

**PSE TITLE IX DECISION-MAKER
FOUNDATIONS & PRACTICUM
SPRING 2023**

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Do You Use Title IX?



Is it Title IX sexual harassment?

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Do You Use Title IX?



Is it Title IX sexual harassment?




Did the harassment occur in an education program or activity?

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Do You Use Title IX?


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


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Do You Use Title IX?

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

 **Title IX
Grievance
Process**

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Do You Use Title IX? For example...

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

If answer to **any question** is **NO**, the Title IX Grievance Process does not apply

Use process for other misconduct



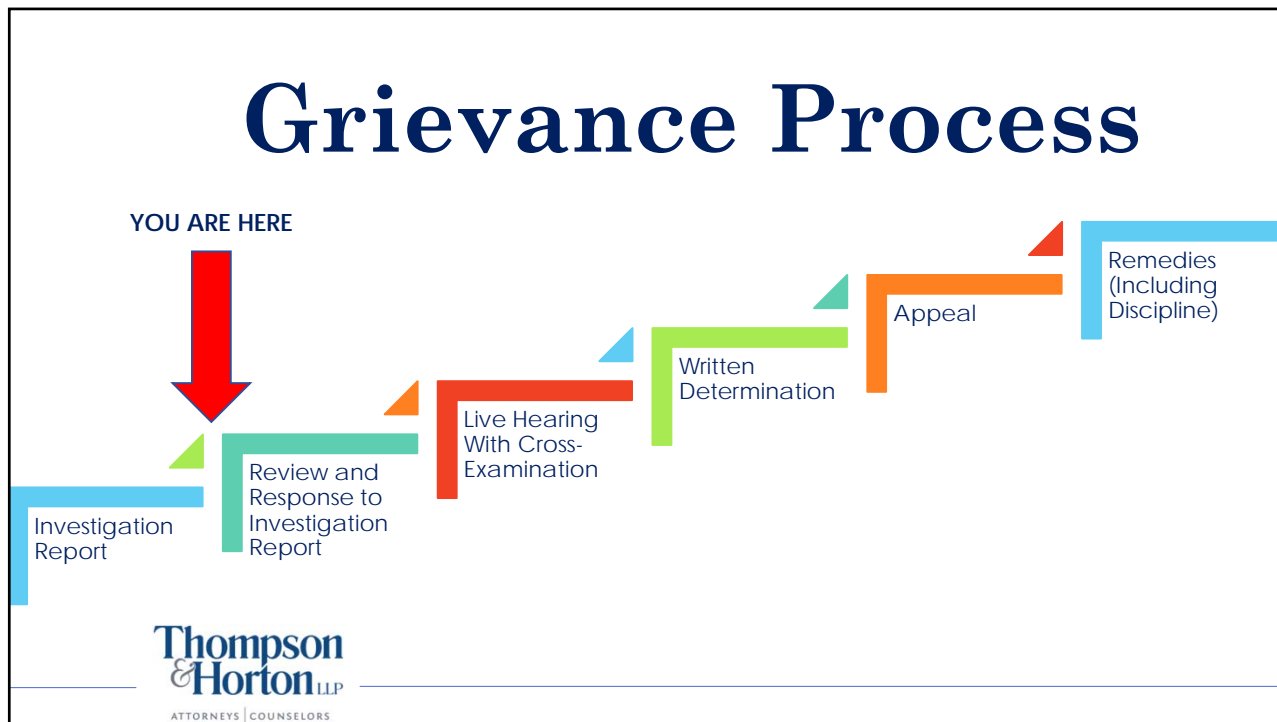
A red circle with a diagonal slash through it, indicating that the Title IX process does not apply if the answer to any question is NO.

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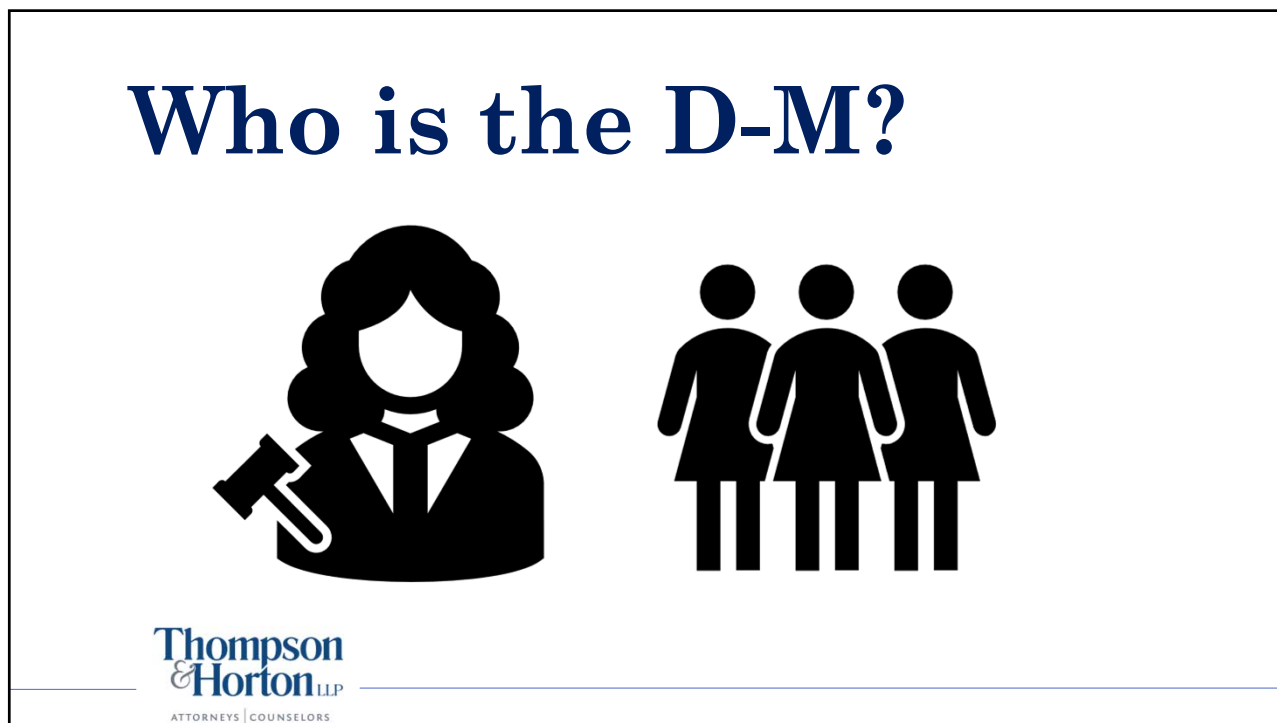
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What is the role of the decision-maker?

- To decide which party is right and which party is wrong
- To decide if the alleged conduct occurred and if so whether it is a policy violation
- To decide if there is enough evidence to find a policy violation
- To implement community standards regarding what is sexual harassment to protect the community

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The Decision-Making Framework



- Part 1**
Serving Impartially
- Part 2**
Learning the Case
- Part 3**
The Live Hearing
- Part 4**
The Written Determination
- Part 5**
Closing the File

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Scenario

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



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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.



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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.



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Scenario

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



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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.




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Part 1: Serving Impartially



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Impartiality

- ▶ Bias
- ▶ Conflict of Interest
- ▶ Prejudgment


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Bias

"[A]n inclination of temperament or outlook, especially a personal and sometimes unreasonable judgment."

"[T]o give a settled and often prejudiced outlook to" ...a person's background biases them against others who are not like them


Synonyms – nonobjectivity, one-sidedness, partiality, partisanship, prejudice
(Merriam-Webster)



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Bias



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

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Bias Examples

Men are sexually aggressive and likely to sexually assault women

Women often regret their sexual experiences and recast them as assault

Men cannot be sexually assaulted

The #metoo movement has led to many more false sexual assault reports by women

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Scenario

What gender is the alleged victim, Casey?

What gender is the alleged perpetrator, Ryan?

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Conflict of Interest

A situation in which the concerns or aims of two different parties are incompatible.

"A conflict of interest arises when what is in a person's best interest is not in the best interest of another person or organization to which that individual owes loyalty."

<https://ethicsunwrapped.utexas.edu/glossary/conflict-of-interest>

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Scenario

Clearest Conflicts—Decision-maker:
 Is related to Ryan
 Formerly dated Isa's parent
 Invests in a business with Casey's parent

Could be Conflicts—Decision-maker:
 Is Ryan's Coach
 Has previously disciplined Casey for dishonesty

Less Risk of Conflict—Decision-maker:
 Signed the Formal Complaint
 Attends the same place of worship as Casey's parents
 Has a history of speaking out on victim or accused rights
 Has other responsibilities, e.g. 504 Coordinator, that cover parties

Not a Conflict—Decision-maker:
 Is an employee or attorney
 Has been trained on trauma informed practices



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Prejudgment

"To judge before hearing or before full and sufficient examination"
 "[A]n opinion about a situation or a person that is formed before knowing or considering all of the facts."
 Cambridge Dictionary

Synonyms – preconception, assumption, presumption/presupposition, speculation
 Merriam-Webster



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Scenario

What do you think about the fact that...?

Casey and Ryan were dating

Casey “made out” with Ryan on multiple occasions

Casey only reported Ryan after being “dumped” and Ryan beginning to date Isa



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Prejudgment Examples

A person was described as clearly upset during their interview, so you presume they are telling the truth

A person was drinking at the time of the incident, so you presume they don't remember what happened

A person consented to sexual behavior before, so you presume they consented this time, too



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Serving Impartially

- Evaluate your own relationship to the case, including the parties and witnesses and the subject matter, throughout the process
- Tell the Title IX Coordinator any concerns with impartiality



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Serving Impartially

- Treat parties equally during the process
- Do not assume based on demographics
- Avoid stereotypes; treat parties as individuals, not members of a group or class



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Serving Impartially

- Follow all policies and procedures
- Objectively examine all the evidence before reaching a decision
- Make your own decision; don't let others influence you (including any investigator conclusions)



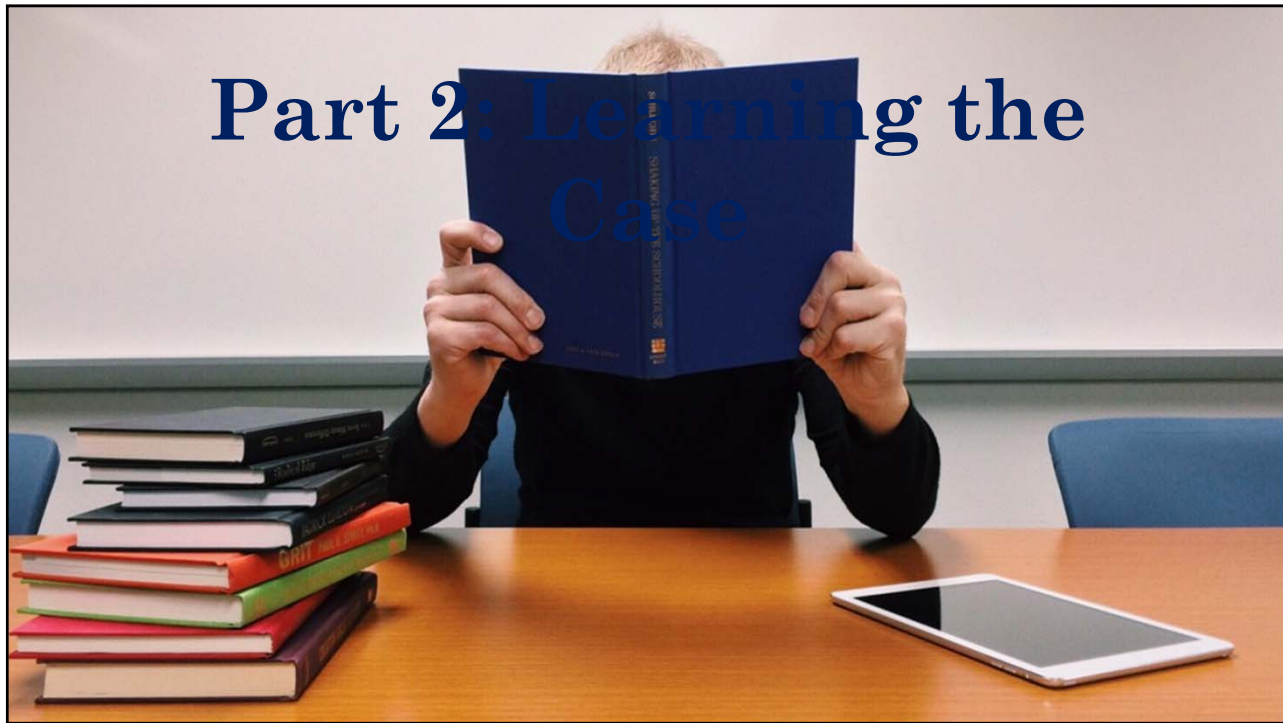
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Perceptions Matter

- Consider your language – avoid “victim,” “perpetrator” (“complainant” and “respondent” is safest), watch your “*hes*” and “*shes*”
- Do not make credibility inferences or conclusions based on status
- Consider what others would think, even if you believe you can overcome appearance of bias or conflict



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Part 2: Learning the Case

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Case File

- ▶ Formal Complaint
- ▶ Written Notice of Allegations
- ▶ Directly Related Evidence
- ▶ Party
- ▶ Responses to Directly Related Evidence
- ▶ Investigation Report
- ▶ Relevant Policy



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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



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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



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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.



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Scenario

Neither student has ever had disciplinary concerns before.



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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.



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Ask Yourself

- ▶ What issues are in dispute and what issues are not in dispute?
- ▶ What areas of inconsistency need to be considered?



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The Hearing

- ▶ Required for post-secondary education (PSE) institutions
- ▶ Can be in person or by videoconference
- ▶ If offered in person, must provide videoconference if requested
- ▶ Must include live cross-examination by an advisor
- ▶ Must be audio or audio-visually recorded or transcribed

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Structuring the Hearing

- ▶ Ground Rules/Questions?
- ▶ Opening Statements? By whom?
- ▶ Who asks questions first? (Decision-Makers, Advisors? Which party goes first?)
- ▶ Closing Statements? By whom?



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What if a party presents new evidence (not in the DRE or investigation report) at the hearing?

- The decision-maker(s) should allow it to avoid a due process challenge
- The decision-maker(s) should allow it if the parties agree
- The decision-maker should not allow it and should continue the hearing
- The decision-maker should not allow it but should remand the case to the investigation

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Notice of Hearing



- ▶ Send notice of hearing to the parties including date, time, location, purpose, and individuals who will be present
- ▶ Recommended to have a pre-hearing conference (make sure to provide notice of this meeting, too)



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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?



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Administration

- ▶ Recording or transcribing
- ▶ Notifying witnesses of attendance
- ▶ If the hearing is held in person, physical facilities, technology, etc.
- ▶ Deliberations



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Decorum

- ▶ Can have expectations for decorum for parties, advisors, witnesses, and support persons
- ▶ Consider your decorum as well



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Cross Examination

- ▶ At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all 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 party's advisor of choice and never by a party personally.
- ▶ Only relevant cross-examination and other questions may be asked of a party or witness.
- ▶ Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.



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Ruling on Questions

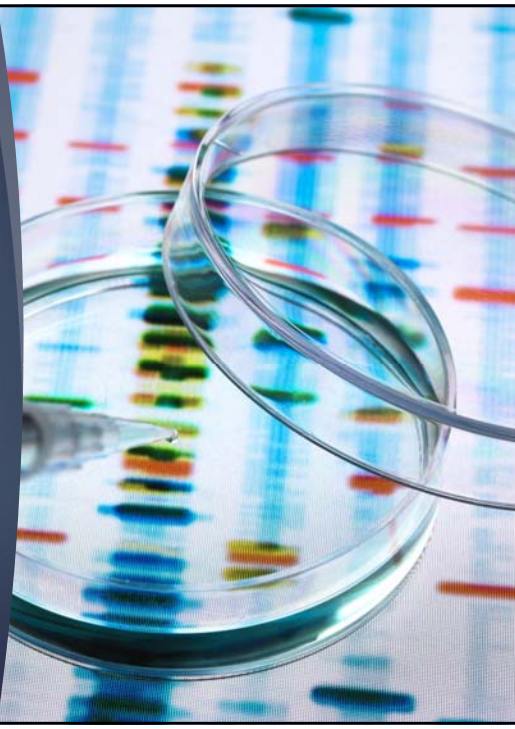
The decision-maker (or hearing chair if multiple decision-makers) must review each question before an answer to determine whether it is **relevant** and **respectful**.



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Relevance

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



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Relevance

Fact or Issue in Dispute

- ▶ 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

Helps Prove or Disprove Issue

- ▶ 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



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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

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Relevant?

Inculpatory

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

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Relevant?

Exculpatory

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

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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

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Ruling on Non-Relevance

- ▶ 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”



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Try & Try Again

- ▶ Not required to give parties an opportunity to restate their question
- ▶ If you do so, we recommend providing only one opportunity

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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?



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A screenshot of a mobile poll interface. At the top, it says "When poll is active, respond at pollev.com/thlaw411" and "Text **THLAW411** to **22333** once to join". The main question is "Relevant and Appropriate?". Below the question is a vertical line with "Yes" at the top and "No" at the bottom. At the bottom of the screen, there is a small footer: "Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app".

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Scenario

Question 2 (Casey to Ryan):

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



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Text **THLAW411** to **22333** once to join

Relevant and Appropriate?

Yes

No

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

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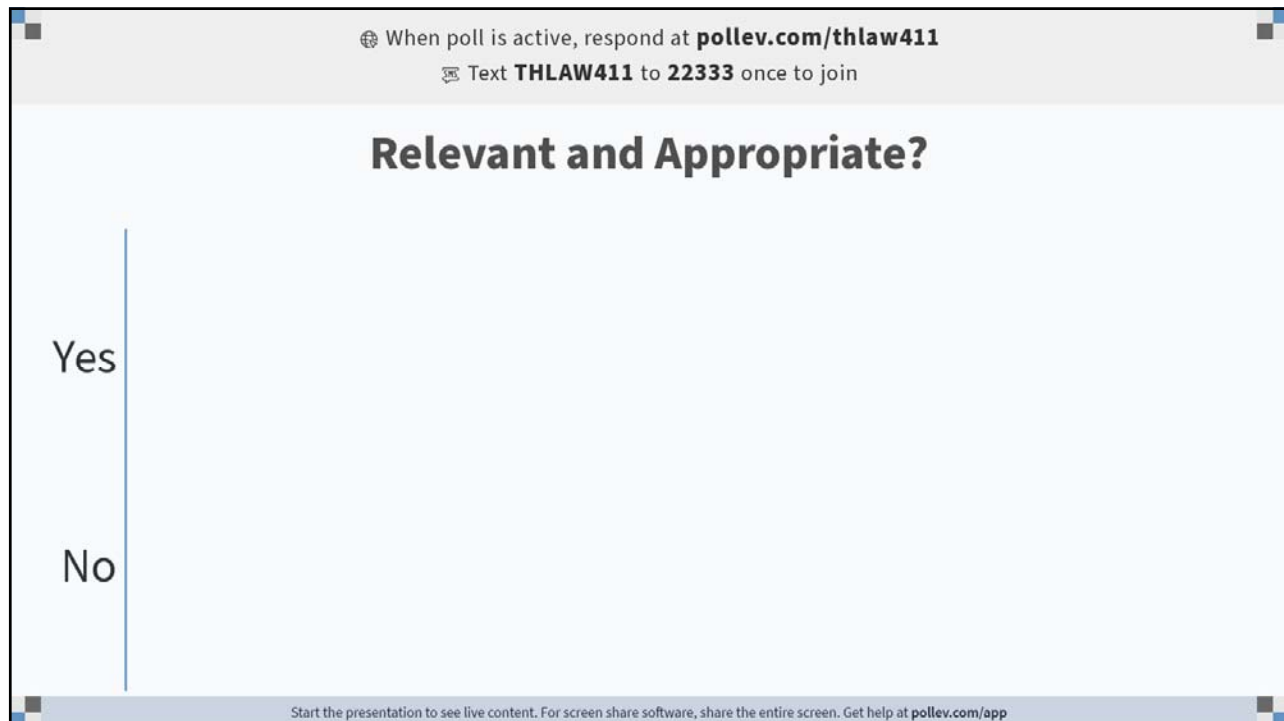
Scenario

Question 3 (Casey to Investigator):

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



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When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

Relevant and Appropriate?

Yes

No

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

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Scenario

Question 4 (Decision-Maker to Investigator):

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



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Scenario

Question 5 (Ryan to Casey):

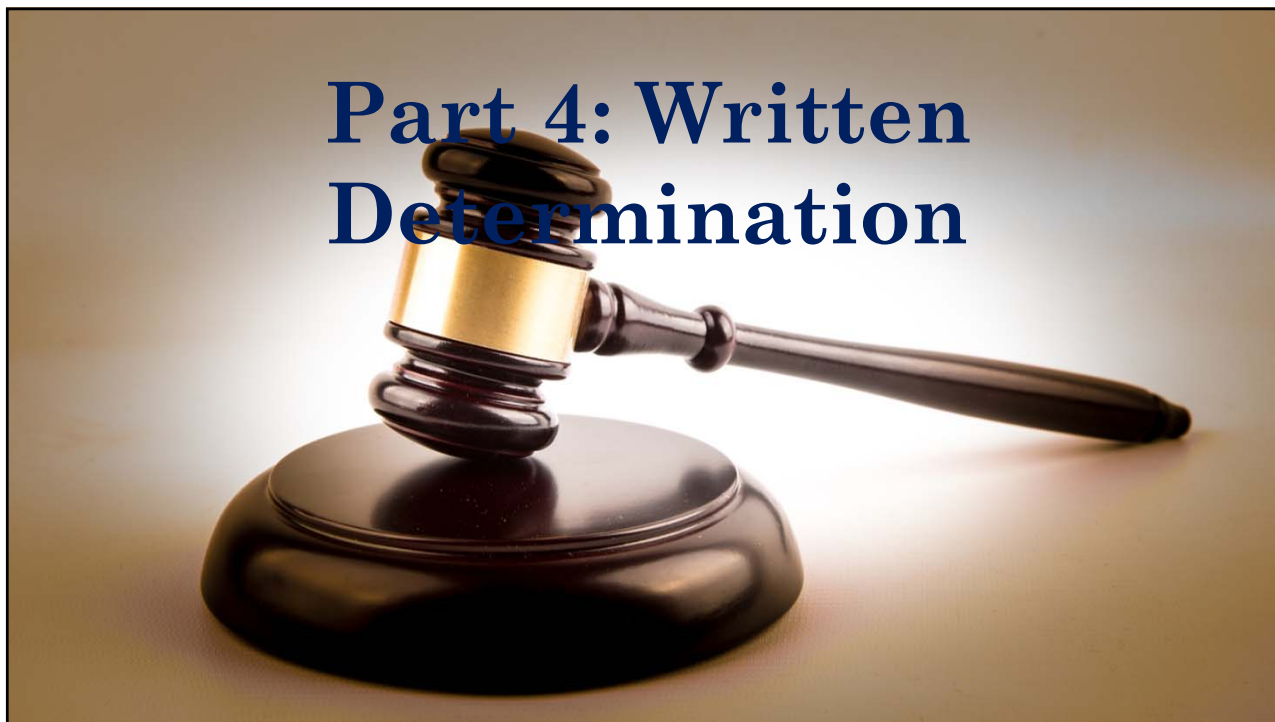
Isn't it true that you are on three different medications for being crazy and in therapy because you're a pathological liar?



69

A screenshot of a Pollev poll interface. At the top, it says "When poll is active, respond at pollev.com/thlaw411" and "Text **THLAW411** to **22333** once to join". The main question is "Relevant and Appropriate?". Below the question is a vertical line with "Yes" at the top and "No" at the bottom. At the bottom of the screen, there is a footer: "Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app".

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Part 4: Written Determination

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Written Determination

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility containing specific requirements.



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Written Determination

Consider how the institution has set up its process for panels

- ▶ Deliberations followed by verbal decision followed by written decision?
- ▶ Deliberations followed by written decision?



Case File

- ▶ Formal Complaint
- ▶ Written Notice of Allegations
- ▶ Directly Related Evidence
- ▶ Party Responses to Directly Related Evidence
- ▶ Investigation Report
- ▶ Party Responses to Investigation Report
- ▶ Hearing Transcript
- ▶ Policy



WRITTEN
DETERMINATION
REQUIREMENT
NUMBER ONE

Identify the
allegations
potentially
constituting sexual
harassment

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Allegations

CLAIM

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

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Scenario

The formal complaint alleges that Ryan Respondent (the “Respondent”) touched or rubbed Casey Complainant (the “Complainant”) in the genital area without consent and for purposes of sexual gratification on [dates].



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WRITTEN
DETERMINATION
REQUIREMENT
NUMBER TWO

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



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Procedural Steps

Notifications to the parties

Interviews with parties and witnesses

Site visits

Methods used to gather evidence

Hearings held



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Procedural Steps

Much of this information will be in the investigation report, but not all



Must include all procedural steps in the written determination



Ask the Title IX Coordinator for assistance finding missing steps



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Scenario

The Complainant reported the conduct to the Dean of Students on [date].

The Title IX Coordinator met with the Complainant on [date], to discuss supportive measures and the formal complaint process.

The Complainant signed a formal complaint on [date].



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Scenario

The Title IX Coordinator sent a notice of allegations on [date].

The Title IX Coordinator assigned the investigator to the case and notified the investigator and parties on [date].

The Title IX Coordinator verified no law enforcement involvement on [date].



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Scenario

Repeat for all steps
through the hearing and
written determination



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WRITTEN
DETERMINATION
REQUIREMENT
NUMBER THREE

Findings of fact
supporting the
determination



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Findings of Fact

- ▶ Identify the undisputed facts related to an issue
- ▶ Identify the first disputed fact related to an issue
 - ▶ Explain your conclusion as to what happened with the first disputed fact
 - ▶ Explain your reasoning for reaching that conclusion
 - ▶ Move to the next disputed fact
- ▶ Decide the overall issue
- ▶ Repeat for any other disputed issues



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What if it's “they said, they said” on a disputed fact?



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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**

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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?

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What is Credibility?

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



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Relevant vs. Credible

Relevant evidence tips the scale (even a feather)

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



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Credible ≠ Truthful

- ▶ Just because you don't find a witness credible does not mean they are a liar
- ▶ We all remember experiences differently and have different perspectives that shape how we view incidents

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Credible ≠ Truthful

Think about your last fight with a loved one or close friend...



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Assessing Credibility

According to the U.S. Department of Education's Office for Civil Rights

“Specialized legal training is not a prerequisite for evaluating credibility, as evidenced by the fact that many criminal and civil court trials rely on jurors (for whom no legal training is required) to determine the facts of the case including the credibility of witnesses.”



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U.S. Department of Education 2020
Title IX Regulations

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Oversimplify Much?

Jurors are given thorough instructions on how to make credibility assessments



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Coordinator to the Rescue!



The Title IX Coordinator and legal counsel may be your best friends when it's time to assess credibility – don't hesitate to ask for help

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Credibility Factors

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



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

EEOC Enforcement Guidance:
Vicarious Liability for Unlawful
Harassment by Supervisors (Jun.
18, 1999)



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

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Credibility Factors

- ▶ Body Language & Demeanor
- ▶ Specific Details
- ▶ Inherent Plausibility
- ▶ Internal Consistency
- ▶ Corroborative Evidence



U.S. Department of Education 2020
Title IX Regulations



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Corroboration

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



Plausibility

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

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?



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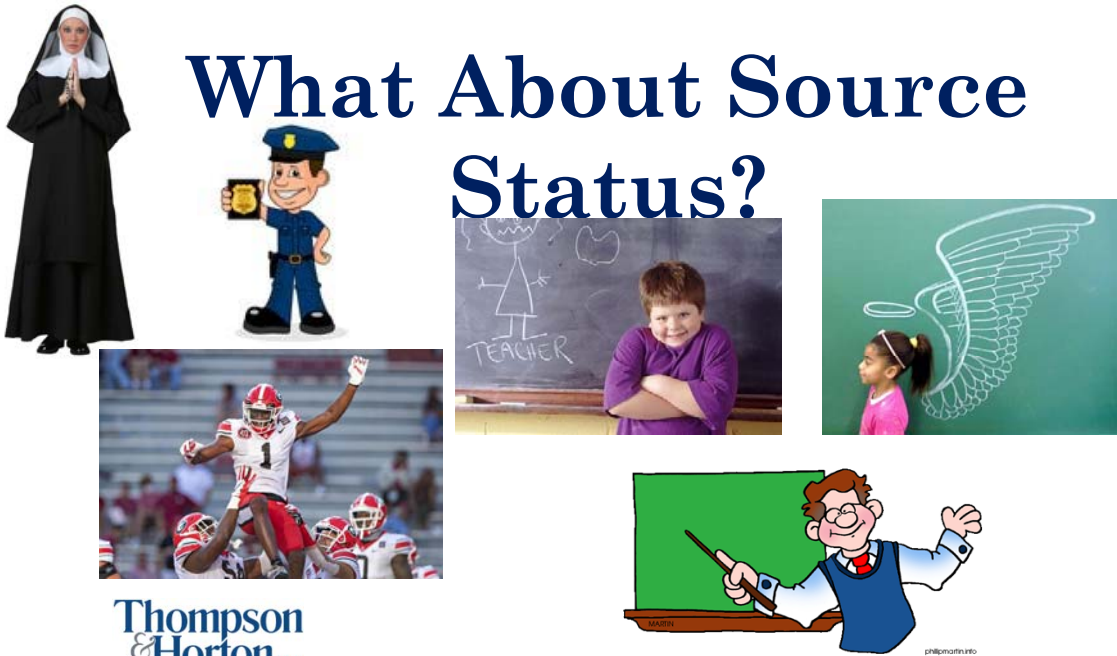
Source Motive

- ▶ Did the witness have reason to lie (or, more likely, embellish)?
 - Friendships
 - Negative History
 - Impact on Witness



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What About Source Status?



The collage includes: a photograph of a nun in a black habit; a cartoon police officer in a blue uniform holding a badge; a photograph of a football player in a white jersey with the number 1; a photograph of a young boy in a purple shirt standing in front of a chalkboard with a stick figure and the word 'TEACHER' drawn on it; a photograph of a young girl in a pink shirt looking at a chalkboard with large angel wings drawn on it; and a cartoon illustration of a male teacher with glasses pointing at a green chalkboard.

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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

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Credibility and Bias

Do not get sucked into biased thinking when assessing credibility

- Bias for or against complainants (victim blaming) or respondents (assuming responsibility)
- Bias against individuals based on culture, background, religion, etc.



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Credibility and Bias

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)



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Trauma & Credibility

- ▶ Be *trauma informed* not *trauma lenient*
- ▶ Do not make negative inferences against a party because of trauma justified responses
- ▶ But do not use trauma to “fill in the gaps” of evidence



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WRITTEN
DETERMINATION
REQUIREMENT
NUMBER FOUR

Use your standard of evidence (typically “preponderance of the evidence” or “more likely than not”)



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Preponderance

- ▶ Used by most institutions
- ▶ It is more likely than not (greater than a 50% chance) that something is true
- ▶ Applies to both findings of fact and the overall question of responsibility
- ▶ For findings of fact, ask if there is sufficient evidence to find that it is more likely than not that a disputed fact is true
- ▶ Once you have “found” all your facts, look at them as a whole to decide if it is more likely than not that a policy violation occurred



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Scenario

Undisputed Facts:

There is no dispute that...

Casey and Ryan started dating at the beginning of the school year.

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Scenario

Disputed Facts:

It is disputed whether...

Ryan knew that Casey did not want to engage in sexual activity with Ryan other than kissing.



111

Scenario

Evidence About Disputed Facts:

Casey said that Ryan knew that Casey did not want to engage in sexual activity with Ryan other than kissing. Casey said the two discussed it. Ryan says they did not ever discuss it.



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Scenario

Evidence About Disputed Facts:

The parties reported their position on this disputed fact consistently to the investigator and all credibility factors weighed equally between the parties.



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Scenario

Evidence About Disputed Facts:

Despite being asked, neither party presented any witnesses to whom they had said anything that would support or refute the claim.



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Scenario

Evidence About Disputed Facts:

However, the Complainant stated that the Complainant welcomed the Respondent's touching and rubbing of the Complainant's behind during the second incident on [date].



115

Scenario

Evidence About Disputed Facts:

That evidence corroborates, even if only slightly, the Respondent's position that the Complainant did not limit their physical activity to kissing alone.



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Scenario

Finding of Fact:

Based on the totality of the relevant evidence available, there is insufficient evidence to support the Complainant's claim that the Respondent was aware of limitations on their sexual behavior. That does not mean that the Complainant's necessarily consented to the conduct on the days in question. But I will not consider any knowledge by the Respondent of boundaries on touching as evidence of whether there was consent on the days in question.



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Scenario

Repeat for all
undisputed and
disputed facts



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Scenario

Undisputed: Ryan touched Casey as alleged on (first incident).

Disputed: Whether the touching was consensual

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Scenario

Undisputed: Ryan touched Casey as alleged on (second incident).

Disputed: Whether the touching was consensual

120

Scenario

What You Can't Consider Without Casey's Informed Consent:

Ryan's claim that Casey let another student engage in similar behavior to that which occurred between the parties.



121

Scenario

What You Can Consider:

Evidence from Ryan of conduct between Ryan and Casey in the past to show consent to the incidents in question—but consider “weight”



122

Scenario

What You Can't Consider:

Any other evidence that is not "relevant" —keeping in mind the definitions and exceptions we discussed earlier.



123

Relevance Exceptions

"Rape Shield"	Complainant's sexual predisposition or prior sexual behavior (limited exception)
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



124

Scenario

Balanced Weight:

Both stories have been consistent

Both parties told "outcry" witnesses

No incidents of past behavior or discipline



125

Scenario

Be Careful With:

Casey's report after Ryan broke things off

Video showed Ryan and Casey walking arm in arm, cuddling, and laughing as they walked

Ryan's nervousness and initial reluctance to describe the touching to the investigator

Ryan *tearfully* denied the allegations to mom right after being charged



126

Scenario

A 51/49 case in favor of a disputed fact leads to a finding of "sufficient evidence that the fact occurred as alleged."



127

Scenario

A 51/49 case against a disputed fact leads to a finding of "insufficient evidence that the fact occurred as alleged."



128

WRITTEN
DETERMINATION
REQUIREMENT
NUMBER FIVE

Conclusions
regarding the
application of the
educational
institution's code of
conduct to the facts

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129

Applying Code to Facts

If there is insufficient evidence of an essential element of an allegation, you must find insufficient evidence of sexual harassment under Title IX.

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130

Scenario

Because there is insufficient evidence that the Respondent's touching of the Complainant was nonconsensual, I must find insufficient evidence of a violation of the code of conduct prohibiting sexual harassment prohibited by Title IX.



131

Applying Code to Facts

If there is sufficient evidence that some or all of the conduct, as alleged, occurred, the decision-maker(s) must consider whether the conduct *established* constitutes prohibited sexual harassment under Title IX.



132

What Title IX Covers

- ▶ The Title IX Coordinator should have previously determined that the conduct alleged, if true, is covered by Title IX
- ▶ However, the written determination must include the analysis of the conduct *established*



133

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



134

Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
- ▶ Based on sex
- ▶ That:
 - Is one of the Title IX “Big Five” or
 - Creates a Title IX “Hostile Environment”



135

Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
- ▶ Based on sex
- ▶ That:
 - Is one of the Title IX “Big Five” or
 - Creates a Title IX “Hostile Environment”



136

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



137

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.



138



139

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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140

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.



141

A screenshot of a web browser displaying a poll. At the top, a grey bar contains the text "When poll is active, respond at pollev.com/thlaw411". The main content area has a light blue background with the question "Is the conduct unwelcome?" in bold black text. Below the question is a horizontal line, and at the bottom are two buttons labeled "Yes" and "No". A footer bar at the very bottom contains the text "Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app".

142

Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
- ▶ Based on sex
- ▶ That:
 - Is one of the Title IX “Big Five” or
 - Creates a Title IX “Hostile Environment”



143

Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
- ▶ Based on sex
- ▶ That:
 - Is one of the Title IX “Big Five” or
 - Creates a Title IX “Hostile Environment”



144

Based on Sex

- ▶ “Sexual”
- ▶ Based on gender (e.g., stereotypes of women’s roles)
- ▶ Based on sexual orientation
- ▶ Based on gender identity



145

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



146

Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
- ▶ **Based on sex**
- ▶ **That:**
 - Is one of the Title IX “Big Five” or
 - Creates a Title IX “Hostile Environment”



147

Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
- ▶ Based on sex
- ▶ **That:**
 - **Is one of the Title IX “Big Five” or**
 - **Creates a Title IX “Hostile Environment”**



148

“Title IX Sexual Harassment”

The Title IX “Big 5” OR Title IX “Hostile Environment”



149

“Title IX Sexual Harassment”

The Title IX “Big 5” OR Title IX “Hostile Environment”



150

Title IX “Big 5”

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



** as defined in the federal higher education laws, the Clery Act and the Violence Against Women Act (known as the “big four”)



151

#1 of the “Big 5” 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



152

#2 of the “Big 5”

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**



153

What is Consent?

- ▶ “Consent” comes into play in sexual assault cases, including those involving fondling
- ▶ Consent is not defined by OCR/the 2020 Title IX rules
- ▶ Must be defined in your policies/procedures



154

#3 of the “Big 5”

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



155

#4 of the “Big 5”

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



156

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

- ▶ A course of conduct based on sex (2+ times)
- ▶ Directed at a specific person
- ▶ That would cause a reasonable person to:
 - Fear for the person’s safety or
 - Fear for the safety of others or
 - Suffer substantial emotional distress
- ▶ Can be direct or indirect



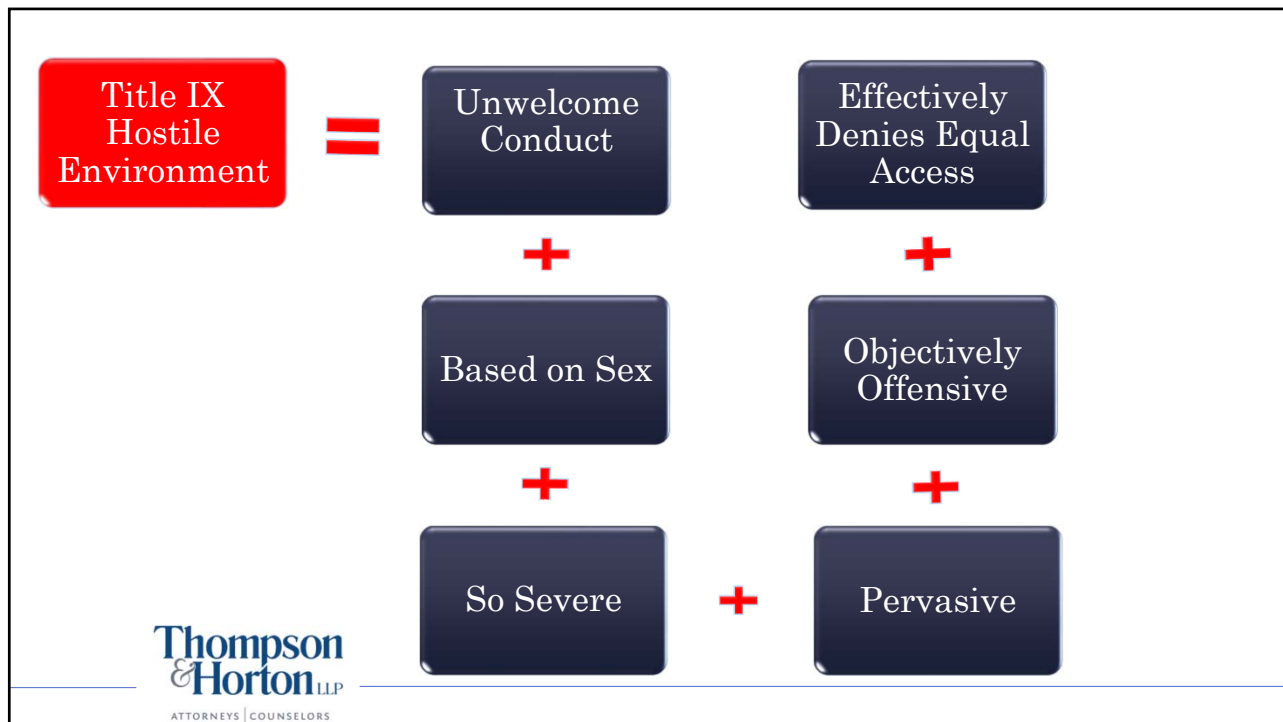
157

“Title IX Sexual Harassment”

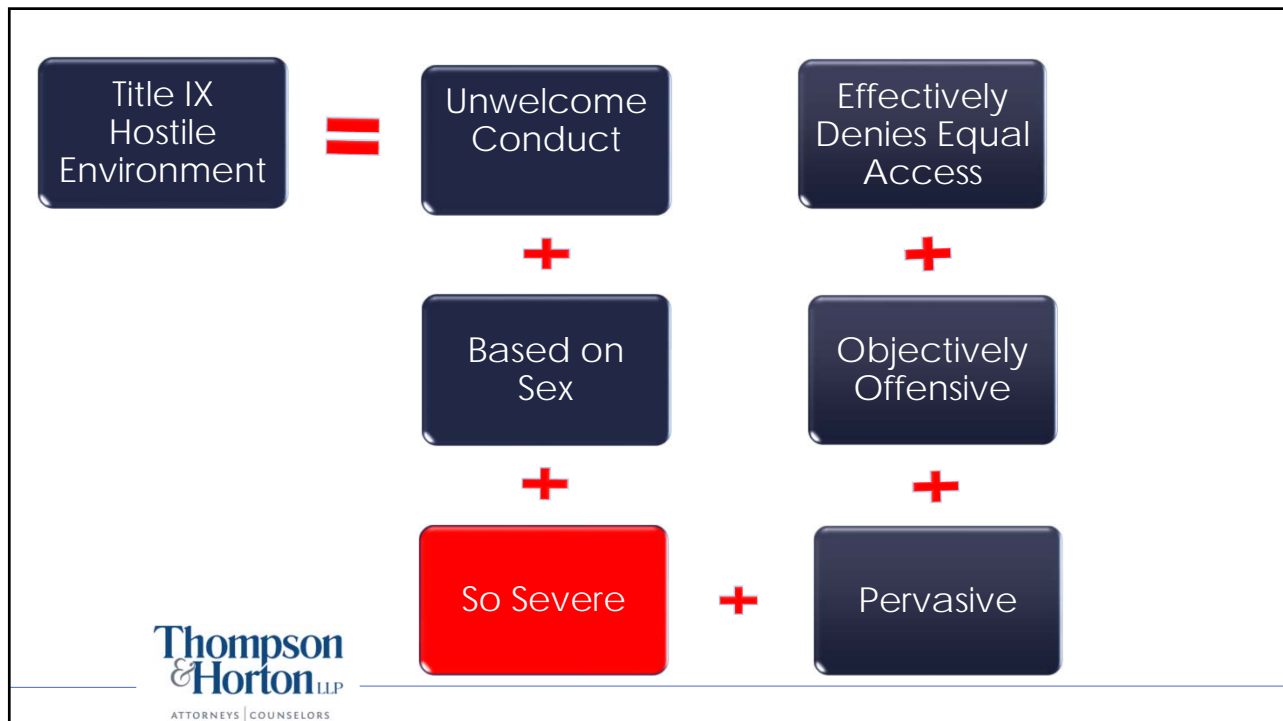
The Title IX “Big 5” OR Title IX “Hostile Environment”



158



159



160

What does "severe" mean (one word)?

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

161

Dictionary Definition

“Severe”

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

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162

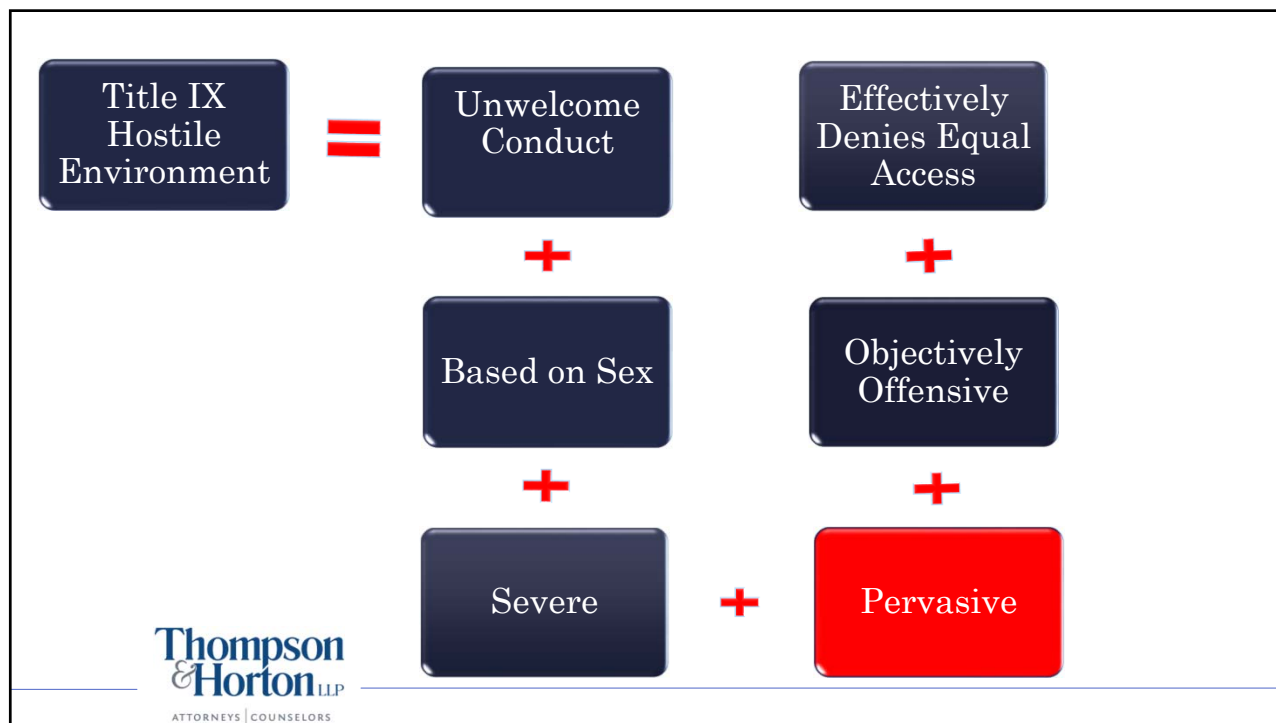
Case Law Definitions

- ▶ “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)



163



164

What does "pervasive" mean (one word)?

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

165

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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166

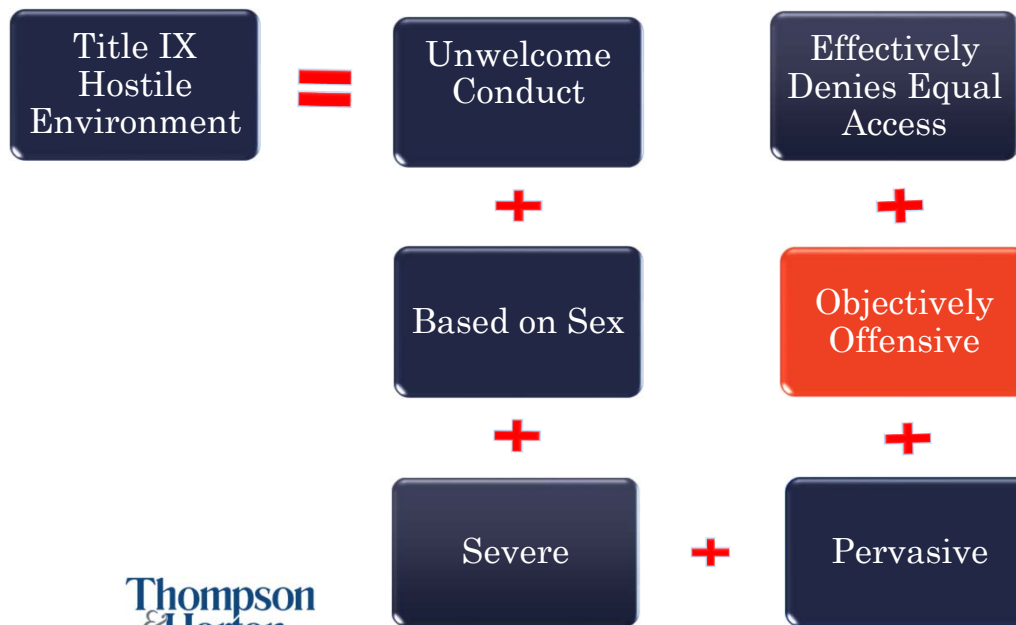
Case Law Definitions

- ▶ “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)



167



168

Dictionary Definition

“Objectively Offensive”

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



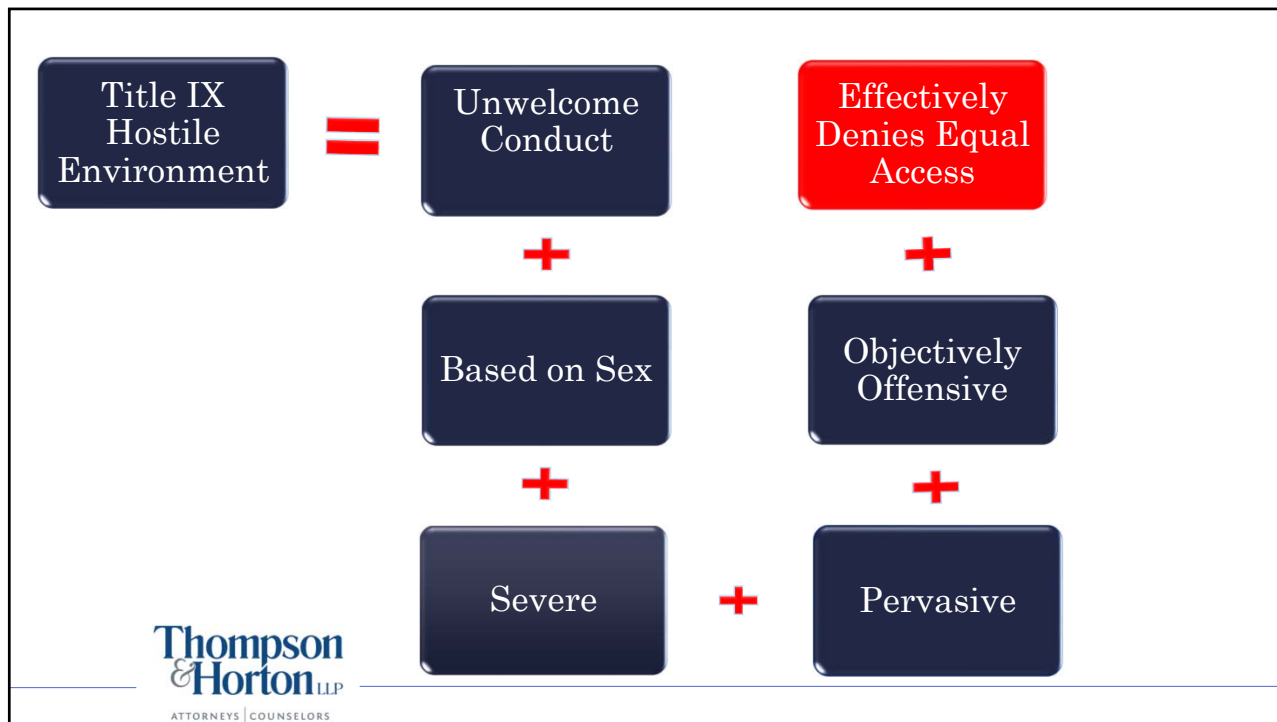
169

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 were aimed.



170



171

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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172

Effective Denial

Examples may include:

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



173

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



174

Effective Denial of Equal Access

- ▶ The key: Deciding the complainant is “not traumatized enough” would be impermissible
- ▶ If you find severe, pervasive, and objectively offensive conduct, you likely will find effective denial

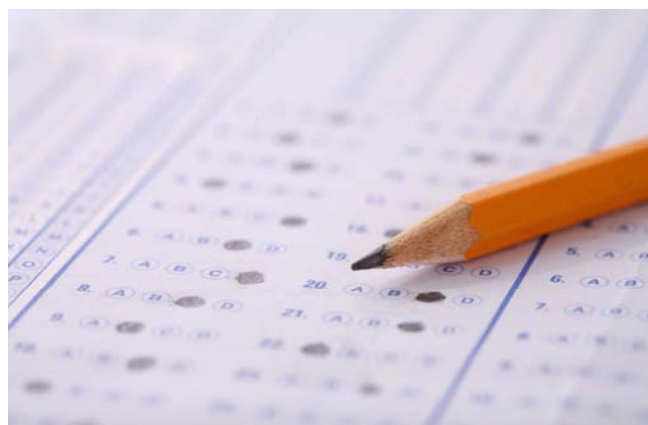


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175

TEST YOURSELF

Is it Title IX Sexual Harassment?
(The “Big Five” or “Hostile Environment”)



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176

Test Yourself

Professor Patterson notices that basketball players regularly slap each other on the butt during games.



177

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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

178

Test Yourself

Two students begin dating and move in together. One reports that the other has begun hitting them, including on campus.



179

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Is it Title IX Sexual Harassment?

- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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

180

Test Yourself

An unknown person airdropped a video on campus of a student, Carson, engaging in sexual activity with an unknown person off campus



181

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Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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

182

Test Yourself

Carson goes to Professor Patterson's office hours to ask how to bring up their grade. Professor Patterson says "It's so hard to think about anything right now, my neck is killing me. Would you mind giving it a quick massage?"



183

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- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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

184

Test Yourself

Robin, the student editor of the campus newspaper, tells Carson, a student photographer, they will publish Carson's photo on the front page of the paper if Carson goes out with Robin.



185

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Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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

186

Test Yourself

While drinking and partying on campus, Robin and Carson start wrestling vigorously. They are laughing the whole time. Robin had a pencil in their pocket, and during the scuffle the pencil entered Carson's anus through the clothing. Carson says they know it was an accident and don't think Robin did it for a sexual reason.



187

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Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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

188

Test Yourself

A nursing student, Carson, reports that another student, Robin, kissed Carson out of nowhere on campus. Carson says they have had issues with Robin for months, including Robin using racial slurs, making fun of people for being overweight, and hurting animals on campus. Carson's email to the Title IX Coordinator says they're at their "wit's end with this sexual harassment."



189

When poll is active, respond at pollev.com/thlaw411
 Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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

190

Test Yourself

Carson reports that they often see Robin taking pictures of Carson on campus. Robin has never asked to do so. Robin has also written on some Discord pages about being “obsessed” with a student. Although Robin doesn’t name the student, Carson has some of the characteristics of the person described.



191

When poll is active, respond at pollev.com/thlaw411
 Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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

192

Test Yourself

Carson's friends report they are worried about Carson. Since beginning to date Robin, Carson has been withdrawn and has seemed afraid whenever around Robin. Carson's friends noticed Carson has bruises on their wrists, though they don't know what they are from.



193

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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

194

Educator Misconduct

- ▶ Remember.... Some courts recognize sexual misconduct between a school employee and a student to be sexual harassment under Title IX even if the hostile environment requirements are not met



195

Title IX Sexual Harassment Is....

- ▶ Unwelcome conduct
- ▶ Based on sex
- ▶ That:
 - Is one of the Title IX “Big Five” or
 - Creates a Title IX “Hostile Environment”



196

Title IX Also Requires

The Title IX rules specify that a school’s “education program or activity” includes situations over which the school exercised substantial control over both the **context of the harassment** and **the alleged harasser**



197

Education Program or Activity

The sexual harassment must occur within the school’s educational program or activity



- Includes situations where conduct occurs as part of the school’s “operations”
- “Includes locations, events, or circumstances over which the [school] exercised substantial control over both the respondent and the context in which the sexual harassment occurs”



198

Off-Campus Events & Activities

Factors such as whether the school funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred may be helpful or useful for schools to consider to determine the scope of a school's program or activity, but no single factor is determinative



199

TEST YOURSELF

Is it in a Program or Activity?



200

Test Yourself

Student Robin allegedly sexually assaulted student Carson in a bathroom on campus.



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201

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

Is the conduct in the school's educational program or activity?

Yes No

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

202

Test Yourself

Robin allegedly sexually assaulted Carson during free time at the hotel on an out of town athletics trip.



203

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

Is the conduct in the school's educational program or activity?

Yes No

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

204

Test Yourself

Robin allegedly sexually assaulted Carson out of state over the summer at Robin's parent's home. Carson is fearful of seeing Robin on campus.



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205

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

Is the conduct in the school's educational program or activity?

Yes No

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

206

Test Yourself

Robin allegedly sexually assaulted Carson out of state over the summer at Robin's parent's home. Carson says Robin has been spreading rumors about how "easy" Carson is and how they like it rough.



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207

When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to **22333** once to join

Is the conduct in the school's education program or activity?

Yes No

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

208

Test Yourself

Carson reports sexual harassment by Robin online.



209

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

Is the conduct in the school's educational program or activity?

Yes No

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

210

Test Yourself

Carson reports sexual harassment by Robin through their school-issued email accounts.



211

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

Is the conduct in the school's educational program or activity?

Yes No

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

212

Title IX Also Requires

The Title IX rules specify that conduct must be “against a person **in the United States**”



213

In the United States



214

In the United States

- ▶ The Title IX rules do not apply extraterritorially (such as study abroad programs or Spring Break abroad)



215

Not in the E/PA or in US?

- ▶ DO NOT IGNORE IT
- ▶ As with any other conduct that falls outside Title IX, other code of conduct provisions can be used to address such conduct
- ▶ Support, support, support



216

Scenario

The conduct established by a preponderance of the evidence is fondling, which is a type of sexual assault prohibited by Title IX.

The conduct occurred at school, so occurred in a program or activity of the educational institution.

The conduct occurred at school, so occurred against a person in the United States.



217

218

WRITTEN
DETERMINATION
REQUIREMENT
NUMBER SIX

A statement of,
and rationale for,
the result as to
each allegation



218

Result of Allegation

- ▶ A determination regarding responsibility
- ▶ The reasons for the determination
- ▶ A list of sanctions imposed on the respondent
- ▶ Whether remedies provided to the complainant (do not list; communicate privately to the complainant)



219

Remember Preponderance

- ▶ It is more likely than not (greater than a 50% chance) that something is true
- ▶ Applies to both findings of fact and the overall question of responsibility
- ▶ For the overall question of responsibility, ask if the facts proved establish Title IX Sexual Harassment in an education program or activity and against a person in the United States



220

What About FERPA?

- ▶ OCR believes that sharing the result as to each allegation including a list of sanctions because sanctions “always directly impact the victim” and so are permitted under FERPA
- ▶ Remedies do not directly affect the respondent so should be communicated separately to the Complainant



221

Scenario

Result of the Allegation

Because the grievance process established that the Respondent engaged in fondling of the Complainant at school, I find sufficient evidence to support the allegation and establish a violation of the institution’s Title IX Sexual Harassment policy. Based on my finding, I recommend that the Respondent be expelled. Remedies will also be provided to the Complainant, which will be communicated to the Complainant separately.



222

223

WRITTEN
DETERMINATION
REQUIREMENT
NUMBER SEVEN

Provide the written
determination to
the parties
simultaneously

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223

224

WRITTEN
DETERMINATION
REQUIREMENT
NUMBER EIGHT

Process for appeal

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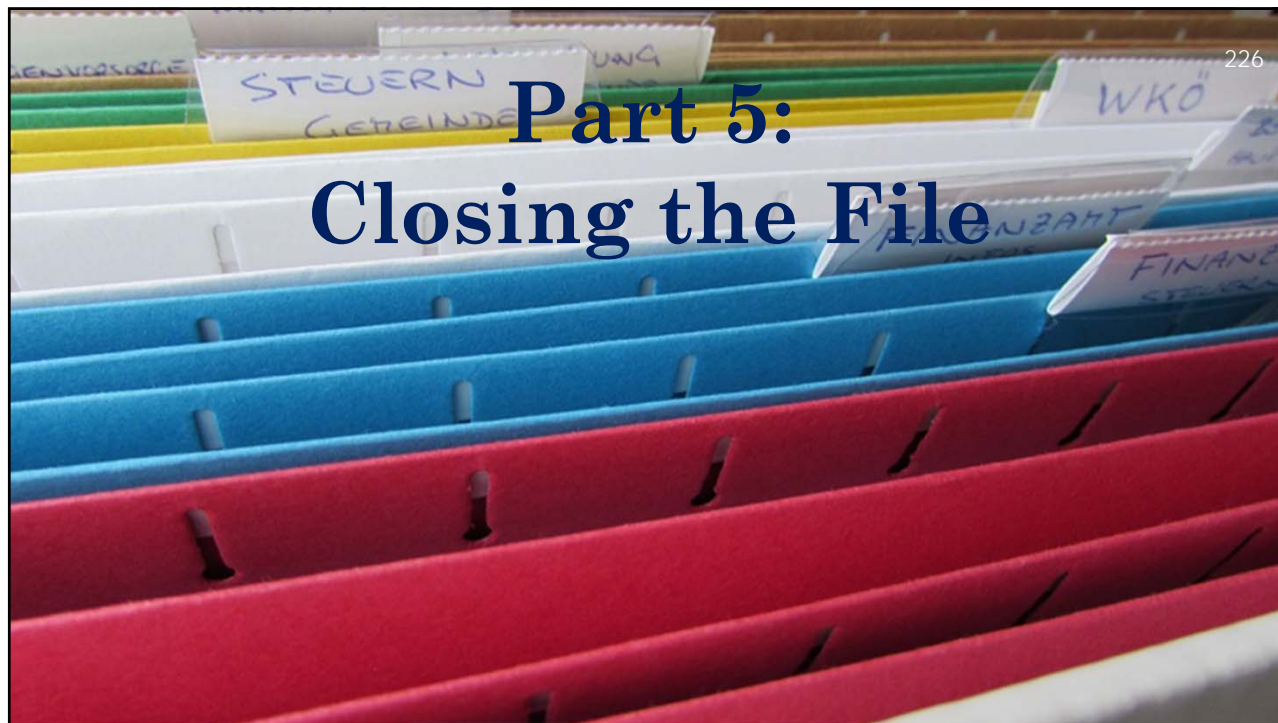
224

Decision-Making Disasters


- ▶ Not explaining the process to the parties and advisors beforehand
 - Party, (Parent) and Advisor Expectations
- ▶ Not thinking about procedural elements that are not mandated by law



225



226



Closing the File

- Finalize the file
- Transmit the file to the Title IX Coordinator or their designee for the case

227



Practicum

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228

Case File

- ▶ Formal Complaint
- ▶ Written Notice of Allegations
- ▶ Directly Related Evidence
- ▶ Party Responses to Directly Related Evidence
- ▶ Investigation Report



Formal Complaint

The formal complaint alleged that the Respondent engaged in non-consensual sexual touching and kissing of the Complainant at a party on campus on [date] 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.”

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)



231

Group Discussion

Bias, Conflict, Prejudgment

What if....?

- ▶ You went to high school with Remi's mother and are personal friends with two of the mother's sisters.
- ▶ Cary's cousin works for your employer and is your supervisee.
- ▶ It's a small community, and you are Facebook friends with Cary (but not Remi). You think Cary added you at some point, but you aren't sure when.



232

Individual Review Investigation Report

Review the report carefully (10 minutes)

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



233

Group Share Out Investigation Report

- ▶ What are the disputed and undisputed facts?
- ▶ What unanswered questions do you have?

File: [Group Whiteboard](#)



234

Group Discussion

Pre-Hearing Meeting

- ▶ Should your institution have a pre-hearing meeting?
- ▶ What issues should be covered at the meeting?



235

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



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Mock Hearing

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



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Group Discussion Deliberation

- ▶ Let's discuss – what does the evidence show?
- ▶ Which party's version of event did you find more credible? Why?
- ▶ Is there sufficient evidence of a policy violation?



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Individual Review

Determination Template

Review the template carefully (10 minutes)

- ▶ Pay special attention to the red text in brackets
- ▶ We will work together as a group to write the written determination after our review

File: [Template for Determination re Responsibility.docx](#)



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Group Exercise

Writing the Decision

- ▶ Write the final determination regarding responsibility
- ▶ Justify your determination
- ▶ What remedies will you recommend?

File: [Template for Determination re Responsibility.docx](#)



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**K-12 TITLE IX DECISION-
MAKER
FOUNDATIONS & PRACTICUM**

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