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Title IX UMD Institutional Advisor Training

October 22, 2026

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Agenda

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



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Definition of Advisor

UMD Policy and Procedures

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

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Title IX Scope, Jurisdiction, and Prohibited Conduct

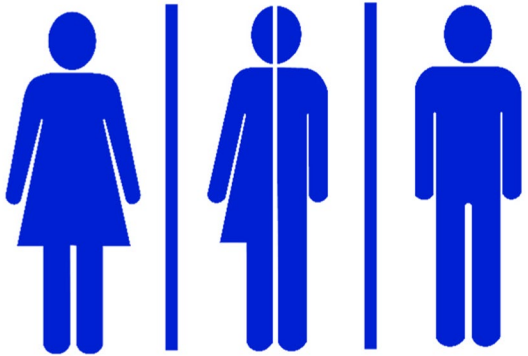
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What is Title IX?

"[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



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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)
- August 2020 regulations presumably in force through at least 2028

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What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the "education program or activity" of a federal funding recipient within the geographic boundaries of the United States
  - Title IX defines "education program or activity" to include the "operations" of educational institutions
- Title IX does ***not*** apply to private conduct occurring in a private location that is not part of education program/activity

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What are examples of education programs and activities?

Admissions	Hiring	Workplace
Academic instruction	Residence life	Amenities on campus
Sports teams	Work-study	Games, concerts, and speeches on-campus
Off-campus trips or experiences organized by the institution	Sponsored organization activities	Anything else that happens on-campus

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Does Title IX apply to off-campus sexual harassment?



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



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



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

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Example

The University's swimming and diving team holds its annual overnight team-bonding retreat at a cabin the athletic department rents each year, with assistant coaches present and transportation arranged by the athletic department. During a late-night bonfire activity, a sophomore swimmer is cornered by a senior teammate. The senior repeatedly tries to get the sophomore to go "somewhere private" despite being told no multiple times, and the senior briefly grabs the sophomore's arm to stop him from walking away.



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What about misconduct that happens abroad?



- Title IX only requires response to sex discrimination and sex-based harassment "in the United States"
- But institutions may investigate things that happen abroad if they are relevant to misconduct occurring in the United States

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Example

Two students, Devon and Casey, are placed as roommates in the same host-family arrangement during a semester abroad in Japan. Devon begins reading Casey's private messages when Casey leaves a phone unattended and confronts Casey about conversations with other students, becoming controlling about who Casey spends time with. After the program ends, Devon, now back on the home campus in the U.S., shows up uninvited to a class Casey is enrolled in that Devon has no reason to attend, and later creates a fake social media account to continue monitoring Casey's posts.



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UMD Policy – Purpose

The University is committed to:

Creating and maintaining a working and learning environment ***free*** from all forms of Sexual Harassment.

The University accomplishes this through training, education, prevention programs, policies and procedures that promote:

- Prompt reporting and response;
- Providing support to persons alleged to be victimized;
- Prohibiting Retaliation; and
- The implementation of timely, fair and impartial investigations and resolutions that ensure due process and remedy policy violations.

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Scope of Policy

UMD Policy and Procedures

- 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
  - Those who are otherwise interacting with the University including, but not limited to volunteers, vendors, guests and visitors.

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Reach of Policy ("Jurisdiction")

UMD Policy and Procedures

- 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; *(Cont.)*

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Reach of Policy ("Jurisdiction") *(Cont.)*

UMD Policy and Procedures

- 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.

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Maryland's Title IX & Non-Title IX Conduct ("Other Sexual Misconduct")

UMD Policy and Procedures

- 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.

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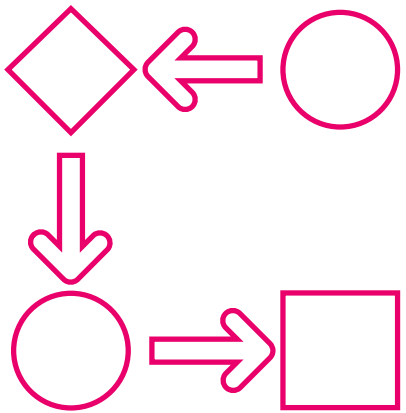
What misconduct does the Title IX regulation address?

- Sex discrimination
    - Sexual harassment



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What is sex discrimination?



- Adverse treatment of a person on the basis of sex
- Limits or excludes the person from participating in the institution's education program or activity or denies or limits the benefits thereof

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Programmatic Discrimination

- Where discrimination occurs in a systematic way due to an *institutional* policy or practice
- Programmatic discrimination adversely affects persons as a group or by category, rather than by individualized decision
- Programmatic discrimination is usually *not* attributed to an individual perpetrator (e.g., “respondent”)

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Individualized Discrimination

A particular decision is made, or particular action taken, that results in adverse treatment of a particular person that limits or excludes that person from participation or denies or limits benefits

Typically, individualized discrimination has an identifiable “respondent” who makes the discriminatory decision

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Example: Individualized Discrimination

The Math Department currently has six male professors and one female professor. A male and female candidate are equally qualified for an open faculty position, but the Chair elects to hire the female candidate to "improve the faculty gender balance."



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Practical Point

Individualized discrimination involves adverse treatment that is taken *because of* or *based on* the target's sex. If a person is treated the same way as similarly situated individuals, *despite* sex, then there is no individualized discrimination, even if the treatment is adverse.

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Example: Similarly Situated

There are ten students in a biology class, eight women and two men. Seven of the women receive passing grades, but one fails. One of the men receives a passing grade, but the other fails. The male student who failed accuses the faculty member of discrimination because, "87% of the women passed, but only 50% of the men passed." Yet, the failing male student's coursework and test scores are very similar to the work of the failing female student.



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Sexual Harassment

Conduct on the basis of sex

And that constitutes:

- Quid pro quo harassment
- Hostile environment harassment
- Certain specific offenses

Sexual harassment generally involves conduct that is *sexual* in nature, that arises from a *romantic* setting, or that otherwise meets the elements of a *crime*

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Conduct that is "Sexual" in Nature

- Asking for sex
- Talking about sex
- Expressing sexual or romantic desire
- Telling sexual jokes
- Physical touch of a romantic nature (e.g., rubbing shoulders or hair)
- Sexual acts
- Sexual blackmail
- Creating sexual deepfakes
- Violence within a romantic relationship
- Leering or following because of romantic interest

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Different Categories of Sexual Harassment

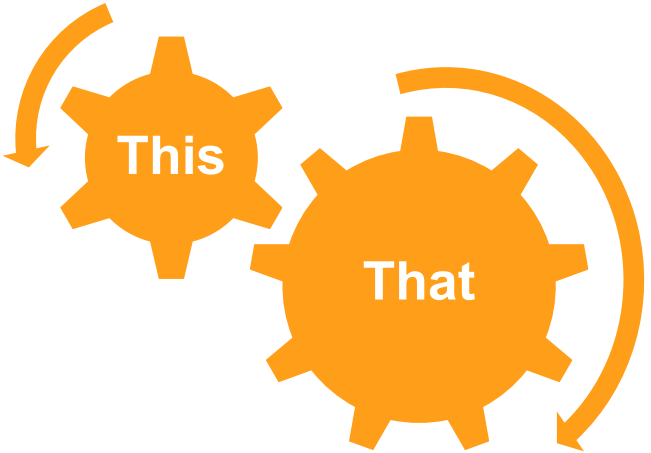
- Quid Pro Quo Harassment
- Hostile Environment Harassment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

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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



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Examples: Quid Pro Quo

A graduate teaching assistant offers to "make sure" an undergraduate student earns a "top grade" if he will send her sexually explicit pictures.

A coach routinely attempts to discuss sexual topics with an athlete and offers the athlete more playing time if the athlete participates in the discussion, shares intimate details and doesn't tell anyone about their discussions.

A supervisor threatens to deny a subordinate a pay increase unless she tells him her "deepest sexual fantasies."



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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.



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Example A: Hostile Environment

A biological male student, Jensen, is openly gay. Other male students in the residence hall frequently whistle and cat call when Jensen walks by and make crass comments about sexual acts Jensen has supposedly engaged in with his boyfriends. These male students leave sex objects outside Jensen's door, write "gay sex jokes" on Jensen's white board, and often slap Jensen on the behind when he walks by in the hallway.



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Example B: Hostile Environment

A male student Luis works part time in the dining hall. His female supervisor repeatedly comments on Luis's appearance, asks Luis about his sex life, rubs Luis's shoulders, and occasionally references sexual acts she would like to perform on Luis, "If I weren't your boss and you didn't have a girlfriend."



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What factors do we consider in determining a hostile environment?

- The degree to which the conduct affected the complainant's ability to access
- Type
- Frequency
- Duration
- Parties' ages
- Parties' roles and other factors about each party
- Previous interactions
- Location of the conduct and context
- Other sex-based harassment at the institution

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Example

A resident assistant in a first-year dorm begins singling out one resident during floor meetings, making comments in front of the group about the resident's weight and suggesting the resident "could use help getting a partner." The RA also starts showing up at the resident's door late at night under the pretext of "room checks" that aren't scheduled for that night and posts vague but recognizable jokes about the resident in the floor's group chat. The resident stops attending floor events, asks for a room transfer, and tells a friend they now avoid the common areas entirely.



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Question for Discussion

- **What factors in this scenario weigh in favor of a finding of hostile environment harassment?**



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Example

A club sports coach, who is a fellow student rather than a staff member, tells a teammate during a single car ride home from practice that he's "had a crush on her for a while" and asks if she'd ever consider dating him. She tells him she's not interested and would rather keep things focused on the team. He says, "okay, no worries" and the subject never comes up again. They continue to practice and compete together for the rest of the season without further incident, though she mentions feeling slightly awkward around him for a couple of weeks.



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Question for Discussion

- **What factors in this scenario weigh against a finding of a hostile environment harassment?**



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What is sexual assault?

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.



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Sex Offense Categories

Key Categories Under VAWA / Clery Act

Rape

Statutory Rape

Fondling

Incest

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What is rape?

Penetration, no matter how slight, of the genital or anal opening of the body of another person with any body part or object, or oral penetration by a sex organ of another person, without the Consent of the victim, including instances where the victim is incapable of giving Consent because of their age or because of their temporary or permanent mental or physical incapacity.

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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

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What is consent? – UMD Policy

- **“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.

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What is consent? – UMD Policy *(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 that the participants stop the 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.

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Example: Consent In Fact?

Jonah and Eloise have been dating for several months. One night while "making out," Jonah says, "I want to have sex with you." Eloise responds, "I don't know if I'm ready. . . ." The two continue to make out for several more minutes, until Jonah unbuttons Eloise's pants. Eloise then lifts her hips up and helps Jonah pull off her pants and underwear. The two then have sexual intercourse.

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What is incapacity?

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






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Example: Incapacity

Charlie and Kelly meet at a party where Kelly has six shots and two beers. After the party, Charlie carries Kelly up the stairs to his apartment because Kelly cannot walk. Kelly is having trouble keeping their eyes open and repeatedly mutters, “where am I?” Charlie says to Kelly, “Are you okay with this?,” and Kelly slurs, “Okay. . .” and then closes their eyes. Charlie starts to have sex with Kelly and realizes that Kelly’s eyes are closed and Charlie proceeds.



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Questions for Discussion

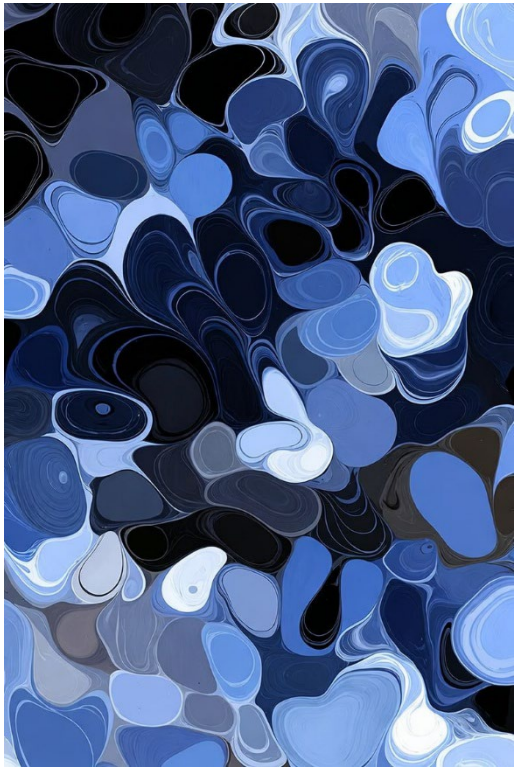
- **Is Kelly incapacitated?**
- **What factors in the scenario lead you to that conclusion?**



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Identifying Incapacity

- Loss of ability to make a reasoned decision and communicate it
- Loss of appreciation of the nature and fact of sexual activity
- Loss of appreciation of the “who, what, when, where, and how”



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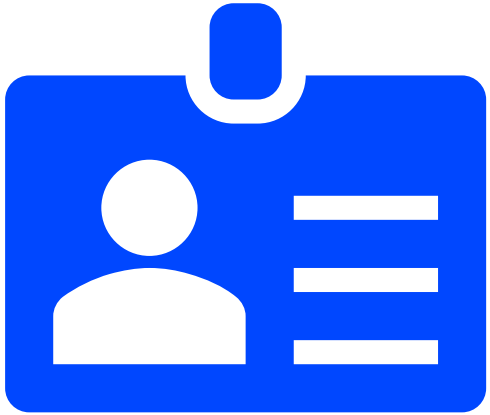
What facts may be relevant to determining incapacity due to alcohol or drugs?

- 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?

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What is statutory rape?

Sexual intercourse with a person who is under the statutory age of consent as defined by law (16).



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What is fondling?

- “Fondling” includes:
  - The 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 their age or because of their temporary or permanent mental or physical incapacity.

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What is incest?

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

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What is domestic violence?

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

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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.

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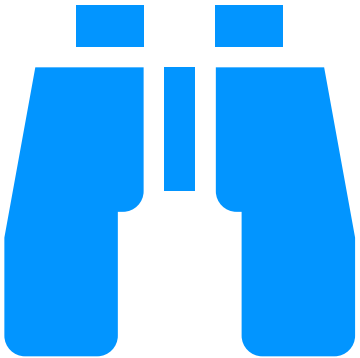
Example: Dating Violence

Student T and Student U have been friends for a few years, and over the past couple of weeks, they have started a romantic relationship, where they have engaged in consensual sexual activity numerous times. Neither of them have defined the relationship to say they are boyfriend and girlfriend. When Student U explains they need space and aren't sure the relationship is working, Student T refuses to leave the dorm lobby, blocks the exit when Student U tries to walk to the elevator, grabs Student U's phone out of their hand to see who they've been texting, and then throws the phone on the ground.



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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.

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Example: Stalking

Jazz is sexually attracted to Naomi, who won't give Jazz the time of day. After Naomi rebuffs Jazz's repeated requests to go on a date, Jazz starts to follow Naomi around campus, appearing outside of her classrooms when Jazz has no other reason to be there. Jazz also drives by Naomi's apartment at night, which Naomi notices. Next, Jazz takes Naomi's photo off her social media page and uses AI to alter it—creating an image of Naomi in a revealing outfit, which Jazz sets as Jazz's home screen. Naomi notices the photo when Jazz comes up to her (again) trying to initiate a conversation. Naomi then reports Jazz for stalking.



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Question for Discussion

- **What if Jazz never interacted with Naomi, but still created the AI picture and set it as Jazz's home screen? Assuming Naomi found out, would she have a viable complaint of sexual harassment? If so, what form of sexual harassment?**



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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.

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Does retaliation require intent?



- “[F]or the purpose of interfering with any right or privilege secured by Title IX . . .”
- Requires a subjective state of mind of the respondent

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Group Scenario

A graduate student in the political science department files a formal complaint alleging that her faculty advisor, Professor Hale, made repeated unwelcome comments about her appearance and once suggested that her "cooperation" outside of academic work could help her secure a sought-after fellowship recommendation.

Another student in the same research group, Daniel, is interviewed during the investigation and confirms that he personally witnessed Professor Hale make a similar comment to the complainant after a meeting, and that the complainant told him about the fellowship comment the same week it happened.

At the conclusion of the investigation and hearing, Professor Hale is found responsible for sexual harassment and is removed from supervising graduate students for two years. *(Cont.)*



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Group Scenario (Cont.)

In the following weeks:

- **Professor Hale, who remains on the department's graduate curriculum committee, votes to reassign Daniel's teaching assistantship from a section he had specifically requested to a different, less desirable section, citing "departmental needs."**
- **Professor Hale tells two colleagues in a hallway conversation that Daniel "clearly has it out for me" and was "not a team player" during the investigation.**
- **Daniel later learns that Professor Hale declined to write him a previously-promised letter of recommendation for an external summer research program, citing only that his "schedule didn't allow it," despite having agreed to write the letter months earlier, before the investigation began.**
- **Separately, the complainant reports that since the determination, several of Professor Hale's close colleagues in the department have stopped greeting her in the hallway and that one made a pointed comment in a seminar about "people who make things difficult for everyone."**



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Questions for Discussion

- **Does Professor Hale's reassignment of Daniel's teaching assistantship constitute retaliation? What additional facts, if any, would you want to know to decide?**
- **Do Professor Hale's hallway comments about Daniel qualify as retaliatory conduct, or are they protected opinion/venting? Where is the line?**
- **Does declining to write the letter of recommendation meet the standard for retaliation? Does it matter that Professor Hale had agreed to write it before the investigation began?**
- **Retaliation requires a showing of intent — "for the purpose of interfering with" a protected right. What facts in this scenario would you point to as evidence of that intent (or the lack of it) for each of the three actions involving Professor Hale?**
- **Is the treatment the complainant describes from other colleagues (being avoided, the pointed seminar comment) attributable to Professor Hale, or could this raise a separate or additional concern?**



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Questions

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Institutional Response to Sexual Harassment

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What do we call the parties in a grievance process?

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

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Title IX Coordinator

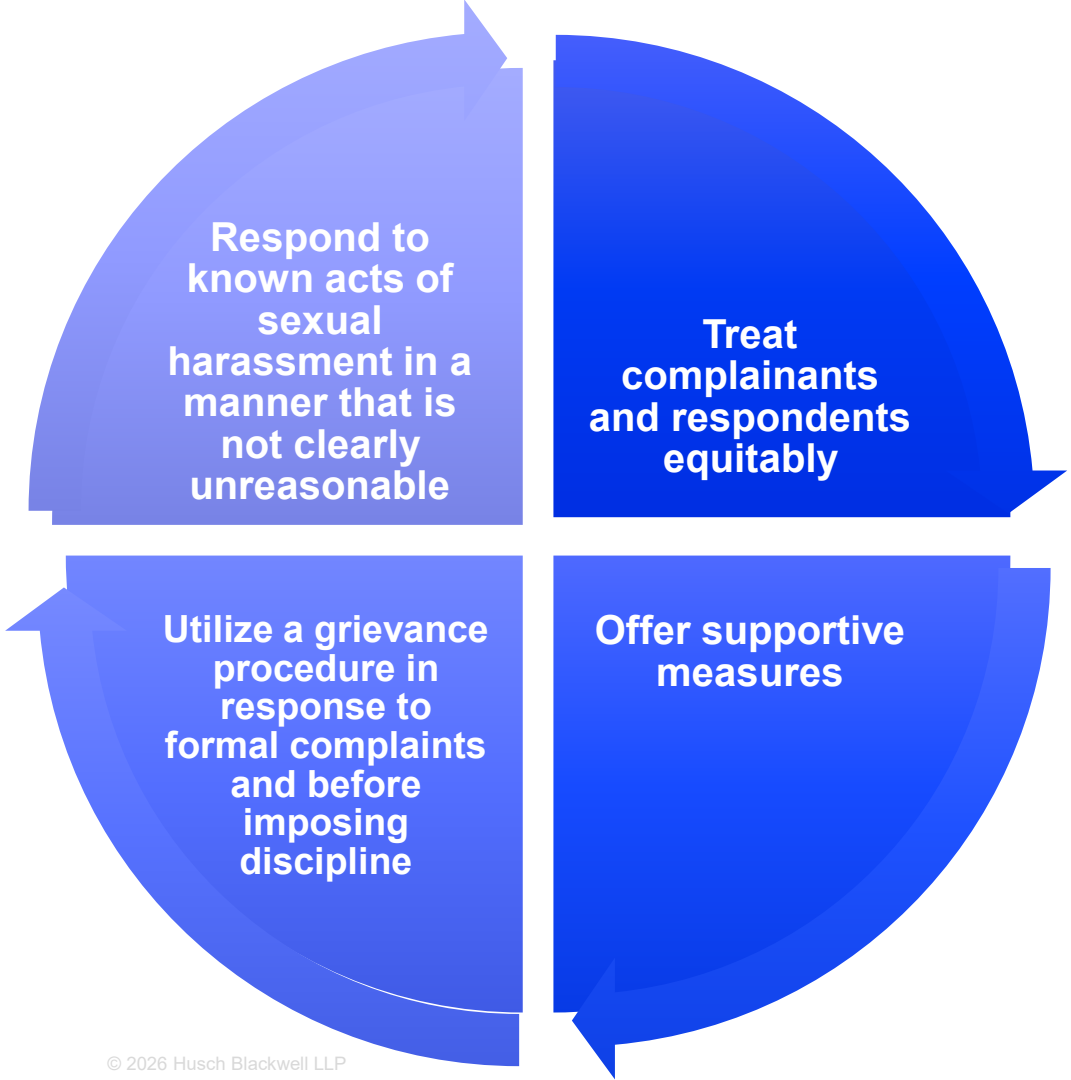
Angela Nastase, JD
Title IX Coordinator and Director
Office of Civil Rights and Sexual Misconduct
(OCRSM: *http://www.ocrsm.umd.edu/*)

University of Maryland, College Park
3101 Susquehanna Hall
4200 Lehigh Rd.
College Park, MD 20742
E-mail: *anastase@umd.edu*
Phone: 301.405.1701

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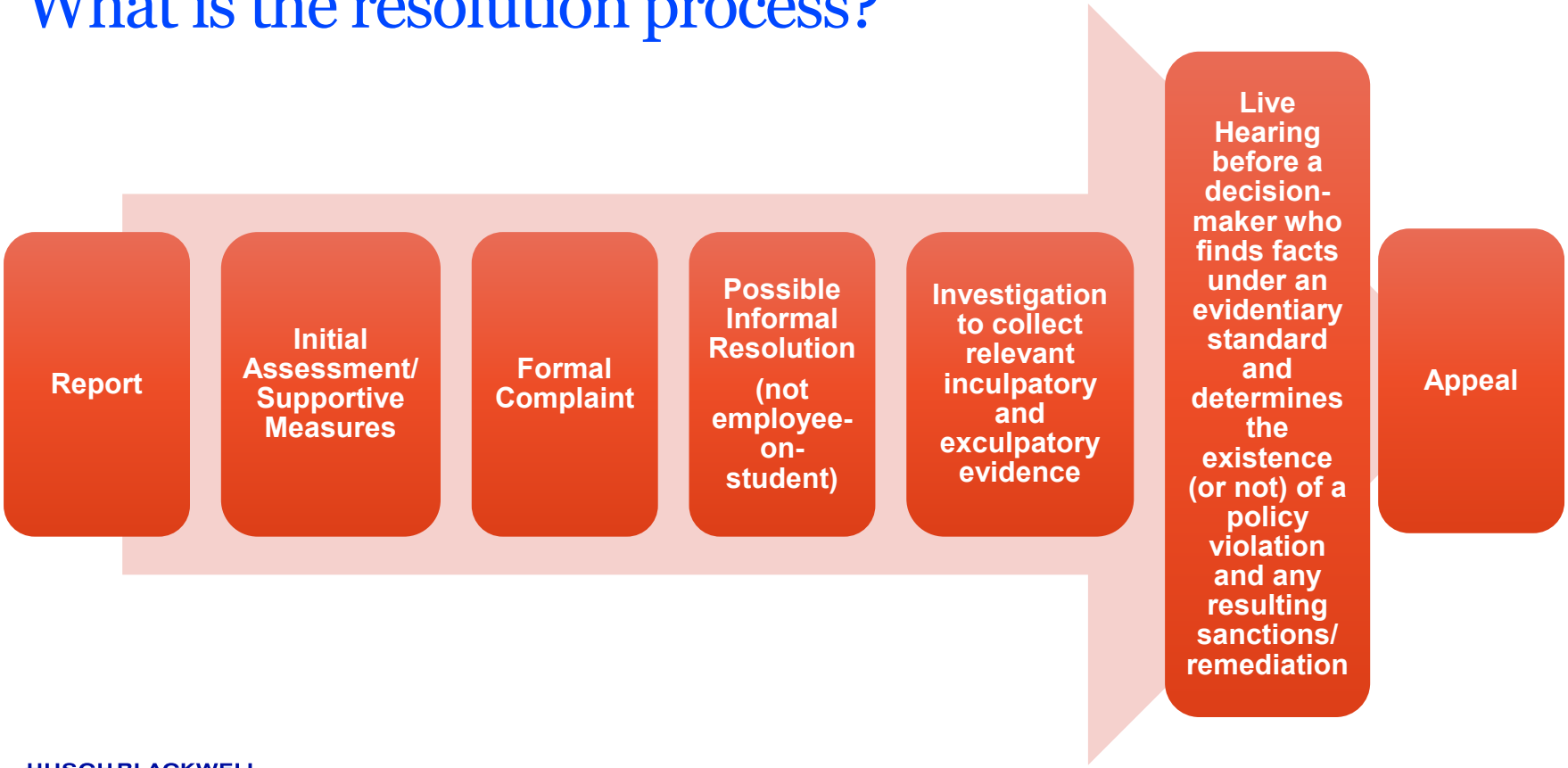
What are the institution's overall duties?



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What is the resolution process?



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What principles do we use to determine remediation?

If a violation is found,

- Institution must take steps to restore or preserve the complainant's access to education
- Various types of supportive measures may be used after the determination to restore or preserve access
- Discipline for the respondent as determined by those with authority over the respondent

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Question for Discussion

- **Why is it important to follow the University's Policy and Procedures on Sexual Harassment and Other Sexual Misconduct?**



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What general principles govern the grievance process?

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

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Qualifications

- Appropriately trained in their duties and relevant policy
- Competent
- Free of conflicts of interest
- Free of bias and not relying on stereotypes

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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



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Examples: Conflicts of Interest

An investigator assigned to a case used to date the brother of the respondent

A hearing officer attends the same church as the complainant and serves with the complainant on the church council

An appeal officer is the subordinate of the hearing panel chair

A complaint is filed by a resident advisor against another RA. One of the two assigned investigators is married to the hall director who directly supervises both RAs.



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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

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Example: Bias

While actively serving as an investigator, the same individual maintains a professional social media profile and occasionally posts or reshares content about campus Title IX work. One recent post (still visible when a new case is assigned to them) states:

"After years of doing this work, I've concluded that the 'false accusation' narrative is almost always a myth pushed by respondents and their lawyers. When a student comes forward, the real risk is that the institution will protect the accused. My job is to make sure that doesn't happen."



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Stereotypes

- A form of bias that operates as a preconceived, generalized, and sometimes inaccurate belief about a person based on their membership in a group or some other characteristic



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Examples: Impermissible Stereotypes

Only promiscuous people get sexually assaulted

Transgender or non-binary students are more likely to make false reports

Athletes are inherently more aggressive and more likely to commit sexual violence

Believing the men cannot be the victims of dating or domestic violence

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How long does a grievance process take?

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

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Do parties get assistance in the grievance process?

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

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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



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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 if implicated by facts

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Can supportive measures affect the respondent?

Yes, but cannot create an unreasonable burden

Cannot be a form of *de facto* discipline

Supportive measures are not a substitute for the investigation and hearing processes

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Example A: Supportive Measures

Employee who works in the business office has accused supervisor of quid pro quo harassment and requests to be allowed to work remotely and be reassigned to a different supervisor in the same office. Employee is allowed to work remotely for at least two weeks, with reassessment thereafter, and is reassigned to a different supervisor for the pendency of the investigation and resolution with the potential for a permanent reassignment depending on the outcome.



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Example B: Supportive Measures

A student reports dating violence by their romantic partner. Student's romantic partner lives in the same housing complex on campus. Student wishes to be relocated to a new housing complex, but no student spots are currently available. Institution temporarily relocates student to an empty RA apartment until a student spot opens in the alternative complex.



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Can an institution immediately suspend a student?

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

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Do students and employees have other rights?

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



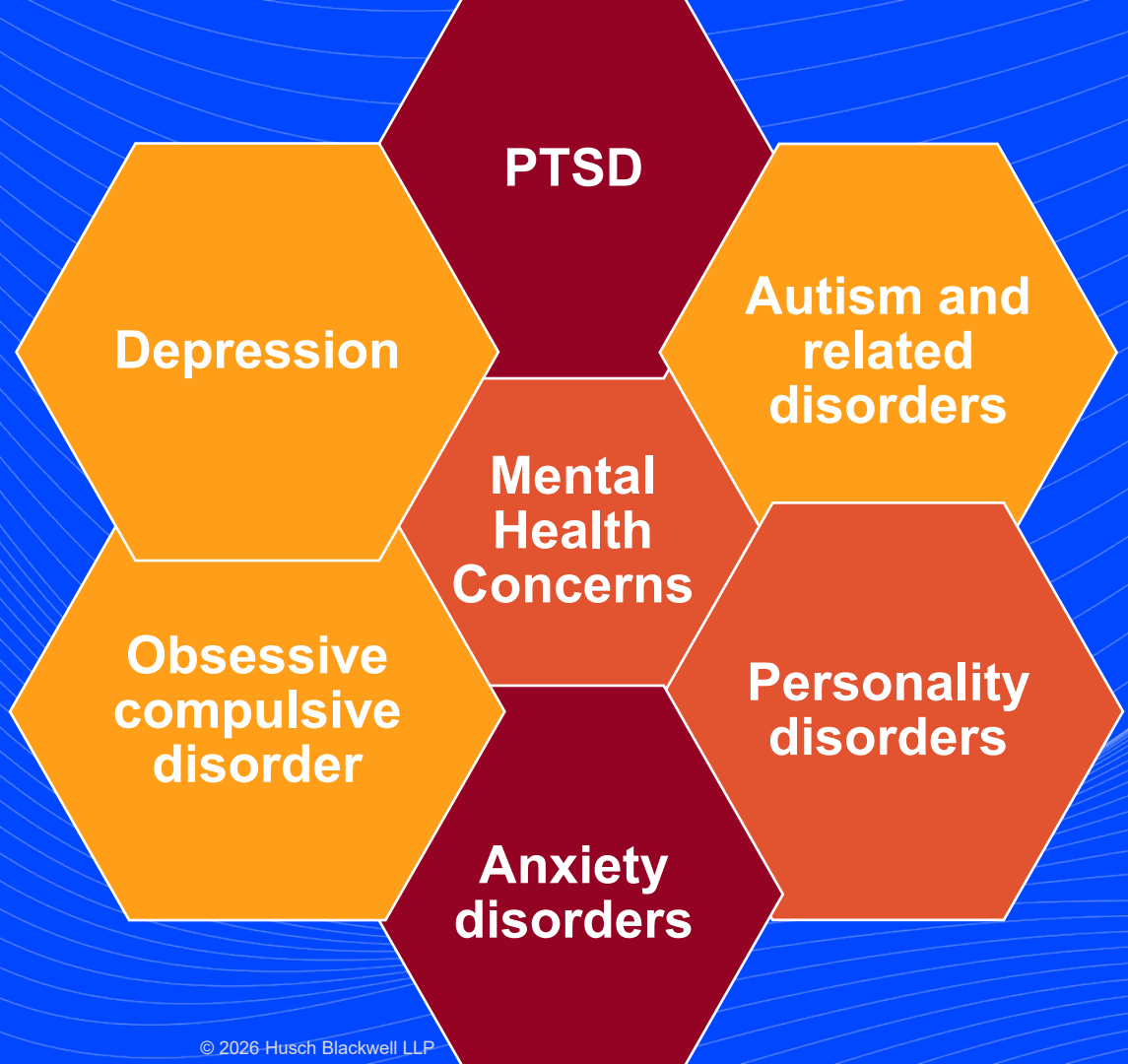
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Does a “disability” include mental health conditions?

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

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What are some examples?



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What are reasonable accommodations?

- Depends on the nature of the disability, how the disability limits the person, and the fundamental requirements of the program/activity at issue.
- *Practice Point*: Approved accommodations may apply during phases of the grievance process.
- *Example from Policy:* The Parties may contact the Title IX Officer or designee to arrange any disability accommodations, language assistance, and/or interpretation services that may be needed at the Hearing. Such accommodations must be requested at least seven (7) Days prior to the Hearing.

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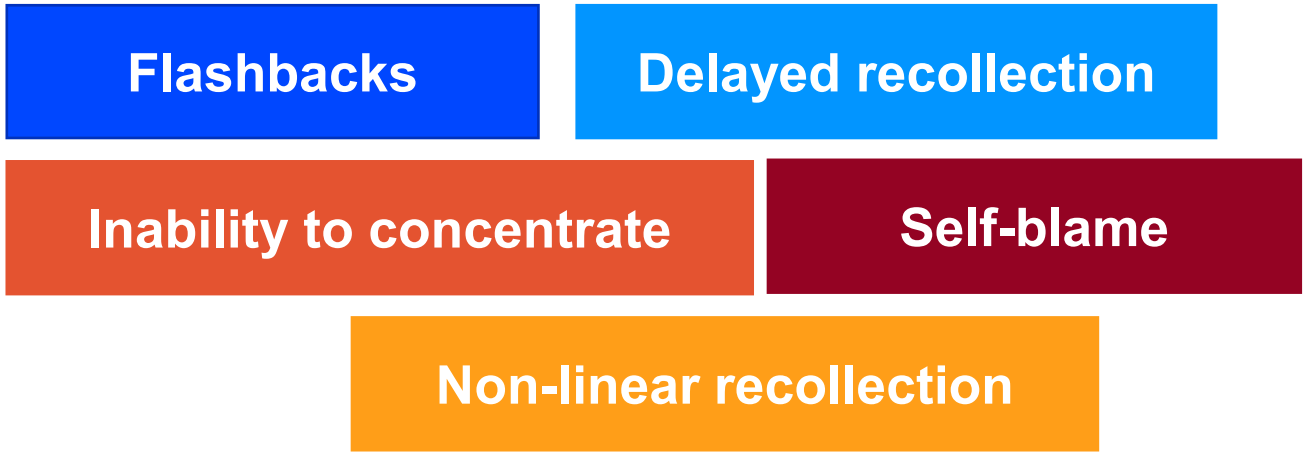
Trauma might affect any party or participant

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

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Possible trauma impact

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



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Trauma & credibility

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

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Example: Trauma Effect?

When asked to describe what happened the night of the incident, the complainant begins mid-event, “I remember being unable to move and telling them to stop.” The complainant then jumps to leaving the apartment, then back to earlier in the evening when they were drinking, and later mentions how they ended up in the bedroom. When the investigator asks for the sequence, the complainant becomes frustrated and says, “I know it doesn’t make sense in that order, but that’s how it comes to me.”



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What is informal resolution?

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



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Types of informal resolution

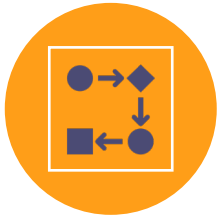
- Mediation
- Facilitated discussions led by Title IX Coordinator
- Restorative justice
- Attorneys for parties negotiate an agreement
- Arbitration without a live hearing

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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

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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



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Questions

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The Grievance Process

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What steps does due process require under the grievance process?

- Examples of due process safeguards under Title IX include:
  - ***Written notice*** to parties of complaints, dismissals, and rights;
  - A ***meaningful opportunity*** to be heard free of bias or conflicts of interests, including an opportunity for advisors to question witnesses and parties;
  - ***Written explanation*** of the decision-maker's determination; and
  - An ***opportunity to appeal.***

85 Fed. Reg. 30,026, 30,053 (May 19, 2020) (citations omitted).

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What are parties provided timely written notice of?

UMD Policy and Procedures

- Reported violation, including the date, time and location (if known), of the alleged violation, and range of potential sanctions
- Rights and responsibilities under the policy and information regarding civil and criminal options
- Date, time, location, participants, and purpose of each Hearing, meeting, or interview the Party is invited or expected to attend, with sufficient time for the Party to prepare
- Final determination by Hearing Officer regarding whether a policy violation occurred and basis for determination
- Sanctions
- Right to appeal and description of appeal process

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What are the parties' rights?

UMD Policy and Procedures

- Access to case file and evidence obtained during the investigation or considered by the Hearing Officer
- Opportunity to be heard through the process
- Opportunity to offer testimony at a Hearing
- Opportunity to submit evidence, witness lists, and suggest specific questions to be posed to the other party during the investigation or Hearing
- Opportunity to review testimony
- Opportunity to review and provide written responses to draft and final investigation reports
- Opportunity to participate at Hearing without being in physical presence of other party
- Opportunity to appeal determination and/or sanction
- Notice before the resolution process

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What is the purpose of an investigation?

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

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What is inculpatory evidence?

- Evidence tending to support the proposition a respondent committed sexual harassment as alleged
- *Example:* Security camera footage from a dorm hallway shows the respondent following closely behind the complainant into her room at 2:14 am and remaining inside for the next 40 minutes, despite the respondent's statement claiming he never entered her room that night.



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What is exculpatory evidence?



- Evidence tending to support that the respondent did ***not*** commit sexual harassment as alleged
- *Example:* A text message sent by the complainant to the respondent the morning after the alleged incident reads: “I agreed to everything last night and I remember what happened, but I wish things had gone differently between us.”

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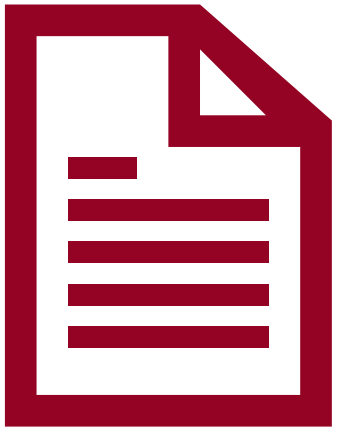
What is a formal complaint?

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

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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."



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What else does the notice need to say?

UMD Policy and Procedures

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

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Core Elements of the Investigation

INTERVIEWS

Parties
Complainant and Respondent interviews (and any advisors present)

Fact Witnesses
Individuals with firsthand knowledge of relevant events or context

Experts (if allowed and relevant)
SANE examiners, digital forensics, medical, or other subject-matter experts

NON-TESTIMONIAL EVIDENCE

Electronic & Documentary
Emails, texts, DMs, social media, photos, videos, documents

Access & Records
Key swipes, door logs, camera footage, academic/HR records

Forensic & Official
SANE exams, police reports, medical records, lab results

Note: Both interviews and non-testimonial evidence must be collected, preserved, and evaluated fairly and impartially.

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Are parties subject to a "gag" order during the investigation?

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

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Discussion

A respondent in a stalking case posts a public story on social media, visible to mutual friends, that reads: “Funny how people only remember things a certain way when they’re mad at you. If you were actually there and saw what really went down, you know I didn’t do anything wrong.”



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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.

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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



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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

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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

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Review of Preliminary Investigation Report

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



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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



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Question for Discussion

- **Are there any techniques the University uses to encourage parties to keep investigation materials confidential?**



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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
- Factual findings and determinations of policy violations are made at a subsequent hearing

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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



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What is the role of an advisor during the investigation?

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

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What must an advisor not do during the investigation?

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

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What if the advisor breaks the rules?

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



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During an interview, a party's advisor begins answering the investigator's questions on the party's behalf before the party can respond, stating "I'll just summarize what happened so we don't waste time," and later tells the party, in front of the investigator, exactly what to say when a follow-up question is asked.

Example: Advisor breaking the rules



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What is the purpose of the hearing?

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

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What does “preponderance” of the evidence mean?

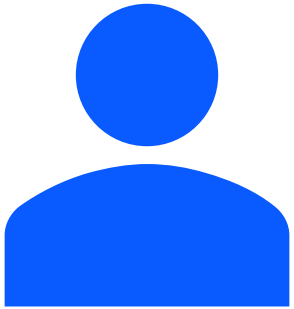
- Preponderance of the evidence:
  - “More likely than not”
  - “Greater than 50% likely”



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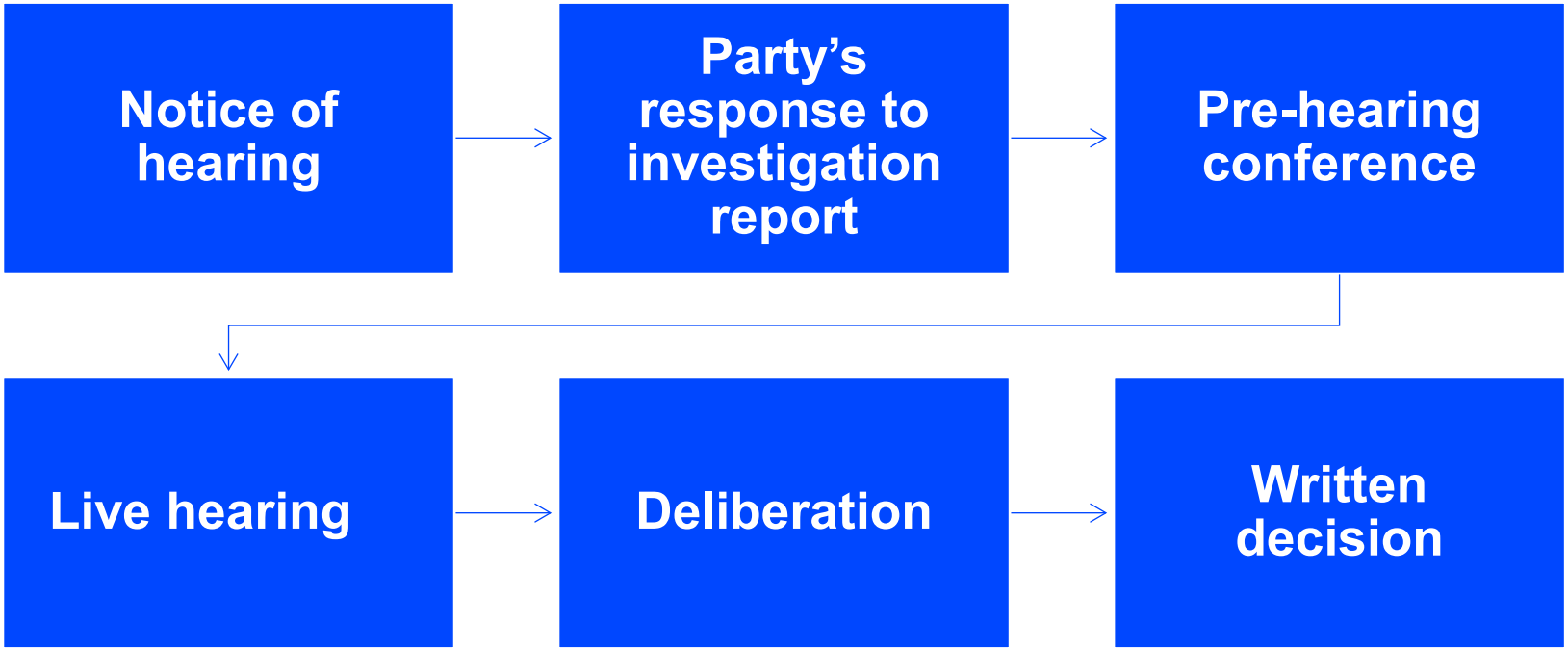
Who runs the hearing?

- The Hearing Officer
- Decides all procedural issues
- Rules on admissibility of evidence



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What are the phases of a typical hearing process?



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What does the notice say?

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

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What is the pre-hearing conference?

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

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Pre-Hearing Conference: What is covered?

- Introductions, including the Hearing Officer's role as a neutral, independent decision-maker responsible for maintaining order and making all necessary rulings
- Confirmation of each party's advisor (and support person, if any), and who may be physically present with a party during the hearing
- The hearing schedule
  - Start/end times, breaks, and that additional day(s) may be added if the hearing does not conclude as scheduled
- *Rules of Decorum*: no disrespectful, bullying, harassing, or disruptive conduct; no unnecessarily repetitive questions; and the consequences for violations (warning, forced break, possible removal)
- *Questioning procedures*: advisors (not parties) conduct all questioning, and every question is subject to a relevance ruling by the Hearing Officer
- Advisors and parties have an opportunity to review proposed questions with the Hearing Officer in advance of the hearing
- Any additional accommodation needs can be raised with the Title IX Coordinator at this stage

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What is a “live” hearing?

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

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Who attends a live hearing?

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

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What are the logistics of a hearing?



Hearing must be recorded (audio or video) or transcribed



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



Hearing can be held virtually using suitable software

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Technology Use During the Hearing

- Hearing conducted via Zoom videoconference and is video-recorded
- Participants should log in and enter the waiting room at least 15 minutes before the hearing start time
- Do not share Zoom meeting information (link, meeting ID, passcode) with anyone else
- Participants are expected to keep cameras on for the majority of the hearing
- Unrecorded breakout rooms are available for a party to confer privately with their advisor, upon request
- The Hearing Officer recommends parties and advisors maintain a separate communication channel (outside Zoom) to communicate with each other during the hearing
- Provide a phone number where you can be reached on the hearing day(s) in case of technical difficulties
- Only the Hearing Officer's recording of the hearing is permitted — no other recordings by participants

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Does the institution provide a party's advisor?

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

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Be Prepared for the Hearing

01

Review Investigation File

02

Know who is attending the hearing

03

Consult with party before the pre-hearing conference and hearing

04

Prepare list of questions

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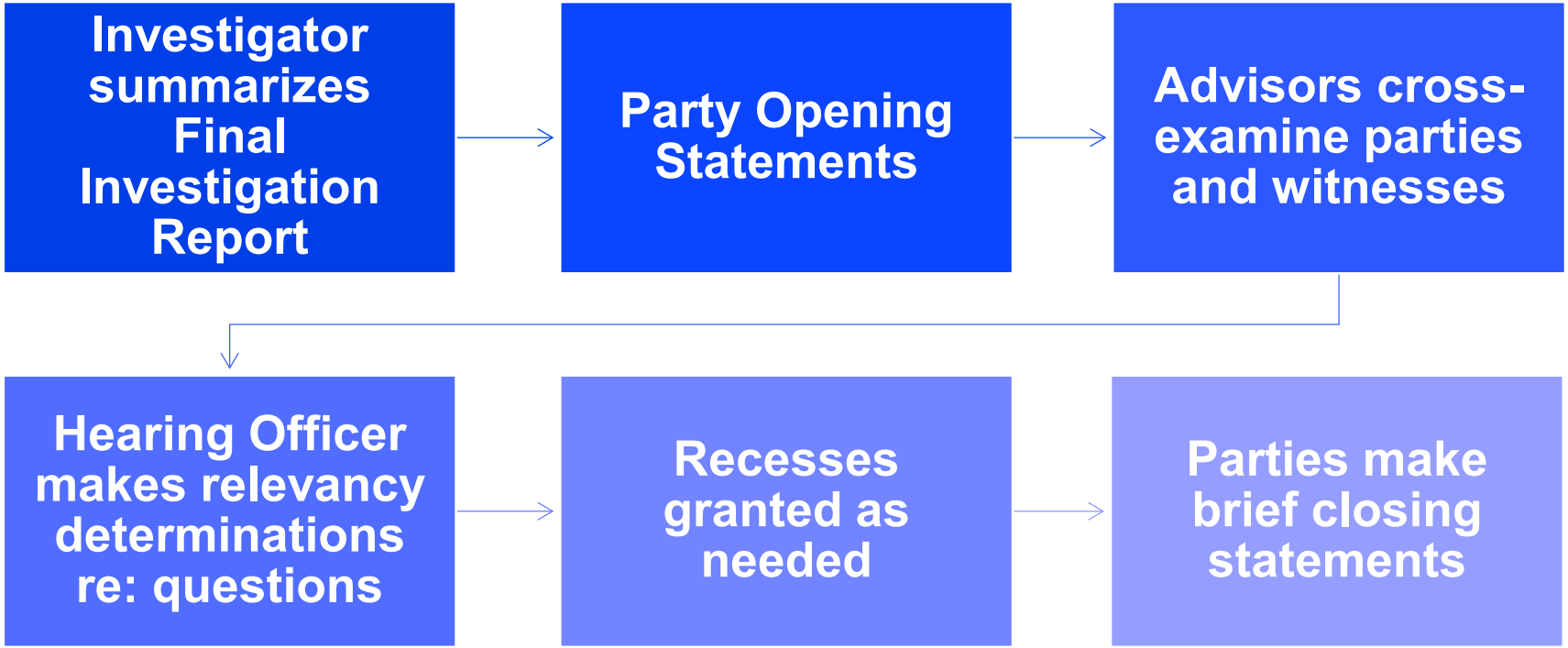
How does the hearing actually work?

Required elements include:

- Hearing officer or panel must independently evaluate questions for relevance and resolve relevancy objections
- Party's advisors must be allowed to conduct live questioning of other party and witnesses
- If a party or witness refuses to submit to live questioning this may diminish weight and/or credibility
- Questioning of sexual history generally not permitted

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UMD Policy – Hearing Sequence



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Who determines relevance?

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

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What is relevance?

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

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Example A: Relevant

A complainant alleges that a respondent exposed himself to her during a video call for a group project. The respondent claims the exposure was accidental and that he was unaware his camera was positioned the way it was. During the hearing, the complainant's advisor asks the respondent: "Isn't it true that you can be seen adjusting the camera angle twice in the screen recording, each time right before the exposure occurred?"



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Example B: Relevant

A resident advisor is accused of pressuring a resident into a sexual relationship by implying it would affect whether she could keep her room assignment for the following year. During the hearing, the complainant's advisor asks the respondent: "Didn't you tell her, in a message now in evidence, 'I control who gets to stay in this building next year, just so you know'?"



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Example: Not relevant

A complainant alleges that a coworker made repeated unwanted sexual comments to her during closing shifts at a campus dining facility. During the hearing, the respondent's advisor asks the complainant: "Isn't it true that you've filed workplace complaints at two other jobs before this one?"

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Example: Likely not relevant

A graduate student alleges that a fellow lab member groped her at a department social event. During the hearing, the respondent's advisor asks the complainant: "Isn't it true that you've been on academic probation for the last two semesters?"



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Is sexual history considered?

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

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Example: Impermissible

A student alleges a classmate sexually assaulted her in his car after a concert. During the hearing, the respondent's advisor asks: "Have you had multiple one-night stands since you broke up with your last boyfriend?"



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Example: Permissible

A student alleges that a non-consensual sexual encounter occurred with a classmate in a shared practice room reserved for music majors, and states he would never have agreed to anything sexual in that specific room because of its glass door and high foot traffic. During the hearing, the respondent's advisor asks: "Did the two of you had a consensual sexual encounter in that exact same practice room two weeks earlier? Did you tell the respondent afterward you liked that no one could fully see in because of how the blinds were angled?"



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Is there a standard of behavior in hearings?

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

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Example A: Impermissible

A respondent's advisor repeatedly types loudly and audibly sighs into his microphone every time the complainant answers a question, and at one point mutters "unbelievable" just loud enough for the Hearing Officer to hear.



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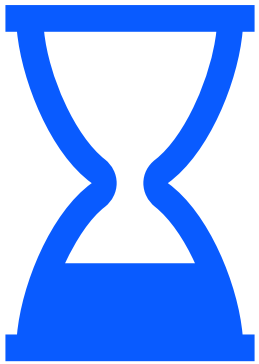
After the Hearing Officer rules that a proposed line of questioning about the complainant's unrelated counseling history is inadmissible, the advisor refuses to move on, repeatedly rephrasing and re-asking variations of the same excluded question for several minutes despite being redirected three times, and eventually tells the Hearing Officer, “You clearly don’t understand how cross-examination is supposed to work.”

Example B: Impermissible



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How long does a hearing last?



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

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How does the hearing officer decide a case?



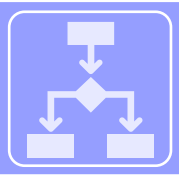
After hearing, the hearing officer must deliberate and consider all the relevant testimony and relevant non-testimonial evidence



Evaluate evidence for weight and credibility



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

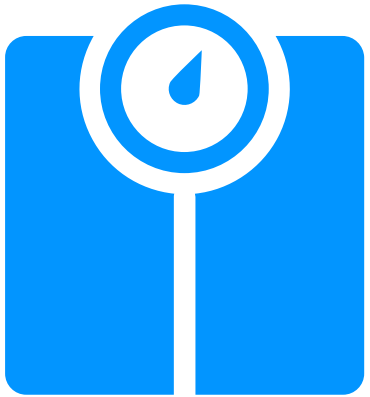


Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred

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What does it mean to weigh evidence?

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



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Example: Considerable weight

A witness testifies that he overheard the respondent on a phone call in the dining hall, roughly an hour after the alleged incident, apologizing to someone and saying “I shouldn’t have pushed it, I'm sorry.” The witness testified he remembers the exact day because it was the day of his economics midterm, which he had just finished, and he recalls checking the time on the dining hall clock as 1:15 pm because he was rushing to his next class. His class attendance records confirm he was marked present for a 1:30 pm class that day, consistent with leaving the dining hall at that time.



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Example: Less weight

A witness says he “might have” seen the two parties arguing near the quad “at some point that week” but can’t remember which day. He says he “thinks” he heard raised voices but admits he had headphones in and “wasn’t really listening.” He also acknowledges he doesn’t know either party well and “could be mixing them up with someone else.”



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

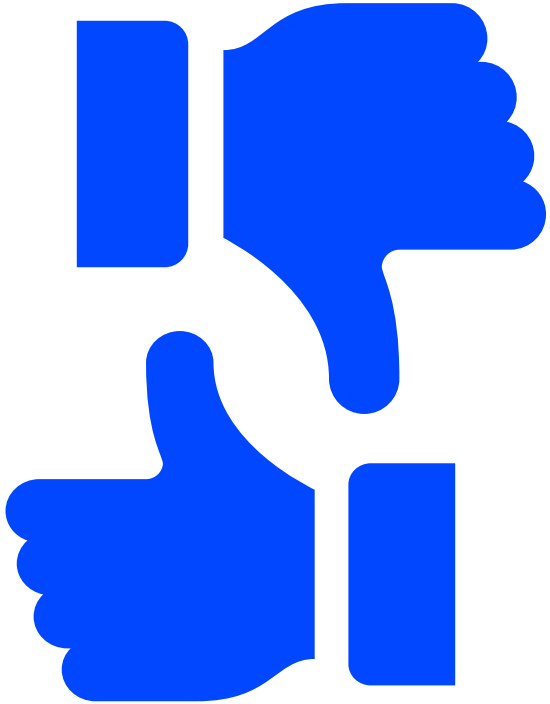
UMD Procedures

- Any and all information for consideration by the Hearing Officer must be provided to the Investigator during the investigation phase of the process and otherwise will not be allowed during the Hearing.
  - If a Party requests that additional information be considered during the Hearing, the Party must clearly demonstrate that such information was not reasonably available to the Parties at the time of the investigation, or that the evidence has significant relevance to a material fact at issue in the investigation.
  - If a Party provides or identifies evidence after the Final Investigation Report is issued, and the Hearing Officer determines that it was reasonably available to them during the investigation process, the Hearing Officer has the discretion to choose to consider such information and may draw a negative inference from the Party's delay in providing or identifying the evidence.
  - The Hearing Officer may, at their discretion, instruct that the investigation be re-opened to consider the evidence. In such cases, the evidence will be made available to the Parties for their review and comment prior to the Hearing.

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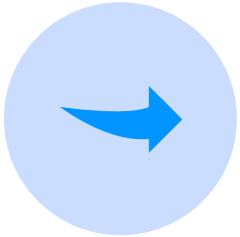
What is a determination?

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



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Purpose of a determination



Moves matter to next procedural step



Record of following process



Documents fair process



Provides parties and subsequent decision-makers with information

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How does a decision get issued?

UMD Updated Procedures; Section VI(D)(7)

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

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

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Questions

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Questioning

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What is the advisor's role in questioning?

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



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Example A: Advisor's role in questioning

Respondent is accused of sexual exploitation for secretly recording a sexual encounter with complainant on his phone without her knowledge or consent. Complainant states she never saw or heard any indication a recording was being made. Advisor for respondent asks questions aimed at establishing that complainant was aware of and consented to being recorded.



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Example A re Advisor's role in questioning: **Questions**

- **Do you recall seeing the respondent's phone propped up on the nightstand?**
- **Did you ask the respondent at any point that evening whether he had done this before?**
- **Did you send the respondent a message two days later asking him to delete the video?**
- **Did the respondent delete the recording when you asked him to?**
- **Had you and the respondent discussed recording a previous encounter together?**
- **Did you tell any friends that a recording existed before filing your complaint?**



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Example B: Advisor's role in questioning

Complainant has accused respondent, a fellow member of an a cappella group, of hostile environment sexual harassment based on repeated unwanted comments made during rehearsals. Advisor for complainant asks questions of the group's faculty advisor to show that complainant's participation and performance in the group declined significantly after the conduct began.



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Example B re Advisor's role in questioning: **Questions**

- **How long have you served as the faculty advisor for this group?**
- **Before this semester, how would you describe the complainant's attendance and participation at rehearsals?**
- **Did the complainant ever come to you with any concerns about rehearsal dynamics?**
- **After the time period in question, did you observe any change in the complainant's attendance, engagement, or vocal performance?**
- **Did the complainant ultimately step back from any solos, leadership roles, or responsibilities within the group? If so, when and why, as far as you understood it?**



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How do I know what questions to ask?

- Review the nature of the allegations
- Review the definition of the particular type of sexual harassment alleged
- Consider facts that would support your party's position that a given element of the sexual harassment is either met or not met
- Prioritize your questioning to focus on the most compelling points
- Consider questions that will bear on credibility

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Example: The Elements

Hostile Environment Sexual Harassment is conduct on the basis of sex that is:

- **Unwelcome conduct**
- **Severe, pervasive and objectively offensive**
- **Effectively denies a person equal access to the University's Education Program or Activity**



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Example for Discussion

Complainant and Respondent work together as peer tutors in the campus writing center. Complainant alleges Respondent has repeatedly sent flirtatious and sexually suggestive messages through the center's internal scheduling app, made comments in front of other tutors speculating about Complainant's "type," and once followed Complainant into the break room and closed the door partway while continuing to talk despite Complainant trying to end the conversation.

Complainant states the conduct has made them dread their shifts, leading them to request a schedule change to avoid overlapping with Respondent, which has reduced their available tutoring hours and pay. Respondent denies any inappropriate messages and says any comments were "just office banter" that everyone participates in.



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Example Questions: Severe Pervasive and Objectively Offensive

- **Can you describe the specific messages Respondent sent through the scheduling app?**
- **Were any of the messages sexual in nature? Were any of a kind that made you uncomfortable?**
- **Did you ever feel unsafe or trapped because of Respondent's conduct?**
- **Did the behavior change or escalate over the time you worked together?**
- **How often did this occur, and over what period of time?**
- **Did this happen in more than one setting — the app, in front of coworkers, in the break room?**
- **Were any comments made in front of other tutors? How did they respond?**
- **Did anyone else say anything to you about Respondent's behavior?**
- **Have you talked to anyone else about this? What was their reaction?**
- **Why did you request the schedule change? What effect has that had on your hours and pay?**



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Example for Discussion

Two students live in the same off-campus apartment complex and are enrolled in the same large lecture course. Respondent is accused of stalking Complainant by repeatedly changing seats to sit directly behind or beside her in a 200-person lecture hall over the course of a month, despite assigned seating not being required and respondent having sat elsewhere earlier in the semester. Respondent admits to moving seats but says it was simply because the acoustics were better near Complainant's usual seat. Complainant says she began arriving late to avoid saving a seat and eventually started watching lecture recordings from home instead of attending in person.



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Example Questions: Complainant (on the basis of sex)

- ***On the basis of sex:***
  - **Describe your prior interactions with the respondent before this course.**
  - **Has Respondent ever complimented your appearance or asked personal questions unrelated to coursework?**
  - **Has Respondent asked to study together or meet outside of lecture?**
  - **Has Respondent sent you messages expressing interest in getting to know you better?**



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Example Questions: Complainant (Course of Conduct)

- ***Course of Conduct:***
  - **When did you first notice the Respondent sitting near you, and how many times did this happen?**
  - **Did the Respondent say anything to you on these occasions?**
  - **Have you had other interactions with the Respondent in or around your apartment complex?**



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Example Questions: Complainant (Directed at a specific person)

- ***Directed at a specific person:***
  - **Why do you believe the seating changes were specifically about you?**
  - **Were other students also sitting in that general area, or was it specifically next to or behind you?**
  - **Does the Respondent have any other reason to be in that part of the lecture hall?**



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Example Questions: Complainant (Fear/distress)

- ***Fear/distress:***
  - **What was it like for you each time you noticed the respondent nearby?**
  - **Did you change your behavior because of this? How?**
  - **What has the overall impact of this been on your coursework and routine?**
  - **Did you tell anyone about it at the time?**



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Questions should result in specific details from parties and witnesses

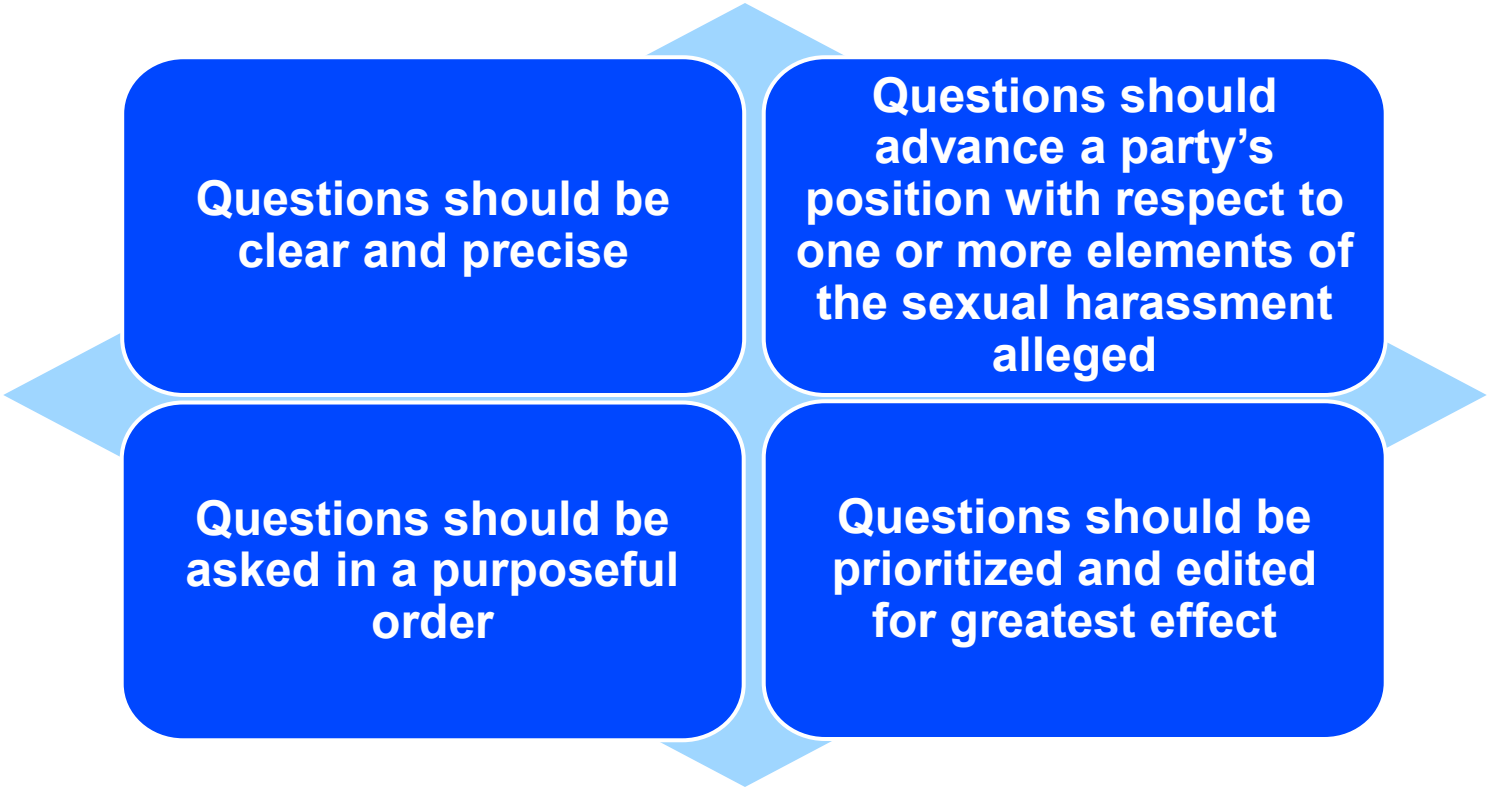
“Complainant alleges that Respondent engaged in stalking behavior.”

vs.

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

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What are the hallmarks of effective questioning?



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What is the appropriate manner of asking questions?

- Address the party respectfully using a preferred title shared at the beginning of hearing
- Use an even and appropriate tone of voice (i.e., no shouting; no snide tone; no sarcasm; no dramatics)
- Do not use intimidating physical actions (i.e., finger pointing; fist pounding; exasperated gestures; etc.)
- **Listen carefully to direction from Hearing Officer about hearing procedure and questioning**

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

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

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What should you do if your question is deemed irrelevant?

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

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Are you required to make objections?

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

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

****But remember**: Hearing Officer has an obligation to screen for relevance and make determinations about whether questions are permissible

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Are you required to “act like a lawyer”?

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

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Group Scenario

A student employee in the campus recreation center accuses her shift supervisor, a fellow student who schedules and approves her hours, of sexual assault. She states the incident occurred in the equipment storage room at the end of a closing shift in February, after the supervisor told her he needed to show her "something in the back" and that no one else was in the building.

The supervisor claims nothing happened in February at all, and that the two only became sexually involved in April, after the semester's scheduling had already been finalized by the recreation center's full-time staff director (not by him). He says it was a mutual, casual relationship that she ended after he started dating someone else, and that she is now retaliating by filing a false complaint. *(Cont.)*



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Group Scenario (Cont.)

Building key-card access logs show the supervisor badged into the storage room at 9:47 pm on the night in question, and the student's badge shows her exiting the building at 10:35 pm, roughly 48 minutes later than her shift was scheduled to end.

The student has a group chat message to a friend, sent at 11:58 pm that same night, reading: "i don't even know what just happened i feel sick."

Two other student employees recall the supervisor telling them, before the alleged incident, that the student "has had a thing for me for a while" and that he was "going to see where it goes."

The student's shift-hour records show she was assigned noticeably more weekend closing shifts with the supervisor in the two months before the incident than any other student employee on staff, despite having previously requested fewer weekend shifts due to a conflicting class schedule.



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Questions for Discussion

- **As the student's advisor, what are questions you would ask the supervisor to challenge his account of when the relationship began?**
- **As the supervisor's advisor, how would you use the key-card access logs to support his version of events, given that they show him in the storage room the same night the student alleges the assault occurred?**
- **How would each advisor address the 48-minute gap between the student's scheduled shift end time and when her badge shows her leaving the building?**
- **The scheduling pattern shows the student was assigned more weekend closing shifts with the supervisor than any other student employee, despite requesting fewer weekend shifts. As the student's advisor, what questions would you ask about this? As the supervisor's advisor, what questions would you ask about this?**



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Confidentiality and Other Expectations

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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



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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

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Family Educational Rights and Privacy Act ("FERPA") *(Cont.)*

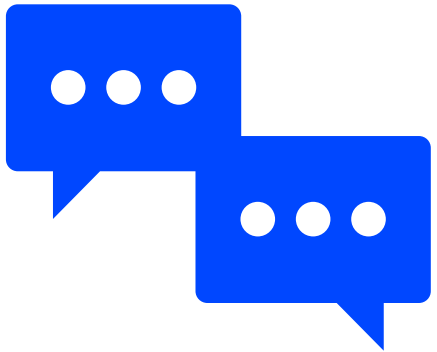
- Discrimination and harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Title IX regulations contain an express preemption provision, permitting FERPA-protected material to be used (and shared) in Title IX proceedings,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



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Must an advisor maintain confidentiality?

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



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Example A: Not permitted

An advisor posts in a private online forum for current and former institutional advisors, describing the general facts of their assigned case (without using names) and asking other members what kinds of questions worked well for them "in a similar situation."



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Example B: Not permitted

A close friend of the respondent, who is not involved in the case in any capacity, texts the respondent's advisor directly, saying the respondent mentioned the advisor's name and asking "just to get a sense of how bad this looks" and whether the advisor thinks the respondent will be found responsible.



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Example C: Not permitted

An advisor who works in a different department from the party emails a coworker to ask for scheduling flexibility around the hearing dates, and when the coworker asks "what's this for, is everything okay?", the advisor responds with a detailed explanation of the allegations and the identities of both parties to "make sure they understand why it is important."



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Are your communications with your party “privileged”?

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

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What if a party is facing criminal charges?

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



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Do you have a role in the appeal?



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

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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



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Appeal Rights

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

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Procedural Irregularity

UMD Policy and Procedures

- 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.

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Example: Procedural irregularity

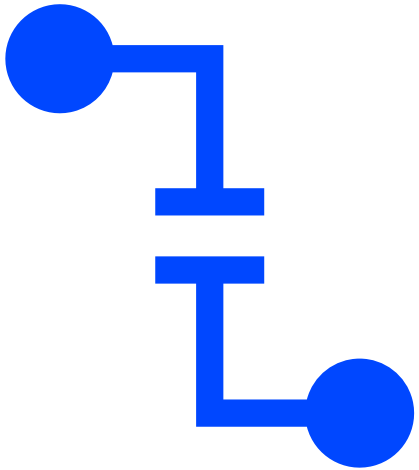
During a hearing, the Hearing Officer allows the respondent's advisor only two questions for a witness before moving on, citing time pressure, without any prior notice that time limits would apply to witness questioning. The respondent appeals, arguing the truncated questioning prevented the advisor from addressing material inconsistencies in the witness's account, and that the determination relied heavily on that witness's testimony.



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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



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New Evidence

UMD Policy and Procedures

- 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.



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Conflict of Interest or Bias

UMD Policy and Procedures

- 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.

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Substantially Disproportionate Sanction

UMD Policy and Procedures

- 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.



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Questions

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