

Thrun Law Firm Webinar

2024 Title IX Regulations – Investigator Training

Title IX Investigator Training

September 13, 2024
Rob Dietzel



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Caution

These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations.

Future legal developments may affect these topics.

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Important Notes

This training is intended to supplement comprehensive Title IX training. This training, by itself, does not satisfy the Title IX training requirements for investigators, decision makers, appeals officers, coordinators, or informal resolution facilitators.

Review of these slides without the synchronous training may not satisfy training requirements.

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Moms for Liberty List: Update

- <https://www.thrunlaw.com/sites/default/files/MomsForLibertyLists08292024.pdf>
- 4 total lists
 - July 15, 2024
 - July 26, 2024
 - July 31, 2024
 - August 28, 2024
- Lists not cumulative
- Still no BSPS schools on the lists

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Legal Landscape

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Title IX

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

20 USC 1681

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2024 Regulations

- Effective 8/1/24
- Not retroactive
- Slightly broadens jurisdiction
 - Within a school's education program or activity;
 - May have to address conduct that occurs outside school's program or activity if it is contributing to a hostile environment

106.11

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Scope

Addresses sex-based discrimination and sex-based harassment (including students, staff)

Also addresses discrimination on the basis of:

- Sex stereotypes
- Sex characteristics
- Pregnancy or related conditions
- Sexual orientation
- Gender identity

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Key Title IX Roles

- Title IX Coordinator:** oversees school's Title IX compliance and is a school employee
- Investigator:** Conducts investigation
- Decisionmaker:** Makes determination of responsibility

Note: Title IX Coordinator and person who hears challenges to supportive measures *must be employees*

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Key Title IX Roles

- Appeals Officer:** Hears appeals from dismissals or determinations of responsibility (must also include someone who can hear challenges to supportive measures); cannot be same person who investigated or made decision
- Informal Resolution Facilitator ("IRF"):** assists parties in reaching informal resolution, if applicable

Note: Single Investigator model permitted; appeals officer/person who hears challenges to supportive measures and IRF must be different people and must not be the Coordinator, Investigator, or Decisionmaker.

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Impartiality

- Persons serving in key roles must not have a conflict of interest or bias for or against:
 - Complainants and respondents generally, or
 - An individual complainant or respondent
- Prejudgment of the facts must be avoided

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Title IX Coordinator

- Must be employee
- Can have more than one, but must designate one with ultimate authority on oversight and compliance
- Tasks may be delegated to designees
- Has discretion to initiate complaint
- Required to ensure recipient's compliance with T9 and take prompt and effective steps to address, remedy, and end sex discrimination
- Additional training requirements

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Investigators & Decisionmakers

- Must be trained
- Must be impartial, with no bias or conflict of interest
- Need not be employees
- May be the same person; may also be Title IX Coordinator

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Sexual Harassment Defined

Conduct **on the basis of sex** that satisfies one or more of the following:

- Quid pro quo harassment
- Hostile environment
- Sexual violence
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking

106.2, 106.10

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Quid Pro Quo

Recipient's employee, agent, or person authorized to provide aid/benefit/service explicitly or impliedly conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct

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Sexual Violence Definitions

"Sexual assault": an offense classified as a forcible or nonforcible sex offense under FBI uniform crime reporting system. Includes rape, sodomy, sexual assault w/object, or fondling directed against another person, w/o victim consent, including instances where victim is incapable of giving consent

"Dating violence": violence committed by a person who is or has been in a romantic or intimate relationship with the Complainant; existence of such a relationship is based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship

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Sexual Violence – cont'd

- **"Domestic violence"**: felony or misdemeanor crimes committed by: (1) a current or former spouse or intimate partner of the Complainant, person with whom the Complainant shares a child, person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner, person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Michigan; or (2) any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Michigan
- **"Stalking"**: engaging in a course of conduct directed at a specific person that would cause a reasonable person to (1) fear for the person's safety or the safety of others; or (2) suffer substantial emotional distress

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Consent

- Term not defined in regulations
- District must define term in its policy
- Look to policy for definition.
 - Consider absence or negation of consent; capacity to consent
- Persons in key Title IX roles must know how to apply consent definition in accordance with policy

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**“Consent”
TLF Policy
Definition**

“Consent” means a voluntary agreement to engage in sexual activity by a person legally capable of consenting. Someone who is incapacitated cannot consent. Past consent does not imply future consent. Silence or an absence of resistance does not imply consent. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Coercion, force, or threat of either invalidates consent. Sexual conduct or relationships between District employees, volunteers, or contractors and students, regardless of age or consent are prohibited.

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Hostile Environment

<u>2020 Regulations</u>	<u>2024 Regulations</u>
Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.	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.”

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Hostile Environment

- Fact-specific inquiry
- Must consider:
 - Degree to which access is affected
 - Type/frequency/duration of conduct
 - Parties’ ages/roles/previous interactions
 - Location
 - Other sex-based harassment within the program or activity

106.2

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Possible Examples of Verbal Harassment

- Unwelcome comments, including derogatory, sexually suggestive, or vulgar language
- Sexual innuendos
- Unwelcome advances or repeated requests for dates
- Threats based on a person’s sex

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Possible Examples of Visual Harassment

- Subjecting another to images, text, or cartoons that are:
 - Sexually suggestive
 - Obscene
 - Pornographic
- Use of obscene gestures
- Leering

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Possible Examples of Physical Harassment

- Unwanted kissing, touching, patting, hugging, pinching, or unwanted physical contact
- Stalking or sex-based assault or battery
- Impeding a person’s movements

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Off-Campus Sexual Harassment

- Case-by-case analysis
- Investigate if school doesn't know where misconduct occurred
- **Must** address conduct that is subject to school's disciplinary authority
 - Consider applicable codes of conduct and Revised School Code provisions
- **Must** address conduct that occurs outside school's program or activity if it is contributing to hostile environment

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Process Overview

- Report of sex-based discrimination (including harassment)
 - T9C must triage (determine if formal complaint will be initiated)
- Formal Complaint – T9C must evaluate
 - Dismiss?
 - Informal Resolution?
 - Investigate?

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Process Overview

- Investigation
 - Parties entitled to inspect and review evidence or evidence summary
- Determination of responsibility
 - Must be in writing and explain rationale
- Appeal

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Reports & Complaints

A recipient with "knowledge" of conduct that reasonably may constitute sex discrimination must respond promptly and effectively

All employees must notify T9C when they have information about conduct that "reasonably may constitute sex discrimination"

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Employee Reporting Obligation

- Employees must **promptly** convey information suggesting sex discrimination to T9C
 - TLF Policy requires any employee with information that may reasonably constitute sex discrimination to convey that information to the T9C **within one business day**
- Employee must provide person alleging sex discrimination T9C's contact information and information about how to make a complaint
- Messaging to all staff
 - If you see something, say something!
 - Noncompliance = discipline

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Complaints

- "Oral or written request" that "objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination"
- For sex-based harassment:
 - Complainant or parent/guardian
 - Title IX Coordinator
- For sex-based discrimination
 - People listed above
 - Any person participating in or attempting to participate in program or activity
 - Any student or employee
 - Grievance process applies only to non-recipient respondents

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T9C May Initiate Complaint

Fact-specific determination, consider:

- Complainant's request not to proceed with complaint
- Complainant's reasonable safety concerns
- Risk of additional sex discrimination if complaint not filed
- Severity of alleged sex discrimination, including whether, if substantiated, respondent would need to be removed or disciplined as remedial measure
- Parties' age and relationship
- Scope of alleged sex discrimination, including any patterns
- Availability of evidence
- Whether discrimination could be remedied without grievance process

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T9C Decision to Initiate

- If decision to initiate, notify complainant, address safety concerns, provide supportive measures
- Regardless of whether complaint initiated, take prompt and effective steps to remedy discrimination and ensure that it does not recur

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Upon Receipt of Complaint

If alleged conduct may constitute sex discrimination, T9C must:

- Treat parties equitably
- Offer and coordinate supportive measures
- Notify complainant and respondent of grievance procedure and informal resolution process (if available)
- Initiate grievance procedure or informal resolution process
- T9C must consult member of student's IEP or Section 504 Team to ensure compliance with IDEA and Section 504

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Supportive Measures

- Designed to restore/preserve equal access
- Available before, during, and after formal complaint or if no formal complaint is filed
- Provided at no cost
- May be discontinued after grievance process/informal resolution
- Cannot be punitive or unreasonably burden a party
- Parties may challenge a decision to provide, deny, modify, or terminate supportive measures (applicable to that party)
 - Challenge must be heard by an impartial employee with ability to modify or reverse supportive measures

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Examples

- Counseling
- Work/class schedule changes
- Extensions of deadlines
- Increased supervision or escorts
- Mutual no-contact order
- Training/education
- Academic supports/accommodations

But, school may not impose discipline or other sanctions against respondent before completing grievance process

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Respondent Removal

Disciplinary sanctions may **NOT** be imposed against respondents before grievance process concludes except:

- Employee respondent may be placed on administrative leave pending completion of grievance process
- Student respondents may be removed from school programs or activities **only on emergency basis**

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Consolidation

May consolidate complaints against more than one respondent or by more than one complainant against one or more respondents, or by one party against another party, if allegations arise out of same facts/circumstances

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Informal Resolution Process



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What is Informal Resolution?

- Before final decision, T9C may offer parties opportunity to informally resolve complaint without full investigation
- **Not** available for allegation that employee sexually harassed student
- Facilitator cannot be same person as investigator/decisionmaker
- May include agreement that restricts parties' contacts or that imposes restrictions on respondent's participation in programs/services
- T9C must still take prompt and effective steps to ensure that sex discrimination is discontinued

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School's Discretion

- School is not required to offer informal resolution, even if requested by one or more parties
- If offered, school has discretion to determine what process will be used
- Consider:
 - What conduct has been alleged?
 - What resolution is sought?

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Voluntary Process

- Neither party may be required or pressured to participate
- Schools cannot require parties to participate or otherwise waive their right to an investigation and adjudication of the complaint
- Parties may withdraw from informal resolution process and resume investigation at any time before resolution is reached

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How to Conduct Grievance Process



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Grievance Procedure

Must have written grievance procedures for all sex discrimination complaints (including sexual harassment) that provide for prompt and equitable resolution

Basic requirements

- Treat parties equitably
- T9C, investigator, or decisionmaker cannot have conflict of interest or bias
- Single investigator model permissible
- Presumption that respondent not responsible
- Establish "reasonably prompt timeframes for major stages of grievance procedures" (evaluation, investigation, determination, appeal)

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TLF Steps & Timelines

- **Evaluation** – within 5 days of complaint
 - T9C or designee determines whether to dismiss, investigate, or offer informal resolution
- **Investigation**
 - T9C appoints investigator, provides notice to parties
 - Completed in 60 days
 - Evidence or summary provided to parties; 5 days to access and respond

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TLF Steps & Timelines

- **Determination**
 - Within 10 days after investigation phase ends, issue final decision
- **Appeal**
 - May appeal within 5 days of determination
 - T9C appoints appeals officer
 - Appeals officer makes decision on appeal within 5 days

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Delays and Time Extensions

- Temporary delays for "good cause" are permitted with notice to parties
- "Good cause" examples:
 - Complexity of investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Absence of parties or witnesses
 - Need to provide accommodations for party or witness with a disability

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Law Enforcement Involvement

- Does *not* relieve school of Title IX obligation to investigate
- Do *not* use police involvement as excuse not to investigate
- Do *not* wait for criminal conclusion
- Can **briefly** delay Title IX investigation for concurrent criminal investigation

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Complaint Notice

- Must provide notice to parties (if known) of:
 - Grievance procedures and informal resolution process
 - Sufficient information for a response, including party identities
 - Alleged conduct
 - Date/location of alleged incidents (if known)
 - Statement prohibiting retaliation
 - Statement that parties are entitled to equal opportunity to access relevant and not impermissible evidence or accurate description of evidence
- Must provide additional notice if new allegations will be investigated during grievance process

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Complaint Investigation

- Investigation must be “adequate, reliable, and impartial”
- Burden is on school to gather sufficient evidence
- Equal opportunity for parties to present witnesses and evidence
- Allow parties equal opportunity to review relevant & permissible evidence (either actual or summary)



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Full & Fair Investigation

- Suspend judgment until investigation is complete
- Do not investigate to prove what is alleged or what you think you know
- Your job is to independently determine the facts based on the evidence
- Interview those with relevant and important knowledge
- Make credibility determinations

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Initial Considerations

- Communicate with parents/guardians if students are involved and with advisor/attorney, if one exists
- Remember mandatory reporting requirements
- Remember respondent presumed not responsible
- **Don't promise confidentiality!**
- Secure evidence
 - Physical
 - Documentary
 - Electronic & Video

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CPS Reporting

- Mandated reports (either by law or policy)
- If reasonable cause to suspect abuse/neglect
 - Make oral report immediately
 - Follow up with written report within 72 hours
- Notify “person in charge”
- Safeguards for making a report and cooperating in investigation
- Criminal sanctions for failing to report

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Investigation Tips

- Create investigation plan based on complaint contents
- Determine relevant factual disputes; may end investigation when factual disputes resolved by preponderance of evidence
- Interview complainant first to gather more information about allegations
- Determine who to interview next and what evidence to secure
- Conduct site visits, if applicable
- Usually interview respondent last

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Create Investigation Plan

- What facts are in dispute?
- What definitions/factors apply?
 - Consent
 - Penetration
 - Sexual gratification
 - Impact on access
- Where will you find evidence?
 - Witnesses
 - Police reports
 - Surveillance video
 - Documents
 - Phone records
 - Texts or emails
 - Social media

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Create Investigation Plan

- How will you get the evidence?
 - Document requests
 - FOIA requests
 - Witness interviews
 - Internal sources (e.g., records, staff reports, staff notes)
 - Site visits

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Digital Evidence

- Review acceptable use policies
 - Was there a violation?
 - Is there an expectation of privacy?
- Consider disabling access to school accounts
- Consider collecting school devices
- Stop auto delete functions
- Remember Internet Privacy Protection Act

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Internet Privacy Protection Act

- PA 478 of 2012
- Effective Dec. 28, 2012
- Applies to employers, including school districts, ISDs, PSAs
- Violation is criminal misdemeanor, subject to fine up to \$1,000
- Civil action permitted for damages, attorney fees, costs



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Personal Internet Account

- Prohibits employers from requesting passwords from employees/applicants for social networking sites
- Prohibits schools from asking students for access to, allow observation of, or disclose information to access “personal internet account”
- Does *not* apply to devices paid for, in whole or part, by school and used for educational purposes

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CAUTION: Photos and Videos of Students


- If allegation involves sexting or other photos or videos of students that could possibly be considered child pornography,
CALL LAW ENFORCEMENT
- Do not view, save, copy, disseminate, handle or maintain photos and videos of students that could be considered child pornography
- Legal exposure for employee & school

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Video Disclosure to Police

If an education record, disclosure **only** if:

- Prior written consent from parent
- Consent exception
 - Health or safety emergency
 - Court order or subpoena
 - Directory information (and no opt out)



20 USC 1232g; FPCO FAQ (April 19, 2018)

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Whom to Interview?

- Complainant (and witnesses identified if needed to determine responsibility)
- Respondent (and witnesses identified if needed to determine responsibility)
- Others who may have knowledge
 - Did they see it?
 - Did they hear about it?
- Consider friends, teachers, coaches, bus drivers, food service staff

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Preparing for the Interview

- Outline questions, topics to address
- Make sure to cover all complaint allegations
- How will you record the interview?
 - Audio – pros and cons
 - Typed notes
 - Handwritten notes
- Notes, recordings may be discoverable

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Recording

- Neither required, nor prohibited
- Consider “chilling” effect
- Michigan law only requires one party’s consent
- But, consider policies and whether to prohibit recording
- If interviewee permitted to record, so should you



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If Respondent is Employee

- Follow Board policy and CBA
- Union representation
- Consider having another witness present
- Direct employee to provide truthful responses
- Ask about awareness of board policies, work rules, previous directives

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NLRB v Weingarten 420 US 251 (1975)

- Employee has right to union representation at investigatory interview which might reasonably result in disciplinary action
- MERC has same standard
- Violation is an unfair labor practice: “interference” with union activity

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“Weingarten” Right

- Employee must request
- Employer not required to bargain or interact with union representative
- Employer, not union, controls interview
- Violation may invalidate investigation and affect ability to discipline



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Interview Ground Rules

- May set ground rules for interviews if rules apply equally to both parties
- Examples:
 - Be honest and forthright
 - Abusive, disruptive behavior or language will not be tolerated
- Cannot restrict parties from discussing allegations or gathering/presenting relevant evidence

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Interview Tips

- Establish rapport
- Inform party or witness that interview summary with their name will be made available to parties
- Ask simple, straightforward questions
- Ask who else may have useful information and whether there is anything you didn't ask that interviewee thinks you should know
- Re-interview parties or witnesses if needed
- Ensure opportunity to respond to all allegations
- Be cognizant of own bias or conflicts of interest!

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Direct vs Leading Questions

- Use “stepped” direct questions
 - What is your class schedule?
 - Who is your second hour teacher?
 - Were you in Ms. Smith's 2nd hour on Tuesday?
 - Did anything out of the ordinary happen that day?
- Leading questions suggest the answer and minimize interaction; not prohibited but be careful not to put words in their mouth
 - What color was the shirt? (direct)
 - Was the shirt blue? (leading)
 - Did Johnny sexually assault Susie? (leading...and bad)

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More Tips

- Advise witness in advance to distinguish between what they saw/heard and what they were told; what they “know” and what they “think”
- Don't interrupt
- Don't fill silence; let pauses breathe
- Listen to answers and ask follow up questions; don't let outline drive you away from relevant information
- Review notes and complaint before concluding interview
- Give Respondent opportunity to respond to all allegations

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During the Interview

- Caution advisor, attorney, or parent, if necessary, that questions are for the witness, not them
- For student interviews, allow parent to weigh in if they choose, *after* all student questions are completed
- Allow breaks, if necessary, but do not break between question and answer

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Using Evidence in Interviews

- Lay foundation before substantive questions
 - You mentioned that X sent you a message that made you uncomfortable, how was that sent?
 - Do you recall when you saw it?
 - What did it say?
 - Is this that message?
(Present screenshot of message)
- Then ask additional questions:
 - How did that message make you feel?
 - What about those words stood out to you?

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Evaluate Evidence

- Must assess all **relevant & permissible** evidence, including both inculpatory and exculpatory
- Credibility determinations made by decisionmaker; cannot be based on status as complainant, respondent, or witness

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“Relevant”

“Related to the allegations of sex discrimination under investigation.... 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.”

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Do's and Don'ts

- ✓ **DO:** Give parties equal opportunity to present witnesses, evidence
- ✗ **DON'T:** Use or disclose questions or evidence that constitute, or seek disclosure of, legally-privileged information
- ✗ **DON'T:** access, consider, disclose, or otherwise use a party's medical records, including mental health records, without consent to do so

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Complainant's Sexual History

Questions and evidence about complainant's sexual interests or prior sexual conduct **are not permissible** unless:

- Offered to prove that someone other than respondent committed the alleged conduct; or
- The questions/evidence concern specific incidents of complainant's prior sexual behavior with respect to respondent and are offered to prove consent

Note: prior consensual sexual contact does not imply consent to the alleged sex-based harassment

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Credibility Determination

- **Decisionmaker** must independently interview parties and witnesses to assess credibility if credibility is relevant and at issue
 - Monitor consistency
 - Consider corroboration either from other witnesses or physical evidence
 - Consider whether there is a motivation to lie
 - Previous consent does not imply future consent
- Don't base credibility assessment solely on whether Complainant was emotional/upset when describing allegations
- Decisionmaker and investigator may be same person

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Evidence Review

- 10-day review periods eliminated
- No longer required to provide *all* evidence
- May provide an "accurate description" of the evidence (still entitled to all evidence if requested)
- Parties entitled to "reasonable opportunity to respond" to evidence
- Take reasonable steps to prevent/address parties' unauthorized disclosure of information and evidence obtained through grievance procedure

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Now What?

- Consider party responses to evidence
- Determine if additional investigation is needed
- Proceed to determination of responsibility; separate investigation report not required

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Decision

- Preponderance of evidence standard applies (unless school uses clear and convincing standard for other investigations)
- If decisionmaker is not persuaded by evidence that sex discrimination occurred, whatever the quantity of evidence, decisionmaker must not determine that sex discrimination occurred

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Evidence Standard

- Decisionmaker makes finding(s) based on policy's standard of evidence or proof
- Recommend: "preponderance of evidence"
 - More likely than not
 - 51%



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Notice of Decision

- Written decision must include:
 - Whether sex discrimination occurred
 - Determination rationale
 - Appeal process and bases
- Complainant must be informed of Respondent's disciplinary sanctions (if any)

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Writing About Evidence

- Remember, testimony IS evidence!
- Consider summarizing relevant information from interviews rather than copying and pasting Q&A
- Consider grouping similar witnesses together (e.g., student-athletes, coaches, eyewitnesses)
- Use quotes from interviews or detailed descriptions of tangible evidence

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Drafting the Final Report

- Summarize all evidence; explain significance
- Make and explain credibility determinations
- Quote applicable policy definitions (including sexual harassment definitions)
- Make specific findings of fact based on preponderance of evidence standard

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Drafting the Final Report

Reach conclusions for each allegation

- Is the allegation substantiated?
- Does the substantiated allegation constitute sex-based discrimination/harassment?
- If so, what kind?
- Why, based on facts? Address each element, including:
 - Consent
 - Sexual gratification
 - Penetration
 - Impact on access

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Drafting the Final Report

- Are there other substantiated policy violations? Based on what?
- What sanctions will be issued to Respondent?
- What remedies will be provided to Complainant and others, including systemic remedies?
- Provide notice of appeal rights/process
- Consider your audience
 - Parties will see it; may share it
 - May be subject to FOIA request, subpoena
 - Will be used to defend any claim of deliberate indifference
- Proof and edit

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Sanctions & Remedies

- If determination that sex discrimination occurred, T9C must coordinate:
 - Remedies to complainant and others who had access limited or denied
 - Sanctions for the respondent
 - Other prompt and effective steps to discontinue sex discrimination

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Remedy Examples

- Provide escort to ensure that complainant and respondent can safely work or attend classes/school activities
- Offer parties school-based counseling
- Provide parties with academic support
- Rearrange course or work schedules to minimize contact between complainant and respondent
- Move complainant's or respondent's locker or work space
- Issue "no contact" directive between complainant and respondent

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Disciplinary Sanctions

- Sanctions should be consistent with applicable codes of conduct, policies, law
- If Board approval is required for discipline (e.g., tenure hearing, expulsion hearing), decision should include applicable recommendation
- Complainant receives notice of respondent's sanctions
- May not discipline party or witness for participating in grievance process or for making a false statement or for engaging in consensual sexual conduct based solely on determination whether sex discrimination occurred

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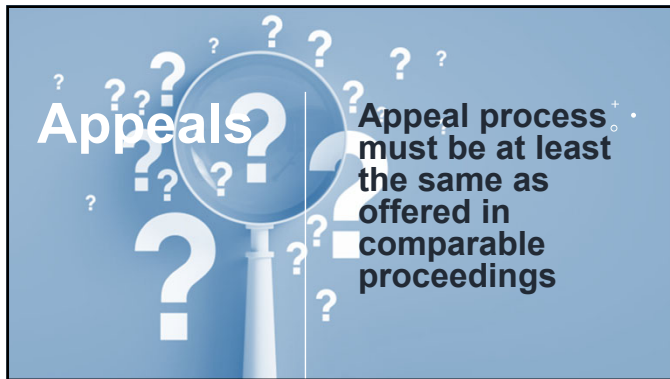
Remember!

- Supportive measures/remedies are available to more than just complainant
- Consider systemic remedies, such as training
- For students with disabilities, convene IEP or Section 504 meetings as necessary

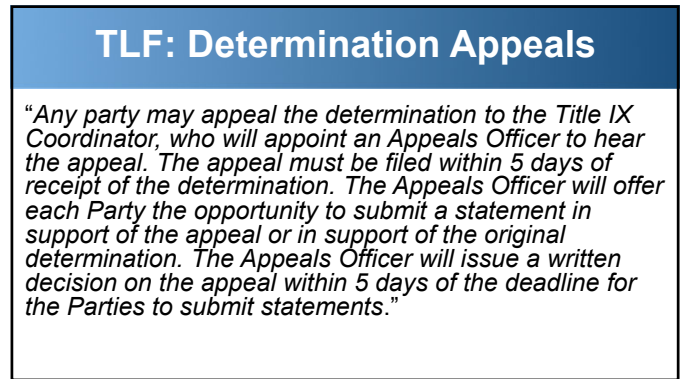
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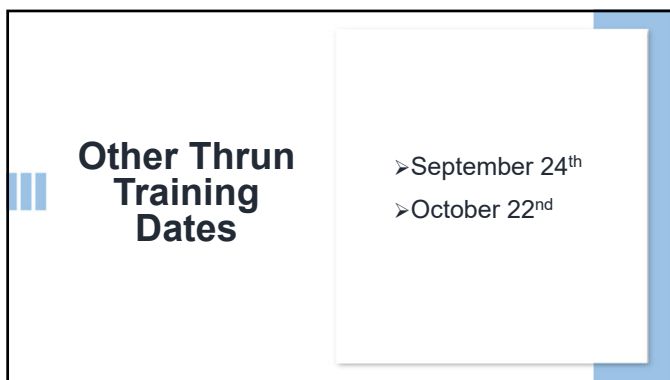
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