

Title IX Training for Decision-Makers

**Train the Trainer
Oregon School Personnel
Administrators Fall 2023 Conference**

Thompson & Horton

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Join the K-12
Title IX Leadership
Alliance

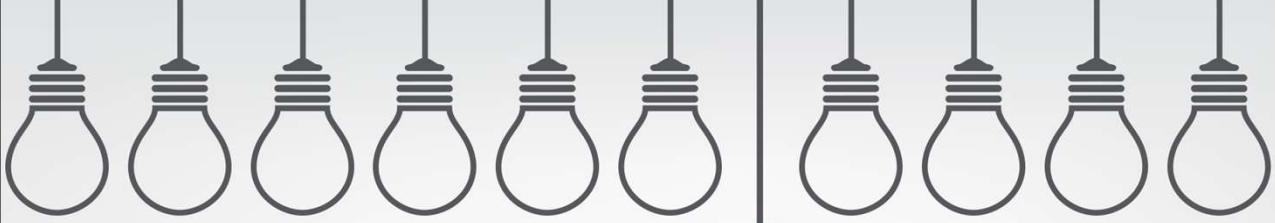
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OSPA Title IX Training Fall 2023

Today	Tomorrow
8 a.m.-Noon Compliance Certification (All Roles) 2:30-3:45 p.m. Investigation Training 3:45-5 p.m. Coordinator Training	9:30-11:30 a.m. Decision-Maker Training Noon-1:30 p.m. Informal Resolution Training



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Ground Rules

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

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**[https://www.thomsonhorton.com/
title-ix-guidebook/](https://www.thomsonhorton.com/title-ix-guidebook/)**



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Train the Trainer Tip

Decision-Maker and Appellate Decision-Maker Required Training (covered in our Compliance Certification Training):

- ✓ What is "Sexual Harassment" under Title IX?
- ✓ What is the scope of the educational institution's "education program or activity"?
- ✓ What are the steps in the Title IX sexual harassment grievance process?
- ✓ How do you serve impartially without bias?

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Train the Trainer Tip

Decision-Maker and Appellate Decision-Maker Required Training (covered in this training):

- ✓ Issues of relevance in the Q&A process
- ✓ When questions and evidence about a complainant's sexual history or predisposition are not relevant
- ✓ The live hearing process (K-12 schools do not generally have hearings)

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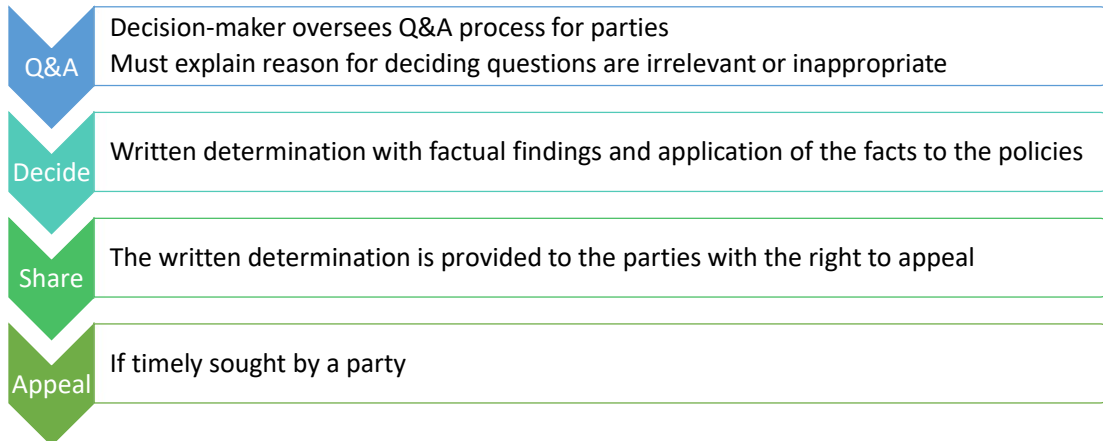


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Post-Formal Complaint: Decision and Appeal



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Who are the Decision-Makers?

- The decision-makers (both initial and appellate) **must** be different people from each other and from the Title IX Coordinator and investigator on a case

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What Does an Initial Decision-Maker Do?

- After the written investigation report is shared with the parties, they are given 10 days to respond
- Allow parties to ask written, relevant questions of any other party or witness
- Review all questions, explain to the party proposing the questions if they decide questions are not relevant or appropriate, forward relevant and appropriate questions to the other party or witness, receive answers and forward them to all parties,
- Evaluate all the relevant evidence—good and bad—objectively
- Issue a written determination regarding responsibility applying the “preponderance of the evidence” standard

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What Does An Appellate Decision-Maker Do?

- Allow parties an equal opportunity to submit a written statement in support of or against the appeal
- Review the parties’ statements and all relevant evidence and write the appeal decision



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Initial Decision-Maker



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Written Q&A

- You can do the Q&A process while the parties are reviewing/responding to the investigation report (10 day period)
- Parties must be afforded the opportunity to submit written, relevant questions to any other party or witness
- You can also require the questions to be appropriate (no ad hominem/personal attacks, no profanity)
- Must allow written, relevant "follow up" questions (make sure it's a real follow up!)

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Notice of Right



- Send notice of right to submit written, relevant questions and follow up questions (email and U.S. mail)
- Provide timeframe for when responses are due (e.g., within 3 or 5 days of electronic delivery of notice)



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Notice of Right

Notice can state that questions and follow-up questions:

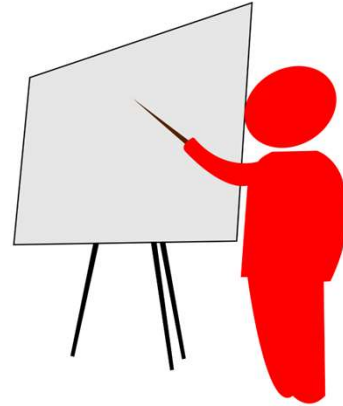
- Should be numbered
- Should identify the name of the party or witness to whom it should be posed



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Notice of Non-Relevance

- Must explain the reason for finding a question not relevant
- Example: "Complainant's Question #3 will not be forwarded to the party or witness because it seeks information protected by a legally recognized privilege"
- Example: "Respondent's Question #3 will not be forwarded to the party or witness because it includes irrelevant personal attacks"



T&H

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Try & Try Again

- Not required to give parties an opportunity to restate their question
- If you do so, we recommend providing only one opportunity and a time-frame for submission (e.g., 2 days)

T&H

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Forwarding Questions

- Forward all relevant and respectful questions to the appropriate party or witness
- Include notification of when a response is required (e.g., within 3 days of electronic delivery of the question)



T&H

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Forwarding Answers

- Forward all answers to all parties
- Answers must be respectful
- Notice of right to submit limited, relevant follow-up questions within a certain time period (e.g., 2 days of electronic transmission of responses)



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Follow-Up Question?

Initial Question: When did it happen?

Answer: Yesterday



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What time of the day did it happen?

Follow-Up	
Not Follow-Up	

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Who was present?

Follow-Up

Not
Follow-Up

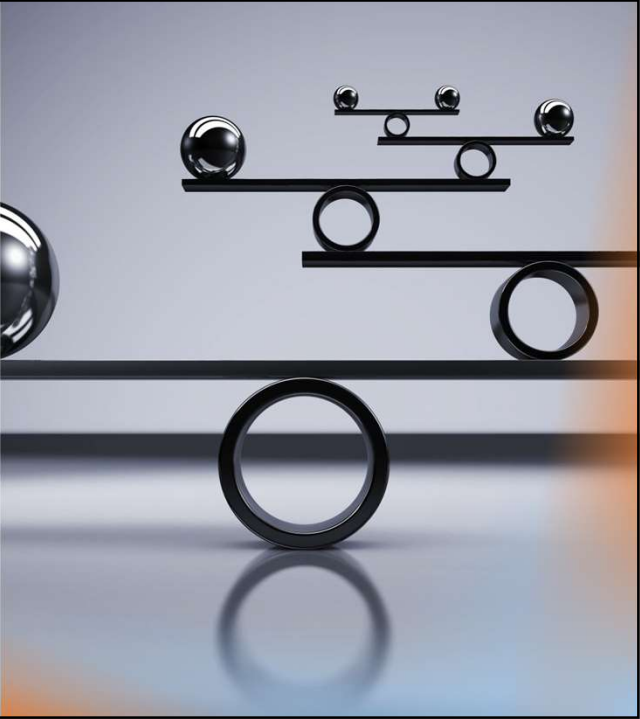
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Analyzing the Evidence

You need to analyze all the evidence **for** and **against** the alleged conduct—consider **every element** of the allegation

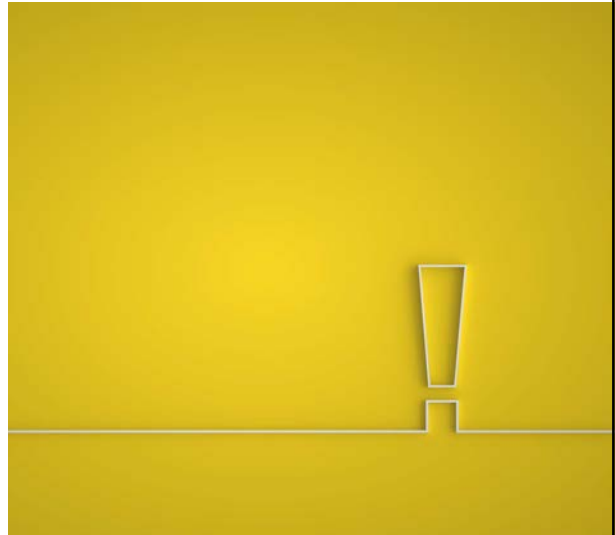
- Direct evidence (e.g., admission)
- Circumstantial evidence (requires an inference)
- Hearsay (limited weight)
- Character evidence (limited weight)
- Prior bad acts (limited weight)



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Not Relevant Without Consent

- Evidence about the Complainant's prior sexual history
 - Unless used to show that someone other than the RP committed the misconduct or prior contact between the parties to show consent
- Information protected by a legally recognized privilege
- A party's medical, psychological, or similar records created in the provision of treatment



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Relevance vs. Weight

- Relevant evidence has **some tendency** to make a matter in dispute in the case more or less likely to be true
- The weight of the evidence is **how much of a tendency** the evidence has to make the matter in dispute more or less likely to be true
- A decisionmaker has to **weigh all the relevant evidence in the case** to determine if each individual fact in dispute is supported and, once all the facts are decided, whether those facts support a finding of responsibility

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In a case that is truly "they said, they said" what is the outcome (using preponderance of the evidence)

The educational institution cannot even investigate because there is no evidence **A**

There must be a finding of "sufficient evidence" (in favor of the alleged victim) **B**

There must be a finding of "insufficient evidence" (in favor of the alleged respondent) **C**

There must be a finding of "inconclusive" (neither for nor against either party) **D**

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Credibility

- Helps you determine the weight of evidence
- Consider things like consistency/inconsistency, reliability/unreliability, accuracy/inaccuracy, memory, and motive
- A witness is not "credible" or "not credible," the question is whether the information provided by the witness is "credible" or "not credible"



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Preponderance of the Evidence

- More likely than not
- 50% and a feather
- The scale is equal when you begin, but there is a presumption of non-responsibility so there must be at least a feather of relevant, credible evidence supporting the allegation for a finding of responsibility to occur

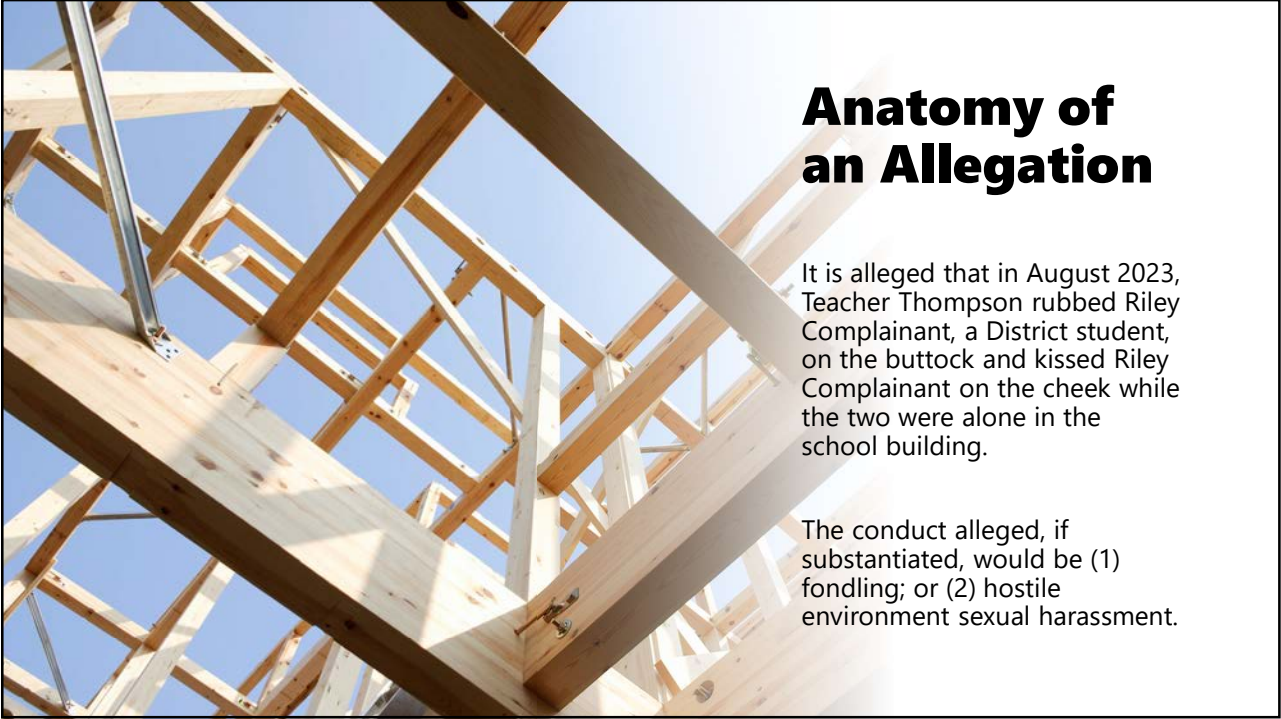
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Our Scenario

Student Riley reports that while alone with Teacher Thompson at school, Teacher Thompson kissed Riley on the cheek and rubbed Riley on the behind.



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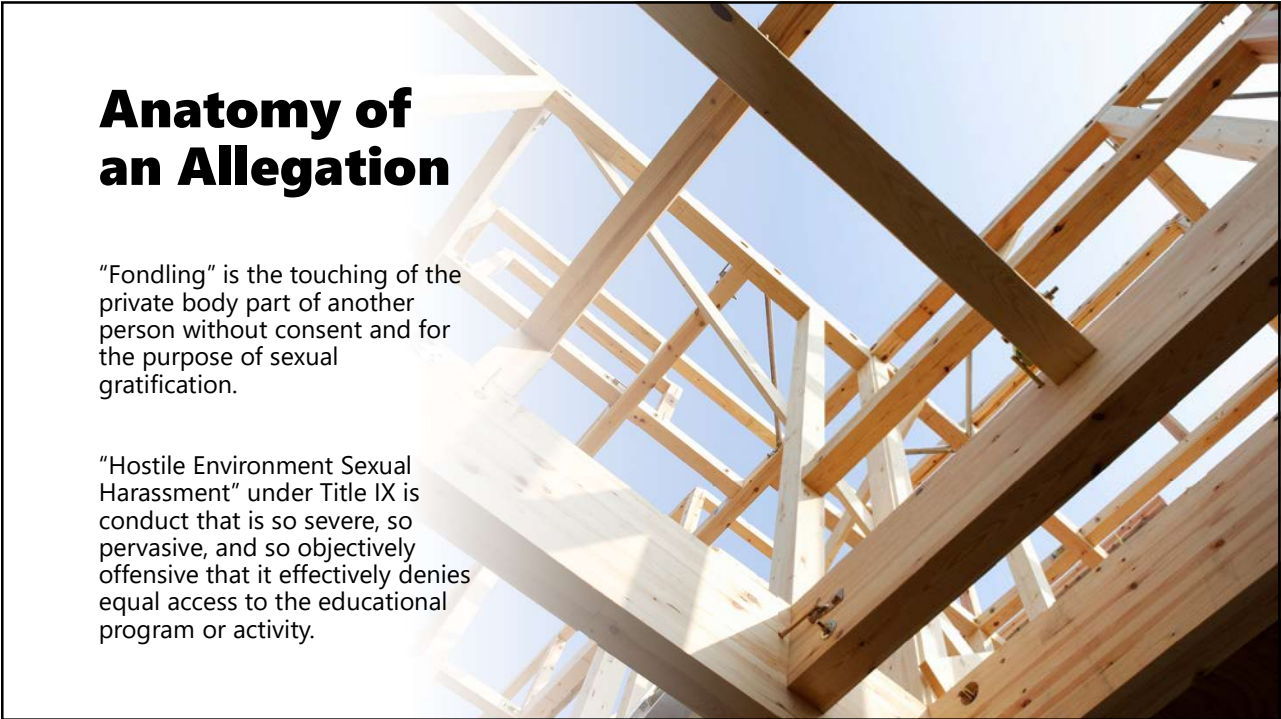


Anatomy of an Allegation

It is alleged that in August 2023, Teacher Thompson rubbed Riley Complainant, a District student, on the buttock and kissed Riley Complainant on the cheek while the two were alone in the school building.

The conduct alleged, if substantiated, would be (1) fondling; or (2) hostile environment sexual harassment.

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Anatomy of an Allegation

"Fondling" is the touching of the private body part of another person without consent and for the purpose of sexual gratification.

"Hostile Environment Sexual Harassment" under Title IX is conduct that is so severe, so pervasive, and so objectively offensive that it effectively denies equal access to the educational program or activity.

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The Constellation of Circumstances, Expectations, and Relationships

- ✓ Impact on CP
- ✓ Type, Frequency, Duration
- ✓ Ages, Roles, Previous Interactions, Other Factors re Parties
- ✓ Location, Context, Control Over Respondent
- ✓ Other Sex-Based Harassment in the Ed Program or Activity

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Weighing the Evidence

First, **find your facts**

Looking at a **disputed facts**

- What does the Complainant say?
- What does the Respondent say? Do any credibility factors need to be considered regarding either of their statements on the issue?
- What did other witnesses say? Any credibility factors?
- Any corroborating or conflicting evidence on either side?
- Any other issues to consider

Now, weigh all that evidence and make a finding on the fact

T&H

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Let's Think About Our Case....

Does the evidence support the claim that Teacher Thompson touched Riley as alleged?

- The complainant consistently reported the conduct occurred as alleged
- The respondent consistently denied engaging in the conduct as alleged
- I considered the consistency of the parties' statements.
- Although Teacher Thompson denied ever kissing students on the cheek or hugging students, a colleague reported that Teacher Thompson regularly gave students hugs.
- I reviewed outcry statements the complainant made to their parents shortly after the incident.
- I considered changes in the complainant's behavior as recognized by the complainant's other teacher and the complainant's mother.
- Video surveillance shows the complainant running out of the classroom approximately five minutes after lunch dismissal.

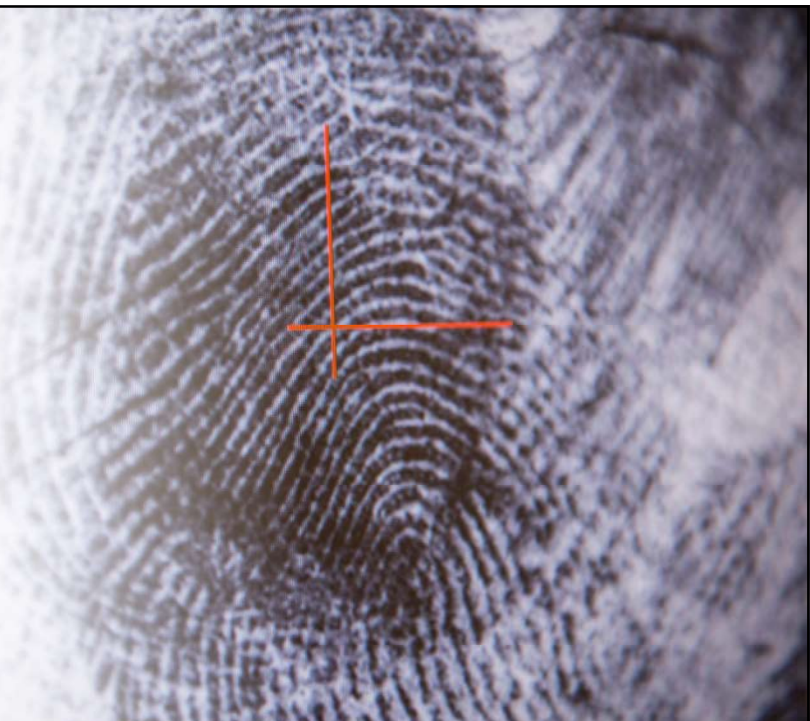
In weighing the evidence, I find sufficient evidence that Teacher Thompson touched Riley as alleged.



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Now, Analyze All Facts

Looking at both the **undisputed facts** and the **facts you have found to be supported by the evidence**, is there sufficient evidence to support a violation of the prohibition on Title IX sexual harassment in an education program or activity and against a person in the U.S.?



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Let's Think About Our Case...

Based on my finding that the respondent touched the complainant's buttocks and kissed the complainant on the cheek, I find sufficient evidence of both fondling and hostile environment sexual harassment under Title IX.



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Written Determination Requirements

- Allegations
- Procedural steps taken
- Statement of, and rationale for, the results as to each allegation, including
 - Determination of responsibility
 - Disciplinary sanctions
 - Remedies (not specified in the report)
- Appeal rights
- Provide to both parties simultaneously



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Disciplinary Sanctions

- Should be based on **previously published** guidelines of possible sanctions
- For a student with a disability, may need to conduct an MDR or take other steps before imposing consequences
- You may still need to complete state law student discipline requirements before actually imposing consequences

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Conflicts of Interest for Decision-Makers

- Communicating with the investigator “off the record”
- Being a subordinate to the Title IX Coordinator or investigator
- Making a credibility determination based on a party’s status as a complainant or respondent
- Making credibility based on outdated notions (e.g., victims of sexual assault report right away, remember all the details of the assault, and show a certain type of emotion; similarly, that individuals falsely accused react a certain way/with strong feelings) or without considering culture, age, religion, ability, incapacitation, and trauma
- Reaching a decision before the Q&A process is complete



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Appellate Decision-Maker



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My institution has had... (choose all applicable)

At least one successful appeal (appeal granted)

At least one unsuccessful appeal (appeal denied)

No appeals

I'm not sure

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Bases for Appeal

- Procedural irregularity—affected the outcome of the dismissal or final decision
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome
- Bias or conflict of interest for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
- You can offer other appeal bases, but must do so fairly between the parties



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Appeal Steps

- Appeal received from one or more parties
- Notice to the parties that an appeal has been filed
- Opportunity for both parties to submit a statement for/against the appeal
- Written decision with result and rationale for appeal
- Written decision provided to both parties simultaneously



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The T9 Coordinator dismisses a complaint of fondling because the circumstances make clear there is no way the conduct was for purposes of sexual gratification (no other reason)

Procedural error, did not affect the outcome

Procedural error, affected the outcome

Not a procedural error

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A party appeals based on the investigator's failure to interview witnesses on a key issue. According to the investigator, the witnesses refused to participate.

Procedural error, did not affect the outcome

Procedural error, affected the outcome

Not a procedural error

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A party's advisor was removed from the process for being disruptive and the party was not allowed to secure another advisor before moving forward

Procedural error, did not affect the outcome
 Procedural error, affected the outcome
 Not a procedural error

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The grievance process lasted 6 months and the Title IX team failed to provide notice of the need for extensions

Procedural error, did not affect the outcome
 Procedural error, affected the outcome
 Not a procedural error

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After a determination of insufficient evidence, the Respondent sends a text message to the Complainant admitting the conduct and laughing because "double jeopardy" means nothing can be done to them.

New evidence, could affect the outcome

New evidence, could not affect the outcome

Not new evidence

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After a determination of insufficient evidence, a classmate comes forward to say the Respondent admitted the conduct to them shortly after the incident

New evidence, could affect the outcome

New evidence, could not affect the outcome

Not new evidence

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After a finding of sufficient evidence, the Respondent points to dispositive evidence in the written determination that was not in the DRE or investigator report as evidence that the decision-maker was biased

Bias, affected the outcome

Bias, did not affect the outcome

Not bias

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Respondent claims the whole system is biased against them because the vast majority of decisions in the past two years have gone in favor of Complainants and the T9C has been cited referring to "pressures" by the "current OCR" to find in favor of CPs

Bias, affected the outcome

Bias, did not affect the outcome

Not bias

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Decision Elements

- Introduction
- Appeal Determination
- Relevant Procedural Background (for timeliness)
 - Dismissal/decision date
 - Appeal date
 - Date(s) for responses to appeals
- Standard of Review
- Summary of Written Determination



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Decision Elements

- Written Statements For/Against the Appeal
- Analysis and Decision
 - Consider each appeal basis separately
- Conclusion



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Analysis & Decision

- Consider all factors for/against the appeal basis/argument – SHOW YOUR WORK!
- Include policy definitions and procedural requirements
- Assess whether there is sufficient evidence of impact on the outcome



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Remember the Standard

- For most educational institutions, “preponderance of the evidence”
 - “More likely than not”
 - “50 percent and a feather”



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Reversals & Remands

- Reversal: Where the appeal makes clear the decision was incorrect
- Remand: Where more information is needed



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Thank You!
Questions?

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