

**HIGHER EDUCATION TITLE IX COORDINATOR FOUNDATIONS & PRACTICUM**




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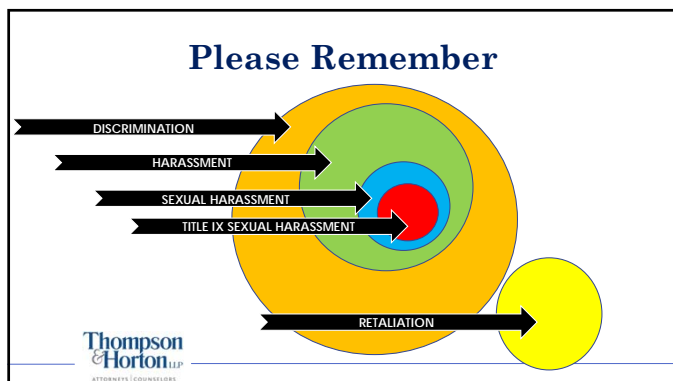
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## Why Are We Here?

- ▶ Training on the 2020 Title IX Rules
- ▶ Not legal advice; keep it hypothetical today—contact me or legal counsel separately for specific issues as they arise
- ▶ These materials will be available for posting on your website after our session




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### Today Is Title IX but...

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




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**My educational institution has trained all Title IX team members at least 8 hours**

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True False

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**My role with Title IX in my educational institution is:**

Title IX Coordinator A
Deputy Title IX Coordinator B
Title IX Investigator C
Other Title IX Team Member D
None of the Above E



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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)

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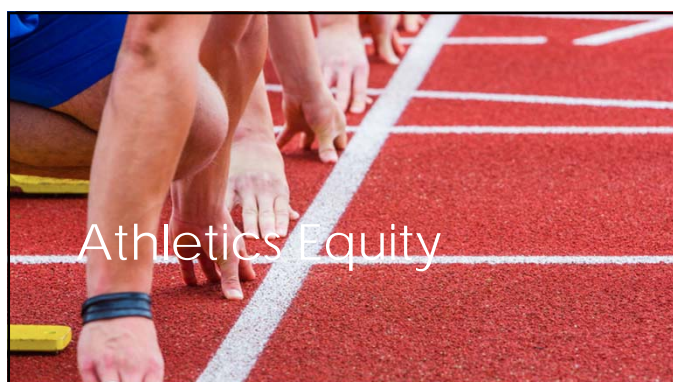
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### What Complaints Could Fall Under Title IX in My Educational Institution?

Different Treatment	Different Impact	Accommodations
	Sexual Misconduct	Sexual Harassment/Bullying

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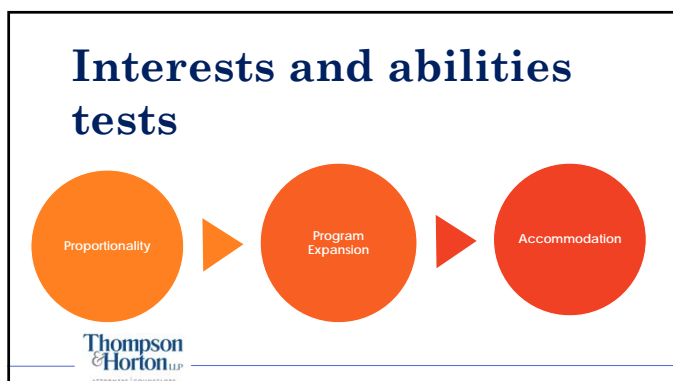
### Interscholastic Athletic Programs

Title IX regulations require that a school provide equal athletic opportunity for male and female students with respect to:

1. Athletic participation opportunities to accommodate student interests and abilities
2. Other athletic benefits and opportunities

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### Benefits & Opportunities

- ▶ Equipment and supplies
- ▶ Scheduling of games and practice times
- ▶ Travel and per diem allowances
- ▶ Coaching and academic tutoring
- ▶ Locker rooms, practice facilities, and competitive facilities
- ▶ Medical and training facilities and services
- ▶ Housing and dining services
- ▶ Publicity
- ▶ Recruitment
- ▶ Support services

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## Sticky Issues – Athletics

Most educational institutions are not in compliance

Training on athletics is limited and overshadowed by sexual harassment

OCR athletics investigations and lawsuits are lengthy and costly

Once trust is lost with the community it is hard to regain




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## Pregnancy & Parenting


- ▶ Title IX’s regulations prohibit discrimination based on pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery from any of those conditions
- ▶ Also prohibits a school from applying any rule related to a student’s parental, family, or marital status that treats students differently based on sex



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## Risky Business


- ▶ Discrimination and exclusion from the education program or activity, including any class or extracurricular activity, based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.
- ▶ That includes harassment by third parties and actions by teachers and other employees with respect to academic requirements.



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## Risky Business


- ▶ Medical and other benefits and services, meaning treating pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom differently than other temporary disabilities with respect to hospital or medical benefits, services, plans, and policies for students.



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## Risky Business

- ▶ Leave policy, meaning that if other leave is not available, a school must provide leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom for as long as the individual’s physician deems medically necessary.



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## 2022 Fact Sheet

- ▶ Issued on the 100th day after the U.S. Supreme Court overturned Roe v. Wade
- ▶ Does not provide new law but it is a clear warning to schools that specific actions concerning students and employees seeking or who have received abortions could lead to administrative enforcement from OCR



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## 2022 Fact Sheet

- ▶ Title IX requires educational institutions to protect their students and employees from discrimination on the basis of pregnancy, including pregnancy termination and recovery therefrom.
- ▶ Schools:
  - > Cannot treat students or employees differently because they obtained an abortion.
  - > Must treat abortion like any other temporary disability for hospital and medical benefits, services, plans, and policies.
  - > Must provide leave to individuals for termination of pregnancy or recovery therefrom for as long as the student or employee's physician says it is medically necessary.



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## 2022 Fact Sheet

Schools cannot treat requests for leave related to abortion differently than other temporary disabilities with respect to commencement, duration, and extensions of leave, payment of disability income, accrual of seniority or any other benefit or service, and reinstatement, along with any other employment-based benefits.



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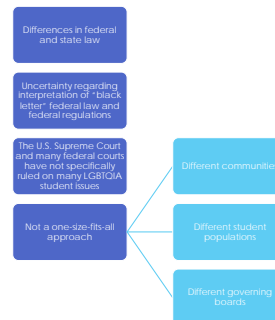
## Transgender FAQs

Preferred Name	Preferred Pronouns	Records	Intimate Facilities • Bathrooms • Showers • Locker room	Attire
Programs / Activities	Overnight Trips	Parental Notice/ Rights (for Minors)	Harassment/ Bullying	Athletics



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## Unclear Answers




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## What we know for certain....

Title IX protects all students, including transgender students, from discrimination and harassment because of the student's sex—which includes the student's deviation from stereotypical gender norms (sex stereotyping, gender stereotyping)

Same-sex sexual harassment is prohibited



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## Sticky Issues – Transgender

State law conflicts (athletics, facilities)

Lack of court guidance and OCR enforcement on those issues

Fierce community and media scrutiny

Confusion by employees




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## Non-Compliance Penalties

Most Common

- ▶ OCR Remedial Action
  - Resolution agreement/monitoring
  - Can lead to process to remove federal funds (lengthy process)
  - Involves a hearing
  - Subject to judicial review

34 CFR 106.3(a), 34 CFR 100.7(d), 100.8, 100.9




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## Non-Compliance Penalties

Less Common

- ▶ Impact on Grant Funds—even before option to enter resolution agreement
- ▶ A reference to the DOJ with a recommendation that it file suit
- ▶ Lawsuits filed by alleged victims or perpetrators in Federal court





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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 May 2023
- 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 educational institution'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




- 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



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## 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 educational institution and in the U.S., the educational institution **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 (240,000+ comments)
- ▶ Purported release date for final rule May 2023, with an effective date in August 2023; 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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### My educational institution has already started thinking about implementing the 2022 Title IX regs

Yes

No




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**How to Make—and Keep—a Resolution to Prepare for the New Title IX Rules**

© JANUARY 19, 2023

IN THE NEWS, POLICES AND PROCEDURES, PROPOSED REGULATIONS, TRAINING

[www.titleIXtips.com](http://www.titleIXtips.com)



We are barely into 2023, and it's shaping up to be the biggest year yet for Title IX. From transgender bathroom bills and athletic participation battles to growing scrutiny on general athletics safety and support and operating students, Title IX will continue to have its moment in the sun in 2023 as it has for the past few years. Of course, the biggest news for Title IX in 2023 will undoubtedly be the issuance of the Biden administration's new Title IX rule. The Department of Education recently confirmed that it intends to host the new regulation on schools in May 2023. Schools, colleges, and universities will once again have to comply with an entirely new grievance structure quickly over the summer.


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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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**Prevention Efforts**

- ▶ Education of the community about sexual harassment and the educational institution's policies and processes, including working with campus, student services, and human resources personnel to ensure the reporting process is well-publicized
  - Campus handbooks
  - Faculty & staff handbooks
  - Informational material to students (and parents of minor students)
- ▶ Training for personnel on how to prevent, identify, report, and respond to sexual harassment in schools
- ▶ Training for students (and parents of minor students) on how to identify and report sexual harassment in schools

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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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**Responding to Reports**

- ▶ Intake
- ▶ Emergency Removal/Administrative Leave
- ▶ Supportive Measures/Formal Complaint Meeting
- ▶ Implementing Supportive Measures
- ▶ Signing a Formal Complaint
- ▶ Considering Dismissal
- ▶ Overseeing Investigation, Decision, and Appeal
- ▶ Implementing Remedies

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SCENARIO #1

Chanda, a student, reports a sexual relationship with Mx. Robin, an “at will” adjunct professor in the math department. Chanda took a course from Mx. Robin during the first semester of freshman year, when Chanda was a minor. The two were first intimate after Chanda was no longer a student in the course but still enrolled as a student. When Mx. Robin broke things off, Chanda looked at the relationship clearly for the first time and fears it was inappropriate. Chanda dropped out of college because of the stress and depression related to the relationship. Chanda reported out of concern about other students being similarly taken advantage of.

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SCENARIO #1

Chanda was in Mx. Robin’s class during the first semester of college. 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.

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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 leg while they were talking.

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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.”

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SCENARIO #1

Mx. Robin came to a party that Chanda also happened to be at just after the semester ended. At the party, Mx. Robin kissed Chanda. Chanda “gave in” because Mx. Robin had been so persistent. Mx. Robin ended the relationship after a few months.

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**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 of a minor, a type of T9SH

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

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**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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**What About the Respondent?**

- ▶ There is no similar rule for respondents
- ▶ Permissive dismissal is allowed if the respondents “enrollment or employment ends”
- ▶ Must not be unreasonable in light of the known circumstances (“deliberately indifferent”) to dismiss

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

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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

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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**If It's Not Title IX Sexual Misconduct**

Title IX SH

Supportive Measures + Other Policy

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**Tip**

- ▶ Just because conduct is not Title IX Sexual Harassment does not mean you will ignore it; you will 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.

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

An educational institution receiving federal funds

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

An educational institution receiving federal funds

in which an Official With Authority has actual knowledge


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## ANY Notice or Knowledge

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


*By an "Official With Authority"*



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## REMEMBER

- ▶ Any person **may report** sex-based discrimination to any OWA, including the Title IX Coordinator
- ▶ Every OWA **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



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## Test Yourself

A student, Carson, mentions to another student, Frankie, while walking down the hall that a professor is sexually harassing them (clearly SPOO). An OWA overhears.




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Is there actual knowledge?

Yes No

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## Test Yourself

An anonymous report is made through the online reporting system that an unnamed student sexually assaulted Carson, another student




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Is there actual knowledge?

Yes No

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## Test Yourself

An OWA hears from staff members that a student, Carson, and a TA supervising the student are having a consensual relationship



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### Is there actual knowledge?

Yes No

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

An educational institution receiving federal funds

in which an Official With Authority has actual knowledge

of Title IX "sexual harassment"

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### Title IX Sexual Harassment Is....

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

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### Title IX Sexual Harassment Is....

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### Unwelcome Conduct

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

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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?

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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 very popular and Carson didn't want to be an outcast.



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### Is the conduct unwelcome?

---

Yes No

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### Title IX Sexual Harassment Is....

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



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### Title IX Sexual Harassment Is....


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



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

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



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## Title IX Sexual Harassment Is....


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



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## Title IX Sexual Harassment Is....


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



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## “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”)

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## #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

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## #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**

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## 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

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## #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

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## #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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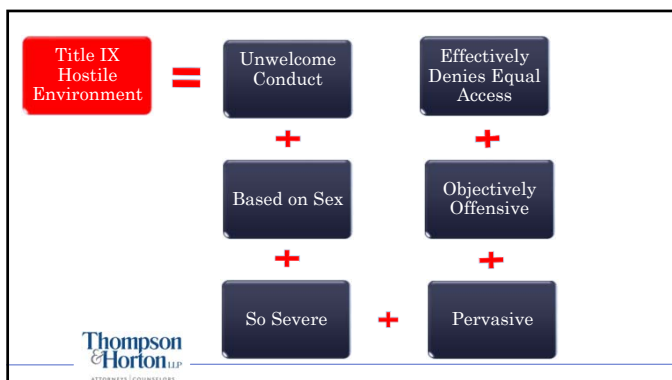
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**“Title IX Sexual Harassment”**

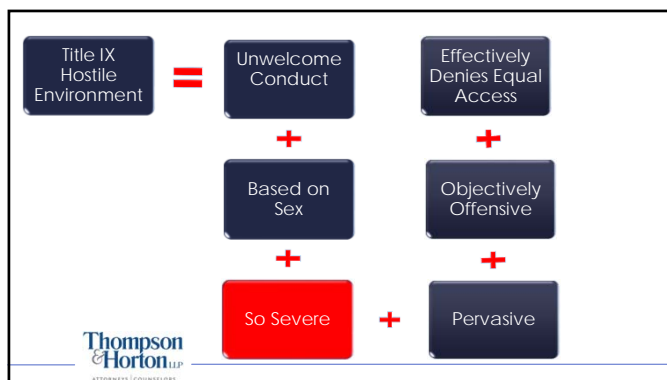
**The Title IX “Big 5”** OR **Title IX “Hostile Environment”**

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

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**Dictionary 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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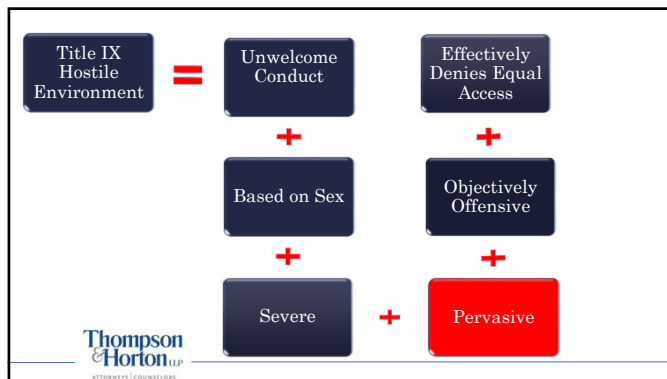
## Case Law Definitions

- ▶ “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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**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)




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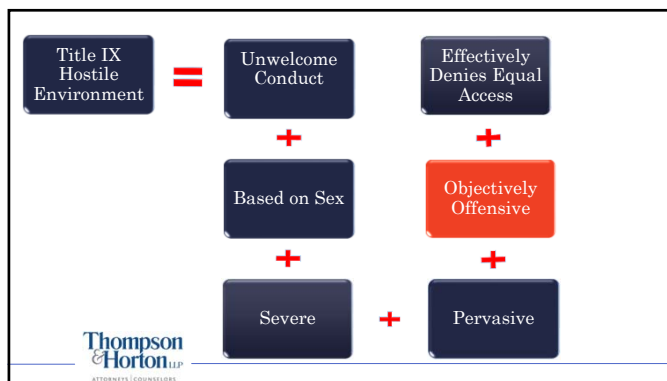
## Case Law Definitions

- ▶ “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)



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108

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

---

Objective                      Subjective

109

## Dictionary Definition

**“Objectively Offensive”**

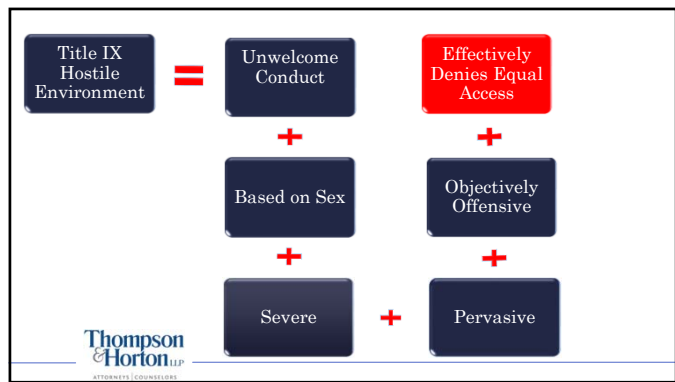
- ▶ “Objective”: Existing independently of perception or an individual's conceptions (Reverso)
- ▶ “Offensive”: Unpleasant or disgusting, as to the sense (Reverso)

110

## 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.

111



112

## 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

113

## Effective Denial


Examples may include:

- ▶ Skipping class to avoid a harasser
- ▶ A decline in a student’s grade point average
- ▶ Difficulty concentrating in class
- ▶ An athlete who quits the team but carries on with other school activities following sexual harassment

114

### 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: Title IX 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

116

### TEST YOURSELF

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

117

### Test Yourself

An employee reports that basketball players regularly slap each other on the butt during games.




118

### 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



119

### Test Yourself

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




120

**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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121

**Test Yourself**

An unknown student airdropped a video in the student center of a student, Carson, engaging in sexual activity with an unknown person off campus.



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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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123

**Test Yourself**

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's fingers touched Carson's crotch through the clothing.



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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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125

**Test Yourself**

Professor Peterson serves as the advisor for intramural debate. Carson tells the professor how much they want to be on the team for an upcoming meet. The professor offers to put Carson on the team if they come by office hours to help with some projects they will consider it. When Carson shows up, Professor Peterson asks Carson for a backrub as one of the "projects."



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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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127

**Test Yourself**

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



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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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129

**Test Yourself**

Carson reports that Robin often takes pictures of Carson at 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."



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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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131

**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.



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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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133

### Title IX Sexual Harassment Is....

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

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### 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 of a minor, a type of T9SH
- No, because Mx. Robin is "at will" and can be terminated without any process

135

**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.

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

- Yes, because educational institutions often take "long arm jurisdiction" over off-campus conduct between students
- No, because the conduct occurred off campus
- No, because the school has no control over the Respondent's home

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

- An educational institution receiving federal funds
- in which an Official With Authority has actual knowledge
- of Title IX "sexual harassment"
- in its "education program or activity"



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## Education Program or Activity

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



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

139

## TEST YOURSELF


Is it in a Program or Activity?

140

## Test Yourself

Student Robin allegedly sexually assaulted student Carson in the bathroom on campus.




141

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

---



Yes No

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142

## Test Yourself

Robin allegedly sexually assaulted Carson during free time at the hotel on a trip with an athletics or intramural program.

143

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

---

Yes No

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### Off-Campus Events & Activities

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



145

### Test Yourself

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



146

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

Yes

No

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147

### Test Yourself

Robin allegedly sexually assaulted Carson over summer break at Carson's house. Carson says students are spreading rumors now about Carson being "fast."



148

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

Yes

No

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149

### Test Yourself

Carson reports sexual harassment by Robin online. Both students were at home off campus using personal devices. No harassment is alleged to have occurred on campus, but Carson 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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**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.

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

Yes, because educational institutions often take "long arm jurisdiction" over off-campus conduct between students

No, because the conduct occurred off campus

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

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153

**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")

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

An educational institution receiving federal funds

in which an Official With Authority 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
- ▶ Support, support, support and look

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

- An educational institution receiving federal funds
- in which an Official With Authority 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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**First Amendment Issues**

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**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

160

**SCENARIO #3**

Charlie, a transgender female nursing student at a public college, is regularly called “he” and “him” by a member of her cohort, Riley. Riley continues to do so even after a meeting with the professor overseeing the program and warnings about how harmful the actions are; Riley says that their religion prohibits them from using female pronouns for someone who is “biologically male.”

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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

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## Two Arguments...

- ▶ The conduct is severe, but protected by the First Amendment
- ▶ The conduct is not severe because it is protected by the First Amendment

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## Tinker and Healy

- ▶ “The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.” *Healy v. James*, 408 U.S. 169, 187–88, (1972)
- ▶ May prohibit speech if there is evidence that it “materially and substantially disrupt[s] the work and discipline of the school.” (quoting *Tinker*)

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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”

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## What is Disruptive?

- ▶ “The University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education. Yet it seems equally apparent that it has available numerous alternatives to imposing punishment on students based on the viewpoints they express.” *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993)

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## What is Disruptive?

- ▶ A university can prohibit “fighting words”– words which by their very utterance tend to incite an immediate breach of the peace. But it cannot prohibit all hate speech as fighting words.
- ▶ “Words which demean a person’s race, sex, religion, etc. are likely to inflict injury and affect a person’s sensibilities....[However, speech] may demean an individual’s characteristics without tending to incite that individual or others to an immediate breach of the peace.” *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisconsin Sys.*, 774 F. Supp. 1163, 1169–70 (E.D. Wis. 1991)

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SCENARIO #4

Charlie, a transgender female nursing student at a public college, is regularly called “he” and “him” by members of her cohort, Riley. Peers also call Charlie “trannie” and “she-male,” and “it.” The peers often laugh when using these terms or pronouns with Charlie in front of patients. The peers 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

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**SCENARIO #5**

Channing is a transgender student in Professor Price’s statistics class. When directed to use Channing’s preferred pronoun, Prof. Price objects, saying that it goes against their religion. The Dean initially offered an accommodation, allowing Prof. Price to use all students’ last names only in the effort to avoid pronouns and first names.

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**SCENARIO #5**

Channing filed a complaint regarding Prof. Price’s refusal to acknowledge Channing’s gender, however. A student who had taken a class with Prof. Price before noticed the change in the Professor’s practice and asked about it. Channing felt compelled to “out” themselves to the student in explanation. Channing feels tension in the class now, feeling everyone knows why Prof. Price only uses last names in this particular class. When the college demands that Prof. Price use Channing’s preferred name and pronouns, Prof. Price refuses.

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**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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**Employee Free Speech**

- ▶ 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)

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**SLATE**

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

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## 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.



175

## 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.'"



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## 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."



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## Coordinator Considerations

- ▶ If religious or First Amendment justifications are provided, a progressive and interactive process is best practice
- ▶ Particularly where individual complaints are involved, care should be taken to determine if misgendering has created a hostile environment and, if so, to respond
- ▶ The state law landscape is more varied; make sure you are aware of your state law



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## Coordinator Considerations

- ▶ Human resources needs to be brought into the fold with Title IX training even if they aren't technically involved
- ▶ Gold standard is training for all individuals involved in implementing discipline for students and employees; not just leadership




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**SCENARIO #6**


Taylor, a student, reports that another student, Charlie, was sexually harassed by a faculty member, Mx. Rowan. Taylor 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.



181

**Should the Title IX Coordinator sign a formal complaint?**

- No, it will be easier to address the conduct through a non-Title IX procedure, so it should be done that way
- No, the Title IX coordinator should respect the autonomy of the complainant and not override their decision
- Yes, the conduct alleged involves an employee using a position of authority to engage in sexual misconduct
- Yes, any time there is a pattern of behavior by the same alleged perpetrator the T9C should sign a formal complaint




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**“Signing” a Formal Complaint**

Examples of circumstances where it might be warranted:

- ▶ Actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority
- ▶ A Title IX Coordinator receives multiple reports of sexual harassment against the same respondent.




183

**“Signing” a Formal Complaint**

Factors to consider:

- ▶ Involvement of violence, weapons, or similar factors
- ▶ Seriousness of alleged conduct
- ▶ The age(s) of the complainant(s)
- ▶ Other complaints against the same respondent



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**What are Charlie's rights in the Title IX grievance process?**

- Because they did not sign the formal complaint they are treated as witnesses
- Because they did not sign the formal complaint the T9C should give them the option to have the rights of complainants in the process
- Because the T9C signed the formal complaint, they must be treated as complainants



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**Complainant’s Role**

- ▶ The complainant is *always* the alleged victim
- ▶ The complainant (and parents/guardians of a minor complainant) *always* must be afforded the rights granted to complainants in the Title IX rules



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**SCENARIO #7**

A staff member comes to you to report an interaction they saw on campus that was concerning. One student, Roshan, appeared to force another student, Cody, into a French kiss. Cody pushed Roshan away and walked off.

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**SCENARIO #7**

When you talk to Cody, Cody said that the incident happened. Cody and Roshan are assigned to the same group project and it was clear Roshan had a crush on Cody. During the incident in question, Roshan and Cody were talking and Cody said they didn't like Roshan "like that." Roshan said, "I can tell you do, come on" and pulled Cody toward them and moved in for a kiss.

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**SCENARIO #7**

Cody confirmed pushing Roshan off and walking away. Cody said that this was the first time something like this happened. Cody adamantly does not want an investigation or even to be identified to Roshan as having made a report. Cody said the incident has had a horrible effect on them, leading to missed classes, inability to sleep at night, and a general fear of being physically close to others.

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**Should the Title IX Coordinator Sign a Formal Complaint?**

- No, because the conduct is not Title IX "sexual harassment"
- No, because Cody does not want to sign a complaint
- Yes, because of the horrible effect on Cody
- Yes, because the conduct is so serious

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190

**If no formal complaint is signed or filed, what can the Title IX Coordinator do**

- Nothing--without a formal complaint, the educational institution cannot respond
- Offer Cody supportive measures but cannot impose disciplinary or punitive consequences on the respondent
- Offer Cody supportive measures and then send the matter to your non-sexual harassment process

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**SCENARIO #8**

Faculty member Smith reports a concern that members of the student organization they sponsor may be engaging in hazing of new members, including using foreign objects to penetrate students' anuses over the clothing. Sponsor Smith denies ever having heard about the conduct in prior years, but says a student (Tanner) reported it earlier in the week and that's the reason for the report now. Sponsor Smith does not know who any specific students are who are involved; the reporting student said they were not.


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**SCENARIO #8**


You contact the reporting student, Tanner, and Tanner says that students have been engaged in this conduct against recruits for years. Tanner identifies one student who has been the target this year, Carmen. You talk to Carmen, and Carmen reports that the conduct occurred on campus one time.



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**SCENARIO #8**


Tanner does not know who the alleged perpetrators are. Carmen does know but refuses to identify the individuals involved. Carmen also refuses to sign a formal complaint. Carmen is doing great in school, is engaged in the organization, and reports no effects whatsoever from the incident.



194

**What should the Title IX Coordinator do next?**

- Not pervasive; use non-T9 process
- No effective denial; use non-T9 process
- Explain to Carmen that no investigation can occur, offer supportive measures
- Explain to Carmen that without the Respondent's name, you can't sign a formal complaint; provide supportive measures
- Sign a formal complaint



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**Carmen does not participate in the investigation, which finds no witnesses and no named alleged perpetrators. What happens next?**


- The Title IX Coordinator can dismiss the formal complaint because there is no way the allegations can be proved
- The Title IX Coordinator can dismiss the formal complaint because there is no one to impose consequences against
- The matter should continue to the decision-making process but only if Carmen agrees to participate as a witness
- The matter should continue to the decision-making process because the conduct alleged, if proved, would be sexual assault



196

**Coordinator Considerations**

- ▶ Signing formal complaints will be less common in cases involving student-on-student conduct
- ▶ Similar considerations should be considered when deciding whether to dismiss for a permissive reason
- ▶ When employees are involved in the allegation, signing formal complaints/declining to dismiss will be more common
- ▶ The decision—either way—must be reasonable in light of the known circumstances




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**SCENARIO #6 (Again)**


Taylor, a student, reports that another student, Charlie, was sexually harassed by a faculty member, Mx. Rowan. Taylor 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.



199

**SCENARIO #6 (Again)**


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



200

**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



202

## Consolidation

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



203

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

---

True False

204

**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.

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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.

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**SCENARIO #9**

Chris and Rory share a friend group, 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.

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

Chris; Rory's complaint is retaliation against Chris so 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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## Cross-Complaints

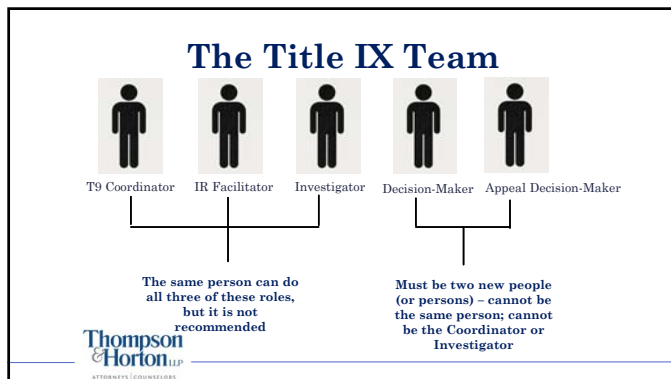
- ▶ Do not ignore cross-complaints
  - The "no judgment before decision" rule applies equally to cross-complaints
- ▶ Consider consolidation

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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

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### Step #0: Intake

- ▶ 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

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### Step #0: Intake

- ▶ 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 institution can evaluate whether the conduct should be addressed under Title IX

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### Step #0: 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 #0: 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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## Step #0: 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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## Step #0: Intake - Questions

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



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## Step #0: Paperwork

- ▶ Recommended to complete an intake form; definitely take notes (T&H Guidebook form available)
- ▶ Document any steps following the interview (recommend follow up communication to the Complainant)



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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 institution 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
- ▶ Changes to class schedule, work schedule or site, parking site, housing, routes to buildings on campus
- ▶ 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

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

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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 campus generally on an emergency basis



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**Step #2: Emergency Removal**

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

**WHAT:** Removal from a program or activity on an emergency basis (class, activity, campus 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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**Robin allegedly raped Carson at school. Can Robin be removed on an emergency basis?**

---

Yes No

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

---

Yes No

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231

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

---

Yes No

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

---

Yes No

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**Step #2 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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## Formal Complaint

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

July 2021 OCR Q&A




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## Formal Complaint

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


July 2021 Q&A



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## Formal Complaint

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



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### Step #3: Notice of Allegations

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

- ❖ The institution'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 institution'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
- ▶ See the T&H Guidebook


Note: This notice is required before you first meet with the Respondent.



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### No More Confidentiality

- ▶ Once a formal complaint has been filed or signed, the institution **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
- ▶ Explain this to the Complainant during the supportive measures meeting so they know the consequences of filing a formal complaint



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### Step #4: Consider Dismissal

#### Responsibilities

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




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

APPEAL



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## 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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## 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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## Informal Resolution

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



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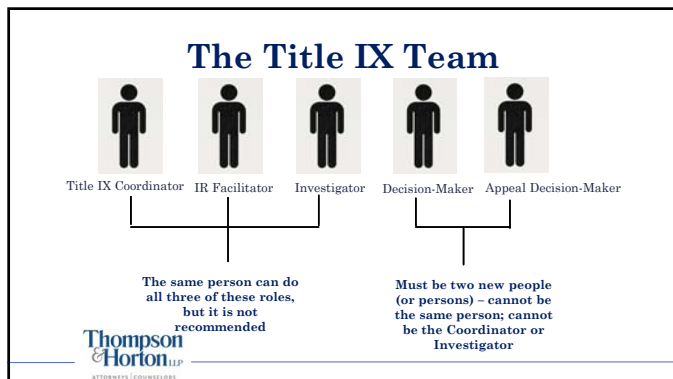
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## Investigation Rules

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

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## Directly Related Evidence

- ▶ Term is not defined in the rules
- ▶ Statements, notes of interviews, and other evidence collected in the investigation (may include drafts)
- ▶ May include audio and video recordings of interviews
- ▶ Even evidence the school doesn't think it will use

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## Investigation Report

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

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## Relevance

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

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## Relevant Evidence Includes

“Inculpatory Evidence”

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

“Exculpatory Evidence”

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



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## Never relevant without consent

Evidence subject to legal privilege

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

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

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

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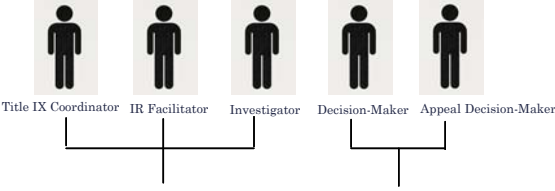
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## The Title IX Team



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

Must be two new people (or persons) - cannot be the same person; cannot be the Coordinator or Investigator

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## Step #7: Hearing

- ▶ Can be a single decision-maker or a panel
- ▶ Live hearing is required with live cross examination by an advisor
  - Must make a ruling on relevance for each question
  - Remember Exceptions:
    - Medical treatment records
    - Privileged information
    - Information about the complainant’s past sexual history or predisposition unless for limited uses authorized by the rule

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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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## Coordinator Considerations

- ▶ Are your procedures ready for a hearing? Consider:
  - Advisor behavior guidelines
  - Advisor role expectations
  - Process to be used for hearings
    - Just cross examination? What else?
    - Who questions first?
    - Who does opening/closing statements?



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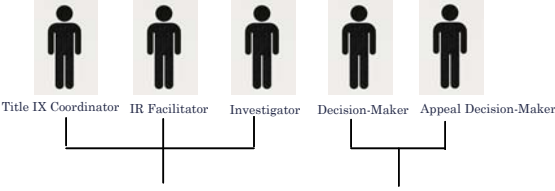
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## Step #7: Appeal


- ▶ Each party can appeal a (1) dismissal and (2) written determination
- ▶ Can appeal on limited, specific bases (unless educational institution 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
- ▶ Reviews the written determination and other file documents as necessary, including any written response to the appeal
- ▶ Issues a written decision including the result and rationale



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After a conviction for conduct that, if proved, would be covered by the Title IX grievance process, the school must complete its own Title IX investigation

True False

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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."

"[T]he standards for criminal investigations are different, [so] 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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**Some Delay Is OK**

- ▶ The educational institution 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 educational institution must send written notice to *both parties* regarding the delay or extension and the reason(s) for the delay or extension
- ▶ Concurrent law enforcement activity is **not** good cause to delay sending the written notice of allegations or delay to the complainant or respondent
- ▶ **T&H Guidebook Document 23 – Notice of Extension of Timeframes**

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**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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**RECORDS**

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**Recordkeeping**

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

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**SERVING IMPARTIALLY**

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### Serving Impartially

The 2020 Title IX regulations require that any individual involved in the Title IX process—Title IX Coordinator, investigator, decisionmaker, appellate decisionmaker, or informal resolution facilitator—not be biased, have a conflict of interest, or prejudice any matter before them



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### Impartial Approach

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



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### Impartiality Do’s and Don’t’s

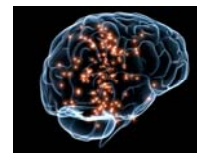
- ▶ Ensure your team is open with the Title IX Coordinator about any concerns
- ▶ Team should follow the process “to the T” and include all relevant evidence in the investigative report, written decision, and appeal decision
- ▶ Do not assume or infer the existence of facts or the outcome, “connect the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



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### 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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SCENARIO #10

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.




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**SCENARIO #10**


Scenario 10(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.



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## Polling Access



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**Was there consent?**

---

Yes No


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**SCENARIO #10**

Scenario 10(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.



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**Was there consent?**

---


Yes No

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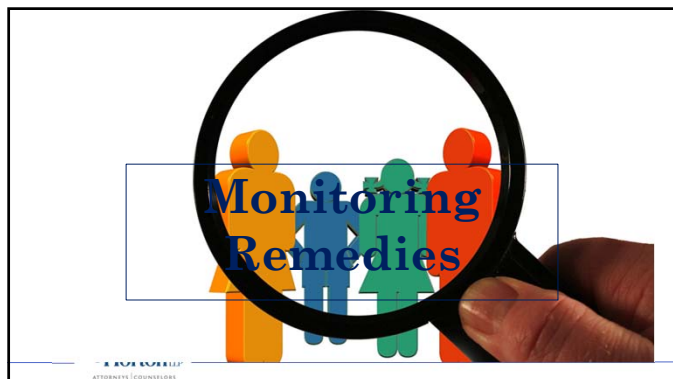
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## Remember

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



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**SCENARIO #11**

Carrington, a student, reports that another student, Rowan, engaged in what you determined to be severe, pervasive, and objectively offensive behavior that would effectively deny a reasonable person equal access to your education program or activity. As remedies, Rowan received a short disciplinary consequence, a no contact order was put in place between the students, it was agreed the students would not be in the same classes, and Carrington was offered counseling.

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**SCENARIO #12**

Carrington claims that Rowan repeatedly violated the no contact order, calling Carrington names and spreading rumors about them. Carrington and Rowan also inadvertently were in the same class during one class period this semester. Carrington did not tell anyone about the continued harassment after the plan was put in place.

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**Does the educational institution risk liability under Title IX based on Rowan's post-resolution conduct?**

Yes, because Rowan violated a no contact order

Yes, because the remedial efforts were not effective

No, because Carrington did not report the conduct to anyone

No, because the post-resolution conduct is not sufficiently severe, pervasive, and objectively offensive to trigger Title IX

None of the above

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**Moore v. Freeport Cmty. Sch. Dist., 2021 WL 5179917 (N.D. Ill. 2021)**

- ▶ A school district "failed to properly investigate" allegations of continued sexual harassment and violations of a safety plan
- ▶ Teacher observed or were told about the continued conduct
- ▶ Telling a complainant that a safety plan will be implemented does not automatically absolve the educational institution of liability under Title IX. Title IX still requires that an educational institution not unreasonably respond to known student-on-student harassment
- ▶ The District did not actually enact the alleged safety plan, thereby allowing the harassment to continue the rest of the semester. That it allegedly did not follow its own safety plan—after harassment continued for weeks—is enough to allege deliberate indifference, and enough to allege that the District's response was clearly unreasonable

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## Case Study #1

Cary has skipped the last several meetings for group projects. They tell group member Wynn that they are skipping because they began receiving sexually charged messages from another student in the group and the messages make them too uncomfortable to attend the meetings. Wynn reports this to the Title IX office, remembering from orientation that it was best to report any unwelcome sex-based behavior.

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## Brainstorm – Case Study # 1

- ▶ How do you assess this report?
- ▶ What should be your next step?
- ▶ Who do you need to meet with?
  - What information do you need to obtain?
  - What information do you need to provide?

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## Practice – Intake Meeting

Coordinator Intake Notes: [Case Study # 1 - Coordinator Notes.docx](#)

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## Practice – Intake Meeting

Coordinator Intake Notes: [Case Study # 1 - Coordinator Notes.docx](#)

Complainant Script: [Case Study #1 Complainant Script - Intake.docx](#)

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## Case Study #1 – More Details

Cary has received sexually charged private messages from Remi, a student they share a class and group project with, through social media. The messages began with comments that Remi loves Cary's tight pants, and that Remi knows Cary wears those types of clothes to turn on Remi.

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## Case Study #1 – More Details

They escalated to comments about wanting to engage in sexual activity with Cary, including very explicit words describing the desired conduct. Remi also sent links to internet pages with descriptions of explicit sexual fantasies, including those involving violence and lack of consent, with questions to Cary about what they fantasized about.

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### Case Study #1 – More Details

Cary does not want any corrective action taken and was worried about the other student seeing Cary as “mean” or overreacting.



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### Brainstorm – Case Study # 1

- ▶ Does the additional information change your assessment of this report?
- ▶ What should be your next step(s)?



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### Case Study #1 – Second Report

The Title IX staff member recommended that Cary communicate to Remi that they did not want to receive any messages from Remi and block Remi’s accounts.

Cary did so, but this week started receiving messages from a new phone number, including sexually charged comments from Remi. Finally, Remi sent a nude photo to Cary via Cary’s school email account. That was the last straw, and Cary returned to the Title IX office. Cary reports experiencing heightened anxiety levels from this experience and now wants to do something formal to get Remi to stop.



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### Brainstorm – Case Study # 1 (Second Report)

- ▶ What supportive measures can you put in place?
- ▶ What should be your next steps?
- ▶ What information do you need to provide and to whom?



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### Writing Exercise – Case Study # 1

- ▶ How would you describe these allegations in the Notice of Allegations?
- ▶ What other information do you need to include in the NOA?



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### Informal Resolution

Remi asks if the parties can engage in informal resolution. Is it appropriate to do so? What issues should you consider?



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## Case Study #2

A student, Cao, enrolled at the College this semester. Cao reports to the Title IX Coordinator that they were sexually assaulted and abused by Reese, a college employee, in a previous relationship years ago and do not feel comfortable on campus with Reese. Cao completes and turns in a formal complaint form under Title IX.



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## Brainstorm – Case Study # 2

- ▶ How do you assess this report?
- ▶ What should be your next steps?
- ▶ Who do you need to meet with?
  - What information do you need to obtain?
  - What information do you need to provide?



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## Practice – Intake Meeting

Coordinator Intake Notes: [Case Study # 2 -](#)

[Coordinator Notes - Copy.docx](#)

Complainant Script: [Case Study #2](#)

[Complainant Script - Intake.docx](#)

Advocate Script: [Case Study #2 Advisor](#)

[Script - Intake.docx](#)



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## Case Study #2 – More details

- The alleged assault happened before Cao was enrolled or Reese was employed by your institution.
- Reese is an instructor in the art department. Cao is a business student and does not intend to take any art classes as part of their course of study.
- Cao has seen Reese more than once on route between two classes and has also run into Reese in the cafeteria closest to the business school building.



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## Brainstorm – Case Study # 2

- ▶ How do you assess this report?
  - Is this covered by Title IX?
  - Is it covered by any other code of conduct?
- ▶ What should be your next steps?
  - What supportive measures can you offer?



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## Case Study #2 - Impartiality

You (if you completed the intake) or the Title IX staff member (who completed the intake) is a former coworker of Cao's. There was not a good relationship, and in fact were part of a grievance dispute against each other.



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## Brainstorm – Case Study # 2

- ▶ How will you assess impartiality?
- ▶ How do you assess the allegations?
- ▶ What should be your next steps?



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## Informal Resolution

Reese asks if the parties can engage in informal resolution. Is it appropriate to do so? What issues should you consider?



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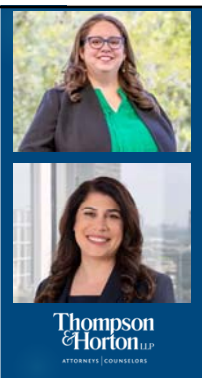
**QUESTIONS?**  
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