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
Partner, Franczek P.C.
Chicago, Illinois
jw@franczek.com
www.titleIXinsights.com
312-786-6137
@JackieWernz (Twitter)



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Why Are We Here?

4


Know the
Rules
SEXUAL HARASSMENT
complaint form

5


Recognize
Title IX Sexual Harassment

6



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

7





8

Why is this so important?

9

- 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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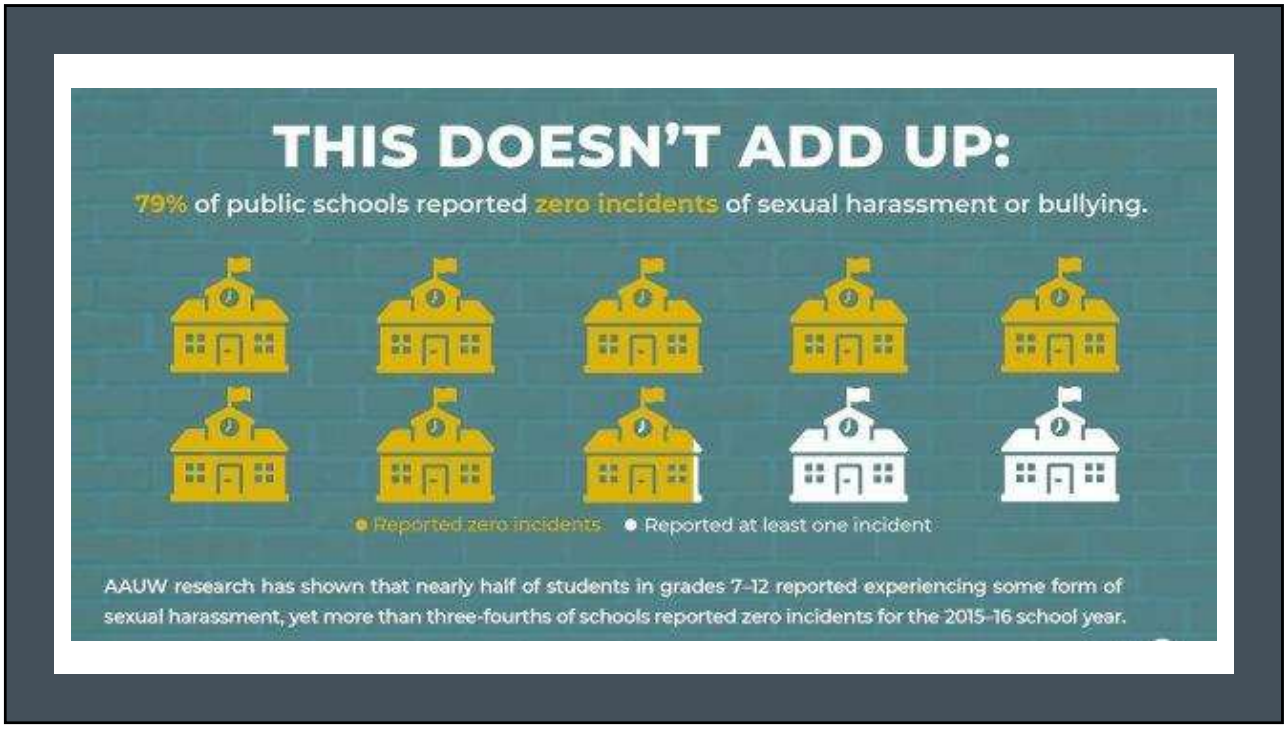
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According to a **2017 report from the Justice Department**, only

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

Conflict

Distraction

Anger

Mistrust

Lost Opportunities

Acting out

Absenteeism

Drop-out

Suicide

ANXIETY

PTSD

DEPRESSION

14

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

16

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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





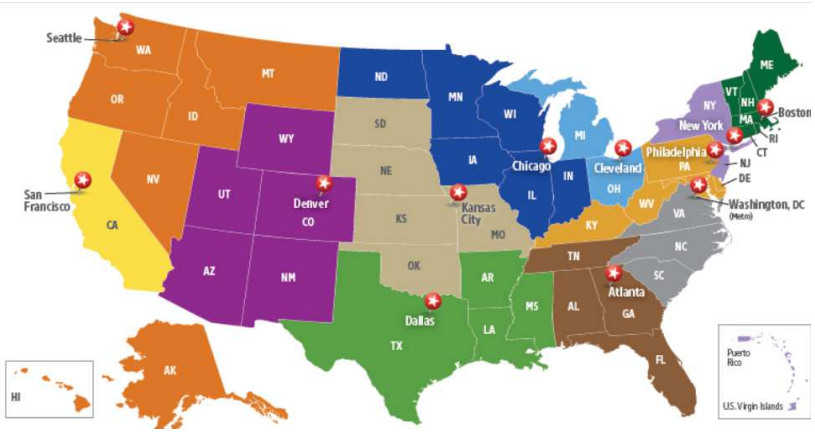
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Responding to Harassment

Is required by the law

18

ED Office for Civil Rights (OCR)



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Ice Breaker

21

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



26

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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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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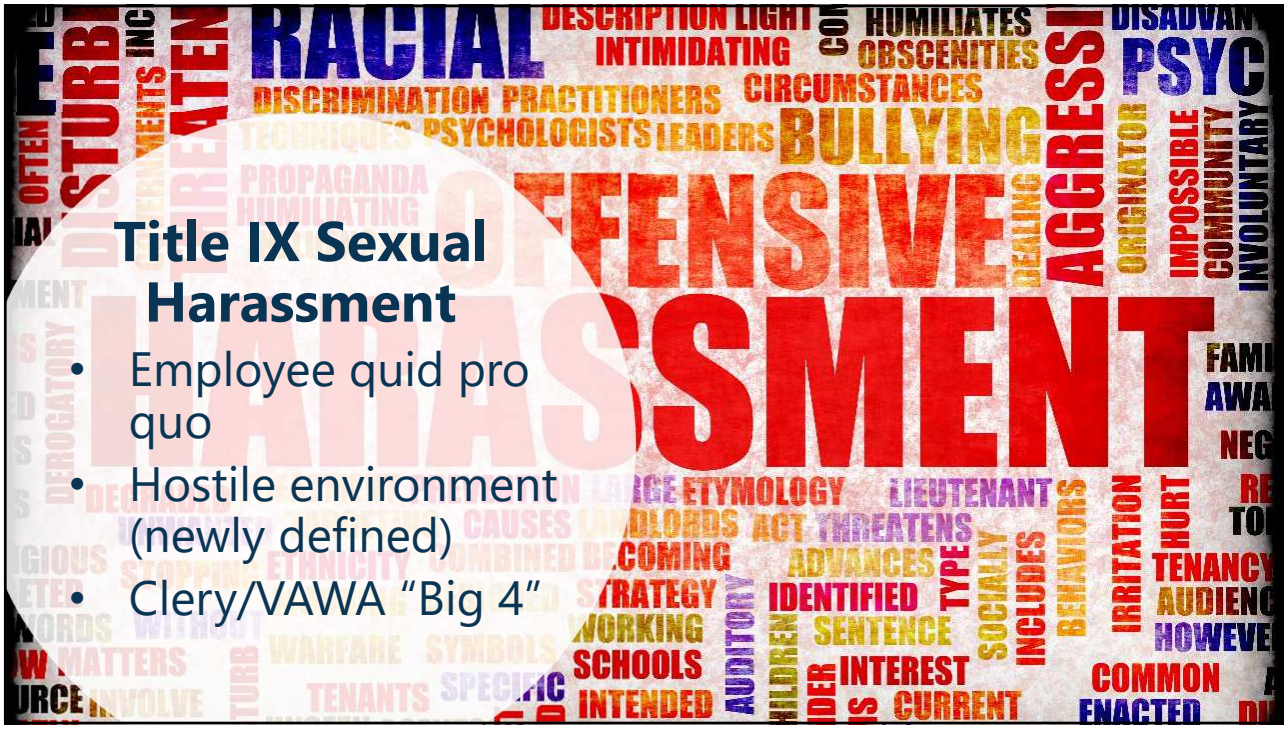
Employment

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

Students

- Oregon Revised Statutes & OAR
- Title IX

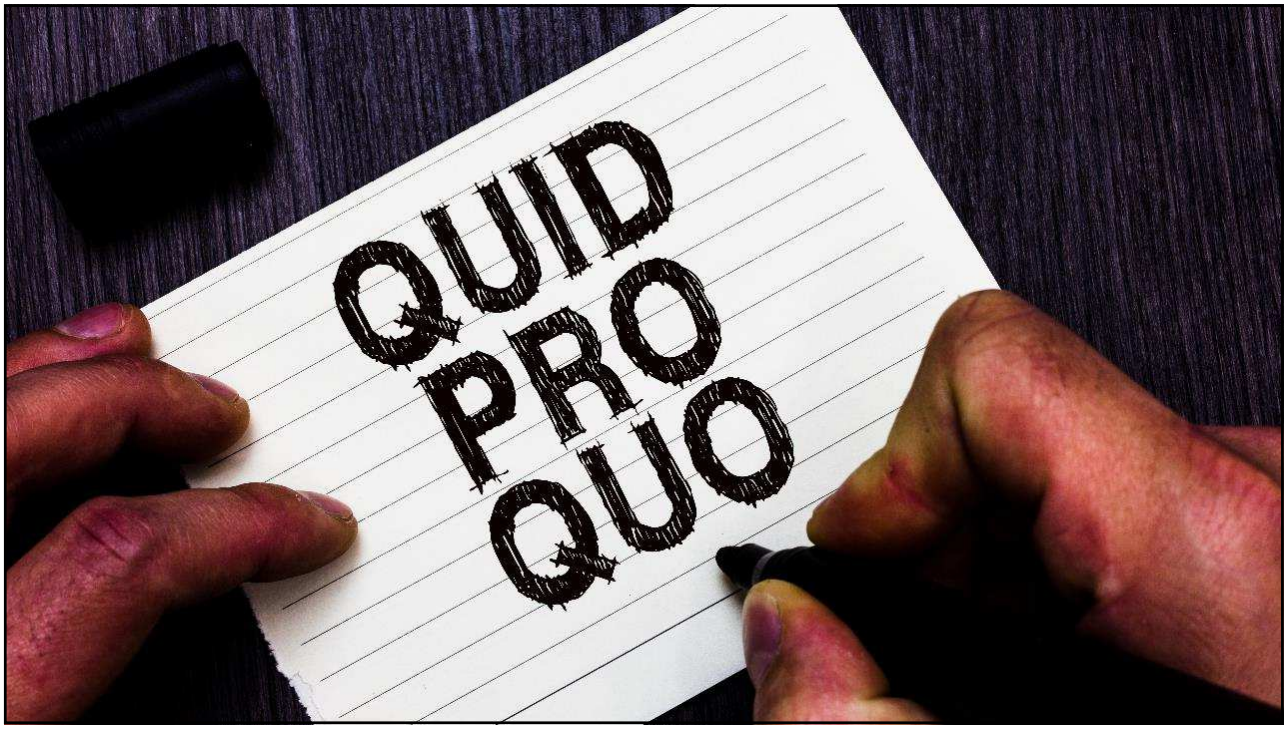
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Title IX Sexual Harassment

- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA "Big 4"

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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 – 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**

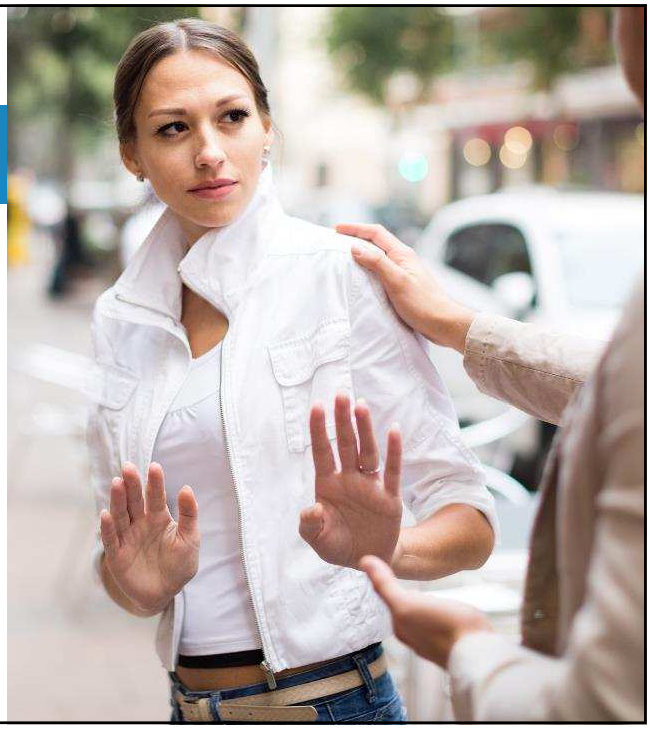
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Unwelcome Conduct

- 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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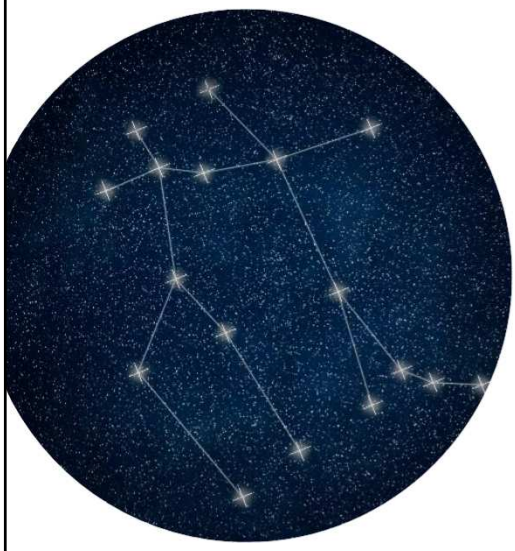
Objectively Offensive

- 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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What about…. casual or isolated comments or conduct?



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Yes or No?

Is this severe, pervasive, and objectively offensive?

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A student makes multiple insensitive jokes to another student

Think to yourself…

65

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…

67

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

Think to yourself…

68

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…

71

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

Think to yourself…

72

The recipient forwards the photo to 20 classmates

Think to yourself…

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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?

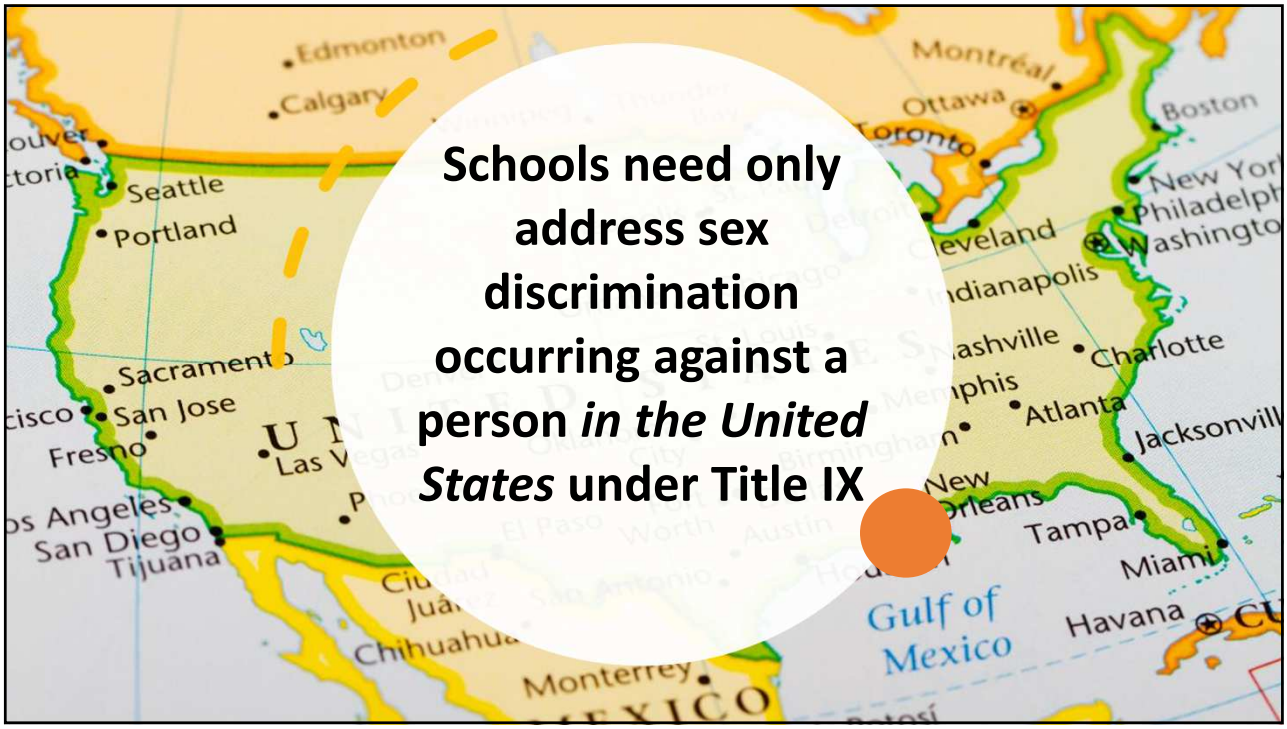
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DISMISSALS

Mandatory if conduct alleged:

Not Title IX Sexual Harassment

Did not occur in the school's program or activity

Did not occur in the United States

**can still address under non-Title IX policy

Permissive if:

Complainant requests to withdraw in writing

Respondent's enrollment or employment ends

Specific circumstances prevent school from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant)

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85

Coffee Break

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How Must You Respond?

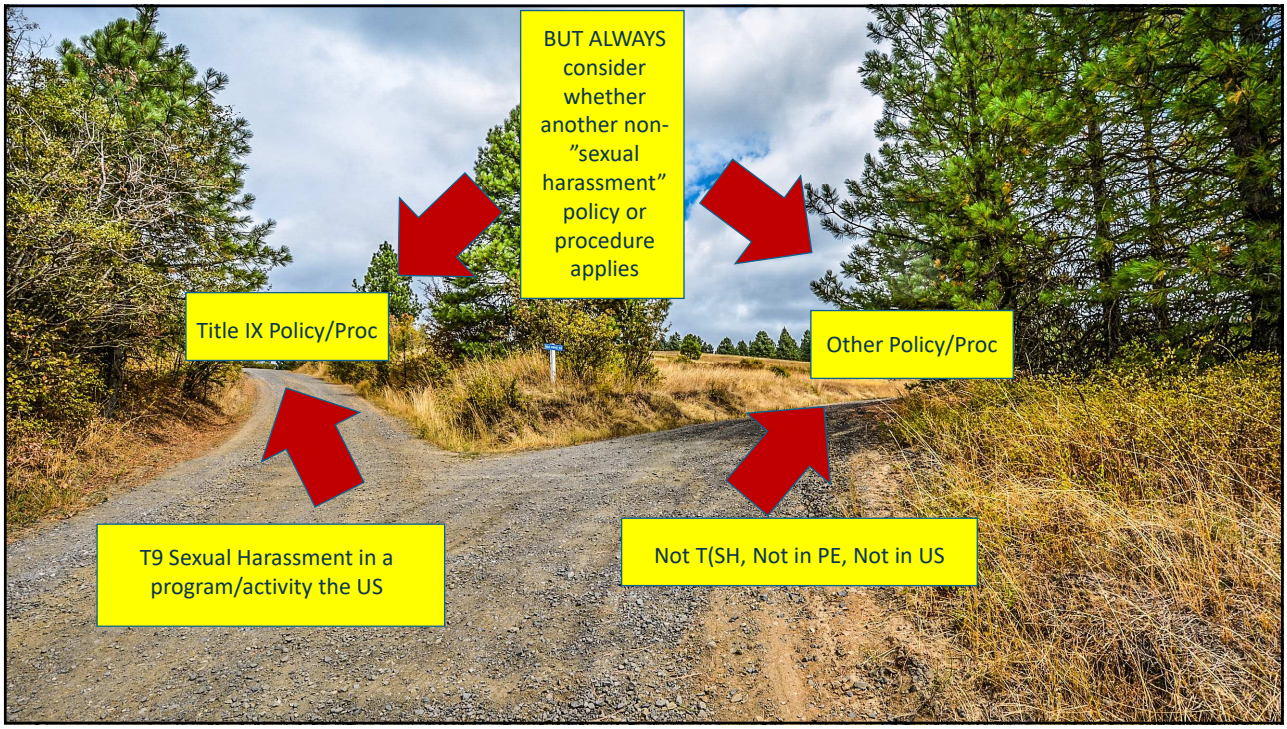
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Board Policies on Harassment

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

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BUT ALWAYS consider whether another non-"sexual harassment" policy or procedure applies
Title IX Policy/Proc
Other Policy/Proc
T9 Sexual Harassment in a program/activity the US
Not T(SH, Not in PE, Not in US

89


DOUBLE JEOPARDY
an individual can NOT be tried twice for the same crime.

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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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1 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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Apply to parties in both *reports* and *Formal Complaints* of sexual harassment

Title IX Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment

NOT a third party who reports Title IX Sexual Harassment perpetrated against someone else

NOT the Title IX Coordinator, even if the TIXC "signs" a Formal Complaint

Title IX Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Terminology

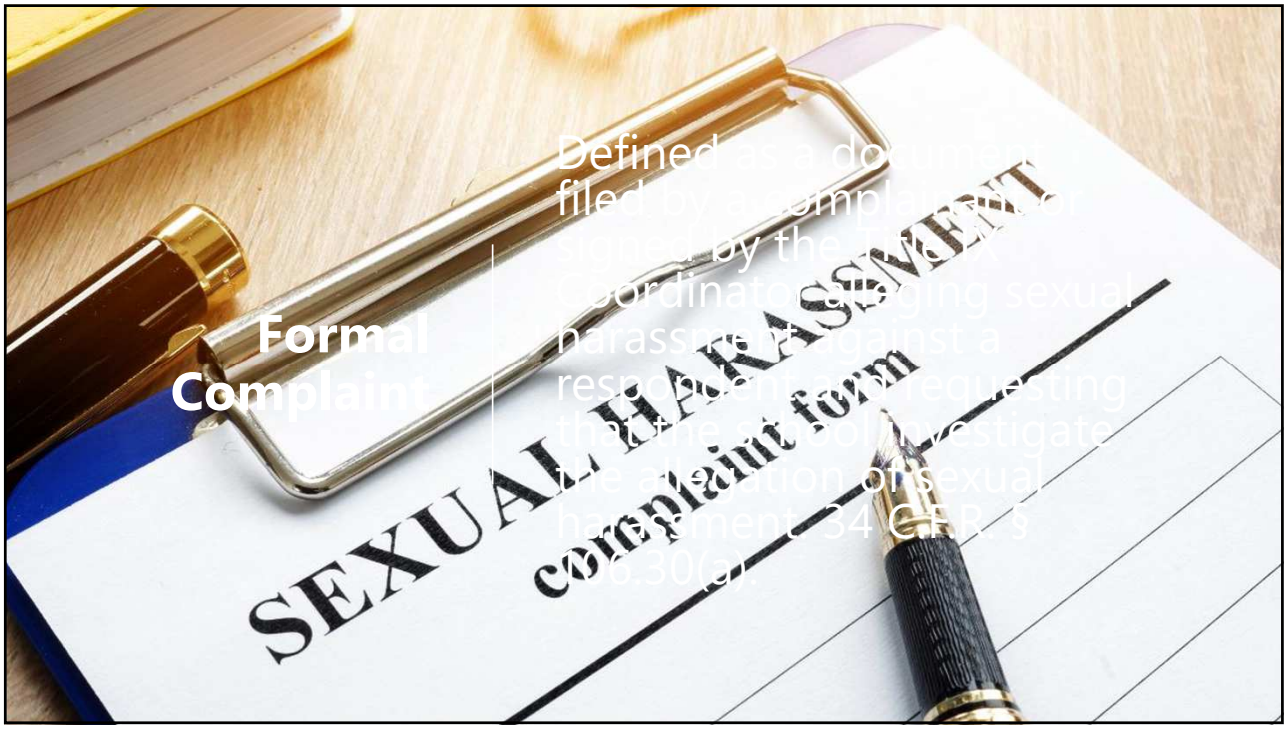
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Title IX Coordinator (or designee) must promptly, **even if no Formal Complaint is filed**:

- 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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Formal Complaint

Defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).

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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 filling 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

99

Emergency Removal/ Admin Leave

Immediate emergency removal

(34 C.F.R. 106.44(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat** to **physical health or safety**
- **Notice, opportunity to challenge** provided "immediately" provided the removal
- Consider other laws, e.g., "change in placement" under IDEA

Employee administrative leave

(34 C.F.R. 106.44(d))

- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements

100

What about Protective Orders?

101

2 **Informal Resolution (Voluntary)**

102

Informal Resolution

INFORMAL RESOLUTION IS NOT PERMITTED UNDER THE FOLLOWING CONDITIONS:	INFORMAL RESOLUTION MAY MOVE FORWARD 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	• 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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Written Notice: Required

- 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)

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3 Investigation

106

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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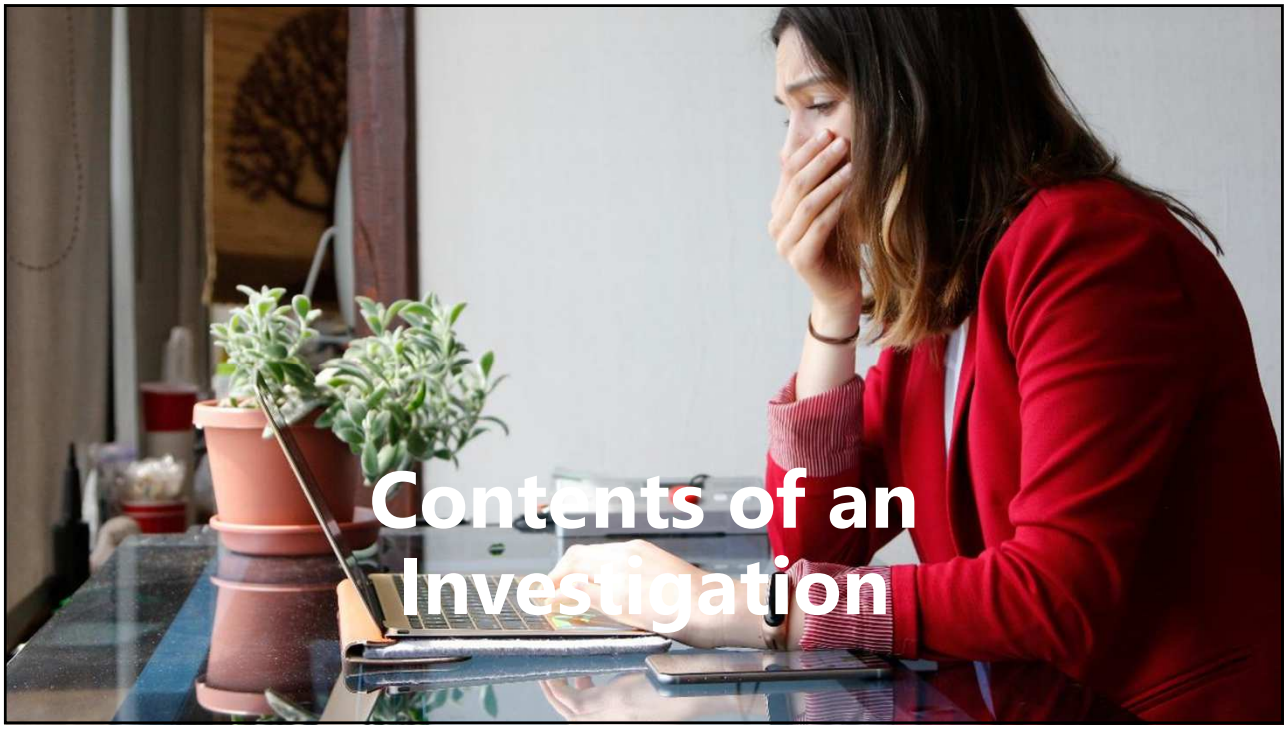
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Who should investigate?

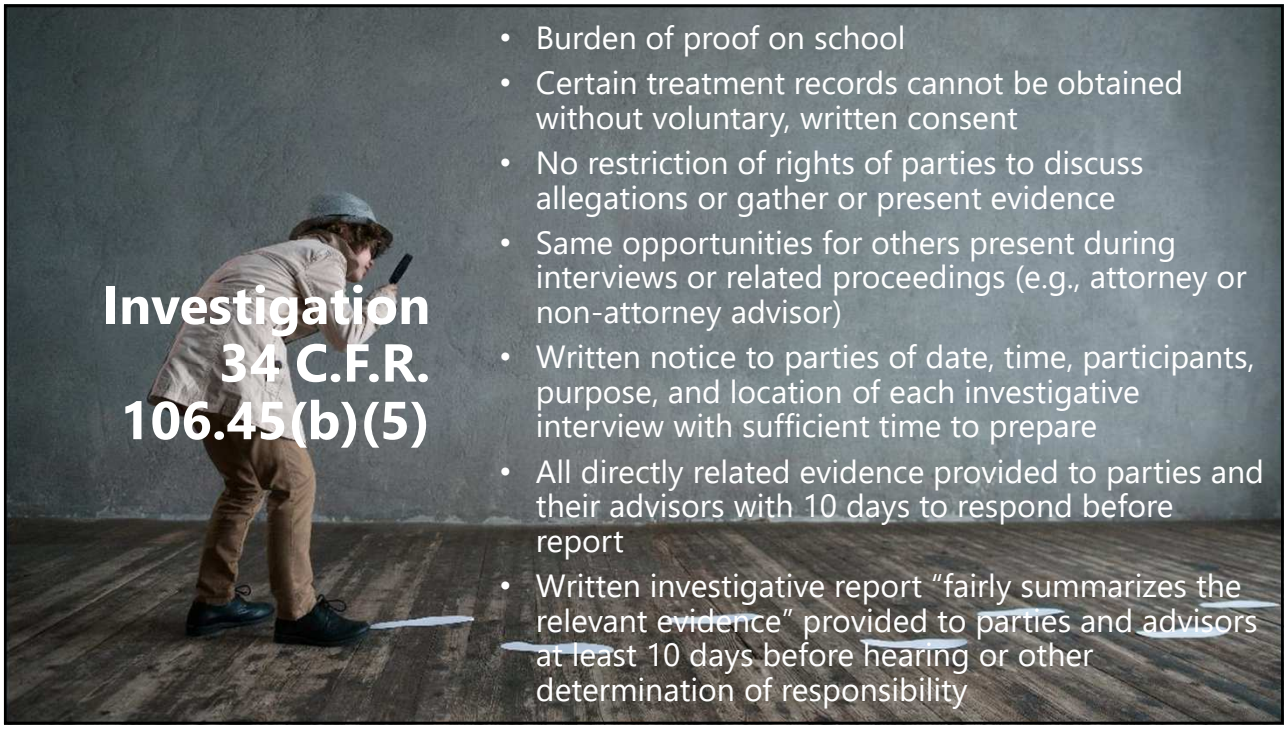
- Consider the perception of bias
  - Your friendship or other relationship with the accused or their family
  - Your personal characcteristics
  - Your personal conflicts (even if just perceived)
  - Personality conflicts

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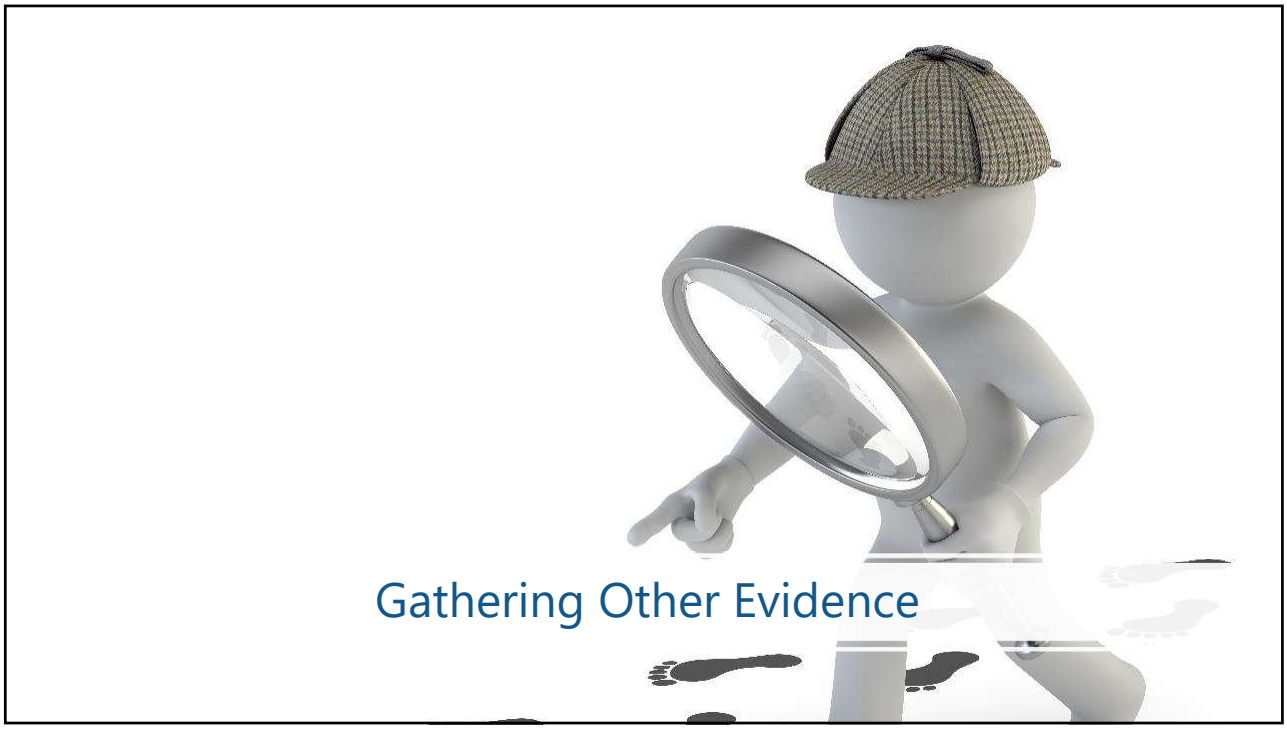
Investigation Plans Aren't Static

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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4 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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Written Determination

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

Preponderance of the Evidence

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Remedies

- 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 prejudge 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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