

HUSCH BLACKWELL

# Title IX UMD Institutional Advisor Training

March 4, 2024

Presenter



**Elizabeth Samples**

**Husch Blackwell**

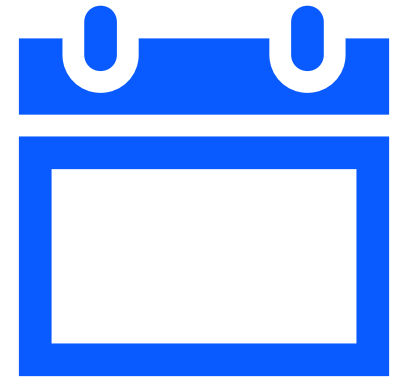
816.983.8271

[elizabeth.samples@huschblackwell.com](mailto:elizabeth.samples@huschblackwell.com)

**HUSCHBLACKWELL**

# Agenda

- Title IX Scope, Jurisdiction, and Prohibited Conduct
- Institutional Response to Sexual Harassment
- The Investigation Process
- The Hearing Process and Questioning
- Confidentiality and Other Expectations



## Definition of Advisor

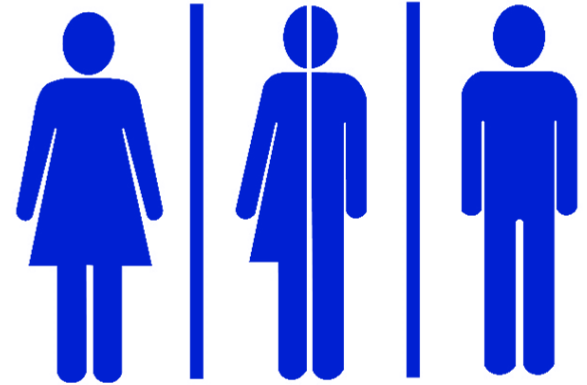
- “**Advisor**” means a person chosen by a Party to provide advice and consultation to that Party, in accordance with this Policy and Procedures.
- An Advisor may be an attorney or another individual. A Party’s Advisor also conducts cross-examination on behalf of that Party at a Hearing, if applicable, in accordance with this Policy and Procedures. An Advisor shall not be an active participant or speak on behalf of a Party except for the purpose of providing cross-examination at a Hearing.
- If a Party does not have an Advisor, the University will provide without fee or charge to that Party, an Advisor of the University’s choice, to conduct cross-examination on behalf of that Party; an Advisor appointed by the University acts in a confidential capacity on behalf of the Party and is not otherwise involved in the proceedings.

# Title IX Scope, Jurisdiction, and Prohibited Conduct

# What is Title IX?

“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

34 C.F.R. § 106.31



# Sex Discrimination: two main types

**Adverse treatment** involves adverse action that is motivated by the target's sex and that directly limits or excludes the target from participation in education program or activities

- Usually by someone in a supervisory or authoritative position

- **Sexual harassment** involves
  - Unwelcome conduct that is
  - Either sexual in nature or sex based and
  - Quid pro quo; hostile environment; sexual assault; or domestic violence, dating violence, stalking
- Sexual harassment is currently subject to more elaborate regulations governing investigation and determination

# What sexual harassment does Title IX apply to?

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





# What are examples of education programs and activities?

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on campus

Sports teams

Work-study

Games, concerts, and speeches on-campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus

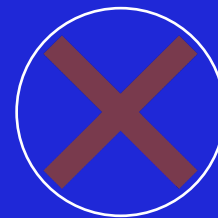
# Does Title IX apply to off-campus sexual harassment?



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



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



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

# Example (included in EP&A)

One student sends vulgar chat messages and sexual imagery to another student in a class conducted via Zoom.

**The tennis team travels to a different school for a tournament and stays overnight at a hotel. At the hotel where the team is staying, the coach sexually harasses the team's manager.**

**Example  
(included  
in EP&A)**

## **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



# Pending Regulations Update

- 2020 Amendments are legally binding
- 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
- Reportedly over 200,000 comments
- Final regulations forthcoming



# UMD Policy - Purpose

***UMD Updated Policy;***

***VI-1.60; also, VI-1.60(A)(II)***

## **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

*UMD Updated Policy*

- 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”)

*UMD Updated Policy*

- 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;

## Reach of Policy (“Jurisdiction”) *cont...*

- 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”)

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

**Preponderance of the evidence**

**=**

**“more likely than not”**

# What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro  
quo  
harass-  
ment

Hostile  
environment  
harassment

Sexual  
assault

Dating  
violence

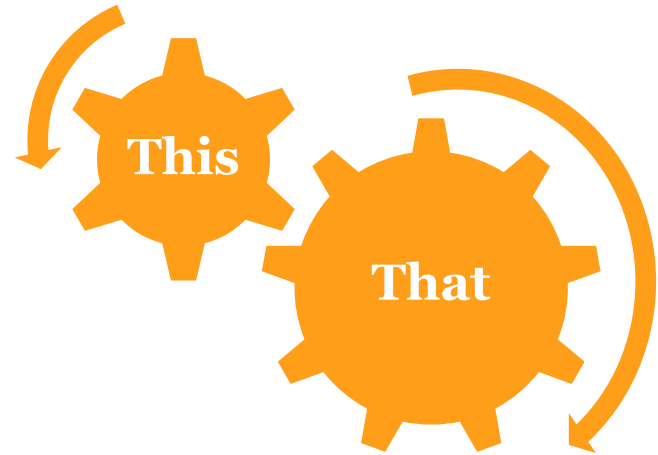
Domestic  
violence

Stalking

# What is quid pro quo?

An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct

- Often arises in the employment context or where an employee holds a position of authority over a student



# Example of quid pro quo

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



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

**Another  
example  
of quid  
pro quo**

# What is hostile environment?

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



# How do we determine if a hostile environment exists?

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

# Example of hostile environment

Employee A repeatedly propositions Employee B despite Employee B repeatedly saying “no.” Employee A also repeatedly comments on Employee B’s physique, tells unwelcome sexual jokes to Employee B, and rubs Employee B’s shoulders.

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

**Another  
example of  
hostile  
environment**

# Does the First Amendment matter?

While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment

The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment



# What is sexual assault?

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

Rape  
(including  
statutory rape)

Sodomy

Sexual assault  
with an object

Fondling

Incest

# What is rape?

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



# What is consent?

- Words or actions that a reasonable person in the perspective of the respondent would understand as agreement to engage in the sexual conduct at issue
- Mere passivity is not sufficient to establish consent
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent

# What is incapacity?

Incapacity refers to a state where a person cannot make an informed and rational decision to engage in sexual contact because the individual lacks conscious knowledge of the “who, what, where, when why or how” of the situation or is physically or mentally helpless.

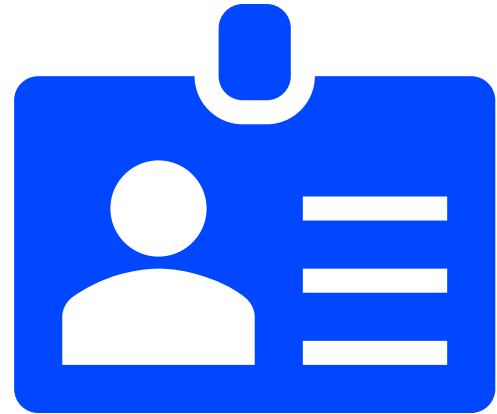


# Incapacity – Common Factors

<b>Physical coordination</b>	<b>Ability to understand</b>	<b>Other</b>	<b>Respondent's reasonable knowledge of capacity</b>
<ul style="list-style-type: none"><li>• Walking, dancing, running, maneuvering (e.g., stairs)</li><li>• Speech</li><li>• Dexterity (phone/computer usage, using keys/key cards)</li><li>• Dressing / undressing</li></ul>	<ul style="list-style-type: none"><li>• Topics of conversation</li><li>• What was said and tracking conversation</li><li>• Knowing the who/when/where of the situation</li><li>• Understanding what is happening generally and with regard to the conduct at issue</li></ul>	<ul style="list-style-type: none"><li>• Quantity consumed (not determinative)</li><li>• Vomiting</li><li>• Passing out/blacking out</li><li>• Sleep</li><li>• Disability/age</li></ul>	<ul style="list-style-type: none"><li>• What was respondent able to observe with respect to the above</li><li>• What should respondent have known based on the above</li></ul>

# What is statutory rape?

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



# What is sodomy?

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

# What is sexual assault with an object?

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

# What is fondling?

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

# Example of fondling

**Student A and Student B attend a dance held in the student union. While on the dance floor, Student A gropes Student B's groin without Student B's permission. Student B views it as unwelcome.**



# What is incest?

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

# What is domestic violence?

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

# What is dating violence?

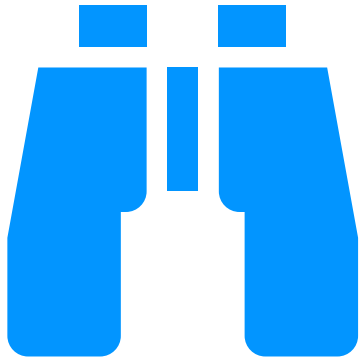
“Dating Violence” is violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship will be determined based on consideration of the following factors:
  - The length of the relationship;
  - The type of relationship; and
  - The frequency of interaction between the persons involved in the relationship.

**Employee A and Employee B are engaged to be married but live separately and have no children in common. Employee A and Employee B get into an argument in Employee A's car in the university's parking lot. During the argument, Employee A slaps Employee's B's face and tells Employee B to "shut your mouth."**

**Example  
of dating  
violence**

# What is stalking?



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

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

## Example of stalking

**Student A is infatuated with Student B, who has rebuffed Student A's romantic advances. Thereafter, Student A dresses in black and sneaks up to the window of Student B's Greek house at night in an attempt to see Student B. Student A does this twice before being caught in the act during Student A's third attempt.**

# Does Title IX also prohibit retaliation?

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

**Employee A testifies at hearing in support of Employee B's complaint of sexual harassment against manager. After institution finds that manager sexually harassed Employee B, manager demotes Employee A to punish Employee A for testifying against manager.**

**Example of retaliation**



# Questions



# Institutional Response to Sexual Harassment

HUSCH BLACKWELL

# What do we call the parties in a grievance process?

- **Complainant:** The alleged victim of the sexual harassment alleged in the formal complaint
- **Respondent:** The person who is alleged to have perpetrated the sexual harassment alleged in the formal complaint

# What are the institution's overall duties?



# Title IX Coordinator

**Angela Nastase, JD**

**Title IX Coordinator and Director**

**Office of Civil Rights and Sexual Misconduct (OCRSM)**

University of Maryland, College Park

3101 Susquehanna Hall

4200 Lehigh Rd.

College Park, MD 20742

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

Phone: 301.405.1701

# How does an institution receive notice of sexual harassment?

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

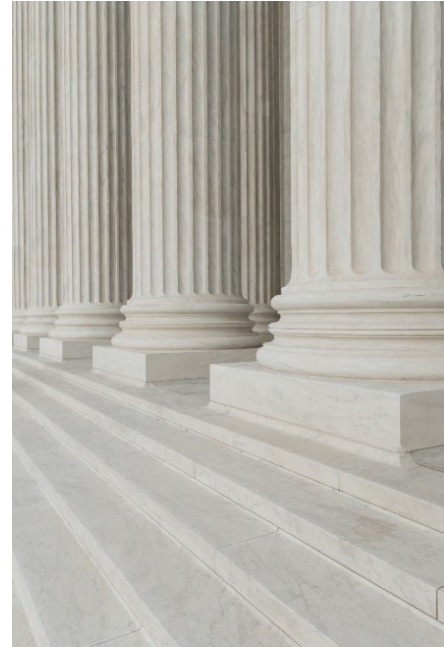


# What is “actual knowledge”?

- “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

## *Sherman v. The Regents of Univ. of Cal.* (N.D. Cal. 2022)

- Former graduate student plaintiffs emailed to the dean about professor respondent's conduct.
- Four months passed between email and U.C. Santa Cruz placing him on leave pending an investigation.
- Court allowed claim of Title IX deliberate indifference to proceed.

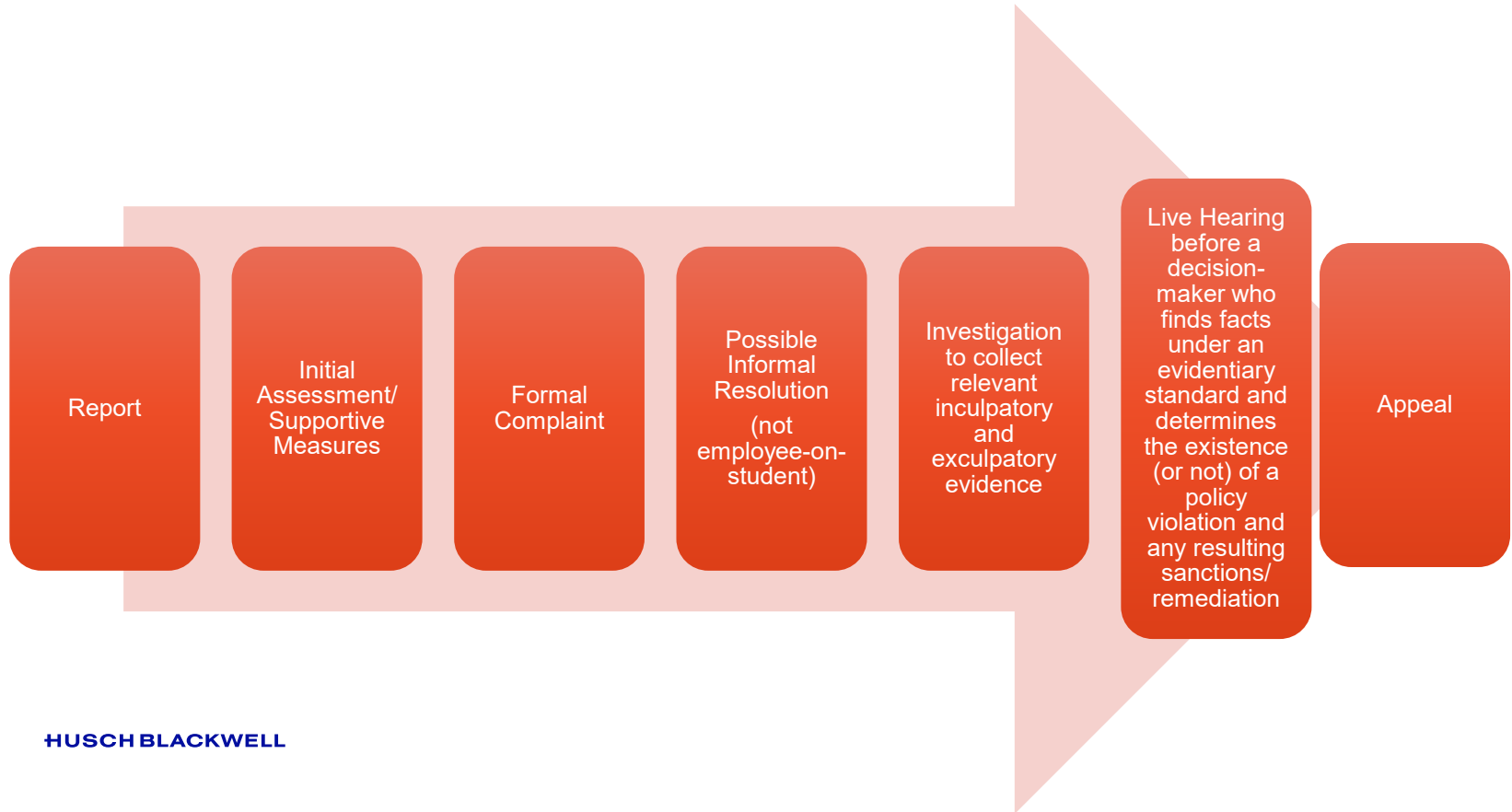




# What are the key steps in the formal grievance process?



# What is the resolution process?



# How does a decision-maker reach a conclusion?



After gathering all the evidence, the decision-maker should consider all the relevant testimony and 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 a policy violation occurred

# What principles do we use to determine remediation?

## If a violation is found,

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

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

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

# Discussion Question

## Why is it important to follow University policies and procedures in investigations?

- High litigation risk if University policies and procedures are not followed.
- Increased probability of OCR/EEOC complaints if University policies and procedures are not followed.
- Damage institutional trust and confidence in fairness of process and proceedings.
- Building institutional culture of compliance.
- Other.



# Importance of Policy

- Reminder: follow institutional policies
- Risks with deviations from institutional policy and procedures, include but are not limited to the following:
  - Increased litigation risk
  - Increased probability of OCR/EEOC complaints/investigations
  - Damage to institutional trust and confidence in fairness of process and proceedings
  - Negative media attention

# What general principles govern the grievance process?

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

# Examples of impermissible stereotypes

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

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

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

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



# What is a conflict of interest?

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

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

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

# What is a conflict of interest?

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

Entrepreneurship Student files a formal complaint of sexual harassment against Finance Student. One of the investigators is Finance Student's academic advisor who has previously written letters of recommendation for Finance Student in which the success coach wrote that Finance Student is "honest to a fault."

## **Example of conflict of interest**

# Example of conflict of interest

Employee A accuses an employee of a food service vendor of sexual harassment. Institution assigns an investigator whose spouse is employed as a manager for the food service vendor and who directly supervises the accused employee.

## Example of bias

**Institutional employee chosen to serve on a hearing panel 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."**

# How long does a grievance process take?

There is no firm deadline, and the length of the grievance process varies depending on a variety of factors

Institution must be reasonably prompt, advise parties of timelines for particular phases of the process, and notify parties of extensions of timelines and the reasons for the same

# What do we do if we find sexual harassment occurred?

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



# Do parties get assistance in the grievance process?

- Yes
- The parties have the right to be accompanied by an advisor of their choice during the investigation and hearing
- The institution must provide the party an advisor for purposes of conducting questioning at the hearing if the party does not have an advisor

# Are the parties entitled to supportive measures?

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

# Examples of supportive measures

**Counseling**

**Academic accommodations**

**Housing accommodations**

**Security escorts**

**Leave of absence**

**Increased security or monitoring**

**Modified work schedules**

**Mutual no-contact order where implicated by facts**

# **Example of reasonable supportive measure**

**Grad Student reports that Undergrad Student sexually harassed Grad by repeatedly propositioning Grad until Grad's brother intervened. Both students would like to receive counseling during the grievance process.**

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

**Example of reasonable supportive measure**

# Example of reasonable supportive measure

Graduate student reports that supervising faculty member has propositioned the graduate student for sex, multiple times. Graduate student wants assistance finding a different supervising faculty member. The department is large and has several faculty members with the competence to oversee graduate student.

**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.**

**Example of unreasonable supportive measure**

# Can supportive measures affect the respondent?

**Yes, but cannot create an unreasonable burden**



**Cannot be a form of *de facto* discipline**



**Supportive measures are not a substitute for the investigation and hearing process**



# **Example of unreasonable burden**

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

**Complainant accuses Respondent of sexual harassment. Complainant and Respondent are in the same MBA concentration. Complainant requests that Respondent be removed from all three of the classes Complainant and Respondent currently share and be prohibited from being on campus after 5:00 pm.**

**Example of disciplinary supportive measure**

## **Example of disciplinary supportive measure**

**Sophomore accuses Freshman of sexual harassment. Sophomore requests as a support measure that Freshman be prohibited from having any contact with, or being in proximity to, Sophomore for the duration of Sophomore's time at the College.**

# Can an institution immediately suspend a student?

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

# Do students and employees have other rights?

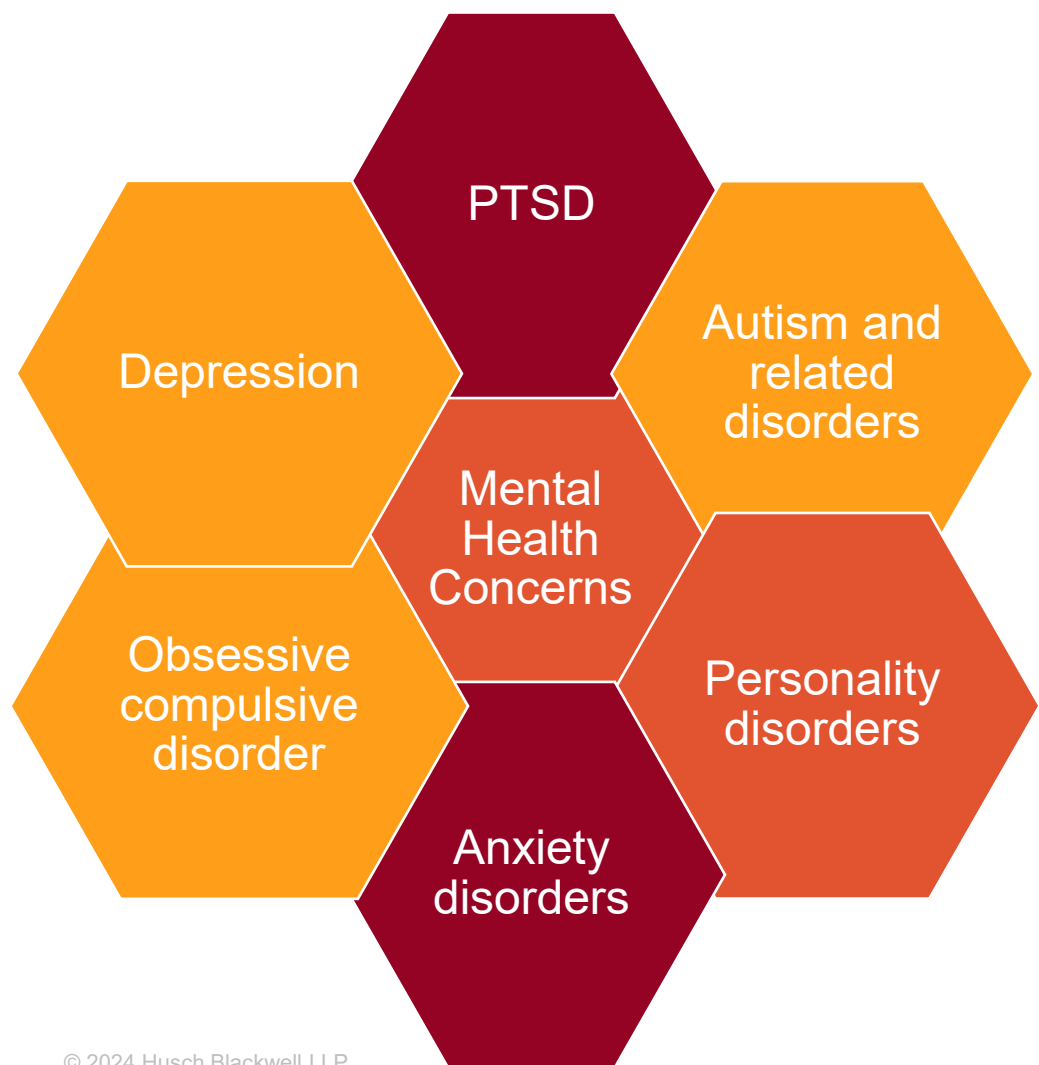
- Yes—other laws may trigger accommodations when a medical condition or disability is present
  - Americans with Disabilities Act
  - Family and Medical Leave Act
  - Section 504 of the Rehabilitation Act



# Does a “disability” include mental health conditions?

- Yes
- A physical or mental impairment that substantially limits one or more major life activities
- A record of having an impairment that is substantially limiting to a major life activity; or
- Being regarded as having an impairment that is substantially limiting to a major life activity

What are some examples?



# What are reasonable accommodations?

- Depends on the nature of the disability, how the disability limits the person, and the fundamental requirements of the program/activity at issue
- Common accommodations include: extension of deadlines; more time for work and tests; time for medical appointments; recorded lectures; note takers



# Trauma might affect any party or participant

- Not in every case
- Not just one party
  - Complainant
  - Respondent
  - Witnesses
  - Support persons
- Never assume anyone interviewed or questioned suffered any trauma

# Possible trauma impact

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



Flashbacks

Inability to concentrate

Non-linear recollection

Delayed recollection

Self-blame

# Trauma & credibility

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

# What is informal resolution?

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



# Types of informal resolution

**Mediation**

**Facilitated  
discussions led  
by Title IX  
Coordinator**

**Restorative  
justice**

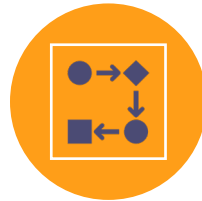
**Attorneys for  
parties negotiate  
an agreement**

**Arbitration  
without a live  
hearing**

# What are the key concepts of informal resolution?



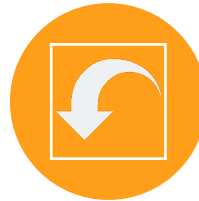
A formal complaint must first have been filed and written notice given to the parties



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



The parties must voluntarily agree to participate in writing



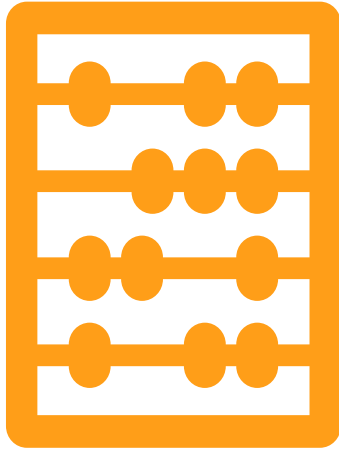
The parties must be allowed to withdraw from informal resolution up until the point it is final

# What are the limitations?



- Sexual assault allegations under state law
- 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



# Questions



HUSCH BLACKWELL

# Investigations

HUSCH BLACKWELL

# 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 is inculpatory evidence?

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



# What is exculpatory evidence?



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

# What 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).**

# What are the phases of an investigation?



# How do we tell the parties about an investigation?

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



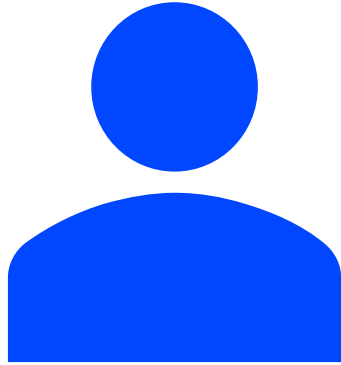


# What else does the notice need to say?

Written notice must also include:

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

# How does evidence get collected?



Interviews of parties and  
witnesses



Collection of  
non-testimonial evidence

# Example sources of non-testimonial evidence

**The parties**

**The witnesses**

**Institutional email**

**Video cameras**

**Key card logs**

**Timesheets**

**Public social media**

**Institution-owned computers**

**Institution-owned personal devices**

**Information on institutional servers**

**Police**

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

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

# Discussion Question: Scenario



**Respondent accused of harassment sends text messages to various co-workers who may have observed Complainant joining in with Respondent’s allegedly harassing behaviors.**

**Respondent’s text says: “Please contact me ASAP if you believe Complainant was a willing participant in this incident.”**

# Discussion Question: Scenario



**Respondent tells friend that respondent has been accused of stalking a peer student at her clinical site and “it’s important that we get our stories lined up.”**

**Classmate states a belief that she has seen respondent arrived at a clinical site at 2:00 p.m., about 2 minutes after Complainant arrived for her shift.**

**Respondent tells Classmate: “No. You’re going to say we were in a virtual study room together at 2 p.m. That’s what you need to say or I’m screwed. I’ll owe you for this . . .”**

# May an investigation collect evidence on sexual history?

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

# May an investigation collect and rely on privileged records?

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





# Do the parties have access to the evidence?

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

# Do the parties get to respond to the evidence?



Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses



Depending on written responses, additional investigation may be needed



Investigator should consider the written responses in drafting final language of investigation report

# Review of Preliminary Investigation Report

- The Investigator will provide the Preliminary Investigation Report to each party.
- The parties will be provided 10 calendar days to review the Preliminary Investigation Report and provide any additional and/or clarifying information to the Investigator. This period of 10 days will be the final opportunity for parties to submit any additional information to the Investigator.



# When is the investigation report finalized?

After the 10-day period to review the evidence expires

The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation

Under the new Title IX regulation, factual findings and determinations of policy violations are made at a subsequent hearing

# May parties have an advisor during the investigation?

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



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

<b>Support</b>	Provide personal support to the party throughout
<b>Preparation</b>	Support the party in preparing for meetings and interviews
<b>Presence</b>	Be present with the party during meetings and interviews
<b>Review</b>	Assist the party in reviewing the evidence prior to the close of the investigation

# What must an advisor not do during the investigation?

<b>Inhibit</b>	Advisor should not inhibit communication between investigator and party
<b>Disrupt</b>	Advisor should not disrupt meetings and interviews
<b>Argue</b>	Advisor should not argue with the investigator
<b>Evidence</b>	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
- Institution may pause the relevant interaction to allow the party to select a new advisor





**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.**

**Example  
of advisor  
breaking  
the rules**

# Example of advisor breaking the rules

**A party's advisor tells the investigator the investigator is to communicate solely through the advisor and not send any emails directly to the student. When the investigator emails the student directly to schedule an interview, the advisor calls and verbally attacks the investigator.**

# Questions



HUSCH BLACKWELL

# Hearing Process

HUSCH BLACKWELL

# What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The hearing officer or panel 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

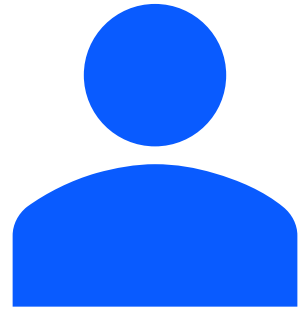
# What does “preponderance” of the evidence mean?

- Preponderance of the evidence
  - “More likely than not”
  - “Greater than 50% likely”



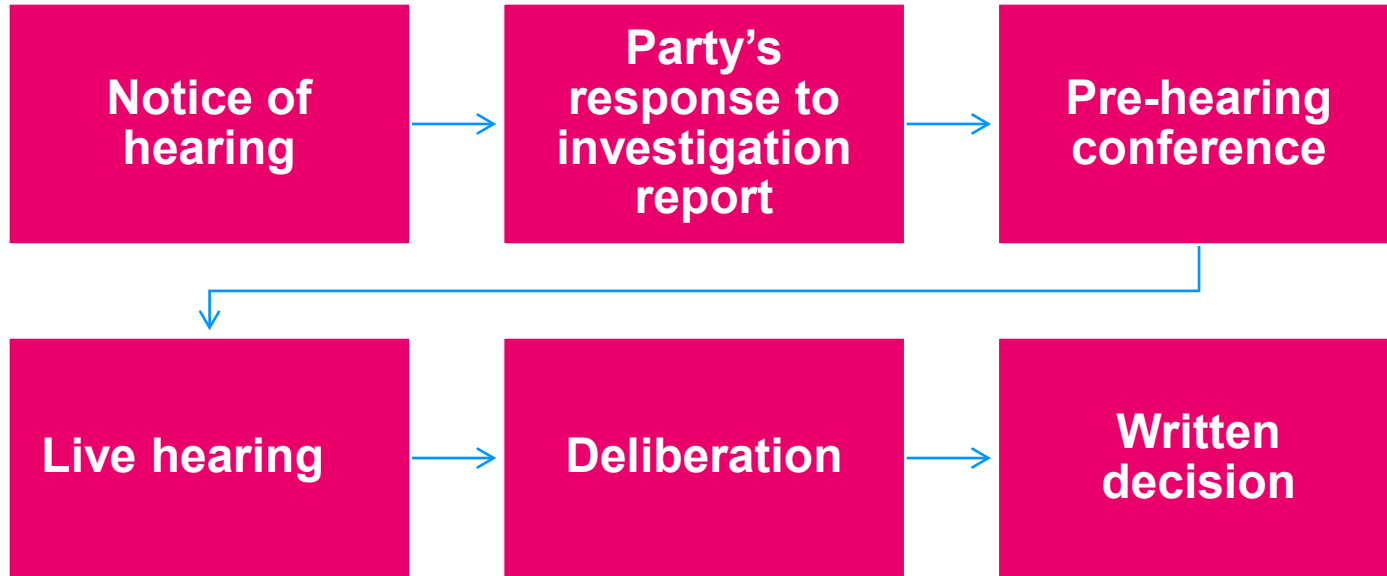
# Who runs the hearing?

- The hearing officer
- Decides all procedural issues
- Rules on admissibility of evidence





# What are the phases of a typical hearing process?





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

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

# What does the notice say?

**Identity of the hearing officer or panel**

**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 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 is a “live” hearing?

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

# Who attends a live hearing?

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

# What are the logistics of a hearing?



Hearing must be recorded (audio or video) or transcribed



Hearing can be held in a single room or with the parties separated in different rooms



Hearing can be held virtually using suitable software

# Does the institution 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 institution must supply one for the purpose of questioning the other party and witnesses on behalf of the student in question

# Be Prepared for the Hearing

**01**

**Review  
Investigation  
File**

**02**

**Know who  
is attending  
the hearing**

**03**

**Consult  
with party  
before the  
pre-hearing  
conference  
and hearing**

**04**

**Prepare list  
of  
questions**



# How does the hearing actually work?

## Required elements include:

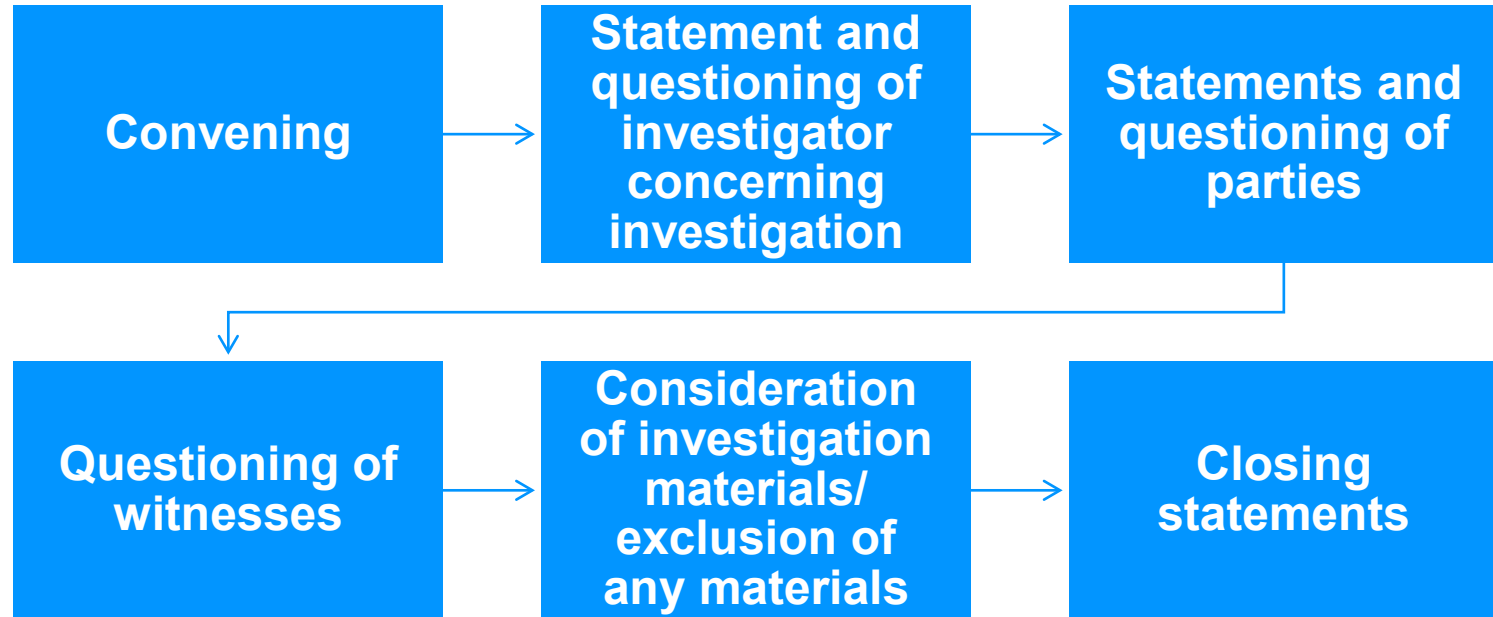
Hearing officer or panel must independently evaluate questions for relevance and resolve relevancy objections

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

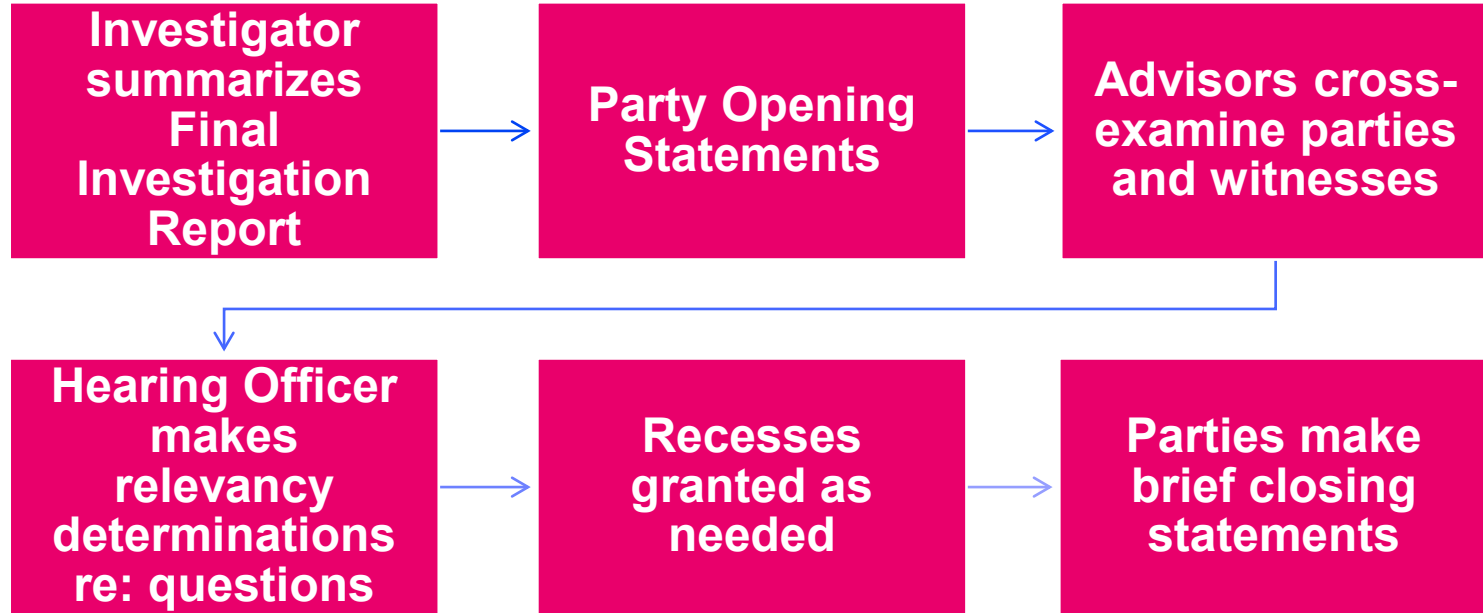
If a party or witness refuses to submit to live questioning this may diminish weight and/or credibility

Questioning of sexual history generally not permitted

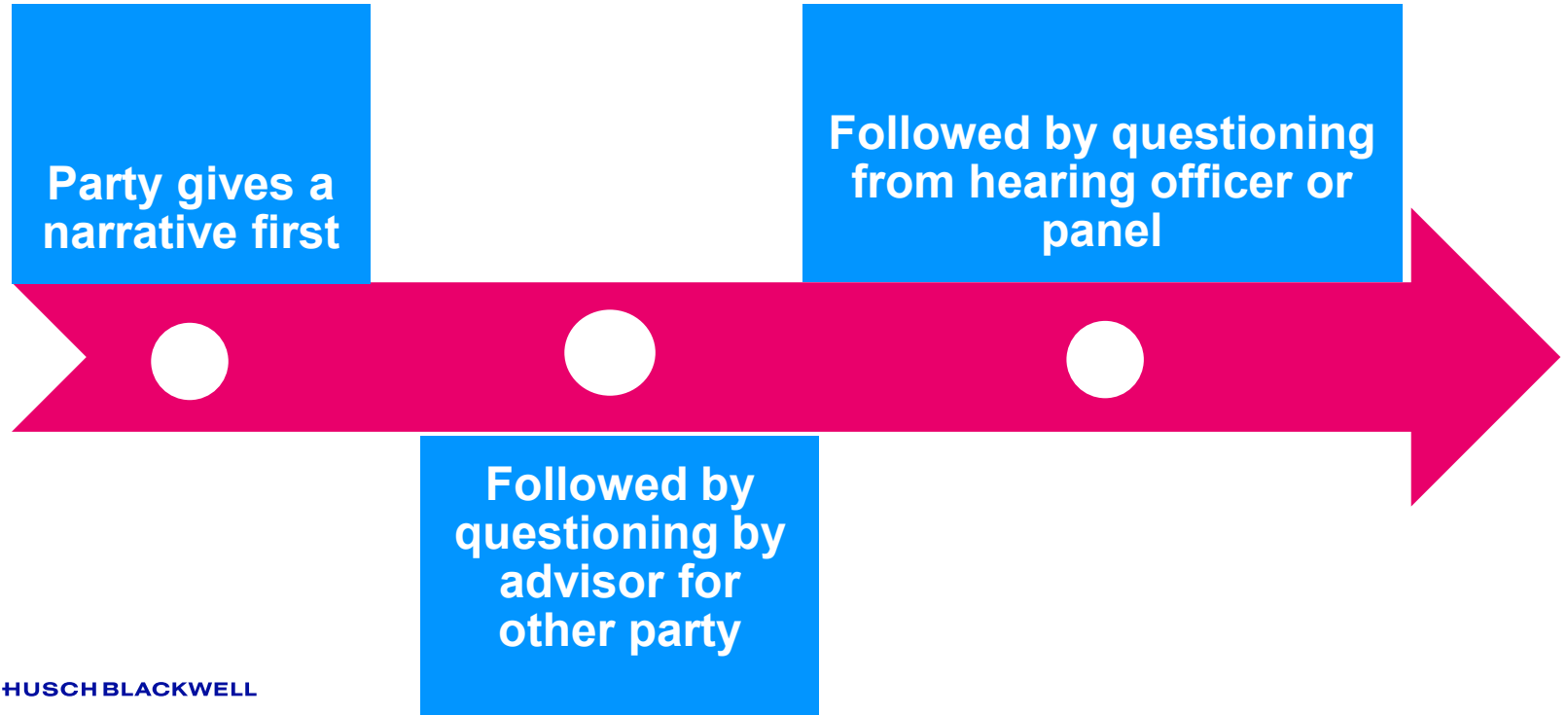
# What is a potential sequence?



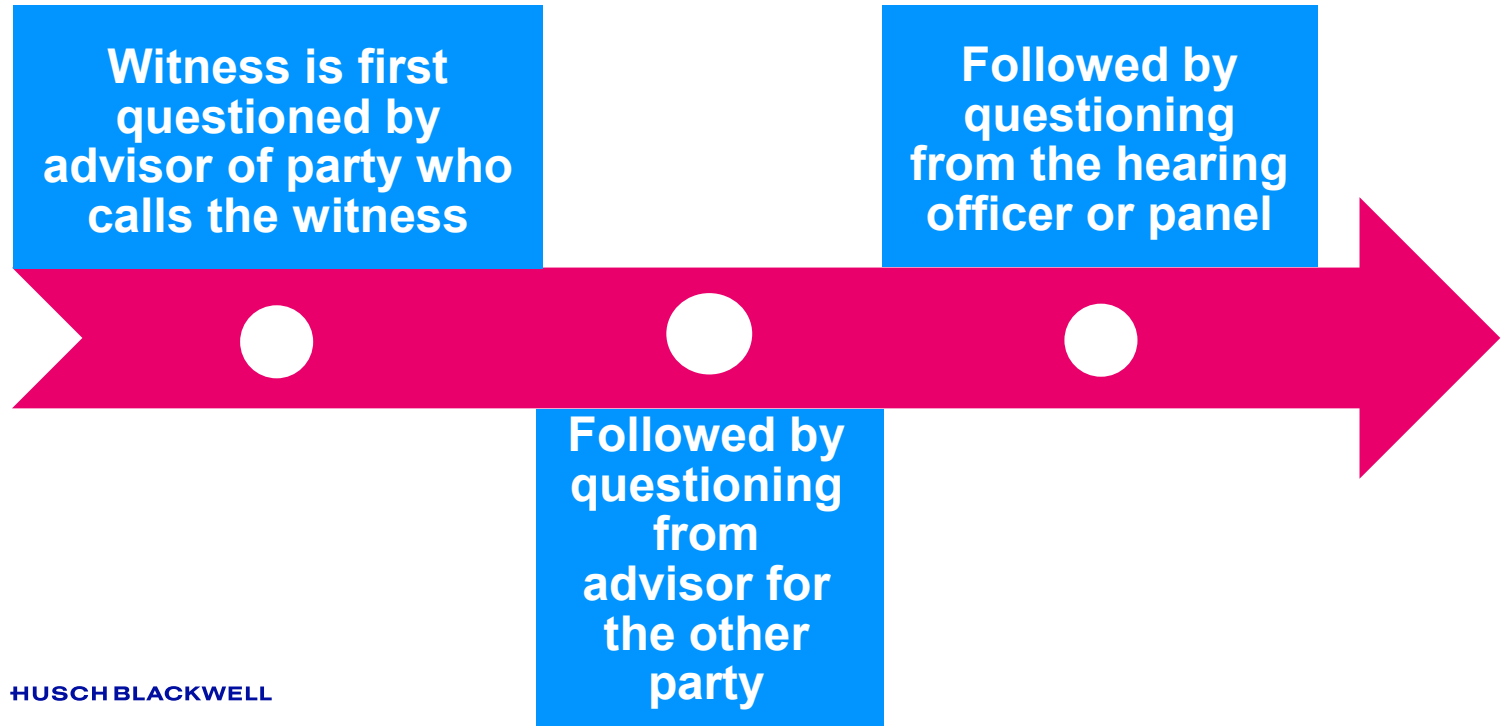
# UMD Policy – Hearing Sequence



# How might questioning of parties take place?



# How might questioning of witnesses take place?



# Who determines relevance?

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

# What is relevance?

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

## **Example (relevant)**

**Student A has accused Student B of sexual assault by having sex with Student A while Student A was incapacitated by alcohol consumption immediately after a party. Advisor for Student B asks Student A: “Did you send any text messages or make any phone calls during the party?”**



**Coach is accused of sexually propositioning Student B in exchange for more playing time. Advisor for complainant asks the Coach: “Didn’t you tell one of the trainers that Student B is a ‘very attractive young woman?’”**

**Example  
(relevant)**

# **Example (not relevant)**

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

**Student A has accused Student B of sexual assault. Advisor for Student A asks Student B: “Were you convicted for driving under the influence when you were a sophomore in high school?”**

**Example  
(not  
relevant)**

# Is sexual history considered?

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

# Example (impermissible)

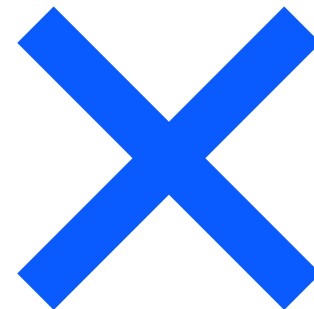
Student A has accused a faculty member of sexual harassment. Advisor for the faculty member asks Student A: “How many men did you sleep with in the month before you claimed the faculty member sexually harassed you?”

**Student A has accused Student B of sexual assault. Student A testified that Student B had intercourse with Student A without using a condom, which Student A states Student A would never have agreed to because Student A always requires protection. Advisor for Student B asks Student A: “But didn’t you have unprotected sex with Student B a week prior? And didn’t you tell Student B it was ‘okay’ that Student B didn’t wear a condom?”**

**Example  
(permissible)**

# Does the “exclusionary” rule still apply?

- The so-called “exclusionary” rule is no longer in effect
- Hearing officer/panel must consider any relevant evidence
- However, testimony that is not subject to cross-examination may be found less credible and/or given less weight





# Example

**Complainant gives emotional account of sexual assault and answers questions from hearing officer. Complainant then answers only one question from respondent's advisor before breaking down and refusing to answer any more. After a break is taken, complainant tells hearing officer complainant cannot endure cross-examination. Complainant leaves the hearing.**



**Witness gives statement to investigator that witness observed complainant right before alleged sexual assault. Witness told the investigator that complainant was too drunk to stand up. Witness fails to attend hearing. Investigator is prepared to relay what witness told investigator.**

**Example**

**Witness answers questions from hearing officer. After consulting with complainant, advisor for complainant says that the advisor has no questions for witnesses. Advisor for respondent then proceeds to cross-examine witness.**

**Example**

# Is there a standard of behavior in hearings?

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

# Example (impermissible)

A respondent's advisor smirks, laughs, and throws up her hands during portions of the complainant's testimony that the advisor believes is not credible.

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

**Example  
(impermissible)**

# Example (impermissible)

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

# How long does a hearing last?



- The length of the hearing is set by the hearing officer or panel
- Hearing officer or panel may set time limits for questioning of each witness
- Hearing officer or panel may preclude questioning that is cumulative or duplicative



# How does the hearing officer decide a case?



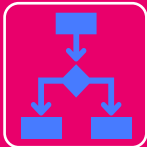
After hearing, the hearing officer must deliberate and consider all the relevant testimony and relevant non-testimonial evidence



Evaluate evidence for weight and credibility



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

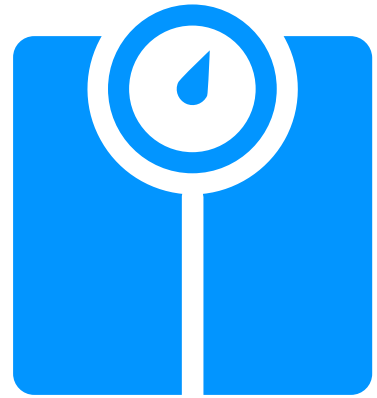


Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



# What does it mean to weigh evidence?

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



# Example of considerable weight

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

**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.”**

**Example  
of less  
weight**

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

- 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

# How does a decision get issued?

In a written document, provided contemporaneously to the parties that:

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



# Questions

HUSCH BLACKWELL



# Questioning

HUSCH BLACKWELL



# What is the advisor's role in questioning?

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





## Example

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

**Did you walk up the stairs to the respondent's apartment unaided?**

**Before the sex started, did you stop the respondent to tell the respondent to use a condom?**

**Did you send a text message immediately after the sex concluded?**

**Example  
questions**

# Example

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

**You were the complainant's roommate?**

**Before the respondent's conduct, did your roommate go to class?**

**After the respondent's conduct, did your roommate still go to class?**

**Did you notice any changes in your roommate's behavior after the respondent's conduct?**

## **Example questions**

# 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 support your party's position that a given element of the sexual harassment is either met or not met
- Prioritize your questioning to focus on the most compelling points
- Consider questions that will bear on credibility

# Example of the elements

## Fondling:

- **Touching**
- **Private body parts**
- **For purpose of sexual gratification**
- **Without consent**

**Complainant and Respondent have a synchronous online class together.  
Complainant has accused respondent of hostile environment sexual harassment.  
Respondent denies all of the allegations.  
Complainant alleges being so affected by the conduct that complainant stopped attending the class.**

## **Example – Discussion**

# Example Questions (Effective Denial of Access)

HUSCH BLACKWELL

## For witnesses

- Did complainant talk to you about her interactions with respondent?
- What did you observe about complainant's attitude towards going to the class she and respondent had together?
- Before the respondent's conduct, did complainant always go to class?
- Did you notice any changes in complainant's behavior after the respondent's conduct?
- After the respondent's conduct, did complainant still go to class?
- If you were also in the class with complainant and respondent, did you observe anything about their interactions during class?



**Complainant and Respondent are both employees in the institution's security department. Respondent is accused of stalking complainant by following her into an equipment room before her shift on three occasions. Respondent has admitted to following Complainant into the equipment room, but says it was to discuss work-related topics. Complainant said she felt uncomfortable and cornered by Respondent's actions.**

## **Example – Discussion**

# Example Questions (Complainant)

## *Course of conduct*

Tell me about the events/actions preceding each instance when the respondent followed you into the equipment room.

Were you having a conversation prior to entering the equipment room?

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?

Was anyone else in the equipment room at the time?

**Does respondent often talk to other officers in the equipment room?**

***Fear/distress***

**What day/time did this happen?**

**Where did it happen?**

**Did respondent walk/stand/sit close to you?**

**Was there anyone else around?**

**What has the impact of this been on you? Did you tell anyone about it?**

**Example  
Questions  
(Complainant)**

# INVEST. 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.”

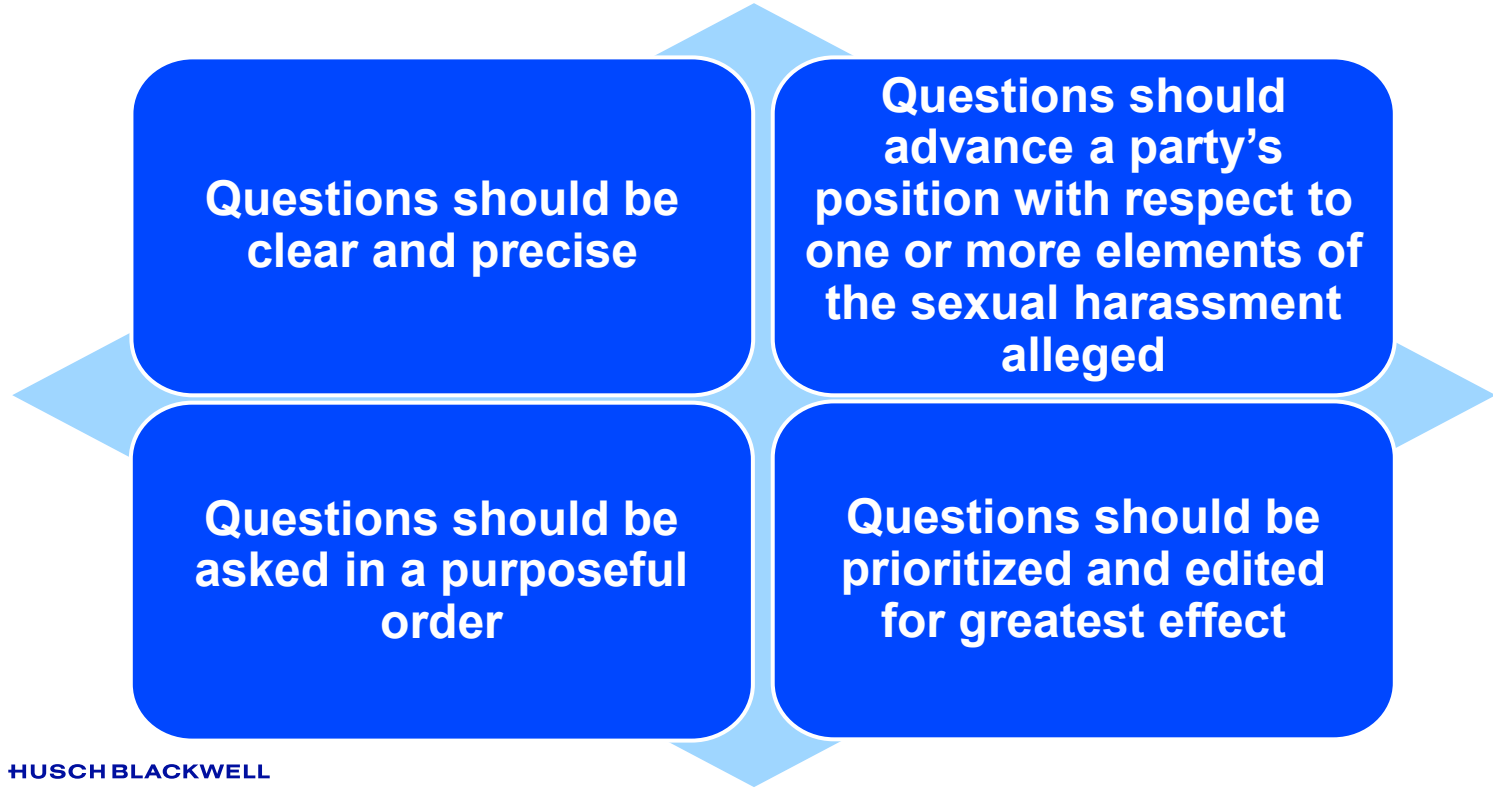
# INVEST. Example: Be Specific

“Complainant alleges that Respondent engaged in stalking behavior.”

vs.

“Complainant alleges that, on five occasions, Respondent has sent her a message in the class forum immediately upon her logging on, has messaged her repeatedly asking for personal information, including her address, and has asked to meet her in person.”

# What are the hallmarks of effective questioning?



# What is the appropriate manner of asking questions?

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

# Are you required to ask questions that your party wants you to ask?

- You should consult with your party and consider their preferences for what questions to ask
- But you are permitted to exercise your own reasonable judgment and are never required to ask questions that you know are improper (i.e., invade sexual history)
- You may consult the hearing officer or panel if your party demands you ask a question and you are uncertain whether it is appropriate



# What should you do if your question is deemed irrelevant?

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

# Are you required to make objections?

If a party believes the other party's advisor is asking an inappropriate question, the party may object

At most institutions, advisors are not permitted to speak for their advisee, make objections, present arguments, or engage in any other active role except questioning (including cross-examination) of the other party and witnesses

# Are you required to “act like a lawyer”?

- Your role as advisor is a non-legal role
- You are not providing legal advice
- You are not a prosecutor or a defense attorney
- You are not required to engage in “zealous advocacy” like a private attorney
- You are asking relevant and appropriate questions to reasonably support the case of the party you are supporting



# Questions

# Confidentiality and Other Expectations

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

# Are sexual harassment cases confidential?

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



# Family Educational Rights and Privacy Act (“FERPA”)



- Protects student records from impermissible disclosures of their education records and provides students rights to access their education records
- How it applies in an investigation context:
  - Records containing identifying information on students are subject to FERPA analysis

# Family Educational Rights and Privacy Act (“FERPA”) cont...

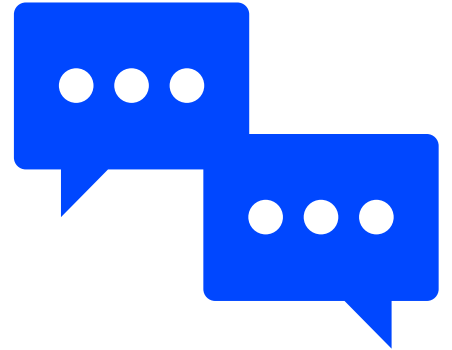
- Discrimination and harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Title IX regulations contain an express preemption provision, permitting FERPA-protected material to be used (and shared) in Title IX proceedings, as required by Title IX itself





# Must an advisor maintain confidentiality?

- Yes
- If you are an institutional employee, you must abide by the same confidentiality rules as the institution itself, including FERPA
- You should maintain the confidentiality of the process and not disclose information to any third-party except as the process itself permits



# Example (not permitted)

Advisor for party is contacted by a local news reporter seeking confirmation that the party has been accused of sexual assault and that a hearing is set for next week.

**The parent of an advisee emails the advisor requesting to have a phone call to “discuss the case.” The advisee (a student) has not provided written consent for the advisor to speak to a parent.**

**Example  
(not  
permitted)**

## **Example (not permitted)**

**An advisor notifies his supervisor that he has been assigned as an advisor to a hearing that will take place during working hours. Before excusing the advisor's absence of regular job duties, the supervisor demands to know who the parties are and what the nature of the allegations are.**

# Are your communications with your party “privileged”?

- No
- Your communications are not protected from discovery in normal criminal and civil legal processes
- But you should not disclose your communications with an advisee to a third-party unless FERPA allows it
- An institution may require you to disclose communications to another institutional official in certain circumstances (i.e., witness tampering; suicidal ideation; disclosure of other sexual harassment; other legitimate educational purposes)

# What if a party is facing criminal charges?

- Your role is solely that of advisor under the relevant sexual harassment policy
- Do not provide advice about criminal charges or criminal processes
- Parties must seek counsel about criminal matters from a licensed attorney



# Do you have a role in the appeal?



- The University only provides an advisor for purposes of the hearing phase
- If a party wants to utilize an advisor for the appeal, they must secure one on their own

# What is the purpose of the appeal?

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





# Appeal Rights

- 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*)



# Questions

HUSCH BLACKWELL

The logo for Huscht Blackwell, featuring the company name in a bold, white, sans-serif font. The text is centered horizontally and set against a blue background with a pattern of thin, white, wavy lines that create a sense of motion and depth.

**HUSCH BLACKWELL**