


TITLE IX TRAINING
2021-2022

YES Prep
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Thompson & Horton LLP
Dallas, Texas

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1

Why Are We Here?



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The School Is On the Hook For Employees—So Employees Are On the Hook, Too.

3



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Who Enforces Title IX?

4



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Why It Matters To You



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KEY TERMS

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Discrimination

The differential treatment of an individual or group of people based on a protected characteristic



Discrimination Examples of Protected Characteristics

- ▶ Race, color, national origin
- ▶ Religion
- ▶ Ethnicity
- ▶ Sex (including gender, gender identity, sexual orientation, and pregnancy)
- ▶ Age
- ▶ Disability

Harassment

One type of discrimination:
Unwelcome conduct, verbal or physical, including intimidation, ridicule, insult, comments, or physical conduct, that is based on an individual's protected characteristic



Sexual Harassment

One type of harassment,
where the conduct is based on sex, including gender, gender identity, or sexual orientation, or pregnancy



Title IX Sexual Harassment

One type of sexual harassment, where the conduct meets certain requirements in the 2020 Title IX regulations (effective August 14, 2020)



Retaliation

A harmful act against a person that is made in response to that person or another person's report, complaints, or participation in a report/complaint process



Putting It All Together

13

DISCRIMINATION
HARASSMENT
SEXUAL HARASSMENT
TITLE IX SEXUAL HARASSMENT
RETALIATION

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TITLE IX BASICS

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14

14

Title IX

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



LGBTQ+ is “Sex” Under Title IX

- ▶ OCR Guidance, June 2021 – “On the basis of sex” encompasses discrimination on the basis of sexual orientation and gender identity
- ▶ So to OCR, **Title IX prohibits discrimination based on sexual orientation and gender identity**

What is Title IX?

17

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2020 Title IX Rules

18

- ▶ Issued by the Trump administration's Office for Civil Rights
- ▶ Effective August 14, 2020
- ▶ Will likely still be in effect until the end of the 2023 calendar year
- ▶ Include significant requirements for handling complaints of **sexual harassment** under Title IX

FEDERAL REGISTER
The Daily Journal of the United States Government

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

A Rule by the Education Department on 05/19/2020

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Final rule.

SUMMARY: The Secretary of Education announces the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The final regulations specify how

Publication Date: 05/19/2020
Agency: Department of Education
Dates: These regulations are effective August 14, 2020
Effective Date: 08/14/2020
Document Type: _____

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18

Today Is Sexual Harassment, But...

Complaints under Title IX, including different treatment and retaliation, that do not involve sexual harassment **should be reported** to the Title IX Coordinator, who must address them; they will **not** be addressed under the Title IX sexual harassment process we are talking about today



TITLE IX SH REQUIREMENTS



What Did The 2020 Rules Require?

- ▶ Designate Title IX Coordinator
- ▶ Inform individuals of the identity of the title IX Coordinator
- ▶ Post the Title IX Coordinator's name/title, address, email address, and telephone number on the school's website


What Does Title IX Require for Sexual Harassment?

- ▶ Have and share publicly its Title IX sexual harassment policy and grievance procedure
- ▶ **Use that policy and procedure any time it receives a report or complaint of covered conduct**
- ▶ Train all Title IX coordinators, investigators, decision-makers (initial complaint and appellate), and informal resolution facilitators (the "Title IX Team")

23

T9SH Training Requirements

- ▶ Comments to the 2020 Title IX rules noted that the rules require schools to “hire and train multiple individuals to fill different roles, thus increasing compliance costs”
- ▶ Said schools must undertake these costs “even if they rarely have Title IX complaints and investigations”



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24

T9SH Training Requirements

- ▶ Critics of the proposed rules said: “Staff at many schools necessarily wear multiple hats and perform multiple functions, and conducting simultaneous Title IX investigations could be impossible under the proposed regulations”
- ▶ **OCR’s Response:** “[W]e believe that the costs and burdens on regulated entities serve the important purpose of furthering Title IX’s non-discrimination mandate”


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Training Required for Team

- The definition of sexual harassment
- The scope of the education program or activity
- How to conduct an investigation and grievance process including appeals and informal resolution processes
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

Investigator Training

Issues of relevance to create an investigative report that fairly summarizes relevant evidence

Decision-Maker Training

Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant



Training:

How Much is Enough?

- ▶ OCR estimated at least 8 hours of initial training needed with additional training each subsequent year
- ▶ Some in the industry suggest far more than 8 hours for competence
- ▶ There is no clear industry standard, so schools must prepare for this argument in future disputes



Training Recommendations

- ▶ **Required:** All required training in Title IX rules for all “roles”

This is what we are covering today

- ▶ **Recommended:** Interactive, role-playing/scenario-based trainings for each Title IX Team role



Additional Training Tidbits

All materials used to train Title IX Team members must be posted on the school/district website (or made available by request if no website)



Additional Training Tidbits



Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must:

- **Not rely on sex stereotypes**
- **Promote impartial investigations and adjudications of formal complaints of sexual harassment**

It's ok—T&H Trainings comply!

T9SH Grievance Process: When & What is Required

A K-12 school

in which any employee has actual knowledge

of "Title IX Sexual Harassment"

in its education program or activity and

against a person in the United States

must respond using the Title IX Sexual Harassment process

33

Sexual Harassment

T9SH Other SH

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33

34

Why Does It Matter?

Just because conduct not covered by Title IX does not mean you will ignore it; you will just use your code of conduct or another, non-Title IX process to address it

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But If It Is Title IX....

If *any school employee* is aware of allegations of *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.



T9SH Grievance Process: When & What is Required

A K-12 school



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), discussed herein



T9SH Grievance Process: When & What is Required

A K-12 school

in which any employee has actual knowledge



Report

“To give a spoken or written account of something that one has observed, heard, done, or investigated.”

Oxford Languages



Title IX Reports

- ▶ Can be made to the Title IX Coordinator or any “Official With Authority”
- ▶ Can be made by any person, whether or not the person reporting is the person alleged to be the victim of sexual harassment
- ▶ Can be made at any time, including during on-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator



41

Actual Knowledge

- ▶ Gossip/Rumor
- ▶ Observed
- ▶ Perceived
- ▶ Heard About

to ANY K-12 employee

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42

T9SH Grievance Process: When & What is Required

A K-12 school
in which any employee has actual
knowledge
of Title IX "sexual harassment"

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42

43

Is It Title IX



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“Title IX Sexual Harassment”

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

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44

“Title IX Sexual Harassment”

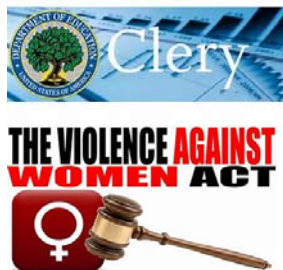
**The Title IX
“Big 5”** OR **Title IX “Hostile
Environment”**



45

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



46

#1 of the “Big 5” Employee Quid Pro Quo

- ▶ An employee of the recipient conditioning an aid, service, or benefit of the school on an individual’s participation in unwelcome sexual conduct
- ▶ Examples:
 - 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



47

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

- ▶ Forcible or nonforcible sex
- ▶ Forcible: without consent, including where one cannot give consent
 - Rape, sodomy, assault with an object, fondling
- ▶ Non-forcible: Incest, Statutory Rape



48

#3 of the “Big 5”

Domestic Violence (VAWA Definition)

- ▶ Felony or misdemeanor crimes of violence
- ▶ Committed by a current or former romantic partner spouse, former spouse, intimate partner, person who shares a child, person similarly situated to a spouse, adults against a person protected under domestic or family violence laws of the jurisdiction

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#4 of the “Big 5”

Dating Violence (VAWA Definition)

- ▶ Committed by a person who has been in a romantic or intimate social relationship with the victim
- ▶ Consider the complainant’s description of the length of the relationship, the type of relationship, and the frequency of the interaction between the persons involved in determining the nature of the relationship
- ▶ Can include sexual, physical, emotional, or psychological violence

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#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 the safety of others or to suffer substantial emotional distress
- ▶ Conduct can be direct or indirect, and does not require professional medical treatment



51

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)



52

53

What About Consent?

- ▶ Title IX generally prohibits “unwelcome” conduct based on sex
- ▶ “Consent” comes into play in sexual assault cases, including those involving fondling



53

54

What is Consent?

- ▶ Not defined by OCR/the 2020 Title IX rules
- ▶ Must be defined in your policies/procedures



54

What is Consent

Generally, consent means the existence of clearly understandable words or actions that manifest a knowing, active, voluntary, and present and ongoing agreement to engage in specific sexual or intimate conduct by one not suffering from incapacitation



Incapacitation

- ▶ Should a reasonable person in the same circumstances have known the other party could or could not consent to the sexual Activity?
- ▶ Consent is not present when an individual does not have the capacity to give consent, voluntarily or involuntarily, due to:
 - Age (younger than 17 in Texas, with exceptions for parties 18 years and under and less than 3 years apart)
 - Physical condition, such as incapacitation due to alcohol or drug consumption (voluntary or involuntary), being unconscious, asleep, or in another state in which the person is unaware that the sexual activity is occurring
 - Disability that impairs the individual's ability to give consent.



“Title IX Sexual Harassment”

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

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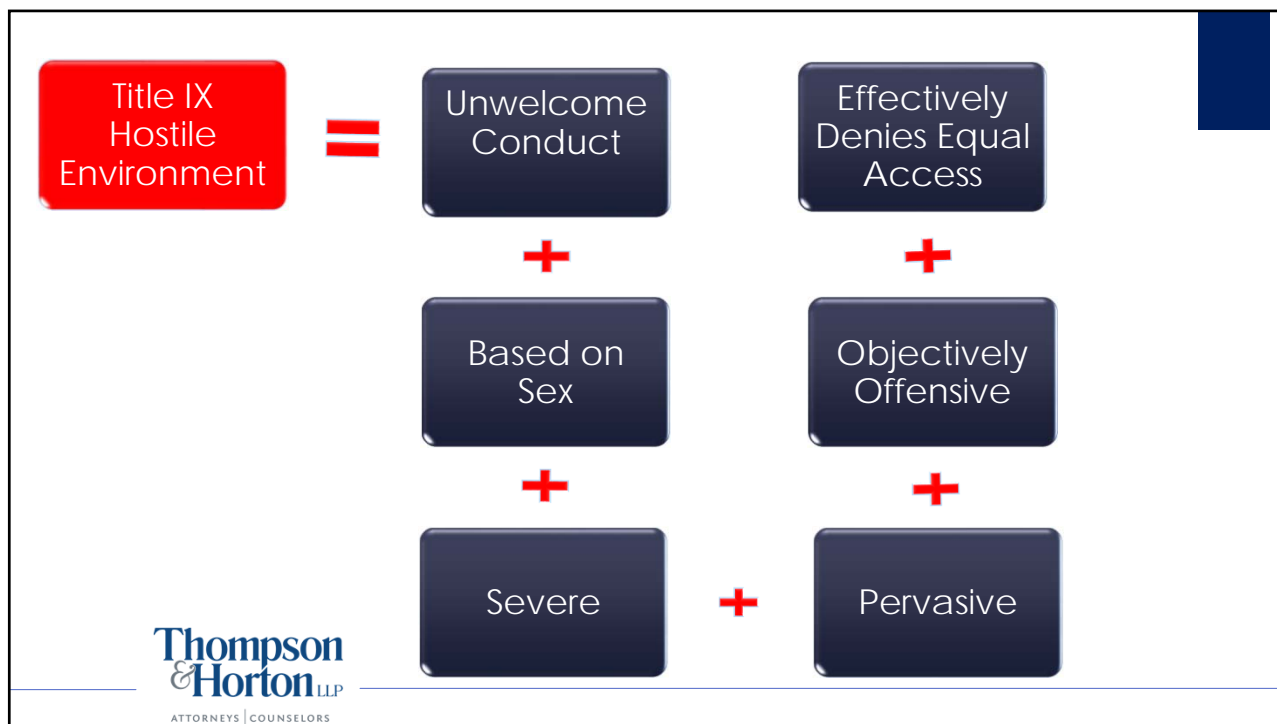
57

“Title IX Sexual Harassment”

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

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58



59

Sexual Harassment: Hostile Environment

Consider:

- ▶ the degree to which the conduct affected the student's education
- ▶ the type, frequency, and duration of the conduct
- ▶ the relationship between the victim and the participant
- ▶ the number of individuals involved
- ▶ the age and sex of the participants
- ▶ size of school, location of incidents, and context
- ▶ other incidents of sex-based harassment

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60

61

Dictionary Definitions: 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)



61

62

Case Definitions: Severe

- ▶ “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)



62

Case Definitions: Severe

- ▶ To establish “severe” harassment, the conduct must be extreme and not merely rude or unpleasant.

Jenkins v. Univ. of Minnesota, 131 F. Supp. 3d 860, 881 (D. Minn. 2015), *aff'd*, 838 F.3d 938 (8th Cir. 2016)



Case Definitions: Severe

- ▶ 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)



Dictionary Definitions: Pervasive

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



Case Definitions: Pervasive

- ▶ “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)



Case Definitions: Pervasive

- ▶ Even a single incident of rape is sufficient to establish that a [complainant] was subjected to severe, pervasive, and objectively offensive sexual harassment for purposes of Title IX.

Lopez v. Metro. Gov't of Nashville & Davidson Cty., 646 F. Supp. 2d 891, 913 (M.D. Tenn. 2009)

- ▶ A single incident of rape could reasonably be understood to have a “systemic effect” on a plaintiff’s access to educational programs.

T.Z. v. City of New York, 634 F. Supp. 2d 263, 270 (E.D.N.Y. 2009)



Case Definitions: Pervasive

By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.

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



Case Definitions: Pervasive

Pervasive is defined as “that becomes or tends to become diffused throughout every part of,” and is different from the word “persistent”

Doe v. Dallas Independent Sch. Dist., 2002
WL 1592694, 2002 U.S. Dist. LEXIS 13014
(N.D.Tex. July 16, 2002)



69

Dictionary Definitions: Objectively Offensive

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



70

70

Case Definitions: Objectively Offensive

“Objectively offensive” means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively

Whether gender-oriented conduct rises to the level of actionable harassment thus depends on a 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 of a comment is to be judged by reference to a reasonable child at whom the comments were aimed



71

Examples

Male student

Called “gay,” “homo” and “f**got” on multiple occasions by other male students

A student grabbed his genitals and engaged in a simulated sexual act while he waited in line in the school cafeteria

He was told in no uncertain terms that he was not welcome in the school because it was believed he was a homosexual

He was slapped, punched and struck with a neck-chain while the perpetrators made statements showing that they intended to harass, harm and demean him based on his perceived sexual orientation

In the circumstances, a reasonable person in L.W.'s protected class would believe that the school environment was hostile and threatening

L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 381 N.J. Super. 465, 490, 886 A.2d 1090, 1105 (App. Div. 2005), aff'd as modified and remanded, 189 N.J. 381, 915 A.2d 535 (2007)



72

72

Examples

Male students videotaped and shared videotapes of female students engaging in sexual encounters with male students on premises of their respective schools

While the cases currently before the court do not include allegations of forcible rape, they do involve substantial violations of the students' sexual autonomy, which is relevant to just how pervasive the ensuing conduct needed to be to rise to the level of actionable harassment

Indeed, it is inaccurate to characterize these cases as involving simple, isolated events. Being taped during sexual activity without permission is an isolated event. The video's being sent to another person is a second event. The next transmission is a third. The availability of the videos was widespread. In a contemporary high school, there is little that is more "pervasive" than electronic communication

T.C. on Behalf of S.C. v. Metro. Gov't of Nashville, 378 F. Supp. 3d 651, 675 (M.D. Tenn. 2019)



Examples

A male student put all of his weight on a female student, touched her breasts, stomach and legs over her clothing, and bit her neck hard enough to leave a mark

Undoubtedly, this behavior is inappropriate and should not be condoned, but it is not adequately severe or pervasive to be covered by Title IX

The court cited cases involving one incident of male student touching a female student's breasts and buttocks, and other incidents of name-calling, insults, and physical harassment, which was found not sufficiently pervasive or severe from an objective standpoint, and two separate incidents with two male students, where one boy touched female student's vagina through her skirt and other boy slapped her buttocks, which was found not sufficiently pervasive under Title IX

Carabello v. New York City Dep't of Educ., 928 F. Supp. 2d 627, 643 (E.D.N.Y. 2013)



Effective Denial

Evaluate whether a reasonable person in the alleged victim's position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment



Effective Denial

Examples may include:

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



Effective Denial of Equal Access

77

- ▶ A complainant does not need to have already suffered loss of education before being able to report sexual harassment
- ▶ Effective denial of equal access to education does not require that a person's total or entire educational access has been denied
- ▶ While these examples help illustrate an effective denial of access, no concrete injury is required to prove an effective denial of equal access



77

Effective Denial of Equal Access

78

- ▶ Complainants do not need to have dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" or exhibited specific trauma symptoms to be effectively denied equal access
- ▶ School officials turning away a complainant by deciding the complainant was "not traumatized enough" would be impermissible



78

T9SH Grievance Process: When & What is Required

79

A K-12 school

in which any employee has actual knowledge

of Title IX "sexual harassment"

in its education program or activity

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Is It In a



80

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Education Program or Activity

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

- This can be on or off campus
- It "includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs"

Education Program or Activity

- ▶ Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
 - Fraternities, sororities, or sports team houses are covered
- ▶ Includes situations where the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. § 1687 and 34 CFR 106.2(h)

Education Program or Activity

- ▶ Title IX applies to electronic, digital, or online harassment regardless of the method by which the conduct is perpetrated; if the sexual harassment occurred in an education program or activity or the educational institution has substantial control over the alleged harasser and the context of the harassment, it is covered
- ▶ “Operations” can include computer and internet networks, digital platforms, and computer hardware or software owned or operated by or used in the operations of the recipient

Education Program or Activity

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

85

Education Program or Activity

Conduct that begins outside of an education program or activity may continue into the education program or activity (“downstream effects”)



85

86

Education Program or Activity

Example: Where a teacher employed by a school visits a student’s home ostensibly to give the student a book but in reality to instigate sexual activity with the student



86

Education Program or Activity

- ▶ Basic instruction
- ▶ Guidance, counseling, and evaluation services
- ▶ Cocurricular and extracurricular activities
- ▶ Health services
- ▶ Student transportation
- ▶ Food services
- ▶ Social work services



Education Program or Activity

- ▶ Field trips
- ▶ Early College High Schools
- ▶ Career and technical programs
- ▶ Early (pre-kindergarten) learning
- ▶ Athletics
- ▶ Special education
- ▶ Visual and performing arts



Education Program or Activity

- ▶ Did the school promote or sponsor the event?

Examples

- Instructional programs
- Athletic programs
- Student organizations



Education Program or Activity

For Off-Campus Conduct, Ask: Did the conduct occur:

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

If the conduct involves speech, use First Amendment analysis to determine if there is jurisdiction for disruption or invasion of rights of others

– Mahanoy Area School District v. B.L. (U.S. 2021)

T9SH Grievance Process: When & What is Required

91

- 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

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In the United States

92



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In the United States

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

T9SH Threshold Questions

Is the alleged conduct:

1. “Title IX Sexual Harassment”
2. “in an educational program or activity”
3. “in the United States”

If yes to **all**: Title IX SH Process

If no to **any**: Another process

Test Yourself

- ▶ A student reports sexual assault by another student at the hotel room booked by the school and chaperoned by school employees during a Spring Break trip in Paris
- ▶ A student reports that a teacher offered a better grade on an assignment for a shoulder massage at their desk during class
- ▶ A student reports that, during lunch, another student slapped their behind repeatedly while laughing and joking with other students
- ▶ A student reports that their friend, another student, has been isolated lately, has had bruises on their arms, and has been constantly fighting with their significant other, who is also a student
- ▶ An employee reports that a student sent them a love note and seems to be following them everywhere at school



95

T9SH Grievance Process: When & What is Required



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

96

96

T9SH Grievance Process

The new Title IX regulations require schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates due process principles, treats all parties fairly, and reaches reliable responsibility determinations

Schools must follow a grievance process that complies with Title IX regulations **before imposing any disciplinary sanctions or other actions that are not supportive measures, against a respondent**



So You Received a Report?

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.

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).

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.**

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.



99

So You Received a Report?

⊖ 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>
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99

100

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


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101

Overview: T9 SH Grievance Process


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102

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
- ▶ Goal is to collect more information about the allegations to allow evaluation of the complaint


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What is Intake?

- ▶ An opportunity to determine the allegations in a report or formal complaint
- ▶ Necessary to evaluate the complaint to determine if Title IX applies

Allegation

“A claim or assertion that someone has done something illegal or wrong, typically one made without proof.”

Oxford Languages

105

Evaluation

“To determine the significance, worth, or condition of usually by careful appraisal and study.”

Merriam-Webster



105

106

What is Intake NOT?

- ▶ Investigation
- ▶ Evidence Gathering
- ▶ Interrogation
- ▶ Credibility Determinations



106

107

Investigation

“An investigation is a thorough search for facts, especially those that are hidden or need to be sorted out in a complex situation. The goal of an investigation is usually to determine how or why something happened.”

Dictionary.com



107

108

Evidence Gathering

An institution bears both the burden of proof and the burden of gathering evidence in the Title IX process.



108

Evidence Gathering

- ▶ Testimony
 - ▶ Communications: Emails, Social Media, etc.
 - ▶ Photographs and Video Recordings
 - ▶ School Records
 - ▶ Police Reports
 - ▶ Expert Evidence
 - ▶ Medical Records**
- ** use of these is limited even in the investigation stage

Preservation of Evidence

- ▶ If you become aware of the existence of evidence that could be at risk of loss, can take steps to preserve evidence
- ▶ Contact law enforcement immediately where knowledge of illegal or illicit evidence

111

Interrogation

“Interviewing ... with the goal of eliciting useful information, particularly information related to a suspected crime.”

Wikipedia



111

112

Credibility Determinations

“The fact that someone can be believed or trusted.”

Cambridge Dictionary



112

Credibility Determinations

- ▶ Inherent Plausibility
- ▶ Demeanor
- ▶ Motive to Falsify
- ▶ Corroboration
- ▶ Past Record



**U.S. Equal Employment
Opportunity Commission**

EEOC Enforcement Guidance:
Vicarious Liability for Unlawful
Harassment by Supervisors (Jun.
18, 1999)



In Other Words...

Intake is NOT an investigatory interview. It is not the time to ask for evidence to support the claims about what happened, to ask for 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.



115

Intake Questions

- ▶ Who
- ▶ What
- ▶ When
- ▶ Where
- ▶ Why
- ▶ How



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Intake Questions

- ▶ What happened that you believed was sexual harassment?
- ▶ What was done? What was said?
- ▶ If touching occurred, ask for the details (in what ways were you touched, where were you touched?)

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117

Intake Questions

- ▶ Where did it occur? (Get details for every situation)
- ▶ When did it occur? At what time of the day?
- ▶ How often did it occur? Is it ongoing?



117

118

Intake Questions

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



118

119

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119

120

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Step #1: Supportive Measures Meeting

For all Title IX Sexual Harassment in a program or activity and in the United States of which the school/district has “actual knowledge,” the Title IX Coordinator must meet with the Complainant (alleged victim) to offer supportive measures and explain the Formal Complaint process, even if no Formal Complaint has been filed



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*



Supportive Measures

- ▶ Counseling
- ▶ Extensions of deadlines or other course-related adjustments
- ▶ Modifications of work or class schedules
- ▶ Campus escort services
- ▶ Mutual restrictions on contact between the parties
- ▶ Leaves of absence
- ▶ Increased security and monitoring of certain areas of the campus

Supportive Measures

- ▶ Title IX Coordinator or designee must implement
- ▶ If necessary to share information to implement measures, obtain Complainant's written consent
- ▶ 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



IDEA and Section 504 Implications

- Some supportive measures, such as provision of counseling or changes to class schedules, will also 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 these students
 - 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 and the Title IX staff will need to be trained on identifying and addressing SPED/504 implications

Step #1: Supportive Measures Meeting



Before a formal complaint is filed, must maintain confidentiality of the Complainant unless necessary to implement supportive measures

Formal Complaint Process

- ▶ During the “supportive measures meeting” the Title IX Coordinator or designee should explain the process for filing a “formal complaint”
- ▶ Best practice is to provide a copy of the policies and procedures describing how to file a formal complaint and the grievance process



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129

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130

Step #2: Emergency Removal

- ▶ After a report (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
- ▶ Can only be done if the terms of emergency removal are met



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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: Must undertake an individualized safety and risk assessment and determine 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



Emergency Removal

Student Discipline Implications

- ▶ Prior to removing student, Title IX Coordinator must consider if state discipline laws are implemented in any way
- ▶ Emergency removals can be tantamount to suspension or expulsion and state laws governing those types of discipline cannot be ignored
- ▶ Although emergency removal is not intended to be disciplinary, unless some state law method allows for removal without consent, you may have to deal with state law
- ▶ Work with legal counsel to determine how to handle this interplay, including considering trying to secure voluntary agreement to a removal



Emergency Removal

Special Education/504 Implications

- ▶ Prior to removing student, Title IX Coordinator must work with IEP/Section 504 Committee for any student receiving services under IDEA or Section 504
- ▶ 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



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



135

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135

136

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137

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



137

138

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 to the Title IX Coordinator that ends with the student signing their name would suffice

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138

139

Formal Complaint

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



139

140

Formal Complaint

- ▶ Once a formal complaint has been filed or signed, the school **must** share the Complainant's name with the Respondent (confidentiality 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 their permission



140


141



Only move to Step 3
if you have a Formal
Complaint

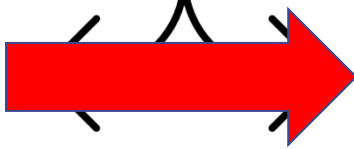
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141



REMEMBER

Sexual Harassment

Title IX SH  **Other SH**

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The diagram features the word "REMEMBER" in red at the top center, flanked by two cartoon elephants holding signs that say "Don't forget". Below this, the words "Sexual Harassment" are written in large blue font. A central vertical line descends from the text and splits into two arrows pointing left and right. On the left, the text "Title IX SH" is displayed with a large green checkmark over it. On the right, the text "Other SH" is displayed with a large red X over it. At the bottom left is the logo for Thompson & Horton LLP, ATTORNEYS | COUNSELORS.

143

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144

145

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146

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



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Notice of Allegations

- ▶ 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

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!

Remember: Once a Formal Complaint is filed or signed, you must notify the respondent of the name of all known alleged victims



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149

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Step #4: Consider Dismissal


Mandatory Dismissals	Permissive Dismissals
Conduct alleged, even if true, would not be Title IX Sexual Harassment	Complainant asks Title IX Coordinator in writing to withdraw complaint or allegations in complaint
Conduct alleged did not occur in the educational program or activity	The respondent’s enrollment or employment ends
Conduct alleged did not occur against a person in the U.S.	Circumstances prevent gathering sufficient evidence to reach a determination



Can use another policy or code of conduct



Cannot use another policy or code of conduct



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REMEMBER

Sexual Harassment

Don't forget

Don't forget

Title IX SH **Other SH**

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151

REMEMBER

Sexual Harassment

Don't forget

Don't forget

Title IX SH **Other SH**

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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

APPEAL

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155

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156

Step #5: Informal Resolution

- ▶ An alternative to the formal grievance procedure that schools may offer, **but not are not required to offer**
- ▶ Is never permitted in cases of alleged employee-on-student conduct
- ▶ Can only be offered once there is a Formal Complaint on file, the parties have been notified of the allegations and their rights, and there is informed, written consent (must be 100% voluntary)
- ▶ Recommend that the informal resolution be completed by someone other than the Title IX Coordinator (not required) – facilitator must be trained



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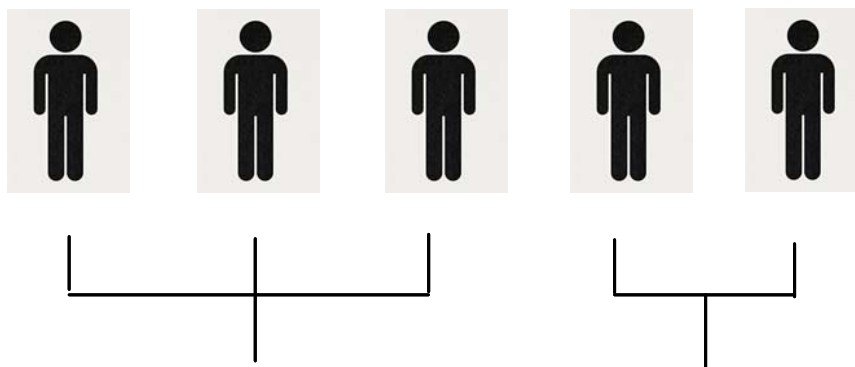
Informal Resolution

- ▶ 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; if not, you move on to Step #5: Investigation



157

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, Investigator, or IR Facilitator



158

159

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159

160

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Step #6: Investigation

- ▶ Recommend that the investigation be completed by someone other than the Title IX Coordinator and Informal Resolution Facilitator (not required)—Investigator must be trained
- ▶ Many required elements of investigation in rules—best practice to use T&H’s investigation checklist and other forms to keep yourself on track



Investigation

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



Directly Related Evidence

- ▶ “Directly Related” is not defined in the rules
- ▶ Statements, notes of interviews, and other types of evidence collected in the investigation
- ▶ Even evidence the school doesn’t think it will use
- ▶ The parties must be given at least 10 days to review all the evidence and submit written responses about the evidence to the investigator
- ▶ The investigator must consider the responses when writing the investigative report



Relevant Evidence

Evidence is relevant if

(a) it has any tendency to make a fact more or less probable than it would be without the evidence,
and;

(b) the fact is of consequence in determining the action

FED. R. EVID. 401



Relevant Evidence Includes

“Inculpatory Evidence”

- Favorable to the Complainant
- Evidence that shows or tends to show an individual’s involvement in the alleged sexual harassment that can establish responsibility

“Exculpatory Evidence”

- Favorable to the Respondent
- Evidence that exonerates or tends to show the Respondent is not responsible for the alleged sexual harassment incident



Exceptions to Relevance

- ▶ Evidence subject to legal privilege
- ▶ Evidence related to a complainant’s past sexual history unless
 - The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
 - 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 physician, psychologist, or other recognized professional or paraprofessional made and maintained in connection with the provision of treatment of the party

If a party wishes that you use such evidence, you should get written consent from the party and (for a minor) their parents/guardians



167

Preponderance of Evidence

More likely
than not
(50% and a
feather)



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168

Review of the Report

- ▶ Investigative report fairly summarizes the relevant evidence
- ▶ School must share the final report with both parties and their advisors
- ▶ Both parties must be given at least 10 days to review and submit a written response regarding the report to the decision-maker before the decision-maker makes any final determination of responsibility

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168

169

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169

170

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- **Step 7: Decision-Making Process**
- **Step 8:** Appeal

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



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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, Investigator, or IR Facilitator

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171

Step #7: Decision-Making Process

- ▶ Decision-maker may not be the Title IX Coordinator or the investigator
- ▶ Oversees a written question-and-answer process in which the parties get to ask written, relevant questions of other parties and witnesses
- ▶ After that process, issues a written determination


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Preponderance of Evidence

173

More likely than not (50% and a feather)



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Written Decision Requirements

174

- ▶ Identify the allegations at issue that potentially constitute sexual harassment
- ▶ Include specific policy provision that the conduct allegedly violates
- ▶ Describe the school's procedural steps to date, from receipt of the complaint to the determination
- ▶ Include findings of fact supporting the determination
- ▶ Include conclusions regarding application of the school's code of conduct to the facts


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175

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



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176

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



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176

177

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178

Step #7: Appeal

- ▶ Each party can appeal either (1) dismissal or (2) written determination
- ▶ Must be able to appeal on specific bases:
 - Procedural irregularities that affected the outcome
 - New evidence
 - Conflict of interest



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178

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- ▶ Must be able to appeal on specific bases:
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Appellate Decision-Maker

- ▶ Provides each party notice of the appellate process and the opportunity to respond to the appeal in writing
- ▶ Appellate decision-maker issues a written decision including the result and rationale

181



MISC.

181

182

Recordkeeping

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

182

Serving Impartially

The new 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

The key: Treat the parties equally until the process and evidence justify treating them differently



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Serving Impartially

Avoid:

- ▶ Bias
- ▶ Conflict of Interest
- ▶ Prejudgment



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Impartiality Do's and Don't's

- ▶ Do 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)

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

QUESTIONS?



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187

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