



**HUSCH BLACKWELL**

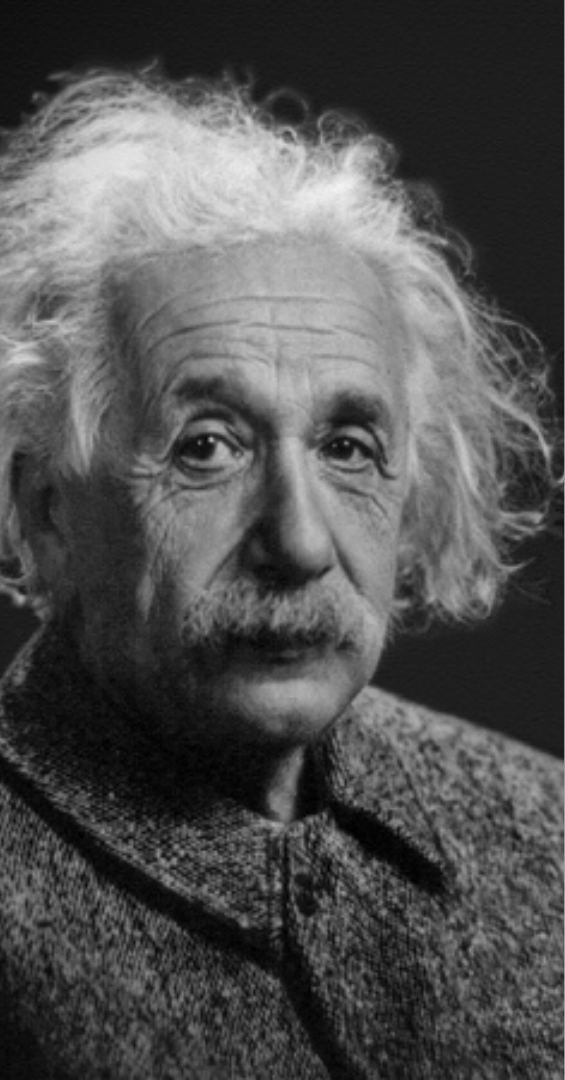
# **Title IX & Sexual Harassment Response**

Participants in Sexual Harassment Policy Process  
Fall 2020



- It's the first day of the Fall semester
- Catherine gets a call from an anonymous student that, over the weekend, she saw sophomore John Respondent punch Respondent's boyfriend, Roy Complainant, in a public parking lot.
- The anonymous student informed Catherine that she was concerned for Complainant because Respondent has been verbally abusive to Complainant throughout their relationship & the violence appears to be "escalating."
- This is the second complaint the University has received about Respondent's treatment of Complainant. In the first one, the University honored Complainant's request to not intervene.

what  
happens  
next



# Theory of Applicability

- $AK + SH + EP + US = IX$
- If any of these elements do not exist, there is no obligation under IX regulations

# “Actual Knowledge” (AK)

- “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a **recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient . . . .**”
- In the postsecondary context, notice to the Title IX Coordinator always constitutes actual knowledge. The determination of whether another employee is an “official with authority to institute corrective measures” depends upon the institution’s operational structure and the employee’s specific roles and duties.



# “Sexual Harassment” (SH)

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Sexual harassment means conduct *on the basis of sex* that satisfies one or more of the following:

- An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- 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; or
- “Sexual assault” as defined in Clery Act, “dating violence” “domestic violence” or “stalking” as defined in VAWA.

# “Educational Program or Activity” (EP)

- Locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs
- “Substantial control” → while factors “such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred . . . may be helpful or useful for recipients to consider . . . to determine the scope of a recipient’s program or activity, no single factor is determinative.”

# “Educational Program or Activity” (EP)

“a recipient’s Title IX obligations extend to incidents of sexual harassment that occur **off campus** if any of three conditions are met:

- the off-campus incident occurs as part of the recipient’s **‘operations’**;
- the recipient exercised **substantial control over the respondent and the context** of alleged sexual harassment that occurred off campus; or
- the incident of sexual harassment occurs at an off-campus building **owned or controlled by a student organization** officially recognized by a postsecondary institution.”



# Practical: Theory of Applicability

- $AK + SH + EP + US = IX$
- If any of these elements do not exist, there is no institutional obligation **under IX regulations**
- Just because it's not IX does not mean we don't deal with it





# Application to Employees

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The regulation's mandatory requirements for investigation and grievance procedures apply to cases involving students and employees

- Regulation does not distinguish between at-will employees or those under an employment contract
- Regulation does not distinguish between classes of faculty
- Regulation does not supplant other institutional obligations under Title VII or other employment laws

# Title IX Coordinator Responsibilities

## When AK + SH + EP + US

“promptly contact the complainant to discuss the availability of supportive measures”

“consider the complainant’s wishes with respect to supportive measures”

“inform the complainant of the availability of supportive measures with or without the filing of a formal complaint”

“explain to the complainant the process for filing a formal complaint”

“Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party”

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- “Other similar measures”



## Return to Hypo

1. What supportive measures might we consider here?
2. What do we do if Complainant says, “I just want to be left alone”?
3. Can we suspend Respondent on an interim basis?



# Can we utilize interim removals or suspensions for students?

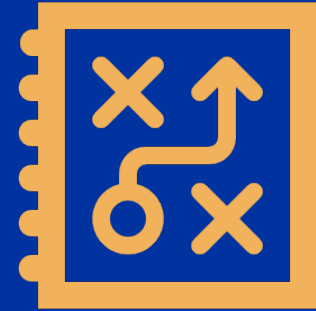
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Students may be removed on a temporary basis only if:

- Individualized safety and risk analysis
- Determines that 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

# Example of immediate threat to physical health or safety

Student A is reported to have raped Student B at gunpoint. Police engage in hot pursuit and apprehend Student A attempting to flee campus. When apprehended, Student A is found in possession of a loaded and unregistered firearm.



# Example of no immediate threat to physical health or safety



Student A reports that Student B committed sexual harassment by repeatedly posting pornographic images on Student B's door in a Greek house. Student A does not allege that Student B has engaged in any physical conduct. When notified of formal complaint, Student B agrees to voluntarily remove images and cooperate with investigation.



# Can we place employees on administrative leave?

- Yes – employee respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies (i.e., Faculty Handbook)



# “Explain to the Complainant the Process for Filing a Formal Complaint”



- “Formal complaint means a document filed by a complainant or **signed by the Title IX Coordinator** alleging sexual harassment against a respondent **and** requesting that the recipient investigate the allegation of sexual harassment.”
- “At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”
- Practical Q: Should IX Coordinator ask for investigation if Complainant doesn’t?

# What Happens When It's IX + FC?

- Notice to the respondent “upon receipt of a formal complaint”
- Sufficient details known at the time and with sufficient time to prepare a response before any initial interview → identities of the parties involved, the conduct allegedly constituting sexual harassment, & the date and location of the alleged incident.
- Q: What does that look like here?

# What Happens When It's IX + FC?

The written notice must:

- include a statement that the respondent is presumed not responsible
- inform the parties that they may have an advisor of their choice and may inspect and review evidence
- inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

## What happens if we start investigating other allegations not in initial notice?

- “The recipient must investigate the allegations in a formal complaint.”
- If no SH + EP + US then “**must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”





“The recipient **may** dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.”

# Documentation & Recordkeeping

A recipient must maintain for a period of **seven years** records of –

- A. **Each sexual harassment investigation** including any determination regarding responsibility and any audio or audiovisual recording or transcript . . . , any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant . . . ;
- B. **Any appeal** and the result therefrom;
- C. **Any informal resolution** and the result therefrom; and
- D. **All materials used to train** Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

# Documentation & Recordkeeping

Additionally, “For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, **including any supportive measures**, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient’s education program or activity. **If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable** in light of the known circumstances.”