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Why Are We Here?

- Training on the current state of Title IX of the Education Amendments of 1972
- Not legal advice; keep it hypothetical today—contact one of us or legal counsel separately for specific issues as they arise
- These materials will be available for posting on your website after our session
- Certification documentation will also be provided shortly



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Ice Breakers



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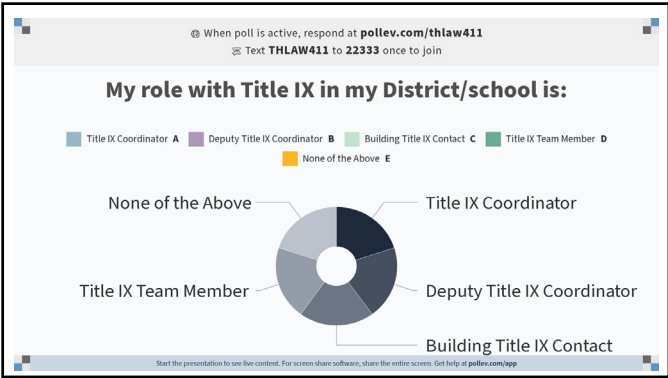
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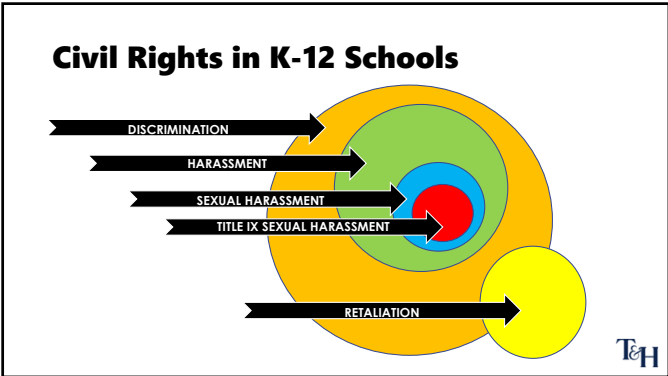
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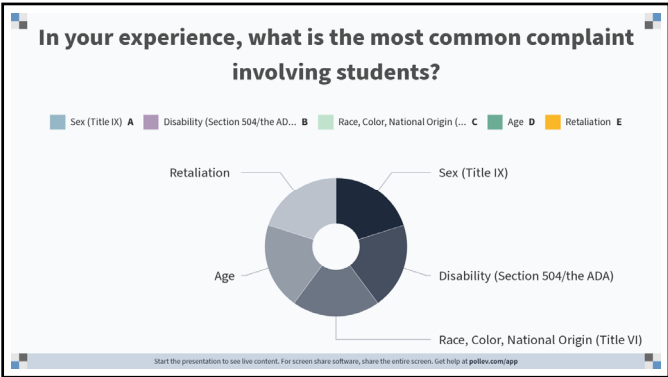
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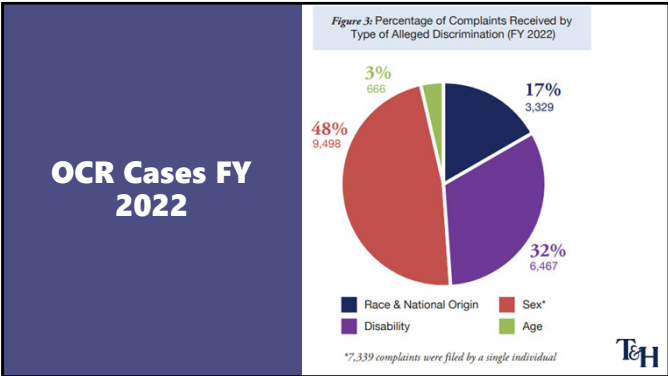
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12

OCR Cases FY 2022 (minus that 7k)

Type	Percentage of 12,621
Disability - 6467	51.2%
Race & National Origin - 3329	26.4%
Sex - 2159	17.1%
Age - 666	5.2%

T&H

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Civil Rights 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

T&H

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Title IX Non-Compliance Penalties

Less Common

- Impact on ED Grant Funds—even before option to enter resolution agreement
- A reference to the DOJ with a recommendation that it file suit
- Lawsuits filed by alleged victims or perpetrators in Federal court
 - Can lead to money damages (though recently limited by the U.S. Supreme Court in *Cummings*)
 - The standards are higher than OCR standards, so we train on the lower OCR standards and leave the higher standards to your litigators

T&H

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Today Is Title IX, But...

- Other civil rights complaints, including discrimination, harassment, or retaliation based on race, color, national origin, age, and disability, **must be reported and addressed**
- They will **not** be addressed under Title IX or the sexual harassment process we are talking about today
- They often **must** be addressed under specific policies with specific requirements (not at the building level)



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Title IX Review

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The Title IX Law (Statute)

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

20 U.S.C. § 1681 (1972)



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What is Title IX?

T&H

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What Conduct Could Fall Under Title IX in My School?

Different Treatment

Different Impact

Pregnancy & Parenting

Sexual Misconduct

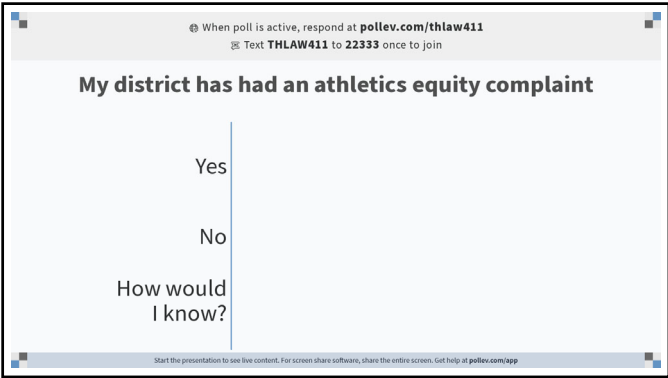
Sexual Harassment/Bullying

T&H

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Athletics Equity

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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



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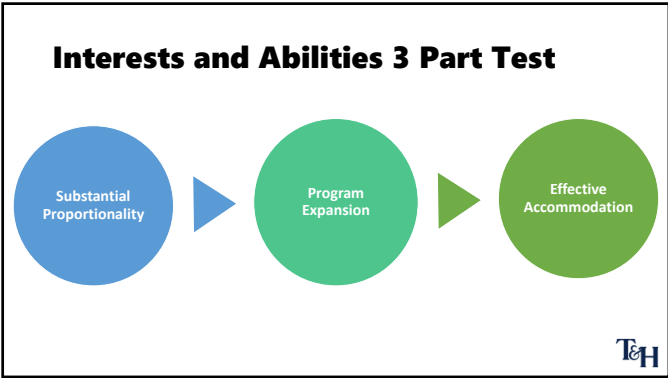
Interscholastic Athletic Programs

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

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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

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The “Laundry List”

- 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

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Title IX Tips – 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



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Pregnancy & Parenting

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Pregnancy Impacts



- **Teen pregnancy:** The birth rate for teenage girls in the U.S. has dropped 67 percent since 2007. Still, in 2021, teens (ages 15–19) gave birth to 146,973 babies. Pregnant teens have the “highest odds” of significant complications with increased risk of multiple adverse outcomes.
- Teen parents are less likely to complete high school and are more likely to be financially insecure. While Title IX has had an overall positive impact on pregnant teens, generally leading to greater educational attainment than 50 years ago, the need for educational programs and services continues.

D. Sandler, U.S. Census Bureau, “The Timing of Teenage Births: Estimating the Effect on High School Graduation and Later Life Outcomes,” June 2017, <https://www2.census.gov/ces/wp/2016/ES-WP-16-398.pdf>; M. Galdi, “Title IX and the Education of Teen Mothers,” Economics of Education Review (Dec. 2016); U.S. Dept of Educ., “Supporting the Academic Success of Pregnant and Parenting Students” (2013), available at <https://www2.ed.gov/about/offices/list/oeo/oeo-2013/pregnancy.html>; Y. Simer et al., “Maternal and Neonatal Complications in Teen Pregnancies: A Comprehensive Study of 661,062 Patients,” Journal of Adolescent Health at 922–27 (June 2022).



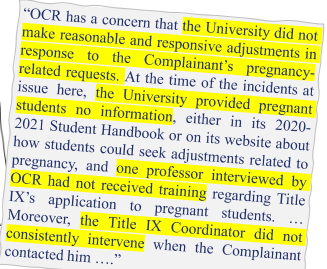
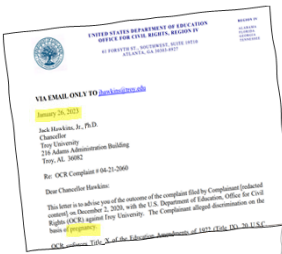
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What's Old is New Again

- The Title IX regulations have addressed pregnant and parenting students since 1975
- The law addresses both "adjustments" (pregnancy only) and different treatment
- Compliance has been inconsistent
- In 2022, the Department of Education proposed substantial revisions to the regulations



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Accommodations Required

- Under current rules, schools must provide reasonable accommodations, including modifying a grading policy.
- Instructors cannot refuse to allow a student to submit work after missing a deadline due to pregnancy or related conditions.
- If grading is based on attendance or participation, the student is allowed to earn the missed credits.



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No Discrimination

- A school district may not allow harassment of pregnant or parenting students
- A school district may not treat pregnant or parenting students differently based on that status
- Many of the requirements in the proposed Title IX rules codify existing expectations on schools from OCR



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Section 504 & Pregnancy

- In addition to Title IX, Section 504 of the Rehabilitation Act also imposes obligations. Although a "normal, healthy pregnancy is generally not considered a disability," pregnancy-related disabilities may be covered.
- Schools must modify academic requirements to ensure no discrimination.
- Need not eliminate or lower essential requirements of a program or activity or to make modifications that would result in a "fundamental" alteration of its programs or activities or would impose an undue financial or administrative burden.



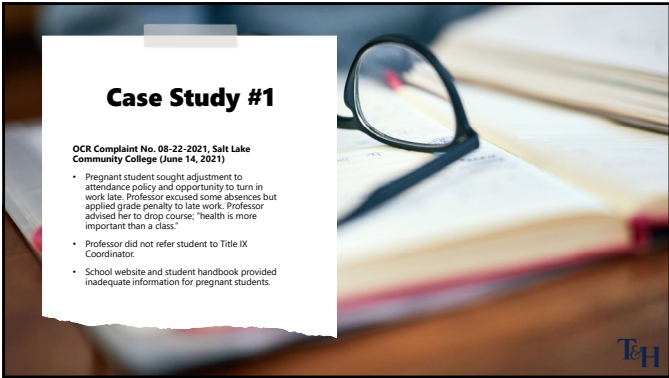
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Current Compliance Challenges

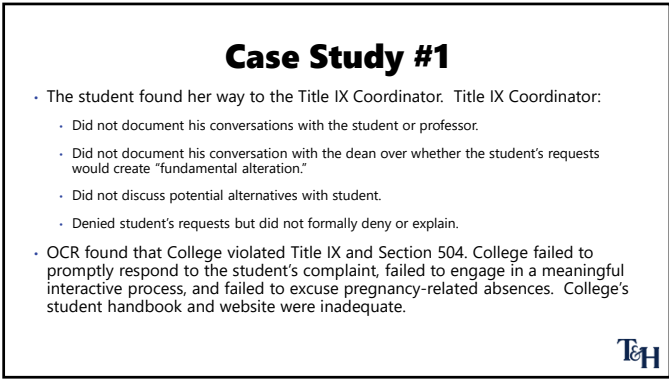
- Recent OCR rulings indicate that the agencies continue to find compliance even under the current rules.
- Because institutional compliance is required under the new rules, schools may face challenges in meeting the new requirements of the proposed rule.
- Schools may want to consider recommended best practices to ensure compliance even if the proposed rule is not adopted.



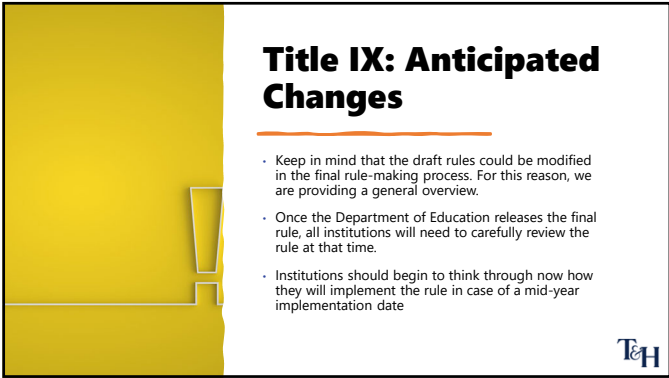
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Title IX: Anticipated Changes

Proposed New Rule: Mandatory notification by employees

When any school or higher ed employee "is informed of a student's pregnancy or related condition" by the student or "a person who has a legal right to act on behalf of the student," the employee must "**promptly**" tell the student or representative how to notify the Title IX Coordinator of the student's pregnancy or related conditions and must provide the Title IX Coordinator's contact information to the student or representative, unless the employee "reasonably believes" the Title IX Coordinator already knows.



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Title IX: Anticipated Changes

Proposed New Rule: Intervention by Title IX Coordinator

If a student or the student's representative "notifies" the Title IX Coordinator about the student's pregnancy or related condition, the Title IX Coordinator must "promptly" inform the student/representative about the student's right to:

- reasonable accommodations in programs, policies, and procedures;
- voluntarily participate in a separate program, have access to a lactation space, and file grievances;
- request a voluntary leave of absence for the period of time "deemed medically necessary" by the student's physician or "other healthcare provider." Student must be reinstated to the same academic status or extracurricular status.



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Title IX: Anticipated Changes

Proposed New Rule: Mandatory training for all employees

"**All employees**" must receive training on the mandatory pregnancy-related notification rule, on the school's obligation to address sex discrimination in its programs and activities, and the "scope of conduct" that constitutes sex discrimination under the rule, including sex-based harassment. 34 C.F.R. 106.8(d).



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Title IX: Anticipated Changes

Proposed New Language on Program Modifications

"Reasonable modifications" due to pregnancy and related conditions must be provided "on an individualized and voluntary basis depending on the student's needs when necessary to prevent discrimination and ensure equal access to the recipient's education program or activity" unless the school can demonstrate that the modification would "fundamentally alter the program or activity."

A fundamental alteration is a change that is "so significant that it alters the essential nature of the recipient's education program or activity."

"Fundamental" alteration language is similar to Section 504 rule.



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Title IX: Anticipated Changes

- New Language on Program Modifications**
- Modifications can include changes in schedule or course sequence; extension time for coursework and rescheduling of tests and examinations; counseling; changes in physical space or supplies; a larger desk or footrest; elevator access; and other "appropriate changes to policies, practices, and procedures."
 - Modifications must be "effectively implemented, coordinated, and documented by the Title IX Coordinator."



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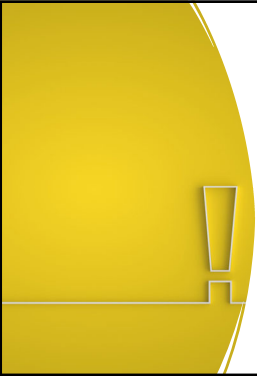
Title IX: Anticipated Changes

Current: May require a doctor's note certifying the student is "physically and emotionally" able to continue participation only if certification is requested of all students with physical or emotional conditions being treated by a physician.

Proposed: May not require a certification from "a physician or other licensed healthcare provider" that the student is able to participate unless the "certified level of physical activity or health is necessary" for participation in the activity and all other students are required to provide a certification too.



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Title IX: Anticipated Changes

Current (temporary disability): A school shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom "in the same manner and under the same policies as any other temporary disability"

Proposed (temporary disability): A school must treat pregnancy or related conditions or any temporary disability resulting therefrom in the manner and under the same policies as any other temporary disability **or physical condition**"



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Title IX: Anticipated Changes

- ▶ **Current (leave of absence):** If the school does not maintain a leave policy for its students, or if the student does not qualify for leave under such a policy, the school must treat pregnancy and related conditions "as a justification for a leave of absence" so long as student's physician deems it medically necessary and must be reinstate student to the same status.
- ▶ **Proposed (leave of absence):** The school must allow the student a voluntary leave of absence "to cover, at minimum, the period of time deemed medically necessary by the student's physician or other licensed healthcare provider." "To the extent that a recipient maintains a leave policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead if the student so chooses." Upon return, the student "must be reinstated" to the same academic status and, "as practicable," to the same extracurricular status.

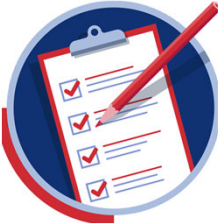




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Title IX Tips: Pregnancy & Parenting

- Student handbooks and the school website should specifically describe the **interactive process** for student pregnancy-related accommodation requests.
- The webpage with pregnancy-related information should be easy to find.
- All employees need training on the mandatory notification rule. All faculty members, academic administrators, and program directors need training on accommodations and the interactive process.





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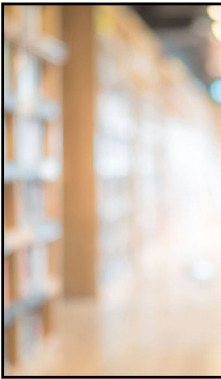


Title IX Tips: Pregnancy & Parenting

- Evaluate the feasibility of designating a deputy Title IX coordinator to serve as a specialist on pregnancy-related issues.
- The Title IX Coordinator should receive training on assessing and documenting whether a proposed accommodation would constitute a fundamental program alteration.



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Title IX: Anticipated Changes

New Rule on Lactation and Breaks During Class

The school/college must ensure the availability of a lactation space, which must be a place other than a bathroom, that is clean, shielded from view, free from intrusions from others, and may be used for pumping or breastfeeding.

Student is entitled to breaks during class to attend to "related health needs, expressing breast milk, or breastfeeding; intermittent medical appointments; access to online or other homebound education"



50

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Text **THLAW411** to **22333** once to join

My school district has lactation request forms

True

False

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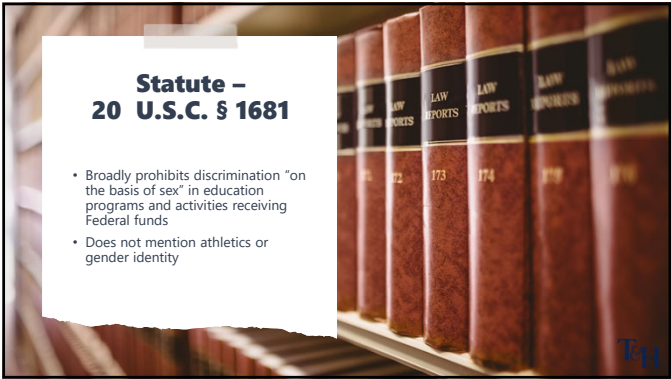
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Transgender Issues

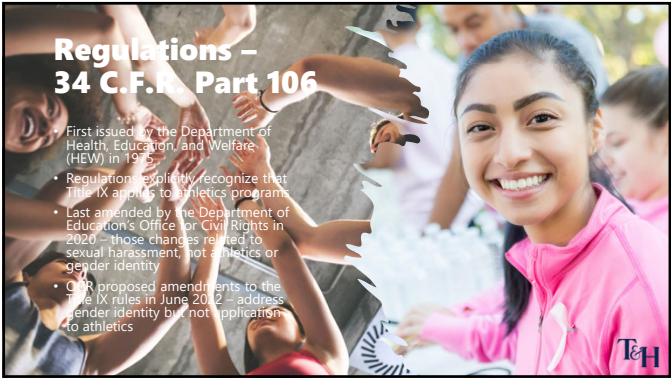
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Statute –
20 U.S.C. § 1681

- Broadly prohibits discrimination “on the basis of sex” in education programs and activities receiving Federal funds
- Does not mention athletics or gender identity

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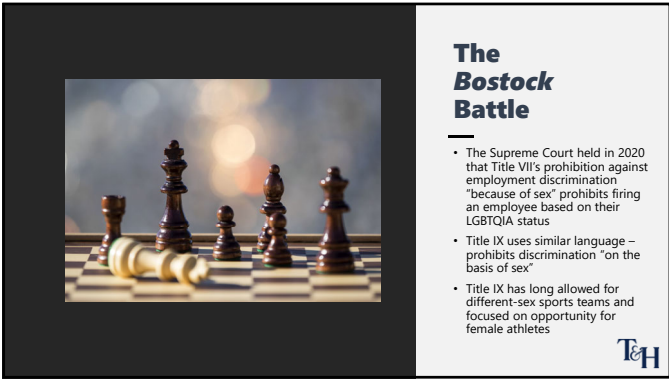
Regulations –
34 C.F.R. Part 106

- First issued by the Department of Health, Education, and Welfare (HEW) in 1975
- Regulation explicitly recognize that Title IX applies to athletics programs
- Last amended by the Department of Education’s Office for Civil Rights in 2020 – those changes related to sexual harassment, not athletics or gender identity
- OCR proposed amendments to the Title IX rules in June 2022 – address gender identity but not application to athletics

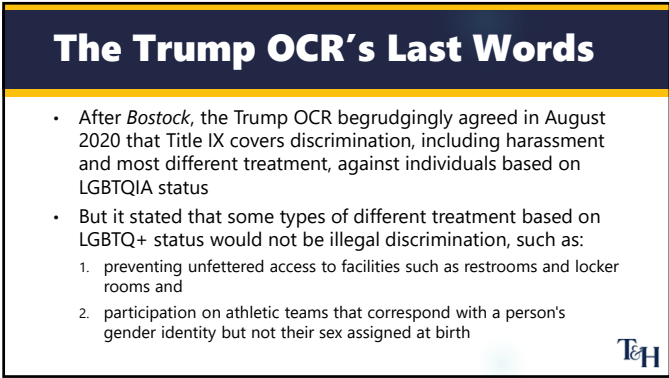
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The Biden OCR's Opening Shots

- July 7, 2021 Notice of Interpretation (NOI)
- Said OCR would investigate allegations of individuals being excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities, or otherwise treated differently because of their sexual orientation or gender identity
- Although the words "bathroom," "restroom," "locker room," and "athletics" did not appear in the NOI, it seemed likely based on the Obama administration's enforcement of Title IX that OCR would expect schools to offer equal access to facilities and athletics teams



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U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

Confronting Anti-LGBTQ+ Harassment in Schools

A Resource for Students and Families

June 2021

Examples of the kinds of incidents CRT and OCR can investigate:

On her way to the girls' restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys' restroom or nurse's office because her school records identify her as "male." Later, the student joins her friends to try out for the girls' cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her "those are the district's policies."

Pursuant to a Federal court order, the Departments have been preliminarily "enjoined and restrained from implementing" this document against the states of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, South Dakota, and West Virginia. See *State of Tenn., et al. v. U.S. Dep't of Educ.*, No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022).

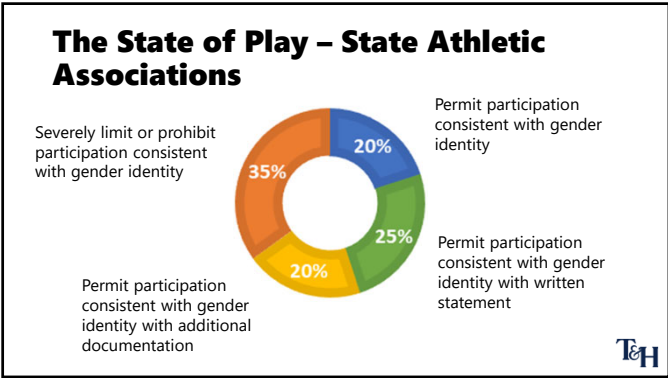
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The State of the Law

- OCR enforcement didn't happen
- In contrast, many states have passed laws prohibiting transgender students from participating on teams matching their gender identity



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Proposed Athletic Rule

- April 6, 2023 notice of proposed rulemaking (NPRM) would amend the existing Title IX regulations
- Applicable to schools, colleges, and universities that receive Federal funds
- Based on two years of outreach to stakeholders
- Goal to address uncertainty about when and how transgender students can participate in school sports, particularly because of state laws

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Proposed 106.41(b)(2)

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity such criteria must, for each sport, level of competition, and grade or education level:

- (i) Be substantially related to the achievement of an important educational objective, and
- (ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.



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Proposed Rule Does Not Chart a Novel Course

- Language is similar to Title IX regulations allowing for single-sex classrooms – 34 C.F.R. 106.34(b)
- The test borrows heavily from Supreme Court's analysis and test in *United States v. Virginia* regarding military college exclusively for males
- Language of the proposed rule is consistent with several courts' analysis regarding transgender athletic participation in Equal Protection and Title IX context, such as *Hecox v. Little*



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Bans on (Total) Bans

Under the proposed regulation, schools would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity



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What Is Allowed?



A school could adopt or apply sex-related criteria limiting or denying a student's eligibility to participate on a male or female team consistent with their gender identity only in limited circumstances. Specifically, any such criteria:

1. Must be substantially related to the achievement of an important educational objective
2. Must minimize harm to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied

Analysis must be specific to each sport, level of competition, and grade or education level



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Two Part Test

1

Substantially related to the achievement of an important educational objective

2

Minimize harm to those students whose opportunities would be limited or denied

Analysis must be specific to each sport, level of competition, and grade or education level



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What Is NOT an Important Educational Objective

- Excluding transgender students from sports
- Communicating or codifying disapproval of a student or a student's gender identity
- Requiring adherence to sex stereotypes
- Administrative convenience
- Pretext for singling out transgender students for disapproval or harm





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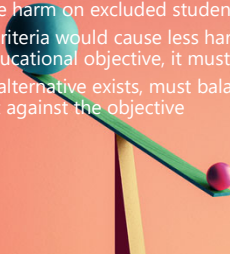
Stereotypes ≠ Substantially Related



- Criteria that assume transgender females possess an unfair physical advantage over cisgender females in every sport, level of competition, and grade or education level would rest on a generalization that would not comply with the proposed rule
- Based on "reasoned analysis rather than . . . the mechanical application of traditional, often inaccurate, assumptions"
- Need "factual justification," not overly broad generalizations about talents, capacities, or preferences of male and female students

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Harm Minimization



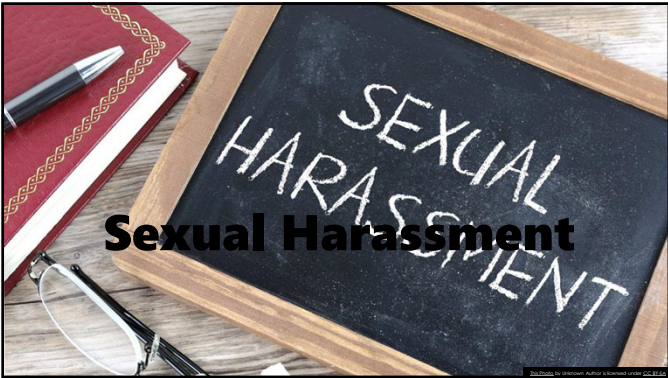
- Must evaluate the harm on excluded students
- If an alternative criteria would cause less harm and still achieve the important educational objective, it must be used
- If no reasonable alternative exists, must balance the harm to the excluded student against the objective

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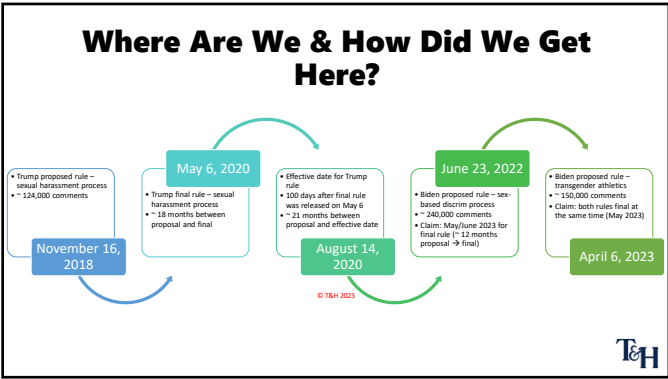
Title IX Tips: Transgender Athletics

- Until a new ED rule becomes law, issues largely depend on state legislation
- Consider issues of eligibility, gender-based discrimination, safety, and fairness
- Document the steps it takes to make the decision, including:
 - Gathering as much information as possible, including state athletic association eligibility
 - Consulting with educational, sports, and health experts about the impact of the transgender student participating
 - Consulting with district's attorney
 - Confidentially informing all parties involved of the decision and the reasoning

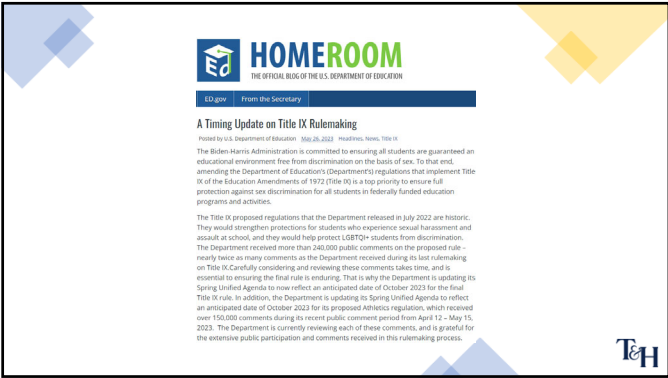
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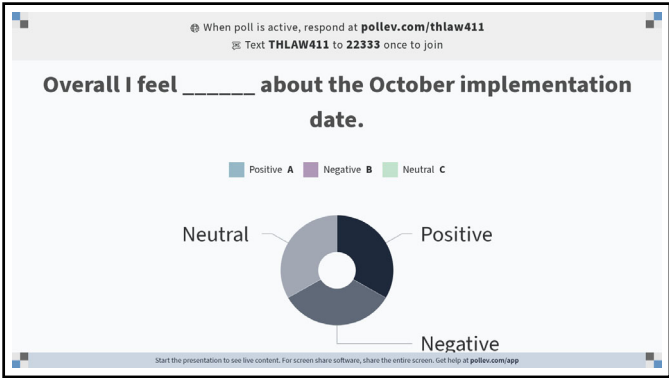
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Where Are We Going?

- Blog post is silent about effective date
- We will at least be living with the current (2020) Title IX rules for fall semester of the 2023–24 academic year

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The Good News...

- Steps you have already taken are not a waste because the rules (presumably) will go into effect (eventually)
- The delay provides us more time to think about changes to be made—if we use that time!
- Nothing prevents you from updating policies this summer to implement elements of the amendments that seem likely to be finalized as proposed, are non-controversial in your community, and make sense for your institution

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The Bad News...

- We may be looking at a mid-year rollout which will be even more challenging than a summer one
- We are stuck with the 2020 amendments, many of which are inefficient and ineffective
- You now must consider policy updates to your current policies, procedures, and other materials under the 2020 amendments in addition to thinking through changes that may need to be implemented mid-year
- Your Title IX “team” and employees need to keep up their training on the current rules and be scheduled for training in November, December, or January on the new rules

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

JANUARY 18, 2023

IN: 2023 REGULATIONS, IN THE NEWS, POLICIES AND PROCEDURES, PROPOSED REGULATIONS, TRAINING

www.titleXtips.com



We are barely into 2023, and it's shaping up to be the biggest year yet for Title IX. From transgender bathroom bans and athletic participation battles to growing scrutiny on general athletics equity and pregnant and parenting 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 confirmed 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.

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Settle Into the 2020 Rules

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The 2020 Rules Are Here to Stay

- Your Title IX team should be well-trained on the current (2020) rules
- Your policies and procedures should be updated for the new academic year based on lessons learned under the current rules
- Consider changes to structures (e.g., deputy Title IX Coordinators)

A purple sticky note is affixed to a light-colored wall. The note has the words "I NEVER LEFT." written in black, bold, capital letters. The note is slightly wrinkled and has a small piece missing from the bottom right corner.

The logo for Thompson & Horton, consisting of the letters "T" and "H" in a stylized, serif font, with a small registered trademark symbol.

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2020 Regs
Requirements

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What Do The 2020 Rules Require?

Designate

Identify

Post

- 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



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What Do The 2020 Rules Require?

Train

Policy

Process

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

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

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



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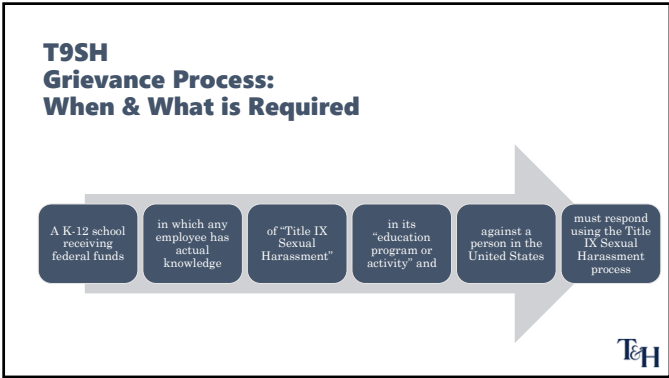
When poll is active, respond at pollev.com/thlaw411

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

TrueFalse

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

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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.



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The Title IX Coordinator’s Role in Addressing Sexual Harassment



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



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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.

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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.

T&H

99

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.

T&H

100

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.”

T&H

101

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.

T&H

102

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

103

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

T&H

104

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

T&H

105

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....



106

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



107

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



108

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

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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

109

T9SH
Grievance Process:
When & What is Required

A K-12 school receiving federal funds

in which any employee has actual knowledge

of "Title IX Sexual Harassment"

in its "education program or activity" and

against a person in the United States

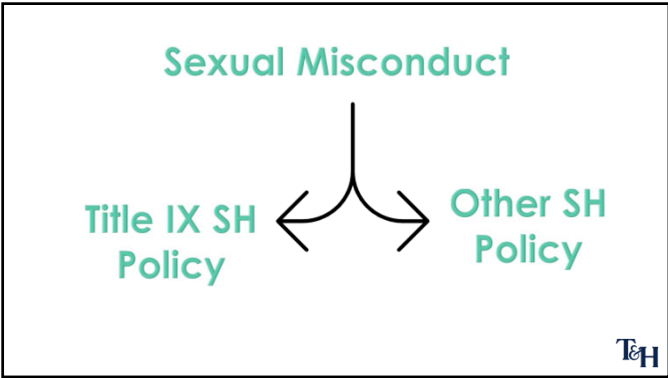
must respond using the Title IX Sexual Harassment process

110

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.

111



112

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

A K-12 school receiving federal funds

T&H

113

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

T&H

114

T9SH
Grievance
Process:
When &
What is
Required

A K-12 school receiving federal funds

in which any employee has actual knowledge

T&H

115

ANY Notice or Knowledge

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

to or by ANY K-12 employee

T&H

116

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

T&H

117

T9SH
Grievance
Process:
When &
What is
Required

A K-12 school

in which any employee has actual
knowledge

of Title IX “sexual harassment”

T&H

118

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”

T&H

119

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”

T&H

120

Unwelcome Conduct

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



121

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”



122

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”



123

Based on Sex

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



124

If it involves
a private
body part,
it’s probably
“based on
sex”



125

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



126

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”



127

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”



128

“Title IX Sexual Harassment”

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



129

“Title IX Sexual Harassment”

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



130

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”)



131

#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



132

#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**



133

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



134

#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



135

#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

T&H

136

#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

T&H

137

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)

T&H

138

“Title IX Sexual Harassment”

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

T&H

139

Title IX
Hostile
Environment

=

Unwelcome
Conduct

Effectively
Denies Equal
Access

+

Based on Sex

Objectively
Offensive

+

So Severe

+

Pervasive

T&H

140

Title IX
Hostile
Environment

=

Unwelcome
Conduct

Effectively
Denies Equal
Access

+

Based on Sex

Objectively
Offensive

+

So Severe

+

Pervasive

T&H

141

What does "severe" mean (one word)?

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollav.com/app](#)

142

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)



143

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)



144

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)



145

Title IX
Hostile
Environment

=

Unwelcome
Conduct

Effectively
Denies Equal
Access

+

+

Based on Sex

Objectively
Offensive

+

+

So Severe

+

Pervasive



146

What does "pervasive" mean (one word)?

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

147

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)



148

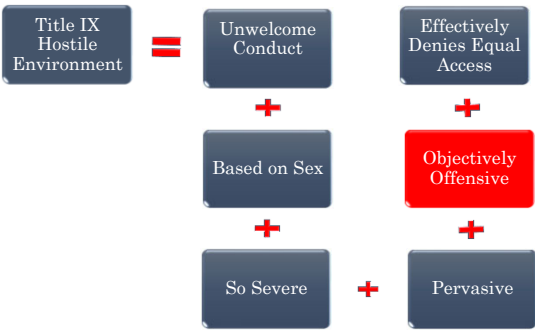
Case Law Definitions

- “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)



149



150

Dictionary Definition

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



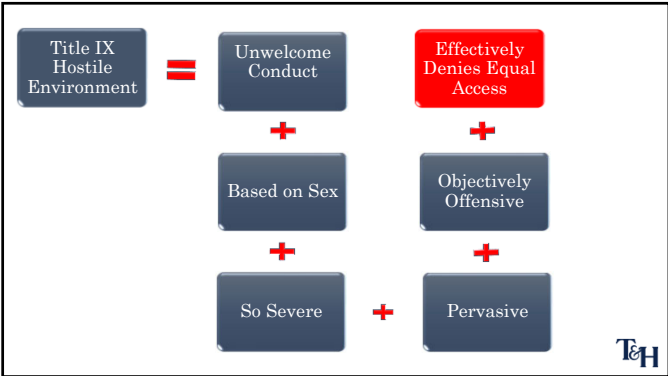
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Case Law Definitions

- “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.



152



153

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



154

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



155

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



156

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

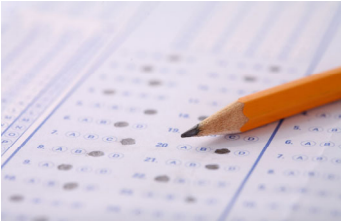




157

TEST YOURSELF

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





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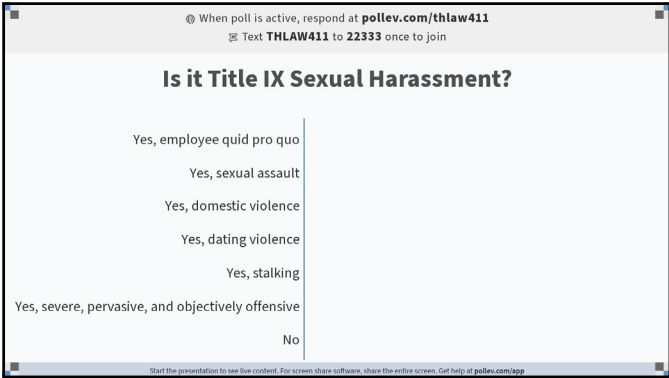
Test Yourself

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





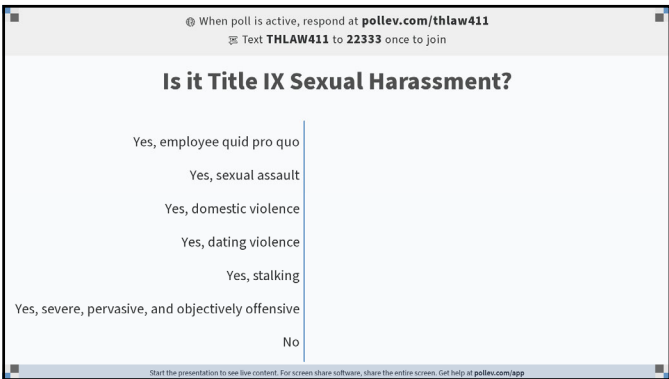
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160



161



162

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.



163

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

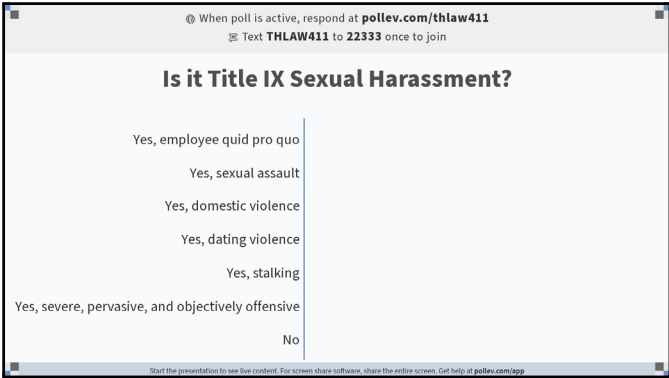
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Test Yourself

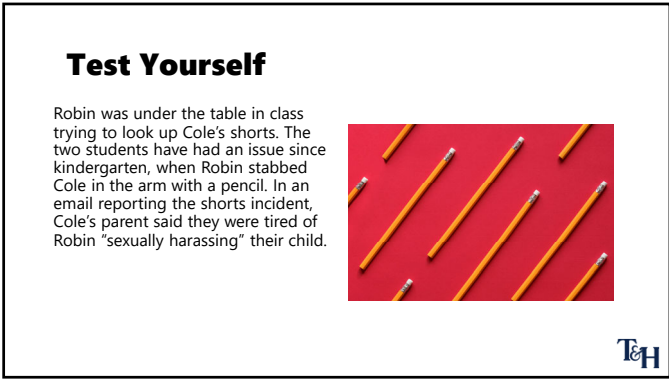
Remington was poking Cali in the behind with a pencil as a joke. Cali reports that while the two were horseplaying and wrestling, the pencil went into Cali's anus through the clothing. Cali says they know it was an accident and don't think Remington did it for a sexual reason.



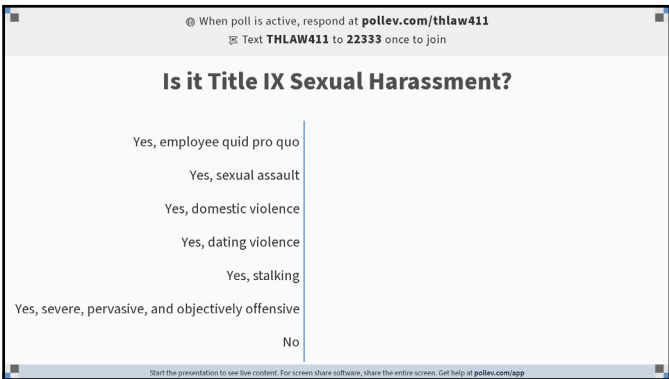
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166



167



168

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

169

Grooming Tips

- Include a definition of grooming in your notice of allegations and report
- Even better if it is defined in your policy
- For example:

Grooming: Grooming is the act of deliberately establishing a relationship with a child to prepare them for sexual abuse. Aspects of sexual grooming may include targeting the victim, securing access to and isolating the victim, gaining the victim's trust, and controlling and concealing the relationship.



170

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 will almost certainly meet the "hostile environment" requirements under Title IX and be found to have occurred in the education program or activity
- Even if not covered by Title IX, check other rules for professionals



171

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”

172

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.

173

Ⓢ When poll is active, respond at polllev.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

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174

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"



175

Education Program or Activity

- Field trips
- Athletics
- Extracurricular activities



176

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



177

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"



178

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.





179

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

Yes

No

180

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")



181

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**



182

In the United States



183

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
- Conduct that begins outside of the U.S. **may continue into the education program or activity ("downstream effects")**



184

T9SH Grievance Process: When & What is Required

A K-12 school

in which any employee has actual knowledge

of Title IX "sexual harassment"

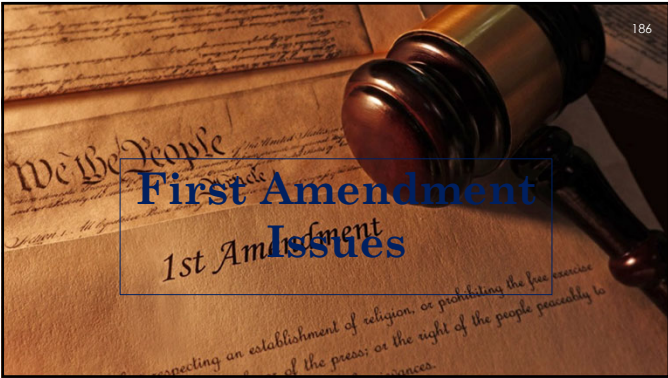
in its "education program or activity"

against a person in the United States

must respond using the Title IX Sexual Harassment process



185



First Amendment Issues

186

Remember

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

187

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.”

T&H

188

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

189

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)]



190

What Is Disruptive?

- Conduct that meets the Title IX tests (severe, pervasive, and objectively offensive) likely 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”



191

SCENARIO #4

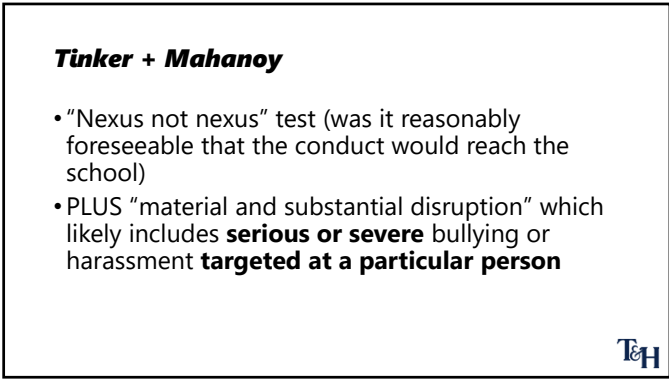
What if all the communications between Charlie and her peers occur off campus, online, and on the students’ own time. The situation involves a handful of students, and other students and members of the school community do not learn about it. But Charlie cannot sleep at night, keeps missing school, and has seen a steep decline in grades.



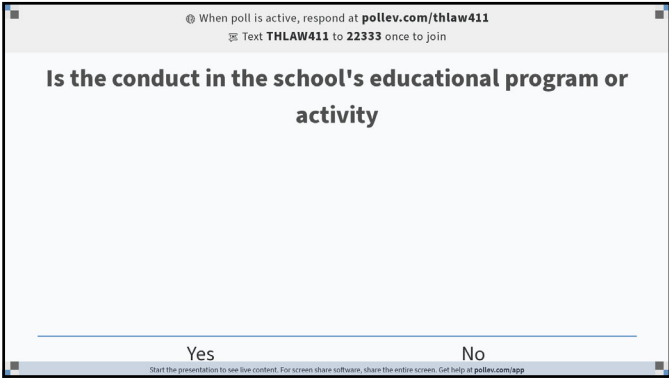
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193



194



195

What About Employees – Inside the Classroom

- Takeaways from recent 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



196

What About Employees – Outside the Classroom

197

- 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)



197

Consolidation and Multi-Party Complaints

198

SCENARIO #5

199

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.

T&H

199

SCENARIO #5

200

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.

T&H

200

SCENARIO #5

201

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.

T&H

201

Who has a valid Title IX formal complaint?

202

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

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202

Cross-Complaints

203

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

T&H

203

Consolidation

204

- Where the allegations of sexual harassment arise out of the same facts or circumstances; examples:
 - Against more than one respondent
 - By more than one complainant against one or more respondents
 - By one party against the other party
- Consider defining the phrase in your procedures

T&H

204

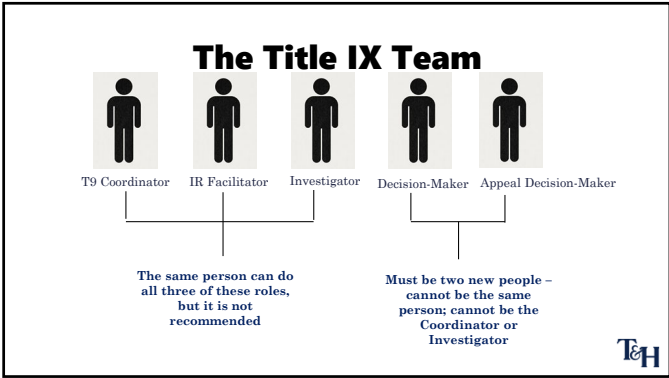


205

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

206



207

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T&H

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T&H

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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" can be used 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

T&H

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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.



211

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.



212

Intake Questions

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



213

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



214

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!)



215

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Step #1: Supportive Measures Meeting

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



217

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



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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**



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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



220

Supportive Measures

- 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





221

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
- The Title IX Team 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



222



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!)



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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



225

Emergency Removal

WHO: Typically used for student respondents (may be used for others)
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



226

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**



227

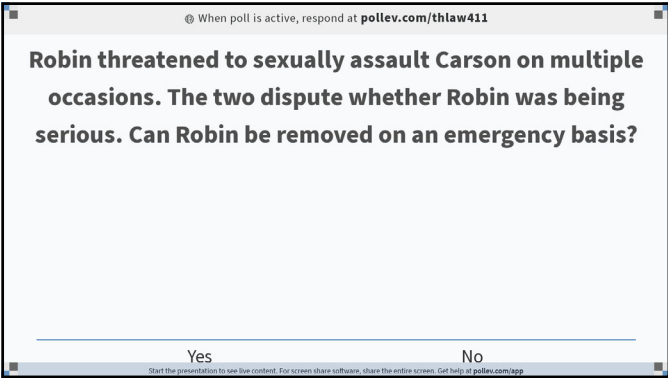
Emergency Removal

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**



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Administrative Leave

WHO: An employee

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

WHEN: "During the pendency of a grievance process that complies with § 106.45"

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



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Only move to Step 3
if you have a Formal
Complaint

– NO DISCIPLINE
WITHOUT A FORMAL
COMPLAINT–

But support, support,
support



231

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Formal Complaint

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

July 2021 OCR Q&A



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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



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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



235

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Requirements for Notice

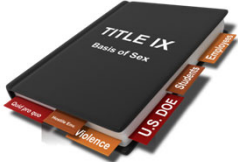


- Upon receipt of a Formal Complaint, a school must provide written notices to known parties:
 - Title IX Grievance Process (including informal resolution)
 - Allegations of sexual harassment
 - Right to inspect and review evidence
 - Right to have an advisor during the process
 - Any policy / provision of code of conduct that prohibits knowingly making false statements or submitting false information



237

Requirements for Notice



- Sufficient details known at the time and sufficient time to prepare a response before any initial interview.
 - Identity of parties involved in incident, if known
 - The conduct allegedly constituting sexual harassment
 - The date and location of the alleged incident, if known



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Impact on Investigation



- Notice of Allegations to the Respondent is required before the school meets with the respondent for an interview
- If there is not a Notice of Allegations, make sure one is sent before you do anything else in the investigation
- If you learn of new allegations, make sure a supplemental NOA goes out
- Supportive measures should have been offered to the parties by this time, as well—verify with the Title IX Coordinator so you can help keep an eye on supportive measures during the investigation



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Investigator Tip

- The Notice of Allegations is the investigator’s “roadmap” to your investigation
- Make sure the investigator understand the allegations and the elements necessary to prove them
- Make sure they ask if they are uncertain!



240

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

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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

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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



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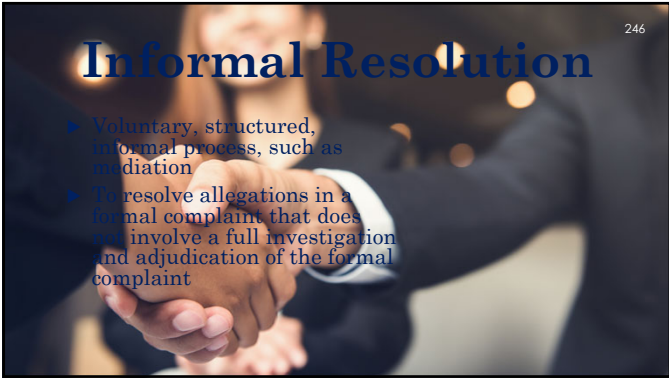
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Informal Resolution

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



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SCENARIO #7

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.

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SCENARIO #7

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.

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SCENARIO #7

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

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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 polllev.com/app

250

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

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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

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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 and can never be reopened
- ▶ If an agreement is not reached (or IR is not used), move on to **Step #6: Investigation**



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Investigation Rules



Jim DeLoe

CC BY



- 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

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Investigation Steps

Written notice to party before each interview

Directly related evidence shared with parties + 10 days to respond

Written investigative report summarizes "relevant evidence"

Investigative report summarizing all "relevant evidence," shared with parties + 10 days to respond

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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

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Investigation Report

▶ Summarizes the *relevant evidence*

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

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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?



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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



260

Never relevant without consent

Evidence subject to legal privilege

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

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

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



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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



263

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



264

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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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



266

Remember Preponderance

- It is more likely than not (greater than a 50% chance) that something is true
- Applies to both findings of fact and the overall question of responsibility
- For the overall question of responsibility, ask if the facts proved establish Title IX Sexual Harassment in an education program or activity and against a person in the United States



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What About FERPA?

- ▶ OCR believes that sharing the result as to each allegation including a list of sanctions because sanctions “always directly impact the victim” and so are permitted under FERPA
- ▶ Remedies do not directly affect the respondent so should be communicated separately to the Complainant



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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



270

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



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Students with Disabilities



272

SCENARIO #8

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.



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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

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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

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Doe v. Dennis-Yarmouth Sch. Dist.,
2022 WL 36480 (D. MA 2022)

- Post-Assault: The Does alleged that the school's actions following Jane Doe's assault showed deliberate indifference
- Given Jane's disability and reduced mental capacity, the alleged determination that the sexual activity between Jane and [the respondent] was "mutual" illustrates an "investigation [that] was so deficient as to be unreasonable."

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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

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T&H

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SCENARIO #9

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.

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SCENARIO #9

280

Scenario 9(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.

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Was there consent?

Yes No

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SCENARIO #9

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Scenario 9(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.

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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



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SCENARIO #10

286

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.

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SCENARIO #10

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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.

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When poll is active, respond at polllev.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 full content. For screen share software, share the entire screen. Get help at polllev.com/app

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-

[illegible][illegible]

True

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

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.**"

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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

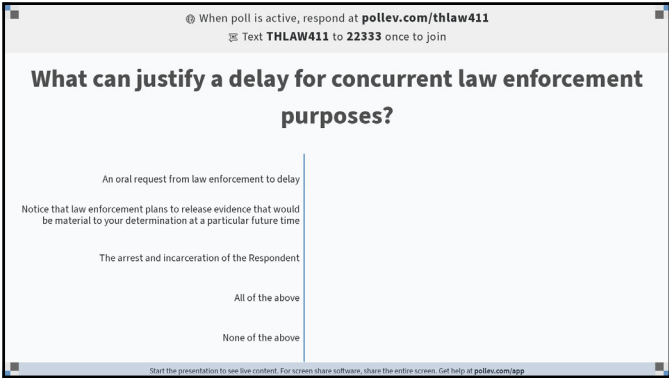
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Notice of Delay

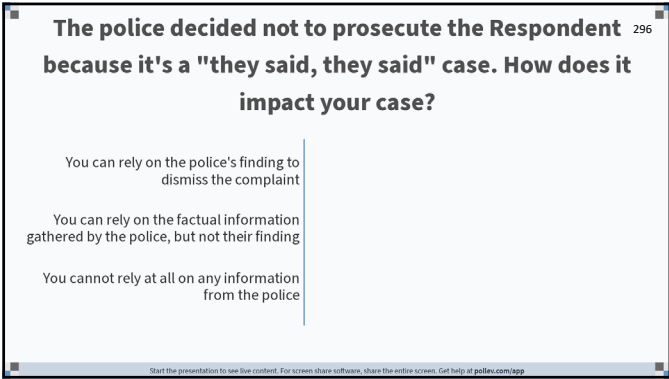


- ▶ The District must send written notice to both parties regarding the delay or extension and the reason(s) for the delay or extension
- ▶ Concurrent law enforcement activity is **not** good cause to delay sending the written notice of allegations or delay to the complainant or respondent
- ▶ **T&H Guidebook Document 23 – Notice of Extension of Timeframes**

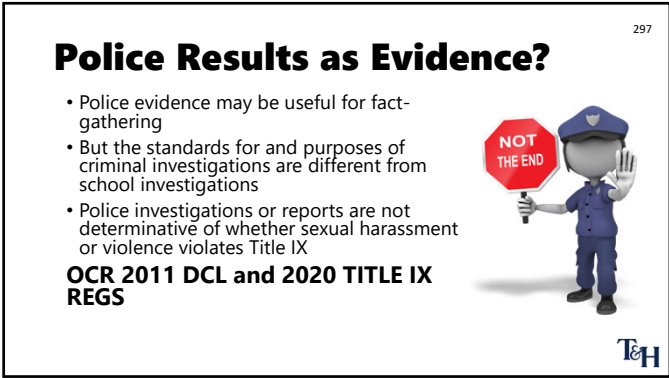
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When the Police Call

• 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



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RECORDS

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Recordkeeping

• All records related to the process must be maintained for 7 years

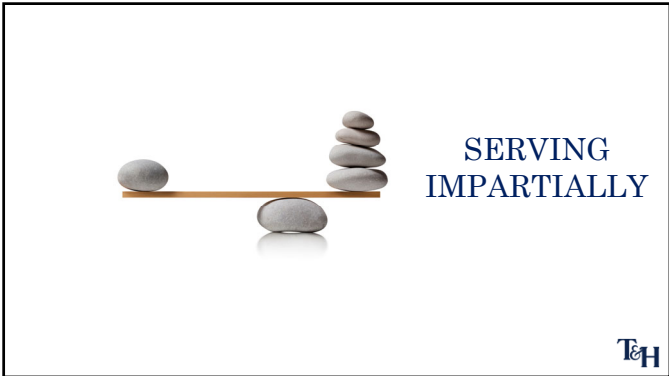
• Provide your final file to the Title IX Coordinator

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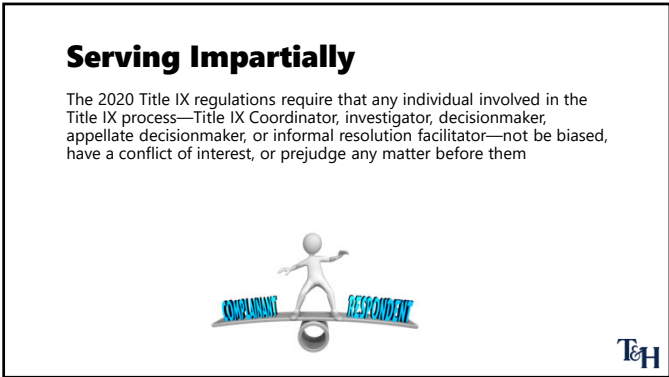
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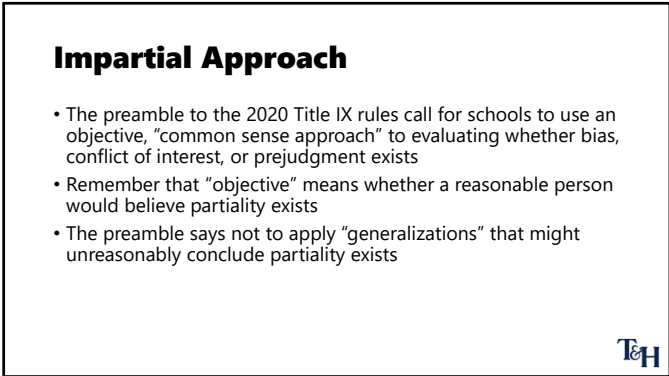
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Impartiality Do's and Don't's

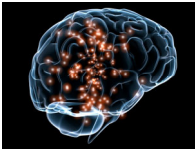
- Ensure your team is open with the Title IX Coordinator about any concerns
- Team should follow the process "to the T" and include all relevant evidence in the investigative report, written decision, and appeal decision
- Do not assume or infer the existence of facts or the outcome, "connect the dots,"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



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Trauma Informed Investigations

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



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Thank You!

Questions?

Email titleix@thlaw.com for more information on our Title IX services



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