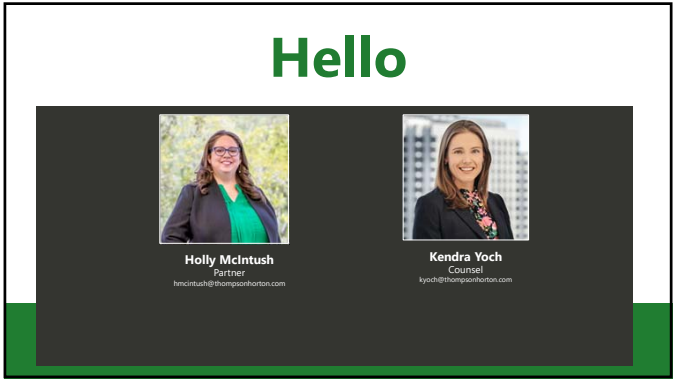
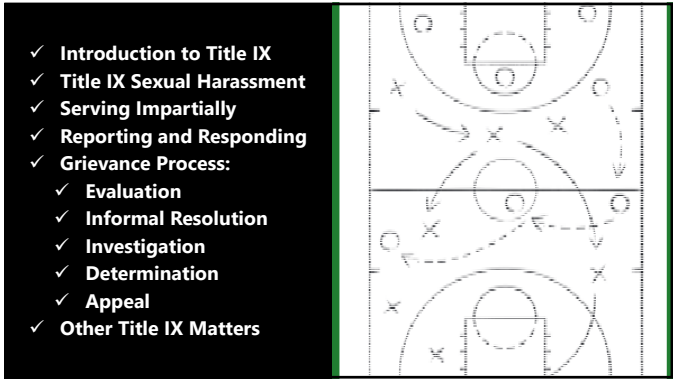


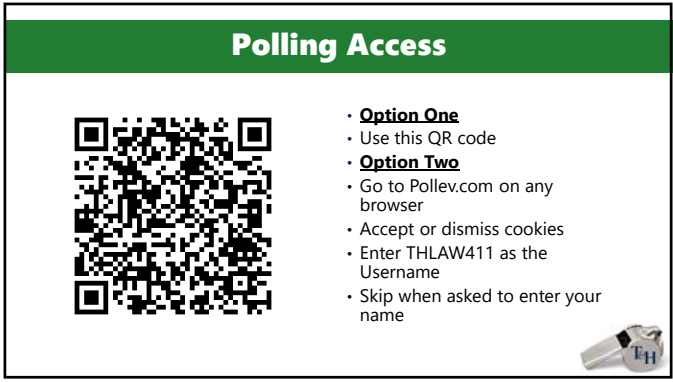
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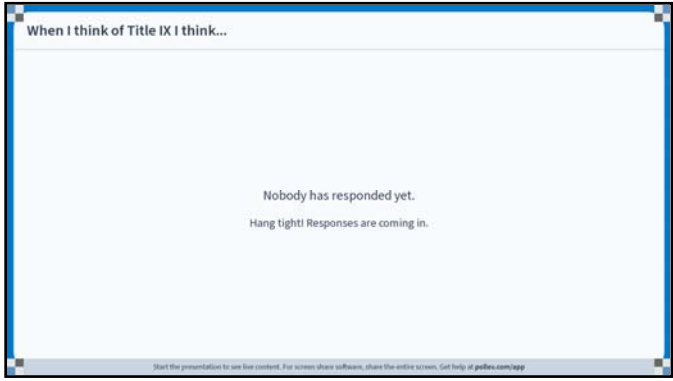
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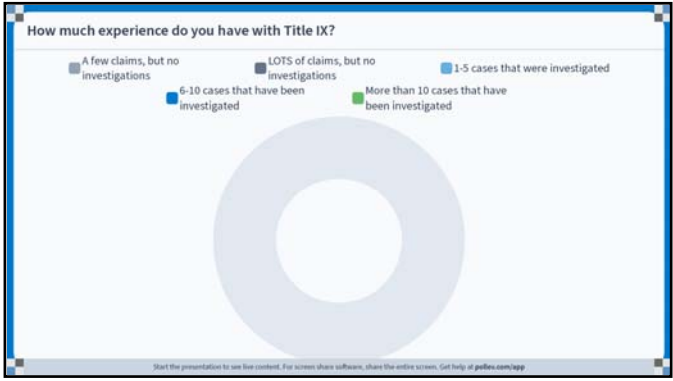
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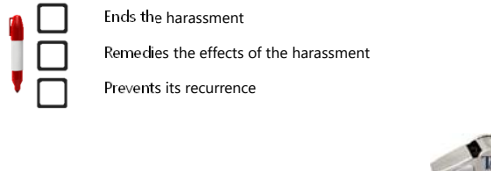


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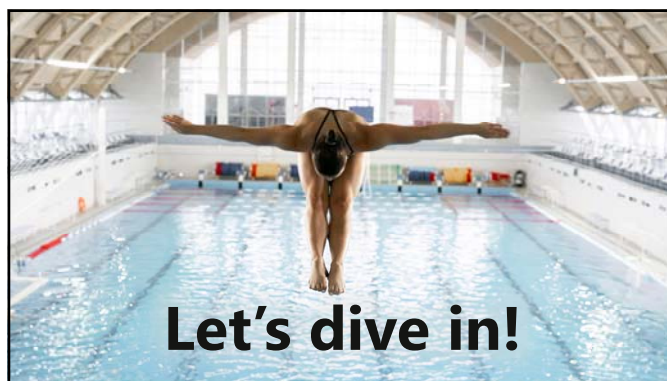
Responsibility to Respond

The district is responsible for promptly and effectively responding to discrimination and harassment in a manner that complies with regulatory requirements and:


- Ends the harassment
- Remedies the effects of the harassment
- Prevents its recurrence



7



8



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

The Patsy T. Mink Equal Opportunity in Education Act, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)

9

Title IX

Recruitment, admissions, and counseling	Financial assistance	Athletics	Sexual harassment
Treatment of pregnant and parenting students	Discipline	Single-sex education	Employment



10



11

People Entitled to Notice


- ▶ Students
- ▶ Parents, guardians, or other authorized legal representatives of elementary and secondary school students
- ▶ Employees
- ▶ Applicants for admission and employment
- ▶ All unions and professional organizations with collective bargaining or professional agreements with the recipients




12

Contents of Notice



- ▶ Statement that recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity it operates
- ▶ Statement that recipient is required by Title IX and its regulations not to discriminate on the basis of sex
- ▶ Statement that the requirement not to discriminate in the education program or activity extends to admission and employment
- ▶ Statement that inquiries about the application of Title IX may be referred to the Title IX Coordinator, to OCR, or both
- ▶ Name and contact information for Title IX coordinator
- ▶ How to locate the recipient's grievance procedures and process, including how to report or file a complaint of sex discrimination, how to report or file a complaint of sexual harassment, and how the recipient will respond



13

Publication of Notice

- ▶ Website KY1
- ▶ Each handbook, catalog, announcement, bulleting, and application form to persons entitled to notice or which are used in connection with recruitment of students or employees

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Website Requirements

- ▶ The following information must be posted on the district's website:
 - ▶ Contact information for the Title IX Coordinator (name or title, office address, e-mail address, telephone number)
 - ▶ Title IX nondiscrimination policy and grievance procedures
 - ▶ Materials used to train Title IX Coordinators, investigators, decisionmakers, appeal decisionmakers, and informal resolution facilitators

<http://school.edu/TitleIX>



15


Title IX Enforcers

		
<p>OCR</p> <ul style="list-style-type: none"> • Regional offices across the U.S., including D.C. • Low bar for opening complaints • Remedies typically include policy changes, training, other remedial efforts 	<p>Department of Justice</p> <ul style="list-style-type: none"> • Based in D.C. • Typically handle higher profile cases • Investigatory and resolution processes are similar to OCR, but can file Federal lawsuits 	<p>Federal Courts</p> <ul style="list-style-type: none"> • Individuals who believe their rights have been violated can sue the school • Intense litigation process • Can lead to significant monetary damages

16

Administrative Enforcement


- ▶ The Office for Civil Rights (OCR) of the Department of Education (ED) is charged with enforcing Title IX. It investigates allegations of Title IX violations.
- ▶ The agency may not initiate enforcement proceedings unless it has given notice of the deficiency to the recipient and the recipient has refused to voluntarily comply. *Gebser*, 524 U.S. at 288.
- ▶ If the recipient refuses to comply, the agency can initiate proceedings to revoke federal funding.



17

Administrative Enforcement

- ▶ The "central purpose" of requiring notice is "to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its program and is willing to institute prompt corrective measures." *Gebser*, 524 U.S. at 289.
- ▶ OCR's mission is to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation's schools.
- ▶ They are a neutral – not the enemy.




18

Title IX 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




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Title IX Non-Compliance Penalties

Less Common

- ▶ Impact on ED Grant Funds—even before option to enter resolution agreement
- ▶ A referral to the DOJ with a recommendation that it file suit
- ▶ Lawsuits filed by alleged victims or perpetrators in Federal court
 - ▶ Can lead to money damages (though limited by the U.S. Supreme Court in *Cummings*)
 - ▶ The standards are higher than OCR standards, so we train on the lower OCR standards and leave the higher standards to your litigators





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Judicial Enforcement

Gebser v. Lago Vista Independent School District

- ▶ High school teacher engaged in a secretive sexual relationship with a female student
- ▶ Although the **principal** was aware of prior alleged sexual comments by the teacher, the evidence indicated that **he was not aware** that the teacher had crossed the line into sexual misconduct
- ▶ Plaintiff sought to impose liability based on theories of either *respondeat superior* or constructive notice to the District


Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998)

21

Judicial Enforcement

Institution may be held liable in damages if an **appropriate official**—an individual with authority to take corrective action—receives **“actual knowledge”** of sexual harassment by a school employee and responds with **“deliberate indifference”**

- ▶ Rejected “constructive notice” and vicarious liability standards
- ▶ Ensures that schools are liable in damages only for “an official decision...not to remedy the violation” and not “for its employees’ independent actions”



22

Judicial Enforcement


The Gebser Actual Knowledge Standard for Liability

A plaintiff must show the school district had “actual knowledge”

- ▶ Constructive notice, or that a school district *should have known*, is not enough
- ▶ *Respondeat superior*/vicarious liability is prohibited

An appropriate school district official must possess such knowledge

- ▶ Generally, this is a campus principal, Title IX Coordinator, superintendent, board member (or other higher level official)
- ▶ The knowledge of the perpetrator is not enough




23

Judicial Enforcement

Davis v. Monroe County Board of Education

- ▶ When can a school district be liable for peer-to-peer harassment?
- ▶ A fifth-grade student allegedly was subjected to prolonged sexual harassment by another student in the classroom
- ▶ The teacher and principal allegedly failed to intervene
- ▶ A school may be liable for its **“deliberate indifference to known acts of peer sexual harassment”**
- ▶ The harassment must be “so **severe, pervasive, and objectively offensive** that it effectively bars the victim’s access to an educational opportunity or benefit”

Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999)




24

Judicial Enforcement

Davis v. Monroe County Board of Education


- ▶ Liability is permitted only if the institution exercised "substantial control over both the harasser and the context in which the known harassment occurs"
- ▶ The school's response must be "clearly unreasonable" This standard is more rigorous than a "mere reasonableness" standard.
- ▶ If the school does not engage in harassment directly, "it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it."



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Judicial Damages

- ▶ To obtain damages for a violation of Title IX, the student must establish **intentional discrimination** based on sex. *Doe v. Edgewood Indep. Sch. Dist.*, 964 F.3d 351, 358 (5th Cir. 2020).
- ▶ **"Disparate impact" discrimination will not state a claim.** *Poloceno v. Dall. Indep. Sch. Dist.*, 826 F. App'x 359 (5th Cir. 2020).
- ▶ Damages are not available under Title IX unless the intentional conduct violates the **"clear terms of the statute."** *Davis*, 526 U.S. at 642.




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Judicial Damages

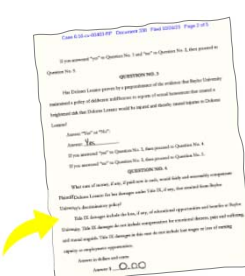
Cummings v. Premier Rehab Keller PLLC, 142 S.Ct. 562 (2022)

- ▶ The Supreme Court held that damages for emotional distress are not available in a private lawsuit under the Rehabilitation Act and the Affordable Care Act, statutes enacted under Congress's Spending Clause power.
- ▶ District courts "across the country since *Cummings* have uniformly held that its holding applies to Title IX claims and precluded emotional distress damages accordingly." *Doe v. Fairfax Cnty. Sch. Bd.*, 2023 WL 424265 (E.D. Va. Jan. 25, 2023)




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Judicial Damages



- ▶ **Although a plaintiff may not receive emotional distress damages, the plaintiff may receive other compensatory damages caused by the loss of educational opportunities and benefits at the institution.**
- The scope of available damages is actively being litigated.




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Title IX Sexual Harassment

- ▶ Jurisdiction
 - ▶ In an education program or activity
 - ▶ Against a person in the United States
- ▶ Sexual harassment
 - ▶ Quid pro quo
 - ▶ Hostile environment
- ▶ Sexual Violence
 - ▶ Sexual assault
 - ▶ Domestic violence
 - ▶ Dating violence
 - ▶ Stalking



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A07 – Evaluation Tool

Title IX Grievance Process

Other discrimination, bullying, or misconduct process

Title IX Sexual Harassment Evaluation Tool
Use this tool to determine if the Title IX grievance process shall be used. Answer all questions based on the **allegation**, not based on your assessment of their plausibility or credibility. If you come to a **NO**, do not use the Title IX Grievance Process. Instead, evaluate under your District's own policies and procedures.

PART ONE: JURISDICTION

Did the conduct occur in a program or activity of the District?
The incident occurred that is within the District's jurisdiction and is occurring within the geographical area that the Title IX Grievance Process covers. If the incident occurred outside the District's jurisdiction, the Title IX Grievance Process is not applicable. (NO)

Did the conduct occur in the United States?
Was the complainant physically located in the U.S. when the alleged incident occurred? (NO)

Was the conduct sex-based?
Includes conduct that is sexual in nature, related to an individual's sex, including sex harassment. (NO)

Was the conduct discriminatory?
Conduct that is not limited or defined as harassment. This is a separate offense not subject to Title IX. Includes conduct that is based on negative characteristics, inability to perform or working the individual because of age or disability, etc. (NO)

Proceed to Part Two

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Title IX Grievance Process

Other discrimination, bullying, or misconduct process

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Do We Use Title IX?

Is it Title IX sexual harassment?

33

Do We Use Title IX?

Is it Title IX sexual harassment?

Did the harassment occur in a District education program or activity?

34

Do We Use Title IX?

Is it Title IX sexual harassment?

Did the harassment occur in a District education program or activity?

Was it in the United States?

35

Do We Use Title IX?

Is it Title IX sexual harassment?

Did the harassment occur in a District education program or activity? → **Title IX Grievance Process**

Was it in the United States?

36

Do We Use Title IX?

<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
No	Did the harassment occur in a District education program or activity?
<input checked="" type="checkbox"/>	Was it in the United States?

If answer to any question is **NO**, the Title IX Grievance Process does not apply. Use process for other misconduct.

37

Do We Use Title IX?

Was it in the United States?

38



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Do We Use Title IX?

<input checked="" type="checkbox"/>	Did the harassment occur in a District education program or activity?
<input checked="" type="checkbox"/>	Was it in the United States?

40

Did the conduct occur in a District program or activity?

- 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

- ▶ Locations, events, or circumstances over which the district exercised substantial control over both the respondent and the context in which the alleged sexual harassment occurred
- ▶ Events operated or overseen by the District (i.e., field trips, athletic competitions)

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Do We Use Title IX?

<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
<input checked="" type="checkbox"/>	Did the harassment occur in a District education program or activity?
<input checked="" type="checkbox"/>	Was it in the United States?




43

Title IX Sexual Harassment

Unwelcome conduct based on sex that is:

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




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Title IX Sexual Harassment

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 - Domestic Violence
 - Dating Violence
 - Stalking



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Was the conduct "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.

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When poll is active respond at PollEx.com/TitleIX12 Send #TitleIX12 to 22333

Is the conduct unwelcome?


0%	0%
Yes	No

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Title IX Sexual Harassment

Unwelcome conduct **based on sex** that is:

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- ▶ Hostile Environment Harassment
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 - Domestic Violence
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 - Stalking



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Was the conduct "sex-based"?

The preamble to the 2020 Rules explains that on the basis of sex includes:

- ▶ Conduct that is sexual in nature
- ▶ Conduct that references one sex or another
- ▶ Conduct aimed at a particular sex
- ▶ Sex stereotyping (gender norms)

Any individual, irrespective of sexual orientation or gender identity can be the victim of sexual harassment




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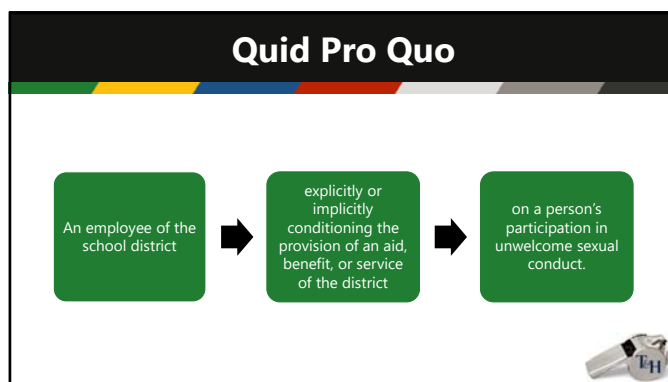
Title IX Sexual Harassment

Unwelcome conduct based on sex that is:

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




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Quid Pro Quo

- ▶ Students by definition cannot engage in quid pro quo sexual harassment
- ▶ It is **presumed** the sexual conduct is unwelcome, severe, objectively offensive, and deprived a student of educational access
- ▶ The employee does not have to make the condition explicit—i.e., state "this for that"—the condition may be implied from the circumstances
- ▶ The age and situation/position of the parties is relevant to the determination of whether a condition is implied




53

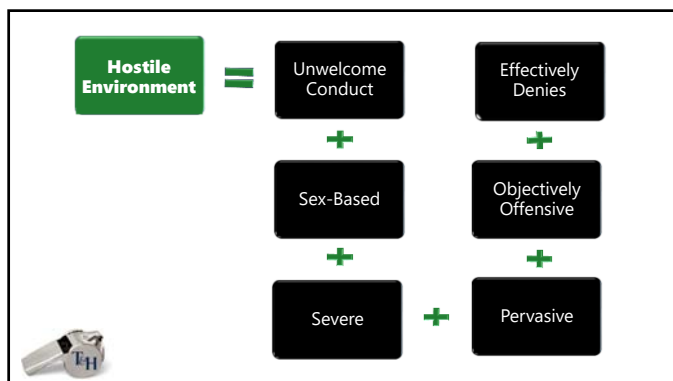
Title IX Sexual Harassment

Unwelcome conduct based on sex that is:

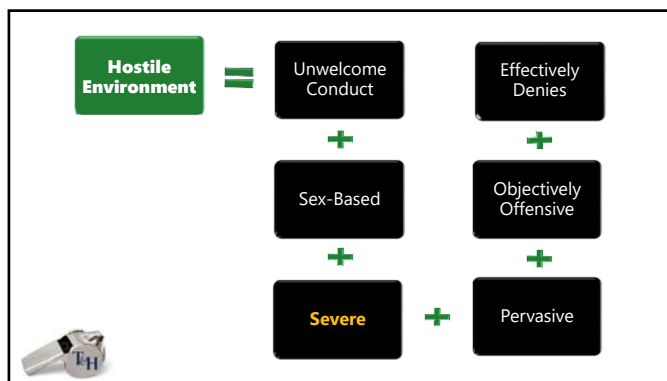
- ▶ Quid Pro Quo Harassment
- ▶ **Hostile Environment Harassment**
- ▶ The "Big Four"—Sexual Offenses
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - Stalking



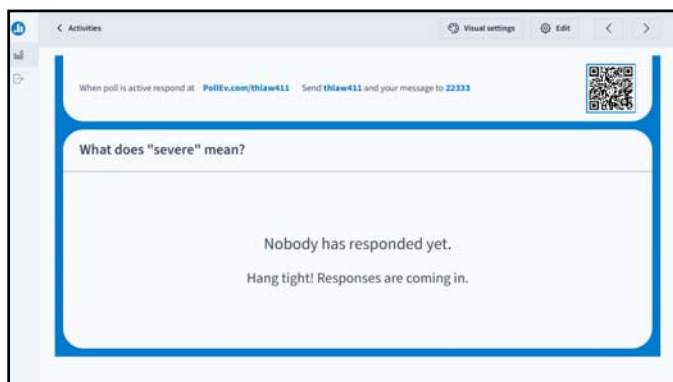
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Severe

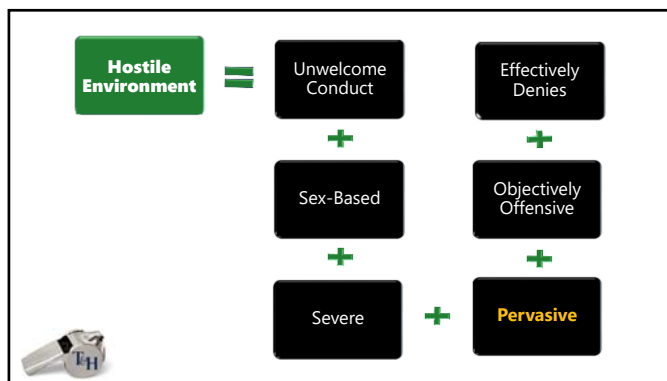
- ▶ Nature and degree of the harassment
- ▶ **Severe**: "causing very great pain, difficulty, worry, damage, etc.; very serious" (Cambridge Dictionary)
- ▶ **Severe**: "very bad, serious, or unpleasant"; "causing a lot of physical pain or suffering;" "very harsh" (Britannica Dictionary)

58

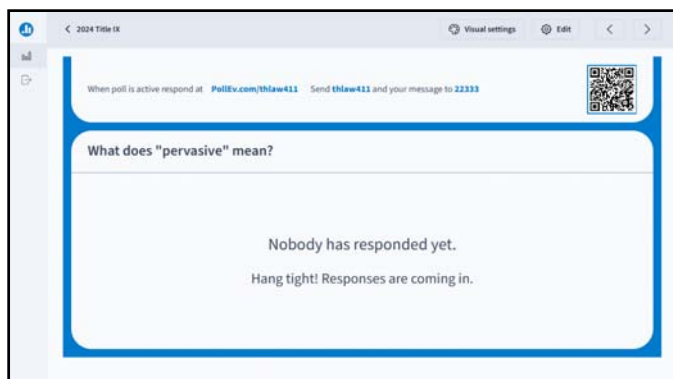
Severe ... The Courts Have Spoken

- ▶ "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.
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
Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156 (5th Cir. 2011)
- ▶ Must be extreme, and not merely rude or unpleasant
Kollaritsch v. Michigan State Univ. Bd. of Trs., 944 F.3d 613 (6th Cir. 2019), cert. denied 141 S. Ct. (2020)
- ▶ Goes beyond mere juvenile behavior among students, even if the behavior is antagonistic, non-consensual, and crass
Jenkins v. Univ. of Minn., 131 F. Supp. 3d 860 (D. Minn. 2015), aff'd, 838 F.3d 938 (8th Cir. 2016)

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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)




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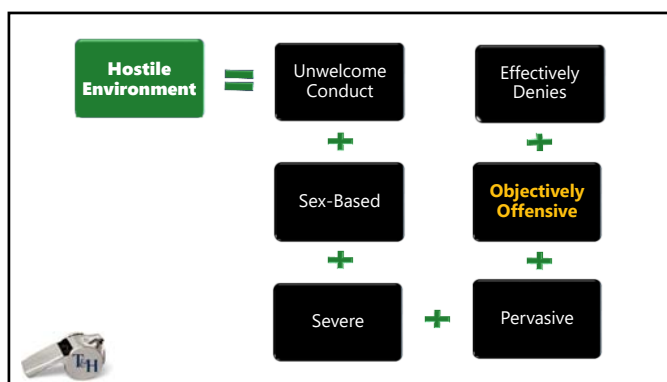
Pervasive ... The Courts Have Spoken

- ▶ Single or isolated incidents are generally not enough
- ▶ But the Court in *Davis* noted a single incident could **hypothetically** be sufficiently severe to meet the standard
- ▶ *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)



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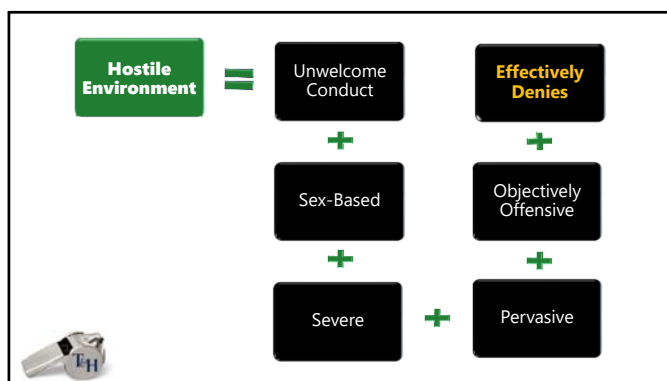


64

- ▶ 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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Effective 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
- ▶ Consider whether the complainant's participation is limited relative to a peer who has not experienced alleged sexual harassment



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Totality of Circumstances

- ▶ 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

Student-on-Student Sex-Based Harassment

Any sexually inappropriate action by a student against another student, including:


- Exposing one's genitalia;
- Inappropriately touching another student; and,
- Making sexual comments to other students or about other students.



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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
- Writing sexual messages/graffiti concerning other students on bathroom walls, locker rooms, etc.
- 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
- Spreading sexual jokes or rumors about another student
- Touching, grabbing, or pinching another student in a sexual way
- Telephoning or emailing sexual messages
- Degrading, shaming, belittling, or humiliating based on sex
- Giving intimate or sexual gifts
- Commenting on others' bodies and physical attributes



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Recognizing Sex-Based Harassment

Employee-on-Student Sex-Based Harassment

An inappropriate relationship between an employee and a student. Includes


- Sex between a student or employee no matter the age; and,
- Any inappropriate communications with students, especially through social media.



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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



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Sexual Abuse



The U.S. Department of Education and numerous studies have estimated that 1 in 10 students experience educator sexual misconduct during their K-12 years.

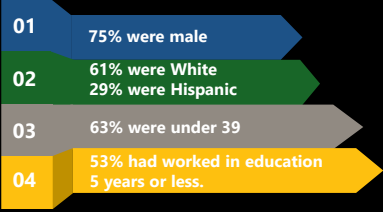
- ▶ Most reports involved noncontact sexual behaviors (e.g., suggestive language, being shown sexual images)
- ▶ But a significant number of children reported sexual contact. The U.S. Department of Education (2020) found that between 2017–2018 there were 14,152 allegations of educator-perpetrated sexual assault and 786 allegations of rape or attempted rape.

Jeglic et al., 2013; Shakeshaft, 2004; Dept of Educ., 2020.

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Teacher Perpetrators in Texas

1,022 Teachers Were Sanctioned Between 2008-2016
Total Teacher Population: 333,886




However, men comprised only 23% of the statewide teacher population.

Younger and early career teachers are more likely to engage in inappropriate relationships.

C. Roberts & D. Thompson (2018)

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Victims of Educator Misconduct

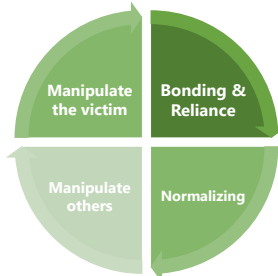


- ▶ Texas and national data show that most victims are female (approximately 72%)
- ▶ Studies and federal data indicate that a majority of victims are in middle school or high school
- ▶ Sex abuse of girls *increases* with their age but *decreases* for boys
- ▶ The reporting rate is very low (4 to 6%)

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Grooming



Grooming refers to the manipulative behaviors employed by a perpetrator to gain the cooperation and trust of the victim and avoid detection.

Grooming also involves earning the trust of the child's family members and the perpetrator's colleagues and supervisors.

- ▶ Bonding actions and boundary crossing include targeting a student for a "special" bond or relationship ("I can talk to you," "you're so mature")
- ▶ Abusers encourage the victim's reliance through tutoring, counseling, lessons, grades, food, transportation
- ▶ "Normalizing": acting like a peer; discussing sexual topics; use of social media

Jeglic et al (2025); Shakeshaft et al (2021)

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Title IX Sexual Harassment

Unwelcome conduct based on sex that is:

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

T&H

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Specific Offenses

#1 Sexual assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation:

- **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
- **Criminal Sexual Contact** - the intentional touching of the clothed or unclothed body parts, without consent of the victim, for the purpose of sexual degradation, sexual gratification, or sexual humiliation; the forced touching by the victim of the actor's clothed or unclothed body parts, without consent of the victim, for the purpose of sexual degradation, sexual gratification, or sexual humiliation
- **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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Consent

- ▶ Title IX generally prohibits "unwelcome" conduct
- ▶ "Unwelcomeness" and lack of consent is presumed with respect to educator-on-student sexual harassment
- ▶ "Consent" comes into play in student-on-student sexual assault cases (rape, nonconsensual sexual contact)
- ▶ 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.



80

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

Capacity to Consent

81


Key Question: Should a reasonable person in the same circumstances have known the other party could or could not consent to the sexual activity?

Incapacitation

82

Specific Offenses

#2 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




83

Specific Offenses

#3 "Dating violence" means 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



84

Specific Offenses

#4 "Stalking" means 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. It is covered by Title IX when on the basis of sex.

Examples:

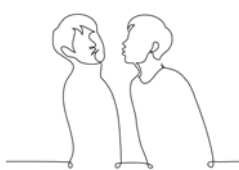
- Following an individual around or spying on an individual
- Sending unwanted texts, email, or other communications
- Calling an individual often or leaving unwanted gifts
- Showing up to locations uninvited
- Threatening physical harm to an individual, their family, pets, or property

Includes cyber-stalking




85

Hostile Environment?

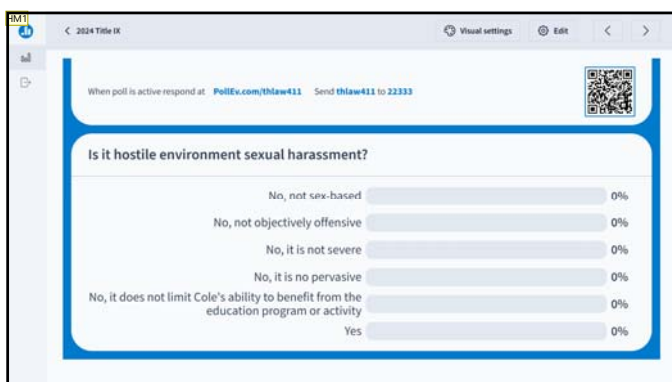


Let's return to Cole and Ryan. Recall:

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.



86



When poll is active respond at: PollEv.com/thlaw411 Send thlaw411 to 22333

Is it hostile environment sexual harassment?

No, not sex-based	0%
No, not objectively offensive	0%
No, it is not severe	0%
No, it is no pervasive	0%
No, it does not limit Cole's ability to benefit from the education program or activity	0%
Yes	0%

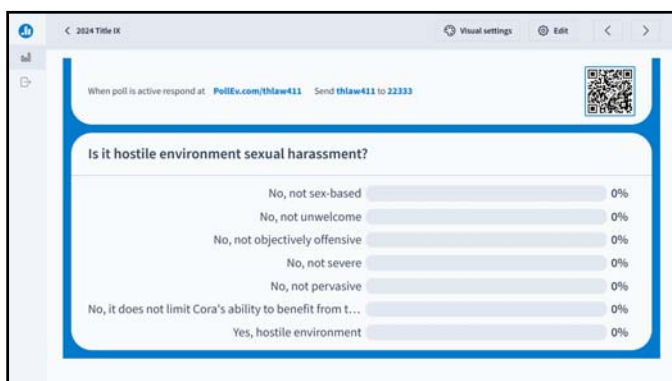
87

Sexual Harassment?

Parent reports to the Principal that Teacher Tate was too attentive her kindergarten child, Cora, and was "hugging" her and stroking her hair in ways that made Cora feel uncomfortable.



88



When poll is active respond at: PollEv.com/thlaw411 Send thlaw411 to 22333

Is it hostile environment sexual harassment?


No, not sex-based	0%
No, not unwelcome	0%
No, not objectively offensive	0%
No, not severe	0%
No, not pervasive	0%
No, it does not limit Cora's ability to benefit from t...	0%
Yes, hostile environment	0%

89

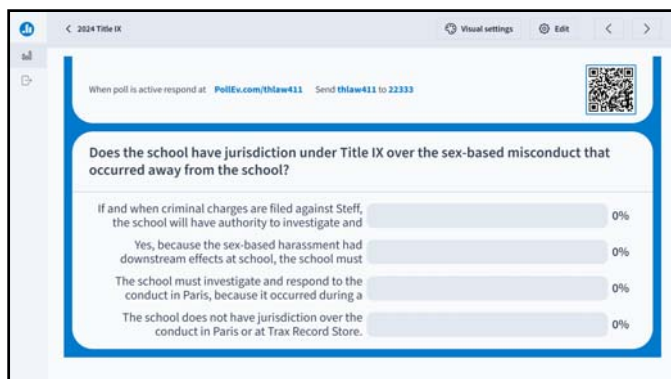
Off-Campus Conduct

Steff McKee exhibits predatory and harassing behavior, especially toward Andie Walsh. During a school-sponsored trip to Paris, France, Steff makes repeated unwanted sexual advances and derogatory remarks towards Andie. His actions continued upon their return, including at Trax Record Store, where Andie works.

Although much of Steff's misconduct occurred outside the country or away from the school, the repercussions of his behavior are felt strongly within the school environment as she faces social ostracism and bullying by Steff and his friends. The hostility is affecting her daily school life and interactions.



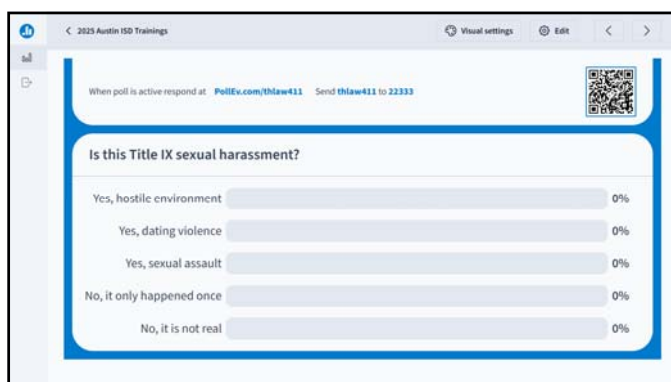
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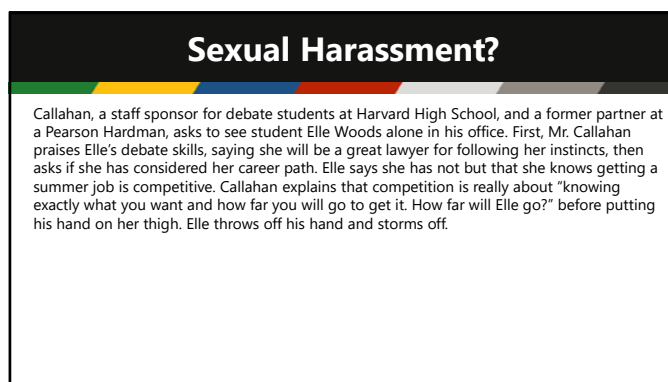
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92



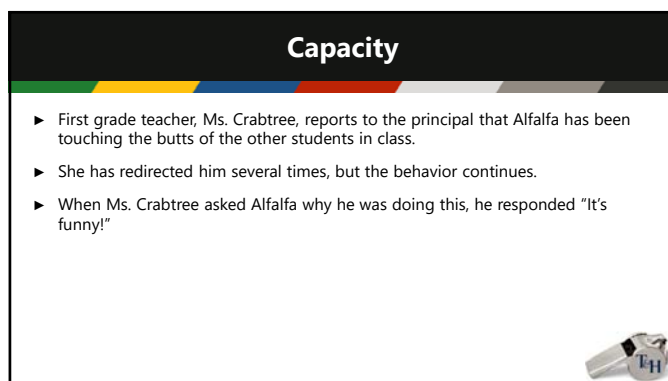
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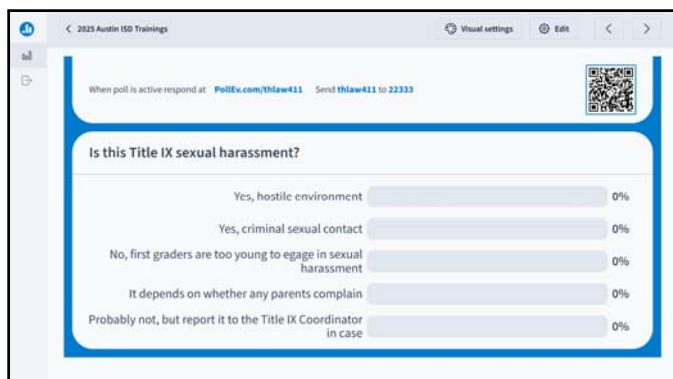
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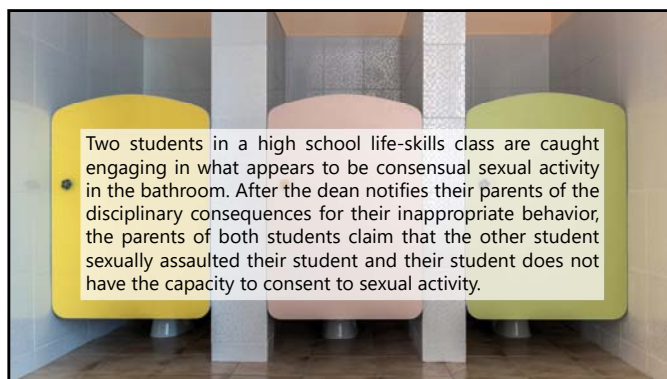
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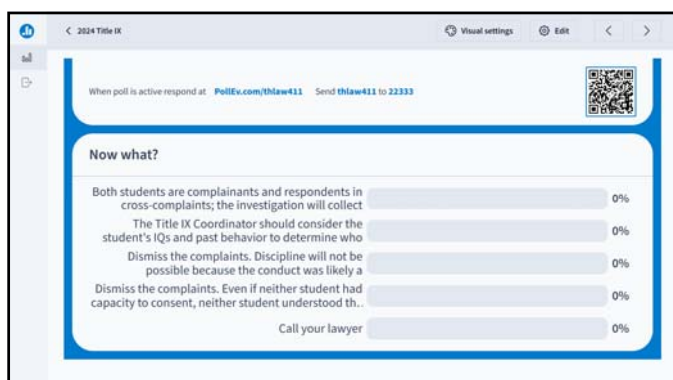
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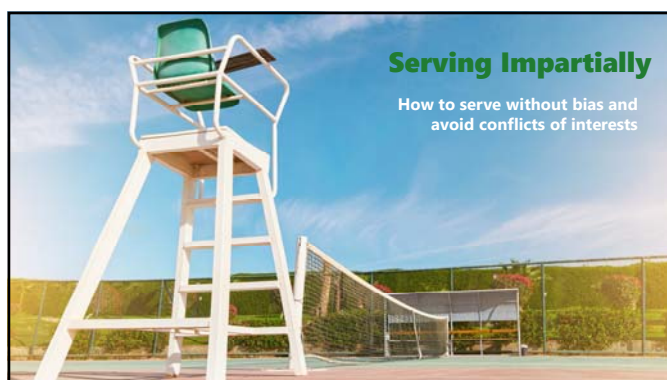
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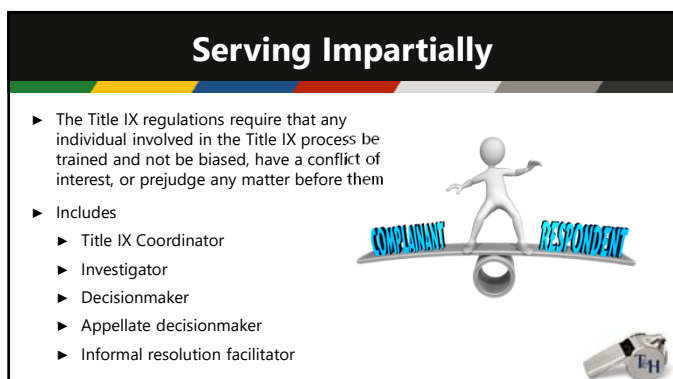
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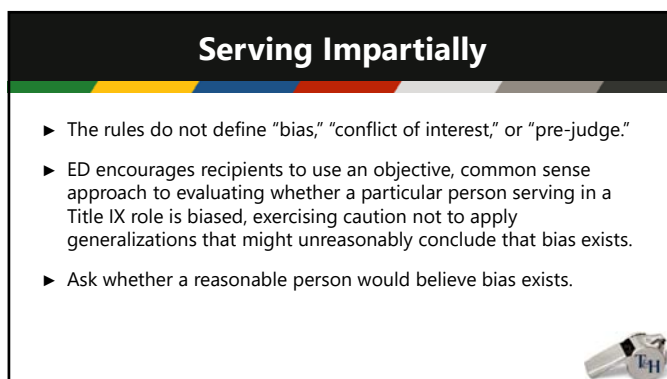
99



100




101



102

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)




103

Bias

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



104

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- ▶ Ethnicity
- ▶ Sexual orientation
- ▶ 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 more false sexual assault reports by women

105

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>



106

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>

107

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



108

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

- ▶ 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



109

When poll is active respond at PollEv.com/thlaw411 Send thlaw411 to 22333

You have a disciplinary role in the school and have imposed discipline on Respondent in the past; can you be impartial?

- Yes, imposing discipline on a student does not create an impermissible risk of bias. 0%
- Yes, if the discipline was at least a year ago. 0%
- No, if the prior discipline was for sexual misconduct. 0%
- No, if Respondent's parents complain about bias. 0%
- No, imposing discipline on a student creates an impermissible risk of bias. 0%

110

When poll is active respond at PollEv.com/thlaw411 Send thlaw411 to 22333

You attend the same religious institution as Complainant; can you be impartial?

- Yes, attending the same religious institution with a party does not create a conflict of interest or impermissible risk of bias. 0%
- Yes, as long as there is no close personal or other relationship between the investigator and the party or their family. 0%
- No, attending the same religious institution with a party creates a conflict of interest or impermissible risk of bias. 0%

111

When poll is active respond at PollEv.com/thlaw411 Send thlaw411 to 22333

You have raised money and marched for victims-rights advocacy groups; can you be impartial?

- Yes, prior advocacy work can never render someone partial. 0%
- Yes, as long as you have been trained in setting aside bias. 0%
- Yes, as long as you have not made statements suggesting you are incapable of being impartial. 0%
- No, prior advocacy creates a perception of bias that cannot be overcome. 0%

112

When poll is active respond at PollEv.com/thlaw411 Send thlaw411 to 22333

You believe traumatic stress affects brain function and, in turn, memory and behavior; can you be impartial?

- Yes, belief in trauma informed practices does not mean someone will prejudice the issues. 0%
- Yes, if you do not rely on apparent trauma as evidence. 0%
- No, belief in trauma informed practices renders you likely to prejudice and be biased. 0%

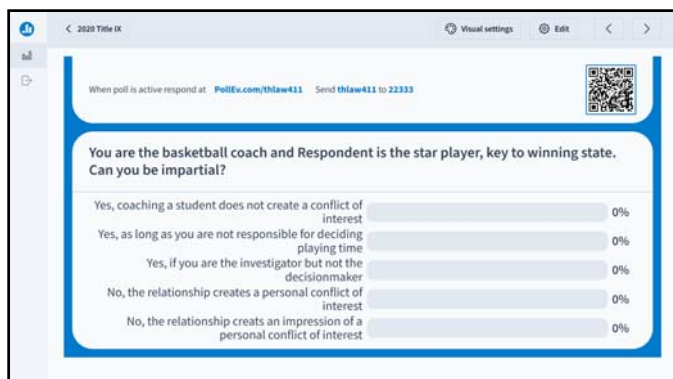
113

When poll is active respond at PollEv.com/thlaw411 Send thlaw411 to 22333

You do an online search of both parties and their parents and find their public social media pages. One parent has been very active criticizing the school district and advocating for new leadership. Can you be impartial?

- No, not if finding against that party could expose you to public attack. 0%
- Yes, you can separate the students from their parents. 0%
- No, informaton from these personal accounts is not in evidence and cannot be unseen. 0%
- Yes, if the Title IX Coordinator will allow you to serve anonymously. 0%

114

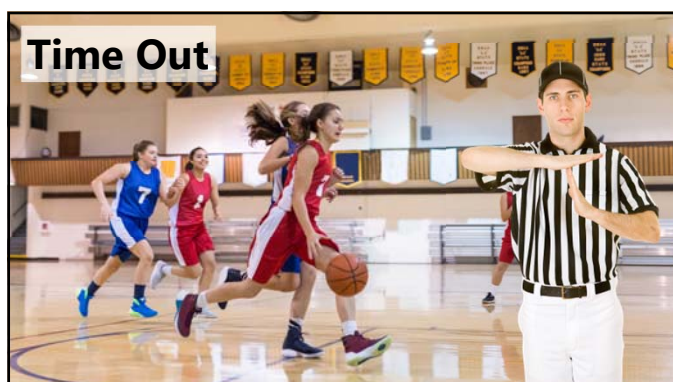


115

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, weigh credibility (unless you are the decision-maker on the initial complaint)

116



117



118

Report and Response

- ▶ Reporting requirements
- ▶ Campus response
- ▶ Intake
- ▶ Supportive measures
- ▶ Emergency removal
- ▶ Signing a complaint

119

Reporting Requirements

All employees must **notify the Title IX Coordinator** when the employee has information about conduct or allegations that **reasonably may constitute sexual harassment** under Title IX.

Employees can notify the Title IX Coordinator of potential sex-based harassment or discrimination in any manner including:

- ▶ Orally (in-person/phone)
- ▶ In writing (email or other documentation)
- ▶ Any way that ensures the Title IX Coordinator receives the information.

120

A diagram with a green background on the right side containing the text "Sources of information". On the left, there are five black boxes with white text: "Witness", "Hear first-hand", "Hear second-hand", "Overhear", and "Otherwise learn about".

121

Reporting Requirements

Employees may have multiple reporting obligations.

- ▶ **Title IX Coordinator** – conduct that may be sexual harassment (including sexual assault, stalking, and other potentially criminal behavior)
- ▶ **Child Protective Services** – conduct that may constitute abuse or neglect
- ▶ **Law Enforcement** – conduct that may be criminal

122

T&H Title IX Tip

- ▶ Consider a telephone or email hotline where students, parents, and employees can make Title IX reports and include information about the hotline on your school district's website
- ▶ If you already have a general hotline for reports, create a way to designate a report as one of sexual harassment and a process where your Title IX Coordinator receives the report
- ▶ Use an email address, [titleix@\[your domain\]](mailto:titleix@[your domain]), where your Title IX Coordinator and designees can monitor and respond to reports

123

Monitoring Barriers to Reporting

Title IX coordinator should:

- ▶ Monitor your education program or activity for barriers to reporting information about conduct that may constitute sex discrimination or harassment under Title IX
- ▶ Take steps reasonably calculated to address such barriers

124

Identifying Barriers

- ▶ Your school district may hear after-the-fact about allegations of sexual harassment in your school district's programs and activities and realize these matters were never properly reported to your Title IX Coordinator.
- ▶ Perhaps the incidents were handled at the campus level with no notice to the Coordinator, or even handled by law enforcement.
- ▶ Because these issues must be reported to the Title IX Coordinator, your Title IX Coordinator should determine the root causes for why reporting is not occurring and take necessary action to correct it.

125


Students Underreport

Reasons students do not report	How you can help
<ul style="list-style-type: none"> • Fear of retaliation, embarrassment, or humiliation • Fear of punishment or loss of special privileges • Confusion and worry that no one will believe them • Unable to process the assault as a sexual assault • Affections are manipulated, or they feel threatened • Lack knowledge about how to report 	<ul style="list-style-type: none"> • Communicate to students that they have a right to be free from harassment and a responsibility not to harass • Let students know where they can go for help if they witness or experience harassment • Serve as a role model for students by exhibiting non-harassing behavior and addressing any instance of inappropriate conduct • Make reporting easy, offer a confidential option

126

DO: Assess Safety


- ▶ If the student is in immediate danger, or is an immediate danger to self or others, remove the student from the environment immediately
- ▶ Move the student to a safe area with adequate supervision
- ▶ Immediately contact the Title IX Coordinator for what to do next



127

DO: Make Necessary Contacts


- ▶ **Law enforcement:** If the allegations include a serious crime or evidence needs to be collected (like information on an electronic device)
- ▶ **Medical Personnel:** If the allegations involve an injury
- ▶ **Parent(s)/guardian(s):** Follow standard policy/practice
- ▶ **Child Protective Services:** If the allegations indicate child abuse or neglect, make a report as required by law and district policy



128

DO: Consider Special Education


- ▶ If a party is a student with a 504 plan or an IEP, contact the relevant special education administrator to consider impacts on special education placement and services



129

DON'T: Investigate


- ▶ Do not conduct investigation interviews
 - Only conduct intake meetings with the reporting party and the complainant/family
- ▶ Do not ask for or collect evidence (there is a *caveat*)
- ▶ An intake meeting should ask what is alleged to have happened, not ask for evidence to support the allegations



130

DON'T: Discipline


- ▶ Do not discipline either party, including the alleged perpetrator
- ▶ While you can “assess safety” for immediate steps to take to keep your community safe, discipline is not permissible at this stage
- ▶ Contact the Title IX Coordinator, who will evaluate potential emergency removal from school or activities



131

DON'T: Violate Confidentiality

- ▶ Do not tell the alleged perpetrator the alleged victim’s name or that a report has been made
- ▶ The school cannot share such information until the Title IX Coordinator says Title IX is not implicated, a Title IX Formal Complaint is filed, or the alleged victim and their parent(s)/guardian(s) allow such disclosure



132


Title IX Coordinator Initial Response

Notify	Support	Initiate
<ul style="list-style-type: none"> ▶ Complainant (or reporter) of grievance and informal resolution procedures ▶ After complaint made, Respondent of grievance and informal resolution procedures 	<ul style="list-style-type: none"> ▶ Offer & coordinate supportive measures for Complainant once report is made ▶ Offer & coordinate supportive measures for Respondent once complaint is made 	<ul style="list-style-type: none"> ▶ Emergency removal or administrative leave ▶ Grievance process or informal resolution ▶ Other steps to ensure harassment does not continue/recur

133

Intake

- ▶ Initial meeting to better understand the allegations and whether they fall within the definition of Title IX sexual harassment
- ▶ Not an investigation or search of evidence
- ▶ Basic questions:
 - ▶ What happened?
 - ▶ Who was involved?
 - ▶ When and where did it happen?
- ▶ Also discuss the grievance process and offer supportive measures



134

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




135

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 a "safe adult" for check-ins ▶ Training and education programs related to sexual harassment 	<ul style="list-style-type: none"> ▶ Mutual no contact orders ▶ 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

136




FAPE

- ▶ Remember: for a student with a disability, the Title IX Coordinator should consult with a special education administrator to ensure that supportive measures do not interfere with the student's IEP or 504 services or accommodations
- ▶ The special education administrator should consider whether an IEP or 504 meeting is warranted



137




MDR

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



138

When poll is active, respond at poller.com/thlaw411

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

Yes No

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

139

When poll is active, respond at poller.com/thlaw411

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

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

140

When poll is active, respond at poller.com/thlaw411

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

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

141

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



142



Only move to next steps if you have a Formal Complaint

- NO DISCIPLINE WITHOUT A FORMAL COMPLAINT & COMPLETING THE GRIEVANCE PROCESS -
- But support, support, support



143



What if the Complainant (or their parent) doesn't want to sign a formal complaint?

144

When to Sign a Formal Complaint

Consider the following factors:

- ▶ Complainant's request not to initiate a complaint
- ▶ Complainant's reasonable safety concerns
- ▶ Risk that additional acts of harassment would occur if a complaint is not initiated
- ▶ Severity of the alleged sexual harassment, including whether (if harassment were established) the removal of a respondent or imposition of other disciplinary sanction would be required to end the harassment and prevent its recurrence
- ▶ Age and relationship of the parties, including whether the respondent is an employee
- ▶ Whether there is an alleged pattern, ongoing sexual harassment, or harassment affecting multiple individuals
- ▶ Availability of evidence to assist the decisionmaker
- ▶ Whether the district could end the alleged sexual harassment and prevent its recurrence without initiating the grievance procedures



145

Sign a Formal Complaint?

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

146

When poll is active, respond at polltv.com/thlaw411
 Text **THLAW411** to **223333** once to join

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 complainants 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

147

Sign a Formal Complaint?

Carey reports another student, Romy, forced Carey to have sex at school. Carey also claims that Romy did the same thing to another student two months ago.

Romy admits that "they resisted initially but I got them to agree" to the police, raising concerns of coercion.

Neither complainant wants to move forward with a complaint, and sexual assault is a required removal to a disciplinary alternative placement under state law.

148

2024 Title IX

When poll is active respond at PollTV.com/thlaw411 Send **thlaw411** to **223333**

What should the school district do?

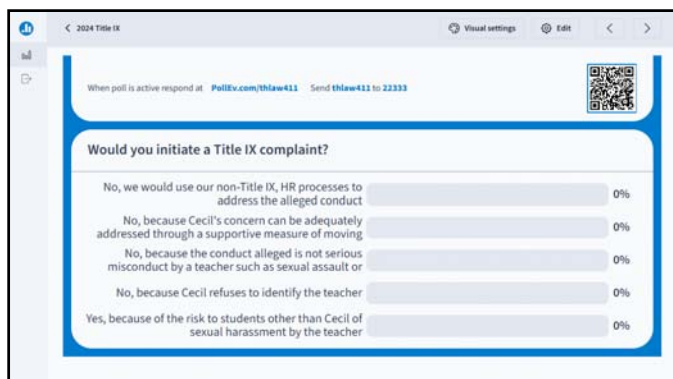
Transfer Romy to the alternative program because it is required under state law and he admitted the conduct	0%
Respect the autonomy of the complainants by using only supportive measures to address the situation at school	0%
Sign a formal complaint and use the Title IX process	0%

149

Sign a Formal Complaint?

Student Cecil reports that a teacher made sexually suggestive comments to Cecil, asked Cecil repeatedly if they wanted rides home or for Cecil to babysit, and gave Cecil hugs frequently. Cecil did not identify the teacher. Cecil asks to move to another high school in the district, but does not want to file a formal complaint.


150



151

When to Sign a Formal Complaint

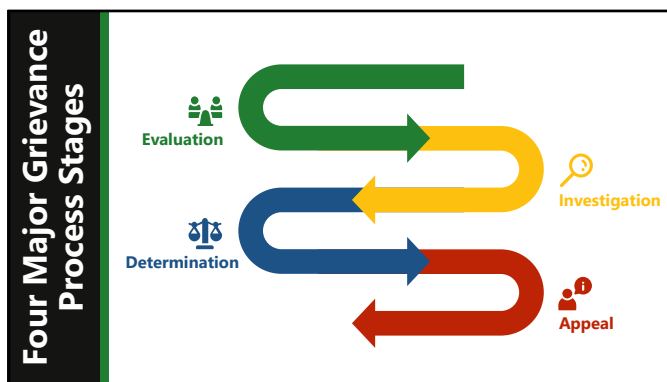
- ▶ Ultimate question is whether the alleged conduct either:
 - ▶ Presents an imminent and serious threat of harm to complainant or another person
 - ▶ Prevents the school from ensuring equal access to its education programs or activities



152



153



154

Ten Basic Requirements for Grievance Process

1. Treat complainants and respondents equitably
2. Require an objective evaluation of all relevant evidence
3. Title IX personnel cannot have a conflict of interest or bias and must be trained
4. Presumption that respondent is not responsible
5. Reasonably prompt timeframes for conclusion of the grievance process
6. Describe or list the range of possible disciplinary sanctions and remedies
7. State whether the standard of evidence is the preponderance of the evidence or clear and convincing evidence standard
8. Permissible bases for appeal
9. Describe the range of supportive measures available
10. Not seek, allow, or otherwise use evidence protected under a legally recognized privilege unless waived


155

Key Terms

Formal Complaint

Any 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




156

A student or employee who is alleged to have been subjected to conduct that could constitute Title IX sexual harassment

- ▶ Even if report made by parent/guardian or third party
- ▶ Even if Title IX Coordinator initiates the grievance process


Key Terms
Complainant




157

Key Terms
Respondent

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




158

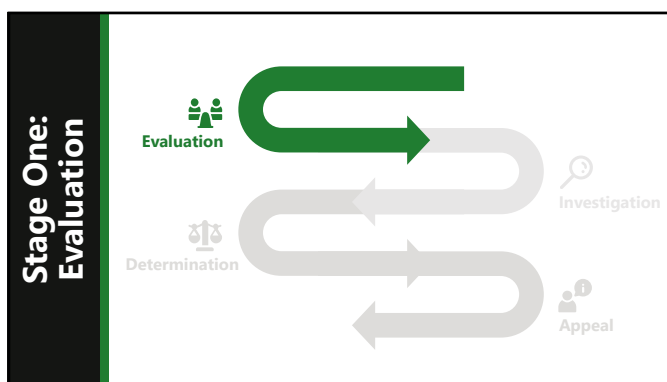


Evaluation

- ▶ Notice of allegations
- ▶ Consolidation
- ▶ Dismissal




159



160

Notice of Allegations

- ▶ The school's grievance process;
- ▶ The allegations of sexual harassment, including sufficient details **available at the time** to allow the parties to respond
 - Identity of parties involved
 - Conduct alleged to constitute sexual harassment
 - Date and location of alleged incident
- ▶ A presumption of non-responsibility;
- ▶ The right to inspect and review evidence;
- ▶ The right to have an advisor during the process;
- ▶ Any provision in the school's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process; and
- ▶ Statement that retaliation is prohibited



161

Consider Consolidation

Multiple Complaints	Same Circumstances
<ul style="list-style-type: none"> • Against more than one respondent • By more than one complainant against one or more respondents • By one party against the other party 	<ul style="list-style-type: none"> • Where the allegations of sexual harassment arise out of the same facts or circumstances • Consider defining the phrase in your procedures

162

Consolidate?

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

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 a year apart.

163

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Should the Complaints be Consolidated?

- Yes, because the respondent is the same in each case 0%
- Yes, because they involve the same type of behavior 0%
- No, because it will be unfair to Rowan to consolidate the cases 0%
- No, because the circumstances and facts of the allegations are not the same 0%

164

Consider Dismissal

Mandatory	Permissive
<ul style="list-style-type: none"> The conduct, if true, would not meet the definition of sexual harassment under Title IX The conduct did not occur in the district's education program or activity The conduct did not occur against a person in the U.S. 	<ul style="list-style-type: none"> The complainant withdraws the complaint or allegations in writing The respondent is no longer enrolled or employed by the district Specific circumstances prevent the district from gathering sufficient evidence

165

Dismiss?

You receive a complaint alleging that student Napoleon Dynamite was subject to sex-based harassment by Summery Wheatley during the bus ride home from school.

You immediately pull the bus security footage, but it shows no interaction between parties.

166

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Can you dismiss?

- Yes, the evidence is clear that the allegation cannot be proven 0%
- No, lack of (or contradictory) evidence is not a reason for dismissal 0%
- Yes, if Napoleon withdraws the allegation after being confronted with the video 0%
- B and C 0%

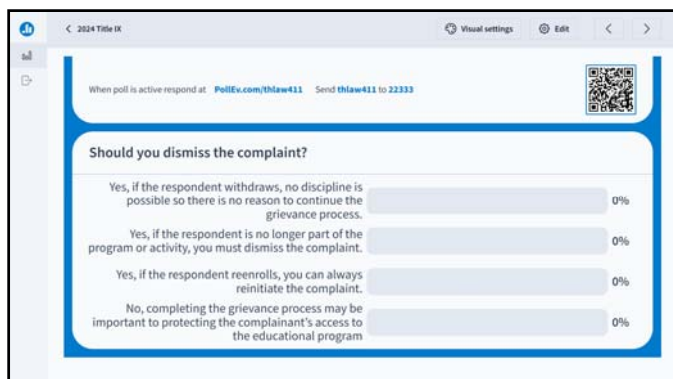
167

Dismiss?

Court alleges that while he was dating Rachel, she was constantly telling him he was a failure and really not good enough for her. Court alleges that Rachel threatened to start posting on social media about what a loser he was if he did not get his act together. If he forgot their plans together, she would scream at him and get in his face.

After Court makes a complaint and you send the notice of allegations to Rachel, Rachel withdraws from the district and enrolls in a local parochial school.

168



169



170

Dismissal

Mandatory	Permissive
<ul style="list-style-type: none"> The conduct, if true, would not meet the definition of sexual harassment under Title IX. The conduct did not occur in the district's jurisdiction. The conduct did not occur against a person in the U.S. 	<ul style="list-style-type: none"> The complainant withdrew the complaint or admissions in writing. The respondent is no longer enrolled in the district. Special circumstances prevent the district from gathering sufficient evidence.

171

REMEMBER ... Supportive Measures

DON'T FORGET!

If you dismiss, you must "at a minimum"

- ▶ Offer supportive measures to complainant and respondent
- ▶ Take appropriate prompt and effective steps to ensure that sexual harassment does not continue or recur

172

Appeal of Dismissal

- ▶ Any party can appeal dismissal
- ▶ Notify parties when appeal is filed
- ▶ Implement appeal procedures equally for the parties
- ▶ Appeal decisionmaker cannot be someone involved in the investigation or dismissal of complaint
- ▶ Appeal decisionmaker must be trained
- ▶ Parties must have 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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174

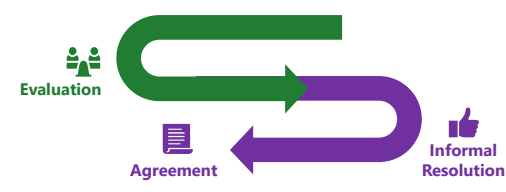
What is Informal Resolution?

A voluntary, structured interaction between involved parties (complainant and respondent) to resolve the allegations without an investigation, written determination, or appeal.



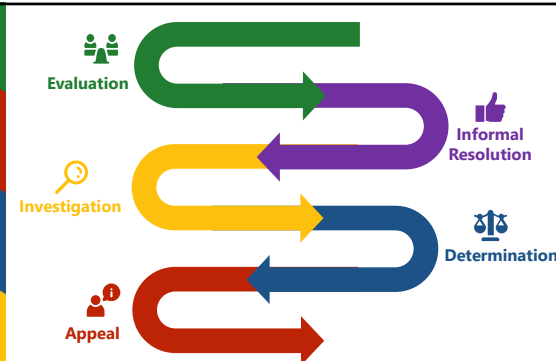
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Informal Resolution Stages

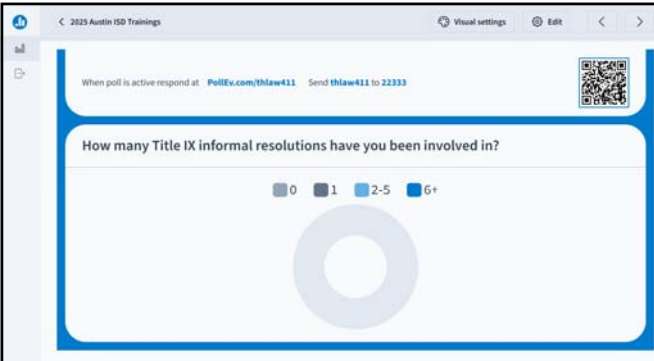


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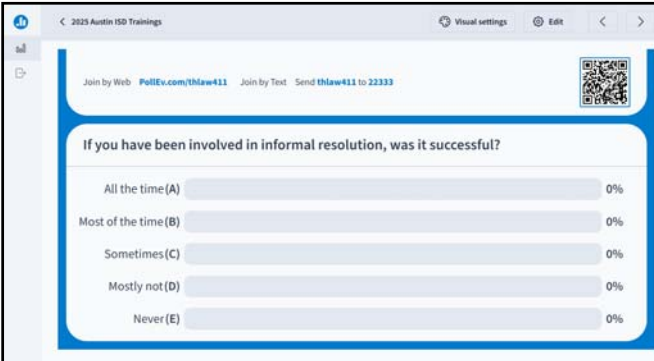
Unsuccessful Informal Resolution



177




178



179

Goals of Informal Resolution


- ▶ Give parties agency and choice over the outcome of the conflict
- ▶ Restore and maintain access to education programs & activities
- ▶ Address the harm raised in the complaint and prevent future harm
- ▶ Facilitate communication and understanding between the parties (when desired)



180

Pros of Informal Resolution


- ▶ Student preference to avoid investigation and hearing process
- ▶ Avoids re-traumatization through more adversarial investigation/decision-making procedures
- ▶ Potential holistic approach through restorative justice
- ▶ Voluntary – student buy-in
- ▶ Reduction of administrative burden
 - ▶ Fewer staff involved
 - ▶ Reduction in timeframes
- ▶ Potentially lowers risk of litigation



181

Cons of Informal Resolution

- ▶ Not appropriate in all cases
 - ▶ Cannot be used in cases with an employee respondent and student complainant
 - ▶ Cannot be used to avoid mandatory sanctions
- ▶ Perception that IR does not provide "justice"
- ▶ Parties might be hesitant to communicate with each other
- ▶ Unskilled facilitator can frustrate process



182

Informal Resolution Procedures

- ▶ When will the Title IX Coordinator offer informal resolution?
- ▶ What steps will the process follow?
- ▶ What records will be maintained and when can they be disclosed?
- ▶ Potential terms
- ▶ District role
- ▶ Prompt timeframe



183

When to use IR

Informal Resolution will not be offered (required)	Informal Resolution will not be offered (consider)	Informal Resolution will be offered
<ul style="list-style-type: none"> ▶ Complaints involving a student complainant and an employee respondent ▶ When it would conflict with state or federal law <ul style="list-style-type: none"> ▶ Mandatory disciplinary sanctions ▶ Special education considerations 	<ul style="list-style-type: none"> ▶ When discipline is necessary to end the alleged conduct and prevent its recurrence <ul style="list-style-type: none"> ▶ Consider severity of the alleged conduct, pattern of behavior, future risk of harm to others ▶ When there is a power differential between the parties or risk of coercion ▶ When multiple individuals may have been impacted but not all are participating 	<ul style="list-style-type: none"> ▶ In all other cases (after a formal complaint is filed)

184

Informal Resolution Process

Process	Records	Terms	Coordinator	Timeframe
<ul style="list-style-type: none"> • The school can set up a process or allow the facilitator to develop a process • Consider whether the parties will meet face-to-face, whether to allow advisors 	<ul style="list-style-type: none"> • Final agreement must be maintained (7 years) (FERPA applies) • Consider whether other records will be maintained or shared 	<ul style="list-style-type: none"> • Anything the parties agree to that the district is willing to enforce • Consider sanctions and remedies 	<ul style="list-style-type: none"> • Consider sign-off by Title IX Coordinator to ensure enforceability 	<ul style="list-style-type: none"> • Include a timeframe in grievance procedures • Extend for good cause and with notice • Consider pausing investigation during IR

185


Informal Resolution Process

- ▶ The school can set up a process (in addition to the required notices) to guide informal resolution or allow the facilitator to develop a process based on the needs of the case
- ▶ Consider whether the parties will meet face-to-face, whether to allow advisors
- ▶ Potential steps:
 1. Introductory letter from facilitator to both parties
 2. Confirm consent to participate
 3. Request for statements from each party addressing the alleged conduct and desired outcome (optional)
 4. Meet/confer with parties (individually or together)
 5. The facilitator drafts the agreement
 6. Review by Title IX Coordinator and sign off on any action required by the school
 7. Parties (and parents of minors) sign
 8. If no agreement, return to grievance process

186

371 What to do with records?

- ▶ The written procedure and notice to the parties must state what information the school will maintain and whether and how it could be disclosed
- ▶ Any final agreement must be maintained (7 years), FERPA applies
- ▶ Consider not maintaining party statements, facilitator notes, offers and counter-offers
- ▶ **Recommended:** Prohibit the disclosure or use of information shared during the informal resolution in the investigation and decisionmaking process if informal resolution is not successful



187

Potential Terms

- ▶ The agreement may include any terms the parties agree on, and the school district is willing to enforce, as long as they do not violate other federal or state laws
- ▶ Consider both remedies and sanctions
- ▶ Consider:

▶ No-contact order or stay-away agreement	▶ Impact statement by complainant
▶ Restrictions on participation in programs and activities	▶ Training, educational courses, counseling, or coaching/mentoring
▶ Community service	▶ Campus escort
▶ Admission of responsibility or apology	▶ Change in class schedule or dining arrangements
▶ Verbal or written warning	▶ Disciplinary sanctions

188

District Agreement?

- ▶ The Rules do not require the Title IX Coordinator to approve or sign the agreement
- ▶ Practically, some terms will require implementation by the district, such as:
 - ▶ Changed schedules
 - ▶ Written warnings and discipline
 - ▶ Provision of counseling, mentoring, training
- ▶ And the district will monitor to ensure compliance with the agreement
- ▶ Consider including approval by the Title IX Coordinator in the IR process

189


Prompt Timeframe

- ▶ The procedure should include a timeframe to complete informal resolution or revert to the grievance process
- ▶ Notify both parties of any extensions and the reasons; keep parties updated
- ▶ Will the investigation be paused or continue while parties engage in IR?



190


Informal Resolution Steps

<p>Title IX Coordinator</p> <ol style="list-style-type: none"> 1. Evaluate 2. Provide Notice 3. Obtain Consent 4. Assign IR Facilitator <p>IR Facilitator</p> <ol style="list-style-type: none"> 1. Review the file 2. Verify impartiality 3. Mediate 4. Resolve and agree 	
--	---

191

531 Step 1: Evaluate

- ▶ Title IX Coordinator must determine if informal resolution is appropriate by conducting an initial assessment
- ▶ Use the requirements and considerations in your informal grievance procedures; consistent practices are important



192

Step 2: Provide Notice

193

Step 3: Obtain Consent

- ▶ Use a standard form that includes the required notices
- ▶ Obtain signatures from parties (and parents if parties are minors)
- ▶ Make sure that parties understand information in the notice, take time to answer questions

194

Step 4: Assign the IR Facilitator

- ▶ Upon receipt of Consent from all parties, the Title IX Coordinator will assign an Informal Resolution Facilitator
- ▶ Follow any criteria and considerations in your procedures

195

IR Facilitator

- ▶ Generally the Title IX Coordinator chooses the facilitator
- ▶ Must not be the investigator, decisionmaker, or appellate decisionmaker
- ▶ Must be **and look** impartial
- ▶ Should have the right "soft" skills
- ▶ Must be well-trained in informal resolution methods and the school's procedures

196

#1

Review the file

197

Review the File


One you are assigned as the Informal Resolution Facilitator, you will need to carefully review the case file materials to:

- ▶ Carefully review the facts of the underlying case, the parties' respective positions regarding the dispute, including undisputed facts and facts which are still in dispute.
- ▶ Gauge how far apart the parties are in their positions and begin to think about how to bring those positions closer together.

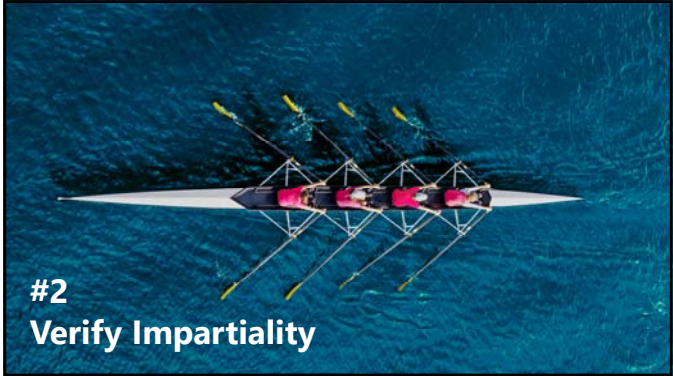
198

Review the File

- ▶ Intake Notes
- ▶ Complaint
- ▶ Written Notice of Allegations
- ▶ Any Directly Related Evidence gathered so far
- ▶ Any information provided by the parties



199




#2 Verify Impartiality

200

Verify Impartially

- ▶ Determine whether you can serve impartially
- ▶ Identify any chance that you may even appear biased, conflicted, or otherwise not neutral if you proceed as the Informal Resolution Facilitator.
- ▶ Promptly bring any concerns you have about your ability to serve as a neutral, unbiased, not conflicted Informal Resolution Facilitator to the attention of the Title IX Coordinator.



201

Perceptions Matter

- ▶ Consider what others might think, even if you believe you can overcome the appearance of a bias or conflict of interest
- ▶ Give equal time, energy, and interest to both parties
- ▶ Consider your language – and your body language
- ▶ Control your facial expressions



202




#3 Mediate

203

Review the File (Again)


- ▶ Review the complaint and file materials again.
- ▶ Pay close attention to each parties' perspective regarding the events giving rise to the complaint.
- ▶ Make note of any areas of possible compromise or opportunities for resolution.



204


Consider the Format

- ▶ This process can take different forms:
 - ▶ In person, virtual, phone, email
 - ▶ Whole group, simultaneous separate meetings, asynchronous




205

Ground Rules



- ▶ Consider developing written information regarding the informal resolution process and your institution's ground rules for information resolution
- ▶ The parties and their advisors should read and sign the informal resolution process procedures and rules document



206

Reach Out to the Parties


- ▶ Can be oral or in writing; use same method for both parties. HM1
- ▶ What is their perspective on the incident(s) at issue?
- ▶ What are their goals for resolution?
- ▶ Are they open to a joint session?
- ▶ Check-in on their supportive measures
- ▶ Ensure the parties understand privacy and confidentiality rules and have no concerns that might impede good faith participation



207

Think through Logistics

- ▶ Find mutually agreeable time and place; consider accessibility, neutrality, and privacy
- ▶ Begin early in the day, if possible
- ▶ Avoid scheduling mediation in close proximity to another mediation or meeting



208

Active Listening


- ▶ Ask prompting questions:
 - ▶ "Why are we here?"
 - ▶ "Tell me more about..."
 - ▶ "Help me understand..."
- ▶ Resist the urge to fill the silence



209

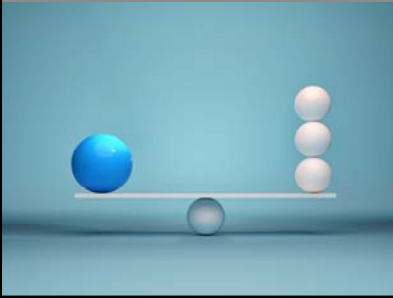
Respect

- ▶ Equal treatment for all parties
- ▶ Cultural sensitivity
- ▶ Understand that emotions are high
- ▶ Acknowledge feelings
- ▶ Reasonable and neutral sympathy is okay
 - ▶ "I can tell this is hard for you."
 - ▶ "I'm sorry this is so difficult."




210

Remain Impartial

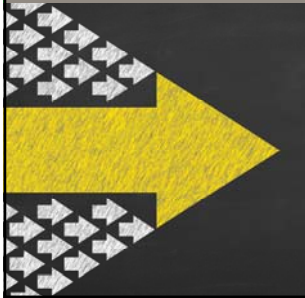


- ▶ Maintain a commitment to aid all parties
- ▶ Avoid accusatory language/placing blame on any party during discussions
- ▶ Do not invest emotionally
- ▶ Stay objective; focus on facts




211

Focus on Resolution




- ▶ Encourage parties to avoid reacting defensively
- ▶ Focus discussions on possible solutions as opposed to "rehashing" defensive statements or explanations
- ▶ Do not allow advisors or parents to frustrate or steamroll the process




212

Suggest, Don't Advocate



- ▶ "What terms would help you reach a resolution in this case?"
- ▶ "I want to provide some options to consider, but these are just suggestions to help get/keep the conversation going."


213



#4
Resolve and Agree

214

Iron Out Details



- ▶ How long will the Agreement remain in effect?
- ▶ How will this impact physical spaces? Cafeterias, lockers, hallways, common spaces?
- ▶ What about academic and extracurricular spaces?
- ▶ Impact on the parties' respective institutional record?

215

Plan Ahead




- ▶ What will happen if the agreement is breached?
- ▶ Is it the same consequence for each provision?
- ▶ How will a breach be determined?



216

Examples of Remedies

- ▶ Provisions similar to Supportive Measures
- ▶ Voluntary restrictions regarding participation in registered student orgs or school events
- ▶ Stay-Away agreement
- ▶ Apologies
- ▶ Changes to class schedule or transportation, subject to availability



217

Examples of Remedies


- ▶ Provisions similar to Supportive Measures
- ▶ Voluntary restrictions regarding participation in registered student orgs or school events
- ▶ Stay-Away agreement
- ▶ Apologies
- ▶ Changes to class schedule or transportation, subject to availability
- ▶ Party participates in educational trainings, counseling, or coaching sessions regarding:
 - ▶ consent & communication,
 - ▶ use of alcohol or drugs
 - ▶ healthy interpersonal relationships
 - ▶ stress management & well-being
- ▶ Participation in restorative work



218

Examples of Remedies

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 - ▶ use of alcohol or drugs
 - ▶ healthy interpersonal relationships
 - ▶ stress management & well-being
- ▶ Participation in restorative work
- ▶ Availability to complainant to read "impact statement" to respondent
- ▶ Voluntary withdrawal from district or transfer to another campus
- ▶ Other measures deemed appropriate by TIX Coordinator



219

Informal Resolution Agreement



- ▶ Must be reduced to writing and signed by the parties
- ▶ Title IX Coordinator should approve any resolution agreed to by the parties



220

Informal Resolution Agreement



- ▶ After signing IR agreement, complainant and respondent are bound by the terms and cannot initiate formal Grievance Process
- ▶ If complainant or respondent circumstances change significantly, may request supplemental agreement and TIXC determines if appropriate




221

Writing the Agreement

The Informal Resolution Agreement should include the following elements:

- ▶ Summary regarding nature of the formal complaint, allegations, and implicated policies
- ▶ Language reflecting that the agreement is entered into voluntarily and is in lieu of a formal investigation
- ▶ Could include an admission of responsibility
- ▶ A description of the agreed terms
- ▶ A violation clause indicating consequences for violating any part of the agreement



222

Writing the Agreement

The Informal Resolution Agreement should include the following elements:

- ▶ Any disciplinary dispositions
- ▶ Confidentiality statement
- ▶ Clear language that parties agree to outcomes
- ▶ A notice regarding the institution's commitment to an harassment-free environment and prohibition against harassment and retaliation
- ▶ A place for the Title IX Coordinator and the parties to sign and date the agreement



223

What Happens Next?

Written Resolution Agreement

- ▶ Final and binding on the parties
- ▶ Allegations addressed are considered resolved
- ▶ No further investigation, adjudication, remediation, discipline, or appeal

No Resolution Agreement

- ▶ At any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution process – TIXC notifies other party
- ▶ Parties are referred back to the formal Grievance Process for investigation and determination
- ▶ Complainant may decide to withdraw the complaint

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225



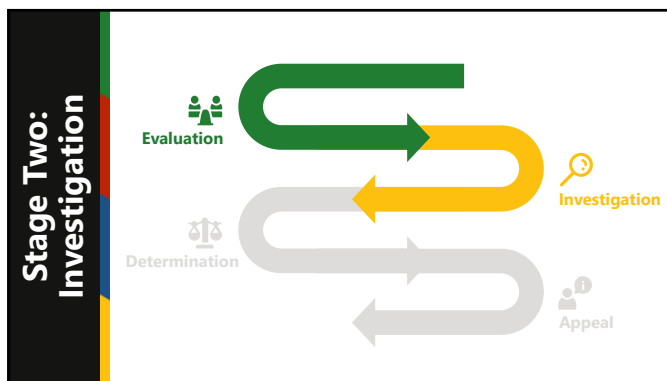
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Pretest: Title IX investigations and determinations are very similar to other student misconduct investigations and determinations.


Very true	0%
True with some exceptions	0%
Differences outweigh the similarities	0%
Entirely false	0%
I'm not sure yet	0%

227



228

Key Investigation Principals



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

229

Parent's Rights During Investigation

- ▶ Right to act on behalf of minor students throughout the grievance process
- ▶ 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

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An Effective Investigation → A Reliable Determination

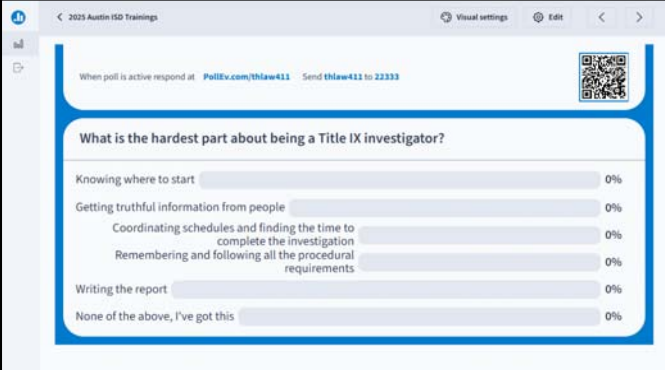
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Investigation Plan

1. Review the file
2. Verify impartiality
3. Introduce yourself to the parties
4. Plan investigation
5. Gather evidence
6. Compile and share "directly related evidence"
7. Draft & share investigation report
8. Transmit file to Title IX Coordinator

232



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What is the hardest part about being a Title IX investigator?

Knowing where to start	0%
Getting truthful information from people	0%
Coordinating schedules and finding the time to complete the investigation	0%
Remembering and following all the procedural requirements	0%
Writing the report	0%
None of the above, I've got this	0%

233

Investigation Roadblocks

- ▶ Managing timeframes
- ▶ Coordinating schedules
- ▶ Uncooperative parties and witnesses
- ▶ Meddling advisors



234



235



Review the File

- ▶ Review all material provided by the Title IX Coordinator
 - ▶ Report
 - ▶ Intake notes
 - ▶ Formal Complaint
 - ▶ Notice of allegations
 - ▶ Supportive measures documentation
 - ▶ Note if either party has an advisor




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Verify Impartiality

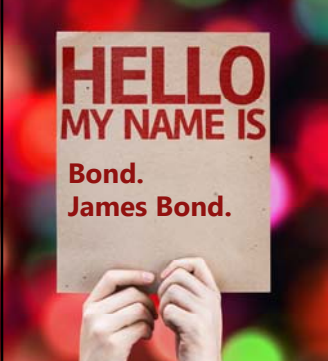
- ▶ An impartial investigator
 - ▶ Is unbiased
 - ▶ Has no conflict of interest
 - ▶ Does not prejudice
 - ▶ Is well trained



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Introduction

- ▶ Not required, but best practice
- ▶ Benefits:
 - ▶ Notice to the parties of the "rules" for the investigation
 - ▶ Notice to the parties that there may be periods where they do not hear from you, and how they can contact you
- ▶ Send to parties, parents/guardians of minor parties, and advisors, if any

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241

Plan Investigation

- ▶ Read the formal complaint, notice of allegations, intake notes, and any other preliminary information provided by the Title IX Coordinator
- ▶ Compare the allegations to the definitions in your district Title IX policies and procedures
- ▶ Use the notice of allegations to determine the scope and focus of the investigation



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Plan Investigation



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



243

What do you need to know?

- ▶ Think back to the Title IX definitions of "Title IX sexual harassment" "in an educational program or activity" and "against a person in the U.S."
- ▶ Look at the allegations and consider what the elements for each claim are
- ▶ Consider information needed to craft a remedy if a violation is found

244


Where will you find evidence?

- ▶ Who may have information?
- ▶ Who will you question first?
- ▶ Is there a recording?
- ▶ Are there texts or social media communications or posts?
- ▶ Identify and preserve evidence at risk of loss
- ▶ Contact law enforcement immediately if there is knowledge of illegal or illicit evidence




245

Scope of Investigation



- ▶ If there are additional allegations → Title IX Coordinator will need to amend the notice of allegations
- ▶ If there are additional complainants or respondents → Title IX Coordinator will need to reach out to determine if there will be a Title IX complaint, provide all necessary notices and supports, and decide if consolidation is proper or if there will be separate investigations




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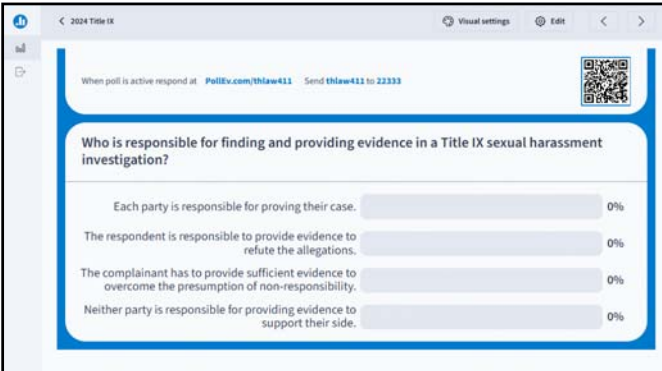
Notice of Interview



- ▶ District must provide the parties written notice of the **date, time, location, participants, and purpose** of all investigative interviews or other meetings with sufficient time to prepare
- ▶ Recommended to do the same for non-party witnesses (not required)



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

Each party is responsible for proving their case.	0%
The respondent is responsible to provide evidence to refute the allegations.	0%
The complainant has to provide sufficient evidence to overcome the presumption of non-responsibility.	0%
Neither party is responsible for providing evidence to support their side.	0%

249

YOU ARE!



- ▶ The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the educational institution, not the parties
- ▶ But if parties want to provide evidence, let them. Do not discourage parties from submitting evidence
- ▶ Give all parties the same opportunity to present evidence, suggest witnesses, and recommend directions for your investigation
- ▶ If you decide not to pursue a suggested route, record your reasons

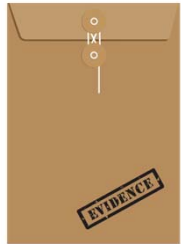



250

Types of Evidence

- ▶ Direct Evidence
- ▶ Circumstantial Evidence
- ▶ Hearsay

Rumor / innuendo (NOT evidence)





251


Direct Evidence

Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

- ▶ What a witness directly experienced
- ▶ Eyewitness testimony
- ▶ Admissions—written or oral
- ▶ Surveillance tape or cell phone video captures the incident




I saw Johnny swimming in the lake.



252


Circumstantial Evidence

Evidence based on inference and not on personal knowledge or observation ... all evidence that is not given by eyewitness testimony.




I saw Johnny walking off the pier, wrapped in his towel, with wet hair.

He must have been swimming.




253

Hearsay Evidence



A statement (oral or written) made by someone other than the person you are interviewing and that is offered to prove the truth of the matter asserted in the statement.


Holly: Kendra said she saw Johnny swimming in the lake.



254

Sources of Evidence

▶ Interviews	▶ Police Reports	▶ Other electronic files/ cloud storage
▶ Testimony	▶ Emails	▶ Journal entries
▶ Documents	▶ Handwritten notes	▶ Medical records (ONLY with written consent)
▶ School records	▶ Calendars	
▶ Campus files	▶ Photographs	
▶ Personnel files	▶ Videos	
▶ Investigation records	▶ Text & instant Messages	
▶ Student files		




255

Conduct Productive Interviews

Preparation is key!!!!


- ▶ Prepare a focused and targeted interview outline
- ▶ Focus on the allegations of sexual harassment and the questions you need to answer to reach a conclusion
- ▶ Identify "must ask" questions to elicit information related to the allegations and questions you have identified
- ▶ Identify evidence to discuss with witness
- ▶ Prepare questions to obtain a reliable chronology of events and all relevant information that witness has
- ▶ Avoid extraneous questions that seek information that is not relevant



256

Game Plan for Interviews

- ▶ Determine how you are going to establish rapport
- ▶ Where are you going to conduct the interview? Will it make the witness feel comfortable?
- ▶ Are you going to have others present? Who?
- ▶ How are you going to open the interview?
- ▶ Set notice of rights/expectations?
- ▶ To record or not to record?



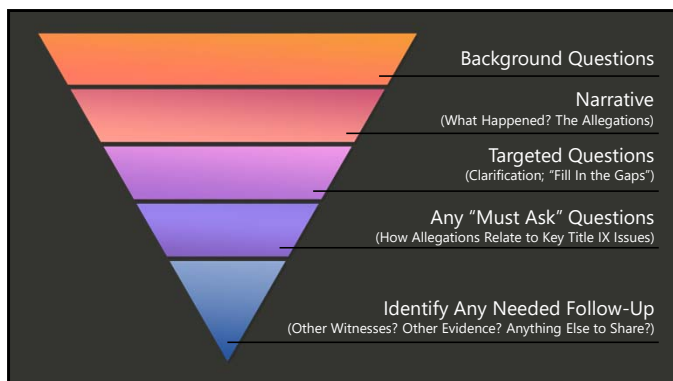
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Interviews

- ▶ Who do we interview?
- ▶ In what order should we conduct the interviews?

Complainant
Witnesses you identified (campus personnel, other students)
Witnesses identified by complainant
Respondent
Witnesses identified by respondent

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259

Interview Dos & Don'ts

DOs	DON'Ts
<ul style="list-style-type: none"> ✓ Make party/witness feel at ease ✓ Be neutral, objective, and open-minded ✓ Listen <i>actively</i>. ✓ Let the interviewee tell their story ✓ Take all allegations and statements seriously ✓ Be thorough – make sure to elicit all relevant facts 	<ul style="list-style-type: none"> ✗ Create a hostile or unwelcoming environment ✗ Have an agenda ✗ Be a passive interviewer ✗ Do all the talking ✗ Rush to judgment or dismiss allegations or statements ✗ Make determinations based on sex-stereotyping or status

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More Interview Dos & Don'ts

DOs	DON'Ts
<ul style="list-style-type: none"> ✓ Ask all necessary follow-up questions ✓ Ask probing questions ✓ Seek information regarding potential justifications/excuses ✓ Test the credibility of the statements in the interview ✓ Ask for supporting documents and/or corroborating witnesses 	<ul style="list-style-type: none"> ✗ Shy away from asking tough questions ✗ Conduct an interrogation ✗ Be argumentative or accusatory ✗ Be unprepared ✗ Conduct the interview without reference to any documentation or other evidence

261



Impermissible Evidence

- ▶ Evidence protected by a legal privilege
- ▶ Health care treatment records
 - MUST OBTAIN WAIVER!**
- ▶ Complainant's sexual predisposition, or prior sexual behavior (unless exception)
 - Impermissible evidence must not be considered (except to determine exception) and must not be disclosed or used

262

Privileged or Confidential

- ▶ Information protected by a recognized federal or state law, such as attorney-client privilege, doctor-patient privilege, or spousal privilege may not be sought, used, or relied on
- ▶ Unless the person holding the privilege has waived it



263

Healthcare Treatment Records




- ▶ Healthcare treatment records made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment may not be accessed, considered, or used
- ▶ Unless the student (parent) provides voluntary written consent
- ▶ Medical records previously provided to the school related to a special education or 504 evaluation become student records and are not impermissible

264

Complainant's Sexual Predisposition and Prior Sexual Behavior

- ▶ Questions and evidence related to a complainant's sexual predisposition or prior sexual behavior are **impermissible** and may not be asked or sought
- ▶ Exceptions: Evidence related to the complainant's prior sexual behavior
 - Offered to show someone other than the respondent committed the alleged conduct
 - Related to the sexual behavior between the complainant and respondent and offered to prove consent
- ▶ **However**, the fact of prior sexual conduct between the parties does not, by itself, demonstrate or imply the complainant's consent to the alleged sex-based harassment



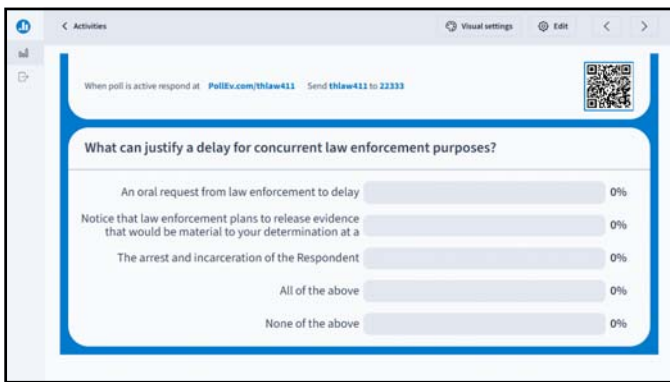
265

Roadblocks: Police Involvement

- ▶ The district must conduct its Title IX investigation in a "reasonably prompt" manner but may temporarily delay the investigation for good cause, which may include concurrent law enforcement activity
- ▶ No long or indefinite delay or extension of timeframes, regardless of whether a concurrent law enforcement investigation is still pending
- ▶ Provide notice of any delay to the parties




266




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What can justify a delay for concurrent law enforcement purposes?

An oral request from law enforcement to delay	0%
Notice that law enforcement plans to release evidence that would be material to your determination at a	0%
The arrest and incarceration of the Respondent	0%
All of the above	0%
None of the above	0%

267

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

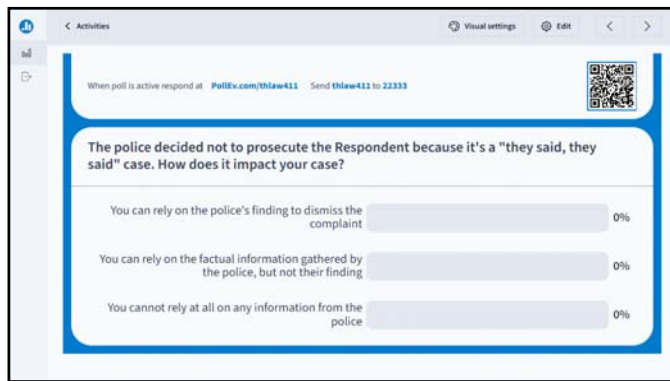
268

Notice of Delay

- ▶ The District must send written notice to both parties regarding the delay or extension and the reason(s) for the delay or extension
- ▶ Concurrent law enforcement activity is not good cause to delay sending the written notice of allegations to the complainant or respondent

269



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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	0%
You can rely on the factual information gathered by the police, but not their finding	0%
You cannot rely at all on any information from the police	0%

270

Police Evidence?



- ▶ Police evidence may be useful for *initial* fact-gathering
- ▶ They **are not** a substitute for your own required investigation
- ▶ The standards for and purposes of criminal investigations are different from school investigations
- ▶ Police investigations or reports are not determinative and you need your own evidence-gathering to determine whether there was Title IX sexual harassment or whether the respondent is responsible



271

Fill In the Gaps

- ▶ Are there any gaps in your chronology of events?
- ▶ Is there any evidence missing?
- ▶ Did you obtain all the documents and information the parties and witnesses referenced?
- ▶ Are there any follow-up questions you need to ask the parties or witnesses?
- ▶ Is there anything else you need to track down to prepare that will allow you (or the decisionmaker) to reach a reliable determination?

272




#6 Compile and Share Directly Related Evidence

273

Compile & Share Directly Related Evidence

- ▶ "Directly related evidence" is not defined in the rules
- ▶ Statements, notes of interviews, and other types of evidence collected in the investigation are likely covered
- ▶ The parties must be given at least 10 days to review all the evidence and submit written responses about the evidence to the investigator
- ▶ The investigator must consider the responses when writing the investigative report




274

275

Prevent Disclosure

- ▶ Take reasonable steps to protect the privacy of parties and witnesses during the grievance process
- ▶ Take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance process



276

Except...

- ▶ Do not restrict the ability of parties to obtain evidence, speak to witnesses, or consult family members, advisors, or confidential resources
- ▶ Disclosures for purposes of administrative proceedings or litigation related to the allegations are authorized



277

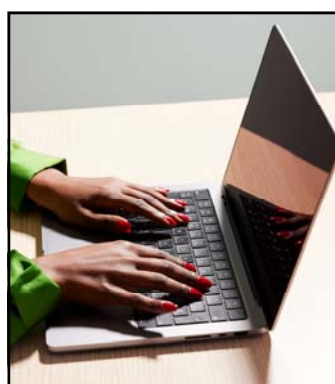
278



#7 Prepare and Share Investigation Report

279

Prepare & Share Investigation Report



- ▶ You can (and should) begin drafting the report during the 10-day DRE period
- ▶ The report must summarize all "relevant evidence" (which may be different from the "directly related evidence")
- ▶ The report must respond to the parties' responses to the investigation report
- ▶ The report must be shared with the parties, who will have 10 days to respond before a decision


280

"Relevant"

Evidence is relevant if

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and;
- (b) the fact is of consequence in determining the action.

Includes "inculpatory" and "exculpatory" evidence

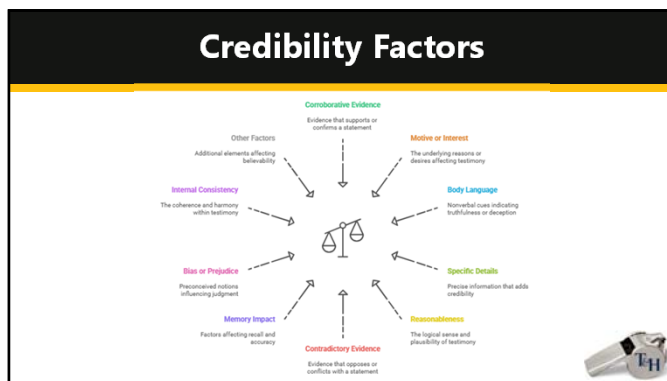


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282



283



284

Consider the Parties' Responses

ASK
YOURSELF

- ▶ Did either party identify evidence that was absent or not gathered?
- ▶ Did either party identify new witnesses or new evidence?
- ▶ Did either party point out inconsistencies in the evidence?
- ▶ Did either party raise concerns regarding the relevance of the evidence?

285

Finalize & Share the Report

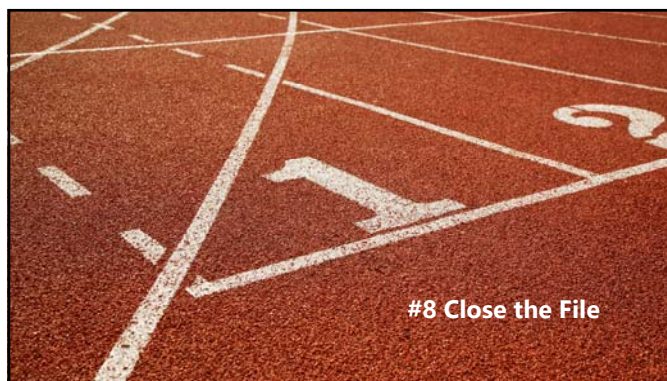
- ▶ The report does not reach a decision/determination, that is the decision-maker's role
- ▶ The educational institution must share the final report with both parties and their advisors
- ▶ Take reasonable steps to protect the privacy of parties and witnesses during the grievance process
- ▶ Both parties must be given at least 10 days to review and respond before a final decision
- ▶ EXCEPT, do not restrict the ability of parties to obtain evidence, speak to witnesses, or consult family members, advisors, or confidential resources

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Investigator Dos and Don'ts

DOs	DON'Ts
<ul style="list-style-type: none"> ✓ Ensure you have no conflict of interest or bias and remain impartial ✓ Treat all parties equitably ✓ Provide an equal opportunity to the parties to present evidence and witnesses ✓ Objectively evaluate all evidence for relevance ✓ Know the elements and definitions of the type of alleged sexual harassment and identify the key factual issues ✓ Conduct a complete and thorough investigation, identify and address any gaps ✓ Ensure your summary of the relevant and not otherwise impermissible evidence is thorough and accurate 	<ul style="list-style-type: none"> ✗ Conduct surprise interviews ✗ Discriminate in the investigation or rely on stereotypes or preconceived notions ✗ Delay or extend the investigation timeline absent good cause ✗ Restrict the parties' ability to discuss allegations or gather evidence ✗ Shy away from asking tough questions ✗ Be accusatory or argumentative ✗ Seek or use impermissible evidence, unless there is a waiver or applicable exception ✗ Violate the parties' confidentiality


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288

Close the File

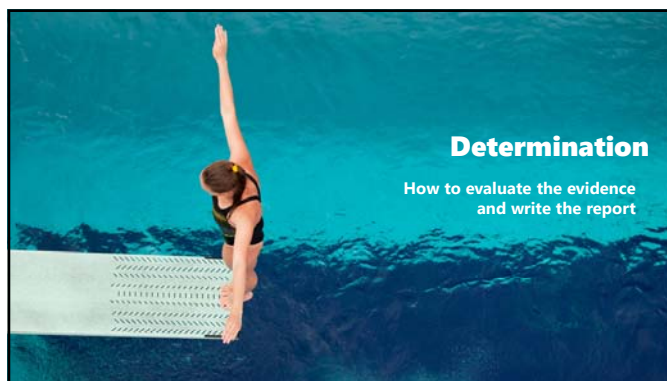
- ▶ Files related to a Title IX complaint must be maintained for seven years
- ▶ Finalize the file and transmit it to the Title IX Coordinator or their designee for the case
- ▶ If you'd like to avoid being called on in six years to find your files, compile and send them to the Title IX Coordinator now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



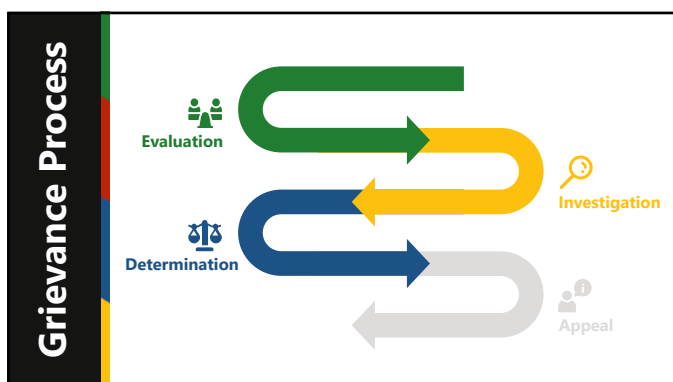
289

Determination

How to evaluate the evidence and write the report



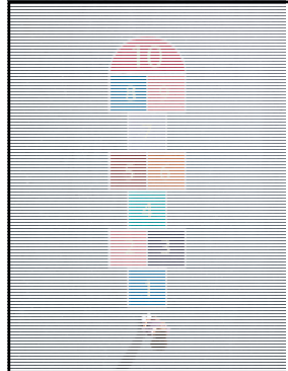
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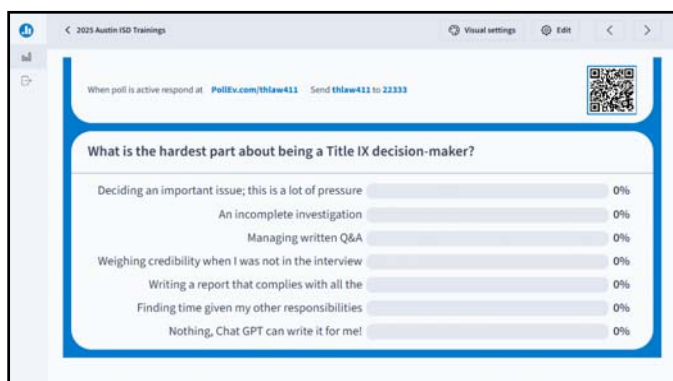
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Decisionmaking Framework

- Step 1:** Learn the Case
- Step 2:** Verify Impartiality
- Step 3:** Conduct Q&A
- Step 4:** Evaluate Evidence
- Step 5:** Prepare Written Determination



292



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What is the hardest part about being a Title IX decision-maker?

Deciding an important issue; this is a lot of pressure	0%
An incomplete investigation	0%
Managing written Q&A	0%
Weighing credibility when I was not in the interview	0%
Writing a report that complies with all the	0%
Finding time given my other responsibilities	0%
Nothing, Chat GPT can write it for me!	0%


293

Step 1: Learn the Case




294

Learn the Case




- ▶ Review the file:
 - ▶ Complaint
 - ▶ Notice of Allegations
 - ▶ Directly related evidence
 - ▶ Investigation Report
 - ▶ Responses to DRE and investigation report




295

Step 2: Verify Impartiality



296


Serving Impartially



- ▶ An impartial decision-maker
 - ▶ Is unbiased
 - ▶ Has no conflict of interest
 - ▶ Does not prejudge
 - ▶ Is well trained
- ▶ Cannot be the Title IX Coordinator or the Investigator (or Appeal Decision-maker)


297

Step 3: Conduct Q&A




298

Written Q&A



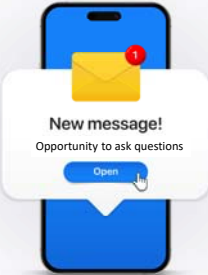
Individuals Involved

- ▶ Parties
- ▶ Witnesses
- ▶ Parents/guardians of minor parties
- ▶ Each party's advisor (can be but is not required to be an attorney)




299

Written Q&A



- ▶ Send notice of right to submit written, relevant questions and follow up questions
- ▶ Provide timeframe for when responses are due (e.g., within 3 or 5 days of electronic delivery of notice)
- ▶ Notice can state that questions and follow-up questions:
 - ▶ Should be numbered
 - ▶ Should identify the name of the party or witness to whom it should be posed




300

Questions Received

Review each question to determine whether it is:

- ▶ **Relevant &**
- ▶ **Respectful**




301

Relevance

Relevant evidence is evidence that has value in proving or disproving a fact at issue and includes both inculpatory and exculpatory evidence.

- ▶ Facts that help prove or disprove an undisputed issue of fact are not relevant
- ▶ Questions that are duplicative of other questions or evidence are not relevant
- ▶ Even if a fact or issue is in dispute, a question is not relevant if it does not "tip the scale" one way or the other in favor of or against the issue in dispute



302

Impermissible Evidence

- ▶ Evidence protected by a legal privilege
- ▶ Health care treatment records

MUST OBTAIN WAIVER!

- ▶ Complainant's sexual predisposition, or prior sexual behavior (unless exception)

Impermissible evidence must not be considered (except to determine exception) and must not be disclosed or used



303

Respectful?

- Cannot use profanity or irrelevant, ad hominem attacks
- Harassing questions will not be tolerated
- No written notice required, but recommend providing



304

2025 Austin ISD Trainings

When poll is active respond at PollEv.com/thlaw411 Send thlaw411 to 22333

Ryan to Casey: Isn't it true that you let Wei touch you the same way over the summer, before we started dating

Relevant 0%

Not relevant 0%

Not appropriate/respectful 0%

305

2025 Austin ISD Trainings

When poll is active respond at PollEv.com/thlaw411 Send thlaw411 to 22333

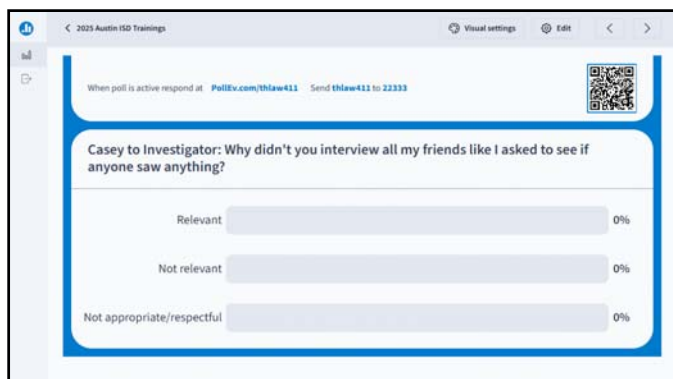
Casey to Ryan: You did this same thing to your ex last year, didn't you?

Relevant 0%

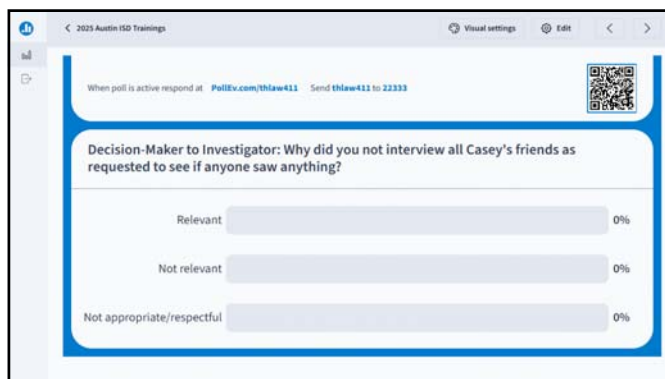
Not relevant 0%

Not appropriate/respectful 0%

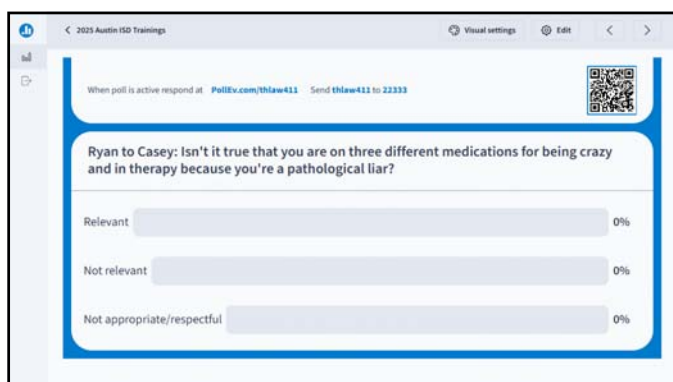
306



307




308



309


Non-Relevant or Disrespectful Questions

- ▶ Must explain the reason for finding a question not relevant
- ▶ Examples:
 - ▶ "Complainant's Question #3 will not be forwarded to the party or witness because it seeks information protected by a legally recognized privilege"
 - ▶ "Respondent's Question #2 will not be forwarded to the party or witness because it includes irrelevant personal attacks"




310

Non-Relevant or Respectful Questions



- ▶ Not required to give parties an opportunity to restate their question
- ▶ If you do so, we recommend providing only one opportunity and a time-frame for submission (e.g., 2 days)

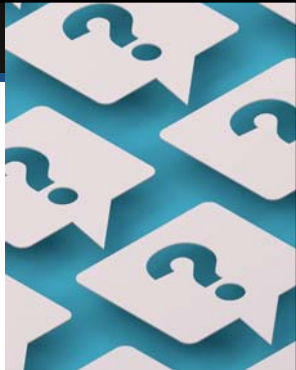
Try & Try Again



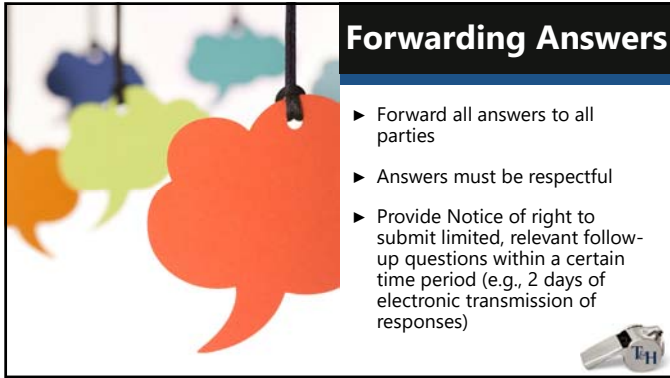
311

Forwarding Questions

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



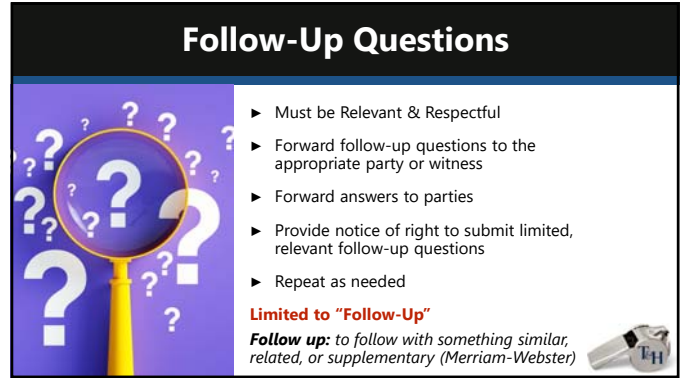
312



Forwarding Answers

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

313

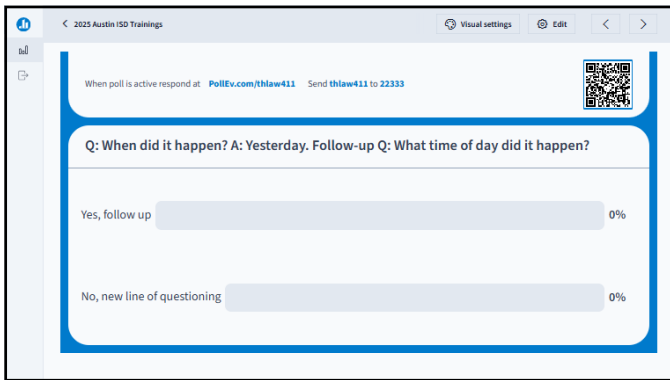


Follow-Up Questions

- ▶ Must be Relevant & Respectful
- ▶ Forward follow-up questions to the appropriate party or witness
- ▶ Forward answers to parties
- ▶ Provide notice of right to submit limited, relevant follow-up questions
- ▶ Repeat as needed

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

314



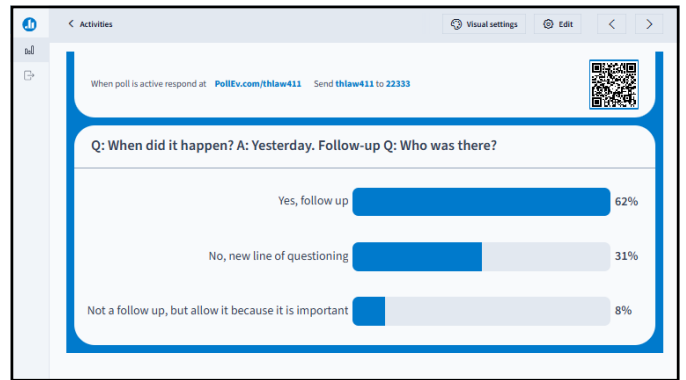
When poll is active respond at PollEv.com/thlaw411 Send [thlaw411](https://t.me/thlaw411) to 22333

Q: When did it happen? A: Yesterday. Follow-up Q: What time of day did it happen?

Yes, follow up 0%

No, new line of questioning 0%

315



When poll is active respond at PollEv.com/thlaw411 Send [thlaw411](https://t.me/thlaw411) to 22333

Q: When did it happen? A: Yesterday. Follow-up Q: Who was there?

Yes, follow up 62%

No, new line of questioning 31%

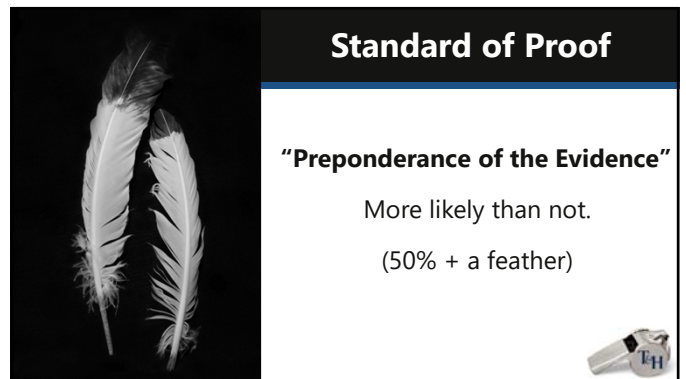
Not a follow up, but allow it because it is important 8%

316



Step 4:
Evaluate Evidence

317



Standard of Proof

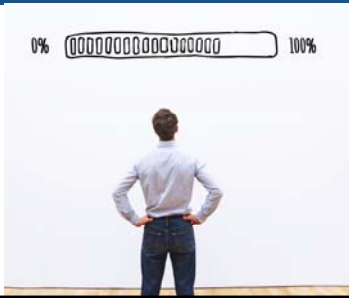
"Preponderance of the Evidence"

More likely than not.
(50% + a feather)

318

Determination

- ▶ Decisionmaker evaluates relevant, not impermissible evidence for its persuasiveness
- ▶ If not persuaded under the standard by the evidence that sexual harassment occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sexual harassment occurred





319

Determination

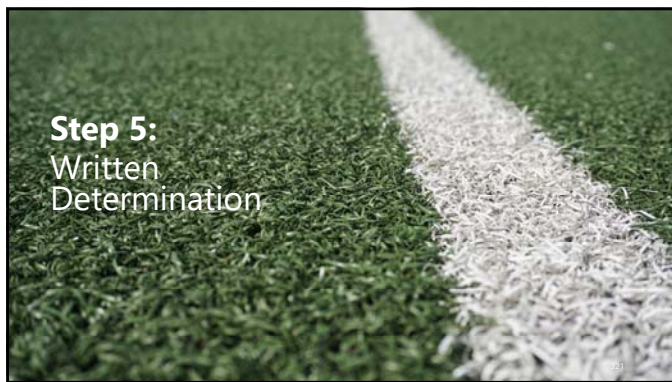
Ask yourself:

- ▶ What facts and issues are not in dispute?
- ▶ What facts and issues are in dispute?
- ▶ What evidence supports each side of the disputed facts and issues?

320

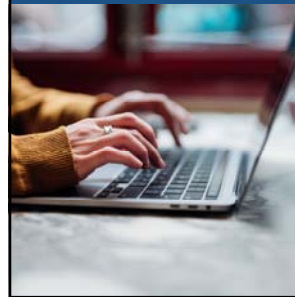

Step 5: Written Determination



321

Written Determination

- ▶ The decision-maker(s) must issue a written determination regarding responsibility containing specific requirements.


322

- ☑ Identify the allegations potentially constituting sexual harassment


**Written
Determination
Requirement
Number One**

323


Allegations



- ▶ Will be provided to you – should be in the “notice of allegations” sent to both parties upon receipt of a formal complaint *and* in the investigation report
- ▶ Must be restated in the written determination



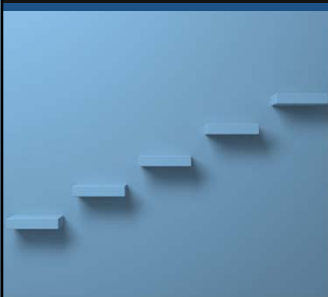
324

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


Written Determination Requirement Number Two

325


Procedural Steps



- ▶ Notifications to the parties
- ▶ Interviews with parties and witnesses
- ▶ Site visits
- ▶ Methods used to gather evidence
- ▶ Much (but not all) of this will be in investigation report
- ▶ Must include all procedural steps in written determination
- ▶ Ask Coordinator for assistance finding missing steps



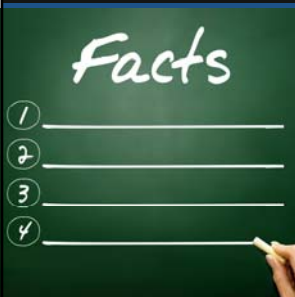
326

 Findings of fact supporting the determination

Written Determination Requirement Number Three

327

Findings of Fact



- ▶ Identify the undisputed facts related to an issue
- ▶ Identify the first disputed fact related to an issue
 - ▶ Explain each party's position and any evidence relevant to the fact
 - ▶ State your conclusion as to what happened with the first disputed fact
 - ▶ Explain your reasoning, including credibility determinations
- ▶ Move to the next disputed fact
- ▶ Decide the overall issue
- ▶ Repeat for any other disputed issues

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329



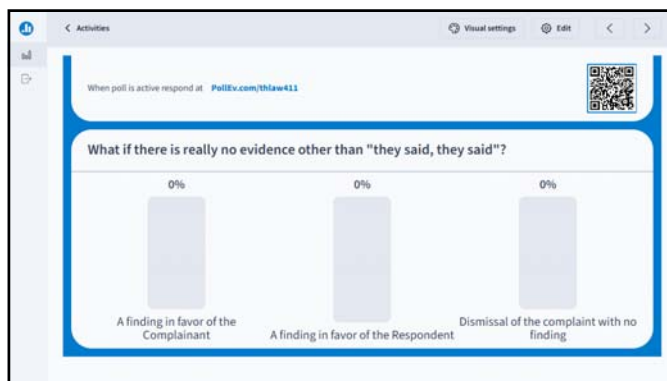
330

They Said/They Said

- ▶ Sexual harassment often occurs behind closed doors
- ▶ There are often no witnesses to the alleged harassment
- ▶ Many cases are going to involve the complainant making certain allegations, the responding denying them, with no other witness
- ▶ **The fact that there are no witnesses to the alleged harassment does not mean it is automatically a "50/50"**
- ▶ A thorough investigation and a complete summary of all relevant evidence can help the decisionmaker assess credibility and reach a reliable determination



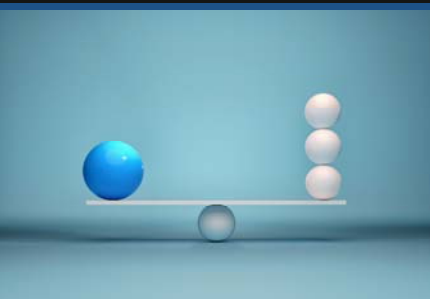
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332


They Said/They Said

- ▶ Very few cases end in 50/50
- ▶ More common for a particular disputed fact to end in 50/50, but even that happens less than one might think
- ▶ What tips the scale one way or another?




333

Credibility




- ▶ In the decision-making process, credibility refers to the process of weighing the accuracy and veracity of evidence
- ▶ Relevant evidence tips the scale (even a feather)
- ▶ Credibility determines how much the scale is tipped – a feather or an elephant




334

Credibility ≠ Truthful

- ▶ Just because you don't find a witness credible does not mean they are a liar
- ▶ We all remember experiences differently and have different perspectives that shape how we view in
- ▶ Think about your last fight with a loved one or close friend...




335



Rank these witnesses in order of believability:



- A. Nun
- B. Teacher
- C. Administrator
- D. Star athlete
- E. Student with a disciplinary record
- F. Police officer



336

Remedies


- ▶ Remedies must be individualized to restore a complainant's equal access to the education program or activity
- ▶ Remedies can also be more wide-spread when multiple people were impacted by the sexual harassment, especially when the allegations related to a policy, procedure, or practice of the school district

343

Remedies

- ✓ Providing a campus escort for the complainant
- ✓ Allowing the complainant to park in the employees' parking lot
- ✓ Changing class schedules or extracurricular activities to ensure the complainant and respondent are separated
- ✓ Providing academic resources, modifications, and support
- ✓ Implementing or extending no-contact orders or "stay away agreements"
- ✓ Providing or coordinating health services and counseling
- ✓ Providing training or educational programs to individuals, school groups, personnel, or the school community
- ✓ Modifications to policies, procedures, or practices



344


- ✓ Process for Appeal

Written Determination Requirement Number Six

345

Process for Appeal

- ▶ Provide the bases for appeal, timeline to file an appeal, and method to do so




346

- ✓ Provide the written determination to the parties simultaneously


Written Determination Requirement Number Seven

347

What about FERPA?



- ▶ OCR states that sharing the result as to each allegation including a list of sanctions is permitted by FERPA because sanctions "always directly impact the victim"
- ▶ Remedies do not directly affect the respondent so should be communicated separately to the Complainant

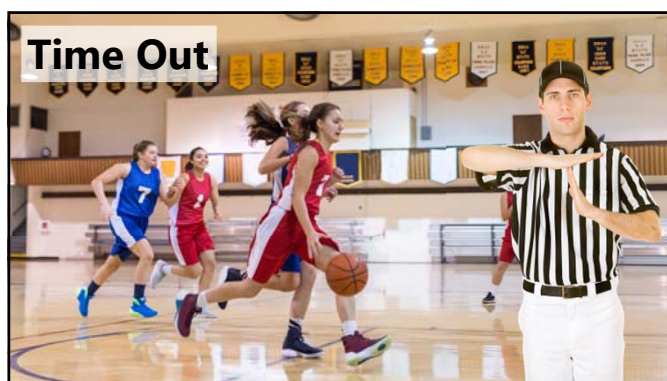


348

Decisionmaker Dos and Don'ts

<div style="display: flex; align-items: center; margin-bottom: 10px;"> ✔ DOs </div> <ul style="list-style-type: none"> ✔ Explain the process to parties and advisors ✔ Assume respondent is not responsible ✔ Exercise independent judgment and objectively evaluate all relevant evidence ✔ Follow your grievance procedure ✔ Make credibility determinations and evaluate the weight of the evidence using preponderance standard ✔ Make a clear determination regarding whether the respondent violated the school's policies 	<div style="display: flex; align-items: center; margin-bottom: 10px;"> ✘ DON'Ts </div> <ul style="list-style-type: none"> ✘ Prejudge the facts or rush to judgment ✘ Consider impermissible evidence unless a waiver or exception applies ✘ Rely on stereotypes or preconceived notions when making credibility determinations or weighing the evidence ✘ Delay or extend the decision timeline absent good cause ✘ Neglect to provide the rationale for the determination
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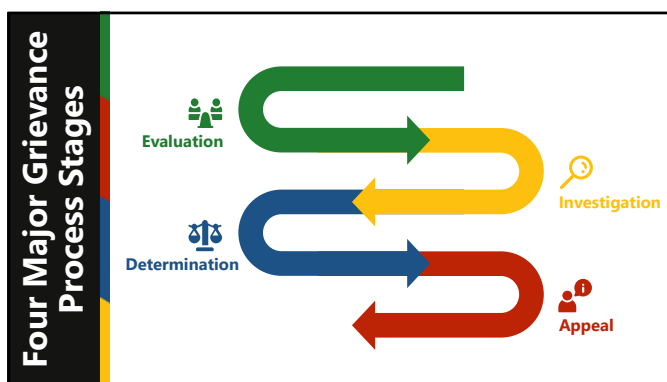
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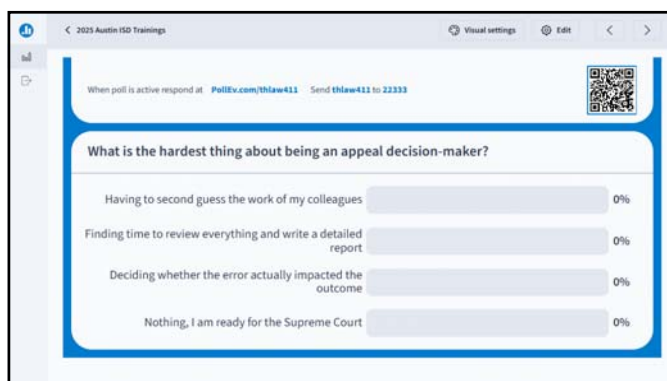


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Appeal Basics

Who	Why?	Appeal Decisionmaker	Steps
<ul style="list-style-type: none"> • Any party can appeal a dismissal or determination 	<ul style="list-style-type: none"> • Based on <ul style="list-style-type: none"> • procedural irregularity that affected the outcome • new evidence not available at the time of the determination that could affect the outcome • bias/conflict of interest that affected the outcome 	<ul style="list-style-type: none"> • Cannot be Title IX Coordinator, Investigator, or initial Decision-Maker • Must be trained 	<ul style="list-style-type: none"> • 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 or determination • Notify all parties of result of appeal and rationale for the outcome

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Appeal Process

1. Review File
2. Verify Impartiality
3. Determine Appeal Validity
4. Notify Parties
5. Analyze Appeal
6. Write Appeal Determination
7. Close the file



355





#1 Review the file

356

Review File

- ▶ Review all material provided by the Title IX Coordinator
- ▶ Appeals are not de novo
- ▶ Confine the review to the record + appeal documents

357





#2 Verify impartiality

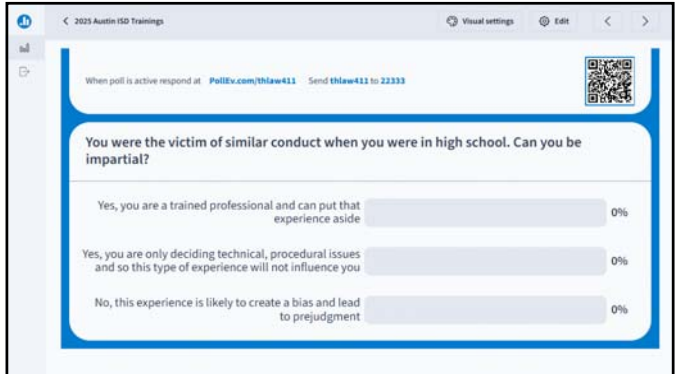
358

Verify Impartially

- ▶ An impartial appeal decision-maker
 - ▶ Is unbiased
 - ▶ Has no conflict of interest
 - ▶ Does not prejudge
 - ▶ Is well trained
- ▶ Cannot be the Title IX Coordinator, Investigator, or Decision-maker

359



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You were the victim of similar conduct when you were in high school. Can you be impartial?

Yes, you are a trained professional and can put that experience aside	0%
Yes, you are only deciding technical, procedural issues and so this type of experience will not influence you	0%
No, this experience is likely to create a bias and lead to prejudgment	0%

360

2025 Austin ISD Trainings

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The main witness is a teacher. You have worked with the teacher before and believe they are completely incompetent. Can you be impartial.

- Yes, you are a trained professional, the teacher's teaching skills are unrelated to their credibility as a witness 0%
- No, your perception makes you biased against the teacher and likely to assume their statements are true 0%
- Yes, so long as the teacher's testimony is not at issue on appeal 0%
- Yes, unless either of the parties knows that you think the teacher is incompetent 0%

361

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

362

#3 Determine validity

363

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)

364

Who Decides?

Title IX Coordinator or appellate decisionmaker?

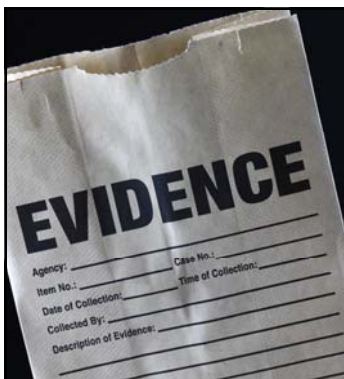
If a dismissal is appealed, the Title IX Coordinator or designee who dismissed the complaint should not decide the validity of the appeal

365

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?

366



New Evidence

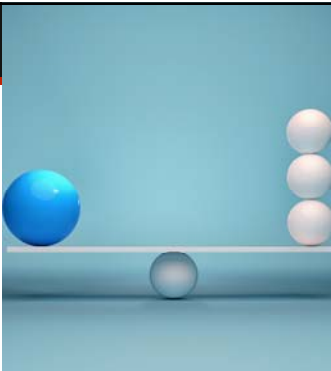
- ▶ Did the appealing party identify new evidence that wasn't reasonably available at the time the decision being appealed was made?
- ▶ Did the appealing party identify how they believe the new evidence could outcome/decision made?




367

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?




368



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)



369




#4 Notify parties

370

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



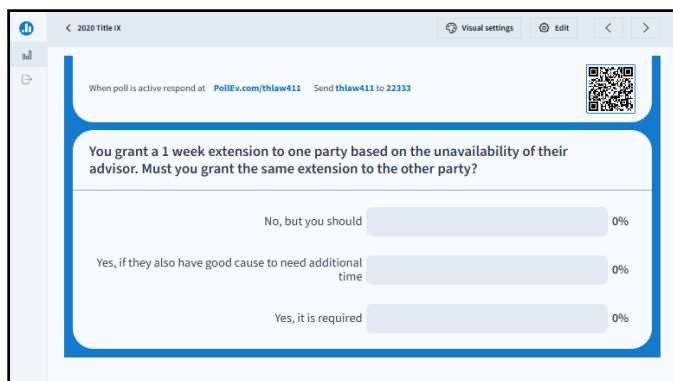
371

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
 - ▶ 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



372



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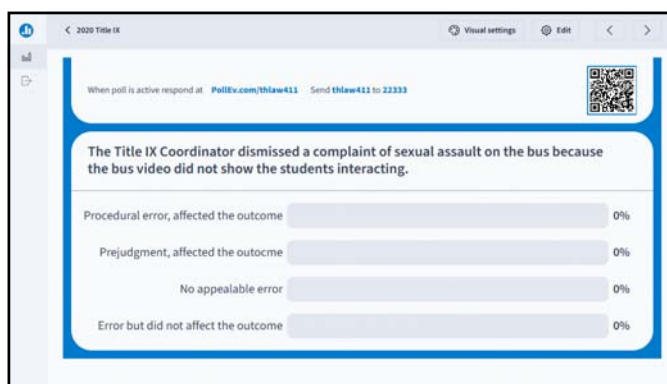


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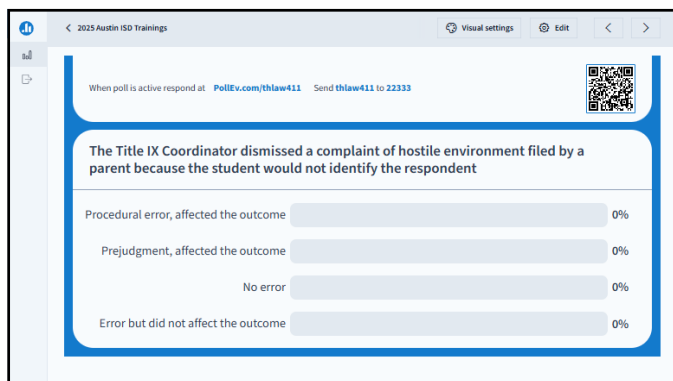
Analyze the Appeal

- ▶ This is where you consider the “weight” and persuasiveness 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

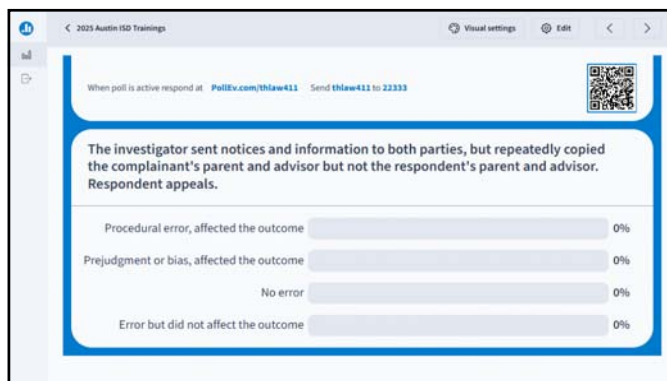
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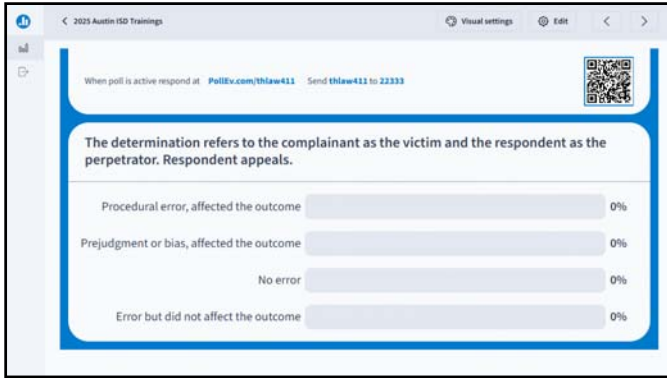
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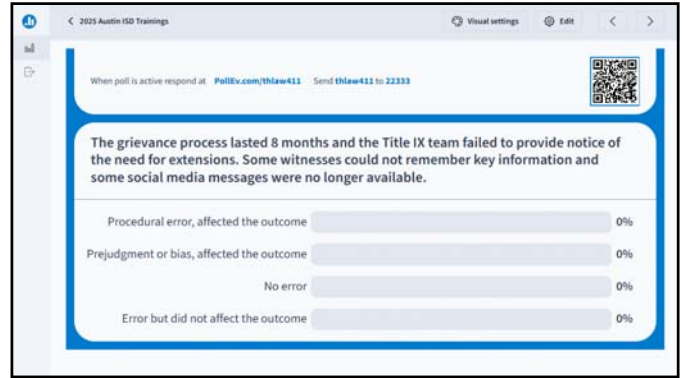
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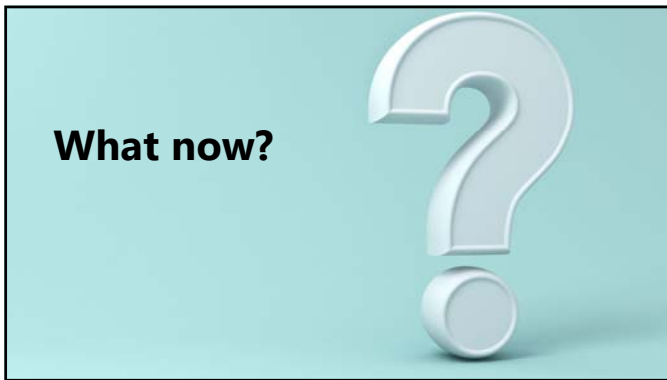
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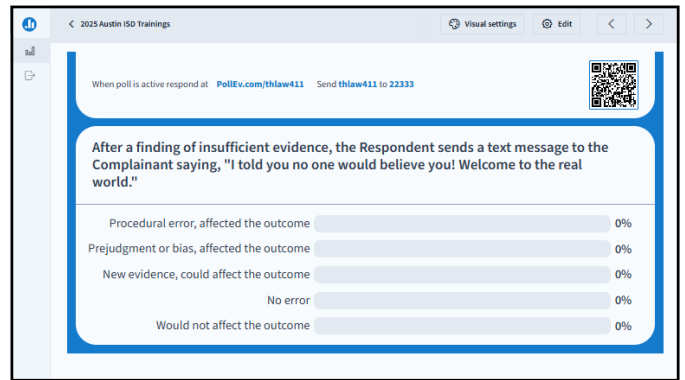
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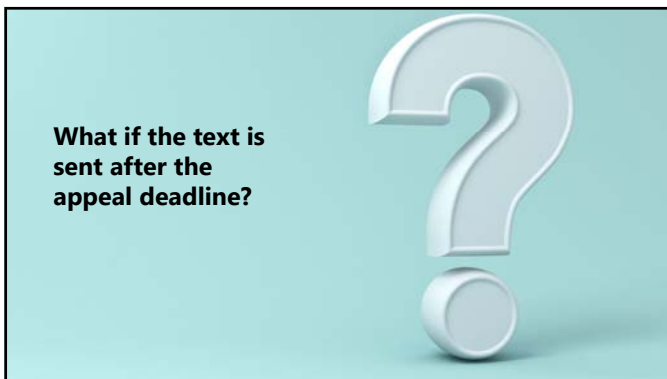
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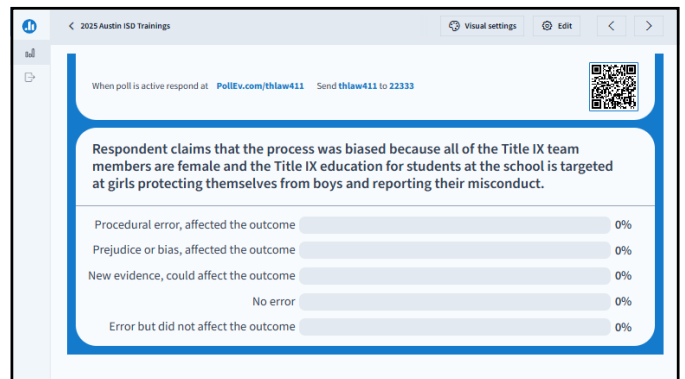
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384



385



386

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

387

Affirm, Reverse, or Remand

Affirm	Reverse	Remand
<ul style="list-style-type: none"> • No error or • The error could not have impacted the outcome 	<ul style="list-style-type: none"> • The appeal makes clear the decision was incorrect 	<ul style="list-style-type: none"> • More information is needed • Return to the investigation or determination stage (possibly with a new investigator or decisionmaker)

388



389

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!

390

Record Keeping

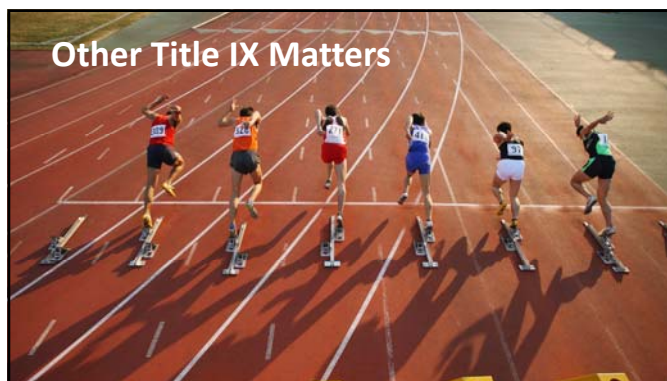
Title IX Records must be maintained for at least **7 years**

- ▶ Reports to the Title IX Coordinator regarding misconduct that reasonably may constitute sexual harassment
- ▶ Complaints
- ▶ Informal Resolution documentation
- ▶ Documentation of the grievance process (including any emergency removal, dismissal, or appeal)
- ▶ Investigation reports, written determinations, appeal determinations
- ▶ Actions to respond (including supportive measures, disciplinary sanctions, remedies)
- ▶ Decisionmaking (whether to initiate a complaint, offer informal resolution, etc.)
- ▶ Training records



391

Other Title IX Matters



392

Title IX




- ▶ Discrimination
 - ▶ Different Treatment
 - ▶ Disparate Impact
- ▶ Retaliation
- ▶ Single Sex Programs
- ▶ Pregnancy Accommodations
- ▶ Athletics
- ▶ Proactive Measures



393

Title IX Coordinator's Responsibilities


- ▶ The Title IX Coordinator has a duty to coordinate your school district's efforts to comply with Title IX and its regulations and retains ultimate oversight over those responsibilities and ensure your school district's consistent compliance with its responsibilities under Title IX and its regulations.
- ▶ A school district with knowledge of conduct that reasonably may constitute sex discrimination or harassment in its education program or activity must respond promptly and effectively, including by following the grievance procedures and other steps to end sex discrimination and harassment, prevent its recurrence, and remedy its effects



394

Title IX Coordinator's Responsibilities

- ▶ Develops a method to survey the school climate and analyze information obtained
- ▶ Monitors outcomes, identifies patterns, and assesses effects on the campus climate
- ▶ Monitors students' participation in athletics to identify disproportionate opportunities based on sex
- ▶ Regularly assesses the adequacy of training opportunities and proposes improvements as appropriate



395

Title IX Coordinator's Responsibilities



- ▶ Involved in everything Title IX
- ▶ Works closely with District leadership and legal counsel
- ▶ Knows and helps draft/revise the District's policies and procedures
- ▶ Coordinates implementation and administration of grievance processes



396

Title IX Designees

- ▶ May assign one or more "designees" to carry out some of the responsibilities for compliance, but a single Title IX coordinator must retain ultimate oversight
- ▶ Consider designating and training:
 - ▶ An administrator on every campus to help with intake of reports of sex discrimination and harassment and to monitor supportive measures
 - ▶ An athletics administrator to monitor and assist with athletics equity compliance
 - ▶ Someone with experience in the accommodations process (Section 504 Coordinator or ADA Coordinator) to serve as a designee for pregnancy accommodations/modifications
 - ▶ An administrator to coordinate with the colleges or universities you work with to provide dual/concurrent enrollment courses to your students



397




398

Different Treatment

Different treatment discrimination occurs when an individual or group of individuals is treated differently because of their sex.


- Different treatment discrimination is generally intentional—the person or entity intended to treat the individuals differently on the basis of sex. But it does not require bad faith, ill will, or evil motive.
- Can be proven with direct, circumstantial, or statistical evidence



399

Different Treatment Test


- ▶ Was the aggrieved person a member of a **protected class** (sex)
- ▶ Was the aggrieved person treated differently than a **similarly situated** individual, not a member of the protected class?
- ▶ Is there a **legitimate, non-discriminatory reason** for the different treatment?
- ▶ Is there evidence that the reason is **pretext** for unlawful discrimination?



400

Similarly Situated



- Students are similarly situated when they are comparable, even if not identical, in relevant respects.
- The "relevant respects" will vary by situation.



401

What is Pre-Text?


- Does the asserted reason explain the actions?
- Does evidence contradict a stated reason for a disparity, exposing it as false?
- Were similarly situated individuals treated differently?
- Were the actions within the bounds of policies, procedures, and past practices?

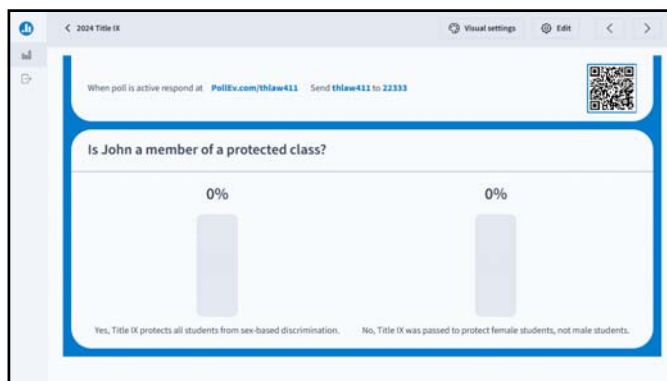
402

Different Discipline

Mr. & Mrs. Bender complain that their son, John, received a 1-week disciplinary alternative placement, while a female student, Claire Standish, received a 1-day in-school suspension "for basically the same thing."



403



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Is John a member of a protected class?


0% 0%

Yes, Title IX protects all students from sex-based discrimination. No, Title IX was passed to protect female students, not male students.

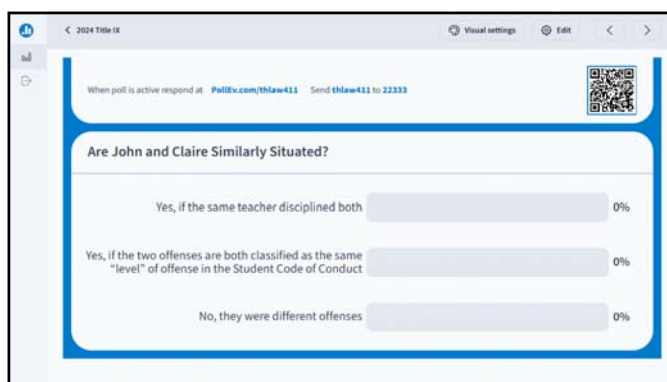
404

Different Discipline

Upon investigation, the Claire's ISS was for yelling at her teacher and being disruptive in class, while the John's discipline was for a fight in the hall.



405



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Are John and Claire Similarly Situated?

Yes, if the same teacher disciplined both 0%

Yes, if the two offenses are both classified as the same "level" of offense in the Student Code of Conduct 0%

No, they were different offenses 0%

406

Different Discipline


John and Claire are both caught smoking in the restroom.

Claire receives a 1-hour after school detention

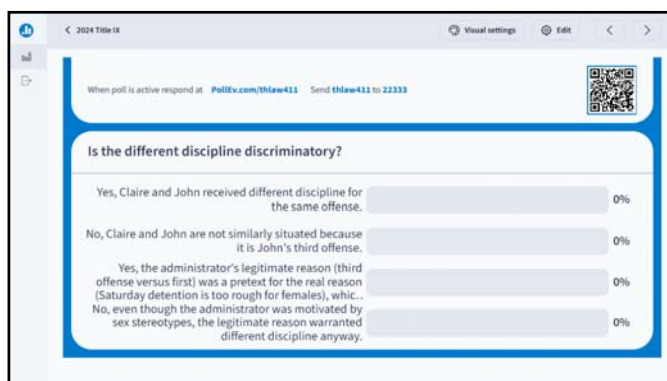
John gets an all-day Saturday detention.

It is Claire's first offense. It is John's third offense.

What if the administrator who disciplined them has been heard saying they'd never send a female student to Saturday detention because those characters are just too rough?



407



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Is the different discipline discriminatory?

Yes, Claire and John received different discipline for the same offense. 0%

No, Claire and John are not similarly situated because it is John's third offense. 0%

Yes, the administrator's legitimate reason (third offense versus first) was a pretext for the real reason (Saturday detention is too rough for females), which... 0%

No, even though the administrator was motivated by sex stereotypes, the legitimate reason warranted different discipline anyway. 0%


408

Dress Code

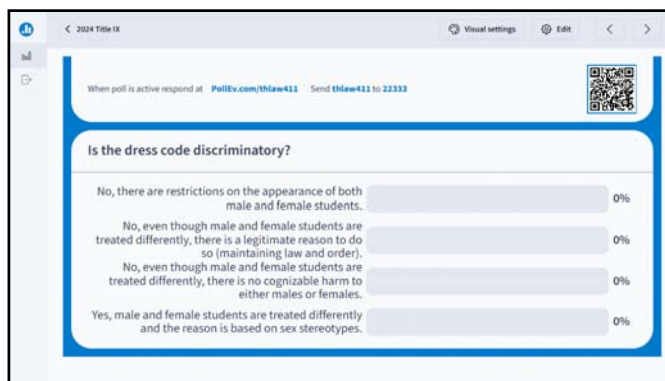
A magnet school's dress code requires girls to wear skirts and bars them from wearing pants or shorts. Boys are prohibited from having long hair and wearing jewelry.

As justification for its decision, the principal cites general discipline and "law and order" concerns. They also say it helps promote "chivalry."

The principal also argues that because female students had achieved academic and extracurricular success, they had not been "hobbled" by the dress code.



409



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Is the dress code discriminatory?


No, there are restrictions on the appearance of both male and female students.	0%
No, even though male and female students are treated differently, there is a legitimate reason to do so (maintaining law and order).	0%
No, even though male and female students are treated differently, there is no cognizable harm to either males or females.	0%
Yes, male and female students are treated differently and the reason is based on sex stereotypes.	0%

410

Preferential Academic Treatment

There is a report that the high school baseball coach, who teaches world geography, has given all the male students As and Bs, while multiple female students have received low grades or failed.


The reason for the different grades cannot be justified by quality of work – even with the same number of questions right on quizzes, boys are more likely to pass.



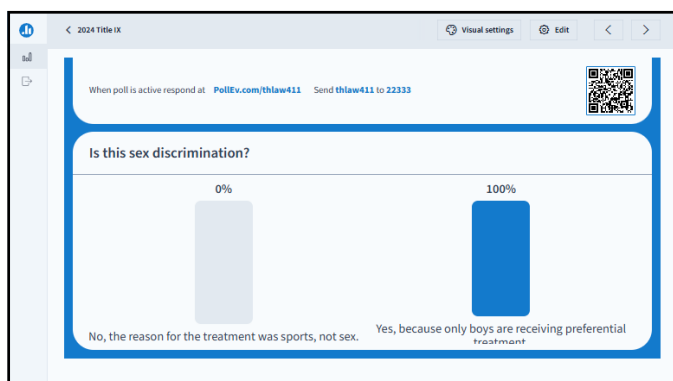
411

Preferential Academic Treatment

You investigate and determine that although problematic, the reason for the grades is that all the males are on the athletic team and must pass to play.



412



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Is this sex discrimination?


No, the reason for the treatment was sports, not sex.	0%
Yes, because only boys are receiving preferential treatment	100%

413

Disparate Impact

Disparate impact discrimination occurs when a facially neutral policy, rule, or practice—applied evenhandedly—has a disproportionate impact or discriminatory outcome on a particular sex. It is often unintentional. The focus is on the *consequences* of the policy or practice rather than the intent of its creation or implementation.


- Consider whether the District has a substantial and legitimate justification for using the policy, rule, or practice
- Generally, there is no respondent



414

Disparate Impact Test


- ▶ Does a neutral policy result in an adverse impact on students of a particular sex?
- ▶ Is the applicable policy necessary to meet an important educational goal?
- ▶ Is there a comparably effective alternative available that would meet the stated educational role with less of a burden or adverse impact on the disproportionately affected group?



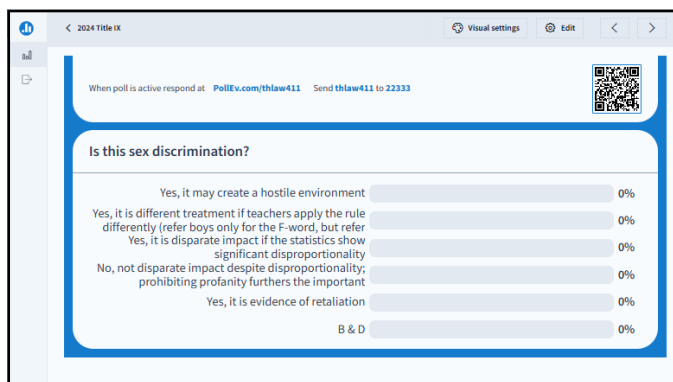
415

Disparate Impact

- ▶ The student code of conduct at Rydell High School prohibits use of profanity
- ▶ The student population is about 50/50 male/female
- ▶ Reviewing the school's discipline data, you see that the students disciplined for this offense are 37/63 male/female



416




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Is this sex discrimination?

Yes, it may create a hostile environment	0%
Yes, it is different treatment if teachers apply the rule differently (refer boys only for the F-word, but refer girls only for the G-word)	0%
Yes, it is disparate impact if the statistics show significant disproportionality	0%
No, not disparate impact despite disproportionality; prohibiting profanity furthers the important educational goal	0%
Yes, it is evidence of retaliation	0%
B & D	0%

417


Disparate Impact




- North by Northwest High School is sponsoring a scenic train trip aboard the *20th Century Limited* to Chicago.
- There will be multiple stops along the way, and the two teachers sponsoring the trip are concerned that some students won't be able to manage getting their own luggage on and off the luggage rack.
- One of the teachers sponsoring the trip, Mr. Thornhill, is in a wheelchair.
- The other, Ms. Kendall, is only 5'2" and has to climb on the seat to reach the luggage rack.

418

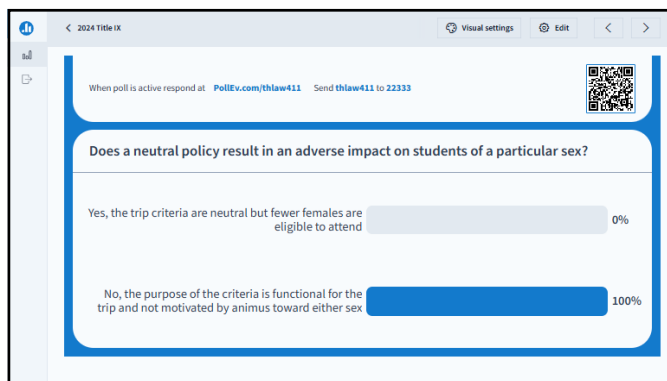
Disparate Impact



- To avoid having sponsors manage the luggage, the school decides to establish a rule that students must be at least 5'9" and able to lift 50lbs above their head to go on the trip.
- Of the students interested in the trip, 25% of females and 75% of males meet the criteria.



419

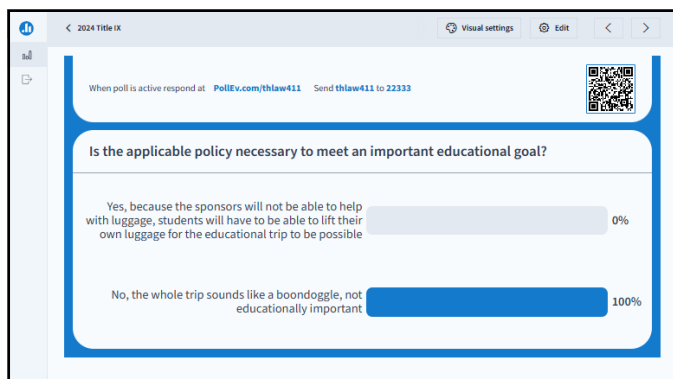


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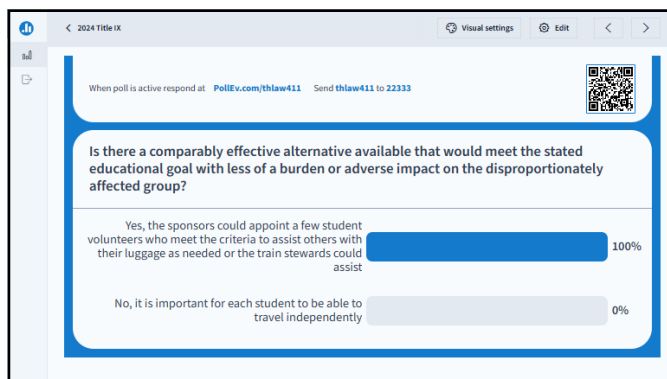
Does a neutral policy result in an adverse impact on students of a particular sex?

Yes, the trip criteria are neutral but fewer females are eligible to attend	0%
No, the purpose of the criteria is functional for the trip and not motivated by animus toward either sex	100%

420



421




422

Retaliation

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


- ▶ Intimidation, threats, coercion, rumor spreading, ostracism, assaults, destruction of property, unjustified punishments, or unwarranted grade reductions aimed at interfering with an individual's rights under Title IX
- ▶ Can be committed by anyone, including the school, students, employees, and third parties



423


Retaliation Test

- ▶ Did the aggrieved person engage in protected activity?
- ▶ Did they suffer an adverse consequence?
- ▶ Is there a causal connection between the activity and the consequence?
- ▶ Is there a legitimate, non-retaliatory reason for the adverse conduct?
- ▶ Is there evidence that the reason is pretext for unlawful retaliation?



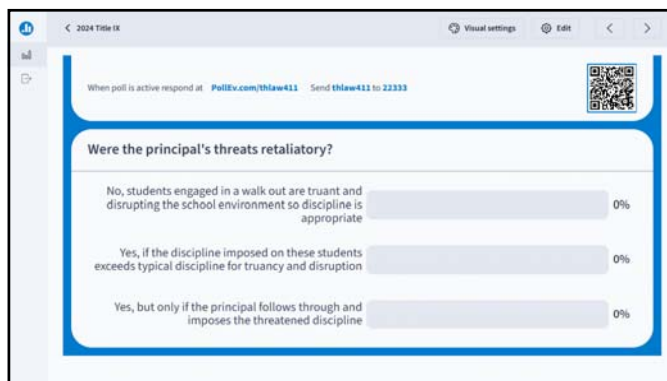
424

Example



- ▶ The principal at Northshore High School instituted a dress code that prohibited female students from dressing "provocatively."
- ▶ At a meeting with school leaders and parents, the principal defended the rules as necessary to prevent sexual harassment and assault.
- ▶ Students emailed the principal and staged a walkout, protesting that the dress code was discriminatory.
- ▶ The principal threatened the students with expulsion, removal from NHS, and loss of privilege to attend prom.


425



426

Single Sex Programs

- ▶ Districts can separate students by sex for:
 - ▶ Contact sports in PE (including wrestling, boxing, rugby, ice hockey, football, basketball)
 - ▶ Ability grouping in PE (as assessed by objective standards of individual performance developed and applied without regard to sex)
 - ▶ Human sexuality classes
 - ▶ Choruses (requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex)
- ▶ Districts can father-son or mother-daughter activities (if offered for one, must provide reasonably comparable activity for other)
- ▶ YMCA, YWCA, Girl Scouts, Boy Scouts, Camp Fire Girls, Boys State/Nation, Girls State/Nation are all permitted



427

Single Sex Programs

▶ **Schools can provide nonvocational single-sex classes and extracurricular activities if**

- ▶ The aim is to:
 - ▶ Improve educational achievement of its students, through a district's overall established policy to provide diverse educational opportunities; or
 - ▶ Meet the particular, identified educational needs of its students,
- ▶ And the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective





428

Single Sex Programs

Requirements	Review	Substantially Equal
<ul style="list-style-type: none"> • Implement its objective in an evenhanded manner • Student participation is completely voluntary; • The district provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity 	<ul style="list-style-type: none"> • Conduct an evaluation every 2 years to ensure that single-sex classes or extracurricular activities are based on genuine justifications and do not rely on overly broad generalizations about the differences between the sexes and are substantially related to the achievement of the important objective identified 	<ul style="list-style-type: none"> • Criteria for admission • Benefits provided • Quality, range, and content of curriculum, books, instructional materials, technology • Qualifications of faculty and staff • Quality, accessibility, and availability of facilities and resources • Intangible features, such as reputation of faculty

429

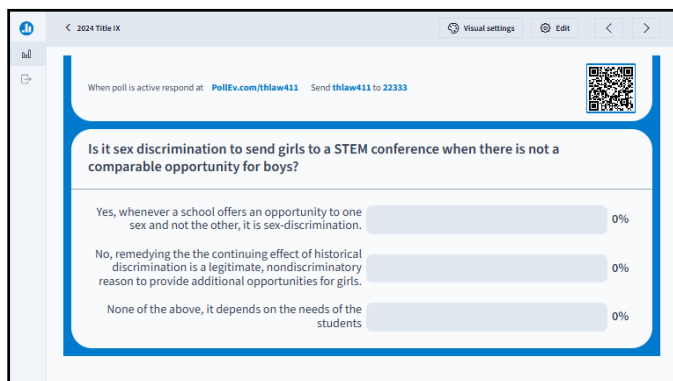
Single- Sex Opportunities



A middle school sends female students to a "Girls in STEM" Robotics Conference. There is not an equivalent opportunity for male students.

The principal justifies this decision based on historical numbers showing female students are underrepresented in advanced science classes at the high school the middle school feeds into.

430




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Is it sex discrimination to send girls to a STEM conference when there is not a comparable opportunity for boys?

Yes, whenever a school offers an opportunity to one sex and not the other, it is sex-discrimination.	0%
No, remedying the the continuing effect of historical discrimination is a legitimate, nondiscriminatory reason to provide additional opportunities for girls.	0%
None of the above, it depends on the needs of the students	0%


431

Single-Sex Opportunities

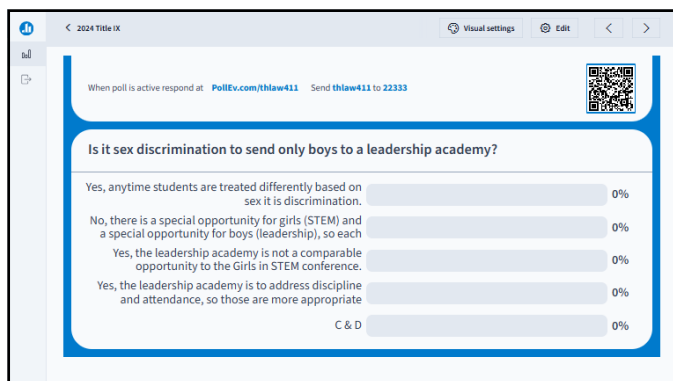


That same middle school sends male students to a leadership academy geared specifically for male students.

The principal justifies this decision based on historical numbers showing male students are more likely to have discipline and attendance issues – something this program says its graduates do better at.



432



433

Accommodating Pregnant Students

- ▶ Pregnant students are entitled to voluntary reasonable accommodations or modifications following an interactive process similar to the disability accommodation process.
- ▶ Can deny accommodation if it would fundamentally alter the program (i.e., a change that is so significant it alters the essential nature of the education program or activity).
- ▶ Examples may include breaks during class, intermittent absences, access to online or homebound education, changes in schedule or course sequence, extensions of time for work or tests, allowing a student to sit or stand, counseling, and elevator access.

434

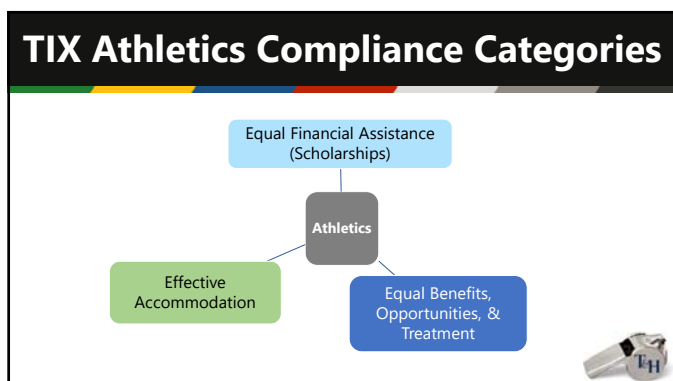
Accommodating Pregnant Students

- ▶ Cannot require supporting documents unless the documentation is necessary and reasonable to determine the reasonable modifications to make or whether to take additional specific actions.
- ▶ May not require a student who is pregnant to provide certification from a healthcare provider that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless specific conditions are met.
- ▶ Students cannot be mandated to participate in alternate programs or special services for pregnant and parenting students as a condition of enrollment, but schools and colleges may offer these programs and services as an option to students.
- ▶ Must allow pregnant and postpartum students to take leave of their academic obligations without penalty because of medically necessary absences associated with pregnancy, childbirth, or postpartum recovery.

435



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437

Evaluation of Benefits, Opportunities, & Treatment

1. Equipment & Supplies
2. Game & Practice Scheduling
3. Travel & Daily Allowance
4. Coaching
5. Academic Tutors
6. Practice & Competition Facilities
7. Medical & Training Facilities & Services
8. Housing & Dining Services
9. Publicity
10. Recruitment

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A word from OCR about boosters...

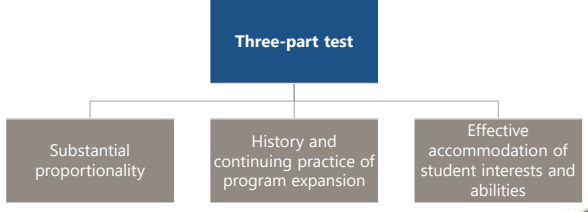


A school can accept voluntary support from boosters, BUT it is the school's responsibility to prevent inequitable results.

So, if a booster donates money only to a men's team, "your school must ensure that the benefits, opportunities, and treatment are equivalent for both men and women in its athletic programs."

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Accommodation of Student Interests and Abilities



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    graph TD
      A[Three-part test] --> B[Substantial proportionality]
      A --> C[History and continuing practice of program expansion]
      A --> D[Effective accommodation of student interests and abilities]
    
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Minneapolis Public Schools OCR 05-22-1171 (Aug. 2024)

Substantial Proportionality

- ▶ District offered all sports sanctioned by state league except clay shooting and synchronized swimming
- ▶ Some sports offered at each high school and some cooperative teams
- ▶ High School enrollment:
 - ▶ Boys 50.3% Girls 48.7%
- ▶ District athletic participation opportunities:
 - ▶ Boys 55.2% Girls 44.8%
- ▶ Gap about 4% or 347 opportunities



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Minneapolis Public Schools OCR 05-22-1171 (Aug. 2024)

School level proportionality

- ▶ 4 high schools had participation gaps sufficient to form a viable team
- ▶ 3 high schools provided athletic opportunities that were substantially proportionate to enrollment
- ▶ Count the number of students participating in coop teams
- ▶ Teams were no cut

Program Expansion

- ▶ District had not tracked and could not identify teams added or eliminated since 1972

Meeting Interests and Abilities

- ▶ No student athletic interest survey in the past 10 years
- ▶ No written policy or procedure for whether and how to add sports and/or levels or publicized method for students to request new sports or levels




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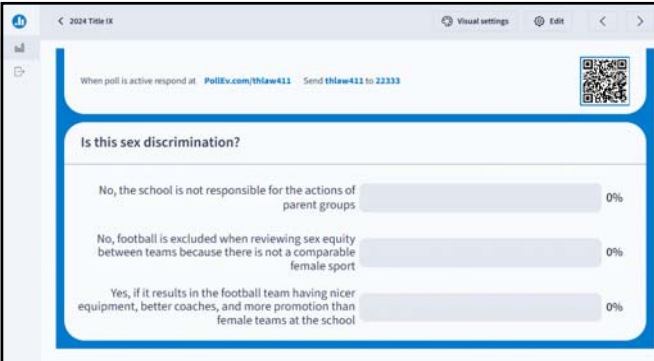
Disparate Impact



- ▶ West Canaan High School allows booster clubs to raise money for the Coyotes athletics teams
- ▶ The football booster club regularly raises more money for their team than all of the other sports combined



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When poll is active respond at PollEv.com/thlaw411 Send thlaw411 to 22333

Is this sex discrimination?

- No, the school is not responsible for the actions of parent groups 0%
- No, football is excluded when reviewing sex equity between teams because there is not a comparable female sport 0%
- Yes, if it results in the football team having nicer equipment, better coaches, and more promotion than female teams at the school 0%

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Required Training

Title IX Team

- Coordinator
- Deputy Coordinators
- Investigators
- Decisionmakers
- Appellate Decisionmakers
- Informal Resolution Facilitators

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Recommended Training

- Students**
- Campus Administrators**
- Designated Personnel**
 - Student Services/Student Affairs
 - Human Resources
 - Athletics
 - Counselors, Nurses, & MH personnel

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Policies and Procedures

- ▶ Should be reviewed every year to implement changes learned from your grievance process and updates in law, regulations, legal cases, and OCR policies.
- ▶ Read standardized policies carefully, they often say you must do additional steps. Make sure to complete key definitions – including consent – and internal deadlines.
- ▶ Look at the interactions between Title IX policies and other policies (e.g., student and employee disciplinary policies and procedures).

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Title IX Audits

- ▶ Audits look at issues that might be raised in an internal, OCR, or court complaint *before* a complaint is actually raised
- ▶ Significantly cheaper than an actual complaint, and can often be protected by attorney-client privilege
- ▶ OCR guidance and other documents can provide good roadmaps (e.g., recent athletics guidance fact sheets)

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OCR complaints arise in different ways:

- ▶ Some start as internal complaints that are unresolved and are escalated by the complainant
- ▶ Some complaints are filed with OCR before school administrators are even aware there is an issue
- ▶ Some complaints are filed at the same time a complainant files a lawsuit, or even after

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Proactive Response = Prevention

- ▶ Take internal complaints seriously
- ▶ Take meaningful measures to resolve meritorious complaints
- ▶ If there are issues, address them
- ▶ Consider internal compliance reviews or audits to show proactive efforts to identify and address potential sex discrimination, including harassment
- ▶ Take voluntary steps at the outset to avoid compulsory steps at the conclusion



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You Want Your "Title IX House" To Be In Order

- ▶ All required training complete and documented
- ▶ All required notices in order
- ▶ Website compliant
- ▶ Policies & procedures compliant
- ▶ Adherence to recordkeeping requirements
- ▶ Documented reports/complaints
- ▶ Complete documentation of grievance process




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Title IX Administrators

T&H Has You Covered

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Thompson & Horton's
2020 Title IX Guidebooks
titleix@thlaw.com

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THOMPSON & HORTON RESOURCES

Title IX Leadership Alliances

K-12

4th Tuesday of the month


- ▶ Register at thlaw.com/k12alliance
- ▶ Email titleix@thlaw.com
- ▶ Use the QR code



Higher Ed


4th Wednesday of the month

- ▶ Register at thlaw.com/higheredalliance
- ▶ Email titleix@thlaw.com
- ▶ Use the QR code




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Thank you!



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