



HUSCH BLACKWELL

**University of the  
Maryland  
Title IX Training**

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December 2022



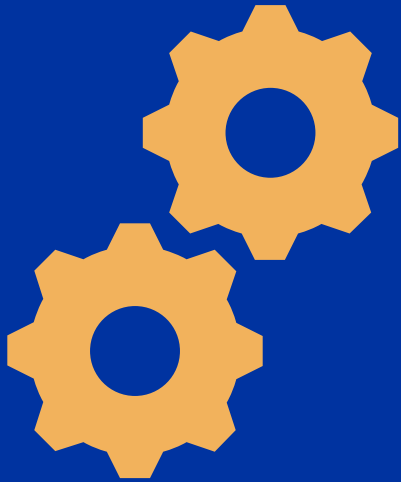
# Housekeeping

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- Not recording & recording is not permitted
- Slides will be provided by email after the training concludes
- Check Zoom name
- Let's discuss! Raise hand, use chat, or just jump in
  - In hypotheticals
- Other breaks—take individually as needed
- Context



## Group Scenarios



# Breakout Groups

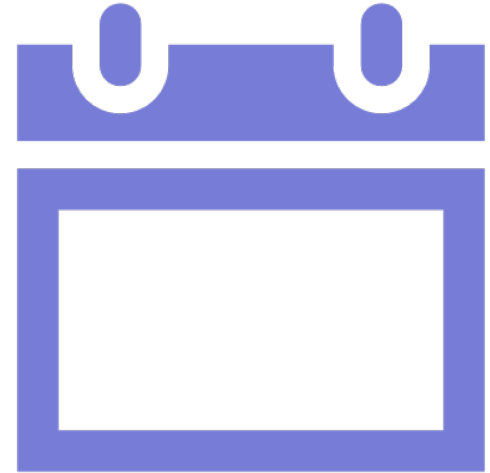
- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Scenario and questions for each Group  
Scenario will be posted in the Chat Box
- Presenters will ask Breakout Groups to provide responses
- Cameras on for breakouts



# Agenda

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- Key Legal Principles
- Policy Concepts
- Conflicts of Interest, Bias, Stereotyping, and Trauma
- Case Processing
- Investigative Issues
- Hearings
- Appeals



# Module 1: Key Legal Principles

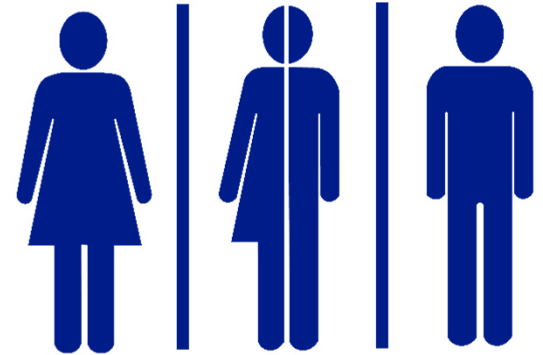
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# What is Title IX?

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“[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.”

34 C.F.R. § 106.31



# Who does Title IX apply to?

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



# Poll question

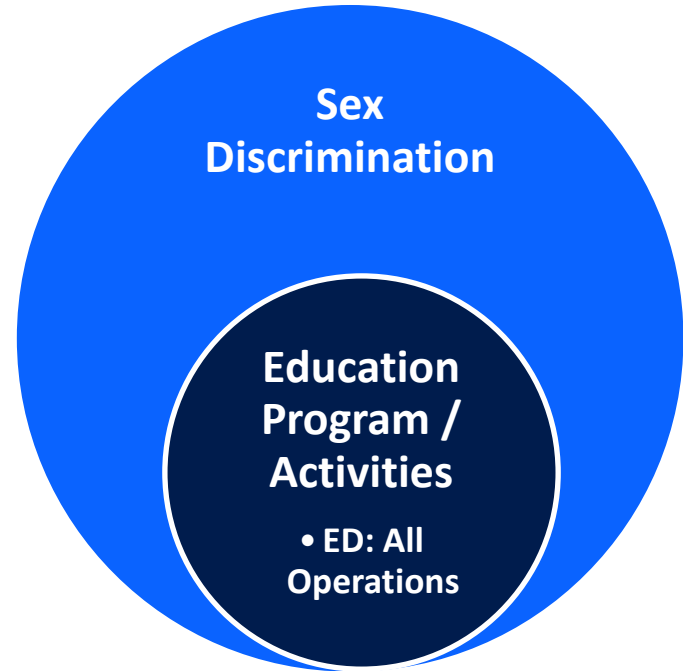
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- Does Title IX apply only to academic activities and athletic participation?
  - Yes
  - No



# What sex discrimination does Title IX apply to?

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



# What are examples of education programs and activities?

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on campus

Sports teams

Work-study

Games, concerts, and speeches on-campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus

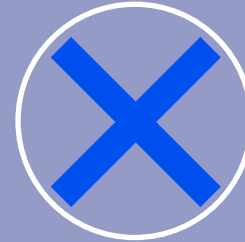
# Does Title IX apply to off-campus sexual harassment?



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



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



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

# Example (included in EP&A)

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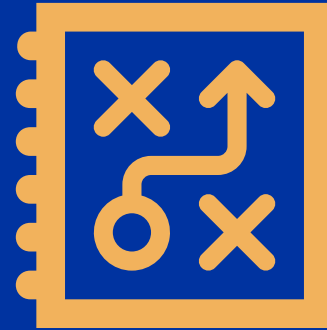


Student is sexually assaulted in a library study room on-campus. The sexual assault occurs on a Saturday evening. The identity of the perpetrator is not immediately known.



# Example (included in EP&A)

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



# Example (excluded from EP&A)



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



# Does Title IX apply to sexual harassment in other countries?

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





# What other policies might apply?

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

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





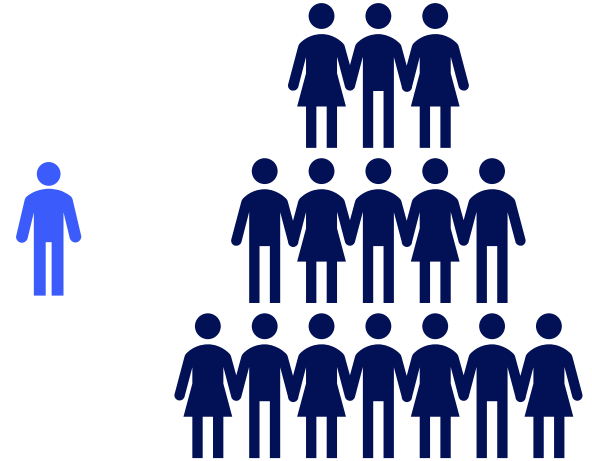
# **Additional Legal Considerations**

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# Title VII of the Civil Rights Act of 1964

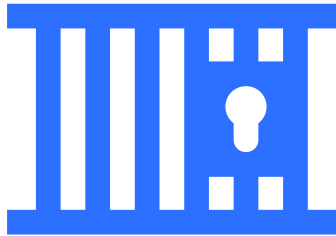
- Prohibits discrimination in employment (private and public) based on:
  - Race
  - Color
  - Religion
  - National Origin
  - Sex





# The Clery Act

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A federal law requiring institutions to collect and publish statistics for certain crimes reported to have occurred on the university's "Clery Geography" (i.e., occurring on campus, on public property within or immediately adjacent to campus, and on other non-campus university property), for the purpose of informing current and prospective students, faculty or staff.



# Violence Against Women Reauthorization Act of 2013 (VAWA)

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Codification of Title IX principles

Sexual misconduct policy

Statements of rights and options

Support persons

Training

# Applicable disabilities statutes

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

# FERPA

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- 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?

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



## Example (permitted communication)

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







## Example (institution may restrict)

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



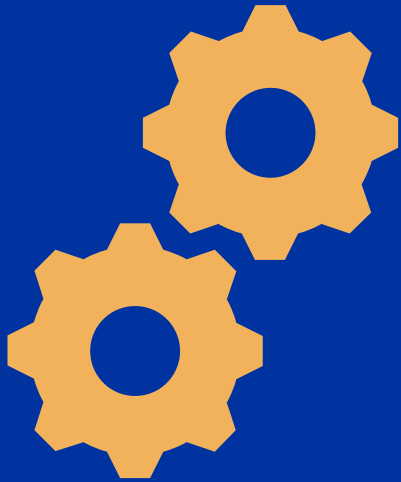


# Are interviews and hearings confidential?

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- 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

## 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 was sober and fondling Student A in front of others. One such individual is a friend of Student B's and complains to the Title IX Coordinator. Later, when Student A is given access to the investigation evidence before the conclusion of the investigation, Student A posts the entire evidentiary record online.



# QUESTIONS

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- Is Student A permitted to contact potential witnesses?
- Is Student A permitted to ask potential witnesses to sign a declaration?
- Can Student A be disciplined for posting the evidence online?
- Can the institution make a public statement in response to media inquiries prompted by Student A's publication?

# **Political and Regulatory Updates**

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# Political Update – “Sex”

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## Mar. 8, 2021 Executive Order

- Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity
- Authorizes the Secretary of Education to take additional action to enforce this policy

## June 16, 2021 Guidance

- Department of Education says Title IX prohibits discrimination based on sexual orientation and gender identity

# Regulatory Update

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



# Notable Title IX Proposed Changes

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## Scope of Coverage

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





# Notable Title IX Proposed Changes

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## Hostile Environment

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



# Notable Title IX Proposed Changes

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## Quid Pro Quo

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



# Notable Title IX Proposed Changes

## Jurisdictional Scope

- Title IX does not apply to sex-based harassment occurring (1) outside an institution's education program or (2) outside the U.S. where does not contribute to a hostile environment in institution's education program or activity in the U.S.
- Conduct occurring within an institution's education program and activity includes conduct that occurs off-campus when the respondent represents the institution or is otherwise engaged in conduct under the institution's "disciplinary authority"
- Harassment occurring outside of an educational program or activity can nevertheless violate Title IX if contributes to a hostile environment within an educational program or activity

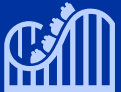


# Notable Title IX Proposed Changes

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## Grievance Process

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



# Notable Title IX Proposed Changes

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## Definitions

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

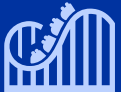
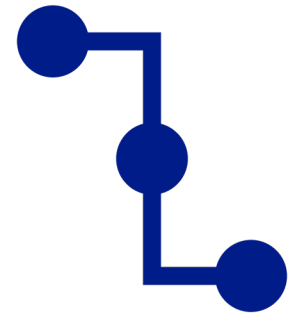


# Notable Title IX Proposed Changes

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## Less Stringent Procedures

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



# Notable Title IX Proposed Changes

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## Advisors

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



# Notable Title IX Proposed Changes

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## Confidential Employees

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





# Notable Title IX Proposed Changes

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## Live Hearings

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



# Notable Title IX Proposed Changes

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## Cross-Examination

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



# Notable Title IX Proposed Changes

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## Determinations

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



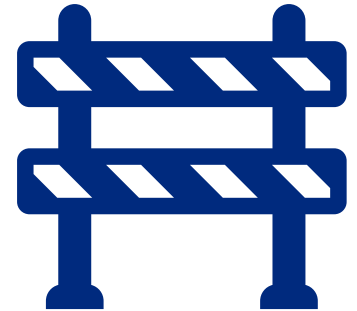
# Notable Title IX Proposed Changes

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## Title IX Coordinator

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

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



# Questions



# Module 2: Applicable Policy Requirements & Key Definitions

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*UMD Updated Policy;  
VI-1.60; also, VI-1.60(A)(II)*

# UMD Policy - Purpose

## The University is committed to:

- Creating and maintaining a working and learning environment *free* from all forms of Sexual Harassment **The University accomplishes this through training, education, prevention programs, policies and procedures that promote:**
  - Prompt reporting and response;
  - Providing support to persons alleged to be victimized;
  - Prohibiting Retaliation; and
  - The implementation of timely, fair and impartial investigations and resolutions that ensure due process and remedy policy violations.



# Scope of Policy

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- The University of Maryland is committed to taking the appropriate steps to **eliminate** Prohibited Conduct, **prevent** its recurrence and **address** its effects.
- The policy applies to all members of the University community, including
  - Students, faculty and University of Maryland staff;
  - Contractors and other third parties who are engaged in any University Education Program or Activity; or
  - Who are otherwise interacting with the University including, but not limited to volunteers, vendors, guests and visitors.





# Reach of Policy (“Jurisdiction”)

- Acts of **Prohibited Conduct** committed by or against students, employees, and third parties when:
  - The conduct occurs **on** University premises, in any University facility, or on property owned or controlled by the University;
  - The conduct occurs **in the context** of a University Education Program or Activity, including, but not limited to, University-sponsored academic, athletic, extracurricular, study abroad, research, online or internship programs or activities;
  - The conduct occurs outside the context of a University Education Program or Activity, but has **continuing adverse effects** on or creates a hostile environment for students, employees or third parties while on University premise or other property owned or controlled by the University or in any University Education Program or Activity; or
  - Conduct otherwise **threatens** the health and/or safety of University members.



# Maryland's Title IX & Non-Title IX Conduct (“Other Sexual Misconduct”)

*UMD Updated Policy;  
VI-1.60(A) Sect. III*

- This Policy also addresses allegations of ***Other Sexual Misconduct***, which includes:
  - Sexual Harassment that occurred against a person outside of the United States or not within an Education Program or Activity;
  - Sexual Coercion;
  - Sexual Exploitation;
  - Sexual Intimidation;
  - Attempted Sexual Assault;
  - Retaliation; and
  - Other Sex-based Offenses.



# Standard of Evidence

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Preponderance of the evidence

=

“more likely than not”

# What is sexual harassment?

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Conduct on the Basis of Sex that is:

Quid  
Pro Quo  
Harassment

Hostile  
Environment  
Harassment

Sexual  
Assault

Relationship  
Violence

Stalking



# Policy Definition “Sexual Harassment”

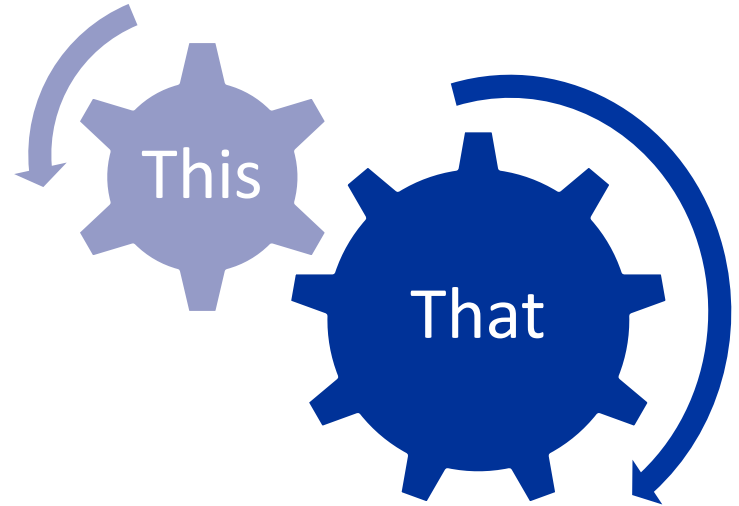
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- Conduct on the basis of sex that satisfies one or more of the following:
  - A University employee conditioning the provision of a University aid, benefit, or service on an individual’s participation in unwelcome sexual conduct;
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University’s education program or activity; or
  - Sexual Assault, Dating Violence, Domestic Violence, or Stalking.

# What is quid pro quo?

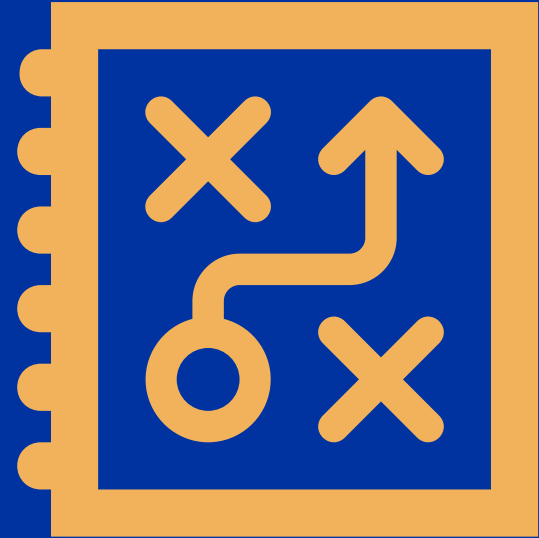
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- **Title IX-Designated**
- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
  - Often arises in the employment context or where an employee holds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



# Example of quid pro quo

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



# Another example of quid pro quo



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



# What is hostile environment?

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



# Poll question

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

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



# How do we determine if a hostile environment exists?

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

# Example of hostile environment

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



# Another example of hostile environment



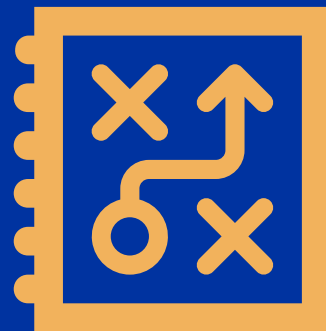
Teaching Assistant asks Student to go on a date, and Student says “no.” TA then repeatedly sends Student text messages using various vulgar terms that suggest Student is promiscuous. When TA and Student are in class, TA mutters these vulgar terms toward Student, loud enough for others to hear. Student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



## Example (not-hostile environment)



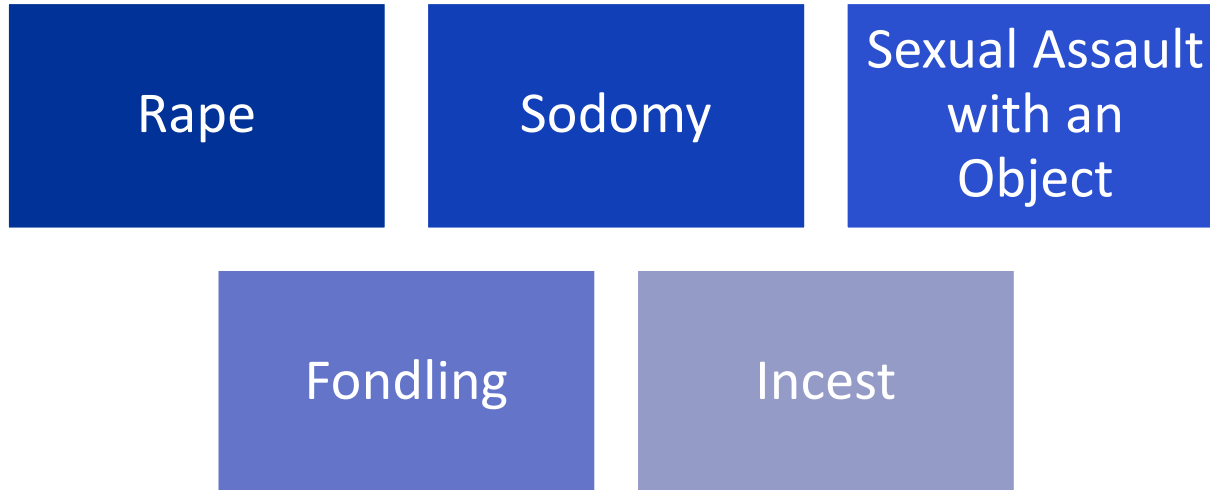
Vocal student actively supports a prominent political candidate who has been accused of sexually harassing campaign staffers. Offended student files a complaint that Vocal student's political support of the candidate has caused a sexually hostile environment on campus.





# What is sexual assault?

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





# What is rape?

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





# What is consent?

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- 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?

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



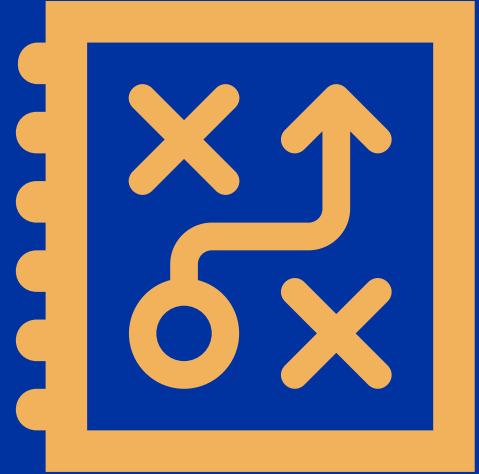
# Example: Incapacitated



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

# Example: Not-Incapacitated

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



# Incapacity – Sample Question Topics

## Physical coordination

- Walking, dancing, running, maneuvering (e.g., stairs)
- Speech
- Dexterity (phone/computer usage, using keys/key cards)
- Dressing/undressing

## Ability to understand

- Topics of conversation
- What was said and tracking conversation
- Knowing the who/when/where of the situation
- Understanding what is happening generally and with regard to the conduct at issue

## Other

- Quantity consumed (not determinative)
- Vomiting
- Passing out/blacking out
- Sleep
- Disability/age

## Respondent's reasonable knowledge of capacity

- What was respondent able to observe with respect to the above
- What should respondent have known based on the above



# What is coercion?

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- Generally
  - Direct or implied threat of force, violence, danger, hardship, or retribution
  - Sufficient to persuade a reasonable person of ordinary susceptibility
  - To perform an act which otherwise would not have been performed or acquiesce in an act to which one would otherwise not have submitted
  - Can include unreasonable and sustained pressure for sexual activity
  - Consider: Impairment of free will
- Differs from seductive behavior based on the type of pressure someone uses



# What is sodomy?

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



# What is sexual assault with an object?

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





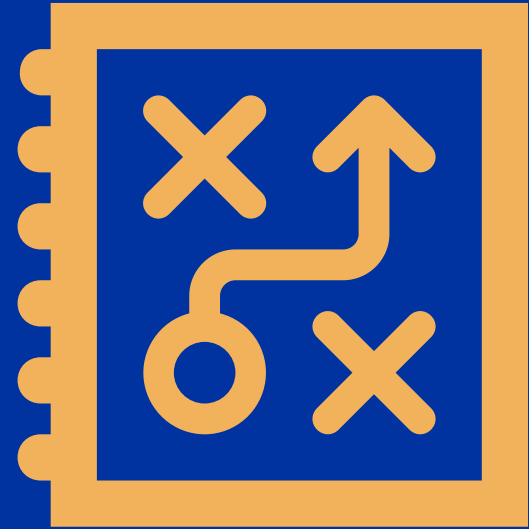
# What is fondling?

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

# Example: Fondling

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





# What is incest?

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

# What is statutory rape?

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



# What is domestic violence?

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



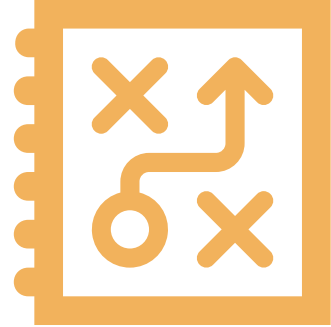
# What is dating violence?

“Dating Violence” is :

- 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 state domestic or family violence laws
  - Any adult or youth who is protected from the individual’s acts under the 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."

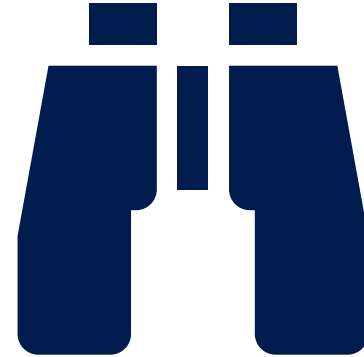


# What is stalking?

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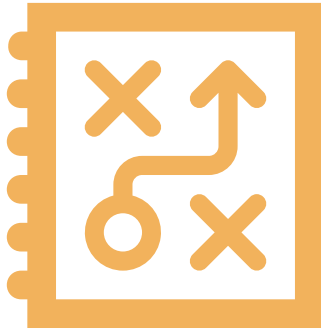
Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- 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.



# Does Title IX also prohibit retaliation?

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**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?

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- Retaliation means intimidating, threatening, coercing or discriminating against, or otherwise taking an ***adverse action*** against an individual:
  - To interfere with any right or privilege secured by law or University policy relating to Prohibited Conduct, or
  - Because an individual has made a report, filed a complaint, testified, assisted, participated or refused to participate in any manner in an investigation, proceeding or hearing related to Prohibited Conduct.



# Adverse Actions are Defined as...

- **Adverse actions** include but are not limited to:
  - Impeding an individual's academic advancement;
  - Terminating, refusing to hire or refusing to promote an individual;
  - Transferring or assigning an individual to a lesser position in terms of wages, hours, job classification or job security;
  - Retaliatory harassment;
  - Charges against an individual for violations of other University policies that do not involve sex discrimination or Prohibited Conduct but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or complaint of Prohibited Conduct, for the purpose interfering with any right or privilege secured by law.

# Retaliation

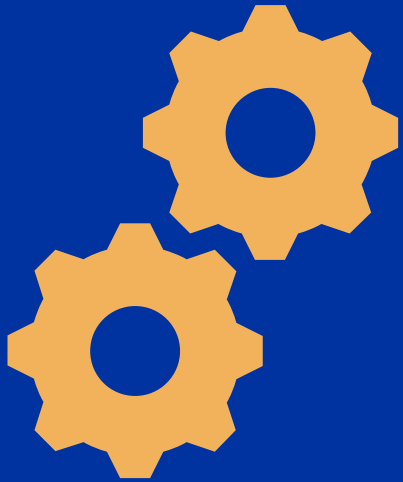


# Example of retaliation

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



## Group Scenario



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



# QUESTIONS

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- Does Title IX jurisdiction extend to the first incident? What questions do you need to ask?
- What about the second incident? What questions do you need to ask?
- What potential forms of sexual harassment might these incidents be classified as?



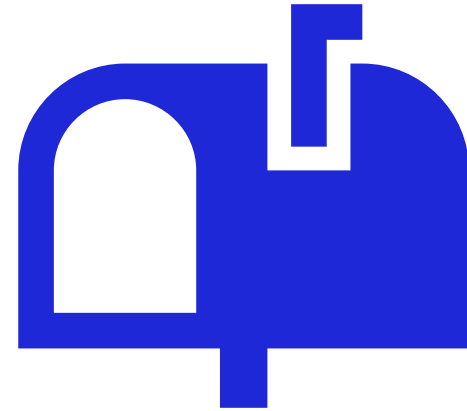
# Module 3: Resolution Options and Case Processing

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# How does an institution get notice of sexual harassment?

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





# What is “Actual Knowledge”?

---

“Actual knowledge” occurs when

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

# Reporting

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- No Time Limit
- Anyone may report
- To
  - Title IX Coordinator/Deputies
  - Mandatory Reporters
- Emergency 911 then Campus Security



# Title IX Coordinator

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**Angela Nastase, JD**

Interim Title IX Coordinator and Director  
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4200 Lehigh Rd.

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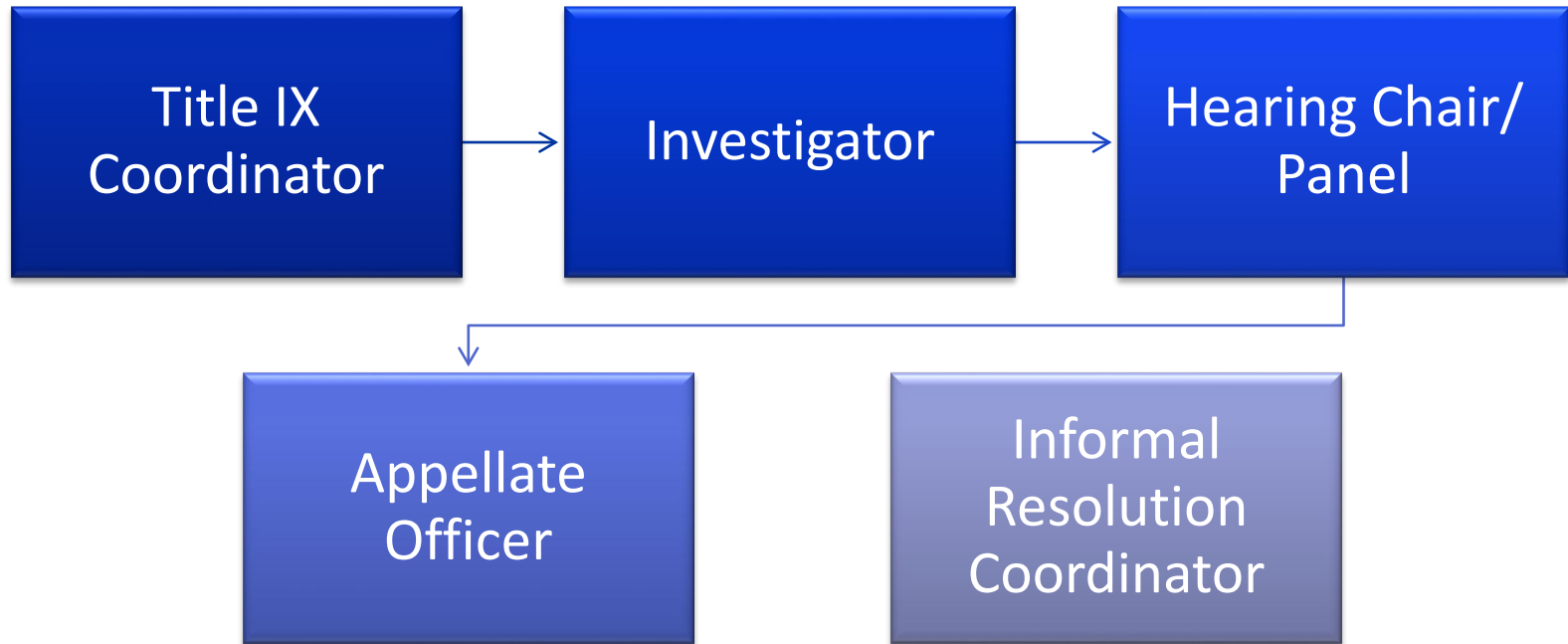
E-mail: [anastase@umd.edu](mailto:anastase@umd.edu)

Phone: 301.405.1701

# What are the institution's overall duties?



# Who are the key institutional actors in the grievance process?



# What is the resolution process?

Report

Initial  
Assessment/  
Supportive  
Measures

Formal  
Complaint

Possible  
Informal  
Resolution  
(not  
employee-  
on-  
student)

Investigation  
to collect  
relevant  
inculpatory  
and  
exculpatory  
evidence

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

Appeal



# What is a formal complaint?

## What

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

## Who

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

## How

- Either physical or electronic submission



# What is a formal complaint?

---

Signed in writing

---

From the alleged victim or the Title IX Coordinator

---

Alleging sexual harassment

---

Indicating desire to initiate the grievance process  
(i.e., investigation and hearing)



# When may the Title IX Coordinator file a formal complaint?

---

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

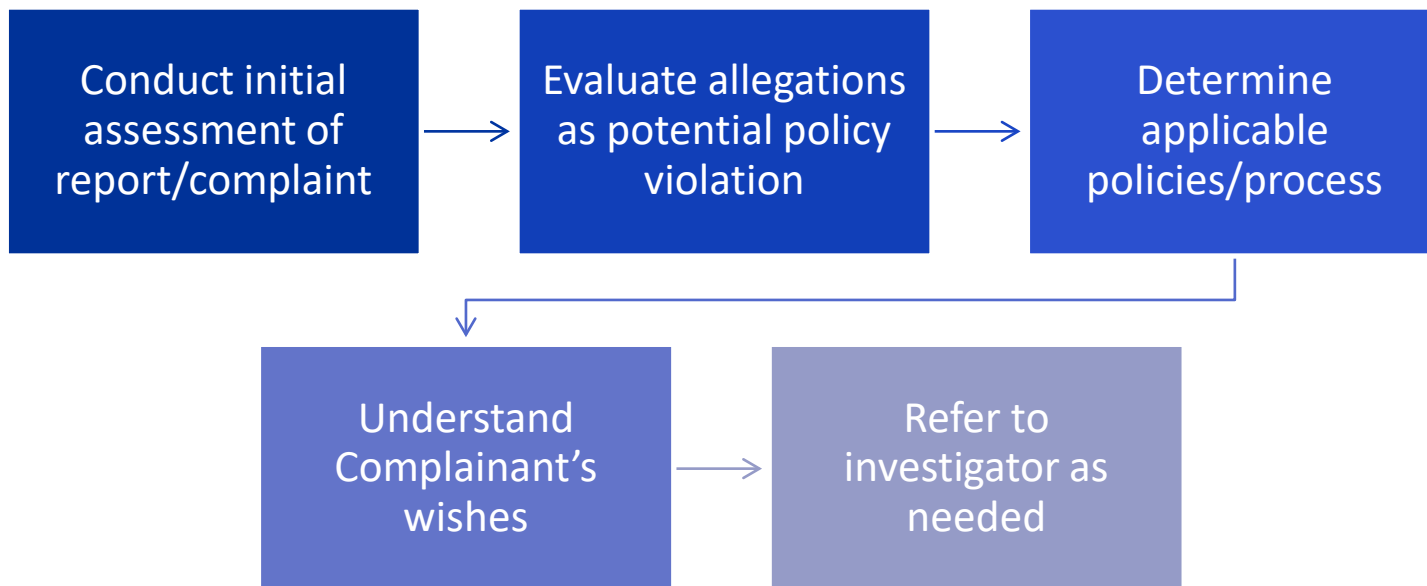


# Example of Title IX Coordinator formal complaint

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



# Intake process





# When *must* we dismiss a formal complaint?

---

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



# When *may* we dismiss a formal complaint?

---

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

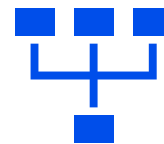
# Can we consolidate the complaints?

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

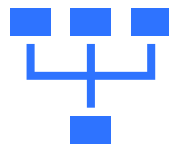


Multiple  
respondents

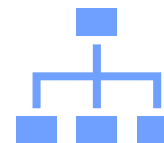
Multiple  
complainants



Multiple allegations  
against a single  
respondent



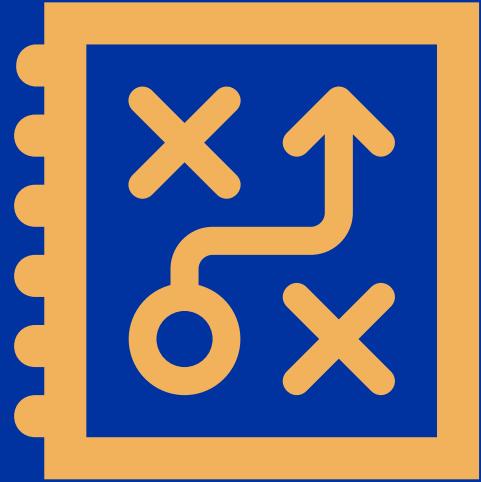
Multiple allegations  
from a single  
complainant





## Example of permissible consolidation

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



## Example of impermissible consolidation

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



# What is the grievance process?

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?

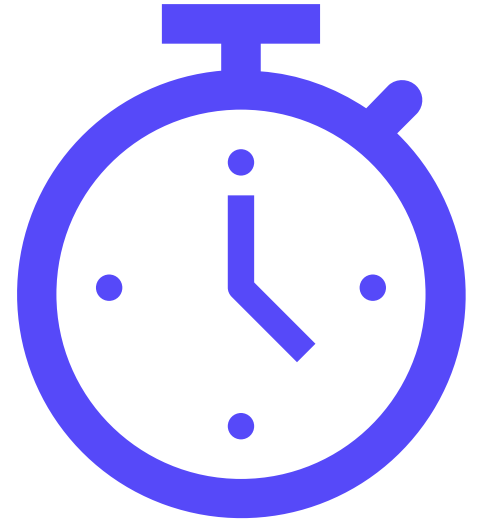
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- Equitable treatment of complainants and respondents
- No stereotypes based on a party's status as complainant or respondent
- Presumption respondent did not violate policy *unless and until* a determination is made after hearing
- Conflict and bias-free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

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



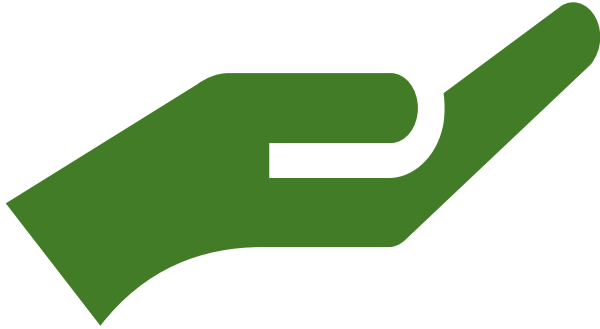
# Supportive measures

---

- Must be offered to an alleged victim once an institution has actual knowledge of potential harassment
  - Must be offered also to respondent once a formal complaint is filed
  - Ambiguity as to whether support services must be offered to respondent before formal complaint is filed
  - Non-disciplinary in nature; non-disciplinary measures only until end of investigation and grievance process
  - Title IX Coordinator has responsibility to oversee offering and implementation

# What are supportive measures?


---





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




# Examples of supportive measures

 Counseling


 Academic accommodations

 Housing accommodations

 Security escorts or transportation arrangements

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order where implicated by facts



# Examples of Supportive Measures under UMD's Policy

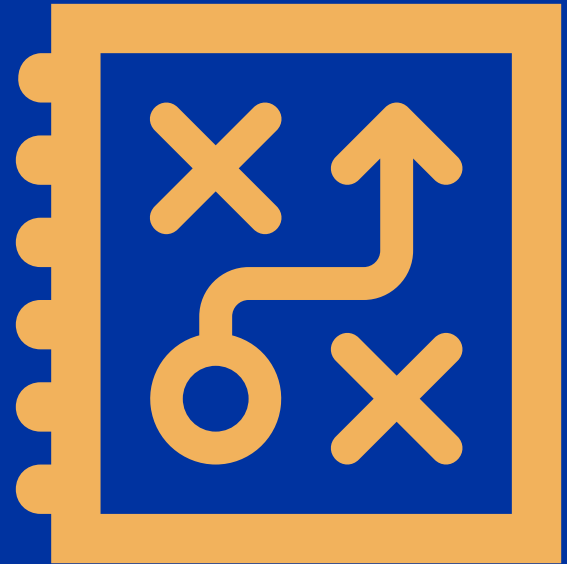
*UMD Updated Policy*

- Supportive measures may vary with the Complainant's campus, needs, and circumstances.
- Supportive measures may include:
  - Academic accommodations
  - Housing accommodations
  - Employment accommodations
  - Care and support measures
  - Addressing safety issues
  - University referrals



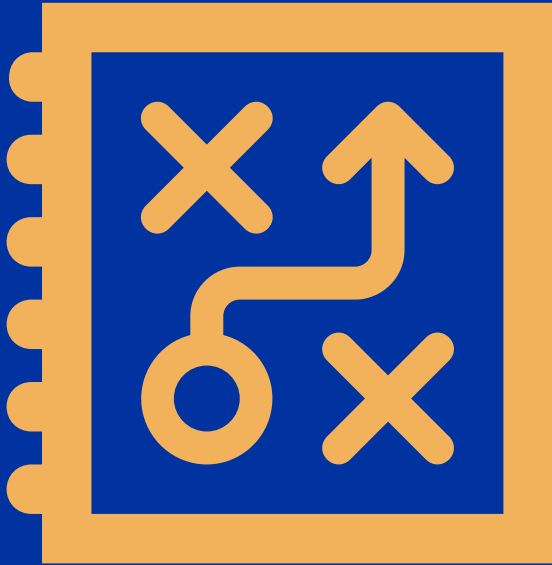
# Example: Reasonable supportive measure

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





# Example: Unreasonable supportive measure



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



# Poll question

---

Can supportive measures affect the respondent?

- Yes
- No
- It depends



# Can supportive measures affect the respondent?

---

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

# Example: Unreasonable burden

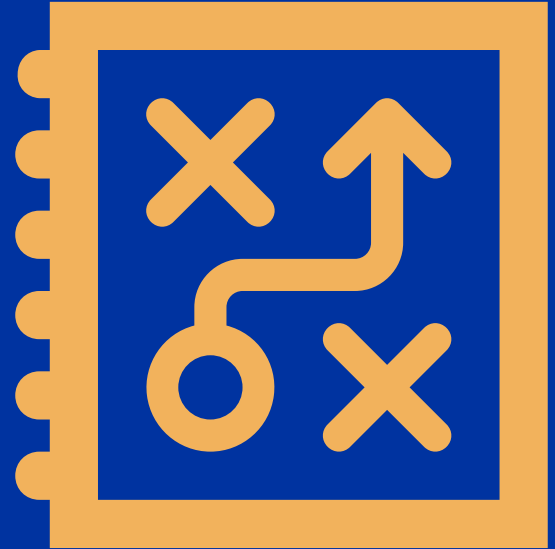


Student Worker accuses Colleague of sexual harassment. Institution imposes proximity restriction that prohibits Worker and Colleague from being within 200 meters of each other pending investigation and hearing.



# Example: Disciplinary supportive measure

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







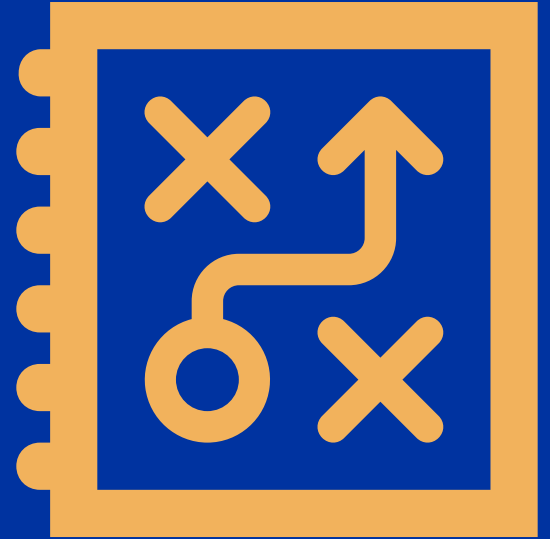
# Can we use interim removals or suspensions for students?

---

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

# Example: Immediate threat to physical health or safety

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





# Interim Removal Considerations

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- Under the UMD Policy, depending on the nature of allegations and circumstances, the Respondent may be suspended from campus or some portion of campus.
- Interim suspension procedures to be followed.
  - Individualized safety and risk analysis
  - Respondent notice and opportunity to challenge decision



# Can we use an already existing process for interim removals?

- Yes – If that process complies with the Title IX standard
- Common institutional examples include:
  - Threat assessment policy
  - Incident response team processes
  - Interim suspension provisions of Student Handbook



# Can we place employees on administrative leave?

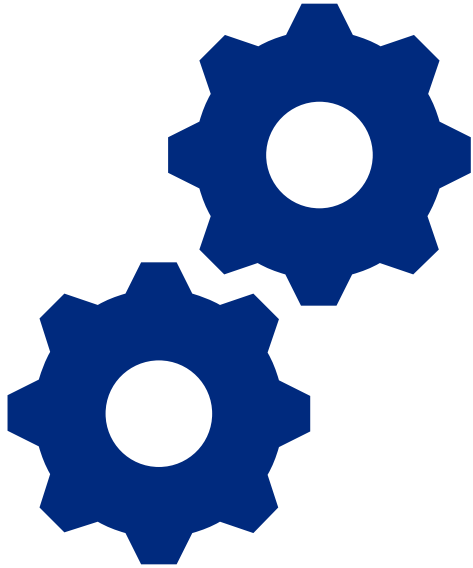
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- Yes – *Employee* respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies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



# Do students and employees have other rights?

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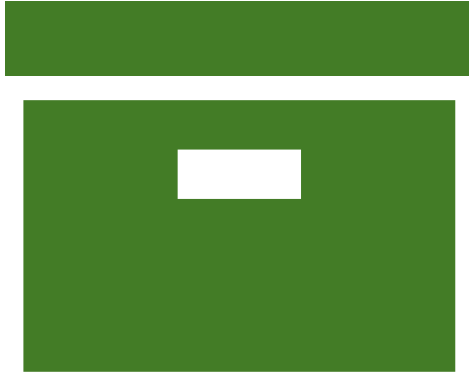


- Yes – Other laws may trigger accommodations when a medical condition or disability is present
  - Americans with Disabilities Act
  - Family and Medical Leave Act
  - Section 504 of the Rehabilitation Act



# Are supportive measures confidential?

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



# Who is responsible for supportive measures?

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



# What is informal resolution?

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



# Types of informal resolution

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**Mediation**

**Facilitated  
discussions led by  
Title IX  
Coordinator**

**Restorative justice**

**Attorneys for  
parties negotiate  
an agreement**

**Arbitration  
without a live  
hearing**



# Poll question

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

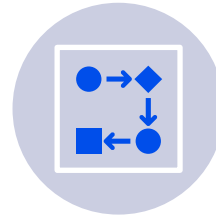
- True
- False

# What are the key concepts of informal resolution?

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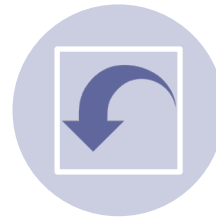
A formal complaint must first have been filed and written notice given to the parties



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



The parties must voluntarily agree to participate in writing



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



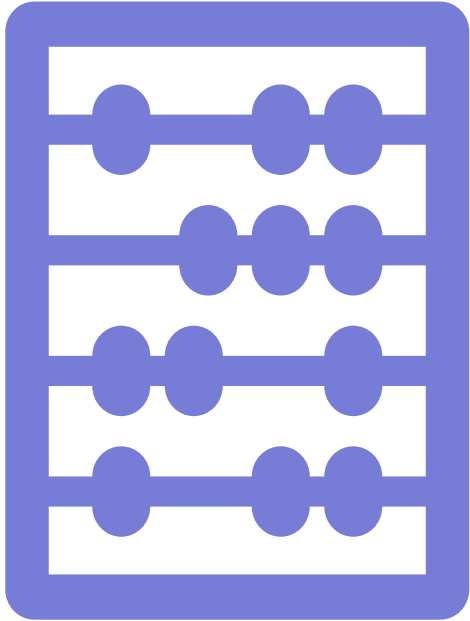
# What are the limitations?

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



# What are considerations around whether informal resolution is appropriate?



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

# How should we document informal resolution?

As appropriate to each matter:

Initial  
consent to  
participate

Notice to  
the parties  
regarding  
the  
allegations

Consent to  
agreed upon  
procedures

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

And/or  
other  
documenta-  
tion as  
appropriate



# Who facilitates an informal resolution?

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





# What is restorative justice?

---

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

-Howard Zehr

# How does restorative justice compare to general informal resolution?

## General Informal Resolution

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

## Restorative Justice

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

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



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

---

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



# Questions



# **Module 4:**

# **Conflicts of Interest, Bias,**

# **Stereotyping, and Trauma**

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# Poll question

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Who is responsible for identifying conflicts of interest?

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



# Who is responsible for identifying conflicts of interest and bias?

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- 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



# What is a conflict of interest?

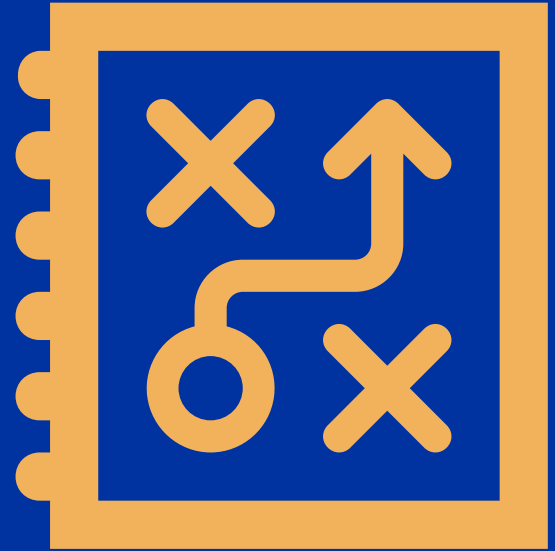
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- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial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

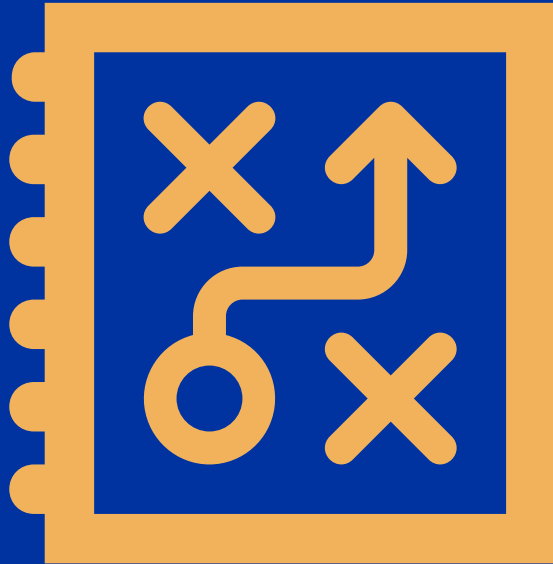


# Example: Conflict of interest

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



# Example: Conflict of interest



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

## 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.”

## Example: Bias

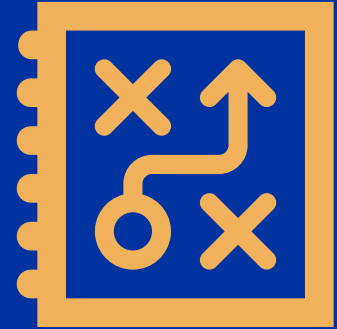
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An employee in the gender studies department who is chosen to serve on a hearing panel also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption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



# Example: Bias

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





# Resource for consideration: Harvard Implicit Bias Test

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



# What is the definition of trauma?



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



English Oxford: Deeply distressing or disturbing experience



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

# What is trauma's impact on the brain?

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- Brain senses threat and sets off alarm
- Thinking brain assesses
- Thinking brain shuts down
- Emotional brain
  - Fight, flight, freeze
- Thinking brain comes back online, turns off alarm, helps calm down
- Emotional brain may continue to sound the alarm, and overwhelming the system going forward





# How do we approach trauma in a Title IX case?

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- 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)



# When does trauma affect a person?

- Not in every case
- Never *assume* anyone participating has suffered any trauma
- Trauma may arise before, during, or after alleged Title IX misconduct, and may impact an individual's response during proceedings
- Not just complainant

# 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

# Physical reaction

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



# Trauma-informed Interviews

---

- Provide information to the individual
- Acknowledge the difficult situation
- Describe the process
  - Your role
  - Policy
  - Communication
- Avoid requiring recitation of information already provided, if possible

# 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



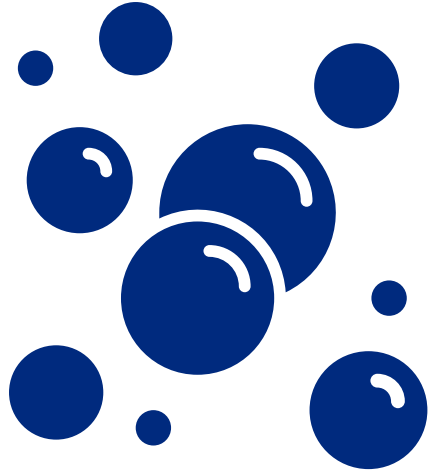


# Trauma-informed Interviews (cont.)

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

# Trauma-informed Interviews (cont.)



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





# Trauma & Credibility

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- 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

# Questions





HUSCH BLACKWELL

**Module 5:  
Addressing Other  
Misconduct**

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# Can other policies apply if sexual misconduct falls outside Title IX?

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- Yes, institutions are free to regulate sexual misconduct that falls outside the scope of Title IX through other policies:
  - Student codes of conduct
  - Faculty handbooks
  - Staff handbooks
  - Policies implementing other laws, such as Title VII



# 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

# Poll question

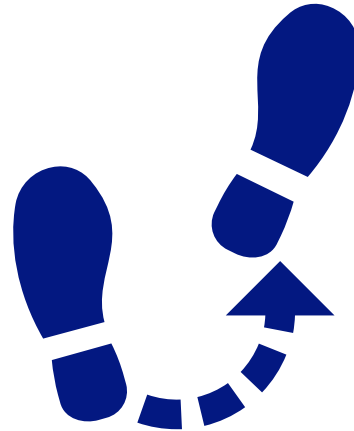
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- May we use another process before Title IX?
  - Yes
  - No



# May we use another process before Title IX?

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





# May we use another process after Title IX?



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



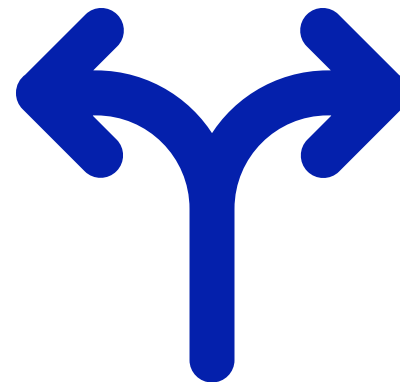




# May we use two processes at the same time?



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



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

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

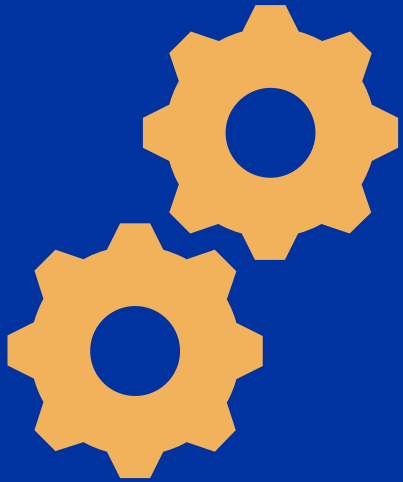




# Student code of conduct / employee standards

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

## Group Scenario



Employee A reports that Employee B sexually harassed Employee A by installing a program on Employee A's computer that caused pornography to play when Employee A logged on. This occurred only once, after which Employee A had the program removed from Employee A's computer. Employee A makes a formal complaint under the institution's Title IX sexual harassment policy.



# QUESTIONS

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- What other policies might be implicated by this report?
- Would the institution have an obligation to take action in the absence of a formal complaint?
- Will this constitute sexual harassment under Title IX? What about under some other standard?

Questions



# Module 6: Investigations

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# Why do I need to know about Investigations?

## Title IX Office

- Responsible for determinations about proceeding to investigation
- Responsible for consolidating investigations, as appropriate
- Provide supplemental notice during course of investigation
- Provide copy of report to parties/advisors

## Investigators

- Responsible for carrying out investigation
- Identify, elicit and gather inculpatory and exculpatory evidence
- Make witness interview determinations

## Decision-makers

- Understanding of investigation process required to make a determination and identify potential additional information needed

## Others

- Important to understand differences between Title IX SH investigation process and other investigation processes





# What is the purpose of an investigation?

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



# What are the general principles of an investigation?

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



# How do we tell the parties about an investigation?

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





# What else does the notice need to say?

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

## Example: Incorrect

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





# Can we gather any information prior to the written notice?

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

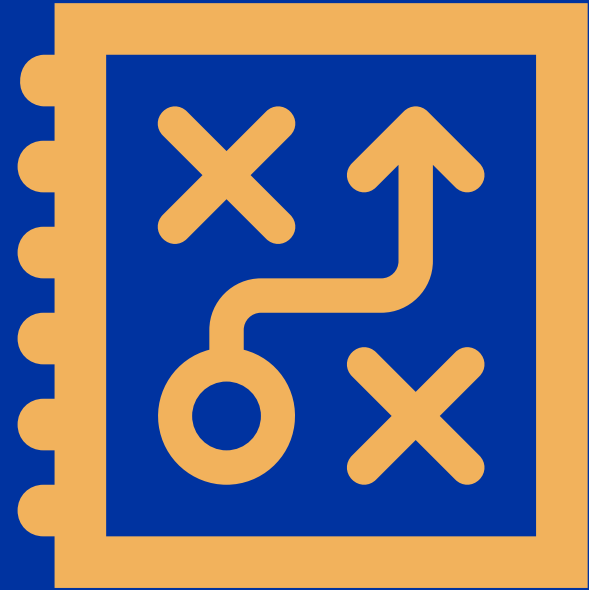
# Example: Preliminary inquiry



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

# Example: Preliminary inquiry

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







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

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





# May parties have an advisor during the investigation?

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



# What is the role of an advisor during the investigation?

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

# What must an advisor *not* do during the investigation?

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



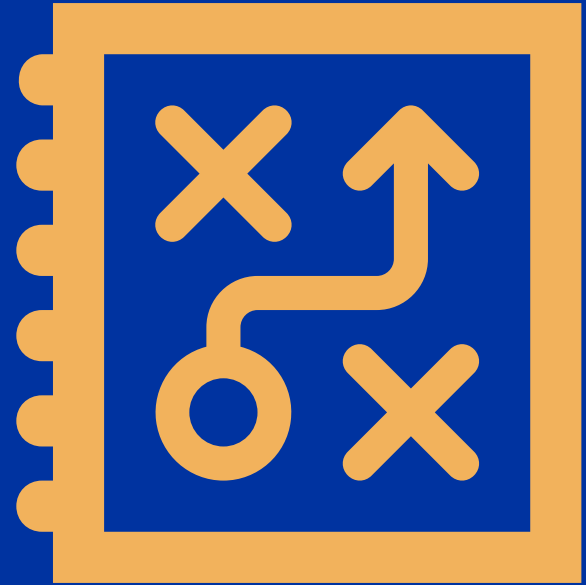
# What if the advisor breaks the rules?



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

# Example: Advisor breaking the rules

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



# Investigation framework

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The investigators interview the complainant, respondent, and relevant witnesses.  
The investigators identify and gather evidence.

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

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

# How do we collect evidence in an investigation?

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**Interviews of  
Parties and Witnesses**



**Collection of  
Non-Testimonial Evidence**





# When might I be asking questions in an investigation?

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- “Little i” investigation (preliminary review of allegations, prior to notice, to determine appropriate process)
- Interviews
- Identifying other evidence
- Cross-examination (as Advisor)
- Hearings



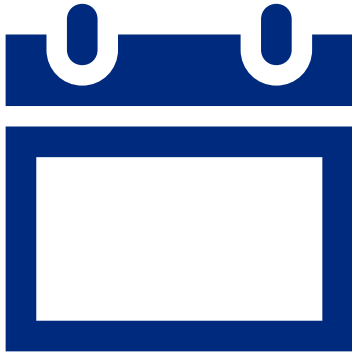
# How do I know what questions to ask?

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- Will vary depending on role
- Review the nature of the allegations
- Review the definition of the particular type of sexual harassment alleged
- Consider facts that would tend to establish a given element of the sexual harassment (or, in the case of advisors, would tend to establish your party's position)
- Consider questions that will bear on credibility

# Practical Considerations

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- Prioritize
- Create list of must-ask questions in advance
- Focus on elements of alleged violation and disputed facts
- Consider appropriate ways to guide off-track witnesses



# What questions should we ask in “Little i” investigations?

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- Identifying alleged victim
- Understanding scope of allegations
- In general, hold off on conducting information gathering seeking to determine whether allegations are *true* until notice has been provided



# 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

# How might we structure an interview?

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Rapport building/information providing phase



Substantive testimony collection

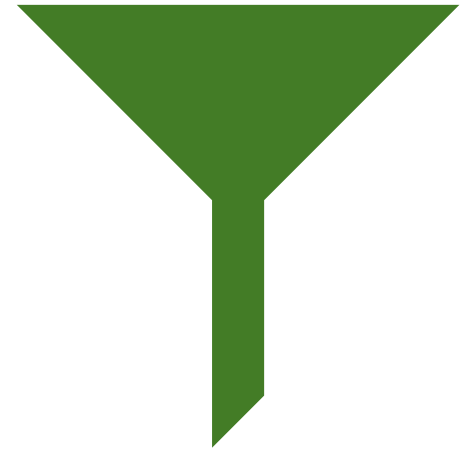


Closure/information providing phase



# How do we structure questions in the substantive phase?

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



# Examples of Open Invitations



“Please tell me what happened that night.”



“Can you walk me through what happened?”



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



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



# Examples of Facilitators



## Examples of Cued Invitations

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

“You said that . . . . Can you elaborate?”

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

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

# Examples of Recognition Prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

# How do I know what questions to ask?

Review the nature of the allegations

Review the definition of the particular type of sexual harassment alleged

Consider facts that would help determine whether a particular element of the alleged violation is satisfied

Focus on relevant evidence (tending to make a *disputed* fact more/less true) and (for investigators) other evidence directly related to allegations

Consider questions that will bear on credibility

# Free Tools!

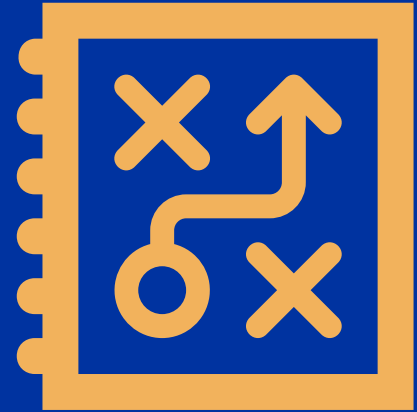
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- Stop
- Look
- Listen



# Example – Discussion

Complainant has accused respondent of hostile environment sexual harassment. Respondent admits to the alleged conduct, but asserts it “wasn’t that bad.” Complainant alleges being so affected by the conduct that complainant stopped attending work at the institution.





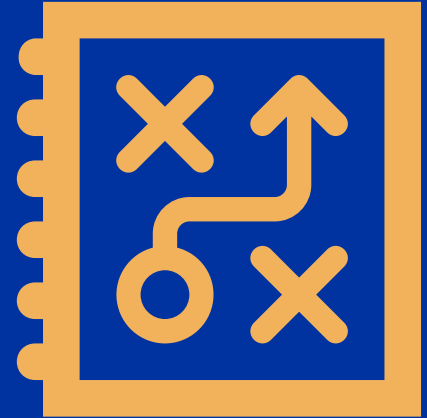
# Example Questions (Effective Denial of Access)

- For witnesses
  - What did complainant say about work?
  - What did you observe about complainant's attitude towards going to work?
  - Before the respondent's conduct, did complainant go to work?
  - Did you notice any changes in complainant's behavior after the respondent's conduct?
  - After the respondent's conduct, did complainant still go to work?
  - Are there any records that would show when complainant went to work before and after the conduct? Time cards? Performance reports? Sign-ons?

# Example -- Discussion

Respondent is accused of stalking complainant by lurking around complainant's car twice.

Respondent has admitted to the first instance but denies the second. Complainant reported clearly seeing the respondent's face the first time at the car but the person was not as clearly in sight as the second time.







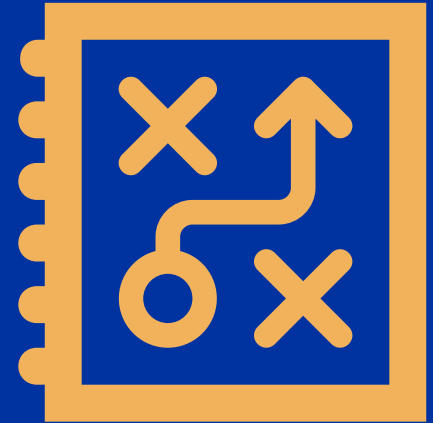
# Example Questions (Complainant)

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- Course of conduct
  - Tell me more about what you saw the second time? Did you actually see the respondent's face? What else do you remember about the person's appearance or attire?
  - Does having seen respondent at your car before lead you to believe respondent was there the second time? Could it have been someone else?
  - Do you actually *know* it was respondent the second time?
  - Have you had any other interactions with respondent? (Explore each)
- Directed at a specific person
  - Why do you believe this conduct is directed at you?
  - As to either incident, why was respondent at the car? Was there anything suggesting respondent went there to see you? Could there have been other reasons for Respondent's presence?
  - What did respondent do at the car each time? What did you do? Did either of you say anything?
- Fear/distress
  - What day/time did this happen?
  - Where did it happen?
  - How far was respondent from you?
  - Was there anyone else around?
  - How tall are you and how much do you weigh? How old are you? Same for respondent
  - What has the impact of this been on you? Did you tell anyone about it?

# Example – Discussion

Respondent is accused of retaliating against complainant for filing a Title IX complaint by excluding complainant from work-related social events. Complainant alleges this has limited complainant's opportunities for advancement and growth in the office because most office networking is done outside the office.





# Example Questions (Advancement)

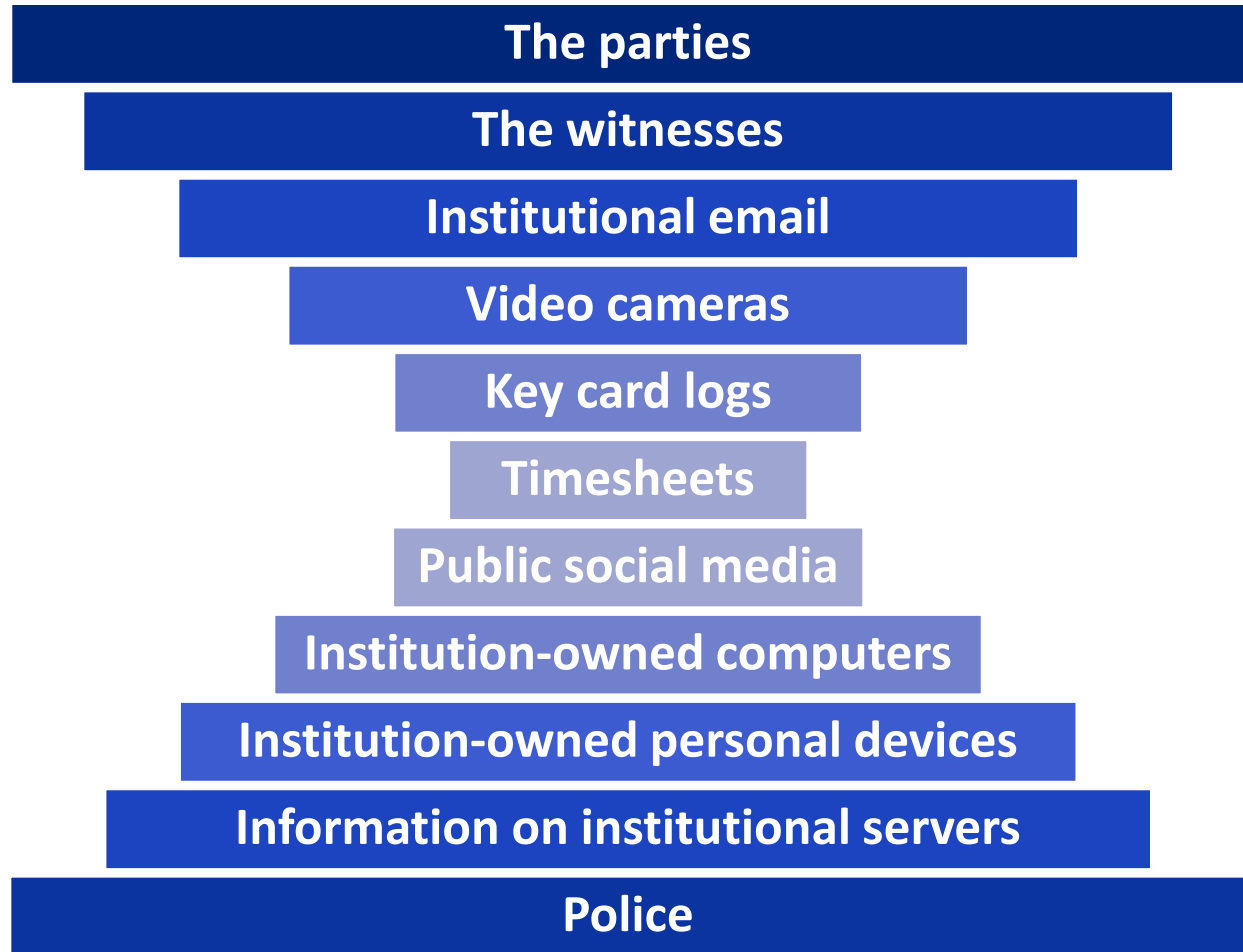
- Events: About which events is complainant concerned? (Types, specific examples) How are events planned and invitations extended? Who has attended these events in the past and who attends now?
- Advancement Opportunities: What are some examples of advancement that arises out of these events? What advancement opportunities are there outside of events? Does everyone who advances attend events?
- Respondent: What is respondent's role with respect to events? Who plans the events? How did respondent exclude complainant? What was the result? Does respondent exclude anyone else?
- What is complainant's history of attending events? What events did complainant attend in the past? Did anything of note occur? What events did complainant not attend after the complaint? Why not? What happened at those events?



# What questions should we ask to help locate other evidence?

- Beyond our discussion and witnesses, what other information might reflect what occurred?
- Where is it?
  - Do you have it?
  - Have you ever had it?
  - Who else might have it?
- What would it show?
- Examples: videos, photos, screen clips (e.g., of Snaps), texts, phone history, voicemail or other recordings, receipts or store records, credit card statements, physical injuries, clothing, maps history (phone/car),
- If provided
  - Where did you get it?
  - Is this complete? (Have you added or deleted anything?)
  - For electronic, consider asking to see original

**Example:  
Sources of  
Non-  
Testimonial  
Evidence**





# 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?

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



## Poll question

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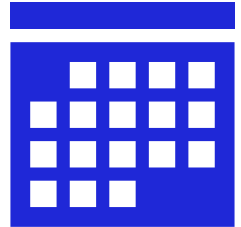
Do the parties have access to the evidence?

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



# Do the parties have access to the evidence?

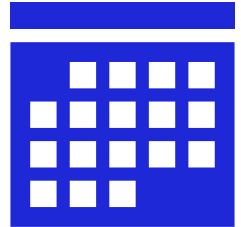
- At a minimum, parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is issued
- Evidence must be provided to a party and their advisor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



# Do the parties get to respond to the evidence?

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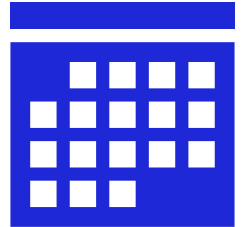
- Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language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



# When is the investigation report finalized?

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





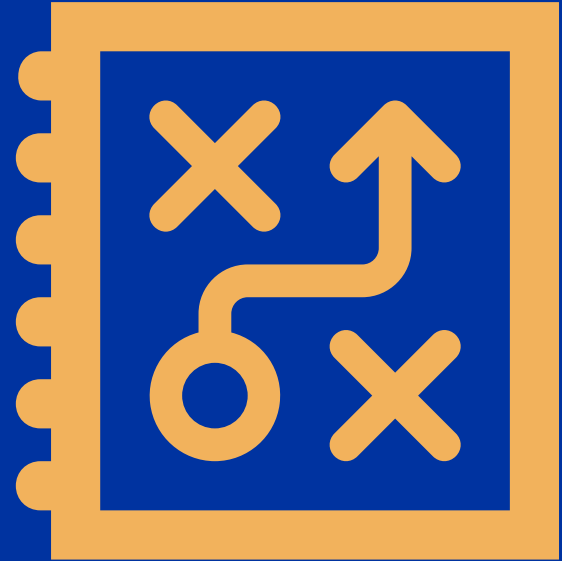
# What exactly has to be shared?

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

## Example

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



# Example



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

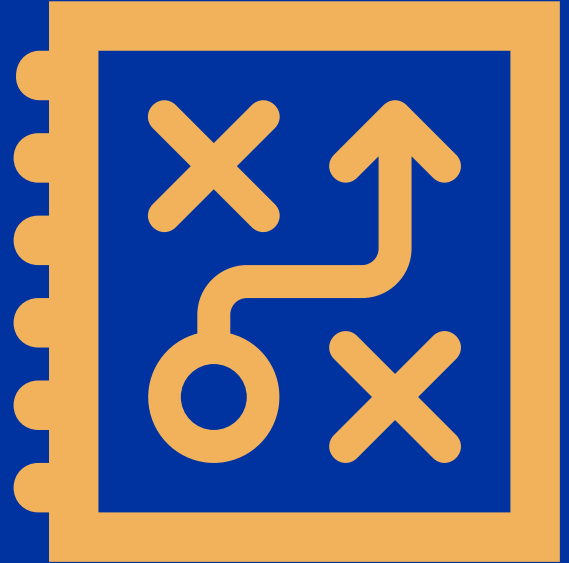
# Example: Permissible



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

# Example: Impermissible

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







# How should we make the evidence available to parties?

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



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

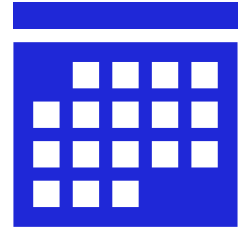
- It depends on whether the party's comments merit a response
- If no response is merited, the party's submission can simply be appended to the final report



# What is the last step in the investigation?

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





# Poll question

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Does the investigation report make findings?

- Yes
- No
- It depends



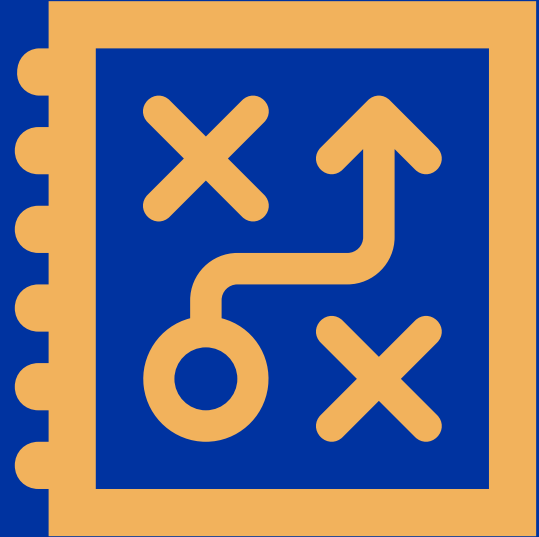
# Should our investigation report comment on credibility?

- If particularly notable credibility issues arise, report should identify the underlying facts
  - E.g., inconsistencies, relationships between parties and witnesses
- Commentary on credibility of every party and witness is unnecessary given they will testify live at hearing



# Example

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





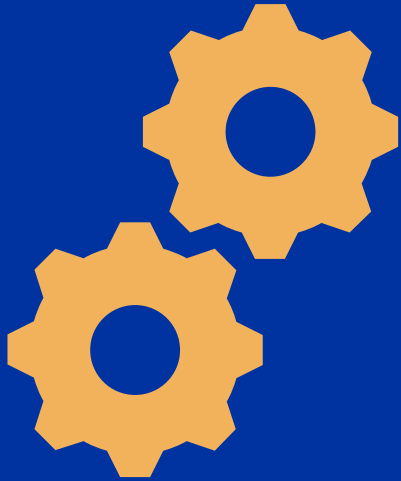
# Poll question

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Do the parties get to comment on the investigation report?

- Yes
- No
- It depends

## Group Scenario



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

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



# Questions



# Module 7: Hearings





# What is the purpose of the hearing?

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

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



# Balancing the parties' interests

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



# Live Hearing Requirement

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

# What happens before the hearing?

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



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



Hearing must be scheduled, and logistics arranged



Witnesses must be notified



Pre-hearing conference may be held



# What is the pre-hearing conference?

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



# What are other pre-hearing conference considerations?

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



# How do we schedule a hearing?

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



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



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

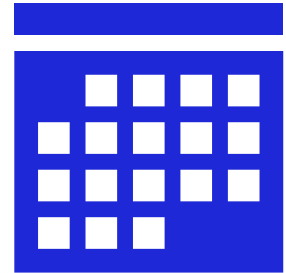


Provide documentation excusing parties and witnesses from other obligations, as necessary

# When should a pre-hearing conference be held?

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





# How do we notify parties and witnesses?

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





# What does the hearing notice say?

---

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

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

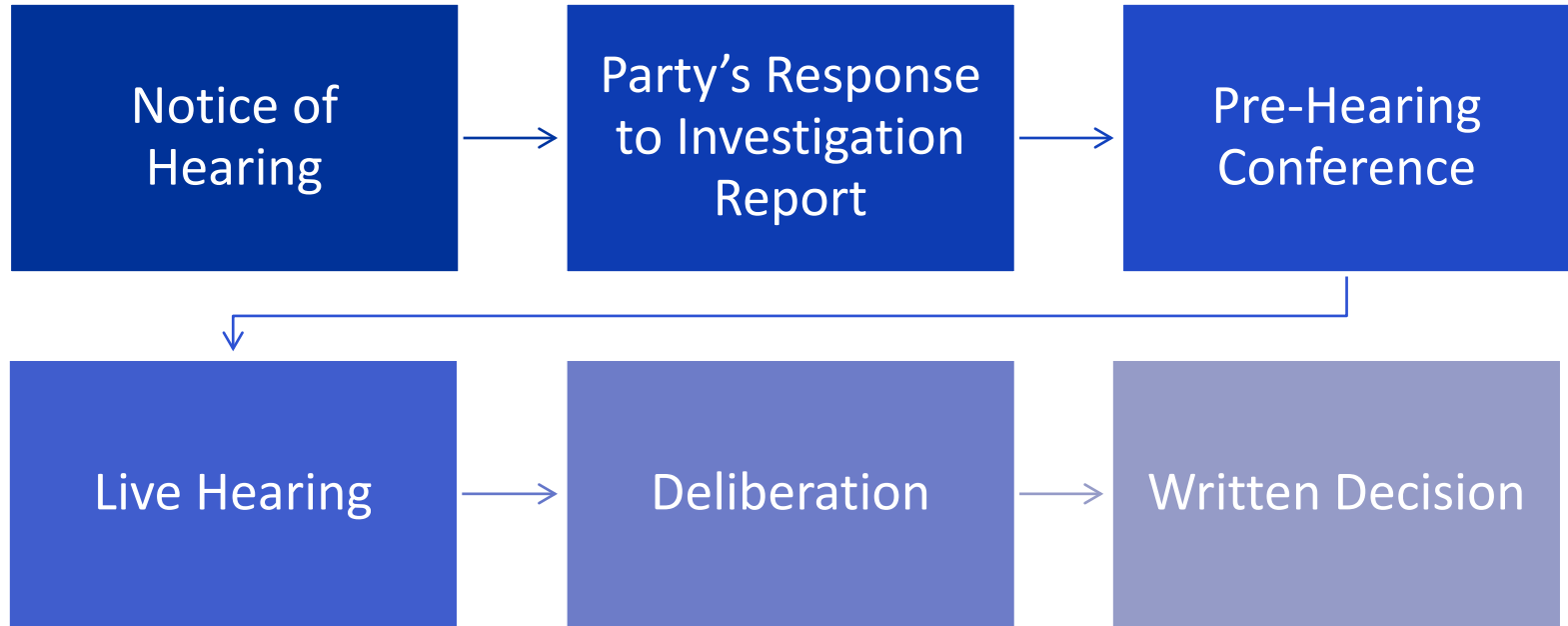
Support	Provide personal support to the party throughout
Preparation	Help the party prepare for pre-hearing conference and live hearing
Presence	Be present with the party during pre-hearing conference and live hearing
Questioning	Conduct live questioning of other party and witnesses at the live hearing



# Does the University provide a party's advisor?

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

# What are the phases of the hearing process?

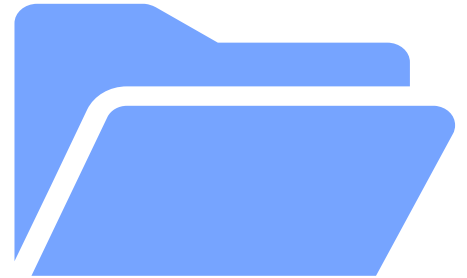




# How should we prepare for a hearing?

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







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

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- 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 ...”***



# Consider Other Potential Policies

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- Examples
  - Student code of conduct
  - Staff handbook
  - Faculty handbook
  - Specific policies related to inappropriate use of computers, hazing, etc.
- Ensure appropriate notice has been given if combining proceedings





# What is a “live” hearing?

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

# What is the Role of Adjudicators?

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





# Role of Advisors

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- Advisors are permitted to conduct direct and cross-examination during the hearing.

# Who attends a live hearing?

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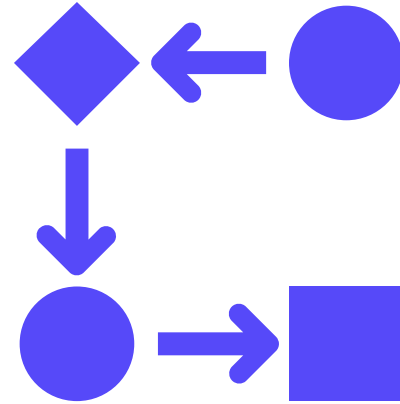
- The decision-maker(s)
- Other necessary institutional personnel or institutional advisors (e.g., attorneys)
- The parties
- Each party's advisor
- *Witnesses as they are called to testify*
- Other support persons for parties, if permitted by institution



# What are the logistics of a hearing?

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



# How does the hearing actually work?

Required elements include:

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

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

Testimony of party or witness who refuses to submit to live questioning from other party's advisor no longer automatically excluded

Questioning of sexual history generally not permitted



# Typical Hearing Elements

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Procedural / housekeeping remarks

Overview / summary of investigation report

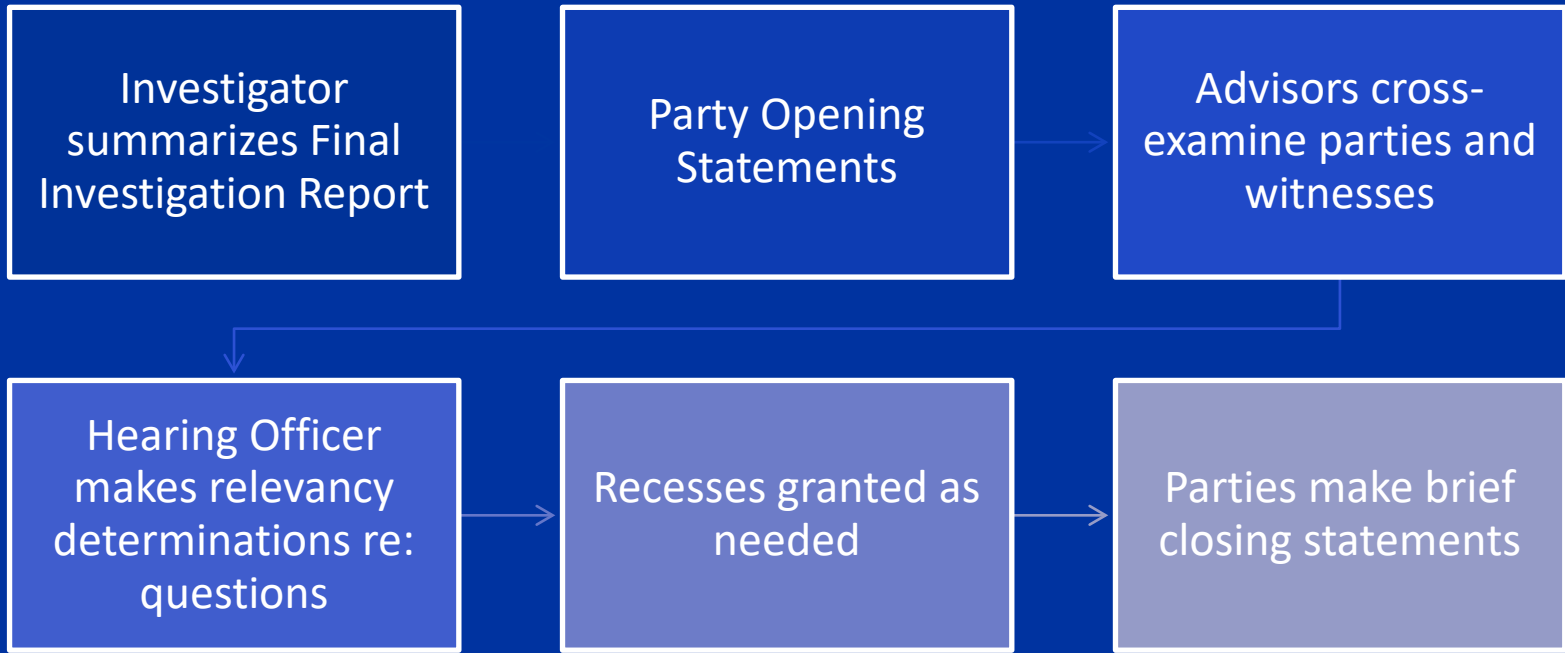
Party statements

Questioning / cross-examination of parties & witnesses

Deliberation



# UMD Policy – Hearing Sequence



# How might questioning of witnesses take place?

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

Followed by questioning of  
hearing officer/panel

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

# Hearing Curve Balls

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# Starting the Hearing: Setting the Tone

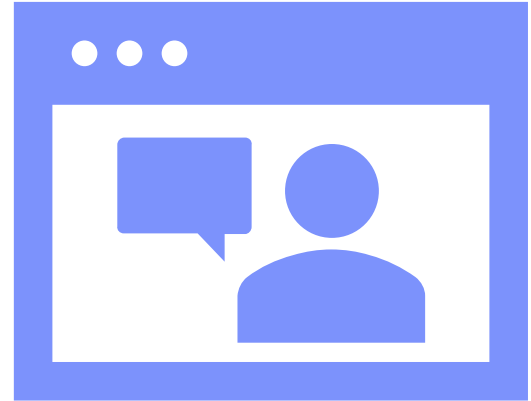
- Affirm notice
- Discuss purpose of hearing/goals: expectations of what hearing is for/not for
- Discuss role of hearing panel/administrator
- Explain ground rules
  - May set rules of decorum
- Address standard of evidence
- Welcome questions
- Take breaks as needed



# Separating the Parties

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- Video/ audio conferencing
- Separate rooms
- Screens





# How should we field curveballs?

When curve balls arise during a hearing,  
**ADDRESS THEM**

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



# The Art of Fielding

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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

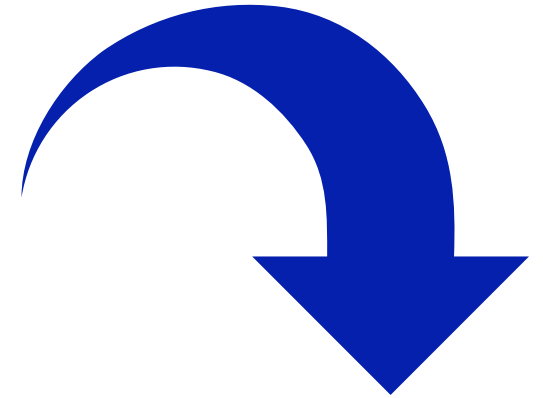


# And Fastballs!

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## 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





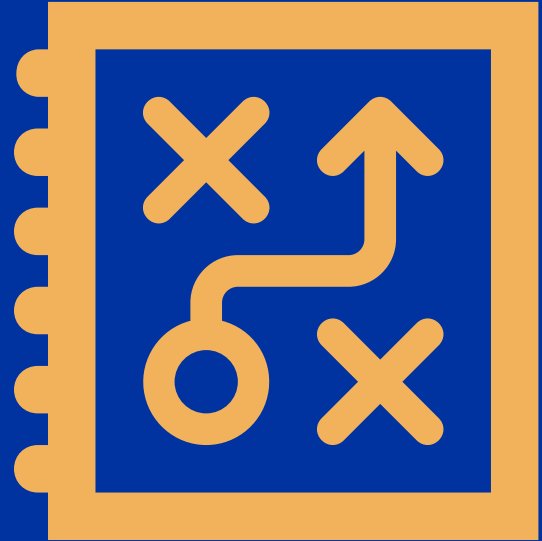
# More Curveballs: Advisors

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

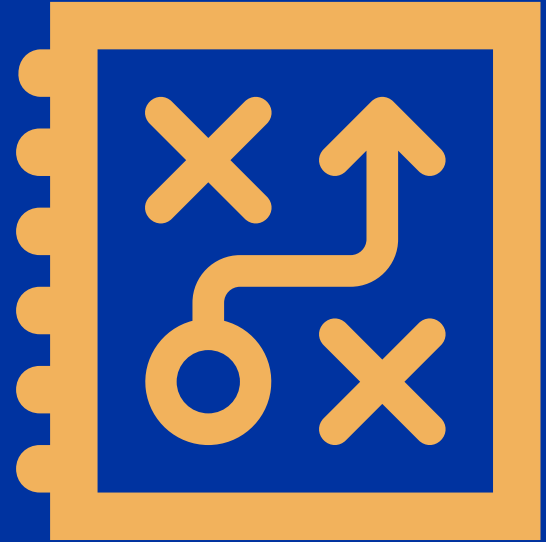
# Example: Permissible

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



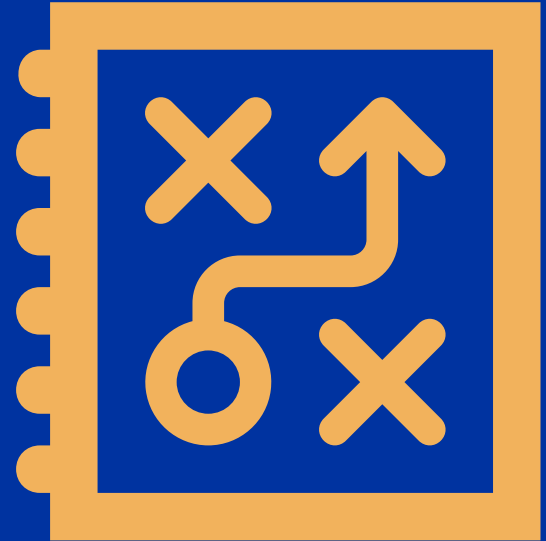
# Example: Impermissible

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



# Example: Impermissible

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





# Is an advisor allowed to question their own party?



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



# Should advisors act like lawyers?

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

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



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

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





# Advisors – What are some hallmarks of effective questioning?

Questions should be clear and precise

Questions should be asked in a purposeful order



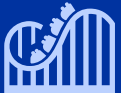
Questions should advance a party's position with respect to one or more elements of the sexual harassment alleged

Questions should be prioritized and edited for greatest effect

# What if evidence is presented at a hearing but not in the investigation?

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- ED, Q&A (updated June 2022):
  - Updates say: “34 C.F.R. § 106.45(b)(1)(ii) require ‘an objective evaluation of all relevant evidence.’”
  - But the following Q&A language remains: A school “may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing.”
    - Sample policy language still includes: granting lesser weight to last-minute information, discretion to exclude additional evidence not identified earlier



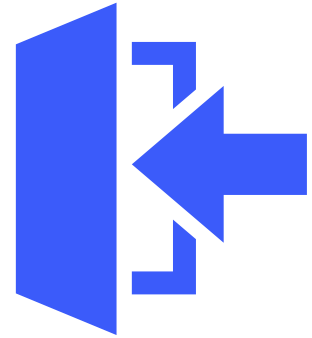
# **Evidentiary Considerations**

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# Who determines relevance?

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





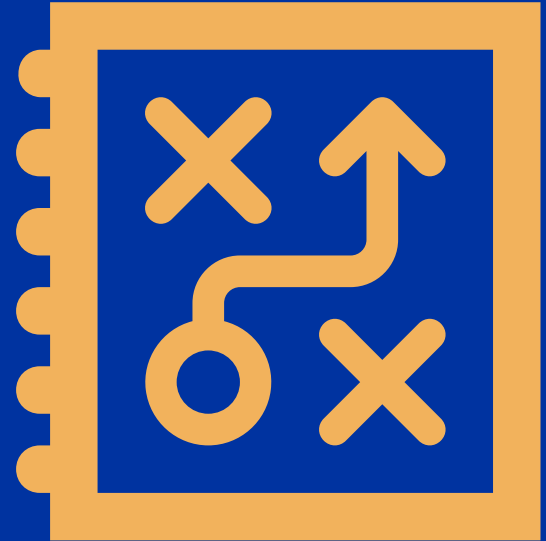
# What is relevance?

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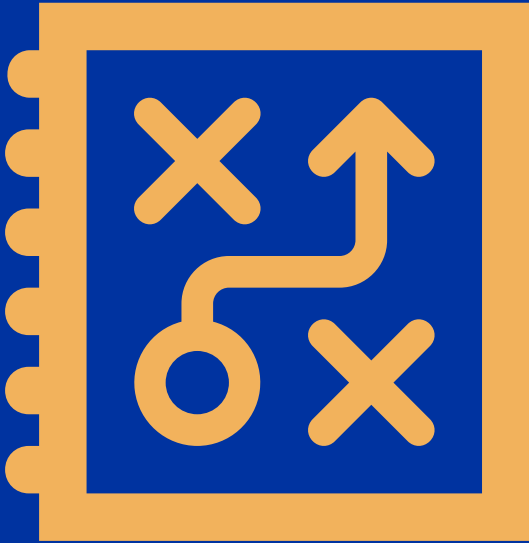
- Evidence is relevant if:
  - It has a tendency to make *a fact* more or less probable than it would be without the evidence; and
  - The *fact is of consequence* in determining the action
- Relevance must be determined considering the form of sexual harassment alleged

## Example: Relevant

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



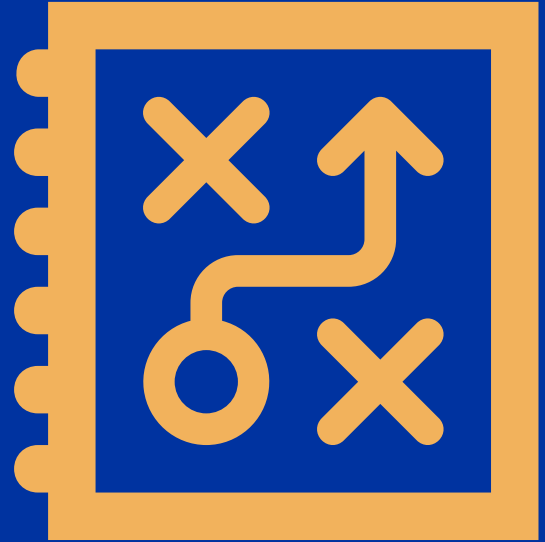
# Example: Relevant



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

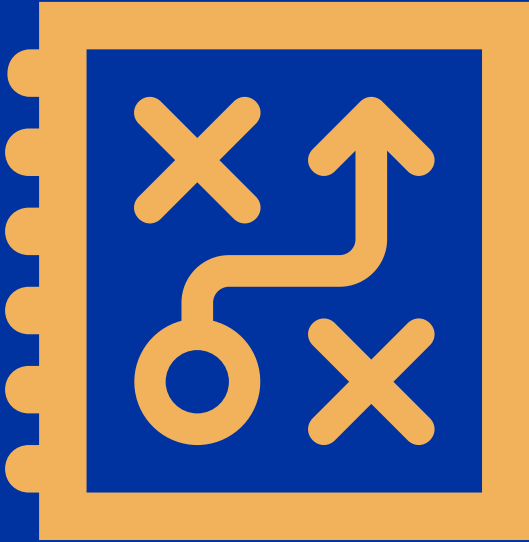
# Example for Discussion

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





# Example for Discussion



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

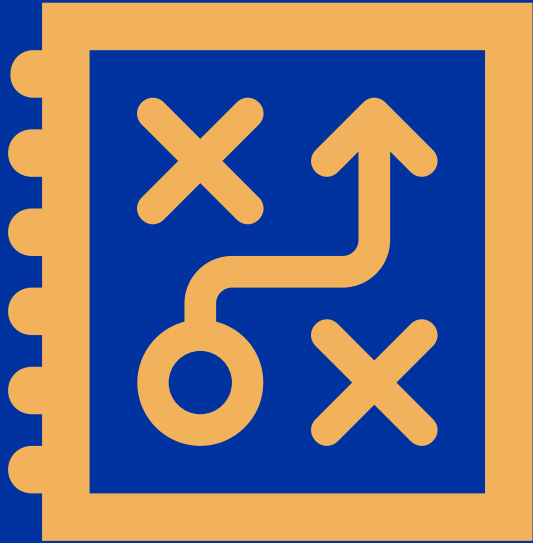


# Is sexual history considered?

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

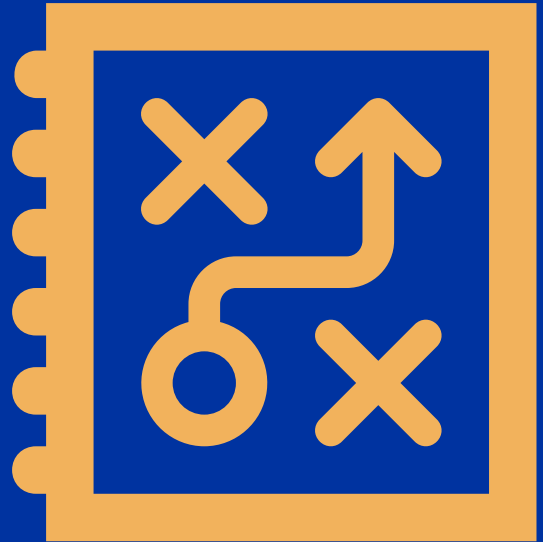
# Example: Impermissible



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

# Example for Discussion

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





## Poll Question

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

- Yes
- No



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

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





# Can a postsecondary institution keep its exclusionary rule?

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

# Updated OCR FAQ Guidance

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

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







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

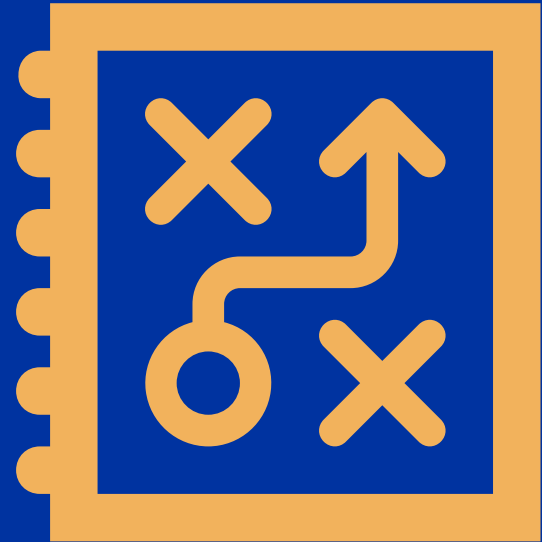
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- Yes
- If a party or witness submits to cross-examination but does not answer questions posed by the decision-maker, the decision-maker still may not draw any inference about the party's credibility based on the party's refusal to answer the questions

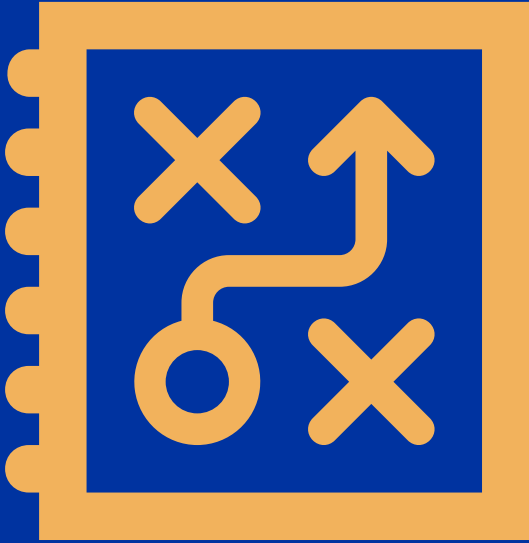
# Example: Not-excluded

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

Respondent does not appear at the hearing.



# Example: Not-excluded



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

# Assessing Credibility

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- Plausibility—Believable?
- Corroboration—Other evidence?
- Consistency
- Demeanor
- Motive to Falsify
- Contemporaneous
- First-hand knowledge
- Influence of others
- Bias (overt/unconscious)
- Behavior after the report





# What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative (tending to prove a proposition) than other evidence
- Weight may vary depending on a range of factors





# Weight - Considerations

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- Believability/probability/plausibility
- Apparently honest and sincere
- Consistent
- Unrefuted
- Corroboration
- Lacking motive/disinterested
- Expertise
- Level of detail
- Unbiased
- Direct vs. circumstantial
- Personal observation vs. general knowledge or hearsay



## Direct vs. Circumstantial (Direct)

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- 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 vs. Circumstantial (Circumstantial)



- Circumstantial (indirect) — Information 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”

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- 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
    - Court rules do not apply
  - Some hearsay is more reliable, e.g.,
    - Statement contemporaneous with the event in question
    - Excitable statement uttered in the moment being perceived
    - See other indicia of credibility

## Example – Weight

Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving.

Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring.

Witness testified he knows the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.



## Example – Weight

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



# Incapacitation & Weight/Credibility

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- Incapacitation alone ≠ unreliable or lack of credibility as to facts





# How do we assess “I don’t remember”?

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- True loss of memory may occur due to, e.g.:
  - Trauma
  - Drug/alcohol consumption
  - Lack of attention
- Balance
  - Memory loss alone does not equate to a lack of credibility
  - Possible to remember some information and not other information
  - Memory loss = an absence of information



# Expert Witnesses

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- 2022 proposed rule clarifies role of experts
- Role: Clarify, explain, and provide opinions on complex matters that an average person would not typically understand
- Not to opine on ultimate fact or policy issues

# Example – Experts

- Blood alcohol level for a typical person the size/weight of complainant after drinking four shots in four hours
  - Vs. whether complainant was incapacitated
- Whether respondent could have traveled from class to complainant’s apartment in order to be present at the time of a stalking incident alleged by complainant
  - Vs. whether respondent was stalking





# Some Common Questions by Hearing Panel

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- 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?



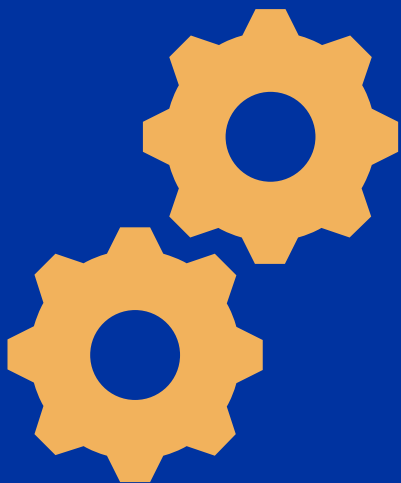


# Some (More) Common Questions by Hearing Panel

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

## Group Scenario



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

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



# Questions

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

# Module 8: Report Writing and Determination

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# Does the investigation report make findings?

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

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



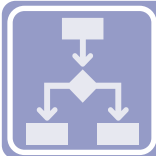
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



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

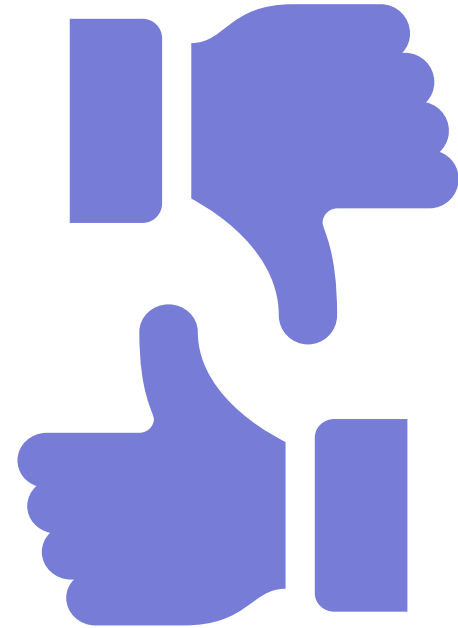


Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred

# What is a determination?

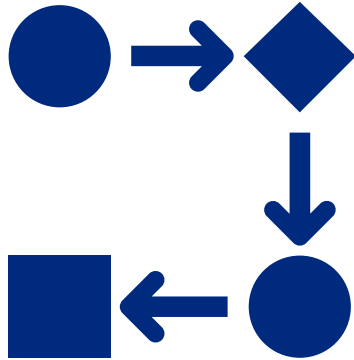
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- The decision as to whether or not prohibited misconduct occurred
- Results in a finding of “violation” or a finding of “no violation” as determined under standard of proof



# Purpose of a determination

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



# Critical Elements



- Preliminary case information
- History of the case
- Allegations
- Applicable policies/procedures
- Standard of proof
- Evidence gathered/considered
- Evidence/Facts
  - Investigation:
    - Inculpatory and exculpatory evidence
    - Agreed upon and disputed material facts
  - Decision-maker (appeal): Factual findings
- Decision-maker (appeal):
  - Analysis and conclusion regarding responsibility
  - Sanctions
  - Procedures/grounds for appeal

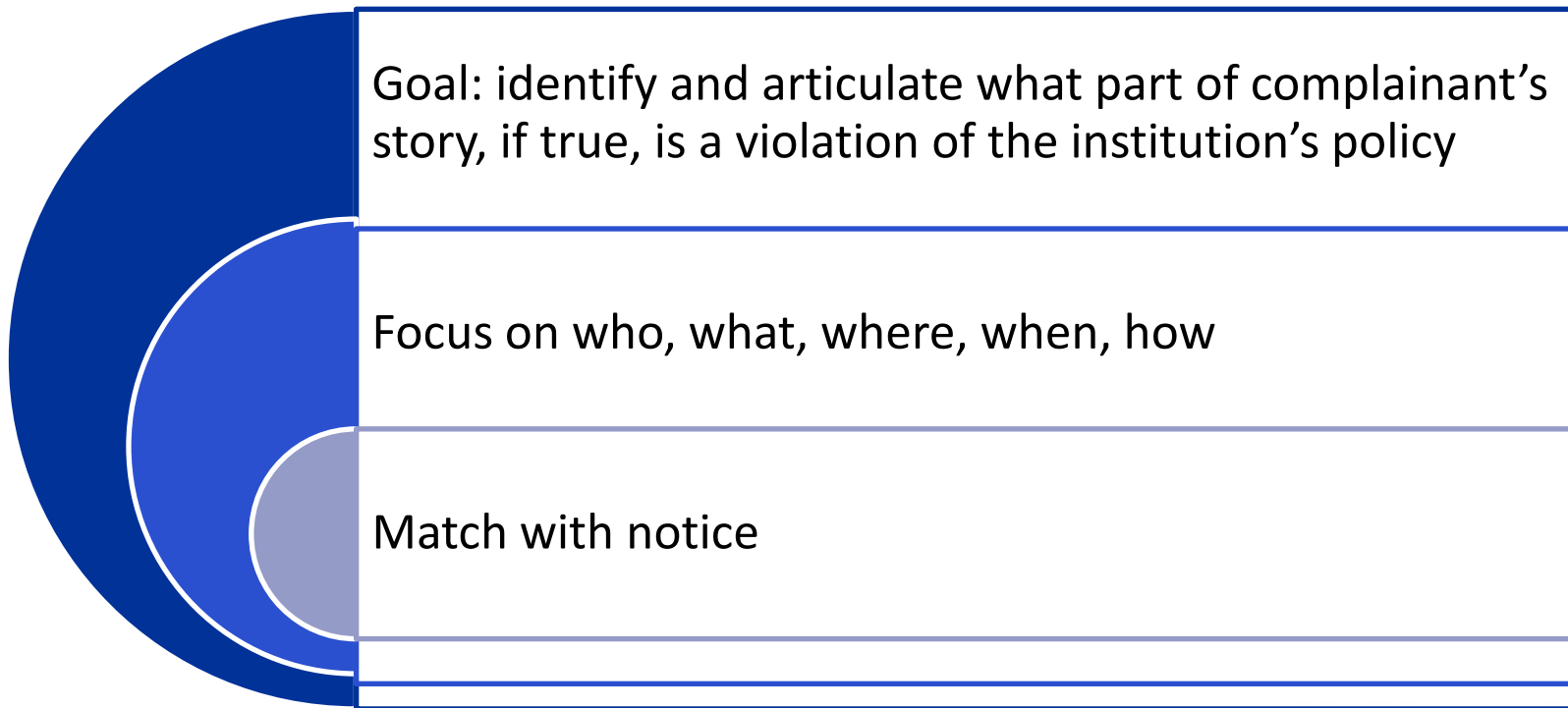
# Preliminary Case Information

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



# Summarizing Allegations



# Applicable Policies & Procedures

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Reference Title IX sexual harassment policy and procedures, including specific language which is pertinent to the allegation

- E.g., include relevant definitions

Attach full copy of Title IX sexual misconduct policy and procedures to report

## History of the Case



How did the institution respond to the report?

- E.g., rights and options provided, notices provided



When, how, and where were parties and witnesses interviewed?



Provide status

- E.g., parties given access to evidence, opportunity to comment, report, applicable timeline dates



Explain any apparently unreasonable delays



# Preponderance as to what?

---

Carefully consider elements of alleged violation

What needs to be shown to establish a violation?

# Facts

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## Facts that matter

- Consider elements of alleged policy violation
- Which facts are relevant to each element?
- Which are disputed and undisputed?

## Goals

- Investigators: identifying disputed/undisputed material facts
- Decision-makers: reaching resolution of disputed material facts

## How to do this?

- Show your work
- Decision-makers: Explain your credibility assessments



# Should our investigation report comment on credibility?

- If particularly notable credibility issues arise, report should identify the underlying facts that may go to a credibility analysis
  - E.g., inconsistencies, relationships between parties and witnesses
- Commentary on credibility of every party and witness is unnecessary given they will testify live at hearing







# Assessment of Credibility

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- Describe your reasoning
- Factors (among others)
  - Plausibility—Is the testimony believable and does it make sense?
  - Specificity
  - Motive to Falsify—Does the person have a reason to lie?
  - Corroboration/consistency/contrary evidence—Is there testimony or evidence that corroborates the witness account? Are the witness accounts consistent? Are inconsistencies explained? Is there evidence disputing the witness account?
  - Past Record—Does the person have a history of similar behavior?

# Example

Writing about  
credibility points –  
Investigative reports

- “Respondent was not reliable when recounting what happened.”

vs.

- “Though Respondent initially said that Respondent could not remember what happened in Complainant room, Respondent later reported recalling X.

Respondent told the Dean that Complainant actively pursued a relationship with Respondent after the night in question through text messages.

Complainant provided a text message string with Respondent in which Respondent asked Complainant to meet Respondent at the library, join Respondent at a restaurant, and come to Respondent’s room on three different occasions; in each instance, Complainant’s text messages to Respondent decline the invitations. (See Exhibit A.) Complainant denied deleting any portion of the text messages from the string, and the Investigator observed them on Complainant’s phone, showing Respondent’s phone number.”



# Example

Writing about  
credibility points –  
Determinations



- “The Hearing Officer find that Witness is not credible.”
- vs.
- “Witness reported arriving at the office at 7 a.m. every morning and never observing Respondent speaking to Complainant before the 9 a.m. office meeting. However, key card records show that Witness did not arrive at the office until 9 a.m. on 23 occasions between March and June, and that, on 18 of those occasions, Complainant and Respondent had both entered the office. Complainant reported that Respondent often harassed Complainant early in the morning, when no one else was present. As such, there were multiple occasions on which Witness was not present to observe whether the parties were not interacting.”



# Important Language Considerations

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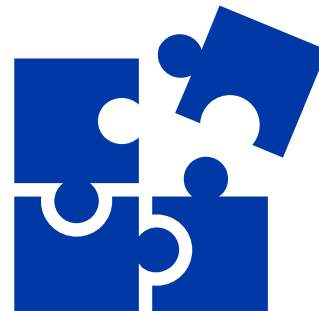
- Use objective terms
  - “Complainant” and “respondent” rather than “victim” and “perpetrator”
  - Reference potential “violation of policy” not “guilt” or violation of “law”
  - Keep in mind that decision-makers will generally assess credibility of **facts**, not **witnesses** as a whole, but-for specific circumstances
- Do not include speculation
- Do not include irrelevant points and discussion
- Be thoughtful about pronouns
- Avoid vague phrasing like “had sex”



# Analysis & Conclusion

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- Put everything together
- As to each allegation
  - Investigator: List disputed/undisputed material facts
  - Decision-maker: Analyze whether a violation of *policy* occurred (not the law)
- Explain your reasoning
- Include the good/bad/ugly
  - E.g., explain decisions about conflicting information (E.g., “As discussed above, there is some evidence suggesting that [X], but the preponderance of the evidence supports a finding [of the opposite of X]”)
- Address sanctions/remediation



# Example

Be specific



- “Complainant alleges that Respondent had sex with Complainant without consent.”

vs.

- “Complainant alleges that Respondent laid on top of Complainant, pulled Complainant’s underwear down with one hand, while pinning Complainant’s arms with Respondent’s other arm, penetrated Complainant’s vagina with a vibrator, while pushing Complainant against the wall next to the bed so Complainant could not move.”

# Example

Be specific



- “Evidence includes a recording of Pat and Dre in which Pat was drunk”

vs.

- “Pat provided a recording of a discussion between Pat and Dre that Pat reported recording at the Bar. In the recording, Pat states loudly, ‘I’m so wasted;’ in the remainder of the two-minute recording, though individual words can be heard, Pat’s speech is unintelligible. Pat stated this was slurring due to intoxication. Dre agreed the recording was of Pat and Dre.”

# Example

Be specific



- “Complainant is credible.”

vs.

- “At the hearing, Respondent emphasized that Complainant sent a text saying, ‘Yeah, tonight was good,’ within an hour of the alleged sexual assault. On its face, the text could be construed as inconsistent with Complainant’s report that the sexual activity that occurred the hour before the text was not consensual.

However, Complainant said that, after Respondent drove Complainant home, Complainant was in shock and sent the text in response to Respondent so Respondent would not come searching for Complainant. Complainant explained engaging in the sexual activity despite it being unwelcome by saying Complainant feared for Complainant’s safety. Complainant reported that Respondent had slapped Complainant, creating a red mark, after Complainant refused to kiss Respondent; Complainant said this occurred about 30 minutes before the sexual activity .... Other than the text message, Complainant’s account is consistent with Complainant’s prior statements and the witness account about overhearing the early stages of the fight over the phone. It is also plausible that one who had just experienced sexual assault would send a text to appease one’s assailant.

In contrast, Respondent’s statements have changed repeatedly since the Complaint...

As such, the Hearing Officer finds Complainant’s account more credible than Respondent’s as to what occurred before the sexual activity.”





# Who determines discipline and remediation?

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



# Documenting Sanctions: Rules of Thumb

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- Should generally address the following factors, where applicable:
  - Impact statement of complainant and respondent, if any
  - Acknowledgment of wrongdoing or impact of conduct by respondent
  - Alignment of sanction to institution's disciplinary philosophy
  - Duration, exceptions, and how unforeseeable questions or circumstances will be resolved
  - Potential ongoing safety risk to community (or not)
  - Any continuation of no-contact directive, and duration and parameters of that directive



# What issues can arise in sanctioning?

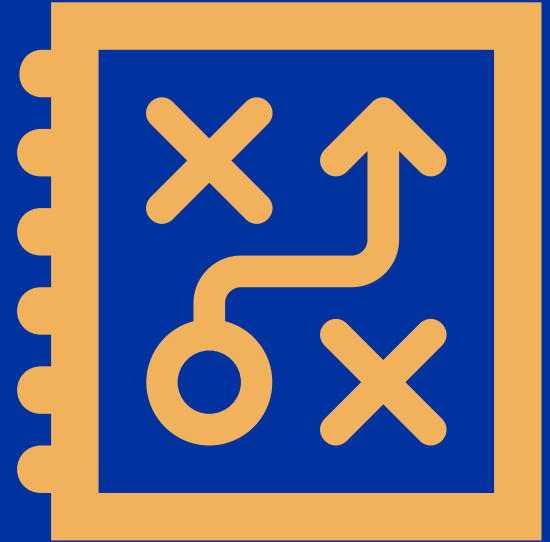
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Common problems:

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

# Example: Sanction Detail

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



# Example: Sanction detail



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

# What are aggravating and mitigating factors?

## Common factors:

- Egregiousness of misconduct (e.g., act of violence, use of a weapon, use of drug)
- State of mind of respondent (bias-motivated, reckless or negligent)
- 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



# Words Matter – Language Considerations

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- 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
  - Address unknown information as needed
  - Consider whether further investigation is needed
- Do not include irrelevant points and discussion
- Be thoughtful about pronouns
- Avoid vague phrasing like “had sex”



# Common “Mistakes” in Report-Writing

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- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- General lack of clarity/coherence
- Including too much information about irrelevant details
- Insufficient information on important issues
- Decision-making
  - Speculation
  - Conclusory determinations and credibility findings
  - Not clearly or adequately explaining basis for decision
  - Not clearly articulating whether/not the preponderance of the evidence establishes that it is more likely than not that the alleged misconduct occurred



# Questions



# Module 9: Appeals



# What is the purpose of the appeal?

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





# Appeal Rights

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- Either Party may appeal the Written Notice of Designation or Written Notice of Determination.
- The bases for appeal are limited to:
  - Procedural irregularity
  - New evidence
  - Conflict of interest
  - Substantially disproportionate sanction (*applicable ONLY to Written Notice of Determination*)

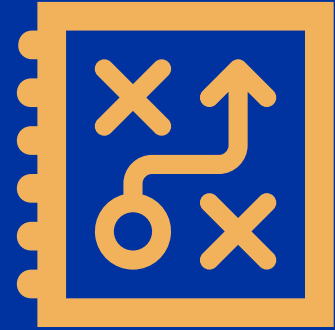
# Procedural Irregularity

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



# For Discussion (Poll)

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





# Poll Question

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Is this a procedural error?

- Yes
- No

# New Evidence

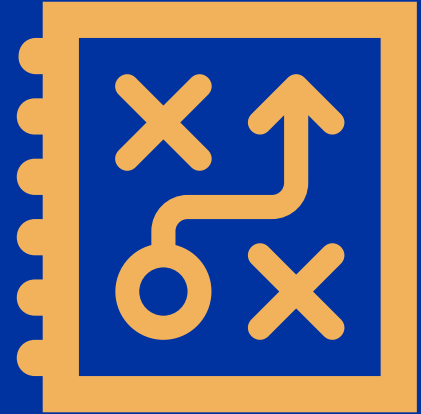
- Evidence that ***was not reasonably available*** at the time the designation or written determination was made, ***that could affect the outcome.***
- Evidence presented prior to the time the designation or written determination is issued **does not qualify** as new evidence that was not reasonably available





# For Discussion (Poll)

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





# Poll Question

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Does this constitute new evidence for purposes of an appeal?

- Yes
- No



# Conflict of Interest

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- The Title IX Officer or designee, Investigator, or Hearing Officer had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the designation or written determination.
- Claims of conflict of interest or bias should be based on the current case and process in question and will be assessed accordingly.



# Substantially Disproportionate Sanction

*UMD Updated Policy*

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



# Appeals Procedures

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Appeals will be in writing only

There will be no hearing

The appeal deliberation is closed to the parties

Written decision will include rationale and be issued within 5 days of deliberations

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



# Conclusion of adjudication

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

# Key concepts

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



# Questions



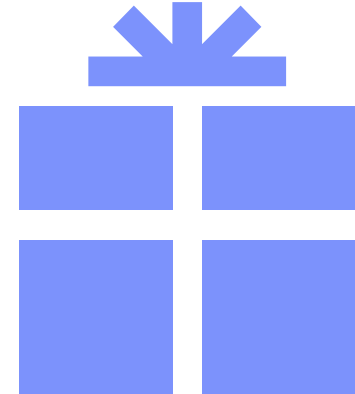




# Wrap Up

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- Follow policies
- Ensure fairness
- Document
- Seek assistance when needed



**HUSCH**  
**BLACKWELL**