

DEPUTY TITLE IX COORDINATOR TRAINING

AUSTIN ISD June 2023

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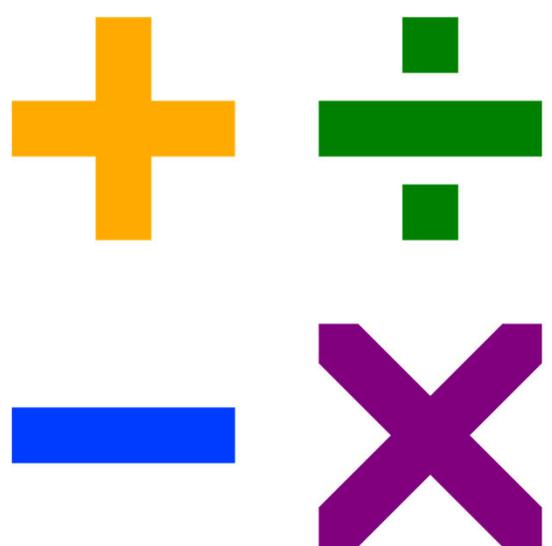


Agenda

- ▶ Overview of Title IX Basics
- ▶ 2020 Title IX Regulations – Sexual Harassment
- ▶ Duties of Deputy Title IX Coordinators

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TITLE IX BASICS



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

Title IX

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

20 U.S.C. §§1681 & 34 C.F.R. Part 106



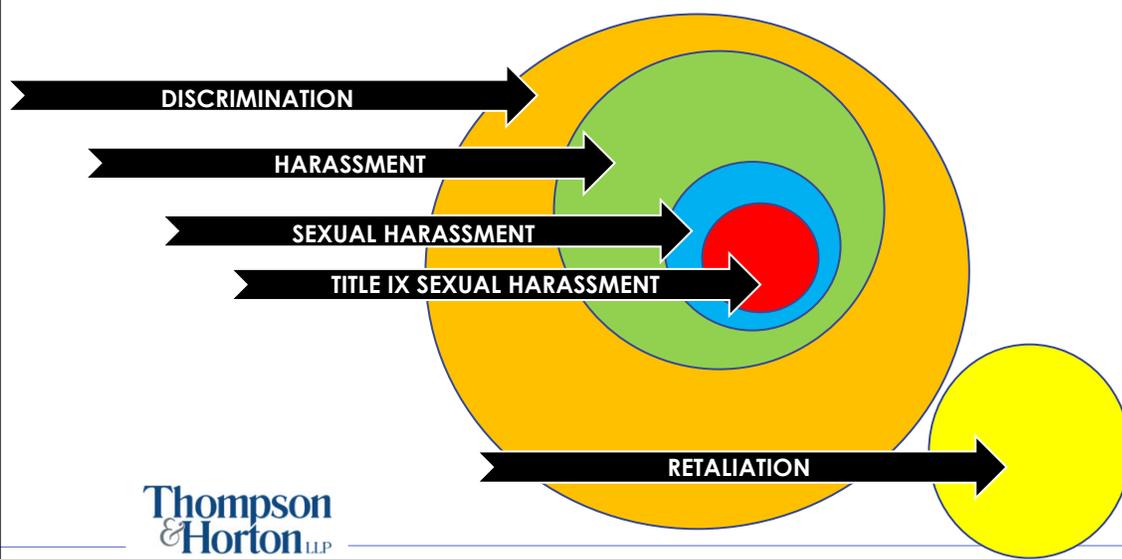
What is Title IX?



Today Is Sexual *Harassment*, But...

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

And Remember



Today Is Sex Harassment, But...

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

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TITLE IX SH REQUIREMENTS

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2020 Title IX Rules

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



What Do The 2020 Rules Require?

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

What Do The 2020 Rules Require?

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

What Do The 2020 Rules Require?

- ▶ Have and share publicly a Title IX sexual harassment policy and grievance procedure
- ▶ Use that policy and procedure any time a report or complaint of covered conduct is received

T9SH Grievance Process: When & What is Required



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A K-12 school

in which any employee has actual knowledge

of “Title IX Sexual Harassment”

in its “education program or activity” and

against a person in the United States

must respond using the Title IX Sexual Harassment process

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T9SH Grievance Process: When & What is Required



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A K-12 school

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K-12 Schools

- ▶ Any K-12 school that receives federal financial assistance from the U.S. Department of Education
 - Includes almost every public school
- ▶ Special rules for K-12 schools (as compared to higher education)—that’s what we’re discussing today



T9SH Grievance Process: When & What is Required

A K-12 school

in which any employee has actual knowledge



ANY Notice or Knowledge

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

*to or by ANY
K-12 employee*

Reports & Complaints

- ▶ Any person **may report** sex-based discrimination to any employee, including any Deputy Title IX Coordinator or the Title IX Coordinator
- ▶ Every employee of the District **is required to report** any information they know suggesting that sex-based discrimination, including harassment, or retaliation has, is, or may be happening
 - Failure to do so may lead to disciplinary action

Test Yourself

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



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Is there actual knowledge?

Yes

No

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Test Yourself

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



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Is there actual knowledge?

Yes

No

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Test Yourself

A building administrator hears from a staff member or a student that Carson and Teacher Thompson are having a consensual relationship.



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Is there actual knowledge?

Yes

No

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T9SH Grievance Process: When & What is Required

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A K-12 school

in which any employee has actual knowledge

of Title IX “sexual harassment”

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Title IX Sexual Harassment Is....

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

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Unwelcome Conduct

- ▶ Not solicited or invited, and the target considers it undesirable or offensive
- ▶ Acquiescence—even willing participation—or the failure to complain or report the conduct does not always mean the conduct was welcome
- ▶ Conduct welcomed on one occasion can be unwelcomed on a subsequent occasion
- ▶ Whether conduct is “welcome” can be impacted by age, disability, relationships, culture, and intoxication

Unwelcome?

A student, Carson, reports that other students are constantly making sexual jokes, making Carson uncomfortable. Carson acknowledges laughing at the jokes, saying they wanted to avoid causing a scene.

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Is the conduct unwelcome?

Yes No

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Unwelcome?

What if Carson shook their head and got up and walked away when jokes were made.

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Is the conduct unwelcome?

Yes No

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Unwelcome?

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

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Is the conduct unwelcome?

Yes No

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Based on Sex

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

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Based on Sex



The sex/gender, sexual orientation, and gender identity of the parties involved is not determinative

- A boy can harass a boy
- A girl can harass a girl
- A cisgender person can harass a cisgender person

“Title IX Sexual Harassment”

The Title IX “Big 5”

Employee Quid Pro Quo

Sexual Assault

Domestic Violence

Dating Violence

Stalking



Hostile Environment

Unwelcome conduct based on sex that is so severe, pervasive, and objectively offensive that it effectively denies equal access to the educational program or activity

In K-12, the **Big Ones** in the **Big 5** Are:

- ▶ Sexual Assault
 - ▶ Rape
 - ▶ Oral sex without consent
 - ▶ Fondling (touching a private body part above or below the clothing without consent for purposes of sexual gratification)
- ▶ Dating Violence (physical or mental violence by current or former romantic partner)

#1 of the “Big 5” **Employee Quid Pro Quo**

- ▶ An employee of the school conditioning an aid, service, or benefit of the school on an individual’s participation in unwelcome sexual conduct
- ▶ Examples include an employee:
 - Requesting sexual favors for a benefit or service
 - Threatening to remove a benefit or service unless a person engages in sexual favors
 - Expecting sexual favors for a benefit or service

#2 of the “Big 5”

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Sexual Assault (Clery Definition)

- ▶ Rape, fondling without consent, incest or statutory rape
- ▶ Any act of vaginal or anal penetration, however slight, with any body part or object, or oral genital contact of another person, without consent
- ▶ Touching of the private body parts of another person for the purpose of sexual gratification, without consent (above or under clothing)

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What is Consent?

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- ▶ “Consent” comes into play in sexual assault cases, including those involving fondling
- ▶ Consent is not defined by OCR/the 2020 Title IX rules
- ▶ Must be defined in your policies/procedures

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What is Consent

Generally, consent means 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**

#3 of the “Big 5” Domestic Violence (VAWA Definition)

- ▶ Felony or misdemeanor crimes of violence
- ▶ By
 - A current or former romantic partner
 - Spouse
 - Former spouse
 - Intimate partner
 - Person who shares a child
 - A person similarly situated to a spouse
 - An adult against a person protected under domestic or family violence laws of the jurisdiction

#4 of the “Big 5”

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Dating Violence (VAWA Definition)

- ▶ Violence committed by a person who has been in a romantic or intimate social relationship with the victim
- ▶ Can include sexual, physical, emotional, or psychological violence
- ▶ Consider the complainant’s description of the length of the relationship, the type of relationship, and the frequency of the interaction



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#5 of the “Big 5”

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Stalking (VAWA Definition)

- ▶ A course of conduct based on sex (2+ times)
- ▶ Directed at a specific person
- ▶ That would cause a reasonable person to:
 - Fear for the person’s safety or
 - Fear for the safety of others or
 - Suffer substantial emotional distress
- ▶ Can be direct or indirect

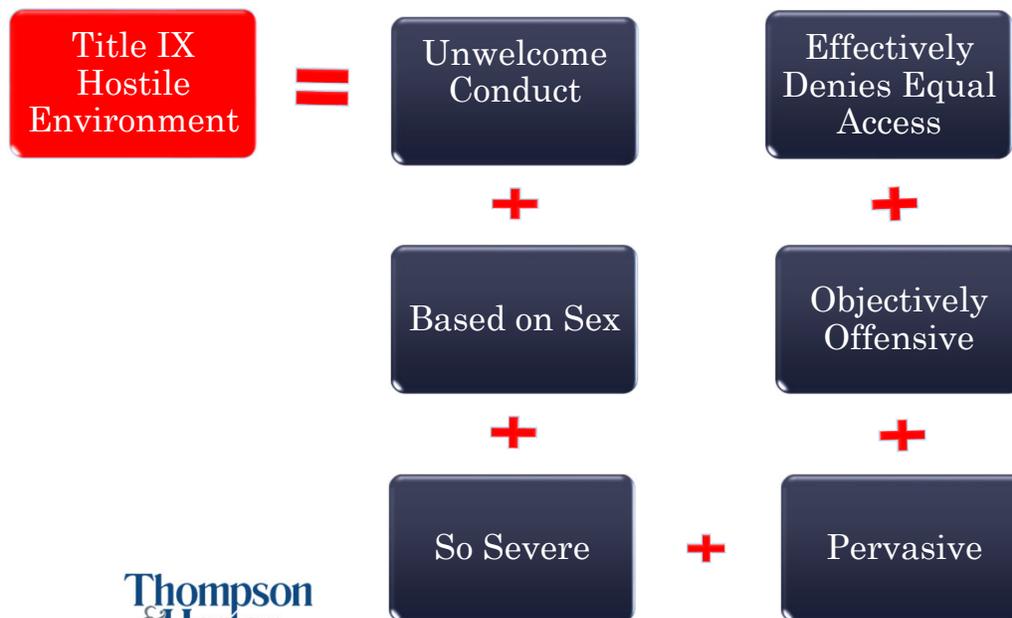


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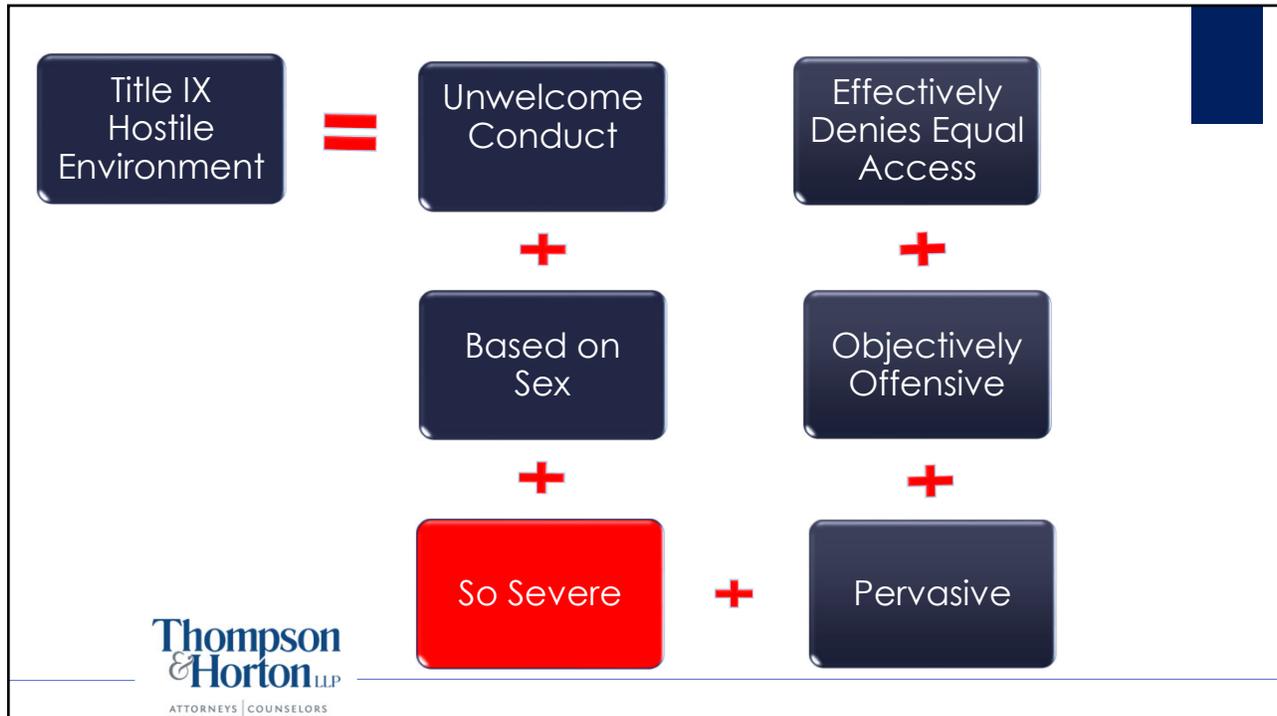
“Title IX Sexual Harassment”

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

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What does "severe" mean (one word)?

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Dictionary Definitions: Severe

- ▶ Very bad, serious, or unpleasant; causing a lot of physical pain or suffering; very harsh (Merriam-Webster)
- ▶ Strict, austere or intense with disastrous consequences. (Black's Law Dictionary)

Case Definitions: Severe

- ▶ “Severe” means something more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and crass.
- ▶ Simple acts of teasing and name-calling are not enough, even where these comments target differences in gender.

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554, 208 L. Ed. 2d 175 (2020)

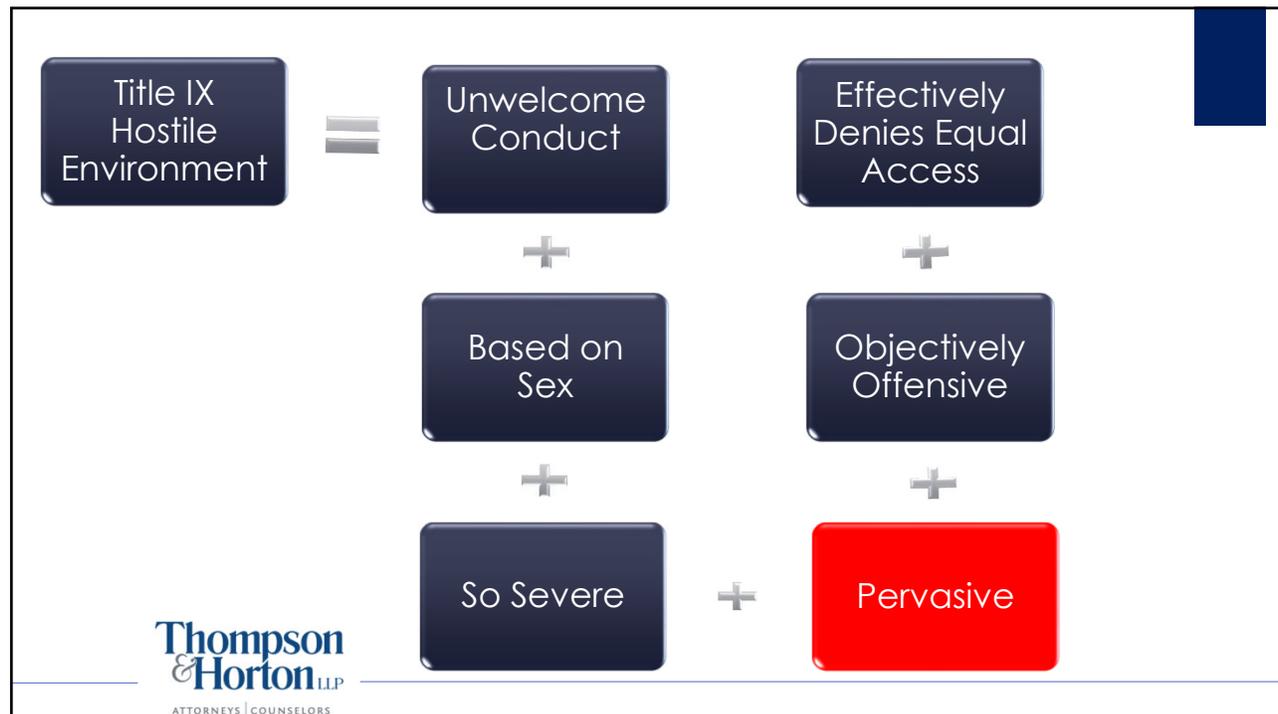
Case Definitions: Severe

- ▶ A school is not perfectly analogous to a workplace, and minor students are not perfectly analogous to adults. Accordingly, some behaviors that plainly would be out of place in a workplace may be tolerable in a school setting as part of the ordinary social development of the school's students
- ▶ At least early on, students are still learning how to interact appropriately with their peers, so it is unsurprising that they may engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting

T.C. on Behalf of S.C. v. Metro. Gov't of Nashville, 378 F. Supp. 3d 651, 674 (M.D. Tenn. 2019)

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What does "pervasive" mean (one word)?

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Dictionary Definitions: Pervasive

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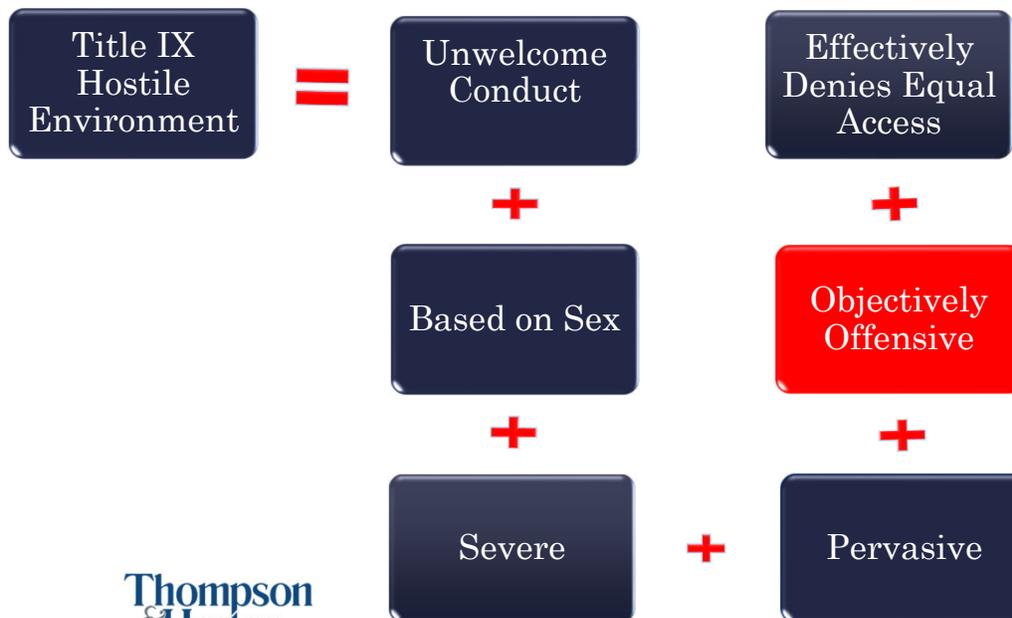
Spread over a large area, either metaphorically, or in a literal manner. For instance, rumors can be quite pervasive amongst people. (Black's Law Dictionary)

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Case Definitions: Pervasive

- ▶ “Pervasive” means “systemic” or “widespread.” For sexual harassment under Title IX, it also means multiple incidents of harassment; one incident of harassment is not usually enough.
- ▶ Most single incidents could be sufficiently severe that it would result in the articulated injury, but a single incident would normally fall short of Title IX's requirement of “systemic” harassment.

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554, 208 L. Ed. 2d 175 (2020)



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

Objective Subjective

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

Objective Subjective

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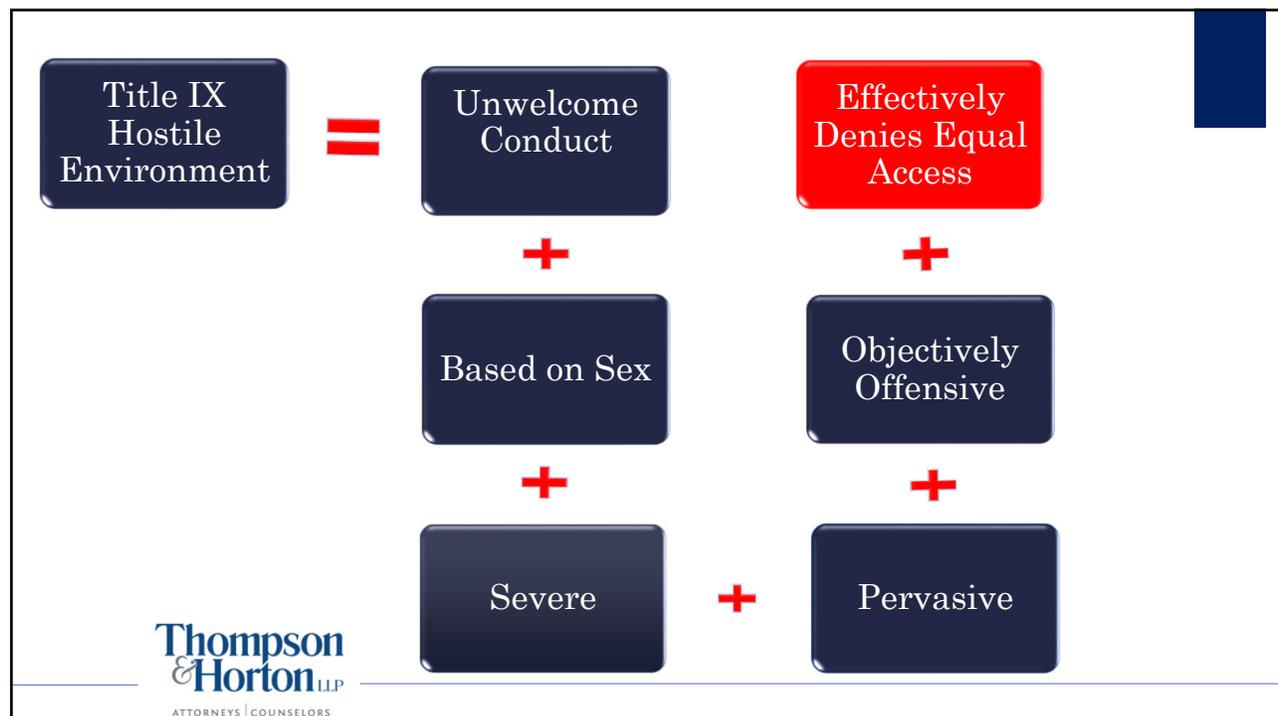
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Case Definitions: Objectively Offensive

- ▶ 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

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Effective Denial

Would a reasonable person in the alleged victim's position be effectively denied equal access to education compared to a similarly situated person who did not suffer the alleged sexual harassment

Effective Denial

Examples may include:

- ▶ Skipping class to avoid a harasser
- ▶ A decline in a student's grade point average
- ▶ Difficulty concentrating in class
- ▶ A third grader who starts bed-wetting or crying at night due to sexual harassment
- ▶ A high school wrestler who quits the team but carries on with other school activities following sexual harassment

Effective Denial of Equal Access

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- ▶ No concrete injury is required to prove an effective denial of equal access
- ▶ A complainant need not have already suffered a loss of education
- ▶ Does not require that a person's total or entire educational access has been denied

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Effective Denial of Equal Access

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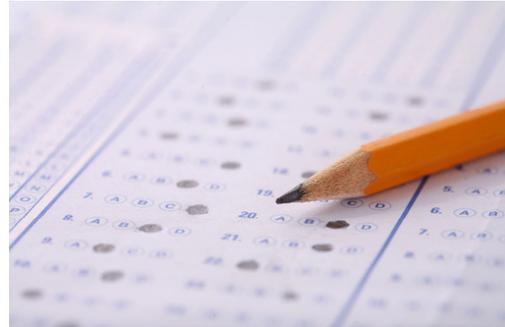
The key: School officials turning away a complainant by deciding the complainant was “not traumatized enough” would be impermissible



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Test Yourself: Is it Title IX Sexual Harassment?



Test Yourself

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



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Is it Title IX Sexual Harassment?

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

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Test Yourself

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



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Test Yourself

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



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Test Yourself

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



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Test Yourself

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



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Test Yourself

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



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Test Yourself

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



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Test Yourself

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



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Test Yourself

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



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Test Yourself

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



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T9SH Grievance Process: When & What is Required



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A K-12 school

in which any employee has actual knowledge

of Title IX “sexual harassment”

in its “education program or activity”

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Education Program or Activity

The sexual harassment must occur within the school's educational program or activity



- Includes situations where conduct occurs as part of the school's "operations"
- "Includes locations, events, or circumstances over which the [school] exercised substantial control over both the respondent and the context in which the sexual harassment occurs"

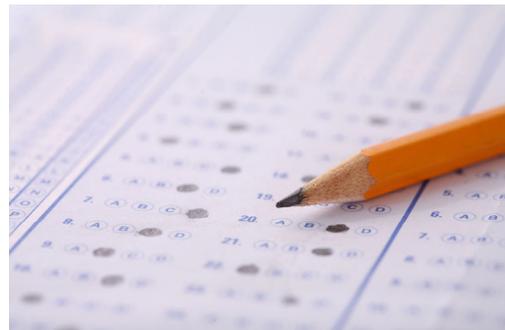
Off-Campus Events & Activities

Factors such as whether the school funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred may be helpful or useful for schools to consider to determine the scope of a school's program or activity, but no single factor is determinative

Even if conduct is outside the EP/A

- ▶ Support, support, support
- ▶ Consider other policies and codes of conduct that may have been violated
- ▶ Conduct that begins outside of an education program or activity may continue into the education program or activity (“downstream effects”)

Test Yourself: Is it in a Program or Activity?



Test Yourself

Robin allegedly sexually assaulted Carson in the bathroom at school.



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

Yes

No

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Test Yourself

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



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

Yes

No

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Education Program or Activity

- ▶ Field trips
- ▶ Athletics
- ▶ Extracurricular activities



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Test Yourself

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



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

Yes No

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Test Yourself

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



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

Yes No

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Test Yourself

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



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

Yes No

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Test Yourself

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



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

Yes No

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Education Program or Activity

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For off-campus conduct ask, did the conduct occur:

- ▶ Via school technology
- ▶ During remote learning
- ▶ During school hours

If so, it may be part of the educational program or activity because of these “hooks”

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Test Yourself

Carson reports sexual harassment by Robin online. Both students were at home on the weekends when the conduct occurred, and it occurred through personal devices. No harassment is alleged to have occurred at school, but Cameron is having difficulty concentrating at school.



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

Yes

No

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T9SH Grievance Process: When & What is Required

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A K-12 school

in which any employee has actual
knowledge

of Title IX “sexual harassment”

in its education program or activity

against a person in the United States

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In the United States



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In the United States

- ▶ The Title IX rules do not apply extraterritorially (such as study abroad programs or Spring Break abroad)
- ▶ As with any other conduct that falls outside Title IX, other code of conduct provisions can be used to address such conduct

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T9SH Grievance Process: When & What is Required

A K-12 school

in which any employee has actual knowledge

of Title IX “sexual harassment”

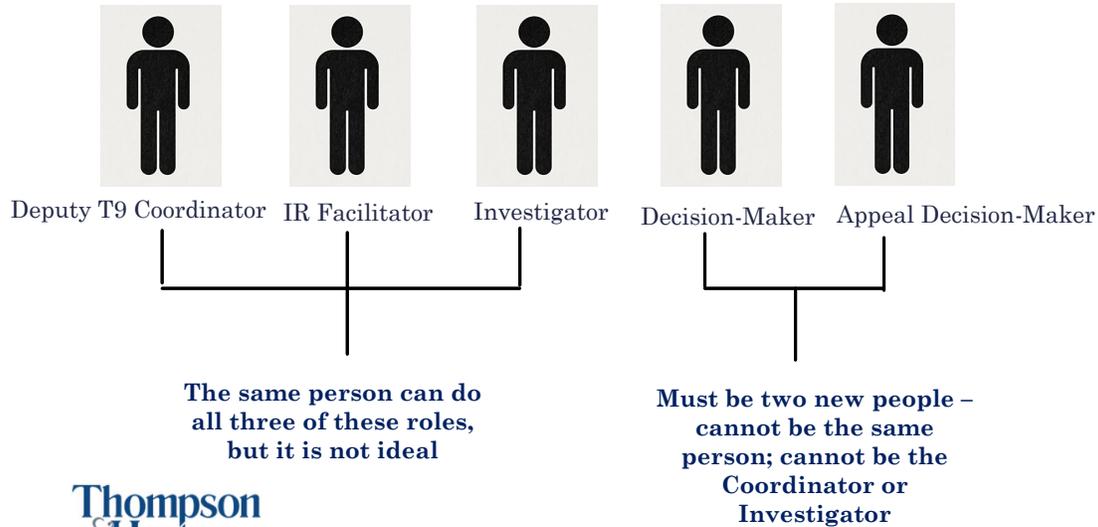
in its “education program or activity”

against a person in the United States

must respond using the Title IX Sexual Harassment process

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The Title IX Team



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Upon receipt of a report...

- ▶ Building employees other than the Deputy Title IX Coordinator must notify the Deputy Title IX Coordinator
- ▶ The Deputy Title IX Coordinator is responsible for evaluating the complaint for Title IX applicability
- ▶ If the matter implicates Title IX, the Deputy Title IX Coordinator is responsible for overseeing the grievance procedure required by the Title IX rules
- ▶ The Deputy Title IX Coordinator should notify the Title IX Coordinator of receipt of the report and the evaluation decision and keep them apprised of the matter

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The Biggest Issues

- ▶ Owe a duty of confidentiality to the alleged victim (complainant) unless and until a formal complaint is filed or signed
- ▶ This means you can't tell the alleged perpetrator (respondent) the complainant's name or any information that might identify the complainant

The Biggest Issues

- ▶ In most cases, the complainant (or a minor complainant's parents/guardians) control whether any investigation occurs

The Biggest Issues

- ▶ Cannot investigate, make a decision, or impose punitive or disciplinary consequences until after the entire grievance process is complete (on average takes about 90-120 days)
- ▶ Cannot interview a party without providing written notice and opportunity to prepare beforehand

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

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



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

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



Overview: T9 SH Grievance Process

For any Title IX Sexual Harassment in a program or activity and in the United States of which the school has actual knowledge, the Title IX Coordinator or their designee must

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

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

- **Step 3:** Notice of Allegations
- **Step 4:** Consider if dismissal is required or warranted
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- **Step 7:** Decision-Making Process
- **Step 8:** Appeal

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

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What if It's Not Clear?

- ▶ In some cases, a report or complaint is clearly about **sexual harassment**, but it is not clear if the report or complaint is of ***Title IX sexual harassment in the schools education program or activity and in the U.S.***
- ▶ “Intake” is necessary where it is not clear that the complaint falls under Title IX
- ▶ The goal of intake is to collect more information about the allegations to allow evaluation of the complaint

What is Intake?

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

Allegation

“A claim or assertion that someone has done something illegal or wrong, typically one made without proof.”

Oxford Languages

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Evaluation

“To determine the significance, worth, or condition of usually by careful appraisal and study.”

Merriam-Webster



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What is Intake NOT?

- ▶ Investigation
- ▶ Evidence Gathering
- ▶ Interrogation
- ▶ Credibility Determinations



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Let's say it again...

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

Preservation of Evidence

- ▶ At this phase, if you become aware of the existence of evidence that could be at risk of loss, you can take steps to preserve evidence
- ▶ Contact law enforcement immediately where knowledge of illegal or illicit evidence (have police collect it!)

Intake Questions

- ▶ What happened to you that led to the report/complaint?
- ▶ What did you or the respondent do? What did you or the respondent say?
- ▶ If touching occurred, (sensitively) get the details necessary to determine if there was sexual assault, fondling, etc.

Intake Questions

- ▶ Where did the conduct occur?
 - ▶ When did it occur? At what time of the day?
 - ▶ How often did it occur? Is it ongoing?
- Get details (sensitively) for all incidents.

Intake Questions

- ▶ Are you alleging any other violations of policy/sexual harassment?
- ▶ Go over what happened—ask “Anything else?”

Intake Questions

- ▶ Who
- ▶ What
- ▶ When
- ▶ Where
- ▶ Why
- ▶ How



Intake Paperwork

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

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Step #1: Supportive Measures Meeting

- ▶ For all Title IX Sexual Harassment in a program or activity and in the United States of which the school/district has “actual knowledge,” the Title IX Coordinator must **promptly contact the complainant confidentiality (and parents of a minor complainant)**
- ▶ Recommended to have a meeting because of the sensitivity of the topic, but can be communicated in writing if cannot secure in-person participation

Four topics must be covered:



The availability of supportive measures



The complainant's wishes with respect to supportive measures



The availability of supportive measures with or without filing a formal complaint



The process for filing a formal complaint

Supportive Measures

- ▶ Available before, during, after, *and even if there never is* a Title IX formal complaint process
- ▶ Available for both the Complainant and the Respondent, although the measures offered need not be equal
- ▶ Free, individualized services designed to restore or preserve an individual's equal access to education, to protect the individual's safety, or deter further sexual harassment
- ▶ *Cannot be punitive or disciplinary*
- ▶ *Cannot unreasonably burden another person*

Examples

- ▶ Counseling
- ▶ Safety plan
- ▶ Class schedule, work schedule or site, or passing time adjustments
- ▶ Extensions of deadlines or other course-related adjustments
- ▶ Campus escort services
- ▶ Mutual restrictions on contact between the parties
- ▶ Leaves of absence
- ▶ Increased security and monitoring of certain areas of the campus

Supportive Measures

- ▶ The Deputy Title IX Coordinator must implement Supportive Measures
 - For an employee party, coordinate with HR
- ▶ If necessary to share information to implement measures, obtain Complainant's written consent
- ▶ Follow up regularly with the parties to make sure the measures are working
- ▶ Increase the severity of measures or take new measures if initial measures are ineffective



IDEA and Section 504 Implications

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

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REMEMBER



Before a formal complaint is filed, the District must maintain confidentiality of the Complainant's name and the details of the report unless necessary to implement supportive measures (get it in writing!)

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During the Supportive Measures meeting...

Also provide the following:

- ▶ Notice of the right to file a police complaint and Title IX complaint at the same time
- ▶ Translation and interpreter services
- ▶ Assistance with understanding and/or initiating the formal investigation process, including with filling out a Formal Complaint or other paperwork
- ▶ Other accommodations, as reasonably appropriate

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Overview: T9 SH Grievance Process

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Step #2: Emergency Removal

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

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Emergency Removal

WHO: A student, employee, or any other Respondent

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

WHEN: After an individualized safety and risk assessment and determination that an immediate threat to the **physical health or safety** of any student or other individual arises from the allegations of sexual harassment justifying removal (mental health or safety is not enough)

AFTER: Must provide the respondent with notice and an opportunity to challenge the decision **immediately following** the removal



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Emergency Removal

Student Discipline Implications

- ▶ Before removing a student, consider state discipline laws
- ▶ An emergency removal can be tantamount to suspension or expulsion and state laws governing those types of discipline cannot be ignored even if we are calling it an “emergency removal” under Title IX
- ▶ Unless some state law method allows for removal without consent, you may not be able to effectuate an emergency removal, even if Title IX authorizes it
- ▶ Work with legal counsel to determine how to handle this interplay



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Emergency Removal

Special Education/504 Implications

- ▶ Before removing a student with a disability, consult with the special education administrator with responsibility for the student's IEP/Section 504 Plan
- ▶ MDR requirements and procedural safeguards will be triggered if removal is for **more than 10 days** (it almost always will be)
- ▶ Special Ed/Section 504 Committees will need to be involved from the beginning and the Title IX staff will need to be trained on identifying and addressing SPED/504 implications

Administrative Leave

WHO: An employee

WHAT: Paid or unpaid administrative removal of an employee from an assignment or position on an emergency basis (usually a removal from work generally)

WHEN: "During the pendency of a grievance process that complies with § 106.45"

LIMIT: State law, board policies, administrative procedures, contracts, and any other documents governing the employment relationship must allow it

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

Yes No

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

Yes No

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

Yes No

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

Yes No

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Overview: T9 SH Grievance Process

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

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**Only move to Step 3
if you have a Formal
Complaint**

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Formal Complaint

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

July 2021 OCR Q&A



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Formal Complaint

- ▶ If filed by a complainant, must contain the complainant's physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint
- ▶ Can be a hard copy document or an electronic document submitted via email or an online portal
- ▶ An email from a student to the Deputy Title IX Coordinator or Title IX Coordinator that ends with the student signing their name would suffice

July 2021 Q&A



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Formal Complaint

- ▶ A third party cannot file a formal complaint of Title IX sexual harassment
- ▶ May have rights under other policies and procedures/code of conduct provisions

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

Deputy Coordinators

Responsibilities

- ▶ Send the Notice of Allegations to the parties after the filing or signing of a Formal Complaint

Step #3: Notice of Allegations

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

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

All the Details

- ▶ The Notice of Allegations (NOA) must include:
 - The identities of the parties involved in the incident, if known
 - The conduct allegedly constituting sexual harassment
 - The date and location of the alleged incident, if known

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

No More Confidentiality

- ▶ Once a formal complaint has been filed or signed, the school **must** share the Complainant's name with the Respondent (**anonymity is not an option**)
- ▶ Compare to the status before a formal complaint is filed, when you **cannot** share the Complainant's name, including with the Respondent, without permission or unless necessary to implement supportive measures

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Deputy Coordinators

Responsibilities

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

Step #4: Consider Dismissal

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Mandatory Dismissals	Permissive Dismissals
Alleged conduct, if proved, would not be sexual harassment	Complainant asks Title IX Coordinator in writing to withdraw complaint
Alleged conduct, if proved, would not be in an educational program or activity	The respondent's enrollment or employment ends
Alleged conduct, if proved, would not be against a person in the U.S.	Circumstances prevent gathering sufficient evidence to reach a determination (non-cooperation by CP, length of time between incident and complaint, etc.)



Can use another policy or code of conduct



Cannot use another policy or code of conduct

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Written Notice and Appeal— Dismissals

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- ▶ If the school dismisses the complaint or allegations in the complaint, it must promptly send written notice of the dismissal **and** the reason for the dismissal to all parties
- ▶ Any party can appeal the dismissal decision

APPEAL

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Deputy Coordinators

Responsibilities

- ▶ Oversee the informal resolution, investigation, decision-making, and appeal processes for formal complaints at your building
- ▶ Report to the Title IX Coordinator on a regular basis regarding status of cases

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Step #5: Informal Resolution

An alternative to the formal grievance procedure that schools may offer, **but not are not required to offer**

Is never permitted in cases of alleged employee-on-student conduct

Can only be offered once there is a Formal Complaint on file, the parties have been notified of the allegations and their rights, and there is informed, written consent (must be 100% voluntary)

Recommend that the informal resolution be completed by someone other than the Title IX Coordinator (not required) – facilitator must be trained



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Informal Resolution

- ▶ Parties must be allowed to stop at any time prior to an agreement
- ▶ If an agreement is reached between the parties, the Title IX Formal Complaint is closed and can never be reopened
- ▶ If an agreement is not reached (or IR is not used), move on to **Step #6: Investigation**



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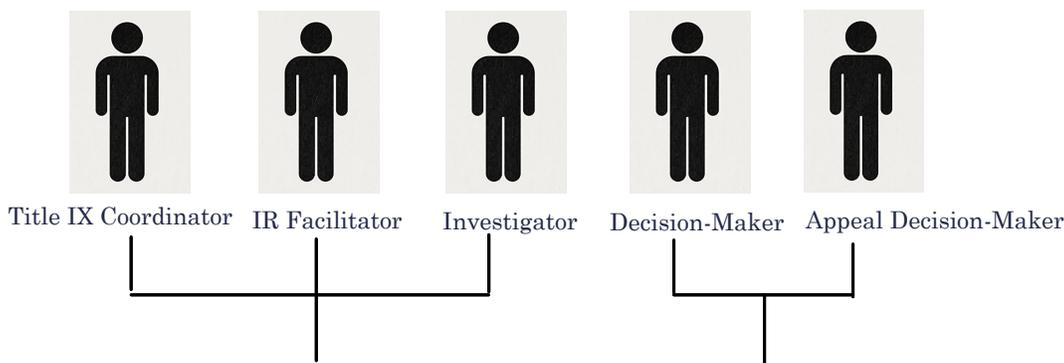
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NOTE: ALL STEPS include strict detailed requirements from the Title IX rules



The Title IX Team



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

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



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

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

Which is not a required element for rape (a type of sexual assault)?

Penetration of the anus or vagina,
no matter how slight

The conduct was non-consensual

The conduct was done for purposes
of sexual gratification

None - they are all required
elements



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Key Investigation Principles

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- ▶ Thorough
- ▶ Prompt
- ▶ Impartial
- ▶ Fair

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Investigator Responsibilities

Plan and carry out investigation

Interview parties/ witnesses and collect evidence

Share directly related evidence with the parties

Consider responses to directly related evidence and write report

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Investigation Rules

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- Impartial + unbiased
- Reasonably prompt timeframes
- Burden of proof on school
- Preponderance standard
- Treat parties fairly
- Limits on use of certain records, evidence
- No “gag orders”
- Equal rights to advisors
- Equal right to present evidence
- Presumption of respondent non-responsibility

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9 for IX

1. Familiarization with the file
2. Verification of impartiality
3. Introduction to parties

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9 for IX

4. Interaction with law enforcement and preservation of evidence
5. Investigation Plan
6. Collection of evidence (interviews and tangible evidence)

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9 for IX

7. Compiling and sharing “directly related evidence” (with 10 days for response)
8. Drafting, finalizing (after responses to DRE) and sharing investigation report (with 10 days for response)
9. Finalizing and transmitting investigation file to Title IX Coordinator

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Interaction with law enforcement

- ▶ Law enforcement is often involved when reported conduct is criminal in nature
- ▶ Child protective services may also be involved/investigating where abuse or neglect is suspected



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Delay for Concurrent Law Enforcement Investigation



- ▶ 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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What can justify a delay for concurrent law enforcement purposes?

An oral request from law enforcement to delay

Notice that law enforcement plans to release evidence that would be material to your determination at a particular future time

The arrest and incarceration of the Respondent

All of the above

None of the above

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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 **not** good cause to delay sending the written notice of allegations or delay to the complainant or respondent
- ▶ **T&H Guidebook Document 23 – Notice of Extension of Timeframes**



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The Police are the Beginning, Not the End

“[A] law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct.”

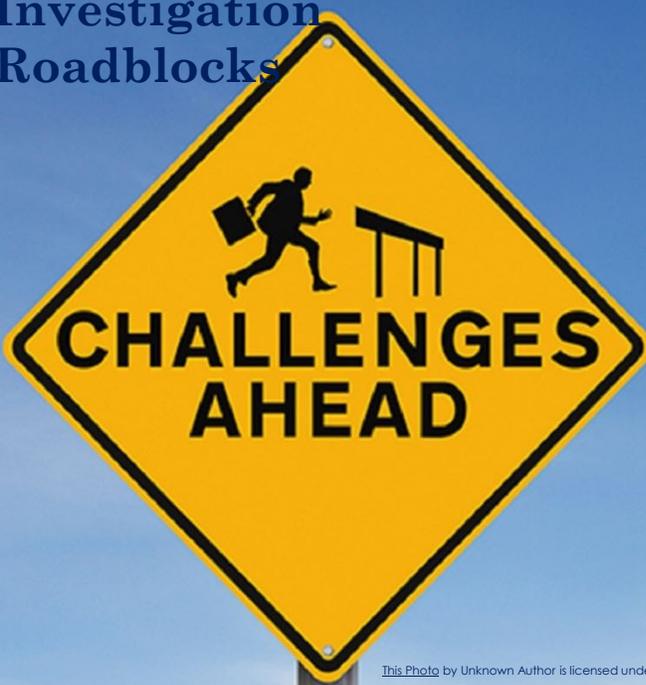
“Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.”



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Investigation Roadblocks

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- ▶ Coordinating schedules
- ▶ Uncooperative parties and witnesses
- ▶ Meddling advisors
- ▶ Delays/managing timeframes

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Investigation Plan

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- ▶ 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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Investigation Steps

Written notice to party before each interview

Directly related evidence shared with parties + 10 days to respond

Written investigative report summarizes “relevant evidence”

Investigative report summarizing all “relevant evidence,” shared with parties + 10 days to respond

Directly Related Evidence

- ▶ Term is not defined in the rules
- ▶ Statements, notes of interviews, and other evidence collected in the investigation
- ▶ Even evidence the school doesn't think it will use

Investigation Report

- ▶ Summarizes the *relevant evidence*
- ▶ Different from *directly related evidence* shared in the previous step



Relevance

- ▶ Does the evidence apply or relate to a “fact” or “issue” in this matter?
- ▶ Is the fact or issue in dispute?
- ▶ Does the evidence make the fact or issue more or less likely to be true?

Relevant Evidence Includes

“Inculpatory Evidence”

- Evidence that makes it **more likely** that a disputed fact or issue is true



“Exculpatory Evidence”

- Evidence that makes it **less likely** that a disputed fact or issue is true

Never relevant without consent

Evidence subject to legal privilege

Evidence related to a complainant’s past sexual history unless:

1. The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
2. The evidence relates to the sexual behavior between the complainant and respondent and is offered to prove consent

A party’s records made or maintained by a medical professional or paraprofessional made and maintained in connection with the provision of treatment of the party

Overview: T9 SH Grievance Process

For any Title IX Sexual Harassment in a program or activity and in the United States of which the school has actual knowledge, the Title IX Coordinator or their designee must

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

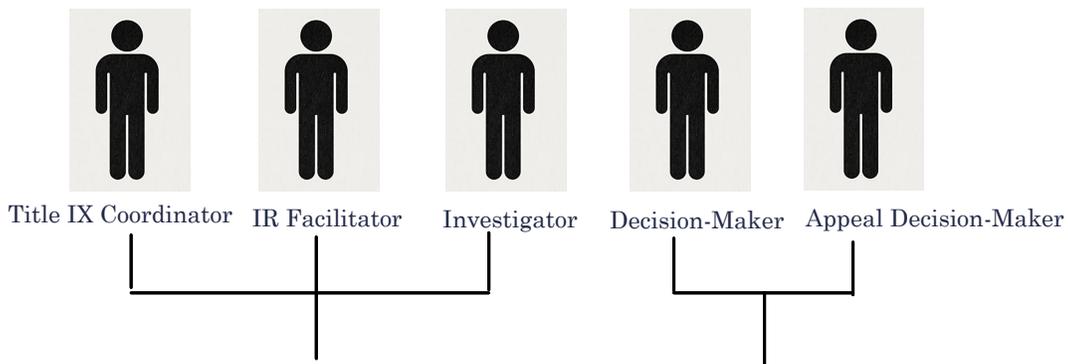
Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee

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

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



The Title IX Team



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

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



Step #7: Decision-Making Process

- ▶ Oversees a written question-and-answer process in which the parties get to ask written, relevant questions and follow-up questions of other parties and witnesses
- ▶ Must provide written explanation to a party if a question is determined not relevant, including the basis for the decision
- ▶ After that process, using a preponderance of the evidence standing, issues a written determination with an independent determination of responsibility or non-responsibility for a policy violation and recommends remedies

Remember Exceptions

- ▶ Medical treatment records
- ▶ Privileged information
- ▶ Information about the complainant's past sexual history or predisposition unless for limited uses authorized by the rule

Scenario

- ▶ Robin and Carson are “making out” in a car and sexual activity occurs; Carson reports that it was sexual assault

Are the following questions proper?

201

To Carson: Isn't it true that you regularly "make out" with people at school?

Proper

Not Proper

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To Carson: Isn't it true that you and Robin regularly make and engage in other sexual activity at school, just like you did on the day in question?

Proper Not Proper

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To Robin: Isn't it true that you often make out and engage in sexual activity with others in the school parking lot?

Proper Not Proper

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To Robin: You receive therapy for impulsive sexual behavior, don't you?

Proper Not Proper

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To Carson: Isn't it true that you told your friend that you lied about what Robin did because you were afraid your parents would find out you engaged in sexual activity?

Proper Not Proper

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To Robin: Isn't it true that you confessed to your priest that you sexually assaulted Carson?

Proper Not Proper

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To Carson: Isn't it true that you were drinking on the night in question and felt uninhibited and now regret your decision?

Proper Not Proper

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To Carson: You "made out" with Robin the day after the alleged incident, didn't you?

Proper Not Proper

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To Carson: Isn't it true that you made out with your significant other (not Robin) the day after the incident?

Proper Not Proper

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What if there is really no evidence other than "they said, they said"?

A finding in favor of the Complainant	A finding in favor of the Respondent	Dismissal of the complaint with no finding
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Written Decision Requirements

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

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Written Decision Requirements

- ▶ Decision must include a statement of, and rationale for, the result as to each allegation, including:
 - Determination regarding responsibility
 - Any disciplinary sanctions imposed on the respondent
 - Whether remedies designed to restore or preserve equal access to educational program will be provided by the school to the complainant
- ▶ Must explain appeal process and permissible grounds for each party to appeal
- ▶ Must provide the written determination to the parties simultaneously

Overview: T9 SH Grievance Process

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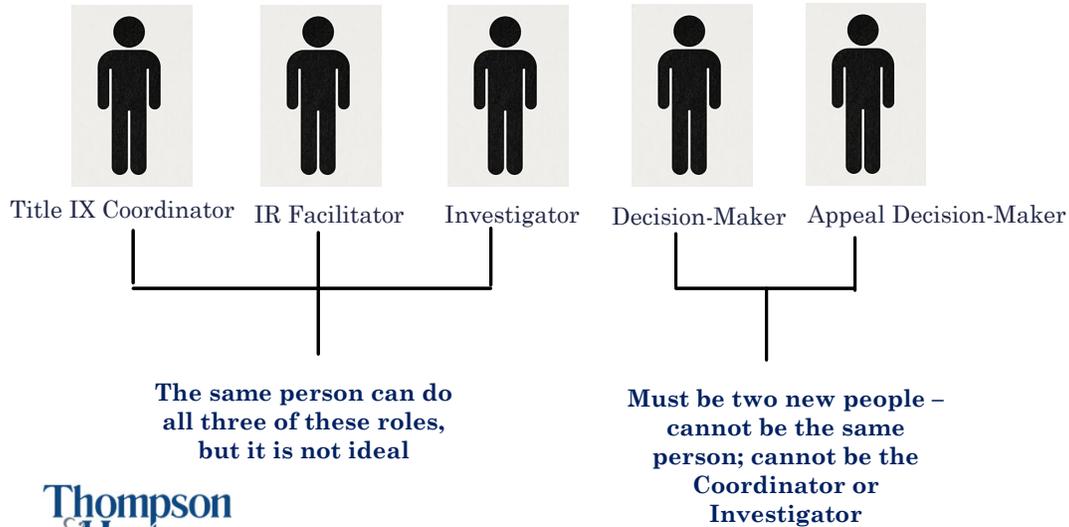
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NOTE: ALL STEPS include strict detailed requirements from the Title IX rules

The Title IX Team



Step #7: Appeal

- ▶ Each party can appeal a (1) dismissal and (2) written determination
- ▶ Can appeal on limited, specific bases (unless District agrees to allow appeal for other reasons):
 - Procedural irregularities that affected the outcome
 - New evidence that could affect the outcome
 - Conflict of interest that affected the outcome

Appellate Decision-Maker

- ▶ Provides each party notice of the appellate process and the opportunity to respond to the appeal in writing
- ▶ Reviews the written determination and other file documents as necessary, including any written response to the appeal
- ▶ Issues a written decision including the result and rationale

Deputy Coordinators

Additional Responsibilities

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

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RECORDS

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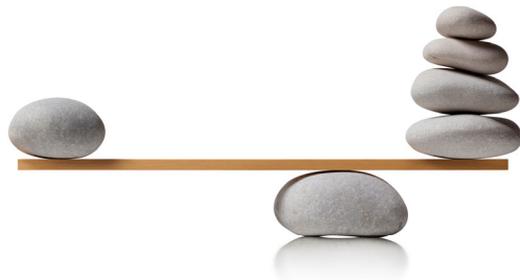
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Recordkeeping

- ▶ All records related to the process must be maintained for 7 years
- ▶ Provide your final file to the Title IX Coordinator

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SERVING IMPARTIALLY

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Serving Impartially

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



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Impartial Approach

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

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

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

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

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

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

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

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

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

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

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

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

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

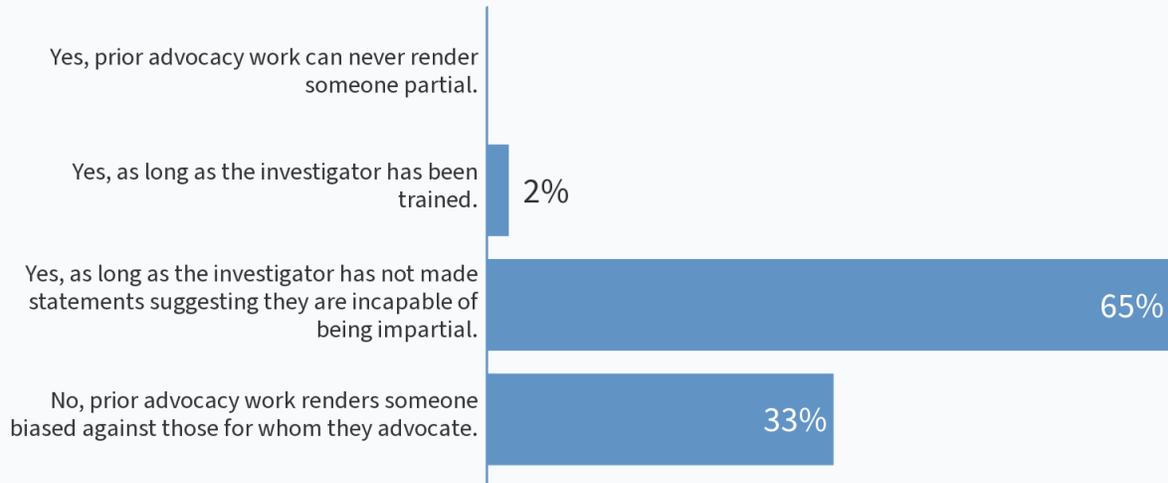
Yes, as long as there is no close personal or church-business relationship between the investigator and Robin or their family.

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

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



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

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

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Impartiality Do's and Don't's

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



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DEPUTY TITLE IX COORDINATOR TRAINING Fall 2022

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