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Advanced Title IX Training: HR Professionals

Spring 2023

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Housekeeping

- **Participants may not record.**
- Change Zoom name to match registration
- Please list your institution with your name
- Raise hand or use chat function to ask questions

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Group Scenario



Breakout Groups

- Scenarios discussed in Breakout Groups
- First group – time to introduce yourselves and select a spokesperson; this will be your group for today's training
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Presenters will visit each Breakout Group at some point during the training
- Add your institution to your displayed name

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Important Disclaimers

- This training is based on currently-operative sexual harassment regulations (August 2020)
- We highlight potential changes that may result from proposed regulations that are not yet effective
- The effective date and final language of proposed regulations have yet to be determined
- Litigation is likely to challenge proposed regulations

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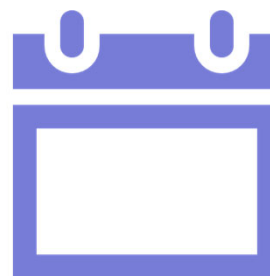
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Agenda

- Title IX Overview and Refresher
- Sequencing and Parallel Processes
- Interim Measures and Supports
- Chosen Names and Pronouns



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Title IX Overview and Refresher

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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 . . .”



20 U.S.C. § 1681

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What is the scope of Title IX's reach?

- Title IX applies to sex discrimination 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 and Firing | Workplace |
| In-person classes | On-campus housing | 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 employee sends vulgar messages and sexual propositions to a co-worker using the institution’s chat software.



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Example (excluded from EP&A)



On a Saturday night, two employees from different departments are both drinking at a local bar, and one employee gropes the other employee's genitals without permission.

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Proposed Change



- Jurisdiction will extend to off-campus sex discrimination where:
 - Respondent represents the institution through their authority
 - Respondent is engaged in conduct under the institution's "disciplinary authority"
 - Off-campus conduct contributes to a hostile environment within programs and activities

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Example

An assistant coach meets with a softball player at a local batting cage to work on hitting. While there, the assistant coach propositions the player for sexual favors in exchange for increased playing time.



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What are the two conceptual types of sex discrimination?

- Adverse treatment discrimination
- Sexual harassment



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Example of Adverse Treatment



Supervisor consistently gives male employees promotions while keeping female employees in their positions, despite all employees being similarly situated in terms of responsibility, experience, and performance.

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Example of Sexual Harassment



Employee repeatedly tells sexual jokes to colleagues, displays sexual imagery, propositions them, and frequently comments on whether colleague's dress is "sexy."

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What is the key distinction between these two concepts?

- Adverse treatment involves adverse action that is motivated by the target's sex and that directly limits or excludes from participation in education program or activities
 - Usually by someone in a supervisory or authoritative position
 - Action typically is not sexual in nature
- Sexual harassment involves unwelcome conduct of a sexual nature or that meets the definition of the VAWA crimes
 - Quid pro quo; hostile environment; sexual assault; domestic violence, dating violence, stalking
 - Sexual harassment is subject to elaborate regulations governing investigation and determination

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Anticipated Change



- Title IX regulations require elaborate procedures for investigating and resolving sexual harassment
- New regulation would require more elaborate procedures for investigating and resolving adverse treatment discrimination too

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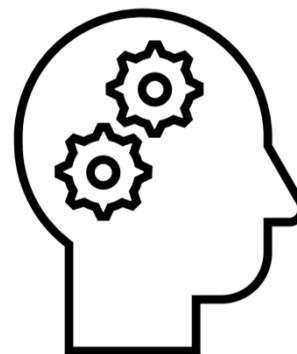
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What triggers an institutional obligation to act under Title IX?

- “Actual knowledge” of alleged sex discrimination in education programs and activities by
- An institutional official with “authority to take corrective action”



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What is sexual harassment under Title IX?

Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

Sexual assault

Dating violence

Domestic violence

Stalking

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- “On the basis of sex” includes:
 - Assigned sex/biological sex
 - Sex stereotypes
 - Sex characteristics
 - Sexual orientation
 - Pregnancy and related conditions

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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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What other laws regulate sex discrimination in employment?

- Title VII of the Civil Rights Act of 1964
- State non-discrimination laws
- Local non-discrimination ordinances



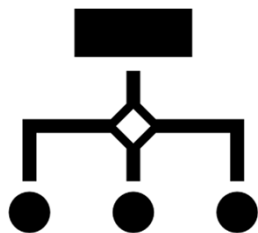
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How does Title IX relate to these other laws?



- Title IX does not displace other laws
- Unless the requirement of another law conflicts with Title IX
- In most cases, institution must comply with Title IX and all other laws

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What are key differences between Title VII and Title IX?

- Title VII applies only to employment
- Title VII has a broad definition of “hostile environment harassment”
- Title VII obligations can be triggered by constructive knowledge (“should have known”)
- Title VII has more flexible procedures
- Title VII compliance can be administered by HR
- Title IX applies to all operations
- Title IX currently has a narrow definition of “hostile environment harassment”
- Title IX obligations are triggered by “actual knowledge”
- Title IX has specific and rigorous procedures for sexual harassment complaints
- Title IX compliance must be overseen by a Title IX Coordinator

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Example



A faculty member is attending a home football game and is groped by an unruly group of students sitting behind her. The faculty member reports the incident to the Dean of Students.

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Example



A male employee gets into an argument with a female employee over politics and during the argument, refers to the female employee as a “b****” and a “c****”.

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Example



In the past year, three LGBTQ employees who work for the same supervisor have all resigned. The Department head has heard the supervisor tell inappropriate jokes about gay people, but never in the presence of a person who is openly gay. In their exit interviews, the departing employees wrote the supervisor was “unwelcoming,” “not inclusive,” and “said and did things that made it impossible for me to work here.”

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Example



A private institution receives three anonymous reports from employees who all accuse the same supervisor of sexually propositioning them in similar ways.

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Proposed Change



- New Title IX regulation will
 - Closely align the Title IX definition of “hostile environment harassment” with the Title IX definition
 - Eliminate the distinction between formal, written complaints and reports
 - This will make it easier for institutions to meet Title VII and Title IX obligations under a unitary policy/process

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Group Scenario



A transgender employee works in the university's convenience store in the student union. The employee is full-time but also takes one course as a student. Over the course of several weeks, a particular group of students who frequent the store begin to mock the employee. They call the employee a "queer" and "tranny" loud enough for the employee to hear. They also make derogatory comments to the employee directly about the employee's manner of dress and appearance. The employee knows the students' names through their use of credit cards and sometimes encounters one or more of them on campus, in other contexts. The employee notifies their direct supervisor who advises the employee that dealing with rude students is just "part of the job" and they should "dress normal" if they don't like the comments. Eventually, the employee reports the conduct to the Director of Human Resources and requests that "something be done about this."

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Questions



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Sequencing and 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 given report

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What other institutional policies/processes may apply?

- Title VII policy
- Consensual relationships policy
- Professionalism policies
- Employee handbook provisions
- Faculty handbook provisions
- Threat assessment
- Contractual provisions
- Others?

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At what point can we use some other policy or process?

- Depending on the facts
 - Before a Title IX grievance process
 - At the same time as a Title IX grievance process
 - After a Title IX grievance process



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Example

An employee on a probationary contract has consistently received poor performance reviews and failed to show up to work on time. A week before the deadline to give the employee a notice of non-renewal, a co-worker accuses the employee of sexual harassment.



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When may a Title IX 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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Example

Employee A and Employee B attend a reception on campus that involves alcohol. Employee B gets drunk and sexually propositions Employee A. The next day, Employee A files a sexual harassment complaint.



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Example

Assume Employee B (from our last example) is an African American male. Three months earlier, Employee C, a White female, got drunk at a reception and sexually propositioned a graduate student. Although the graduate student did not file a sexual harassment complaint, Employee C's supervisor, who saw the incident, gave Employee C a written reprimand and required her to undergo training.



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Example

Supervisor is accused of showing a subordinate employee a pornographic video during the workday, which prompts the employee to complain to the Department manager and file a written complaint with the Title IX Coordinator.



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What are some differences about a Title IX investigation?

- Prior, written notice to the parties with a description of the conduct at issue
- The right to be accompanied by an advisor of choice
- The right to identify other witnesses and evidence
- The right to review the corpus of evidence and comment on it before the investigation is complete

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Example

A player accuses a coach of repeatedly pursuing a sexual relationship with the player and showering the player with unwelcome personal gifts like jewelry, clothing, and offers to take her on trips.



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Proposed Change



- New definition of retaliation will make clear that conduct charges cannot be used to retaliate against a person for exercising Title IX rights or refusing to participate in Title IX grievance process.

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May an institution tell a complainant about different processes?

- Yes, as long as the institution does not communicate pre-judgment of the outcome
- Institution may provide information to a complainant about how they might make a complaint under a particular policy and the consequences of doing so under different policies

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Example

An employee has a habit of telling crass jokes at work. A co-worker believes the joking is unprofessional but doesn't feel it has impacted their work. The Title IX Coordinator explains the Title IX definition of hostile environment harassment and explains how the employee could alternatively make a complaint to human resources of unprofessional conduct.



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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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Must Title IX functions and HR functions be separated?

- An institution must have a Title IX Coordinator responsible for Title IX compliance
- The Title IX Coordinator may delegate certain aspects of Title IX compliance to deputies and others, with appropriate oversight
- Title IX permits HR professionals to serve as Title IX Coordinator, Title IX deputies, Title IX investigators, hearing officers, and appeals officers, provided there is no conflict of interest or bias

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Example



A human resources specialist previously investigated a staff member for misuse of institutional resources and concluded the staff member lied about certain reimbursements. The Title IX Coordinator now wishes to assign the human resources specialist to investigate a formal complaint of sexual harassment against the staff member.

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Example



The institution's Title IX policy names the Director of Human Resources as the appellate officer for all Title IX complaints against staff. Additionally, the Director is designated the decision-maker under the Title VII policy.

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Example



A faculty member requests that a human resources staffer serve as their advisor in a Title IX case. Unbeknownst to the faculty member, the human resources staffer has previously advised the Dean about various anonymous complaints made about the faculty member's demeanor.

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Group Scenario




Devon makes a formal complaint to the Title IX Coordinator that Devon was pressured into a sexual relationship by Devon's supervisor, Kris. According to Devon, the two attended an industry conference in New York, and Kris pressured Devon to stay an extra night after the conference ended so they could "get to know each other better." Devon reports that Kris took Devon to an expensive dinner, then convinced Devon to drink heavily at the hotel bar, and finally took Devon to Kris' room where Kris promised to ensure Devon's promotion if Devon slept with Kris. Devon reports that the two had multiple additional sexual encounters at Kris' house upon returning from the conference until Devon ended the relationship. In Kris' Title IX interview, Kris claims Devon had sex with Kris willingly and that it was Devon who brought up the subject of a promotion after the sexual encounter. Kris claims it was Kris who ended the relationship because a colleague from another school advised Kris it was unprofessional. The Title IX investigator confirms that Kris and Devon both submitted their full hotel stay for reimbursement, while Kris also submitted the expensive dinner and bar tab. The university is a state university funded by tax dollars.


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Interim Measures and Supports

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What is the Title IX regulatory obligation?

- Upon receipt of actual knowledge of sexual harassment, institution must offer supportive measures to putative victim.
- Supportive measures must also be offered to putative respondent when respondent receives notice of report/complaint or otherwise requests them.
- Intended to preserve access to education programs and activities.

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What is the Title IX civil liability obligation?

- Institution must respond to known sexual harassment in a way that is not “clearly unreasonable.”
- Institution cannot turn a “blind eye” to sexual harassment.
- If initial measures fail to prevent recurrence of sexual harassment, institution must try additional steps that are not clearly unreasonable.

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Example



Subordinate reports their supervisor forcibly groped them and then threatened to fire them if they spoke about it to anyone. Subordinate reports to the Department Head who orally tells supervisor to “behave yourself” but does nothing more.

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What is the Title VII standard?

- Once employer has actual or constructive knowledge of sexual harassment, employer must take steps “reasonably likely” to stop the harassment.

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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


 Work schedule accommodations


 Change in work location

 Security escorts

 Leave of absence

 Increased security or monitoring

 Temporary change of supervisor

 Mutual no-contact order where implicated by facts

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How do we consider whether a support measure is reasonable?

- Do you already offer it to others?
- How long will it last?
- How much will it cost?
- Will it require other people to assume duties they are not paid to do?
- Is it disproportionate to the alleged misconduct?
- Would it cause the institution to violate some other law or contract?
- Would it fundamentally alter the nature of a job or operations?
- Others?

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Example



Employee who has made a sexual harassment complaint requests to have her start time delayed by 15 minutes and her end time extended 15 minutes so that she won't have to encounter the respondent in the elevator, when he arrives and leaves work.

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Example



Employee who has accused supervisor of sexual harassment requests that institution pay for counseling with a preeminent expert in a nearby city who charges \$1,000 per hour for sessions. Competent, local counselors are available and charge \$250 per hour.

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Example



Employee who has filed sexual harassment complaint against former romantic partner/co-worker asks institution to place a gag order on co-worker because employee is concerned co-worker may discuss the prior romantic encounters with others.

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Example



Faculty member files sexual harassment complaint against Chair who faculty member claims accused the faculty member of having “PMS” during a heated argument. Complaining faculty member requests to be placed on paid leave for the balance of the semester and for the institution to pay for 50 sessions of external counseling.

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No contact orders as a form of supportive measure

- Cannot be automatically imposed in every case.
- May be reasonably necessary where there is a specific concern about ongoing contact or interaction.
- Scope of a no contact order can vary substantially depending on the facts.

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Example



Employee A and Employee B were dating and broke up. Employee B has since texted Employee A late at night and shown up at Employee A's office during the day begging Employee A to resume the relationship. Employee A files a formal complaint of stalking. Should there be a no contact order? What should its terms be?

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Example



Assume Employee A and Employee B work in a three-person department that is critical to institutional operations. The third-employee is out on FMLA leave. It is essential to operations that Employee A and Employee B be able to communicate about their work. Should there be a no contact order? What should its terms be?

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What if an employee violates a no contact order?

- Violation of a no contact order may, depending on policy language, be treated as a separate violation of the Title IX policy; or
- Simply an act of insubordination that is subject to discipline in the ordinary course.

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Example



Employee is accused of sexually harassing a student. Employee is prohibited from communicating with student pending investigation. Employee sends student multiple text messages discussing the investigation. Employee is “at will.”

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What about interim removals?

- 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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What about employees?

- Under Title IX employees can be placed on administrative leave without a showing of physical danger to any person.
- But consider whether contracts and handbooks provide required certain substantive standards or procedural due process to be met.

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Example



Faculty handbook states that a faculty member can be suspended from their duties, with pay, only if President determines that serious, immediate harm would come to the institution in the absence of a suspension.

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Can the administrative leave be “without pay?”

- For public institutions, leave without pay may implicate procedural due process rights.
- For all institutions, leave without pay may be treated by courts as a de facto termination.
- Leave without pay may be deemed disciplinary in nature by OCR.



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Example



Collective bargaining agreement for staff includes provision stating that no staff member will be suspended from their duties without just cause and with an immediate opportunity to appeal the suspension.

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What about reassignment as an interim measure?

- Absent limitations in a contract or handbook, employers are generally free to change duties or positions temporarily as an interim measure.
- Compensation should generally be kept the same, absent a ground for discipline.

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Example



Employee who works the front desk of a residence hall is accused of leering at female students who gathered in the lobby before going to a formal. While investigation is pending, employee is reassigned to the housing department's administrative office to assist with clerical matters.

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What about confidentiality?



- FERPA applies to student records and limits institutional ability to discuss student matters.
- No federal law generally makes personnel matters generally confidential, although most institutions have confidentiality policies.
- Public institutions may be subject to specific personnel confidentiality rules.

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Group Scenario



The College's deputy athletics director is a former basketball player and one of the College's most famous alumni. Two athletic staffers make reports to human resources on the same day accusing the deputy of sexually harassing them by repeatedly commenting on their appearances and asking about their sexual relationships with their husbands. The staffers each indicate a fear that they will suffer immediate retaliation from other employees and students who idolize the deputy. One staffer has text messages from the deputy that are explicitly sexual and ask about her sexual encounters. Later that day, the student newspaper publishes an article, citing anonymous sources, stating that the deputy has been accused of sexual harassment. The following day, the Title IX Coordinator receives an anonymous report from a "student athlete" indicating the deputy has made sexual comments to several female athletes and is known to be a "creeper." The deputy has an employment contract that requires "just cause" for termination and has a \$200,000 "without cause" buyout. The Athletics Director wishes to "get in front" of the issue by calling a press conference at which he will strongly denounce sexual harassment in all forms, announce the deputy has been placed on leave, and make clear the institution is "in the process" of parting ways with the deputy.

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Questions



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Chosen Names and Pronouns

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Does the law require the use of chosen names and pronouns?

- Federal law does not (presently) mandate the use of chosen (a/k/a “preferred”) names or pronouns for any student (cisgender, transgender, or otherwise)
- But the refusal to use chosen names and pronouns based on protected status and/or the use of non-chosen names and pronouns based on protected status may constitute discrimination or harassment based on the facts

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Example



Faculty member is concerned they will not be able to remember every student's pronouns. Faculty member chooses never to use pronouns for any student and refers to all students by their chosen first name.

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Example



Faculty member is concerned they will not be able to remember every student's pronouns and elects to refer to every student by either their chosen first name or by the gender-neutral "they/them/their."

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Example



Faculty member dislikes transgender students. Faculty member's default practice is to refer to students by first name but when addressing transgender students, faculty member intentionally uses a misgendered honorific and always uses the transgender student's legal name instead of their chosen name.

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Remember, there are two types of discrimination under Title IX . . .

- Adverse treatment discrimination
- Sexual harassment



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Meriwether v. Hartop (6th Cir. 2021) (1 of 2)

- Institution adopts mandatory chosen pronouns policy
- Faculty member wishes to refer to transgender students by last name instead of chosen honorific or pronouns
- Institution finds faculty member engaged in hostile environment harassment and/or adverse treatment discrimination

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Meriwether v. Hartop (6th Cir. 2021) (2 of 2)

- Faculty member files lawsuit asserting free speech, freedom of religion, and due process claims
- Faculty member's claims survive a motion to dismiss
- Court says: "there is no suggestion [faculty] member's speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits."
- "[Faculty member's] decision not to refer to Doe using feminine pronouns did not have a [systematic effect of denying the victim equal access to an education program or activity]."

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What factors could suggest systematic discrimination?

- Repeated and pervasive conduct
- Reduction in academic performance
- Need to transfer class
- Conduct prompts others to harass/discriminate
- Disruption in class
- Need for counseling
- Others????

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Meriwether takeaways

- Misgendering or failure to use chosen names is not inherently discrimination as defined by law (but may be)
- Faculty members have First Amendment academic freedom rights that limit institutional ability to compel language
- Faculty members with religious beliefs may be entitled to an accommodation (more on that later)

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Chosen name/pronoun policy

- Not required nationally
- Distinction between advisory policies (“should”) and mandatory policies (“must”)
- Consider distinctions between employees and non-employees
- Think about practicality



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Example



Institution enacts policy that states:
“Employees shall refer to all students
by their chosen names and pronouns.”

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What are potential challenges?

- How will employees know?
- How will the institution track?
- Will the institution itself abide by the policy? (i.e., transcripts; official communications)
- How frequently are changes allowed?
- What about non-binary pronouns?
- What if the chosen name is vulgar or disruptive?
- Are there exceptions?

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Example



Institution's policy states: "A student's chosen first name will be used when it is unnecessary for the legal name to be used, it is technically feasible to use the chosen name, and the chosen name is not being used for an improper purpose."

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Are there alternatives to a policy?

- Rely on general non-discrimination and harassment policies and address complaints as made
- Prepare and publish guidance/educational documents



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The Title IX religious exemption

Title IX “does not apply to an educational institution which is controlled by a religious organization to the extent application of [Title IX] would not be consistent with the religious tenants of such organization.”

20 U.S.C. § 1681(a)(3)

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Claiming the religious exemption

- Religious exemption is self-executing and may be asserted directly when needed
- Institution may voluntarily seek assurance of exemption through application to ED



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What does it mean to be “controlled by a religious organization”?

- Defined broadly to include:
 - Divinity schools and seminaries
 - Institution controlled by a particular denomination or religious body
 - Institution is not controlled by a particular denomination or religious body but is a religious institution in its own right

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What factors matter?

- Required membership in religious organization
- Required religious practices
- Statements of faith
- Charters and bylaws
- Selection of board members
- Financial support
- Institutional mission
- Marketing content
- Others?

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Example



Institution is a self-described “non-denominational Christian college.” Mission statement requires adherence to “Biblical teachings” for all employees and students. All employees and students must attend weekly chapel service. Institution’s mission statement references multiple Biblical passages and states that “leading people to Christ” is a core priority of institution.

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Do civil rights laws protect individual religious liberty?

- Title VII prohibits employment discrimination based on “religion”
 - But there is an exemption for religious institutions
- State non-discrimination statutes typically mirror Title VII and may also extend to non-employee students
- Prohibit classic discrimination by adverse treatment as well as failure to accommodate religion
- Apply to both public and private institutions

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What must an employer do to accommodate religious belief?



- Employer must accommodate employee’s sincerely held religious beliefs or practices unless
- The accommodation would impose an “undue hardship”

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What does it mean to have a sincerely held religious belief?

- Whether the employee has a personal, genuinely held belief
- Belief does not have to be part of organized religion
- Belief does not have to be orthodox to the employee's claimed faith
- Religious belief can still be sincere even if recently adopted or occasionally violated
- Religious belief does not have to be validated by a religious leader (priest, pastor, rabbi, imam, etc.) to be genuine

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What does it mean to create an undue hardship?

- The burden must be genuine and not speculative
- The burden must be more than *de minimus*. E.g.,
 - Costly
 - Compromises safety
 - Infringes rights of other employees
 - Violates CBA or seniority rights
 - Would place the institution in legal jeopardy
 - Requires other employees to do more than their share of hazardous or burdensome work

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Kluge v. Brownsburg Community School Corp. (7th Cir. 2023)

- Teacher sought religious exemption from K-12 school district policy that required teachers to refer to students by chosen first name.
- Granting accommodation was an undue burden because teacher's refusal to follow policy harmed transgender students and disrupted the learning environment.
- One judge dissented.

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Groff v. DeJoy (U.S. 2023)

- Supreme Court considering whether the “more than de minimis” test for “undue burden” is correct or should be modified.
- Whether an “undue burden” can be demonstrated merely by showing the requested accommodation would burden co-workers, rather than an employer itself.

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Group Scenario



Fatima is a resident assistant at a public university. The university requires all RAs to use the chosen names and pronouns for all students. Fatima is a Muslim who believes it violates her religion to use a chosen name or pronouns when doing so is at odds with a person's "biological sex." Fatima requests an exemption from the name requirement. She proposes that if a student seeks her assistance who wishes to be referred to by names/pronouns that conflict with Fatima's religious beliefs, she will refer the student to another RA who does not have a religious objection. Another RA, Damian, is a transgender student who has volunteered to work specifically with transgender and other LGBTQ students. Other RAs, who feel unequipped to understand and address specific issues faced by transgender students, have referred them to Damian, with the full knowledge and approval of the RD for the building.

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Questions



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