

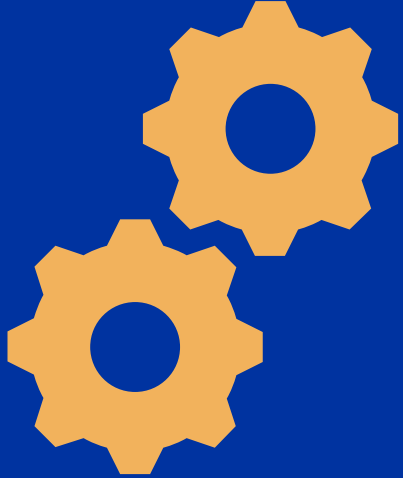


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Title IX & Sexual Harassment Response

Participants in Sexual Harassment policy process
Fall 2021

Group Scenario



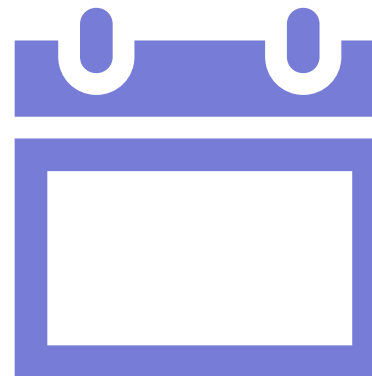
Breakout Groups

- 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

- Title IX Status, Scope & Jurisdiction
- Privacy & Confidentiality
- University Reporting
- Supportive Measures & Interim Restrictions
- The Investigation Process
- Alternative & Parallel Processes
- Regulatory & Caselaw Update
- The Hearing Process
- Decision Making
- Appeals





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**Title IX Status,
Scope &
Jurisdiction**





What is the purpose of the the University of Illinois Sexual Misconduct Policy?

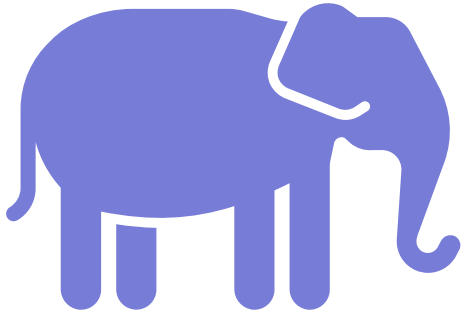
“This policy was revised in July 2020 as part of the effort to align the University’s policy and procedures with new Title IX regulations This policy also addresses other categories of sexual misconduct that do not fall within the definition of ‘Title IX Sexual Harassment’ ... but that may violate other conduct requirements.

The purpose of this policy in delineating which conduct is ‘Title IX Sexual Harassment’ is not to imply that the University considers certain conduct more or less objectionable, nor to discourage any person from submitting a report. Rather, the purpose of this policy is to ensure that all persons who experience sexual misconduct described in this policy have full access to the rights and resources they are entitled to, and that every complaint is handled fairly and equitably, in a manner consistent with applicable law, and with the ultimate aim of maintaining an institutional climate of safety and accountability.”

- Campus Administrative Manual



Have the Title IX regulations been rescinded?



- No
- The 2020 Title IX regulations remain in effect and institutions must continue to abide by them
- Court challenges to the regulations have been unsuccessful (to date)
- Current administration cannot rescind or alter regulations without rulemaking process



Will the Title IX regulations be rescinded?

- Changes are likely but wholesale rescission is not
- ED is currently engaged in a “comprehensive review” of Title IX regulations
 - Internal review of regulations and guidance
 - Public hearings with comments and feedback from stakeholders
- Any changes likely will not take effect until 2022-2023 academic year at the earliest



Is there guidance in the interim?

- Yes
- July 2021 ED Q&A document on Title IX sexual harassment guidance
- Q&A articulates ED's interpretation of existing regulations and does not have the force and effect of law
- Includes sample language for key policy provisions



Are there key points from the Q&A? (1 of 7)

- Regulatory application
 - Regulations apply to sexual harassment occurring on or after August 14, 2020
 - Sexual harassment in online/virtual operations of an institution is covered by Title IX
 - A school's Title IX obligations continued despite COVID-19

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

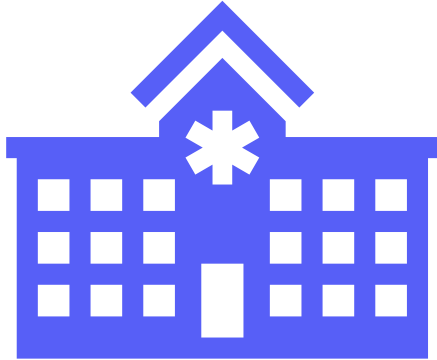


Poll question

- What is the most common “financial assistance” trigger for Title IX?
 - Government supported research
 - Subsidized grants and loans for students
 - Work study
 - COVID-19 emergency funding



Can Title IX apply to entities other than colleges and universities?



- Yes
- If those entities have an educational program and receive federal financial assistance
- E.g., K-12 schools; charter schools; hospitals

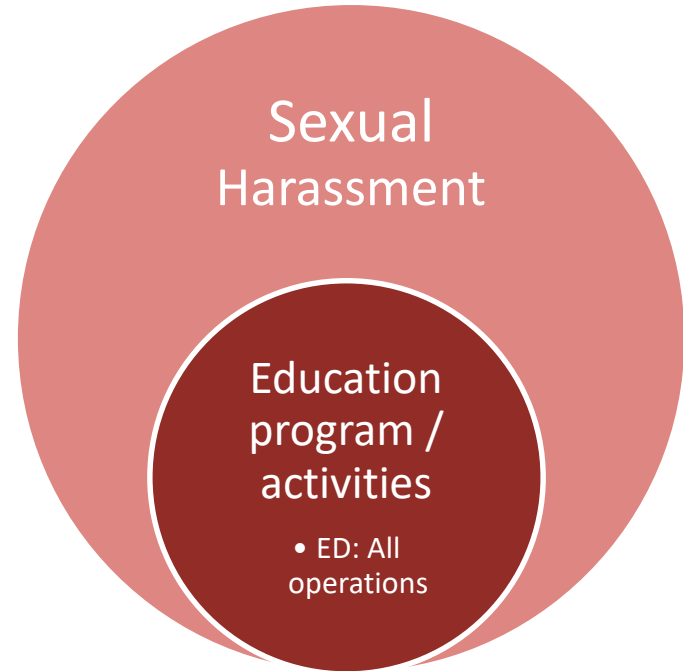
Does Title IX apply to persons?

- No
- But Title IX requires covered educational institutions to have certain policies that prohibit sexual harassment
- And those policies apply to persons



What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment 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

In-person classes

Dormitories

Recreational amenities on campus

Sports teams

Virtual classes

Performances on campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus



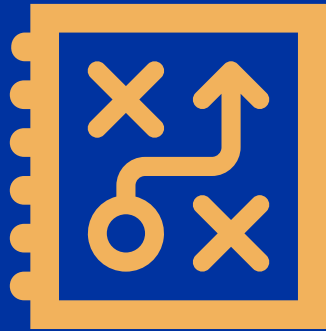
Example (included in EP&A)

—
One student in an online College course conducted by Zoom repeatedly sends vulgar and propositioning messages to another student using the Zoom private chat feature. The two students are physically in different places during the course.



Example (included in EP&A)

—



Student is sexually assaulted by teammates in a locker room after a practice that takes place at the University's on-campus field house. The teammates are all the same sex and gender.

Example (included in EP&A)



Two students in the nursing program are in clinical rotations at a local hospital supervised by a preceptor who receives compensation from the College. One student sexually assaults the other in a breakroom commonly used by students in the program.

Example (excluded from EP&A)



On a Saturday night, two students meet at a local bar and eventually go to a local hotel to “hook up.” One student exceeds the bounds of consent by attempting to choke the other student during the sexual encounter, despite having never discussed it.

Example (excluded from EP&A)



A student parks on the far side of a public street adjacent to campus and is car-jacked while leaving for the day. The perpetrator drives the student to a secluded location across town and rapes the 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



Poll question

- May an institution still investigate and discipline reported sexual harassment occurring abroad?
 - Yes
 - No
 - It depends



When must we dismiss a Title IX complaint?

- Alleged sexual harassment occurred outside education programs or activities
- Alleged misconduct could not be sexual harassment even if true
- Complainant is not a current participant in education programs and activities at time of complaint



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



What other University policies may apply?

- Sexual Misconduct Policy*
- Nondiscrimination Policy
- University Code of Conduct
- Student Code
- Statement on Consenting Relationships
- Potentially intersecting policies
 - Expression
 - Disability accommodations
 - Privacy/records (employee and student)
 - Clery Act



What standards do we apply to Title IX processes?

- “Grievance procedures that provide for the prompt and equitable resolution of student and employee complaints” of sex discrimination under Title IX. 34 C.F.R. § 106.8(b)
- “Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.” 2020 Final Rule



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

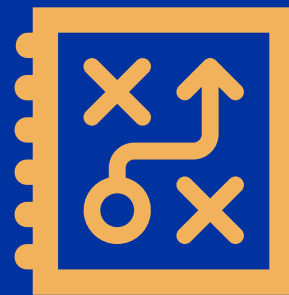


What is a conflict of interest?

- A material connection to a dispute, the parties involved, or a witness, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior relationship; professional interest; financial interest; prior involvement in a matter; or nature of position

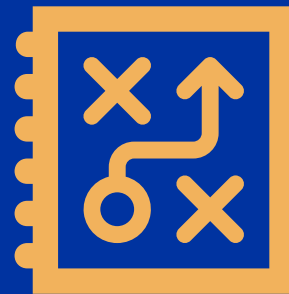
Example

The University hires an outside attorney to serve as an investigator. The outside attorney currently represents the respondent's father in a personal injury lawsuit.



Example

The College assigns a faculty member to serve on a hearing panel. The faculty member previously wrote a glowing letter of recommendation for the complainant and has recently advised the complainant on graduate school applications.





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



Policy language – Sexual Misconduct

Sexual Misconduct means Title IX Sexual Harassment, sexual harassment, sexual assault, dating violence, domestic violence, stalking, unwelcome sexual, sex or gender-based conduct, sexual violence, or sexual exploitation, as defined below. Prohibited Sexual Misconduct means any conduct prohibited by this policy other than Title IX Sexual Harassment. Title IX Sexual Harassment means conduct on the basis of sex that satisfies one or more of the following:

1. Quid Pro Quo Sexual Harassment: conduct (1) by an employee of the University, which (2) conditions the provision of an aid, benefit, or service of the University, on (3) an individual's participation in unwelcome sexual conduct; or
2. Hostile Environment Sexual Harassment: (1) unwelcome conduct that (2) a reasonable person would determine to be so (3) severe, (4) pervasive, and (5) objectively offensive that (6) it effectively denies a person equal access to the University's education program or activity; or
3. Sexual Assault (defined below); or
4. Stalking (defined below); or
5. Dating Violence (defined below); or
6. Domestic Violence (defined below).

What is Title IX sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

Sexual assault

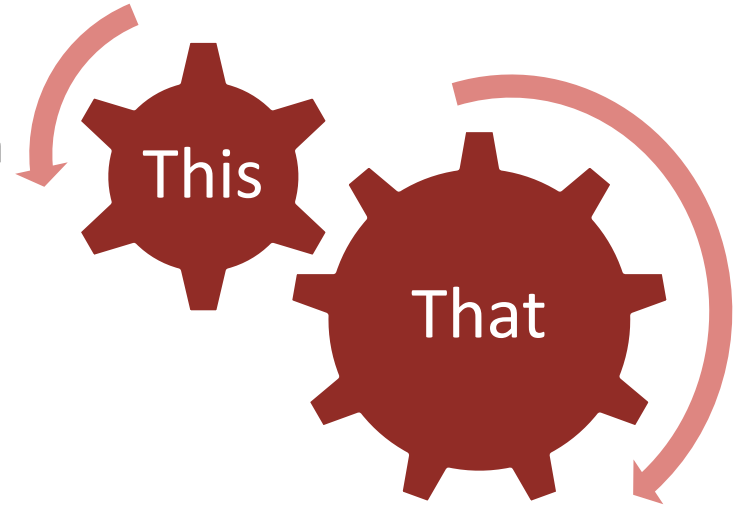
Dating violence

Domestic violence

Stalking

What is quid pro quo?

- 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



Another example of quid pro quo

—



A graduate student gives an undergraduate a failing grade on a lab exercise. When the undergraduate visits during office hours, the graduate student indicates a willingness to improve the grade if the undergraduate performs sexual favors.

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.





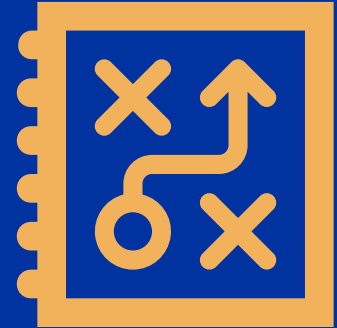
How do we determine if a hostile environment exists?

- 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

Political Science student repeatedly jokes and denigrates Business student based on Business student's gender expression. These jokes occur in class, in the bookstore where both students work, and in the residence hall at night. Political Science student always tells the jokes in the presence of others.



Another example of hostile environment



Business office employee repeatedly rubs the business office employee's own genitals in the presence of an office colleague, to whom the business office employee is attracted. The business office employee also repeatedly touches the colleague's shoulders and hair, without asking. The two work in the same room. The colleague is "grossed out" and gets stressed about what the business office employee might try next.



Another example of hostile environment

Art student expressed a desire to have sex with Math student, who declines. Thereafter, at numerous Greek parties attended by both, Art student asks if Math student is “ready to fu*k yet.” Math student stops going to Greek parties to avoid being confronted by Art student.





Does the First Amendment matter?

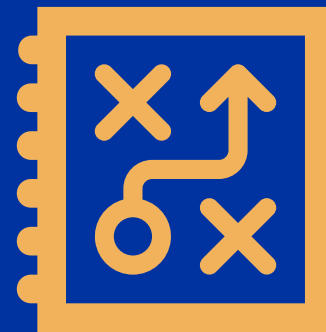


- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment



Example (not-hostile environment)

—
Student, a cis-female, leads an on-campus protest opposing the institution's switch to gender-neutral housing and gender-neutral bathrooms. During the protest, Student holds a sign that reads: "I don't want to shower with dudes!"





Example (not-hostile environment)

—

During a University forum on gender issues, Student argues that another student is a bigot and part of “the patriarchy” because the other student rejects the entire construct of gender identity. Looking at the other student, Student says: “I don’t have to dress or behave a certain way just because I have a pu**y!!!.”



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



Policy language – Sexual Assault

Sexual Assault means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. This includes:

1. Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
2. The touching of the private body parts of another person for the purpose of sexual gratification, without the consent, as defined in this policy, of the victim.
3. Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.



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.



Policy language – Consent

Consent means informed, freely and actively given, mutually understandable words or actions that indicate a willingness to participate in a mutually agreed upon sexual activity. A person can withdraw consent at any time. There is no consent when there is coercion, force, threats, or intimidation. There is no consent when the victim is under duress or is deceived. A person's lack of verbal or physical resistance or manner of dress do not constitute consent. Consent to past sexual activity with another person does not constitute consent to future sexual activity with that person. Consent to engage in sexual activity with one person does not constitute consent to engage in sexual activity with another person. A person cannot consent to sexual activity if the person is unable to understand the nature, fact, or extent of the activity or give knowing consent due to circumstances including without limitation the following:

- the person is incapacitated due to the use or influence of alcohol or other drugs;
- the person is asleep or unconscious;
- the person is under the legal age to provide consent; or
- the person has a disability that prevents such person from having the ability or capacity to give 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)

Freshman and Sophomore are drinking shots in Freshman's dorm room and talking. Freshman encourages Sophomore to take several hydrocodone to "loosen up." After 30 minutes, Sophomore cannot stand, calls Freshman the wrong name, and has trouble staying awake. Freshman then has sex with Sophomore who lays unresponsive and does not wake up for six hours.



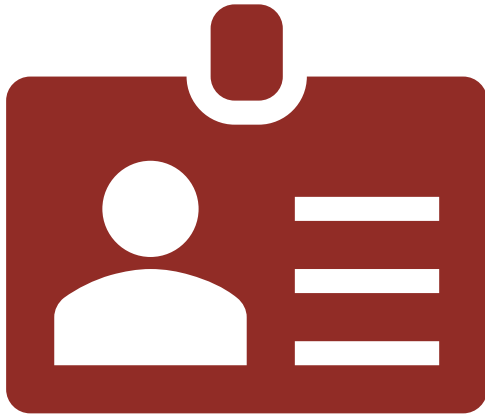


Example (not-incapacitated)



Third-Year and Fourth-Year go out to dinner and share one bottle of wine over the course of two hours. They return to Third-Year's on-campus apartment and watch a movie. Fourth-Year grows tired, brushes their teeth, and climbs into bed. While in bed, the two make out and have sex. Fourth-Year wakes up the following morning with a headache.

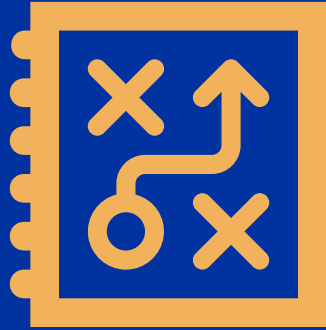
What is statutory rape?



Sexual intercourse with a person who is under the statutory age of consent as defined by law.



Example



Short Student and Tall Student meet at a tailgate party, go to Short's dorm room after the football game, and have sex. Both are sober. Unbeknownst to Short, Tall is a dual-enrolled high school student who is 16. Short is 22. Tall's parents learn of the sexual encounter and make a report to the Title IX Coordinator.

Poll question

- Would the outcome change if Tall wanted to continue in a relationship with Short?
 - Yes
 - No

Poll question

- Must the institution report this situation to local authorities?
 - Yes, they must report
 - Only if the 16-year-old wants them to
 - No, Title IX prohibits disclosure



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.



Example



Medical Student and Resident discuss and agree to vaginal intercourse. The room is dark. After making out, and without discussion, Medical Student insert's Medical Student's penis into Resident's mouth. Resident reacts negatively and says: "No, I don't do that. Get out." Medical Student has always had oral sex prior to vaginal sex with previous sexual partners and expected the same in this case.

Poll question

- Does it matter that Medical Student expected oral sex based on how Medical Student's prior sexual encounters transpired?
 - Yes
 - No
 - It depends



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.



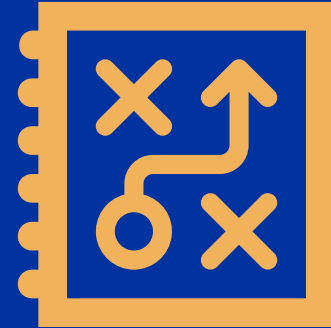
What is fondling?

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 of fondling

Nursing Student and Student Body President are “making out” for the first time. Nursing Student begins to “feel up” President’s chest from outside the clothing. President pushes Nursing Student’s hands away. After more kissing, Nursing Student places their hands up President’s shirt and touches President’s bare chest. President responds: “I said no. Stop.”



Poll question

- How many instances of fondling are there in this scenario?
 - One
 - Two



What is incest?

Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.



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?

“Dating Violence” is violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship will be determined based on 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 of dating violence

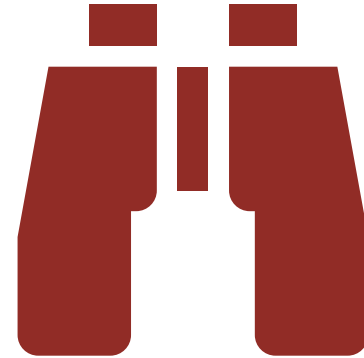
Two students have been dating for several months. One walks in on the other making out with a coworker on the sofa in the coworker's on-campus office. The student who walked in loudly shouts derogatory expletives at the other, threatens to “kill you both,” and forces/yanks the other student by the arm and off the sofa.



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 of stalking



Housing employee breaks up with Facilities employee. Facilities employee repeatedly shows up at the Housing office crying and asking for Housing employee. Facilities employee repeatedly instant messages Housing employee during work to talk about their relationship. Housing employee rebuffs Facilities employee. One night, Facilities employee follows Housing employee home by car from the institution's parking lot, prompting Housing employee to call police.



Does Title IX also prohibit retaliation?

Yes – Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated in or refused to participate in any manner in an investigation, proceeding, or hearing under the institution’s policy.



Does Title IX also prohibit retaliation?

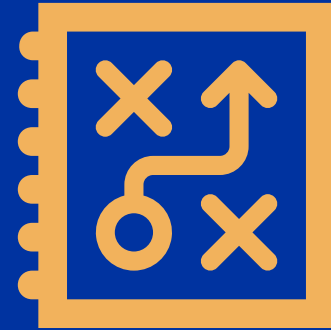
Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any *individual* for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy (34 C.F.R. § 106.71)



Example of retaliation

—

A student reports that another committed sexual assault. Believing that the reporter has filed false accusations, a third student—the roommate of the respondent—spray paints derogatory terms on the reporter's car.



Poll question

- Does it matter that the roommate believes the report is false?
 - Yes
 - No



Example of Retaliation????

—

A student reports that another committed sexual assault. Respondent's lawyer sends the reporter a letter stating that the report is false and that the reporter is committing defamation. The letter demands the reporter retract the report or respondent will sue.



Poll question

- Is this retaliation?
 - Yes
 - No



Policy language – Non-Title IX prohibited Sexual Misconduct

Unwelcome Sexual, Sex or Gender-Based Conduct means any unwelcome sexual, sex-based, or gender-based conduct occurring within or having an adverse impact on the workplace or academic environment, regardless of how it is conducted (physically, verbally, in writing, or via an electronic medium) and regardless of the sexes or genders of the individuals involved. This category of misconduct comes in three forms, each of which may also qualify as Title IX Sexual Harassment or violate the Nondiscrimination Policy in some circumstances:

1. **Gender-Based or Sexual Hostility:** Objectively offensive treatment of another person or group, through words or conduct, with hostility, objectification, exclusion, or as having inferior status based on sex, gender (including gender identity or gender expression), or sexual orientation.
2. **Unwanted Sexual Attention:** Objectively offensive sexual attention, advances, or comments that a person reasonably should know are unwanted or which continue to occur or persist after the recipient has communicated a desire that the behavior stop.
3. **Sexual Coercion:** Use of force, violence, threats, or other threats of harm by an individual to compel or attempt to compel another individual to engage in unwelcome sexual activity.

... To be disciplined through a formal complaint process, however, the behavior must be by an employee acting in the course of employment.



Policy language – Non-Title IX prohibited Sexual Misconduct

Sexual Harassment means any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or educational opportunities, assessment or status at the University; (2) submission to or rejection of such conduct by an individual is used as the basis for employment or educational decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work or educational performance or creating an intimidating, hostile or offensive working or educational environment.

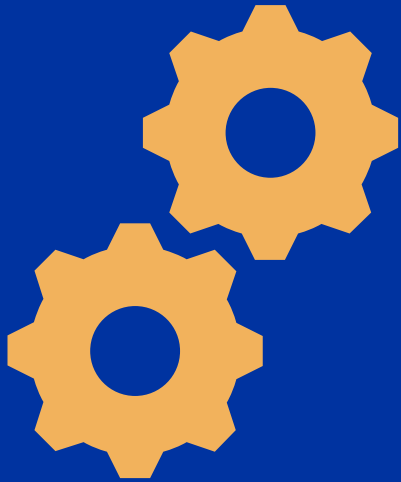


Policy language – Non-Title IX prohibited Sexual Misconduct

Sexual Exploitation means the use of another person's nudity or sexual activity without consent for the purpose of sexual gratification, financial gain, personal benefit, personal advantage, or any other non-legitimate purpose. Sexual exploitation includes, but is not limited to:

1. without the knowledge and consent of all participants, observing, recording, or photographing nudity or sexual activity of one or more persons in a location where there is a reasonable expectation of privacy, allowing another to observe, record, or photograph nudity or sexual activity of one or more persons, or otherwise distributing recordings, photographs, or other images of the nudity or sexual activity of one or more persons; and
2. sending sexually explicit materials of another person without consent of the recipient.

Group Scenario



On-Campus Student and Online Student connect on Tinder. They meet in a campus parking lot where they take several shots of hard alcohol and anti-depressants that On-Campus brought. The two students kiss in the car for 30 minutes before driving to an off-campus hotel room where they have oral sex and intercourse without incident. The two students connect again a week later and meet in On-Campus's dorm room. At Online's request, On-Campus supplies alcohol and anti-depressants. The two engage in mutual oral sex and mutual digital penetration. Online then gets on top of On-Campus and initiates intercourse. However, before the act is complete, Online passes out and slumps over. After some time, On-Campus carries Online to On-Campus's car in order to drive Online back to Online's off-campus apartment. Online comes-to in the car and becomes violent, striking On-Campus, throwing items at On-Campus, and demanding to know what On-Campus did "while I was out." The next day, Online files a formal complaint, accusing On-Campus of sexual assault by incapacitation with respect to both encounters. Online files a counter-complaint alleging sexual assault and dating violence with respect to the second encounter. On-Campus then files a counter-counter complaint accusing Online of retaliation by having brought a frivolous counter-complaint.

Questions





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**Privacy &
Confidentiality**





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



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



Are an advisor's communications with a party “privileged”?

- Not absent a privileged relationship (e.g., not if advisor is an employee with no special relationship—engaged as attorney, treating healthcare provider, pastor serving in that role—to party)
- Communications are generally not found protected from discovery in criminal and civil legal processes
- Advisors should not disclose communications with a party to a third-party unless FERPA/privilege/policy allows it
- An institution may require advisors to disclose communications to another institutional official in certain circumstances (e.g., health/safety emergency)



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University
Reporting



Who manages Title IX prevention and response at the University

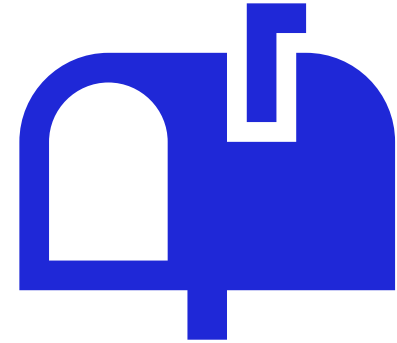
Title IX Coordinator
Danielle Morrison
Title IX Office
616 E. Green Street
Suite 214
Champaign, IL 61820
(844) 616-7978
titleixcoordinator@illinois.edu

- Deputy Title IX Coordinator for Athletics: Sara Burton
- Title IX Office
- Other campus Title IX coordinators



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



What are University reporting options?

- Report to Title IX office/Coordinator
- Report to institutional official with authority (“responsible employee”)
- University reporting form



Who are University “responsible employees”?

- “A responsible employee is any University employee
 - who has the authority to take action to address complaints of sexual violence;
 - who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX Coordinator or other appropriate university officials; or
 - whom a student could reasonably believe has this authority or duty.
- “Responsible employees must immediately report allegations or disclosures of sexual violence/sexual misconduct involving anyone covered under the policy to the Title IX Coordinator.”
- Err on the side of considering self responsible employee, unless you are a listed confidential resource or in certain categories of student employees



Who/what are University confidential resources?

- Women's Resources Center
- Counseling Center
- McKinley Health Center (Mental Health)
- Disability Resources & Educational Services
- Center for Wounded Veterans in Higher Education
- Veterinary Medical School social worker
- EAP



When do we reach out to the alleged victim?

- After institution has actual knowledge of alleged sexual harassment, Title IX Coordinator must contact alleged victim
- Provide information about supportive measures, explain the grievance process and how to file a formal complaint, and discuss the alleged victim's wishes



What if we can't identify the alleged victim from a report?

- Title IX Coordinator should oversee preliminary investigation to determine identity of alleged victim
- If identity of alleged victim cannot be discerned after reasonable inquiry, matter should be documented and consideration given as to whether other policies (such as student code of conduct) are used



HUSCH BLACKWELL

**Supportive
Measures & Interim
Restrictions**



Do we need a formal complaint?

- No. Not in order to contact the alleged victim and begin support services
- The formal complaint is a specific written document that is required to commence the investigation and hearing process



Are there key points from the Q&A? (2 of 7)

- Combatting sexual harassment
 - Schools should take steps to affirmatively prevent sexual harassment in addition to the grievance process
 - Schools can take additional steps to combat sexual harassment as long as those steps don't conflict with regulations

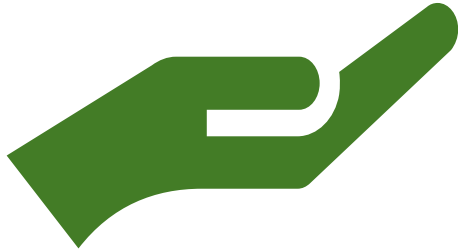


Supportive measures

- 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

 Leave of absence

 Increased security or monitoring

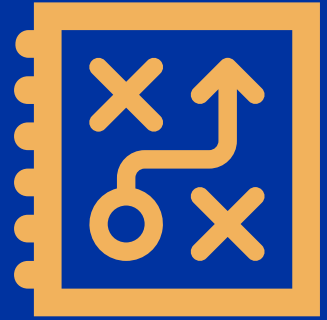
 Modified work schedules

 Mutual no-contact order where implicated by facts



Example of reasonable supportive measure

Grad Student reports that Undergrad Student sexually harassed Grad by repeatedly propositioning Grad until Grad's brother intervened. Grad would like to receive counseling but does not wish to file a formal complaint. Grad does not believe Undergrad poses a physical threat.





Example of 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 of reasonable supportive measure

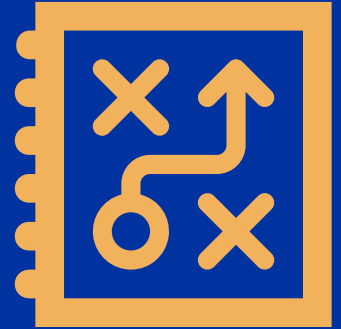
Graduate student reports that supervising faculty member has propositioned the graduate student for sex, multiple times. Graduate student wants assistance finding a different supervising faculty member. The department is large but does not have other faculty members with the faculty member's precise expertise.





Example of unreasonable supportive measure

One student reports the other of a sexual assault three years ago between the two when they were first years. The reporter has received strong academic marks since then. The reporter requests a refund of all tuition and housing charges for the last three years and a waiver of tuition and charges until the reporter completes graduate school.



Example of 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

- Is the prior scenario different if the complaining employee alleges they have anxiety disorder and PTSD as a result of the misconduct?
 - Yes
 - No

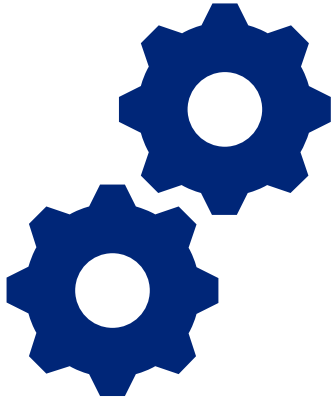


Clery ⇔ supportive measures

- Rights and options
 - Statements about disciplinary proceedings
 - Notification about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid and other services available for victims, both within the institution and in the community
- Required by VAWA
 - Must be given in writing to the reported victim of any VAWA crime Consider equitable access to supportive measures information for respondents



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



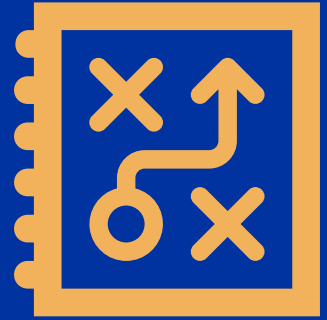
Can supportive measures affect the respondent?

- 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



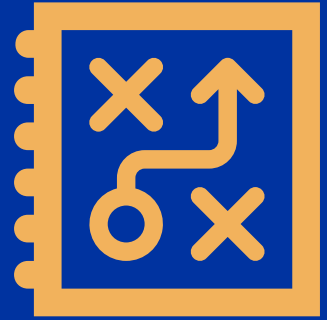
Example of unreasonable burden

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.



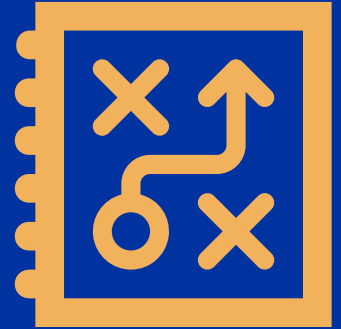
Example of disciplinary supportive measure

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, removed from shared dormitory and made to live off campus, and prohibited from being on campus after 5:00 pm.



Example scenario

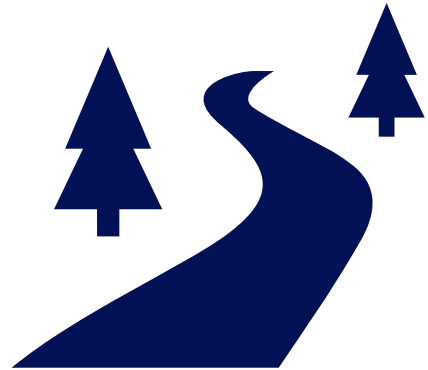
Two students are admitted to institution as first years. Prior to arriving on campus, one reports that the other sexually harassed the reporting student when the two were undergraduates at the same institution. The reporter wants counseling; safety escorts; and access to the respondent's student's schedule so the reporter can avoid the respondent.





What if the report falls outside Title IX jurisdiction?

- Title IX requires supportive measures for reported sexual harassment covered by Title IX
- Institution may provide supportive measures for reported conduct that falls outside Title IX's scope





Are supportive measures confidential?

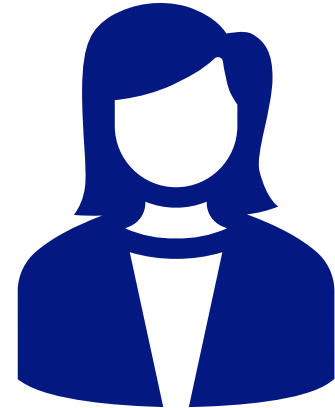


- Generally, yes
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with institutional employees who have a legitimate need to know



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



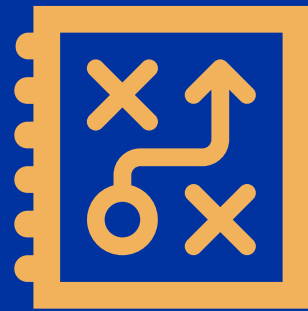


Can we use interim removals or suspensions for students?

- 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

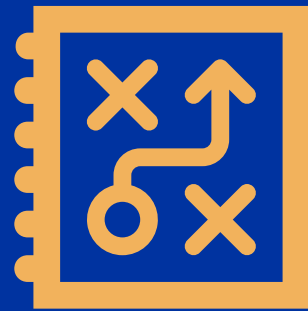
Example of immediate threat to physical health or safety

Mechanic Student is reported to have raped Tech Student after providing Tech with a large quantity of heroin. Tech explains that Mechanic keeps heroin 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.



Example of immediate threat to physical health or safety

Student reports that another slapped and beat the reporter when the broke up with the other student. The reporter says the respondent has since threatened to kill the reporter and anyone the reporter might date. The breakup occurred two days ago. The reporter has visible injuries.



Example of no immediate threat to physical health or safety



Engineering Student reports that Philosophy Student committed sexual assault by having sex with Engineer while Engineer was incapacitated after the two were drinking. The incident occurred two years ago. Philosopher has no disciplinary record. Engineer reports minimal but positive interactions with Philosopher since the incident.



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)

Example of administrative leave



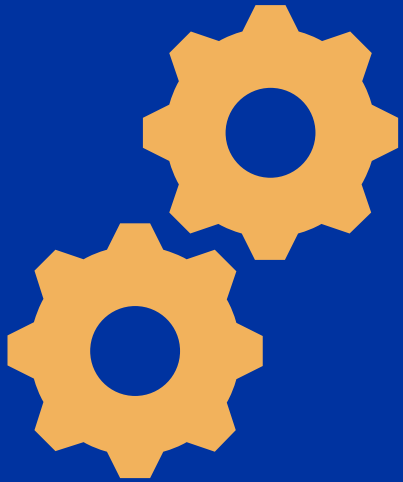
Faculty member is accused of having sex in on-campus office with Undergraduate Student currently in the faculty member's class. Undergraduate alleges the encounter was non-consensual. Faculty member admits to sex but denies it was coerced or otherwise non-consensual. Institution temporarily suspends faculty member from teaching but continues pay and administrative duties.

Example of administrative leave



Athletics department trainer is accused by multiple student athletes of unwelcome and unnecessary touching of genitals. Institution removes trainer from having any contact with student athletes pending investigation.

Group Scenario



Future Oncologist and Future Psychiatrist are both in their third year of medical school. Oncologist reports that Psychiatrist sexually harassed Oncologist by repeatedly propositioning Oncologist at a school-sponsored happy hour. Oncologist has not decided whether to file a formal complaint. Oncologist requests several supportive measures, including free counseling; the ability to complete the semester remotely; never to be in the same class or clinical rotation with Psychiatrist; and for Psychiatrist to participate in supplemental sexual harassment training and a substance abuse prevention program. Oncologist submits a doctor's note indicating Oncologist suffers from anxiety and PTSD when in Psychiatrist's presence. Unbeknownst to Oncologist, another student accused Psychiatrist of similar sexual harassment a year prior but did not make a formal complaint. The Dean reports that the school has never allowed a student in their third year to study remotely and that required in-person experiences cannot be replicated remotely. The Dean also reports that, due to the small size of the class, it would be impossible to guaranty Oncologist and Psychiatrist would never be in the same class or clinical rotation.

Questions





HUSCH BLACKWELL

The Investigation Process





What is the purpose of 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



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

- What is the first step in the investigation process?
 - Receiving a written, formal complaint
 - Issuing a written notice to the parties
 - Scheduling interviews
 - Collecting emails and text messages
 - Notifying the hearing officer that there is a new case



What is a formal complaint?

- Signed 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).

Poll question

- May a putative victim who has already graduated file a formal complaint?
 - Yes
 - No
 - It depends



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

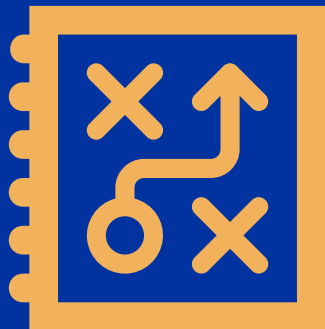




What else does the notice need to say?

- 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.



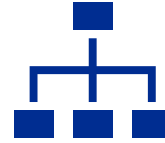
May we take steps to preserve information before sending the written notice?



- 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

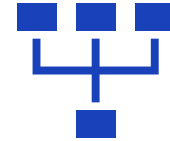
Can we consolidate the complaints?

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

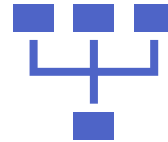


Multiple respondents

Multiple complainants



Multiple allegations against a single respondent



Multiple allegations from a single complainant



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

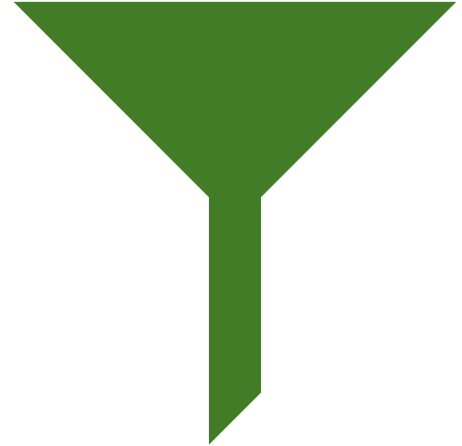


Closure/information providing phase



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 of 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 of facilitators



Examples of 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 of recognition prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)



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



Poll question

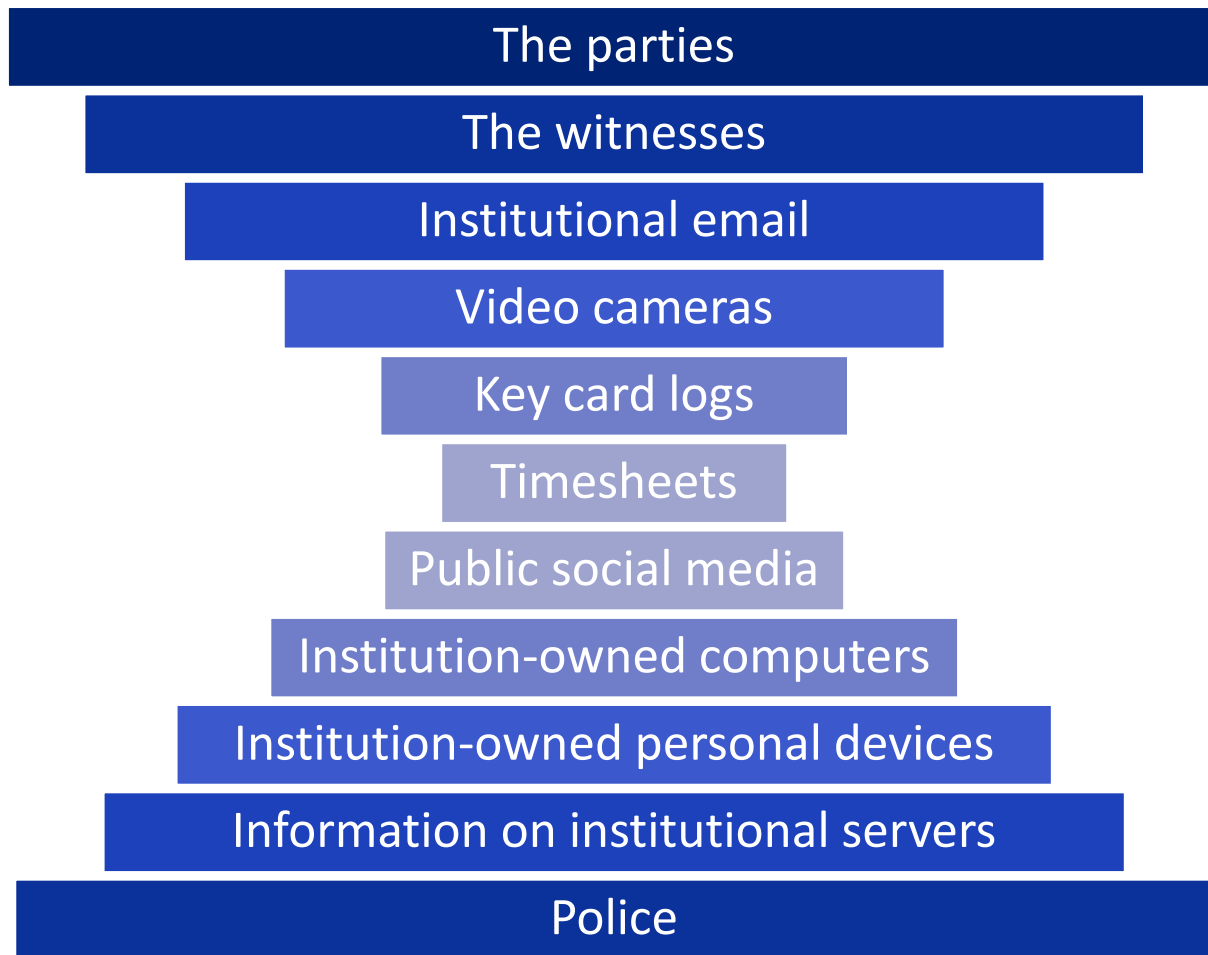
- Do the parties have the right to audio or video record an interview?
 - Yes
 - No
 - It depends on whether you are a “one party” consent state



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

- No – parties do not have the right to insist on recording an interview
- “One party consent” refers only to criminal laws governing wiretapping and electronic surveillance
- If the interview is recorded, the institution should make the recording and give the parties access as required at the appropriate time

**Example
sources of
non-testimonial
evidence**





May an investigation collect evidence on sexual history?

- Generally, no – Evidence of a complainant’s prior sexual behavior is relevant 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



How do we approach potential 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)

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



Trauma might affect a party

- Not in every case
- Not just one party
- Never assume 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



Are there key points from the Q&A? (3 of 7)

- Process
 - A school may use a “trauma-informed” approach as long as it does not adopt improper presumptions or stereotypes
 - Presumption of no responsibility does not mean a presumption that the complainant is lying or that alleged harassment did not occur



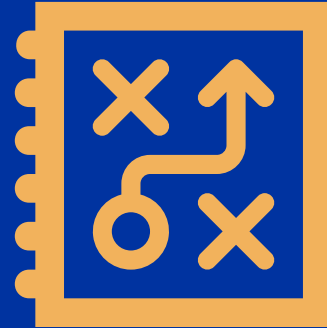
May an investigation collect and rely on privileged records?



- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes

Example of permissible use

—
Student who makes report of sexual assault executes release allowing disclosure of counseling records demonstrating student sought an emergency counseling session the morning after the alleged sexual assault



Example of impermissible use

—



Employee accuses Student of sexual assault and reports that Student transmitted an STD. Student denies sexual encounter occurred. Investigator unilaterally contacts student health center seeking records to determine whether Student has been treated for STD.



Do the parties have access to the evidence?

- 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 finalized
- 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





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.

Poll question

- If we have complete transcripts of the interviews, do we have to share the audio recordings too?
 - Yes
 - No



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



Poll question

- If a party's response to the evidence prompts more investigation, does the institution have to re-do the ten-day period after the new evidence is in?
 - Yes
 - No



Policy language – Experts (student procedure)

- Parties may identify expert witnesses
 - Submit expert report with credentials and intended testimony
 - Provided to other party in timely manner
 - Opportunity to challenge expertise
 - Hearing panel Chair determines relevance

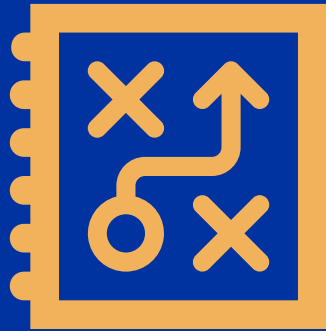


Are we required to address a party's response to the evidence?

- 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



Example



Party responds to evidence that investigator failed to interview Key Witness, who party says personally observed the alleged sexual harassment at issue. Investigator should either conduct the interview or explain in final report why it was not conducted.



How is the investigation concluded?

- 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





Does the investigation report make findings?

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



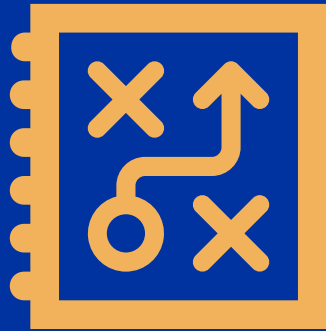
Should our investigation report comment on credibility?

- 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.



Do the parties get to comment on the investigation report?

- Yes
- Parties are permitted to “review” and provide “written response” to investigation report



Example

Written Response to Investigation Report Checklist

- To the extent the party disagrees with the investigation report, any argument or commentary regarding such disagreement;
- Any argument that evidence should be categorically excluded from consideration at the hearing based on privilege, relevancy, the prohibition on the use of sexual history, or for any other reason;
- A list of any witnesses that the party contends should be requested to attend the hearing pursuant to an attendance notice issued by the hearing officer;
- A list of any witnesses that the party intends to bring to the hearing without an attendance notice issued by the hearing officer;
- Any objection that the party has to the institution's Hearing Procedures;
- Any request that the parties be separated physically during the pre-hearing conference and/or hearing;
- Any other accommodations that the party seeks with respect to the pre-hearing conference and/or hearing;
- The name and contact information of the advisor who will accompany the party at the pre-hearing conference and hearing;
- If the party does not have an advisor who will accompany the party at the hearing, a request that the University provide an advisor for purposes of conducting questioning.

Poll question

- What are we supposed to do with a party's response to the investigation report?
 - Append it to the report
 - Throw it away
 - Review it and consider whether any changes to the investigation report are merited
 - Send it to the other party



May parties have an advisor during the investigation?

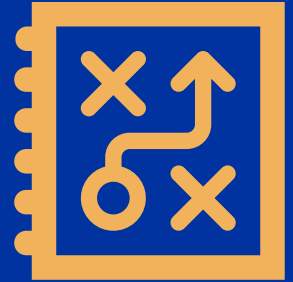
- Yes – parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role during the investigation phase
- Institution is not required to provide an advisor during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





Example

The institution sends a written notice of investigation to respondent requesting an interview. The advisor (an attorney) responds and indicates respondent will not submit to an interview. The advisor submits a legal brief seeking “dismissal” of the complaint and giving the respondent’s factual narrative. The document is on law firm letterhead and signed only by the advisor.



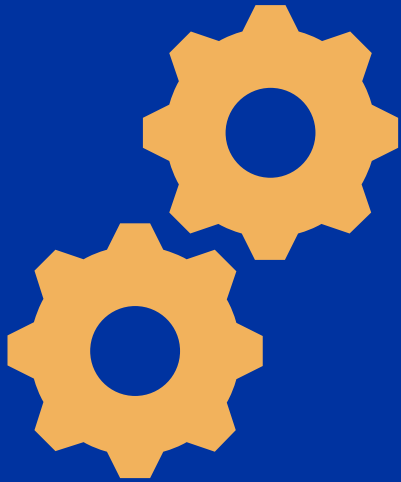


Example

A complainant identifies a sexual assault victim's advocate as advisor. The advocate indicates by email complainant will only respond to written questions that are pre-screened by the advocate and revised, as necessary, so as not to re-traumatize the complainant. Advocate tells investigator not to communicate with complainant directly.



Group Scenario



Student athlete accuses teammate of sexual harassment after teammate kisses student athlete in a hotel room at an out-of-season summer tournament in which some team members are playing with coach's encouragement. Teammate does not respond to investigator's written request for interview. Eventually, attorney for teammate sends letter to investigator indicating teammate 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, teammate's attorney sends a signed declaration from teammate disputing the allegations and accusing student athlete of falsifying the complaint. The teammate's attorney also identifies six student athletes who teammate wants interviewed; three will purportedly testify to teammate's activities on the night in question and the other three will purportedly testify about prior allegedly false allegations against other students made by complainant

Questions





HUSCH BLACKWELL

Alternative & Parallel Processes





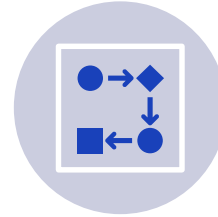
What is informal resolution?

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

What are the key concepts of informal resolution?



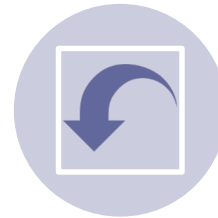
A formal complaint must first have been filed and written notice given to the parties



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

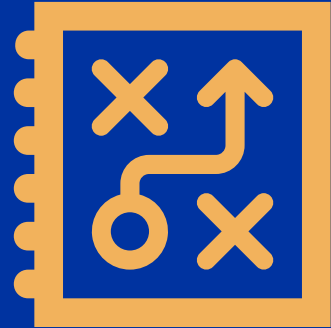


The parties must be allowed to withdraw from informal resolution up until the point it is final



Example

Parties agree to engage in informal resolution in the form of separate meetings with the College's ombudsperson in an attempt to reach an agreement regarding their future interaction. A written agreement is eventually reached and signed by both parties.





What are the limitations?

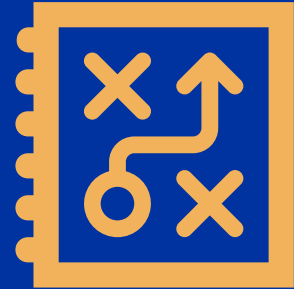
- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment





Example (impermissible)

Student files a formal complaint accusing a faculty member of groping the student during a clinical experience. As the hearing approaches, the student decides not to participate in the hearing and requests that the matter be resolved by the faculty member apologizing. Faculty member apologizes and matter is closed “by agreement.”



Poll Question

- Is a hearing the only way this case is resolved?
 - Yes
 - No



Are there key points from the Q&A (4 of 7)?

- Informal Resolution
 - Regulations leave the term “informal process” undefined to allow schools discretion to adopt processes that serve the needs of their communities
 - Schools may exercise discretion to make fact-specific determinations about whether to offer informal resolution in response to a particular complaint
 - Whether to participate in a particular form of informal resolution is a decision for each party to make, and parties should not be pressured to participate



How Do We Ensure Participation is Voluntary?

- Educate parties and community about informal resolution options
- Provide written information, such as:
 - Whether and when the process can be terminated
 - Whether information shared can be used in a resumed formal process, or subsequent conduct matters (and, if so, which ones)
 - How informal resolution differs from formal investigation and adjudication
 - Whether the process involves face-to-face interaction
- Make participation contingent on successful completion of preparatory meetings
- Require parties to sign agree to process in writing
- Frequent check-ins and monitoring
- Define and document completion of informal resolution (e.g., signed or otherwise documented/acknowledged agreement)

What are some sample policy terms around informal resolution?

- Only available for complaints involving parties of same status (e.g., student; employee)
- Title IX Coordinator will determine whether informal resolution is appropriate
- School will appoint a facilitator, who may be the Title IX Coordinator
- Parties will be given a written notice with
 - allegations
 - requirements of the informal resolution process
 - circumstances under which agreed informal resolution precludes parties from resuming a formal process arising from the same allegations
 - any consequences resulting from participating in the informal resolution process, including
 - records that will be maintained or could be shared
 - use of information gathered in formal process if no informal resolution is reached and the matter reverts to the formal process
- Parties must consent in writing to the process
- Parties may submit a written statement
- Parties may request that witnesses be interviewed, but there will not be a full investigation
- Any informal resolution must address concerns of the complainant and responsibility of the school to address alleged policy violations while also respecting the due process rights of respondent
- Informal resolution remedies include mandatory training, reflective writing assignment, counseling, written counseling memorandum by an employee's supervisor, suspension, termination, or expulsion, or other methods designed to restore or preserve equal access to the school's education programs or activities
- At conclusion of process, facilitator will write an informal resolution report and provide it to parties
- At any time prior to completing informal resolution process, either party may withdraw from the informal resolution process and resume or begin the formal resolution process
- Unless specified otherwise, informal resolution final when agreement signed by parties

See July 2021 Q&A

the University of California (C.D. Cal. 2015 – pre-2020 regs)

- “UCLA handled Takla’s report through what appears to be a truncated process called ‘Early Resolution,’ rather than a formal hearing . . . even though [the administrator] learned through investigation that [Respondent] had previously harassed another graduate student and two junior professors. This was in violation of UCLA’s own Title IX policy, which prohibits the use of Early Resolution in cases that involve multiple complaints of sexual misconduct.”
- Administrator “discouraged Takla from filing a written request for a formal investigation, stating that [Respondent’s] peers may well side with [Respondent] and that Early Resolution would be faster and more efficient.”



Takla (cont.)

- “Takla requested a formal investigative report after the conclusion of Early Resolution, but was told that no formal documentation or report existed because the matter was handled through Early Resolution. This too was in violation of UCLA’s own policy, which states that Early Resolution efforts should be documented.”
- “UCLA took nine months to investigate Takla’s report but did not make any findings at the conclusion of its investigation, again in violation of UCLA’s policy.”
- “UCLA did not inform Takla of the outcome of Early Resolution or whether [Respondent] was sanctioned for his conduct.”
- Allowed case to proceed



the Univ. of California (N.D. Cal. 2016 – pre-2020 regs)

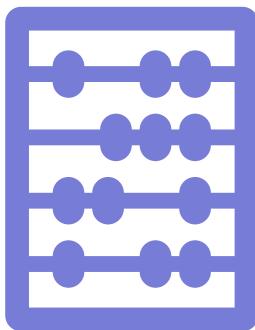
“In arguing that ... deliberate indifference, Karasek asserts that the University improperly used an informal resolution process to address her complaint”

- “During the entire pendency of the investigatory and disciplinary process, Respondent was ‘allowed to remain on campus, unrestricted, creating a sexually hostile environment’”
- “Karasek was not contacted during the entire pendency of the informal resolution process and was not given an opportunity either to present [Karasek’s] claim at a disciplinary hearing or to appeal the University’s disciplinary decision.”
- Case allowed to proceed
 - “[E]ven assuming that a school’s violation of its own sexual harassment policy is relevant to the deliberate indifference analysis, Karasek identifies no way in which the University’s use of an early resolution process to address her complaint was in violation of University policy.”
 - “We might have handled the situation differently, but the Supreme Court has instructed us to ‘refrain from second guessing the disciplinary decisions made by school administrators’ unless those decisions were ‘clearly unreasonable’”





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



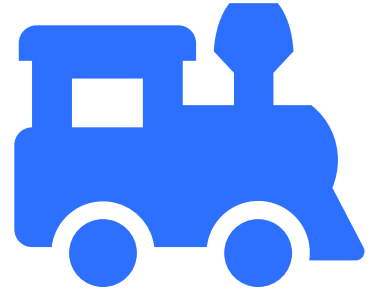
Who facilitates an informal resolution?

- 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



Training

- Training required for all institutional participants in the process, including informal resolution facilitators/mediators
 - Training must be non-biased and not rely on stereotypes
 - Training for institutional participants retained for seven years
 - Training documents posted on institution's website





What is a facilitator's role?

- Varies with matter/policy
- E.g.,
 - Conduct intake/pre-conference in consultation with Title IX official
 - Provide notices
 - Develop agreed-upon process
 - Maybe interview witnesses, collect documents
 - Facilitate storytelling by all participants
 - Identify and list harms
 - Brainstorm solutions
 - Prepare resolution agreement with input from parties

Poll Question

- What is the most common type of informal resolution?
 - Mediation
 - Facilitated discussions led by Title IX Coordinator
 - Restorative justice
 - Attorneys for parties negotiate an agreement
 - Arbitration without a live hearing

Example questions for parties

Will vary depending
on circumstances

What concerns do you have about participating in this process?

What happened from your perspective?

At the time of the incident, what were you thinking about?

What have you thought about since the incident?

What impact has this incident had on you?

What has been the hardest thing about this incident?

Who else has been impacted? How?

In retrospect, what should have gone differently?

What can make things right?

How can we rebuild trust?

Are there things in this community that permit/encourage incidents like this to happen that you would like to see addressed?



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



What are key distinctions of restorative justice approach?

The cornerstone of the restorative justice approach is the recognition of harm—not the violation of a rule

Traditional Conduct Process:

What rule was violated?

Is there enough evidence to support a finding of responsibility?

How should we punish the offender?

Did we follow our policy?



Restorative Justice Process:

What is the harm?

Who is responsible?

What can they do to repair the harm?

How can we rebuild trust?

How does restorative justice compare to general informal resolution?

General Informal Resolution

- No guided or structured preparation
- Immediate parties only
- Shared responsibility/no obligation to accept responsibility
- Solution: Compromise
- Focus on facts/evidence

Restorative Justice

- Substantial preparation
- Community & institutional participation
- Acceptance of responsibility
- Trauma-informed safeguards
- Focus on repairing relationships & restoring trust

Common features: trained facilitators; shuttle negotiation; described as “mediation”



How long can an informal resolution take?

- Informal resolution should be reasonably prompt
- Typically has the effect of suspending any default investigation and hearing process
- If informal resolution fails or appears futile, institution should promptly resume default investigation and hearing process

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



Example

Informal resolution indicates that, in lieu of investigation and hearing, respondent will apologize for respondent's conduct and avoid future communication with complainant. Agreement states that, if respondent violates informal resolution, respondent will be subject to discipline under Student Code of Conduct but formal Title IX complaint is resolved and closed.





Is an informal resolution final?

- No, if
 - Informal resolution not complete (parties may revert to formal process)
 - Terms of the informal resolution are not final (i.e., contingent) and contemplate a potential return to formal process
- Depends on agreed procedures/resolution



How is an informal resolution documented?

- Agreements should be well-documented by the informal resolution facilitator
- Ideally, parties will sign the agreement or provide some other form of written confirmation
- Formal settlement agreements are typically not required unless they are resolving legal claims that have been asserted



Is Title IX the exclusive process for resolving sexual misconduct?



- No
- Title IX does not preclude the use of other policies and processes that may be implicated by a report of sexual misconduct



What other policies/processes may apply?

- Title VII policy
- Consensual relationships policy
- Professionalism policies
- Student code of conduct
- Threat assessment
- Employee handbook provisions
- Faculty handbook provisions
- Contractual provisions



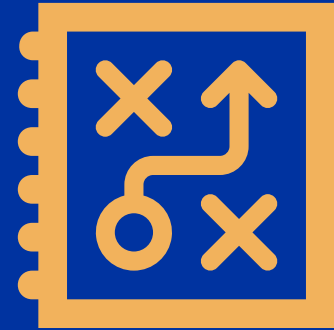
May we use another process before Title IX?

- 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



Example

Student makes a verbal report that resident director provided alcohol to underage Student and then attempted to grope Student before Student fled the room. Resident director admits to providing alcohol but denies any attempted groping.



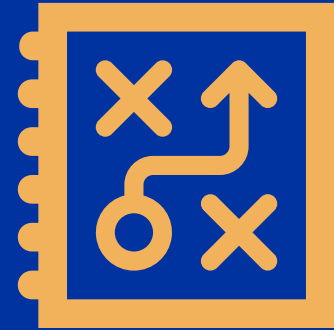
Poll question

- May the institution terminate the resident director's employment for violating its drug and alcohol policy even if there is no formal Title IX complaint?
 - Yes
 - No



Example

Football Player files a formal Title IX complaint accusing Student Team Manager of punching and kicking Player to the point of leaving bruises. Manager admits to punching and kicking Player but denies there is a dating relationship.



Poll question

- Can the institution bring code of conduct charges against Manager regardless of whether there is a formal complaint of dating violence?
 - Yes
 - No



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





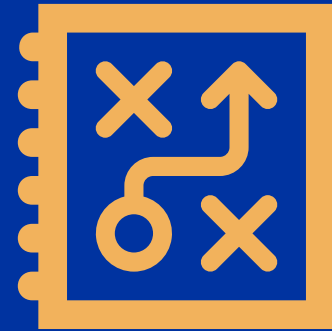
Are there key points from the Q&A? (5 of 7)

- Other policies
 - Schools may address conduct that falls outside the scope of the regulations through other policies
 - A school may use its code of conduct to address sexual harassment where the complainant is not a participant at the time the complaint is filed
 - Forms of sex discrimination other than sexual harassment are not covered by the sexual harassment regulations and may be resolved through a different process that is prompt and equitable



Example

Medical Student accuses Physical Therapy Student of sexual assault after Physical Therapy Student rendered Medical Student incapacitated by providing Medical Student with illegal drugs. Title IX hearing officer concludes Physical Therapy Student provided Medical Student illegal drugs but that Medical Student was not incapacitated.

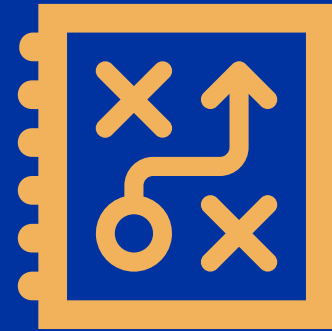


Poll question

- Can the institution now charge Physical Therapy Student with violation of its drug and alcohol policy prohibition on distributing illegal drugs?
 - Yes
 - No

Example

Employee is accused of hostile environment sexual harassment. Title IX process results in a “no violation” finding because harassment is not pervasive. Institution then initiates process under Title VII policy contending that harassment is severe.





May we use two processes at the same time?

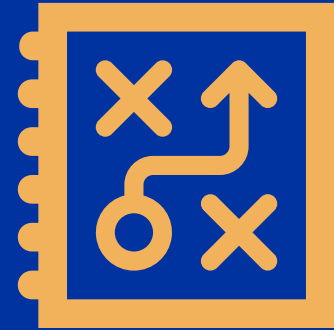


- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ



Example

Faculty member at religious institution is accused of sexually harassing students by requiring them to read sexualized and satirical accounts of Biblical events. Institution initiates a Title IX process as well as discipline process under faculty handbook for actions seriously undermining religious mission of institution.





May we conduct a “joint” investigation?

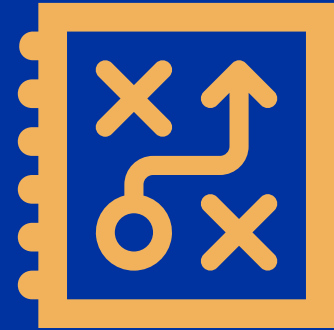
- Yes
- But any “joint” investigation must satisfy the Title IX standards
- Important to be clear to the parties what is going on
- Important to maintain integrity of Title IX evidence





Example

Employee is accused of sexually harassing a co-worker. Institution initiates a Title VII investigation and a Title IX investigation. Title IX investigator and Title VII investigator conduct joint interviews of parties and witnesses.





What should a notice say when two policies or processes are relevant?

- Identify relevant policies/procedures
- Provide timeline, where appropriate
- Confirm that all required notice information provided (from all policies/processes)

Poll question

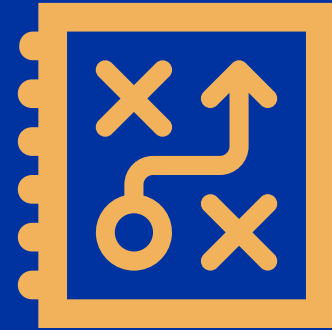
- Do you know what policy your institution would use to investigate a sex discrimination complaint based on differential *treatment*?
 - Yes
 - No

Poll question

- Can the resolution of a non-Title IX process result in the termination of a Title IX process?
 - Yes
 - No

Example

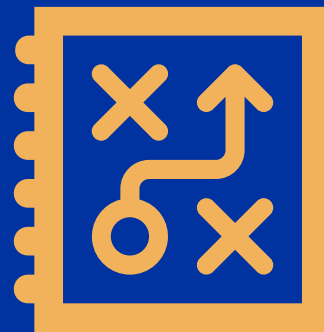
Male respondent at private religious college is accused of sexually assaulting female complainant in a female-only dorm. Respondent has two previous conduct charges for entering female-only dorms after hours. Based on respondent's admission that he entered female dorm after hours, even though he denies sexual contact, institution dismisses respondent under its "three strikes your out" conduct provision.





Example

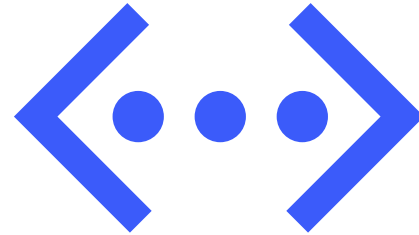
Student complains that Graduate Assistant harassed Student by sending Student an email with a pornographic video attached from GA's University laptop. GA claims the video was sent to Student by accident; Student's email account was close to the intended recipient's email account, which was mistyped. Institution terminates GA for violating institutional prohibition on accessing pornography from institutional computers.





Can two institutions have jurisdiction at the same time?

- Yes
- Joint programs or collaborations will often result in dual jurisdiction
- May include dual jurisdiction with non-educational entity such as a hospital





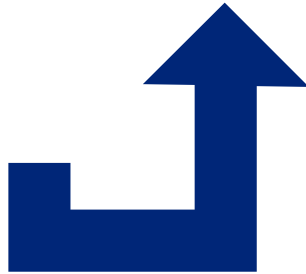
Example



Multiple schools collaborate to share classroom and dormitory space for a “semester in D.C.” program where students take classes and live while working in a government internship. One student from College sexually harasses a student from University in the classroom space.



What is the procedure if we don't have Title IX jurisdiction?



- If no formal complaint has been filed, refer the matter elsewhere (law enforcement, alternative process, etc.)
- If a formal complaint has been filed, dismiss the formal complaint, notify the parties, and refer the matter elsewhere

Poll question

- Is an institution required to dismiss a Title IX complaint if the respondent is terminated or separated pursuant to some other process?
 - Yes
 - No



When may a case be dismissed?

- Complainant withdraws allegations in writing
- Respondent is no longer employed or is no longer a student
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination



Policy language – Employee departures

- Non-student employee respondent departure = Title IX Sexual Harassment resolution process ends
- University may shift to an investigation under Procedures for Addressing Discrimination, Harassment, and Non-Title IX Sexual Misconduct Complaints
- Employee not eligible for rehire



Why would an institution continue with a Title IX process after respondent departure?

- Complainant's wishes
- Desire to avoid "passing the harasser" scenario
- Community expectation
- Large investment of time and resources to date
- Potential for respondent's return in the future
- Other factors possible



Are there key points from the Q&A? (6 of 7)

- Respondent departure dismissals
- Confirms institutions may dismiss in cases of respondent departures
- “Proceeding with the grievance process could potentially allow a school to determine
 - the scope of the harassment,
 - whether school employees knew about it but failed to respond,
 - whether there is a pattern of harassment in particular programs or activities,
 - whether multiple complainants experienced harassment by the same respondent, and
 - what appropriate remedial actions are necessary.”

July 2021 ED Q&A



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

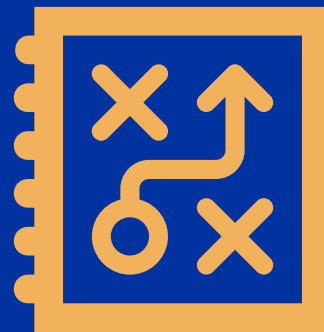


- No
- Title IX regulation requires the use of specific Title IX process for any “sexual harassment” as defined by Title IX that occurs in institution’s programs and activities



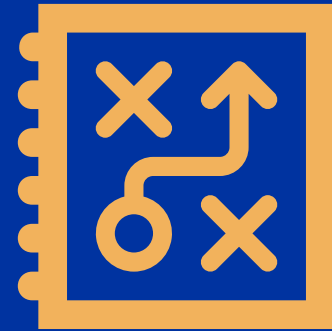
Example (impermissible)

Alpha Alpha Student files formal Title IX complaint against Mu Mu Student alleging that Mu raped Alpha in a Greek house by having non-consensual vaginal sex. Alpha does not want to participate in a hearing, so institution dismisses Title IX case and re-charges Mu with rape by way of non-consensual vaginal sex under student code of conduct.



Example

Dorm Resident files formal Title IX complaint against Student Security Officer alleging that Officer engaged in sexual harassment by masturbating in the hallway outside Resident's room. Resident withdraws Title IX complaint to avoid being cross-examined at hearing. Institution then charges Officer with lewd conduct under student code of conduct, which does not use a hearing process.



Poll question

- Is it permissible to charge respondent with lewd conduct in this scenario?
 - Yes
 - No
 - It depends



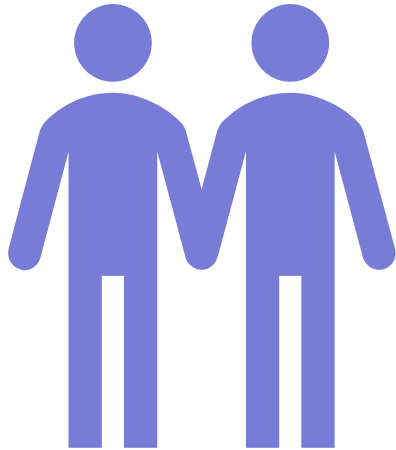
What if a party refuses to be interviewed?

- Institution cannot compel a party to submit to a Title IX interview
- Institution may evaluate whether to proceed if complainant refuses
- Investigation should proceed despite respondent's refusal
- May dismiss if other sufficient evidence is unavailable



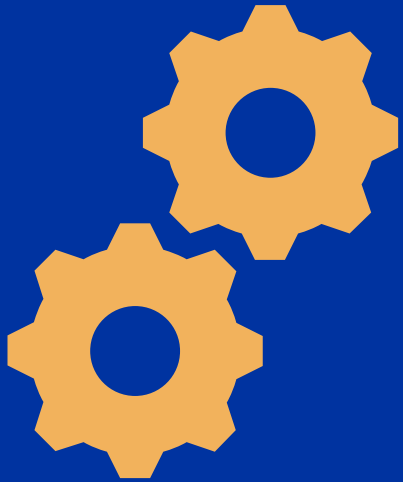


What if a party refuses to be interviewed without their lawyer?



- Party may be accompanied by an advisor of choice, including a lawyer
- Institution may require its lawyer to be present during interview

Group Scenario



Junior Student files sexual harassment complaint alleging that Senior Student broke down the door to Junior’s dorm room while high on drugs, took off Senior’s own clothes, and attempted to get in bed with Junior while naked. As Title IX investigation proceeds, Junior indicates a desire for informal resolution of the sexual harassment complaint if Senior will apologize and agree to treatment. Senior agrees, and the Title IX complaint is closed. Unbeknownst to Junior, Senior has one prior conduct charge for illegal drug use and was previously reported to have sexually harassed another student while drunk. Concerned about the continuing risk Senior may pose, and after the Title IX complaint is closed, institution charges Senior under its conduct code for illegal drug use; damaging institutional property; lewd conduct; and invasion of privacy. The institution’s conduct code does not use a hearing model. The institution finds Senior in violation of its code based on Junior’s statement and the statements of other witnesses that were made in the Title IX case before it was resolved. Senior accuses the institution of a “bait and switch.”

Questions





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Regulatory & Caselaw Update



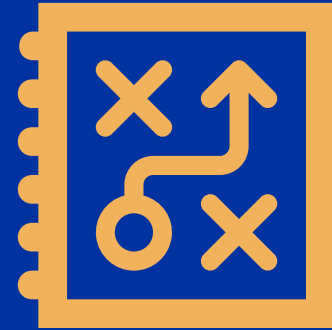


What is ED's current position on gender identity and Title IX?

- June 2021 Notice of Interpretation
 - Title IX prohibits discrimination based on gender identity and sexual orientation
 - Makes clear that harassment based on gender identity and/or sexual orientation is sexual harassment covered by August 2020 regulation
- Religious exemption still applies and is still viable

Example

Student experiences repeated jokes and taunts from peers in a dormitory regarding Student's transgender status and manner of gender expression. Student files formal complaint of sexual harassment. Complaint is covered by 2020 sexual harassment regulations.





Are there other administration initiatives concerning LGBTQ+?

- Biden-administration wide-directive to apply civil rights laws and regulations to ensure equal access for LGBTQ+ in USA and abroad
- Dear Colleague Letter on Transgender Students
- Executive Order on Preventing and Combatting Discrimination Based on Gender Identity or Sexual Orientation
- Anticipate more robust OCR enforcement of LGBTQ+ implicated complaints of discrimination/harassment



What are trends in caselaw?

- Continued growth in number of respondent-initiated lawsuits alleging:
 - Title IX sex discrimination based on status as male
 - Due process violations for failure to provide fundamental fairness (public schools)
 - Breach of contract for failure to follow policies and procedures in handbooks
 - Negligent administration of Title IX policies

Example: Does v. Marian University (7th Cir. 2019)

- Adverse results for respondents, most of whom are male, is “gender-neutral because both men and women can be respondents.”
- Decision “against the weight of the evidence” not gender bias inference
- Gender bias might be shown by:
 - Institution treating particular respondent differently because of sex, including comments or statements by people administering internal process
 - Combined with media or political pressure on institution to enforce rules against men accused of sexual misconduct



Example: Does 1-2 v. University of Denver

- Respondent can prevail if demonstrates sex (male) was a motivating factor in disciplinary decision
- Can be shown by:
 - Significant (and largely unexplainable) procedural irregularities that all work to the benefit of a party of the opposite sex
 - Statistical evidence demonstrating harshness to males or leniency to women



Example: Does 1-2 v. University of Minnesota

- Public attention, media pressure, and threat of loss of public funding can support circumstantial case of intentional bias against male student athletes accused of sexually assaulting women
- Institution's history of legal claims brought by female victims, and desire to avoid future claims of a similar nature, can be circumstantial evidence of anti-male bias



Example: Doe v. N.Y. Univ.

- Dismissed Respondent's promissory estoppel claim allowed to proceed based on advisor's alleged promise that, at most, he would face a one-semester suspension
- Respondent's Title IX claims allowed to proceed based, in part, on allegation that Zoom glitches impaired his ability to participate fairly and meaningfully in the process



Example: Doe v. Hobard & William Smith Colls.

- Respondent alleged breach of contract claims based on allegations that investigator failed to obtain evidence favorable to respondent and attorney fed answers to the complainant during the conduct hearing in contravention of policy
- Court allowed case to proceed



Example: Doe v. Purchase Coll. State Univ.



- When finding respondent responsible, hearing board failed to elicit or weigh testimony regarding whether the complainant consented to sexual activity through actions
- Court annulled campus appeal board decision, stating that decision was “surmise, conjecture, or speculation”






Are there other trends?

- Rising number of cases presenting a conflict between First Amendment rights and anti-harassment policies
- Preferred name policies; social media policies; application of conduct expectations to off-campus social media



Example: Meriwether v. Hartop

- Institution's policy required all faculty members to refer to students by their preferred pronouns
 - Religious faculty member refuses and Title IX complaint is made; hostile environment harassment is found before being revised to finding a disparate treatment
 - Faculty member sues and wins; First Amendment's academic freedom principles protect faculty when teaching, including protection from certain compelled speech
 - U.S. Court of Appeals
- 

Example: Kluge v. Brownsburg Comm. Sch. Dist.

- High school policy required teachers to use students' gender-appropriate pronouns and chosen names
- Orchestra teacher was allegedly forced to resign for refusal to comply based on religious beliefs after school declined accommodation of using student last names
- Faculty member sues and loses; requested accommodation caused undue hardship because it hampered school's ability to provide education and safe environment and exposed school to potential Title IX lawsuit
- U.S. District Court

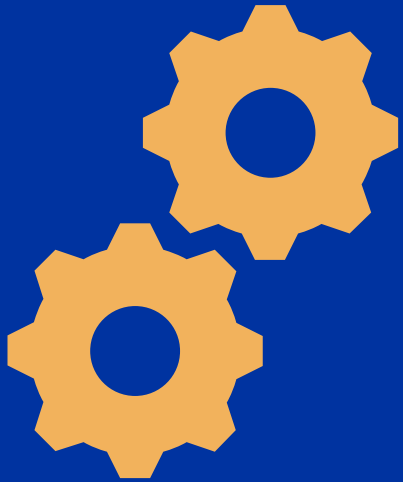


Example: Mahanoy Area Sch. Dist. v. B.L.

- Cheerleader disciplined for vulgar social media posts about team
- School's ability to discipline for off-campus speech is significantly less than on-campus speech
- School has a duty to protect the expression of unpopular views
- Vulgar speech on private time with no evidence of disruption is insufficient to overcome First Amendment's protections



Group Scenario



Two years ago, institution settled lawsuit brought by student raped at the house of a Greek organization. As part of settlement, institution issued public statement promising “robust” measures to prevent sexual assault in the Greek community. Recently, institution received Title IX sexual harassment complaint alleging members of the same Greek organization are creating a hostile environment through public Facebook posts that refer to members of the opposite sex using vulgar terms and that discuss the members’ sexual conquests with members of other Greek organizations (without using names). The complaint specifically states: “It’s clear the institution isn’t keeping its promise to prevent sexual assault when it’s allowing students to post garbage like this where everyone can see it.” The institution is a private college whose freedom of expression policy states: “although private, college supports and will abide by freedom of speech principles as embodied in the First Amendment.”

Questions



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The Hearing Process



Policy language – Pre-hearing procedures

Investigator provides evidence to parties/advisors (language/timing varies slightly with student/employee process)

Investigator provides investigation report to parties/advisors with opportunity to respond (language/timing varies slightly with student/employee process)

Hearing panel determined, parties informed of panel (opportunity to challenge for bias/conflict)

Hearing scheduled and parties notified



What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
 - The decision-maker 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

Who is the “decision-maker”?



- A single hearing officer; or
- A hearing panel led by a chair

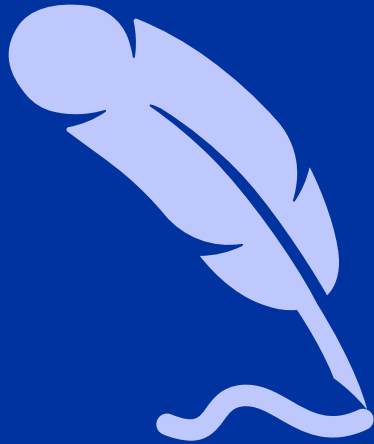
Poll Question

- The decision-maker must apply a preponderance of the evidence standard.
 - True
 - False

Policy language – Standard of evidence



- Preponderance of the evidence
- (NOT “clear and convincing evidence”)





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 assessment
- Hearing must be scheduled and logistics arranged
- Witnesses must be notified
- Pre-hearing conference may be held



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 letters excusing parties and witnesses from other obligations, as necessary

Poll Question

- May an institution set an overall time limit for the length of a hearing?
 - Yes
 - No



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

Example

Based on investigation report and in consultation with the parties, hearing officer issued letters to 8 witnesses advising them of the hearing date and time and requesting their presence at the identified location.



Poll Question

- May an institution compel a witness to attend the hearing?
 - Yes
 - No

Poll Question

- May an institution compel faculty and supervisors to relieve a witness of obligations that would otherwise prevent them from attending a hearing?
 - Yes
 - No

Example

Prehearing Conference Checklist

- Recording /consent/prohibition on recording and screen clips
- Purpose of meeting
- Hearing logistics (including any accommodations)
- Discuss impact of any no-contact orders
- Confirm notices
- ID each party's advisor & witnesses
- ID other parties present
- Address conflict/bias concerns
- Discuss roles
- The hearing procedures and order
- Rules of decorum
- Impact of not appearing
- Scope of hearing (conduct/policies at issue)
- Matters raised in the parties' written responses to the investigation report, as the meeting leader deems appropriate
- ID any evidence and/or exhibits to be presented
- Any stipulations may be made to expedite the hearing
- Arguments that evidence identified in the final investigation report as relevant is, in fact, not relevant (and vice versa)
- Any pre-submitted questions



What are other pre-hearing conference considerations?

- The pre-hearing conference can be two separate meetings—one with each party and advisor; but follow up notification may be required
- The pre-hearing conference can 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



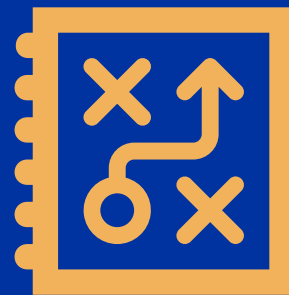
When should a pre-hearing conference be held?

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



Example

The investigation report issues, the institution identifies the hearing officer, and a hearing is scheduled to take place in 14 days. The institution schedules a pre-hearing conference 3 days before the hearing is set to occur.





Who attends a hearing?

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



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



Policy language -- Advisors

- Will relay party's own questions
- May, but is not required to, ask additional cross-examination questions as they deem appropriate
- If party and advisor of choice are not present at a hearing, University-appointed advisor will conduct cross-examination on behalf of the party

How does the hearing actually 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

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

Questioning of sexual history generally not permitted



What is the role of hearing decision makers?

- Conduct hearing
- Make a finding
- Determine sanction
- Explain decision
- Ensure clear record



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



Example: Doe v. Purdue University

- 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 noted, “[T]wo of the three panel members candidly admitted that they had not read the investigative report ...”
- Court let case proceed on due process and Title IX claims





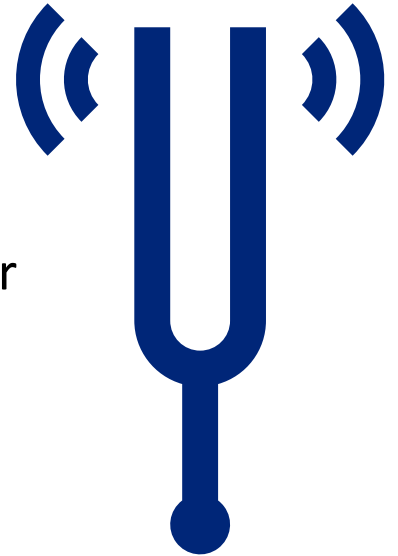
What are common hearing procedures?

- Method of recording, consent, and prohibition on other recording
- Advisor role
- Witnesses excluded unless testifying
- Parties and the decision makers allowed to hear and see all individuals who testify or otherwise speak at the hearing
- Pre-submitted questions
- Decision-maker(s) will oversee the hearing process and resolve all procedural disputes
- Objections allowed (?)
- If a question is excluded as not relevant, the decision will be explained
- Investigator statement
- Order of parties/witnesses
- Access to evidence during hearing
- Timing and continuances
- The hearing is not the time to appeal the investigation or litigate claims about process
- Decision-maker(s) have discretion to interpret, apply, and modify hearing procedures in any manner that is not clearly unreasonable and inconsistent with the policy



Starting the Hearing: Setting the Tone

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



Separating the Parties

- Video/ audio conferencing
- Separate rooms
- Screens





Can we set standards of behavior for hearings?

Yes, provided they are applied equally to participants and do not violate explicit guarantees from the Title IX regulation.



What are common rules of decorum?

- Vary in discretion of institution within bounds of regulations
- All parties, advisors, and others present at a hearing are 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 if any party, advisor, or witness is speaking or being questioned virtually
- The 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
- 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
- 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
- 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



How should we field these?

- When curve balls arise during a hearing, ADDRESS THEM
 - Late/new evidence
 - Conflicts of interest
 - Heightened emotions
 - Potential trauma-impact



Fielding practice



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



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

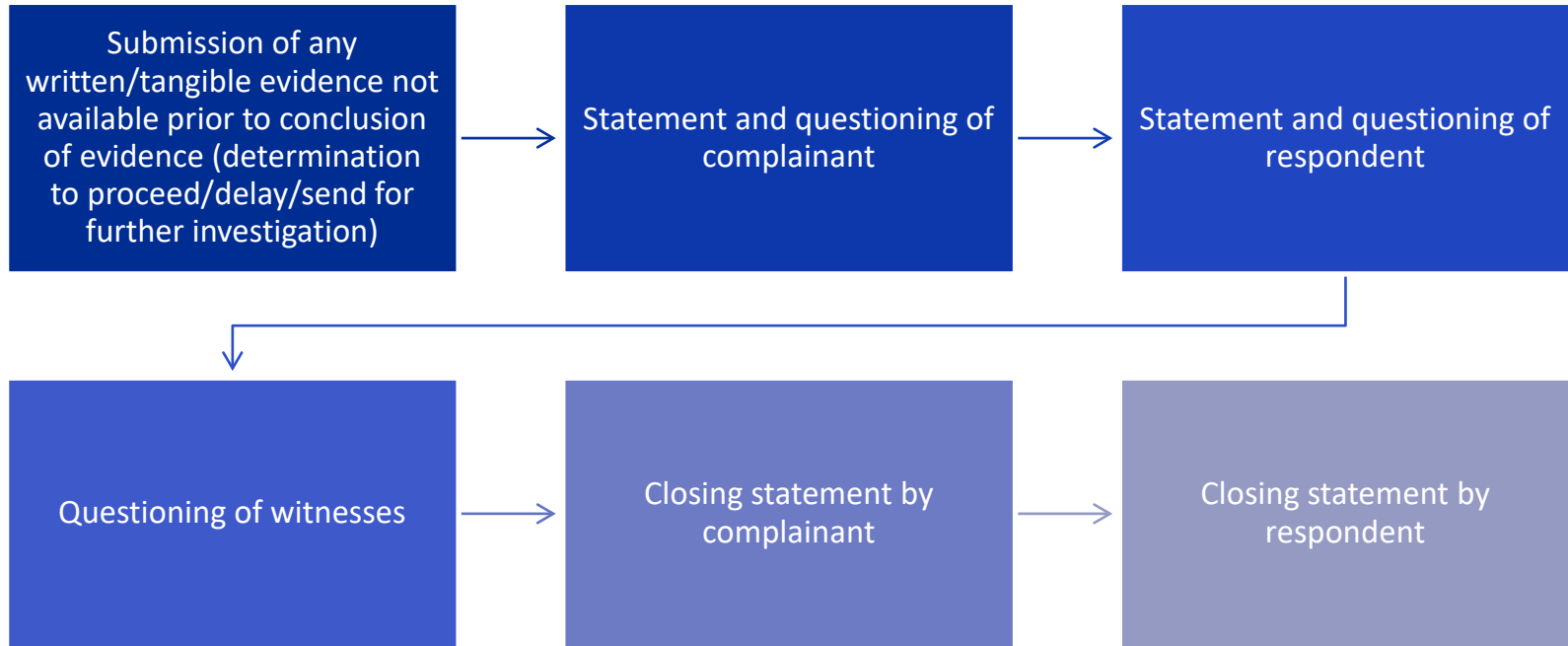


Heightened emotions: Take a break so hearing can proceed productively



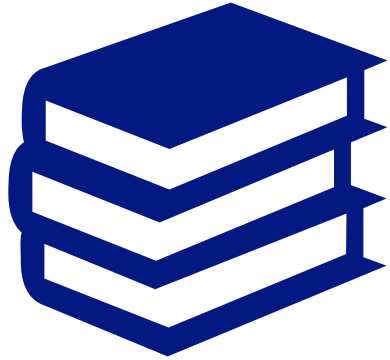
Potential trauma-impact: Take breaks, rely on support persons, and give opportunity to party potentially impacted to participate in the manner they are most comfortable

What is a common sequence?





Do the rules of evidence apply at a hearing?



- Limited rules apply:
 - The cross-examination exclusionary rule
 - The relevance rule
 - The prohibition on use of sexual history; and
 - Limits on the use of privileged materials



Who determines relevance?

- Decision-maker(s) must screen questions for relevance and resolve relevance objections
- Decision-maker(s) 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



Example (relevant)

—
Student has accused another student of dating violence by way of slapping Student. Advisor for respondent asks complainant how many dates complainant and respondent went on before the slapping incident.



Example (relevant)

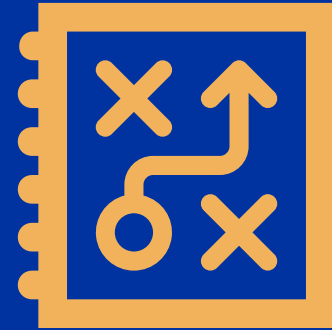
—



Faculty member is accused of engaging in quid pro quo harassment by rounding up a student's final grade in exchange for a sexual favor. Complainant's advisor asks faculty member whether he rounded up any other student's grade.

Example (not relevant)

—
Employee accuses another employee of sexual harassment by telling sexual jokes in the workplace. Advisor for complainant asks respondent whether respondent had an affair with a co-worker three years prior.





Is sexual history considered?

- Generally, no – Evidence of a complainant’s prior sexual behavior is relevant 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)

—
Student has accused another student of sexual assault by incapacitation. Advisor for respondent asks complainant how many times complainant has had “drunk sex” with other persons.



Example (permissible)

—



Student has accused another student of sexual assault by way of incapacitation. Advisor for respondent asks complainant whether complainant had any other sexual encounters with respondent when they were drunk.



Policy language – not evidence

Neither information that

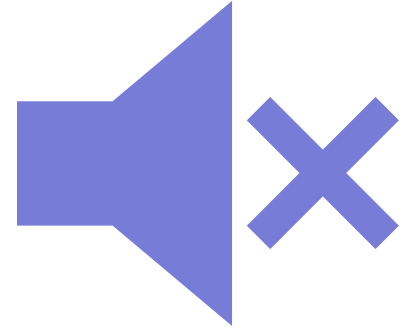
- solely addresses the character of any person nor
- information about any complainant's prior sexual conduct with anyone other than the respondent (unless such information is offered to prove that someone other than the respondent is responsible for the alleged conduct)

is evidence.



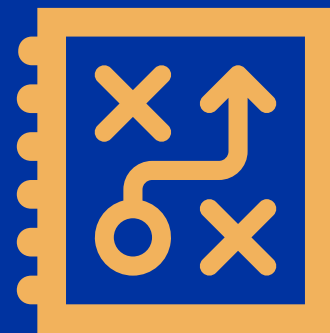
Does any testimony get excluded?

- Yes – Decision-maker(s) must exclude the statements of any party or witness who refuses to submit to cross-examination from the other party’s advisor



Example (excluded)

—
Witness gives testimony in support of complainant's account that respondent sexually assaulted complainant. When advisor for respondent seeks to cross-examine witness about a long-standing grudge witness holds against respondent, witness refuses to answer questions.



Example (excluded)

—

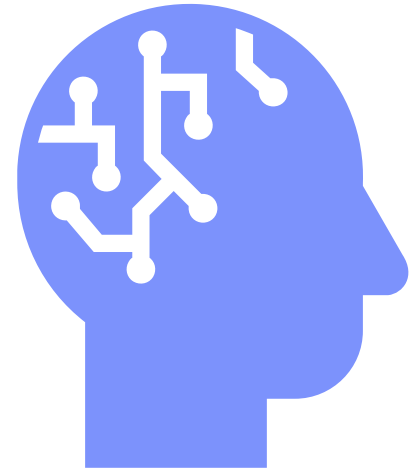


During hearing, respondent seeks to “introduce into evidence” an email respondent obtained from witness stating that “respondent could not have committed sexual assault because they were with me at that time in a different town.” Witness is not present at the hearing.



Are there any exceptions to the exclusionary rule?

- Generally, “no.”
- Various hearsay exceptions set forth in civil rules of evidence do not apply
- If the alleged harassment itself is a verbal or written statement, it may be considered



Example (not excluded)

—



During hearing, complainant identifies a text message from the respondent, sent to the complainant, calling the complainant a sexual epithet. The respondent refuses to submit to cross-examination. The respondent's text message is still considered.

Example (excluded)

—



During hearing, respondent identifies text message sent to respondent by complainant's friend indicating "complainant admitted to me they made it up." Friend refuses to attend hearing. Text message is excluded.



Are there key points from the Q&A? (7 of 7)

- Hearings
 - The cross-examination exclusionary rule does not apply to statements that are themselves alleged to be harassment; otherwise, no exceptions
 - An advisor may fulfill their cross-examination duty simply by restating questions their party wants asked



To sum up, what kinds of questions are usually irrelevant?

- Past romantic or sexual history or predisposition unrelated to the allegations - unless offered as evidence that someone other than the respondent committed the alleged misconduct, or offered as history relevant to the issue of consent
- Evidence proffered solely to show reputation or character
- Questions about prior conduct allegations (unless relevant as evidence of substantially similar prior conduct or pattern)
- Medical and mental health history and/or records or other records protected by a legally recognized privilege (unless determined relevant and the party consents);
- Harassing or badgering questions
- Repetitive or duplicative questions
- Foundational questions seeking information already in evidence, not in dispute, or which do not go to credibility



How should questioning proceed?

- Respectfully
- Open ended questions
 - Generate more information
- Closed-ended questions
 - Clarify specifics
 - Provide clarification
 - Often result in yes/no responses that often don't offer much additional information





What do we do with awkward silences?



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



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*



Policy language – questioning by hearing panel/case coordinator

- CC may ask questions/deliberate – no vote
- Director of the Office for Student Conflict Resolution or a designee may ask questions/deliberate – no vote
- Panel members may ask questions/deliberate/vote



What are some questioning guidelines for decision makers?

- Ask the difficult but relevant questions: Give both parties an opportunity to address your concerns
- Credibility: If you have concerns that a witness is not providing complete and accurate testimony, respectfully explain the relevant basis for your concern and indicate that you are interested in hearing the individual's response to your concern (e.g., "Help me understand...")



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

Example decision-maker questions



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?

Example decision-maker questions



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?



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



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



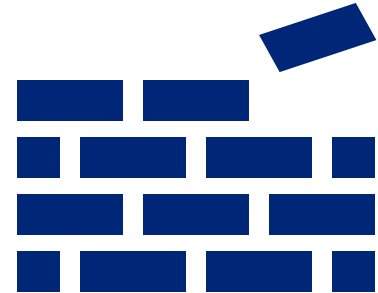
What is the appropriate manner of Advisor questions?

- E.g.,
 - Not invade physical space (e.g., from their 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)
 - Avoid intimidating physical actions (i.e., finger pointing; fist pounding; exasperated gestures; etc.)



What are the hallmarks of effective questioning?

- Advisor questions should be:
 - Clear and precise
 - Advance a party's position with respect to one or more elements of the sexual harassment alleged
 - Be asked in a purposeful order

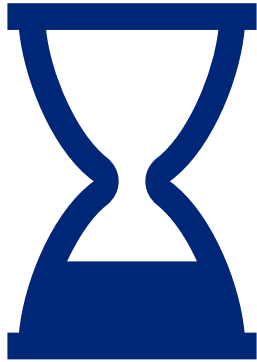




How do we facilitate effective cross examination?

- Ensure parties have opportunity to hear/review what other parties and witnesses offer
- Enforce structure
- Enforce rules of decorum

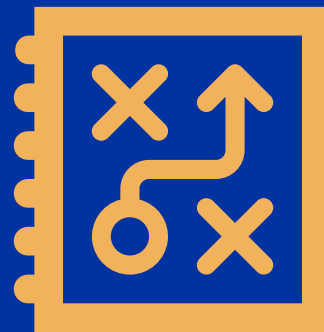
How long does a hearing last?



- Decision-maker(s) have the ability to set reasonable time limits on the hearing and its constituent parts
- Parties must have a reasonable opportunity to conduct questioning/cross-examination, but do not have the right to question/cross-examine witnesses as long as they want

Example

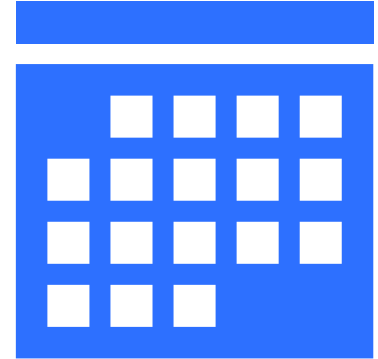
In a case involving two parties and four witnesses, hearing officer budgets four hours of time for the hearing—one hour for each party to testify and be cross-examined and two hours total for the four witnesses.



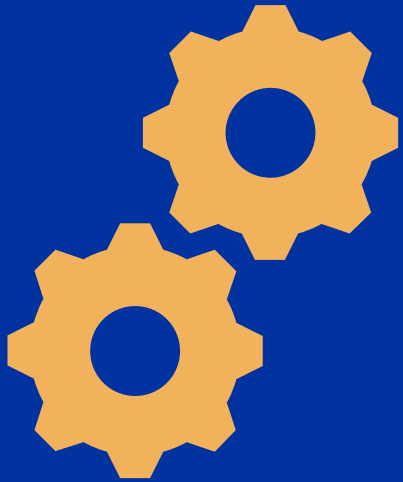


Can we delay or “continue” a hearing once it starts?

- Yes, but only if a delay is not clearly unreasonable
- Consider pre-scheduling an alternative date
- Inconvenience alone should not be the determinative factor; every date will inconvenience someone



Group Scenario



Respondent is accused of sexually harassing a minor at a sports camp. Institution uses a hearing panel. In advance of the hearing, institution provides the hearing panel a copy of the investigation report and all evidence disclosed to the parties, including witness statements. At the hearing, the investigator testifies briefly about the nature of the formal complaint and the timing of various stages of the investigation. Advisor for the respondent then seeks to cross-examine the investigator about specific questions investigator asked or did not ask in interviews. The hearing chair rules the questioning irrelevant. When complainant is cross-examined by respondent's advisor, complainant takes long pauses and asks for several breaks before answering questions. The hearing officer permits this. Later, advisor for the complainant seeks to cross-examine respondent about whether respondent has been diagnosed with pedophilia. The respondent refuses to answer. Three witnesses who gave statements in the investigation do not appear at the hearing.



HUSCH BLACKWELL

Decision Making



How do(es) the decision-maker(s) decide a case?



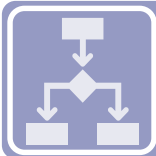
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



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



Hearsay

- Hearsay — Statement (written or oral) made by a non-available witness offered to prove fact in question
- Longstanding evidentiary principle of when courts can rely on hearsay
- Some hearsay is more reliable
 - Statement contemporaneous with the event in question
 - Excitable statement uttered in the moment being perceived



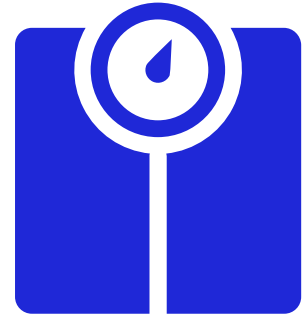
Credibility

- To be determined by hearing panel, following hearing and examination of investigative report, evidence and hearing testimony
- Common factors:
 - Consistency
 - Corroboration
 - Plausibility
 - Motive
 - Demeanor
 - Level of detail
 - Expertise



What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and more relevant to issues at hand than other evidence



For discussion – Credibility & weight

—



- Prior false allegations filed against a party vs. brought by a party
- Printed text messages from party vs. from phone company
- Offhand comment at time of event vs. statement after formal complaint
- Observation of disinterested stranger based on brief encounter vs. party's friends who was present throughout alleged conduct

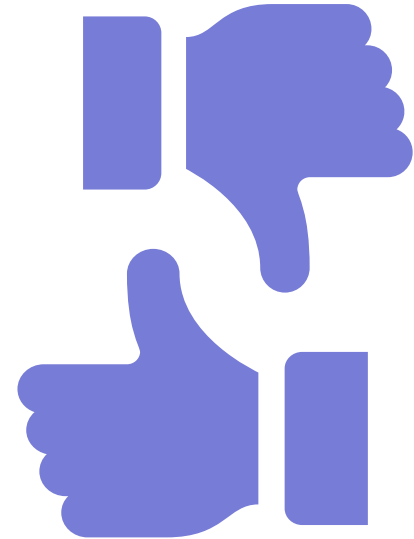


How do(es) the decision-maker(s) issue a decision?

- 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 Decision



- 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



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



Policy language – Disciplinary process

- Students: Two-phase hearing by panel on responsibility then discipline
- Employees: Finding of responsibility, then consultation with appropriate administrators and determination of appropriate sanction



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/extracurriculars)

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”



What details should we include in disciplinary findings?

- Recommended details:
 - Duration of any ongoing restriction
 - Foreseeable exceptions, if any, and expectations (e.g., work environment, academic classes, athletic teammates, residential etc.)
 - How to handle unforeseeable circumstances that may arise
- Restrictions should have some endpoint, and not be imposed in perpetuity unless there is an ongoing safety risk



What are aggravating and mitigating factors?

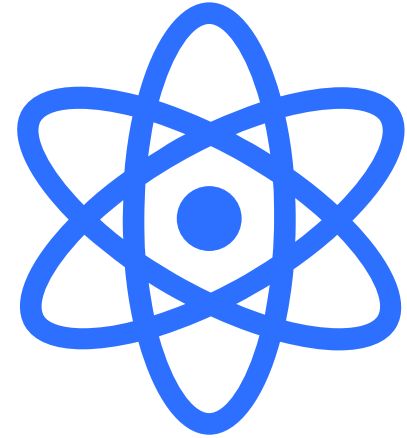
- Common factors:
 - Egregiousness of misconduct (e.g., act of violence, use of a weapon, use of drug)
 - State of mind of respondent (bias-motivated, reckless or negligence)
 - Safety risk to the broader community
 - Impact statement
 - Conduct during the investigation and adjudication (cooperative or less than cooperative)
 - Circumstances relating to a lack of consent, force, threat, coercion, intentional incapacitation)
 - Position of trust / power differential



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





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”
- 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)



“Runner alleges that Card Player had sex with Runner without consent.”

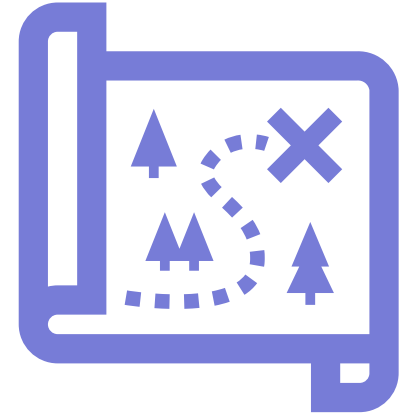
vs.

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



How should a conclusion be written?

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



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.”



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

Finalizing decisions

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





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Appeals



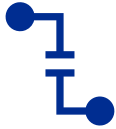
What is the purpose of the appeal?

- 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



Policy language

- Clearly erroneous standard applies to appeal
 - “The appeal panel is charged with overturning or remanding a determination only if they are left with a definite and firm conviction that a mistake has occurred”

What are the potential outcomes of an appeal?



Appeal is denied and determination is made final



Appeal is granted and determination is changed by the appeal officer



Appeal is granted, determination is “vacated”, and appeal officer sends matter back for a new investigation and/or hearing as appropriate, depending on the nature of the error the appeals officer found

Questions



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