



HUSCH BLACKWELL

Title IX Training

Creighton University Sexual Harassment Policy
Investigators and Hearing Panel Members

Fall 2021



Housekeeping

- **Recording is not permitted**
- Slides will be provided by email
- Update Zoom name with name and Title IX role (e.g. “Coord,” “Inv,” “Admin,” “Legal,” etc.)
- Raise hand or use chat function to ask questions
- Anticipated lunch break of 12:00 pm to 12:30 pm
- Other breaks—take individually as needed

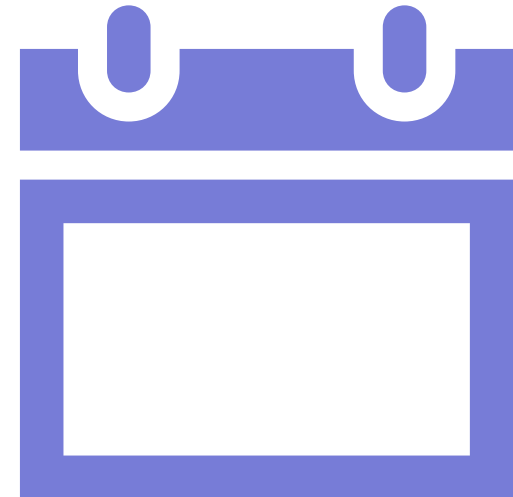
This training is a component of the University’s comprehensive training program which includes other programming and live discussion.



Agenda



- Key Legal Principles and Considerations
- Applicable Policy Requirements
- Resolution Options and Case Processing
- Investigations and Key Issues
- Informal Resolutions and Confidentiality
- Hearings Process, Cross Examination and Questioning
- Decision-Making and Evidentiary Concepts
- Sanctioning
- Decision-Making and Writing





Goals



- Understand
 - Title IX
 - Applicable policies
 - Mapping relevant policies
 - Identify issues for consideration

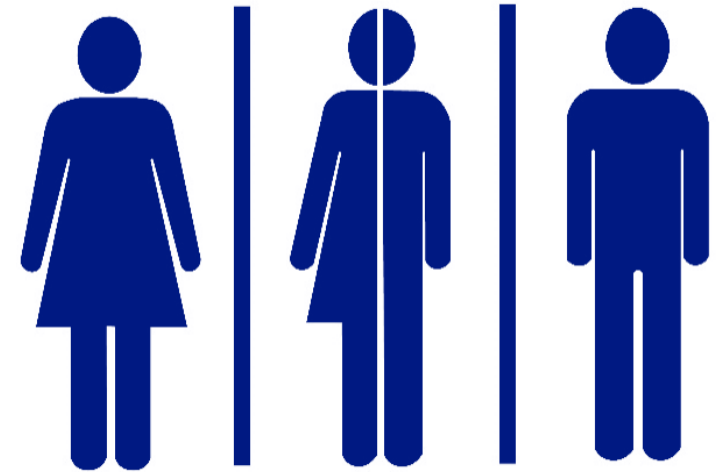
Key Legal Principles and Considerations



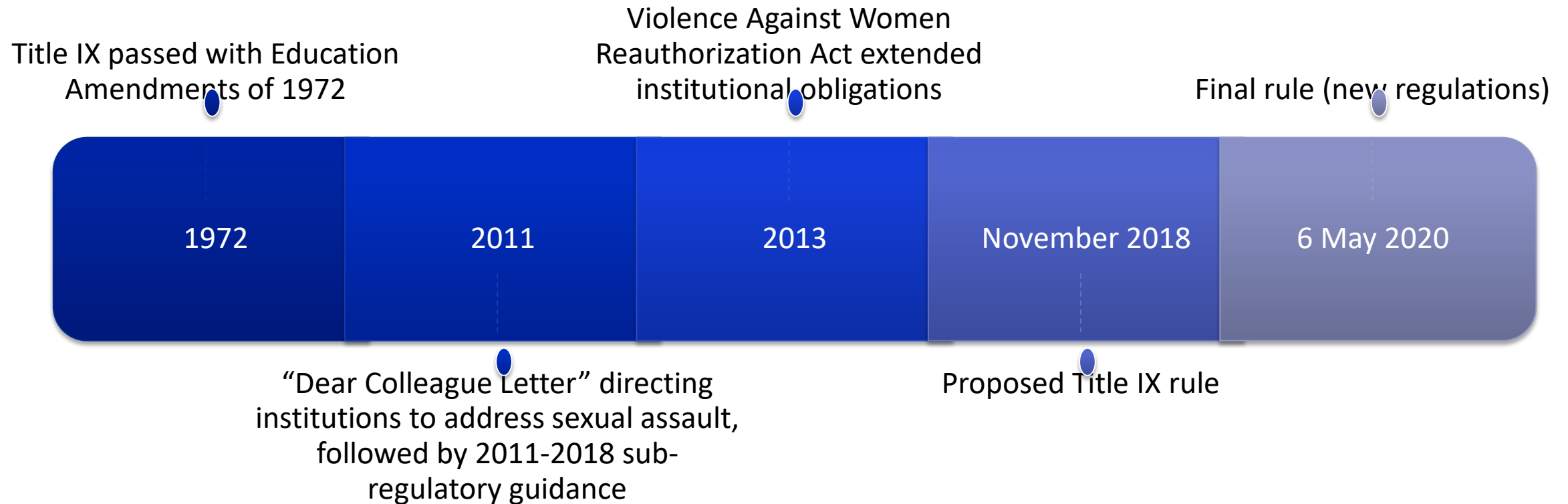
What is Title IX?

“[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



Why are we talking about this now?





Who does Title IX apply to?

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



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

Academic instruction

Residence life

Amenities on campus

Sports teams

Work-study

Games, concerts, and speeches on-campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus

Does Title IX apply to off-campus sexual harassment?



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



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

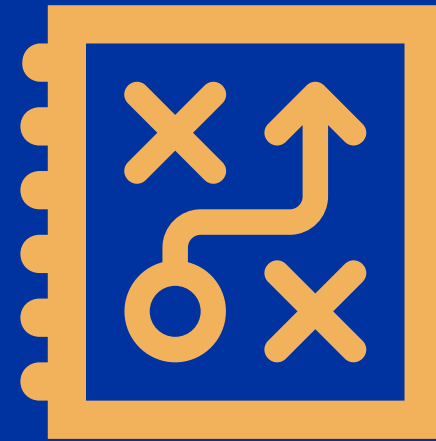


No, if it occurs in a private location and is not part of an institution's education program or activity



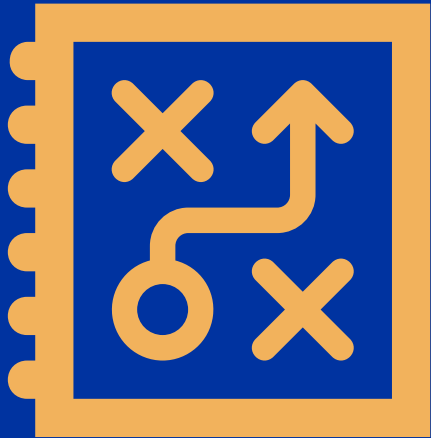
Example (included in EP&A)

A student reports being sexually assaulted at an off-campus hotel during the course of a student government leadership retreat being held at the hotel.





Example (excluded from EP&A)



A student reports being sexually assaulted by another student at a party during the summer in the reporting student's hometown.



Additional Legal Considerations





The Clery Act

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



Additional Legal Considerations: Violence Against Women Reauthorization Act of 2013

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

Applicable disabilities statutes



- The Americans With Disabilities Act
- Section 504 of the Rehabilitation Act



Section 504 of the Rehabilitation Act

- The first statute to require disability accommodation (1973)
- Makes it illegal for the federal government, federal contractors, and any entity receiving federal assistance to discriminate on the basis of disability
- “No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity”



ADA—Title III

- Title III: Prohibits privately owned “places of public accommodation” from discriminating “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”
- Colleges and universities are places of public accommodation
- Must make reasonable accommodations in policies, practices, and procedures



FERPA

- *Addressed in Confidentiality Section*



Standard of Evidence



Legal Standard

Preponderance of the evidence

=

“more likely than not”



Creighton Language:

- “**Finding:** A conclusion by the preponderance of the evidence standard that the conduct did or did not occur as alleged.”



Reporting Requirements

Reporting of prohibited conduct

- The University ***requires*** all faculty and staff with supervisory or leadership responsibilities, or responsibilities related to student welfare as mandatory reporters and are required to report incidents of harassment, discrimination, sexual and/or relationship misconduct to the Office of Equity and Inclusion.
- Student employees, in the administration of their job duties, ***are also considered*** mandatory reporters.
- All other individuals are ***strongly encouraged*** to report concerning behaviors, harassment, discrimination, sexual misconduct, relationship misconduct and crimes.



Mandatory Reporting Exceptions

- These individuals are not required to be mandatory reporters but are considered ***voluntary reporters***:
 - The Associate Director for Prevention, Education and Inclusion who serves as a confidential advocate for students, faculty and staff in relation to this policy
 - On-campus licensed professional counselors and staff
 - On-campus health service providers and staff
 - Clergy members during the rite of confession
 - Faculty or staff who are closely related (e.g. sibling, parent, guardian, grandparent or spouse) to the person experiencing or reporting an incident



Confidential Resources

On campus:

- The Violence Intervention and Prevention Center (VIP)
- Student Counseling Services
- Employee Assistance Program

Off campus:

- Women's Center for Advancement

Applicable Policy Requirements



Purpose of Policy

Creighton University works to:

- Provide a workplace and an educational environment, as well as other education programs, and activities, that are free from discrimination, harassment and retaliation

To affirm its commitment to promoting the goals of fairness and equity...

- Creighton University has developed internal policies and procedures that provide a prompt, fair and impartial process for those involved in an allegation of harassment, discrimination, and/or retaliation



Purpose of Policy

- The purpose of this policy is:
 - To **communicate processes for investigating** complaints in a manner that is fair, equitable, and reasonably protects the privacy of individuals in situations of harassment, discrimination, and/or retaliation;
 - To **enable** Creighton University in its efforts to provide a workplace and educational environment, as well as other benefits, programs, and activities, that are free from discrimination;
 - To **promote compliance** with federal and state civil rights laws;
 - To **set forth guidance** for preventing harassment, discrimination, and/or retaliation;
 - To enable Creighton University in its efforts to take **timely corrective action** when harassment, discrimination, and/or retaliation is alleged to have occurred; and
 - To establish a **consistent process**.



Scope of Policy

- Creighton's policy applies to all faculty, staff and students of the University community.
- Individuals with a faculty appointment, vendors, independent contractors, and others subject to agreement with the University will be expected to comply with this policy



Reach of Policy

- This policy applies to Sexual Harassment that occurs **within the University's Education Programs or Activities** and that is committed by an administrator, faculty member, staff member, student, contractor, guest, or other member of the University community.
- This policy **does not apply** to Sexual Harassment that occurs **off-campus, in a private setting, and outside the scope of the University's Education Programs or Activities**; such misconduct may be prohibited by the Standards of Conduct if committed by a student, the Faculty Handbook if committed by a faculty member, or other University policies and standards if committed by an employee.
- Creighton may extend jurisdiction to off-campus and/or online conduct when the University determines that the conduct affects a ***substantial University interest***.

What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo
harassment

Hostile environment
harassment

Sexual
assault

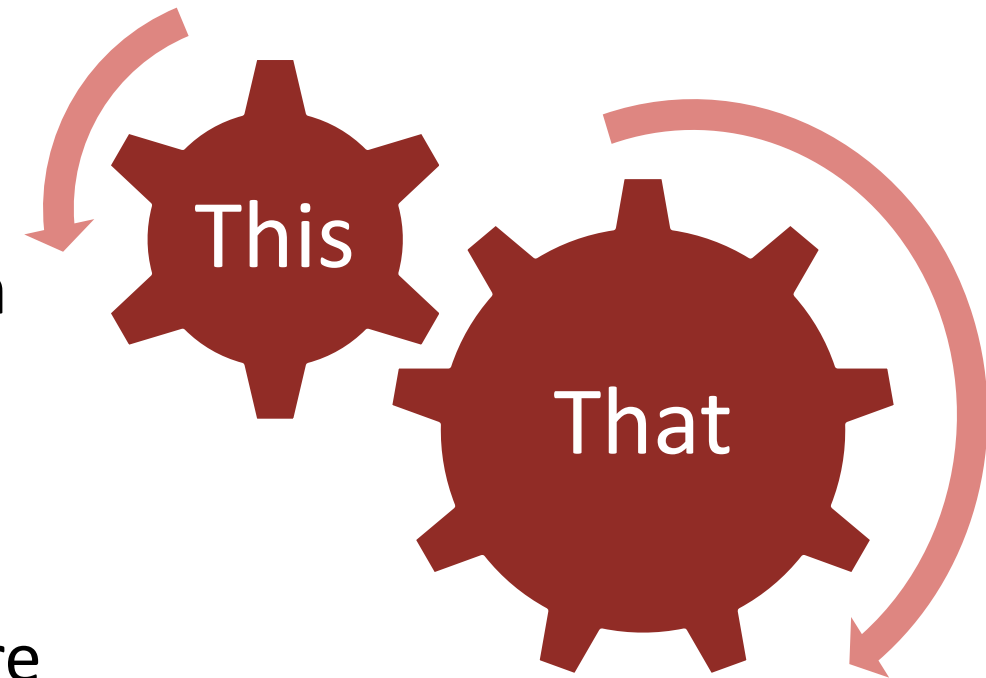
Relationship
violence

Stalking



What is quid pro quo?

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



Example of quid pro quo?

During a performance review, manager laments that the office culture has become too stodgy. He tells subordinate employee that his reviews account for an employee's willingness to socialize with others in the office and invites subordinate to dinner that night.

Subordinate is in a relationship with another individual and has no romantic interest in the manager.





Another example of quid pro quo?



A faculty member tells a student that the faculty member's spouse is out of town that weekend and that the student can receive extra credit if the student agrees to join the faculty member for dinner and drinks at the faculty member's house.



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?

—
Bookworm student asks Social Butterfly to come to his room when the two are in the elevator of their shared dormitory. Butterfly has no romantic interest in Bookworm and declines. Bookworm insists and briefly blocks the exit to the elevator when it opens on Social Butterfly's floor.

Butterfly then uses the stairs instead of the elevator and avoids Bookworm in other areas of the dormitory.





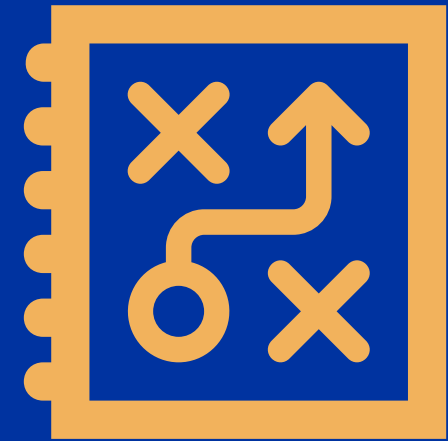
Another example of hostile environment?



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?

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!"





Does the First Amendment matter?

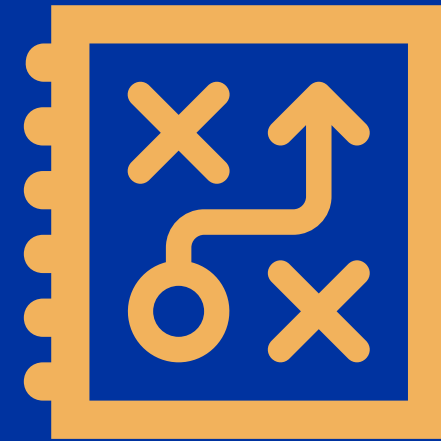


- First Amendment applies to state action, **not private institutions**
- However, many private institutions adopt First Amendment principles into their policies
- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment



Example (not-hostile environment)

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





What is sexual assault?

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

Rape

Sodomy

Sexual assault
with an object

Fondling

Incest



What is consent?

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



What is incapacity?

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

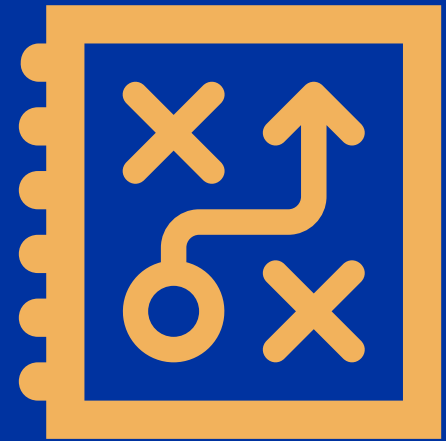




Example (not incapacitated)

Tall student drinks four beers at happy hour, then two mixed drinks at dinner. Tall walks to Friend's apartment after dinner and falls asleep for two hours.

Tall wakes up, showers, and then initiates sexual contact with Friend. Tall is an active participant in the intercourse.





Example (not incapacitated)



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



What is 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?

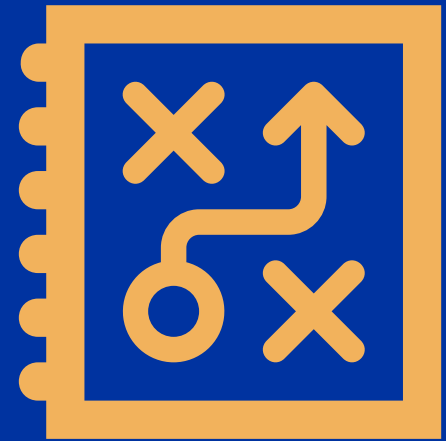
“Dating Violence” is :

- Actual, attempted or threatened violence by one individual against another individual with whom they are, or have been, in a social relationship of a romantic or intimate nature; or
- Conduct that would constitute a felony or misdemeanor crime of violence by an individual against:
 - A current or former spouse or intimately partner
 - An individual with whom they share a child
 - An individual similarly situated to a spouse under Nebraska state domestic or family violence laws
 - Any adult or youth who is protected from the individual’s acts under the Nebraska state domestic or family violence laws



Example of dating violence

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

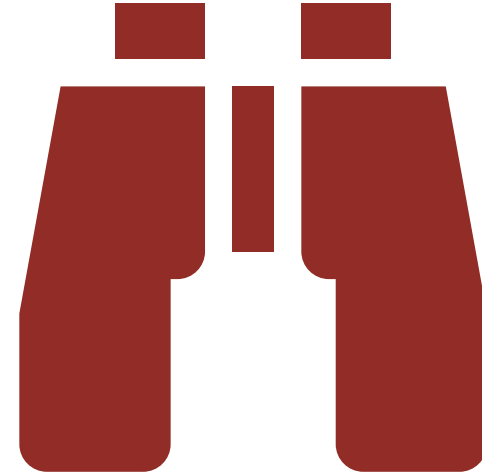




What is stalking?

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

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





Example of stalking



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



Retaliation



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)



What is Retaliation?

- **Retaliation** is an intentional, adverse action taken against a person for making a report of alleged policy violations or for participating in any proceeding under this policy
 - Retaliation can be committed by or directed toward any individual or group, not just the reporting and responding parties
- An **Adverse Action** is any conduct that seeks to discourage, threaten, intimidate, harass, or coerce an individual from engaging in activity protected under this policy



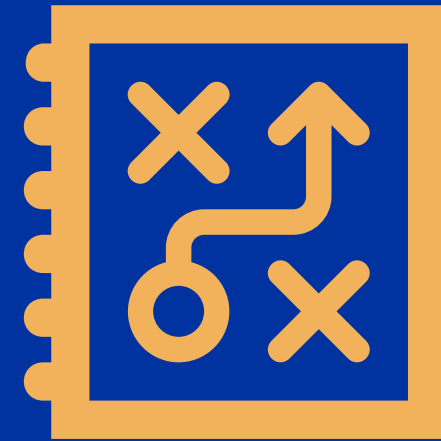
University Response

- “In accordance with its history, mission, and credo, Creighton University believes that each individual should be treated with respect and dignity and that any form of harassment, discrimination, and/or retaliation is a violation of human dignity.”
- “The University condemns and prohibits these and will take all reasonable efforts to prevent such conduct and promptly address conduct found to be in violation of this policy”

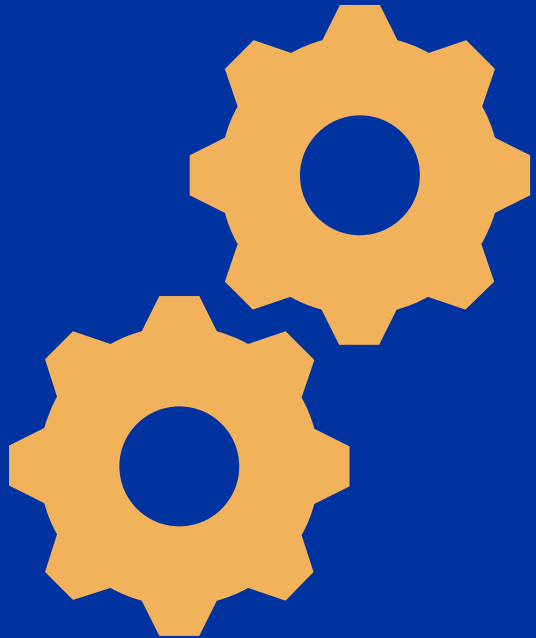
Example of retaliation?

Office Worker's agrees to participate in a witness interview as part of Coworker's sexual harassment complaint against Manager.

When Office Worker later asks Manager to approve a work-from-home schedule, Manager declines, saying "You have some nerve asking me for this after what you did."



Group Scenario



Student A reports that Student B sexually harassed Student A on two occasions. The first incident occurred when Student B groped Student A's leg under the table while the students were sitting next to each other at a meeting of the university's debate team.

The second incident occurred later that night during dinner at a local restaurant attended by eight members of the debate team. Student A was intoxicated and left the group to use the restroom. Student B followed and tried to kiss Student A in the hallway while also groping Student A's chest through Student A's shirt.

Questions



Resolution Options & Case Processing

Examples of Policies with Related Concepts

Discrimination

- Sexual Harassment
- Other non-discrimination statement & policies

Relationships

- Workplace
- Employee/student

Conduct

- Student
- Faculty/Employee

Discipline

- Student
- Faculty
- Employee



Understand Title IX and Title VII Procedures

- New Title IX Regulations -- Employees
 - Impose additional procedural requirements
 - Only for allegations meeting new sexual harassment definition
 - Expressly contemplate “dual” compliance approach with Title IX and Title VII

How do Title IX and Title VII standards compare?

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

Title VII Sexual Harassment

Quid pro quo

Sufficiently severe
or pervasive

Title IX Sexual Harassment

Any quid pro quo by
employee

Unwelcome and
Sufficiently severe
and pervasive and
objectively
offensive

Any sexual
assault/DV
/stalking

Comparison

Common Title VII Response

Resolution by internal investigation

Formal or informal complaint

Advisor silent supporter

Resolution does not require active complainant

May or may not result in formal report

Title IX Regs Requirements

Discipline requires regimented investigation & hearing process

Formal complaint only

Advisor entitled to participate

Need participating complainant

Requires formal report & other documentation



Example (overlapping policies)

- Employee reports that Dean repeatedly sexually touched Employee and that this sexual touching was witnessed by Dean's Administrative Assistant.
- HR interviews Assistant who confirms that Dean has repeatedly touched Employee in a sexual and unwelcomed way. Assistant does not want to get involved and will not participate in any sort of hearing. Employee also refuses to participate in any hearing.
- How should HR respond in satisfying obligations under VII and IX?





Institutional Response to Sexual Harassment

What are the institution's overall duties?

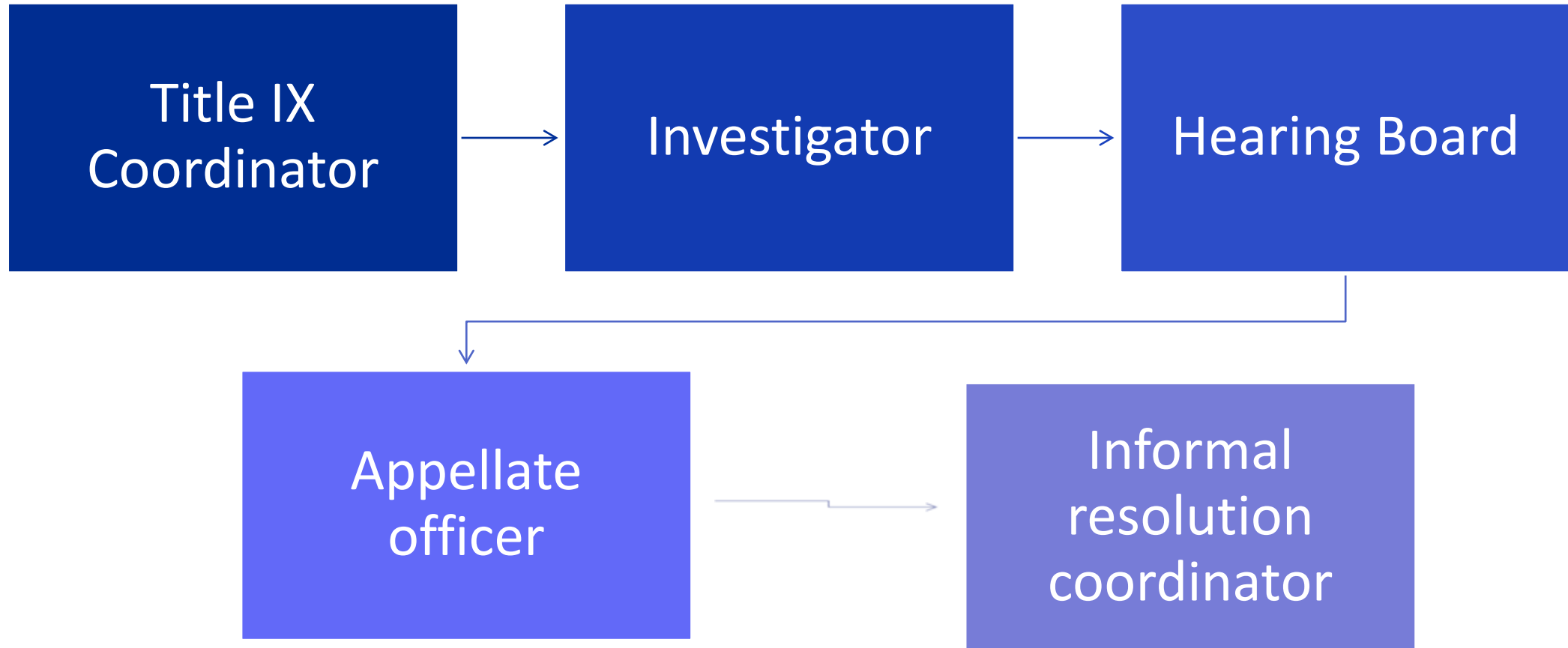
Respond to known acts of sexual harassment in a manner that is not clearly unreasonable

Treat complainants and respondents equitably

Utilize a grievance procedure in response to formal complaints and before imposing discipline

Offer supportive measures

Who are the key institutional actors in the grievance process?





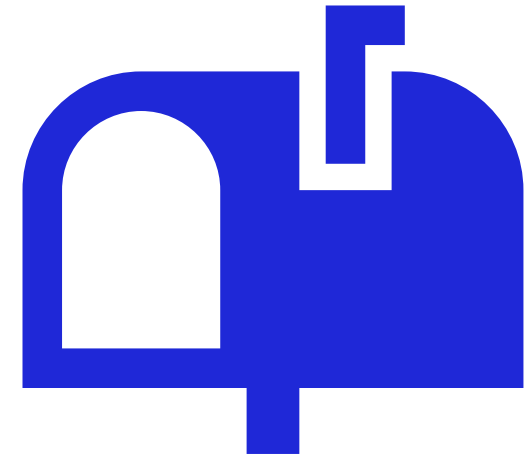
Defining what is adequate, reliable, and impartial process

- 34 CFR 106.8(b) requires recipients to “adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints” of sex discrimination under Title IX.
- “Prompt and equitable grievance procedures” in the regulation means investigations of sexual harassment allegations that provide for “Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.”



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



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

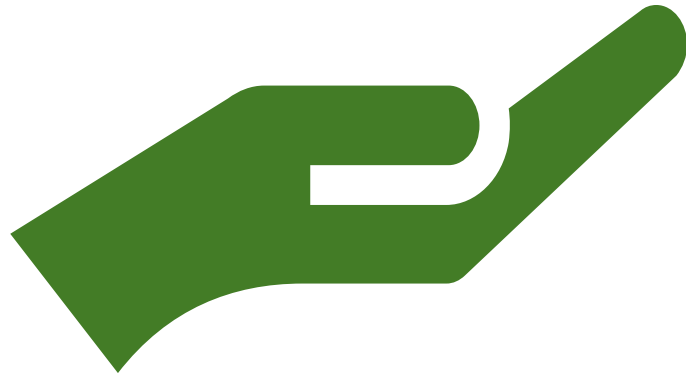


What if we can't identify the alleged victim from a report?

- 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 utilized



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 Under Creighton's Policy

- Supportive measures may include:
 - Academic Accommodations
 - Housing Accommodations
 - Employment Accommodations
 - Care and Support (e.g. Referral to EAP, facilitating assistance for an individual to obtain medical, healthcare, advocacy and therapy services)
 - Community Education
 - Safety Planning
 - Student Financial Aid Counseling
 - Visa and Immigration Assistance
 - University Referrals
 - Other (e.g. Campus Ban and bar orders, any other actions deemed appropriate by the Office of Equity and Inclusion or Campus Administrator)



Interim Removals



Can we utilize interim removals or suspensions for students?

- Students may be removed on a temporary basis only if:
 - Individualized safety and risk analysis
 - Determines that 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

Emergency Removal Considerations for Students

- A Respondent can be removed when an ***individualized safety and risk analysis*** has determined that an immediate threat to the physical health or safety of any student or other individual justifies removal.
- This risk analysis is performed by the Title IX Coordinator in conjunction with the Threatening Behaviors Committee (TBC) using its standard objective threat assessment procedures.
- Requirements:
 - Notice
 - Opportunity to request a meeting with the Title IX Coordinator prior to removal or as soon thereafter as reasonably possible
 - Opportunity to “show cause” against removal



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 (i.e., Faculty Handbook)



Processing Complaints

What is a formal complaint?

What

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

Who

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

How

- Either physical or electronic submission



When may the Title IX Coordinator file a formal complaint?

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



Example of T9 Coordinator formal complaint

Student A reports Student B has posted a TikTok video boasting (falsely) that Student B had sex with Student A and several others over the previous weekend, including Student C. Neither A nor C wish to file a report but indicate they will cooperate with an investigation if the Title IX Coordinator files a formal complaint.





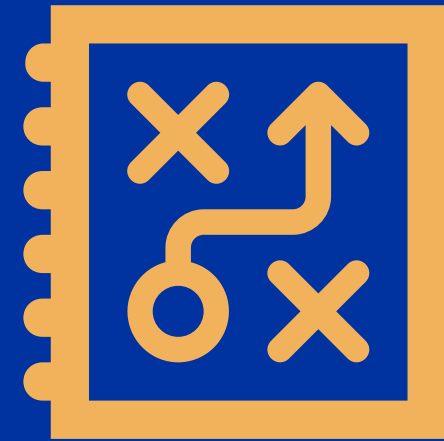
When must we dismiss a formal complaint?

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



Example of dismissal

Music student reports that Neuroscience student sexually assaulted Musician in their hometown during summer break. The alleged assault occurred in Neuroscientist's house after the two attended a co-ed softball game hosted by a local recreation league. Musician and Neuroscientist have had no contact since the alleged sexual assault.





When may we dismiss a formal complaint?

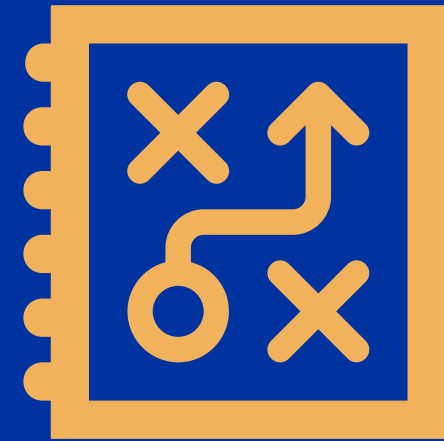
- Alleged victim indicates in writing a desire to withdraw the complaint (or particular allegations)
- Respondent is no longer enrolled in or employed by the institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination



Example of permissive dismissal

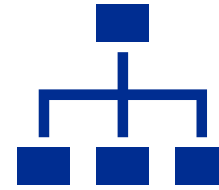
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Prior to investigation being completed, respondent graduates institution and Complainant indicates Complainant will not testify at a hearing because any discipline would be meaningless in light of respondent's graduation. There are no witnesses to the alleged sexual harassment and no non-testimonial evidence, such as video footage.



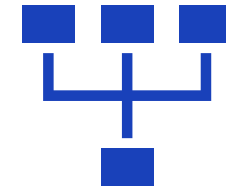
Can we consolidate the complaints?

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

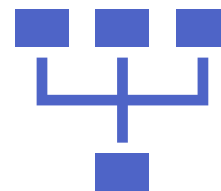


Multiple respondents

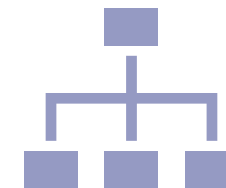
Multiple complainants



Multiple allegations against a single respondent



Multiple allegations from a single complainant

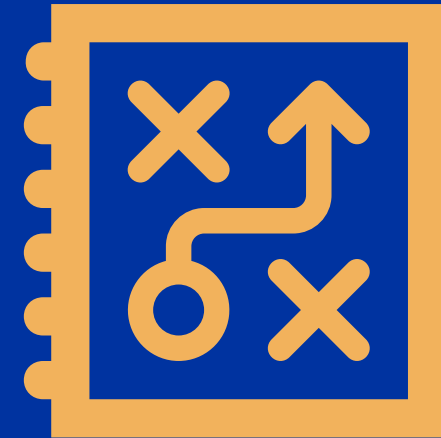




Example of permissible consolidation

Students A and Student B attended a party at a recognized Greek house together. Both A and B allege that two members of the house deceived them into taking hallucinogens and then having sex with them while they were incapacitated.

A and B each file their own formal complaint of sexual harassment from the same incident.



Example of impermissible consolidation



Law Student files a harassment complaint against Prof. Z, alleging that Z repeatedly made sexually inappropriate jokes in class.

At the same time, Prof. M has filed a complaint against Prof. Z, alleging that Z gave M a poor tenure review after M refused to date Z.

What is the grievance process?

Investigation to collect relevant inculpatory and exculpatory evidence

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

Appeal



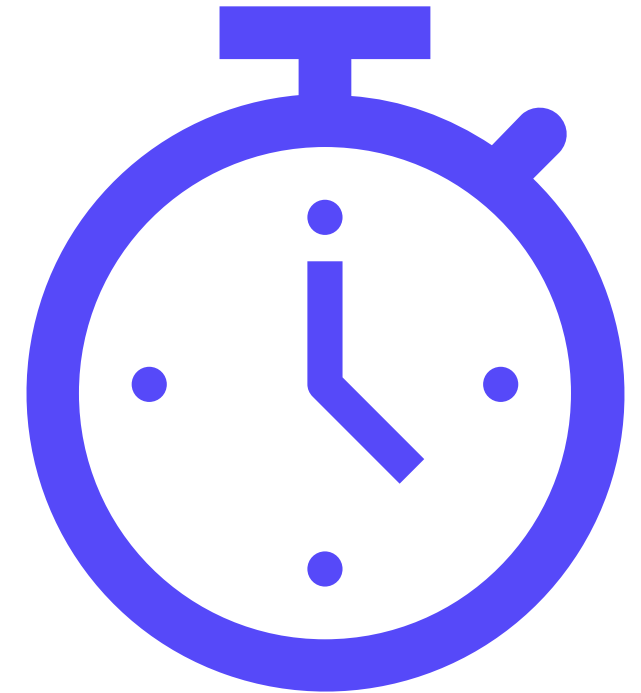
What general principles govern the grievance process?

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



How long does a grievance process take?

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





What do we do if we find sexual harassment occurred?

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



Bias, Stereotype and Conflicts





Who is responsible for identifying conflicts of interest and bias?

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

Examples of impermissible stereotypes

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

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

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

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



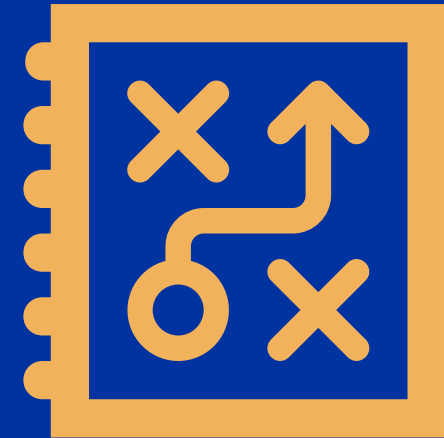
What is a conflict of interest?

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



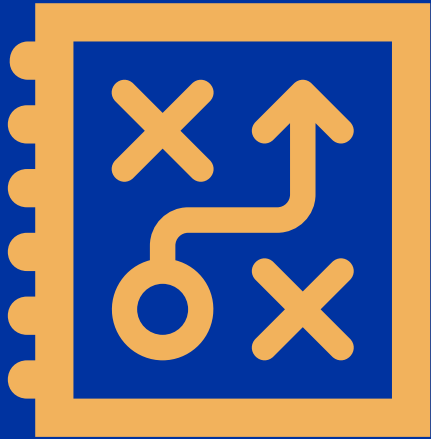
Example #1 - conflict of interest

Stats Student files a complaint against Math Student alleging a hostile environment. Prof. T is selected for the hearing panel, but Prof. T is also Math Student's dissertation advisor.





Example #2 - conflict of interest



University Lawyer is accused of sexually harassing a co-worker. The university assigns a hearing panel member who serves on a local charitable board with Lawyer.



Example #1 - bias

Prof. G is selected to serve on a hearing panel in a Title IX case involving two students.

Last year, Prof. G appeared on a podcast during which he discussed the “kangaroo court” nature of university Title IX processes and complained that universities have no business being in the middle of “lovers’ quarrels” between students.





Example #2 - bias



Prof. R is a well-known proponent of criminal justice reform, specifically cases involving sexual assault. R has published several papers questioning the validity of victim testimony, specifically the reliability of eye-witness testimony. Prof. R is then selected as a hearing panel member in a case involving a complainant who was under the influence of alcohol at the time of the alleged assault.



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- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
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- Individual institutional actors should self-police conflicts of interest and self-identify bias

Resource for consideration: Harvard implicit bias test

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



Investigations and Key Issues



What is the purpose of an investigation?

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

Investigator(s)

- The investigator(s) are assigned by the Title IX Coordinator.
- The members of the Title IX Team are vetted and trained to ensure they are not biased for or against any party in a specific case, or for or against Complainants and/or Respondents, generally.



What is inculpatory evidence?

- Evidence tending to support the proposition a respondent committed sexual harassment as alleged
- Example: A text message sent the day after an incident from the respondent stating: “I never should have forced you to have sex with me after you said ‘no.’ I’m so sorry for what I did.”





What is exculpatory evidence?



- Evidence tending to support that the respondent did not commit sexual harassment as alleged
- Example: A text message sent the day after an incident from the complainant stating: “I know that I said ‘yes’ at the time. And I knew what I was doing. But now I feel like you just used me as a one-night-stand.”



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 ***final*** fact-finding



What is relevance?

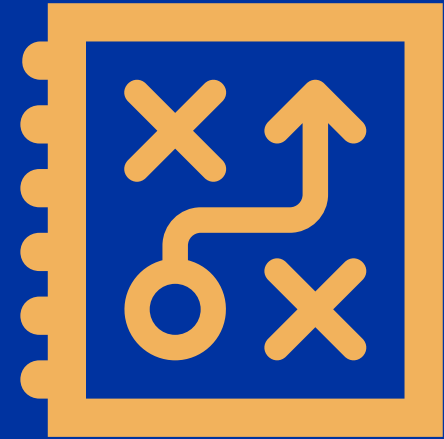
Evidence is relevant if:

- 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 #1 (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 #2 (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 #1 (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.





Example #2 (not relevant)



Journalism student has accused Professor of sexual harassment. Advisor for Professor asks Journalist: “Were you disciplined for plagiarism during the fall semester of your sophomore year?”



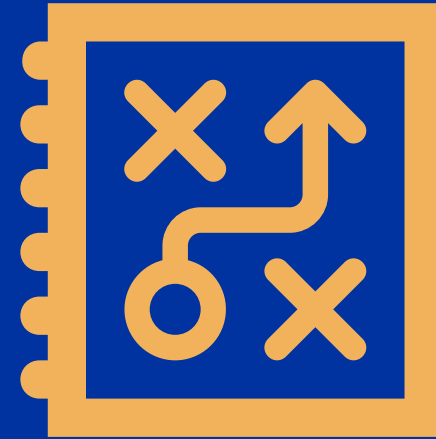
Is sexual history considered?

- 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 #1 (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 #2 (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.



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”

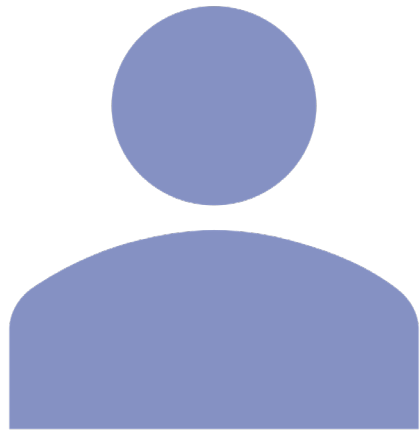




What else does the notice need to say?

- 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

How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of
non-testimonial evidence

What are some general principles about interviewing?

Timing	Conduct interviews as soon as reasonably possible to maximize the most accurate memories
Setting	Choose a private and quiet setting
Role	Maintain role as fact-gatherer; not a prosecutor; not a defense attorney
Prepare	Anticipate questions that you will be asked and have responses ready



Example question

From student witness: “Will I be disciplined if I don’t show up for the hearing?”

Answer: “It’s very important for you to attend so we have accurate and complete information. And I’m personally asking you to attend if your presence is requested. But no, you won’t be disciplined for failing to attend.”



Another example question



- From a party: “I want to tell you something ‘off-the-record.’ Is that okay?”
- Answer: “The nature of the interview is that everything is ‘on-the-record.’ So no, I can’t have an ‘off-the-record’ conversation with you. But you can have a confidential conversation with one of the University counselors.”

How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase



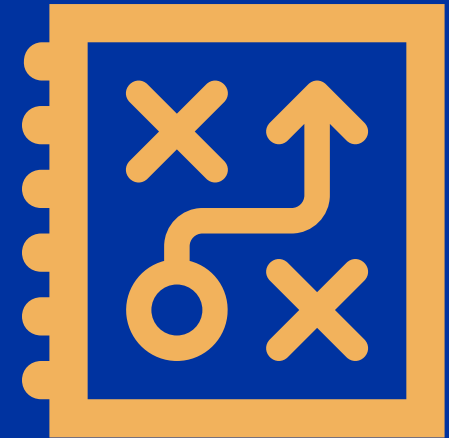
How do you build rapport?

- Take the time to learn basic information about the interview subject before conducting the interview
- Learn something about the subject and share something about yourself; find commonality
- Explain the nature of the investigation, your role, and the rules of the interview
- Explain why you need accurate and detailed information
- Acknowledge the stresses the subject is likely feeling



Example of rapport building

“I saw in the directory that you are from Colorado. My family likes to visit the state. Are there any places you’d recommend we visit?”





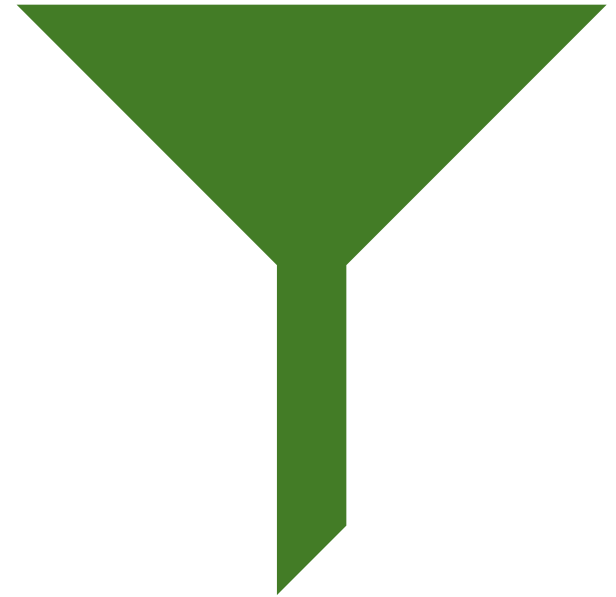
Things helpful to say in every interview . . .

- “If I ask a question you don’t understand, please tell me.”
- “If I ask a question and you don’t know the answer, it’s okay to say you don’t know.”
- “If you think I’ve misunderstood anything you say today, please tell me.”
- “I want to get as much information as possible, so please be detailed in what you share. And if I don’t ask about something you think is important, please tell me.”
- “To do my job, I need accurate information. So I always remind every witness that it’s important to tell the truth.”



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 recognition prompts as long as possible
- Avoid suggestive or leading questions
- Save externally derived information for last



Examples of open invitations



“Tell me what happened that night.”



“Will you walk me through what you remember?”



“Tell me more about that.”



“What happened next?”

Examples of facilitators



Examples of cued invitations

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

“You said that
What did you mean?”

“You used the word
‘pressured’ to describe .
. . . . Can you be specific
about what they did?”

“If I understood you
right, you said that after
. . . . Did anything
happen 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)

Examples of suggestive questions (avoid)

“I’m sure it’s difficult when you see them on campus. Do you agree?”

“You probably thought that was an invitation to have sex, right?”

“If I were in your position, I would probably feel threatened. Did you?”



How do we make a record of the interview?

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





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

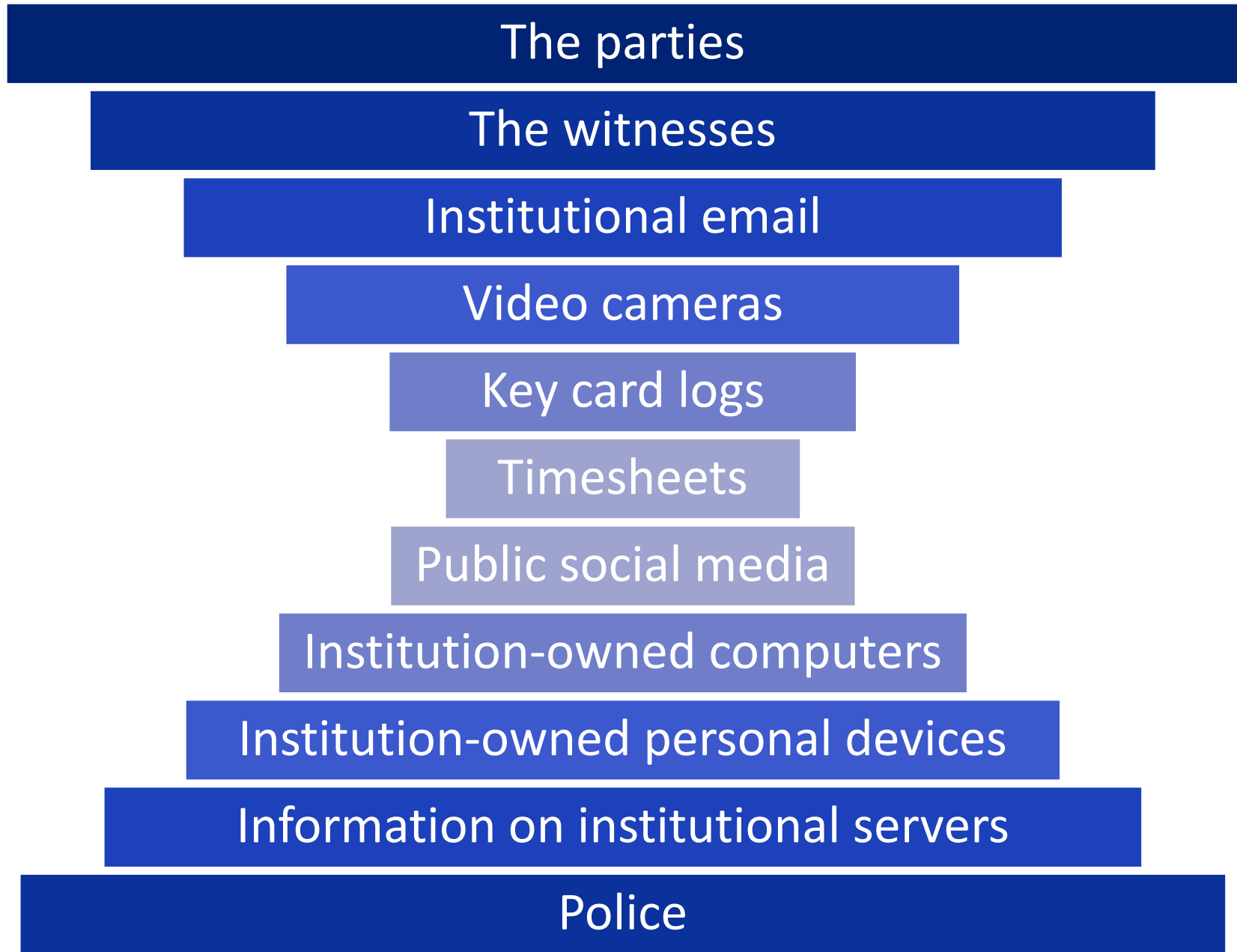
- No – parties do not have the right to insist on recording an interview
- If the interview is recorded, the institution should make the recording and give the parties access as required at the appropriate time



May parties present expert witnesses?

- Parties must have equal opportunity to present witnesses, including fact *and* expert witnesses

**Example
sources of
non-testimonial
evidence**





May an investigation collect and rely on privileged records?

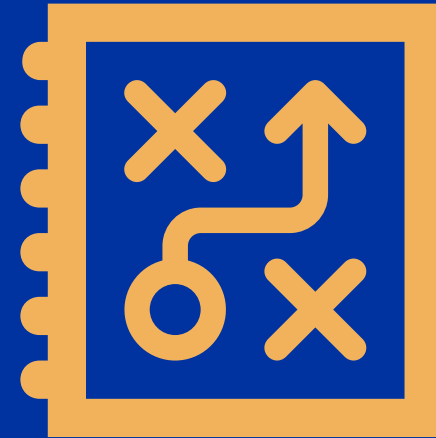


- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes

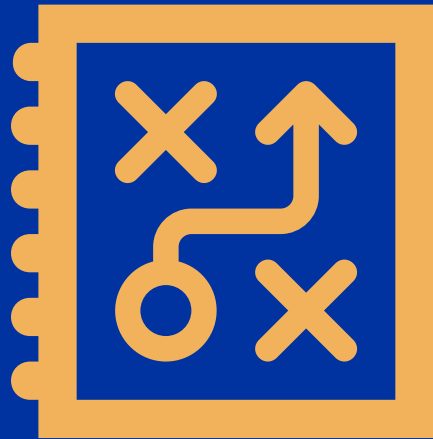


Example of permissible use

—
Student who makes report of sexual assault executes a HIPAA-compliant release requesting and authorizing the hospital to provide a copy of a SANE/SART examination to the investigator.



Example of impermissible use



Respondent tells investigator
Respondent met with an attorney the day after the alleged sexual assault. The investigator demands that the respondent reveal what was said to the attorney. When the respondent declines, the investigator notes that in the report and advises the hearing panel to draw an adverse inference against the respondent for “failing to cooperate.”



Do the parties have access to the evidence?

- At a minimum, parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is 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





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





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 – not final findings. The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation.
- Under the new Title IX regulation, factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing.



May parties have an advisor during the investigation?

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





What if the advisor breaks the rules?



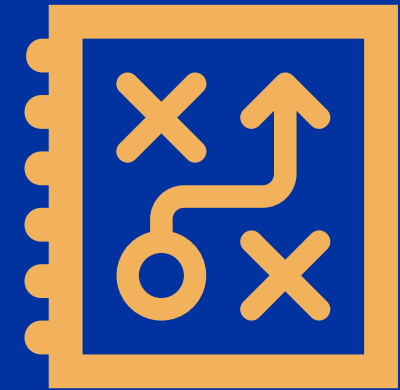
- Institution may impose limits on the advisor's role and certain behavior standards
- Must be applied equally for both parties
- Institution may exclude advisor who violates rules, but must pause the relevant interview, meeting, or interaction until the party has a new advisor



Example of advisor breaking the rules

Psychology student names the student's mother as advisor. The institution's policy states that advisors may not obstruct communications between the institution and a party.

The mother tells the investigator the investigator is to communicate solely through the mother and not send any emails directly to the student. When the investigator emails the student directly to schedule an interview, the mother calls and verbally attacks the investigator.





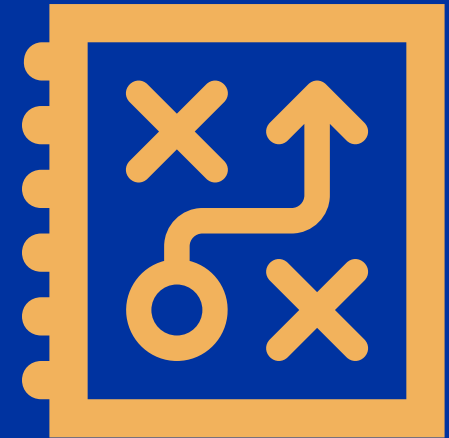
Are parties subject to a “gag” order during the investigation?

- No – the institution may not restrict the ability of parties to discuss the allegations or to gather and present relevant evidence, which includes talking to witnesses
- But institution can still enforce prohibitions on witness intimidation, witness manipulation, false statements, retaliation, harassment, etc.



Example of permissible conduct

Respondent accused of sexual assault sends text messages to various students who may have observed the complainant's level of intoxication on the night in question. Respondent's text says: "Please contact me ASAP if you believe the complainant was sober."

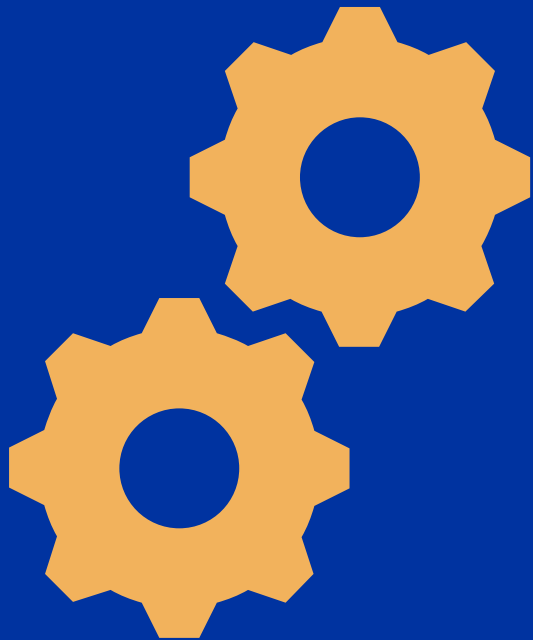


Example of impermissible conduct



Respondent tells roommate that respondent has been accused of sexual assault and “it’s important that we get our stories lined up.” Roommate states a belief that respondent arrived home at 2:00 a.m. Respondent says: “No. You’re going to say you saw me here in bed at 11:00 p.m. That’s what you need to say or I’m screwed. I’ll owe you for this . . .”

Group Scenario



Student A is being investigated for sexually assaulting Student B. Student A contacts various individuals who were present at a party immediately before the sexual assault and asks the individuals to sign a declaration attesting that Student B filed the complaint because Student A broke up with her after their consensual sexual encounter.

During the investigation, Student A's parents are quoted in a news story about inequitable Title IX processes on college campuses. The parents do not name Student B, but the story reveals specific information about the investigative interview of Student A.

Later, Student A posts a video on TikTok where Student A is reading several text messages sent by Student B to Student A following their sexual encounter.

Questions





Evidentiary Concepts



Key Legal Principles

- Weight of evidence
- Direct vs. circumstantial
- Hearsay
- Assessment of credibility



Direct v. Circumstantial

- **Direct** — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference
 - e.g.: testimony of a witness who actually observed and perceived event in question (see, hear, touch)



Direct v. Circumstantial

- **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.: witness testimony saw student alleged to have hit someone with bat, with bloody bat an hour after the assault



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



What does it mean to weigh evidence?

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





Example of considerable weight

Complainant alleges Respondent committed sexual assault at approximately 11:45 p.m. while the two were alone in Complainant's Greek house. Respondent claims he left the house at 11:25 and walked home.

Witness is Respondent's roommate and testified that Respondent had returned to their apartment building at 11:40 p.m. that night, a fact he remembers because Respondent sent a text message to Roommate to let him into the building because he had lost his keys.

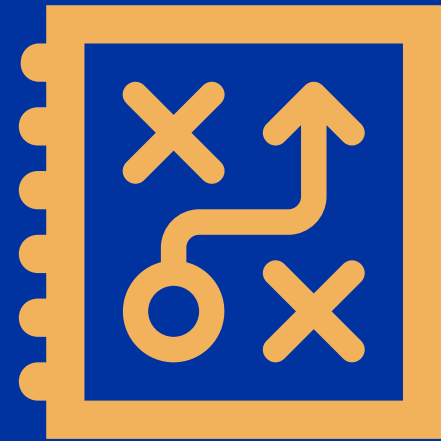




Example of less weight

Complainant alleges Respondent committed sexual assault at approximately 11:45 p.m. while the two were alone in Complainant's Greek house. Respondent claims he left the house at 11:25 and walked home.

Witness testified that Respondent had returned to their apartment building at about 11:30 or midnight that night, a fact he remembers because he bumped into Respondent in the hallway of the apartment building.





Trauma Issues



Balance

- “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”
 - Candace Jackson, Acting Asst. Secretary of Ed (2017)



Trauma might affect a party

- Not in every case
- Not just one party
- Never assume anyone interviewed or questioned 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



Investigating trauma

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



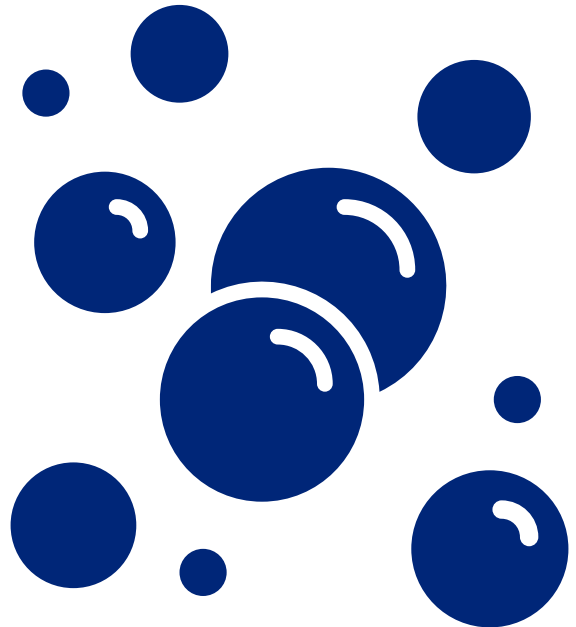


Trauma-informed interview

- Important to focus on two concepts:
- What are you **able** to tell me about your **experience**?
 - Allow complainant to begin where he/she wants
 - Allow an uninterrupted statement
 - Use follow-up questions (non-leading)



Trauma-informed interview (cont.)



- Instead of asking “why,” ask about what witness was thinking during the experience
- Ask about memories associated with the senses:
 - Sights
 - Smells
 - Feelings



Awareness of respondent trauma

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

Informal Resolution and Confidentiality



What is informal resolution?

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



Does every case with disputed facts have to proceed to hearing?

- No – As long as the procedural requirements to enter informal resolution are met, Title IX regulations permit a wide range of alternative models, including a decision by a single individual (i.e., “arbitration”)
- It is especially important to advise the parties of the nature of this type of resolution and how it differs from the default investigation and hearing



Informal Resolution

- The Office of Equity and Inclusion will determine if informal resolution is appropriate based on the alleged conduct and the desire of the parties to reach a mutually agreeable resolution
- The specific manner of the informal resolution process will be determined by the parties and the Title IX Coordinator, in consultation together.



Informal Resolution

- If the parties reach a resolution through the informal Resolution process and the Title IX Coordinator agrees that the resolution is not clearly unreasonable, the Title IX Coordinator will:
 - Reduce the terms of the agreed resolution to writing and present the resolution to the parties for their written signature; and
 - Sign the resolution.
- The Office of Equity and Inclusion will keep records of any informal resolution, although, the outcome of an informal resolution will not become part of a student, staff, or faculty member's official disciplinary record with the University



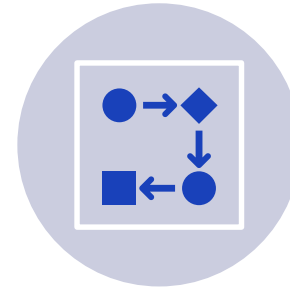
Informal Resolution

- Informal Resolutions may not be appealed and are considered resolved and will not be subject to further investigation, adjudication, remediation, or discipline by the University
- If a party fails to abide by the terms of the informal resolution, the other party should notify the Executive Director to discuss possible action
- In the case where an agreement is not reached and the Title IX Officer or designee determines that further action is necessary, or if either Party fails to comply with the terms of the informal resolution, the matter may be referred for an investigation and adjudication

What are the key concepts of informal resolution?



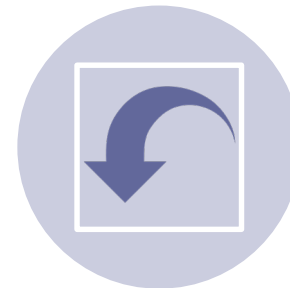
A formal complaint must first have been filed and written notice given to the parties



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

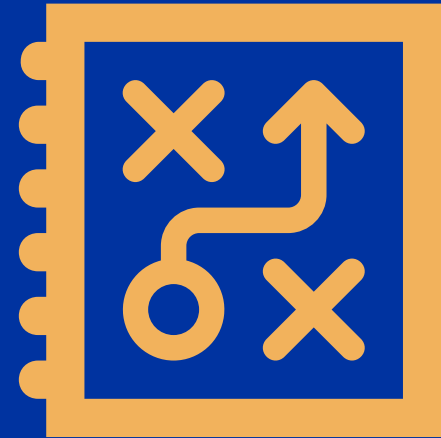


The parties must be allowed to withdraw from informal resolution up until the point it is final



Example (informal resolution)

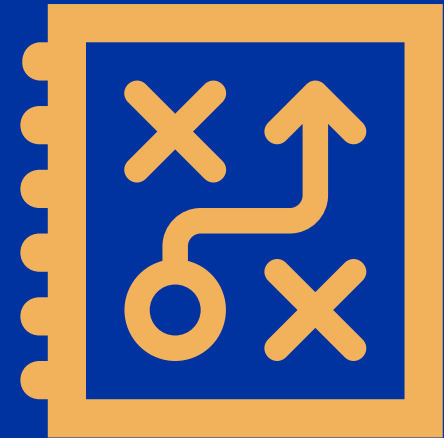
Parties agree to engage in informal resolution in the form of mediation. Parties meet with third-party mediator three times over the course of two weeks and are very near to reaching a complete agreement. The morning of the last session, the complainant indicates a desire to stop mediation and resume the formal investigation/hearing process.





Example (cont.) - resolution

- Investigation and hearing process would resume
- If complainant withdraws complaint, or refuses to participate, institution might elect to dismiss complaint
- But Title IX Coordinator might also elect to file formal complaint and cause the issue to be adjudicated fully





What are the limitations?

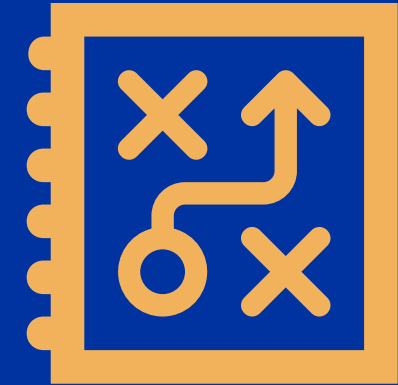
- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment





Example (impermissible)

Student files a formal complaint accusing a faculty member of offering to give student better grades in exchange for sexual favors. Faculty member proposes to informally resolve the complaint by apologizing for a “bad joke” and having a colleague grade student’s work product. Student indicates they are amenable to the faculty member’s proposal.





Example (impermissible)



Enrollment agreement for students contains a clause stating: “Student hereby waives their right to a formal investigation and hearing as contemplated by Title IX and instead agrees that all reports of sexual harassment will be summarily resolved by a decision issued by the Dean of Students after an investigation.”



Who facilitates an informal resolution?

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

**What are
some
examples of
informal
resolution?**

Facilitated exchange of resolution offers

Mediation

Arbitration

Restorative justice

Settlement with the involvement of attorneys



Is an informal resolution final?

- Generally, yes – Most informal resolutions will result in an agreement that resolves the allegations in a definitive and final way
- A party cannot demand an investigation and hearing of the same conduct that has been resolved through informal resolution
- Exception exists if terms of the informal resolution are not final (i.e., contingent) and contemplate a potential return to the formal process



Example of Informal Resolution

Informal resolution indicates that, in lieu of investigation and hearing, respondent will apologize for respondent's misconduct and attend counseling, but should respondent sexually harass complainant again, complainant will be free to file a formal complaint encompassing the entire range of sexual harassment.





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

Hearings, Cross Examination and Questioning



What happens before a hearing?

- Notice of allegations
- Investigation & report
- Notice of hearing
- Name decision maker(s)
- Share hearing procedures
- *Optional pre-hearing meeting to
- *May allow raising/ consideration of evidentiary/
relevance arguments



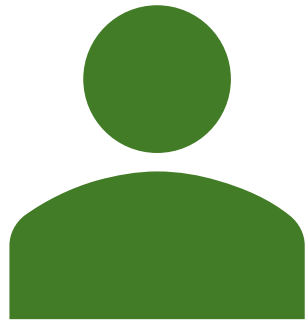
What is the purpose of the hearing?

- 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 runs the hearing?

- Regulation requires hearing to be administered by “decision-maker(s)”
- Means institution can use a single hearing officer or a hearing panel (presumably, with a chairperson)



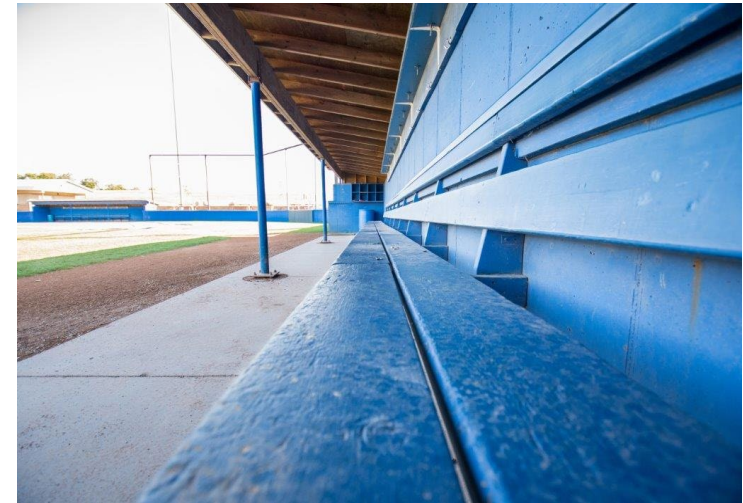
Who are the “decision makers”?

- A Hearing Board: three-member panel
 - The Decision-Makers will not have had any previous involvement with the investigation
 - The Title IX Coordinator may not serve as a Hearing Board Member or Chair in the matter but may serve as an administrative facilitator of the hearing if their previous role(s) in the matter do(es) not create a conflict of interest



What is the Role of the Adjudicator (or Panel)?

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





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.



Example (permissible)

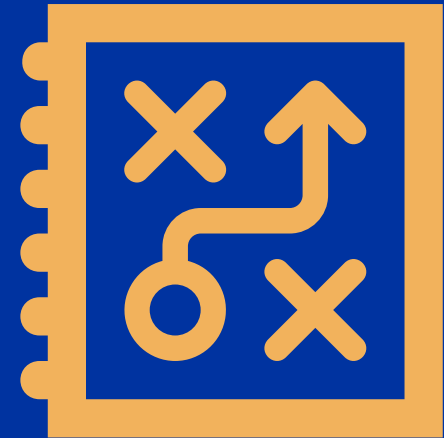


Institution's hearing procedures require all participants to maintain decorum, remain at their respective assigned table at all times, and direct all communications to the hearing officer with the exception of questions posed to the other party and witnesses by each party's respective advisor.



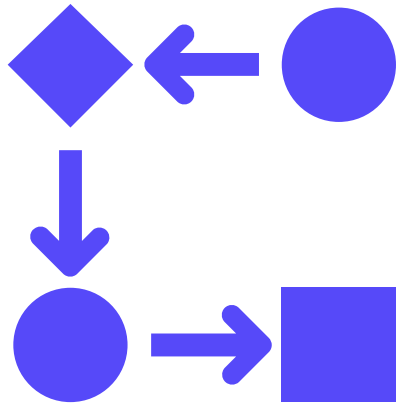
Example (impermissible)

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





What are the logistics of a hearing?



- Hearing must be recorded (audio or video) or transcribed
- Hearing must have “live”– (i.e., contemporaneous participation by parties and their advisors)
- Hearing can be held in a single room or with the parties separated in different rooms
- Hearing can be held virtually using suitable software



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

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

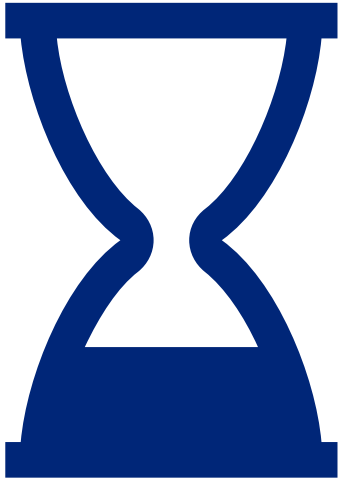
Party's advisors must be allowed to conduct live questioning of other party and witnesses

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



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
- Decision-maker(s) should set an overall length to the hearing in advance and keep parties on schedule



Structural requirements for hearings

- The Title IX Coordinator will assign a **three-member panel** from the pool, including designating one of the three members as the Chair for the hearing.
- The Decision-Makers will not have had any previous involvement with the investigation.
- The Title IX Coordinator may elect to **have an alternate** from the Pool sit in throughout the Resolution Process in the event that a substitution is needed for any reason.

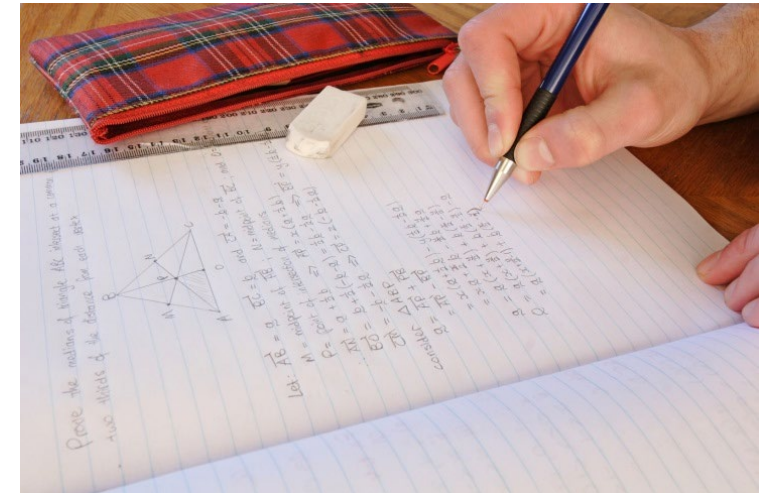
Pre-Hearing Conference

- Hearing Chair will convene a pre-hearing conference with each party and/or their Advisor(s)
- The Title IX Coordinator, General Counsel, and/or designee may attend and assist with determinations regarding relevance and admissibility.
- Addresses:
 - The hearing procedures
 - Matters raised in the parties' written responses to the investigation report, as the Hearing Chair deems appropriate
 - ID each party's Advisor of Choice & witnesses
 - ID any evidence and/or exhibits to be presented
 - Whether 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)



Pre-Hearing Homework

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





Lesson for Panel Members: *Doe v. Purdue University, et al. (2019)*

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

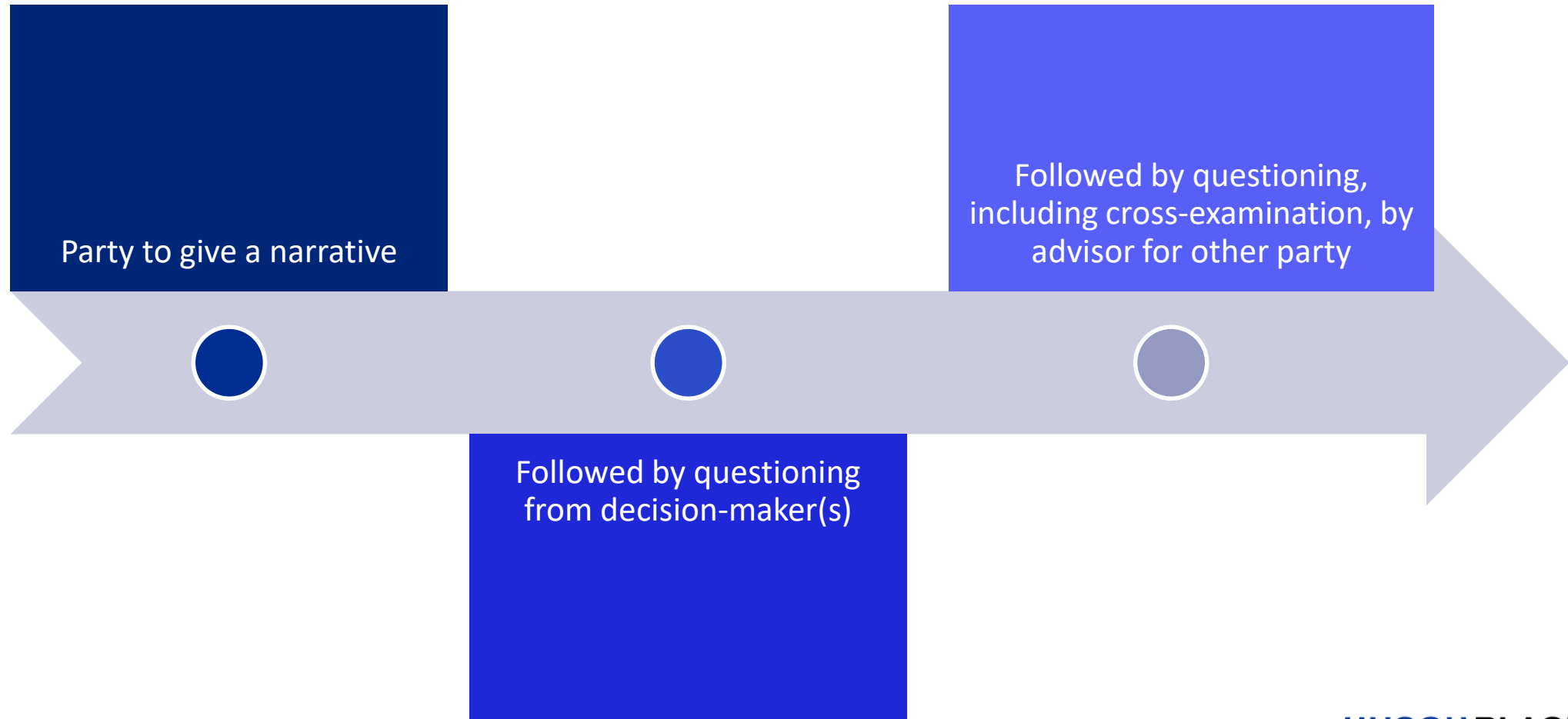


Typical Hearing Structure

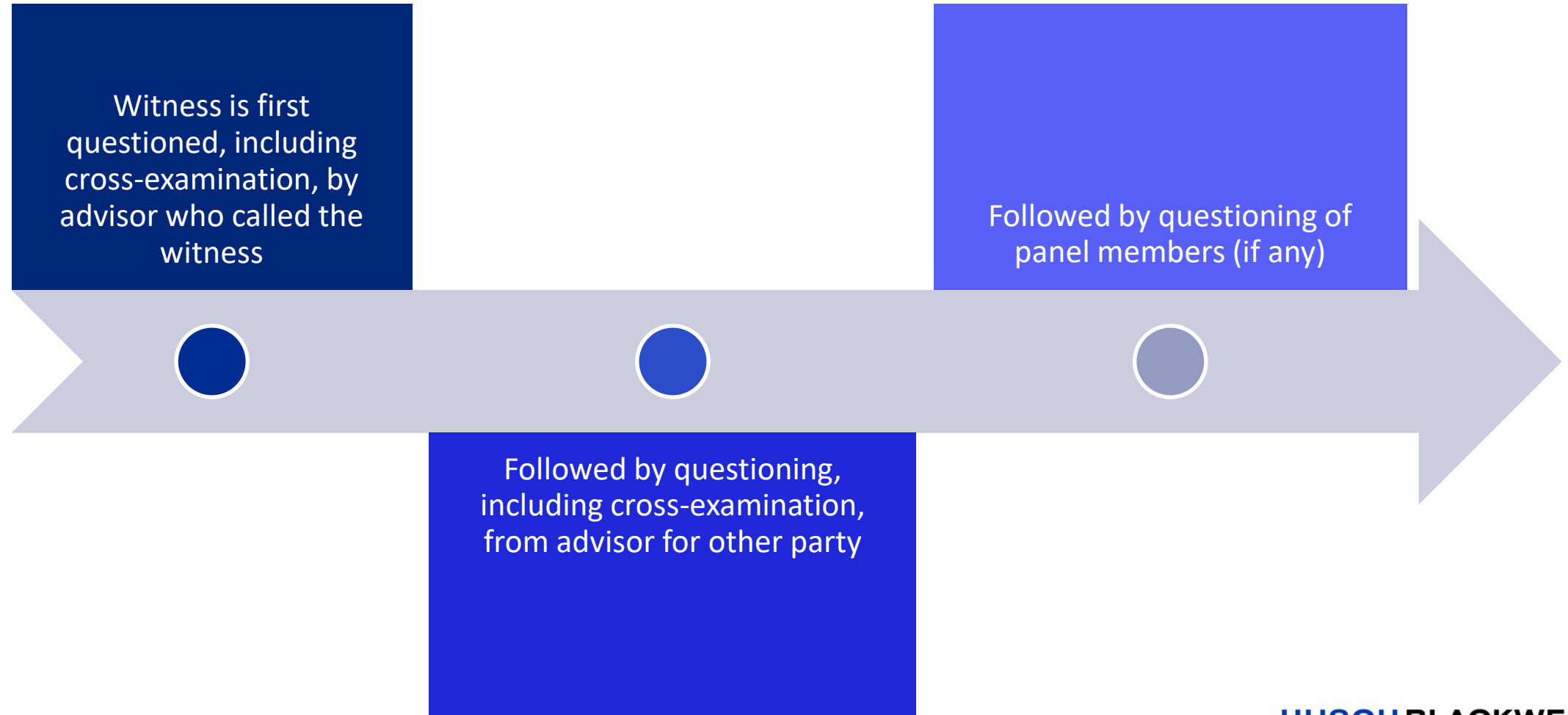
- Chair/leader provides opening remarks
- Consider investigation report/summary
 - Parties have opportunity to respond to investigation report
- Statement and questioning of parties (complainant, then respondent)
- Questioning of witnesses
- Closing statements (complainant, then respondent)
- Deliberation
- Written determination



How might questioning of parties take place?



How might questioning of witnesses take place?





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



Common Ground Rules

- Allowances (or not) on video/ audio recording
- Expectation of truthfulness
- Role of advisor/support person(s)
- Reasonable time limits
- Explain that if presentation goes beyond scope/time limits, a party may be interrupted



Separating the Parties

- Video/ audio conferencing
- Separate rooms
- Screens





~~Unavailable-Witnesses~~ **Rescinded** (but see and follow Policy)

- ~~• For Title IX proceedings, if a witness previously interviewed does not testify at hearing cannot rely on that testimony~~
 - ~~▪ No finding (unless other evidence supports finding)~~
 - ~~▪ Dismissed, or~~
 - ~~▪ May transfer to other policy~~
 - ~~• All information gathered during investigation and hearing can be considered~~
 - ~~• Includes statements from witnesses who did not testify at hearing~~



Be Ready for Curveballs



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



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



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



Heightened emotions → Take a break so hearing can proceed productively



Potential trauma-impact →

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



And Fastballs!

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





More Curveballs: Advisors

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





Cross-examination



Facilitating Effective Cross Examination

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





Advisors are not required to “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 a private attorney
 - Advisors are asking relevant and appropriate questions to reasonably support the case of the party you are supporting



What is the appropriate manner of Advisor questions?

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



What are the hallmarks of effective questioning?

- Advisors' 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



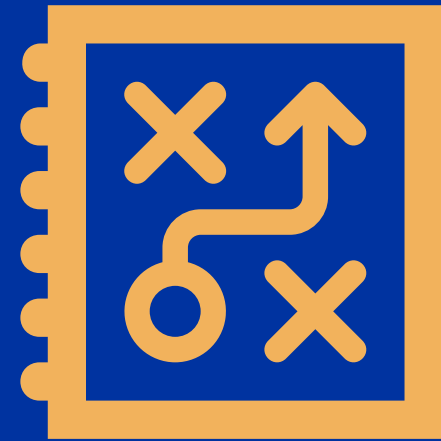
Who determines relevance?

- 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



Example (relevant)

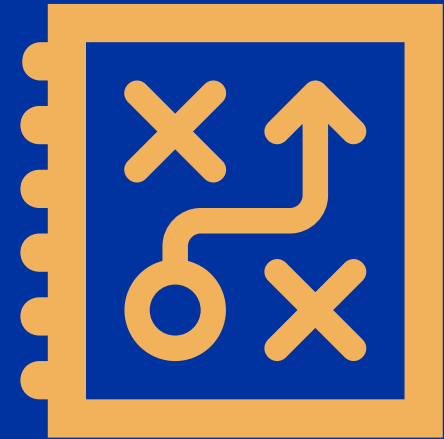
Nursing student has accused Physical Therapy student of sexual assault by having sex with Nursing student while Nursing student was incapacitated by alcohol after a happy hour. Advisor for P.T. student asks Nursing student: “Did you send any text messages or make any phone calls during the happy hour?”





Example (not relevant)

Complainant alleges Significant Other engaged in dating violence by kicking complainant during an argument. Advisor for Significant Other asks complainant: “Isn’t it true that you are only dating Significant Other because of the Other family’s money?”





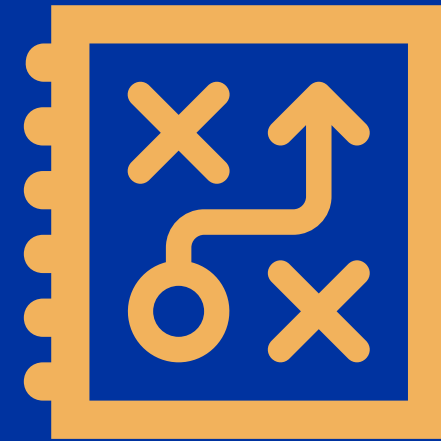
What is the advisor's role in questioning?

- Asking relevant questions, including those characterized as “cross-examination” of the other party and witnesses
- The questions asked are reasonably intended to support the position of the party who the advisor is supporting



Example

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

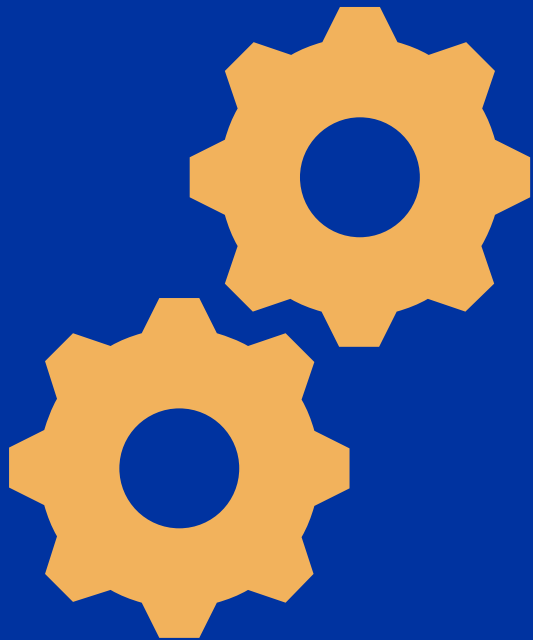




Example questions

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

Group Scenario



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

GTA claims student has falsely accused GTA of misconduct because GTA refused to “date” the student after the hookup. Video shows the student and GTA leaving the lab together at 9:15 pm on Saturday, March 7. GTA has a text message the student sent the GTA on May 26 stating: “I’m so happy we can finally be together. I want to spend my life with you!”

Two student witnesses claim that the GTA repeatedly looked at student during class in a way that was “creepy.” Academic records show the student had a B- average on work performed before March 7 and an A+ average for work performed after March 7.



Questioning



Questioning

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





General Questioning Guidelines

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





General Questioning Guidelines

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





When Asking Questions . . .

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



Some Common Questions by Hearing Panel

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



Some (More) Common Questions by Hearing Panel

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



Decision-Making and Evidentiary Concepts



Panel decision-making

- Evaluating relevance
- Factual and credibility analysis in support of conclusion
- Consideration and exclusion of statements and evidence
- Deliberating



Key Principles

- Direct vs. circumstantial
 - Hearsay
- Weight of evidence
- Assessment of credibility

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



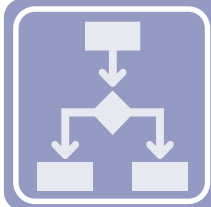
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



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



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

Sanctioning



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 utilized after the determination to restore or preserve access
- Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable



Disciplinary Philosophy

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



Sanctioning Goals

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



Sanctioning Policy

- If there is a finding of responsibility, the letter will include any sanctions issued which the University is permitted to share and any remedies provided to the Complainant, designed to ensure access to the University's educational or employment program or activity, to the extent the institution is permitted to share.



Determining Sanctions

- When determining the appropriate sanctions, consideration shall be given to the nature and severity of the behavior and the existence of any prior incidents or violations



Avoid Sanctioning Problems

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



Increased Detail in Sanction

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





Increased Detail in Sanction

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



Applying aggravating and mitigating factors

—

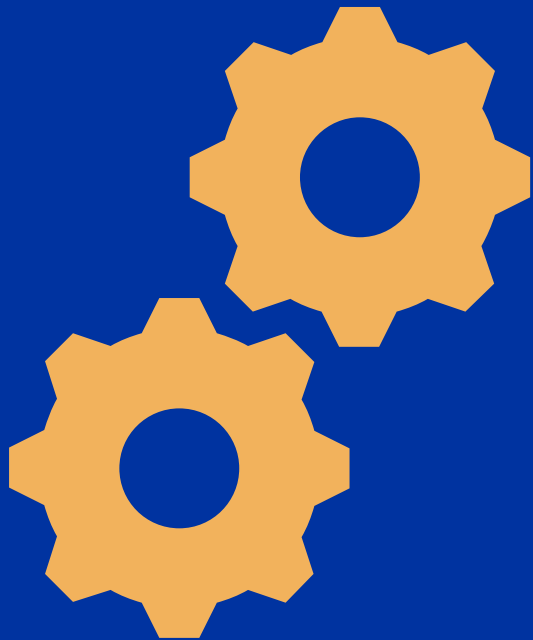


Aggravating and Mitigating Factors

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



Group Scenario



Actor is the lead in a for-credit university theatrical production. Director (also a student) develops feelings for Actor and the two go on 2-3 dates following rehearsals.

Actor then decides to end the relationship. Director is incensed and begins relentless criticism of Actor's performance during rehearsals. Actor ultimately decides to withdraw from the production and takes an incomplete in the class.

Director also follows Actor home one night and confronts Actor in a parking lot, first begging him to return to the cast and then threatening him with further public derision.

Actor ultimately returned to the production and finished the class but switched majors the following semester to avoid any contact with Director.

At the hearing, Director explains that he was just "testing" and "pushing" Actor to motivate Actor and help him develop "thick skin."

Decision-Making and Writing



What Is a Determination?

- The decision as to whether or not sexual harassment occurred
- Results in a finding of “violation” or a finding of “no violation”





Purpose of a Decision

- Sparks some sort of action
- Record of following process
- Documents fair process
- Provides parties and subsequent decision-makers with information





Documenting the Decision

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





Critical 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

Periodic Table of the Elements

1																	18
1 H Hydrogen 1.008																	2 He Helium 4.003
3 Li Lithium 6.941	4 Be Beryllium 9.012											5 B Boron 10.811	6 C Carbon 12.011	7 N Nitrogen 14.007	8 O Oxygen 15.999	9 F Fluorine 18.998	10 Ne Neon 20.180
11 Na Sodium 22.990	12 Mg Magnesium 24.305											13 Al Aluminum 26.982	14 Si Silicon 28.086	15 P Phosphorus 30.974	16 S Sulfur 32.066	17 Cl Chlorine 35.453	18 Ar Argon 39.948
19 K Potassium 39.098	20 Ca Calcium 40.078	21 Sc Scandium 44.956	22 Ti Titanium 47.867	23 V Vanadium 50.942	24 Cr Chromium 51.996	25 Mn Manganese 54.938	26 Fe Iron 55.845	27 Co Cobalt 58.933	28 Ni Nickel 58.693	29 Cu Copper 63.546	30 Zn Zinc 65.38	31 Ga Gallium 69.723	32 Ge Germanium 72.631	33 As Arsenic 74.922	34 Se Selenium 78.971	35 Br Bromine 79.904	36 Kr Krypton 84.798
37 Rb Rubidium 84.468	38 Sr Strontium 87.62	39 Y Yttrium 88.906	40 Zr Zirconium 91.224	41 Nb Niobium 92.906	42 Mo Molybdenum 95.96	43 Tc Technetium 98.907	44 Ru Ruthenium 101.07	45 Rh Rhodium 102.905	46 Pd Palladium 106.42	47 Ag Silver 107.868	48 Cd Cadmium 112.414	49 In Indium 114.818	50 Sn Tin 118.710	51 Sb Antimony 121.760	52 Te Tellurium 127.6	53 I Iodine 126.904	54 Xe Xenon 131.294
55 Cs Cesium 132.905	56 Ba Barium 137.327	57-71 Lanthanides	72 Hf Hafnium 178.49	73 Ta Tantalum 180.948	74 W Tungsten 183.84	75 Re Rhenium 186.207	76 Os Osmium 190.23	77 Ir Iridium 192.227	78 Pt Platinum 195.085	79 Au Gold 196.967	80 Hg Mercury 200.592	81 Tl Thallium 204.383	82 Pb Lead 207.2	83 Bi Bismuth 208.980	84 Po Polonium [209]	85 At Astatine [208]	86 Rn Radon [222]
87 Fr Francium 223.020	88 Ra Radium 226.025	89-103 Actinides	104 Rf Rutherfordium [261]	105 Db Dubnium [262]	106 Sg Seaborgium [266]	107 Bh Bohrium [264]	108 Hs Hassium [265]	109 Mt Meitnerium [268]	110 Ds Darmstadtium [269]	111 Rg Roentgenium [272]	112 Cn Copernicium [277]	113 Nh Nihonium [278]	114 Fl Flerovium [285]	115 Uup Ununpentium [288]	116 Lv Livermorium [293]	117 Uus Ununseptium [294]	118 Uuo Ununoctium [294]
57 La Lanthanum 138.905	58 Ce Cerium 140.116	59 Pr Praseodymium 140.908	60 Nd Neodymium 144.242	61 Pm Promethium 144.913	62 Sm Samarium 150.36	63 Eu Europium 151.964	64 Gd Gadolinium 157.25	65 Tb Terbium 158.925	66 Dy Dysprosium 162.500	67 Ho Holmium 164.930	68 Er Erbium 167.259	69 Tm Thulium 168.934	70 Yb Ytterbium 173.054	71 Lu Lutetium 174.967			
89 Ac Actinium 227.028	90 Th Thorium 232.038	91 Pa Protactinium 231.036	92 U Uranium 238.029	93 Np Neptunium 237.045	94 Pu Plutonium 244.064	95 Am Americium 243.061	96 Cm Curium 247.070	97 Bk Berkelium 247.070	98 Cf Californium 251.080	99 Es Einsteinium [254]	100 Fm Fermium 257.093	101 Md Mendelevium 258.1	102 No Nobelium 259.103	103 Lr Lawrencium [262]			
Alkali Metal		Alkaline Earth		Transition Metal			Basic Metal		Semimetal	Nonmetal		Halogen	Noble Gas	Lanthanide		Actinide	

©2015 The Periodic Table of Elements Project



Preliminary Case Information

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



History of the Case

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



Summarizing Allegations

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

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





Factual Findings

Acceptance of undisputed facts?

Goal: Reach conclusion of disputed facts

Relevant?

Weight?

Persuasive?

Show your work

Explain your decisions





Factual Findings (cont.)

Resolving credibility

Is there corroborating evidence?

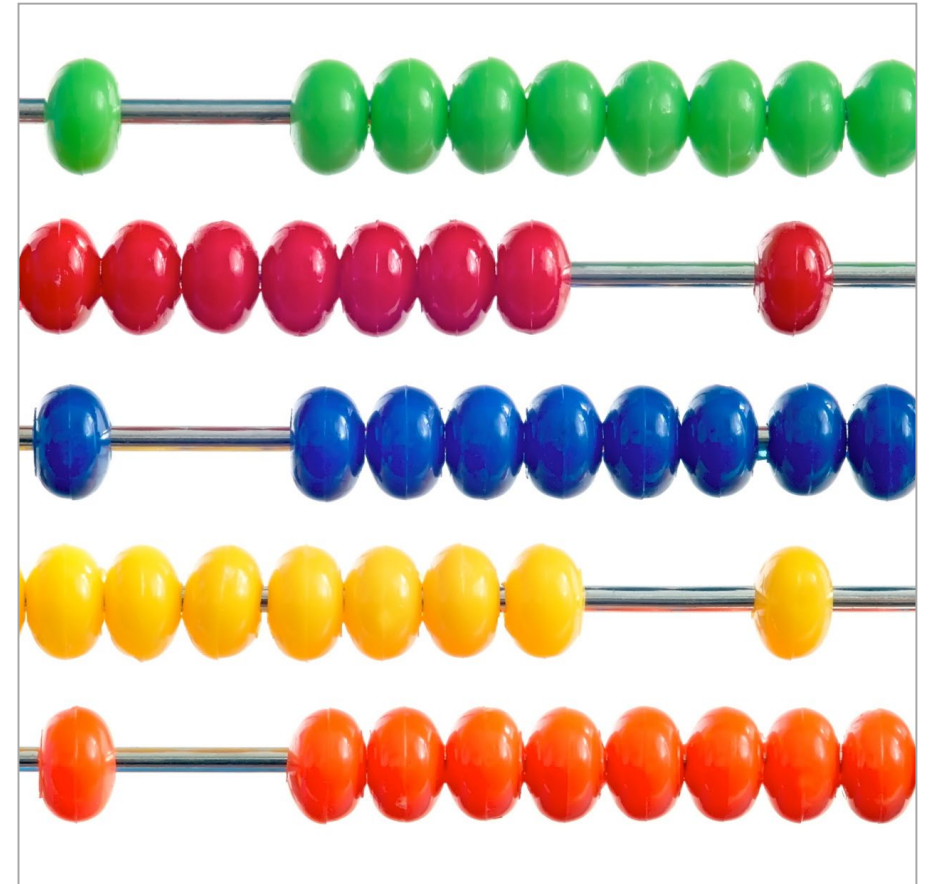
Are there inconsistencies?

Insufficient explanation of inconsistencies?

Consider the logic of a person's narrative

Consider the impact of trauma

Don't assume that a delay in reporting detracts from credibility





Important Language Considerations

Use objective terms

“Complainant” and “respondent” rather than “victim” and “perpetrator”

“Violation of policy” not “guilty” or violation of “law”

Generally, credibility of *facts*, not *witnesses*, as a whole, but-for specific circumstances

Do not include speculation

Do not include irrelevant points and discussion

Be thoughtful about pronouns

Avoid vague phrasing like “had sex”



Be Specific

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

VS.

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



Analysis and Conclusion

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





Check Your Work

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





Confidentiality



Are sexual harassment cases confidential?

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





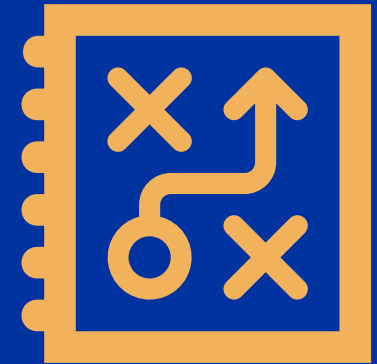
Are parties allowed to talk about a case?

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



Example (permitted communication)

Respondent in sexual harassment case contacts Complainant's Best Friend and asks Friend if she has discussed the incident with Complainant. Respondent explains that he is trying to find out why Complainant filed the complaint because Respondent believed their sexual activity was consensual.

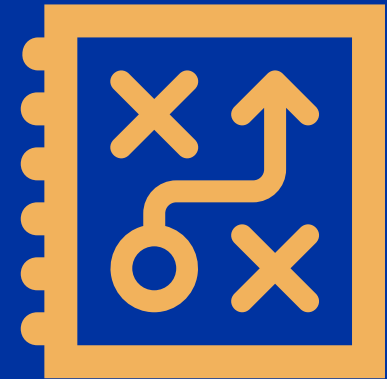




Example (institution may restrict)

Complainant contacts witness with whom Complainant exchanged text messages following a sexual encounter with Respondent that forms the basis of the complaint.

Complainant asks witness to delete the texts because they show Complainant's consent to the sexual activity.





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

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