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Title IX's Reach May Expand: Application to Non-Profits and Schools Not Accepting Federal Funding

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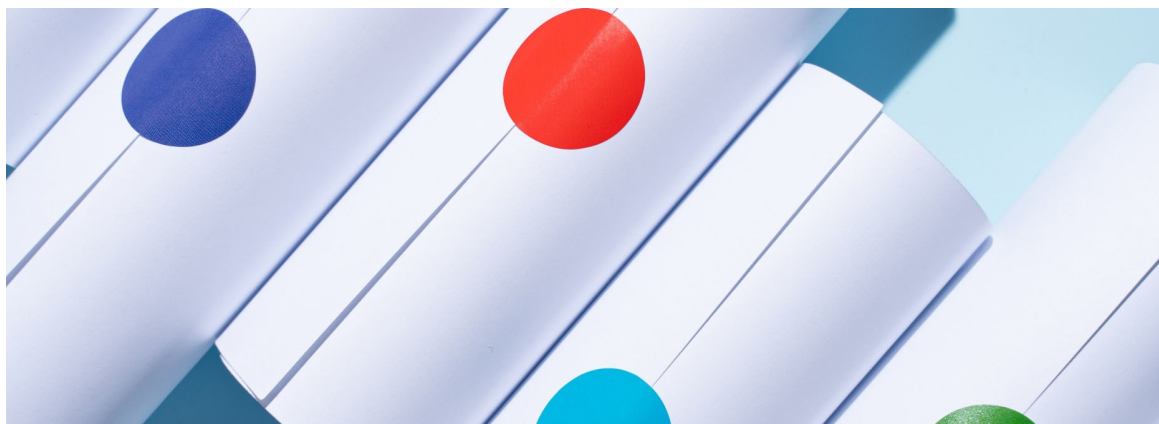
Agenda

- Background of Title IX
- Case Law Updates
- Conflicting Title IX Case Law
- Reading the Tea Leaves
- Title IX 101



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Background of Title IX

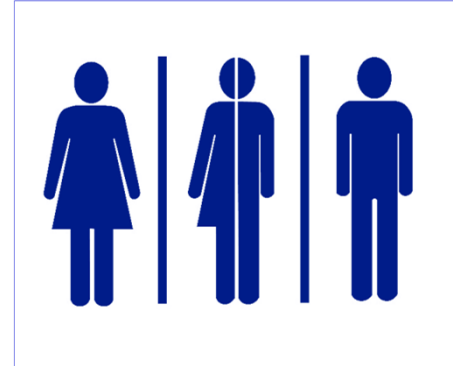
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What is Title IX?

“[N]o 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.***”

34 C.F.R. § 106.31



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Who does Title IX apply to?

- Entities that receive federal financial assistance, including colleges and universities that participate in Title IV funding
 - Not individual persons
 - But institutions are required to adopt policies and procedures to implement Title IX that *do* apply to individual persons



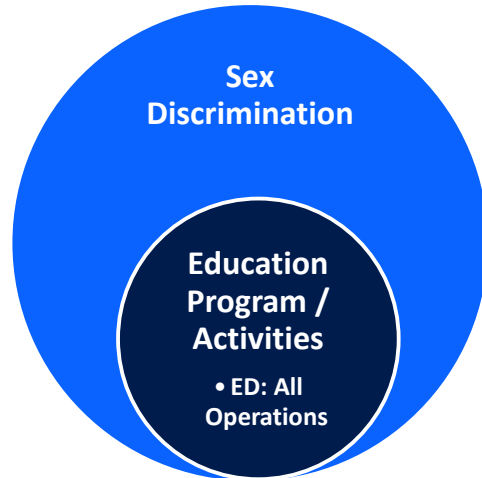
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What sex discrimination does Title IX apply to?

- Title IX applies to sex discrimination in the “education program or activity” of a federal funding recipient
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



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What sex discrimination has Title IX historically NOT applied to?

- Private schools not receiving federal financial assistance from U.S. Department of Education
- Religious schools and organizations not receiving federal financial assistance from U.S. Department of Education
- Nonprofit organizations not receiving federal financial assistance from U.S. Department of Education
- Private businesses

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What Changes May Be Coming?

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Buettner-Hartsoe v. Baltimore Lutheran High School Association d/b/a Concordia Preparatory School (D.Md. July 2022)

- Former Students of CPS, a private school in Maryland, sued CPS alleging the school failed to address complaints of sexual assault and sexual harassment.
- CPS moved to dismiss the lawsuit on the grounds it was not subject to Title IX because it did not receive federal funding from U.S. Department of Education.

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Buettner-Harstoe: Holding & Analysis

- Holding: CPS was a recipient of federal funding and subject to Title IX due to the school's status as a 501(c)(3) tax-exempt organization, even though it did not receive direct federal aid nor any funds directly the U.S. Department of Education.
 - Court found that the school's tax-exempt status was a form of federal financial assistance.

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Buettner-Harstoe: Analysis

- Further, the court held, "Enforcing the mandates of Title IX in schools with 501(c)(3) status aligns with and protects the principal objectives of Title IX: 'to avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices.'



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E.H. v. Valley Christian Academy (C.D. Cal. July 2022)

- Female player on football team was told she could not play in football games because she is female.
- Player alleged that school is subject to Title IX because it received federal financial assistance in the form of a PPP loan and because of its tax-exempt, 501(c)(3) status.
- Valley Christian argued that receiving a PPP loan does not constitute federal financial assistance.
 - Simply being a tax-exempt organization does not mean it receives federal financial assistance

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E.H.: Holding & Analysis

- Holding:
 - (1) A private religious school's tax-exempt status confers a federal financial benefit that obligates compliance with Title IX.
 - (2) Participation in the PPP loan program is federal financial assistance and **does** trigger Title IX.
- Valley Christian's Motion to Dismiss denied in part as to E.H.'s Title IX claim.

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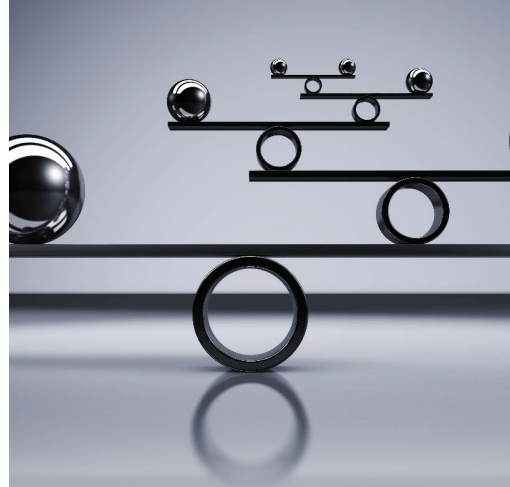
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Current status of cases

- Baltimore Lutheran High School Association appealed the decision in early September 2022.
- Valley Christian case is currently in discovery; trial set for October 2023.



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Why do these cases matter?

- Independent schools are not traditionally required to comply with Title IX unless they received “federal financial assistance.”
- Title IX defines “federal financial assistance” to include federal grants or loans and any other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity.
- Potential for interpretation of definition of federal financial assistance to be expanded in light of recent case decisions

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Conflicting Title IX Case Law

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Tax Exempt Status - Sufficient

- A few courts have found that tax exempt status constitutes federal financial assistance for purposes of Title VI and Title IX:
 - *McGlotten v. Connally* (D.D.C. 1972)
 - *Fulani v. League of Women Voters Educ. Fund* (S.D.N.Y. 1988)

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Tax Exempt Status - Insufficient

- Other courts have held that tax exempt status, without more, is insufficient to subject an entity to the antidiscrimination requirements of Title IX.
 - *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n* (N.D. Ill 2001)
- Courts have also held that tax-exempt status does not constitute federal financial assistance within the meaning of Title IX.
 - *Zimmerman v. Poly Prep Country Day Sch.* (E.D.N.Y. 2012); *Russo v. Diocese of Greensburg* (W.D. Pa. 2010)

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Federal Financial Assistance – PPP Loans

- Courts have considered whether PPP loans are federal financial assistance for purposes of Title VI and the ADA.
 - *Awah v. Mansfield Kaseman Health Clinic* (D. Md. 2021)
 - *Fernandez v. Bruno Northfleet, Inc.* (S.D. Fla. 2021)

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Reading the Tea Leaves



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What does the *Amicus* Brief in *Buettner-Harsoe* signal?



- *Amicus* parties
 - National Association of Independent Schools
 - National Business Officers Association
 - Association of Independent Schools of Greater Washington
 - Southern Association of Independent Schools
 - Virginia Association of Independent Schools
 - North Carolina Association of Independent Schools
 - Palmetto Association of Independent Schools



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Amicus Brief in Buettner-Harsoe

- Letter in Support
- “Who We Are”
 - 7 parties and 54 signatories represent 30,500 private schools and 4.6 million students
 - Nonprofit organizations with 501(c)(3) tax exemptions
 - Guided by specific missions
 - Overseen by independent boards
 - Primarily financed through tuition and charitable contributions

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Amicus Brief in Buettner-Harsoe - Arguments

- Extension of Title IX “could impose massive, prescriptive compliance regimes that would overwhelm those entities, both financially and administratively.”
- Threatens to upset balance between investment in quality education, safety and health vs. affordable tuition and competitive salaries.
- Independent schools already protect students and staff through rigorous and effective safeguards tailored to their size and mission.
- Schools’ reliance on the absence of tax exemptions in the definition of “federal financial assistance” and declining federal funds
- The government has never brought an enforcement action against a nonprofit that does not receive federal funds for failing to have a Title IX program.

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Amicus Brief in *Buettner-Harsoe* - Consequences

- Title IX's regulations are burdensome and could put some independent schools in financial jeopardy.
 - 12% of NAIS members have an enrollment of fewer than 100 students.
 - These schools would need to hire staff devoted to Title IX compliance.
- The interpretation of "federal financial assistance" utilized by the court could trigger a host of restrictions applicable to recipients of federal grants generally.
- Focus on independent school policies that are "legally compliant, mission-consistent, and tied to deeply held beliefs in the community."

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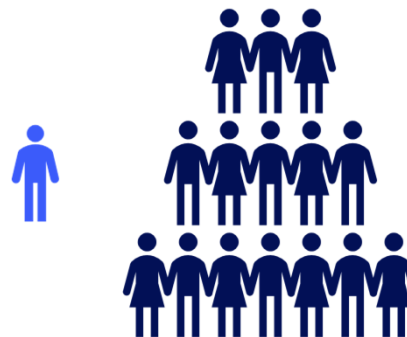
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Title VII of the Civil Rights Act of 1964

- Prohibits discrimination in employment (private and public) based on:
 - Race
 - Color
 - Religion
 - National Origin
 - Sex



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Title VI of the Civil Rights Act of 1964

- “No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”
- Prohibits discrimination based on:
 - Race
 - Color
 - National Originin programs or activities that receive Federal financial assistance.

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Disability statutes

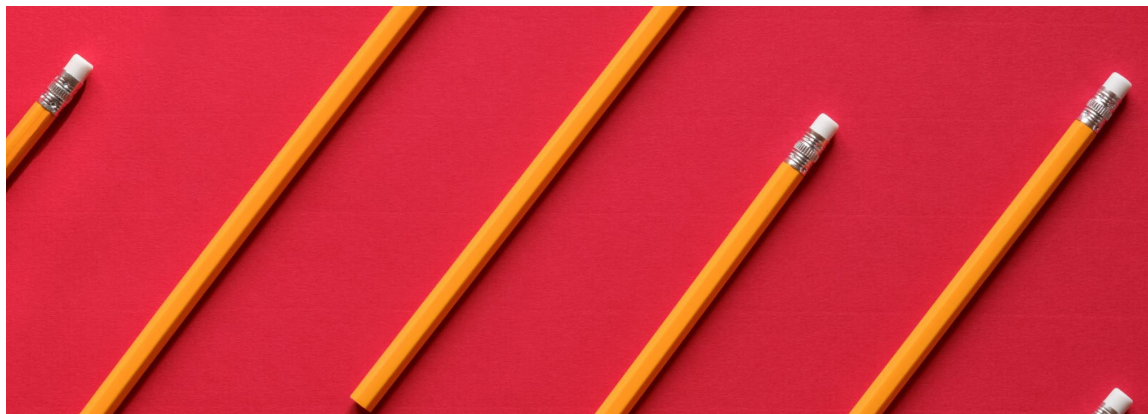


- The Americans With Disabilities Act
- Section 504 of the Rehabilitation Act

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Title IX 101

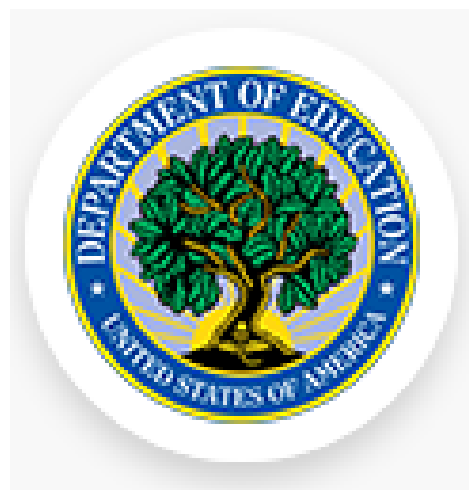
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Regulatory Update

- On June 23, 2022, the U.S. Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- Over 235,000 comments submitted during comment period
- Compliance with August 2020 regulations is still mandatory

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What is Title IX sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

Sexual assault

Dating violence

Domestic violence

Stalking

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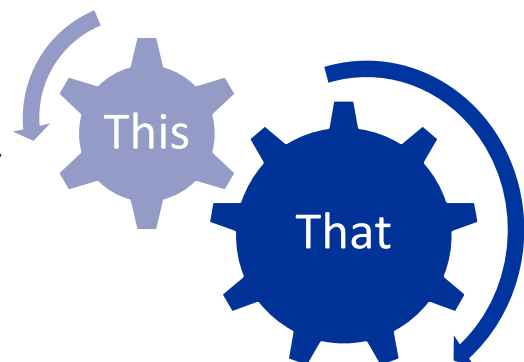
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What is quid pro quo?

- **Title IX-Designated**
- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
 - Often arises in the employment context or where an employee holds a position of authority over a student



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What is hostile environment?

Unwelcome conduct determined by a reasonable person to be so severe, pervasive or persistent, and objectively offensive that it effectively denies a person equal access to the University's education programs or activities.



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What is sexual assault?

Title IX regulations define “sexual assault” as incorporating the following classes of conduct:

Rape

Sodomy

Sexual Assault
with an
Object

Fondling

Incest

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What is consent?

- Words or actions that a reasonable person would understand as agreement to engage in the sexual conduct at issue.
- A person who is incapacitated cannot consent.
- A person who is below the statutory age of consent cannot consent.
- Consent cannot be procured through threats or coercion.

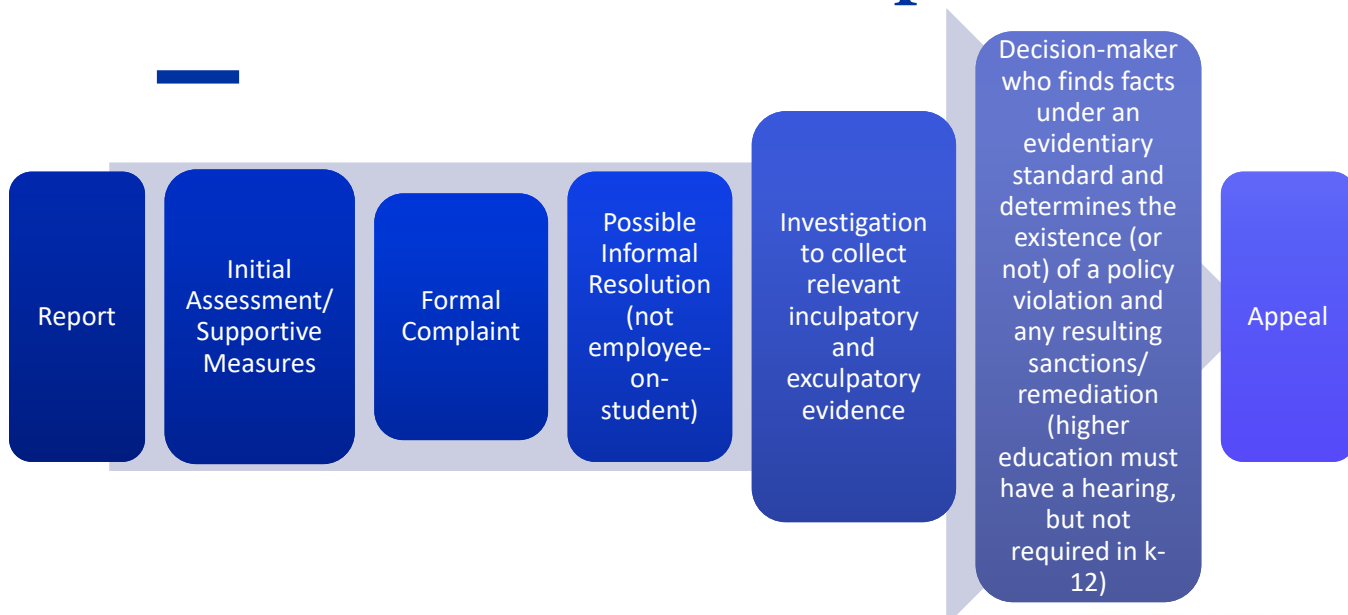


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What is the resolution process?



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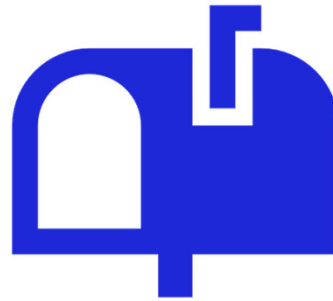
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How does an institution get notice of sexual harassment?

Sexual harassment response is triggered when institution has “actual knowledge” of potential sexual harassment.



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What is “Actual Knowledge”?

“Actual knowledge” occurs when

- An institutional official, with authority to take corrective action
- Observes or receives a report
- Of sexual harassment occurring in the institution’s education programs and activities

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What is a formal complaint?

What

- Document
- Alleging sexual harassment
- Requesting an investigation / resolution under grievance procedures

Who

- Signed by
 - Alleged victim or
 - The Title IX Coordinator
- If filed by alleged victim, alleged victim must be current or attempted participant in education programs and activities
- Third-parties may not file formal complaints on behalf of an alleged victim

How

- Either physical or electronic submission

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Investigation framework

The investigators interview the complainant, respondent, and relevant witnesses. The investigators identify and gather evidence.

At the conclusion of evidence gathering, the investigators give the parties an equal opportunity to inspect and review evidence obtained.

After the parties have provided their written response, the investigators will create a written investigative report summarizing the relevant evidence collected.

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What is informal resolution?

A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.

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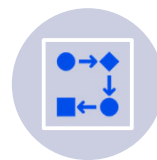
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What are the key concepts of informal resolution?



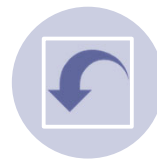
A formal complaint must first have been filed and written notice given to the parties



The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



The parties must voluntarily agree to participate in writing



The parties must be allowed to withdraw from informal resolution up until the point it is final

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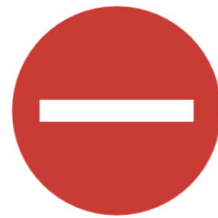
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What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Cannot require persons to consent to informal resolution as a condition of employment or enrollment



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Who facilitates an informal resolution?

- Any suitably qualified and trained person may facilitate informal resolution, including the Title IX Coordinator
- Facilitator can be a third-party mediator or alternative dispute resolution specialist
- Default rules on conflicts of interest and bias apply

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How do(es) the decision-maker(s) decide a case?



After hearing (if applicable), decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the school district



Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred

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What is the purpose of the appeal?

- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek "de novo" review



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What are the grounds for appeal?

Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter



New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal, that could affect the outcome of the matter; or



Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

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Questions?



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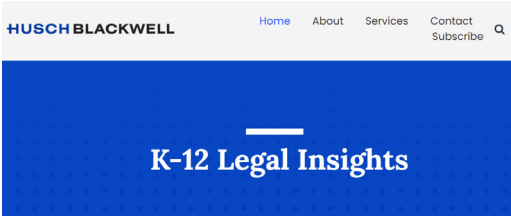
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Upcoming Title IX Training for K-12 Schools

- Mark your calendars for January 18, 2023
- The invitation will be out today
- You can find the registration link in the resources folder

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