

## OSPA VIRTUAL FALL SUMMIT 2020

# Title IX Compliance Certification Training: Coordinator Training

October 26-27, 2020

Presented by Jackie Gharapour Wernz ,Partner

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## Your Host

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## Title IX Coordinator Responsibilities

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

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## Title IX Coordinator Responsibilities

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

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## Timeline



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## Website Posting Required by 8/14

- Training materials used to train Title IX Team
- Title IX Coordinator Information
- Policy Language
  - Nondiscrimination Language
  - TIX SH Grievance Process

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## Robin's Report

- This morning
- Email from Dean of Students/AP
- Robin, a first-year lacrosse player, reported conduct that occurred against Robin's friend, Cameron, also a first-year lacrosse player

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## Robin's Report

- Lacrosse orientation week
- Park across street from the school
- Two upperclassmen lacrosse players vs. Cameron—the main Respondent is Parker

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## Robin's Report

- Verbal harassment
  - Going to violate your mother
  - Want to “smoke” (understood to mean sexual assault), will give starting position on team if do
- Grabbed Cameron by the neck and bent Cameron over; poked Cameron's anus over the clothes

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## Robin's Report

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

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## Robin's Report

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

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## TIX Quid Pro Quo

**Definition:** An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct

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

**Codified:** Severity and harm presumed

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## VAWA "Big Four"

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

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

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

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

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## [www.titleXinsights.com](http://www.titleXinsights.com)

### OCR Clarifies VAWA “Big Five” Definitions Under Title IX, Warranting Revised Procedures

By Jackie Gharapour Wernz on October 13, 2020

POSTED IN NEWS AND DECISIONS

On October 7, 2020, the U.S. Department of Education’s Office for Civil Rights issued a [blog post](#) clarifying the definitions of “sexual assault,” “dating violence,” “domestic violence,” and “stalking” under Title IX. Your educational institution should review its policies and procedures to include this important information. Any revisions should be posted on your institution’s website along with other procedures. For K-12 institutions that use the Illinois Association of School Board’s PRESS policies, our team has revised PRESS 2:265 Exhibit 1 (E1) to address these important changes. Contact [TitleX@Franczek.com](mailto:TitleX@Franczek.com) or your Franczek attorney to obtain a copy of the revised procedure.

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## Sexual Assault under VAWA

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

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## CONSENT

- Need internal definition
- Remember “unwelcome” standards

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## Also, Hostile Environment

- Unwelcome conduct
- Of a sexual nature
- So severe, pervasive, **and** objectively offensive
- Effectively denies access

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**What if the only activity reported was the verbal taunting (nothing physical). Is the alleged conduct "Title IX Sexual Harassment"?**

Yes - severe, pervasive, and objectively offensive + effectively denies access

No - not severe

No - not pervasive

No - not objectively offensive

No - not effective denial of access

How the heck should I know? I'm calling the lawyer.

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## Title IX – What is a Hostile Environment

<b>Old Definition</b> Unwelcome conduct determined by a reasonable person to be <b>severe, pervasive or persistent as to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities</b>	<b>New Definition (8/14)</b> Unwelcome conduct determined by a reasonable person to be <b>so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the school's education program or activity</b>
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## Was the conduct in a program or activity of the school?

Yes, because the park is close enough to the school

Yes, because regardless of where the conduct occurred the coaches were overseeing practice

No, because although the coaches were overseeing practice the park is off school grounds

I quit!

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

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### **If it's not "Title IX Sexual Harassment," what do you do? (best choice)**

- Tell the dean he can't do anything further because it's not Title IX Sexual Harassment
- Tell the dean to consider other policy violations (bullying, code of conduct) at the building level
- Tell the dean to follow up with Cameron to seek more information
- Ask the dean if she's interested in a new position because you're is about to be free....

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### **Can Robin file a complaint?**

- Yes, because Robin's education could have been impacted by the climate of sexual violence on Robin's sports team
- No, because Robin would have to have Cameron's permission to file a complaint on Cameron's behalf
- No, because there is no allegation of Title IX Sexual Harassment perpetrated against Robin

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**You think it's TIX SH.... What do you do next?**

Contact Robin to obtain more information **A**

Contact Robin to offer an opportunity to file a formal complaint and supportive measures **B**

Contact Cameron to offer an opportunity to file a formal complaint and supportive measures **C**

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

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

***New:  
Initial  
Response***

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When poll is active, respond at [Pollev.com/franczek](https://Pollev.com/franczek)  
Text **FRANCZEK** to **22333** once to join

**Cameron is in class that day, can the Dean/AP meet with Cameron to discuss supportive measures/the right to file a formal complaint?**

Yes, but only if the Dean/AP has had Title IX Coordinator training.

Yes, but only if the Title IX Coordinator delegates that authority to the Dean/AP.

No, because the rules say the Title IX Coordinator must have that meeting.

A & B

None of the above

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## Cameron's Report

- You tell the Dean to meet with Cameron (**WRITE IT DOWN**)
- Cameron confirms all of the allegations

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## What Supportive Measure Would You Offer (Order from Best to Worst)

- A mutual no contact order (applicable to all students)
- Waiver of attendance requirements for soccer for Cameron
- Counseling for Cameron
- A unilateral no contact order (applicable only to the upperclass students)
- Increased monitoring or supervision
- Removing the upperclass students from the team pending an investigation

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## Cameron's Report

- Cameron does not want to file a formal complaint
- Cameron begs not to be named to the upperclass students

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### Can you honor Cameron's confidentiality request?

No, names must always be provided to the Respondent when a Complainant reports Title IX Sexual Harassment

No, because this situation warrants "signing" a formal complaint and Cameron must therefore be named

Yes, because a complainant's name can be kept confidential until a formal complaint is filed

None of the above

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## "Signing a Complaint"

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

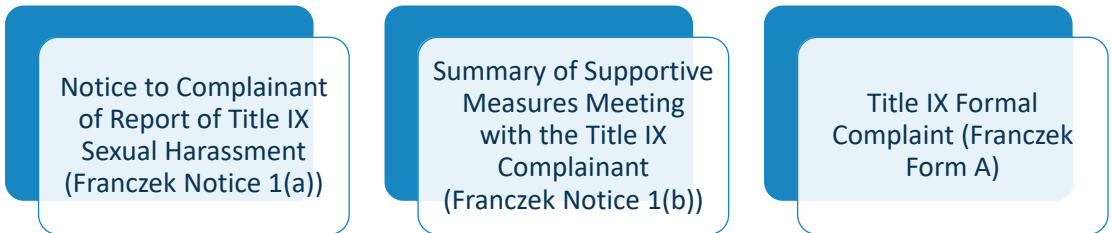
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# Forms/Notices

## Initial Contact and Meeting with the CP



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

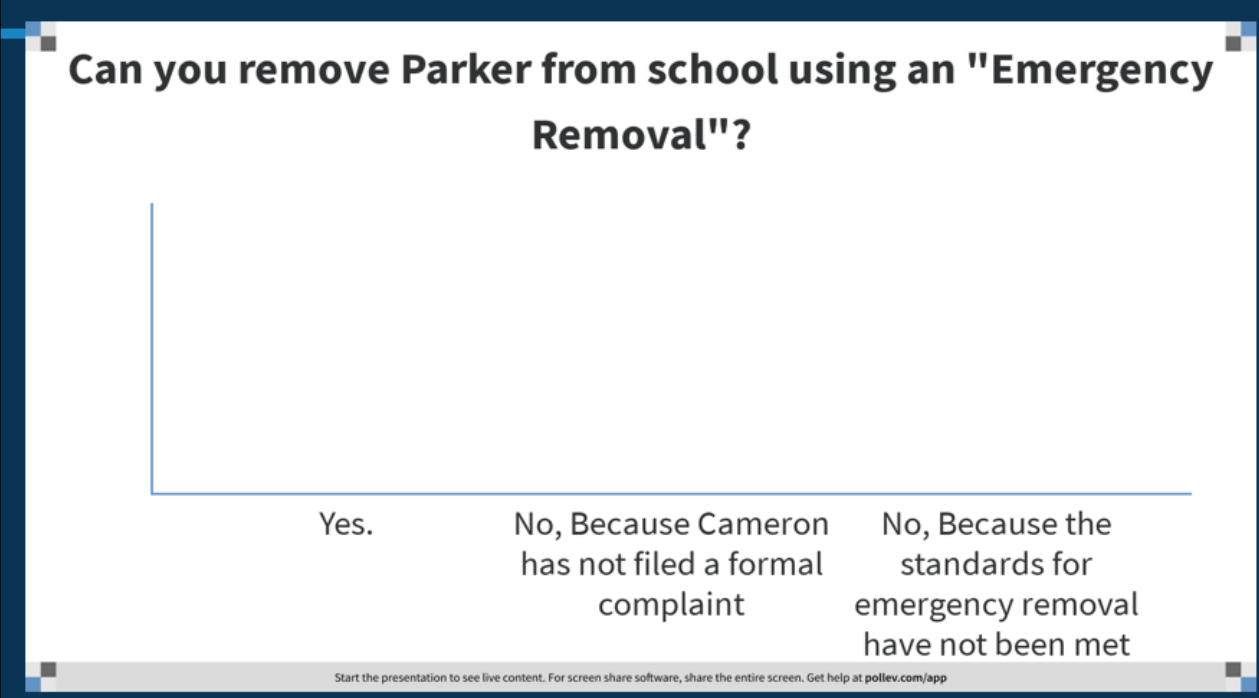
Summary of Supportive Measures Meeting with the Title IX Complainant (Franczek Notice 1(b))

Title IX Formal Complaint (Franczek Form A)

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### Can you remove Parker from school using an "Emergency Removal"?



Yes.

No, Because Cameron has not filed a formal complaint

No, Because the standards for emergency removal have not been met

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**Can you remove the "shaking head" coach on administrative leave during the investigation?**

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Yes, if school policy otherwise allows it	No, because there is not a sufficient showing of an immediate threat to Cameron's physical health from the teacher's actions
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**Emergency Removal/  
Admin Leave**

<p><b>Immediate emergency removal</b> (34 C.F.R. 106.44(c))</p> <ul style="list-style-type: none"><li>• Based on an individualized safety and risk analysis</li><li>• Necessary to protect a student or other individual from <b>immediate threat to physical health or safety</b></li><li>• <b>Notice, opportunity to challenge</b> provided "immediately" provided the removal</li></ul>	<p><b>Employee administrative leave</b> (34 C.F.R. 106.44(d))</p> <ul style="list-style-type: none"><li>• Not prohibited</li><li>• Consider state law, board policy, handbooks, and bargaining agreements</li></ul>
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## Remember State & Federal Law

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

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## Forms/Notices

### Notice of Emergency Removal

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

Notice of Title IX  
Emergency Removal or  
Admin Leave for  
Employee (Franczek  
Letter 4(b))

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**Cameron presents a court order prohibiting the upperclass students from being at school. What do you do?**

Ignore it, because removing the students from school would be punitive or disciplinary, and that's not possible until after a determination is made

Enforce it and do not get involved - this is between Cameron and the upperclass students

Enforce it and tell the upperclass students that they should raise any concerns with the court

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**Your institution offers face-to-face restorative justice. Can this IR be done with Cameron?**

Yes, because the new Title IX rules now clearly allow informal resolution **A**

Yes, as long as the facilitator has been trained on Title IX **B**

No, because Cameron has not filed a formal complaint. **C**

No, because sexual harassment cannot be addressed through face-to-face informal resolution **D**

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## Formal Complaint – Next Steps

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

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## Forms/Notices

### Notice of Allegations

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

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

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**Cameron and the upperclass students reach an agreement in informal resolution. Can the Title IX process ever recommence?**

Yes, but only if the upperclass students failed to comply with its terms

Yes, but only for allegations not resolved in informal resolution

No, because you can only recommence an investigation before a resolution is reached

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## Forms/Notices

### Informal Resolution Process

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

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

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## Let the investigation begin....

- Identify investigator
- Investigator sends notice to parties (and, we recommend, to witnesses) before interviews

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## Forms/Notices

### Notice of Interview

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

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

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## Let the investigation begin....

- Provide advisor notice

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## Forms/Notices

### Notice to Advisors

Advisor  
Conduct  
Expectations

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## Witness – Devon

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

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## Witness – Devon

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

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### In which case does the school have jurisdiction?

None

All

Spring break conduct

Summer snapchat incident

Teacher photo incident

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### How can you respond if the teacher quit during the investigation?

Consider other code of conduct or policy violations

Send both parties a formal dismissal notice

Meet with Devon to discuss supportive measures for the remainder of time at the school

All of the above

None of the above

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**Say the teacher didn't quit, but Devon calls to ask to withdraw the formal complaint. What do you do?**

- Respect Devon's autonomy and wishes by dismissing the complaint
- Tell Devon you will not dismiss the Complaint because there is an ongoing risk to other students
- Require that Devon submit the request in writing and then dismiss the Complaint

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**It turns out that the incident occurred two years ago, before Devon was a student. What CAN'T you do?**

- Dismiss the complaint because of the difficulty in gathering evidence to reach a determination
- Continue with the complaint because the teacher was employed at the time of the incident
- Dismiss the complaint because Devon was not a student at the time the conduct occurred

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**You're investigating Devon's complaint, when Devon ghosts you completely. Can you dismiss the complaint?**

No Yes

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## DISMISSALS

<b>Mandatory if conduct alleged:</b> <ul style="list-style-type: none"><li>Not Title IX Sexual Harassment</li><li>Did not occur in the school's program or activity</li><li>Did not occur in the United States</li></ul> <p>**can still address under non-Title IX policy</p>	<b>Permissive if:</b> <ul style="list-style-type: none"><li>Complainant requests to withdraw in writing</li><li>Respondent's enrollment or employment ends</li><li>Specific circumstances prevent school from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant)</li></ul>
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## Forms/Notices

### Notice of Dismissal

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

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

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## Investigation

- Collect evidence
- Share "directly related evidence"
- Investigative report fairly summarizing "relevant evidence"
- Share and transmit report to decision-maker

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## Forms/Notices

### Sharing of Evidence

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

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## Forms/Notices

### Investigative Report

- Title IX Investigative Report Template (Franczek Form B)
- Notice of Investigative Report (Franczek Notice 8(a))
- Notice of Other Party's Written Response (Franczek Notice 8(b))
- Transmittal Cover Letter to Decision-maker at Conclusion of Investigation (Franczek Letter 8(c))

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## Decision

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

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## Appeal Notice

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

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

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# Bias, Conflicts of Interest, and Other Fairness Concerns

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## Bias, Conflict, Prejudgment

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

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## Bias

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

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## Conflict of Interest

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

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## Pre-Judgment

Tips for avoiding pre-judgment of facts:

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

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## Recordkeeping/File Maintenance

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## Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

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Questions?



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