

HUSCH BLACKWELL

# University of Maryland

## Title IX Training: Sexual Harassment and Other Sexual Misconduct

February 2026

# Agenda

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Title IX Scope, Jurisdiction, and Prohibited Conduct

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Intake, Supportive Measures and Pregnancy Accommodations

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Confidentiality and Other Expectations

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Investigation, Hearing and Appeal

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Informal Resolution and Other Processes

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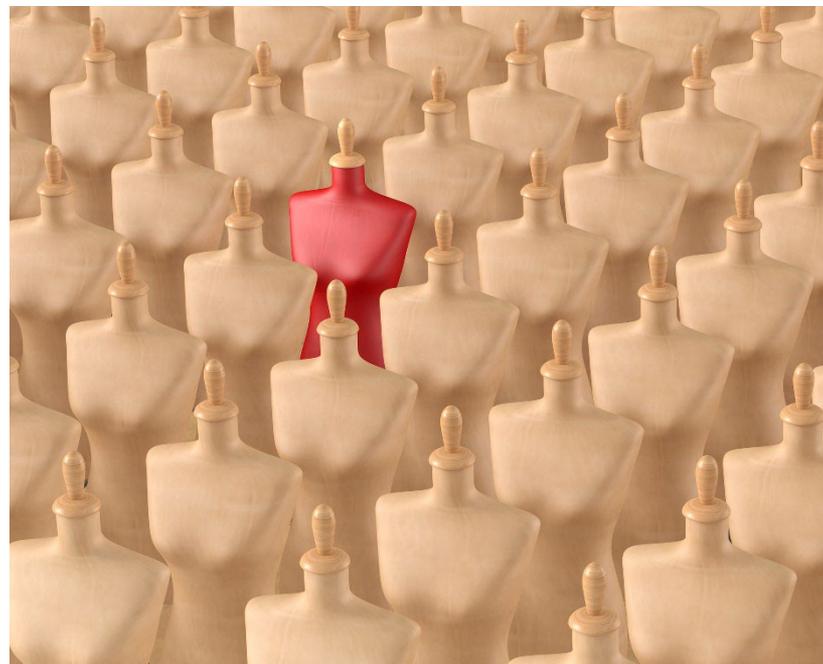


# Title IX Scope, Jurisdiction, and Prohibited Conduct

# 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.”

20 U.S.C. § 1681



# Title IX Regulations

- Contained at 34 C.F.R. §, Part 106 (Department of Education)
- Regulations address a host of subjects, including general non-discrimination, scholarships, athletics, housing, employment, and sexual harassment response
- The “August 2020 regulations” refer to a series of amendments to Part 106 made by the first Trump Administration that addressed sexual harassment response and imposed significant due process requirements (including live hearings)

# Biden-Era Regulations Vacated

- The Biden administration proposed multiple revisions to Part 106, including many that addressed procedural response to sex discrimination and sexual harassment
  - Vacated nationwide by *State of Tennessee v. Cardona* (E.D. Ky., Jan. 9, 2025)
  - February 4, 2025, Dear College Letter from ED reverts to August 2020 regulations
  - August 2020 regulations presumably in force through at least 2028

# August 2020 Regulations

- “Sex” not defined to include gender identity and sexual orientation
- No content addressing separation based on gender identity
- No detailed rules for response to adverse treatment sex discrimination (as opposed to sexual harassment)
- Rigorous procedures for sexual harassment investigations and hearings
- Minimal content on pregnancy discrimination and accommodation

# 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

# 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 is not part of an education program/activity



# *Example*

**A group of students from the University attend a lecture held at a private college in D.C. The students are accompanied by a faculty advisor and travel in a university-owned van. While at the college-hosted reception after the lecture, one student is groped by an intoxicated attendee.**



# 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?



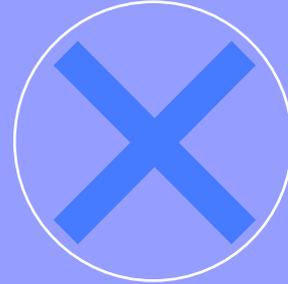
Yes, if the conduct at issue occurs in the context of an education program or activity



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*

**A student in the chess club reports being sexually assaulted while attending a chess tournament at another university. The student traveled to the tournament with other members of the chess club, using transportation arranged and funded by the club (which receives university funding). The chess club's faculty advisor accompanied the group on the bus and attended the tournament with the students.**



# *Example*

**An alumna comes back to campus to attend a reunion event hosted by a student organization at an off-campus venue. During the event, the alumna is inappropriately touched by an intoxicated attendee who is currently enrolled as a student.**



## *Example*

**After spending time drinking at a concert, Graduate Student visits Student's apartment. Graduate Student then uses physical force to pressure Student into unwanted sexual activity. Student's apartment is in a privately owned building located near campus. The apartment complex has an agreement allowing it to use the university's name and branding in its marketing materials, which sometimes leads people to mistakenly think the university owns or operates the complex.**



# 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

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

## Reach of Policy (“Jurisdiction”)

- Acts of ***Prohibited Conduct*** committed by or against students, employees, and third parties when:
  - The conduct occurs ***on*** University premises, in any University facility, or on property owned or controlled by the University
  - The conduct occurs ***in the context*** of a University Education Program or Activity, including, but not limited to, University-sponsored academic, athletic, extracurricular, study abroad, research, online, or internship programs or activities

## 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 and Non-Title IX Conduct (“Other Sexual Misconduct”)

- This Policy also addresses allegations of **Other Sexual Misconduct**, which include:
  - 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 tenured professor develops a romantic interest in a student. The professor invites the student to meet privately during office hours and asks intrusive questions about the student's personal relationships. The professor then comments, "I really enjoy our talks... If you continue coming to my office hours, I can promise you'll do very well in this class."**



# 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

**A female student frequently experiences lewd sexual remarks and whistles from others while exercising at the campus recreation center. On one occasion, while she is working out, someone writes “call for a fun night” on her car window with soap and attaches a balloon made from a condom to her side mirror. Feeling unsafe, the student decides to stop using the recreation center and instead purchases a membership at a private fitness facility.**



# 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?

Rape

Statutory Rape

Fondling

Incest

# What is rape?

- 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



# University's Definition of Consent

- “**Consent**” means a knowing, voluntary, and affirmatively communicated willingness to participate in a particular sexual activity or behavior
- Only a person who has the ability and capacity to exercise free will and make a rational, reasonable judgment can give Consent
- Consent may be expressed either by words and/or actions, as long as those words and/or actions create a mutually understandable agreement to engage in specific sexual activity
- It is the responsibility of the person who wants to engage in sexual activity to ensure that the person has Consent from the other party, and that the other party is capable of providing Consent

# University's Definition of Consent *cont.*

- Lack of protest or resistance is not Consent; nor may silence, in and of itself, be interpreted as Consent
- Previous relationships, including past sexual relationships, do not imply Consent to future sexual acts
- Consent to one form of sexual activity cannot automatically imply Consent to other forms of sexual activity
- Consent must be present throughout sexual activity and may be withdrawn at any time; if there is confusion as to whether there is Consent or whether prior Consent has been withdrawn, it is essential the participants stop activity until the confusion is resolved
- Consent cannot be obtained by use of physical force or Sexual Coercion
- An individual who is Incapacitated is unable to give Consent

# What is incapacity?

- Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effects 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 A: Incapacity?*

**Student A and Student B often engage in sexual activity together after consuming alcohol or drugs. Knowing about the institution's Title IX policy, they agree ahead of time to give "blanket consent" for sex, "even if one of us is too intoxicated to respond." One evening, after both students drink and use MDMA, Student A has sex with Student B while Student B is unconscious. Later, Student B files a Title IX complaint alleging that Student A committed sexual assault.**



## *Example B: Incapacity?*

**Alex and Chris attend a football tailgate party. Over the course of three hours, each consumes six beers. Instead of going to the game, they decide to go back to Alex's on-campus apartment to hook up. Both Alex and Chris drive separately from the tailgate to Alex's apartment without any issues. Once there, they have sex and then fall asleep for several hours. Later, Alex reports that he was too intoxicated to give consent. Several people who were at the tailgate remember talking with Alex and Chris about the game, their predictions for the outcome, and upcoming stadium renovations.**



# What is statutory rape?



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

## *Example:* Statutory rape

**State law establishes the age of consent at 16. The University runs a summer lacrosse camp. During the camp, an 18-year-old participant has sexual intercourse with a 15-year-old participant in a residence hall room after curfew hours. Both participants attend the same high school, and the two had been in a romantic relationship, with prior sexual encounters, before attending the camp.**



# What is fondling? *(Updated June 2025)*

- Intentional touching of clothed or unclothed body parts, without consent of the victim, for the purpose of sexual degradation, sexual gratification, or sexual humiliation, or
- The forced touching by the victim of the other individual's clothed or unclothed body parts, without consent of the victim, for the purpose of sexual degradation, sexual gratification, or sexual humiliation
  - This definition includes instances where the victim is incapable of giving consent because of age or incapacity due to temporary or permanent mental or physical impairment, or intoxication for the purpose of sexual degradation, sexual gratification, or sexual humiliation

## *Example: Fondling*

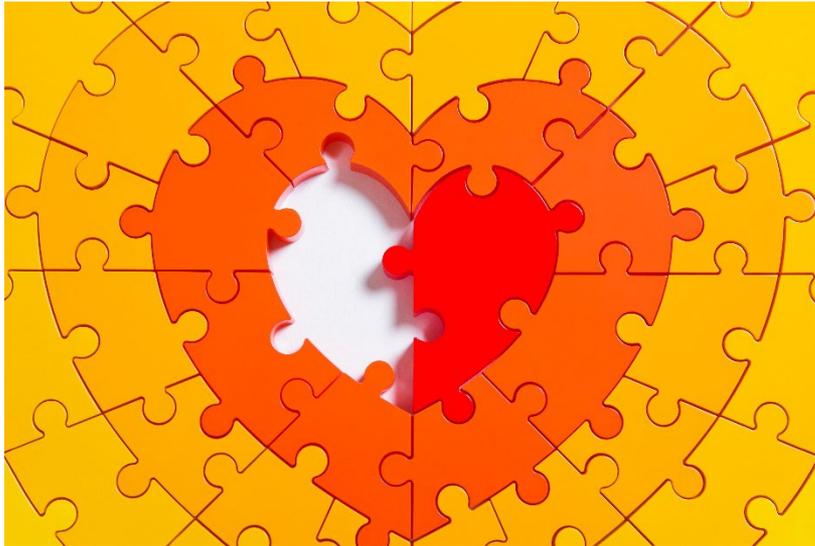
**Student A and Student B are romantically interested in each other. While sitting on the bed in Student B's dorm room, Student A places their hand on Student B's leg. Student B pushes Student A's hand away while laughing. Several minutes later, Student A shoves their hand down Student B's crotch and squeezes Student B's genitals.**



# 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

**Taylor and Morgan have been casually seeing each other, sometimes spending the night together, and frequently texting. One evening, during a heated argument, Morgan throws Taylor's water bottle at Taylor. The water bottle misses Taylor, strikes the wall, and leaves a hole in the wall.**



# 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?*

**Jordan and Riley ended their relationship after Jordan became interested in Casey. Riley begins sending Jordan numerous text messages every day, pleading with Jordan to leave Casey and get back together. In the texts, Riley uses harsh language and threatens to harm Casey. One evening, while Jordan and Casey are dining at a restaurant, Riley approaches them, causes a scene, and throws a glass of water at Jordan.**



## 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?*

**Elliot is accused of sexual assault, but is found not responsible after a hearing in which the complainant does not attend and Elliot testifies that the encounter was fully consensual. Although the Title IX Coordinator has no evidence, she suspects Elliot may have intimidated the complainant into not participating in the hearing. Convinced that Elliot is “evading accountability,” the Title IX Coordinator chooses to refer Elliot to student conduct for violating the university’s alcohol policy, despite never having made such a referral for any other complainant or respondent in the past.**



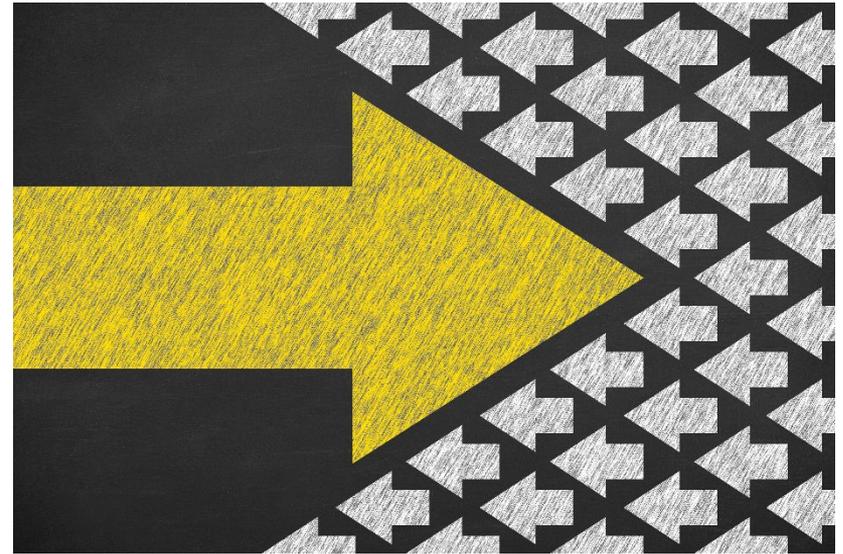
# Is it retaliation if a respondent files a counter-complaint?



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

# Is there any retaliation that is allowed?

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



## *Example*

**A well-known student musician at a public university is accused of sexual misconduct. The complainant shares her story with the campus newspaper, which publishes the allegations while keeping her identity confidential by referring to her as “Sarah Smith.” In response, the student musician agrees to an interview and states that he is innocent, claims the accusations are untrue, and asserts that “Sarah Smith” is making these allegations out of retaliation because he refused to collaborate with her on a high-profile performance opportunity.**



# *Scenario for Discussion*

Riley and Sam are both graduate teaching assistants (TAs) in the English Department. They occasionally collaborate on grading and share an office, but do not socialize outside of work. During finals week, the department chair, Dr. Kim, invites all TAs to a “thank you” dinner at a local restaurant. Attendance is optional, but Dr. Kim announces that those who attend will receive a glowing recommendation from her after graduation.

At the dinner, Riley drinks several cocktails and becomes loud. Riley repeatedly comments on Sam’s appearance, complimenting Sam’s clothing in a way that makes Sam uncomfortable. Riley then leans in and whispers a sexually suggestive remark to Sam, who tries to change the subject. Riley later sends Sam a string of late-night text messages, including one with an inappropriate meme and another asking if Sam wants to “hang out somewhere private.” Sam does not reply.

After the dinner, Riley continues to make suggestive comments in the shared office space. Sam avoids Riley as much as possible, but files a Title IX complaint a month later, after Riley jokes about “grading each other’s bodies” in front of another TA.



# *Questions for Discussion*

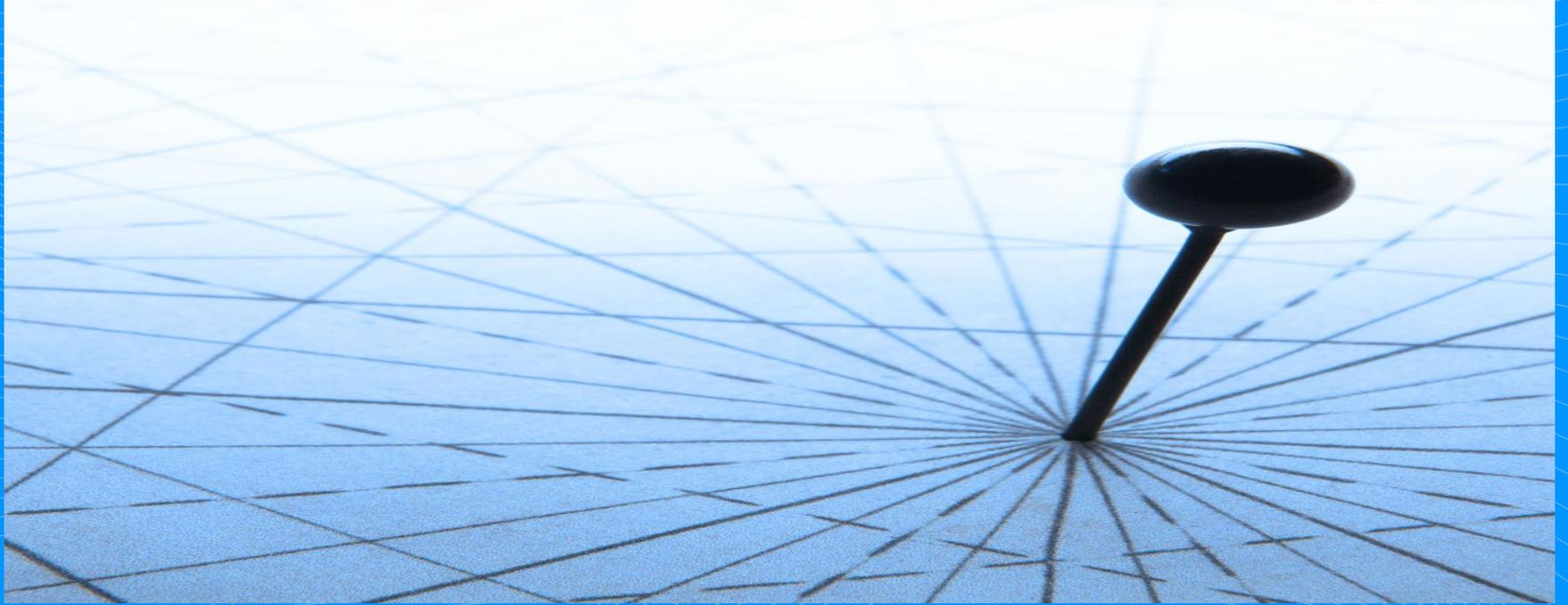
- **What forms of misconduct might be present in Riley's actions?**
- **Does the university's policy apply to all of Riley's conduct? What facts would you consider in your analysis?**
- **Are there any facts missing that you would want to know to determine if the policy applies?**
- **Does the timing of Sam's complaint or his avoidance of Riley after the incidents matter?**



# Questions?



# Role of OCRSM



# Office of Civil Rights and Sexual Misconduct (OCRSM)

- Main mission is to foster learning and working environments free from all forms of discrimination and harassment
- Offers training, education, and outreach opportunities for offices, departments, and student groups across campus
  - Aimed at informing the campus community and increasing awareness around policies, rights, supportive measures, and other available resources on and off campus

# OCRSM Compliance Training & Presentation Topics

- General OCRSM overview
- Sexual Misconduct (including Title IX) Policy overview presentation
- Non-Discrimination Policy overview presentation
- Responsible University Employee (RUE) Reporting Responsibilities
- How to Respond to a Disclosure
- Supportive Measures and Resources Overview
- Pregnancy and Title IX
- Best Practices for TAs, GAs, and Others
- On-Campus and Off-Campus Resources for Students and Staff/Faculty
- Others upon request and approval

# OCRSM Workshops

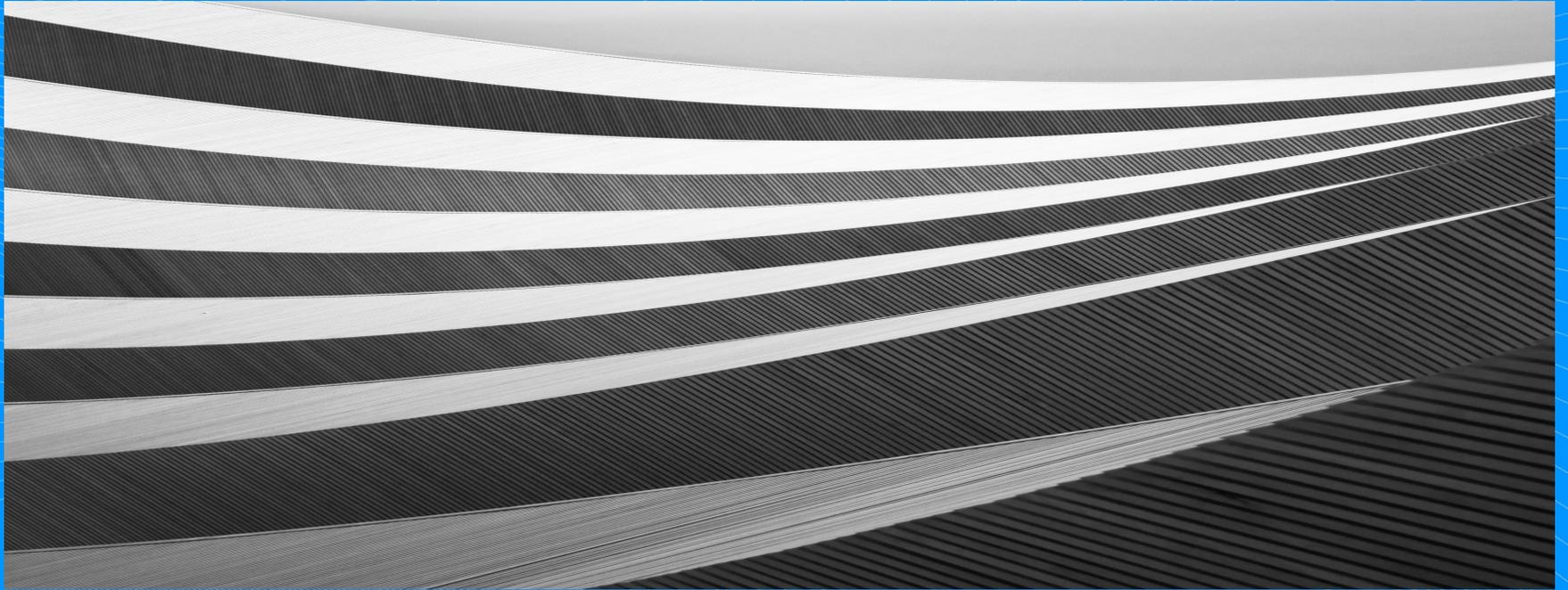


- Recognizing Healthy and Unhealthy Signs in Relationships
- Self Love Workshop
- Boundary Setting & the 10 Signs
- Practicing Open Communication
- Behind the Post Workshop (Social Media Safety)
- Love Languages and Safety Planning
- Escalation Workshop

# Resources

- *Confidential Support Resources*
  - *E.g.*, Counseling Center, University Health Center, Faculty Staff Assistance Program
- *Off-Campus Confidential Resources*
  - *E.g.*, House of Ruth Maryland, Domestic Violence and Sexual Assault Center
- *University Resources*
  - *E.g.*, UMPD, Counseling Center Suicide Prevention, Ombuds services, Belonging & Community resources

# The Grievance Process



# What is the grievance process?

Report, Intake,  
and Supportive  
Measures

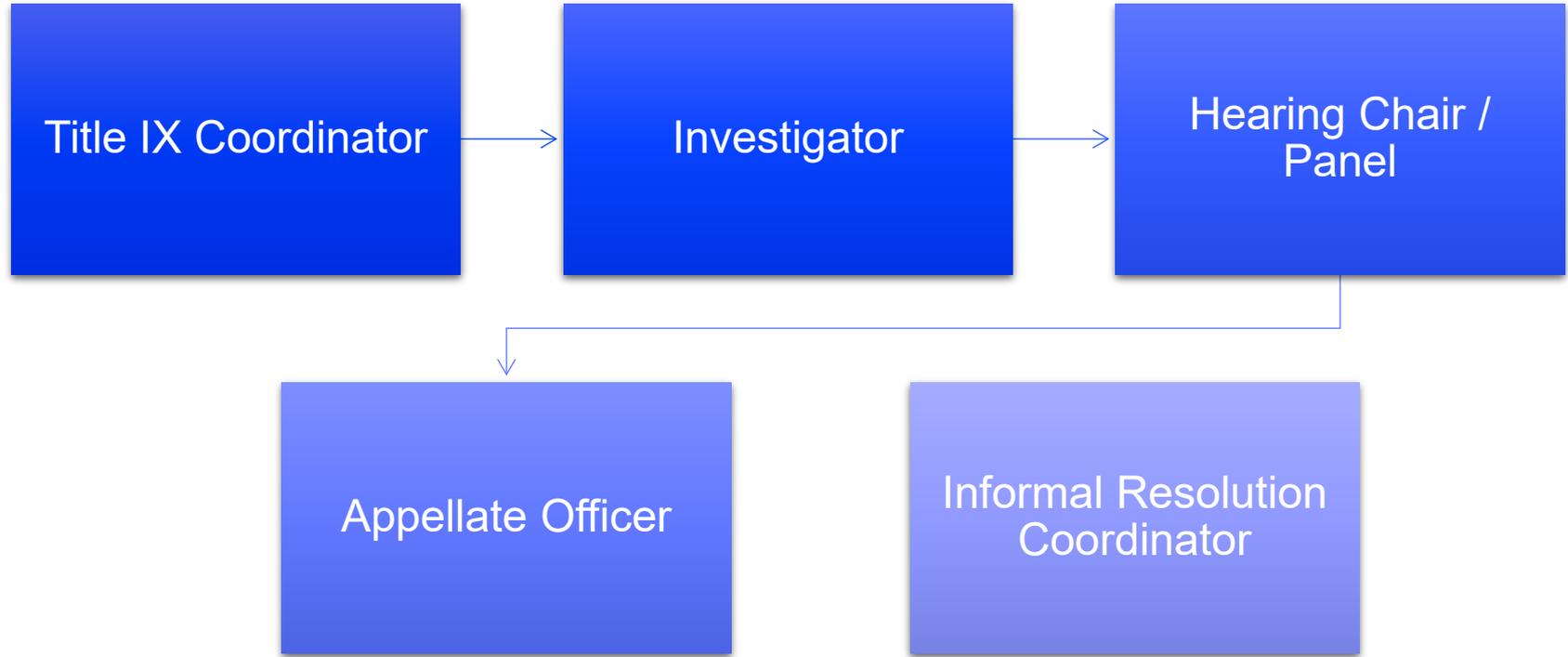
Formal  
Complaint  
(Complainant's  
or, sometimes,  
institutional  
option)

Investigation to  
collect relevant  
inculpatory and  
exculpatory  
evidence

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

Appeal

# 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:* “Actual knowledge”?

**A student who missed an important lab assignment comes to the faculty member’s office and discloses that the student missed the examination because she was at the hospital having a SANE examination performed. The student tells the faculty member she was raped by another student at a party the prior evening.**



# Reporting Obligations

- The University requires that RUEs (any university administrator, supervisor, faculty member, campus police, coach, trainer, resident assistant, or non-confidential first responder) must promptly notify the Title IX Officer of any report of sexual harassment or other sexual misconduct brought to their attention

<https://ocrsm.umd.edu/frequently-asked-questions>

# When do we reach out to the alleged victim?

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



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

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

# 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 A: Dismissal*

**Student complains that they experienced a “Title IX” violation when a graduate assistant allegedly made antisemitic comments during class.**



# 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 B: Dismissal*

**After a student submits a verbal harassment complaint against an assistant coach, the assistant coach resigns and accepts a position at a different institution. The university marks the former assistant coach as “ineligible for rehire” in its records and closes the complaint without further investigation.**



## *Example C: Dismissal*

**A former student reports experiencing domestic violence by an employee during the time when the former student was both enrolled and employed full-time at the institution. The former student has since relocated and expresses a strong reluctance to have any further contact with the institution due to previous negative experiences.**



# 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 sexual assault against Jane Doe during the 2023-2024 academic year.”**



# 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*

**A complainant reports being groped by an unidentified person in the campus library during the late evening hours. The Title IX Coordinator reviews security camera footage and analyzes building access logs to try to identify the individual involved.**



# 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:* Supportive measures

**Employee is the victim of dating violence perpetrated by their significant other in a University parking lot. Employee requests time off from work for one hour every Friday afternoon for the next two months to attend counseling sessions.**



## *Example:* Supportive measures?

**A third-year student reports they were sexually harassed by a faculty member during their first year. The student requests a refund of tuition for the entire first year, despite having obtained all As except for two Bs.**



# 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

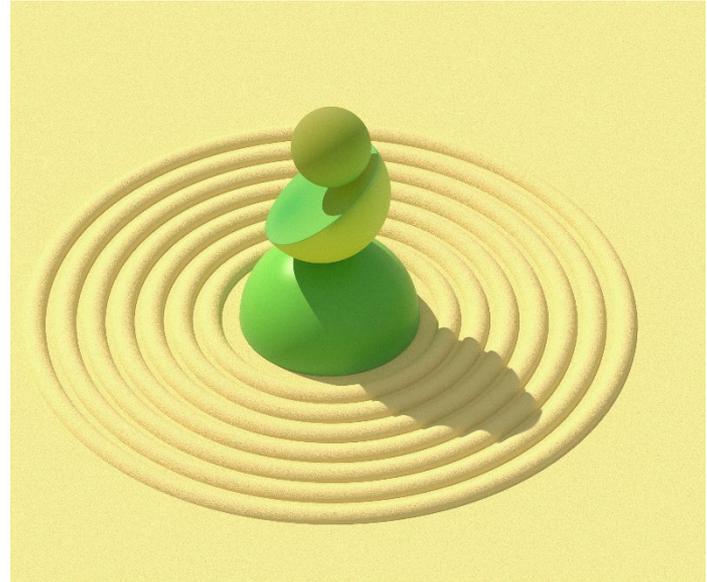
## *Example:* Right to accommodations?

**Student with depression accuses a coach of sexual harassment. The student reports that the sexual harassment has aggravated the depression and necessitates accommodations of various types, including extra time to complete assignments and tests.**



# What if the report falls outside Title IX jurisdiction?

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



# 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 removals or suspensions for students?



- Students may be removed on an 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:* removal?

**Student X reports that Student Y sexually assaulted them after giving them a beverage that had been spiked with an unknown substance. The incident is said to have taken place the previous night, and Student X has visible bruises. Additionally, Student Z, who knows Student X, reports that two weeks earlier, Student Y tried to drug them as well, but a friend intervened before anything further happened.**



# Can we utilize an already existing process for removals?

- Yes, if that process complies with the Title IX standard
- Common institutional examples include:
  - Threat assessment policy
  - Behavioral Evaluation and Threat Assessment (BETA) Team
  - 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 upon employee status and other policies (e.g., Faculty Handbook)

## *Example: Administrative leave*

**A maintenance staff member is reported for frequently being present near the locker room and watching students while they are partially undressed. The staff member faced similar allegations five years ago. There are no accusations of physical contact or violence. The institution places the staff member on administrative leave while the investigation is conducted.**



# *Scenario for Discussion*

Before leaving the restaurant, Dr. Kim and Riley have a private conversation. Dr. Kim asks Riley if they are seeing anyone and remarks, “You’re the kind of TA students develop crushes on.” Dr. Kim then comments, “If I weren’t your supervisor, I’d ask you out myself.”

Riley laughs and leaves. The next week, Dr. Kim assigns Riley to a different course section without explanation. Riley feels uncomfortable and confides in another faculty member, who reports the situation to Human Resources.

When contacted, Riley says they do not want to file a formal complaint because Dr. Kim writes recommendation letters for all TAs and controls future TA assignments. Riley is also applying for a competitive fellowship that requires Dr. Kim’s endorsement.



# *Questions for Discussion*

- **What supportive measures could the university offer Riley?**
- **What should the university do if Riley does not want to file a complaint?**
- **If Riley does file a complaint, what should an anti-retaliation plan include?**



# Pregnancy Accommodations

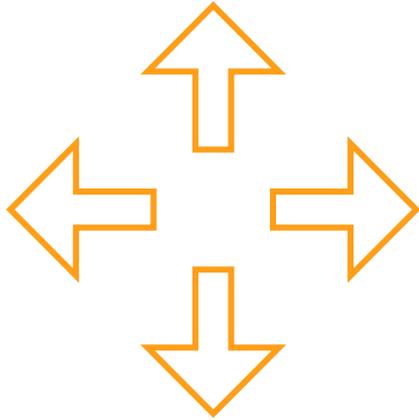
# Pregnancy and Pregnancy-Related Conditions

- 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
- Access to lactation space (*2024 Regulations*)
- 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*

**The University operates an Army ROTC program that includes a course involving 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 and 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

# University Resources for Students

- Lactation & Feeding Spaces
- University Health Center
- UMD Parents' Listserv
- Family Spaces
- Child and Elder Care Services

# Questions?





# 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



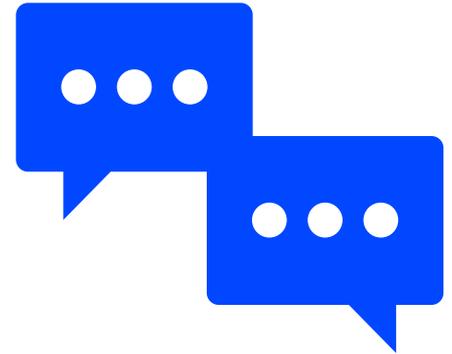
# Family Educational Rights and Privacy Act (“FERPA”)



- 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 A:* Not permitted

**A University-appointed advisor informs his department supervisor that he will need to attend meetings related to a Title IX case during work hours. The supervisor, before approving the advisor's time away from regular duties, requests the names of the individuals involved and detailed information about the allegations in the case.**



## *Example B:* Not permitted

**Shortly after the hearing, the parent of the complainant contacts the lead investigator by phone and leaves a voicemail asking for an update on the status of the investigation and to discuss specific details of the case. The complainant has not provided written authorization for the investigator to communicate with their parent.**



# 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



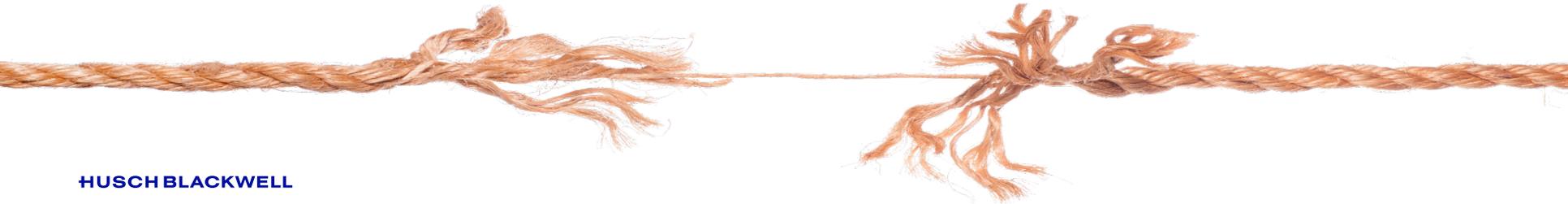
## *Example:* Confidential supportive measures?

**Title IX Coordinator receives a call from the sister of a student who reported being sexually harassed at a football game. The sister purports to know about the student's report of sexual harassment and demands to know whether the institution has provided her sister with counseling resources.**



# 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*

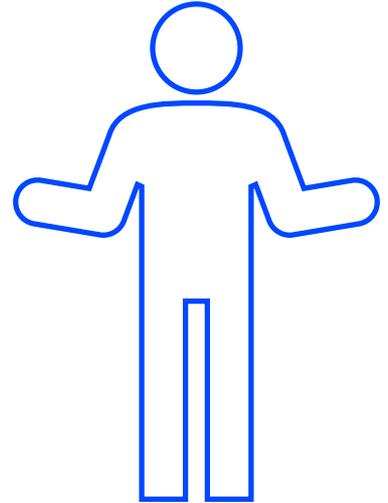
## *Examples: Conflicts*

- **An investigator assigned to a Title IX case previously tutored the complainant in high school and continues to have a friendly relationship with the complainant's family**
- **An appeal officer currently reviewing the case was formerly the complainant's supervisor and, in that role, issued a formal warning to the complainant regarding job performance concerns**



# What is bias?

- A prejudice, predisposition, or inclination in favor of or against a thing or person
- Team members must be free of bias against complainants or respondents generally, or a specific complainant or respondent



## Example: Bias

**An investigator assigned to a sexual assault case also provides sexual misconduct trainings to various groups on campus. Recently, during a training, an attendee asked the investigator whether there are any “false” reports of rape. The investigator publicly stated in response, “I’ve never seen a false report. And when hearings have found someone not responsible, I’ve disagreed with the outcome. I think all these allegations should be believed.”**



# Practical Point

**Title IX team members who have public-facing roles must be especially careful not to make statements or deliver content that would be perceived as demonstrating bias.**

## Example: Bias

**A hearing officer (a faculty member) previously had the complainant as a student. As a student, the complainant was the hearing officer’s “prize pupil”, and the hearing officer wrote several letters of recommendation supporting the student’s admission to a prestigious graduate program. In one of those letters, the hearing officer (then faculty member) described the complainant as having “the most integrity of any student I have ever encountered.”**



# 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

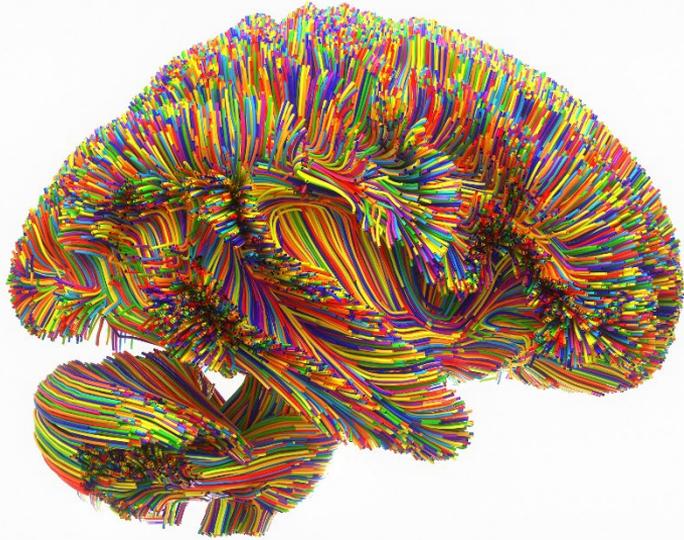


*The Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5)* defines trauma as exposure to actual or threatened death, serious injury, or sexual violence



*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 effect of trauma can lead to misconceptions about how victims of sexual violence “act” or “should act”

## *Example A:* Potential trauma effect

**Complainant gives a specific description of a song that was playing in the background, but cannot initially recall whether, without the complainant's consent, the respondent engaged in oral sex or intercourse first.**



## *Example B:* Potential trauma effect

**During interview, complainant comments, “Maybe this is all a mistake, and I should drop the whole thing. . . . I just feel so stupid for taking a drink from a stranger. My friend got drugged once, and I should have known better based on what happened to her.”**



# 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 and Credibility

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

# Investigation, Hearing, and Appeal



# 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

**Alex has reported that Casey sexually assaulted him while he was incapacitated. Alex's suitemate saw Alex and Casey together in the kitchen shortly before they went into Alex's bedroom. The suitemate will testify that Alex was stumbling and slurring his words at the time.**



## *Example:* Character witness

**Morgan, who has been close friends with Casey since their freshman year of high school, was not in Alex's suite on the night in question. Morgan plans to testify that Casey has always cared deeply for Alex and, based on her character, would never intentionally harm Alex or anyone else.**



# 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?”

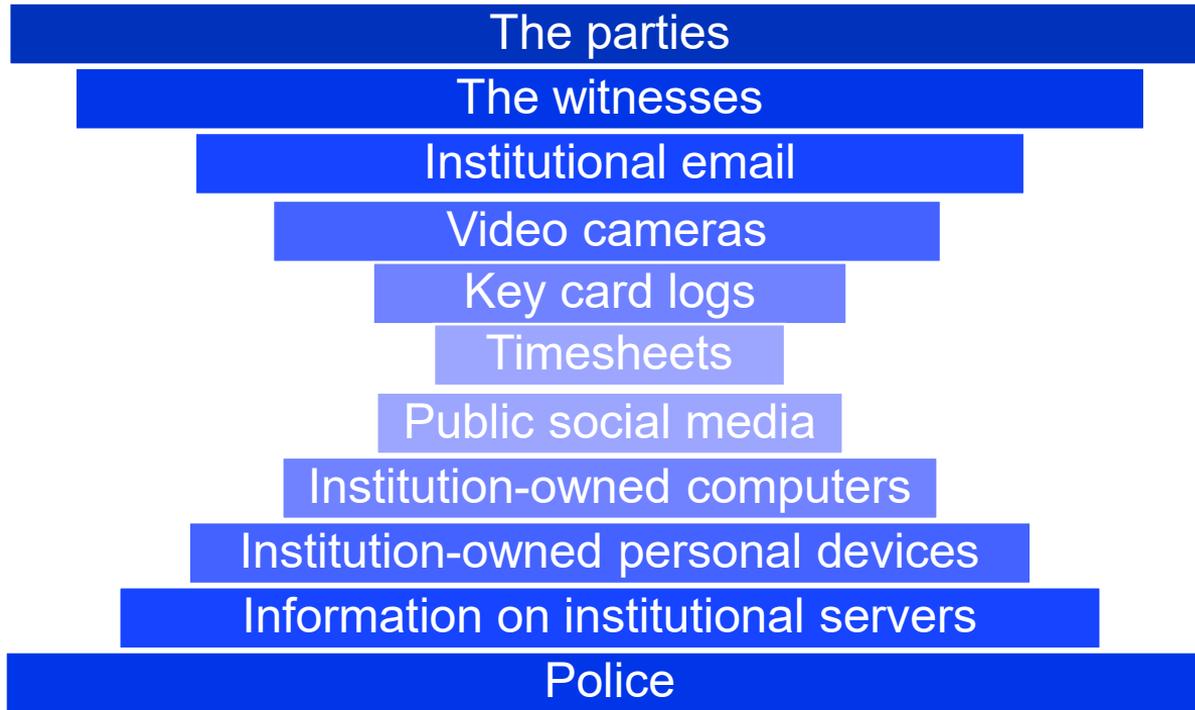
“If I understood you right, you said that after . . . . Can you tell me what happened in between?”

# 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



# 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*

**Sally accuses Cade of forced oral sex. Cade wants to testify that Sally performed oral sex on all of Cade's friends and has joked openly that she loves performing oral sex.**



# 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 HIPAA release authorizing a local hospital to disclose copies of her SANE examination and related medical records to the Title IX investigator.**



# *Scenario for Discussion*

**You are assigned to investigate Sam's complaint against Riley. Sam provides a list of colleagues who may have witnessed Riley's behavior. One witness, Jordan, shares the office with both Sam and Riley and also attended the dinner.**



# *Questions for Discussion*

- **How will you prepare for your interview with Jordan?**
- **What strategies will you use to build rapport during the interview?**
- **How will you structure your interview outline?**
- **What information or documents will you review beforehand?**
- **Are there others you should speak with before Jordan?**



# 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 needs 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.
- ***Generally not shared:*** Logistical communications, calendar invites, support measure communications

# 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
- \*Maryland requirement to allow support persons

## *Example A: Advisor conduct*

**Complainant identifies their mother as an advisor. During the interview, mother attempts to conference call father and the family's attorney, repeatedly speaks for the complainant, criticizes the investigator's questions, and threatens to sue the school.**



## *Example B:* Advisor conduct

**The institution issues a written notice of investigation to the respondent and requests an interview. The respondent's attorney replies that she is scheduled for back-to-back court proceedings for the next two months and will not be able to attend any meetings with the respondent until her court obligations have concluded.**



# 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?

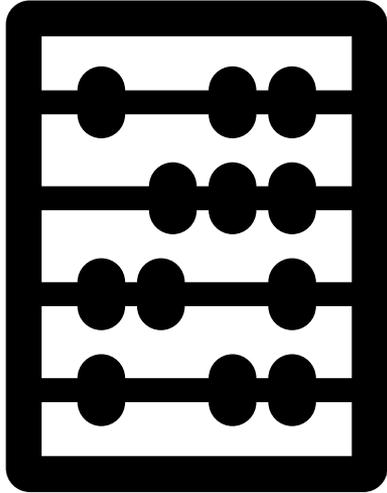
- Institution must provide written notice to the parties of time and place of hearing
- Institution should provide written notice to witnesses requesting their presence
- Notice may be issued by the decision-maker or another institutional official in coordination with decision-maker

# 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



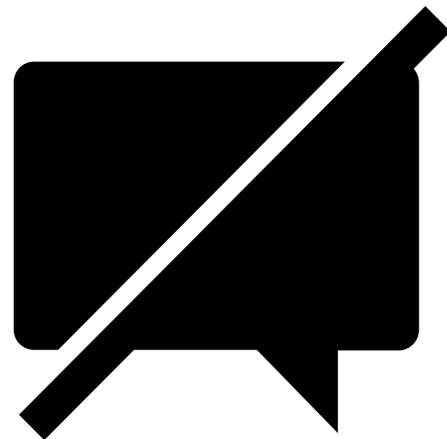
# What are some key elements of a hearing?



- 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:

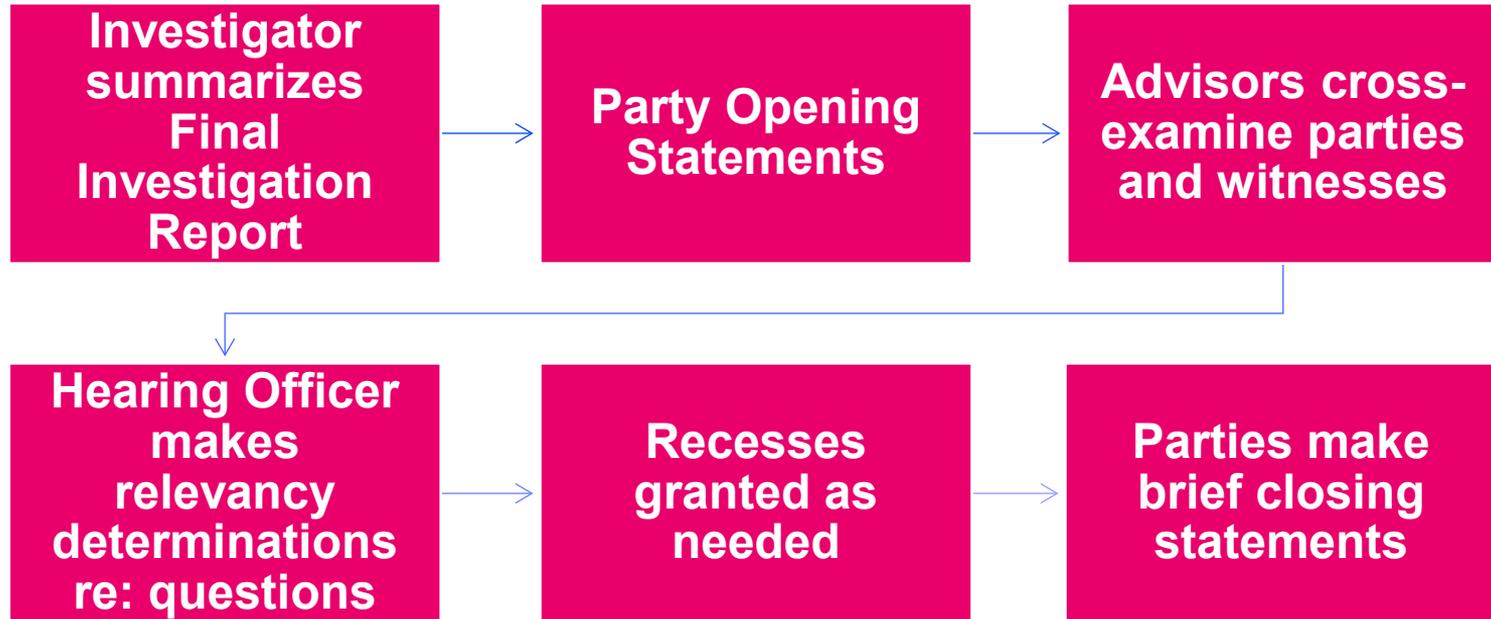
Hearing officer must independently evaluate questions for relevance and resolve relevancy objections

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 stalking. Student B's advisor wants to question Student A about an Instagram message Student A sent Student B shortly after Student B sent Student A chocolate covered strawberries wherein Student A wrote, "How did you know these were my favorite? You make me feel so special!"**



## *Example:* Not relevant

**Student A has accused Student B of stalking. Student B's advisor wants to question Student A regarding whether Student A previously accused Student C of sexual harassment, in an unrelated incident.**



# Evidence Gathered/Considered

## *Facts that matter*

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

## *Goals*

- *Investigators:* identifying disputed /undisputed material facts
- *Decision-makers:* reaching resolution of disputed material facts (or, sometimes, on appeal, procedural issues)

## *How to do this?*

- Show your work
- Explain as needed (e.g., if emphasized by a party) irrelevant information not considered
- *Decision-makers:* Explain your credibility assessments

# 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

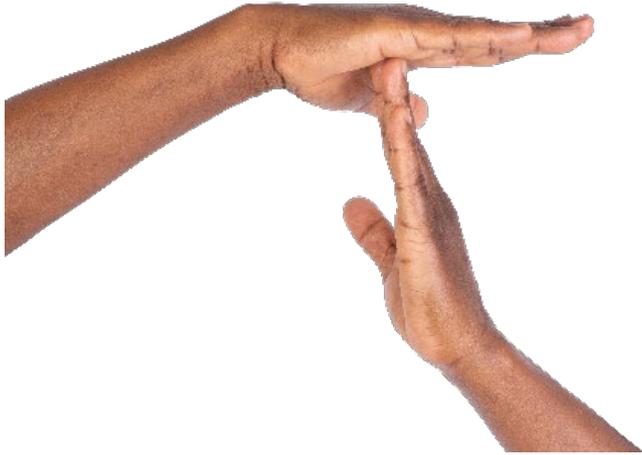
**The University conducts all Title IX hearings virtually using Zoom videoconference. The University's rules require that a party or advisor who wishes to speak use the hand raise function and be called upon before speaking.**



# 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 as 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

# Prior to Issuing the Written Notice of Determination

- Parties have the option to provide written impact statements
- Hearing Officer confers with the Title IX Coordinator or designee and other University administrator—these individuals provide input with respect to recommended sanction
  - Other University administrators may include UHR/Staff Relations and department/unit heads and supervisors for staff, and the Provost's Office/Faculty Affairs and department/unit heads and supervisors for faculty.

# Appeals

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# 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
- 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

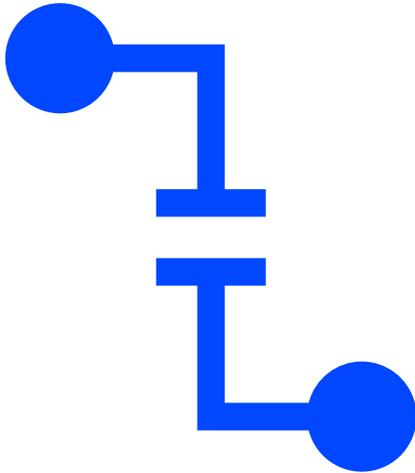
- In all cases, the procedural irregularity must be one that affects the ultimate outcome of the designation or the written determination
- A procedural irregularity affecting the designation or the written determination may include:
  - A failure to follow the University's procedures
  - A failure to 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 upon 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 90 days of submission of a formal complaint. Hearing was held 92 days after submission of formal complaint due to a counting error. The evidence would have been the same if the hearing were held 2 days 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

- 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 was studying abroad 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 the process in question and will be assessed accordingly

## Substantially Disproportionate Sanction



- 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

# *Scenario for Discussion*

During the investigation, Sam reports that Riley has started leaving anonymous notes in Sam's mailbox and has been seen waiting outside Sam's evening seminar classroom.

A fellow TA, Priya, tells the investigator she saw someone who looked like Riley standing near Sam's classroom building on two occasions, but admits she only saw the person from a distance and cannot be sure. The investigator does not ask Priya any follow-up questions about how she identified Riley.

At the hearing, Riley admits to sending some emails but denies leaving notes or waiting outside Sam's classroom. Riley presents evidence of being in a different building at the time of one alleged incident. Priya does not appear at the hearing, but the investigator summarizes her statement. Riley's advisor requests a postponement until Priya can attend, but the hearing officer denies the request. The hearing officer credits Priya's statement and finds Riley responsible for stalking, noting the decision is based on Priya's identification of Riley near the classroom.



# *Questions for Discussion*

- **Should the hearing officer have postponed the hearing as Riley's advisor requested?**
- **Was it necessary for the hearing officer to explain why Riley's evidence was not credited?**
- **Should the decision be reversed on appeal? Would your answer change if the notes in Sam's mailbox had contained threats?**



# 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



# Types of Informal Resolution

Mediation

Facilitated  
discussions led  
by Title IX  
Coordinator

Restorative Justice

Attorneys for  
parties negotiate  
an agreement

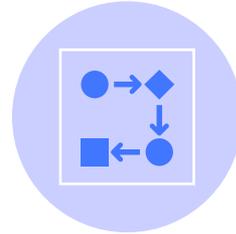
Administrative  
Adjudication  
(no hearing)

Other?

# What are the key concepts of informal resolution?



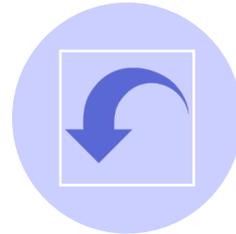
A formal complaint must first have been filed and written notice given to the parties



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 or sexual coercion (*Maryland 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 work supervisor of sexually harassing them by repeatedly telling sexual jokes and asking about the student's sex life and sending inappropriate messages to the student on social media. The supervisor proposes to apologize and undergo extensive training.**



## *Example:* Permissible informal resolution

**Student A accuses Student B of sexual harassment. Student B offers to have no contact with Student A, complete coursework remotely until graduating, and agrees to a permanent campus ban.**



# 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 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

# 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 A:* Informal resolution detail

**Two students who are both mathematics majors agree “not to interact with each other while they are at the University.” 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 B:* Informal resolution detail

**Student accused of sexual assault agrees to work with 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 C: 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 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?



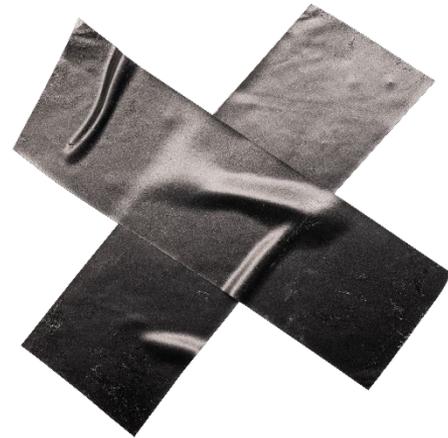
- No—Title IX does not preclude the use of other policies and processes that may be implicated by a report of sexual misconduct

# 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

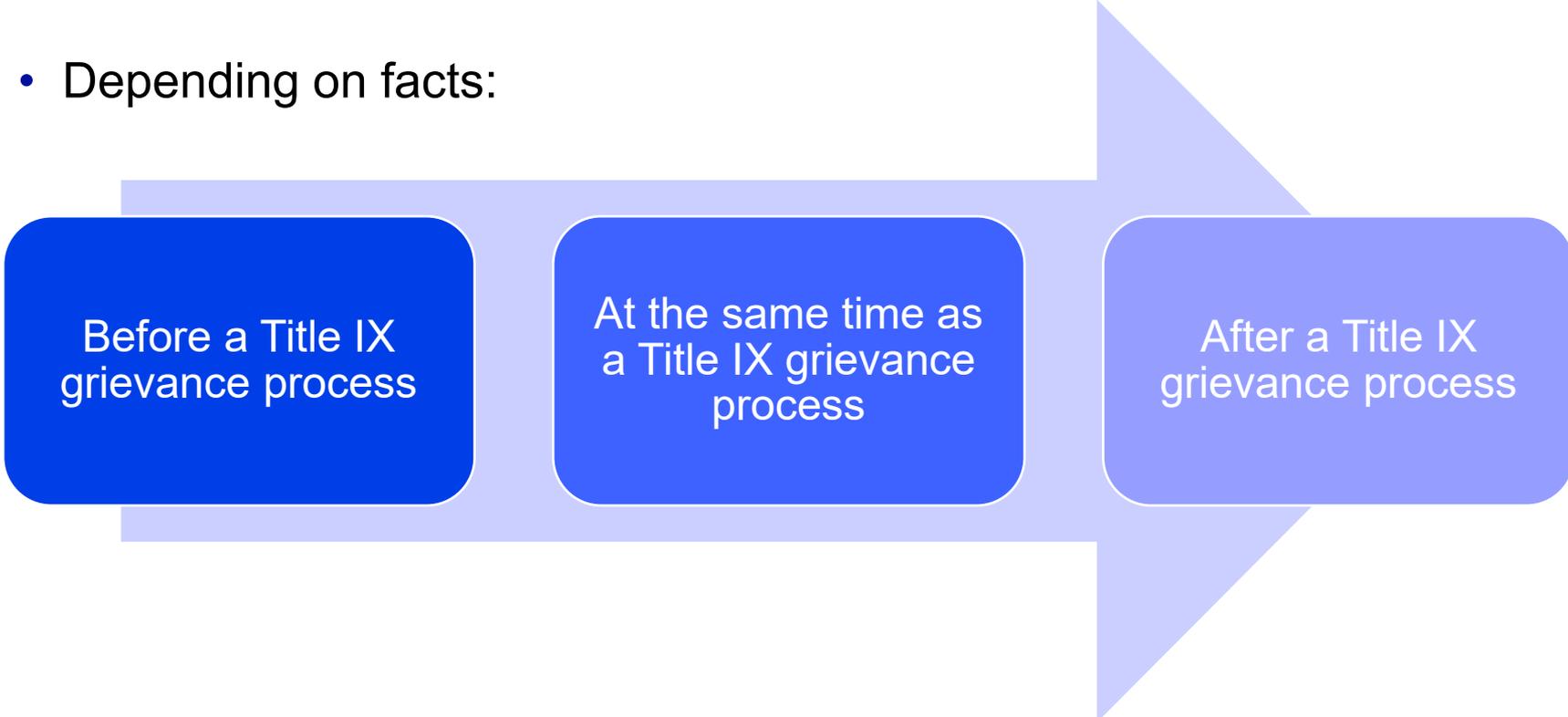
# Can we use another process to make the same finding we would otherwise make under Title IX policy?

- 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



# 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*

**Amy accuses Brady of breaking into Amy's dorm room and stealing Amy's underwear. Suspecting that Brady might try something like this (because Brady is obsessed with Amy), Amy set a hidden camera and captured the entire incident on video, which indisputably shows Brady rifling through Amy's clothes and leaving with a pair of underwear.**



## *Example: During Title IX*

**Amir accuses Taylor of sexually assaulting him after he became incapacitated from smoking marijuana in an on-campus residence hall at a public university. During the Title IX interview, Taylor admits to providing Amir with the marijuana but asserts that Jordan was alert and willingly consented to sexual activity. The university prohibits the distribution of controlled substances on campus.**



## *Example: After Title IX*

**Faculty member accuses a Dean of quid pro quo by offering to “guarantee” faculty member a promotion to full professor in exchange for sexual favors. Dean denies ever making such an offer, and a hearing panel finds the quid pro quo allegation unsubstantiated. However, evidence at the hearing shows that faculty member and Dean exchanged dozens of sexual emails and, in some of them, Dean described odd sexual fantasies.**



# Questions?



The background features a solid blue field with a series of white, wavy, parallel lines that create a sense of depth and movement, resembling a stylized mountain range or a series of ripples. The lines are more densely packed in the center and become more sparse towards the edges.

**HUSCH BLACKWELL**