

Steering Through the Storm: Coordinating Title IX Cases in Uncertain Times

OSPA Summer Conference
July 28, 2024



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Scope (2020 & 2024)

The **2020 Rule** provides a grievance process only for "sexual harassment" complaints

- educational institutions must address other Title IX discrimination and retaliation, but not through any specific process

The **2024 Rule** applies to all reports or complaints of sex discrimination



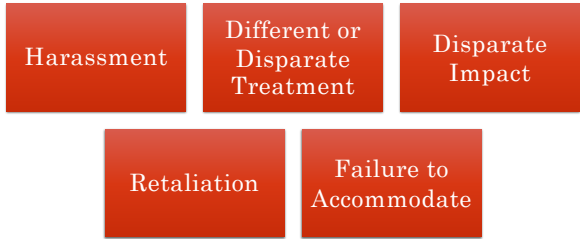
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What is "Sex Discrimination"?



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What is Sex Discrimination? (2020 & 2024)



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Areas of Concern (2020 & 2024)

- Recruitment, Admissions, Counseling (Higher Ed only)
- Financial Assistance (Higher Ed only)
- Pregnancy and Related Conditions
- Parenting Status
- Student Discipline
- Single-Sex Programs
- LGBTQI+ Issues
- Employment
- Harassment
- Sex-Based Assault & Violence



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The Takeaway

As of the effective date of the 2024 Rule, an educational institution **must** use the **2024 Title IX process** to address information about conduct that may be **sex discrimination**, not just for **sex-based harassment**. Using another disciplinary process or code can lead to significant consequences to the institution (from OCR) and to individual employees who use the wrong process to address reports.

*For reports of conduct before August 1, **must** use the **2020 Title IX process** for **sexual harassment** allegations and **your other Title IX policy/process** for all other **sex discrimination**.*

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That Includes Discrimination Based on LGBTQI+ Status



"Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity" – 34 C.F.R. § 106.10 (2024 Version).

"Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex" except for in athletics or housing in higher education – 34 C.F.R. § 106.31 (2024 Version).

These provisions are the focus of state lawsuits against the rule; changes seem likely, but until then this is the law of the land in Oregon as of August 1, 2024.

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Yes, Sex-Based Harassment Is Still Covered



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SEX(UAL OR -BASED) HARASSMENT (2020* & 2024)

THE TITLE IX BIG 5+

1. Title IX "quid pro quo"
2. Sexual assault
3. Domestic violence
4. Dating violence
5. Stalking

HOSTILE ENVIRONMENT

- Unwelcome conduct
- Based on sex
- Sufficiently severe, pervasive, objectively offensive to have a sufficient impact on access to education program or activity

*"Hostile Environment" is not a defined term in the 2020 Rule/is implied only
+The "Title IX Big 5" is not in either Rule; it's just a handy way to remember this list, which is derived in part from the "Big 4" in another federal law applicable to higher education institutions

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#1: Title IX* Quid Pro Quo

2020 Rule

An employee of the school conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct

2024 Rule

An employee, agent, or other person authorized by the school to provide an aid, benefit, or service under the school's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct

*It is not called "Title IX quid pro quo" in the rules, but there can be other types of quid pro quo prohibited by policy

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#2 Sexual Assault* (2020 & 2024)

- Rape (penetration, no matter how slight, of the vagina or anus with any body part or object or oral penetration by a sex organ of another person without consent)
- Fondling (touching the private body parts of another person for the purpose of sexual gratification without consent)
- Incest
- Statutory rape

*Both the 2020 and 2024 rules cross-reference a definition elsewhere; we've given you that definition here

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#3 Domestic Violence (2020* & 2024)

- Felony or misdemeanor crimes committed by a person who:
- (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim
 - (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner
 - (C) Shares a child in common with the victim or
 - (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction

*The 2020 Rule cross-references a definition elsewhere; we've given you that definition here

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#4 Dating Violence (2020* & 2024)

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, where the existence of such a relationship shall be determined based on a consideration of the following factors:

- (1) The length of the relationship;
- (2) The type of relationship; and
- (3) The frequency of interaction between the persons involved in the relationship

*The 2020 Rule cross-references a definition elsewhere; we've given you that definition here

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#5 Stalking (2020* & 2024)

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- (A) Fear for the person's safety or the safety of others or
- (B) Suffer substantial emotional distress

*The 2020 Rule cross-references a definition elsewhere; we've given you that definition here

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If it's not the Big 5....

Title IX only applies if the conduct alleged, if substantiated, would constitute a **"hostile environment"*** as defined by the rule

*different definitions in the 2020 and 2024 Rules



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Hostile Environment* (2020 Rule)

- Unwelcome conduct
- Based on sex
- So severe, pervasive, **and** objectively offensive that it effectively denies **equal access** to the school's education program or activity



*"Hostile Environment" is not a defined term in the 2020 Rule/is implied only

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"Hostile Environment" (2024 Rule)

- Unwelcome
- Sex-based conduct
- Subjectively and objectively offensive
- So severe **or** pervasive that the conduct results in a **limitation or denial** of a person's ability to participate in or benefit from the school's education program or activity



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What These Terms Mean (2020 & 2024)

Unwelcome	Severe*	Pervasive*	Offensive*
Not solicited or invited and objectionable or offensive	More than just juvenile, crass behavior even if sex-based; Not as high of a standards as in the courts	Often refers to repeated conduct; Can also refer to conduct that is otherwise widespread (internet, public)	Offensive, hostile, or abusive, inappropriate, unacceptable

*These terms are not defined in the Rules

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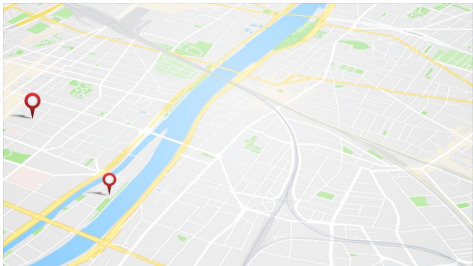
Hostile Environment Factors (2020* & 2024)

- The degree to which the conduct affected the complainant’s ability to access the education program or activity
- The type, frequency, and duration of the conduct
- The parties’ ages, roles within the education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct
- The location of the conduct and the context in which the conduct occurred
- Other sex-based harassment in the recipient’s education program or activity.

*These are not included in the 2020 Rule but have been used by OCR since at least 2000

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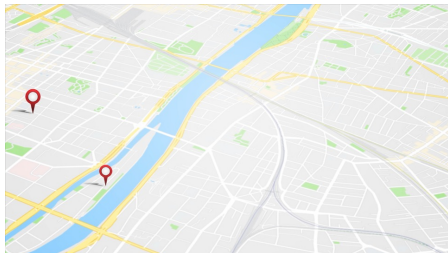
Where Must Sex Discrimination Occur



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What the Statute Says

Title IX applies in an educational institution’s “education program or activity” against a “person in the United States”



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“Substantial Control” (2020 Rule)

Education Program or Activity:

- Operations of the educational institution
- Conduct on school-owned or operated technology
- 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
- ~~• For higher ed, includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution~~

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“Disciplinary Authority”

Education Program or Activity:

- Operations of the educational institution
- Conduct on school-owned or operated technology
- Conduct that is subject to the school’s “disciplinary authority”
- ~~• For higher ed, includes conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and~~

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Is This Your Code?

“This [Student Conduct] policy may apply to situations where off campus conduct causes a significant disruption of an educational or District related activity.”

“Student-athletes are expected to exhibit exemplary behavior both on and off school grounds. Off-campus actions that violate school policies or legal statutes, such as drug or alcohol use, violence, or any conduct detrimental to the team’s image, may result in disciplinary measures.”

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Hostile Environment (2024 Rule)

- The 2024 Rule says that a school "has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the school's education program or activity or outside the United States."
- **This is not new!** Even the 2020 rule required addressing **any** on-campus hostile environment
- But what constitutes a hostile environment can be confusing when some of the conduct contributing to the environment occurs on campus

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Off-Campus "Contribution" (2024 Rule)

- Not required to determine whether conduct that occurred outside the EP/A or the U.S. is in itself Title IX Sex-Based Harassment
- Not required to respond independently to the alleged conduct that occurred outside the education program or activity.
- Not required to provide supportive measures for sex-based harassment that occurred outside the EP/A or the U.S. and has not contributed to a sex-based hostile environment in the EP/A and in the U.S.

89 Fed. Reg. 33530

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Off-Campus "Contribution" (2024 Rule)

- Only required to address a hostile environment that exists under the education program or activity (the EP/A) and against a person in the U.S.
- In evaluating the hostile environment "totality of the circumstances" factors, may be required to consider allegations about conduct that occurred outside of the EP/A or the U.S. that may be contributing to the alleged sex-based hostile environment
- However, may need to consider conduct outside the EP/A or the U.S. to assess whether a hostile environment exists *within the EP/A and the U.S.*

89 Fed. Reg. 33530-31

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What Information Requires Institutional Response?



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Notice/Knowledge

2020 Rule: Notice/Knowledge

- Actual knowledge
- Of Title IX **sexual harassment**
- By a Title IX Coordinator or "Official With Authority"
- Includes all K-12 employees

2024 Rule: Notice/Knowledge

- "Information about conduct that may constitute **sex discrimination**"
- By the Title IX Coordinator
- **BUT** requires the educational institution to require certain non-confidential employees to report to the Title IX Coordinator
- Requires confidential employees and other employees not required to report to the Title IX Coordinator to provide information to the reporting party

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Exception to Reporting Requirements

2020 Rule: Exception to Reporting

Actual knowledge does not exist when the only official of the educational institution with actual knowledge is the person who allegedly engaged in discrimination (the **respondent**).

2024 Rule: Exception to Reporting

An employee who is the person allegedly subjected to discrimination (a **complainant**) is not required to report.

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Notices to Reporting Parties (2024 Rule)

Non-Confidential Employee Not Required to Report

If they do not report the information to the Title IX Coordinator, must provide to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX:

- The contact information for the Title IX Coordinator
- Information about how to make a complaint

Confidential Employee

Must explain to any person who informs the confidential employee of conduct that reasonably may constitute sex discrimination under Title IX:

- The employee's status as confidential and what that means
- How to contact the Title IX Coordinator and make a complaint
- That the Title IX Coordinator may be able to offer and coordinate supportive measures and initiate informal resolution or the formal grievance process

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K-12 Confidential Employees (2024 Rule)



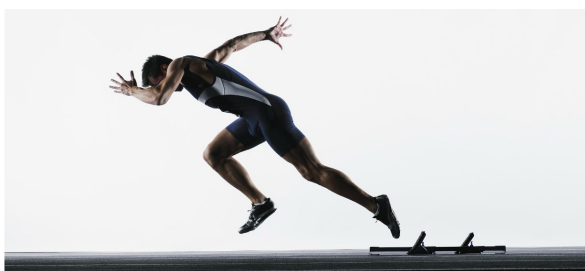
PRIVILEGED UNDER LAW.-
ARE THERE ANY?



DESIGNATED AS PRIVILEGED
BY THE EDUCATIONAL
INSTITUTION – SHOULD
THERE BE ANY?

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What Initial Response is Required?



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Initial Response to Notice

- 2020 Rule: Title**

The Title IX Coordinator must promptly contact the complainant to:

 - Discuss the availability of supportive measures
 - Consider the complainant's wishes with respect to supportive measures
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
 - Explain to the complainant the process for filing a formal complaint
- 2024 Rule: Title**

The Title IX Coordinator must:

 - Treat the parties equally
 - Offer and coordinate supportive measures to complainant (and respondent once informal resolution is offered or the grievance process begins)
 - Notify the complainant or, if unknown, the reporting party of the grievance procedures and, if relevant, informal resolution process

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Supportive Measures

- 2020 Rule: Supportive Measures**

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the educational institution's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational institution's educational environment, or deter sexual harassment
- 2024 Rule: Supportive Measures**

Supportive measures must not unreasonably burden either party and must be designed to protect the safety of the parties or the educational institution's educational environment or to provide support during the educational institution's grievance procedures and if applicable during the informal resolution process, an educational institution must not impose such measures for punitive or disciplinary reasons.

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Examples of Supportive Measures

- 2020 Rule: Examples of SMs**

 - Counseling
 - Extensions of deadlines or other course-related adjustments
 - Modifications of work or class schedules
 - Campus escort services
 - Mutual restrictions on contact between the parties
 - Changes in work or housing locations
 - Leaves of absence
 - Increased security and monitoring of certain areas of the campus
- 2024 Rule: Examples of SMs**

 - Counseling
 - Extensions of deadlines or other course-related adjustments
 - Changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative
 - Campus escort services
 - Restrictions on contact applied to one or more parties
 - Leaves of absence
 - Increased security and monitoring of certain areas of the campus
 - Training and education programs

For complaints other than sex-based harassment or retaliation, an educational institution, its employee, or any other person is not required to alter the alleged discriminatory conduct as a SM

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More Supportive Measures Rules (2020 & 2024 Rules)

- Supportive measures:
- Must be maintained as confidential unless necessary to release information to implement (or allowed by law)
- The 2024 Rule also requires educational institutions to:
- Provide a timely opportunity to seek, from an appropriate and impartial employee (other than the person who made the decision), modification or reversal of any supportive measure decision related to the party
 - Allow parties to seek additional modification or termination of supportive measures applicable to them if circumstances change materially
 - Ensure the Title IX Coordinator coordinates with one or more members of a student with a disability's K-12 students IEP or Section 504 team regarding supportive measures

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Emergency Removals

- | | |
|---|---|
| <p>2020 Rule: Title</p> <ul style="list-style-type: none">• The educational institution must undertake an individualized safety and risk analysis, determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal• Must provide notice and opportunity to challenge immediately after the removal | <p>2024 Rule: Title</p> <ul style="list-style-type: none">• The educational institution must undertake an individualized safety and risk analysis, determine that an immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sex discrimination justifies removal• Must provide notice and opportunity to challenge immediately after the removal |
|---|---|

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Administrative Leave

- | | |
|---|---|
| <p>2020 Rule: Title</p> <ul style="list-style-type: none">• Nothing in this subpart precludes an educational institution from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act. | <p>2024 Rule: Title</p> <ul style="list-style-type: none">• Nothing in this part precludes an educational institution from placing an employee respondent on administrative leave from employment responsibilities during the pendency of the educational institution's grievance procedures. This provision must not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12134. |
|---|---|

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Informal Resolution

- 2020 Rule: Title**
 - Requires a formal complaint
 - Must be voluntary
 - Cannot require IR or waiver of right to adjudication
 - Formal Complaint required
 - Written notice required
 - Written consent required
 - Cannot be offered for employee-on-student cases
- 2024 Rule: Title**
 - No formal complaint required
 - Must be voluntary
 - Cannot require or pressure IR or waiver of right to adjudication
 - Supportive measures required
 - Written notice required
 - Consent required
 - Cannot be offered in employee-on-student cases in K-12

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Informal Resolution Notice

- 2020 Rule: Notice of IR**
 - In writing
 - The allegations
 - Requirements of IR
 - Right to withdraw prior to agreement and resume the grievance process with respect to the formal complaint
 - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared
- 2024 Rule: Notice of IR**
 - In writing **or oral**
 - The allegations
 - Requirements of IR
 - Right to withdraw prior to agreement and to initiate or resume the educational institution's grievance procedures
 - Potential terms that could be in an agreement
 - Which records will be maintained and could be shared
 - That if the grievance procedure resumes, no one can access, consider, disclose, or otherwise use information, including records, obtained solely through the IR process
 - That the IR facilitator may serve as a witness in the grievance procedure if resumed

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Informal Resolution Limits

- 2020 Rule: IR Limits**
 - Cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.
- 2024 Rule: IR Limits**
 - Cannot offer if there are allegations that an employee engaged in sex discrimination toward a student or such a process would conflict with Federal, State or local law
 - The informal resolution facilitator cannot be the investigator or decisionmaker for the case

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Responding to Complaints



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What is a Complaint

2020 Rule: Formal Complaint

- Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator
- Can consolidate complaints

2024 Rule: Complaint

- A complaint includes an **oral or written** request to initiate a grievance
- In the absence of a complaint or informal resolution process, the T9C must determine whether to initiate a complaint if necessary to address conduct that may constitute sex discrimination under Title IX
- Can consolidate complaints; if one includes allegations of sex-based harassment involving a student, must use procedures for those types of cases

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Complaints

2020 Rule: Who Can File/Sign?

An individual who is alleged to be the victim of conduct that could constitute sexual harassment. 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 educational institution with which the formal complaint is filed.

2024 Rule: Who can Make/Initiate

- A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX; or
- A **person other than a student or employee** who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the educational institution's education program or activity when the alleged sex discrimination occurred.

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Response to a Complaint

- 2020 Rule: Title**

 - Initiate the grievance procedures or informal resolution process
 - Send a notice of allegations to all known parties
- 2024 Rule: Title**

 - Explicitly requires contacting the respondent to notify of grievance procedures and informal resolution process and to offer and coordinate supportive measures
 - For allegations of *sex discrimination* alleging the educational institution's policy or practice discriminates on the basis of sex, the educational institution is not considered the respondent
 - Initiate the grievance procedures or informal resolution process
 - Send a notice of allegations to all known parties

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Grievance Procedures



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Grievance Process Requirements

- 2020 Rule: Grievance Process Requirements**

 - Treat parties equally by providing supportive measures to complainant and not finding a respondent responsible until after the grievance process
 - Require no conflict of interest or bias and require training for all roles
 - Include a presumption of non-responsibility
 - Include reasonably prompt time frames for conclusion of the grievance process, including for filing and resolving appeals and the IR process, and a process for extensions
 - Describe the range of or list possible disciplinary sanctions and remedies
 - State the standard of evidence to be used
 - Include the procedures for appeal
 - Describe the range of supportive measures
 - Require an objective evaluation of all relevant evidence (inculpatory and exculpatory)
 - Provide the credibility determinations not be based on status
- 2024 Rule: Grievance Process Requirements**

 - Treat parties equitably
 - Prohibit conflicts of interest or bias and require training for all roles
 - Include a presumption of non-responsibility
 - Establish reasonably prompt time-frames for "major stages" and a process for extensions**
 - Take reasonable steps to protect privacy
 - Applicable to allegations of sex-based harassment
 - Describe the supportive measures available to the parties
 - Describe the range of or list possible disciplinary sanctions and remedies
 - Require an objective evaluation of all relevant evidence (inculpatory and exculpatory)
 - Provide that credibility determinations not be based on status
 - Requires use of preponderance of the evidence standard unless using clear and convincing in all other comparable proceedings, including those related to other discrimination complaints

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The Title IX Team

2020 Rule: Title IX Team

- Title IX Coordinator, investigator, and informal resolution facilitator can be the same person
- Must be a different decision-maker
- Must be a different appellate decision-maker

2024 Rule: Title IX Team

- The Title IX Coordinator, investigator, and decision-maker can be the same person
- Must be a different appellate decision-maker
- Must be a different informal resolution facilitator

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Dismissal of Complaint Allegations

2020 Rule: Dismissals

- Provides grounds for mandatory or permissive dismissal
- Upon dismissal, institution must send written notice of dismissal, reasons for dismissal, and notice of right to appeal
- Party can appeal dismissal on three bases

2024 Rule: Dismissals

- No more mandatory dismissal, all permissive
- Must provide written notice of dismissal, basis, and notice of right to appeal to party's who have notice of the complaint (in writing for sex-based harassment complaints involving a student in higher ed)
- Party can appeal dismissal on three bases
- Even after dismissal, must take appropriate and prompt steps to ensure sex discrimination does not continue or recur

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Dismissal Bases

2020 Rule: Dismissal Bases

- Mandatory
- Conduct alleged, even if substantiated, not Title IX "sexual harassment" in an education program or activity and against a person in the U.S.
- Permissive
- Respondent's enrollment or employment ends
 - Complainant requests to withdraw the complaint and would not be deliberately indifferent to dismiss
 - Specific circumstances prevent collecting sufficient evidence to make a determination

2024 Rule: Dismissal Bases

- All Permissive
- Unable to identify the respondent after taking reasonable steps
 - Respondent is not participating in the education program or activity and is not employed
 - Complainant voluntarily withdraws any or all of the allegations in the complaint in writing, the Title IX Coordinator declines to initiate a complaint, and the educational institution determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX
 - After making reasonable efforts to clarify the allegations with the complainant, the The conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX

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Dismissal Bases

2020 Rule: Dismissal Bases

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- Conduct alleged, even if substantiated, not Title IX "sexual harassment" in an education program or activity and against a person in the U.S.
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 - After making reasonable efforts to clarify the allegations with the complainant, the The conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX

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Notice of Allegations

2020 Rule: NOA

- Must be in writing, be updated if new allegations are added, and include:
- Notice of grievance & IR processes
 - Sufficient information including identities of parties involved in the incident and details about the alleged discrimination, including date and location
 - Presumption of non-responsibility
 - Inform parties of advisor rights and right to inspect and review "directly related evidence"
 - Cite any code of conduct provision that prohibits knowingly making false statements or providing false information

2024 Rule: NOA

- Must be updated if new allegations are added, and include:
- Notice of grievance and IR processes
 - Sufficient information including identities of parties involved in the incident and details about the alleged discrimination, including date and location
 - A statement that retaliation is prohibited

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Investigations

2020 Rule: Investigations

- Seven general requirements
- Burden of proof and evidence on institution
 - Equal opportunity to present witnesses, including expert witnesses, and evidence
 - No "gag rules" or limits on right to gather/present evidence
 - Same opportunity to advisor, but can limit role if equally applied
 - Provide written notice of interviews and meetings (with specifics) with time to prep
 - Parties can inspect, review, and respond to directly related evidence
 - Parties can review and respond to investigation report

2024 Rule: Investigations

- Retains most general requirements, with some modification
- Burden on institution to gather sufficient evidence for determination
 - Equal opportunity to present relevant fact witnesses and evidence: expert witnesses can be allowed, but not required (must be equal between parties)
 - Investigator must review all evidence gathered to evaluate if "relevant"
 - Provide each party with a description of all relevant evidence and an opportunity to respond

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Sharing Evidence

2020 Rule: Sharing Evidence

For all formal complaints in K-12

- Review of directly related evidence with 10 days to respond
- Review of investigation report with 10 days to respond

2024 Rule: Sharing Evidence

For K-12, all that is required is "provide each party with a description of relevant/permissible evidence with a reasonable opportunity to respond"

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Excluded Evidence #1

2020 Rule: Excluded Evidence #1

Cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

2024 Rule: Excluded Evidence #1

- Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:
- Evidence that is protected under a privilege as recognized by Federal or State law, unless the person holding such privilege has waived the privilege voluntarily in a manner permitted in the educational institution's jurisdiction;

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Excluded Evidence #2

2020 Rule: Excluded Evidence #2

Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, without the party's (or their parent's) written consent.

2024 Rule: Excluded Evidence #2

Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:

(Health records) - A party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the educational institution obtains that party's voluntary, written consent for use in the educational institution's grievance procedures; and

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Excluded Evidence #3

2020 Rule: Excluded Evidence #3

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

2024 Rule: Excluded Evidence #3

Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:
(Sexual interests or conduct) - Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. The fact of prior consensual sexual conduct between the complainant and respondent does not demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.

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Decisionmakers

2020 Rule: Different Decision-maker

Decision-maker cannot be Title IX Coordinator or investigator

2024 Rule: Investigator-Decisionmaker

- Same person can be investigator and Decisionmaker
- If Decisionmaker is not persuaded under the applicable evidentiary standard that sex discrimination occurred, whatever the quantity of evidence is, the decision-maker should not determine that sex discrimination occurred

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Credibility

- The 2024 Rule requires an educational institution to provide a process that allows the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is **both** in dispute **and** relevant to evaluating one or more allegations of sex discrimination

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Decision

- 2020 Rule: Written Determination**
 - Written determination required for all cases
 - Must include:
 - Allegations
 - Procedural steps taken
 - Findings of fact
 - Conclusions regarding application of code of conduct to the facts
 - Statement and rationale for the result as to each allegation, including determination regarding responsibility
 - Any disciplinary sanctions imposed
 - Whether remedies will be provided
 - Appeal procedures
- 2024 Rule: Determination**
 - For K-12, sufficient to notify parties (orally or in writing) of the outcome, including the determination of whether sex discrimination occurred under Title IX, the reasons for the decision, and appeal rights

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Remedies and Disciplinary Sanctions

- 2020 Rule: Written Determination**
 - Must be included in the written determination
- 2024 Rule: Notice of Outcome**
 - Institution—not Decisionmaker—responsible for deciding remedies and disciplinary sanctions
 - Title IX Coordinator to provide and implement remedies and other appropriate prompt and effective steps to ensure sex discrimination does not continue

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Relevance Definition (2024 Rule)

- The 2020 Rule does not define “relevant”
- The 2024 Rule defines “relevant” as “related to the allegations of sex discrimination under investigation as part of the grievance procedures. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred. Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

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Appeals

- 2020 Rule: Appeal Bases**
 - Required for all dismissals and determinations for all formal complaints of sexual harassment
 - Decision-maker(s) for appeal cannot be decision-maker(s) that reached the determination or dismissal, the investigator(s), or the Title IX Coordinator;
 - Required on three bases
 - Can offer appeal for other bases, but must offer equally
- 2024 Rule: Appeal Bases**
 - Required for all dismissals and for determinations in complaints of sex-based harassment involving a student party on same three bases from 2020 Rule
 - Remaining cases require the same appeal as used for comparable cases
 - Decisionmaker for appeal must be person who did not take part in an investigation or decision being appealed
 - Appeal Decisionmaker must be trained

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Specified Appeal Bases (2020 & 2024 Rules)

- Procedural irregularity + affected the outcome
 - New evidence not reasonably available at the time of the determination + could affect the outcome
 - Bias or conflict of interest of Title IX team member + affected the outcome
- Remember these are only applicable under the 2024 Rule to
- ** Under both Rules, an educational institution can offer appeals on other bases as long as it does so equally between the parties

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Appeals

- 2020 Rule: Appeal Requirements**
 - Written notification when an appeal is filed
 - Implement appeal procedures equally
 - Equal opportunity to parties to submit a written statement in support of, or challenging, the outcome;
 - Written decision provided to both parties describing the result and the rationale
- 2024 Rule: Appeal Requirements**
 - Notify when appeal is filed
 - Implement appeal procedures equally
 - Provide parties a reasonable and equal opportunity to make a statement in support of, or challenging, the dismissal
 - Notify parties of result of appeal and rationale for result
- ** Notices must be in writing for complaints of sex-based harassment involving a student party at a postsecondary institution**

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Serving Impartially



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Bias, Conflicts of Interest, and Prejudgment

- Both the 2020 and 2024 Rules require Title IX team members to be impartial
- We will discuss impartiality regarding specific roles other than the Title IX Coordinator in other sessions
- Let's look at some examples Title IX Coordinators might face

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Bias in Title IX Coordination

- Bias can affect the coordinator's decisions regarding case management, policy enforcement, and support resources
- Example: A coordinator who has personal beliefs about gender roles might unknowingly favor one gender over another in providing support or making decisions on disciplinary actions

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Conflicts of Interest in Title IX Coordination

- Conflicts of interest can arise if the coordinator has personal or professional relationships with any party involved in a case
- Example: A coordinator who has previously worked closely with a respondent or complainant might find it difficult to remain impartial during the investigation process

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Prejudgment in Title IX Coordination

- Forming opinions about the merits of a case before fully reviewing the evidence can lead to biased decisions and undermine the fairness of the process
- Example: A coordinator might prematurely judge the credibility of a complainant or respondent based on initial reports or their own experiences, affecting their objectivity in handling the case

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Conflicts of Interest in Title IX Coordination

- Training and Education
- Clear Policy and Procedures
- Self-Assessment and Reflection
- External Review and Consultation
- Transparency and Documentation
- Disclosure and Recusal
- Focus on Fairness Between Parties



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Don't Forget Your Records & Trainings

- Under both the 2020 and 2024 Rules, educational institutions must maintain records related to Title IX cases for no less than 7 years
- The 2020 Rule requires posting of all trainings for Title IX Team members (including these!) on your educational institution's website
- The 2024 Rule would only require that the training materials be maintained and made available if requested (you can still post online but are not required)

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Questions



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LINK TO
SURVEY



Sunday, July 28, 3:00 pm

with Jackie Gharapour Wernz presenting
*Steering Through the Storm: Coordinating Title IX
Cases in Uncertain Times*

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