


**TITLE IX TRAINING  
SUMMER 2022**

**Garland ISD**  
July 19, 2022  
Morning Session

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Thompson & Horton LLP  
Dallas, Texas




Presented by  
Jackie Gharapour Wernz  
Partner

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**GISD TIX Coordinator**



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# GISD TIX Coordinator

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Any individual may report sex discrimination, including sexual harassment, at any time, including during non-business hours, by mail, phone, or email. [Reports can also be made online via the Ethics and compliance reporting hotline](#) or by calling [1-800-527-7140](tel:1-800-527-7140).



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# Why Are We Here?

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# Schools are “on the hook” for complying with Title IX, and they comply *through you*

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# Who Enforces Title IX?

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# Why It Matters To You



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# KEY TERMS

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# Discrimination

The differential treatment of an individual or group of people based on a protected characteristic



## Discrimination Examples of Protected Characteristics

- ▶ Race, color, national origin
- ▶ Religion
- ▶ Ethnicity
- ▶ Sex (including gender, gender identity, sexual orientation, and pregnancy)
- ▶ Age
- ▶ Disability

# Harassment

**One type of discrimination:**  
Unwelcome conduct, verbal or physical, including intimidation, ridicule, insult, comments, or physical conduct, that is based on an individual's protected characteristic



# Sexual Harassment

**One type of harassment,**  
where the conduct is based on sex, including gender, gender identity, or sexual orientation, or pregnancy





## Title IX Sexual Harassment

**One type of sexual harassment**, where the conduct meets certain requirements in the 2020 Title IX regulations (effective August 14, 2020)



## Retaliation

A harmful act against a person that is made in response to that person or another person's report, complaints, or participation in a report/complaint process



# Putting It All Together

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# Today Is Sex Discrimination, But...

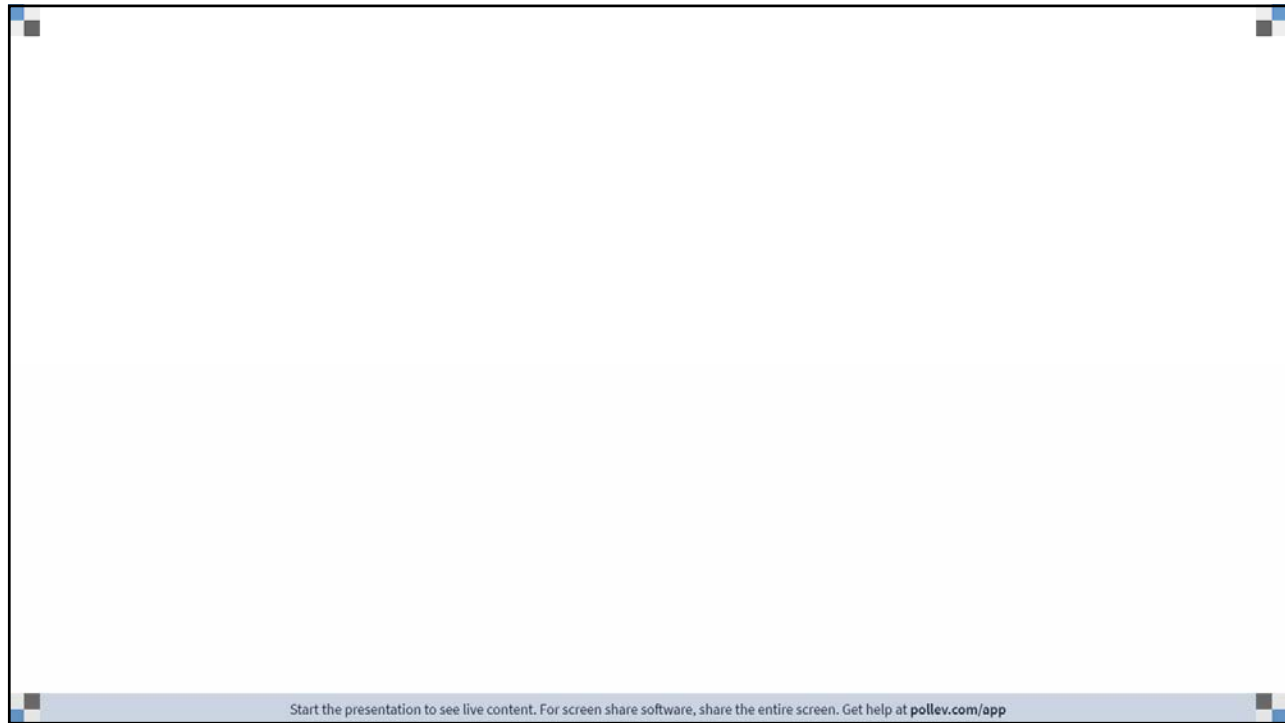
Complaints of discrimination, harassment, or retaliation based on protected statuses other than sex **should be reported** to the appropriate District Official, who must address them; they will **not** be addressed under the Title IX sexual harassment process we are talking about today

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# Test Yourself

A female student reports that in an advanced math class, the teacher does not ever choose her for enrichment groups and grades her harder than boys in the class.



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## What type of discrimination is alleged?

- Different Treatment
- Disparate Impact
- Harassment
- Retaliation
- None of the above because it's "he said, she said"

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# Test Yourself

The female math student says that after reporting the math teacher, he avoids looking at, talking to, and calling on her in class. She overheard him saying to another teacher that he was avoiding her because he's afraid she is going to take everything he says wrong.

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## What type of discrimination is alleged?

- Different Treatment
- Disparate Impact
- Harassment
- Retaliation
- None of the above because the teacher has a right to protect himself

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# Test Yourself

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In the investigation of the female math student's report, the investigator learns that because of various eligibility requirements for the advanced math course, many fewer female students have been eligible for the class than male students.

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## What type of discrimination is alleged?

- Different Treatment
- Disparate Impact
- Harassment
- Retaliation
- None of the above because there is no rule excluding female students from the class

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# Test Yourself

In interviewing students regarding the female math student's complaints, other female students in the class report male students passing notes of naked female figures repeatedly despite being told that it bothers the female students.

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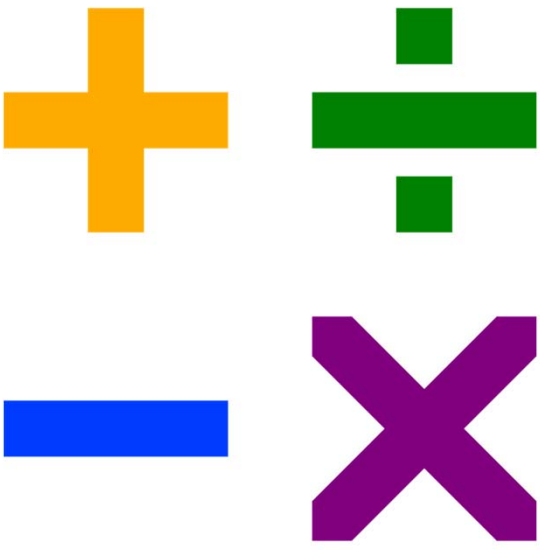
## What type of discrimination is alleged?

- Different Treatment
- Disparate Impact
- Harassment
- Retaliation
- None of the above because the conduct is not directed at a particular student


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# TITLE IX BASICS



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

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## Title IX

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

**20 U.S.C. §§1681 & 34 C.F.R. Part 106**

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# What is Title IX?

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Athletics

Discipline

Sexual Harassment

Pregnant/Parenting Students

College Recruitment, Admissions, Counseling & Aid

Single-Sex Education

Retaliation

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## LGBTQ+ is "Sex" Under Title IX

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- ▶ OCR Guidance, June 2021 – "On the basis of sex" encompasses discrimination on the basis of sexual orientation and gender identity
- ▶ So, to OCR, Title IX prohibits discrimination based on sexual orientation and gender identity

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## Today Is Sexual Harassment, But...

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

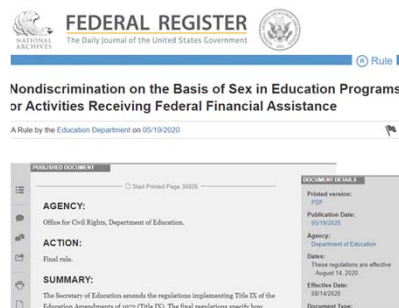


## TITLE IX SH REQUIREMENTS



# 2020 Title IX Rules

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



# 2022 Proposed Rules

- ▶ Issued by the Biden administration in proposed form on June 23, 2022
- ▶ Comment period ends September 12, 2022
- ▶ Department of ED will review and respond to all comments in the final rule
- ▶ Purported release date for final rule May/June 2023, with an effective date in August 2022; this would be extremely fast based on past experience
- ▶ Would change many of the requirements for handling complaints and apply to all **sex discrimination**, not just sex-based harassment

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## What Do The 2020 Rules Require?

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

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## What Do The 2020 Rules Require?

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

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## Training Required for Team

- The definition of sexual harassment
- The scope of the education program or activity
- How to conduct an investigation and grievance process including appeals and informal resolution processes
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

## Investigator Training

Issues of relevance to create an investigative report that fairly summarizes relevant evidence

## Decision-Maker Training

Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant

## What Do The 2020 Rules Require?

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



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

A K-12 school  
in which any employee has actual  
knowledge  
of “Title IX Sexual Harassment”  
in its “education program or activity”  
and  
against a person in the United States  
must respond using the Title IX Sexual  
Harassment process

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**Sexual  
Harassment**

**T9SH** ← → **Other SH**

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## Why Does It Matter?

Just because conduct not covered by Title IX does not mean you will ignore it; you will consider whether another policy, code of conduct, or other rule prohibits the conduct, and **use that process** to address the conduct.



## But 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.



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

**A K-12 school**

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# **K-12 Schools**

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- ▶ 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

in which any employee has actual knowledge

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**ANY** Notice or Knowledge

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

*to or by ANY  
K-12 employee*

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# Title IX Reports


- ▶ Can be made to the Title IX Coordinator or any “Official With Authority” (any K-12 employee)
- ▶ Can be made by any person, whether or not the person reporting is the person alleged to be the victim of sexual harassment
- ▶ Can be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator
- ▶ **BUT REMEMBER** no report need be made; **ANY NOTICE** of the conduct (even without a request for a response) is “actual knowledge”

# Actual Knowledge

- ▶ Actual knowledge is an argument made by lawyers in the courtroom or before OCR
- ▶ If you’re asking yourself if you have actual knowledge of something, you likely do—so just move forward with the process
- ▶ Training employees is **critical**—all employees must know they have a duty to report

# T9SH Grievance Process: When & What is Required

A K-12 school  
in which any employee has actual  
knowledge  
of Title IX "sexual harassment"



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# Is It Title IX sexual harassment?



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# “Title IX Sexual Harassment”

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


  
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# “Title IX Sexual Harassment”

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

  
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## 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”)

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

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

## #2 of the “Big 5”

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### Sexual Assault (Clery Definition)

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



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## What Is Consent?

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- ▶ Title IX generally prohibits “unwelcome” conduct based on sex (we’ll talk about that in a bit)
- ▶ “Consent” comes into play in sexual assault cases, including those involving fondling



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# What is Consent?

- ▶ Consent is not defined by OCR/the 2020 Title IX rules
- ▶ Must be defined in your policies/procedures

# What is Consent

Generally, consent means the existence of clearly understandable words or actions that manifest a **knowing, active, voluntary, and present and ongoing** agreement to engage in specific sexual or intimate conduct by one **not suffering from incapacitation**

# Incapacitation

- ▶ Inability to give consent
- ▶ Can be temporary or permanent reason
- ▶ Occurs when an individual lacks the capacity to give consent, voluntarily or involuntarily, due to things like:
  - > Lack of consciousness (e.g., being asleep or another state where unaware sexual activity is occurring)
  - > Age (legal age of consent is 17 in Texas; consider *Romeo and Juliet* law)
  - > Physical condition, such as incapacitation due to alcohol or drug consumption (voluntary or involuntary), being unconscious, asleep, or in another state in which the person is unaware that the sexual activity is occurring
  - > Disability that impairs the individual's ability to give consent

## #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, person similarly situated to a spouse, adult against a person protected under domestic or family violence laws of the jurisdiction

## #4 of the “Big 5”

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### Dating Violence (VAWA Definition)

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



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## #5 of the “Big 5”

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### Stalking (VAWA Definition)

- ▶ A course of conduct based on sex (2+ times)
- ▶ Directed at a specific person
- ▶ That would cause a reasonable person to fear for the person’s safety or the safety of others or to suffer substantial emotional distress
- ▶ Conduct can be direct or indirect, and does not require professional medical treatment




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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”

  
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# “Title IX Sexual Harassment”

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



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Title IX  
Hostile  
Environment

=

Unwelcome  
Conduct

Effectively  
Denies Equal  
Access

+

+

Based on Sex

Objectively  
Offensive

+

+

So Severe

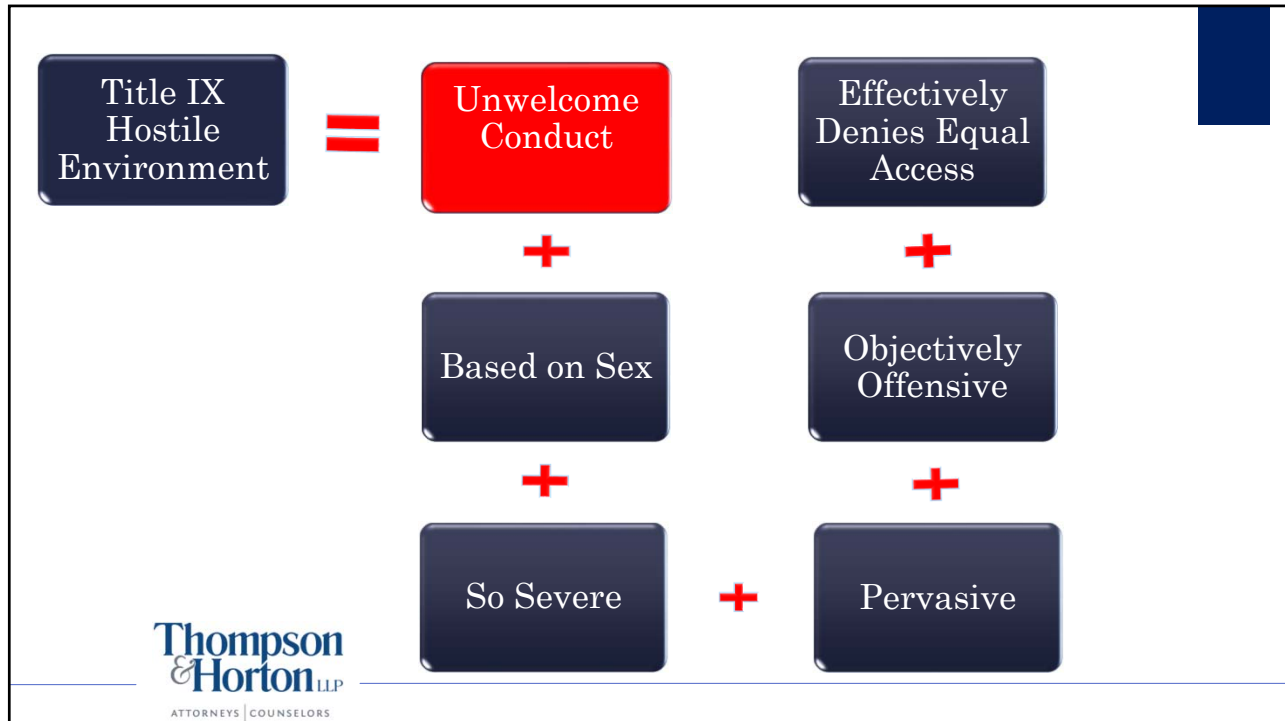
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Pervasive



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# Unwelcome Conduct

- ▶ Not solicited or invited, or 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 friend of a student, Carson, reports that Carson is in a consensual relationship with an employee of the school.

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## Is the conduct unwelcome?

Yes No

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# Unwelcome?

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



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**Is the conduct unwelcome?**

Yes

No

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# Unwelcome?

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

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## Is the conduct unwelcome?

Yes No

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# Unwelcome?

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



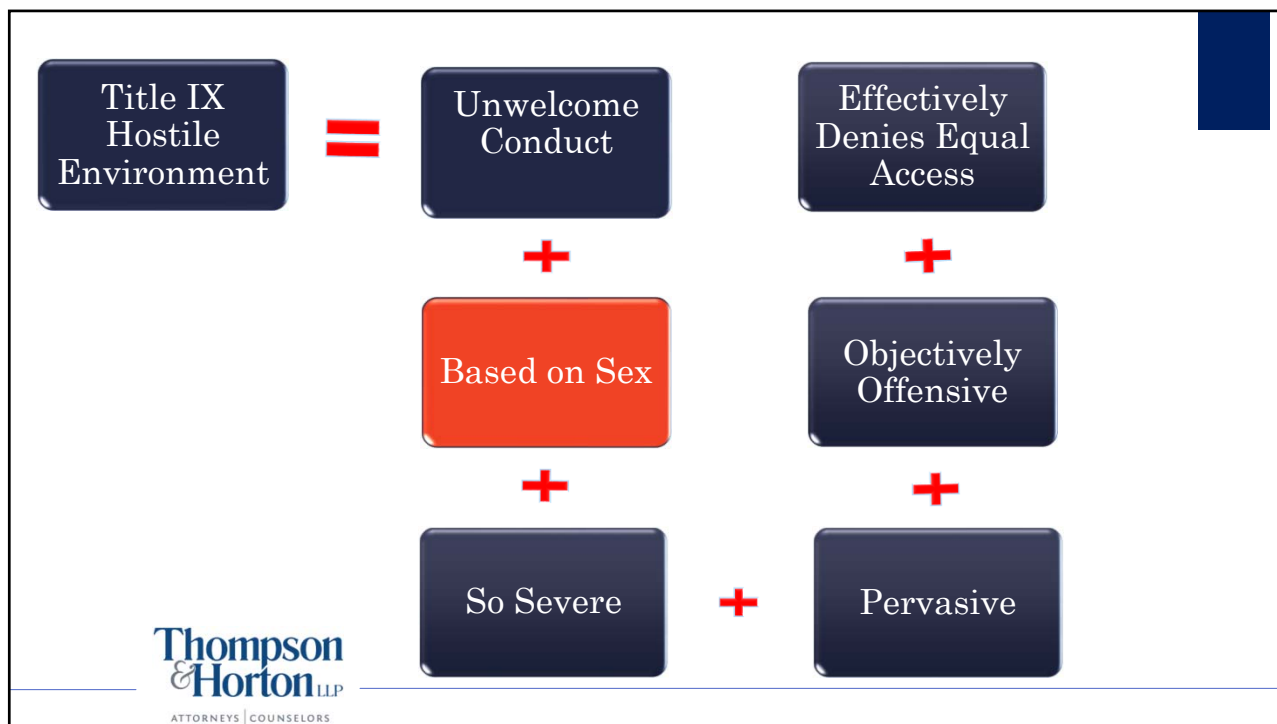
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**Is the conduct unwelcome?**

Yes

No

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# Based on Sex

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

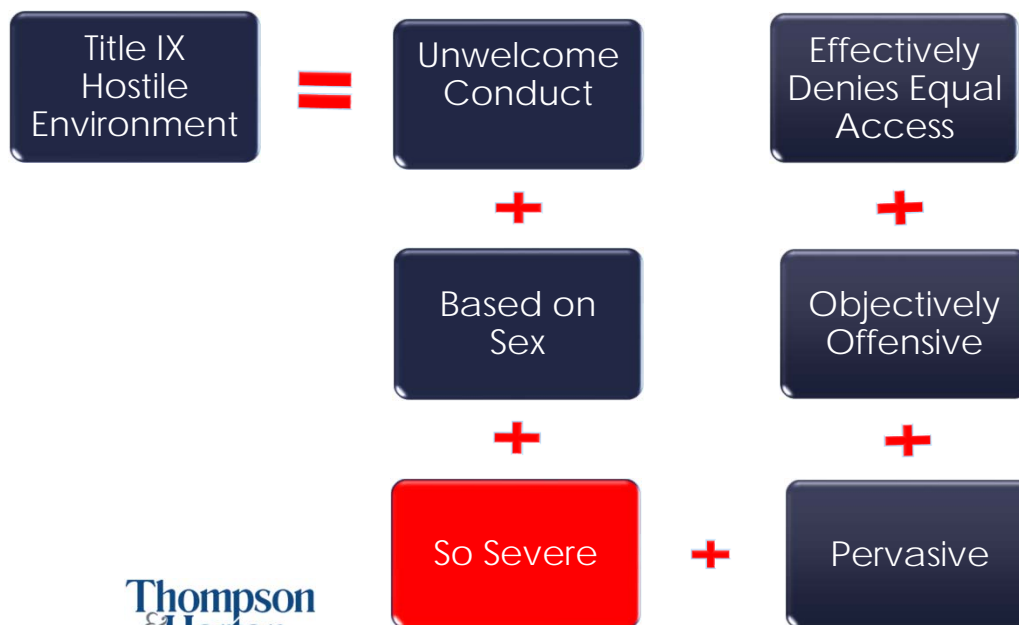
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# Based on Sex

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

- A boy can harass a boy and a girl can harass a girl, regardless of sexual orientation



## What does "severe" mean (one word)?

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## Dictionary Definitions: Severe

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- ▶ 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 Definitions: Severe

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

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

## Case Definitions: Severe

- ▶ To establish “severe” harassment, the conduct must be extreme and not merely rude or unpleasant.

***Jenkins v. Univ. of Minnesota***, 131 F. Supp. 3d 860, 881 (D. Minn. 2015), *aff'd*, 838 F.3d 938 (8th Cir. 2016)

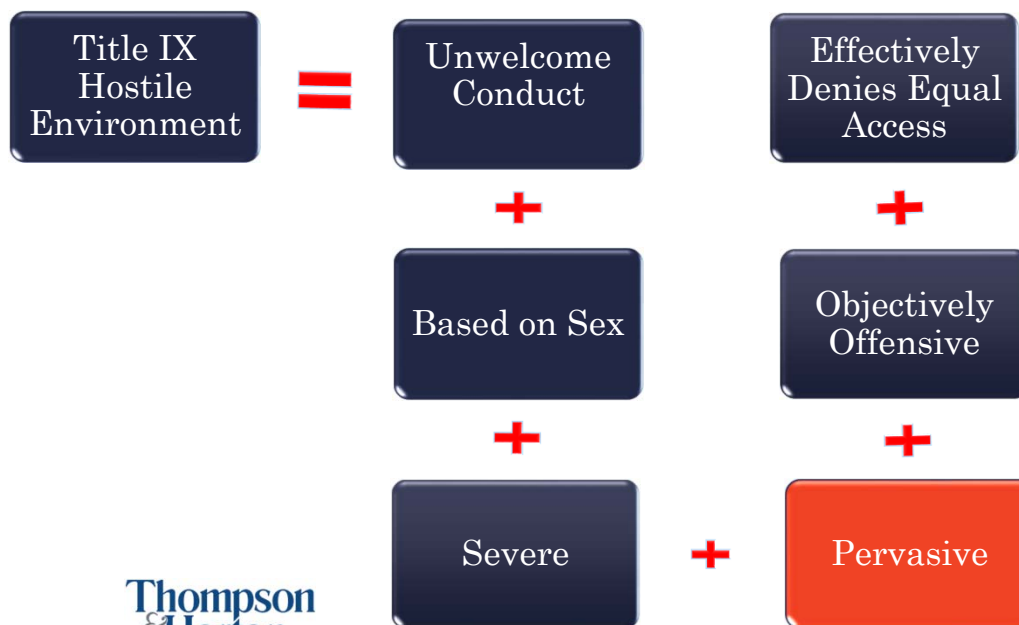
# Case Definitions: Severe

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

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



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What does "pervasive" mean (one word)?

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## Dictionary Definitions: Pervasive

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

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## Case Definitions: Pervasive

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

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



## Case Definitions: Pervasive

- ▶ Even a single incident of rape is sufficient to establish that a [complainant] was subjected to severe, pervasive, and objectively offensive sexual harassment for purposes of Title IX.

***Lopez v. Metro. Gov't of Nashville & Davidson Cty.***, 646 F. Supp. 2d 891, 913 (M.D. Tenn. 2009)

- ▶ A single incident of rape could reasonably be understood to have a “systemic effect” on a plaintiff's access to educational programs.

***T.Z. v. City of New York***, 634 F. Supp. 2d 263, 270 (E.D.N.Y. 2009)

\*of course, rape is covered under the Title IX “Big 5,” but these cases show that some very serious conduct can be pervasive even if it only happens once.



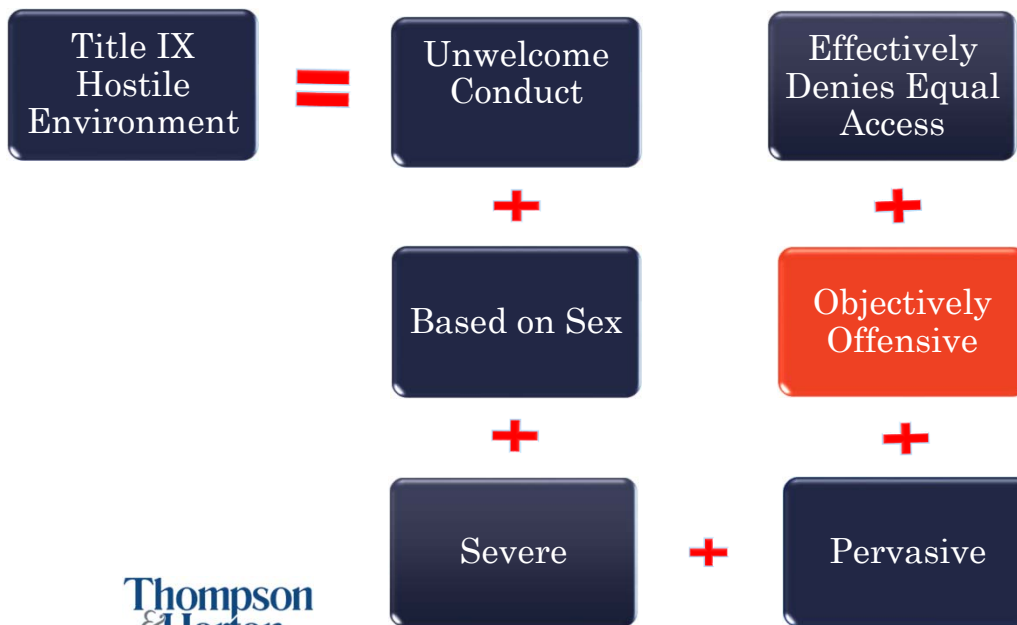
# Case Definitions: Pervasive

Pervasive is defined as “that becomes or tends to become diffused throughout every part of,” and is different from the word “persistent”

*Doe v. Dallas Independent Sch. Dist.*, 2002 WL 1592694, 2002 U.S. Dist. LEXIS 13014 (N.D.Tex. July 16, 2002)



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What does "objective" mean (one word)?

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## Dictionary Definitions: Objectively Offensive

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- ▶ “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 Definitions: Objectively Offensive

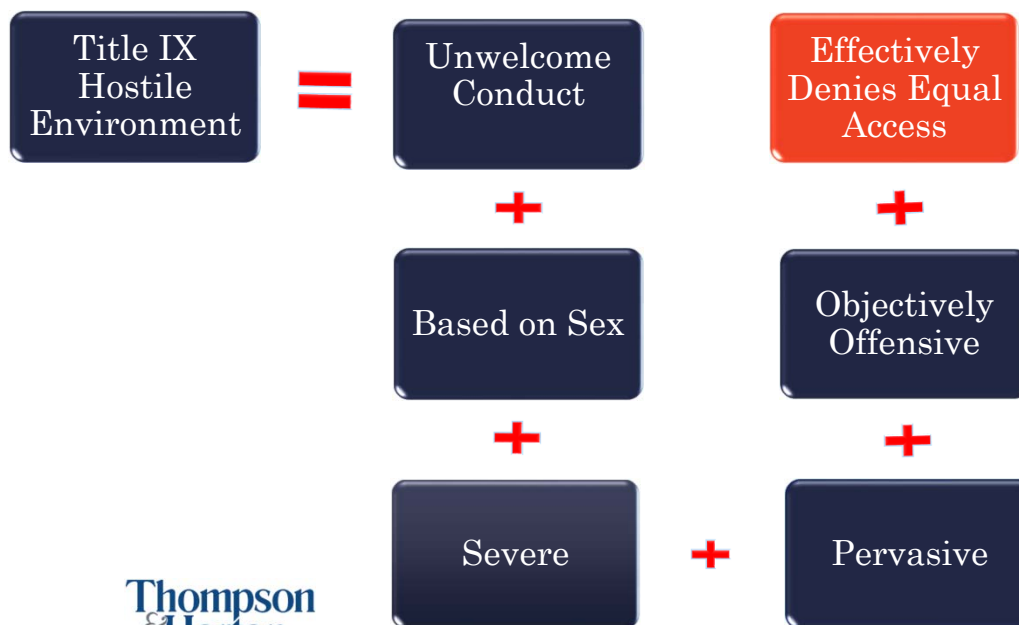
“Objectively offensive” means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively

Whether gender-oriented conduct rises to the level of actionable harassment thus depends on a 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 of a comment is to be judged by reference to a reasonable child at whom the comments were aimed



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# Effective Denial

Evaluate whether a reasonable person in the alleged victim's position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment

# Effective Denial

Examples may include:

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



## Effective Denial of Equal Access

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- ▶ While these examples help illustrate an effective denial of access, no concrete injury is required to prove an effective denial of equal access
- ▶ A complainant does not need to have already suffered loss of education before being able to report sexual harassment
- ▶ Effective denial of equal access to education does not require that a person's total or entire educational access has been denied



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## Effective Denial of Equal Access

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- ▶ Complainants do not need to have dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" or exhibited specific trauma symptoms to be effectively denied equal access
- ▶ School officials turning away a complainant by deciding the complainant was "not traumatized enough" would be impermissible



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## Test Yourself: Is it Title IX Sexual Harassment?



## Test Yourself

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



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## Is it Title IX Sexual Harassment?

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

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105

# Test Yourself

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



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## Is it Title IX Sexual Harassment?

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


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107

# Test Yourself

108

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



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109

# Test Yourself

110

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



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111

# Test Yourself

112

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



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# Test Yourself

114

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



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115

# Test Yourself

116

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



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117

# Test Yourself

118

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



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119

# Test Yourself

120

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



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# Test Yourself

122

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



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123

# Test Yourself

124

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



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# T9SH Grievance Process: When & What is Required

A K-12 school  
in which any employee has actual  
knowledge  
of Title IX “sexual harassment”  
in its “education program or activity”

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# Is it in an educational...



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## Education Program or Activity

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

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

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## Education Program or Activity

If one of those two standards (“operations” or “substantial control” are met), the conduct can occur:

- ▶ On or off campus
- ▶ Via electronic, digital, or online sources regardless whether on a personal or school device
- ▶ Via computer and internet networks, digital platforms, and computer hardware or software of the school

## Education Program or Activity

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

## Education Program or Activity

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Conduct that begins outside of an education program or activity may continue into the education program or activity (“downstream effects”)



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**Test Yourself:**  
Is it in a  
Program or  
Activity?



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# Test Yourself

Robin allegedly sexually assaulted Carson in the bathroom at school.



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

Yes No


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# Test Yourself

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



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

Yes No

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## Education Program or Activity

- ▶ Field trips
- ▶ Athletics
- ▶ Extracurricular activities



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## Test Yourself

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



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

Yes No

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# Test Yourself

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



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

Yes No

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# Test Yourself

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



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

Yes No


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# Test Yourself

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



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

Yes No

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**Education Program or Activity** 146

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

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

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

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# Test Yourself

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



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

Yes

No


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## Two Tests for Off-Campus Speech on a Personal Device

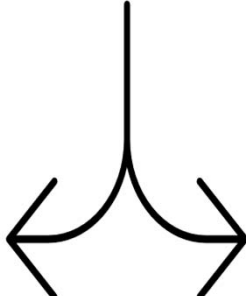
<p><u>Test #1 (Title IX)</u></p> <p>Is it in the “educational program or activity” for Title IX?</p> <p>Substantial control over:</p> <ul style="list-style-type: none"><li>▶ The alleged harasser</li><li>▶ The context of the harassment</li></ul>	<p><u>Test #2 (First Amendment)</u></p> <p>Can you reach the speech under the First Amendment?</p> <p><b>Severe, pervasive, and objectively offensive harassment can likely be addressed under the First Amendment</b></p> <p><u>Mahanoy Area School District v. B.L.</u> (U.S. 2021)</p>
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# REMEMBER Sexual Harassment



**T9SH**      **Other**

  
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# T9SH Grievance Process: When & What is Required

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- A K-12 school
- in which any employee has actual knowledge
- of Title IX “sexual harassment”
- in its education program or activity
- against a person in the United States

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# In the United States

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## In the United States

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

## T9SH Threshold Questions

Is the alleged conduct:

1. “Title IX Sexual Harassment”
2. “in an educational program or activity”
3. “in the United States”

If yes to **all**: Title IX SH Process

If no to **any**: Another process

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## T9SH Grievance Process: When & What is Required

A K-12 school  
in which any employee has actual knowledge  
of Title IX “sexual harassment”  
in its “education program or activity”  
against a person in the United States  
must respond using the Title IX Sexual Harassment process

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## T9SH Grievance Process

The new Title IX regulations require schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates due process principles, treats all parties fairly, and reaches reliable responsibility determinations

Schools must follow a grievance process that complies with Title IX regulations **before imposing any disciplinary sanctions or other actions that are not supportive measures, against a respondent**

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

**Assess Safety:** If a student is in immediate danger or is an immediate danger to self or others, remove the student from the environment immediately. Move the student to a safe area with adequate supervision and immediately contact the Title IX Coordinator for what to do next.

**Consider Law Enforcement, Medical, and Parental Contact:** If allegations include a serious crime, alleged injury, or evidence that needs to be collected (like photographs on an electronic device), follow standard building procedures to contact police, medical, and parent(s)/ guardian(s).

**Consider Reporting Abuse, Neglect, or Exploitation:** Anyone who has a reasonable cause to believe a child, a person 65 years or older, or an adult with disabilities is being abused, neglected, or exploited must report it to DFPS. If in doubt, report. Report at 1-800-252-5400 or the **Texas Abuse Hotline.**

**Consider Contacting Special Education:** If a party is a student with a 504 plan or an IEP, contact relevant special education administration to consider impacts on special education placement and services.



### So, you received a report and notified the Title IX Coordinator... What should you *not* do?

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

Do not conduct investigation interviews (asking for or collecting evidence)—only conduct intake meetings with the reporting party and the complainant/family. An intake meeting means asking what is alleged to have happened, not asking for evidence to support the allegations.

Do not discipline either party, including the alleged perpetrator. See the step above “assessing safety” for immediate steps to take to keep your community safe. Contact the Title IX Coordinator to authorize suspensions or other removals from school or activities.

Do not violate the confidentiality of the alleged victim by telling the alleged perpetrator the alleged victim’s name or that a report has been made. We cannot share such information until the Title IX Coordinator says Title IX is not implicated, a Title IX formal complaint is filed, or the alleged victim and their parent(s)/guardian(s) allow it.



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

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



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## What if It's Not Clear?

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

## What is Intake?

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

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# Allegation

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

Oxford Languages



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# Evaluation

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

Merriam-Webster



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# What is Intake NOT?

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



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# Let's say it again...

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



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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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## Intake Questions

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

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# Intake Questions

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



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# Intake Questions

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



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# Intake Questions

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



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## Step #1: Supportive Measures Meeting

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



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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
- ▶ Extensions of deadlines or other course-related adjustments
- ▶ Modifications of work or class schedules
- ▶ Campus escort services
- ▶ Mutual restrictions on contact between the parties
- ▶ Leaves of absence
- ▶ Increased security and monitoring of certain areas of the campus

# Supportive Measures

- ▶ Title IX Coordinator or designee must implement
- ▶ If necessary to share information to implement measures, obtain Complainant's written consent
- ▶ Follow up regularly with the parties to make sure the measures are working
- ▶ Increase the severity of measures or take new measures if initial measures are ineffective



## IDEA and Section 504 Implications

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

## REMEMBER



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



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## Step #2: Emergency Removal

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



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## Emergency Removal

**WHO:** A student, employee, or any other Respondent

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

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

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



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# Emergency Removal

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## 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

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## 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



## Overview: T9 SH Grievance Process

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Only move to Step 3  
if you have a Formal  
Complaint

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# Formal Complaint

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

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# Formal Complaint

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

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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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 **REMEMBER** 

## Sexual Harassment

Title IX SH  Other SH



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The diagram features the word "REMEMBER" in red at the top center, flanked by two cartoon elephants holding signs that say "Don't forget". Below this, the title "Sexual Harassment" is written in large blue letters. A central vertical line descends from the title and splits into two arrows pointing left and right. On the left, the text "Title IX SH" is displayed with a large green checkmark over it. On the right, the text "Other SH" is displayed with a large red X over it. At the bottom left is the logo for Thompson & Horton LLP, ATTORNEYS | COUNSELORS.

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## Step #3: Notice of Allegations

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

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



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# All the Details

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

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

# No More Confidentiality

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

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# Step #4: Consider Dismissal

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



Can use another policy or code of conduct



Cannot use another policy or code of conduct



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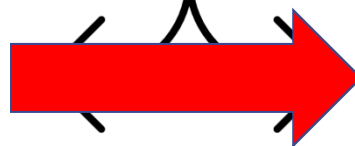
## REMEMBER



# Sexual Harassment

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~~Title IX SH~~



Other SH



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**REMEMBER**

# Sexual Harassment

Title IX SH ← → Other SH

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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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## Step #5: Informal Resolution

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

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

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

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


  
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## Informal Resolution

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

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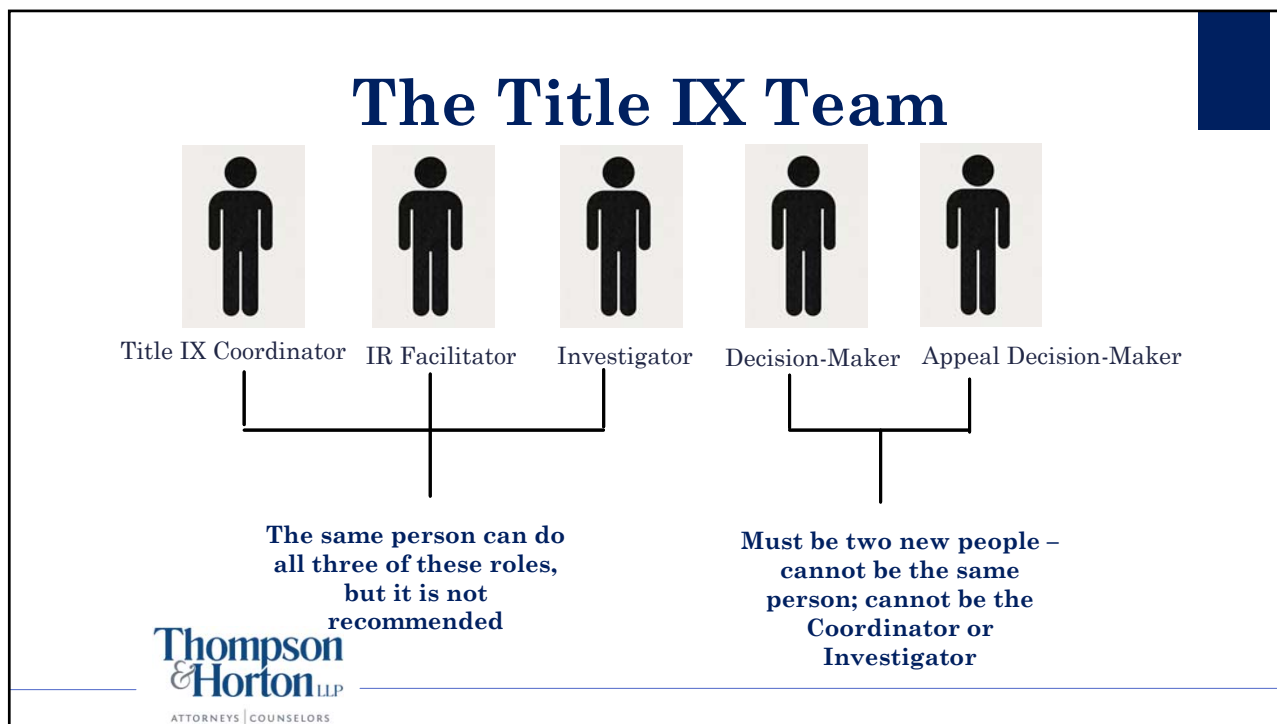
**NOTE: ALL STEPS include strict detailed requirements from the Title IX rules**



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## Step #6: Investigation

- ▶ Many required elements of investigation in rules—best practice to use **T&H's Guidebook** to keep yourself on track

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# Investigation Rules



This Photo

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

# Investigation Steps

Written notice to party before each interview

Directly related evidence shared with parties + 10 days to respond

Written investigative report summarizes "relevant evidence"

Investigative report shared with parties + 10 days to respond

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## Step #7: Decision-Making Process

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- ▶ Oversees a written question-and-answer process in which the parties get to ask written, relevant questions of other parties and witnesses
- ▶ After that process, issues a written determination

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## Preponderance of Evidence

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More likely  
than not  
(50% and a  
feather)



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## Written Decision Requirements

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



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## Written Decision Requirements

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



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## Step #7: Appeal

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



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## Appellate Decision-Maker

- ▶ Provides each party notice of the appellate process and the opportunity to respond to the appeal in writing
- ▶ Appellate decision-maker issues a written decision including the result and rationale



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MISC.

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## Recordkeeping

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

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## Serving Impartially

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



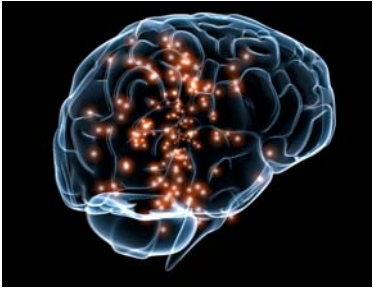
## Impartiality Do's and Don't's

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



# Trauma Informed Investigations

- ▶ Science shows trauma can have a neurological effect, particularly on memory
- ▶ Trauma can impact either party
- ▶ There is a difference between being trauma-informed and trauma-lenient – do not use apparent existence of trauma as *evidence* of alleged conduct



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## QUESTIONS?



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