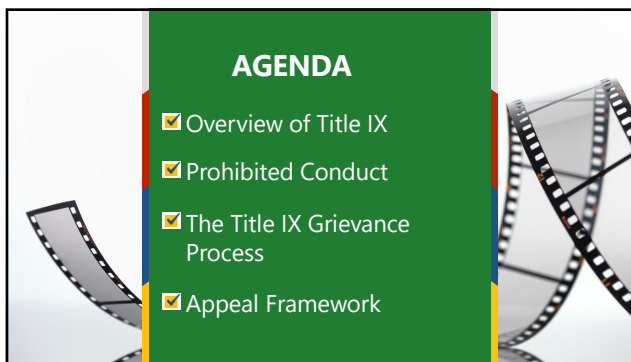


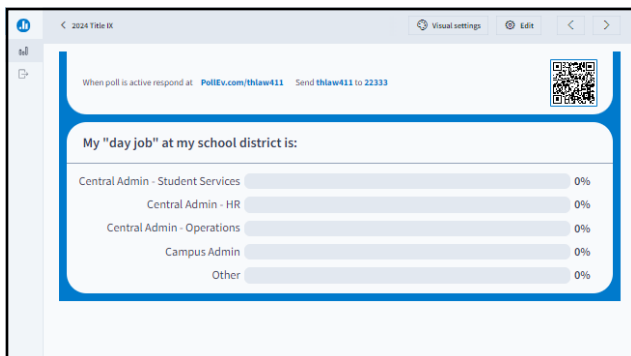
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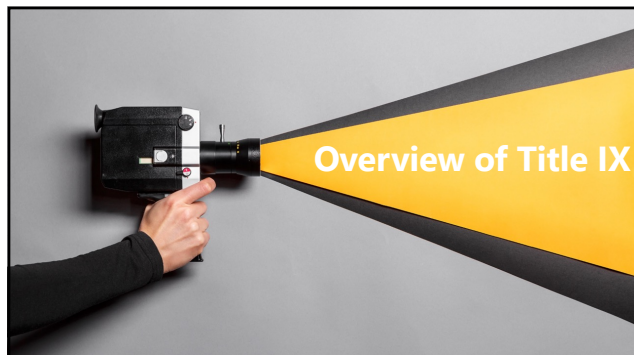
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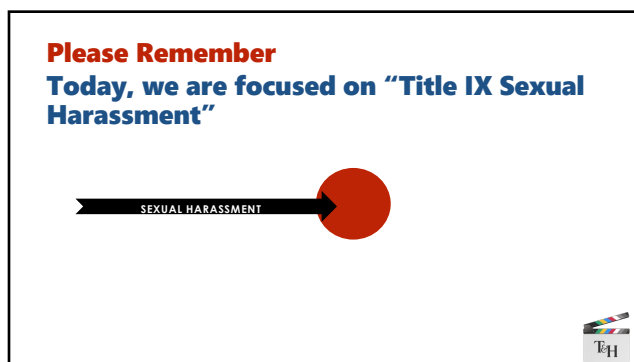
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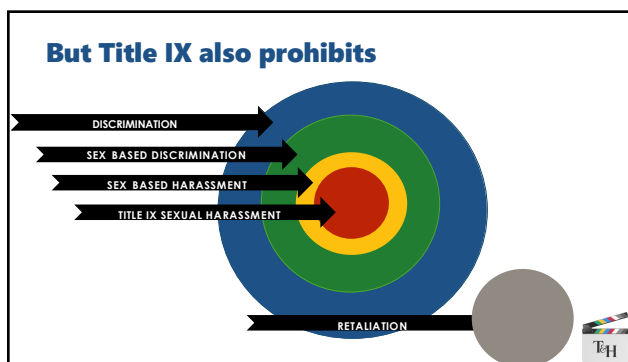
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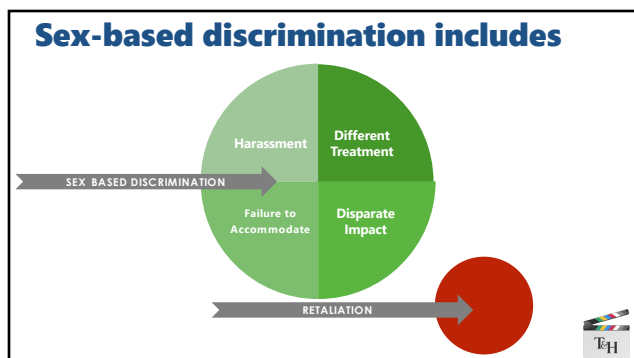
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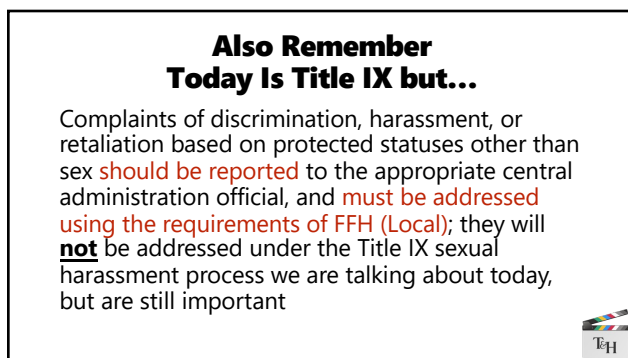
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12



Sex-Based Harassment

"Sex-based harassment . . . is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex," including sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.



14

Sex-Based Harassment

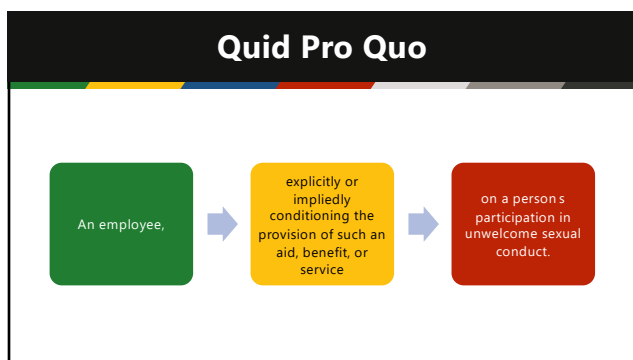
- ▶ Employee Quid Pro Quo
- ▶ Hostile Environment Harassment
- ▶ The "Big Four"—Sexual Offenses
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - Stalking

15

Sex-Based Harassment

- ▶ **Employee Quid Pro Quo**
- ▶ Hostile Environment Harassment
- ▶ The "Big Four"—Sexual Offenses
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - Stalking


16



17

Quid Pro Quo

- ▶ "Sleep with me and you will receive an A"
- ▶ "Your low grade had nothing to do with you not wanting to go out with me"
- ▶ "If you don't sleep with me, I won't renew your position"
- ▶ "Go for a drink with me and I'll make sure you get that raise you've been seeking"
- ▶ "Come to my room tonight at this conference so we can talk about that recommendation you asked me for. I feel like I need to get to know you better."



18


Sex-Based Harassment

- ▶ Quid Pro Quo Harassment
- ▶ **Hostile Environment Harassment**
- ▶ The “Big Four”—Sexual Offenses
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - Stalking

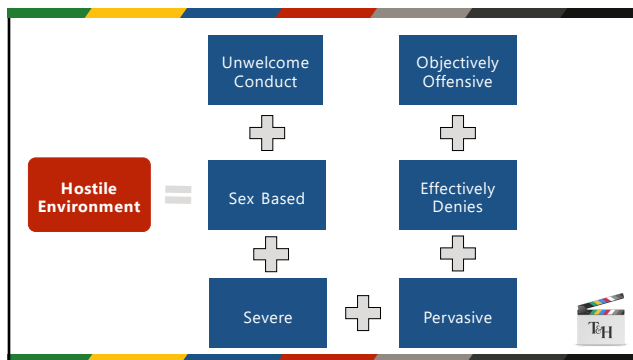
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Hostile Environment

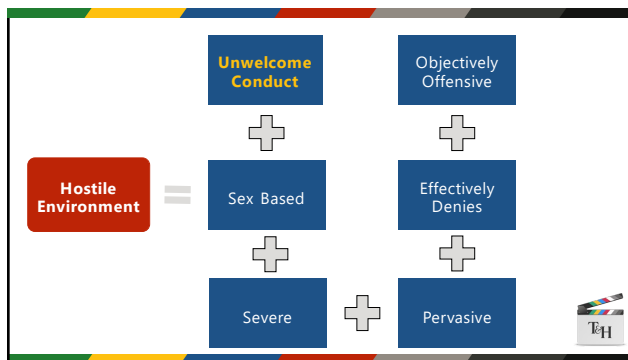
Unwelcome sex-based conduct that, based on the totality of the circumstances, is so **severe, pervasive, and objectively offensive** that it **effectively denies** a person’s equal access to the recipient’s education program or activity (i.e., creates a hostile environment).



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21



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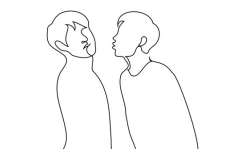
Unwelcome

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



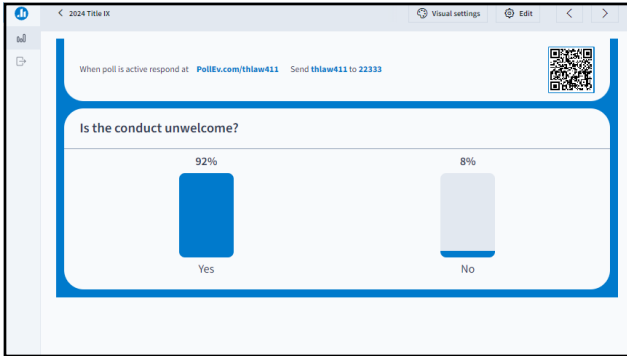
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Welcome?

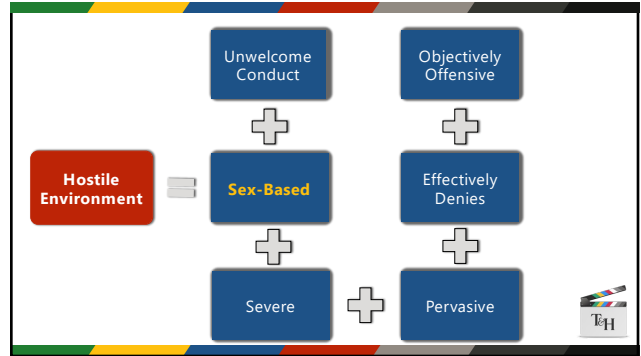


Student Cole reports that Ryan asked Cole for a kiss. Cole did not say no. Cole reports looking at Ryan uncertainly, however, and not kissing Ryan back. When asked for details, Cole said they were too afraid to say no because Ryan is a “cool kid,” and Cole didn’t want to be an outcast.

24



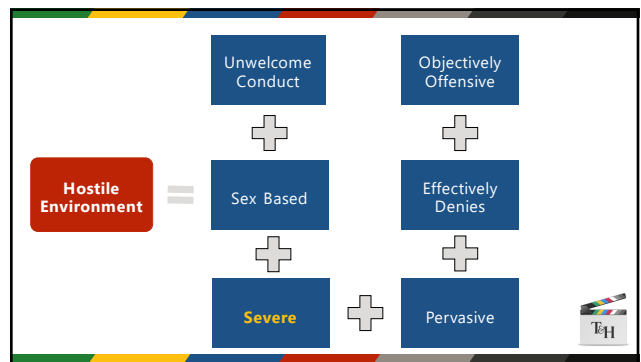
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26

- ### Hostile Environment Sex-Based Harassment Includes
- ▶ "Sexual" harassment
 - ▶ Otherwise "sex based" harassment (e.g., involving a sexual body part, even if not "sexual")
 - ▶ Harassment based on gender (e.g., stereotypes of women's roles)
 - ▶ Harassment based on sexual orientation
 - ▶ Harassment based on gender identity

27



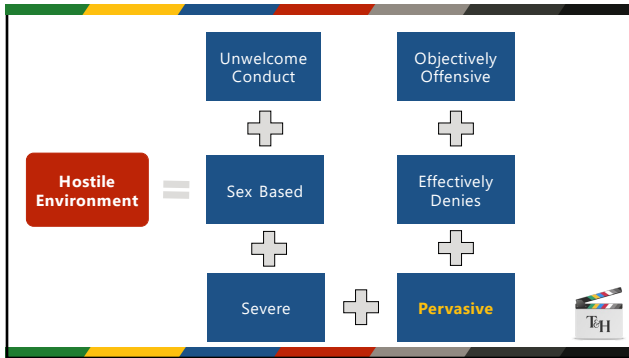
28

- ### Severe
- ▶ Nature and degree of the harassment
 - ▶ **Severe:** "causing very great pain, difficulty, worry, damage, etc.; very serious" (Cambridge Dictionary)
 - ▶ **Severe:** "very bad, serious, or unpleasant"; "causing a lot of physical pain or suffering;" "very harsh" (Britannica Dictionary)

29

- ▶ "Courts [] must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable to adults ... Indeed, at least early on, students are still learning how to interact appropriately with peers.
- ▶ Simple acts of teasing and name calling among school children are not enough, even where the comments target differences in gender
Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999)
- ▶ Must be more than the sort of teasing and bullying that generally takes place in schools
Sanchez v. Carrollton Farmers Branch Indep. Sch. Dist., 647 F.3d 156 (5th Cir. 2011)

30



31

Pervasive

- ▶ Frequency or duration of harassment; scope or continuousness
- ▶ Systemic or widespread
- ▶ **Pervasive:** "existing in or spreading through every part of something" (Merriam-Webster Dictionary)
- ▶ **Pervasive:** "present or noticeable in every part of a thing or place" (Cambridge English Dictionary)

A photograph of a bookshelf filled with various dictionaries, including Merriam-Webster and Cambridge English dictionaries.

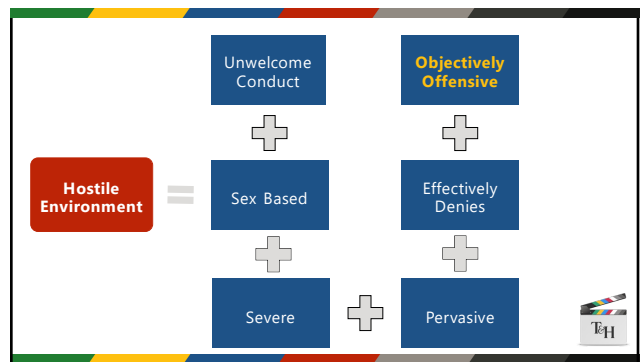
32

Pervasive ... The Courts Have Spoken

- ▶ Single or isolated incidents are generally not enough
- ▶ *Davis* limited student-on-student harassment to encompass only "pervasive" and "widespread" conduct with the "systemic effect of denying the equal access to an educational program or activity"
- ▶ Courts evaluate whether there was a "systemic or ongoing pattern of harassment," a "series of incidents," or "numerous acts of objectively offensive" conduct

E.g., Carmichael v. Galbraith, 574 F.App'x 285 (5th Cir. 2014)

33

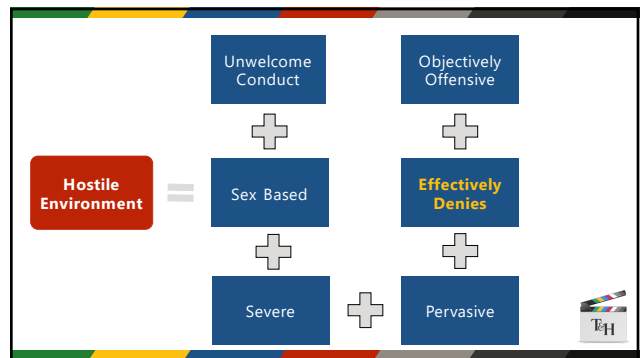


34

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

Objectively Offensive

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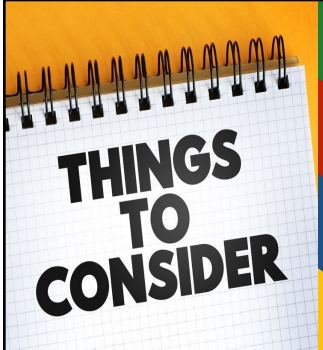
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Effectively Denies Equal Access to Your Education Programs or Activities

- ▶ Complainant must demonstrate some impact on their ability to participate or benefit from the education program or activity, but the definition does not specify any particular limits or denials
- ▶ Does not require a complainant to demonstrate any particular harm, such as reduced grades or missed classes.



37



THINGS TO CONSIDER

- ▶ The degree to which the conduct affected the complainant's ability to access the education program or activity
- ▶ The type, frequency, and duration of the conduct
- ▶ The location of the conduct and the context in which the conduct occurred
- ▶ The parties' ages, roles within the education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct
- ▶ Other sex-based harassment in the education program or activity

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Recognizing Sex-Based Harassment

- ▶ The Title IX regulations contemplate sex-based harassment occurring in a variety of circumstances
- ▶ Sex-based harassment may manifest itself multiple ways
- ▶ Key is to recognize when conduct may constitute sex-based harassment that needs to be reported
- ▶ Examples on following slides are instructive and are not an exhaustive or exclusive list of conduct constituting sex-based harassment

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Examples of Student-Student Sex-Based Harassment


- Rating other students
- Snapping bra straps of other students
- Disseminating sexual pictures, photographs, illustrations, messages, e-mails or notes
- Making sexual comments, jokes, gestures, or looks
- Intentionally brushing up against another student in a sexual way
- Blocking or cornering another student in a sexual way
- Forcing another student into a kiss or a sexual act
- Flashing another student
- Touching, grabbing, or pinching another student in a sexual way
- Writing sexual messages/graffiti concerning other students on bathroom walls, locker rooms, etc.
- Spreading sexual jokes or rumors about another student



40

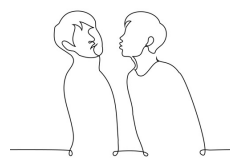
Examples of Employee-Student Sex-Based Harassment

- Entering into personal relationships with students
- Engaging in a sexual relationship with a student
- Using language of a flirtatious, profane, or sexual nature around students
- Dating or becoming romantically involved with students
- Showing pornographic, provocative, or sexually suggestive materials to students
- Meeting with students alone outside of school
- Meeting alone with students in isolated places
- Showing favoritism to students
- Having physical contact with students, except for inoffensive contact
- Wearing provocative or revealing clothing or exposing inappropriate body parts
- Patting others on any body area except shoulders, arms and upper back
- Tickling or wrestling with students
- Playing games that involve inappropriate touching
- Giving compliments that relate to physique or body development
- Kissing students
- Giving massages to students



41

Hostile Environment?



Let's return to Cole and Ryan. Recall:

Student Cole reports that Ryan asked Cole for a kiss. Cole did not say no. Cole reports looking at Ryan uncertainly, however, and not kissing Ryan back. When asked for details, Cole said they were too afraid to say no because Ryan is a "cool kid," and Cole didn't want to be an outcast.

42

Is it hostile environment sex-based harassment?

No, not, sex-based 0%

No, not objectively offensive 0%

No, not pervasive 0%

No, it does not deny equal access to the education program or activity 0%

None of the above 0%

Yes 0%

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

43

Sex-Based Harassment

- ▶ Parent Dietrichson reports to Principal Neff that Teacher Phyllis was too attentive her kindergarten child, Lola, and was "hugging" her and stroking her hair in ways that made Lola feel uncomfortable



44

Is it hostile environment sex-based harassment?

No, not, sex-based 0%

No, not objectively offensive 0%

No, not pervasive 0%

No, it does not deny equal access to the education program or activity 0%

None of the above 0%

Yes 0%

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

45

Sex-Based Harassment

- ▶ Sam is a middle school student. She likes to play video games and wears her hair in braids and short shorts. Her friend Joe reports that other students have created AI generated images of Sam as Lara Croft.
- ▶ At first Sam thought it was funny, but then images started circulating of Sam as Lara Croft in a skimpy bikini and a few boys started leering at her in the hallway, which she attributed to the images.



46

Is it hostile environment sex-based harassment?

No, not, sex-based 0%

No, not objectively offensive 0%

No, not pervasive 0%

No, it does not deny equal access to the education program or activity 0%

None of the above 0%

Yes 0%

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

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Sex-Based Harassment

- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ **The "Big Four"—Sexual Offenses**
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - Stalking

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Sex-Based Harassment

- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ **The “Big Four”—Sexual Offenses**
 - **Sexual Assault**
 - Domestic Violence
 - Dating Violence
 - Stalking

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Specific Offenses: Sexual Assault

Sexual assault - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI:

- ▶ **Rape** - penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person without the consent of the victim
- ▶ **Fondling** - the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim
- ▶ **Incest** - sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
- ▶ **Statutory Rape** - sexual intercourse with a person who is under the statutory age of consent

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Sexual Assault

- ▶ Forced vaginal or anal penetration with a body part or object
- ▶ Forced oral sex (giving or receiving)
- ▶ Unwelcome touching or groping of the breast, genitalia, or buttocks
- ▶ The use of coercion, threats, force, or intimidation to compel another person to initiate or continue sexual activity against the person's will
- ▶ Sexual activity with a person who is substantially physically or mentally impaired by illness, alcohol, or drugs, or who is physically incapable of communicating, asleep, or unconscious
- ▶ Sexual activity with a person who is unable to consent because of age or ability

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Sex-Based Harassment


- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ **The “Big Four”—Sexual Offenses**
 - **Sexual Assault**
 - **Domestic Violence**
 - Dating Violence
 - Stalking

52

Specific Offenses: Domestic Violence

Domestic violence includes felony or misdemeanor crimes committed by a person who:


- ▶ Is a current or former spouse, intimate partner, or person similarly situated to a spouse of the victim
- ▶ Is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner
- ▶ Shares a child in common with the victim
- ▶ Commits acts against a person who is protected under the family or domestic violence laws of your state or local government



53

Domestic Violence

- ▶ Physical abuse (hitting, choking, punching, biting, shooting, etc.)
- ▶ Threats of physical harm to the victim or others
- ▶ Blackmail
- ▶ Restraining a person against their will (locking in a house or room, taking away keys)
- ▶ Forced sexual activity
- ▶ Stalking
- ▶ Trespassing or property destruction
- ▶ Animal abuse



54

Sex-Based Harassment


- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ **The “Big Four”—Sexual Offenses**
 - Sexual Assault
 - Domestic Violence
 - **Dating Violence**
 - Stalking

55

Specific Offenses: Dating Violence

“**Dating violence**” - violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship


Can include sexual, physical, emotional, or psychological violence or threat of sexual or physical abuse



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Dating Violence

- ▶ All examples under domestic violence
- ▶ Intimidation
- ▶ Name calling and put downs
- ▶ Maintaining control over the victim's financial or other resources
- ▶ Threats to commit suicide or homicide if the victim ends the relationship
- ▶ Attempts to isolate the victim from friends or family
- ▶ Encouraging others to engage in such behaviors



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Sex-Based Harassment

- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ **The “Big Four”—Sexual Offenses**
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - **Stalking**

58

Specific Offenses: Stalking

“**Stalking**” - engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress; covered by Title IX when on the basis of sex.

Examples:

- ▶ Following an individual around or spying on an individual
- ▶ Sending unwanted texts, email, or other communications
- ▶ Calling an individual often or leaving unwanted gifts
- ▶ Showing up to locations uninvited
- ▶ Threatening physical harm to an individual, their family, pets, or property


Includes cyber-stalking




59

Stalking

- ▶ Calling, texting, emailing, or mailing the victim's repeatedly at home or work
- ▶ Repeated, uninvited appearances at the victim's residence or workplace
- ▶ Breaking into the victim's home or vehicle
- ▶ Stealing the victim's belongings
- ▶ Checking the victim's electronic devices or social media accounts
- ▶ Reading a person's mail or other private writings or communications




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Consent

- ▶ "Unwelcome" and lack of consent are not the same, used in different contexts
- ▶ "Unwelcome" conduct is part of hostile environment harassment
- ▶ "Consent" comes into play in student-on-student sexual assault cases (rape, sodomy, fondling, etc.)
- ▶ Not defined in Title IX Rules
- ▶ Must be defined in your policies/procedures

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Consent... Generally


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

62

Capacity to Consent

Consent is not present when a person does not have capacity to consent, voluntarily or involuntarily due to:

- ▶ Age
- ▶ Physical condition
 - Due to alcohol or drug consumption
 - Being unconscious
 - Being asleep, or in another state in which the person is unaware that the sexual activity is occurring
- ▶ Disability that impairs the individual's ability to give consent



63

Young, Incapacitated, Neurodivergent Parties



64

When These Issues Come Into Play




- ▶ Is conduct *consensual*? (for purposes of sexual assault like rape and fondling)
- ▶ Is conduct *for purposes of sexual gratification*? (for purposes of fondling)
- ▶ Is conduct *unwelcome*? (for purposes of hostile environment harassment)
- ▶ Is conduct *subjectively and objectively offensive*? (for purposes of hostile environment harassment)

65

Other Age Situations


- ▶ A student under the age of majority can never consent to sexual conduct with an adult (except based on lack of sufficient age gap)
- ▶ A student can never consent to or welcome sex-based conduct, including sexual conduct and sex-based harassment, with/from an employee of the school district they attend
- ▶ Age will often be a factor when considering the "constellation of circumstances, expectations, and relationships" in the hostile environment sex-based harassment analysis



66

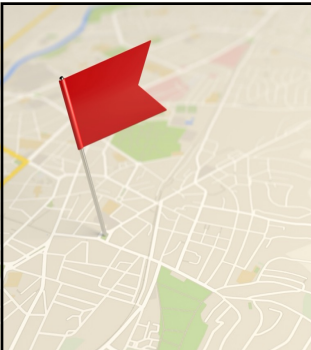
Incapacitation

- ▶ Where a person lacks the capacity to consent to conduct
- ▶ The person may not appreciate that the conduct is sexual or appreciate the nature or extent of the situation
- ▶ Can be based on physical or mental status, developmental disability, or based on alcohol or drug use



67

Jurisdiction: Sex Discrimination in Education Programs & Activities





Education Program or Activity

- ▶ Conduct within the District's operations
- ▶ Off-campus conduct
 - ▶ Settings operated or overseen by the District
 - ▶ Student organizations' properties
- ▶ External conduct that contributes to a hostile environment *within* the education program or activity

69

Conduct within the District's Operations




- Classroom
- Hallway
- Restroom
- Lunchroom
- Lockers
- Parking Lot
- Computer
- Field Trip
- Gym
- Playing Field
- Bus
- Before/After School
- Cell Phone

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Off-Campus Settings

- ▶ School-sponsored education programs or activities are covered no matter where they take place, including off-campus and online
- ▶ So are off-campus settings that are operated or overseen by the school (i.e., athletic facilities)



71



The Title IX Grievance Process

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THE TITLE IX GRIEVANCE PROCESS

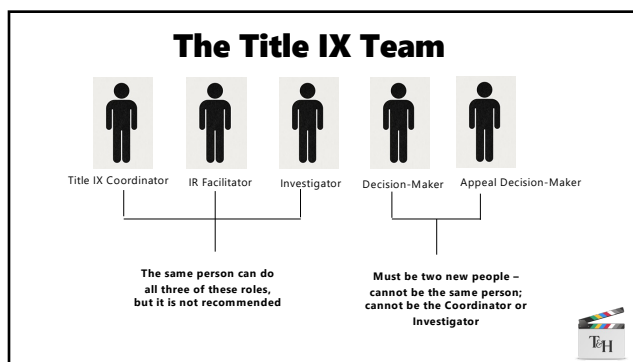
- ▶ Meet the Cast
- ▶ Opening Credits: The Initial Response
- ▶ Main Feature: A Movie in Four Acts
 - Evaluation
 - Investigation
 - Determination
 - Appeal

73




Meet the Cast

74




75



Complainant

An individual who is alleged to be the victim of conduct that could constitute sexual harassment

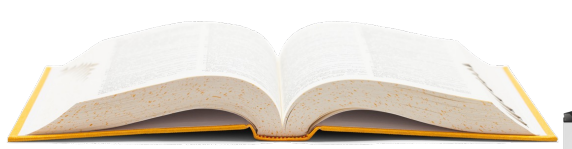

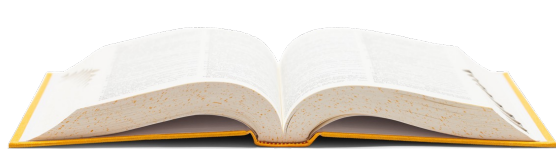
- Even if report made by parent/guardian or third party
- Even if Title IX Coordinator signs the Formal Complaint
- Person considered complainant even if they do not choose to file a Formal Complaint



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Respondent


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

Formal Complaint

A document

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



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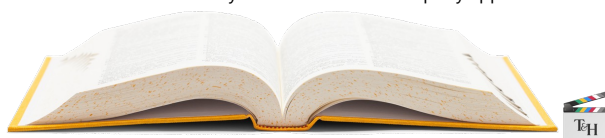
Advisors

Parties – whether students or employees – have the right to have an advisor of their choice present

May be an attorney (or a non-attorney)

Your institution or the facilitator may impose restrictions on their participation

Any restrictions must be equally applied

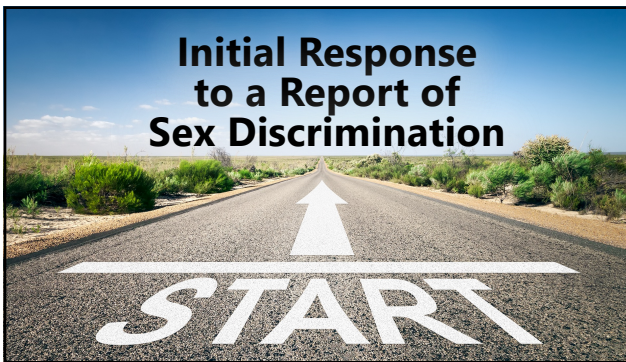


Parent's Rights

- ▶ Right to act on behalf of minor students throughout the grievance process
- ▶ May make a Title IX complaint; may exercise the rights of a complainant
- ▶ May accompany student to all meetings and interviews
- ▶ When parent and minor student disagree → give deference to judgment of parent
- ▶ School may set expectations to which parents must comply; these must apply equally to the parties


80

Initial Response to a Report of Sex Discrimination



81

Title IX Coordinator's Response to Report



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

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Supportive Measures

- ▶ Must not **unreasonably** burden either party
- ▶ Must be designed to:
 - Restore or preserve access to the education program or activity
 - Protect safety of parties or educational environment
 - Provide support during grievance process
- ▶ Nondisciplinary and nonpunitive



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Supportive Measures

Academic	Emotional/Wellness	Safety/Security
<ul style="list-style-type: none"> ▶ Deadline extensions ▶ Schedule modification or other course-related adjustments ▶ Tutoring ▶ Offers to retake courses or redo assignments ▶ Changes in extracurricular activities 	<ul style="list-style-type: none"> ▶ Counseling ▶ Excused absences ▶ Leave of absence ▶ Referral to medical or psychological care ▶ Designation of an employee as a "check-in" for any necessary emotional support ▶ Training and education programs related to sex-based harassment 	<ul style="list-style-type: none"> ▶ No contact orders (unilateral or mutual) ▶ Escort between classes ▶ Changes to class seating ▶ Assignments to certain routes, bathrooms, or cafeteria locations ▶ Increased security and monitoring ▶ Assistance reporting potentially criminal conduct to law enforcement

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Emergency Removal

- ▶ Must be on emergency basis
- ▶ Must conduct an individualized safety and risk analysis
- ▶ Must determine that an **immediate threat to the physical health** of a complainant or any students, employees, or other persons arising from the allegations of sex based harassment justifies removal
- ▶ Does not modify any rights under IDEA, Section 504, or ADA



85

Students with Disabilities



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

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

Consider and FBA/BIP and additional supportive measures

86

Administrative Leave

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

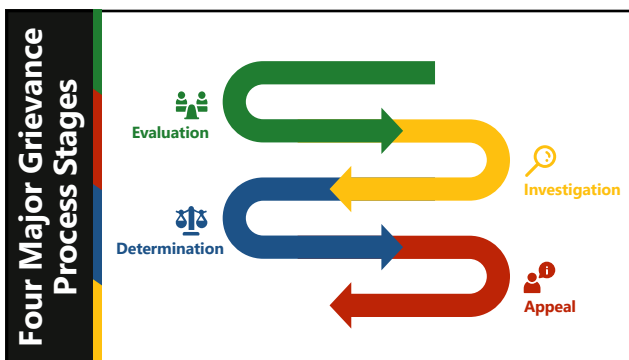


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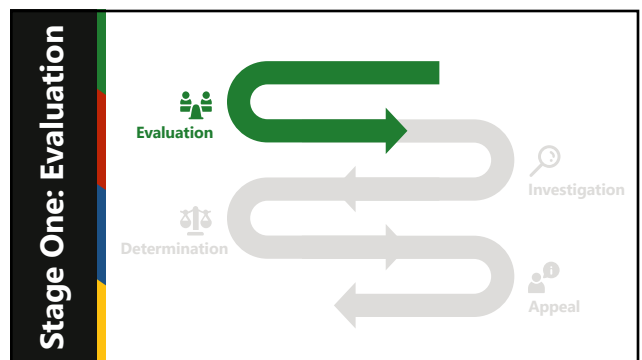
A (Grievance Process) Movie in Four Acts



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89



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Title IX Coordinator

- ▶ Notice of allegations to complainant and respondent
- ▶ Permissive dismissal, if appropriate (and any appeal)
- ▶ Supportive measures
- ▶ Administrative leave / emergency removal
- ▶ Consider consolidation

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Notice of Allegations

- ▶ School's grievance procedures
- ▶ Sufficient information **available at the time** to allow the parties to respond
 - Identity of parties involved
 - Conduct alleged to constitute sex discrimination
 - Date and location of alleged incident
- ▶ Statement that retaliation is prohibited
- ▶ Statement that the parties are entitled to an equal opportunity to access the relevant evidence or an accurate description (with option to request the evidence)
- ▶ Notice of Allegations to the Respondent is required before the school meets with the respondent for an interview

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Dismissal

MANDATORY	PERMISSIVE
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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Appeal of Dismissal

Who	Why?	Appeal Decisionmaker	Steps
• Any party can appeal a dismissal	• Based on <ul style="list-style-type: none"> • procedural irregularity • new evidence • bias/conflict of interest • That would change the outcome 	• Cannot be someone involved in the investigation or dismissal of complaint • Must be trained	• Notify parties when appeal is filed • Implement appeal procedures equally for the parties • Give parties a reasonable and equal opportunity to make a statement in support of or challenging the dismissal • Notify all parties of result of appeal and rationale for the outcome

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Stage Two: Investigation

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Key Investigation Principles

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

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Investigator's Duties

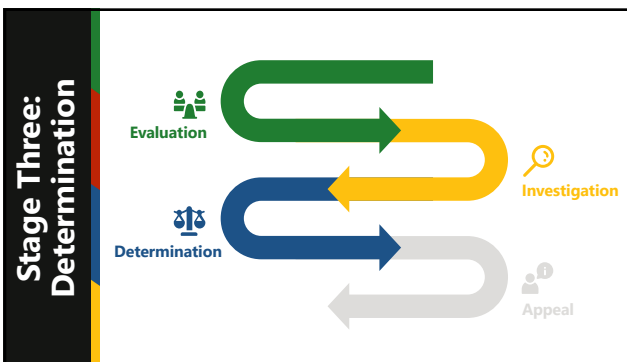
- ▶ Serve Impartially
- ▶ Gather evidence
- ▶ Equal opportunity for parties to present witnesses and evidence
- ▶ Review all evidence and determine what evidence is relevant and permissible
- ▶ Provide parties with directly related evidence & 10 days to respond
- ▶ Provide parties with investigation report



Investigation

- ▶ Burden on recipient to conduct an investigation that gathers sufficient evidence
- ▶ Provide equal opportunity for parties to present relevant fact witnesses and other inculpatory and exculpatory evidence
- ▶ Review all evidence gathered and determine what evidence is relevant and what evidence is impermissible
- ▶ Provide parties with the directly related evidence and 10 days to respond
- ▶ Provide parties with an investigation report that fairly summarizes the relevant evidence


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Standard of Proof


- Preponderance of Evidence:
Probability of Truth > 50%
- Applies to both findings of fact and the overall question of responsibility
- For findings of fact, ask if there is sufficient evidence to find that it is more likely than not that a disputed fact is true
- Once decisionmaker has "found" all your facts, look at them as a whole to decide if it is more likely than not that a policy violation occurred



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Determination


If not persuaded by the evidence (under the applicable standard and whatever the quantity of evidence may be) that sex-based harassment occurred, the decisionmaker must not determine that sex discrimination occurred



101

Written Determination

- ▶ Notify the parties in writing of the determination of whether sex-based harassment occurred
- ▶ Include allegations, procedural steps, findings of fact, conclusions regarding the application of the code of conduct to the facts, a determination and rationale for each allegation, any disciplinary sanctions, whether remedies will be provided, and procedures for appeal



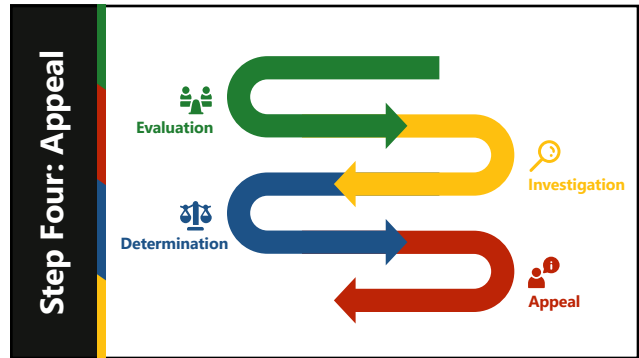
102

Determination & Discipline

- ▶ Complete the investigation and determination before the imposition of any disciplinary sanctions against a respondent
- ▶ Do not discipline a party, witness, or others participating in the grievance process for making a false statement or for engaging in consensual sexual conduct based solely on the determination of whether sex discrimination occurred



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Appeal Framework

9 for IX

1. Review File
2. Verify Impartiality
3. Determine Appeal Validity
4. Notify Parties
5. Stick to Timeframes
6. Analyze Appeal
7. Write Appeal Determination
8. Reverse or Remand
9. Close the file



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#1 Review File



- ▶ Review all material provided by the Title IX Coordinator
- ▶ Create a checklist to ensure all steps in the process are met and to document compliance
- ▶ Appeals are not de novo
- ▶ Confine the review to the record + appeal documents




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#2 Verify Impartially

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

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Bias

- ▶ “[A]n inclination of temperament or outlook, especially a personal and sometimes unreasonable judgment.”
- ▶ “[T]o give a settled and often prejudiced outlook to...a person’s background biases them against others who are not like them
- ▶ Synonyms – nonobjectivity, one-sidedness, partiality, partisanship, prejudice (Merriam-Webster)

109

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

110

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- ▶ Gender identity
- ▶ Disability
- ▶ Immigration status
- ▶ Financial ability
- ▶ Other characteristic

- ▶ Men are sexually aggressive and likely to sexually assault women
- ▶ Women often regret their sexual experiences and recast them as assault
- ▶ Men cannot be sexually assaulted
- ▶ The #metoo movement has led to many false sexual assault reports by women

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Conflict of Interest

A situation in which the concerns or aims of two different parties are incompatible.

“A conflict of interest arises when what is in a person’s best interest is not in the best interest of another person or organization to which that individual owes loyalty.”

<https://ethicsunwrapped.utexas.edu/glossary/conflict-of-interest>

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Conflict of Interest

<p>Clearest Conflicts: Is related to the Respondent Formerly dated a key witness’s parent Invests in a business with the Complainant’s parent</p>	<p>Could be Conflicts: Is Respondent’s Coach Has previously disciplined Complainant for dishonesty</p>
<p>Less Risk of Conflict: Has a history of speaking out on victim or accused rights Has other responsibilities, e.g. 504 Coordinator, that cover parties</p>	<p>Not a Conflict: Is an employee or attorney Has been trained on trauma informed practices</p>

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Prejudgment

“To judge before hearing or before full and sufficient examination”

“[A]n opinion about a situation or a person that is formed before knowing or considering all of the facts.”

Cambridge Dictionary

Synonyms – preconception, assumption, presumption/presupposition, speculation

Merriam-Webster

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Merriam-Webster

- A person was described as clearly upset during their interview, so you presume their recollection is credible
- A person was drinking at the time of the incident, so you presume they don't remember what happened
- A person consented to sexual behavior before, so you presume they consented this time, too



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Impartiality DOs & DON'Ts

- DO be open with the Title IX Coordinator about any concerns
- DO follow the process to the T and include all relevant evidence in the investigative report, written decision, and appeal decision
- DON'T not assume or infer the existence of facts or the outcome, "connect the dots speculate rely on personal experience or beliefs"

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Trauma Informed


- ▶ 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 the apparent existence of trauma as evidence of alleged conduct



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#3 Determine Validity of Appeal

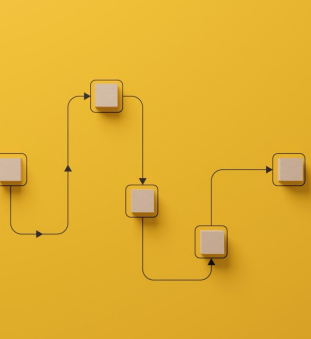
- The appeal must be on one of the three authorized bases:
 1. Procedural irregularity + affected outcome
 2. New evidence + could have affected outcome
 3. Bias or conflict of interest + affected outcome
- Also consider whether the appeal is **timely** (consider your policy or timelines in determination of responsibility)



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Procedural Error

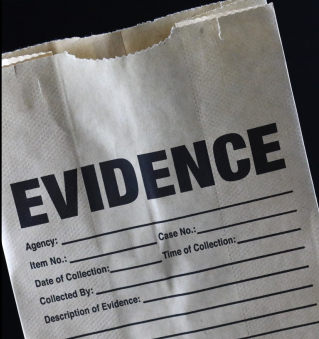

- Did the appealing party identify a procedural irregularity?
 - Failure to follow policy/procedure steps
 - Failure to analyze all relevant evidence
 - Inappropriate disqualification of evidence or questions
- Did the appealing party identify how they believe the error affected the outcome/decision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



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New Evidence

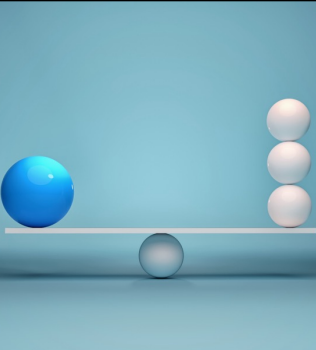
- Did the appealing party identify new evidence that wasn't reasonably available at the time the decision being appealed was made?
- Did the appealing party identify how they believe the new evidence could outcome/decision made?

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Bias or Conflict

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



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Evaluation



- Evaluation just considers whether a valid appeal basis is being raised
- It does not address the "weight" of the argument (how persuasive it is)

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#4 Notify the Parties

- If the appeal is valid:
 - Must notify both parties of appeal in writing
 - Can be from the Title IX Coordinator
- Must provide the parties equal opportunity to submit written statements for or against the appeal
 - Consider using an appeal form that requests "just the facts"
 - Then request a written statement from both parties
 - Avoids the appealing party feeling cheated that they did not get to respond the responding party's appeal statement

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#5 Stick to Timeframes

- Grievance process must include reasonably prompt time frames, including for filing and resolving appeals
- You can temporarily delay time frames for the grievance process temporarily for good cause with written notice – needs to be in process
- Must provide written notice of delay to all parties (complainants & respondents)
 - Must include reason for and length of delay
- When deciding whether to grant a delay or extension, consider the interests of:
 - Promptness
 - Fairness to the parties
 - Accuracy of adjudications

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The appellate decision-maker has other job responsibilities and they blow up shortly after being assigned the appeal

Good cause Not good cause

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Rei requests access to the (lengthy) directly related evidence and 10 additional days to review and write the appeal

Good cause Not good cause

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Should you grant 10 days?

Yes, if there is good cause you must grant the extension requested

Yes, because the DRE in the case is particularly voluminous

No, you must also consider the interests of promptness and fairness to the parties

No, you are not required to grant any specific length of extension requested

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Must you also grant the extension and provide the DRE to Charlie?

No, the rules do not require it

No, but you should to be fair

Yes, because it would not be fair if you didn't


Yes, the rules require that you treat the parties equally during the appeal

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#6 Analyze Appeal

- This is where you consider the "weight" of the arguments made in the appeal
- Make sure to consider arguments raised by both sides
- Typical appeal issues:
 - Dismissals
 - Second-Guessing
 - New Evidence
 - Impartiality



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The T9 Coordinator dismisses a complaint of fondling because the circumstances make clear there is no way the conduct was for purposes of sexual gratification (no other reason)

Procedural error, did not affect the outcome

Procedural error, affected the outcome

Not a procedural error

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A party appeals based on the investigator's failure to interview witnesses on a key issue. According to the investigator, the witnesses refused to participate.

Procedural error, did not affect the outcome

Procedural error, affected the outcome

Not a procedural error

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A party's advisor was removed from the process for being disruptive and the party was not allowed to secure another advisor before moving forward

Procedural error, did not affect the outcome

Procedural error, affected the outcome

Not a procedural error

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The grievance process lasted 6 months and the Title IX team failed to provide notice of the need for extensions

Procedural error, did not affect the outcome

Procedural error, affected the outcome

Not a procedural error

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After a determination of insufficient evidence, the Respondent sends a text message to the Complainant admitting the conduct and laughing because "double jeopardy" means nothing can be done to them.

New evidence, could affect the outcome

New evidence, could not affect the outcome

Not new evidence

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After a determination of insufficient evidence, a classmate comes forward to say the Respondent admitted the conduct to them shortly after the incident

New evidence, could affect the outcome

New evidence, could not affect the outcome

Not new evidence

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After a finding of sufficient evidence, the Respondent points to dispositive evidence in the written determination that was not in the DRE or investigator report as evidence that the decision-maker was biased

Bias, affected the outcome

Bias, did not affect the outcome

Not bias

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Respondent claims the whole system is biased against them because the vast majority of decisions in the past two years have gone in favor of Complainants and the T9C has been cited referring to "pressures" by the "current OCR" to find in favor of CPs

Bias, affected the outcome

Bias, did not affect the outcome


Not bias

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#7 Write Appeal Determination


- Decision Elements:
 - Introduction
 - Appeal Determination
 - Relevant Procedural Background (for timeliness)
 - Dismissal/decision date
 - Appeal date
 - Date(s) for responses to appeals
 - Standard of Review
 - Summary of Written Determination
 - Written Statements for/against appeal
 - Analysis & Decision – consider each appeal basis separately
 - Conclusion



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Analysis & Decision


- Consider all factors for/against the appeal basis/argument – **SHOW YOUR WORK!**
- Include policy definitions and procedural requirements
- Assess whether there is sufficient evidence of impact on the outcome
- Remember the preponderance of the evidence standard



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#8 Reverse or Remand

- Reversal: Where the appeal makes clear the decision was incorrect
- Remand: Where more information is needed




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#9 Close the File




- ▶ Files related to a Title IX complaint must be maintained for seven years
- ▶ Finalize the file and transmit it to the Title IX Coordinator or their designee for the case
- ▶ If you'd like to avoid being called on in six years to find your files, compile and send them to the Title IX Coordinator now
- ▶ Think broadly!




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Thank You



Holly McIntush
Partner
hmcintush@thompsonhornton.com



Kendra Yoch
Counsel
kyoch@thompsonhornton.com

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