

**TRAIN THE TRAINER:**  
TITLE IX COMPLIANCE TRAINING  
CERTIFICATION

Oregon School Personnel Association  
2022 Fall Summit  
October 3, 2022

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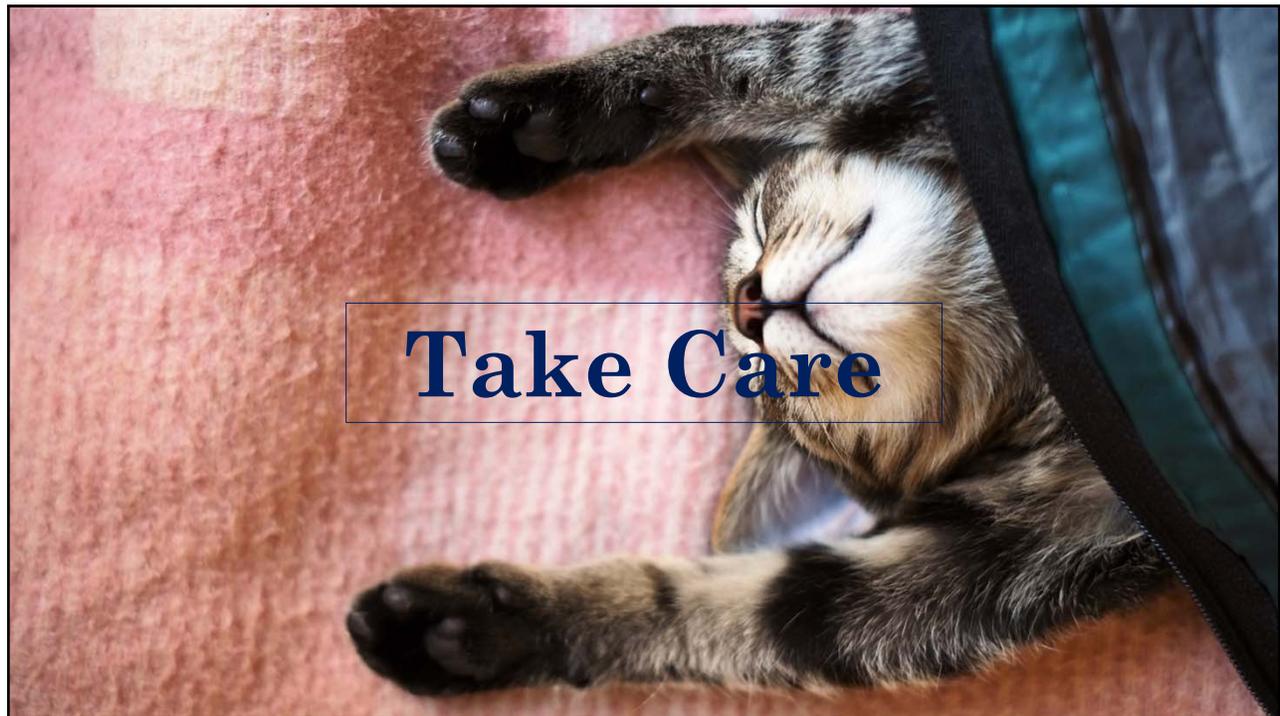
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# Why Are We Here?

- ▶ Training on the 2020 Title IX Rules
- ▶ Not legal advice; keep it hypothetical today—contact me or legal counsel separately for specific issues as they arise
- ▶ These materials will be available for posting on your website after our session



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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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# Why Train the Trainer?

## You must train:

- ▶ All Title IX “team” members on the definition of sexual harassment, the scope of the education program or activity, how to conduct the grievance process (all stages), and how to serve impartially
- ▶ Investigators on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- ▶ Decision-makers on technology used at live hearings (if used) and issues of relevance, including when questions about a complainant’s past sexual behavior are not relevant



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# Why Train the Trainer?

## Critics of the 2020 Title IX rules pointed out 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”
- ▶ “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”



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# Why Train the Trainer?

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OCR's response?

“[W]e believe that the costs and burdens on regulated entities serve the important purpose of furthering Title IX's non-discrimination mandate”



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# Why Train the Trainer?

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In the preamble to the rules, OCR estimated that a new Title IX Coordinator, investigator, decision-maker, and informal resolution facilitator would need **8 hours** of initial training under the rules, with additional training each subsequent year



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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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## So, Why Train the Trainer?

- ▶ Lots of training to be done
- ▶ Budget constraints mean outside training is not always possible
- ▶ Although our many free resources, including our [www.titleIXtips.com](http://www.titleIXtips.com) blog and our frequent complimentary webinars help, you will probably need to do some in-house training yourself

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A slide titled "Polling Access" with a yellow background. The title "Polling Access" is in a large, dark blue serif font. A QR code is on the left. To the right, there are two options: "Option One" (Use this QR code) and "Option Two" (a list of steps). The Thompson & Horton LLP logo is at the bottom left. A small number "12" is in the top right corner.

## Polling Access

**Option One**  
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**Option Two**

- ▶ Go to Pollev.com on any browser
- ▶ Accept or dismiss cookies
- ▶ Enter THLAW411 as the Username
- ▶ Skip when asked to enter your name

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

True False

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## My role with Title IX in my District/school is:

■ Title IX Coordinator **A** ■ Deputy Title IX Coordinator **B** ■ Building Title IX Contact **C** ■ Title IX Team Member **D**  
■ None of the Above **E**

Role	Label
Title IX Coordinator	A
Deputy Title IX Coordinator	B
Building Title IX Contact	C
Title IX Team Member	D
None of the Above	E

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## Train the Trainer Tip

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- ▶ Before you jump into Title IX, make sure your audience has a solid foundation of terminology related to civil rights complaints, generally, and Title IX, specifically
- ▶ We often assume a greater level of knowledge among our trainees than they have
- ▶ Although it is not necessary for all team members to be “fluent” in the jargon associated with Title IX, understanding the basics is a must

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# Civil Rights ABCs

- ▶ Discrimination
- ▶ Protected Characteristics/ Classes
- ▶ Harassment
  - Sexual Harassment
    - Title IX SH
- ▶ Retaliation



**What is the first word that comes to mind when you hear  
"Title IX"? (One word only)**

# What is Title IX?



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## Reiterate Your Point: Practice

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**A student reports being disciplined more harshly than another student of a different gender identity for the same conduct. What is the most accurate description of the conduct alleged?**

- Discrimination **A**
- Harassment **B**
- Sexual Harassment **C**
- Title IX Sexual Harassment **D**

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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.Pysch., “Spaced Repetition,”  
Psychology Today (Mar. 21, 2014)



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## Today Is Sexual Harassment, But...

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



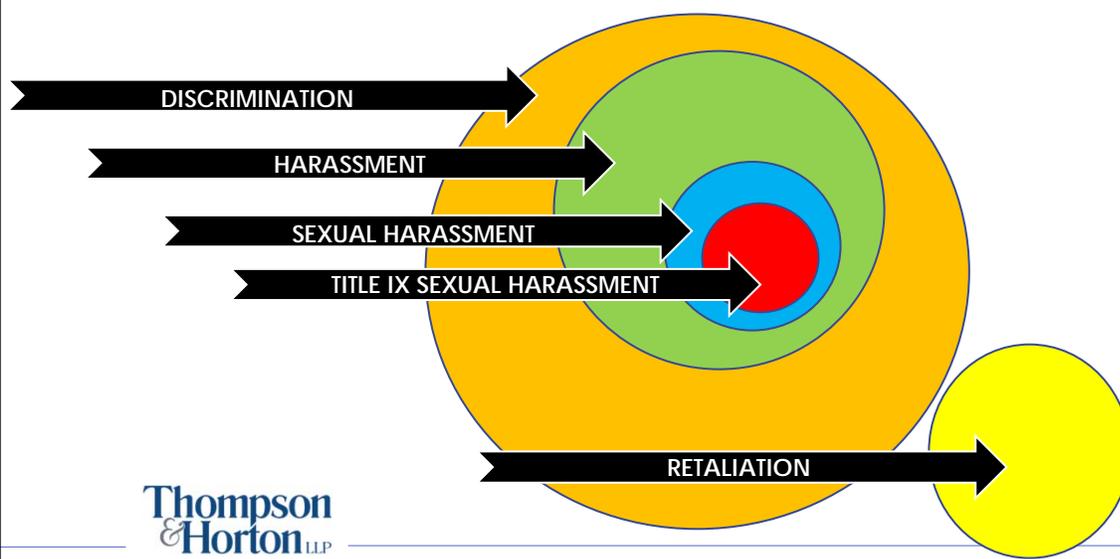
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## Train the Trainer Tip

- ▶ 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

## And Remember



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## Today Is Sex Discrimination, But...

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



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## Train the Trainer Tip

- ▶ Why does it matter?
- ▶ Team members must understand that Title IX is just one part of the educational institution's compliance
- ▶ Complaints of non-sex based violations should still be reported to the appropriate official and addressed, but will not be addressed under the Title IX Sexual Harassment policy/procedures



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# Title IX Authority

Statute

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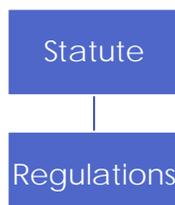
# Statute

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

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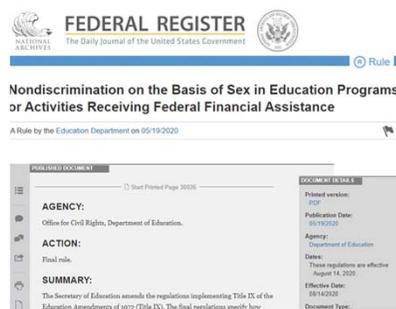
# Title IX Authority



Major amendment effective August 14, 2020; first time in 40 years. Biden is amending them again—June proposed rules.

# 2020 Title IX Rules

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



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## What Do The 2020 Rules Require?

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



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## What Do The 2020 Rules Require?

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



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## What Do The 2020 Rules Require?

- ▶ 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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## What We Did: 2020-2022

- ▶ Frantically updated our policies and procedures on Title IX sexual harassment
- ▶ Completed basic training on the new rules (definitions, process outline)
- ▶ Fumbled our way through intake and formal complaint processing
- ▶ Hoped for the best and changes to come



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## What We Missed: 2020-2022

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- ▶ Understanding if our policies and procedures reflect the process we really want (and use)
- ▶ Completing practical training on processing Title IX complaints
- ▶ Considering the interplay between state laws and employment policies and agreements



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## Often Missed: 2020-2022

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- ▶ At least one overarching Title IX Coordinator
- ▶ Title IX Coordinator contact information on websites and in handbooks, catalogs, etc., including for employment and unions



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# Check Yourself

- ▶ Review your website
- ▶ Consider not just what is required
  - Title IX requirements
  - Other civil rights laws
  - Easy link from homepage



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# 2022 Proposed Rules

- ▶ Issued by the Biden administration in proposed form on June 23, 2022
- ▶ Comment period ends September 12, 2022
- ▶ Department of ED will review and respond to all comments in the final rule
- ▶ Purported release date for final rule May/June 2023, with an effective date in August 2022; this would be extremely fast based on past experience
- ▶ Would change many of the requirements for handling complaints and **apply to all sex discrimination**, not just sex-based harassment



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

Yes

No

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# Title IX Authority

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```
graph TD; A[Statute] --> B[Regulations]; B --> C[Legal Opinions];
```

**Statute**

**Regulations** Major amendment effective August 14, 2020; first time in 40 years. Biden is amending them again—June proposed rules.

**Legal Opinions** Courts often defer to agency interpretations of regulations, though the extent they will with the new Title IX regs is unclear

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# Title IX Authority

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graph TD; Statute --> Regulations; Regulations --> OCR_Guidance[OCR Guidance]; Regulations --> Legal_Opinions[Legal Opinions]; OCR_Guidance --> OCR_Decisions[OCR Decisions];
```

Used (abused?) by the Obama OCR to increase Title IX requirements without public comment. Trump rescinded almost all such guidance. Biden team has used it, barely.

Major amendment effective August 14, 2020; first time in 40 years. Biden is amending them again—June proposed rules.

Courts often defer to agency interpretations of regulations, though the extent they will with the new Title IX regs is unclear

Supposed to be posted online when there is a finding against a recipient. Done slowly and inconsistently.

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# Non-Compliance Penalties

Most Common

- ▶ OCR Remedial Action
  - Resolution agreement/monitoring
  - Can lead to process to remove federal funds (lengthy process)
  - Involves a hearing
  - Subject to judicial review

34 CFR 106.3(a), 34 CFR 100.7(d), 100.8, 100.9

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# Non-Compliance Penalties

## Less Common

- ▶ Impact on Grant Funds—even before option to enter resolution agreement
- ▶ A reference to the DOJ with a recommendation that it file suit

34 CFR 106.4(a); (34 CFR 100.8(a)(1))

- ▶ Lawsuits filed by alleged victims or perpetrators in Federal court

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SCENARIO #1

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Chanda, a former student who graduated a year ago, reports a sexual relationship with Mx. Robin, who teaches math. The two 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

46

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.



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SCENARIO #1

47

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 leg while they were talking.



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SCENARIO #1

48

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.”



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SCENARIO #1

49

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.



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## 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

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# 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



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# 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



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# P/ATP

- ▶ The regs are silent as to what to do if someone tries
  - 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....

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# 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

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## What About the Respondent?

- ▶ There is no similar rule for respondents
- ▶ Permissive dismissal is allowed if the respondents “enrollment or employment ends”
- ▶ Must not be unreasonable in light of the known circumstances (“deliberately indifferent”) to dismiss

### 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

**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**

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**If It’s Not Title IX  
Sexual Misconduct**

**Title IX SH** ← → **Supportive  
Measures +  
Other Policy**

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## Train the Trainer Tip

- ▶ 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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## T9SH Grievance Process: When & What is Required



A K-12 school receiving federal funds

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# 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



## T9SH Grievance Process: When & What is Required

A K-12 school receiving federal funds

in which any employee has actual knowledge

Four empty rounded rectangular boxes stacked vertically, intended for additional notes or conditions.



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## ANY Notice or Knowledge

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

*to or by ANY  
K-12 employee*

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## Reports & Complaints

- ▶ 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

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## Reiterate Your Point: Practice

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



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Is there actual knowledge?

Yes

No

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## Reiterate Your Point: Practice

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



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### Is there actual knowledge?

Yes No

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# Reiterate Your Point: Practice

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



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## Is there actual knowledge?

Yes No

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

A K-12 school

in which any employee has actual knowledge

of Title IX “sexual harassment”

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**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”

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## 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”



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## 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



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# Unwelcome?

A student, Carson, reports that other students are constantly making sexual jokes, which Carson said makes them uncomfortable. Carson acknowledges actively participating in the jokes, laughing at the jokes and even joining in, saying they wanted to avoid causing a scene.



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**Is the conduct unwelcome?**

Yes

No

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# Unwelcome?

Carson reports that Robin forcibly kissed Carson on multiple occasions. Robin asked Carson for a kiss. Carson did not say no. Carson reports looking at Robin uncertainly, however, and not kissing Robin back. When asked for details, Carson said they were too afraid to say no because Robin is a “cool kid,” and Carson didn’t want to be an outcast.



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**Is the conduct unwelcome?**

Yes

No

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## Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
- ▶ Based on sex
- ▶ That:
  - Is one of the Title IX “Big Five” or
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## Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
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- ▶ That:
  - Is one of the Title IX “Big Five” or
  - Creates a Title IX “Hostile Environment”

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# Based on Sex

- ▶ “Sexual”
- ▶ Based on gender (e.g., stereotypes of women’s roles)
- ▶ Based on sexual orientation
- ▶ Based on gender identity

# 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

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## 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”



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## 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”**



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# “Title IX Sexual Harassment”

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

  
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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 (known as the “big four”)

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## #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

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## #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**

  
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## 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

  
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## #3 of the “Big 5”

# Domestic Violence (VAWA Definition)

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- ▶ 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

  
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## #4 of the “Big 5”

# Dating Violence (VAWA Definition)

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- ▶ 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

  
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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
  - Fear for the safety of others or
  - Suffer substantial emotional distress
- ▶ Can be direct or indirect

## 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)

**“Title IX Sexual Harassment”**

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

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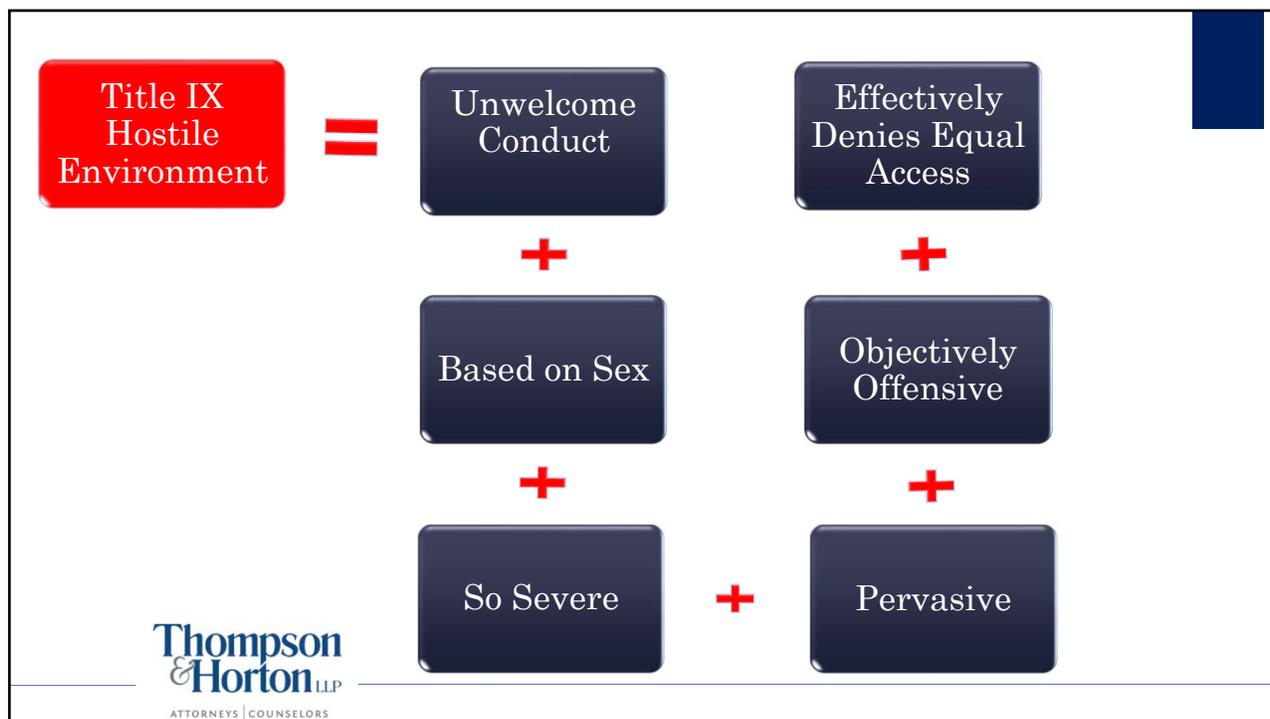
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**“Title IX Sexual Harassment”**

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

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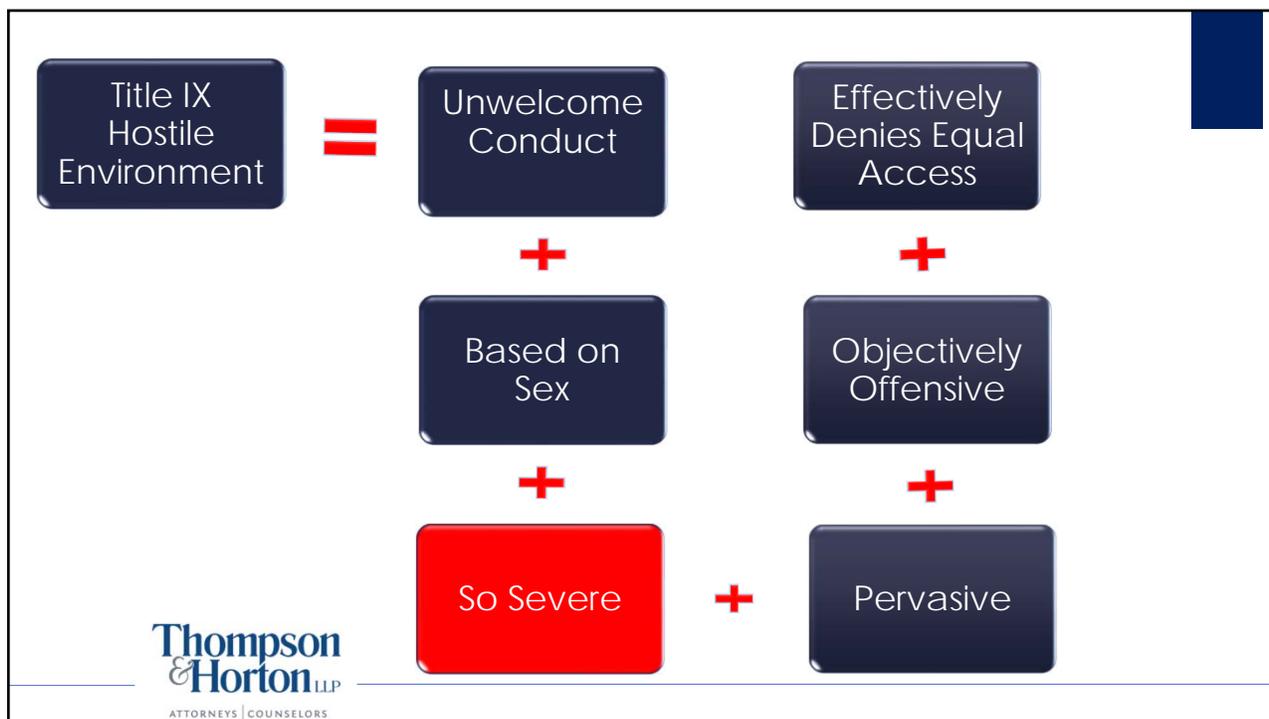
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## Train the Trainer Tip

- ▶ How do you teach severe, pervasive, and objectively offensive?
- ▶ Common sense definitions (ask the trainees)
- ▶ Dictionary definitions
- ▶ Case law definitions and examples

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99

# Common Sense Definition:

## Severe

What does "severe" mean (one word)?

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100

101

## 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)



101

102

## 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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103

## 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)



103

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## Common Sense Definition: Pervasive

**What does "pervasive" mean (one word)?**

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## 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)



105

106

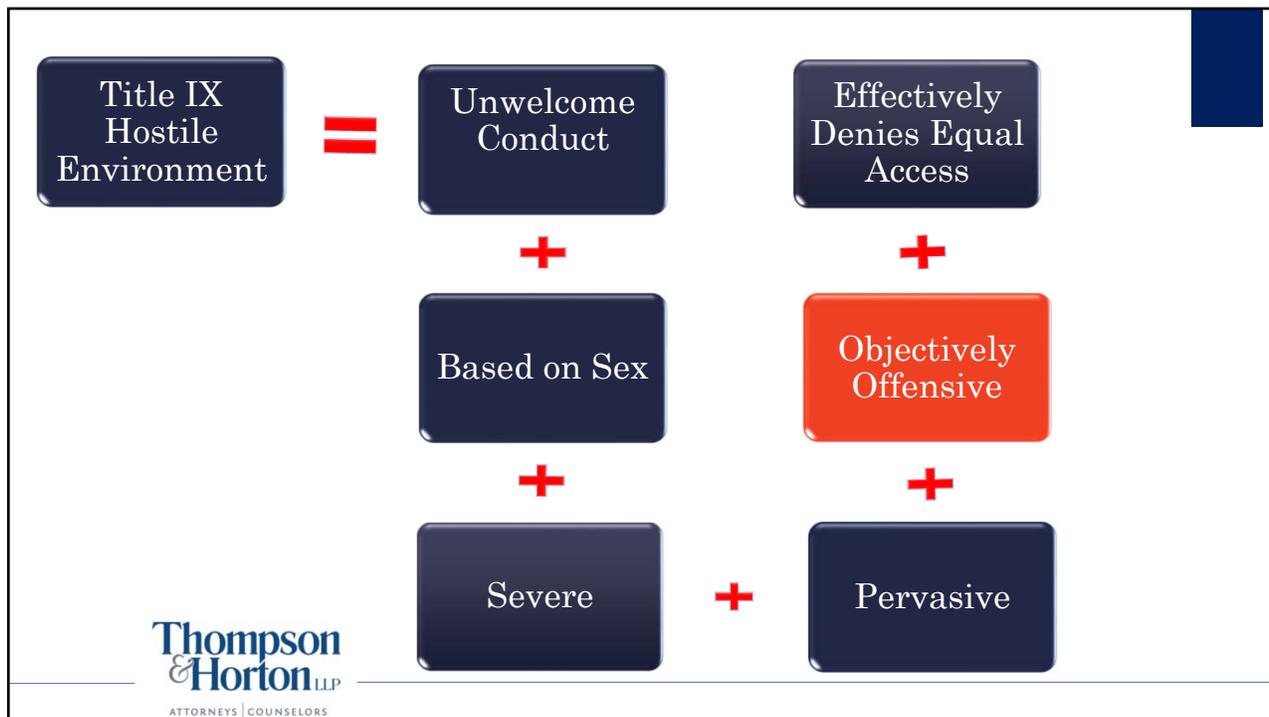
## Case Definitions: Pervasive

- ▶ “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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## Common Sense: Objective

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**Is the phrase "It is raining" objective or subjective?**

Objective Subjective

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109

**Common Sense: Objective**

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**Is the phrase "the rain is fun" objective or subjective?**

---

Objective Subjective

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**Dictionary Definitions:  
Objectively Offensive**

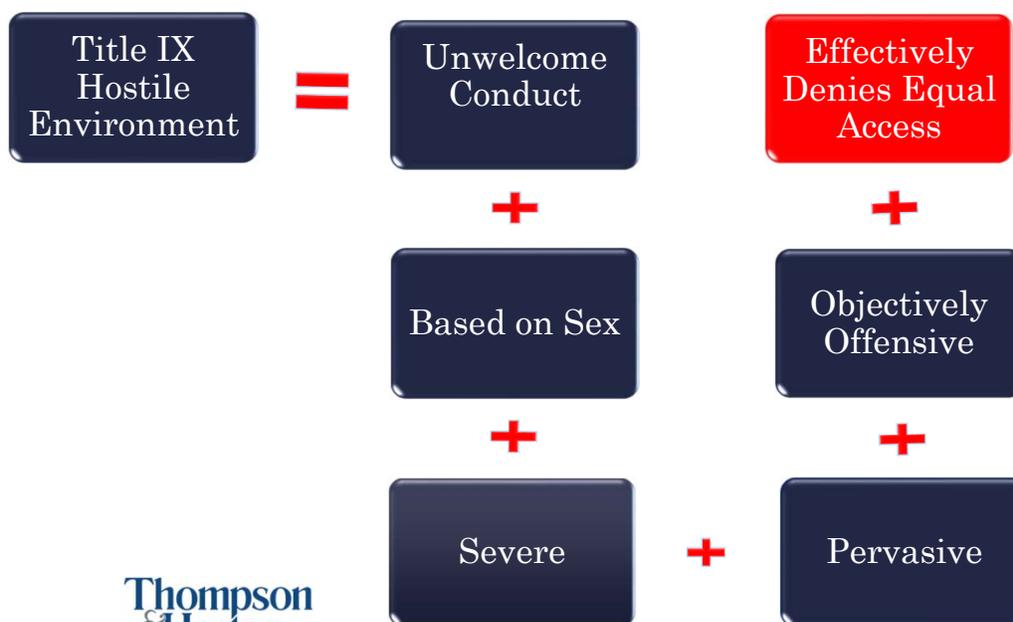
- ▶ “Objective”: Existing independently of perception or an individual's conceptions (Reverso)
- ▶ “Offensive”: Unpleasant or disgusting, as to the sense (Reverso)

  
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## Case Definitions: 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.
- ▶ 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 were aimed.



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# 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



113

114

# 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



114

## Effective Denial of Equal Access

115

- ▶ 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



115

## Effective Denial of Equal Access

116

- ▶ 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



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## Train the Trainer Tip

- ▶ It is not enough to teach the definitions
- ▶ Investigators and decision-makers must understand how to tie their work to the elements
- ▶ For example:
  - If stalking is alleged, what evidence is there for or against the element that the person feared for safety or suffered emotional distress?
  - If sexual assault is alleged, must address consent.

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**Reiterate Your Point:**  
Is it Title IX Sexual Harassment?  
(The “Big Five” or “Hostile Environment”)



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## Reiterate Your Point: T9SH

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



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### 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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## Reiterate Your Point: T9SH

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



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- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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## Reiterate Your Point: T9SH

An unknown student airdropped a video in the cafeteria at lunch of a student, Carson, engaging in sexual activity with an unknown person off campus.



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- Yes, employee quid pro quo
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- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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## Reiterate Your Point: T9SH

Carson reports that another student, Robin, put their hand on Carson's chair when Carson was sitting down in class, and when Carson sat down, Robin's fingers touched Carson's crotch through the clothing.



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- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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## Reiterate Your Point: T9SH

Teacher Thompson serves as the advisor for the debate team. Carson tells the teacher how much they want to be on the team for an upcoming meet. The teacher offers to put Carson on the team if they stay after school to help with projects a few days a week before the meet. When Carson shows up after school, the teacher asks Carson for a backrub as one of the “projects.”



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- Yes, severe, pervasive, and objectively offensive
- No

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## Reiterate Your Point: T9SH

Robin, the student editor of the school newspaper, tells Carson, a student photographer, they will publish Carson's photo on the front page of the paper if Carson goes out with Robin.



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- Yes, severe, pervasive, and objectively offensive
- No

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131

## Reiterate Your Point: T9SH

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



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- Yes, dating violence
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- Yes, severe, pervasive, and objectively offensive
- No

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## Reiterate Your Point: T9SH

Robin was under the table in class trying to look up Carson's shorts. The two students have had an issue since kindergarten, when Robin stabbed Carson in the arm with a pencil. In an email reporting the shorts incident, Carson's parent said they were tired of Robin "sexually harassing" their child.



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- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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## Reiterate Your Point: T9SH

Carson reports that Robin often takes pictures of Carson at school without permission. Carson also reports that Robin created a webpage “Why I Love You” about Carson and showed it to a classmate, who told Carson about it. Carson is “really freaked out.”



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- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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## Reiterate Your Point: T9SH

Carson reports that a Teacher Thompson regularly tickled students, poked Carson in the stomach under the clothes, grabbed Carson's phone and said, "You like it when that phone vibrates don't you," and gave Carson a note signed "love, Teacher Thompson" at the end.



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### 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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## Reiterate Your Point: T9SH

Carson's friends report they are worried about Carson. Since beginning to date Robin, Carson has been withdrawn and has seemed afraid whenever around Robin. Carson's friends noticed Carson has bruises on their wrists, though they don't know what they are from.



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- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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## 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”

  
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### 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

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# Educator Misconduct

- ▶ Sexual conduct between a school employee and a student cannot be consensual so = sexual assault
- ▶ Other sexual harassment between a student and a teacher or other employee can never be welcome
- ▶ Such conduct is covered by the Title IX sexual harassment process if it one of the Big Five or severe, pervasive, and objectively offensive that it would effectively deny equal access
- ▶ Even if not covered by Title IX, check other rules for professionals

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.

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## 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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# 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”

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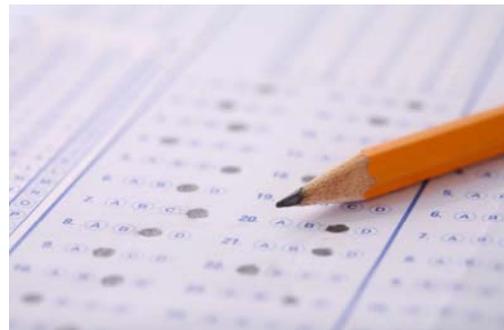
## Education Program or Activity

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"

**Reiterate  
Your Point:**  
Is it in a  
Program or  
Activity?



149

# Reiterate Your Point:

**EP/A**  
Robin allegedly sexually assaulted Carson in the bathroom at school.



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

Yes No

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151

# Reiterate Your Point:

## EP/A

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



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

Yes No

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## Education Program or Activity

- ▶ Field trips
- ▶ Athletics
- ▶ Extracurricular activities



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## 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

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# Reiterate Your Point:

## EP/A

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



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

Yes No

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# Reiterate Your Point:

## EP/A

Robin allegedly sexually assaulted Carson over summer break at a sleepover at Carson's house. Carson says students are spreading rumors now about Carson being "fast."



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

Yes No

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# Reiterate Your Point:

## EP/A

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



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

Yes No

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160

# Reiterate Your Point:

## EP/A

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



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

Yes No

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# Reiterate Your Point:

## EP/A

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



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

Yes No

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## 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”

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## Reiterate Your Point:

**EP/A** 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 Cameron is having difficulty concentrating at school.



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

Yes No

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**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”)

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# T9SH Grievance Process: When & What is Required

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A K-12 school

in which any employee has actual knowledge

of Title IX “sexual harassment”

in its education program or activity

against a person in the United States

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# In the United States

170



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## 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



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## T9SH Grievance Process: When & What is Required

A K-12 school

in which any employee has actual knowledge

of Title IX “sexual harassment”

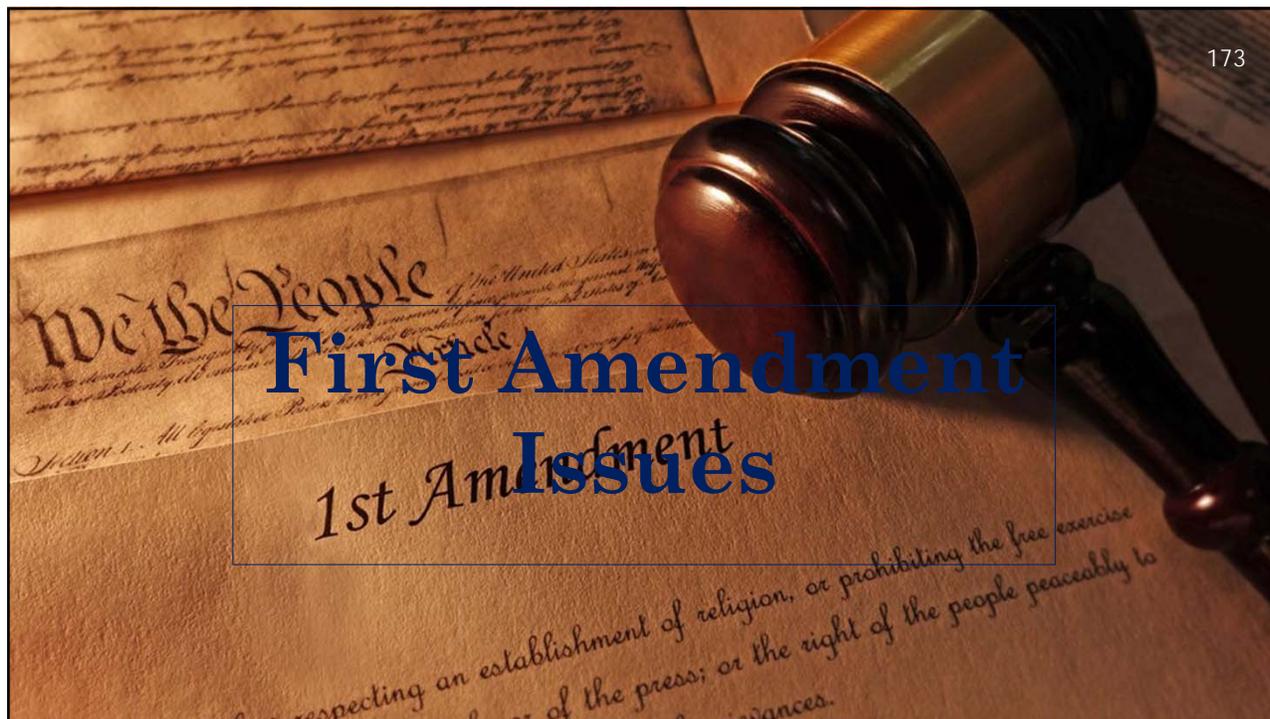
in its “education program or activity”

against a person in the United States

**must respond using the Title IX Sexual Harassment process**



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173



174

175

## Train the Trainer Tip

- ▶ Employees may be uncertain about the interplay between state law and other authority on questions of LGBTQ+ rights
- ▶ OCR has been unambiguous on its position (see C. Lhamon at NSBA COSA 2022)

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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.”

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## 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

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# Two Views

- ▶ The conduct is severe, but protected by the First Amendment
- ▶ The conduct is not severe because it is protected by the First Amendment

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## *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*)]

## What Is Disruptive?

- ▶ Conduct that meets the Title IX tests (severe, pervasive, and objectively offensive) should be punishable 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”

SCENARIO #4

181

Charlie, an eight-year-old fourth-grade transgender female student, is regularly called “he” and “him” by her peers. Peers also call Charlie “trannie” and “she-male,” and “it.” The peers often laugh when using these terms or pronouns with Charlie. The peers and their parents say that their religion does not allow them to recognize a gender identity different from the sex assigned at birth.



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**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

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SCENARIO #4

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

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**Is the speech protected by the First Amendment?**

- Yes, because schools can't discipline students for off-campus speech, even if online, on a student's own time
- Yes, because the speech is not sufficiently severe to be harassment
- Yes, if the conduct has a sufficient "nexus" to the school environment
- No, because the speech is harassment it can be disciplined as long as policy allows it

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## Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038, 2045 (2021)

- ▶ Set forth a new (confusing) test for disciplining off-campus speech
- ▶ Identified several types of off-campus behavior that “may call for school regulation”
- ▶ Includes “severe bullying or harassment targeting particular individuals” and “threats aimed at teachers or other students”



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## When Can We Reach Off Campus Speech?

- ▶ Until we receive more guidance from the courts, we will fall back on same questions courts asked under the “nexus” approach  
**E.g., Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).**
  - “We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct “would foreseeably create a risk of substantial disruption within the school environment,” at least when it was similarly foreseeable that the off-campus expression might also reach campus.”



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

Yes No

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## Education Program or Activity

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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"

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## When Can We Reach Off Campus Speech?

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

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**For non-sex based conduct, my institution responds to off-campus conduct?**

Yes  
No  
Unkown

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## Train the Trainer Tip

- ▶ Do you actually know what other departments are doing when it comes to non-Title IX discipline? Find out before you train.
- ▶ Training on how to handle off-campus conduct and non-Title IX conduct is essential for those implementing discipline outside the Title IX space

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## Train the Trainer Tip

First Amendment law is complicated and always changing; encourage team members to rely on the Title IX Coordinator and legal counsel for help making these calls



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SCENARIO #5

Channing is a transgender student in Mx. Ryan's orchestra class. When directed to use Channing's preferred pronoun, Mx. Ryan objects, saying that it goes against their religion. The school initially offered an accommodation, allowing Mx. Ryan to use all students' last names only in the effort to avoid pronouns and first names.



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SCENARIO #5

195

Channing reports that other kids notice Mx. Ryan's refusal to acknowledge Channing's gender, however. One student asked Channing why Mx. Ryan wouldn't just say their name, and Channing felt compelled to "out" themselves to the student in explanation. Channing feels tension in the class now, feeling everyone knows why Mx. Ryan only uses last names in this particular class. When the District demands that Mx. Ryan use Channing's preferred name and pronouns, Mx. Ryan refuses.



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### Can the school terminate Ms. Ryan's employment?

No, because the conduct is protected by First Amendment free speech principles

No, because the conduct is protected as an expression of Mx. Ryan's religion

No, because the conduct is not severe

Yes, after going through the Title IX process

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# K-12 Classroom Speech

## *In the classroom...*

- ▶ There is a young and captive audience in the classroom
- ▶ Schools have the right to control curriculum
- ▶ The role of the educator is to convey the curriculum
- ▶ Accordingly, schools can impose **viewpoint neutral** limits on **personal opinions** and **discussions on issues not related to the curriculum** as long as they are **not arbitrary**



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# *Kluge v. Brownsburg*

“When you work in a public school, you sign up to follow the law and the policies/practices of that organization and that might mean following practices that are different than your beliefs.”

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



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## *Kluge v. Brownsburg*

Takeaways from this and other cases:

- ▶ Attempt to accommodate religious requests from employees
- ▶ If conduct rises to the level of SPOO, 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

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SCENARIO #5.5

After Channing's school begins to require teachers to use preferred pronouns, Mx. Ryan speaks out at a Board meeting.

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SCENARIO #5.5



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### Can the school terminate Ms. Ryan's employment?

- No, because the conduct is protected by First Amendment free speech principles
- No, because the conduct is protected as an expression of Ms. Ryan's religion
- No, because the conduct is not severe
- Yes, after going through the Title IX sexual harassment process

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# Outside the Classroom

- ▶ Speech by a public employee speaking as a private citizen on a matter of public concern is protected
- ▶ Even protected speech may be limited if the employer's interest in promoting efficiency of its public services outweighs the employee's free speech interests (balancing)

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

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## *What About Meriwether?*

### **Meriwether v. Hartop, 992 F.3d 492 (6<sup>th</sup> Cir 2021)**

- ▶ Even in the higher ed context, if there is a showing that misgendering has created a hostile environment that showing would likely overcome a faculty member's refusal to use preferred pronouns
- ▶ In the K-12 context, schools have even more leeway to require use of preferred pronouns for both students and employees, particularly if an opportunity for religious or First Amendment objections are allowed



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## **Train the Trainer Tip**

- ▶ If religious or First Amendment justifications are provided, a progressive and interactive process is best practice
- ▶ Particularly where individual complaints are involved, care should be taken to determine if misgendering has created a hostile environment and, if so, respond
- ▶ The state law landscape is more varied; make sure you are aware of your state law



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## Train the Trainer Tip

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

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**Signing  
Complaints**

208

**SCENARIO #6**

209

Tommy, a student, reports that another student, Charlie, was in a relationship with Mx. Rowan, who teaches French, and that things got violent. 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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**Should the Title IX Coordinator sign a formal complaint?**

- No, it will be easier to address the conduct through a non-Title IX procedure, so it should be done that way
- No, the Title IX coordinator should respect the autonomy of the complainants and not override their decision
- Yes, the conduct alleged involves an employee using a position of authority to engage in sexual misconduct
- Yes, any time there is a pattern of behavior by the same alleged perpetrator the T9C should sign a formal complaint

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## “Signing” a Formal Complaint

211

Examples of circumstances where it might be warranted:

- ▶ Actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority
- ▶ The institution wishes to investigate allegations in order to determine whether it has probable cause of employee sexual misconduct that affect the recipient’s ESSA obligations
- ▶ A Title IX Coordinator receives multiple reports of sexual harassment against the same respondent.



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## “Signing” a Formal Complaint

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Factors to consider:

- ▶ A pattern of alleged conduct
- ▶ Involvement of violence, weapons, or similar factors
- ▶ Seriousness of alleged conduct
- ▶ The age(s) of the complainant(s)
- ▶ Other complaints against the same respondent



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

Because they did not sign the formal complaint they are treated as witnesses

Because they did not sign the formal complaint the T9C should give them the option to have the rights of complainants in the process

Because the T9C signed the formal complaint, they must be treated as complainants

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# Complainant's Role

- ▶ The complainant is *always* the alleged victim
- ▶ The complainant (and parents/guardians of a minor complainant) *always* must be afforded the rights granted to complainants in the Title IX rules

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SCENARIO #7

215

A staff member comes to you to report an interaction they saw outside the building that was concerning. One student, Roshan, appeared to force another student, Cody, into a French kiss. Cody was squirming and eventually pulled away and ran off.



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SCENARIO #7

216

When you talk to Cody, Cody said that the incident happened. Cody and Roshan had been “hanging out” a lot lately and it was clear Roshan had a crush on Cody. During the incident in question, Roshan and Cody were talking and Cody said they didn’t like Roshan “like that.” Roshan said “I can tell you do, come on” and pushed Cody back and moved in for a kiss.



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**SCENARIO #7**

217

Cody confirmed pushing Roshan off and running away. Cody said the two had not talked since and that this was the first time something like this happened. Cody adamantly does not want an investigation or even to be identified to Roshan as having made a report. Cody said the incident has had a horrible effect on them, leading to missed classes, inability to sleep at night, and a general fear of being physically close to others.

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**Should the Title IX Coordinator Sign a Formal Complaint?**

- No, because the conduct is not Title IX "sexual harassment"
- No, because Cody does not want to sign a complaint
- Yes, because of the horrible effect on Cody
- Yes, because the conduct is so serious

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

- Nothing--without a formal complaint, the educational institution cannot respond
- Offer Cody supportive measures but cannot impose disciplinary or punitive consequences on the respondent
- Offer Cody supportive measures and then send the matter to your non-sexual harassment process

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SCENARIO #8

220

Coach Ramsey reports a concern that members of their sports team may be engaging in hazing, including using foreign objects to penetrate students' anuses over the clothing. Ramsey denies ever having heard about the conduct before, but says a student reported it earlier in the week and that's the reason for the report now. Ramsey does not know who any specific students are who are involved; the reporting student said they were not.

  
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SCENARIO #8

221

You contact the reporting student, Tanner, and Tanner says that students have been engaged in this conduct for years. Tanner identifies one student who has been the target this year, Carmen. You talk to Carmen, and Carmen reports that the conduct occurred at school after practice one time.



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SCENARIO #8

222

Tanner does not know who the alleged perpetrators are. Carmen does know but refuses to identify the individuals involved. Carmen also refuses to sign a formal complaint. Carmen is doing great in school, is a star on the team, and reports no effects whatsoever from the incident.



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## What should the Title IX Coordinator do next?

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

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## Who are the parties to the complaint if the T9C signs the formal complaint?

- No complainant or respondent
- No complainant, Coach Ramsey is the respondent
- Carmen is the complainant, no respondent
- Carmen is the complainant, Coach Ramsey is the respondent

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

**What happens next?**

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

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## **Train the Trainer Tip**

- ▶ Signing formal complaints will be less common in cases involving student-on-student conduct
- ▶ When employees are involved in the allegation, signing formal complaints will be more common
- ▶ The decision—either way—must be reasonable in light of the known circumstances

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SCENARIO #6 (Again)

228

Tommy, a student, reports that another student, Charlie, was in a relationship with Mx. Rowan, who teaches French, and that things got violent. 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 #6

229

The Title IX Coordinator signs formal complaints in the cases involving Charlie, Casey, and Mx. Rowan (dating violence, hostile environment sexual harassment). Charlie and Casey agree to participate in the process. Neither knows the other exists, however. The incidents happened years apart.



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### Should the Complaints be Consolidated?

Yes, because the respondent is the same in each case

Yes, because they involve the same type of behavior

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

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

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# Consolidation

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



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# Consolidation

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



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SCENARIO #9

233

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.

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SCENARIO #9

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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.

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SCENARIO #9

235

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.



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### Who has a valid Title IX formal complaint?

Chris; Rory's complaint is just to deflect attention from Chris's complaint and should not be allowed

Rory; Chris's complaint is clearly a facade 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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# Cross-Complaints

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



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## 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



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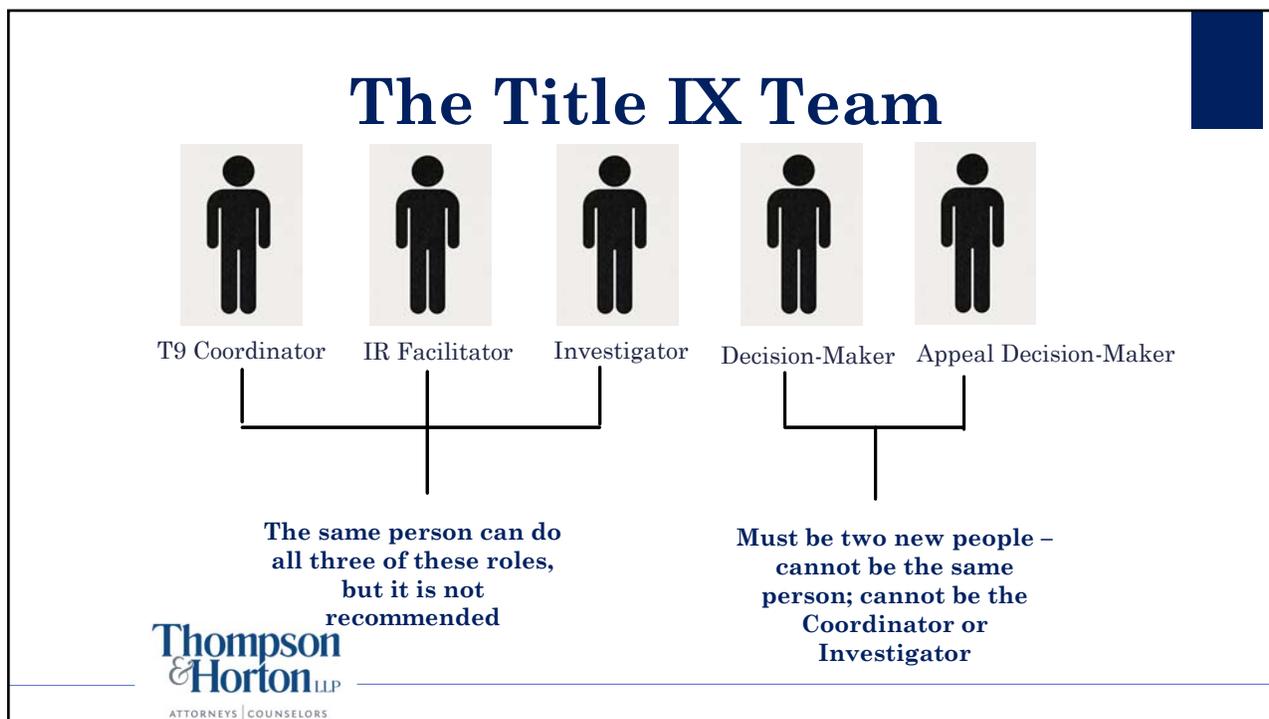
## Train the Trainer Tip

Best Practices – Have a building contact dedicated to Title IX

- ▶ Regarding what is sexual harassment, how to report sexual harassment, and rights and responsibilities under Title IX
  - Train staff and students each year
  - Inform students by October 1 of each school year
  - Post materials (flyers) in the building
- ▶ Communicate with parents about the Title IX process
- ▶ Post the building contact's information on the school's webpage



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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) and offer right to file a formal complaint
- **Step 2:** Consider if emergency removal/administrative leave warranted

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

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

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

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



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## So, you received a report and notified the District Coordinator... Now what *can* you do?

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- ▶ Address immediate threats to health or safety (consider emergency removal)
- ▶ Consider contacting the police or child protective services
- ▶ Consider contacting parents of the parties
- ▶ Consider helping the Complainant get medical help
- ▶ Consider contacting special education/disability services



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So, you received a report and notified the District Coordinator... Now what *can* you do?

- ▶ Investigate anything (yet)
- ▶ Discipline anyone (yet)
- ▶ Tell the Respondent or their parents details about the complaint that could identify the Complainant (unless a formal complaint has been filed or the Complainant has agreed)



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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” is necessary where it is not clear that the complaint falls under Title IX
- ▶ The goal of intake is to collect more information about the allegations to allow evaluation of the complaint

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# What is Intake?

- ▶ An opportunity to clarify the allegations in a report or complaint of sexual harassment
- ▶ Necessary to evaluate the complaint to determine if Title IX applies



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# Let's say it again...

- ▶ Intake is **NOT** an investigatory interview.
- ▶ It is **NOT** the time to ask for evidence or witnesses or to look for other information that might help prove or disprove the complaint
- ▶ Instead, this is an opportunity to make sure you know all the conduct that the complainant and their parents/guardians **claim occurred** so that the school can evaluate whether the conduct should be addressed under Title IX



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## 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!)

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## Intake Paperwork

- ▶ Recommended to complete an intake form; definitely take notes (Guidebook forms available)
- ▶ Document any steps following the interview (recommend follow up communication to the Complainant and their parents/guardians)
- ▶ Share this documentation with the Title IX Coordinator

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- **Step 8:** Appeal

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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 confidentiality (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

## 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



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# Supportive Measures

- ▶ The School Coordinator may implement Supportive Measures (with oversight from the District Coordinators)
  - For an employee party, coordinate with HR
- ▶ 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



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# IDEA and Section 504 Implications

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

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## 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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## During the Supportive Measures meeting...

Also provide the following:

- ▶ Notice of the right to file a police complaint and Title IX complaint at the same time
- ▶ Translation and interpreter services, if needed
- ▶ Assistance with understanding and/or initiating the formal investigation process, including with filling out a Formal Complaint or other paperwork, if needed
- ▶ Other accommodations, if needed and reasonably appropriate
- ▶ Guidebook checklist covers all issues to be discussed at the meeting

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## Overview: T9 SH Grievance Process

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## Step #2: Emergency Removal

- ▶ After a report (no need for Formal Complaint)
- ▶ The Title IX Coordinator or designee should consider whether the reported conduct warrants removing an alleged perpetrator (respondent) from a class, an activity, or school or work generally
- ▶ Can only be done if the terms of emergency removal are met



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## Emergency Removal

**WHO:** A student, employee, or any other Respondent

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

**WHEN:** 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



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# 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



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# 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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**Robin allegedly raped Carson at school. Can Robin be removed on an emergency basis?**

---

Yes No

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**Robin allegedly subjected Carson to severe, cruel, demeaning, pervasive, objectively offensive verbal harassment based on sex. Can Robin be removed on an emergency basis?**

---

Yes No

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**Robin allegedly fondled Carson at school. Can Robin be removed on an emergency basis?**

---

Yes No

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**Robin threatened to sexually assault Carson on multiple occasions. The two dispute whether Robin was being serious. Can Robin be removed on an emergency basis?**

---

Yes No

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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 -**  
Always support,  
support, support

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

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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



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## Step #3: Notice of Allegations

Upon receipt of a formal complaint a school must provide each known party written notice of:

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



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## All the Details

- ▶ The Notice of Allegations (NOA) must include:
  - The identities of the parties involved in the incident, if known
  - The conduct allegedly constituting sexual harassment
  - The date and location of the alleged incident, if known
- ▶ See the T&H Guidebook – Documents 19 & 20

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



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# 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

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### Responsibilities

- ▶ If necessary, review a Formal Complaint to determine if dismissal is warranted
  - Usually only required if the initial report comes in the form of a Formal Complaint
- ▶ Continue to consider whether dismissal is appropriate throughout the lifespan of the grievance process



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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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# 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 #6 (Again)

Tommy, a student, reports that another student, Charlie, was in a relationship with Mx. Rowan, who teaches French, and that things got violent. 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 #6

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The Title IX Coordinator signs formal complaints in the cases involving Charlie, Casey, and Mx. Rowan (dating violence, hostile environment sexual harassment). 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 #6

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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

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# IR Limitations

- ▶ Only once formal complaint is filed (explain permissive dismissal to Complainant—see 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 even if agreed to 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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## My institution is using informal resolution in Title IX sexual harassment cases...

- Never
- In all possible cases (i.e., for all cases other than those involving employee-on-student conduct)
- In all possible cases except for those involving sexual assault
- Unknown

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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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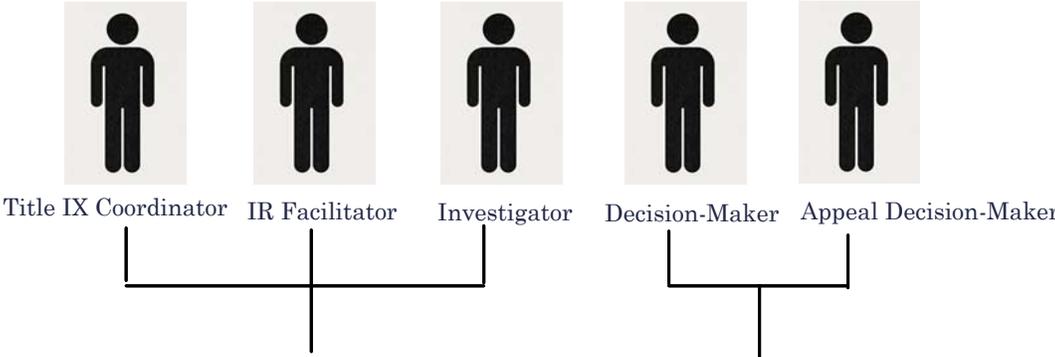
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## The Title IX Team



**The same person can do all three of these roles, but it is not recommended**

**Must be two new people – cannot be the same person; cannot be the Coordinator or Investigator**



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# Investigation Rules



This Photo

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- 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
- ▶ 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



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# 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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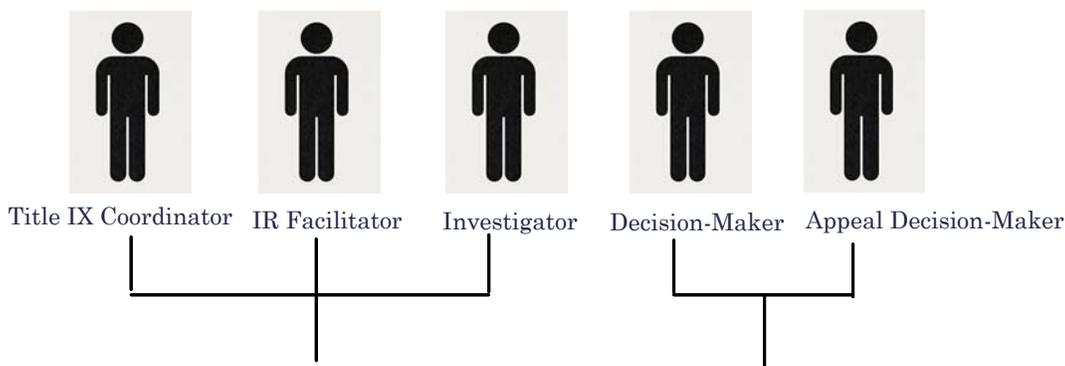
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## Step #7: Decision-Making Process

- ▶ 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 standing, issues a written determination with an independent determination of responsibility or non-responsibility for a policy violation and recommends remedies



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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



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## Written Decision Requirements

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- ▶ Allegations
- ▶ Policy allegedly violated
- ▶ Procedural steps taken, from receipt of formal complaint through determination
- ▶ Findings of fact
- ▶ Application of facts to policy



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## Written Decision Requirements

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- ▶ 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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# Train the Trainer Tip

## Decision-making disasters

- ▶ Not explaining the process to the parties and advisors beforehand
  - Party, (Parent) and Advisor Expectations
- ▶ Not making clear what “follow-up” means (K-12)
- ▶ Not ensuring procedures match your intended goals
- ▶ Not notifying the parties of the outcome



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- **Step 1:** Hold a “supportive measures meeting” with the Complainant (alleged victim) and offer right to file a formal complaint
- **Step 2:** Consider if emergency removal/administrative leave warranted

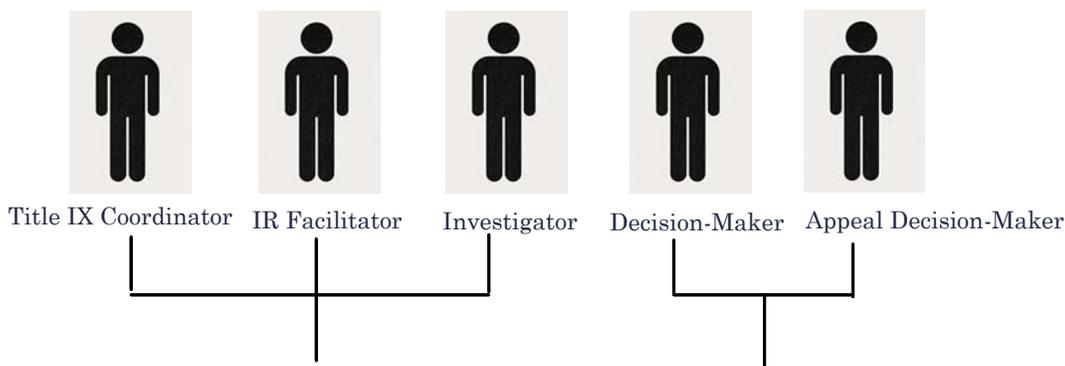
Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee

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

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



# The Title IX Team



The same person can do all three of these roles, but it is not recommended

Must be two new people – cannot be the same person; cannot be the Coordinator or Investigator



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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



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## Appellate Decision-Maker

- ▶ Provides each party notice of the appellate process and the opportunity to respond to the appeal in writing
- ▶ 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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# Appeal

- ▶ Upon receipt of appeal, should be provided to both parties
- ▶ Both parties should be given equal opportunity to respond to the appeal
- ▶ Appellate decision-maker issues a written determination on the appeal



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# Appellate Disasters

- ▶ Not limiting the initial appeal; makes equal opportunity to respond a challenge
  - See the T&H Guidebook appeal form
- ▶ Conducting a “de novo” review
- ▶ Not providing a **thorough** rationale



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## Train the Trainer Tip

For all decisionmakers:

- ▶ The best training is often “hand holding” through the process
- ▶ Trainings with engaging hypotheticals and writing exercises are also helpful

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**Students with  
Disabilities**

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SCENARIO #10

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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 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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## 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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## Train the Trainer Tip

- ▶ 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



SCENARIO #11

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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 #11

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Scenario #1:

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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**SCENARIO #11**

**Scenario #2:**

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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SCENARIO #12

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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 #12

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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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## 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

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

- ▶ A school district “failed to properly investigate” allegations of continued sexual harassment and violations of a safety plan
- ▶ Teacher observed or were told about the continued conduct
- ▶ Telling a complainant that a safety plan will be implemented does not automatically absolve the educational institution of liability under Title IX. Title IX still requires that an educational institution not unreasonably respond to known student-on-student harassment
- ▶ The District did not actually enact the alleged safety plan, thereby allowing the harassment to continue the rest of the semester. That it allegedly did not follow its own safety plan—after harassment continued for weeks—is enough to allege deliberate indifference, and enough to allege that the District's response was clearly unreasonable

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

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True False

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**My institution uses its Title IX sexual harassment grievance process for employee-on-employee conduct.**

True

False

Unsure

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## “Any Person”

- ▶ Rules and preamble say they apply to any person
- ▶ Some courts have held that Title VII preempts Title IX *in suits for money damages*
  - Analysis not based on whether the conduct was in an education program or activity
- ▶ OCR has dismissed complaints in some cases under 2020 rules, but has not provided any clarity



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## Preemption

“To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.”

34 CFR 106.6(h)



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## RECORDS

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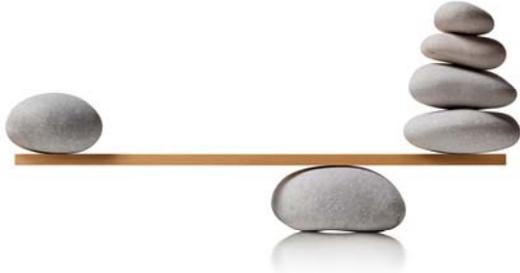
## Recordkeeping

- ▶ 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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## SERVING IMPARTIALLY

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## Serving Impartially

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



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# Impartial Approach

- ▶ The preamble to the 2020 Title IX rules call for schools to use an objective, “common sense approach” to evaluating whether bias, conflict of interest, or prejudice exists
- ▶ Remember that “objective” means whether a reasonable person would believe partiality exists
- ▶ The preamble says not to apply “generalizations” that might unreasonably conclude partiality exists



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**The investigator is a basketball coach and Robin is the star of the team, key to winning State; can they be impartial?**

Yes, coaching a student does not create a conflict of interest.

Yes, as long as the investigator is not responsible for deciding playing time.

No, the relationship creates a personal conflict of interest for the coach.

No, the relationship creates an impression of a personal conflict of interest for the coach.

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**The investigator has a disciplinary role in the school and has imposed discipline on Robin in the past; can they be impartial?**

Yes, imposing discipline on a student does not create an impermissible risk of bias.

No, but only if the discipline was for prior sexual misconduct.

No, imposing discipline on a student creates an impermissible risk of bias.

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**The investigator attends the same religious institution as Robin; can they be impartial?**

Yes, attending the same religious institution with someone does not create a conflict of interest.

Yes, as long as there is no close personal or church-business relationship between the investigator and Robin or their family.

No, attending the same religious institution with someone creates a conflict of interest.

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**The investigator has raised money and marched for victims-rights advocacy groups; can they be impartial?**

- Yes, prior advocacy work can never render someone partial. **A**
- Yes, as long as the investigator has been trained. **B**
- Yes, as long as the investigator has not made statements suggesting they are incapable of being impartial. **C**
- No, prior advocacy work renders someone biased against those for whom they advocate. **D**

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**The investigator believes traumatic stress affects brain function and, in turn, memory and behavior; can they be impartial?**

- Yes, belief in "trauma informed practices" does not render someone impartial.
- Yes, if the investigator does not rely on apparent trauma as evidence.
- No if the investigator uses trauma-informed investigative techniques.
- No, belief in "trauma informed practices" renders someone biased toward victims.

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## Impartiality Do's and Don'ts

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



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## QUESTIONS?



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