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Why are we here?

3

Know the Rules

SEXUAL HARASSMENT
complaint form

4

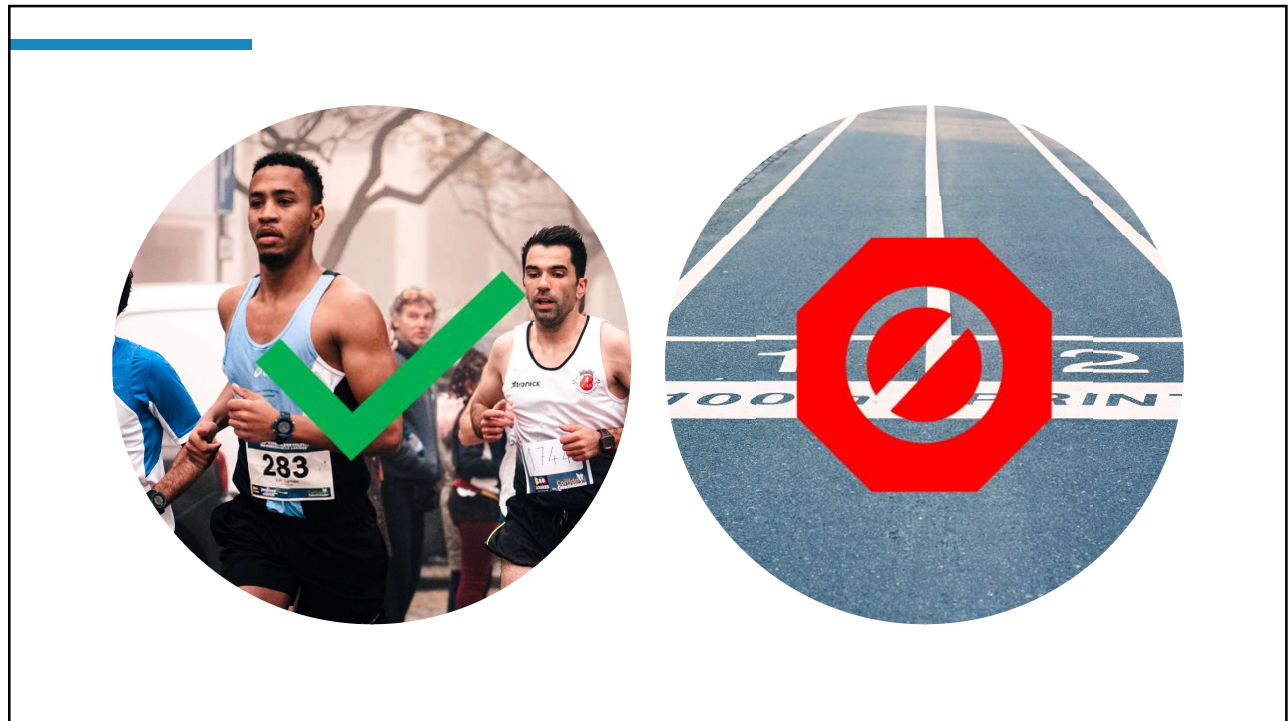
Recognize Title IX Sexual Harassment

5



But not just any action -- the *right* action for
the conduct at issue!

6



7



8

1 in 4 women
experiences sexual
assault before age 18

10% of children are
targets of educator
sexual misconduct
before high school
graduation

48% of U.S. students are
subject to sexual
harassment or assault at
school before graduating
high school

In 2010-2011, 36% of
girls, 24% of boys and
30% of all students
grades 7-12 experienced
online sexual harassment

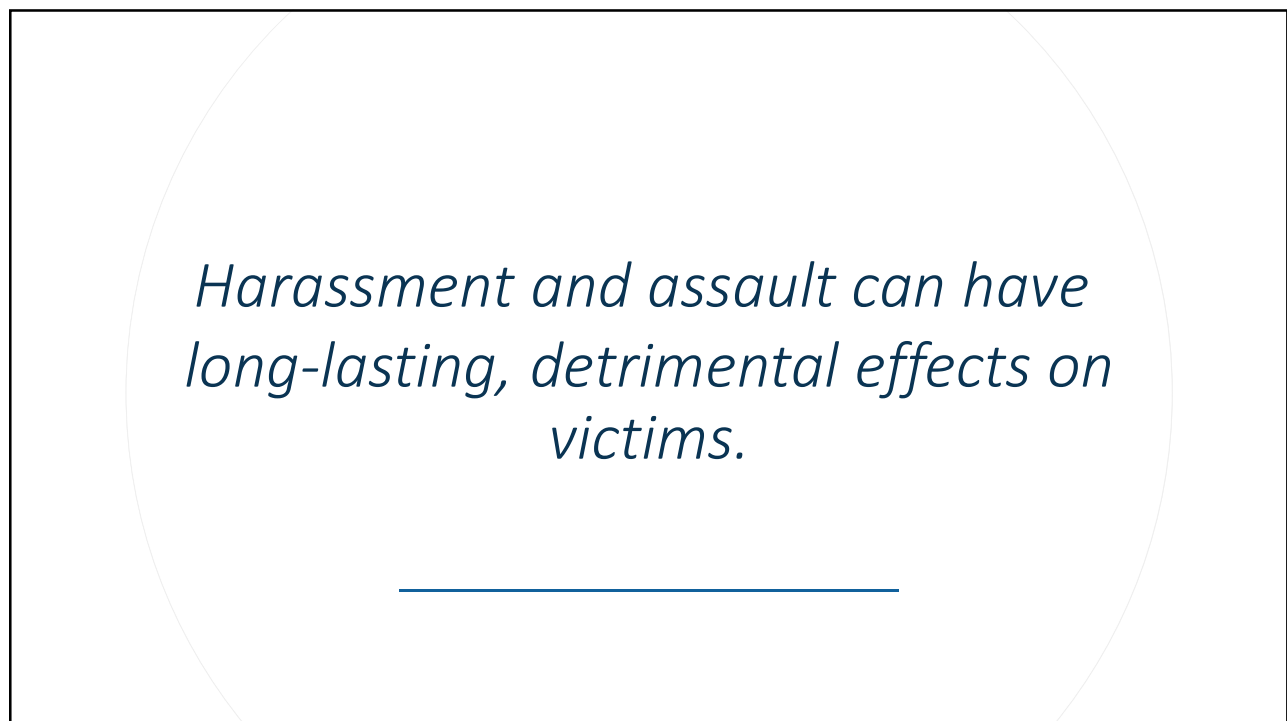
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Only
23 percent
of all sexual assaults are reported
to the police.

10



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Effects on Individuals

Poor performance in
school

Stress Disengagement Fear
Distraction Anger Mistrust Conflict
Acting out Absenteeism Lost Opportunities
Suicide ANXIETY Drop-out
DEPRESSION PTSD

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Effects on Teams

Decreased focus
Lost productivity
Withdrawal
Neglect
Absenteeism
Malingering
Lack of trust in leadership
Turnover



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*Unfair processes can
have
long lasting,
detrimental effects on
the parties*

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Responding to
Harassment
Required by the law

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What is Title IX?

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Title IX Statute

(20 U.S.C. §§ 1681–1688)

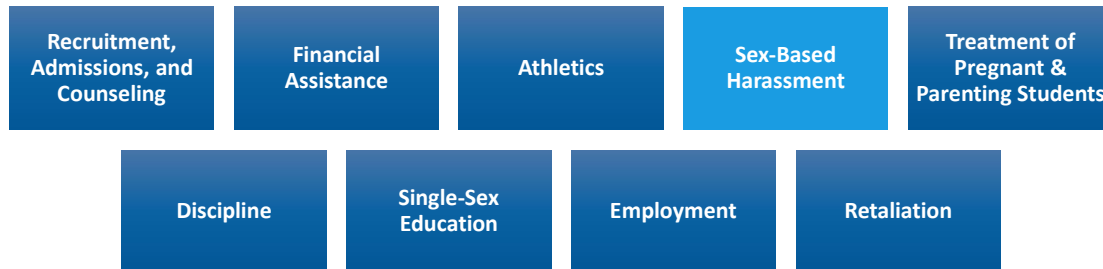
"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

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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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Employment

- Illinois Human Rights Act
- Title VII
- Title IX

Students

- Illinois Human Rights Act
- Illinois Sex Equity Regulations
- Title IX

It Depends
Who [Well,
Which Law]
You Ask

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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

25

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

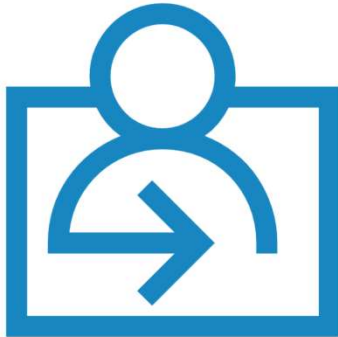


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Official with Authority

- 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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Issue Spotting

Order of protection: Principal served with order of protection requiring student to have no contact with another student due to alleged sexual assault

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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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**It Depends
Who [Well,
Which Law]
You Ask**

Employment

- Illinois Human Rights Act
- Title VII
- Title IX

Students

- Illinois Human Rights Act
- Illinois Sex Equity Regulations
- Title IX

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Title IX – What is Sexual Harassment?

Hostile Environment

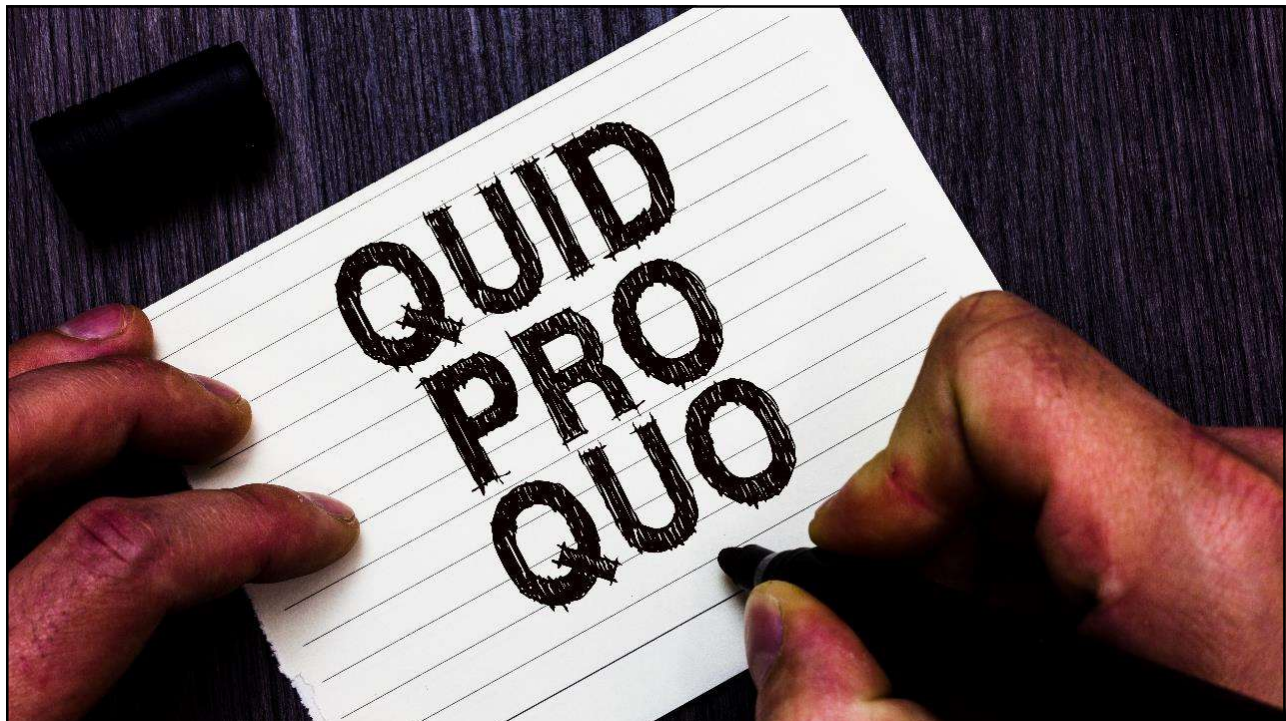
Quid pro quo by an
employee

Sexual Assault
Domestic Violence
Dating Violence
Stalking

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Quid Pro Quo

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 (8/14)

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

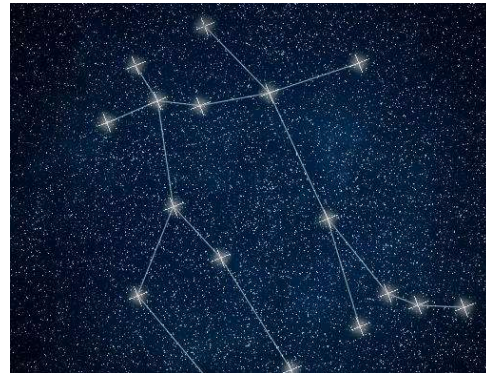
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Objectively Offensive

- 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

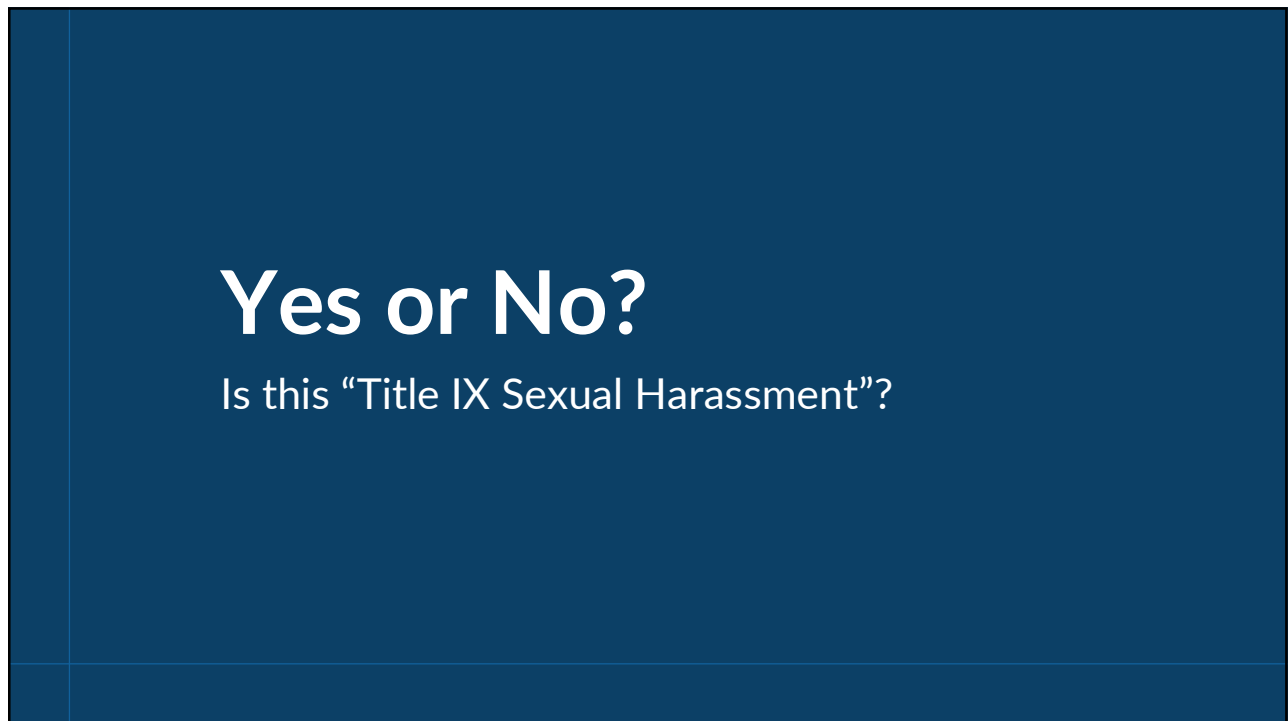
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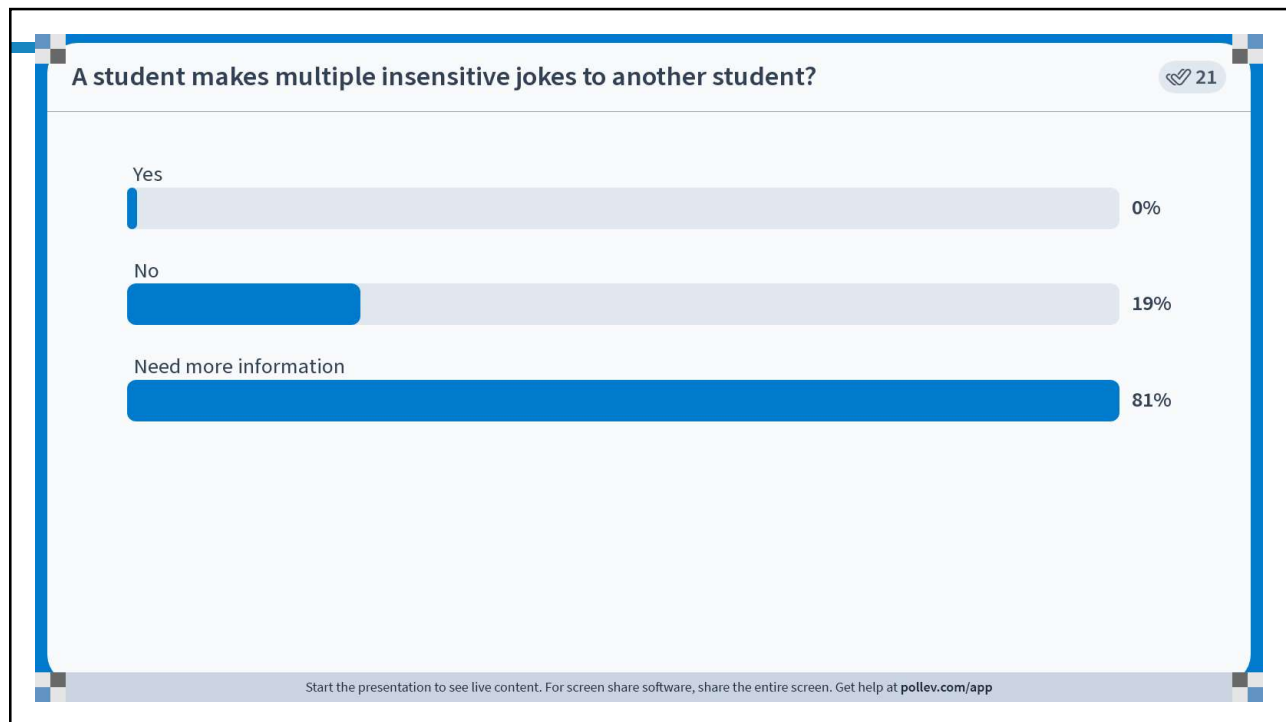
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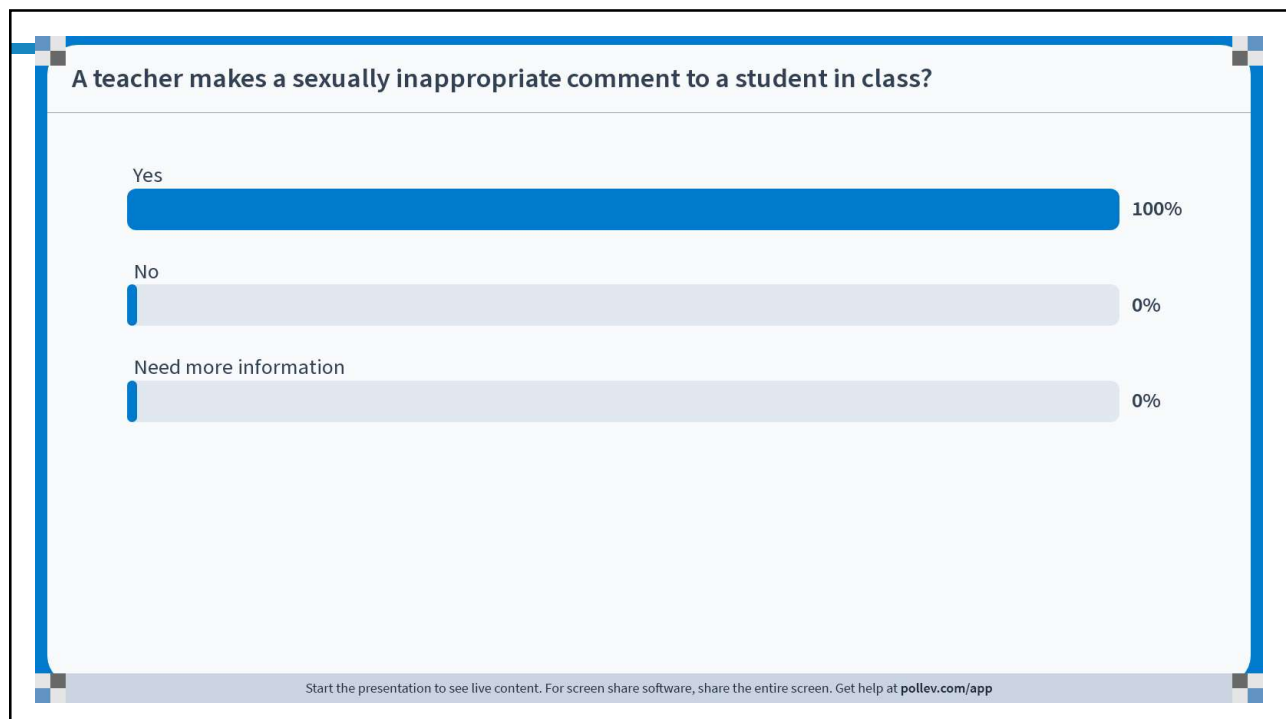
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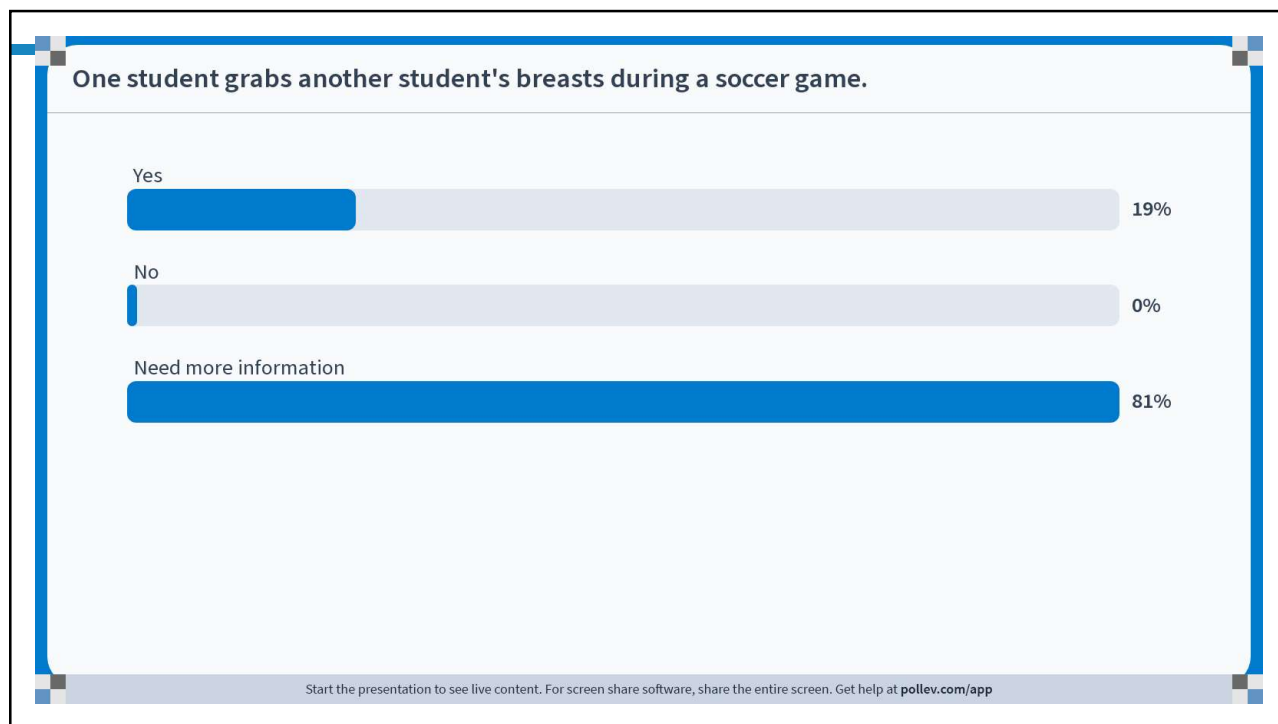
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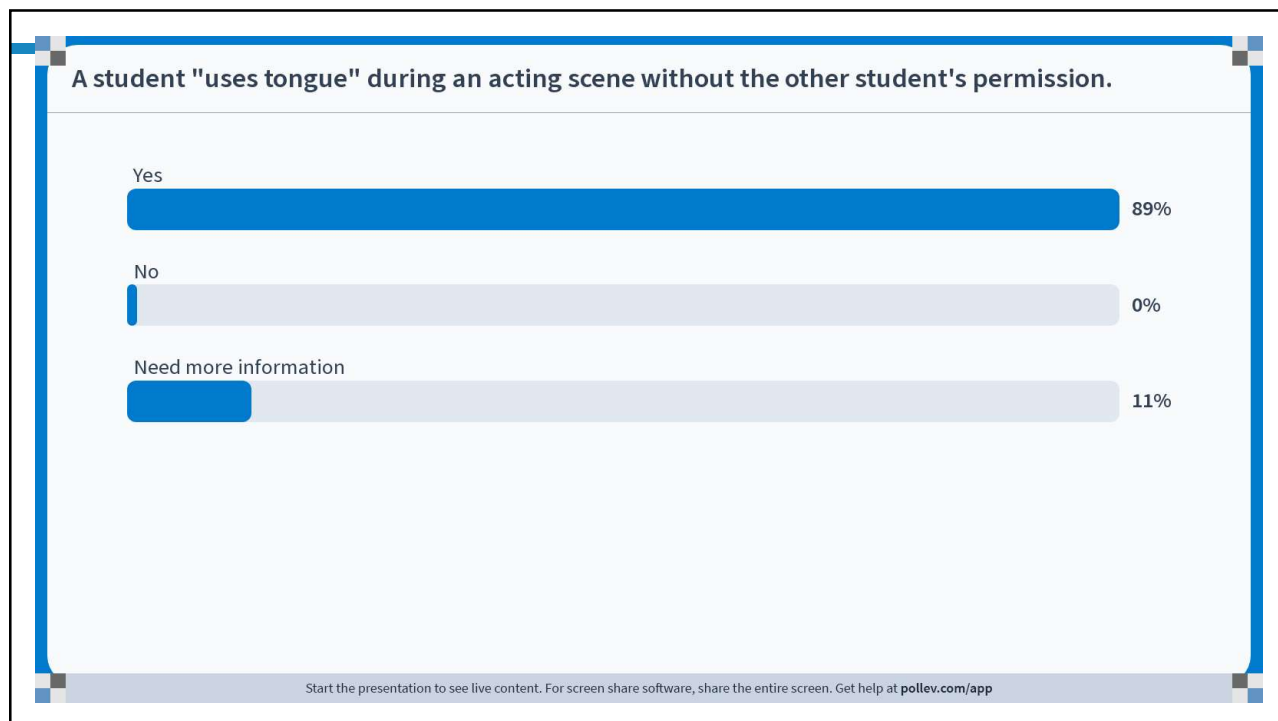
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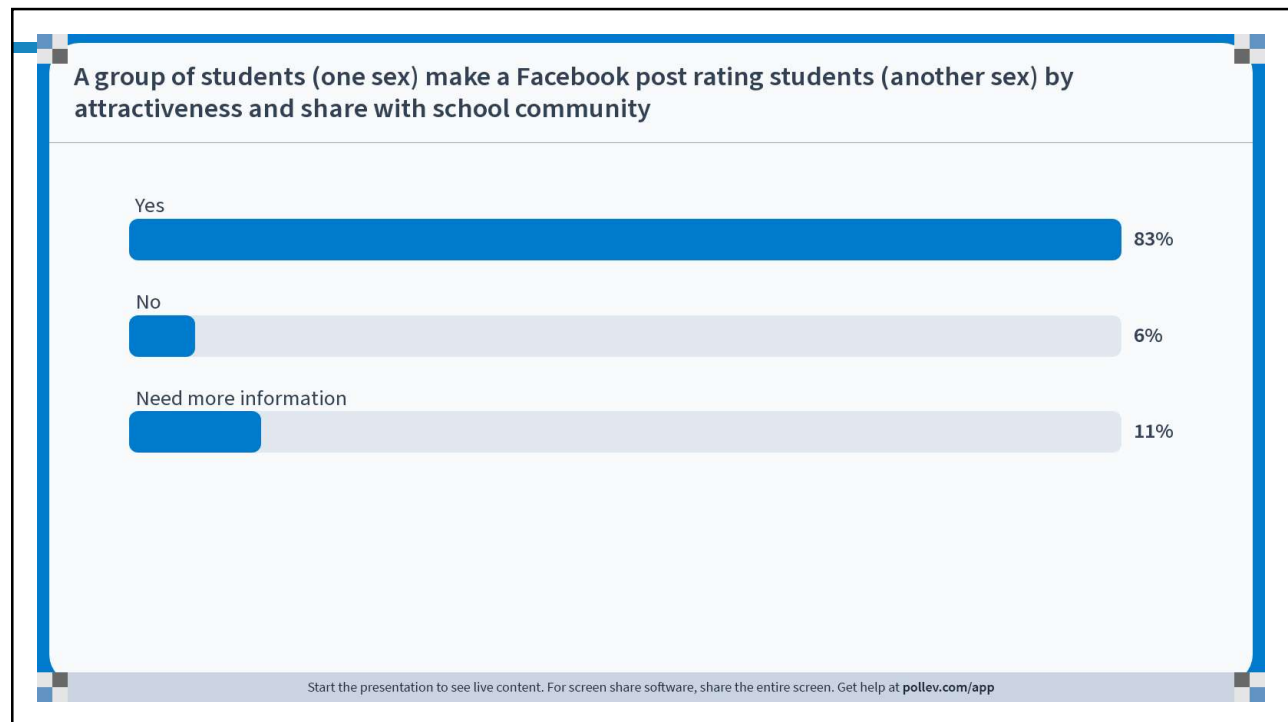
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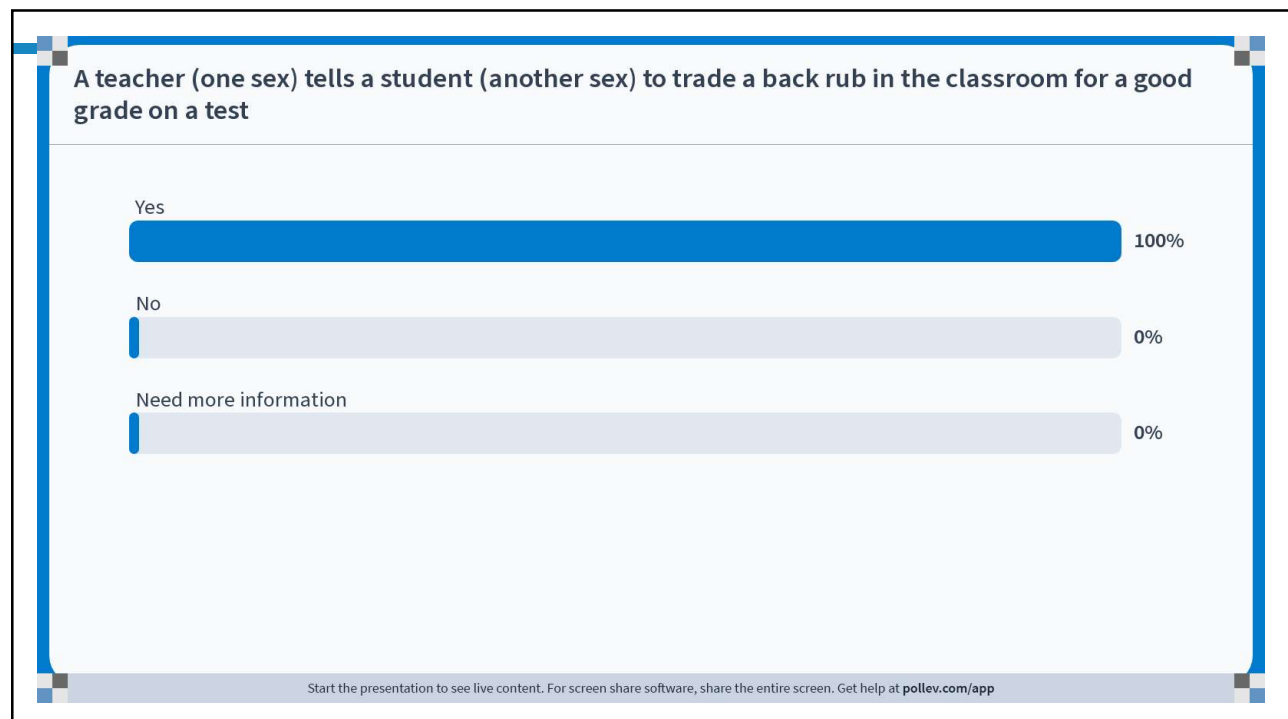
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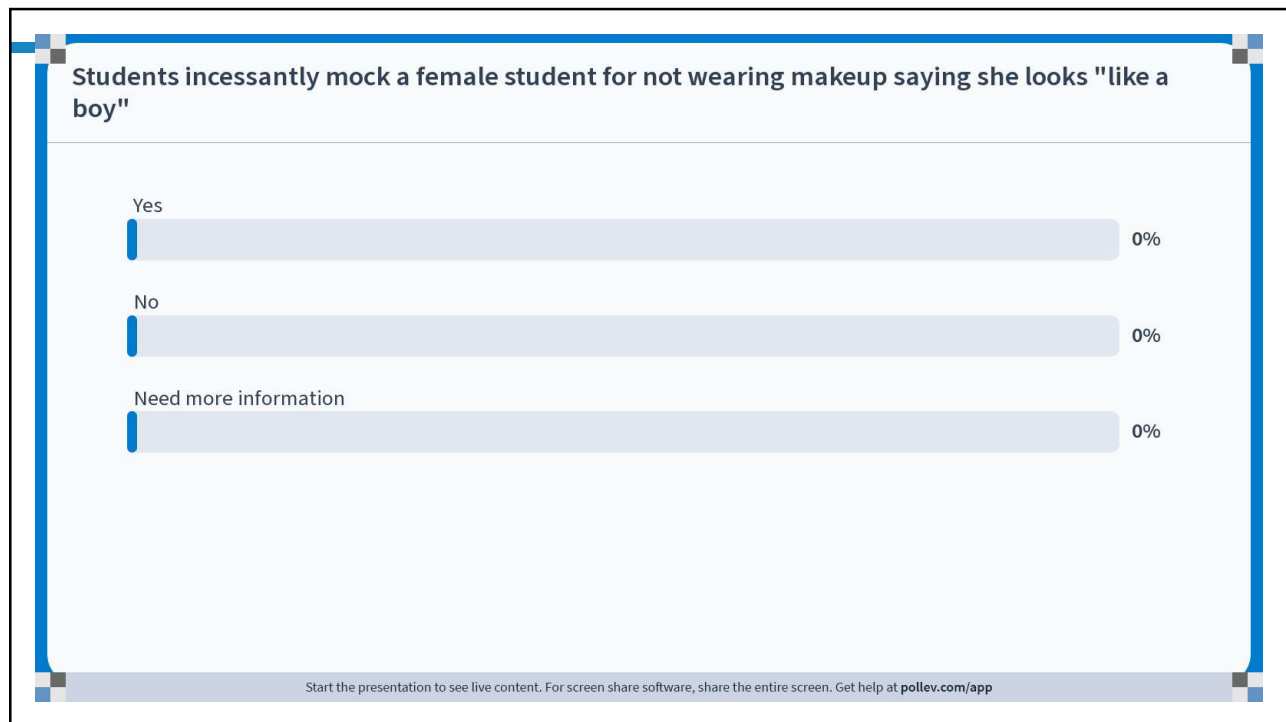
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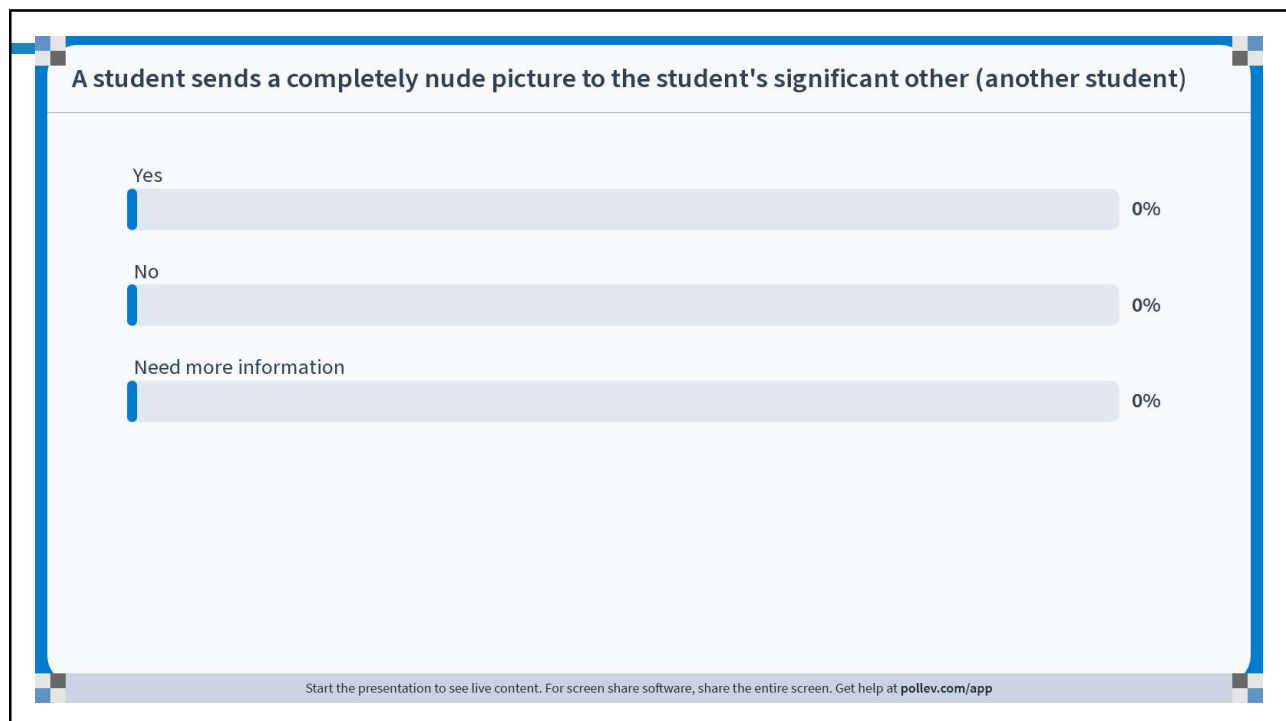
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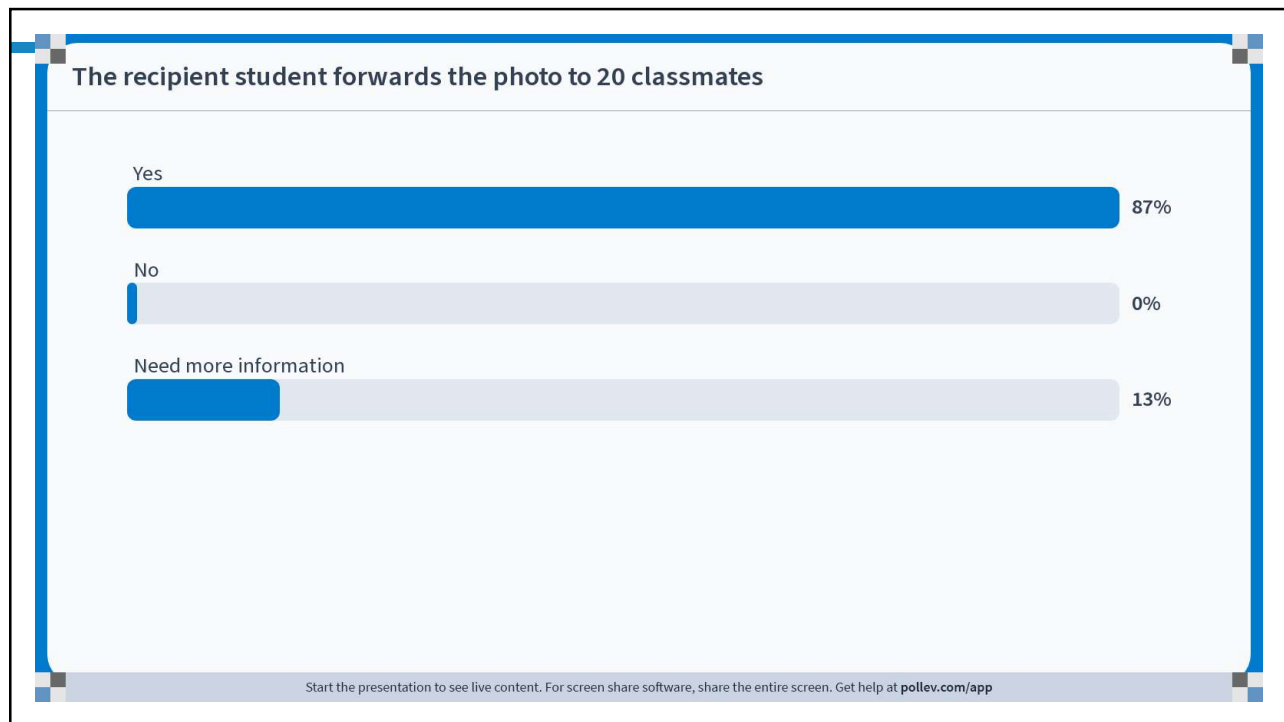
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When must a school respond to Title IX sexual harassment?

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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Title IX Sexual Harassment Must Be “In a Program or Activity”

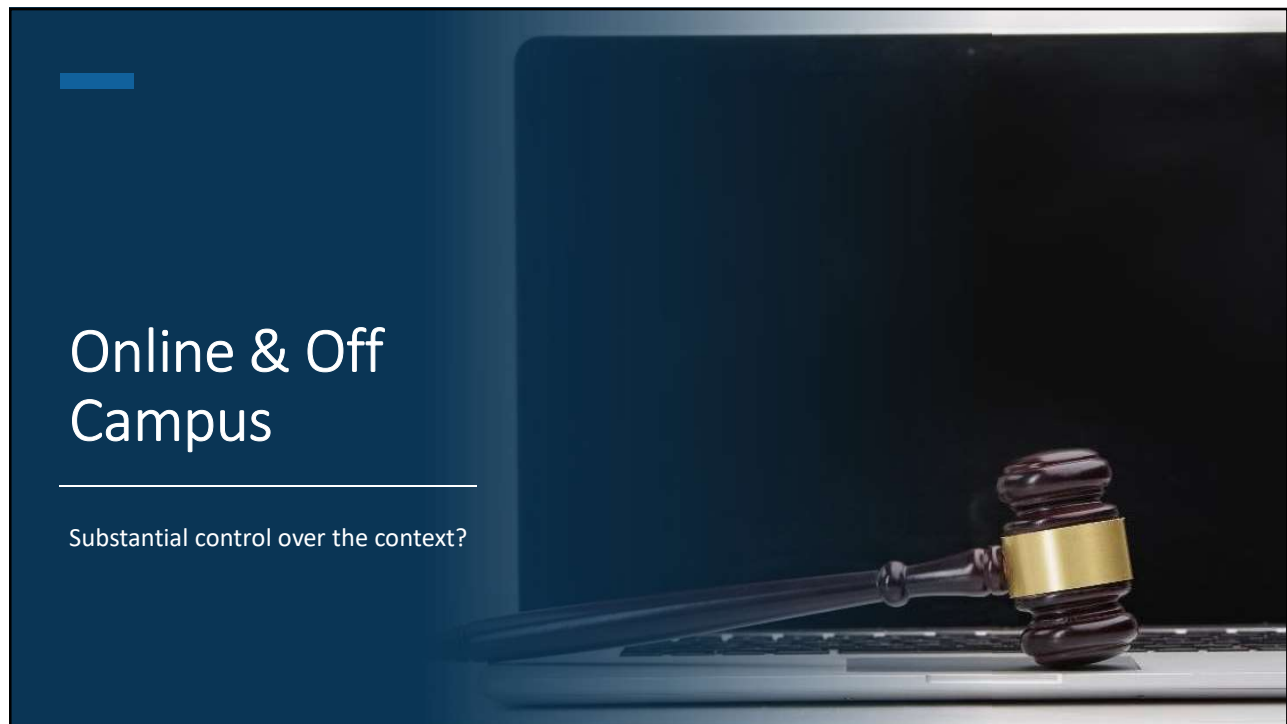


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Program or Activity: Any location, events, or circumstance over which the school exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred

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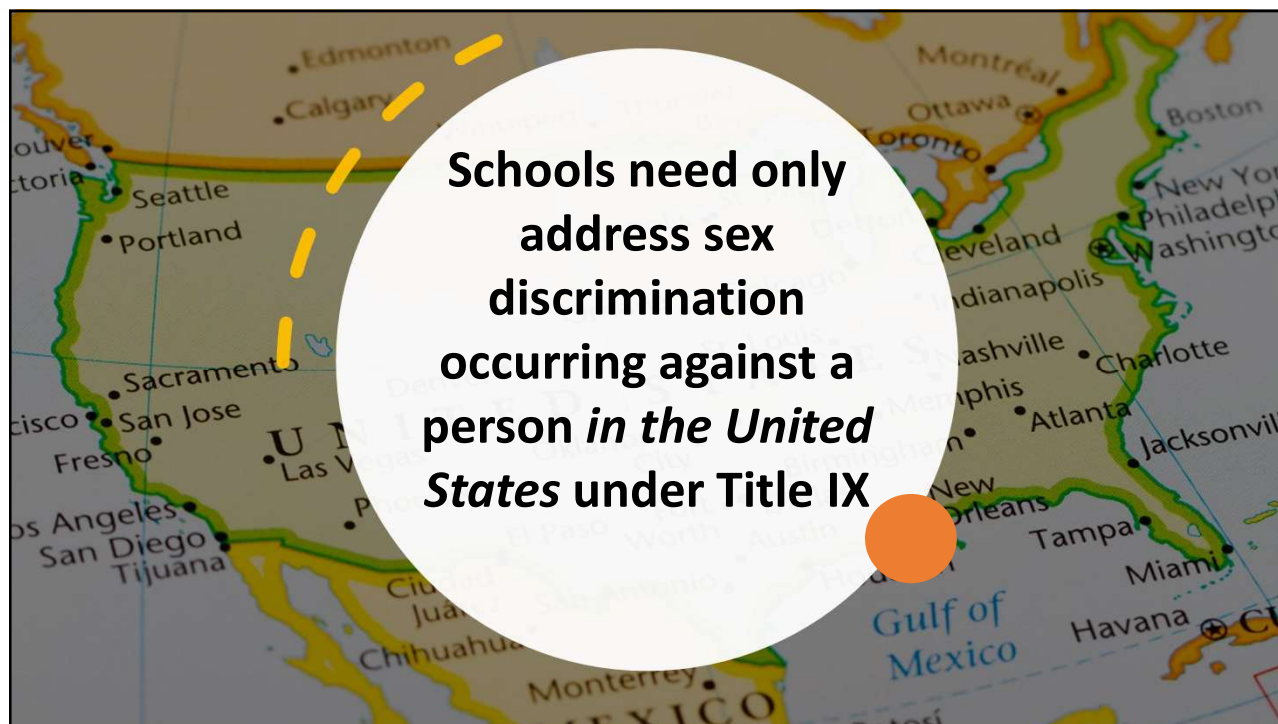


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When must a school respond to Title IX sexual harassment?

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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DISMISSALS

Mandatory if conduct alleged: **Permissive if:**

• Is not Title IX Sexual Harassment • Did not occur in the school's program or activity • Did not occur in the United States **Remember, you can still address under non-Title IX policy	• Complainant requests to withdraw in writing • Respondent's enrollment or employment ends • Specific circumstances prevent school from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant)
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How Must You Respond?

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Purpose: Evaluation

- Key terms
 - Evaluation: collect information to decide what kind of violation has been alleged
 - Intake Meeting: this is not an interview, it is a process to decide which kind of complaint this is and, therefore, what type of procedure to use
 - Investigation: collect information to decide if violation of rule occurred

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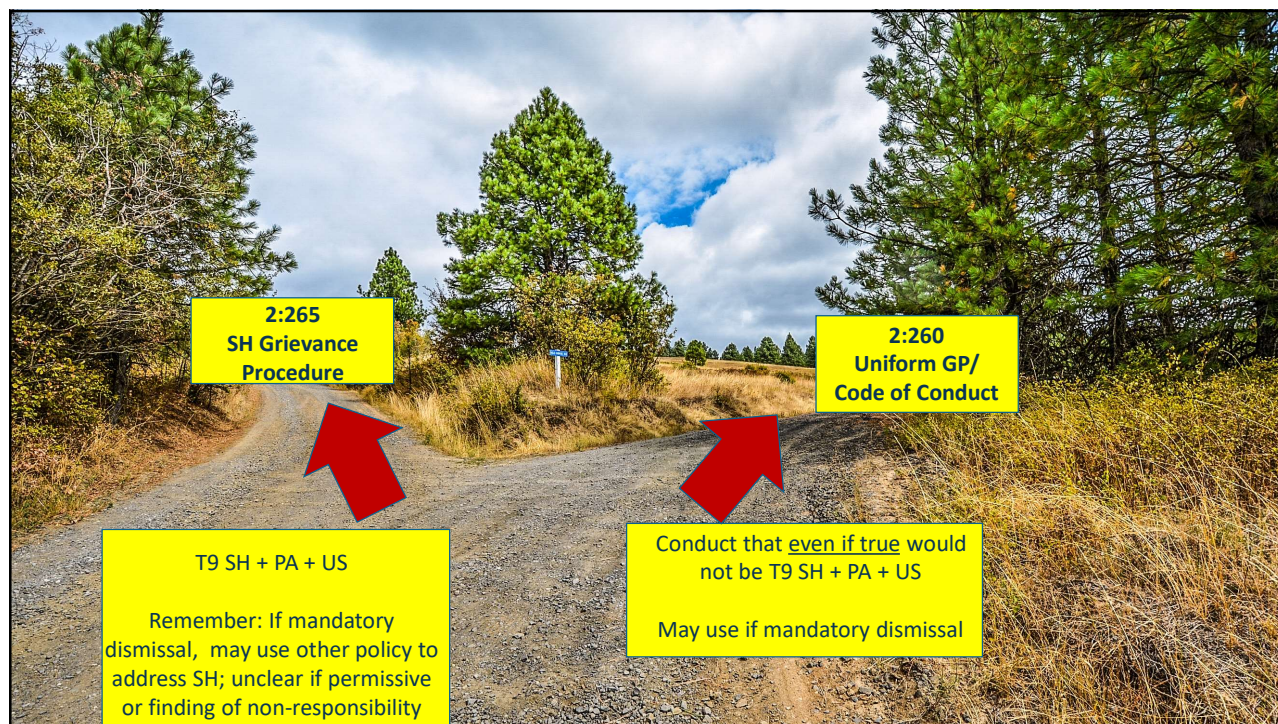
Board Policies on Harassment

- **Option 1: Policy 2:265** Title IX Sexual Harassment Procedure and related administrative procedures (for Title IX Sexual Harassment)
- **Option 2: Policy 2:260** Uniform Grievance Procedure (other sexual harassment, other violations of law and of board policy)
- **Option 3:** Other rules or policies not related to SH

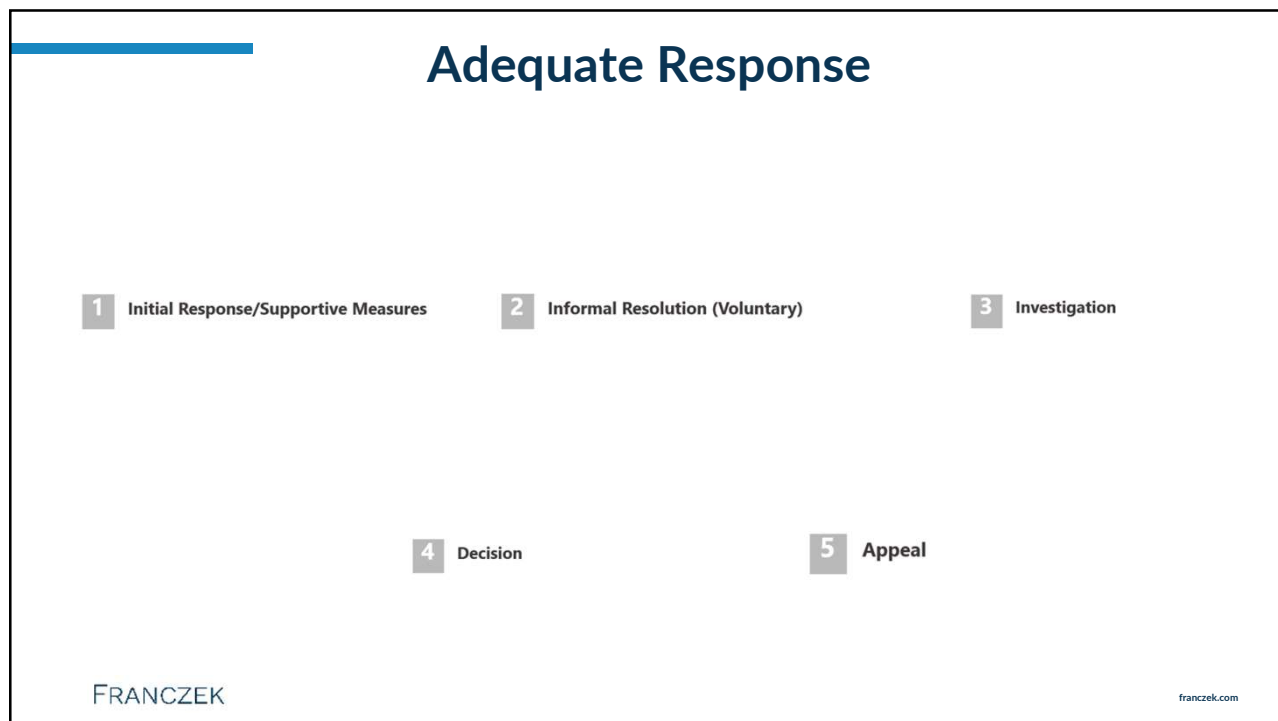
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Initial Response/Supportive Measures

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Title IX Coordinator

- Must be called Title IX Coordinator
- Must meet with alleged victims of sexual harassment (the Title IX Complainant) *upon actual knowledge of TIX sexual harassment even if no formal complaint filed*
- Can delegate responsibilities

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Terminology

Apply to parties in both *reports* and *Formal Complaints* of Title IX Sexual Harassment

Title IX Complainant: A person who is alleged to be the victim of conduct that could constitute Title IX Sexual Harassment

- **NOT** a third party who reports Title IX Sexual Harassment perpetrated against someone else
- **NOT** the Title IX Coordinator, even if the TIXC “signs” a Formal Complaint

Title IX Respondent: A person who has been reported to be the perpetrator of conduct that could constitute Title IX Sexual Harassment

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Title IX Coordinator (or designee) must promptly, **even if no Formal Complaint is filed:**

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

Initial Response

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Formal Complaint

Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).



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Signing a Complaint

Factors to consider



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Supportive Measures

What Changed?

OLD TERM (OCR Guidance)

- Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access
- Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents

NEW TERM (2020 Rule)

- **Non-punitive**, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).
- **Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party**
- **Should be confidential**

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Emergency Removal/ Administrative Leave

Immediate emergency removal

(34 C.F.R. 106.44(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat to physical health or safety**
- **Notice, opportunity to challenge** provided “immediately” provided the removal
- Consider other laws, e.g., expulsion laws (SB100), “change in placement” under IDEA or 504

Employee administrative leave

(34 C.F.R. 106.44(d))

- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements

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2 Informal Resolution (Voluntary)

79

Informal Resolution

INFORMAL RESOLUTION IS NOT REQUIRED	NOT ALLOWED FOR EMPLOYEE -STUDENT	TIMING
• Cannot condition enrollment, employment, or any right on waiver of right to investigation and adjudication of formal complaints under grievance procedure • Both parties must voluntarily consent in writing	• Not available to resolve allegations that employee sexually harassed a student	• Cannot offer informal resolution process until formal complaint is filed • Any time prior to reaching a determination, either party may request informal resolution • Any party has a right to withdraw prior to agreement

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Informal Resolution Facilitators

- We do not recommend using
the Title IX Coordinator or
investigator or decision-maker
(complaint and appeal)

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3 Investigation

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Formal Complaint Response

34 C.F.R. 106.45(b)

- Requires a number of specific steps for investigating
- Major shift from previous, more deferential stance toward specific policies and practices for complaint resolution

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Who should investigate?

- Can be the Title IX Coordinator
- But should it?

84

- Written notice to known parties “upon receipt of written complaint”
- Sufficient time to allow respondent to prepare a response before any **initial** interview
- Must include:
 - Notice of grievance process, including any informal resolution process
 - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)

More Steps: Written Notice

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- Must include:
 - Statement that respondent presumed not responsible and that responsibility will be determined at conclusion of grievance process
 - Notice of parties’ rights to have an attorney or non-attorney advisor and to inspect and review evidence
 - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process
- Must be supplemented if new allegations opened for investigation

More Steps: Written Notice

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Contents of an Investigation

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Investigation 34 C.F.R. 106.45(b)(5)

- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All directly related evidence provided to parties and their advisors with 10 days to respond before report
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility

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Investigation Plans Aren't Static

Reassess plan for
investigation
frequently



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Gathering
Other
Evidence



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Warning! Hands off

- Rape shield (for Complainant) -- *unless*
 - Used to prove someone other than respondent committed the conduct or
 - Specific incidents related to the Respondent to show consent
- Medical records (treatment)
- Privileged information

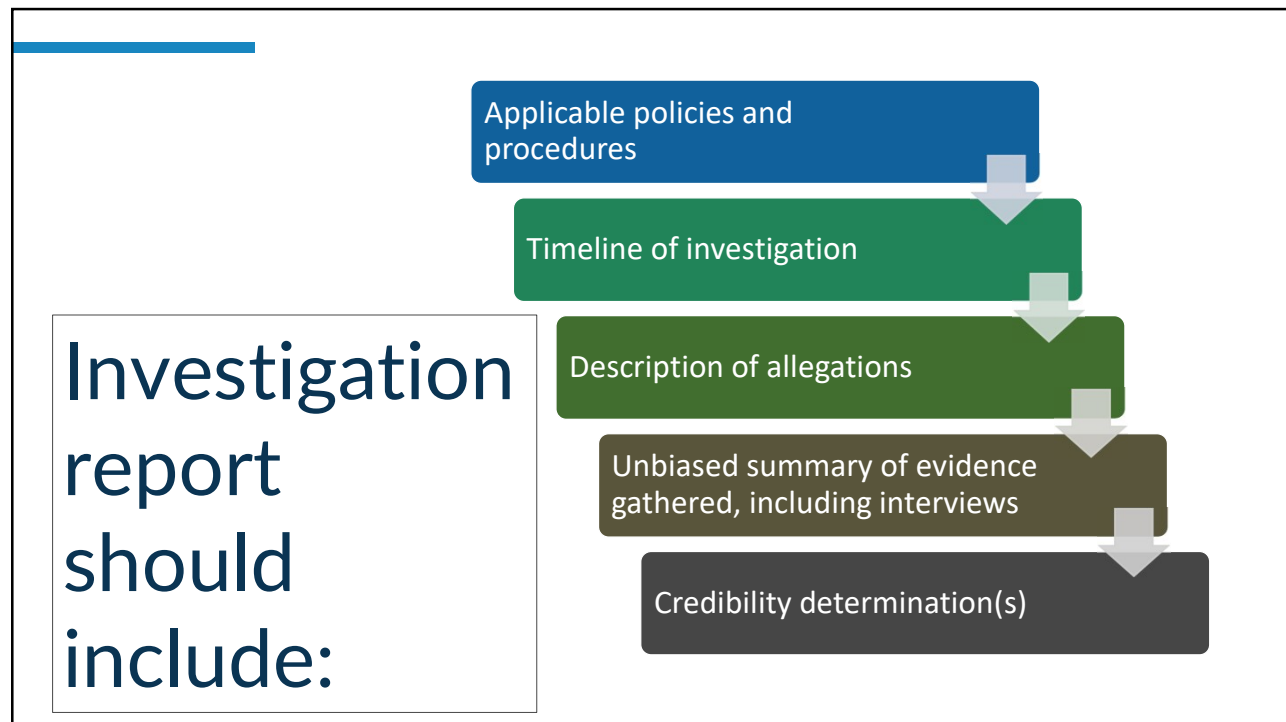
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Opportunity to Review Evidence

- Before the investigatory report is completed, evidence relating to the allegations must be sent to each party and advisor and should include all directly related evidence (including that which the school does not intend to rely upon and exculpatory and inculpatory evidence).
- Parties have 10 days to provide a written response.

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Investigation Report Writing

- Fairly summarizes all relevant evidence
- Provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility

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Decision

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Decision-maker(s) (Complaint)

- Cannot be the Title IX Coordinator or investigator

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Determinations of Responsibility 34 C.F.R. 106.45(b)(6)

- Live hearing with live cross by party advisors **required** for higher ed, **not K-12**
- Live hearing **permitted** for K-12
- Each party allowed to submit written, **relevant** questions to be asked of another party or witness to the decision-maker, who will provide each party with the answers and the opportunity for follow-up questions

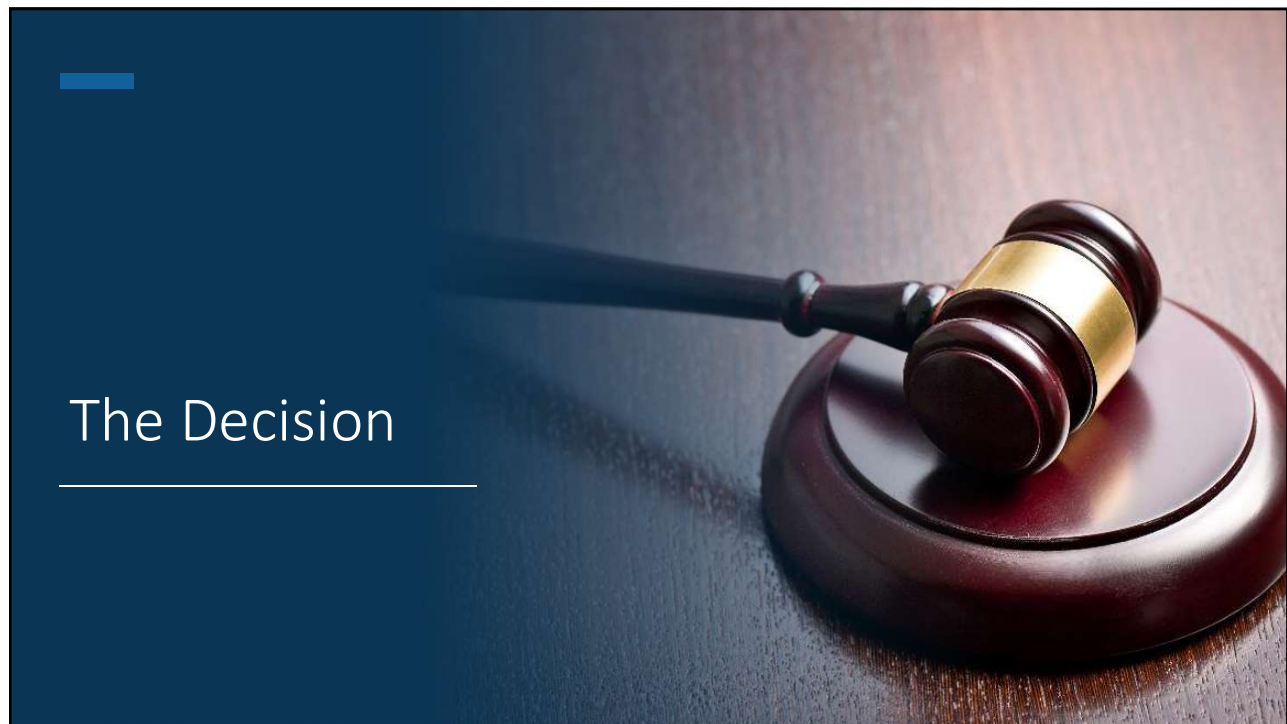
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Rulings on Relevance in Written “Cross”

- Provide reasoning for irrelevance
- Admit and consider all relevant evidence
- Questions must be appropriate
- Identify exceptions
- No improper inference

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Written Determination	Identify	Identify the allegations
	Describe	Describe procedural steps taken
	Cite	Cite potential policy violations
	Summarize	Fairly summarize all relevant evidence
	Provide	Provide statement of result, with rationale, for each allegation
	Appeal	Appeal procedures

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**Remember the
Standard of
Proof**

**Preponderance
of the Evidence**

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Remedies

- Can be punitive/disciplinary
- Can be supportive measures or similar actions as well
- Can address individuals or larger community

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5 Appeal

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Appeal Process

Process

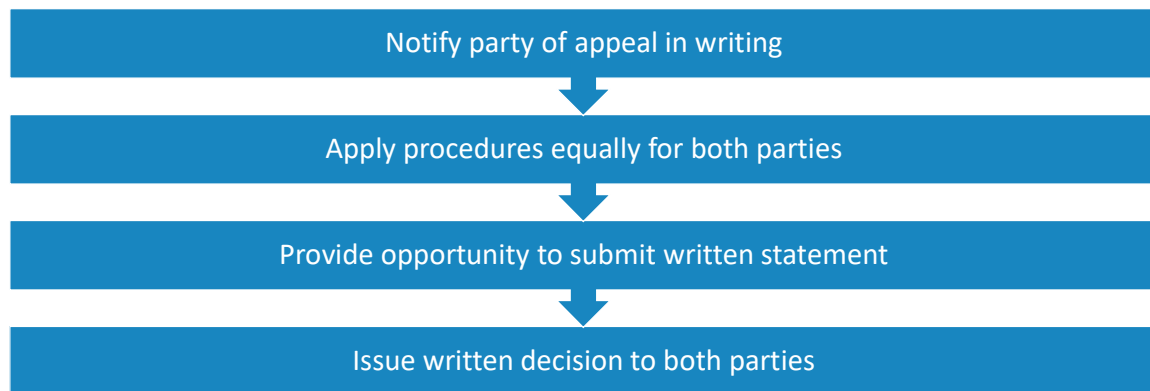
- Available to both parties
- Appeal dismissal or determination

Bases for appeal (must impact outcome)

- Procedural issue
- New evidence
- Bias/conflict of interest

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Appeal Process



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**Decision-maker
(Appeal)**

Cannot be the Title IX
Coordinator or investigator or
decision-maker (complaint)

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Bias, Conflict, Prejudgment

The Title IX Coordinator, investigator, decision-maker, or informal resolution facilitator 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.

Also, they may not prejudge any matter before them.

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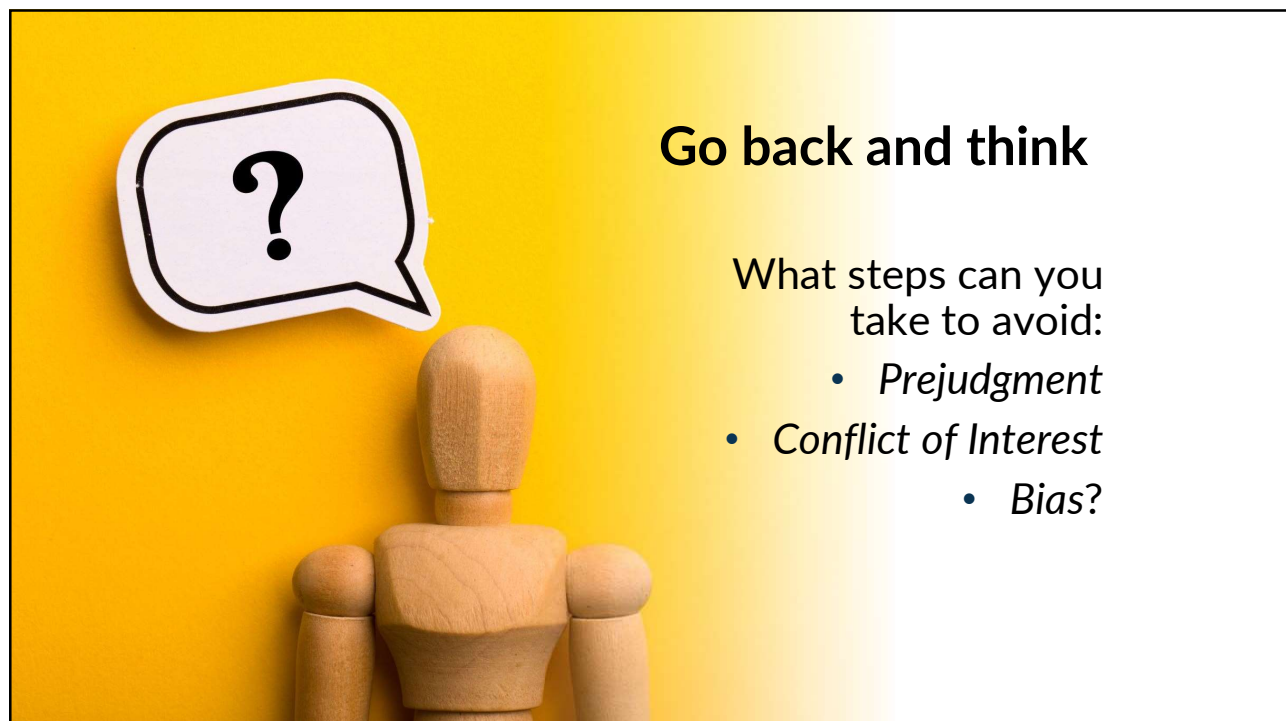


Bias, Conflict, Prejudgment

Consider *perceptions*, not just reality:

- Institutional bias
- Your friendship or other relationship with the accused or their family
- Your personal characteristics
- Your personal conflicts (even if just perceived)
- Personality conflicts

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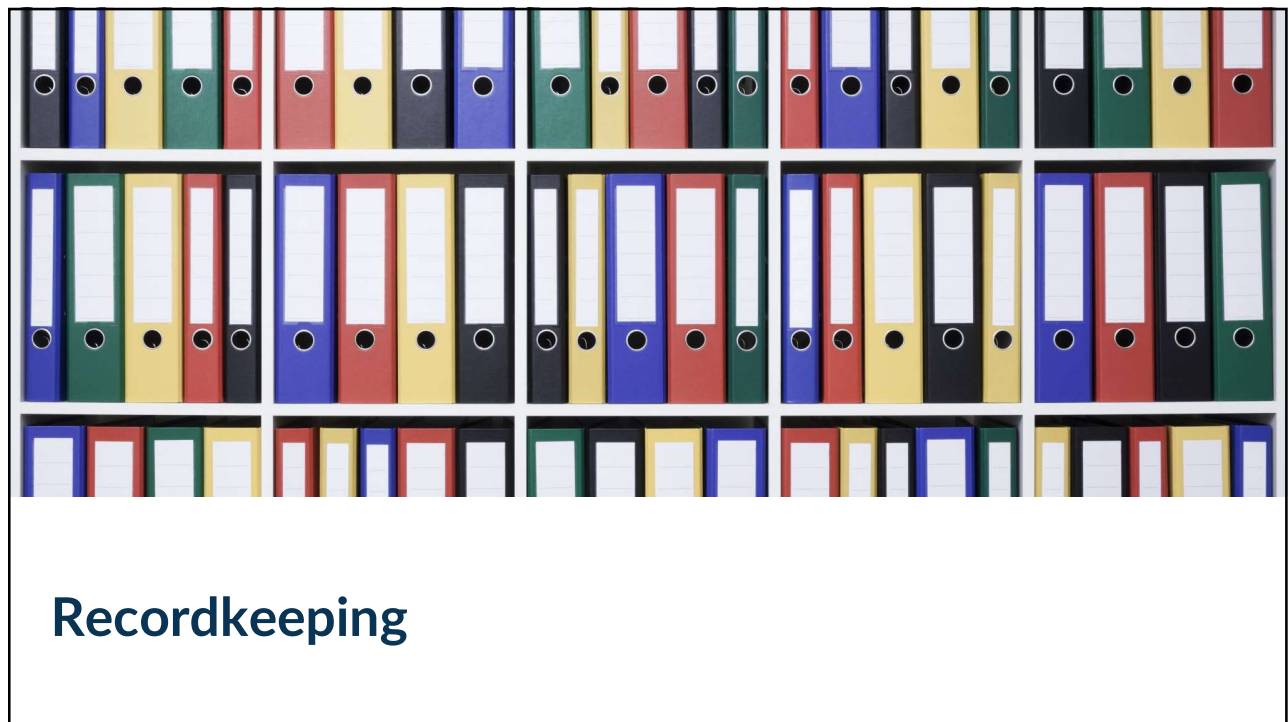


Go back and think

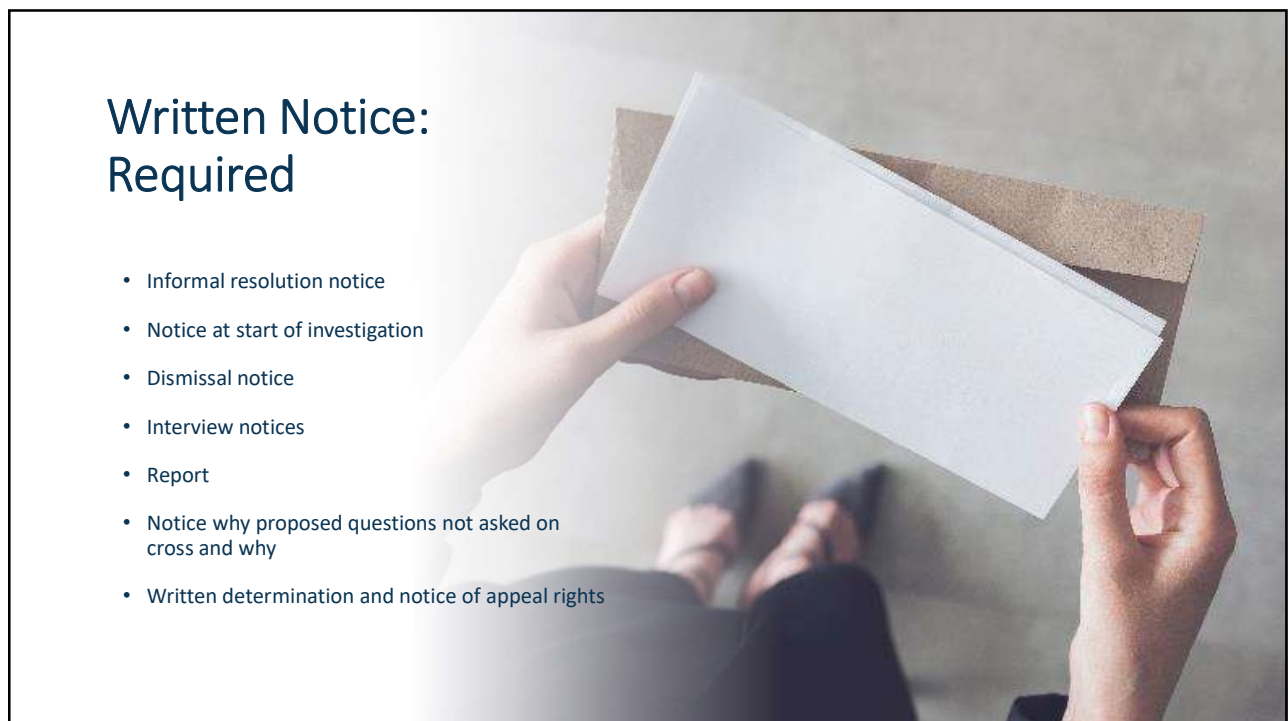
What steps can you take to avoid:

- *Prejudgment*
- *Conflict of Interest*
- *Bias?*

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Written Notice: Recommended

- Document information to Complainant at initial meeting, including supportive measures requested/provided
- Document evidence provided to both parties
- Document opportunity to ask questions, answers, follow-up questions, etc.

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Recordkeeping

Must maintain the following for 7 years:

- Sexual harassment investigation documents, including:
 - Determination regarding responsibility
 - Recordings or transcripts of live hearing
 - Disciplinary sanctions imposed on Respondent
 - Remedies provided to Complainant
- Appeal and result
- Informal resolution and result
- Actions taken in response to a report of sexual harassment
- Actions taken in response to a formal complaint of sexual harassment

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Recordkeeping

Responses to formal and informal complaints and actions taken in response should include:

- The basis for the school's conclusion that its response was not deliberately indifferent
- Documentation that it has taken measures designed to restore or preserve equal access to the school's education program or activity
- Supportive measures or, if no supportive measures are provided, the reasons why such a response was not clearly unreasonable in light of the known circumstances

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Questions



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