

**HIGHER EDUCATION
TITLE IX ADVISOR
FOUNDATIONS & PRACTICUM**

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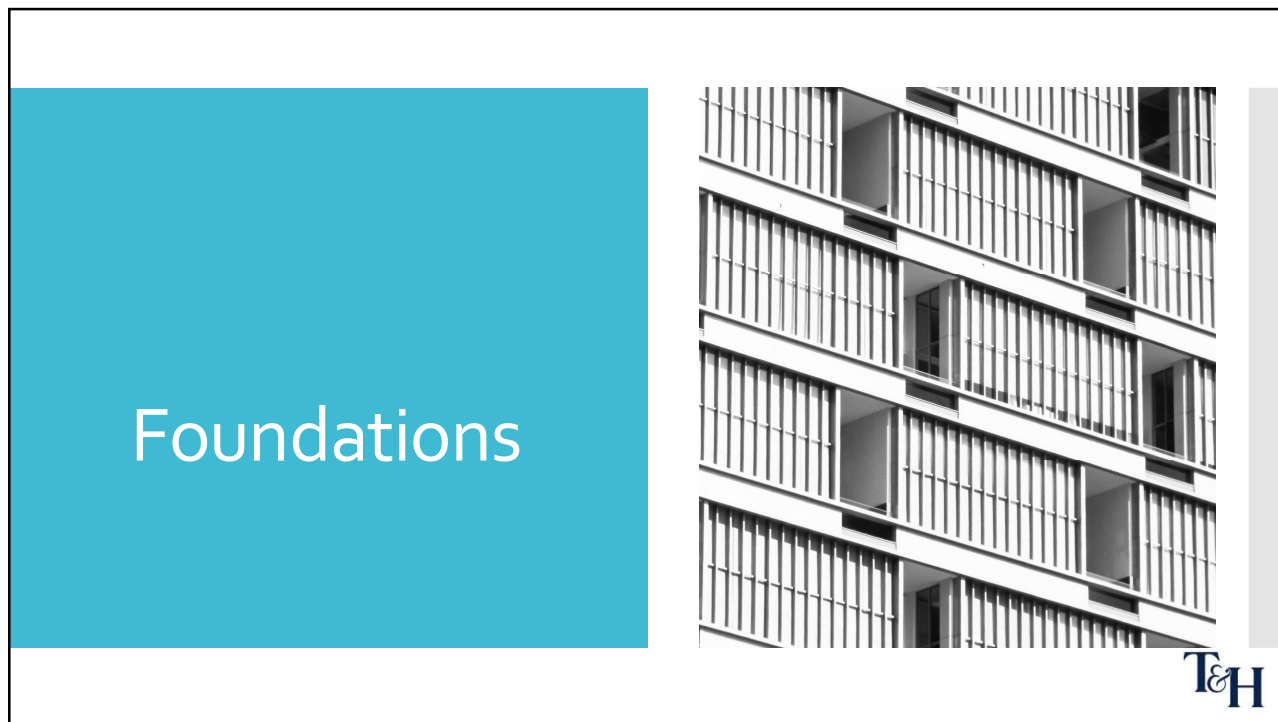
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Foundations



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Housekeeping

- Training on the 2020 Title IX Rules
- Not legal advice; keep it hypothetical today—contact your T&H or other legal counsel separately for specific issues as they arise
- These materials will be available for posting on your website after our session



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T&H

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What word describes your feeling about being an appointed advisor?

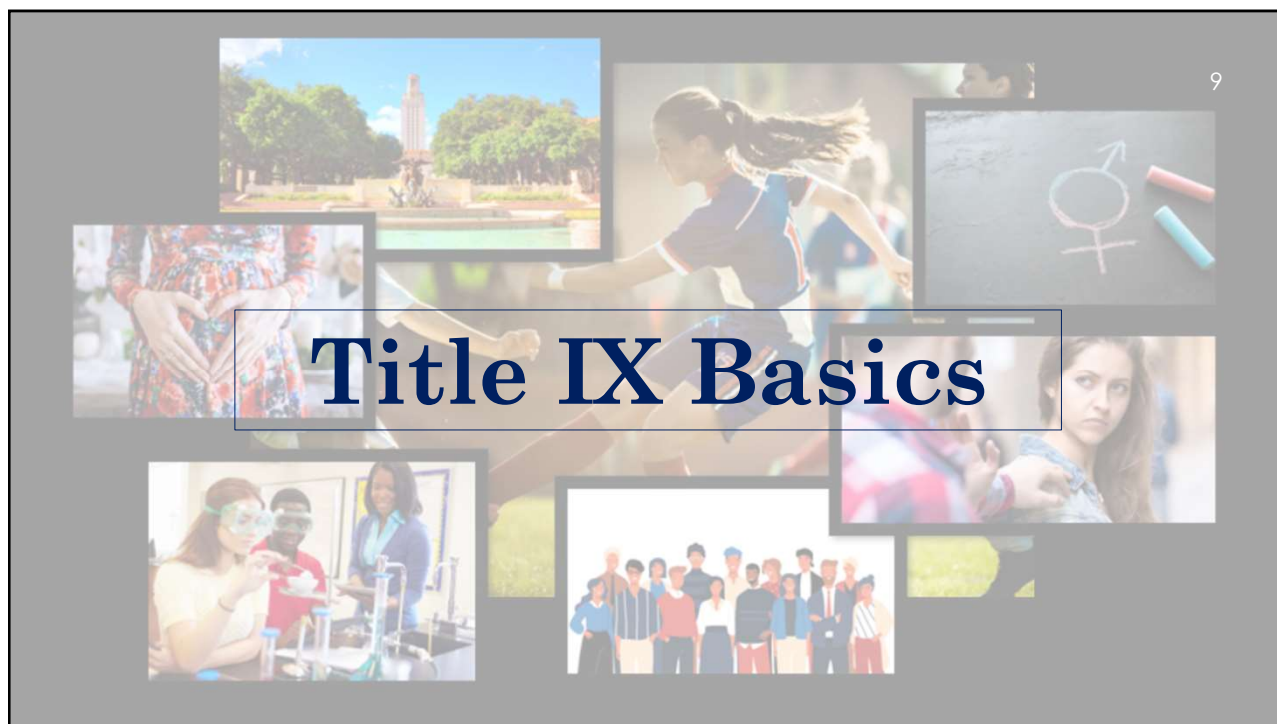
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What is your role with your college or university?

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What is the first word that comes to mind when you hear "Title IX"? (One word only)

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Title IX

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 educational program or activity receiving federal financial assistance.

20 U.S.C. § 1681 (1972)



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What is Title IX?



Athletics

Discipline

Sexual Harassment

Pregnant/Parenting Students

College Recruitment, Admissions, Counseling & Aid

Single-Sex Education

Retaliation



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Who Enforces Title IX?

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Title IX Non-Compliance Penalties

Most Common

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




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Title IX Non-Compliance Penalties

Less Common

- Impact on Grant Funds—even before option to enter resolution agreement
- A reference to the DOJ with a recommendation that it file suit
- Lawsuits filed by alleged victims or perpetrators in Federal court



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The screenshot shows the official Federal Register entry for the 2020 Title IX rules. It includes the title, agency (Office for Civil Rights, Department of Education), and a summary of the regulations.

2020 Title IX Rules

Issued by the Trump administration's Office for Civil Rights

Effective August 14, 2020

Include significant requirements for processing reports and complaints of sexual harassment under Title IX



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2022 Proposed Rules

- Issued by the Biden administration in proposed form on June 23, 2022
- Comment period ended September 12, 2022
- Department of ED will review and respond to all comments in the final rule
- Purported release date for final rule May 2023, with an effective date in August 2022; this would be extremely fast based on past experience
- Would change many of the requirements for handling complaints and apply to all sex discrimination, not just sex-based harassment

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Where Are We Now?

- The Department of Education is considering public comments as required before finalizing the rule
- In all there were approximately 240,000 comments (compare to 124,000 comments to the 2020 Title IX rules when proposed)
- The 2020 Title IX rules will be in effect until at least the end of this summer

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TITLE IX SEXUAL HARASSMENT REQUIREMENTS




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What Title IX Covers

1. "Title IX Sexual Harassment"
2. "in an educational program or activity"
3. "in the United States"

If yes to all: Prohibited by Title IX

If no to any: Not Prohibited by Title IX



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What's Covered?

Sexual Harassment

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Title IX Sexual Harassment

Employee quid pro quo

Stalking

Sexual assault

Dating violence

Domestic violence

"The Big Five"

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**#1:
Employee
Quid Pro Quo**

An employee of the educational institution conditioning an aid, service, or benefit of the educational institution on an individual's participation in unwelcome sexual conduct

Examples include an employee:

- 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:
Sexual
Assault (Clery
Definition)**

Rape: Any act of vaginal or anal penetration, however slight, with any body part or object, or oral genital contact without consent

Fondling: Touching of the private body parts of another person for the purpose of sexual gratification, without consent (above or under clothing)

Incest

Statutory Rape



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“Consent” comes into play in sexual assault cases, including those involving fondling

Consent is not defined by OCR/the 2020 Title IX rules

Defined in your policies/procedures

What is Consent?

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This slide features a light blue background on the right side with the title 'What is Consent?'. On the left, there are three stacked rounded rectangular boxes: a teal box with the text '“Consent” comes into play in sexual assault cases, including those involving fondling', a purple box with 'Consent is not defined by OCR/the 2020 Title IX rules', and a red box with 'Defined in your policies/procedures'. The T&H logo is in the bottom right corner.

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#3: Domestic Violence (VAWA Definition)

Felony or misdemeanor crimes of violence

By

- A current or former romantic partner
- Spouse
- Former spouse
- Intimate partner
- Person who shares a child
- A person similarly situated to a spouse
- An adult against a person protected under domestic or family violence laws of the jurisdiction

T&H

This slide has a light blue background on the left side with the title '#3: Domestic Violence (VAWA Definition)'. On the right, there are two stacked rounded rectangular boxes: a yellow one with 'Felony or misdemeanor crimes of violence' and a green one with 'By'. Below these is a bulleted list of seven categories of individuals. The T&H logo is in the bottom right corner.


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**#4:
Dating
Violence
(VAWA
Definition)**

Violence committed by a person who has been in a romantic or intimate social relationship with the victim

Can include sexual, physical, emotional, or psychological violence

Consider the complainant's description of the length of the relationship, the type of relationship, and the frequency of the interaction



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**#5:
Stalking
(VAWA
Definition)**


A course of conduct based on sex (2+ times)

- Can be direct or indirect

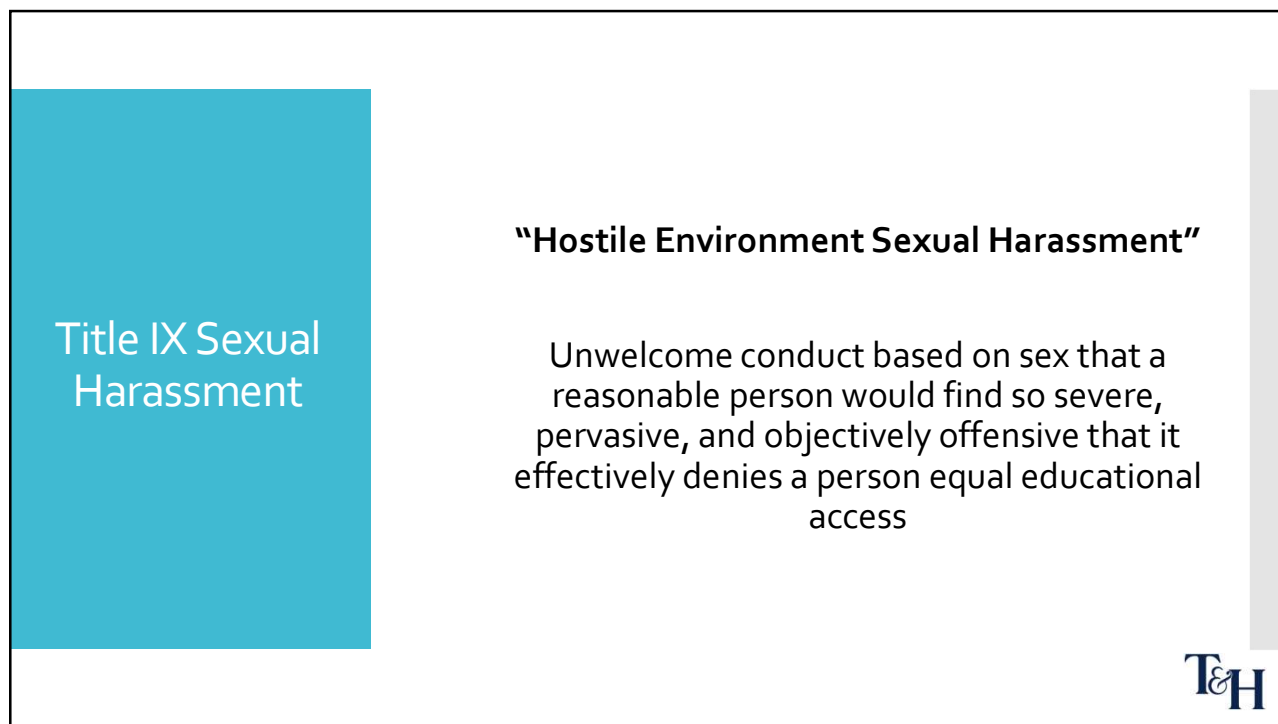
Directed at a specific person

That would cause a reasonable person to:

- Fear for the person's safety or
- Fear for the safety of others or
- Suffer substantial emotional distress

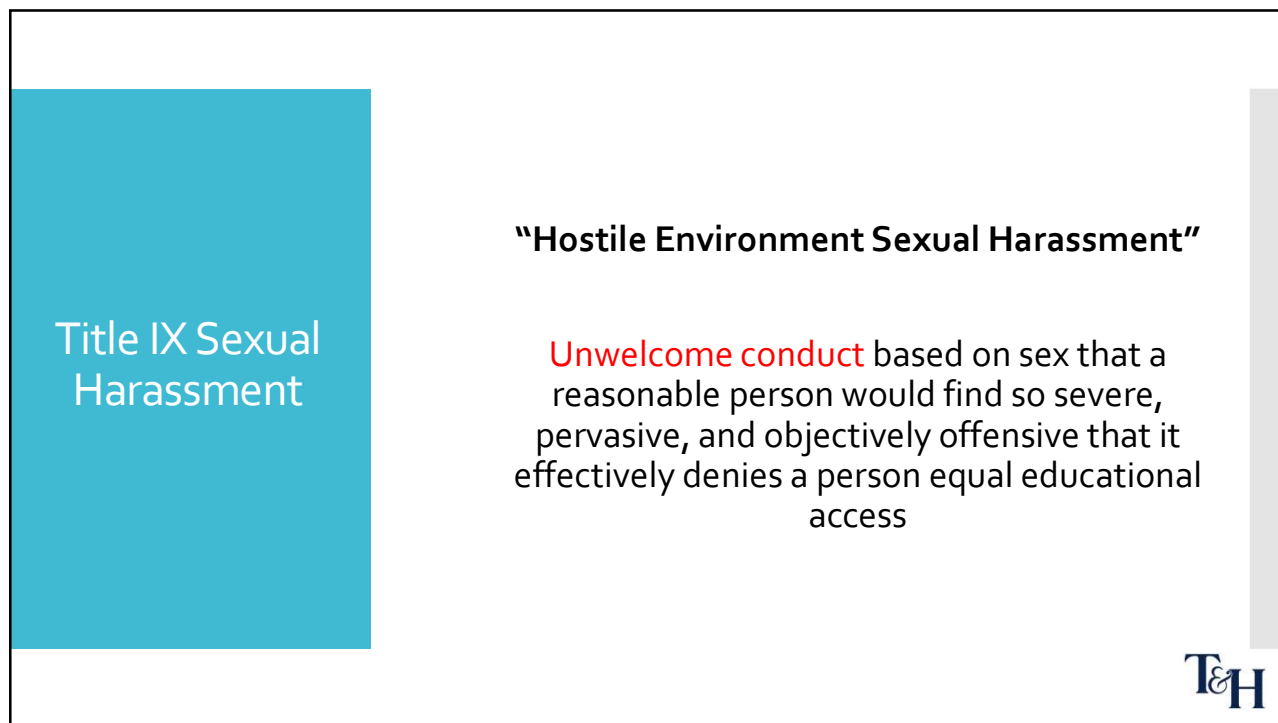


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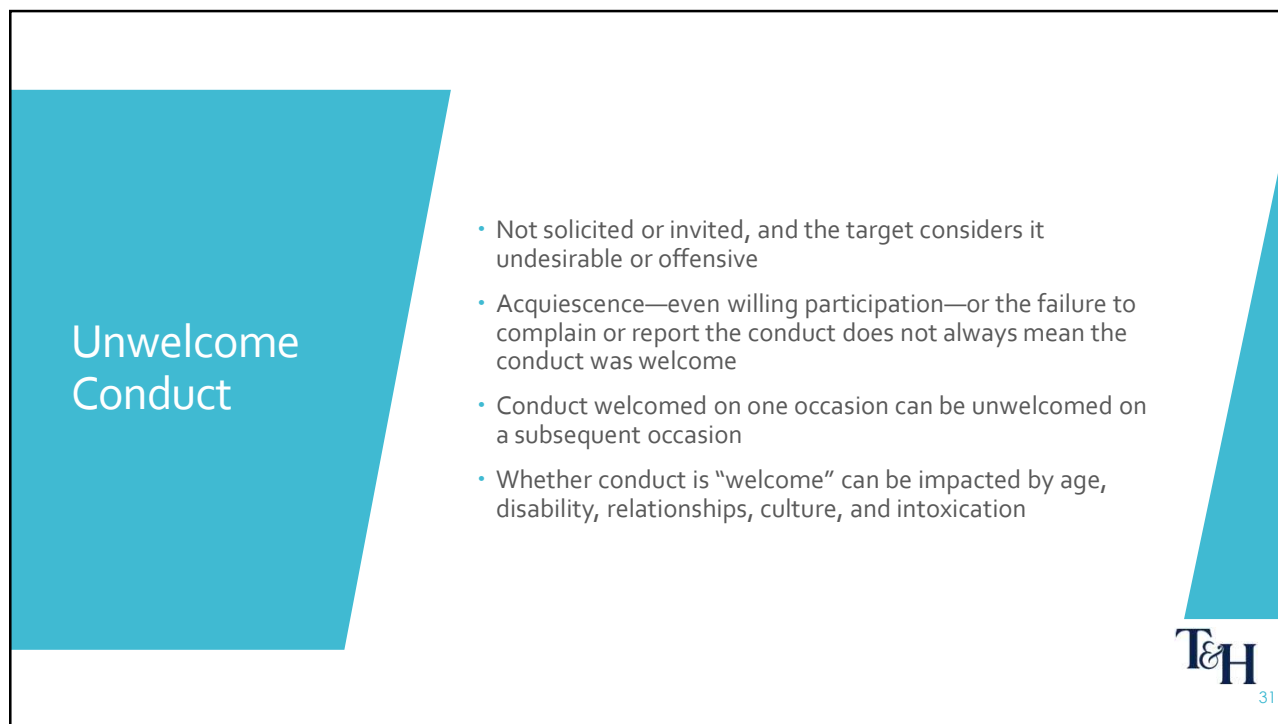
This slide features a teal rectangular box on the left side containing the text "Title IX Sexual Harassment". To the right of this box, the text "Hostile Environment Sexual Harassment" is displayed in a bold, black font. Below this heading, a paragraph of text defines the concept: "Unwelcome conduct based on sex that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access". The text is centered. In the bottom right corner, there is a logo consisting of the letters "T" and "H" in a stylized, serif font.

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This slide is identical in layout to the previous one, but with a specific text change. The teal box on the left contains "Title IX Sexual Harassment". The bold heading "Hostile Environment Sexual Harassment" is present. The defining paragraph is: "Unwelcome conduct based on sex that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access". In this version, the words "Unwelcome conduct" are highlighted in red. The "T&H" logo is in the bottom right corner.

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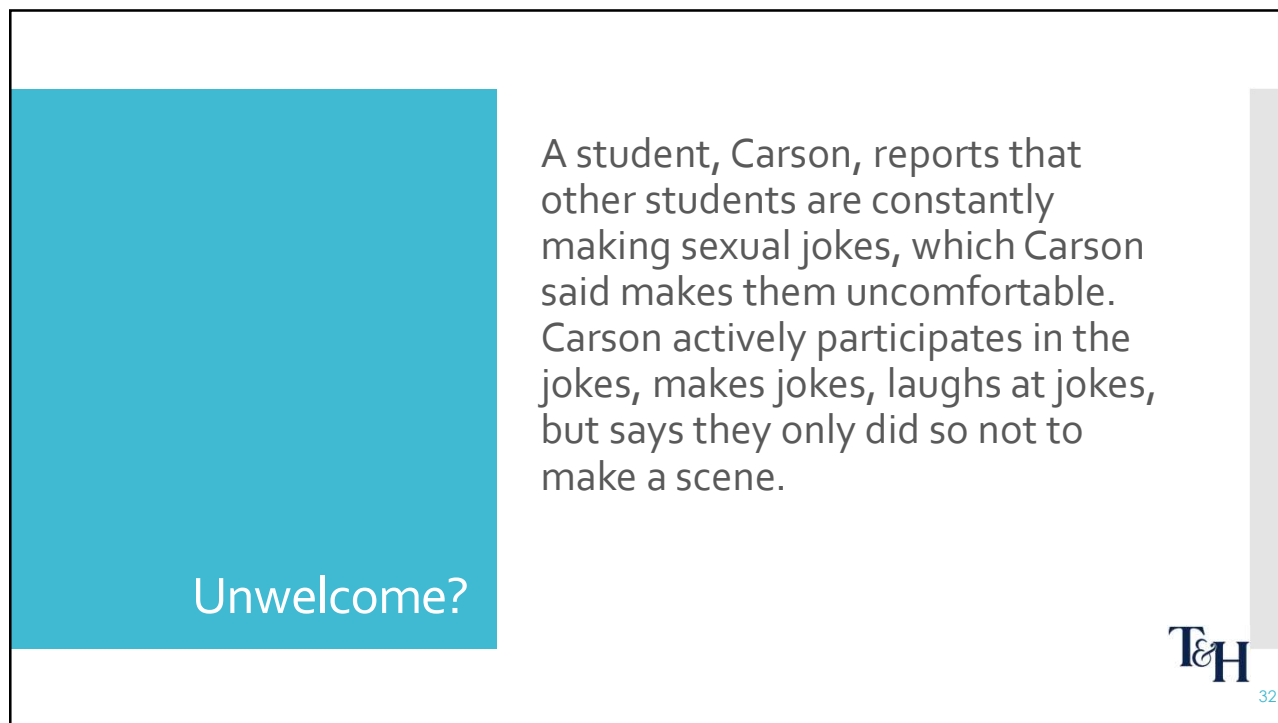


Unwelcome Conduct

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

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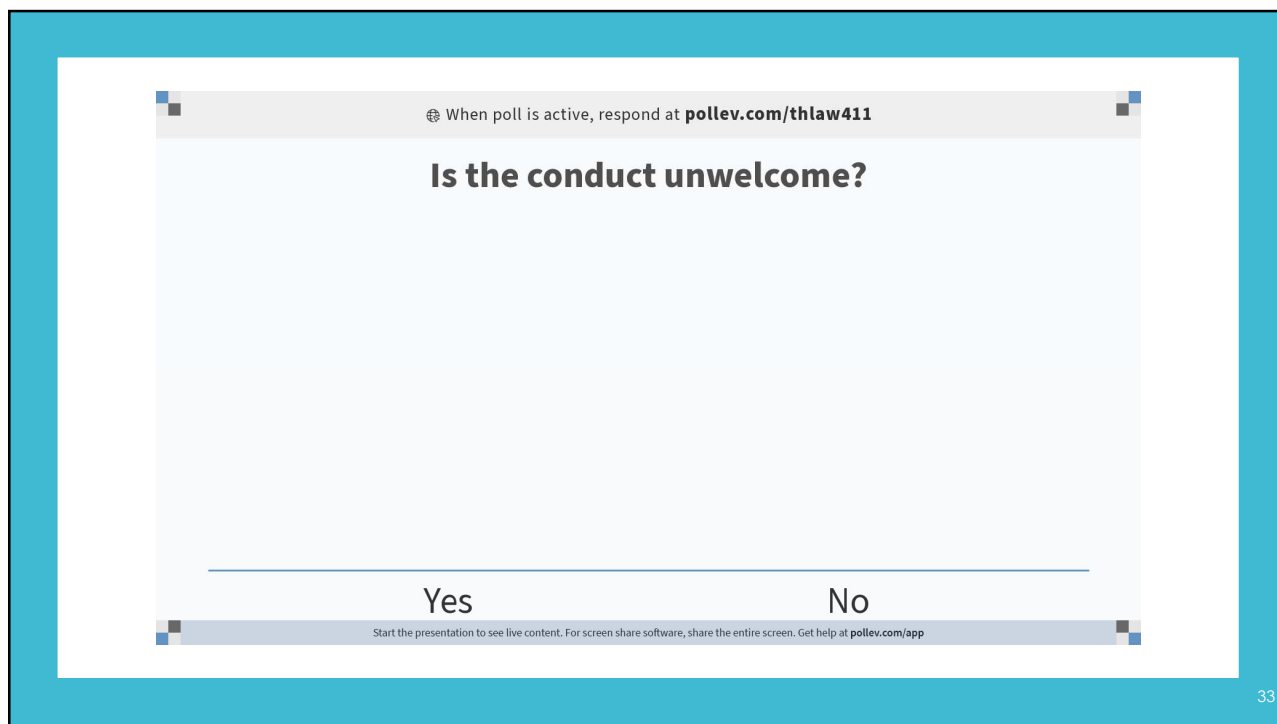


Unwelcome?

A student, Carson, reports that other students are constantly making sexual jokes, which Carson said makes them uncomfortable. Carson actively participates in the jokes, makes jokes, laughs at jokes, but says they only did so not to make a scene.

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Unwelcome?

OCR 2001 Guidance: "On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that he or she objects, then the evidence generally will not support a conclusion that the conduct was unwelcome."

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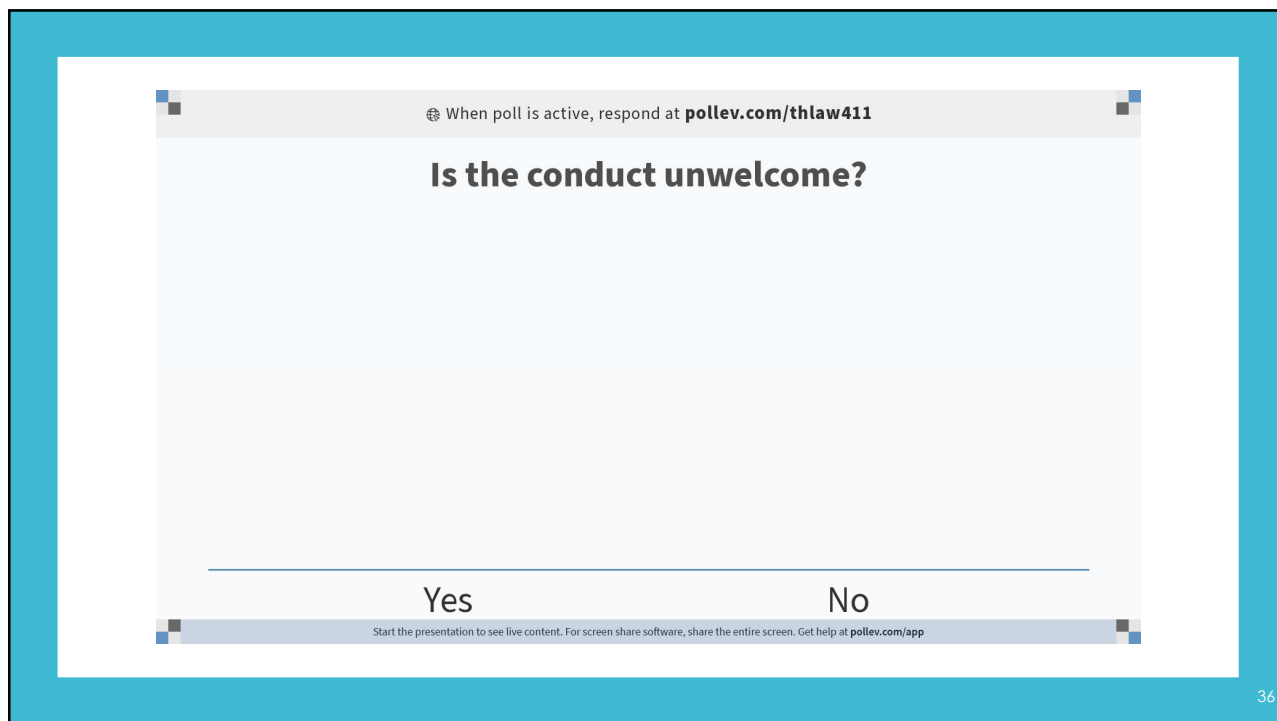


Unwelcome?

Carson reports that Robin forcibly kissed Carson on multiple occasions. Robin asked Carson for a kiss. Carson did not say no. Carson reports looking at Robin uncertainly, however, and not kissing Robin back. When asked for details, Carson said they were too afraid to say no because their social group revolves around Robin's friends.

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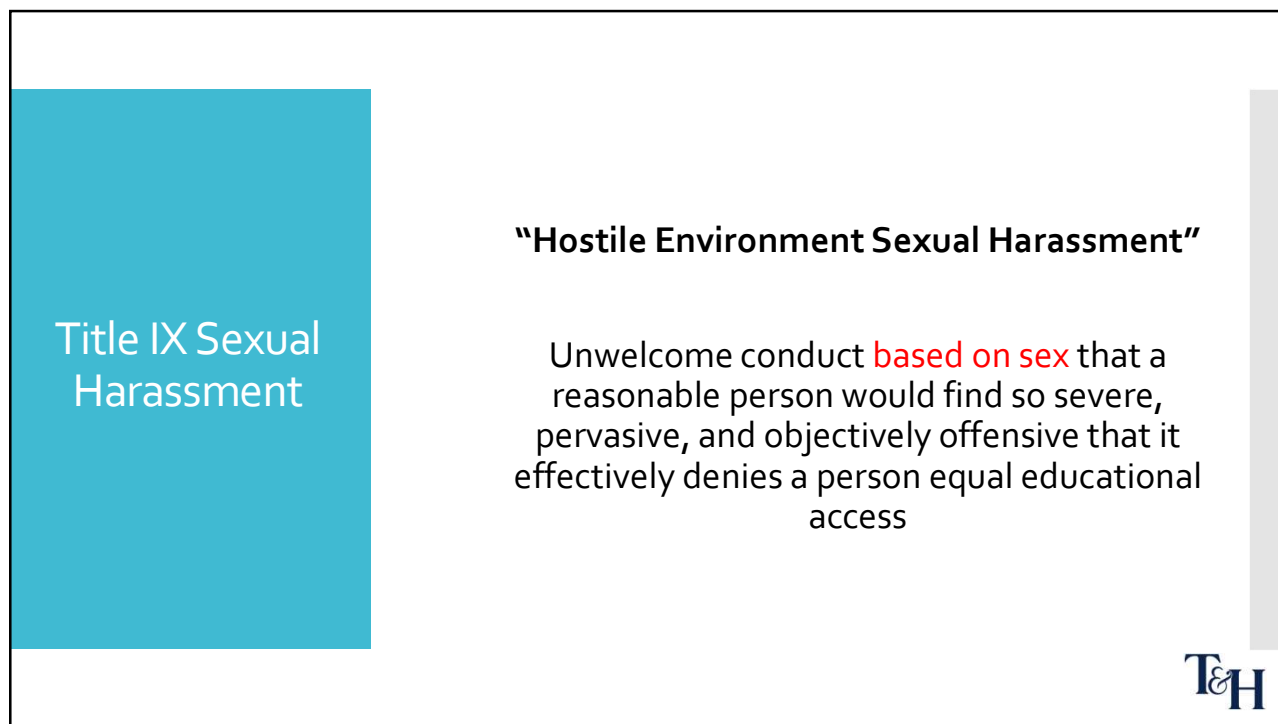
Is the conduct unwelcome?

Yes No

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A slide with a teal header box on the left containing the text "Title IX Sexual Harassment". The main content area on the right features the title "“Hostile Environment Sexual Harassment”" in bold, followed by a definition: "Unwelcome conduct based on sex that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access". The T&H logo is in the bottom right corner.

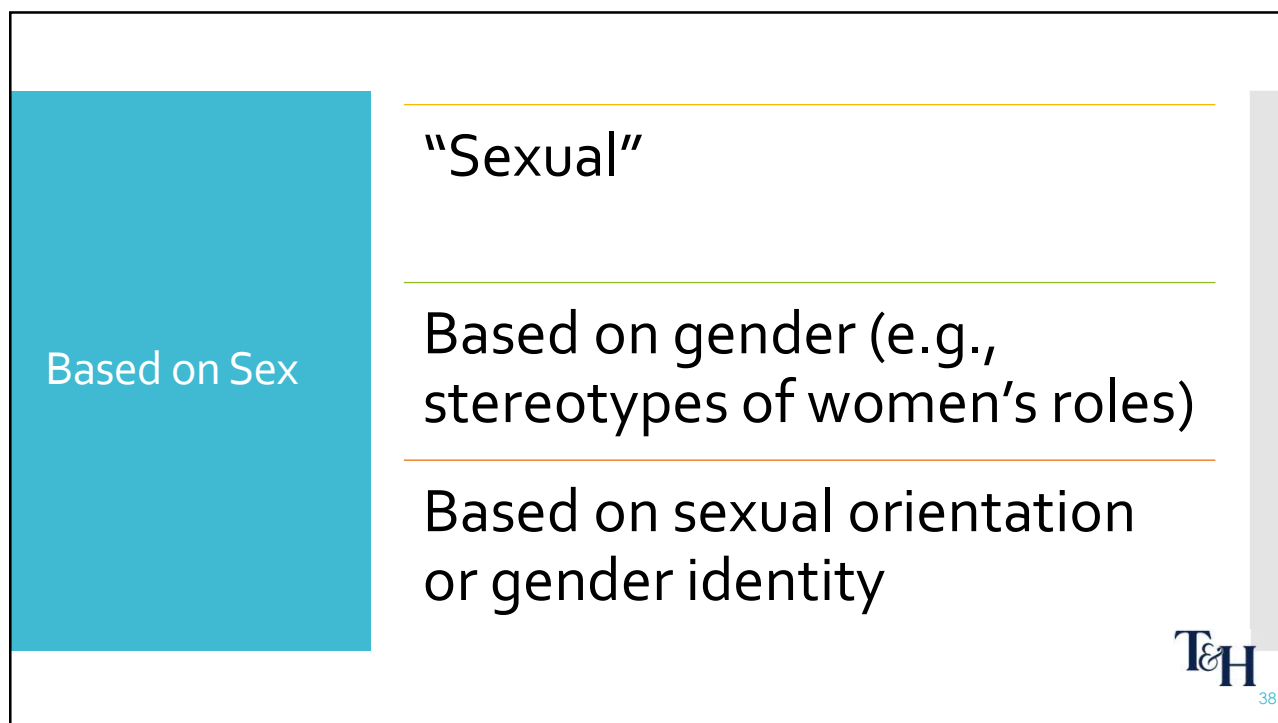
Title IX Sexual Harassment

“Hostile Environment Sexual Harassment”

Unwelcome conduct **based on sex** that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access

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A slide with a teal header box on the left containing the text "Based on Sex". The main content area on the right features the title "“Sexual”" in bold, followed by two definitions separated by horizontal lines: "Based on gender (e.g., stereotypes of women’s roles)" and "Based on sexual orientation or gender identity". The T&H logo is in the bottom right corner.

Based on Sex

“Sexual”

Based on gender (e.g., stereotypes of women’s roles)

Based on sexual orientation or gender identity

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LGBTQ+ is "Sex" Under Title IX

- OCR Guidance, June 2021 – "On the basis of sex" encompasses discrimination on the basis of sexual orientation and gender identity
- So, to OCR, Title IX prohibits **discrimination based on sexual orientation and gender identity**



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Based on Sex

The sex/gender, sexual orientation, and gender identity of the parties involved is not determinative

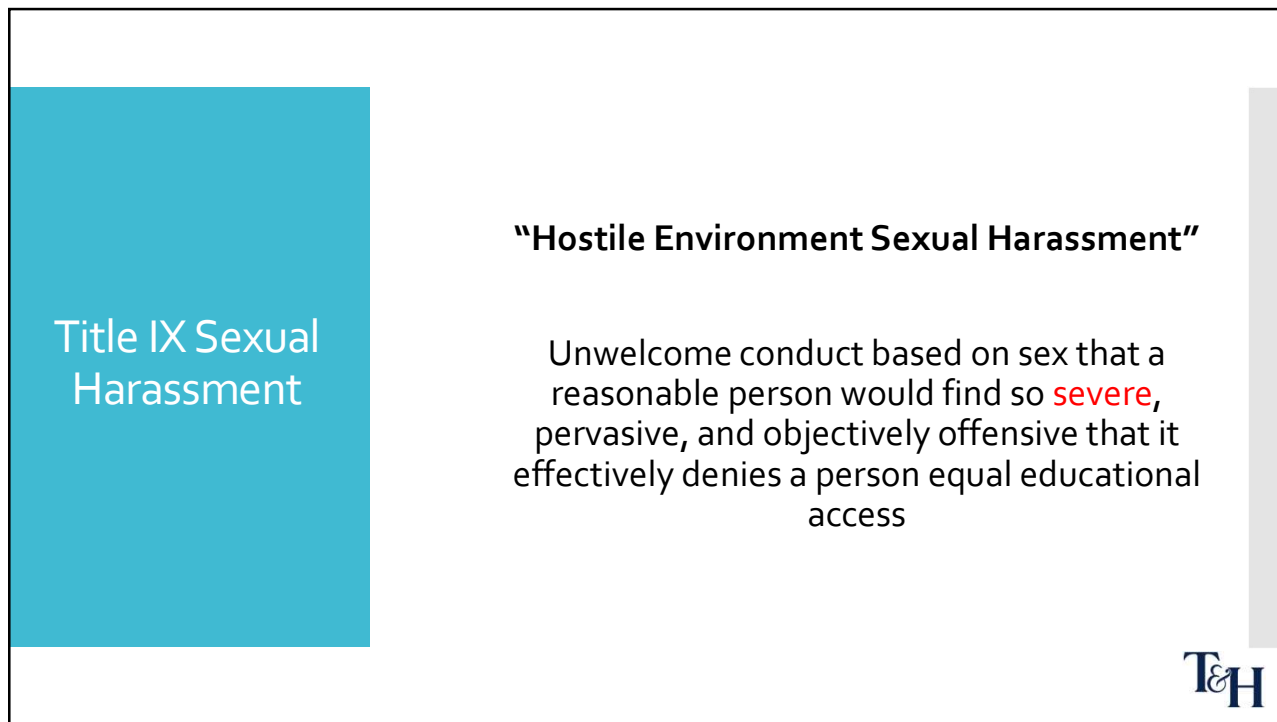
- A male can harass a male (even if both are heterosexual)
- A female can harass a female (same)
- A cisgender person can harass a cisgender person

**Cisgender ("sis-gender") is a person whose gender identity and expression match the biological sex they were assigned at birth



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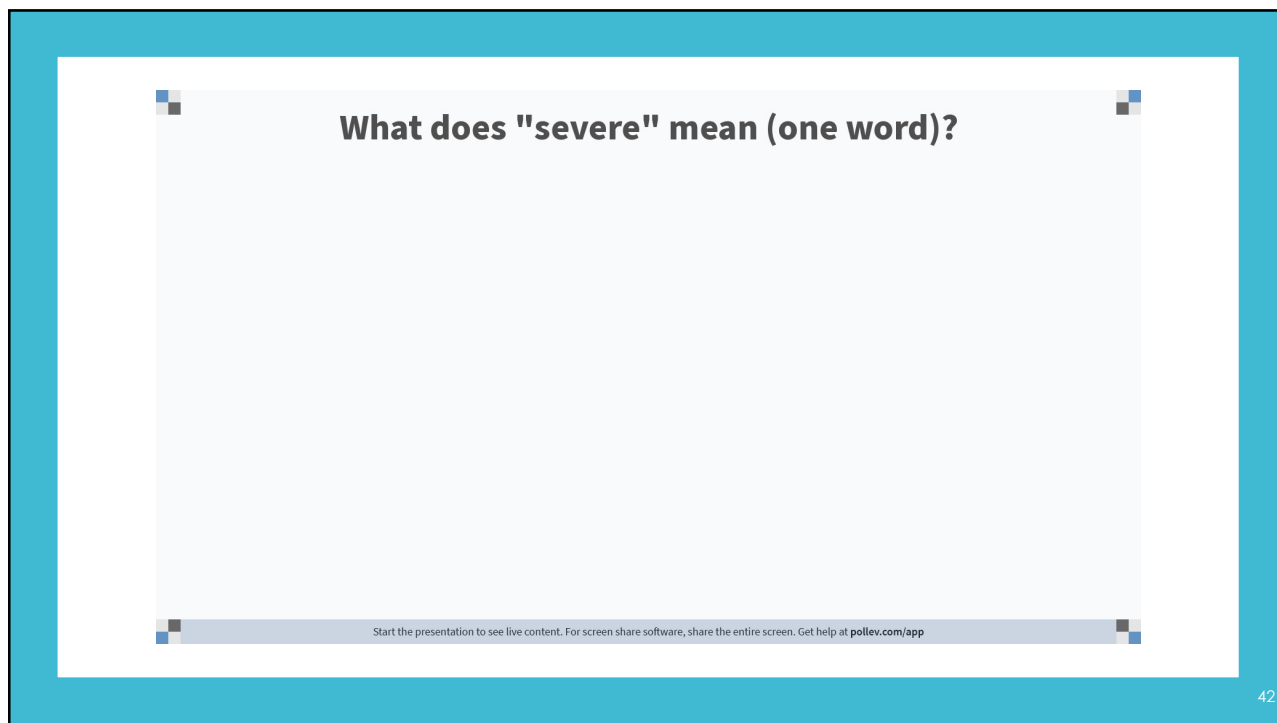
Title IX Sexual Harassment

“Hostile Environment Sexual Harassment”

Unwelcome conduct based on sex that a reasonable person would find so **severe**, pervasive, and objectively offensive that it effectively denies a person equal educational access




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What does "severe" mean (one word)?

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"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)

Dictionary Definition

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"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)

Case Law Definitions

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Case Law Definitions

- 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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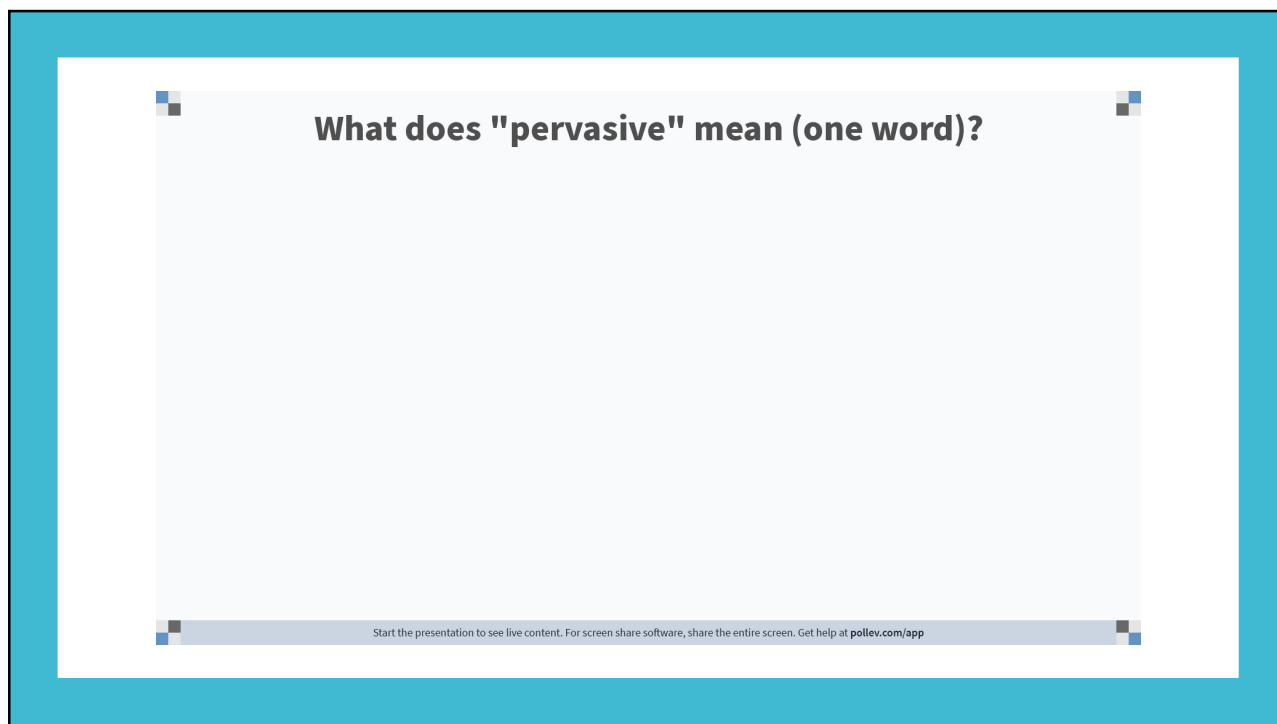
Title IX Sexual Harassment

“Hostile Environment Sexual Harassment”

Unwelcome conduct based on sex that a reasonable person would find so severe, **pervasive**, and objectively offensive that it effectively denies a person equal educational access




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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 Law Definitions

“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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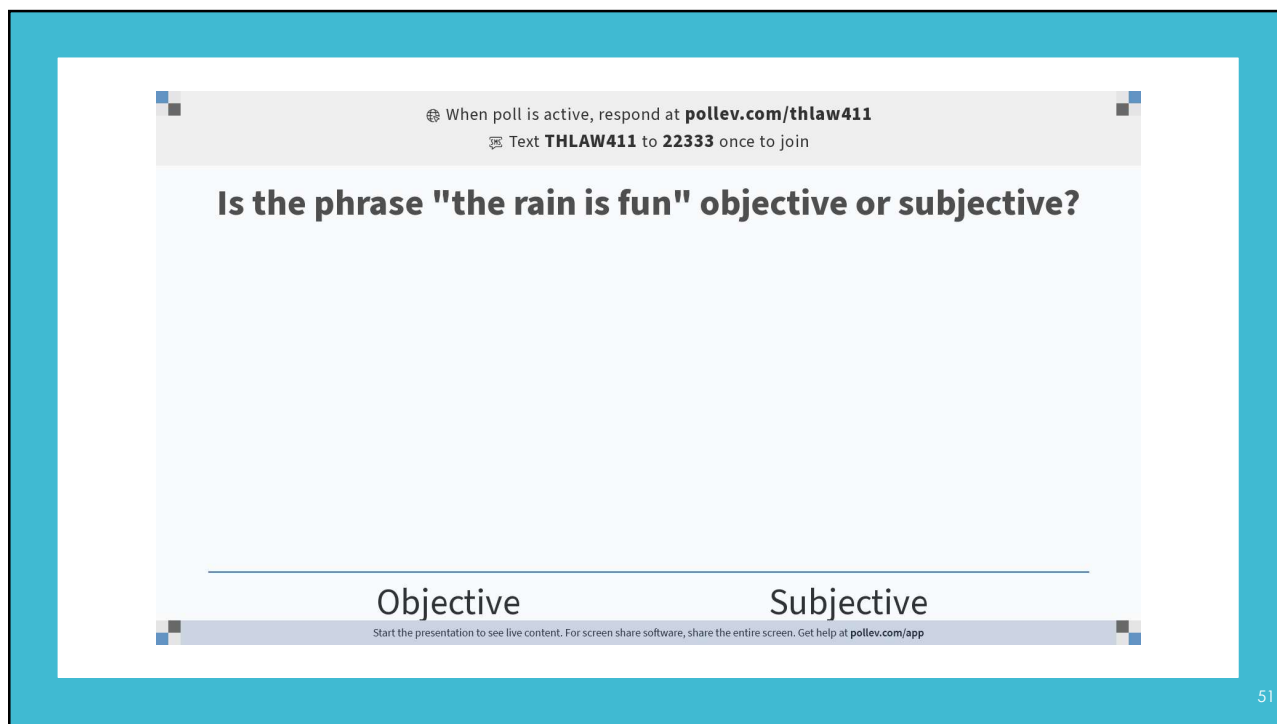
Title IX Sexual Harassment

“Hostile Environment Sexual Harassment”

Unwelcome conduct based on sex that a reasonable person would find so severe, pervasive, and **objectively offensive** that it effectively denies a person equal educational access



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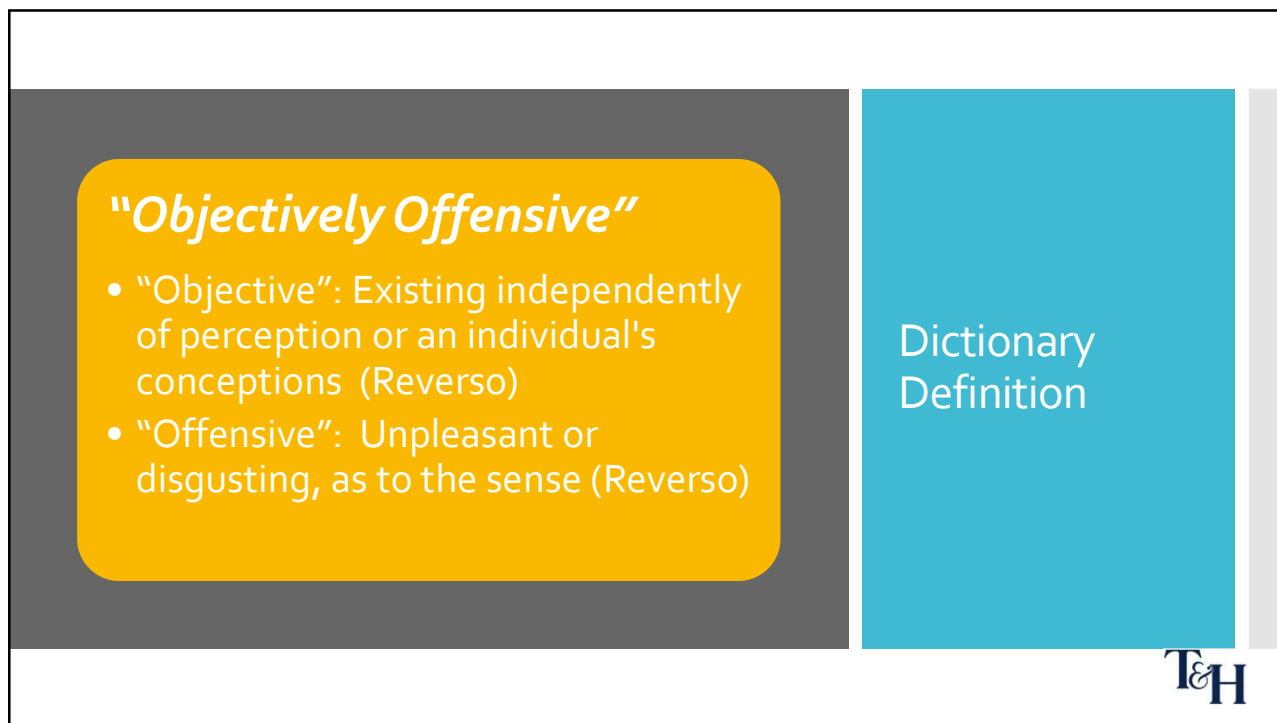
Is the phrase "the rain is fun" objective or subjective?

Objective Subjective

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"Objectively Offensive"

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

Dictionary Definition


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Case Law Definitions

- “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 or behavior were aimed.




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Title IX Sexual Harassment

“Hostile Environment Sexual Harassment”


Unwelcome conduct based on sex that a reasonable person would find so severe, pervasive, and objectively offensive that it **effectively denies a person equal educational access**



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Effective Denial

Would a reasonable person in the alleged victim's position be effectively denied equal access to education compared to a similarly situated person who did not suffer the alleged sexual harassment




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Effective Denial

Examples may include:

- Skipping class to avoid a harasser
- A decline in a student's grade point average
- Difficulty concentrating in class
- An athlete who quits the team but carries on with other school activities following sexual harassment



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Effective Denial of Equal Access

- No concrete injury is required to prove an effective denial of equal access
- A complainant need not have already suffered a loss of education
- Does not require that a person's total or entire educational access has been denied

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What's Covered?

In an Education Program or Activity

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Education Program or Activity

Includes locations, events, and circumstances over which the school exercised substantial control over both the alleged harasser and the context of the alleged harassment


Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house)

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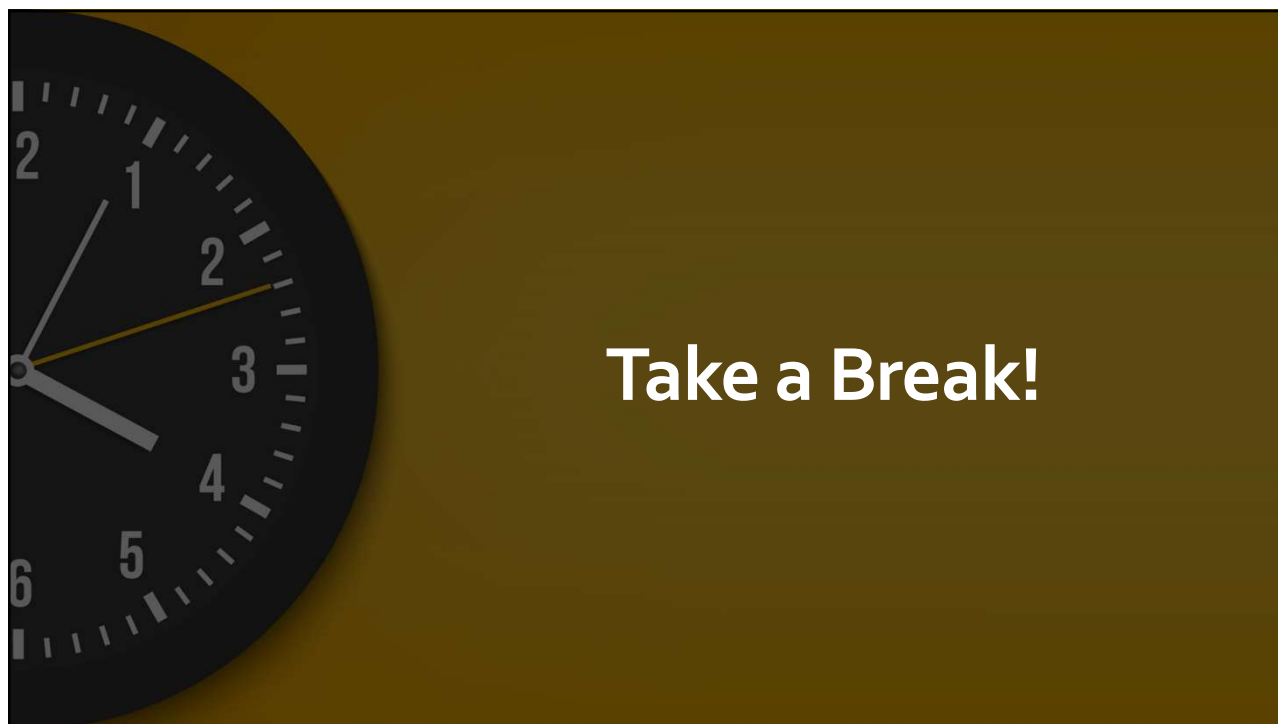


What's Covered?

In the United States



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Overview: T9 SH Grievance Process

For any Title IX Sexual Harassment in a program or activity and in the United States of which the Title IX Coordinator or an "Official With Authority" has actual knowledge, the Title IX Coordinator or their designee must

- **Step 1:** Offer "supportive measures" to the alleged victim (Complainant) and explain rights, including to file a formal complaint
- **Step 2:** Consider if emergency removal/administrative leave of the alleged perpetrator (Respondent) is warranted

Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee

- **Step 3:** Notice of Allegations
- **Step 4:** Consider Dismissal
- **Step 5:** Informal Resolution (in some cases)
- **Step 6:** Investigation
- **Step 7:** Hearing
- **Step 8:** Appeal

NOTE: ALL STEPS include strict detailed requirements from the Title IX rules



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The Title IX Team



Title IX Coordinator



IR Facilitator



Investigator(s)



Decision-Maker(s)



Appeal Officer



Advisor(s)



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



Must be two different people – cannot be the same person; cannot be the Coordinator or Investigator



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Both parties must have an advisor for all stages of the Title IX sexual harassment grievance process.



True False

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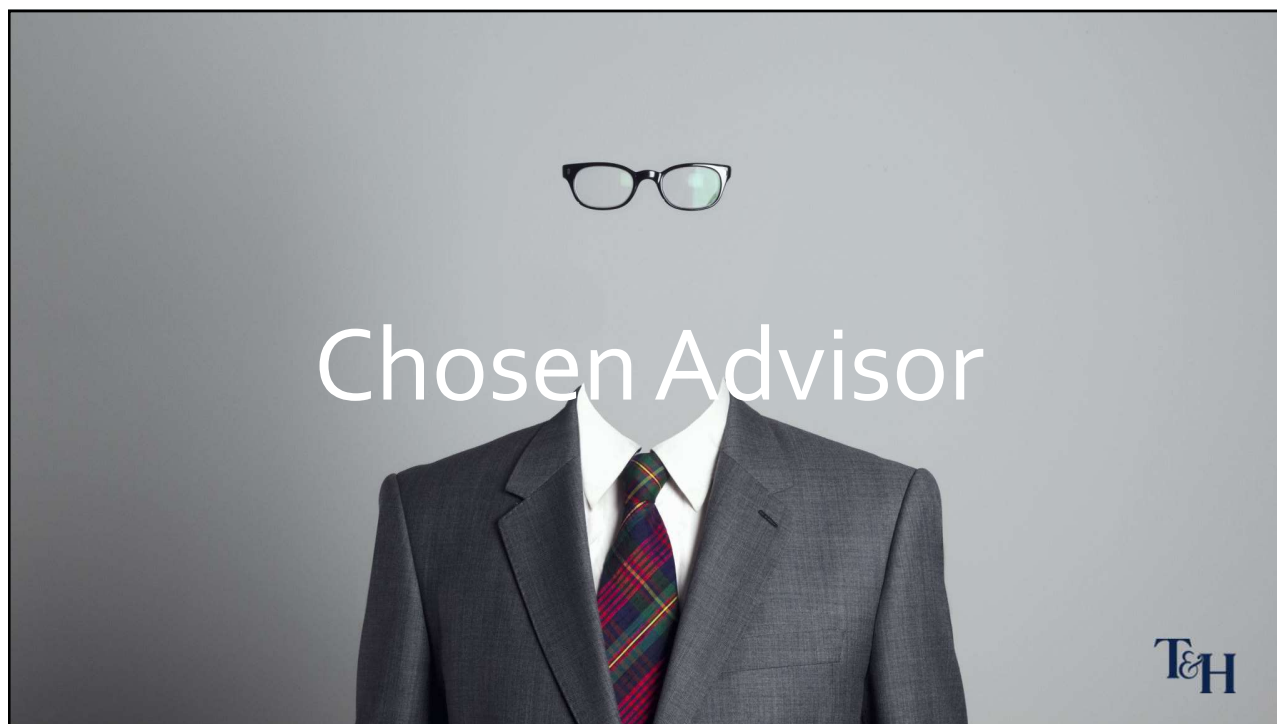
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Two Types of Advisors

- Advisor selected by the party (Chosen Advisor)
- Advisor appointed by the educational institution (Appointed Advisor)



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Advisor Chosen by a Party

- The educational institution must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.
- The educational institution may not limit the choice or presence of an advisor for either the complainant or respondent in any meeting or grievance proceeding.
- Advisors may be, but are not required to be, attorneys.
- The educational institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

The logo consists of the letters "T&H" in a blue serif font, located in the bottom right corner of the slide.

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Party Selected Advisor's Participation

For any Title IX Sexual Harassment in a program or activity and in the United States of which the educational institution has actual knowledge, the Title IX Coordinator or their designee must

- **Step 1:** Offer "supportive measures" to the alleged victim (Complainant) and explain rights, including to file a formal complaint
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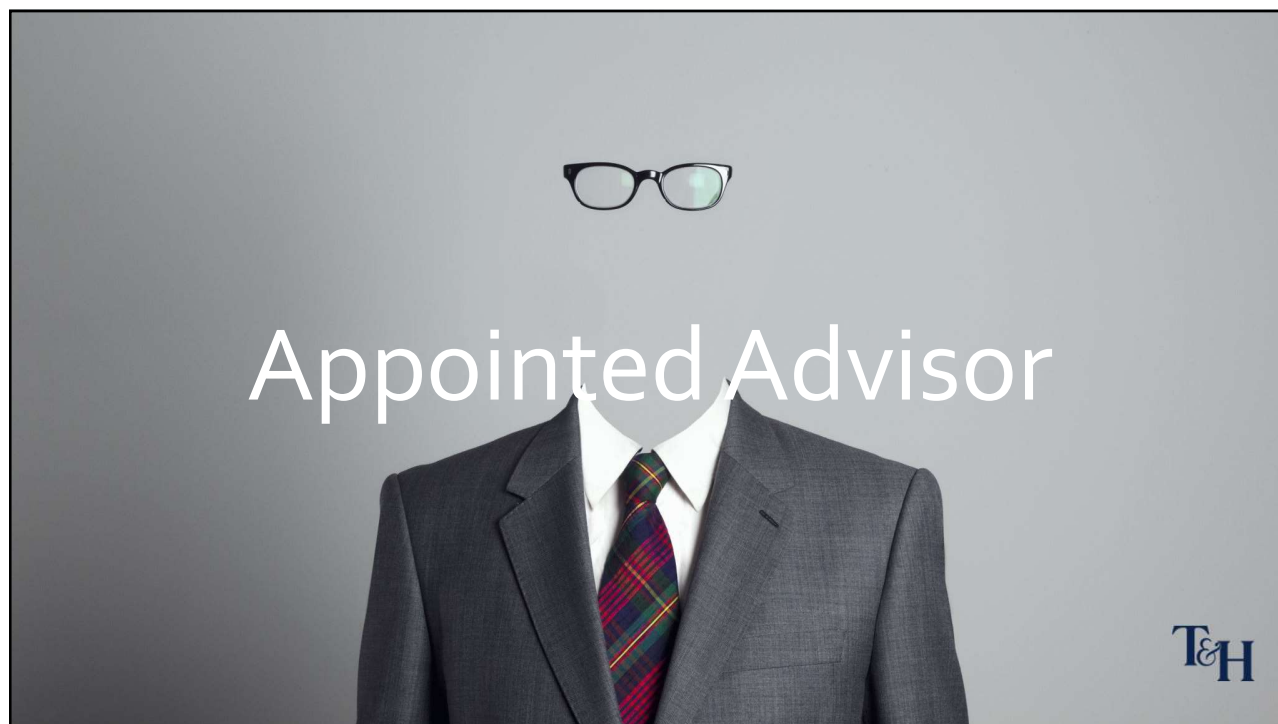
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Advisor of Choice: Specific Rights

- Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence.
- Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond.
- At the live hearing, the decision-maker(s) must permit each party's advisor to directly, orally, and in real time ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant.



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Appointed Advisor's Participation

For any Title IX Sexual Harassment in a program or activity and in the United States of which the educational institution has actual knowledge, the Title IX Coordinator or their designee must

- **Step 1:** Offer "supportive measures" to the alleged victim (Complainant) and explain rights, including to file a formal complaint
- **Step 2:** Consider if emergency removal/administrative leave of the alleged perpetrator (Respondent) is warranted

Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee

- **Step 3:** Notice of Allegations
- **Step 4:** Consider Dismissal
- **Step 5:** Informal Resolution (in some cases)
- **Step 6:** Investigation
- **Step 7:** Hearing
- **Step 8:** Appeal

NOTE: ALL STEPS include strict detailed requirements from the Title IX rules



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What part(s) of the process does your institution allow appointed advisors to participate in?


The entire process (start to finish)		A
The entire decision-making process (from responding to the investigation report through the hearing)		B
Only the pre-hearing conference and hearing		C
Only cross examination at the hearing		D
Something else (tell us in the chat)		E

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Appointed Advisor

- During a live hearing at a higher educational institution, each party’s advisor must be permitted to ask any other party or witness relevant questions and follow-up questions, including those challenging credibility.
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the parties' advisor of choice and never by a party personally, notwithstanding the discretion of the educational institution to otherwise restrict the extent to which advisors may participate in the proceedings.
- If a party does not have an advisor present at the live hearing, the educational institution must provide without fee or charge to that party, an advisor of the educational institution’s choice, who may be, but is not required to be, an attorney, to conduct cross examination on behalf of that party.



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If one party chooses an advisor who is an attorney, the educational institution must appoint an attorney advisor for the other party if they do not have an advisor

True False

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Under the Title IX rules, an advisor cannot:

Advise both the Complainant and Respondent

Be a witness in the matter

Disagree with or disbelieve their advisee

All of the above

None of the above

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Under the Title IX rules, an advisor cannot:

- Be biased toward any party or type of party
- Have a conflict of interest that would impact their party
- Be called as a witness against their party
- All of the above
- None of the above


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Bias

The 2020 Title IX regulations require that any Title IX Coordinator, investigator, decisionmaker, appellate decisionmaker, or informal resolution facilitator not be biased, have a conflict of interest, or prejudge any matter before them.




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Conflict of Interest

“A situation in which a person is in a position to derive personal benefit from actions or decisions made in their official capacity.”


Oxford Languages



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The Appointed Advisor's Role



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01 Provide support

02 Help understand the process

03 Be proactive

04 Be assertive

05 Be inquisitive

Appointed Advisor Role

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Carefully review all relevant policies and procedures

Understand the evidence and alleged facts in the case—What is disputed?
What is not disputed?

Learn the Rules

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Investigation Report Response



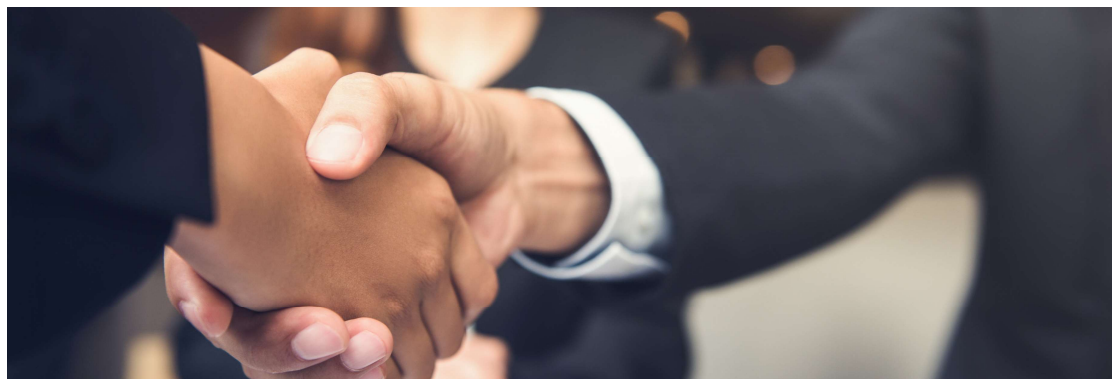
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Investigation Report Response

- Discuss with your advisee what the report got right and what it got wrong
- Point out any evidence proposed that the investigator did not address (witnesses or tangible evidence)
- Don't expect your advisee to understand what they are being asked to do – support and advise them



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Pre-Hearing Conference



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Pre-Hearing Conference

Consider:

- Getting to know the hearing officer and understand if there are any concerns with bias, conflict of interest, or prejudgment that you want to address
- Asking questions about process and procedures, including any rules governing your role during the hearing
- Offering witnesses you wish to be present during the hearing
- Securing pre-hearing rulings on the relevance of questions
- Discussing location of hearing (live hearing can occur via technology with the parties located in separate rooms or remotely at request of either party—if the decision-makers and parties can see and hear the parties and witnesses during testimony)



86



Hearing Preparation



87

Hearing Prep List

- Review evidence and investigation report— what documentation do you need? Do you need demonstrative evidence (e.g., visuals)?
- What witnesses should attend to help make your case? Do you need an expert witness? Need to help secure reluctant witnesses?
- Opening statement prep
- Prepping your party to testify
- Prepping for cross-examination of other parties and witnesses (conducted by the advisor)
- Closing statement prep
- Impact statement (if necessary)

88

Can a party present new evidence (not in the DRE or investigation report) at the hearing?

Yes, the decision-maker(s) should allow it to avoid a challenge that the process was not fair ("due process" for public institutions)


Yes, but only if the parties agree

No, the decision-maker should not allow it and should continue the hearing


No, the decision-maker should not allow it but should remand the case to the investigation

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89



The Hearing




90



Individuals Involved


- Parties
- Each party's advisor (can be but is not required to be an attorney)
- Decision-Maker(s)
- Witnesses (including Investigator(s))
- Institutional Representative (Facilitator)?
- Support Person?



91

Hearing Fundamentals


- The burdens of **proof and production** are on the educational institution, not the parties
- The educational institution cannot limit either party (or their advisor) from discussing the allegations or gathering and presenting relevant evidence (**no gag orders**)
- All parties must have **equal opportunity to present witnesses**, including expert witnesses, as the hearing
- Only **relevant evidence** can be discussed at the hearing



92

Hearing Fundamentals

- The decision-maker uses a **preponderance of the evidence standard** (more likely than not or “50% and a feather”)
- After the hearing, a **written determination** will be provided to the parties




93

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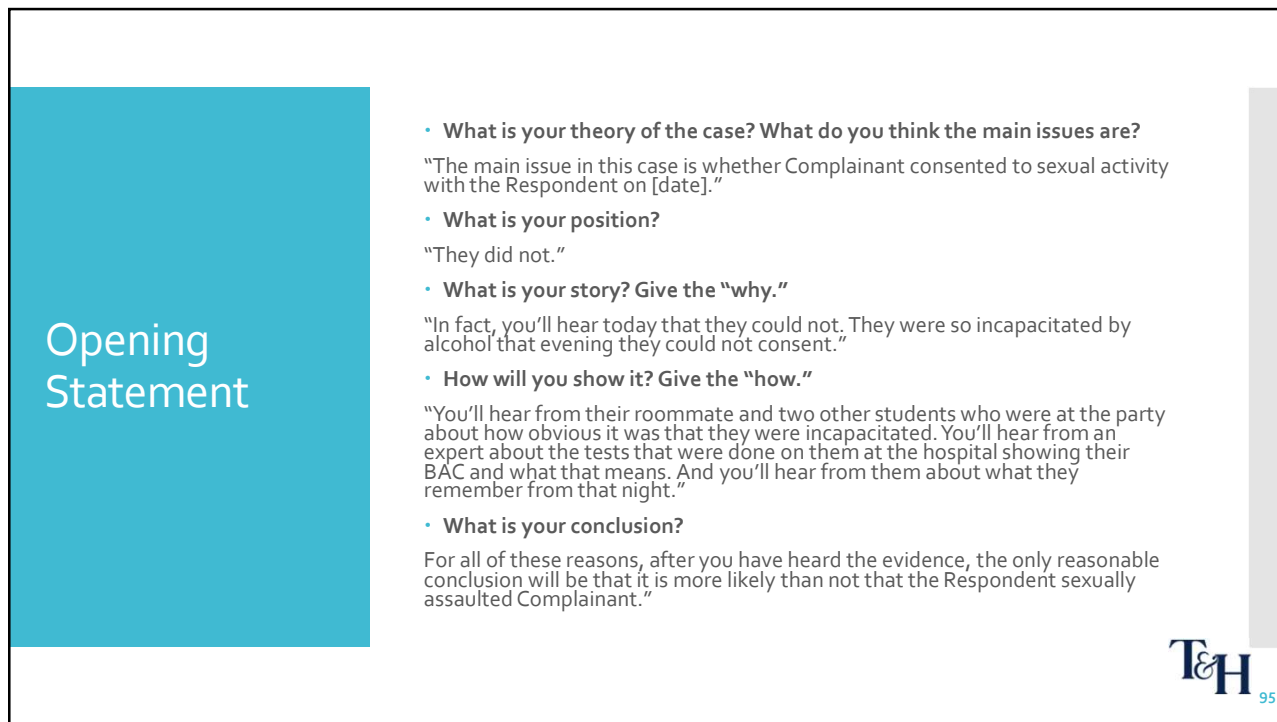
Under the Title IX rules, the hearing must include:

- Opening and closing statements
- Hearing officer questions for the parties or witnesses
- Advisor questions for their own party
- Advisor questions for the other parties and witnesses
- All of the above

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



94

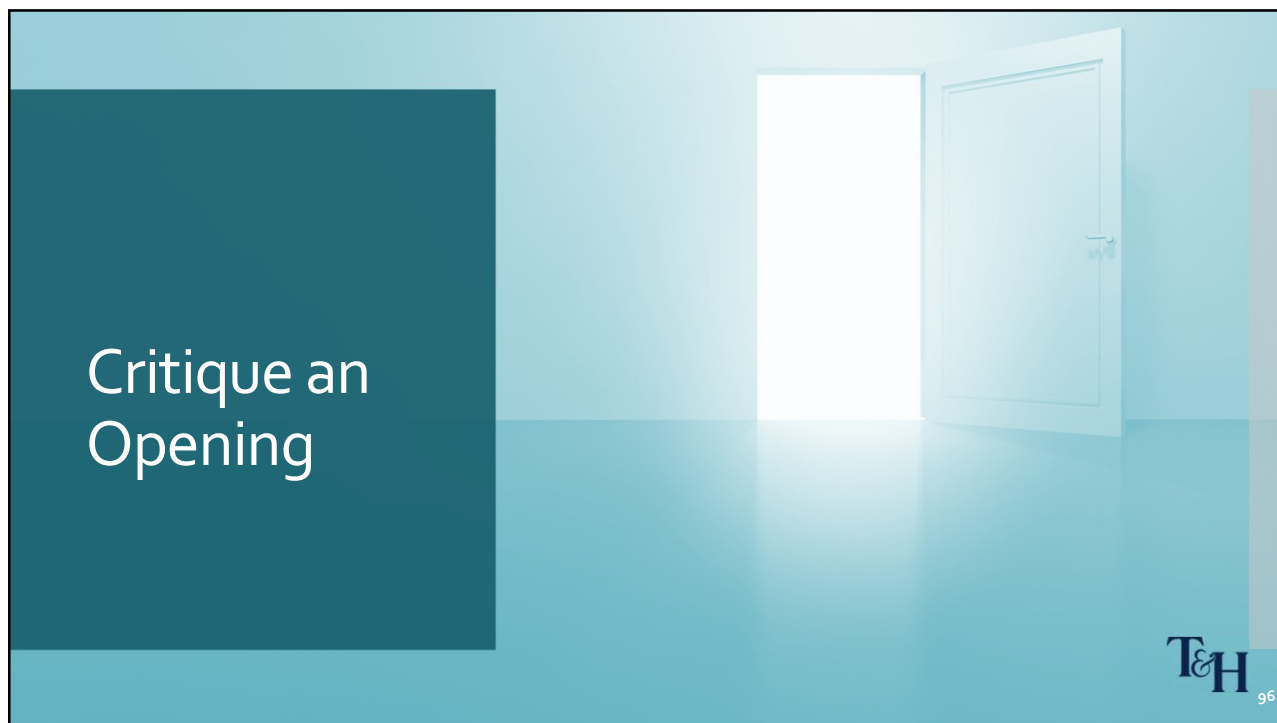
A slide titled "Opening Statement" with a teal background on the left. The right side contains a list of questions and corresponding sample text for an opening statement.

Opening Statement

- **What is your theory of the case? What do you think the main issues are?**
"The main issue in this case is whether Complainant consented to sexual activity with the Respondent on [date]."
- **What is your position?**
"They did not."
- **What is your story? Give the "why."**
"In fact, you'll hear today that they could not. They were so incapacitated by alcohol that evening they could not consent."
- **How will you show it? Give the "how."**
"You'll hear from their roommate and two other students who were at the party about how obvious it was that they were incapacitated. You'll hear from an expert about the tests that were done on them at the hospital showing their BAC and what that means. And you'll hear from them about what they remember from that night."
- **What is your conclusion?**
For all of these reasons, after you have heard the evidence, the only reasonable conclusion will be that it is more likely than not that the Respondent sexually assaulted Complainant."

T&H 95

95

A slide titled "Critique an Opening" with a dark teal background on the left and a light blue background on the right featuring an open doorway.

Critique an Opening

T&H 96


96



97

Direct Examination

- Usually will be used for your party or a “friendly” witness
- Hopefully, you know what to expect from this person’s testimony
- The goal: prove your case, tell your story, enhance the party’s or witness’s credibility in the eyes of the decision-maker
- Typically your questions should be **not leading**

The logo for Thompson & Horton LLP, featuring the letters 'T&H' in a stylized font with the number '98' below it.

98

Leading the Witness

LEADING

- What is your issue with the other party?
- Do you and the other party fight often?
- Why did your relationship with the other party change recently?

NOT LEADING

- Do you know the respondent?
- How do you know them? For how long?
- How would you describe your relationship? Has it always been the same or has it changed over time? How?
- [Only if necessary] So is it fair to say that the two of you did not get along?

T&H₉₉

99

Critique a Direct

T&H₁₀₀

100



101

Hearing Officer Questions

- For witnesses that you intend to cross-examine, the hearing officer may ask them questions first
- The hearing officer likely will not allow you to repeat questions so listen closely!
- Keep track of what has and has not been asked so you can address whatever is needed on cross

102

Cross Examination

- The purpose of cross examination is to poke holes in the other sides' case, show credibility weaknesses in witnesses or evidence, and thus help improve your case
- Your goal is not to make anyone **look bad** - trying to do so will likely only make you look bad
- On cross examination, the questioner uses **closed, leading questions** – think “yes” or “no” questions like “You and the Complainant were together during the entire party, correct?” or “You agreed to begin kissing the Respondent, didn’t you?”



103



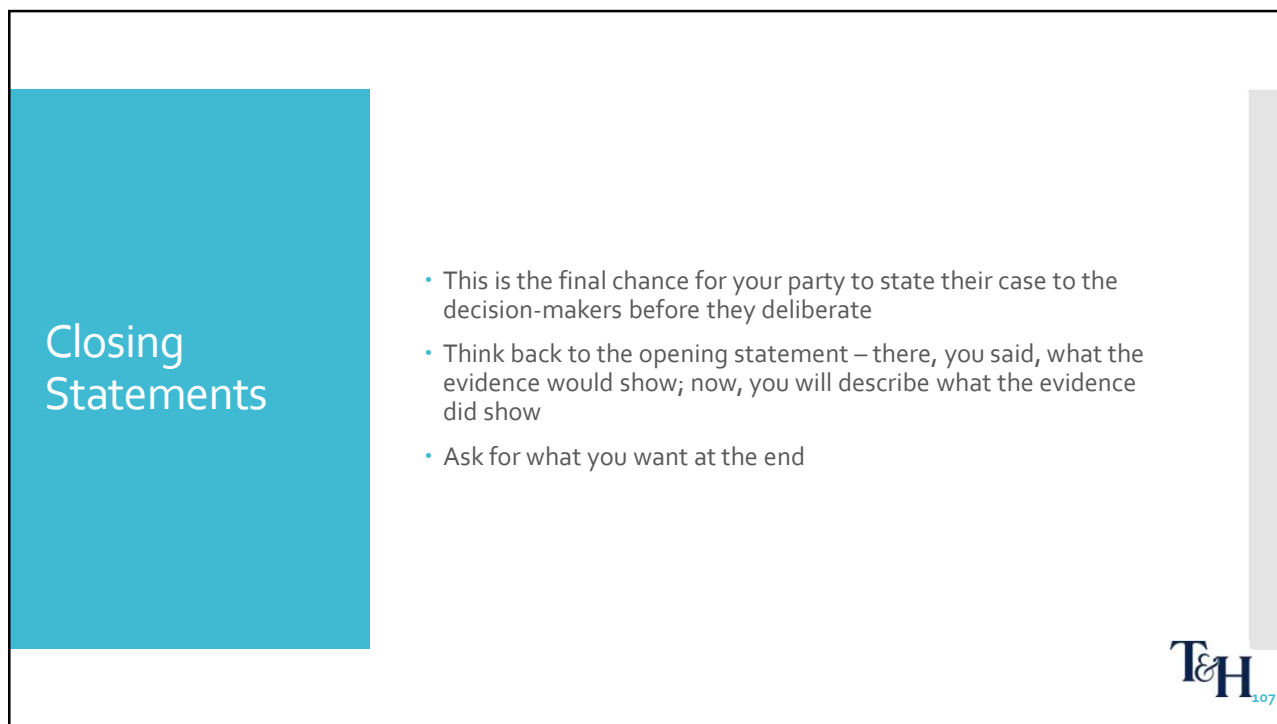
104



105



106

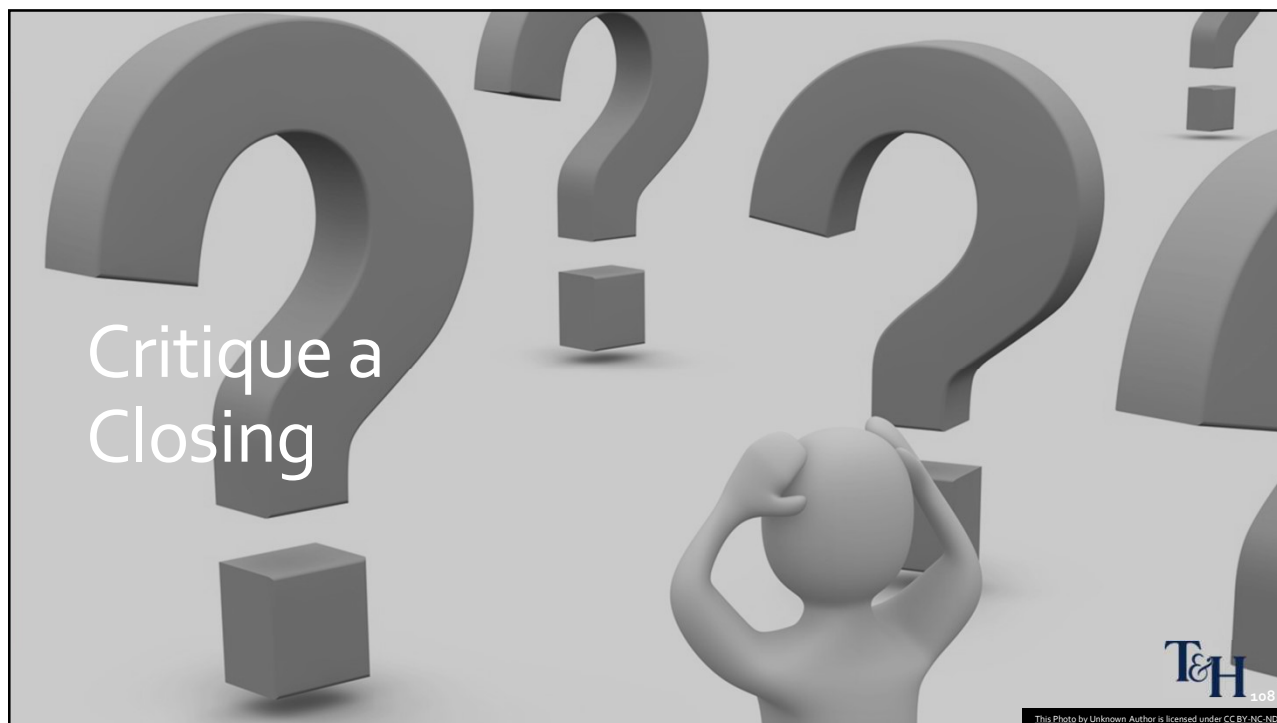
A presentation slide with a teal square on the left containing the text "Closing Statements". To the right, there is a bulleted list of three points. The slide includes a logo in the bottom right corner.

Closing Statements

- This is the final chance for your party to state their case to the decision-makers before they deliberate
- Think back to the opening statement – there, you said, what the evidence would show; now, you will describe what the evidence did show
- Ask for what you want at the end

T&H₁₀₇

107

A presentation slide with a grey background featuring several large, 3D question marks. A 3D figure is shown in the bottom right, scratching its head in a thinking pose. The text "Critique a Closing" is overlaid on the left. The slide includes a logo in the bottom right corner.

Critique a Closing

T&H₁₀₈

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109




110



Dispute

Relevance



111



Relevance


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



112

Relevance

<p><u><i>Fact or Issue in Dispute</i></u></p> <ul style="list-style-type: none"> • Facts that help prove or disprove an undisputed issue of fact are not relevant • Questions about certain topics are never relevant under the Title IX rules (next slide) • Questions that are duplicative of other questions or evidence are not relevant 	<p><u><i>Helps Prove or Disprove Issue</i></u></p> <ul style="list-style-type: none"> • Even if a fact or issue is in dispute, a question is not relevant if it does not “tip the scale” one way or the other in favor of or against the issue in dispute
---	--




113

Relevance Exceptions

“Rape Shield”	}	Complainant’s sexual predisposition or prior sexual behavior (limited exceptions)
Treatment Records	}	Records by a physician, psychiatrist, psychologist, or similar professional in provision of treatment
Privileged Info	}	Attorney-client, physician-patient, priest-penitent, marriage, privilege against self-incrimination, etc.

UNLESS written consent from the impacted party or witness




114

Rape Shield Rule

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant unless:

- Offered to prove that someone other than the respondent committed the conduct alleged by the complainant or
- The questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent




115

Relevant?

Inculpatory

Evidence tending to **prove** that the fact or issue in dispute occurred




116

Relevant?

Exculpatory


Evidence tending to **disprove** that the fact or issue in dispute occurred




117

Respectful

- Questions and answers must be respectful
- For example, cannot use profanity or irrelevant, ad hominem attacks
- Harassing questions will not be tolerated
- No "ruling" required, but recommend providing



118




Ruling on Non-Relevance

Decision-maker must explain the reason for finding a question not relevant **on the record**

Example: "The question seeks information protected by a legally recognized privilege"

Example: "The question includes irrelevant personal attacks"

If not done, ASK



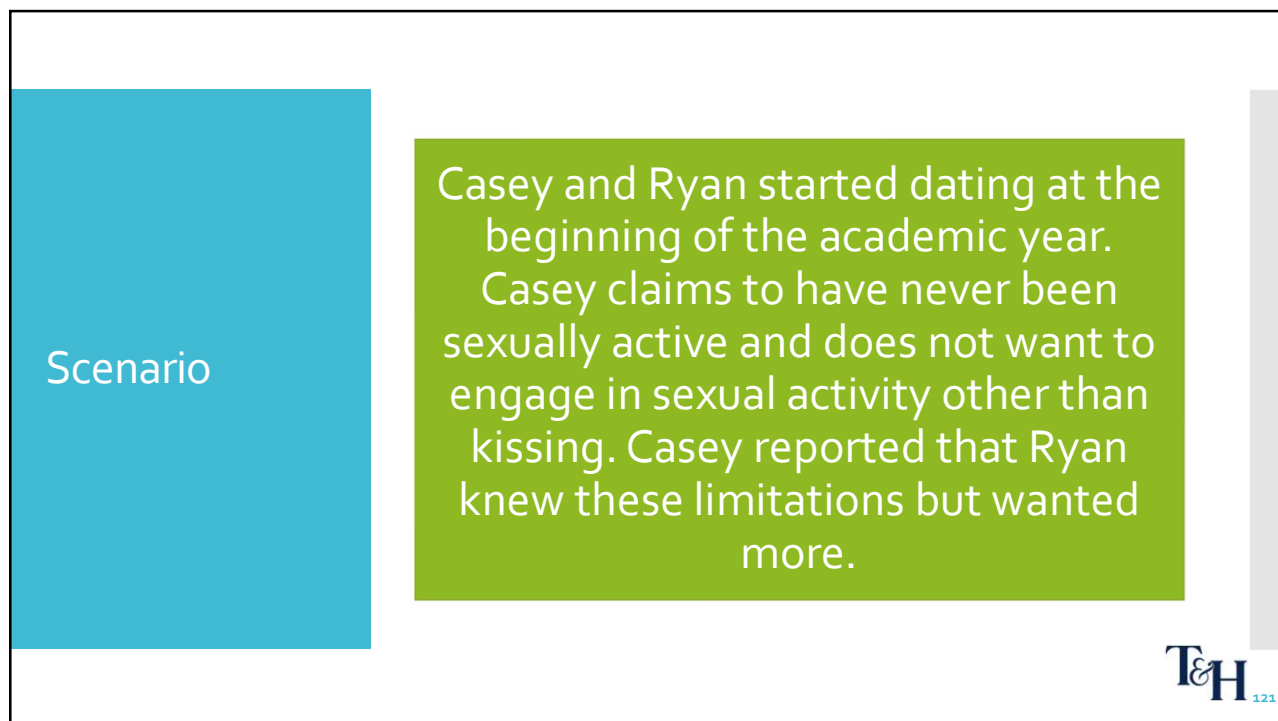
119

Scenario

A student, Casey, alleges that another student, Ryan, touched Casey in the genital area on two occasions on campus.




120




Scenario

Casey and Ryan started dating at the beginning of the academic year. Casey claims to have never been sexually active and does not want to engage in sexual activity other than kissing. Casey reported that Ryan knew these limitations but wanted more.



121

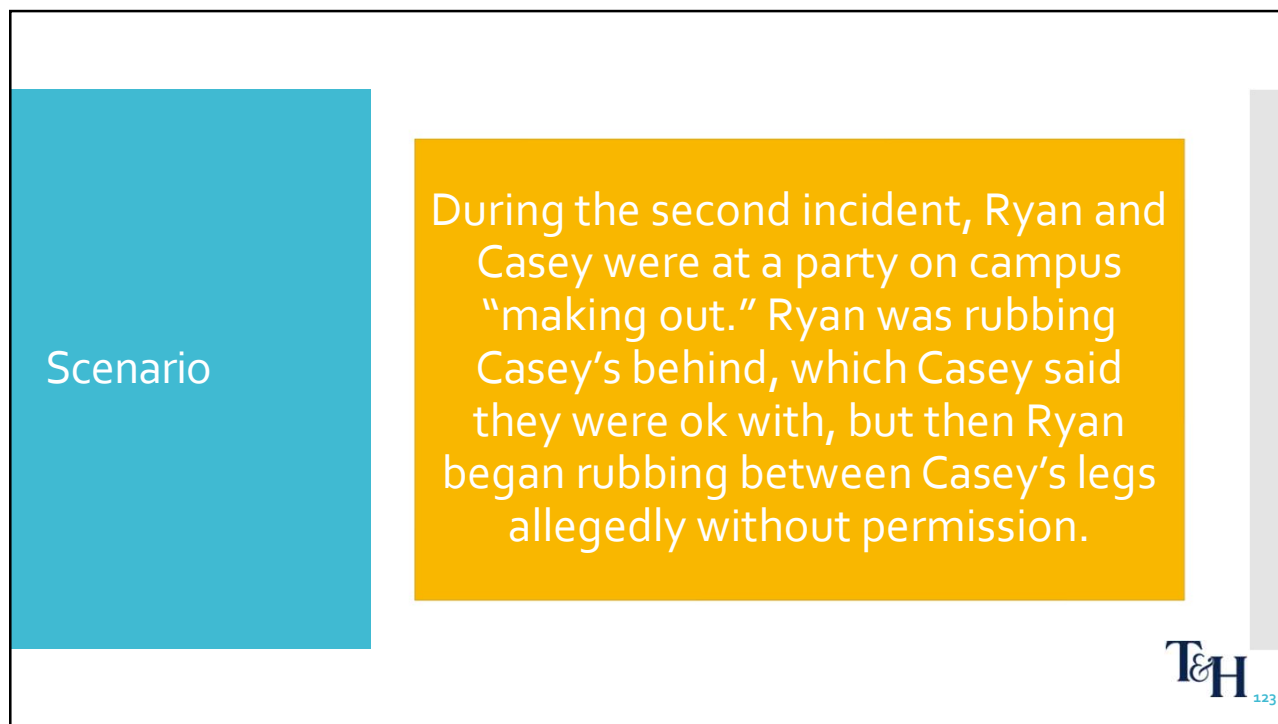


Scenario

During the first incident, Ryan and Casey were on campus. Ryan was tickling Casey and, while Casey was protesting, touched Casey's private area.



122

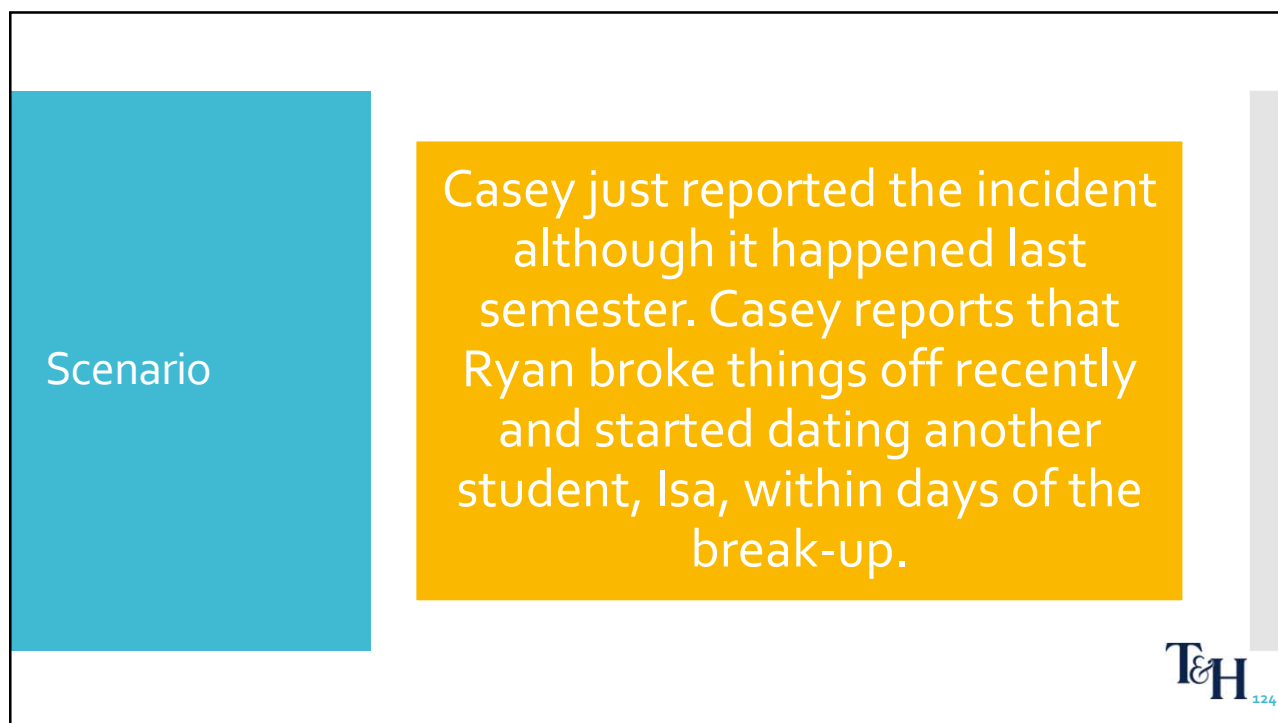
A slide with a white background. On the left is a teal rectangular box containing the word "Scenario" in white text. To the right of this box is a larger yellow rectangular box containing the following text in white: "During the second incident, Ryan and Casey were at a party on campus 'making out.' Ryan was rubbing Casey's behind, which Casey said they were ok with, but then Ryan began rubbing between Casey's legs allegedly without permission." In the bottom right corner of the slide is the logo "T&H" with the number "123" below it.

Scenario

During the second incident, Ryan and Casey were at a party on campus "making out." Ryan was rubbing Casey's behind, which Casey said they were ok with, but then Ryan began rubbing between Casey's legs allegedly without permission.

T&H₁₂₃

123

A slide with a white background. On the left is a teal rectangular box containing the word "Scenario" in white text. To the right of this box is a larger yellow rectangular box containing the following text in white: "Casey just reported the incident although it happened last semester. Casey reports that Ryan broke things off recently and started dating another student, Isa, within days of the break-up." In the bottom right corner of the slide is the logo "T&H" with the number "124" below it.

Scenario

Casey just reported the incident although it happened last semester. Casey reports that Ryan broke things off recently and started dating another student, Isa, within days of the break-up.

T&H₁₂₄


124

Scenario

Casey and Ryan do not dispute that the touching occurred

Ryan claims the touching was all consensual/ Casey disagrees

There are no witnesses to the behavior




125

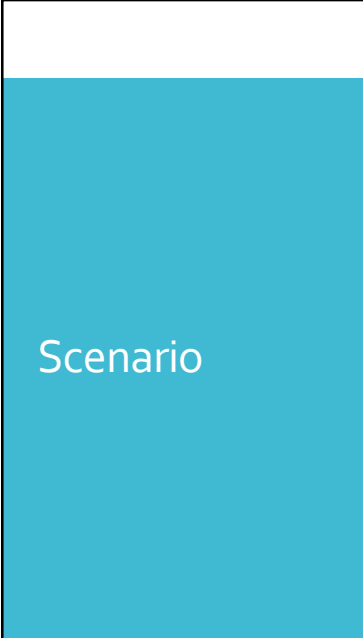
Scenario

Casey told a friend, Wei, right after the second incident what happened and Wei encouraged Casey to report it

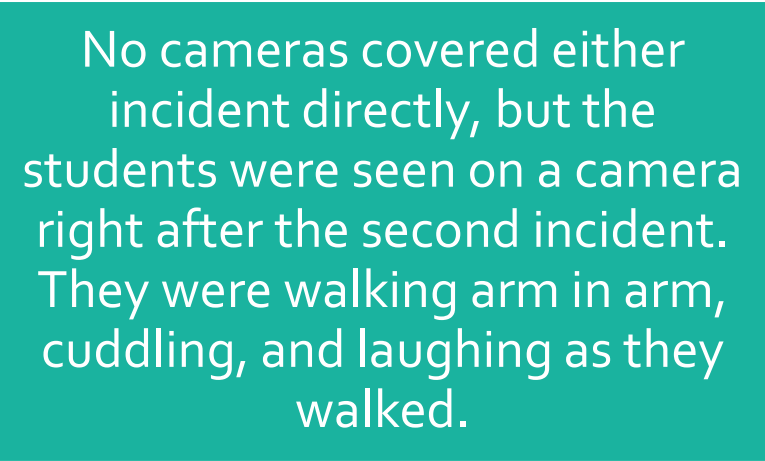
After being charged, Ryan tearfully denied the allegations to Ryan's mom




126



Scenario



No cameras covered either incident directly, but the students were seen on a camera right after the second incident. They were walking arm in arm, cuddling, and laughing as they walked.



T&H₁₂₇

127



Scenario



Neither student has ever had disciplinary concerns before.




T&H₁₂₈

128

Scenario

Casey's story has been consistent throughout


Ryan seemed incredibly nervous in the initial interview and at first denied ever touching Casey. As the interviewer built rapport, Ryan acknowledged that the touching occurred but said it was consensual.



129

Ask Yourself

- What issues are in dispute and what issues are not in dispute?
- What areas of inconsistency need to be considered?
- What credibility concerns could you address?




130

Polling Access

Option One
Use this QR code

Option Two
Go to Pollev.com on any browser
Accept or dismiss cookies
Enter THLAW411 as the Username
Skip when asked to enter your name




131

131

Scenario

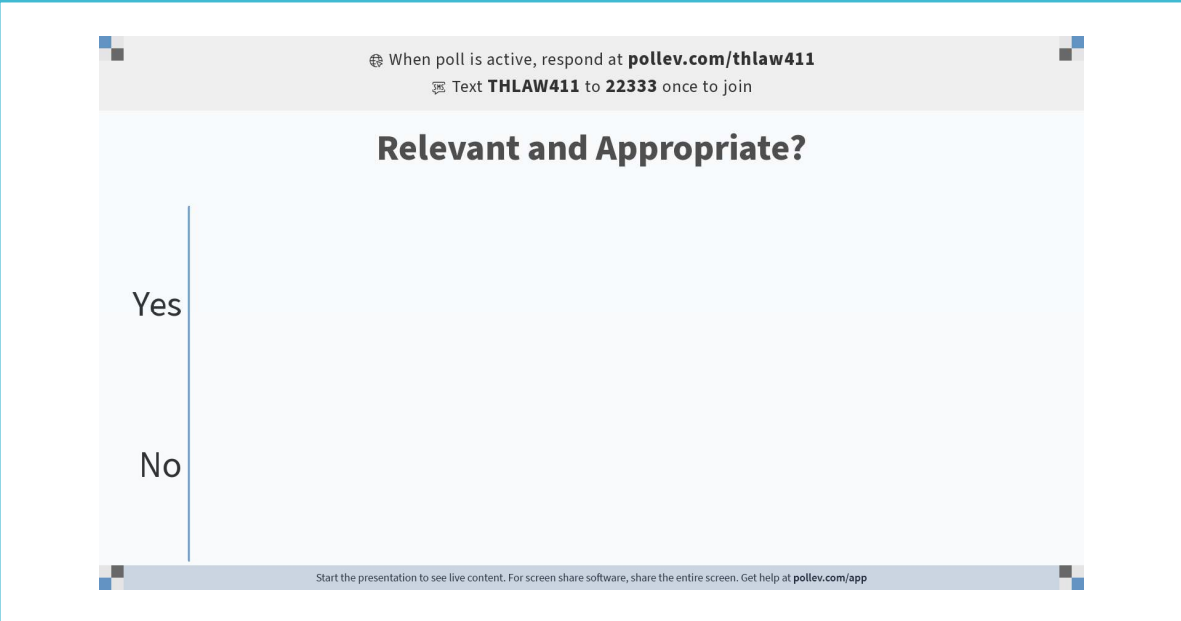
Question 1 (Ryan to Casey):

Isn't it true that you let Wei touch you the same way over the summer before we started dating?



132

132



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Relevant and Appropriate?

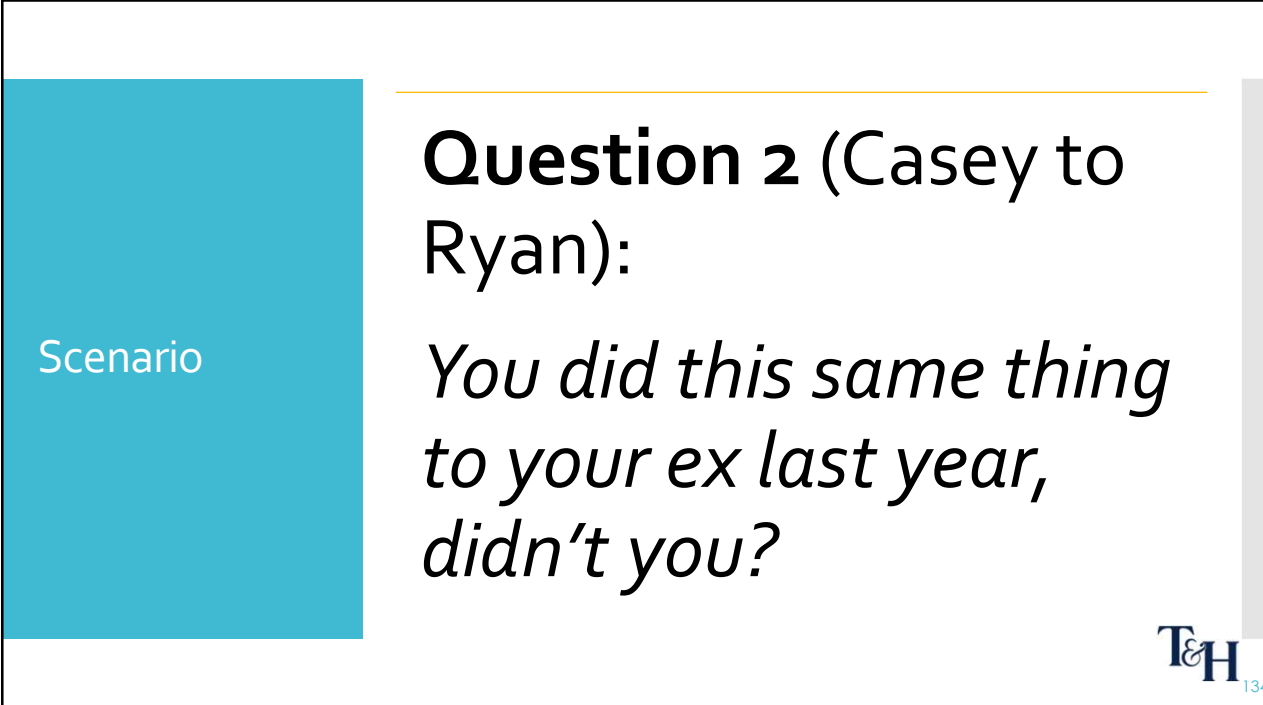
Yes

No

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133

133



Scenario

Question 2 (Casey to Ryan):

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

T&H
134

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Relevant and Appropriate?

Yes

No

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135

Scenario

Question 3 (Casey to Investigator):

Why didn't you interview all Casey's friends like Casey asked to see if anyone saw anything?

T&H 136

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Relevant and Appropriate?

Yes

No

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137

137

Scenario

Question 4 (Decision-Maker to Investigator):

Why did you not interview all Casey's friends as requested to see if anyone saw anything?

T&H
138

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Relevant and Appropriate?

Yes

No

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139

139

Scenario

Question 5 (Ryan to Casey):

Isn't it true that you are on three different medications for being crazy and in therapy because you're a pathological liar?

T&H 140

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Relevant and Appropriate?

Yes

No

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141

Hearsay

142



Hearsay

- When a witness reports what **someone else said**
- Although it is generally disallowed as evidence in a court of law, **there is no rule against hearsay evidence in Title IX hearings**
- Decision-makers may give hearsay **less weight**



143

Hearsay



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145



146

In a case that is truly "they said, they said" what is the outcome (using preponderance of the evidence)

The educational institution cannot even investigate because there is no evidence	A
There must be a finding of "sufficient evidence" (in favor of the alleged victim)	B
There must be a finding of "insufficient evidence" (in favor of the alleged respondent)	C
There must be a finding of "inconclusive" (neither for nor against either party)	D

147

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50/50 is Very Rare

Very few cases end in 50/50

More common for a particular disputed fact to end in 50/50, but even that happens less than one might think

What tips the scale one way or another?


T&H 148

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149

149

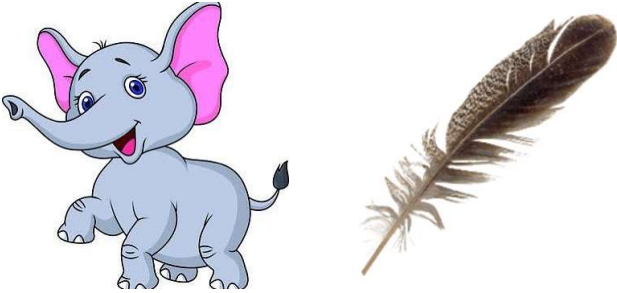


What is Credibility?

In the Title IX process, credibility refers to the process of weighing the accuracy and veracity of evidence

150

150



Relevant vs. Credible

Relevant evidence tips the scale (even a feather)

Credibility determines how much the scale is tipped – a feather or an elephant


151

151

Just because you suggest a witness is not credible does not mean you are calling them a liar

We all remember experiences differently and have different perspectives that shape how we view incidents

Credible ≠ Truthful



152


152



153

Credibility Factors

- Inherent Plausibility
- Motive to Falsify
- Corroboration
- Demeanor
- Past Record

 **U.S. Equal Employment Opportunity Commission**

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors>

154

Corroboration

- This is the gold standard evidence for credibility—does other evidence also say what the evidence you are assessing says

155

155

Plausibility

Is the testimony believable on its face? Does it make sense?
Are there more likely alternatives based on the evidence?

156

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Source Opportunity

How did the witness learn the information?

- If it was firsthand, could the individual have seen/heard what they claim from where they were?
- If they obtained the information from someone else, who? How did that person obtain the information? Could that individual have seen/heard what they claim from where they were?

157

157

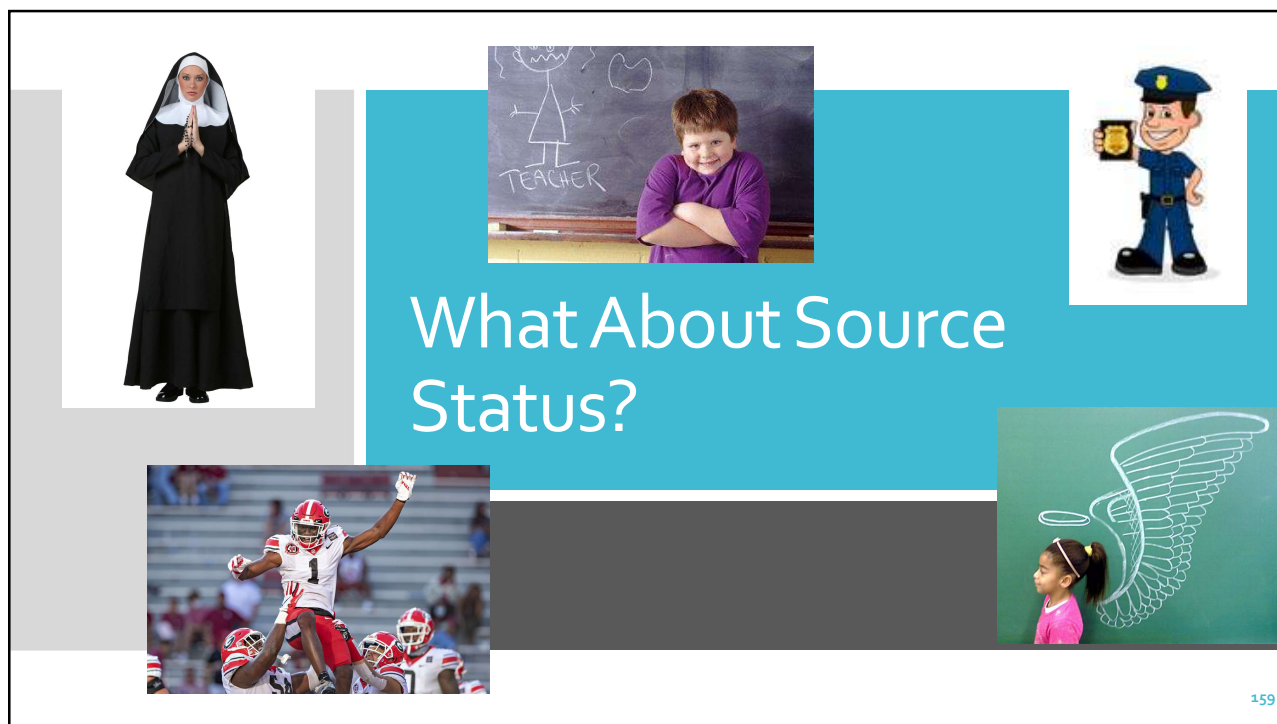
Source Motive

• Did the witness have reason to lie (or, more likely, embellish)?

- Friendships
- Negative History
- Impact on Witness

T&H 158

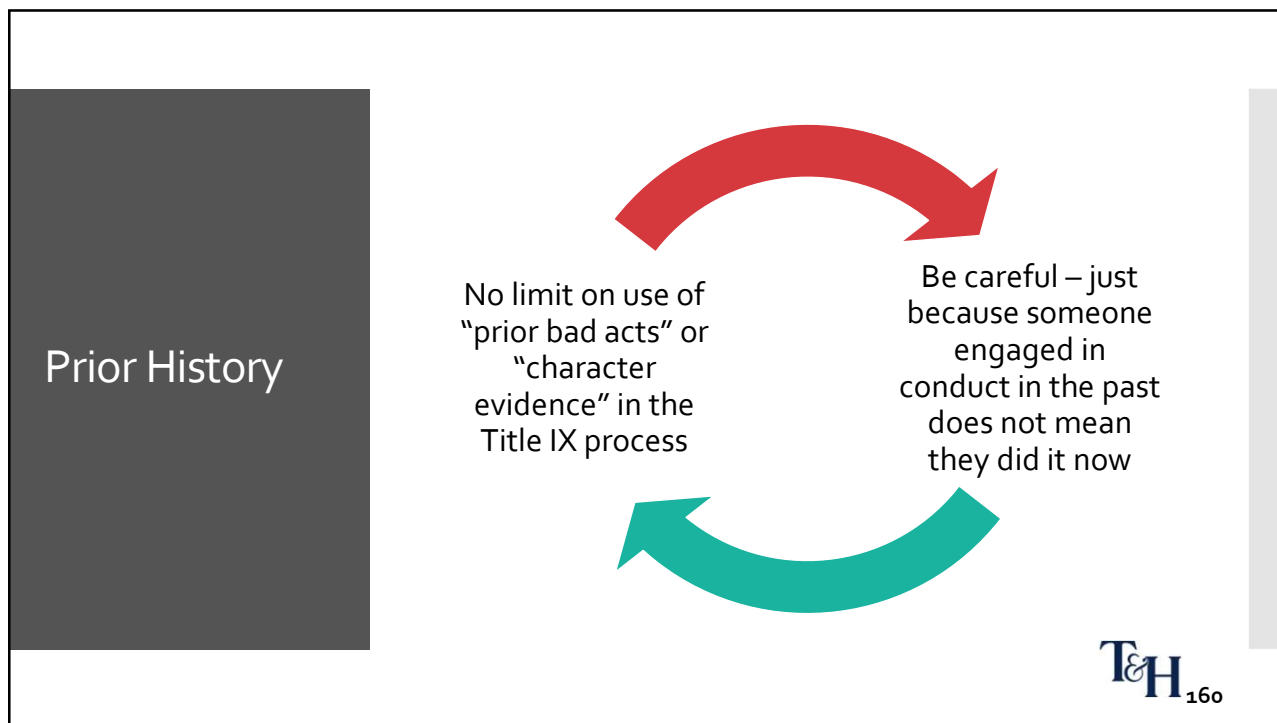
158



What About Source Status?

159

159



Prior History

No limit on use of "prior bad acts" or "character evidence" in the Title IX process

Be careful – just because someone engaged in conduct in the past does not mean they did it now

T&H₁₆₀

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Credibility and Bias

For your own party or witnesses, consider how a party or witness's culture, background, religion, or other factors may impact behavior during the process

- Culture can impact what is considered sexual harassment
- Culture can also impact how a person responds to behavior (e.g., unwelcomeness may not be shown)

161

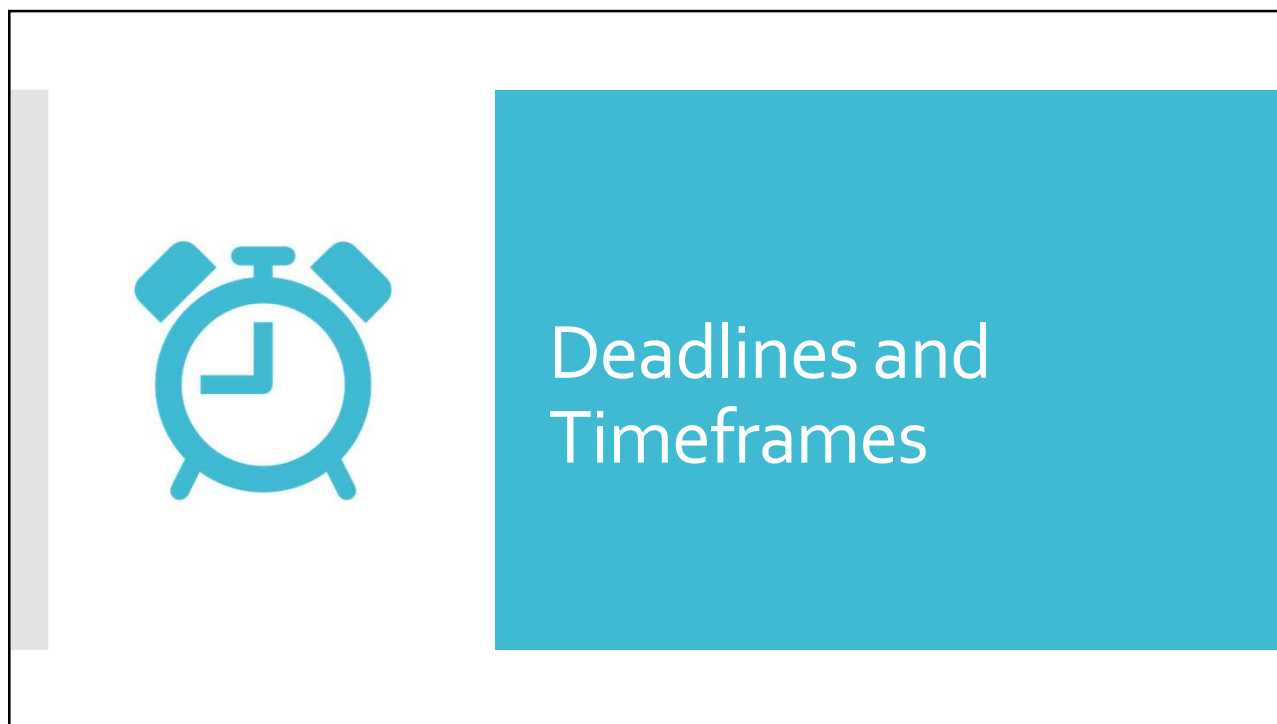
161

Trauma & Credibility

Identify	Trauma may impact some credibility factors
Advocate	DMs should not make negative inferences against a party because of trauma justified responses
Don't Hide	Don't hide behind trauma to try to "fill in the gaps" of evidence

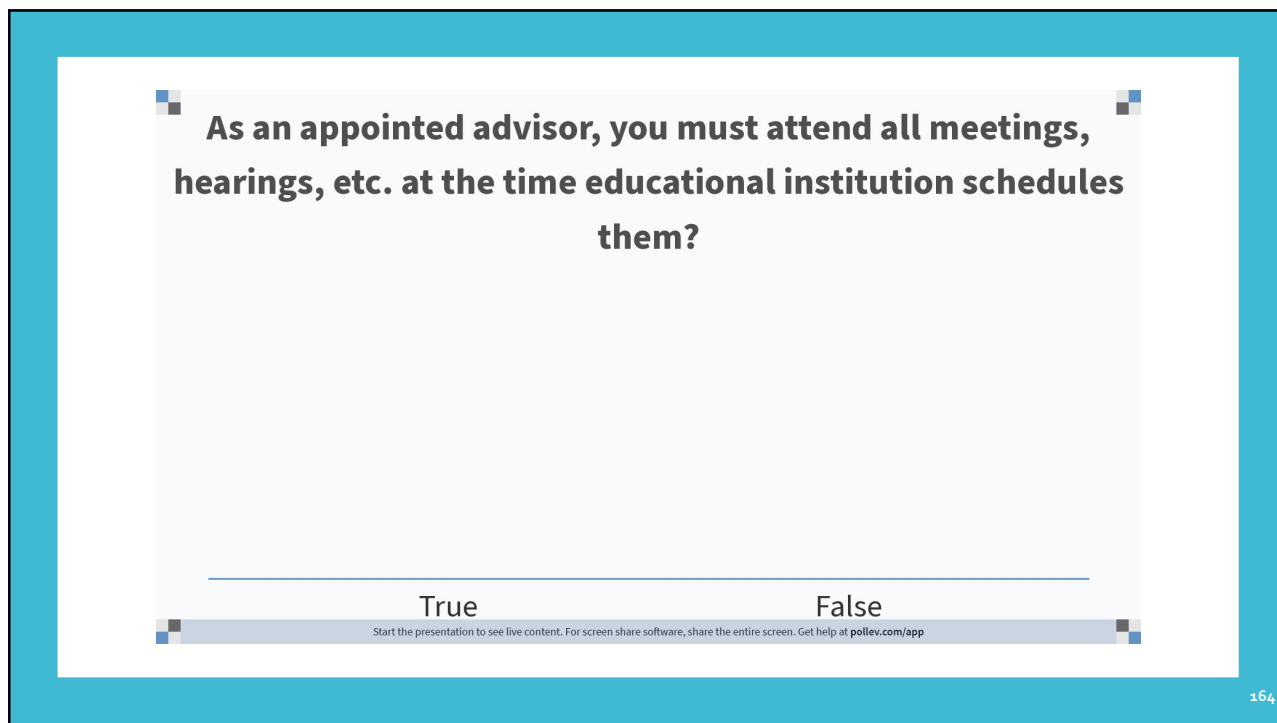
T&H 162

162



A slide featuring a teal alarm clock icon on the left and a teal rectangular box on the right containing the text "Deadlines and Timeframes" in white.

163



A polling slide with a teal border. The question is: "As an appointed advisor, you must attend all meetings, hearings, etc. at the time educational institution schedules them?". Below the question are two options: "True" and "False". At the bottom, there is a small text line: "Start the presentation to see live content. For screen share software, share the entire screen. Get help at poller.com/app".

164

Deadlines and Scheduling

The educational institution's Title IX process must include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, **with allowance for short-term, good cause delays or extensions of the time frames.**

However, the educational institution may continue with the process if it cannot secure a party or their advisor's participation after reasonable attempts.

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165

The educational institution must balance expediency, reflecting the goal of resolving a grievance process as quickly as possible, with fairness and accuracy based on its unique attributes and experience with its disciplinary proceedings.

Note that the educational institution may, in its discretion, dismiss a formal complaint or allegations therein if specific circumstances prevent it from gathering sufficient evidence to reach a determination. For example, if a complainant refuses to participate in the grievance process, the educational institution may dismiss the formal complaint if the lack of cooperation prevents it from gathering sufficient evidence.

Deadlines and Scheduling

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You test positive for COVID.

Good Cause Not Good Cause

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You have a previously scheduled two-week vacation out of the country without internet access.

Good Cause Not Good Cause

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This time of year is packed with work meetings and deadlines, and the dates the hearing officer suggests keep conflicting with your work

Good Cause Not Good Cause

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Your party needs language or disability assistance for the hearing and securing assistance is taking more time than expected.

Good Cause Not Good Cause

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Agree to Disagree?

171

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You and your advisee fundamentally disagree on strategy for cross examination. Who decides?

- The party
- The advisor
- The hearing officer
- The Title IX Coordinator

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Ethical Quandaries

173

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Your advisee admits to filing a maliciously false complaint or engaging in the alleged sexual misconduct. What do you do?

- Nothing--they are your client and the information they told you is privileged
- Report the conduct to the hearing officer
- Report the conduct to the Title IX Coordinator
- Withdraw from your role as an advisor without explanation
- Something else (tell us what it is)

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Concerns Learned in the Advisor Role

175

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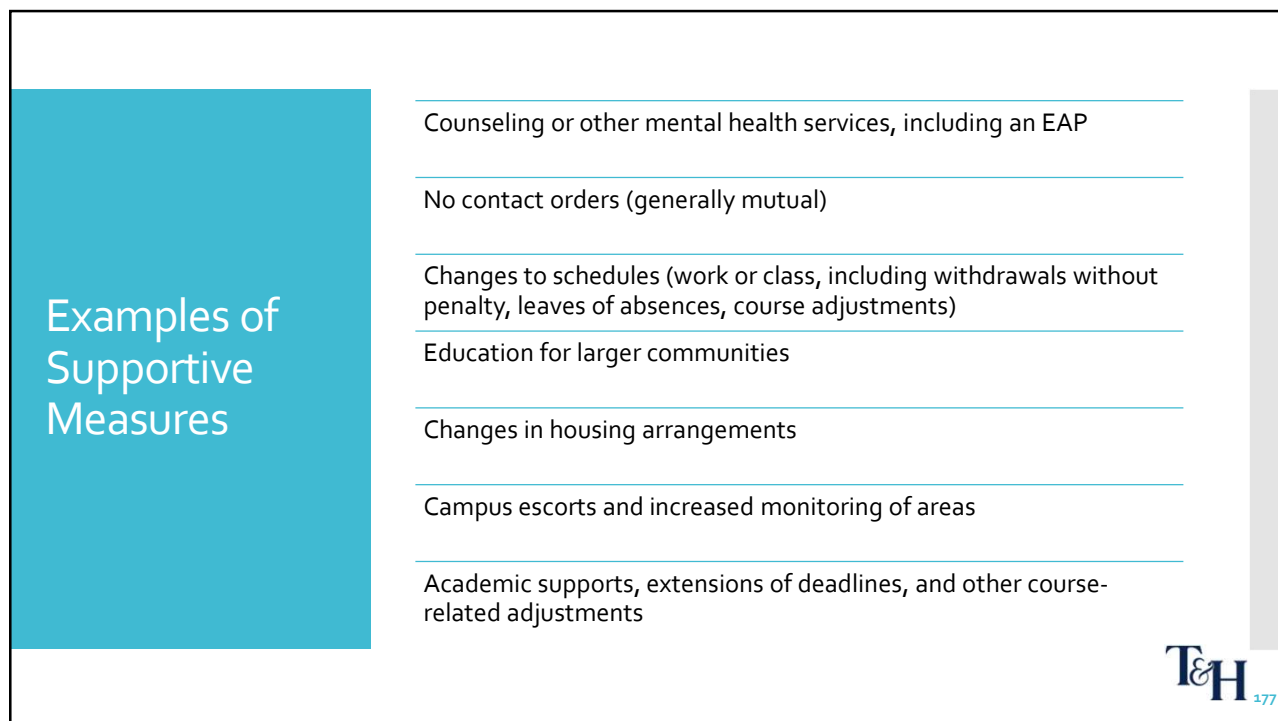
Supportive Measures

- During the advising process, you may become aware of information suggesting that your party needs additional supports
- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to a party and that are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties, to protect the educational environment, or to deter sexual harassment
- The Title IX Coordinator or their designee may be able to provide additional or augmented supports to your party, but may not be privy to the information your advisee is sharing with you
- **Help your party contact the Title IX Coordinator to address these concerns**



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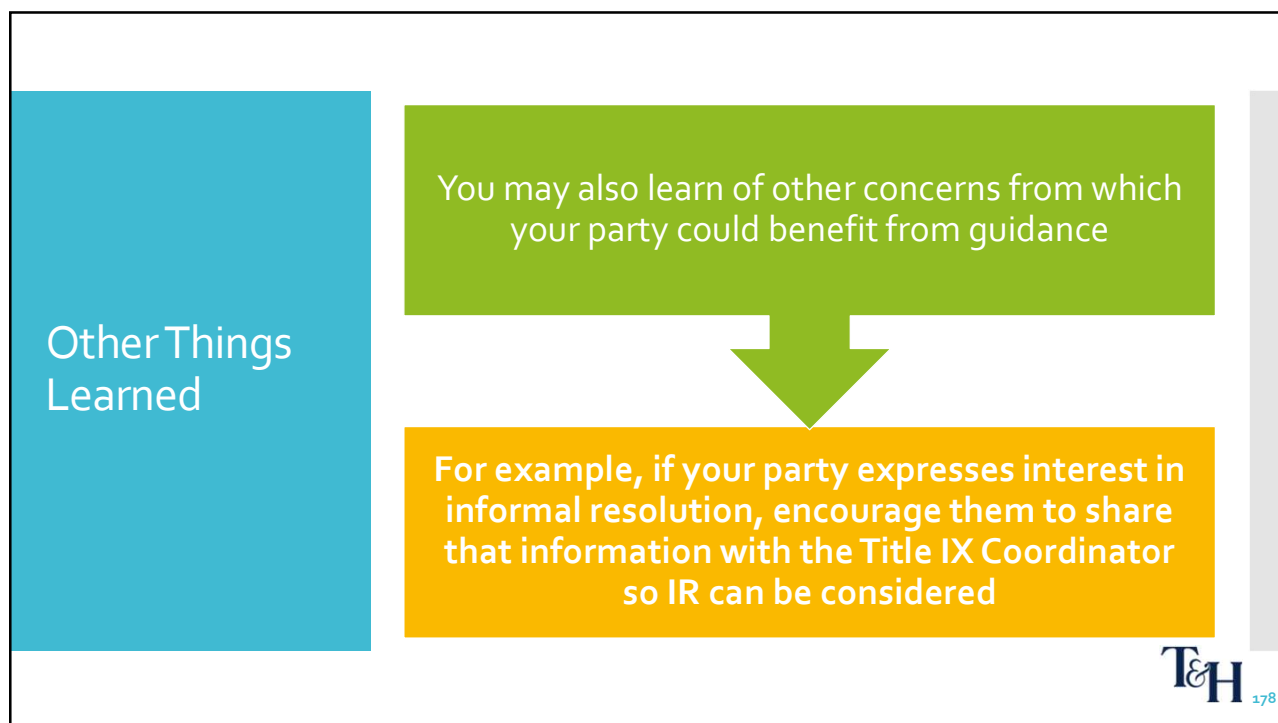


Examples of Supportive Measures

- Counseling or other mental health services, including an EAP
- No contact orders (generally mutual)
- Changes to schedules (work or class, including withdrawals without penalty, leaves of absences, course adjustments)
- Education for larger communities
- Changes in housing arrangements
- Campus escorts and increased monitoring of areas
- Academic supports, extensions of deadlines, and other course-related adjustments

T&H 177

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Other Things Learned

You may also learn of other concerns from which your party could benefit from guidance

↓

For example, if your party expresses interest in informal resolution, encourage them to share that information with the Title IX Coordinator so IR can be considered

T&H 178

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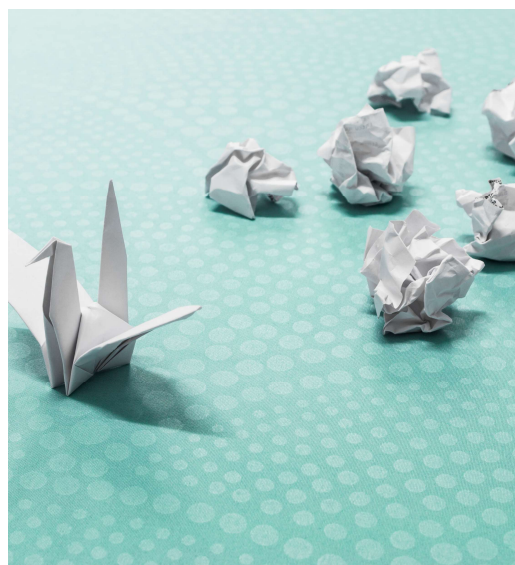
Other Things Learned

- Retaliation is prohibited
- That means intimidation, threats, coercion, or other discrimination against any individual for the purpose of interfering with any right secured by Title IX, or because the individual has made a report or complaint or has testified, assisted, or participated or refused to participate in any manner in an investigation, proceedings, or hearing under Title IX
- If you learn of information suggesting someone is being retaliated against, work with your party to report it



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Practicum



180

180

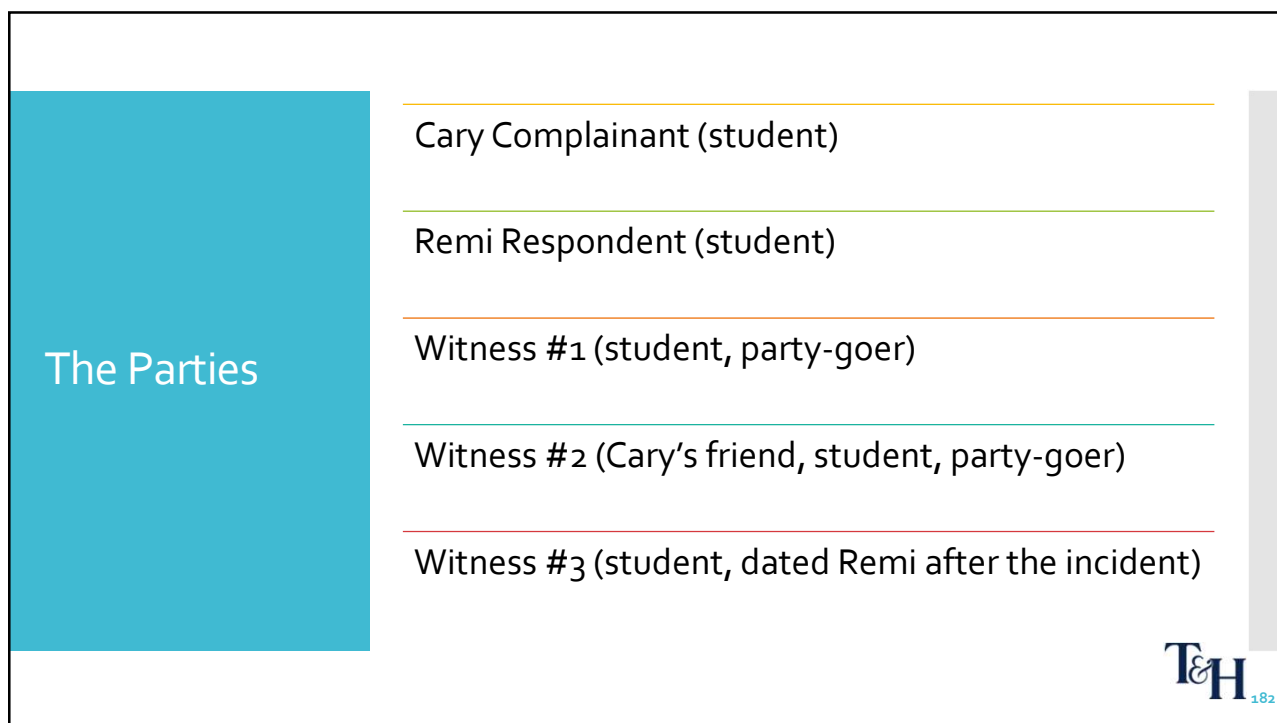


The Case

You are assigned to be the advisor for Cary Complainant, a student complainant in a Title IX sexual assault case.




181



The Parties

- Cary Complainant (student)
- Remi Respondent (student)
- Witness #1 (student, party-goer)
- Witness #2 (Cary's friend, student, party-goer)
- Witness #3 (student, dated Remi after the incident)




182

What if you are assigned as Cary's advisor and...

- You went to high school with Remi's mother.
- Remi's cousin is your supervisee.
- You are Facebook friends with Remi, who "friended" you, but not Cary. You don't think Cary ever tried to add you at any point.

Group Discussion
Bias, Conflict, Prejudgment




183

Individual Review Investigation Report

Review the report carefully

- Take notes on the disputed and undisputed facts
- What unanswered questions do you have?



184

Review the Investigation Report

The formal complaint alleged that the Respondent engaged in non-consensual sexual touching and kissing of the Complainant at a party during a school-sponsored trip while the Complainant was incapacitated by alcohol. The formal complaint indicates that the allegation is being opened both as potential “fondling” and potential “hostile environment sexual harassment.”



185

ELEMENTS

Hostile Environment Sexual Harassment

- Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access

Fondling

- The touching of the private body parts of another person for the purpose of sexual gratification without the consent of said person, including instances where the person is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.



186

Consent

With the foregoing, consent means 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 (as defined below). Consent must be all of the following:

1. Knowing
2. Active
3. Voluntary
4. Present and Ongoing

T&H₁₈₇

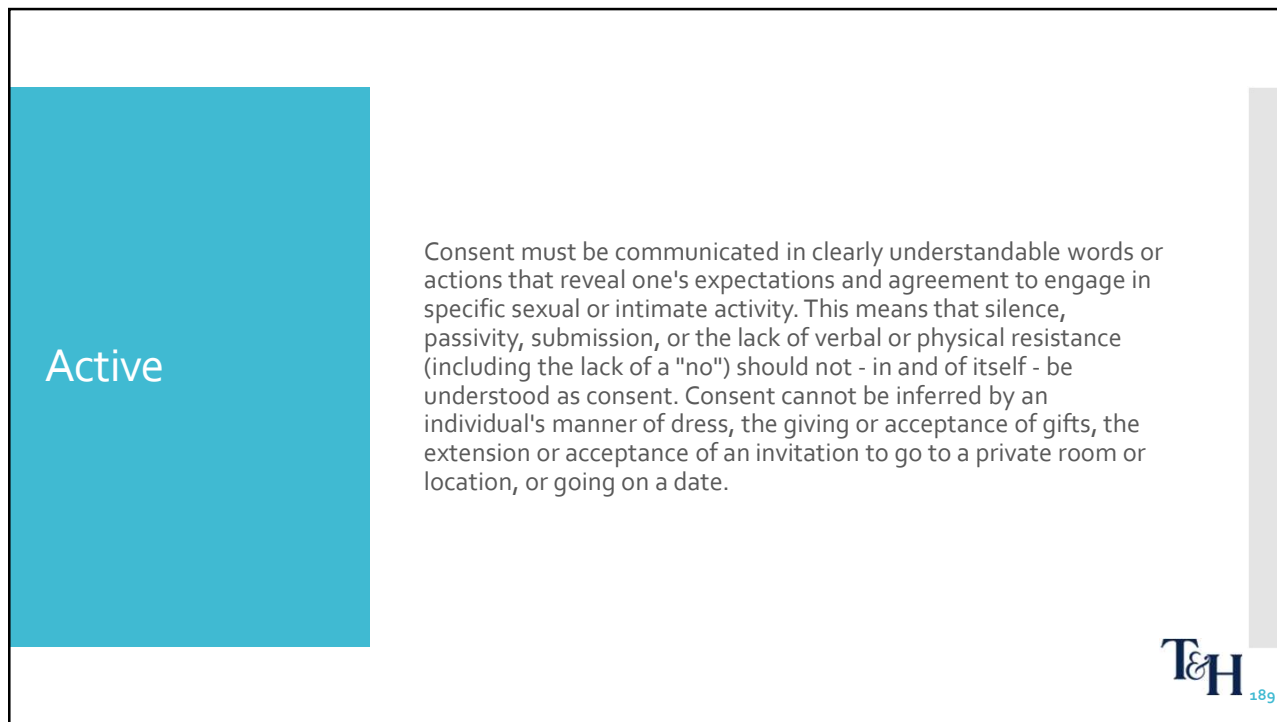
187

Knowing

Consent must demonstrate that all individuals are in a state of mind to understand, to be aware of, and to agree to the "who" (same partners), "what" (same acts), "where" (same location), "when" (same time), and "how" (the same way and under the same conditions) of sexual or intimate activity.


T&H₁₈₈

188

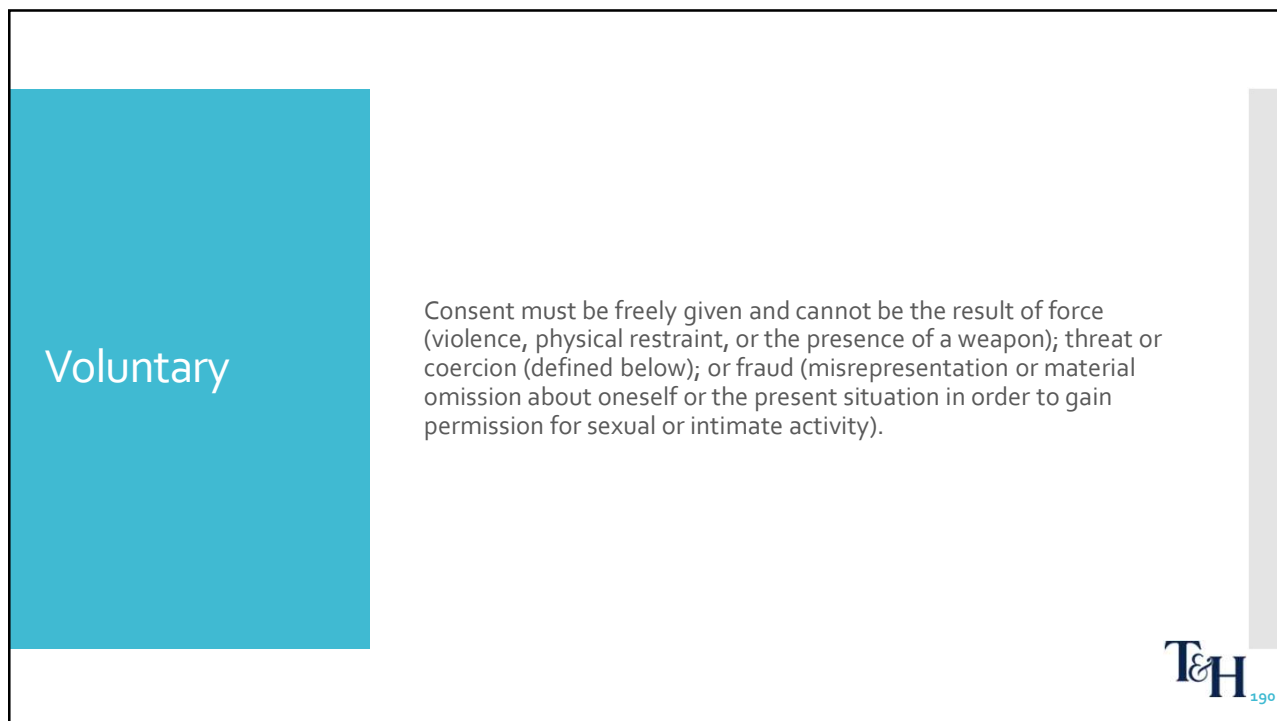


Active

Consent must be communicated in clearly understandable words or actions that reveal one's expectations and agreement to engage in specific sexual or intimate activity. This means that silence, passivity, submission, or the lack of verbal or physical resistance (including the lack of a "no") should not - in and of itself - be understood as consent. Consent cannot be inferred by an individual's manner of dress, the giving or acceptance of gifts, the extension or acceptance of an invitation to go to a private room or location, or going on a date.




189



Voluntary

Consent must be freely given and cannot be the result of force (violence, physical restraint, or the presence of a weapon); threat or coercion (defined below); or fraud (misrepresentation or material omission about oneself or the present situation in order to gain permission for sexual or intimate activity).



190

Present & Ongoing

Consent must exist at the time of the sexual or intimate activity. Consent to previous sexual or intimate activity does not imply consent to later sexual or intimate acts; similarly, consent to one type of sexual or intimate activity does not imply consent to other sexual or intimate acts. Consent may also be withdrawn at any time by the person making known, by articulated word or concrete action, his or her intention to withdraw it, and thereupon, the sexual or intimate activity should immediately cease.



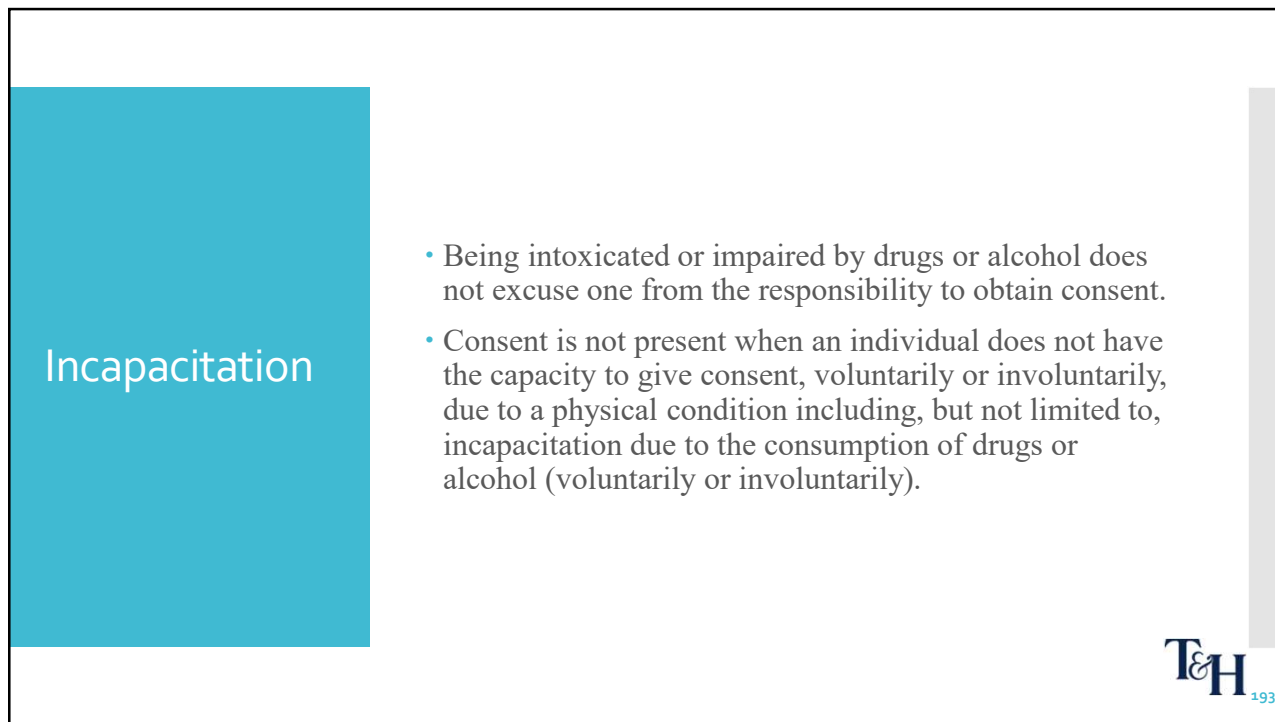
191

Consent

- When determining whether consent was present, we will consider whether a reasonable person in the same circumstances should have known whether the other party could or could not consent to the sexual activity.
- It is always the requirement of the individual initiating sexual contact (or undertaking a new type of sexual activity) to ensure that consent is present before acting and is present during sexual activity.



192



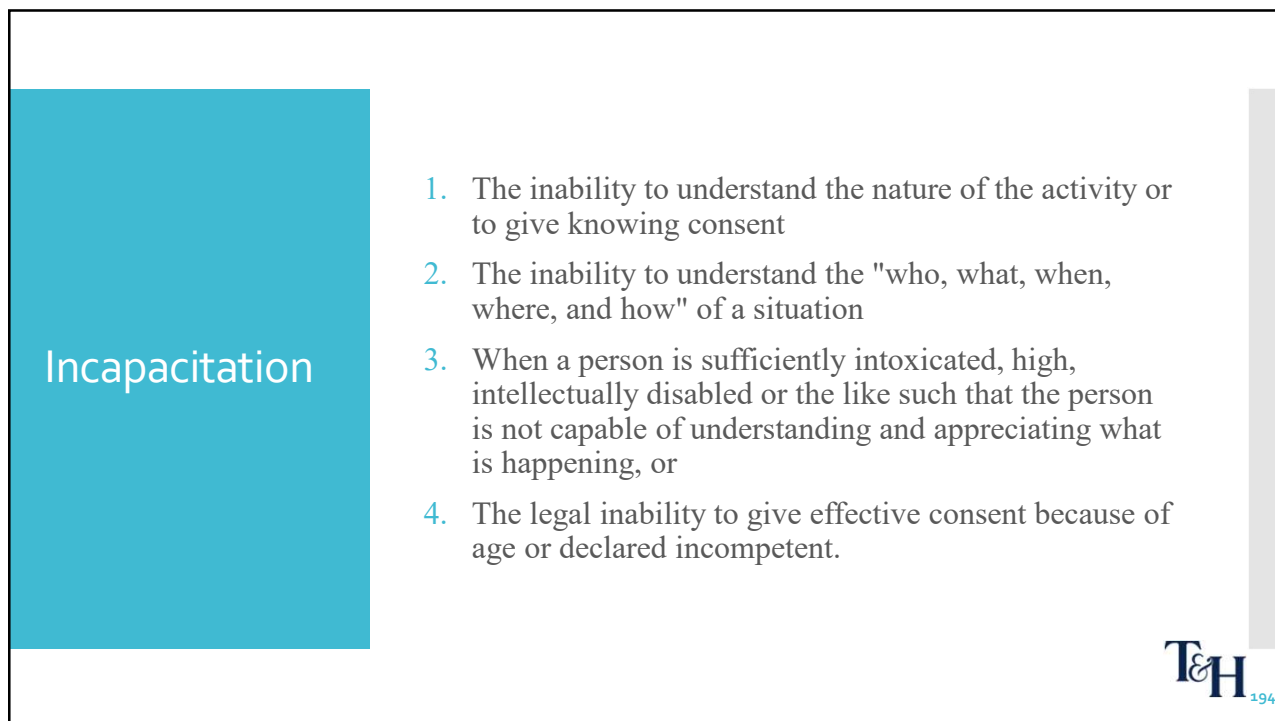
A slide with a teal header box on the left containing the word "Incapacitation". To the right, there are two bullet points. In the bottom right corner, there is a logo with the letters "T&H" and the number "193" below it.

Incapacitation

- Being intoxicated or impaired by drugs or alcohol does not excuse one from the responsibility to obtain consent.
- Consent is not present when an individual does not have the capacity to give consent, voluntarily or involuntarily, due to a physical condition including, but not limited to, incapacitation due to the consumption of drugs or alcohol (voluntarily or involuntarily).

T&H₁₉₃

193



A slide with a teal header box on the left containing the word "Incapacitation". To the right, there are four numbered list items. In the bottom right corner, there is a logo with the letters "T&H" and the number "194" below it.

Incapacitation

1. The inability to understand the nature of the activity or to give knowing consent
2. The inability to understand the "who, what, when, where, and how" of a situation
3. When a person is sufficiently intoxicated, high, intellectually disabled or the like such that the person is not capable of understanding and appreciating what is happening, or
4. The legal inability to give effective consent because of age or declared incompetent.

T&H₁₉₄

194



What questions do you have about the elements of the policies and procedures you have reviewed?

Group Discussion Policy & Procedure Elements



195



The Alleged Facts

- The parties both reported that they had discussed prior to going out that the Complainant did not like the Respondent “like that” and just wanted to be friends, nothing more.
- Both parties said that the parties had at least one shot of liquor before going to the party and three to five shots of vodka at the party. The Complainant says they also each consumed 2-3 beers at the party.
- The Respondent says they were keeping an eye on the parties’ drinking and “cut them both off” about halfway through the party. The Respondent says that both parties were “sober” by the time they left the party.



196

The Alleged Facts

- The Complainant consistently has reported and testified that they were heavily intoxicated, remembers little after about halfway into the party, but remembers “coming to” during the sexual interaction with the Respondent because it was “so shocking.” The Complainant said they remember the interaction “very clearly” but not the before or after.
- The Respondent says that they went into the bathroom at a party because the Complainant said they weren’t feeling well. The Respondent said that once in the bathroom with the door closed, the Complainant started kissing the Respondent. Things escalated from there, according to the Respondent, with the two touching each other in the groin area over the clothing. At some point, the Respondent says that the Complainant stopped them and started crying. The Complainant ran out of the bathroom.



197

The Alleged Facts

- Witness #1, who was not identified by either party but was identified by the investigator through investigation of who was at the party, said they were waiting for a long time for the bathroom at the party. After awhile, they banged on the door. At that point, Witness #1 saw the Complainant run out of the bathroom crying. The Respondent was in the bathroom. Witness #1 knows the Respondent from class, and so asked what was going on. Witness #1 said the Respondent said “Who knows?!” and then walked out of the bathroom quickly. When asked about this interaction after interviewing Witness #1, the Respondent acknowledged that the interaction occurred as Witness #1 reported but said they just “must have forgotten about it.”



198

The Alleged Facts

- Witness #2, who was identified by the Complainant as a friend at the party, said they saw the Complainant a few times at the party but were distracted because their crush was there and they were focused on flirting with the crush. Witness #2 said that the Complainant was "sort of wobbly" near the back half of the party, with maybe a little slurring of words, but that generally everyone at the party was "a little tipsy" so didn't think it was a big deal. Witness #2 said they did not notice the Complainant stumbling, seeming confused, or passing out.



199

The Alleged Facts


- In a text message the morning after the interaction, the Respondent sent a text message to the Complainant asking "Do you remember last night?" and saying "nothing happened, we just talked and hung out and it was a great time." Complainant said they responded "Yes. I remember. It was fine." Complainant said at the time they did not remember what happened the night before, they remembered later on but was too embarrassed to tell the Complainant. Later, when the Complainant remembered what occurred, they at first felt too ashamed to report the incident. Only when they learned that the Respondent had started dating Witness #3 did the Complainant feel they must report the incident because they did not want Witness #3 to get hurt.
- In a text message a few weeks after the party, the Respondent said they did not think the Complainant was "totally wasted" but that it seemed like the Complainant "was going to get sick" when they went into the bathroom. In the same text message the Respondent referred to being "buzzed" and "plastered" at the party.



200




The Alleged Facts


- Witness #3, who subsequently dated the Respondent after the incident, said that the Respondent discussed the situation with the Complainant with Witness #3 shortly after they started dating. The Respondent told Witness #3 that the parties were drunk on the night in question but that the conduct "was totally consensual." The Respondent acknowledges telling Witness #3 about what happened with the Complainant, but said they did so just because they were all in the same friend group and Respondent didn't want Witness #3 to hear that they had hooked up with Complainant from someone else. Respondent denies saying that they were drunk, but acknowledges mentioning "consent" during the conversation. Witness #3 said that after they started dating the Respondent, the Complainant confided that the Respondent had "taken advantage of" the Complainant at a party. The Respondent said this was after the conversation with the Respondent about the incident. Witness #3 said that while dating the Respondent, the Respondent once "went too far" when the two were hooking up even though Witness #3 and the Respondent had agreed on a boundary.
- The Respondent denied in the response to the directly related evidence that anything negative ever happened with Witness #3.



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Investigation Report

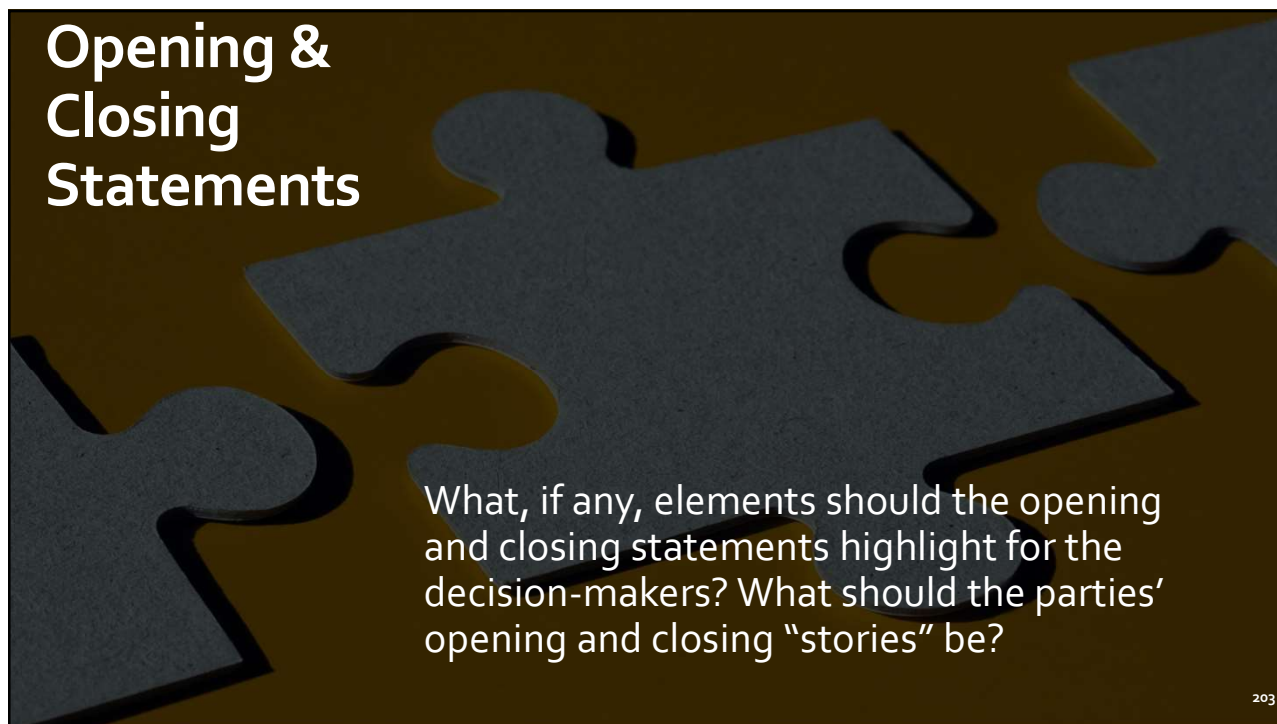
-  What are the disputed and undisputed facts?
-  What unanswered questions do you have?
-  Keep track of your questions



202

Opening & Closing Statements

What, if any, elements should the opening and closing statements highlight for the decision-makers? What should the parties' opening and closing "stories" be?

The background of the slide features several interlocking puzzle pieces in shades of grey and blue, set against a dark brown background. The puzzle pieces are arranged in a way that suggests a complex or interconnected theme, likely related to the legal or procedural nature of the training.

203


203

Breakout Discussion
Preparing for the Hearing

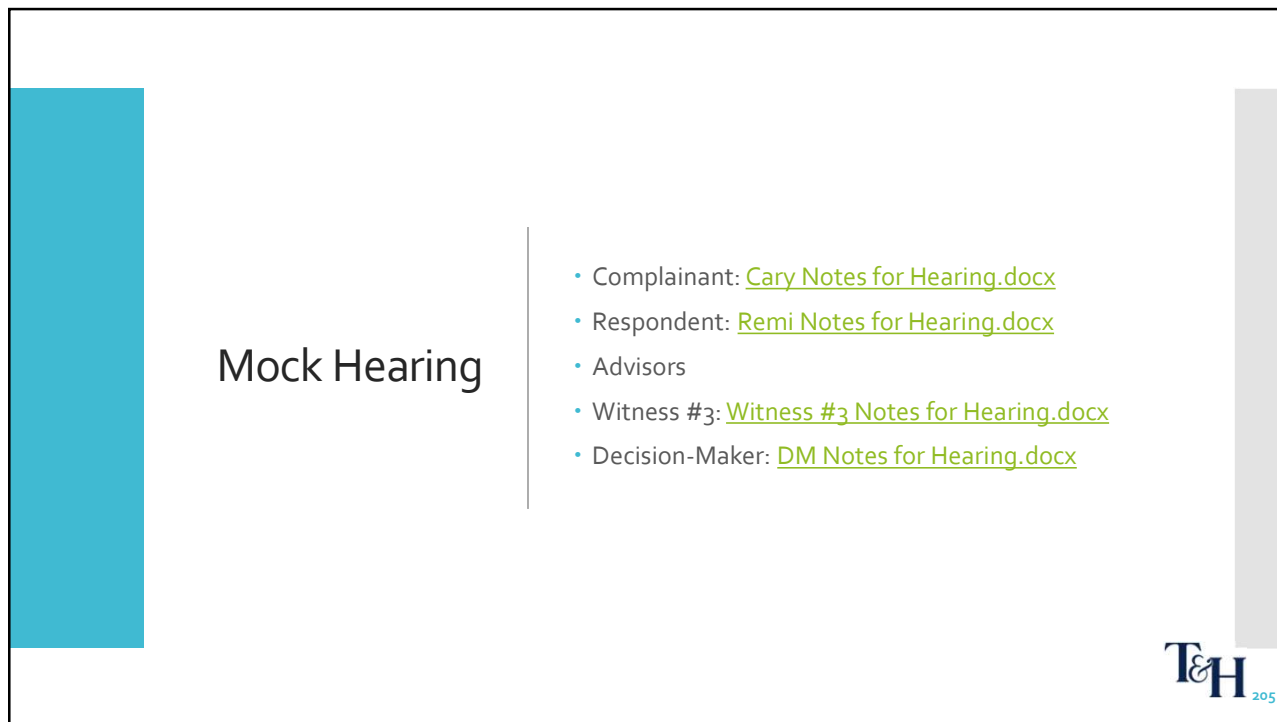
Break-Out Room 1: Complainant
Write out questions for Respondent & Witness 3
Pick two persons to play Complainant and their Advisor

Break-Out Room 2: Respondent
Write out questions for Complainant & Witnesses 1 & 2
Pick two persons to play Respondent and their Advisor

Break-Out Room 3: Decision-Maker
Write out questions for Parties & Investigator
Pick two persons to play Decision-Makers


The logo for Thompson & Horton LLP, featuring the letters 'T&H' in a stylized font with the number '204' below it.

204

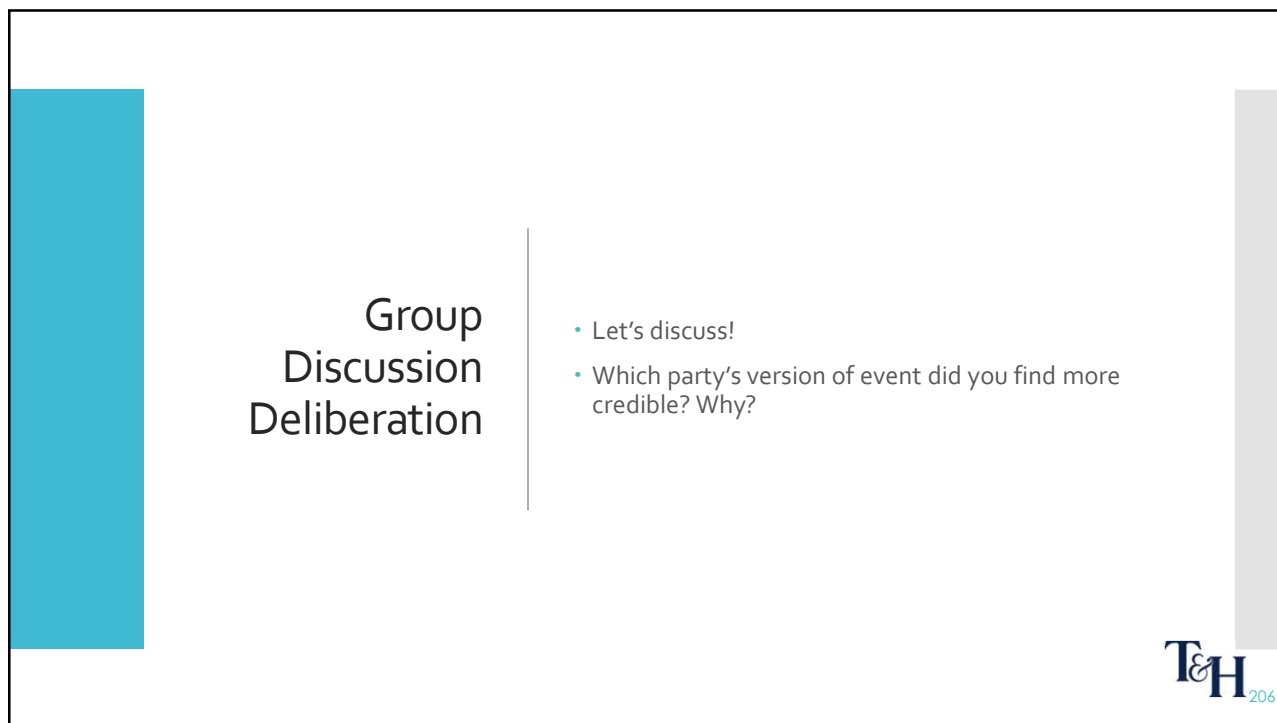
A slide titled "Mock Hearing" with a list of participants and their associated documents. The slide features a teal vertical bar on the left and a grey vertical bar on the right. The text is centered on the page.

Mock Hearing

- Complainant: [Cary Notes for Hearing.docx](#)
- Respondent: [Remi Notes for Hearing.docx](#)
- Advisors
- Witness #3: [Witness #3 Notes for Hearing.docx](#)
- Decision-Maker: [DM Notes for Hearing.docx](#)




205

A slide titled "Group Discussion Deliberation" with a list of discussion points. The slide features a teal vertical bar on the left and a grey vertical bar on the right. The text is centered on the page.

Group Discussion Deliberation

- Let's discuss!
- Which party's version of event did you find more credible? Why?



206

**THANK YOU!
QUESTIONS?**

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Jackie Gharapour Wernz
Partner

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