



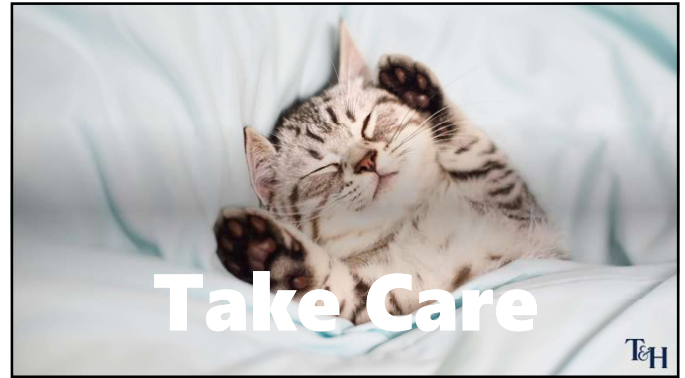
**Title IX Training**  
Chicago Public Schools  
May 17, 2023

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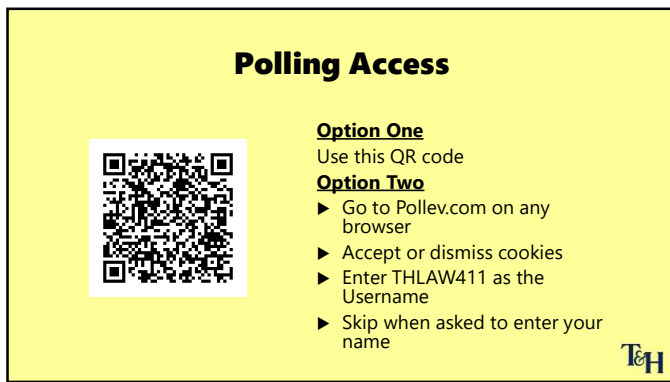
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**Take Care**

T&H

2



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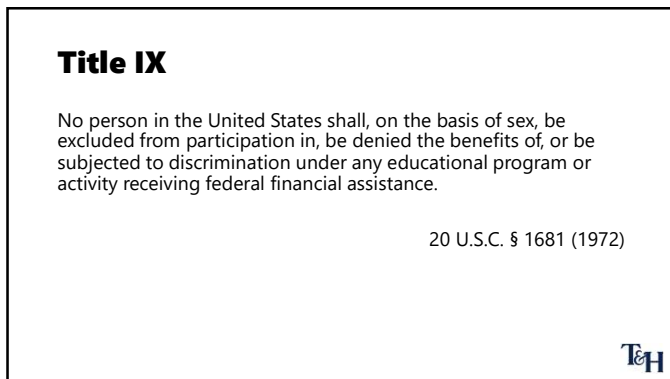
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**Title IX Review**

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**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 educational program or activity receiving federal financial assistance.

20 U.S.C. § 1681 (1972)

T&H

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**What is Title IX?**



A central diagram with a red hexagon at the top labeled "Sexual Harassment". Below it are several blue hexagons: "Athletics", "Discipline", "Programs/Parenting Students", "College Requirements, Admissions, Counseling & Aid", "Single-Sex Education", and "Retaliation". Each hexagon contains a small image related to the category.

T&H

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## What Conduct Could Fall Under Title IX?



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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 current academic year
- Include significant requirements for handling complaints of sexual harassment under Title IX

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### What Do The 2020 Rules Require?

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

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### What Do The 2020 Rules Require?

- Train**
  - Train all Title IX coordinators, investigators, decision-makers (initial complaint and appellate), and informal resolution facilitators (the "Title IX Team")
- Policy**
  - Have and share publicly a Title IX sexual harassment policy and grievance procedure
- Process**
  - Use that policy and procedure any time a report or complaint of covered conduct is received

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### T9SH Grievance Process: When & What is Required

12

### If it is Title IX....

If *any school employee* is aware of any information about *Title IX Sexual Harassment in an education program or activity of the school and in the U.S.*, the school **cannot impose punitive or disciplinary consequences on the alleged perpetrator** until it has used the Title IX sexual harassment process. You **MUST** use the Title IX process.



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### 2022 Proposed Rules

- Issued by the Biden administration in proposed form on June 23, 2022
- Comment period ended September 12, 2022
- Department of ED will review and respond to all comments in the final rule
- Purported release date for final rule May or June 2023, with an effective date in August 2023; this would be extremely fast based on past experience but that's their story and they're sticking to it!
- Would change many of the requirements for handling complaints and **apply to all sex discrimination**, not just sex-based harassment



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### The Title IX Coordinator's Role in Addressing Sexual Harassment



- Preventing sexual harassment
- Facilitating reports of sexual harassment
- Responding to reports of sexual harassment



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### Facilitating Reports

Any person may report sex discrimination, including sexual harassment, in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during nonbusiness hours) by using the telephone number or electronic mail address, or by mail, to the office address listed for the Title IX Coordinator.



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### However....

A school district is responsible for *any* report to any K-12 employee of conduct that, if proved, would fall under Title IX



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**SCENARIO #1**

Chanda, a former student who graduated a year ago, reports a sexual relationship with Mx. Robin, who teaches math. The two allegedly were first intimate at Chanda's graduation party and dated over the summer and into the fall. When Mx. Robin broke things off, Chanda looked at the relationship clearly for the first time and fears it was inappropriate. Chanda reported out of concern about other students being similarly taken advantage of.

**TH**

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**SCENARIO #1**

Chanda was in Mx. Robin's class during the final semester of Chanda's last year before graduation. According to Chanda, Mx. Robin regularly touched and hugged students, including Chanda, when they came into class each day. Mx. Robin took great interest in Chanda's life. Mx. Robin called Chanda "sweetheart" and "sunshine" and told Chanda "I've never had a student mean this much to me." Chanda's home life was tumultuous and so Chanda appreciated the attention.

**TH**

21

**SCENARIO #1**

Mx. Robin would regularly ask Chanda to stay after class to "check in." On those occasions, Mx. Robin would ask Chanda to sit next to Mx. Robin, and Mx. Robin's leg would brush up against Chanda's. On at least one occasion, Mx. Robin patted Chanda's leg while they were talking.

**TH**

22

**SCENARIO #1**

Chanda says that there has been gossip for years that Mx. Robin is not always professional with students. Near the end of the class, right before graduation, Mx. Robin gave a note to Chanda that ended signed with "Love, Mx. Robin."

**TH**

23

**SCENARIO #1**

Mx. Robin came to Chanda's graduation party with some friends. Chanda had not invited Mx. Robin but another graduate had. At the party, Mx. Robin stayed later than anyone else and at the end of the night kissed Chanda. Chanda "gave in" because Mx. Robin had been so persistent. Mx. Robin ended the relationship after a few months. Under state law and relevant policies and contracts, Mx. Robin has no expectation of continued employment.

**TH**

24

**Is the conduct subject to the Title IX SH grievance procedure?** 25

No, because Chanda is not participating in or attempting to participate in an education program or activity at the time of the report

No, because the conduct while Chanda was a student was not sufficiently severe, pervasive, and objectively offensive

Yes, because Mx. Robin's actions while Chanda was a student could be grooming, a type of T9SH

No, because Mx. Robin is "at will" and can be terminated without any process


25

**P/ATP**

"At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed"

2020 Title IX Rule


Note that this requirement only applies at the time the formal complaint is filed, and is not affected by a complainant's later decision to remain or leave a school



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**P/ATP**


- OCR Q&A July 2021: Examples of situations of a complainant "attempting to participate" include when they:
  1. Withdrew from the school due to alleged sexual harassment but express a desire to re-enroll if the school responds appropriately to the allegations
  2. Graduated but intend to apply to a new program or to participate in alumni programs and activities
  3. Are on a leave of absence but are still enrolled or intend to re-apply after the leave
  4. Have applied for admission



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**P/ATP**

- The regs are silent as to what to do if someone files a complaint and is not P/ATP
  - Not a listed basis for dismissal
- In practice, however, a complaint should be dismissed if filed by a student who is not participating or attempting to participate in an education program or activity
- Except....




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**P/ATP**

OCR Q&A July 2021


- A Title IX Coordinator can and in some cases must file a formal complaint even if the complainant is not P/ATP.
  - For example, if "a pattern of alleged sexual harassment by a perpetrator in a position of authority" is alleged



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**What About the Respondent?**

- There is no similar rule for respondents to be P/ATP
- Permissive dismissal is allowed if the respondent's "enrollment or employment ends"
- Must not be unreasonable in light of the known circumstances ("deliberately indifferent") to dismiss



30

**Is the conduct subject to the Title IX SH grievance procedure?**

No, because Chanda is not participating in or attempting to participate in an education program or activity at the time of the report

No, because the conduct while Chanda was a student was not sufficiently severe, pervasive, and objectively offensive

Yes, because Mx. Robin's actions while Chanda was a student could be grooming, a type of T9SH

No, because Mx. Robin is "at will" and can be terminated without any process

31

**T9SH Grievance Process: When & What is Required**

A K-12 school receiving federal funds

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

32

**Tip**

- Just because conduct is not Title IX Sexual Harassment does not mean you will ignore it; you can just use a different policy/procedure to address it.
- Train staff to take a "yes, and" approach to responding to complaints rather than a "no, but" response.

33

**Sexual Misconduct**

Title IX SH Policy

Other SH Policy

34

**T9SH Grievance Process: When & What is Required**

A K-12 school receiving federal funds

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

35

**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

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**T9SH  
Grievance  
Process:  
When &  
What is  
Required**

A K-12 school receiving federal funds

in which any employee has actual knowledge

T&H

37

**ANY Notice or Knowledge**

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

to or by ANY K-12 employee

T&H

38

**REMEMBER**


- Any person **may report** sex-based discrimination to any employee, including 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

T&H

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**Test Yourself**

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



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40

**Is there actual knowledge?**


Yes No

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41

**Test Yourself**

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



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**Is there actual knowledge?**

---


Yes No

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43

**Test Yourself**

A building administrator hears from staff members that a student, Cameron, and Teacher Thompson are having a consensual relationship



**T&H**

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**Is there actual knowledge?**

---


Yes No

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45

**Test Yourself**

A building principal receives a court order saying one student, Reid, must have no contact with another student, Cody, for "sexual assault"



**T&H**

46

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**Is there actual knowledge?**

---

Yes No

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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"
- 
- 
- 


**T&H**

48



### 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"



49

### 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"



50

### 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



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### Unwelcome?

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



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### Is the conduct unwelcome?

---


Yes No

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53

### Unwelcome?

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.




54



55

### 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"



56

### 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"



57

### Based on Sex

- "Sexual"
- Based on gender (e.g., stereotypes of women's roles), sexual orientation, gender identity
- Otherwise "sex-based" (e.g., involves a private body party)



58

### Based on Sex



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

- A boy can harass a boy (even if both are heterosexual)
- A girl can harass a girl (same)
- A cisgender person can harass a cisgender person

\*\*Cisgender ("sis-gender") is a person whose gender identity and expression match the biological sex they were assigned at birth



59

### 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"



60

**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"



61

**"Title IX Sexual Harassment"**


**The Title IX "Big 5" OR Title IX "Hostile Environment"**



62

**"Title IX Sexual Harassment"**



**The Title IX "Big 5" OR Title IX "Hostile Environment"**




63

**Title IX "Big 5"**

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



\*\* as defined in the federal higher education laws, the Clery Act and the Violence Against Women Act (known as the "big four")




64

**#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




65

**#2 of the "Big 5"**

**Sexual Assault (Clery Definition)**


- **Rape:** Any act of vaginal or anal penetration, however slight, with any body part or object, or oral genital contact without consent
- **Fondling:** Touching of the private body parts of another person for the purpose of sexual gratification, without consent (above or under clothing)
- **Incest**
- **Statutory Rape**



66

**What is Consent?**


- “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



67

**#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



68

**#4 of the “Big 5”  
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”  
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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**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)



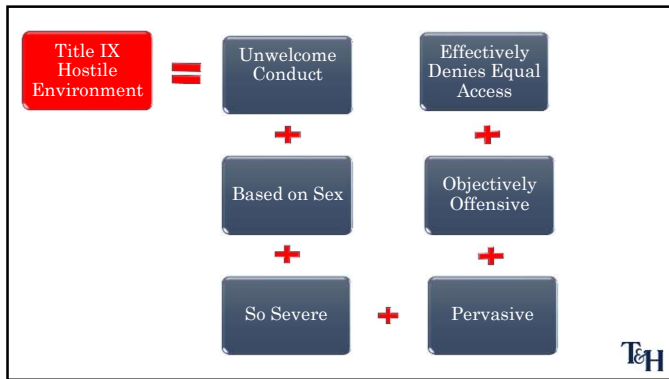
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**“Title IX Sexual Harassment”**

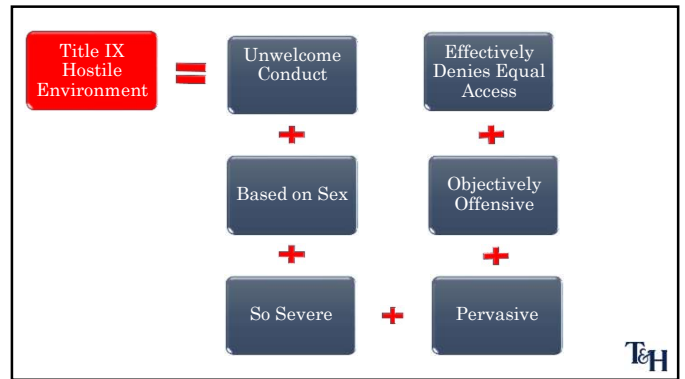
**The Title IX “Big 5”** OR **Title IX “Hostile Environment”**



72



73



74

What does "severe" mean (one word)?

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75

**Dictionary Definition**

**"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)

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**Case Law Definitions**

- "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)

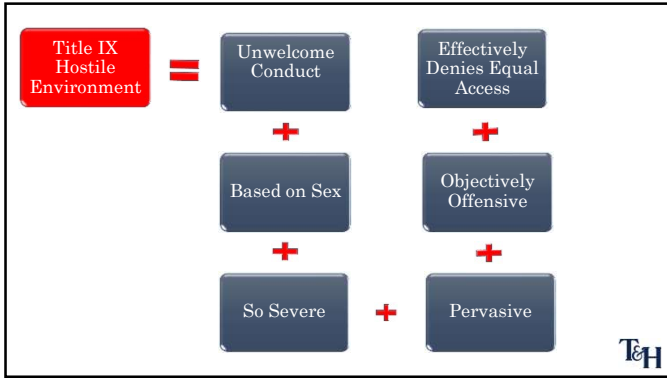
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**Case Law Definitions**

- 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)

78



79

**What does "pervasive" mean (one word)?**

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**Dictionary Definition**

**"Pervasive"**  
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)

TH

81

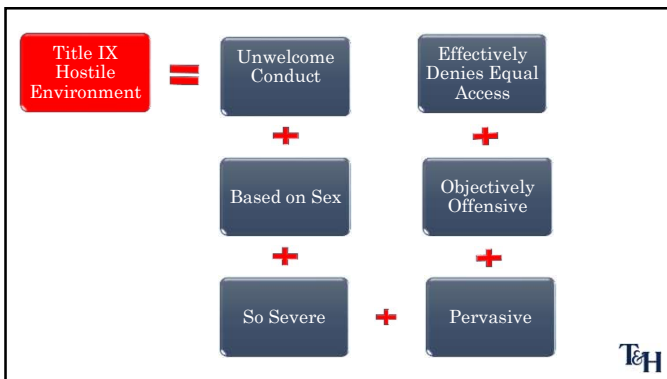
**Case Law Definitions**

- "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)

TH

82



83

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

Objective Subjective


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84

### Dictionary Definition

**“Objectively Offensive”**


- “Objective”: Existing independently of perception or an individual’s conceptions (Reverso)
- “Offensive”: Unpleasant or disgusting, as to the sense (Reverso)



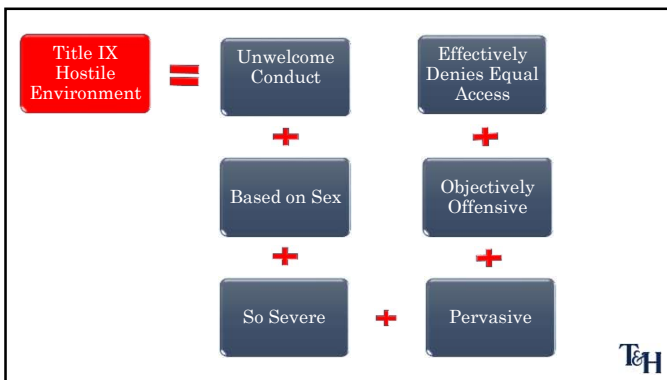
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### Case Law Definitions

- “Objectively offensive” means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively.
- Consider the constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.
- The victim’s perceptions are not determinative. The objective offensiveness is to be judged by reference to a reasonable person of the same age at whom the comments or behavior were aimed.




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87

### 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




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### 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



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### Effective Denial of Equal Access



- 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


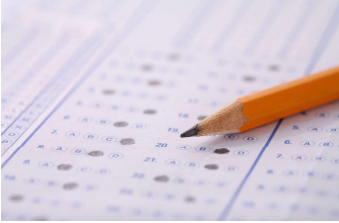
- The key: School officials turning away a complainant by deciding the complainant was "not traumatized enough" would be impermissible
- If you have an allegation of severe, pervasive, and objectively offensive conduct, you likely can assume effective denial



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### TEST YOURSELF

Is it Title IX Sexual Harassment?  
(The "Big Five" or "Hostile Environment")



92

### Test Yourself

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



93

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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

Two employees begin dating and move in together. One reports that the other has begun hitting them.



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### Test Yourself

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



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### Test Yourself

Casey reports that another student, Rowan, put their hand on Casey's chair when Casey was sitting down in class, and when Casey sat down, Rowan's fingers touched Casey's crotch through the clothing.



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### Test Yourself

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



101

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- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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102

### Test Yourself

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



103

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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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104

### Test Yourself

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



105

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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

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

106

### Test Yourself

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



107

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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

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

108

### 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. Carson is "really freaked out."



109

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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

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

110

### Test Yourself

Carson reports that 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.



111

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### Is it Title IX Sexual Harassment?

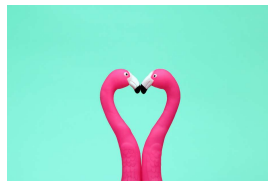
- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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112

### Test Yourself

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.



113

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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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114

### 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"



115

### Is the conduct subject to the Title IX SH grievance procedure?

No, because Chanda is not participating in or attempting to participate in an education program or activity at the time of the report

No, because the conduct while Chanda was a student was not sufficiently severe, pervasive, and objectively offensive

Yes, because Mx. Robin's actions while Chanda was a student could be grooming, a type of T9SH


No, because Mx. Robin is "at will" and can be terminated without any process

116

### Grooming Tips

- Include a definition of grooming in your notice of allegations and report
- Even better if it is defined in your policy
- For example:


*Grooming: Grooming is the act of deliberately establishing a relationship with a child to prepare them for sexual abuse. Aspects of sexual grooming may include targeting the victim, securing access to and isolating the victim, gaining the victim's trust, and controlling and concealing the relationship.*



117

### Educator Misconduct


- Sexual conduct between a school employee and a student cannot be consensual so = sexual assault
- Other sexual harassment between a student and a teacher or other employee can never be welcome
- Such conduct will almost certainly meet the "hostile environment" requirements under Title IX and be found to have occurred in the education program or activity
- Even if not covered by Title IX, check other rules for professionals



118

### 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"



119

### SCENARIO #2

A student, Chi, reports being assaulted by Reagan, another student who Chi has been dating for over a year. The conduct allegedly occurred off campus at Reagan's home.



120

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### Does the alleged conduct fall under the school's Title IX jurisdiction?

- No, because the conduct occurred off campus
- No, because the school has no control over the Respondent's home
- No, as long as Chi is not an athlete covered by an off-campus code provision


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121

### 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"

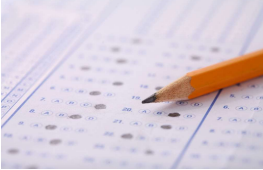


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### TEST YOURSELF

Is it in a Program or Activity?



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### Test Yourself

Student Robin allegedly sexually assaulted student Carson in the bathroom at school.



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124

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


Yes No

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125

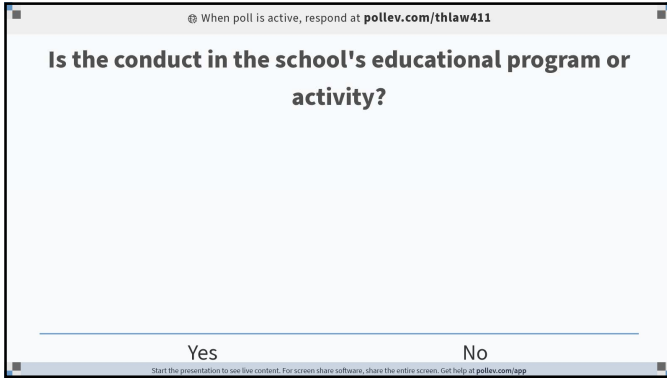
### Test Yourself

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



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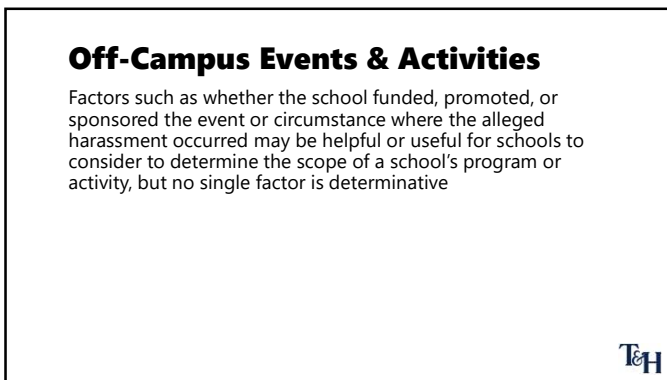
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127



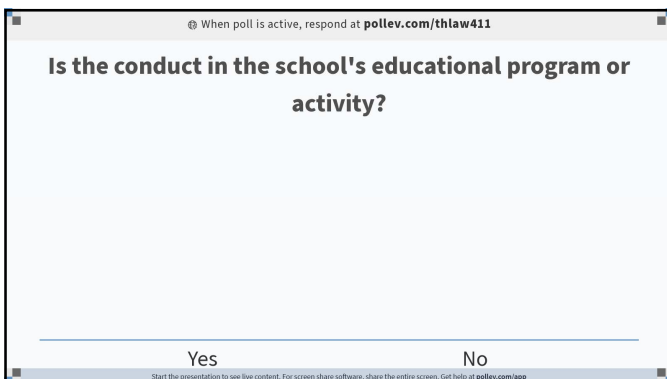
128



129



130



131





132



133

**Test Yourself**

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





134



135

**Test Yourself**

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



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**Test Yourself**

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**  
**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"**



140

**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 Carson is having difficulty concentrating at school.



141

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

Yes No


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142

**SCENARIO #2**

A student, Chi, reports being assaulted by Reagan, another student who Chi has been dating for over a year. The conduct allegedly occurred off campus at Reagan's home.

143



143

When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)

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

**Does the alleged conduct fall under the school's Title IX jurisdiction?**

No, because the conduct occurred off campus

No, because the school has no control over the Respondent's home

No, as long as Chi is not an athlete covered by an off-campus code provision

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

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**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”)

T&H

145

**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

T&H

146

**In the United States**



T&H

147

**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
- Support, support, support

T&H

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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

T&H

149

**First Amendment  
Issues**



T&H

150

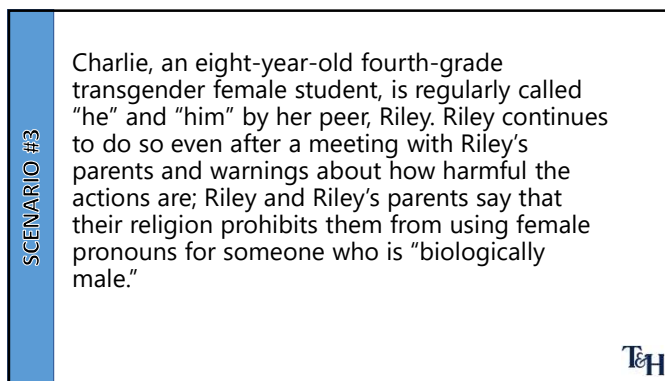


**Remember**

- OCR Guidance, June 2021 – “On the basis of sex” encompasses discrimination on the basis of sexual orientation and gender identity
- At least to OCR, Title IX prohibits discrimination based on sexual orientation and gender identity

T&H

151

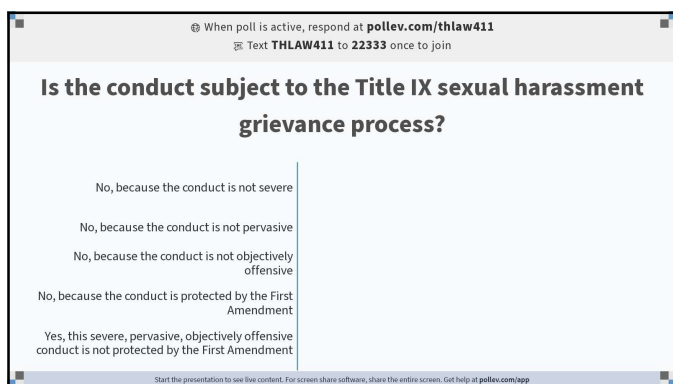


SCENARIO #3

Charlie, an eight-year-old fourth-grade transgender female student, is regularly called “he” and “him” by her peer, Riley. Riley continues to do so even after a meeting with Riley’s parents and warnings about how harmful the actions are; Riley and Riley’s parents say that their religion prohibits them from using female pronouns for someone who is “biologically male.”

T&H

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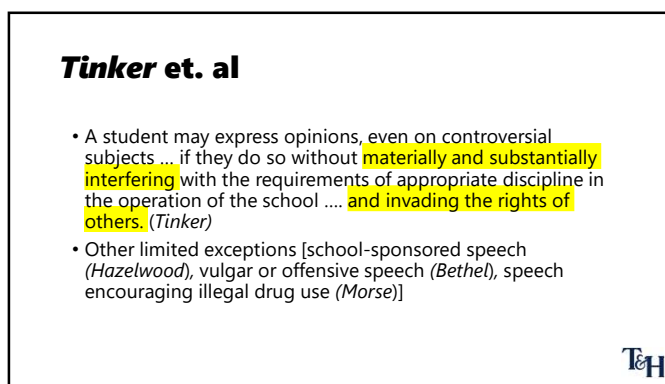
When poll is active, respond at [polllev.com/thlaw411](https://polllev.com/thlaw411)  
Text: THLAW411 to 223333 once to join

**Is the conduct subject to the Title IX sexual harassment grievance process?**

- No, because the conduct is not severe
- No, because the conduct is not pervasive
- No, because the conduct is not objectively offensive
- No, because the conduct is protected by the First Amendment
- Yes, this severe, pervasive, objectively offensive conduct is not protected by the First Amendment

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153

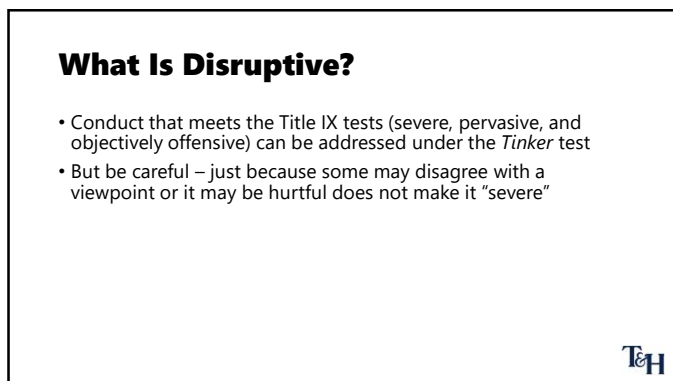


**Tinker et. al**

- A student may express opinions, even on controversial subjects ... if they do so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school .... and invading the rights of others. (*Tinker*)
- Other limited exceptions [school-sponsored speech (*Hazelwood*), vulgar or offensive speech (*Bethel*), speech encouraging illegal drug use (*Morse*)]

T&H

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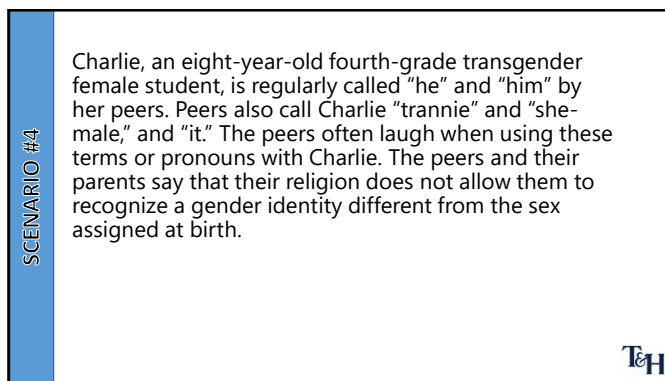


**What Is Disruptive?**

- Conduct that meets the Title IX tests (severe, pervasive, and objectively offensive) can be addressed under the *Tinker* test
- But be careful – just because some may disagree with a viewpoint or it may be hurtful does not make it “severe”

T&H

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SCENARIO #4

Charlie, an eight-year-old fourth-grade transgender female student, is regularly called “he” and “him” by her peers. Peers also call Charlie “trannie” and “she-male,” and “it.” The peers often laugh when using these terms or pronouns with Charlie. The peers and their parents say that their religion does not allow them to recognize a gender identity different from the sex assigned at birth.

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**Is the conduct subject to the Title IX sexual harassment grievance process?**

- No, because the conduct is not severe
- No, because the conduct is not pervasive
- No, because the conduct is not objectively offensive
- No, because the conduct is protected by the First Amendment
- Yes, this severe, pervasive, objectively offensive conduct is not protected by the First Amendment

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

157

**SCENARIO #4.5**

What if all the communications between Charlie and her peers occur off campus, online, and on the students' own time. The situation involves a handful of students, and other students and members of the school community do not learn about it. But Charlie cannot sleep at night, keeps missing school, and has seen a steep decline in grades.

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**Is the speech protected by the First Amendment?**

- Yes, because schools can't discipline students for off-campus speech, even if online, on a student's own time
- Yes, because the speech is not sufficiently severe to be harassment
- Yes, if the conduct has a sufficient "nexus" to the school environment
- No, because the speech is harassment it can be disciplined as long as policy allows it

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159

**Remember Mahanoy**

- "Nexus not nexus" test (was it reasonably foreseeable that the conduct would reach the school)
- PLUS "material and substantial disruption"

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160

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

Yes No

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161

**When Can We Reach Off Campus Speech?**

- Consider how you treat non-sexual harassing conduct off-campus

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162

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### For non-sex based conduct, my institution responds to off-campus conduct?

Yes  
No  
Unkown

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163

SCENARIO #5

Channing is a transgender student in Mx. Ryan's orchestra class. When directed to use Channing's preferred pronoun, Mx. Ryan objects, saying that it goes against their religion. The school initially offered an accommodation, allowing Mx. Ryan to use all students' last names only in the effort to avoid pronouns and first names.

T&H

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SCENARIO #5

Channing reports that other kids notice Mx. Ryan's refusal to acknowledge Channing's gender, however. One student asked Channing why Mx. Ryan wouldn't just say their name, and Channing felt compelled to "out" themselves to the student in explanation. Channing feels tension in the class now, feeling everyone knows why Mx. Ryan only uses last names in this particular class. When the District demands that Mx. Ryan use Channing's preferred name and pronouns, Mx. Ryan refuses.

T&H

165

### Can the school terminate Ms. Ryan's employment?

No, because the conduct is protected by First Amendment free speech principles

No, because the conduct is protected as an expression of Mx. Ryan's religion

No, because the conduct is not severe

Yes, after going through the Title IX process

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166

### **Kluge v. Brownsburg**

- School district had policy of respect for transgender students
- Mr. Kluge's religious opposition is directly at odds
- Two students were directly affected and alleged emotional harm
- An initial accommodation was offered but the harm continued

T&H

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168

### **Kluge v. Brownsburg**

"When you work in a public school, you sign up to follow the law and the policies/practices of that organization and that might mean following practices that are different than your beliefs."

**Kluge v. Brownsburg Cmty. Sch. Corp.**, No. 1:19-CV-2462-JMS-DLP, 2021 WL 2915023 (S.D. Ind. July 12, 2021)


Affirmed by the Seventh Circuit on April 7, 2023.

T&H

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### **What About Meriwether?**

- **Meriwether v. Hartop**, 992 F.3d 492 (6<sup>th</sup> Cir 2021)



169



JURISPRUDENCE

### **Trump Judge: Professor Has a First Amendment Right to Misgender a Trans Student in the Classroom**


BY MARK JOSEPH STERN  
MARCH 29, 2021 • 2:47 PM



170

### **Meriwether v. Hartop**


- College professors have academic freedom which gives them more autonomy regarding what they say in the classroom
- This was a matter of public concern: Taken in context, his speech 'concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.'
- In higher education, the interest in "promoting the efficiency of the public services the school performs through him not enough to limit his speech.



171

### **Meriwether v. Hartop**


- "At this stage of the litigation, there is no suggestion that Meriwether's speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits."
- The school did not even offer him any accommodation (he wanted to put a disclaimer statement on his syllabus)
- "Without such a showing, the school's actions 'mandate[ ] orthodoxy, not anti-discrimination,' and ignore the fact that '[t]olerance is a two-way street."



172

### **Meriwether v. Hartop**

- Title IX does not compel a contrary result.
- Meriwether's actions was not "serious enough to have the systemic effect of denying the victim equal access to an educational program or activity" (citing *Davis*)
- The Provost even admitted that Meriwether's conduct "was not so severe and pervasive that it created a hostile educational environment."




173

### **But That's Not K-12**

***In the k-12 classroom...***

- There is a young and captive audience in the classroom
- Schools have the right to control curriculum
- The role of the educator is to convey the curriculum
- Accordingly, schools can impose **viewpoint neutral** limits on **personal opinions** and **discussions on issues not related to the curriculum** as long as they are **not arbitrary**



174

### **Kluge v. Brownsburg**

Takeaways from this and other cases:

- Attempt to accommodate religious requests from employees
- If conduct is severe, pervasive, and objectively offensive, K-12 schools have more leeway to limit the speech in the school environment
- Pay close attention to case law developments in your jurisdiction—things are changing fast



175

Channing's school board is considering a policy to require teachers to use preferred pronouns, and Mx. Ryan speaks out against it at a Board meeting.

SCENARIO #5.5



176



SCENARIO #5.5



177

### **Can the school terminate Ms. Ryan's employment?**

- No, because the conduct is protected by First Amendment free speech principles
- No, because the conduct is protected as an expression of Mx. Ryan's religion
- No, because the conduct is not severe
- Yes, after going through the Title IX sexual harassment process

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### **Outside the Classroom**

179

- Speech by a public employee speaking as a private citizen on a matter of public concern is protected
- Even protected speech may be limited if the employer's interest in promoting efficiency of its public services outweighs the employee's free speech interests (balancing)

**Garcetti v. Ceballos**, 547 U.S. 410 (2006); **Connick v. Myers**, 461 U.S. 138 (1983); **Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205**, 391 U.S. 563 (1968)



179

### **Consolidation and Multi-Party Complaints**



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181

SCENARIO #16 (Again)

Let's go back to....

Tommy, a student, reports that another student, Charlie, was sexually harassed by a teacher, Mx. Rowan. Tommy also says another student, Casey, was in a similar situation the previous year. Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.

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SCENARIO #16 (Again)

The Title IX Coordinator signs formal complaints in the. Charlie and Casey agree to participate in the process. Neither knows the other exists, however. The incidents happened years apart.

T&H

182

183

Should the Complaints be Consolidated?

Yes, because the respondent is the same in each case

Yes, because they involve the same type of behavior

No, because it will be unfair to Mx. Rowan to consolidate the cases

No, because the circumstances and facts of the allegations are not the same

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Consolidation

- Where the allegations of sexual harassment arise out of the same facts or circumstances
- Consider defining the phrase in your procedures

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Consolidation

- Against more than one respondent
- By more than one complainant against one or more respondents
- By one party against the other party

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If the complaints are consolidated, Charlie and Casey can have the same advisor

True False

186

187

SCENARIO #9

Rory is a teaching assistant. Chris, a student in the class, and Rory, meet through the class and hit it off; they share phone numbers and begin texting. The texts are playful and flirtatious, even though very early on Chris tells Rory they are not interested in a relationship or hooking up because they are dating someone else. Rory regularly compliments Chris's looks, and it is clear that Chris is appreciative of the comments.

T&H

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SCENARIO #9

At the end of the semester, Chris gets a below-average grade in the class. Chris texts Rory and says, "If you don't fix this, I'm going to show your texts to the administration." Rory says there is nothing to do. Chris files a formal Title IX complaint against Rory, alleging sexual harassment based on Rory's position of authority over Chris in the class. Chris also alleges that the low grade was retaliation by Rory for Chris declining Rory's sexual advances.

T&H

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SCENARIO #9

Chris and Rory share a friend group at school, and Rory comes to you dismayed because Chris has been telling everyone Rory is a "sexual predator" who has done the same thing to many students. Neither the institution nor Rory is aware of any prior complaints against Rory by other students.

T&H

189

190

**Who has a valid Title IX formal complaint?**

Chris; Rory's complaint is just to deflect attention from Chris's complaint and should not be allowed

Rory; Chris's complaint is clearly false because it was filed only after the bad grade

Chris and Rory both have valid complaints

Neither has a valid complaint

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191

**Cross-Complaints**

- Do not ignore cross-complaints
  - The "no judgment before decision" rule applies equally to cross-complaints
- Consider consolidation

T&H

191

192

**The Title IX SH Grievance Process**

T&H

192



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## A Caveat re Minors

- For minor parties, their parents/guardians share all rights with the party
- In the case of disagreement, typically the parent/guardian's will prevail

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## The Title IX Team

194

## 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**

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## 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

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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" can be used 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

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## 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!)

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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 confidentially (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



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### 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



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### 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**



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### 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



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### Supportive Measures


- If necessary to share information to implement measures, obtain Complainant's written consent (or confirm in writing)
- 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

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## 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
- The Title IX Team 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 (confirm in writing!)



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## Step #2: Emergency Removal

- After a report or notice (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 on an emergency basis



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## Emergency Removal

**WHO:** Typically used for student respondents (may be used for others)

**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**



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## 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



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

**– NO DISCIPLINE  
WITHOUT A FORMAL  
COMPLAINT–  
But support, support,  
support**



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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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## 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 (or a minor student's parent/guardian) to the School Coordinator or Title IX Coordinator that ends with the student/parent/guardian 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**




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## Requirements for Notice




- Upon receipt of a Formal Complaint, a school must provide written notices to known parties:
  - Title IX Grievance Process (including informal resolution)
  - Allegations of sexual harassment
  - Right to inspect and review evidence
  - Right to have an advisor during the process
  - Any policy / provision of code of conduct that prohibits knowingly making false statements or submitting false information




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## Requirements for Notice




- Sufficient details known at the time and sufficient time to prepare a response before any initial interview.
  - Identity of parties involved in incident, if known
  - The conduct allegedly constituting sexual harassment
  - The date and location of the alleged incident, if known




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## Impact on Investigation

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- Notice of Allegations to the Respondent is required before the school meets with the respondent for an interview
- If there is not a Notice of Allegations, make sure one is sent before you do anything else in the investigation
- If you learn of new allegations, make sure a supplemental NOA goes out
- Supportive measures should have been offered to the parties by this time, as well—verify with the Title IX Coordinator so you can help keep an eye on supportive measures during the investigation




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## Investigator Tip

222

- The Notice of Allegations is your "roadmap" to your investigation
- Make sure you understand the allegations and the elements necessary to prove them
- If you are uncertain, ask!



222

### 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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### Step #4: Consider Dismissal


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

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





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### Informal Resolution

- Voluntary, structured, informal process, such as mediation
- To resolve allegations in a formal complaint that does not involve a full investigation and adjudication of the formal complaint


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**SCENARIO #6 (Again)**


Tommy, a student, reports that another student, Charlie, was sexually harassed by a teacher, Ms. Rowan. Tommy also says another student, Casey, was in a similar situation the previous year. Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.



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**SCENARIO #6 (Again)**


The Title IX Coordinator signs formal complaints in the. Charlie and Casey agree to participate in the process. Neither knows the other exists, however. The incidents happened years apart.



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**SCENARIO #6 (Again)**

The complaints are consolidated. Charlie and Rowan want to do informal resolution. Casey does not.



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When poll is active, respond at [polllev.com/thlaw411](https://polllev.com/thlaw411)  
Text **THLAW411** to **22333** once to join

**Can IR proceed between Charlie and Rowan?**


- Yes, but only if Casey agrees to participate too, because all parties to a complaint must agree to IR for it to proceed
- Yes, as long as your policy allows IR in this circumstance
- Yes, but only if Charlie and Rowan agree that information from The IR can be used in Casey's case
- No, because Rowan is an employee

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## IR Limitations

- ▶ Only once formal complaint is filed (explain permissive dismissal to Complainant—see T&H Guidebook – Form 49)
- ▶ Only if completely voluntary—consequences must be explained and any party can withdraw before an agreement is reached, ending the IR process
- ▶ Only before determination regarding responsibility
- ▶ Not in cases involving allegations of employee-on-student conduct
  - Can prohibit for other situations, as well



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## What if a party violates an IR agreement?

- The institution can impose consequences even if not in the agreement
- The institution can impose consequences if parties agreed to it in the agreement
- The institution can reopen the Title IX process
- The institution cannot respond as the Title IX process is over

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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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### Key Investigation Principles

- Thorough
- Prompt
- Impartial
- Fair



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### Investigation Roadmap



#### 9 for IX


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

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### Investigation Roadmap



#### 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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### Investigation Roadmap



#### 9 for IX

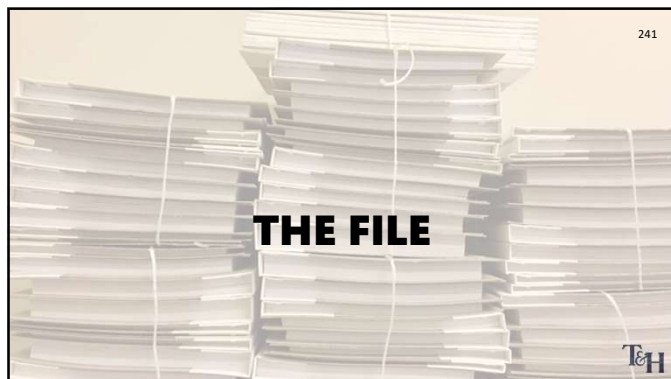
7. Compiling and sharing "directly related evidence" (with 10 days for response)
8. Drafting, finalizing (after responses to DRE) and sharing investigation report (with 10 days for response)
9. Finalizing and transmitting investigation file to Title IX Coordinator

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## 1. Familiarization with the file

- Review all material provided by the Title IX Coordinator
- Create a checklist to ensure all steps are met and to document compliance
  - [T&H Guidebook Checklist B – Title IX Investigation Checklist](#)

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### Case Study

On August 22, 2022, Francis F. requested to speak with me after school about a friend in the class. Francis reported that this friend had experienced sexual assault at school. Francis did not initially name the student, but eventually told me it was Carson C., another student in my class.

- Teacher Thompson Handwritten Statement  
August 22, 2022

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From: Principal Patterson  
To: Title IX Coordinator  
Subject: Statement (Confidential)  
Date: Monday, August 22, 2022 3:23:08 PM  
Re: Statement Allegations of Sexual Assault

On Monday, August 22, 2022, at approximately 1:30 p.m., Teacher Thompson reported to me that a sixth-grade student, Francis Friend, reported concerns of sexual assault against a peer, Carson Complainant (6th grade). Francis F. reported that another student, Robin Respondent (6th grade), has inappropriately touched Carson in private areas and would repeatedly ask to "make out" even when Carson said no. Francis F. reported that these incidents occurred last spring, over the summer, and in the first weeks of school as per self reports by Carson to Francis. Francis was unable to recall any specific dates. The alleged assaults occurred in the hallways during the school day and at the students' houses. Francis said Robin has attempted to apologize to Carson on a few occasions, including in an in-person conversation with Francis and maybe by electronic messages to Carson. Francis said Carson appears to be in a "downward spiral."

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From: Ms. Complainant  
To: Title IX Coordinator  
Subject: Carson Complainant  
Date: Thursday, August 25, 2022 7:18:28 PM

Today I received a call from the school that on Monday, you became aware that Robin Respondent sexually touched my child on their private part. I'm not sure why it took y'all so long to let me know, and I am going to be calling a lawyer. I assume Robin has been expelled from school? That needs to happen right now.

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### Our Case: More Facts

- Supportive measures are in place
- The Title IX Coordinator determined that, if true, the alleged conduct could be "fondling," a type of sexual assault, and severe, pervasive, and objectively offensive "sexual harassment"
- A notice of allegations was sent on August 30, 2022

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### NOA: Allegations

It is alleged that during the Spring semester of 2022 or during the first weeks of school in August 2022:

1. Robin Respondent (the "Respondent") touched Carson Complainant's (the "Complainant's") genitals over the clothing without consent, and
2. The Respondent repeatedly asked the Complainant to "make out" even when Carson said "no."




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### Our Case: Allegations

The alleged conduct, if true, could be sexual harassment in an education program or activity of a recipient of federal funding and against a person in the United States. Specifically:

1. Touching the private body parts of another without consent and for purposes of sexual gratification is "fondling," which is a type of sexual assault under Title IX, and
2. Unwelcome sex-based conduct that is so severe, pervasive, and objectively offensive that it effectively denies equal access to the District's educational program or activity is "sexual harassment" prohibited under Title IX.



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### 2. Verification of impartiality

Any individual designated as an Investigator may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

**34 C.F.R. § 106.45(b)(1)(iii)**



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### An impartial investigator

...


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



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### Impartial Approach

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



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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?**

Yes, engaging in such advocacy work does not create impermissible bias or conflict of interest.

Yes, as long as the investigator has been trained.

Yes, as long as the investigator has not made statements suggesting they are incapable of being impartial.

No, a person who has engaged in such advocacy work can never 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 create a conflict of interest or bias.

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 Tips**

- 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. Introduction to parties**


- Not required, but best practice
- Benefits:
  - Notice to the parties of the "rules" for the investigation
  - Notice to the parties that there may be periods where they do not hear from you, and how they can contact you



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## Introduction to Parties

- T&H Guidebook Document 28 – Investigator Introduction to Party
- Send to parties, parents/guardians of minor parties, and advisors, if any



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## LAW ENFORCEMENT & EVIDENCE



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### 4. 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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### Our Case: The Police

- Carson's parents filed a police report regarding the alleged fondling
- Officer Ogletree contacts you upon finding out that you are investigating and is quite angry that you are "screwing up their investigation"
- The Officer says the school must turn over the investigation to the police and stop "meddling" in police business



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### Can the educational institution stop its investigation?

- Yes, it should not be involved in investigating such serious crimes when the police are involved
- Yes, but only for as long as is necessary for law enforcement to decide whether to prosecute
- Yes, but only for as long as is necessary for law enforcement to gather initial facts
- No, it cannot delay at all for a law enforcement request

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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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## 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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## 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 the supportive measures meeting, offer to file a complaint, and sending the written notice of allegations to the complainant and respondent
- ▶ **T&H Guidebook Document 23 – Extension Notice**



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

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



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## Police Results as Evidence?

- Police evidence may be useful for fact-gathering
- But the standards for and purposes of criminal investigations are different from school investigations
- Police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX



**OCR 2011 DCL and 2020 TITLE IX REGS**



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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



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## 5. Investigation Plan

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

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### Who is responsible for finding and providing evidence in a Title IX sexual harassment investigation?

The Complainant must provide evidence to support the complaint
The Respondent must provide evidence to refute the complaint
Both parties must provide evidence to support their side
Neither side must provide evidence to support their side

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### It's Your Job!

- The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school district, not the parties
- Off limits: medical treatment records without voluntary, written consent

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### But if the Parties Want to Share...

- Let them! Do not discourage parties from submitting evidence
- Give them the same opportunity to present evidence, suggest witnesses, recommend directions for your investigation
- If you decide not to pursue a suggested route, record your reasons and summarize in your report

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### Before Interviews

Schools 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

An icon of a white envelope with a red flap that says "NOTICE" in white letters. A yellow warning triangle with a black exclamation mark is positioned at the bottom right of the envelope.

T&H

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277

## Before Interviews

- Recommended to do the same for non-party witnesses (not required)
- Use **T&H Guidebook Document 30 – Notice to Party of Investigative Interview or Other Meeting** and **Document 31 – Notice to Witness of Investigative Interview of Other Meeting**

T&H

277

## Remember...

- Your job is not to weigh the evidence
- Keep in mind the standard of proof (preponderance of the evidence) in planning the investigation
- But you will not apply it directly

T&H


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## Standard of Evidence

- Most Districts uses the “preponderance of the evidence” standard
- Preponderance of Evidence:
  - A fact is more likely than not to be true; a proposition is more probably true than false
  - At least 51% of evidence favors the Complainant (50% and a feather)
- Where the evidence is equipoise (“50/50”), the result is a determination that respondent is not responsible

Probability of Truth > 50%



T&H

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## COLLECTION OF EVIDENCE

T&H

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## 6. Collection of Evidence

- Includes interviews and reviews of tangible evidence
- Remember that this is your burden – think creatively, broadly, and evenhandedly

T&H

281

282

## Start of Interviews

- Explain background information
  - Explain expectations for parents/guardians and advisors
  - Use **T&H Guidebook Document 34 – Party Interview Intro** or **T&H Guidebook Document 35 – Witness Interview Intro**
- Take notes using memorandum of interview or finalize notes in a memo after
  - **T&H Guidebook Document 33 – Memorandum of Interview**

T&H

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**An investigator can put the following limits on a party<sup>283</sup>**  
**regarding advisors**

- None; a party must be allowed their advisor of choice
- The investigator can deny a request for an additional advisor if a minor party's parent attends meetings or interviews with them
- The investigator can deny a request for a support person if a non-minor student has an advisor
- The investigator can deny a request to have a student or employee unconnected with the case as an advisor
- The investigator can deny a request for a party to have a witness as an advisor with them
- None of the above

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

283

**Right to an Advisor<sup>284</sup>**

- Complainant and Respondent must be given the opportunity to select an advisor of their choice
- The advisor may be present for any meeting or interview during the investigation
- Advisor may inspect and review the evidence and report

284

**Advisor Expectations<sup>285</sup>**

- The District may establish reasonable restrictions regarding the extent to which the advisor may participate in the proceedings, but the restrictions must be equally applied to both parties
- Recommended to provide an advisor (and party/parent) expectations document early on – in writing before the first interview or meeting
- Go over the expectations at the beginning of the first interview or meeting and secure confirmation of understanding
- Example is available in our [Guidebook – Document 3](#)

285

**Words Matter<sup>286</sup>**

- Are you using terms that suggest prejudgment (“victim” and “perpetrator”)
- Avoid suggesting belief or disbelief (“I’m so sorry this happened to you”)
- You can be empathetic, though (“I can tell this is difficult, would you like a break” or “I don’t expect you to be able to tell me every detail”)
- Avoid words that seem to blame a party (“Why didn’t you report it”)

286

**It’s Not Relevant<sup>287</sup>**

- **Medical Record Information:** Cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process
  - For a minor, consent of parent is required

287

**It’s Not Relevant<sup>288</sup>**

- **Legally Privileged Information:** No information protected by a legal privilege may be used during an investigation unless waived in writing by the person holding the privilege (party and, for a minor, their parent/guardian)
  - Attorney-Client Privilege
  - Physician-Patient or Psychotherapist Patient Privilege – records maintained in connection with the provision of the treatment of the party


288



289

### It's Not Relevant

- **Complainant Sexual History or Behavior:** Questions and evidence related to a complainant's prior sexual history or sexual behavior are not relevant and may not be asked or sought
  - Exceptions in two narrow circumstances




289

290

### "Rape Shield" Exceptions

- To show that someone other than the Respondent engaged in the alleged conduct
- Prior conduct between the parties to be used to show consent



290

During an interview, the interviewer can tell a party not to talk about the case with others not involved in the process

---

True False

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291

292

### Don't Tell...

- Gag orders are not allowed in the Title IX process
- You can express the need to maintain confidentiality



292

During an interview, the interviewer can tell a witness not to talk about the case with others

---

True False


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293

294

### Retaliation Warning

- Investigators can (and should) warn parties and witnesses of risks that sharing information could lead to retaliation
- Also inform parties and witnesses that they should report if they feel they are retaliated against




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295

### Closing Interviews

- Ask “anything else”
- Consider allowing parents/guardians and/or advisor to ask questions
- Ask for questions, including about process
- Always discuss retaliation – both against them and against the other party
- Explain next steps
- Ask the witness to reach out if they think of anything else later




295

296

### After the Interview

- Finalize your notes as soon as possible
- Assess whether to update the investigation plan with other witnesses or evidence identified during the interview
- Gather any remaining evidence that is relevant to the allegations
- Assess whether any factual or chronological gaps exist and, if so, complete additional interviews and/or evidence collection




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297

### Uncooperative Witnesses

- What if a party or witness refuses to show up?
- Cannot punish the party or witness for refusing to participate
- Cannot make a decision solely based on a party's non-cooperation




297

298

### Uncooperative Witnesses

- For parties, use **T&H Guidebook Document 32 – Party Non Response to Interview Request**
- For witnesses, there is less leverage; get creative
- Consider:
  - > Why the non-cooperation?
  - > Explain the consequences
  - > Involve others




298

299

### What must the investigator provide the parties after the end of evidence collection?

- A copy of all evidence obtained in the investigation
- A summary of all evidence obtained in the investigation
- A copy of all directly related evidence obtained in the investigation
- A summary of all directly related evidence obtained in the investigation

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### DIRECTLY RELATED EVIDENCE




300

301

## 7. Compiling and sharing the DRE

- "Directly related evidence" is not defined in the rules
- Statements, notes of interviews, and other types of evidence collected in the investigation are likely covered




301

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## Directly Related Evidence

- Even evidence the school doesn't think it will use
- The parties must be given at least 10 days to review all the evidence and submit written responses about the evidence to the investigator
- The investigator must consider the responses when writing the investigative report
- Use **T&H Guidebook Document 37 – Notice of Right to Review and Respond to DRE**



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303

## What is not directly related evidence related to Carson's formal complaint?

- "Sexting" messages between Robin and Carson in the Spring and Summer
- Draft interview notes or recordings once notes have been finalized
- A written statement from another classmate saying Robin did the same thing to them the year before
- Evidence of the specifics of Robin's disability services

All of the above are directly related

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303


304

## Does DRE include...??

Evidence subject to legal privilege

Evidence related to a complainant's past sexual history not related to:

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



304

305



# INVESTIGATION REPORT




305

306

## What must be included in the report

- A summary of all evidence obtained in the investigation
- A summary of all directly related evidence obtained in the investigation
- A summary of all relevant evidence obtained in the investigation


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306

## 8. Drafting, finalizing, and sharing the report

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





307

## Relevant Evidence

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.

Fed. R. Evid. 401



308


## Relevant Evidence

### Inculpatory Evidence

- ▶ Favorable to complainant
- ▶ Evidence that shows or tends to support the allegations of sexual harassment and/or the respondent's involvement in the allegations to establish responsibility

### Exculpatory Evidence

- ▶ Favorable to the respondent
- ▶ Evidence that exonerates or tends to show the respondent is not responsible for the allegations of sexual harassment



309

## Rank the evidence from most relevant to least/not relevant

- "Sexing" between the parties during the spring and summer
- A written statement from a classmate saying Robin did the same thing to them
- A text message in which Robin apologizes to Carson for "going too far" and "not listening"
- Francis's statement that Robin told Francis to apologize to Carson for "going too far" and "not listening"
- Evidence that Carson "made out" with another classmate as justification for asking Carson to make out


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



310


## Remember – not 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




311

## Credibility Determinations



The investigator does not make **findings** regarding credibility, but the investigator should include information related to credibility in the investigative report to help the decisionmaker assess credibility and reach a reliable determination that the respondent is or is not responsible for the alleged sexual harassment



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## Credibility Determinations


Inherent Plausibility

Demeanor


Motive to Falsify

Corroboration

Past Record



**U.S. Equal Employment Opportunity Commission**  
EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (Jun. 18, 1997)




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## Credibility Factors

- ▶ Corroborating evidence
- ▶ Contradictory evidence
- ▶ Source of information (and source motive)
- ▶ Body language and demeanor
- ▶ Specific details
- ▶ Reasonableness of testimony / plausibility


- ▶ Witness's memory (impact of time, outside influence, trauma, intoxicant)
- ▶ Witness's demeanor
- ▶ Witness's motivations or interest in the outcome
- ▶ Witness's bias or prejudice
- ▶ Internal consistency
- ▶ Other factors of believability



314

### Example


The parties do not dispute that in the Spring semester of 2022 and during the first weeks of school in August 2022, Robin touched Carson for purposes of sexual gratification on three occasions. The main dispute is whether that conduct was consensual.



315

### Example


According to Carson, Carson and Robin had discussed previously that Carson had never done anything sexual and did not want to do so. Carson says when Robin asked to "make out" or touch Carson, Carson always said no. Carson said they really like Robin and their families are friends, so Carson did not want to do anything to put that at risk. Carson also said that their parents are very strict and Carson was afraid if they knew anything happened, they would blame Carson. So, despite having said they did not want to, Carson said they eventually said "ok fine" on the occasions when the touching occurred.



316

### Finalize the Report

- After the 10 day DRE review period, consider and address any responses to DRE in the report
- The report does not reach a decision/determination, that is the decision-maker's role
- The school must share the final report with both parties and their advisors (Use [T&H Guidebook Document 39 – Notice to Parties to Review Investigative Report](#))
- Both parties must be given at least 10 days to review and respond before a final decision



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## Considering the Parties' Response to the Evidence

ASK  
YOURSELF

- ▶ Did either party identify evidence that was absent or not gathered *and that should be?*
- ▶ Did either party identify new witnesses or new evidence *that should be considered?*
- ▶ Did either party point out inconsistencies in the evidence *that are material to facts or issues in dispute?*
- ▶ Did either party raise concerns regarding the relevance of the evidence *that should be considered?*




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### Investigator Tips

DOs DON'Ts




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### Investigator "DOs"

Ensure you have no conflict of interest or bias & remain impartial	Treat all parties equitably	Provide equal opportunity to the parties to present evidence and witnesses	Objectively evaluate all evidence	Conduct a complete and thorough investigation
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### Investigator "DONTs"

Conduct surprise interviews	Discriminate in the investigation or rely on stereotypes or preconceived notions	Restrict the parties' ability to discuss allegations or gather evidence	Use privileged or other irrelevant information	Determine credibility or make a finding regarding responsibility
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322

### Closing the File




322

323

### Closing the Investigation File

- Finalize the file
- Transmit the file to the Title IX Coordinator or their designee for the case



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### 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

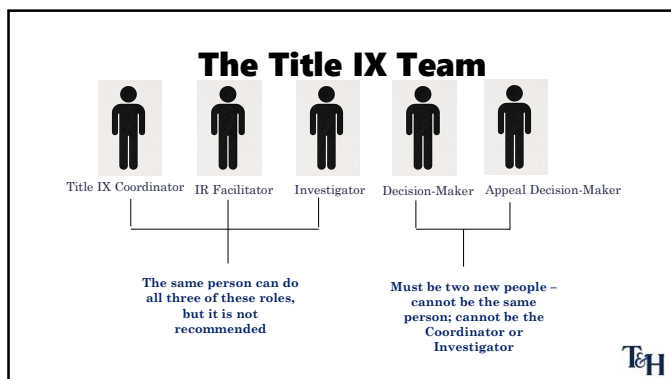
Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee

- **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**



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325

### 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 standard, issues a written determination with an independent determination of responsibility or non-responsibility for a policy violation and recommends remedies

T&H

326

### Scenario

A student, Casey, alleges that another student, Ryan, touched Casey in the genital area on two occasions at school.

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327

### Scenario

Casey and Ryan started dating at the beginning of the school year. Casey claims to have never been sexually active and does not want to engage in sexual activity other than kissing. Casey reported that Ryan knew these limitations but wanted more.

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328

### Scenario

During the first incident, Ryan and Casey were sitting in the stands out on the field at lunch. Ryan was tickling Casey and, while Casey was protesting, touched Casey's private area.

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329

### Scenario


During the second incident, Ryan and Casey were in the hallway "making out." Ryan was rubbing all over Casey's behind, which Casey said they were ok with, but then Ryan began rubbing between Casey's legs allegedly without permission.

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330


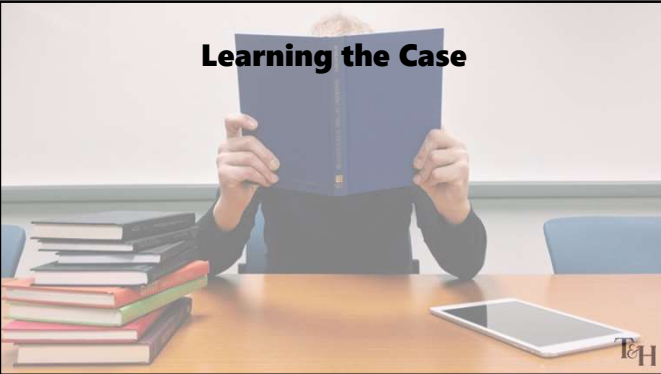
**Scenario**

Casey just reported the incident although it happened last semester. Casey reports that Ryan broke things off recently and started dating another student, Isa, within days of the break-up.



331



**Learning the Case**



332

**Case File**

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




333

**Scenario**

Casey and Ryan do not dispute that the touching occurred

Ryan claims the touching was all consensual/ Casey disagrees

There are no witnesses to the behavior




334

**Scenario**

Casey told a friend, Wei, right after the second incident what happened and Wei encouraged Casey to report it


After being charged, Ryan tearfully denied the allegations to Ryan's mom



335

**Scenario**

No cameras covered either incident directly, but the students were seen on a hallway camera right after the second incident. They were walking arm in arm, cuddling, and laughing as they walked.




336



**Scenario**

Neither student has ever been in trouble at school before for any similar behavior, although both have had some disciplinary incidents in the past.




337

**Scenario**

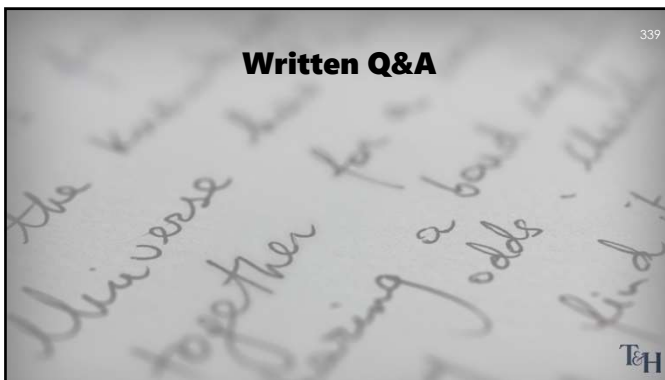
Casey's story has been consistent throughout

Ryan seemed incredibly nervous in the initial interview and at first denied ever touching Casey. As the interviewer built rapport, Ryan acknowledged that the touching occurred but said it was consensual.




338

**Written Q&A**




339




339

**Notice of Right**

**NOTICE**



- Send notice of right to submit written, relevant questions and follow up questions (email and U.S. mail)
- Provide timeframe for when responses are due (e.g., within 3 or 5 days of electronic delivery of notice)




340

**Notice of Right**

Notice can state that questions and follow-up questions:

- > Should be numbered
- > Should identify the name of the party or witness to whom it should be posed




341

**Questions Received**

Review each question to determine whether it is:

**Relevant & Respectful**



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## Relevance Exceptions

"Rape Shield"	Complainant's sexual predisposition or prior sexual behavior (limited exceptions)
Treatment Records	
Privileged Info	

Records by a physician, psychiatrist, psychologist, or similar professional in provision of treatment

Attorney-client, physician-patient, priest-penitent, marriage, privilege against self-incrimination, etc.


**UNLESS written consent from the impacted party or witness**



343

## Respectful



- Questions and answers must be respectful
- For example, cannot use profanity or irrelevant, ad hominem attacks
- Harassing questions will not be tolerated
- No written notice required, but recommend providing



344

## Notice of Non-Relevance


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



345

## Try & Try Again


- ▶ 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)



346

## Scenario

**Question 1** (Ryan to Casey):  
*Isn't it true that you let Wei touch you the same way over the summer before we started dating?*



347

© When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)  
☑ Text **THLAW411** to **22333** once to join

### Relevant and Appropriate?

Yes


No

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348

## Scenario

**Question 2** (Casey to Ryan):  
*Ask Ryan to tell you about the ex they did this same thing to last year.*



349

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

### Relevant and Appropriate?

Yes


No

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350

## Scenario

**Question 3** (Casey to Investigator):  
*I want you to ask the investigator why they didn't interview all my classmates like I asked to see if anyone saw anything.*



351

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

### Relevant and Appropriate?

Yes


No

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352

## Scenario

**Question 4** (Decision-Maker to Investigator):  
*Why did you not interview all Casey's classmates as requested to see if anyone saw anything.*



353

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

### Relevant and Appropriate?

Yes


No

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354

## Scenario

**Question 5 (Ryan to Casey):**  
*Why don't you tell them about how you are on three different medications for being crazy and in therapy because you're a pathological liar?*



355

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

### Relevant and Appropriate?

Yes



No

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356

## Forwarding Questions



- ▶ Forward all relevant and respectful questions to the appropriate party or witness
- ▶ Include notification of when a response is required (e.g., within 3 days of electronic delivery of the question)



357

## Forwarding Answers

- ▶ Forward all answers to all parties
- ▶ Answers must be respectful
- ▶ Notice of right to submit limited, relevant follow-up questions within a certain time period (e.g., 2 days of electronic transmission of responses)




358

## Follow-Up Questions

- Relevant
- Respectful
- Limited to “Follow-Up”



***Follow up:** to follow with something similar, related, or supplementary (Merriam-Webster)*



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## Repeat (and Repeat...)

- ▶ Forward all answers to both parties
- ▶ Answers must be respectful
- ▶ Provide notice of right to submit limited, relevant follow-up questions




360

# Follow-Up Question?

**Initial Question:** When did it happen?

**Answer:** Yesterday



361

When poll is active, respond at [polllev.com/thlaw411](https://polllev.com/thlaw411)  
Text **THLAW411** to **223333** once to join

## What time of the day did it happen?

Follow-Up

Not Follow-Up

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362

When poll is active, respond at [polllev.com/thlaw411](https://polllev.com/thlaw411)  
Text **THLAW411** to **223333** once to join

## Who was present?



Follow-Up

Not Follow-Up

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

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# Part 4: Written Determination



364

# Written Determination



The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility containing specific requirements.



365

# Case File

- ▶ Formal Complaint
- ▶ Written Notice of Allegations
- ▶ Directly Related Evidence
- ▶ Party Responses to Directly Related Evidence
- ▶ Investigation Report
- ▶ Party Responses to Investigation Report
- ▶ Relevant Questions & Answers



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WRITTEN DETERMINATION REQUIREMENT  
NUMBER ONE

Identify the allegations potentially constituting sexual harassment

Thompson & Horton LLP

367

## Allegations

**CLAIM**

- ▶ Will be provided to you – should be 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

Thompson & Horton LLP

368

## Scenario

The formal complaint alleges that Ryan Respondent (the “Respondent”) touched or rubbed Casey Complainant (the “Complainant”) in the genital area without consent and for purposes of sexual gratification on September 5, 2021, in the stands outside at lunch and on September 13, 2021, in the hallway at school.

Thompson & Horton LLP

369

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WRITTEN DETERMINATION REQUIREMENT  
NUMBER TWO

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

Thompson & Horton LLP

370

## Procedural Steps

- Notifications to the parties
- Interviews with parties and witnesses
- Site visits
- Methods used to gather evidence
- Hearings held

Thompson & Horton LLP

371

## Procedural Steps

Much of this information will be in the investigation report, but not all

Must include all procedural steps in the written determination

Ask the Title IX Coordinator for assistance finding missing steps

Thompson & Horton LLP

372

## Scenario

The Complainant reported the conduct to the principal on January 8, 2023.  
The Title IX Coordinator met with the Complainant on January 15, 2023, to discuss supportive measures and the formal complaint process.  
The Complainant signed a formal complaint on January 16, 2023.



373

## Scenario

The Title IX Coordinator sent a notice of allegations on January 18, 2023.  
The Title IX Coordinator assigned the investigator to the case and notified the investigator and parties on January 18, 2023.  
The Title IX Coordinator verified no law enforcement or CPS involvement on January 18, 2023.



374

## Scenario

Repeat for all steps through the Q&A and response to the investigation report.



375

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WRITTEN  
DETERMINATION  
REQUIREMENT  
NUMBER THREE

Findings of fact  
supporting the  
determination



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## Findings of Fact

- ▶ Identify the undisputed facts related to an issue
- ▶ Identify the first disputed fact related to an issue
- ▶ Explain your conclusion as to what happened with the first disputed fact
- ▶ Explain your reasoning for reaching that conclusion
- ▶ Move to the next disputed fact
- ▶ Decide the overall issue
- ▶ Repeat for any other disputed issues



377

When you have a case that comes down to  
“they said, they said” what do you do?




378

379

WRITTEN DETERMINATION REQUIREMENT  
NUMBER FOUR



Use “preponderance of the evidence” standard—more likely than not



379

## Preponderance

- ▶ It is more likely than not (greater than a 50% chance) that something is true
- ▶ Applies to both findings of fact and the overall question of responsibility
- ▶ For findings of fact, ask if there is sufficient evidence to find that it is more likely than not that a disputed fact is true
- ▶ Once you have “found” all your facts, look at them as a whole to decide if it is more likely than not that a policy violation occurred




380

## Scenario

**Undisputed Facts:**  
There is no dispute that...

Casey and Ryan started dating at the beginning of the school year.




381

## Scenario

**Disputed Facts:**  
It is disputed whether...

Ryan knew that Casey did not want to engage in sexual activity with Ryan other than kissing.




382

## Scenario

**Evidence About Disputed Facts:**

Casey said that Ryan knew that Casey did not want to engage in sexual activity with Ryan other than kissing. Casey said the two discussed it. Ryan says they did not ever discuss it.



383

## Scenario

**Evidence About Disputed Facts:**

The parties reported their position on this disputed fact consistently to the investigator and all credibility factors weighed equally between the parties.



384



## Scenario

### Evidence About Disputed Facts:

Despite being asked, neither party presented any witnesses to whom they had said anything that would support or refute the claim.



385

## Scenario

### Evidence About Disputed Facts:

However, the Complainant stated that the Complainant welcomed the Respondent's touching and rubbing of the Complainant's behind during the second incident on January 13, 2023.



386

## Scenario

### Evidence About Disputed Facts:

That evidence corroborates, even if only slightly, the Respondent's position that the Complainant did not limit their physical activity to kissing alone.



387

## Scenario

### Finding of Fact:

Based on the totality of the relevant evidence available, there is insufficient evidence to support the Complainant's claim that the Respondent was aware of limitations on their sexual behavior. That does not mean that the Complainant's necessarily consented to the conduct on the days in question. But I will not consider any knowledge by the Respondent of boundaries on touching as evidence of whether there was consent on the days in question.



388

## Scenario

**Repeat for all undisputed and disputed facts**



389

## Scenario

**Undisputed:** Ryan touched Casey as alleged on September 5 (first incident).

**Disputed:** Whether the touching was consensual



390

## Scenario

**Undisputed:** Ryan touched Casey as alleged on September 13 (second incident).

**Disputed:** Whether the touching was consensual

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## Scenario

**What you Can't Consider Without Casey's Informed Consent:**

Ryan's claim that Casey let another student engage in similar behavior to that which occurred between the parties.

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## Scenario

**What you Can Consider:**

Evidence from Ryan of conduct between Ryan and Casey in the past to show consent to the incidents in question—but consider “weight”

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## Scenario

**What you Can't Consider:**

Any other evidence that is not “relevant”—keeping in mind the definitions and exceptions we discussed earlier.

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## Relevance Exceptions

“Rape Shield”	}	Complainant's sexual predisposition or prior sexual behavior (limited exception)
Treatment Records		Records by a physician, psychiatrist, psychologist, or similar professional in provision of treatment
Privileged Info	}	Attorney-client, physician-patient, priest-penitent, marriage, privilege against self-incrimination, etc.

**UNLESS** written consent from the impacted party or witness

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## Scenario

**Balanced Weight:**

Both stories have been consistent  
Both parties told “outcry” witnesses  
No *relevant* incidents of past behavior or discipline

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## Scenario

### Be Careful With:

Casey's report after Ryan broke things off  
Video showed Ryan and Casey walking arm in arm, cuddling,  
and laughing as they walked  
Ryan's nervousness and initial reluctance to describe the  
touching to the investigator  
Ryan *tearfully* denied the allegations to mom right after being  
charged



397

## Scenario

A 51/49 case in favor of a  
disputed fact leads to a finding  
of "sufficient evidence that the  
fact occurred as alleged."



398

## Scenario

A 51/49 case against a  
disputed fact leads to a finding  
of "insufficient evidence that  
the fact occurred as alleged."



399

400

WRITTEN  
DETERMINATION  
REQUIREMENT  
NUMBER ONE

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



400

## Applying Code to Facts

If there is insufficient evidence of an  
essential element of an allegation, you  
must find insufficient evidence of sexual  
harassment under Title IX.



401

## Scenario

Because there is insufficient evidence  
that the Respondent's touching of the  
Complainant was unwelcome, I must find  
insufficient evidence of a violation of the  
District's code of conduct prohibiting  
sexual harassment prohibited by Title IX.



402

## Applying Code to Facts

If there is sufficient evidence that some or all of the conduct, as alleged, occurred, the Decision-maker must consider whether the conduct *established* constitutes prohibited sexual harassment under Title IX.



403

## What Title IX Covers

- ▶ 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*



404

## Scenario

The conduct established by a preponderance of the evidence is fondling, which is a type of sexual assault prohibited by Title IX.

The conduct occurred at school, so occurred in a program or activity of the District.

The conduct occurred at school, so occurred against a person in the United States.



405

WRITTEN  
DETERMINATION  
REQUIREMENT  
**PARAGRAPH SIX**

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



406

## Result of Allegation

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



407

## Remember Preponderance


- ▶ It is more likely than not (greater than a 50% chance) that something is true
- ▶ Applies to both findings of fact and the overall question of responsibility
- ▶ For the overall question of responsibility, ask if the facts proved establish Title IX Sexual Harassment in an education program or activity and against a person in the United States



408

## What About FERPA?

- ▶ OCR believes that sharing the result as to each allegation including a list of sanctions because sanctions “always directly impact the victim” and so are permitted under FERPA
- ▶ Remedies do not directly affect the respondent so should be communicated separately to the Complainant



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## Scenario

**Result of the Allegation**

Because the grievance process established that the Respondent engaged in fondling of the Complainant at school, I find sufficient evidence to support the allegation and establish a violation of the District's Title IX Sexual Harassment policy. Based on my finding, I recommend that the Respondent be expelled. Remedies will also be provided to the Complainant, which will be communicated to the Complainant separately.

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411

WRITTEN DETERMINATION REQUIREMENT  
NUMBER SEVEN

Provide the written determination to the parties simultaneously

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412

WRITTEN DETERMINATION REQUIREMENT  
NUMBER EIGHT

Process for appeal

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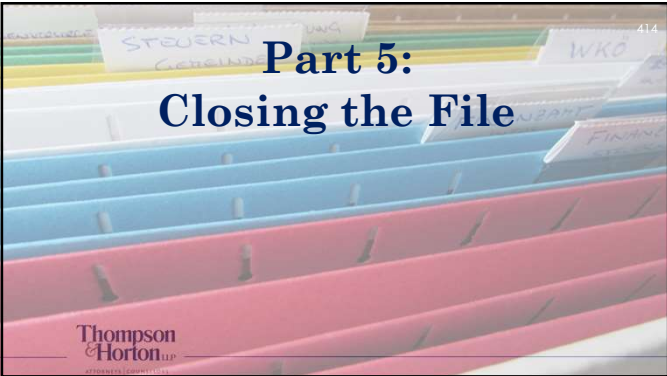
412

## Decision-Making Disasters

- ▶ Not explaining the process to the parties and advisors beforehand
  - Party, (Parent) and Advisor Expectations
- ▶ Not making clear what “follow-up” means
- ▶ Not ensuring procedures match your intended goals
- ▶ Not notifying the parties of the outcome

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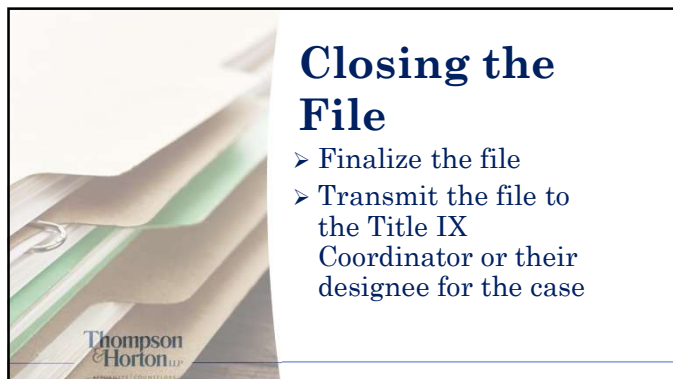
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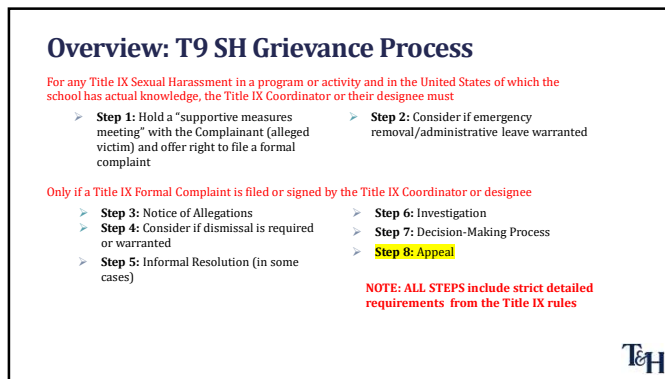
## Part 5: Closing the File

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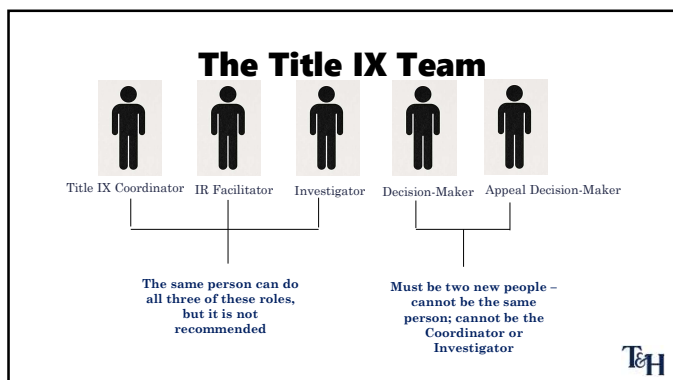
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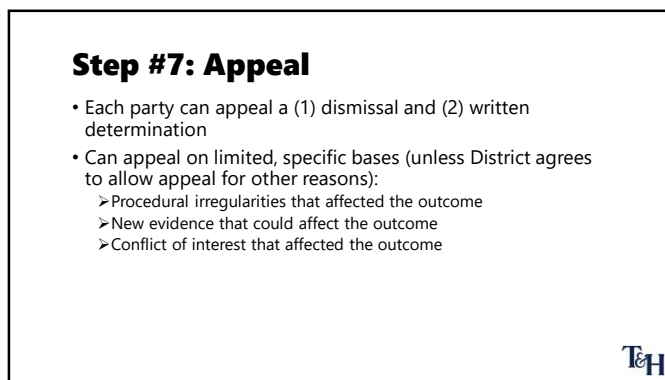
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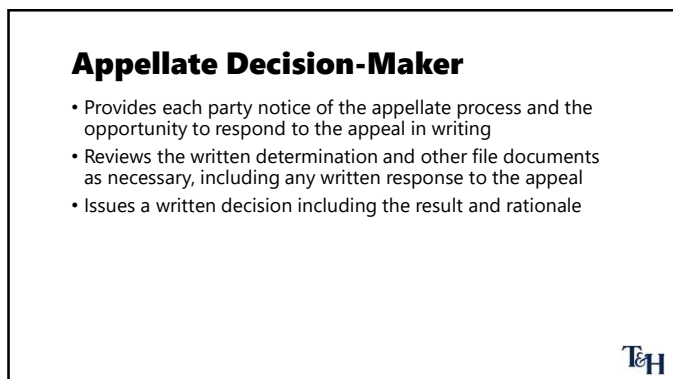
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417



418



419



420

SCENARIO #11

421

Chen and Ricki were together for two years off and on before an acrimonious split. After the breakup, Chen reported that Ricki sexually assaulted Chen once during the relationship.

T&H

421

SCENARIO #11

422

Scenario 11(a):

Chen reports that on the occasion in question, Ricki told Chen that if they did not have sex, Ricki would share a sex video the two had made previously. Accordingly, Chen agreed to have sex.

T&H

422

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Yes No

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SCENARIO #11

424

Scenario 11(b):

Chen reports that the two often engaged in "rough sex" that involved hitting, choking, and tying each other up. On the occasions in question, while Ricki was choking Chen, Chen became afraid and wanted to stop. Chen tried to protest and hit Ricki, but Ricki said that was often part of the role-playing the two would do during rough sex and so did not stop.

T&H

424

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**Was there consent?**

Yes No

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425

**Remember**

- Your grievance procedure should define consent
- Individuals evaluating, investigating, and performing other Title IX team member roles should use the definition as a guide

T&H

426

**Title IX Training**  
Chicago Public Schools  
May 17, 2023



**Jackie Gharapour Wernz**  
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