



# The New Title IX Final Rule: First Impressions & Next Steps

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# Session Agenda



Sarah Ford

- I. Where we are: Context and Framework
- II. What's In and What's Out
- III. New Procedural Requirements
- IV. Countdown to August 14, 2020



# TITLE IX

*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.*

# Title IX's Purpose

## GENDER DISCRIMINATION

Prohibitions on participation

Unequal funding of athletics

Pregnancy Discrimination

Sexual Harassment

- Sexual Assault
- Stalking
- Domestic/Dating Violence
- Verbal/expressive





## Law

- Passed by Congress
- Mandatory authority



## Rules

- Formal agency process
- Mandatory authority



## Guidance

- Within agency's discretion
- Arguably not mandatory

Law

- Title IX itself

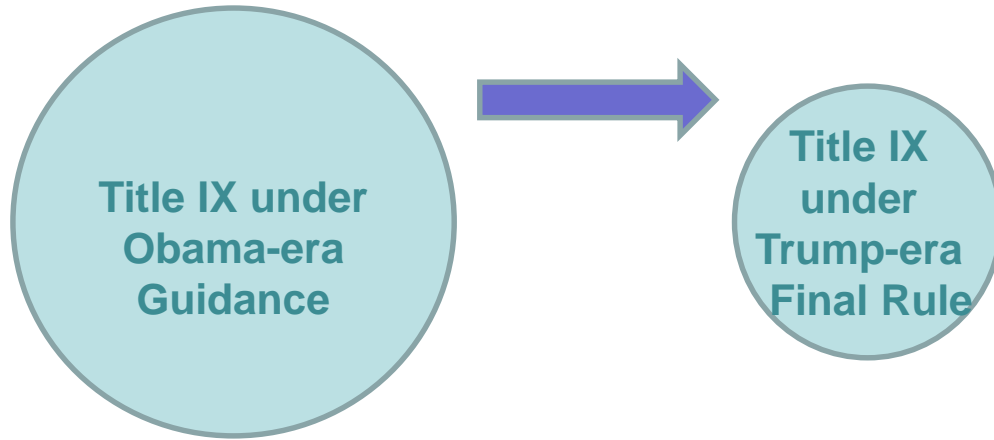
Rules

- Trump-era Final Rule

Guidance

- Obama-era Dear Colleague Letter

# Overarching Goals of Final Rule

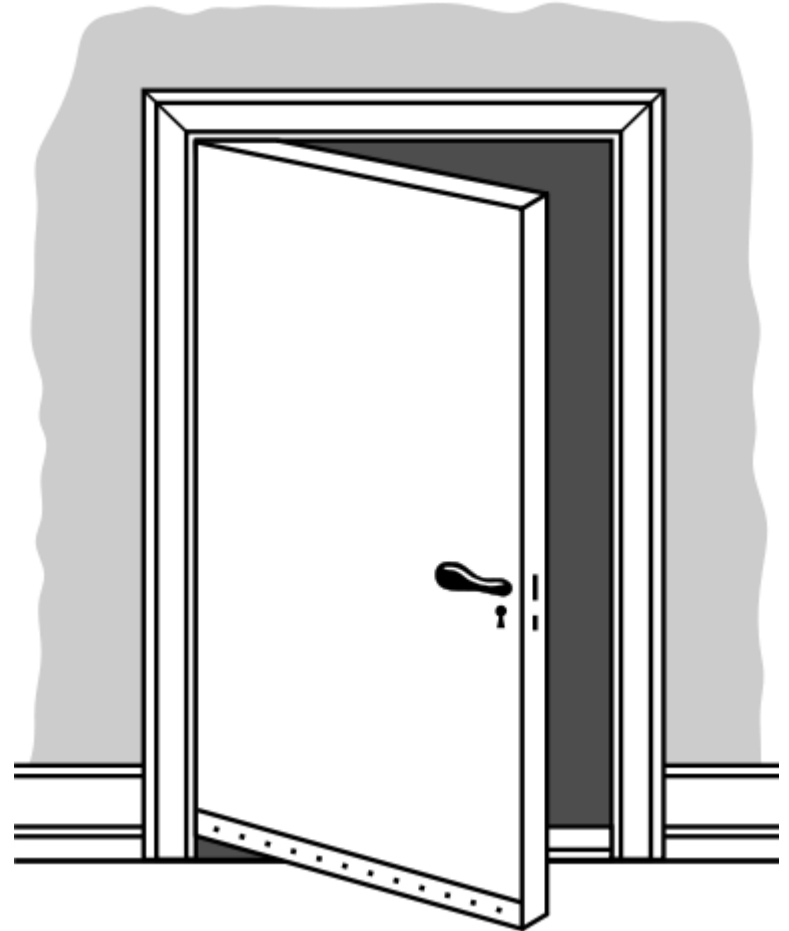


1. Narrow the scope of incidents that fall within the law

2. Recalibrate the balance between complainants and respondents



# EXPANSIVE V. SELECTIVE





## Grievance Initiation

# What triggers a school's responsibility to respond?



- ▶ Reports made to any employee who a student might reasonably perceive to have authority or responsibility
- ▶ Sexual misconduct the school knows or *reasonably should know* about

- ▶ Reports made to an official with authority to institute corrective measures
- ▶ Sexual misconduct of which the school has *actual* knowledge

# 3 ½ THRESHOLD QUESTIONS



1. **Who** is the complainant?

1.5 Was the complainant in the United States?

2. **Where** did the incident(s) take place?

3. **What** type of conduct occurred?

# WHO IS THE COMPLAINANT?

Anyone can report sexual misconduct. Reporting sexual misconduct does not make you the Complainant.

The Complainant is the victim/survivor. (Even if that person did not report the sexual misconduct.)

At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the education program or activity of the school.

~~Visitors?~~

~~Graduates?~~

Was the Complainant a “person in the United States” at the time of the incident?

~~Other former students?~~

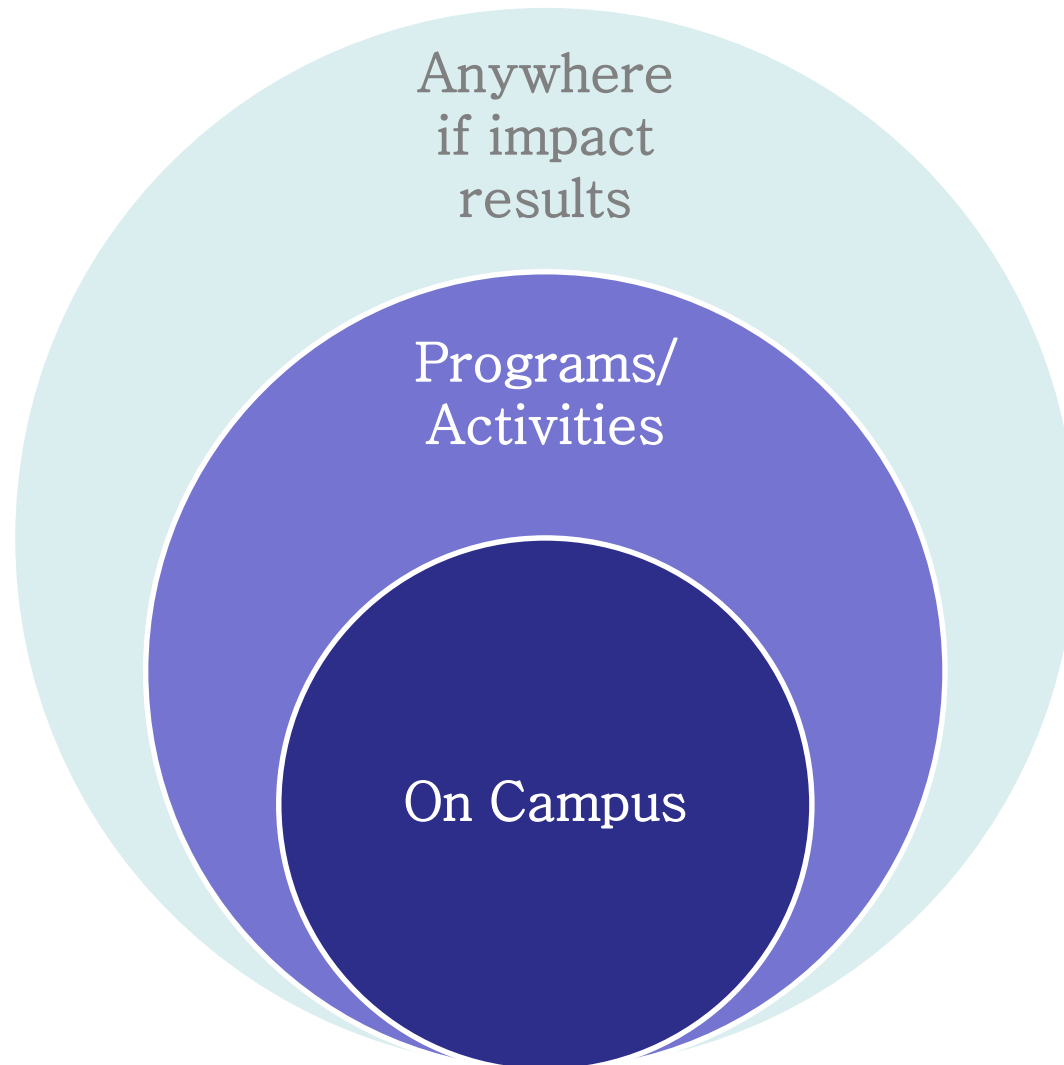
# WHAT IF THE COMPLAINANT CAN'T FILE A FORMAL COMPLAINT OR DOESN'T WANT TO?

- The Title IX Coordinator may initiate a grievance process if s/he believes that a NON-deliberately indifferent response to the allegations requires an investigation.\*

\* If proceeding against the wishes of the complainant, do so thoughtfully, not automatically.

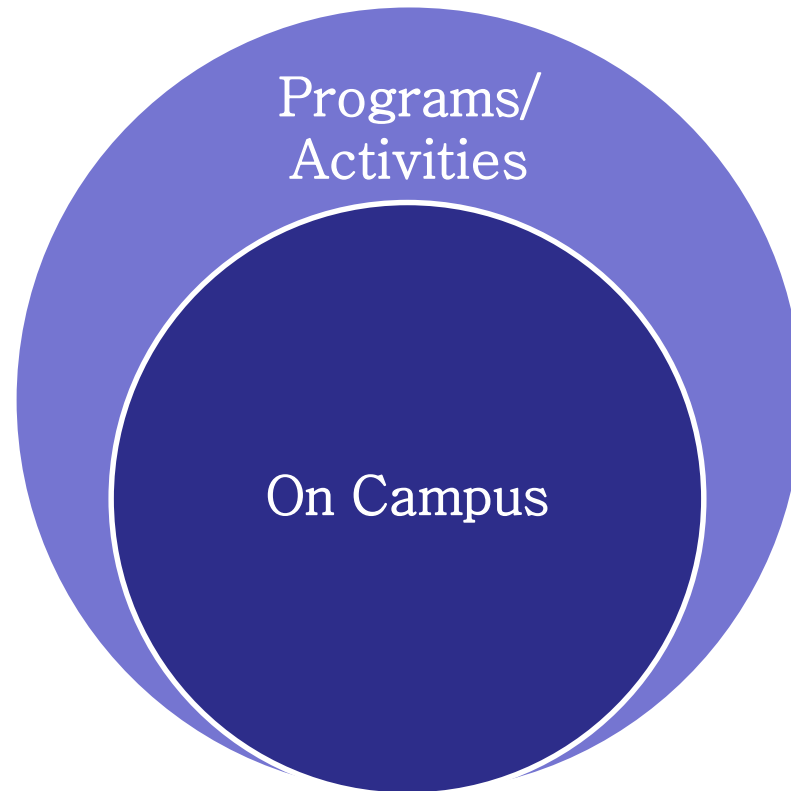
**Policies**

# Where does Title IX apply?

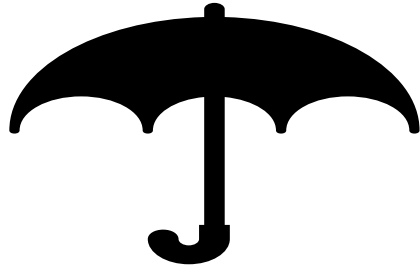


**Policies**

# Where does Title IX apply?



# Substantial Control over Context (**Where**)



Your education programs & activities

## Locations

Residence Halls

Classrooms

Campus

grounds/facilities

Fraternity/sorority  
houses

## Events

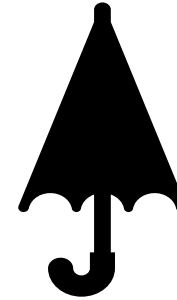
School sporting events

## Circumstances

Athletics

Extracurricular  
activities

Clinics/Internships



## Everything Else

Private off-campus housing

Off-campus bars or  
restaurants

Off-campus parties

Personal travel

# What constitutes sexual harassment?



- Sexual Assault
  - Dating and Domestic Violence
  - Stalking
  - A school employee conditioning the provision of an aid, benefit, or service on participation in unwelcome sexual conduct
  - 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 school's education program or activity
- Clery Act, VAWA definitions
- Quid Pro Quo*



# What constitutes sexual harassment?



“Unwelcome conduct of a sexual nature,” that includes “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”

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“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 school’s education program or activity”

# New Definition of Sexual Harassment

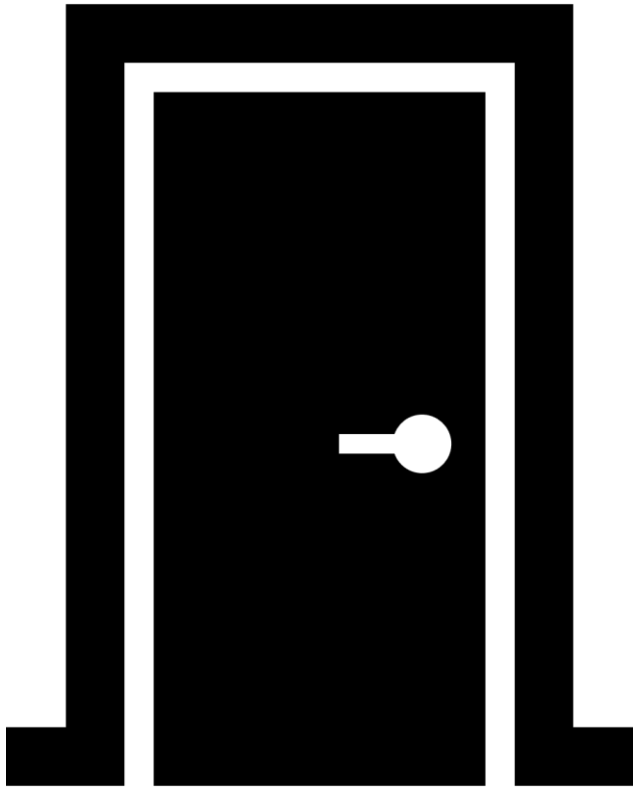
A threat of rape (not pervasive)

Catcalls on the way to class last Thursday (not severe or pervasive)

Catcalls on the way to class on a daily basis (not severe)

Daily threat of rape that results in student dropping out of school

Daily threats of rape that fail to dissuade a student from attending class (didn't deny equal access)



So what happens if the answer to

Who

or

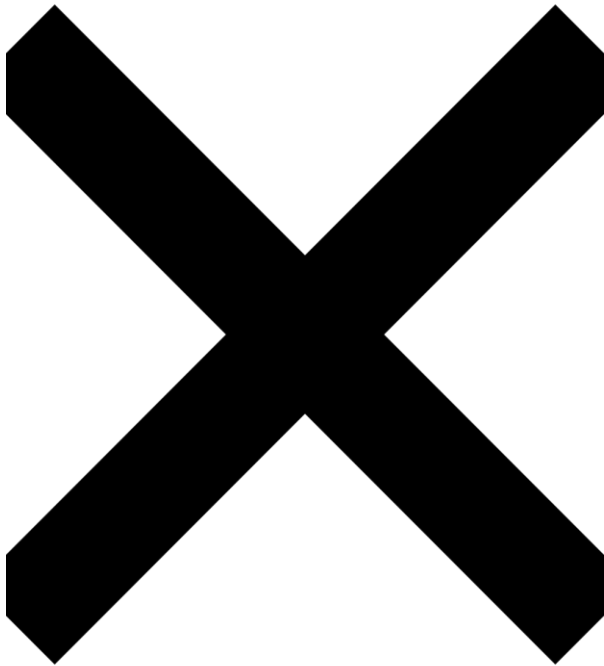
Where

or

What

doesn't take the case over the threshold?

# MANDATORY DISMISSAL



The school must dismiss the formal complaint with regard to that conduct\* for purposes of sexual harassment under Title IX.

\* Complaint could be dismissed in part

# VOLUNTARY DISMISSAL

1. Complainant no longer wishes to proceed
  2. Respondent no longer works at/attends the school
  3. Information not available
- If a mandatory or voluntary dismissal occurs, notify both parties in writing and provide the reason(s)
  - Right to appeal the dismissal

# POP QUIZ: MANDATORY DISMISSAL?

Student complains that a public safety employee makes suggestive remarks to him whenever he sees him, about once a week.

Student complains that a professor told her, “girls don’t belong in this class but I sure do like to watch you coming and going.”

Student complains she was sexually assaulted by two older students in the restroom of a local bar.

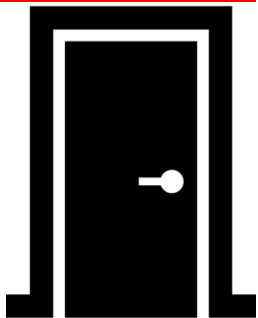
Student complains that his ex-girlfriend, also a student, has been following him home every time he leaves campus and sitting outside his house in her car for hours.

SO WE CAN'T DO ANYTHING ABOUT  
THOSE INCIDENTS????

Yes  
You  
Can

Dismissal does not preclude action under another provision of the school's code of conduct.

**Title IX Office**



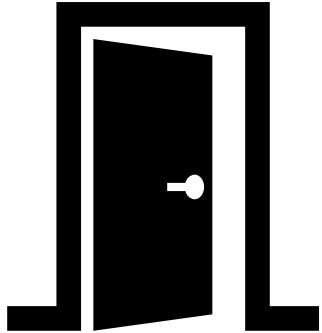
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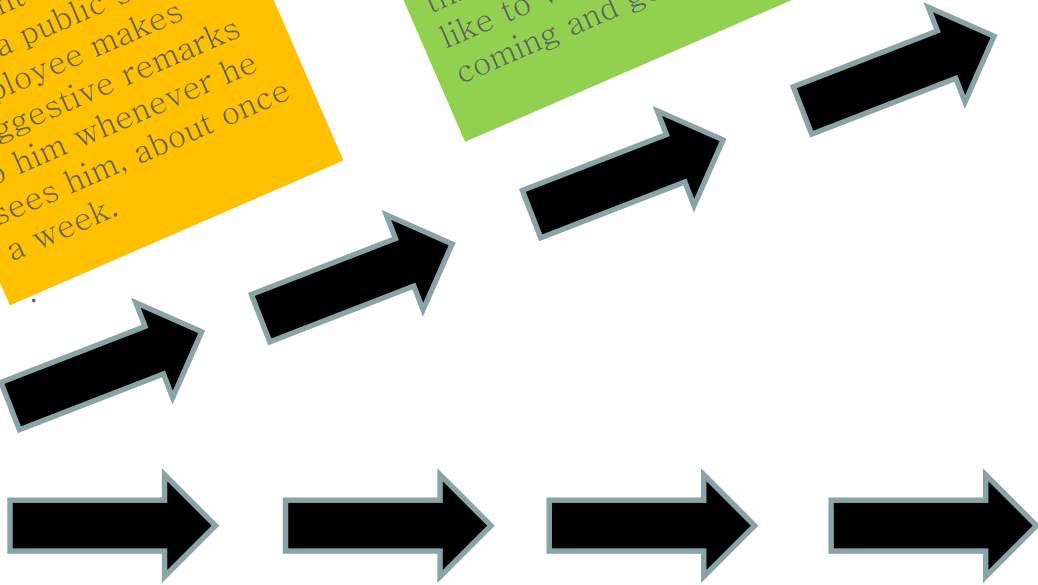
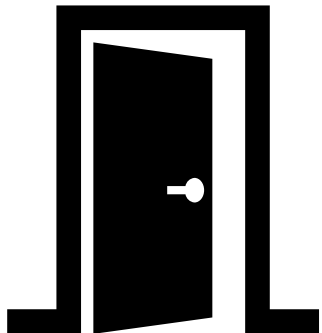
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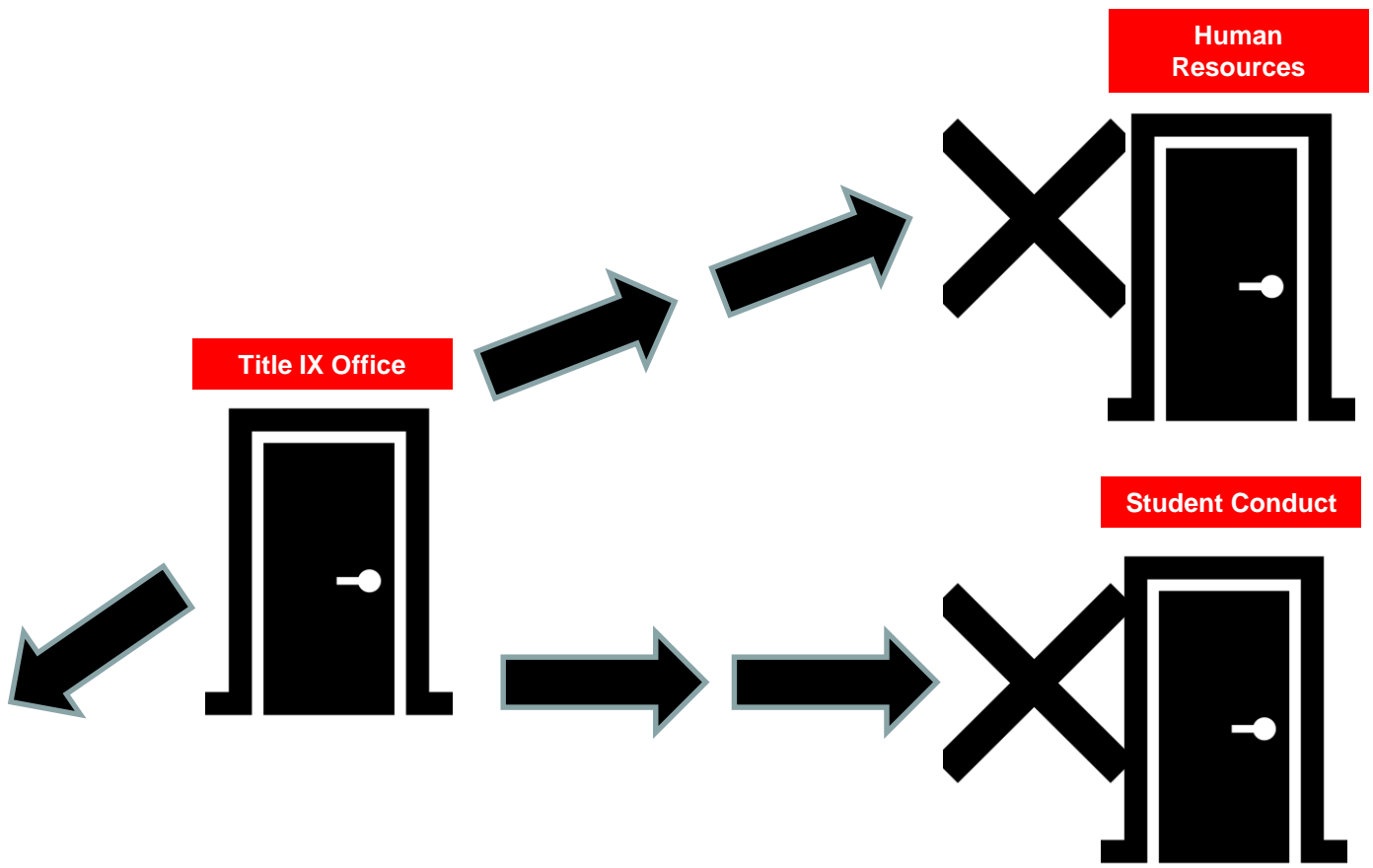
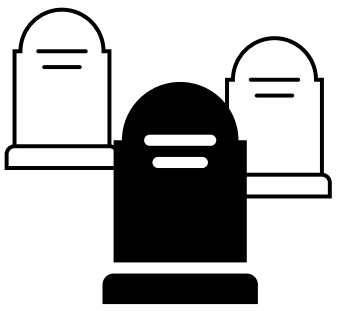
**Human Resources**



**Student Conduct**







*A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.*

– Department of Education's Summary of Major Provisions of the Title IX Final Rule

## WAIT, ARE YOU TELLING ME THAT DOE WILL LET US...

- Refer “non Title IX” cases to other offices for investigation and discipline?

YES

- Use the same procedures we will be using for Title IX cases to investigate and discipline “non Title IX” cases?

YES

- Use our current Obama-era procedures to investigate and discipline “non Title IX” cases?

YES

- Use our old pre-Obama-era procedures to investigate and discipline “non Title IX” cases?

YES

- Run simultaneous parallel procedures for different aspects of the same course of conduct?

YES

- Just ignore and do nothing about non-Title IX cases?

YES

# JURISDICTIONAL ANALYSIS

