

The logo for Husch Blackwell, consisting of a stylized white 'H' shape on a blue background. The top part of the 'H' is a rounded rectangle with two vertical bars inside, resembling a 'B'. The middle part is a vertical bar, and the bottom part is a horizontal bar with a vertical bar extending downwards from its center.

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Informal Resolution Under the New Title IX Regulations and Its Interrelationship With Employment and Title VII

National Conference on Law and Higher
Education



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Title IX Regulations

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Title IX Regulations

- Culmination of rulemaking process began in November 2018
 - 105,000 + comments received regarding proposed federal regulations – rumors have flown for the past year
- Final regulations released on May 6, 2020
 - 2,000+ pages of commentary
- Final rule is effective August 14, 2020
 - Has the force of a federal regulation
 - Compliance with the rule is mandatory, not advisory, as with Dear Colleague Letters





What does the regulation do?

- Sets the standard for administrative enforcement of Title IX
- Will not alter standards for lawsuits seeking money damages for violation of Title IX
- Likely necessitated changes in your institution's Sexual Harassment/Sexual Misconduct/Title IX policy, procedures, and practices



34 C.F.R. § 106.45(b)(9)

Informal Resolution

“[A]t **any time prior to reaching a determination** regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient . . .”

- (i) Provides to the parties a **written notice** disclosing: the **allegations**, the **requirements of the informal resolution process** including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations,
 - provided, however, that **at any time prior to agreeing to a resolution**, any party has the **right to withdraw** from the informal resolution process and resume the grievance process with respect to the formal complaint, and
 - any **consequences** resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- ❖ **See TX Transcript Notation and Information sharing Requirements**
- (ii) Obtains the parties’ **voluntary, written consent** to the informal resolution process; and
- (iii) Does **not** offer or facilitate an informal resolution process to resolve allegations that an **employee sexually harassed a student**.



Written Notice of Allegations

- Identity of parties involved (if known)
- Specific section of institution's policies that have allegedly been violated
- Alleged conduct constituting misconduct
- Date and location of alleged incident
- Sufficient time for Respondent to prepare a response prior to any formal interviews or process
- Background information regarding informal resolution process

34 C.F.R. § 106.45(b)(1)(iii)

Conflict of Interest, Bias, & Training

- **Conflict of Interest/Bias:** Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- **Training:** A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias. . . .
- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;



34 C.F.R. § 106.45(b)(1)(v) Grievance Process Requirements

Include **reasonably prompt time frames** for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals **and informal resolution processes** if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for **good cause** with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.





34 C.F.R. § 106.45(b)(2)(9)

Voluntary Participation

“A recipient **may not** require **as a condition** of

- enrollment or continuing enrollment,
- or employment or continuing employment,
- or enjoyment of any other right,

waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.

Similarly, a recipient **may not** require the parties to participate in an informal resolution process under this section and **may not** offer an informal resolution process **unless a formal complaint is filed.**”



How Do We Ensure Participation is Voluntary?

- Educate the parties and the community about informal resolution options
- Provide Notice of Rights & Options, such as:
 - Whether and when the process can be terminated
 - Whether information shared can be used in subsequent conduct matters
 - How IR differs from formal investigation and adjudication
 - Whether the process involves face-to-face interaction
- Participation contingent on successful completion of preparatory meetings
- Require parties to sign a Participation Agreement
- Frequent check-ins and monitoring



Informal Resolution is Not for All Situations

Factors to consider:

- The nature of the alleged offense
- Whether there is an ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Whether alleged respondent is a repeat offender
- Whether the person alleged to have caused the harm is participating in good faith

Remember: Traditional investigative/adjudicative processes *should* be used when an accused student *denies* responsibility.

Remember: Traditional investigative/adjudicative processes *must* be used an employee is accused of sexually harassing a student



Training

- Training required for all institutional participants in the process, including informal resolution facilitators/mediators
 - Training must be non-biased and not rely on stereotypes
 - Training for institutional participants in a given case must be retained for seven years
 - Training documents must be posted on institution's website



Important Note

- ***An informal resolution process does not delay an institution's duty to conduct a prompt investigation of a complaint***



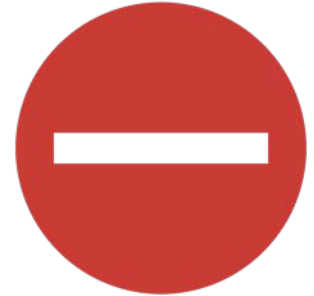
Documentation

- Documentation is key at every step of the way!
 - Initial consent to participate
 - Notice to the parties regarding the allegations
 - Any agreement reached through the informal resolution process should be documented in writing, and signed by all the parties involved



What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a Formal Complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment



The Relationship Between Title VII and Title IX: A Brief Overview

- **What does Title VII do? What does Title IX do?**
 - **How they differ?**
- **When it matters: informal resolution in the interstices of the two statutes**
 - **At the highest level of generality, Title VII and Title IX are statutes which allow covered individuals to seek redress for acts of discrimination. At increasing levels of specificity, distinctions arise...**

- **Title VII of the Civil Rights Act of 1964 achieved the greatest coverage reaching private employers under the Interstate Commerce Clause.**
 - **Title IX of the Education Amendments of 1972 were enacted pursuant to congressional authority under the Spending Clause to reach recipients of federal funds.**

- **Title VII created an express right of action based on employment status and membership in one of the five protected groups; it does not require a contractual relationship.**
 - **Title IX is viewed as creating an implied right of action based on contract: Title IX created a contract under which the federal government agrees to provide funding to an institution so long as it does not violate the statute.**

- **Title VII is susceptible of proof under disparate treatment and disparate impact theories/Title VII looks to results, not motivation.**
 - **Courts have generally followed substantive Title VII law in interpreting Title IX, but the availability of disparate impact theory to challenge facially neutral policies on the basis of their adverse impact based on sex is an open question.**

- **Title VII requires the exhaustion of administrative remedies and has Statutes of Limitations tripwires, but continuing violation theory may lie.**
 - **Title IX has no exhaustion of administrative remedies requirement but availability of continuing violation theory an open question.**

- **The purpose of Title VII is largely compensatory—placing the employee where she would have been but for the discrimination.**
 - **Title IX seeks to remedy gender discrimination in federally funded educational institutions and programs.**

- Subsequent to its passage in 1964, in 1991, Title VII was amended to provide for compensatory and punitive damages, but capped based on the number of employees.
 - Title IX has no damages cap, and the federal government may withdraw funding.

- **Is the choice between Title VII and Title IX “either” or “and”?**
 - **Even though individuals employed by educational institutions are covered by Title IX, a number of those claims are filed under Title VII because of the characteristics I have mentioned: it has the express cause of action, specifically provides for compensatory damages, and doesn’t rely on a contractual framework. Title IX, on the other hand, may be preferable for other reasons. Does a claimant have the option to choose one or the other?**

- **The 5th Circuit and 7th Circuit have held that Title VII preempts Title IX:**
 - **Lakoski v James, 66F.3d 751 (5th Cir. 1995)**
 - Title IX does not provide a direct private right of action for individuals seeking money damages for discrimination by federally funded educational institutions.
 - **Waid v Merrill Area Public Schools, 91 F.3d 857 (7th Cir. 1996)**
 - It is well-established that Title VII's own remedial mechanisms are the only ones available to protect the rights created by Title VII.
- **The First, Fourth and most recently the Third Circuits have held to the contrary—that Title IX rights are independent of and not preempted by Title VII.**
 - **Lipsett v University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988)**
 - **Preston v Com. of Va. Ex Rel. New River Com. Col., 31 F.3d 203 (4th Cir. 1994)**
 - **Doe v Mercy Catholic Medical Center, 850 F.3d 545 (3d Cir. 2017)**
 - The rights under Title VII and Title IX are independent from each other and Title IX should not be preempted by Title VII.

- **Other open issues in the relationship between Title VII and Title IX:**
 - **Bostock v Clayton, 140 S.Ct. 1731 (2020)**
 - Supreme Court issues its long-awaited decision addressing the issue of whether Title VII's prohibition of discrimination on the basis of sex also prohibits discrimination on the basis of sexual orientation and transgender status. A majority of the Court concluded that it did.

- Availability of disparate impact proof process
- Continuing violation theory
- “Reverse discrimination”:
 - Sassaman v. Gamache (2nd Cir. 566 F3d. 307)
 - Sassaman was pressured to resign after a woman he worked with accused him of sexual harassment, and allegedly told afterwards by a supervisor.

Mediation in Context of School Discipline

- **Pros:**
 - Parties decide
 - Empowerment
 - Aligns with educational mission/ Timing?
 - Restorative
 - Cost containment
 - Reach decision all can live with (rather than win/lose through adjudication)
 - Faster result
 - More private/confidential

Administration Change



Clock is Ticking



Divination





34 C.F.R. § 106.45(b)(9)

Informal Resolution

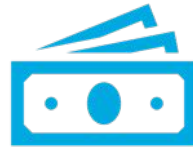
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Why Even Bother With Mediation?



Student
satisfaction



Cost of
administration



Fairness

Skills of an Empath



Other Benefits



RESTORATIVE



NO
PROCEEDING



MORE
REMEDIES



In-house vs. Outside Mediator?



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Legal Issues and Cases

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Legal Issues

- Very few reported cases analyzing informal resolution practices.
- Federal courts have been resistant to allowing deliberate indifference claims based on an institution's use of an informal resolution process in general.
- Key issue is **voluntariness**.
- If the institution follows (or makes a good-faith attempt to follow) its policies and procedures, courts appear to be reluctant to second-guess the decision or outcome.



Takla v. Regents of the University of California (C.D. Cal. 2015)

1. “UCLA handled Takla’s report through what appears to be a **truncated process** called ‘Early Resolution,’ rather than a formal hearing . . . even though [the administrator] learned through her investigation that [Respondent] had previously harassed another graduate student and two junior professors. **This was in violation of UCLA’s own Title IX policy, which prohibits the use of Early Resolution in cases that involve multiple complaints of sexual misconduct.**”
2. Administrator “**discouraged** Takla from filing a written request for a formal investigation, stating that [Respondent’s] peers may well side with him and that Early Resolution would be faster and more efficient.”

Takla – cont'd

3. “Takla requested a formal investigative report after the conclusion of Early Resolution, but was told that **no formal documentation or report existed** because the matter was handled through Early Resolution. This too was **in violation of UCLA’s own policy**, which states that Early Resolution efforts should be documented.”
4. “UCLA took **nine months** to investigate Takla’s report but did not make any findings at the conclusion of its investigation, **again in violation of UCLA’s policy.**”
5. “UCLA **did not inform Takla of the outcome** of Early Resolution or whether Piterberg was sanctioned for his conduct.”

Court denied UCLA’s MTD



Karasek v. Regents of the Univ. of California (N.D. Cal. 2016)

“In arguing that she has made a sufficient showing of deliberate indifference, Karasek asserts that the University improperly used an informal resolution process to address her complaint”

- “[A]t no time during the entire pendency of the early resolution process was [she] allowed to participate in any investigatory or disciplinary process.”
- “During the entire pendency of the investigatory and disciplinary process, Respondent was ‘allowed to remain on campus, unrestricted, creating a sexually hostile environment’”
- Karasek was not contacted during the entire pendency of the informal resolution process and was not given an opportunity either to present her claim at a disciplinary hearing or to appeal the University’s disciplinary decision.”

Court granted UC’S MTD:
“[E]ven assuming that a school’s violation of its own sexual harassment policy is relevant to the deliberate indifference analysis, **Karasek identifies no way in which the University’s use of an early resolution process to address her complaint was in violation of University policy.**”



Karasek (9th Cir. 2020)

- “We might have handled the situation differently, but the Supreme Court has instructed us to ‘refrain from second guessing the disciplinary decisions made by school administrators’ unless those decisions were ‘clearly unreasonable’”
- “[T]he decision to resolve Commins’s complaint informally without allowing Commins to testify or present evidence is troubling, given the context and nature of her assault. . . . Despite these shortcomings, however, UC’s response did not exhibit deliberate indifference. After Commins reported her assault, UC moved quickly to suspend her assailant, and UC imposed fairly stringent sanctions upon resolution of Commins’s complaint. We may disagree with UC’s handling of Commins’s complaint, but that does not suffice for Title IX liability.”

956 F.3d 1093, 1108–10 (9th Cir. 2020) (citing *Davis*, 526 U.S. at 648).

Burtner v. Hiram College (N.D. Ohio 1998)

- “[B]efore the plaintiff left for graduate school in New York, she and the other female student signed off on an informal grievance procedure. [Respondent] also signed off on the procedure which found that he had violated the school’s sexual harassment policy.”
- “Even if Plaintiff Burtner could establish actual notice in this case, she cannot show that Defendant Hiram College was deliberately indifferent to her situation after it received her complaint.”





Hayut v. S.U.N.Y. (2nd Cir. 2003)

- “That the [university administrators] also sought to address the matter informally does not suggest any attempt to stymie more formal measures, as the grievance procedures for the SUNY defendants permit concurrent informal complaint processes.”
- **Affirmed SJ in University’s favor:** “We, therefore, find that, on the undisputed facts of this case, no reasonable jury could conclude that the response by the individual defendants, on behalf of the SUNY defendants, exhibited deliberate indifference. It follows that there is no evidence supporting Title IX liability against the SUNY defendants.”



Questions & Discussion