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Title IX Sexual Harassment Response

Participants in sexual harassment policy process

Spring 2024

Day 1

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



Agenda

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



Title IX Scope & Jurisdiction

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



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

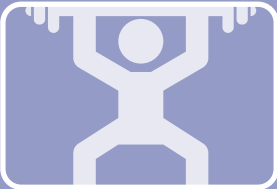
Two Types of Sex Discrimination

- 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

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

Example: Adverse Treatment

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



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.

Example: Adverse Treatment



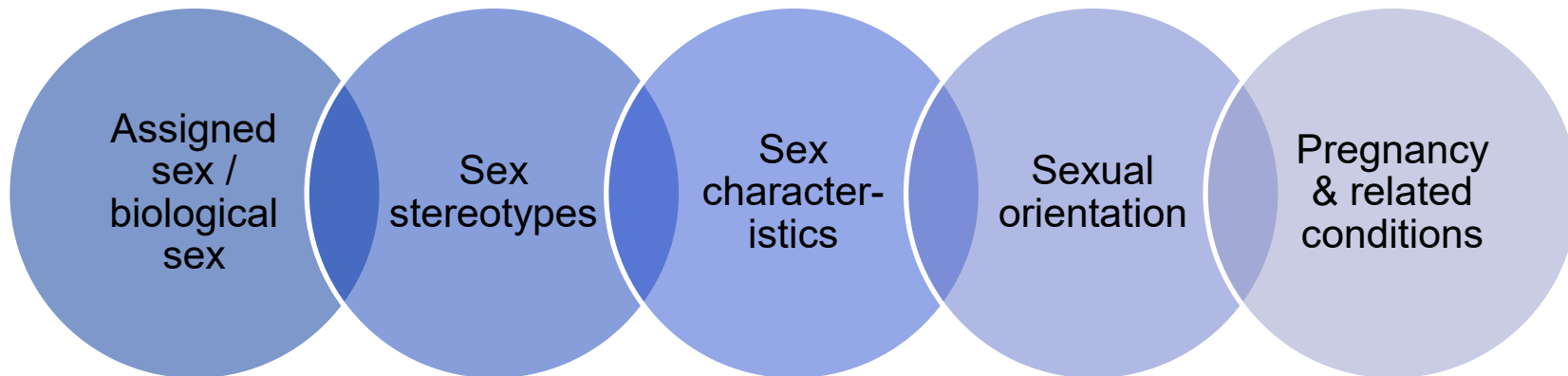
Student repeatedly makes unwelcome sexual comments and sexual jokes to another student in the same residence hall, propositions the other student to engage in sexual encounters despite repeatedly being told “no,” and exposes themselves to the other student one night after returning from a party, drunk.

Example: Sexual Harassment



Likely Change: “On the Basis of Sex”

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



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



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

Does Title IX apply to off-campus sexual harassment?



Yes, if the conduct at issue occurs in the context of an education program or activity



Yes, if the conduct at issue occurs in location owned / controlled by the institution or officially-recognized student organization



No, if it occurs in a private location and is not part of an institution's education program or activity



No, if it occurs outside the United States

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

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.

Example: Included in EP&A?



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.

Example: Included in EP&A?



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.

Example: Included in EP&A?



What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro
quo
harass-
ment

Hostile
environment
harassment

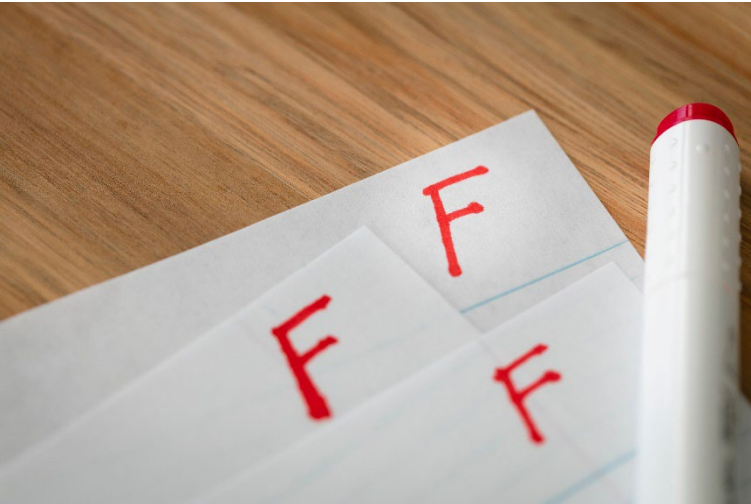
Sexual
assault

Dating
violence

Domestic
violence

Stalking

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

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.

Example: Quid pro quo



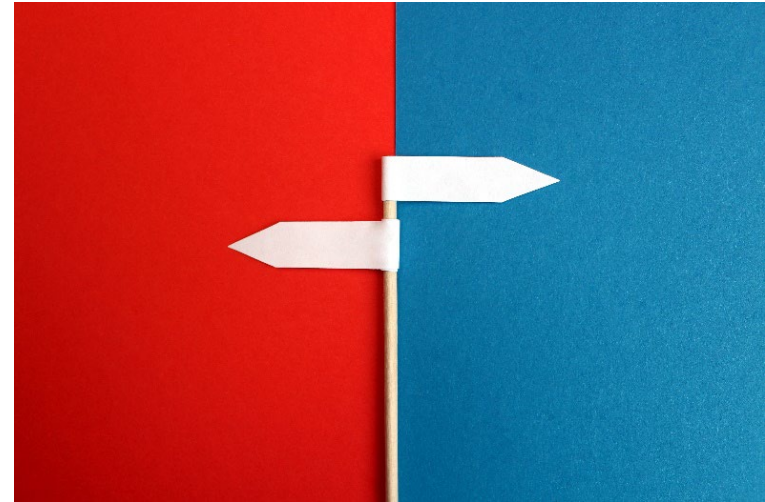
What is hostile environment?

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.



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



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



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????

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

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 tenants 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

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

Updated NIBRS Classifications

Rape

Statutory
Rape

Fondling

Incest

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.

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



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.

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.

Example: Incapacitated



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.

Example: Not-Incapacitated



What is statutory rape? (Revised NIBRS)



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

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.

Example: Statutory rape



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.

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.

Example: Fondling



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.

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.



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.

Example: Dating violence



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.

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.

Example: Stalking



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.

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.

Example: Retaliation



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.

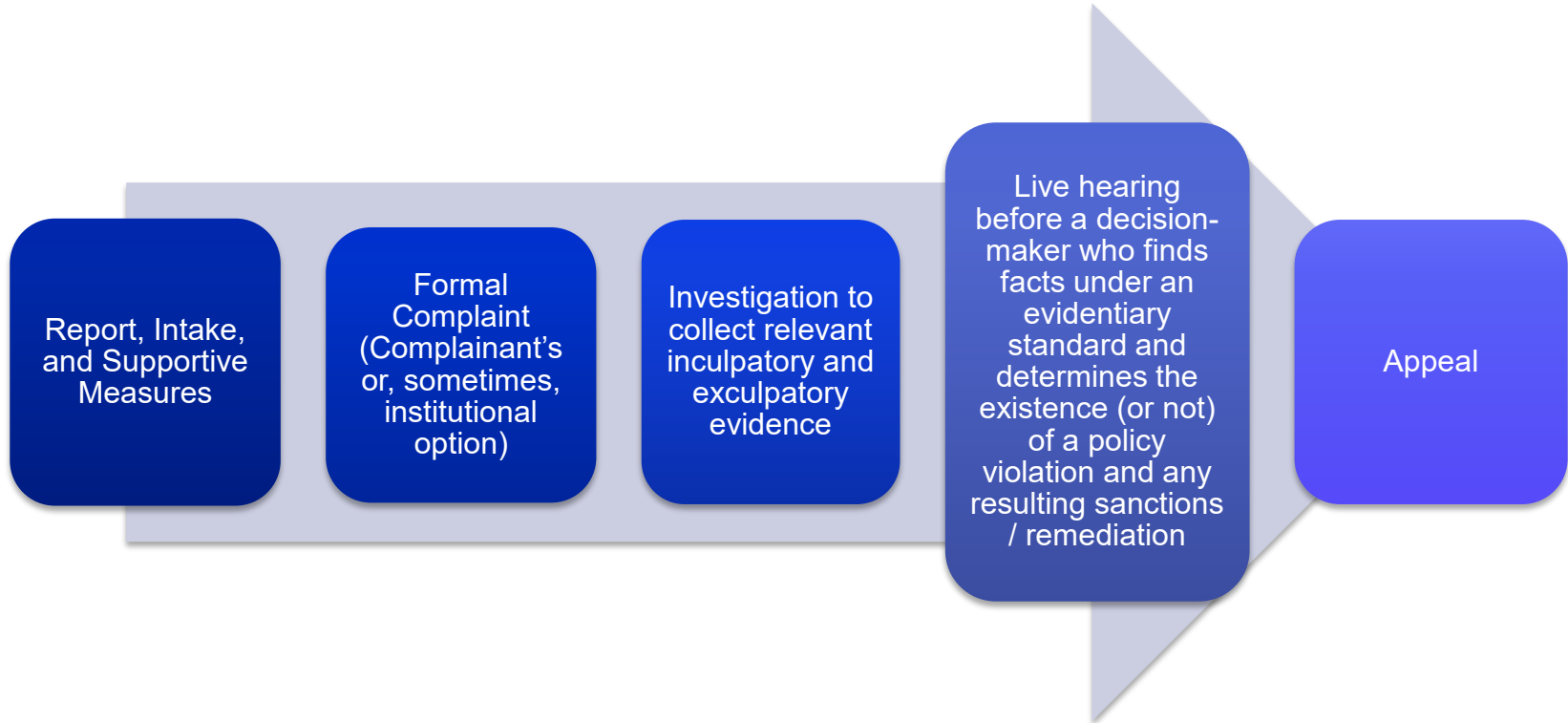




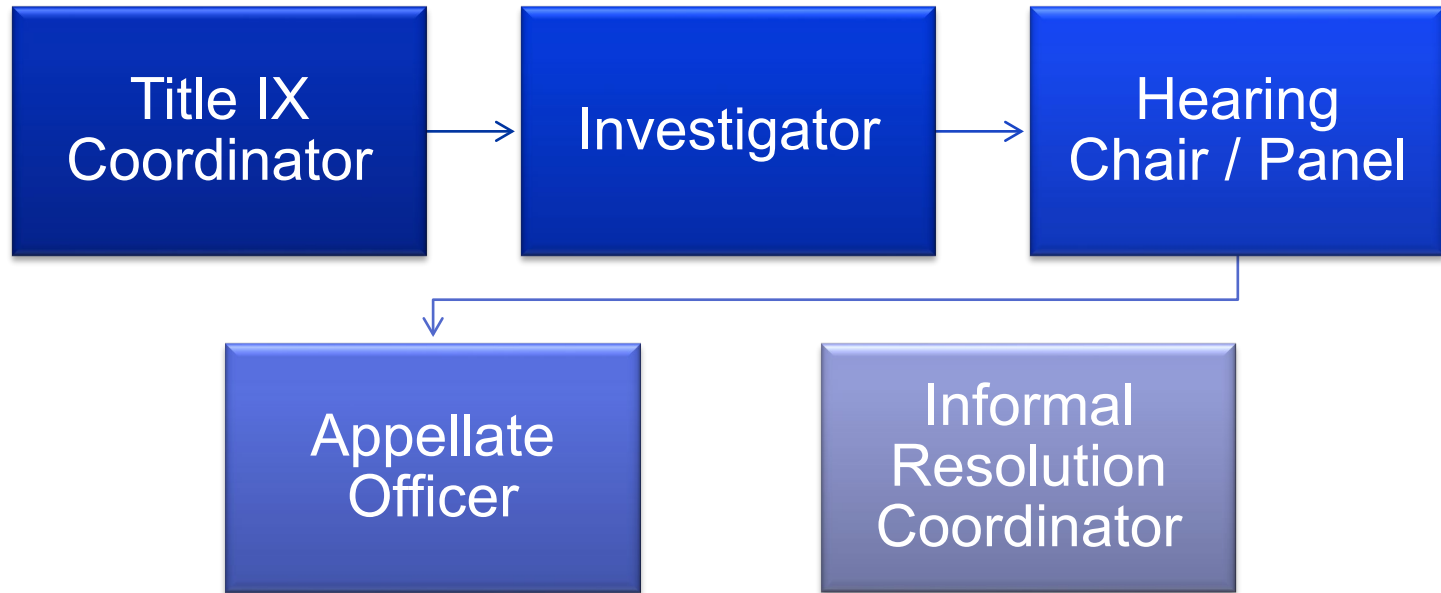
Questions

Intake and Supportive Measures

What is the grievance process?



Who are the key institutional actors in the grievance process?



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



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

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



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.

Example: Conflict of Interest



How does an institution get notice of sexual harassment?



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

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

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

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?

Example: Institutional Knowledge



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



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.



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

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

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

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



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

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.

Example: Reasonable Supportive Measure



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.”

Example: Reasonable Supportive Measure?



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



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

Do students and employees have other rights to accommodation?

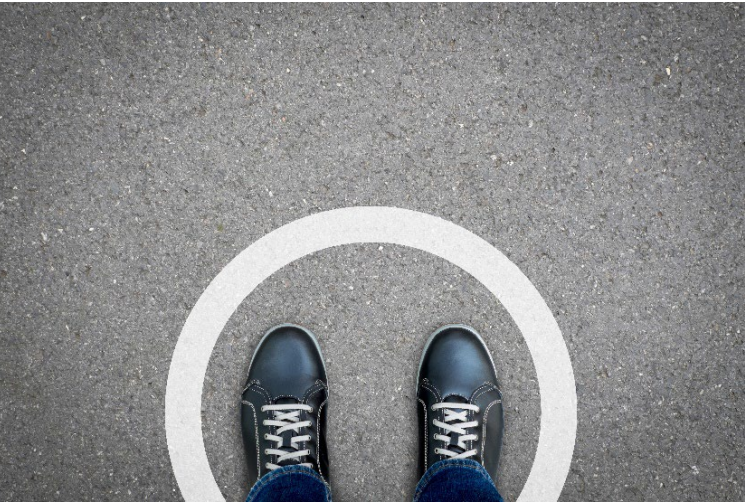
- Yes—other laws may trigger accommodations when a medical condition or disability is present.
E.g.:
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Section 504 of the Rehabilitation Act
 - Title IX pregnancy accommodation provisions

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

Example: Disability



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

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



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?”

Example: Confidentiality



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

Can we utilize interim removals or suspensions for students?



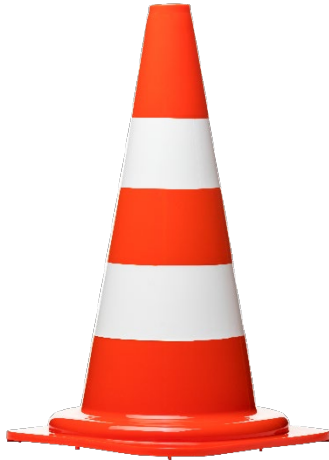
- Students may be removed on emergency basis if:
 - Individualized safety and risk analysis
 - Determines an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
 - Student is given immediate notice and opportunity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

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.

Example: Immediate Threat



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

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



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

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)

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

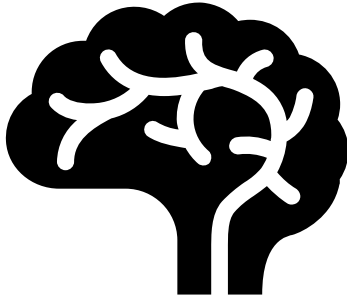


English Oxford: Deeply distressing or disturbing experience



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

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

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.

Example: Trauma Effect



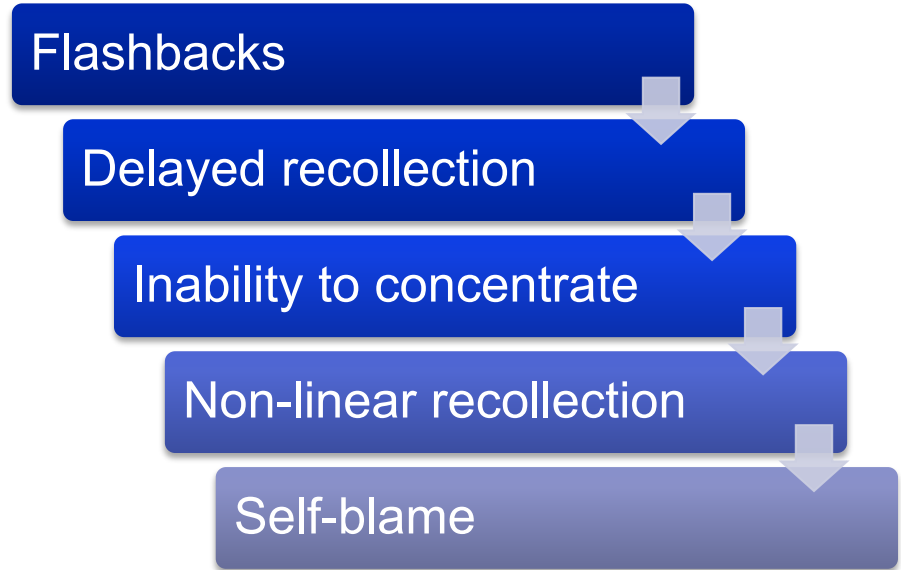
During interview, complainant comments that they were “so stupid” to follow perpetrator to their apartment, observes that “I should have said ‘no’ and left as soon as they offered me that drink,” and “my parents are going to kill me when they find out I put myself in this position.”

Example: Trauma Effect



Possible Effects On Recall

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



Trauma & Credibility

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

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)

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



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.



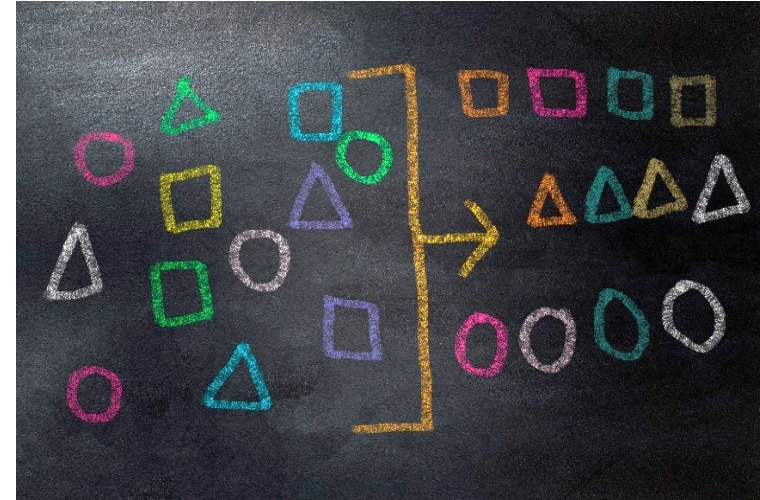


Questions

The Investigation

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



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

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).

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

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.

Example: Dismissal



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



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.

Example: Dismissal



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

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

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

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



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.

Example: Participating at time of alleged misconduct update



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

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

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

Example: Inadequate notice



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

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.

Example: Preliminary inquiry



How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of non-testimonial evidence



Conclusion of Day 1

Questions?

**HUSCH
BLACKWELL**

HUSCHBLACKWELL

Title IX Sexual Harassment Response

Participants in sexual harassment policy process

Spring 2024

Day 2

Agenda

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



The Investigation

How do we collect evidence in an investigation?



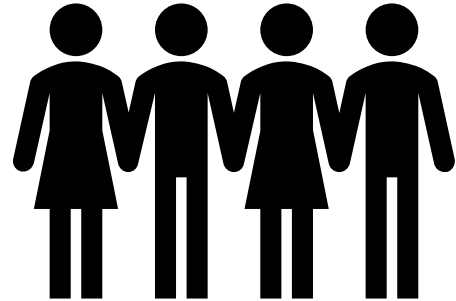
Interviews of parties and witnesses



Collection of non-testimonial evidence

Who do we interview?

- Parties
- Fact witnesses
- Maybe character witnesses
- Maybe experts



What's the difference between a fact witness and a character witness?

A **fact witness** has personal knowledge about specific facts that are relevant to determining whether or not a given act of sexual harassment occurred.

A **character witness** does not possess knowledge of specific, relevant facts but instead speaks to a person's general character traits or their general disposition.

Jack has accused Jill of sexually assaulting Jack when Jack was incapacitated. Student witness saw Jack and Jill at a party, shortly before the assault, and observed that Jack could not stand and had to be helped by Jill to a waiting rideshare.

Example: Fact Witness



Jane has been Jill's friend since high school. Jane was out of town the night of the alleged sexual assault. But Jane will testify that Jill is a kind person who would never hurt or take advantage of anyone.

Example: Character Witness



Likely Change: Experts

- Proposed regulation would provide that institutions have discretion to allow or not allow expert witnesses, as long as the rule applies equally to the parties.

How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

How do I ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of specific questions (“recognition prompts”) as long as possible
- Avoid suggestive or leading questions

Examples of open invitations



“Please tell me what happened that night.”



“Can you walk me through what happened?”



“In your own words, tell me what occurred.”



“Can you tell me everything that happened from that point forward?”

Examples of facilitators



Examples of cued invitations

“You mentioned that
Can you tell me more?”

“You said that Can
you elaborate?”

“You said they ‘coerced’
you. Can you tell me
specifically what they
did?”

“If I understood you right,
you said that after
Can you tell me what
happened in between?”

Examples of recognition prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



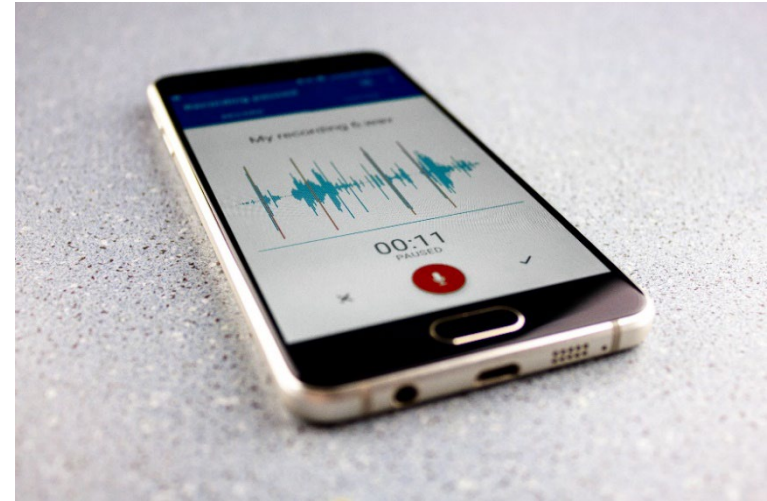
“Did it hurt?” (option choosing)



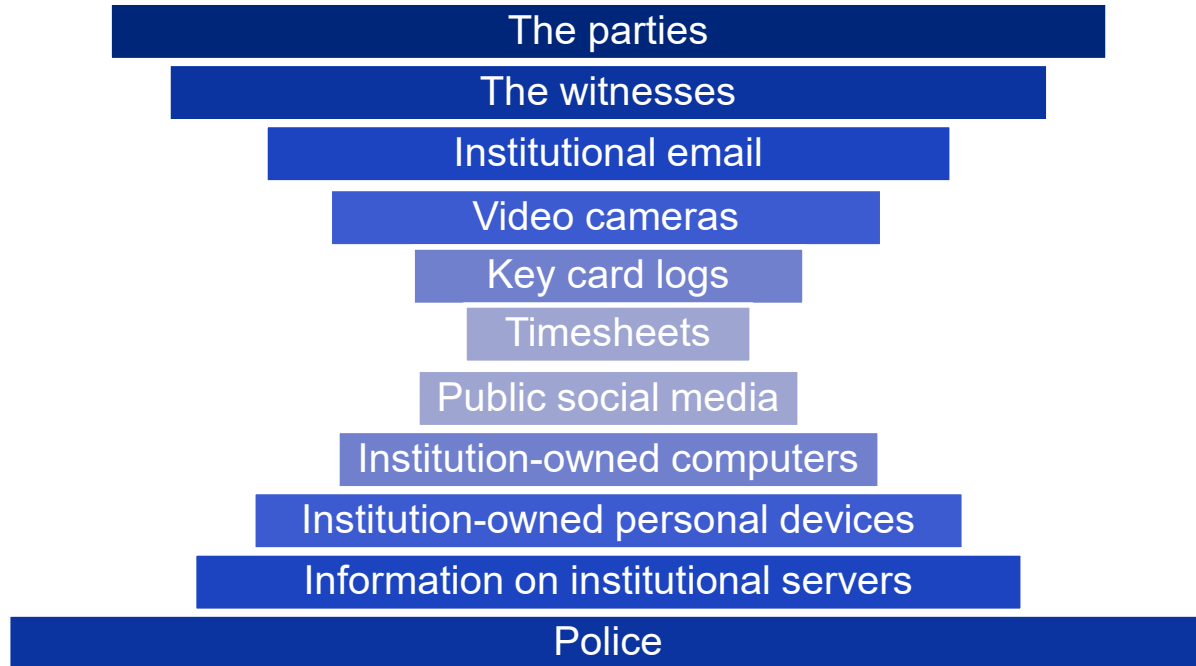
“Was he slurring words?” (option choosing)

How do we make a record of the interview?

- Trend towards audio recording
- Extensive note taking followed by preparation of a summary is permissible
- Video recording is disfavored



Example sources of non-testimonial evidence



May an investigation collect evidence on sexual history?

Generally, no – Evidence of a complainant's prior sexual behavior is relevant only if offered to prove that someone other than the respondent committed the conduct, or if evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent

Cade accuses Simon of forced oral sex. Simon claims that Cade is experienced at oral sex and urges the investigator to ask Cade how many times Cade has willingly performed oral sex on others in the past.

Example: Prohibited



Likely Change: Expanded Prohibition on Sexual History Evidence

- Proposed definition expanded to prohibit consideration of evidence that
 - “Relates to the complainant’s sexual interests or prior sexual conduct” unless
 - Showing someone other than respondent committed the act or
 - To prove consent with specific incidents between the complainant and respondent

May an investigation collect and rely on privileged records?

- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes

Complainant executes a written release allowing Title IX investigator to obtain a copy of notes from Complainant's counseling session where Complainant reported alleged rape to counselor the day after it's occurrence.

Example: Permissible collection



Do the parties have access to the evidence?



- Parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is finalized
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally

What exactly has to be shared?

- Anything that has “evidentiary” value
- That is, the information is potentially inculpatory or exculpatory in light of the allegations at issue; or is otherwise potentially relevant
- E.g., witness statements; interview transcripts; text messages; social media posts; photographs; etc.
- Logistical communications; calendar invites; support measure communications generally are not shared

Is the evidence “confidential?”

- Institution may require parties and advisors to agree not to disclose investigation evidence to third-parties
- But cannot prohibit parties from speaking about the allegations themselves



Likely Change: Confidentiality



- Proposed regulation would provide that institution “must” take reasonable steps to prevent and address “unauthorized disclosure of information and evidence obtained solely through . . . grievance procedures.”

Do the parties get to respond to the evidence?

- Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report



How is the investigation concluded?

- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing

Does the investigation report make findings?

- No – currently the investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the current Title IX regulations, factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing

Likely Change: Combined Investigator/Decision-Maker Model



- Proposed regulation would allow a combined investigation/decision making model
- But, with more robust rights of the parties to pose questions through the investigator
- Proposed regulation would provide:
 - If not using a live hearing
 - Must allow parties to propose relevant and not otherwise impermissible questions and follow up questions for any party or witness

Likely Change: Access to Evidence and Investigation Reports

- Proposed regulation would provide:
 - Institution must provide equitable access to the relevant evidence
 - Or to a written investigation report that accurately summarizes the evidence and access to relevant evidence upon request
 - Must provide a reasonable period of time to respond before determination

Likely Change (cont.)



- Proposed regulation would provide:
 - Investigation report becomes optional
 - But minimally parties must have access to the relevant evidence itself
 - If adopting single investigator/decision-maker model, investigation report is effectively supplanted by a written decision document

May parties have an advisor during the investigation?



- Yes – parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role during the investigation phase
- Institution is not required to provide an advisor during the investigation phase

The institution sends a written notice of investigation to Respondent requesting an interview.

Respondent's attorney claims he is in trial for the next eight weeks and cannot be available to accompany Respondent until after trial is complete.

Example: Advisor conduct



Complainant is accompanied to interview by a family member who repeatedly interrupts the questioning, attempts to answer for the complainant, shouts at the investigator, and demands “answers” to certain questions, “before we go any further.”

Example: Advisors



Group Scenario

Lacrosse player makes formal complaint accusing coach of repeated sexual joking and commenting on players' sex lives. Player alleges coach has created a hostile environment for the entire team. Player notifies other team members of the complaint.

Title IX Coordinator notifies coach of the complaint and investigation. Within twenty-four hours, Title IX Coordinator begins to receive emails from players and parents supporting coach and accusing player of being disgruntled due to a lack of playing time.

Coach hires an attorney as advisor, who notifies Title IX Coordinator that coach intends to sue player for defamation. At coach's interview, attorney provides the investigator with a stack of affidavits, signed by 2/3 of the players, denying that coach created a hostile environment.

Investigator sends an email to all team members requesting that players individually contact investigator to schedule an interview. Only one team member, complainant's roommate, responds. This witness corroborates the complainant's account.

Complainant and witness receive no playing time at the next three games. Each makes a complaint of retaliation. Coach's attorney sends complainant and witness a cease-and-desist letter, accusing them of defamation. Coach's attorney demands that investigation be suspended and threatens suit against the institution.





Questions

The Hearing

What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

Who is the “decision-maker”?

- A single hearing officer; or
- A hearing panel led by a chair



What standard of evidence can be used?

- Either
 - Preponderance of the evidence OR
 - Clear and convincing evidence
- Institution must select a standard and apply it uniformly in all cases, regardless of the identity of the respondent

What happens before the hearing?

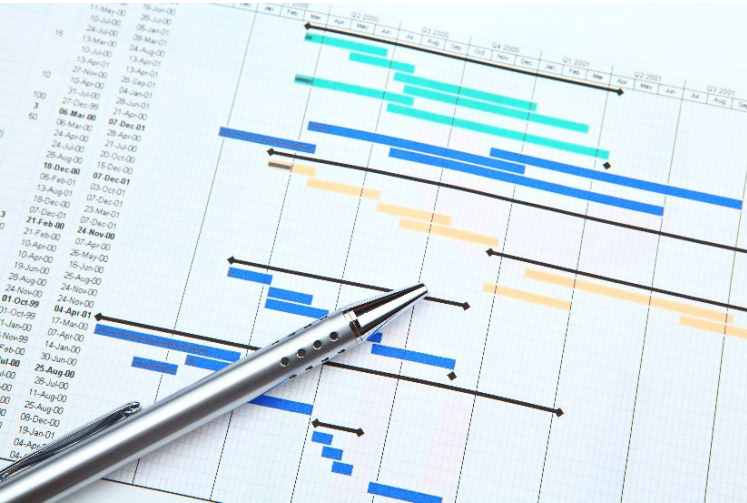
- Parties are provided the final investigation report at least 10 days prior to the hearing
- “Decision-maker” must be identified and clear conflicts of interest assessment
- Hearing must be scheduled and logistics arranged
- Witnesses must be notified
- Pre-hearing conference should be held



Likely Change: Response to Evidence

- Proposed regulation would provide:
 - Institution must provide the parties with a “reasonable opportunity to review and respond to the evidence” prior to the determination
 - May be satisfied simply by allowing the party to respond at the hearing itself
 - There is no explicit right to respond to an “investigation report”
 - Use of an investigation report is optional; parties may simply be provided access to the evidence itself

How do we schedule a hearing?



- Set aside sufficient time considering the nature and complexity of the case
- Consider class and work schedules of parties and key witnesses to avoid conflicts
- Consider pre-scheduling a backup or “spill over” date in the event the hearing runs long or must be continued
- Provide letters excusing parties and witnesses from other obligations, as necessary

How do we notify parties and witnesses?

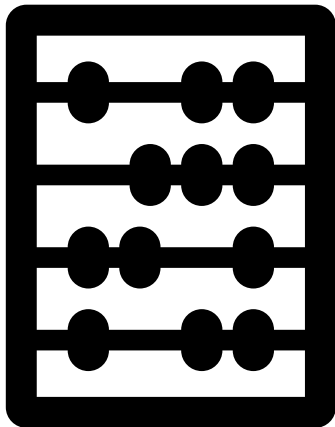
- Institution must provide written notice to the parties of time and place of hearing
- Institution should provide written notice to witnesses requesting their presence
- Notice may be issued by the decision-maker or another institutional official in coordination with decision-maker

What is a pre-hearing conference?

- A meeting with the parties, decision-maker, and other necessary officials to:
 - Address logistical issues and concerns
 - Discuss the sequence of the hearing and rules of decorum
 - Hear and resolve objections or concerns that can be addressed in advance
 - Take up other issues that will ensure hearing time is focused on testimony



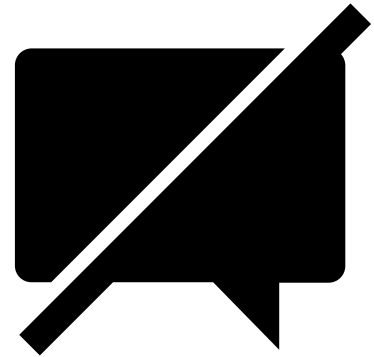
What are some key elements of a hearing?



- Live testimony from witnesses
- Contemporaneous questions from the decision-maker and cross-examination from the advisor for the other party
- Decision-maker must screen all questions for relevance and intrusion into prohibited sexual history
- Hearing must be recorded or transcribed
- Steps to separate parties, if requested

What about the “exclusionary” rule?

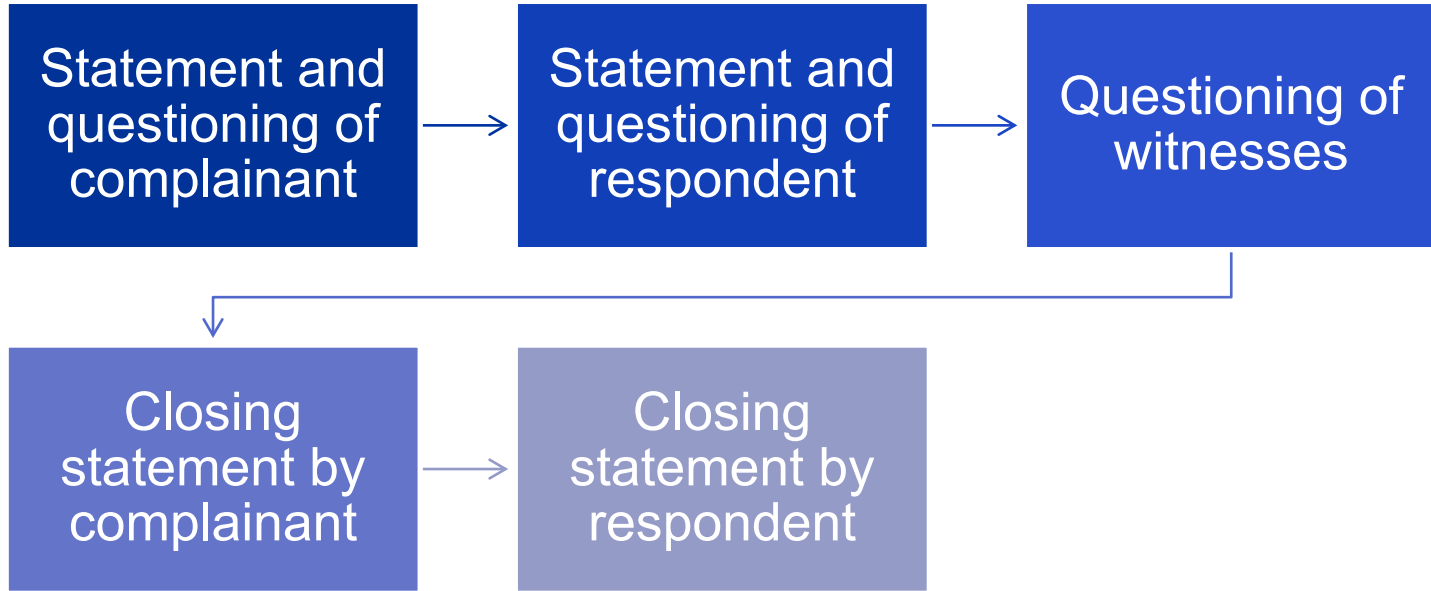
- Exclusionary rule contained in 2020 regulation is no longer enforceable.
- Decision-maker may consider all statements, even if witness is not subject to cross-examination
- Decision-maker may consider the absence of cross-examination in assigning weight and credibility
- **Note:** Certain public institutions in certain jurisdictions may be required to enforce exclusionary rule as a matter of procedural due process.



Likely Change: Exclusionary Rule Comes Back (in part)

- Proposed regulation would reinstitute a partial exclusionary rule:
- “If a party does not respond to questions related to their credibility, the decision-maker must not rely on any statement of that party that supports that party’s position.”

What is a potential sequence?



Who determines relevance?

- Decision-maker(s) must screen questions for relevance and resolve relevance objections
- Decision-maker(s) must explain any decision to exclude a question as not-relevant



Student A has accused Student B of sexual assault. Student B's advisor wants to question Student A about text messages Student A sent Student B shortly after the alleged assault, including a text message where Student A wrote: "Tonight was great. Let's get together this weekend."

Example: Relevant



Student A accuses Student B of sexual assault. Advisor for Student A wants to question Student B regarding whether Student B made racially harassing remarks to a different student on a different occasion than the alleged assault.

Example: Not Relevant



Likely Change: Relevance

- Proposed regulation would define relevant evidence as that which:
 - “May aid a decisionmaker in determining whether the alleged sex discrimination occurred”



Is an advisor required to ask questions a party wants asked?

- Advisors should consult with their party and consider their preferences for what questions to ask
- But an advisor must exercise their own reasonable judgment and is never required to ask questions that the advisor knows are improper (e.g., invade sexual history)
- An advisor may consult the decision-maker if a party demands the advisor ask a question that advisor is uncertain is appropriate

Can we have standards of decorum for hearings?

- Yes, strongly recommended
- But standards must be applied equally/equitably to both parties



Institution conducts all Title IX hearings virtually using interactive software. Institution's rules require a party or advisor who wishes to speak to use the hand raise function and be called upon before speaking.

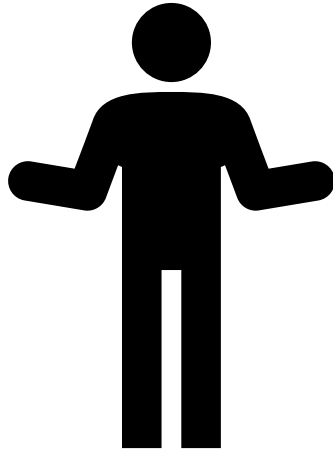
Example: Rules of decorum



Are there “objections” at hearings?

- Minimally, the institution must allow a party to raise an objection that evidence is not relevant or should be specifically excluded (e.g., sexual history; confidential privilege)
- Institution may permit other objections to be raised
- Institution may limit the right of objection to a party

Likely Change: Prohibited Questions



Proposed regulation would also prohibit questions that are “unclear or harassing of the party being questioned.”

Can we delay or “continue” a hearing once it starts?

- Yes, but only if a delay is not clearly unreasonable
- Consider pre-scheduling an alternative date
- Inconvenience alone should not be the determinative factor; every date will inconvenience someone



How do(es) the decision-maker(s) decide a case?



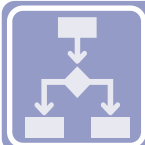
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the institution



Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred

Assessment of credibility

- Line up facts relevant to credibility
- Factors (among others)
 - Plausibility—Is the testimony believable and does it make sense?
 - Specificity
 - Motive to falsify—Does the person have a reason to lie (other than mere status as party)?
 - Corroboration/consistency/contrary evidence—Is there testimony or evidence that corroborates the witness account? Are the witness accounts consistent? Are inconsistencies explained? Is there evidence disputing the witness account?
 - Past Record—Does the person have a history of similar behavior?



What is the outline of a written decision?

- A written document, provided contemporaneously to the parties that:
 - Identifies the allegations of sexual harassment
 - Describes the various procedural steps taken from the time the formal complaint was made
 - States findings of facts supporting the determination
 - Reaches conclusions regarding application of relevant policy definitions to the facts
 - Includes a rationale for each finding for each allegation
 - States the disciplinary sanctions and remedies, if implicated by the determination made, and
 - Explains the procedures and grounds for appeal

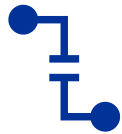
Who determines discipline and remediation?

- Some institutions will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
- If referred to someone else, that must occur before the written determination is issued



What are the grounds for appeal?

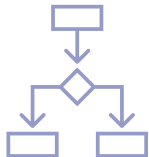
Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter;



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; or



Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

Likely Change: Appeal Standard

Proposed regulation would provide similar grounds for appeal to current regulation, but each requires a showing that the outcome “would” have changed, instead of “could” have changed.



Respondent appeals and submits evidence that one member of a three-person hearing panel previously wrote gushing letters of recommendation for complainant. Hearing panel member did not self-disclose the letters when selected to serve on the panel.

Example: Appeal



Group Scenario

Jamie accuses Cleo of stalking by repeatedly sending Jamie personal text messages and lurking outside Jamie's townhouse. During the investigation, witness Damien, who is Jamie's friend, tells the investigator he saw a figure lurking outside Jamie's townhouse, and he is confident it was Cleo. The investigator did not ask Damien why he was so confident.

At the hearing, Cleo admits to sending personal text messages but denies ever being outside Jamie's townhouse. Under cross-examination, Cleo testifies she was studying for a midterm the night of the alleged lurking and provides a syllabus to confirm the date of the midterm. Jamie admits they never saw the face of the lurking figure. Damien does not appear at the hearing, but the investigator verbally relays what Damien said in his interview. Cleo's advisor demands the hearing be delayed until Damien's attendance is secured. The hearing officer denies the request.

The hearing officer credits Damien's testimony to the investigator and finds Cleo responsible for stalking. The hearing officer notes that the decision is a "close one" and that Cleo's actions would not constitute stalking but for the fact Cleo lurked outside Jamie's townhouse.





Questions

Informal Resolution & Other Processes

What is informal resolution?

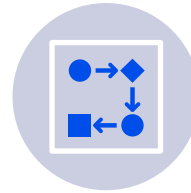
A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.



What are the key concepts of informal resolution?



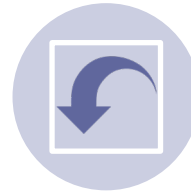
A formal complaint must first have been filed and written notice given to the parties



The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



The parties must voluntarily agree to participate in writing



The parties must be allowed to withdraw from informal resolution up until the point it is final

What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment

A student files a formal complaint accusing their faculty advisor of sexually harassing student by repeatedly asking if student is dating. Faculty member claims they were just trying to get to know student and offers to apologize.

Example: Impermissible informal resolution



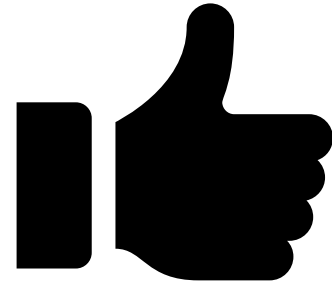
Student A accuses Student B of dating violence. Student B wants to apologize, offer to take anger management counseling, and promise not to contact Student A again. Student A would prefer these terms to an investigation and live hearing.

Example: Permissible informal resolution



Must an institution allow informal resolution?

Current regulations permit but do not require informal resolution



Why approve informal resolution?



- Deference to the parties' wishes
- Often quicker and more efficient
- Removes uncertainty of outcome
- More flexibility and creativity than a disciplinary outcome
- Mitigates litigation risk (for everyone)
- Others?

Why not approve informal resolution?

- Conduct is too severe or concerning
- Proposed terms are simply inadequate
- Undermines public confidence in Title IX compliance
- No confidence parties will abide by agreement
- Concern a party is being pressured or improperly influenced
- Others?

What issues need to be addressed in informal resolution?

- The substantive terms
- How compliance will be verified
- The punishment for non-compliance
- The effect on the pending formal complaint
- The effect on collateral conduct charges/policy violations
- Others?



Two students at a small college agree “not to interact with each other while they are at the college.” What does “interact” mean? How will shared spaces be used? What if they are in the same class? What if they have the same friends?

Example: Informal resolution detail



Student accused of stalking agrees to hire a counselor and follow the counselor's recommendations for treatment. What if the counselor fails to diagnose a condition? How will the counselor's recommendations be known? How will treatment be confirmed?

Example: Informal resolution detail



Two employees agree to informal resolution in which Respondent will complete 20 hours of community service and retake the Title IX training course for students. Respondent only completes 12 hours and fails to take the course. What is the consequence?

Example: Informal resolution detail



How should we document an informal resolution?

- Documented in writing
- All essential terms in the same document
- Signed by the parties
- Dated
- Indicating institutional approval
- Indicating closure of grievance procedure

Likely Changes: Informal Resolution

Proposed regulation would say:

- Facilitator of informal resolution cannot be investigator or decision-maker
- If informal resolution fails, institution may not use evidence obtained solely through informal resolution

Is Title IX the exclusive process for resolving sexual misconduct?



- No
- Title IX does not preclude the use of other policies and processes that may be implicated by a report of sexual misconduct

What other policies/processes may apply?

- Title VII policy
- Consensual relationships policy
- Professionalism policies
- Student code of conduct
- Threat assessment
- Employee handbook provisions
- Faculty handbook provisions
- Contractual provisions

At what point can we use some other policy?

Depending on facts:



Before a Title IX
grievance
process

At the same time
as a
Title IX grievance
process

After a Title IX
grievance
process

Faculty member reports that a student was watching graphic pornography in the lecture hall during class. Faculty member is concerned other students may feel harassed. Institution prohibits using its network to view pornography and conduct code prohibits conduct that disrupts academic instruction.

Example: Before Title IX

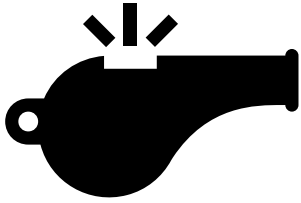


Student A returns to their residence hall to find Student B drunk and exposing themselves to others in the lobby. Student A makes a sexual harassment complaint. Title IX investigator secures video from the lobby that clearly depicts Student B exposing themselves to others. The residence hall contract prohibits students from appearing naked outside their room or the restroom. The student conduct code prohibits lewd or obscene behavior. Student B refuses to participate in Title IX process.

Example: During Title IX



Likely Change: Clarified Definition of Retaliation



New definition of retaliation will make clear that conduct charges cannot be used to retaliate against a student for exercising Title IX rights or refusing to participate in Title IX grievance process.

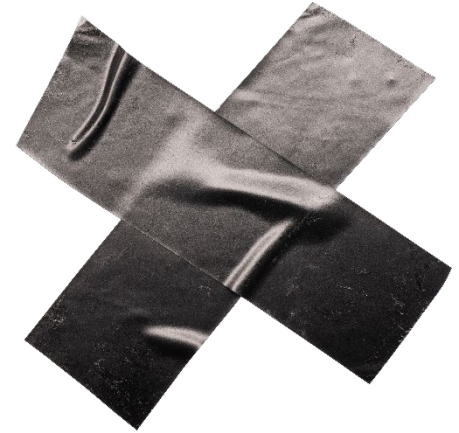
Student accuses faculty member of sexual harassment by pursuing romantic relationship with student that was unwelcome. Title IX hearing officer concludes that faculty member and student had a romantic relationship, that faculty member instigated it, but student welcomed the relationship and reciprocated faculty member's advances. Institution has a separate policy that prohibits faculty from pursuing or engaging in romantic relationships with students unless student and faculty member are married.

Example: After Title IX



Can we use another process to make the same finding we would otherwise make under Title IX policy?

- No
- Title IX regulation requires the use of specific Title IX process for any “sexual harassment” as defined by Title IX that occurs in institution’s programs and activities



Group Scenarios

Alex makes a formal complaint that Ellis fondled Alex by repeatedly touching Alex's genitals outside Alex's clothing while the two were kissing.

Ellis claims they thought Alex consented and proposes an informal resolution that will include an apology and mandatory Title IX training. Alex agrees to avoid the uncertainty of a hearing. The informal resolution agreement states that it "shall not be construed as an admission of liability on Respondent's part," and notes "this agreement is confidential and finally resolves the formal Title IX complaint." Ellis apologizes and completes the training.

Later, Alex connects with Emery, who claims to have had a similar experience wherein Ellis forcibly fondled them after consensual kissing. After Alex's prompting, Emery files their own formal complaint. Alex also re-files their original complaint and specifically alleges that Ellis "defrauded" Alex into the informal resolution by being falsely apologetic and lying about their belief Alex consented.

Alex meets with the investigator in Emery's case, recounts their experience with Ellis, and tells the investigator that Ellis escaped discipline by "duping me into a settlement." Ellis files a complaint alleging Alex is retaliating against Ellis and breaching confidentiality.





Questions

Caselaw Update

General Litigation Trends

- Continued growth of respondent-filed lawsuits alleging discriminatory and unfair processes
- General growth in state tort and breach of contract theories resulting from narrowed Title IX damages
- More cases including claims of LGBTQ+ harassment and/or discrimination
- More retaliation cases



Case #1: *Roe v. St. John's University* (2d Cir. 2024)

- Plaintiff was found responsible for two sexual assaults by university
- Plaintiff sues university under Title IX for anti male bias and for failing to investigate his claim that one accuser made a false allegation of sexual assault on social media
- Plaintiff also brings breach of contract claim against university
- A 2-1 decision affirms the district court's dismissal of Roe's claims



Some Key Takeaways



- To prove “erroneous outcome” theory of liability, respondent/plaintiff must show sex was motivating factor in decision
- An erroneous outcome and typical procedural errors are not enough, by themselves, to show improper motivation
- A singular alleged false accusation of sexual assault on social media is not severe, pervasive, and objectively offensive
- Judges are deeply divided on Title IX respondent cases

Case #2: *MacIntyre v. Carroll College* (9th Cir. 2022)

- Plaintiff was former golf coach whose contract was non-renewed after coach complained about Title IX (equity) non-compliance and hostile environment and discrimination by athletic director and president
- School settled Plaintiff's internal complaints and agreed to a two-year contract for Plaintiff
- When school elected not to extend two-year contract, Plaintiff sued for retaliation
- Non-renewal of a fixed term contract can be adverse employment action for retaliation



Some Key Takeaways



- Title IX protects employees from retaliation, similar to Title VII
- An adverse action is “one that might have dissuaded a reasonable person” from complaining about discrimination
- It is easier to show adverse action for retaliation purposes than for employment discrimination generally
- A school cannot avoid retaliation by claiming the expiration of a fixed contract is not adverse action

Case #3: *Barlow v. Washington State Univ.* (Wash. 2024)

- Plaintiff was raped by a peer at an off-campus apartment
- University had prior notice that peer posed a risk of sexual misconduct due to events at another system campus
- University allowed student to transfer to Plaintiff's campus while investigations were pending
- Court holds university has a “special relationship” as a landlord that requires it to both control and protect students who are on campus or involved in university activities



Some Key Takeaways



- Institutions may have a tort law duty to protect students from criminal acts of peers even though students are adults
- Increasingly likely that courts impose a duty of care for sexual misconduct on campus where the risk was foreseeable
- Continued efforts by plaintiffs to expand the duty of care to that similar in a K-12 context
- State tort theories may pose a greater risk of damage verdicts than Title IX

Case #4: *Parents Defending Education v. Lin Mar Community School District* (8th Cir. 2023)

- K-12 school district enacts policy that says “intentional and/or persistent refusal . . . to respect a student’s gender identity is a violation” of bully and harassment policies
- Parents sue to enjoin policy as violating First Amendment rights of their children
- Policy’s prohibition on a refusal to “respect a student’s gender identity” is unconstitutionally vague and could prohibit clearly protected speech, such as a minor expressing the opinion that biological sex is immutable



Some Key Takeaways



- Policies that prohibit certain types of speech must be clear so people are on notice of what will constitute a violation
- A policy cannot define harassment or bullying to include clearly protected First Amendment speech
- Policies concerning names and pronouns must be carefully crafted and still are highly susceptible to legal challenge

Case #5: *D.N. by Jessica N. v. DeSantis* (S.D. Fla. 2023)

- Florida law prohibits transgender women from participating on women's designated sports teams at public K-12 schools or public universities
- Transgender female challenges law as violating Title IX and U.S. Constitution
- Court rules law does not violate Title IX because Title IX's definition of "sex" does not include gender identity and Title IX specifically allows sex-segregated teams



Some Key Takeaways



- There is a conflict between the Department of Education’s broader interpretation of “sex” under Title IX and some courts’ narrower interpretations
- Courts are conflicted as to whether Title IX includes “gender identity” as part of sex
- Dozens of states have passed laws restricting participation on teams to biological sex, affecting both schools and athletic conferences
- More litigation and legislation in this space is likely

Case #6: *Doe v. Ohio University (S.D. Ohio 2023)*

- Plaintiff reported being sexually assaulted while incapacitated
- After making report, Plaintiff is allegedly called a liar, poked, prodded, and joked at by friends of the respondent, in class
- Professor and institution allegedly did nothing to stop the peer harassment
- Plaintiff's claim survives summary judgment
- But Plaintiff cannot pursue punitive damages or emotional distress damages under *Cummings*



Some Key Takeaways



- Institutions can face Title IX deliberate indifference claims based on peer harassment prompted by a complaint
- The failure to take any action to stop peer-harassment is deliberate indifference
- Supreme Court's *Cummings* decision has substantially narrowed the scope of recoverable damages on Title IX deliberate indifference claims



Questions