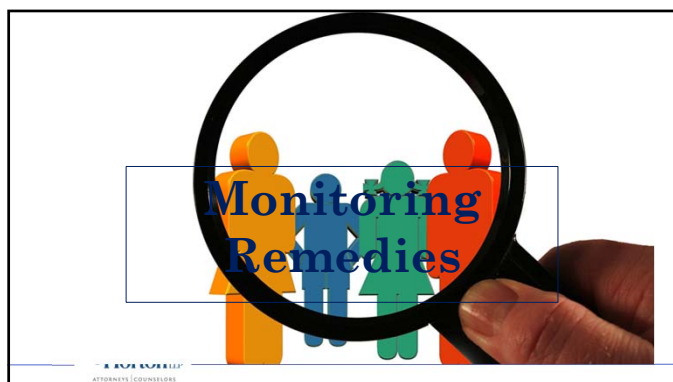
337

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

Thompson & Horton LLP
ATTORNEYS AT LAW

338



339

SCENARIO #12

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

340

SCENARIO #12

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

341

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to 22333 once to join

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

Yes, because Rowan violated a no contact order

Yes, because the remedial efforts were not effective

No, 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

None of the above

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

342

**Moore v. Freeport Cmty. Sch. Dist.,
2021 WL 5179917 (N.D. Ill. 2021)**

- ▶ 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—is enough to allege deliberate indifference, and enough to allege that the District’s response was clearly unreasonable

Thompson & Horton LLP
ATTORNEYS AT LAW

343



344

When poll is active, respond at poll.lev.com/thlaw411

After a conviction, the school must complete its own Title IX investigation

True False

Wait the presentation to see how content. For screen-share software, share the entire screen. Get help at poll.lev.com/help

345

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 violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.”

Thompson & Horton LLP
ATTORNEYS AT LAW

346

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

Thompson & Horton LLP
ATTORNEYS AT LAW

347

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
- ▶ **T&H Guidebook Document 23 – Notice of Extension of Timeframes**

Thompson & Horton LLP
ATTORNEYS AT LAW

348

When poll is active, respond at polllev.com/thlaw411
 Text THLAW411 to 223333 once to join

What can justify a delay for concurrent law enforcement purposes?

- An oral request from law enforcement to delay
- Notice that law enforcement plans to release evidence that would be material to your determination at a particular future time
- The arrest and incarceration of the Respondent
- All of the above
- None of the above

Start the presentation to see live content. For screen share software, share the entire screen. Get help at polllev.com/help

349

The police decided not to prosecute the Respondent because it's a "they said, they said" case. How does it impact your case?

- You can rely on the police's finding to dismiss the complaint
- You can rely on the factual information gathered by the police, but not their finding
- You cannot rely at all on any information from the police


Start the presentation to see live content. For screen share software, share the entire screen. Get help at polllev.com/help

350

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




Thompson & Horton LLP
ATTORNEYS AT LAW

351

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



Thompson & Horton LLP
ATTORNEYS AT LAW

352



RECORDS

Thompson & Horton LLP
ATTORNEYS AT LAW


353

Recordkeeping

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

Thompson & Horton LLP
ATTORNEYS AT LAW

354




SERVING IMPARTIALLY

Thompson & Horton LLP
ATTORNEYS AT LAW

355

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 prejudice any matter before them



Thompson & Horton LLP
ATTORNEYS AT LAW

356

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 prejudice 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

Thompson & Horton LLP
ATTORNEYS AT LAW

357

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)

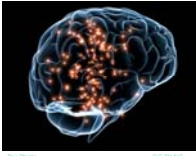


Thompson & Horton LLP
ATTORNEYS AT LAW

358

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



Thompson & Horton LLP
ATTORNEYS AT LAW


359

Changes on the Horizon

360

2022 Proposed Rules

- ▶ Issued by the Biden administration in proposed form on June 23, 2022
- ▶ Comment period ends September 12, 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



361


Process for complaints

Proposed Rules

- ▶ Apply only to complaints of "sexual harassment"
- ▶ Very specific process outlined in Policy FFH (LOCAL) – separate from other complaints of civil rights violations

Current Rules

- ▶ Will apply to all complaints of "sex discrimination," including "sex-based harassment" but includes types of discrimination beyond harassment based on sex
- ▶ School boards likely will be able to use one single process and FFH for all civil rights violations and other complaints under that policy
- ▶ Will still contain many specific requirements, but fewer than under the current rules



362

“Based on sex”

Current Rules

- ▶ Do not specifically define what conduct is “based on sex”
- ▶ OCR and the Courts have long recognized that conduct based on sex stereotypes, pregnancy or related conditions, and failure to comply with gender-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, and gender identity” (Proposed § 106.10)



363

“Hostile Environment”

Current Rules

Defined as unwelcome conduct determined by a reasonable person to be **severe, pervasive, and objectively offensive** that it **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 (i.e., creates a hostile environment).



364

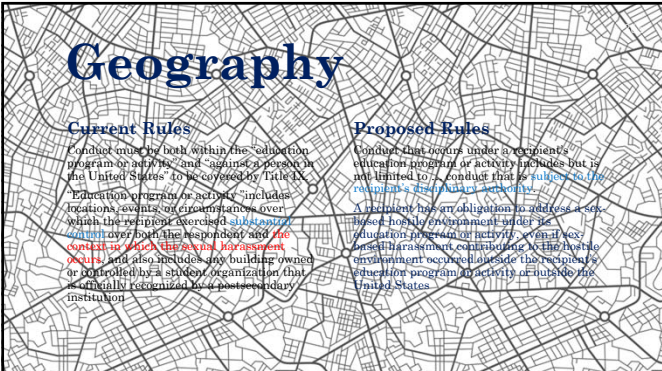
Geography

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. Education program or activity includes locations, events, or circumstances over which the recipient exercised substantial authority over the respondent and the conduct or alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

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 substantial authority**. A recipient has an obligation to address a sex-based hostile environment under the regulations proposed here if the sex-based harassment, comprising a hostile environment, occurred inside the recipient’s education program or activity or outside the United States.



365

Supports & Removals

Current Rules

- ▶ Supportive measures may not be punitive or disciplinary, or unreasonable burden any individual
- ▶ Limited emergency removals are allowed to remove a student only if there is an imminent threat to the recipient’s health or safety from the allegations

Proposed Rules

- ▶ Supportive measures may include temporary measures against a respondent imposed for a substantiated non-disciplinary reason
- ▶ Can include voluntary or involuntary changes of class, work, housing, or restriction of social or any other activity, regardless of whether there is a comparable alternative
- ▶ Emergency removals can be imposed for an **imminent and serious threat to the health or safety** from the allegations



366



367



368

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.

Thompson & Horton LLP
ATTORNEYS AT LAW

369

Brainstorm – First Report

- ▶ What should be your next step?
- ▶ What information do you need?
- ▶ What information should you provide?

Thompson & Horton LLP
ATTORNEYS AT LAW

370

371

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?

Thompson & Horton LLP
ATTORNEYS AT LAW

371

Brainstorm – First Report

- ▶ What should be your next step?
- ▶ What information do you need from Cary to evaluate this report?
- ▶ What information should you provide to Cary and their parents?

[First Report - Coordinator Notes.docx](#)

Thompson & Horton LLP
ATTORNEYS AT LAW

372

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](#)



373

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 themselves. Cary had to struggle to get away from Remi and left the room.



374

More Info – First Report

- ▶ Remi and Cary have three classes together: AP English, Geometry, and Marching Band.
- ▶ Cary is afraid to come to school because they will see Remi.
- ▶ Cary does not want Remi to know they told anyone. But Cary’s parents want an investigation and want Remi expelled.
- ▶ Cary’s parents want Remi removed from all of Cary’s classes and shared activities while you investigate.



375

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.



376

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?

[Second Report - Coordinator Notes.docx](#)



377

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.



378

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.



379

Brainstorm – Second Report

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



380

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?



381

Brainstorm – Second Report

- ▶ Is the alleged conduct Title IX sexual harassment?
 8. Is the conduct severe?
 9. Is the conduct pervasive?
 10. Is the conduct objectively offensive?
 11. Would a reasonable person’s equal access to the education program or activity be effectively denied by the conduct?
 12. Did the conduct occur in a program or activity of the District?
 13. Did the conduct occur against a person in the United States?



382

Brainstorm – Second Report

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



383

Writing Practice – Notice of Allegations

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

[Second Report – Notice of Allegations.docx](#)



384

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.



385

Brainstorm

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



386

Informal Resolution

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



387

QUESTIONS?
THANK YOU!

Holly McIntush
Partner
hmcintush@thlaw.com

Jackie Gharapour Wernz
Partner
jwernz@thlaw.com



Thompson & Horton LLP

© Thompson & Horton LLP September 2022. Marketing materials. Not legal advice.



388

© Thompson & Horton LLP 2023. These materials are not legal advice. These materials are subject to a LIMITED LICENSE AND COPYRIGHT. These materials are proprietary and are owned and copyrighted by Thompson & Horton LLP. As training materials used to train Title IX personnel, these materials must be posted publicly by any organization or entity that purchased training for its Title IX personnel using these materials on that organization or entity's website or, if it has no website, must be made available by any such organization or entity for inspection and review at its offices. Accordingly, Thompson & Horton LLP has granted a LIMITED LICENSE to the organization or entity that lawfully purchased training using these materials (the "LICENSEE") to post these materials on its website or otherwise make them available as required by 34 C.F.R. 106.45(B)(10). The LICENSEE and any party who in any way receives and/or uses these materials agree to accept all terms and conditions and to abide by all provisions of this LIMITED LICENSE. Only the LICENSEE may post these materials on its website, and the materials may be posted only for purposes of review/inspection by the public; they may not be displayed, posted, shared, published, or used for any other purpose. Thompson & Horton LLP does not authorize any other public display, sharing, posting, or publication of these materials by the LICENSEE or any other party and does not authorize any use whatsoever by any party other than the LICENSEE. No party, including the LICENSEE, is authorized to copy, adapt, or otherwise use these materials without explicit written permission from Thompson & Horton LLP. No party, including the LICENSEE, is authorized to remove this LIMITED LICENSE AND COPYRIGHT language from any version of these materials or any copy thereof. Should any party, including the LICENSEE, display, post, share, publish, or otherwise use these materials in any manner other than that authorized by this LIMITED LICENSE, Thompson & Horton LLP will exercise all available legal rights and seek all available legal remedies including, but not limited to, directing the party to immediately remove any improperly posted content, cease and desist any unauthorized use, and compensate Thompson & Horton LLP for any unauthorized use to the extent authorized by copyright and other law. These materials may not be used by any party, including the LICENSEE, for any commercial purpose unless expressly authorized in writing by Thompson & Horton LLP. No other rights are provided, and all other rights are reserved.