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Title IX & Sexual Harassment Response

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Can Title IX apply to entities other

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What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the “education program or activity”

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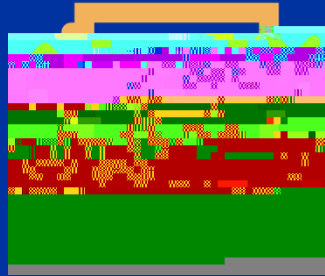




Example (included in EP&A)

—
One student in an online College course conducted by Zoom repeatedly sends vulgar and propositioning messages to another student using the Zoom private chat feature. The two students are physically in

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Example (included in EP&A)

Two students in the nursing program are in clinical rotations at a local hospital supervised by a preceptor who receives compensation from the College. One student sexually assaults the other in a breakroom commonly used by students in the program.

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Example (excluded from EP&A)

On a Saturday night, two students meet at a local bar and eventually go to a local hotel to “hook up.” One student exceeds the bounds of consent by attempting to choke the other student during the sexual encounter, despite having never discussed it.


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Example (excluded from EP&A)



A student parks on the far side of a public street adjacent to campus and is car jacked while leaving for the day. The perpetrator drives the student to a secluded location across town and rapes the student.

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Does Title IX apply to sexual harassment in other countries?

- No – the Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- Other countries may have laws that govern sexual harassment

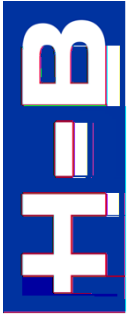


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When must we dismiss a Title IX complaint?

-



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

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Example of hostile environment

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Political Science student repeatedly
jokes and

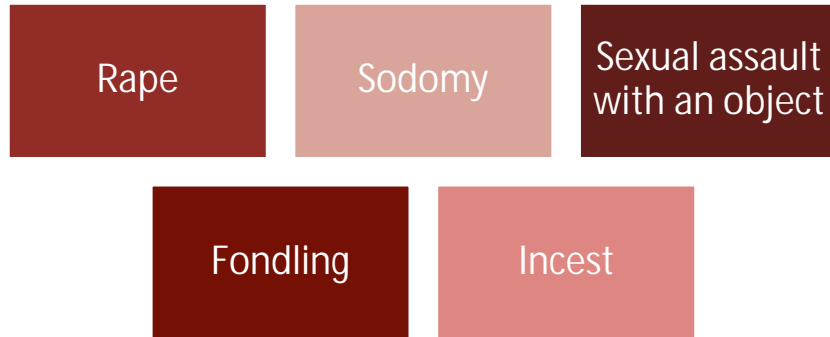
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What is sexual assault?

Title IX regulations define “sexual assault” as incorporating the following classes of conduct:



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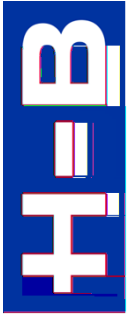


What is rape?

Having carnal knowledge of a person, without the consent of the victim, including instances the

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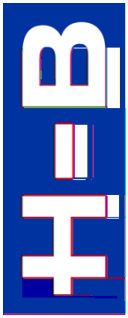


What is consent?

- Words or actions that a reasonable person in the

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What is sodomy?

Oral or anal sexual intercourse with another person 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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Example



Medical Student and Nursing Student discuss and agree to vaginal intercourse. The room is dark. After making out, and without discussion, Medical Student inserts Medical Student's penis into Nursing Student's mouth. Nursing Student reacts negatively and says: "No, I don't do that. Get out." Medical Student has always had oral sex prior to vaginal sex in previous sexual encounters and expected the same in this case.

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What is sexual assault with an object?

Using an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, 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. An "object" or "instrument" is anything used by the perpetrator other than the perpetrator's genitalia.

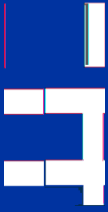

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What is fondling?


Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, or otherwise prohibited by law.

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Example of fondling


Law Student and Music Student are “making out” for the first time. Law Student begins to “feel up” Music Student’s chest from outside the clothing. Music Student pushes Law Student’s hands away. After more kissing, Law Student places their hands up Music Student’s shirt and touches Music Student’s bare chest. Music Student responds: “I said no. Stop.”



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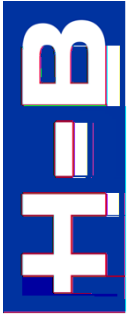
What is incest?

Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.



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What is domestic violence?

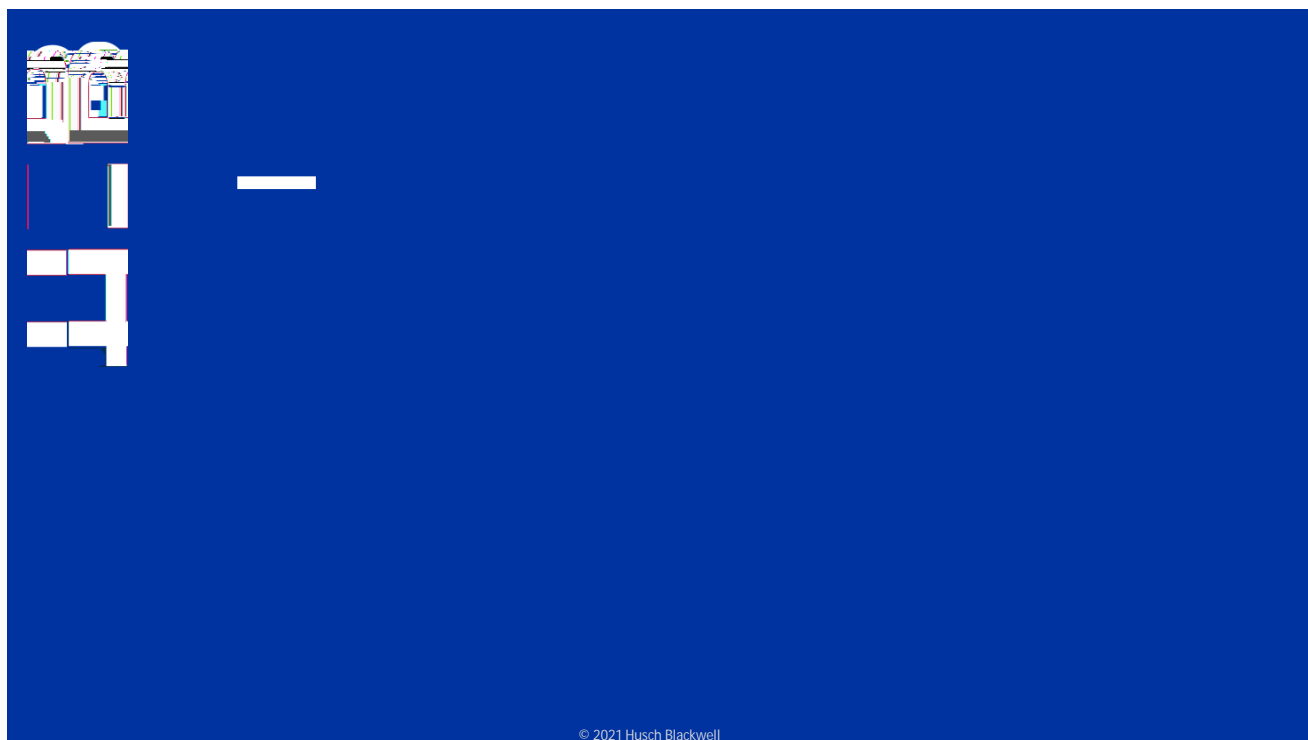
Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state, or by any



Example of stalking

Housing employee breaks up with Facilities employee. Facilities employee repeatedly shows up at the Housing office crying and asking for Housing employee. Facilities employee repeatedly instant messages Housing employee during work to talk about their relationship. Housing employee rebu emp

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On Campus Student and Online Student connect on Tinder. They meet in a campus parking lot where they take several shots of hard alcohol and anti depressants that On Campus brought. The two students kiss in the car for 30 minutes before driving to a local hotel where they have oral sex and intercourse without incident. The two students connect again a week later and meet in On c.1

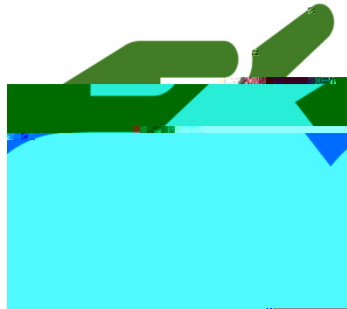


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What are supportive measures?



- 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

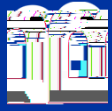
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- Counseling
- Academic accommodations
- Housing accommodations
- Security escorts
- Leave of absence
- Increased security or monitoring
- Modified work schedules

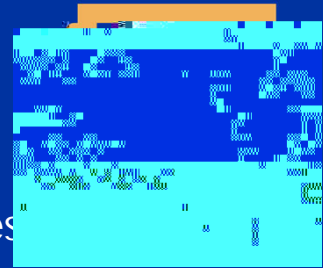
work

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Example of reasonable supportive measure

Grad Student reports that Undergrad Student sexually harassed Grad by repeatedly propositioning Grad until Grad's brother intervened. Grad would like to receive counseling but does not wish to file a formal complaint. Grad does not believe Undergrad poses a physical threat.



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Example of reasonable supportive measure

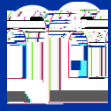
History student in History 101 reports that another student, also in History 101, sexually assaulted History student two weeks ago. History student is uncertain whether to file a formal complaint but wants assistance transferring to a different section of History 101.



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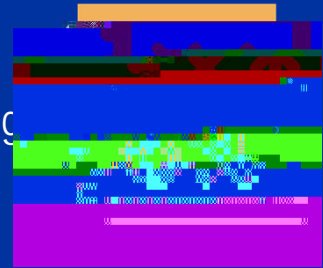
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Example of reasonable supportive measure

Graduate student reports that supervising faculty member has propositioned the graduate student for sex, multiple times. Graduate student wants assistance finding a different supervising faculty member. The department is large and has several faculty members with the competence to oversee graduate student.



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Example of unreasonable supportive measure

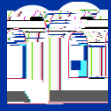

One student reports another student committed sexual assault three years ago when they were first years. The reporter has received strong academic marks since then. The reporter requests a refund of all tuition and housing charges for the last three years and a waiver of tuition and charges until the reporter completes graduate school.



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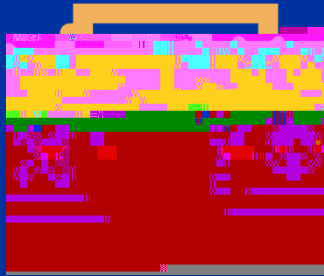
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Example of unreasonable supportive measure

Employee in maintenance department accuses supervisor of sexual harassment by way of making sexualized jokes and remarks. Employee requests to be on indefinite paid leave for the remaining six months of the academic year. Employee could easily be reassigned to work under a different supervisor in a different part of campus.



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Do students and employees have other rights?

- Yes—other laws may trigger accommodations when a medical condition or disability is present
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Section 504 of the Rehabilitation Act



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Can supportive measures affect the respondent?

- Yes, but cannot create an unreasonable burden
- Cannot be a form of *de facto* discipline
- Supportive measures are not a substitute for the investigation and hearing process

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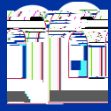


Example of unreasonable burden

Student Worker accuses Colleague of

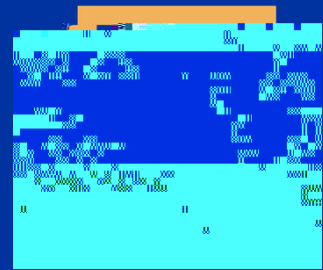
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Example of disciplinary supportive measure

In State Student accuses Out of State Student of sexual assault. In State requests as a support measure that Out of State be removed from all shared classes, removed from shared dormitory and made to live off campus, and prohibited from being on campus after 5:00 pm.



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Example of disciplinary supportive measure

Sophomore accuses Freshman of sexual harassment. Sophomore requests as a support measure that ~~sexual~~

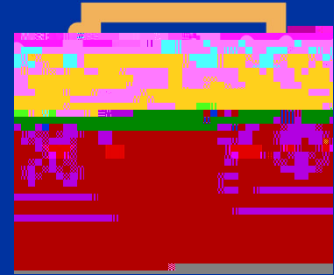
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Example scenario

Two students are admitted to institution as first years. Prior to arriving on campus, one reports that the other sexually harassed the reporting student when the two were sophomores in high school. The reporter wants counseling; safety escorts; and access to the respondent's schedule so the reporter can avoid the respondent.



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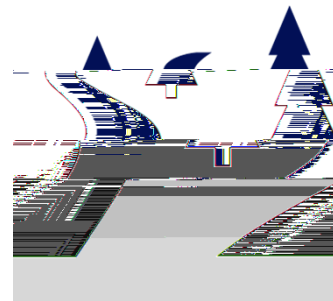
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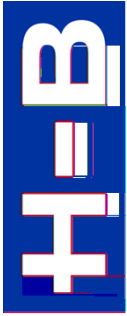
What if the report falls outside Title IX jurisdiction?

- 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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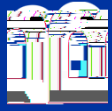
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Are supportive measures confidential?

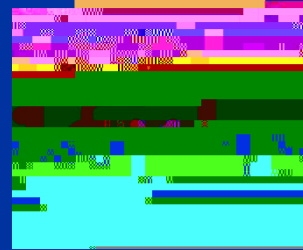
- Generally, yes
- Only shared to the extent necessary

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Example of immediate threat to physical health or safety

Student reports that another slapped and beat the reporter when they broke up with the other student. The reporter says the respondent has since threatened to kill the reporter and anyone the reporter might date. The breakup occurred two days ago. The reporter has visible injuries.



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Example of no immediate threat to physical health or safety

Student reports that Philosophy Student committed sexual assault by having sex with Engineer while Engineer was incapacitated after the two were drinking. The incident

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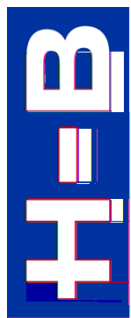
Title



Future Oncologist and Future Psychiatrist are both in their third year of medical school. Oncologist reports that Psychiatrist sexually harassed Oncologist by repeatedly propositioning Oncologist at a school sponsored happy hour. Oncologist has not decided whether to file a formal complaint. Oncologist requests several supportive measures, including free counseling; the ability to complete the semester remotely; never to be

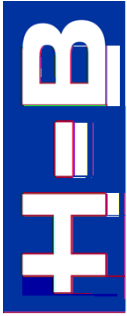


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What is the purpose of Title IX investigation?

- 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



What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
-

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Example (preliminary inquiry)

Student submits formal complaint via email with a single sentence reading, "Named Student sexually assaulted me." Prior to sending a written notice, investigator meets with the complainant and asks for more specific information about

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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 after you got to the party?"

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Examples of facilitators



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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 what they did?”

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

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Examples of recognition prompts



“What did she say?” (directive)



“What day did that happen?” (directive)





“Did

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Example of permissible use



Student who makes report of sexual assault executes release allowing disclosure of counseling records demonstrating student sought an emergency counseling session the morning after the alleged sexual assault



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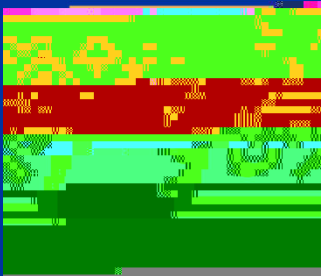
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Example of impermissible use

Employee accuses Student of sexual assault and reports that Student transmitted an STD. Student denies sexual encounter occurred. Investigator unilaterally contacts student health center seeking records to determine whether Student has been treated for STD.



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Do the parties have access to the evidence?

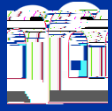
- Parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is finalized
- Evidence must be provided to a party and their advisor in physical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

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Do the parties get to respond to the evidence?

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Example (impermissible)

After completing all interviews, investigator prints the evidence and tells parties they can schedule a time to review it in a conference

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Does the investigation report make findings?

- No – the investigation report fairly summarizes the relevant

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Questions



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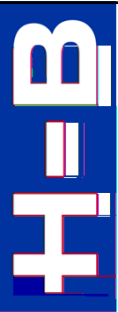


What is the purpose of the hearing?

- 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

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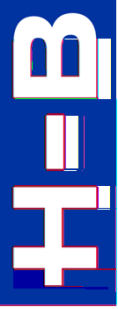
Who is the “decision-maker”?



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

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What standard of evidence can be used?

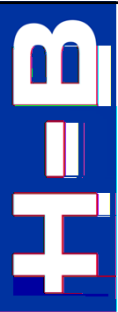
- Either

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

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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

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What is a conflict of interest?

- A material connection to a dispute, the parties involved, or a witness, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior relationship; professional interest; financial interest; prior involvement in a matter; or nature of position

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Example

The University hires an outside attorney to serve as a hearing officer. The outside attorney currently represents the respondent's father in a personal injury lawsuit.



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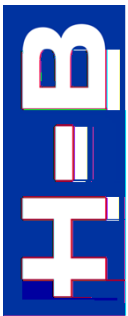
Example

The College assigns a faculty member to serve on a hearing panel. The faculty member previously wrote a glowing letter of recommendation for the complainant and has recently advised the complainant on graduate school applications.



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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

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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

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Example

Based on investigation report and in consultation with the parties, hearing officer issued letters to 8 witnesses advising them of the hearing date and coordination

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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 may have their testimony excluded (depends on policy)

Questioning of sexual history generally not permitted


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What is a potential sequence?

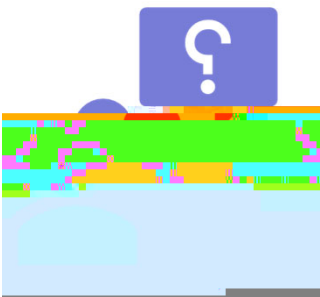
Statement and
cross-examination

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Title




Is an advisor allowed to question their own party?



- Not unless the institution chooses to allow it
- The Title IX regulation requires cross examination, but not “direct” examination

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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

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What is relevance?


Evidences relevantif:

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Example (relevant)




Faculty member is accused of engaging in quid pro quo harassment by rounding up a student's final grade in exchange for a sexual favor. Complainant's advisor asks faculty member whether he rounded up any other student's grade.


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Example (not relevant)

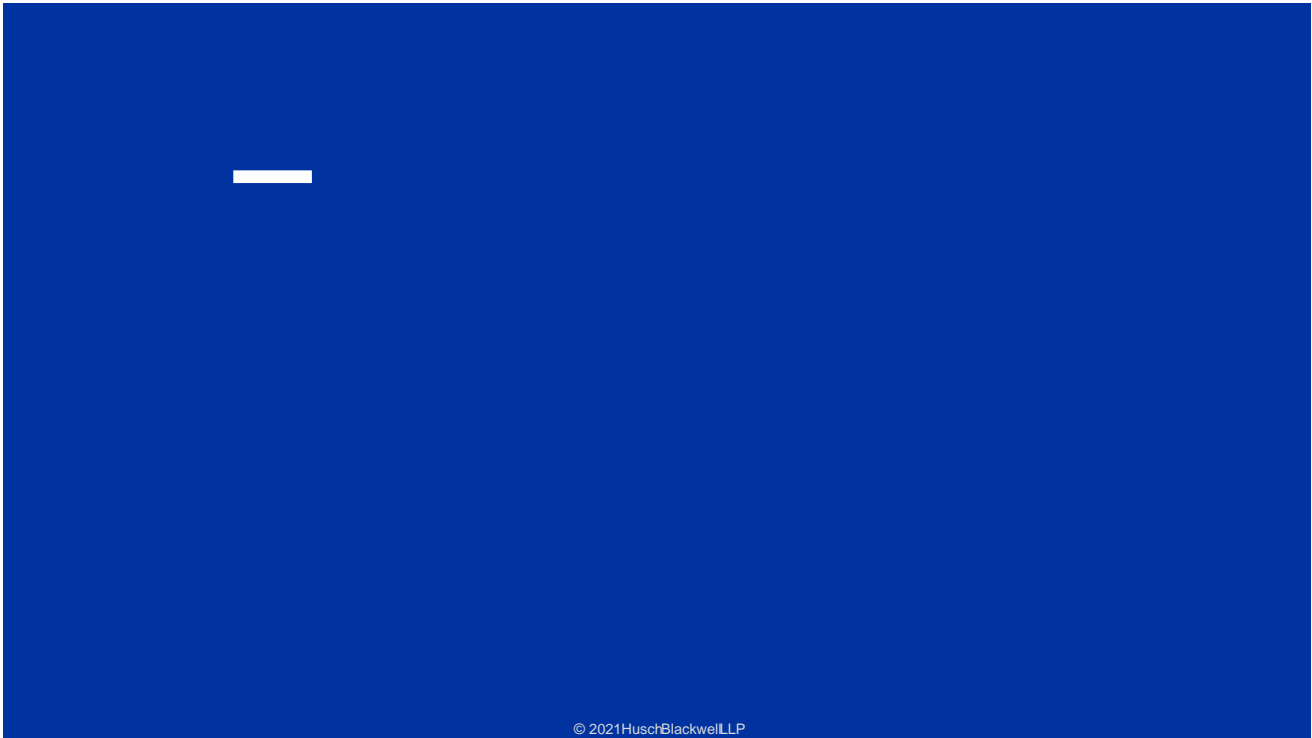


Employee accuses another employee of sexual harassment by telling sexual jokes in the workplace. Advisor for complainant asks respondent whether respondent had an affair with a co worker three years prior.

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Example (excluded)

Witness gives testimony in support of complainant's account that respondent sexually assaulted complainant. When advisor for respondent seeks to cross examine witness about a long standing grudge witness holds against respondent, witness refuses to answer questions. School has maintained exclusionary rule.



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Example (included)

During hearing, respondent seeks to "introduce into evidence" an email respondent obtained from witness stating that "respondent could not have committed sexual assault because they were with me at that time in a different town." Witness is not present at the hearing due to an unavoidable scheduling conflict. Institution.

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Example (not excluded)

During hearing, complainant identifies a text message from the respondent, sent to the complainant, calling the complainant a sexual epithet. The respondent

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Can we have standards of decorum for hearings?

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

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Example (permissible)

Institution's hearing procedures require all participants to remain seated during the hearing and to remain silent when another party is testifying or engaging in cross examination except to succinctly raise an objection.



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Title



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 (not) plaintiffs & 166 MnD2X9'a'äBYUÄFISÄ 2021Husch

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

- In a written document, provided contemporaneously to the parties that:
 - Identifies the allegations of sexual harassment

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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

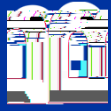
Title IX Coordinator, investigator, or decision maker (hearing official) had a conflict of interest or bias against complainant or respondent generally or the individual complainant or respondent that affected the outcome of the matter

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Respondents

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Example

Parties agree to engage in informal

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Example (impermissible)

Student files a formal complaint accusing a faculty member of groping the student during a clinical experience. As the hearing approaches, the hearing

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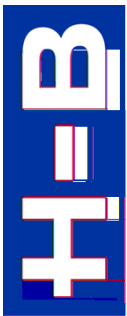
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Who facilitates an informal resolution?

- 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

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How long can an informal resolution take?

- Informal resolution should be reasonably prompt
- Typically has the effect

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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

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May we use another process before Title IX?

- Yes
- Some processes do not require a formal complaint and may be initiated prior to Title IX
- Other policy violations may be apparent prior to Title IX



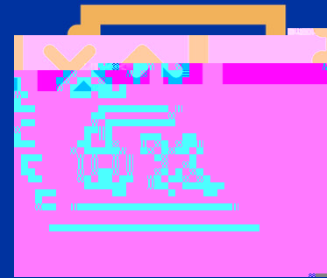
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Example

Student makes a verbal report that resident director provided alcohol to underage Student and then attempted to grope Student before Student fled the room. Resident director admits to providing alcohol but denies any attempted groping.



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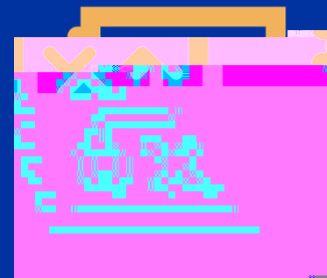
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Example

Volleyball Player files a formal Title IX complaint accusing Student Team Manager of punching and kicking Player to the point of leaving bruises. Manager admits to punching and kicking Player but denies there is a dating relationship.



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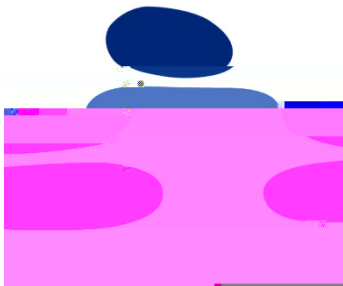
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May we use another process after Title IX?

- Yes
- Some conduct may not violate Title IX standards but will violate other standards
- Some conduct may merit additional punishment beyond what is merited by Title IX policy




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HB

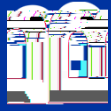
Example

Medical Student accuses Physical Therapy Student of sexual assault after Physical Therapy Student rendered Medical Student incapacitated by providing Medical Student with illegal drugs. Title IX hearing officer concludes Physical Therapy Student provided Medical Student illegal drugs but that Medical Student was not incapacitated.



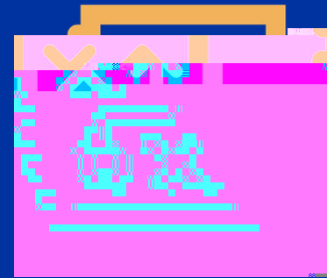
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Example

Employee is accused of hostile environment sexual harassment. Title IX process results in a “no violation” finding because harassment is not pervasive. Institution then initiates process under Title VII policy contending that harassment is severe.



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May we use two processes at the same time?



- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ

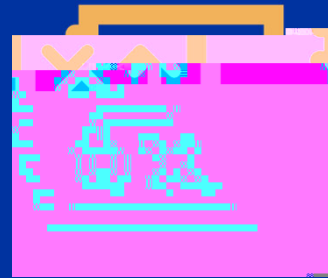
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Example

Math faculty member at religious institution is accused of sexually harassing students by requiring them to read sexualized and satirical accounts of Biblical events. Institution initiates a Title IX process as well as discipline process under faculty handbook for actions seriously undermining religious mission of institution.



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May we conduct a “joint” investigation?

- Yes
- But any “joint” investigation

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Example

Employee is accused of sexually harassing a co worker. Institution initiates a Title VII investigation and a Title IX investigation. Title IX investigator and Title VII investigator conduct joint interviews of parties and witnesses.



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Example

Male respondent at private religious college is accused of sexually

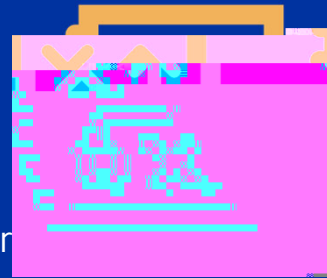
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Example

Student complains that Graduate Assistant harassed Student by sending Student an email with a pornographic video attached from GA's University laptop. GA claims the video was sent to Student by accident; Student's email account was close to the intended recipient's email account, which was mistyped. Institution terminates GA for violating institutional prohibition on accessing pornography from institutional computers.



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Why would an institution continue with a Title IX process after respondent departure?

- Complainant's wishes
- Desire to avoid "passing the harasser" scenario
- Community expectation
- Large investment of time and

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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

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Example (impermissible)

Alpha Alpha Student files formal Title IX complaint against Mu Mu Student alleging that Mu raped Alpha in a Greek house by having non consensual vaginal sex. Alpha does not want to participate in a hearing, smot

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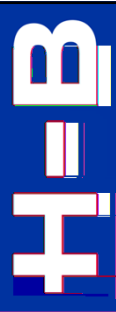


Have the Title IX regulations been rescinded?

- No
- The 2020 Title IX regulations remain in effect and institutions must continue to abide by them
- Court challenges to the regulations have been largely unsuccessful (to date; but see D. Mass.)
- Current administration cannot rescind or alter regulations without rulemaking process

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Will the Title IX regulations be rescinded?

- Changes are likely but wholesale rescission is not
- ED is currently engaged in a “comprehensive review” of Title IX regulations
 - Internal review of regulations and guidance
 - Public hearings with comments and feedback from stakeholders
- Any changes likely will not take effect until 2022 2023 academic year at the earliest

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Is there guidance in the interim?

- Yes
- July 2021 ED Q&A document on Title IX sexual harassment guidance
- Q&A articulates ED's interpretation of existing regulations and does not have the force and effect of law
- Includes sample language for key policy provisions

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Are there key points from the Q&A? (1 of 5)

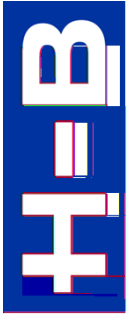
- Regulatory application
 - Regulations apply to sexual harassment occurring on or after August 14, 2020
 - Sexual harassment in online/virtual

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Are there key points from the Q&A? (4 of 5)

- Process

A school may use a



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Example: Meriwether v. Hartop

- Institution's

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Two years ago, institution settled lawsuit brought by student raped at the house of a Greek organization. As part of settlement, institution issued public statement promising “robust” measures to prevent sexual assault in the Greek community. Recently, institution received Title IX sexual harassment complaint alleging members of the same Greek organization are creating a hostile environment through public Facebook posts that refer to members of the opposite sex using vulgar terms and



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