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Title IX & Sexual Harassment Response – Advanced Course

Participants in Sexual Harassment policy process

2021

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Agenda

- Title IX jurisdiction
- Investigations
- Hearings
- Parallel processes

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Title IX Jurisdiction

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What is the basic Title IX jurisdictional test?

- Title IX applies to sexual harassment that occurs:
  - On campus
  - On other property substantially controlled by the institution
  - In the house of a recognized student organization
  - Or elsewhere in the context of an institution program or activity

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Example

A student worker is sexually assaulted in the kitchen of a fast-food restaurant located in the Student Union, which is on campus. The restaurant is owned by a non-profit food and beverage corporation of which the institution's president is the sole shareholder.

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Example

The institution's business school has rented a local event venue for a diversity banquet. During the reception, one student is sexually harassed by another student. The local event venue is owned by a private company.

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Example

A sexual assault occurs in an off-campus house owned by an LLC that is associated with an ecumenical religious group that is registered and recognized by the institution as a student organization.

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Is other off-campus conduct covered?

Did the conduct occur in the context of something the institution organized and administered?

Was the conduct committed by an employee or agent of the institution acting in the course and scope of their duties?

Did the conduct arise in a private setting as a result of decisions of private actors?

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Example

Resident assistants in dormitory organize students to clean up litter at a local park as part of community engagement week. Students, led by the RAs, walk from the dormitory to the local park. During the event, one student loudly and repeatedly makes jokes about another student's gender.

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Example

A faculty member offers to meet with a student at a local bar to discuss the student's research interests and to interview the student to serve as a research assistant. While at the bar, the faculty member offers to employ the student as a research assistant in exchange for sex.

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Example

Student A invites Student B to spend the weekend with Student A at Student A's parents' house. While at the house, Student A serves Student B alcohol and has sex with Student B while Student B is incapacitated.

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Does Title IX apply outside the United States?

- No
- Current Title IX regulation limits application to persons "in the United States"
- U.S. territories are included as "in the United States"

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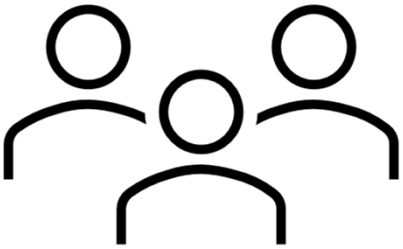
Do we need disciplinary jurisdiction "over the parties"?

- No
- Jurisdiction focuses on the *context* in which the reported harassment arose
- Ability to discipline parties may affect the *disposition*



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Example

During an on-campus football game an adult fan sexually propositions and fondles another fan without consent. Neither fan is a student or employee. The putative victim is 16 years old.

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What if a complainant is not a student or employee?

- To make a formal complaint, the complainant must be a current or attempted participant in the institution's programs or activities
- But Title IX coordinator retains ability to act as a complainant regardless of the putative victim's status

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What if the complainant ceases being a student or employee?

- It makes no difference so long as the Title IX grievance process was appropriately initiated
- A complainant's graduation, termination, or separation does not automatically terminate a Title IX grievance process
- A complainant's *refusal to participate* may trigger permissive dismissal if other sufficient evidence is not available

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What if a respondent is no longer a student or employee?

- A respondent's separation from institution does not automatically terminate the grievance process
- A respondent's separation gives the institution *discretion* to dismiss

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Example

Coach accused of sexually harassing student manager resigns at the end of the season prior to Title IX hearing being completed. Coach moves to a different state and indicates his intent never to return to campus.

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How do we address jurisdiction for pre-August 2020 misconduct?

- Regulations apply to conduct occurring on or after August 14, 2020
- But pre-August 14, 2020, Title IX policies have been superseded by new ones with jurisdictional limits

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Example

Institution's pre-August 2020 Title IX policy applied to all student-on-student harassment, regardless of location. In December 2020, Student A reports that Student B sexually assaulted Student A at an off-campus party in May 2020.

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Can two institutions have jurisdiction at the same time?

- Yes
- Joint programs or collaborations will often result in dual jurisdiction
- May include dual jurisdiction with non-educational entity such as a hospital

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Example

Multiple schools collaborate to share classroom and dormitory space for a "semester in D.C." program where students take classes and live while working in a government internship. One student from School A sexually harasses a student from School B in the classroom space.

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What is the procedure if we don't have Title IX jurisdiction?

- If no formal complaint has been filed, refer the matter elsewhere (law enforcement, alternative process, etc.)
- If a formal complaint has been filed, dismiss the formal complaint, notify the parties, and refer the matter elsewhere

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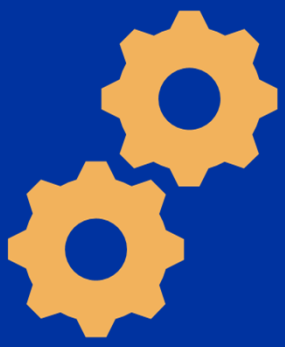
Group Scenario



Student A and Student B are dating and in their final semester of study. They share an on-campus apartment. Two weeks before graduation, Student A makes an oral report that Student B struck Student A in their apartment on multiple occasions. Student A elects to receive counseling. After graduating, and over the summer, Student A and Student B both work with the school's career placement office to find employment. After a night of drinking, on July 4, Student B beats Student A at their shared, off-campus house. The following day, July 5, Student B drives Student A to the school's career placement office and is present while Student A meets with the career advisor. On July 6, Student A files a formal complaint with the Title IX Coordinator against Student B complaining about the pre-graduation conduct, July 4 incident, and Student B never letting Student A "out of sight". On July 7, before Student B is notified of the formal complaint, Student B accepts a job offer. As of July 7, Student A is still unemployed.

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Investigations

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At what point do we have a Title IX investigation?

- After a valid formal complaint is filed
- After a valid written notice is provided to both parties

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Can we do an investigation based solely on a report?

- Not a formal investigation
- A preliminary inquiry is permissible to learn sufficient facts to determine whether the matter should be resolved pursuant to Title IX or some other policy

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Example

Student A reports by phone that Student A "knows someone who was raped by Student B." Title IX Coordinator schedules an interview with Student A to learn more facts about the putative victim and the basis of Student A's report.

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Example (impermissible)

Title IX Coordinator receives an anonymous voicemail stating: "Student A raped two other students homecoming weekend." Based on the voicemail, the Title IX Coordinator notifies Student A that Student A is the subject of a Title IX complaint and demands Student A appear for an interview.

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Can we "outsource" an investigation?

- Yes
- Investigator must:
  - Have appropriate credentials
  - Be appropriately trained
  - Agree to follow the policy and process
  - Agree to confidentiality consistent with Title IX and FERPA

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Example

Institution has a high-profile Title IX complaint involving alleged sexual assault and student athletes. Institution contracts with a retired FBI agent to conduct the investigation. Investigator signs an engagement letter and undergoes training on the institution's policy and process prior to commencing work.

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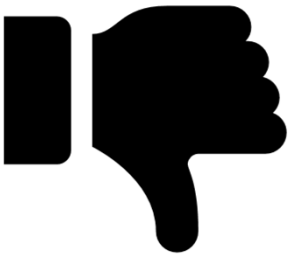
What if a party refuses to be interviewed?

- Institution cannot compel a party to submit to a Title IX interview
- Complainant's refusal may result in permissive dismissal if other sufficient evidence is unavailable
- Investigation should proceed despite respondent's refusal and report will summarize other evidence



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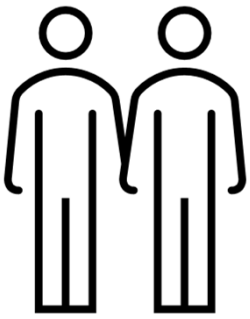
What if a party refuses to be interviewed without their lawyer?



- Party may be accompanied by an advisor of choice, including a lawyer
- Institution may require its lawyer to be present during interview

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Can you conduct a single interview for two complaints?

- Yes, if two complaints have been appropriately consolidated
- If two complaints are not consolidated, conduct two separate interviews (in sequence, if desired)

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Example

Student A and Student B each file complaints alleging that Student C groped them during the same party the weekend of homecoming while Student C was drunk and acting boorish. Investigator conducts a single interview of Student C.

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Example

Student A accused Student B of sexually assaulting Student A last summer. Student C accused Student B of committing dating violence three weeks ago. Investigator conducts one interview of Student B. Then starts a new recording and conducts a second interview of Student B.

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How should we make the evidence available to parties?

- Regulation requires the evidence be *sent* to each party and advisor in
  - Electronic format or
  - Hard copy

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Example

Ten days prior to issuing the investigation report, the investigator converts all evidence to password protected .pdfs and sends the parties and advisors a secure link to download the materials.

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Example

Ten days prior to issuing the investigation report, the investigator makes paper copies of all evidence and places a watermark in the footer of each indicating “complainant’s copy” or “respondent’s copy.” Investigator then delivers the paper copy to each party and their advisor.

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Example

Ten days prior to issuing the investigation report, the investigator uploads all evidence to a private "course" on the institution's learning management system and sends an invite to each party and their advisor to enroll in the course and review the materials.

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Are we required to address a party's response to the evidence?

- It depends on whether the party's comments merit a response
- If no response is merited, the party's submission can simply be appended to the final report

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Example

Party responds to evidence that investigator failed to interview key witness, Student A, who party says personally observed the alleged sexual harassment at issue. Investigator should either conduct the interview or explain in final report why it was not conducted.

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Example

Party responds to evidence with a lengthy narrative that reargues points the party made in their interview and denies the party committed sexual harassment. The investigator may simply append the statement to the final investigation report.

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Can our investigation report make findings?

- Report may identify undisputed facts
- Report should not resolve disputed facts or weigh any evidence
- "Findings of fact" are made at the hearing stage

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Should our investigation report comment on credibility?

- If particularly notable credibility issues arise, report should identify them
- Commentary on credibility of every party and witness is unnecessary given they will testify live at hearing

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Example

During interview, a party gives one factual account. When confronted with a text message contradicting the account, the party admits to the investigator the party was not being truthful and revises the party's account. Investigator may note the party's admission in investigation report.

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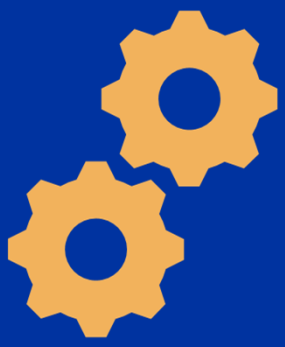
Group Scenario



Student A files a formal complaint accusing Math Instructor of offering Student A a better grade in exchange for sex. After investigator conducts initial interviews of Student A and Instructor, Student A emails investigator and states she has learned that Instructor similarly propositioned Student B, who was in the same Math class as Student A. Investigator interviews Student B who validates Student A's report and adds that Instructor invited Student B to his house, gave Student B multiple glasses of wine, and then had sex with Student B while Student B was in a stupor. Student B makes a formal complaint and indicates a desire to make a police report. When Instructor learns of Student B's involvement, Instructor hires a prominent defense attorney who sends an email to the investigator indicating (1) that Instructor is invoking their Fifth Amendment right against self-incrimination and will not submit to any further interviews or communications; and (2) Instructor has resigned, effective immediately, mooting the need for any investigation.

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Questions

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Hearings

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What is a "live" hearing?

- A proceeding held by the hearing officer or panel, either in-person or virtually where:
  - Parties are present with their advisors at the same time
  - Parties and witnesses testify with contemporaneous participation (i.e., no "pre-recording")
  - Parties' advisors ask live questions of the other party and witnesses

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Do the rules of evidence apply at a hearing?

- Limited rules apply:
  - The cross-examination exclusionary rule
  - The relevance rule
  - The prohibition on use of sexual history; and
  - Limits on the use of privileged materials

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Are there any exceptions to the exclusionary rule?

- Generally, "no."
- Various hearsay exceptions set forth in civil rules of evidence do not apply
- If the alleged harassment itself is a verbal or written statement, it may be considered

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Example

Respondent is accused of repeatedly calling Complainant sexual slurs in the presence of others, amounting to hostile environment harassment. Respondent does not appear at hearing. Complainant may still testify that Respondent spoke the slurs in question.

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What is relevance?

- Evidence is relevant if:
  - It has a tendency to make a fact more or less probable than it would be without the evidence; and
  - The fact is of consequence in determining the action
- Relevance must be determined considering the specific form and elements of sexual harassment alleged

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Example (relevant)

Student A has accused Student B of rape by having vaginal intercourse with Student A while Student A was incapacitated by alcohol consumption immediately after a party. Advisor for Student B asks Student A: "Did you make phone calls as you were leaving the party?"

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Example (relevant)

Student A is accused of fondling Student B while the two were dancing at a party. Student B's advisor asks Student A the following: "After you stopped dancing, didn't you tell Student C that Student A was 'hot' and you wanted to 'hook up'"?

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Example (not relevant)

Complainant alleges boyfriend/respondent engaged in dating violence by kicking complainant during an argument. Advisor for boyfriend/respondent asks complainant: "Isn't it true that boyfriend/respondent bought you an expensive purse for your birthday?"

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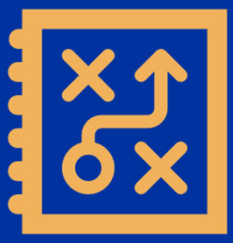
Example (not relevant)



Student A has accused Student B of sexual assault. Advisor for Student A asks Student B: "Were you convicted for driving under the influence when you were a sophomore in high school?"

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Who determines relevance?

- Hearing officer or panel must screen questions for relevance and resolve relevance objections
- Hearing officer or panel must explain any decision to exclude a question as not-relevant

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Is there a standard of behavior in hearings?

- There should be
- All parties (including advisors) must:
  - Act professionally
  - Maintain decorum
  - Not disrupt proceedings

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Can we adopt written standards of conduct for hearings?

- Yes
- Should be provided in advance
- Must apply equally to both complainant and respondent
- Enforced by the hearing officer/chair

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Example (impermissible)

A respondent's advisor smirks, laughs, and throws up her hands during portions of the complainant's testimony that the advisor believes are not credible.

Rule: "Parties and their advisors must remain professional at all times and not react physically or verbally to testimony given by others."

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Example (impermissible)

During questioning of the respondent, a complainant's advisor leaves her table, points a finger at the respondent, and says "you are a rapist!"

Rule: "Advisors must remain seated at their table."

Rule: "Advisors are permitted to ask relevant questions but are not allowed to make statements or accusations."

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Example (impermissible)

After the hearing officer rules a question is not relevant, the advisor begins to argue with the Hearing officer and exclaims: "I can't believe how incompetent you are!"

Rule: "Parties and their advisors must maintain decorum at all times. Any disagreement with a ruling by the chair may be briefly and respectfully noted."

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Example (impermissible)

As a party is testifying, the advisor supporting them nods his head when the party gives a "good" answer and shakes his head side to side when the party says something unhelpful.

Rule: "Parties and advisors are not allowed to coach or react to witness testimony by use of affirmative or negative gestures, such as head nods, hand signals, or otherwise."

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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 (i.e., invade sexual history)
- An advisor may consult the hearing officer or panel if a party demands the advisor ask a question that advisor is uncertain is appropriate

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Are parties allowed to make objections?

- At most institutions, a party is permitted to briefly and professionally note an objection to a ruling or other circumstance the party believes is improper
- Some institutions also allow an advisor to make objections
- Hearing officers/panel chairs have discretion to control excessive or improper objections

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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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May an institution hire a third-party to serve as hearing officer?

- Yes
- Must be
  - Qualified
  - Trained on institution's policy
  - Have engagement letter or contract sufficient to satisfy FERPA
  - No bias or conflict of interest

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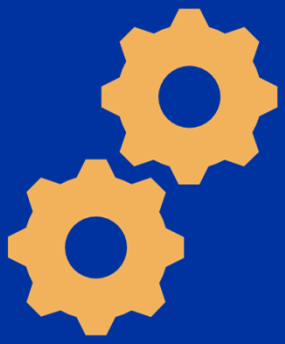
Group Scenario



Complainant has accused respondent of hostile environment sexual harassment by engaging in repeated sexual overtures. Hearing chair requires a list of witnesses who will testify at the hearing. During the hearing, the chair limits cross-examination to no more than 15 minutes per witness. When advisor for respondent asks complainant whether her grade point average has increased since she met respondent, the chair rules the question irrelevant and directs the complainant not to answer. The respondent then interjects loudly: "But their grades have gone up and they are at the top of the class. How could they have a hostile environment?" Towards the end of the hearing, he calls, Student A, who will testify that complainant's grades have improved since she met respondent, complainant is near the top of the class, complainant has recently been admitted to a top medical school, and complainant has not been bothered by respondent's actions in the least. The chair rules that Student A may not testify because Student A was not on the witness list. Respondent requests that the hearing be continued for three days so complainant's advisor can prepare to question Student A. The hearing officer denies the request. Ultimately, the hearing officer finds the respondent did engage in hostile environment harassment.

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Questions

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Parallel Processes

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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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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 had sex with student. Before student signs a formal complaint, resident director confesses that he had sex with student, but says it was consensual. Resident director's contract strictly prohibits all manner of sexual contact between resident director and students, consensual or otherwise.

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Example

Student A files a formal Title IX complaint, accusing Student B of recording the two having sex without Student A's permission. Student A discloses that she is 17. Student B admits to making the videos but claims Student A consented.

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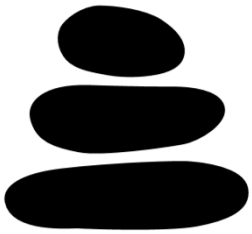
May we use another process after Title IX?

- 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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Example

Respondent is accused of sexually assaulting a peer at a Greek house. During Title IX hearing, Complainant admits the sexual encounter occurred at a private residence not owned by a Greek organization. Title IX hearing results in a "no violation" finding because of the location of the incident. Institution then initiates code of conduct charges against respondent.

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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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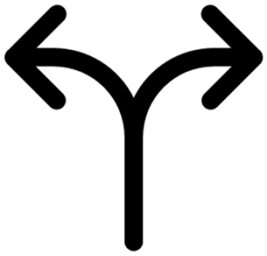
May we use two processes at the same time?



- 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

Faculty member at religious institution is accused of serving alcohol to underage student and performing non-consensual oral sex on student. Faculty member contends sex was consensual. Institution initiates Title IX investigation and parallel investigation of whether faculty member violated professionalism obligations by having sexual encounter with a student.

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May we conduct a "joint" investigation?

- Yes
- But any "joint" investigation must satisfy the Title IX standards
- Important to be clear to the parties what is going on
- Important to maintain integrity of Title IX evidence

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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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Can the resolution of one process "moot" a Title IX process?

- Yes
- Title IX permits dismissal of Title IX complaint if respondent is separated from the institution
- Earlier process that results in dismissal (student) or termination (employee) may support dismissal of Title IX complaint

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Example

Respondent is accused of sexually assaulting peer at a party at Respondent's house that violates COVID protocols. Respondent has two prior COVID protocol violations. Institution promptly dismisses student for COVID protocol violation using student code of conduct. Institution may dismiss Title IX complaint.

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Example

Student complains that adjunct faculty member coerced student into oral sex. Faculty member admits sexual encounter but denies it was coerced. Institution promptly terminates faculty member's contract based on institution's prohibition of any sexual relationship between faculty and student and bans faculty member from reemployment. Institution may dismiss Title IX complaint.

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Must an institution dismiss Title IX complaint if employee is terminated?

- No
- Dismissal is permissive
- Reasons not to dismiss include:
  - Concern about reemployment
  - Public relations concerns
  - Desire of complainant(s) to continue
  - Desire to document sexual misconduct (if supported by evidence) in personnel record.

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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" that occurs in institution's programs and activities

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Example (impermissible)

Student A files formal Title IX complaint against Student B alleging that Student B raped Student A in a dormitory. When Student A expresses concern about cross-examination, institution dismisses Title IX complaint and simply charges respondent with "rape" under code of conduct. Code of conduct process does not include a live hearing or cross-examination.

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Example

Student A files formal Title IX complaint against Student B alleging that Student B raped Student A in a dormitory by drugging Student A with a "roofie." When Student A expresses unwillingness to be cross-examined, institution dismisses Title IX complaint and charges respondent with violating code of conduct's prohibition on providing illegal drugs to other students and endangering the health and safety of other students.

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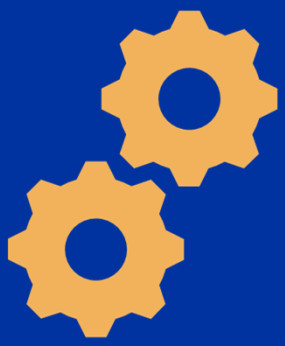
Group Scenario



Student A files a formal complaint that Student B engaged in sexual assault by coercion by threatening self-harm unless Student A had sexual intercourse with Student B. During the initial interview, Student A discloses that Student A and Student B had a complicated history with multiple consensual sexual encounters involving consensual (but illegal) drug use. According to Student A, Student B always supplied the drugs. When Student A sought to end the relationship with Student B, Student B threatened suicide, before Student A acceded to Student B's repeated requests to have intercourse to prove that "we're meant to be together." Student A reports that Student A does not feel physically threatened by Student B. Student B has no history of violence toward any other person. After Student B admitted in Student B's Title IX interview to supplying illegal drugs to Student A, institution initiates student conduct proceeding and expels Student B for distribution of illegal drugs. Institution then dismisses Title IX proceeding based on Student B's conduct dismissal. Student A is upset by the dismissal because Student A is concerned Student B is a sexual predator and may repeat the conduct elsewhere.

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Questions

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