

Example

A member of the university's board of trustees offers to secure a student's admission to the university's medical school if the student agrees to perform sexual favors the student would otherwise not want to perform.

What factors do we consider in determining a hostile environment?

- The degree to which the conduct affected the complainant's ability to access
- Type
- Frequency
- Duration
- Parties' ages
- Parties' roles and other factors about each party
- Previous interactions
- Location of the conduct and context
- Other case-based harassment at the institution

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What is hostile environment harassment?

Unwelcome, non-based conduct that, based on the totality of circumstances, is **subjectively and objectively offensive** and is so **severe or pervasive** that it limits or denies a **person's ability** to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).



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Question for Discussion	Question for Discussion
What factors in this scenario weigh in favor of a finding of hostile environment harassment?	What factors in this scenario weigh against a finding of hostile environment harassment?

Example

A first-year student is sexually attracted to a graduate student, starts a conversation with the graduate student, and then sends a crude and sexually explicit electronic message to the graduate student. The graduate student initially responds to the message, but then decides to block the first-year student's e-mail address and refuses to be left alone. Two days later, the first-year student sends the graduate student an e-mail expressing his sexual interest and asking the graduate student to have consensual, "two-responsible adults". The graduate student does not respond and never hears from the first-year again, although they occasionally pass each other in a public sidewalk.

What is sexual assault?

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.



Practical Point Every state has laws governing the mandatory reporting of child sexual abuse. Depending on state law, sexual assaults of minors may need to be immediately reported to state or local officials, irrespective of what the victim and/or their parents want to do.	What is domestic violence? <i>Domestic or interpersonal violence committed by a person who:</i> • Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a household member of the victim • Is cohabiting, or has cohabited, with the victim as a spouse or intimate partner • Shares a child in common with the victim, or • Commits acts against a youth or adult victim who is protected from these acts under the family or domestic violence laws of the jurisdiction
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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.

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;
- Where the existence of such a relationship will be determined based on consideration of the following:
 - The length of the relationship
 - The type of relationship, and
 - The frequency of interaction between the persons involved in the relationship.

Example (Poll to Follow)	Example
Griff and Dallas meet at a party and hookup in Griff's on-campus apartment. The two do not see each other again for three weeks, until they meet at another party and decide to hookup again. During the second hookup, Dallas refuses to choke Griff without consent, causing Dallas to pass out.	Ashlin and Dallas live in the same residence hall. Dallas is romantically attracted to Ashlin and asks Ashlin to go with Dallas to a dance. Ashlin declines and indicates she's not interested in Dallas. Dallas then sends Ashlin a friend request on social media and a friend request. A few days later, Ashlin posts a photo of herself at a local party wearing a bikini. Dallas comments on Ashlin's social media, "Gorgeous! Looking hot on!" Ashlin reports Dallas for stalking.

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

Question for Discussion

Do Dallas's actions amount to stalking?

What if, in addition, Dallas repeatedly takes pics of Akilah's common room and tries to get information on Akilah's interests and hobbies from Akilah's friends?

Example

Cyrus is accused of hounding Jamie outside a residence hall. At the hearing, Cyrus testifies I never touched Jamie. We just talked, and I was a huge jerk. Jamie testifies that, after Cyrus hounded Jamie, Cyrus got grouped against a gavelman. The hearing officer finds Jamie more credible and determines a preponderance of the evidence supports that Cyrus hounded Jamie.

Is it retaliation if a respondent files a counter-complaint?

- Only if the counter-complaint is made in bad faith for the purpose of interfering with the complainant's exercise of Title IX rights

Question for Discussion

Can Cyrus be disciplined for falsely testifying that he didn't fondle Jamie?

What if, after the Title IX hearing, the institution uncovered security camera footage that clearly depicted Cyrus grabbing Jamie's crotch, and Jamie pulling away in shock?

Practical Point

Institutions should proceed cautiously and not presume a counter-complaint is retaliatory simply because it comes second. Doing so can create a "here to the Title IX Coordinator" scenario and risks systematic bias against respondents.

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Is there any retaliation that is allowed?

- Some conduct that meets the technical definition of retaliation may be Constitutionally protected
- Freedom speech
- Freedom of association
- Freedom of religion

Example

A chaplain at a private religious institution is accused of sexual assault and refuses to be interviewed by the Title IX investigator. The institution's status prevents it from punishing, punishing, providing spiritual advice, leading Bible studies, and teaching theology classes. The institution's president terminates the chaplain's employment simply because the Chaplain is refusing to cooperate in the Title IX investigation.

Example

A high-profile student athlete at a public university is accused of sexual assault. Over the course of the investigation, it becomes clear the allegations are correct and the student is found guilty. The university's disciplinary committee then issues a suspension from a sport in which the student has a stellar record. After the complaint involves the athlete and a member of the university's basketball team, the suspension is a natural result. After the complaint involves the athlete and a staff on the student newspaper writes a scathing editorial according to the content of the interview the Title IX process and making it harder for "real victims" to be believed.

Can employees be compelled to serve as witnesses?

"Nothing in this definition [of retaliation] ... precludes a manager from requiring an employee or other person authorized by a manager to provide aid, benefit, or service . . . to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under the act."

New Title IX Regulations



What is bias?



- A **prejudice, predisposition, or inclination** in favor of or against a thing or person
- Team members must be free of bias against complainants or respondents generally, or a specific complainant or respondent

Example of Bias

A hearing officer (a faculty member) previously had the complaint as a student. As a student, the student was frequently absent from class and did not do his homework. One day, the student came to class and the student on the stand accused the student of having a paper work stolen and threatening to file the student. The student accused the student "I am irregularly confronted with your performance. This is, without question, one of the fastest and least effective students I have had in my career. I fear your future is bleak."



Example of Bias

An investigator assigned to a sexual assault case also serves on the board of a local sexual assault advocacy organization. The organization recently announced a new campaign supporting sexual assault victims titled, "Believe them all." As a board member, the investigator invited to approve the campaign. The investigator holds the personal belief that persons who report sexual assault should be believed unless objective evidence proves their allegations to be false.

What are stereotypes?

A form of bias that operates as a preconceived, generalized, and sometimes inaccurate belief about a person based on their membership in a group or some other characteristic.



Examples of Impermissible Stereotypes

Members of sports teams and Greek organizations always live for each other.

Women who wear tight dresses and go to parties are looking to hook up.

Men are always the aggressors in a sexual encounter.

Gay men are always physically weak and "effeminate."

Transpeople are looking to draw attention to themselves.

Can the Title IX Coordinator be an investigator?

- No per se rule prohibits Title IX Coordinator from being an investigator
- Title IX Coordinator must be especially attentive to actual or perceived conflicts of interest

What are some of the Title IX Coordinator's responsibilities?	Can the Title IX Coordinator be a decision-maker?
- Coordinate overall Title IX compliance - Answer questions about Title IX programs - Coordinate - Receive reports and complaints - Provide information about options and rights to complainants and others - Coordinate supportive measures - Provide information about grievance processes and internal review - Initiate review processes - Review for conflicts and bias - Coordinate with disability services - Evaluate efficacy of reporting and barriers to reporting - Ensure retention of Title IX records	- No per se rule prohibits the Title IX Coordinator from acting as a decision-maker - Potential for conflicts of interest - Potential to undermine confidence in Title IX Coordinator's ability to effectively serve

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Secondary Steps

Funding

Insert

Does the Title IX regulation define consent?

"The Assistant Secretary will not require a recipient to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment."

New Title IX Regulation



How should we think about consent?

- **Consent is defined**
 - Determined by whether the relevant facts establish conduct that amounts to agreement to be bound by a legal or moral obligation as an agreement is defined by the institution
- **Ability to consent**
 - Determined by whether a person has capacity to consent or whether they have lost such capacity

After how slight of the vagina or anus with any or oral penetration by a sex organ of another related object. This definition also includes if the victim is incapable of giving consent by permanent mental or physical incapacity or influence of drugs or alcohol) or because of consent is not required on the part of the victim to consent.

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How if a person is incapacitated or drugged?

- Loss of ability to make a reasoned decision and communicate
- Loss of appreciation of the nature and fact of sexual activity
- Loss of appreciation of the "who, what, where, when, and how"

Example

Angel went out to a bar with her friends at 9:00 pm and had eight cocktails over the course of two hours. Leaving the bar at 11:00 p.m., Angel was standing alone in a parking lot. Angel attempted to make a call while riding in a cab back to her apartment but could not enter the passcode on her phone. Upon arriving to campus, and before exiting the car, Angel and her friends noticed marijuana. As her friends led her by the hand up to the residence hall's entrance, Angel asked "Where are we?"

What is relevant to determining if alcohol or drugs?

- Time period of consumption
- Nature of alcohol or drugs
- Amount of alcohol or drugs
- Size of the person consuming
- Others?

Nonforcible sexual intercourse with a person who is under the statutory age of consent.



Does retaliation require intent?

- “For the purpose of interfering with any right or privilege secured by Title IX...”
- Requires a subjective state of mind of the respondent

Can peers engage in retaliation?

- "A recipient must prohibit retaliation, including peer retaliation . . ."
- Complaints of peer retaliation may be appropriate for consideration with an underlying report of sex discrimination or sex-based harassment

Discussion

Coordinator engage in retaliation?

X Coordinator always referred distribution to student conduct, is outcome of the Title IX case?

Is it retaliation to punish someone for lying during a Title IX proceeding?

- An institution may punish a person for making false statements in a Title IX proceeding
- Provided there is evidence of falsity apart from the outcome of the Title IX proceeding itself

The was of a conference in a neighboring city
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 society member is identified as a relevant
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 ing so will anger other faculty who are allied with

Questions



Discussion

Can you compel the faculty member to attend a meeting?

Can you compel the institution to have the power to discipline employees to participate?

The Title IX Coordinator and Title IX Team

Module 4

Dr. Robert M. Loeferer

What is a conflict of interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interests, financial interest, prior involvement, and/or nature of position



Team members' general
interest in their
own policy



of interest
not relying

Examples of Conflicts

An investigator assigned to a case testified for the complainant when the complainant was a child in an adult case with the complainant's family.

A hearing officer previously wrote a glowing letter of recommendation for the respondent.

An appeal officer in a case previously supervised the complainant and recommended her termination for performance reasons.

Who can serve as an appeal officer?

- Appeal officer should be a different person(s) than the person whose decision is appealed
- Not decision-maker
- Not determiner of criminal
- Not decider of supportive measures



as an informal resolution facilitator?

- Cannot be the investigator in the same case
- Cannot be the decision-maker in the same case

Who administers supportive measures?



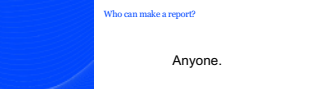
- Title IX Coordinator must "coordinate" supportive measures
- Responsibility for determining supportive measures (or some types of them) can be delegated with appropriate oversight

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What's the difference between a report and a complaint?

- A report is information about potential sex discrimination or sex-based harassment
- A complaint is an oral or written request to investigate and determine alleged sex discrimination or sex-based harassment



Who can make a report?

Anyone.

<http://www.fda.gov/oc/ohrt/>

Must a school provide lactation space?

- Must provide access to lactation space, other than a bathroom, that is clean and private
- Space must be available both for expressing breast milk or for breastfeeding, as needed



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Who is responsible for ensuring accommodations?



- The Title IX Coordinator must "coordinate these actions"
- Title IX Coordinator must ensure that student is provided notification of protections against discrimination and various pregnancy related rights

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Are there reporting obligations for the needs of pregnant students?

- When student informs employee of student's pregnancy or related condition
- Employee must promptly provide student with Title IX Coordinator's contact information and inform student of Title IX Coordinator's ability to prevent sex discrimination and ensure equal access



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Upcoming Title IX Trainings

- Informal Trainer(s) - August 6th
 - 10:00 - 3:30 PM CST
 - August 13th - 14th
 - 1:00 - 5:00 PM CST
- <https://www.huschblackwell.com/titleix-training>

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