



Drafting a Notice of Investigation for Civil Rights/Title IX Cases



Disclaimer



- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- We have a variety of stakeholders here, so please keep that in mind.
- Watch for your “Thanks for Attending” email, which will include a link to the **slides** for this webinar.
- Yes, you may share the slides with your colleagues! You also have permission to post them if you consider this part of your Title IX training.

Agenda



- What is the purpose of notice?
- Regulatory requirements
 - Title IX
 - Other laws
 - Constitutional Due Process
- What does a good notice look like?
- When do you amend your notice?

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What is the Purpose of Notice?

Hint: It's not just compliance.

Institutional Ethic of Care



- Fairness
- Integrity
- Honesty
- Transparency
- Parties feeling heard

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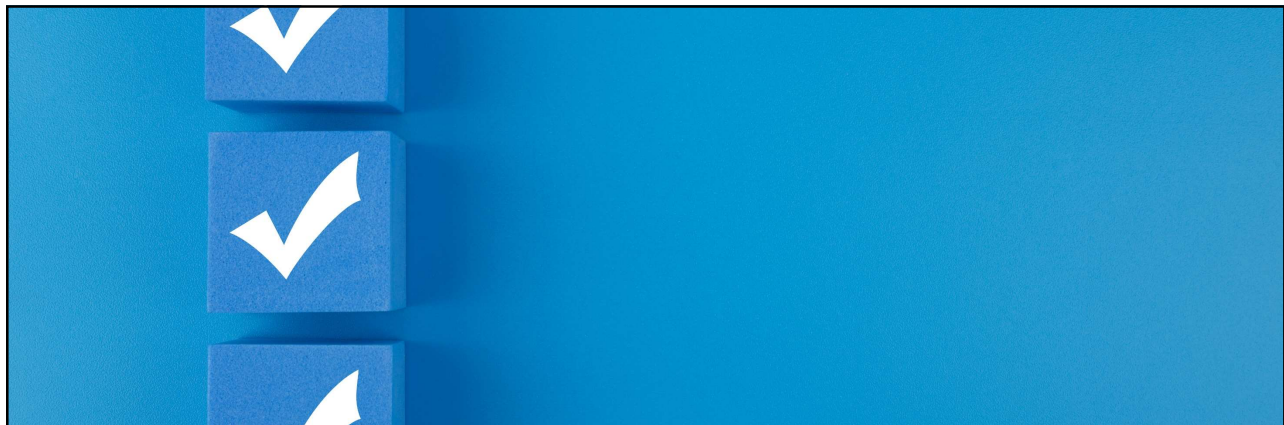
Who Needs the Notice?



- Intake personnel should be conscious of what information is required in the formal complaint and the notice so they can help obtain the information.
- Investigators and decision-makers need it to establish their scope.
- Parties and advisors need it to help define what information is relevant and what information they wish to provide.
- Coordinators need the notice because it documents that they addressed all potential policy violations.

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Connect the Dots



Regulatory Requirements

Title IX etc.

Title IX Requirements



- 34 CFR 106.45(b)(2) – Must provide to the parties
 - Notice of the grievance process
 - Notice of the allegations of sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
 - Identities of the parties involved in the incident, if known
 - Conduct allegedly constituting sexual harassment
 - Date and location of the alleged incident, if known

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Title IX Requirements (cont.)



- Statement that the respondent is presumed not responsible for the alleged conduct
- Statement that a determination regarding responsibility is made at the conclusion of the grievance process
- Parties may have an advisor of their choice, who may be, but is not required to be, an attorney
- Parties and their advisors may inspect and review evidence gathered during the investigation process
- Inform the parties of any provision in the code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

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Other Civil Rights Laws



- Title VII – None
- ADA/504 – None
- Title VI – None

What's up with that? But check your policies, as they may be more specific.

Consider: Should parties get less notice in cases involving other types of allegations? Is there a downside to giving more notice?

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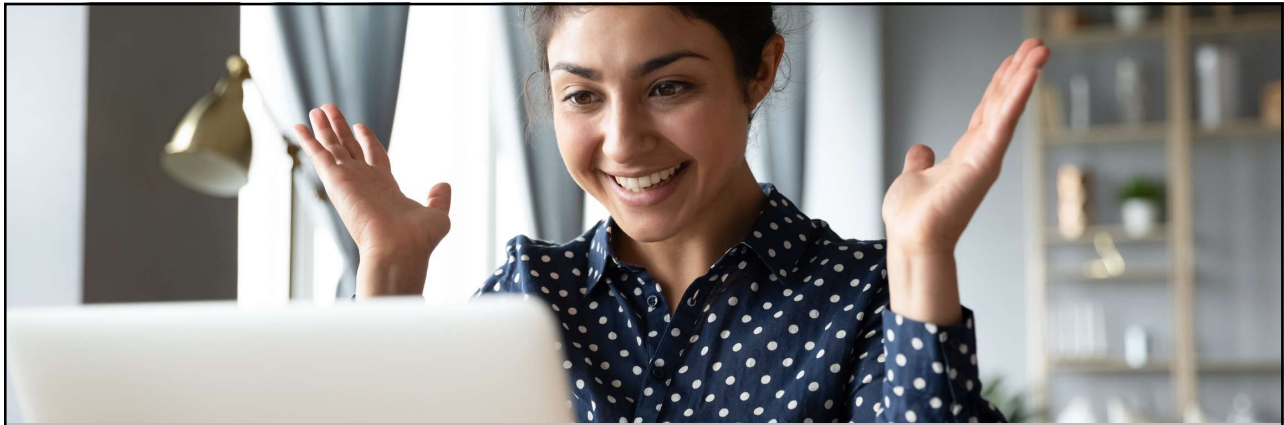
Constitutional Due Process



- Must provide notice of the allegations and an opportunity to be heard
 - Notice – Understand the charges sufficiently to defend oneself
 - Opportunity to be heard – Must be appropriate to the nature of the case

Private institutions are not held to constitutional due process standards, but instead are held to a contractual “good faith and fair dealing” standard – which may be satisfied in the same manner. (Lots of case law developing the nuances here.)

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Good Notice

Let's talk best practices.

Allegations



- Be specific! Consider attaching the formal complaint.
- Include parties, dates, locations, and conduct.
- “Title IX Sexual Harassment” is too broad. Is it quid pro quo?
Stalking?
- What specific sections of the policy might have been violated?
- Make sure to use the policy prohibitions that were in place at the time of the prohibited conduct.
 - You can't get a ticket for running a stop sign that won't get put up until tomorrow.

Allegations: Identities



- Can a complainant remain anonymous?
 - Under Title IX, the notice of allegations must include the name of the parties “who are known.”
 - If the institution knows who the complainant is, the name must typically be provided.

Consider: How can a respondent properly prepare to defend against the allegations if they don't know who the complainant is?

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Allegations: Identities Pt. 2



- Consider whether it is helpful to include the relationships of the parties.
 - Relationship to the institution
 - Student, employee, third party? This matters for Title IX jurisdiction.
 - Relationship to each other
 - May be important if there is a power differential underlying the reported conduct

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Allegations: Conduct



- Be specific as to the types of sexual activities that are reported as non-consensual or to be violent.
 - Example: Sexual Assault can be anything from unwanted grinding on the dance floor to nonconsensual penetration.
- When handling discrimination cases, include all given examples of both direct discrimination and disparate treatment.

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Allegations: Date and Location



- Date helps identify which policy language was in effect at the time of the conduct.
- Location helps to identify whether the conduct was in the context of your education program or activity.
 - Title IX: Does it fall within the scope of the regulated conduct?
 - Other civil rights laws: If it occurred off-campus, is it within the scope of jurisdiction in your policy?

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Allegations: Bad Examples



- Respondent is alleged to have engaged in sexual harassment in violation of the Title IX Policy.
- Respondent is alleged to have engaged in unwanted oral sex with Complainant.
- Respondent is alleged to have engaged in stalking of Complainant between January and June 2022.

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Allegations: Good Example Pt. 1



- Complainant reported that Respondent engaged in the following conduct:
 - On January 21, 2022, in Respondent's residence hall room, Respondent performed oral sex on Complainant without Complainant's consent.
 - On January 28, 2022, Respondent continued to text Complainant after being told to leave Complainant alone.
 - On January 29, 2022, Respondent followed Complainant from her residence hall to her class, then waited outside to talk to her.

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Allegations: Good Example Pt. 2



- If true as reported, Respondent may have violated the following provisions of the 2021-2022 Title IX Policy:
 - Section X.4 – Title IX Sexual Harassment – Sexual Assault
 - Section X.5 – Title IX Sexual Harassment – Stalking

A copy of the 2021-2022 Policy is attached.

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To Whom Do You Send It?



- To both parties (and their advisors, if known).
- They both need the same information about allegations and policy violations.
- You can write two separate letters, or you can cc: the complainant on the letter to the respondent.
 - The complainant may find it jarring to receive a letter addressed to the respondent.
- Pro tip: Choose a format that facilitates a repeat of the same information in both letters, regardless of recipient.

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Incomplete Formal Complaints



- Formal complaints for purposes of Title IX must allege conduct that, if true, would constitute Sexual Harassment.
 - If it's an "unwelcome conduct" prong, or stalking is alleged, the impact is an element of the formal complaint.
 - Initial assessment may require that the formal complaint be amended to include necessary information prior to sending Notice.
- Outside the Title IX context, "formal complaints" aren't necessarily required. Check your policy for specifics.

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What if I'm not sure about...



- Be careful of falling into the trap of pre-adjudicating cases before issuing notice.
 - Initial assessment, yes. "This could potentially constitute..."
 - Pre-adjudication, no. "There is no way they will have the evidence to support..."
 - This is an art form, not a science.

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Multiple Policies?



- If something could be both Title IX and Non-Title IX, note that in the notice. Respondents should understand that both definitions apply.
- If other policies might apply (e.g. prohibited relationships, acceptable use policy), consider including notice of these as well, even if they may not use the same adjudication process.

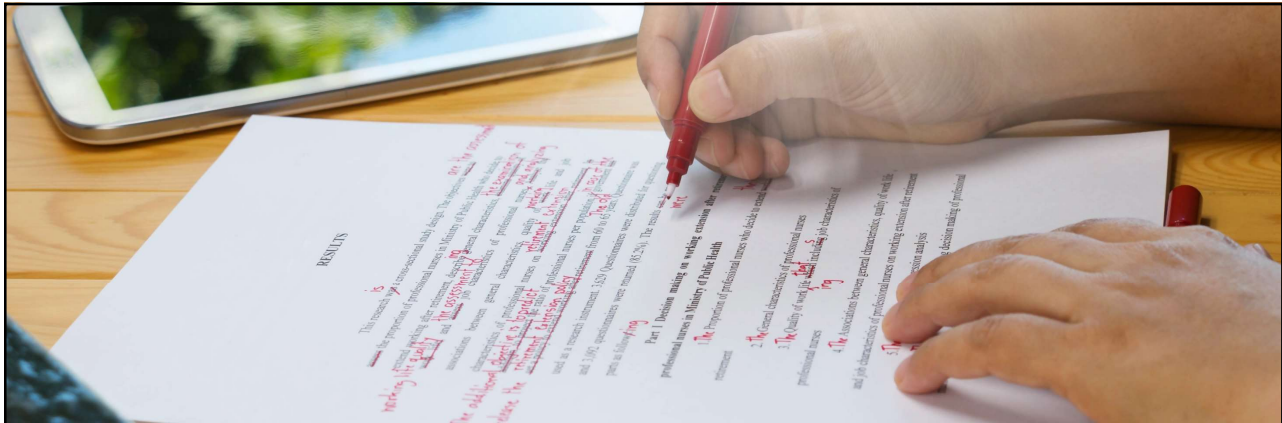
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Things You Don't *Have* To Include...



- How to access supportive measures
- A reminder that retaliation is prohibited, including who to contact if retaliation occurs
- How to request an interpreter* for the party or their advisor
- How to request disability accommodations for the process
- Name of investigator(s) and how to raise concerns about bias or conflict of interest
- Lists of confidential resources
- Information on how to access an institution-appointed advisor if available at this point, in these circumstances

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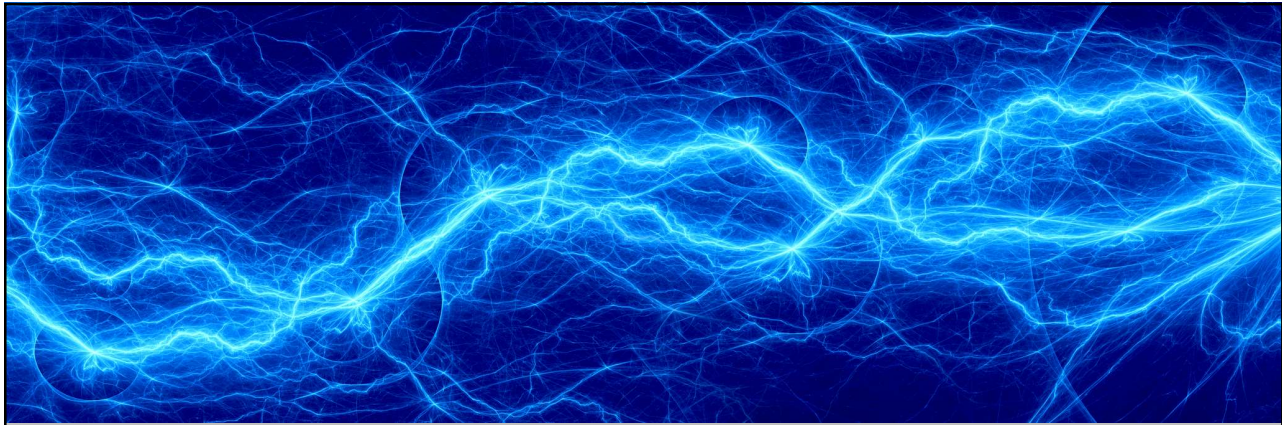
Amending Notice

When do you do it?

When Do You Amend Your Notice?



- Investigators should consider themselves mandatory reporters.
- Any time they learn of a potential policy violation, they should report it to the Coordinator.
- The Coordinator should decide whether the conduct can be added to the current investigation. Factors to consider:
 - Same parties? Same type of conduct? Same policies?
 - More examples to demonstrate violations?
- Issue an amended notice so that investigators may ask questions about additional conduct that must be adjudicated.



The Notice – At the End

Views from the Decision-Maker

When writing a decision



- It is helpful to have the notice of allegations attached to the report.
- The notice will be what the decision starts with, to set forth the potential allegations and policy violations.
- The decision will be limited to the allegations and policy violations in the notice.
- Think of it like an electric current – the notice connects to the investigation, which connects to the report, which connects to the decision. The current can't grow between stages, but it can flow.

Upcoming Events



Go to www.bricker.com/events -

- Nov 3rd - Title IX Level 1, 2, and 3 start up again
- Nov 4th - In-Person Hearing Training in Dayton, OH on November 4th
- Nov. 16th – Free webinar: Title IX Litigation Update
- Dec. 21st – Free webinar: Potential Implications for the U.S. Supreme Court’s Decision Impacting Affirmative Action
- Feb. 16th – Free webinar: Clery Hot Topics

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