

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




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1



**Take Care**



2



Foundations



3




How Did We Get Here?  
(To the Decision-Making Process, That Is)

4

**Do You Use Title IX?**

Is it Title IX sexual harassment?




5

**Do You Use Title IX?**

Is it Title IX sexual harassment?

Did the harassment occur in an education program or activity?



6

### Do You Use Title IX?

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

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### Do You Use Title IX?

<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
<input checked="" type="checkbox"/>	Did the harassment occur in an education program or activity? <span style="float: right;">➔ Title IX Grievance Process</span>
<input checked="" type="checkbox"/>	Was it in the United States?

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### Do You Use Title IX? For example...

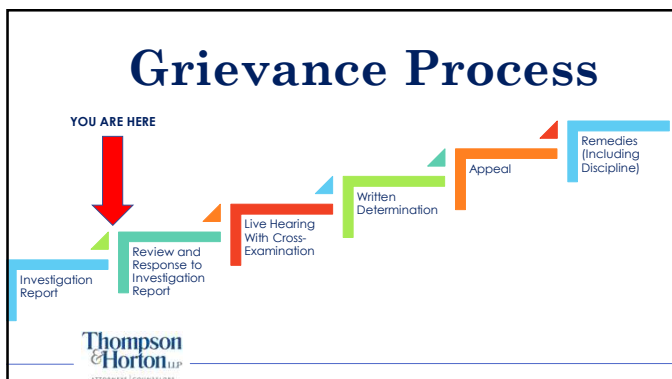
<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?	<p style="color: red; font-size: small;">If answer to <b>any</b> question is <b>NO</b>, the Title IX Grievance Process does not apply</p> <p style="color: red; font-size: small;">Use process for other misconduct</p>
<b>NO</b>	Did the harassment occur in an education program or activity?	
<input checked="" type="checkbox"/>	Was it in the United States?	

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10



11

### Who is the D-M?

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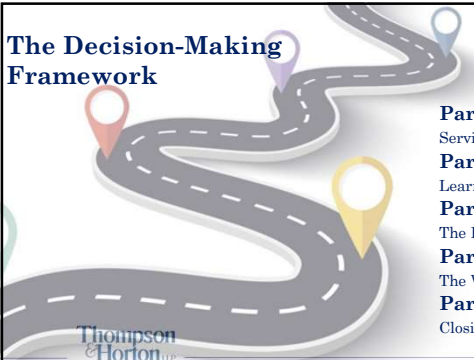
### What is the role of the decision-maker?

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

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13

### The Decision-Making Framework



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

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## Scenario

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

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## Scenario

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

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## Scenario

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

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## Scenario


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

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## Scenario

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



19



## Part 1: Serving Impartially




20

## Impartiality

- ▶ Bias
- ▶ Conflict of Interest
- ▶ Prejudgment

21

## Bias

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


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

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




22

## Bias



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



23


## Bias Examples

Men are sexually aggressive and likely to sexually assault women

Women often regret their sexual experiences and recast them as assault

Men cannot be sexually assaulted

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



24

## Scenario

What gender is the alleged victim, Casey?

What gender is the alleged perpetrator, Ryan?

25

## Conflict of Interest

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

"A conflict of interest arises when what is in a person's best interest is not in the best interest of another person or organization to which that individual owes loyalty."  
<https://ethicsunwrapped.utexas.edu/glossary/conflict-of-interest>

26

## Scenario

<p><b>Clearer Conflicts—Decision-maker:</b> Is related to Ryan Formerly dated Iso's parent Invests in a business with Casey's parent</p>	<p><b>Could be Conflicts—Decision-maker:</b> Is Ryan's Coach Has previously disciplined Casey for dishonesty</p>
<p><b>Less Risk of Conflict—Decision-maker:</b> Signed the Formal Complaint Attends the same place of worship as Casey's parents Has a history of speaking out on victim or accused rights Has other responsibilities, e.g. 504 Coordinator, that cover parties</p>	<p><b>Not a Conflict—Decision-maker:</b> Is an employee or attorney Has been trained on trauma informed practices</p>

27

## Prejudgment

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

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

28

## Scenario

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

---

Casey and Ryan were dating

---

Casey "made out" with Ryan on multiple occasions

---

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

29

## Prejudgment Examples

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

---

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


---

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

30

**Serving Impartially**


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



31

**Serving Impartially**


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



32

**Serving Impartially**


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



33

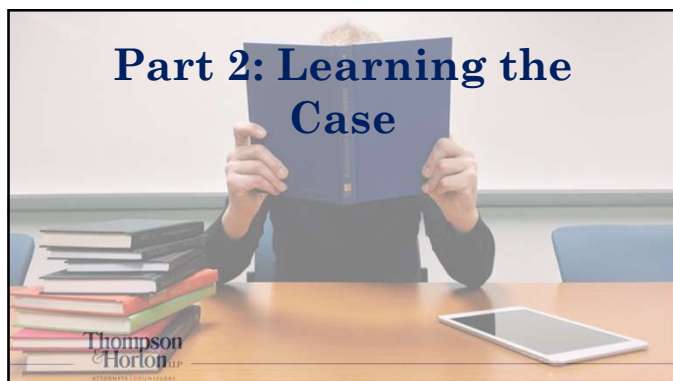

**Perceptions Matter**

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



34



**Part 2: Learning the Case**

35

**Case File**

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


36

## Scenario

Casey and Ryan do not dispute that the touching occurred

Ryan claims the touching was all consensual/ Casey disagrees

There are no witnesses to the behavior



37

## Scenario

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


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



38

## Scenario


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



39

## Scenario

Neither student has ever had disciplinary concerns before.



40

## Scenario

Casey's story has been consistent throughout


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



41

## Ask Yourself

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



42

# Part 3: The Hearing



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# The Hearing

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

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# Structuring the Hearing

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

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

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

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# Notice of Hearing

## NOTICE




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

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# Individuals Involved

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



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## Administration

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



49

## Decorum

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



50

## 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.



51

## Ruling on Questions

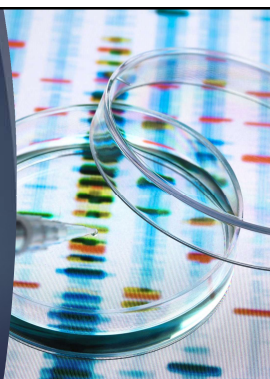
The decision-maker (or hearing chair if multiple decision-makers) must review each question before an answer to determine whether it is **relevant** and **respectful**.



52

## Relevance

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



53

## Relevance

### Fact or Issue in Dispute

- ▶ Facts that help prove or disprove an undisputed issue of fact are not relevant
- ▶ Questions about certain topics are never relevant under the Title IX rules (next slide)
- ▶ Questions that are duplicative of other questions or evidence are not relevant

### Helps Prove or Disprove Issue

- ▶ Even if a fact or issue is in dispute, a question is not relevant if it does not "tip the scale" one way or the other in favor of or against the issue in dispute




54

## Relevance Exceptions

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

**UNLESS written consent from the impacted party or witness**




55

## Inculpatory

Relevant?

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




56

## Exculpatory

Relevant?


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



57

## Respectful


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




58

## 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"





59

## Try & Try Again


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



60

# Scenario

**Question 1** (Ryan to Casey):  
*Isn't it true that you let Wei touch you the same way over the summer before we started dating?*



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## Relevant and Appropriate?

Yes


No

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62

# Scenario

**Question 2** (Casey to Ryan):  
*You did this same thing to your ex last year, didn't you?*



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## Relevant and Appropriate?

Yes


No

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# Scenario

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



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## Relevant and Appropriate?

Yes

No


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# Scenario

**Question 4** (Decision-Maker to Investigator):

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



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## Relevant and Appropriate?

Yes

No


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68

# Scenario

**Question 5** (Ryan to Casey):

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



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## Relevant and Appropriate?


Yes

No

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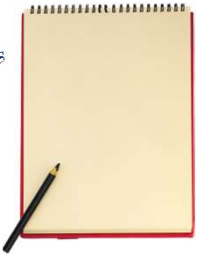

# Part 4: Written Determination

71

# Written Determination

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





72

## Written Determination

Consider how the institution has set up its process for panels

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




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## Case File

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



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WRITTEN DETERMINATION REQUIREMENT  
NUMBER ONE

## Identify the allegations potentially constituting sexual harassment

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## Allegations



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

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## Scenario

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

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WRITTEN DETERMINATION REQUIREMENT  
NUMBER TWO


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

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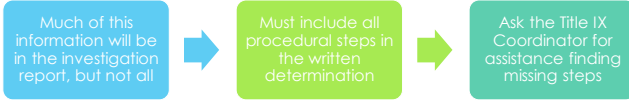

## Procedural Steps

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



79

## Procedural Steps


80

## Scenario

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

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

The Complainant signed a formal complaint on [date].




81

## Scenario

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

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

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



82

## Scenario

Repeat for all steps through the hearing and written determination



83

WRITTEN DETERMINATION REQUIREMENT NUMBER THREE


Findings of fact supporting the determination



84

## 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



85

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




86

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


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

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87

## 50/50 is Very Rare

- ▶ Very few cases end in 50/50
- ▶ More common for a particular disputed fact to end in 50/50, but even that happens less than one might think
- ▶ What tips the scale one way or another?



88



# CREDIBILITY




89

## What is Credibility?

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

90

## Relevant vs. Credible

Relevant evidence tips the scale (even a feather)

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



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## Credible ≠ Truthful

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

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## Credible ≠ Truthful

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



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## Assessing Credibility

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

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



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U.S. Department of Education 2020  
Title IX Regulations

94

## Oversimplify Much?

Jurors are given thorough instructions on how to credibility assessments



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## Coordinator to the Rescue!



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

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## Credibility Factors

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





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

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



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

97

## Credibility Factors

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






U.S. Department of Education 2020  
Title IX Regulations

98

## Corroboration

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






99

## Plausibility


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



100

## Source Opportunity


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



101

## Source Motive

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



102

## What About Source Status?

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## Prior History

- ▶ No limit on use of “prior bad acts” or “character evidence” in the Title IX process
- ▶ Be careful – just because someone engaged in conduct in the past does not mean they did it now

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## Credibility and Bias

Do not get sucked into biased thinking when assessing credibility

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

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## Credibility and Bias

Consider how a party or witness’s culture, background, religion, or other factors may impact behavior during the process

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

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## Trauma & Credibility

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

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WRITTEN DETERMINATION REQUIREMENT  
NUMBER FOUR


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

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## Preponderance

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



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## Scenario

**Undisputed Facts:**  
**There is no dispute that...**  
Casey and Ryan started dating at the beginning of the school year.

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## Scenario

**Disputed Facts:**  
**It is disputed whether...**  
Ryan knew that Casey did not want to engage in sexual activity with Ryan other than kissing.

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## Scenario

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

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## Scenario

**Evidence About Disputed Facts:**  
The parties reported their position on this disputed fact consistently to the investigator and all credibility factors weighed equally between the parties.

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## Scenario

**Evidence About Disputed Facts:**  
Despite being asked, neither party presented any witnesses to whom they had said anything that would support or refute the claim.

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## Scenario

### Evidence About Disputed Facts:

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



115

## Scenario

### Evidence About Disputed Facts:

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



116

## Scenario

### Finding of Fact:

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



117

## Scenario

Repeat for all undisputed and disputed facts



118

## Scenario

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

**Disputed:** Whether the touching was consensual



119

## Scenario

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

**Disputed:** Whether the touching was consensual




120

## Scenario

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

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




121

## Scenario

**What You Can Consider:**

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




122

## Scenario

**What You Can't Consider:**

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




123

## Relevance Exceptions

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

UNLESS written consent from the impacted party or witness




124

## Scenario

**Balanced Weight:**

Both stories have been consistent  
 Both parties told “outcry” witnesses  
 No incidents of past behavior or discipline




125

## Scenario

**Be Careful With:**

Casey’s report after Ryan broke things off  
 Video showed Ryan and Casey walking arm in arm, cuddling, and laughing as they walked  
 Ryan’s nervousness and initial reluctance to describe the touching to the investigator  
 Ryan *tearfully* denied the allegations to mom right after being charged



126

## Scenario

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



127

## Scenario

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



128

WRITTEN  
DETERMINATION  
REQUIREMENT  
NUMBER FIVE

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



129

## Applying Code to Facts

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



130

## Scenario

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



131

## Applying Code to Facts


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



132

## What Title IX Covers

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



133

## What Title IX Covers

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


**If yes to all: Prohibited by Title IX**  
**If no to any: Not Prohibited by Title IX**



134

## Title IX Sexual Harassment Is....


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



135

## Title IX Sexual Harassment Is....


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



136

## Unwelcome Conduct

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



137

## Unwelcome?

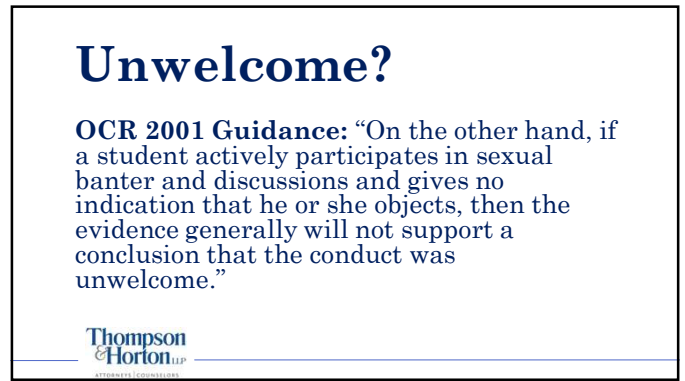
A student, Carson, reports that other students are constantly making sexual jokes, which Carson said makes them uncomfortable. Carson actively participates in the jokes, makes jokes, laughs at jokes, but says they only did so not to make a scene.



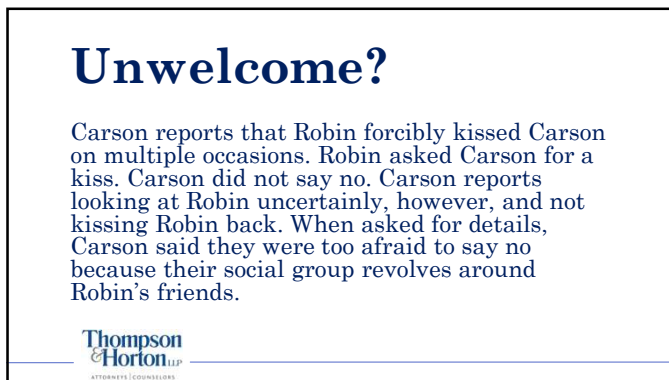
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139



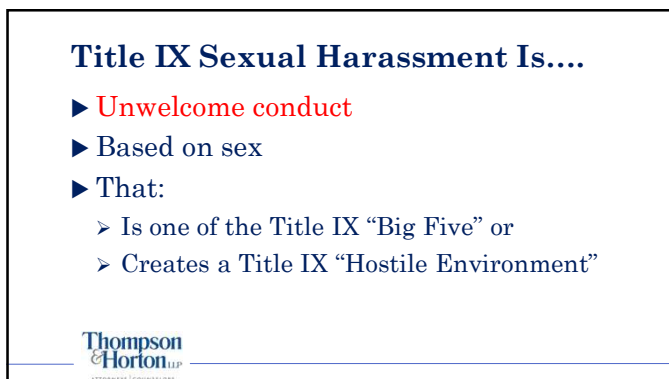
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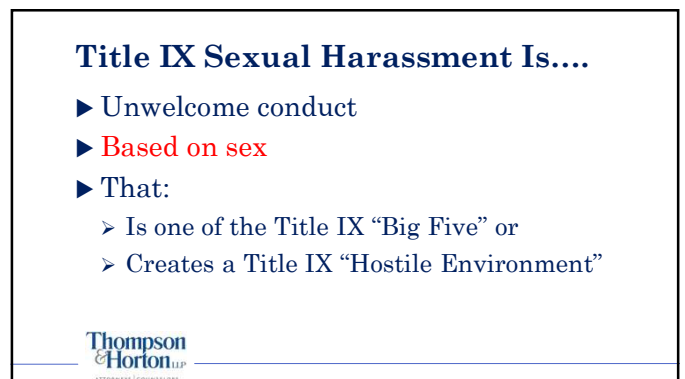
141



142



143



144



## Based on Sex

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



145

## Based on Sex

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

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

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




146

## Title IX Sexual Harassment Is....


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



147

## Title IX Sexual Harassment Is....


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



148

## “Title IX Sexual Harassment”


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



149

## “Title IX Sexual Harassment”



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



150

## Title IX “Big 5”

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

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

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

- ▶ An employee of the educational institution conditioning an aid, service, or benefit of the educational institution on an individual’s participation in unwelcome sexual conduct
- ▶ Examples include an employee:
  - Requesting sexual favors for a benefit or service
  - Threatening to remove a benefit or service unless a person engages in sexual favors
  - Expecting sexual favors for a benefit or service

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

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

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## 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

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## #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

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## #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

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

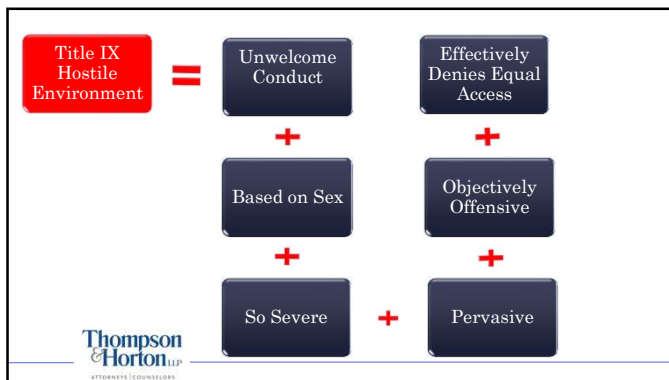
- ▶ A course of conduct based on sex (2+ times)
- ▶ Directed at a specific person
- ▶ That would cause a reasonable person to:
  - Fear for the person’s safety or
  - Fear for the safety of others or
  - Suffer substantial emotional distress
- ▶ Can be direct or indirect

157

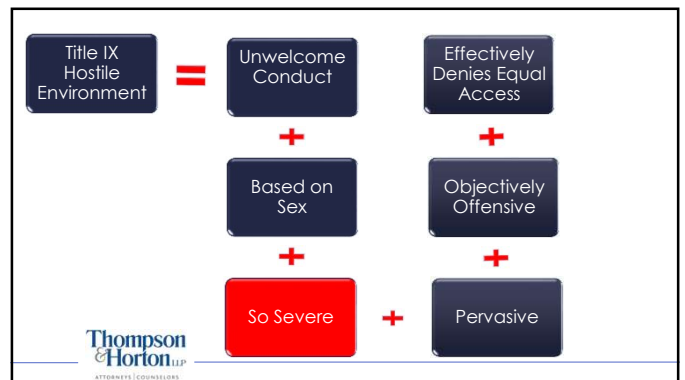
**“Title IX Sexual Harassment”**

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

158



159



160

**What does "severe" mean (one word)?**

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

161

**Dictionary Definition**

**“Severe”**


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

162

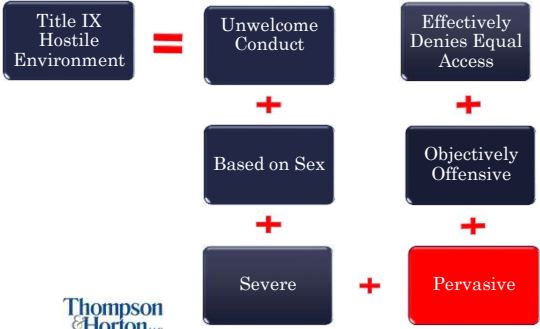
## Case Law Definitions

- ▶ “Severe” means something more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and crass.
- ▶ Simple acts of teasing and name-calling are not enough, even where these comments target differences in gender.


Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019), cert. denied, 141 S. Ct. 554, 208 L. Ed. 2d 175 (2020)



163

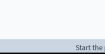


Title IX Hostile Environment = Unwelcome Conduct + Effectively Denies Equal Access + Based on Sex + Objectively Offensive + Severe + Pervasive



164

**What does "pervasive" mean (one word)?**




165

## Dictionary Definition

*“Pervasive”*

Spread over a large area, either metaphorically, or in a literal manner. For instance, rumors can be quite pervasive amongst people. (Black’s Law Dictionary)




166

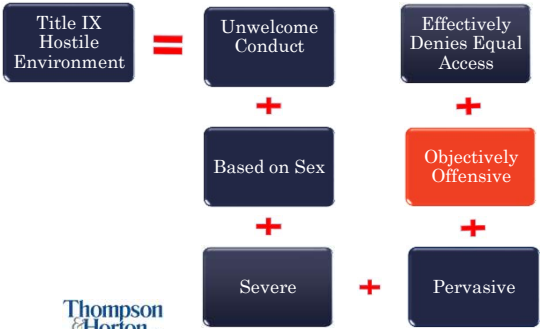
## Case Law Definitions

- ▶ “Pervasive” means “systemic” or “widespread.” For sexual harassment under Title IX, it also means multiple incidents of harassment; one incident of harassment is not usually enough.
- ▶ Most single incidents could be sufficiently severe that it would result in the articulated injury but a single incident would normally fall short of Title IX’s requirement of “systemic” harassment.


Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019), cert. denied, 141 S. Ct. 554, 208 L. Ed. 2d 175 (2020)



167



Title IX Hostile Environment = Unwelcome Conduct + Effectively Denies Equal Access + Based on Sex + Objectively Offensive + Severe + Pervasive



168

## Dictionary Definition

### “Objectively Offensive”

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



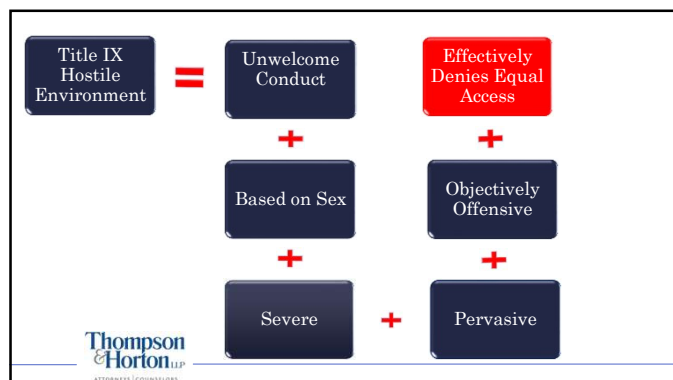
169

## Case Law Definitions

- ▶ “Objectively offensive” means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively.
- ▶ Consider the constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.
- ▶ The victim’s perceptions are not determinative. The objective offensiveness is to be judged by reference to a reasonable person of the same age at whom the comments were aimed.



170



171

## Effective Denial

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



172

## Effective Denial

Examples may include:

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



173

## Effective Denial of Equal Access


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



174

### Effective Denial of Equal Access

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

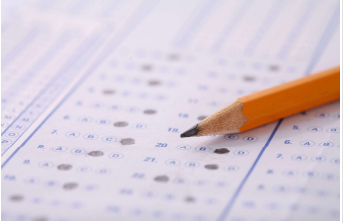


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### TEST YOURSELF

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



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### Test Yourself

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



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### Is it Title IX Sexual Harassment?

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

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### Test Yourself

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



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180

## Test Yourself

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




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- Yes, dating violence
- Yes, stalking
- Yes, severe, pervasive, and objectively offensive
- No

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182

## Test Yourself

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

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- No

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184

## Test Yourself

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




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186

## Test Yourself

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



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188

## Test Yourself

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



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190

## Test Yourself

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



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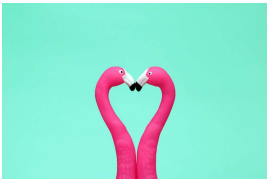
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192



## Test Yourself

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



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## 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

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## Title IX Sexual Harassment Is....

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

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## Title IX Also Requires


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

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## 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”

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### Off-Campus Events & Activities

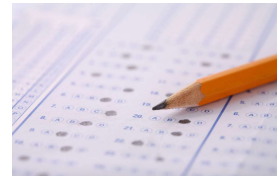
Factors such as whether the school funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred may be helpful or useful for schools to consider to determine the scope of a school's program or activity, but no single factor is determinative



199

### TEST YOURSELF

Is it in a Program or Activity?



200

### Test Yourself

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



201

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

---

Yes No

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202

### Test Yourself

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



203

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

---

Yes No

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204

**Test Yourself**

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



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

Yes No

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206

**Test Yourself**

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



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

Yes No

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208

**Test Yourself**

Carson reports sexual harassment by Robin online.



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

Yes No

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210

## Test Yourself

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




211

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


Yes No

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212

## Title IX Also Requires

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



213


## In the United States




214

## In the United States


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



215

## Not in the E/PA or in US?

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




216

# Scenario

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

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

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




217

218

WRITTEN  
DETERMINATION  
REQUIREMENT

NUMBER SIX


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



218

# Result of Allegation



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



219

# Remember Preponderance



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

220

# What About FERPA?

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





221

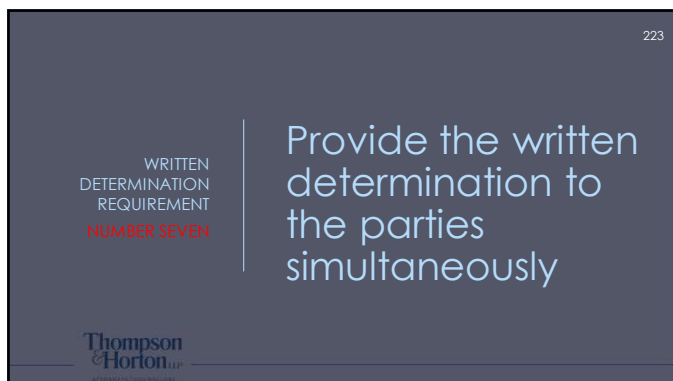
# Scenario

**Result of the Allegation**

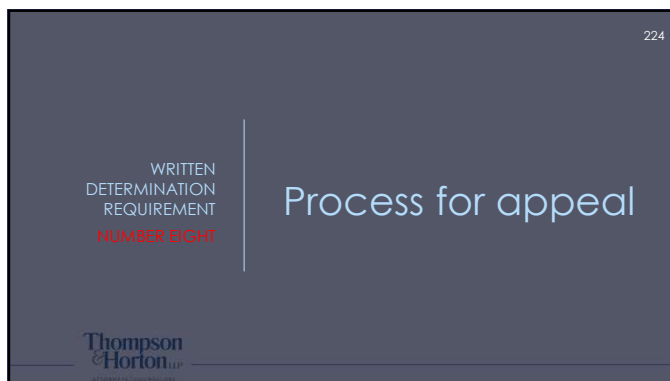
Because the grievance process established that the Respondent engaged in fondling of the Complainant at school, I find sufficient evidence to support the allegation and establish a violation of the institution's Title IX Sexual Harassment policy. Based on my finding, I recommend that the Respondent be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



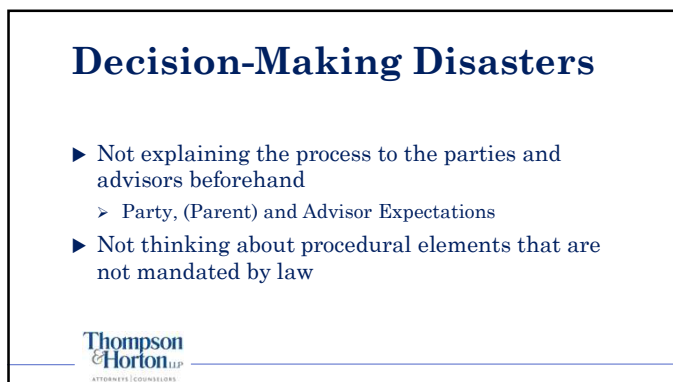
222



223



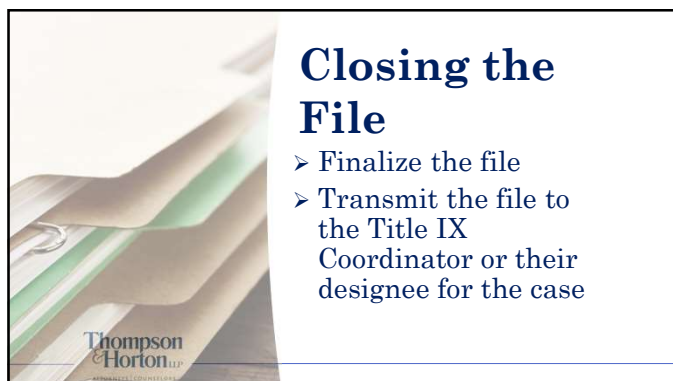
224



225



226



227



228

## Case File

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



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229

## 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.”

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## 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)

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## 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.

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232

## Individual Review Investigation Report

Review the report carefully (10 minutes)

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

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233

## Group Share Out Investigation Report

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

File: [Group Whiteboard](#)


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234

## Group Discussion

### Pre-Hearing Meeting

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




235

## Breakout Discussion

### Preparing for the Hearing


<p style="text-align: center;"><b>Break-Out Room 1: Complainant</b></p> <p>Write out questions for Respondent &amp; Witness 3</p> <p>Pick two persons to play Complainant and their Advisor</p>	<p style="text-align: center;"><b>Break-Out Room 2: Respondent</b></p> <p>Write out questions for Complainant &amp; Witnesses 1 &amp; 2</p> <p>Pick two persons to play Respondent and their Advisor</p>	<p style="text-align: center;"><b>Break-Out Room 3: Decision-Maker</b></p> <p>Write out questions for Parties &amp; Investigator</p> <p>Pick two persons to play Decision-Makers</p>
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236

## Mock Hearing

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




237

## Group Discussion

### Deliberation

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



238

## Individual Review

### Determination Template

Review the template carefully (10 minutes)

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

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




239

## Group Exercise

### Writing the Decision

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

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



240



Higher Education

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241

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