

HUSCH BLACKWELL

# University of Maryland Title IX Training

January 17, 2025

# Agenda

- Title IX Scope, Jurisdiction, and Prohibited Conduct
- The Grievance Process
- Intake, Supportive Measures and Pregnancy Accommodations
- Confidentiality and Other Expectations
- Investigation, Hearing and Appeal
- Informal Resolution & Other Processes



# Title IX Scope, Jurisdiction, and Prohibited Conduct

# *Tennessee v. Cardona* (E.D. Ky. Jan. 9, 2025)

- 2024 Title IX Regulations struck down by U.S. District Court for Eastern District of Kentucky when it granted Plaintiffs' motion for summary judgment, which in effect declared regulations unconstitutional for all schools nationwide
  - Rule already enjoined in 26 states and certain institutions



# The Court's Decision

- Department of Education exceeded statutory authority when revising “on the basis of sex” to include discrimination on the basis of sex beyond “discrimination on the basis of being a male or female”
  - Differentiated *Bostock v. Clayton County* decision reasoning that it was limited to Title VII.
- Final Rule was unconstitutional – violated First Amendment and Spending Clause
- Final Rule was arbitrary and capricious

# 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

# To which entities does Title IX apply?

- Entities that receive federal financial assistance, including colleges and universities that participate in U.S. Dept. of Ed. Federal Student Aid funding
  - Not individual persons
    - But institutions are required to adopt policies and procedures to implement Title IX that do apply to individual persons



# Two Types of Sex Discrimination

- Adverse treatment 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, or by institutional policy
- Sexual harassment
  - 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 subject to more elaborate regulations governing investigation and determination



Programmatic  
Discrimination

Individualized  
Discrimination

Sex-Based Harassment

# Example: Adverse treatment

**Female supervisor prefers working with women and consistently gives a male subordinate poor performance reviews to drive him out of the department.**



# Example: Adverse treatment

**College consistently spends millions of dollars upgrading and maintaining all the male residence halls but spends almost no money on female residence halls, which are constantly in a state of disrepair.**



# Example: Sexual harassment

**Student repeatedly makes unwelcome sexual comments and sexual jokes to another student in the same residence hall, propositions the other student to engage in sexual encounters despite repeatedly being told “no,” and exposes themselves to the other student one night after returning from a party.**



# What's the difference between sexual conduct and conduct that is on the basis of sex?

- “Sexual” means the conduct itself has a sexual nature
- “On the basis of sex” means the conduct is targeted at a person because of their sex

# What is the scope of Title IX's reach?

- 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 locations that are not part of education program/activity



# 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.

# What are examples of education programs and activities?

Admissions

Financial Aid

Athletics

Housing

Academics

Employment

Concerts,  
Performances,  
and Events on  
Campus

Clinical  
Rotations and  
Placements

Organized Trips  
and Volunteer  
Outings

Sponsored  
Organization  
Activities

Online Programs

Activities in  
Property Owned  
or Controlled by  
the Institution

# 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 location owned / controlled by the institution or officially-recognized student organization



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



No, if it occurs outside the United States

# Example: Included in EP&A?

**Student alleges a sexual assault while attending an away game at another university. Student attended the away game with other students who were recruited by the athletic department to attend and who rode on a bus the athletic department paid for. An athletic department staffer rode on the bus and attended the game with the students.**



# Example: Included in EP&A?

**An alumnus returns to campus and attends a Greek alumni reception held at a sorority house located off campus. While at the reception, the alumnus is fondled by a drunk attendee who is a current student.**



# Example: Included in EP&A?

**Student A goes to Student B's apartment after drinking at the bar. Student A uses physical force to coerce Student B into sexual activity. Student B's apartment is owned by a private corporation and is located across the street from campus. However, the apartment complex pays the university a license to use the university's logo in its advertising, so some people mistakenly believe the complex is owned by the university.**



# 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.



# Prohibited Conduct

# 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: Quid pro quo

**A graduate assistant supervises a Saturday lab session. The assistant is attracted to a particular undergraduate and offers to give the undergraduate an inflated grade if the undergraduate sends the assistant naked pictures. The undergraduate has no romantic interest in the assistant. But the undergraduate sends the pictures anyway fearing that she will receive a poor grade if she does not.**



# 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.



# Example: Hostile environment

**Female student is repeatedly subject to derogatory sexual comments and “cat calls” while working out in the recreation center. One day, while student is working out, someone soaps “call for a good time” on the female students’ windshield and ties an inflated condom to her antenna. Student is now afraid to attend the center and buys a membership to a private gym.**



# 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

# What factors could suggest a denial of access to EP&A?

Repeated and pervasive conduct

Reduction in academic or work performance

Need to transfer class, work assignment, or other designation

The conduct prompts others to harass/discriminate

Disruption in class or other operation

Self-exclusion to avoid being subjected to the conduct

Others????



# Does refusal to use chosen names and pronouns create a hostile environment?

- Federal law does not (presently) mandate the use of chosen (a/k/a “preferred”) names or pronouns for any student (cisgender, transgender, or otherwise)
- But the refusal to use chosen names and pronouns based on protected status and/or the use of non-chosen names and pronouns based on protected status may constitute discrimination or harassment based on the facts and the legal jurisdiction
- And, could be a violation of policy

# What is sexual assault?

- Title IX regulations initially defined “sexual assault” as incorporating the following classes of conduct from FBI’s NIBRS:

Rape

Sodomy

Sexual assault  
with an object

Fondling

Incest

# Updated NIBRS Classifications

Rape

Statutory  
Rape

Fondling

Incest

# What is rape? (Revised NIBRS)

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes instance in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

# How should we think about consent?

- Consent in fact
  - Determined by whether the relevant facts establish conduct that amounts to agreement to engage in sexual activity-- as agreement is defined by the institution
- Ability to consent
  - Determined by whether a person has capacity to consent or whether they have lost such capacity

# What is consent?

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



# What is incapacity?

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

# What facts may be relevant to determining incapacity due to alcohol or drugs?

- Ability to speak coherently
- Ability to track conversation
- Ability to appreciate and weigh risks and benefits
- Ability to walk or stand
- Ability to engage in behaviors requiring presence of mind
- Time period of consumption
- Nature of alcohol or drugs
- Amount of alcohol or drugs
- Size of the person consuming
- Others?



# Example: Incapacitated

**Student A and Student B have had several prior sexual encounters. One night, Student A provides Student B with drugs that, unknown to Student A, are laced with fentanyl. Student B takes the drugs voluntarily and then falls into a stupor and cannot speak coherently. Student A who has only smoked marijuana, then has sex with Student B.**



# Example: Not-incapacitated

**Damon and Jeremy attend a football tailgate. Each have six beers over the course of three hours. Instead of going to the game, Damon and Jeremy decide to hookup at Damon's on-campus apartment. Each separately drives from the tailgate without incident to Damon's apartment where the two have sex and then fall asleep for a few hours. Later, Damon claims he was too drunk to consent. Multiple people from the tailgate recall having conversations with Damon and Jeremy about the game, who was likely to win, and renovations planned for the stadium.**



# What is statutory rape? (Revised NIBRS)

Nonforcible sexual intercourse with a person who is under the statutory age of consent.



# Example: Statutory rape

**State law sets a minimum age of consent at 17. The college hosts a summer basketball clinic. An 18-year-old attendee has sex with a 15-year-old attendee. The encounter happens in a dormitory room after curfew. The two attendees are from the same high school and had several sexual encounters before the clinic.**



## What is fondling (Revised NIBRS)?

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

**Student attends a party at an off-campus fraternity house. While dancing, student's breasts and buttocks are groped by three other students who are acting on a dare.**



# What is domestic violence?

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

# What is dating violence?

“Dating Violence” is violence committed by a person:

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





# Example: Dating violence

**Kace and Jamie have hooked up, occasionally spend the night at each other's apartments, and text each other frequently. One night, during an argument, Jamie throws Kace's phone at Kace. The phone misses Kace but hits the wall and is destroyed.**



# What is stalking?

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for their safety or the safety of others; or
  - Suffer substantial emotional distress.



# Example: Stalking

**Alfie and Hana broke up after Alfie took an interest in Mira. Hana sends Alfie dozens of text messages each day begging Alfie to dump Mira and return to Hana. In the messages, Hana uses expletives and threatens to kill Mira. One night, while Alfie and Mira are having dinner at a sports bar, Hana loudly confronts Alfie and Mira and throws a drink in Alfie's face.**



# 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.

# Example: Retaliation

**Jane files a Title IX sexual harassment complaint against a coworker, accusing him of unwelcome sexual propositioning. The investigation finds some evidence to support Jane's complaint, but a hearing panel ultimately finds the coworker's conduct did not rise to the level of harassment. Annoyed at the distraction Jane's complaint has caused for the department, Jane's supervisor looks for a reason to terminate Jane and eventually fires her when she shows up to work 10 minutes late.**



# Is it retaliation if a respondent files a counter-complaint?

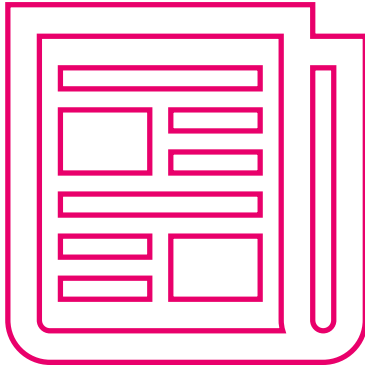
- Only if the counter-complaint is made in bad faith for the purpose of interfering with the complainant's exercise of Title IX rights



# Practical Point

**Institutions should proceed cautiously and not presume a counter-complaint is retaliatory simply because it comes second. Doing so can create a “race to the Title IX Coordinator” scenario and risks systematic bias against respondents.**

# Is there any retaliation that is allowed?



- Some conduct that meets the technical definition of retaliation may be Constitutionally protected
- Freedom speech
- Freedom of association
- Freedom of religion



# Example

**A high-profile student athlete at a public university is accused of sexual assault. Over the course of the investigation, it becomes clear the allegations are suspect and may have been the product of delusions from a complainant who was high on drugs and had a mental illness. After the complainant withdraws the allegations, a staffer on the student newspaper writes a scathing editorial accusing the complainant of misusing the Title IX process and making it harder for “real victims” to be believed.**

# Group Scenario

Alex and Jamie, both students in the sociology program at the University, are enrolled in the SOC 500 and occasionally study together, though they do not interact outside of class. This sociology class is required to complete their major.

Their sociology professor, who is also their advisor, invites the SOC 500 class to her house for a class game night. Although the game night is not required, students who attend receive extra credit, which is outlined in the course syllabus.

During the game night, Alex and Jamie both indulge in alcoholic beverages. Alex makes a sexually inappropriate joke during the game, and only Jamie hears the joke. Alex then places his hand on Jamie's leg, which makes Jamie uncomfortable, so she moves to sit across the room from Alex. After Jamie moves away from Alex, Alex starts texting Jamie repeatedly, asking whether she finds him attractive and suggesting they go back to his off-campus apartment together after the game night ends. Jamie does not respond to Alex's texts.

When game night ends, Alex offers to drive Jamie back to her dorm room on campus. Jamie accepts, but Alex takes her to his apartment instead, saying that it was closer, and he did not want to drive all the way back to campus. Jamie is tired and does not want to find a way back to campus and does not want to upset Alex. Alex offers Jamie his bed and says he will sleep on the couch. After Jamie falls asleep, Alex joins Jamie in his bed. When Jamie wakes up the next morning, she finds Alex in the bed with his hand on her buttocks. Jamie is distressed, and immediately calls a friend to pick her up.

The rest of the semester continues, with Jamie and Alex occasionally studying together. The week before the end of the semester, Jamie files a Title IX complaint against Alex based on Alex's actions during game night.



# Group Scenario Questions

- 1. What potential forms of sexual harassment are implicated by Alex's actions?**
- 2. Does the University apply to some of all of Alex's actions? How would you analyze this, and what key facts would you consider?**
- 3. Are there facts that you would like to have, that are not present in the scenario, to determine whether the University's policy applies?**
- 4. Is the fact that Jamie did not file a complaint immediately and continued studying with Alex relevant?**

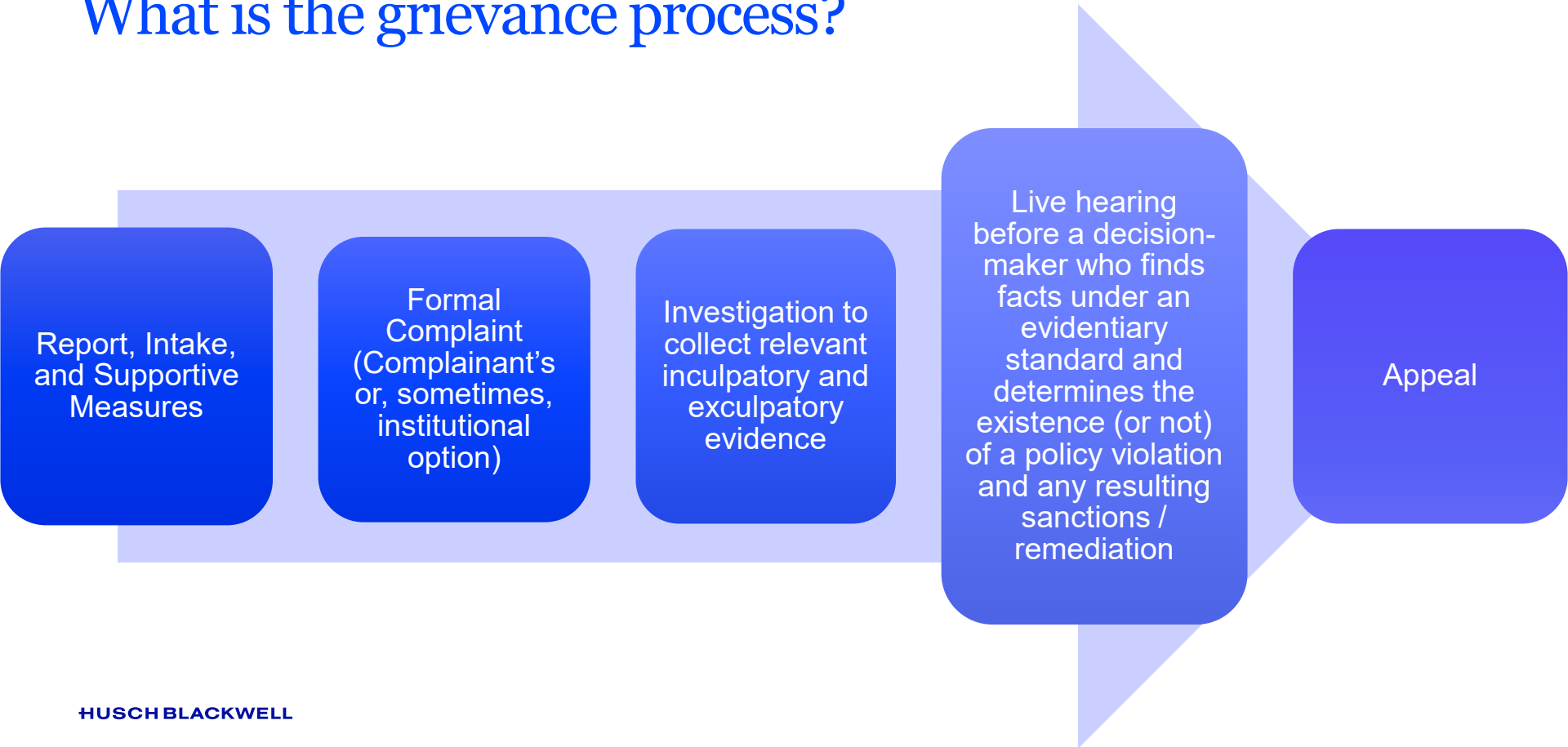




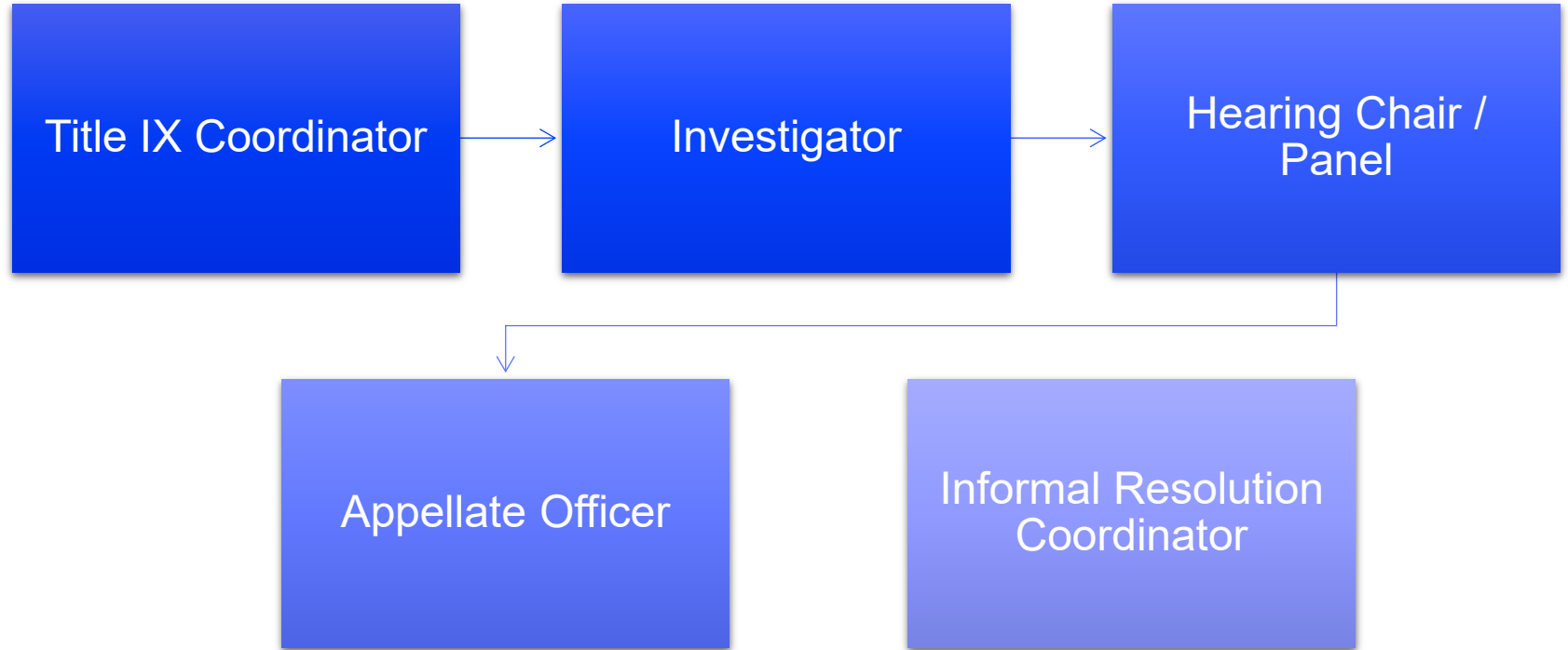
# Questions

# The Grievance Process

# What is the grievance process?



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



# What general principles govern the grievance process?

- Significant deference to the complainant's wishes about whether to proceed
- Equitable treatment of complainants and respondents
- Presumption respondent did not violate policy unless and until a determination is made after hearing
- No stereotypes based on a party's status as complainant or respondent
- Conflict and bias-free institutional participants
- Trauma-informed





# Intake, Supportive Measures and Pregnancy Accommodations

# 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

# Example: Institutional knowledge

**Faculty member serves as academic advisor to Student A. During academic advising session, Student A discloses that their grades have suffered because they missed classes due to being sexually assaulted by a peer. Faculty member has no authority to investigate or discipline under the institution's Title IX Policy. Is the faculty member's knowledge imputed to the institution?**



# When do we reach out to the alleged victim?

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



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

In allowing claim of Title IX deliberate indifference to proceed, court noted the allegation that over four months passed between the former graduate student plaintiff's initial email to the dean about the professor respondent's conduct and the University placing him on leave pending an investigation.



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

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

# Do we need a “formal complaint” before contacting the alleged victim?

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



# What is a formal complaint?

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



# When must we dismiss a Title IX complaint?



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

# Example: Dismissal

**Student reports that faculty member teaching poetry class required student to read classic Roman poetry that included graphic sexual elements. Student is offended by the content and “feels harassed.” Student demands that the institution force the faculty member to alter the content of the course.**



# When may we dismiss a Title IX complaint?

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



# Example: Dismissal

**After student files a verbal harassment complaint against assistant coach, assistant coach resigns and takes a job at another institution. Institution codes the former assistant coach as a “no rehire” in its system and dismisses the complaint.**



# Example: Participating at time of alleged misconduct update

**A former student complains of domestic violence committed by an employee when the former student was enrolled and also working full time at the institution. The former student has moved away. Former student has no desire to be involved with the institution in any way going forward because they had such a negative experience in the past.**



# How do we tell the parties about an investigation?



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

# What else does the notice need to say?

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



# Example: Inadequate notice

**Title IX Coordinator sends notice of investigation to Respondent stating, “You have been accused of committing stalking against Jane Doe in February 2022.”**



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

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

# Example: Preliminary inquiry

**Complainant alleges they were fondled by an unknown individual in the library late at night. Title IX Coordinator secures video footage and card swipe data to determine the identity of the alleged perpetrator.**



# Supportive Measures

# What are supportive measures?

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



# Examples of supportive measures

 Counseling

 Academic accommodations


 Housing accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order where implicated by facts

# Example: Reasonable supportive measure

**Employee is the victim of domestic violence perpetrated by their spouse in a University parking lot. Employee requests time off from work for one hour every Thursday for six weeks to attend counseling sessions.**



# Example: Reasonable supportive measure?

**Student reports they were sexually assaulted by a peer 18 months ago. Student requests a refund of tuition for the last three semesters and a change of all grades to “Pass.”**





# Do students and employees have other rights to accommodation?

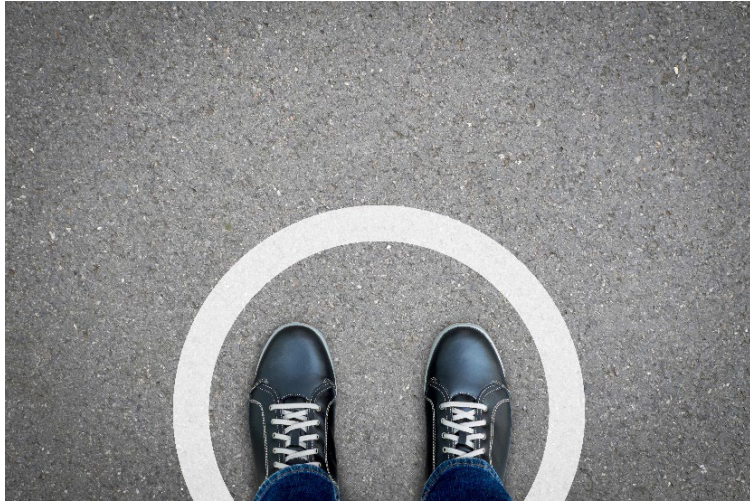
- Yes—other laws may trigger accommodations when a medical condition or disability is present.
  - Americans with Disabilities Act
  - Family and Medical Leave Act
  - Section 504 of the Rehabilitation Act
  - Pregnancy accommodation provisions

# Example: Disability

**Student is sexually assaulted by a peer and is later diagnosed with PTSD and major depressive disorder triggered in part by the sexual assault.**



# What if the report falls outside Title IX jurisdiction?



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

# Who is responsible for supportive measures?

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

# Can we utilize 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

**Student A reports that Student B raped Student A after providing Student A with a drink laced with drugs. The alleged incident occurred last night, and Student A is covered in bruises. Student C, an acquaintance of Student A, reports that they were drugged by Student B two weeks ago, although a friend walked in and prevented Student B from effectuating a sexual assault.**



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



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

# Can we place employees on administrative leave?

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



# Example: Administrative leave

**Maintenance worker is accused of lingering near the restroom and glancing at students in various stages of undress. Maintenance worker was accused of similar behavior five years prior.**

**Maintenance worker is not accused of physical violence. Institution places worker on administrative leave pending results of the investigation.**



# Group Scenario

Prior to Alex leaving the sociology professor's house after game night, Alex and the sociology professor had a conversation in the professor's kitchen. The sociology professor asked Alex if Alex was seeing anyone and commented that anyone would be lucky to sleep with Alex. Alex feels uncomfortable by this comment, but laughs and agrees. The sociology professor then tells Alex that if Alex was not their student, they would definitely "slide into Alex's DM's."

Alex tells the professor he has to leave because he is taking Jamie home and leaves the kitchen. Alex then finds Jamie and offers to drive Jamie back to Jamie's dorm, Jamie agrees, and the two of them leave the sociology professor's house.

The next week in class, Alex is uncomfortable by the sociology professor's comments from game night. Alex feels like the sociology professor is focused on him more in class and making sexually suggestive looks at him. Alex tells his lacrosse coach about his experience in class and laughs it off. His lacrosse coach reports the conduct to the Title IX Coordinator.

When Alex meets with the Title IX Coordinator, he expresses that he does not want to file a complaint against the sociology professor because she is his advisor, and he wants a good recommendation letter from her for a job he is applying for. He also says that the sociology professor is a highly-regarded scholar in the field. Alex also needs one more sociology course to complete his major, and the sociology professor is the only one teaching that course next semester.



# Group Scenario Questions

1. What are some options for supportive measures that the Title IX Coordinator can offer Alex?
2. What if Alex does not move forward with a complaint?
3. Assume Alex does proceed to filing a complaint, would an anti-retaliation plan be appropriate in this situation? What should be included in this plan?



# Pregnancy Accommodations

# Pregnancy and Pregnancy-Related Conditions

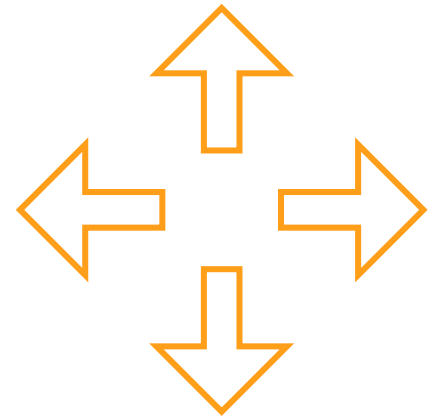
- Discrimination and harassment based on pregnancy or pregnancy related conditions is prohibited
- Institution must provide reasonable modifications based on individualized needs (do not have to fundamentally alter programs)
- Right of reinstatement to academic status held when leave began
- Explicit requirement for lactation space
- Limitations on document demands to validate conditions of pregnancy and certifications of safety

# What are pregnancy and related conditions?

- Pregnancy
- Childbirth
- Termination of pregnancy
- Lactation
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
- Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions

# What reasonable accommodations are pregnant students allowed?

- Reasonable modifications
- Based on individualized needs
- Determined after consultation with the student
- Fundamental alteration is not required



# What are some common examples of reasonable accommodations?

- Breaks during class to express breast milk or breast feed
- Breaks to attend to pregnancy related needs, including eating, drinking, or using the restroom
- Intermittent absences to attend appointments
- Access to online or homebound education
- Changes in schedule or course sequences
- Extensions of time and rescheduling
- Counseling



# May an institution require a pregnant student to provide a doctor's certification?

- Only when certified level of physical ability or health is necessary
- Such certification is required of all students participating in the class, and
- Information obtained is not used for discriminatory purpose

# Example

**A school operates a military studies program that includes a course that involves physical activity similar to that which one would experience in basic training. All students are required to provide a pre-clearance letter from a physician. The school may require a pregnant student to provide a pre-clearance letter.**



# OCRSM pregnancy & related conditions page

- The University must excuse absences due to pregnancy or childbirth for as long as a doctor deems it medically necessary.
- The University must allow the student to return to the same academic and extracurricular status as before the student's medical leave began and to make up any missed work due to doctor's appointments, medical conditions, and childbirth. If a student's grade is based in part on class participation or attendance, the student should be allowed to make up the participation or attendance credits.
- The University must provide the student with the same special services it provides to students with temporary medical conditions, including online instruction, tutoring, and/or independent study.

# Salt Lake Community College June 2022

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

# SLCC: Background

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

## SLCC: OCR Finding

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

## SLCC: OCR Findings

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

## SLCC: OCR Findings

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



## SLCC: OCR Findings

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

# SLCC: Voluntary Resolution Agreement

- Revise its nondiscrimination statement
- Revise its grievance procedures
- Conduct investigation
- Conduct training

# Group Scenario

A student working in the College of Arts and Sciences has formally requested pregnancy accommodations from the Title IX Coordinator. Student is in her second trimester and has been experiencing increased fatigue and occasional back pain, which are affecting her ability to perform her usual work duties effectively. Student's requested accommodations include:

1. **Flexible Work Hours:** To allow for rest periods and medical appointments.
2. **Ergonomic Adjustments:** Provision of a supportive chair and possibly a standing desk to alleviate back pain.
3. **Remote Work Options:** If feasible, to reduce commute-related fatigue.

After consulting with the Dean of the college, the Title IX Coordinator provides the student with an accommodation for working remotely 2 days per week. The Title IX Coordinator denies the other requests without explanation.



# Group Scenario Questions

- 1. Can the Title IX Coordinator ask for a note from the student's healthcare provider?**
- 2. Can the Title IX Coordinator deny the requests for ergonomic adjustments and flexible work hours? Is there risk in doing so? Does the Title IX Coordinator need to provide a rationale for denying these?**
- 3. What are the student's options? Can she appeal the denial of the accommodations or pursue accommodations by any other method?**



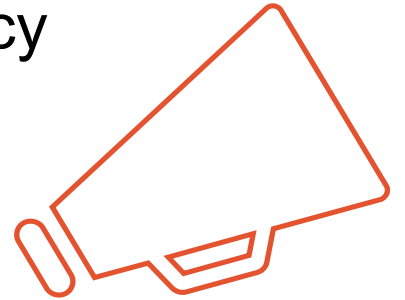


# Questions

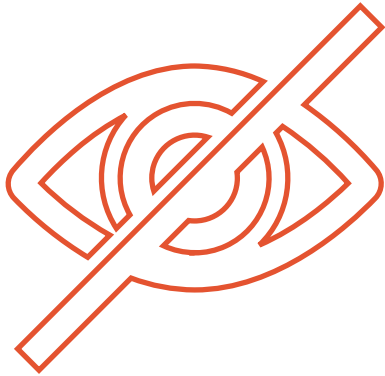
# Confidentiality and Other Expectations

# 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”)

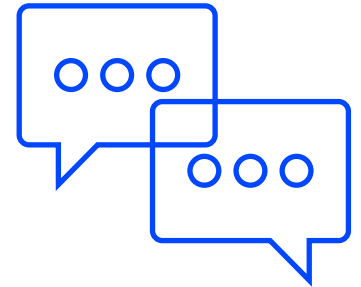


- Protects student records from impermissible disclosures of their education records **and** provides students rights to access their education records
- How it applies in an investigation context:
  - Records containing identifying information on students are subject to FERPA analysis



# Must an official acting under the policy 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)

Appeal Officer is contacted by a local news reporter seeking confirmation that the party has been found responsible for violating the University's policy and asks questions about the appeal timeline.



## Example (not permitted)

The parent of a complainant emails the investigator requesting to have a phone call to “discuss the case.” The complainant has not provided written consent for the investigator to speak to a parent.



# Example (not permitted)

**A University-appointed advisor notifies his supervisor that he has been assigned as an advisor and there may be meetings with the party 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 supportive measures confidential?

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



# Example: Confidentiality

**Title IX Coordinator receives a call from a woman who claims to be the mother of Student A who reported being a victim of sexual assault. Woman demands to know “What you are doing for my daughter?” and specifically “Are providing my daughter with counseling?”**



# 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



# Examples of Conflicts

**An investigator assigned to a case babysat for the complainant when the complainant was a child as is still close with the complainant's family.**

**A hearing officer previously wrote a glowing letter of recommendation for the respondent.**

**An appeal officer in a case previously supervised the complainant and recommended her termination for performance reasons.**



# What does it mean to be “trauma informed”?

- Title IX regulations do not define the term
- There is no standard or commonly accepted definition
- In practice, it means:
  - Prompt provision of supportive measures such as counseling to address the immediate and ongoing effects of trauma
  - Understanding the neurobiology of trauma and its impact on a victim’s neurobiological functioning
  - Adopting investigation and hearing techniques that minimize the risk of exacerbating trauma while still being fair and impartial

# 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



The Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5): exposure to actual or threatened death, serious injury, or sexual violence.



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 a neurobiological effect?



- Experiencing trauma can affect the brain itself by altering chemical processes and brain functioning
- These alterations can affect how a person processes information, what they remember, and how they relay information
- Ignorance of the neurobiological affect of trauma can lead to misconceptions about how victims of sexual violence “act” or “should” act

# Example: Trauma effect

**Complainant gives hyper-specific description of the scent of deodorant the perpetrator was wearing but cannot initially recall whether perpetrator forced oral sex before intercourse, or vice versa.**



# Example: Trauma effect

**During interview, complainant comments that they were “so stupid” to follow perpetrator to their apartment, observes that “I should have said ‘no’ and left as soon as they offered me that drink,” and “my parents are going to be so upset when they find out I put myself in this position.”**



# Possible Effects On Recall

- People who have suffered trauma may experience any or a mix of:

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame

# Trauma & Credibility

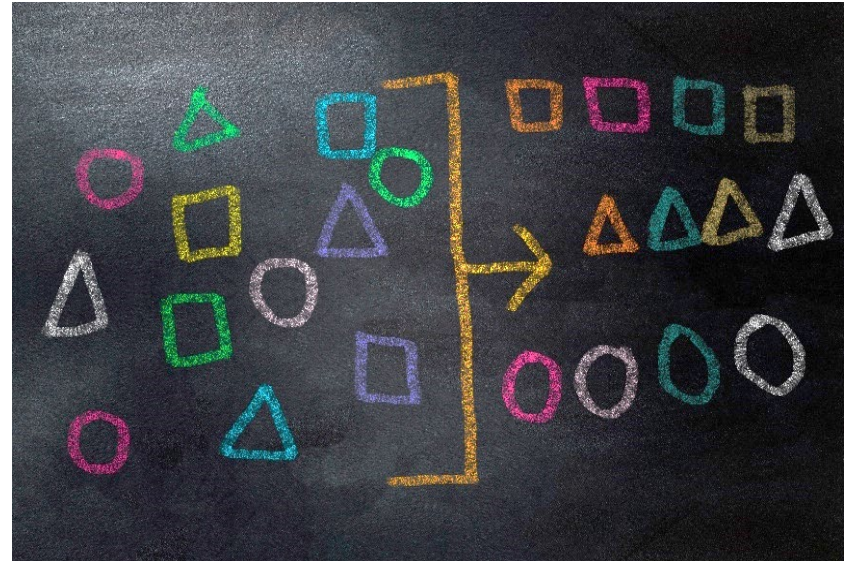
- Avoid making assumptions based on the way an individual delivers information
- Understand memory may be clarified in time
- Address inconsistencies



# The Investigation

# What is the purpose of Title IX investigation?

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



# What are the general principles of an investigation?

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

# How do we collect evidence in an investigation?



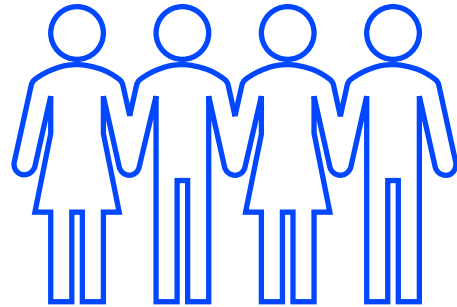
Interviews of parties  
and witnesses



Collection of  
non-testimonial evidence

# Who do we interview?

- Parties
- Fact witnesses
- Maybe character witnesses
- Maybe experts



# What's the difference between a fact witness and a character witness?

- A **fact witness** has personal knowledge about specific facts that are relevant to determining whether or not a given act of sexual harassment occurred.
- A **character witness** does not possess knowledge of specific, relevant facts but instead speaks to a person's general character traits or their general disposition.

# Example: Fact witness

**Jack has accused Jill of sexually assaulting Jack when Jack was incapacitated. Student witness saw Jack and Jill at a party, shortly before the assault, and observed that Jack could not stand and had to be helped by Jill to a waiting rideshare.**



# Example: Character witness

**Jane has been Jill's friend since high school. Jane was out of town the night of the alleged sexual assault. But Jane will testify that Jill is a kind person who would never hurt or take advantage of anyone.**





# How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

# How do I ask questions in the substantive phase?

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

# 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 from that point forward?”

# Examples of facilitators



# Examples of cued invitations

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

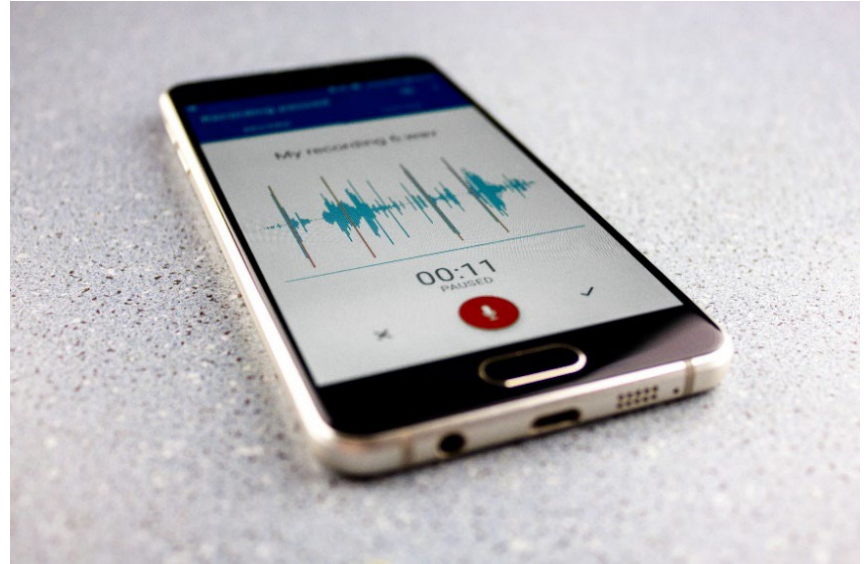
“You said that . . . . Can you  
elaborate?”

“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?”

# How do we make a record of the interview?

- Trend towards audio recording
- Extensive note taking followed by preparation of a summary is permissible
- Video recording is disfavored



# 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

## 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



# Example: Prohibited

**Cade accuses Simon of forced oral sex. Simon claims that Cade is experienced at oral sex and urges the investigator to ask Cade how many times Cade has willingly performed oral sex on others in the past.**



# May an investigation collect and rely on privileged records?

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

# Example: Permissible collection

**Complainant executes a written release allowing Title IX investigator to obtain a copy of notes from Complainant's counseling session where Complainant reported alleged rape to counselor the day after it's occurrence.**



# Group Scenario

**You have been assigned as the investigator for Jamie's Title IX complaint against Alex, alleging sexual harassment. After your interview with Jamie, she provides you with a list of witnesses. Witness A was present at the sociology game night and is in class with Jamie and Alex.**



# Group Scenario Questions

1. How will you prepare for your interview?
2. What will you do to build rapport as the interviewer?
3. As the interviewer, how will you build out your outline?
4. As the interviewer, what documents will you review to prepare for the interview? Are there any individuals you will want to talk to before Witness A?



# Do the parties have access to the evidence?



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

# What exactly has to be shared?

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

# Is the evidence “confidential?”

- Institution may require parties and advisors to agree not to disclose investigation evidence to third-parties
- But cannot prohibit parties from speaking about the allegations themselves





# Do the parties get to respond to the evidence?

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



# How is the investigation concluded?

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

# Does the investigation report make findings?

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

# May parties have an advisor during the investigation?



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

# Example: Advisor conduct

**The institution sends a written notice of investigation to Respondent requesting an interview. Respondent's attorney claims he is in trial for the next eight weeks and cannot be available to accompany Respondent until after trial is complete.**



# Example: Advisors

**Complainant is accompanied to interview by a family member who repeatedly interrupts the questioning, attempts to answer for the complainant, shouts at the investigator, and demands “answers” to certain questions, “before we go any further.”**





# Questions

# The Hearing



# What is the purpose of the hearing?

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

# Who is the “decision-maker”?

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



# What standard of evidence can be used?

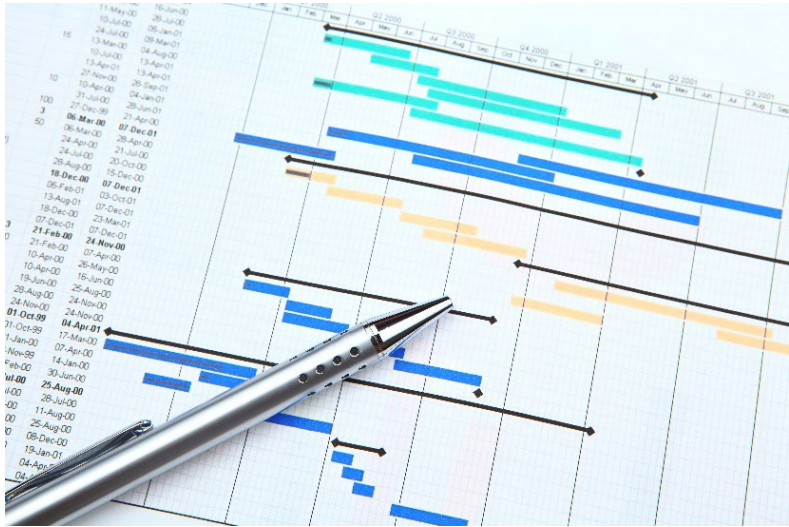
- Either
  - Preponderance of the evidence OR
  - Clear and convincing evidence
- Institution must select a standard and apply it uniformly in all cases, regardless of the identity of the respondent

# What happens before the hearing?

- Parties are provided the final investigation report at least 10 days prior to the hearing
- “Decision-maker” must be identified and clear conflicts of interest assessment
- Hearing must be scheduled and logistics arranged
- Witnesses must be notified
- Pre-hearing conference should be held



# How do we schedule a hearing?



- Set aside sufficient time considering the nature and complexity of the case
- Consider class and work schedules of parties and key witnesses to avoid conflicts
- Consider pre-scheduling a backup or “spill over” date in the event the hearing runs long or must be continued
- Provide letters excusing parties and witnesses from other obligations, as necessary

# 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

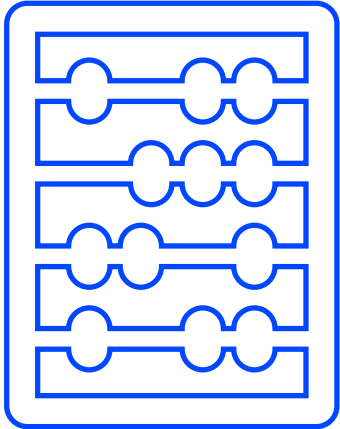
# What is a pre-hearing conference?

- A meeting with the parties, decision-maker, and other necessary officials to:
  - Address logistical issues and concerns
  - Discuss the sequence of the hearing and rules of decorum
  - Hear and resolve objections or concerns that can be addressed in advance
  - Take up other issues that will ensure hearing time is focused on testimony





# What are some key elements of a hearing?



- Live testimony from witnesses
- Contemporaneous questions from the decision-maker and cross-examination from the advisor for the other party
- Decision-maker must screen all questions for relevance and intrusion into prohibited sexual history
- Hearing must be recorded or transcribed
- Steps to separate parties, if requested

# What about the “exclusionary” rule?



- Exclusionary rule contained in 2020 regulation is no longer enforceable.
- Decision-maker may consider all statements, even if witness is not subject to cross-examination
- Decision-maker may consider the absence of cross-examination in assigning weight and credibility
- **Note:** Certain public institutions in certain jurisdictions may be required to enforce exclusionary rule as a matter of procedural due process.

# How does the hearing actually work?

## Required elements include:

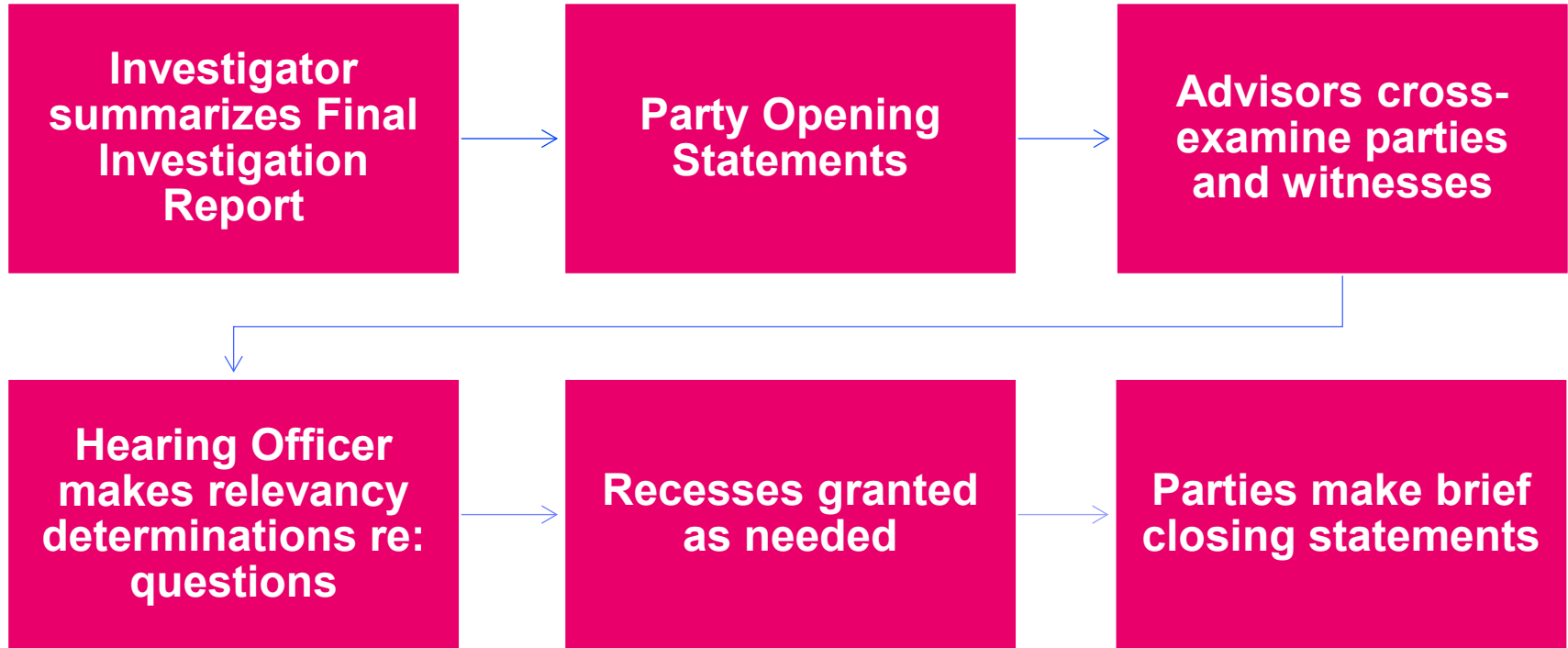
Hearing officer must independently evaluate questions for relevance and resolve relevancy objections

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

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

# UMD Policy – Hearing Sequence



# Who determines relevance?

- Decision-maker(s) must screen questions for relevance and resolve relevance objections
- Decision-maker(s) must explain any decision to exclude a question as not-relevant



# Example: Relevant

**Student A has accused Student B of sexual assault. Student B's advisor wants to question Student A about text messages Student A sent Student B shortly after the alleged assault, including a text message where Student A wrote: "Tonight was great. Let's get together this weekend."**



# Example: Not relevant

**Student A accuses Student B of sexual assault. Advisor for Student A wants to question Student B regarding whether Student B made racially harassing remarks to a different student on a different occasion than the alleged assault.**



# 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



# Can we have standards of decorum for hearings?

- Yes, strongly recommended
- But standards must be applied equally/equitably to both parties



# Example: Rules of decorum

**Institution conducts all Title IX hearings virtually using interactive software. Institution's rules require a party or advisor who wishes to speak to use the hand raise function and be called upon before speaking.**



## Are there “objections” at hearings?

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

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

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

# How does the decision-maker decide a case?



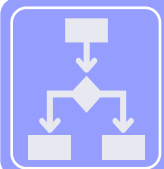
After hearing, decision-maker must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



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

# Assessment of credibility



- Line up facts relevant to credibility
- 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 (other than mere status as party)?
  - 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?

# What is the outline of a written decision?

- 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

# 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





# Appeals

# What is the purpose of the appeal?

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



# Appeal Rights

- Either Party may appeal the Written Notice of Designation or Written Notice of Determination within 5 days of receipt.
- Parties will be notified if the other Party files a written appeal statement and given notice in writing of the general grounds for the appeal. The other Party will be given five (5) Days from receipt of the other Party's written appeal statement to submit a written appeal statement in support of the designation or written determination.
- The bases for appeal are limited to:
  - Procedural irregularity
  - New evidence
  - Conflict of interest or bias
  - Substantially disproportionate sanction (*applicable ONLY to Written Notice of Determination*)

# Procedural Irregularity

*UMD Updated Policy;  
VI-1.60*

- In all cases, the procedural irregularity must be one that affects the ultimate 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.

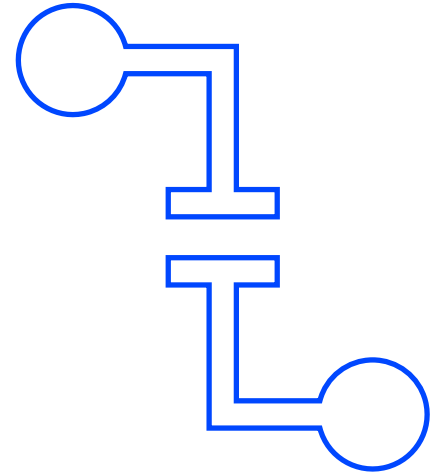
# Example (procedural irregularity)

During a hearing, the hearing panel denies the respondent's advisor the right to submit written questions to the witnesses. The respondent appeals, citing this procedural irregularity, and argues that key witness testimony relied on by the hearing panel must be excluded because the witness was not subjected to questioning by the advisor, as required by the policy. And without such testimony, the outcome cannot be supported.



# Are all procedural errors appealable?

- No – the procedural irregularity must be one that “affected the outcome of the matter”
- Errors that affect the outcome may be referred to as “prejudicial” errors
- Errors that do not affect the outcome may be called “non-prejudicial” or “harmless” errors



# Example (harmless error)

**Policy required hearing to be held within 60 days of submission of Complaint. Hearing was held 61 days after submission of Complaint due to a counting error. The evidence would have been the same if the hearing were held a day earlier.**



# Example (procedural error)

**Appeals officer finds there was a prejudicial procedural error because the hearing officer failed to send notices requesting several of the respondent's key witnesses appear. Appeals officer vacates the adverse finding against the respondent and directs that a new hearing take place after appropriate notices to appear have been issued.**





# New Evidence

**UMD Updated Policy;  
VI-1.60**

- 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.



## Example (new evidence)

**After determination is made that respondent did not commit sexual misconduct, complainant secures a previously unknown video made by a bystander at a party that depicts respondent groping complainant and complainant attempting to pull away from respondent. The bystander has been out of the country and only learned of the hearing after returning a few days ago.**



## Conflict of Interest or Bias

- 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;  
VI-1.60*

- 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.



# Example: Appeal

**Respondent appeals and submits evidence that one member of a three-person hearing panel previously wrote gushing letters of recommendation for complainant. Hearing panel member did not self-disclose the letters when selected to serve on the panel.**



# Group Scenario

After the investigation is underway, Jamie adds an allegation of stalking to her complaint, accusing Alex of repeatedly sending Jamie personal text messages during the investigation and hanging around her dorm building, despite living off-campus. During the investigation, Witness B, who also lives in Jamie's dorm building, tells the investigator he saw a figure outside of the dorm building, and she is confident it was Alex. The investigator asks Witness B why she is so confident that the person she saw was Alex, and she says it is because "I know a snake when I see one." The investigator does not ask any follow up questions.

At the hearing, Alex admits to sending personal text messages but denies ever being outside Jamie's dorm building. Under cross-examination, Alex testifies he was studying for a midterm the night of the alleged lurking and provides a syllabus to confirm the date of the midterm and divulges that he and Witness B previously had a one-night stand, and he thinks Witness B is using this opportunity to get back at him for not calling her back. Jamie admits they never saw the face of the lurking figure. Witness B does not appear at the hearing, but the investigator verbally relays what Witness B said in her interview. Alex's advisor demands the hearing be delayed until Witness B's attendance is secured. The hearing officer denies the request.

The hearing officer credits Witness B's testimony to the investigator and finds Alex responsible for stalking. The hearing officer notes that the decision is a "close one" and that Alex's actions would not constitute stalking but for the fact Alex was seen outside Jamie's dorm building.



# Group Scenario Questions

- 1. Should the hearing officer have delayed the hearing as requested by Alex's advisor?**
- 2. Was it appropriate for the hearing officer to credit Witness B's testimony?**
- 3. Was it necessary for the hearing officer to explain why he did not credit Alex's testimony?**
- 4. Should the hearing officer's decision be reversed on appeal?  
Would your answer be the same if the text messages threatened Jamie with physical violence?**





# Questions



# Informal Resolution and Other Processes

# What is informal resolution?

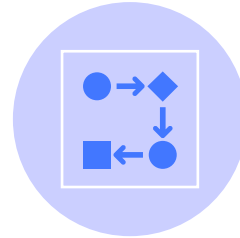
A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.



# What are the key concepts of informal resolution?



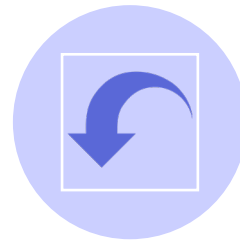
A formal complaint must first have been filed and written notice given to the parties



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



The parties must voluntarily agree to participate in writing



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

# 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

# Example: Impermissible informal resolution

**A student files a formal complaint accusing their faculty advisor of sexually harassing student by repeatedly asking if student is dating. Faculty member claims they were just trying to get to know student and offers to apologize.**



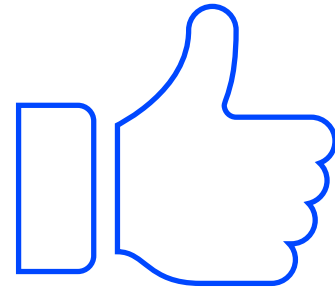
# Example: Permissible informal resolution

**Student A accuses Student B of dating violence. Student B wants to apologize, offer to take anger management counseling, and promise not to contact Student A again. Student A would prefer these terms to an investigation and live hearing.**



# Must an institution allow informal resolution?

- Current regulations permit but do not require informal resolution



# Why approve informal resolution?



- Deference to the parties' wishes
- Often quicker and more efficient
- Removes uncertainty of outcome
- More flexibility and creativity than a disciplinary outcome
- Mitigates litigation risk (for everyone)
- Others?



# Why not approve informal resolution?

- Severity of conduct
- Proposed terms are simply inadequate
- Undermines public confidence in Title IX compliance
- No confidence parties will abide by agreement
- Concern a party is being pressured or improperly influenced
- Others?

# What issues need to be addressed in informal resolution?

- The substantive terms
- How compliance will be verified
- The punishment for non-compliance
- The effect on the pending formal complaint
- The effect on collateral conduct charges/policy violations
- Others?



# Example: Informal resolution detail

**Two students at a small college agree “not to interact with each other while they are at the college.” What does “interact” mean? How will shared spaces be used? What if they are in the same class? What if they have the same friends?**



# Example: Informal resolution detail

**Student accused of stalking agrees to hire a counselor and follow the counselor's recommendations for treatment. What if the counselor fails to diagnose a condition? How will the counselor's recommendations be known? How will treatment be confirmed?**



# Example: Informal resolution detail

**Two employees agree to informal resolution in which Respondent will complete 20 hours of community service and retake the Title IX training course for students. Respondent only completes 12 hours and fails to take the course. What is the consequence?**



# What other factors may guide institutional decision?

- Severity and nature of the conduct
- Pattern of misconduct
- Likelihood dismissal would be a sanction under grievance procedure if misconduct found
- How long process has already lasted
- Publicity
- Potential effect on campus climate
- Desires of the parties
- Ability of the parties to abide by a resolution
- Likelihood a resolution will result

# Example

**A varsity coach is accused of fondling two student athletes. The athletes alleged the fondling occurred at the team hotel after the coach had been drinking in the bar. The athletes request to have an informal resolution because they believe the coach has a drinking problem and should seek treatment. They do not want the coach to be terminated.**



# What are some potential terms of informal resolution?

- Restrictions on contact
- Restrictions on a respondent's participation in certain activities or events
- Training or education
- Withdrawal or resignation
- Apology
- Negotiated discipline or sanctions
- Others?



# How should we document an informal resolution?

- Documented in writing
- All essential terms in the same document
- Signed by the parties
- Dated
- Indicating institutional approval
- Indicating closure of grievance procedure

# Is Title IX the exclusive process for resolving sexual misconduct?



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

# What other policies/processes may apply?

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

# At what point can we use some other policy?

- Depending on facts:



Before a Title IX  
grievance process

At the same time  
as a Title IX  
grievance process

After a Title IX  
grievance process

# Example: Before Title IX

**Faculty member reports that a student was watching graphic pornography in the lecture hall during class. Faculty member is concerned other students may feel harassed. Institution prohibits using its network to view pornography and conduct code prohibits conduct that disrupts academic instruction.**



# Example: During Title IX

**Student A returns to their residence hall to find Student B drunk and exposing themselves to others in the lobby. Student A makes a sexual harassment complaint. Title IX investigator secures video from the lobby that clearly depicts Student B exposing themselves to others. The residence hall contract prohibits students from appearing naked outside their room or the restroom. The student conduct code prohibits lewd or obscene behavior. Student B refuses to participate in Title IX process.**



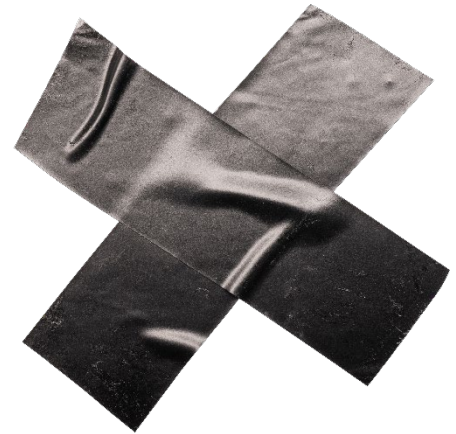
# Example: After Title IX

**Student accuses faculty member of sexual harassment by pursuing romantic relationship with student that was unwelcome. Title IX hearing officer concludes that faculty member and student had a romantic relationship, that faculty member instigated it, but student welcomed the relationship and reciprocated faculty member's advances. Institution has a separate policy that prohibits faculty from pursuing or engaging in romantic relationships with students unless student and faculty member are married.**



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

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







# Questions

**HUSCH BLACKWELL**