

Title IX & Due Process

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Agenda

1. Introduction
2. Title IX Regulations & Due Process
 - Implications
3. Walsh v. Hodge Opinion (5th Circuit)
4. Forecast & Questions: On the Horizon?



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Introduction



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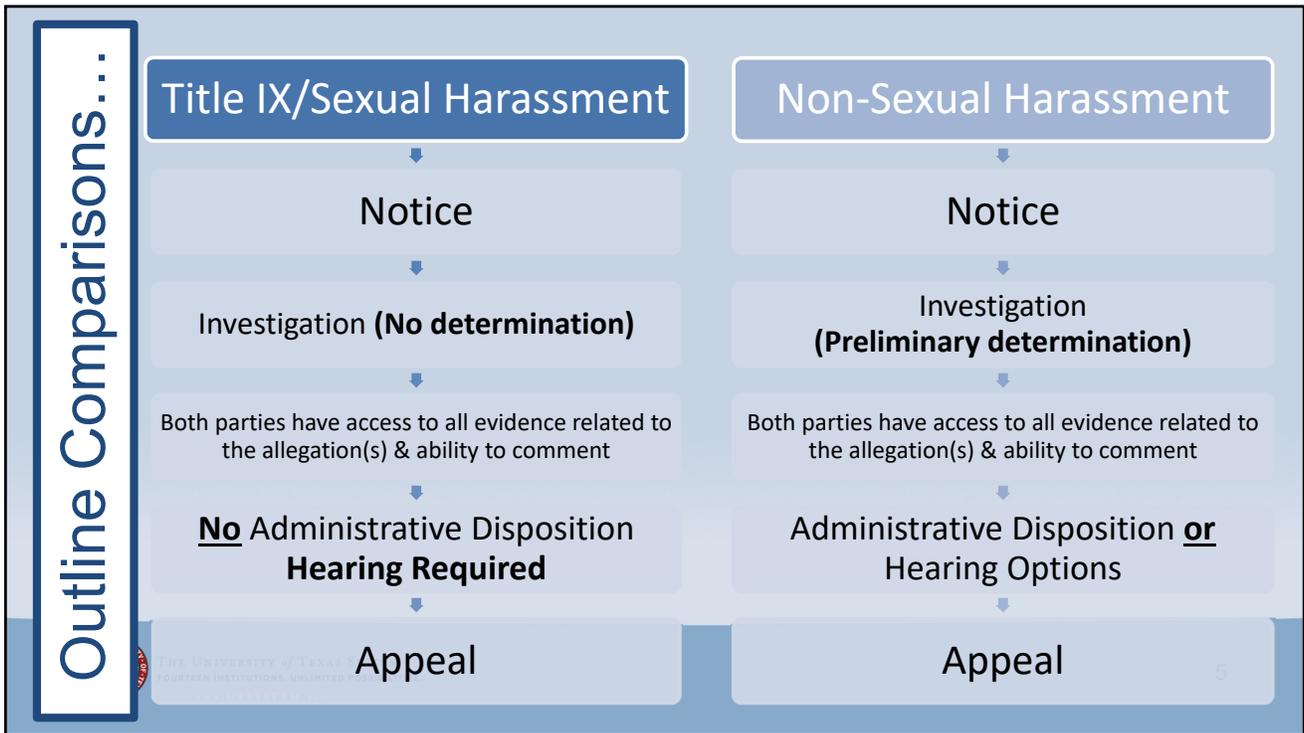
Title IX vs. Title VII Comparison

Title IX	Title VII
Prohibits sex discrimination in education programs or activities (applies to students & employees).	Prohibits sex discrimination in employment.
Recipient obligation to respond when definitional & jurisdictional elements apply...that is not "deliberately indifferent"	Employer obligation to respond to quid pro quo or hostile environment (severe or pervasive) sexual harassment...exercise "reasonable care"
Institutional Process: Notice, Opportunity to Respond, Live Hearing, Appeal	Institutional Process: Notice, Opportunity to Respond. Typically concludes with report and referral to supervisor.
Cross-examination required at hearings by the Parties' Advisors	
Formal rules of evidence do not apply...	



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Presentation of Witnesses and Exhibits

Formal rules of evidence do not apply.



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Witness Questioning under Title IX

- Questioning conducted by each party's **advisor**.
- **Institution** provides advisor to question witnesses at the hearing, if either CP or RP doesn't have an advisor of choice.
- **Hearing officer** rules on relevance for **every question**.



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Exclusion of Statements

Not submitting to cross-examination:

If a **party or witness** refuses to submit to any cross-examination questions during the hearing, the **hearing officer** will not rely on any statement of that party or witness, when reaching a responsibility determination.



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Possible Exclusions:

- Statements against interest by RP
- Statements made by CP
- Statements made by nurse as author of SANE exam
- Statements made by any person who does not attend hearing
- Emails/Texts



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Possible Exclusion (Example)

- W1: Hey, how was the party last night?
- RP: I got too drunk. LOL.
- W1: Did you see CP?
- RP: Yeah, but I did something stupid. I pinched CP's butt.



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Possible Exclusion (Example)

- W1: Hey, how was the party last night?
- RP: ~~I got too drunk. LOL.~~
- W1: Did you see CP?
- RP: ~~Yeah, but I did something stupid. I pinched CP's butt.~~



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But, An Exception on Exclusions...

“A respondent’s alleged verbal conduct that itself constitutes the sexual harassment at issue is not the respondent’s ‘statement’ as that word is used [in the regulations] because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself.”

- OCR Blog, May 22, 2020



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Exclusion Exception (Example)

- RP: If you go out with me, I’ll give you an A in the course.

Because this is the underlying conduct and it is not a “factual assertion to prove or disprove the allegations,” this remark may be considered by the hearing officer even if the RP does not submit to cross examination.



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No Inference Based on Absence or Refusal



“[T]he decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”



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The background of the slide is a photograph of a grand, classical-style building, likely a courthouse, featuring tall, fluted columns and a wide set of stone steps leading up to the entrance.

Due Process Update...

Walsh v. Hodge (5th Circuit)



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Cross-Examination Comparison Sexual Misconduct Hearings

Possible Views	
1. No cross-examination necessary...	Investigator testimony sufficient.
2. Indirect cross-examination...	Questions submitted & managed through Hearing Officer or Panel.
3. Direct cross-examination...	Questions asked directly by the party's advisor.



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Required by Title IX Regulations



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Overview & Setting: Walsh v. Hodge

- Walsh, 2 colleagues, & 2 medical students go to conference in Seattle.
- Banquet dinner with alcohol: “festive and somewhat boisterous”
- Student #1 (CP) filed sexual harassment complaint against Walsh (RP) when back in Texas.



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Allegations: Walsh v. Hodge



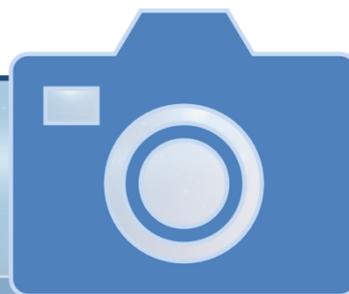
- Walsh (RP) put his arm around CP, rubbed her back, & touched her buttocks.
- RP stood beside CP and looked down CP’s dress.
- RP asked whether he should come to CP’s room.
- Next morning, RP wrote email saying that CP and Student #2 could do some “hands on” training which CP interpreted as sexually suggestive.



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Walsh's Response: Walsh v. Hodge

- “Flirtation was mutual”: CP & RP held hands all night, danced together, & CP willingly sat on RP’s hand
- Photos (evidence)



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Faculty Termination Hearing: Walsh v. Hodge

- Photos **not** admitted into evidence.
- CP (Student #1) did not testify: **Investigator** relayed to the hearing panel what CP stated.



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5th Circuit Response: Walsh v. Hodge

“In this case, where **credibility** was critical and the sanction imposed would result in **loss of employment** and likely future opportunities in academia, it was important for the Committee to hear from Student #1 (CP), and Walsh (RP) should have had an opportunity to test Student #1’s credibility.”



5th Circuit Response (Cont.): Walsh v. Hodge

“[D]ue process in the university disciplinary setting requires some opportunity for **real-time cross-examination**, even if only through a hearing panel. We stop short of requiring that the questioning of a complaining witness be done by the accused party, as we have no reason to believe that questioning by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.”



Cross-Examination Comparison Sexual Misconduct Hearings

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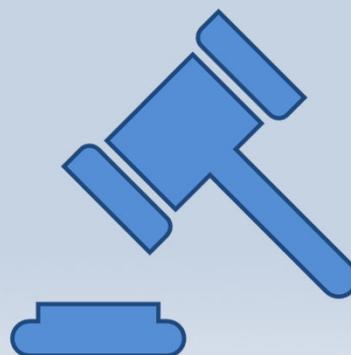
Possible Questions to Legal Affairs



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1. Relevance Rulings

Instead of the hearing officer ruling on the **relevance** of each question posed for a witness, can the hearing officer just say in the beginning that the hearing officer considers all questions relevant unless objected to or unless the hearing officer interrupts and says a question is irrelevant?



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2. Separation Accommodations



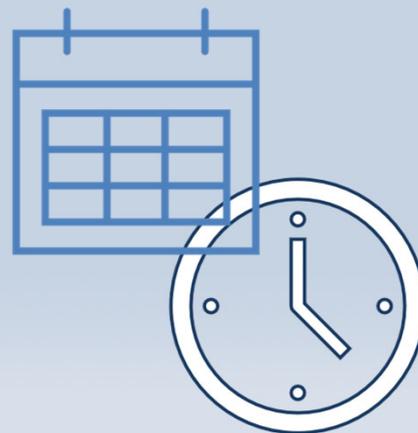
A sexual misconduct hearing is occurring over Zoom. One of the parties does not want to (a) **see** or (b) **hear** the other party. How can this be accommodated? Can either party turn the camera off so the other party doesn't see them?



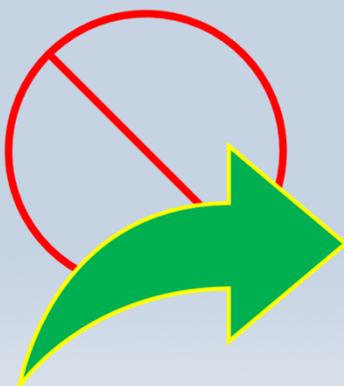
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3. Policy Application

In preparing for an upcoming hearing, it's noted that the alleged conduct occurred in the Spring 2020. But the hearing will be in December 2020, after the new regs went into effect. Which policy should apply—the old one or the new one?



4. Mandatory Dismissals



The alleged conduct in a sexual misconduct case occurred off-campus outside any official university function. Under the university's policy, this formal complaint meets the "mandatory dismissal" requirement under Title IX because it allegedly didn't happen as part of the institution's "educational program or activity." But the Title IX Coordinator's dismissal letter says the case will proceed. How can the formal complaint be dismissed and yet still proceed at the same time?



5. Appeals Officers

Who should hear the appeal of a sexual misconduct case?

What about for appeals of formal complaint dismissals?



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6. Redactions



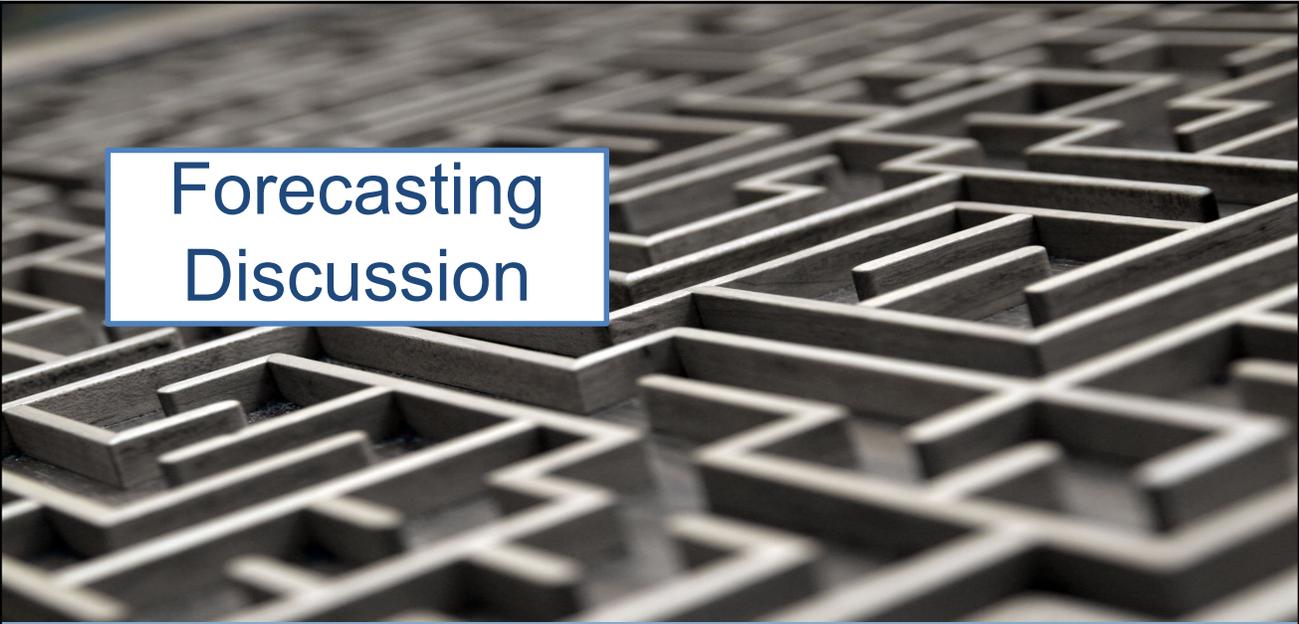
An investigation report is being prepared to be sent to both parties (and advisors), and the investigator redacted the following:

- a. Medical documents
- b. Personal information (address, phone #)
- c. Witness statements

Are these redactions permitted?



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Forecasting Discussion



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Q & A



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