

## OSPA VIRTUAL FALL SUMMIT 2020

# Title IX Compliance Certification Training: Basic Training

**October 26-27, 2020**

**Presented by Jackie Gharapour Wernz ,Partner**

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## Your Host

**Jackie Gharapour Wernz**

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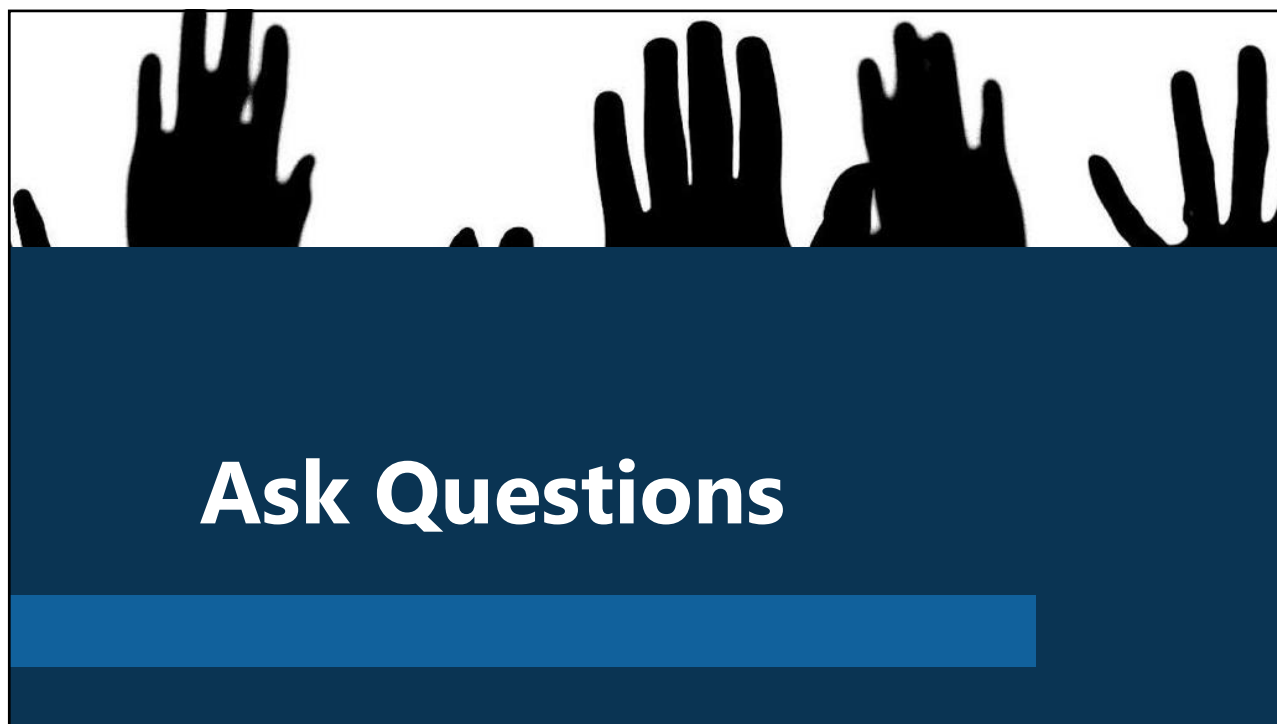
[www.titleXinsights.com](http://www.titleXinsights.com)

312-786-6137

@JackieWernz (Twitter)



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But not just any action, the right action for  
the conduct at issue!

7



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# Why is this so important?

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1 in 4 women  
experiences sexual  
assault before age 18

10% of children are  
targets of educator  
sexual misconduct  
before high school  
graduation

48% of U.S. students are  
subject to sexual  
harassment or assault at  
school before graduating  
high school

In 2010-2011, 36% of  
girls, 24% of boys and  
30% of all students  
grades 7-12 experienced  
online sexual harassment

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According to a 2017 report from the Justice Department, only

**23 percent**

of all sexual assaults are reported to the police.

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*Harassment  
and assault can have  
long lasting,  
detrimental effects on  
victims*

13

## Effects on Individuals

Poor performance in  
school

Stress Disengagement Fear  
Distraction Anger Mistrust Conflict  
Lost Opportunities  
Acting out Absenteeism Drop-out  
Suicide ANXIETY PTSD  
DEPRESSION

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## Effects on Teams

Decreased focus  
Lost productivity  
Withdrawal  
Neglect  
Absenteeism  
Malingering  
Lack of trust in leadership  
Turnover



15

*Unfair processes can  
have  
long lasting,  
detrimental effects on  
the parties*

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## Mattress Protest and Its Aftermath

Case of alleged rape at Columbia first yielded much sympathy for the accuser and protest, but ends with the university apologizing to the accused. The case has had on the discussion of sexual assault on campus.

By **Jeremy Bauer-Wolf** // July 24, 2017



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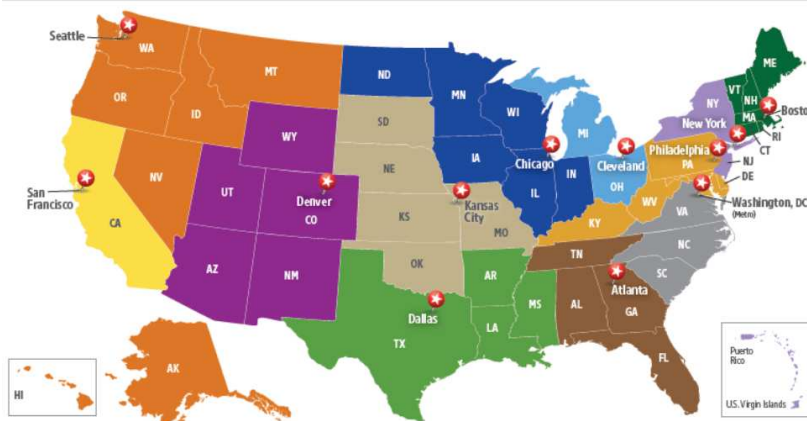


## Responding to Harassment

*Is required by the law*

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## ED Office for Civil Rights (OCR)



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## Ice Breaker

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**Have you been involved  
in responding to a “Title  
IX Complaint”?**

Think to yourself...

22

**Have you been involved in  
a student or employee issue  
involving unwanted  
conduct on the basis of sex?**

Think to yourself....

23

What is Title IX?

24

# What is the first word you think of when you think of “Title IX”

Think to yourself...

25



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## Title IX Statute

(20 U.S.C. §§ 1681–1688)

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

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## What falls under Title IX?

Recruitment,  
Admissions, and  
Counseling

Financial  
Assistance

Athletics

Sex-Based  
Harassment

Treatment of  
Pregnant &  
Parenting Students

Discipline

Single-Sex  
Education

Employment

Retaliation

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## Title IX Regulations

(34 C.F.R. Part 106 – Amended as of 8/14/2020)

- Prohibit discrimination on the basis of sex
- Establish procedural requirements
  - Policy + detailed grievance procedure
  - Designation of Title IX coordinator(s)
  - And many more requirements!

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## When Must the School Respond to Sexual Harassment?

30

## It Depends Who [Well, Which Law] You Ask

### Employment

- Oregon Revised Statutes & OAR
- Title VII
- Title IX

### Students

- Oregon Revised Statutes & OAR
- Title IX

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## When must a school respond to Title IX sexual harassment?

A school with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond

32

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A school with **actual knowledge of** [Title IX] sexual harassment in an education program or activity against a person in the United States must respond

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## Reporting Sexual Harassment: Who, How and When?

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator
- Or by any means that results in the Title IX Coordinator receiving the person's report
- Such a report may be made at any time, including during non business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator

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## Actual Knowledge

AKA "Notice"

To Title IX  
Coordinator or  
"official with  
authority"



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## Actual Knowledge (AKA "notice")

1. Sense
2. Report

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## Official with Authority



- Title IX Coordinator
- Any other officials who have been given authority to institute corrective measures by the school district
- K-12: All employees

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## Key Word: "Allegation"

Once a school has notice of **an allegation** that, **if true**, would constitute Title IX Sexual Harassment, it must respond

"Well, we didn't believe there was enough evidence it happened" does not get you past your responsibility to use your Title IX Sexual Harassment grievance process

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## Issue Spotting

**Order of protection:** Principal served with order of protection requiring one student to have no contact with another student due to an alleged sexual assault in the school's program or activity

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**Does the Principal have “actual knowledge” that a sexual assault occurred?**

Think to yourself...

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## When must a school respond to Title IX sexual harassment?

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A school with **actual knowledge** of [Title IX] sexual harassment in an education program or activity against a person in the united States must respond

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# What is Sexual Harassment?

43

**It Depends  
Who [Well,  
Which Law]  
You Ask**

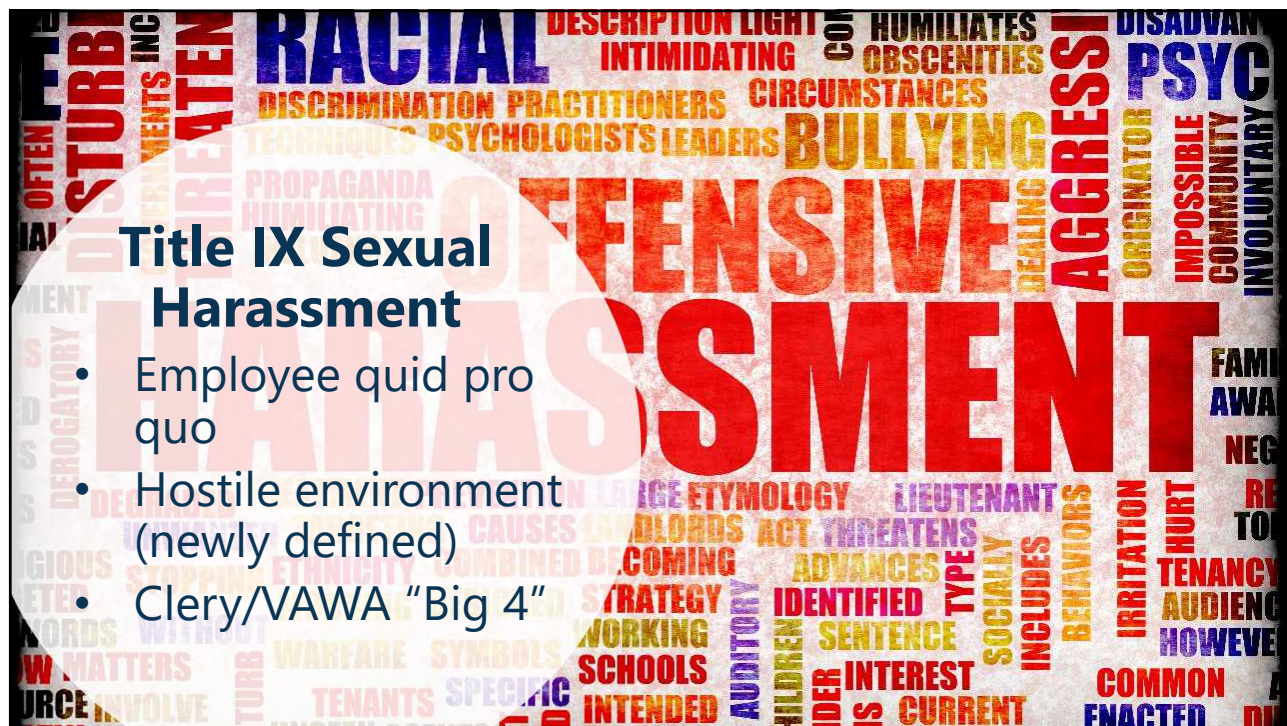
## Employment

- Oregon Revised Statutes & OAR
- Title VII
- Title IX

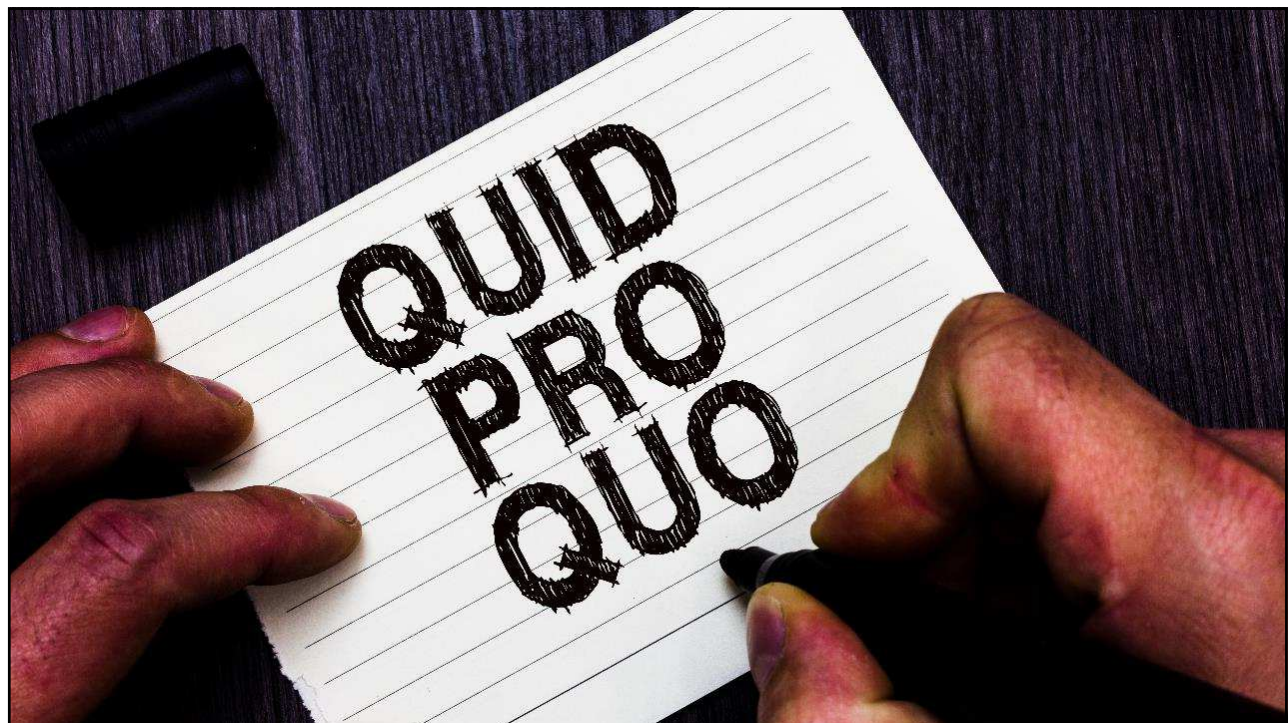
## Students

- Oregon Revised Statutes & OAR
- Title IX

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## Quid Pro Quo

Quid = Something

Pro = For

Quo = Something

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## Title IX Quid Pro Quo

**Definition:** An employee of the educational institution conditioning an aid, service, or benefit of the educational institution on participation in unwelcome sexual conduct

**New:** Only an employee (not a volunteer, another student, etc.)

**Codified:** Severity and harm presumed

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## VAWA “Big Four”

Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Domestic Violence 34 U.S.C. 12291(a)(8)

Dating Violence 34 U.S.C. 12291(a)(10)

Stalking 34 U.S.C. 12291(a)(30)

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Title IX Hostile  
Environment

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## Title IX – What is a Hostile Environment

### Old Definition

Unwelcome conduct determined by a reasonable person to be **severe, pervasive or persistent as to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities**

### New Definition (8/14)

Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the school's education program or activity**

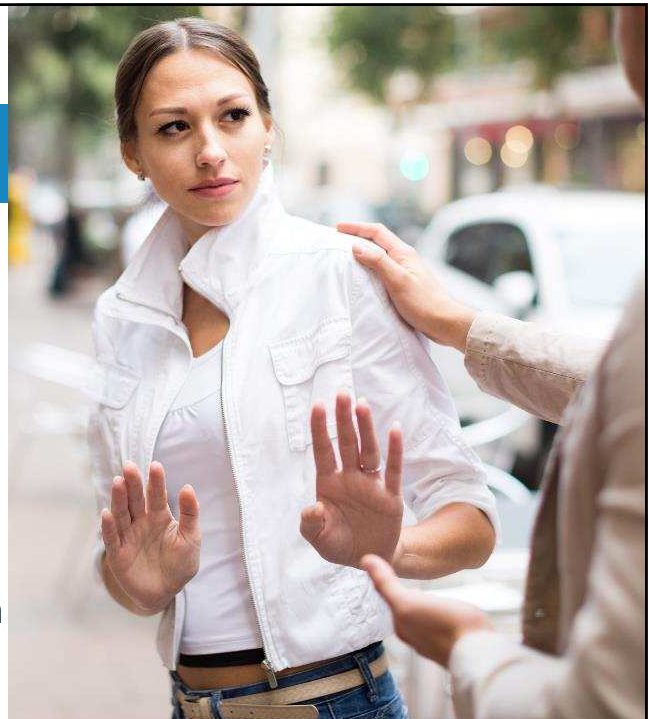
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## Unwelcome Conduct

- Not **Consent**
- Not **Participation**
- Not **Silence**
- Age Matters
- Intoxication Matters
- Culture Matters
- Ability Matters

**\*\*subjective + reasonable person**

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# What is the first word you think of when you think of “severe”

Think to yourself...

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## Severe

- Something more than juvenile behavior
- Something more than antagonistic, non-consensual, and crass conduct
- Simple acts of teasing and name-calling are not enough, even when comments are based on sex
- It is not enough to show that a student has been teased or called offensive names

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# What is the first word you think of when you think of “pervasive”

Think to yourself...

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## Pervasive

- Systemic or widespread
- Multiple incidents of harassment
- One incident is not enough, even if very severe

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**What is the first word you think  
of when you think of “objectively  
offensive”**

Think to yourself...

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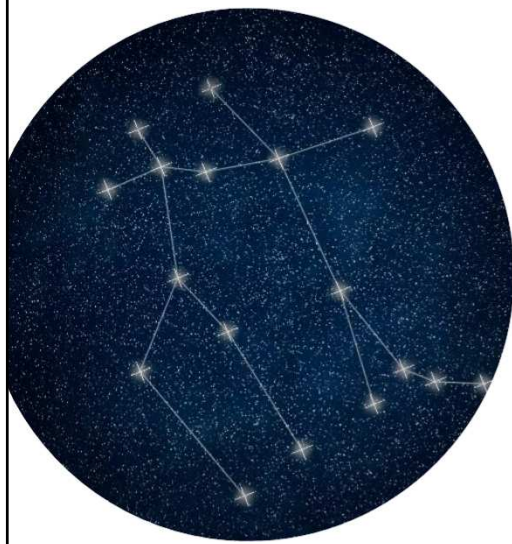
## **Objectively Offensive**

- Behavior that would be offensive to a reasonable person under the circumstances
- Not just offensive to the victim, personally or subjectively
- Consider ages, numbers, relationships

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Constellation of surrounding  
circumstances, expectations, and  
relationships

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## Hostile Environment Factors

Context, Nature, Scope, Frequency,  
Duration, and Location of the Incidents

Identity, Number, Ages, and  
Relationships of the Persons involved

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## Denial of Equal Access

- Need not be denial of all access
- Decline in grades may not be sufficient, but may be relevant
- Look at impact on a reasonable person—not required that the impact actually occur to the Complainant in your case

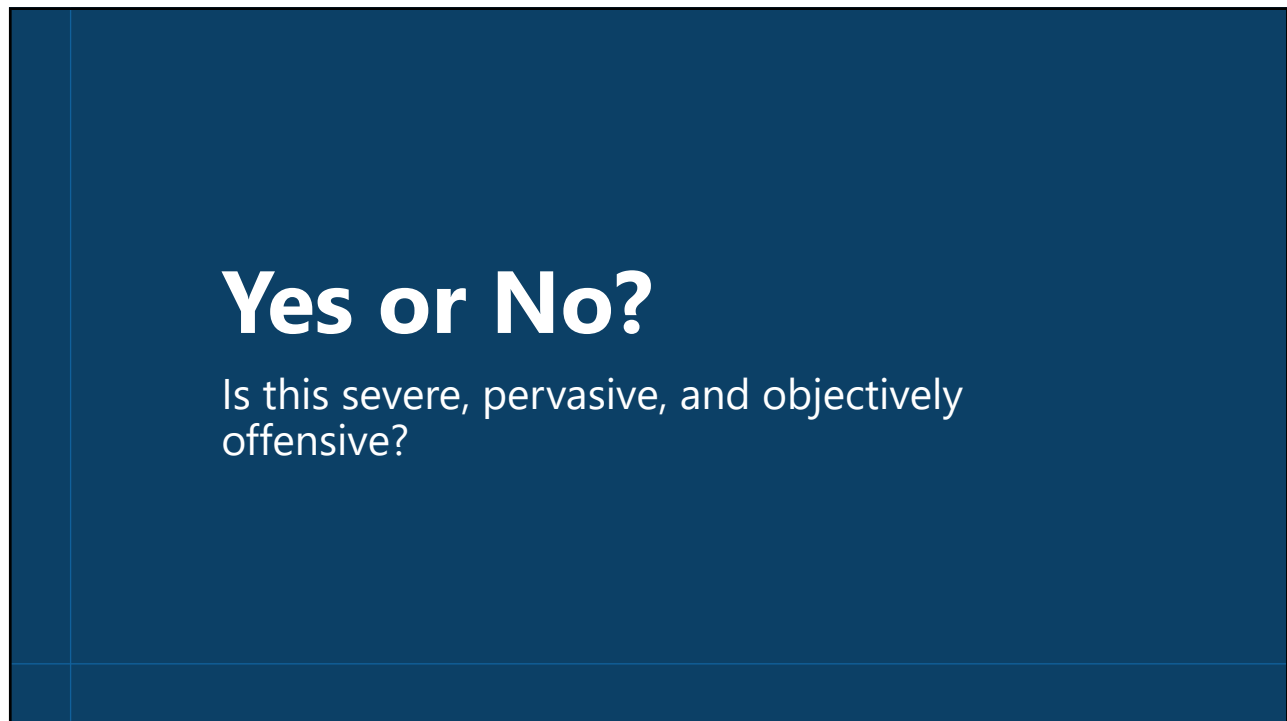
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# **A student makes multiple insensitive jokes to another student**

Think to yourself...

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# **A teacher makes a sexually inappropriate comment to a student in class**

Think to yourself...

66

**One student grabs  
another student's breasts  
during a soccer game**

Think to yourself...

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**One student "uses tongue"  
during an acting scene (in  
class) without permission  
from the other student**

Think to yourself...

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**A group of students of one sex post a Facebook “Hot List” about a group of opposite sex students**

Think to yourself...

69

**A teacher offers a student a good grade on a test for a back rub alone in the classroom**

Think to yourself...

70

**Students incessantly mock a female student for not wearing makeup saying she looks “like a boy”**

Think to yourself...

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**A student sends a completely nude photo to the student’s significant other (another student)**

Think to yourself...

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# The recipient forwards the photo to 20 classmates

Think to yourself...

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## When must a school respond to Title IX sexual harassment?

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A school with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the united States must respond

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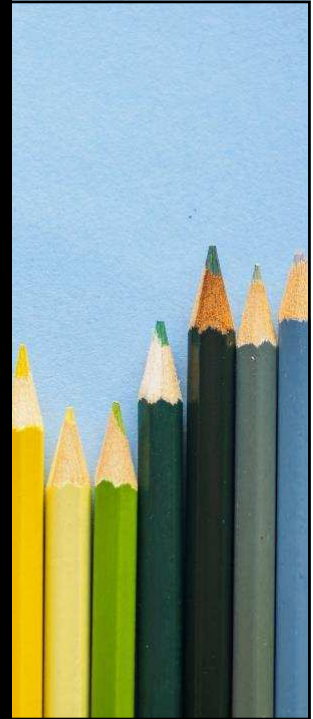
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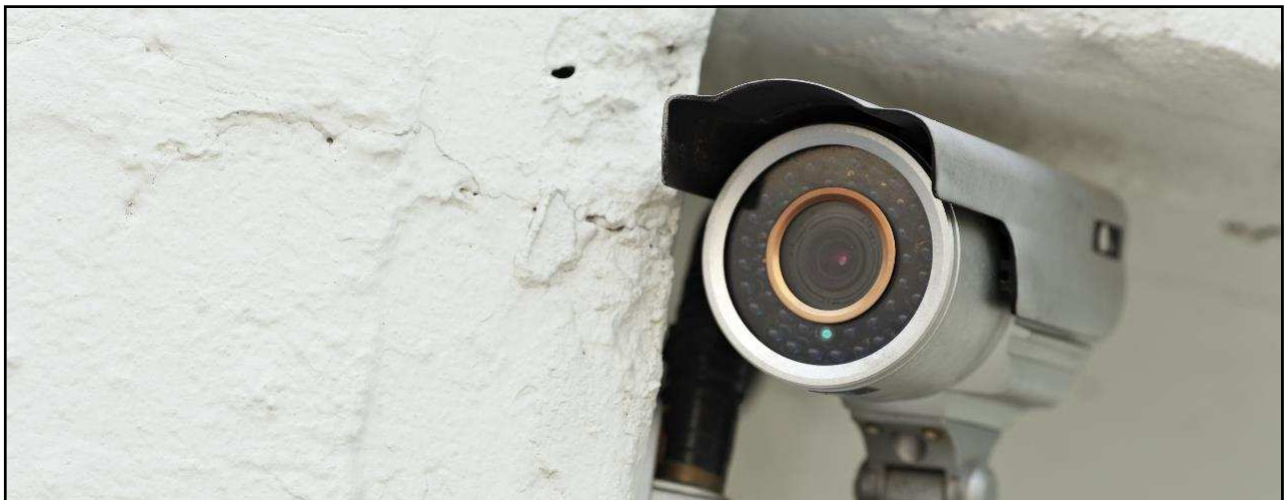
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## Title IX Sexual Harassment Must Be “In a Program or Activity”



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**Program or Activity:** Any location, events, or circumstance over which the school exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred

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**When must a school respond to Title IX sexual harassment?**

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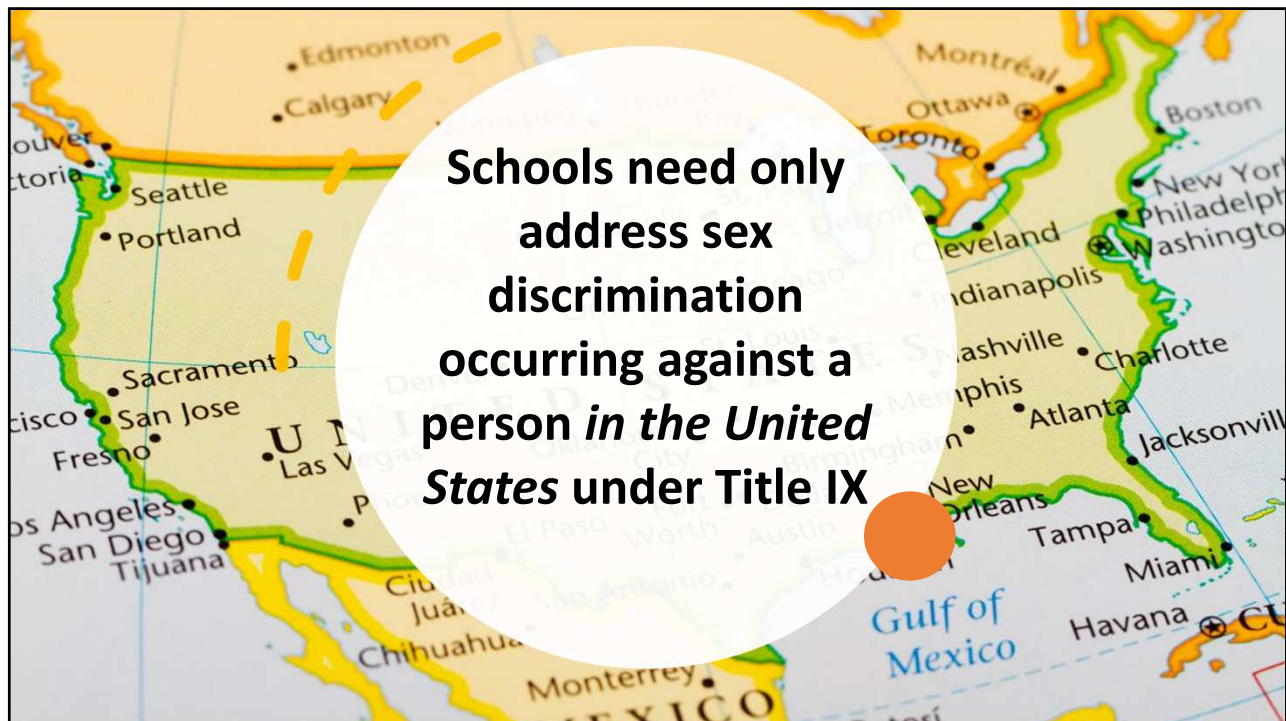
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## DISMISSALS

<b>Mandatory if conduct alleged:</b>	<b>Permissive if:</b>
Not Title IX Sexual Harassment	Complainant requests to withdraw in writing
Did not occur in the school's program or activity	Respondent's enrollment or employment ends
Did not occur in the United States	Specific circumstances prevent school from gathering evidence sufficient to reach a determination (e.g., passage of time, lack of cooperation by complainant)

\*\*can still address under non-Title IX policy

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## **When must a school respond to Title IX sexual harassment?**

A school with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the united States **must respond**

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# Coffee Break

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## How Must You Respond?

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### Board Policies on Harassment

- One Policy, One Procedure
- One Policy, Two Procedures
- Two Policies/Procedures

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## Adequate Response

1 Initial Response/Supportive Measures

2 Informal Resolution (Voluntary)

3 Investigation

4 Decision

5 Appeal

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## Initial Response/Supportive Measures

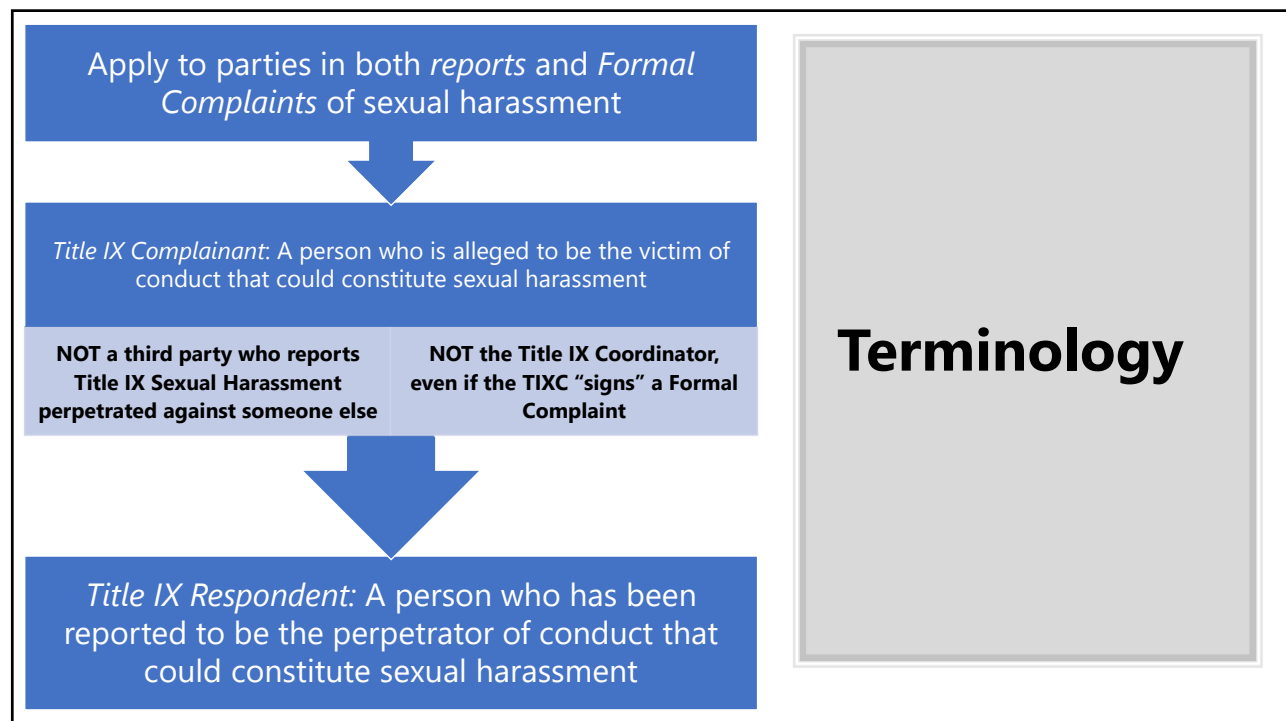
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## Title IX Coordinator

- Must be called Title IX Coordinator
- Must meet with alleged victims of sexual harassment (the Title IX Complainant)  
*upon actual knowledge of TIX SH even if no formal complaint filed*
- Can delegate responsibilities

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Title IX Coordinator (or designee) must promptly, **even if no Formal Complaint is filed:**

- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint

**New:  
Initial  
Response**

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# Signing a Complaint

Factors to consider

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## Supportive Measures

## What Changed?

### OLD TERM (OCR Guidance)

- Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access
- Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents

### NEW TERM (Final Rule)

- **Non-punitive**, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).
- **Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party**
- **Should be confidential**

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## Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervision

A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for "emergency removals" for students and "administrative leaves" for employees

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## Emergency Removal/ Admin Leave

Immediate emergency removal	Employee administrative leave
(34 C.F.R. 106.44(c))	(34 C.F.R. 106.44(d))
<ul style="list-style-type: none"><li>• Based on an individualized safety and risk analysis</li><li>• Necessary to protect a student or other individual from <b>immediate threat</b> to <b>physical health or safety</b></li><li>• <b>Notice, opportunity to challenge</b> provided "immediately" provided the removal</li><li>• Consider other laws, e.g., "change in placement" under IDEA</li></ul>	<ul style="list-style-type: none"><li>• Not prohibited</li><li>• Consider state law, board policy, handbooks, and bargaining agreements</li></ul>

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# What about Protective Orders?

101

**2**

## **Informal Resolution (Voluntary)**

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## Informal Resolution

### INFORMAL RESOLUTION IS NOT PERMITTED UNDER THE FOLLOWING CONDITIONS:

- Cannot condition enrollment, employment, or any right on waiver of right to investigation and adjudication of formal complaints under grievance procedure
- Cannot require use of informal resolution process
- Cannot offer informal resolution process until formal complaint is filed
- Not available to resolve allegations that employee sexually harassed a student

### INFORMAL RESOLUTION MAY MOVE FORWARD UNDER THE FOLLOWING CONDITIONS:

- Any time prior to reaching a determination, either party may request informal resolution
- Requires voluntary, written consent from both parties
- Any party has a right to withdraw prior to agreement

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### Informal Resolution Facilitators

- We do not recommend using the Title IX Coordinator or investigator(s) or decisionmakers (complaint and appeal)

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- To both parties
- In writing
- Allegations
- Requirements of informal resolution process (including circumstances under which the party cannot resume a formal complaint arising from the allegations)
- Resulting consequences of participating (e.g., records)

## Written Notice: Required

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## 3 Investigation

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## *New:* Formal Complaint Response

34 C.F.R. 106.45(b)

- Requires a number of specific steps for investigating
- Major shift from previous, more deferential stance toward specific policies and practices for complaint resolution

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## ANATOMY OF AN INVESTIGATION

Written notice to the parties

Choosing an investigator

Required elements of an investigation

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- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any **initial** interview
- Must include:
  - Notice of grievance process, including any informal resolution process
  - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)

**More  
Steps:  
Written  
Notice**

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- Must include:
  - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process
  - Notice of parties’ rights to have an attorney or non-attorney advisor and to inspect and review evidence
  - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process
- Must be supplemented if new allegations opened for investigation

**More  
Steps:  
Written  
Notice**

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## Written Notice: Required

- Informal resolution notice
- Notice at start of investigation
- Dismissal notice
- Interview notices
- Report
- Notice why proposed questions not asked on cross and why
- Written determination and notice of appeal rights

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## Written Notice: Recommended

- Document information to complainant at initial meeting, including supportive measures requested/provided
- Document that review of evidence provided to both parties
- Document opportunity to ask questions, answers, follow-up questions, etc.

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## Who should investigate?

- Can be the Title IX Coordinator
- But should it?

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## Who should investigate?

- Trained
- Unbiased
- No actual or perceived conflict of interest
  - Consider “institutional interests”
- No prejudgment of the facts

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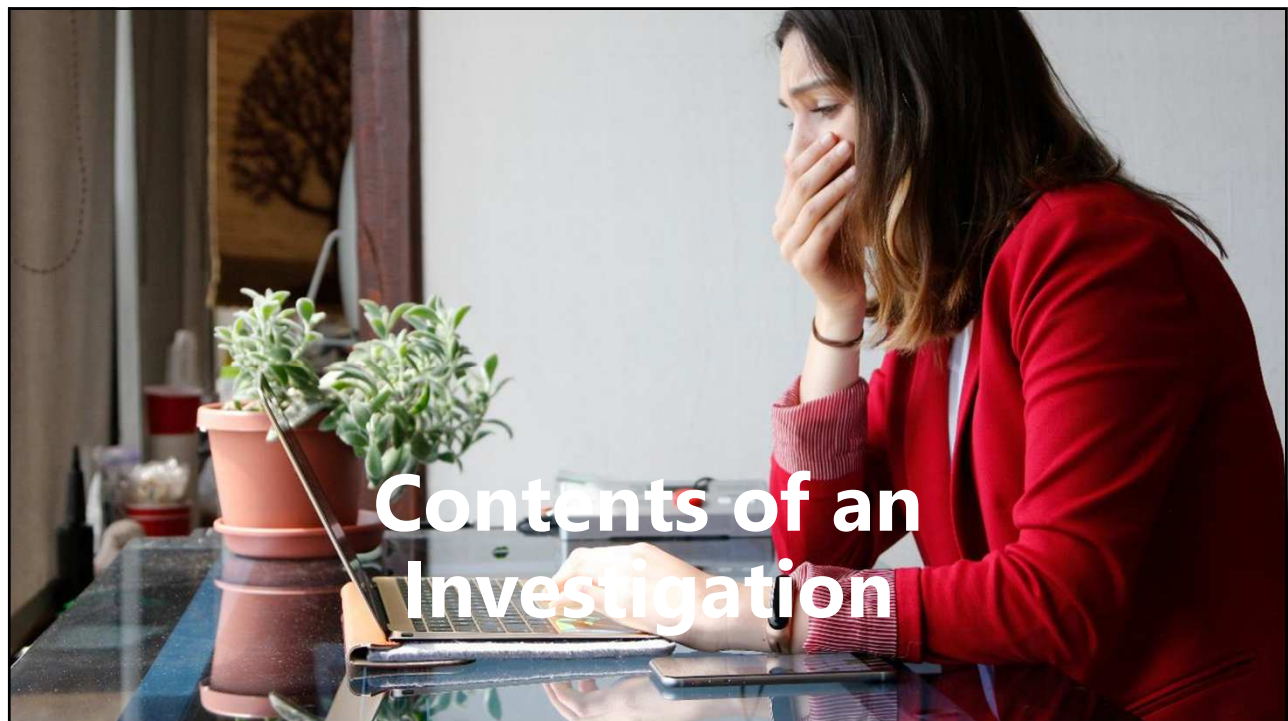
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## Who should investigate?

- Consider the perception of bias
  - Your friendship or other relationship with the accused or their family
  - Your personal characteristics
  - Your personal conflicts (even if just perceived)
  - Personality conflicts

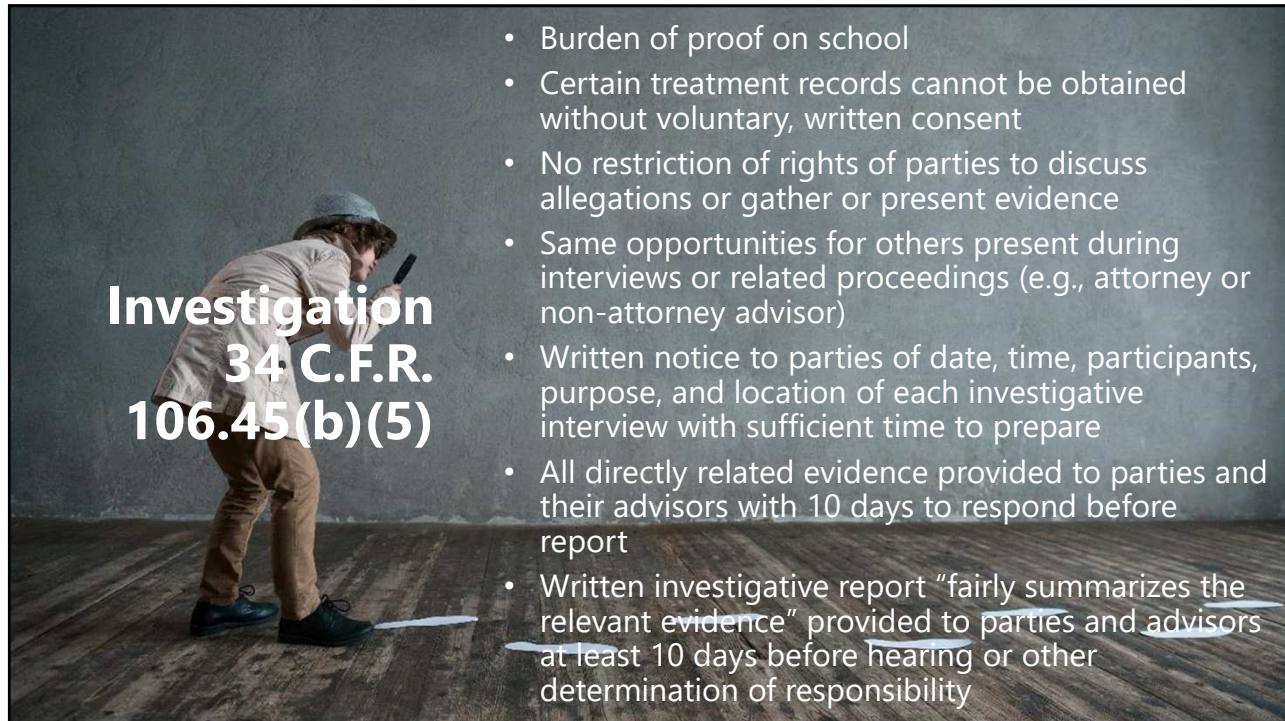
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Contents of an  
Investigation

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**Investigation**  
**34 C.F.R.**  
**106.45(b)(5)**

- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All directly related evidence provided to parties and their advisors with 10 days to respond before report
- Written investigative report "fairly summarizes the relevant evidence" provided to parties and advisors at least 10 days before hearing or other determination of responsibility

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## Investigation Plans Aren't Static

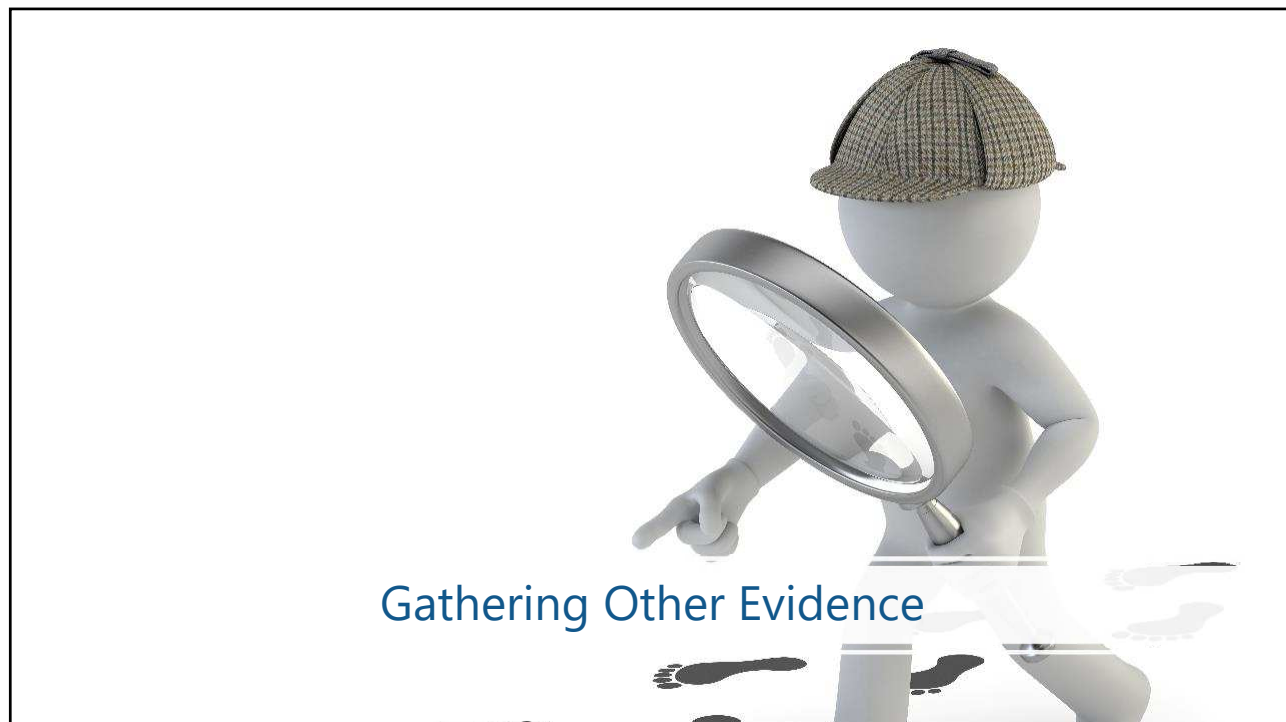
Reassess plan for investigation frequently



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## Warning! Medical Records

- Notice of allegations should not divulge either party's medical information
- Prohibited from accessing or using medical, psychological, or similar records in grievance process without a party's (or parent's) voluntary, written consent

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## Opportunity to Review Evidence

- Before the investigatory report is completed, evidence relating to the allegations must be sent to each party and advisor and should include all directly related evidence (including that which the school does not intend to rely upon and exculpatory and inculpatory evidence)
- Parties have 10 days to provide a written response

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## Investigation Report Should Include

Applicable policies and procedures

Timeline of investigation

Description of allegations

Unbiased summary of evidence gathered, including interviews

Credibility determination(s)

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## Investigation Report Writing

- Fairly summarizes all relevant evidence
- Provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility

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**Decision**

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## Decisionmaker(s) (Complaint)

- Cannot be the Title IX Coordinator or the investigator(s)

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## Determinations of Responsibility 34 C.F.R. 106.45(b)(6)

- Live hearing with live cross by party advisors required for higher ed, **not K-12**; Hearings permitted for K-12
- Each party allowed to submit written, **relevant** questions to be asked of another party or witness to the decisionmaker, who will provide each party with the answers and the opportunity for follow-up questions

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## Relevance

- Rape shield laws – for CP only
  - Unless
    1. Used to prove someone other than respondent committed the conduct or
    2. Specific incidents related to the RP to show consent
- Treatment records
- Legally privileged information

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## Rulings on Relevance in Written “Cross”

- Provide reasoning for irrelevance
- Admit and consider all relevant evidence
- Questions must be appropriate
- Identify exceptions

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## The Decision

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<b>Written Determination</b>	Identify	Identify the allegations
	Describe	Describe procedural steps taken
	Cite	Cite potential policy violations
	Summarize	Fairly summarize all relevant evidence
	Provide	Provide statement of result, with rationale, for each allegation
	Appeal	Appeal procedures

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**Remember the  
Standard of  
Proof**

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**Preponderance  
of the Evidence**

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## Remedies

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- Can be punitive/disciplinary
- Can be supportive measures or similar actions as well
- Can address individuals or larger community

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## 5 Appeal

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### Appeal Process

- Available to both parties
- Can appeal determination regarding responsibility or dismissal
- Three bases for appeal (must impact outcome):
  - Procedural issue;
  - New evidence not reasonably available; or
  - Conflict of interest or bias

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## Appeal Process

- Notify party of appeal in writing
- Apply procedures equally for both parties
- Opportunity to submit written statement
- Issue written decision to both parties

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**Decisionmaker(s)  
(Appeal)**

Cannot be the Title IX  
Coordinator or the  
investigator(s) or the  
decisionmaker (complaint)

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# Bias, Conflicts of Interest, and Other Fairness Concerns

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## Bias

The Title IX Coordinator, investigator, decision-maker, or informal resolution facilitator must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudice any matter before them.

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# Think About

What steps can you take to avoid:

*Prejudgment*

*Conflict of Interest*

*Bias*

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## Recordkeeping

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## Recordkeeping

- Maintain records for 7 years
- Documents for each step in the process (determinations, results, etc.)
- Actions taken in response to reports, complaints

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## Recordkeeping

- For response to reports and complaints
  - Basis for conclusion that response was not deliberately indifferent
  - Documentation of measures taken
  - Supportive measures (or if none provided, why)

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# Questions



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