

HUSCH BLACKWELL

Title IX Sexual Harassment Response

Participants in sexual harassment policy process

Spring 2024

Day 1

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Housekeeping

- Participants may not record
- Change Zoom name to match registration name
- Please list your institution with your name
- Raise hand or use chat function to ask questions
- Examples and scenarios are fictitious



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Evolving Regulations

- This training is based on currently-operative sexual harassment regulations (August 2020)
- We will highlight potential changes that may result from proposed regulations that are not yet effective
- The effective date and final language of proposed regulations have yet to be determined
- Litigation may challenge final regulations once effective



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Agenda

- Title IX Scope & Jurisdiction
- Intake and Supportive Measures
- The Investigation
- The Hearing
- Informal Resolution and Other Processes
- Case Law Update



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Title IX Scope & Jurisdiction

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What is Title IX?

“[N]o 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.”

34 C.F.R. § 106.31



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To which entities does Title IX apply?



Entities that receive federal financial assistance, including colleges and universities that participate in U.S. Dept. of Ed. Federal Student Aid funding

- Not individual persons
- But institutions are required to adopt policies and procedures to implement Title IX that do apply to individual persons

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Two Types of Sex Discrimination

- Adverse treatment that is motivated by the target's sex and that directly limits or excludes the target from participation in education program or activities
 - Usually by someone in a supervisory or authoritative position, or by institutional policy
- Sexual harassment involves
 - Unwelcome conduct that is
 - Either sexual in nature or sex based and
 - Quid pro quo; hostile environment; sexual assault; or domestic violence, dating violence, stalking
 - Sexual harassment is currently subject to more elaborate regulations governing investigation and determination

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Likely Change: Expanded Scope of Conduct Subject to Heightened Regulatory Requirements



Proposed regulation requires grievance procedures for all forms of sex discrimination



Proposed regulation continues to require more rigorous procedures for “sex-based” harassment

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Female supervisor prefers working with women and consistently gives a male subordinate poor performance reviews to drive him out of the department.

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Example: Adverse Treatment



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College consistently spends millions of dollars upgrading and maintaining all the male residence halls but spends almost no money on female residence halls, which are constantly in a state of disrepair.

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Example: Adverse Treatment



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Student repeatedly makes unwelcome sexual comments and sexual jokes to another student in the same residence hall, propositions the other student to engage in sexual encounters despite repeatedly being told “no,” and exposes themselves to the other student one night after returning from a party, drunk.

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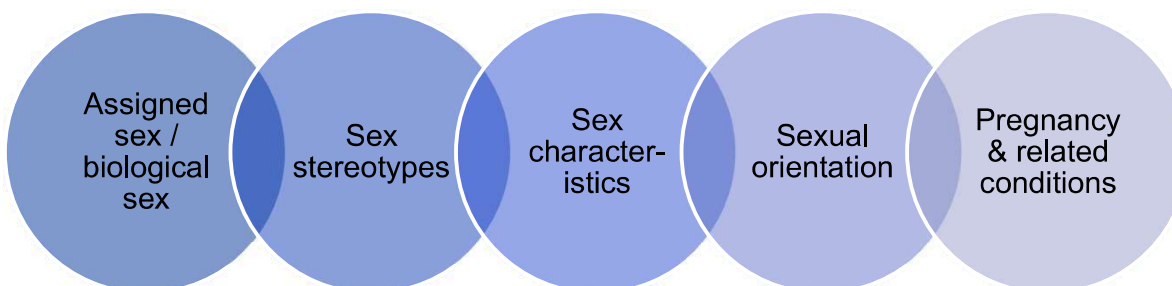
Example: Sexual Harassment



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Likely Change: “On the Basis of Sex”

- Proposed regulation would provide:
 - “On the basis of sex” includes:



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What is the scope of Title IX’s reach?

- Title IX applies to sex discrimination in the “education program or activity” of a federal funding recipient
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in private locations that are not part of education program/activity



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What are examples of education programs and activities?

Admissions	Financial Aid	Athletics	Housing
Academics	Employment	Concerts, Performances, and Events on Campus	Clinical Rotations and Placements
Organized Trips and Volunteer Outings	Sponsored Organization Activities	Online Programs	Activities in Property Owned or Controlled by the Institution

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Does Title IX apply to off-campus sexual harassment?

 <p>Yes, <u>if</u> the conduct at issue occurs in the context of an education program or activity</p>	 <p>Yes, <u>if</u> the conduct at issue occurs in location owned / controlled by the institution or officially-recognized student organization</p>	 <p>No, if it occurs in a private location and is not part of an institution's education program or activity</p>	 <p>No, if it occurs outside the United States</p>
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Likely Change: Expanded Scope of Off-Campus Conduct

- Proposed regulation would provide:
 - Jurisdiction will extend to off-campus sex discrimination where:
 - Respondent represents the institution through their authority
 - Respondent is engaged in conduct under the institution's "disciplinary authority"
 - Off-campus conduct contributes to a hostile environment within programs and activities

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Student alleges a sexual assault while attending an away game at another university. Student attended the away game with other students who were recruited by the athletic department to attend and who rode on a bus the athletic department paid for. An athletic department staffer rode on the bus and attended the game with the students.

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Example: Included in EP&A?



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An alumnus returns to campus and attends a Greek alumni reception held at a sorority house located off campus. While at the reception, the alumnus is fondled by a drunk attendee who is a current student.

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Example: Included in EP&A?



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Student A goes to Student B's apartment after drinking at the bar. Student A uses physical force to coerce Student B into sexual activity. Student B's apartment is owned by a private corporation and is located across the street from campus. However, the apartment complex pays the university a license to use the university's logo in its advertising, so some people mistakenly believe the complex is owned by the university.

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Example: Included in EP&A?



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What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro
quo
harassment

Hostile
environment
harassment

Sexual
assault

Dating
violence

Domestic
violence

Stalking

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What is quid pro quo?



- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
- Often arises in the employment context or where an employee holds a position of authority over a student

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A graduate assistant supervises a Saturday lab session. The assistant is attracted to a particular undergraduate and offers to give the undergraduate an inflated grade if the undergraduate sends the assistant naked pictures. The undergraduate has no romantic interest in the assistant. But the undergraduate sends the pictures anyway fearing that she will receive a poor grade if she does not.

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Example: Quid pro quo



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What is hostile environment?

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.

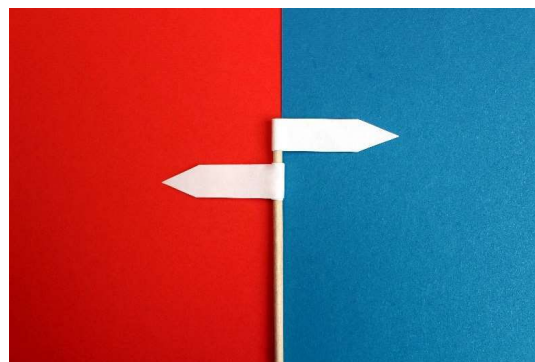


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Likely Change: “Hostile Environment”

- Proposed regulation would alter to:
 - Severe or pervasive
 - Evaluated subjectively and objectively
 - Denies or limits a person’s ability to participate in or benefit from programs and activities
 - Considering numerous facts and circumstances



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Transgender male is subject to repeated derogatory comments about his appearance by peers in the recreation center and is repeatedly heckled when he uses the male locker room. One day, while student is working out in the recreation center, someone soaps a derogatory, gender-based slur on the student’s windshield. Student is now afraid to attend the center and buys a membership to a private gym.

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Example: Hostile environment



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What factors could suggest systematic discrimination?

- Repeated and pervasive conduct
- Reduction in academic or work performance
- Need to transfer class, work assignment, or other designation
- The conduct prompts others to harass/discriminate
- Disruption in class or other operation
- Self-exclusion to avoid being subjected to the conduct
- Others????

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Does refusal to use chosen names and pronouns create a hostile environment?

- Federal law does not (presently) mandate the use of chosen (a/k/a “preferred”) names or pronouns for any student (cisgender, transgender, or otherwise)
- But the refusal to use chosen names and pronouns based on protected status and/or the use of non-chosen names and pronouns based on protected status may constitute discrimination or harassment based on the facts

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The Title IX Religious Exemption

- Title IX “does not apply to an educational institution which is controlled by a religious organization to the extent application of [Title IX] would not be consistent with the religious tenets of such organization.” 20 U.S.C. § 1681(a)(3)
- Religious organizations may pre-register an exemption with the Department of Education or simply assert an exemption as a defense to an OCR complaint or lawsuit

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What is sexual assault?

- Title IX regulations initially defined “sexual assault” as incorporating the following classes of conduct from FBI’s NIBRS:

Rape

Sodomy

Sexual assault
with an object

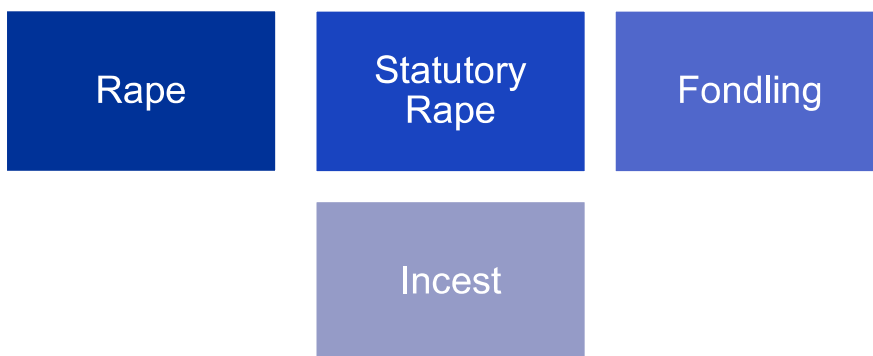
Fondling

Incest

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Updated NIBRS Classifications



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What is rape? (Revised NIBRS)

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes instance in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

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What is consent?

- Words or actions that a reasonable person in the respondent's perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent



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What is incapacity?

Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.

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Student A and Student B have had several prior sexual encounters. One night, Student A provides Student B with drugs that, unknown to Student A, are laced with fentanyl. Student B takes the drugs voluntarily and then falls into a stupor and cannot speak coherently. Student A who has only smoked marijuana, then has sex with Student B.

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Example: Incapacitated



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Damon and Jeremy attend a football tailgate. Each have six beers over the course of three hours. Instead of going to the game, Damon and Jeremy decide to hookup at Damon's on-campus apartment. Each separately drives from the tailgate without incident to Damon's apartment where the two have sex and then fall asleep for a few hours. Later, Damon claims he was too drunk to consent. Multiple people from the tailgate recall having conversations with Damon and Jeremy about the game, who was likely to win, and renovations planned for the stadium.

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Example: Not- Incapacitated



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What is statutory rape? (Revised NIBRS)



Nonforcible sexual intercourse with a person who is under the statutory age of consent.

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State law sets a minimum age of consent at 17. The college hosts a summer basketball clinic. An 18-year-old attendee has sex with a 15-year-old attendee. The encounter happens in a dormitory room after curfew. The two attendees are from the same high school and had several sexual encounters before the clinic.

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Example: Statutory rape



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What is fondling (Revised NIBRS)?

Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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Student attends a party at an off-campus fraternity house. While dancing, student's breasts and buttocks are groped by three other students who are acting on a dare.

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Example: Fondling



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What is domestic violence?

Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the state.

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What is dating violence?

"Dating Violence" is violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship will be determined based on consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.



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Kace and Jamie have hooked up, occasionally spend the night at each other's apartments, and text each other frequently. One night, during an argument, Jamie throws Kace's phone at Kace. The phone misses Kace but hits the wall and is destroyed.

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Example: Dating violence



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What is stalking?



- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress.

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Alfie and Hana broke up after Alfie took an interest in Mira. Hana sends Alfie dozens of text messages each day begging Alfie to dump Mira and return to Hana. In the messages, Hana uses expletives and threatens to kill Mira. One night, while Alfie and Mira are having dinner at a sports bar, Hana loudly confronts Alfie and Mira and throws a drink in Alfie's face.

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Example: Stalking



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Does Title IX also prohibit retaliation?

Yes – Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated in or refused to participate in any manner in an investigation, proceeding, or hearing under the institution's policy.

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Jane files a Title IX sexual harassment complaint against a coworker, accusing him of unwelcome sexual propositioning. The investigation finds some evidence to support Jane's complaint, but a hearing panel ultimately finds the coworker's conduct did not rise to the level of harassment. Annoyed at the distraction Jane's complaint has caused for the department, Jane's supervisor looks for a reason to terminate Jane and eventually fires her when she shows up to work 10 minutes late.

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Example: Retaliation



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Group Scenario

Jasper and Kris are members of College's mock trial club and are partners for an upcoming competition at Big City University. The club is student-run and has no advisor. Students arrange and pay for their own travel to competitions. College covers only the entrance fee.

During one on-campus practice with the whole team present, Jasper tells a raunchy sexual joke that Kris finds offensive. Once, while Jasper and Kris are practicing on their own at Kris's off-campus apartment, Jasper comments "If we didn't have to practice, I'd like to f*** you right now."

The day before the competition, Jasper and Kris drive to Big City in Kris's car. Jasper and Kris each have their own hotel room that each independently paid for. Kris comes to Jasper's room for a final run-through. In the hotel room, Jasper repeatedly comments on Kris's appearance and eventually places their hand on Kris's crotch. Kris slaps Jasper and leaves the room.

The next morning, Jasper wakes up to find that Kris has left the hotel and returned to College. Without a partner, Jasper is forced to withdraw and take a ride-share back to College. Kris eventually files a Title IX complaint against Jasper.

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Questions

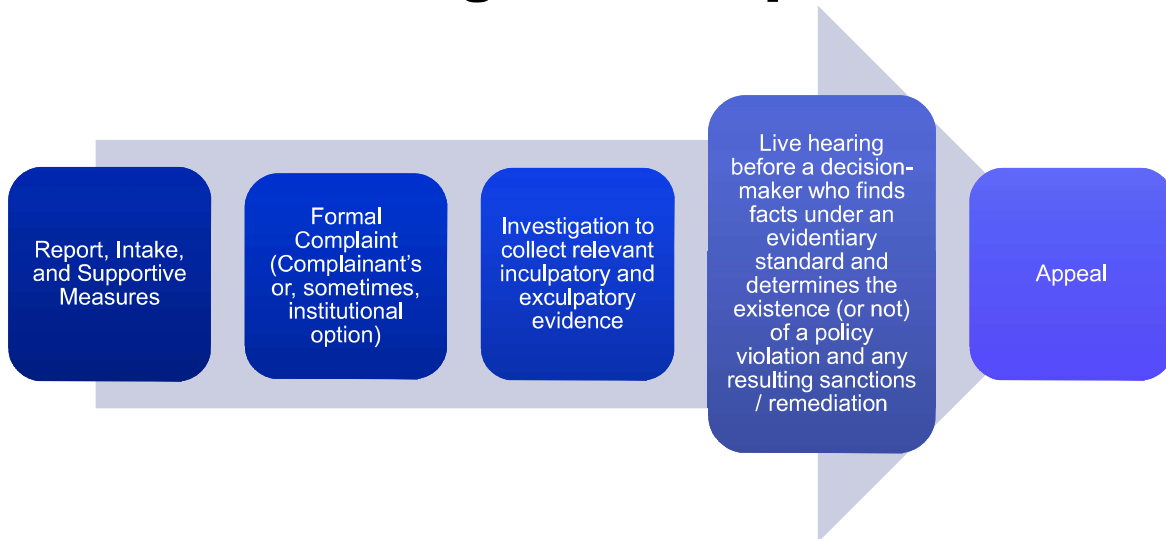
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Intake and Supportive Measures

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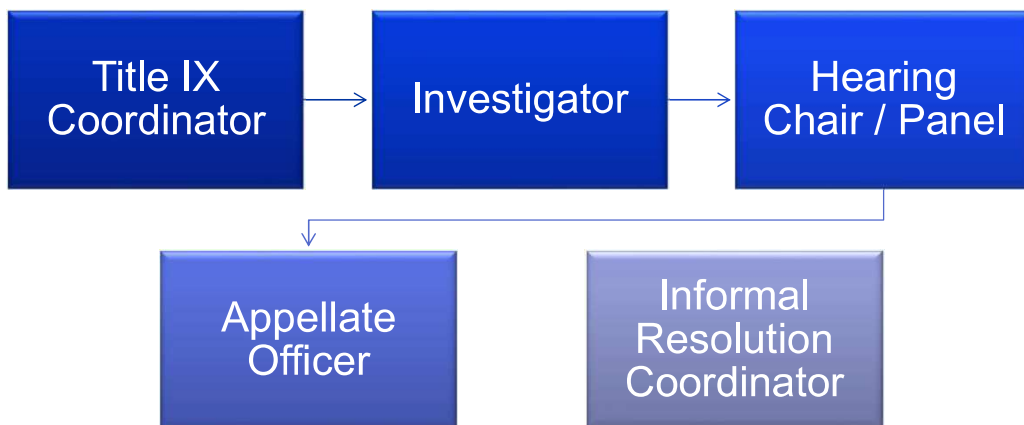
What is the grievance process?



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Who are the key institutional actors in the grievance process?



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What general principles govern the grievance process?

- Significant deference to the complainant's wishes about whether to proceed
- Equitable treatment of complainants and respondents
- Presumption respondent did not violate policy unless and until a determination is made after hearing
- No stereotypes based on a party's status as complainant or respondent
- Conflict and bias-free institutional participants
- Trauma-informed



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Who is responsible for identifying conflicts of interest and bias?

Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias

Institution must also permit parties to raise concerns of conflicts of interest and bias

*Individual institutional actors should self-police conflicts of interest and self-identify bias

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What is a conflict of interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position



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Institution's Title IX Coordinator is also an unpaid assistant coach for the basketball team. Student reports to the Title IX Coordinator that they were sexually assaulted by a member of the basketball team who Title IX Coordinator has directly interacted with, as assistant coach, for the last two seasons.

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Example: Conflict of Interest



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How does an institution get notice of sexual harassment?



- Sexual harassment response is triggered when institution has “actual knowledge” of potential sexual harassment.

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What is “actual knowledge”?

- “Actual knowledge” occurs when
 - An institutional official, with authority to take corrective action
 - Observes or receives a report
 - Of sexual harassment occurring in the institution’s education programs and activities

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Likely Change: More Mandatory Reporters

- Proposed regulation would create classes of mandatory reporters:
 - Employees with authority to implement corrective measures
 - Administrative leaders, teachers and advisors
 - Other employees either to report or to provide contact for Title IX Coordinator and information about how to report

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Faculty member serves as academic advisor to Student A. During academic advising session, Student A discloses that their grades have suffered because they missed classes due to being sexually assaulted by a peer. Faculty member has no authority to investigate or discipline under the institution's Title IX policy. Is the faculty member's knowledge imputed to the institution?

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Example: Institutional Knowledge



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When do we reach out to the alleged victim?

- After institution has actual knowledge of alleged sexual harassment, Title IX Coordinator must contact alleged victim
- Provide information about supportive measures, explain the grievance process and how to file a formal complaint, and discuss the alleged victim's wishes



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Sherman v. The Regents of Univ. of Cal. (N.D. Cal. 2022)

In allowing claim of Title IX deliberate indifference to proceed, court noted the allegation that over four months passed between the former graduate student plaintiff's initial email to the dean about the professor respondent's conduct and U.C. Santa Cruz placing him on leave pending an investigation.



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What if we can't identify the alleged victim from a report?

- Title IX Coordinator should oversee preliminary investigation to determine identity of alleged victim
- If identity of alleged victim cannot be discerned after reasonable inquiry, matter should be documented and consideration given as to whether other policies (such as student code of conduct) are utilized

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Likely Change: Express Coverage of Preliminary Investigation

- Proposed regulation contemplates preliminary investigation
 - To determine identities of the parties
 - To clarify allegations prior to dismissing on the basis they could not constitute sex discrimination

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Do we need a “formal complaint” before contacting the alleged victim?

- No. Not in order to contact the alleged victim and begin support services
- The formal complaint is a specific written document that is required (for now) to commence the investigation and hearing process

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What are supportive measures?









- Non-disciplinary, non-punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party



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Examples of supportive measures

-  Counseling
-  Academic accommodations
-  Housing accommodations
-  Security escorts
-  Leave of absence
-  Increased security or monitoring
-  Modified work schedules
-  Mutual no-contact order where implicated by facts

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Employee is the victim of domestic violence perpetrated by their spouse in the college's parking lot. Employee requests time off from work for one hour every Thursday for six weeks to attend counseling sessions.

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Example: Reasonable Supportive Measure



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Student reports they were sexually assaulted by a peer 18 months ago. Student requests a refund of tuition for the last three semesters and a change of all grades to “Pass.”

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Example: Reasonable Supportive Measure?



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Likely Change: Supportive Measures

- Proposed regulation would provide:
 - May be no more restrictive of respondent than is necessary
 - Either party affected by a decision regarding supportive measures must be allowed to appeal to an impartial employee
 - Respondent must be allowed to challenge supportive measures that burden respondent before they are enacted, except in an emergency



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Likely Change: Supportive Measures (cont.)

- Proposed regulation would provide:
 - Supportive measures may also be shared with another party “only if necessary to restore or preserve that party’s access to the education program or activity.”
 - Either party must be allowed to seek modification or termination of supportive measures “if circumstances change materially.”
 - Supportive measures that burden a respondent must be terminated at the conclusion of the grievance procedures

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Do students and employees have other rights to accommodation?

- Yes—other laws may trigger accommodations when a medical condition or disability is present.
E.g.:
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Section 504 of the Rehabilitation Act
 - Title IX pregnancy accommodation provisions

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Student is sexually assaulted by a peer and is later diagnosed with PTSD and major depressive disorder triggered in part by the sexual assault.

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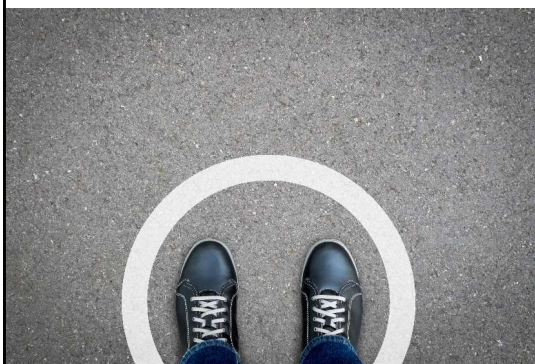
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Example: Disability



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What if the report falls outside Title IX jurisdiction?



- Title IX requires supportive measures for reported sexual harassment covered by Title IX
- Institute may provide supportive measures for reported conduct that falls outside Title IX's scope

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Are supportive measures confidential?

- Generally, yes
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with institutional employees who have a legitimate need to know



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Title IX Coordinator receives a call from a woman who claims to be the mother of Student A who reported being a victim of sexual assault. Woman demands to know “What you are doing for my daughter?” and specifically “Are providing my daughter with counseling?”

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Example: Confidentiality



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Who is responsible for supportive measures?

- Title IX Coordinator is responsible for “coordinating the effective implementation”
- May be delegated with appropriate oversight
- Typically, a collaborative effort involving more than one institutional office or department

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Can we utilize interim removals or suspensions for students?



- Students may be removed on emergency basis if:
 - Individualized safety and risk analysis
 - Determines an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
 - Student is given immediate notice and opportunity to contest the removal

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Student A reports that Student B raped Student A after providing Student A with a drink laced with drugs. The alleged incident occurred last night, and Student A is covered in bruises. Student C, an acquaintance of Student A, reports that they were drugged by Student B two weeks ago, although a friend walked in and prevented Student B from effectuating a sexual assault.

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Example: Immediate Threat



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Likely Change: Interim removals



- Proposed regulation would provide:
 - Interim removals or suspensions can be utilized when there is an “immediate and serious threat to health or safety.”
 - Requirement of “physical” threat is removed

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Can we utilize an already existing process for interim removals?

- Yes, if that process complies with the Title IX standard.
- Common institutional examples include:
 - Threat assessment policy
 - Critical Incident Response Team (“CIRT”)
 - Interim suspension provisions of Student Handbook



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What does it mean to be “trauma informed”?

- Title IX regulations do not define the term
- There is no standard or commonly accepted definition
- In practice, it means:
 - Prompt provision of supportive measures such as counseling to address the immediate and ongoing effects of trauma
 - Understanding the neurobiology of trauma and its impact on a victim’s neurobiological functioning
 - Adopting investigation and hearing techniques that minimize the risk of exacerbating trauma while still being fair and impartial

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How do we approach trauma in a Title IX case?

Balance

“Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”

- Candace Jackson, Acting Asst. Secretary of ED (2017)

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What is the definition of trauma?



Merriam-Webster: A very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



English Oxford: Deeply distressing or disturbing experience



Wikipedia: Is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience

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What is a neurobiological effect?



- Experiencing trauma can affect the brain itself by altering chemical processes and brain functioning
- These alterations can affect how a person processes information, what they remember, and how they relay information
- Ignorance of the neurobiological affect of trauma can lead to misconceptions about how victims of sexual violence “act” or “should” act

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Complainant gives hyper-specific description of the scent of deodorant the perpetrator was wearing but cannot initially recall whether perpetrator forced oral sex before intercourse, or vice versa.

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Example: Trauma Effect



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During interview, complainant comments that they were “so stupid” to follow perpetrator to their apartment, observes that “I should have said ‘no’ and left as soon as they offered me that drink,” and “my parents are going to kill me when they find out I put myself in this position.”

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Example: Trauma Effect



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Possible Effects On Recall

- People who have suffered trauma may experience any or a mix of:

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame

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Trauma & Credibility

- Avoid making assumptions based on the way an individual delivers information
- Understand memory may be clarified in time
- Address inconsistencies

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Can we place employees on administrative leave?

- Yes – employee respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies (e.g., Faculty Handbook)

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Maintenance worker is accused of lingering near the restroom and glancing at students in various stages of undress. Maintenance worker was accused of similar behavior five years prior. Maintenance worker is not accused of physical violence. Institution places worker on administrative leave pending results of the investigation.

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Example: Administrative Leave



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Group Scenario

Sage reports to the Title IX Coordinator that their roommate Blair came home after a party, looking disheveled and crying. Sage reports that Blair has not left their apartment and speculates that Blair may have been sexually assaulted. Sage discloses that Blair has made “suicidal comments” in the past.


Title IX Coordinator secures a meeting with Blair, but Blair is guarded and asks questions about confidentiality. Reluctant to share details, Blair discloses only that something “horrible” happened with “Sawyer.” Blair comments, “I can’t believe I put myself in this situation.” Title IX Coordinator encourages Blair to seek counseling.

After the meeting, the Title IX Coordinator confirms that another student recently made a sexual assault report about Sawyer Jones. That student is still deciding whether to make a formal complaint. Registrar confirms there is only one student at the College with the first name “Sawyer.”

A day later, Sage calls and reports that Blair has started cutting their arms.

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Questions

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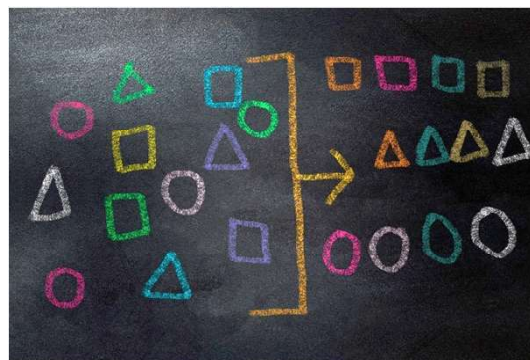
The Investigation

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What is the purpose of Title IX investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine through a live hearing
- Whether or not the reported sexual harassment occurred



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What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have equal opportunity to review and comment on evidence developed
- Investigation is evidence-gathering; not fact-finding

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What is a formal complaint?



- Signed writing
- From the alleged victim or the Title IX Coordinator;
- Alleging sexual harassment;
- Indicating desire to initiate the grievance process (i.e., investigation and hearing).

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When must we dismiss a Title IX complaint?



- Alleged sexual harassment occurred outside education programs or activities
- Alleged misconduct could not be sexual harassment even if true
- Complainant is not a current participant in education programs and activities at time of complaint

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Student reports that faculty member teaching poetry class required student to read classic Roman poetry that included graphic sexual elements. Student is offended by the content and “feels harassed.” Student demands that the institution force the faculty member to alter the content of the course.

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Example: Dismissal



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When may we dismiss a Title IX complaint?

- Complainant withdraws allegations in writing
- Respondent is no longer employed or is no longer a student
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination



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After student files a verbal harassment complaint against assistant coach, assistant coach resigns and takes a job at another institution. Institution codes the former assistant coach as a “no rehire” in its system and dismisses the complaint.

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Example: Dismissal



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Likely Change: Elimination of “Formal Complaint” requirement

Proposed regulation would eliminate the concept of a “formal” complaint

New regulation recognizes only a “complaint” that can be verbal or written

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Likely Change: Legal Representatives Filing Complaints



- Proposed regulation would provide:
 - A person who is legally authorized to act on behalf of a complainant may file a complaint
 - E.g., parent, guardian

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Likely Change: Shifting Dismissal Obligations

- Proposed regulations would permit, rather than mandate dismissal
- Regulation commentary suggests that dismissal would be unusual and additional steps may be needed to clarify allegations before dismissal
- Supportive measures and other preventative measures may still be needed even if there is a dismissal
- Proposed regulation would:
 - Specifically permit dismissal if the identity of the respondent cannot be determined after reasonable inquiry

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Likely Change: Timing of Prohibited Conduct

- Proposed regulation would allow complaints from someone who was a participant in education programs and activities at the time of the alleged misconduct



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A former student complains of domestic violence committed by an employee when the former student was enrolled and also working full time at the institution. The former student has moved away. Former student has no desire to be involved with the institution in any way going forward because they had such a negative experience in the past.

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Example: Participating at time of alleged misconduct update



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How do we tell the parties about an investigation?



- Institution must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how” before investigating

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What else does the notice need to say?

- Written notice must also include:
 - Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
 - That parties have the right to an advisor of their choice
 - That parties have the right to inspect and review evidence
 - Any prohibition on providing knowingly false statements or information

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Title IX Coordinator sends notice of investigation to Respondent stating, “you have been accused of committing stalking against Jane Doe in February 2022.”

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Example: Inadequate notice



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Can we gather any information prior to the written notice?

- Yes, but only to the extent necessary to determine how the case will proceed
- Typically, this “preliminary inquiry” would involve identifying the putative victim and understanding the scope of the allegations
- Information gathering that seeks to determine whether the allegations are true is investigatory and should await the written notice

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Complainant alleges they were fondled by an unknown individual in the library late at night. Title IX Coordinator secures video footage and card swipe data to determine the identity of the alleged perpetrator.

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Example: Preliminary inquiry



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How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of non-testimonial evidence

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**Conclusion of Day 1
Questions?**

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