

# Title IX Compliance Training Certification

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## Train the Trainer

### Oregon School Personnel Administrators Fall 2023 Conference

# Thompson & Horton

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Join the K-12 Title IX Leadership Alliance

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## AGENDA

- ✓ Sexual Harassment Under Title IX
- ✓ The Title IX Sexual Harassment Grievance Process
- ✓ Serving Impartially



THIS IS OUR AGENDA

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# OSPA Title IX Training Fall 2023

<b>Today</b> <b>8-9 a.m.</b> Compliance Certification Part 1 <b>10:15 a.m.-Noon</b> Compliance Certification Part 2 <b>2:30-3:45 p.m.</b> Investigation Training <b>3:45-5 p.m.</b> Coordinator Training	<b>Tomorrow</b> <b>9:30-11:30 a.m.</b> Decision-Maker Training <b>Noon-1:30 p.m.</b> Informal Resolution Training
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### Ground Rules

- ✓ Ask questions/share perspective
- ✓ Not legal advice/keep it hypothetical
- ✓ Materials will be available for website posting

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## Polling Access



**Option One**  
Use this QR code

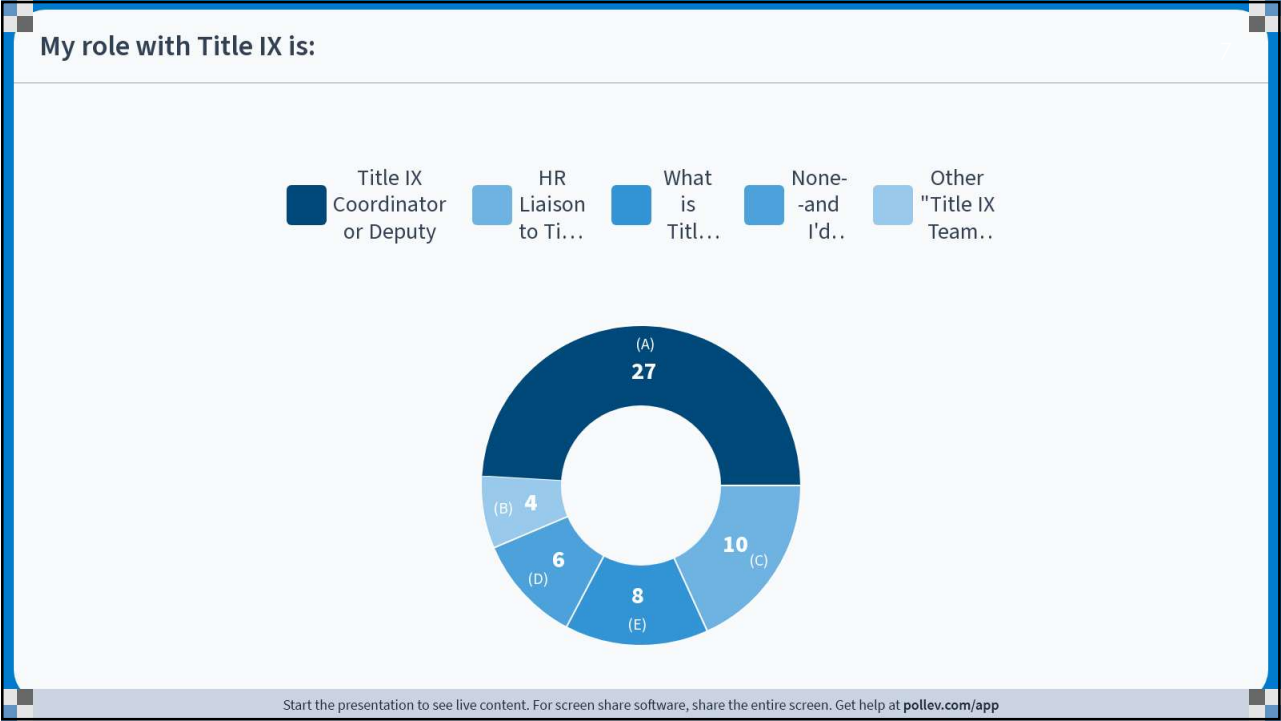
**Option Two**

- ✓ 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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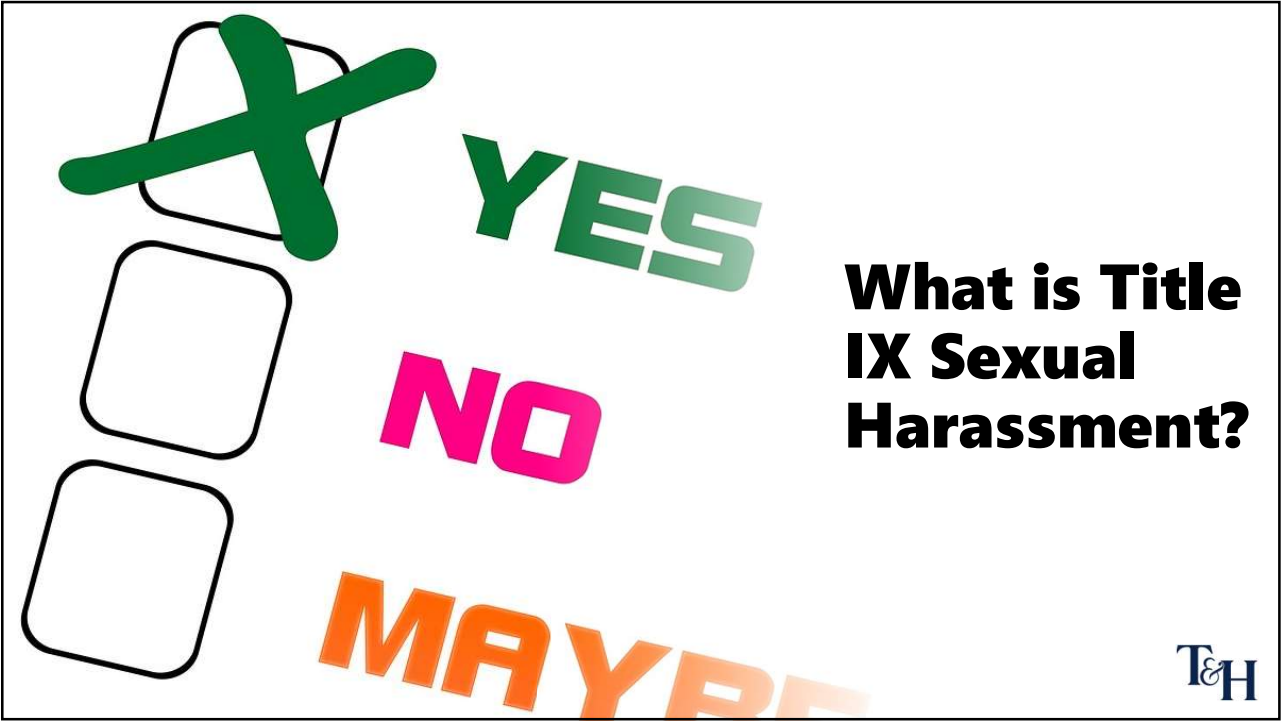


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# Introduction to Title IX Sexual Harassment

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2020  
Title IX  
Rules

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- Issued by the Trump administration’s Office for Civil Rights
- Effective August 14, 2020
- Will be in effect at least until December 2023
- Include significant requirements for handling complaints of sexual harassment under Title IX

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## When Does the T9SH Process Apply?

1

When any district "official with authority" has actual knowledge...

2

of "Title IX Sexual Harassment"...

3

"in an education program or activity" of the district...

4

and "against a person in the United States"...

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## If the T9SH Process Applies...

If any "Official With Authority" (K-12 employee) is aware of any information even suggesting that "Title IX Sexual Harassment" "in an education program or activity" and "against a person in the U.S." is, has been, or might be happening, the school cannot impose punitive or disciplinary consequences on the alleged perpetrator until it has used the Title IX sexual harassment process

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## Two Parts of the Analysis

### What Conduct is Covered?

- ✓ "Title IX Sexual Harassment"\*
  - ❑ "The Big Five"\*
  - ❑ "Title IX Hostile Environment Harassment"\*
- ✓ "In an Educational Program or Activity"
- ✓ "Against a person in the United States"

\* Not regulatory terms

### What Process Applies to Covered Conduct?

- ✓ Supportive Measures/Notice of Process to Complainant
- ✓ Formal Complaint
- ✓ Notice to Parties\*/Supportive Measures to Respondent
- ✓ Informal Resolution\*
- ✓ Investigation\*
- ✓ Hearing\*
- ✓ Decision\*
- ✓ Appeal\*

\* Only if a formal complaint is on file

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## Train the Trainer Tip

- ✓ Perhaps the most essential and underrated training is of **building administrators**
- ✓ Highly recommended to have **Deputy Title IX Coordinators** in each building
- ✓ Subscribe to emails from [www.titleixtips.com](http://www.titleixtips.com) for upcoming free webinar!

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## Part 1: The Title IX “Threshold Questions”

Would the alleged conduct, if substantiated, be:

1. Title IX “Sexual Harassment”
2. In an “educational program or activity” of the educational institution
3. Against a person in the United States?

If the answer to **all of these questions** is yes, the conduct is covered by the Title IX grievance process and the process **must be used** to address the reported behavior

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# Title IX “Sexual Harassment”

## The Title IX “Big Five”

- ✓ Employee Quid Pro Quo
- ✓ Sexual Assault\*
- ✓ Domestic Violence\*
- ✓ Dating Violence\*
- ✓ Stalking\*

\*VAWA/Clery Crimes

## Title IX “Hostile Environment”


- ✓ Unwelcome Conduct
- ✓ Based on Sex
- ✓ That is so severe
- ✓ And pervasive
- ✓ And objectively offensive
- ✓ That it effectively denies equal access to the educational program or activity

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# #1 Employee Quid Pro Quo

- ✓ An employee of the educational institution
- ✓ Conditioning the provision of an aid, benefit, or service of the educational institution
- ✓ On an individual’s participation in unwelcome sexual conduct

The  
“Big 5”



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## #2 Sexual Assault

- ✓ Rape (sexual penetration—anal or vaginal—however slight with any body part or object without consent)
- ✓ Forced sexual acts, including oral sex
- ✓ Fondling (touching of the private body parts of another person without consent and for the purpose of sexual gratification)
- ✓ Incest
- ✓ Statutory Rape

The  
“Big 5”



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## #3 Domestic Violence

- ✓ Felony or misdemeanor crimes of violence
- ✓ Committed by:
  - The victim's current or former spouse or intimate partner
  - A person with whom the victim shares a child
  - A person cohabitating with or who has cohabitated with the victim of a spouse or intimate partner
  - A person similarly situated to a spouse of the victim under state domestic or family violence laws
  - Any other person against an adult or youth victim who is protected from that person's acts under state domestic or family violence laws

The  
“Big 5”



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## **#4 Dating Violence**

- ✓ Violence or threat of violence
- ✓ Committed by a person who is or has been in a social relationship of a romantic or intimate nature
- ✓ Where the existence of such a relationship will be determined by considering the length of the relationship, the type of the relationship, and the frequency of interactions



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## **#5 Stalking**

- ✓ A course of conduct
- ✓ Directed at a specific person
- ✓ That would cause a reasonable person to feel fear for their safety or the safety of another or suffer substantial emotional distress



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## Examples of Quid Pro Quo

- ✓ "Sleep with me and you will receive an A"
- ✓ "Your low grade had nothing to do with you not wanting to go out with me"
- ✓ "If you don't sleep with me, I won't renew your position"
- ✓ "Go for a drink with me and I'll make sure you get that raise you've been seeking"
- ✓ "Come to my room tonight at this conference so we can talk about that recommendation you asked me for. I feel like I need to get to know you better."



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## Examples of Sexual Assault

- ✓ Forced vaginal or anal penetration with a body part or object
- ✓ Forced oral sex (giving or receiving)
- ✓ Unwelcome touching or groping of the breast, genitalia, or buttocks
- ✓ The use of coercion, threats, force, or intimidation to compel another person to initiate or continue sexual activity against the person's will
- ✓ Sexual activity with a person who is substantially physically or mentally impaired by illness, alcohol, or drugs, or who is physically incapable of communicating, asleep, or unconscious
- ✓ Sexual activity with a person who is unable to consent because of age or ability



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## Examples of Domestic Violence

- ✓ Physical abuse (hitting, choking, punching, biting, shooting, etc.)
- ✓ Harassment (physical or verbal)
- ✓ Threats of physical harm to the victim or others
- ✓ Blackmail
- ✓ Restraining a person against their will (locking in a house or room, taking away keys)
- ✓ Forced sexual activity
- ✓ Stalking
- ✓ Trespassing or property destruction
- ✓ Animal abuse



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## Examples of Dating Violence

- ✓ All examples under domestic violence
- ✓ Intimidation
- ✓ Name calling and put downs
- ✓ Maintaining control over the victim's financial or other resources
- ✓ Threats to commit suicide or homicide if the victim ends the relationship
- ✓ Attempts to isolate the victim from friends or family
- ✓ Encouraging others to engage in such behaviors



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## Examples of Stalking

- ✓ Calling, texting, emailing, or mailing the victim's repeatedly at home or work
- ✓ Repeated, uninvited appearances at the victim's residence or workplace
- ✓ Breaking into the victim's home or vehicle
- ✓ Stealing the victim's belongings
- ✓ Checking the victim's electronic devices or social media accounts
- ✓ Reading a person's mail or other private writings or communications



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## Hostile Environment Sexual Harassment

- ✓ Unwelcome conduct
- ✓ Based on sex
- ✓ That is so severe
- ✓ And pervasive
- ✓ And objectively offensive
- ✓ That it effectively denies equal access to the educational program or activity of the educational institution (effective denial is a **very** low bar under OCR standards)

A chalkboard with the words 'HOSTILE ENVIRONMENT' written in white chalk. The chalkboard is on a wooden surface, and there are some papers and a pen nearby.

HOSTILE  
ENVIRONMENT

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**Unwelcome Conduct**

- ✓ The complainant did not welcome or invite the conduct and found the conduct to be objectionable or offensive
- ✓ Unwelcomeness is determined from the perspective of the complainant (subjective)
- ✓ But whether conduct is deemed unwelcome also depends on the context and totality of the circumstances as interpreted by a reasonable person (objective); mere acquiescence in conduct or the absence of an objection does not mean the conduct is unwelcome, but if a party responds positively to conduct without indicating in words or actions their objection, the evidence may not support a finding of unwelcomeness




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**“Based on Sex”**

- ✓ “Sexual”
- ✓ Otherwise “sex based” (e.g., private body parts involved)
- ✓ Based on perceived or actual failure to comply with gender based norms
- ✓ Based on perceived or actual sexual orientation or gender identity





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# Severe, Pervasive, and Objectively Offensive



## Severe

- More than just juvenile, crass, even sex-based behavior
- OCR standard is not as high as the court standard for lawsuits of money damages



## Pervasive

- Typically, repeated conduct (more than one time)
- Other facts or circumstances can make a single instance widespread (e.g., technology, observers, maybe even severity?)



## Objectively Offensive

- Offensive to a reasonable person, not to the person who is the alleged victim of the conduct

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# The Constellation of Circumstances, Expectations, and Relationships

- Impact on CP
- Type, Frequency, Duration
- Ages, Roles, Previous Interactions, Other Factors re Parties
- Location, Context, Control Over Respondent
- Other Sex-Based Harassment in the Ed Program or Activity

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## Education Program or Activity

Title IX only covers conduct that occurs in the education program or activity of the educational institution, which means:

- ✓ All the "operations" of a school district
- ✓ "Locations, events, or circumstances over which the educational institution exercised substantial control over both the respondent and the context in which the sexual harassment occurred"

***CAN INCLUDE CONDUCT ON OR OFF CAMPUS***



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## Factors to Consider

- ✓ No single factor is determinative to conclude whether a [school district] exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of "all of the operations of" a school
- ✓ Can ask, "Did the school district fund, promote, or sponsor the event or circumstance?"
- ✓ The relationship of the complainant (alleged victim) or respondent (alleged perpetrator) to the school district is not relevant to "program or activity"\*

\*Such information may be relevant to the right to file a complaint and to dismissal



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## Both In and Out?

What if conduct occurs both in and outside of the education program or activity?

- ✓ "Off campus" does not automatically mean that the incident occurred outside the [school district]'s education program or activity
- ✓ DOE says schools are obliged to think through the scope of each [school district]'s own education program or activity
- ✓ Schools MUST investigate what occurred "in" the program or activity, even if the conduct relates to something that occurred "outside of" the program or activity

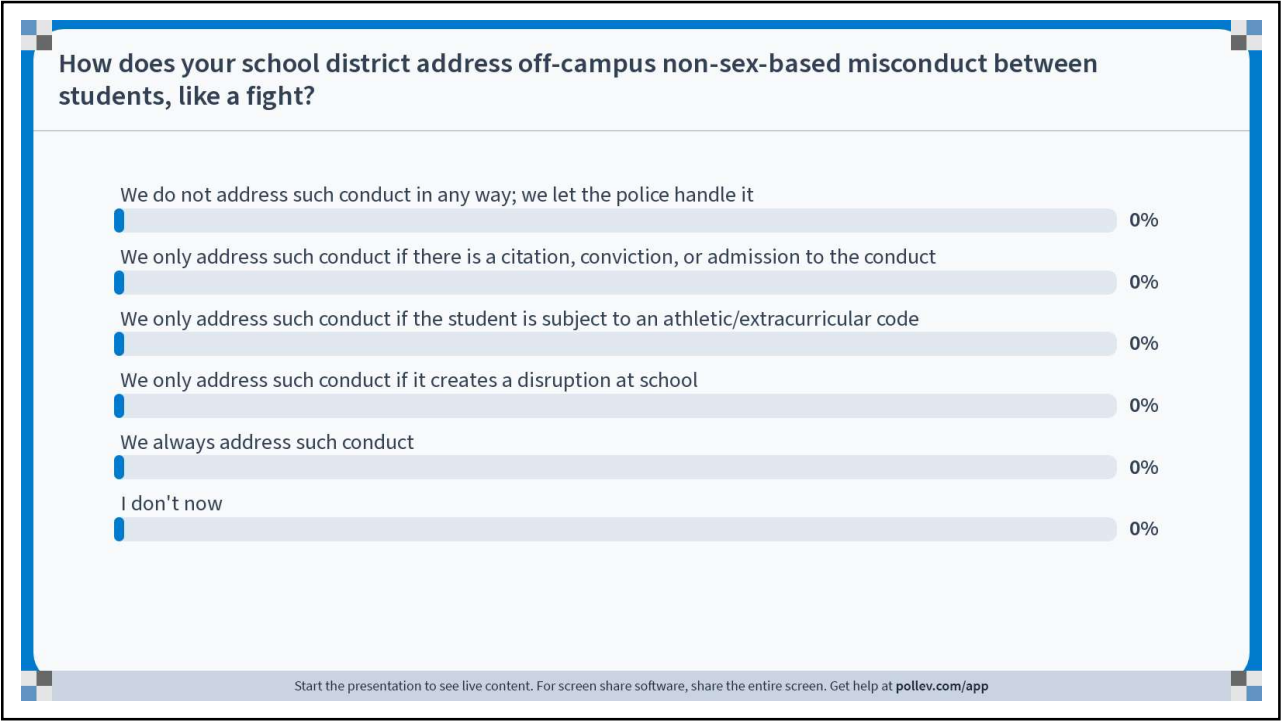


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## What's Not Debatable

"If a sexual assault occurs against a student outside of an education program or activity, and the student later experiences Title IX sexual harassment in an education program or activity, then a recipient with actual knowledge of such sexual harassment in the recipient's education program or activity must respond pursuant to §106.44(a)." (DOE, Preamble to 2020 Regs)

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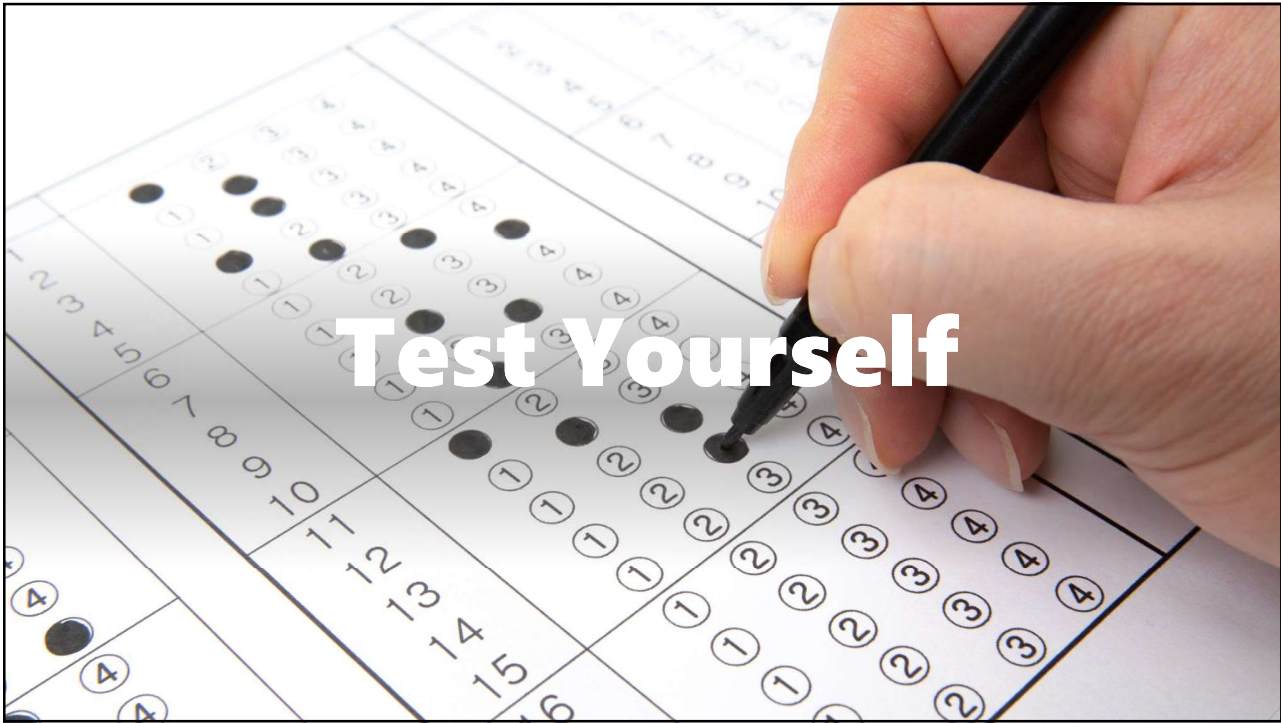
A man and a woman are in a meeting room. The man is pointing at a whiteboard covered in pink sticky notes. The woman is looking at the board. There are blue chairs and a wooden table in the foreground.

## Train the Trainer Tip

- ✓ Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators must be trained on **"the scope of the [school district]'s education program or activity"**
- ✓ Consider how you treat **non-sex-based conduct**
- ✓ Real world **examples** are critical

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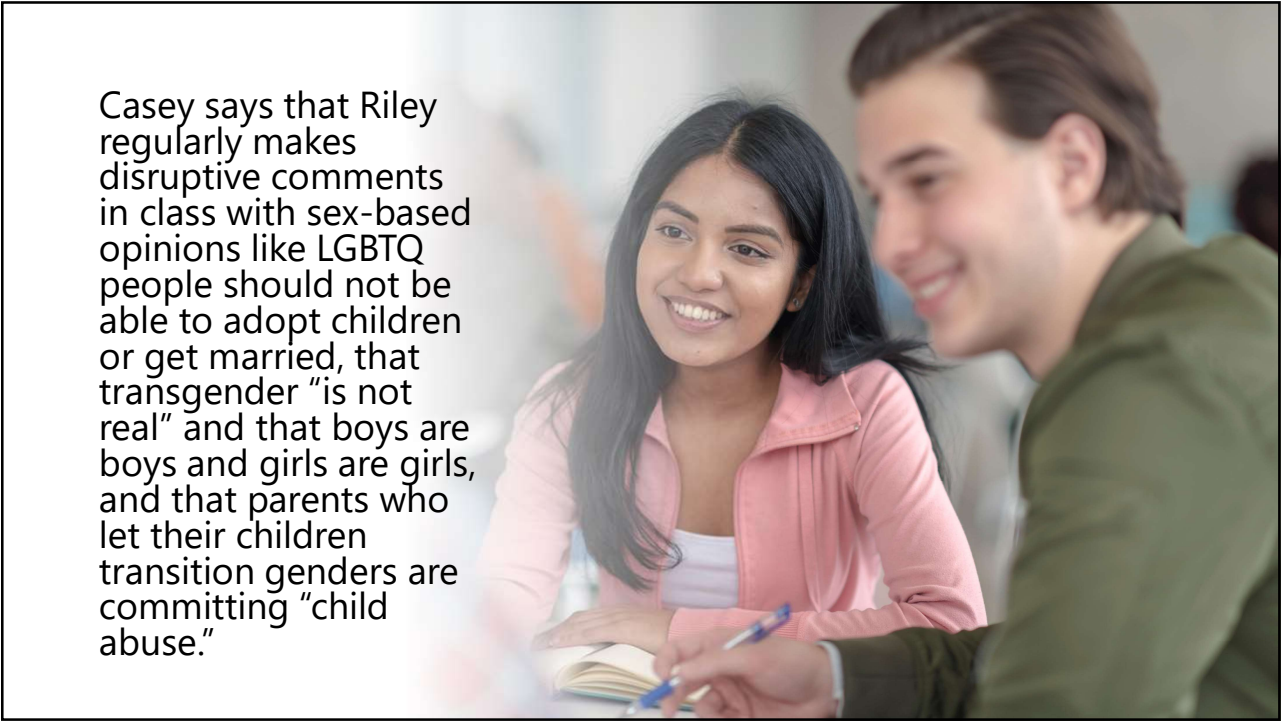
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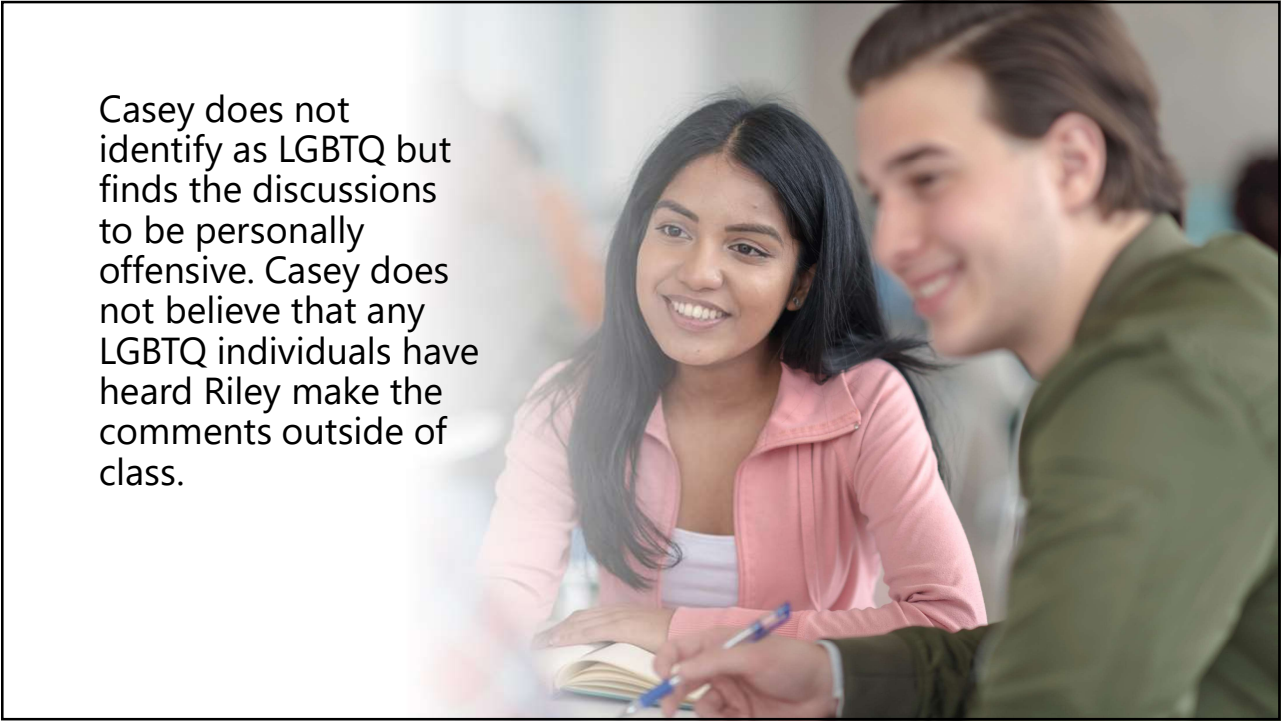
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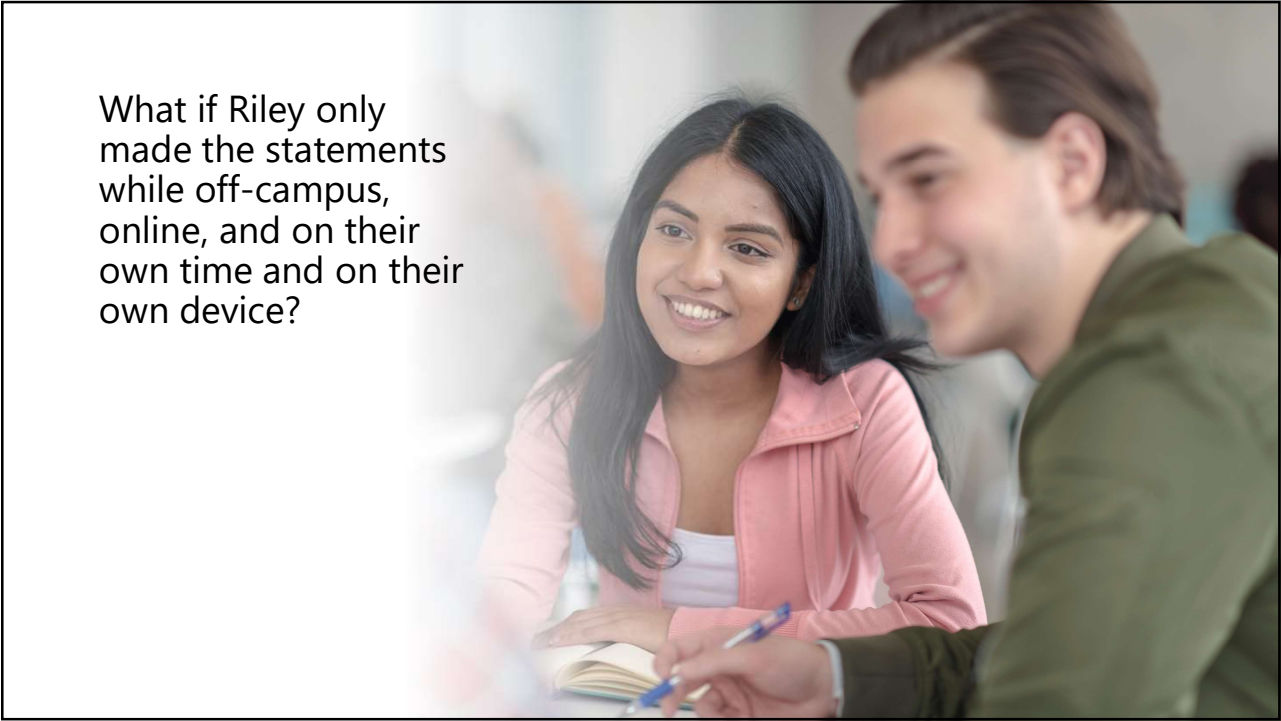


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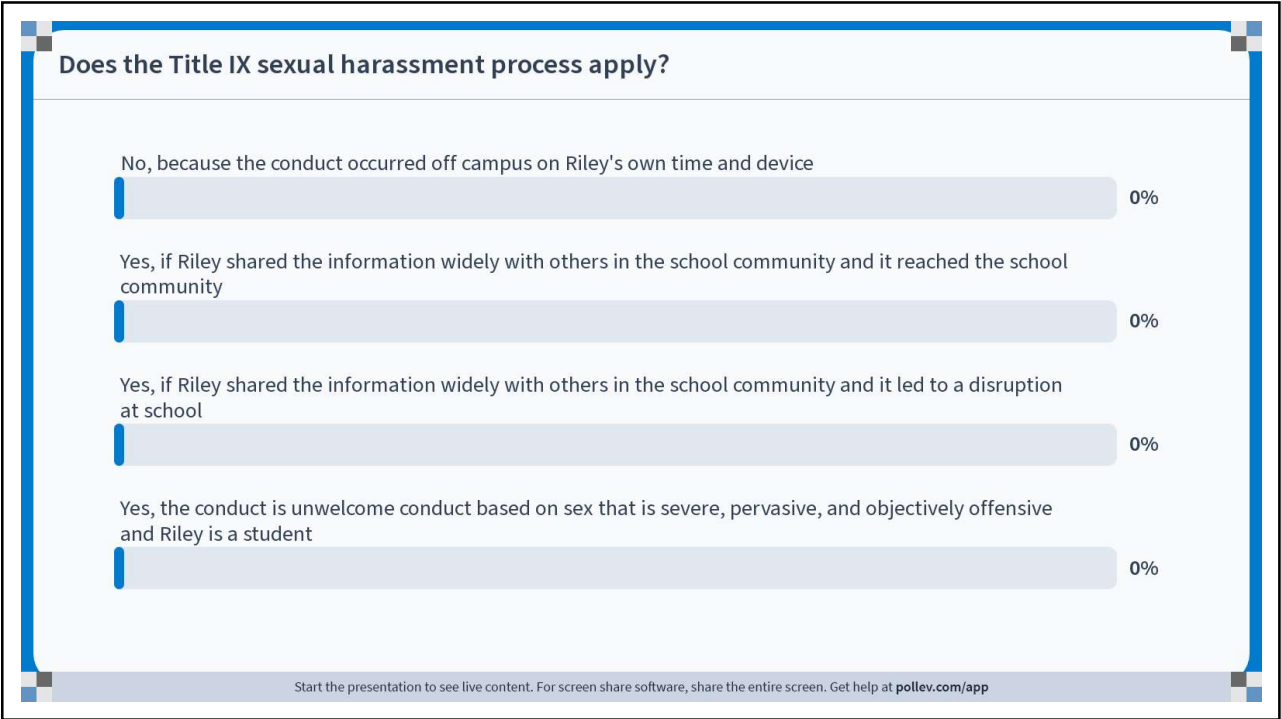


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Riley also refuses at school to use preferred pronouns with a student, Charlie, who is transgender. Casey says Riley does this both inside and outside of class. Riley says their religion does not allow them to recognize transgender individuals.

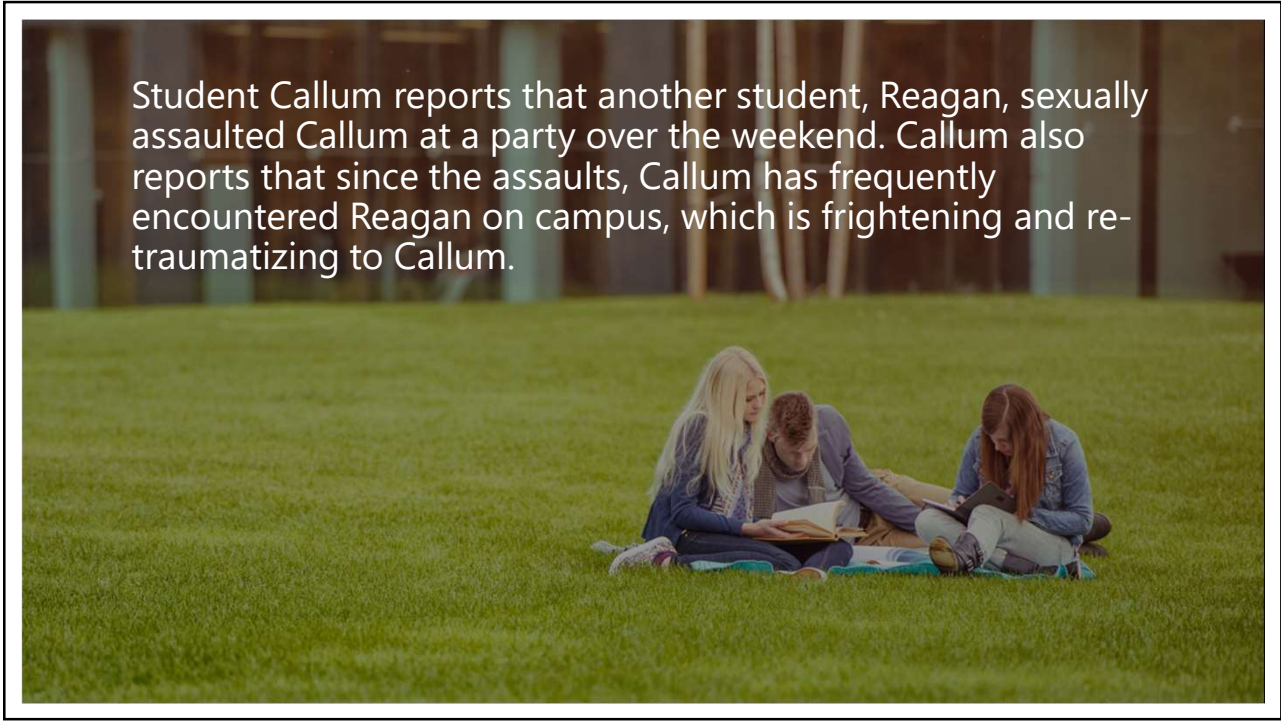


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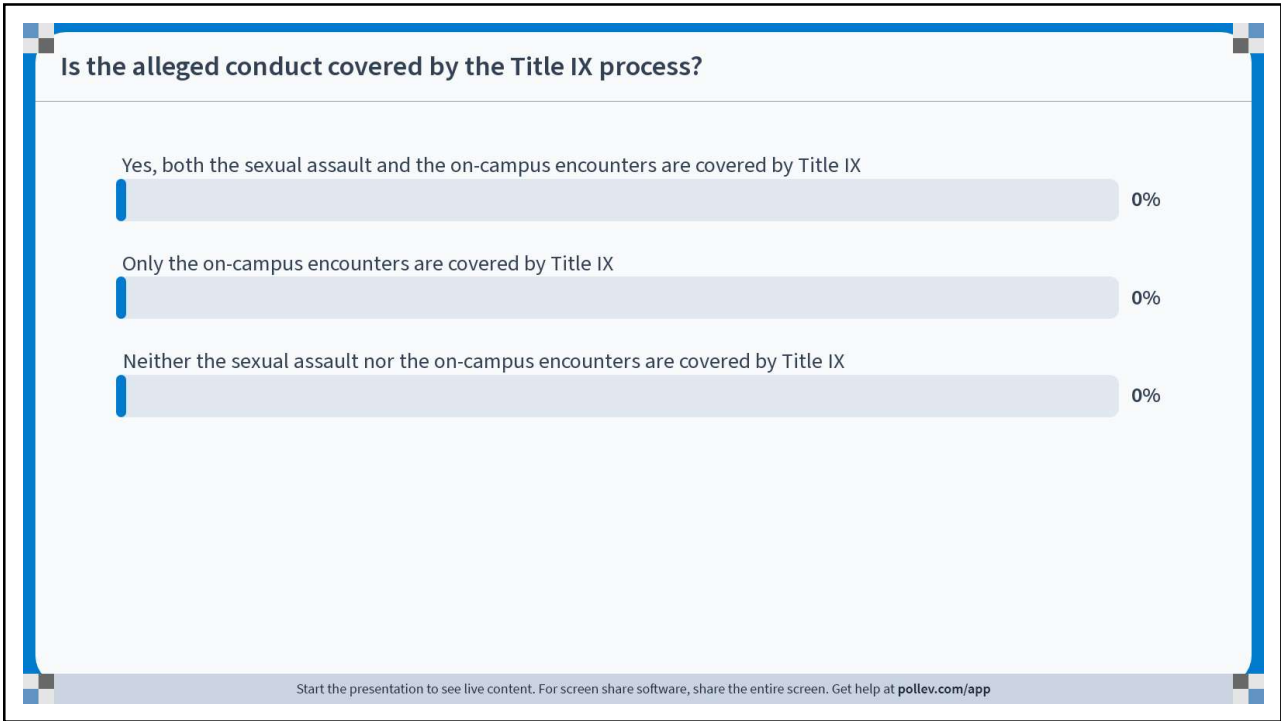


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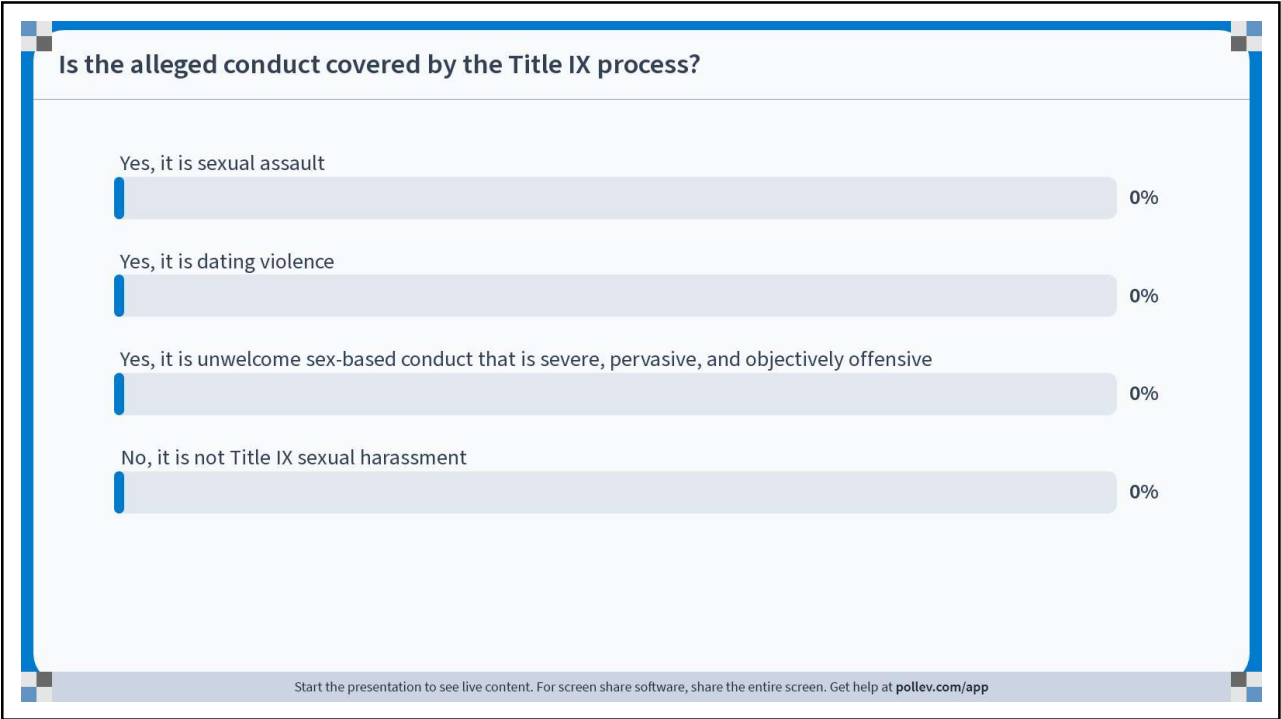
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Student Chandler reports that another student, Remi, forcibly kissed Chandler on campus on one occasion.



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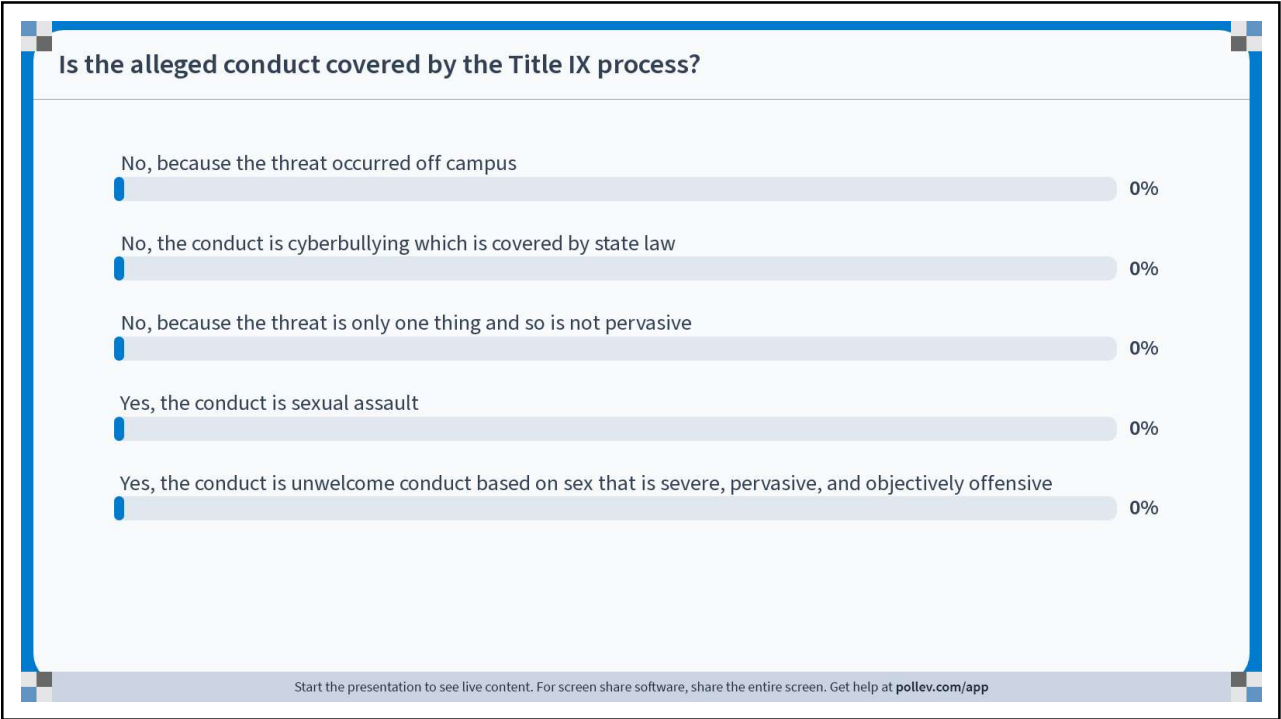


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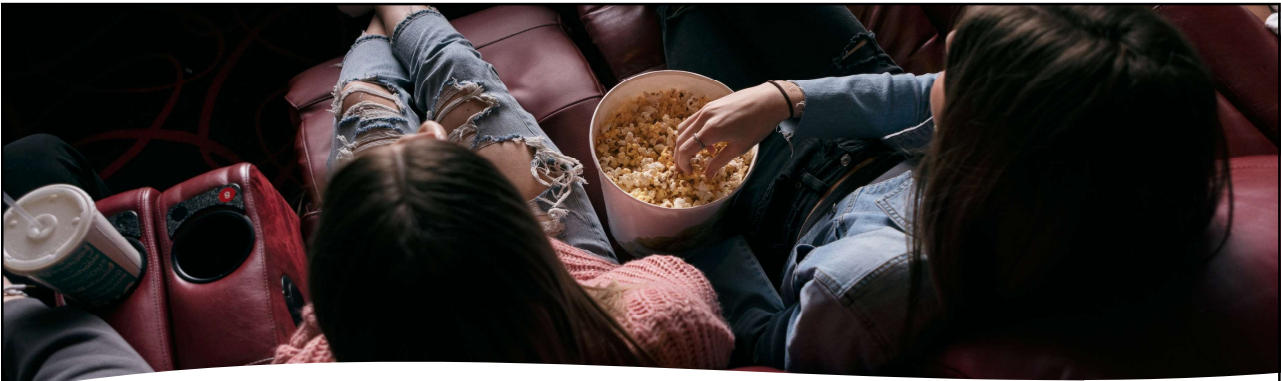


Charlie reports to the Title IX office that their significant other, Rory, threatened to share a video on social media with their shared friends at the school unless Charlie agreed to engage in sexual activity to which Charlie does not wish to consent. The video is of Charlie and Rory engaging in consensual sexual activity and was made with Charlie's knowledge and consent. When asked, Charlie clarified that Rory made the threat one time while the two were at Rory's house on the weekend. Charlie did not agree, Rory has not sent the video, but this kind of thing would no doubt go viral at school.

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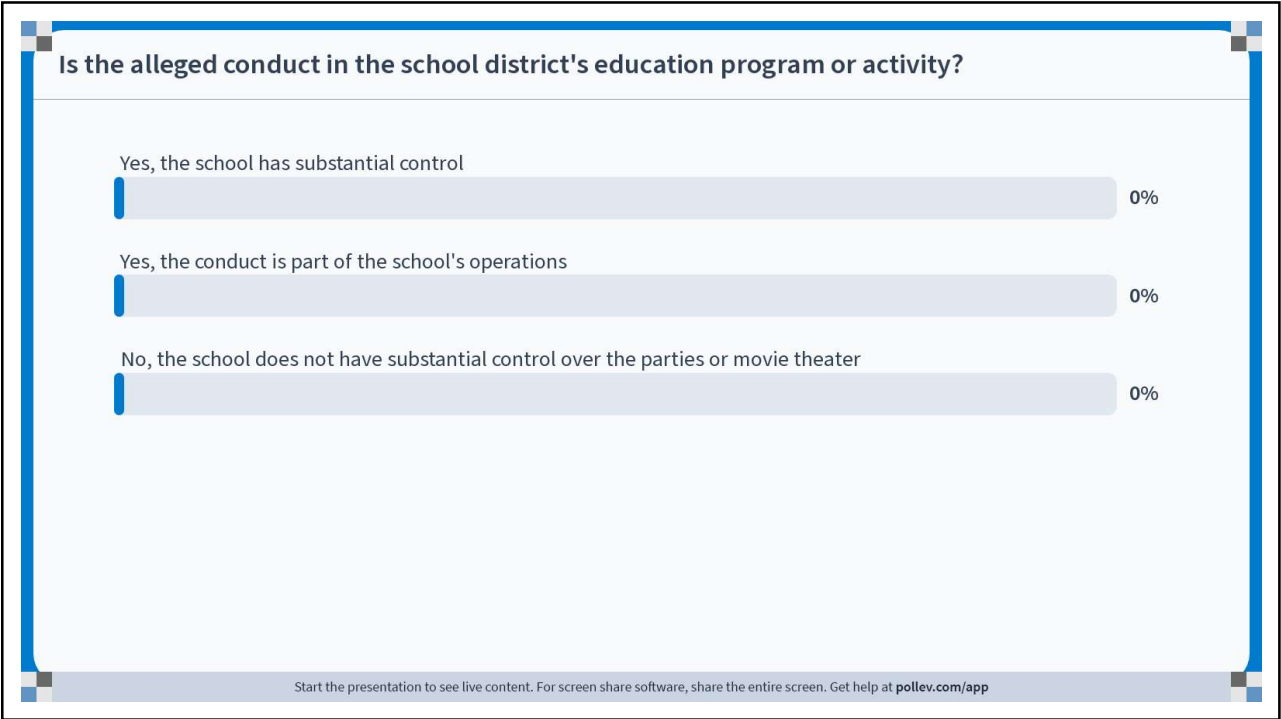
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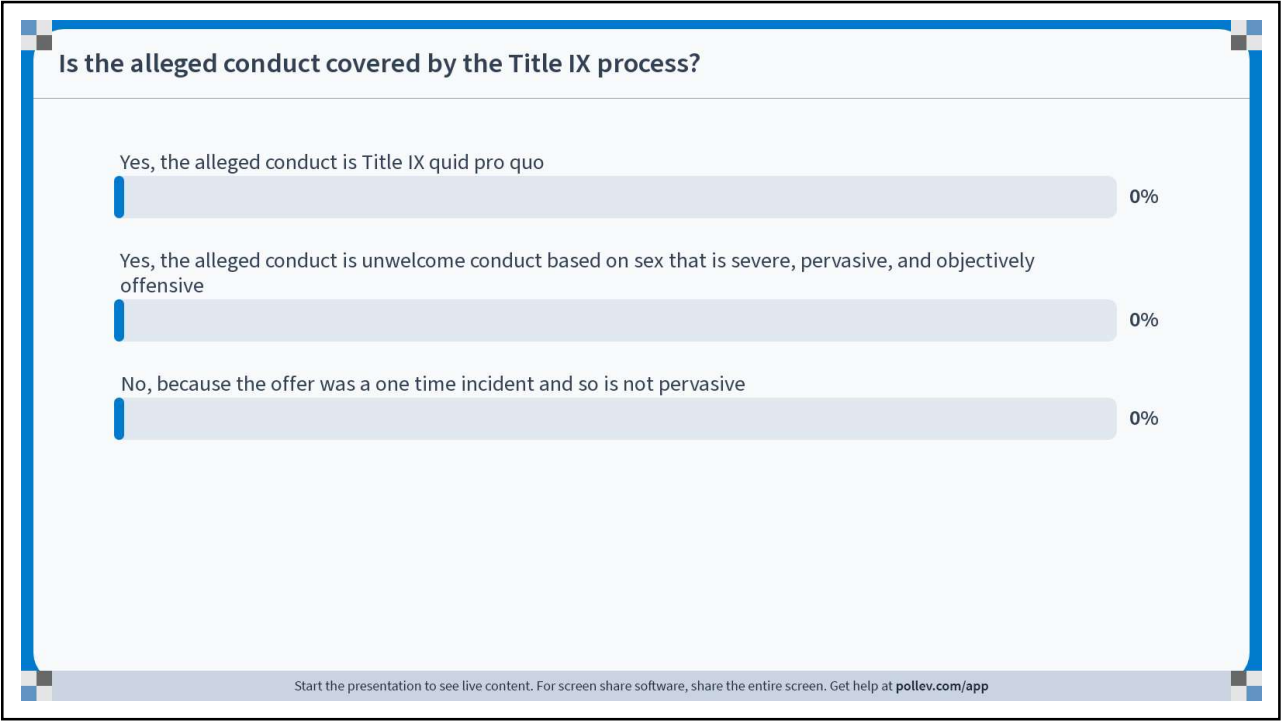
Carson reports that Robin, a student teaching assistant for Carson’s English class, shares many friends with Carson in the school. They often see each other at parties and other activities off campus. Robin seeks out Carson in those circumstances, flirts, and has asked Robin to “hang out sometime” several times. Carson said they try to limit the time spent with Robin and have just laughed uncomfortably and tried to change the subject when Robin has asked about hanging out. Carson says that last week, Robin sat next to Carson at a movie. During the previews, Robin said they knew Carson had been struggling to keep a good grade. Robin offered to provide Carson some extra help preparing for the final exam and suggested that they get together for a dinner the next night to begin studying. Carson did not do so but felt pressure because of their grade.




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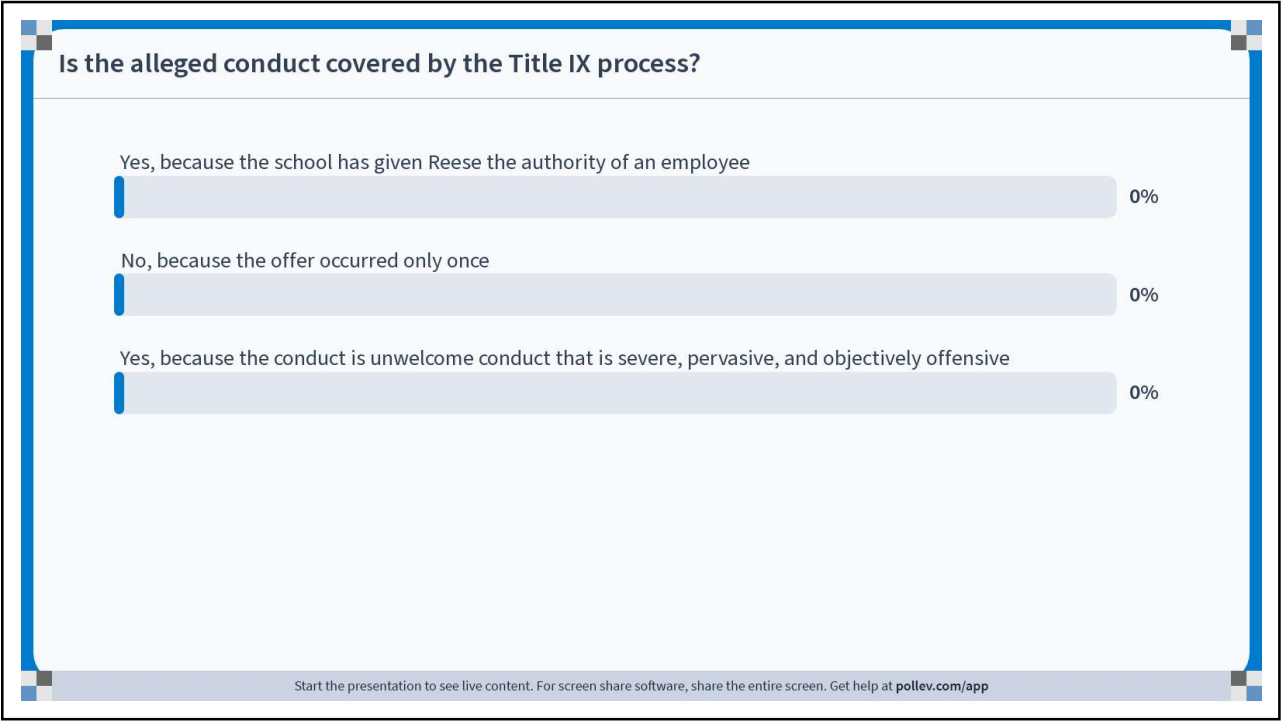


Cade, a student athlete, reports that a community volunteer, Reese, who helps out with the team, offered to help get Cade more playing time if Cade would go out on a date with Reese.




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Cade, a student athlete, reports that a coach, Reese, is very “touchy feely” with athletes. Almost every time Coach Reese speaks to athletes, they touch the athlete on the small of the back. Athletes also feel like Coach Reese is a very “close talker” which makes athletes feel uncomfortable.




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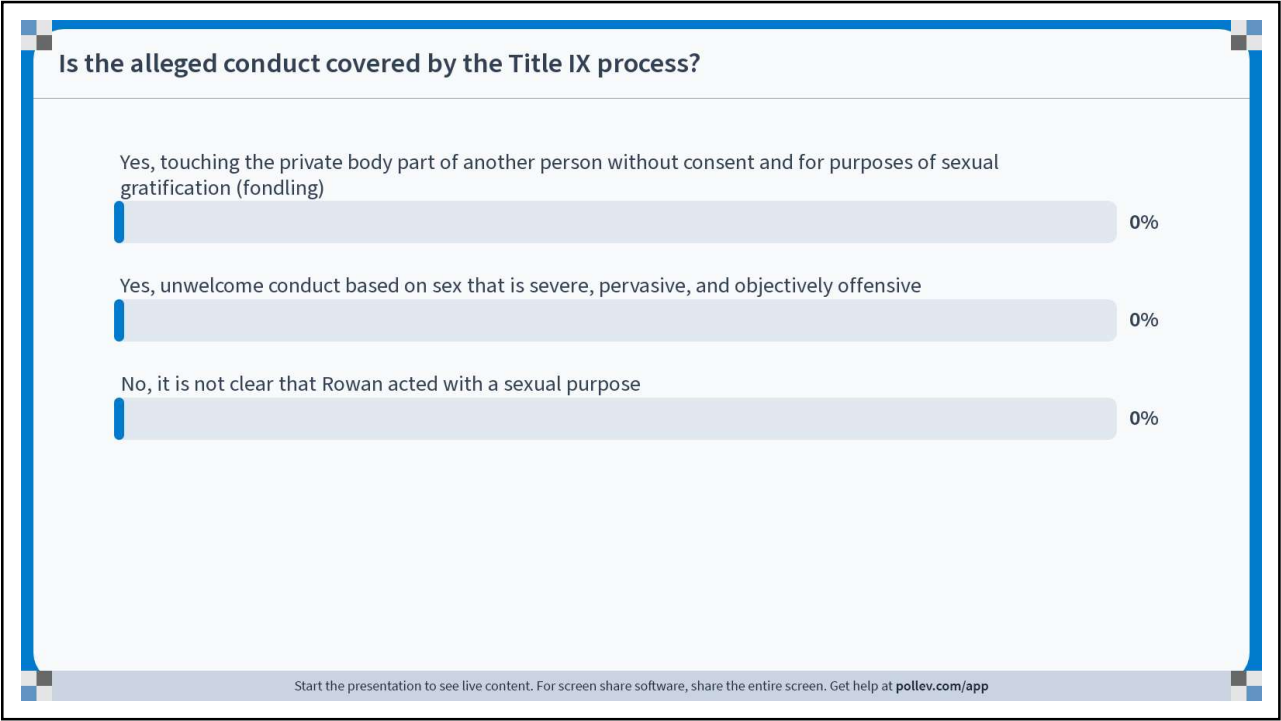
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Employee Corey reports that during a meeting where they were sitting on the same row as another employee, Rowan, Corey had to step out to make a phone call and had to pass in front of Rowan with their backside to Rowan to get out of the row. According to Corey, Rowan touched Corey’s buttocks in a sexual way while walking by. Corey immediately reported the incident to their supervisor, who was in the room and who pulled Rowan aside to ask what happened. Rowan said they did not recall touching Corey at all, but if they did they are sure it was just an accident.



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## Scenario

Carey receives services as a student with an intellectual disability and was discovered in a bathroom on campus with Riley, a student without a known disability. The two had their clothes off. After being told there would be consequences imposed for the on-campus sexual behavior, Carey’s parent claimed that the conduct was sexual assault, harassment, and abuse because Casey is incapable of consent. Riley says that the conduct was a mutual two-sided interaction. Numerous employees say they have first-hand knowledge that Carey and Riley have been “a thing” all school year.

TH

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A man in a pink shirt and a woman in a patterned dress are standing in a meeting room, looking at a whiteboard covered in pink sticky notes. The man is pointing at one of the notes. There are blue chairs and a wooden table in the foreground.

# Train the Trainer Tip

- ✓ Use **these!**
- ✓ Use your **previous cases**

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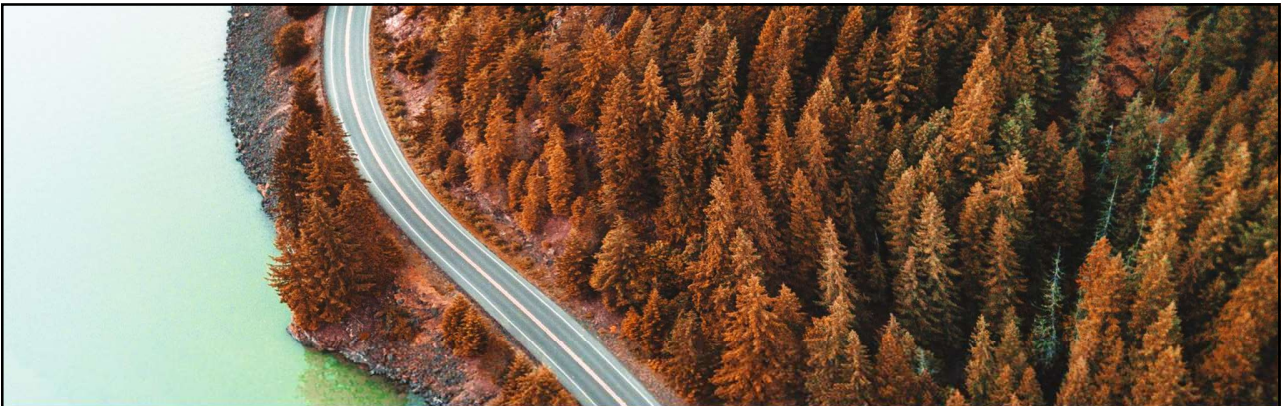





## Remember!

- Just because something fails to meet one or more of the threshold questions does not mean that the educational institution will ignore the conduct
- Consider other policies and procedures, including those prohibiting non-Title IX sexual harassment
- The best practice in every case is to **support, support, support** any member of your community who reports sex-based misconduct

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# The Title IX Sexual Harassment Grievance Process



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**Title IX Coordinator or Deputies**  
The “Mother Hen”

Oversees the process, serving as a resource for parties and other members of the Title IX Team; keeps the trains on time and the “baby chicks” in line  
Best practice is not to serve in other roles



**Investigator(s)**  
The “Indecisive One”

Collects relevant evidence, compiles directly related evidence, and drafts a report summarizing the relevant evidence, **but does not make a decision**  
Best practice is not to serve in any other roles



**Decision-Maker(s)**  
The “Judge”

Oversees the hearing (higher ed) or written Q&A process (K-12)  
Makes the final determination on the merits, including findings of responsibility and remedies



**The Appellate Decision-Maker**  
The “Second Guesser”

Oversees the written appeal process and makes decision regarding appeal. May uphold the decision/deny the appeal, or grant the appeal and reverse or remand.

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# Other Key Players

**Remember: A minor party’s parent is not an advisor and gets to participate just like the party in the process**

CP

**The Complainant**  
The Alleged Victim

The person alleged to have been subjected to covered conduct—regardless of whether:

1. Another person (a third party reporter) reports the alleged misconduct
2. The Title IX Coordinator signs a formal complaint on behalf of the institution
3. The Complainant is a minor

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**The Respondent**  
The Alleged Perpetrator

The person alleged to have engaged in covered conduct

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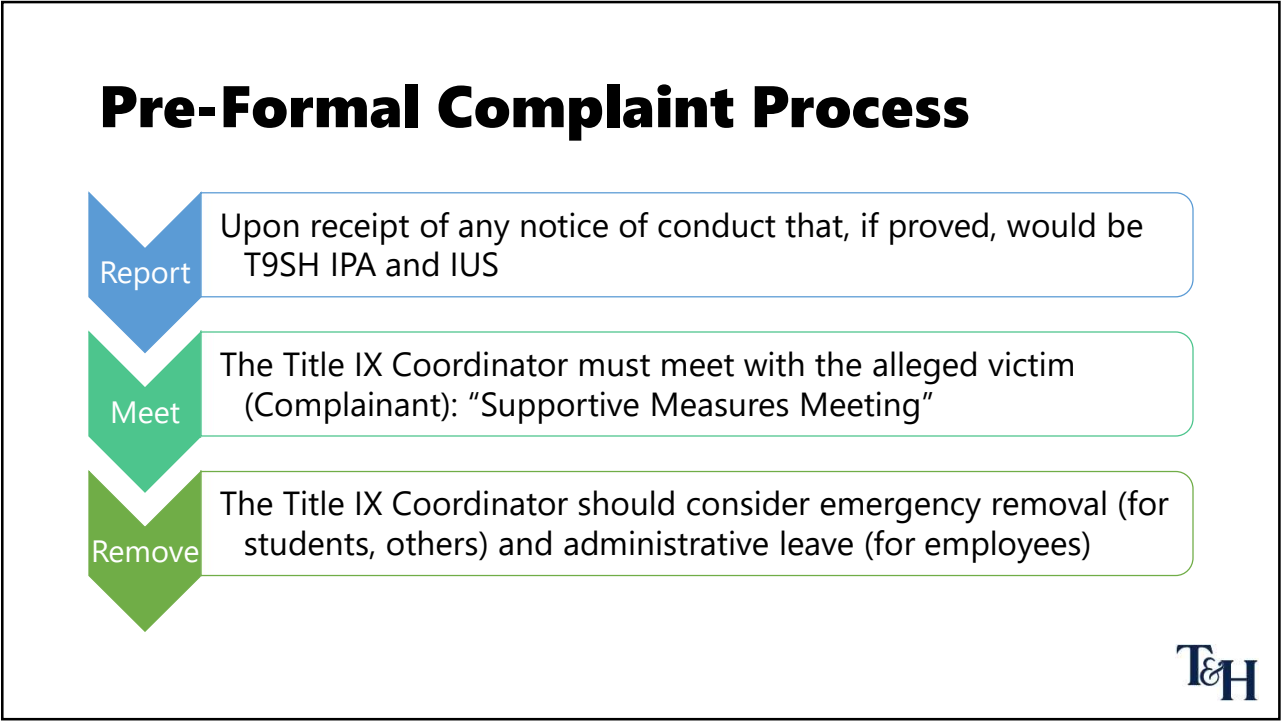
**The Advisor**

**Chosen:** A person who must be allowed to assist the party at all stages of the process

**Appointed:** K-12 schools are not required to appoint advisors for parties

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## Report vs. Complaint vs. Notice

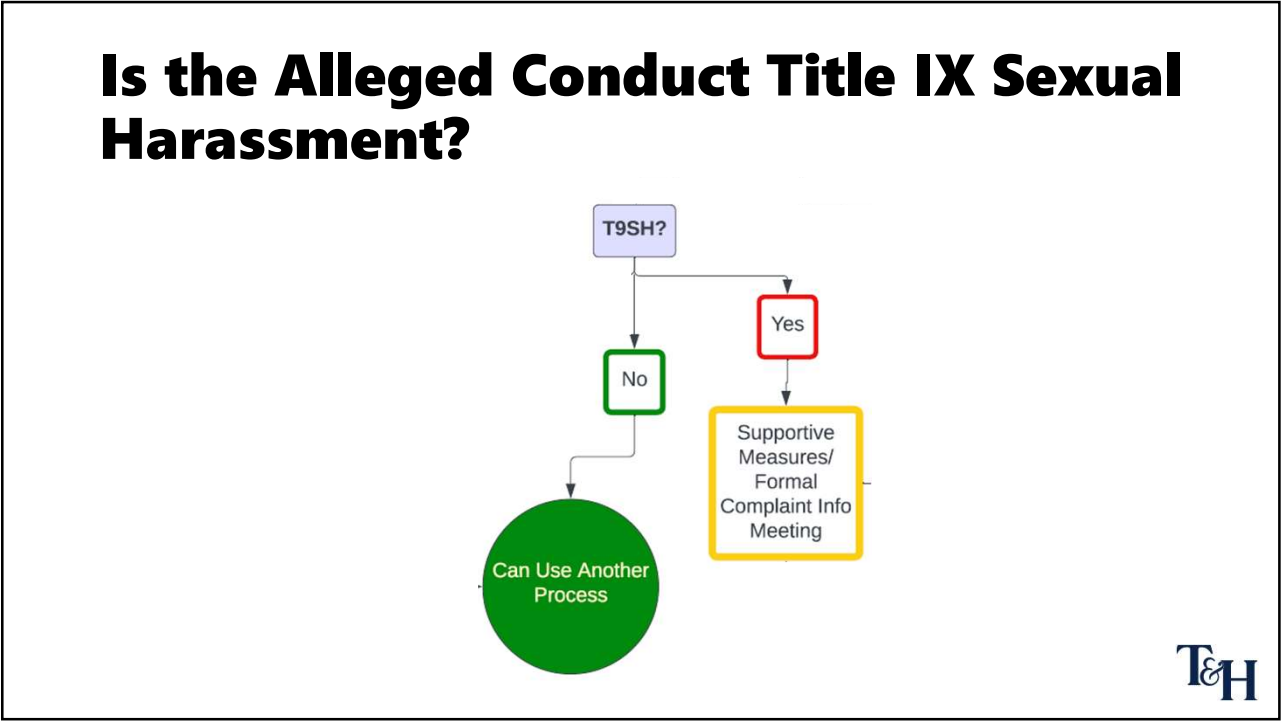
✓ A report is someone sharing information that suggests that sex-based harassment has been, is, or might be occurring.

✓ A complaint is someone sharing information that suggests that sex-based harassment has been, is, or might be occurring and asking that the educational institution respond to it.

Both reports and complaints **to any K-12 employee** are "actual notice" triggering the Title IX process. So is **any observation** by any K-12 employee.

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## Supportive Measures Meeting

- ✓ Contact the Title IX Complainant (and a minor Complainant's parent/guardian to discuss the availability of "supportive measures"
- ✓ Consider the Title IX Complainant's wishes with respect to supportive measures
- ✓ Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- ✓ Explain the process for filing a Formal Complaint

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## Supportive Measures

- ✓ Non-punitive, individualized services
- ✓ Offered as appropriate, without charge, as reasonably available
- ✓ Before or after the filing of a formal complaint, or even if no formal complaint has been filed
- ✓ Should be designed to restore or preserve equal access to the education program or activity
- ✓ Without “unreasonably” burdening the other party
- ✓ Should be confidential



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## Supportive Measures: 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



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# Emergency Removal/ Admin Leave

- ✓ Emergency removal is based on an individualized safety and risk analysis
- ✓ Only available when necessary to protect a student or other individual from immediate threat to physical health or safety
- ✓ Must provide notice and an opportunity to challenge immediately after the removal
- ✓ Administrative leave for employees is much easier; it is allowed as long as state law, board policy, employee handbooks, collective bargaining agreements, or other applicable rules or requirements are met



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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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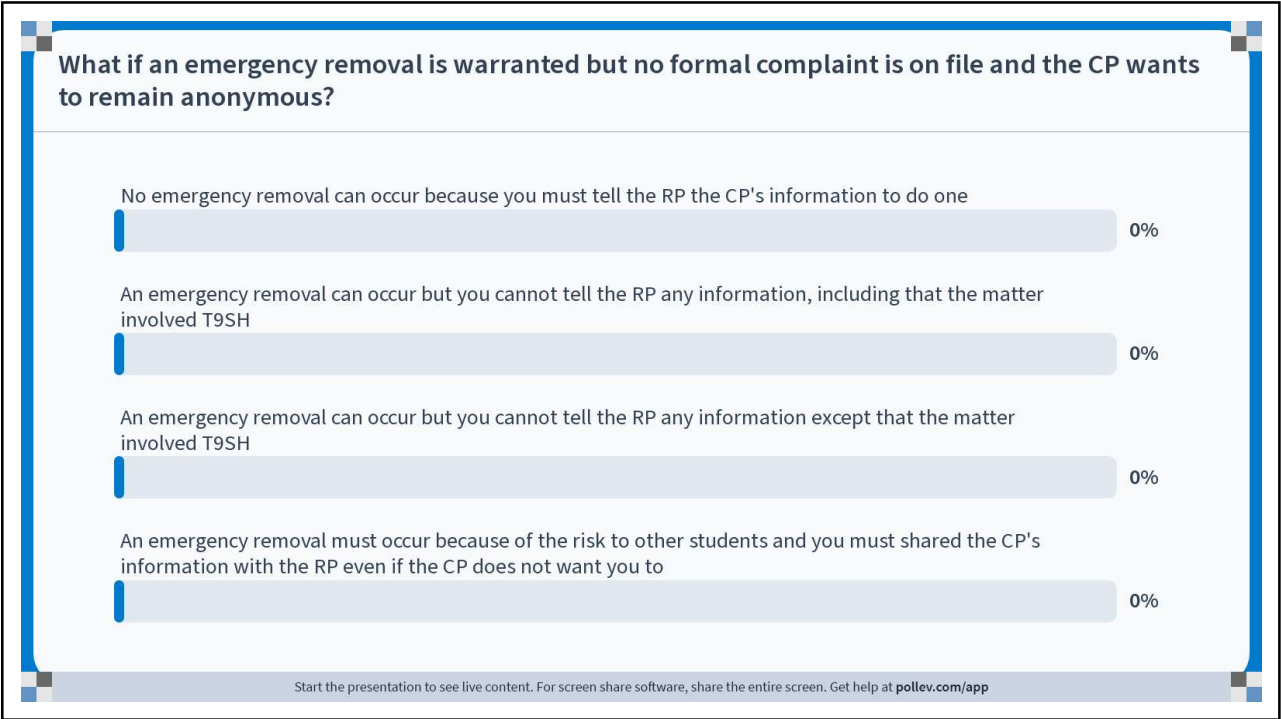
## Don't Spill the Tea

A violation of confidentiality could result from sharing details about the report with:

- The Respondent (alleged perpetrator)
- Witnesses
- Classroom Teachers
- Other Administrators



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**No Formal Complaint?**  
**Go No Further!**

NO Notice to the Respondent  
NO Investigation  
NO Determination of Responsibility  
NO Punitive or Disciplinary Consequences

**ONLY Supportive Measures**  
*If you can't move on without discipline, sign a formal complaint*



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What can be a Formal Complaint?

A complaint of Title IX sexual harassment on the District's Formal Complaint form

0%

A written document requesting that a school respond to a report of sexual harassment, physically signed by the complainant or their parent

0%

An email from the complainant or their parent/guardian requesting that a school respond to a report of sexual harassment

0%

Any request (oral or verbal) that the school district respond to a report of sexual harassment

0%

All of the above

0%

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

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## Formal Complaint


- ✓ A written document
- ✓ **Signed by the complainant** (or a minor complainant's parent/guardian)—an email is enough
- ✓ Or **filed by the Title IX Coordinator**
- ✓ Reporting T9SH IPA + IUS
- ✓ Requesting that the School or District respond




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## No More Confidentiality

- ✓ Once a formal complaint has been filed or signed, the school must share any known Complainant's name with the Respondent in a Notice of Allegations (**anonymity is not an option**)
- ✓ Compare to the status before a formal complaint is filed, when you **must protect the Complainant's confidentiality**, 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) **before they file a formal complaint if possible** so they know the consequences of filing a formal complaint



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## Train the Trainer Tip

- ✓ Training for **building administrators**, who are the front line for sex-based harassment complaints, on the confidentiality requirements is imperative
- ✓ Education for **parents and guardians** and **older students** is also helpful to avoid misunderstandings
- ✓ Consider graphics and easy-to-understand posters and handouts on this and other civil rights processes

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## Post-Formal Complaint: Preliminary Matters

Notice


Notice of allegations to both parties + supportive measures for respondent

Dismiss

Consider mandatory or discretionary dismissal

IR

Voluntary informal resolution



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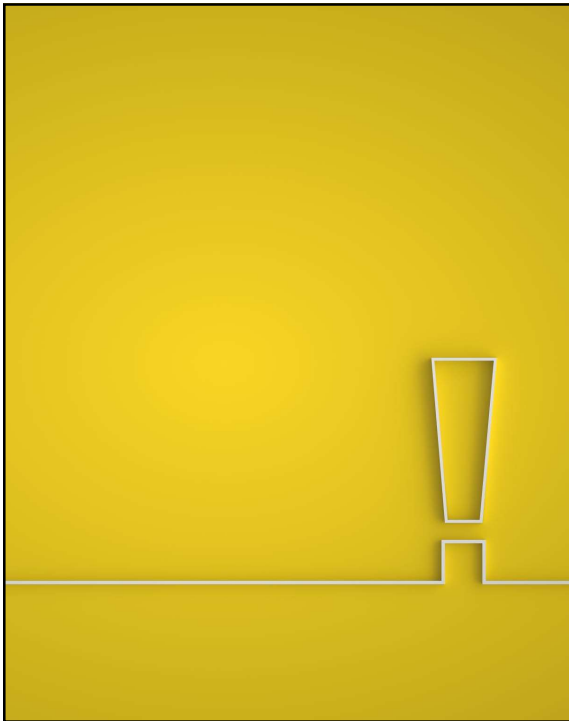


# Notice of Allegations

- ✓ Upon receipt of the formal complaint
- ✓ Must be provided with sufficient time for the respondent to prepare a response before any initial interview



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# Notice of Allegations

- Must include:
- ✓ Notice of grievance process, including right to IR
  - ✓ Notice of allegations, in sufficient details to allow the respondent to prepare a response, including the names of all known parties, the conduct alleged to have occurred, and the date and location of the conduct, if known
  - ✓ A statement that the respondent is presumed not responsible
  - ✓ Notice of the parties' rights to have an advisor
  - ✓ Notice of any provision in the code of conduct prohibiting false statement or false evidence



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### Mandatory Dismissals

(CAN use another process)

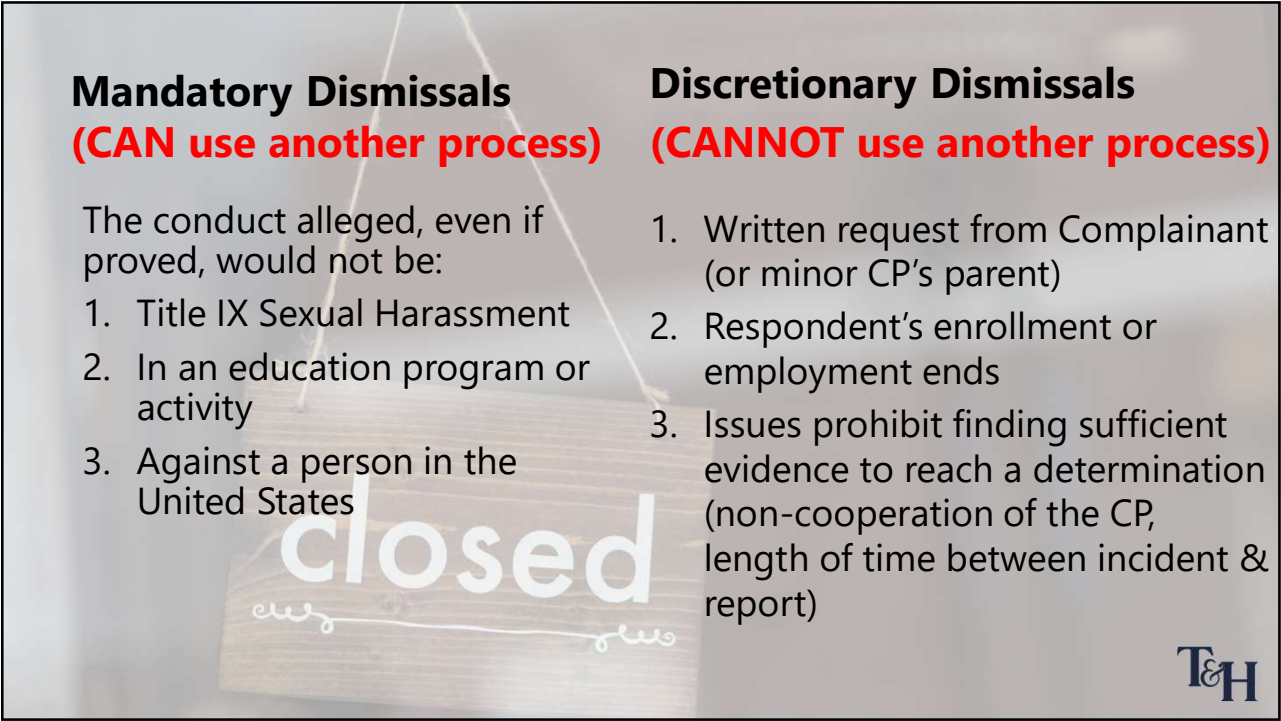
The conduct alleged, even if proved, would not be:


1. Title IX Sexual Harassment
2. In an education program or activity
3. Against a person in the United States

### Discretionary Dismissals

(CANNOT use another process)

1. Written request from Complainant (or minor CP's parent)
2. Respondent's enrollment or employment ends
3. Issues prohibit finding sufficient evidence to reach a determination (non-cooperation of the CP, length of time between incident & report)





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## Dismissal Notice

- ✓ 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

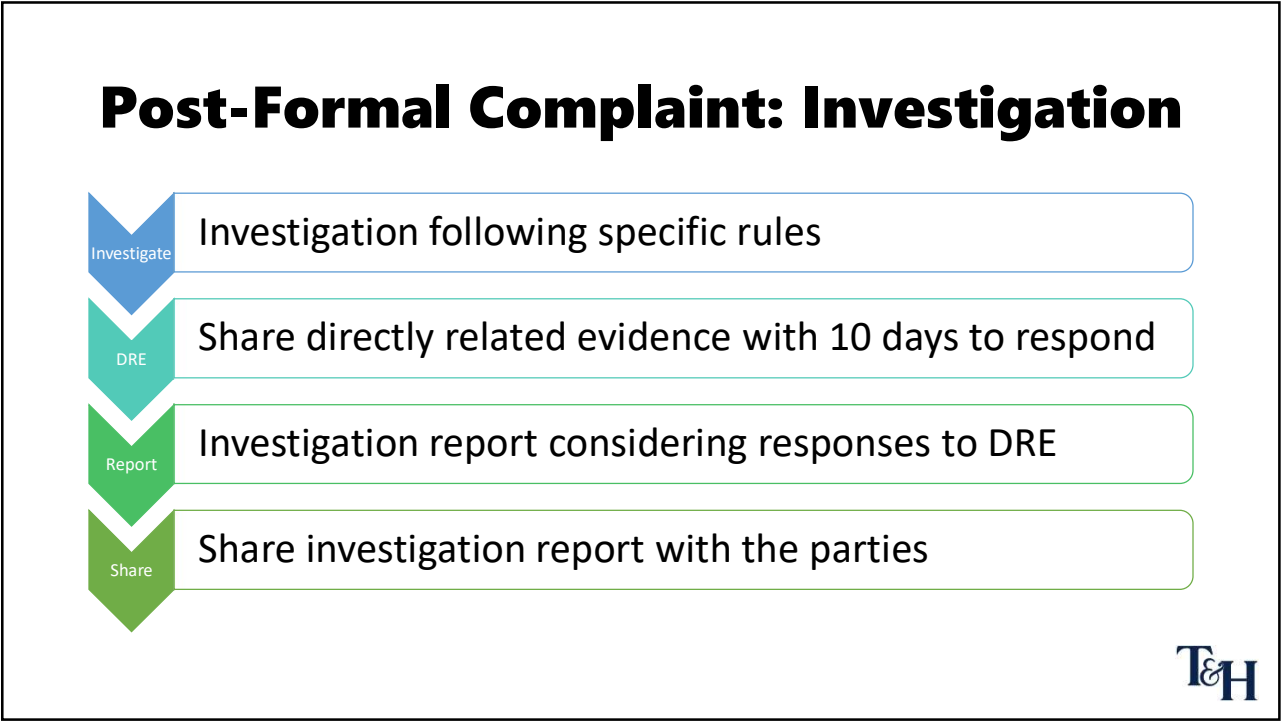
- ✓ Only after a formal complaint has been filed
- ✓ Cannot be required, explicitly or implicitly
- ✓ Any time prior to reaching a determination on the merits
- ✓ Parties can ask for it or it can be offered
- ✓ Both parties must sign an agreement after receiving notice of allegations and rights
- ✓ Not allowed in cases involving employee-on-student misconduct
- ✓ Any party can withdraw prior to a signed agreement
- ✓ Once a signed agreement is reached, the T9SH grievance process is over forever



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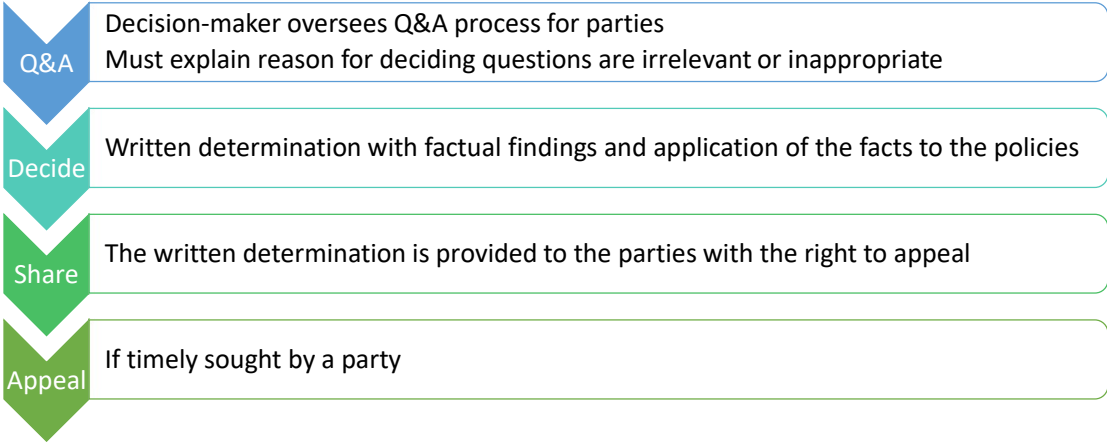


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# Post-Formal Complaint: Decision and Appeal



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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 2020 Title IX regulations require that any individual involved in the Title IX process—Title IX Coordinator, investigator, decisionmaker, appellate decisionmaker, or informal resolution facilitator—be free from **bias, conflict of interest**, and be trained to serve **impartially** and **without prejudging the facts** in 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 prejudgment 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



T&H

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## Bias and Conflict of Interest

- Prohibiting conflicts of interest and bias, including racial bias, on the part of people administering a grievance process is an essential part of providing both parties a fair process and increasing the accuracy and reliability of determinations reached in grievance processes
- It is up to the educational institution to decide how best to implement the impartiality requirements
- Recipients should have objective rules for determining when a Title IX team member is biased

T&H

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## **Bias and Conflict of Interest**

- An educational institution can have a process for parties to assert claims of conflict of interest or bias during the investigation
- Arguing that a Title IX Team member was biased, had a conflict of interest, or prejudged the facts in a manner that affected the outcome of the case must be a basis for appeal
- Training materials must be available online in part to ensure that they do not contain biased information



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## **Bias and Conflict of Interest**

- Nothing prevents an educational institution's employees or contractors from serving on the Title IX Team, despite concerns of some that there is a potential for a conflict of interest
- The Department encourages educational institutions to pursue alternatives to the inherent difficulties that arise when a recipient's own employees are expected to perform these functions free from conflicts of interest and bias
- These roles can be outsourced, but the rules do not require educational institutions to use outside, unaffiliated Title IX personnel because the DOE did not conclude that such prescription is necessary to effectuate the purposes of the regulations



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## Bias and Conflict of Interest

- Some best practices the Department identified in the preamble to the 2020 regs include ensuring that investigators have institutional independence and deciding that Title IX Coordinators should have no role in the hiring or firing of investigators
- Particular professional experiences (e.g., a history of working in the field of sexual violence) or affiliations also do not *per se* create bias or conflict of interest; excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially



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## Bias and Conflict of Interest

- The mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel; the final regulations help ensure that each individual case is decided on its merits
- Bear in mind that the very training required by the Title IX rules is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that prior professional experience need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role



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## Train the Trainer Tip

Train all Title IX Team members to

- ✓ Be open with the Title IX Coordinator about any concerns about bias or conflict of interest
- ✓ Follow the Title IX process “to a T”
- ✓ Not assume or infer the existence of facts or the outcome, “connect the dots,” speculate, rely on personal experience or beliefs, weigh credibility (unless they are the decision-maker on the initial complaint)
- ✓ Avoid sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do



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## Train the Trainer Tip

- ✓ Educational institutions have significant control, and flexibility, to prevent conflicts of interest and bias by carefully selecting training content focused on impartiality and avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- ✓ Recommend a separate training for your Title IX Team each year on this important topic



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## Train the Trainer Tip

- ✓ Research and data concerning sexual violence dynamics may be valuable and useful, but cannot be relied on to apply generalizations to particular allegations of sexual harassment.
- ✓ The DOE is not proactively scouring recipients' curricula to spot instances of sex stereotyping



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## Train the Trainer Tip

- ✓ A training approach that encourages Title IX personnel to "believe" one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate Title IX precluding credibility determinations based on a party's status as a complainant or respondent.
- ✓ The Department cautions against training materials that promote the application of "profiles" or "predictive behaviors" to particular cases.



## Trauma Informed Investigations

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

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## Train the Trainer Tip

The preamble notes:

- ✓ Title IX Team Members should receive trauma-informed training to limit the risk of re-traumatizing parties during the investigation
- ✓ Title IX Team members should be trained **not** to use a trauma-informed approach to evaluate the testimony of parties or witnesses or assess credibility
- ✓ Train Team members that a trauma-informed approach to evaluating evidence can lead adjudicators to overlook significant inconsistencies on the part of complainants in a manner that is incompatible with due process protections for the respondent
- ✓ Investigators and adjudicators should consider and balance noteworthy inconsistencies (rather than ignoring them altogether) and must use approaches to trauma and memory that are well grounded in current scientific findings



# Thank You!

## Questions?

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### Title IX Compliance Training Certification & Train the Trainer Oregon School Personnel Administrators Fall 2023 Conference

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Join the K-12  
Title IX Leadership  
Alliance

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