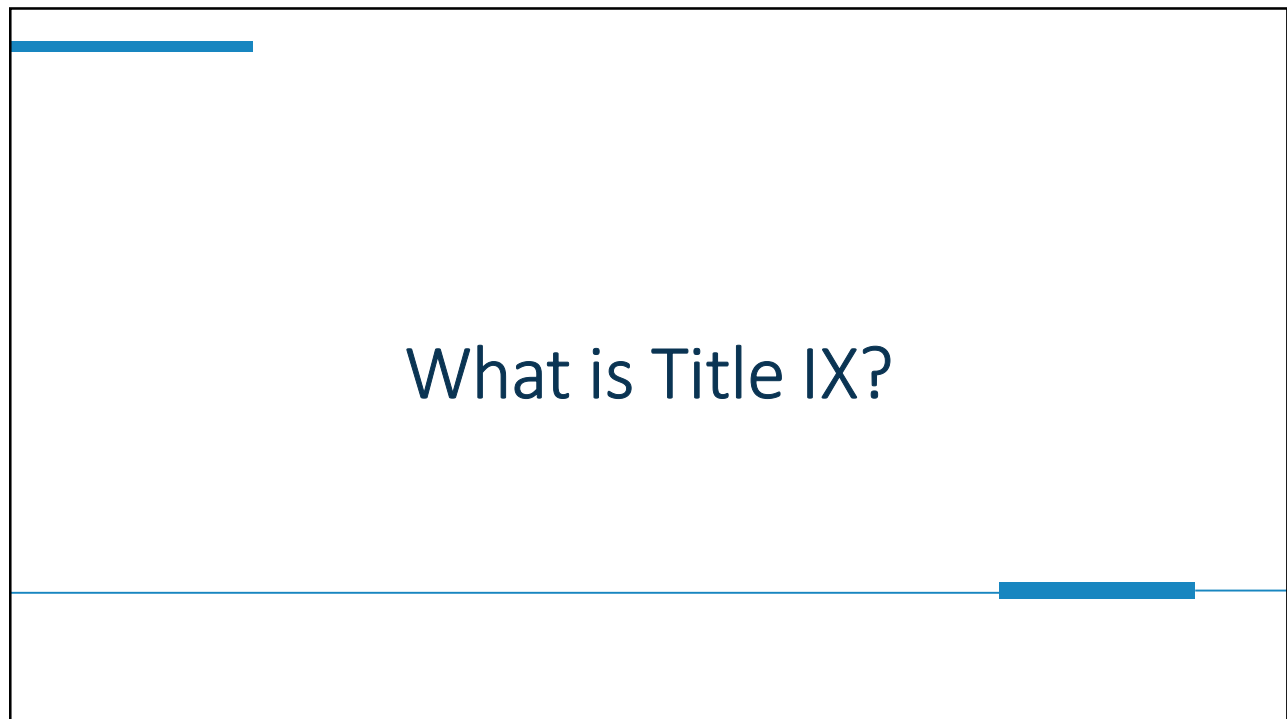




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## Title IX Statute

(20 U.S.C. §§ 1681–1688)

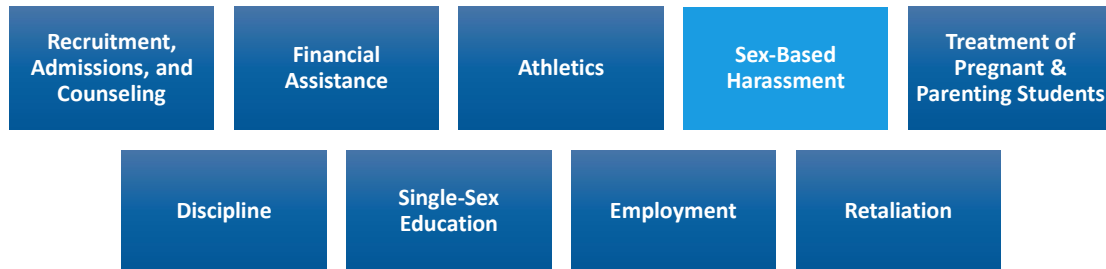
"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

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## What falls under Title IX?



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## Title IX Regulations

(34 C.F.R. Part 106 – Amended as of 8/14/2020)

- Prohibit discrimination on the basis of sex
- Establish procedural requirements
  - Policy + detailed grievance procedure
  - Designation of Title IX coordinator(s)
  - And many more requirements!

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## When Must a School Respond to Sexual Harassment?

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**When must a  
school  
respond to  
Title IX sexual  
harassment?**

A school with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond

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## When must a school respond to Title IX sexual harassment?

A school **with actual knowledge** of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond

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## What is Actual Knowledge?

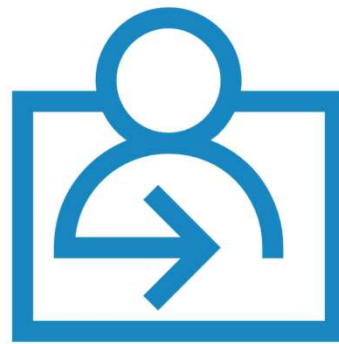
- Sense
- Report

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## Official with Authority

- Title IX Coordinator
- Any other officials who have been given authority to institute corrective measures by the school district
- K-12: All employees



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## Reporting Sexual Harassment: Who, How and When?

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator
- Or by any means that results in the Title IX Coordinator receiving the person's report
- Such a report may be made at any time, including during non-business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator

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## Key Word: “Allegation”

Once a school has notice of **an allegation** that, **if true**, would constitute Title IX Sexual Harassment, it **must** respond

“Well, we didn’t believe there was enough evidence it happened” is **not** a valid excuse to avoid using your Title IX Sexual Harassment grievance process

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## When must a school respond to Title IX sexual harassment?

A school with actual knowledge of **[Title IX] sexual harassment** in an education program or activity against a person in the United States must respond

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# What is Sexual Harassment?

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## Title IX – What is Sexual Harassment?

Hostile Environment

Quid pro quo by an  
employee

Sexual Assault  
Domestic Violence  
Dating Violence  
Stalking

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## Quid Pro Quo

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Quid = Something

---

Pro = For

---

Quo = Something

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## Title IX Quid Pro Quo

**Definition:** An employee of the educational institution conditioning an aid, service, or benefit of the educational institution on participation in unwelcome sexual conduct

**New to 2020 rules:** Only an employee (not a volunteer, another student, etc.)

**Codified:** Severity and harm presumed

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## Clery Act/VAWA “Big Four”

Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Domestic Violence 34 U.S.C. 12291(a)(8)

Dating Violence 34 U.S.C. 12291(a)(10)

Stalking 34 U.S.C. 12291(a)(30)

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## Title IX – What is a Hostile Environment

### Old Definition

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

### 2020 Regs Definition

Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the school's education program or activity**

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## Unwelcome Conduct

- Not **Participation**
- Not **Silence**
- Age Matters
- Intoxication Matters
- Culture Matters
- Ability Matters

\*\*subjective + reasonable person

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## Severe

- Something more than juvenile behavior
- Something more than antagonistic, non-consensual, and crass conduct
- Simple acts of teasing and name-calling are not enough, even when comments are based on sex
- It is not enough to show that a student has been teased or called offensive names

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## Pervasive

- Systemic or widespread
- Multiple incidents of harassment
- One incident is not enough, even if very severe

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## Objectively Offensive

- Behavior that would be offensive to a reasonable person under the circumstances
- Not just offensive to the victim, personally or subjectively
- Consider ages, numbers, relationships – the constellation of surrounding circumstances, expectations, and relationships



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## Hostile Environment Factors

Context, Nature,  
Scope, Frequency,  
Duration, and Location  
of the Incidents

Identity, Number,  
Ages, and  
Relationships of the  
Persons involved

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## Title IX Coordinator Responsibilities

- Must be called Title IX Coordinator
- Must be identified (with name or title, address, phone, and email) in policy and on website
- Must meet with alleged victims of Title IX Sexual Harassment

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## Title IX Coordinator Responsibilities

- Informs Complainant (CP) of availability of supportive measures and formal complaint process
- Decides whether to “sign” a complaint when the CP doesn’t want to file
- Coordinates implementation of supportive measures
- Ensures effective implementation of remedies
- Monitors ongoing compliance with Title IX

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## Robin’s Report

- Email from Dean
- Robin, a first-year soccer player, reported conduct that occurred against Robin’s friend, Cameron, also a first-year soccer player

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## Robin's Report

- Soccer orientation week
- Park across street from the school
- Two upperclassmen soccer players vs. Cameron

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## Robin's Report

- Verbal harassment
  - Going to violate your mother
  - Want to “smoke” (understood to mean sexual assault)
- Grabbed Cameron by the neck and bent Cameron over; poked Cameron's anus over the clothes

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## Robin's Report

- Coaches saw the incident
  - Laughed at first
  - Noticed Cameron looked shaken
  - Sternly reprimanded upperclassmen in front of Cameron
  - Told Cameron if it happened again to report it
- Nonetheless, incidents kept occurring

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## Robin's Report

- One (same) coach observed later incident; shook head and walked away
- Last day of orientation
  - Hazing ritual
  - Multiple upperclassmen grabbed Cameron and two other rookies
  - Pulled down pants, poked anus with broomstick

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## Title IX Hostile Environment

- Unwelcome conduct
- determined by a reasonable person to be so
- severe,
- pervasive, and
- objectively offensive
- that it effectively denies a person's equal access to the recipient's education program or activity



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## VAWA “Big Four”

Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Domestic Violence 34 U.S.C. 12291(a)(8)

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Stalking 34 U.S.C. 12291(a)(30)

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## Sexual Assault under VAWA

- Sexual Assault:
  - Penetration without consent (rape)
  - Fondling without consent
  - Incest
  - Statutory rape

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### Title IX Coordinator must promptly, **even if no Formal Complaint is filed:**

- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint

**Initial  
Response**

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## Cameron's Report

- You tell the Dean to meet with Cameron (**WRITE IT DOWN**)
- Cameron confirms all of the allegations
- Cameron wants the upperclass students removed from the team
- Cameron does not want to file a formal complaint or be named to the upperclass students

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## Forms/Notices

### Initial Contact and Meeting with the CP

Notice to Complainant  
of Report of Title IX  
Sexual Harassment  
(Franczek Notice 1(a))

Summary of Supportive  
Measures Meeting  
with the Title IX  
Complainant  
(Franczek Notice 1(b))

Title IX Formal  
Complaint (Franczek  
Form A)

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## Forms/Notices

### Notice of Emergency Removal

Notice of Title IX  
Emergency Removal  
of Student  
(Franczek Letter 4(a))

Notice of Title IX  
Emergency Removal  
of Student (Franczek  
Letter 4(b))

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## Remember State & Federal Law

- Additional process may be required for emergency removal to occur
  - Student discipline – state laws (e.g., long term suspension, expulsion)
  - Disability rights – federal and state law
  - Employee rights – law, policy, agreements

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## Forms/Notices

### Informal Resolution Process

Offer of Title IX  
Informal Resolution  
Process  
(Franczek Notice 5(a))

Notice of Closure of  
Title IX Informal  
Resolution Process  
(Franczek Notice 5(b))

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## Back to Robin

- Let's assume Cameron doesn't want to file a complaint....

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## “Signing a Complaint”

- Consider:
  - Pattern of alleged conduct
  - Involvement of violence, weapons, etc.
  - Seriousness of alleged conduct
  - Age of student harassed
- Title IX Coordinator does not become Complainant or party
- Decision to sign a Formal Complaint (or not?) reviewed for “deliberate indifference”

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## Formal Complaint – Next Steps

- Written notice to all known parties
  - Grievance process
  - Allegations
  - Respondent presumed not responsible
  - Right to advisor
  - Right to inspect/review evidence
  - Notice of provision on false statements

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## Forms/Notices

### Notice of Allegations

Notice of Allegations of  
Title IX Sexual  
Harassment by a  
Complainant (Franczek  
Notice 2(a))

Notice of Allegations  
Upon Signing of Formal  
Complaint by the Title  
IX Coordinator  
(Franczek Notice 2(b))

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## Let the investigation begin....

- The Title IX Investigator is ready to investigate
- Must send notice to parties (and, we recommend, to witnesses)

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## Forms/Notices

### Notice of Interview

Notice of Title IX  
Interview or Meeting  
with Title IX Party  
(Franczek Notice 6(a))

Notice of Title IX  
Interview or Meeting  
with Non-Party  
Witness (Franczek  
Notice 6(b))

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## Witness – Devon

- Devon, witness
- Also on the soccer team, upperclass student

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## Witness – Devon

- Sexual assault by classmate on spring break trip last year (abroad)
- Sexual harassment by classmate via Snapchat over the summer (off-campus, not on school tech or hours)
- A teacher asked Devon for a naked photo and Devon shared one; the teacher quit shortly after

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## Forms/Notices

### Notice of Dismissal

Notice of Mandatory  
Dismissal of  
Allegations of Title IX  
Sexual Harassment  
(Franczek Letter 3(a))

Notice of Permissive  
Dismissal of  
Allegations of Title IX  
Sexual Harassment  
(Franczek Letter 3(b))

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## Remember with Devon

- You can remove the teacher while you investigate
  - Administrative leave (can be used with or in lieu of emergency removal)
  - Check your policies/procedures, CBAs, employment contracts, laws, etc.

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## Forms/Notices

### Notice to Advisors

Advisor  
Conduct  
Expectations

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## So the investigation is done....

- Must share evidence with both parties and advisors simultaneously with 10 days to respond before writing the report
  - Review/consider responses
  - Share responses with the other side

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## Forms/Notices

### Sharing of Evidence

Notice of Directly  
Related Evidence  
(Franczek Letter 7(a))

Notice of Other  
Party's Written  
Response to Evidence  
(Franczek Letter 7(b))

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## The investigative report

- Must fairly summarize relevant evidence
- Must be provided to both parties and their advisors simultaneously at least 10 days prior to a hearing (if applicable) or other time of determination
- Transmit report and any party written response(s) to the Decisionmaker

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## Forms/Notices

### Investigative Report

Title IX Investigative  
Report Template  
(Franczek Form B)

Notice of Investigative  
Report (Franczek  
Notice 8(a))

Notice of Other Party's  
Written Response  
(Franczek Notice 8(b))

Transmittal Cover  
Letter to Decision-  
maker at Conclusion of  
Investigation (Franczek  
Letter 8(c))

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## Decision

- Decision-maker (“written cross”) (Franczek Notices 9(a)-(e))
- Written determination (Franczek Form C - Written Determination Template)

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## Appeal Notice

- Upon receipt of an appeal, the Title IX Coordinator must notify the other party/parties of the appeal
- Both parties must be given an opportunity to submit a written statement for or against the appeal

(Franczek Notices 11(a) and (b))

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# Bias, Conflicts of Interest, and Other Fairness Concerns

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## Bias

The Title IX Coordinator must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudge any matter before them.

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## Conflict of Interest

- Flexibility to choose employees or outsource adjudication functions
- No *per se* prohibited conflicts of interest when using school employees or individuals with histories of working in field of sexual violence as decisionmaker
- Caution against using generalizations to identify conflict of interest

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## Pre-Judgment

Tips for avoiding pre-judgment of facts:

- Each case is fact-specific
- Keep an open mind
- Listen to facts presented

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## Sex Stereotypes

- Must not rely on sex stereotypes such as:
  - Women are “asking for it” based on actions or clothing
  - Men cannot be sexually assaulted
  - Women only decide they were assaulted after the fact due to regret or embarrassment
  - Men are more likely to be sexual aggressors
- Consider intersection of sex stereotypes with race, ability, sexuality, and gender identity

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## Recordkeeping/File Maintenance

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## Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

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## Questions?



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