

The logo for Husch Blackwell, consisting of a large white stylized letter 'B' at the top, a vertical bar in the middle, and a large white stylized letter 'T' at the bottom, all set against a dark blue background.

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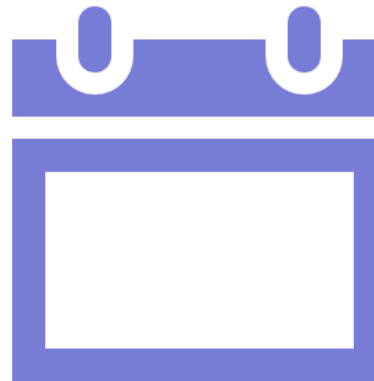
Our New Title IX Policies are Updated – Now What?

November 11, 2020



Agenda

- Supportive measures
- Investigations
- Hearings
- Appeals
- Informal Resolution





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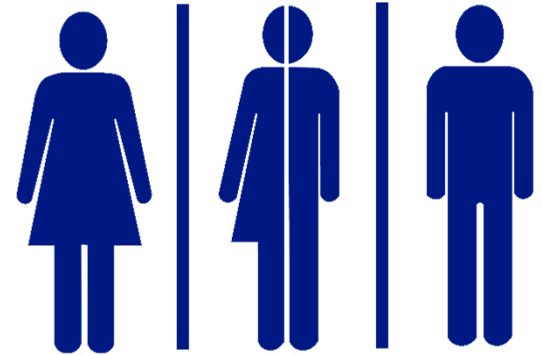
Title IX Overview



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.”

32 C.F.R. § 106.31



What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment 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 a private location that is not part of education program/activity



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

How do Title IX and Title VII standards compare?

“Neither Federal non-sex discrimination civil rights law represents a ‘zero-tolerance’ policy banning all sexual harassment.” – Preamble to 2020 Title IX Regulations

Title VII Sexual Harassment

Quid pro quo

Sufficiently severe or pervasive

Title IX Sexual Harassment

Any quid pro quo by employee

Unwelcome and Sufficiently severe and pervasive and objectively offensive

Any sexual assault/DV /stalking



How should we treat alleged conduct that may violate Title IX and Title VII policies?

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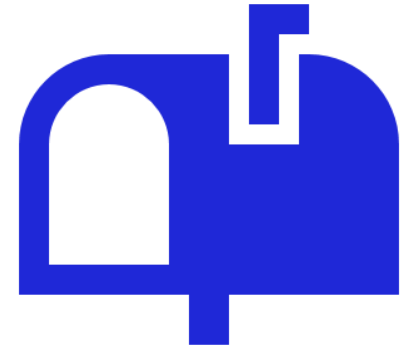
“The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer’s obligations under Title VII and Title IX.”

— Preamble to 2020 Title IX Regulations (also 34 C.F.R. § 106.6(f))



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



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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Supportive Measures





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

Example of reasonable supportive measure

Student A and Student B used to be in a romantic relationship. Since the relationship ended, Student B has gossiped about Student A's sexual proclivities with Student A's friend group. Student A does not wish to file a formal complaint, but wants access to counseling and to be allowed to change sections of a course that Student A currently shares with Student B.



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Example of unreasonable supportive measure

Employee A alleges Employee B engaged in sexual harassment by pervasively telling unwelcome sexual jokes in the workplace. Employee A asks the institution to retain the services of a specific psychologist in a different state to provide Employee A counseling at a cost of \$1,000 per hour and to pay for Employee A's travel expenses. The institution has access to local counselors of suitable qualification who are under a fixed contract to provide counseling to employees.





What are the compliance points to consider?

- Creation of a Supportive Measures document.
- Remember Clery obligation for VAWA crimes.
- Consider overlap in documentation.
- Consider who will provide and implement requests.
- Determine how long supportive measure will be provided (with or without the filing of a formal complaint).



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Investigations





What is the purpose of an investigation?

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

What is inculpatory evidence?

- Evidence tending to support the proposition a respondent committed sexual harassment as alleged.
- Example: A text message sent the day after an incident from the respondent stating: “I never should have forced you to have sex with me after you said ‘no.’ I’m so sorry for what I did.”



What is exculpatory evidence?



- Evidence tending to support that the respondent did not commit sexual harassment as alleged.
- Example: A text message sent the day after an incident from the complainant stating: “I know that I said ‘yes’ at the time. And I knew what I was doing. But now I feel like you just used me as a one-night-stand.”



What are the general principles of an investigation?

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



Do the parties have access to the evidence?

- At a minimum, 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





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 – the investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the new Title IX regulation, factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing



Are parties subject to a “gag” order during the investigation?

- No – the institution may not restrict the ability of parties to discuss the allegations or to gather and present relevant evidence, which includes talking to witnesses.
- But the institution can still enforce prohibitions on witness intimidation, witness manipulation, false statements, retaliation, harassment, etc.



What are the compliance points to consider?

- Clearly identify the role of the investigator in report writing.
- Outline for the parties the procedures regarding sharing information from the investigation.
- Determine how the investigator will present the report to the decision-maker(s).



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Hearings





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 runs the hearing?

- Regulation requires hearing to be administered by a “decision-maker(s)”
- Means institution can use a single hearing officer or a hearing panel (presumably, with a chairperson)





What are the logistics of a hearing?

- Hearing must be recorded (audio or video) or transcribed
- Hearing must have “live” – i.e., contemporaneous participation by parties and their advisors
- Hearing can be held in a single room or with the parties separated in different rooms
- Hearing can be held virtually using suitable software



Do we provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing
- Advisor can be, but does not have to be, an attorney
- If a party does not have an advisor, institution must supply one for the purpose of questioning the other party and witnesses on behalf of the student in question

How does the hearing actually work?

- Title IX regulation is largely silent on specific elements
- Required elements include:

Decision-maker(s) must independently evaluate questions for relevance and resolve relevancy objections

Party's advisors must be allowed to conduct live questioning of other party and witnesses

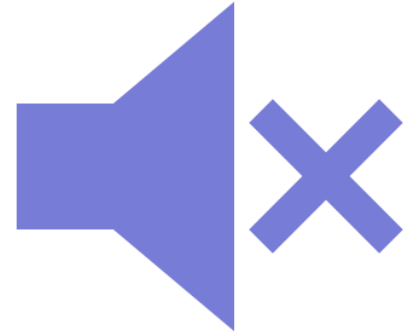
Party or witness who refuses to submit to live questioning from other party's advisor must have their testimony excluded

Questioning of sexual history generally not permitted



Does any testimony get excluded?

- Yes – Decision-maker(s) must exclude the statements of any party or witness who refuses to submit to cross-examination from the other party's advisor





Can we set standards of behavior for hearings?

Yes, provided they are applied equally and do not violate explicit guarantees from the Title IX regulation.



What are the compliance points to consider?

- Create Hearing Procedures
- Include a pre-hearing meeting in your process
- Identify multiple dates all parties are available for the hearing
- Determine how advisors will function within the hearing process



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Appeals





What is the purpose of the appeal?

- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek “de novo” review



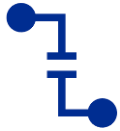


Who can appeal?

- Title IX regulation requires that either party be allowed to appeal
- Third-party persons cannot file appeals on behalf of a party

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 of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or

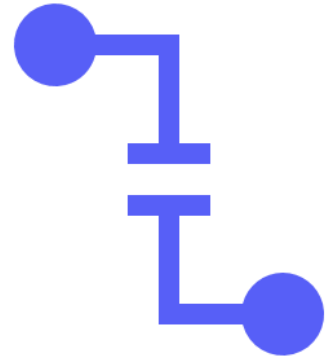


Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter



Are all procedural errors appealable?

- No – the procedural irregularity must be one that “affected the outcome of the matter”
- Errors that affect the outcome may be referred to as “prejudicial” errors
- Errors that do not affect the outcome may be called “non-prejudicial” or “harmless” errors



What are the potential outcomes of an appeal?



Appeal is denied and determination is made final



Appeal is granted and determination is changed by the appeal officer



Appeal is granted, determination is “vacated”, and appeal officer sends matter back for a new investigation and/or hearing as appropriate, depending on the nature of the error the appeals officer found



What are the compliance points to consider?

- Determine the scope of the appeal within the policy
- Identify trained appeal officer
- Provide information to the parties regarding the appeal



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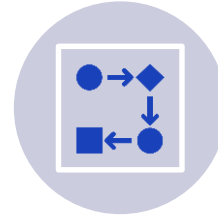
Informal Resolution



What are the key concepts of informal resolution?



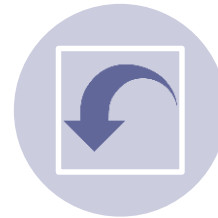
A formal complaint must first have been filed and written notice given to the parties



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



Who facilitates an informal resolution?

- Any suitably qualified and trained person may facilitate informal resolution, including the Title IX Coordinator
- Facilitator can be a third-party mediator or alternative dispute resolution specialist
- Default rules on conflicts of interest and bias apply

What are some examples of informal resolution?

Facilitated exchange of resolution offers

Mediation

Arbitration

Restorative justice

Settlement with the involvement of attorneys



Is an informal resolution final?

- Generally, yes – Most informal resolutions will result in an agreement that resolves the allegations in a definitive and final way
- A party cannot demand an investigation and hearing of the same conduct that has been resolved through informal resolution
- Exception exists if terms of the informal resolution are not final (i.e., contingent) and contemplate a potential return to the formal process



What are the compliance points to consider?

- Determine the types of informal resolution to be utilized
- Create an informal resolution process
- Determine if there are limits on when the process can be utilized
- Consider whether statements made in informal resolution may be used in the formal complaint process

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