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Summer 2024 Title IX Conference,  
Day 1



# Braving the Elements: Identifying, Investigating, and Analyzing Claims Under Title IX

Title IX Conference:  
Higher Ed & K-12 Training  
July 23-24, 2024



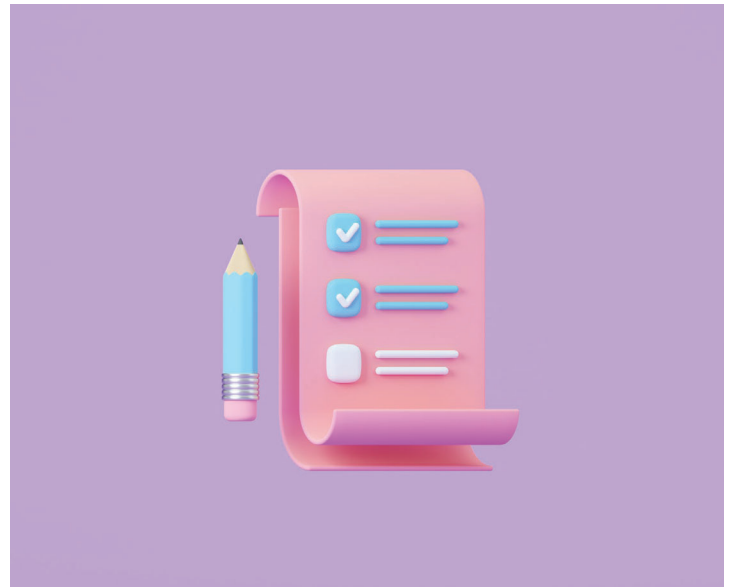
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# Agenda

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- Introduction to Elements
  - What are elements
  - Why elements matter
    - Evaluation
    - Notice of Allegations
    - Investigations
    - Decisions
- The elements in Title IX cases
  - Sex(ual or -Based) Harassment
  - Different Treatment
  - Disparate Impact
  - Failure to Accommodate
  - Athletics Equity
  - Retaliation
- Practice





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# Introduction to “Elements”

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## What are Elements?

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- In the context of legal proceedings, including Title IX cases, the “elements” of a claim refer to the specific components or factors that must be proven to establish that a policy violation occurred
- The elements are different for different claims, and there are important differences between the elements of some claims between the 2020 and 2024 Title IX rule

## Example

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"My brother stole my cookie."

**Claim:** Theft

**Elements:** (1) the unlawful taking (2) of the property of another (3) without their consent (4) and with the specific intent to permanently deprive the owner of that property.

**Ownership:** Is there evidence to support or refute that the cookie was mine in the first place?

**Taking:** Is there evidence to support or refute that my brother took the cookie?

**Without Permission:** Is there evidence to support that the cookie was taken without my permission?

**Intent to Deprive:** Is there evidence that my brother meant to deprive me of the cookie?

## **Why Elements Matter**

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Elements serve as the building blocks of the case and provide a framework for understanding the nature and scope of the allegations from start to finish

## Evaluation

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**Evaluation:** Could the alleged facts, if substantiated, violate a policy of the educational institution? How do you know? Look at **the elements** in the policy.

*At the restaurant tonight I wasn't hungry after my meal, so I got a cookie to go. I left the cookie on the counter in the kitchen while I showered. The cookie was gone when I got out of the shower. When I asked my brother if he had seen the cookie, he said no. He had crumbs on his shirt when I asked him. I think he took and ate the cookie.*



# Notice of Allegations

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**Notice of Allegations:** The facts described in each allegation should match up with **each element** of the claim

The Complainant alleges that on July 23, 2024, the Respondent took and ate a cookie that belonged to the Complainant without the Complainant's consent.

# Notice of Allegations

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**Notice of Allegations:** The facts described in each allegation should match up with **each element** of the claim

The Complainant alleges that on July 23, 2024, the Respondent took **[taking]** and ate **[intent to permanently deprive]** a cookie that belonged **[property]** to the Complainant without the Complainant's consent **[consent]**.

# Investigation

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**Notice of Allegations:** The investigation should be focused on finding evidence related to any disputed element of the allegations

- The Respondent says that the cookie did not belong to the Complainant [property]
- The Respondent denies taking the cookie [taking]
- The Respondent denies eating the cookie [intent to permanently deprive]

# Investigation

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**Notice of Allegations:** The investigation should be focused on finding evidence related to any disputed element of the allegations

- The Respondent says that the cookie did not belong to the Complainant [property]
  - What do the grandparents say about whose cookie it was?
  - What supports the parties' claims about ownership – what details can they provide?
  - Is there any documentation to show ownership

## Decision

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**Written Determination:** The decision must analyze each disputed element to determine if there is sufficient evidence to support it

*The parties dispute whether the cookie belonged to the Complainant. The evidence in support of the allegation includes the Complainant's statement that the cookie belonged to them and the grandparents' statements that they believed the Complainant did not eat their cookie at dinner but that they did not see the Complainant bring the cookie home. The evidence refuting the allegation includes the Respondent's statement that the cookie was leftover from a birthday party earlier in the week and a photograph of a wrapper with "happy birthday" on it that the Respondent said was from the cookie. When asked about the birthday party, the Complainant and the grandparents said they were not aware of a birthday party that the Respondent attended in the prior weeks. The Complainant also said that the Respondent regularly hides wrappers in their room and that the wrapper could have been months old for all they knew.*

The background of the slide is a close-up photograph of light-colored wooden planks, possibly oak, arranged in a staggered pattern. The wood grain is clearly visible, and the planks are separated by dark lines, likely from the joints or a digital overlay. The lighting is even, highlighting the natural texture of the wood.

# **Elements in Title IX Cases**

## **Prohibited Conduct – Title IX**

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- Sex Discrimination
- In an Education Program or Activity
- Against a Person in the United States

# Title IX Sex Discrimination

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- Sex(ual or -Based) Harassment
- Different Treatment
- Disparate Impact
- Failure to Accommodate
- Retaliation



## **Sexual Harassment (2020 Rule)**

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- Employee quid pro quo
- Sexual assault
- Domestic Violence
- Dating Violence
- Stalking
- Hostile Environment Sexual Harassment

## **Sex-Based Harassment (2024 Rule)**

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- Employee or agent quid pro quo
- Sexual assault
- Domestic Violence
- Dating Violence
- Stalking
- Hostile Environment Sexual Harassment

## **Employee Quid Pro Quo (2020 Rule)**

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- An employee of the educational institution
- Conditioning the provision of an aid, benefit, or service on
- A person's participation in unwelcome sexual conduct

## **Employee Quid Pro Quo (2020 Rule)**

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- Is the Respondent an employee of the educational institution?
- Did the Complainant participate in conduct with the Respondent?
- Was the conduct sexual?
- Was the sexual conduct unwelcome?
- Did the Respondent condition an aid, benefit, or service on the unwelcome sexual conduct?

## **Employee or Agent Quid Pro Quo (2024 Rule)**

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- An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity
- Explicitly or impliedly conditioning the provision of such an aid, benefit, or service on
- A person's participation in unwelcome sexual conduct;

## **Employee or Agent Quid Pro Quo (2024 Rule)**

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- Is the Respondent an employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity?
- Did the Complainant participate in conduct with the Respondent?
- Was the conduct sexual?
- Was the sexual conduct unwelcome?
- Did the Respondent explicitly or impliedly condition an aid, benefit, or service on the unwelcome sexual conduct?
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# Sexual Assault

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## Rape

- Was there sexual penetration of the Complainant?
- Was it by the Respondent?
- Was there consent?

## Fondling

- Did the Respondent touch the private body parts of the Complainant?
- Was there consent?
- Was it for purposes of sexual gratification?

## Dating Violence

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- Was there violence against the Complainant?
- Based on the length of the relationship, the type of relationship, and the frequency of interaction between the parties, was the violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant?



## Domestic Violence

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- Was there a crime of violence against the Respondent?
- Would it be a felony or misdemeanor under state law?
- Is the Respondent a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim?
- If not, is the Respondent cohabitating, or has cohabitated, with the victim as a spouse or intimate partner
- If not, did the Respondent share a child in common with the Complainant, or
- If not, was the crime committed against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction?

# Stalking

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- Was there a course of conduct?
- Was the conduct directed at a specific person?
- Would the conduct cause a reasonable person to fear for their safety or the safety of another?
- If not, would it cause a reasonable person to suffer substantial emotional distress?

## **Hostile Environment Sexual Harassment (2020 Rule)**

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- Was there unwelcome conduct?
- Was it based on sex?
- Was it severe?
- Was it pervasive?
- Was it objectively offensive?
- Was it so severe, pervasive, and objectively offensive that it effectively denied equal access to the education program or activity?

## Hostile Environment Sex-Based Harassment (2024 Rule)

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- Was there unwelcome conduct?
- Was it based on sex?
- Was it objectively offensive?
- Was it severe?
- If not, was it pervasive?
- Was it so severe or pervasive that it limited or denied the Complainant's ability to participate in or benefit from the recipient's education program or activity

## Different Treatment Discrimination

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- Different Treatment Discrimination occurs where, based on the totality of relevant facts, looking to direct evidence, circumstantial evidence, or both, an individual or a group of individuals is intentionally treated differently, at least in part, because of an actual or perceived Protected Characteristic or actual or perceived membership in a Protected Class
- Evidence that may support a finding of Different Treatment Discrimination includes direct evidence, such as a statement from a decision-maker that expresses a discriminatory motive or express or admitted classifications explicitly distributing benefits or burdens based on a Protected Characteristic

## Different Treatment Discrimination

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Absent direct evidence of discriminatory intent, examine the circumstantial evidence, typically asking the following questions:

- Did the educational institution or a member of the educational institution's community limit or deny educational or employment services, benefits, or opportunities to one or more members of a Protected Class by treating them differently from one or more individuals who are not members of that Protected Class? If yes, ask:
- Do the context and circumstances support finding a legitimate, nondiscriminatory reason for the different treatment? If no, there is sufficient evidence of Discrimination. If yes, ask:
- Is there sufficient evidence that the legitimate, nondiscriminatory reason is a pretext for Discrimination—in other words, it is not the true reason for the action? If yes, there is sufficient evidence of Discrimination.

## Different Treatment Discrimination

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- In evaluating claims of Different Treatment Discrimination, OCRI may also consider other circumstantial evidence to determine whether there was discriminatory intent underlying an action.
- Such circumstantial evidence may include but is not limited to whether the impact of the action weighs more heavily on members of a Protected Class, whether there is a history of discriminatory conduct toward members of a Protected Class, the administrative history behind a policy or decision, and whether policies or practices have been applied inconsistently to individuals of a Protected Class.

# Disparate Impact Discrimination

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Disparate Impact Discrimination occurs where:

- (1) A facially neutral policy, procedure, or rule has an adverse impact on one or more individuals based on a protected characteristic
- (2) The policy, procedure, or rule is not necessary to meet an important education goal or job-related and consistent with business necessity
- (3) Even if the policy, procedure, or rule is necessary to meet such a goal or necessity, there is a comparably effective alternative policy, procedure, or rule that would meet the goal or necessity with less adverse impact on the individuals disproportionately impacted, and
- (4) Even if there is not a comparable effective alternative, if the important education goal or job-related business necessity is a Pretext for Discrimination



## Disparate Impact Discrimination

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In evaluating claims of Disparate Impact Discrimination, consider:

- Does a facially neutral policy, procedure, or rule have an adverse impact on one or more individuals based on a Protected Characteristic? If yes, ask:
- Is the facially neutral policy, procedure, or rule necessary to meet an important educational goal or job-related and consistent with business necessity? If no, there is sufficient evidence of Discrimination. If yes, ask:
- Is there a comparably effective alternative policy, procedure, or rule that would meet the important goal or business necessity with less of a burden or adverse impact on the individuals disproportionately impacted? If yes, there is sufficient evidence of Discrimination. Even if no, ask:
- Is reliance on the goal or business necessity a pretext for discrimination? If yes, there is sufficient evidence of Discrimination.

## Failure to Accommodate

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- Discrimination can occur when the educational institution fails to reasonably accommodate or make reasonable modifications in policies, practices, or procedures based on pregnancy or a related condition when such accommodation or modification is necessary to avoid discrimination based on pregnancy or a related condition
- A member of the educational institution's community's decision to deny a request for a reasonable accommodation or modification can also constitute different treatment discrimination if the requirements of different treatment are established

## Failure to Accommodate

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When considering a complaint that a student was not reasonably accommodated, the educational institution will consider:

- Whether the student is a student who is experiencing pregnancy or a related condition
- Whether the student provided adequate notice to the educational institution that they believed they needed one or more academic adjustments, educational auxiliary aids or services, or modifications to one or more policies, practices, or procedures, and
- Whether a requested academic adjustment, auxiliary aid or service, or modification is or was necessary, and either:
  - The educational institution did not provide the academic adjustment, auxiliary aid or service, or modification, or
  - The academic adjustment, auxiliary aid or service, or modification provided were not of adequate quality or effectiveness.

## **Failure to Accommodate**

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If the answer to all questions is yes, there is sufficient evidence of Discrimination. For purposes of deciding whether a requested academic adjustment, auxiliary aid or service, or modification to one or more policies, practices, or procedures is necessary, the educational institution is not required to modify academic requirements that are essential to a program of instruction being pursued or to any directly related licensing requirement; provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature as auxiliary aids or services; or modify policies, practices, or procedures if doing so would fundamentally alter the nature of the service, program or activity.

# Retaliation

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- Retaliation is taking an Adverse Action against a person because the person engaged in or might engage in Protected Activity.
- Evidence that may support a finding of Retaliation includes direct evidence, such as a statement from a decision-maker that expresses a retaliatory motive or express or admitted classifications explicitly distributing benefits or burdens based on engagement in Protected Activity.

# Retaliation

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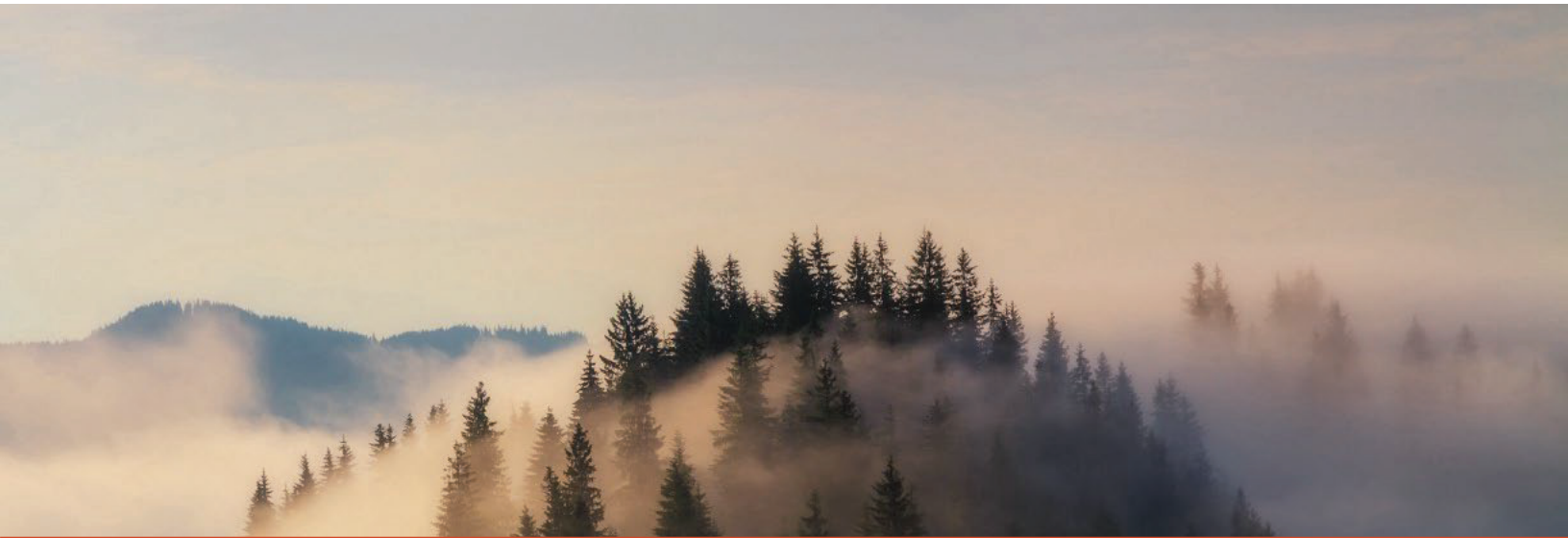
Absent direct evidence of retaliatory intent, OCRI examines the circumstantial evidence, typically asking the following questions:

- Did the Complainant engage in Protected Activity or did the Respondent believe the Complainant might engage in Protected Activity? If yes, ask:
- Did the Complainant subsequently experience an Adverse Action? If yes, ask:
- Is there some evidence that the Adverse Action was caused by the Protected Activity? If yes, ask:
- Do the context and circumstances support finding a legitimate, nonretaliatory reason for the Adverse Action? If no, there is sufficient evidence of Retaliation. If yes, ask:
- Is there sufficient evidence that the legitimate, nonretaliatory reason is a pretext for Retaliation? If yes, there is sufficient evidence of Retaliation

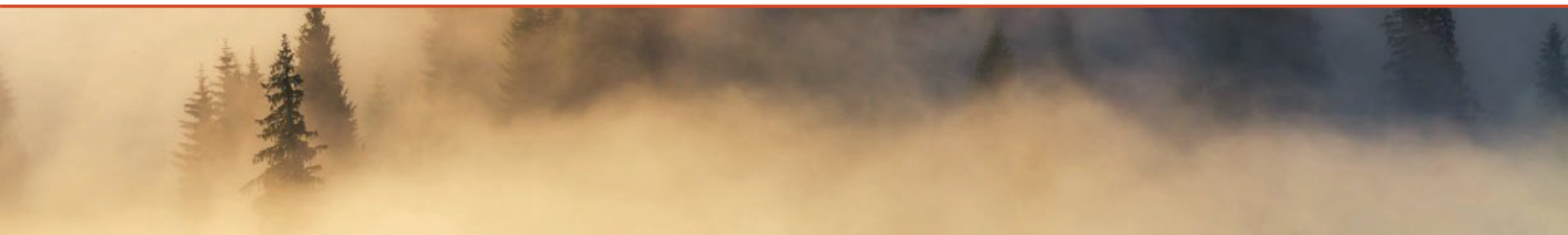
## Retaliation

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- In evaluating claims of retaliation, you may also consider other circumstantial evidence to determine whether there was retaliatory intent underlying an action
- Such circumstantial evidence may include but is not limited to whether the impact of the action weighs more heavily on individuals who engaged in protected activity, whether there is a history of discriminatory conduct toward those who engage in protected activity, the administrative history behind a policy or decision, and whether policies or practices have been applied inconsistently to individuals who engaged in protected activity



# **Brave the Elements**





# Brave the Elements

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An employee reports that athletes on a particular team regularly slap each other on the butt during games



## **Brave the Elements**

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- Two employees begin dating and move in together
- One reports that the other is hitting them

## Brave the Elements

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- The parties in a sexual assault case attempt informal resolution, but the respondent decides to end the process before a resolution is reached
- While the investigation is ongoing, the respondent reports that the complainant has been telling students on campus that the respondent is a rapist and that people should avoid the respondent
- The respondent believes that the complainant is upset that the respondent did not agree to the terms the complainant proposed during informal resolution and is attempting to apply pressure to get the respondent to reconsider

## **Brave the Elements**

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An unknown student anonymously shared, on campus, an explicit video of a student

## Brave the Elements

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- A student files a sex harassment complaint against a teacher/faculty member
- The faculty member denies the charge and it is found to be unsubstantiated during in investigation
- The student reports that the faculty member excludes the student from academic and social opportunities associated with the class, goes out of their way to avoid the student, making it difficult to get help after and outside of class, and gives of negative vibes toward the student (looks and body language)
- The faculty member acknowledges they have created some distance but says it is only for self-protection

## **Brave the Elements**

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A complainant student reports that another student put a hand on the complainant's chair when the complainant was sitting down and touched the complainant's crotch through the clothing

## Brave the Elements

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- A student alleges that their teacher/professor treats students of the complainant's gender differently in classes
- Students of complainant's gender are called on less frequently even when they raise their hands
- The students all talk about their grades, and students of the complainant's gender receive lower grades even though they generally have higher GPAs
- The teacher/professor allegedly makes comments in class about members of the complainant's gender

## Brave the Elements

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- A student asks their teaching assistant for some additional help in a class
- The teaching assistant sets up a time for the two to work
- During the session, the teaching assistant asked the student for a back massage while they discussed the project





## Brave the Elements

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- A student complainant reports that another student, the respondent, who is an individual with autism, won't take the hint that the complainant is not interested in the respondent
- The complainant says the respondent regularly waits outside the complainant's classes, comes to the complainant's sporting events and sits in the front row, and texts the complainant, sometimes sending dozens of messages back to back when the complainant does not answer

## Brave the Elements

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A student complainant reports that another student, the respondent, initiated sexual intercourse without asking while the two were "making out"

The complainant was so shocked they did not say no; they just froze and waited until the respondent finished

After, the complainant did not say much and just asked the respondent to leave

**Questions?**

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