

Train the Trainer: Title IX Compliance Training Certification

Oregon School Personnel Association
October 2021



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Jackie Gharapour Wernz
Partner

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Why Are We Here?



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POLITICO

EDUCATION

Biden vows 'quick end' to DeVos' sexual misconduct rule

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.

By **BIANCA QUILANTAN**
05/06/2020 09:33 PM EDT
Updated: 05/07/2020 11:07 AM EDT

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FEDERAL REGISTER
The Daily Journal of the United States Government

NATIONAL ARCHIVES

U.S. DEPARTMENT OF EDUCATION

Rule

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

A Rule by the Education Department

PUBLISHED DOCUMENT

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Final rule.

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

DOCUMENT DETAILS

Printed version: PDF

Publication Date: 05/19/2020

Agency: Department of Education

Dates: These regulations are effective August 14, 2020.

Effective Date: 08/14/2020

Document Type:

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Trump Era Positions

Obama Era Positions

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What We Got Instead

Same Law
Same Rules
New Guidance Saying the Same Thing
(until 2023 at the earliest)

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Train the Trainer



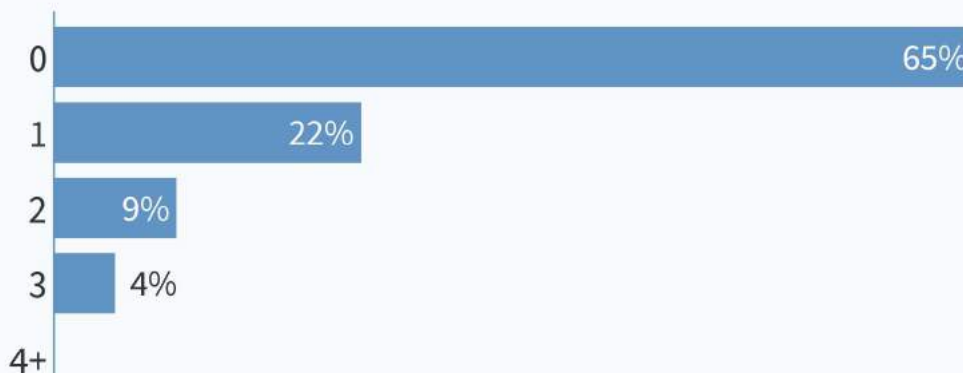
- Training Requirements and Recommendations
- Framework for Training Your Teams on Basic Title IX Training
- Scenarios To Learn and Use
- Questions + Clarifications

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My School/District has had __ Title IX Sexual Harassment Formal Complaints under the new regulations



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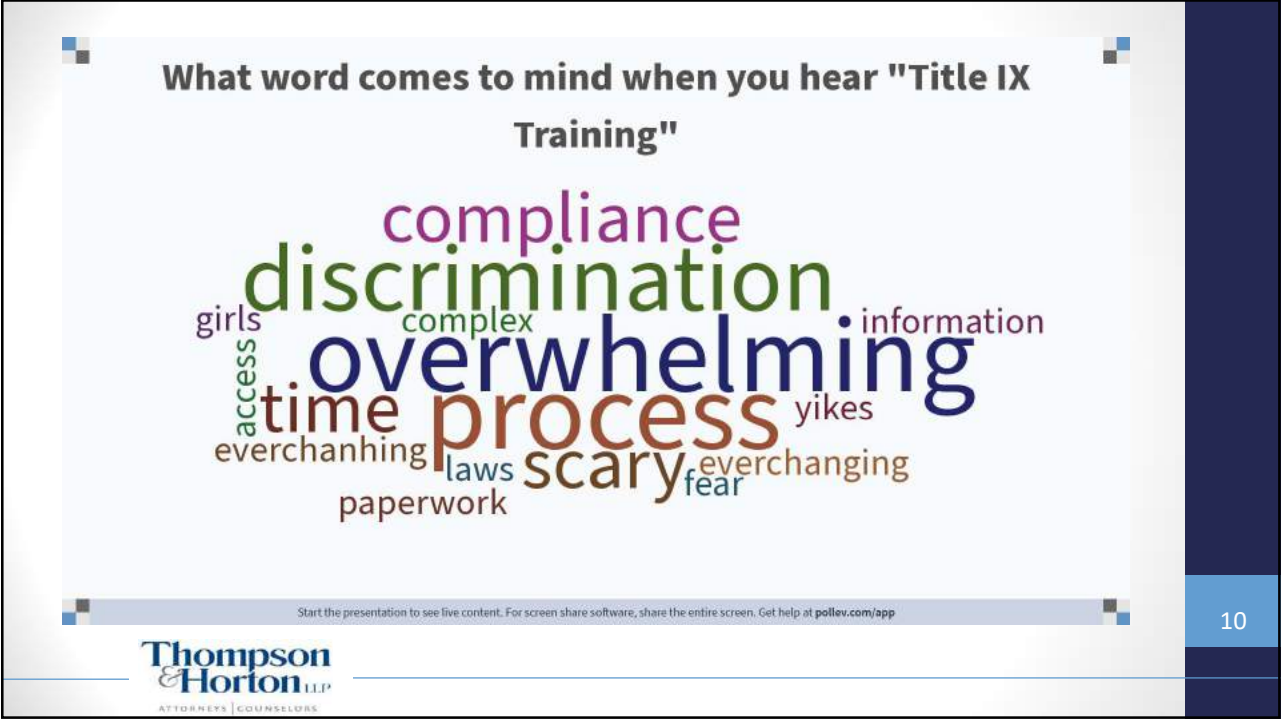
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T9SH Training Requirements

- Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must receive training on:
 - **The definition of sexual harassment**
 - **The scope of the education program or activity**
 - **How to conduct an investigation and grievance process including hearings (if used), appeals, and informal resolution processes**
 - **How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias**

T9SH Training Requirements

- Decision-makers must receive training on:
 - **Any technology used at live hearings (if used)**
 - **Issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant**

T9SH Training Requirements

- Investigators must receive training on:
 - **Issues of relevance to create an investigative report that fairly summarizes relevant evidence**

T9SH Training Requirements

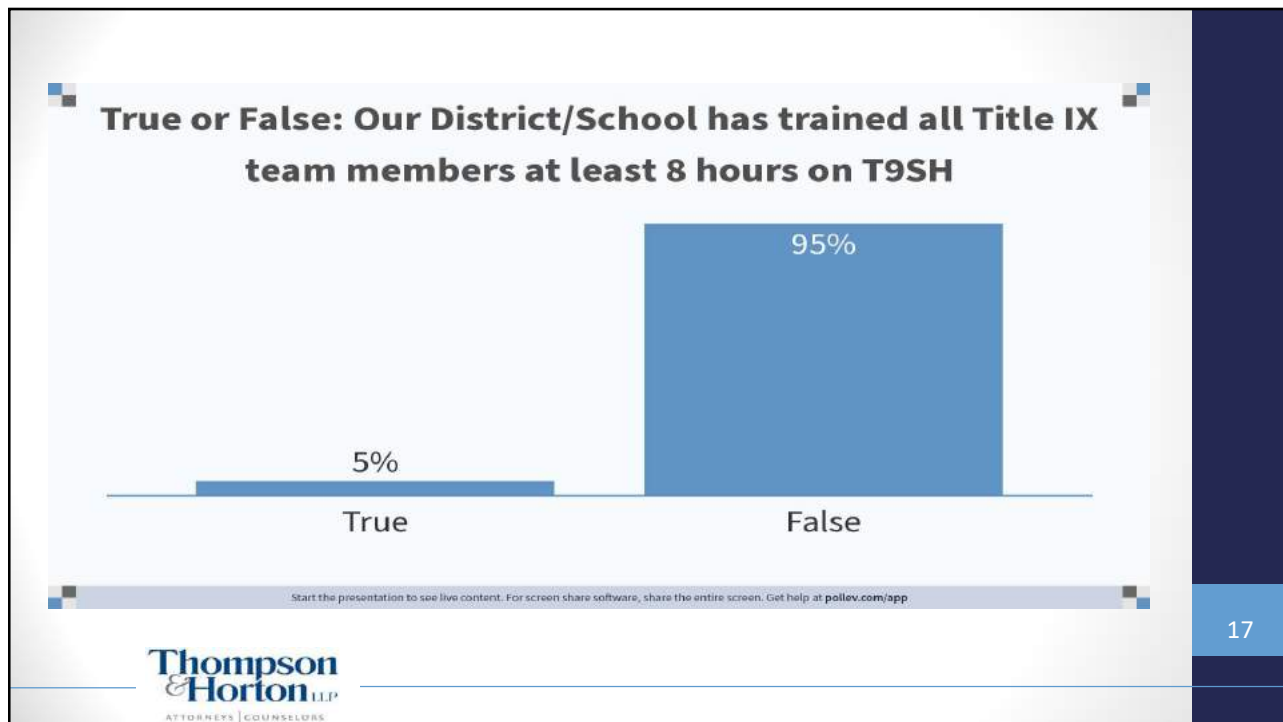
- Comments to the rules noted that the rules require schools to “hire and train multiple individuals to fill different roles, thus increasing compliance costs”
- Schools must undertake these costs “even if they rarely have Title IX complaints and investigations”

T9SH Training Requirements

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

T9SH Training Requirements

- OCR estimates that a new Title IX Coordinator, investigator, decision-maker, and informal resolution facilitator will need 8 hours of initial training under the rules, with additional training each subsequent year
- "The Department wishes to leave recipients flexibility to decide to what extent additional training is needed to ensure that Title IX personnel are trained when they serve so that recipients efficiently allocate their resources among Title IX compliance obligations and other important needs of their educational communities."



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How Much is Enough?

- At least one Title IX organization that often serves as an expert witness for plaintiffs/student complainants has stated that all roles require **far more than** 8 hours to achieve competence
- Unlikely that this is a true “standard of care” but be prepared for this argument in future disputes

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Training Recommendations

- Required: All required training in Title IX rules for all “roles”
- Recommended: Interactive, role-playing/scenario-based trainings for each “role”



Additional Training Tidbits

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



Additional Training Tidbits



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

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

Framework for Training Your Team

Framework for Training Your Team









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KEY TERMS



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Why Does It Matter?

- We often assume a greater level of knowledge among our trainees than they have
- Although knowing all the jargon associated with Title IX is not necessary, being “fluent” in these terms is essential to proper implementation of the process

Discrimination

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



Discrimination

Examples of Protected Characteristics:

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

Harassment

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



Sexual Harassment

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



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Title IX Sexual Harassment

One type of sexual harassment, where the conduct meets certain requirements in the 2020 Title IX regulations (effective August 14, 2021)



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Retaliation

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

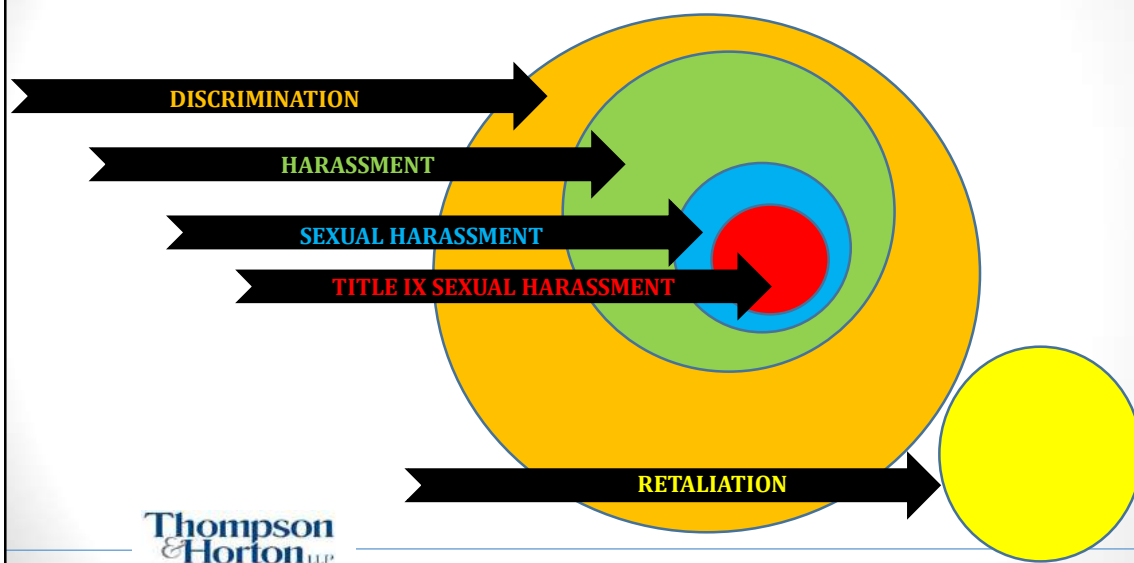


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Reiterate Your Point: Visually



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Reiterate Your Point: Practice

A student reports that they were disciplined more harshly than another student of a different sex or gender identity for the same conduct. What is the best answer?

Answer	Percentage
Discrimination	79%
Harassment	0%
Sexual Harassment	11%
Title IX Sexual Harassment	11%

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Reiterate Your Point: Practice

Provide an example of sexual harassment.

- “ excessive attention ”
- “ derogatory language based on gender identity or sexual orientation ”
- “ Sexual jokes ”
- “ Telling lewd jokes or sharing stories about sexual experiences, even if this is not directed at you but

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Why Does It Matter?

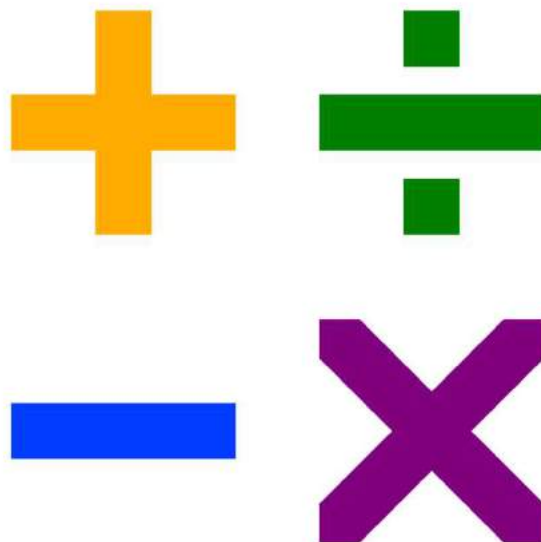
“You are most likely to remember something later if you repeat it using spaced repetitions. This means that you repeat the information over and over, but you put some time in between the repetitions This technique is also called spaced retrieval, because you are retrieving the information from your memory over spaced intervals.”

Angela Troyer, Ph.D., C.Psych., “Spaced Repetition,” Psychology Today (Mar. 21, 2014)



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TITLE
IX
BASICS



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What is Title IX?

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Why Does It Matter?

- Team members must understand that Title IX covers more than sexual harassment
- Complaints of non-sexual-harassment Title IX violations should still be reported to the Title IX Coordinator and addressed, but will not be addressed under the Title IX Sexual Harassment policy/procedures

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Who Enforces Title IX?



And don't forget ... the
School/District

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The School is on the Hook—So, So Are You

A school/district is “on the hook” for responding appropriately to Title IX sexual harassment when **any K-12 employee** knows of conduct that is covered by the rules.

That means **you are “on the hook” too!**



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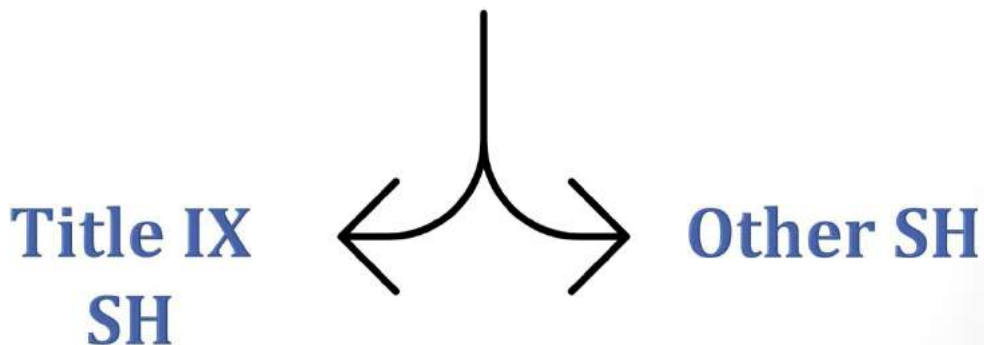
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Why Does It Matter?

- This is the “why” for the training – what happens if we fail to comply?
- Team members should understand that although the Federal Government agencies that enforce Title IX do not investigate individuals, failure to comply with requirements can lead to being named in a lawsuit in rare circumstances
- Even more likely, failure to comply is a violation of the District/school’s expectations for employees and can lead to discipline

What are the 2020 Title IX Rules?

Sexual Harassment



Why Does it Matter?

- Just because conduct is not **Title IX Sexual Harassment** does not mean you will ignore it; you will 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.



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Keep It Equitable

- OCR does not enforce school codes of conduct but may investigate complaints that a school’s code of conduct treated students differently based on sex, including sexual orientation and gender identity (2021 Q&A)
- Consider
 - For example, if you discipline other types of off-campus cyberbullying or harassment through a code of conduct, use the same response for non-Title-IX sex-based online cyberbullying or harassment
 - For non-Title-IX sex based physical conduct, such as an off campus sexual assault, consider how you would handle acts of off-campus physical conduct unrelated to sex (e.g., an off campus fight)



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The Biden Administration

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



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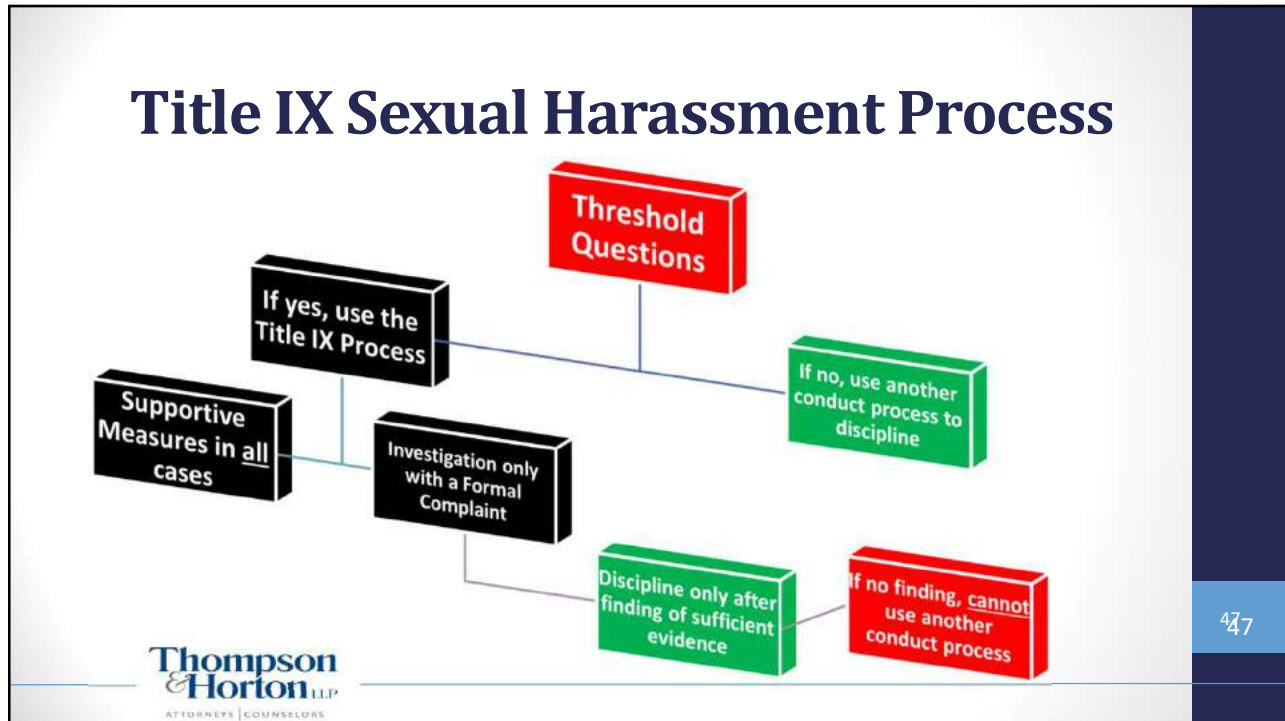


TITLE IX SH PROCESS

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What are the Threshold Questions for the Title IX Sexual Harassment Process?

A stack of four blue and white blocks, each with a question mark on its top face, arranged in a pyramid shape.

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THRESHOLD QUESTIONS

Is the alleged conduct:

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

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

If no to **any**: Use another process

sexual harassment?

THRESHOLD QUESTIONS

Program
Activity

In the United States

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“Title IX Sexual Harassment”

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

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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



How can we teach the Title IX "Big 5"?

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

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

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

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

Fondling includes touching of private parts, for purposes of sexual gratification, non-consensually; need not be under clothing or involve penetration

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

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

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

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

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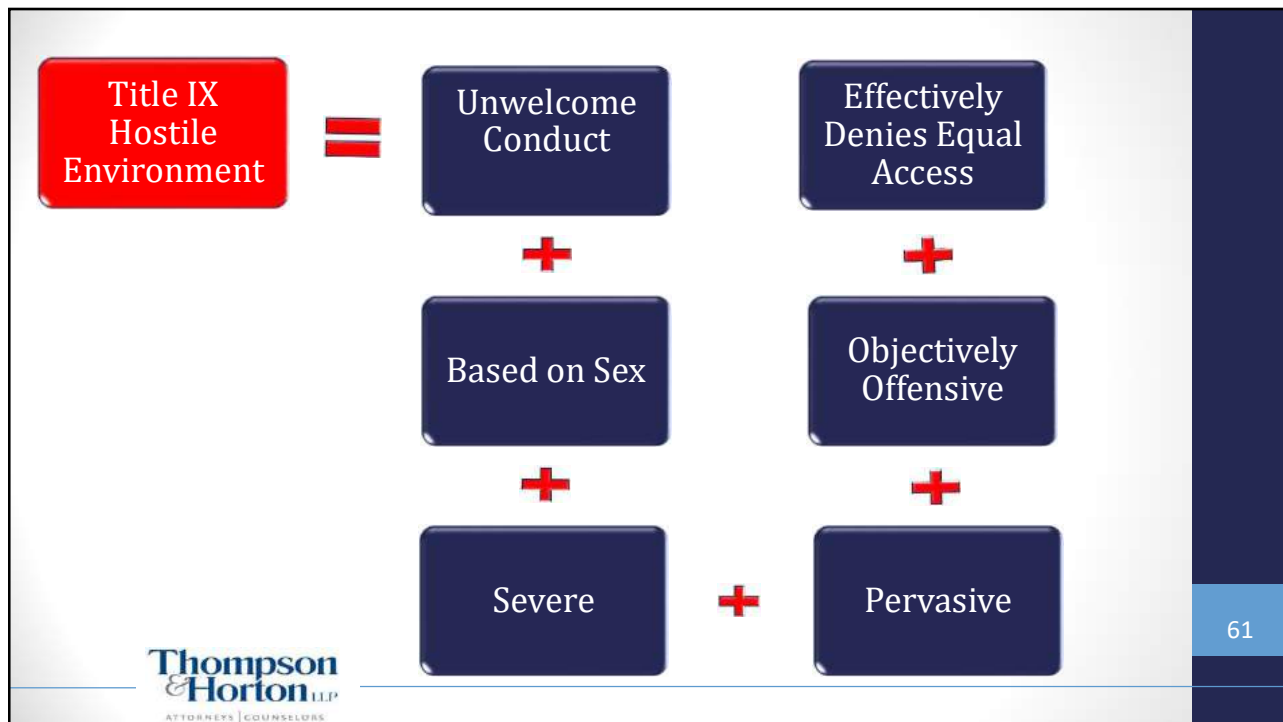
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#5 of the “Big 5” Stalking (VAWA Definition)

- A course of conduct based on sex (2+ times)
- Directed at a specific person
- That would cause a reasonable person to fear for the person’s safety or the safety of others or to suffer substantial emotional distress
- Conduct can be direct or indirect, and does not require professional medical treatment

“Title IX Sexual Harassment”

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



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Sexual Harassment: Hostile Environment

Several factors are considered:

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

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How can we teach "severe," "pervasive," and "objectively offensive"?

- “ Examples ”
- “ examples and non examples ”
- “ Dictionary definition ”
- “ examples ”

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Common Sense Definition

What is the first word you think of when you hear "severe"?
(no spaces)

serious

harsh extreme scarring traumatizing unordinary intense
causing-harm impactful unwanted
highly-impactful damage significant

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Dictionary Definition

“Severe”

- Very bad, serious, or unpleasant; causing a lot of physical pain or suffering; very harsh (Merriam-Webster)
- Strict, austere or intense with disastrous consequences. (Blakc’s Law Dictionary)

“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)

“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 Definitions: Severe

- “Severe” means something more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and crass.
- Simple acts of teasing and name-calling are not enough, even where these comments target differences in gender.

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



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Case Definitions: Severe

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

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



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Case Definitions: Severe

- A school is not perfectly analogous to a workplace, and minor students are not perfectly analogous to adults. Accordingly, some behaviors that plainly would be out of place in a workplace may be tolerable in a school setting as part of the ordinary social development of the school's students.
- At least early on, students are still learning how to interact appropriately with their peers, so it is unsurprising that they may engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting.

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



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Case Definitions: Pervasive

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

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

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



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Case Definitions: Pervasive

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

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



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Case Definitions: Pervasive

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

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

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

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



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Case Definitions: Pervasive

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

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



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Case Definitions: Objectively Offensive

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

Whether gender-oriented conduct rises to the level of actionable harassment thus depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved. The victim's perceptions are not determinative.

The objective offensiveness of a comment is to be judged by reference to a reasonable child at whom the comments were aimed.



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Examples

- Male student
- Called “gay,” “homo” and “f**got” on multiple occasions by other male students
- A student grabbed his genitals and engaged in a simulated sexual act while he waited in line in the school cafeteria
- He was told in no uncertain terms that he was not welcome in the school because it was believed he was a homosexual
- He was slapped, punched and struck with a neck-chain while the perpetrators made statements showing that they intended to harass, harm and demean him based on his perceived sexual orientation
- In the circumstances, a reasonable person in L.W.'s protected class would believe that the school environment was hostile and threatening

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



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Examples

- Male students videotaped and shared videotapes of female students engaging in sexual encounters with male students on premises of their respective schools
- While the cases currently before the court do not include allegations of forcible rape, they do involve substantial violations of the students' sexual autonomy, which is relevant to just how pervasive the ensuing conduct needed to be to rise to the level of actionable harassment
- Indeed, it is inaccurate to characterize these cases as involving simple, isolated events. Being taped during sexual activity without permission is an isolated event. The video's being sent to another person is a second event. The next transmission is a third. The availability of the videos was widespread. In a contemporary high school, there is little that is more “pervasive” than electronic communication.

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



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Examples

- A male student put all of his weight on a female student, touched her breasts, stomach and legs over her clothing, and bit her neck hard enough to leave a mark.
- Undoubtedly, this behavior is inappropriate and should not to be condoned, but it is not adequately severe or pervasive to be covered by Title IX.
- The court cited cases involving one incident of male student touching a female student's breasts and buttocks, and other incidents of name-calling, insults, and physical harassment, which was found not sufficiently pervasive or severe from an objective standpoint, and two separate incidents with two male students, where one boy touched female student's vagina through her skirt and other boy slapped her buttocks, which was found not sufficiently pervasive under Title IX.

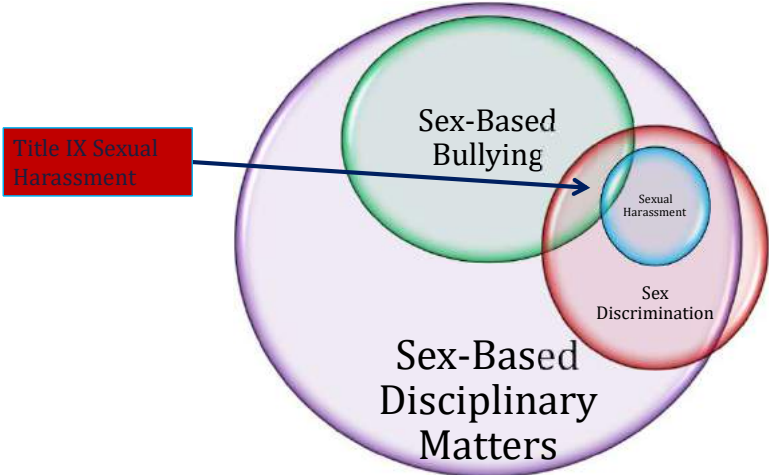
Carabello v. New York City Dep't of Educ., 928 F. Supp. 2d 627, 643 (E.D.N.Y. 2013)



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Remember: The Many Shades of Sexual Misconduct



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Educational Program or Activity

- The sexual harassment must occur **within the school’s educational program or activity**
 - This can be on or off campus
 - It “includes locations, events, or circumstances over which the recipient exercised **substantial control over both the respondent and the context** in which the sexual harassment occurs.”

Examples: Program or Activity

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



Examples: Program or Activity

Did the school promote or sponsor the event?

- Examples
 - ❖ Instructional programs
 - ❖ Athletic programs
 - ❖ Student organizations



Examples: Program or Activity

More Examples

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



Off Campus: Program or Activity?

Did the conduct occur:

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

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

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



How can we teach the "Threshold Questions"?

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Reiterate Your Point: Practice

A student reports sexual assault by another student on a school spring break trip to Paris

All threshold questions are met	
Not "Title IX Sexual Harassment"	
Not "in a Program or Activity"	
Not "in the U.S."	

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Reiterate Your Point: Practice

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Text **THOMPSONHORTON365** to **22333** once to join

A student reports that a teacher offered a better grade for a back rub at the teacher's house after school

All threshold questions are met

Not "Title IX Sexual Harassment"

Not "in a program or activity"

Not "in the United States"

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Reiterate Your Point: Practice

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A student reports that a classmate slapped their behind, tried to force them to kiss, and sent text messages saying they wanted to hook up even after they asked not to

All threshold questions are met

Not "Title IX Sexual Harassment"

Not "in a program or activity"

Not in the United States

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Remember

- Just because conduct is not **Title IX Sexual Harassment** does not mean you will ignore it; you will 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.



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If All Threshold Questions Are “Yes,” What Process Is Used?



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Grievance Process

- The new Title IX regulations require schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates **due process principles**, treats all parties fairly, and reaches reliable responsibility determinations
- Schools must follow a grievance process that complies with Title IX regulations **before** imposing any disciplinary sanctions or other actions that are not supportive measures, against a respondent



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Accessibility Requirements

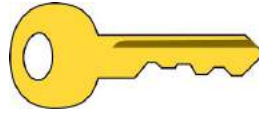
- Communicate early and often with Special Education staff when a student with a disability is involved in the Grievance Process
- Title IX Coordinator should consult with school’s Special Education or Section 504 staff to identify appropriate accommodations for students with disabilities involved in the process
 - Applies to Complainants, Respondents, and any witnesses
- Provide required accommodations from IEP/Section 504 during process
- Accommodations may not give a student an unfair advantage
- Consider accommodations for parents/advisors in process (ADA/disability and Title VI/language)



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Key Terms in the Title IX Grievance Process



- **Complainant:** The alleged victim of the conduct that could constitute sexual harassment
 - The Complainant is always the victim, even if a report was made by a parent/guardian, third party, or signed by the Title IX Coordinator
 - Even if no formal complaint is filed, this term is used to describe the alleged victim
- **Respondent:** The individual reported to be the perpetrator of the conduct that could constitute sexual harassment
 - Required to call the accused the “Respondent”
 - Even if no formal complaint is filed, this term is used to describe the alleged perpetrator

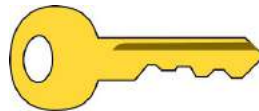
Note: For all parties and witnesses who are minors, parents/guardians have same rights as the party/witness



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Key Terms in the Title IX Grievance Process



- **Formal Complaint:** A document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the district investigate the allegation of sexual harassment.
 - Complainant must be participating in or attempting to participate in education program or activity of the District.
 - May be filed with Title IX Coordinator in person, by mail, or by e-mail via the contact information required to be listed for the Title IX Coordinator
 - Title IX Coordinator does not become the Complainant where he/she signs complaint
 - Cannot require use of a particular form (but can offer/encourage)—an email is enough



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Remember Training Tips for Terms

“You are most likely to remember something later if you repeat it using spaced repetitions. This means that you repeat the information over and over, but you put some time in between the repetitions This technique is also called spaced retrieval, because you are retrieving the information from your memory over spaced intervals.”

Angela Troyer, Ph.D., C.Psych., “Spaced Repetition,” Psychology Today (Mar. 21, 2014)



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Overview: T9 SH Grievance Process

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

- **Step 1:** Hold a “supportive measures meeting” with the Complainant (alleged victim)
- **Step 2:** Consider if emergency removal/administrative leave warranted
- **Step 3:** Consider if dismissal is required or warranted

Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee and not dismissed:

- **Step 4:** Notice of Allegations
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- **Step 7:** Decision-Making Process
- **Step 8:** Appeal

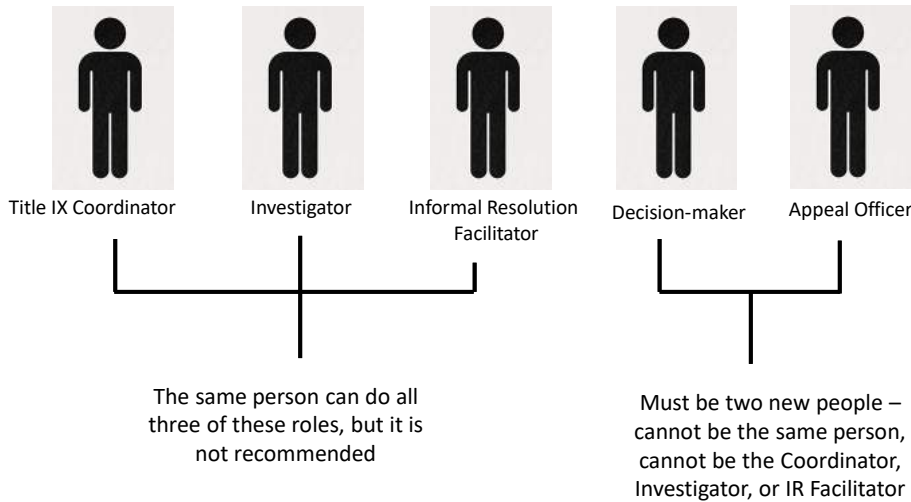
NOTE: ALL STEPS include strict detailed requirements the Title IX rules



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Many District Staff Members Will Be Involved



TH Train Your Team Resources How to Choose Your Title IX Team

Free Resource to Help Choose & Train Your Team

Title IX Coordinator Role:

Who to Choose: Lower Profile Student Matters	Who to Choose: Higher Profile Student Matters + Matters Involving Employees	Training Considerations
<p>The Title IX Coordinator must be an employee of the district or network; this is the only role that cannot be contracted out.</p> <p>The Title IX Coordinator is usually a district- or network-level administrator (e.g., Director of HR, Director of Student Services, Staff attorney).</p> <p>We recommend that you avoid the highest level administrators (e.g., Superintendent), General Counsel, as those individuals play other roles in the Title IX process that can conflict with the Title IX Coordinator role.</p> <p>We recommend that your Title IX Coordinator not serve as an investigator in formal Title IX complaints. This is not prohibited but can lead to perceptions of bias or conflict of interest by parties in an investigation.</p>	<p>The Title IX Coordinator can "delegate" responsibilities to other employees of the district or network. Such individuals should be trained in Title IX Coordinator roles before having such responsibilities designated to them. Accordingly, we recommend training 3-5 district- or network-level administrators, all building-level principals and deans/assistant principals, counselors, social workers, and others who might be called on to provide supportive measures.</p>	

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Step #1

The Supportive Measures Meeting

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

Note: Unless a Formal Complaint is filed, the school must keep the report and the Complainant’s identity confidential—including from the alleged perpetrator (Respondent)



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Reiterate Your Point: Visual



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

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Why Does It Matter?

- Building administrators are used to moving quickly when they receive a report of misconduct
- Within hours of a report, they may have interviewed all parties and witnesses, sent the alleged perpetrator home pending an investigation, even suspended the alleged perpetrator
- These steps may violate many requirements of the new regulations, including the confidentiality requirement
- Drive home this point in your training through visuals, repetition, and practice

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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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Supportive Measures

- Examples:
 - ❖ counseling
 - ❖ extensions of deadlines or other course-related adjustments
 - ❖ modifications of work or class schedules
 - ❖ campus escort services
 - ❖ mutual restrictions on contact between the parties
 - ❖ leaves of absence
 - ❖ increased security and monitoring of certain areas of the campus



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Implementing Supportive Measures

- Title IX Coordinator or designee must implement
- Measures should remain confidential
 - If necessary to share information to implement measures, **obtain Complainant’s written consent**
- Follow up regularly with the parties to make sure the measures are working
 - Increase the severity of measures or take new measures if initial measures are ineffective



IDEA and Section 504 Implications

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

Tip for Title IX Teams

- Work with your school district to come up with a comprehensive list of supportive measures that your school district may offer
- Provide that packet to those making supportive measures determinations
- Provide a checklist for the supportive measures meeting if being handled by a designee (contact us at titleIX@thlaw.com for a template)



How can we teach how to properly handle a supportive measures meeting?

Breakout Discussion

Carson is dating Ryan. Their friend, Franky, reports that Carson has been seen yelling at Carson at lunch, grabbing Carson’s arm and pulling Carson away from friends that Ryan doesn’t like Carson talking to. Franky said Carson confided that Ryan is isolating Carson from friends and family, but that Carson is too afraid to report the conduct.

Topics to consider with small group discussion:

- Is this Title IX?
- If yes, what should the building administration do upon receipt of this report. What should they not do?
- Who should the supportive measures meeting be held with?
- What duty of confidentiality is owed to Carson? How will that come into play in the initial stages of the process?



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Step #2

Emergency Removal/Admin Leave

- After a report (no need for Formal Complaint)
- The Title IX Coordinator or designee should consider whether the reported conduct warrants removing an alleged perpetrator (respondent) from a class, an activity, or school or work generally.
- There are only two ways to do this:

EMERGENCY REMOVAL (Students & Non-Employees)	OR	ADMINISTRATIVE LEAVE (Students & Non-Employees)
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Emergency Removal


WHO: A student or other non-employee respondent

WHAT: Removal from a program or activity on an emergency basis (class, activity, school generally, etc.)

WHEN: Must undertake an individualized safety and risk assessment and determine that an immediate threat to the **physical health or safety** of any student or other individual arises from the allegations of sexual harassment justifying removal (**mental health or safety** is not enough)

AFTER: Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

Note: Make sure any removal complies with requirements of state law (suspensions/expulsions) and laws governing students with disabilities (504 or IEP change in placement)



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Discipline Implications

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



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IDEA & Section 504 Implications

- Prior to removing student, Title IX Coordinator must work with IEP/Section 504 Committee to determine if supportive measures constitute:
 - Change in placement;
 - Trigger a disciplinary removal analysis; or
 - Require manifestation determinations.
- MDR requirements and procedural safeguards will be triggered if removal is for **more than 10 days**
- **Again:** SPED/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 respondent
- 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:** Whenever state law, Board policies, administrative procedures, contracts, and any other documents governing the employment relationship allow it

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How can we teach emergency removals?

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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Breakout Discussion

Carson is dating Ryan. Their friend, Franky, reports that Carson has been seen yelling at Carson at lunch, grabbing Carson’s arm and pulling Carson away from friends that Ryan doesn’t like Carson talking to. Franky said Carson confided that Ryan is isolating Carson from friends and family, but that Carson is too afraid to report the conduct.

Topics to consider with small group discussion:

- Would this be appropriate for an emergency removal? Why or why not?
- If not, what options are available to the school to maintain distance between the students?



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Overview: T9 SH Grievance Process

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Step #3

Consider Dismissal

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



Can use another policy or code of conduct





Cannot use another policy or code of conduct

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Formal Complaints: Dismissal

- 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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Only move to Step 4 if you have a Formal Complaint that has not been dismissed

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Don't forget

REMEMBER

Don't forget

Sexual Harassment

~~TH IX SH~~ → **Other SH**

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Training Note

- Although you are expected to train all Title IX team members on dismissals, the decision typically will be made by the Title IX Coordinator and not delegated to a designee
- Accordingly, it is not as essential to cover the issue at length in your basic trainings of non-Title IX Coordinators



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Step #4

Notice of Allegations (NOA)

Upon receipt of a formal complaint and prior to any interviews, school must provide each known party written notice of:

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



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Sufficient Details

Notice of Allegations (NOA) must include:

- The identities of the parties involved in the incident, if known
- The conduct allegedly constituting sexual harassment
- The date and location of the alleged incident, if known.

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

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

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Training Note

- Although you are expected to train all Title IX team members on the basics of notice of allegations, the Title IX Coordinator usually requires the notice so in depth coverage is not required in your basic training
- **However, it is essential to drive home the fact that the notice is required before anyone first meets with the Respondent for an interview. This is one of the most common missteps in the initial stages of Title IX investigations.**



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Step #5

Informal Resolution

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



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Step #5

Informal Resolution



- Parties must be allowed to stop at any time prior to an agreement
- If an agreement is reached between the parties, the Title IX Formal Complaint is closed; if not, you move on to Step #5: Investigation



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Training Note

Although you are expected to train all Title IX team members on the basics of informal resolutions, you should cover the topic in depth in a subsequent training for informal resolution facilitators



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Step #6

Investigation

- Recommend that the investigation be completed by someone other than the Title IX Coordinator and Informal Resolution Facilitator (not required)—Investigator must be trained
- Many required elements of investigation in rules—best practice to use a checklist and other forms to keep yourself on track (contact us at titleIX@thlaw.com for forms and checklists)



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Overview of the Investigative Process

- The school district must investigate all Formal Complaints
- Treat the Complainant and Respondent equitably
- The school district must provide **equal opportunity** to the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence



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Overview of the Investigative Process

- The Respondent is **presumed not responsible** at the outset of the investigation
- The Investigators must remain impartial and be free of conflicts of interest or bias
- Consistent investigation process for student-on-student and employee-on-student sexual harassment



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Overview of the Investigative Process

- A school cannot restrict the parties' ability to discuss the allegations or gather evidence (i.e. no “gag orders”)
- But confidentiality should be maintained to the greatest extent possible
- You can warn parties of the risks that can result from sharing too much information about a complaint or situation (e.g., retaliation complaints)



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Right to an Advisor

- The Complainant and Respondent must be given the opportunity to select an advisor of their choice
- The advisor may be present for any meeting or interview during the investigative process
- The school district may establish restrictions regarding the extent to which the advisor may participate in the proceedings if the restrictions are equally applied to both parties
- Advisor may inspect and review the evidence



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Standard of Evidence

- School districts must decide whether they want to use a “preponderance of the evidence” or “clear and convincing evidence” standard
 - ❑ A **preponderance of the evidence** standard of evidence is understood to mean concluding that a fact is more likely than not to be true.
At least 51% of the evidence favors the Complainant.
 - ❑ A **clear and convincing evidence** standard of evidence is understood to mean concluding that a fact is highly probable to be true.



Must use the same standard of evidence for **all** complaints against students and employees



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Investigation Time Frames

- Investigation is conducted within reasonably prompt time frames
 - ❑ Some exceptions due to law enforcement investigations, party or witness absence, or providing language or disability accommodations
- Considerations in developing time frames
 - ❑ Written notice required for any interviews or meetings
 - ❑ Provide party with sufficient time to prepare for interviews
 - ❑ Scope of investigations
 - ❑ Required time for parties to submit written responses to the evidence



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Gathering Evidence

- The burden to gather evidence is on the school—not the parties
- **Equal opportunity** for the parties to present inculpatory and exculpatory evidence



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Relevant Evidence

Evidence is relevant if

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

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

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Relevant Evidence

- “Inculpatory Evidence”
 - Favorable to the Complainant
 - Evidence that shows or tends to show an individual’s involvement in the alleged sexual harassment that can establish responsibility
- “Exculpatory Evidence”
 - Favorable to the Respondent
 - Evidence that exonerates or tends to show the Respondent is not responsible for the alleged sexual harassment incident



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Gathering the Evidence



- No information protected by legal privilege may be used during an investigation unless waived in writing by the person holding the privilege
 - Attorney-Client, Physician/ Psychotherapist-Patient, etc.
 - No questions may be asked about these matters unless privilege is waived

Interviews

- School must provide parties **written notice** of the date, time, location, participants, and purpose of all investigative interviews or other meetings **with sufficient time to prepare**

No more surprise interviews!



- Must provide parties with equal opportunity to present evidence and identify fact and expert witnesses

Interviews – Rape Shield Protections

- Questions and evidence related to a Complainant's prior sexual history or sexual behavior are **not relevant** and may not be asked/sought
- Exceptions in two narrow circumstances:
 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
- Except in these two narrow circumstances, do not seek evidence or ask a complainant questions about their prior sexual history or sexual behavior



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Evaluating the Evidence

- Investigators must objectively evaluate all the evidence
 - No conflict of interest or bias
 - Investigation cannot itself discriminate against the Complainant or Respondent on the basis of sex
 - Respondent maintains the **presumption of not responsible** during the investigation
 - Only at the conclusion of the entire grievance process can a finding of responsibility be made



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Evaluating the Evidence

- Investigators must objectively evaluate all the evidence
 - Credibility determinations cannot be made based on the status as a Complainant, Respondent, or witness
 - Credibility determinations are not made by the investigator—the decision-maker will decide credibility
 - Investigator can include a summary of contradicting evidence and statements for the decision maker

Reviewing the Evidence

- Must provide the parties and advisors an opportunity to inspect and review the evidence
 - Evidence that is directly related to the allegations raised in the Formal Complaint
 - Statements, notes of interviews, and other types of evidence the school plans to use before reaching a determination *and* evidence the school doesn't think it will use
 - Provide the evidence in electronic or hard copy format
- The parties must be given at least **10 days** to review all the evidence and submit written responses about the evidence to the investigator

Finalizing the Investigation Report

- The Investigator must consider the parties’ response(s) to the evidence in finalizing the report
- Investigator must share the final report with both parties and their advisors
- Both parties must be given at least **10 days** to review and submit a written response regarding the report to the decisionmaker before any final determination of responsibility



Training Note


Although you are expected to train all Title IX team members on the basics of investigations covered in this training, you should cover much more with investigators in a subsequent training

Step #7

Decision-Making Process

- Decisionmaker may not be the Title IX Coordinator or the investigator
- Decisionmaker (and anyone designated to facilitate an informal resolution process) must be free from conflicts of interest or bias:
 - ❖ against complainants and respondents generally; or,
 - ❖ against the particular complainant or respondent


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Written Cross Examination

- Live hearings, with cross-examination, *are not required* at the K-12 level
- Instead, a written question and answer process is required after completion of the investigation report and after the report is provided to both parties
- Each party must have the opportunity to submit written, **relevant** questions for any other party or witness
- Must provide opportunity for additional, **limited** follow-up questions from each party



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Limits on Questions

Same limits apply to questions as apply to the investigation; these questions are not relevant:

- Rape shield protections (other than exceptions)
- Privileged information
- Medical information

The decision-maker must give a written explanation as to any questions that are determined not relevant



Determination Process

- Decisionmaker must issue a written determination of responsibility
- Decision must:
 - Use school's standard of evidence
 - Be based on independent judgement
 - Include an independent evaluation of relevant evidence, conclusion about whether the respondent is responsible for alleged sexual harassment, and, if so, the consequences or other responses to be imposed



Remedies

- The Title IX Coordinator is responsible for effective implementation of any remedies.
- Remedies must be designed to **restore or preserve equal access** to the school’s educational program or activity.
- Need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent.
- If a student respondent is found responsible for sexual assault, discipline could include suspension, alternative placement, or expulsion.



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Written Decision Requirements

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



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Written Decision Requirements

- Decision must include a statement of, and rationale for, the result as to each allegation.
 - ❖ 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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Training Note

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Step #8 Appeal

- Each party can appeal dismissal or written determination
- Each party must be provided notice of the appellate process and the opportunity to appeal
- Grounds for appeal:
 - Mandatory
 - Procedural irregularities that affected the outcome
 - New evidence
 - Conflict of interest
 - School may choose to offer appeals on additional bases.
 - Both parties must have equal appeal rights.

Appeals

- Decision-maker on appeal cannot be the same decision-maker from the initial determination, the investigator, or the Title IX Coordinator
- Process:
 - ❖ Both parties provided notice of the appeal and given opportunity to submit written statements
 - ❖ Decision-maker issues a written decision including the result and rationale

Recordkeeping



Must retain records for **seven** years.

Records must include:

- Final determination;
- Any audio/visual records or transcripts;
- Supportive measures taken or reason for no supportive measures;
- Sanctions imposed;
- Remedies provided;
- Appeal and result;
- Informal resolution and result;
- All training materials; and
- The basis for the school's conclusion that any response to an allegation of sexual assault was not deliberately indifferent and that it took measures to restore/preserve equal access.

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Serving Impartially



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How to Serve Impartially

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

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



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Bias

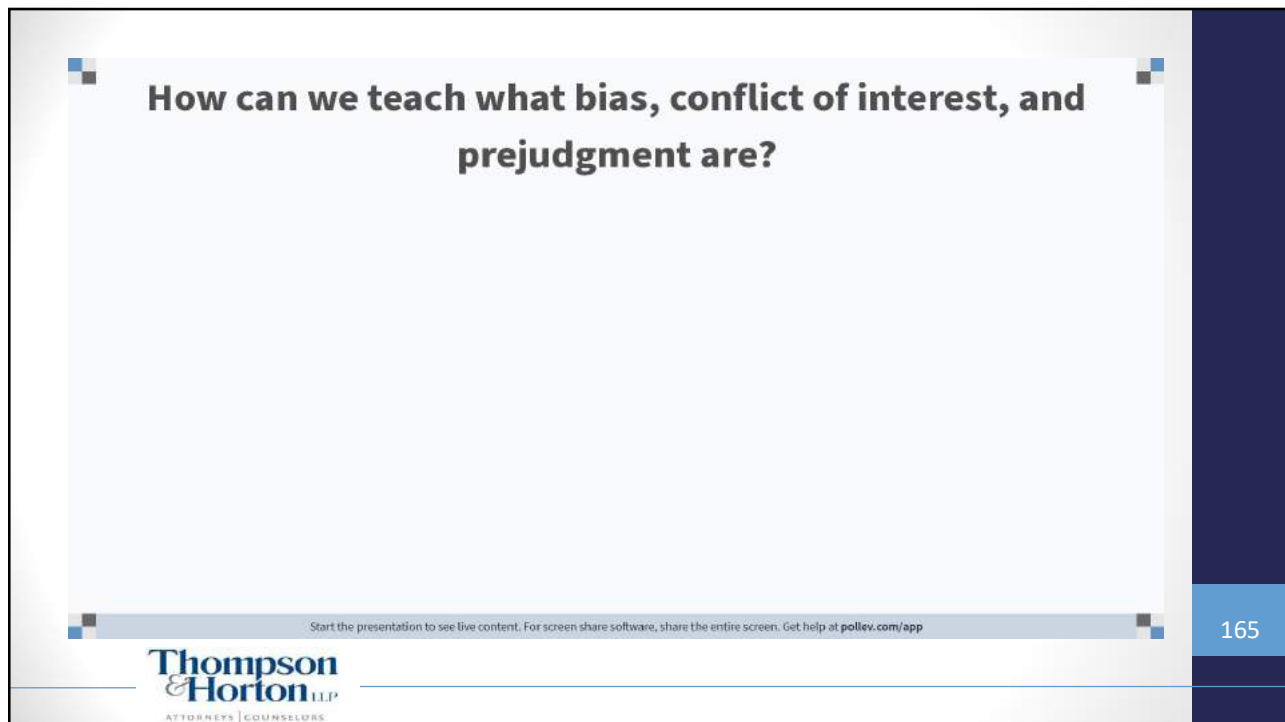
- Under the commentary regarding the Title IX regulations, prohibited bias includes bias based on an individual's:
 - Sex
 - Race
 - Ethnicity
 - Sexual orientation
 - Gender identity
 - Disability
 - Immigration status
 - Financial ability
 - Other characteristic



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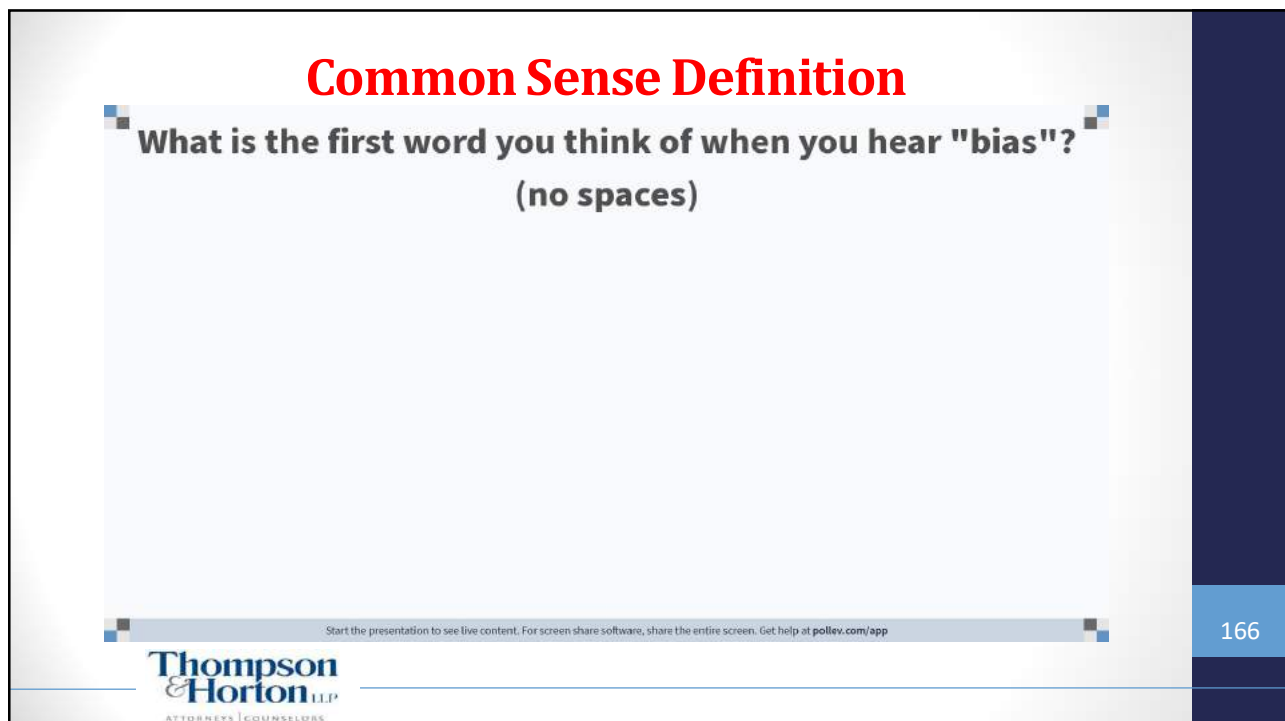
How can we teach what bias, conflict of interest, and prejudice are?

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Common Sense Definition

What is the first word you think of when you hear "bias"?
(no spaces)

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Dictionary Definitions

Bias

- “[A]n inclination of temperament or outlook, especially: a personal and sometimes unreasonable judgment.”
- “[T]o give a settled and often prejudiced outlook to...his background biases him against foreigners.”

Merriam-Webster

Synonyms – nonobjectivity, one-sidedness,
partiality, partisanship, prejudice



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Dictionary Definitions

Conflict of Interest

- A situation in which the concerns or aims of two different parties are **incompatible.**”
- A conflict of interest arises when what is in a person’s best interest is not in the best interest of another person or organization
individual owes loyalty.”

<https://ethicsunwrapped.utexas.edu/glossary/conflict-of-interest>



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Dictionary Definitions

Prejudgment

- “To judge before hearing or before full and sufficient examination”
- “[A]n opinion about a situation of a person that is formed before knowing or considering all of the facts.” – Cambridge Dictionary

Synonyms – Merriam-Webster

- Preconception
- Assumption
- Presumption/presupposition
- Speculation



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Active Challenges: Bias

A father and his son are involved in a horrific car crash and the man died at the scene. But when the child arrived at the hospital and was rushed into the operating theatre, the surgeon pulled away and said: “I can’t operate on this boy, he’s my son”.

How can this be?



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Active Challenges: Bias

Work through sample questions to identify and re-draft the questions to remove bias:

1. **I have seen you and the respondent together and have never noticed any issues between you, so can you help me understand how it’s possible you’re saying the relationship was harassing?**
2. **You didn’t think that behavior was inappropriate, did you?**
3. **Why didn’t you report the conduct to someone sooner?**
4. **What was the first thing you said to the victim?**



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Discussion: Conflict of Interest

Would you perceive this as a conflict?

- An investigator has a close family relationship with a party or witness
- A Title IX Team member is the coach of the accused, who is expected to take the team to the state finals
- An assistant principal is asked to investigate a complaint against the principal
- The decision-maker and the complainant attend the same religious institution



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Examples: Prejudgment

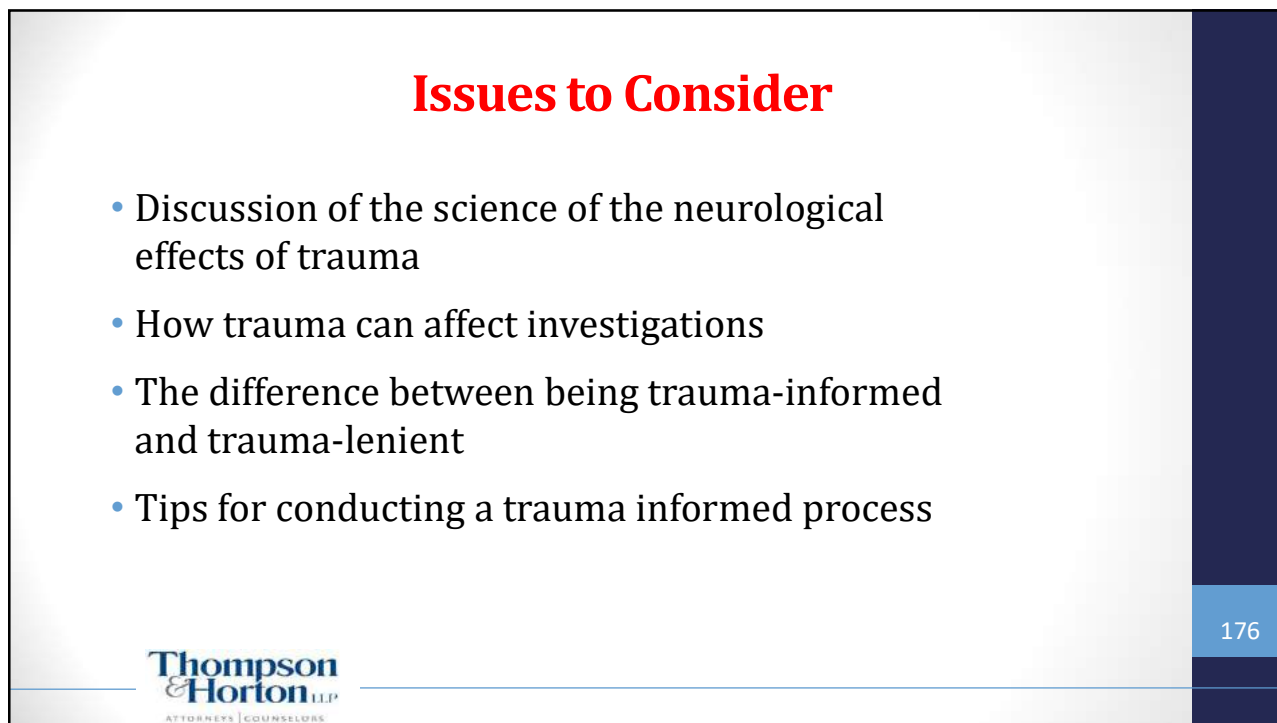
- An investigator, after interviewing only the complainant, concludes that the respondent must have engaged in the alleged misconduct because the complainant was so upset during the interview there was no way they could not be telling the truth
- The decision-maker, after reviewing the investigative report, decides that one party is correct before the written cross examination process occurred



Provide Dos and Don'ts

- 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)





Issues to Consider

- Discussion of the science of the neurological effects of trauma
- How trauma can affect investigations
- The difference between being trauma-informed and trauma-lenient
- Tips for conducting a trauma informed process

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