

All Hands on Deck
Lee College Title IX Training
February 26-27, 2024

Thompson & Horton
HOUSTON • DALLAS • AUSTIN • FORT WORTH

Holly McIntush
hmcintush@thlaw.com

Follow our Title IX blog
<https://titleixtips.com/>

1

Agenda

- ✓ Title IX Basics
- ✓ Investigation
- ✓ Decision-Making
- ✓ Appeals

2

Title IX Basics

T&H

3

Why Are We Here?

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

T&H

4

Please Remember

DISCRIMINATION
HARASSMENT
SEXUAL HARASSMENT
TITLE IX SEXUAL HARASSMENT
RETALIATION

Thompson & Horton LLP
ATTORNEYS AT LAW

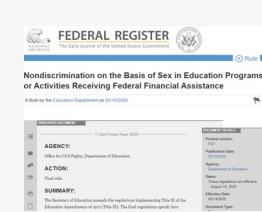
5

Today Is Title IX but...

Complaints of discrimination, harassment, or retaliation based on protected statuses other than sex **should be reported** to the appropriate official, who must address them; they will **not** be addressed under the Title IX sexual harassment process we are talking about today, but are still important

T&H

6



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 Jan 2024
- Include significant requirements for handling complaints of sexual harassment under Title IX

7

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 (240,000+ comments)

Purported release date for final rule was May 2023; then October 2023; then January 2024; now April 30, 2024

Would change many of the requirements for handling complaints and **apply to all sex discrimination**, not just sex-based harassment

8

Do You Use Title IX?

<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
-------------------------------------	-----------------------------------

9

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?

10

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?

11

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

12

Do You Use Title IX?

<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.

T&H

13

Do You Use Title IX?

<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
-------------------------------------	-----------------------------------

T&H

14

“Title IX Sexual Harassment”

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

T&H

15

“Title IX Sexual Harassment”

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

T&H

16

Title IX #1 of the “Big 5” Employee Quid Pro Quo

- An employee of the school conditioning an aid, service, or benefit of the school 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

T&H

17

Title IX #2 of the “Big 5” Sexual Assault (Clery Definition)


- Rape, fondling without consent, incest or statutory rape
- Any act of vaginal or anal penetration, however slight, with any body part or object, or oral genital contact of another person, without consent
- Touching of the private body parts of another person for the purpose of sexual gratification, without consent (above or under clothing)

T&H

18

Title IX
#2 of the "Big 5"
Sexual Assault
(Clergy Definition)

- Rape, fondling **without consent**, incest or statutory rape
- Any act of vaginal or anal penetration, however slight, with any body part or object, or oral genital contact of another person, **without consent**
- Touching of the private body parts of another person for the purpose of sexual gratification, **without consent** (above or under clothing)




19

Title IX
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



20

Title IX
How does Lee College define consent?


Consent is voluntarily and knowingly expressing **unambiguous** participation in a mutually agreed upon sexual activities at any stage of sexual activity and does not include coerced submission or submission out of fear. In the absence of an individual's inability to offer resistance, say "no" or **provide clear, concise and positive** verbal communications and physical actions indicating approval, agreement and permission to engage in sexual activities by all parties, **one should not infer or presume consent**. A prior or current relationship, even if it sexual activity is/was involved, does not imply consent for future sexual activity.



21

Title IX
#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



22

Title IX
#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




23

Title IX
#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


24



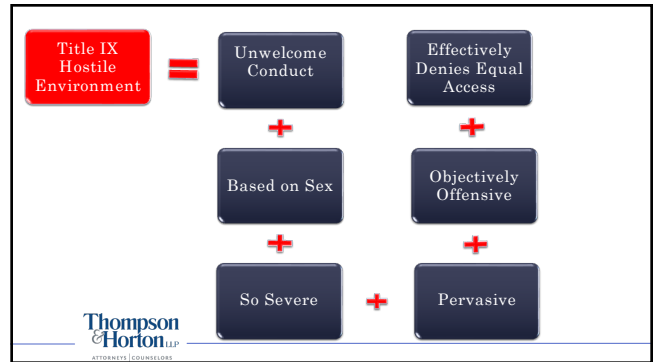
24

“Title IX Sexual Harassment”

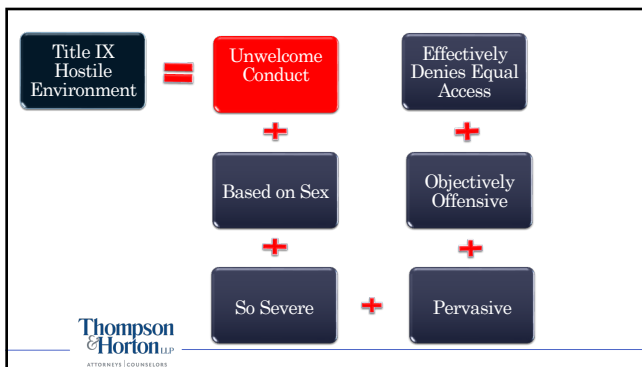
The Title IX “Big 5” OR Title IX “Hostile Environment”



25




26



27


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



28


Polling Access



Option One
Use this QR code

Option Two

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

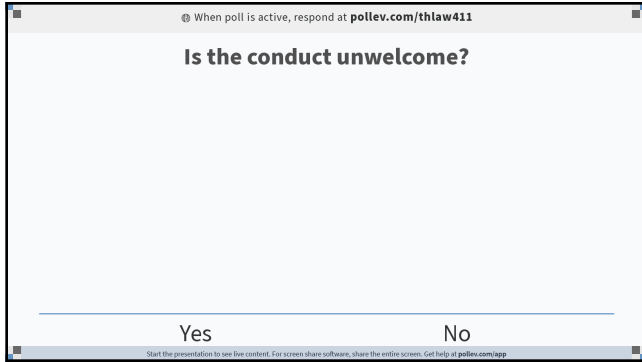


29

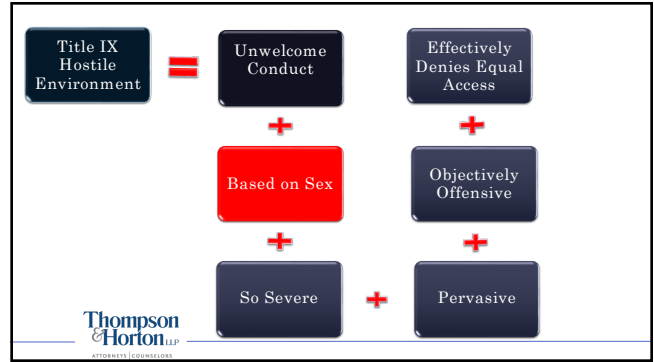
Unwelcome?

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.

30



31



32

Title IX Sexual Harassment
Based on Sex

“Sexual”

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

Based on sexual orientation

Based on gender identity

T&H

33

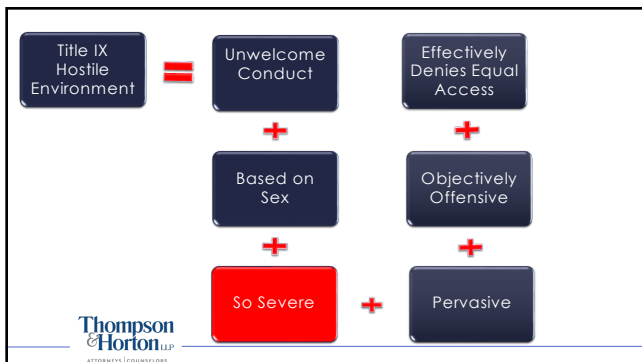
Based on Sex

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
- A transgender person can harass a transgender person

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

34



35


What does "severe" mean (one word)?

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

36

Dictionary Definitions: 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)




37

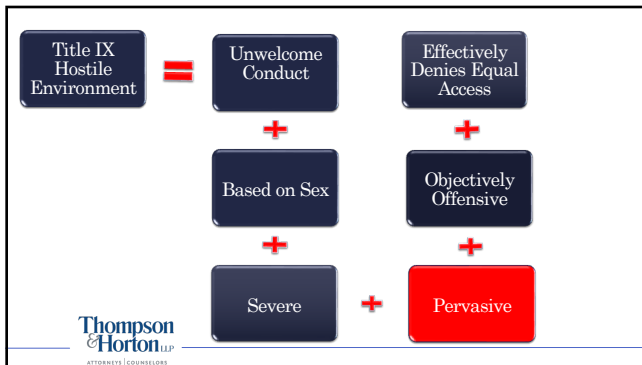
Case Law Definitions

- "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)



38



39


What does "pervasive" mean (one word)?

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

40

Dictionary Definitions: 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)




41

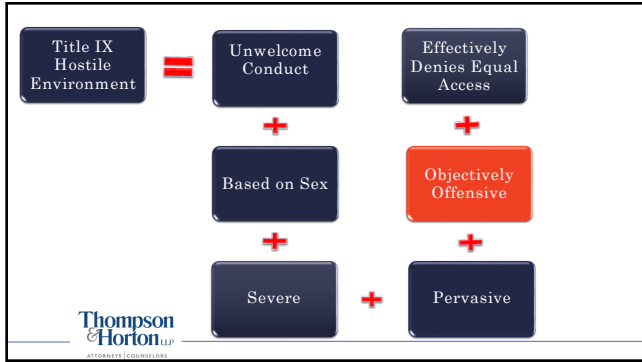
Case Definitions: Pervasive

- "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)



42



43

Dictionary Definition: Objectively Offensive

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

The Thompson & Horton logo is in the bottom right corner.

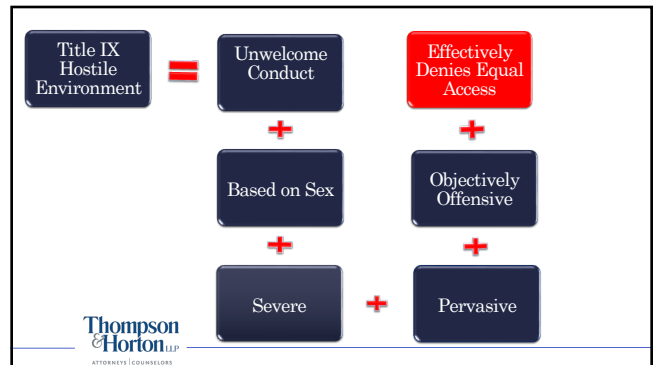
44

Case Definitions: Objectively Offensive

- Offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively
- The objective offensiveness of conduct is to be judged by reference to a reasonable child at whom the conduct were aimed

The Thompson & Horton logo is in the bottom right corner.

45



46

Effective Denial of Equal Access

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?

The Thompson & Horton logo is in the bottom right corner.

47

Effective Denial of Equal Access

Examples may include:

- Skipping class to avoid a harasser
- A decline in a student's grade point average
- Difficulty concentrating in class
- A third grader who starts bed-wetting or crying at night due to sexual harassment
- A high school wrestler who quits the team but carries on with other school activities following sexual harassment

The Thompson & Horton logo is in the bottom right corner.


48

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

49

Effective Denial of Equal Access

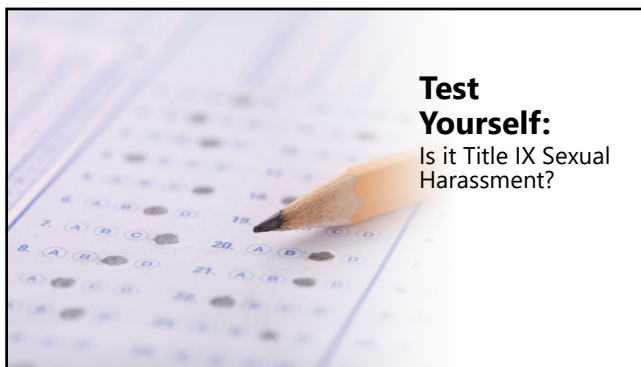


The key: School officials turning away a complainant by deciding the complainant was "not traumatized enough" would be impermissible.

50


Test Yourself:

Is it Title IX Sexual Harassment?



51

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



52

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

Is it Title IX Sexual Harassment?

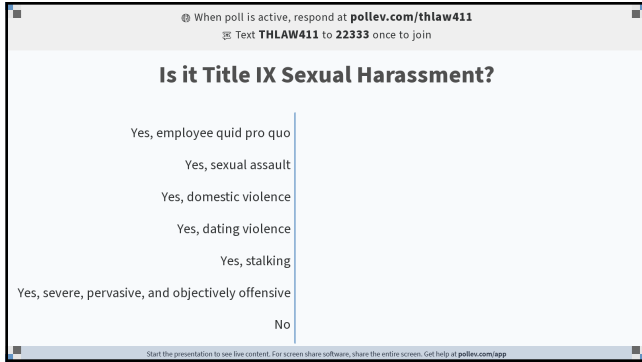
- Yes, employee quid pro quo
- Yes, sexual assault
- Yes, domestic violence
- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

53

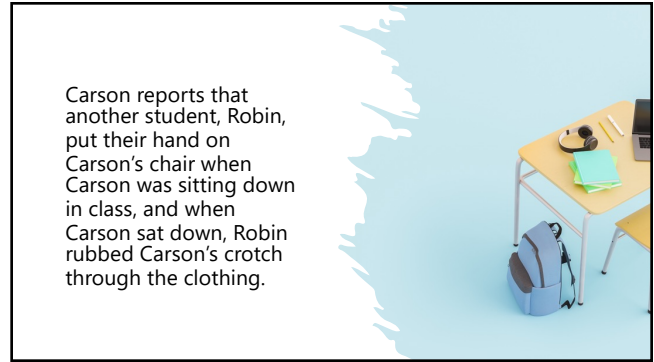
In the cafeteria at lunch, an unknown student airdropped a video of a student, Carson, engaging in sexual activity with an unknown person.



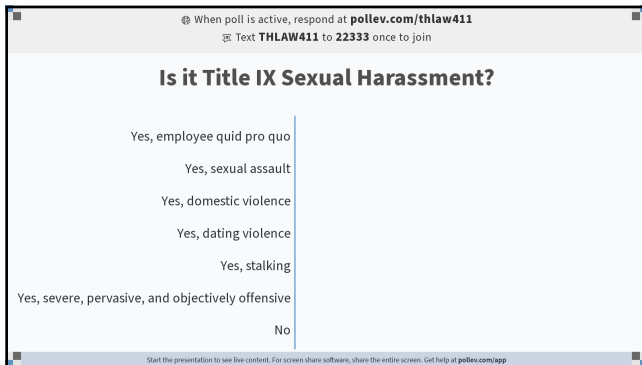
54



55



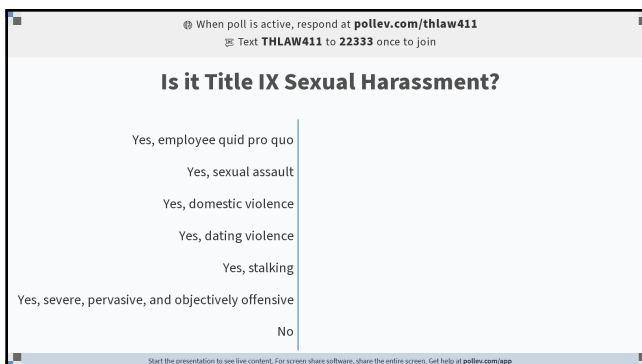
56



57



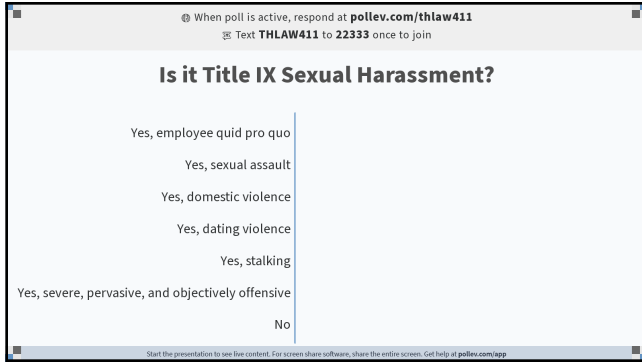
58



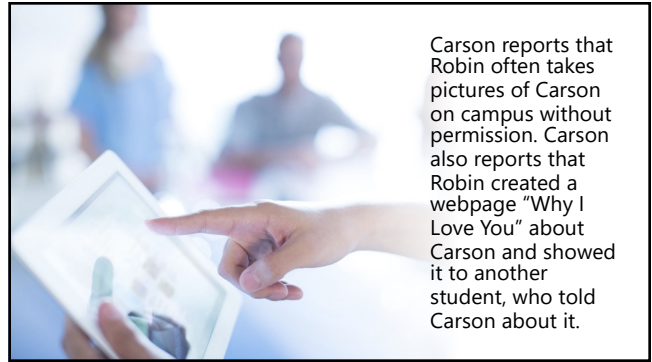
59



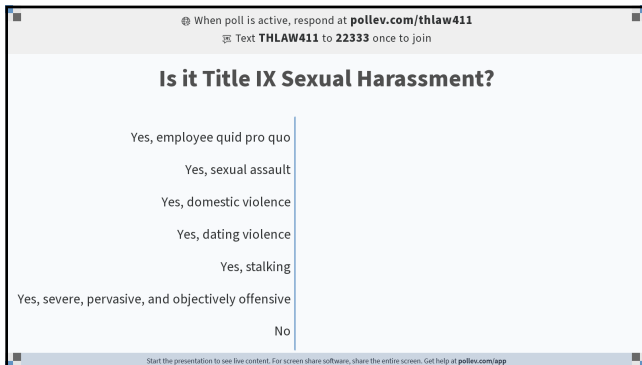
60



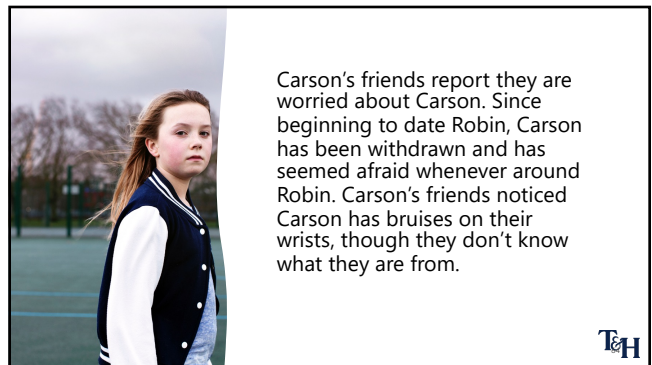
61



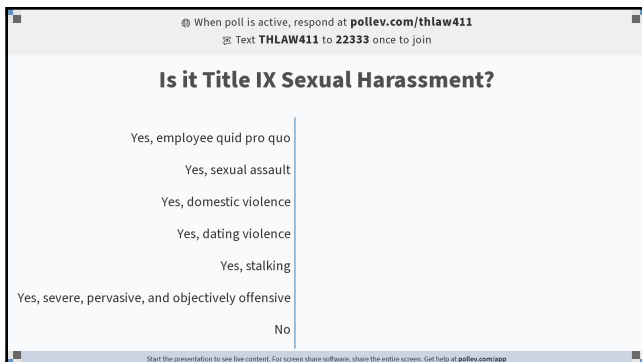
62



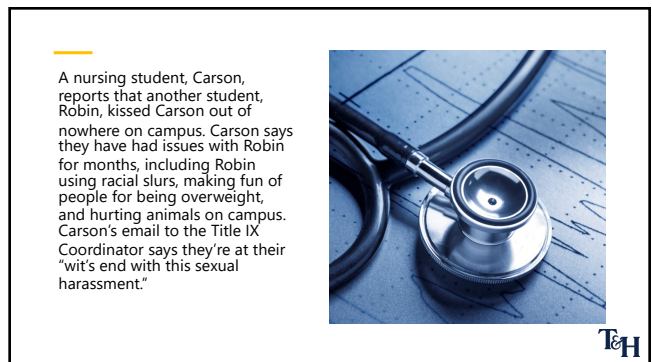
63



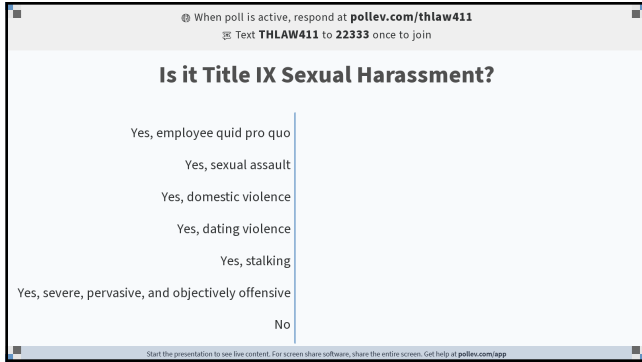
64



65




66



67

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




68

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?




69



Education Program or Activity

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

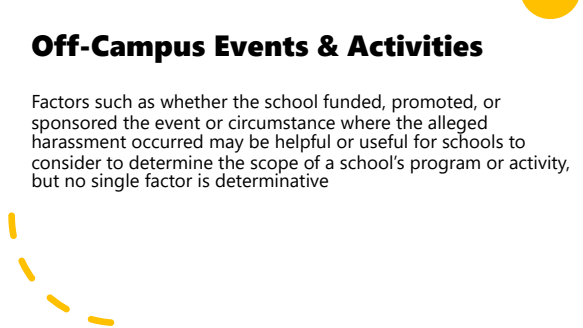
- Includes situations where conduct occurs as part of the school's "operations"
- "Includes locations, events, or circumstances over which the [school] exercised **substantial control** over both the **respondent** and the **context** in which the sexual harassment occurs"



70

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

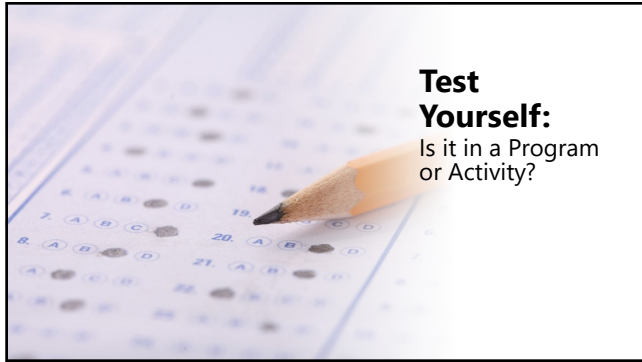


71

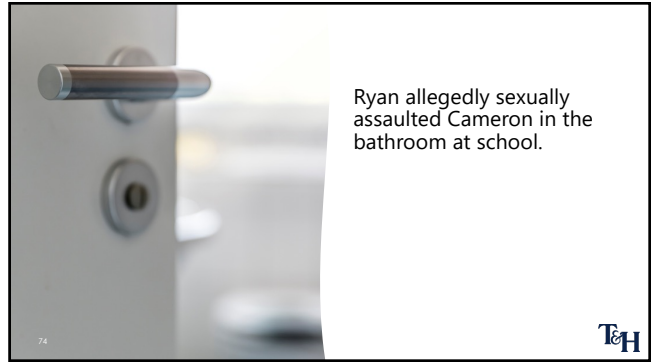
What should I do if I receive a report Of harassment outside a district program or activity?

- Support
- Support
- Support
- Consider other policies and codes of conduct that may have been violated
- Remember: conduct that begins outside of an education program or activity may continue into the education program or activity ("downstream effects")

72



73



74



75



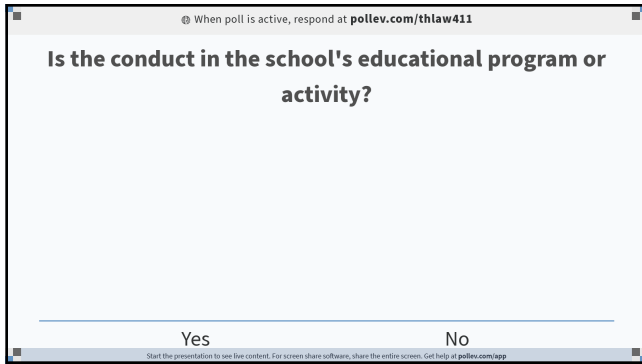
76



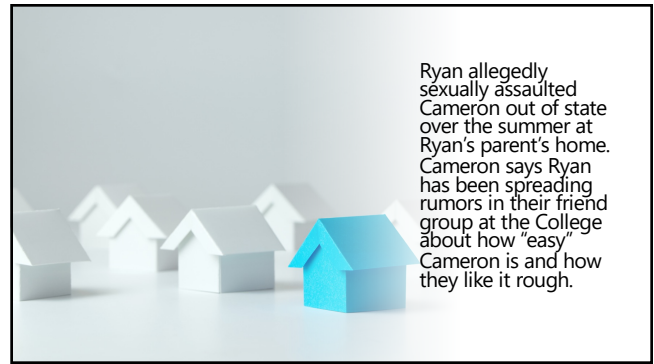
77



78



79



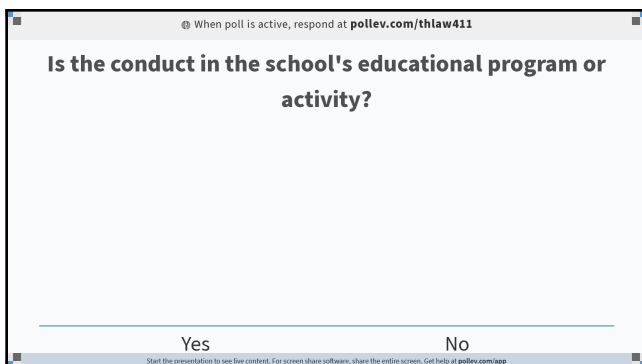
80



81



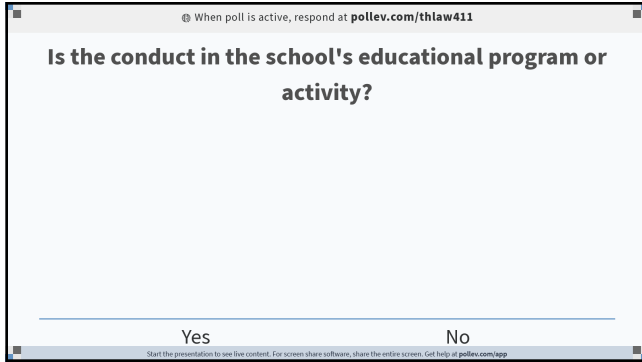
82



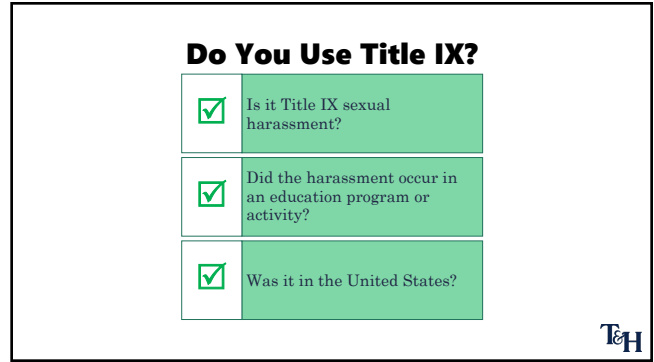
83



84



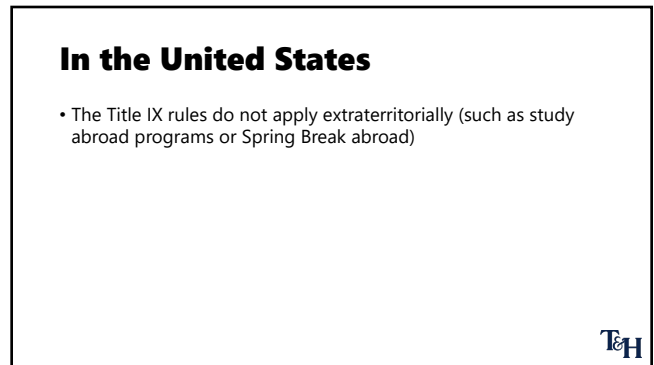
85



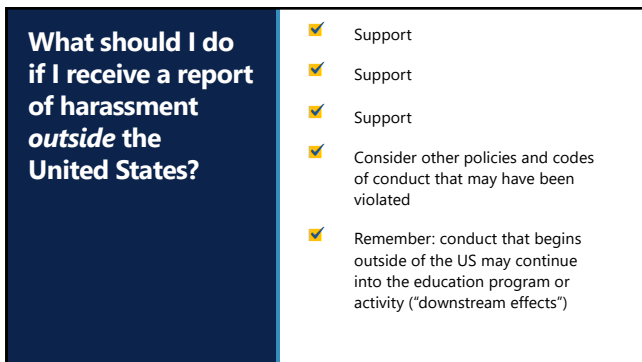
86



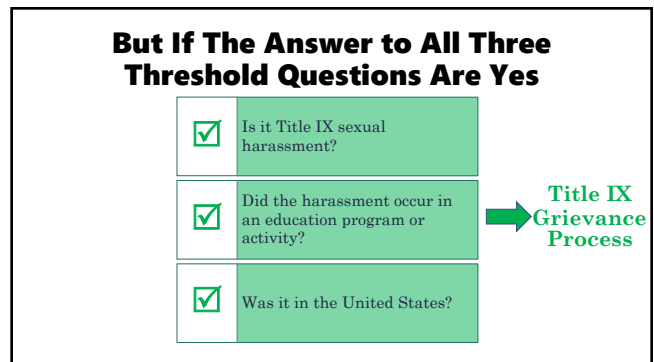
87



88



89




90

What is The Title IX Grievance Process?

Step ½: Contact Complainant (Intake)
Step 1: Supportive Measures Meeting With Complainant
Step 2: Consider Emergency Removal / Administrative Leave for Respondent

If Complainant files a Formal Complaint or Title IX Coordinator signs a Formal Complaint


Step 3: Notice of Allegations
Step 4: Consider Dismissal
Step 5: Informal Resolution (in appropriate cases)




91

Title IX Grievance Process Steps

Step 6: Investigation
Step 7: Decision
Step 8: Appeal


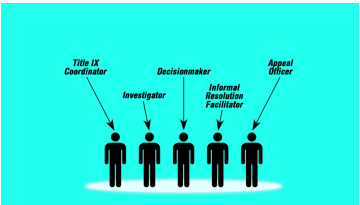


NOTE: ALL STEPS include strict detailed requirements from the Title IX rules



92

Title IX Personnel




93

The Title IX Coordinator signs the complaint over the objections of the alleged victim. Who is the complainant?

The Title IX Coordinator	0%
The alleged victim	0%
The College	0%
No one	0%

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


94



Complainant

An individual who is alleged to be the victim of conduct that could constitute sexual harassment


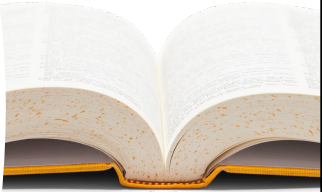
- Even if report made by parent/guardian or third party
- Even if Title IX Coordinator signs the Formal Complaint
- Person considered complainant even if they do not choose to file a Formal Complaint



95

Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment



96

Title IX Process Steps

Step 0.5: Intake

- Educational institutions are responsible any time an “official with authority” has “actual knowledge” of conduct that triggers the Title IX process
- It’s not always clear if Title IX is triggered; intake is a process to learn more about what is alleged
- This is not an investigatory interview—you are not seeking evidence



97

Title IX Process Steps

Step 1: Supportive Measures Meeting

If any “official with authority” has notice of conduct that triggers Title IX, a supportive measures meeting must be held by the Title IX Coordinator or designee

- A minor student’s parents must be involved
- Discuss supportive measures and the Title IX formal complaint process



98

Four topics must be covered:



The availability of supportive measures



The complainant’s wishes with respect to supportive measures



The availability of supportive measures with or without filing a formal complaint



The process for filing a formal complaint



99

Title IX Process Steps

Step 2: Removal of the Respondent

Even if no formal complaint is filed...

- **Emergency Removal** A party (usually respondent) who is found based on an individualized analysis to pose an immediate threat to the physical health and safety of any person (including self) can be removed on an emergency basis – must give the removed party notice and an opportunity to respond after the removal
- **Administrative Leave** An employee can be put on administrative leave subject to the educational institution’s normal leave policies



100



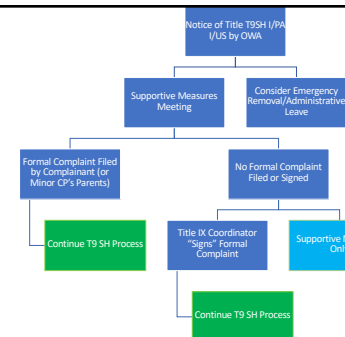
Only move to Step 3 if you have a Formal Complaint

– NO DISCIPLINE WITHOUT A FORMAL COMPLAINT–
But support, support, support



101

Do You Keep Going?



102

Formal Complaint

- A document
- Filed by a complainant or signed by the Title IX Coordinator
- Alleging sexual harassment against a respondent
- Requesting that the school investigate the allegation of sexual harassment

July 2021 OCR Q&A



103

Formal Complaint

- If filed by a Complainant, must contain the Complainant's physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint
- Can be a hard copy document or an electronic document submitted via email or an online portal
- An email from a student to the Title IX Coordinator or OWA that ends with the student signing their name would suffice

July 2021 Q&A



104

Formal Complaint

- A third party cannot file a formal complaint of Title IX sexual harassment
- May have rights under other policies and procedures/code of conduct provisions



105

Title IX Process Steps

Step 3: Notice of Allegations

Only if a formal complaint is filed...

- **Must include the names of the parties and details such as date, locations, and alleged conduct**
- **See T&H Guidebook – Documents 19 & 20**

Note: This notice is required before any first investigatory meeting/interview with the Respondent.



106

No More Confidentiality

- Once a formal complaint has been filed or signed, the institution **must** share the Complainant's name with the Respondent (**anonymity is not an option**)
- Compare to the status before a formal complaint is filed, when you **cannot** share the Complainant's name, including with the Respondent, without permission or unless necessary to implement supportive measures
- **Explain this to the Complainant during the supportive measures meeting so they know the consequences of filing a formal complaint**



107

Title IX Process Steps

Step 4: Consider Dismissal

Only if a formal complaint is filed...

- Consider if dismissal is required or warranted (at this stage and throughout the lifespan of the process)
- **See T&H Guidebook – Document 22**


Note: This is usually only necessary if the initial report comes in the form of a Formal Complaint




108

Dismissal Reasons


Mandatory Dismissals	Permissive Dismissals
Alleged conduct, if proved, would not be sexual harassment	Complainant asks Title IX Coordinator in writing to withdraw complaint
Alleged conduct, if proved, would not be in an educational program or activity	The respondent's enrollment or employment ends
Alleged conduct, if proved, would not be against a person in the U.S.	Circumstances prevent gathering sufficient evidence to reach a determination (non-cooperation by CP, length of time between incident and complaint, etc.)



Can use another policy or code of conduct





Cannot use another policy or code of conduct



109

Written Notice and Appeal—Dismissals

- If the educational institution dismisses the complaint or allegations in the complaint, it must promptly send written notice of the dismissal and the reason for the dismissal to all parties
- Any party **can appeal** the dismissal decision


110

Title IX Process Steps


Step 5: Consider Informal Resolution

Only if a formal complaint is filed...

- Can be offered in certain cases (not in cases involving employee-on-student allegations)
- If successful, ends the Title IX process with no appeal rights




111



Informal Resolution


- Voluntary, structured, informal process, such as mediation
- To resolve allegations in a formal complaint that does not involve a full investigation and adjudication of the formal complaint



112

IR Limitations


- Only once formal complaint is filed (explain permissive dismissal to Complainant—see [T&H Guidebook – Form 49](#))
- Only if completely voluntary—consequences must be explained and any party can withdraw before an agreement is reached, ending the IR process
- Only before determination regarding responsibility
- Not in cases involving allegations of employee-on-student conduct
 - Can prohibit for other situations, as well



113

Informal Resolution

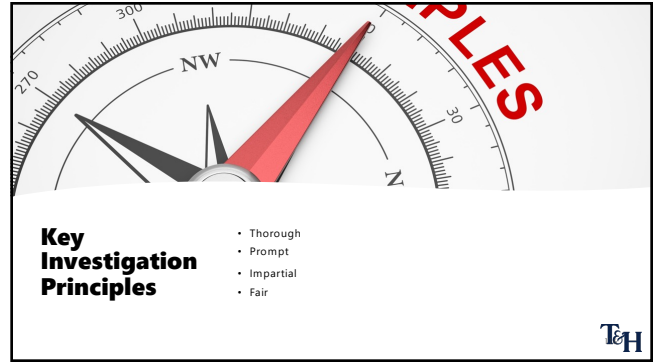
- Parties must be allowed to stop at any time prior to an agreement
- If an agreement is reached between the parties, the Title IX Formal Complaint is closed and can never be reopened
- If an agreement is not reached (or IR is not used), move on to [Step #6: Investigation](#)



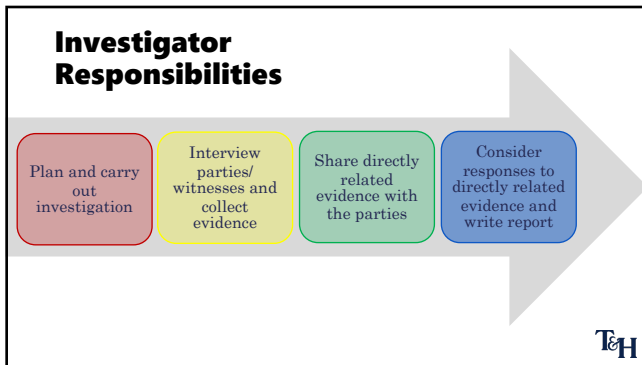
114



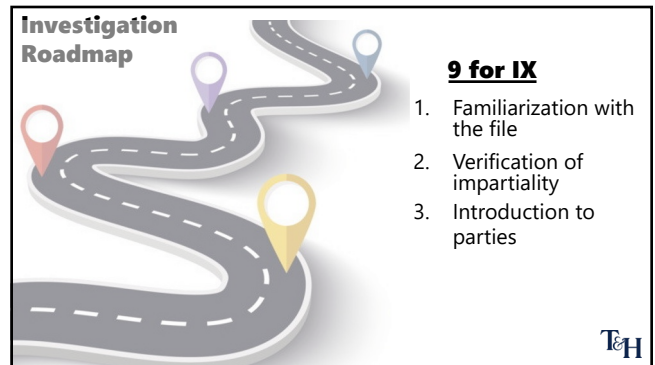
115



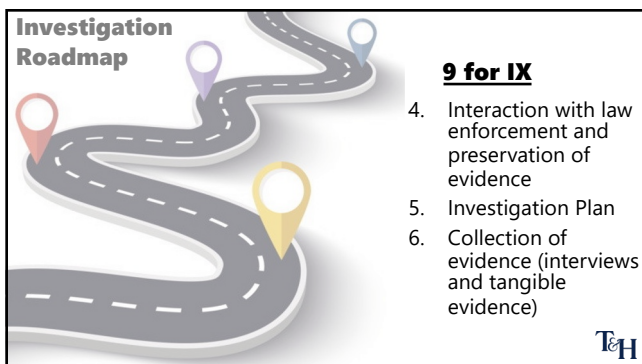
116



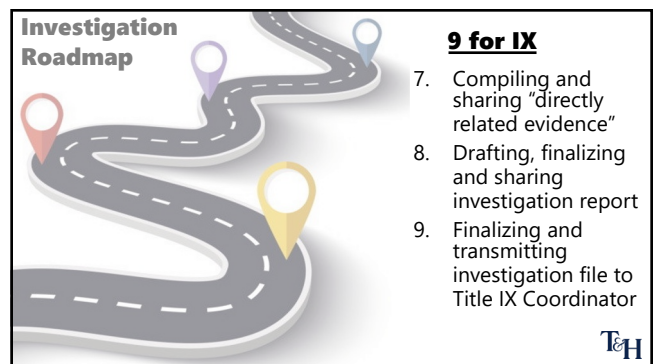
117



118



119



120




Investigation Roadblocks

- Coordinating schedules
- Uncooperative parties and witnesses
- Meddling advisors
- Delays/managing timeframes

T&H

121



1. Familiarization with the file

- Review all material provided by the Title IX Coordinator
- Create a checklist to ensure all steps are met and to document compliance
 - T&H Guidebook Checklist B – Title IX Investigation Checklist

T&H

122

Our Case	<p>On January 22, 2024, Francis Friend requested to speak with me after class about a friend in the class. Francis reported that this friend had been touched in the genital area without consent during a social event on campus. Francis did not initially name the student, but eventually told me it was Casey Complainant, another student in my class.</p> <p>- Professor Peterson Handwritten Statement January 22, 2024</p>
-----------------	---

123

Our Case	<p>From: Casey Complainant To: Title IX Coordinator Subject: Complaint Date: Thursday, January 24, 2024 7:18:28 PM</p> <p>I know that Francis Friend spoke to our professor about what happened to me on campus. I didn't want to tell anyone, but now that it's out, I do think it's important that something be done. I also need you to know that the person who did this to me also has made numerous horrible statements to me, all sexual in nature. Please let me know what you will be doing to deal with this situation.</p>
-----------------	--


124

Our Case: More Facts	<ul style="list-style-type: none"> • A formal complaint was filed on January 25, 2024 by Casey Complainant • Supportive measures are in place • The Title IX Coordinator determined that, if true, the alleged conduct could be "fondling," a type of sexual assault, and severe, pervasive, and objectively offensive "sexual harassment" • A notice of allegations was sent on January 30, 2024
-----------------------------	---

125


Our Case: Notice of Allegations	<p>It is alleged that on or around [dates]:</p> <ol style="list-style-type: none"> 1. Reese Respondent (the "Respondent") touched Casey Complainant's (the "Complainant's") genitals over the clothing without consent, and 2. The Respondent repeatedly made sex-based comments to the Complainant.
--	--

126



2. Verification of impartiality



Any individual designated as an Investigator may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent
34 C.F.R. § 106.45(b)(1)(iii)



127

An impartial investigator ...

- Is unbiased
- Has no conflict of interest
- Does not prejudge
- Is well trained



128

The investigator has a disciplinary role at the College and has imposed discipline on Reese in the past. Can they be impartial?

Yes, imposing discipline on a student does not create an impermissible risk of bias. 0%


No, not if the discipline was for prior sexual misconduct. 0%


No, imposing discipline on a student creates an impermissible risk of bias. 0%


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


129

Impartial Approach

 The preamble to the 2020 Title IX rules call for educational institutions to use an objective, "common sense approach" to evaluating whether bias, conflict of interest, or prejudice exists

 Remember that "objective" means whether a reasonable person would believe partiality exists

 The preamble says not to apply "generalizations" that might unreasonably conclude partiality exists



130

The investigator attends the same religious institution as Casey. Can they be impartial?

Yes, attending the same religious institution with someone does not create a conflict of interest. 0%

Yes, as long as there is no close personal or church-business relationship between the investigator and C... 0%

No, attending the same religious institution as someone creates a conflict of interest. 0%

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

131

The investigator has raised money and marched for victims-rights advocacy groups. Can they be impartial?

Yes, engaging in such advocacy work does not create impermissible bias or conflict of interest. 0%

Yes, as long as the investigator has been trained in setting aside bias. 0%

Yes, unless the investigator has made statements suggesting they cannot be impartial. 0%


No, a person who has engaged in such activity can never be impartial. 0%

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


132

Impartiality Tips

- Be open with the Title IX Coordinator or their designee about any concerns—better to report something that turns out to be nothing than to ignore something that turns out to be a big deal
- When in doubt, disclose any concerns to the parties and get their agreement to allow you to continue in the role (with Title IX Coordinator)
- Show your work! The best way to avoid a claim of bias, conflict of interest, or prejudgment is to methodically work your case and write a solid report




133



3. Introduction to parties

- Not required, but best practice
- Benefits:
 - Notice to the parties of the "rules" for the investigation
 - Notice to the parties that there may be periods where they do not hear from you, and how they can contact you
 - **T&H Guidebook Document 28 – Investigator Introduction to Party**
 - Send to parties, parents/guardians of minor parties, and advisors, if any



134



4. Interaction with law enforcement

- Law enforcement is often involved when reported conduct is criminal in nature
- Child protective services may also be involved/investigating where abuse or neglect of a student under the age of 18 is suspected



135

Our Case: The Police

- Casey filed a police report regarding the alleged fondling
- Officer Ogletree contacts you upon finding out that you are investigating and is quite angry that you are "screwing up their investigation"
- The Officer says the school must turn over the investigation to the police and stop "meddling" in police business

136

Can the educational institution stop its investigation?

- Yes, it should not be involved in investigating such serious crimes when the police are involved
- Yes, but only for as long as is necessary for law enforcement to decide whether to prosecute
- Yes, but only for as long as is necessary for law enforcement to gather initial facts
- No, it cannot delay at all for a law enforcement request

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

137

The Police are the Beginning, Not the End

"[A] law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct."

"Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation."



138

Delay for Concurrent Law Enforcement Investigation




- ▶ The District must conduct its Title IX investigation in a "reasonably prompt" manner but may temporarily delay the investigation for good cause, which may include concurrent law enforcement activity
- ▶ No long or indefinite delay or extension of timeframes, regardless of whether a concurrent law enforcement investigation is still pending

139

Notice of Delay

- ▶ The District must send written notice to both parties regarding the delay or extension and the reason(s) for the delay or extension
- ▶ Concurrent law enforcement activity is not good cause to delay sending the written notice of allegations to the complainant or respondent
- ▶ [T&H Guidebook Document 23 – Notice of Extension of Timeframes](#)



140

What can justify a delay for concurrent law enforcement purposes?

- An oral request from law enforcement to delay
- Notice that law enforcement plans to release evidence that would be material to your determination at a particular future time
- The arrest and incarceration of the Respondent
- All of the above
- None of the above

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [gallus.com/app](#)

141

The police decided not to prosecute the Respondent because it's a "they said, they said" case. How does it impact your case?

- You can rely on the police's finding to dismiss the complaint
- You can rely on the factual information gathered by the police, but not their finding
- You cannot rely at all on any information from the police


Start the presentation to see live content. For screen share software, share the entire screen. Get help at [gallus.com/app](#)

142

Police Results as Evidence?

- Police evidence may be useful for fact-gathering
- But the standards for and purposes of criminal investigations are different from college investigations
- *Police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX*



OCR 2011 DCL and 2020 TITLE IX REGS




143

When the Police Call

- Document everything!
 - Ask police to put request for delay in writing
 - Reduce verbal (e.g., telephone) conversations in writing
 - Best practice is to respond with summary/"If my summary is incorrect, please let me know by [date] or I will assume it is correct."
- Explain in writing the College's obligation to conduct its own Title IX investigation and ask for notification when you can begin your investigation
- Follow up, then follow up again, then again




144



5. Investigation Plan

- What are the issues and facts in dispute?
- Who will you interview and in what order?
- Is there physical evidence to preserve or obtain?
- What other evidence might be helpful? How can you get it?



145




Planning the Investigation

- What questions need to be answered for a thorough and impartial investigation?
 - What evidence do you need to collect?
 - Who should you interview?
- In what order will you conduct witness interviews?
- Think: What information do you need to obtain to allow the decisionmaker to answer the key questions and make a reliable determination




146



What Are the Questions?

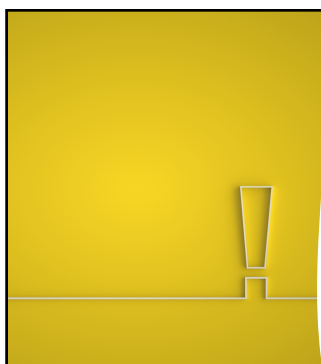
- Think back to the Title IX definitions of "Title IX sexual harassment" "in an educational program or activity" and "against a person in the U.S."
- Look at the allegations and consider what the elements for each claim are
- Consider information needed to craft a remedy if a violation is found



147

Our Case: Fondling	
	<ul style="list-style-type: none">○ Was there touching of the private body parts of another?○ Was it without consent?○ Was it for purposes of sexual gratification?○ Was it in an "educational program or activity"○ Was it "against a person in the U.S."

148



Hostile Environment

Was there: <ul style="list-style-type: none">• Unwelcome conduct?• Based on Sex? Was it so: <ul style="list-style-type: none">• Severe?• Pervasive? and• Objectively Offensive?	That it would effectively deny equal access? <ul style="list-style-type: none">• Was it in an "educational program or activity"• Was it "against a person in the U.S."
--	---




149

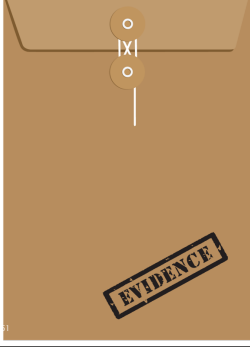
Impact – Effective Denial

- What were the effects on the Complainant, if any?
- What were the effects on the larger educational community, if any?
- What issues may need to be addressed with the Respondent, if any?

** Some institutions will separate this process from the initial investigation




150



Types of Evidence

- ▶ Direct Evidence
- ▶ Circumstantial Evidence
- ▶ Hearsay

Rumor / innuendo
(NOT evidence)




151

Direct Evidence

Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

BLACK'S LAW DICTIONARY 675 (10th ed. 2014)

- ▶ What a witness directly experienced
- ▶ Eyewitness testimony
- ▶ Admissions—written or oral
- ▶ Surveillance tape or cell phone video captures the incident




152

Circumstantial Evidence

Evidence based on inference and not on personal knowledge or observation ... all evidence that is not given by eyewitness testimony.

Black's Law Dictionary 674 (10th ed. 2014)




153




Circumstantial Evidence

154



Hearsay Evidence


- A statement (oral or written) made by someone NOT WHILE TESTIFYING and that is offered to prove the truth of the matter asserted in the statement.
- FED. R. EVID. 801(c)



155

Sources of Evidence

- Testimony
- Documents
- Education records
- Campus files
- Personnel files
- Investigation records
- Student files
- Police Reports
- Emails
- Handwritten notes
- Calendars
- Photographs
- Videos
- Text & instant Messages
- Other electronic files/ cloud storage
- Journal entries
- Medical records (ONLY with written consent)
- Interviews



156

Preserving Evidence

- If there is evidence that could be at risk of loss, take steps to preserve evidence
- Contact law enforcement immediately if there is knowledge of illegal or illicit evidence

157

My role at HCC is in?

Office of Institutional Equity	0%
Counseling & Ability Services	0%
HCC Campus	0%
Office of General Counsel	0%
Other	0%

158

They-Said / They-Said What Do You Do?

159

They-Said / They-Said No Other Witnesses

- ▶ Sexual harassment often occurs behind closed doors
- ▶ There are often no witnesses to the alleged harassment
- ▶ Many cases are going to involve the complainant making certain allegations, the responding denying them, with no other witness or documentary evidence
- ▶ The fact that there are no witnesses to the alleged harassment does not mean it is automatically a "50/50"
- ▶ A thorough investigation and a complete summary of all relevant evidence can help a decisionmaker assess credibility and reach a reliable determination

160

What if there is really no evidence other than "they said, they said"?

A finding in favor of the Complainant A finding in favor of the Respondent Dismissal of the complaint with no finding

161

Who is responsible for finding and providing evidence in a Title IX sexual harassment investigation?

The Complainant must provide evidence to support the complaint

The Respondent must provide evidence to refute the complaint

Both parties must provide evidence to support their side

Neither side must provide evidence to support their side

162

You are!

- The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the educational institution, not the parties
- Off limits: medical treatment records without voluntary, written consent

163


But if the Parties Want to Share... Let them!

- Do not discourage parties from submitting evidence
- Give them the same opportunity to present evidence, suggest witnesses, recommend directions for your investigation
- If you decide not to pursue a suggested route, record your reasons and summarize in your report

164

Interviews – Outline

- Prepare an interview outline for each witness
 - Bullet points and lists can help you stay on track
 - But they don't help with word choice
 - Consider writing out (at least the most tricky) questions
- But you must always be flexible




165

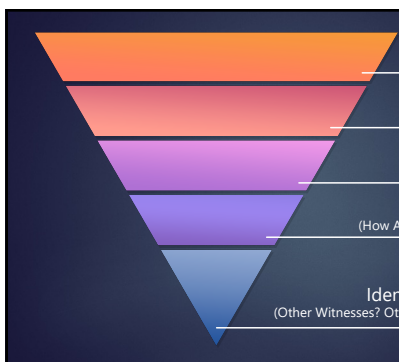
Interview Outline

- Determine how you are going to establish rapport
- Focus on the allegations in the Formal Complaint and prepare questions to obtain a reliable chronology of events and all relevant information the witness has
- Identify "must ask" questions to elicit information related to Title IX sexual harassment definitions or to fill in gaps in chronology
- Identify evidence to discuss with witness

Good Preparation Is Key!



166




- Background Questions
- Narrative (What Happened? The Allegations)
- Targeted Questions (Clarification; "Fill In the Gaps")
- Any "Must Ask" Questions (How Allegations Relate to Key Title IX Issues)
- Identify Any Needed Follow-Up (Other Witnesses? Other Evidence? Anything Else to Share?)

167

"Must-Ask" Questions

- Is the conduct on the basis of sex?
- Is the conduct at issue Title IX sexual harassment?
 - If hostile environment harassment, was the conduct "unwelcome"?
 - If student-on-student Title IX Big 5, was there consent?
- Did the conduct occur in the District's education program and activities?
- How was the complainant denied equal access to District programs or activities?



168

Our Case: Writing Out Questions	<ul style="list-style-type: none">○ Tell me about your relationship with Reese/Casey.○ Would you say you were friends or more than friends?○ Did your relationship change at any time?○ How did it change?
--	---



169

Our Case: Writing Out Questions	<ul style="list-style-type: none">○ Did you and Reese/Casey ever touch each other sexually?○ How frequently did that happen?○ Ok, let's talk about the first time it happened, who was present, where were you, how was the conduct initiated, what did you say/they say?○ Let's talk about the next time it happened... (etc.)
--	--

170


Before Interviews

- Decide how you will record information from the interviews
- Recordings may have to be shared (see later discussion of Directly Related Evidence)
- Consider having a note-taker attend



171

Before Interviews



Schools must provide the parties written notice of the date, time, location, participants, and purpose of **all investigative interviews or other meetings** with sufficient time to prepare

172

Before Interviews

- Recommended to do the same for non-party witnesses (not required)
- Use T&H Guidebook Document 30 – Notice to Party of Investigative Interview or Other Meeting and Document 31 – Notice to Witness of Investigative Interview of Other Meeting

173

In what order will you interview the witnesses?



Casey	<input type="text"/>
Reese	<input type="text"/>
Professor Patterson	<input type="text"/>
Officer Ogletree	<input type="text"/>
Francis Friend	<input type="text"/>

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


174

Remember...

- Your job is not to weigh the evidence
- Keep in mind the standard of proof (preponderance of the evidence) in planning the investigation
- But you will not apply it directly




175



Standard of Evidence


- Most educational institutions uses the "preponderance of the evidence" standard
- Preponderance of Evidence:
 - A fact is more likely than not to be true; a proposition is more probably true than false
 - At least 51% of evidence favors the Complainant (50% and a feather)**Probability of Truth > 50%**
- Where the evidence is equipoise ("50/50"), the result is a determination that respondent is not responsible

176




6. Collection of Evidence

- Includes interviews and reviews of tangible evidence
- Remember that this is your burden – think creatively, broadly, and evenhandedly




177



Start of Interviews

- Explain background information
 - Explain expectations for parents/guardians and advisors
 - Use T&H Guidebook Document 34 – Party Interview Intro or T&H Guidebook Document 35 – Witness Interview Intro
- Take notes using memorandum of interview or finalize notes in a memo after
 - T&H Guidebook Document 33 – Memorandum of Interview



178

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

An investigator can put the following limits on a party regarding advisors

None; a party must be allowed their advisor of choice

The investigator can deny a request for an additional advisor if a minor party's parent attends meetings or interviews with them

The investigator can deny a request for a party to have a witness as an advisor with them

The investigator can deny a request to have a student or employee unconnected with the case as an advisor


None of the above

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

179

Right to an Advisor

- Complainant and Respondent must be given the opportunity to select an advisor of their choice
- The advisor may be present for any meeting or interview during the investigation
- Advisor may inspect and review the evidence and report



180

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

What if a parent or advisor is unruly during an interview

The investigator can't do anything; a party has the right to the advisor of their choice

The investigator can warn the person to stop and remove them if they don't


The investigator can automatically remove the person if they were give a notice of expectations before the meeting or interview

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


181

Advisor Expectations

- The educational institution may establish reasonable restrictions regarding the extent to which the advisor may participate in the proceedings, but the restrictions must be equally applied to both parties
- Recommended to provide an advisor (and party/parent) expectations document early on – in writing before the first interview or meeting
- Go over the expectations at the beginning of the first interview or meeting and secure confirmation of understanding
- Example is available in our [Guidebook – Document 3](#)




182



During Interviews


- Your goal is to obtain information, not share information
- Begin with open ended questions
- Probe more specifically if necessary



183

During Interviews

- Do not use terms that suggest prejudice or bias, like "victim" and "perpetrator"
- Do not use sex stereotypes
- Do not require one party to carry the burden of presenting or identifying evidence
- Do not be swayed in the evidence you collect and document by party status



184

Words Matter

- Avoid suggesting belief or disbelief ("I'm so sorry this happened to you")
- You can be empathetic, though ("I can tell this is difficult, would you like a break" or "I don't expect you to be able to tell me every detail")
- Avoid words that seem to blame a party ("Why didn't you report it")

185

185

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

A Respondent argues that a Complainant's mental health issues are the reason for a false complaint. Can the investigator ask the Complainant about it?

No, information from treatment records is never relevant

Yes, because it would be unfair to the Respondent not to consider their argument

Yes, but only if there is voluntary, written consent

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

186

Don't Ask...

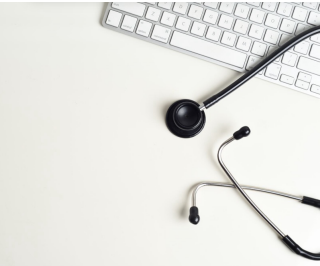
Unless you have written consent:

- Medical records
- Privileged information
- Information about the Complainant's sexual predisposition or prior sexual behavior ("rape shield")

For consent, use **T&H Guidebook Document 36 – Authorization to Use Otherwise Irrelevant Information**

187


It's Not Relevant



- **Medical Record Information:** Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process
 - For a minor, consent of parent is required

188


It's Not Relevant



- **Legally Privileged Information:** No information protected by a legal privilege may be used during an investigation unless waived in writing by the person holding the privilege (party and, for a minor, their parent/guardian)
 - Attorney-Client Privilege
 - Physician-Patient or Psychotherapist Patient Privilege – records maintained in connection with the provision of the treatment of the party

189

It's Not Relevant



- **Complainant Sexual History or Behavior:** Questions and evidence related to a complainant's prior sexual history or sexual behavior are not relevant and may not be asked or sought
- Two Narrow exceptions
 - To show that someone other than the Respondent engaged in the alleged conduct
 - Prior conduct between the parties to be used to show consent

190

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


During an interview, the interviewer can tell a party not to talk about the case with others in the school community

True False

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

191

Title IX Don't Tell...



- Gag orders are not allowed in the Title IX process
- You can express the need to maintain confidentiality

192

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

During an interview, the interviewer can tell a witness not to talk about the case with others in the school community

True False

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

193



Retaliation Warning


- Investigators can (and should) warn parties and witnesses of risks that sharing information could lead to retaliation
- Also inform parties and witnesses that they should report if they feel they are retaliated against



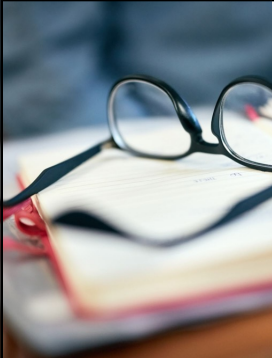
194

Closing Interviews

- Ask "anything else"
- Consider allowing parents/guardians and/or advisor to ask questions
- Ask for questions, including about process
- Always discuss retaliation – both against them and against the other party
- Explain next steps
- Ask the witness to reach out if they think of anything else later




195



After the Interview

- Finalize your notes as soon as possible
- Assess whether to update the investigation plan with other witnesses or evidence identified during the interview
- Gather any remaining evidence that is relevant to the allegations
- Assess whether any factual or chronological gaps exist and, if so, complete additional interviews and/or evidence collection




196

Uncooperative Witnesses

- What if a party or witness refuses to show up?
- Cannot make a decision solely based on a party's non-cooperation



197





Uncooperative Witnesses

- For parties, use T&H Guidebook Document 32 – Party Non Response to Interview Request
- For witnesses, there is less leverage; get creative
- Consider:
 - Why the non-cooperation?
 - Explain the consequences
 - Involve others

198

Remember...

Presumption that respondent is not responsible



199


You've Gathered the Evidence and Conducted the Interviews, Now What?



200

"Fill In the Gaps"

- Are there any gaps in your chronology of events?
- Is there any evidence missing?
- Did you obtain all the documents and information the parties and witnesses referenced?
- Are there any follow-up questions you need to ask the parties or witnesses?
- Is there anything else you need to track down to prepare a thorough investigation report that will allow the Decisionmaker to reach a reliable determination?



201

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

What must the investigator provide the parties after the end of evidence collection?

- A copy of all evidence obtained in the investigation
- A summary of all evidence obtained in the investigation
- A copy of all directly related evidence obtained in the investigation
- A summary of all directly related evidence obtained in the investigation

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

202



7. Compiling & Sharing Directly Related Evidence


- "Directly related evidence" is not defined in the rules
- Statements, notes of interviews, and other types of evidence collected in the investigation are likely covered



203

Directly Related Evidence

- Even evidence the school doesn't think it will use
- The parties must be given at least 10 days to review all the evidence and submit written responses about the evidence to the investigator
- The investigator must consider the responses when writing the investigative report
- Use [T&H Guidebook Document 37 – Notice of Right to Review and Respond to DRE](#)



204



205

Does DRE include...??

Evidence subject to legal privilege

Evidence related to a complainant's past sexual history not related to:

206

Finalize the Report

- After the 10 day DRE review period, consider and address any responses to DRE in the report
- The report does not reach a decision/determination, that is the decision-maker's role
- The educational institution must share the final report with both parties and their advisors (Use T&H Guidebook Document 39 – Notice to Parties to Review Investigative Report)
- Both parties must be given at least 10 days to review and respond before a final decision

207

Considering the Parties' Response to the Evidence

- Did either party identify evidence that was absent or not gathered and that should be?
- Did either party identify new witnesses or new evidence that should be considered?
- Did either party point out inconsistencies in the evidence that are material to facts or issues in dispute?
- Did either party raise concerns regarding the relevance of the evidence that should be considered?

208

8. Drafting, finalizing, and sharing the report

- The report must summarize all "relevant evidence"
- You can (and should) begin drafting the report during the 10-day DRE period
- The report must be shared with the parties who have 10 days to respond before a decision

209

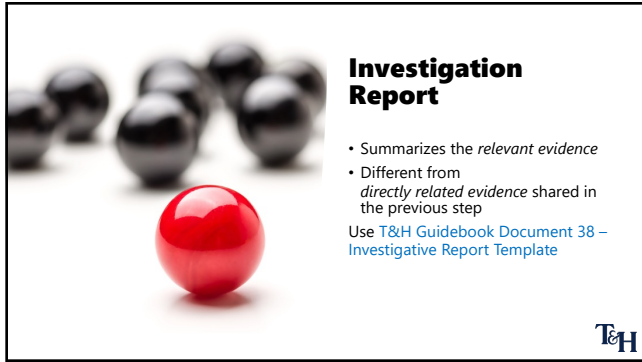
When poll is active, respond at pollev.com/thlaw411
Text **THLAW411** to 22333 once to join

What must be included in the report

- A summary of all evidence obtained in the investigation
- A summary of all directly related evidence obtained in the investigation
- A summary of all relevant evidence obtained in the investigation

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


210



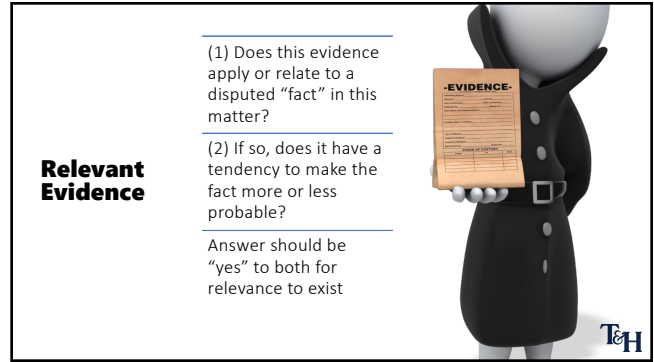
Investigation Report

- Summarizes the *relevant evidence*
- Different from *directly related evidence* shared in the previous step

Use [T&H Guidebook Document 38 – Investigative Report Template](#)




211



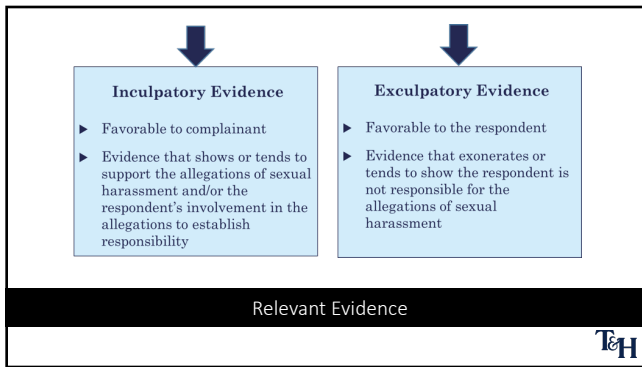
Relevant Evidence

- Does this evidence apply or relate to a disputed “fact” in this matter?
- If so, does it have a tendency to make the fact more or less probable?

Answer should be “yes” to both for relevance to exist



212




Inculpatory Evidence

- Favorable to complainant
- Evidence that shows or tends to support the allegations of sexual harassment and/or the respondent’s involvement in the allegations to establish responsibility

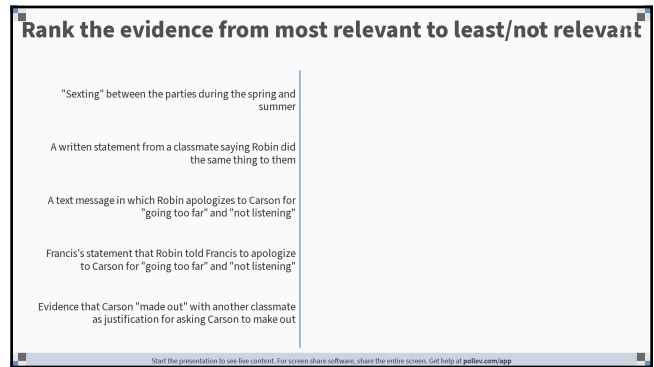
Exculpatory Evidence

- Favorable to the respondent
- Evidence that exonerates or tends to show the respondent is not responsible for the allegations of sexual harassment

Relevant Evidence



213

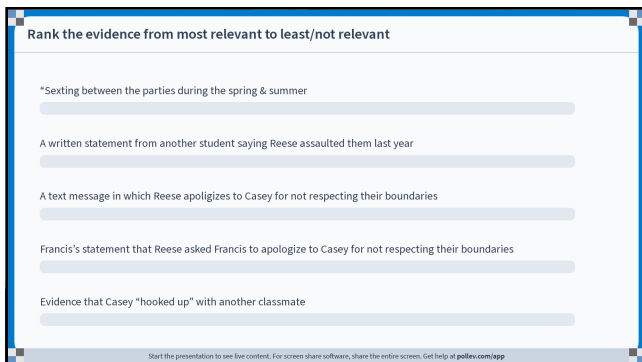


Rank the evidence from most relevant to least/not relevant

- “Sexting” between the parties during the spring and summer
- A written statement from a classmate saying Robin did the same thing to them
- A text message in which Robin apologizes to Carson for “going too far” and “not listening”
- Francis’s statement that Robin told Francis to apologize to Carson for “going too far” and “not listening”
- Evidence that Carson “made out” with another classmate as justification for asking Carson to make out

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [poller.com/app](#)

214

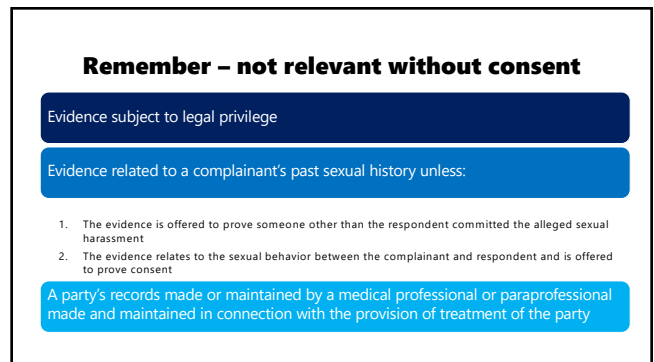


Rank the evidence from most relevant to least/not relevant

- “Sexting” between the parties during the spring & summer
- A written statement from another student saying Reese assaulted them last year
- A text message in which Reese apologizes to Casey for not respecting their boundaries
- Francis’s statement that Reese asked Francis to apologize to Casey for not respecting their boundaries
- Evidence that Casey “hooked up” with another classmate

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [poller.com/app](#)

215



Remember – not relevant without consent

Evidence subject to legal privilege

Evidence related to a complainant’s past sexual history unless:

- The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
- The evidence relates to the sexual behavior between the complainant and respondent and is offered to prove consent

A party’s records made or maintained by a medical professional or paraprofessional made and maintained in connection with the provision of treatment of the party

216

Credibility Determinations

The investigator does not make findings regarding credibility, but the investigator should include information related to credibility in the investigative report to help the decisionmaker assess credibility and reach a reliable determination that the respondent is or is not responsible for the alleged sexual harassment

217

Credibility Determinations

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

U.S. Equal Employment Opportunity Commission
 EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (Jun. 18, 1999)

218

Credibility Factors

<ul style="list-style-type: none"> ▶ Corroborating evidence ▶ Contradictory evidence ▶ Source of information (and source motive) ▶ Body language and demeanor ▶ Specific details ▶ Reasonableness of testimony / plausibility 	<ul style="list-style-type: none"> ▶ Witness's memory (impact of time, outside influence, trauma, intoxicant) ▶ Witness's demeanor ▶ Witness's motivations or interest in the outcome ▶ Witness's bias or prejudice ▶ Internal consistency ▶ Other factors of believability
---	---

219

9. Closing the File

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

220

Decision-Making

221

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

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

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

222

The Decision-Making Framework

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



223



1. Learning the Case



224

Case File

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



225

Our Case	A student, Cary, alleges that another student, Riley, touched Cary in the genital area on two occasions on campus.
-----------------	--

226

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

227

Our Case	During the first incident, Riley and Cary were on campus. Riley was tickling Cary and, while Cary was protesting, touched Cary's private area.
-----------------	--

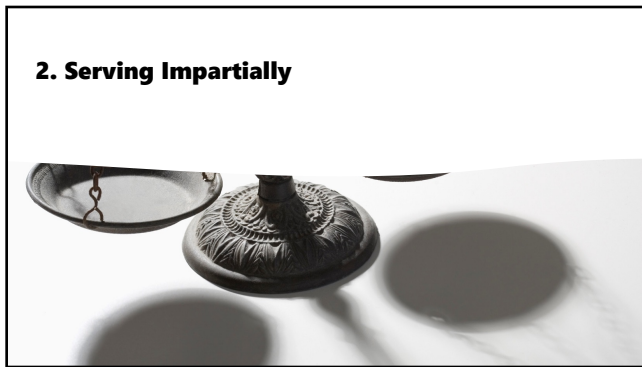
228

Our Case	
	During the second incident, Riley and Cary were at a party on campus “making out.” Riley was rubbing Cary’s behind, which Cary said they were ok with, but then Riley began rubbing between Cary’s legs, allegedly without permission.

229

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

230




231

Our Case: Serving Impartially	What gender is the Complainant, Cary?
	What gender is the Respondent, Riley?

232

Our Case: Serving Impartially	What do you think about the fact that...?
	<p>Cary and Riley were dating</p> <p>Cary “made out” with Riley on multiple occasions</p> <p>Cary only reported Riley after being “dumped” and Riley beginning to date Isa</p>

233

<h3>Prejudgment Examples</h3> <p>A person was described as clearly upset during their interview, so you presume they are telling the truth</p> <p>A person was drinking at the time of the incident, so you presume they don't remember what happened</p> <p>A person consented to sexual behavior before, so you presume they consented this time, too</p> 

234

Our Case	Cary and Riley do not dispute that the touching occurred
	Riley claims the touching was all consensual/ Cary disagrees There are no witnesses to the behavior.

235

Our Case	Cary told a friend, Wei, right after the second incident what happened and Wei encouraged Cary to report it.
	After being charged, Riley tearfully denied the allegations to Riley's mom.

236

Our Case	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.


237

Our Case	Neither student has ever had disciplinary concerns before.

238

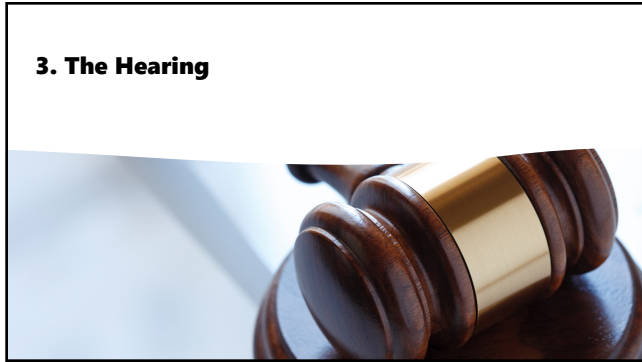
Our Case	Cary's story has been consistent throughout.
	Riley seemed incredibly nervous in the initial interview and at first denied ever touching Cary. As the interviewer built rapport, Riley acknowledged that the touching occurred but said it was consensual.

239

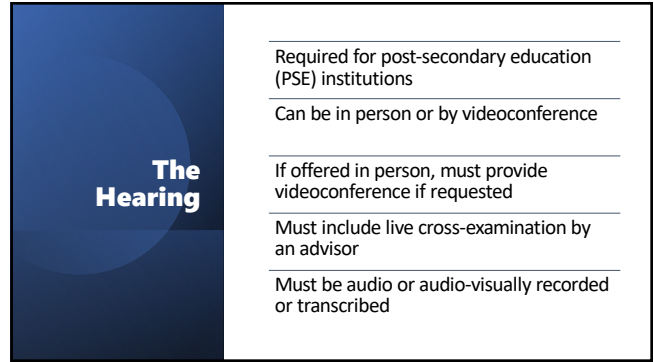
	Ask Yourself <ul style="list-style-type: none">• What issues are in dispute and what issues are not in dispute?• What areas of inconsistency need to be considered?
--	---

240

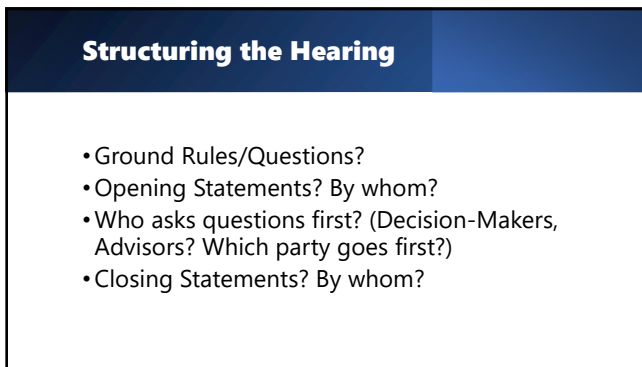




241



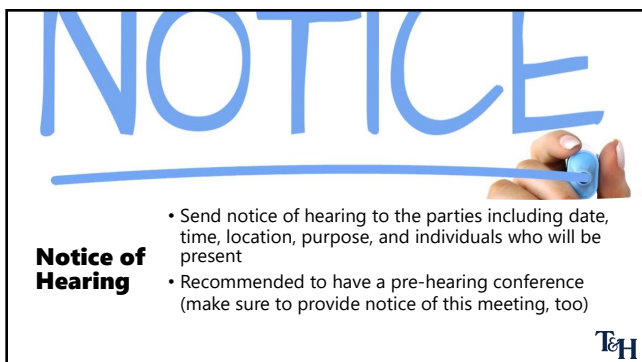
242



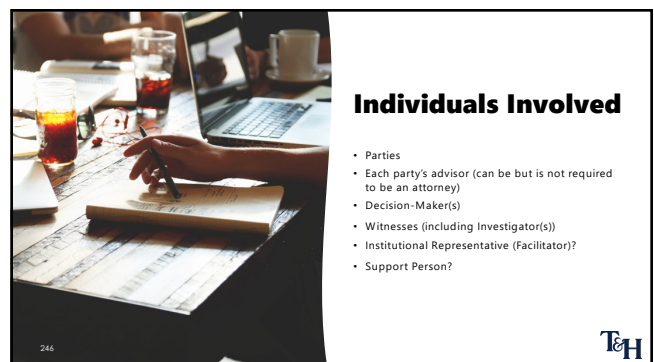
243



244



245



246


Administration

Recording or transcribing

Notifying witnesses of attendance

If the hearing is held in person, physical facilities, technology, etc.

Deliberations



247

Decorum

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




248

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.

249

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**.

250

Relevance

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




251

Respectful


Questions and answers must be respectful

For example, cannot use profanity or irrelevant, ad hominem attacks

Harassing questions will not be tolerated



252



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"
- No relevance ruling required for questions that are not respectful; but recommended

253

Try & Try Again

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



254

Our Case	Question 1 (Riley to Cary): Isn't it true that you let Wei touch you the same way over the summer before we started dating?

255

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/help

256

Our Case	Question 2 (Cary to Riley): You did this same thing to your ex last year, didn't you?

257

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

Relevant and Appropriate?

Yes

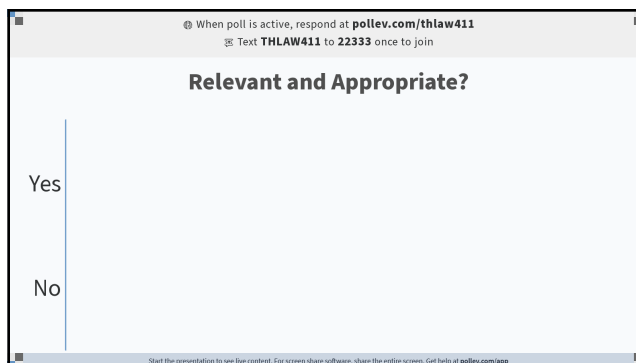
No

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

258

Our Case	Question 3 (Cary to Investigator): Why didn't you interview all my friends like I asked to see if anyone saw anything?

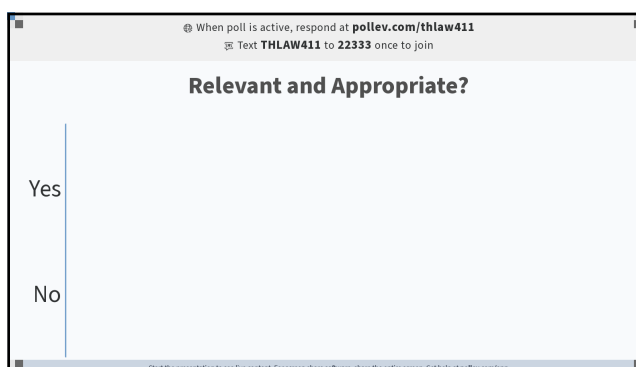
259



260

Our Case	Question 4 (Decision-Maker to Investigator): Why did you not interview all Cary's friends as requested to see if anyone saw anything?

261



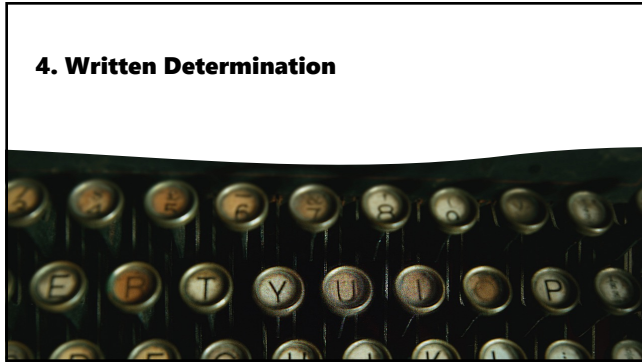
262

Our Case	Question 5 (Riley to Cary): Isn't it true that you are on three different medications for being crazy and in therapy because you're a pathological liar?

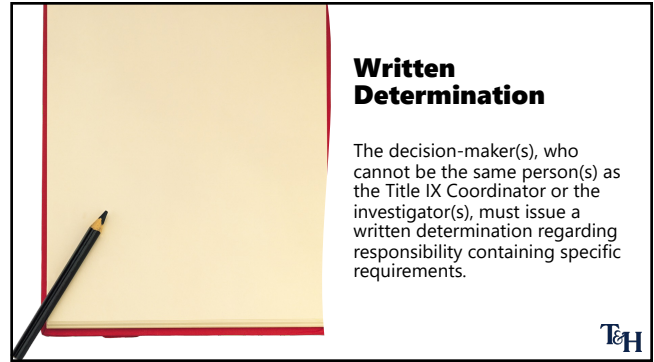
263



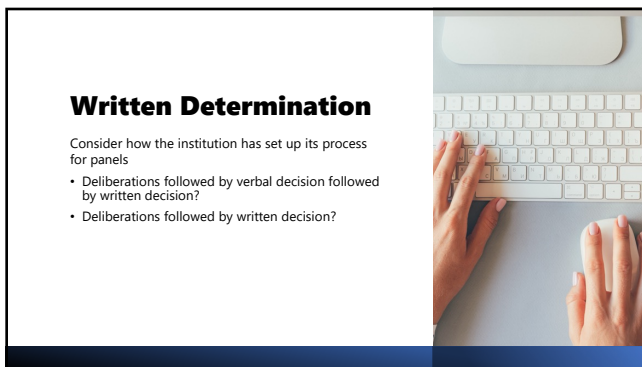
264



265



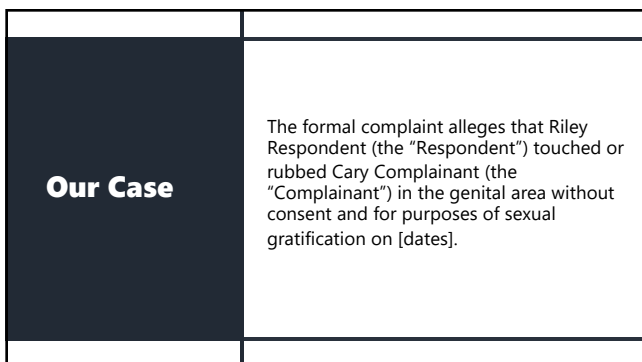
266



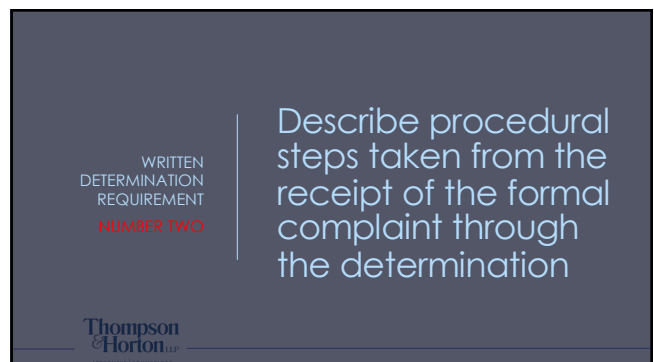
267



268



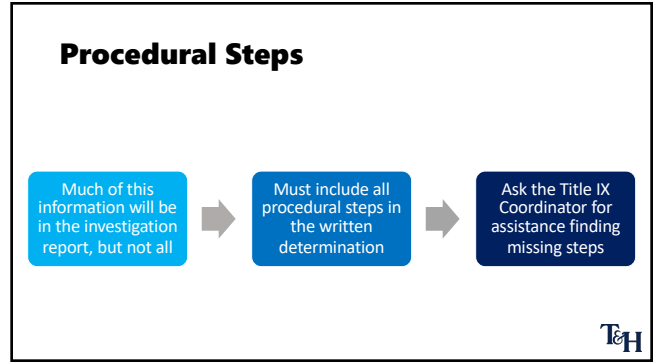
269



270

Procedural Steps	_____ Notifications to the parties
	_____ Interviews with parties and witnesses
	_____ Site visits
	_____ Methods used to gather evidence
	_____ Hearings held

271



272

Our Case	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].

273

Our Case	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].

274

Our Case	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].

275

Repeat for all steps through the hearing and written determination.

T&H

276

WRITTEN DETERMINATION REQUIREMENT
NUMBER THREE



Findings of fact supporting the determination



277

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



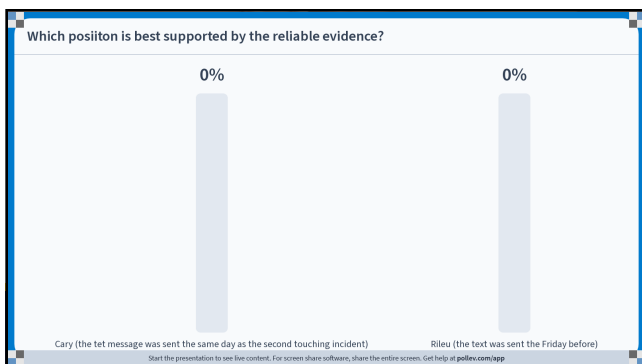
278

Our Case	<ul style="list-style-type: none">• Cary produced a text message from Riley in which Riley says: "I'm so sorry for yesterday."• There is a dispute about when that message was sent as compared to the alleged incident.
-----------------	---

279

Our Case	<ul style="list-style-type: none">• Cary says Riley sent the message the evening after the second touching incident.• Riley says the message was sent days before, on a Friday, and was about Riley making fun of Cary for getting a bad grade on a test.• The text message was sent at 10 pm and Riley has basketball practice every morning at 5:30 am on weekdays, so said they would not have been awake that late.• Cary's professor verified that Cary failed a test the Friday before the the second incident.
-----------------	--

280



281

Our Case	<ul style="list-style-type: none">• Cary says two witnesses (Wei and Wynn) were around when Riley was trying to pressure Cary into agreeing to sexual activity other than kissing.• Cary reported that the comments were made at a normal tone of voice.• None of the witnesses reported seeing or hearing the alleged comments.
-----------------	--

282

Is it inherently plausible that the witnesses would not have heard the comments?

Yes No

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

283

Our Case

When the investigator is interviewing Wei, Wei says they believe Cary made their boundary clear in a conversation with Riley and that Riley crossed it without consent, as alleged.

284

My role at HCC is in?

Office of Institutional Equity	0%
Counseling & Ability Services	0%
HCC Campus	0%
Office of General Counsel	0%
Other	0%

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

285

Rank these witnesses in order of believability (most believable to least believable)

A nun

A teacher

An administrator

A star athlete

A person with a disciplinary or criminal record

A police officer

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

286

Our Case

During the interview, Cary cannot recall certain details of the incident, such as the sequence of events or who Cary talked to after.

287

Which of the following is not relevant to deciding the impact of Cary's lack of recall on reliability of their account?

The students were drinking alcohol at the time of the incident	0%
Throughout the entire interview, Cary had shifty eyes, fidgety behavior, and nervous blinking	0%
Although Cary had been previously composes, when asked about these topics the complainant's neck be...	0%
The details Cary cannot recall are not significant to the overall findings when the evidence is taken in its...	0%
None of the above- they're all relevant to assessing Cary's credibility	0%

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

288

WRITTEN DETERMINATION REQUIREMENT
NUMBER FOUR


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

Thompson & Horton

289

Preponderance

- Used Lee College (and 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



290

T&H

290

Our Case	Undisputed Facts: There is no dispute that... Cary and Riley started dating at the beginning of the school year.

291

Our Case	Disputed Facts: It is disputed whether... Riley knew that Cary did not want to engage in sexual activity with Riley other than kissing.

292

Our Case	Evidence About Disputed Facts: Cary said that Riley knew that Cary did not want to engage in sexual activity with Riley other than kissing. Cary said the two discussed it. Riley says they did not ever discuss it.

293

Our Case	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.

294

Our Case	<p>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.</p>
-----------------	--

295

Our Case	<p>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].</p>
-----------------	--

296


Our Case	<p>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.</p>
-----------------	--

297

Our Case	<p>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 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.</p>
-----------------	---

298


Repeat for all undisputed and disputed facts.




299

Relevance Exceptions


UNLESS written consent from the impacted party or witness



“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.

300

Our Case	<p>Balanced Weight: Both stories have been consistent Both parties told "outcry" witnesses No incidents of past behavior or discipline</p>
-----------------	--

301

Our Case	<p>Be Careful With: Cary's report after Riley broke things off Video showed Riley and Cary walking arm in arm, cuddling, and laughing as they walked Riley's nervousness and initial reluctance to describe the touching to the investigator Riley tearfully denied the allegations to mom right after being charged</p>
-----------------	---


302

WRITTEN
DETERMINATION
REQUIREMENT
NUMBER FIVE

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




303



Applying Code to Facts

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*




304

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.

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.



305

Our Case	<p>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.</p>
-----------------	--

306

307

WRITTEN DETERMINATION REQUIREMENT
NUMBER SIX

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

Thompson & Horton

307

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)

308

308

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



T&H

309

Our Case

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 and in the U.S.

310

311

WRITTEN DETERMINATION REQUIREMENT
NUMBER SEVEN

Provide the written determination to the parties simultaneously

Thompson & Horton

311

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

T&H

312

<h2>Our Case</h2>	<p>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.</p>
-------------------	---

313

314

WRITTEN
DETERMINATION
REQUIREMENT
NUMBER EIGHT

Process for appeal

**Thompson
& Horton**
ATTORNEYS AT LAW

314

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

T&H

315

4. Closing the File

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



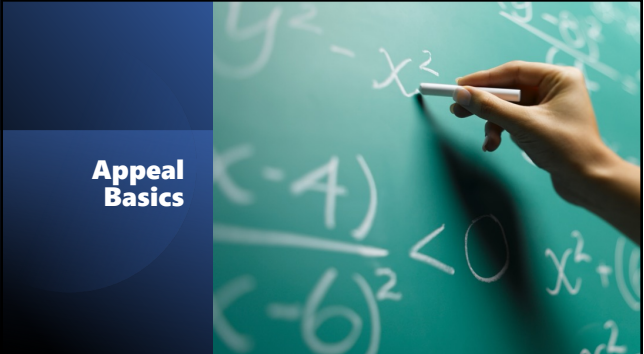
316



The Appeal

317

Appeal Basics



318

Title IX Appeal Basics Any party to a Title IX formal complaint can appeal:

1. A **dismissal** of a formal complaint or allegation therein
2. A **written determination of responsibility** for a formal complaint or allegation therein

319

Title IX Appeal Basics

Three bases for appeals:

1. A **procedural irregularity** that affected the outcome
2. **Newly discovered evidence** that could affect the outcome
3. Title IX personnel had a **conflict of interest or bias** that affected the outcome

**Can offer appeals on other bases if done equally

320


The appellate decision-maker:

1. Cannot be the same person as the Title IX Coordinator or the Title IX Coordinator's designee(s), the investigator(s), or the initial decision-maker(s) assigned to the case
2. Is not recommended to be the same person as the informal resolution facilitator on the case
3. Must be impartial (no bias, conflict of interest, or prejudice)

Title IX Appeal Basics

321


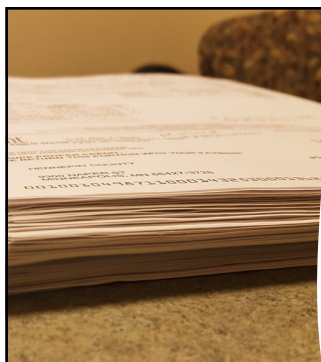
1. Review the File



322


The File Rules

- Appeals are not *de novo*
- Confine the review to the record + appeal documents



323

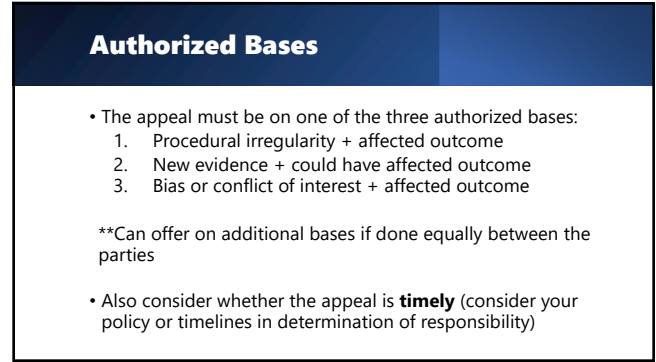
2. Verify Impartiality



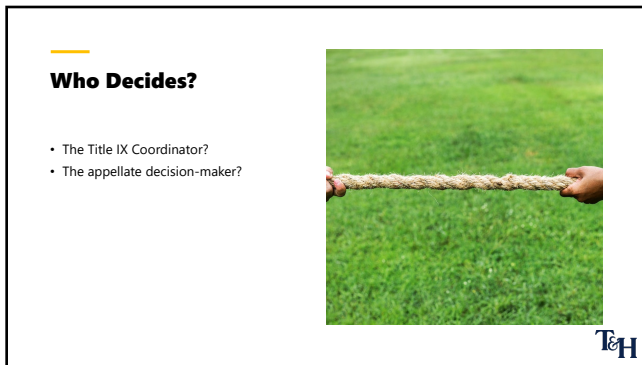
324



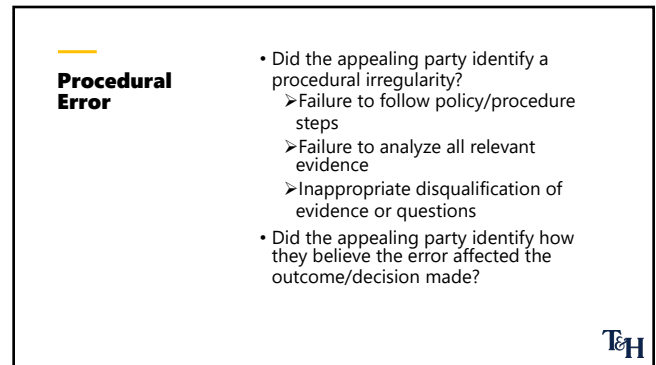
325



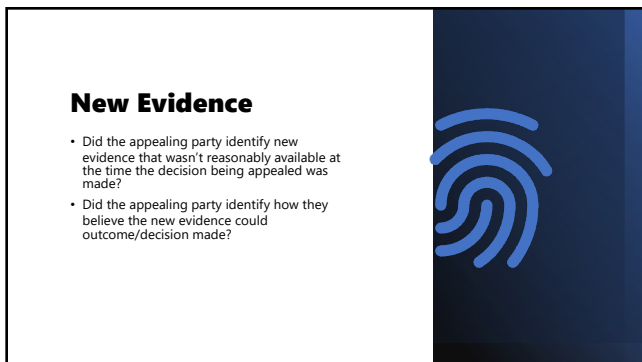
326



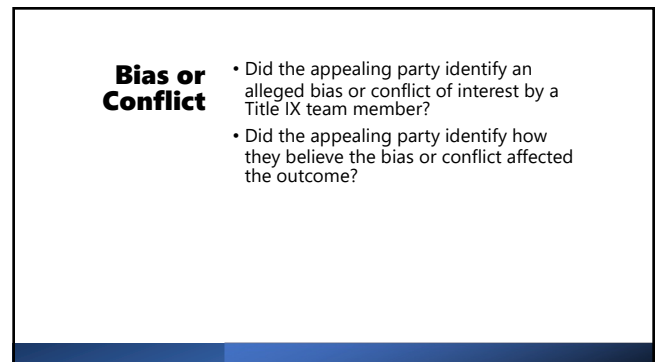
327



328




329




330

Evaluation



- Remember, evaluation just considers whether a valid appeal basis is being raised
- It does not address the "weight" of the argument (how persuasive it is)




331

**Our Case:
The Appeal**

The written determination found that there was insufficient evidence to support the allegations. Cary appeals. Cary points to the following concerns:
The investigator and decision-maker both relied on evidence that Cary had made unsubstantiated allegations of sexual assault against another student the previous year. Cary claims this evidence is irrelevant and that reliance on the evidence is both a procedural error and a sign of bias.
After the decision, Riley reached out to Carson on messenger with the following exchange:
Riley: Hey, I know we aren't supposed to talk. Just wanted to say I'm really sorry for everything.
Cary: What do you mean?
Riley: I just didn't mean for things to go so far.
Riley: I just liked you. I didn't think it would all bother you so much.
Cary claims this is new evidence that Riley engaged in the alleged conduct.

332

Should Charlie's appeal proceed?



Yes	100%
No	0%

More evidence is needed (share your thoughts)

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

333

**4.
Notice
to
Parties**




334

If the appeal is valid:

- Must notify both parties of appeal in writing
 - Can be from the Title IX Coordinator
- Must provide the parties equal opportunity to submit written statements for or against the appeal
- Must issue a written determination to both parties

See [T&H Guidebook Document 45 \(Appeal Form\)](#) & [47 \(Notice\)](#)

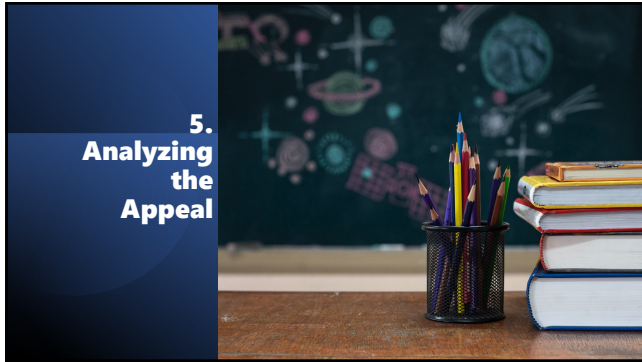


335

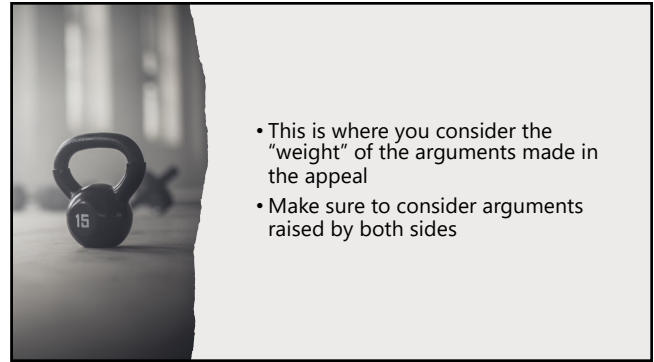
Considerations

- Consider using an appeal form that requests "just the facts"
- Then request a written statement from both parties
- Avoids the appealing party feeling cheated that they did not get to respond the responding party's appeal statement

336



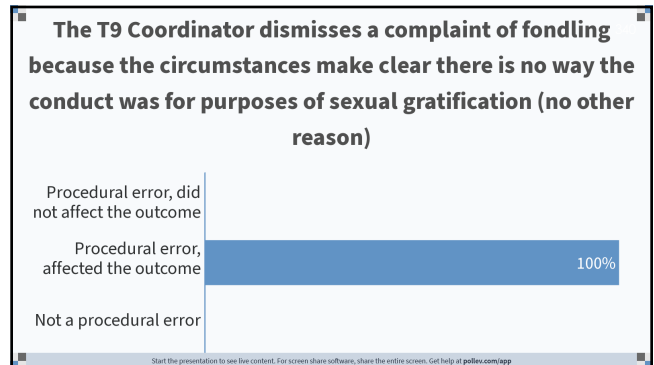
337



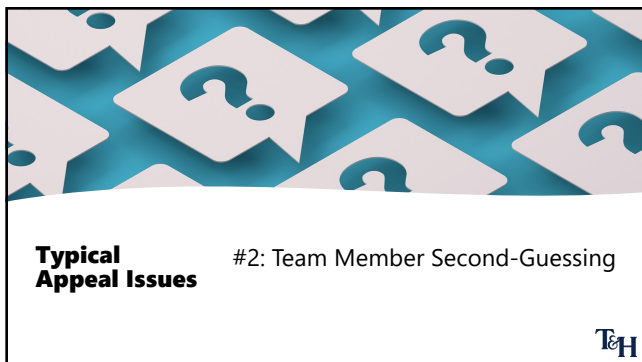
338



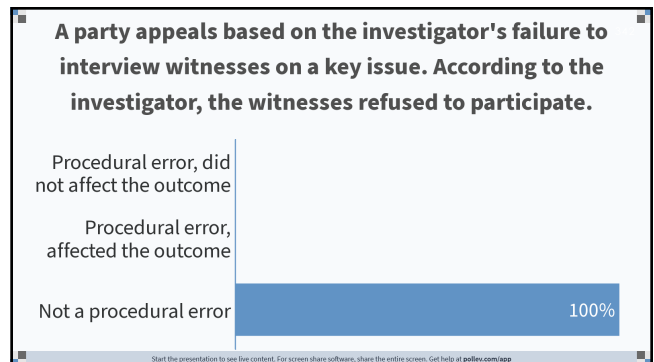
339



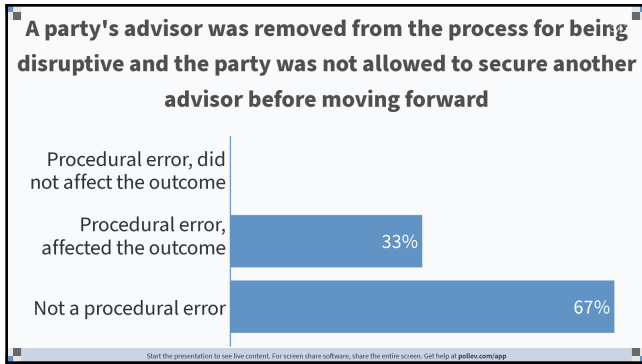
340



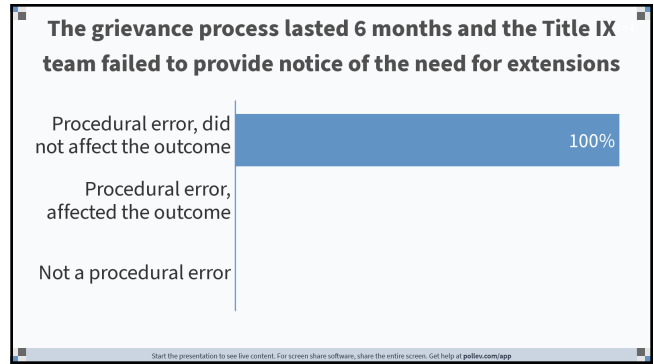
341



342



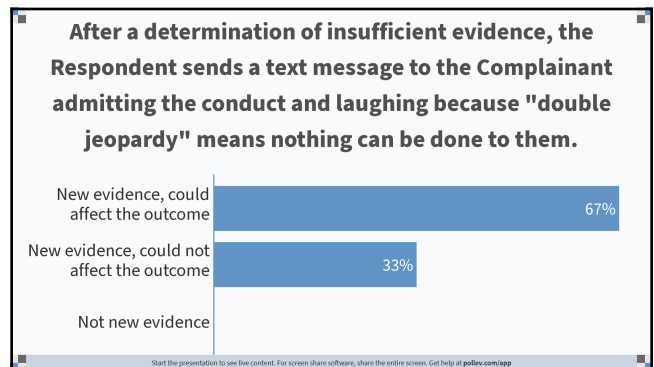
343



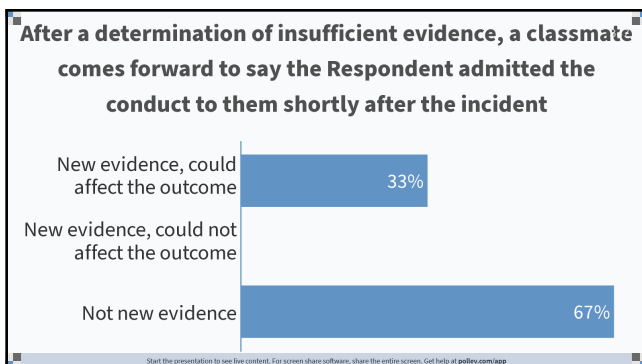
344



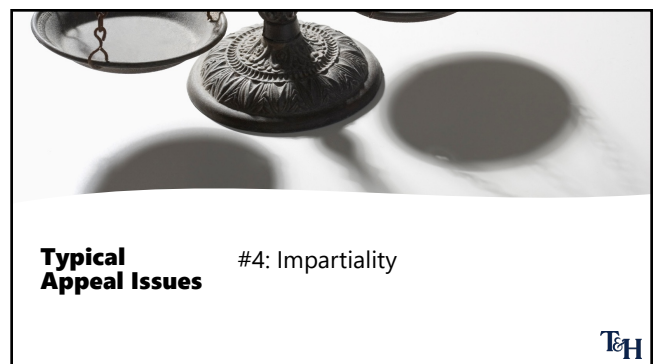
345



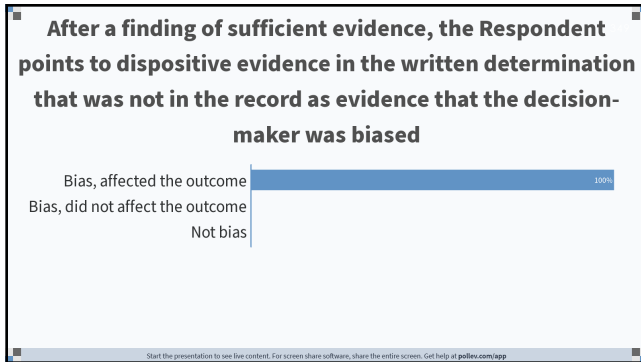
346



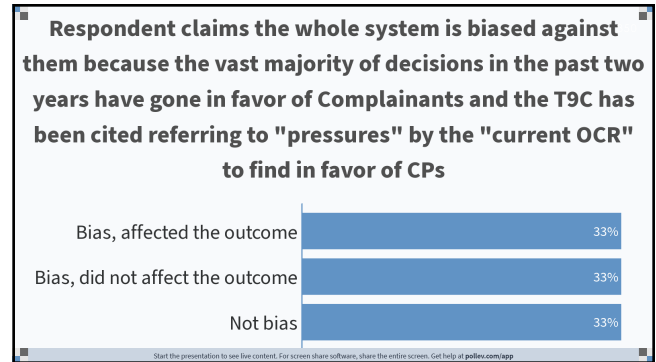
347



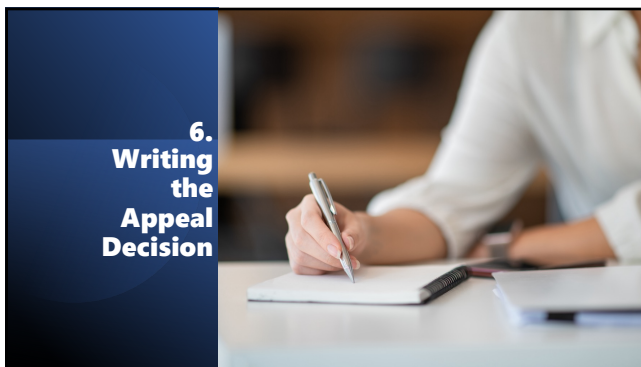
348



349



350



351

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/Dismissal

352

Decision Elements

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

353

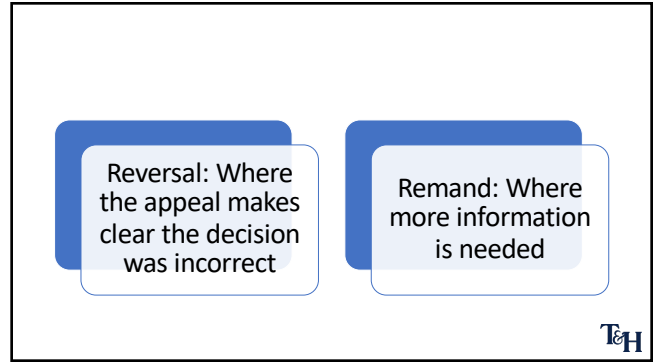
Analysis & Decision

- 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

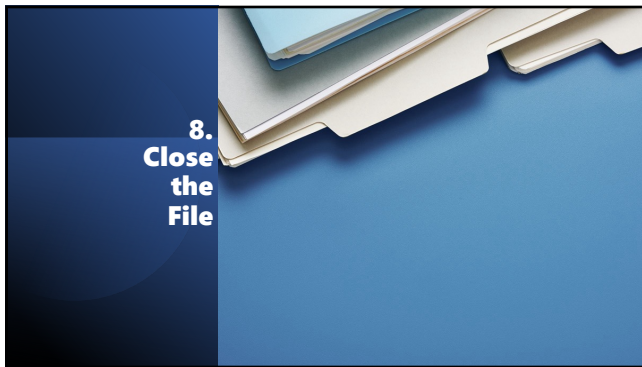
354



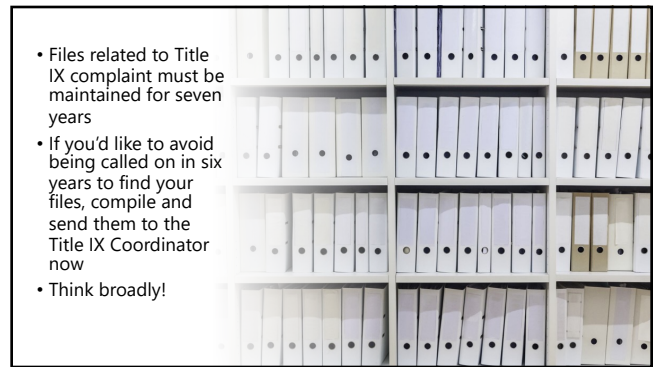
355



356



357



358



359



360

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.”

361

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)

362

**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.

363


**Table Review
Investigation Report**

Review the report carefully (10 minutes)

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



364




**Group Share Out
Investigation Report**

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

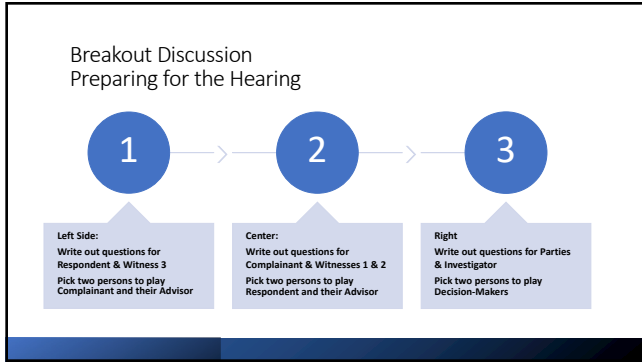
365

**Group Discussion
Pre-Hearing Meeting**

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



366



367

Group Share Out: 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?

368

Table 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

369

Group Exercise: Writing the Decision

DETERMINATION REGARDING RESPONSIBILITY

- **Complainant:** Cary Complainant
- **Respondent:** Remi Respondent
- **Decision-Maker(s):** Lee College's Best Ever Decision Panel
- **Date:** February 27, 2024
- This is the written determination regarding responsibility regarding a formal complaint alleging Title IX sexual harassment in a (College/University) education program or activity and against a person the United States. The formal complaint involves [Complainant(s)'s First and Last Name(s)] (the "Complainant(s)") and [Respondent(s)'s First and Last Name(s)] (the "Respondent(s)"). The formal complaint includes the following allegation(s) potentially constituting sexual harassment as defined in the regulations implementing Title IX of the Education Amendments of 1972, 34 CFR §106.30:

370

Group Exercise: Writing the Decision

The formal complaint includes the following allegation(s) potentially constituting sexual harassment as defined in the regulations implementing Title IX of the Education Amendments of 1972, 34 CFR § 106.30:

1. [State allegation #1, including all known alleged facts, including the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known].
2. [Repeat if necessary for additional allegations]

The alleged conduct, if true, would violate [College/University] [policy/policies], [Policy Name(s)].

The Title IX Coordinator assigned the above-named decision-maker(s) to oversee the hearing and issue a written determination regarding responsibility as required by [College/University] policy, [Policy Name(s)], and relevant law.

371

Group Exercise: Writing the Decision

The decision-maker(s) reviewed the relevant evidence obtained during the investigation and hearing, including the directly related evidence, any responses to the directly related evidence, the investigative report, any responses to the investigative report, and the testimony and evidence addressed at the hearing. After careful review of the information available in the record, the decision-maker(s) conclude(s) that there is [sufficient evidence or insufficient evidence] to support the allegation(s) [or, for more than one allegation where there is a different decision for the allegations, there is sufficient evidence to support allegation(s) #(s) and insufficient evidence to support allegation(s) #(s)].

This written determination summarizes the applicable policy requirements, the relevant facts obtained during the investigation and decision-making processes, and the decision-maker(s) findings.

372

Group Exercise: Writing the Decision

Policy Requirements

The [College/University]'s Title IX grievance procedures and relevant law prohibit Title IX "sexual harassment" in the [College/University]'s education program or activity and against a person in the United States.

Under Title IX and related [College/University] policy, "sexual harassment" means conduct based on sex that satisfies one or more of the following:

1. An employee of the [College/University] conditioning the provision of an aid, benefit, or service of the [College/University] on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [College/University]'s education program or activity; or
3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

[Add other relevant policy definitions or provisions applicable in the case]

373

Group Exercise: Writing the Decision

Findings of Fact Supporting the Determination

Based on my review of the record, I make the following findings of fact:

The following material facts are not in dispute. [Include all facts that the parties agree on and that are material to the allegations].

The parties [disagree on or dispute] [state first fact in dispute]. According to the Complainant, [explain Complainant's position]. According to the Respondent, [explain the Respondent's position]. According to [Witness Name or Number], [summarize any witness testimony that is relevant to the disputed fact]. Documentary or other tangible evidence relevant to this disputed fact includes [summarize any documentary or other tangible evidence relevant to the disputed fact]. The decision-maker also considered the following additional details in considering this disputed fact: [Include specific details that may weigh on credibility, including inconsistencies and any explanations therefore, physical demeanor, or any other evidence not previously discussed that should be considered in deciding this fact]

Based on the foregoing, I find [sufficient evidence or insufficient evidence] to support this disputed fact. [Explain your reasoning]

[repeat the previous two paragraphs for all material facts in dispute].

374

Group Exercise: Writing the Decision

Findings of Fact Supporting the Determination

Based on my review of the record, I make the following findings of fact:

The following material facts are not in dispute. [Include all facts that the parties agree on and that are material to the allegations].

The parties [disagree on or dispute] [state first fact in dispute]. According to the Complainant, [explain Complainant's position]. According to the Respondent, [explain the Respondent's position]. According to [Witness Name or Number], [summarize any witness testimony that is relevant to the disputed fact]. Documentary or other tangible evidence relevant to this disputed fact includes [summarize any documentary or other tangible evidence relevant to the disputed fact]. The decision-maker also considered the following additional details in considering this disputed fact: [Include specific details that may weigh on credibility, including inconsistencies and any explanations therefore, physical demeanor, or any other evidence not previously discussed that should be considered in deciding this fact]

Based on the foregoing, I find [sufficient evidence or insufficient evidence] to support this disputed fact. [Explain your reasoning]

[repeat the previous two paragraphs for all material facts in dispute].

375

Group Exercise: Writing the Decision

Application of the Facts to the Policy

[Describe your conclusions as to whether the facts you found above constitute a violation of the Title IX sexual harassment grievance procedure. Is the conduct Title IX sexual harassment in the [College/University]'s education program or activity and against a person in the U.S.? Explain why you reached that conclusion. You may need to spell out the elements of a particular type of misconduct; for example, that the conduct was so severe, pervasive, and objectively offensive that it effectively denied equal access to the [College/University]'s education program or activity. Alternatively, if it is not Title IX sexual harassment in the [College/University]'s education program or activity and against a person in the U.S., explain how you reached that conclusion.]

376

Group Exercise: Writing the Decision

Determination Regarding Responsibility (RESPONSIBLE)

[Include only if relevant] Based on the record, the findings of fact, and the application of the facts to the policy, the decision-maker(s) find(s) that the Respondent **is responsible** for one or more allegations of Title IX sexual harassment in the [College/University]'s program or activity and against a person in the U.S. Specifically, the Respondent is responsible for [describe allegations for which responsibility was found]. As explained above, I reached this determination because [summarize reasoning].

[Include only if relevant] Because I have found the Respondent responsible for this conduct, I recommend that the [College/University] impose the following disciplinary sanctions on the Respondent: [state all disciplinary sanctions].

[Include only if relevant] I also recommend that the [College/University] provide the Complainant the following remedies designed to restore or preserve equal access to the [College/University]'s education program or activity: [state all non-disciplinary sanctions].

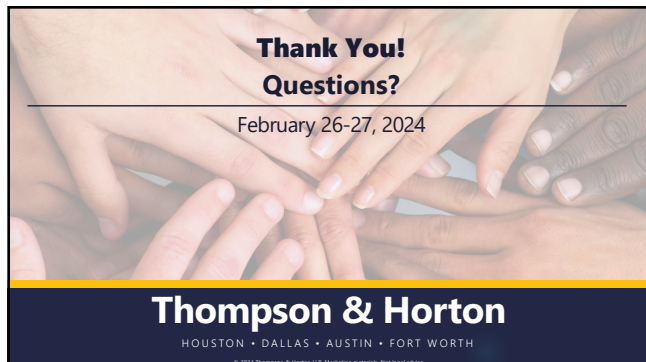
377

Group Exercise: Writing the Decision

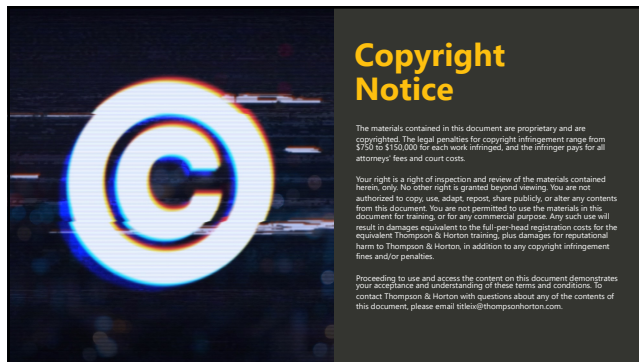
Determination Regarding Responsibility (NOT RESPONSIBLE)

[Include only if relevant] Based on the record, the findings of fact, and the application of the facts to the policy, the decision-maker(s) find that the Respondent **is not responsible** for one or more allegations of Title IX sexual harassment in the [College/University]'s program or activity and against a person in the U.S. Specifically, the Respondent is not responsible for [describe allegations for which responsibility was found]. As explained above, I reached this determination because [summarize reasoning]. Because I find that the Respondent is not responsible for [the allegation(s) or allegations #s], I do not recommend any disciplinary sanctions or remedies to restore or preserve equal access.

378



379



380