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Title IX Sexual Harassment Response

Participants in sexual harassment policy process

Spring 2024

Day 2

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Agenda

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



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The Investigation

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How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of non-testimonial evidence

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Who do we interview?

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



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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.

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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.

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Example: Fact Witness



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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.

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Example: Character Witness



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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.

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How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

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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

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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 from that point forward?”

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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
specifically 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 it hurt?” (option choosing)



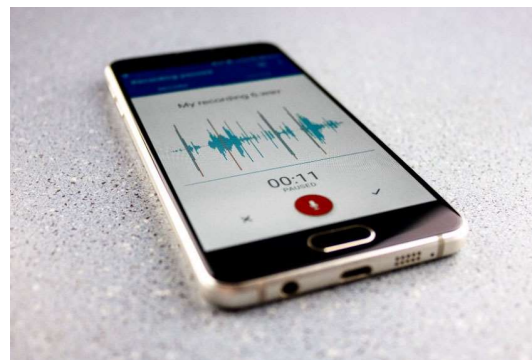
“Was he slurring words?” (option choosing)

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How do we make a record of the interview?

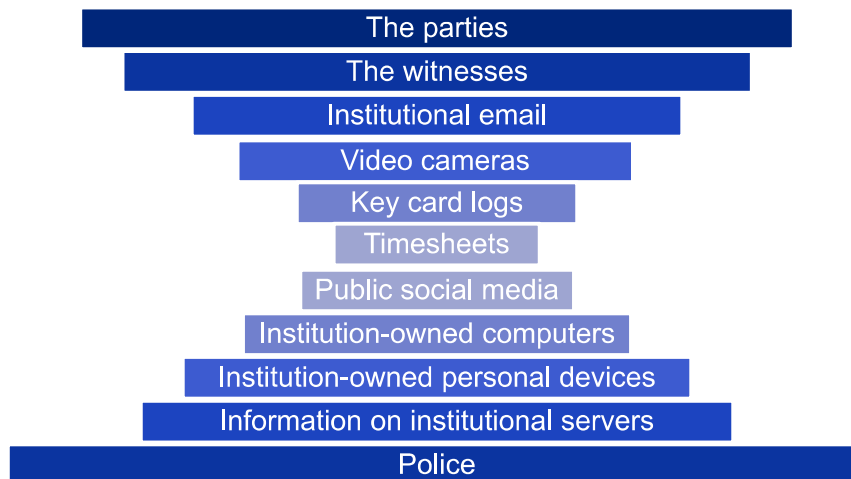
- Trend towards audio recording
- Extensive note taking followed by preparation of a summary is permissible
- Video recording is disfavored



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Example sources of non-testimonial evidence



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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

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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.

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Example: Prohibited



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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

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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

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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.

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Example: Permissible collection



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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

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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

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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



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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.”

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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



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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

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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

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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

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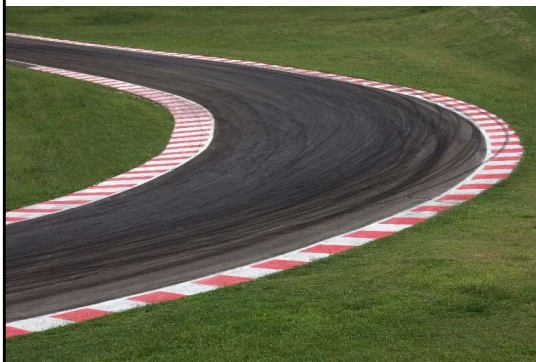
Likely Change: Access to Evidence and Investigation Reports

- 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

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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

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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

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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.

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Example: Advisor conduct



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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.”

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Example: Advisors



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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.

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Questions

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The Hearing

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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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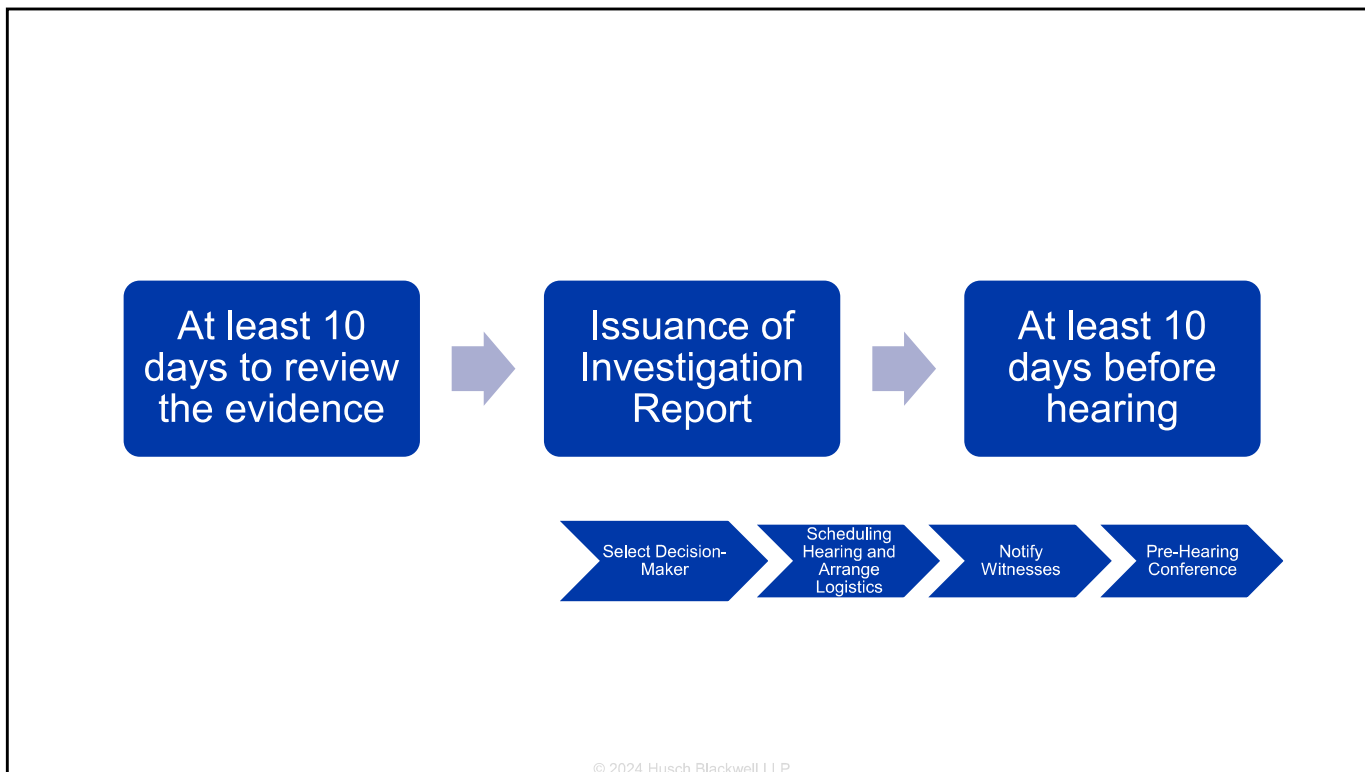
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What happens before the hearing?

- 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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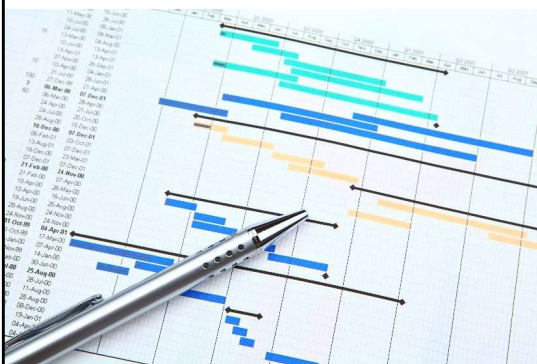
Likely Change: Response to Evidence

- 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

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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 obligations, as necessary

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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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What is a pre-hearing conference?

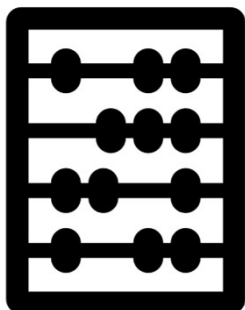
- A meeting with the parties, decision-maker, and other necessary officials to:
 - Address logistical issues and concerns
 - Discuss the sequence of the hearing and rules of decorum
 - Hear and resolve objections or concerns that can be addressed in advance
 - Take up other issues that will ensure hearing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



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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

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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.



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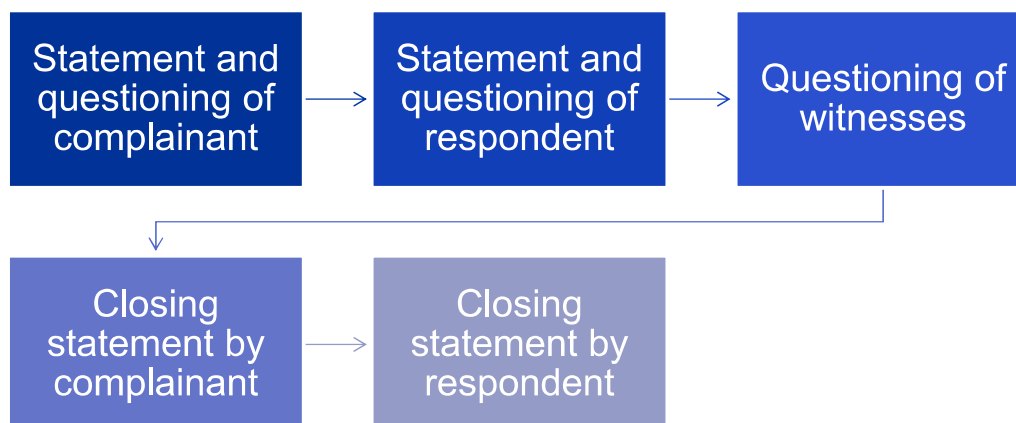
Likely Change: Exclusionary Rule Comes Back (in part)

- 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.”

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What is a potential sequence?

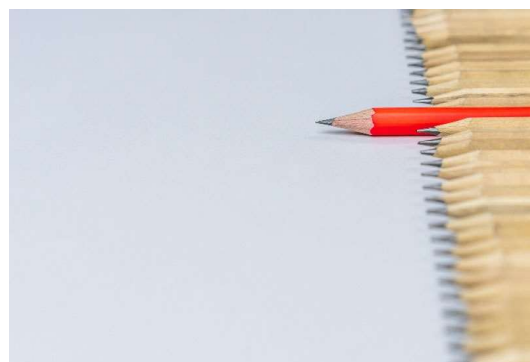


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Who determines relevance?

- 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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Example: 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."



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Example: Not 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.



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Likely Change: Relevance

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



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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

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Can we have standards of decorum for hearings?

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



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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.

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Example: Rules of decorum



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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

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Likely Change: Prohibited Questions



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

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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



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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

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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?



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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

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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



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What are the grounds for appeal?

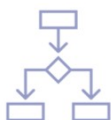
Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter;



New evidence that was not reasonably available at the time 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

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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.



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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.

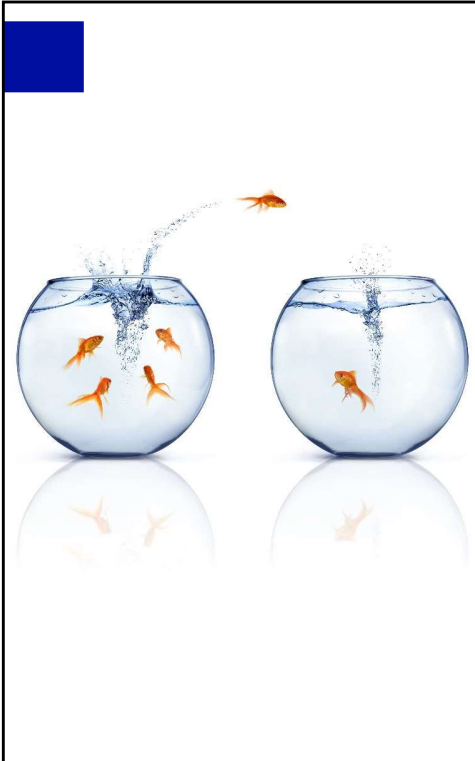
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Example: Appeal



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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.

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Questions

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Informal Resolution & Other Processes

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What is informal resolution?

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



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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

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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

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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.

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Example: Impermissible informal resolution



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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.

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Example: Permissible informal resolution



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Must an institution allow informal resolution?

Current regulations permit but do not require informal resolution



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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?

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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?

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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?



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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?

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Example: Informal resolution detail



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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?

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Example: Informal resolution detail



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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?

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Example: Informal resolution detail



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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

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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

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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

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What other policies/processes may apply?

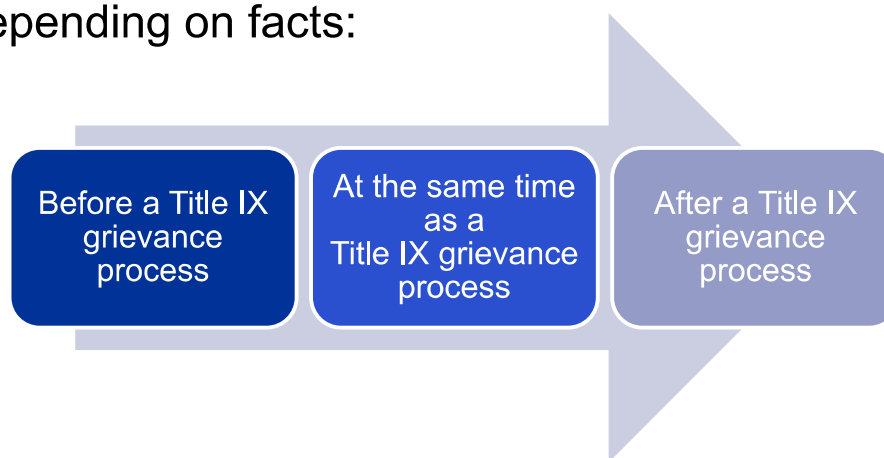
- Title VII policy
- Consensual relationships policy
- Professionalism policies
- Student code of conduct
- Threat assessment
- Employee handbook provisions
- Faculty handbook provisions
- Contractual provisions

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At what point can we use some other policy?

Depending on facts:



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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.

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Example: Before Title IX



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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.

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Example: During Title IX



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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.

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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.

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Example: After Title IX



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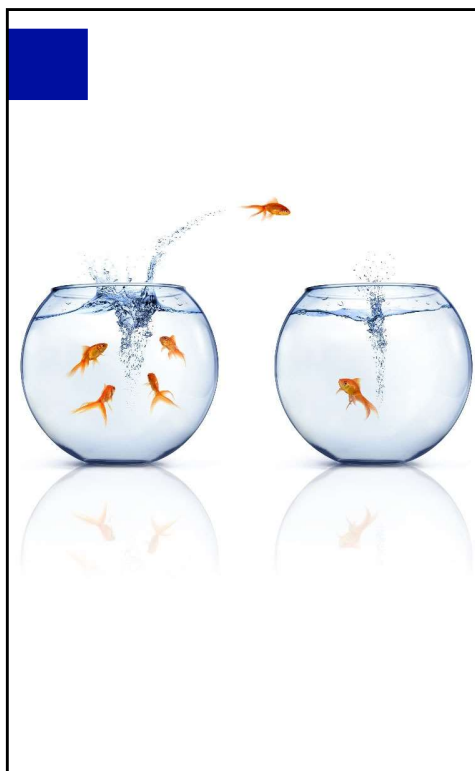
Can we use another process to make the same finding we would otherwise make under Title IX policy?

- 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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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.

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Caselaw Update

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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



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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



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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

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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



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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

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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



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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

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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



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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

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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



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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

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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*



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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

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Questions



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