

LEGAL UPDATES

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Title IX Considerations in the Era of COVID-19

Title IX obligations continue despite the COVID-19 pandemic. As many schools have implemented stay-at-home orders with students moving off campus, the means by which institutions are fulfilling these obligations are changing. This alert provides practical guidance for Title IX coordinators and investigators for responding to a variety of issues and demands. In light of the ever-changing landscape, we advise you to consult with your legal counsel to obtain legal advice specific to your circumstances.

Conducting remote interviews

Many institutions have already adopted some remote investigation practices, particularly to support investigations with study-abroad students and investigations conducted by outside investigators. There are a variety of technologies to help institutions conduct interviews and share information among various parties and witnesses. As an initial matter, we recommend that Title IX coordinators consult with their information technology (IT) department Chief Information Officers (CIOs) to determine which systems are best suited to their unique online environment. Additionally, IT and CIO partners can help Title IX teams assess the privacy and security risks of such tools and encryption capabilities, as well as troubleshoot problems relating to such tools.

Video conferencing through tools such as Skype, Zoom and WebEx allows investigators an opportunity to build trust, establish rapport, and assess body language, and are preferred over audio-only conferencing tools. The following are recommended best practices for conducting remote interviews:

1. **Control the environment.** Dress professionally and find a quiet space where you will not be disturbed. Use your technology tool to preview

your interviewee's view of your working space. Secure any confidential information, so it is not visible.

2. **Ensure privacy.** To facilitate a confidential and often sensitive conversation, notify the interviewee in advance that you will be using video conferencing. Suggest that the individual find a private location to participate in the video call. Ensure that the area in which you are working will not be accessed by other persons during your interview.
3. **Know your technology.** Be familiar with the technology tool you are using and its features (e.g., mute, chat, share screen, turn video on/off, switch in/outputs for microphone and speakers). Be ready to help the interviewee troubleshoot.
4. **Include support persons.** In advance of an interview, remind the interviewee of their right to have a support person on the line, including through the video conference, and invite this support person to join the remote meeting.

Sharing reports and other evidence remotely

Recognizing some variability, institutions of higher education generally follow one of three procedures to provide preliminary reports and evidence to the parties for their review:

Providing a copy of the report;

Providing a redacted report, while allowing the parties to view unredacted information in-person at a scheduled time; or

Providing only in-person access to the report at a scheduled time.

While institutions should comply with their applicable procedures and past practice to the greatest extent possible, stay-at-home orders and other COVID-19 prevention measures may render in-person report inspections difficult or impossible.

To address this need, there are a variety of technology tools that can serve as a substitute for in-person review. Some applications, such as Google Drive, Onehub and Box, allow individuals to access information remotely through web-based platforms with functionality allowing the institution to “lock down” documents, thereby prohibiting a user from downloading or printing documents. Of course, nothing is foolproof, and such applications cannot prevent an individual from using their cell phone or other device to produce an image of their computer screen.

To the extent that your institution only permits in-person review of reports and evidence as an effort to help protect the privacy interests of all parties and witnesses involved—and you wish to transition this practice to an online platform—it is worth emphasizing to the parties the institutions’

expectations for use of any documents shared remotely. Indeed, using this as a teaching opportunity to explain the underlying reasons for any prohibitions against copying, removing, or photographing information, in addition to any preclusion on sharing or disseminating that information, can help the party understand not only the bounds of their access, but the reason for such a restriction. At the same time, institutions must exercise care not to overstep and inadvertently infringe upon any rights of the parties to discuss the allegations or investigation.

For institutions transitioning the function of sharing the preliminary report to an online platform, it is recommended that they comply with past practices regarding which information is shared. For example, if historically parties were able to review in person the entire investigative report and underlying evidence, the institution should continue to allow for inspection of that same body of information through the online platform.

Providing interim measures

Interim measures are individualized services offered to a complainant and/or respondent prior to and during an investigation. Institutions' obligation to provide interim measures continues even if students have left campus due to COVID-19 prevention measures. As an initial matter, the Title IX coordinator should revisit interim measures currently provided to students to evaluate the need for any change in light of the COVID-19 pandemic, particularly in light of students' departures from campus and other COVID-19 prevention measures where applicable.

Going forward, Title IX coordinators must be knowledgeable about what resources and services are being continued during this time, and whether the delivery of those services is changing due to the pandemic. For instance, referrals to campus-based counseling services are one example of an interim measure that would certainly change under stay-at-home orders. If these services are being provided online, it is recommended that, if possible, campus counseling provides telehealth services to allow for continuity of care and/or that assistance is given to students to transition to care from a counselor in their local area. Please review *Counseling During Campus Closure: Telehealth and Licensure*, which specifically addresses the provision of teletherapy to students during this pandemic.

Other considerations for Title IX coordinators are the institutions' efforts to assist individuals in making reports to law enforcement and providing referrals for local community services. With students returning home, and potentially dispersed across the country, institutions' current local resources may no longer be the best option to support those students. Title IX coordinators should evaluate whether local community resources to which students are typically referred are capable of addressing students' needs if they have left the area. Additionally, as needs in other cities and states may arise, Title IX coordinators may want to consider reaching out to other Title IX coordinators to build a community of practice and to help identify other resources that are local to students in need.

10 Practical tips for Title IX coordinators in addressing COVID-19-related Title IX concerns

1. Educate institutional leadership about the need to satisfy civil rights obligations and continue Title IX-related work. Inform them about any necessary modifications to existing practices.
2. Consult with your CIO and/or IT department regarding the use of technology tools, particularly with regard to security and encryption.
3. Learn available technology tools and their features.
4. Level-set all investigators on use of technology tools, virtual interview strategies and related techniques.
5. Be knowledgeable about what virtual capabilities your advocacy and counseling teams are implementing, if any.
6. Identify a protocol for sharing reports and evidence virtually.
7. Consider updating your “rights and options” notifications to include a notice about providing support to your students and other university community members in identifying other resources and services in their now-local community.
8. Ask whether your institution has a heat map identifying the locations of displaced students. If not, consider creating one, to the extent possible, to assist with your efforts to support parties involved in Title IX matters.
9. Plan to over-communicate with parties, support persons and witnesses.
10. Be ready to get creative and think outside the box. Rely on both inside and outside partners, including your community of practice, to successfully complete investigations, adjudicate claims and support students.

FAQs

Below, we have included questions posed by participants during a recent Husch Blackwell webinar addressing Title IX issues in light of COVID-19.

Can institutions postpone investigations until students return to campus?

No. Institutions should not adopt a blanket policy postponing all investigations. You may have complainants who decide they are no longer interested in pursuing an investigation due to a change in circumstances resulting from COVID-19, but institutions must allow complainants to make this

determination themselves. In accordance with your policy, institutions should also continue to investigate allegations that are serious enough to warrant moving forward irrespective of the complainant's wishes (e.g., assault with a weapon, pattern of perpetration or other immediate safety risk to the community). At the same time, depending upon the facts of the case and the willingness of the parties, institutions can be flexible in terms of both whether to proceed and the timing in which the investigation will be conducted, in accordance with your policies and existing practices. Recognition of the unique circumstances created by this global pandemic is more than reasonable, so long as institutions do not, even inadvertently, deprioritize allegations or the rights of parties.

What if the complainant wishes to postpone an investigation, but the respondent wishes to proceed?

Institutions should ensure that any decisions they make are fair, reasonable and provide procedural protections to all parties. Any request to postpone an investigation due to COVID-19-related concerns, which may be reasonable for a variety of safety, administrative and personal reasons, must be balanced with the harm such a request, if granted, could cause to the non-requesting party or to the investigation overall. For one thing, respondents may want to proceed in order to get the benefit of witness' recollections that may be fresher now or evidence that may be more readily available now than later. Further, where the respondent is subject to an interim measure (e.g., a registration hold or an interim suspension), any unreasonable delay in investigating and adjudicating a complaint may be unfair to the respondent or create risk to the institution. Given the potential impact to respondents, institutions should only consider delaying an investigation until student return where both parties agree or where a delay can occur in a manner with adequate protections for the rights of the respondent. On the other hand, some reasonable delays due to the pandemic, particularly in these first few weeks of adjustments, are expected and reasonable so long as the institution clearly communicates with the parties about these circumstances.

Instead of emailing or sharing a report through a document-sharing platform, can we set up a video call with the party and share our screen?

We understand that some institutions are considering this option, as it may reduce the likelihood that a party takes a photograph of the preliminary report. As a practical matter, this may be time-consuming for your Title IX office. Furthermore, if your past practice has been to allow the party to be alone with a report, your presence on a video chat while a party reviews the report may undermine an existing expectation of privacy in this circumstance.

If your policy only allows for in-person review of certain information, and you are working with highly sensitive information and anticipate a meaningful risk that information from a report may be disseminated in violation of your policy, one possible solution is to rely on your community of practice to arrange a socially distanced visit with a partner in their location (e.g., a peer institution, a law firm

or mediation center) at which the parties can review the information at that location. In so doing, the institution should consider utilizing a Family Educational Rights and Privacy Act (FERPA) release with the parties, so that this information can be permissibly shared with your partner for the purpose of facilitating the review and to ensure that the information will not be redisclosed.

Can we record online video interviews? How do we make sure the parties don't record?

Institutions should comply with their past practices regarding recording by both the interviewer and interviewee. If your policy prohibits the parties from recording an interview, institutions should stress that requirement to the parties. While it may be near-impossible to ensure that the parties are not recording remotely, covertly doing so in violation of policy could be grounds in and of itself for disciplinary action, and furthermore may, in some states, be a violation of state law. As such, clear and consistent communication, on an ongoing basis, about your policies and procedures is important.

Critically, institutions should not use the recording feature on a technology platform without fully vetting how the recording is stored. As a best practice, institutions should continue to record interviews using the same tools you previously used. If you want to utilize the recording tools on external platforms, be sure to consult with your IT department or CIO regarding encryption, security and storage.

What about live hearings? Should we continue to conduct hearings in-person, or via video conferencing?

At this time, moving live hearings to a remote format is advised. While the decision will depend on whether your state or locality has issued a shelter-in-place or stay-at-home order, and how your institution is implementing COVID-19 prevention measures, using video conferencing is likely the easiest – and safest – means of conducting the hearing. The video conferencing tools we mentioned earlier allow for multi-party video conferencing, so all parties can see, hear and talk to each other. There are also technology tools that allow for “break-out” rooms, where the parties can consult with their counsel (as appropriate) and support persons, who may be located remotely from the party, in a private manner. The submission and sharing of evidence in advance of the hearing, which may already be required in your policy, will help ensure that the hearing can be conducted smoothly even in a remote setting.

If for some reason a remote hearing is not possible, your institution must carefully weigh the rights of the parties, the requirements of your policies and procedures, the state and federal requirements or advisements regarding stay-at-home orders and essential activities, and public safety in deciding whether to go forward with a live hearing in-person or postpone the hearing. It is unclear and may depend on applicable government orders (which may not address this issue), whether these hearings would be considered “essential,” and thus take place in-person. Whether to host a live hearing,

postpone a hearing until a stay-at-home order is lifted or conduct a remote hearing may be one of the toughest questions facing Title IX coordinators in the near future, and we strongly advise consulting with your attorneys to make these decisions on a case-by-case basis.

Contact us

Husch Blackwell's Higher Education practice team continues to monitor state and federal guidance and enforcement actions in this area. Should you have any questions, please do not hesitate to contact Julie Miceli, Mary Dewese or your Husch Blackwell attorney.

COVID-19 resource

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.