

Title IX Training for Coordinators

Train the Trainer Oregon School Personnel Administrators Fall 2023 Conference

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Title IX Leadership
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Ground Rules

- ✓ Ask questions/share perspective
- ✓ Not legal advice/keep it hypothetical
- ✓ Materials will be available for website posting

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AGENDA

- ✓ Title IX – Sexual Harassment & Beyond
- ✓ Title IX Coordinator Responsibilities
- ✓ The *New New* Title IX Regulations
- ✓ Preliminary Matters in the Title IX Sexual Harassment Grievance Procedure
- ✓ Grievance Procedure Issues
- ✓ Interplay Between Title VI & Title IX



THIS IS
OUR AGENDA

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OSPA Title IX Training Fall 2023


Today
8-9 a.m.
Compliance Certification Part 1
10:15 a.m.-Noon
Compliance Certification Part 2
2:30-3:45 p.m.
Investigation Training
3:45-5 p.m.
Coordinator Training

Tomorrow
9:30-11:30 a.m.
Decision-Maker Training
Noon-1:30 p.m.
Informal Resolution Training



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

The Patsy T. Mink Equal Opportunity in Education Act, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)




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Title IX Basics

- ✓ Conditions the receipt of federal money on a promise not to discriminate
- ✓ Guarantees equal educational opportunity in federally funded educational programs and activities




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Title IX Basics


- ✓ Purpose was to remove barriers that prevent women from participating in educational opportunities and careers based on sex—but the law applies equally regardless of sex or gender
- ✓ Applies to all aspects of educational institutions programs and activities including admissions, all aspect of operations, and employment



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Title IX Regulations

- ✓ Issued by the U.S. Department of Education's Office for Civil Rights
- ✓ "General statement" with the "effect of law"
- ✓ Think a school board's policy (law) vs. the district administration's procedures (regulations)
- ✓ OCR can also issue "guidance" which purportedly does not create new law (but often does in practice!)



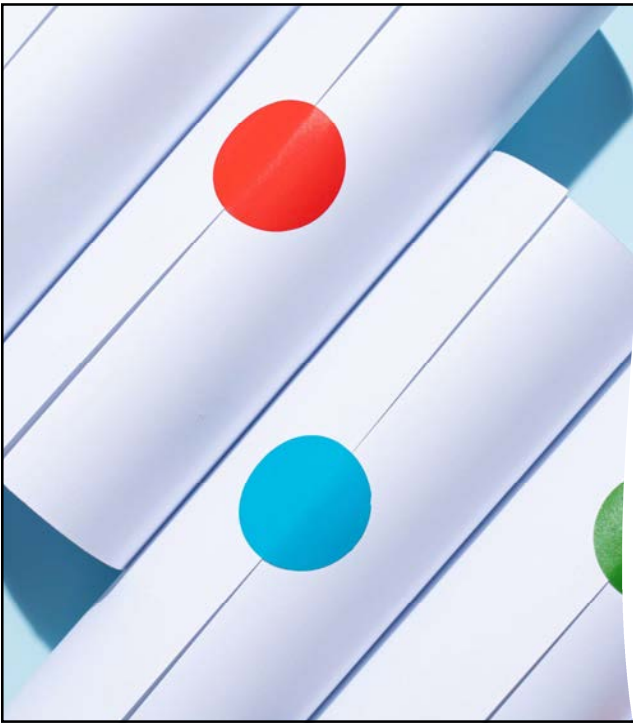
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Regulatory Scope

- ✔ Recruitment, admissions, and counseling
- ✔ Financial assistance
- ✔ Athletics
- ✔ Sex-based harassment (including sexual assault and violence)
- ✔ Treatment of pregnant and parenting students
- ✔ Treatment of LGBTQI+ students
- ✔ Discipline
- ✔ Single-sex education
- ✔ Employment
- ✔ Retaliation

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Key Title IX Procedural Requirements

- ✔ Nondiscrimination notice
- ✔ Grievance procedures
- ✔ Easily understood and widely distributed

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Key Title IX Procedural Requirements

- ✓ Designate a Title IX Coordinator
- ✓ Posting and sharing of contact information

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Title IX Enforcers

OCR

- ✓ Regional offices
- ✓ Low bar
- ✓ Usually non-monetary remedies

DOJ

- ✓ D.C.
- ✓ Higher profile cases
- ✓ Similar to OCR, but can file lawsuits in federal court

Federal Courts

- ✓ Individuals can sue
- ✓ Intense process
- ✓ Can lead to money damages

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Train the Trainer Tip

- ✓ Information about the laws, regulations and enforcement agencies is important for the Title IX Coordinator and Deputies to know, but is **less important for others** you will need to train
- ✓ For others, **focus on policy requirements** for authority and internal consequences for repercussions

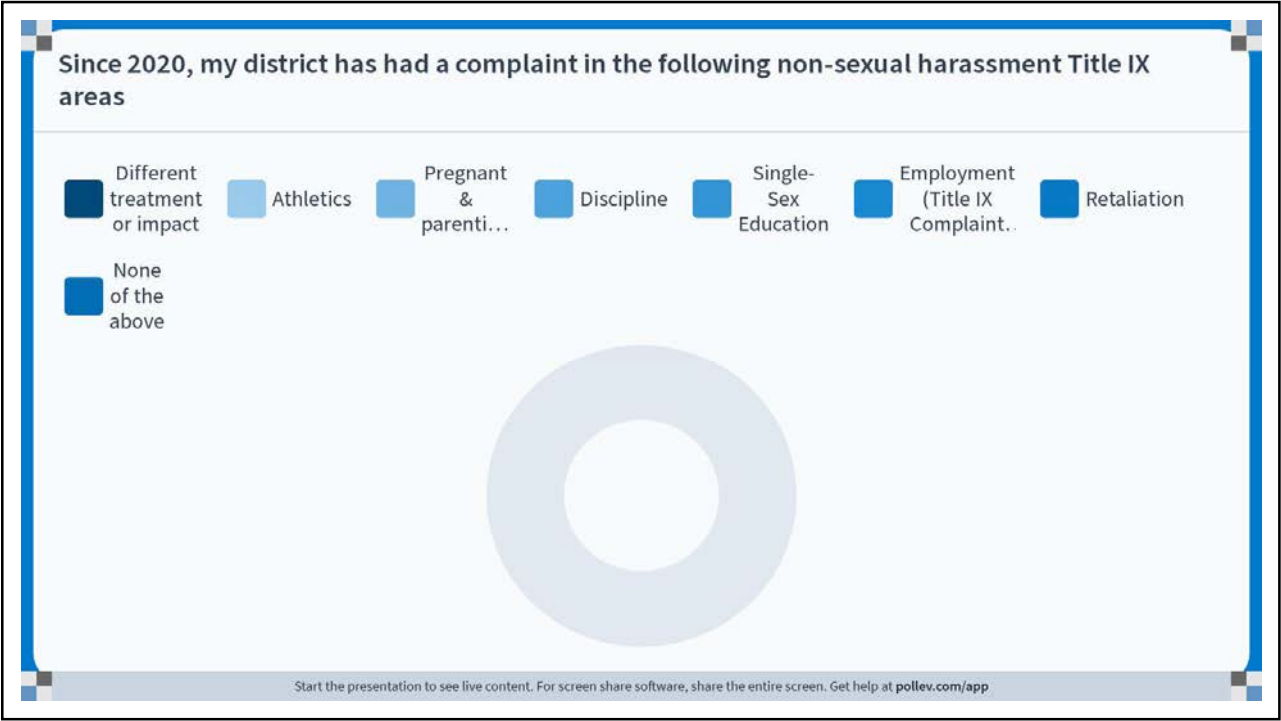
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Title IX Beyond Sexual Harassment

- ✓ Disparate Impact & Treatment
- ✓ Athletics
- ✓ Pregnant & Parenting Students
- ✓ Discipline
- ✓ Single-Sex Education
- ✓ Employment
- ✓ Retaliation

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Remember

- ✓ Different process than sex-based harassment (for now!)
- ✓ Just as important (and risky!)
- ✓ Training is essential (spotting, reporting, responding—or not!)

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Title IX Coordinator Responsibilities

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**The Title IX
Coordinator is
the Title IX
Leader**



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Coordinator Recommendations

✓ Authority

✓ Independence

✓ Full-Time

✓ Deputies

✓ Knowledge

✓ Supported

[2015 OCR Guidance to Coordinators \(rescinded but still useful for some things!\)](#)

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Coordinator Responsibilities

✓ Involved in everything Title IX

✓ Works closely with District leadership and legal counsel

✓ Knows and helps draft/revise the District’s policies and procedures

✓ Coordinates implementation and administration of grievance processes

✓ Monitors outcomes, identify patterns, and assesses effects on the campus climate

✓ Develops a method to survey the school climate and analyze information obtained

[2015 OCR Guidance to Coordinators \(rescinded but still useful for some things!\)](#)

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Coordinator Responsibilities

- ✓ Monitor students’ participation in athletics to identify disproportionality or negative effects on a gender
- ✓ Regularly assess the adequacy of training opportunities and propose improvements as appropriate
- ✓ Train and provides technical assistance to members of the school community
- ✓ Oversee deputies and other designees
- ✓ Work closely with other members of the school community where job responsibilities intersect with Title IX

[*2015 OCR Guidance to Coordinators \(rescinded but still useful for some things!\)*](#)

TH

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A photograph showing a man and a woman in a meeting room. The man, wearing a pink shirt and glasses, is pointing at a whiteboard covered with pink sticky notes. The woman, with curly hair and wearing a patterned top, is looking at the board. They are standing in front of a wooden table with blue chairs. The room has large windows and modern decor.

Train the Trainer Tip

- ✓ Consider training for District leadership (Superintendent, Board Members) on the **scope and risks** of Title IX
- ✓ An under-resourced Title IX office is like **playing the lottery** where losing can cost millions

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New Hanover County school board reaches \$5.75 million settlement in Kelly case, pledges 'programmatic changes'

WHQR | By Benjamin Schachtman
Published June 9, 2023 at 3:10 PM EDT

Boulder Valley School District agrees to pay \$1.2 million to settle lawsuit over sexual assault allegations

By Alison Borden and Jenny Brundin · Nov. 1, 2022, 9:06 pm

NYC Schools Reaches \$700K Court Settlement With Student Sex Assault Survivors as Biden Administration Rewrites Title IX Rules

By Mark Keierleber | August 25, 2021

CPR News

Central Bucks reportedly plans to spend \$1 million-plus in legal fees in response to allegations of anti-LGBTQ discrimination in schools

By Emily Rizzo · March 23, 2023

WHYY

PBS NPR

County to spend up to \$1 million to audit schools' Title IX compliance

BY KYLE MARTIN
Daily Post Staff Writer

October 25, 2020 8:00 am

Daily Post

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The New New Title IX Rules



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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 was May or June 2023, with an effective date in August 2023
- ✓ In May the Department backtracked, pushing to October for a final rule, which would mean Dec 2023/Jan 2024 would be the earliest possible effective date; that date recently has been reported to be pushed back again because of regulatory requirement deadlines that have passed
- ✓ Will change many of the requirements for handling complaints and apply to all sex discrimination, not just sex-based harassment

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Train the Trainer Tip

- ✓ Consider training for District leadership (Superintendent, Board Members) on the **broadened scope** of the proposed rules
- ✓ Seek approval now to begin **working through changes** to maximize benefits of proposed rules

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2020
Title IX
Rules

Issued by the Trump administration’s Office for Civil Rights

Effective August 14, 2020

Will be in effect at least until December 2023

Include significant requirements for handling complaints of sexual harassment under Title IX

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The 2020 Title IX Rules

What do they require?

Designate

A Title IX Coordinator

Identify

The Title IX Coordinator to your community, including by posting contact information (including email) online

Post

Post all training materials used to train Title IX team members on your district website

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The 2020 Title IX Rules

What do they require?



Train
Title IX Coordinator, Investigators, Decision-makers, Appeals Officers, and Informal Resolution Facilitators



Policy & Procedure
Have and share publicly a policy prohibiting Title IX sexual harassment and a grievance procedure



Process
Use the policy and grievance process any time a report of covered conduct is received

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Two Parts of the Analysis

What Conduct is Covered?

✓ "Title IX Sexual Harassment"*

❑ "The Big Five"*

❑ "Title IX Hostile Environment Harassment"*

✓ "In an Educational Program or Activity"

✓ "Against a person in the United States"

* Not regulatory terms

What Process Applies to Covered Conduct?

✓ Supportive Measures/Notice of Process to Complainant

✓ Formal Complaint

✓ Notice to Parties*/Supportive Measures to Respondent

✓ Informal Resolution*

✓ Investigation*

✓ Hearing*

✓ Decision*

✓ Appeal*

* Only if a formal complaint is on file

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Title IX “Sexual Harassment”

The Title IX “Big Five”

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

*VAWA/Clery Crimes

Title IX “Hostile Environment”

- ✓ Unwelcome Conduct
- ✓ Based on Sex
- ✓ That is so severe
- ✓ And pervasive
- ✓ And objectively offensive
- ✓ That it effectively denies equal access to the educational program or activity

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A photograph showing a man and a woman in a meeting room. The man, wearing a pink shirt and glasses, is pointing at a whiteboard covered with pink sticky notes. The woman, with curly hair and wearing a patterned top, is looking at the whiteboard. They are standing in front of a wooden table with blue chairs. The room has large windows and modern decor.

Train the Trainer Tip

- ✓ Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators must be trained on **“the definition of sexual harassment”**
- ✓ Real world **examples** are critical

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Train the Trainer Tip

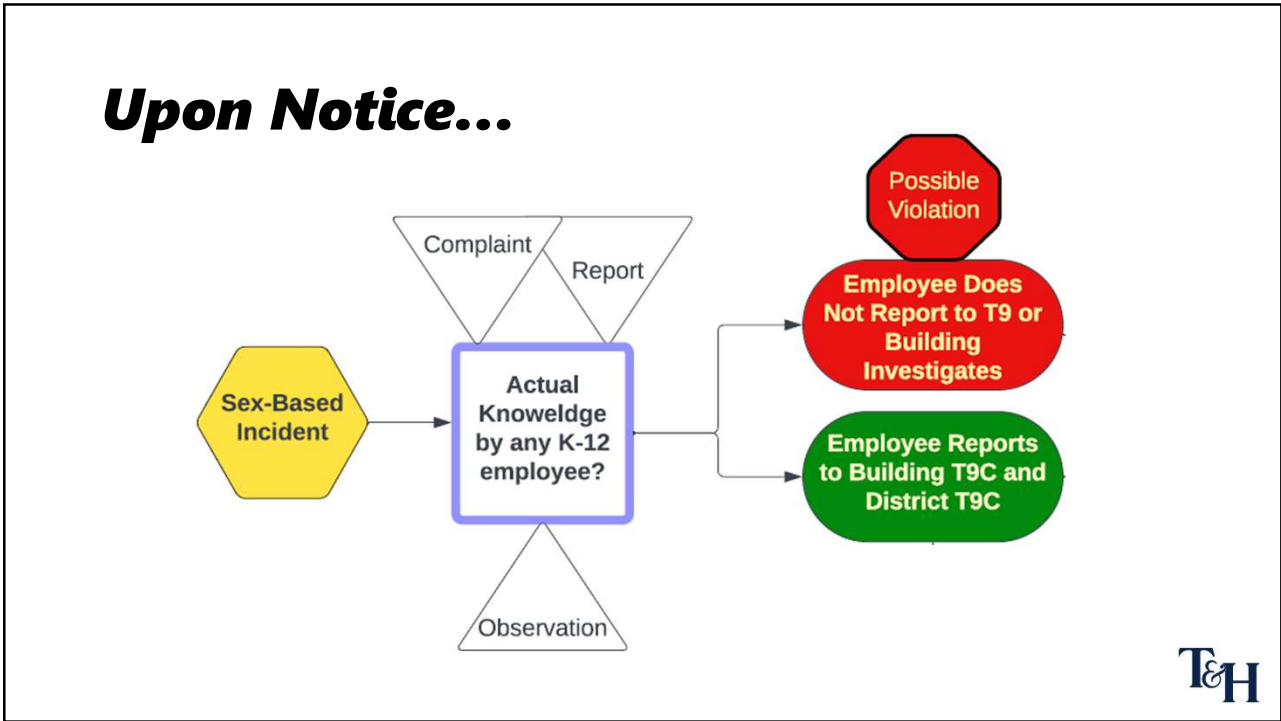
Does it involve a penis?

Does it involve a vagina?

Does it involve an anus or
buttocks?

✔ If yes to any one, contact the
Title IX Coordinator

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The Building Received A Report...

What Can the Building Do?

- Assess safety (isolate student with supervision if needed)
- Make required contacts (police, child protected services, complainant's parents/guardians)
- Contact special education if student(s) with disabilities involved

What Shouldn't the Building Do?

- Interview the complainant
- Collect evidence (witness statements, etc.)
- Discipline any student
- Put a stay away/no contact order in place
- Tell the respondent and their parents/guardians details about the report

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Pre-Formal Complaint Process

Report

Upon receipt of any notice of conduct that, if proved, would be T9SH IPA and IUS

Meet

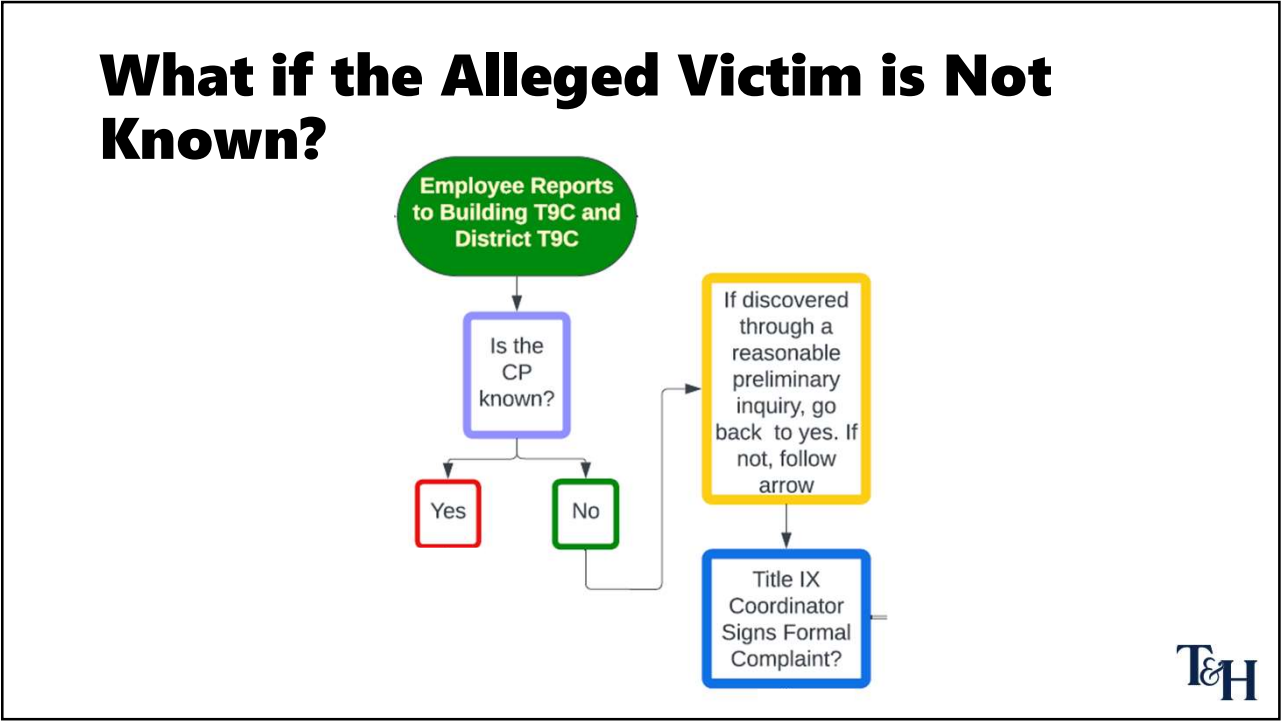
The Title IX Coordinator must meet with the alleged victim (Complainant): "Supportive Measures Meeting"

Remove

The Title IX Coordinator should consider emergency removal (for students, others) and administrative leave (for employees)

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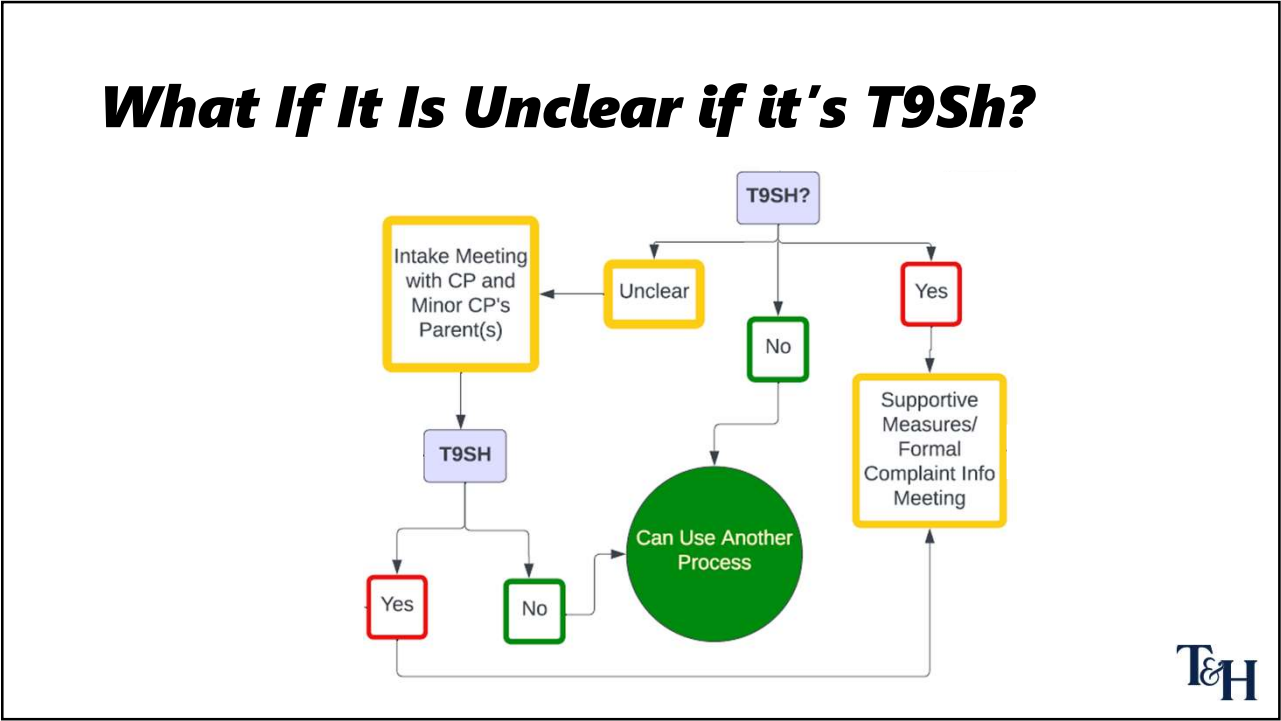
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Reasonable Inquiry

- ✓ A reasonable inquiry is not an investigation—the idea here is to see if you are able to identify the alleged victim, not evidence to support the allegation
- ✓ A similarly inquiry may be required if the alleged perpetrator is not known, but that would be later in the process

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Intake

- ✓ The purpose is to understand what the party alleges, not to collect evidence to support or refute those allegations
- ✓ Can discuss supportive measures (because you can offer those for any conduct, regardless of whether it is T9SH)
- ✓ Only discuss ability to file a T9 Formal Complaint if you determine during intake that the conduct, if proved, would be T9SH + IPA + IUS. Otherwise, use **“yes, and”** approach!

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Intake With Complainant

- What happened?
- Who did it?
- When did it happen?
- Where did it happen?
- Who was present?
- Why did it happen?
- How did it happen?
- Anything else you would like to report?

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Pre-Formal Complaint Process

Report

Upon receipt of any notice of conduct that, if proved, would be T9SH IPA and IUS

Intake

What you do if you don't know if the conduct is T9SH + IPA + IUS; Purpose is to understand allegations, not obtain evidence

Meet

The Title IX Coordinator must meet with the alleged victim (Complainant): "Supportive Measures Meeting"

Remove

The Title IX Coordinator should consider emergency removal (for students, others) and administrative leave (for employees)

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Emergency Removals: IDEA, Section 504, and Discipline Implications

- ✓ An emergency removal could implicate placements and services under IDEA and Section 504
- ✓ Title IX Coordinators should reach out to Special Education or Section 504 Staff prior to implementing an emergency removal
- ✓ May need to hold IEP/Section 504 meeting to determine if changes must be made to student's IEP/Section 504 Plan
- ✓ Just because Title IX authorizes a Title IX administrator to remove a student on an emergency basis does not mean that the Constitution and state law allow a Title IX administrator to do so

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Train the Trainer Tip

- ✓ Training for Title IX Team members on **special education** and **student discipline** requirements is important
- ✓ Best practice is to “**cross-train**” administrators and staff who work with student with disabilities and on student discipline to work closely with the Title IX team in relation to supportive measures and removals

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Signing a Formal Complaint


- ✓ An alleged perpetrator in a position of authority
- ✓ Multiple reports of sexual harassment against the same respondent
- ✓ Multiple reports of sexual harassment by the same complainant
- ✓ Use of extreme violence or weapons



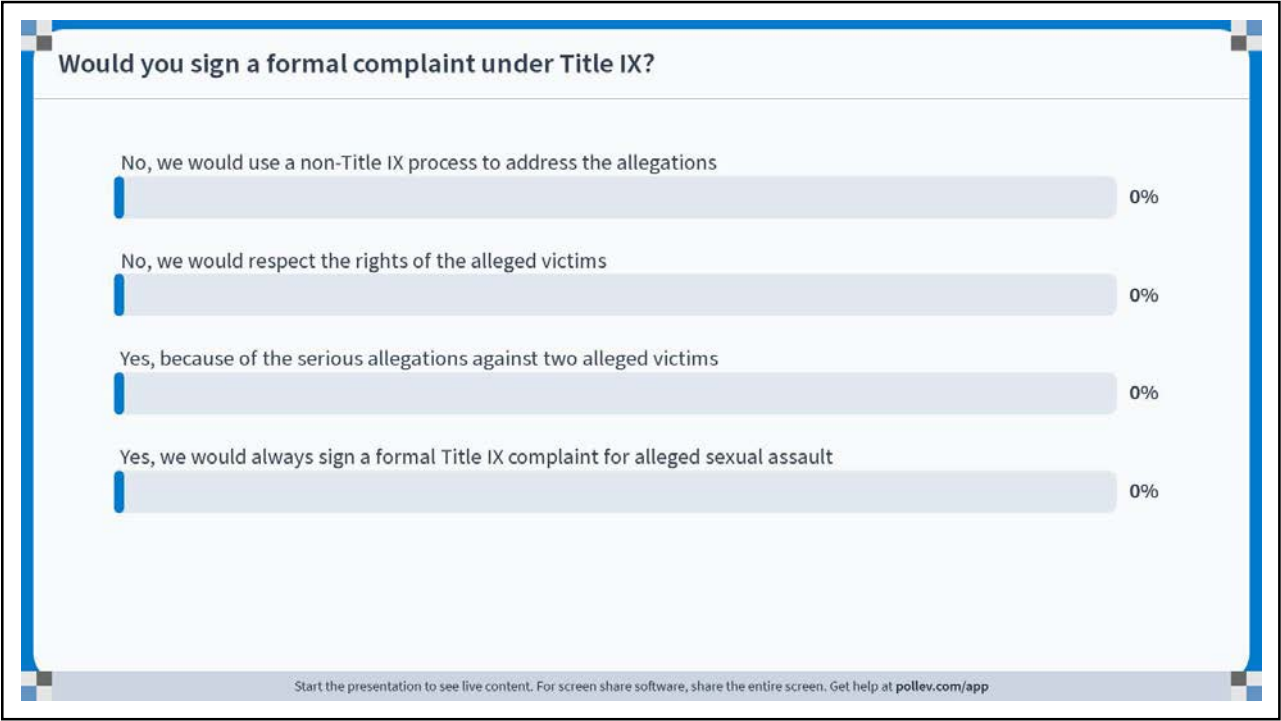
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Scenario

Carey reports another student, Romy, forced Carey to have sex at school. Carey also claims that Romy did the same thing to another student two months ago. Romy admits that “they resisted initially but I got them to agree” to the police, raising concerns of coercion. Neither complainant wants to move forward with a complaint, and sexual assault is a required removal to a disciplinary alternative placement under state law.




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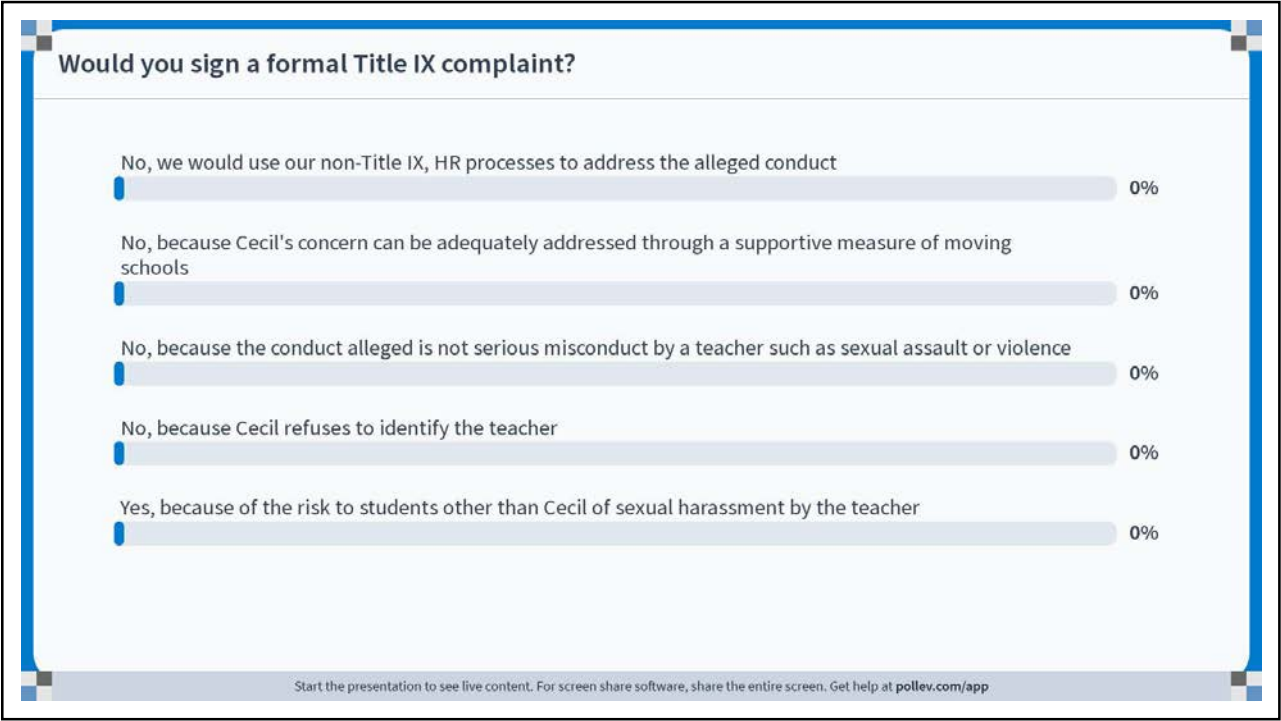
Scenario



High school student Cecil reports that a teacher gave Cecil a lot of attention, asked Cecil repeatedly if they wanted rides home from school, invited Cecil to babysit for the teacher’s toddler, and gave Cecil hugs frequently. Cecil did not identify the teacher. Cecil asks to move to another school in the district but does not want to file a formal complaint.



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Mandatory Dismissals

(CAN use another process)


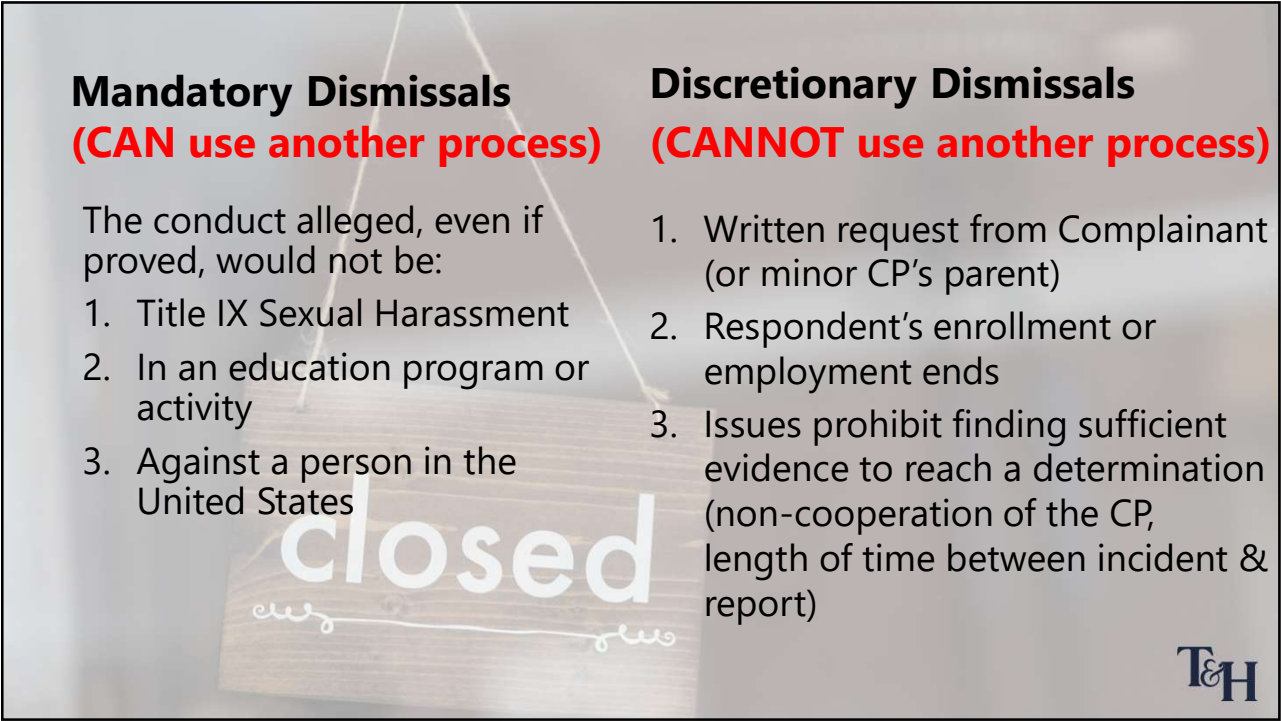
The conduct alleged, even if proved, would not be:

1. Title IX Sexual Harassment
2. In an education program or activity
3. Against a person in the United States

Discretionary Dismissals

(CANNOT use another process)

1. Written request from Complainant (or minor CP's parent)
2. Respondent's enrollment or employment ends
3. Issues prohibit finding sufficient evidence to reach a determination (non-cooperation of the CP, length of time between incident & report)



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Compare & Contrast Scenario #1

A student, Chandler, reports that another student, Rabi, grabbed Chandler’s butt without consent multiple times at school. The incidents allegedly happened in private with no witnesses, and there were no cameras with relevant footage. Chandler immediately stops participating in the process after filing a formal complaint without explanation.

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Should the formal complaint be dismissed?

Yes, because there is not enough evidence to reach a determination; another non-Title IX process can be used instead

0%

Yes, because there is not enough evidence to reach a determination; but another non-Title IX process cannot be used instead

0%

No, because a decision cannot be made in a Title IX case based on a party's non-participation in the process

0%

No, because of the risk of harm to other students

0%

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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Compare & Contrast Scenario #2

What if the same alleged incidents happened, and Chandler immediately stopped participating as in Scenario #1. But unlike Scenario #1, there were reportedly several witnesses in the area when the incidents occurred and video surveillance in the building also caught some of the conduct on tape.



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Compare & Contrast Scenario #3

Same scenario but this time Chandler does not stop participating. Instead, Rabi's parents decide to withdraw Rabi from school and send Rabi to a local private school.



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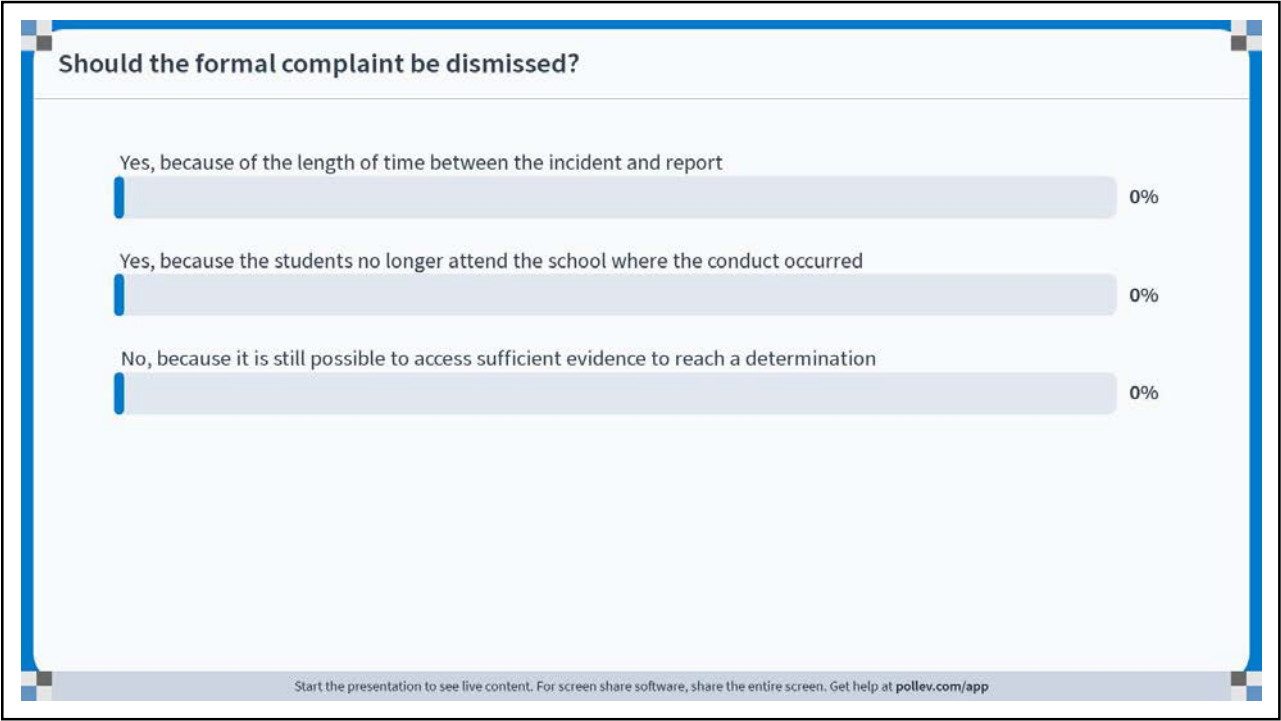
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Compare & Contrast Scenario #4

What if the alleged conduct occurred when Chandler and Rabi were in middle school. They are now in high school at another school in the District. All parties and witnesses continue to attend District schools but are spread out at schools across the District.

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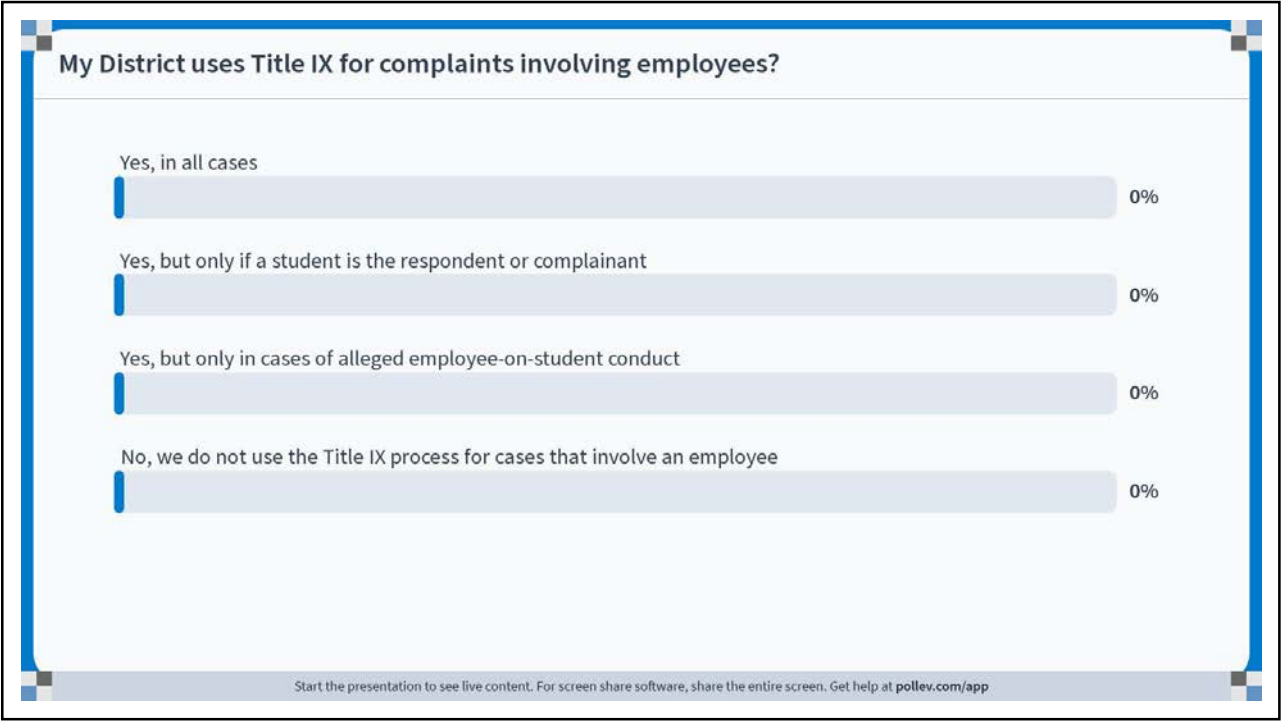
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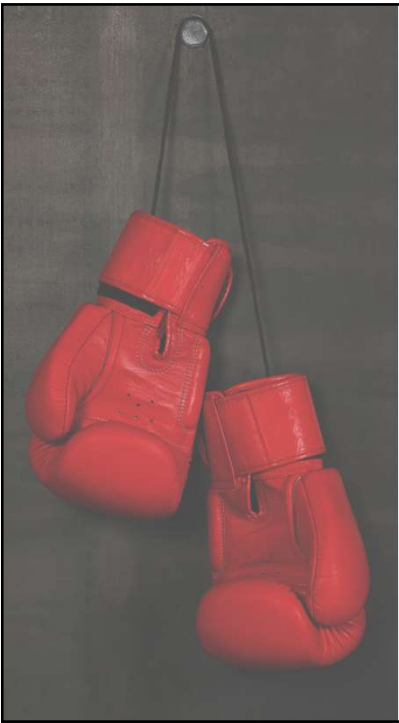
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Title IX v. Title VII

- Title VII of the Civil Rights Act of 1964
- Before the 2020 Title IX rules, most educational institutions used Title VII, not Title IX, for complaints by an employee
- There are some key differences between the two laws

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Some Key Differences

Issue	Title IX	Title VII
Definition of sexual harassment	Severe, pervasive, and objectively offensive Effective denial of access	Severe or pervasive Impact on access
Notice required for employer responsibility	Actual knowledge (actual notice)	Actual or constructive (should have known)
Country Jurisdiction	In the U.S. only	Can cover outside of the U.S.
Who Investigates	No single investigator model (different investigator and decisionmaker)	Same person often investigates and decides responsibility
Investigation Information Shared	Sharing directly related evidence and full final report required	Neither required
Right to Confront Other Party	Required (Written Q&A)	Not required

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According to the DOE

- The Title IX regulations apply to employee claims of sex-based harassment
- OCR recognizes that there are different obligations required by the laws
- Schools can address behavior prohibited by Title VII that is not prohibited by Title IX through its HR processes, but for conduct covered by Title IX OCR may expect schools to use the Title IX process

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Title IX Training for Investigators

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Handouts!

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OSPA Title IX Training Fall 2023

<p>Today</p> <p>8 a.m.-Noon Compliance Certification (All Roles)</p> <p>2:30-3:45 p.m. Investigation Training</p> <p>3:45-5 p.m. Coordinator Training</p>	<p>Tomorrow</p> <p>9:30-11:30 a.m. Decision-Maker Training</p> <p>Noon-1:30 p.m. Informal Resolution Training</p>
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4




Ground Rules

- ✓ Ask questions/share perspective
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What is the first word (one word, no spaces) you think of when you hear "Title IX Investigation"?

Nobody has responded yet.
Hang tight! Responses are coming in.

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A photograph showing a man and a woman in a meeting room. The man, wearing a pink shirt and glasses, is pointing at a whiteboard covered with pink sticky notes. The woman, with curly hair and wearing a patterned top, is looking at the board. They are standing next to a wooden table with blue chairs. The room has large windows and modern decor.

Train the Trainer
Tip

Investigator Required Training (covered in our Compliance Certification Training):

- What is "Sexual Harassment" under Title IX?
- What is the scope of the educational institution's "education program or activity"
- What are the steps in the Title IX sexual harassment grievance process?
- How do you serve impartially without bias?

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Train the Trainer Tip

Investigator Required Training
(covered in this training):

- ✓ How to conduct an investigation under Title IX
- ✓ Issues of relevance

9

Our Scenario

Student Riley reports that while alone with Teacher Thompson at school, Teacher Thompson kissed Riley on the cheek and rubbed Riley on the behind.



10

2020
Title IX
Rules

Issued by the Trump administration’s Office for Civil Rights

Effective August 14, 2020

Will be in effect at least until December 2023

Include significant requirements for handling complaints of sexual harassment under Title IX

11

Two Parts of the Analysis

What Conduct is Covered?

“Title IX Sexual Harassment”*

- “The Big Five”*
- “Title IX Hostile Environment Harassment”*

“In an Educational Program or Activity”

“Against a person in the United States”

* Not regulatory terms

What Process Applies to Covered Conduct?

Supportive Measures/Notice of Process to Complainant

Formal Complaint

Notice to Parties*/Supportive Measures to Respondent

Informal Resolution*

Investigation*

Hearing*

Decision*

Appeal*

* Only if a formal complaint is on file

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First Steps in the Investigation Process

- Verify impartiality
- Administrative steps
- Review Notices of Allegations
- Introduce yourself to the parties
- Review file
- Investigation planning

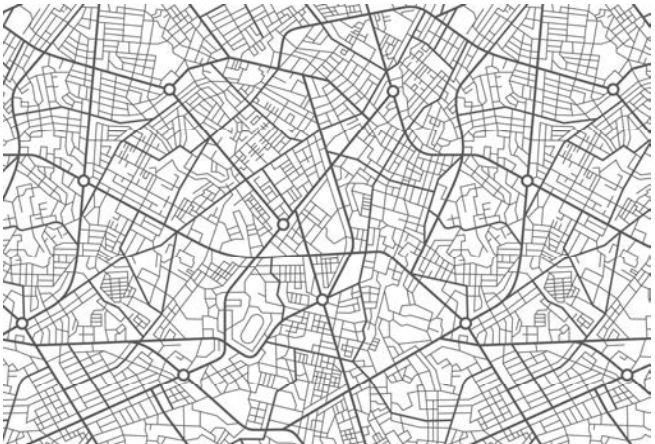


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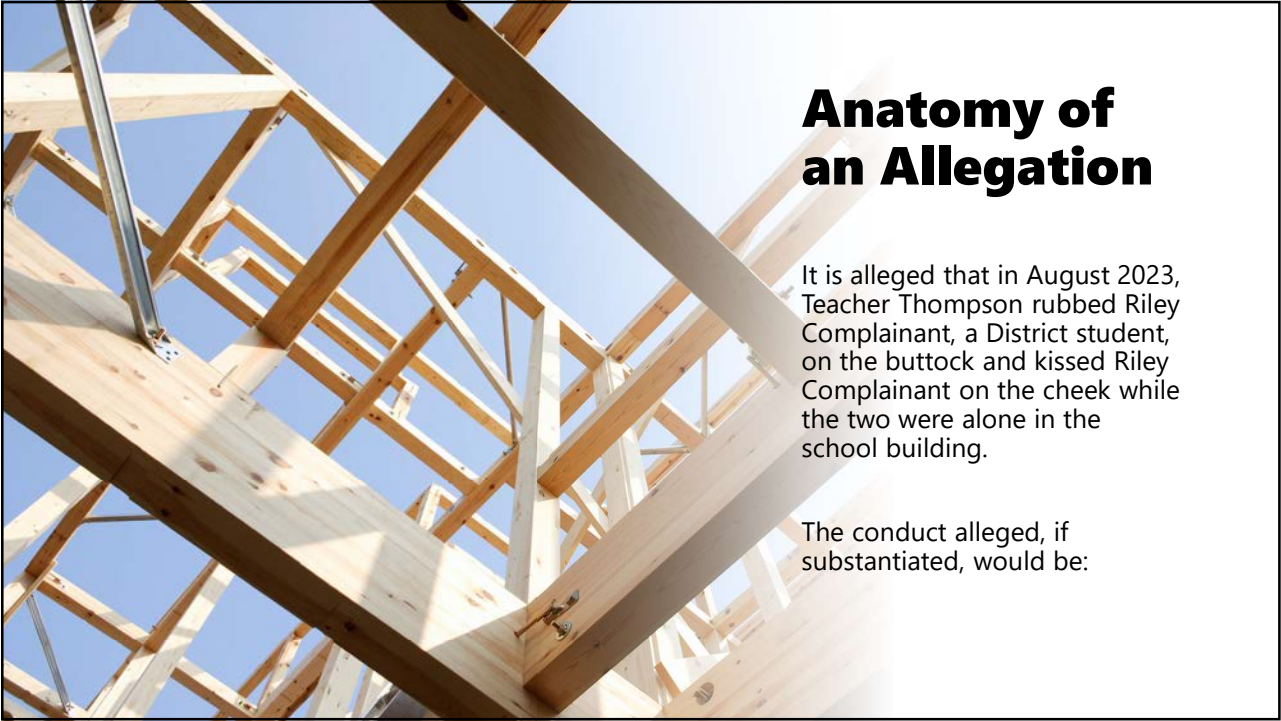
The Investigator’s Roadmap – The NOI/NOA

Notice of Investigation or Notice of Allegations

- ✓ Typically sent before the investigator is assigned
- ✓ Must contain sufficient details known at the time and with sufficient time to prepare before any initial party interview
 - Identities of the parties involved in the incident, if known
 - The conduct allegedly constituting sexual harassment
 - The date and location of the alleged incident, if known



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Anatomy of an Allegation

It is alleged that in August 2023, Teacher Thompson rubbed Riley Complainant, a District student, on the buttock and kissed Riley Complainant on the cheek while the two were alone in the school building.

The conduct alleged, if substantiated, would be:

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The conduct alleged, if substantiated, would be (vote for all that are correct)

Employee quid pro quo

0%

Fondling

0%

Stalking

0%

Unwelcome sex-based conduct that is severe, pervasive, and objectively offensive

0%

Not Title IX sexual harassment because neither severe nor pervasive

0%


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Anatomy of an Allegation

“Fondling” is the touching of the private body part of another person without consent and for the purpose of sexual gratification.

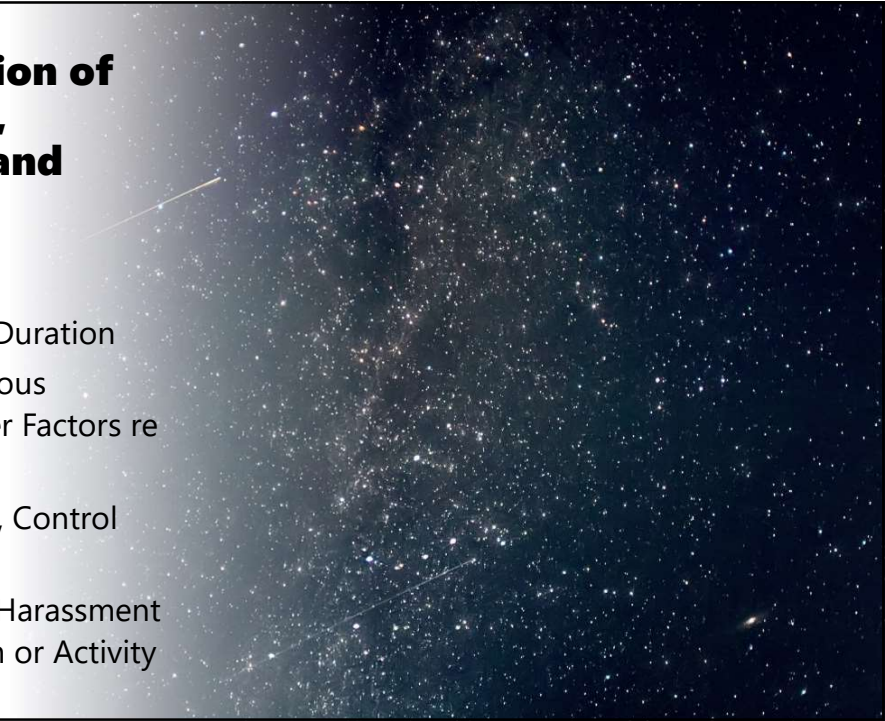
“Hostile Environment Sexual Harassment” under Title IX is conduct that is so severe, so pervasive, and so objectively offensive that it effectively denies equal access to the educational program or activity.



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The Constellation of Circumstances, Expectations, and Relationships

- ✓ Impact on CP
- ✓ Type, Frequency, Duration
- ✓ Ages, Roles, Previous Interactions, Other Factors re Parties
- ✓ Location, Context, Control Over Respondent
- ✓ Other Sex-Based Harassment in the Ed Program or Activity



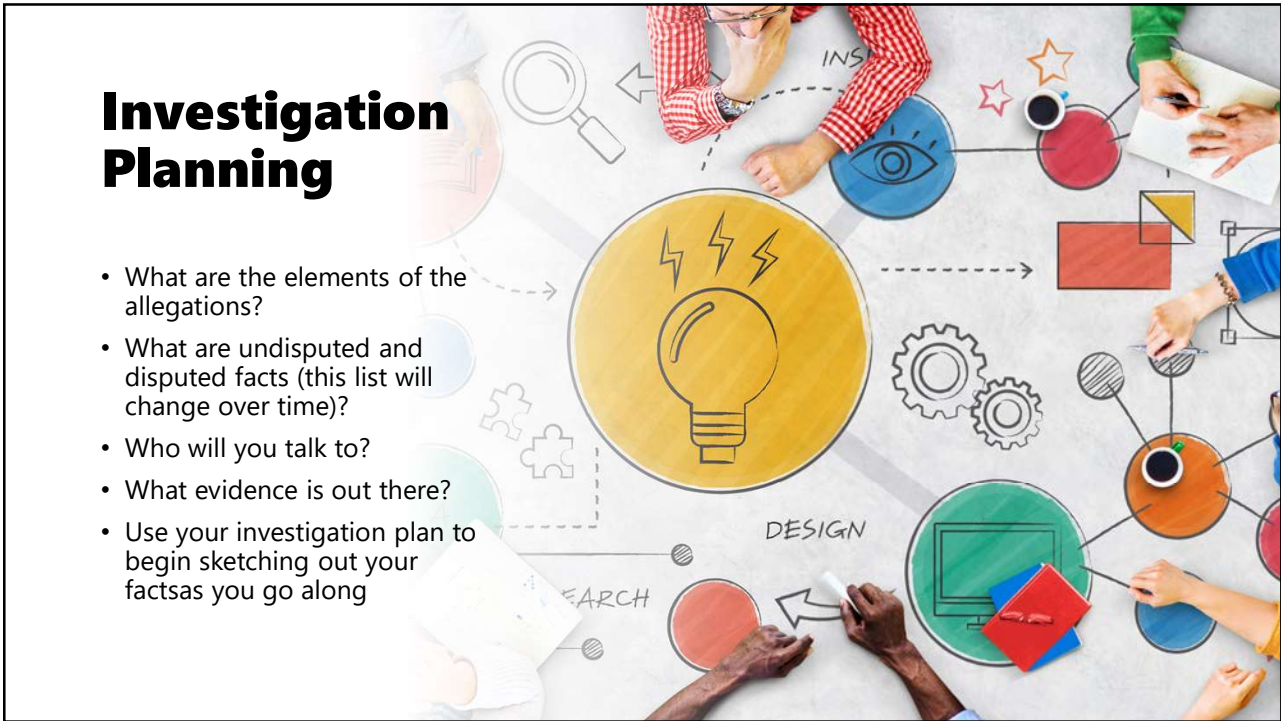
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Introduction to Parties

- Not required, but we recommend it
- Introduce yourself
- Explain that there will be lapses of time

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Investigation Planning

- What are the elements of the allegations?
- What are undisputed and disputed facts (this list will change over time)?
- Who will you talk to?
- What evidence is out there?
- Use your investigation plan to begin sketching out your facts as you go along

20



Train the Trainer Tip

- ✔ Title IX investigators need hands on training on how to complete the investigation process
- ✔ The T&H Guidebook is a great on-the-job training tool for investigators (email mirvin@thlaw.com and mention the OSPA discount)

21

Next Steps in the Investigation Process

- Notices of interviews to parties
- Notices of interviews to witnesses?
- Interview planning
- Conduct interviews
- Update investigation plan, considering factual and chronological gaps *considering the elements of the allegations and disputed/undisputed facts*



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Impartial Investigations

- Do not discourage a party from submitting certain evidence
- Do not use terms like “victim” and “perpetrator”
- Do not use sex stereotypes
- Do not make credibility determinations (that’s the decision-maker’s job)

23



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Next Steps in the Investigation Process


- Directly Related Evidence
- Parties have 10 days to respond to the DRE
- Investigation report summarizing relevant evidence
- Parties have 10 days to respond to report



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Directly Related Evidence

- Term is not defined
- Think broadly—probably includes almost everything collected in the investigation
- Responses to DRE are shared with the other party



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Investigation Report

- Fairly summarizes the “relevant evidence”
- Evidence is relevant if it makes a (1) **fact or issue in dispute** (2) **more or less likely to be true**

27



Investigation Report

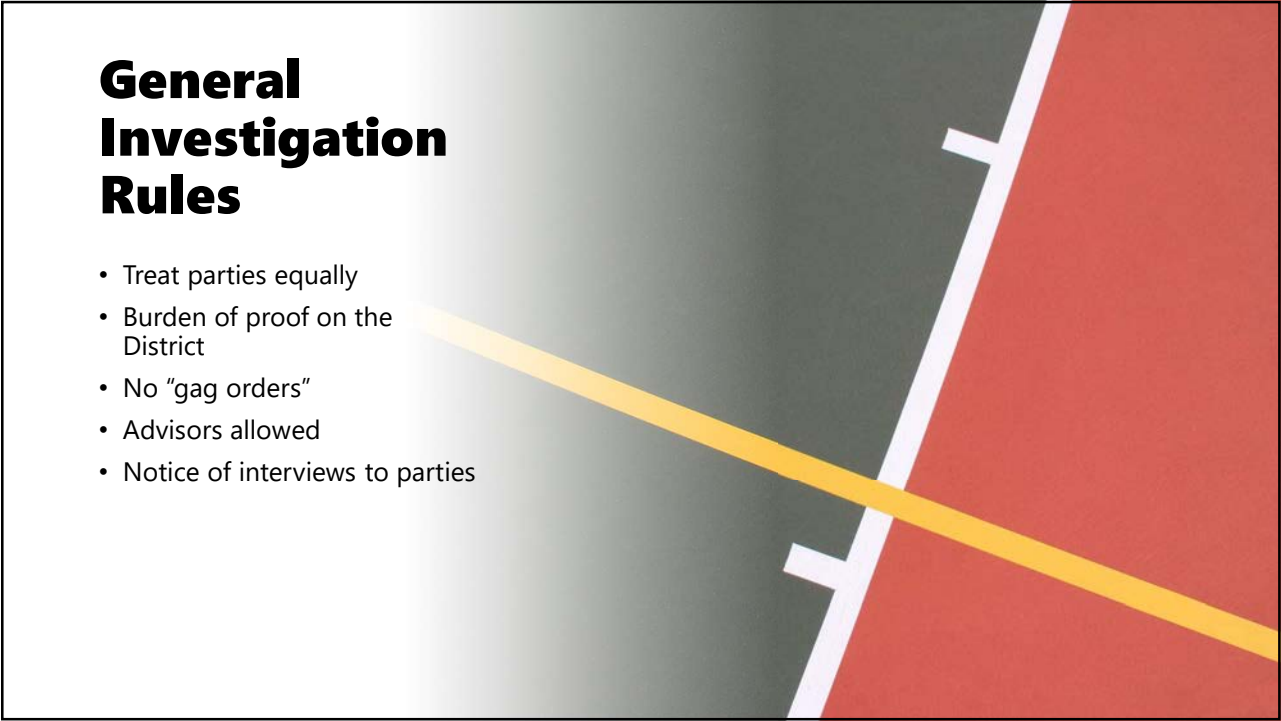
Conduct that is not relevant without written consent:

- Complainant's sexual behavior or predisposition unless used to show:
- Someone other than RP committed the conduct
- Past conduct between CP & RP to show consent
- Can't access, consider, disclose or use medical or psychological treatment records made/maintained re treatment
- Can't use questions or evidence that seek disclosure of legally privileged information unless waived

28

General Investigation Rules

- Treat parties equally
- Burden of proof on the District
- No “gag orders”
- Advisors allowed
- Notice of interviews to parties



29

What if the Police are Involved?

- Limited or temporary delay in timeframe is allowed, but not required
- Document, document, document



30

Trauma Informed Investigations

- Do not use blaming, accusing, or judging language
- You can acknowledge the difficulty or both parties
- Use open-ended questions



31

Retaliation

- The investigator should explain that retaliation is prohibited and will not be tolerated
- Give examples of retaliation between parties
 - Ostracizing someone
 - Spreading rumors or gossiping



32

Trauma Informed Investigations

- Science shows trauma can have a neurological effect, particularly on memory
- Trauma can impact either party
- There is a difference between being trauma-informed and trauma-lenient – do not use apparent existence of trauma as *evidence* of alleged conduct

33



Train the Trainer Tip

- ✓ Investigators should receive trauma-informed training to limit the risk of re-traumatizing parties during the investigation
- ✓ Investigators should be trained **not** to use a trauma-informed approach to evaluate the testimony of parties or witnesses or assess credibility
- ✓ Investigators should learn a trauma-informed approach to evaluating evidence can lead them to overlook significant inconsistencies on the part of complainants in a manner that is incompatible with due process protections for the respondent
- ✓ Investigators should document noteworthy inconsistencies (rather than ignoring them altogether) and must use approaches to trauma and memory that are well grounded in current scientific findings

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Title IX Training for Decision-Makers

**Train the Trainer
Oregon School Personnel
Administrators Fall 2023 Conference**

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OSPA Title IX Training Fall 2023

Today	Tomorrow
<p>8 a.m.-Noon Compliance Certification (All Roles)</p> <p>2:30-3:45 p.m. Investigation Training</p> <p>3:45-5 p.m. Coordinator Training</p>	<p>9:30-11:30 a.m. Decision-Maker Training</p> <p>Noon-1:30 p.m. Informal Resolution Training</p>



2



Ground Rules

- ✓ Ask questions/share perspective
- ✓ Not legal advice/keep it hypothetical
- ✓ Materials will be available for website posting

3

**[https://www.thompsonhorton.com/
title-ix-guidebook/](https://www.thompsonhorton.com/title-ix-guidebook/)**



4



Train the Trainer Tip

Decision-Maker and Appellate Decision-Maker Required Training (covered in our Compliance Certification Training):

- ✓ What is "Sexual Harassment" under Title IX?
- ✓ What is the scope of the educational institution's "education program or activity"?
- ✓ What are the steps in the Title IX sexual harassment grievance process?
- ✓ How do you serve impartially without bias?

5



Train the Trainer Tip

Decision-Maker and Appellate Decision-Maker Required Training (covered in this training):

- ✓ Issues of relevance in the Q&A process
- ✓ When questions and evidence about a complainant's sexual history or predisposition are not relevant
- ✓ The live hearing process (K-12 schools do not generally have hearings)

6

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- ☑ Skip when asked to enter your name

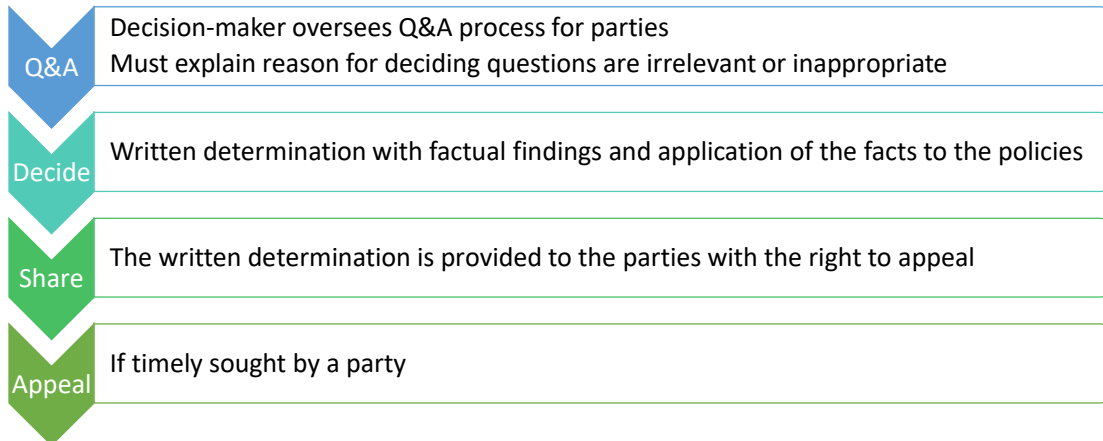


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8

Post-Formal Complaint: Decision and Appeal




9

Who are the Decision-Makers?

- The decision-makers (both initial and appellate) **must** be different people from each other and from the Title IX Coordinator and investigator on a case

10




What Does an Initial Decision-Maker Do?

- After the written investigation report is shared with the parties, they are given 10 days to respond
- Allow parties to ask written, relevant questions of any other party or witness
- Review all questions, explain to the party proposing the questions if they decide questions are not relevant or appropriate, forward relevant and appropriate questions to the other party or witness, receive answers and forward them to all parties,
- Evaluate all the relevant evidence—good and bad—objectively
- Issue a written determination regarding responsibility applying the “preponderance of the evidence” standard

11

What Does An Appellate Decision-Maker Do?

- Allow parties an equal opportunity to submit a written statement in support of or against the appeal
- Review the parties’ statements and all relevant evidence and write the appeal decision



12

Initial Decision-Maker



13



Written Q&A

- You can do the Q&A process while the parties are reviewing/responding to the investigation report (10 day period)
- Parties must be afforded the opportunity to submit written, relevant questions to any other party or witness
- You can also require the questions to be appropriate (no ad hominem/personal attacks, no profanity)
- Must allow written, relevant "follow up" questions (make sure it's a real follow up!)

14

Notice of Right



- Send notice of right to submit written, relevant questions and follow up questions (email and U.S. mail)
- Provide timeframe for when responses are due (e.g., within 3 or 5 days of electronic delivery of notice)



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Notice of Right

Notice can state that questions and follow-up questions:

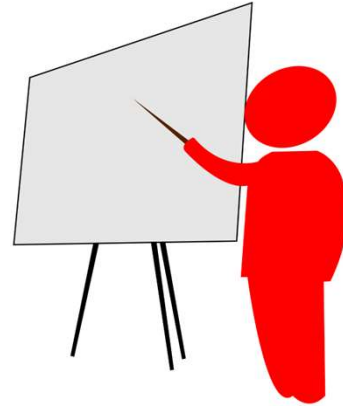
- Should be numbered
- Should identify the name of the party or witness to whom it should be posed



16

Notice of Non-Relevance

- Must explain the reason for finding a question not relevant
- Example: "Complainant's Question #3 will not be forwarded to the party or witness because it seeks information protected by a legally recognized privilege"
- Example: "Respondent's Question #3 will not be forwarded to the party or witness because it includes irrelevant personal attacks"



T&H

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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 and a time-frame for submission (e.g., 2 days)

T&H

18

Forwarding Questions

- Forward all relevant and respectful questions to the appropriate party or witness
- Include notification of when a response is required (e.g., within 3 days of electronic delivery of the question)



T&H

19

Forwarding Answers

- Forward all answers to all parties
- Answers must be respectful
- Notice of right to submit limited, relevant follow-up questions within a certain time period (e.g., 2 days of electronic transmission of responses)



T&H

20

Follow-Up Question?

Initial Question: When did it happen?

Answer: Yesterday



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What time of the day did it happen?

Follow-Up	
Not Follow-Up	

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Who was present?

Follow-Up

Not Follow-Up

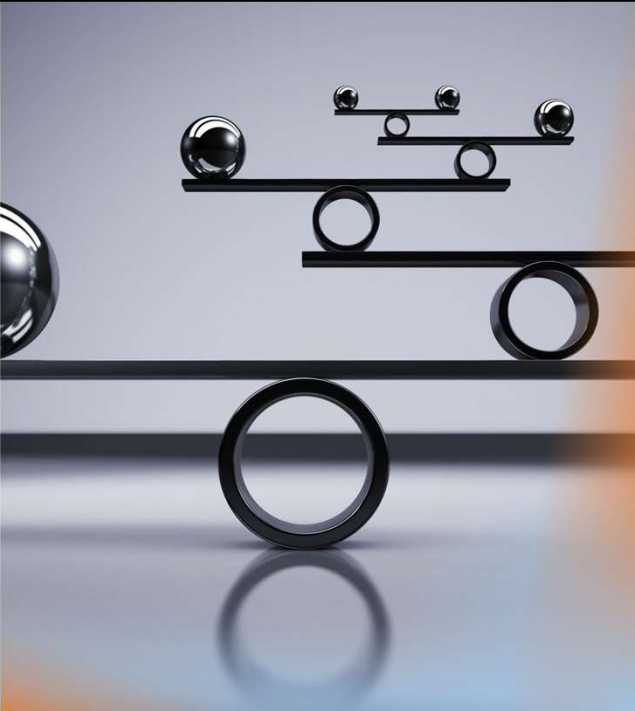
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Analyzing the Evidence

You need to analyze all the evidence **for** and **against** the alleged conduct—consider **every element** of the allegation

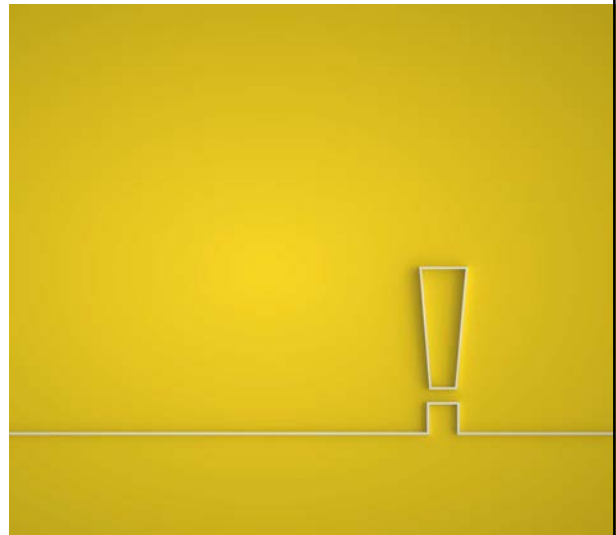
- Direct evidence (e.g., admission)
- Circumstantial evidence (requires an inference)
- Hearsay (limited weight)
- Character evidence (limited weight)
- Prior bad acts (limited weight)



24

Not Relevant Without Consent

- Evidence about the Complainant's prior sexual history
 - Unless used to show that someone other than the RP committed the misconduct or prior contact between the parties to show consent
- Information protected by a legally recognized privilege
- A party's medical, psychological, or similar records created in the provision of treatment



25

Relevance vs. Weight

- Relevant evidence has **some tendency** to make a matter in dispute in the case more or less likely to be true
- The weight of the evidence is **how much of a tendency** the evidence has to make the matter in dispute more or less likely to be true
- A decisionmaker has to **weigh all the relevant evidence in the case** to determine if each individual fact in dispute is supported and, once all the facts are decided, whether those facts support a finding of responsibility

26

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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Credibility

- Helps you determine the weight of evidence
- Consider things like consistency/inconsistency, reliability/unreliability, accuracy/inaccuracy, memory, and motive
- A witness is not "credible" or "not credible," the question is whether the information provided by the witness is "credible" or "not credible"

T&H

28

Preponderance of the Evidence

- More likely than not
- 50% and a feather
- The scale is equal when you begin, but there is a presumption of non-responsibility so there must be at least a feather of relevant, credible evidence supporting the allegation for a finding of responsibility to occur

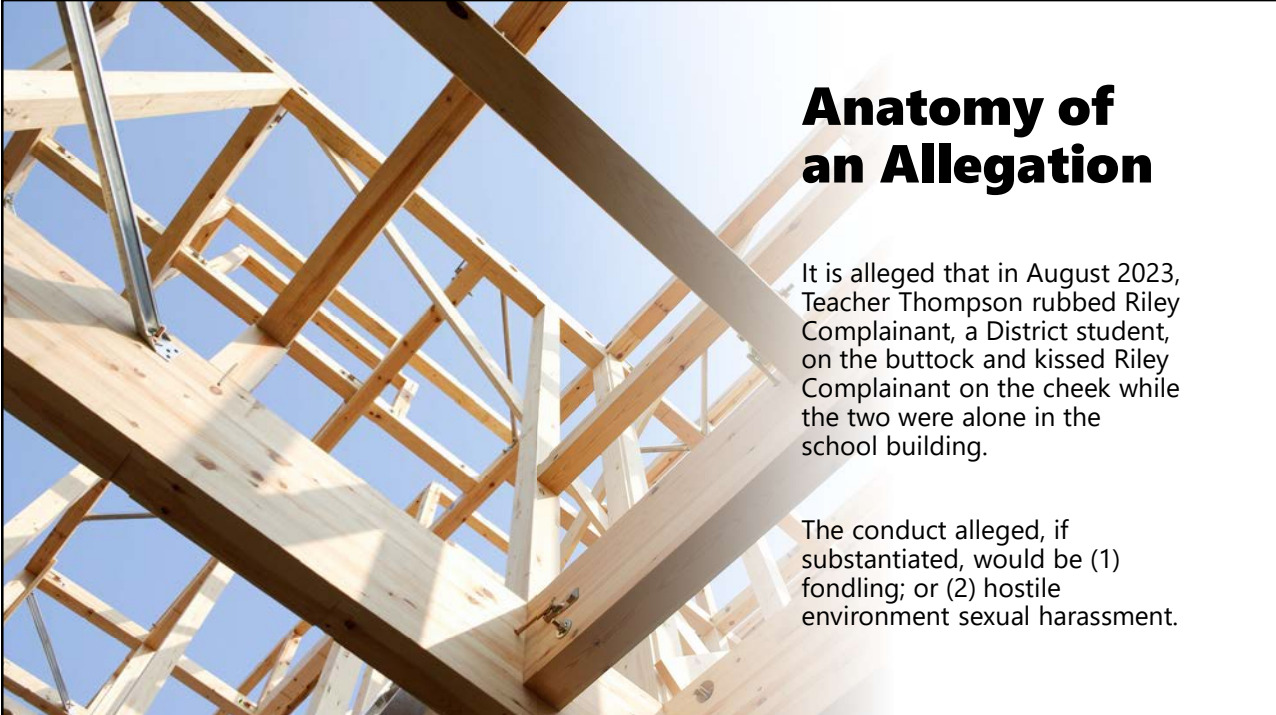
29

Our Scenario

Student Riley reports that while alone with Teacher Thompson at school, Teacher Thompson kissed Riley on the cheek and rubbed Riley on the behind.



30



Anatomy of an Allegation

It is alleged that in August 2023, Teacher Thompson rubbed Riley Complainant, a District student, on the buttock and kissed Riley Complainant on the cheek while the two were alone in the school building.

The conduct alleged, if substantiated, would be (1) fondling; or (2) hostile environment sexual harassment.

31



Anatomy of an Allegation

"Fondling" is the touching of the private body part of another person without consent and for the purpose of sexual gratification.

"Hostile Environment Sexual Harassment" under Title IX is conduct that is so severe, so pervasive, and so objectively offensive that it effectively denies equal access to the educational program or activity.

32

The Constellation of Circumstances, Expectations, and Relationships

- ✓ Impact on CP
- ✓ Type, Frequency, Duration
- ✓ Ages, Roles, Previous Interactions, Other Factors re Parties
- ✓ Location, Context, Control Over Respondent
- ✓ Other Sex-Based Harassment in the Ed Program or Activity

33

Weighing the Evidence

First, **find your facts**

Looking at a **disputed facts**

- What does the Complainant say?
- What does the Respondent say? Do any credibility factors need to be considered regarding either of their statements on the issue?
- What did other witnesses say? Any credibility factors?
- Any corroborating or conflicting evidence on either side?
- Any other issues to consider

Now, weigh all that evidence and make a finding on the fact

T&H

34

Let's Think About Our Case....

Does the evidence support the claim that Teacher Thompson touched Riley as alleged?

- The complainant consistently reported the conduct occurred as alleged
- The respondent consistently denied engaging in the conduct as alleged
- I considered the consistency of the parties' statements.
- Although Teacher Thompson denied ever kissing students on the cheek or hugging students, a colleague reported that Teacher Thompson regularly gave students hugs.
- I reviewed outcry statements the complainant made to their parents shortly after the incident.
- I considered changes in the complainant's behavior as recognized by the complainant's other teacher and the complainant's mother.
- Video surveillance shows the complainant running out of the classroom approximately five minutes after lunch dismissal.

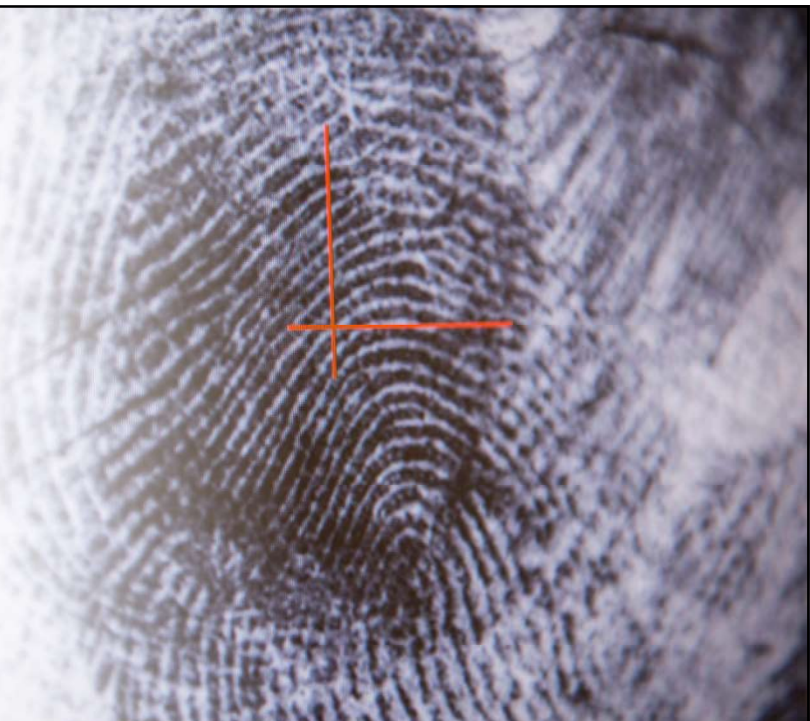
In weighing the evidence, I find sufficient evidence that Teacher Thompson touched Riley as alleged.



35

Now, Analyze All Facts

Looking at both the **undisputed facts** and the **facts you have found to be supported by the evidence**, is there sufficient evidence to support a violation of the prohibition on Title IX sexual harassment in an education program or activity and against a person in the U.S.?



36

Let's Think About Our Case...

Based on my finding that the respondent touched the complainant's buttocks and kissed the complainant on the cheek, I find sufficient evidence of both fondling and hostile environment sexual harassment under Title IX.



37

Written Determination Requirements

- Allegations
- Procedural steps taken
- Statement of, and rationale for, the results as to each allegation, including
 - Determination of responsibility
 - Disciplinary sanctions
 - Remedies (not specified in the report)
- Appeal rights
- Provide to both parties simultaneously



38

Disciplinary Sanctions

- Should be based on **previously published** guidelines of possible sanctions
- For a student with a disability, may need to conduct an MDR or take other steps before imposing consequences
- You may still need to complete state law student discipline requirements before actually imposing consequences

39

Conflicts of Interest for Decision-Makers

- Communicating with the investigator “off the record”
- Being a subordinate to the Title IX Coordinator or investigator
- Making a credibility determination based on a party’s status as a complainant or respondent
- Making credibility based on outdated notions (e.g., victims of sexual assault report right away, remember all the details of the assault, and show a certain type of emotion; similarly, that individuals falsely accused react a certain way/with strong feelings) or without considering culture, age, religion, ability, incapacitation, and trauma
- Reaching a decision before the Q&A process is complete



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Appellate Decision-Maker



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My institution has had... (choose all applicable)

At least one successful appeal (appeal granted)

At least one unsuccessful appeal (appeal denied)

No appeals

I'm not sure

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Bases for Appeal

- Procedural irregularity—affected the outcome of the dismissal or final decision
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome
- Bias or conflict of interest for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
- You can offer other appeal bases, but must do so fairly between the parties



43

Appeal Steps

- Appeal received from one or more parties
- Notice to the parties that an appeal has been filed
- Opportunity for both parties to submit a statement for/against the appeal
- Written decision with result and rationale for appeal
- Written decision provided to both parties simultaneously



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The T9 Coordinator dismisses a complaint of fondling because the circumstances make clear there is no way the conduct was for purposes of sexual gratification (no other reason)

Procedural error, did not affect the outcome

Procedural error, affected the outcome

Not a procedural error

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A party appeals based on the investigator's failure to interview witnesses on a key issue. According to the investigator, the witnesses refused to participate.

Procedural error, did not affect the outcome

Procedural error, affected the outcome

Not a procedural error

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A party's advisor was removed from the process for being disruptive and the party was not allowed to secure another advisor before moving forward

Procedural error, did not affect the outcome
 Procedural error, affected the outcome
 Not a procedural error

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The grievance process lasted 6 months and the Title IX team failed to provide notice of the need for extensions

Procedural error, did not affect the outcome
 Procedural error, affected the outcome
 Not a procedural error

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After a determination of insufficient evidence, the Respondent sends a text message to the Complainant admitting the conduct and laughing because "double jeopardy" means nothing can be done to them.

New evidence, could affect the outcome

New evidence, could not affect the outcome

Not new evidence

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After a determination of insufficient evidence, a classmate comes forward to say the Respondent admitted the conduct to them shortly after the incident

New evidence, could affect the outcome

New evidence, could not affect the outcome

Not new evidence

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After a finding of sufficient evidence, the Respondent points to dispositive evidence in the written determination that was not in the DRE or investigator report as evidence that the decision-maker was biased

Bias, affected the outcome

Bias, did not affect the outcome

Not bias

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Respondent claims the whole system is biased against them because the vast majority of decisions in the past two years have gone in favor of Complainants and the T9C has been cited referring to "pressures" by the "current OCR" to find in favor of CPs

Bias, affected the outcome

Bias, did not affect the outcome

Not bias

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Decision Elements

- Introduction
- Appeal Determination
- Relevant Procedural Background (for timeliness)
 - Dismissal/decision date
 - Appeal date
 - Date(s) for responses to appeals
- Standard of Review
- Summary of Written Determination



53

Decision Elements

- Written Statements For/Against the Appeal
- Analysis and Decision
 - Consider each appeal basis separately
- Conclusion



54

Analysis & Decision

- Consider all factors for/against the appeal basis/argument –
SHOW YOUR WORK!
- Include policy definitions and procedural requirements
- Assess whether there is sufficient evidence of impact on the outcome



55

Remember the Standard

- For most educational institutions, “preponderance of the evidence”
 - “More likely than not”
 - “50 percent and a feather”



56

Reversals & Remands

- Reversal: Where the appeal makes clear the decision was incorrect
- Remand: Where more information is needed



57

Thank You!
Questions?

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Title IX Compliance Training Certification

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OSPA Title IX Training Fall 2023

Yesterday	Today
8-9 a.m.	9:30-11:30 a.m.
Compliance Certification Part 1	Decision-Maker Training
10:15 a.m.-Noon	Noon-1:30 p.m.
Compliance Certification Part 2	Informal Resolution Training
2:30-3:45 p.m.	
Investigation Training	
3:45-5 p.m.	
Coordinator Training	



2



3

A row of ten light bulbs hanging from a cord. The seventh bulb from the left is illuminated and has a colorful, multi-colored glow. The other bulbs are unlit and have a standard grey glow. The background is a light grey gradient.

Ground Rules


- ✓ Ask questions/share perspective
- ✓ Not legal advice/keep it hypothetical
- ✓ Materials will be available for website posting

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7

A man and a woman are in a meeting room. The man is pointing at a whiteboard covered in pink sticky notes. The woman is looking at the board. There are blue chairs and a wooden table in the foreground.

Train the Trainer Tip

Informal Resolution Facilitator Training (covered in our Compliance Certification Training):

- ✓ What is "Sexual Harassment" under Title IX?
- ✓ What is the scope of the educational institution's "education program or activity"?
- ✓ What are the steps in the Title IX sexual harassment grievance process?
- ✓ How do you serve impartially without bias?

8

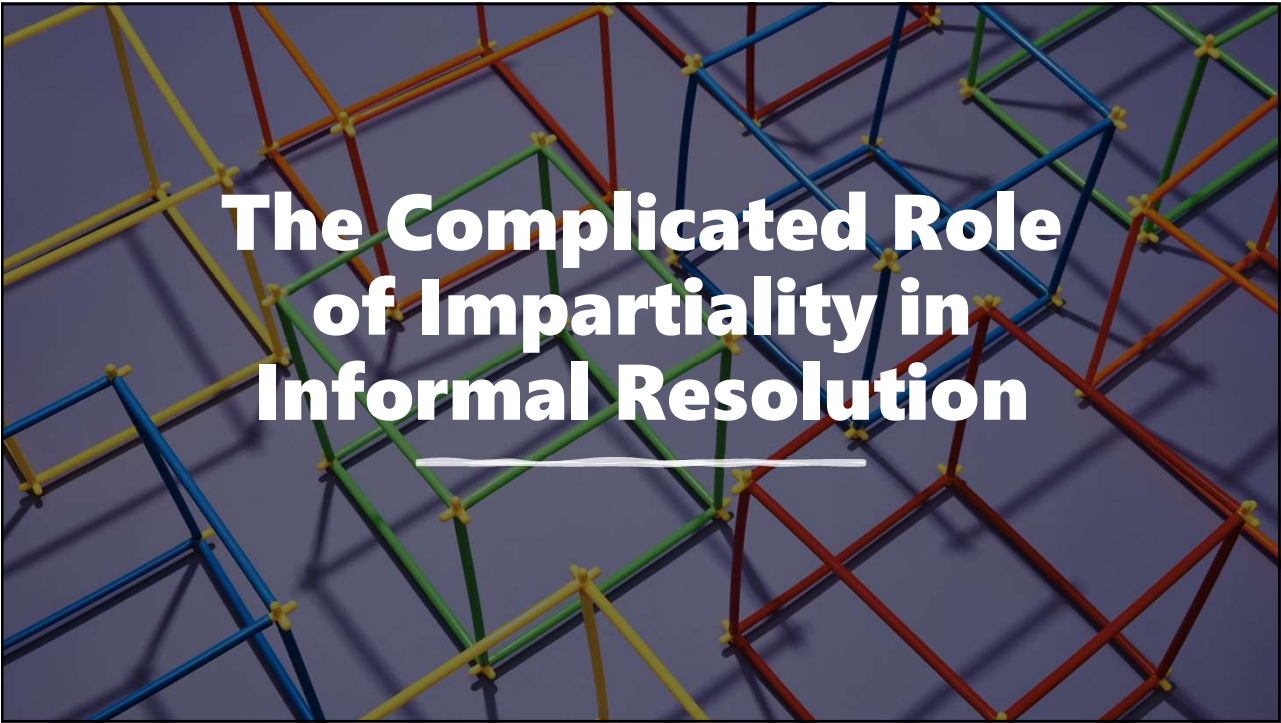


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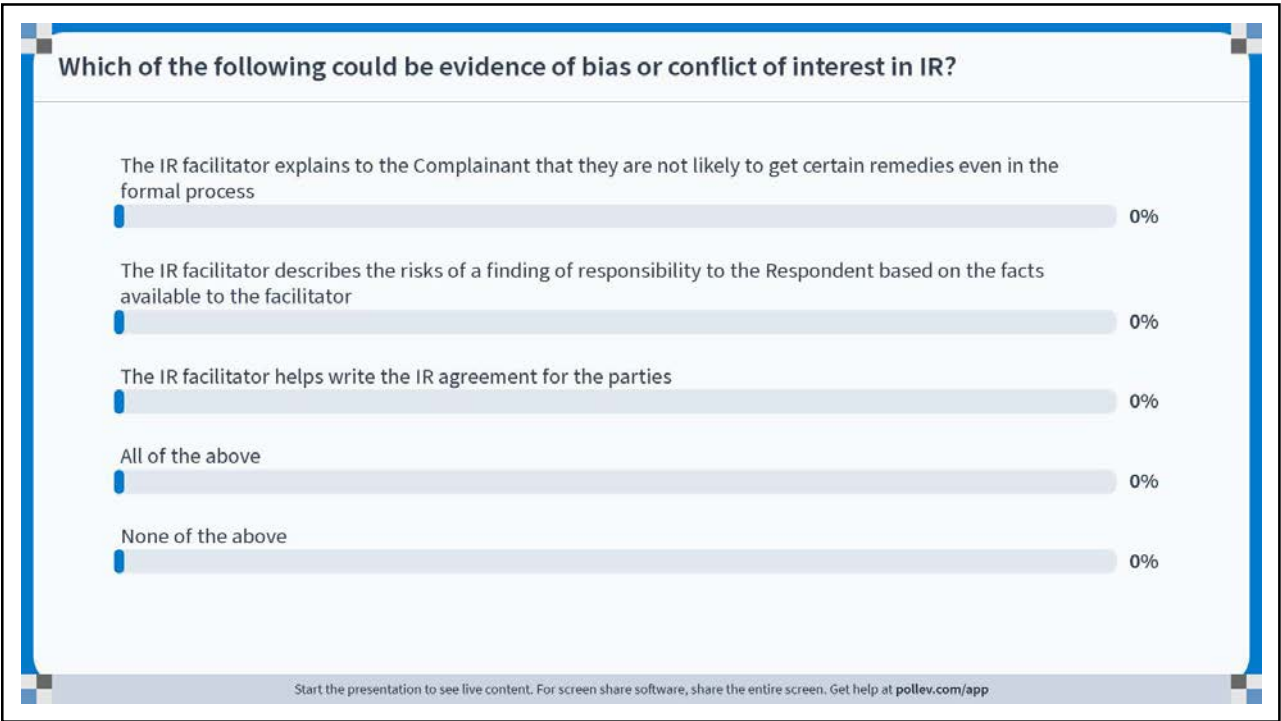
Informal Resolution Theory

- Informal resolution is not intuitive
- The role is very different from other roles in the Title IX process
- Certain skills may increase the chances of success

10



11




12

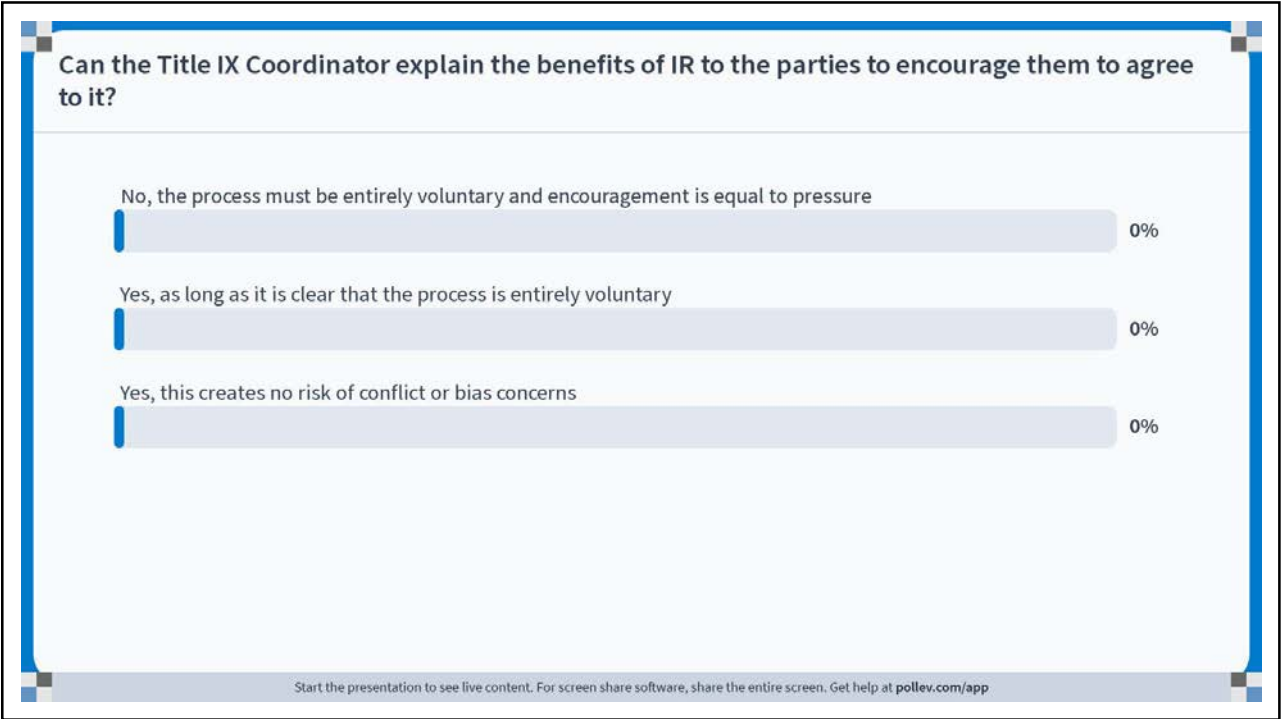
Benefits of IR

The rules recognize that IR is efficient and effective

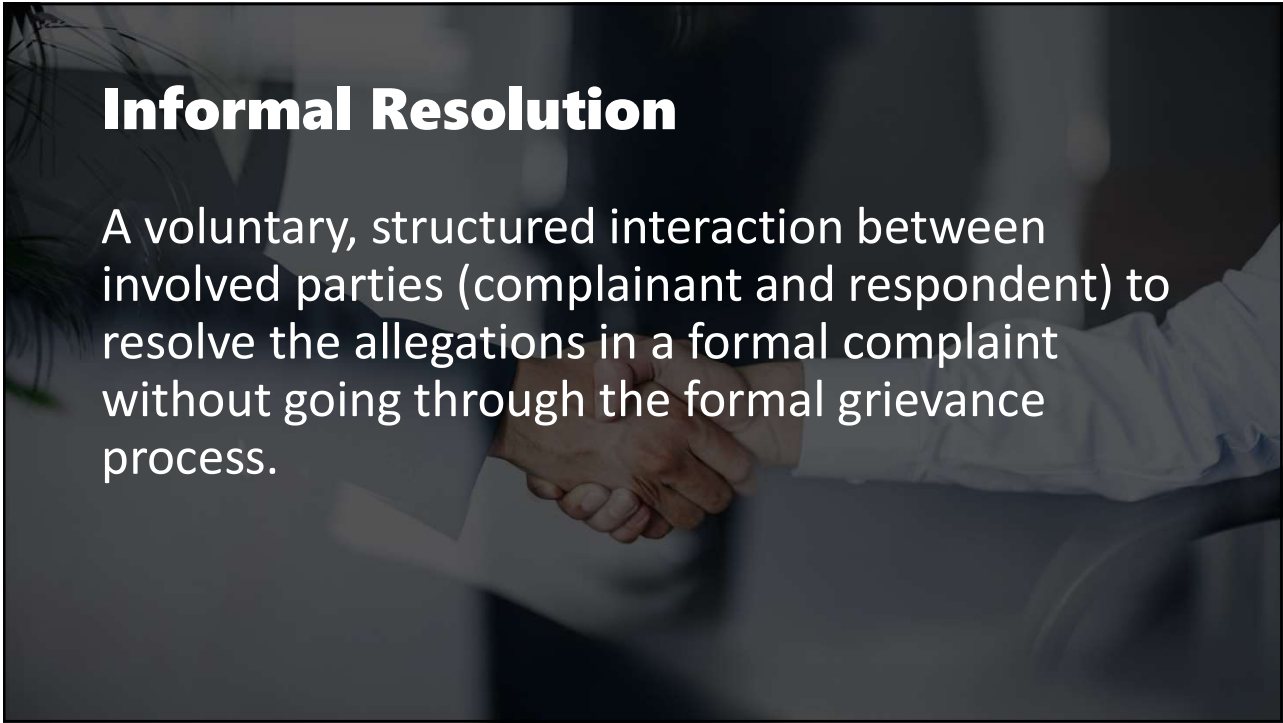
- Flexibility in Process
- Less Adversarial
- Speed
- Restorative Nature/Not Zero Sum
- Similar Outcomes
- Mutual Agreement Provides Control



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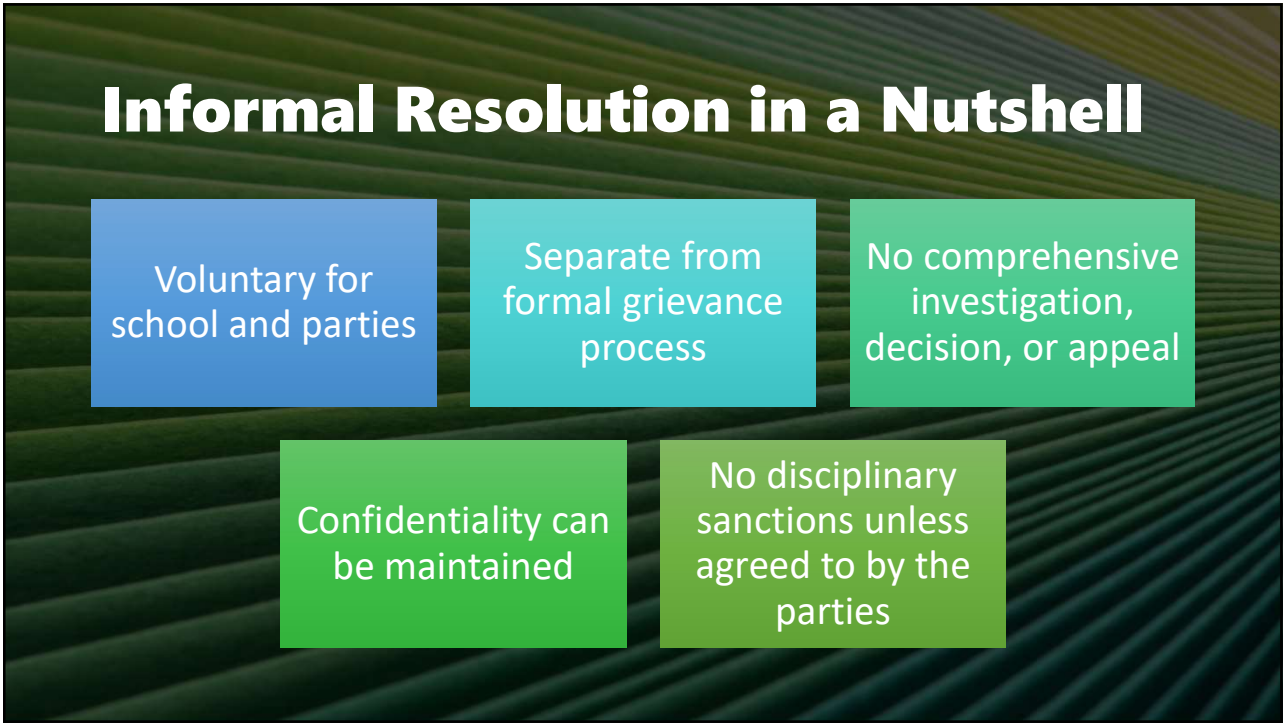
14



Informal Resolution

A voluntary, structured interaction between involved parties (complainant and respondent) to resolve the allegations in a formal complaint without going through the formal grievance process.

15



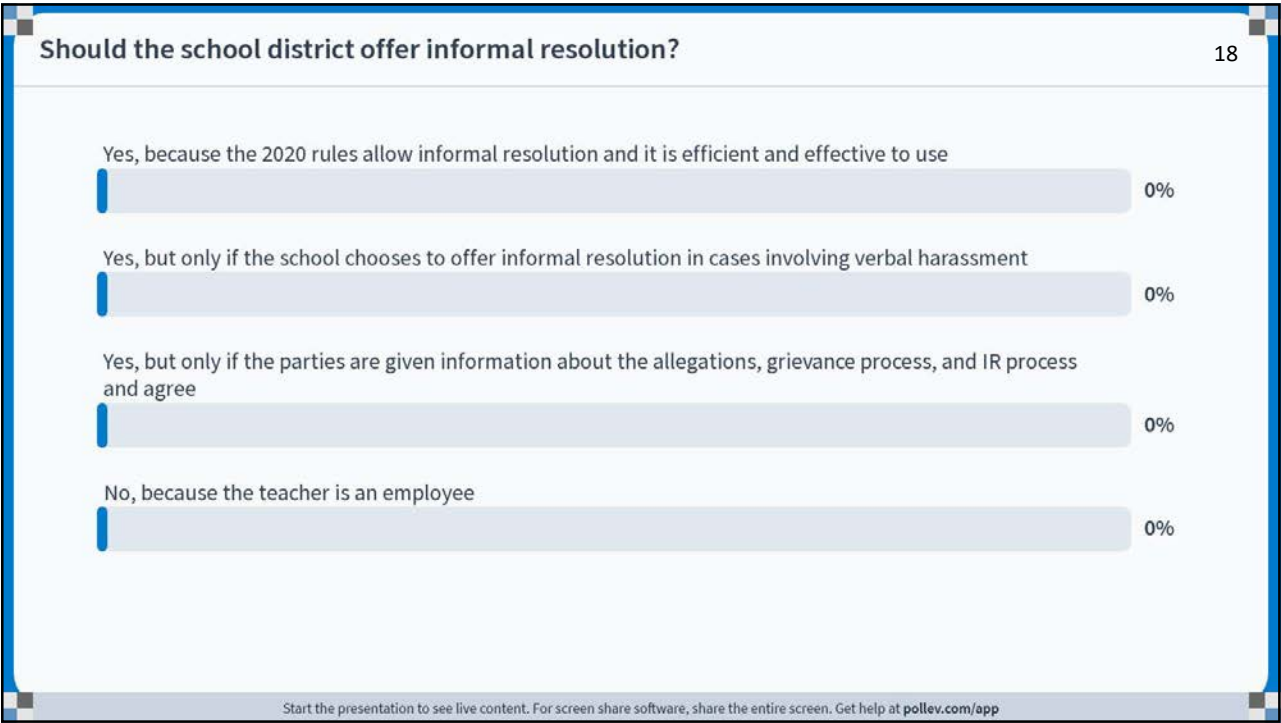
16

Scenario

Cleo is a student in Teacher Thompson’s class and reports that the teacher regularly makes highly sexualized comments in class, making Cleo uncomfortable.




17



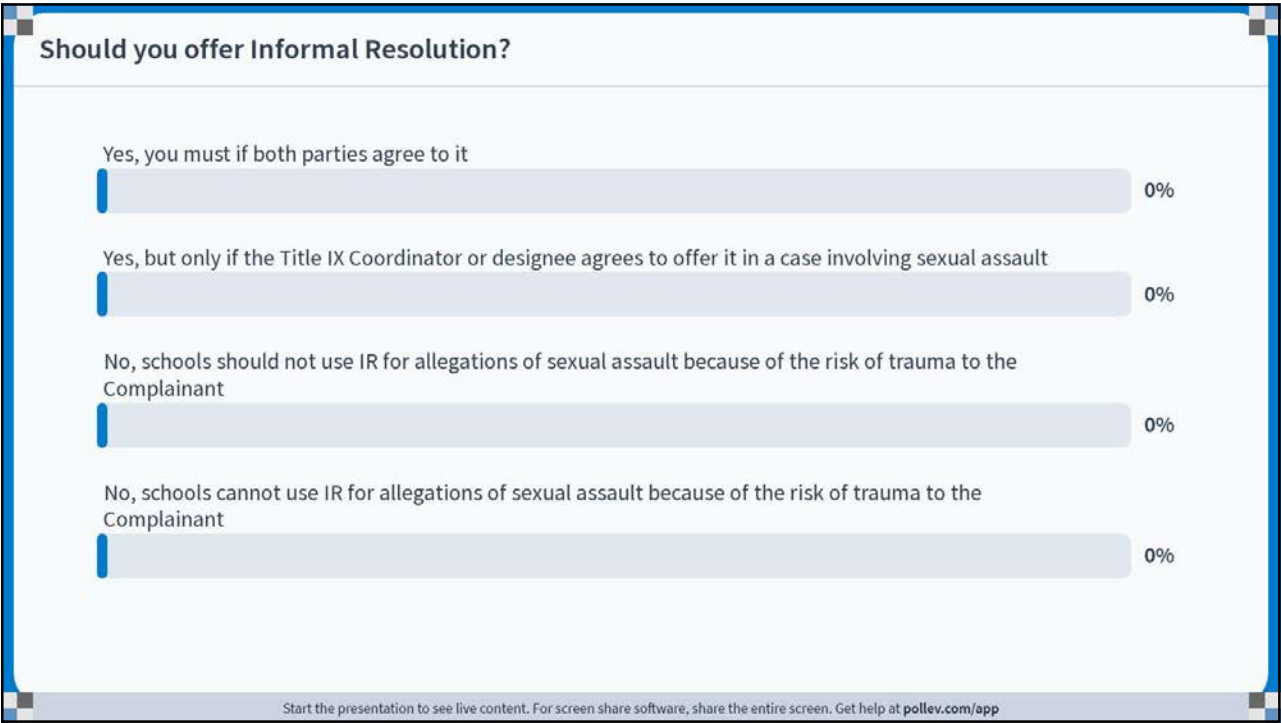
18

Scenario

Charlie reports that Ryan sexually assaulted Charlie on an overnight trip for an athletic team. Ryan reports that they believed the conduct was consensual.




19




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Informal Resolution Formalities

- Both parties must agree (get it in writing)
- School can offer IR but is not required to do so
- You should think now about if there are "off limits" topics for you (e.g., sexual assault)
- Be consistent



21



Trauma & Informal Resolution

Informal Resolution can promote:

- ✓ Empowerment
- ✓ Recognition
- ✓ True Resolution

22

Scenario

You reach out to the Complainant, Cole, and the Complainant’s parents as the first step in your informal resolution mediation process in a complaint involving Reese. You introduce yourself, describe the process, and ask if they have any questions. They have none. After the phone call ends, Cole emails you the following:

I don’t really want to do this; my parents are making me. Reece deserves to be kicked out of school and I know that can only happen if there is an investigation.

TH

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Should informal resolution proceed?

No, because the Complainant does not want to do so

No, because the Complainant is not open to reaching a resolution

Yes, because the Complainant is a minor so their parent's decision prevails

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An illustration of a clipboard with a checklist and a pencil. The clipboard has a red clip at the top and a purple border. The checklist has three items: the first two are checked with green checkmarks, and the third is unchecked with a grey square. A yellow pencil with an orange eraser is positioned to the right of the clipboard.

Request to Participate

- The Title IX Coordinator or their designee can **offer** the IR process to one party
- Either party also may submit written **request** to Title IX Coordinator to participate in IR
- Either way, promptly notify the other party of the request and provide both parties your written Notice & Consent
- Both parties must voluntarily consent to participate
- If either party declines, the Title IX Coordinator should notify other party that informal resolution has been terminated and resume formal Grievance Process

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Notice & Consent

Notice **must include**

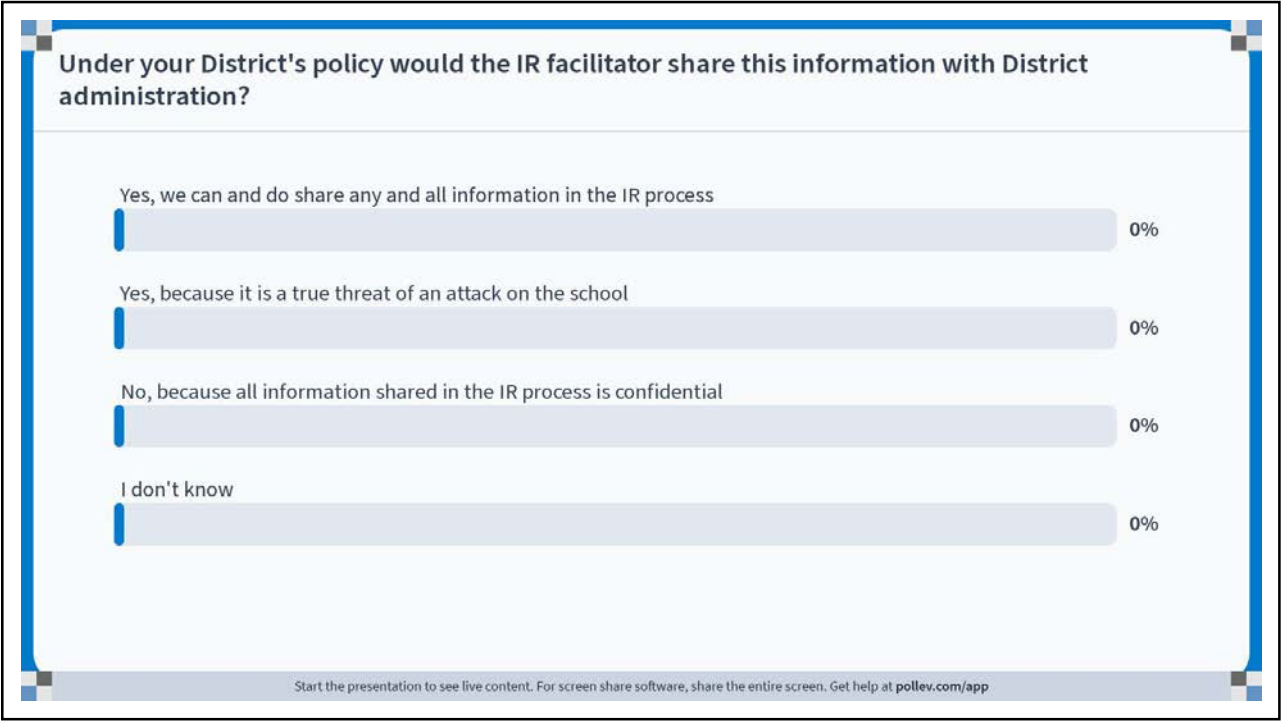
- Requirements for informal resolution process
- Including circumstances where informal resolution precludes parties from resuming Grievance Process for formal complaint based on or arising from same allegations
- Including record-keeping requirements
- Including when information from the IR process can be used elsewhere (e.g., formal complaint process, discipline)

27

Scenario

During informal resolution, the facilitator learns from one of the parties that the other party sent a threat by text message threatening to blow up the school if the Title IX process does not go their way

28



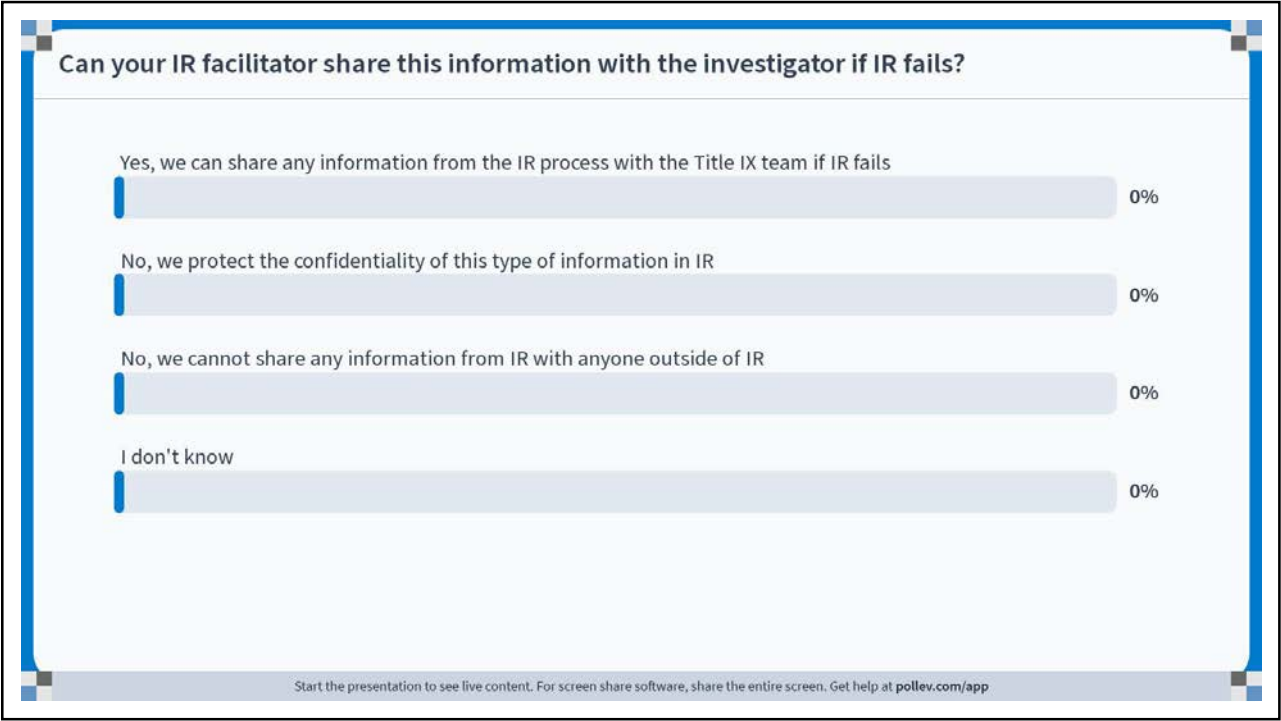
29



Scenario

During the IR process, a party admits that they either made up the allegations or committed the alleged misconduct


30



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Requirements

- Parties may have advisor (attorney or non-attorney) and minor parents/guardians may attend
- Restrictions okay if equally applied
- Must be reasonably prompt



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- Mediation
- Restorative Justice
- Something Else?

Method



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Mediation

- May be governed by state law
- Is "facilitated resolution" of a dispute under Title IX "mediation"?
- In person or "shuttle diplomacy"?



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I believe face-to-face mediation is appropriate in sexual assault cases.

True

False

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A fluffy white cat with blue eyes is sitting on a light orange surface, yawning with its mouth wide open, showing its pink tongue and teeth. The background is a solid light orange color.

Mutually Agreeable Time and Place

- Mutually agreeable time and place
- Begin early if possible
- Not close proximity to another mediation
- Neutral, comfortable location
- No privacy/confidentiality concerns

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Preparation

- IR facilitator should review all documents in the file for the case
- IR facilitator may wish to ask parties if they would like to submit documents or a statement before mediation begins
- Do not predetermine the case—you are NOT a decisionmaker
- Keep an open mind



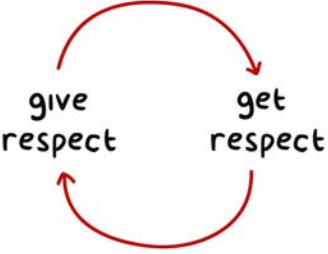
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Set Ground Rules

- Consider developing written information regarding the process and ground rules for informal resolution session
- Have all parties read and sign



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Respect All Parties

- Equal treatment for all parties
- Cultural sensitivity
- Understand emotions are high & acknowledge feelings

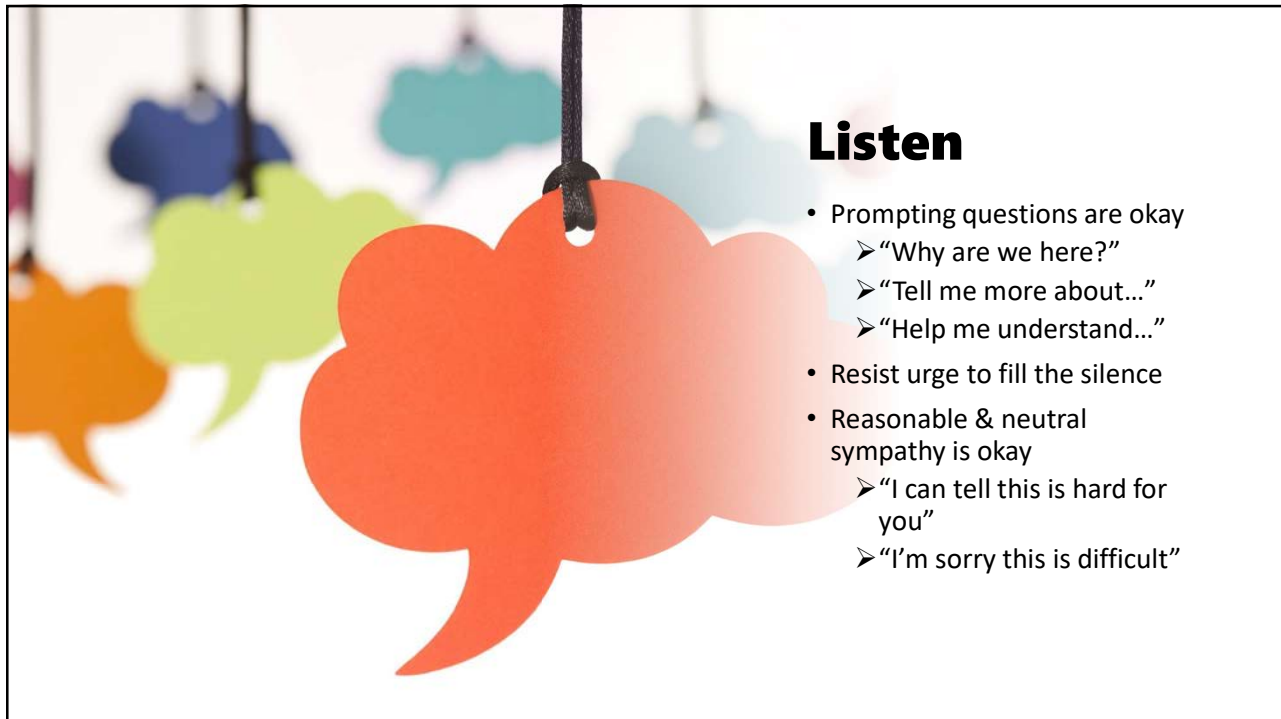
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Overview

- IR facilitators should begin with a solid "intro" so the parties understand expectations and the process
- Allow the parties to share their story with the IR facilitator *if they would like to do so*

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Listen

- Prompting questions are okay
 - “Why are we here?”
 - “Tell me more about...”
 - “Help me understand...”
- Resist urge to fill the silence
- Reasonable & neutral sympathy is okay
 - “I can tell this is hard for you”
 - “I’m sorry this is difficult”

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Be Approachable

- Friendly yet firm
- Empathetic yet impartial
- Listen carefully – cues
- Convey sense of optimism



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Broker – First Party

- Determine what the first party wants to ask for to resolve the process
- Brainstorm first—nothing is off the table at first, narrow down later based on the other party's response—and provide suggestions
- Make sure you understand if there has been information shared with you by the first party that is off limits to share with the other party
- Front any concerns with any of the suggestions before you go to the other party, but don't take it off the table



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Examples of Suggestions

- No contact orders
- Tutoring or academic adjustments
- Counseling (offered or required)
- Training (offered or required)
- Admission and apology for wrongdoing
- Apology for Impact only
- Managing course schedules
- Online courses
- Employee supervision



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Be Open to Suggestions

- Do not shut down any ideas – write them all down
- Discuss pros/cons and possibility of solution working
- Suggest, but don't advocate
- If a party refuses to make further offers, ask questions to understand why

45

45

Suggestion Language

- “What terms would help you reach a resolution in this case?”
- “I want to provide some options to consider, but these are just suggestions to help get/keep the conversation going.”
- “The other party offered [explain], what is your response?”



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Broker – Second Party

- Follow the process you used with the first party, FIRST; don't immediately confront the other party with the first party's suggestions
- After discussing the second party's asks, consider if there is overlap you can discuss
- Then, address things that don't match up
- Continue brainstorming, explaining limits, and ensuring information that can be shared



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Remain Impartial


- Commitment to aid all parties
- Avoid accusatory language/placing blame on any party during discussions
- Do not invest emotionally
- Stay objective; focus on facts
- No consideration of external factors



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Remain Impartial

- Remind that you do not have material interest in outcome
- Be consistent
- Communicate effectively
- Transparency



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Be Inclusive

- Allow both sides to be fairly represented
- Communicate with any party necessary to address conflict
- Do not allow advisors (or parents) to steamroll process

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Focus on Resolution

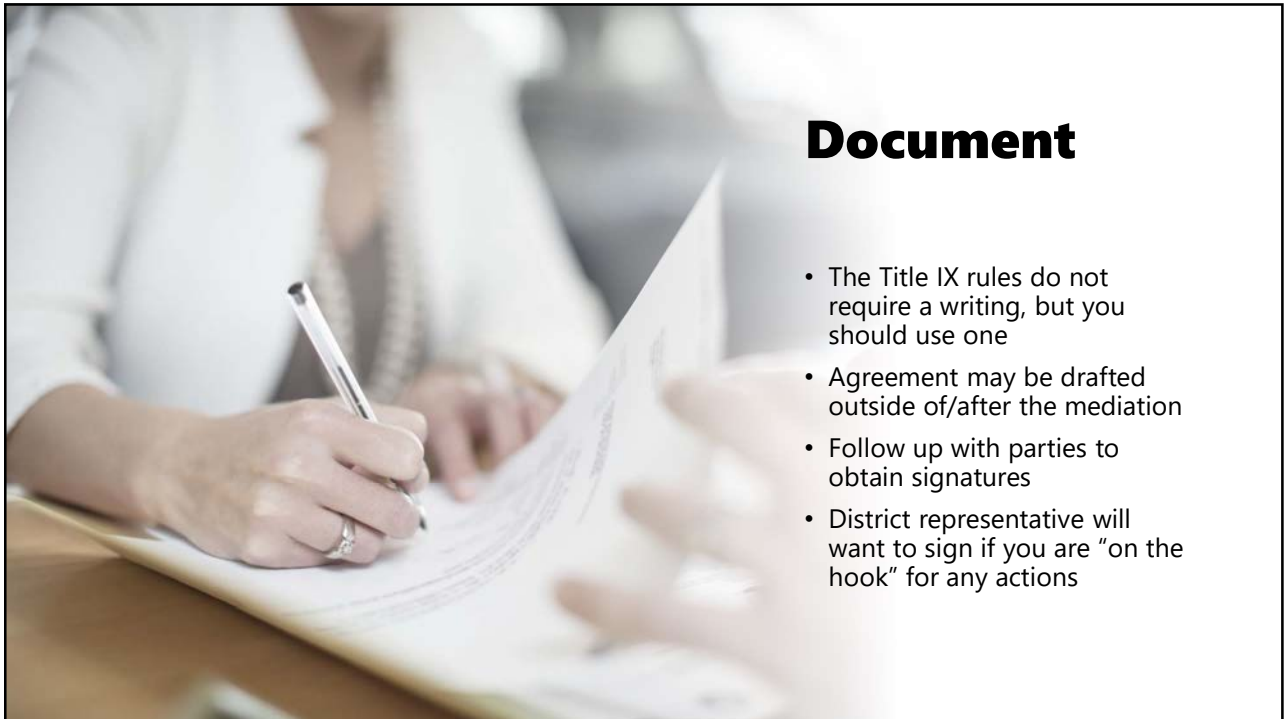
- Encourage parties to not react defensively
- Focus discussion on possible solutions as opposed to “rehashing” defensive statements or explanations



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Document

- The Title IX rules do not require a writing, but you should use one
- Agreement may be drafted outside of/after the mediation
- Follow up with parties to obtain signatures
- District representative will want to sign if you are “on the hook” for any actions



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When can the Title IX process resume after the IR process has begun?

Anytime

Anytime before an agreement is reached

Never

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Timeframes

- During informal resolution, time frames for formal Grievance Process will be placed on hold
- Think about putting time limits in place, but be flexible

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What happens if a party violates the IR agreement terms?

Nothing

Whatever is dictated in the agreement

The Title IX process begins again

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Thank You!

Questions?

Informal Resolution Training

Oregon School Personnel

Administrators Fall 2023 Conference

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Join the K-12
Title IX Leadership
Alliance

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