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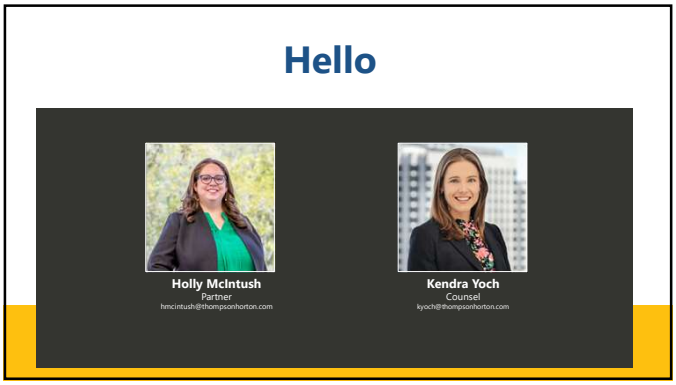

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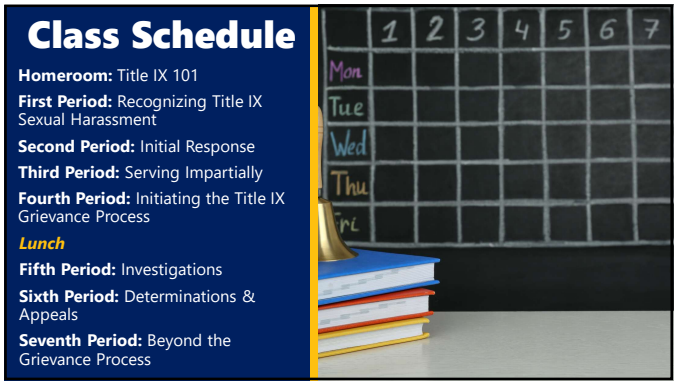

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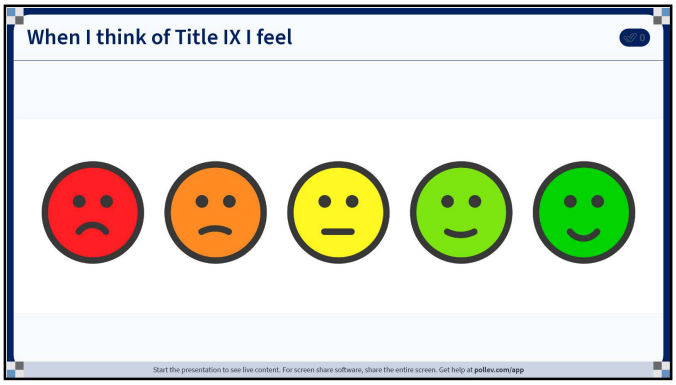

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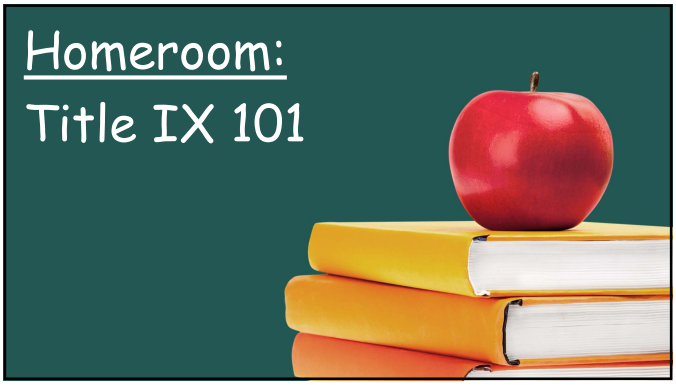

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"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance."

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

9

Title IX's Scope

Recruitment, admissions, and counseling	Financial assistance	Athletics	Sexual harassment
Treatment of pregnant and parenting students	Discipline	Single-sex education	Employment

10

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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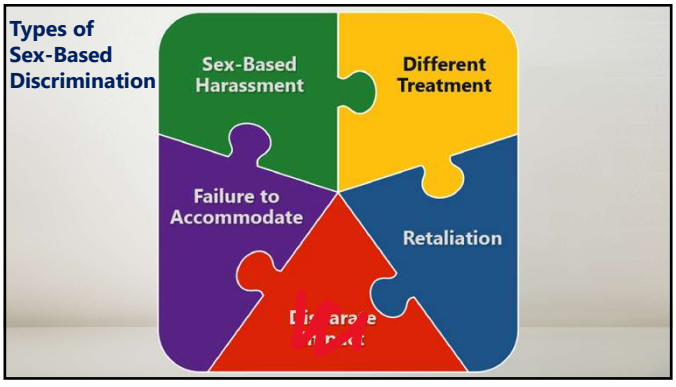

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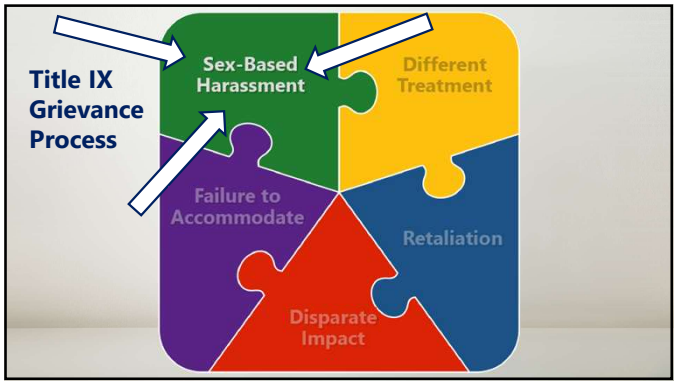

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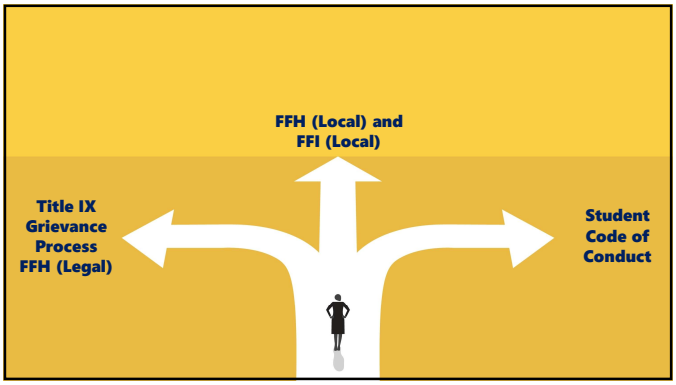

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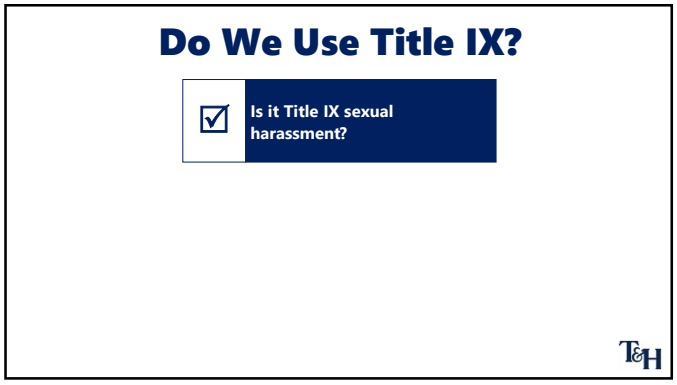

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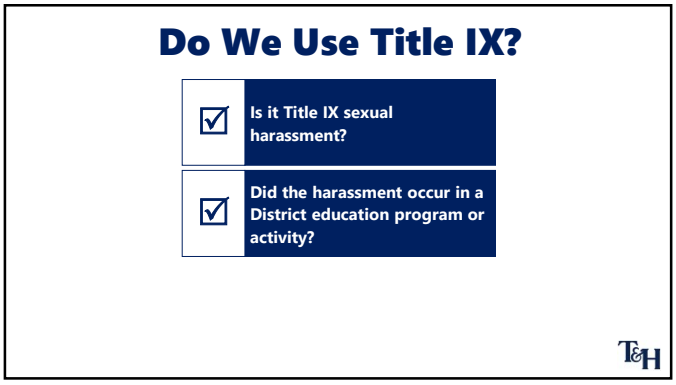

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Do We Use Title IX?

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

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Do We Use Title IX?

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

20

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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Do We Use Title IX?

Start with the easiest question.

- ☑ Was it in the United States?

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Where Did It Occur?

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Do We Use Title IX?

Next ask:

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

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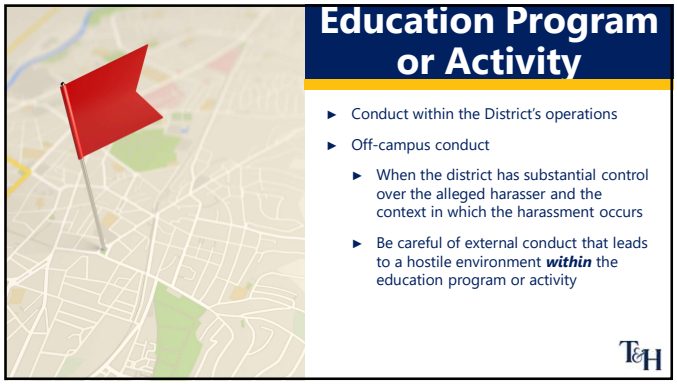

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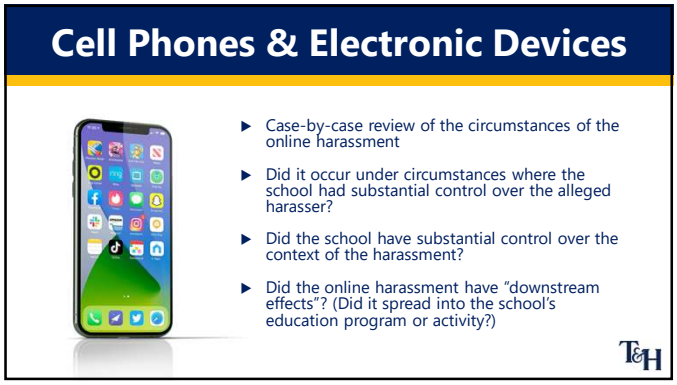

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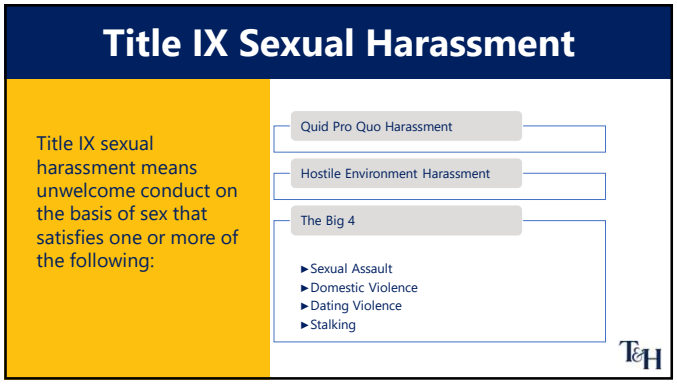

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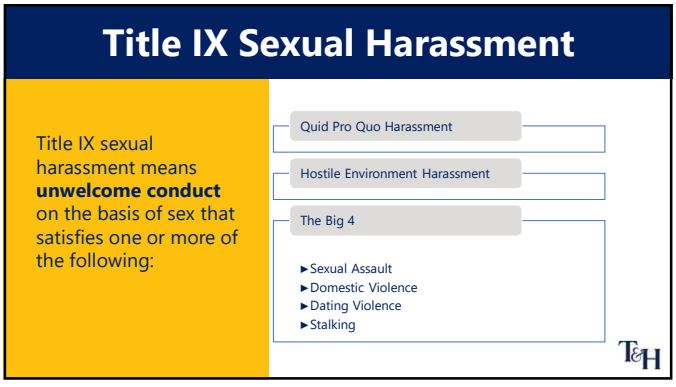

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Unwelcome

- 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, Brandon Walsh, reports that other students are constantly making sexual jokes, which Brandon said makes them uncomfortable. Brandon laughs at the jokes but says they only did so so as not to make a scene.

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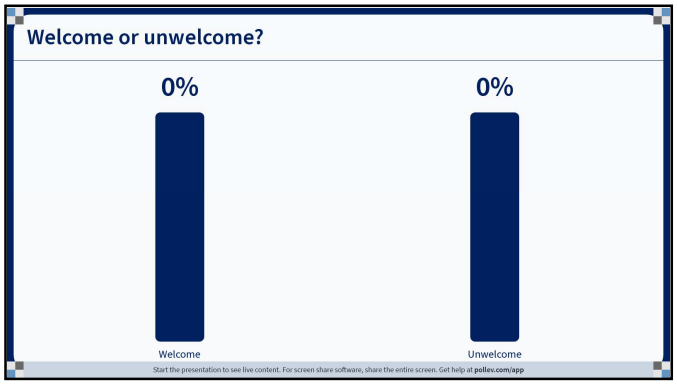

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What If?

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

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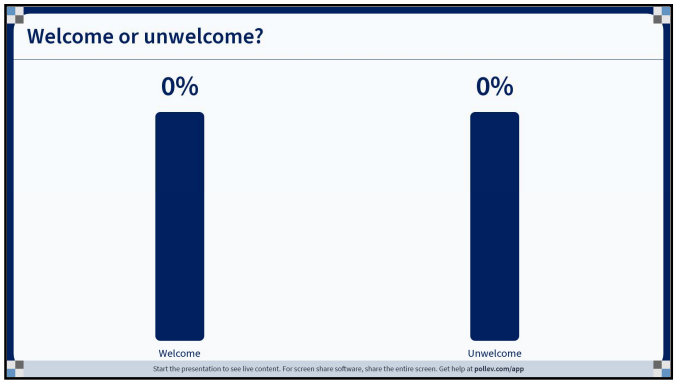

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Title IX Sexual Harassment

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

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

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Sex-based?

David Silver drops out of football to join the staff of the West Beverly High radio station. The football players repeatedly taunt him, saying things like:

- "You're too weak to be a real man."
- "Why don't you play football like normal guys?"
- "Oh, I get it. You're gay"
- "Man up."

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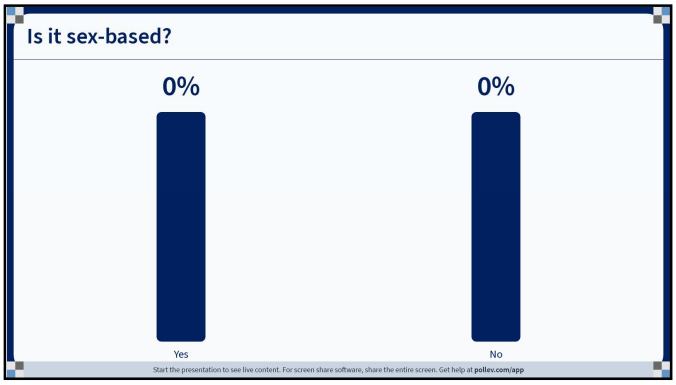

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On the Basis of Sex

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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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

Hostile Environment

The Big 4

- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

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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

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

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

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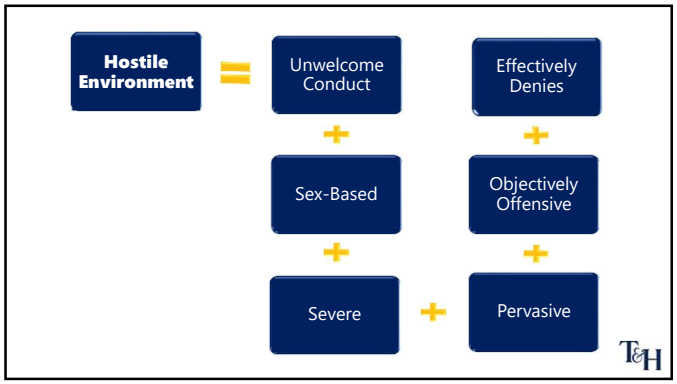

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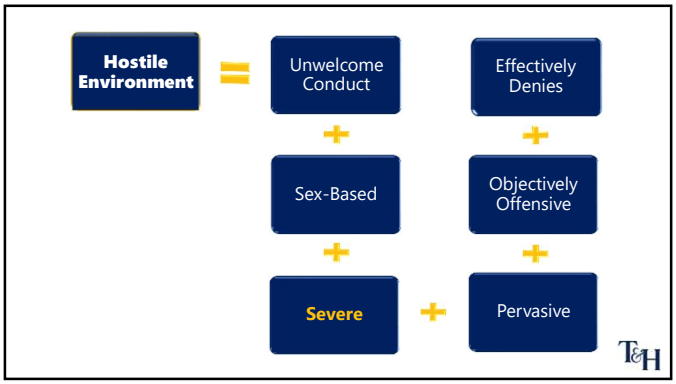

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Severe

- 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: Court Guidance

- 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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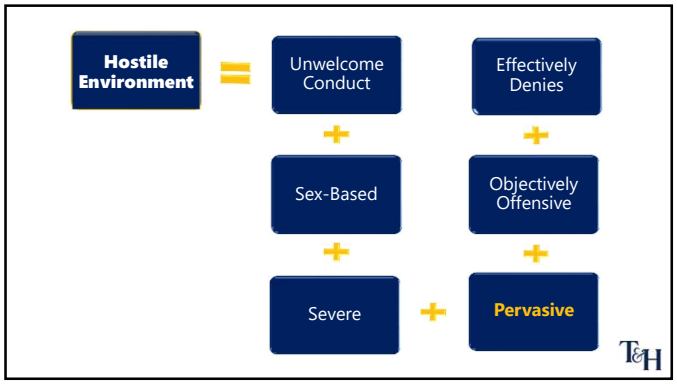

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Pervasive

- 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: Court Guidance

- Single or isolated incidents are generally not enough
- 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)
- But with technology, a single action could become widespread

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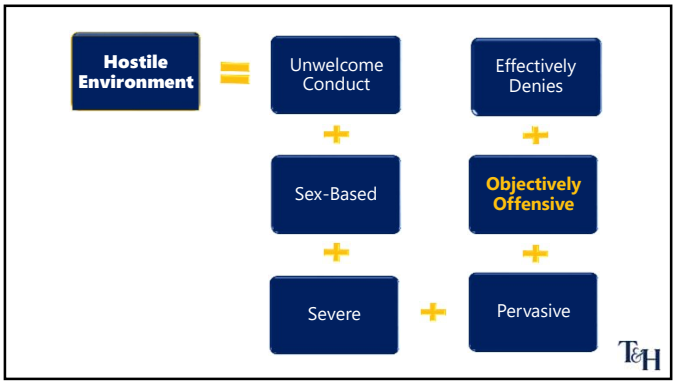

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- Offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively
- The objective offensiveness of conduct is to be judged by reference to a reasonable child at whom the conduct were aimed

Objectively Offensive

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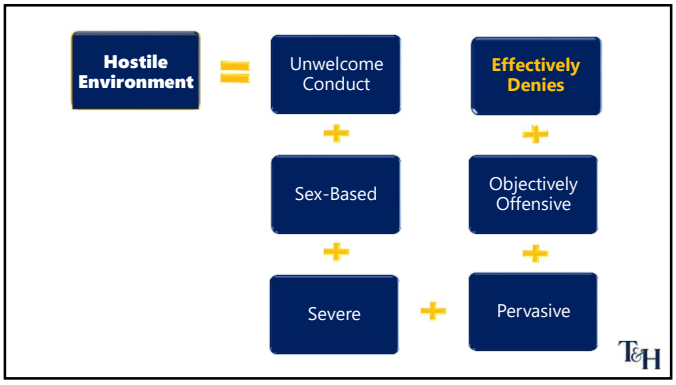

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Effectively Denies Equal Access to Your Education Programs or Activities

- 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.

55

Effective Denial of Equal Access

- 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
- Emailing, texting or DMing 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

61

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
- Hostile Environment
- **The Big 4**
  - ►Sexual Assault
  - ►Domestic Violence
  - ►Dating Violence
  - ►Stalking

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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

Sexual Contact - intentional touching of the clothed or unclothed body parts without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation; forced touching by the victim of the actor's clothed or unclothed body parts, without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation

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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Capacity to Consent

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

65

Incapacitation

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

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Age of Consent

- 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

67

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 or 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 (2 or more acts)

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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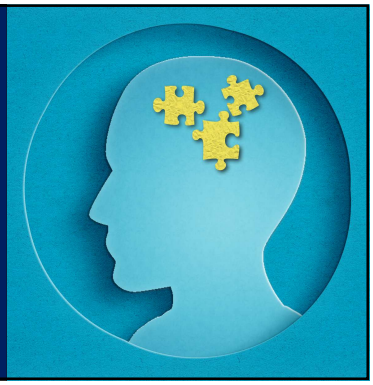
Young, Incapacitated, Neurodivergent Parties



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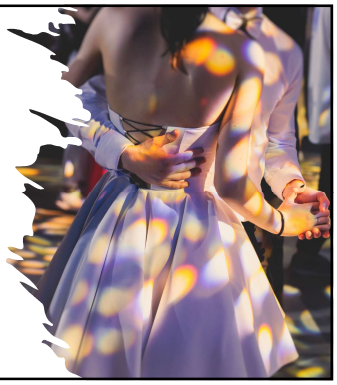
When These Issues Come Into Play?

- Is conduct *consensual*? (for purposes of sexual assault)
- Is conduct *for purposes of sexual gratification*? (for purposes of criminal sexual contact)
- Is conduct *unwelcome*? (for purposes of hostile environment harassment)
- Is conduct *subjectively and objectively offensive*? (for purposes of hostile environment harassment)

74

At the West Beverly High prom, Steve Sanders is dancing with Kelly Taylor. Steve has a crush on Kelly and thinks she returns the crush, but Kelly is in love with another classmate.

While dancing, Steve pulls her in close and slowly begins to move his hand from her waist to her butt. She pulls his hand back up and tells him to cut it out. Steve says, "come on, Kelly. You know you want this," and pulls her in closer and begins to grind against her. Kelly shoves him and runs off the dance floor.



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Donna Martin is chair of the prom. At the last minute the band she booked canceled.

She has tried everything and cannot find a replacement band. So Donna She asks sophomore David Silver to fill in and DJ the dance.

When David arrives, he begins to flirt with Donna and when she blows him off, he says he'll only fill in *"If you're real nice to me..."*

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Brenda and Dylan 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 Brenda slap Dylan and him shove her away hard enough for her to hit the wall.

Administrators want to discipline both students for fighting.

79

Is this Title IX Sexual Harassment

Quid Pro Quo?	0%
Sexual Assault?	0%
Domestic or Dating Violence?	0%
Stalking?	0%
Hostile Environment?	0%
None of the above	0%

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

80

Over several weeks, a group of boys in David's class repeatedly make comments to him about how attractive his stepsister Kelly is. They ask David questions such as, "Is Kelly really that hot in person?" and "Does she look like that at home?" They also make increasingly sexual comments about Kelly when David is present.

David initially laughs along because he doesn't want to draw attention to himself. When David tells the boys to leave him alone, one responds, "Come on, you're a dude, you have to like living with the hottest girl in school."

81

Is this Title IX Sexual Harassment

Quid Pro Quo?	0%
Sexual Assault?	0%
Domestic or Dating Violence?	0%
Stalking?	0%
Hostile Environment?	0%
None of the above	0%

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

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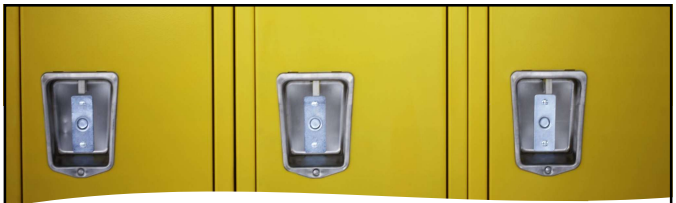
Brenda and Dylan break up, and Dylan begins dating Brenda's (now former) BFF, Kelly.

Brenda confronts Kelly at lunch, telling her that "Dylan will never love you the way he loved me" and that Kelly "stole" him from her.

83



Over the next several weeks, Kelly begins finding handwritten notes in her locker and on the windshield of her car. The notes are anonymous at first, but Kelly recognizes Brenda's handwriting. They include statements such as:

You can't have him forever.

I know where you are.

Dylan will come back to me.

You should be careful who you trust.

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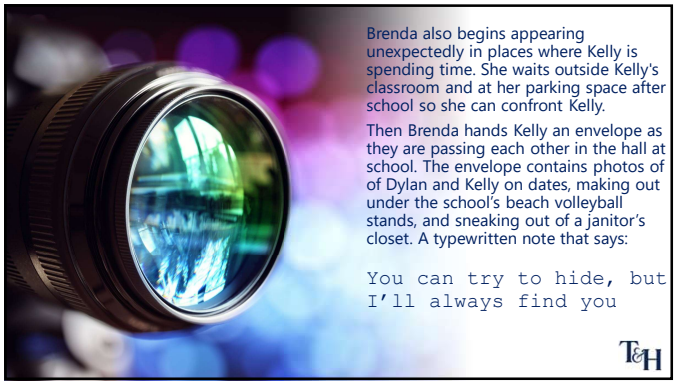

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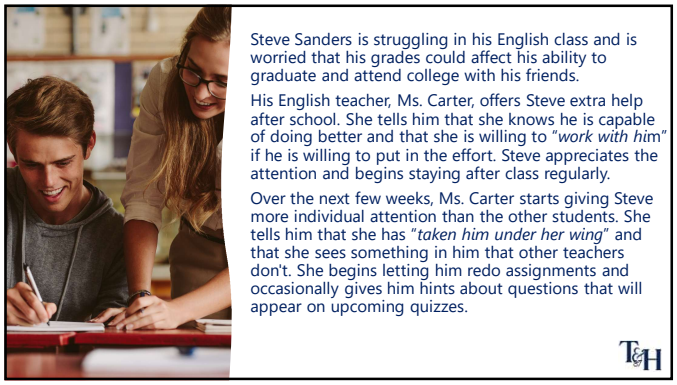

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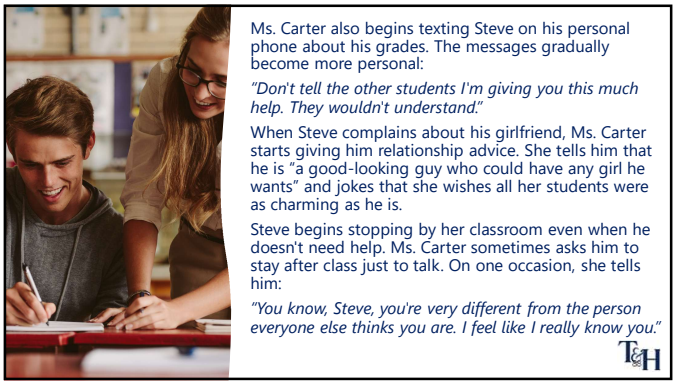

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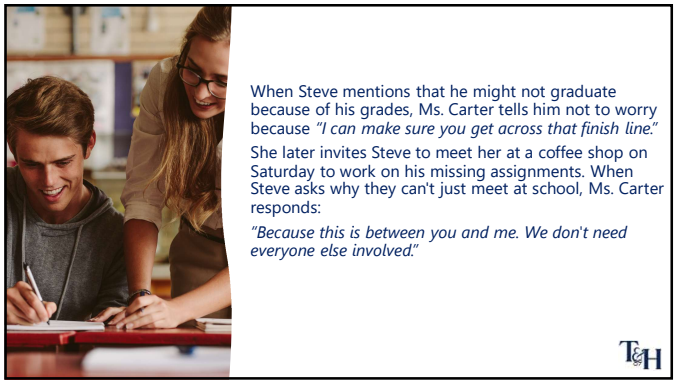

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Andria Zuckerman is a nerdy student who likes photography and runs the school newspaper.

Her friend Brandon reports that other students have created an AI generated "news" story regarding Andria and Brandon, that includes images of Andria and Brandon making out, with Andria partially unclothed, that is circulating around the school.

91

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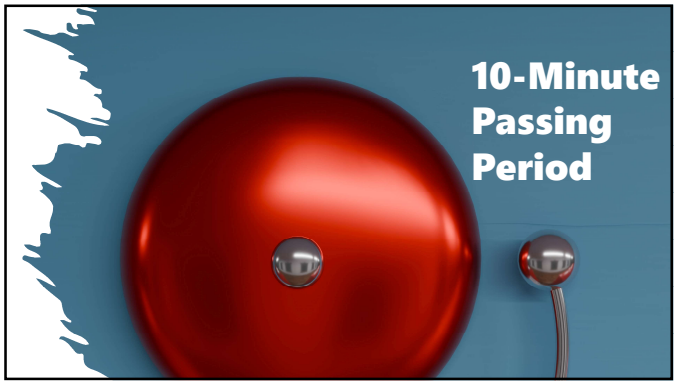

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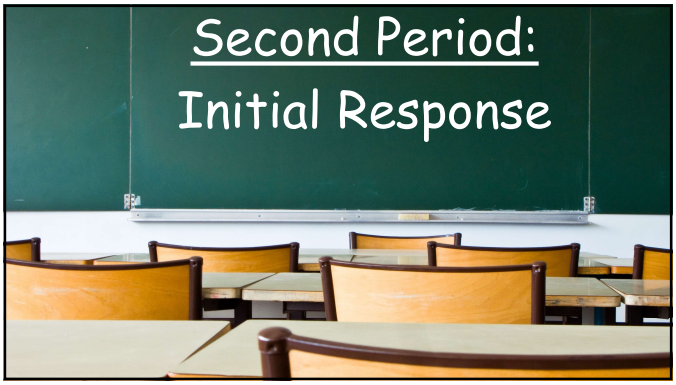

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Sources of Information

- 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

98

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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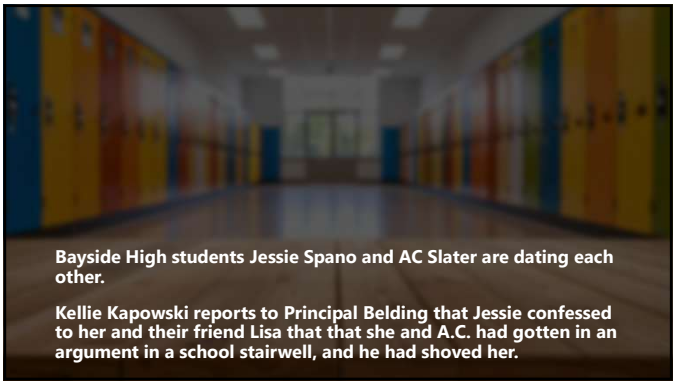

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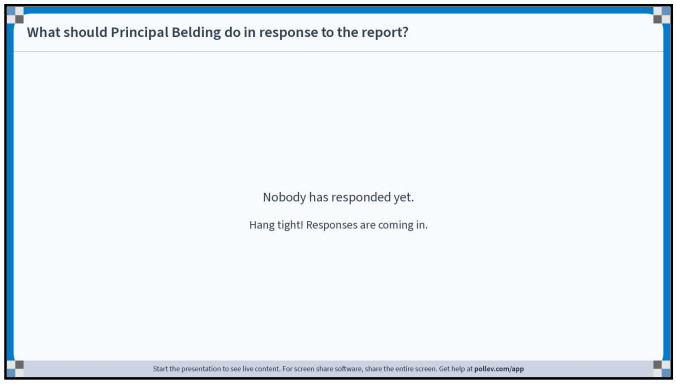

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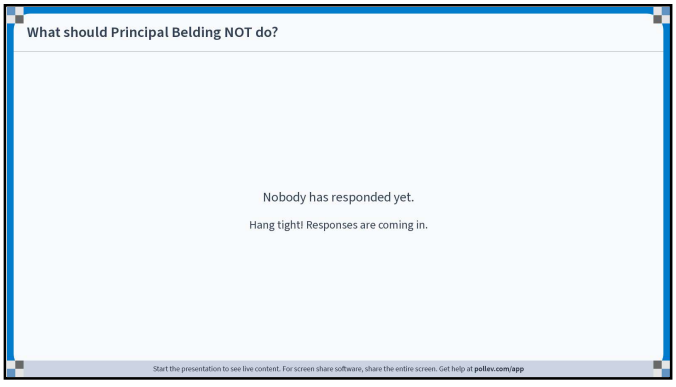

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Campus Initial Response: "DOs"

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

103

Campus Initial Response: "DONTs"

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

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

104

Coordinator's Response to Report

When notified of conduct that reasonably may constitute sex discrimination (including harassment) under Title IX, the Title IX Coordinator must take actions set forth in the regulations to promptly and effectively end sex discrimination in its education program or activity, prevent it recurrence, and remedy its effects

105

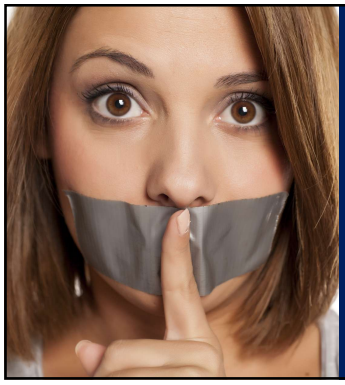
Title IX Coordinator Initial Response

Support
- Offer & coordinate supportive measures for complainant
- Offer & coordinate supportive measures for respondent **after** formal complaint signed

Notify
- Complainant (or reporter) of grievance and informal resolution procedures
- **After** formal complaint signed, 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

106



Until there is a formal complaint, the Complainant's identity is CONFIDENTIAL – including from accused & their parents

107

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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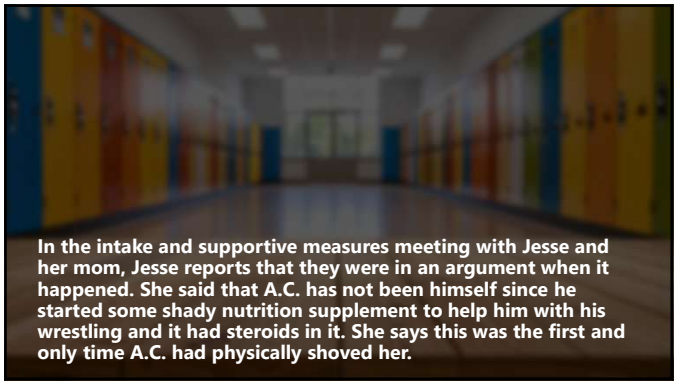

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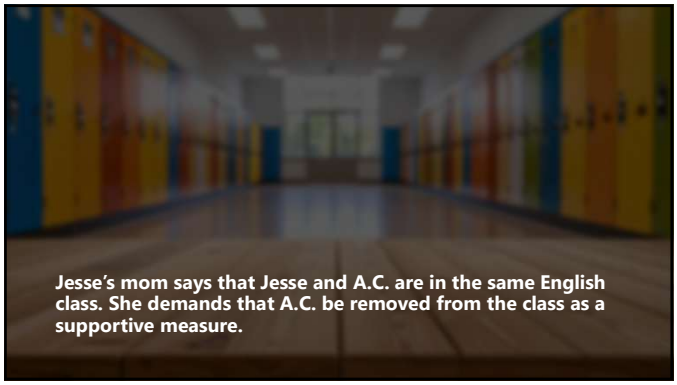

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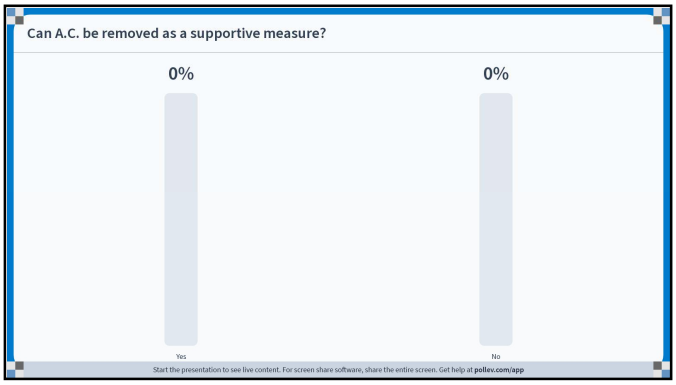

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Supportive Measures

- 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	Emotional/ Wellness	Safety/Security
► Deadline extensions	► Counseling	► No contact orders
► Schedule modification or other course-related adjustments	► Excused absences	► Escort between classes
► Tutoring	► Leave of absence	► Changes to class seating
► Offers to retake courses or redo assignments	► Referral to medical or psychological care	► Assignments to certain routes, bathrooms, or cafeteria locations
► Changes in extracurricular activities	► Designation of a "safe adult" for check-ins	► Increased security and monitoring
	► Training and education programs related to sexual harassment	► 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

116

- 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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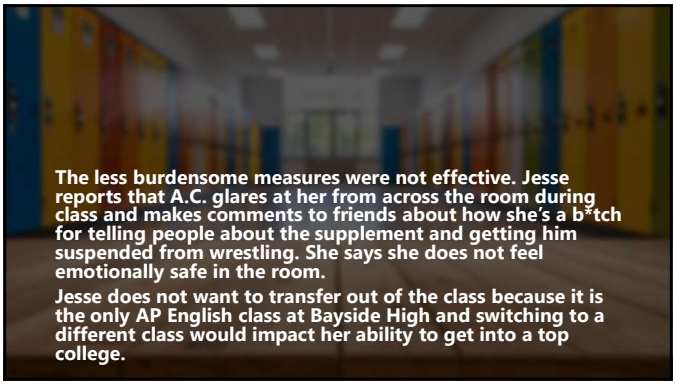

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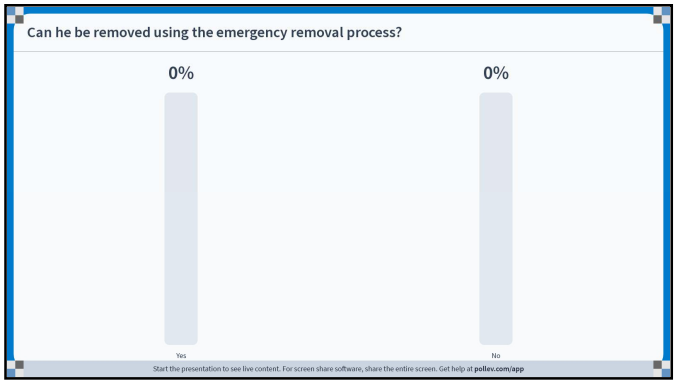

119

If the respondent has an IEP or 504 Plan, an MDR is required before a removal exceeding 10 school days.

If the alleged conduct is a manifestation of the student's disability, the removal cannot occur.

Consider and FBA/BIP and additional supportive measures

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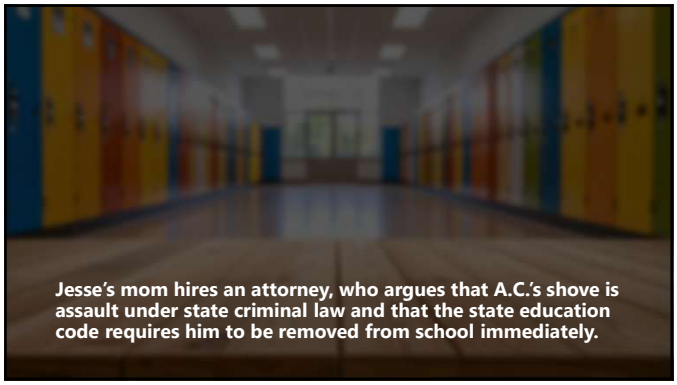

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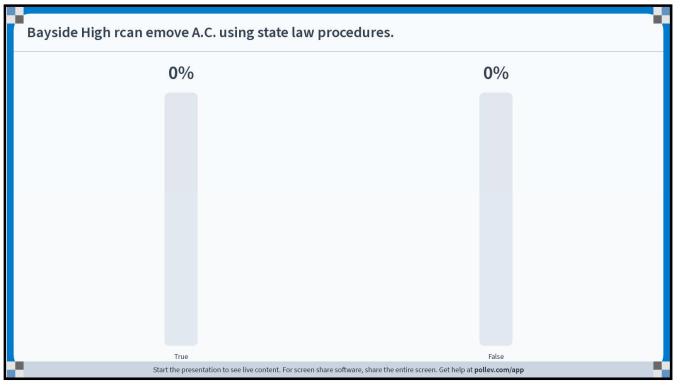

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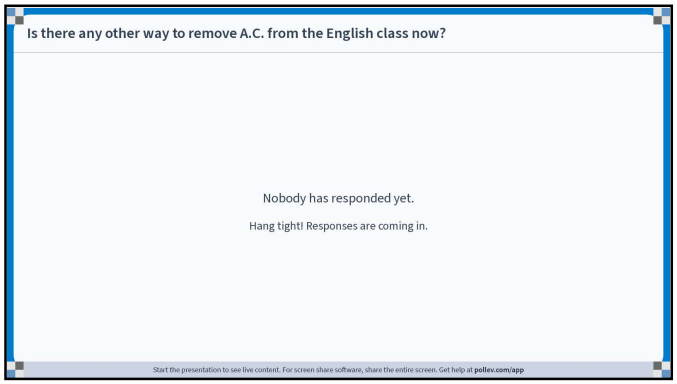

123

Administrative Leave

- Administrative leave with pay for employees is permitted
  - Follow state law, district/board policy, district procedures, employment contracts, and collective bargaining agreements
- Decisions and processes for placing employees on administrative leave with pay should be consistent with your standard procedures regarding employee administrative leave during other investigations

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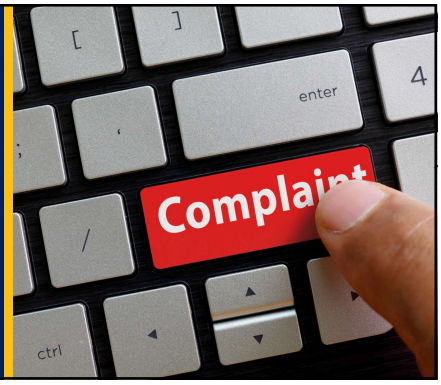
Parties and the Formal Complaint



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A student or employee who is alleged to have been subjected to conduct that could constitute sexual harassment under Title IX or this part

- Even if report made by parent/guardian or third party
- Even if Title IX Coordinator initiates the grievance process
- The complainant must be participating or attempting to participate in the District's education program or activity at the time the complaint is filed

Key Terms

Complainant

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Key Terms

Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

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A document

- Filed by a complainant or signed by the Title IX Coordinator
- Alleging sexual harassment against a respondent
- Requesting that the school investigate the allegation of sexual harassment

Key Terms

Formal Complaint

128

Report or Complaint?

- A **report** is someone sharing information that suggests that sexual harassment has occurred or might be occurring. It triggers the Coordinator to meet with Complainant
- A **formal complaint** is the signed written request for the district to investigate.
- You must have a formal complaint before you begin a Title IX investigation

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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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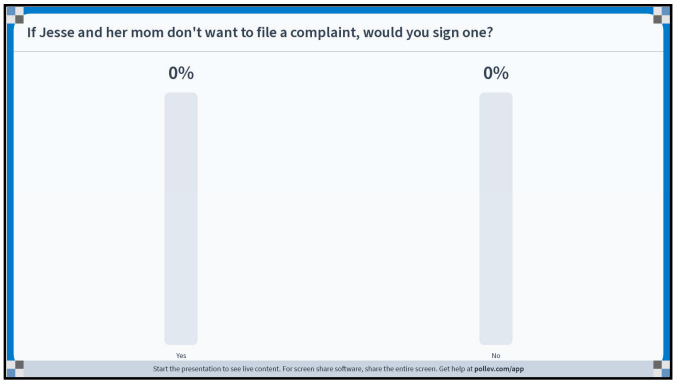

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When to sign a Complaint?

- The Title IX Coordinator should initiate a complaint when it would be deliberately indifferent not to do so
- Consider 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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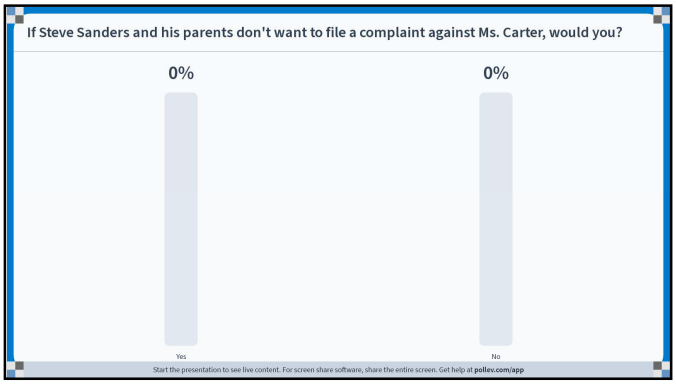

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Remember

- If the alleged misconduct would be Title IX sexual harassment and the Title IX Coordinator does not initiate a complaint, the alleged misconduct CANNOT be addressed through another district policy or procedure

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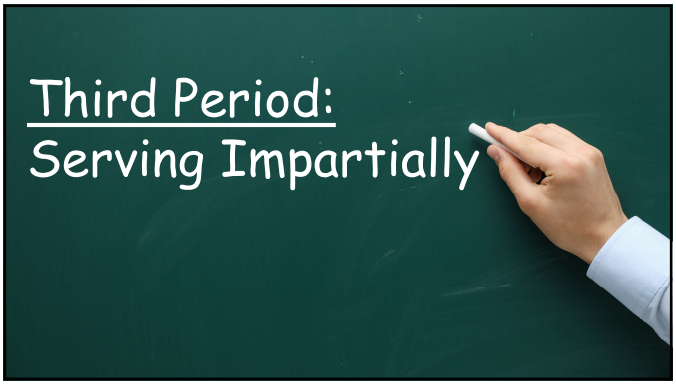

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Ten Basic Requirements for Local Grievance Procedures

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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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)

139

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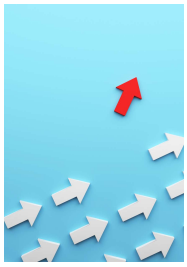
(Merriam-Webster)

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



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(Merriam-Webster)

- Sex
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- 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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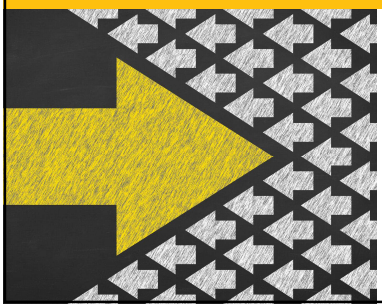
Conflict of Interest



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

- Related to a party or witness
- Business relationship with a party or witness
- School relationship with a party or witness (research advisor, coach)
- Previously disciplined a party
- Previously spoke or wrote about victim rights or accused rights
- Employee or attorney of the institution
- Prior experience in the role

Likelihood of conflict

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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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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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Impartial Approach

- The preamble to the 2020 Title IX rules call for educational institutions to use an objective, "common sense approach" to evaluating whether bias, conflict of interest, or prejudgment exists
- "Objective" means whether a reasonable person would believe partiality exists
- The preamble says not to apply "generalizations" that might unreasonably conclude partiality exists

146

The Title IX Coordinator is also the athletics director, and A.C. is a star wrestler, key to winning state. Can they be impartial? Why or why not?

Nobody has responded yet.

Hang tight! Responses are coming in.

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

147

The Title IX Coordinator has a disciplinary role in the school and has disciplined Jesse in the past for academic dishonesty. Can they be impartial? Why or why not?

Nobody has responded yet.

Hang tight! Responses are coming in.

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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The Title IX Coordinator believes traumatic stress affects brain function and, in turn, memory and behavior. Can they be impartial? Why or why not?

Nobody has responded yet.

Hang tight! Responses are coming in.

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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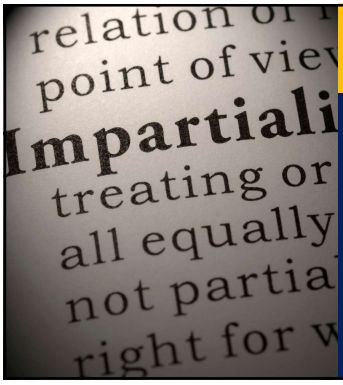

Impartiality DOs & DON'Ts

- 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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Fourth Period: Starting the Title IX Grievance Process

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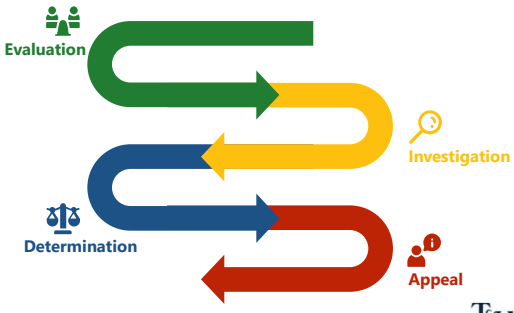
Four Major Grievance Process Stages



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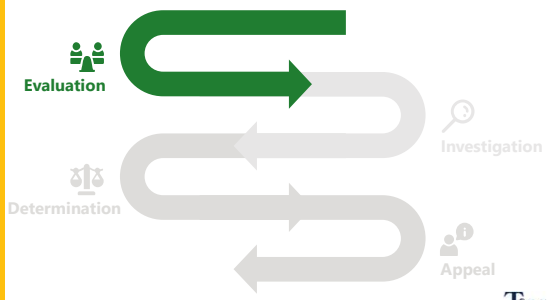
Stage One: Evaluation



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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 – CANNOT PROCEED ANONYMOUSLY
  - 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 to ask about the allegations
- No pulling Respondent 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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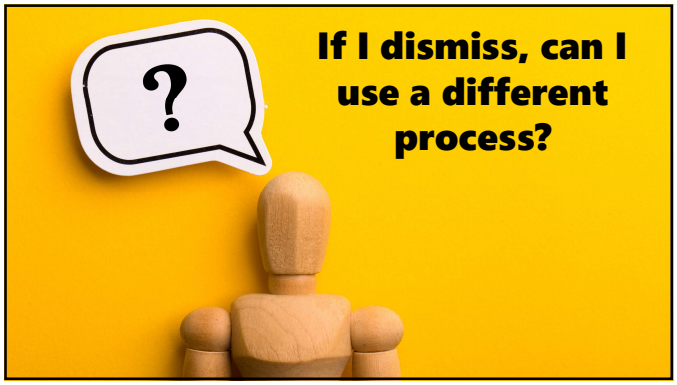

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Dismissal

Mandatory

- The conduct, if true, would not meet the definition of sexual harassment unde… IX
- …e conduct did …ur in …district's ed…
- The … not occur against… …son in the U.S.

Permissive

- T… …plainant withd… the … …int or all… …s in writ…
- The respo… …longer enrolled or … …d by the district
- Speci… …mstan… pr… …e district fr… …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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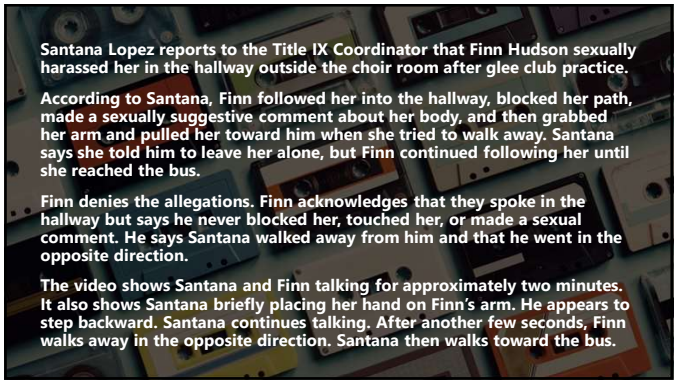

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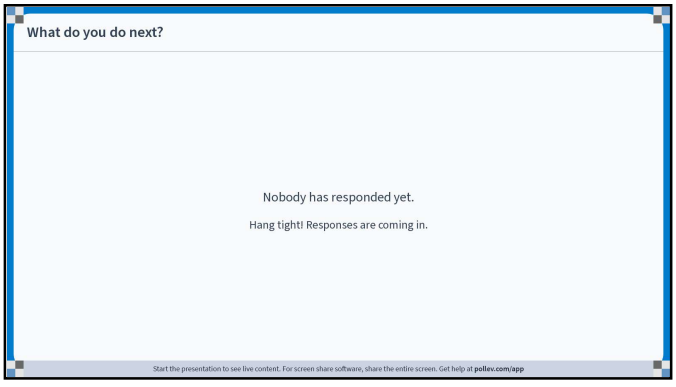

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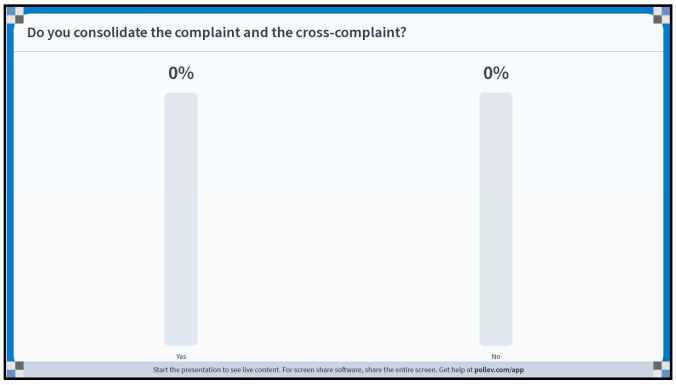

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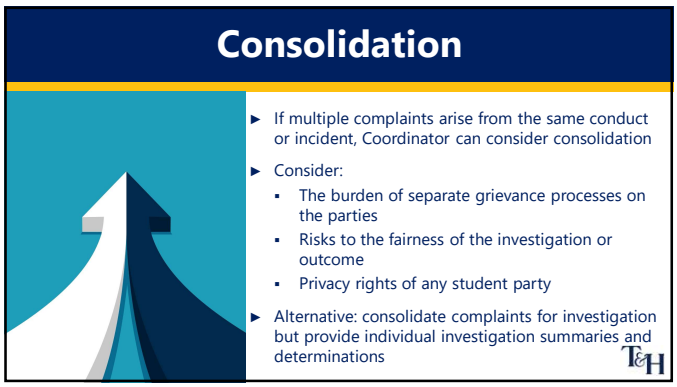

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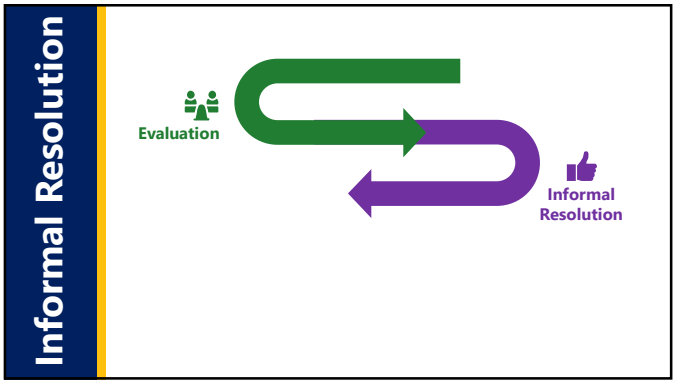

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Informal Resolution

- The District may offer informal resolution with a trained facilitator
- The District can decide when it's appropriate and when it's not based on allegations, but may not offer it for allegations of harassment by an employee against a student
- Parties may elect to participate; it must be voluntary
- Title IX Coordinator still must take other appropriate prompt and effective steps to ensure that sexual harassment does not continue/recur

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What is Informal Resolution?

A voluntary, structured interaction between involved parties (complainant and respondent) to resolve the allegations without an investigation, determination, or appeal.

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Informal Resolution

- Schools have discretion as to how to structure the informal resolution process
- Consider addressing in written procedures:
  - When will the Title IX Coordinator offer informal resolution?
  - How will the facilitator be chosen?
  - What steps will the process follow?
  - What records will be maintained and when can they be disclosed?
  - Potential terms
  - Prompt timeframe

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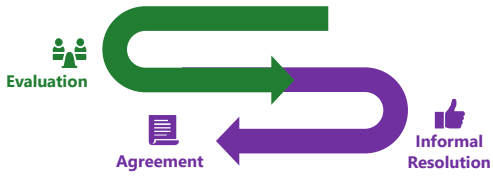
Successful Informal Resolution



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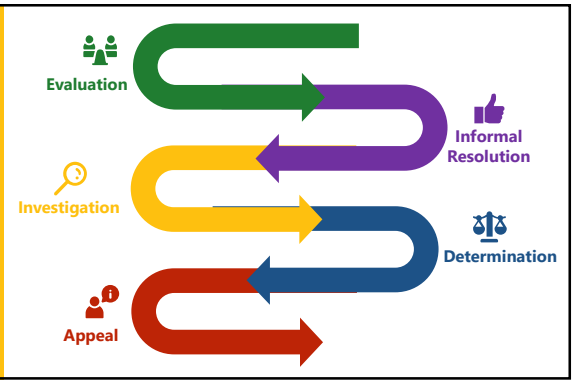
Unsuccessful Informal Resolution



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Lunch Break

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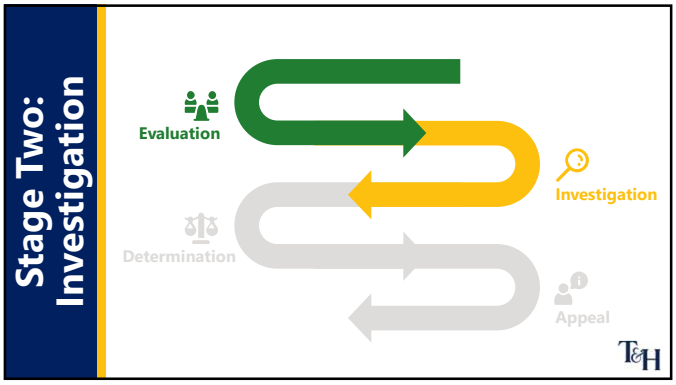

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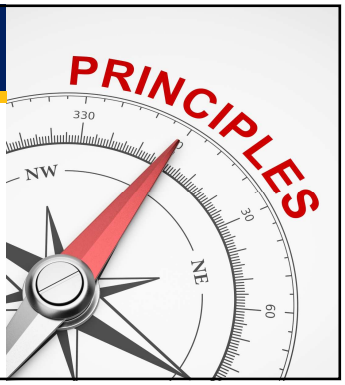
Key Investigation Principals

- Thorough
- Prompt
- Impartial
- Fair



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Investigation Steps

1. Review the file
2. Verify impartiality
3. Plan investigation
4. Gather evidence
5. Conduct productive interviews
6. Fill in the gaps
7. Compile and share "directly related evidence"
8. Draft & share investigation report
9. Transmit file to Title IX Coordinator

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#1 Review File

- Review all material provided by the Title IX Coordinator
  - Report
  - Intake notes
  - Formal Complaint
  - Notice of allegations
  - Supportive measures documentation
  - Note if either party has an advisor
- Create a checklist to ensure all steps are met and to document compliance (T&H Guidebook Checklist B – Investigator Checklist)

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You Belong with Me

Rory's classmate Tristan DuGray has shown an interest in Rory since she first arrived at Chilton. Tristan frequently calls Rory "Mary," a nickname Rory has repeatedly told him she does not like. Tristan's behavior becomes increasingly focused on her relationship with Dean. Tristan tells Rory that Dean is "not her type" and repeatedly suggests that a relationship between Rory and someone like Dean cannot last.

When Rory asks Dean to accompany her to Chilton's Winter Formal, Tristan becomes visibly upset. Before the dance, he tells Rory that he had intended to ask her himself and asks why she would choose Dean over him. Rory tells Tristan that she is not interested in dating him and asks him to stop bringing it up.

At the dance Tristan confronts Dean. After the dance, Rory tells Tristan that his behavior toward Dean is making her uncomfortable and again tells him that she is happy with Dean.

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You Belong with Me

Over the following weeks, Tristan continues approaching Rory at school. He repeatedly asks her questions about her relationship with Dean, including whether Dean has said that he loves her and whether Rory is sure that Dean is "good enough" for her.

Rory tells him directly: "I am with Dean. I don't want to date you. Please stop asking me." Tristan responds that Rory only thinks she wants Dean because she has never given anyone else a chance.

A few weeks later, Rory is assigned to play Juliet in Chilton's production of ***Romeo and Juliet***. Paris assigns Tristan the role of Romeo.

During rehearsals, Tristan repeatedly makes comments about how they would make a better couple than Rory and Dean.

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You Belong with Me

When rehearsals are moved to Miss Patty's dance studio in Stars Hollow, Tristan goes to Doose's Market, where Dean works. Tristan approaches Dean and deliberately tells him that he will be playing Romeo opposite Rory's Juliet.

Rory later confronts Tristan and asks him to stop interfering with her relationship. She tells him that his comments, repeated attempts to persuade her to leave Dean, and decision to approach Dean about their relationship are making her uncomfortable.

Tristan tells Rory: "I'm not doing anything wrong. I like you. You like me more than you want to admit. I'm just trying to get you to realize that Dean isn't the right guy for you."

Rory reports Tristan's conduct to a teacher and says that she wants him to leave her alone.

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Dear Party & Parent:

On [date] Chilton ISD received a formal complaint alleging that Rory G. (the "Complainant") may have been subjected to sexual harassment by Tristan D. (the "Respondent") under Title IX of the Education Amendments of 1972. The complaint alleges that, on multiple days over the last four months, Respondent repeatedly made unwelcome romantic overtures toward Complainant, even after being asked to stop and told they were unwelcome. The alleged behavior would be, severe, pervasive, and objectively offensive to a reasonable person.

You Belong With Me Notice of Allegations

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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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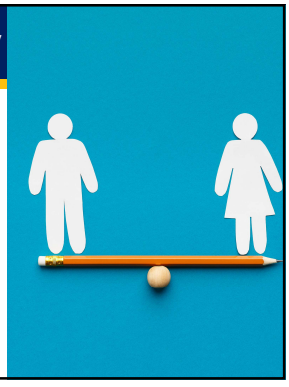
#2 Verify Impartiality

- An impartial investigator
  - Is unbiased
  - Has no conflict of interest
  - Does not prejudge
  - Is well trained



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T&H Title IX Tip

- Be open with the Title IX Coordinator or their designee about any concerns—better to report something that turns out to be nothing than to ignore something that turns out to be a big deal
- When in doubt, disclose any concerns to the parties and get their agreement to allow you to continue in the role (with Title IX Coordinator)
- Show your work! The best way to avoid a claim of bias, conflict of interest, or prejudgment is to methodically work your case and write a solid report

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#3 Plan Investigation

- 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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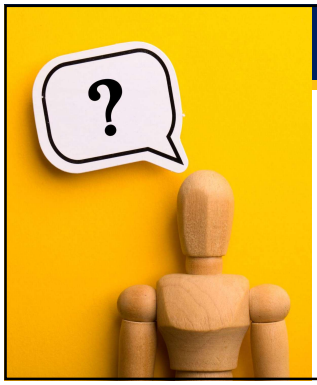

What Do You Need to Know?

- Think back to the Title IX definitions of "Title IX sexual harassment" "in an educational program or activity" and "against a person in the U.S."
- Look at the allegations and consider what the elements for each claim are
- Consider information needed to craft a remedy if a violation is found

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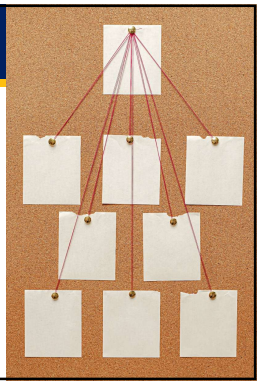
Our Investigation

The "elements" of the allegation determine the scope and focus.

Hostile Environment–
Unwelcome behavior
Based on sex, that is so
Severe
Pervasive, and
Objectively offensive that it
Effectively denies equal access to the District's education programs and activities

Jurisdiction–
Did it occur in a District education program or activity?



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When poll is active respond at PollEv.com/thtitle9 Send thtitle9 and your message to 22333

Based on the allegations and elements of hostile environment, what are your must-ask questions?

Nobody has responded yet.

Hang tight! Responses are coming in.

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Where will you find evidence?

- Who may have information?
- Who will you question first?
- Is there a recording?
- Are there texts or social media communications or posts?
- Identify and preserve evidence at risk of loss
- Contact law enforcement immediately if there is knowledge of illegal or illicit evidence

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Who is responsible for finding and providing evidence?

The complainant (needs to overcome the presumption of non-responsibility) 0%

The respondent (needs to establish their non-responsibility) 0%

The district 0%

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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YOU ARE!

- The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the educational institution, not the parties
- But if parties want to provide evidence, let them. Do not discourage parties from submitting evidence

- Give all parties the same opportunity to present evidence, suggest witnesses, and recommend directions for your investigation
- If you decide not to pursue a suggested route, record your reasons

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"Relevant"

Evidence is relevant if:

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

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

Includes "inculpatory" and "exculpatory" evidence

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Types of Evidence

- Direct Evidence
- Circumstantial Evidence
- Hearsay

Rumor / innuendo (NOT evidence)

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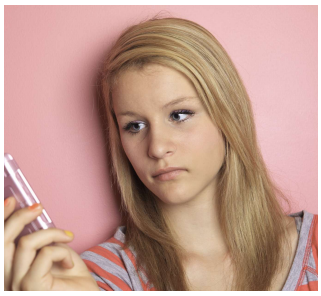
Hannah has been receiving anonymous threatening messages from the school's messaging app ever since being interviewed during the investigation into her friend Spencer's Title IX complaint.



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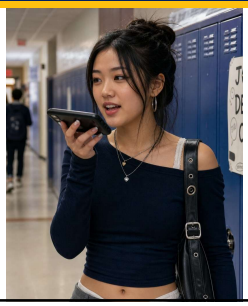
Direct Evidence

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

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



Aria: I saw and heard Mona dictate the text message.

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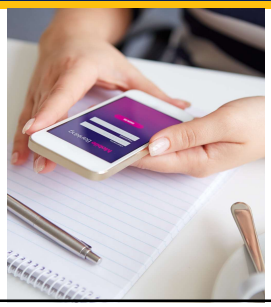
Circumstantial Evidence

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



Mona's advanced computer science class had recently learned about common spoofing tricks in a lesson on internet security.

Mona's unique ID was used to log into the school's messaging app just moments before the message was sent.

She must have sent the message.

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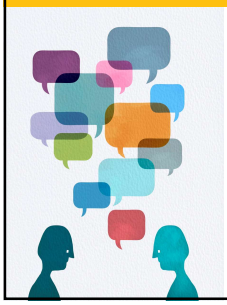
Hearsay Evidence



A statement (oral or written) made by someone other than the person you are interviewing and that is offered to prove the truth of the matter asserted in the statement.

Emily: Aria told me she saw Mona send the message.

Allison: Mona told me she sent the message.

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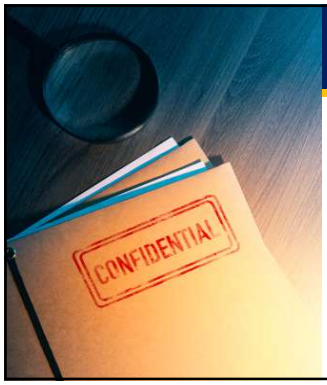

Impermissible Evidence

- 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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Privileged or Confidential

- Information protected by a recognized federal or state law, such as attorney-client privilege, doctor-patient privilege, or spousal privilege may not be sought, used, or relied on
- Unless the person holding the privilege has waived it

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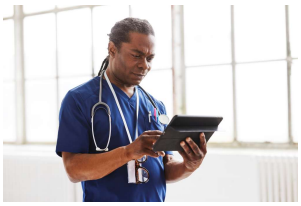
Healthcare Treatment Records



- Healthcare treatment records made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment may not be accessed, considered, or used
- Unless the student (parent) provides voluntary written consent
- Medical records previously provided to the school related to a special education or 504 evaluation become student records and are not impermissible

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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 sex-based harassment

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Sources of Evidence

- Interviews
- Testimony
- Documents
- School records
- Campus files
- Personnel files
- Investigation records
- 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)

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#5 Conduct Productive Interviews

Preparation is key!!!!!

- Prepare a focused and targeted interview outline
- Focus on the allegations of sexual harassment and the questions you need to answer to reach a conclusion
- Identify "must ask" questions to elicit information related to the allegations and questions you have identified
- Identify evidence to discuss with witness
- Prepare questions to obtain a reliable chronology of events and all relevant information that witness has
- Avoid extraneous questions that seek information that is not relevant

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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
- Recommended to do the same for non-party witnesses (not required)

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Game Plan for Interviews

- Determine how you are going to establish rapport
- Where are you going to conduct the interview? Will it make the witness feel comfortable?
- Are you going to have others present? Who?
- How are you going to open the interview?
- Set notice of rights/expectations?
- To record or not to record?

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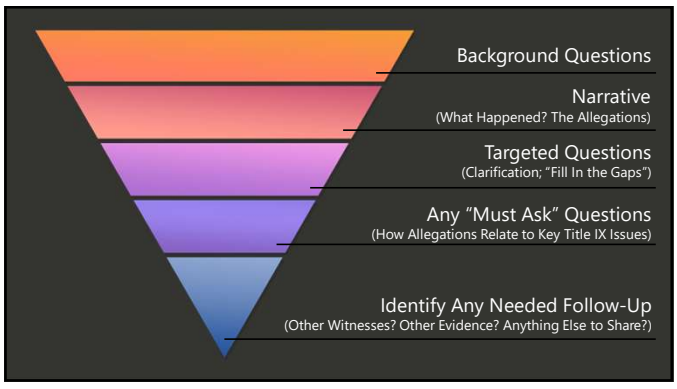

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Scope of Investigation

- If there are additional allegations → Title IX Coordinator will need to amend the notice of allegations
- If there are additional complainants or respondents → Title IX Coordinator will need to reach out to determine if there will be a Title IX complaint, provide all necessary notices and supports, and decide if consolidation is proper or if there will be separate investigations

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Subsequent Interviews

- Given the information you learned in the first interview, what additional questions do you have for witnesses? For the other party?
- Give the parties an opportunity to respond to what the other said; this may involve follow-up interviews

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Interview Dos & Don'ts

DOs

- ✓ Make party/witness feel at ease
- ✓ Be neutral, objective, and open-minded
- ✓ Listen actively
- ✓ Let the interviewee tell their story
- ✓ Take all allegations and statements seriously
- ✓ Be thorough – make sure to elicit all relevant facts

DON'Ts

- × Create a hostile or unwelcoming environment
- × Have an agenda
- × Be a passive interviewer
- × Do all the talking
- × Rush to judgment or dismiss allegations or statements
- × Make determinations based on sex-stereotyping or status

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More Interview Dos & Don'ts

DOs

- ✓ Ask all necessary follow-up questions
- ✓ Ask probing questions
- ✓ Seek information regarding potential justifications/excuses
- ✓ Test the credibility of the statements in the interview
- ✓ Ask for supporting documents and/or corroborating witnesses

DON'Ts

- × Shy away from asking tough questions
- × Conduct an interrogation
- × Be argumentative or accusatory
- × Be unprepared
- × Conduct the interview without reference to any documentation or other evidence

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#6 Fill In the Gaps

- Are there any gaps in your chronology of events?
- Is there any evidence missing?
- Did you obtain all the documents and information the parties and witnesses referenced?
- Are there any follow-up questions you need to ask the parties or witnesses?
- Is there anything else you need to track down to prepare that will allow the decisionmaker to reach a reliable determination?
- If you were the decisionmaker, would you have more questions?

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What if it's They Said-They Said?

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They Said/They Said

- Sexual harassment often occurs behind closed doors, with no witnesses
- 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 the decisionmaker assess credibility and reach a reliable determination

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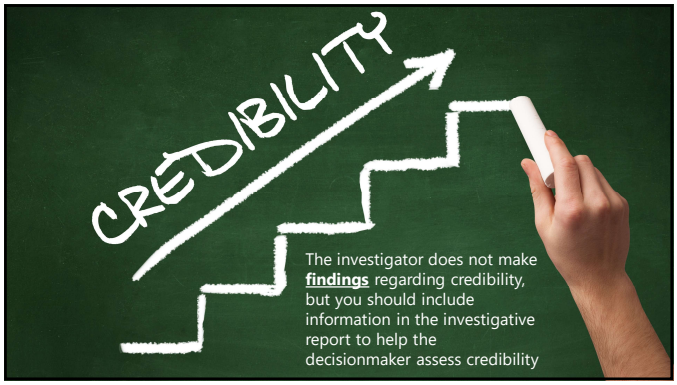

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Group Discussion

Rank these witnesses in order of credibility:

- Nun
- Teacher
- Administrator
- Star athlete
- Honor student
- Person with a disciplinary record
- SRO

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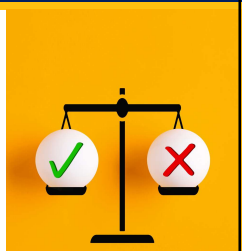
Credibility

- The decisionmaker cannot make credibility determinations based on a person's role as the complainant, respondent, or a witness (or being a nun or police officer)
- The investigator needs to collect evidence that may
  - corroborate or contradict the parties' accounts
  - make one version more plausible than the other
  - bear on a witness's or party's ability to accurately and objectively perceive, recall, or explain what happened



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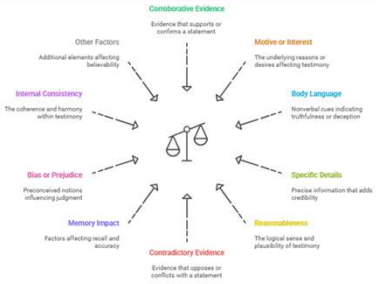
Credibility Factors



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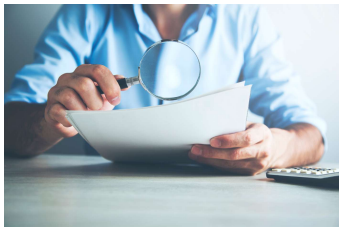
#7 Share Directly Related Evidence

- The parties must be given at least 10 days to review the directly related 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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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

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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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Student witness names should be redacted from the investigation report.

True 0%

False 0%

If the witness or witness's parent requests anonymity 0%

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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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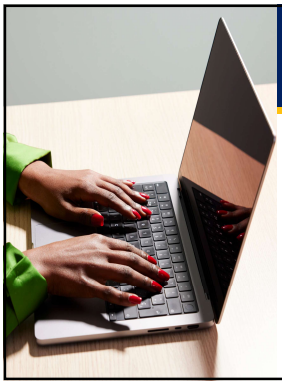

#8 Prepare & Share Investigation Report

- Investigator can (and should) begin drafting the report during the 10-day DRE period
- The report must summarize all "relevant evidence" (which may be different from the "directly related evidence")
- The report must respond to the parties' responses to the investigation report
- The report must be shared with the parties, who will have 10 days to respond before the determination

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Writing Our Report

Summary of Investigation

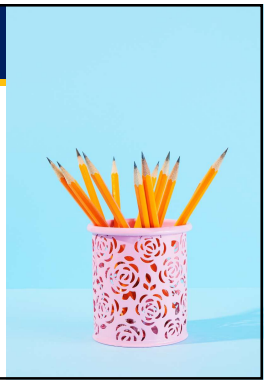
The following is a summary of the investigative steps taken in this matter:

The case was assigned to the investigator on [date].

The investigator interviewed [Party *or* Witness] on [date], at [time], [at [location] *OR* via [method]]. Others present at the interview included [*list names and roles*].

[*Repeat for additional parties and witnesses until all interviews are addressed.*]

[*Include any other relevant steps*



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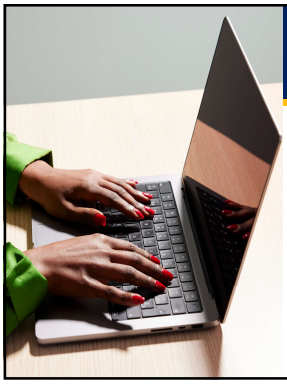

Investigation Report Best Practices

- Divide the report by issue
- For each issue, start with the undisputed facts
- For the disputed facts, describe the parties' positions and the evidence supporting each position
- Don't forget to include information that will allow the decisionmaker to assess credibility

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Finalize & Share the Report

- The report does not reach a decision/determination, that is the decision-maker's role
- The educational institution must share the final report with both parties and their advisors
- Take reasonable steps to protect the privacy of parties and witnesses during the grievance process
- EXCEPT, do not restrict the ability of parties to obtain evidence, speak to witnesses, or consult family members, advisors, or confidential resources
- Both parties must be given at least 10 days to review and respond before the determination

229

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

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When the Police Call

- Document everything!
- Ask police to put request for delay in writing
- Reduce verbal (e.g., telephone) conversations in writing
- Best practice is to respond with summary/"If my summary is incorrect, please let me know by [date] or I will assume it is correct."
- Explain in writing the school's obligation to conduct its own Title IX investigation and ask for notification when you can begin your investigation
- Follow up, then follow up again, then again

231

Notice of Delay

- The District must send written notice to both parties regarding the delay or extension and the reason(s) for the delay or extension
- Concurrent law enforcement activity is <u>not</u> good cause to delay sending the written notice of allegations to the complainant or respondent

232

In a sexual assault case, the police decide not to prosecute because it's a "they said/they said" case. How does this impact your investigation?

You can dismiss the Title IX matter	0%
The police investigation is irrelevant to the Title IX matter	0%
You can consider evidence shared by the police but their determination does not impact the Title IX finding	0%

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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Police Evidence?

- Police evidence may be useful for *initial* fact-gathering
- They **<u>are not</u>** 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

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

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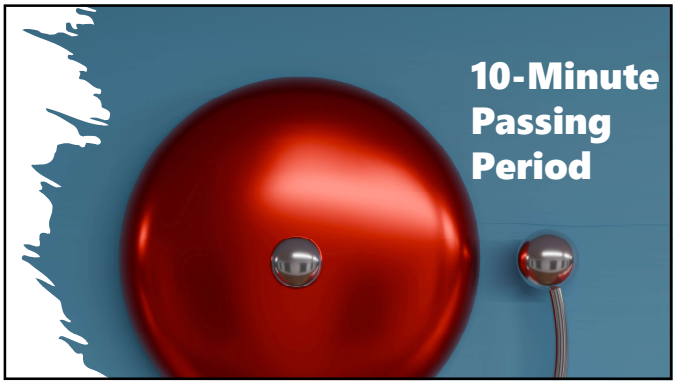

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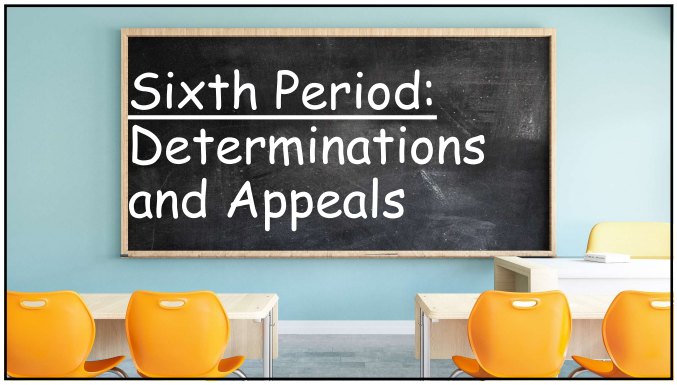

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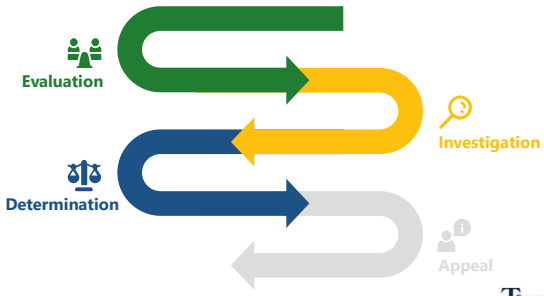
Stage Three: Determination



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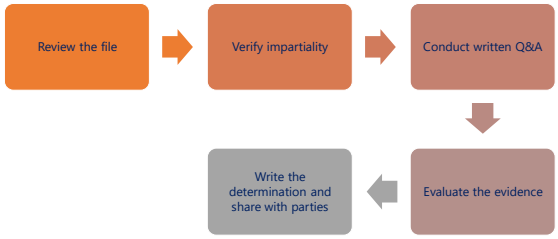
Decisionmaking Steps



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Decisionmaker Questions

1. What does the evidence show is more likely than not to have occurred?
2. Do those actions constitute Title IX sexual harassment?

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#1 - 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

241

Capeside High Spring Dance

During the dance, the gymnasium is crowded with music playing loudly. Joey is standing near the bleachers talking to a group of peers.

Pacey, who is walking through the gymnasium greeting various groups, approaches Joey's group. While chatting, Pacey stands close to Joey, puts his arm firmly around her shoulder, and pulls her in close while making a joke to the group.

242

Capeside High Spring Dance

Joey stiffens, drops her hands to her sides, and subtly pulls back, but she does not say anything directly to Pacey because she feels put on the spot surrounded by their classmates.

A short time later, as Pacey turns to walk toward the concessions table, he reaches out and firmly pulls Joey's waist toward him, giving her a side hug, rubbing her hip, and squeezing her butt while saying, "Keep holding down the fort, Jo."

243

Capeside High Spring Dance

Joey immediately steps backward against the bleachers and crosses her arms. Feeling humiliated and uncomfortable, she leaves the main floor and goes to the media table where Dawson is working. She tells Dawson that Pacey touched her without asking and made her feel unsafe at the school event.

244

Capeside High Spring Dance

The following Monday, Dawson mentions the situation to Pacey at his locker. Pacey dismisses the concern: "*We were at a school dance having fun, and Joey and I have known each other for years. I was just being playful putting my arm around her – but I didn't squeeze her butt! If she had a problem with me hugging her, she would have told me to stop right then.*"

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#2 - Verify Impartiality

- No bias for against complainants or respondents generally
- No bias for or against these parties
- No conflict of interest
- No prejudgment

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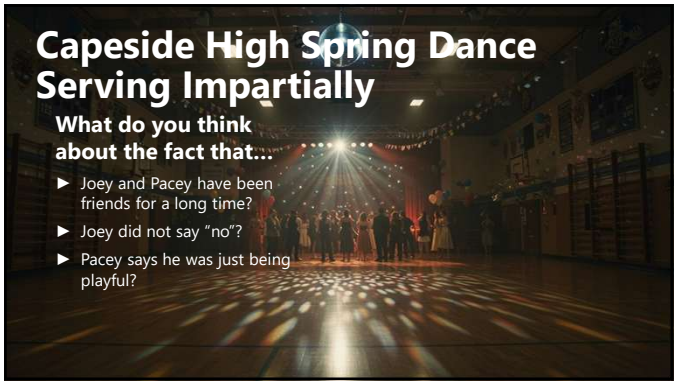

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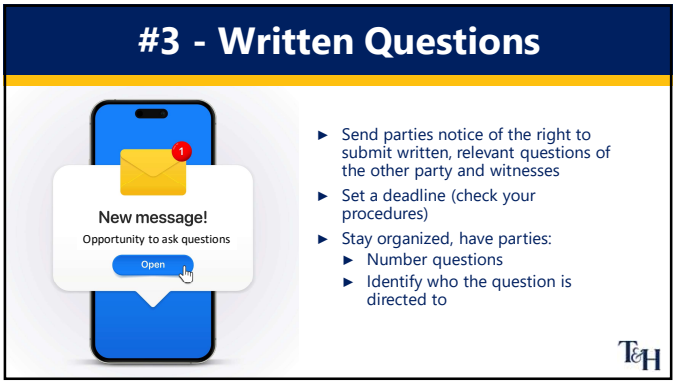

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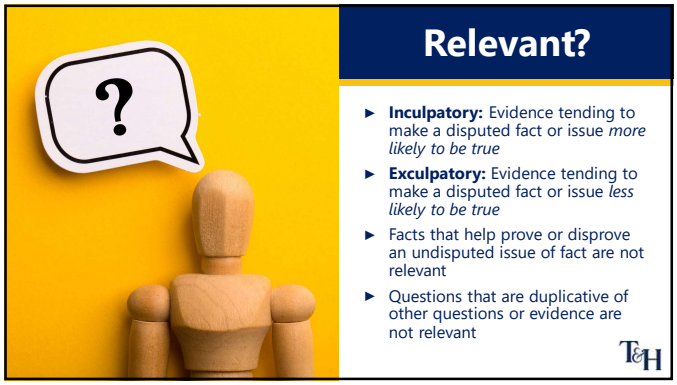

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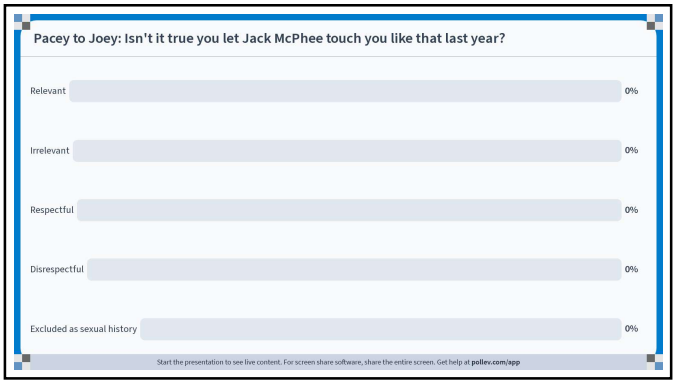

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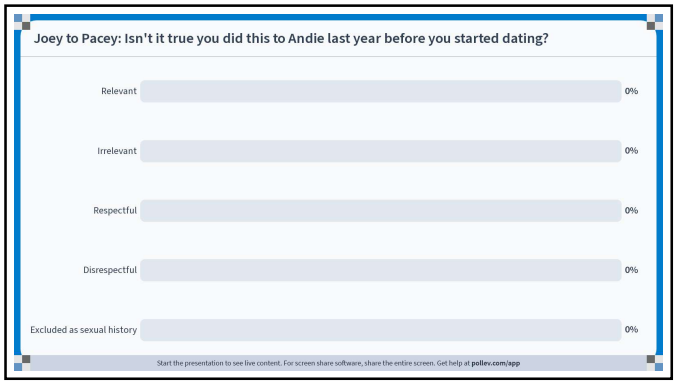

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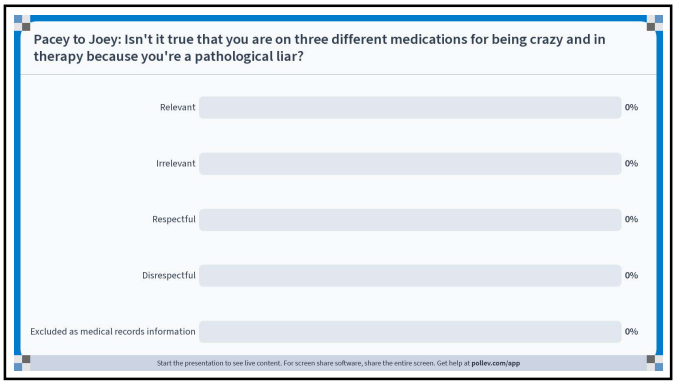

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Disallowed Questions

- Must explain the reason for finding a question not relevant
- Examples:
  - "Complainant's Question #3 will not be forwarded to the party or witness because it seeks information protected by a legally recognized privilege"
  - "Respondent's Question #2 will not be forwarded to the party or witness because it includes irrelevant personal attacks"

257

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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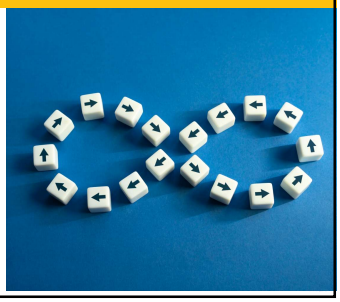
Answers and Follow Up

- Forward relevant and respectful questions to the appropriate party or witness
- Set a deadline for responses
- Forward questions and responses to both parties
- Solicit any follow up questions (set a deadline)
- Repeat as needed



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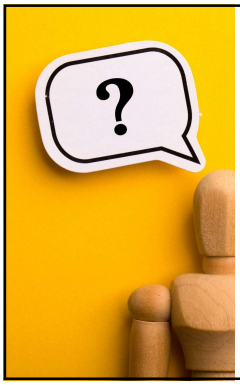

Follow-Up Question?

Initial Question:
When did it happen?

Answer:
Yesterday

Follow Up Questions:
What time did it happen?
Who was there?

260

Capeside High Spring Dance More Facts

Pacey does not deny the side hug or rubbing Joey's hip. He says it was not sexual, it was friendly and he thought Joey was ok with it.

Pacey denies squeezing Joey's butt.

Joey says that the hug and hip rub felt sexual because Pacey then grabbed her butt. She says she did not consent to any of it.

261

Capeside High Spring Dance More Facts

Several witnesses (Joey's friends) reported seeing Pacey hug Joey and that he put his hand on her hip. They noticed that Joey immediately appeared uncomfortable. They were not able to see if Pacey touched Joey's butt.

Dawson said that Joey reported the whole thing to him right away.

262

Capeside High Spring Dance More Facts

Witnesses reported that Joey gave Pacey the cold shoulder for a few days after the dance, but then they seemed to be friends again.

During his interview, Pacey seemed to minimize the events, saying they had moved on and the school really should not be so interested in the lives of high schoolers.

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#4 - Evaluate the Evidence

Standard of proof:

"Preponderance of the Evidence"

More likely than not.

(50% + a feather)

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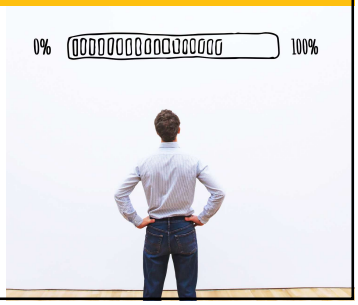
Determination

- 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



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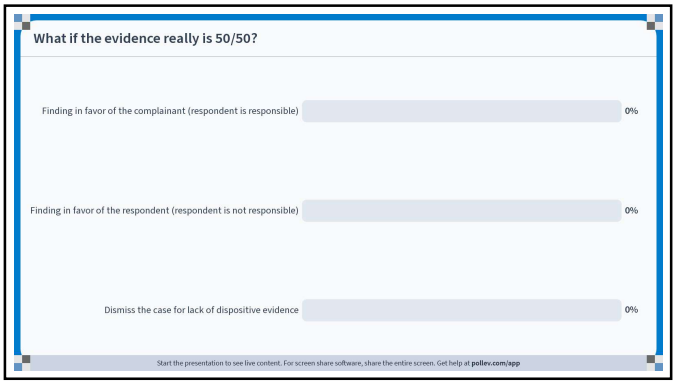

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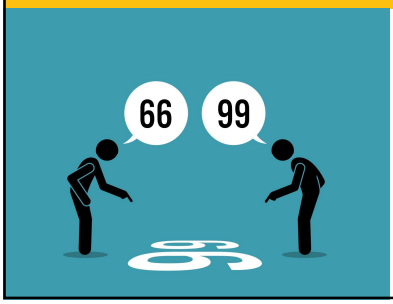
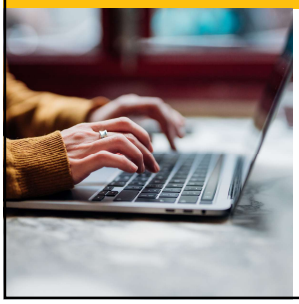
Credibility ≠ Truthful



- Just because you don't find a witness credible does not mean they are a liar.
- We all remember experiences differently and have different perspectives that shape how we view in.
- Think about your last fight with a loved one or close friend…

267

#5 - Written Determination



- The decision-maker(s) must issue a written determination regarding responsibility containing specific requirements.

268

Number One

Identify the allegations potentially constituting sexual harassment

- Will be provided in the "notice of allegations" sent to both parties upon receipt of a formal complaint *and* in the investigation report.
- Must be restated in the written determination.

269

Number Two

Describe procedural steps taken from the receipt of the formal complaint through the determination

- Notifications to the parties
- Interviews with parties and witnesses
- Site visits
- Methods used to gather evidence
- Much (but not all) of this will be in investigation report
- Q&A overview
- Ask Coordinator for assistance finding missing steps

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Number Three

Findings of fact supporting the determination

- Identify the undisputed facts related to an issue
- Identify the first disputed fact related to an issue
  - Explain each party's position and any evidence relevant to the fact
  - State your conclusion as to what happened with the first disputed fact
  - Explain your reasoning, including credibility determinations
- Move to the next disputed fact

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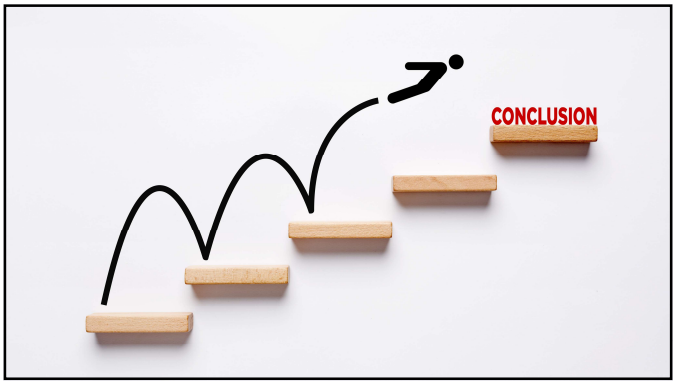

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Capeside High Spring Dance
More Facts

Joey produced a text message from Pacey later that night in which Pacey says: "I'm so sorry about tonight. I didn't mean to upset you."

There is a dispute about to what that message refers.

Joey says it refers to the touching. Pacey says it refers to the fact that he barged in on her conversation with her friends.

273

Capeside High Spring Dance
More Facts

Joey says two friends were standing close by when Pacey touched her.

Neither witness reported seeing Pacey squeeze Joey's butt. Both said Joey looked uncomfortable and walked away suddenly, but Joey did not tell them what had happened.

274

Is it inherently plausible that Pacey squeezed Joey's butt and neither witness saw it? Is it plausible that Joey would not have told the friends what happened?

Yes, it is a dark and crowded dance; Joey walked away immediately to tell Dawson	0%
No, if they were paying enough attention to see that Pacey hugged Joey and she looked uncomfortable, they would have had to see if he had also grabbed her butt.	0%
More details are needed about the dance and Joey's relationship with the friends.	0%

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Capeside High Spring Dance
The Written Determination

Undisputed Facts:

There is no dispute that…

Joey and Pacey have been friends for several years.

Pacey gave Joey a side hug and put his hand on her hip as he was walking away from Joey and her friends at the dance.

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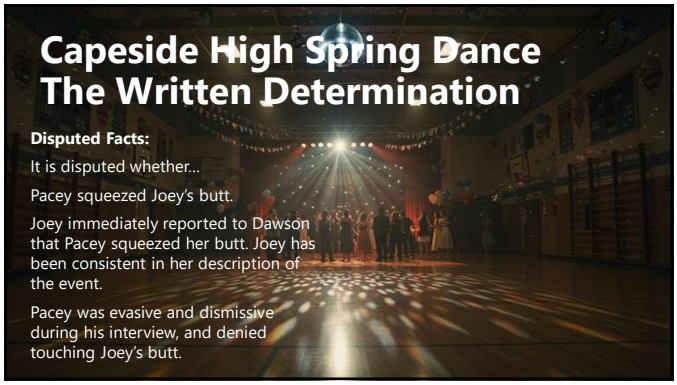

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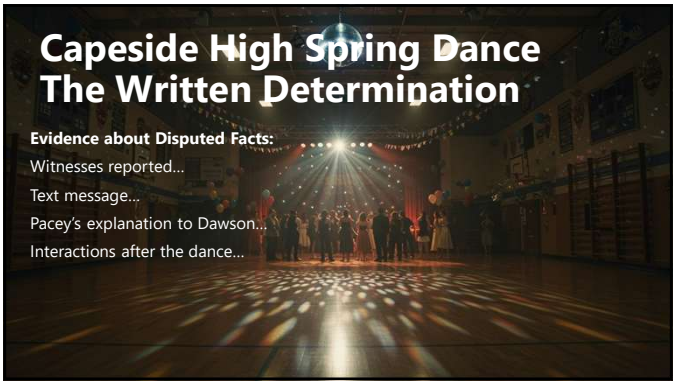

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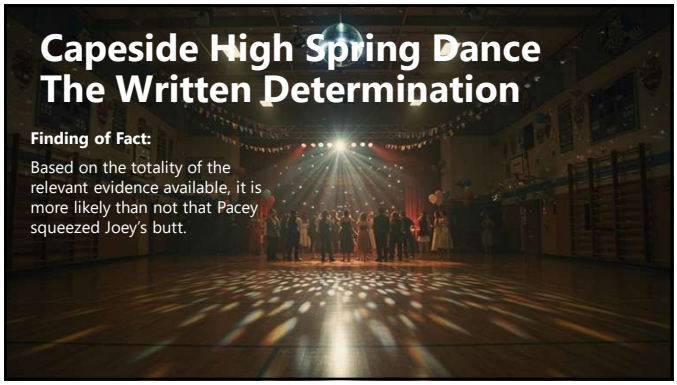

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Number Four

Conclusions regarding the application of the educational institution's code of conduct to the facts

- The Title IX Coordinator should have previously determined that the conduct alleged, if true, is covered by Title IX
- However, the written determination must include the analysis of the conduct established
- Remember to make findings with respect to each element of the alleged misconduct
- Refer to definitions in the policy

280

Three Part Test

1. Is the alleged conduct sexual harassment as defined by the Title IX regulations?
2. Did the alleged harassment occur in a district program or activity?
3. Was the alleged harassment against a person in the United States?

281

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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Criminal Sexual Contact

- Respondent intentionally touched complainant's body (over or under the clothing)
- Without Complainant's consent
- For the purpose of sexual gratification (or humiliation or degradation)
- *Check your procedures for the definition of consent

283

Capeside High Spring Dance The Written Determination

Given the findings of fact above, the evidence is sufficient to establish that Pacey intentionally touched Joey's body, and that Joey did not communicate consent to be touched, either verbally or nonverbally. The evidence is insufficient, however, to establish that Pacey's intent was sexual gratification.

284

Number Five

A statement of, and rationale for, the result as to each allegation

- A determination regarding responsibility
  - The reasons for the determination
- A list of sanctions imposed on the respondent
  - The reasons for the sanctions
- Whether remedies provided to the complainant (do not list; communicate privately to the complainant)
  - The reasons for the remedies

285

Determination and Discipline

- Complete the investigation and determination 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.

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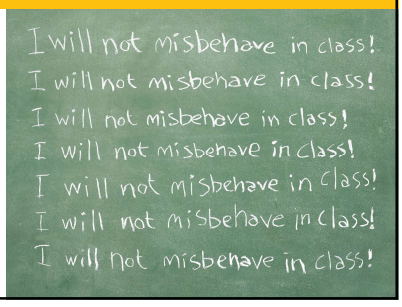
Sanctions

- Disciplinary:
  - Suspension
  - Expulsion
  - Probation
  - Loss of privileges
- Rehabilitative:
  - Counseling
  - Training
  - Community service



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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 district.

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Remedies

- ✓ Providing a campus escort for the complainant
- ✓ Allowing the complainant to park in the employees' parking lot
- ✓ Changing class schedules or extracurricular activities to ensure the complainant and respondent are separated
- ✓ Providing academic resources, modifications, and support
- ✓ Implementing or extending no-contact orders or "stay away agreements"
- ✓ Providing or coordinating health services and counseling
- ✓ Providing training or educational programs to individuals, school groups, personnel, or the school community
- ✓ Modifications to policies, procedures, or practices

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Capeside High Spring Dance The Written Determination

The conduct occurred at the spring dance, which was sponsored by the District, so occurred in a program or activity of the educational institution and in the U.S.

The conduct established by a preponderance of the evidence does not meet the definition of unwelcome sexual contact, a type of sexual assault prohibited by Title IX.

290

Capeside High Spring Dance The Written Determination

Because the grievance process did not establish that the Respondent engaged in unwelcome sexual contact, Respondent is not responsible for a violation of the district's Title IX Sexual Harassment policy.

291

Capeside High Spring Dance The Written Determination

Because I did not find the Respondent responsible for a violation of the district's Title IX sexual harassment policy, I am not recommending any disciplinary action for Respondent or remedies for Complainant. Any request to continue or modify the supportive measures currently in place should be made to the Title IX Coordinator.

292

Number Six

Process for Appeal

- Provide the bases for appeal, timeline to file an appeal, and method to do so

293

Number Seven

Provide the written determination to the parties simultaneously

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

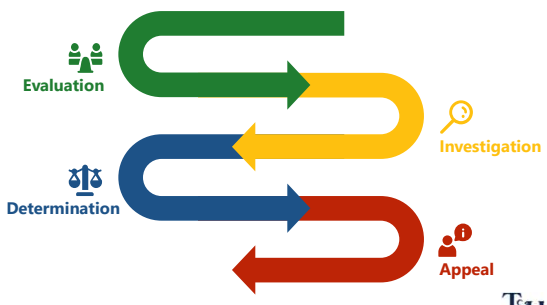
- ✓ Explain the process to parties and advisors
- ✓ Assume respondent is not responsible
- ✓ Exercise independent judgment and objectively evaluate all relevant evidence
- ✓ Follow your grievance procedure
- ✓ Make credibility determinations and evaluate the weight of the evidence using preponderance 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

295

Step Four: Appeal



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Appeal Steps

Appeal filed, Review Record → Verify Impartiality → Determine Appeal Validity → Notice of Appeal → Review Party Statements → Analyze Evidence and Arguments → Draft Appeal Determination

297

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

298

Class Dismissed

During end-of-day dismissal in the 5th-grade hallway, Mr. Bullock (substitute teacher) was managing line departure. According to the complaint filed by Courtnee's mother, Mr. Bullock blocked Courtnee from exiting the classroom door, placed both hands firmly on her shoulders, and squeezed her upper arms while standing over her. He allegedly told her, "You're not going anywhere until you give me a smile and a *special* hug."

Courtnee reported feeling frightened, trapped, and physically intimidated. She refused to hug him, squirmed out of his grip, and ran to her school bus crying. Her parent filed a formal Title IX complaint alleging non-consensual sexual contact and quid pro quo.

Mr. Bullock denied demanding a hug or squeezing her shoulders. He claimed he merely placed a supportive, guiding hand on her back to prevent students from rushing into the crowded hallway during dismissal.

299

Class Dismissed

The district assigned Mr. Johnson (Abbott's head custodian, who completed basic Title IX investigator training) to conduct the investigation.

- Mr. Johnson interviewed Courtnee in the main office with her mother present.
- Mr. Johnson interviewed Mr. Bullock, who reiterated that his touch was purely for hallway safety.
- During his interview with Mr. Bullock, Mr. Johnson stated on record: "*Kids these days exaggerate everything to get out of trouble. I've known you for five years; you're just an old-school educator who cares about order.*"
- Mr. Johnson submitted his investigative report concluding that the physical contact was non-sexual, brief, and intended solely for safety maintenance during dismissal.

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Class Dismissed

The District Title IX Coordinator reviewed Mr. Johnson's investigative report and issued a finding of "Not Responsible" for Title IX sexual harassment. The written determination stated:

"Based on the preponderance of the evidence in the investigative record, the respondent's physical touch was a minor, supervisory contact intended to manage student safety in a crowded hallway. The evidence does not support a finding that the contact was sexual in nature and does not meet the definition of Title IX sexual harassment."

301

Verify Impartiality

- No bias for against complainants or respondents generally
- No bias for or against these parties
- No conflict of interest
- No prejudgment

302

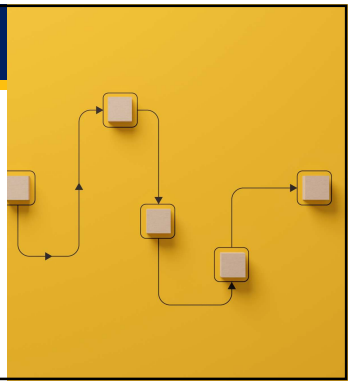
Determine Validity of Appeal

- 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)

303

Procedural Error

- Did the appealing party identify a procedural irregularity?
  - Failure to follow policy/procedure steps.
  - Failure to analyze all relevant evidence.
  - Inappropriate disqualification of evidence or questions.
- Did the appealing party identify how they believe the error affected the outcome/decision made?



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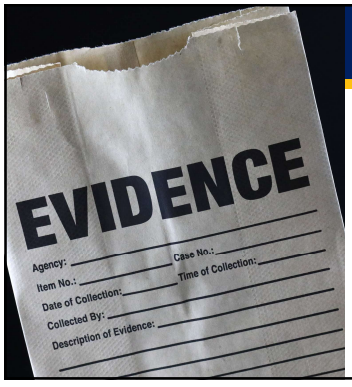


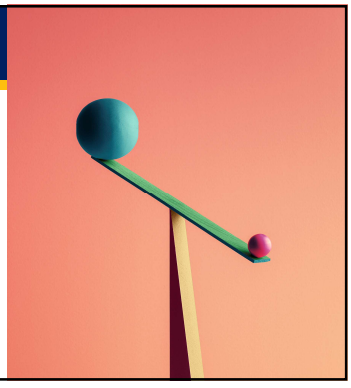
New Evidence

- Did the appealing party identify new evidence that wasn't reasonably available at the time the decision being appealed was made?
- Did the appealing party identify how they believe the new evidence could outcome/decision made?

305

Bias or Conflict

- Did the appealing party identify an alleged bias or conflict of interest by a Title IX team member?
- Did the appealing party identify how they believe the bias or conflict affected the outcome?



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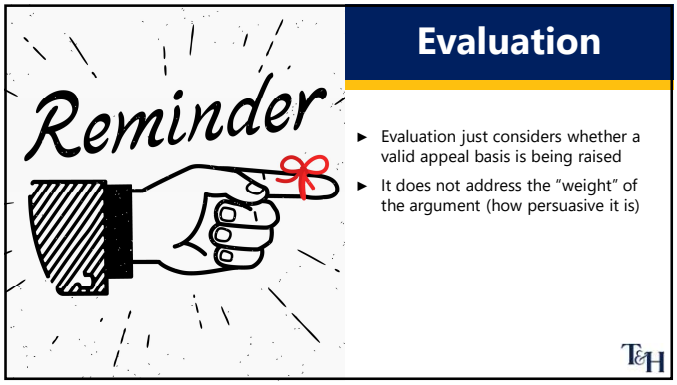

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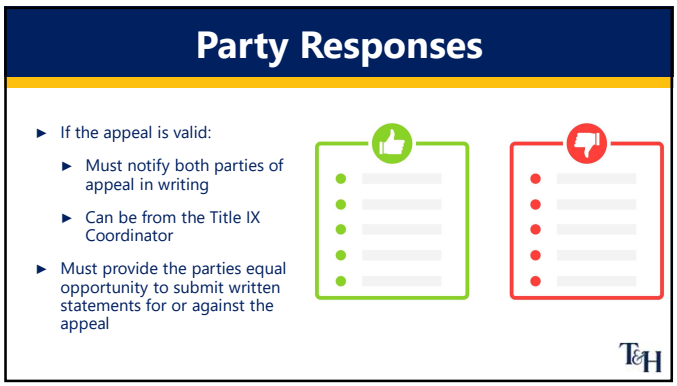

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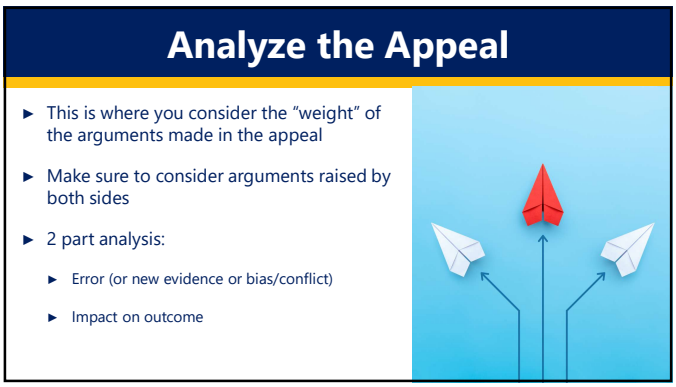

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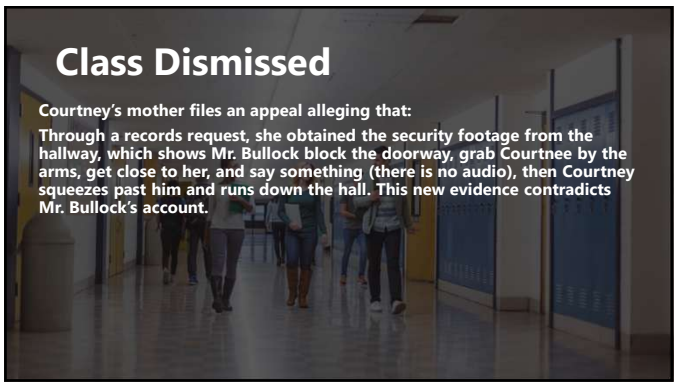

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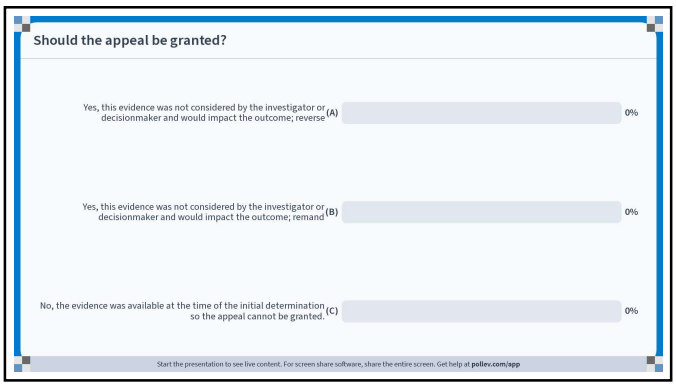

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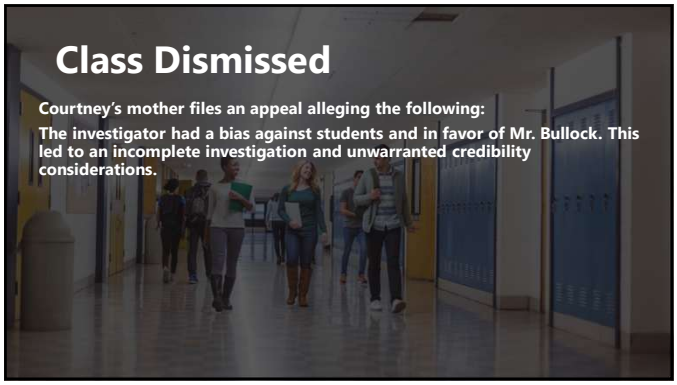

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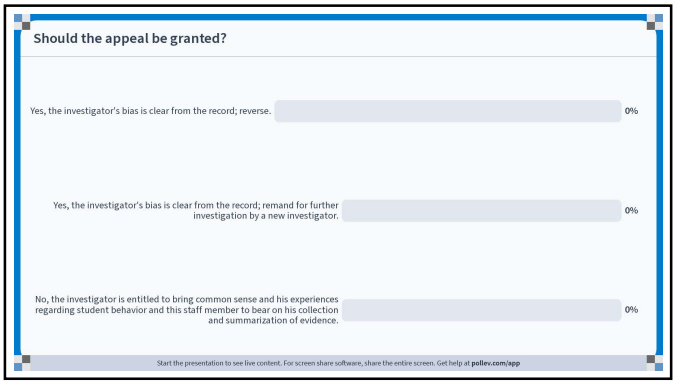

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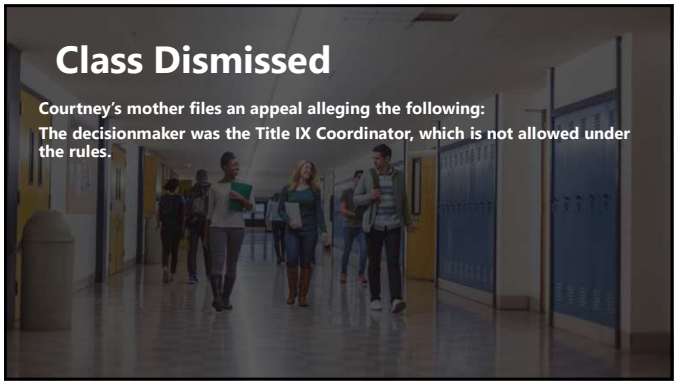

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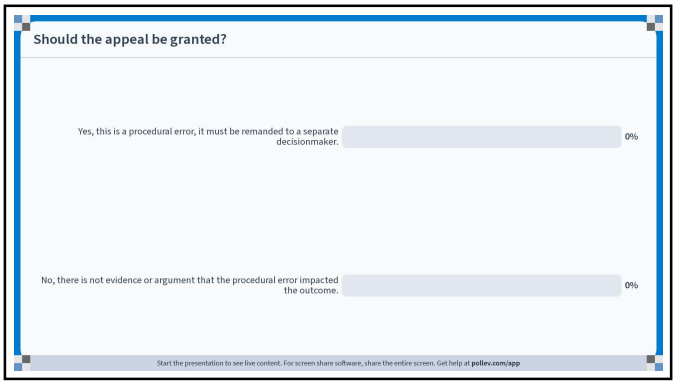

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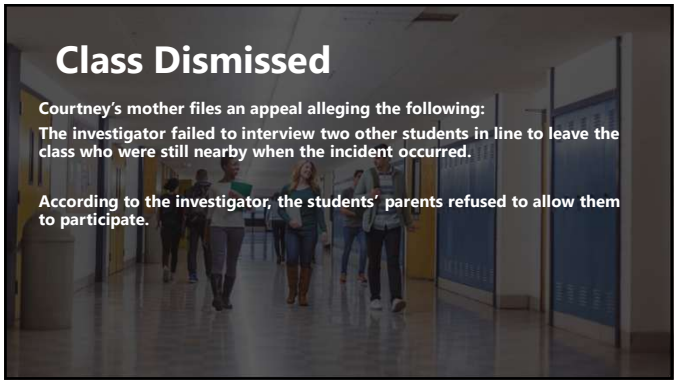

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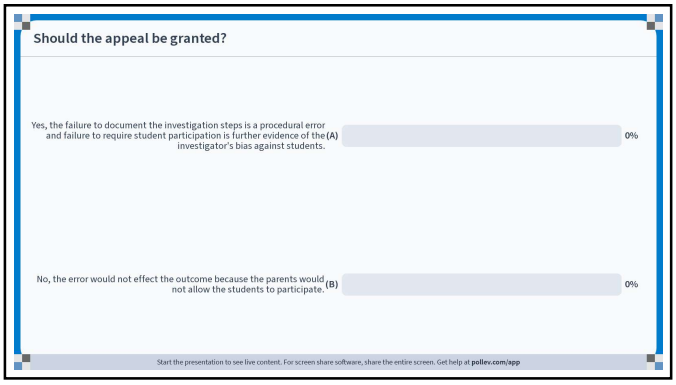

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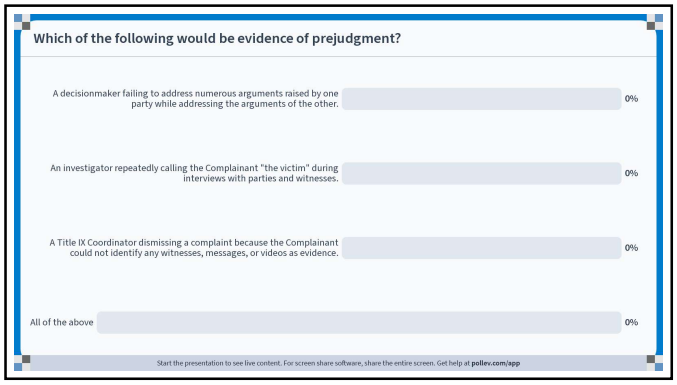

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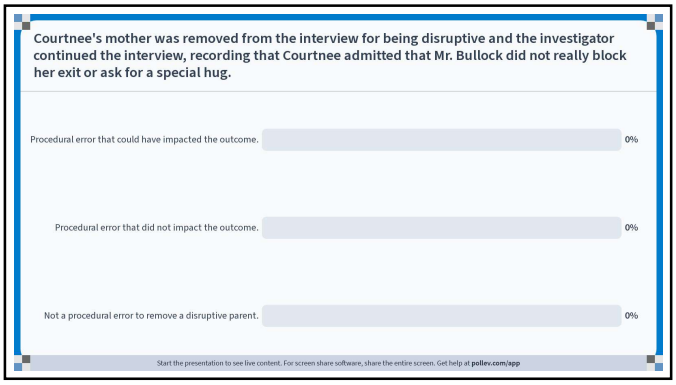

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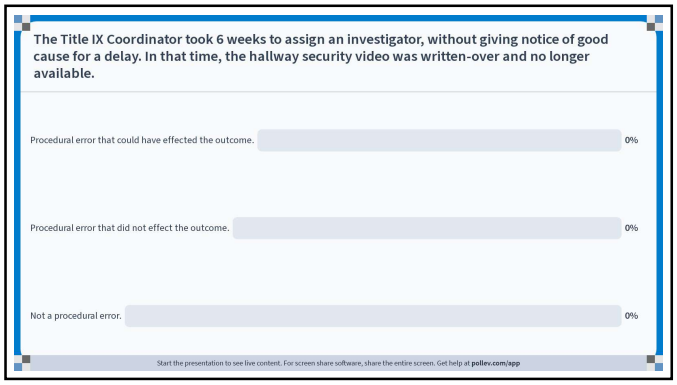

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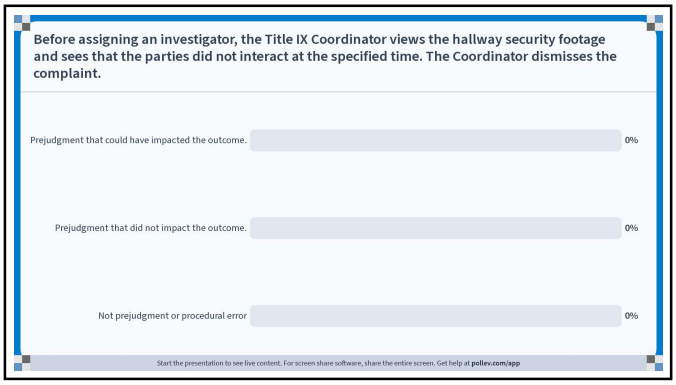

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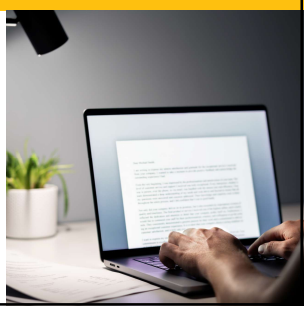
Write the Report

- Write a determination that includes the relevant information from the decision, party statements, and reasons for the appeal determination
- Remember to show your work and use your policy definitions
- Assess whether there is sufficient evidence of impact on the outcome
- Remember the preponderance of the evidence standard



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Outcome

Affirm	Reverse	Remand
• No error or • The error did not impact the outcome.	• The appeal makes clear the decision was incorrect.	• More information is needed. • Return to the investigation or decisionmaking stage (possibly with a new investigator or decisionmaker).

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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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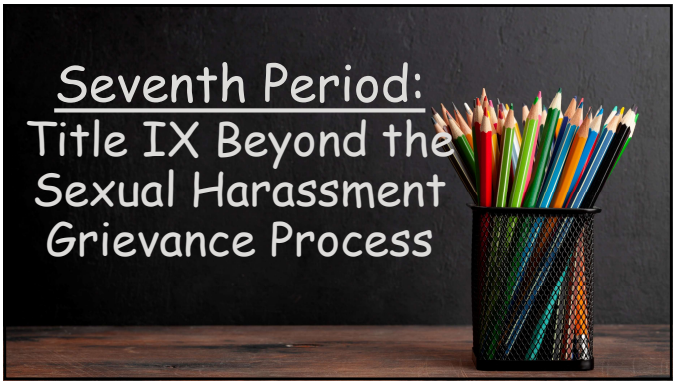

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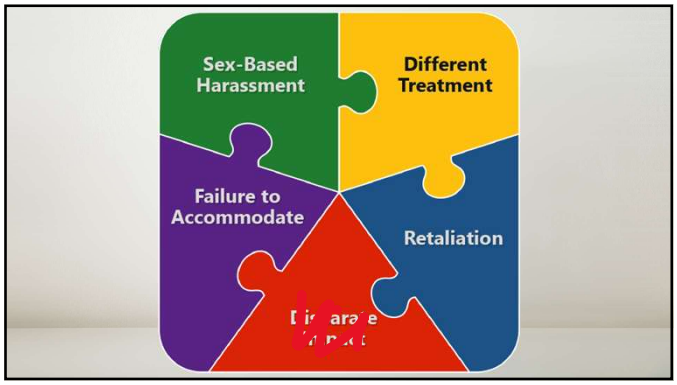

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Different Treatment Test

- Was the aggrieved person a member of a **protected class** (sex)?
- Was the aggrieved person treated differently than a **similarly situated** individual, not a member of the protected class?
- Is there a **legitimate, non-discriminatory reason** for the different treatment?
- Is there evidence that the reason is **pretext** for unlawful discrimination?

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Similarly Situated

- Students are similarly situated when they are comparable, even if not identical, in relevant respects.
- The "relevant respects" will vary by situation.

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What is Pre-Text?

- Does the asserted reason explain the actions?
- Does evidence contradict a stated reason for a disparity, exposing it as false?
- Were similarly situated individuals treated differently?
- Were the actions within the bounds of policies, procedures, and past practices?

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Different Discipline

- Kitty Song Covey, a Portland HS student, attends the Korean International Speech & Strategy Camp. Her assigned roommate at KISS constantly plays video games late at night and has a 24-hour webcam set up that portrays Kitty sleeping.
- Kitty asks for a new room assignment, but when KISS does not give her one, she moves into the dorm room of her male classmates.
- When PHS learns Kitty broke the KISS rules, it kicks Kitty off the debate team. Her male roommates are only suspended for one tournament.

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Are Kitty and her male roommates similarly situated?

No, she lived in the dorm of another gender and they did not — 0%

Yes, they all broke the same rule about gender-specific dorms — 0%

It depends on whose idea it was — 0%

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Different Discipline

- Kitty is on academic probation.
- Her roommate Min-Ho was disciplined at the debate camp for throwing a party where alcohol was served.
- Her roommate Quincy was disciplined at the debate camp for having a guy he was dating in his room past curfew.
- Her roommate Dae had a clean disciplinary record until this incident.

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Was Kitty treated differently than her roommates?

Yes, it was the same offence — 0%

No, because of their different disciplinary history — 0%

Yes, but their disciplinary histories provide a non-discriminatory reason for their different treatment. — 0%

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Does it matter that Kitty's cited history was academic, not conduct-based?

Nobody has responded yet.

Hang tight! Responses are coming in.

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Pregnancy Discrimination

- Tree Hill HS cheerleader Haley James Scott learns that she is pregnant.
- The cheer coach tells Haley that she cannot practice or cheer during the upcoming basketball season because it could be harmful to her or the baby.
- The coach offers Haley the option of becoming the team's "manager" for the remainder of the season.
- When Haley protests, the coach tells her she can continue on the team IF she gets certification from a doctor

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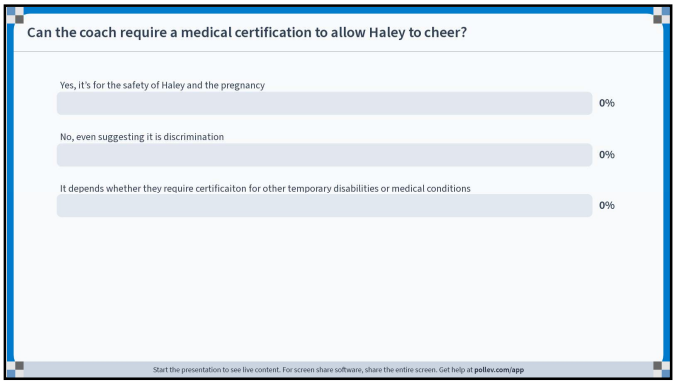

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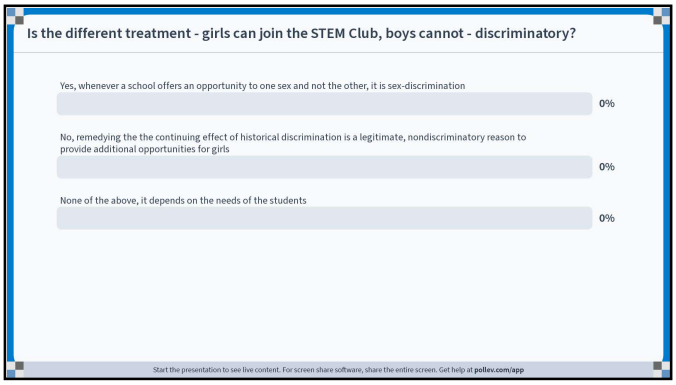

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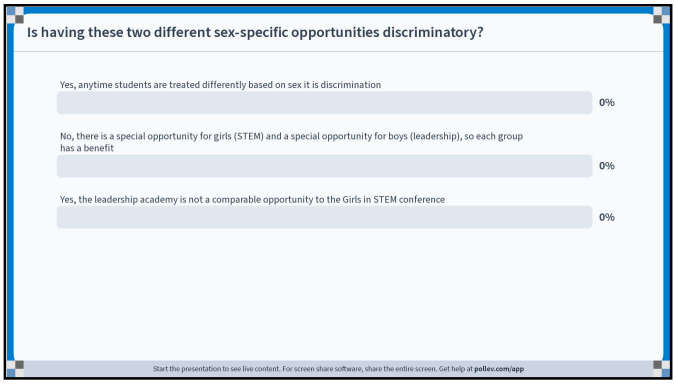

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Single-Sex Programs

The Rule

Schools cannot provide or otherwise carry out any education programs or activities separately, or require or refuse participation, based on sex.

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Single-Sex Programs

The Exceptions

- Contact sports in PE (including wrestling, boxing, rugby, ice hockey, football, basketball)
- Ability grouping in PE (as assessed by objective standards of individual performance developed and applied without regard to sex)

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Single-Sex Programs

The Exceptions:

- Human sexuality classes
- Choruses (requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex)

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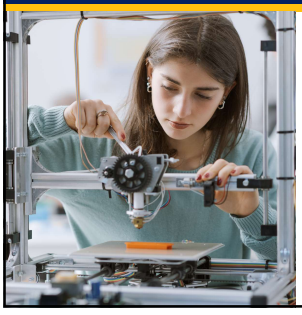
Single-Sex Programs



Exception: schools can provide nonvocational single-sex classes and extracurricular activities **if**:

- The aim is to:
  - Improve educational achievement of its students, through a district's overall established policy to provide diverse educational opportunities; or
  - Meet the particular, identified educational needs of its students; **and**
- The single-sex nature of the class or extracurricular activity is substantially related to achieving that objective

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The Rules for the Exception

- The recipient implements its objective in an evenhanded manner
- May be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex
  - the policies and criteria of admission,
  - the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology,
  - the qualifications of faculty and staff,
  - geographic accessibility,
  - the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty

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Single-Sex Programs

The Rules for the Exception

- Student enrollment in a single-sex class or extracurricular activity is completely voluntary;
- The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity

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Single-Sex Programs

The Rules for the Exception

- The recipient must conduct periodic evaluations (every 2 years) to ensure that:
- Single-sex classes or extracurricular activities are based upon genuine justifications
- do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex, **and**
- any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.

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Athletics Equity

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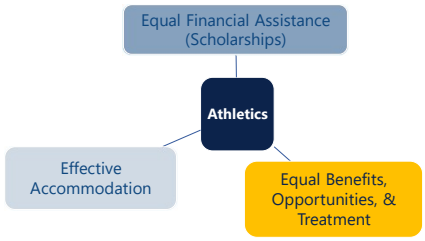
Athletics Equity Encompasses



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Benefits, Opportunities, & Treatment

1. Equipment & Supplies
2. Game & Practice Scheduling
3. Travel & Daily Allowance
4. Coaching
5. Academic Tutors
6. Practice & Competition Facilities
7. Medical & Training Facilities & Services
8. Housing & Dining Services
9. Publicity
10. Recruitment

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What About Boosters?

- Panther Booster Buddy Garrity has offered to fund the installation of astroturf for the Dillon High School football stadium in exchange for a permanent sign on the field for his car dealership.
- Coach Taylor tells the school board that this would improve the Panthers' games and save the school district money in watering and maintaining the field in drought-stricken West Texas.

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Accounting for Donor Funds

- An institution can accept voluntary support from donors, BUT it is the institution's responsibility to prevent inequitable results.
- If a donor donates money only to a men's team, "your school must ensure that the benefits, opportunities, and treatment are equivalent for both men and women in its athletic programs."

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Failure to Accommodate

Failure to Accommodate occurs when a school district fails to provide a reasonable accommodation – such as breaks, intermittent absences for medical appointments, or changes to schedules – to a pregnant or parenting student

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Pregnancy Accommodations

- As her pregnancy progresses, Haley's doctor recommends that she be permitted to take brief breaks during class as needed to use the restroom, stretch, or change positions, and recommends that she have access to a desk that allows her to sit comfortably.
- Haley provides the doctor's note to her Tree Hill High teachers and asks to be able to stand at the back of the room and stretch as needed and use an available desk with additional space.

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Pregnancy Accommodations

- Hayley's English teacher tells her that she can use the special desk, but that students are expected to remain in their assigned seats for the entire 90-minute class period and that allowing Haley to move around would be disruptive and unfair to other students.

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Pregnancy Accommodations

- Haley complains to the assistant principal.
- The AP agrees that Haley should not receive "special treatment" and tells her that she can use the nurse's office if she needs a break, but warns her that the absences will count against her attendance and tells Haley she is expected to follow the same classroom rules as everyone else.
- Haley then comes to you as the Title IX Coordinator.

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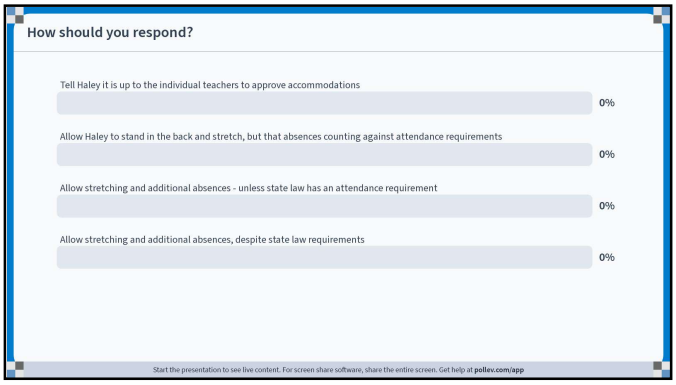

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Pregnancy Accommodations

Institutions must treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any:

- medical or hospital benefit,
- service,
- plan or policy

that it operates

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Pregnancy Accommodations

If your school does not have a leave policy for students, or if a student otherwise does not qualify for leave, it must:

- Treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began

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Pregnancy Accommodations

What to do:

- Institutions must excuse absences due to pregnancy or childbirth for as long as the student's doctor says is necessary
- This is true *even if* the instructor has a "strict" attendance policy or your state has a minimum attendance policy for obtaining class credit
- Schools should not hesitate to modify attendance-for-credit policies

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Retaliation Test

- Did the aggrieved person engage in protected activity?
- Did they suffer an adverse consequence?
- Is there a causal connection between the activity and the consequence?
- Is there a legitimate, non-retaliatory reason for the adverse conduct?
- Is there evidence that the reason is pretext for unlawful retaliation?

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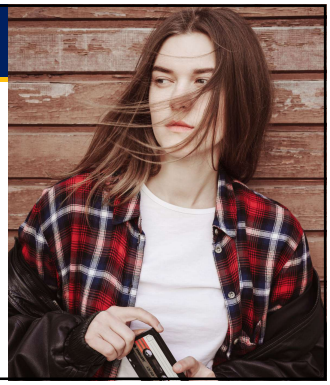
Retaliation

- Angela Chase reports to her counselor that classmate Jordan Catalano has repeatedly made unwanted sexual comments toward her and has been sending her sexually suggestive messages. Angela doesn't want a formal investigation, so the counselor calls in Jordan for an informal talk about his behavior
- Jordan stops speaking to Angela and his friends stop inviting her to lunch and begin making comments about her in the hallway. Angela's friend Rayanne tells her that Jordan says Angela "made a big deal out of nothing."



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Did Angela engage in protected activity?

No, because she reported to the counselor, not the Title IX Coordinator	0%
No, because the counselor doesn't have disciplinary authority	0%
No, because she declined an investigation	0%
Yes	0%

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Did Angela suffer an adverse consequence?

No, because no employee has done anything to her	0%
No, because she is still able to fully participate in her classes and activities	0%
Yes, adverse social consequences are sufficient	0%
No, because the behavior isn't severe or pervasive	0%

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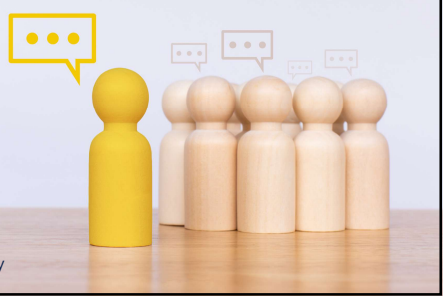
Retaliatory Harassment

- If the school is aware of retaliation by other students, it should be investigated
- Most policies define it as severe, pervasive, or persistent behavior
  - Courts define it as severe, pervasive and objectively offensive
- Not required to use the formal Title IX grievance process unless your policy requires it



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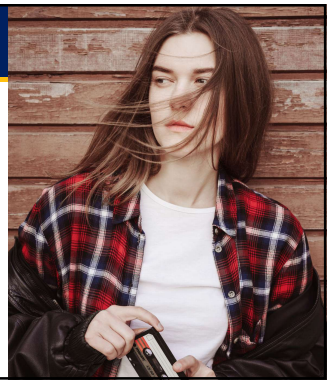
Retaliation

- A few weeks later, Angela applies to be on the yearbook staff. She previously contributed several photographs to the yearbook.
- The yearbook advisor tells Angela that she was not selected because the yearbook staff needs students who can work cooperatively with the rest of the staff and meet deadlines.
- Angela had missed two deadlines and failed to attend one mandatory yearbook meeting. Because the yearbook has a tight production schedule, the advisor chose students who had demonstrated greater reliability.



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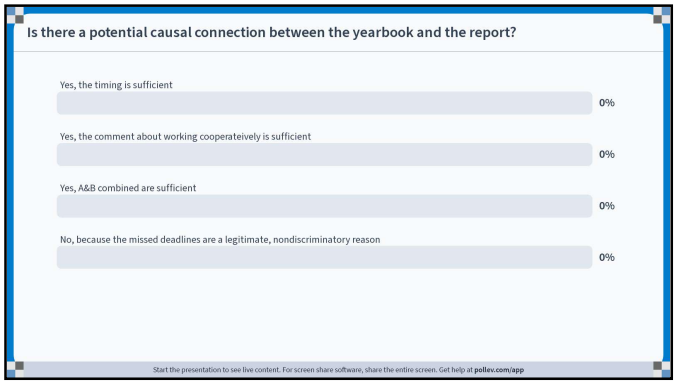

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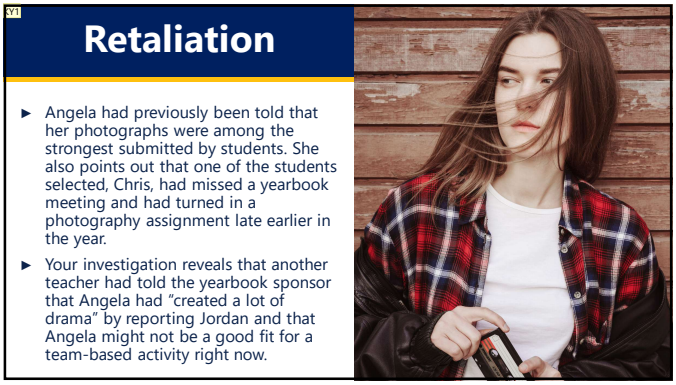

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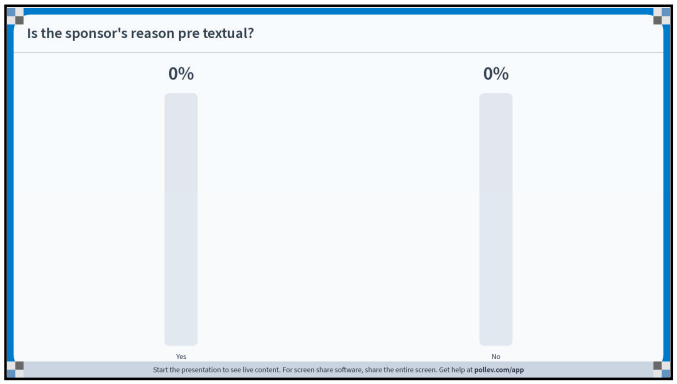

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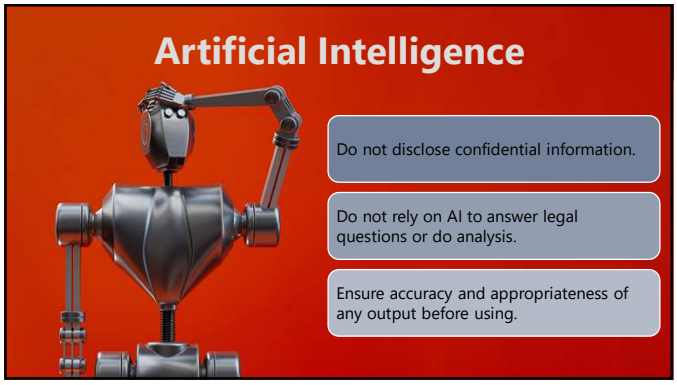

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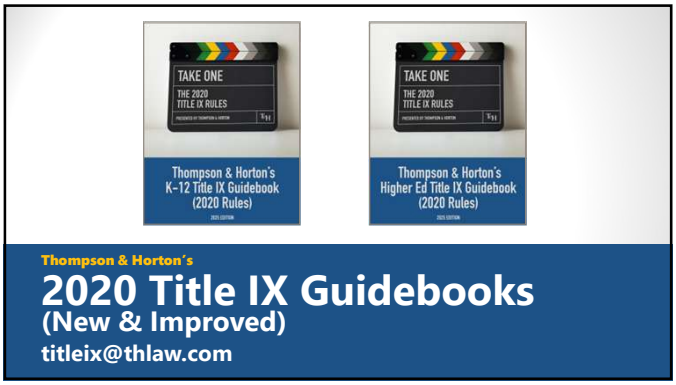

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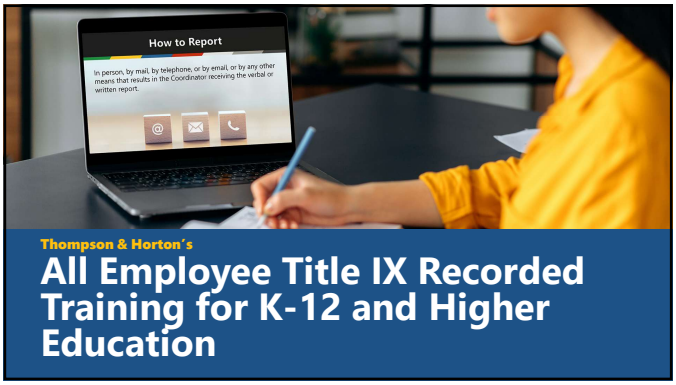

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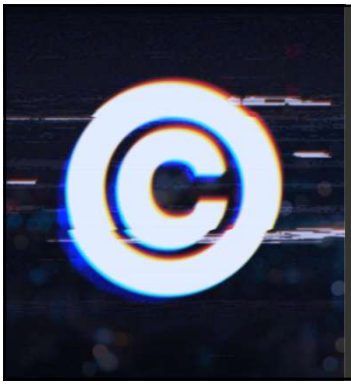

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