

Title IX Final Rule Basics

1. Introduction

1.1 SCI Welcome & Legal disclaimer



Notes:

1.2 Title IX Final Rule Basics

The slide features a dark blue background. On the left, there is a grayscale image of a large, historic building with a prominent tower and spire. A small red rectangular graphic is positioned over the image. In the top right corner, the 'STUDENT CONDUCT INSTITUTE' logo is displayed in white. The main title, 'Title IX Final Rule Basics', is centered in a large white font. Below the title, the names and titles of the presenters, Abbey Marr J.D. and Adam Wolkoff, J.D./Ph.D., are listed in white. The date 'November 2021' is located in the bottom right corner.

**STUDENT
CONDUCT
INSTITUTE**

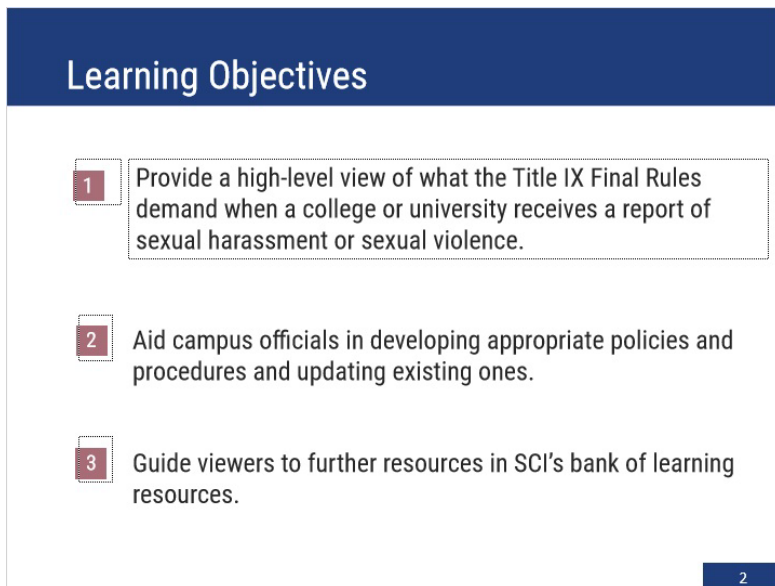
Title IX Final Rule Basics

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Former Assistant Director, SCI

November 2021

1.3 Learning Objectives

The slide has a dark blue header with the title 'Learning Objectives' in white. The main content area is white and contains three numbered learning objectives, each preceded by a red square icon with a white number. A small blue box with the number '2' is in the bottom right corner.

Learning Objectives

- 1 Provide a high-level view of what the Title IX Final Rules demand when a college or university receives a report of sexual harassment or sexual violence.
- 2 Aid campus officials in developing appropriate policies and procedures and updating existing ones.
- 3 Guide viewers to further resources in SCI's bank of learning resources.

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1.4 Road Map

Road Map

- A brief history of Title IX guidance and regulations concerning sexual harassment and sexual violence
- Title IX definitions and scope
- Intake of complaints, supportive measures, and the formal complaint
- Notice of Allegations and dismissal grounds
- Investigative process
- Advisor of choice
- Live hearing with cross-examination
- Appeal
- Conflict of interests, bias, and retaliation

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1.5 Title IX and Sexual Harassment

Title IX and Sexual Harassment

- 1997/2001 Sexual Harassment Guidance
- *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) (teacher-on-student sexual harassment)
- *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (student-on-student sexual harassment).
- April 2011 Dear Colleague Letter
- April 2014 Q&A Dear Colleague Letter

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1.6 Title IX and Sexual Harassment

Title IX and Sexual Harassment

- September 2017 Dear Colleague Letter
- November 2018 Notice of Proposed Rulemaking (“NPRM”)
- May 19, 2020: Title IX Final Rules

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1.7 Scope of the Title IX Final Rule

Scope of the Title IX Final Rule



Schools can have separate procedures for Title IX and non-Title IX misconduct

- Not all matters historically considered “Title IX” cases fall within the scope
- Narrows the geographic scope of institution’s obligation to respond
- Narrows the types of “sexual harassment” subjected to Title IX investigation and adjudication
- **Conduct falling outside scope may still be resolved through a non-Title IX process**

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2. Brief History & Jurisdiction

2.1 “Sexual Harassment”: Then and Now

“Sexual Harassment”: Then and Now

2001 Revised Sexual Harassment Guidance	Title IX Final Rule
• Quid Pro Quo Sexual Harassment; • Hostile environment, which means conduct that is “sufficiently serious to deny or limit a student’s ability to participate in or benefit from the school’s program based on sex.”	• Employee Quid Pro Quo; • Unwelcome conduct on the basis of sex that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational institution’s education program or activity; • Sexual assault [as defined in the Clery Act], or dating violence, domestic violence, or stalking [as defined in the Violence Against Women Act (VAWA)].

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2.2 “Actual Knowledge” and Duty to Respond

“Actual Knowledge” and Duty to Respond

- A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States must respond promptly in a manner that is **not deliberately indifferent**, meaning not clearly unreasonable in light of the known circumstances.
- What is “actual knowledge”?
 - Notice of sexual harassment
 - To a recipient’s Title IX Coordinator or any official who has the authority to institute corrective measures (Think: *Gebser/Davis*)
- Responsible employee framework is not mandated, but can continue at the institution’s option (except at K-12 level)

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2.3 Jurisdiction under Title IX Final Rule

Jurisdiction under Title IX Final Rule

- **Only** within the United States.
- On-campus, or
- Off-campus, only if location is part of "operations" and institution has substantial control over the place and the respondent
- Example: Building owned or controlled by a student organization that is officially recognized by the institution
- *Possibly*: Online harassment where network/software/hardware is part of "operations" and institution has substantial control



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2.4 Conflicts of Interest and Bias

Conflicts of Interest and Bias

Prohibited Conflicts of Interest and Bias

- Having a conflict of interest or bias for or against complainants and respondents generally
 - **CAUTION:** "Believe All Women" (or All Men)
- Having a conflict of interest or bias for or against the specific parties
- Overlapping investigator, decision-maker, and appeals roles

Not a *per se* conflict or bias

- Gender, research interests, work history
- Advocacy background
- Title IX Coordinator serving as Title IX Investigator
- Title IX Coordinator serving as facilitator in informal resolution process

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2.5 Intake Process and Supportive Measures

Intake Process and Supportive Measures

- Title IX Coordinator will offer parties supportive measures, even where no formal complaint is filed
- Examples of supportive measures (*See*, 85 Fed. Reg. 30026, 30401)
 - counseling
 - extensions of deadlines or other course-related adjustments
 - modifications of work or class schedules
 - campus escort services
 - restrictions on contact between the parties (no contact orders)
 - changes in work or housing locations
 - leaves of absence
 - increased security and monitoring of certain areas of the campus

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3. Allegations, Dismissals, and Investigation

3.1 Emergency Removals

Emergency Removals

- **CAUTION:** Interim suspensions are prohibited for Title IX student-respondents
 - Department of Education considers them disciplinary sanctions
- Emergency Removal may be used where
 - Person poses threat of immediate **physical** harm
 - Threat arises from allegations of sexual harassment
 - Depends on individualized safety and risk assessment
- Must provide opportunity for “immediate” opportunity to challenge the removal (need not be a formal hearing)

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3.2 Formal Complaint

Formal Complaint

- Institutions **must** investigate all “formal complaints” filed with the Title IX Coordinator
- Who can file a formal complaint?
 - A person who is currently participating in the education programs or activities of the institution
 - A person who is attempting to participate in those programs or activities
 - The Title IX Coordinator
- Multiple complaints arising from same incidents can be consolidated

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3.3 Time Frames

Time Frames



The Final Rules do not impose a 60-day rule, but the time frame must be reasonably prompt

- Section 106.45(b)(1)(v) requires recipients to set a reasonably prompt time frame for concluding the formal complaint grievance process
- Schools also have to set a time frame for concluding appeals and any informal resolution process
- No maximum or minimum number of days; needs to promote a reasonably prompt investigation and adjudication

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3.4 Allegations and Advisor

Notice of Allegations and Right to Advisor

Timing

- Send to parties as soon as practicable after filing of formal complaint
- No investigative interviews until parties have sufficient time to review allegations

Contents

- Allegations of sexual harassment
- Identities of parties, if known, including the complainant's name
- Date, time, and location of the incident, if known
- Parties' basic procedural rights
- Presumption of non-responsibility

Advisor

- Notice must inform parties of right to advisor, who may be attorney
- School does not need to pay for attorney unless otherwise required under code
- Reasonable restrictions ok...
- Unless they conflict with cross-examination role

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3.5 Mandatory and Discretionary Dismissal

Mandatory and Discretionary Dismissal

- Institutions **must** dismiss formal complaints that don't fall within the statutory criteria for the Title IX grievance process
 - Institution may still investigate through a non-Title IX process
- Institutions **may** dismiss complaints that do meet the criteria if:
 - A complainant notifies the TIXC in writing that they would like to withdraw the formal complaint or any allegations in it;
 - The respondent is not enrolled/ employed by the institution; or,
 - If specific circumstances prevent the institution from gathering evidence sufficient to reach a determination
- Any party may appeal a dismissal determination

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3.6 Investigative Process

Investigative Process

Evidence Collection	Evidence Sharing	Investigative Report
• Interviews of parties and witnesses after Notice of Allegations • Both inculpatory and exculpatory evidence needs to be collected • Evidence will be directly related to the allegations • May include evidence that the institution does not intend to rely on	• Mandatory inspection process with ten day minimum review period • Parties may review evidence with their advisors present • May set reasonable rules (e.g. confidentiality agreement)	• Summarizes relevant evidence directly related to allegations • Cannot make determination regarding responsibility • Parties have opportunity to review before hearing

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3.7 Live Hearing

Live Hearing

Basic Rules
• All parties, advisors, witnesses, and decision-makers may be physically present in same location, or • They may participate remotely via secure technology, but • Decision-makers must be able to see and hear parties and witnesses.



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4. Cross-examination and Appeals

4.1 Relevant Questions

Relevant Questions

- Questioning Process
 - Decision-maker asks questions of the parties and witnesses
 - Advisors ask "relevant" cross-examination questions
 - Decision-maker decides if questions are relevant
- Relevance Determination
 - **General rule: does the question make a fact at issue more or less likely to be true?**
 - Specific exclusions governing Title IX hearings:
 - "Rape Shield" (with two exceptions). 34 C.F.R. § 106.45(6)(i).
 - Offered to prove someone else committed alleged conduct
 - Offered to prove consent
 - Privileged information. 34 C.F.R. § 106.45(1)(x).
 - Undisclosed medical records. *See*, 85 Fed. Reg. 30026, 30294
 - Duplicative questions. *See*, 85 Fed. Reg. at 30331.

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4.2 Cross-Examination

Cross-Examination

- At a live hearing, each party's advisor [must be permitted to] to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." Id. § 106.45(b)(6)(i).
- Parties and witnesses are not required to submit to cross-examination or otherwise participate in the Title IX grievance process. 34 C.F.R. § 106.45(b)(6)(i).
 - ✓ Note: Decisions can also be made in the absence of a party or witnesses. A decision maker may consider statements made by a party or witness who does not submit to cross-examination at a live hearing. A federal court vacated regulatory language in the 2020 amendments that prohibited decision-makers in postsecondary schools from relying on statements by individuals who did not submit to cross-examination during a live hearing. As a result, postsecondary schools are no longer subject to this language.
Decision: Victim Rights Law Center et al. v. Cardona, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021).
 - ✓ No inference of responsibility from decision not to testify

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4.3 Determination Regarding Responsibility

Determination Regarding Responsibility

- Identify allegations potentially constituting sexual harassment;
- Describe procedural steps taken from receipt of the formal complaint through the determination, including notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Identify findings of fact supporting the determination;
- Identify which section of the Code of Conduct, if any, respondent has/has not violated.
- For each allegation, provide:
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
 - A statement of, and rationale for, any disciplinary sanctions the recipient imposes on the respondent; and
 - A statement of, and rationale for, whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- Describe appeal procedures

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4.4 Appeal

Appeal

- Title IX Final Rules mandate access to an appeal
- Parties can appeal dismissal of formal complaint and determination regarding responsibility
- Final Rules mandate three appeal grounds:
 - **Procedural irregularity** that affected the outcome of the matter (i.e. a failure to follow the institution's own procedures);
 - **New evidence** that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a **conflict of interest or bias** for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter.

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4.5 Retaliation (Section 106.71)

Retaliation (Section 106.71)

- Title IX prohibits retaliation against people who seek to assert their Title IX rights
- This section reinforces that right by prohibiting any recipient or other person from:
 - intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX
 - because the individual has made a report or complaint,
 - the individual testified, assisted, or participated or
 - the individual refused to participate in any manner
 - in a Title IX investigation, proceeding, or hearing.

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4.6 Under the 2020 Title IX Rules, who is not able to file a formal complaint?

(Multiple Choice, 10 points, unlimited attempts permitted)

Test Your Knowledge

Under the 2020 Title IX Rules, who is not able to file a formal complaint?

- ☒ An alum with no continuing connection to the institution
- ☐ A person applying to attend an institution
- ☐ An employee

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Correct	Choice
X	An alum with no continuing connection to the institution
	A person applying to attend an institution

Correct	Choice
	An employee

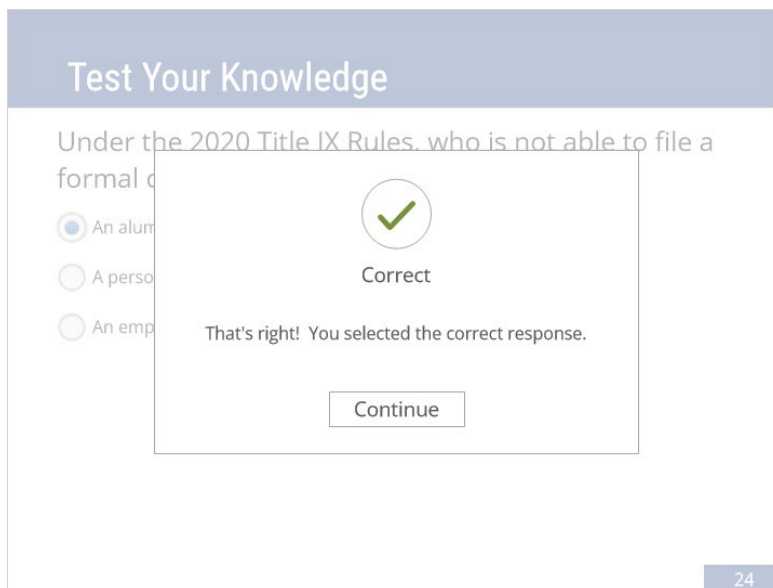
Feedback when correct:

That's right! You selected the correct response.

Feedback when incorrect:

You did not select the correct response.

Correct (Slide Layer)



Incorrect (Slide Layer)

Test Your Knowledge

Under the 2020 Title IX Rules, who is not able to file a formal complaint?

- ☒ An alum
- ☐ A person
- ☐ An employee



Incorrect

You did not select the correct response.

Continue

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Try Again (Slide Layer)

Test Your Knowledge

Under the 2020 Title IX Rules, who is not able to file a formal complaint?

- ☒ An alum
- ☐ A person
- ☐ An employee



Incorrect

That is incorrect. Please try again.

Try Again

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4.7 Which cross-examination question will always be irrelevant under the 2020 Title IX Rules?

(Multiple Choice, 10 points, unlimited attempts permitted)

Test Your Knowledge

Which cross-examination question will always be irrelevant under the 2020 Title IX Rules?

- ☒ A question regarding a discussion between the complainant and their mental health provider during a medical visit.
- ☐ A question regarding a complainant's past sexual history.
- ☐ A question regarding a complainant's history of taking psychiatric medications.

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Correct Choice

- | | |
|---|--|
| X | A question regarding a discussion between the complainant and their mental health provider during a medical visit. |
| | A question regarding a complainant's past sexual history. |
| | A question regarding a complainant's history of taking psychiatric medications. |

Feedback when correct:

That's right! You selected the correct response.

Feedback when incorrect:

You did not select the correct response.

Correct (Slide Layer)

Test Your Knowledge

Which cross-examination question will always be irrelevant?

- ☒ A question about the defendant's mental health.
- ☐ A question about the defendant's physical health.
- ☐ A question about the defendant's criminal record.
- ☐ A question about the defendant's family background.

That's right! You selected the correct response.

Continue

25

Incorrect (Slide Layer)

Test Your Knowledge

Which cross-examination question will always be irrelevant?

- ☒ A question about the defendant's mental health.
- ☐ A question about the defendant's physical health.
- ☐ A question about the defendant's criminal record.
- ☐ A question about the defendant's family background.

Incorrect

You did not select the correct response.

Continue

25

Try Again (Slide Layer)

Test Your Knowledge

Which cross-examination question will always be irrelevant?

- ☒ A question about the defendant's mental health.
- ☐ A question about the defendant's physical health.
- ☐ A question about the defendant's criminal record.
- ☐ A question about the defendant's family background.



Incorrect

That is incorrect. Please try again.

Try Again

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4.8 The 2020 Title IX Rules prohibit this conduct as retaliation:

(Multiple Choice, 10 points, unlimited attempts permitted)

Test Your Knowledge

The 2020 Title IX Rules prohibit this conduct as retaliation:

- ☐ Intimidating, threatening, or coercing another individual because they have decided to participate in a Title IX investigation.
- ☐ Intimidating, threatening, or coercing another individual because they have decided *not* to participate in a Title IX investigation.
- ☒ All of the above

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Correct Choice

Intimidating, threatening, or coercing another individual because they have decided to participate in a Title IX investigation.

Correct Choice

Intimidating, threatening, or coercing another individual because they have decided not to participate in a Title IX investigation.

X All of the above

Feedback when correct:

That's right! You selected the correct response.

Feedback when incorrect:

You did not select the correct response.

Correct (Slide Layer)

The screenshot shows a presentation slide titled "Test Your Knowledge". The main text on the slide is "The 2020 Title IX Rules prohibit this conduct as retaliation". Below this text are three radio button options: "Intimidate or threaten another individual because they have decided not to participate in a Title IX investigation.", "Intimidate or threaten another individual because they have decided not to participate in a Title IX investigation.", and "All of the above". The third option is selected. A modal dialog box is overlaid on the slide, indicating a correct answer. The dialog box contains a green checkmark icon, the word "Correct", the text "That's right! You selected the correct response.", and a "Continue" button. The slide number "26" is visible in the bottom right corner.

Incorrect (Slide Layer)

Test Your Knowledge

The 2020 Title IX Rules prohibit this conduct as retaliation.

- ☐ Intimidate or threaten someone who has decided to file a complaint.
- ☐ Intimidate or threaten someone who has decided to file a complaint.
- ☒ All of the above.

Incorrect

You did not select the correct response.

[Continue](#)

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Try Again (Slide Layer)

Test Your Knowledge

The 2020 Title IX Rules prohibit this conduct as retaliation.

- ☐ Intimidate or threaten someone who has decided to file a complaint.
- ☐ Intimidate or threaten someone who has decided to file a complaint.
- ☒ All of the above.

Incorrect

That is incorrect. Please try again.

[Try Again](#)

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4.9 Further Reading

Further Reading

- [*Gebser v. Lago Vista Independent School Dist.*](#), 524 U.S. 274 (1998)
- [*Davis v. Monroe County Board of Education*](#), 526 U.S. 629 (1999)
- [Title IX Final Rules](#), 85 Fed. Reg. 30026 (May 19, 2020)
- [Joint Guidance](#) on Federal Title IX Regulations (2020)

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Notes:

5. Exit Questions

5.1 Attest

(True/False, 100 points, 1 attempt permitted)



I attest that I watched and completed this course in full.

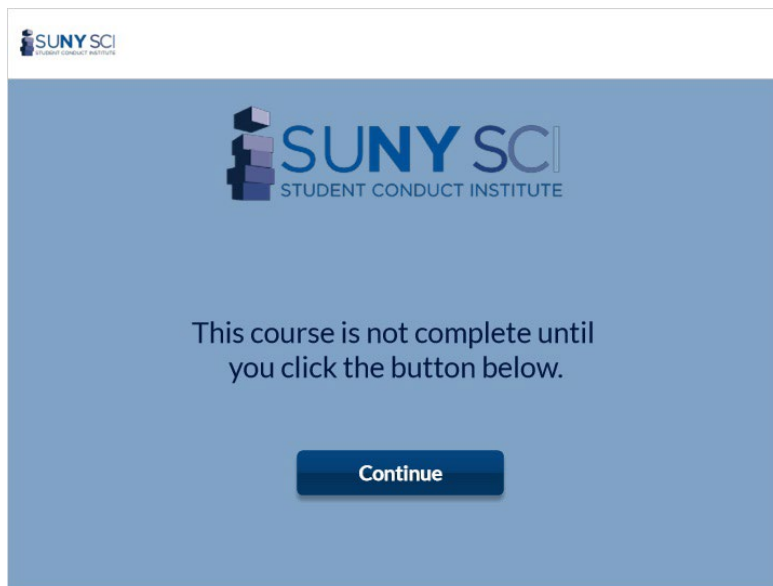
☒ True

☐ False

Correct	Choice
X	True

5.2 Results Slide

(Results Slide, 0 points, 1 attempt permitted)



Results for
5.1 Attest

Result slide properties	Passing Score
80%	

Success (Slide Layer)



This course is not complete until
you click the button below.

Continue

Failure (Slide Layer)



This course is not complete until
you click the button below.

Continue

5.3 End Course



We invite you to take an optional Course Feedback Survey to help our team improve your learning experience. The link to this survey is located in the Table of Contents menu.

To end the course, click the button below.
Proceed back to the main menu.
DO NOT CLICK THE BACK BUTTON

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End Course