

**ADVANCED TITLE IX SEXUAL  
HARASSMENT TRAINING  
AND “TRAIN THE TRAINER”  
Spring 2022**

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Presented by  
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# A Caveat re Minors

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



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# Why Are We Here?

- ▶ Training on the 2020 Title IX Rules  
[Yes, the Title IX Rules are still in effect]
- ▶ Not legal advice; keep it hypothetical today—contact me separately for specific issues as they arise
- ▶ These materials will be available for posting on your website after our session



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# Check Yourself

- ▶ Review your website
- ▶ Consider not just what is required
  - Title IX requirements
  - Other civil rights laws
  - Easy link from homepage



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# Train the Trainer

- ▶ Training Requirements and Recommendations
- ▶ Framework for Training Your Teams on Basic Title IX Training
- ▶ Scenarios To Learn and Use
- ▶ Questions + Clarifications



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# Why Train the Trainer?

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## You must train:

- ▶ All Title IX “team” members on the definition of sexual harassment, the scope of the education program or activity, how to conduct the grievance process (all stages), and how to serve impartially
- ▶ Investigators on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- ▶ Decision-makers on technology used at live hearings (if used) and issues of relevance, including when questions about a complainant’s past sexual behavior are not relevant



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# Why Train the Trainer?

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## Critics of the 2020 Title IX rules pointed out that:

- ▶ The rules require schools to “hire and train multiple individuals to fill different roles, thus increasing compliance costs”
- ▶ Schools must undertake these costs “even if they rarely have Title IX complaints and investigations”
- ▶ “Staff at many schools necessarily wear multiple hats and perform multiple functions, and conducting simultaneous Title IX investigations could be impossible under the proposed regulations”



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# Why Train the Trainer?

OCR's response?

“[W]e believe that the costs and burdens on regulated entities serve the important purpose of furthering Title IX's non-discrimination mandate”



# Why Train the Trainer?

In the preamble to the rules, OCR estimated that a new Title IX Coordinator, investigator, decision-maker, and informal resolution facilitator would need **8 hours** of initial training under the rules, with additional training each subsequent year



## How Much is Enough?

- ▶ At least one Title IX organization that often serves as an expert witness for plaintiffs/student complainants has stated that all roles require far more than 8 hours to achieve competence
- ▶ Unlikely that this is a true “standard of care” but be prepared for this argument in future disputes



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## So, Why Train the Trainer?

- ▶ Lots of training to be done
- ▶ Budget constraints mean outside training is not always possible
- ▶ Although our many free resources, including our [www.titleIXtips.com](http://www.titleIXtips.com) blog and our frequent complimentary webinars help, you will probably need to do some in-house training yourself

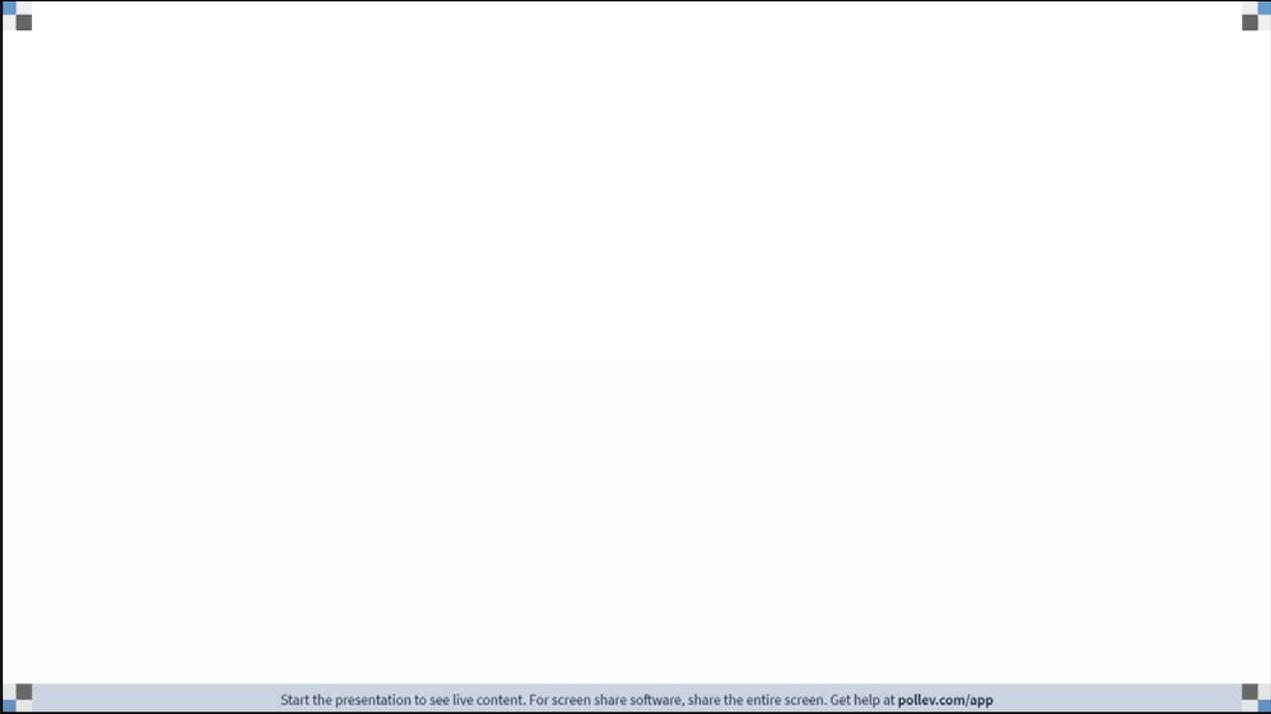


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When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)

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

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True False

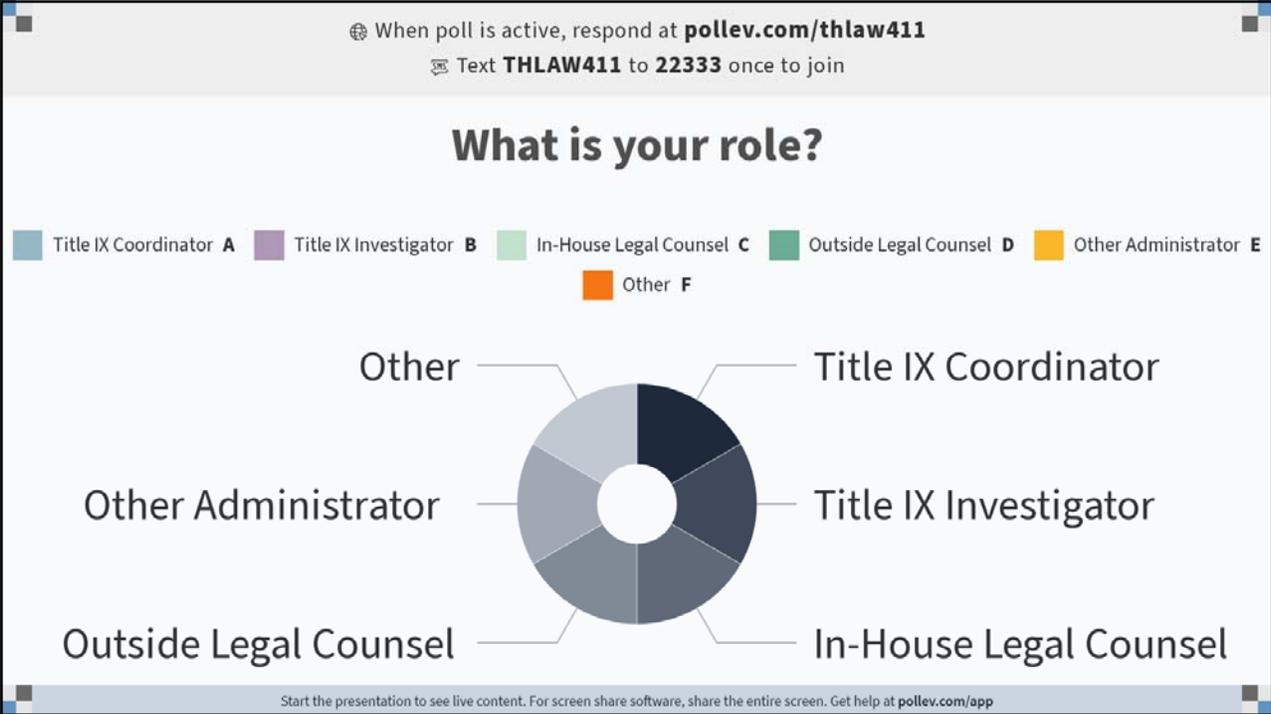
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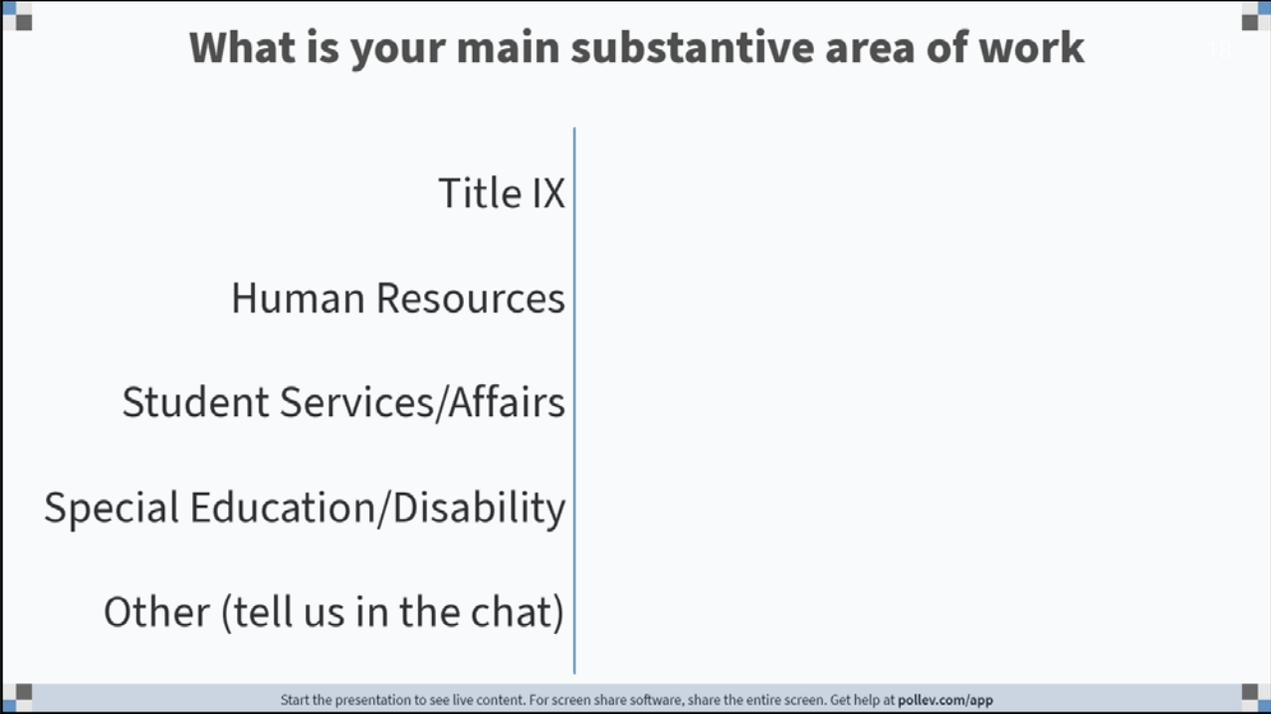
**My educational institution has had \_\_ formal complaints under the 2020 Title IX regs**

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1-2  
3-5  
5+  
Unknown

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17



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**What is the most important question for us to address today?**

Top

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

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## Train the Trainer Tip

- ▶ Before you jump into Title IX, make sure your audience has a solid foundation of terminology related to civil rights complaints, generally
- ▶ We often assume a greater level of knowledge among our trainees than they have
- ▶ Although it is not necessary for all team members to be “fluent” in the jargon associated with Title IX, understanding the basics is a must

## Civil Rights ABCs

- ▶ Discrimination
- ▶ Protected Characteristics/ Classes
- ▶ Harassment
- ▶ Sexual Harassment
- ▶ Retaliation



## Reiterate Your Point: Visually

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**DISCRIMINATION**

**HARASSMENT**

**SEXUAL HARASSMENT**

**TITLE IX SEXUAL HARASSMENT**

**RETALIATION**

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## Reiterate Your Point: Practice

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**A student reports being disciplined more harshly than another student of a different gender identity for the same conduct. What is the most accurate description of the conduct alleged?**

Discrimination	A
Harassment	B
Sexual Harassment	C
Title IX Sexual Harassment	D

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# Why Does It Matter?

“You are most likely to remember something later if you repeat it using spaced repetitions. This means that you repeat the information over and over, but you put some time in between the repetitions . . . . This technique is also called spaced retrieval, because you are retrieving the information from your memory over spaced intervals.”

Angela Troyer, Ph.D., C.Pysch., “Spaced Repetition,”  
Psychology Today (Mar. 21, 2014)



# What is Title IX?



# Train the Trainer Tip

- ▶ Why does it matter?
- ▶ Team members must understand that Title IX covers more than sexual harassment
- ▶ Complaints of non-sexual-harassment Title IX violations should still be reported to the Title IX Coordinator and addressed, but will not be addressed under the Title IX Sexual Harassment policy/procedures



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## Remember

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

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# Train the Trainer Tip

- ▶ Employees may be uncertain about the interplay between state law and other authority on questions of LGBTQ+ rights
- ▶ OCR has been unambiguous on its position (see C. Lhamon at NSBA COSA 2022)



# THOMPSON & HORTON PRESENTS 50 Years of Title IX

DATE	WEBINAR
June 2, 2022	Title IX Sexual Harassment Update
June 9, 2022	Title IX Athletics Update
June 16, 2022	Title IX and LGBTQ Students
June 23, 2022	50 Years of Title IX
June 30, 2022	The Future of Title IX



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# Title IX Authority

Statute

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# Statute

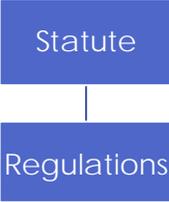
“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.”

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# Title IX Authority



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graph TD; A[Statute] --- B[Regulations];
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Major amendment effective August 14, 2020; first time in 40 years. Biden will amend them yet again; proposal expected in April.

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## What We Did: 2020-2022

- ▶ Frantically updated our policies and procedures on Title IX sexual harassment
- ▶ Completed basic training on the new rules (definitions, process outline)
- ▶ Fumbled our way through intake and formal complaint processing
- ▶ Hoped for the best and changes to come

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## What We Missed: 2020-2022

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- ▶ Understanding if our policies and procedures reflect the process we really want
- ▶ Completing practical training on processing Title IX complaints
- ▶ Considered the interplay between state laws and employment policies and agreements



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## What We Missed: 2020-2022

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- ▶ Addressing other types of sex discrimination covered by Title IX (transgender rights and athletic compliance)
- ▶ Processing sexual harassment reports and complaints that are not covered by Title IX
- ▶ Non-sex-based civil rights issues (race, color, national origin, disability)



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# 624 More Days?

Trump OCR Title IX Regulations	Biden OCR Title IX Regulations
Proposed November 29, 2018	Proposal Estimate: April 22, 2022
Final Rule May 6, 2020	Final Estimate: September 28, 2023
Effective August 14, 2020	Effective Estimate: January 6, 2024

# Rules Requirements

## Done Well

- ▶ Designate Title IX Coordinator
- ▶ Include T9C contact information in policy, on website, and in handbooks and catalogs provided to students and employees
- ▶ Update and publish policy and procedures with requirements from 2020 regulations (including grievance procedure)

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# Policy vs. Procedure

These are not the same things!



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# Rules Requirements

## Often Missed

- ▶ Include email address in contact information shared for the T9C (in addition to name/title, address, and phone number)
- ▶ Include T9C contact information in handbooks and catalogs provided to applicants for admission and employment and unions
- ▶ Non-discrimination policy
  - Say Title IX requires it
  - Say the responsibility extends to admission (for higher ed) and employment
  - Say inquiries can be made to the T9C, OCR, or both

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# Rules Requirements

- ▶ On “actual knowledge” to a T9C or OWA (all K-12 employees)
- ▶ Of “sexual harassment”
- ▶ Within the institution’s education program or activity
- ▶ Against a person in the U.S.
- ▶ The institution must respond as required by the 2020 Title IX Rules

# Title IX “sexual harassment”

## “The Title IX Big 5”

- ▶ Sexual assault, dating violence, domestic violence, stalking (as defined in Clery/VAWA)
- ▶ Employee quid pro quo

## “Hostile Environment SH”

- ▶ Unwelcome sex-based conduct that is so severe, pervasive, and objectively offensive that it effectively denies equal access to the institution’s education program or activity

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## “Education Program or Activity”

- ▶ Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred
- ▶ Includes a building owned or controlled by a student organization officially recognized by a postsecondary institution (such as a fraternity or sorority house)



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## Rules Requirements

- ▶ On “actual knowledge” to a T9C or OWA (all K-12 employees)
- ▶ Of “sexual harassment”
- ▶ Within the institution’s education program or activity
- ▶ Against a person in the U.S.
- ▶ **The institution must respond as required by the 2020 Title IX Rules**



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# Rules Requirements

What is the required response?

For any Title IX “sexual harassment in a program or activity and in the U.S. of which the school has actual knowledge, the Title IX Coordinator or their designee must:

- ▶ **Step 1:** Hold a supportive measures meeting with the alleged victim (“Complainant”)
- ▶ **Step 2:** Consider if emergency removal is warranted



# Rules Requirement

What is the required response?

Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee and not dismissed:

- ▶ **Step 3:** Consider dismissal
- ▶ **Step 4:** Notice of Allegations
- ▶ **Step 5:** Informal Resolution (if offered, appropriate)
- ▶ **Step 6:** Investigation
- ▶ **Step 7:** Decision (with written Q&A for ESE, hearing for PSE)
- ▶ **Step 8:** Appeal



## Title IX Team Members

Title IX  
Coordinator



Investigator



IR  
Facilitator

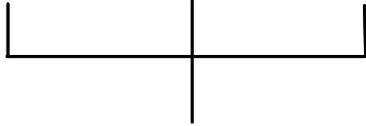


Decision-  
maker



Appellate  
Decision-  
maker





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

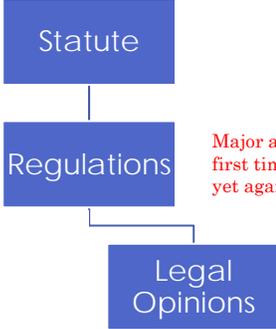


Cannot be the same person, cannot be the Coordinator or Investigator – not recommended to be the IR facilitator



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## Title IX Authority



Statute

Regulations

Legal Opinions

Major amendment effective August 14, 2020; first time in 40 years. Biden will amend them yet again; proposal expected in April.

Courts often defer to agency interpretations of regulations, though the extent they will with the new Title IX regs is unclear



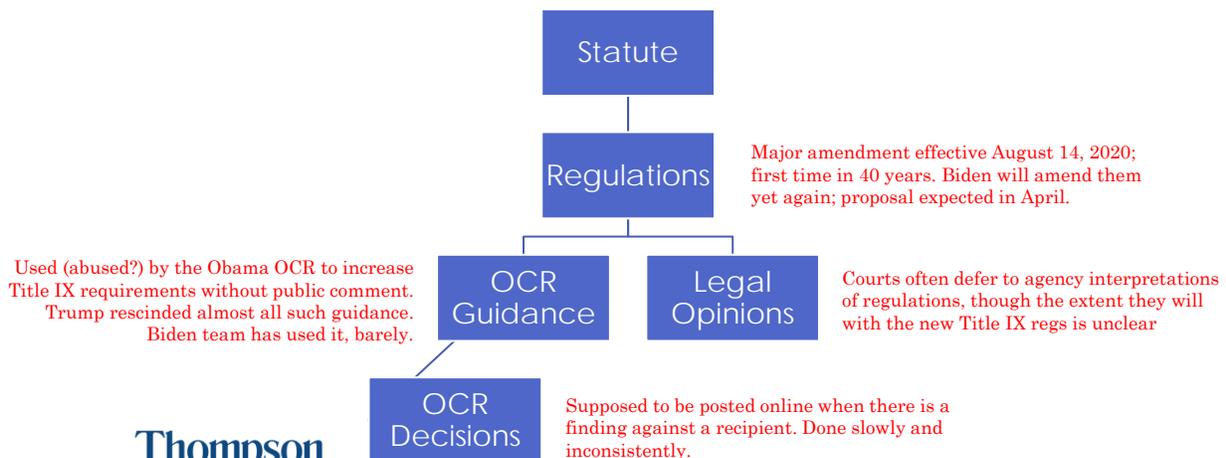
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# VRLC v. Cardona

- ▶ Plaintiffs challenged 13 provisions of the 2020 Title IX rules
- ▶ Claimed some provisions exceeded the Department's power, among other concerns
- ▶ Court applied Chevron deference to uphold all but one of the provisions (the "exclusionary rule" for live hearings)

2021 WL 3185743

# Title IX Authority



# Non-Compliance Penalties

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## Most Common

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

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



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# Non-Compliance Penalties

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## Less Common

- ▶ **Impact on Grant Funds—even before option to enter resolution agreement**
- ▶ **A reference to the DOJ with a recommendation that it file suit**

34 CFR 106.4(a); (34 CFR 100.8(a)(1))



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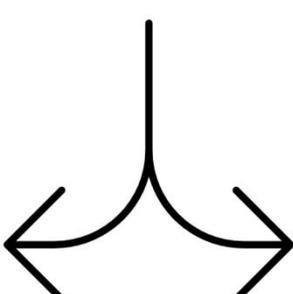
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# If It's Not Title IX

## Sexual Misconduct

Title IX SH



Supportive Measures + Other Policy

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## Train the Trainer Tip

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



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### SCENARIO #1

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



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SCENARIO #1

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



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SCENARIO #1

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



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SCENARIO #1

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



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SCENARIO #1

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



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

- No, because Chanda is not participating in or attempting to participate in an education program or activity
- No, because the conduct while Chanda was a student was not sufficiently severe, pervasive, and objectively offensive
- Yes, because of Dr. Robin's abuse of authority in grooming Chanda for a relationship while a student
- No, because Dr. Robin is "at will" the school can terminate Dr. Robin without any process

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# Participating in the Education Program or Activity

(PERSONAL JURISDICTION)

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# P/ATP

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

## 2020 Title IX Rule

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



# P/ATP

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



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# P/ATP

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



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# P/ATP

## OCR Q&A July 2021

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



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## What About the Respondent?

- ▶ There is no similar rule for respondents
- ▶ Permissive dismissal is allowed if the respondents “enrollment or employment” ends
- ▶ Must consider deliberate indifference here, too



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## Definitions of “Sexual Harassment”



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## Title IX “Big 5”

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



\*\* as defined in the federal higher education laws, the Clery Act and the Violence Against Women Act



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

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



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## #2 of the “Big 5” Sexual Assault (Clery Definition)

- ▶ Forcible: sex without consent, including where one cannot give consent
  - ▶ Rape, sodomy, assault with an object, fondling\*\*
- ▶ Non-forcible: Incest, Statutory Rape
  - ▶ Considered sexual assault “under the law”
- ▶ \*\*Fondling includes touching of private parts (policy should say whether above or under the clothing), for purposes of sexual gratification, non-consensually; need not be under clothing or involve penetration



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## Consent

- ▶ Not defined in the law
- ▶ Must be defined in your policy
- ▶ Policy definition must be applied in your grievance process



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# Consent

Generally, consent is 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.



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# Consent

Consent is not present when an individual does not have the capacity to give consent, voluntarily or involuntarily, due to age (consider state law), physical condition, or disability that impairs the individual's ability to give consent.



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# Consent

- ▶ For age, consider “Romeo and Juliet” exceptions
- ▶ Physical conditions that can lead to lack of capacity include incapacitation (not just intoxication) due to the consumption of drugs or alcohol (voluntarily or involuntarily) or being in a state of unconsciousness, sleep, or other state in which the person is unaware that sexual activity is occurring.



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## #3 of the “Big 5” Domestic Violence (VAWA Definition)

- ▶ Felony or misdemeanor crime of violence
- ▶ Committed by a current or former romantic partner spouse, former spouse, intimate partner, person who shares a child, person similarly situated to a spouse, adults against a person protected under domestic or family violence laws of the jurisdiction



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## #4 of the “Big 5” Dating Violence (VAWA Definition)

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



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## #5 of the “Big 5” Stalking (VAWA Definition)

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

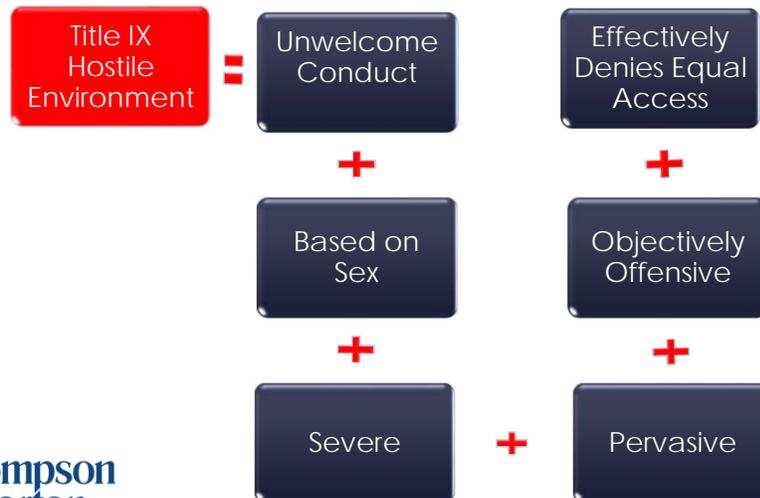


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# Train the Trainer Tip

- ▶ It is not enough to teach the definitions
- ▶ Investigators and decision-makers must understand how to tie their work to the elements
- ▶ For example, if stalking is alleged, what evidence is there for or against the element that the person feared for safety or suffered emotional distress? If sexual assault is alleged, must address consent.

# Let's Talk About SPOO



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## Train the Trainer Tip

- ▶ How do you teach severe, pervasive, and objectively offensive?
- ▶ Common sense definitions (ask the trainees)
- ▶ Dictionary definitions
- ▶ Case law definitions and examples



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## Dictionary Definition: Severe

- ▶ Very bad, serious, or unpleasant; causing a lot of physical pain or suffering; very harsh (Merriam-Webster)
- ▶ Strict, austere or intense with disastrous consequences. (Black's Law Dictionary)



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## Case Definitions: Severe

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

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



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## Case Definitions: Severe

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

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



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## Case Definitions: Severe

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

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



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## Dictionary Definition: Pervasive

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



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## Case Definitions: Pervasive

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

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



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## Case Definitions: Pervasive

- ▶ By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.

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



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## Case Definitions: Pervasive

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

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

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

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



## Case Definitions: Pervasive

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

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



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## Dictionary Definitions: Objectively Offensive

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



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## Case Definitions: Objectively Offensive

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



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# Examples

- ▶ Male student
- ▶ Called “gay,” “homo” and “f\*\*got” on multiple occasions by other male students
- ▶ A student grabbed his genitals and engaged in a simulated sexual act while he waited in line in the school cafeteria
- ▶ He was told in no uncertain terms that he was not welcome in the school because it was believed he was a homosexual
- ▶ He was slapped, punched and struck with a neck-chain while the perpetrators made statements showing that they intended to harass, harm and demean him based on his perceived sexual orientation
- ▶ In the circumstances, a reasonable person in L.W.'s protected class would believe that the school environment was hostile and threatening

L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 381 N.J. Super. 465, 490, 886 A.2d 1090, 1105 (App. Div. 2005), aff'd as modified and remanded, 189 N.J. 381, 915 A.2d 535 (2007)



# Examples

- ▶ A male student put all of his weight on a female student, touched her breasts, stomach and legs over her clothing, and bit her neck hard enough to leave a mark.
- ▶ Undoubtedly, this behavior is inappropriate and should not to be condoned, but it is not adequately severe or pervasive to be covered by Title IX.
- ▶ The court cited cases involving one incident of male student touching a female student's breasts and buttocks, and other incidents of name-calling, insults, and physical harassment, which was found not sufficiently pervasive or severe from an objective standpoint, and two separate incidents with two male students, where one boy touched female student's vagina through her skirt and other boy slapped her buttocks, which was found not sufficiently pervasive under Title IX.

Carabello v. New York City Dep't of Educ., 928 F. Supp. 2d 627, 643 (E.D.N.Y. 2013)

**Note: Under the 2020 Title IX regulations this conduct could be fondling**



# Examples

- ▶ Male students videotaped and shared videotapes of female students engaging in sexual encounters with male students on premises of their respective schools
- ▶ While the cases currently before the court do not include allegations of forcible rape, they do involve substantial violations of the students' sexual autonomy, which is relevant to just how pervasive the ensuing conduct needed to be to rise to the level of actionable harassment
- ▶ Indeed, it is inaccurate to characterize these cases as involving simple, isolated events. Being taped during sexual activity without permission is an isolated event. The video's being sent to another person is a second event. The next transmission is a third. The availability of the videos was widespread. In a contemporary high school, there is little that is more "pervasive" than electronic communication.

T.C. on Behalf of S.C. v. Metro. Gov't of Nashville, 378 F. Supp. 3d 651, 675 (M.D. Tenn. 2019)



# Examples

- ▶ A male student began physically and verbally pressuring his girlfriend (also a student) into having sex, which she did not want. They broke up.
- ▶ At school, after school, and during school events, he would text her and contact her over social media even though she repeatedly told him to stop. He also texted and harassed her friends at school.
- ▶ He grabbed, pushed, and yelled at her outside her classrooms and stalked her on school property by following her to her car after school, showing up after each class, and following her in the halls.
- ▶ He frequently harmed her physically, causing pain by grabbing and squeezing her arms and wrists. He also smashed his hands against the walls to make his hands bleed.
- ▶ He texted her and her friends he was planning to kill himself.

Wiley v. Bd. of Ed. of St. Mary's Cty., 2021 WL 3857950 (D. MD 2021)



**SCENARIO #2**

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A friend of a student, Chi, reports that Chi was assaulted by Reagan, another student who Chi has been dating for over a year. The conduct alleged occurred off campus at Reagan’s home. Reagan has a history of reports of violence from other students, including from a former partner. You email Chi to try to set up a meeting, but Chi does not respond.

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### What is your next step?

- Sign a formal complaint because of the alleged pattern of behavior by a single perpetrator
- Send a follow up communication to Chi explaining the consequences if you do not meet and, if Chi does not respond, sign a formal complaint because of the alleged pattern
- Close the file because of Chi's unwillingness to participate in the process
- Close the file because Chi has not filed a formal complaint and the case does not warrant signing a complaint

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# Occurrence in the Education Program or Activity

(PHYSICAL JURISDICTION)



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## Is the alleged conduct in the education program or activity?

- No, because the school did not have substantial control over either the alleged perpetrator or the context of the alleged harassment
- No, because the school did not have substantial control over the context of the harassment
- Yes, because although the school lacked substantial control over the context of Chi's abuse, it had control over the context in which it failed to act (the assaults on the other students)

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SCENARIO #2

101

You finally meet with Chi, and Chi wants to file a formal complaint under Title IX.



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## Brown v. State (University of Arizona) (9th Cir. 2022)

- ▶ A football player (Bradford) abused his girlfriend (Brown) in a private, off-campus residence unconnected to any school activity; both were students
- ▶ Although Bradford had to receive approval from the football program to live off campus and paid for the residence with his scholarship funds, this was not sufficient to show the University had substantial control
  - ▶ Use of scholarship funds did not render the housing University property
  - ▶ Approval requirement showed control over Bradford, not his residence
- ▶ “Disciplinary authority over a student is not enough by itself to establish that the school controls the locations or contexts where the student is found”
- ▶ Even though the abuse may not have occurred absent Bradford and Brown’s shared connection to the University, not everything that happens between fellow students occurs “under [the operations of]” the institution.

23 F.4th 1173



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103

## Hall v. Millersville University (3rd Cir. 2022)

- ▶ A student (Hall) and her non-student boyfriend had a history of staying together in the residence hall on campus
- ▶ A resident assistant submitted a report after coming to Hall's door after hearing a struggle and Hall's boyfriend said things "got a little physical." The police responded and drove the boyfriend off campus. The Deputy TIXC looked over the RAs report and then filed it away; no investigation was conducted.
- ▶ The mother of Hall's roommate reported the incident to University police, the counseling department, and the Area Coordinator in the following days; she was told nothing could be done without a complaining witnesses



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## Hall v. Millersville University (3rd Cir. 2022)

- ▶ Several months later, residents and the RA heard noises from Hall's room, including the sound of a woman screaming for help. The RA knocked on the door, but heard nothing, and did not inquire further.
- ▶ That night, the boyfriend killed Hall through "strangulation and multiple traumatic injuries" after potentially sexually assaulted her
- ▶ Hall's family brought suit against Millersville under Title IX



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## Hall v. Millersville University (3rd Cir. 2022)

- ▶ Millersville argued that it could not be held liable because Hall's boyfriend was not a Millersville student
- ▶ The Third Circuit rejected this argument, noting that the only requirement is that the University have **actual control** over the assailant
  - ▶ Liability is not just for acts of employees, students, or even guests that are invited *by the school* (think: lecturers, visiting athletic programs, etc.)



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## Hall v. Millersville University (3rd Cir. 2022)

- ▶ Control is not limited to formal disciplinary authority
- ▶ Control is the ability to take remedial action
- ▶ Evidence of control over the boyfriend:
  - ▶ Rules for dorm guests (used twice to exclude the boyfriend from campus)
  - ▶ Ability to issue “no trespass orders” against anyone
- ▶ Hall appears to be the first time a federal appeals court has found that a Title IX funding recipient can be liable for deliberate indifference to sexual harassment perpetrated by a non-student guest on campus.



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## Hall v. Millersville University (3rd Cir. 2022)

- ▶ However...
- ▶ The Court made a point to note that it “[does] not think it is likely that a university would have substantial control over any random third party who wanders onto an open campus and harasses students, nor it is likely that a university would have substantial control over all aspects of a campus which is open to the public.”
- ▶ But, a K-12 school might: “A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy.”



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## Hall v. Millersville University (3rd Cir. 2022)

- ▶ Remember to follow up; it is not just your response “in the moment” that matters
  - ▶ “Though [the RA’s] removal of [the boyfriend] the night of October 4th ‘took care of the immediate problem,’ we cannot say this alone establishes Millersville’s response to [Hall’s] abuse was not clearly unreasonable as a matter of law.”
  - ▶ “A reasonable jury could still conclude Millersville acted with deliberate indifference due to its inaction in response to [the RA’s] subsequent incident report or [the parent’s] calls, as well as its failure to generate a police report regarding [the boyfriend’s] removal until after [Hall’s] death.”



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# First Amendment Implications



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SCENARIO #3

During Pride Week, a Christian student group puts out the following statement on social media:

“This week, our educational institution has been celebrating Pride Week. This week supports and promotes transgenderism and other forms of sexual degeneracy and licentiousness. It spits in the face of any Christian who attends this institution.”



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SCENARIO #3

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“Pride Week promotes sexual perversion and the degradation of the moral principles which have set this country apart from the rest of the world. We strongly condemn this abhorrent event and its participants. We are truly disappointed that our educational institution has chosen to promote this kind of content.”

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SCENARIO #3

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A group of LGBTQ+ students file a formal complaint of Title IX sexual harassment. They point to other posts by the student group of a similar tenor and say that the pervasiveness of the posts make them feel unwelcome and unsafe on campus. They believe the speech is hate speech and that the student group should be disciplined and banned.

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

No, because it is not directed at any particular student

No, because the conduct is not severe

Yes, because the conduct is sufficiently severe, pervasive, and objectively offensive

None of the above (explain in the chat)

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**For Sexual Harassment to be Covered by the New Title IX Rules**

- ▶ The conduct must be “Title IX Sexual Harassment” as defined by the rules
- ▶ The conduct must have occurred in a program or activity of the school
- ▶ The conduct must have occurred in the United States

**ALL THREE MUST BE PRESENT FOR THE TITLE IX RULES TO APPLY**

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# Two Views

- ▶ The conduct is severe, but we can't touch it because it's protected by the First Amendment
- ▶ The conduct is not severe because it is protected by the First Amendment



# The Student Speech Tests: a Trilogy "Plus One"

**"School-tolerated speech"**

- Speech that merely happens to occur on school property
- School can regulate "school-tolerated" speech only where the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."
- *Tinker v. Des Moines Indep. Comm. Dist.*, 393 U.S. 503 (1969).

**"School-sponsored speech"**

- Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school
- School can place restrictions on "school-sponsored" speech so long as the restrictions are "reasonably related to legitimate pedagogical concerns"
- *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

**"Vulgar or obscene speech"**

- Speech that is "vulgar, lewd, obscene, and plainly offensive," although not necessarily legally "obscene"
- a school may prohibit "vulgar speech," regardless of whether the speech causes a substantial disruption
- *Bethel School District No. 403 v. Fraser*, 475 U.S. 675 (1986).



# The Student Speech Tests:

a Trilogy “Plus One”

## Is *Morse* a Fourth Test?



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*Morse v. Frederick*, 127 S. Ct. 2618 (2007)

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# The Other Tinker Test: Invasion of the rights of others

A student may express his opinions, even on controversial subjects ... if he does so without materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school .... **and without colliding with the rights of others.**

*Tinker v. Des Moines Indep. Comm. Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969)

The Forgotten Tinker test!

- ▶ “But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Id.* at 513, 89 S. Ct. at 740.
- ▶ “In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.” *Id.* at 509, 89 S. Ct. at 738.

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## Train the Trainer Tip

First Amendment law is complicated and always changing; encourage team members to rely on the Title IX Coordinator and legal counsel for help making these calls



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SCENARIO #4

Multiple students report that another student, Reese, created a website that includes comments about classmates that the classmates believe are sexual harassment. You look at the website and find that it does not include Reese's name or the names of any classmates or the educational institution.



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SCENARIO #4

121

The website assigns names to unknown individuals and describes them. For example, it refers to “Chicky-F\*\*k” as “a PILF who loves to bring chicken sandwiches for lunch.” Another entry refers to “Hot Pants” as “a leather pants wearing hottie.” According to the students, anyone from the school would know to whom each entry referred.



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SCENARIO #4

122

The website calls the listed students names, including “sluts,” “whores,” “hussies,” “nymphos,” “skanks,” and “trollops.” It also includes elaborate sexual fantasies about what the author “wants to do” to some of the listed students.



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**SCENARIO #4**

123

The website began circulating around campus a few weeks ago, and the interest has grown to a fever pitch. It is unclear how the website was first introduced to the community. Some of the students identified created an Insta page to collect information about the creator of the page, and believe they were able to identify them as Reese.

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**Would the alleged conduct, if true, fall under the Title IX grievance procedure?**

- Yes, the conduct is so severe, pervasive, and objectively offensive that it would effectively deny equal access to the educational program or activity
- No, the website was only posted once so it is not pervasive
- No, the conduct, even though crude, is not severe
- No, the page was clearly a joke and so the conduct is not objectively offensive
- None of the above

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## Is this case within the institution's Title IX sexual harassment jurisdiction?

Yes, because the alleged perpetrator and victims are students

Yes, because it was reasonably foreseeable that such a page would disrupt the educational environment and is aimed at particular individuals

No, because the conduct occurred off campus

No, because Reese's speech is protected by the First Amendment

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## Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038, 2045 (2021)

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Justice Breyer:

“Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. The parties' briefs, and those of amici, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.”

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## **Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038, 2045 (2021)**

Justice Breyer was hesitant to set out a specific test for what constituted “off campus” speech or when a school would be justified in disciplining a student for such speech, noting that circumstances would vary based on:

- ▶ a student’s age
- ▶ the nature of the school’s off-campus activity, and
- ▶ the impact upon the school itself.

However, he mentioned three features of off-campus speech that diminish a school’s ability to regulate such speech:



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## **Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038, 2045 (2021)**

“First, a school, in relation to off-campus speech, will rarely stand in loco parentis.”

- ▶ In other words, parents should generally be responsible for disciplining their children for off-campus speech, not the schools.
- ▶ This was one of the major themes of both the plaintiffs and the organizations supporting them.



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## **Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038, 2045 (2021)**

“Second, from the student speaker’s perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day.”

- ▶ Since punishing kids for what they say away from school means kids would never be 100% free to express themselves, courts should be “more skeptical” of a school’s efforts to punish for off-campus speech.



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## **Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038, 2045 (2021)**

“Third, the school itself has an interest in protecting a student’s unpopular expression, especially when the expression takes place off campus.”

- ▶ Calling schools “the nurseries of democracy” and invoking the “marketplace of ideas” concept, the Court stressed that unpopular speech deserves more protection, not less.



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## Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038, 2045 (2021)

Ultimately the Court agreed that the school could not show the “substantial disruption” needed under the Tinker test.

### Factors Considered:

- ▶ B.L.’s tweets were intended to contain an actual message criticizing the rules of the cheerleader community;
- ▶ did not amount to “fighting words” (historically deemed unprotected speech);
- ▶ were not obscene “as this Court has understood that term”
- ▶ were posted outside of school hours from an off-campus location;
- ▶ did not identify the school or target any member of the community; and
- ▶ were transmitted using her personal cell phone, to a “private circle” of friends.



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## Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038, 2045 (2021)

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## Mahanoy Area Sch. Dist. v. B.L. by and through Levy, 141 S. Ct. 2038, 2045 (2021)

- ▶ Schools should be extra careful about disciplining students for religious or political speech.
  - ▶ “When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.”
  - ▶ A number of groups have been trying to draw a circle around both religious and political speech, giving them a heightened form of protection (if not making them outright untouchable).
  - ▶ Several of the justices asked questions specifically about political and religious speech during oral argument.



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## When Can We Reach Off Campus Speech?

- ▶ Until we receive more guidance from the courts, we will need to fall back on same questions courts asked under the “nexus” approach
  - E.g., Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).**
    - “We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct “would foreseeably create a risk of substantial disruption within the school environment,” at least when it was similarly foreseeable that the off-campus expression might also reach campus.”



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## When Can We Reach Off Campus Speech?

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

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**For non-Title IX sexual misconduct, my institution responds to complaints that occur outside the program or activity.**

True False Unknown

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

Yes  
No  
Unkown

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# Keep It Equitable

- ▶ OCR does not enforce school codes of conduct but may investigate complaints that a school's code of conduct treated students differently based on sex, including sexual orientation and gender identity (2021 Q&A)
- ▶ Consider
  - For example, if you discipline other types of off-campus cyberbullying or harassment through a code of conduct, use the same response for non-Title-IX sex-based online cyberbullying or harassment
  - For non-Title-IX sex based physical conduct, such as an off campus sexual assault, consider how you would handle acts of off-campus physical conduct unrelated to sex (e.g., an off-campus fight)

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# Train the Trainer Tip

- ▶ Do you actually know what other departments are doing when it comes to non-Title IX discipline? Find out before you train.
- ▶ Training on how to handle off-campus conduct and non-Title IX conduct is essential for those implementing discipline outside the Title IX space



## Want More on Student Speech?

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



## Want More on Student Speech?

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### Thompson & Horton Webinar on Demand

Gaslighting, Cancel Culture, or Free Speech  
- Lessons from the Yale Law School “Trap  
House” Controversy

<https://vimeo.com/644967627>



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### SCENARIO #5

Tao is a heterosexual student at your institution. Tao reports that employee Ryan, who teaches sociology, has engaged in the following conduct:

- ▶ Posts regularly on social media about disagreement with the homosexual lifestyle and its “negative impact” on society
  - For K-12, assume the account is under the handle “TeachSoc” and does not identify Ryan by name or the school



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SCENARIO #5

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- ▶ Used primary text resources in teaching a lesson on stratification in society—sex and gender—that championed the heterosexual nuclear family
- ▶ Although a text on the opposite perspective was also taught, it seemed to Tao that Ryan picked something less persuasive and much shorter on purpose

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SCENARIO #5

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- ▶ At the beginning of the year, called students by their first names except for two transgender students, who Ryan called by their last names; at some point, presumably when a complaint was raised, Ryan began calling all students in the class by their last names

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SCENARIO #5

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- ▶ Tao reports having heard Ryan call the transgender students by their unpreferred pronouns when talking with other students and teachers, but does not remember who else was involved in the conversations



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

No, because the conduct alleged is not "sexual harassment"

No, because Dr. Ryan's conduct is protected by the First Amendment

No, because the conduct is not severe

Yes, because the conduct is severe, pervasive, and objectively offensive

None of the above (explain in the chat)

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## For Sexual Harassment to be Covered by the New Title IX Rules

- ▶ The conduct must be “Title IX Sexual Harassment” as defined by the rules
- ▶ The conduct must have occurred in a program or activity of the school
- ▶ The conduct must have occurred in the United States

**ALL THREE MUST BE PRESENT FOR THE TITLE IX RULES TO APPLY**



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## Is the conduct protected by the First Amendment?



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# Constitutional Limits

Nothing in this part requires a recipient to:

- ▶ Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;
- ▶ Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or
- ▶ Restrict any other rights guaranteed against government action by the U.S. Constitution.

34 CFR 106.6(d)(2)



# K-12 Classroom Speech

*In the classroom...*

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



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# Higher Ed Classroom

Academic freedom is the freedom of a teacher or researcher in higher education to investigate and discuss the issues in his or her academic field, and to teach or publish findings without interference from political figures, boards of trustees, donors, or other entities. Academic freedom also protects the right of a faculty member to speak freely when participating in institutional governance, as well as to speak freely as a citizen.

AAUP.ORG FAQs on Academic Freedom



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# Outside the Classroom

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

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



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# Employee vs. Citizen

When a public employee speaks in [their] capacity as an employee and addresses personal matters such as personnel and employment disputes, rather than in [their] capacity as a citizen on a matter of public interest, [their] speech falls outside the protection of the First Amendment. When the speech in question merely touches on an element of personal concern in the broader context of a matter of public concern, however, a court is not precluded from concluding that an employee's speech as a whole addresses a matter of public concern.

Salge v. Edna Indep. Sch. Dist., 411 F.3d 178, 186 (5th Cir. 2005)



# Public Concern?

Speech is not on a matter of public concern if it is made solely in “furtherance of a personal employer-employee dispute.” Typically, an employee speaks in furtherance of his personal employer-employee dispute when [they] discuss[ ] personnel matters directly impacting [their] job or criticizes other employees or supervisors' job performance.



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## Private Speech?

Private speech involves “solely personal matters or strictly a discussion of management policies that is only interesting to the public by virtue of the manager’s status as an arm of the government”



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## Public Concern?

Speech on a matter of public concern need not be made before a public audience, although “it may relate to the public concern if it is made against the backdrop of public debate”



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## *Meriwether v. Hartop*

- ▶ Philosophy professor at Shawnee State University (public, Ohio) received a written reprimand for violating policy requiring faculty to refer to students by chosen pronouns
- ▶ Reversed motion to dismiss
- ▶ First amendment may extend to faulty use of pronouns in classroom

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



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## *Meriwether v. Hartop*

- ▶ Meriwether addressed students as “Mr.” or “Ms.”, believing “this formal manner of addressing students helps them view the academic enterprise as a serious, weighty endeavor” and “foster[s] an atmosphere of seriousness and mutual respect”
- ▶ It is “an important pedagogical tool in all of his classes, but especially in Political Philosophy where he and [the] students discuss many of the most controversial issues of public concern”



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## *Meriwether v. Hartop*

- ▶ January 2018, he responded to a student he had never met and who presented as male saying, “Yes, sir”
- ▶ Doe “demanded” after class that Meriwether “refer to [Doe] as a woman” and use “feminine titles and pronouns”
- ▶ When Meriwether said he wasn’t sure if he could comply, Doe became hostile and said Meriwether would be fired if he didn’t comply

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## *Meriwether v. Hartop*

- ▶ Meriwether reported the incident to the Dean of Students and his department chair, who informed Title IX
- ▶ The Dean of the College of Arts and Sciences first told Meriwether to stop using sex-based references
- ▶ He pointed out that would be next to impossible and suggested he refer to Doe by only Doe’s last name, which the Dean accepted

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## *Meriwether v. Hartop*

- ▶ Meriwether asked if he could use preferred pronouns but include a disclaimer in the syllabus noting he was doing so under compulsion and setting forth his personal and religious beliefs about gender identity
- ▶ The Dean rejected this suggestion

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## *Meriwether v. Hartop*

- ▶ “[T]he academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not.”
- ▶ “By forbidding Meriwether from describing his views on gender identity even in his syllabus, Shawnee State silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion.”

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## *Meriwether v. Hartop*

- ▶ Shawnee State argued that it has a compelling interest in stopping discrimination against transgender students, citing cases where employers cannot take adverse employment actions based on transgender status under Title VII
- ▶ “Purportedly neutral non-discrimination policies cannot be used to transform institutions of higher learning into ‘enclaves of totalitarianism.’” (citing *Tinker*).



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## *Kluge v. Brownsburg*

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



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## *Kluge v. Brownsburg*

- ▶ Mr. Kluge's religious opposition to transgenderism is directly at odds with BCSC's policy of respect for transgender students, which is grounded in supporting and affirming those students.
- ▶ Even with the last-name-only accommodation, there is an undue hardship: Mr. Kluge's use of the last names only accommodation burdened BCSC's ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students

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## *Kluge v. Brownsburg*

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

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

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# *Kluge v. Brownsburg*

Regarding *Meriwether*, the court noted that it was not following that case, in part because courts have continually emphasized the distinction between public K-12 schools and universities in addressing speech and other constitutional issues



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# *Misgendering Takeaways*

## Federal Law

- ▶ Even in the higher ed context, if there is a showing that misgendering has created a hostile environment that showing would likely overcome a faculty member's refusal to use preferred pronouns
- ▶ In the K-12 context, schools have even more leeway to require use of preferred pronouns for both students and employees, particularly if an opportunity for religious or First Amendment objections are allowed



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# Misgendering Takeaways

## Federal Law

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



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SCENARIO #5

What if Tao reported that the content assigned in class includes vulgar sexual language, sexual scenes, sexual references, prostitution, and sex-based violence, which Tao finds offensive as a survivor of sexual assault.



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

No, because Dr. Ryan's conduct is protected by the First Amendment

No, because the conduct is not severe

Yes, because the conduct is sufficiently severe, pervasive, and objectively offensive

None of the above (explain in the chat)

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**REMEMBER!**

**For Sexual Harassment to be Covered by the New Title IX Rules**

The conduct must be “Title IX Sexual Harassment” as defined by the rules

The Big 5

Or

Hostile Environment

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## Train the Trainer Tip

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

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SCENARIO #6

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Tommy, a student, reports that another student, Charlie, was in a relationship with Rowan, who teaches French, and that things got violent. Tommy also says another student, Casey, was in a similar situation the previous year. Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.



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## 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

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## What are the rights of Casey and Charlie in the Title IX grievance process?

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

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**SCENARIO #7**

A staff member comes to you to report an interaction they saw outside the building that was concerning. One student, Roshan, appeared to force another student, Cody, into a French kiss. Cody was squirming and eventually pulled away and ran off.

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SCENARIO #7

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When you talk to Cody, Cody said that the incident happened. Cody and Roshan had been “hanging out” a lot lately and it was clear Roshan had a crush on Cody. During the incident in question, Roshan and Cody were talking and Cody said they didn’t like Roshan “like that.” Roshan said “I can tell you do, come on” and pushed Cody back and moved in for a kiss.

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SCENARIO #7

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

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

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

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

- Nothing--without a formal complaint, the educational institution cannot respond
- Only offer Cody supportive measures, and nothing more
- Offer Cody supportive measures and then send the matter to your non-sexual harassment process

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SCENARIO #8

183

A coach, Ramsey, reports a concern that members of their team may be engaging in hazing, including using foreign objects to penetrate students' anuses over the clothing. Ramsey denies ever having heard about the conduct before, but says a student reported it earlier in the week and that's the reason for the report now. Ramsey does not know who any specific students are who are involved; the reporting student said they were not.

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SCENARIO #8

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You contact the reporting student, Tanner, and Tanner confirms that students have been engaged in this conduct for years. Tanner identifies one student who has been the target this year, Carmen. You talk to Carmen, and Carmen reports that the conduct occurred in the locker room after practice one time.

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SCENARIO #8

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



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## What should the Title IX Coordinator do next?

- Refer the matter to the non-Title IX SH process because it is not pervasive
- Refer the matter to the non-Title IX SH process because there is no effect on Carmen
- Explain to Carmen that without a formal complaint, no investigation can occur; provide supportive measures
- Explain to Carmen that without knowing the names of the alleged perpetrators, you cannot sign a formal complaint; provide supportive measures
- Sign a formal complaint and initiate an investigation
- None of the above (explain in the chat)

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## Who are the parties to the complaint if the T9C signs the formal complaint?

No complainant or respondent

No complainant, Coach Ramsey is the respondent

Carmen is the complainant, no respondent

Carmen is the complainant, Coach Ramsey is the respondent

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

The Title IX Coordinator can dismiss the formal complaint because there is no way the allegations can be proved

The Title IX Coordinator can dismiss the formal complaint because there is no one to impose consequences against

The matter should continue to the decision-making process but only if Carmen agrees to participate as a witness

The matter should continue to the decision-making process because the conduct alleged, if proved, would be sexual assault

Other (explain in the chat)

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SCENARIO #6 (Again)

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Tommy, a student, reports that another student, Charlie, was in a relationship with Rowan, who teaches French, and that things got violent. Tommy also says another student, Casey, was in a similar situation the previous year. Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.

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SCENARIO #6

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The Title IX Coordinator signs formal complaints in the cases involving Charlie, Casey, and Rowan (dating violence, hostile environment sexual harassment). Charlie and Casey agree to participate in the process. Neither knows the other exists, however. The incidents happened years apart.



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### Should the Complaints be Consolidated?

- Yes, because the respondent is the same in each case
- Yes, because they involve the same type of behavior
- No, because it will be unfair to Rowan to consolidate the cases
- No, because the parties do not know about each other

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# Consolidation

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



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# Consolidation

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



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

True False

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**SCENARIO #6**

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

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## Can IR proceed between Charlie and Rowan?

Yes, but only if Casey agrees to participate too, because all parties to a complaint must agree to IR for it to proceed

Yes, as long as your policy allows IR in this circumstance

Yes, but only if Charlie and Rowan agree that information from The IR can be used in Casey's case

No, because Rowan is an employee

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# Informal Resolution

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

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# IR Limitations

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



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## What if a party violates an IR agreement?

The institution can impose consequences even if not in the agreement

The institution can impose consequences even if agreed to in the agreement

The institution can reopen the Title IX process

The institution cannot respond as the Title IX process is over

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## My institution is using informal resolution in Title IX sexual harassment cases...

Never

In all possible cases (i.e., for all cases other than those involving employee-on-student conduct)

In all possible cases except for those involving sexual assault

Unknown

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**SCENARIO #9**

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

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SCENARIO #9

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

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SCENARIO #9

204

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

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## Who has a valid Title IX formal complaint?

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

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

Chris and Rory both have valid complaints

Neither has a valid complaint

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# Cross-Complaints

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

  
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SCENARIO #10

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Carey, who receives services as a student with an intellectual disability, is discovered in a bathroom on campus with Riley, a student without a known disability. The two had their clothes off. After being told there would be consequences imposed for the on-campus sexual behavior, Carey claimed that the conduct was sexual assault, harassment, and abuse. Riley reported that the conduct was a mutual two-sided interaction. Numerous employees reported first-hand knowledge that Carey and Riley had been “a thing” all school year.

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## Does the incident trigger the Title IX sexual harassment process?

No, because Carey only alleged the conduct was sexual assault after being confronted with consequences for the mutual behavior

No, because multiple employees reported that Carey and Riley had been "a thing" all year

Yes, because Carey claims the conduct was sexual assault

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## Doe v. Dennis-Yarmouth Sch. Dist., 2022 WL 36480 (D. MA 2022)

- ▶ Sixteen-year-old Jane Doe, was enrolled in Dennis-Yarmouth's Wave Program for students with mental disabilities
- ▶ After Jane was allowed to go to the bathroom unsupervised, Jane's assistant discovered her and a male Wave Program student in the boys' bathroom with their clothes off
- ▶ The Does allege that Jane was sexually assaulted, harassed, and abused
- ▶ The school did not investigate. The Title IX Coordinator later wrote that the "encounter between [Jane] and the other student had been viewed as a mutual two-sided interaction" that did not warrant investigation

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## **Doe v. Dennis-Yarmouth Sch. Dist., 2022 WL 36480 (D. MA 2022)**

- ▶ Post-Assault: The Does alleged that the school's actions following Jane Doe's assault showed deliberate indifference
- ▶ Given Jane's disability and reduced mental capacity, the alleged determination that the sexual activity between Jane and [the respondent] was "mutual" illustrates an "investigation [that] was so deficient as to be unreasonable."



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## **Train the Trainer Tip**

- ▶ Consider training for disability services professionals/special education administrators on Title IX
- ▶ Use hypothetical cases to increase ability for issue-spotting in cases involving students with disabilities and sex



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SCENARIO #11

214

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

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**SCENARIO #11**

**Scenario #1:**

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

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**Was there consent?**

Yes No

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**SCENARIO #11**

**Scenario #2:**

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

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**Was there consent?**

Yes No

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**SCENARIO #12**

220

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

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SCENARIO #12

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

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

- Yes, because Rowan violated a no contact order
- Yes, because the remedial efforts were not effective
- No, because Carrington did not report the conduct to anyone
- No, because the post-resolution conduct is not sufficiently severe, pervasive, and objectively offensive to trigger Title IX
- None of the above

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

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



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## After a conviction, the school must complete its own Title IX investigation

True False

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**My institution uses its Title IX sexual harassment grievance process for employee-on-employee conduct.**

True - Higher Education  
False - Higher Education  
True - K-12  
False - K-12  
Unsure

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## “Any Person”

- ▶ Rules and preamble say they apply to any person
- ▶ Some courts have held that Title VII preempts Title IX *in suits for money damages*
  - Analysis not based on whether the conduct was in an education program or activity

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# Preemption

“To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.”

34 CFR 106.6(h)



# Decision-Making Disasters

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# Decision-Making

## K-12

- ▶ Written Questions & Answers
- ▶ Limited Follow-Up Q&A
- ▶ No Hearing Required
- ▶ Written Determination

## Higher Education

- ▶ Hearing
- ▶ Written Determination



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# Decision Disasters

- ▶ Not explaining the process to the parties and advisors beforehand
  - Party, (Parent) and Advisor Expectations
- ▶ Not making clear what “follow-up” means (K-12)
- ▶ Not ensuring procedures match your intended goals
- ▶ Not notifying the parties of the outcome



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# Appeal

- ▶ Upon receipt of appeal, should be provided to both parties
- ▶ Both parties should be given equal opportunity to respond to the appeal
- ▶ Appellate decision-maker issues a written determination on the appeal

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# Appellate Disasters

- ▶ Not limiting the initial appeal; makes equal opportunity to respond a challenge
  - See the T&H Guidebook appeal form
- ▶ Conducting a “de novo” review
- ▶ Not providing a **thorough** rationale



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# Train the Trainer Tip

For all decisionmakers:

- ▶ The best training is often “hand holding” through the process
- ▶ Trainings with engaging hypotheticals and writing exercises are also helpful



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# THANK YOU! QUESTIONS?



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