Implementing the Title IX Grievance Process without Missing a Beat

Eanes Independent School District
Title IX Basic Training
July 17, 2025

Thompson & Horton LLP
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SET LIST

- Title IX Basics
- Responding to Reports
  - Jurisdictional Issues
  - Recognizing Title IX Sexual Harassment
- The Title IX Grievance Process
  - Initial Response & Evaluation
  - Investigation & Determination
- Serving Impartially



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Polling Access

Option One
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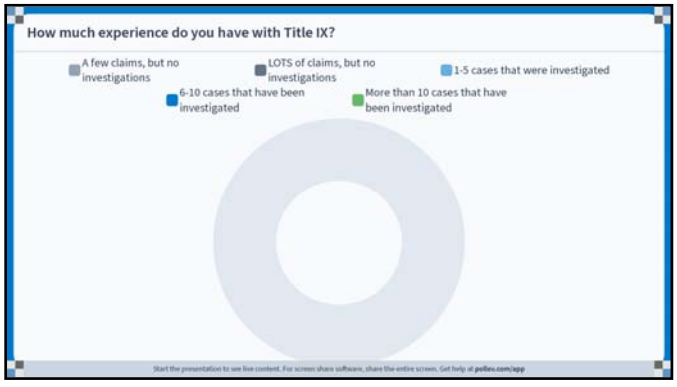
Option Two
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- Accept or dismiss cookies
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- Skip when asked to enter your name

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Responsibility to Respond

The district is responsible for promptly and effectively responding to discrimination and harassment *in a manner* that complies with regulatory requirements and:

- Ends the harassment
- Remedies the effects of the harassment
- Prevents its recurrence

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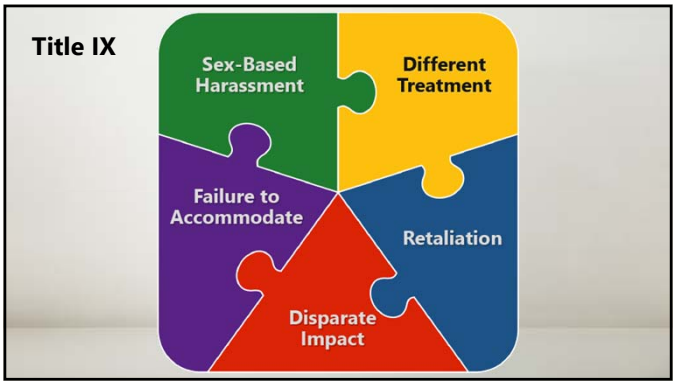


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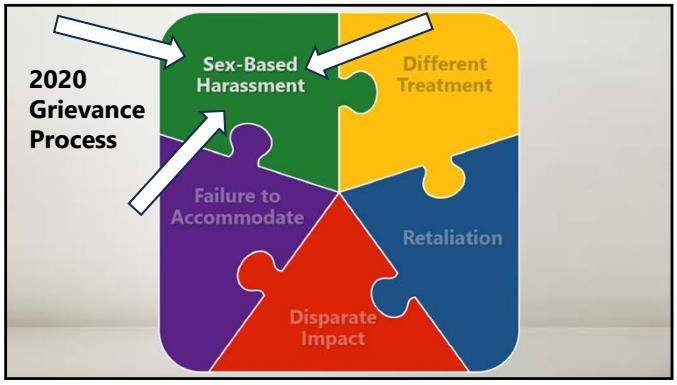
"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance."

The Patsy T. Mink Equal Opportunity in Education Act, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)

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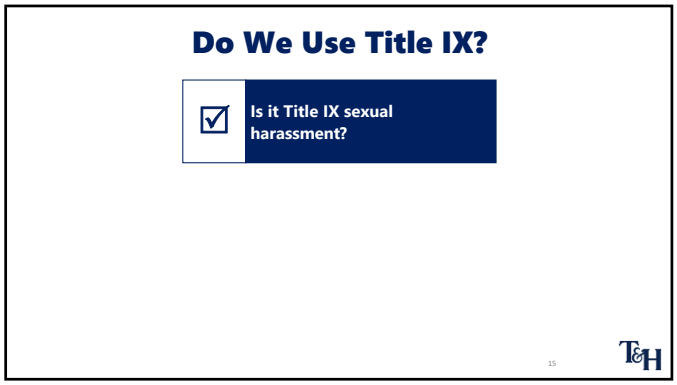
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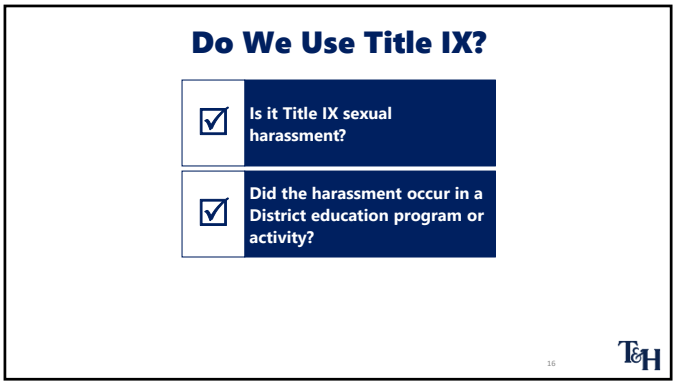
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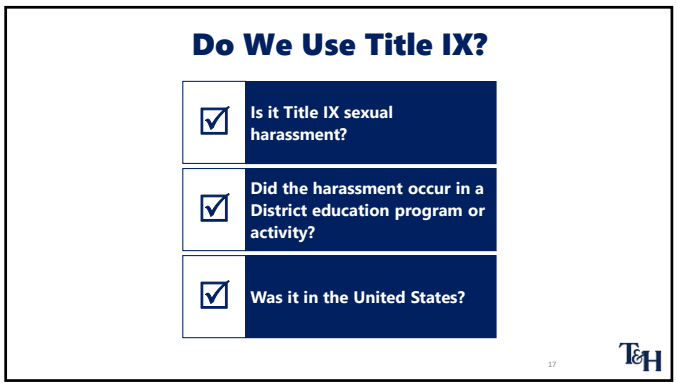
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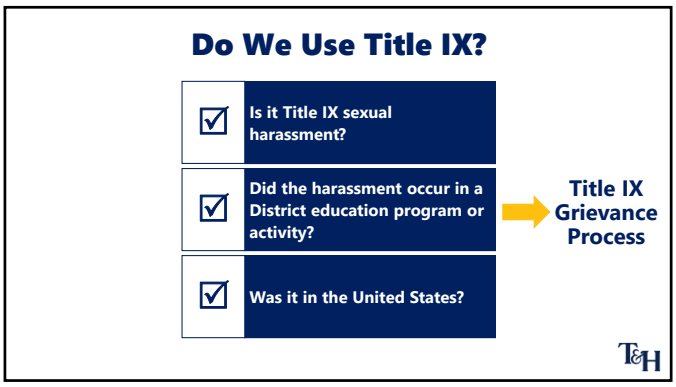
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Do We Use Title IX?

- ☑ Is it Title IX sexual harassment?
- No — Did the harassment occur in a District education program or activity?
- ☑ Was it in the United States?

If answer to any question is NO, the Title IX Grievance Process does not apply

Use process for other misconduct

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Let's start with the easiest question first

- ☑ Was it in the United States?

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Did it occur in the United States?



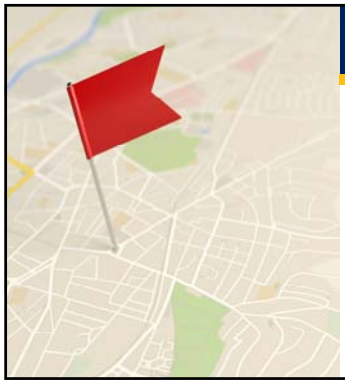
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Next easiest...

- ☑ Did the harassment occur in a District education program or activity?
- ☑ Was it in the United States?

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Education Program or Activity

- Conduct within the District's operations
- Off-campus conduct
  - When the district has substantial control over the alleged harasser and the context in which the harassment occurs
  - Be careful of external conduct that leads to a hostile environment ***within*** the education program or activity

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Conduct within the District's Operations



- Classroom
- Hallway
- Restroom
- Lunchroom
- Lockers
- Parking Lot
- Computer
- Field Trip
- Gym
- Playing Field
- Bus
- Athletics
- Arts and clubs

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Cell Phones & Electronic Devices



- Case-by-case review of the circumstances of the online harassment
- Did it occur under circumstances where the school had substantial control over the alleged harasser?
- Did the school have substantial control over the context of the harassment?
- Did the online harassment have "downstream effects"? (Did it spread into the school's education program or activity?)

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And now comes the most complicated...

- ☑ **Is it Title IX sexual harassment?**
- ☑ **Did the harassment occur in a District education program or activity?**
- ☑ **Was it in the United States?**

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Title IX Sexual Harassment

Title IX sexual harassment means unwelcome conduct on the basis of sex that satisfies one or more of the following:

- Quid Pro Quo Harassment
- Hostile Environment Harassment
- The Big 4
  - ►Sexual Assault
  - ►Domestic Violence
  - ►Dating Violence
  - ►Stalking

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Unwelcome

- ►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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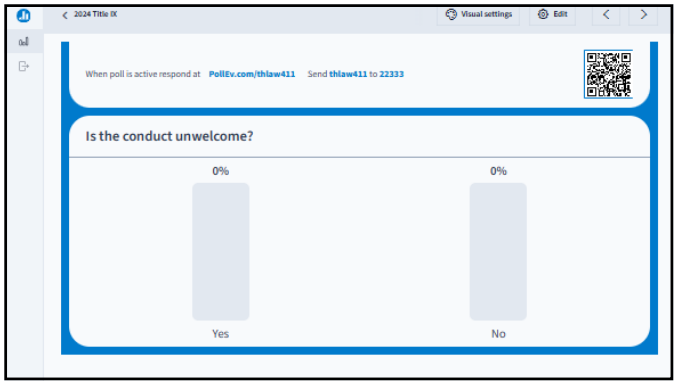
Unwelcome?



A student, Carson, reports that other students are constantly making sexual jokes, which Carson said makes them uncomfortable. Carson actively participates in the jokes, makes jokes, laughs at jokes, but says they only did so not to make a scene.

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On the Basis of Sex

The preamble to the 2020 Rules explains:

- On the basis of sex includes:
  - Conduct that is sexual in nature
  - Conduct that references one sex or another
  - Conduct aimed at a particular sex
  - Sex stereotyping (gender norms)
- Any individual, irrespective of sexual orientation or gender identity can be the victim of sexual harassment



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Quid Pro Quo

An employee of the school district → conditioning the provision of an aid, benefit, or service of the district → on a person's participation in unwelcome sexual conduct.

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Quid Pro Quo

- Students by definition cannot engage in quid pro quo sexual harassment
- It is **presumed** the sexual conduct is unwelcome, severe, objectively offensive, and deprived a student of educational access
- The employee does not have to make the condition explicit—i.e., state "this for that"—the condition may be implied from the circumstances
- The context is relevant to the determination of whether a condition is implied

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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"
- "Come to my conference hotel room tonight for a nightcap so we can talk about that recommendation you asked me for. I feel like I need to get to know you better."

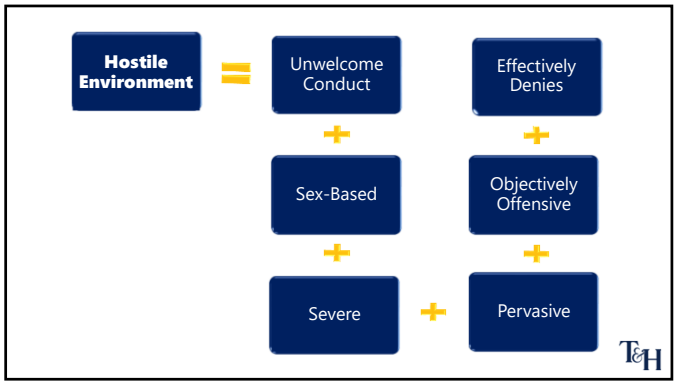
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Title IX Sexual Harassment

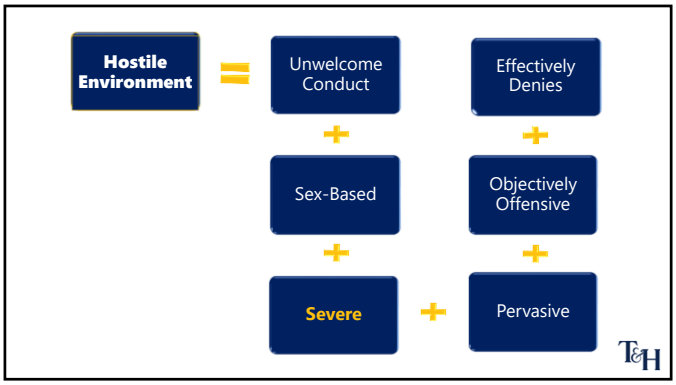
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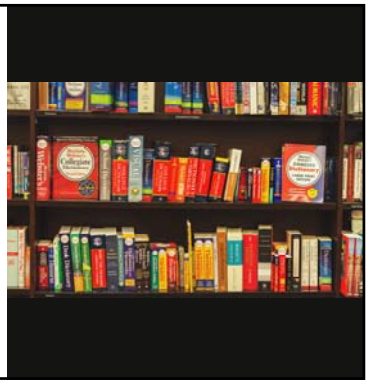
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Severe

- Nature and degree of the harassment
- Severe: "causing very great pain, difficulty, worry, damage, etc.; very serious" (Cambridge Dictionary)
- Severe: "very bad, serious, or unpleasant"; "causing a lot of physical pain or suffering;" "very harsh" (Britannica Dictionary)



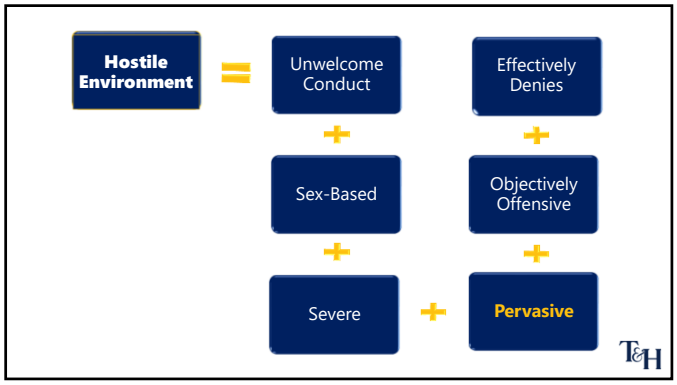
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Severe … The Courts Have Spoken

- Courts "must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable to adults … Indeed, at least early on, students are still learning how to interact appropriately with peers."
  Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999)
- Must be more than the sort of teasing and bullying that generally takes place in schools
  Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156 (5th Cir. 2011)
- Must be extreme, and not merely rude or unpleasant
  Kollaritsch v. Michigan State Univ. Bd. of Trs., 944 F.3d 613 (6th Cir. 2019), *cert. denied* 141 S. Ct. (2020)
- Goes beyond mere juvenile behavior among students, even if the behavior is antagonistic, non-consensual, and crass
  Jenkins v. Univ. of Minn., 131 F. Supp. 3d 860 (D. Minn. 2015), *aff'd*, 838 F.3d 938 (8th Cir. 2016)

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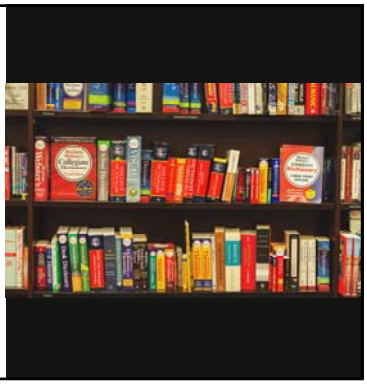
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Pervasive

- Frequency or duration of harassment; scope or continuousness
- Systemic or widespread
- Pervasive: "existing in or spreading through every part of something" (Merriam-Webster Dictionary)
- Pervasive: "present or noticeable in every part of a thing or place" (Cambridge English Dictionary)



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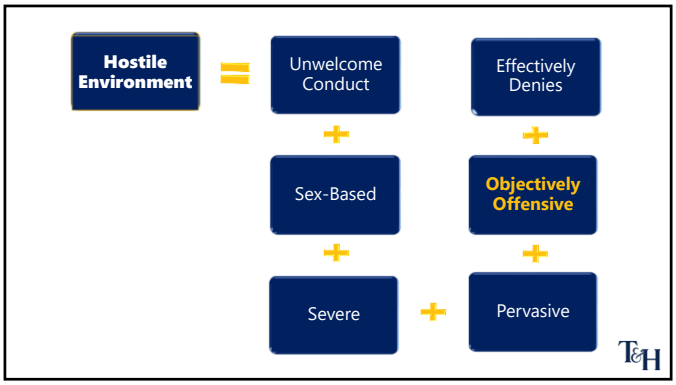
Pervasive ... The Courts Have Spoken

- Single or isolated incidents are generally not enough
- The Supreme Court noted a single incident could **hypothetically** be sufficiently severe to meet the standard
- Courts evaluate whether there was a "systemic or ongoing pattern of harassment," a "series of incidents," or "numerous acts of objectively offensive" conduct

  E.g., Carmichael v. Galbraith, 574 F.App'x 285 (5th Cir. 2014)

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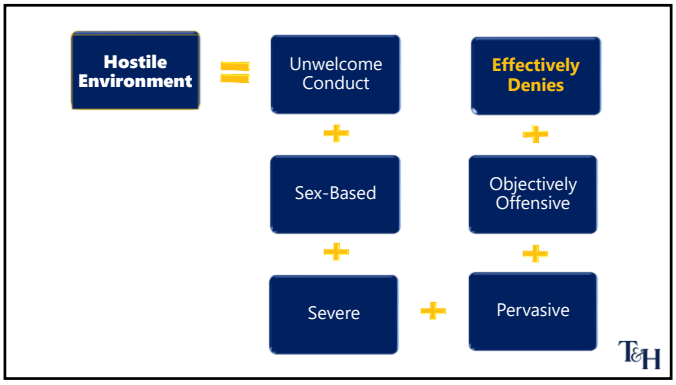


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- Offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively
- The objective offensiveness of conduct is to be judged by reference to a reasonable child at whom the conduct were aimed

Objectively Offensive

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Effective Denies Equal Access to Your Education Programs or Activities

- The school must evaluate whether a reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.
- Does not require a complainant to demonstrate any particular harm, such as reduced grades or missed classes.

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Effective Denial of Equal Access

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- 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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- 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 location of the conduct and the context in which the conduct occurred
- 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
- Other sexual harassment in the education program or activity

Totality of Circumstances

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Recognizing Sexual Harassment

- The Title IX regulations contemplate sexual harassment occurring in a variety of circumstances
- Sexual harassment may manifest itself multiple ways
- Key is to recognize when conduct may constitute sexual harassment that needs to be responded to using the Title IX Grievance Process
- Examples on following slides are instructive and are not an exhaustive or exclusive list of conduct constituting sexual harassment

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Examples of Student-Student Sexual Harassment

- Rating other students
- Snapping bra straps of other students
- Disseminating sexual pictures, photographs, illustrations, messages, e-mails or notes
- Making sexual comments, jokes, gestures, or looks
- Writing sexual messages/graffiti concerning other students on bathroom walls, locker rooms, etc.
- Intentionally brushing up against another student in a sexual way
- Blocking or cornering another student in a sexual way
- Forcing another student into a kiss or a sexual act
- Flashing another student
- Spreading sexual jokes or rumors about another student
- Touching, grabbing, or pinching another student in a sexual way
- Telephoning or emailing sexual messages
- Degrading, shaming, belittling, or humiliating based on sex
- Giving intimate or sexual gifts
- Commenting on others' bodies and physical attributes

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Recognizing Sexual Harassment

Employee-on-Student Sexual Harassment

An inappropriate relationship between an employee and a student. Includes

- Sex between a student or employee no matter the age; and,
- Any inappropriate communications with students, especially through social media.



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Examples of Employee-Student Sexual Harassment

- Entering into personal relationships with students
- Engaging in a sexual relationship with a student
- Using language of a flirtatious, profane, or sexual nature around students
- Dating or becoming romantically involved with students
- Showing pornographic, provocative, or sexually suggestive materials to students
- Meeting with students alone outside of school
- Meeting alone with students in isolated places
- Showing favoritism to students
- Having physical contact with students, except for inoffensive contact
- Wearing provocative or revealing clothing or exposing inappropriate body parts
- Patting others on any body area except shoulders, arms and upper back
- Tickling or wrestling with students
- Playing games that involve inappropriate touching
- Giving compliments that relate to physique or body development
- Kissing students
- Giving massages to students

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Sexual Abuse



The U.S. Department of Education and numerous studies have estimated that 1 in 10 students experience educator sexual misconduct during their K-12 years.

- Most reports involved noncontact sexual behaviors *(e.g.,* suggestive language, being shown sexual images)
- But a significant number of children reported sexual contact. The U.S. Department of Education (2020) found that between 2017–2018 there were 14,152 allegations of educator-perpetrated sexual assault and 786 allegations of rape or attempted rape.

Jeglic et al, 2013; Shakeshaft, 2004; Dep't of Educ. (2020).

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Teacher Perpetrators in Texas

1,022 Teachers Were Sanctioned Between 2008-2016
Total Teacher Population: 333,886

01 **75% were male**

However, men comprised only 23% of the statewide teacher population.

02 **61% were White**
29% were Hispanic

03 **63% were under 39**

Younger and early career teachers are more likely to engage in inappropriate relationships.

04 **53% had worked in education 5 years or less.**

C. Roberts & D. Thompson (2018)

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Victims of Educator Misconduct



- Texas and national data show that most victims are female (approximately 72%)
- Studies and federal data indicate that a majority of victims are in middle school or high school
- Sex abuse of girls *increases* with their age but *decreases* for boys
- The reporting rate is very low (4 to 6%)

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Grooming

Grooming refers to the manipulative behaviors employed by a perpetrator to gain the cooperation and trust of the victim and avoid detection.

Grooming also involves earning the trust of the child's family members and the perpetrator's colleagues and supervisors.



- **Bonding actions and boundary crossing include targeting a student for a "special" bond or relationship ("I can talk to you," "you're so mature")**
- **Abusers encourage the victim's reliance through tutoring, counseling, lessons, grades, food, transportation**
- **"Normalizing": acting like a peer; discussing sexual topics; use of social media**

Jeglic et al (2025); Shakeshaft et al (2021)

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Sexual Assault

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 the consent of the victim

Fondling - the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

Incest - sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law

Statutory Rape - sexual intercourse with a person who is under the statutory age of consent

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Consent

- "Consent" comes into play in student-on-student sexual assault cases
- Not defined in Title IX Rules
- Must be defined in your policies or procedures
- Generally: The existence of clearly understandable words or actions that manifest a knowing, active, voluntary, and present and ongoing agreement to engage in specific sexual or intimate conduct by one not suffering from incapacitation

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Consent is not present when a person does not have capacity to consent, voluntarily or involuntarily due to:

- Age
- Physical condition
  - Due to alcohol or drug consumption
  - Being unconscious
  - Being asleep, or in another state in which the person is unaware that the sexual activity is occurring
- Disability that impairs the individual's ability to give consent

Capacity to Consent

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Key Question: Should a reasonable person in the same circumstances have known the other party could or could not consent to the sexual activity?

Incapacitation

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- In Texas, 17 is the age of consent
- Exception: parties at least 14 years of age and less than 3 years apart in age
- Students younger than age 14 can never consent
- But remember…public school employees are prohibited from engaging in sexual or romantic relationships with students regardless of the student's age

Age of Consent

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Domestic Violence

felony or misdemeanor crimes committed by a person who:

Is a current or former spouse intimate partner, or person similarly situated to a spouse of the victim

Is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner

Shares a child in common with the victim

Commits acts against a person who is protected under the family or domestic violence laws of your state or local government

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Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim

Existence of such a relationship shall be determined based on the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship

Can include sexual, physical, emotional, or psychological violence or threat of sexual of physical abuse

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Dating Violence Examples

- Physical abuse (hitting, choking, punching, biting, shooting, etc.)
- Threats of physical harm to the victim or others
- Intimidation, blackmail
- 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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Stalking

A course of conduct

directed at a specific person

that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress

Includes cyber-stalking

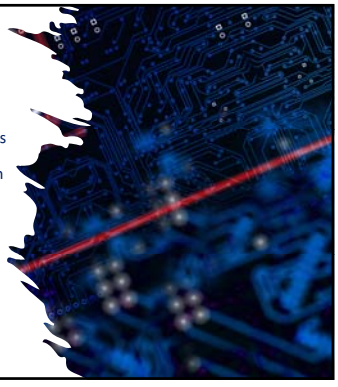
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Stalking Examples

- Following an individual around or spying on an individual
- Threatening physical harm to an individual, their family, pets, or property
- 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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While on an overnight school trip, a group of students gather in a hotel room for a party to celebrate their team victory. Carson has never drank alcohol before, but Robin convinces Carson to "*get blasted*," saying Carson is too uptight and "*Just let me liberate you*." As the night goes on, Carson begins to slur their words and stumble. At one point, Robin grabs Carson by the waist to stop them from falling and then pulls Carson toward them until Carson's butt is touching Robin's crotch. Robin rubs up against Carson and says "*Shake your rump. Get down, get up. Do it like it hurt, like it hurt.*" When Carson starts to pull away, Robin says "*I know you want it. I hate these blurred lines.*"



"Blurred Lines" by Robin Thicke (written by Pharrell Williams / Robin Thicke / Joseph Harris Clifford)

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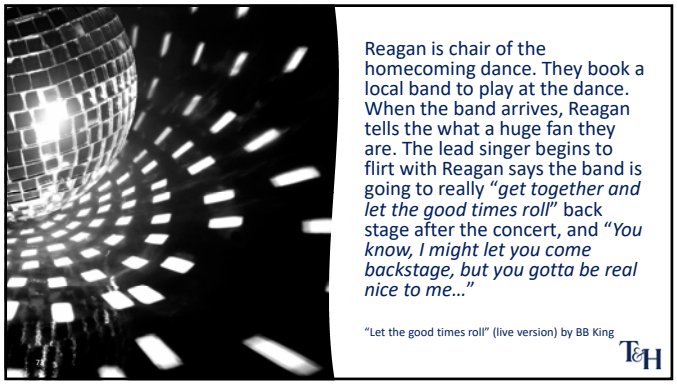
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Text **THLAW411** to **22333** once to join

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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Reagan is chair of the homecoming dance. They book a local band to play at the dance. When the band arrives, Reagan tells the what a huge fan they are. The lead singer begins to flirt with Reagan says the band is going to really "*get together and let the good times roll*" back stage after the concert, and "*You know, I might let you come backstage, but you gotta be real nice to me…*"

"Let the good times roll" (live version) by BB King

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- Melissa reports that her friend Rihanna is in a toxic relationship
- According to Melissa, Rihanna's boyfriend tears her down emotionally, cursing at her and insulting her, just so he can be the one to put her back together
- Melissa has noticed a large black and blue bruise on Rihanna's arm and thinks he might also be physically abusing her
- But according to Melissa, Rihanna can't get enough of her boyfriend and won't listen to reason because all she has is "*Love on the Brain*"

Love on the Brain
by Fred Ball, Joseph Angel, and Robyn Fenty



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

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

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- Pat and Neil have a turbulent relationship
- They argue all the time – staff reports it is because no one can tell either of them that they're wrong
- Most recently, they got into an argument in the stairwell of one of your campus buildings
- Security video footage shows them shoving and hitting each other during the argument
- Administrators want to discipline both students for fighting

Love is a Battlefield
by Mike Chapman and Holly Knight

77

When poll is active, respond at **pollev.com/thlaw411**
Text **THLAW411** to **22333** once to join

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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Stacy reports that Riley has been taunting them about their mom. Riley has asked to come over after school and hang around by the pool so they can see Stacy's mom in their bathing suit. Riley told Stacy that since Stacy's dad moved out, Stacy's mom could really use a person like Riley. Riley spread a rumor that one time last year, when Riley was hired to mow their lawn, Stacy's mom came outside, wearing just a towel and that the way she said "You missed a spot over there," was meant to be a "come on" to Riley. When Stacy confronted Riley, Riley accused Stacy of having a crush on Riley and said "Your mom has got it going on. Stacy, can't you see? You're just not the one for me. I know it might be wrong, but I'm in love with your mom."

"Stacy's Mom" by Fountains of Wayne (written by Adam Schlesinger and vocalist Chris Collingwood



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

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Casey and Ryan used to date. Casey broke up with Ryan recently, and reports that Ryan has not handled the break-up well.

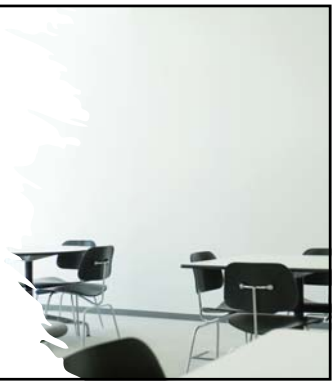
Ryan left a poem in Casey's locker that said:

Since you've gone,
I've been lost without a trace.
I dream at night,
I can only see your face.
I look around,
but it's you I can't replace.
I feel so cold,
and I long for your embrace.

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The next day, during lunch, Ryan sat down next to Casey. Casey told Ryan that they were making them uncomfortable and asked Ryan to sit someplace else. Ryan refused. Casey then got up to leave and Ryan called after them,

"Can't you see that you belong to me?"



82



"Every Breath You Take" by the Police (written by Gordon Matthew Thomas Sumner (Sting))

A week or so later, Ryan handed Casey an envelope as they were passing each other in the hall at school. The envelope contained photos of Casey that Ryan had taken – of Casey at band practice, of Casey hanging out with their friends, and even of Casey having dinner with their family. There was a note in the envelope that said:

Every breath you take
And every move you make
Every bond you break
Every step you take
I'll be watching you

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

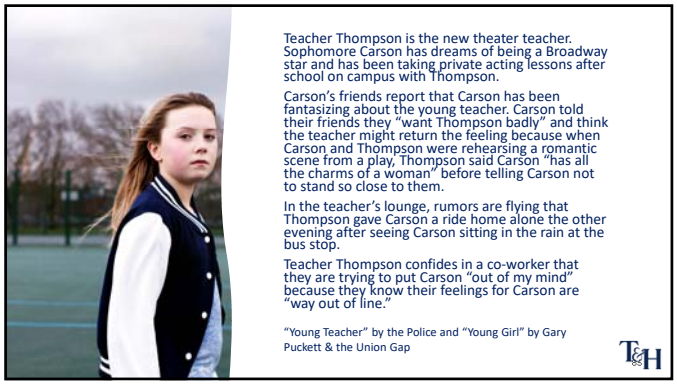
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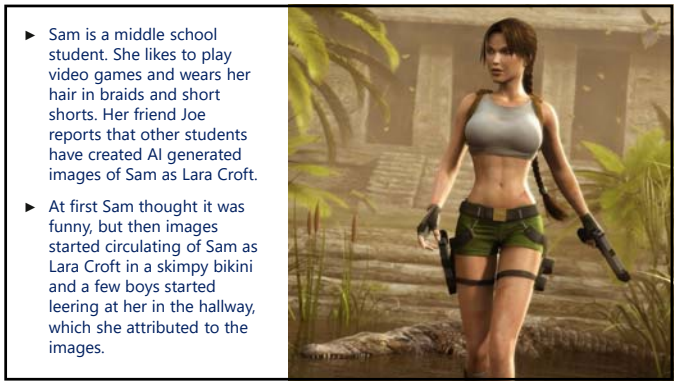
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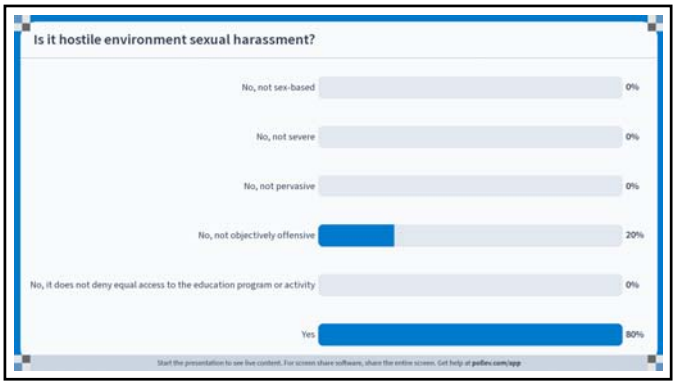
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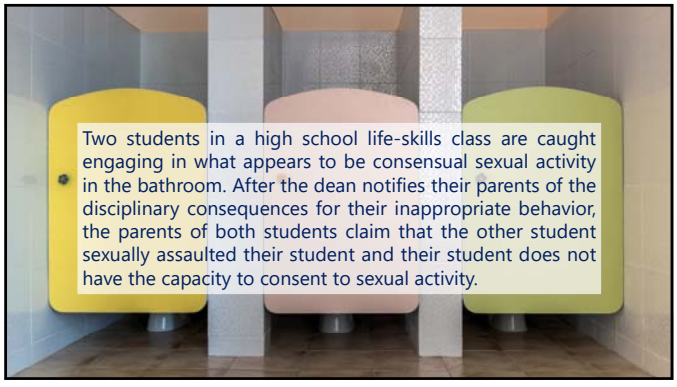
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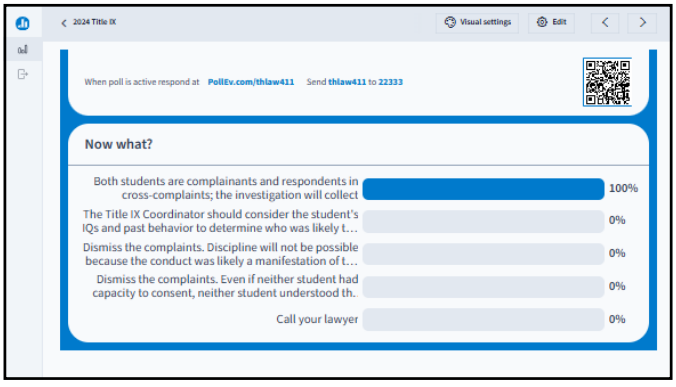
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Reporting Requirements



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All employees must **notify the Title IX Coordinator** when the employee has **any information or knowledge** about conduct or allegations that **may constitute sexual harassment** under Title IX.

Employees can notify the Title IX Coordinator of potential sexual harassment in any manner including:

- Orally (in-person/phone)
- In writing (email or other documentation)
- Any way that ensures the Title IX Coordinator receives the information.

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Sources of information

- Witness
- Hear first-hand
- Hear second-hand
- Overhear
- Otherwise learn about

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Reporting Requirements

Employees may have multiple reporting obligations.

- **Title IX Coordinator** – conduct that may be sexual harassment (including sexual assault, stalking, and other potentially criminal behavior)
- **Child Protective Services** – conduct that may constitute abuse or neglect
- **Law Enforcement** – conduct that may be criminal



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Students Underreport

Reasons students do not report	How you can help
• Fear of retaliation, embarrassment, or humiliation • Fear of punishment or loss of special privileges • Confusion and worry that no one will believe them • Unable to process the assault as a sexual assault • Affections are manipulated, or they feel threatened • Lack knowledge about how to report	• Communicate to students that they have a right to be free from harassment and a responsibility not to harass • Let students know where they can go for help if they witness or experience harassment • Serve as a role model for students by exhibiting non-harassing behavior and addressing any instance of inappropriate conduct • Make reporting easy, offer a confidential option

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Campus "DOs"

- **Assess Safety**
- **Make Contact** Law Enforcement Medical Parent
- **Required Reporting**
- **Special Education?**

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Campus "DONTs"

What NOT to Do Until the Title IX Coordinator Decides if Title IX Applies

- **Investigate**
- **Discipline**
- **Violate Confidentiality**

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Title IX Coordinator Initial Response

Support
- Offer & coordinate supportive measures for complainant
- Offer & coordinate supportive measures for respondent if grievance process or informal resolution initiated

Notify
- Complainant (or reporter) of grievance and informal resolution procedures
- After complaint made, respondent of grievance and informal resolution procedures

Initiate
- Emergency removal or administrative leave
- Grievance process or informal resolution
- Steps to ensure harassment does not continue/ recur

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Intake

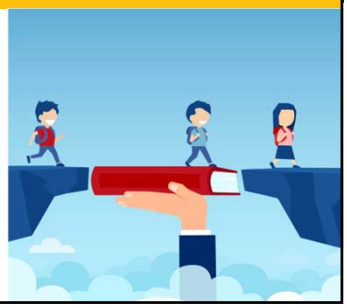
- Initial meeting to better understand the allegations and whether they fall within the definition of Title IX sexual harassment
- Not an investigation or search of evidence
- Basic questions:
  - What happened?
  - Who was involved?
  - When and where did it happen?
- Also discuss the grievance process and offer supportive measures



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Supportive Measures

- Must not **unreasonably** burden either party
- Must be designed to:
  - Restore or preserve access to the education program or activity
  - Protect safety of parties or educational environment
  - Deter sexual harassment
  - Provide support during grievance process
- Nondisciplinary and nonpunitive
- Confidential



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Supportive Measures

Academic
- Deadline extensions
- Schedule modification or other course-related adjustments
- Tutoring
- Offers to retake courses or redo assignments
- Changes in extracurricular activities

Emotional/ Wellness
- Counseling
- Excused absences
- Leave of absence
- Referral to medical or psychological care
- Designation of a "safe adult" for check-ins
- Training and education programs related to sexual harassment

Safety/Security
- No contact orders
- Escort between classes
- Changes to class seating
- Assignments to certain routes, bathrooms, or cafeteria locations
- Increased security and monitoring
- Assistance reporting potentially criminal conduct to law enforcement

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Supportive Measures

- Title IX Coordinator should follow up regularly with the parties to ensure the measures are working
- Title IX Coordinator may need to modify the measures, increase the intensity of measures, or take new measures if initial supportive measures are ineffective
- Either party can also seek to modify the supportive measures if there has been a material change to the circumstances



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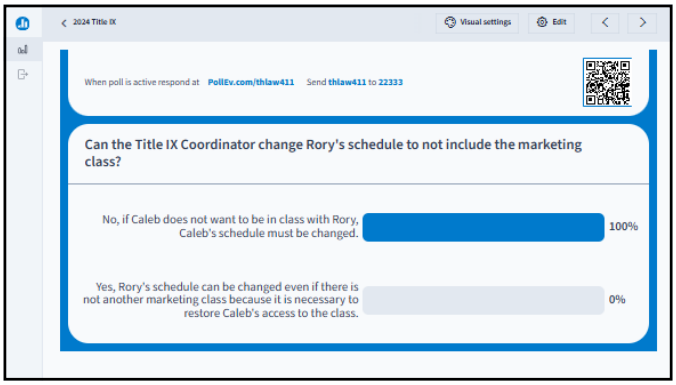
- Remember: for a student with a disability, the Title IX Coordinator should consult with a special education administrator to ensure that supportive measures do not interfer with the student's IEP or 504 services or accommodations
- The special education administrator should consider whether an IEP or 504 meeting is warranted

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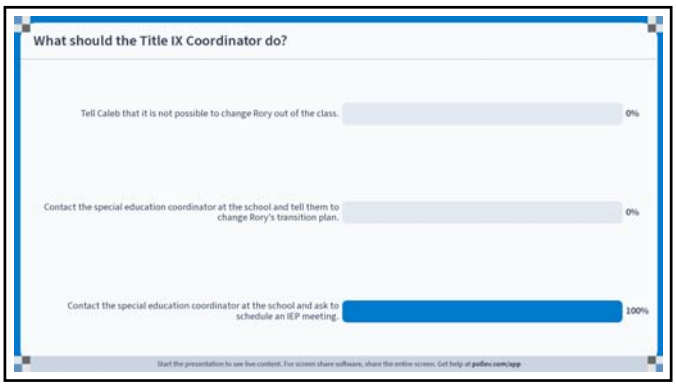
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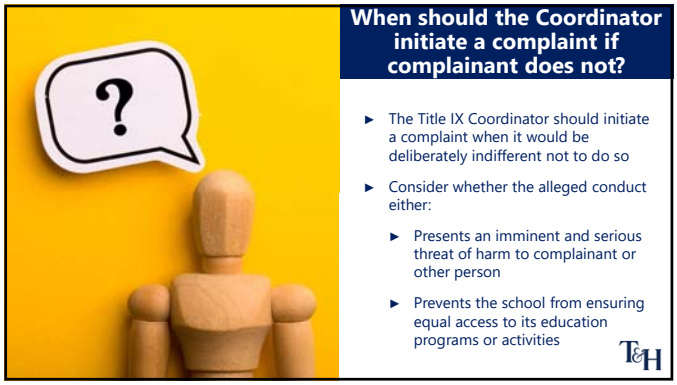
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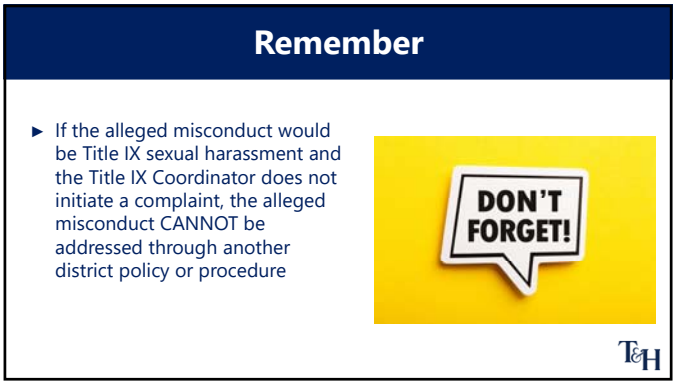
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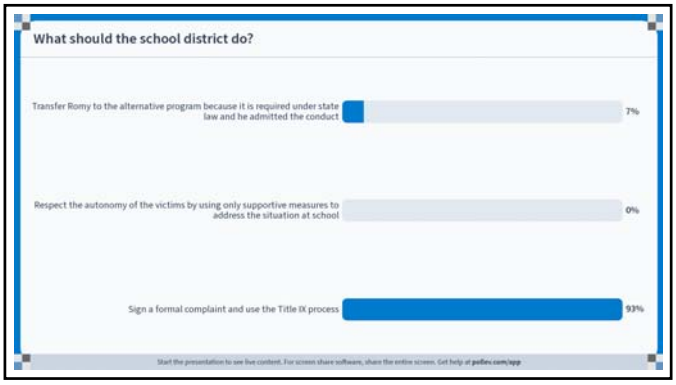
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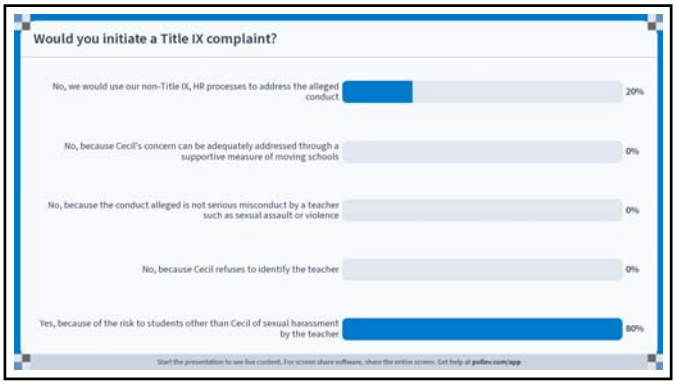


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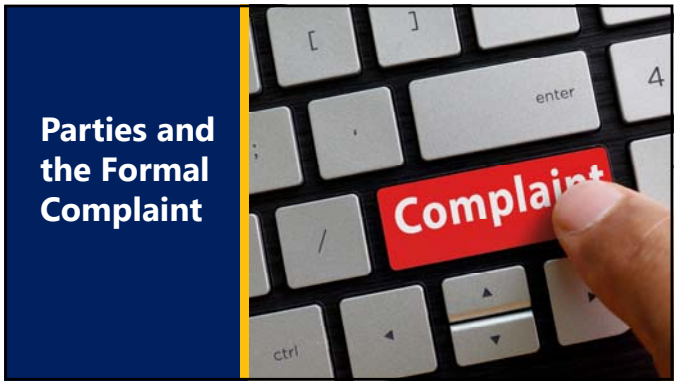
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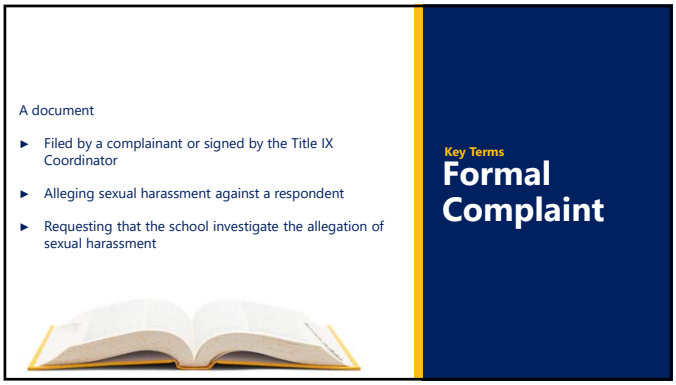
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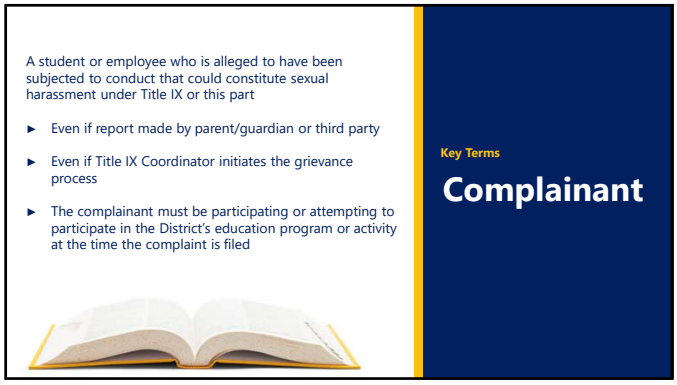
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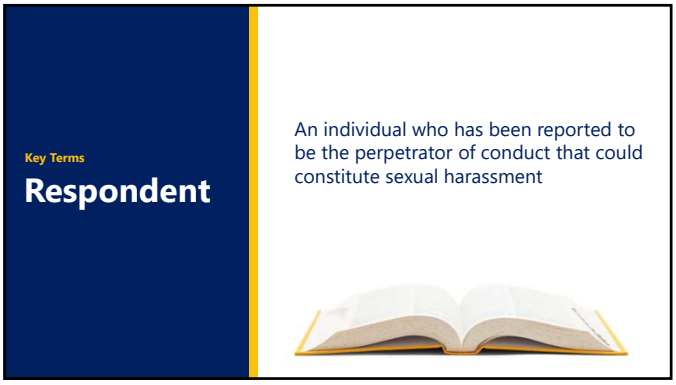
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Parent's Rights

- Right to act on behalf of minor students throughout the grievance process
- May make a Title IX complaint; may exercise the rights of a complainant
- May accompany student to all meetings and interviews
- When parent and minor student disagree → give deference to judgment of parent
- District may set expectations to which parents must comply; these must apply equally to the parties

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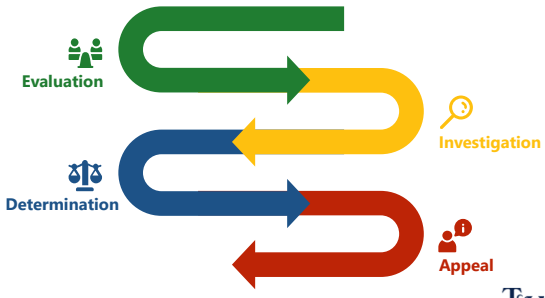
122

When to Sign a Formal Complaint

- Ultimate question is whether the alleged conduct either:
  - Presents an imminent and serious threat of harm to complainant or another person
  - Prevents the school from ensuring equal access to its education programs or activities

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Four Major Grievance Process Stages



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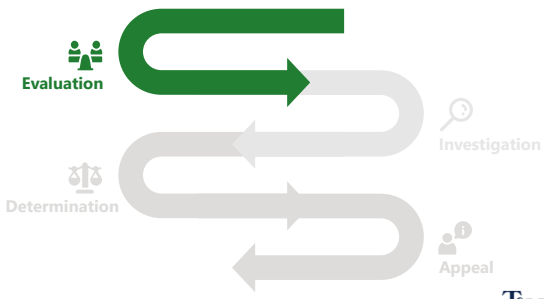


Ten Basic Requirements for Grievance Process

1. Treat complainants and respondents equitably
2. Require an objective evaluation of all relevant evidence
3. Title IX personnel cannot have a conflict of interest or bias and must be trained
4. Presumption that respondent is not responsible
5. Reasonably prompt timeframes for conclusion of the grievance process
6. Describe or list the range of possible disciplinary sanctions and remedies
7. State whether the standard of evidence is the preponderance of the evidence or clear and convincing evidence standard
8. Permissible bases for appeal
9. Describe the range of supportive measures available
10. Not seek, allow, or otherwise use evidence protected under a legally recognized privilege unless waived

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Stage One: Evaluation



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Notice of Allegations

- Provide notice of the District's Title IX grievance procedures
- Sufficient information ***available at the time*** to allow the parties to respond
  - Identity of parties involved
  - Conduct alleged to constitute sexual harassment
  - Date and location of alleged incident
- Statement that retaliation is prohibited
- Statement that the parties are entitled to an equal opportunity to access the directly related evidence

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Notice of Allegations

- At the time the Notice of Allegations is provided to the respondent, offer supportive measures or schedule a supportive measures meeting
- Notice of Allegations to respondent is required before the school meets with the respondent for an interview
- No surprise interviews of employees
- No pulling students out of class to inquire about an incident right after the school receives notice



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Dismissal

Mandatory	Permissive
• The conduct, if true, would not meet the definition of sexual harassment under Title IX • The conduct did not occur in the district's education program or activity • The conduct did not occur against a person in the U.S.	• The complainant withdraws the complaint or allegations in writing • The respondent is no longer enrolled or employed by the district • Specific circumstances prevent the district from gathering sufficient evidence

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Dismissal

Mandatory	Permissive
• The conduct, if true, would not meet the definition of sexual harassment unde… IX • …e conduct did n… …ur in …district's ed… …n p… …n or … • The… …d not occur agains… …son in the U.S.	• T… …plainant withd… the c… …int or all… …s in writi… • The respo… …longer enrolled or… …d by the district • Specif… …mstan… pr… …e district fr… g… …ng sufficient evid…

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REMEMBER … Supportive Measures



If you dismiss, you must "at a minimum"

- Offer supportive measures to complainant & respondent
- Take appropriate prompt and effective steps to ensure that sexual harassment does not continue or recur

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Appeal of Dismissal

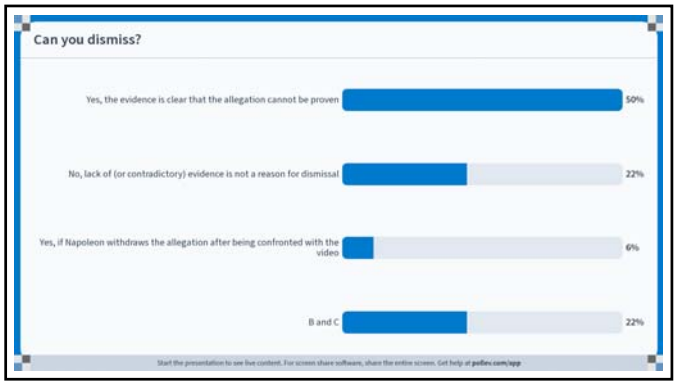
Who	Why?	Appeal Decisionmaker	Steps

• Any party can appeal a dismissal	• Based on
	  • procedural irregularity
	  • new evidence
	  • bias/conflict of interest
	• That would change the outcome
		• Cannot be someone involved in the investigation or dismissal of complaint
		• Must be trained
			• Notify parties when appeal is filed
			• Implement appeal procedures equally for the parties
			• Give parties a reasonable and equal opportunity to make a statement in support of or challenging the dismissal
			• Notify all parties of result of appeal and rationale for the outcome

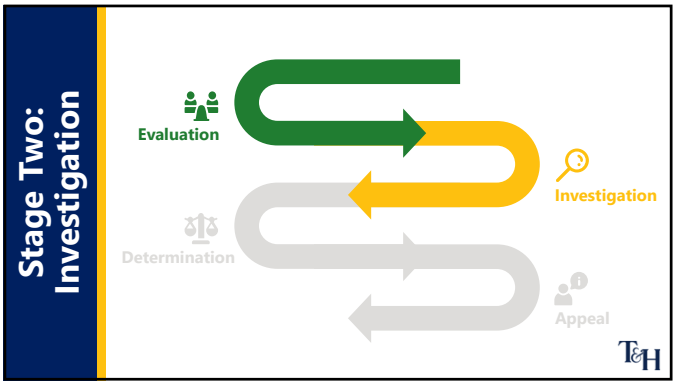
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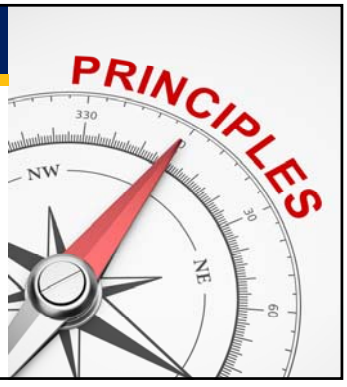
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Key Investigation Principals

- Thorough
- Prompt
- Impartial
- Fair



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Investigator Tip

- The Notice of Allegations is your "roadmap" to your investigation
- Make sure you understand the allegations and the elements necessary to prove them
- If there is evidence of new allegations, ensure a new Notice of Allegations is provided to both parties

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Investigation Plan

- What questions need to be answered for a thorough and impartial investigation?
- What evidence do you need to collect?
- Who should you interview?
- In what order will you conduct witness interviews?
- Prepare interview outlines
- Think: What information do you need to obtain to allow the decisionmaker to answer the key questions and make a reliable determination

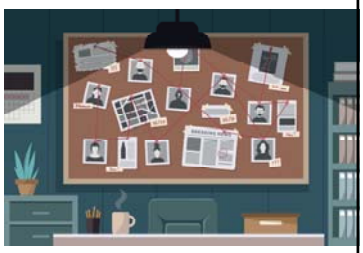
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Evidence Gathering

- Burden on the District to conduct an investigation that gathers sufficient evidence
- Provide equal opportunity for parties to present relevant fact witnesses and other inculpatory and exculpatory evidence
- Review all evidence gathered and determine what evidence is directly related and what evidence is relevant

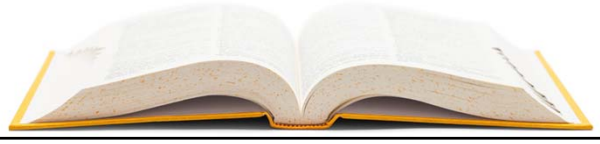


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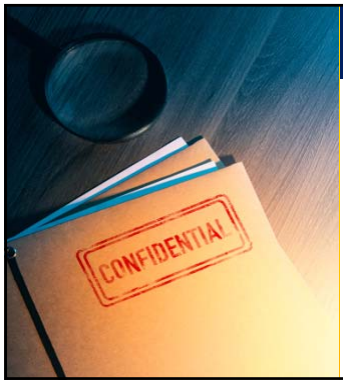
"Relevant"

Related to the allegations of sexual harassment under investigation as part of the grievance procedures.

Questions are relevant when they seek evidence that may aid in showing whether the alleged sexual harassment occurred, and **evidence** is relevant when it may aid a decisionmaker in determining whether the alleged sexual harassment occurred.



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Impermissible Evidence

- Evidence protected by a legal privilege
- Health care treatment records

MUST OBTAIN WAIVER!

- Complainant's sexual predisposition, or prior sexual behavior (unless exception)

Impermissible evidence must not be considered (except to determine exception) and must not be disclosed or used

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Complainant's Sexual Predisposition and Prior Sexual Behavior

- Questions and evidence related to a complainant's sexual predisposition or prior sexual behavior are **impermissible** and may not be asked or sought
- Exceptions: Evidence related to the complainant's prior sexual behavior
  - Offered to show someone other than the respondent committed the alleged conduct
  - Related to the sexual behavior between the complainant and respondent and offered to prove consent
- **However**, the fact of prior sexual conduct between the parties does not, by itself, demonstrate or imply the complainant's consent to the alleged sexual harassment

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Types of Evidence

- Direct Evidence
- Circumstantial Evidence
- Hearsay

Rumor / innuendo (NOT evidence)



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Direct Evidence

"Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."

Black's Law Dictionary 675 (10th ed. 2014)

- What a witness directly experienced
- Eyewitness testimony
- Admissions—written or oral
- Surveillance tape or cell phone video captures the incident

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Circumstantial Evidence

"Evidence based on inference and not on personal knowledge or observation … all evidence that is not given by eyewitness testimony."

Black's Law Dictionary 674 (10th ed. 2014)





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Hearsay Evidence

"A statement (oral or written) made by someone NOT WHILE TESTIFYING and that is offered to prove the truth of the matter asserted in the statement."

Fed. R. Evid. 801(c)



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Sources of Evidence

- Interviews
- Documents
- School records
- Campus files
- Personnel files
- Student files
- Police Reports
- Emails
- Handwritten notes
- Calendars
- Photographs
- Videos
- Text & instant Messages
- Other electronic files/ cloud storage
- Journal entries
- Medical records (ONLY with written consent)
- Social media posts
- Voicemails, call logs

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Before Interviews

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



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Sharing the Evidence

- The parties must be given at least 10 days to review the directly evidence and submit written responses about the evidence to the investigator
  - Includes evidence the school doesn't think it will use
- The investigator must consider the responses when writing the investigative report



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Evaluating Party Responses



- Did either party identify evidence that was absent or not gathered?
- Did either party identify new witnesses or new evidence?
- Did either party point out inconsistencies in the evidence?
- Did either party raise concerns regarding the relevance of the evidence?

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Investigation Report

- The report must summarize all "relevant evidence"
- Investigator can (and should) begin drafting the report during the 10-day DRE period
- The report must be shared with the parties who have 10 days to respond before a decision



154

Prevent Disclosure

- Take reasonable steps to protect the privacy of parties and witnesses during the grievance process
- Take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance process



155

Except…

- Do not restrict the ability of parties to obtain evidence, speak to witnesses, or consult family members, advisors, or confidential resources
- Disclosures for purposes of administrative proceedings or litigation related to the allegations are authorized



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Witness names should be redacted from the investigation report

True 0%

False 0%

True for student witnesses but false for staff witnesses 0%

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Police Involvement

- The district must conduct its Title IX investigation in a "reasonably prompt" manner but may temporarily delay the investigation for good cause, which may include concurrent law enforcement activity
- No long or indefinite delay or extension of timeframes, regardless of whether a concurrent law enforcement investigation is still pending



158

The police decided not to prosecute the Respondent because it's a "they said, they said" case. How does it impact your case?

- You can rely on the police's finding to dismiss the complaint
- You can rely on the factual information gathered by the police, but not their finding
- You cannot rely at all on any information from the police

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Police Evidence?

- Police evidence may be useful for *initial* fact-gathering
- They **are not** a substitute for your own required investigation
- The standards for and purposes of criminal investigations are different from school investigations
- Police investigations or reports are not determinative and you need your own evidence-gathering to determine whether there was Title IX sexual harassment or whether the respondent is responsible



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Investigator Dos and Don'ts

DOs

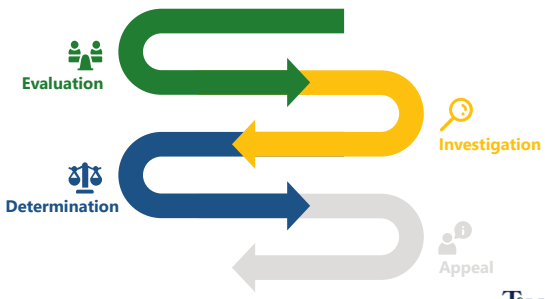
- ✓ Ensure you have no conflict of interest or bias and remain impartial
- ✓ Treat all parties equitably
- ✓ Provide an equal opportunity to the parties to present evidence and witnesses
- ✓ Objectively evaluate all evidence for relevance
- ✓ Know the elements and definitions of the type of alleged sexual harassment and identify the key factual issues
- ✓ Conduct a complete and thorough investigation, identify and address any gaps
- ✓ Ensure your summary of the relevant and not otherwise impermissible evidence is thorough and accurate

DON'Ts

- × Conduct surprise interviews
- × Discriminate in the investigation or rely on stereotypes or preconceived notions
- × Delay or extend the investigation timeline absent good cause
- × Restrict the parties' ability to discuss allegations or gather evidence
- × Shy away from asking tough questions
- × Be accusatory or argumentative
- × Seek or use impermissible evidence, unless there is a waiver or applicable exception
- × Violate the parties' confidentiality

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Stage Three: Determination



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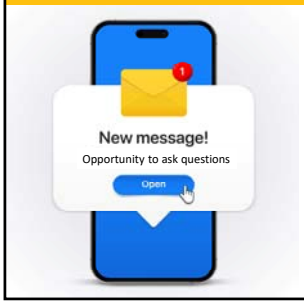
Review Case File

- Formal Complaint
- Written Notice of Allegations
- Directly Related Evidence
- Party Responses to Directly Related Evidence
- Investigation Report
- Party Responses to the Investigation Report



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Written Questions



- The parties can submit written questions to each other and to the witnesses
- The decisionmaker provides relevant and respectful questions to the person for a written answer
- The decisionmaker shares the answers with the parties and allows for follow up questions

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Relevant and Respectful?

Relevant?

- **Inculpatory:** Evidence tending to make a disputed fact or issue *more likely to be true*
- **Exculpatory:** Evidence tending to make a disputed fact or issue *less likely to be true*

Respectful?

- Cannot use profanity or irrelevant, ad hominem attacks
- Harassing questions will not be tolerated

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Non-Relevant or Respectful Questions



Try & Try Again

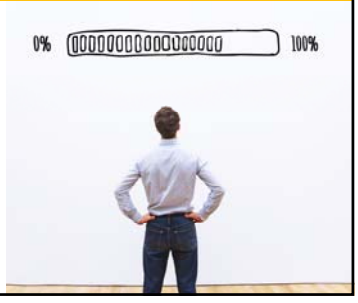
- Provide the reason that the question is not relevant
- Not required to give parties an opportunity to restate their question
- If you do so, we recommend providing only one opportunity and a time-frame for submission (e.g., 2 days)

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Determination

- Decisionmaker evaluates relevant, not impermissible evidence for its persuasiveness
- If not persuaded by the evidence that sexual harassment occurred, the decisionmaker must not determine that sexual harassment occurred
- Standard of Proof: Preponderance of the Evidence = >50%



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They Said/They Said

- Sexual harassment often occurs behind closed doors
- There are often no witnesses to the alleged harassment
- Many cases are going to involve the complainant making certain allegations, the responding denying them, with no other witness
- **The fact that there are no witnesses to the alleged harassment does not mean it is automatically a "50/50"**
- A thorough investigation and a complete summary of all relevant evidence can help you/the decisionmaker assess credibility and reach a reliable determination

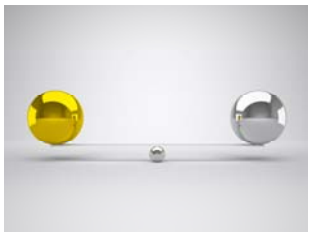
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They Said/They Said

- Very few cases end in 50/50
- More common for a particular disputed fact to end in 50/50, but even that happens less than one might think
- What tips the scale one way or another?



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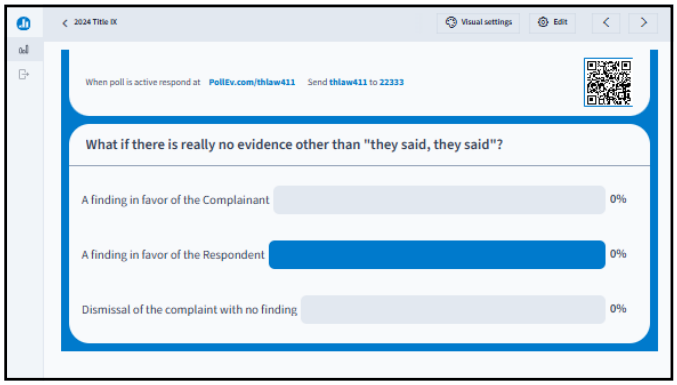
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Credibility Factors

- **Corroborative evidence**
- **Contradictory evidence**
- Motive or interest in outcome
- Body language and demeanor
- Specific details
- Reasonableness of testimony / plausibility
- Memory (impact of time, outside influence, trauma, intoxicant)
- Bias or prejudice
- Internal consistency
- Other factors of believability

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- ☑ Identify the allegations potentially constituting sexual harassment
- ☑ Describe procedural steps taken from the receipt of the formal complaint through the determination
- ☑ Findings of fact supporting the determination

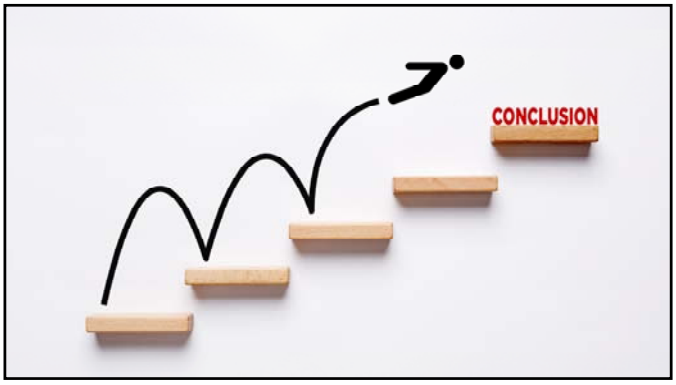
Written Determination Requirements #1 - #3

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- ☑ Conclusions regarding the application of the educational institution's code of conduct to the facts
- ☑ A statement of, and rationale for, the result as to each allegation
- ☑ Process for Appeal
- ☑ Provide the written determination to the parties simultaneously

Written Determination Requirements #4-#7

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What about FERPA?

- OCR states that sharing the result as to each allegation including a list of sanctions is permitted by FERPA because sanctions "always directly impact the victim"
- Remedies do not directly affect the respondent so should be communicated separately to the Complainant

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Decisionmaker Dos and Don'ts

DOs

- ✓ Explain the process to parties and advisors
- ✓ Assume respondent is not responsible
- ✓ Exercise independent judgment and objectively evaluate all relevant evidence
- ✓ Follow your grievance procedure
- ✓ Make credibility determinations and evaluate the weight of the evidence using preponderance standard
- ✓ Make a clear determination regarding whether the respondent violated the school's policies

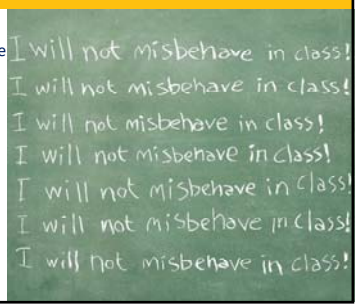
DON'Ts

- ✗ Prejudge the facts or rush to judgment
- ✗ Consider impermissible evidence unless a waiver or exception applies
- ✗ Rely on stereotypes or preconceived notions when making credibility determinations or weighing the evidence
- ✗ Delay or extend the decision timeline absent good cause
- ✗ Neglect to provide the rationale for the determination

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Determination & Discipline

- Complete the investigation and determination (and any appeal) before the imposition of any disciplinary sanctions against a respondent
- Do not discipline a party, witness, or others participating in the grievance process for making a false statement or for engaging in consensual sexual conduct based solely on the determination of whether sexual harassment occurred
- Consider rehabilitative sanctions, as well as discipline



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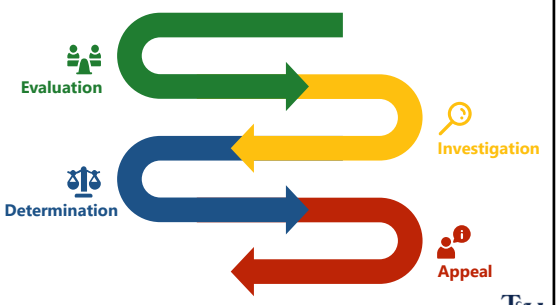
Remedies

- Remedies must be individualized to restore a complainant's equal access to the education program or activity
- Remedies can also be more wide-spread when multiple people were impacted by the sexual harassment, especially when the allegations related to a policy, procedure, or practice of the school district



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Step Four: Appeal



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Review File

- Appellate decisionmaker must be someone other than the investigator or decisionmaker
- Appellate decisionmaker must be trained and impartial
- Review all material provided by the Title IX Coordinator
- Appeals are not de novo, confine the review to the record + appeal documents



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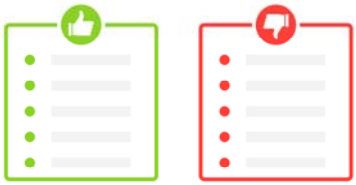
Determine Validity of Appeal

- The appeal must be on one of the three authorized bases:
  1. Procedural irregularity + affected outcome
  2. New evidence + could have affected outcome
  3. Bias or conflict of interest + affected outcome
- Also consider whether the appeal is **timely** (consider your policy or timelines in determination of responsibility)

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Party Responses

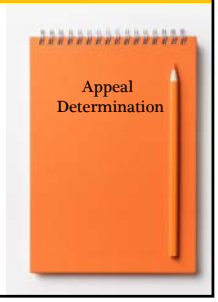
- If the appeal is valid:
  - Must notify both parties of appeal in writing
  - Can be from the Title IX Coordinator
- Must provide the parties equal opportunity to submit written statements for or against the appeal



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Analyze and Decide

- This is where you consider the "weight" of the arguments made in the appeal
- Make sure to consider arguments raised by both sides
- Write a determination that includes the relevant information from the decision, party statements, and reasons for the determination
- Remember to show your work and use your policy definitions



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Affirm, Reverse, or Remand

- Affirm: Where there was no error or the error could not have impacted the outcome
- Reverse: Where the appeal makes clear the decision was incorrect
- Remand: Where more information is needed, return to the investigation or determination stage (possibly with a new investigator or decisionmaker)

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Serving Impartially

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



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Bias

- "[A]n inclination of temperament or outlook, especially a personal and sometimes unreasonable judgment."
- "[T]o give a settled and often prejudiced outlook to"...a person's background biases them against others who are not like them
- Synonyms – nonobjectivity, one-sidedness, partiality, partisanship, prejudice

(Merriam-Webster)



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(Merriam-Webster)

- Sex
- Race
- Ethnicity
- Sexual orientation
- Gender identity
- Disability
- Immigration status
- Financial ability
- Other characteristic



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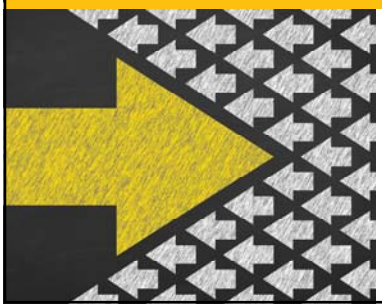
(Merriam-Webster)

- Sex
- Race
- Ethnicity
- Sexual orientation
- Gender identity
- Disability
- Immigration status
- Financial ability
- Other characteristic
- Men are sexually aggressive and likely to sexually assault women
- Women often regret their sexual experiences and recast them as assault
- Men cannot be sexually assaulted
- The #metoo movement has led to many more false sexual assault reports by women

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Conflict of Interest



A situation in which the concerns or aims of two different parties are incompatible.

"A conflict of interest arises when what is in a person's best interest is not in the best interest of another person or organization to which that individual owes loyalty."

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

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Conflict of Interest

Clearest Conflicts:
Is related to the Respondent
Formerly dated a key witness's parent
Invests in a business with the Complainant's parent

Could be Conflicts:
Is Respondent's Coach
Has previously disciplined Complainant for dishonesty

Less Risk of Conflict:
Has a history of speaking out on victim or accused rights
Has other responsibilities, e.g. 504 Coordinator, that cover parties

Not a Conflict:
Is an employee or attorney
Has been trained on trauma informed practices

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Prejudgment

"To judge before hearing or before full and sufficient examination"

"[A]n opinion about a situation or a person that is formed before knowing or considering all of the facts."

Cambridge Dictionary

Synonyms – preconception, assumption, presumption/presupposition, speculation

Merriam-Webster



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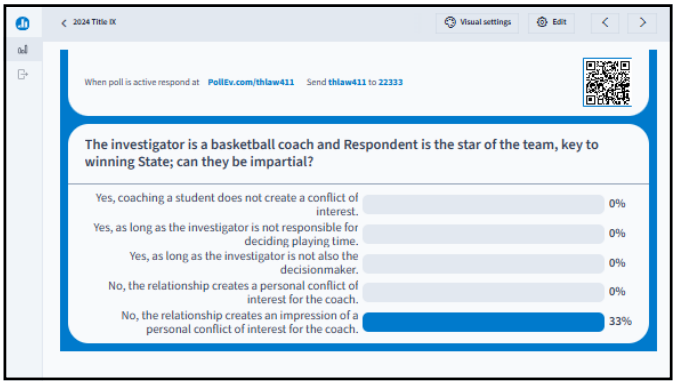
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Merriam-Webster

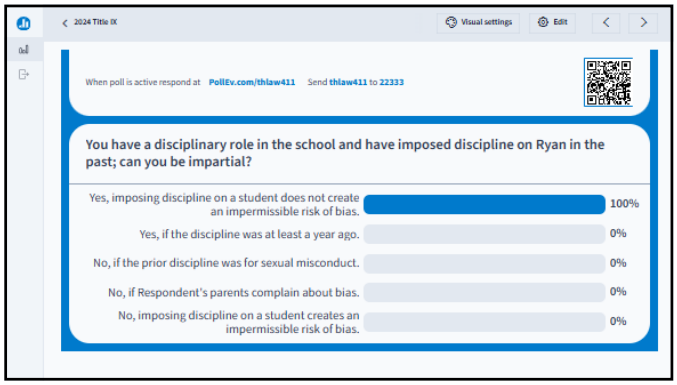
Examples:

- A person was described as clearly upset during their interview, so you presume their recollection is credible
- A person was drinking at the time of the incident, so you presume they don't remember what happened
- A person consented to sexual behavior before, so you presume they consented this time, too

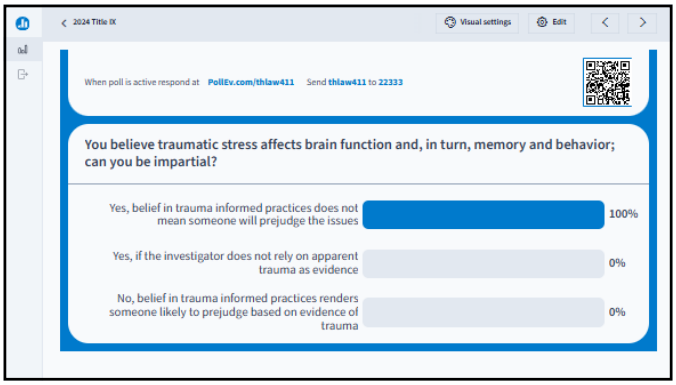
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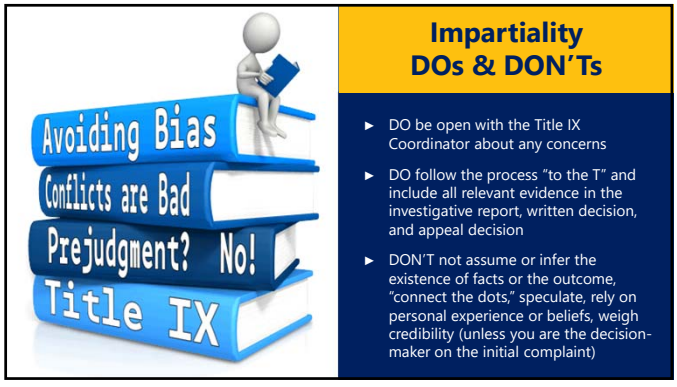
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Impartiality DOs & DON'Ts

- DO 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
- DON'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 you are the decision-maker on the initial complaint)

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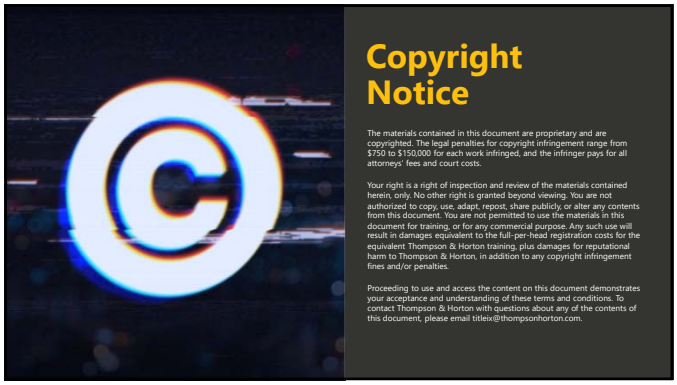
Record Keeping

Title IX Records must be maintained for at least **7 years**

- Reports to the Title IX Coordinator regarding misconduct that reasonably may constitute sexual harassment
- Complaints
- Informal Resolution documentation
- Documentation of the grievance process (including any emergency removal, dismissal, or appeal)
- Determination
- Actions to respond (including supportive measures, disciplinary sanctions, remedies)
- Decisionmaking (whether to initiate a complaint, impose a disciplinary removal, offer informal resolution, etc.)
- Training records

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