

Thrun Law Firm Webinar

2024 Title IX Regulations – Comprehensive Training

**Comprehensive Title IX Training
2024 Regulations**



October 22, 2024
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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 satisfy the training requirements for Title IX Coordinators, Investigators, Decision-Makers, Informal Resolution Facilitators, and Appeals Officers under the 2024 Title IX regulations.

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

School officials must ensure that your school has adopted grievance procedures that align with this training.

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Fluid Situation

- 2020 regulations effective 8/14/20
- NPRM issued June 23, 2022
- Over 240,000 public comments
- 2024 regulations released 4/19/24; effective 8/1/2024
- Louisiana Court issued injunction, applying to LA, MS, MT, ID, on 6/14/24
- Tennessee Court issued injunction, applying to TN, KY, OH, IN, VA, WV, on 6/17/24
- Kansas Court issued injunction on 7/2/24 applying to KS, AK, UT, WY...and.....

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Kansas Injunction Applies as to...

“the schools attended by the members of Young America’s Foundation or Female Athletes United, as well as the schools attended by the children of the members of Moms for Liberty.”



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July 15, 2024 List

- Calumet High School (Calumet MI)
- Fowlerville Junior High (Fowlerville MI)
- Grand Rapids Christian High School (Grand Rapids MI)
- Lake Linden-Hubbell High School (Lake Linden MI)
- Royal Oak High School (Royal Oak MI)
- Saline Middle School (Saline MI)
- Eisenhower High School (Shelby Township MI)
- Farber Hebrew Day School (Southfield MI)
- Frankel Jewish Academy of Metro Detroit (W. Bloomfield MI)

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"[T]he court concludes that all of the Plaintiff Organizations' members, current and prospective, are entitled to the relief ordered in this action. The court's order regarding identification of affected schools was the first step in ensuring that Defendants have notice on that point. Supplements to the original notice may be appropriate as the case progresses.... As a result of the ruling herein, Moms for Liberty is granted until **July 26, 2024**, to file a notice of schools attended by its members' children."

July 19, 2024 Order

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Additional Lists

- <https://www.thrunlaw.com/sites/default/files/MomsForLibertyLists09132024.pdf>
- 5 total lists
 - July 15, 2024
 - July 26, 2024
 - July 31, 2024
 - August 28, 2024
 - September 13, 2024
- Lists not cumulative

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Bases for Injunctions

- Title IX intends "sex" to be a binary concept based on plain language and legislative history
- USDOE cannot make major legislative declarations without clear congressional authority
- 2024 regulations may chill free speech re: sexual orientation & gender identity
- 2024 definition of hostile environment harassment is ambiguous

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Discretionary Compliance

"[N]othing in this order limits the ability of any school to adopt or follow its own policies, or otherwise comply with applicable state or local laws or rules regarding the subjects addressed herein. Rather, it simply prohibits [USDOE] from demanding compliance...by the schools affected by this order, or imposing consequences for such schools' failure to comply...."

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ED Response

The Education Department is currently reviewing the latest order and "stands by the final Title IX regulations released in April 2024," an Education Department spokesperson said in a statement.

Education Week Article, July 3, 2024

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July 24, 2024 OCR Guidance

- Pointers for Implementation
- Video on drafting policies, procedures and required notices

"As of July 19, 2024, pursuant to federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alaska, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at <https://www.ed.gov/media/document/list-of-schools-enjoined-2024-t9-rule.pdf>. Per court order, this list of schools will be supplemented on or before July 26 and may also be supplemented at subsequent times. This resource does not currently apply in those states and schools."

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OCR Addition on August 1, 2024

"The April 2024 Title IX regulation...is enforced by the Department's Office for Civil Rights (OCR) and is effective on August 1, 2024. As of July 31, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at <https://www2.ed.gov/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf>. Per Court order, this list of schools may be supplemented in the future. The Final Rule and these resources do not currently apply in those states and schools. Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools.

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Status Today

- Regulations are effective
- Michigan schools must adopt policy, train staff, and comply with 2024 regulations
- But...

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What About the Lists?

- Schools not named in injunction **must** implement 2024 regulations
- Schools named in injunctions must decide how to proceed
 - **may** implement 2024 regulations (with some risk) and archive 2020 policy
 - **may** continue to follow 2020 regulations and ensure other policies address discrimination based on pregnancy, gender identity, and sexual orientation
- All schools must respond to sex discrimination, harassment, and retaliation allegations in a manner that is not deliberately indifferent

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Don't Forget ELCRA

- PA 6 of 2023, amends the ELCRA to include **sexual orientation and gender identity or expression** as protected classes
- Effective Feb 13, 2024

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Legal Landscape

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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Title IX Timeline

- 1972: Title IX Enacted
- 1974: Dep't of Health, Education, & Welfare issues regs.
- 1997: OCR: Schools must respond to sexual harassment allegations
- 1998: *Gebser v Lago Vista* (Employee-to-student liability)
- 1999: *Davis v Monroe Cnty Bd of Ed* (student-to-student liability)
- 2020: OCR issues updated regs
- 2024: OCR again issues updated regs

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Gebser v Lago Vista Ind Sch Dist (US, 1998)

Schools may be liable for money damages for **employee-to-student** sexual harassment if a school official who has authority to institute corrective action

- Has actual notice of the employee's misconduct; and
- Is deliberately indifferent to the employee's misconduct, *i.e.* school made "an official decision...not to remedy the violation"

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Davis v Monroe Cnty Bd of Ed (US, 1999)

Schools may be liable for money damages for **student-to-student** sexual harassment if:

- School official who has authority to institute corrective action has actual notice of the misconduct and is deliberately indifferent to it;
- School has substantial control over both the harasser and "context" where the harassment occurs; and
- Harasser's conduct is "so severe, pervasive, and objectively offensive" that it "effectively denies equal access to an institution's resources or opportunities."

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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 Changes

- Broadens scope; applies to all sex discrimination
- Includes discrimination based on pregnancy, sexual orientation, gender identity
- Modified employment practice requirements
- "Single investigator" model permitted
- Grievance process streamlined; more local control
- Removed right to advisor/attorney
- Training must be aligned to local grievance process

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What Hasn't Changed

- All staff have reporting obligation
- Respondent presumed not responsible until determination of responsibility
- Limitations on removing student respondent
- Significant training and record retention requirements
- Liability for failing to respond promptly and appropriately

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Pre-Employment Inquiries

- Cannot inquire as to marital status, including whether an applicant is "Miss or Mrs."
- May only ask about sex if do so for everyone and the response isn't used as basis for discrimination

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Sex Separation

- May provide separate toilet, locker room, shower facilities based on sex, but must be comparable
- Separation based on sex for athletics not prohibited; separation based on objective criteria for P.E. not prohibited; human sexuality classes may be grouped based on sex
- Consider whether disproportionate enrollment is based on discriminatory counseling
- 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** prohibited (except athletics)

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Athletics

- No person shall, on the basis if sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in...any athletics offered by a recipient
- May offer separate teams based on sex if selection is based on competitive skill/activity; members of opposite sex may have right to try out unless contact sport
- Must provide equal athletic opportunity for members of both sexes
- Michigan law requires that girls be allowed to compete for a position on boys' teams

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Pregnancy Protections

- Can't treat individuals differently based on current, past, or suspected parental, family, or marital status
- Can't discriminate based on pregnancy or "related conditions"
- Must ensure equal access, including:
 - Reasonable modifications for students
 - Reasonable break time for lactation
 - Lactation space for students and employee
- Must treat pregnancy/related conditions like other temporary medical conditions
- Documentation requirements limited

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Pregnancy Related Conditions

- Childbirth
- Termination of pregnancy
- Lactation
- Medical condition related to any of the above
- Recovery from any of the above

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Notice to Coordinator

When learning that student is pregnant or has a related condition, employees must:

- Provide name and contact information of T9C to student or parent/guardian
- Inform student or parent/guardian that T9C can coordinate actions to prevent discrimination

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Additional Obligations

- Notice to student or parent/guardian of nondiscrimination obligation
- Reasonable modifications to policies/practices to ensure equal access based on individualized need after consulting with student; student may accept or reject
- Student may voluntarily access separate/comparable program/activity
- Voluntary leave of absence may be required
- Access to lactation space, other than bathroom, that is clean, shielded from view, free from intrusion

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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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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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OCR 2001 Guidance

Hostile Environment =
Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **or** persistent, and to **interfere with or limit** a student's ability to participate in or benefit from school services, activities, or opportunities

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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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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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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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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”

106.44

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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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“Confidential” Employees

Schools may designate employees as “confidential,” meaning they are not required to report knowledge of sex discrimination to the T9C; confidential employee must advise person claiming or reporting sex discrimination how to contact T9C

No requirement to designate any employee as “confidential;” recommend *not* doing so at K-12 level

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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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Offering Supportive Measures

- Not "one size fits all"
- Must be offered whether or not complainant files complaint
- **Document** whether supportive measures offered and which were taken; retain documentation
- Modify, as necessary, to avoid deliberate indifference
- Keep confidential to extent possible except as may be required by law
- Coordinated by T9C
- If complainant or respondent is student with a disability, T9C must consult with member of IEP/504 Team

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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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Student Emergency Removal

- Individualized safety and risk analysis
 - "An imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegation of sex discrimination justifies removal"
- 2024 regulations removed "physical" threat requirement
- Respondent must be provided notice and may challenge immediately following removal
- Does not modify any rights under IDEA or Section 504

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Permissive Dismissal If...

- Unable to identify respondent after reasonable effort
- Respondent is not participating in school's program/activity
- Complainant voluntarily withdraws any or all of the allegations, T9C determines not to initiate complaint, and without the allegations there is no alleged conduct that would constitute sex discrimination
- Alleged conduct, even if true, would not constitute sex discrimination (must first attempt to clarify allegations)

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Dismissal Notice

- Promptly notify complainant and respondent (if respondent received notice of allegations) of the basis for dismissal;
- Provide parties notice of appeal rights

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Dismissal Appeal

- Notify parties if appeal filed
- Implement appeal procedures equally
 - Parties may make statement in support of or challenging decision
 - Notify parties of appeal decision
- Appeals officer may not have been involved in investigation or decision to dismiss
- Offer supportive measures to complainant and, as applicable, respondent
- T9C must ensure sex discrimination is discontinued

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Bases to Appeal Dismissal

- Procedural irregularity that would change the outcome
- New evidence that would change the outcome that was not reasonably available at time of dismissal
- Person in key role had a conflict of interest or bias that would change outcome

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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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Notice & Consent Required

- Must obtain voluntary consent from both parties for informal resolution process
- May not require waiver of right to investigation/decision as condition of continued enrollment/employment or exercise of any other right
- Must provide notice to parties

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Informal Resolution Notice Contents

- Allegations
- Informal resolution requirements
- Right to withdraw from informal resolution process and resume grievance process before agreeing to resolution
- Agreeing to resolution at conclusion of process would preclude initiating or resuming grievance process for same allegations
- Potential terms that may be requested or offered, including that final resolution will be binding on parties
- Information that will be maintained and whether and how information will be disclosed

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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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Grievance Procedure (Cont.)

- May adopt different grievance procedures, but must "articulate consistent principles" for when each applies
- For sex-based harassment complaints, grievance procedure must:
 - Describe range of supportive measures available
 - List or describe range of potential disciplinary sanctions/remedies

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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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OCR: Law Enforcement

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

LaPorte Comm Sch Corp (OCR, 2015)

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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

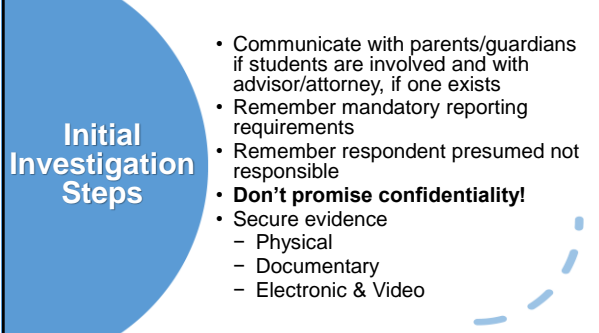
- Investigation must be “adequate, reliable, and impartial”
- Burden is on school to gather sufficient evidence
- Equal opportunity for parties to present witnesses and evidence
- Allow parties equal opportunity to review relevant & permissible evidence (either actual or summary)



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Initial Investigation Steps

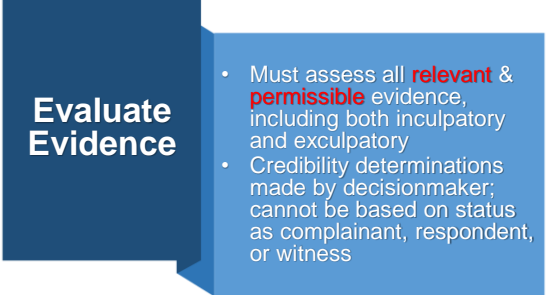
- Communicate with parents/guardians if students are involved and with advisor/attorney, if one exists
- Remember mandatory reporting requirements
- Remember respondent presumed not responsible
- **Don't promise confidentiality!**
- Secure evidence
 - Physical
 - Documentary
 - Electronic & Video



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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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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
- Decisionmaker and investigator may be same person

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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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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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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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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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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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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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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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Appeals

Appeal process must be at least the same as offered in comparable proceedings

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Appeals Considerations

- Any party may appeal a dismissal or determination of responsibility
- Check policy for time frames to file and decide appeal (TLF Policy: 5 days to file; 5 days to decide)
- Appeals Officer cannot be same person as investigator/decisionmaker

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TLF: Bases for Dismissal Appeals

- Procedural irregularity that affected outcome
- New evidence that was not reasonably available at the time of the determination and could affect the outcome
- Title IX Coordinator, investigator, or decisionmaker had a conflict of interest that affected outcome

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TLF: Determination Appeals

“Any party may appeal the determination to the Title IX Coordinator, who will appoint an Appeals Officer to hear the appeal. The appeal must be filed within 5 days of receipt of the determination. The Appeals Officer will offer each Party the opportunity to submit a statement in support of the appeal or in support of the original determination. The Appeals Officer will issue a written decision on the appeal within 5 days of the deadline for the Parties to submit statements.”

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Training Requirements

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All Employee Training

- All employees must be trained upon hiring and change in role that alters their Title IX duties, and **annually** thereafter
- Training must include:
 - School's obligation to address sex discrimination
 - Scope of sex discrimination and definition of sex-based harassment
 - When to notify T9C, inform students of rights, etc.

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Key Role Training

- 📄 All Employee Training
- 🗨️ School's grievance procedure and informal resolution process
- ⚖️ How to serve impartially
- 👤 What is considered "relevant" & impermissible evidence
- ✓ T9C must also be trained on recordkeeping and compliance requirements

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Other Thrun Training Dates

2024 T9 Regulations:

- November 19
- January 15

2020 T9 Regulations:

- November 12

All trainings are 10:00am – 1:00pm EST

Register on www.ThrunLaw.com/calendar/list

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Retaliation

- Recipients must prohibit retaliation, including peer retaliation
- If allegations of retaliation arise, must initiate grievance procedures

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Definition

"Intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee...for the purpose of interfering with any right or privilege secured by Title IX...or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding...."

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Clarifying Definition


- Recipient may require employee to participate as a witness or otherwise in the grievance procedure/investigation
- Peer retaliation means retaliation by a student against another student

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Student Privacy



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Confidentiality

- Schools must take reasonable steps to protect privacy of parties and witnesses during grievance process
- May not restrict ability to
 - obtain and present evidence, including by speaking to witnesses
 - consult with family members, advisors
 - Prepare for or participate in grievance process
- May not rely on FERPA to violate Title IX requirement

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Record Keeping

Maintain for 7 years:

- For each sex discrimination complaint, records documenting informal resolution or grievance procedure and outcome
- For sex discrimination report to T9C, records documenting response and compliance
- All documents used to provide required training
 - This PowerPoint!
 - Available for public inspection upon request

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Nondiscrimination Policy

Must adopt, publish, and implement a policy stating that recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, including in admission and employment.

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Nondiscrimination Notice

- Notice of nondiscrimination to students, parents, guardians, employees, applicants, unions
- Must include on website and in each handbook, catalog, announcement, bulletin, and application form made available to all of the people listed above
- May shorten notice by including statement of nondiscrimination, that concerns may be reported to T9C, and include link to full notice on website

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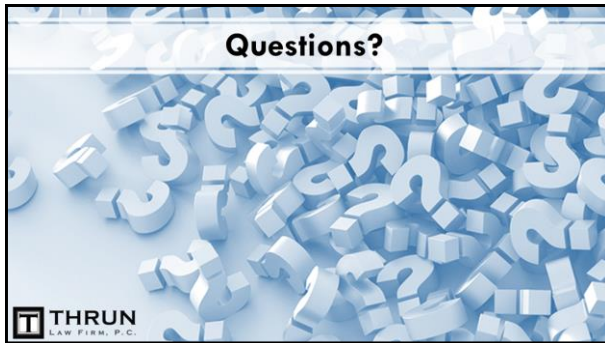
Notice Contents

- Recipient does not discriminate in any program/activity, including admission and employment
- Inquiries may be made to T9C, and T9C contact information
- How to find nondiscrimination policy and grievance procedure
- How to make a report of sex discrimination

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