

Speed Dating with The New Title IX

Title IX Conference:
Higher Ed & K-12 Training
July 23-24, 2024



Sponsored By



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Your Presenters



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2020 Rule: The Basics

- Proposed November 16, 2018
- Final Rule Issued May 6, 2020
- Effective Date of August 14, 2024
- Applicable to incidents occurring after the effective date
- Over 2000 pages of preamble and rule

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2024 Rule: The Basics

- Proposed June 23, 2022
- Final Rule Issues April 19, 2024
- "Effective Date" of August 1, 2024 (enjoined in Idaho and 14 other states and 1000+ individual schools, colleges, and universities)
- Applicable to incidents occurring after the effective date
- Over 1500 pages of rule (57) and preamble (1504)

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Break Up or Stay Together?

The Ex



The One?



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What is Speed Dating Again?

Dictionary

Definitions from [Oxford Languages](#) · [Learn more](#)



speed dat·ing

noun

an organized social activity in which people seeking romantic relationships have a series of short conversations with potential partners in order to determine whether there is mutual interest.

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Why Speed Dating With the 2024 Rule?



Efficiency: Meet all the elements of the rules you need quickly



Reduced Pressure: We don't know whether these rules are here to stay, so it's too early to commit



Fun: It might even be a little fun?

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2024 Rule – Required Training

All Employee Training

- The school's obligation to address sex discrimination in its education program or activity
- The scope of conduct that constitutes sex discrimination under Title IX and its regulations, including the definition of sex-based harassment, and
- Responsibilities of non-confidential and confidential employees to report information about conduct that reasonably may be sex discrimination to the Title IX Coordinator or provide certain information to the reporting party if not required to report
- Responsibilities of all employees to provide certain information to a student or a person with a legal right to act on behalf of the student informs the employee of the student's pregnancy or related condition

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2024 Rule – Required Training

Informal Resolution Facilitators

- All “all employee” training topics
- The rules and practices associated with the school’s informal resolution process
- How to serve impartially, including by avoiding conflicts of interest and bias

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2024 Rule – Required Training

Investigators, Decisionmakers, and Individuals With Authority to Modify or Terminate Supportive Measures

- All “all employee” training topics
- The school’s required response to sex discrimination (§ 106.44)
- The school’s grievance procedures for sex discrimination complaints (§ 106.45 and, for higher ed, § 106.46)
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- The meaning and application of the term “relevant” in relation to questions and evidence and the types of evidence that are impermissible regardless of relevance under the school’s Title IX grievance procedures

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2024 Rule – Required Training

Coordinators and Designees

- *All training topics stated so far*
- Their specific responsibilities related to:
 - Their role as Title IX Coordinator or designee
 - The right of the Coordinator to delegate to designees
 - Specific actions the school must take to prevent discrimination and ensure equal access for pregnancy and related conditions, if relevant to the person's role
 - The school's required response to sex discrimination (§ 106.44), including supportive measures, if relevant to the person's role
 - The school's recordkeeping requirements
- Any other training necessary to coordinate the school's compliance with Title IX

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2020 Rule – Required Training

Coordinators, investigators, Decision-makers (initial and appellate), and Informal Resolution Facilitators:

- The definition of sexual harassment
- The scope of the education program or activity
- How to conduct an investigation and grievance process, including hearings (for higher ed), appeals, and informal resolution processes
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

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2020 Rule – Required Training

Investigators:

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence

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2020 Rule – Required Training

Initial Decision-makers:

- Any technology used at live hearings (for higher ed)
- 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

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What Conduct is Covered?



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Scope (2020 & 2024)

The **2020 Rule** provides a grievance process only for "sexual harassment" complaints

- Recipients must address other Title IX discrimination and retaliation, but not through any specific process

The **2024 Rule** applies to **all** reports or complaints of sex discrimination

- For higher ed, there is a different grievance procedure for sex-based harassment complaints involving a student



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What is "Sex Discrimination"?



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What is Sex Discrimination? (2020 & 2024)

Harassment

Different or
Disparate
Treatment

Disparate
Impact

Retaliation

Failure to
Accommodate

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Areas of Concern (2020 & 2024)

- Recruitment, Admissions, Counseling (Higher Ed only)
- Financial Assistance (Higher Ed only)
- Pregnancy and Related Conditions
- Parenting Status
- Student Discipline
- Single-Sex Programs
- LGBTQI+ Issues
- Employment
- Harassment
- Sex-Based Assault & Violence



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The Takeaway

An educational institution **must** use the **Title IX process** to address allegations of conduct that, if substantiated, would be sex discrimination, including sex-based harassment (2024 Rule) or sexual harassment (2020 Rule). Using another disciplinary process or code can lead to significant consequences to the institution (from OCR) and to individual employees who use the wrong process to address reports.

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LGBTQI+ Status (2024 Rule)



"Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity" – 34 C.F.R. § 106.10 (2024 Version).

"Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex" except for in athletics or housing in higher education – 34 C.F.R. § 106.31 (2024 Version).

These provisions are the focus of state lawsuits against the rule; changes seem likely

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What Harassment is Prohibited?



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Sex(ual or –Based) Harassment

The Ex: Sexual Harassment

- Employee Quid Pro Quo
- Hostile Environment
- “The Big Four” as defined in the Violence Against Women Act/Clery Act
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking

Speed Date: Sex-Based Harassment

- Employee or Agent Quid Pro Quo
- Hostile Environment Harassment
- Specific Offenses
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking

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Title IX Quid Pro Quo Sex Harassment

The Ex: Sexual Harassment

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct

Speed Date: Sex-Based Harassment

An employee, **agent, or other person authorized by the recipient** to provide an aid, benefit, or service under the recipient’s education program or activity **explicitly or impliedly** conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct

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Hostile Environment Sex Harassment

The Ex: Hostile Environment

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

Speed Date: Hostile Environment

Defined as unwelcome sex-based conduct that is sufficiently severe *or* pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).

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Hostile Environment Factors (2024 Rule)

The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity

The type, frequency, and duration of the conduct

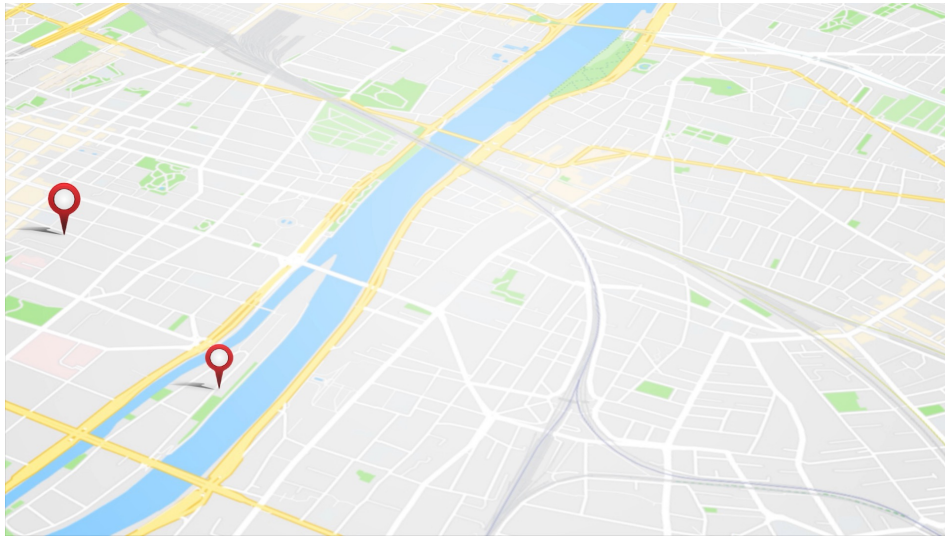
The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct

The location of the conduct and the context in which the conduct occurred

Other sex-based harassment in the recipient's education program or activity

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Where Must Prohibited Conduct Occur



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Education Program or Activity

The Ex: EP/A

School operations + locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and **the context in which the sexual harassment occurs**, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

Speed Date: EP/A

School operations + conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and subject to the recipient's **disciplinary authority**.

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Education Program or Activity

The Ex: EP/A

If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient **must dismiss the formal complaint** with regard to that conduct for purposes of sexual harassment under title IX or this part

Speed Date: EP/A

- A recipient has an **obligation** to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States

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What Information Requires Institutional Response?



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Notice/Knowledge

The Ex: Notice/Knowledge

- Actual knowledge
- By a Title IX Coordinator or "Official With Authority"
- Includes all K-12 employees

Speed Date: Notice/Knowledge

- "Information about conduct that may constitute sex discrimination"
- By the Title IX Coordinator
- Requires the educational institution to require certain non-confidential employees to report to the Title IX Coordinator
- Requires confidential employees and other employees not required to report to the Title IX Coordinator to provide information to reporting party

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Higher Ed Employee Reporting

The Ex: Notice/Knowledge

- Actual knowledge of "sexual harassment"
- By a Title IX Coordinator or "Official With Authority"
- Includes all K-12 employees

Speed Date: Notice/Knowledge

- "Information about conduct that may constitute sex discrimination"
 - By the Title IX Coordinator
- BUT**
- Requires the educational institution to require certain non-confidential employees to report to the Title IX Coordinator
 - Requires confidential employees and non-confidential employees who are not required to report to the Title IX Coordinator to provide information to reporting party about the Title IX Coordinator and process

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Exception to Reporting Requirements

The Ex: Exception to Reporting

Actual knowledge does not exist when the only official of the recipient with actual knowledge is the person who allegedly engaged in discrimination (the **respondent**).

Speed Date: Exception to Reporting

An employee who is the person allegedly subjected to discrimination (a **complainant**) is not required to report.

Information learned at a public awareness event, although the Title IX Coordinator must use the information to inform efforts to prevent sex-based harassment

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Higher Ed Reporting

Type of Employee	Report to Title IX Coordinator?	Provide Information to Reporting Party?
Non-confidential employee who has authority to institute corrective measures on behalf of the recipient or responsibility for administrative leadership, teaching, or advising	Yes	Yes
All other non-confidential employees	Must Do One or the Other	
Confidential Employees	No	Yes

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Notices to Reporting Parties (2024 Rule)

Non-Confidential Employee Not Required to Report

If they do not report the information to the Title IX Coordinator, must provide to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX:

- The contact information for the Title IX Coordinator
- Information about how to make a complaint

Confidential Employee

Must explain to any person who informs the confidential employee of conduct that reasonably may constitute sex discrimination under Title IX:

- The employee's status as confidential and what that means
- How to contact the Title IX Coordinator and make a complaint
- That the Title IX Coordinator may be able to offer and coordinate supportive measures and initiate informal resolution or the formal grievance process

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Students Employees – Higher Ed (2024 Rule)

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A higher education institution must determine how to handle students who also are employees, considering, at minimum:

- The person's *primary relationship* with the institution (employment or education)
- Whether the individual learned of the information while performing employment-related work

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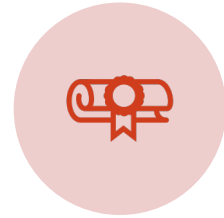
Confidential Employees (2024 Rule)



PRIVILEGED UNDER LAW



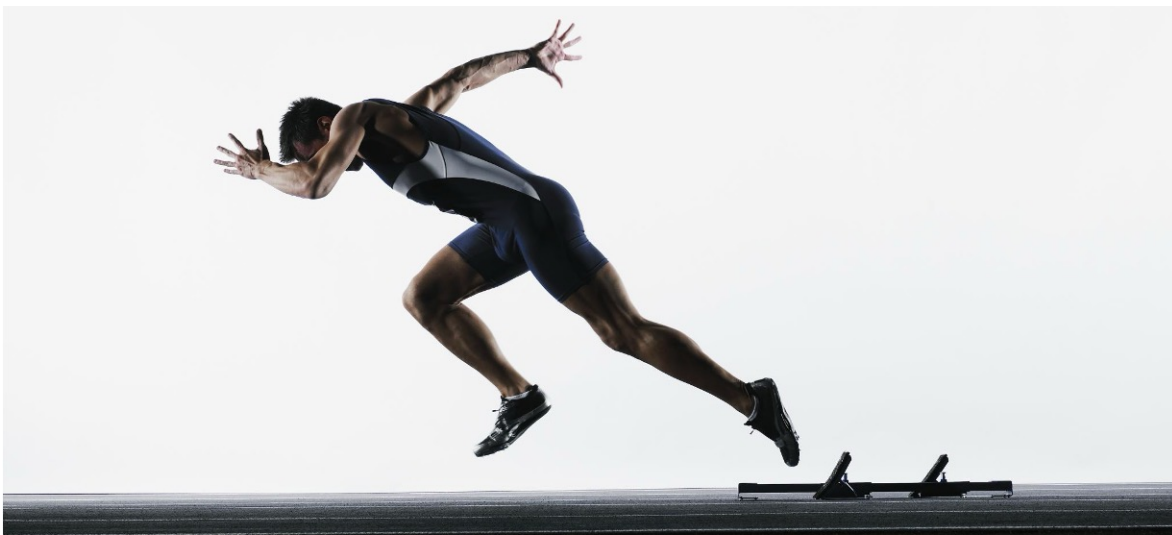
**DESIGNATED AS
PRIVILEGED BY
EDUCATIONAL
INSTITUTION**



**POSTSECONDARY
EMPLOYEE CONDUCTING
CERTAIN APPROVED
RESEARCH ON SEX
DISCRIMINATION**

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What Initial Response is Required?



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Initial Response to Notice

The Ex: Title

The Title IX Coordinator must promptly contact the complainant to:

- Discuss the availability of supportive measures
- Consider the complainant's wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- Explain to the complainant the process for filing a formal complaint

Speed Date: Title

The Title IX Coordinator must:

- Treat the parties equally
- Offer and coordinate supportive measures to complainant (and respondent once informal resolution is offered or the grievance process begins)
- Notify the complainant or, if unknown, the reporting party of the grievance procedures and, if relevant, informal resolution process

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Supportive Measures

The Ex: Supportive Measures

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment

Speed Date: Supportive Measures

Supportive measures must not unreasonably burden either party and must be designed to protect the safety of the parties or the recipient's educational environment or to provide support during the recipient's grievance procedures and if applicable during the informal resolution process. A recipient must not impose such measures for punitive or disciplinary reasons.

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Examples of Supportive Measures

The Ex: Examples of SMs

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus

Speed Date: Examples of SMs

- Counseling
 - Extensions of deadlines or other course-related adjustments
 - Changes in class, work, housing, or extracurricular or any other activity, **regardless of whether there is or is not a comparable alternative**
 - Campus escort services
 - Restrictions on contact applied to one or more parties
 - Leaves of absence
 - Increased security and monitoring of certain areas of the campus
 - Training and education programs
- For complaints other than sex-based harassment or retaliation, an educational institution, its employee, or any other person is not required to alter the alleged discriminatory conduct as a SM

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More Supportive Measures Rules (2020 & 2024 Rules)

Supportive measures:

- Must be maintained as confidential unless necessary to release information to implement (or allowed by law)

The 2024 Rule also requires educational institutions to:

- Provide a timely opportunity to seek, from an appropriate and impartial employee (other than the person who made the decision), modification or reversal of any supportive measure decision related to the party
- Allow parties to seek additional modification or termination of supportive measures applicable to them if circumstances change materially
- Ensure the Title IX Coordinator coordinates with one or more members of a student with a disability's K-12 students IEP or Section 504 team regarding supportive measures (allowed to coordinate with ODS in Higher ed)

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Emergency Removals

The Ex: Title

- The recipient must undertake an individualized safety and risk analysis, determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide notice and opportunity to challenge immediately after the removal

Speed Date: Title

- The recipient must undertake an individualized safety and risk analysis, determine that an immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sex discrimination justifies removal
- Must provide notice and opportunity to challenge immediately after the removal

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Administrative Leave

The Ex: Title

- Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

Speed Date: Title

- Nothing in this part precludes a recipient from placing an employee respondent on administrative leave from employment responsibilities during the pendency of the recipient's grievance procedures. This provision must not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12134.

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Informal Resolution

The Ex: Title

- Requires a formal complaint
- Must be voluntary
- Cannot require IR or waiver of right to adjudication
- Formal Complaint required
- Written notice required
- Written consent required
- Cannot be offered for employee-on-student cases

Speed Date: Title

- No formal complaint required
- Must be voluntary
- Cannot require or pressure IR or waiver of right to adjudication
- Supportive measures required
- Written notice required
- Consent required
- Cannot be offered in employee-on-student cases

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Informal Resolution Notice

The Ex: Notice of IR

- In writing
- The allegations
- Requirements of IR
- Right to withdraw prior to agreement and resume the grievance process with respect to the formal complaint
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

Speed Date: Notice of IR

- In writing or oral, *except* for sex-based harassment allegations involving a student (must be in writing)
- The allegations
- Requirements of IR
- Right to withdraw prior to agreement and to initiate or resume the recipient's grievance procedures
- Potential terms that could be in an agreement
- Which records will be maintained and could be shared
- That if the grievance procedure resume, no one can access, consider, disclose, or otherwise use information, including records, obtained solely through the IR process
- That the IR facilitator may serve as a witness in the grievance procedure if resumed

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Informal Resolution Limits

The Ex: IR Limits

- Cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Speed Date: IR Limits

- Cannot offer if there are allegations that an employee engaged in sex discrimination toward a student or such a process would conflict with Federal, State or local law
- The informal resolution facilitator cannot be the investigator or decisionmaker for the case

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Responding to Complaints



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What is a Complaint

The Ex: Formal Complaint

- Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator
- Can consolidate complaints

Speed Date: Complaint

- A complaint includes an oral or written request to initiate a grievance
- In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient's education program or activity
- Can consolidate complaints; if one includes allegations of sex-based harassment involving a student, must use procedures for those types of cases

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Complaints

The Ex: Who Can File/Sign?

An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

Speed Date: Who can Make/Initiate

- A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX; or
- A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.

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Response to a Complaint

The Ex: Title

- Initiate the grievance procedures or informal resolution process
- Send a notice of allegations to all known parties

Speed Date: Title

- Explicitly requires contacting the respondent to notify of grievance procedures and informal resolution process and to offer and coordinate supportive measures
 - For allegations of *sex discrimination* alleging the educational institution's policy or practice discriminates on the basis of sex, the educational institution is not considered the respondent
- Initiate the grievance procedures or informal resolution process
- Send a notice of allegations to all known parties

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Grievance Procedures



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Grievance Process Requirements

The Ex: Grievance Process Requirements

- Treat parties equally by providing supportive measures to complainant and not finding a respondent responsible until after the grievance process
- Require no conflict of interest or bias and require training for all roles
- Include a presumption of non-responsibility
- Include reasonably prompt time frames for conclusion of the grievance process, including for filing and resolving appeals and the IR process, and a process for extensions
- Describe the range of or list possible disciplinary sanctions and remedies
- State the standard of evidence to be used
- Include the procedures for appeal
- Describe the range of supportive measures
- Require an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide the credibility determinations not be based on status

Speed Date: Grievance Process Requirements

- Treat parties equitably
- Prohibit conflicts of interest or bias and require training for all roles
- Include a presumption of non-responsibility
- Establish reasonably prompt time-frames for “major stages” and a process for extensions
- Take reasonable steps to protect privacy
- Applicable to allegations of sex-based harassment
 - Describe the supportive measures available to the parties
 - Describe the range of or list possible disciplinary sanctions and remedies
- Require an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide that credibility determinations not be based on status
- Requires use of preponderance of the evidence standard unless using clear and convincing in all other comparable proceedings, including those related to other discrimination complaints

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The Title IX Team

The Ex: Title IX Team

- Title IX Coordinator, investigator, and informal resolution facilitator can be the same person
- Must be a different decision-maker
- Must be a different appellate decision-maker

Speed Date: Title IX Team

- The Title IX Coordinator, investigator, and decision-maker can be the same person
- Must be a different appellate decision-maker
- Must be a different informal resolution facilitator

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Dismissal of Complaint Allegations

The Ex: Dismissals

- Provides grounds for mandatory or permissive dismissal
- Upon dismissal, institution must send written notice of dismissal, reasons for dismissal, and notice of right to appeal
- Party can appeal dismissal on three bases

Speed Date: Dismissals

- No more mandatory dismissal, all permissive
- Must provide written notice of dismissal, basis, and notice of right to appeal to party's who have notice of the complaint (in writing for sex-based harassment complaints involving a student in higher ed)
- Party can appeal dismissal on three bases
- Even after dismissal, must take appropriate and prompt steps to ensure sex discrimination does not continue or recur

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Dismissal Bases

The Ex: Dismissal Bases

Mandatory

- Conduct alleged, even if substantiated, not Title IX "sexual harassment" in an education program or activity and against a person in the U.S.

Permissive

- Respondent's enrollment or employment ends
- Complainant requests to withdraw the complaint and would not be deliberately indifferent to dismiss
- Specific circumstances prevent collecting sufficient evidence to make a determination

Speed Date: Dismissal Bases

All Permissive

- Unable to identify the respondent after taking reasonable steps
- Respondent is not participating in the education program or activity and is not employed
- Complainant voluntarily withdraws any or all of the allegations in the complaint in writing, the Title IX Coordinator declines to initiate a complaint, and the educational institution determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX
- After making reasonable efforts to clarify the allegations with the complainant, the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX

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Dismissal Bases

The Ex: Dismissal Bases

Mandatory

- Conduct alleged, even if substantiated, not Title IX “sexual harassment” in an education program or activity and against a person in the U.S.

Permissive

- Respondent’s enrollment or employment ends
- Complainant requests to withdraw the complaint and would not be deliberately indifferent to dismiss
- Specific circumstances prevent collecting sufficient evidence to make a determination

Speed Date: Dismissal Bases

All Permissive

- Unable to identify the respondent after taking reasonable steps
- Respondent is not participating in the education program or activity and is not employed
- Complainant voluntarily withdraws any or all of the allegations in the complaint in writing, the Title IX Coordinator declines to initiate a complaint, and the educational institution determines that, without the complainant’s withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX
- After making reasonable efforts to clarify the allegations with the complainant, the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX

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Notice of Allegations

The Ex: NOA

Must be in writing, be updated if new allegations are added, and include:

- Notice of grievance & IR processes
- Sufficient information including identities of parties involved in the incident and details about the alleged discrimination, including date and location
- Presumption of non-responsibility
- Inform parties of advisor rights and right to inspect and review “directly related evidence”
- Cite any code of conduct provision that prohibits knowingly making false statements or providing false information

Speed Date: NOA

Must be updated if new allegations are added, and include:

- Notice of grievance and IR processes
- Sufficient information including identities of parties involved in the incident and details about the alleged discrimination, including date and location
- A statement that retaliation is prohibited

For Higher Ed complaints of sex-based harassment involving a student, must be in writing & also include:

- Presumption of non-responsibility + determination only made at end of the grievance procedure and only after having an opportunity “to present relevant evidence to a trained, impartial decisionmaker”
- Right to receive access to relevant evidence or to an investigative report with summary of evidence

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Delay of NOA (2024 Rule)

- For higher education institution cases with allegations of sex-based harassment involving a student, the 2024 Rule will allow a reasonable delay in providing the NOA if there are legitimate concerns for the safety of any person as a result of providing the notice
- The legitimate concerns must be based on an individualized safety and risk analysis and not on mere speculation or stereotypes

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Investigations

The Ex: Investigations

Seven general requirements

- Burden of proof and evidence on institution
- Equal opportunity to present witnesses, including expert witnesses, and evidence
- No "gag rules" or limits on right to gather/present evidence
- Same opportunity to advisor, but can limit role if equally applied
- Provide written notice of interviews and meetings (with specifics) with time to prep
- Parties can inspect, review, and respond to directly related evidence
- Parties can review and respond to investigation report

Speed Date: Investigations

Retains most general requirements, with some modification

- Burden on institution to gather sufficient evidence for determination
- Equal opportunity to present relevant fact witnesses and evidence; expert witnesses can be allowed, but not required (must be equal between parties)
- Investigator must review all evidence gathered to evaluate if "relevant"
- Provide each party with a description of all relevant evidence and an opportunity to respond

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Higher Ed Sex-Based Harassment Cases w/Student

The Ex: Investigations

Seven general requirements

- Burden of proof and evidence on institution
- Equal opportunity to present witnesses, including expert witnesses, and evidence
- No “gag rules” or limits on right to gather/present evidence
- Same opportunity to advisor, but can limit role if equally applied
- Provide written notice of interviews and meetings (with specifics) with time to prep
- Parties can inspect, review, and respond to directly related evidence
- Parties can review and respond to investigation report

Speed Date: Investigations

For higher education complaints with sex-based harassment allegations involving a student, must also:

- Provide written notice of interviews and meetings (with specifics) with time to prep
- Same opportunity to advisor, but can limit role if equally applied
- Must allow parties the same opportunities to have others in addition to advisors present during meetings and proceedings
- Discretion regarding experts
- Extensions for good cause with written notice
- Equitable access to and right to respond to evidence or summary in report
- Institutions also required to take reasonable steps to prevent unauthorized disclosure

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Sharing Evidence

The Ex: Sharing Evidence

For all formal complaints (both K-12 and higher ed):

- Review of directly related evidence with 10 days to respond
- Review of investigation report with 10 days to respond

Speed Date: Sharing Evidence

For K-12 and non-harassment higher ed complaints, all that is required is “provide each party with a description of relevant/permissible evidence with a reasonable opportunity to respond”

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Higher Ed Sex-Based Harassment Cases w/Student

The Ex: Sharing Evidence

For all formal complaints (both K-12 and higher ed):

- Review of directly related evidence with 10 days to respond
- Review of investigation report with 10 days to respond

Speed Date: Sharing Evidence

- Reasonable opportunity to review or respond to the evidence before a decision
- Provide either equitable access to the relevant and not otherwise impermissible evidence, **or** to the written investigative report that accurately summarizes this evidence
- If report provided, must also provide the parties with equitable access to the relevant and not otherwise impermissible evidence upon the request of any party

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Higher Ed Sex-Based Harassment Cases w/Student

The Ex: Sharing Evidence

For all formal complaints (both K-12 and higher ed):

- Review of directly related evidence with 10 days to respond
- Review of investigation report with 10 days to respond

Speed Date: Sharing Evidence

- If a higher ed institution conducts a live hearing as part of its grievance procedures, it must provide this opportunity to review the evidence in advance of the live hearing
- It is at the institution's discretion whether to provide this opportunity to respond prior to the live hearing, during the live hearing, or both prior to and during the live hearing

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Excluded Evidence #1

The Ex: Excluded Evidence #1

Cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Speed Date: Excluded Evidence #1

- Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:
- Evidence that is protected under a privilege as recognized by Federal or State law, unless the person holding such privilege has waived the privilege voluntarily in a manner permitted in the recipient's jurisdiction;

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Excluded Evidence #2

The Ex: Excluded Evidence #2

Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, without the party's (or their parent's) written consent.

Speed Date: Excluded Evidence #2

Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:
(Health records) - A party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent for use in the recipient's grievance procedures; and

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Excluded Evidence #3

The Ex: Excluded Evidence #3

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Speed Date: Excluded Evidence #3

Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:

(Sexual interests or conduct) - Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. The fact of prior consensual sexual conduct between the complainant and respondent does not demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.

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Decisionmakers

The Ex: Different Decision-maker

Decision-maker cannot be Title IX Coordinator or investigator

Speed Date: Investigator-Decisionmaker

- Same person can be investigator and Decisionmaker
- If Decisionmaker is not persuaded under the applicable evidentiary standard that sex discrimination occurred, whatever the quantity of evidence is, the decision-maker should not determine that sex discrimination occurred

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Credibility

- The 2024 Rule requires an educational institution to provide a process that allows the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is **both** in dispute **and** relevant to evaluating one or more allegations of sex discrimination
- For higher education grievance procedures with allegations of sex-based harassment involving a student, the decisionmaking process must include either a decisionmaker asking their and the parties' proposed questions and follow-up questions of other parties and witnesses either at individual meetings or a live hearing, or an advisor asking such questions and follow-up questions

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Higher Ed Hearings

The Ex: Hearings Required

- For postsecondary institutions, the recipient's grievance process must provide for a live hearing
- Can hold hearing (either at a party's request or the institution's discretion) in separate rooms using technology. Must audio or audio visually record and make the recording available to the parties

Speed Date: Hearings Allowed

- A postsecondary institution's sex-based harassment grievance procedures for cases involving students may, but need not, provide for a live hearing
- If a live hearing is offered, can still do so (either at a party's request or the institution's discretion) in separate rooms using technology
- Must continue to audio or audio visually record and make the recording available to the parties

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Higher Ed Hearings

The Ex: Cross-Examination

- Detailed provisions regarding questions and cross-examination of parties and witnesses
- If party does not have an advisor, recipient must provide an advisor of the recipient's choice without fee or charge

Speed Date: Cross-Examination

- Institutions have the option under Title IX to have the decision-maker ask questions and follow-up questions to parties and witnesses, including those proposed by the parties to the decision-maker, either in one-on-one meetings with the parties/witnesses or in a live hearing
- Institutions can still choose to allow advisors to question parties and witnesses at a hearing; if they do, must provide advisor to party who does not have one

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Higher Ed Hearings

The Ex: Relevance Determinations

- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

Speed Date: Relevance Determinations

- Decisionmaker must determine whether a proposed question is relevant and not otherwise impermissible prior to the question being posed to the witness or party, and must explain any decision to exclude a question as not relevant
- If decisionmaker determines that a party's question is relevant and not otherwise impermissible, then it must be asked except that a postsecondary institution must not permit questions that are unclear or harassing of the party being questioned

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Decision

The Ex: Written Determination

- Written determination required for all cases
- Must include:
 - Allegations
 - Procedural steps taken
 - Findings of fact
 - Conclusions regarding application of code of conduct to the facts
 - Statement and rationale for the result as to each allegation, including determination regarding responsibility
 - Any disciplinary sanctions imposed
 - Whether remedies will be provided
 - Appeal procedures

Speed Date: Determination

- Written determination only required for higher education complaints of sex-based harassment involving a student party; must include:
 - Allegations
 - Procedural Steps
 - Findings of Fact
 - Application of Policy to Facts
 - Statement and Rationale for Determination for Each Allegation
 - Procedures and Bases for Appeal
- For all other cases, sufficient to notify parties of the outcome, including the determination of whether sex discrimination occurred under Title IX, the reasons for the decision, and appeal rights

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Remedies and Disciplinary Sanctions

The Ex: Written Determination

- Must be included in the written determination

Speed Date: Notice of Outcome

- Institution—not Decisionmaker—responsible for deciding remedies and disciplinary sanctions
- Title IX Coordinator to provide and implement remedies and other appropriate prompt and effective steps to ensure sex discrimination does not continue

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Relevance Definition (2024 Rule)

- The 2020 Rule does not define “relevant”
- The 2024 Rule defines “relevant” as “related to the allegations of sex discrimination under investigation as part of the grievance procedures. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred. Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

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Appeals

The Ex: Appeal Bases

- Required for all dismissals and determinations for all formal complaints of sexual harassment
- Decision-maker(s) for appeal cannot be decision-maker(s) that reached the determination or dismissal, the investigator(s), or the Title IX Coordinator;
- Required on three bases
- Can offer appeal for other bases, but must offer equally

Speed Date: Appeal Bases

- Required for all dismissals and for determinations in complaints of sex-based harassment involving a student party on same three bases from 2020 Rule
- Remaining cases require the same appeal as used for comparable cases
- Decisionmaker for appeal must be person who did not take part in an investigation or decision being appealed
- Appeal Decisionmaker must be trained

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Specified Appeal Bases (2020 & 2024 Rules)

- Procedural irregularity + affected the outcome
- New evidence not reasonably available at the time of the determination + could affect the outcome
- Bias or conflict of interest of Title IX team member + affected the outcome

* Remember these are only applicable under the 2024 Rule to higher education cases involving an allegation of sex-based harassment with a student party and to dismissal

** Under both Rules, an educational institution can offer appeals on other bases as long as it does so equally between the parties

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Appeals

The Ex: Appeal Requirements

- Written notification when an appeal is filed
- Implement appeal procedures equally
- Equal opportunity to parties to submit a written statement in support of, or challenging, the outcome;
- Written decision provided to both parties describing the result and the rationale

Speed Date: Appeal Requirements

- Notify when appeal is filed
- Implement appeal procedures equally
- Provide parties a reasonable and equal opportunity to make a statement in support of, or challenging, the dismissal
- Notify parties of result of appeal and rationale for result

** Notices must be in writing for complaints of sex-based harassment involving a student party at a postsecondary institution

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Serving Impartially



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Bias, Conflicts of Interest, and Prejudgment

- Both the 2020 and 2024 Rules require Title IX team members to be impartial
- We will discuss impartiality regarding specific roles other than the Title IX Coordinator in other sessions
- Let's look at some examples Title IX Coordinators might face

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Bias in Title IX Coordination

- Bias can affect the coordinator's decisions regarding case management, policy enforcement, and support resources
- Example: A coordinator who has personal beliefs about gender roles might unknowingly favor one gender over another in providing support or making decisions on disciplinary actions

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Conflicts of Interest in Title IX Coordination

- Conflicts of interest can arise if the coordinator has personal or professional relationships with any party involved in a case
- Example: A coordinator who has previously worked closely with a respondent or complainant might find it difficult to remain impartial during the investigation process

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Prejudgment in Title IX Coordination

- Forming opinions about the merits of a case before fully reviewing the evidence can lead to biased decisions and undermine the fairness of the process
- Example: A coordinator might prematurely judge the credibility of a complainant or respondent based on initial reports or their own experiences, affecting their objectivity in handling the case

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Conflicts of Interest in Title IX Coordination

- Training and Education
- Clear Policy and Procedures
- Self-Assessment and Reflection
- External Review and Consultation
- Transparency and Documentation
- Disclosure and Recusal
- Focus on Fairness Between Parties



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Don't Forget Your Records & Trainings

- Under both the 2020 and 2024 Rules, educational institutions must maintain records related to Title IX cases for no less than 7 years
- The 2020 Rule requires posting of all trainings for Title IX Team members (including these!) on your educational institution's website
- The 2024 Rule would only require that the training materials be maintained and made available if requested

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Questions



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