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Before the New Title IX Rules Drop

Issues in Higher Education Webinar Series



Presenters



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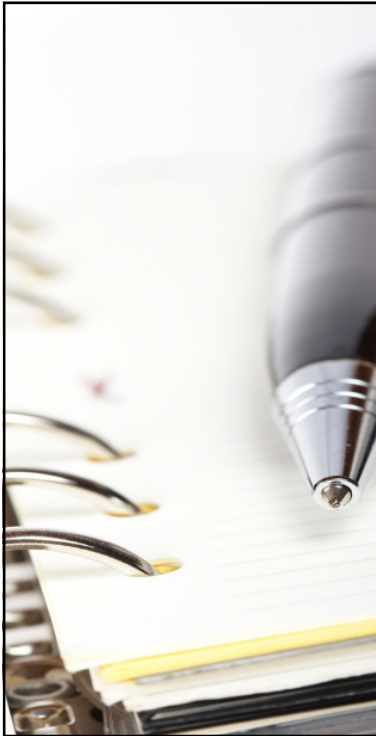


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Agenda

- **Title IX Considerations in light of Covid-19**
 - *Completing Investigations*
 - *Providing Interim Measures*
 - *Processing New Complaints*
- **New Trends to Consider Before the Rules**
 - *Sanctioning Guidelines and Mitigating/Aggravating Factors*
 - *Pivoting from “training” to “professional development”*
 - *Concerns specific to graduate programs*



When Are the New Regulations Expected?



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What do we know?

- Multiple calls for ED to not release Title IX regulations now
- No clear response... yet
- Rumor for release of final rules “now-ish”
- OMB meetings scheduled through Apr. 16

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Election Year

- ED is motivated to release
- Rules not finalized soon could be overturned through the Congressional Review Act
- Congress has 60 legislative days to enact a resolution to invalidate a new regulation
 - By simple majority of both chambers
 - Danger zone hits over the summer

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COVID-19

Investigations, Interim Measures, and New Complaints

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Investigations

- Title IX obligations do not dissipate in a pandemic
 - Compliance risk
 - Deliberate indifference liability (civil actions)
- OCR
 - Ask for extensions as necessary



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Investigations

- Remote investigations
 - Trust
 - Confidentiality
 - Availability



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Technology Tips

Interview Platforms

- Zoom
- GoToMeeting
- WebEx
- Google Hangouts
- Skype

Document Sharing

- Box
- Google Drive
- Sharepoint

- Encryption/security: talk with IT/CIO

(not an endorsement)

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Best Practices for Remote Interviews

- Control the environment
- Be familiar with the platform used, and ensure interviewee is, too
- Make sure the complainant and respondent know they can have a support person on the line
- Rely on parties to help get contact information for witnesses



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Other Investigatory Issues

- Physical evidence
- Providing access to a Preliminary Report
 - Google Drive
 - OneHub
 - Box
- Familiarize yourself with any “lock down” options

Waivers

- Acknowledgment regarding confidentiality of reports
- Comply with existing procedures as much as possible
- Avoid adopting a blanket policy of postponing investigations

Interim Measures

- Individualized services offered to a complainant and/or respondent prior to and during an investigation
 - Obligation will continue even during remote learning



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Campus Counseling

- Telehealth: Use of audio/video platforms or other telecommunications technologies to provide long-distance health care, including therapy
- Considerations
 - In-state vs. Interstate
 - HIPAA
 - Insurance/ risk management
 - Impact of Emergency Declarations

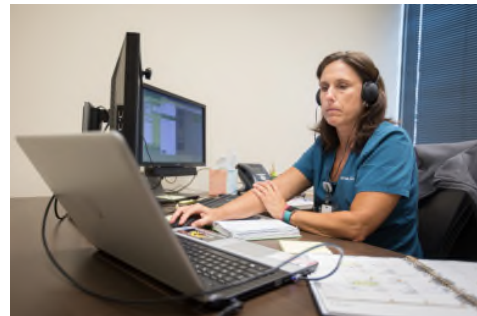


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Telehealth

- Require student consent that expressly address insurance and privacy issues
- Have students check with their insurance providers teletherapy coverage
- Ensure your liability insurance permits the provision of teletherapy in these circumstances



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Community Referrals

- The community in which the university resides vs. the community in which the student now resides
- Can the community resources you typically use continue to address student needs?
- What community referrals are made by the universities in the area which the student is currently residing?
- Consider adding to your rights and options to inform students that you can help them find local resources.



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Responding to New Allegations

- Look at your policy
 - Online course/related conduct
 - Off-campus conduct
 - Virtual conduct
- *Knew or Should Have Known* standard
 - Responsible employee obligations



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Top “To Dos” for Title IX Coordinators

1. Educate leadership about need to continue work and any necessary modifications
2. Learn available technology tools and their features
3. Consider updating your rights and options to include notice about support for finding local resources
4. Level-set all investigators on virtual interview strategy, techniques
5. Identify a protocol for sharing reports virtually
6. Be knowledgeable about what virtual capabilities your advocacy and counseling teams have
7. Ensure/ recommend consultation with IT/CIO on use of those tools, security and encryption
8. Ask whether your institution has a heat map identifying displaced students
9. Plan to overcommunicate
10. Be ready to get creative and think outside the box; and be ready to rely on partners (legal, student affairs, etc.)

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Before the Final Rule: Emerging Practice Trends

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Common Sanctioning Issues

- A common practice has been for institutions to grant wide latitude to sanctioning officials.
- Common problems:
 - Lack of consistency in sanctions for similar circumstances
 - Lack of clear explanation (and written record) of why sanctions should differ in similar circumstances
 - Failure to address expectations following disciplinary action (e.g., participation in athletics/extra-curriculars)
 - These issues can play out in a negative and public way, as well as through appeals and legal challenges.

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Sanctioning Trends

- As a result, we see institutions working to mitigate these risks:
 - Trend 1: Enhanced training for sanctioning officials
 - Trend 2: Tracking sanctioning decisions and evaluating for overall trends and problems
 - Trend 3: Development of sanctioning guidelines and matrices
 - Trend 4: Addressing expectations following disciplinary action

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Trend 1: Enhanced Training

- Institutions are focusing greater attention on training for sanctioning officials.
- Mitigating and aggravating factors warranting reduction or increase of appropriate sanction
- Documenting the sanctioning decision



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Aggravating and Mitigating Factors

- Common factors:
 - Prior disciplinary history
 - Egregiousness of misconduct (e.g., act of violence, use of a weapon, use of drug)
 - State of mind of respondent (bias-motivated, reckless or negligence)
 - Safety risk to the broader community
 - Impact statement
 - Conduct during the investigation and adjudication (cooperative or less than cooperative)
 - Circumstances accompanying a lack of consent (e.g., force, threat, coercion, intentional incapacitation)
 - Position of trust/ power differential

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Trend 2: Sanctioning Guidelines

- Institutions are experimenting with sanctioning guidelines to provide a range of acceptable sanctions for specific offenses.
- Providing examples of misconduct to complement definitions
- Common challenge: Some may seek a highly prescriptive sanctioning matrix (e.g., if this offense, then that decision)
- This approach eliminates all discretion, and may be too formulaic making it difficult to defend.
- Best practice is to use sanctioning guidelines as advisory, giving the official discretion to consider aggravating and mitigating factors

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Trend 3: Expectations Upon Return

- An emerging best practice is to set expectations for at the sanctioning-stage.
 - *Example:* Student suspended for engaging in dating violence will not be permitted to participate in band upon her return
 - Eliminates confusion or vagueness as to whether individual has full privileges upon their return

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Sanctioning Best Practices

- Sanctions should be ***applied*** in a manner that furthers the institution's disciplinary philosophy
- Sanctioning decisions should be ***documented*** to include the aggravating and mitigating factors that were relevant to the decision
- Sanctioning guidelines should ***preserve discretion***
- Sanctioning officials should address expectations for ***return*** of students/staff following suspension

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Trend 4: Title IX Coordinator Oversight

- Recommended best practice for Title IX Coordinator to track sanctioning decisions.
- Categories to consider:
 - Sanction
 - Violation type
 - Circumstances
 - Status (staff, faculty, student)
 - Gender
 - Race
 - Relevant mitigating or aggravating factors



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Tracking

- Common challenges in tracking sanctions:
 - “Closing the loop” on decisions that are made outside of the process
 - Accounting for aggravating and mitigating factors that factored into the disciplinary decision.
 - Once you have the data, what do you do with it?
 - What to do if data suggests a misapplication of sanctions? (e.g., potential bias, lack of consistency, special treatment of certain sub-groups, etc.)
 - Consult legal

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Training v. Education

- The floor
- Compliance
- Check-the-box
- Mandatory
- Online training
 - Same each year
 - Easy
 - Reporting not prevention
- Aspirational
- Shifting culture
- Principled approach/ encouraged participation
- Meaningful discussion
- Multiple touchpoints
- Coordinated branding
- Consistent messaging
- Deeper

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Process for Enhancing Education

- Inventory training programs
 - Reporting obligations
 - Rights and options
 - Prevention
 - Bystander intervention
 - Health and wellness/ healthy relationships
 - Implicit bias
 - Affirmative consent
- Inventory offices providing same
- Evaluate consistency and quality control



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Enhancing Education (continued)

- Evaluate delivery methods
- Recognize contributions from all
- Build trust to form internal community of practice
- Seek input
- Build a “brand”
- Consider specific coordination role

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Special Considerations for Graduate Programs

- Graduate programs are unique environments
- Investigations, interim measures and sanctions can have significant impact for individuals beyond parties and witnesses



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Considerations

- Continuation of funding and purchasing, etc.
- Niche academic areas – limited individuals who can step into missing roles
- Recruitment of new students and communication



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Considerations

- Attendance at conferences
- Timing of investigation/ findings
- Increased concern from students about retaliation
 - Retaliation can look different, be more subtle and harder to prove
 - EG: neutral reference letter



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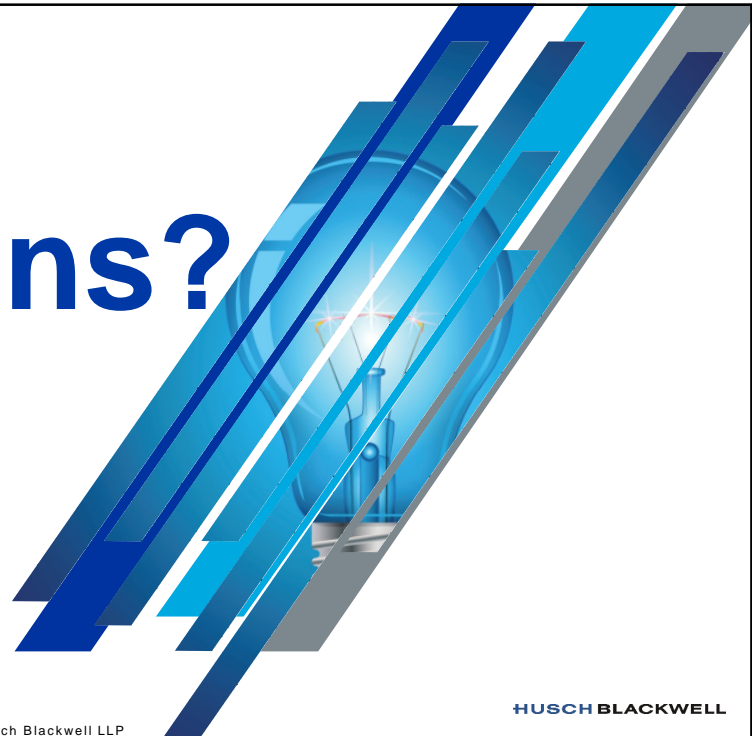
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Recommendations

- Balance “need to know” with “need to manage”
- Recognize that every graduate program is different
- Recognize you may not fully understand the domino effect
 - Find a Dean or Department Chair to assist and manage



Questions?



Thank You

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