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**Title IX:  
Where We Are In 2018**

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Heartland Campus Safety  
Summit

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# Poll Everywhere



Text the word  
"HUSCHEDU" to  
22333 to join

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## How do you feel about the current state of Title IX?

Great  
Good  
Neutral  
Not Good  
Bad

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# The Law Itself

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## Title IX



“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . .”

20 U.S.C. § 1681(a)

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## No person . . .

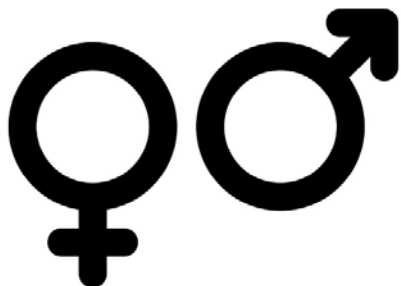
- Any person who participates in education programs or activities at the time of the alleged misconduct



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## On the basis of sex . . .



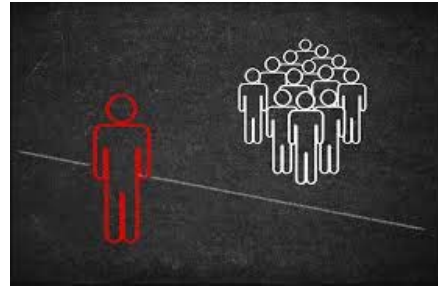
- Adverse treatment is because of a person's sex; or
- Adverse treatment is sexual in nature

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## Excluded from participation . . .

- Explicitly excludes; or
- Conduct sufficiently serious such that it has the practical effect of excluding



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## Education programs and activities . . .



- All the “operations” of the institution
- Academics, employment, activities, and outreach

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## Receiving financial assistance. . .

- Compliance with Title IX is a condition to participating in federal financial aid programs
- Non-compliance could result in loss of funding



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## Title IX: Institutional duties



- No institutional sex discrimination by policy or practice
- Obligation to respond to and address known sexual misconduct

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**Administrative  
Enforcement**

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**My institution has modified its Title IX practices in light of the current administration's guidance.**

True

False

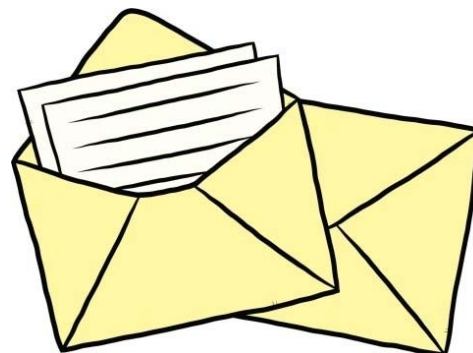
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## September 2017 DCL

- Rescinded most Obama-era guidance
- Relies on 2001 guidance and new 2017 Q&A



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## Key elements of rescinded guidance

- 60 day timeframe
- Mandatory preponderance standard
- Mutuality of appeal
- Discouragement of cross examination
- Ban on use of sexual history
- No reliance on criminal investigation
- Investigation of all reports, regardless of location
- Interim measures burden falls on respondent

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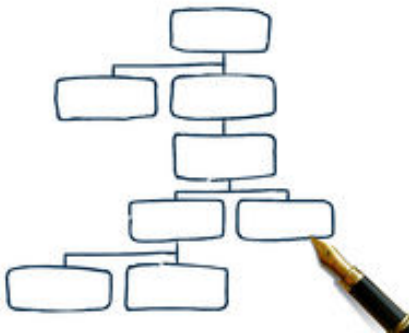
## Explanation for rescinding

- “Imposed new mandates”
- “Improper pressure . . . to adopt procedures that do not afford fundamental fairness”
- “Led to deprivation of rights for many students”
- “Not succeeded in providing clarity”
- “[I]mposed these regulatory burdens without affording notice and the opportunity for public comment”

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## Rulemaking process



- ED intends to engage in rulemaking process with notice and comment
- New approach will “respond to the concerns of stakeholders” and “align with the purpose of Title IX to achieve fair access to educational benefits”

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I have read the 2011 Revised Sexual Harassment Guidance

True

False

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## 2011 Guidance

- “Sexual harassment is unwelcome conduct of a sexual nature.”
- Sexual harassment is a “form of sex discrimination prohibited by Title IX.”



## 2001 Guidance continued

- “[B]oth male and female students are protected from sexual harassment engaged in by a school’s employees, other students, and third parties.”
- “[G]ender-based harassment . . . based on sex or sex-stereotyping . . . is also a form of sex discrimination to which a school must respond.”

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## 2001 Guidance continued

- Sexual harassment is discriminatory when it is quid pro quo or hostile environment.
- If a student engaged in discriminatory sexual harassment against another student that the school knows or should know of “the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.”

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## 2017 Q&A

- Sub-regulatory guidance that is technically advisory
- Preview of formal regulations to be released for notice and comment



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## Promptness



- 60 days expectation has been removed
- OCR evaluates school's good faith effort to conduct "fair, impartial investigation in a timely manner"

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## Standard of proof

- Option to use either preponderance or clear and convincing
- But standard used for sexual misconduct cases should be consistent with that used for other forms of misconduct



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## Appeals

- Appeals are optional
- May allow only for responding party
- If allowed for both, must use equally available procedures



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If one student accuses another of sexual harassment, and they share a class, my institution is most likely to move which student to another section

The complainant

The respondent

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## Interim measures

- Prohibits schools from relying on “fixed rules or operating assumptions that favor one party over another”
- School cannot make interim measures available only to one party
- Institution must make “every effort to avoid depriving any student of her or his education”

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## Written notice



- Should be given once investigation is opened
- Sufficient factual details
  - Identities of parties
  - Specific policy provisions
  - Precise conduct
  - Date and location
- Sufficient time to prepare before “initial interview”

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## Anticipated regulations

- Likely to be released before end of 2018
- Short notice and comment period
- Anticipated to take effect 2019



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## Potential additional elements



- Change in OCR enforcement standard
- Narrowing of “responsible employee” definition
- Mandatory investigation of multiple offenders

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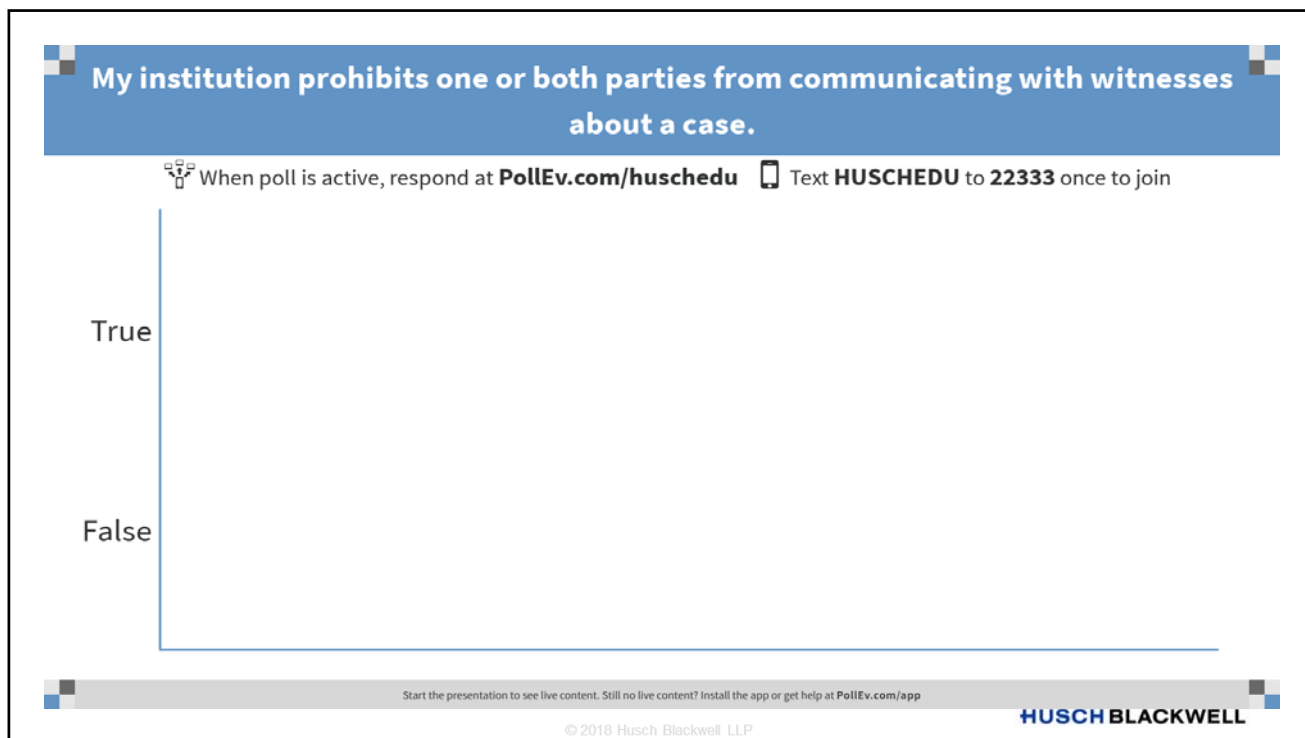
## Potential additional elements (cont.)

- Clarification of off-campus responsibility
- Minimum due process for interim suspensions
- Policy must include presumption of not responsible until found responsible
- Policy can expressly allow for dismissal of cases that do not constitute sexual harassment even if allegations are true

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## Potential additional elements (cont.)

- No restriction on parties' ability to gather or present relevant evidence
- *Brady*-style obligation to produce investigative file
- Cross-examination in hearings and an effective substitute if following a civil rights model

I think cross-examination is . . .

A bad thing that will deter reports and intimidate victims

A good thing that will bring fairness to the process

I don't have an opinion

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## Potential additional elements (cont.)

- Three year records retention minimal requirement
- Obligation to maintain and produce training materials
- Express FERPA preemption
- Self-executing religious exemption



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# Industry Trends

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## Standard of proof

- Almost all institutions maintaining preponderance
- Preponderance likely to continue as industry standard



## Consent



- Most institutions maintaining affirmative consent standard
- Unlikely anticipated regulations will alter

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## Support services

- Continued increase in utilization of advocacy and counseling
- Substantial investment in expanded capacity
- Respondent-focused resources



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## Gender identity



- Still unresolved nationally
- ED and DOJ may issue formal guidance
- More institutions including gender identity as protected category

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## Cross-examination

- Public institutions under pressure from court decisions to allow
- New regulations will likely apply to all institutions



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## Informal resolution



- Increasingly promoted and used by institutions for non-violent cases
- Eases administrative burden on investigators and adjudicators

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## Historic reports

- #MeToo resulting in rise in historic reports
- Many institutions undergoing self-imposed historic reviews
- Trend of historic cases likely to continue



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**My institution has received a historic report (conduct occurring least 5 years ago) since this academic year started.**

True

False

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# Litigation Trends

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## Historic view



- Courts very deferential to disciplinary decisions
- Disciplinary hearings not expected to be trial-like

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## Current trend

- Rise in number of respondent-filed due process cases
- Courts much more willing to critique processes



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## Greatest due process risks

- Inadequate initial written notice
- Failure to provide supplemental notice
- Unfair exclusion of evidence/witnesses
- Denial of right to confront evidence
- Lack of cross-examination or effective substitute

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## Doe v. Baum

- Sexual assault case
- “He said/she said”
- Turned on credibility
- Dismissal was the sanction



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## Due process holding

“If a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”

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## Reverse Title IX claim

- Plaintiff alleged sufficient facts to proceed on a claim the decision was the result of anti-male bias
- Key facts
  - Public pressure for university to crack down on male rapists
  - University discounted credibility of respondent's witnesses because they were “fraternity brothers”

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## Other trends

- Respondent defamation suits
- Title IX/ADA/Section 504 hybrid suits
- State-law anti-discrimination suits



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## Questions



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