



HUSCH BLACKWELL

Trident University International
a member of the AIU System

Title IX Training - Day 1

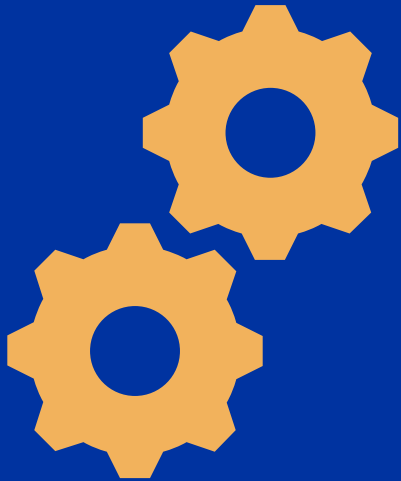
July 2022



Housekeeping

- **Recording is not permitted**
- Slides will be provided by email after the training concludes
- Change Zoom name to match registration
- Raise hand or use chat function to ask questions
- Other breaks—take individually as needed

Group Scenarios



Breakout Groups

- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Scenario and questions for each Group
Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Cameras on for breakouts



Agenda

- Overview of Title IX / Regulatory Update
- Title IX Policy & Key Definitions
- Non-Title IX Misconduct
- Pregnancy Discrimination
- Transgender Legal Considerations

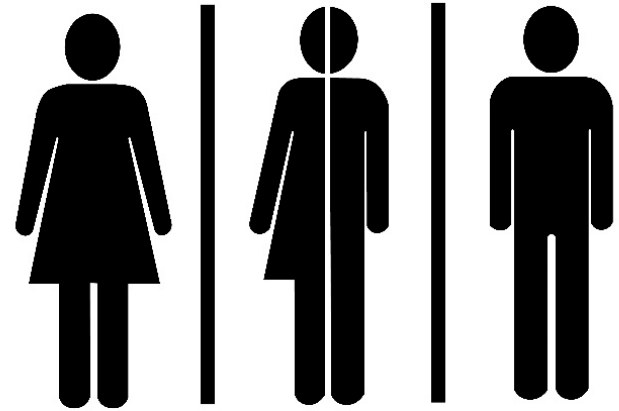


Module 1: Overview of Title IX / Regulatory Update

What is 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.”

32 C.F.R. § 106.31



Who does Title IX apply to?

- Entities that receive federal financial assistance, including colleges and universities that participate in Title IV funding
 - Not individual persons
 - But institutions are required to adopt policies and procedures to implement Title IX that *do* apply to individual persons

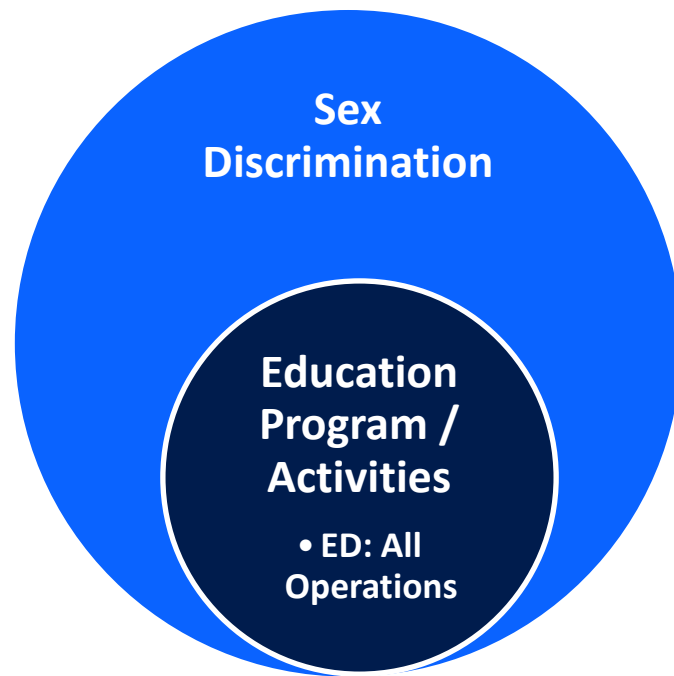


Poll question #1

- Does Title IX apply only to academic activities and athletic participation?
 - Yes
 - No

What sex discrimination does Title IX apply to?

- Title IX applies to sex discrimination in the “education program or activity” of a federal funding recipient
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



What are examples of education programs and activities?

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on campus

Sports teams

Work-study

Games, concerts, and speeches on-campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus

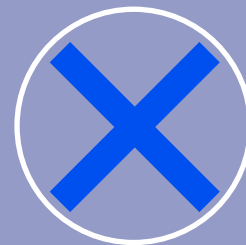
Does Title IX apply to off-campus sexual harassment?



Yes, if the conduct at issue occurs in the context of an education program or activity



Yes, if the conduct at issue occurs in a house owned or controlled by an officially-recognized Greek organization or other student organization



No, if it occurs in a private location and is not part of an institution's education program or activity



Example #1 (included in EP&A)



Student is sexually assaulted in a library study room on-campus. The sexual assault occurs on a Saturday evening. The identity of the perpetrator is not immediately known.



Example #2 (included in EP&A)

—

The debate team travels to a different school for a tournament and stays overnight at a hotel. At the hotel where the team is staying, the advisor sexually harasses the team's captain.





Example (excluded from EP&A)



During spring break, two students travel to another state and stay at an all-inclusive resort owned by a prominent hotel chain. The students booked the trip on their own for leisure purposes. While staying at the resort, one student sexually assaults the other student.



Does Title IX apply to sexual harassment in other countries?

- No – the Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- Other countries may have laws that govern sexual harassment





Additional Legal Considerations



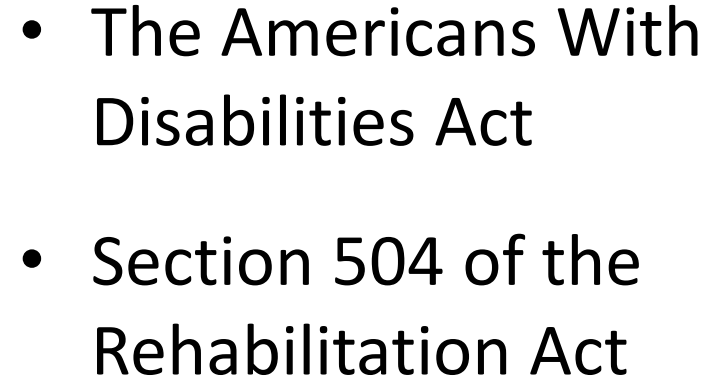
The Clery Act

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 U.S.C. section 1092(f)), a federal law that requires institutions to collect and publish statistics for certain crimes reported to have occurred on the university's "Clery Geography" (i.e., occurring on campus, on public property within or immediately adjacent to campus, and on other non-campus university property), for the purpose of informing current and prospective students, faculty or staff.



Violence Against Women Reauthorization Act of 2013

- Codification of Title IX principles
- Sexual misconduct policy
- Statements of rights and options
- Support persons
- Training



FERPA

- Sexual harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Records containing identifying information on students are subject to FERPA analysis
- The Title IX regulation contains an express preemption, permitting FERPA-protected material to be used as required by Title IX itself





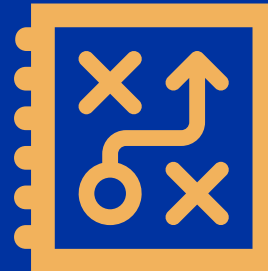
Are parties allowed to talk about a case?

- Title IX regulation prohibits an institution from restricting the ability of a party to discuss the allegations under investigation or to gather or present evidence
- First Amendment additionally limits public institutions' ability to restrict speech about a case
- Witness manipulation and intimidation can still be addressed by institution



Example (permitted communication)

Respondent in sexual harassment case affirmatively calls several other students who know complainant. Respondent tells such persons he has been accused of sexual harassment and is attempting to determine whether the complainant discussed the effect of respondent's actions with any of them.

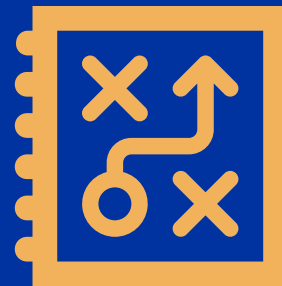




Example (institution may restrict)

—

Complainant contacts witness who complainant knows will testify to witness' belief, based on observation, that complainant was not incapacitated and desired to have sex with respondent. Complainant tells witness to ignore investigator's request for an interview, to lie if witness is asked what witness observed, and not to show up at a hearing under any circumstances.





Are interviews and hearings confidential?

- Institution should restrict access to investigations and hearings to those persons whose attendance is required to effectuate policy
- Parties may be accompanied by advisors of choice and potentially others if justified by the need for a reasonable accommodation
- Media should not be granted access to interviews and hearings

Political and Regulatory Updates



Political Update

- **Mar. 8, 2021:** Executive Order Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity
 - Authorizes the Secretary of Education to take additional action to enforce this policy
- **June 16, 2021:** Department of Education says Title IX prohibits discrimination based on sexual orientation and gender identity

Regulatory Update

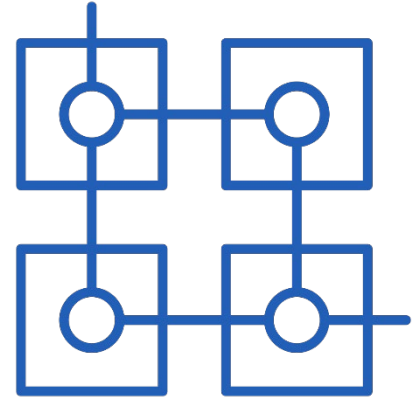
- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- 60 days for public comments



Notable Title IX proposed changes

Scope of Coverage

- Explicitly includes as forms of sex discrimination under Title IX discrimination based on pregnancy, sexual orientation, gender identity, sex stereotypes, or sex characteristics.



Notable Title IX proposed changes

Hostile Environment

- Modifies the definition of hostile environment sexual harassment to align with Title VII
- Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from an education program or activity.

Notable Title IX proposed changes

Quid Pro Quo

- Applies to conduct by agents or other persons authorized by the institution to provide an aid, benefit, or service under the institution's education program or activity.
- Does not apply to students with leadership positions in extracurricular activities because such students are typically not authorized by an institution to provide aid, benefits, or services under an institution's education program or activity.

Notable Title IX proposed changes

Jurisdictional Scope

- Harassment occurring outside of an educational program or activity can nevertheless violate Title IX if such harassment contributes to a hostile environment within an educational program or activity.
- Conduct occurring within an institution's education program and activity includes conduct that occurs off-campus when the respondent represents the institution or is otherwise engaged in conduct under the institution's "disciplinary authority."

Notable Title IX proposed changes

Jurisdictional Scope

- Title IX does not apply to sex-based harassment occurring (1) outside an institution's education program or (2) outside the U.S. where the harassment does not contribute to a hostile environment in the institution's education program or activity in the U.S.



Notable Title IX proposed changes

Grievance Process

- Expands application of the grievance process requirements to all forms of sex discrimination, not just sexual harassment
- BUT -- includes additional requirements for sexual harassment complaints involving students at postsecondary institutions and generally preserves more of the procedural requirements of the current regulations.

Notable Title IX proposed changes

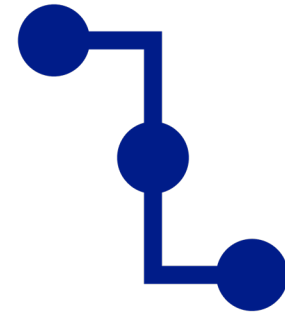
Definitions

- Refines definitions of retaliation to include “intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in an institution’s Title IX process.”
- Adds definition of peer retaliation: retaliation by one student against another student.

Notable Title IX proposed changes

Less Stringent Procedures

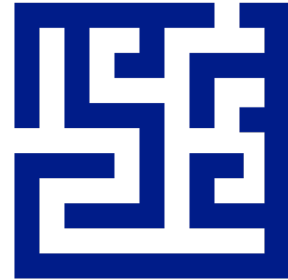
- Relaxes several procedural processes:
 - Complaints may be made orally or in writing
 - Removes the participation requirement for students, employees, & those persons authorized to act on their behalf
 - Mandatory dismissal now permissive
 - Evidence review process



Notable Title IX proposed changes

Advisors

- The right to an advisor would be preserved in sexual harassment complaints involving postsecondary students, but that is not the case for complaints of sexual harassment that do not involve students or sex discrimination complaints



Notable Title IX proposed changes

Confidential Employees

- Employees whose communications are privileged under law and are associated with their role or duties for the institution;
- Employees whom the institution has designated as a confidential resource for the purpose of providing services to individuals in connection with sex discrimination; and
- Employees of postsecondary institutions who conduct human subjects research studies that have been approved by the institution's Institutional Review Board and that are designed to gather information about sex discrimination.

Notable Title IX proposed changes

Live Hearings

- Eliminates the live hearing requirement and allows use of the single-investigator model
- Institutions must develop a process for assessing credibility that could be satisfied by either “advisor-conducted questioning at a live hearing” or having the “decisionmaker ask their questions and the parties’ questions of any party and witnesses during individual meetings.”



Notable Title IX proposed changes

Cross-Examination

- In live hearings, the decisionmaker must determine the relevance of advisor-conducted questioning prior to a party answering. The decisionmaker should not permit questions that are “vague or ambiguous, or harassing of the party being questioned.”
- If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party’s position.

Notable Title IX proposed changes

Determinations

- Notice of determination need not be in writing or include any specific details in sex discrimination complaints or sexual harassment complaints that do not involve postsecondary students.
- Must provide written determination of whether sex-based harassment occurred in cases involving postsecondary students.

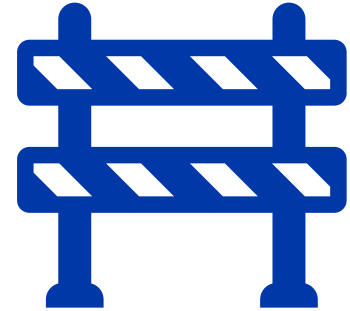


Notable Title IX proposed changes

Title IX Coordinator

Must monitor barriers to reporting conduct that may constitute sex discrimination; and that the institution must take steps reasonably calculated to address identified barriers:

- regular campus climate surveys
- Targeted feedback from students and employees who have reported or made complaints about sex discrimination
- public awareness events for purposes of receiving feedback from student and employee attendees,
- publicizing and monitoring an email address designated for anonymous feedback about reporting barriers.



Module 2: Title IX Policy & Key Definitions



CTU/AIU Policy

- “Consistent with the University’s Non-Discrimination Notice and the U.S. Department of Education’s implementing regulations for Title IX of the Education Amendments of 1972 (“Title IX”) (see 34 C.F.R. § 106 et seq.), the University prohibits Sexual Harassment that occurs within its education programs or activities. The University is committed to creating and maintaining a community in which students, faculty and employees work in an environment free from all forms of discrimination, harassment, or violence.”



Scope of CTU/AIU Policy

- “This policy applies to Sexual Harassment that occurs within the University’s Education Programs or Activities and that is committed by an administrator, faculty member, staff, student, contractor, guest, or other member of the University community.”



Reach of CTU/AIU Policy

- “This policy does not apply to Sexual Harassment that occurs off-campus, in a private setting, and outside the scope of the University’s Education Programs or Activities[.]”
 - Such sexual misconduct may be prohibited by the student conduct policy, faculty handbook, or other University policies and standards
- [T]his policy does not apply to Sexual Harassment that occurs outside the geographic boundaries of the United States, even if the Sexual Harassment occurs in the University’s Education Programs or Activities, such as a study abroad program.

What is sexual harassment?

Conduct on the Basis of Sex that is:

**Quid
Pro Quo
Harassment**

**Hostile
Environment
Harassment**

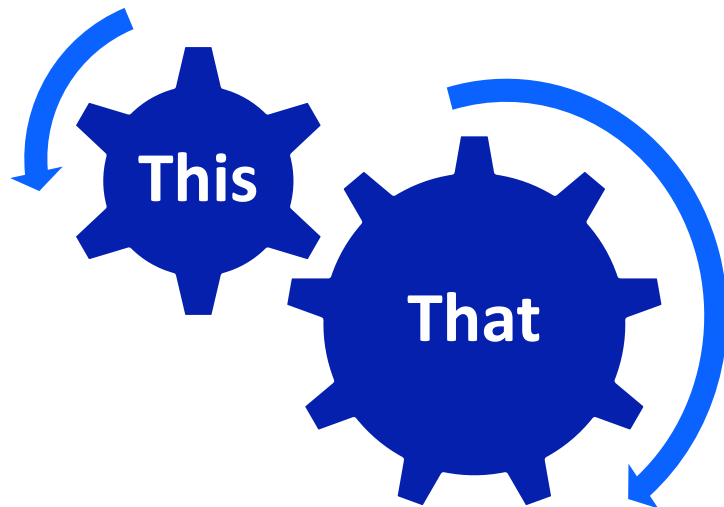
**Sexual
Assault**

**Relationship
Violence**

Stalking

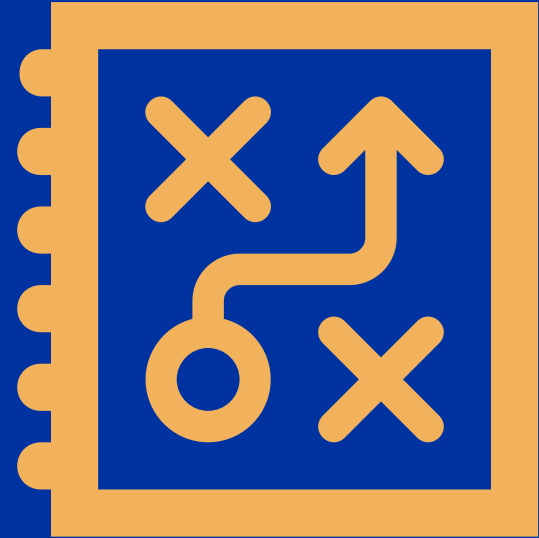
What is quid pro quo?

- *Title IX-Designated*
- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
 - Often arises in the employment context or where an employee holds a position of authority over a student



Example of quid pro quo

Manager tells subordinate employee that subordinate will not get a raise this year unless subordinate performs sexual favors for manager. Subordinate is in a relationship with another individual and has no interest in performing sexual favors for manager.





Another example of quid pro quo



A faculty member tells a student that the student can increase the student's grade if the student wears revealing clothing that is "more pleasing" to the faculty member's eye.

What is hostile environment?

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.



Poll question #2

When considering whether a hostile environment exists, whose perspective do we consider?

- The complainant's
- A reasonable person's
- Both

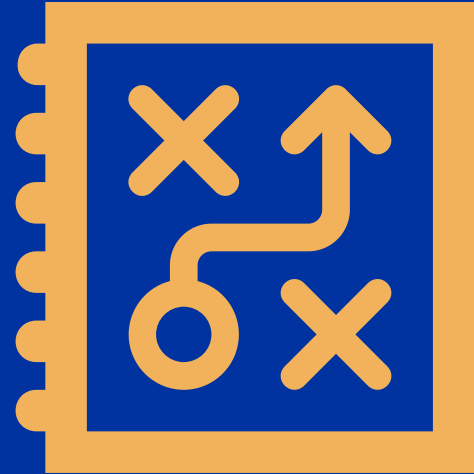


How do we determine if a hostile environment exists?

- Consider all the facts and circumstances, such as:
 - The type of misconduct
 - The frequency of the misconduct
 - Where the misconduct occurs
 - Whether a power differential exists, etc.
- From the perspective of a reasonable person

Example of hostile environment

Bookworm student repeatedly gropes Social Butterfly student's buttocks when the two are in the elevator of the library. Butterfly has no romantic interest in Bookworm and has told Bookworm to stop. But Bookworm persists, causing Butterfly to use the stairs instead of the elevator and to avoid Bookworm in other areas of library and campus buildings.





Another example of hostile environment



Teaching Assistant asks Student to go on a date, and Student says “no.” TA then repeatedly sends Student text messages using various vulgar terms that suggest Student is promiscuous. When TA and Student are in class, TA mutters these vulgar terms toward Student, loud enough for others to hear. Student blocks TA’s phone number and drops the biology class to avoid TA.



And another example of hostile environment

Student Jack obtains a nude picture of Student Jill from Jill's former romantic partner. Jack threatens to post the nude picture on social media unless Jill poses nude for Jack. Jill poses for Jack repeatedly to avoid the nude picture being circulated. Jack is not an employee.

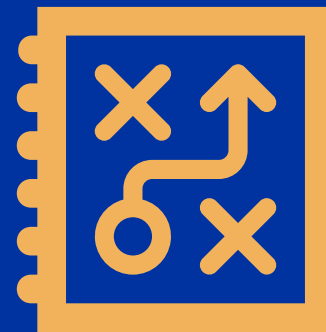




Example (not-hostile environment)

—

Vocal student actively supports a prominent political candidate who has been accused of sexually harassing campaign staffers. Offended student files a complaint that Vocal student's political support of the candidate has caused a sexually hostile environment on campus.





What is sexual assault?

Title IX regulations define “sexual assault” as incorporating the following classes of conduct:

Rape

Sodomy

**Sexual
Assault with
an Object**

Fondling

Incest



What is rape?

Having carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. There is “carnal knowledge” if there is the slightest penetration of the vagina or penis by the sex organ of the other person. Attempted rape is included.



What is consent?

- Policy definition – read it carefully
- Words or actions that a reasonable person in the respondent's perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent

What is incapacity?

Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.



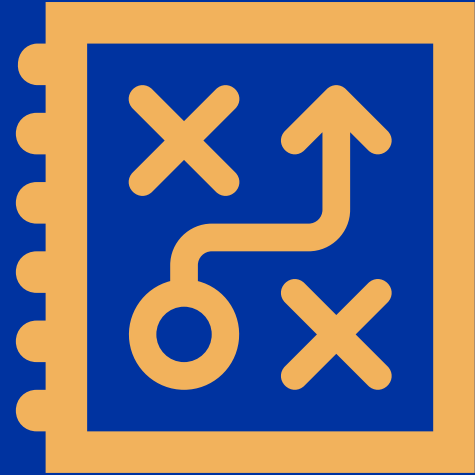
Example: Incapacitated



Short student has had ten cocktails over the course of two hours. Sober student takes Short student to Sober's apartment. Short student cannot walk without support, forgets Sober's name, and passes into a stupor when Sober places Short student on Sober's bed. Sober then engages in sexual activity with Short student.

Example: Not-Incapacitated

Tall student had four beers over the course of two hours with dinner. Tall student calls Friend to see if Friend is home. Tall student then drives from campus to Friend's off-campus apartment. Upon arriving, Tall student initiates sexual contact with Friend, and then insists that Friend uses contraception before the two have intercourse. Tall student is an active participant in the intercourse.





What is sodomy?

Oral or anal sexual intercourse with another person without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



What is sexual assault with an object?

Using an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. An “object” or “instrument” is anything used by the perpetrator other than the perpetrator’s genitalia.

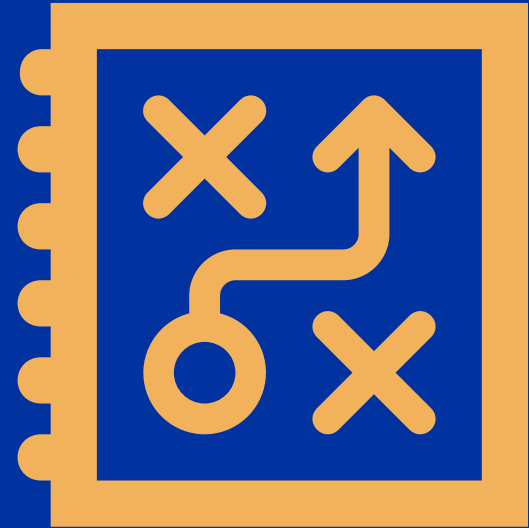


What is fondling?

Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Example: Fondling

Clumsy student and Dance student attend a dance held in the student union. While on the dance floor, Clumsy gropes Dancer's groin without permission. Dancer does not welcome the groping and views it as unwelcome.



What is domestic violence?

Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the state.

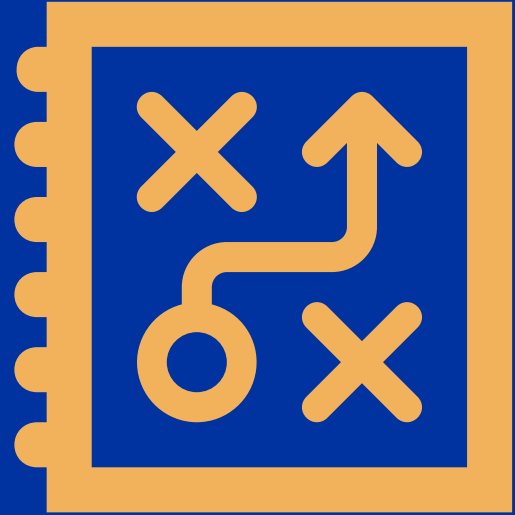


What is dating violence?

- Actual, attempted, or threatened violence by one individual against another individual with whom they are, or have been, in a social relationship of a romantic or intimate nature.
- The existence of such a relationship will be determined based on a consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.

Example: Dating violence

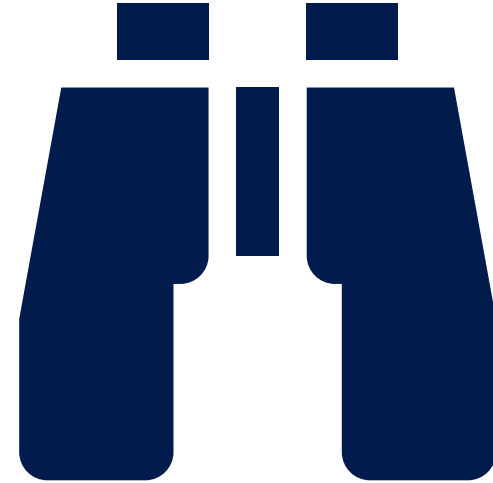
President's Chief of Staff and Statistics Department Chair are engaged to be married but live separately and have no children in common. Chief of Staff and Department Chair get into an argument over sex in Chief of Staff's car in the institution's parking lot. During the argument, Chief of Staff slaps Department Chair's face and tells Chair to "shut your mouth."



What is stalking?

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for their safety or the safety of others; or
- Suffer substantial emotional distress.



Example: Stalking

Freshman is infatuated with Sophomore who has rebuffed Freshman's romantic advances. Thereafter, Freshman dresses in black and sneaks up to the window of Sophomore's house (owned by sponsored Student Organization) at night in an attempt to see Sophomore. Freshman does this twice before being caught in the act during Freshman's third attempt.





Does Title IX also prohibit retaliation?

Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any *individual* for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy

(34 C.F.R. § 106.71)

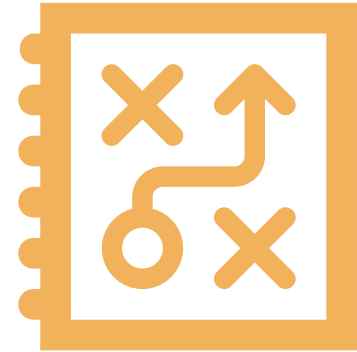
Retaliation

- Material . . .
- Adverse action . . .
- Taken against someone . . .
- Because . . .
- They engaged in protected activity

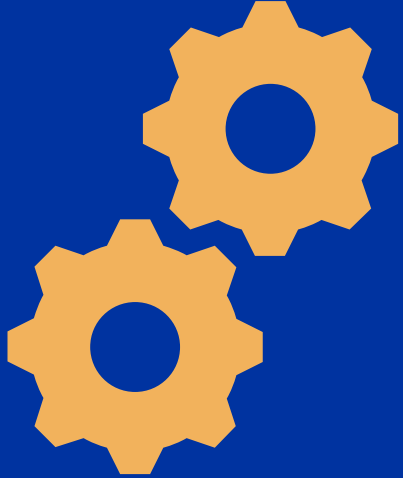


Example of retaliation

Groundskeeper testifies at hearing in support of Office Worker's complaint of sexual harassment against Manager. After institution finds that Manager sexually harassed Office Worker, Manager demotes Groundskeeper to punish Groundskeeper for testifying against Manager.



Group Scenario #1



Student A reports that Student B sexually harassed Student A on two occasions. The first incident consisted of Student B groping Student A's genitals without permission while the two were dancing at a local bar that had been rented out for a student event. The second incident consisted of Student B attempting to have sexual intercourse with Student A one week later, when Student A was intoxicated after studying and drinking at Student B's apartment with their study joint group.

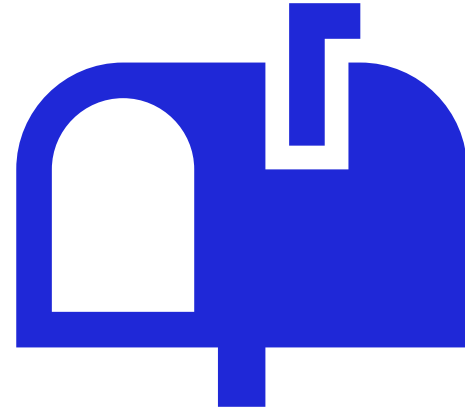


Institutional Response to Sexual Harassment



How does an institution get notice of sexual harassment?

Sexual harassment response is triggered when institution has “actual knowledge” of potential sexual harassment.





What is “Actual Knowledge”?

“Actual knowledge” occurs when

- An institutional official, with authority to take corrective action
- Observes or receives a report
- Of sexual harassment occurring in the institution’s education programs and activities

Reporting



No Time Limit
To

- Title IX Coordinator/Deputies
- Mandatory Reporters

Employee Reporting

- **CTU policy:** “[A]ny person may report Sexual Harassment to any University employee with managerial authority over other employees, including deans, program directors, program chairs, department heads, supervisors, and other managers (collectively “Reporting or Institutional Officials”) who must promptly forward such report of Sexual Harassment to the Title IX Coordinator.”
 - University employees who are not Reporting or Institutional Officials are encouraged, but are not required to, forward reports of Sexual Harassment to the Title IX Coordinator



Employee Reporting

- **Trident Policy:** “Any person, whether or not the person reporting is the alleged victim, may report sex discrimination, including sexual harassment, sexual assault, dating violence, domestic violence, or stalking. Reports shall be to Title IX Coordinator, any college official who has the authority to institute corrective measures on behalf of the College, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.”



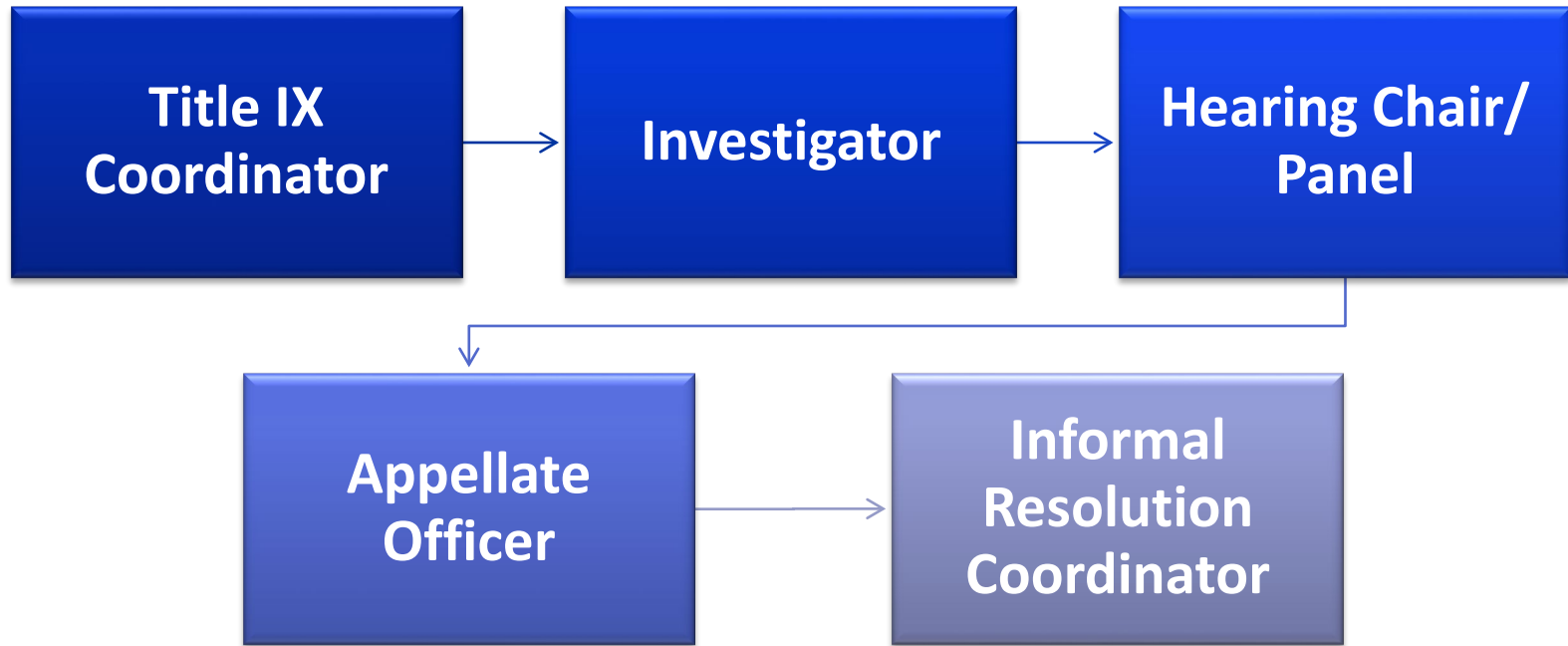
Making Reports

- What?
 - Observed sexual misconduct
 - Sexual misconduct reported to a mandatory reporter
- How?
 - To Title IX Coordinator/Deputy
- When?
 - ASAP

What are the institution's overall duties?



Who are the key institutional actors in the grievance process?



What is the resolution process?

Report

**Initial
Assessment/
Supportive
Measures**

**Formal
Complaint**

**Possible
Informal
Resolution
(not
employee-
on-
student)**

**Investigation
to collect
relevant
inculpatory
and
exculpatory
evidence**

**Live Hearing
before a
decision-maker
who finds facts
under an
evidentiary
standard and
determines the
existence (or
not) of a policy
violation and
any resulting
sanctions/
remediation**

Appeal

What is a formal complaint?

What

- Document
- Alleging sexual harassment
- Requesting an investigation / resolution under grievance procedures

Who

- Signed by
 - Alleged victim or
 - The Title IX Coordinator
- If filed by alleged victim, alleged victim must be current or attempted participant in education programs and activities
- Third-parties may not file formal complaints on behalf of an alleged victim

How

- Either physical or electronic submission



What is the purpose of a Title IX investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine through a live hearing
- Whether or not the reported sexual harassment occurred

Poll question #3

- Does the investigation report make findings?
 - Yes
 - No
 - Sometimes



Does the investigation report make findings?

- **No** – The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the current Title IX regulations, factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing



What is the purpose of a hearing?

- To consider parties' written report responses to investigation report and
- To hear live testimony and receive non-testimonial evidence so that
 - The decision-maker can determine facts under a preponderance of the evidence standard
 - Apply those facts to the policy using the preponderance of the evidence standard, and
 - Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

How does the hearing work?

- Title IX regulation is largely silent on specific elements
- Required elements include:

Decision-maker(s) must independently evaluate questions for relevance and resolve relevancy objections and decisions of new evidence admissibility

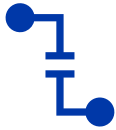
Parties can address Hearing Officer and make closing arguments

Parties' advisors must be allowed to conduct live questioning of other party and witnesses

Questioning of sexual history generally not permitted

What are the grounds for appeal?

Title IX regulation requires the following permitted grounds to appeal a decision resulting from adjudication or a Formal Complaint dismissal:



Procedural irregularity that affected the outcome of the matter

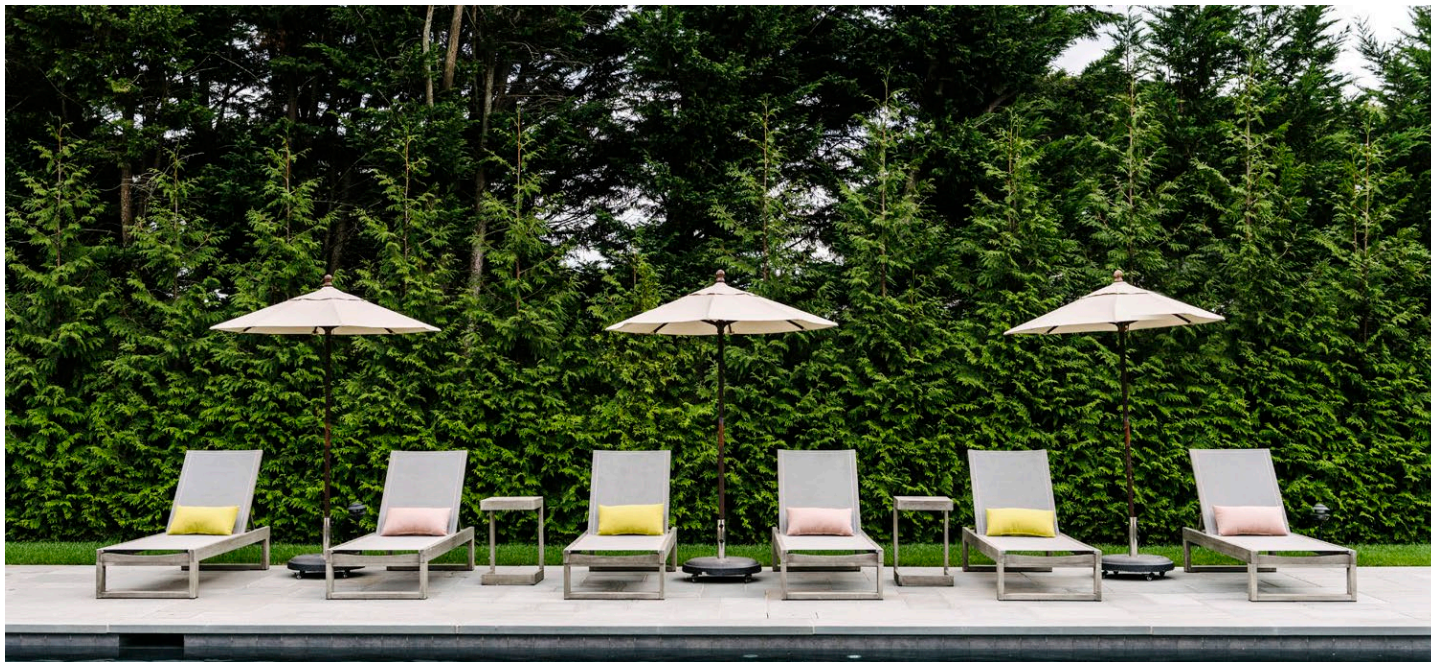


New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or



Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

Break



Module 3:

Non-Title IX Misconduct



What other policies might apply?

- Institutions are free to use
 - Student code of conduct
 - Faculty/employee handbooks
 - Other policies

to address sexual harassment that does not occur in an education program or activity



Student code of conduct / employee standards

- Conduct outside of the purview of Title IX policy
- Examples:
 - General bullying
 - Uncivil behavior
 - Harassment based on membership in a protected class

Title VII

- *It shall be an unlawful employment practice for an employer . . . To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .*

Poll question #4

- May we use another process before Title IX?
 - Yes
 - No



May we use another process before Title IX?

- **Yes**
- Some processes do not require a formal complaint and may be initiated prior to Title IX
- Other policy violations may be apparent prior to Title IX





May we use another process after Title IX?

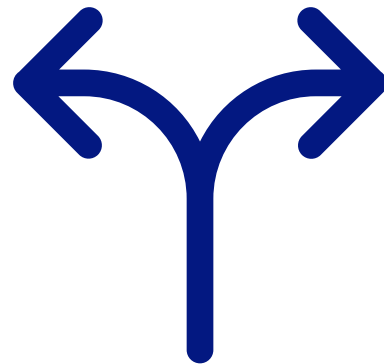
- Yes
- Some conduct may not violate Title IX standards but will violate other standards
- Some conduct may merit additional punishment beyond what is merited by Title IX policy





May we use two processes at the same time?

- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ



Can we use another process to make the same finding we would otherwise make under Title IX policy?

- **No**
- Title IX regulation requires the use of specific Title IX process for any “sexual harassment” that occurs in institution’s programs and activities



Module 4: Pregnancy Discrimination

Legal Requirements

- Applicable Laws:
 - Title IX
 - Pregnancy Discrimination Act
 - ADA/Section 504
 - State and local civil rights laws





Pregnancy Discrimination Act

Title VII, as amended by the PDA, prohibits *employment* discrimination based on:

- Current pregnancy
- Past pregnancy
- Potential or intended pregnancy
- Medical conditions related to pregnancy or childbirth



ADA / Section 504

- Federal laws that prohibit disability discrimination and require institutions to make reasonable accommodations to qualified individuals with a disability.
- Disability = A physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.
- Pregnancy itself is not a disability, but complications from pregnancy or childbirth may qualify.

Title IX Regulations: Gender-Neutral Rules



A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

34 CFR § 106.40(a)



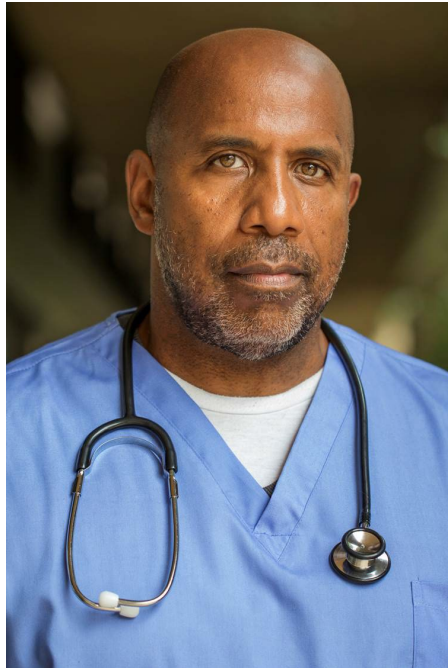
Title IX Regulations: Equal Participation

A recipient shall not discriminate against any student or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient. 34 CFR § 106.40(b)(1)





Title IX Regulations: Medical Certification



A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

34 CFR § 106.40(b)(2)



Title IX Regulations: Separate Programs

A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

34 CFR § 106.40(b)(3)



Title IX Regulations: Temporary Disability Policies

A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

34 CFR § 106.40(b)(4)

.



Title IX Regulations: Leaves of Absence

In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

34 CFR § 106.40(b)(5)



OCR Guidance: Administrative Measures

Schools **MUST**

- Protect students from harassment based on pregnancy or related conditions.
- Possess and distribute a policy against sex discrimination. OCR recommends the policy make clear that sex discrimination covers discrimination against pregnant and parenting students too.





OCR Guidance: Administrative Measures

Schools **MUST**

- Adopt and publish grievance procedures for students to file complaints of sex discrimination, including discrimination related to pregnancy or parenting.
- Identify at least one employee to carry out Title IX responsibilities.



OCR Guidance: Day-to-Day

Schools **MUST**

- Allow pregnant students to continue participating in classes and extracurricular activities.
- Allow pregnant students to choose if they want to participate in special programs or classes for pregnant students. Schools may not pressure students to participate in these types of programs.
- Provide reasonable adjustments such as a larger desk or elevator access.





OCR Guidance: Day-to-Day

Schools **MUST**

- Allow pregnant students to return to the same academic and extracurricular status as before medical leave, including the opportunity to make up missed work.
- Ensure that teachers understand the Title IX requirements. Teachers may not prohibit students from submitting work after a deadline missed due to pregnancy or childbirth. Students should be permitted to make up missed participation and attendance credits.



OCR Guidance: Medical Accommodations

Schools **MUST**

- Excuse absences due to pregnancy or childbirth for as long as medically necessary.
- Provide pregnant students with the same special services they provides to individuals with temporary medical conditions, including remote instruction, tutoring, and/or independent study.



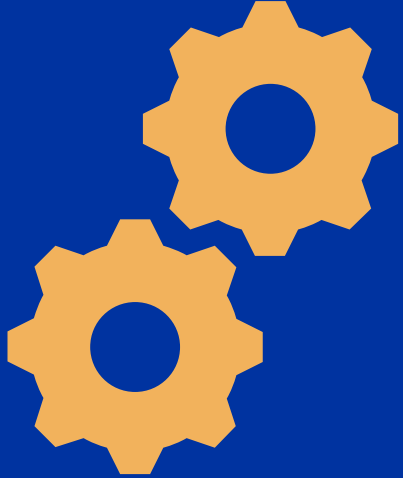


OCR Guidance: Medical Accommodations



- Schools may only require pregnant students to submit a doctor's note if the school also requires a doctor's note from all students who have a physical or emotional condition requiring treatment by a doctor.

Group Scenario #2



Amy is enrolled in an accelerated program at Husch College of Nursing. Two months into the eight-month program, she notifies the nursing director that she is pregnant and is due in February. The nursing director reminds Amy that the college has a zero-absence policy and if she misses more than two consecutive days of class or clinical, she will be dismissed from the program. When Amy delivers her baby, she misses two days of class, including one pop quiz, and three days of clinical. She receives a zero for the absences in accordance with the college policy, which is applied consistently to all students regardless of the reason for the absence. Amy files a complaint alleging that she should have been allowed to make up the missed quiz and clinicals.



Salt Lake Community College

June 2022 OCR Decision

- A student at SLCC found out she was pregnant after the semester began. She told her professor she was pregnant and struggling with morning sickness, which caused her to miss or be late to the professor's classes.
- The student requested academic adjustments from the professor to allow for additional absences and allow her to turn in assignments late.

SLCC: Background

- The professor told the student that she was concerned the student decided to continue with the class and that she had lowered final grades if missed days were excessive. The professor also told her a late submission penalty would apply to late assignments and advised the student to drop the class because “health is more important than a class.”
- The student contacted the Disability Resource Center on her own to seek formal academic adjustments and provided a note from her treating physician. An Advisor spoke with the student and referred the student to the Title IX Coordinator to discuss her adjustments.
- The Title IX Coordinator determined the student’s requested academic adjustments constituted a fundamental alteration to the courses.

SLCC: OCR Findings

- The professor's alleged comments encouraging the student to drop the class could constitute pregnancy discrimination and therefore merited a prompt and equitable resolution under Title IX grievance procedures (which SLCC did not conduct).
- The Title IX Coordinator did not create an investigatory file, obtain written statements, take notes of his conversations, or issue a notice of the investigation's outcome to the student.

SLCC: OCR Findings

- The Title IX Coordinator did not respond to the student's allegation the professor encouraged her to drop the class because of her pregnancy, which she viewed as discriminatory.
- SLCC did not engage in the interactive process with the student to determine appropriate academic adjustments in light of her pregnancy.

SLCC: OCR Findings

- To the extent SLCC determined the student's requested adjustments would have constituted a fundamental alteration, SLCC did not engage in a proper deliberative process in making such determination.
- SLCC did not consider whether the student's pregnancy caused a temporary disability or engage in the interactive process under Section 504.

SLCC: OCR Findings

- SLCC's failed to excuse the student's absences and tardies caused by her pregnancy in violation of Title IX.
- SLCC's website does not contain information on how a student may file a complaint alleging pregnancy discrimination, nor does SLCC mention pregnancy discrimination in their Student Code.



SLCC: Voluntary Resolution Agreement

- Revise its Nondiscrimination Statement to include reference to actual or potential parental, family, or marital status, including pregnancy and related conditions.
- Revise its grievance procedures to include information regarding students' opportunity to file a grievance based on alleged pregnancy discrimination, including grievances related to different treatment based on pregnancy, exclusion from the College's programs or activities based on pregnancy, or the College's failure to excuse pregnancy-related absences or provide appropriate academic adjustments in the same manner as it provides academic adjustments to students with temporary disabilities.



SLCC: Voluntary Resolution Agreement

- The College will provide information on its Title IX and Disability Resource Center webpages that describes the process under which pregnant students can seek academic adjustments, including:
 - the rights of pregnant students under Title IX;
 - how to request academic adjustments, special services, excused absences, or leaves of absence;
 - the process the College follows to determine appropriate academic adjustments and special services;
 - the process available to students if the College denies requested academic adjustments or special services; and
 - the process the College uses to determine when a requested academic adjustment constitutes a fundamental alteration of a program or activity.



SLCC: Voluntary Resolution Agreement

- Training for the professor, all staff in the DRC, and all staff in the Title IX office
- Conduct investigation into student's allegations of discrimination
- Promptly take any necessary steps to remedy any discrimination that is found



Title IX Proposed Regulations

- Include explicit protections for students and employees based on pregnancy or related conditions, including childbirth, termination of pregnancy, or lactation.
- Institutions would be required to provide reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees.

Title IX Proposed Regulations

- The proposed regulations would expand the scope of protections for pregnancy or related conditions by prohibiting institutions from discriminating against a student or employee based on current, potential, or past pregnancy or related conditions.



Title IX Proposed Regulations

- When a student tells an institution's employee about the student's pregnancy or related conditions, the employee must provide the student with the Title IX Coordinator's contact information.
- The Title IX Coordinator must inform the student of the institution's obligations to prohibit sex discrimination and also to provide the student with options for reasonable modifications, access to separate and comparable portions of education programs or activities, allow for a voluntary leave of absence, and ensure there is available lactation space that is clean and private.



Title IX Proposed Regulations

- Reasonable modifications for pregnancy or related conditions would be required to be provided to students based on their individualized needs.
- Such modifications may include breaks during class to attend to related health needs, breastfeeding, or expressing breast milk; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course sequence; time extensions for coursework and rescheduling of tests; counseling; changes in physical space or supplies; elevator access; or other appropriate changes to policies, practices, or procedures.



Common Policy & Practice Problems

- Zero absence attendance policies.
- Targeted medical documentation requirements.
- Requirements to restart programs from the beginning rather than status at the time a leave began.
- Deference to discriminatory clinical site policies.

Practical Guidance: Inclusive Language and Policies



- Much of the statutory language surrounding pregnancy is not gendered.
- Students of many genders, including cisgender women, non-binary people, and transgender men, might be pregnant.
- Regardless of a student's gender-identity, they are protected through their status as a pregnant person.



Practical Guidance: Faculty and Staff Training

- Many pregnancy discrimination investigations share a common theme: students reach out to faculty and staff members who are not familiar with the rights of pregnant students.
- **Solution: Inform all faculty and staff of the rights of pregnant students under Title IX.**



Practical Guidance: Review Institutional Policies

- Another common problem OCR identifies is school Title IX policies which do not specifically address pregnancy.
- Clear, written guidelines will allow faculty and staff to understand their obligations towards pregnant students, as well as provide pregnant students with clear expectations for available support.
- **Solution: Review institutional policies to ensure pregnancy discrimination is explicitly addressed.**

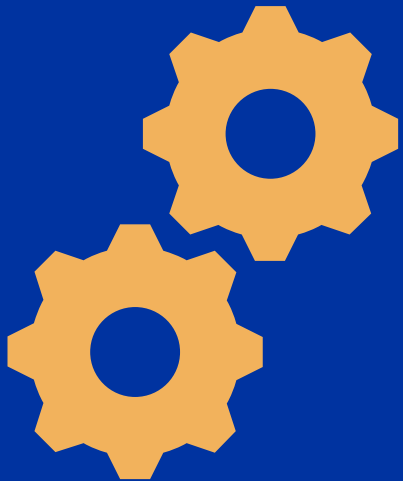


Practical Guidance: Review Institutional Procedures

- A common challenge OCR often finds in pregnancy discrimination cases is a lack of prompt responses to student Title IX grievances.
- Individuals who express concerns about any type of discrimination, including pregnancy discrimination, should receive prompt responses to those concerns.
- **Solution: Evaluate your school's grievance procedures. Does every student receive a response to a report of discrimination? Is that response timely?**

Module 5: Transgender Legal Considerations

Group Scenario #3



Student employee who identifies as male works with Professor Clueless for two semesters providing classroom assistance. At the start of the following semester, Student notifies Professor Clueless that she has changed her name and should be identified by female pronouns. Professor Clueless continues to refer to Student as “he” and “him” and calls her a “nice young man” on several occasions. Professor Clueless also refers to Student by her dead name. Student files a complaint alleging sex harassment.



OCR Response to Inquiry (March 9, 2020)

“By itself, refusing to use transgender students’ preferred pronouns is not a violation of Title IX and would not trigger a loss of funding or other sanctions. To the extent any prior OCR subregulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative.

However, sex-based harassment, including that predicated on sex stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity. Thus, harassing a student—including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility-based on the student's failure to conform to stereotypical notions of masculinity and femininity can constitute discrimination on the basis of sex under Title IX in certain circumstances. Schools have a responsibility to protect students against such harassment.”

EEOC FAQ (June 15, 2021)

Q.11. Could use of pronouns or names that are inconsistent with an individual's gender identity be considered harassment?

Answer: Yes, in certain circumstances. Unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*, the Commission explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.



Meriwether v. Hartop (6th Cir. 2021)

- Institution adopts mandatory preferred pronouns policy
- Faculty member wishes to refer to transgender students by last name instead of preferred honorific or pronouns
- Institution finds faculty member engaged in hostile environment harassment and/or adverse treatment discrimination
- Faculty member files lawsuit asserting free speech, freedom of religion, and due process claims



Meriwether v. Hartop (6th Cir. 2021)

- Faculty member's claims survive a motion to dismiss
- Court says: “there is no suggestion [faculty] member’s speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits.”
- “[Faculty member’s] decision not to refer to Doe using feminine pronouns did not have a [systematic effect of denying the victim equal access to an education program or activity].”



Flaming v. West Point School Board, (E.D. Va. 2021)

- Teacher fired after not using he/him pronouns for a student who was assigned female at birth.
- Teacher avoided using pronouns, called student by preferred name. Sometimes referred to student using female pronouns when student was not in the room.
- Dismissed all claims other than breach of contract regarding procedures surrounding termination

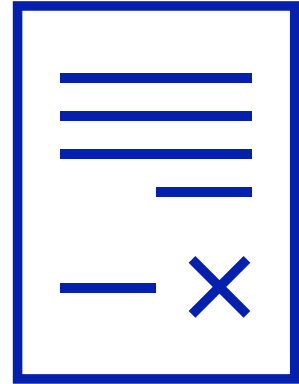


Takeaways

- Misgendering or failure to use preferred names is not inherently discrimination as defined by law (but may be)
- Faculty members have First Amendment academic freedom rights that limit institutional ability to compel language
- Faculty members with religious beliefs may be entitled to an accommodation (more on that later)

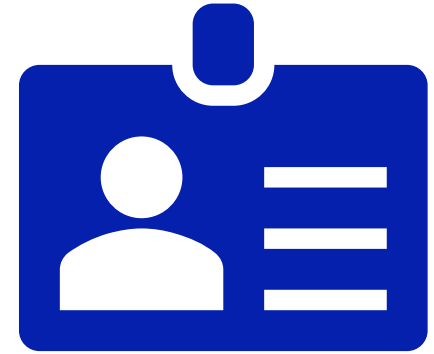
Pronoun best practices

- Allow students to use preferred pronouns
- Avoid gendered language when possible
- Encourage students to use pronouns on signature lines in email
- Develop a pronoun policy



Name change best practices

- Ask students what their preferred names are
 - Legal name changes not required
- Develop a name change policy





Bathroom choice

- “Bathroom bans” – rules and laws that restrict which bathrooms transgender individuals are allowed to use
- State legislation to limit individuals using a bathroom that does not correspond with their gender on their birth certificate



Whitaker v. Kenosha Unified School Dist. (7th Cir. 2017)

- Wisconsin high school prohibited plaintiff, a 17-year-old transgender male, from using the boys' restroom
 - Plaintiff alleged violations of Title IX and the 14th Amendment
 - 7th Cir. Held: “[t]here was irreparable harm because **use of the boys’ restroom was integral to the student’s transition and emotional wellbeing.**”





Grimm v. Gloucester Cty. Sch. Bd. **(4th Cir. 2019)**

- Virginia high school prohibited plaintiff, a transgender male student, from using the boys' restroom at school
- Plaintiff suffered from urinary tract infections as a result of bathroom avoidance and endured suicidal thoughts
- Plaintiff alleged violations of Title IX and 14th Amendment



Grimm v. Gloucester Cty. Sch. Bd. (4th Cir. 2019) (cont'd)

- Court granted Plaintiff's motion for summary judgment
 - "there is no question that the [School] Board's policy discriminates against transgender students on the basis of their gender nonconformity. . . . Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go."
- Affirmed by 4th Circuit in 2020
- SCOTUS declined to hear an appeal to the *Grimm* ruling, leaving the 4th Circuit holding in place

Title IX Proposed Regulations

- Prohibit all forms of sex discrimination, including discrimination based on sexual orientation, gender identity, and sex characteristics.
- There are limited circumstances which permit different treatment or separation based on sex (e.g., toilet, locker room, and shower facilities); under these limited circumstances, such different treatment could not be conducted in a manner that subjects a person to more than *de minimis* harm.

Title IX Proposed Regulations

- When an institution adopts a policy or engages in a practice that prevents a person from participating consistent with the person's gender identity and that policy or practice is not explicitly allowed under Title IX, then the institution subjects the person to more than *de minimis* harm.

Title IX Proposed Regulations

- ED will issue a separate notice of proposed rulemaking for amendments to § 106.41 to address what criteria, if any, institutions may use to establish student eligibility to participate on a particular male or female athletics team.

Questions







HUSCH BLACKWELL

**Trident University International
a member of the AIU System**

Title IX Training - Day 2



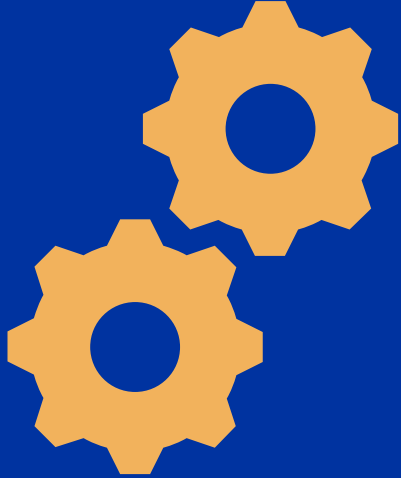
July 2022



Housekeeping

- **Recording is not permitted**
- Slides will be provided by email after the training concludes
- Change Zoom name to include institution
- Raise hand or use chat function to ask questions
- Other breaks—take individually as needed

Group Scenarios



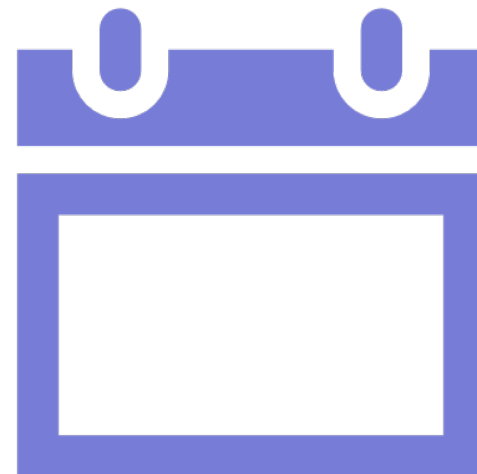
Breakout Groups

- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Scenario and questions for each Group
Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Cameras on for breakouts



Agenda

- Relationship Between Title VII and Title IX
- Intake and Case Processing
- Key Topics: Bias, Stereotyping, Conflicts of Interest and Trauma
- Investigations



Module 1: Relationship Between Title VII and Title IX

How do Title IX and Title VII standards compare?

“Neither Federal non-sex discrimination civil rights law represents a ‘zero-tolerance’ policy banning all sexual harassment.” – Preamble to 2020 Title IX Regulations

Title VII Sexual Harassment

Quid pro quo

Sufficiently severe
or pervasive

Title IX Sexual Harassment

Any quid pro quo by
employee

Unwelcome and
Sufficiently severe
and pervasive and
objectively offensive

Any sexual
assault/DV
/stalking

Title VII of the Civil Rights Act of 1964

- Prohibits discrimination in employment (private and public) based on:
 - Race
 - Color
 - Religion
 - National Origin
 - Sex



Title VII Sexual Harassment Standard

Hostile environment

Unwelcome
subjectively and
objectively

“severe OR
pervasive”

Similar conduct at
issue under Title IX

Quid Pro Quo

Sexual Violence
(e.g. assault)

Example of typical “Title VII” process

Complaint to manager, HR,
ethics line, etc.

HR/manager
collaborate to provide
information to parties,
investigate, and resolve

HR/manager take any
appropriate corrective
and preventive action,
and protect against
retaliation

Comparison

Common Title VII Response

Resolution by internal investigation

Formal or informal complaint

Advisor silent supporter

Resolution does not require active complainant

May or may not result in formal report

Title IX Regs Requirements

Discipline requires regimented investigation & hearing process

Formal complaint only

Advisor entitled to participate

Need participating complainant

Requires formal report & other documentation



What triggers an employer's liability for sexual harassment under Title VII?

- ✓ An employer, its agent, or its supervisor
- ✓ Knew or should have known
- ✓ About severe **OR** pervasive sexual harassment
- ✓ That a reasonable person would consider intimidating, hostile, or abusive
- ✓ By an employee or non-employee over which it has control and
- ✓ Failed to take appropriate corrective action

- U.S. Equal Employment Opportunity Commission, *Harassment*
(<https://www.eeoc.gov/harassment>)

What triggers obligations for VII vs. IX?





Categories

1. VII obligations but no IX obligations (no need to follow IX policies)
 - Should have known of discrimination but no formal complaint
 - Discrimination does not meet IX definition of SH
 - Complainant no longer employed or a student
2. Twin VII and IX obligations
 - Quid pro quo, “severe and pervasive,” VAWA crimes
 - ***Complainant currently employed or a student***
 - Formal complaint

Example: Overlapping Policies

- Finance office employee claims Supervisor is subjecting employee to pervasive and severe racial and sex harassment
- Finance office administrator corroborates the claim
- How should institution respond in satisfying obligations under VII and IX?



Module 2: Intake and Case Processing



Intake process

- Conduct initial assessment of report/complaint
- Evaluate allegations as potential policy violation
- Determine applicable policies/process
- Understand Complainant's wishes
- Refer to investigator as needed



What is a formal complaint?

- Signed in writing
- From the alleged victim or the Title IX Coordinator
- Alleging sexual harassment
- Indicating desire to initiate the grievance process (i.e., investigation and hearing)



When may the Title IX Coordinator file a formal complaint?

- Typically, when there is an important institutional interest in adjudicating a report irrespective of the alleged victim's wishes
- Typically involves serious misconduct, repeated misconduct, or misconduct by employees
- If alleged victim does not wish to file a formal complaint, Title IX Coordinator's decision to do so must not be clearly unreasonable



Example of T9 Coordinator formal complaint

Two female students, who do not know one another, each separately report they were sexually assaulted by a male student. Both female students suspect they were drugged. Neither female student wishes to file a formal complaint, but each has indicated they will cooperate with an investigation if the Title IX Coordinator files a formal complaint.





When must we dismiss a formal complaint?

- If filed by the alleged victim, and the alleged victim is not a current or attempted participant in education programs and activities
- Complaint does not allege sexual harassment in the institution's education programs or activities
- Complaint alleges sexual harassment abroad
- Conduct alleged would not amount to sexual harassment even if it occurred as reported
- *Practice point – duty*

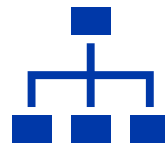


When may we dismiss a formal complaint?

- Alleged victim indicates in writing a desire to withdraw the complaint (or particular allegations)
- Respondent is no longer enrolled in or employed by the institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

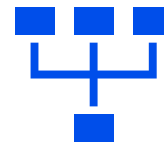
Can we consolidate the complaints?

Yes – Complaints can be consolidated if they arise out of the same facts and circumstances

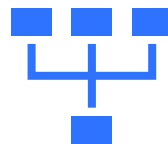


Multiple respondents

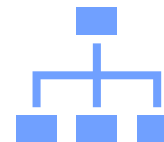
Multiple complainants



Multiple allegations against a single respondent



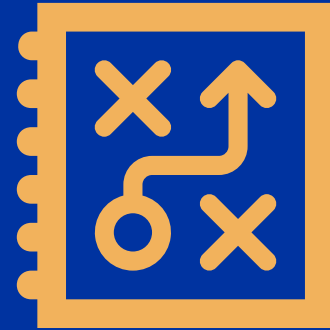
Multiple allegations from a single complainant





Example of permissible consolidation

Students A and Student B, who are roommates, allege that Student C barged into their apartment drunk and propositioned them for sex. Student A and Student B each file their own formal complaint of sexual harassment from the same incident.



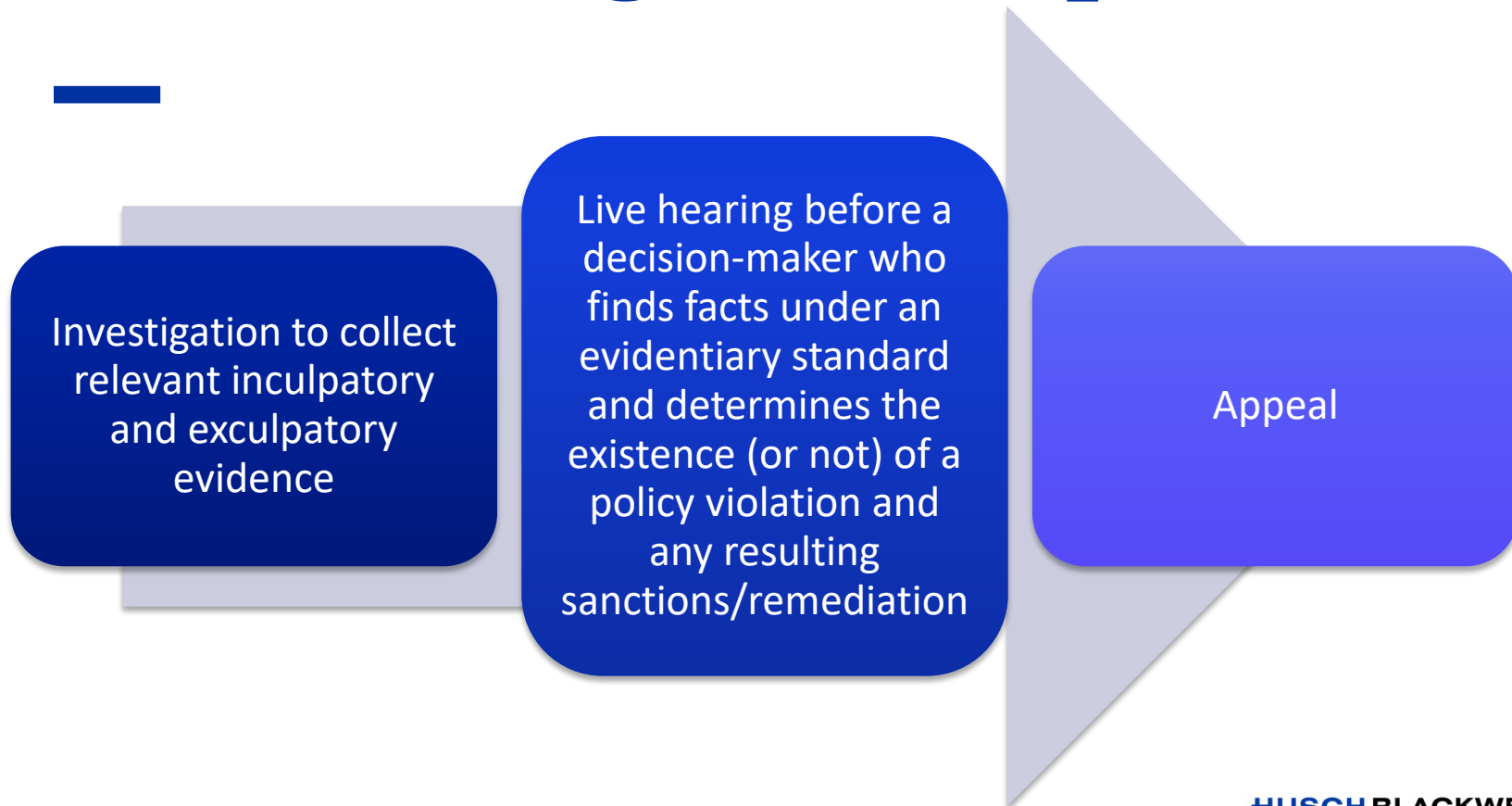


Example of impermissible consolidation



Graduate files a formal complaint that Research Fellow sexually assaulted Graduate two years ago when Graduate was incapacitated by drugs taken to treat a back injury. Undergraduate, Fellow's present romantic partner, files a formal complaint that Fellow committed dating violence by slapping Undergraduate during an argument a month ago.

What is the grievance process?





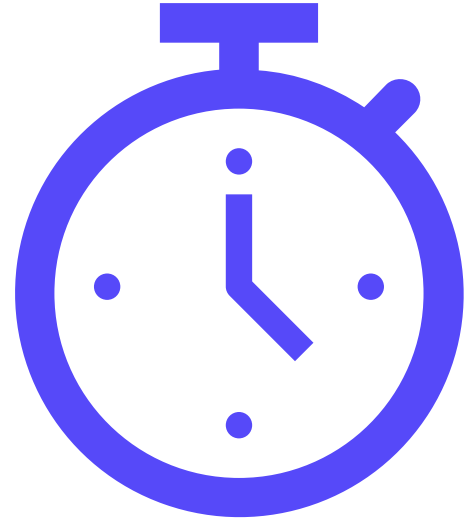
What general principles govern the grievance process?

- Equitable treatment of complainants and respondents
- No stereotypes based on a party's status as complainant or respondent
- Presumption respondent did not violate policy unless and until a determination is made after hearing
- Conflict and bias-free institutional participants



How long does a grievance process take?

- There is no firm deadline, and the length of the grievance process varies depending on a variety of factors
- Institution must be reasonably prompt, advise parties of timelines for particular phases of the process, and notify parties of extensions of timelines and the reasons for the same





What do we do if we find sexual harassment occurred?

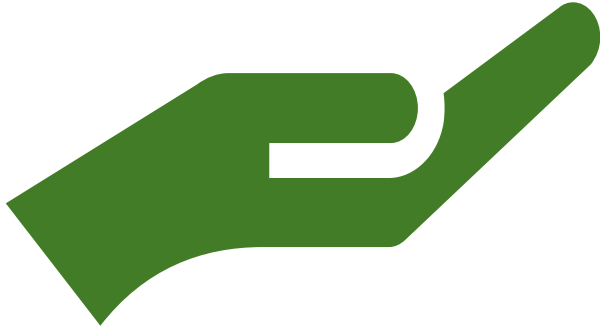
- If grievance process results in a finding of sexual harassment:
 - Discipline for the respondent as determined by those with authority over the respondent
 - For complainant, grant remedies reasonably necessary to restore or preserve access to education programs and activities



Supportive measures

- Must be offered to an alleged victim once an institution has actual knowledge of potential harassment
 - Must be offered also to respondent once a formal complaint is filed
 - Ambiguity as to whether support services must be offered to respondent before formal complaint is filed
 - Non-disciplinary in nature; no-disciplinary measures until end of investigation and grievance process
 - Title IX Coordinator has responsibility to oversee offering and implementation

What are supportive measures?



- Non-disciplinary, non-punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party

Examples of supportive measures



Counseling



Academic accommodations



Housing accommodations



Security escorts or transportation arrangements



Leave of absence



Increased security or monitoring



Modified work schedules

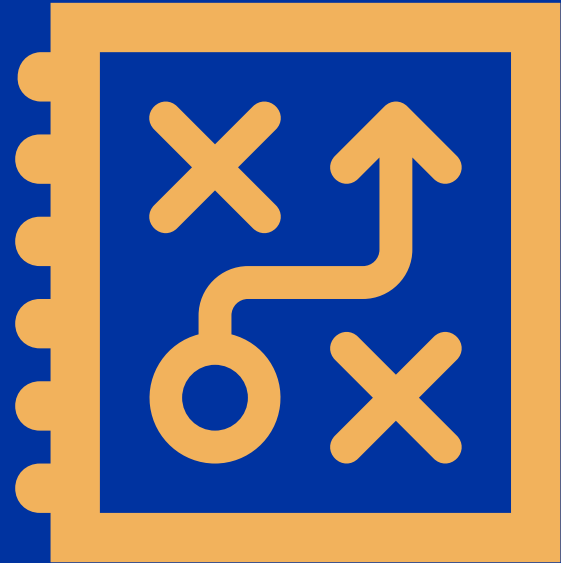


Mutual no-contact order where implicated by facts



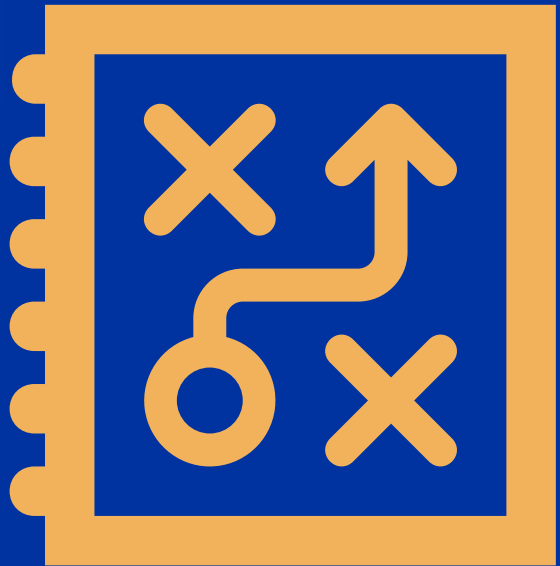
Example: Reasonable supportive measure

History student in History 101 reports that another student, also in History 101, sexually assaulted History student two weeks ago. History student is uncertain whether to file a formal complaint but wants assistance transferring to a different section of History 101.





Example: Unreasonable supportive measure



Employee in maintenance department accuses supervisor of sexual harassment by way of making sexualized jokes and remarks. Employee requests to be on indefinite paid leave for the remaining six months of the academic year. Employee could easily be reassigned to work under a different supervisor in a different part of campus.



Poll question

Can supportive measures affect the respondent?

- Yes
- No
- It depends



Can supportive measures affect the respondent?

- Yes, but cannot create an unreasonable burden
- Cannot be a form of *de facto* discipline
- Supportive measures are not a substitute for the investigation and hearing process

Example: Unreasonable burden



Student Worker accuses Colleague of sexual harassment. Institution imposes proximity restriction that prohibits Worker and Colleague from being within 200 meters of each other pending investigation and hearing.



Example: Disciplinary supportive measure

In-State Student accuses Out-of-State Student of sexual assault. In-State requests as a support measure that Out-of-State be removed from all shared classes and prohibited from being on campus after 5:00 pm.





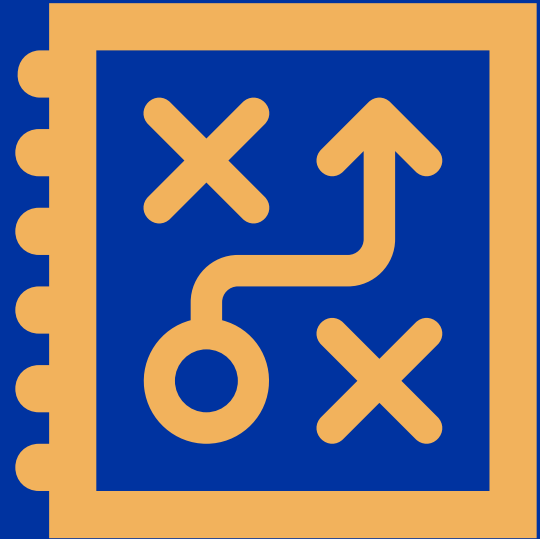
Can we use interim removals or suspensions for students?

- Students may be removed on emergency basis if:
 - Individualized safety and risk analysis
 - Determines an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
 - Student is given immediate notice and opportunity to contest the removal



Example: Immediate threat to physical health or safety

Mechanic Student is reported to have raped Tech Student after providing Tech with a large quantity of heroin. Tech explains that Mechanic keeps heroin in Mechanic's campus locker and is known to sell it to others. Tech explains that at least one other student has been sexually assaulted by Mechanic using this method.





Can we use an already existing process for interim removals?

- **Yes** – If that process complies with the Title IX standard
- Common institutional examples include:
 - Threat assessment policy
 - Critical Incident Response Team (“CIRT”)
 - Interim suspension provisions of Student Handbook

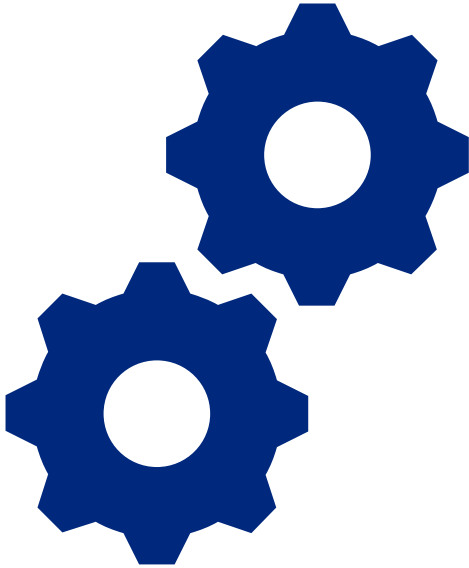


Can we place employees on administrative leave?

- **Yes** – Employee respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies (e.g., Faculty Handbook)



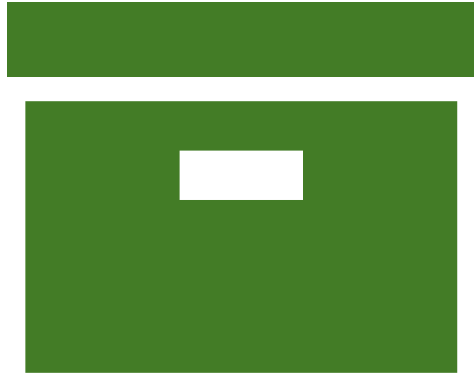
Do students and employees have other rights?



- **Yes** – Other laws may trigger accommodations when a medical condition or disability is present
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Section 504 of the Rehabilitation Act



Are supportive measures confidential?



- Generally, **Yes**
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with institutional employees who have a legitimate need to know



Who is responsible for supportive measures?

- Title IX Coordinator is responsible for “coordinating the effective implementation”
- May be delegated with appropriate oversight
- Typically, a collaborative effort involving more than one institutional office or department



What is informal resolution?

A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.



Types of informal resolution

Mediation

**Facilitated
discussions led by
Title IX
Coordinator**

Restorative justice

**Attorneys for
parties negotiate
an agreement**

**Arbitration
without a live
hearing**



Poll question

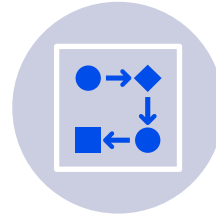
Informal resolution is an option before a formal complaint has been filed.

- True
- False

What are the key concepts of informal resolution?



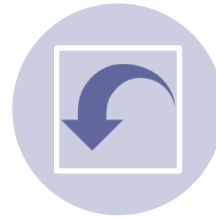
A formal complaint must first have been filed and written notice given to the parties



The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



The parties must voluntarily agree to participate in writing



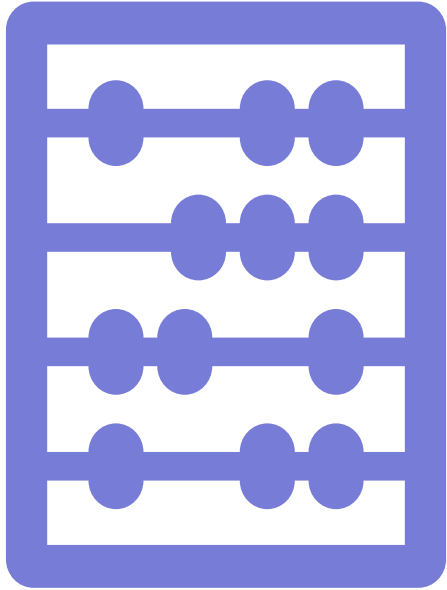
The parties must be allowed to withdraw from informal resolution up until the point it is final

What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment



What are considerations around whether informal resolution is appropriate?



- Nature of the alleged offense
- Any ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Any past findings regarding respondent
- Status of the parties
- Good faith participation of the parties

How should we document informal resolution?

As appropriate to each matter:

Initial consent to participate

Notice to the parties regarding the allegations

Consent to agreed upon procedures

Any agreement reached through the informal resolution process signed by all parties

And/or other documentation as appropriate



Who facilitates an informal resolution?

- Any suitably qualified and trained person may facilitate informal resolution, including the Title IX Coordinator
- Facilitator can be a third-party mediator or alternative dispute resolution specialist
- Default rules on conflicts of interest and bias apply



What is restorative justice?

“Restorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”

-Howard Zehr

How does restorative justice compare to general informal resolution?





Can a case that is resolved informally be “reopened”?

- It depends upon the terms of the informal resolution
- Title IX Coordinator should ensure that any informal resolution clearly resolves this question



Module 3:

Key Topics: Bias, Stereotyping, Conflicts of Interest and Trauma



Poll question

Who is responsible for identifying conflicts of interest?

- Title IX Coordinator
- Parties
- Those acting on behalf of the institution in the Title IX process
- All of the above



Who is responsible for identifying conflicts of interest and bias?

- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also permit parties to raise concerns of conflicts of interest and bias
- *Individual institutional actors should self-police conflicts of interest and self-identify bias

Examples of impermissible stereotypes

“Anyone who would go into another’s bedroom drunk must have wanted to have sex.”

“Students can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

“There are no false reports of rape. Therefore, every complainant must be believed.”



What is a conflict of interest?

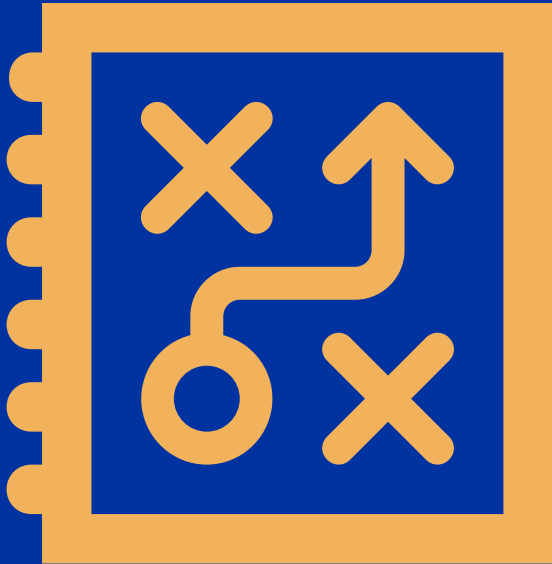
- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position

Example: Conflict of interest

Student Math files a formal complaint of sexual harassment against Student Chemistry. One of the hearing panel members selected is Student Chemistry's faculty advisor who has previously written letters of recommendation for Student Chemistry's application to graduate school in which faculty advisor wrote that Student Chemistry is "honest to a fault."



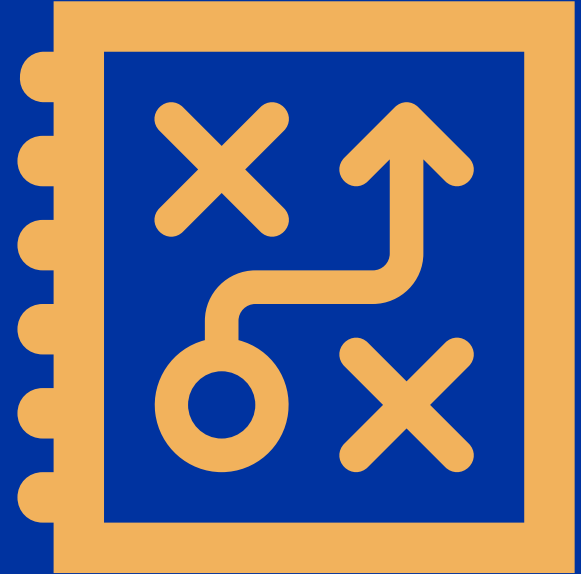
Example: Conflict of interest



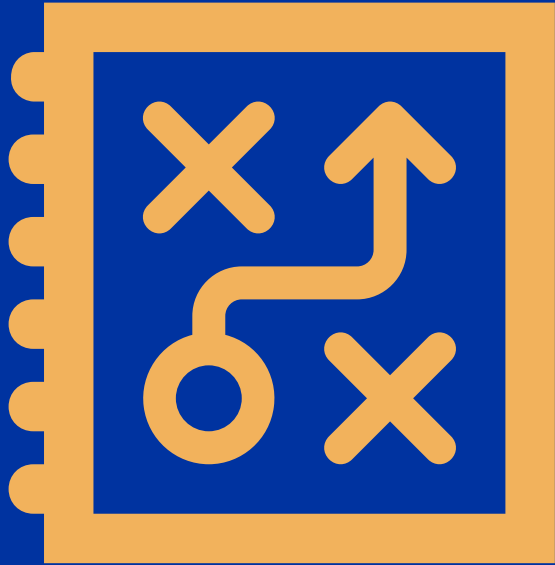
An administrator accuses an employee of an office supply vendor of sexual harassment; matter is investigated. Institution assigns a hearing panel member whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.

Example: Bias

An employee in the gender studies department who is chosen to serve on a hearing panel also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."



Example: Bias



Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.” Investigator tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”



Example #2 of bias



Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.” Investigator tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”



Resource for consideration: Harvard Implicit Bias Test

<https://implicit.harvard.edu/implicit/takeatest.html>





Trauma

“Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”

- Candace Jackson, Acting
Asst. Secretary of Ed (2017)



Trauma might affect a party

- Not in every case
- Not just one party
- Do not make assumptions that anyone participating in a hearing has suffered any trauma

Possible trauma impact

People who have suffered trauma may, but may not, experience any or a mix of the following:

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame



Trauma & Credibility

- Don't assume information is not credible due to the manner delivered
- Understand memory may be clarified in time
- Address inconsistencies
- Ascertain fair and impartial assessment of the facts and give appropriate weight to party and witness statements

What is the definition of trauma?



Merriam-Webster: A very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



English Oxford: Deeply distressing or disturbing experience



Wikipedia: Is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience

Physical reaction



- Brain—Trauma triggers chemical reaction which impacts
 - Perception
 - Ability to React
 - Memory
- Each individual reacts differently



Addressing trauma

- Avoid judgment, impatience, disrespect, misuse of power
- Emphasize
 - Safety/comfort
 - Choices
 - Support for person
 - Personal support
 - Available services
 - Remain objective on facts
 - Trustworthiness/transparency





Trauma-informed questioning

- Provide information to the party
- Acknowledge the difficult situation
- Provide as many options as possible
- For hearing panel, avoid requiring recitation of information already provided if possible
- The process
 - Your role
 - Policy
 - Communication



Awareness of respondent trauma

- Own experience
- Around event
- Around accusations
- Thoughts in the respondent's mind:
 - Will this be a criminal investigation?
 - Could I go to jail?
 - Could I get kicked out of school?
 - Should I have a lawyer?
 - Should I tell my parents?
 - You can't answer these questions but must give time and options
- Institution should always offer interim measures and counseling

Module 4: Investigations



What is the purpose of an investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine
- Whether or not the reported sexual harassment occurred



What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity to review and comment on evidence developed
- Investigation is evidence-gathering; not fact-finding



Poll question

The Title IX Coordinator can begin investigating to determine details in preparing the written notice.

- True
- False



How do we tell the parties about an investigation?

- Institution must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how” before investigating



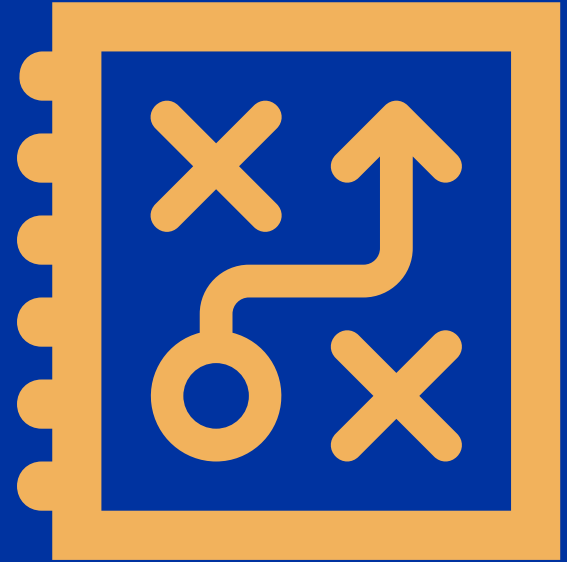


What else does the notice need to say?

- Written notice must also include:
 - Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
 - That parties have the right to an advisor of their choice
 - That parties have the right to inspect and review evidence
 - Any prohibition on providing knowingly false statements or information

Example: Incorrect

Student accuses Employee of quid pro quo harassment. Prior to sending written notice, Title IX Coordinator appoints investigator who schedules interviews with Employee's co-workers. Only after these interviews are complete, does the investigator send a written notice to Employee.

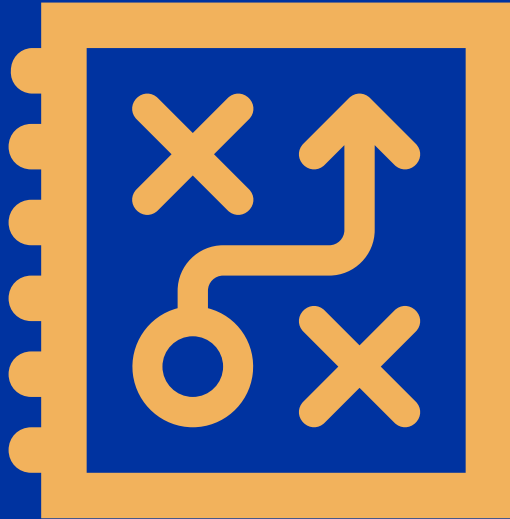




Can we gather any information prior to the written notice?

- **Yes** – But only to the extent necessary to determine how the case will proceed
- Typically, this “preliminary inquiry” would involve identifying the putative victim and understanding the scope of the allegations
- Information gathering that seeks to determine whether the allegations are true is investigatory and should await the written notice

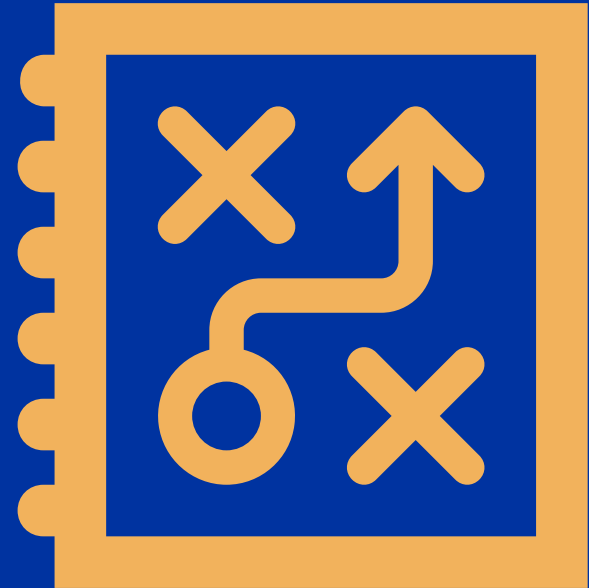
Example: Preliminary inquiry



Student submits formal complaint via email with a single sentence reading, “Named Student sexually assaulted me.” Prior to sending a written notice, investigator meets with the complainant and asks for more specific information about what happened—the “who, what, when, where, and how.”

Example: Preliminary inquiry

Campus visitor reports that Student was sexually assaulted by another student. Investigator sends email to Student seeking to meet with Student to understand what happened and how Student wishes to proceed.



May we take steps to preserve information before sending the written notice?

- **Yes** – If the work isn't investigatory and there is a legitimate concern information will be lost
 - Placing a “hold” on an email account
 - Asking IT to capture server-level data
 - Having campus security suspend auto-delete of security footage





May parties have an advisor during the investigation?

- **Yes** – Parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role during the investigation phase
- Institution is not required to provide an advisor during the investigation phase



What is the role of an advisor during the investigation?

Support	Provide personal support to the party throughout
Preparation	Help the party prepare for meetings and interviews
Presence	Be present with the party during meetings and interviews
Review	Assist the party in reviewing the evidence prior to the close of the investigation

What must an advisor not do during the investigation?

Inhibit	Advisor cannot inhibit communication between investigator and party
Disrupt	Advisor cannot disrupt meetings and interviews
Argue	Advisor is not permitted to argue with the investigator
Evidence	Advisor does not present evidence or “make a case”



What if the advisor breaks the rules?

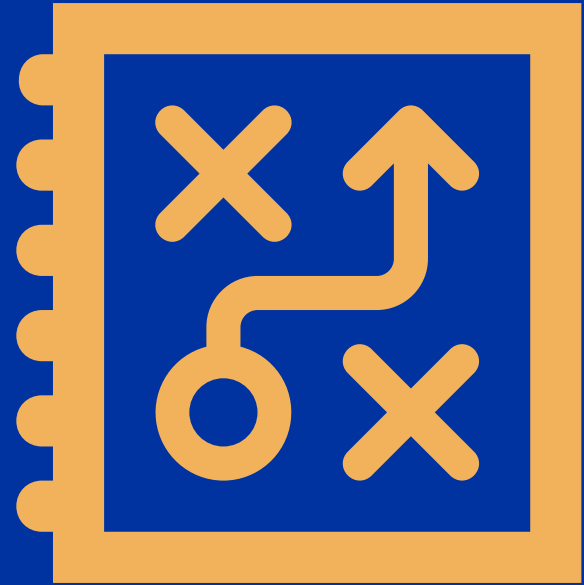


- An advisor who violates the rules may be excluded from further participation
- The University may pause the relevant interaction to allow the party to select a new advisor



Example: Advisor breaking the rules

During the interview, a party's advisor repeatedly interrupts the investigator, objects to questions, argues that the investigator should ask different questions, and attempts to present legal arguments citing caselaw.



Investigation framework

A diagram showing the investigation framework. It consists of three blue rounded rectangular boxes arranged horizontally, connected by a light blue arrow pointing from left to right. The first box contains the text: 'The investigators interview the complainant, respondent, and relevant witnesses. The investigators identify and gather evidence.' The second box contains the text: 'At the conclusion of evidence gathering, the investigators give the parties an equal opportunity to inspect and review evidence obtained.' The third box contains the text: 'After the parties have provided their written response, the investigators will create a written investigative report summarizing the relevant evidence collected.'

The investigators interview the complainant, respondent, and relevant witnesses.

The investigators identify and gather evidence.

At the conclusion of evidence gathering, the investigators give the parties an equal opportunity to inspect and review evidence obtained.

After the parties have provided their written response, the investigators will create a written investigative report summarizing the relevant evidence collected.

How do we collect evidence in an investigation?



**Interviews of
Parties and Witnesses**



**Collection of
Non-Testimonial Evidence**

How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection

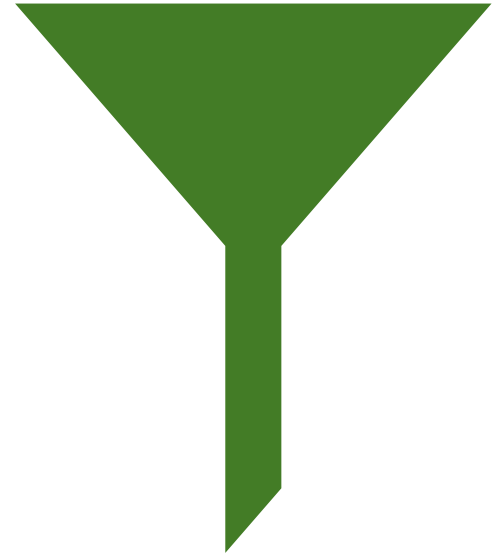


Closure/information providing phase



How do I ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of specific questions (“recognition prompts”) as long as possible
- Avoid suggestive or leading questions



Examples: Open Invitations



“Please tell me what happened that night.”



“Can you walk me through what happened?”



“In your own words, tell me what occurred.”



“Can you tell me everything that happened after you got to the party?”

Examples: Facilitators



Examples: Cued Invitations

“You mentioned that .
... Can you tell me
more?”

“You said that
Can you elaborate?”

“You said they
‘coerced’ you. Can you
tell me what they
did?”

“If I understood you
right, you said that
after Can you tell
me what happened in
between?”

Examples: Recognition Prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

Active listening

- Active listening – “the most effective tool that exists for demonstrating understanding and reducing misunderstanding”
Gerald Goodman, *The Talk Book*
- When engaging active listening skills, you will hear both factual content, and the feeling accompanying that that content
- Active listening requires a set of skills that you can employ; focus on employing the same skills you would apply when trying to understand information in an emergency situation



Active listening

- What is required for effective listening
 - Create a listening environment
 - Physical environment
 - Internal environment
 - What word can you make out of the letters of “LISTEN” that is an essential skill for effecting communication?”
 - Adapted with permission from “Essentials of Active Listening” – Written by Dean of University of Missouri Kansas City Law School

Active listening

Adapted with permission
from “Essentials of Active
Listening” – Written by Dean
of University of Missouri
Kansas City Law School

- Why listen?
 - To gain information, perspectives, and to understand emotions.
 - To encourage speaker.
 - To build rapport.
- Why listen actively?
 - To facilitate communication.
 - To diffuse emotions.
 - To translate content.
 - To ensure accuracy.



Active listening

- Feedback Loops
 - Paraphrase factual content
 - To check your understanding of the ideas, information, or suggestions of others, state the speaker's idea in your own words or give an example that shows what you think the speaker is talking about.
 - Check Perceived Emotions
 - To check your perception of the feelings of someone else, state what you perceive that person to be feeling.

- Adapted with permission from “Essentials of Active Listening” – Written by Dean of University of Missouri Kansas City Law School



Ineffective	Effective
NON VERBAL BEHAVIOR	
Listener looks bored, uninterested or judgmental; avoids eye contact; displays distracting mannerisms (doodles, etc.)	Listener maintains positive posture; avoids distracting mannerisms; keeps attention focused on speaker; maintains eye contact; nods and smiles when appropriate.
FOCUS OF ATTENTION	
Listener shifts focus of attention to self: “When something like that happened to me, I....” (attention may focus internally, as when thinking about how you would feel, respond, etc.)	Listener keeps focus on speaker: “When that happened, what did you do?”
ACCEPTANCE	
Listener fails to accept speaker’s ideas and feelings: “I think it would have been better to...”	Listener accepts ideas and feelings: “That’s an interesting idea, can you say more about it?”
EMPATHY	
Listener fails to empathize: “I don’t see why you felt that...” (or, more commonly, simply silence or ignoring feelings)	Listener empathizes, “So when that happened, you felt angry.”

PROBING	
Listener fails to probe into an area, to follow up on an idea or feeling	<p>Listener probes in a helpful way (but does not cross examine)</p> <p>“Could you tell me more about that? Why did you feel that way?”</p> <p>“A few minutes ago you said...”</p>
PARAPHRASING	
Listener fails to check the accuracy of communication by restating in his own words important statements made by the speaker	Listener paraphrases at the appropriate time.
SUMMARIZING	
Listener fails to summarize	Listener summarizes the progress of the conversation from time to time
ADVISE	
Listener narrows the range of alternatives by suggesting the “Solution”	Listener broadens the range of ideas by suggesting (or asking the speaker for) a number of alternatives



How do we make a record of the interview?

- Note-taking and audio recording are both appropriate methods of making a record of the interview
- If the investigator takes notes, they should be used to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator's mind
- If the investigator records the interview, the investigator must be sure to clearly state on the record the time, place, date, and persons involved in the interview

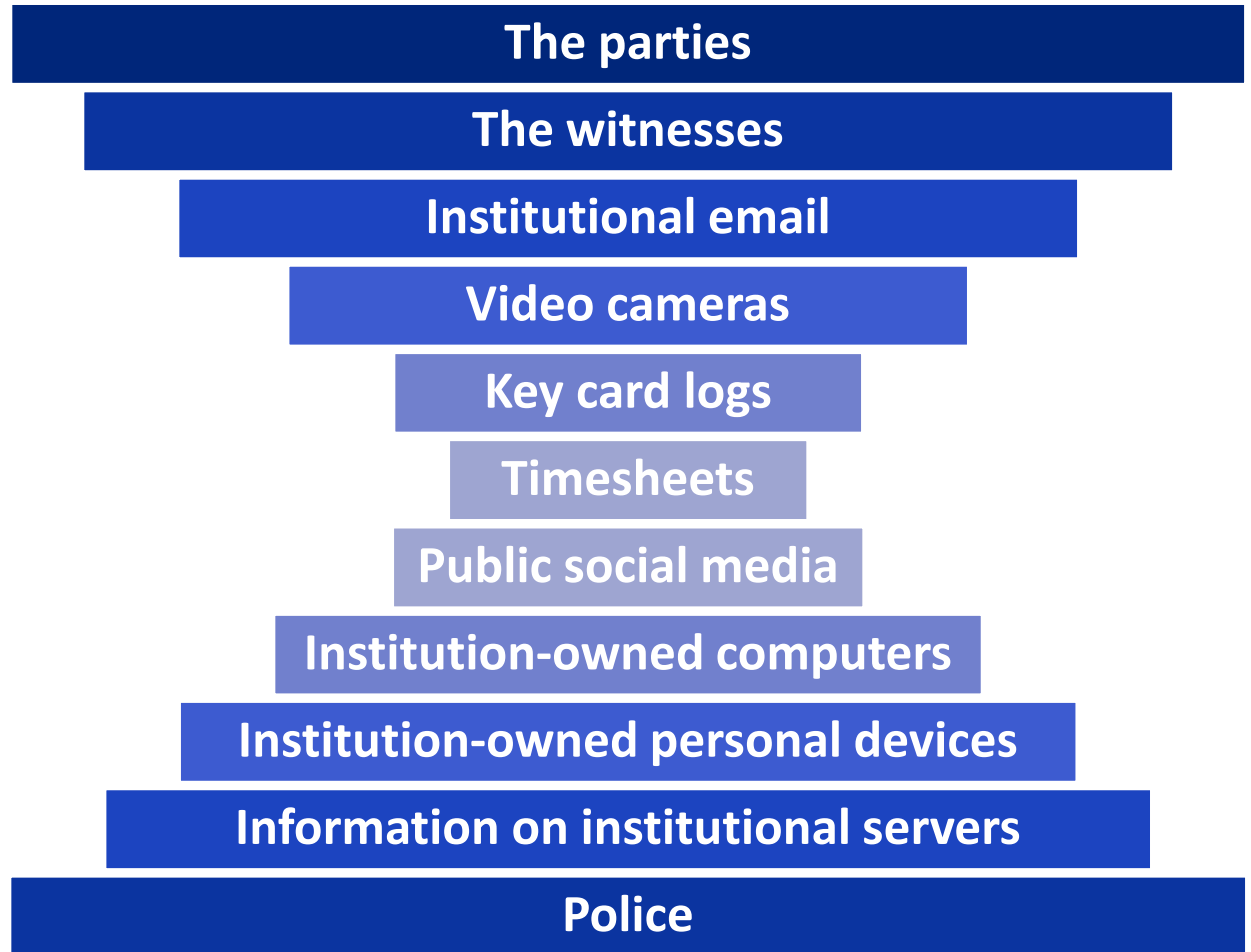




Do parties/witnesses have a right to record the interview themselves?

- Investigation meetings are not audio or video recorded by the University and may not be recorded by any participant.
- Parties and witnesses may take notes during investigation meetings.

Example: Sources of Non- Testimonial Evidence





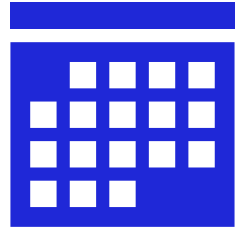
Poll question

Do the parties have access to the evidence?

- Yes, only during the hearing
- Yes, at least 10 days before the investigative report is issued
- Not usually
- It depends

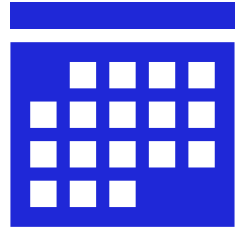
Do the parties have access to the evidence?

- At a minimum, parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is issued
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally



Do the parties get to respond to the evidence?

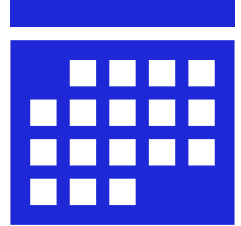
- **Yes** – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report





When is the investigation report finalized?

- After the 10-day period to review the evidence expires
- The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the 2020 Title IX regulation, factual findings and determinations of policy violations are made at a subsequent hearing



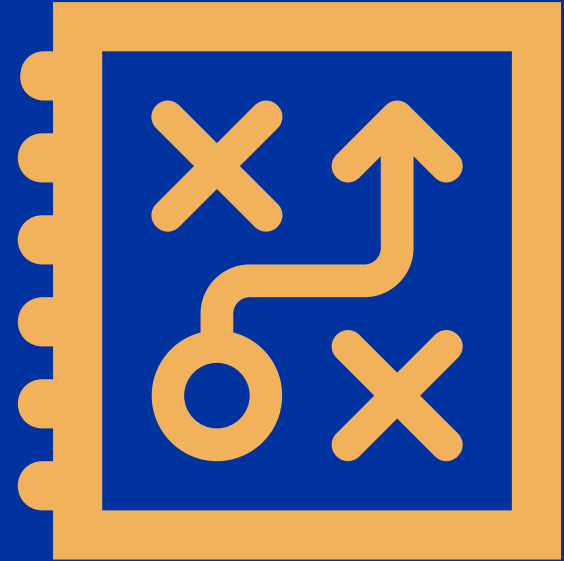


What exactly has to be shared?

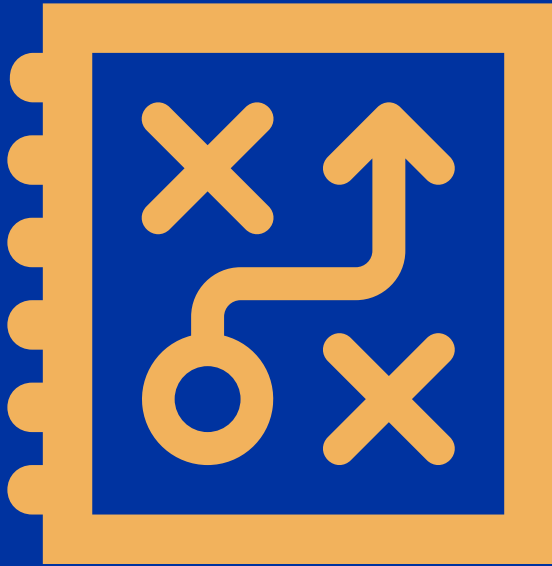
- Anything that has “evidentiary” value
- That is, the information is potentially inculpatory or exculpatory in light of the allegations at issue; or is otherwise potentially relevant
- E.g., witness statements; interview transcripts; text messages; social media posts; photographs; etc.
- Logistical communications; calendar invites; support measure communications generally are not shared

Example

Transcript of interview with complainant contains 10 minutes of initial discussion about complainant's supportive measures and access to counseling. Investigator redacts this portion of the transcript before sharing with the parties.



Example

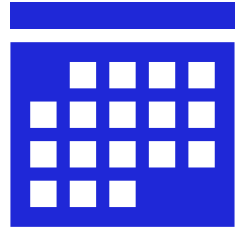


Investigator had 12 emails with respondent and advisor attempting to negotiate a time and place for interview. Investigator excludes the 12 emails from the evidence made available to the parties.

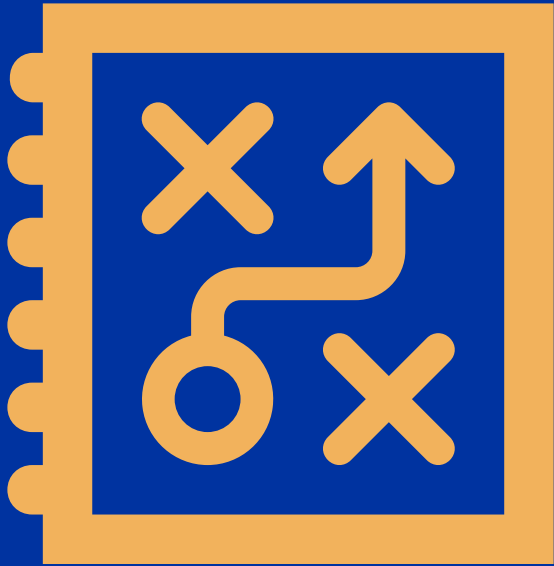


Do the parties get to respond to the evidence?

- **Yes** – After they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report



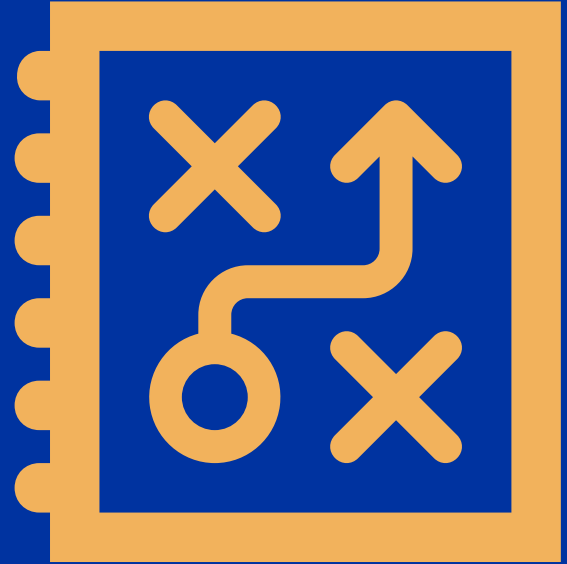
Example: Permissible



After completing all interviews, investigator uploads interview transcripts and other evidence to a secure file sharing program and sends individual links and passwords to each party and their advisor.

Example: Impermissible

After completing all interviews, investigator prints copy of the evidence and tells parties they can schedule a time to review it in a conference room without cell phones.





How should we make the evidence available to parties?



- Regulation requires the evidence be sent to each party and advisor in
 - Electronic format or
 - Hard copy



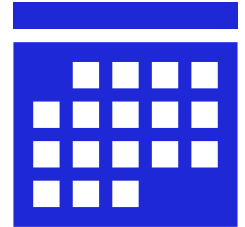
Are we required to address a party's response to the evidence?

- It depends on whether the party's comments merit a response
- If no response is merited, the party's submission can simply be appended to the final report



What is the last step in the investigation?

- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing





Poll question

Does the investigation report make findings?

- Yes
- No
- It depends



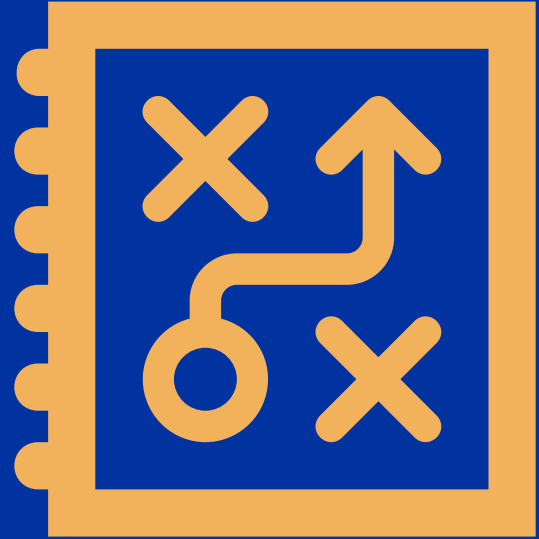
Should our investigation report comment on credibility?

- If particularly notable credibility issues arise, report should identify them
- Commentary on credibility of every party and witness is unnecessary given they will testify live at hearing



Example

During interview, a party gives one factual account. When confronted with a text message contradicting the account, the party admits to the investigator the party was not being truthful and revises the party's account. Investigator may note the party's admission in investigation report.



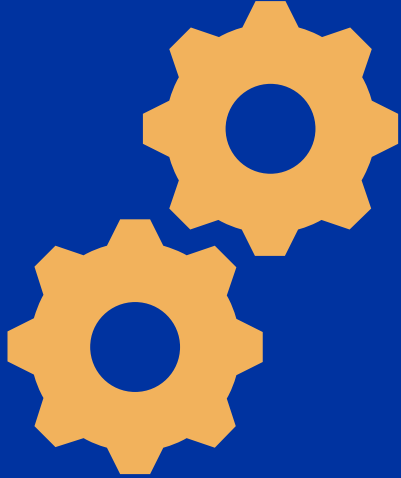


Poll question

Do the parties get to comment on the investigation report?

- Yes
- No
- It depends

Group Scenario



Accounting Student accuses Management Student of sexual harassment after Management Student repeatedly sends Accounting Student sexual messages on Instagram. Management Student does not respond to investigator's written request for interview. Eventually, attorney for Management Student sends letter to investigator indicating Management Student will not submit to interview and demanding complaint be dismissed because the incident occurred outside Title IX jurisdiction.

After investigator completes other interviews and makes the evidence available, Management Student's attorney sends a signed declaration from Management Student disputing the allegations and accusing Accounting Student of falsifying the complaint. Management Student's attorney also identifies six other students who Management Student wants interviewed; three will purportedly testify to Management Student's relationship with Accounting Student and the other three will purportedly testify about prior allegedly false allegations against other students made by complainant.

Questions



HUSCH
BLACKWELL



HUSCH BLACKWELL

**Trident University International
a member of the AIU System**

Title IX Training - Day 3

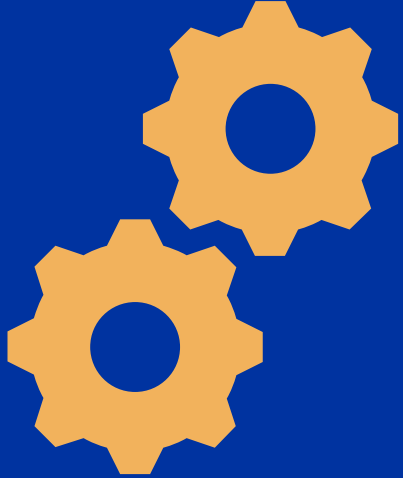
July 2022



Housekeeping

- **Recording is not permitted**
- Slides will be provided by email after the training concludes
- Change Zoom name to include institution and position
- Raise hand or use chat function to ask questions
- Other breaks—take individually as needed

Group Scenarios



Breakout Groups

- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Scenario and questions for each Group
Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Cameras on for breakouts



Agenda

- Hearing Process
- Effective Questioning and Cross-Examination
- Hearing Decision
- Appeals



Module 1: Hearing Process



What is the purpose of the hearing?

To hear testimony and receive non-testimonial evidence so that:

- The hearing officer can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary



Balancing the parties' interests

- The Department of Education believes that live hearings with cross-examination serve as a valuable truth-seeking tool in the grievance process
- But the Department recognizes that cross-examination in cases involving violent allegations could be traumatic for complainants
- To balance the two, the Department mandated both parties have the right to a third-party advisor

Role of the Advisor: Pre-Hearing

When investigating a formal complaint and throughout the grievance process, an institution must:

- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties...



Live Hearing Requirement

- Postsecondary institutions must provide for a live hearing
- At that hearing, the decision-maker must allow the advisors to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility
- Cross-examination may occur with the parties located in separate rooms at the request of either party


What is the role of an advisor during the hearing process?

Support	Provide personal support to the party throughout
Preparation	Help the party prepare for pre-hearing conference and live hearing
Presence	Be present with the party during pre-hearing conference and live hearing
Questioning	Conduct live questioning of other party and witnesses at the live hearing


What are the phases of the hearing process?




What happens before the hearing?

 Parties are provided the final investigation report at least 10 days prior to the hearing

 “Decision-maker” must be identified and clear conflicts of interest assessed

 Hearing must be scheduled, and logistics arranged

 Witnesses must be notified

 Pre-hearing conference may be held



What is the pre-hearing conference?

- Discuss hearing procedures
- Discuss any stipulations that may be made to expedite the hearing
- Discuss what witnesses need to attend
- Resolve other matters raised in the party's written responses to the investigation report

How do we schedule a hearing?



Set aside sufficient time considering the nature and complexity of the case



Consider class and work schedules of parties and key witnesses to avoid conflicts



Consider pre-scheduling a backup or “spill over” date in the event the hearing runs long or must be continued



Provide documentation excusing parties and witnesses from other obligations, as necessary



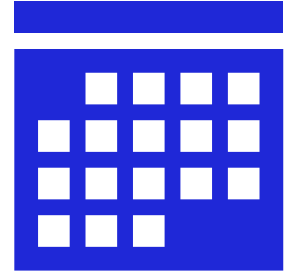
What are other pre-hearing conference considerations?

- The pre-hearing conference may (under regulations) be two separate meetings—one with each party and advisor; but follow up notification may be required
- The pre-hearing conference may be conducted virtually
- Advisors should be allowed to attend although their role can still be passive if the institution desires
- The pre-hearing conference is not required but is a best practice that facilitates a smooth hearing



When should a pre-hearing conference be held?

- Any time after the final investigation report is issued
- The decision-maker is identified
- Sufficient time exists to address issues raised in the pre-hearing conference before the hearing occurs





How do we notify parties and witnesses?

- Institution must provide written notice to the parties of time and place of hearing
- Institution should provide written notice to witnesses requesting their presence
- Notice may be issued by the decision-maker or another institutional official in coordination with decision-maker





What does the hearing notice say?

- Identity of the hearing officers
- Deadline for the parties to submit response to investigation report
- Date for the pre-hearing conference
- Date and time for the hearing (no earlier than 10 days after investigation report is issued)



What is a “live” hearing?

- A proceeding held by the hearing officer, either in-person or virtually where:
 - Parties are present with their advisors at the same time
 - Parties and witnesses testify with contemporaneous participation (i.e., no “pre-recording”)
 - Parties’ advisors ask live questions of the other party and witnesses

Who attends a live hearing?

- The decision-maker(s)
- Other necessary institutional personnel or institutional advisors (e.g., attorneys)
- The parties
- Each party's advisor
- Witnesses as they are called to testify
- Other support persons for parties, if permitted by institution





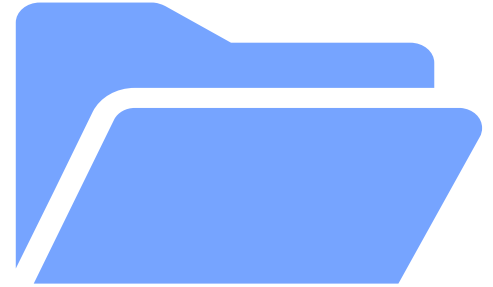
Who are the “decision makers”?

- **CTU Policy:** Title IX Coordinator appoints a hearing council who will oversee the hearing process and render a determination of responsibility
 - Hearing Council is comprised of at least 3 Administrators
 - Administrators trained annually
- **Trident:** Hearing may be before a single decision-maker or panel of decision-makers



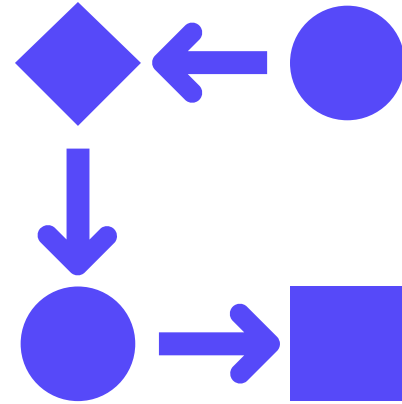
How should we prepare for a hearing?

- Know who's coming (parties, witnesses, advisors, others)
- Consider potential conflicts of interest
- Review relevant policies
- Review investigative report
- Review hearing procedures
- Review rules of decorum
- Review any responses to report by parties
- Prepare “must ask” questions
- Anticipate questions and issues



What are the logistics of a hearing?

- Hearing must be recorded (audio or video) or transcribed
- Hearing can be held in a single room or with the parties separated in different rooms
- Hearing can be held virtually using suitable software





Does the University provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing
- If a party does not have an advisor, the University will supply one for the purpose of questioning the other party and witnesses on behalf of the student in question



What is the Role of Adjudicators?

- Conduct hearing (if applicable)
- Make a finding
- Determine sanction
- Explain decision
- Ensure clear record



How does the hearing actually work?

Required elements include:

Hearing Officer must independently evaluate questions for relevance and resolve relevancy objections

Party's advisors must be allowed to conduct live questioning of other party and witnesses

Party or witness who refuses to submit to live questioning from other party's advisor must have their testimony excluded **Subject to modified rule*

Questioning of sexual history generally not permitted



Participation of Advisors

- Advisors are permitted to conduct direct and cross-examination during the hearing.
- If a party does not have an advisor present at the hearing, the University will provide that party, free of charge, with an advisor of the University's choice, to conduct questioning on behalf of that party.

Consider Other Potential Policies

- Student Code of Conduct
- Staff Handbook
- Faculty Handbook
- Specific policies related to inappropriate use of computers, hazing, etc.





Lesson for Panel Members:

Doe v. Purdue University, et al. (2019)

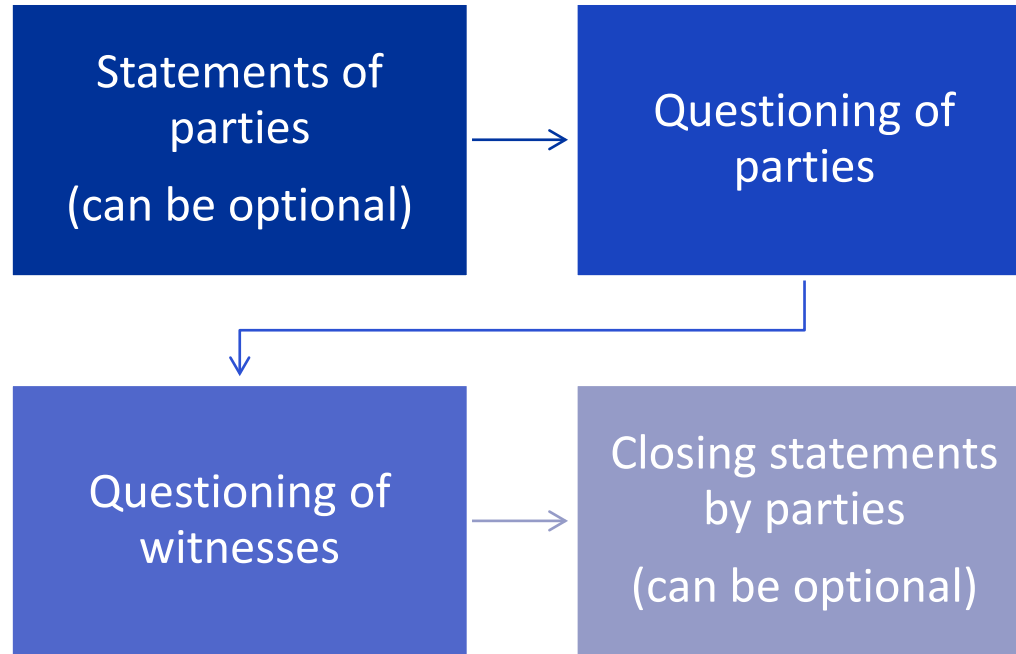
- Denied MTD on due process and Title IX claims
- Student suspended with conditions; later expelled
- Student claimed due process was inadequate, e.g.:
 - Not provided with investigative report
 - No opportunity for cross-examination
 - Complainant & witnesses found credible by committee, but not interviewed in person by fact-finder
- Court found material issues of fact and denied MTD, noting:
 - ***“... two of the three panel members candidly admitted that they had not read the investigative report ...”***

Typical Hearing Elements

- Procedural / housekeeping remarks
- Overview / summary of investigation report
- Party statements
- Questioning / cross-examination of parties & witnesses
- Deliberation
- Written determination



What is a potential sequence?



How might questioning of witnesses take place?

Witness is first questioned,
including cross-examination,
by advisor who called the
witness

Followed by questioning of
hearing officer/panel

Followed by questioning,
including cross-examination, from
advisor for other party

Hearing Curve Balls



Starting the Hearing: Setting the Tone

- Affirm notice
- Discuss purpose of hearing/goals: expectations of what hearing is for/not for
- Discuss role of hearing panel/administrator
- Explain ground rules
- Address standard of evidence
- Welcome questions
- Take breaks as needed



What are Common Rules of Decorum?

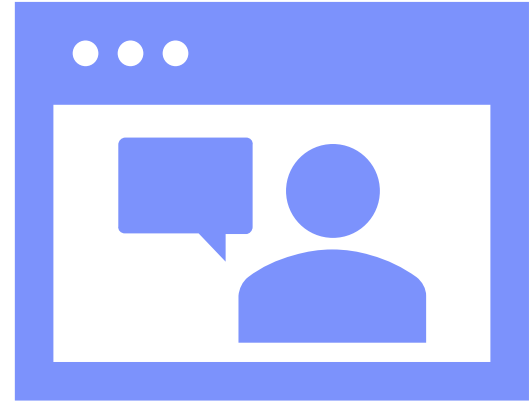
- All present required to act professionally, maintain decorum, and abide by the institution's policies, procedures and any decision-maker rules and directives
- Cameras must remain on during speaking/questioning
- Other than conducting questioning, advisors are not permitted to speak for their advisee, make objections, present arguments, or engage in any other active role
- Advisors may speak (via quiet consultation or notes) with the parties they represent; if lengthy private discussions are required, a break may be requested

What are Common Rules of Decorum? (*cont'd*)

- Any abusive, intimidating, or disrespectful way of questioning will be prohibited
- Advisors violating rules of decorum may be asked to leave the hearing and may be excluded (and/or limited) from participation in any subsequent meeting or hearing
- Institution will appoint a different advisor for a party whose advisor is removed, does not appear, or if the party does not select an advisor
- All participants in the hearing process are expected to provide complete and truthful information and may be subject to disciplinary action for failing to provide truthful information

Separating the Parties

- Video/ audio conferencing
- Separate rooms
- Screens





How should we field curveballs?

When curve balls arise during a hearing,
ADDRESS THEM

- Late/new evidence
- Conflicts of interest
- Heightened emotions
- Potential trauma-impact



The Art of Fielding



Be ready to respond to curveballs with questions (or recess to regroup)



Late/new evidence → Why wasn't this presented during the investigation?



Conflicts of interest → Why are these being raised now? What changed?



Heightened emotions → Take a break so hearing can proceed productively



Potential trauma-impact → Take breaks, rely on support persons, and give opportunity to party potentially impacted to participate in the manner they are most comfortable

And Fastballs!

Character witnesses/ statements

- Character evidence does not often hold much weight as to whether a policy violation occurred
- May or may not be allowable, based on policy
- If allowed, best practice is to impose reasonable limits, and
- Explain that these are generally considered only as part of sanctioning





More Curveballs: Advisors

- Need to allow advisor to conduct cross-examination, but can enforce reasonable expectations of professionalism
- Need to establish appropriate boundaries with advisors
- Role should be set by policy
- Hearing panel serves as umpire: 3 strikes you are out rule
- If ejected from game, generally allow for party to find new support person/advisor



Poll Question

Must the hearing officer exclude the statements of any party or witness who refuses to attend the hearing and/or submit to cross-examination?

- Yes
- No

Victim Rights Law Center et al. v. Cardona *(D. Mass. July 28, 2021)*

- Struck down part of the 2020 amendments to Title IX regulations
- Vacated regulatory language prohibiting decision makers at postsecondary institutions from relying on statements by individuals who did not submit to cross-examination during a live hearing
- Department of Education guidance indicates that it will not enforce the vacated language.
- Decision maker may not make an inference solely from the decision of a party or witness to not participate at the hearing



Can a postsecondary institution keep its exclusionary rule?

- No.
- To the extent statements made by a party or witness who does not submit to cross-examination at a live hearing are relevant, they must be considered in any Title IX grievance process initiated after July 28, 2021.

Updated OCR FAQ Guidance

Question: Despite the court's decision, may a postsecondary school choose to maintain the prohibition on considering statements made by a party or witness who does not submit to cross-examination at a live hearing as part of its Title IX grievance process?

Answer: No. The 2020 amendments at 34 C.F.R. § 106.45(b)(1)(ii) require “an objective evaluation of all relevant evidence.” To the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation's relevance rules, they must be considered in any postsecondary school's Title IX grievance process that is initiated after July 28, 2021.



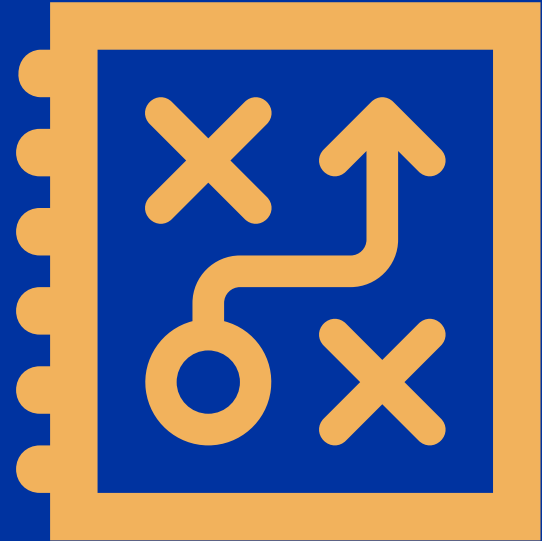
Can a decision-maker rely on statements of a party or witness who does not answer questions posed by the decision maker?

- Yes.
- If a party or witness submits to cross-examination but does not answer questions posed by the decision-maker, the decision-maker still may not draw any inference about the party's credibility based on the party's refusal to answer the questions.

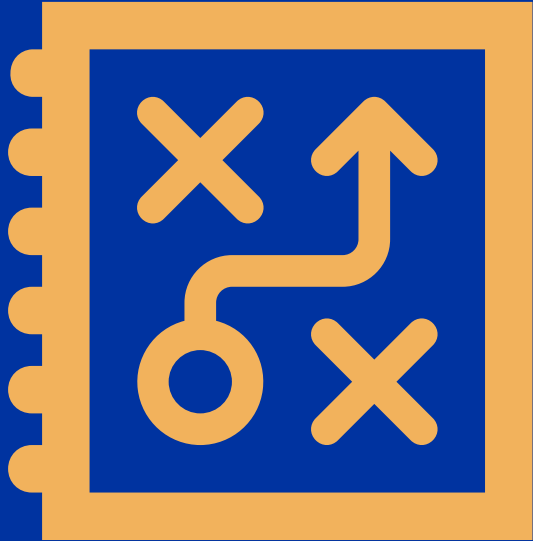
Example: Not-excluded

Respondent told investigator that respondent could not have committed an alleged assault because Respondent was in a different city that day.

Respondent does not appear at the hearing.



Example: Not-excluded



Complainant's advisor decides not to ask any questions of Respondent, who is present at the hearing and willing to submit to cross examination, deciding to rest on Respondent's prior statements.

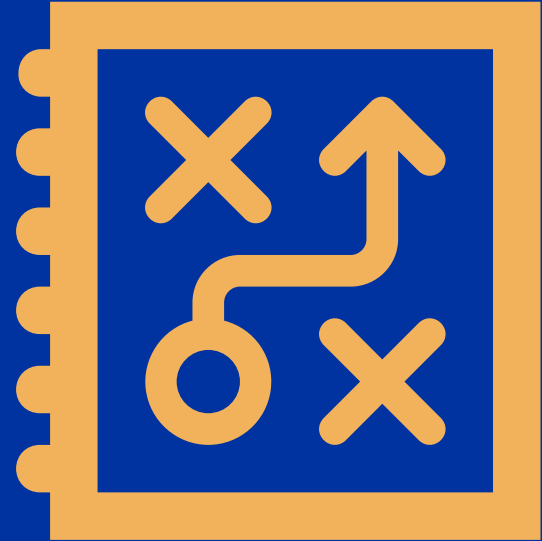


Is there a Standard of Behavior in Hearings?

- Yes
- All parties (including advisors) must:
 - Act professionally
 - Maintain decorum
 - Not disrupt proceedings

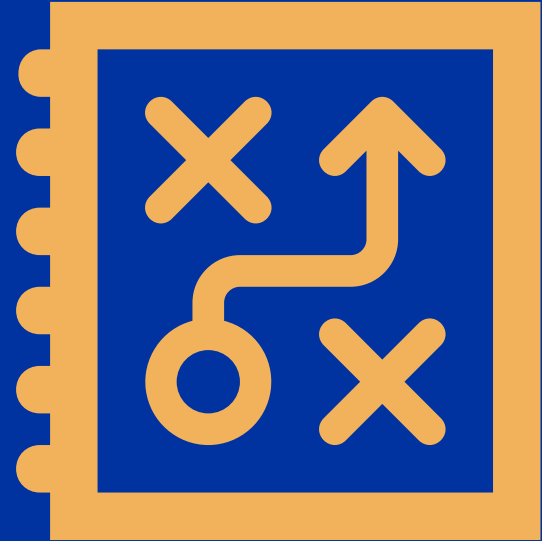
Example: Permissible

Institution's hearing procedures require all participants to maintain decorum, remain at their respective assigned table at all times, and direct all communications to the hearing officer with the exception of questions posed to the other party and witnesses by each party's respective advisor.



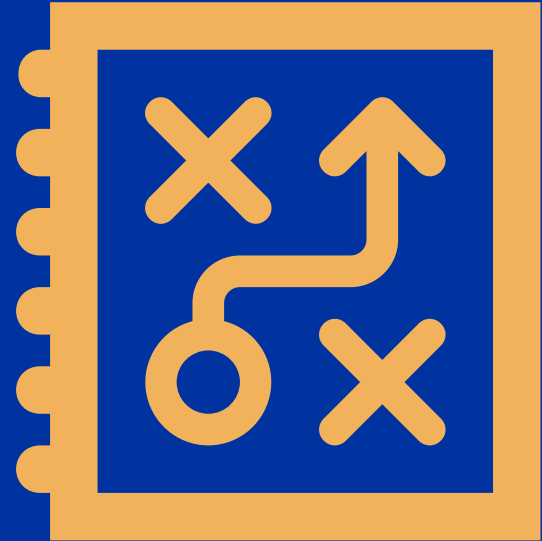
Example: Impermissible

Institution's policy prohibits a party or advisor from "doing anything that would make another party uncomfortable or suffer anxiety, including asking questions that may cause a party to relive an experience in a traumatizing way."

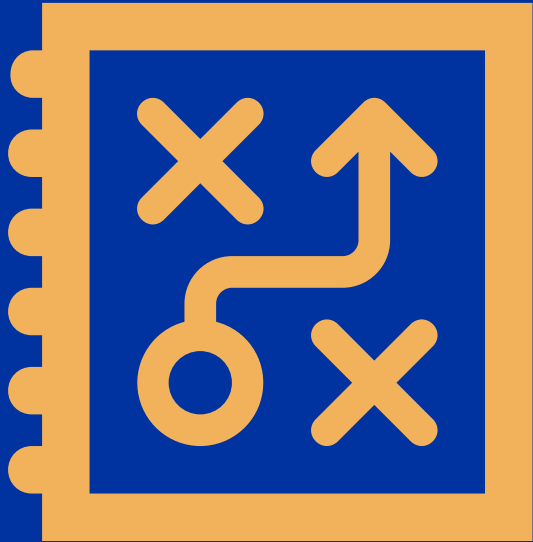


Example: Impermissible

A respondent's advisor interrupts with "strenuous objections" to questions asked by complainant's advisor based on "hearsay," "assumes facts not in evidence" and other bases other than relevance.

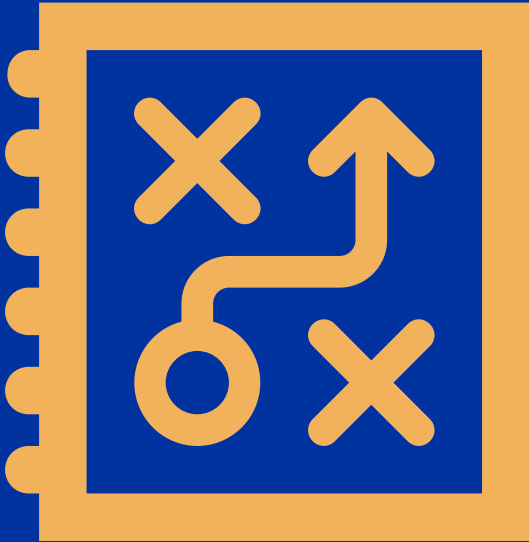


Example: Impermissible



During questioning of the respondent, a complainant's advisor shares a Zoom screen reading "liar."

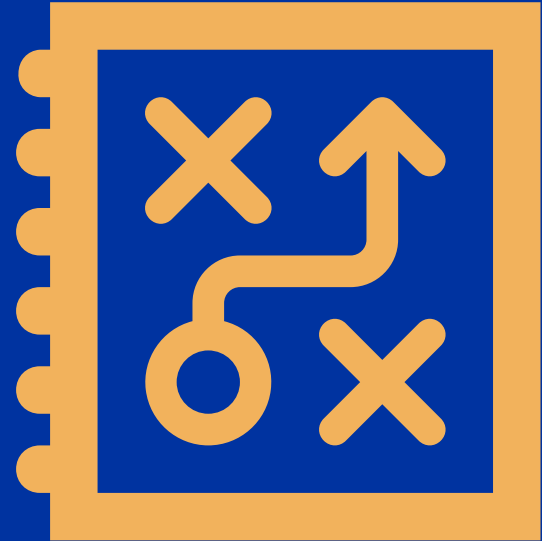
Example: Impermissible



After the hearing officer rules a question is not relevant, the advisor begins to argue with the Hearing officer and exclaims: “I can’t believe how incompetent you are!”

Example: Impermissible

As a party is testifying, the advisor supporting them nods his head when the party gives a “good” answer and shakes his head side to side when the party says something unhelpful.



Module 2: Effective Questioning and Cross-Examination



Do we provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing
- Advisor can be, but does not have to be, an attorney
- If a party does not have an advisor, institution must supply one for the purpose of questioning the other party and witnesses on behalf of the student in question



Is an advisor allowed to question their own party?



- Not unless the institution chooses to allow it
- The Title IX regulation requires cross-examination, but not “direct” examination



Should advisors act like lawyers?

Unless an attorney is used, the role of an advisor is a non-legal role

- Advisors are not providing legal advice
- Advisors are not a prosecutor or a defense attorney
- Advisors are not required to engage in “zealous advocacy” like an attorney
- Advisors are asking relevant and appropriate questions to reasonably support the case of the party they are supporting



Are there “objections” at hearings?

- Minimally, the institution must allow a party to raise an objection that evidence is not relevant or should be specifically excluded (e.g., sexual history; confidential privilege)
- Institution may permit other objections to be raised
- Institution may limit the right of objection to a party



Is an advisor required to ask questions a party wants asked?

- Advisors should consult with their party and consider their preferences for what questions to ask
- But an advisor must exercise their own reasonable judgment and is never required to ask questions that the advisor knows are improper (e.g., invade sexual history)
- An advisor may consult the decision-maker if a party demands the advisor ask a question that advisor is uncertain is appropriate

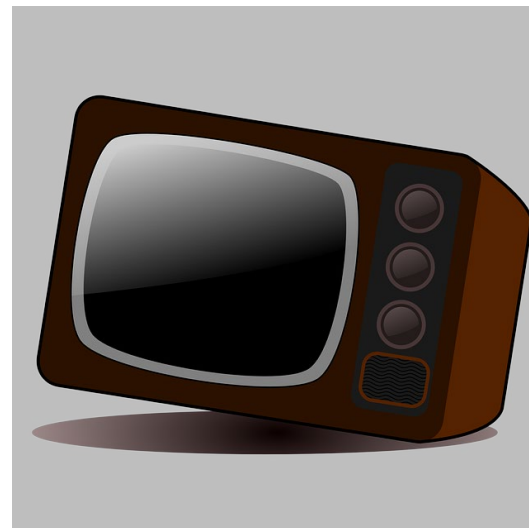
How do I know what questions to ask?

Review	Review the nature of the allegations
Review	Review the definition of the particular type of sexual harassment alleged
Consider	Consider facts that would support your party's position that a given element of the sexual harassment is either met or not met
Prioritize	Prioritize your questioning to focus on the most compelling points
Consider	Consider questions that will bear on credibility



Facilitating Effective Cross Examination

- Different than live cross examination in court (or on TV)!
- The goal is to ensure that each party has an opportunity to hear what the other party and witnesses are offering
- Does not automatically make the process an adversarial one



Questioning . . .

- Often one of the most critical parts of any hearing
- Provides an opportunity to further clarify facts and evidence, if needed
- The wrong question—or the right question asked the wrong way—can open the door for challenges





What are the hallmarks of effective questioning?

- Questions should be clear and precise
- Questions should advance a party's position with respect to one or more elements of the sexual harassment alleged
- Questions should be asked in a purposeful order
- Questions should be prioritized and edited for greatest effect



General Questioning Guidelines

- Open-ended questions generate more information while closed-ended questions will clarify specifics.
- Close-ended questions result in yes/no responses that often don't offer much additional information. Use close-ended questions to obtain specifics and clarify information you have already received.
- Silence is ok: Give the witness time to answer.





General Questioning Guidelines (more)

- **Credibility:** If you have concerns that a witness is not providing complete and accurate testimony, respectfully explain the reason for your concern and indicate that you are interested in hearing the individual's response to your concern (e.g., "Help me understand...") and address inconsistencies.
- **Be professional and respectful:** Keep in mind that questioning, while sometimes necessary, may put a party or witness on the defensive.
- **Ask the difficult but relevant questions:** Give both parties an opportunity to address your concerns.



When Asking Questions . . .

- **Non-verbal communication**
 - Convey care, concern, and interest to both sides
 - Make eye-contact
- **Verbal communication**
 - Avoid questions that imply the alleged conduct occurred or did not occur
 - Avoid questions that blame or judge the complainant
 - Avoid question that blame or presume violation by respondent
 - Use medical terms for clarification

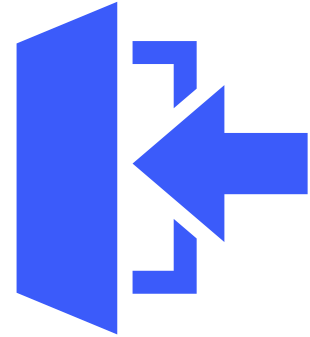


What is the appropriate manner of asking questions?

- From your table or podium
- Address the party respectfully using a preferred title of courtesy (i.e., “Mr.” “Ms.” “Dr.” “Professor”) unless requested to use a first name
- Use an even and appropriate tone of voice (i.e., no shouting; no snide tone; no sarcasm; no dramatics)
- Do not invade a witness’s physical space
- Do not use intimidating physical actions (i.e., finger pointing; fist pounding; exasperated gestures; etc.)

Who determines relevance?

- Hearing officer must screen questions for relevance and resolve relevance objections
- Hearing officer must explain any decision to exclude a question as not relevant



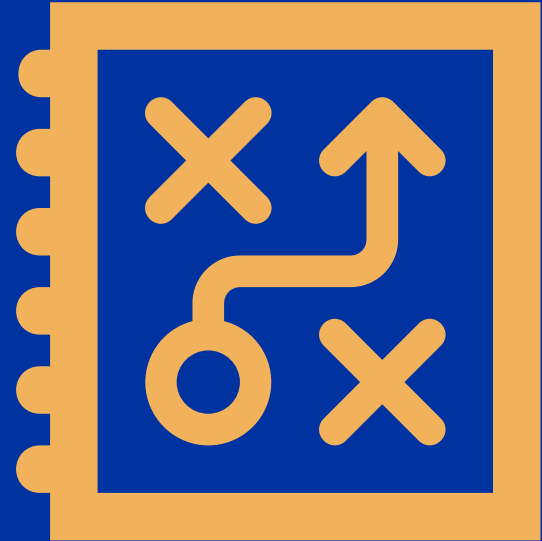


What is relevance?

- Evidence is relevant if:
 - It has a tendency to make a fact more or less probable than it would be without the evidence; and
 - The fact is of consequence in determining the action
- Relevance must be determined considering the form of sexual harassment alleged

Example: Relevant

One student has accused another of stalking. Respondent's advisor asks Complainant, "Did Respondent ever threaten to harm you physically?"



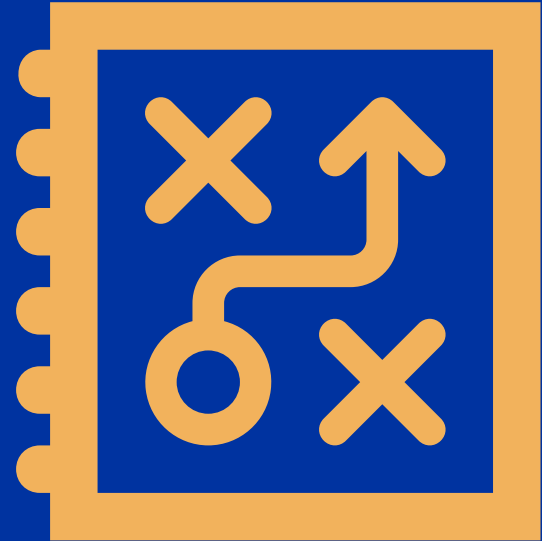
Example: Relevant



Assistant Provost has complained that Cabinet member created a sexually harassing hostile environment. Advisor for Assistant Provost asks Cabinet member, “Did you tell the Cabinet, in front of the Assistant Provost, that Assistant Provost was better suited to be a sexy stay-at-home parent than to be Assistant Provost?”

Example for Discussion

Faculty Member accused Senior of posting negative reviews on RateMyProfessors.com after Faculty Member declined Senior's attempts to instigate a romantic relationship. Advisor for Senior asks Faculty Member, "Haven't you had several negative reviews on RateMyProfessors.com?"



Example for Discussion



Student A alleges Student B committed sexual assault when groping Student A's buttocks. Student A's advisor asks Student B, "Haven't you been found responsible for groping two other students?"



What should you do if the hearing officer says a question irrelevant?

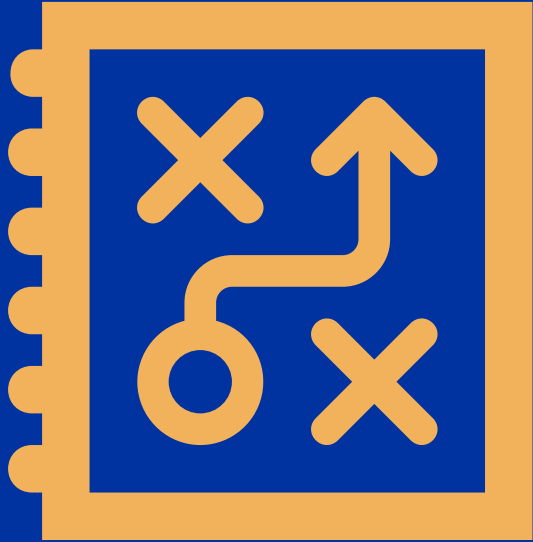
- If you understand the scope of the decision, move on to another question
- If you do not understand the scope of the decision, you may respectfully request an explanation
- Advisors are not permitted to argue with the hearing officer like a lawyer



Is sexual history considered?

- Generally, **no** – Evidence of a complainant's prior sexual behavior is relevant and appropriately considered only if:
 - Offered to prove that someone other than the respondent committed the conduct, or
 - If evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent

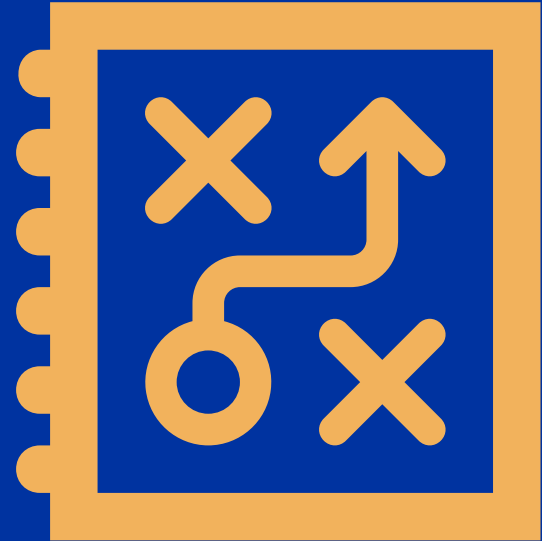
Example: Impermissible



One student has accused another of sexual assault. Complainant testified that Respondent had intercourse with Complainant without using a condom, which Complainant would never have agreed to. Advisor for Respondent asks Complainant: “But didn’t you have unprotected sex with another student a week prior?”

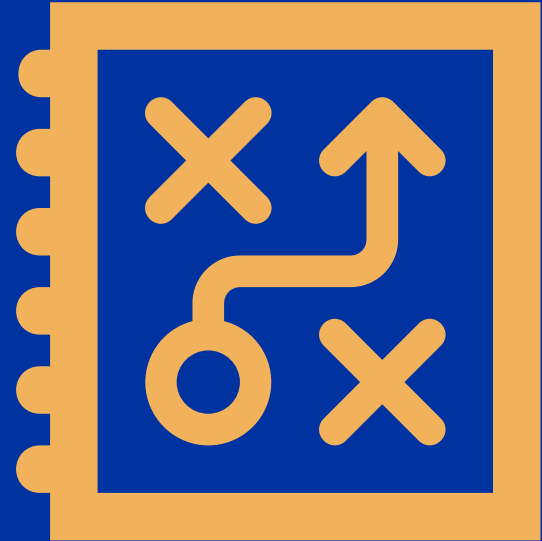
Example for Discussion

Literature student has accused Faculty Member of sexual harassment. Advisor for the faculty member asks literature student: “You failed Faculty Member’s course. Didn’t you accuse another professor of sexual harassment after you failed that professor’s course?”



Example

Respondent is accused of having sex with the complainant when complainant was incapacitated due to alcohol. Advisor for respondent asks questions that may demonstrate complainant was able to function and fully understand the nature of sexual activity.

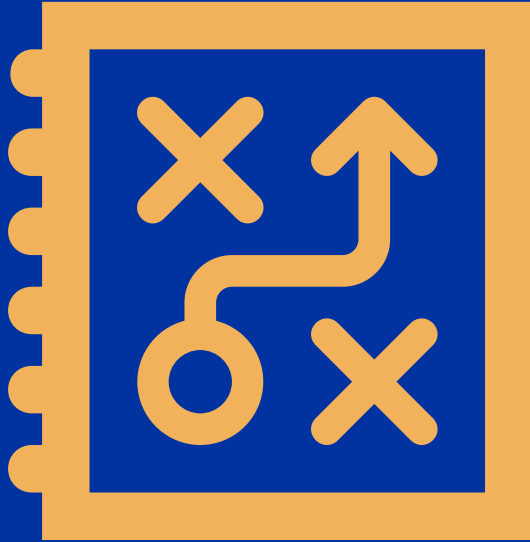




Example Questions

- You walked up the stairs to the respondent's apartment unaided?
- Before the sex started, you stopped the respondent to tell the respondent to use a condom?
- You sent a text message immediately after the sex concluded?

Example



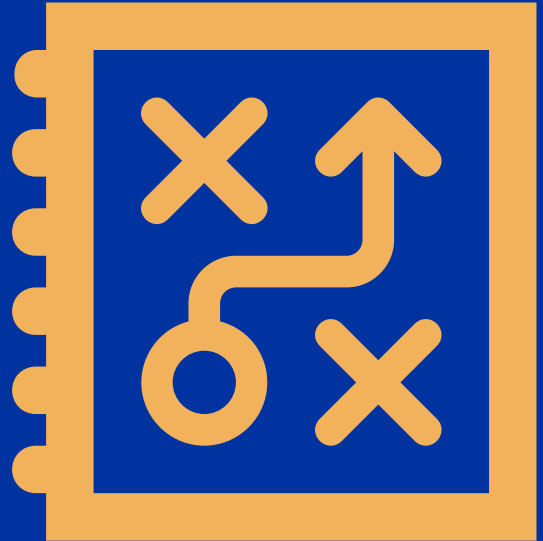
Complainant has accused respondent of hostile environment sexual harassment. Advisor for complainant asks questions of a roommate that may show complainant was so affected by the conduct that complainant stopped going to class.

Example Questions

- You were the complainant's roommate?
- Before the respondent's conduct, did your roommate go to class?
- After the respondent's conduct, did your roommate still go to class?
- Did you notice any changes in your roommate's behavior after the respondent's conduct?

Example

Respondent is accused of stalking complainant by lurking outside her window. Respondent has admitted to lurking once but denies that he lurked a second time. Complainant has stated she clearly saw the respondent's face the first time but only saw a shadow move outside her window the second time.





Example Questions

- In the case of the second incident, you didn't actually see the respondent's face?
- You saw a shadow move outside your window and believe it could have been a person?
- And you are assuming that because you saw the respondent outside your window once before, that person you may have seen could have been the respondent?
- But you actually don't know the respondent was outside your window a second time?

Example



Complainant accused respondent of forcing oral sex when complainant only consented to “making out.” Respondent claims complainant consented to oral sex because complainant “finished” the act after the respondent forced the complainant’s head onto the respondent’s genitals.



Example Questions

- So you took your hand, placed it on the complainant's head, and pushed the complainant's head onto your genitals?
- And before that, the two of you were only kissing?
- And before that, the two of you had not discussed oral sex, right?
- And you continued to keep your hand on the back of the complainant's head as the oral sex progressed?
- And you never stopped to ask if the complainant was okay with this, right?

Example

Respondent is accused of having sex with the complainant when complainant was incapacitated due to alcohol. Advisor for respondent asks questions that may demonstrate complainant was able to function and fully understand the nature of sexual activity.



Example questions

- You walked up the stairs to the respondent's apartment unaided?
- Before the sex started, you stopped the respondent to tell the respondent to use a condom?
- You sent a text message immediately after the sex concluded?

Example

Complainant has accused respondent of hostile environment sexual harassment. Advisor for complainant asks questions of a roommate that may show complainant was so affected by the conduct that complainant stopped going to class.





Example questions

- You were the complainant's roommate?
- Before the respondent's conduct, did your roommate go to class?
- After the respondent's conduct, did your roommate still go to class?
- Did you notice any changes in your roommate's behavior after the respondent's conduct?



What do we do with awkward silences?



- Give the witness time to answer
- Before answering, witnesses should pause to allow for relevance rulings



When Asking Questions . . .

Consider impact of both

- Nonverbal communications
 - Make eye contact
 - Convey appropriate attitude
 - Attention to all parties/witnesses
- Verbal communications
 - Avoid questions implying pre-judgment
 - Avoid questions implying blame/judgment
 - Use formal/medical terms for clarification



Some Common Questions by Hearing Panel

- What do you want to have happen?
- Is there something you feel we should take into consideration that is not already before us?
- Is there any evidence that the [other party] provided or anything they said that you feel you haven't had an opportunity to respond to?
- Are there specific questions you feel should be presented to the other party or witnesses that have not been asked?

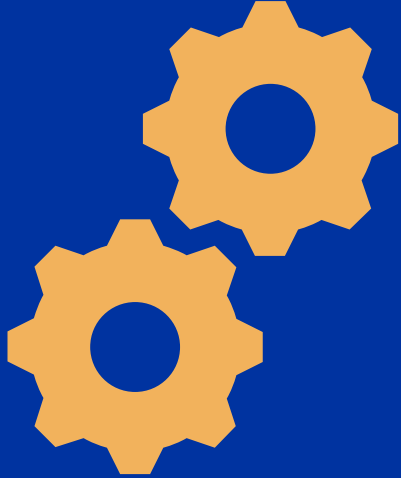


Some (More) Common Questions by Hearing Panel

- Were you given an opportunity to review the investigative report?
- Were you given an opportunity to respond to the report? In your own words, can you describe your response to the report?
- What fact or circumstance about this matter do you feel we should concentrate on in our deliberations?
- Is there anything else you wish to add?



Group Scenario



Student accuses GTA of using a power differential to coerce the student into performing oral sex in exchange for a better grade. Student states that the oral sex occurred in the library at 9:30 pm on a Saturday in March. GTA claims oral sex occurred between student and GTA in late May at a party off campus, after grades had been assigned. GTA says it was a consensual “hook up.” GTA claims student has falsely accused GTA of misconduct because GTA refused to “date” the student after the hookup.

Video shows the student and GTA leaving the lab together at 9:15 pm on Saturday, March 7. GTA has a text message the student sent the GTA on May 26 stating: “I’m so happy we can finally be together. I want to spend my life with you!” Two student witnesses claim that the GTA repeatedly looked at student during class in a way that was “creepy.” Academic records show the student had a B- average on work performed before March 7 and an A+ average for work performed after March 7.



Questions

- What are the elements of the sexual harassment alleged?
- If you were the advisor for the complainant, what questions would you ask the respondent?
- If you were an advisor for the complainant, what questions would you ask the student witnesses?
- If you were the advisor for the respondent, what questions would you ask the complainant?
- If you were the advisor for the respondent, what questions would you ask the student witnesses?

Module 3: Hearing Decision

How long does a hearing last?



- The length of the hearing is set by the hearing officer
- No hearing will exceed 7 hours absent extraordinary circumstances
- Hearing officer may set time limits for questioning of each witness
- Hearing officer may preclude questioning that is cumulative or duplicative

How does the hearing officer decide a case?



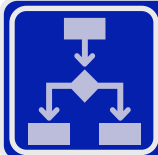
After hearing, the hearing officer must deliberate and consider all the relevant testimony and relevant non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the institution



Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



Direct v. Circumstantial Evidence

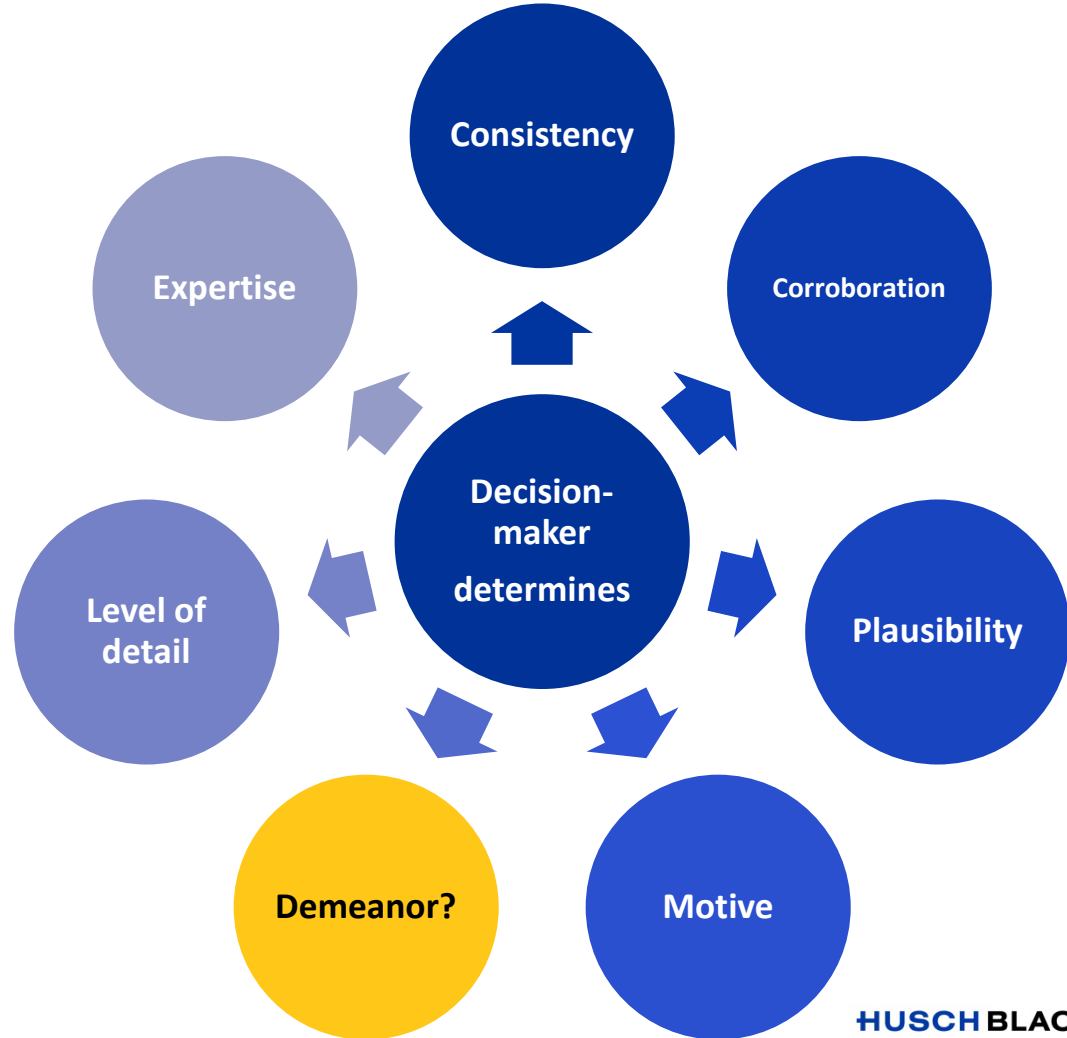
- Direct — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference
 - e.g.: videotape
- Circumstantial (indirect) — Series of facts which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred
 - e.g.: party's phone records show party's phone at scene of alleged misconduct
- Either may be relevant



Hearsay

- Hearsay — Statement (written or oral) made by a non-available witness offered to prove fact in question
- Longstanding evidentiary principles of when courts can rely on hearsay—some types of hearsay more reliable
- All may be relevant

Credibility





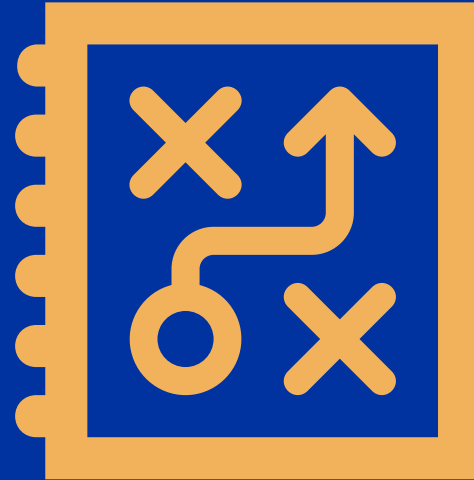
What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative than other evidence
- Weight may vary depending on a range of factors, such as credibility; corroboration; consistency; level of detail; expertise of the witness; whether a witness is disinterested, etc.



Example of considerable weight

Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving. Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring. Witness testified he knows the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.



Example of less weight

Witness says he saw a couple leaving the bar “sometime after ten but before midnight” but witness is not “sure exactly” when. Witness testified they “sort of looked” like complainant and respondent and witness is “pretty sure” it was them. But witness also says witness had spent two hours at a different bar before that and was “pretty drunk at the time I saw them.”

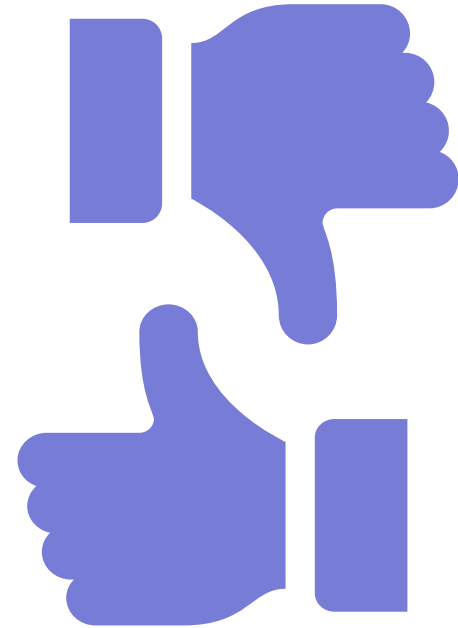


How does the hearing officer issue a decision?

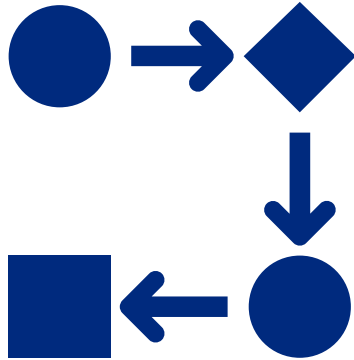
- In a written document, provided contemporaneously to the parties that:
 - Identifies the allegations of sexual harassment
 - Describes the various procedural steps taken from the time the formal complaint was made
 - States findings of facts supporting the determination
 - Reaches conclusions regarding application of relevant policy definitions to the facts
 - Includes a rationale for each finding for each allegation
 - States the disciplinary sanctions and remedies, if implicated by the determination made, and
 - Explains the procedures and grounds for appeal

What is a determination?

- The decision as to whether or not prohibited misconduct occurred
- Results in a finding of “violation” or a finding of “no violation” as determined under standard of proof



Purpose of a determination



- Moves matter to next procedural step
- Record of following process
- Documents fair process
- Provides parties and subsequent decision-makers with information



Who determines discipline and remediation?

- Some institutions will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
- If referred to someone else, that must occur before the written determination is issued

Documenting the Decision

- Each decision should be explained in writing in as careful detail as a finding of responsibility. Why?
 - The act of documenting helps a decision-maker consider all relevant issues
 - Demonstrates that the decision was informed and not based on actual or perceived bias
 - Demonstrates that the decision was not without thought, arbitrary, or capricious
 - Demonstrates alignment with institution's disciplinary philosophy
 - Provides appeals official and any reviewing court with a reason to grant the sanctioning official discretion in his/her decision
- The decision need not be lengthy

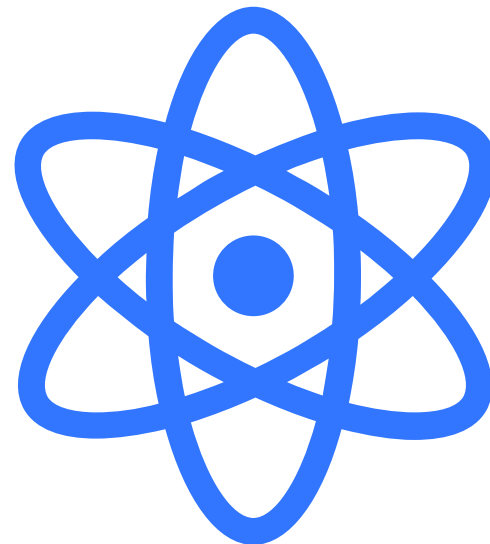




What are common report elements?

*May incorporate investigative report for some or much of the following:

- Preliminary case information
- History of the case
- Allegations
- Applicable policies/procedures
- Standard of evidence
- Evidence considered
- Factual findings
- Analysis and conclusion
- Sanctions/remedies
- Procedures/basis for appeal



Preliminary Case Information

- Names of the parties
- Investigators name(s)
- Adjudicator(s) names
- When and how the case was received and assigned
- Key dates





History of the Case

- How did the institution respond to the report?
 - E.g., rights and options provided, notification of respondent
- Investigation
- When, how, and where were parties and witnesses interviewed?
- Subsequent adjudication
- Explain delays

Summarizing Allegations

Goal: Identify and articulate what part of complainant's story, if true, is a violation of the institution's policy

- Focus on who, what where, when, how.
- Should match notice!



Factual Findings

- Acceptance of undisputed facts?
- **Goal:** Reach conclusion of disputed facts
 - Relevant?
 - Weight?
 - Persuasive?
 - Show your work
 - Explain your decisions





Factual Findings (cont.)

- Resolving credibility
 - Is there corroborating evidence?
 - Are there inconsistencies?
 - Insufficient explanation of inconsistencies?
 - Consider the logic of a person's narrative
 - Consider the impact of the trauma
 - Don't assume that a delay in reporting detracts from credibility



Important Language Considerations

- Use objective terms
 - “Complainant” and “respondent” rather than “victim” and “perpetrator”
 - “Violation of policy” not “guilty” or violation of “law”
 - Generally, credibility of ***facts***, not ***witnesses*** as a whole, but-for specific circumstances
- Do not include speculation
- Do not include irrelevant points and discussion
- Be thoughtful about pronouns
- Avoid vague phrasing like “had sex”

Be Specific

“Jane alleges that Sara had sex with her without her consent.”

vs.

“Jane alleges that Sara laid on top of her, pulled her underwear down with one hand, while pressing her elbow on her other hand, penetrated her vagina with a vibrator, and held her down so she could not move.”

Analysis and Conclusion

- Put everything together
- Analyzing whether a violation of policy occurred (not the law)
- Discuss each allegation and your decision on each
- Explain your reasoning
- Deal with inconvenient facts and inconsistencies
- Phone a (need-to-know) friend if necessary



Language for Findings

- Adjudicator's task is to determine if preponderance of the evidence supports a finding
- Unless there is an assertion of bad faith or clear error, task is not to determine that conduct did not occur
- Absent clear evidence an allegation is false, **avoid** language such as:
 - "No violation"
 - "Innocent"

Sample language:

"The preponderance of the evidence does not support a finding of a policy violation."

"The preponderance of the evidence falls short of demonstrating that it is more likely than not the alleged conduct occurred."

Check Your Work

- The decision must be able to stand on its own
- Spelling and punctuation matter – have proofread
- Double check that the allegations decided match the notice
- Include the good, the bad and the ugly
 - Procedural errors (inconsequential or corrected)
 - Delays



What are some report-writing tips?

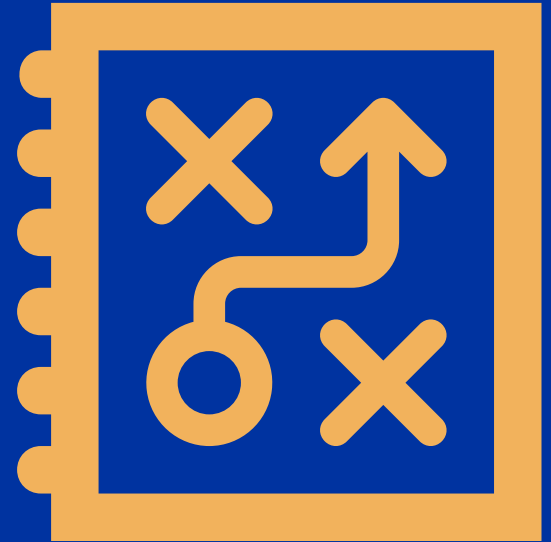
- Use objective terms
 - “Complainant” and “respondent” rather than “victim” and “perpetrator”
 - “Violation of policy” rather than “guilty” or violation of “law”
- Discuss each allegation
- Explain reasoning: e.g., conflicting evidence; credibility
- Address inconvenient facts
- Do not include speculation
- Do not include irrelevant points and discussion
- Be thoughtful about objective tone
- Avoid vague phrasing like “had sex”

Example: Report Detail

“Student A alleges that Student B had sex with Student A without consent.”

vs.

“Student A alleges that Student B laid on top of Student A , forcefully removed Student A’s underwear with one hand while pressing Student B’s other hand on Student A’s hands, penetrated Student A’s vagina with a vibrator, and pinned Student A down.”



Example: Conclusion



“The preponderance of the evidence does not support a finding of a policy violation as to the allegation of X.”

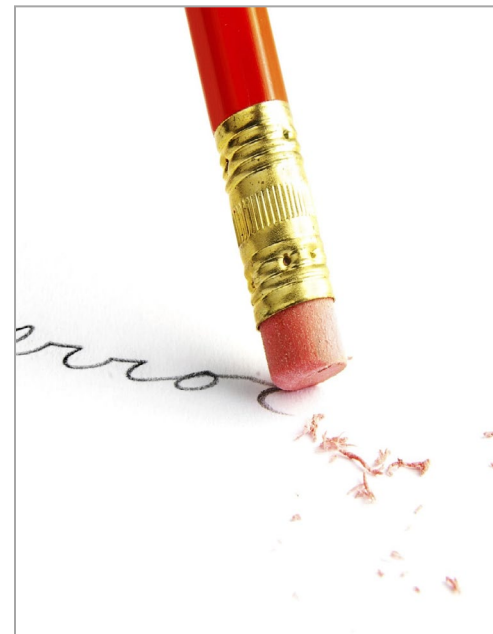
or

“The preponderance of the evidence falls short of demonstrating that it is more likely than not that the alleged X occurred.”



Avoid Common “Mistakes” with Decision-Writing

- Conclusory determinations
- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- Speculation
- General lack of clarity/coherence
- Including too much information about irrelevant details
- Including insufficient information on important issues
- Not clearly or adequately explaining basis for decision





What principles do we use to determine discipline?

Discipline should vary depending on the nature of the violation found considering aggravating and mitigating factors

All things being equal, like violations should have like punishments

Discipline has educational, punitive, and protective elements



What principles do we use to determine remediation?

If a violation is found,

Institution must take steps to restore or preserve the complainant's access to education

Various types of supportive measures may be used after the determination to restore or preserve access

Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable



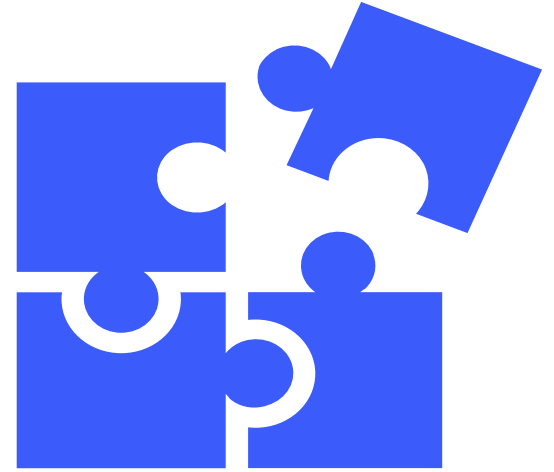
Disciplinary Philosophy

- Violations of the policy by an individual will be addressed in accordance with applicable university policies and procedures, which may include disciplinary actions up to and including expulsion or termination from the university.
- When determining appropriate sanctions, the university may consider prior findings of misconduct.
- Violations of law will be addressed by law enforcement and may result in criminal penalties.



Sanctioning goals

- Punitive
- Safety
- Reduce recidivism / recurrence
- Advance educational and developmental growth of offender (learning from one's mistake)
- Appropriate fit for circumstances



Sanctioning Policy (CTU & AIU)

The range of potential sanctions/corrective actions that may be imposed, among others, are as follows:

- **Student sanctions** may include but are not limited to:
 - written or verbal apology; sexual assault, dating violence, domestic violence or stalking prevention education; verbal, written or final warning; no contact order issued by the University; probation, suspension, and/or dismissal from the University.
- **Employee sanctions** may include but are not limited to:
 - verbal coaching; documented coaching; formal policy reminder; written warning; final written warning; termination of employment; administrative leave of absence; sexual assault, dating violence, domestic violence or stalking prevention education; training; and/or no-contact order issued by the University. *Note: Employees are also subject to all Employee Handbook, department, and workplace policies, including but not limited to the Code of Business Conduct & Ethics.*
- **Guests and other third-party sanctions** may include but are not limited to:
 - removal from the University property; referral to law enforcement; requirement to complete prevention education training prior to resuming a relationship with the University; and/or termination of contractual or other arrangements



Sanctioning Policy (Trident)

- Following an investigation of allegations presented before the decision-maker or hearing panel, the following sanctions may be imposed:
 - Reprimand
 - Special conditions
 - Disciplinary probation
 - Loss of privileges
 - Suspension from the college
 - Expulsion from the college
 - Additional measures
 - Any combination of the above
- A college employee who violates this procedure will be subject to disciplinary action up to and including termination.



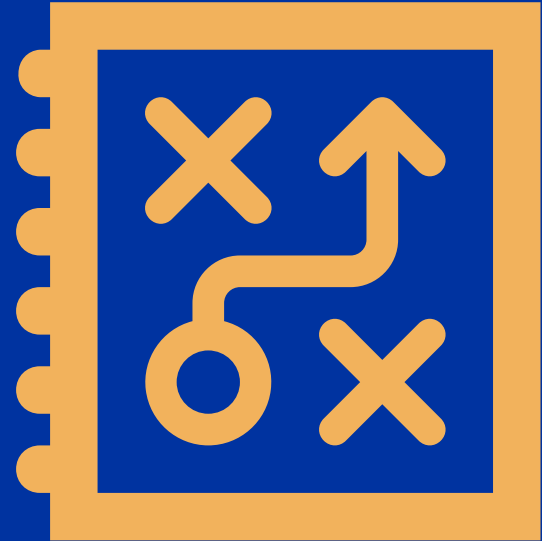
What issues can arise in sanctioning?

Common problems:

- Ambiguity in sanction
- Lack of clear explanation (and written record) of why sanctions should differ in similar circumstances
- Failure to address expectations for returning students and/or employees following disciplinary action (e.g., participation in athletics/extra-curriculars)
- Identity of decider if questions arise

Example: Sanction Detail

Following an investigation, Student is suspended for stalking following a break-up with Partner, also a student. Sanctioning panel issues a no-contact directive to both students. Student returns to campus following a suspension to learn that the (now-ex) Partner is enrolled in the same lab course, which is offered only once a semester.



Example: Sanction detail



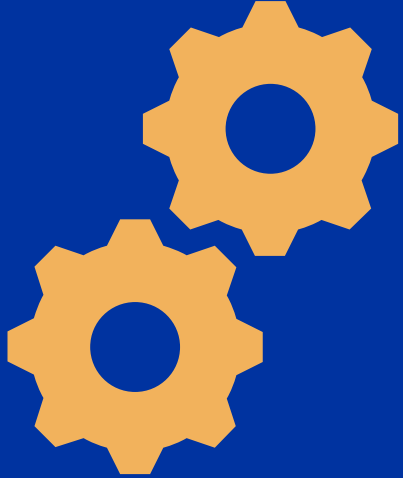
Student suspended for engaging in dating violence “will not be permitted to participate in band upon return to campus for two academic years.” The Title IX Coordinator will have discretion to identify the appropriate person(s) to resolve any ambiguities related to this sanction that may arise in the future.

What are aggravating and mitigating factors?

Common factors:

- 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 relating to a lack of consent, force, threat, coercion, intentional incapacitation)
- Position of trust / power differential

Group Scenario



Nurse reports that Chemist stalked Nurse on three occasions. The first incident involved several evening where Chemist followed Nurse after class to his car, tailgated his car back to apartment, and standing outside of apartment for hours watching through the window while Nurse undressed. The second incident consisted of Chemist changing class schedules to be near Nurse in attempt to create a relationship with Nurse. In hearing, Chemist explains “friendly signals” that support that she did not know her conduct was unwelcome. Nurse presents evidence that Chemist talked to others that she wanted to hurt Nurse for reporting.



Increased Detail in Sanction Term

- Ambiguity in sanctions can lead to questions later
- Example:
 - Following an investigation, student is suspended for stalking following a break up with her boyfriend. Sanctioning panel issues a no-contact directive on both students. The respondent returns to campus following her suspension to learn that the complainant ex-boyfriend is enrolled in the same lab course, which is only offered at that time
- Prevent the problem:
 - Sanctioning official should have addressed the no-contact directive in more detail





Increased Detail in Sanction Term, Part 2

- Recommended details:
 - Duration of an ongoing restriction (e.g., how long will a no-contact directive apply)
 - Foreseeable exceptions, if any, and expectations (e.g., work environment, academic classes, athletic teammates, residential etc.)
 - How to handle unforeseeable circumstances that may arise
- It is recommended that restrictions have some endpoint, and not be imposed in perpetuity unless there is an ongoing safety risk



Addressing Expectations Upon Return from Suspensions

- An emerging best practice is to set expectations for returning students and employees at the sanctioning stage
- **Example:**
 - Student suspended for engaging in dating violence will not be permitted to participate in band upon their return (participation and representing institution is a privilege, not a right)
- **Benefit:**
 - Eliminates confusion or vagueness as to whether individual has full privileges upon return





How should we document sanctions?

Generally, address the following, where applicable:

- Impact statement of complainant and respondent, if any
- Acknowledgment of conduct or impact of conduct by respondent
- Alignment of sanction to institution's disciplinary philosophy
- Potential ongoing safety risk to community (or not)
- Any continuation of no-contact directive, and duration and parameters of that directive

Module 4:

Appeals



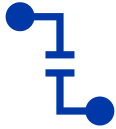
What is the purpose of the appeal?

- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek “de novo” review



What are the grounds for appeal?

Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter



New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal, that could affect the outcome of the matter; or



Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

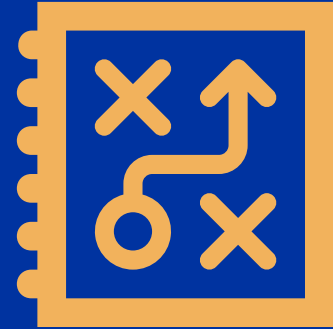
Procedural irregularity

- In all cases, the procedural irregularity that affected the outcome: meaning it must be ***material***.
- A procedural irregularity affecting the written determination may include, *i.e.*:
 - A failure to follow the University's procedures;
 - A failure to objectively evaluate all relevant evidence, including inculpatory or exculpatory evidence; or
 - A determination regarding what evidence was excluded as irrelevant.



For Discussion (Poll)

- Complainant contends that the investigator failed to interview 19 witnesses who have knowledge of an alleged sexual assault based on discussions with Complainant or Complainant's friends following the incident.
- Investigator only interviewed 11 of the witnesses.





Poll Question

Is this a procedural error?

- Yes
- No

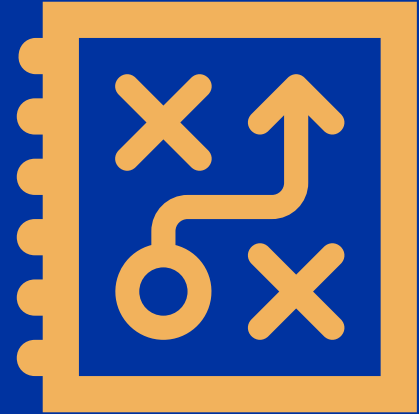
New evidence

- Evidence that ***was not reasonably available*** at the time ***that could have affected the outcome.***
- Practice Tip: Evidence presented prior to the time the designation or written determination is issued **does not qualify** as new evidence that was not reasonably available



For Discussion (Poll)

- Respondent told investigators Witness saw Complainant leaving a classroom on date of sexual interaction and talked to Complainant, who was jovial; Complainant confirmed this at hearing; Witness was never interviewed.
- On appeal, Respondent presents new affidavit from Witness recounting same conversation with Complainant but also stating that Respondent told Witness about sexual interaction at issue the day it happened; Respondent had not shared that conversation during investigation or hearing.





Poll Question

Does this constitute new evidence for purposes of an appeal?

- Yes
- No



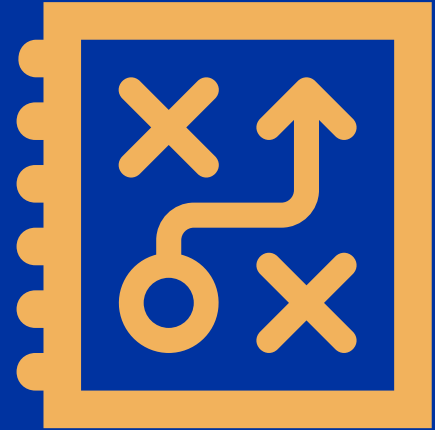
Conflict of Interest

- The Title IX Officer (or designee), Investigator, or hearing panel member and/or University Authority had a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent that affected the outcome.
- Claims of conflict of interest or bias should be based on the current case and process in question and will be assessed accordingly.

For Discussion

Do the following circumstances or relationships constitute conflicts of interest?

- Respondent faculty member and the hearing officer previously disagreed about a curriculum matter
- Complainant is currently a student in a hearing panel member's class
- Respondent is a staff member in the Title IX Coordinator's office





Substantially disproportionate sanction

- Applicable ***only*** to written determination
- The Sanction set forth in the written determination is substantially disproportionate to the facts of the particular Policy violation.

Appeals Procedures

Appeals will be in writing only

There will be no hearing

The appeal deliberation is closed to the parties

**Written decision will include rationale and be issued
within 10 days of deliberations**

The appeal decision is final and is not subject to further appeal

Appeal official options

The Appellate Hearing Officer(s) may:

- Affirm, in whole or part, the decision
- Overturn, in whole or part, the decision or
- Remand the matter to remedy procedural errors or consider new evidence





Conclusion of adjudication

- The determination regarding responsibility for a violation becomes final either:
- On the date that the University provides the Parties with the written decision of the result of the appeal if an appeal is filed, or
- If an appeal is not filed, on the date after which an appeal would no longer be considered timely, subject to any remanded proceedings.

Key concepts

- Appeals are not intended to allow for a second review of the same information provided to the campus Title IX office
- An Appellate Officer should not substitute their judgment for that of other decisionmakers



Practice point:

Stay within the scope of the appeal



- It is best practice for an appeals process to be designed to ***catch errors*** and ensure that the underlying investigation and adjudication process was ***fair and thorough***
- This is contrast to an appeal process that provides another party the opportunity to second-guess decisions, absent clear error

Appeal preparation

- **Step 1: Review relevant policy and procedures**
- **Step 2: Review appeal and any response (and supporting documents)**
 - What arguments have been raised in the appeal?
 - What arguments have been raised in the response?
- **Step 3: Consider whether the grounds have been satisfied**
 - If **yes**, proceed; if **no**, prepare explanation of decision
- **Step 4: Review investigative report, hearing transcript, outcome letter, and any sanction decision**
 - Do you understand what decision was reached and why?



Appeal decision letter

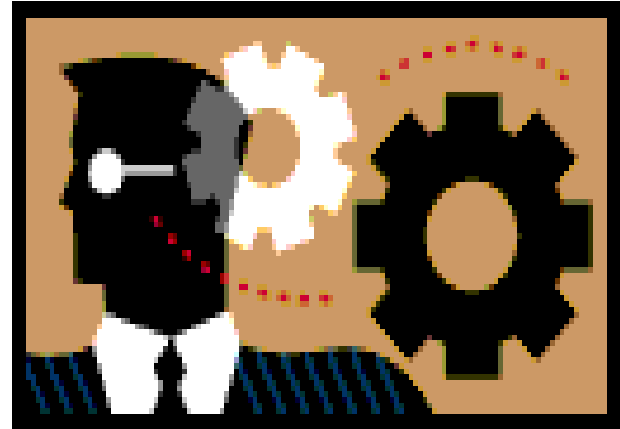
Structure of a Decision Letter

- ***Background Information***

- When was complaint submitted?
- What was alleged?
- What did the hearing panel find?
- What sanction was found, if any?
- When was appeal submitted and was it timely?

- ***Summary of Appeal***

- What is the appealing party alleging, and is that allowable under policy?
- Address cross appeals in same way.



Appeal decision letter

Structure for a Decision Letter

Analysis of each basis of appeal, separately



- What factors support or contradict the appeal argument?
- If error is alleged, did an error occur?
- If an error occurred, would it have been sufficient to significantly impact the outcome of the investigation?
- **Conclusion**
 - Is the appeal granted or denied?
 - If granted, what outcome?

Practical Tips: Documenting the Decision

Summarize appeal official's decision, ***upfront***

Address the appeal grounds

Address all arguments raised in appeal, cross-appeal, and in any response

Address all relevant policy definitions and procedural provisions

Consult with Title IX Coordinator and legal counsel regarding any procedural or legal questions or issues

Show your work: Explain what decision you reached and why

It is a best practice for appeal decision letters to tell the whole story within the “four corners” of the letter.

Questions



HUSCH
BLACKWELL