

New Title IX Regulation Checklist

With the release of the final Title IX regulation by the U.S. Department of Education, Husch Blackwell's higher education practice team appreciates that institutions might be finding it difficult to navigate all of the policy and procedural changes that will be required by August 14, 2020. To assist your Title IX team and institutional leadership as you begin work to update your policies, procedures, and practices, we have carefully analyzed the extensive 2000+ page regulation and guidance to identify the most important decision points for your team to consider in the early stages of your process.

We hope that this complimentary resource is helpful to institutions starting this work, and we stand ready to assist your teams and answer any questions that you might have.

Application to Employees

- Will you have a unitary Title IX policy and eliminate any separate employee-specific policies?
- How will you coordinate your obligations under Title VII and Title IX?
- Do you need to make any changes to existing faculty or staff handbooks or collective bargaining agreements to comply with Title IX?

Standard of Evidence

- Will you change your standard of evidence?
- How will you bring alignment between the standard used for students and employees (including faculty)?
- How will you communicate to your community about why you chose the standard you selected?

Programmatic Scope

- What are all of the physical locations and events over which your institution exercises substantial control, such that they are likely to be considered part of your institution's "education program or activity" subject to Title IX?
- Are there any officially recognized fraternities, sororities, or other student organizations that own or control an off-campus building that would be considered part of your institution's "education program or activity" subject to Title IX? If so, do you intend to continue recognizing these organizations?
- Will you address sexual harassment and sexual assault that does not arise in connection with your institution's "education program or activity" (including conduct that occurs outside of the U.S.) through a separate policy from your Title IX policy? If so, what will the scope of each policy be and how and when will each policy apply?

Temporal Scope

- Will you address complaints only if they are based on events that occurred while the alleged victim was participating or attempting to participate in your institution's education program or activity?
- Or will you also address complaints based on events that occurred at other times? If so, will this be done as part of your Title IX policy or a different policy?
- Will you have the Title IX Coordinator be the complainant if the complaint is based upon events that occurred when the alleged victim was not participating or attempting to participate in one of your education programs or activities?
- When would it be clearly unreasonable for the institution not to move forward with an investigation and resolution?

Notice/Actual Knowledge

- What process will you use for receiving and processing formal complaints?
- Will you modify your current mandatory reporting policies?
- Will you conduct an inventory of institutional officials whose knowledge will constitute "actual knowledge" (i.e., those who have authority to institute corrective measures on behalf of the institution)?
- Do you have any lab or other K-12 schools on campus? (Note: different rules apply to K-12—any staff member's knowledge is imputed to the institution).

Support Measures/Services

- How will the Title IX Coordinator oversee the offering of "supportive measures"?
- Do you intend to authorize one or more Deputy Title IX Coordinators or other officials to offer and oversee implementation of "supportive measures"?

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- Will you combine the information about “supportive measures” with the notice of rights and options required under VAWA/the Clery Act?

Bias and Conflict of Interest

- How will you ensure that your process is free of bias and conflicts of interest?
- What standards will you use to determine if a participant in your process is biased or has a conflict of interest?
- Will you vet participants for bias and conflicts of interest in advance? If so, who will do this and how will it be done?
- How will you evaluate claims of bias and conflict of interest? Who will do this and how will it be done?

Interim Removals

- Will you utilize an existing threat assessment policy for interim removals or address this as part of your Title IX policy?
- What process will you put in place for a suspended student to appeal an interim removal?
- Who will be decision makers for interim removals and appeals?

Informal Resolution

- Do you plan to use an informal resolution option?
- Who will be responsible for overseeing the informal process?
- Who will be responsible for serving as a facilitator or mediator?
- What will the process look like?

Investigation Process

- Who will serve as an investigator?
- What record-keeping system are you going to use to store and share information?
- How will you provide an opportunity to view the written report and evidence?

Hearing Process

- Who will be your decision-maker(s) (e.g., one hearing officer, a hearing panel, etc.)?
- Who will you provide as support persons if a party does not have one?
- What rules of decorum will you have for support persons (who could be attorneys)?

- What technology will you use to conduct the hearing if an in-person hearing is not possible or appropriate?

Appeals

- Will you offer any additional grounds for appeal?
- Who will be your appeal decision maker(s)?

Training

- Who are all of the individuals who need to be trained?
- What training(s) will you use?
- How are you going to retain training records?
- How are you going to make the training materials available?

Records Preservation

- What retention system will you use?
- How will you manage rights of access (e.g., in person, electronic)?
- Who will store the records? (Title IX Coordinator? General Counsel? Other?)

Retaliation

- Do you need to revise your anti-retaliation policies?

Religious Exemption

- Is your institution controlled by a religious organization?
- Do any of the current elements of the regulation conflict with your institution’s religious beliefs?
- Do you want to seek confirmation of your exemption?

FERPA

- If you have been using FERPA consent forms before sharing information between and among students involved in a particular matter, do you plan to discontinue that practice?

Constitutional Protections

- If you are subject to the federal or state constitution, how will you ensure compliance with those additional requirements?

Preemption of State Law

- Are you subject to a state law that conflicts, or potentially conflicts, with the final Title IX regulation?
- If so, do you intend to seek an opinion from your Attorney General or other confirmation that there is indeed a conflict and/or that federal law controls?



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Title IX & Sexual Harassment Response

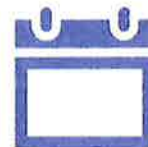
Participants in Sexual Harassment policy process
Fall 2021

THE UNIVERSITY OF MICHIGAN



Agenda

- Title IX Scope & Jurisdiction
- Support and Interim Measures
- The Investigation Process
- The Hearing Process
- Alternative and Parallel Processes
- Regulatory and Caselaw Update



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Title IX Scope & Jurisdiction



What is Title IX?

“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

32 C.F.R. § 106.31



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Can Title IX apply to entities other than colleges and universities?



- Yes
- If those entities have an educational program and receive federal financial assistance
- E.g., K-12 schools; charter schools; hospitals

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Does Title IX apply to persons?

- No
- But Title IX requires covered educational institutions to have certain policies that prohibit sexual harassment
- And those *policies* apply to persons



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What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the "education program or activity" of a federal funding recipient
 - Title IX defines "education program or activity" to include the "operations" of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



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What are examples of education programs and activities?

Admissions	Hiring	Workplace
In-person classes	Dormitories	Recreational amenities on campus
Sports teams	Virtual classes	Performances on campus
Off-campus trips or experiences organized by the institution	Sponsored organization activities	Anything else that happens on-campus

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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 different places during the course.



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Example (included in EP&A)

Student is sexually assaulted by teammates in a locker room after a practice that takes place at the University's on-campus field house. The teammates are all the same sex and gender.



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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?

- Alleged sexual harassment occurred outside education programs or activities
- Alleged misconduct could not be sexual harassment even if true
- Complainant is not a current participant in education programs and activities at time of complaint

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When may a case be dismissed?

- Complainant withdraws allegations in writing
- Respondent is no longer employed or is no longer a student
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

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What other policies might apply?

- Institutions are free to use
 - Student code of conduct
 - Faculty/employee handbooks
 - Other policies
- to address sexual harassment that does not occur in an education program or activity

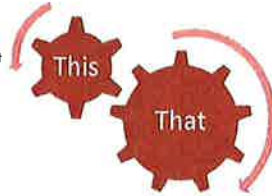
What is sexual harassment?

Conduct on the basis of sex that is:



What is quid pro quo?

- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
 - Often arises in the employment context or where an employee holds a position of authority over a student



Example of quid pro quo



A graduate student gives an undergraduate a failing grade on a lab exercise. When the undergraduate visits during office hours, the graduate student indicates a willingness to improve the grade if the undergraduate performs sexual favors.

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What is hostile environment?

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.



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How do we determine if a hostile environment exists?

- Consider all the facts and circumstances, such as:
 - The type of misconduct
 - The frequency of the misconduct
 - Where the misconduct occurs
 - Whether a power differential exists, etc.
- From the perspective of a reasonable person

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Example of hostile environment

Political Science student repeatedly jokes and denigrates Business student based on Business student's gender expression. These jokes occur in class, in the bookstore where both students work, and in the residence hall at night. Political Science student always tells the jokes in the presence of others.



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Another example of hostile environment

Business office employee repeatedly rubs the business office employee's own genitals in the presence of an office colleague, to whom the business office employee is attracted. The business office employee also repeatedly touches the colleague's shoulders and hair, without asking. The two work in the same room. The colleague is "grossed out" and gets stressed about what the business office employee might try next.



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Another example of hostile environment

Art student expressed a desire to have sex with Math student, who declines. Thereafter, at numerous Greek parties attended by both, Art student asks if Math student is "ready to fu*k yet." Math student stops going to Greek parties to avoid being confronted by Art student.



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Does the First Amendment matter?



- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment

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Example (not-hostile environment)

Student, a cis-female, leads an on-campus protest opposing the institution's switch to gender-neutral housing and gender-neutral bathrooms. During the protest, Student holds a sign that reads: "I don't want to shower with dudes!"



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Example (not-hostile environment)

During a University forum on gender issues, Student argues that another student is a bigot and part of "the patriarchy" because the other student rejects the entire construct of gender identity. Looking at the other student, Student says: "I don't have to dress or behave a certain way just because I have a pu**y!!!"



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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 where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. There is “carnal knowledge” if there is the slightest penetration of the vagina or penis by the sex organ of the other person. Attempted rape is included.

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What is consent?

- Words or actions that a reasonable person in the respondent’s perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent

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What is incapacity?

Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.



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Example (incapacitated)

Freshman and Sophomore are drinking shots in Freshman's dorm room and talking. Freshman encourages Sophomore to take several hydrocodone to "loosen up." After 30 minutes, Sophomore cannot stand, calls Freshman the wrong name, and has trouble staying awake. Freshman then has sex with Sophomore who lays unresponsive and does not wake up for six hours.



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Example (not-incapacitated)

Third-Year and Fourth-Year go out to dinner and share one bottle of wine over the course of two hours. They return to Third-Year's on-campus apartment and watch a movie. Fourth-Year grows tired, brushes their teeth, and climbs into bed. While in bed, the two make out and have sex. Fourth-Year wakes up the following morning with a headache.



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What is statutory rape?



Sexual intercourse with a person who is under the statutory age of consent as defined by law.

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Example

Short Student and Tall Student meet at a tailgate party, go to Short's dorm room after the football game, and have sex. Both are sober. Unbeknownst to Short, Tall is a dual-enrolled high school student who is 16. Short is 27. Tall's parents learn of the sexual encounter and make a report to the Title IX Coordinator.



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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, 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 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 other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the state.

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What is dating violence?

"Dating Violence" is violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship will be determined based on consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.

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Example of dating violence

Two graduate students have been dating for several months. One walks in on the other making out with a coworker on the sofa in the coworker's on-campus office. The student who walked in loudly shouts derogatory expletives at the other, threatens to "kill you both," and forces/yanks the other graduate student by the arm and off the sofa.



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What is stalking?

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for their safety or the safety of others; or
- Suffer substantial emotional distress.



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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 rebuffs Facilities employee. One night, Facilities employee follows Housing employee home by car from the institution's parking lot, prompting Housing employee to call police.

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Does Title IX also prohibit retaliation?

Yes – Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated in or refused to participate in any manner in an investigation, proceeding, or hearing under the institution's policy.

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Example of retaliation

A student reports that another committed sexual assault. Believing that the reporter has filed false accusations, a third student—the roommate of the respondent—spray paints derogatory terms on the reporter's car.



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Example of Retaliation????

A student reports that another committed sexual assault. Respondent's lawyer sends the complainant a letter stating that the report is false and that the complainant is committing defamation. The letter demands the complainant retract the report or respondent will sue.



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Group Scenario



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 an off-campus hotel room where they have oral sex and intercourse without incident. The two students connect again a week later and meet in On-Campus's dorm room. At Online's request, On-Campus supplies alcohol and anti-depressants. The two engage in mutual oral sex and mutual digital penetration. Online then gets on top of On-Campus and initiates intercourse. However, before the act is complete, Online passes out and slumps over. After some time, On-Campus carries Online to On-Campus's car in order to drive Online back to Online's off-campus apartment. Online comes-to in the car and becomes violent, striking On-Campus, throwing items at On-Campus, and demanding to know what On-Campus did "while I was out." The next day, Online files a formal complaint, accusing On-Campus of sexual assault by incapacitation with respect to both encounters. On-Campus files a counter-complaint alleging sexual assault and dating violence with respect to the second encounter. Online then files a counter-counter complaint accusing On-Campus of retaliation by having brought a frivolous counter-complaint.

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Questions



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Support Measures and Interim Restrictions



How does an institution get notice of sexual harassment?

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



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What is “actual knowledge”?

- “Actual knowledge” occurs when
 - An institutional official, with authority to take corrective action
 - Observes or receives a report
 - Of sexual harassment occurring in the institution’s education programs and activities

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When do we reach out to the alleged victim?

- After institution has actual knowledge of alleged sexual harassment, Title IX Coordinator must contact alleged victim
- Provide information about supportive measures, explain the grievance process and how to file a formal complaint, and discuss the alleged victim’s wishes

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What if we can't identify the alleged victim from a report?

- Title IX Coordinator should oversee preliminary investigation to determine identity of alleged victim
- If identity of alleged victim cannot be discerned after reasonable inquiry, matter should be documented and consideration given as to whether other policies (such as student code of conduct) are utilized

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Do we need a formal complaint?

- No. Not in order to contact the alleged victim and begin support services
- The formal complaint is a specific written document that is required to commence the investigation and hearing process

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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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Examples of supportive measures

- Counseling
- Academic accommodations
- Housing accommodations
- Security escorts
- Leave of absence
- Increased security or monitoring
- Modified work schedules
- Mutual no-contact order where implicated by facts

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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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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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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 sexual harassment. Institution imposes proximity restriction that prohibits Worker and Colleague from being within 400 meters of each other pending investigation and hearing.



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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 Freshman be prohibited from having any contact with, or being in proximity to, Sophomore for the duration of Sophomore's time at the College.



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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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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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Are supportive measures confidential?



- Generally, yes
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with institutional employees who have a legitimate need to know

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Who is responsible for supportive measures?

- Title IX Coordinator is responsible for “coordinating the effective implementation”
- May be delegated with appropriate oversight
- Typically, a collaborative effort involving more than one institutional office or department



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Can we utilize interim removals or suspensions for students?

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

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Example of immediate threat to physical health or safety

Mechanic Student is reported to have raped Tech Student after providing Tech with a large quantity of heroin. Tech explains that Mechanic keeps heroin in Mechanic’s campus locker and is known to sell it to others. Tech explains that at least one other student has been sexually assaulted by Mechanic using this method.



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