

K-12 Title IX Administrator Certification Conference

**Austin, Texas and Virtual
September 13–14, 2023**

DAY ONE

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Today's Presenters



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BECAUSE IT'S NOT JUST BUSINESS

IT'S PERSONAL

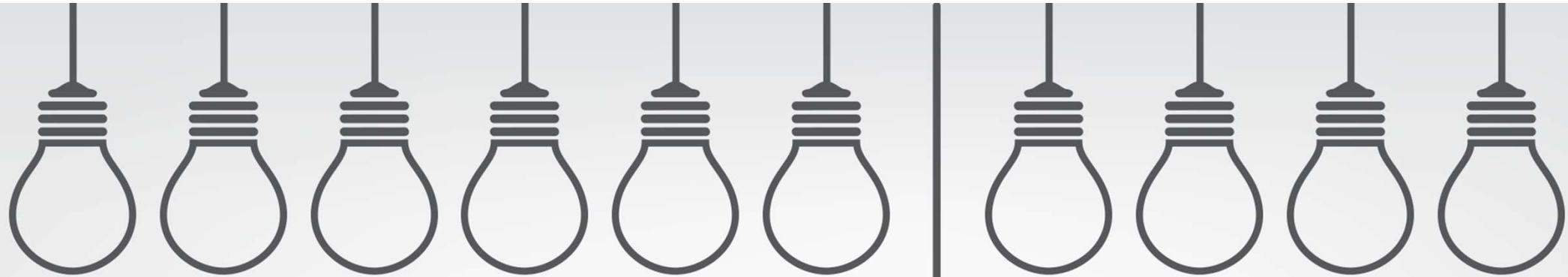
LEGAL REPRESENTATION FOR EDUCATION, GOVERNMENT, AND PRIVATE BUSINESS

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Take Care



Ground Rules

- Ask questions/share perspective
- Not legal advice/keep it hypothetical
- Materials will be available for website posting



DAY ONE (11 a.m. – 5 p.m.)

- ✓ Introduction to Title IX
- ✓ Break (12:15 – 12:30 p.m.)
- ✓ Title IX Beyond Sex-Based Harassment (working lunch)
- ✓ Introduction to Title IX Sexual Harassment
- ✓ Break & Snack (3:45 p.m. to 4 p.m.)
- ✓ Prevention and Enforcement



Polling Access



Option One

Use this QR code

Option Two

- ▶ Go to Pollev.com on any browser
- ▶ Accept or dismiss cookies
- ▶ Enter THLAW411 as the Username
- ▶ Skip when asked to enter your name

My role with Title IX is:

8

Coordinator

Deputy
Coordinator

Investigator

Decision-
Maker

Appeal
Decision-
Maker

Informal
Resolution
Faciliatator

Legal

Other



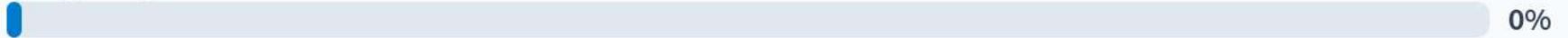
The issue that most keeps me up at night as a Title IX administrator is....

Transgender issues



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Pregnancy accommodations



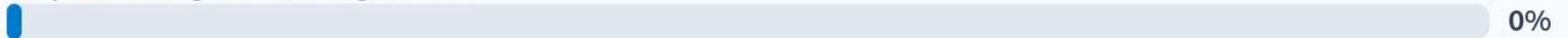
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Sexual harassment concerns



0%

Implementing the new regulations



0%

Something else (share out!)



0%



Introduction to Title IX



Introduction to Title IX

- ✓ Title IX Law and Regulatory Requirements
- ✓ Title IX Enforcement
- ✓ Interplay Between Title VII and Title IX
- ✓ Overview of Title IX Coordinator Responsibilities



Rank these sources of Title IX authority from most to least authoritative for OCR

OCR Guidance



Title IX Statute



OCR Title IX Regulations



OCR Decisions



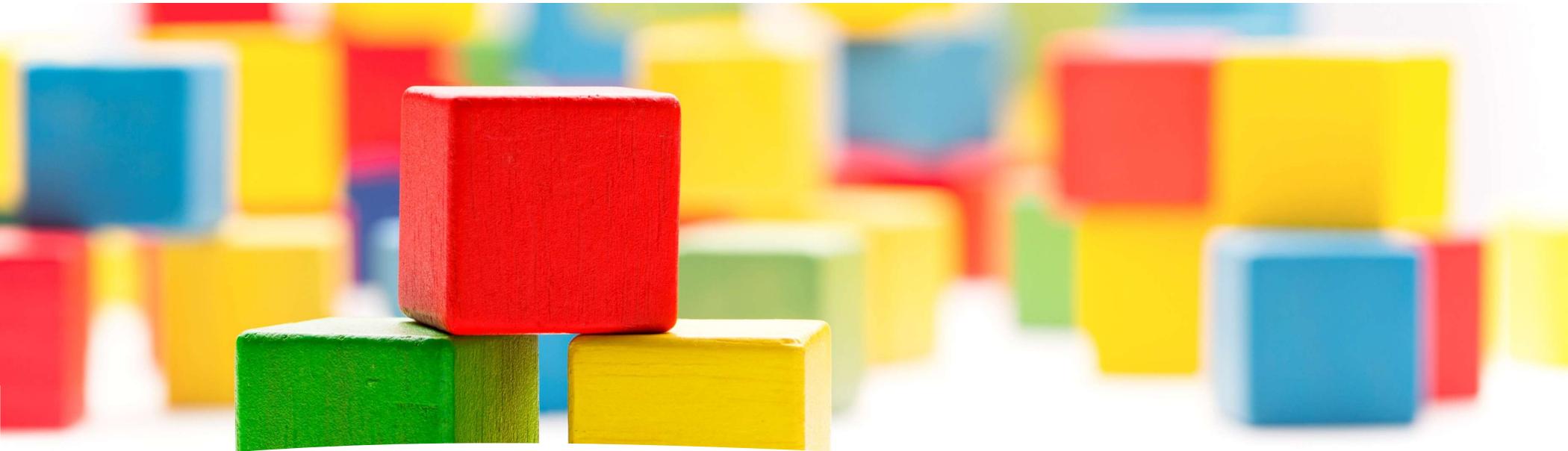


Law and Regulatory Requirements

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

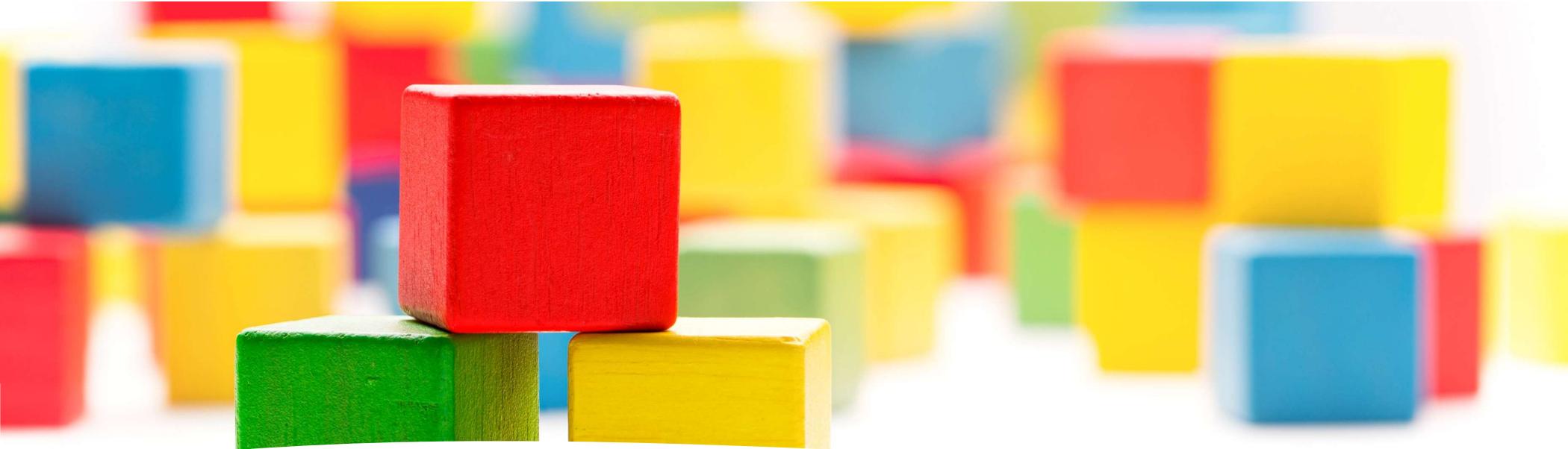
The Patsy T. Mink Equal Opportunity in Education Act, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)





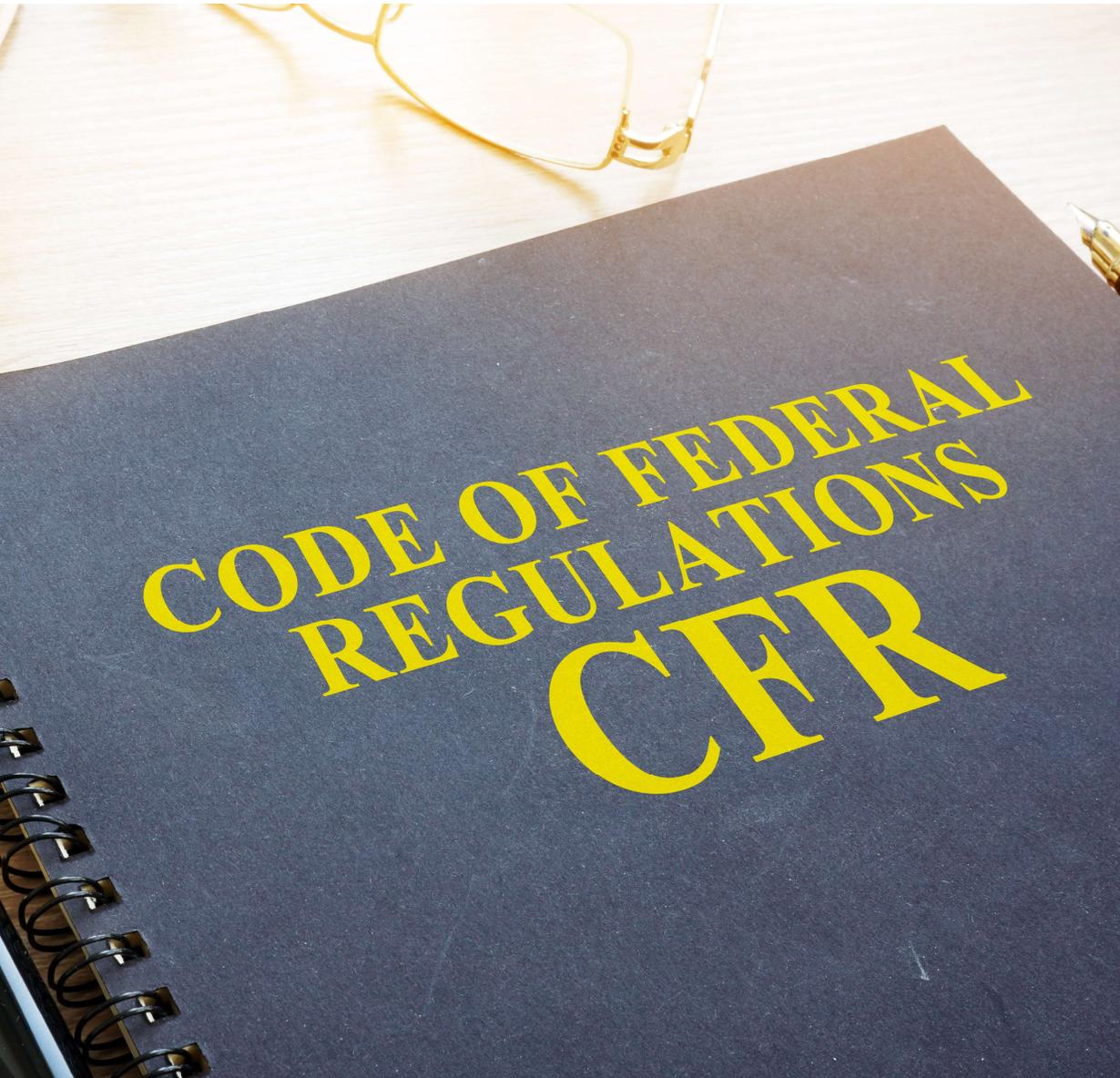
Title IX Basics

- Conditions the receipt of federal money on a promise not to discriminate
- Guarantees equal educational opportunity in federally funded educational programs and activities



Title IX Basics

- Purpose was to remove barriers that prevent women from participating in educational opportunities and careers based on sex—but the law applies equally regardless of sex or gender
- Applies to all aspects of educational institutions programs and activities including admissions, all aspect of operations, and employment



“The Regs”

T&H

What is the difference between a regulation and guidance?

An educational institution must comply with a regulation, but guidance is only suggested

0%

An educational institution's funding can be removed for violation a regulation, but not guidance

0%

Nothing, both have the force of law

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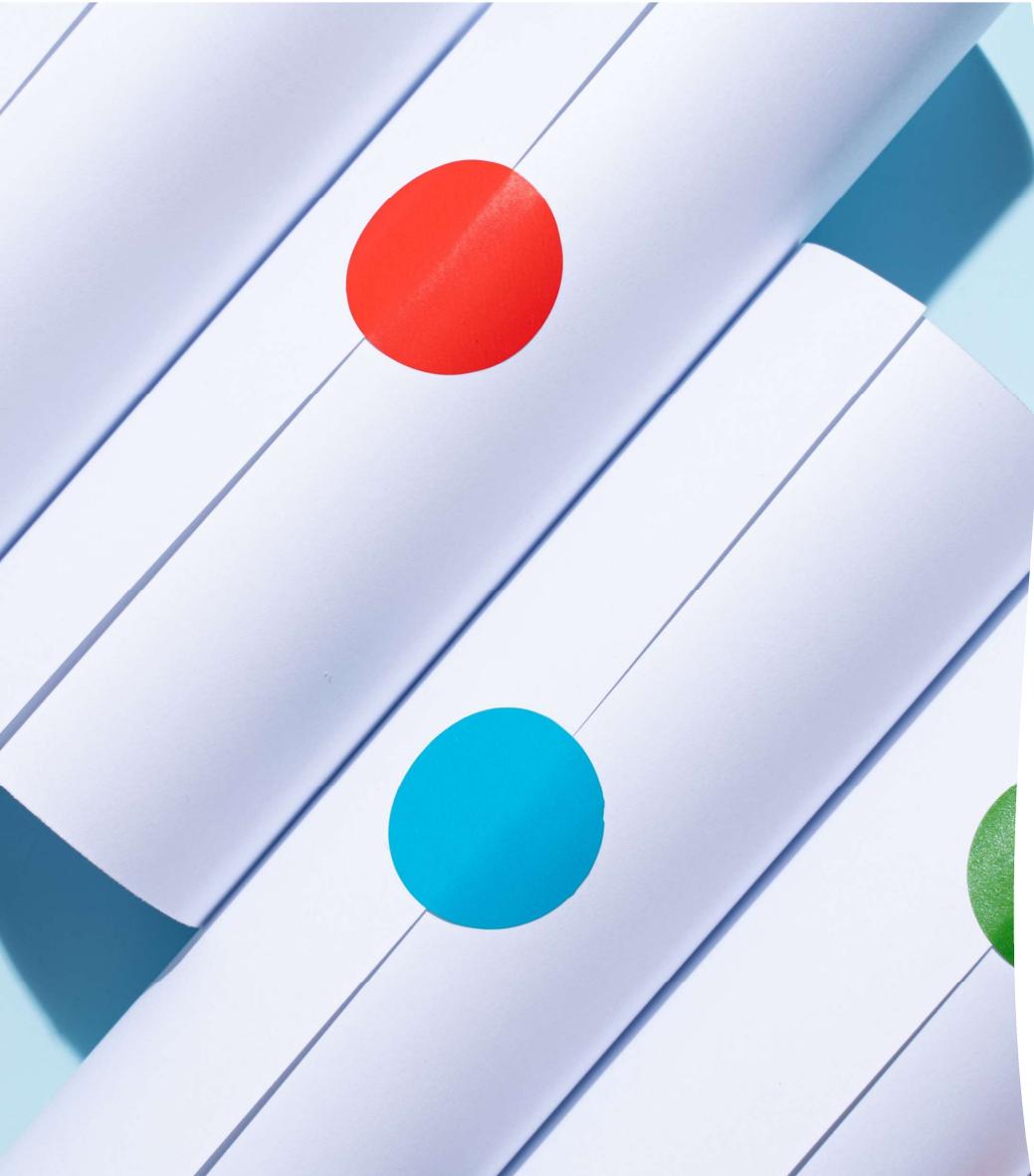
Title IX Regulations

- Issued by the U.S. Department of Education's Office for Civil Rights
- "General statement" with the "effect of law"
- Think a school board's policy (law) vs. the district administration's procedures (regulations)
- OCR can also issue "guidance" which purportedly does not create new law (but often does in practice!)

A close-up photograph of a mechanical device, possibly a coin-operated scale or a similar instrument. The device features a coin slot on the left side with a red label that reads "50¢". Below the slot is a dial with a needle and a small window. The device is made of polished metal and has a textured surface. The background is a dark, solid color.

Regulatory Scope

- Recruitment, admissions, and counseling
- Financial assistance
- Athletics
- Sex-based harassment (including sexual assault and violence)
- Treatment of pregnant and parenting students
- Treatment of LGBTQI+ students
- Discipline
- Single-sex education
- Employment
- Retaliation

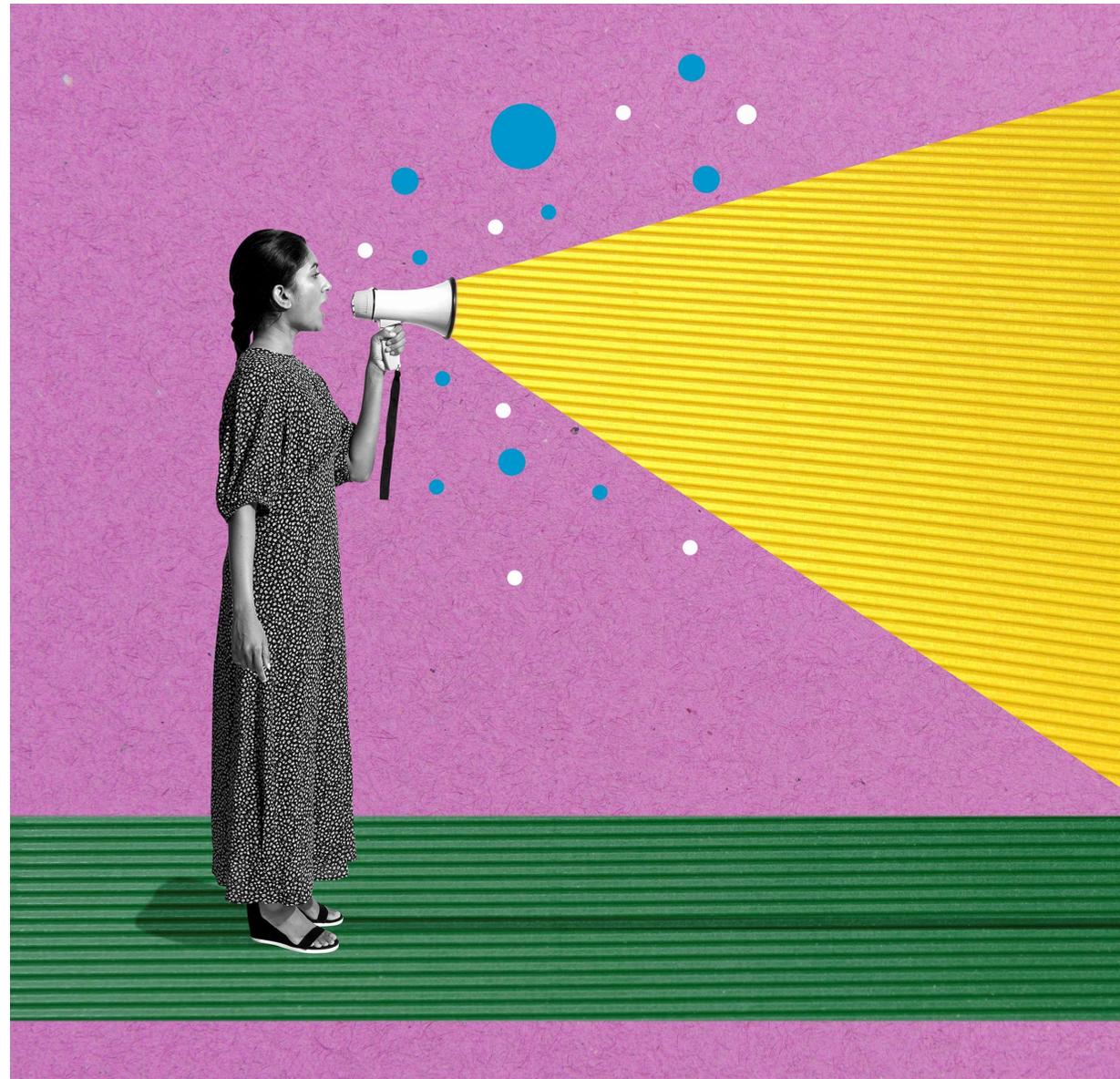


Key Title IX Procedural Requirements

- Nondiscrimination notice
- Grievance procedures
- Easily understood and widely distributed

Key Title IX Procedural Requirements

- Designate a Title IX Coordinator
- Posting and sharing of contact information





Title IX Enforcement

Title IX Enforcers



OCR

- Regional offices across the U.S., including D.C.
- Low bar for opening complaints
- Remedies typically include policy changes, training, other remedial efforts



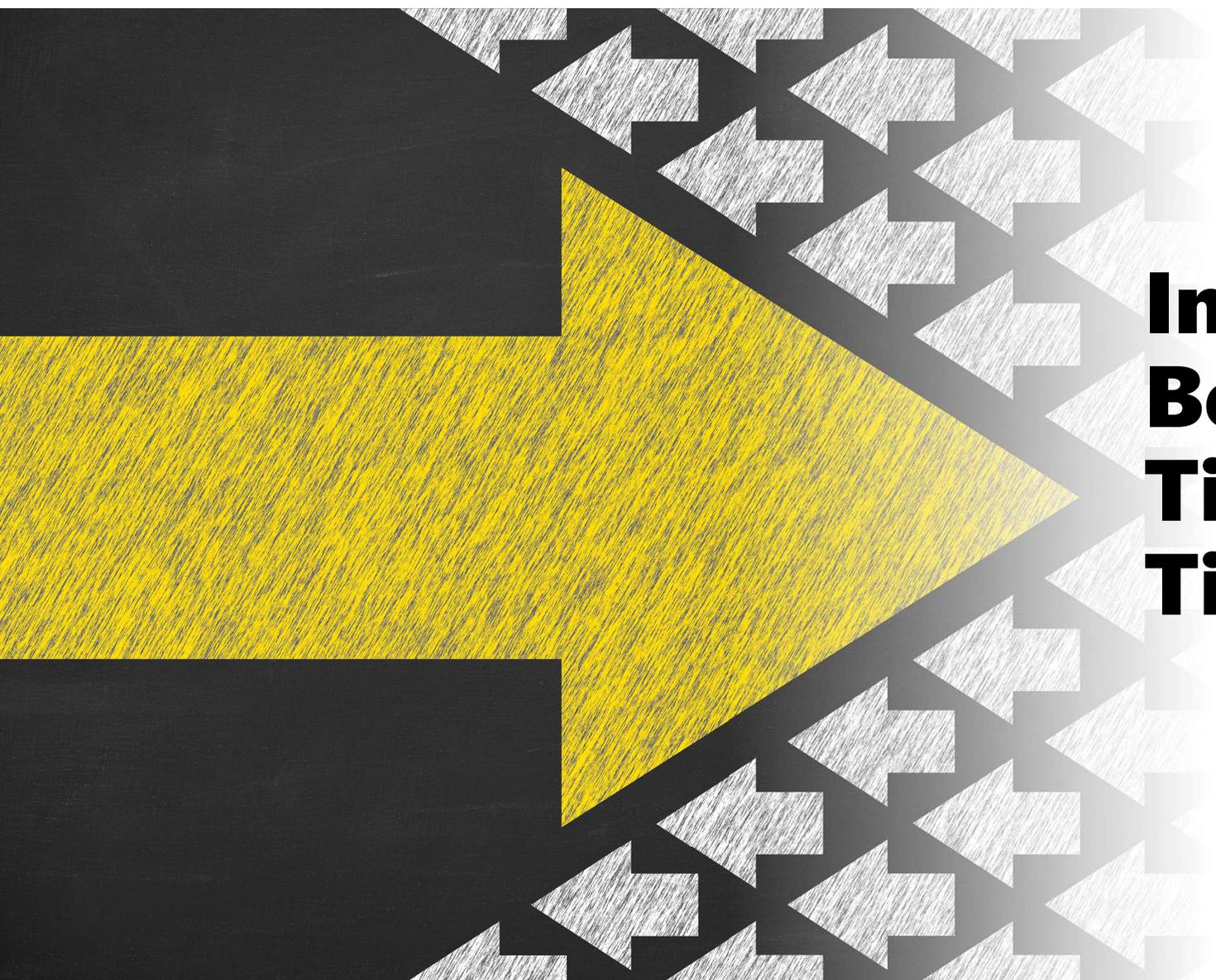
Department of Justice

- Based in D.C.
- Typically handle higher profile cases
- Investigatory and resolution processes are similar to OCR, but can file Federal lawsuits



Federal Courts

- Individuals who believe their rights have been violated can sue the school
- Intense litigation process
- Can lead to significant monetary damages



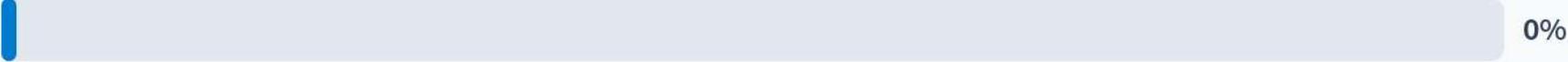
**Interplay
Between
Title VII and
Title IX**

My District uses Title IX for complaints involving employees?

Yes, in all cases



Yes, but only if a student is the respondent or complainant



Yes, but only in cases of alleged employee-on-student conduct



No, we do not use the Title IX process for cases that involve an employee





Title IX v. Title VII

- Title VII of the Civil Rights Act of 1964
- Before the 2020, most educational institutions used Title VII, not Title IX, for complaints by an employee
- There are some key differences between the two laws

Some Key Differences

Issue	Title IX	Title VII
Definition of sexual harassment	Severe, pervasive, and objectively offensive Effective denial of access	Severe or pervasive Impact on access
Notice required for employer responsibility	Actual knowledge (actual notice)	Actual or constructive (should have known)
Country Jurisdiction	In the U.S. only	Can cover outside of the U.S.
Who Investigates	No single investigator model (different investigator and decisionmaker)	Same person often investigates and decides responsibility
Investigation Information Shared	Sharing directly related evidence and full final report required	Neither required
Right to Confront Other Party	Required (Written Q&A)	Not required



Introduction to Title IX Coordinator Responsibilities

Coordinator Recommendations

- Authority
- Independence
- Full-Time
- Deputies
- Knowledge
- Supported

[2015 OCR Guidance to Coordinators \(rescinded but still useful for some things!\)](#)

Coordinator Responsibilities

- Involved in everything Title IX
- Works closely with District leadership and legal counsel
- Knows and helps draft/revise the District's policies and procedures
- Coordinates implementation and administration of grievance processes
- Monitors outcomes, identify patterns, and assesses effects on the campus climate
- Develops a method to survey the school climate and analyze information obtained

[2015 OCR Guidance to Coordinators \(rescinded but still useful for some things!\)](#)

Coordinator Responsibilities

- Monitor students' participation in athletics to identify disproportionality or negative effects on a gender
- Regularly assess the adequacy of training opportunities and propose improvements as appropriate
- Train and provides technical assistance to members of the school community
- Oversee deputies and other designees
- Work closely with other members of the school community where job responsibilities intersect with Title IX

[2015 OCR Guidance to Coordinators \(rescinded but still useful for some things!\)](#)



BREAK

15 Minutes



Title IX Beyond Sex Based Harassment



Title IX Beyond Sex-Based Harassment

- ✓ Disparate Impact & Treatment
- ✓ Athletics
- ✓ Pregnant & Parenting Students
- ✓ Discipline
- ✓ Single-Sex Education
- ✓ Employment
- ✓ Retaliation



Since 2020, my district has had a complaint in the following non-sexual harassment Title IX areas

- Different treatment or impact
- Athletics
- Pregnant & parent...
- Discipline
- Single-Sex Education
- Employment (Title IX Complaint..
- Retaliation
- None of the above



Title IX Beyond Sex-Based Harassment

- ✓ **Disparate Impact & Treatment**
- ✓ **Athletics**
- ✓ **Pregnant & Parenting Students**
- ✓ **Discipline**
- ✓ **Single-Sex Education**
- ✓ **Employment**
- ✓ **Retaliation**



Remember

- Different process than sex-based harassment (for now!)
- Just as important (and risky!)
- Training is essential (spotting, reporting, responding—or not!)



Scenario

Several students spoke up at a school board meeting saying their school district removed books because of LGBTQ content or authorship. Others claimed books were removed because they championed principles of diversity, equity, and inclusion, including based on sex. The students reported feeling targeted, marginalized, and unwelcome because of the book bans.

Different Treatment Test

Treating similarly situated persons differently because of sex

1. Was the aggrieved person a member of a protected class (sex, gender, sexual orientation, gender identity)
2. Was the aggrieved person treated differently?
3. Is there a legitimate, non-discriminatory reason for the different treatment?
4. Is there evidence that the reason is pretext for unlawful discrimination?

Disparate Impact

A neutral (non sex-based) rule has a negative impact on one protected class (sex, gender, sexual orientation, gender identity)

1. Does a neutral policy result in an adverse impact on students of a particular sex, gender, sexual orientation, or gender identity
2. Is the applicable policy necessary to meet an important educational goal
3. Is there a comparably effective alternative available that would meet the stated educational role with less of a burden or adverse impact on the disproportionately affected group

Scenario

A student reports to her teacher, Teacher A, that she is pregnant. Teacher A is extremely supportive, allowing the student to sit at a table in the classroom instead of a small desk and re-opening closed assignments and tests for the student to complete.

Another teacher, Teacher B, noticed that the student looked pregnant, but the student didn't feel comfortable talking to Teacher B about it. Neither Teacher A nor Teacher B referred the student to the Title IX Coordinator. The student's grades began to suffer in Teacher B's class, in part due to pregnancy-related attendance issues due to complications with her pregnancy.

Scenario

Parents on a Facebook comment thread (not affiliated with the school district) complain at how much nicer the boys baseball playing field, including dugouts, are than the girls. The girls team also does not have access to a team room, whereas the boys' baseball players do. The differences are based on booster clubs and parent donations, which all teams have equal opportunity to get. A parent of a female student who plays softball also complains that her daughter and a large group of girls have been asking for a gymnastics team for years but they are always told it's "too expensive."

Athletics

- Title IX requires *equal opportunity* in athletics, including club, intramural, and interscholastic teams
- Equal opportunity is measured by:
 1. The benefits, opportunities, and treatment given to boys and girls teams and
 2. How a school is meeting students' athletic interests and abilities

Benefits, Opportunities, and Treatment

13 "program components"/the "Laundry List"

- Equipment and Supplies
- Scheduling of Games and Practice Times
- Travel and Per Diem Allowance
- Coaches
- Tutors
- Locker Rooms and Facilities
- Medical and Training Services
- Housing and Dining Services
- Publicity
- Recruitment
- Support Services

The Three Prong Test

For Interests and Abilities

Prong 1: Proportionality

Percentage of students vs. percentage of athletes per sex

Prong 2: Expansion

History of continuing practice of expansion

Prong 3: Accommodation

Accommodating interests effectively

Scenario

A student reports that their teacher has been sexually harassing them. The teacher claims that the student is angry about a grade on a test. An investigation finds insufficient evidence to support the allegations and so concludes the teacher is not responsible for sexual harassment. The teacher returns from leave to teach the class that the student is in, but asks that the student be moved to a different classroom because of fear that the student will misinterpret things again. The teacher also tells several other teachers at the school to “be careful” because the student might do this to them, too.

Retaliation

- Intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX or implementing policies, or because the individual made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing regarding conducted prohibited by Title IX or implementing policies
- Charges against an individual for code of conduct violations that do not involve Title IX sex-based harassment, arise out of the same facts or circumstances as a report or complaint of sex-based harassment, for the purpose of interfering with any right or privilege secured by Title IX or implementing policies is retaliation.

Retaliation Test

1. Did the aggrieved person engage in protected activity?
2. Did they suffer an adverse consequence?
3. Is there a causal connection between the activity and the consequence?
4. Is there a legitimate, non-retaliatory reason for the adverse conduct?
5. Is there evidence that the reason is pretext for unlawful retaliation?



Introduction to Title IX Sexual Harassment



Title IX Beyond Sex-Based Harassment

- ✓ What is Sexual Harassment
- ✓ Young, Incapacitated, and Neurodivergent Parties



**THIS IS
OUR AGENDA**



What is Title IX Sexual Harassment?

2020 Title IX Rules

- Issued by the Trump administration's Office for Civil Rights
- Effective August 14, 2020
- Will be in effect at least until December 2023
- Include significant requirements for handling complaints of sexual harassment under Title IX

2022 Proposed Rules

- Issued by the Biden administration in proposed form on June 23, 2022
- Comment period ended September 12, 2022
- Department of ED will review and respond to all comments in the final rule
- Purported release date for final rule was May or June 2023, with an effective date in August 2023
- In May the Department backtracked, pushing to October for a final rule, which would mean Dec 2023/Jan 2024 would be the earliest possible effective date; that date recently has been reported to be pushed back again because of regulatory requirement deadlines that have passed
- Will change many of the requirements for handling complaints and apply to all sex discrimination, not just sex-based harassment

The Good News...

- Steps taken so far aren't wasted
- More time to think and plan
- Can begin updating now





The Bad News...

- Double the work
- Current rules aren't great
- Mid-year roll-out risk

What Not To Do Now

- Use your “Title IX Grievance Process” for Title IX matters other than sex-based harassment
- Use that grievance process for conduct that does not meet the definitions of “sexual harassment” under the current rules

A photograph of a small, fluffy kitten with brown, black, and white patches lying on its back on a blue and white striped blanket. The kitten's front paws are raised and crossed, and its hind legs are also raised. The kitten's eyes are partially closed, giving it a sleepy or relaxed expression. The text "Settle Into the 2020 Rules" is overlaid in the center of the image in a bold, white, sans-serif font.

Settle Into the 2020 Rules

The 2020 Title IX Rules

What do they require?



Designate

A Title IX Coordinator



Identify

The Title IX Coordinator to your community, including by posting contact information (including email) online



Post

Post all training materials used to train Title IX team members on your district website

The 2020 Title IX Rules

What do they require?



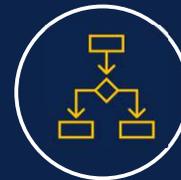
Train

Title IX Coordinator, Investigators, Decision-makers, Appeals Officers, and Informal Resolution Facilitators



Policy & Procedure

Have and share publicly a policy prohibiting Title IX sexual harassment and a grievance procedure



Process

Use the policy and grievance process any time a report of covered conduct is received

When Does the T9SH Process Apply?

1

When any district "official with authority" has actual knowledge...

2

of "Title IX Sexual Harassment"...

3

"in an education program or activity" of the college...

4

and "against a person in the United States"...

If the T9SH Process Applies...

If **any “Official With Authority”** is aware of any information **even suggesting** that “Title IX Sexual Harassment” “in an education program or activity” and “against a person in the U.S.” **is, has been, or might be happening**, the school cannot impose punitive or disciplinary consequences on the alleged perpetrator **until it has used the Title IX sexual harassment process**

Two Parts of the Analysis

What Conduct is Covered?

- ▶ "Title IX Sexual Harassment"*
 - ❑ "The Big Five"*
 - ❑ "Title IX Hostile Environment Harassment"*
- ▶ "In an Educational Program or Activity"
- ▶ "Against a person in the United States"

* Not regulatory terms

What Process Applies to Covered Conduct?

- ▶ Supportive Measures/Notice of Process to Complainant
- ▶ Formal Complaint
- ▶ Notice to Parties*/Supportive Measures to Respondent
- ▶ Informal Resolution*
- ▶ Investigation*
- ▶ Hearing*
- ▶ Decision*
- ▶ Appeal*

* Only if a formal complaint is on file

The Title IX “Threshold Questions”

Would the alleged conduct, if substantiated, be:

1. Title IX “Sexual Harassment”
2. In an “educational program or activity” of the educational institution
3. Against a person in the United States?

If the answer to **all of these questions** is yes, the conduct is covered by the Title IX grievance process and the process **must be used** to address the reported behavior

Title IX “Sexual Harassment”

The Title IX “Big Five”

- ▶ Employee Quid Pro Quo
- ▶ Sexual Assault*
- ▶ Domestic Violence*
- ▶ Dating Violence*
- ▶ Stalking*

*VAWA/Clery Crimes

Title IX “Hostile Environment”

- ▶ Unwelcome Conduct
- ▶ Based on Sex
- ▶ That is so severe
- ▶ And pervasive
- ▶ And objectively offensive
- ▶ That it effectively denies equal access to the educational program or activity

#1 Employee Quid Pro Quo

- An employee of the educational institution
- Conditioning the provision of an aid, benefit, or service of the educational institution
- On an individual's participation in unwelcome sexual conduct



#2 Sexual Assault

- Rape (sexual penetration—anal or vaginal—however slight with any body part or object without consent)
- Forced sexual acts, including oral sex
- Fondling (touching of the private body parts of another person without consent and for the purpose of sexual gratification)
 - Incest
- Statutory Rape



**The
“Big 5”**

#3 Domestic Violence

- Felony or misdemeanor crimes of violence
 - Committed by:
 - The victim's current or former spouse or intimate partner
 - A person with whom the victim shares a child
 - A person cohabitating with or who has cohabitated with the victim of a spouse or intimate partner
 - A person similarly situated to a spouse of the victim under state domestic or family violence laws
 - Any other person against an adult or youth victim who is protected from that person's acts under state domestic or family violence laws



#4 Dating Violence

- Violence or threat of violence
- Committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
- Where the existence of such a relationship will be determined by considering the length of the relationship, the type of the relationship, and the frequency of interactions



**The
"Big 5"**

#5 Stalking

- A course of conduct
- Directed at a specific person
- That would cause a reasonable person to feel fear for their safety or the safety of another or suffer substantial emotional distress



**The
"Big 5"**

Examples of Quid Pro Quo

- "Sleep with me and you will receive an A"
- "Your low grade had nothing to do with you not wanting to go out with me"
- "If you don't sleep with me, I won't renew your position"
- "Go for a drink with me and I'll make sure you get that raise you've been seeking"
- "Come to my room tonight at this conference so we can talk about that recommendation you asked me for. I feel like I need to get to know you better."

Examples of Sexual Assault

- Forced vaginal or anal penetration with a body part or object
- Forced oral sex (giving or receiving)
- Unwelcome touching or groping of the breast, genitalia, or buttocks
- The use of coercion, threats, force, or intimidation to compel another person to initiate or continue sexual activity against the person's will
- Sexual activity with a person who is substantially physically or mentally impaired by illness, alcohol, or drugs, or who is physically incapable of communicating, asleep, or unconscious
- Sexual activity with a person who is unable to consent because of age or ability

Examples of Domestic Violence

- Physical abuse (hitting, choking, punching, biting, shooting, etc.)
- Harassment (physical or verbal)
- Threats of physical harm to the victim or others
- Blackmail
- Restraining a person against their will (locking in a house or room, taking away keys)
- Forced sexual activity
- Stalking
- Trespassing or property destruction
- Animal abuse

Examples of Dating Violence

- All examples under domestic violence
- Intimidation
- Name calling and put downs
- Maintaining control over the victim's financial or other resources
- Threats to commit suicide or homicide if the victim ends the relationship
- Attempts to isolate the victim from friends or family
- Encouraging others to engage in such behaviors

Examples of Stalking

- Calling, texting, emailing, or mailing the victim's repeatedly at home or work
- Repeated, uninvited appearances at the victim's residence or workplace
- Breaking into the victim's home or vehicle
- Stealing the victim's belongings
- Checking the victim's electronic devices or social media accounts
- Reading a person's mail or other private writings or communications

Hostile Environment Sexual Harassment

- Unwelcome conduct
- Based on sex
- That is so severe
- And pervasive
- And objectively offensive
- That it effectively denies equal access to the educational program or activity of the educational institution (effective denial is a **very** low bar under OCR standards)



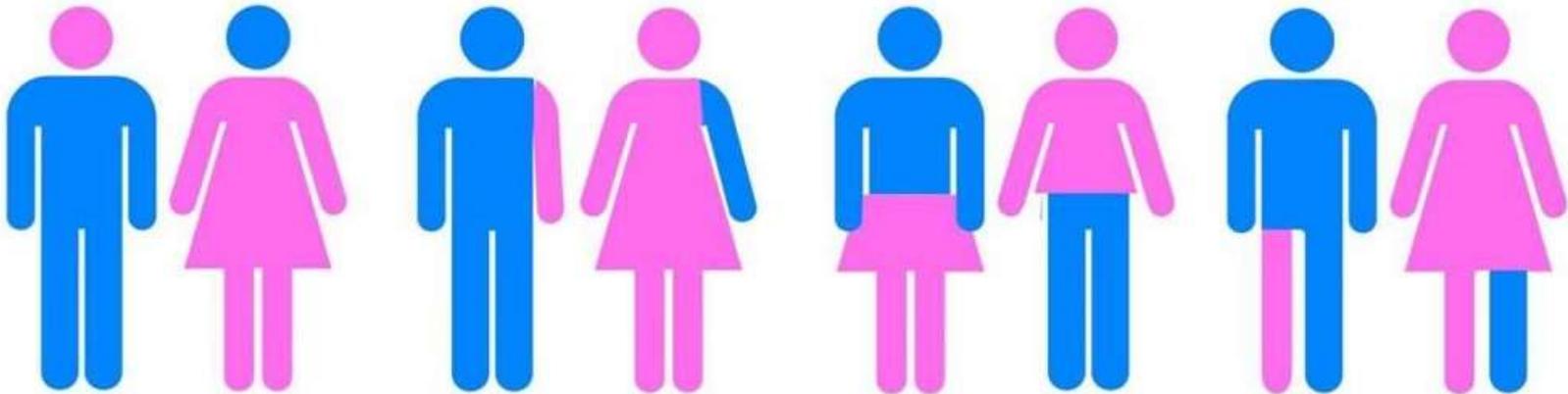


Unwelcome Conduct

- The complainant did not welcome or invite the conduct and found the conduct to be objectionable or offensive
- Unwelcomeness is determined from the perspective of the complainant (subjective)
- But whether conduct is deemed unwelcome also depends on the context and totality of the circumstances as interpreted by a reasonable person (objective); mere acquiescence in conduct or the absence of an objection does not mean the conduct is unwelcome, but if a party responds positively to conduct without indicating in words or actions their objection, the evidence may not support a finding of unwelcomeness

“Based on Sex”

- “Sexual”
- Otherwise “sex based” (e.g. private body parts involved)
- Based on perceived or actual failure to comply with gender based norms
- Based on perceived or actual sexual orientation or gender identity



Severe, Pervasive, and Objectively Offensive



Severe

More than just juvenile, crass, even sex-based behavior
Likely not as high a standard as the courts' standard from *Gebser & Davis*



Pervasive

Typically, repeated conduct (more than one time)
Other facts or circumstances can make a single instance widespread (e.g., technology, observers, maybe even severity?)



Objectively Offensive

Offensive to a reasonable person, not to the person who is the alleged victim of the conduct

The Constellation of Circumstances, Expectations, and Relationships

- The degree to which the conduct affected the complainant's access to the education program or activity
- The type, frequency, and duration of the conduct
- The parties ages, roles, previous interactions, and other factors about the parties
- The location of the conduct, the context in which the conduct occurred, and the control the educational institution has over the respondent
- Other sex-based harassment in the education program or activity



Title IX Jurisdictional Limits

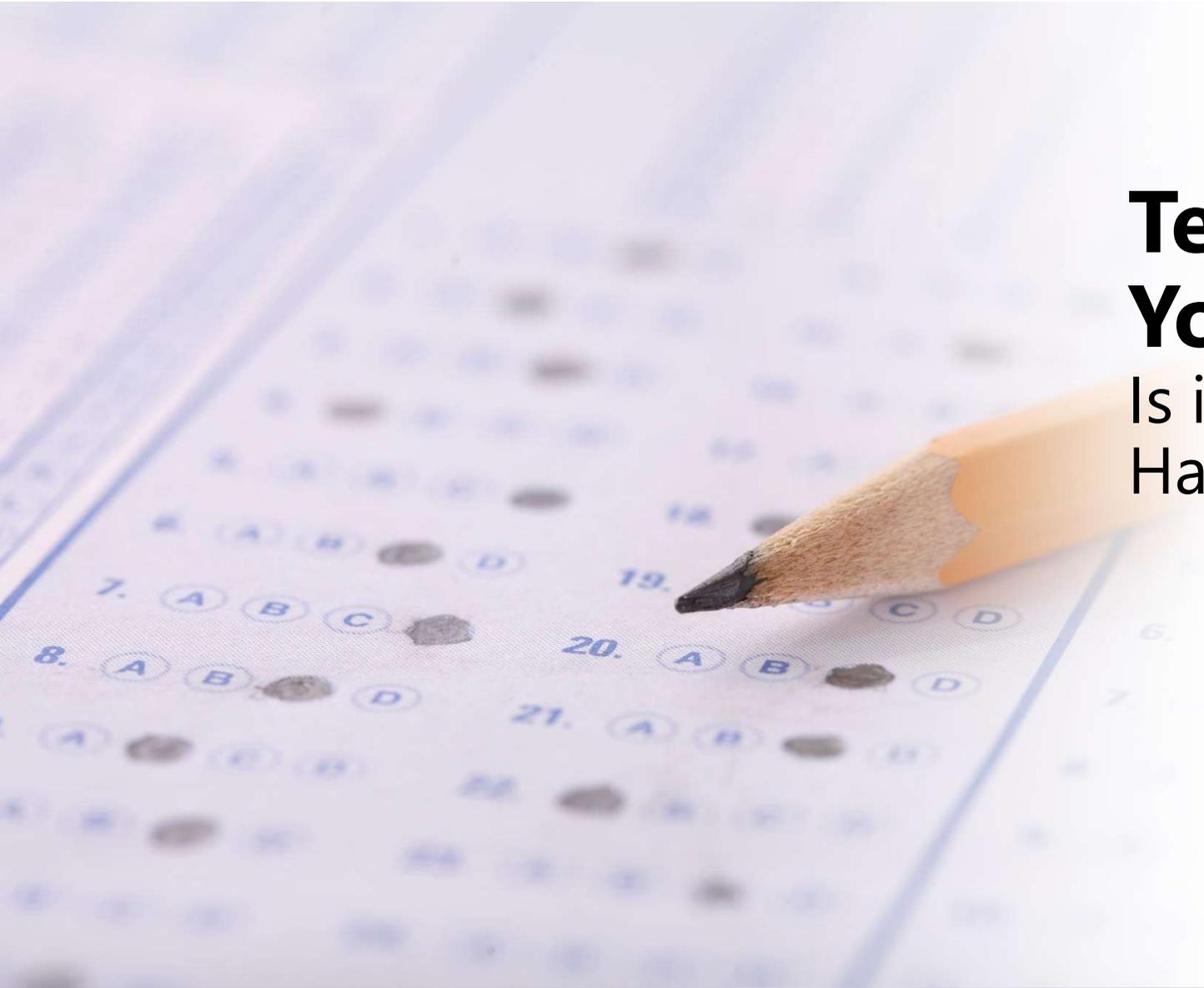
Conduct must also have occurred **both**

1. In an educational program or activity of the educational institution to be covered by Title IX, which includes:

- The educational institution's operations
- Locations, events, or circumstances over which the educational institution exercised substantial control over both the respondent and the context in which the sexual harassment occurred
- Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house)

and

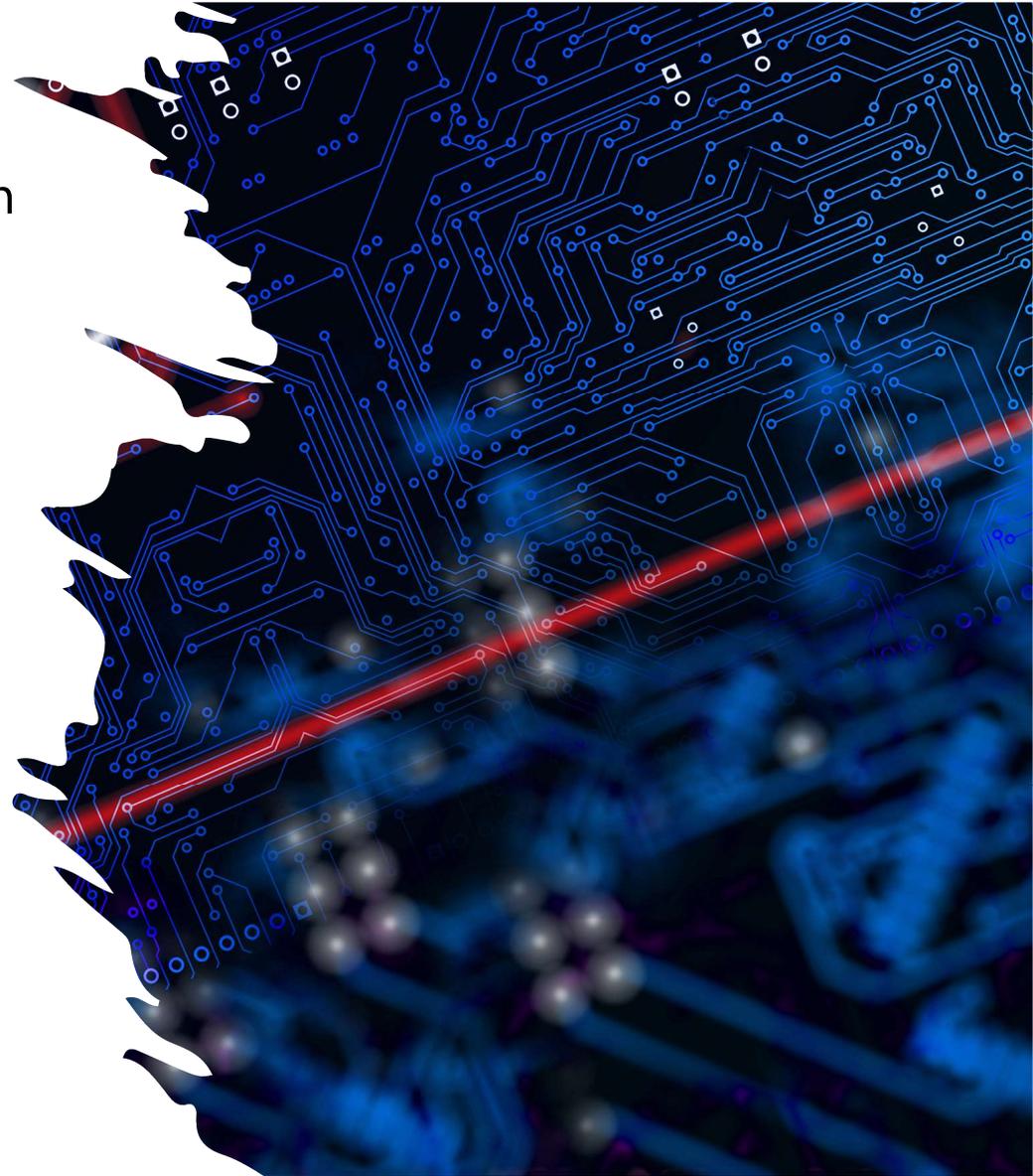
2. Against a person in the United States



Test Yourself: Is it Title IX Sexual Harassment?

While on an overnight school trip, a group of students gather in a hotel room for a party to celebrate their team victory. Carson has never drunk alcohol before, but Robin convinces Carson to *"get blasted,"* saying Carson is too uptight and *"Just let me liberate you."* As the night goes on, Carson begins to slur their words and stumble. At one point, Robin grabs Carson by the waist to stop them from falling and then pulls Carson toward them until Carson's butt is touching Robin's crotch. Robin rubs up against Carson and says *"Shake your rump. Get down, get up. Do it like it hurt, like it hurt."* When Carson starts to pull away, Robin says *"I know you want it. I hate these blurred lines."*

"Blurred Lines" by Robin Thicke (written by Pharrell Williams / Robin Thicke / Joseph Harris Clifford)



🌐 When poll is active, respond at pollev.com/thlaw411

📱 Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

Yes, employee quid pro quo

Yes, sexual assault

Yes, domestic violence

Yes, dating violence

Yes, stalking

Yes, severe, pervasive, and objectively offensive

No



Reagan is student chair of the homecoming dance. Most of the student committee members want a disco theme, but student Corey really wants Reagan to choose their proposed jazz theme. Reagan says they'll choose Corey's theme if Corey will make out with them. When Corey refuses, Reagan says they'll settle for just one kiss, saying

"Give me a kiss to build a dream on, And my imagination will thrive upon that kiss."

"A Kiss to Build a Dream On" by Louis Armstrong
(written by Bert Kalmar / Harry Ruby / Oscar Hammerstein)



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Yes, stalking

Yes, severe, pervasive, and objectively offensive

No



“Country Girl (Shake it for Me)” by Luke Bryan

A new student, Cameron, has just moved to a large urban high school from a small town. Cameron reports that Rory constantly calls Cameron “country girl,” makes fun of Cameron for their accent, and asks if Cameron is driving their tractor to school.

Recently, at the school dance, Rory came up to Cameron while they were dancing and said “Shake it for the young bucks sittin' in the honky-tonks, Shake it for the rednecks rockin' 'til the break of dawn, Aw country girl, shake it for me.”

Cameron’s parents have demanded that the school stop Rory from sexually harassing Cameron.

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Yes, severe, pervasive, and objectively offensive

No

Following an overnight lacrosse trip, Wei reports that they heard a disturbance late at night from the room above theirs. According to Wei, it sounded like “some kind of trouble, some kind of fight.” Wei knows Luka was staying in that room and had traded to be in the same room as the teammate they were dating. When Wei saw Luka the next day, they noticed bruising on Luka’s arm. When Wei asked about it, Luka said “Just don’t ask me what it was. don't ask me what it was. I think it's 'cause I'm clumsy.” Luka also said something about trying to not talk too loud or act crazy before repeating “Just don’t ask me what it was.”

“Luka” by Suzanne Vega



🌐 When poll is active, respond at pollev.com/thlaw411

📱 Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

Yes, employee quid pro quo

Yes, sexual assault

Yes, domestic violence

Yes, dating violence

Yes, stalking

Yes, severe, pervasive, and objectively offensive

No

Stacy reports that Riley has been taunting them about their mom. Riley has asked to come over after school and hang around by the pool so they can see Stacy's mom in their bathing suit. Riley told Stacy that since Stacy's dad moved out, Stacy's mom could really use a person like Riley. Riley spread a rumor that one time last year, when Riley was hired to mow their lawn, Stacy's mom came outside, wearing just a towel and that the way she said "You missed a spot over there," was meant to be a "come on" to Riley. When Stacy confronted Riley, Riley accused Stacy of having a crush on Riley and said "Your mom has got it going on. Stacy, can't you see? You're just not the one for me. I know it might be wrong, but I'm in love with your mom." "Stacy's Mom" by Fountains of Wayne (written by Adam Schlesinger and vocalist Chris Collingwood



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Yes, employee quid pro quo

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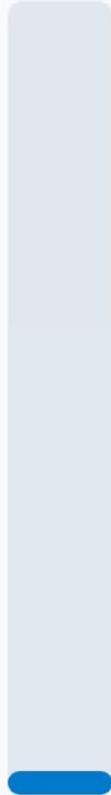
Yes, stalking

Yes, severe, pervasive, and objectively offensive

No

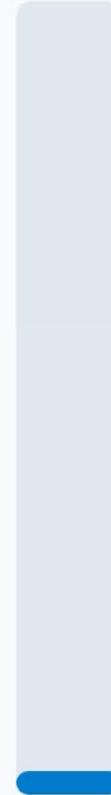
The conduct is in an education program or activity

0%

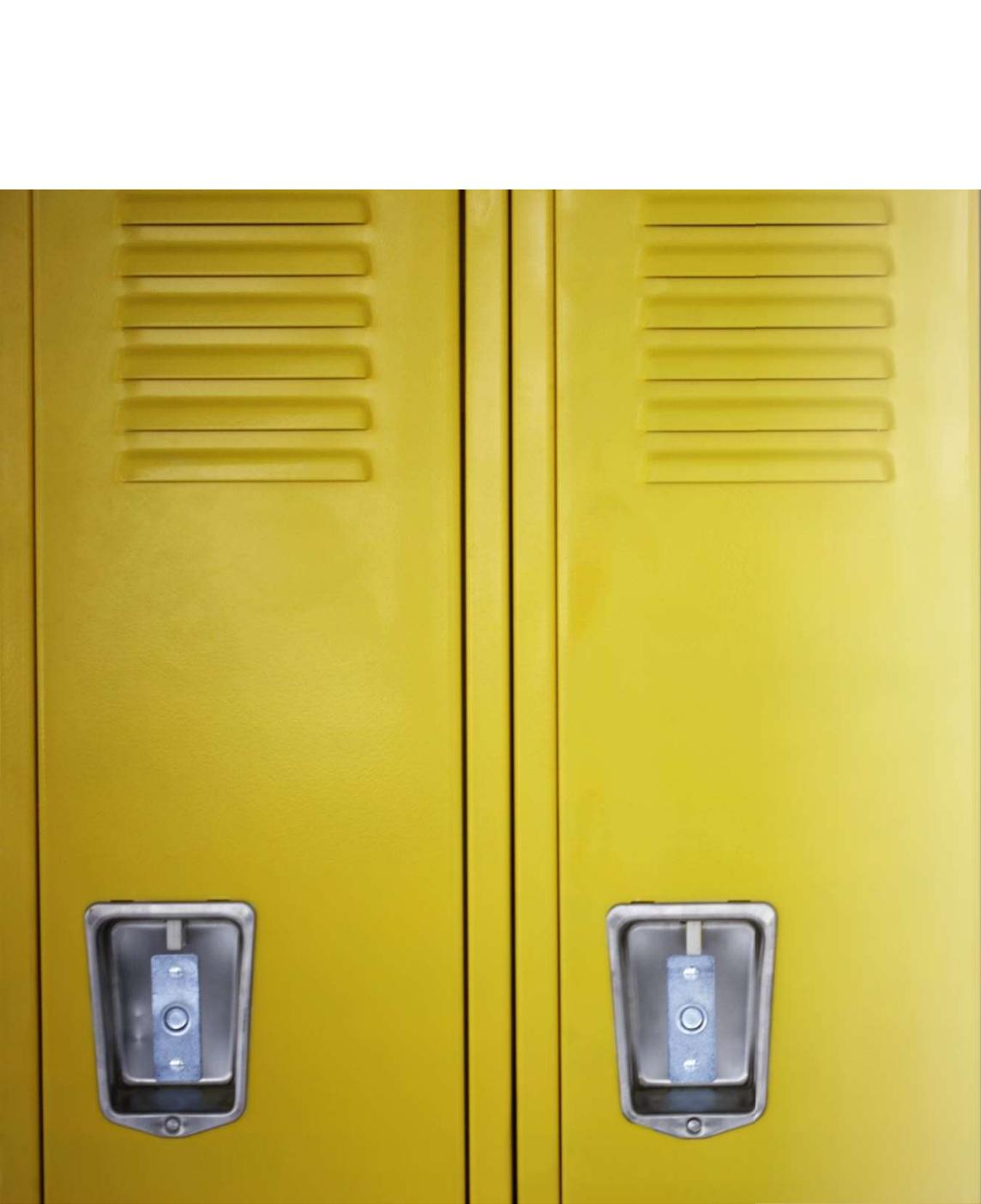


True

0%



False



Casey and Ryan used to date. Casey broke up with Ryan recently, and reports that Ryan has not handled the break-up well.

Ryan left a poem in Casey's locker that said:

*Since you've gone,
I've been lost without a trace.
I dream at night,
I can only see your face.
I look around,
but it's you I can't replace.
I feel so cold,
and I long for your embrace.*

The next day, during lunch, Ryan sat down next to Casey. Casey told Ryan that they were making them uncomfortable and asked Ryan to sit someplace else. Ryan refused. Casey then got up to leave and Ryan called after them,

"Can't you see that you belong to me?"





A week or so later, Ryan handed Casey an envelope as they were passing each other in the hall at school. The envelope contained photos of Casey that Ryan had taken – of Casey at band practice, of Casey hanging out with their friends, and even of Casey having dinner with their family. There was a note in the envelope that said:

Every breath you take
And every move you make
Every bond you break
Every step you take
I'll be watching you

“Every Breath You Take” by the Police
(written by Gordon Matthew Thomas Sumner (Sting))

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📧 Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

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Yes, sexual assault

Yes, domestic violence

Yes, dating violence

Yes, stalking

Yes, severe, pervasive, and objectively offensive

No



Teacher Thompson is the new theater teacher. Sophomore Carson has dreams of being a Broadway star and has been taking private acting lessons after school on campus with Thompson.

Carson's friends report that Carson has been fantasizing about the young teacher. Carson told their friends they "want Thompson badly" and think the teacher might return the feeling because when Carson and Thompson were rehearsing a romantic scene from a play, Thompson said Carson "has all the charms of a woman" before telling Carson not to stand so close to them.

In the teacher's lounge, rumors are flying that Thompson gave Carson a ride home alone the other evening after seeing Carson sitting in the rain at the bus stop.

Teacher Thompson confides in a co-worker that they are trying to put Carson "out of my mind" because they know their feelings for Carson are "way out of line."

"Young Teacher" by the Police and "Young Girl" by Gary Puckett & the Union Gap



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📱 Text **THLAW411** to **22333** once to join

Is it Title IX Sexual Harassment?

Yes, employee quid pro quo

Yes, sexual assault

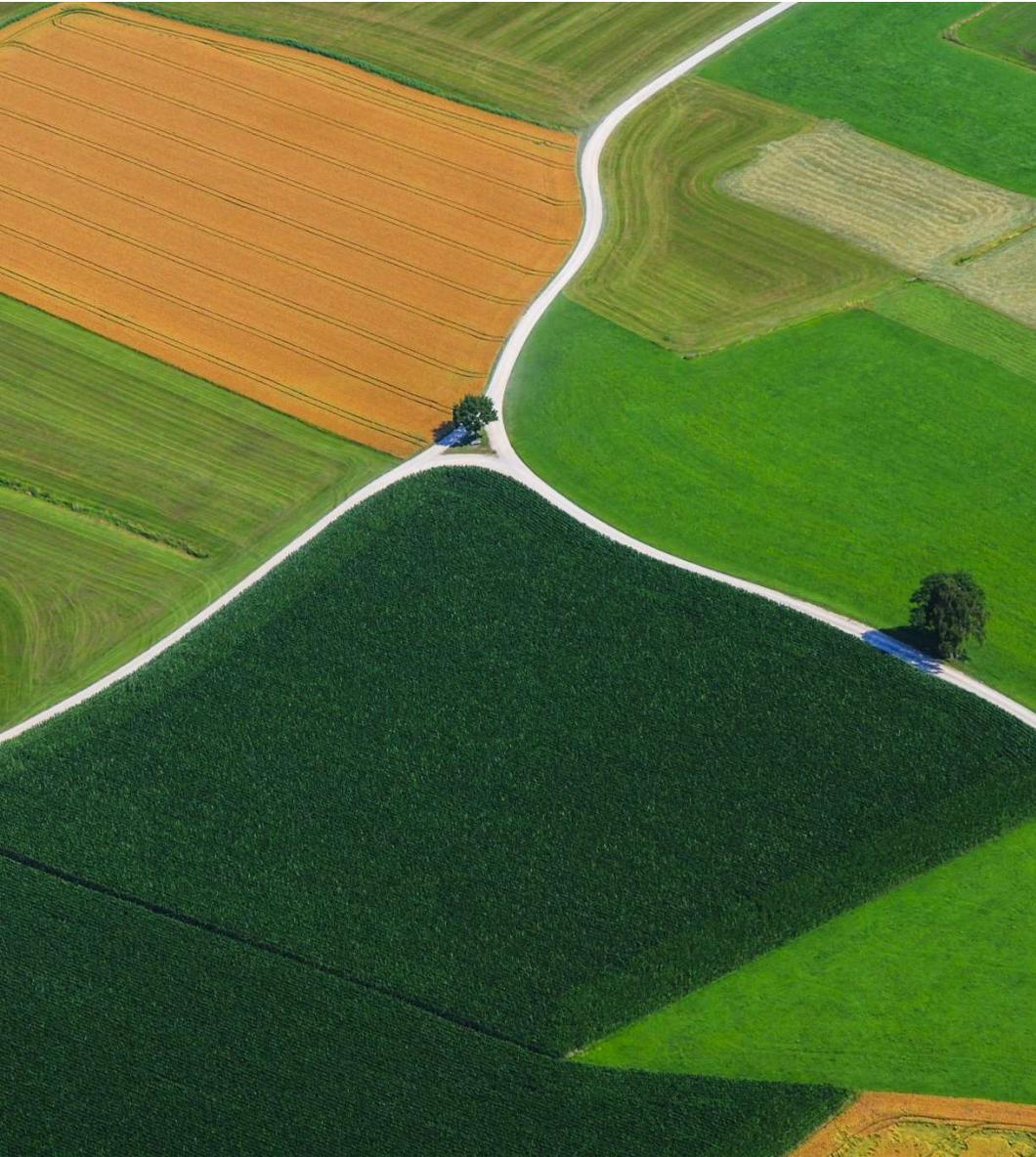
Yes, domestic violence

Yes, dating violence

Yes, stalking

Yes, severe, pervasive, and objectively offensive

No



Remember!

- ▶ Just because something fails to meet one or more of the threshold questions does not mean that the educational institution will ignore the conduct
- ▶ Consider other policies and procedures, including those prohibiting non-Title IX sexual harassment
- ▶ The best practice in every case is to support, support, support any member of your community who reports sex-based misconduct



Young, Incapacitated, Neurodivergent Parties

When These Issues Come Into Play

- Is conduct *consensual*? (for purposes of sexual assault like rape and fondling)
- Is conduct *unwelcome*? (for purposes of sex-based harassment)
- Is conduct *severe, pervasive, and objectively offensive*? (for purposes of sex-based harassment)

Scenario

Two five-year-old students are playing outside at recess and one pulls down the others' pants saying, "You show me yours and I'll show you mine." The next day in class, the respondent squeezes the complainant's buttocks with a hand.

Is the conduct Title IX sexual harassment?

Yes, because the respondent touched the complainant's buttocks without consent and for purposes of sexual gratification



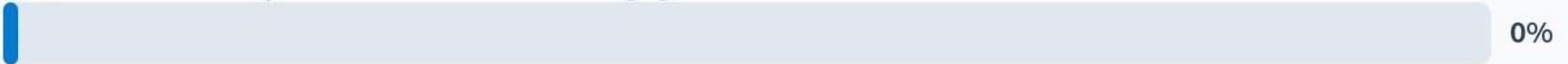
Yes, because the conduct is unwelcome, sex-based based, and severe, pervasive, and objectively offensive



No, because the touching was not done for sexual gratification and the conduct is not severe



No, because a five-year-old child can never engage in Title IX sex-based harassment



Scenario

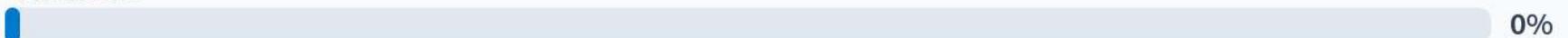
Two fifteen-year-old students are outside on school property at lunch and one pulls down the others' pants saying, "You show me yours and I'll show you mine." The next day in class, the respondent squeezes the complainant's buttocks with a hand.

Is the conduct Title IX sexual harassment?

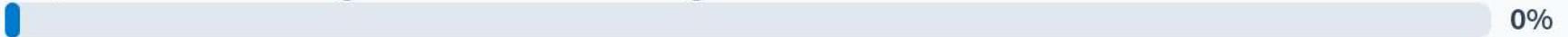
Yes, because the respondent touched the complainant's buttocks without consent and for purposes of sexual gratification



Yes, because the conduct together is unwelcome, sex-based, and severe, pervasive, and objectively offensive



No, because the touching was not done for sexual gratification and the conduct is not severe



Yes, because any time fifteen-year-olds engage in sex-based conduct it is Title IX sexual harassment



None of the above



Other Age Situations

- A student under the age of majority can never consent to sexual conduct with an adult (except “Romeo and Juliet laws”)
- A student can never consent to or welcome sex-based conduct, including sexual conduct and sex-based harassment, with/from an employee of the school district they attend
- Age will often be a factor when considering the “constellation of circumstances, expectations, and relationships” in the hostile environment sex-based harassment analysis

Incapacitation

- Where a person lacks the capacity to welcome or consent to conduct
- The person may not appreciate that the conduct is sexual or appreciate the nature or extent of the situation
- Can be based on physical or mental status, developmental disability, or based on alcohol or drug use

Scenario

Two high school students, Cleo and Reese, are drinking heavily and surreptitiously at a football game. They go to the bathroom during halftime and sneak into a stall together and start “making out” and proceeded to have sex. According to Cleo, they remember wanting to make out but didn’t want to do more and remembered trying to say no. Cleo acknowledged being “super drunk” and not being sure how clear they were. According to Reese, they asked Cleo’s permission before doing anything and felt comfortable that Cleo was consenting.

But, wait! Can't the school discipline the students for drinking at a school event?

Yes, and they should discipline both because it is a serious offense



Yes, but they should not because it might chill reporting of sexual harassment



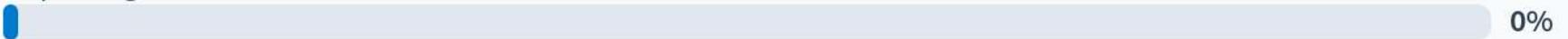
Yes, but only Reese is found to have sexually assaulted Cleo



No, because the sexual misconduct is so intertwined with the drinking

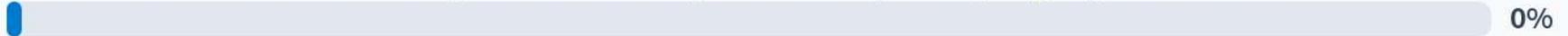


No, schools cannot discipline students when sexual assault is alleged because of the chilling effect on reporting

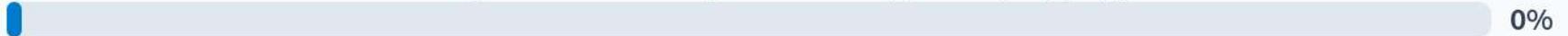


Which evidence would NOT be relevant to the question of "incapacitation"?

Whether others saw Cleo at the game and said they were slurring words, tripping, and confused



Whether others saw Reese at the game and said they were slurring words, tripping, and confused



Whether others saw Reese "slip" something into Cleo's drinks or "feed" Cleo drinks



Whether Cleo gets drunk at school events often



All of the above



Scenario

Chris is a popular student at school, an athlete, and a straight A student. Chris reports that another student at school, Ray, a student with autism, regularly waits for Chris to exit school and follows Chris while Chris walks home. Chris has also seen Ray in hallways where Chris has classes, seeming to observe Chris through windows. Chris has asked the Assistant Principal/Dean to talk to Ray, but the conduct has continued. Chris believes that Ray has a crush and is scared that Ray will do something to Chris.

Is this conduct sex-based harassment?

Yes, because Chris believes Ray has a crush and fears for their safety due to Ray's actions

0%

Yes, because Ray's actions would cause a reasonable person to fear for their safety or experience substantial emotional distress

0%

No, because the conduct is not sex-based

0%

No, because Ray as a student with autism lacks the capacity to engage in sex-based harassment

0%

If Ray admits during an interview that they have a crush on Chris, is the conduct Title IX sexual harassment

Yes, because Chris fears for their safety due to Ray's actions



Yes, because Ray's actions would cause a reasonable person to fear for their safety or experience substantial emotional distress



No, because the conduct is not severe



No, as long as Ray's intention is not to hurt Chris





BREAK

15 Minutes



Prevention & Enforcement



Prevention & Enforcement

- ✓ Information Collection and Reporting Duties
- ✓ Title IX Training, Policies, and Audits
- ✓ The OCR Complaint Process



**THIS IS
OUR AGENDA**

Information Collection and Reporting Duties



The Civil Rights Data Collection

- The CRDC is a generally biennial survey of data from public schools and other local educational agencies that OCR requires from schools
- The CRDC gathers information about student access to educational programs, activities, and staff and school climate factors, such as student discipline and harassment or bullying incidents, from public schools serving students in prekindergarten through 12th grade. The data are disaggregated by race/ethnicity, sex, English learner (EL), and disability.
- Failure to report incidents is not always seen a good thing

Title IX Training, Policies and Audits



Title IX – Required Training

Who: Title IX sexual harassment team members (coordinators, investigators, decision-makers, and informal resolution facilitators) (aka “the Title IX Team”)

What: Be adequately trained on:

- The definition of sexual harassment under Title IX
- The scope of the education program or activity
- How to conduct the investigation and grievance processes, including hearings (if used), appeals, and informal resolution
- How to serve impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias

Title IX – Required Training

Who: Title IX sexual harassment investigators

What: In addition to the general training requirements, must be trained on issues of relevance to create an investigative report that fairly summarizes relevant evidence

Title IX – Required Training

When and How Much:

- According to the preamble to the 2020 Title IX regs, OCR estimates that a new Title IX Team member needs up to 8 hours of initial training, with additional training each subsequent year
- At least one Title IX organization that often serves as an expert witness for plaintiffs/student complainants has stated that all roles require far more than 8 hours; unlikely this is based on anything, but be prepared for the argument in future disputes

Title IX – Required Training

Who: Title IX sexual harassment decision-makers

What: In addition to the general requirements, must be trained on:

- Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Technology at live hearings (if used)

Don't Forget

Any materials used to train Title IX coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must:

1. Not rely on sex stereotypes
2. Promote impartial investigations and adjudications of formal complaints of sexual harassment
3. Be posted online on a District's website (posting a link to a broad page with several trainings may not be enough)

Title IX – Recommended Training

Recommended to train all employees in K-12 on

- Recognizing sexual harassment (consider covering all civil rights issues, including race, color, national origin, and disability)
- Reporting sexual harassment

Title IX Policies and Procedures

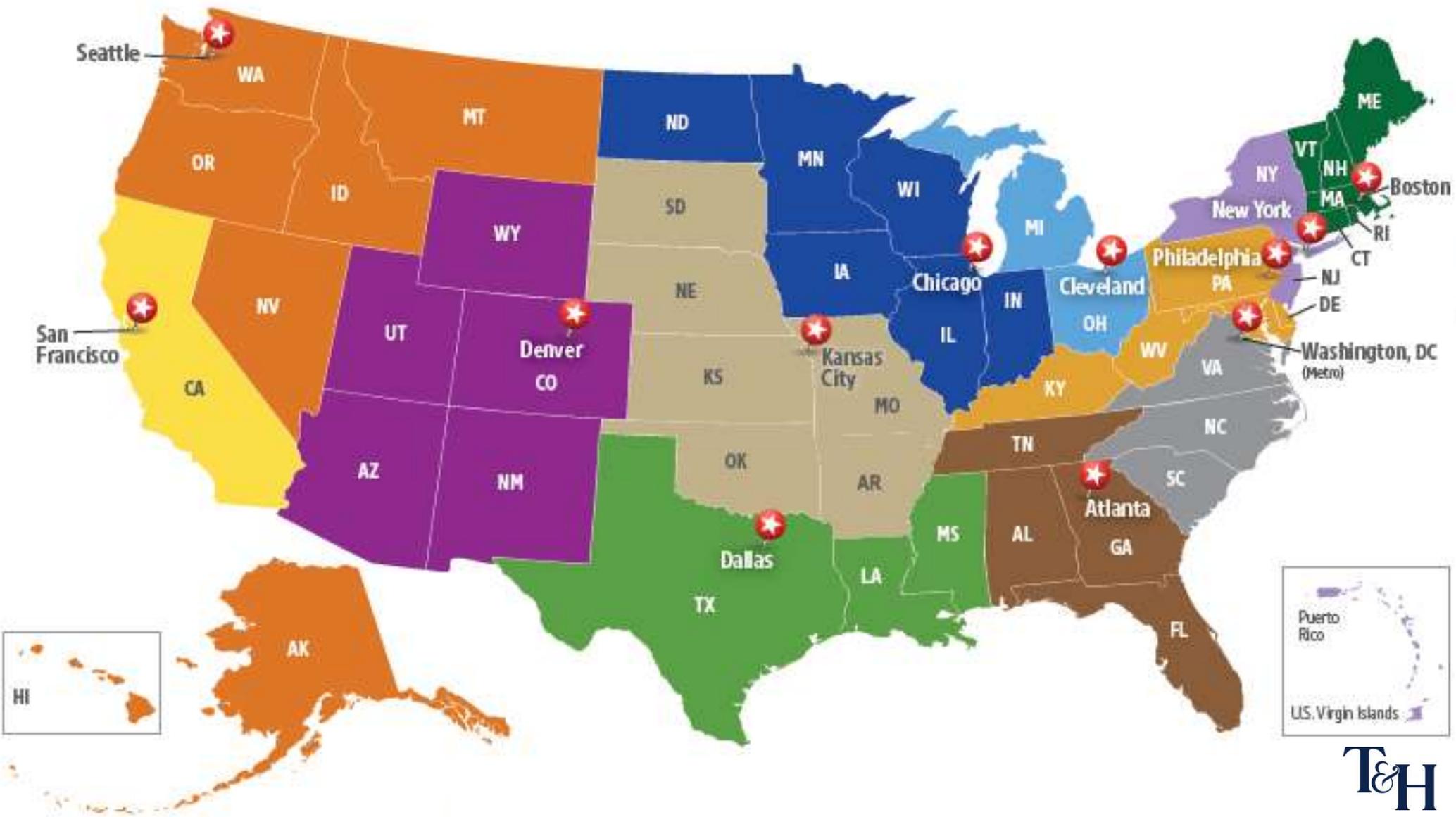
- Should be reviewed every year to implement changes learned from your grievance process and updates in law, regulations, legal cases, and OCR policies
- Read carefully your state school board's association policy services policy, they often say you must do additional steps (e.g., regulations). Make sure to complete key definitions – including consent – and internal deadlines
- Look at the interactions between Title IX policies and other policies (e.g., student and employee disciplinary policies and procedures)

Title IX Audits

- Audits look at issues that might be raised in an internal, OCR, or court complaint *before* a complaint is actually raised
- Significantly cheaper than an actual complaint, and can often be protected by attorney client privilege
- OCR guidance and other documents can provide good roadmaps (e.g., recent athletics guidance fact sheets)

The OCR Complaint Process

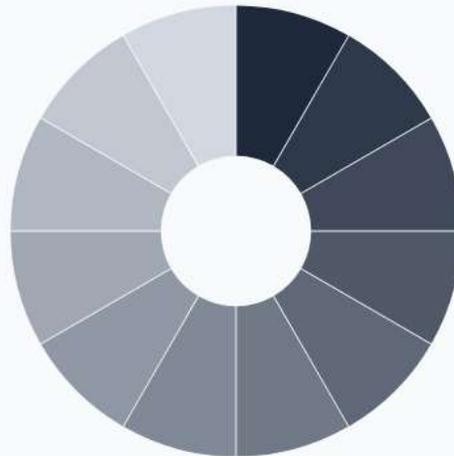


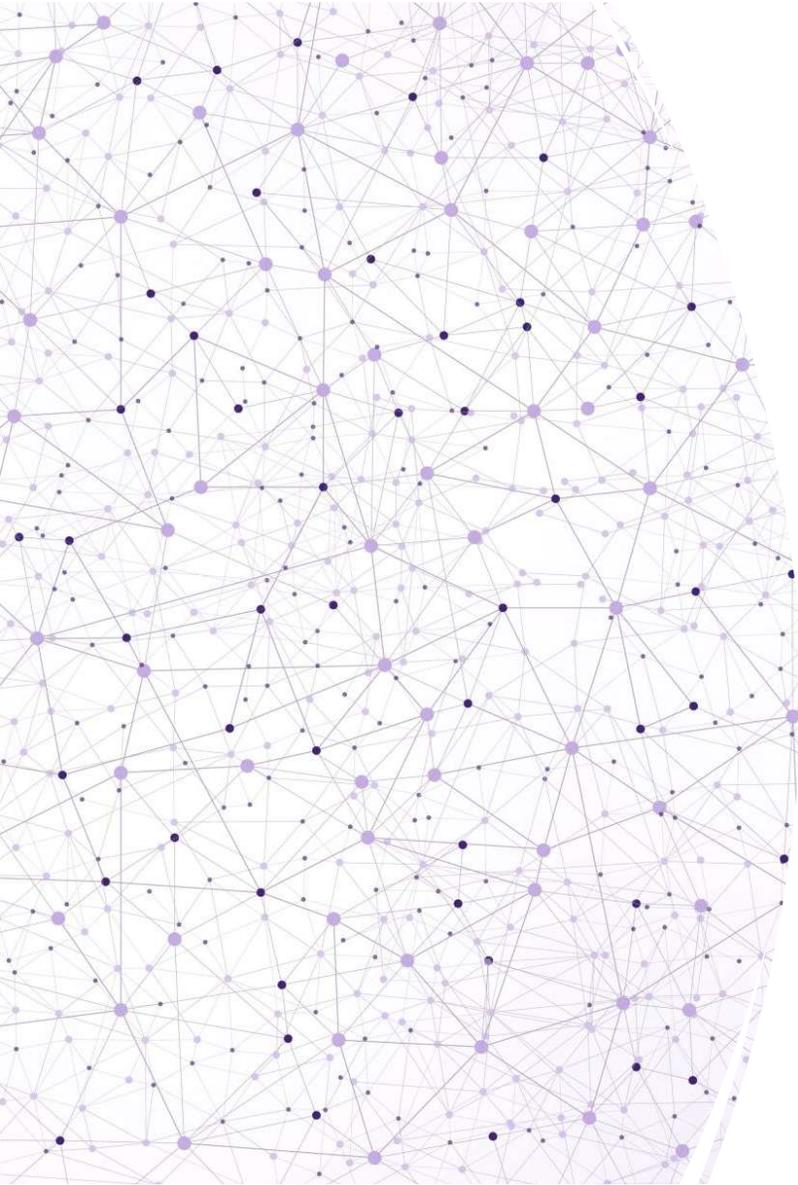


What is your OCR region?

131

-  Boston (CT, ME, MA, NH, RI, VT...) **A**  Chicago (IL, IN, IA, MN, ND, W... **B**  New York (NJ, NY, PR, VI) **C**  Cleveland (MI, OH) **D**
-  Philadelphia (DE, MD, KY, PA, ... **E**  Kansas City (AR, KS, MO, NE, O... **F**  Atlanta (AL, FL, GA, TN) **G**  Denver (AZ, CO, NM, UT, WY) **H**
-  Dallas (LA, MS, TX) **I**  San Francisco (CA) **J**  DC (NC, SC, VA, DC) **K**  Seattle (AL, American Samoa, G... **L**





OCR's Method

- Investigates complaints – either filed by complainants or initiated by OCR
- Issues letters of findings and, if a violation is found, enters into resolution agreements with parties
- Monitors agreements by reviewing and responding to revisions of policies, training materials, remedies or consequences for parties or others

**My educational institution has been subject to a
"compliance review" or "directed investigation"**

True

False

How the heck
should I know?



Anatomy of an OCR Complaint

Evaluation

Mediation

Investigation

Resolution

Monitoring

Enforcement

An illustration of a person in a dark blue suit and red tie, holding a clipboard with a red clip. The clipboard contains a checklist with several rows of red stars and checkboxes. One checkbox is checked with a red mark. The person is using a pen to write on the clipboard. The word "Evaluation" is overlaid in white text on the clipboard.

Evaluation

Evaluation Tips

OCR provides support to complainants during evaluation, but not to recipients (schools, colleges, and universities)



Evaluation

- The process by which OCR determines if a complaint will be investigated
- OCR considers whether there is a violation of a law that it enforces against an educational institution that receives financial assistance from ED
- There is no review of the merits of the complaint

Section 108 Dismissals

- Subject matter jurisdiction (CPM §§ 104, 108(a))
- Personal jurisdiction over school or institution (CPM §§ 105, 108(b))
- Timeliness (CPM §§ 106, 108(c))
 - But see exceptions

Section 108 Dismissals

- Lack of detail (CPM § 108(d))
 - 20 (formerly 14) calendar days to supplement
- No consent (CPM § 108(e))
- Failure to state a claim (CPM § 108(f))

What You Don't Know Might Hurt You



RAPID RESOLUTION



WHAT DO YOU NEED TO
KNOW TO RESPOND?



MUST KNOW THE RIGHT
QUESTIONS TO ASK.

A photograph showing a group of people in a circle, with their hands raised in a gesture of agreement or participation. The image is dimly lit and has a blueish tint. The word "Mediation" is overlaid in white text in the center.

Mediation

Mediation

Benefits:

- Early resolution
- Agreement remains private
- No finding of violation by OCR
- No monitoring



What You Don't Know Might Hurt You



IS YOUR CASE A GOOD
CANDIDATE?



HOW TO ADVOCATE
DURING MEDIATION



WHAT SHOULD BE IN AN
AGREEMENT

A magnifying glass with a black handle and frame is positioned over a document. The document has a dark blue background with a lighter blue geometric pattern. The word "Investigation" is written in white, sans-serif font across the center of the magnifying glass's lens. The background is a dark blue, textured surface.

Investigation



First Impressions

- Notice of Allegations (NOA) or Notice of Investigation (NOI) + Data Request
- Educational Institution's "Narrative and Data Response"
 - OCR doesn't care about case law!

An aerial photograph of a forest during autumn. The trees have a mix of green, yellow, and orange leaves, with some bare branches visible. The ground is covered in fallen leaves and some small structures or paths are faintly visible.

Interviews/ "On-Site Visit"

- Front scheduling issues early
- "On-Sites" are becoming less common – consider whether one might be important for your case
- Prepare for interviews! (make sure everyone sees the "forest")

What about....

Interviews of students under age 18? Focus groups of students?

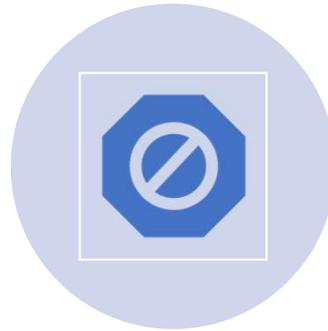
Sharing records for students unrelated to the case?

Refusing to provide records?

What You Don't Know Might Hurt You



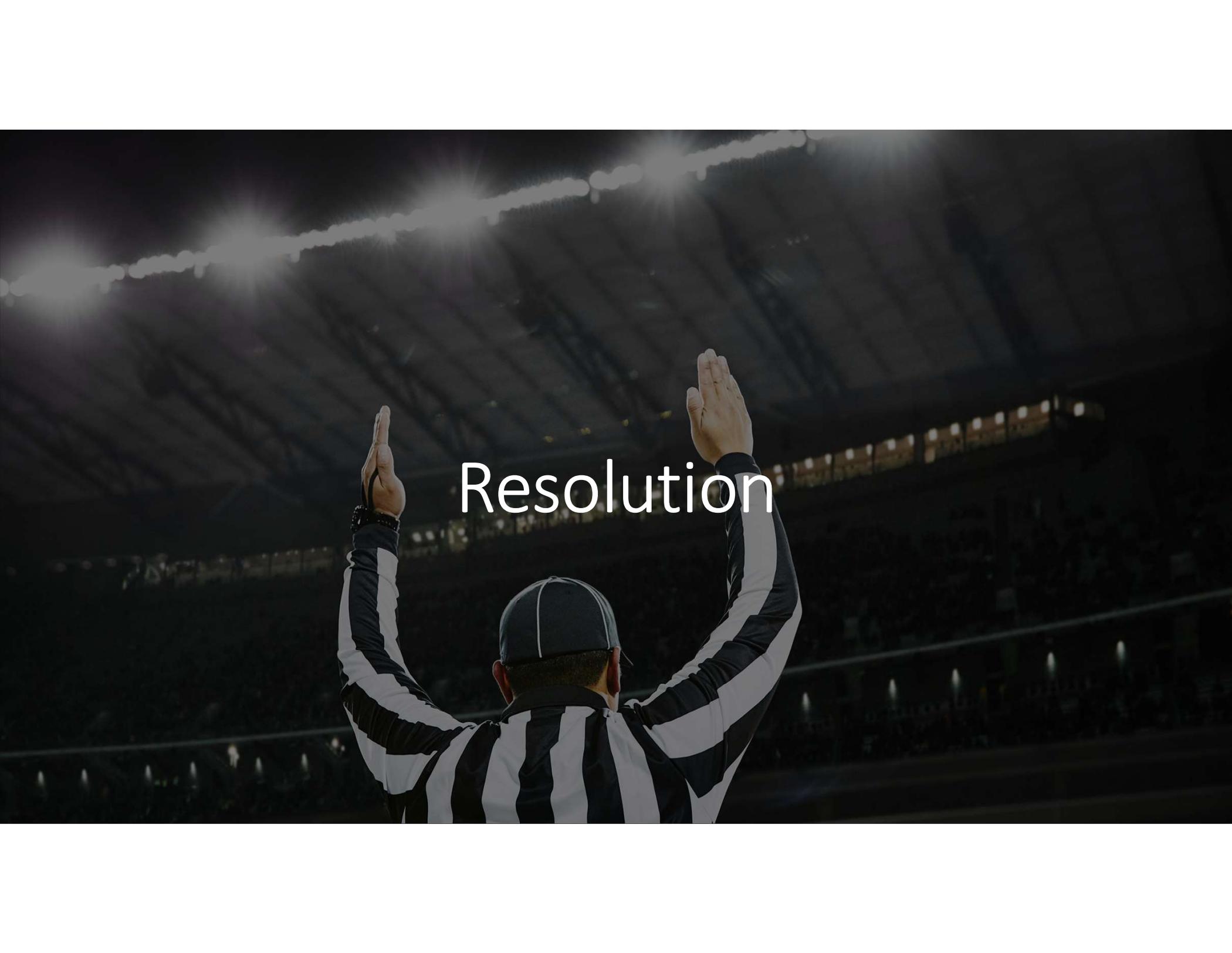
MANAGING THE
TIMEFRAMES



LIMITING DATA REQUESTED



CONTROLLING INTERVIEWS
AND ON-SITES

A referee in a black and white striped uniform is seen from behind, with both arms raised in a gesture of celebration or acknowledgment. The referee is wearing a dark cap and a watch on their left wrist. The background is a large, dark stadium filled with spectators, illuminated by bright lights that create a bokeh effect. The overall atmosphere is one of triumph and excitement.

Resolution

Investigative Determinations



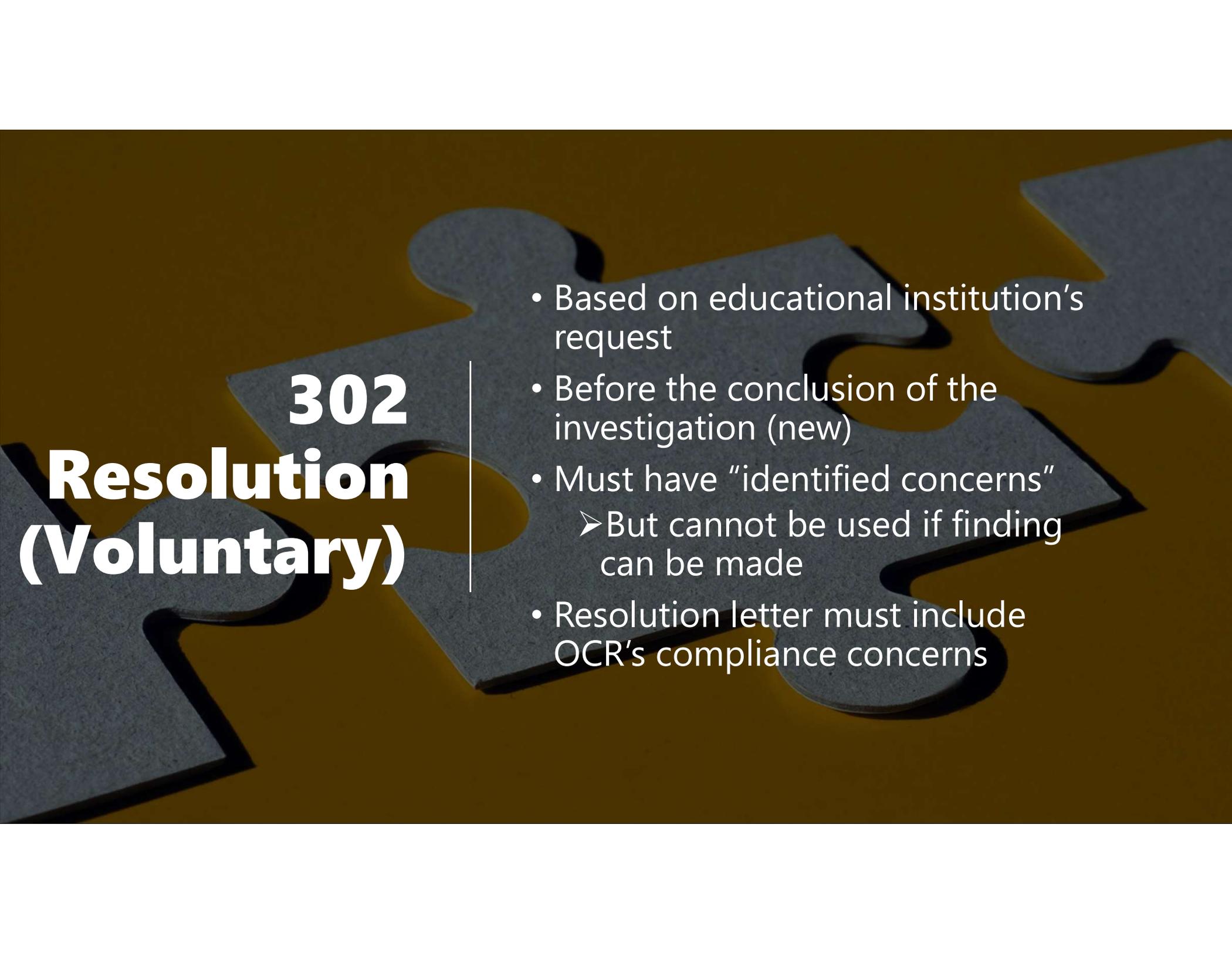
INSUFFICIENT EVIDENCE
DETERMINATION



NON-COMPLIANCE
DETERMINATION



MIXED DETERMINATION



302 Resolution (Voluntary)

- Based on educational institution's request
- Before the conclusion of the investigation (new)
- Must have "identified concerns"
 - But cannot be used if finding can be made
- Resolution letter must include OCR's compliance concerns

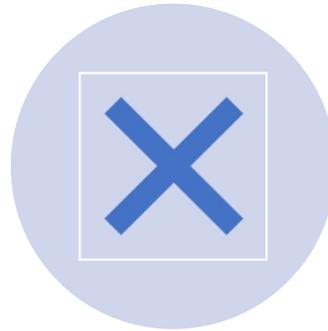
303 Resolution

- OCR will contact the educational institution to ask if they will enter into an agreement; will share draft agreement (not draft letter)
- Must notify the complainant that they will negotiate an agreement
- 90-day negotiation period
 - Cannot be extended
 - Must be ended at end of 90 days or if clear no agreement will be signed
 - Impasse letter (10 days) then Letter of Impending Enforcement

What You Don't Know Might Hurt You



TIME PRESSURES FOR
FINAL DECISION



LACK OF ACCESS TO THE
LETTER



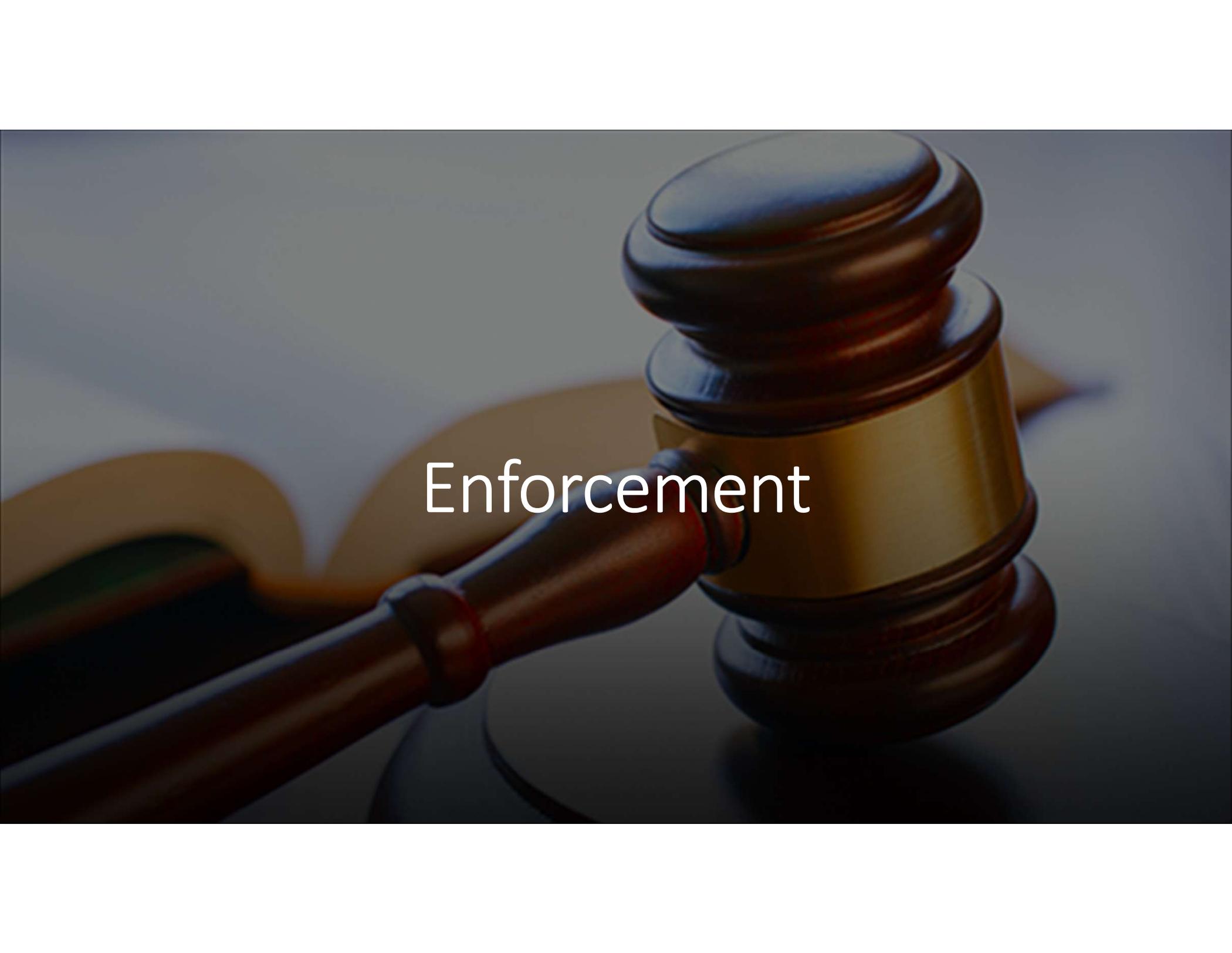
PROPOSING CHANGES TO
THE AGREEMENT



Monitoring

Monitoring

Submit	Submit data as required to show compliance
Request	Request extensions of time if needed
Monitor	Stay on top of OCR because they may not stay on top of you

A close-up photograph of a wooden gavel resting on a stack of books. The gavel has a dark wood handle and a light-colored wooden head with a rounded top. The books are stacked in the background, with their pages visible. The word "Enforcement" is overlaid in white, sans-serif font across the center of the image.

Enforcement



THANK YOU!
Questions?

K-12 Title IX Administrator Certification Conference
September 13–14, 2023

DAY ONE

Thompson & Horton

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