



TAKE TWO

**THE 2024
TITLE IX RULES**

PRESENTED BY THOMPSON & HORTON





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A Sneak Preview of the New Title IX Rules



Thompson & Horton

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Where We Are, Where We Are Going



Stage 01

June 23, 2022
Proposed rules
launched on
Title IX's 50th
Anniversary

Stage 02

Department of Ed
received public
comment, finalized
rule, sent to OIRA for
review, and OIRA
completed its review

Stage 03

April 19, 2024
Department of Ed
released new Title IX
rules

Stage 04

**New Title IX
Rules effective
August 1, 2024**













Title IX Administrators

T&H Has You Covered

AGENDA



Quick Takes



Clarification of Scope



Initial Response to
Sex Discrimination



Grievance Process(es)



Administrative Requirements



Quick Takes

The Real Truth about the 2024 Rules



True

- ▶ All sex discrimination, not just sexual harassment, must proceed through the Title IX grievance process.
- ▶ Codifies that sex discrimination encompasses discrimination against LGBTQI+ individuals.
- ▶ Expanded definition of sex-based harassment = Title IX grievance process applies to additional misconduct.
- ▶ Increases protections for pregnant and parenting students.
- ▶ Simplifies the grievance process significantly for K-12 schools and higher ed discrimination complaints and provides greater flexibility.



False

- ▶ Does not require schools to allow students to participate in sports teams based on gender identity.
Athletics will be addressed in a separate rule that has not been finalized or released.
- ▶ Does not require schools to allow students to live in sex-separate housing based on gender identity.
- ▶ Does not eliminate due process protections for Respondents.
- ▶ Does not remove codification of First Amendment protections from the rules.

Changes in New Rules

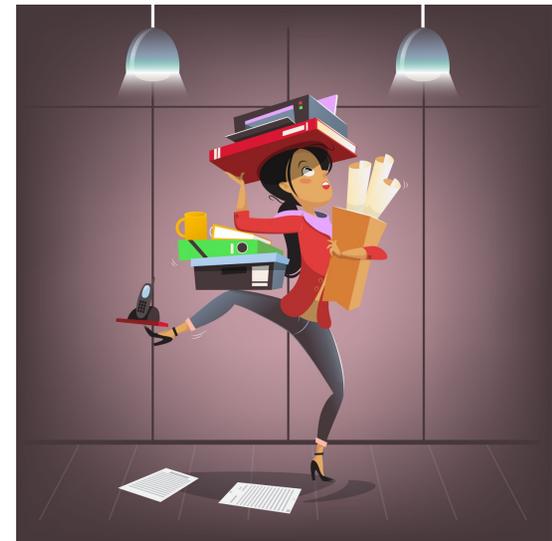
SCOPE



PROCESS



ADMINISTRATIVE REQUIREMENTS



Let's Dive In!



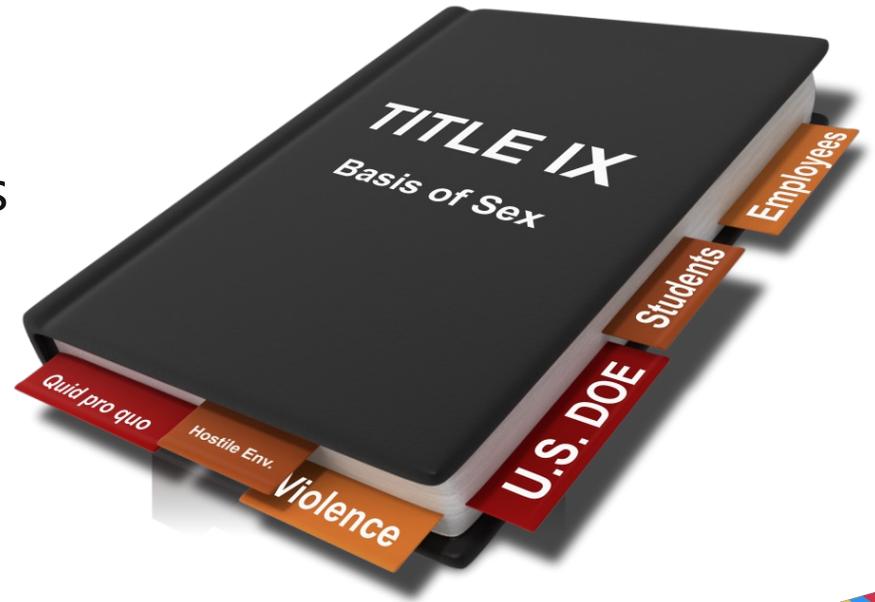
Expanded Scope



Scope of Title IX

34 C.F.R. § 106.10

“Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”





Specific “Bases” of Discrimination

- ▶ Codifies LGBTQI+ protections
 - First time Title IX regulations have expressly defined discrimination on the basis of sex to include sex stereotypes, sex characteristics, sexual orientation, and gender identity
- ▶ Aligns with OCR’s recent interpretation
- ▶ Preamble states it aligns with *most* recent court decisions
- ▶ Reflects increased focus on pregnancy discrimination

Sex Discrimination in Education Programs or Activities

34 C.F.R. § 106.31(a)(2)

"In the limited circumstances in which Title IX or this part permits different treatment on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than **de minimis harm** except as permitted by [certain provisions of the Title IX regulations]. **Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.**"





What Is De Minimis Harm?

- ▶ The rules do not define or explain this
- ▶ It is an objective standard
- ▶ Harm "must be genuine and objectively non-trivial and assessed from the perspective of a reasonable person in the individual's position"
- ▶ Preamble: "there are injuries, including stigmatic injuries, associated with treating individuals differently on the basis of sex, and in such circumstances, no additional showing of a more 'material' harm is required under Title IX"

Where Does the De Minimis Harm Standard Apply?

- ▶ Any circumstance in which a recipient engages in permissible sex separation or differentiation, unless subject to an exception
- ▶ Restrooms
- ▶ Locker rooms
- ▶ Access to classes and activities
- ▶ Dress and grooming codes



Where Does the De Minimis Harm Standard **NOT** Apply?

- ▶ Institutions controlled by religious organizations (with a religious exemption)
- ▶ Military and merchant marine educational institutions
- ▶ Membership practices of social fraternities and sororities, and voluntary youth service organizations
- ▶ Admission to certain classes
- ▶ Sex-separate housing
- ▶ Sex-separate athletic teams





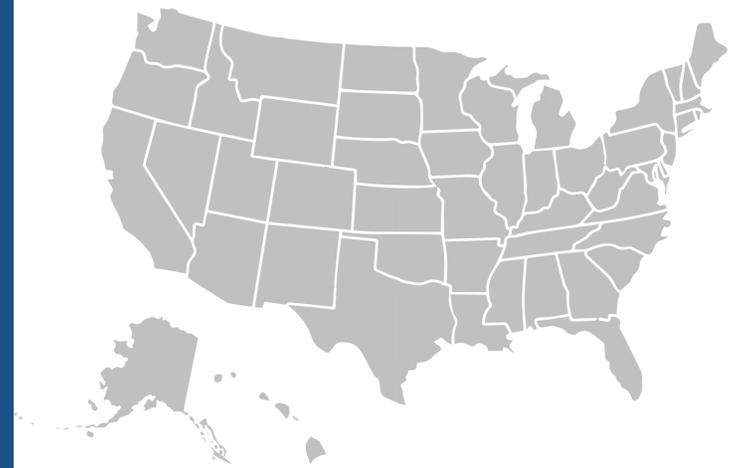
Preamble Discussion: Sex-Separate Facilities

- ▶ “The Department has determined . . . that sex separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination.”
- ▶ “However, when such separation imposes more than de minimis injury on a protected individual . . . such as when it denies a transgender student access to a sex-separate facility or activity consistent with that student’s gender identity, this would violate Title IX’s general nondiscrimination mandate.”

What About State Laws?

34 C.F.R. § 106.6(b)

“Effect of State or local law or other requirements. The obligation to comply with Title IX and this part is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or this part.”



**Litigation
is
Anticipated**



**Talk to Your
Institution's
Leadership
&
Consult
Your
Attorney**



A photograph of a pregnant woman from the waist up, shown in profile. She is wearing a light blue, long-sleeved, ribbed sweater over a white top. Her hands are gently resting on her bare, pregnant belly. The background is a solid, light blue color.

Protections for Pregnant and Parenting Students and Employees

Pregnancy or Related Condition

Includes

- ▶ Pregnancy, childbirth, termination of pregnancy, or lactation
- ▶ Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
- ▶ Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions





Notice and Reporting

When ***any*** employee is informed of a student's pregnancy or related conditions by a student or a person who has a legal right to act on behalf of the student, the employee must promptly inform that person of the Title IX Coordinator's contact information and that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination, unless the person reasonably believes the Title IX Coordinator has already been notified.

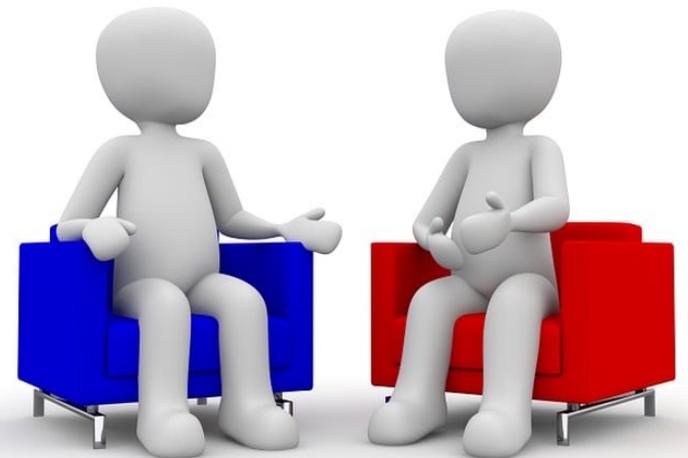
Protections

- ▶ Must not adopt or implement any policy, practice or procedure concerning current, potential, or past parental, family, or marital status, which treats persons differently.
- ▶ Must not discriminate in education programs or activities against any student, applicant, or employee based on the person's current, potential, or past pregnancy or related conditions.
- ▶ Must treat pregnancy or related conditions in the same manner as other medical conditions.
- ▶ Must not make pre-admission or pre-employment inquiries about marital status – such as whether someone is “Miss” or “Mrs.”



Accommodations

- ▶ Pregnant students are entitled to voluntary reasonable accommodations or modifications following an interactive process similar to the disability accommodation process.
- ▶ Can deny accommodation if it would fundamentally alter the program (i.e., a change that is so significant it alters the essential nature of the education program or activity).
- ▶ Examples may include breaks during class, intermittent absences, access to online or homebound education, changes in schedule or course sequence, extensions of time for work or tests, allowing a student to sit or stand, counseling, and elevator access.



Lactation Space

- ▶ Must provide reasonable break time for an employee to express breast milk or breastfeed as needed.
- ▶ Time must be sufficient for the employee to travel to the space, express breast milk or breastfeed, wash, store, and return to work.
- ▶ Ensure access to a lactation space for students and employees, which must be a space other than a bathroom that is clean, shielded from view, and free from intrusion from others.
- ▶ Other protections, such as the PUMP Act and PWFA, may require more.



Expansion of Prohibited Conduct:

Definition of Sexual Sex-Based Harassment

right
relation or from an
point of view.
Harassment
feeling of intense
annoyance cause
that disturbs or
ight for what is

Sex-Based Harassment

“Sex-based harassment . . . is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex,” including sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ Specific offenses





Sex-Based Harassment

- ▶ Change from *sexual harassment* to sex-based harassment
- ▶ Makes clear that the harassment does not have to be *sexual* in nature
- ▶ Specifically refers to the expanded scope in Section 106.10 to include LGBTQI+ and pregnancy-related harassment
- ▶ It's still hostile environment + the Big 5

Quid Pro Quo

An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.





Quid Pro Quo

- ▶ Not limited to employees; others can be the perpetrators of quid pro quo harassment
- ▶ Includes “other persons authorized” by the school “to provide an aid, benefit, or service” under the education program or activity
- ▶ Specifically includes that it can be explicit or implied

Specific Offenses

The definition includes the same offenses from the current rules, but provides the definition in the text, instead of simply referring to other statutes (VAWA)

- ▶ Sexual assault
- ▶ Dating violence
- ▶ Domestic violence
- ▶ Stalking



New! Hostile Environment Harassment

Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is **so severe or pervasive** that it **limits or denies a person's ability to participate in or benefit from** the recipient's education program or activity (*i.e.*, creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of several factors.



New! Hostile Environment Factors

Factors Listed in Regulation

- ▶ The degree to which the conduct affected the complainant's ability to access the education program or activity
- ▶ The type, frequency, and duration of the conduct
- ▶ The location of the conduct and the context in which the conduct occurred
- ▶ The parties' ages, roles within the education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct
- ▶ Other sex-based harassment in the education program or activity





Hostile Environment

- ▶ No more "severe, pervasive, AND objectively offensive"
- ▶ New Rule: "so severe OR pervasive"
- ▶ Limits or denies ability to participate or benefit instead of "effectively denies equal access to the education program or activity"
- ▶ Does require the conduct to be subjectively and objectively offensive
- ▶ Focus – totality of the circumstances

Where Must Sex Discrimination
Occur?

Jurisdiction



Title IX

A red flag pin is stuck into a map of a city street grid. The map shows various streets, green spaces, and a blue river or canal. The flag is positioned in the upper left quadrant of the map.

Jurisdictional Issues

- ▶ Conduct within the school's operations
- ▶ Off-campus conduct
 - ▶ Settings operated or overseen by the school
 - ▶ Student organizations' properties
 - ▶ Conduct subject to the institution's ***disciplinary authority***
- ▶ External conduct that contributes to a hostile environment ***within*** the education program or activity



Off-Campus Settings

- ▶ Events operated or overseen by the school (i.e., field trips)
- ▶ Post-secondary only: buildings owned or controlled by an officially-recognized student organization



School Disciplinary Authority



- ▶ If the institution chooses to discipline students for off-campus misconduct, it must exercise disciplinary authority over sex discrimination that occurs in a similar context
- ▶ Does the school code of conduct apply if a student steals from a classmate off-campus?
- ▶ How about an off-campus nonsexual assault of a student?



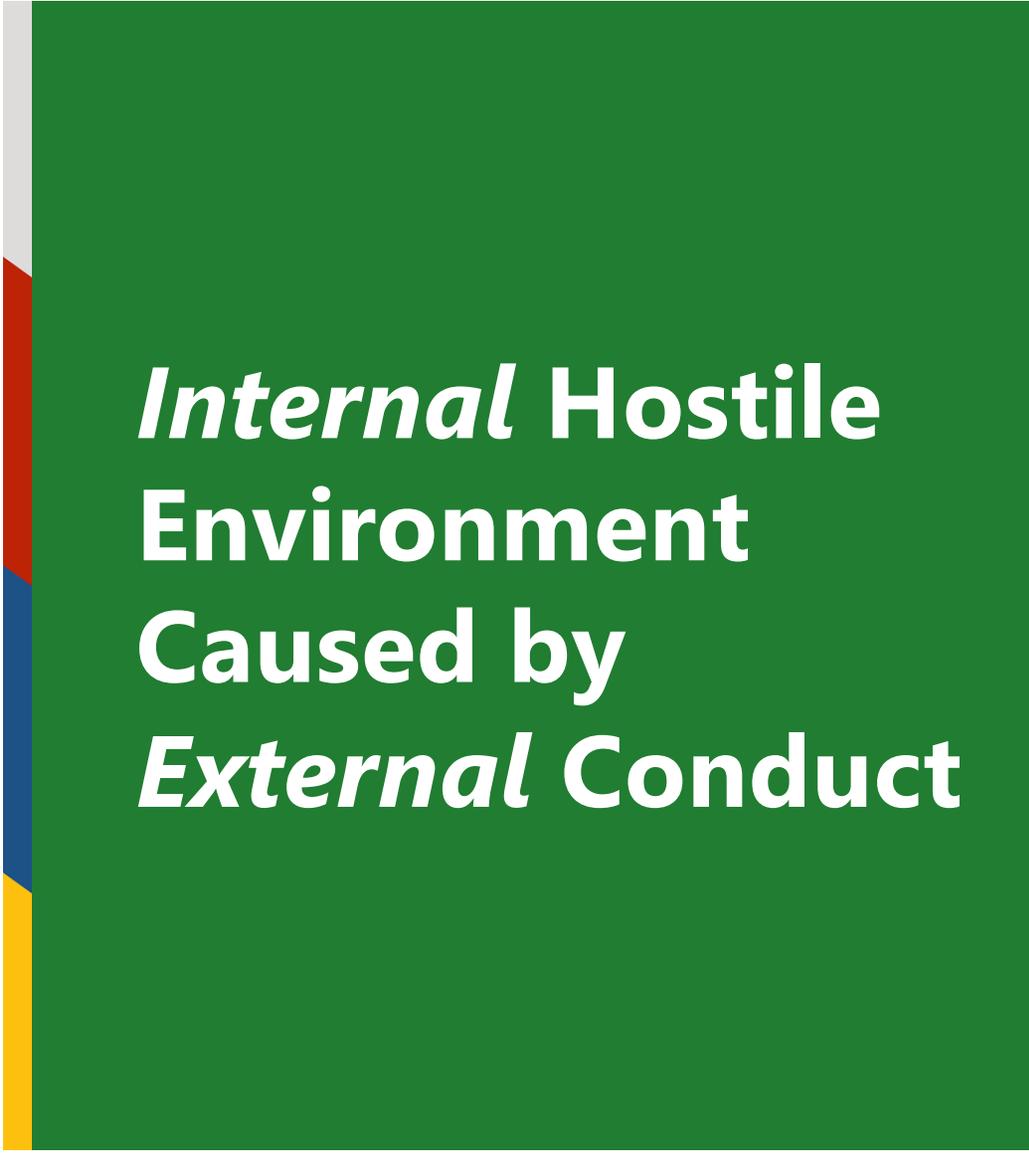
Disciplinary Authority of K-12 Schools



- ▶ Many states have laws requiring K-12 schools to discipline students for certain off-campus criminal conduct
- ▶ Schools must treat off-campus sexual misconduct similarly to other off-campus misconduct
- ▶ Off-campus sexual assaults or other sex-based criminal conduct will need to go through Title IX grievance process if it could subject a student to school-based discipline



- ▶ Off-campus sex-based harassment that contributes to a hostile environment on campus
- ▶ Conduct outside the United States that causes a hostile environment domestically
- ▶ Fact-specific inquiry



***Internal Hostile
Environment
Caused by
External Conduct***

Expanded Application of Grievance Process



What's New?



1

Requires grievance process for complaints of sex-based harassment + sex discrimination and retaliation

2

This includes allegations of LGBTQI+ and pregnancy-related discrimination and harassment

3

The new definition of complainant increases the persons who can make a complaint that triggers the grievance process

4

The elimination of a "formal complaint" and inclusion of "oral complaints" may increase the number of complaints to which the grievance process applies



Response to Known Retaliation

- ▶ Must prohibit retaliation, including peer retaliation, in education programs and activities
- ▶ When a school has “information about conduct that reasonably may constitute” Title IX retaliation, the school must respond as it is required to respond to sex discrimination
- ▶ If a school receives a complaint alleging retaliation, it must initiate its grievance process (generally, its process for complaints of sex discrimination) or an informal resolution process

“Complainant”

- (1) A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; *or*
- (2) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient’s education program or activity **at the time of the alleged sex discrimination.**





“Complainant”

- ▶ Anyone who has been subjected to Title IX sex discrimination in the school’s education program or activity can be a complainant
- ▶ The complainant need only to have been participating in or attempting to participate in the program or activity at the time of the alleged discrimination, not when the person makes a complaint

“Complaint”

An oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.





“Complaint”

- ▶ Formal complaint no longer required to trigger the grievance process
- ▶ Oral reports can trigger the Title IX grievance process
- ▶ Requirement for oral report:
 - **Objectively** can be understood to be
 - A request to investigate and make a determination regarding allegations of sex discrimination
- ▶ This is a **reasonable person** standard



“Complaint”

- ▶ Schools must ensure oral reports and complaints are tracked and addressed
- ▶ Schools must ensure the Title IX Coordinator is made aware of *all* oral and written complaints
- ▶ Policies and training should be sufficient so *all personnel* know what to do if they receive an oral or written complaint



Initial Response to Alleged Sex Discrimination

Employee Response

Mandatory Reporters

- ▶ K-12: all employees except **confidential employees**
- ▶ Higher ed:
 - ▶ Officials with authority to take corrective measures **and**
 - ▶ Officials with “responsibility for administrative leadership, teaching, or advising”
 - ▶ Except confidential employees

Confidential Employees

- ▶ Explain to reporter:
 - ▶ Confidential status (including duty to report under other laws) and limits on their reporting requirements
 - ▶ How to contact Title IX Coordinator
 - ▶ That Title IX Coordinator can implement supportive measures and may be able to offer informal resolution or an investigation

Other Higher Ed Employees

- ▶ Must either notify Title IX Coordinator, **or**
- ▶ Provide person who provided the information with:
 - Contact information for Title IX coordinator, **and**
 - Information on how to file a complaint



Confidential Employees



Employee whose communications are privileged or confidential under Federal or State law (only with respect to information received while functioning with the scope of those duties)



Employee *designated* as confidential due to their role in providing services to persons regarding sex discrimination



Postsecondary employee conducting certain approved research on sex discrimination (only with respect to information received in study)

Title IX Coordinator Initial Response

Support

- ▶ Offer & coordinate supportive measures for Complainant once report is made
- ▶ Offer & coordinate supportive measures for Respondent once complaint is made

Notify

- ▶ Complainant (or reporter) of grievance and informal resolution procedures
- ▶ After complaint made, Respondent of grievance and informal resolution procedures

Initiate

- ▶ Emergency removal or administrative leave
- ▶ Grievance process or informal resolution
- ▶ Other steps to ensure discrimination does not continue/ recur

Title IX Coordinator & Pregnant Students

Upon learning that a student is pregnant, the Title IX Coordinator or appropriate designee must:

- ▶ Inform the student of the school's obligation to prohibit sex discrimination and provide the notice of nondiscrimination
- ▶ Make reasonable modifications or accommodations to prevent discrimination and ensure equal access
- ▶ Allow voluntary access to any separate and comparable portion of the school's program or activity
- ▶ Allow a voluntary leave of absence to cover, at a minimum, the period of time deemed medically necessary by the student's licensed healthcare provider
- ▶ Ensure the availability of a lactation space



When should the Coordinator initiate a complaint if complainant does not?

- ▶ New rules lay out several factors to consider
- ▶ Ultimate question is whether the alleged conduct either:
 - ▶ Presents an imminent and serious threat of harm to Complainant or other person
 - ▶ Prevents the school from ensuring equal access to its education programs or activities



Supportive Measures

- ▶ Must not **unreasonably** burden either party
- ▶ Must be designed to:
 - ▶ Protect safety of parties or educational environment
 - ▶ Provide support during grievance process
- ▶ For **discrimination** complaints, not required to alter alleged discriminatory conduct as a supportive measure
- ▶ Up to institution to determine whether to modify or terminate after grievance process or informal resolution
- ▶ Complainants and Respondents may seek modification of any decision to provide, modify, or terminate supportive measures from a neutral party other than the one who made initial decision



Students with Disabilities

K-12

- ▶ The Title IX Coordinator **must** consult with "one or more members, as appropriate," of the IEP or 504 team "to determine how to comply with the requirements of the IDEA and Section 504 in the implementation of **supportive measures**"

Higher Ed

- ▶ The Title IX Coordinator **may** consult with the individual or office designated to serve students with disabilities to determine how to comply with Section 504 in the implementation of **supportive measures**

Informal Resolution

- ▶ School may offer informal resolution with a trained facilitator
- ▶ School may decide when it's appropriate and when it's not based on allegations, but may not offer it for allegations of harassment by an employee against a K-12 student
- ▶ Parties may elect to participate
- ▶ School must provide notice of its availability with notice to complainant and respondent of grievance procedures
- ▶ Title IX Coordinator still must take other appropriate prompt and effective steps to ensure that sex discrimination does not continue/recur



The Grievance Process(es)



Double Feature

K-12 (All) & Higher Ed Sex Discrimination

- ▶ Requires basic structure for processing complaints
- ▶ Much more flexibility in designing that process

Higher Ed Sex-Based Harassment

- ▶ Limited to reports involving a student complainant or student respondent
- ▶ Looks more like 2020 Rules
- ▶ Additional notice requirements
- ▶ Additional opportunities to review evidence
- ▶ Additional decision-making requirements



**K-12 +
Higher Ed
Sex Discrimination**
Choose Your Own Adventure

K-12 + Higher Ed Sex Discrimination



- ▶ Grievance procedures must be in writing
- ▶ Must contain provisions in Section 106.45 of the Rules
- ▶ When the allegation is that a policy or practice discriminates on the basis of sex, the recipient is not a respondent





BASICS

Eight Basic Requirements for Grievance Process

1. Treat complainants and respondents equitably
2. Title IX personnel cannot have a conflict of interest or bias
3. Presumption that respondent is not responsible
4. Reasonably prompt timeframes for “major stages of grievance procedures”
5. Reasonable steps to protect privacy of witnesses and parties but must not restrict the ability of parties to obtain and present evidence
6. Objective evaluation of all relevant evidence
7. Exclusion of certain impermissible evidence
8. If the recipient adopts grievance procedures that apply to the resolution of some, but not all, complaints, articulate consistent principles for how to determine which procedures apply

Students with Disabilities

K-12

- ▶ The Title IX Coordinator **must** consult with "one or more members, as appropriate," the IEP or 504 team to determine how to comply with the requirements of the IDEA and Section 504
"throughout the implementation of grievance procedures"

Higher Ed

- ▶ The Title IX Coordinator **may** consult with the individual or office designated to support students with disabilities to determine how to comply with Section 504

Students with Disabilities:

“Throughout the Grievance Process”

Consult the IEP / 504 Team:

- ▶ Supportive measures
- ▶ Emergency removals
- ▶ Disciplinary sanctions
- ▶ Interview accommodations
- ▶ FAPE considerations
- ▶ **Don't forget**, an MDR is required when a change of placement is proposed



Notice of Allegations

- ▶ School's grievance procedures
- ▶ Sufficient information ***available at the time*** to allow the parties to respond
 - Identity of parties involved
 - Conduct alleged to constitute sex discrimination
 - Date and location of alleged incident
- ▶ Statement that retaliation is prohibited
- ▶ Statement that the parties are entitled to an equal opportunity to access the relevant evidence or an accurate description (with option to request the evidence)

Dismissal

~~MANDATORY~~

PERMISSIVE



Permissive Dismissal

- ▶ Unable to identify the respondent after taking reasonable steps to do so
- ▶ Respondent is not participating in your education program or activity and is not employed by you
- ▶ The complainant voluntarily withdraws any or all allegations and without the withdrawn allegations, the remaining conduct would not constitute Title IX sex discrimination if proven (and Title IX Coordinator declines to initiate a complaint)
- ▶ The alleged conduct, even if proven, would not constitute Title IX sex discrimination
 - Prior to dismissal, you must take reasonable steps to clarify the allegations with the complainant



REMEMBER ... Supportive Measures



If you dismiss, you must "at a minimum"

- ▶ Offer supportive measures to complainant
- ▶ If respondent has been notified of allegations, offer supportive measures to respondent
- ▶ Require the Title IX coordinator to take appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur

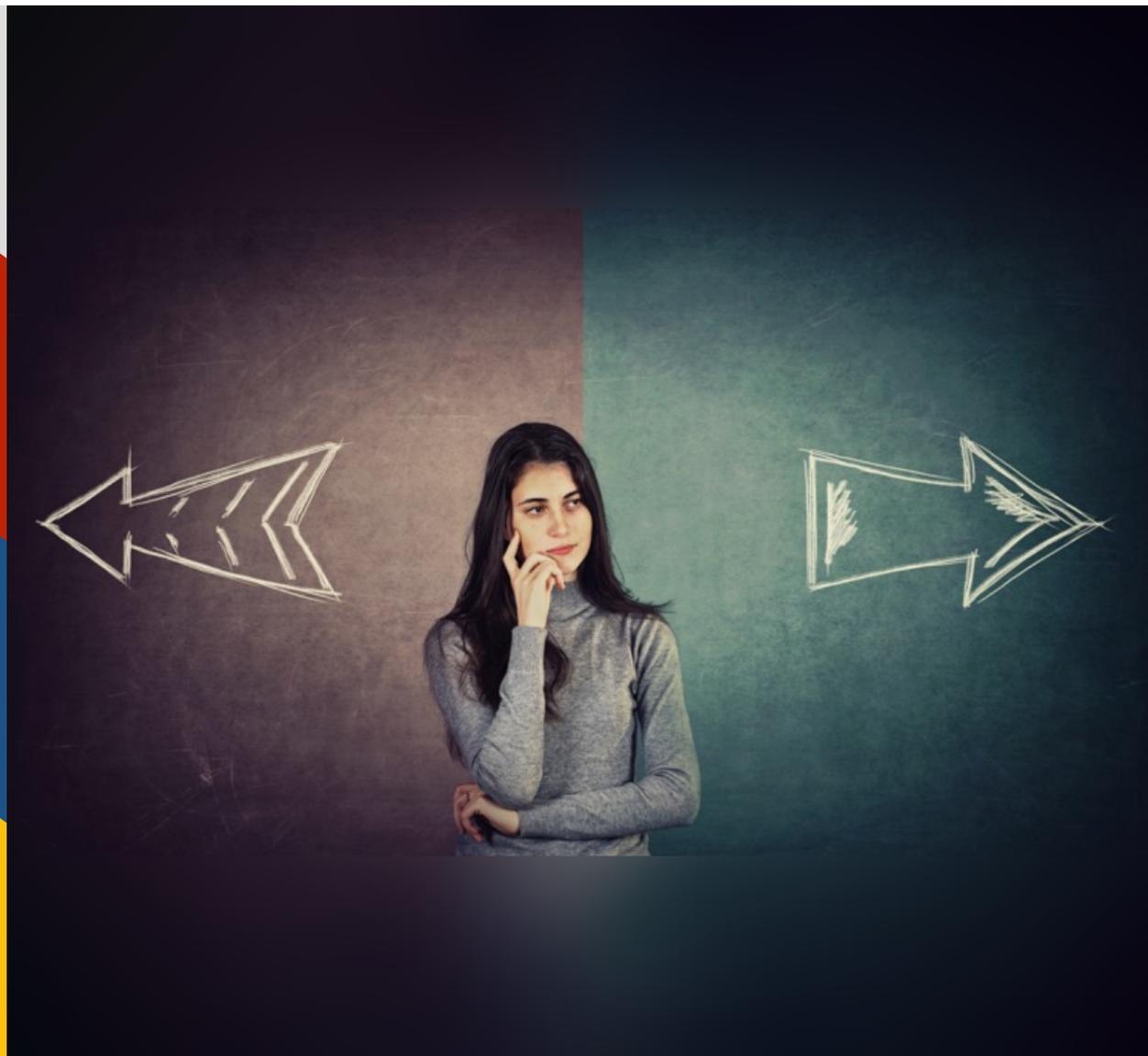


Appeal of Dismissal

- ▶ Any party can appeal dismissal
- ▶ Notify parties when appeal is filed
- ▶ Implement appeal procedures equally for the parties
- ▶ Appeal decisionmaker cannot be someone involved in the investigation or dismissal of complaint
- ▶ Appeal decisionmaker must be trained
- ▶ Parties must have reasonable and equal opportunity to make a statement in support of or challenging the dismissal
- ▶ Notify all parties of result of appeal and rationale for the outcome



**Investigations,
Credibility
Assessments, &
Determinations**



Investigation

- ▶ Burden on recipient to conduct an investigation that gathers sufficient evidence
- ▶ Provide equal opportunity for parties to present relevant fact witnesses and other inculpatory and exculpatory evidence
- ▶ Review all evidence gathered and determine what evidence is relevant and what evidence is impermissible
- ▶ Provide parties with an equal opportunity to access either the relevant and not impermissible evidence or an accurate description of this evidence

If you provide a description of the evidence, you must provide access to the evidence upon request of any party

- ▶ Provide a reasonable opportunity to respond



“Relevant”

Related to the allegations of sex discrimination under investigation as part of the grievance procedures.

Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and **evidence** is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.



A magnifying glass is positioned over a stack of folders on a wooden desk. The top folder is orange and has a red stamp that reads "CONFIDENTIAL".

Impermissible Evidence

- ▶ Evidence protected by a legal privilege
- ▶ Evidence provided to a confidential employee
- ▶ Health care treatment records

MUST OBTAIN WAIVER!

- ▶ Complainant's sexual interests, or prior sexual conduct (unless exception)

Impermissible evidence must not be considered (except to determine exception) and must not be disclosed or used

When Credibility Is at Issue and Relevant



- ▶ A recipient must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess their credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination

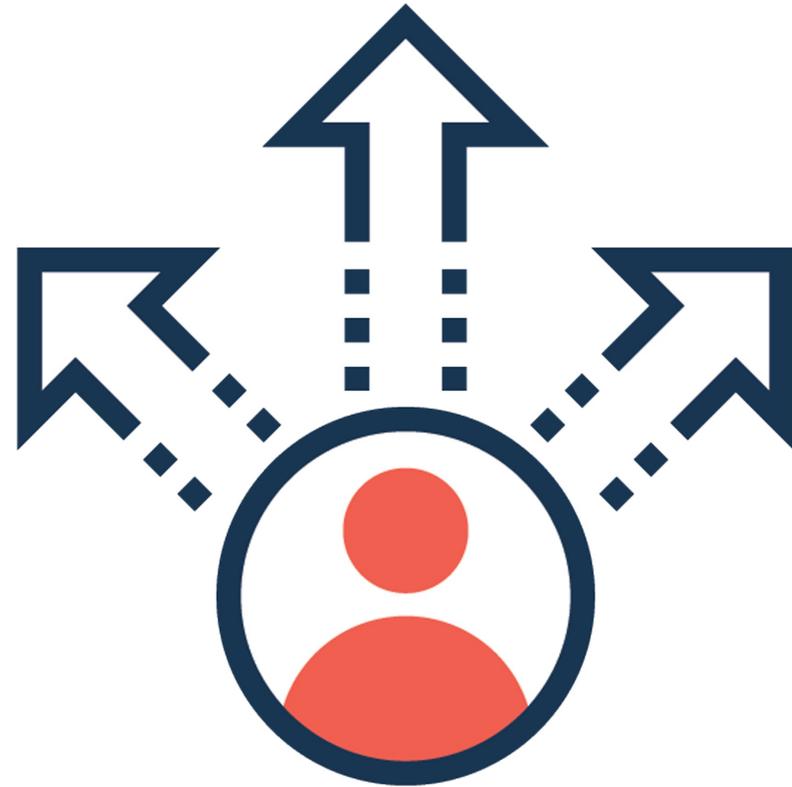


When Consent Is at Issue and Relevant

- ▶ How is "consent" defined?
- ▶ Whether and how to define consent is up to the recipient
- ▶ But the burden of proving consent (or lack thereof) rests on the recipient
- ▶ Definition can take into account age and developmental level so long as consistent with applicable disability laws
- ▶ If the records maintained by a physician, psychologist or other recognized professional in connection with the provision of treatment (e.g., medical records) are relevant to consent, may only be used with the party's **voluntary, written consent**



The Determination



DECISION

Standard of Proof

- ▶ Use the preponderance of evidence standard of proof, unless the recipient uses the clear and convincing evidence standard in all other proceedings, including those related to other discrimination complaints

Determination

- ▶ Decisionmaker evaluates relevant, not impermissible evidence for its persuasiveness
- ▶ If not persuaded under the standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sex discrimination occurred



Notice of Determination

- ▶ Notify the parties in writing of the determination of whether sex discrimination occurred and the rationale for the determination
- ▶ Notify the parties of the procedures and permissible bases for appeal, if applicable



Post-Determination Actions

- ▶ If there is a determination that sex discrimination occurred, as appropriate, require the Title IX Coordinator to:
 - ▶ Coordinate the provision and implementation of **remedies** to a complainant or other persons identified as having had equal access to the education program or activity limited or denied by sex discrimination
 - ▶ Coordinate the imposition of any **disciplinary sanctions** on a respondent, including notification to the complainant of any such disciplinary sanctions
 - ▶ Take **other appropriate prompt and effective steps** to ensure that sex discrimination does not continue or recur within the education program or activity



Determination & Discipline

- ▶ Complete the investigation and determination before the imposition of any disciplinary sanctions against a respondent
- ▶ Do not discipline a party, witness, or others participating in the grievance process for making a false statement or for engaging in consensual sexual conduct based solely on the determination of whether sex discrimination occurred



Appeals



- ▶ Recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints





All K-12 + Higher Ed Sex Discrimination Grievance Process

- ▶ Can use single-investigator model
- ▶ No 10-day response to directly-related evidence or to report
- ▶ Certain requirements when credibility is at issue and relevant
- ▶ Separate report and determination not required
- ▶ Notice of determination is streamlined; no onerous requirements for content
- ▶ No prescriptive appeal process for Title IX determinations, can use process similar to your appeal process for similar complaints



Higher Ed
Sex-Based Harassment
Grievance Process(es)

Double Feature

K-12 (All) & Higher Ed Sex Discrimination

- ▶ Requires basic structure for processing complaints
- ▶ Much more flexibility in designing that process

Higher Ed Sex-Based Harassment

- ▶ Limited to reports involving a student complainant or student respondent
- ▶ Looks more like 2020 Rules
- ▶ Additional notice requirements
- ▶ Additional opportunities to review evidence
- ▶ May choose whether to hold a live hearing – **but keep in mind due process rights at public institutions**
- ▶ If no live hearing, have separate Q&A meetings with decisionmaker

~~Double~~ Triple Feature

Sex Discrimination

- ▶ Same basic due process requirements we just discussed
- ▶ Much more flexibility in designing process

Sex-Based Harassment No Hearing

- ▶ Looks more similar to the current rules
- ▶ Similar notice & access to evidence requirements
- ▶ Decision-maker asks their and parties' questions at individual meetings with parties & witnesses

Sex-Based Harassment Live Hearing

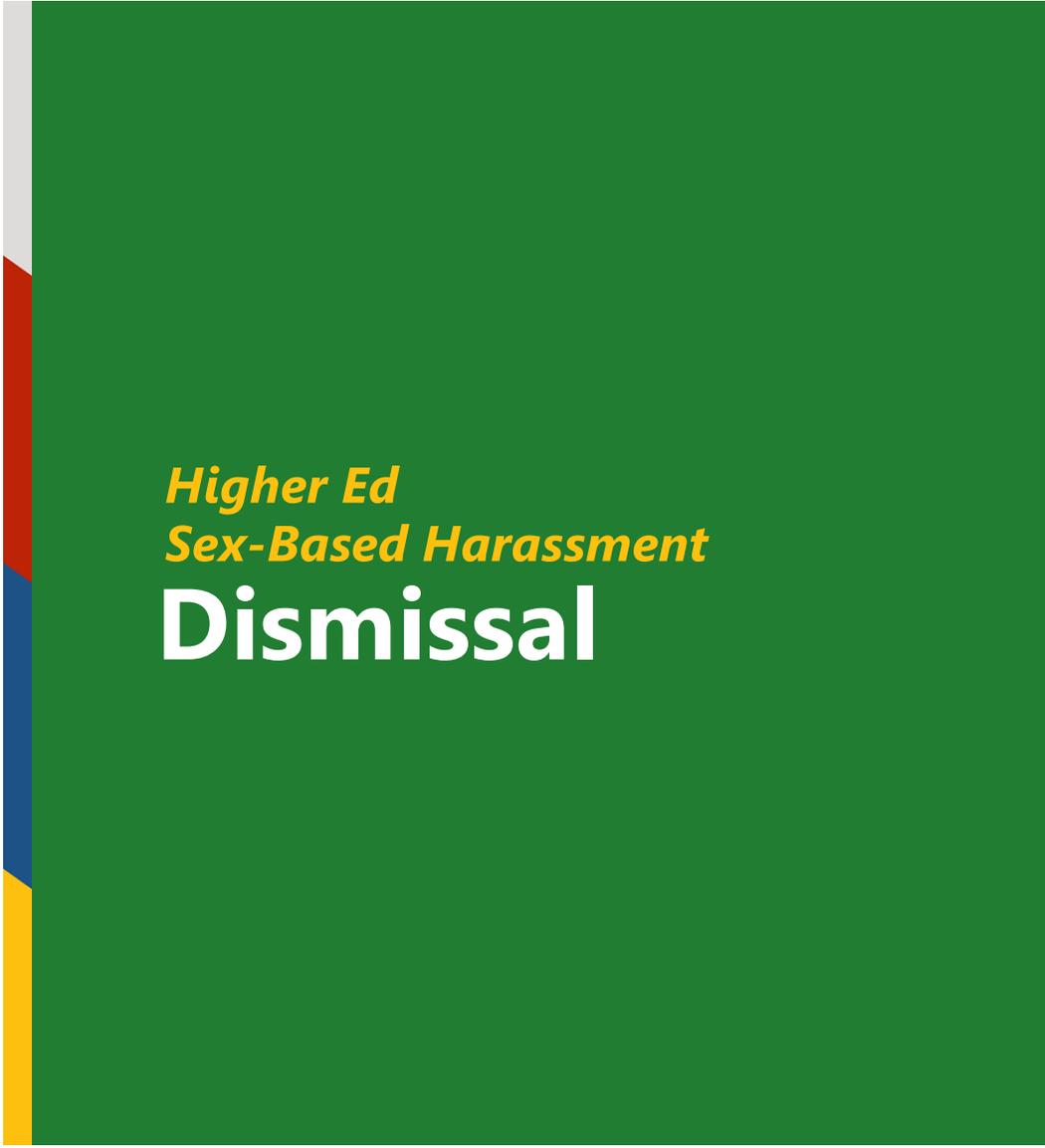
- ▶ Looks very similar to process under current rules
- ▶ Can be in person or virtual with separate rooms for parties
- ▶ Can choose to allow advisors to ask questions – must provide advisors if you do

*Higher Ed
Sex-Based Harassment*
Scope

- Sex-based harassment *only* if a *student complainant* or a *student respondent*
- If consolidated with a sex-based discrimination complaint, sex-based harassment procedures apply to both



- May dismiss for same reasons may dismiss sex discrimination complaint
- Provide the parties simultaneous notice of dismissal and basis for it
 - But if dismissed before NOA is sent to Respondent, need only notify Complainant
- If dismissal is based on voluntary withdrawal, obtain the withdrawal in writing
- May be appealed



*Higher Ed
Sex-Based Harassment*
Dismissal

Higher Ed Sex-Based Harrasment Notice of Allegations

- Everything in Notice of Allegations for Sex-Based Discrimination Complaint 
 - Presumption of non-responsibility
 - Opportunity to present not otherwise impermissible evidence to trained, impartial decisionmaker
 - Right to an advisor of choice
 - Access to relevant evidence *or* an investigative report
 - Provisions prohibiting knowingly making false statements or knowingly submitting false information during the grievance process
- Delayed Notice if resonable concern for the safety of any person as a result of providing the notice



Higher Ed Sex-Based Harassment **Investigations**

- Burden on institution to gather sufficient evidence for determination.
- Equal opportunity to present relevant fact witnesses and evidence
 - Expert witnesses can be allowed (equally), but not required
- Investigator must review all evidence gathered to evaluate if “relevant.”



Higher Ed Sex-Based Harassment **Investigations**

- Like under current rules, must:
 - Provide written notice of interviews and meetings (with specifics) with time to prepare or participate
 - Parties have same opportunity to advisor, but can limit role if equally applied
- Must allow parties same opportunity (if any) to have others in addition to advisors present during meetings and proceedings
- Provide access and opportunity to respond to report that summarizes relevant evidence
 - Provide access to evidence itself if requested by a party

Higher Ed Sex-Based Harassment **Confidentiality**

Institutions must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures

Higher Ed Sex-Based Harassment Decisionmaking Q&A and Q&A

- ✓ Must allow decisionmaker to assess parties' and witnesses' credibility
- ✓ Parties allowed to propose initial questions
- ✓ Investigator or decisionmaker poses questions in individual meetings
- ✓ Provide parties recording or transcript of meetings
- ✓ Parties propose follow-up questions
- ✓ Investigator or decisionmaker poses follow-up questions in individual follow-up meetings



Higher Ed Sex-Based Harassment **Relevance**

- The decisionmaker must determine whether a proposed question is relevant and not otherwise impermissible prior to posing it to the witness or party
 - Must explain any decision to exclude a question as not relevant.
 - Must not permit questions that are unclear or harassing of the party or witness being questioned.
 - Must give an opportunity to clarify or revise rejected question
- Same evidentiary exclusions as with sex-based discrimination

Higher Ed Sex-Based Harassment **Weight of the Evidence**



- Decisionmaker may choose whether to place less or no weight upon statements by a party who refuses to answer relevant, permissible questions
- But the decisionmaker may not decide whether sex-based harassment occurred based solely on refusal to answer





Constitutional Due Process

In some circumstances, public institutions of higher education will be required to provide a live hearing as a matter of constitutional due process

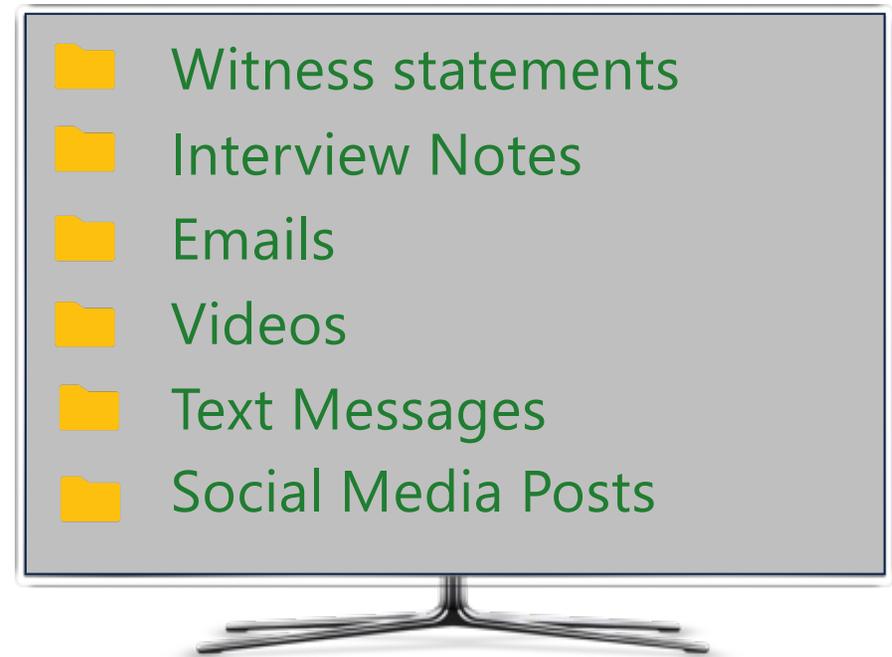


Higher Ed
Sex-Based Harassment
Live Hearings

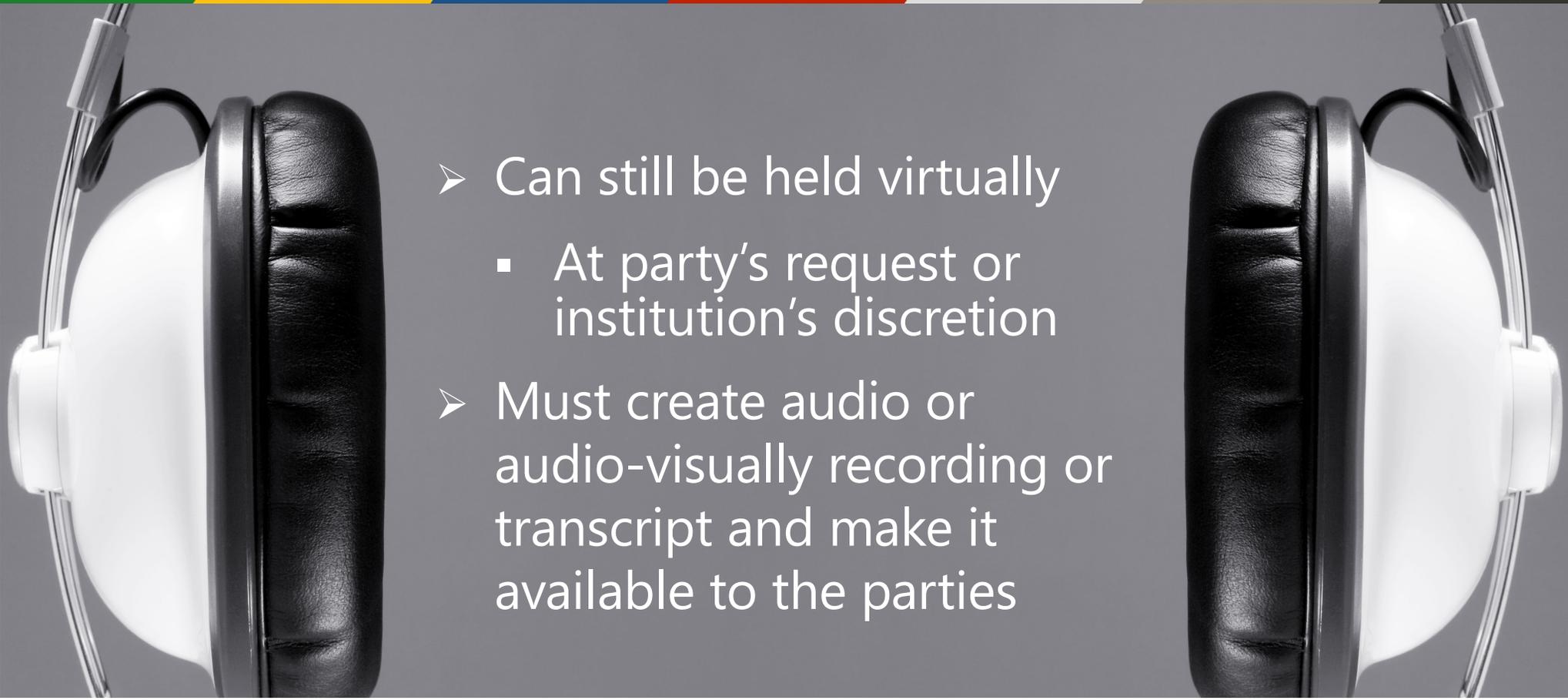
Higher Ed Sex-Based Harassment

Access to Record

- ▶ Must provide an opportunity to access evidence in advance of live hearing
- ▶ No specific requirements for how to provide access to evidence or investigative report
- ▶ No strict timeframes but must be reasonable



Higher Ed Sex-Based Harassment **Logistics**

- 
- Can still be held virtually
 - At party's request or institution's discretion
 - Must create audio or audio-visually recording or transcript and make it available to the parties

Higher Ed Sex-Based Harassment **Cross-Examination**



- Must either have decisionmaker pose questions proposed by party or allow advisor to do so
 - If allow advisor to question, must provide advisor of institution's choice to party (cannot be a confidential employee)
 - No questioning by parties
- Same relevance provisions as for Q&A



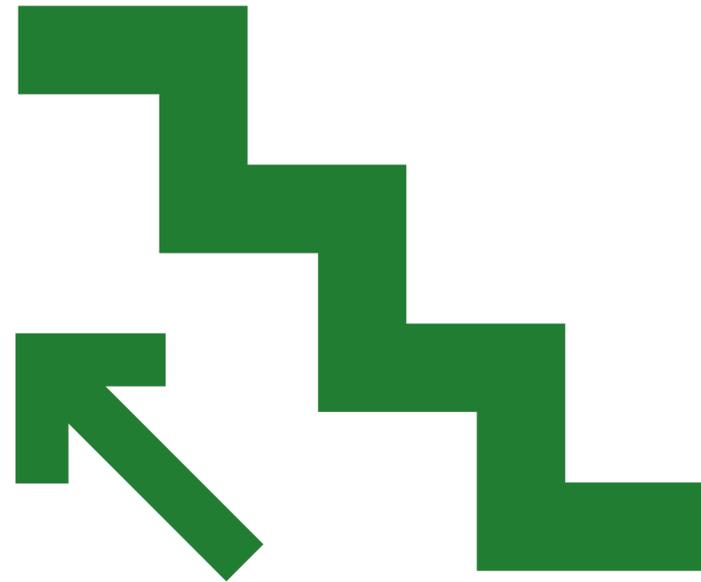
**Higher Ed
Sex-Based Harassment**

Written Determination

- Whether holding a ***live hearing or individual meetings***, postsecondary institutions must provide a written determination in all sexual harassment cases.
- Written determination must include:
 - ✓ Allegations
 - ✓ Policies & Procedures Used
 - ✓ Evaluation of Relevant Facts
 - ✓ Determination for Each Allegation
 - ✓ Sanctions & Remedies
 - ✓ Procedures and Bases for Appeal
- Must be delivered to parties simultaneously

Higher Ed Sex-Based Harassment **Appeals**

- Procedural irregularity that would change the outcome
- New evidence that would change the outcome and was not reasonably available when decision was made
- Bias or conflict of interest that would change the outcome
- Additional bases school allows that are equally available to the parties



Administrative Requirements



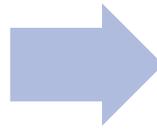
Actions to Operate Education Program or Activity Free from Sex Discrimination

DISCRIMINATION



Duty to Operate Free from Sex Discrimination

When notified of conduct that reasonably may constitute sex discrimination under Title IX



**Take actions per the rules to promptly and effectively:
end any sex discrimination in its education program or activity,
prevent its recurrence, and
remedy its effects**



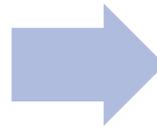
Duty to Operate Free from Sex Discrimination

Regardless of whether a complaint is initiated

When informal resolution is used

When a complaint is dismissed

When there is a determination that sex discrimination occurred



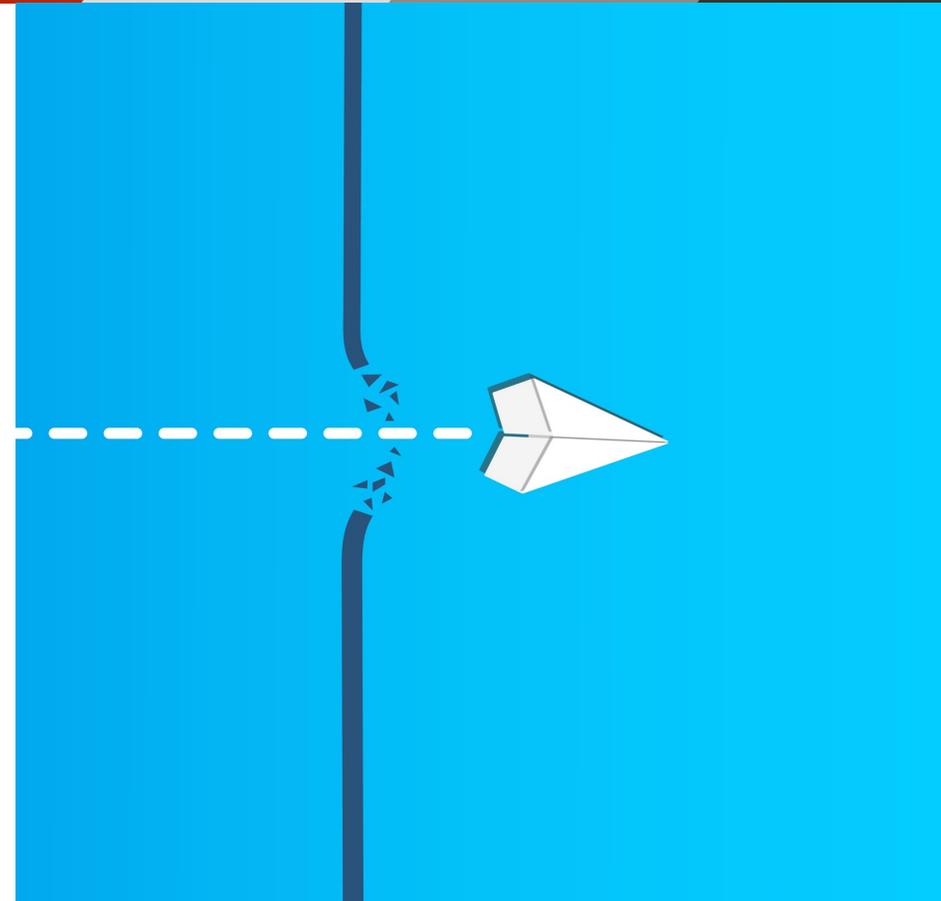
Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the education program or activity



Duty to Operate Free from Sex Discrimination

Title IX coordinator must:

- ▶ Monitor your education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX
- ▶ Take steps reasonably calculated to address such barriers



Notice of Non-Discrimination in a Nutshell

Who?

“Parties Entitled to Notice”

- ▶ Students
- ▶ Parents, guardians, etc.
- ▶ Employees
- ▶ Applicants for admission
- ▶ Applicants for employment
- ▶ All unions and professional organizations with agreements with recipients

What?

- ▶ Statement of nondiscrimination and prohibition of sex discrimination in education programs or activities
- ▶ Inquiries may be referred to Title IX coordinator, to OCR, or both
- ▶ Name and contact info for Title IX coordinator
- ▶ How to locate nondiscrimination policy
- ▶ How to report
- ▶ How to make a complaint
- ▶ How to locate grievance procedures

Where?

- ▶ Website
- ▶ Each handbook, catalog, announcement, bulletin, and application form to
 - Persons entitled to notice
 - Used in connection with recruitment of students or employees
- ▶ Substance of notice can be limited, if necessary, because of format or size of publication

Training



Required Training *Annually*



Title IX Team



All Employees

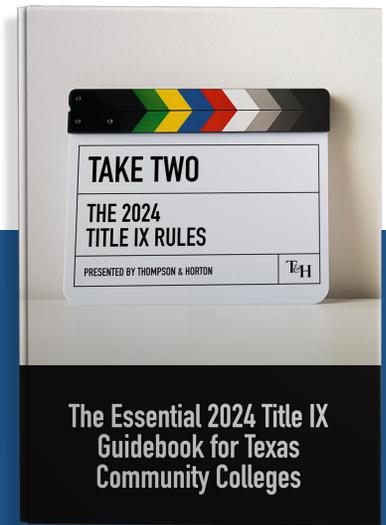
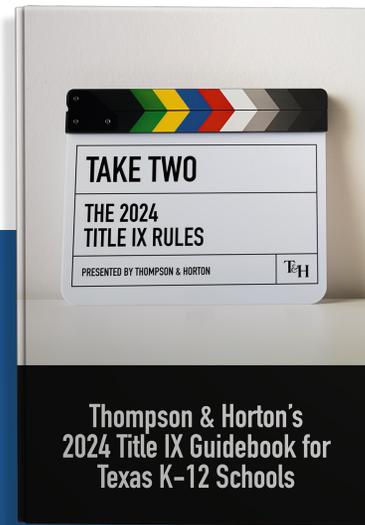
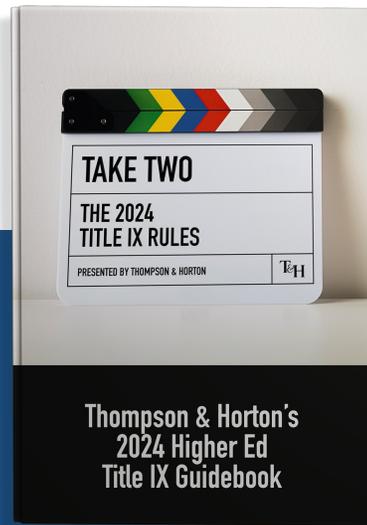
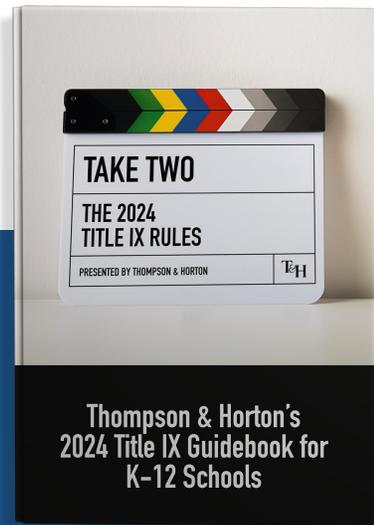


**Confidential
Employees**

Training Regarding New Pregnancy Discrimination Requirements

- ▶ Title IX Coordinator and any designees must be trained on their specific responsibilities to pregnant and parenting students
- ▶ All employees must be trained on how to respond to information about a student's pregnancy or related condition





Thompson & Horton's

2024 Title IX Guidebooks

Title IX Training

thlaw.com/titleix

Thompson & Horton has K-12 and Higher Education training options to meet your needs, whether you need to train one Title IX coordinator, your entire Title IX team, administrators, all personnel, or your school board. We provide training for schools seeking initial compliance with the 2024 Title IX Rules, intermediate and advanced role training to help your Title IX team develop practical skills for responding to complaints of sex discrimination and sex-based harassment, as well as "add-on" courses that address key issues your institution may face when complying with Title IX.

Our training is available in-person, online via Zoom, or in a hybrid model. We offer the trainings à la carte or in packages. We can also work with you to create a customized training package to meet your institution's unique needs.

Thompson & Horton also has New 2024 Title IX guidebooks for K-12 schools and Higher Education institutions that provide analysis, tips, checklists, and forms for the 2024 amendments to the Title IX regulations.

For more information, you can contact your Thompson & Horton attorney or email us at titleIX@thlaw.com.



Title IX Leadership Alliances

K-12

4th Tuesday of the month

- ▶ Register at thlaw.com/k12alliance
- ▶ Email titleix@thlaw.com
- ▶ Use the QR code



Community College

Last Wednesday of the month

- ▶ Register at thlaw.com/ccalliance
- ▶ Email titleix@thlaw.com
- ▶ Use the QR code



4 Yr. College or University

Last Thursday of the month

- ▶ Register at thlaw.com/4yralliance
- ▶ Email titleix@thlaw.com
- ▶ Use the QR code







Coming Soon From
**Thompson &
Horton**



Monthly TacTIXs Webinar Series

Run the World Policy & Procedure Writers
April 24, 2024



Title IX Webinar for Higher Ed

Lights! Camera! Higher Ed Action Plan!
May 2, 2024



K-12 Lunch & Learn – Dallas

Lights! Camera! K-12 Action Plan!
May 1, 2024



K-12 Lunch & Learn – Houston

Lights! Camera! K-12 Action Plan!
May 3, 2024

THOMPSON & HORTON RESOURCES



Blog

Title IX Tips

▶ titleixtips.com



Social Media

T&H on X (Twitter)

▶ twitter.com/THSchoolLaw

Follow us for upcoming webinars, alerts, and posts as we await the 2024 Title IX Rules

Thank You!



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