




Elizabeth H. Canning

Campus and Workplace Solutions

Title IX
Elizabeth H. Canning, Esq.
www.ecanninglaw.com



EHC
Campus and Workplace Solutions

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Agenda

- 1 2020 Title IX Regulations
- 2 Other Title IX Requirements
- 3 Other Sex/Gender Discrimination & School Policy
- 4 Other Laws

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Section 1

New Title IX Regulations




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Who Monitors Title IX Compliance and Why?

- Department of Education, Office for Civil Rights
- The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education.



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Title IX- the law

Title IX of the Education Amendments Act of 1972

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

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What is Discrimination?

- Treating someone differently because of their identity within a protected category
- May be an act of different treatment
- May also be a facially neutral rule or policy that has a disparate impact
- **Exception:** when there is a legitimate business reason for the rule or policy

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"It is impossible," Justice Gorsuch wrote, "to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

June 15, 2020

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Title IX- some history...and some that remains

- 1998/1999 Gebser and Davis- deliberate indifference
- 2001- Sexual Harassment guidance
- 2007- Dear Colleague on Single Sex Programs
- 2010- Dear Colleague on Harassment and Bullying
- 2011- Dear Colleague Letter on Sexual Harassment (rescinded)
- 2014- Q&A (rescinded)

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Title IX background, continued

- 2015- Dear Colleague Letter on Title IX Coordinators
- 2016- Dear Colleague Letter on Transgender Students (Rescinded)
- 2018- revised case processing manual
- 2018- Proposed new regulations
- May 6, 2020.....new regulations!
- August 14, 2020- Effective date

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Title IX- what it covers


What does the school pay for or enable, control, own...etc?

- employees, students
- academics
- employment, benefits, opportunities
- extra-curriculars
- the ability to engage in what the school has to offer
- on-campus, off-campus (with some caveats)
- athletics
- discipline

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2020 Title IX Regulations

MEMO FROM: DEBORAH STUMP
Betsy DeVos, Secretary of Education—Bloomberg



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Know Your IX @knowyourix · May 18
About a third of seniors are pushed out of school in the aftermath of violence. DeVos' rule will maximize dropout rates and reduce reporting. Survivors are already experiencing an unacceptable status quo that will be made far worse by DeVos' changes to Title IX.

Alexandra Knudby @alexknudby · Apr 15
Feeling like you're a headline like with Title IX advocates claiming DeVos's new rules are necessary because the status quo for "harassment" is unacceptable, isn't it clear that those causing existing problems, the ones that advocates will "rescind" them, and severely.

Know Your IX @knowyourix · May 13
Drope Title IX rule helps survivors of sexual violence to a higher standard than other forms of harassment and discrimination.

Nine For All @nineforall · May 18
Secretary Betsy DeVos @ DeVos May 18
That one #TitleIX regulation for creating #Challengers on our college campuses. It is one of the original ones under the 2011 DCL. No one in this country should be penalized guilty by association.

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Michelle Ann Donnell @MichelleAnnD · May 17
Need of Title IX rule? Can't say right to those Biden's history of erasing due process rights from accused students. What would happen if they were judged to a campus tribunal?

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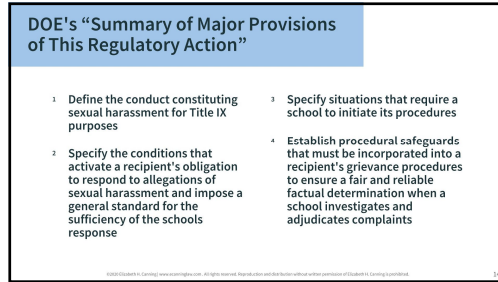


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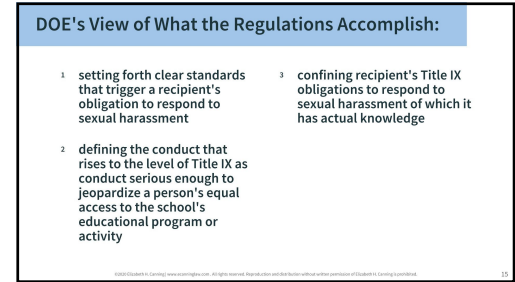
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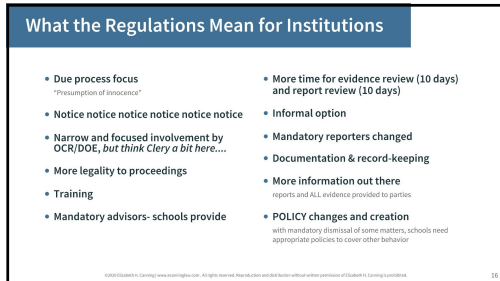
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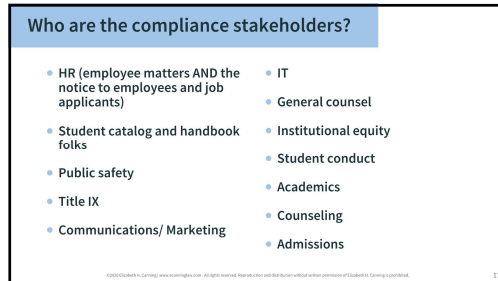
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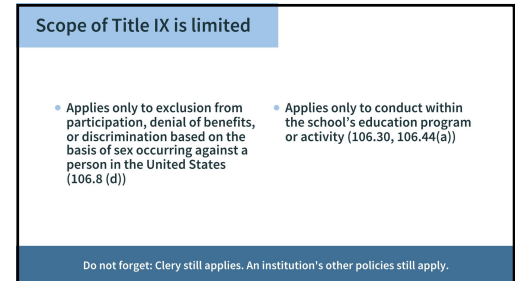
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106.30 Definitions

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;
- Unwelcome conduct on the basis of sex that is so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the recipient's education program or activity
- Sexual assault, as defined in 20 USC 1092(f)(6)(A)(v), dating violence as defined in 34 USC 12291(a)(10), domestic violence as defined in 34 USC 12291(a)(8) or stalking as defined in 34 USC 12291(a)(30)

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Focusing In

- So severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.
- "The objective nature of the inquiry simply means that evaluation is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive."
- "The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the conduct offensive."

Quotations from DOE commentary in unofficial version p. 514

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Sexual Assault (UCR definition)

- The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

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Domestic Violence

- includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

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Dating Violence

- Violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; AND
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship.

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Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - (A) fear for his or her safety or the safety of others; or
 - (B) suffer substantial emotional distress

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Further Limits to the Scope

- **Actual knowledge** means notice of SH or allegations of SH to a recipient's TIXC or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.
- The mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the school.

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106.30 Definitions- FORMAL COMPLAINT

1. alleging sexual harassment against a respondent,
2. about conduct within its educational program or activity,
3. requesting initiation of the school's grievance procedures, and
4. filed by a complainant at a time when they are participating or attempting to participate in the school's education program or activity.

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Dismissal

- **MUST** dismiss, as Title IX complaints, complaints that do not satisfy requirements of "Formal Complaint"
- **MAY** dismiss for other reasons such as request from complainant, respondent no longer at the school, or no ability to gather the information necessary, etc.
- **NB:** Appeal rights attach, however.

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106.30 Definitions: Supportive Measures- TIXC responsible

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to C and R before and after the filing of a formal complaint or where no complaint has been filed
- Such measures are designed to (1) restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party, (2) protect the safety of all parties and the recipient's educational environment and (3) deter sexual harassment

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No formal complaint? Just a report?

- Recipient must offer and implement supportive measures designed to effectively restore or preserve the complainant's access to the recipient's educational program or activity.
- At the same time it offers supportive measures, Recipient must inform complainant of the right to file a formal complaint at that time or a later date

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106.45: Grievance Procedures MUST

- **Treat complainants and respondents equitably**
Equitable resolution for C must include remedies (where responsibility is found) that must be designed to restore or preserve access to the school's program or activity
Equitable resolution for R must include due process protections before any disciplinary sanctions are imposed
- **Require objective evaluation of all relevant evidence**
Includes both in/ex-culpatory evidence
Credibility determinations may not be based on someone's status as R or C
- **Coordinators, investigators, and decision makers may not have a conflict of interest or bias**
Must receive training
Training materials must not promote stereotypes and must promote impartial investigations and adjudications
- **Include presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of grievance process**

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106.45: Grievance Procedures & Time frames MUST:

- Include reasonably prompt time frames for conclusion of the grievance process, including for filing and resolving appeals, if any, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to C & R of the delay or extension and the reasons why.

Good cause includes considerations such as the absence of the parties or witnesses, concurrent law enforcement activity, or the need for language assistance or accommodation of disabilities

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106.45 Grievance Procedures- Notice of allegations

- Upon receipt of a *formal complaint*, school must provide the following written notice to the parties who are known:
 - A) Notice of the school's grievance procedures
 - B) Notice of the allegations constituting a potential violation of the school's code of conduct
 - including sufficient details known at the time and with sufficient time to prepare a response before any initial interview
 - SEE THIS SECTION FOR LAUNDRY LIST OF WHAT MUST BE IN THE NOTICE
 - Ongoing notice requirement when new allegations added to investigation

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Grievance Procedures, contd

- Provide party whose participation is invited or expected with written notice of date, time, location, participants, purpose of all meetings, with sufficient time for party to prepare to participate.
- Must provide live hearing
 - Each party must be able to ask the other party and any witnesses all relevant questions, including those challenging credibility
 - Such cross examination must be conducted by the party's advisor of choice.
 - Schools must provide advisor to those who do not have one.

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Advisor requirement

- Advisor of choice
- Limits on role and rules of decorum
- Cross examination
- Schools must provide for cross examination if a party does not have an advisor
- "Only relevant cross-examination and other questions may be asked of a party or witness."



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Evidence and Report Review add 20+ days

- Prior to completion of the report, the recipient must send the parties the evidence that is subject to review and inspection. Parties shall have at least TEN DAYS to provide a written response which the investigator shall consider prior to completion of the written report.
- all evidence must be available at hearing so that the parties can refer to it. (what if school and parties disagree whether something is relevant?)
- Create an investigative report that FAIRLY summarizes RELEVANT EVIDENCE and, AT LEAST TEN DAYS prior to a hearing, provide a copy of the report to the parties for their review and written response.

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Relevant and Probative?

Relevance

the tendency of a given item of evidence to prove or disprove one of the elements of the case, or to have probative value to make one of the elements of the case likelier or not.

Probative

"tending to prove." Probative evidence "seeks the truth." Tends to prove the proposition for which it is proffered.

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Hearing- Live with Cross Examination.

- The decision-maker must explain to the party's advisor asking questions any decision to exclude questions as not-relevant (include relevant).
- If a party or witness does not submit to cross examination at the hearing, the decision maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility the investigation.
- Provide both parties equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence that the recipient does not intend to rely upon in reaching a determination regarding responsibility.

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Written Decision Must Include...

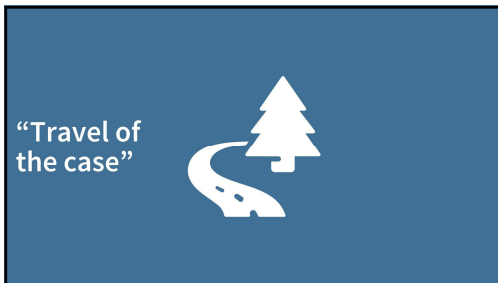
- Identification of the code alleged to have been violated
- Description of the procedural steps taken from receipt of the complaint through determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Findings of fact used to support the determination
- Conclusions regarding the application of the code of conduct to the facts.
- Statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility.
- Any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the program or activity.
- The procedures and bases for an appeal.

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Appeal grounds

- 1 Procedural irregularity
- 2 New evidence that was not reasonably available at the time of determination regarding responsibility or dismissal was made, that would affect the outcome of the matter
- 3 The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against parties generally or the individual party that affected the outcome of the matter
- 4 Other bases determined by the school, provided offered to both parties

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Informal Process

- At ANY TIME prior to reaching a determination
May include mediation
That does not involve full investigation and adjudication
- MUST:
Provide parties written notice disclosing Allegations
Requirements of the informal resolution process incl. the circumstances under which it precludes parties from returning a formal complaint arising from the same allegations.
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared
- Obtain parties' voluntary written consent

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Record-keeping

For a period of SEVEN YEARS

- Each sexual harassment investigation (including determination regarding responsibility, discipline, remedies, etc.)
- Any appeal and result therefrom
- Informal resolutions
- All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.

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Additional Record-keeping- For Seven years

- Records of any actions, including any supportive measures, taken in response to a **REPORT or FORMAL COMPLAINT** of sexual harassment

In each instance, school must document the basis for its conclusion that its response was not clearly unreasonable

Must document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity

The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

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Training. 106.45

- All key actors must receive specific training on skills and abilities required by the grievance procedures.
- Training must be kept and put on website.

RELEVANCE. BIAS. PROCESS.

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ACTION! Categorized compliance efforts.



Documents & Process



Technology



Training



People

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Documents & Process

- Policy and procedure**
Complaint form
- Notice of policy**
job descriptions, applications, parents, students, employees, unions, ...
- Supportive Measures**
Anytime. Document what was offered and how it complies with the standards under the regulations
- Complaint intake and assessment**
Form to assess complaint; Notice to investigate or not to investigate; decisions on interim measures
- Investigation reports**
Consistent regardless of investigator, with required information
- Hearing**
Forms to document how questions assessed; forms documenting decisions per regulators
- Appeal**
Appeal assessment form; notice of decisions; remember, this is for decisions at the beginning as well as the end (two different form notices of decision)
- Notices of investigation, meeting, hearing, case dismissal, outcome.**

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Technology & Training

- Recording equipment and storage
- Determine who will train
- Training materials go on website

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Staff/People

Understand how the regulations impact staffing needs

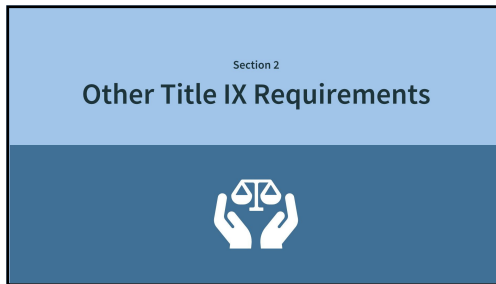
- Hearing officers
- Advisors
- People to help with coordinating supportive measures
- Meetings with parties
- Preparing documentation
- Training for all students and employees
- Investigators
- Appeal officers

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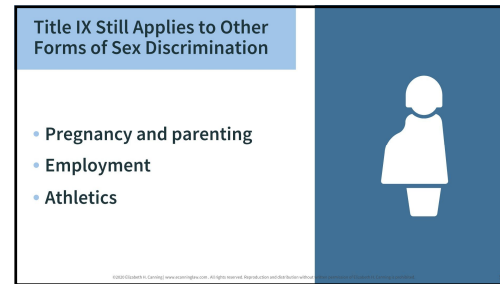
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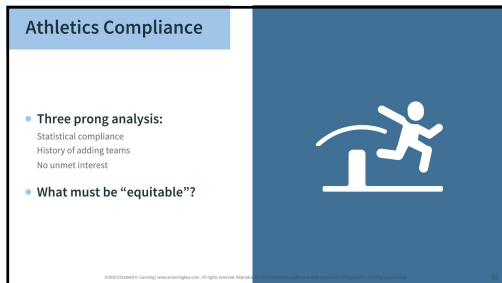
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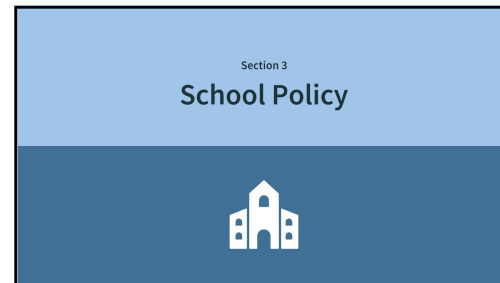
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Section 4
Additional Laws



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What are the Laws and Policies that guide this work?

- **State and federal guidance**
 - Title IX, Clery Act, VAWA
 - Title VI/VII
 - ADA/Section 504
 - ADEA
 - Laws prohibiting discrimination related to pregnancy and pregnancy-related conditions
 - State nondiscrimination laws
 - State and Federal Court case decisions
- **School Policies**
 - Nondiscrimination Policy
 - Sexual Violence and Sexual Harassment Policy
 - Violence in the Workplace Policy
 - Ethics/Code of Conduct
 - Union contracts

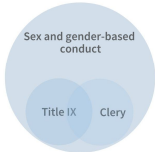
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Let's Talk about Clery!



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Clery!



- Annual report
- Timely warnings
- Response and accommodations
- Prevention and education requirements

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Sex based discrimination and harassment (not Title IX)

Includes gender based discrimination and harassment



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What can sexual harassment look like?

<p>Derogatory statements</p> <ul style="list-style-type: none"> • "She's really aggressive for a woman!" • "Boys don't cry." • "You should dress more ladylike/manly." • "Don't be such a ____." 	<p>Unwanted Sexual advances</p> <ul style="list-style-type: none"> • Cat calls • Comments on someone's physical attractiveness • Repeated requests for someone's contact information • Repeated requests for dates
<p>Nonverbal Sexual Harassment</p> <ul style="list-style-type: none"> • Sexually explicit gestures directed at an individual • Gestures intended to mock someone, based on sex. • Staring at someone in an unwelcome manner • Displaying sexually explicit images 	<p>Physical sexual harassment</p> <ul style="list-style-type: none"> • Unwanted touching of a sexual nature • Patting or grabbing someone with out consent • Sexual assault • Dating/domestic violence

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What are examples of protected categories?

- Race
- Religion
- Gender/Sex
- Sexual Orientation (Varies)
- Gender Identity/Expression
- National Origin
- Disability
- Age
- Veteran Status
- Marital Status
- Pregnancy/parenting

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Title VII, ADA & ADEA prohibit discrimination and harassment

- Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
- Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

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Overheard...

- "I didn't intend to offend or harass"
- "Lighten up! It's just a joke" or "I'd think they'd take it as compliment!"
- "It wasn't about them" or "they could have left."
- "They didn't tell me it offended them!"

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Petty Sights Do Not Violate the Law

- Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality.
- To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

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Retaliation

- Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

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What is **not** Adverse Action?

- Petty slights, minor annoyances, trivial issues
- Acts motivated by a business reason other than retaliation

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Receiving Information: Options for Next Steps

Do

- Thank them for sharing
- Let them know you are not confidential but that the school does have confidential resources
- Let them know the school has policies
- Contact the appropriate person

Do not

- Minimize or inflame
- Judge or opine
- Discourage
- Investigate or prompt for more information
- Promise confidentiality

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Exercise



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