

**THE ESSENTIAL
TITLE IX
ACTION PLAN
FOR 2023**

Webinar February 9, 2023

Thompson & Horton LLP
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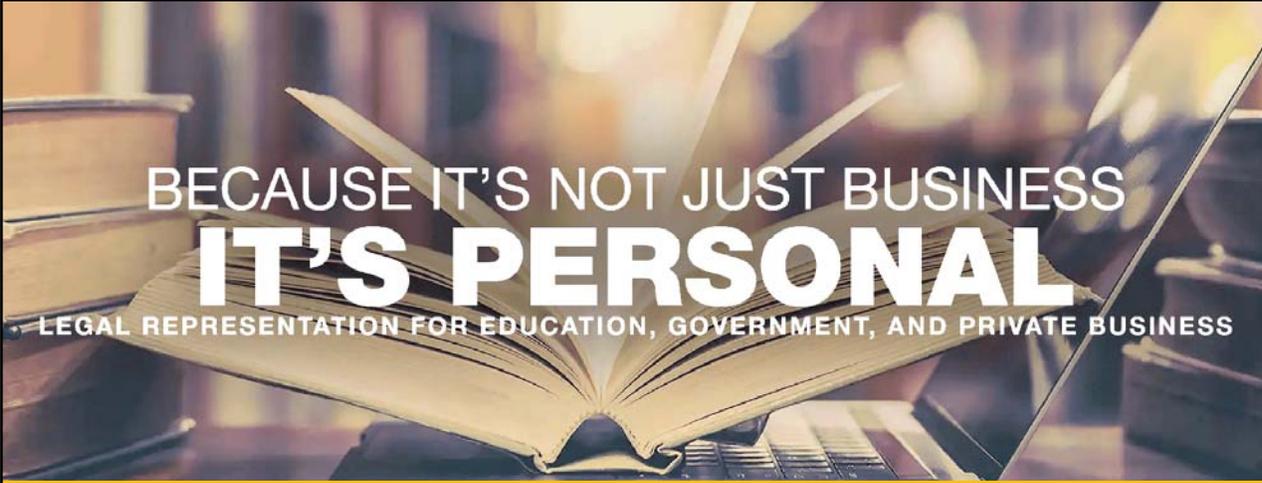
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BECAUSE IT'S NOT JUST BUSINESS
IT'S PERSONAL
LEGAL REPRESENTATION FOR EDUCATION, GOVERNMENT, AND PRIVATE BUSINESS

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Your Hosts

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THIS IS OUR AGENDA

- ✓ Why Are We Here?
- ✓ Your Action Plan in 5 Steps
- ✓ Step 1: Orient Yourself
- ✓ Step 2: Leadership Buy-In
- ✓ Step 3: Scheduling Training
- ✓ Step 4: Policies & Procedures
- ✓ Step 5: Templates

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Why Are We Here?



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- Effective August 14, 2020
- Address "sexual harassment" under Title IX with very prescriptive rules



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- Address "sexual harassment" under Title IX with very prescriptive rules
- New proposed rules: Catherine Lhamon & Joe Biden's proposed Title IX rules
- Proposed June 23, 2022 on the 50th anniversary of Title IX
- Will address "sex-based discrimination"
- Expected to become final in May 2023



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- Address "sexual harassment" under Title IX with very prescriptive rules
- New proposed rules: Catherine Lhamon & Joe Biden's proposed Title IX rules
- Proposed June 23, 2022 on the 50th anniversary of Title IX
- Will address "sex-based discrimination," not just "sexual harassment" but with somewhat less prescriptive rules
- No one wants to do the "summer scramble" again
- But how do you tackle this issue when the rules aren't even final yet?
- Today's goal: a practical action plan



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Step One: Orient Yourself



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The Proposed Rules

Two grievance processes

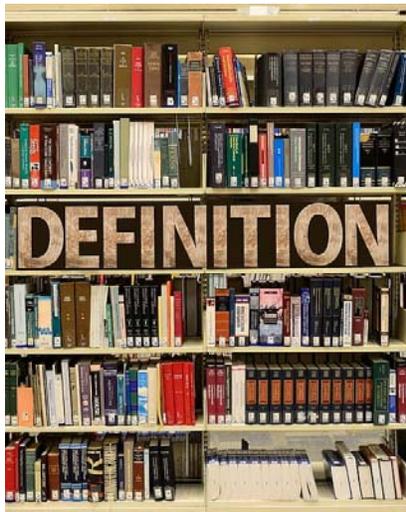
1. 106.45 applies to all complaints of sex-based discrimination
2. 106.46 applies to Higher Education complaints of sex-based harassment



T&H

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“Sex-Based Harassment”



- Hostile Environment Harassment (“severe or pervasive” not “severe, pervasive, and objectively offensive” + “denies or limits” not “effectively denies”
- The Title IX “Big Five”
 - *Quid Pro Quo*
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking

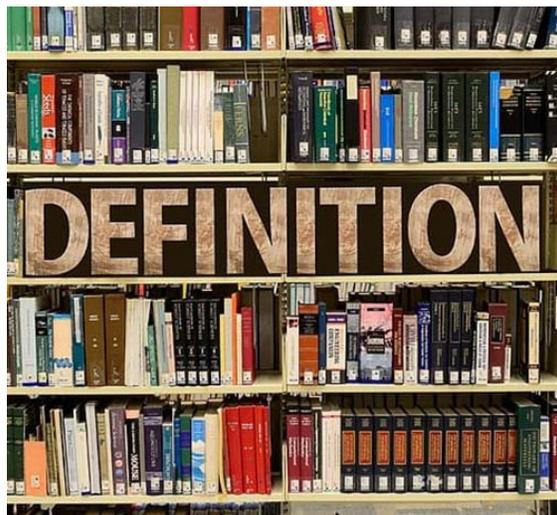


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“Education Program or Activity”

- Currently: “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs”
- Proposed: “subject to the recipient’s disciplinary authority”

* Both include buildings owned or controlled by an officially recognized student organization at an IHE



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Off Campus Conduct

- Current rules: **mandate** dismissal if conduct did not occur in an educational institution's education program or activity or against a person in the U.S.
- Proposed rules: dismissal is **permissive** and must address conduct "even if sex-based harassment contributing to the hostile environment occurred outside of the recipient's education program or activity or outside the U.S."
- Is this a distinction **with** or **without** a difference?

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General Grievance Process Hot Takes

Evaluation

Supportive measures can temporarily burden the respondent

ER for non-physical risk

No complaint required for IR

No more mandatory dismissal

Investigation

Oral complaints trigger the grievance process

Except for IHE sex-based harassment, can just provide description of relevant evidence (w/opportunity to request to review permissible evidence)

Except for IHE sex-based harassment, written notice of interviews not required

Determination

Title IX Coordinator, investigator, and decision-maker can be the same person

Live hearings not required; may allow decision-maker to ask questions if offered (consider local due process)

New "exclusionary rule"

Except for IHE sex-based harassment, limited notice of outcome required



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General Grievance Process Hot Takes

Current: Appeals

- Required for all dismissals and determinations for all formal complaints of sexual harassment
- Decision-maker(s) for appeal cannot be decision-maker(s) that reached the determination or dismissal, the investigator(s), or the Title IX Coordinator
- Required for three bases; can offer for others, if equally offered

Proposed: Appeals

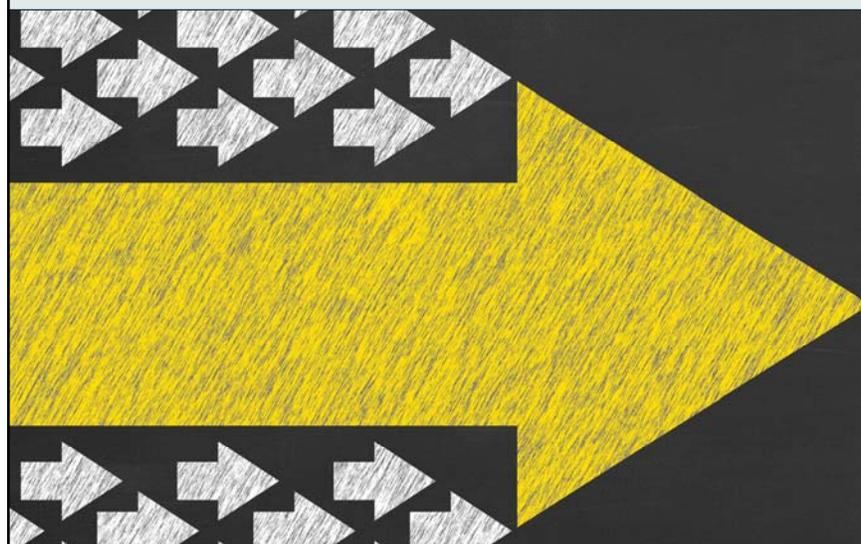
- Required for all dismissals; required for three bases for IHE sex-based harassment decisions
- Does not identify required bases for appeal
- Decision-maker for appeal must be person who did not take part in an investigation or dismissal decision
- Decision-maker must be trained



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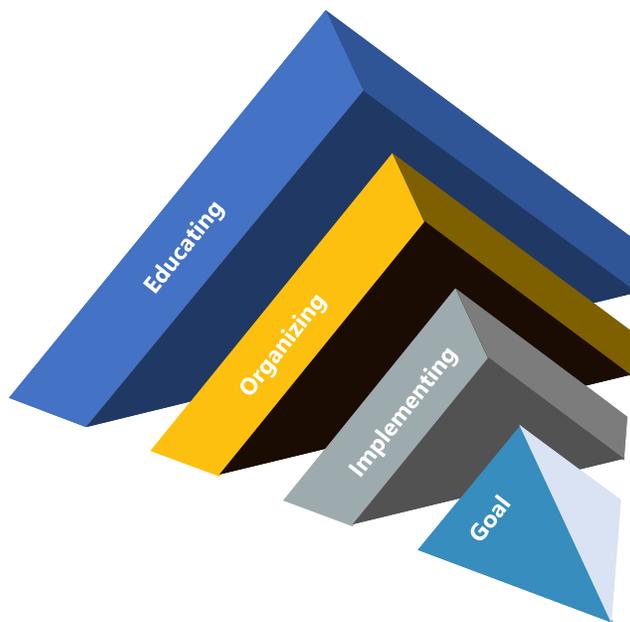
Step Two: Leadership



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Your Leaders Matter **BUT** MAY NOT KNOW THEY DO

Ensuring your leadership understands you will need time and funding for training, policy updates, and creating necessary templates is essential to allowing you to effectively organize and implement the rest of your "action plan"



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Action Plan Step

- Get on your leadership's calendar in February or March
- Come prepared with a clear outline of budget and resources needed to effectuate the other steps of your plan
- Get buy-in on timing of your remaining action plan steps and a commitment to making them a priority within the institution



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3 Step Three: Training



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Training Hot Takes

Current: Training

- Training for Title IX team on the grievance process for sexual harassment only
 - Includes specific topics for Title IX investigators and decision-makers

Proposed: Training

- Training for Title IX team on the grievance process for all types of sex-discrimination, including sex-based harassment
 - Includes specific topics for Title IX Coordinators and Designees and Informal Resolution Facilitators



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Training Hot Takes

- *NEW!* Training for **all employees** on identifying and reporting sex-based harassment
- *NEW!* Training for “**Confidential Employees**”



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Confidential Employees

Employee with duty of privilege under Federal or State law associated with their role

Employee *designated* as confidential due to their role in providing services to persons regarding sex discrimination

Postsecondary employee conducting certain approved research on sex discrimination (limited to information received in study)



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Training on Rules
All Title IX Team Members

- Minimum 3-hour basic training for all
- Minimum 2-hour role training
- Recommend much more; consider 8-hour reference in 2020 rules



Identifying Sex Discrimination
All Employees

- Consider "small bites" for training
- Use non-traditional "training" for regular updates



Confidential Employee Duties
Confidential Employees + T9Cs & DCs

- Consider "small bites" for training
- Use non-traditional "training" for regular updates

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Step Four: Policies & Procedures



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Policies & Procedures

Begin reviewing and revising your policies, procedures, handbooks, and other documents to get a head start on the new rules.

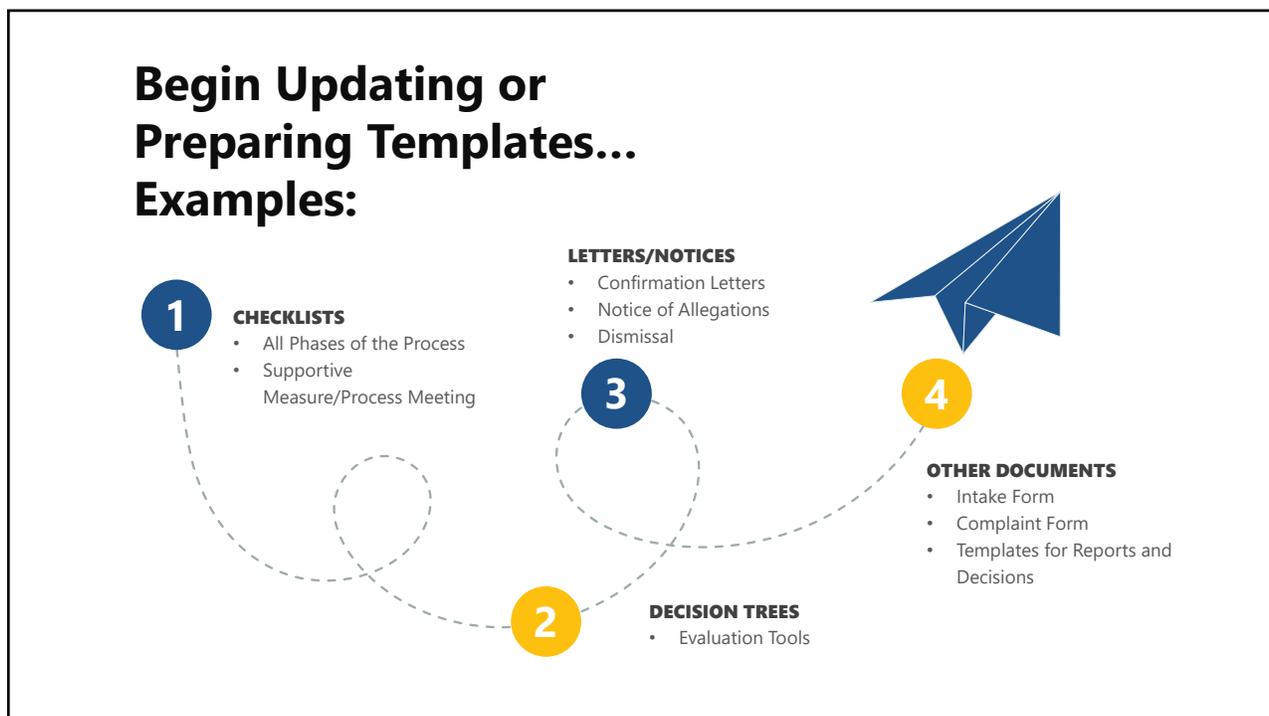
- 1 Learn from our mistakes under the 2020 Title IX rules
- 2 Provide your community more than the bare minimum from the rules
- 3 Rather wait for a template? Identify your source now

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5 Step Five: Templates



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Title IX 2022 Guidebook

What is the Thompson & Horton 2022 Title IX Guidebook?



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**What You Don't
Know Might
Hurt You:**
Surviving an OCR or DOJ Civil
Rights Complaint

 March 2, 2023 @ 1:00 PM

 bit.ly/T9Complaint

Say What?
First Amendment Limits on
Addressing Disruptive
Student, Parent, and Employee
Speech in Public Schools

 April 13, 2023 @ 1:00 PM

 bit.ly/T9saywhat



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Thank You!

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