

# Title IX Training

*Attorney-Client Privileged  
Communication*

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# Why are we here today?

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## » 34 CFR § 106.45

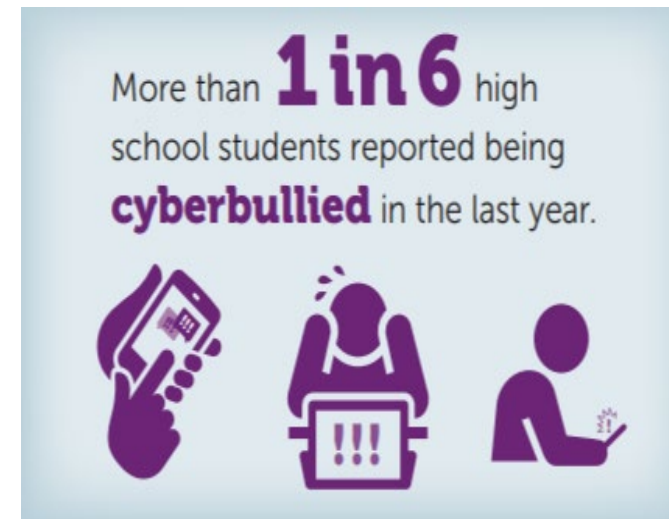
“A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive *training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant...A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence ...*



# Why are we here today?

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- In a 2021 report, the National Center for Injury Prevention and Control found:
  - » Bullying is widespread in the U.S.
  - » Bullying negatively impacts all youth involved including those who are bullied, those who bully others and bystanders.
  - » Bullying is a frequent discipline problem occurring daily or at least once a week.



# Title IX Topics for Today

1. Definition of sexual harassment in final rule;
2. The scope of the school's education program or activity;
3. How to conduct an investigation and grievance process (including hearings, appeals, informal resolution process, as applicable)
4. How to serve in the Title IX process impartially;
5. Conflicts of interest and bias;
6. Issues of relevance (including how to apply rape shield protections)
7. Evidentiary standards in Title IX;
8. Creating an investigative report;

# Bullying Topics

1. Describe impact of bullying on students.
2. Describe methods of bullying.
3. Define the term “bullying.”
4. Define the term “cyberbullying.”
5. Describe duties in responding to reports of bullying.

# Title IX

# Scenario 1: Title IX Formal Complaint Procedures

- You overhear AB make fun of BC for wearing a pink shirt. AB and BC are both males. The next day, BC's parents come to you and want to file a Title IX Formal Complaint. Should you allow it?

# Scenario 2: Pantsing

- A parent calls you and tells you her son, X, has been pantsed during gym class by her classmates. The parents tells you X is embarrassed and does not want to attend school. Is this a potential Title IX incident?



# 1. Definition of Sexual Harassment

# Sexual Harassment: Conduct “*on the basis of sex*”

- Title IX regulations define “sexual harassment” as conduct on the **on the basis of sex** that meets one or more of the following definitions:
  - » **Quid pro quo (“this for that”)**
  - » **Hostile environment**
  - » **Sexual Assault, Dating Violence, Domestic Violence and Stalking**

# “sex”

- Biological gender;
  - Gender identity;
  - Gender non-conformity;
  - Sexual orientation;
  - Transgender status.
- 
- US Department of Ed has stated that its definition of sexual harassment applies to the protection of any person who experiences sexual harassment, regardless of sexual orientation or gender identity.

# “harassment”

- Harassment can take many forms:
  - » Name-calling;
  - » Written statements;
  - » Images and graphics
  - » Other actions that may be physically threatening, harmful, or humiliating.
- Title IX applies to:
  - » *Sexual* harassment

# The definition of sexual harassment in § 106.30

- Under § 106.30, *sexual harassment* means conduct on the basis of **sex** that satisfies one or more of the following:
  - (1) 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 (“quid pro quo”);
  - (2) 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; or
  - (3) “Sexual assault” as defined in [20 U.S.C. 1092\(f\)\(6\)\(A\)\(v\)](#), “dating violence” as defined in [34 U.S.C. 12291\(a\)\(10\)](#), “domestic violence” as defined in [34 U.S.C. 12291\(a\)\(8\)](#), or “stalking” as defined in [34 U.S.C. 12291\(a\)\(30\)](#).

(2) 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

- More than a single incident of, for example, offensive touching;
- Some courts have even held that three separate occasions of sexual harassment involving a male student shoving a female student into a locker, demanding that she perform sexual acts on him, and making obscene gestures at her, was not severe, pervasive, and objectively offensive because the complainant could not explain how the incidents *deprived a student's access to educational resources, opportunities, or benefits*.
- Courts have deemed conduct to be severe, pervasive, and objectively offensive where a party can demonstrate an interference with educational opportunities, such as a drop in grades and decreased attendance.
- Must have the effect of denying equal access to education.

# What does “effectively denies a person equal access to the recipient's education program or activity” mean?

- Department of Education has issued guidance on this question. It may include
  - » Skipping class to avoid harasser;
  - » Decline in grade point average;
  - » Having difficulty concentrating in class;
  - » 3d grader who starts bed-wetting or crying at night due to sexual harassment; and
  - » Wrestling athlete who quits team to avoid harassment but continues on with other classes;
- **Complainant does not need to have “already suffered loss of education before being able to report sexual harassment.”**
- Effective denial does not require “that a person’s total or entire educational access has been denied.”
- Complainant need not have dropped out of class, had a panic attack or reached a breaking point to be effectively denied equal access.
- **“No concrete injury is required to prove an effective denial of equal access.”**

# SEXUAL ASSAULT

- **Sexual Assault**” includes any of the following forcible or nonforcible conduct:
  - » Forcible Conduct includes:
    - Rape
    - Sodomy
    - Sexual assault with an object
    - Forcible Fondling
  - » Nonforcible Conduct includes:
    - Incest
    - Statutory Rape



# Dating Violence

- The term “dating violence” involves violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined on based on a consideration of the following factors:
  - » The length of the relationship;
  - » The type of relationship;
  - » The frequency of the interaction between the persons involved in the relationship.

# Scenario 3: Dating Violence as Title IX?

- AB and BC were formally dating. Jealous about AB's new relationship with DE, BC grabs AB and chokes her. Is this a possible Title IX violation?

# STALKING

- Stalking is defined as engaging in
  - » **Course of conduct** directed at a specific person
  - » That would cause a **reasonable person** to
    - **Fear** for his or her safety or the safety of others **OR**;
    - Suffer **substantial emotional distress**.
- Examples of stalking behavior include:
  - Following or spying on a person
  - Waiting at places in order to make unwanted contact with the victim
  - Leaving unwanted items or gifts for the victim
  - Posting or spreading rumors about the victim on the internet or by word of mouth

# Refresher: “Actual Knowledge”

- Title IX is triggered when **any employee** of an elementary and secondary schools has **notice** of **sexual harassment** or **allegations** of sexual harassment.
- Bottom Line: If you witness sexual harassment or **are the recipient of allegations of sexual harassment, YOU MUST NOTIFY THE TITLE IX COORDINATOR.**
- Other laws, such as child abuse laws, have criminal penalties for failure to report incidents of child abuse, such as sexual assault.

# Scenario 4 : Title IX or Mere Bullying?

- AB, a boy, is heard asking BC, a girl, if BC is pansexual. Later on, AB spreads the rumor that BC is pansexual. BC is noticeably distraught as a result of AB's actions. Is Title IX implicated?

# Scenario 5: Title IX or Mere Bullying?

- AB, the boy from the previous scenario, is disciplined for his comments about BC's sexual orientation. AB is not allowed to go to homecoming. AB's girlfriend, also a student, challenges BC to a fight at school. Is Title IX implicated?

# Distinguishing Bullying and Title IX

- Bullying of a student could occur by physical contact or through electronic means and may include hazing, threats, taunting, teasing, confinement, assault, demands for money, destruction of property, theft of valued possessions, name calling, rumor spreading, or ostracism.
- Title IX Sexual Harassment may include all of the above, but is **based on sex.**

## 2. The Scope of the School's Education Program or Activity



# 34 CFR § 106.44

- “**Education program or activity**” includes 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.”
- Whether the District has “substantial control over the respondent and the context in an off-campus setting” requires the district to make a “**fact-specific determination**.”
  - Did school fund, promote, or sponsor the event or circumstance?

**No single factor is determinative.**

# “Education program or activity”

- Title IX obligations **extend to off-campus sexual harassment incidents if any of three conditions are met:**
- the off-campus incident occurs as part of the recipient’s “operations” pursuant to 20 U.S.C. § 1687 and 34 CFR 106.2(h);
- the recipient exercised substantial control over the respondent and the context of the alleged sexual harassment that occurred off-campus; or
- the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization recognized by a postsecondary institution.

# Scenario 6: Inside or Outside Title IX?

- During the weekend, AB uses a district-provided electronic device to send communications to BC making fun of BC's sexuality. Is Title IX implicated?

# Scenario 7: Inside or Outside Title IX?

- You learn that a TikTok video is circulating among students that makes fun of BC's transgender status. You learn the video was created by AB during school. Is Title IX implicated?

# Employee's Duty to Report

- FFH (Local) requires any district employee who suspects or receives **direct** or **indirect notice** that a student or a group of students may have experienced prohibited conduct **shall immediately notify** the appropriate District official listed in this policy
- Consider the following:
  - » You witness the sexual harassment;
  - » Another student tells you they were assaulted by their boyfriend/girlfriend;
  - » A parent tells you about an incident that is or could meet the definition of sexual harassment.

# What is District's Response After Receipt of a Report of Sexual Harassment?

- » When the school has actual knowledge of sexual harassment in any of its programs or activities that take place in the United States, it must “**respond promptly in a manner that is not deliberately indifferent.**”

# What is District's Response After Receipt of a Report of Sexual Harassment?

- Board Policy FFH (Local) requires the District to “promptly notify the parents of any student alleged to have experienced prohibited conduct by a **District employee or another adult.**”
- Reports of prohibited conduct must be made “as soon as possible after the alleged act or knowledge of the alleged act.”
- Who should the report be made to?
  - » **Title IX Coordinator**

# What is District's Response After Receipt of a Report of Sexual Harassment?

- Title IX Coordinator must offer supportive measures to a Complainant before or after a Formal Complaint is filed, or where no Formal Complaint is Filed.
- Supportive measures are
  - » Non-disciplinary, non-punitive individualized services,
  - » Offered as appropriate, as reasonably available and without a fee or charge,
  - » Designed to restore or preserve equal access to the District's education program or activity,
  - » Without unreasonably burdening the other party.

**Respondent is presumed not responsible during the investigation and therefore measures cannot be disciplinary. Respondents are also entitled to supportive measures.**



# Examples of Supportive Measures

- Counseling;
- Extensions of deadlines or other course-related adjustments;
- Modification of class schedules;
- Campus escort services;
- Increased security and monitoring of certain campus locations/activities;
- Mutual restrictions on contact between the parties;
- Providing safe spaces.

Remember: Supportive measures are designed to restore or preserve equal access to the school's education program or activity.

# Scenario 8: Report or Not Report ?

- You learn that a TikTok video is circulating among students that makes fun of BC's transgender status. You learn the video was created by AB outside of school.
- Do you report it?

# Scenario 9: Report or Not Report ?

- A parent tells you that step-daughter, Y, has made an outcry of sexual assault against his son, X. The alleged assault occurred at home. Is this within Title IX's jurisdiction.

# Consequences for Failing to Report

- An OCR complaint could be filed and investigated, resulting in findings against the District.
- Victim could file suit against the District.
- Any employee who failed to report violated Board Policy. Disciplinary consequences could be implemented for failure to report.
- Any educator who fails to report could also result in a report to State Board for Educator Certification.

# Emergency Removal

- Title IX does not preclude the district from removing the Respondent. District must:
  - » Undertake an **individualized safety and risk assessment**;
  - » Determine that an **immediate threat** to the physical health or safety of any student or other individual arising from the allegations justifies removal;
  - » Provide the Respondent with **notice and an opportunity to challenge** the decision immediately following the removal.
- Title IX does not preclude the District from placing a nonstudent on admin leave during the pendency of a Title IX Complaint.

# Title IX Coordinator Must Offer Complainant Opportunity to File a Formal Complaint

- A Formal Complaint is:
  - » Filed by Complainant, or
  - » Signed by the Title IX Coordinator
    - *Required where not doing so would be “clearly unreasonable in light of the known circumstances.”*
- Alleging sexual harassment against a Respondent and requesting that the district investigate.
- Complaint may be filed a student’s parent or guardian.

# When is Dismissal of Formal Complaint Required?

- The District must dismiss a Formal Complaint if the conduct alleged:
  - » Would not constitute sexual harassment, even if proved.
  - » Did not occur in the District's education program or activity
    - An education or activity includes: locations, events, or circumstances over which the district exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
  - » Or did not occur against a person in the United States.
- Dismissal does not preclude the District from acting under provision of the Student Code of Conduct or other grievance policies.

# When is Dismissal of Formal Complaint Permitted?

- District may dismiss the Formal Complaint if at any time during the investigation:
  - » Complainant notifies the Title IX Coordinator in writing that the Complainant wants to withdraw the Complaint;
  - » Respondent is no longer enrolled or employed by the District; or
  - » Specific circumstances prevent the district from gathering evidence.



# 3. Investigation and the Grievance process (Hearings, Appeals, Informal Resolution Process)

# Investigation of Formal Complaint

- The role of the Investigator is to gather facts.
  - ❖ Investigator must be neutral.
  - ❖ Investigator must interview witnesses.
  - ❖ Investigator must gather information.
  - ❖ Investigator must give parties opportunity to review and respond to the evidence.
  - ❖ Prepare the investigative report and provide an opportunity to the parties to review and respond.
  - ❖ Provide the investigative report to the Title IX Coordinator/Decision-Maker.
- The role of the Decision-Maker is to make conclusions based on facts gathered by the Investigator.
  - ❖ The Decision-Maker decides responsibility for Title IX purposes.
  - ❖ Produces a Written Determination and provides to both parties at the same time.

# Investigation of Formal Complaint

- Investigator must review the Formal Complaint.
  - ❖ Review dates, locations, times where the alleged harassment occurred.
  - ❖ Remember the 5 W's (who, what, when, where, why) and how.
  - ❖ Confirm whether there any witnesses.
  - ❖ Did the Complainant talk to anyone about the incident?
  - ❖ Did the Respondent ever threaten the Complainant?
  - ❖ Ask "Is there anything else I should know?"
  - ❖ Are there any other accusations against Respondent?
  - ❖ "Are there any other documents (texts, pictures, etc) that you want to provide?"

# Explain Process to the Parties

- Explain to the parties the process. Have a copy of the policy to share.
- Reassure parties (including witnesses) that retaliation is prohibited under the policy and will not be tolerated.
- Confidentiality cannot be guaranteed but will keep the information as confidential as possible.

# How to conduct an investigation

- ❖ Upon receipt of a **formal complaint**, the Title IX Coordinator will provide **written notice** to the complainant and respondent about the allegations of sexual harassment and allow sufficient time for the parties to prepare a response before any initial interview with the assigned investigator.
- ❖ Title Coordinator appoints an investigator, decision-maker, and if, necessary, an appeal decision maker.
- ❖ After receiving the written complaint, the investigator will meet promptly with each party to conduct initial interviews, gather information, and collect evidence.
- ❖ The parties may submit evidence, testimony, witnesses, or other information that they wish the investigator to consider.
- ❖ The investigator must provide to any party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of any investigative interview or other meetings, with sufficient time for the party to prepare to participate.
- ❖ Parties must have same opportunities to have others present during interviews or related proceedings, including an “advisor” (maybe an attorney).
- ❖ Equal opportunity for parties to present witnesses and evidence.

# How to conduct a grievance process

- Grievance process must:
  - » Give all parties **written notice** of the allegations, an opportunity to select an advisor, and an opportunity to submit and review evidence throughout the investigation.
  - » Provide parties at least 10 days to **inspect, review, and respond to all evidence directly related** to the allegations prior to the completion of the investigative report.
  - » Utilize **trained Title IX personnel** to objectively investigate all reports of sexual harassment.
  - » Create an **investigative report** that summarizes the relevant evidence.
  - » Provide parties at least 10 days to **review and provide a written response** to the investigative report.
  - » **Apply a presumption of innocence** on the respondent during the grievance process and utilize either a preponderance of the evidence standard in making findings.
  - » Keep the burden of proof and the **burden of gathering evidence on the institution**, not the

# How to conduct a grievance process, cont'd

- Grievance process must:
  - » Ensure **the investigator is a different person** than the final decision maker in a formal complaint.
  - » Prohibit any **inappropriate questioning about prior sexual history** and protect the privacy of a party's medical, psychological, or similar treatment records.
  - » Provide a **written determination** with an analysis as to how the conclusion was reached.
  - » Offer an **opportunity to appeal** a final determination. An appeal can be filed on the following bases: procedural irregularity, newly discovered evidence, and/or bias of the Title IX personnel that affected or could affect the outcome of the matter. A covered entity may also add other rights to appeal, so long as the other bases are available to all parties.
  - » Provide **protection from retaliation** for any individual that participates in a Title IX grievance process.

# How to conduct an appeal

- District must offer both parties an appeal from a determination of responsibility, and from a dismissal of a formal complaint or any allegations within the complaint for the following reasons:
  1. Procedural irregularity affecting the outcome;
  2. Newly discovered evidence that was not reasonably available at the time of the determination and could affect the outcome; and
  3. Conflict of interest on behalf of Title IX Coordinator, investigator, or decision-maker that affected the outcome.
- The ISD's policy may also offer additional bases for appeal.
- The appeal decision maker must not be the initial decision-maker, the investigator, or the Title IX Coordinator.



# How to conduct an appeal

- To initiate an appeal, a party must file a written request for appeal with the Title IX Coordinator within three (3) District days of a party's receipt of the final determination.
- The Title IX Coordinator will review the request and assign an appropriate appellate decision-maker in compliance with law and policy. If the reason for appealing the dismissal or determination of responsibility is not mandatory, the District may dismiss the appeal.
- If the request for an appeal is not dismissed, the Coordinator will designate an appellate decision-maker to proceed. The appellate decision-maker may not be the same person as the decision-maker that reached the determination regarding responsibility or dismissal, the investigator who investigated the complaint at issue, or the Title IX Coordinator.
- The Title IX Coordinator will notify the non-appealing party in writing when an appeal is filed and implement appeal procedures equally for both parties. Both parties will be provided a reasonable, equal opportunity to submit a written statement in support of, or challenging, the dismissal of a formal complaint or determination of responsibility.

# How to conduct an appeal

- In an appeal of dismissal of a complaint or any allegation therein, the District's designated appellate decision-maker will review the request for appeal and issue a written decision explaining why the appeal of the dismissal is granted or denied.
- The appellate decision-maker may not be the Title IX Coordinator, the investigator, or the decision-maker assigned to the complaint or allegation at issue.
- The written decision of the appellate decision-maker will provide the rationale for the District's response to the complainant's appeal of the District's dismissal of a formal complaint or any allegation therein. The decision will either instruct the Title IX Coordinator to resume implementation of the Title IX formal complaint process or will inform the appealing party of additional options. A copy of this written response will be provided simultaneously to both parties.

# How to conduct an appeal

- If an appeal regarding the determination of responsibility is filed, the determination does not become final, and **the District may not proceed with administering Title IX disciplinary sanctions or remedies based on the determination**, until the date that the District provides both parties with the written result of the appeal.
- If an appeal is not filed, the determination of responsibility becomes final on the date on which an appeal of the determination would no longer be considered timely.
- For an appeal by either party to be fully effective, the District must wait to act on the determination regarding responsibility while maintaining the status quo between the parties through supportive measures designed to ensure equal access to education.

# How to conduct an appeal

- The written decision of the appellate decision-maker will describe the result of the appeal of the determination regarding responsibility and the rationale for the result.
- A copy of the written decision of appeal must be provided simultaneously to both parties.
- Once an appellate decision-maker issues a written decision regarding the appeal of the determination of responsibility, the District will proceed with implementing Title IX disciplinary sanctions or remedies or take other appropriate action.

# How to conduct an informal resolution process

- If a formal complaint has been filed, other than a complaint alleging sexual harassment of a student by an employee, and prior to reaching a determination regarding responsibility, the Title IX Coordinator may offer but may not require a party to participate in a voluntary informal resolution process, such as mediation.
- In addition, either party may request informal resolution by making a written request to the Title IX Coordinator, who will promptly notify the other party of this request. The other party is not required to agree to participate. If a party declines or at any time withdraws from an informal resolution process, the Coordinator will notify the other party that the informal resolution process has been terminated and resume the formal complaint process.

# How to conduct an informal resolution process, cont.

- Prior to facilitating or designating another person to facilitate the informal resolution process, the Title IX Coordinator will provide both parties written notice that contains at least the following information:
  - » the allegations;
  - » the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations; provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint; and
  - » any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
- Obtain the parties' voluntary, written consent to the informal resolution process.

# 4 & 5. How to Serve in the Title IX Process Impartially; Conflicts of Interest and Bias

# How to serve impartially

- Avoid prejudgment of the facts at issue;
  - » Passing judgment prematurely or without sufficient reflection or investigation;
  - » The report of harassment, nor the defense to said report, should be met with prejudgment.
  - » Prejudgment often occurs when the report of harassment includes someone's sexual history, drugs, alcohol use, past conduct.
  - » Ears open, mouth closed;
  - » Don't jump to conclusion.
  - » *Classic Example*: "She was wearing x, y and z, therefore she must have consented to some degree."
- Avoid conflicts of interest;
- Avoid bias.



# How to serve impartially

- Avoid conflicts of interest;
  - » A conflict of interest occurs when a personal or private interest potentially compromises someone's judgment.
  - » Title IX does not list the types of conflicts of interest;
  - » Obvious conflicts of interest:
    - Title IX Coordinator is related to the Complainant or Accused;
    - Title IX Investigator and parents of Accused are business partners;
    - Title IX Decision Maker is a coach/mentor of the Accused.
  - » May include:
    - Actual;
    - Perceived;
    - Potential.

# How to avoid being biased

- Bias means prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.
- Frequently based on the Title IX personnel's life experience.
- Bias can be innate or learned.
- Examples of types of bias and/or conflict of interest.
  - » That's just Mario. He's harmless. I've known his family for years.
  - » A belief that the Complainant tends to exaggerate incidents or is dramatic.
  - » A belief that one of parties has a history of lying.

# 6. Issues of Relevance (Including How to Apply Rape Shield Protections)

# Issues of Relevance

- What is relevancy?
- The meaning of "relevance" in U.S. law is reflected in Rule 401 of the Federal Rules of Evidence. That is "having any tendency to make the existence of any fact that is of consequence to the determinations of the action more probable or less probable than it would be without the evidence."
- In other words, if a fact were to have no bearing on the truth or falsity of a conclusion, it would be legally irrelevant.

# Issues of Relevance

- Rule 401. Test for Relevant Evidence
  - » Evidence is relevant if:
    - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
    - (b) the fact is of consequence in determining the action.

# Issues of Relevancy – “A Brick Is Not A Wall”

- Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.
- Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand.
- “Conditional” relevancy = probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact.

# What is relevant and what is not Relevant?

## **RELEVANT:**

- The Formal Complaint and any attachments.
- Board Policies, including but not limited to Board Policy FFH.
- Information received from interview of Complainant and Respondent.
- Information received from interviews of the witnesses.
- Age and grade level of the parties and witnesses.
- Documents provided by the parties which might include texts, emails, and recordings.

## **NOT RELEVANT:**

- Sexual and disciplinary history of Complainant.
- Popularity and reputation of either of the parties.

# Issues of Relevance: Examples

1. Y is charged with stealing costume makeup from a drugstore the night before Halloween. The prosecution wants to offer evidence that Y's mom had refused to buy Y a Halloween costume. Relevant?
2. At Y's trial, the prosecutor wants to introduce testimony from the store manager that the makeup department is a frequent target of thieves. Relevant?
3. Y, a known member of Hispanic Kings, is charged with car theft. Is the fact that he is a member of Hispanic Kings relevant?
4. Y, a known member of Hispanic Kings and who has a history of car theft convictions, is charged with car theft. Are his prior convictions relevant?



# “Rape Shield” Rule of Evidence

- A presumption that a complainant’s past sexual conduct is not admissible unless it meets certain exceptions:
  1. The questions and evidence are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant;
    - » “You’ve got the wrong person” defense
  - or
  2. The questions and evidence relate to specific incidents of the Complainant’s prior sexual behavior with respect to the Respondent and are offered to prove consent.

# “Rape Shield” Example

- The evidence reveals X is on birth control. Evidence of her taking birth control cannot be used to prove she is more likely to engage in consensual sexual acts.
- The evidence reveals X often wears short skirts. Evidence of her wearing short skirts cannot be used to prove she is more likely to engage in sexual acts.
- The evidence reveals that X has three girlfriends at the same time. Evidence of X’s multiple girlfriends cannot be used to prove X is more likely to engage in sexual acts.
- X accused B of stalking. However, the investigation reveals that X’s ex-boyfriend has a past pattern of stalking X. May B may offer evidence of the existence of X’s relationship with ex-boyfriend to show that X’s ex-boyfriend is the real perpetrator.
- The evidence reveals sexually-charged messages between Complainant and Accused. Accused can offer the messages as evidence that the relationship was consensual.

# 7. Evidentiary Standards

# Preponderance of the Evidence

- “Preponderance of Evidence” is a standard of evidence meaning that a proposition is more likely than not to be true.
- Think: OJ Simpson Case
  - » Not enough evidence to hold him criminally responsible (without a reasonable doubt), but enough to find him guilty in civil court (preponderance of the evidence).

# 8. Creating an Investigative Report

# Creating an Investigative Report

- The investigative report will fairly summarize all relevant evidence and may include the following content:
  - » Identification of the allegations potentially constituting sexual harassment;
  - » Any procedural steps taken by Title IX personnel from the receipt of the formal complaint through the conclusion of the investigation, including any notifications to the parties, interviews, site visits, and methods used to gather evidence;
  - » Responses of each party to the allegations in the formal complaint;
  - » Evidence obtained by the District;
  - » Relevant evidence considered by the investigator;
  - » The parties' responses to the evidence after review and inspection;
  - » Findings of fact; and
  - » Identification of any District policies or codes of conduct implicated by the facts, including referrals to FFH for Investigations for Reports Other Than Title IX, FFI, or other District processes initiated as a result of the investigation.

# Creating an Investigative Report, cont.

- Report format:
  - » Table of Contents;
  - » Summary;
  - » Background (General Background, Complaint, Investigation, Evidence Collection)
  - » Evidence Considered (e.g., where does the evidence diverge, where is it contradictory to the testimony, where does it corroborate the testimony)
  - » Analysis

# Recent Title IX Cases:

- *Moore v. Freeport Community Sch. Dist. No. 145* (N.D. Illinois 2021)
  - » JD is a kindergarten student.
  - » JD’s teacher notices behavioral issues and that JD becomes introverted when asked if anything is wrong.
  - » Eventually, JD reveals to mom that one of her classmates, JJ, was picking on JD and touched her insides in her pants.
  - » JD’s mom tells JD’s principal, who assures mom that a “safety plan” would be put in place, wherein JJ would be kept separate from JD and would never be without adult supervision at school.
  - » Despite the “safety plan”, JD seeks JJ at school on a daily basis, often without adult supervision. JJ also continues to call JD names.
  - » **Court: “That the District allegedly did not follow its own safety plan—after harassment continued for weeks—is enough to allege deliberate indifference, and enough to allege that the District’s response was clearly unreasonable.”**



# Recent Title IX Cases:

- *Moore v. Freeport Community Sch. Dist. No. 145* (N.D. Illinois November 8, 2021)
  - » **Court: “That the District allegedly did not follow its own safety plan—after harassment continued for weeks—is enough to allege deliberate indifference, and enough to allege that the District's response was clearly unreasonable.”**
  - » **How to avoid *Moore*?**
    - Ensure that the District’s promised response to a TIX complaint is followed and documented;
    - If necessary, inform teachers and staff of the need to keep JJ separate from JD.
    - If an instance occurs where, because of deficient enforcement of the safety plan, JJ’s harassment continues, don’t coverup—document.
    - Escalate disciplinary measures against JJ.

# Recent Title IX Cases:

- *Sprull v. The School District of Philadelphia* (E.D. Pennsylvania October 28, 2021)
  - » Phillip, a student at Philly S.D., struggles with anxiety, depression, learning disabilities, and behavioral issues.
  - » Phillip's IEP dictates that Phillip must receive one-on-one counseling for thirty minutes per week and a safety plan.
  - » Phillip is constantly bullied by his classmates, who call him sexually disparaging names.
  - » One day, a visibly upset and emotional Phillip approaches the counselor, who turns Phillip away. Phillip goes home and commits suicide.
  - » **How to avoid *Sprull*?**
    - *Always escalate to the Title IX Coordinator;*
    - *Always Ensure Safety Plan is Being Enforced;*
    - *If Spec. Ed., review student's IEP for extra counseling needs.*

# Recent Title IX Cases:

- *NP v. Kenton County Public Schools* (E.D. Kentucky September 27, 2021)
  - » NP, a special education and football player, underwent an array of mistreatment from school administration, including:
    - Another student threatened NP with a gun. Administrators learned of the incident but failed to report to NP's parents;
    - Teachers made sexual inappropriate comments to NP;
  - » The Court: **Defendants had knowledge that NP was being sexually harassed and failed to investigate or respond to the allegations in an appropriate manner.**
  - » *How to avoid NP? Follow the Title IX Policy; take all complaints seriously.*

End of Presentation

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**Thank You!**

