

HUSCH BLACKWELL

American InterContinental University System (AIUS)

Comprehensive Title IX Training: Day 1

Fall-Winter 2023-2024

Presenters



Julie Miceli
Office Managing Partner
312-526-1521 (Direct)
julie.miceli@huschblackwell.com



Elizabeth Samples
Partner
816-983-8271 (Direct)
elizabeth.samples@huschblackwell.com

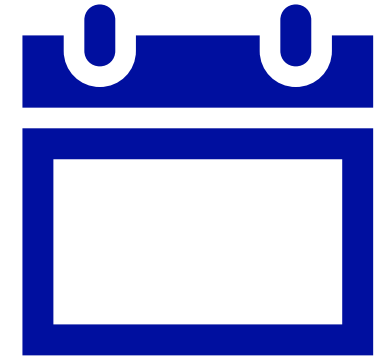
Agenda - Day 1 – Thursday, Nov. 2

Module 1 – Key legal principles & considerations

Module 2 – Applicable policy requirements

Module 3 – Pregnancy discrimination

Module 4 – Transgender legal considerations



Module 1: Key Legal Principles & Considerations

Title VI of the Civil Rights Act of 1964

- Prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds or federal financial assistance

Title VII of the Civil Rights Act of 1964

- Prohibits protected class discrimination in the workplace
 - Race, color, sex, religion, national origin
- Includes protected class harassment and pregnancy discrimination
 - Note that sexual harassment under Title IX is defined differently and institutions are subject to significantly different obligations in responding to such harassment under Title IX

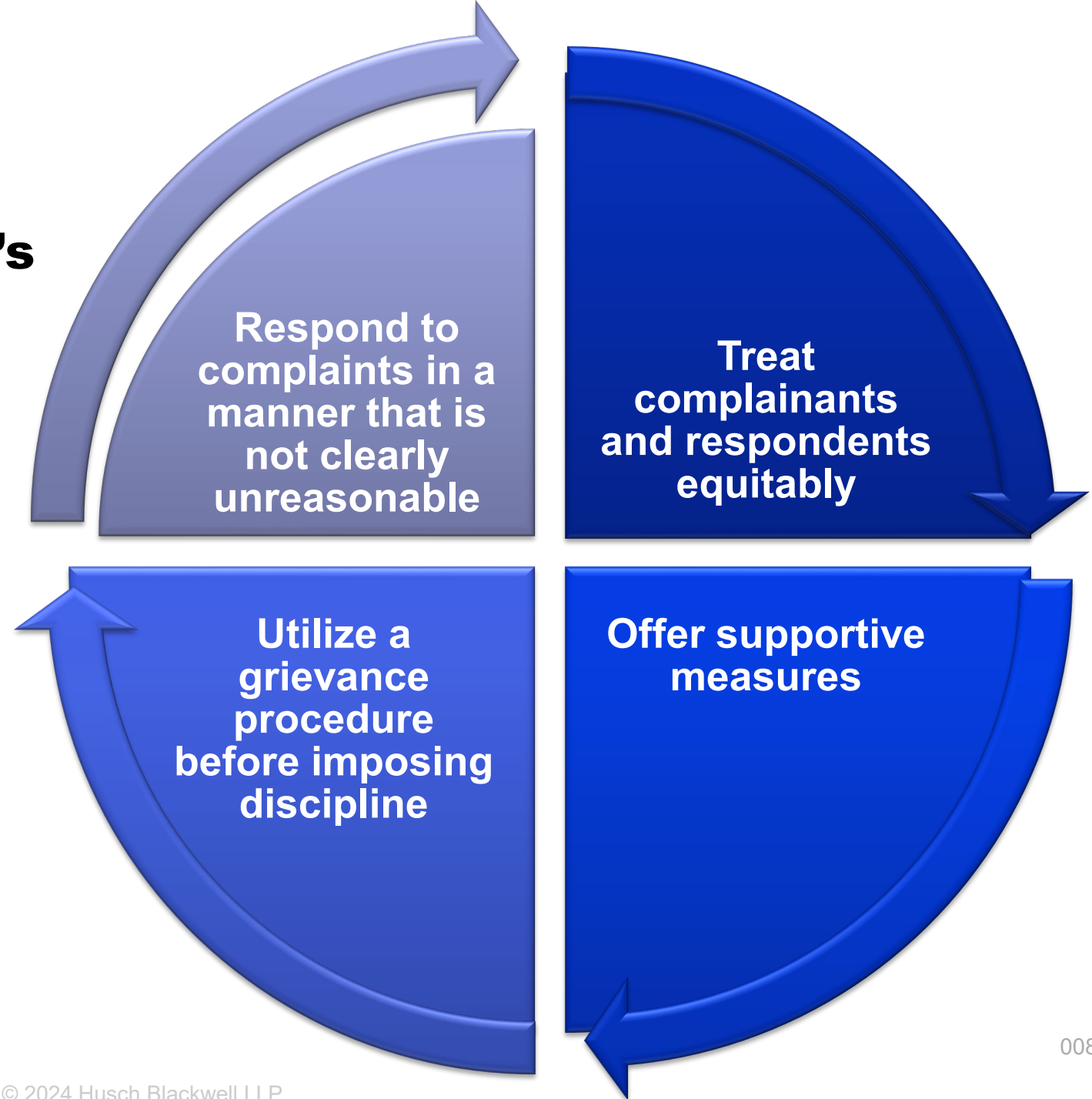
What is Title IX?

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

34 C.F.R. § 106.31



What are the institution's overall duties?

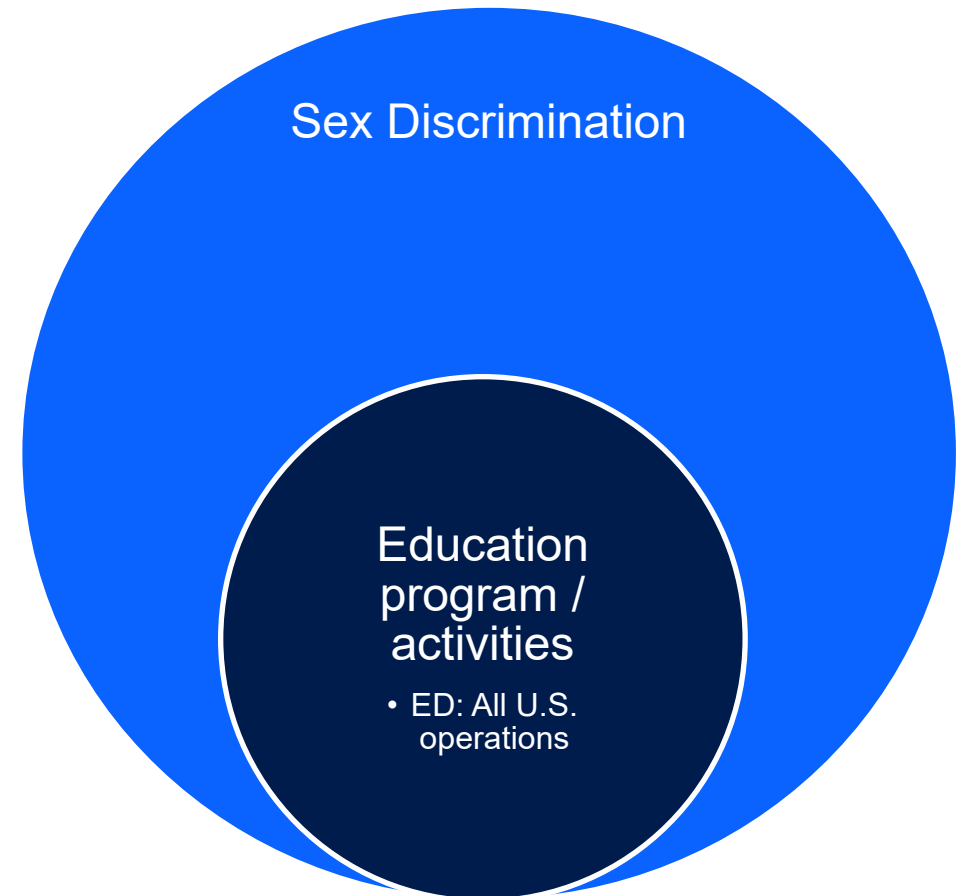


Sex Discrimination: two main types

- Adverse treatment involves adverse action that is motivated by the target's sex and that directly limits or excludes the target from participation in education program or activities
 - Usually by someone in a supervisory or authoritative position
- Sexual harassment involves
 - Unwelcome conduct that is
 - Either sexual in nature or sex based and
 - Quid pro quo; hostile environment; sexual assault; or domestic violence, dating violence, stalking
 - Sexual harassment is currently subject to more elaborate regulations governing investigation and determination

What is the scope of Title IX's reach?

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



What are examples of education programs and activities for Title IX purposes?

Admissions	Hiring	Workplace	Academic instruction
Residence life	Events/amenities on campus	Sports teams	Work-study
Clinical rotations	Off-campus trips or experiences organized by the institution	Sponsored organization activities	Anything else that happens on-campus

Does Title IX apply to off-campus sexual harassment?



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



Yes, if the conduct at issue occurs in location owned/controlled by the institution or officially-recognized student organization



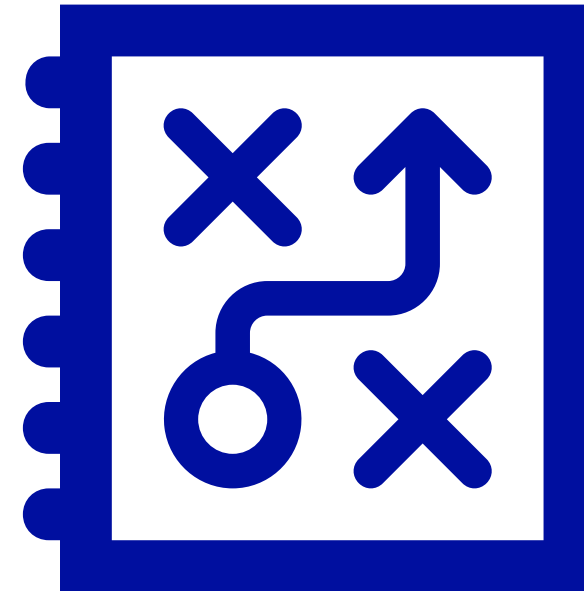
No, if it occurs in a private location and is not part of an institution's education program or activity



No, if it occurs outside the United States

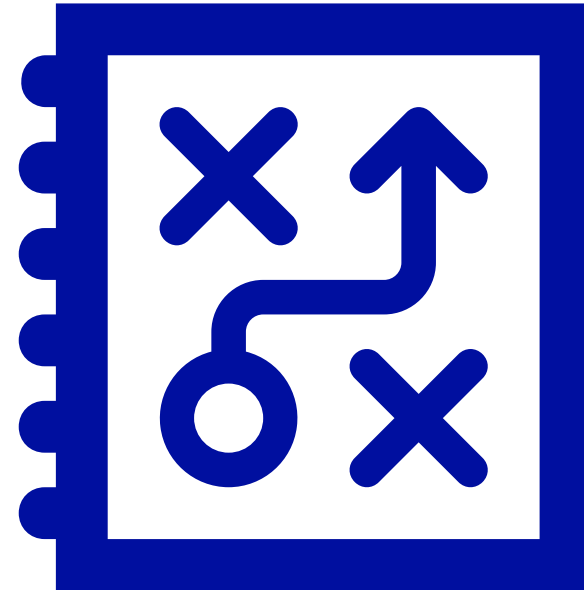
Example (included in EP&A)

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



Example (excluded from EP&A)

Student A reports that Student B sexually assaulted Student A over the summer while both students were back in their hometown. The alleged assault occurred after the two had been on a date.



Does Title IX apply to sexual harassment in other countries?

- No – the U.S. Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- But sexual harassment that occurs abroad could “contribute” to a hostile environment on campus



What other policies might apply?



- To address sexual harassment that does not occur in an education program or activity, institutions are free to consider:
 - Student code of conduct
 - Faculty/employee handbooks
 - Other policies

Political Update – “Sex”

Mar. 8, 2021 Executive Order

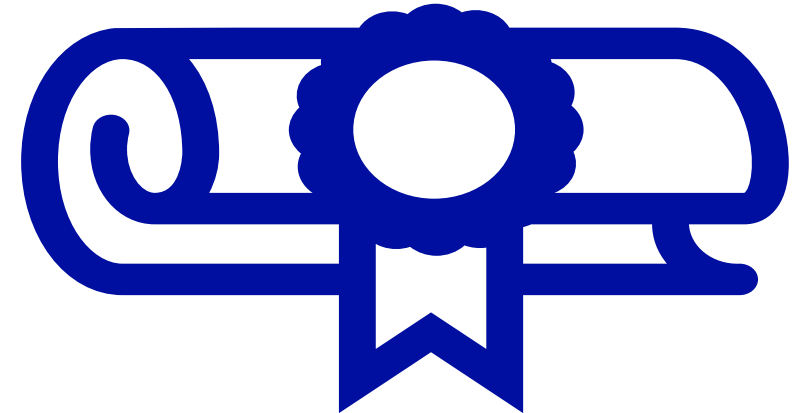
- Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity
- Authorizes the Secretary of Education to take additional action to enforce this policy

June 16, 2021 Guidance

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

Regulatory update

- On June 23, 2022, the U.S. Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- 60 days for public comments
- Initially anticipated in May 2023, but delayed until October 2023 and now perhaps longer... [~Spring 2024?]



How does an institution receive notice of sexual harassment?



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

What is “actual knowledge”?

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

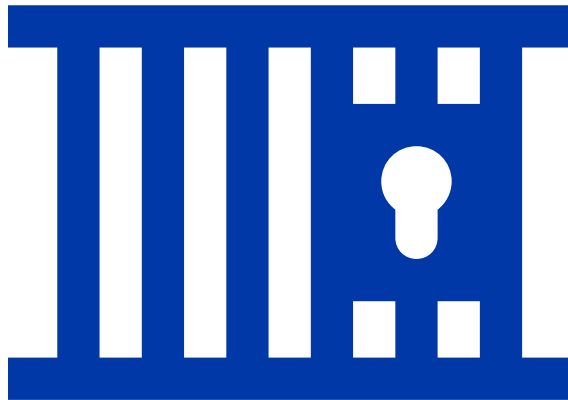
Sherman v. The Regents of Univ. of Cal. (N.D. Cal. 2022)

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



Other legal considerations

The Clery Act



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

Violence Against Women Reauthorization Act of 2013 (VAWA)

Codification of Title IX principles

Sexual misconduct policy

Statements of rights and options

Support persons

Training

Applicable disabilities statutes

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



ADA – Title I, II and III

- **Title I:** Prohibits disability-based discrimination in employment by private employers, state and local governments, employment agencies, and labor unions
- **Title II:** Prohibits disability-based discrimination in state and local government programs, services, and activities (including public education)
- **Title III:** Prohibits privately-owned “places of public accommodation” from discriminating “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”
- Colleges and universities must make reasonable accommodations in policies, practices, and procedures.
- Note emerging caselaw across some circuits recognizing “hostile environment” claims under the ADA

Section 504 of the Rehabilitation Act

- The first statute to require disability accommodations (1973)
- Makes it illegal for the federal government, federal contractors, and any entity receiving federal assistance to discriminate on the basis of disability
- “No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . .”

What are their general principles?

No disability discrimination in employment

No disability discrimination in programs and activities

No disability discrimination by places of public accommodation

Accessibility for facilities and services

Reasonable accommodations/ modifications

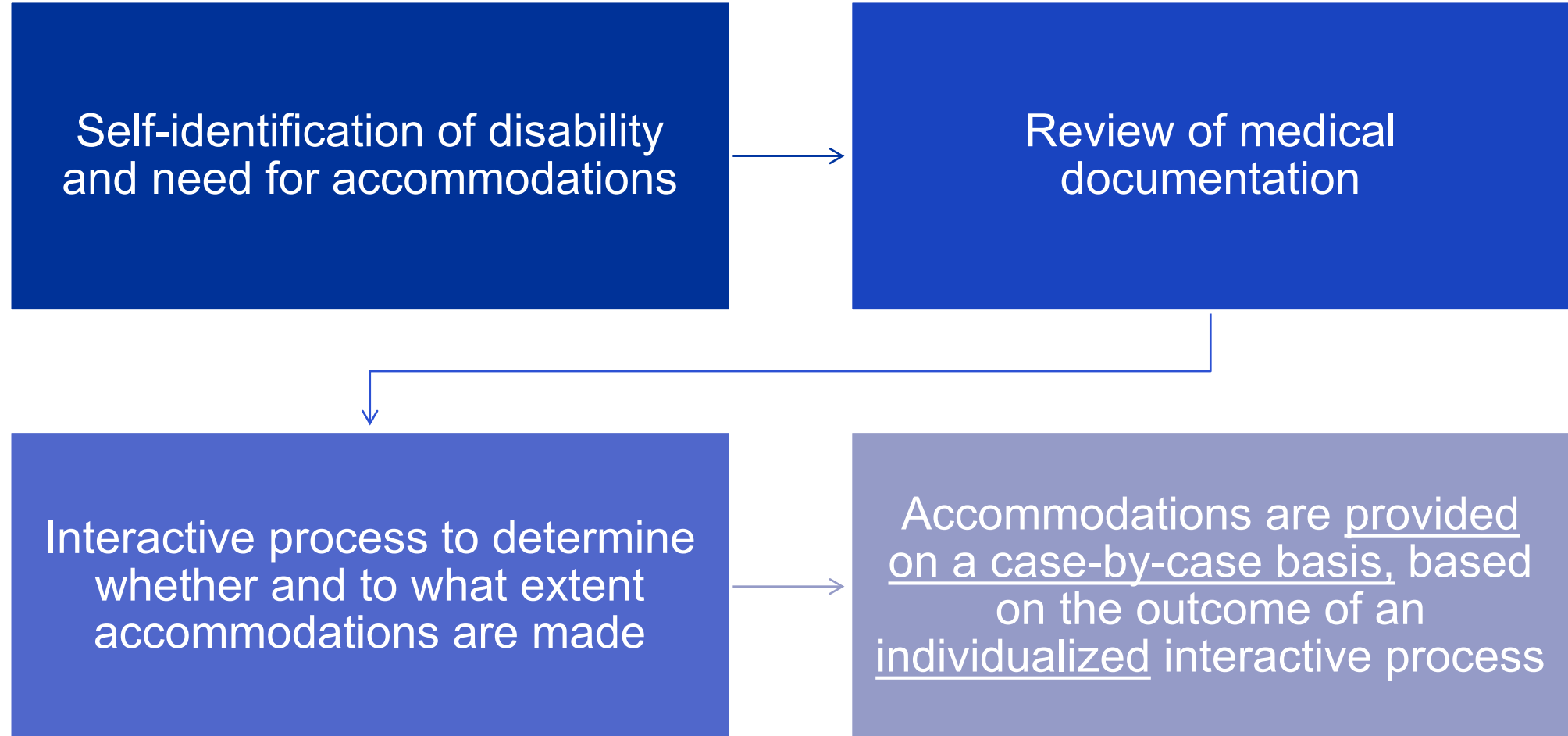
Does a “disability” include mental health conditions?

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

What are some examples?



What is the process?



What are reasonable accommodations?

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

Age Discrimination in Employment Act

- Federal law that prohibits employment discrimination against individuals age 40 or older



Pregnant Workers Fairness Act

- New Law effective June 27, 2023
- Administered by the EEOC with regulations forthcoming
 - Notice of proposed rulemaking published in August of 2023
- Requires employers to provide reasonable accommodations to a qualified employee's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions
- Applies unless the accommodation will cause an undue hardship on the operation of the business of the covered entity.
- Fills in gaps not always covered by Title VII or the ADA, which can apply to pregnancy, childbirth or related medical conditions in some circumstances.

Genetic Information Nondiscrimination Act of 2008 ("GINA")

- Protects individuals against discrimination based on their genetic information in health coverage (Title I) and in employment (Title II)
- Prohibits employers from discriminating against employees ***or applicants*** because of genetic information.
 - in making employment decisions,
 - restricts employers and other covered entities from requesting, requiring or purchasing genetic information, and
 - strictly limits the disclosure of genetic information.

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
 - 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



Standards of evidence

- Preponderance of the evidence: “more likely than not”
- Clear and convincing: firm belief or conviction that it is highly probable that the factual contentions of the claim are true
 - This is a higher standard of proof than proof by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt
- Reasonable basis: objective consideration of the circumstances
 - Related concept: reasonable person standard (how a person under similar circumstances would be expected to react)

Module 2: Key Policy Requirements

Introduction to Policy

- Consistent with the University's Non-Discrimination Notice and the U.S. Department of Education's implementing regulations for Title IX of the Education Amendments of 1972 ("Title IX") (see 34 C.F.R. § 106 et seq.), the University prohibits Sexual Harassment that occurs **within its education programs or activities**. The University is committed to creating and maintaining a community in which students, faculty and employees work in an environment free from all forms of discrimination, harassment, or violence. The Sexual Misconduct - Sexual Harassment Policy prohibits sexual harassment **including**: Quid Pro Quo Sexual Harassment, Hostile Environment Sexual Harassment, Sexual Assault, Domestic Violence, Dating Violence, and Stalking.

Scope of Policy

- This policy applies to Sexual Harassment that occurs **within the University's Education Programs or Activities** and that is committed by an administrator, faculty member, staff, student, contractor, guest, or other member of the University community. This policy does not apply to Sexual Harassment that occurs off-campus, in a private setting, and outside the scope of the University's Education Programs or Activities; **such sexual misconduct may be prohibited by the Student Conduct Policy if committed by a student, the Faculty Handbook if committed by a faculty member, or other University policies and standards if committed by an employee.**

What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo
harassment

Hostile environment
harassment

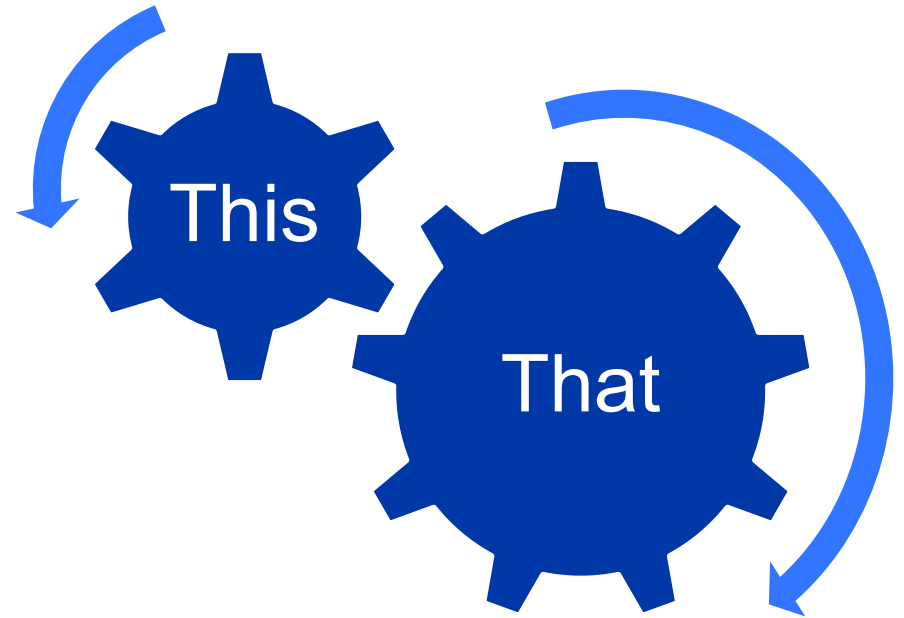
Sexual
assault

Relationship
violence

Stalking

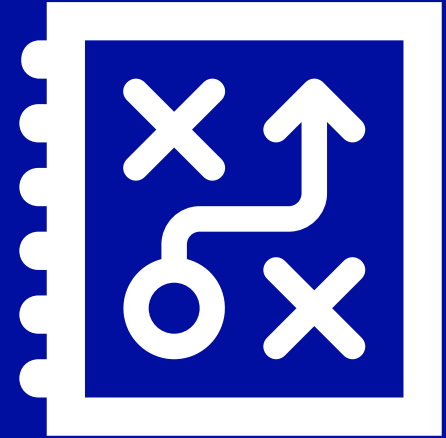
What is quid pro quo?

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



Example of quid pro quo

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



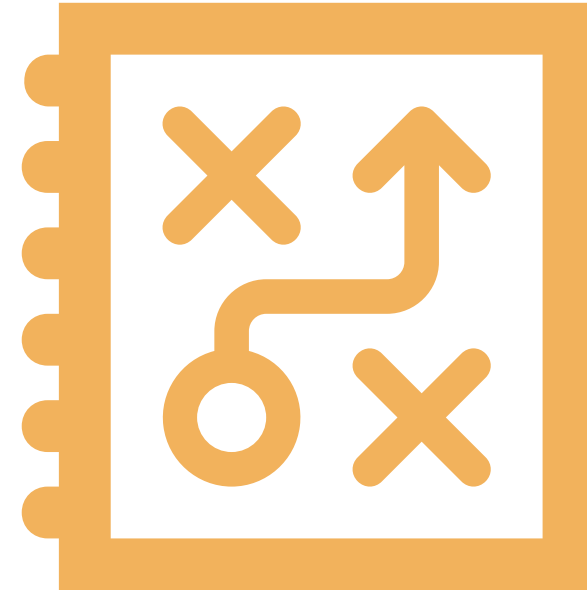
What is hostile environment?

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



Example of hostile environment

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

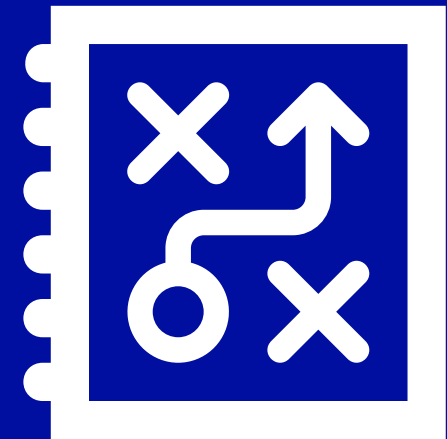


How do we determine if a hostile environment exists?

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

Example of hostile environment

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



What is sexual assault?

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

Rape

Sodomy

Sexual
assault with
an object

Fondling

Incest

What is rape?

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

What is consent?

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

What is incapacity?

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



Incapacity – Common Factors

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

Does Title IX also prohibit retaliation?

Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any *individual* for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy (34 C.F.R. § 106.71)

How does the institution address Title IX sexual harassment?

- When the institution has actual knowledge of actual or potential sexual harassment it must:
 - Offer **supportive measures** to the putative victim and information about options.
 - If a formal complaint is filed investigate and resolve the complaint through established grievances procedures.
 - If sexual harassment is substantiated, impose discipline on the perpetrator and provide remediation to the victim.

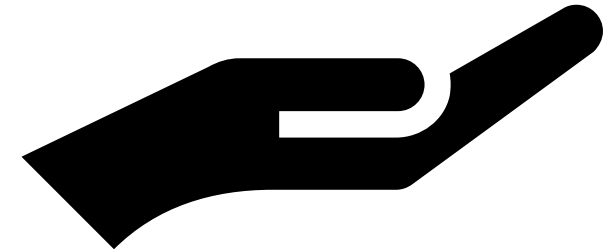
Which employees have a duty to report sexual harassment?

- In addition to reporting to the Title IX Coordinator, any person may report Sexual Harassment to any University employee with managerial authority over other employees, including deans, program directors, program chairs, department heads, supervisors, and other managers (collectively “Reporting or Institutional Officials”) who must promptly forward such report of Sexual Harassment to the Title IX Coordinator Professionals at Student Counseling and Wellness Center who are confidential resources



What are supportive measures?

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



Examples of Supportive Measures



Counseling



Academic Accommodations



Housing Accommodations



Security Escorts



Leave of Absence



Increased Security or Monitoring



Modified Work Schedules



Mutual No-Contact Order Where Implicated by Facts

What general principles govern the grievance process?

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

How do we tell the parties about an investigation?

- Provide the parties notice of a formal complaint
 - Depending on the policy at issue, notice may be required to be in writing (e.g., Discrimination Complaint Procedures)
- Depending on nature of complaint may include the following: sufficient details about the “who, what, when, where, and how”



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



Are investigations confidential?

- All investigations 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



How does a decision-maker reach a conclusion?



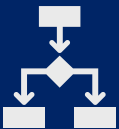
After gathering all the evidence, the decision-maker should consider all the relevant testimony and non-testimonial evidence



Evaluate evidence for weight and credibility



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



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

What principles do we use to determine remediation?

If a violation is found,

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

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

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

Importance of Policy

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

Module 3: Pregnancy Discrimination

Agenda

- Overview of legal requirements
- New Title IX proposed rules
- Recent case law
- Hypothetical scenarios
- Practical guidance

Applicable Laws

- Title IX
- ADA/Section 504
- State and local civil rights laws
- Pregnancy Discrimination Act



Title IX

- Federal law that prohibits discrimination based on sex in education programs or activities that receive federal financial assistance.
- Title IX regulations prohibit discrimination based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom and related conditions.

ADA / Section 504

- Federal laws that prohibit disability discrimination and require institutions to make reasonable accommodations to qualified individuals with a disability.
- Disability = A physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.
- Pregnancy itself is not a disability, but complications from pregnancy or childbirth may qualify.

Pregnancy Discrimination Act

Title VII, as amended by the PDA, prohibits *employment* discrimination based on:

- Current pregnancy
- Past pregnancy
- Potential or intended pregnancy
- Medical conditions related to pregnancy or childbirth

Title IX Regulations: Gender-Neutral Rules



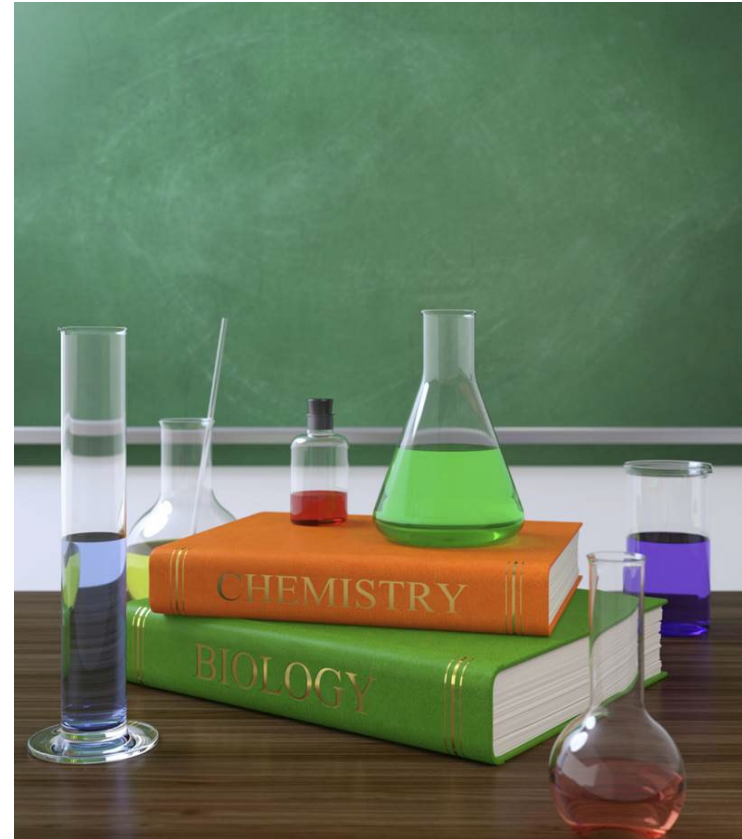
A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

34 CFR § 106.40(a)

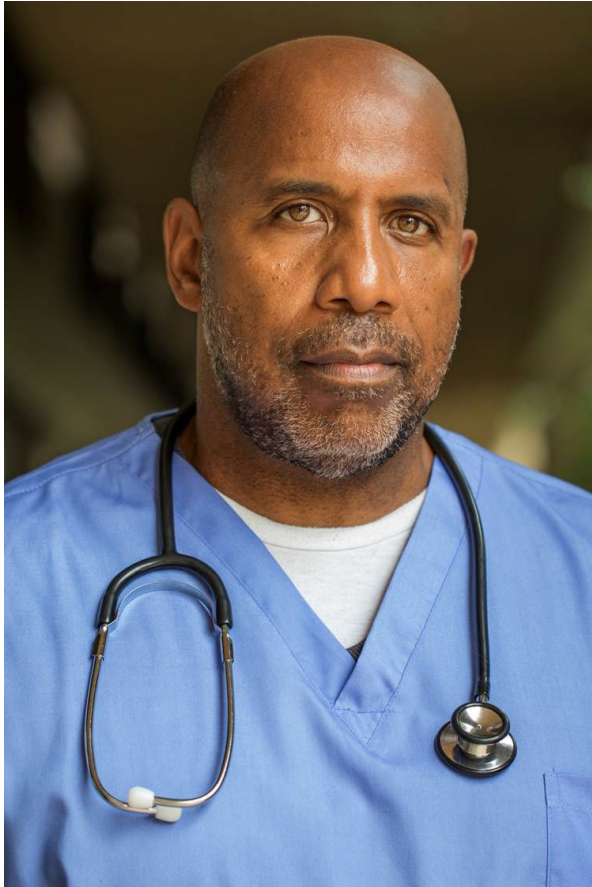
Title IX Regulations: Equal Participation

Schools must not discriminate against any student or exclude any student from their education program or activity, including any class or extracurricular activity, based on a student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

34 CFR § 106.40(b)(1)



Title IX Regulations: Medical Certification



A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

34 CFR § 106.40(b)(2)

Title IX Regulations: Separate Programs

A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

34 CFR § 106.40(b)(3)

Title IX Regulations: Temporary Disability Policies

A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

34 CFR § 106.40(b)(4)



Title IX Regulations: Leaves of Absence

In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

34 CFR § 106.40(b)(5)

OCR Guidance: Administrative Measures

Schools **MUST**

- Protect students from harassment based on pregnancy or related conditions.
- Possess and distribute a policy against sex discrimination. OCR recommends the policy make clear that sex discrimination covers discrimination against pregnant and parenting students too.



OCR Guidance: Administrative Measures

Schools **MUST**

- Adopt and publish grievance procedures for students to file complaints of sex discrimination, including discrimination related to pregnancy or parenting.
- Identify at least one employee to carry out Title IX responsibilities.





OCR Guidance: Day-to-Day

Schools **MUST**

- Allow pregnant students to continue participating in classes and extracurricular activities.
- Allow pregnant students to choose if they want to participate in special programs or classes for pregnant students. Schools may not pressure students to participate in these types of programs.
- Provide reasonable adjustments such as a larger desk or elevator access.

OCR Guidance: Day-to-Day

Schools **MUST**

- Allow pregnant students to return to the same academic and extracurricular status as before medical leave, including the opportunity to make up missed work.
- Ensure that instructors understand the Title IX requirements. Instructors may not prohibit students from submitting work after a deadline missed due to pregnancy or childbirth. Students should be permitted to make up missed participation and attendance credits.

OCR Guidance: Medical Accommodations

Schools **MUST**

- Excuse absences due to pregnancy or childbirth for as long as medically necessary.
- Provide pregnant students with the same special services they provides to individuals with temporary medical conditions, including remote instruction, tutoring, and/or independent study.



OCR Guidance: Medical Accommodations



- Schools may only require pregnant students to submit a doctor's note if the school also requires a doctor's note from all students who have a physical or emotional condition requiring treatment by a doctor.

Salt Lake Community College June 2022 OCR Decision

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

SLCC: Background

- The professor told the student that she was concerned the student decided to continue with the class and that she had lowered final grades if missed days were excessive.
- The professor also told her a late submission penalty would apply to late assignments and advised the student to drop the class because “health is more important than a class.”

SLCC: Background

- The student contacted the Disability Resource Center on her own to seek formal academic adjustments and provided a note from her treating physician. An advisor spoke with the student and referred the student to the Title IX Coordinator to discuss her adjustments.
- The Title IX Coordinator determined the student's requested academic adjustments constituted a fundamental alteration to the courses.

SLCC: OCR Findings

- The professor's alleged comments encouraging the student to drop the class could constitute pregnancy discrimination and therefore merited a prompt and equitable resolution under Title IX grievance procedures (which SLCC did not conduct).

SLCC: OCR Findings

- The Title IX Coordinator did not respond to the student's allegation the professor encouraged her to drop the class because of her pregnancy, which she viewed as discriminatory.

SLCC: OCR Findings

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

SLCC: OCR Findings

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

SLCC: Voluntary Resolution Agreement

- Revise Nondiscrimination Statement
- Revise grievance procedures
- Revise Title IX and Disability Resource Center webpages
- Conduct training for the professor, all staff in the DRC, and all staff in the Title IX office
- Conduct investigation into student's allegations of discrimination & promptly take any necessary steps to remedy any discrimination that is found

Future Legal Developments



Title IX Proposed Regulations

- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- Public comment period closed September 12th



Title IX Proposed Regulations

- Include explicit protections for students and employees based on pregnancy or related conditions, including childbirth, termination of pregnancy, or lactation.
- Institutions would be required to provide reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees.

Title IX Proposed Regulations

- When a student tells an institution's employee about the student's pregnancy or related conditions, the employee must provide the student with the Title IX Coordinator's contact information.
- The Title IX Coordinator must inform the student of the institution's obligations to prohibit sex discrimination and also to provide the student with options for reasonable modifications, access to separate and comparable portions of education programs or activities, allow for a voluntary leave of absence, and ensure there is available lactation space that is clean and private.

Title IX Proposed Regulations

Reasonable modifications for pregnancy or related conditions would be required to be provided to students based on their individualized needs:

- Breaks during class to attend to related health needs, breastfeeding, or expressing breast milk
- Intermittent absences to attend medical appointments
- Access to online or other homebound education
- Changes in schedule or course sequence
- Time extensions for coursework and rescheduling of tests
- Counseling
- Changes in physical space or supplies
- Elevator access

Common Policy & Practice Issues

Zero absence
attendance policies

Targeted medical
documentation
requirements

Requirements to
restart programs from
the beginning rather
than status at the
time a leave began

Deference to
discriminatory clinical
site policies

Practical Guidance: Inclusive Language and Policies



- Much of the statutory language surrounding pregnancy is not gendered.
- Students of many genders, including cisgender women, non-binary people, and transgender men, might be pregnant.
- Regardless of a student's gender-identity, they are protected through their status as a pregnant person.

Practical Guidance: Faculty and Staff Training

- Many pregnancy discrimination investigations share a common theme: students reach out to faculty and staff members who are not familiar with the rights of pregnant students.
- **Solution: Inform all faculty and staff of the rights of pregnant students under Title IX.**

Practical Guidance: Review Institutional Policies

- Another common problem OCR identifies is school Title IX policies which do not specifically address pregnancy.
- Clear, written guidelines will allow faculty and staff to understand their obligations towards pregnant students, as well as provide pregnant students with clear expectations for available support.
- **Solution: Review institutional policies to ensure pregnancy discrimination is explicitly addressed.**

Practical Guidance: Review Institutional Procedures

- A common challenge OCR often finds in pregnancy discrimination cases is a lack of prompt responses to student Title IX grievances.
- Individuals who express concerns about any type of discrimination, including pregnancy discrimination, should receive prompt responses to those concerns.
- **Solution: Evaluate your school's grievance procedures. Does every student receive a response to a report of discrimination? Is that response timely?**

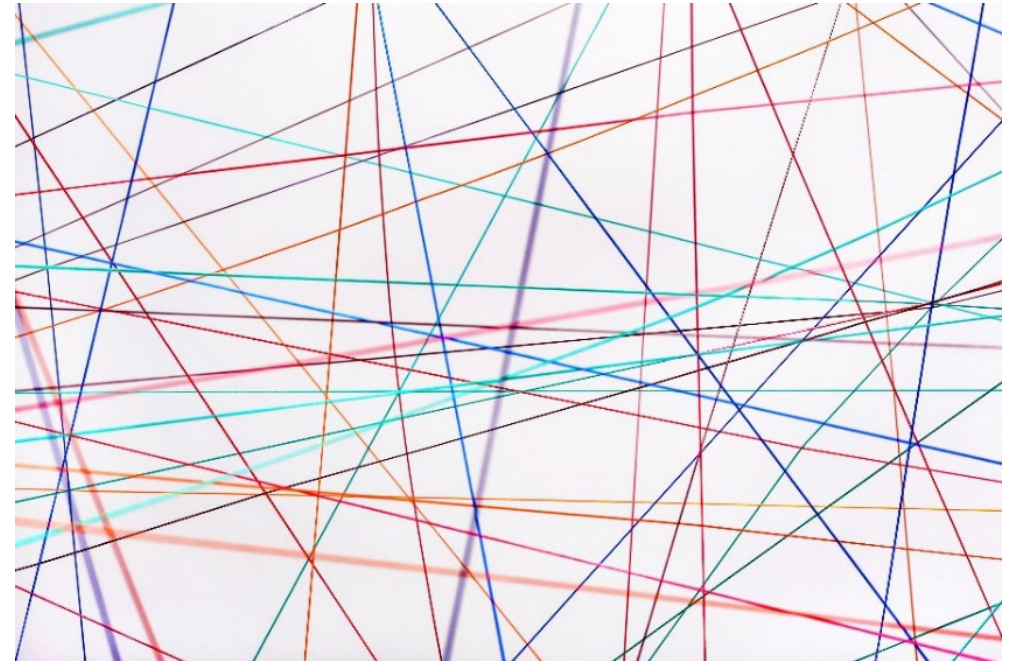
Questions



Module 4: Transgender Issues

Sex For Purposes of Title IX (ED)

- Assigned sex/biological sex
- Gender identity
- Sex stereotypes
- Sex characteristics
- Sexual orientation
- Pregnancy and related conditions
- ***U.S. Department of Education Guidance and Proposed Title IX Regulations***



Court Precedents

- Not all courts agree with the Department of Education
- Some courts construe Title IX as referring only to assigned sex/biological sex
- Others embrace the Department's interpretation
- The law varies depending on the federal judicial circuit the institution is located in



Example: Sexual Harassment

Student A has been repeatedly sending Student B elicited and pornographic messages on direct message through the students' online classroom portal and campus email. Student B happens to be transgender.



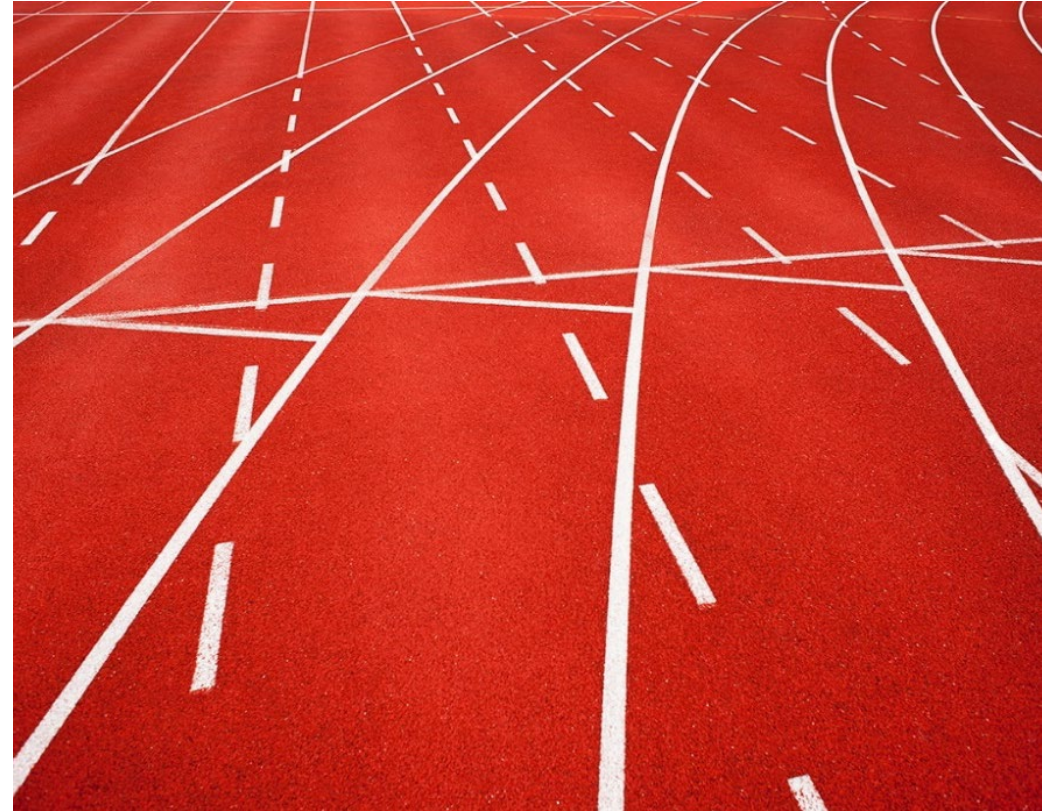
Example: Adverse Treatment

A faculty member grades transgender students more harshly than other students because faculty member does not believe in gender identity as a concept and believes transgender students should “dress normally.”



Legal Distinctions Most Likely To Matter For

- Locker room/bathroom access
- Sex-segregated sports teams
- Sex-segregated housing
- Naming and pronoun conventions
- Hostile environment harassment predicated on verbal, written, or physical contact that is not a sexual assault

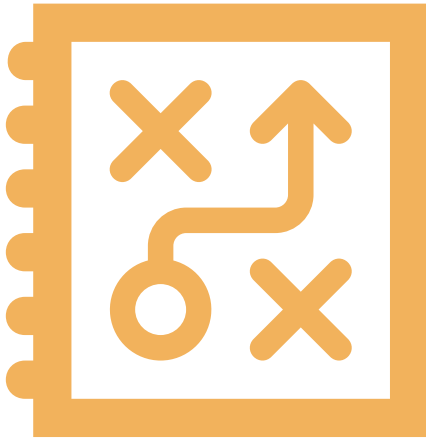


Names and Pronouns

- Federal law does not (presently) mandate the use of chosen (a/k/a “preferred”) names or pronouns for any student (regardless of gender identity)
- But refusal to use chosen names and pronouns because of a person’s gender identity *may* constitute discrimination or harassment



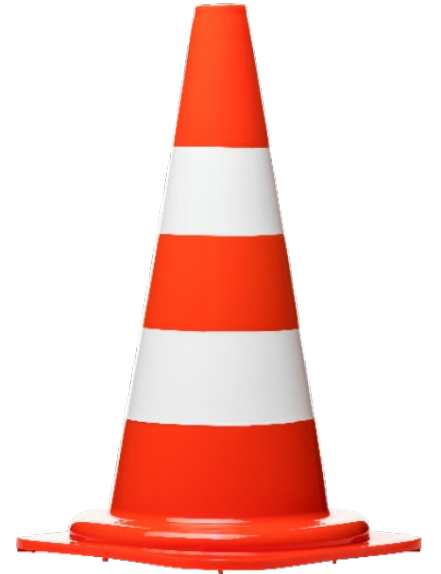
Example



Faculty member dislikes transgender students. Faculty member's default practice is to refer to students by first name but when addressing transgender students, faculty member intentionally uses a misgendered honorific and always uses the transgender student's dead name instead of their preferred name.

Other Legal Concerns

- Required use of chosen names and pronouns may be deemed a form of compelled speech that implicates First Amendment rights at public institutions
- Required use of chosen names and pronouns may conflict with religious belief and implicate the need for a Title VII religious accommodation analysis
- The outcome of these scenarios may vary depending on whether the individual declining to use chosen names and pronouns is an employee, a faculty member, or a student



***Meriwether v. Hartop* (6th Cir. 2021) (1 of 2)**

- Shawnee State U. (OH) adopts mandatory preferred pronouns policy
- Faculty member wishes to refer to transgender students by last name instead of preferred honorific or pronouns
- Institution finds faculty member engaged in hostile environment harassment and/or adverse treatment discrimination

***Meriwether v. Hartop* (6th Cir. 2021) (2 of 2)**

- Faculty member files lawsuit asserting free speech, freedom of religion, and due process claims
- Faculty member's claims survive a motion to dismiss
- Court says: "there is no suggestion [faculty] member's speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits."
- **"[Faculty member's] decision not to refer to Doe using feminine pronouns did not have a [systematic effect of denying the victim equal access to an education program or activity]."**

***Meriwether* takeaways**

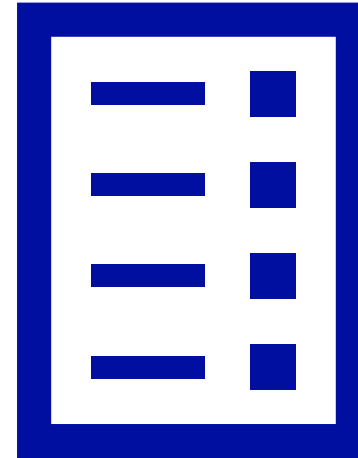
- Misgendering or failure to use preferred names is not inherently discrimination as defined by law (***but may be***)
- Faculty members may have First Amendment academic freedom rights that limit institutional ability to compel language
- Faculty members with religious beliefs may be entitled to an accommodation (more on that later)

What factors could suggest systematic discrimination?

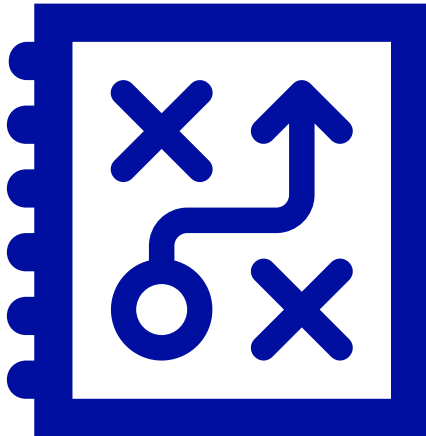
- Repeated and pervasive conduct
- Reduction in academic performance
- Need to transfer class
- Conduct prompts others to harass/discriminate
- Disruption in class
- Need for counseling
- Others????

Preferred name/pronoun policy

- Not required nationally
- Distinction between advisory policies (“should”) and mandatory policies (“must”)
- Consider distinctions between employees and non-employees
- Think about practicality

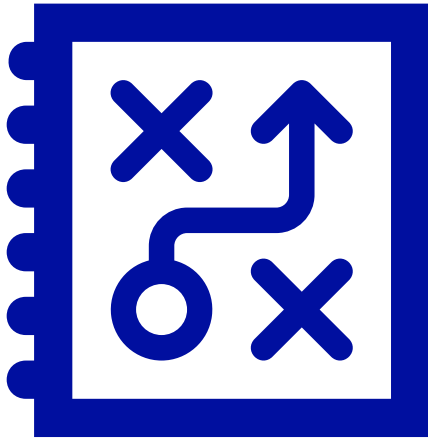


Example



Institution enacts policy that states:
“Employees shall refer to all students by
their preferred names and preferred
pronouns.”

Example



Institution's policy states: "A student's preferred first name will be used when it is unnecessary for the legal name to be used, it is technically feasible to use the preferred name, and the preferred name is not being used for an improper purpose.*"

What are potential challenges?

- How will employees know?
- How will the institution track?
- Will the institution itself abide by the policy? (i.e., transcripts; official communications)
- How frequently are changes allowed?
- What about non-binary pronouns?
- What if the preferred name is vulgar or disruptive?
- Are there exceptions?

Are there alternatives to a policy?

- Rely on general non-discrimination and harassment policies and address complaints as made
- Prepare and publish guidance/educational documents



Housing

- Title IX explicitly permits sex separated housing provided the separate housing facilities are comparable in quality
- Courts are split as to whether this provision of Title IX permits separation based on assigned sex/biological sex or whether students should be allowed to select based on gender identity



Religious Exemption



- Title IX has a self-executing exemption for religious colleges and universities
- Title IX does not apply *to the extent* it conflicts with a genuinely held religious belief
- Dozens of religious colleges and universities have claimed a Title IX exemption from application of the law in specific scenarios implicating gender identity or sexual orientation

FERPA

- Requires institutions to maintain the confidentiality of student records, including student records that document gender identity, gender related accommodations, and complaints of gender-based harassment
- Absent narrow exceptions, students *alone* control FERPA rights in higher education
- Absent narrow exceptions, parents do not have a right to access student records of college students
- Parents do have the right to access FERPA protected records of K-12 students



Example: Parent Involvement

Parent contacts the general counsel because parent has “heard” that their son has begun identifying as female and parent is concerned student is having a “mental health crisis.” General counsel learns student has recently identified as transgender because of documentation that prompted an email account name reassignment.



Biden Executive Orders

- Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation (EO 13988)
 - Directs all federal agencies that enforces federal laws prohibiting sex discrimination to also prohibit discrimination based on sexual orientation and gender identity, including in education.



Biden Executive Orders

- Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity (EO 14021)
 - Aim of ensuring that in federally funded entities, there is an educational environment free from sexual harassment, sexual violence, and discrimination on the basis of sex, sexual orientation, and gender identity



Questions



HUSCH
BLACKWELL

HUSCH BLACKWELL

American InterContinental University System (AIUS)

Comprehensive Title IX Training: Day 2

Fall-Winter 2023-2024

Presenters



Julie Miceli
Office Managing Partner
312-526-1521 (Direct)
julie.miceli@huschblackwell.com



Elizabeth Samples
Partner
816-983-8271 (Direct)
elizabeth.samples@huschblackwell.com

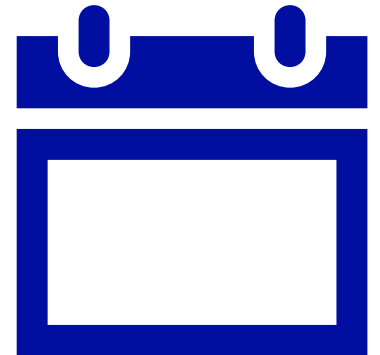
Agenda - Day 2 – Tuesday, Nov. 7

Module 5 – Resolution options and case processing

Module 6 – Key topics (bias, stereotyping, conflicts and trauma)

Module 7 – Addressing other misconduct

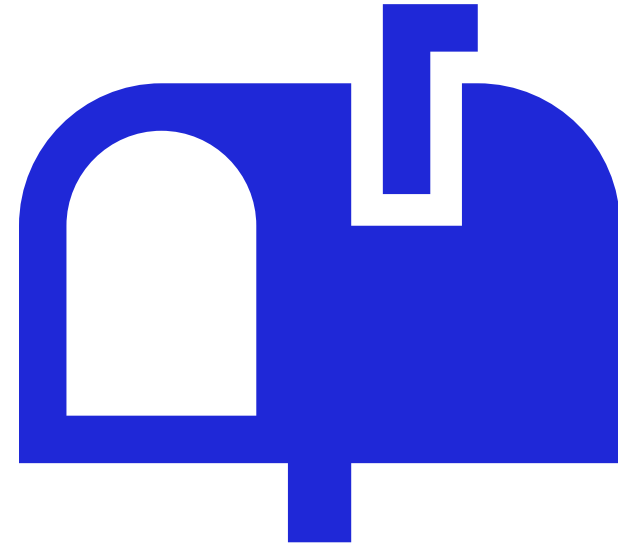
Module 8 – Relationship between Title VII and Title IX



Module 5: Resolution Options and Case Processing

How does an institution get notice of sexual harassment?

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



What is “Actual Knowledge”?

“Actual knowledge” occurs when

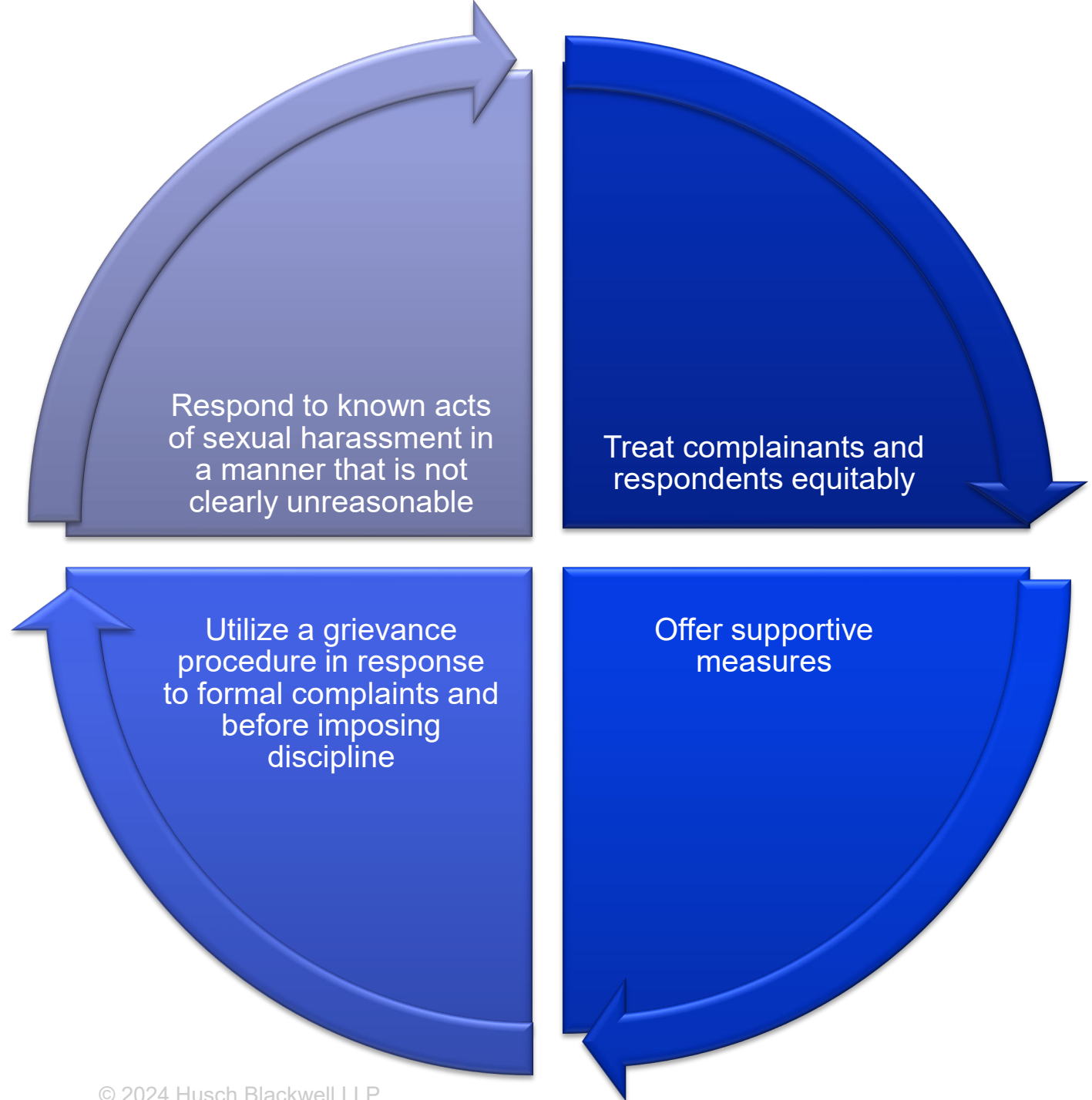
- An institutional official, with authority to take corrective action
- Observes or receives a report
- Of sexual harassment occurring in the institution’s education programs and activities



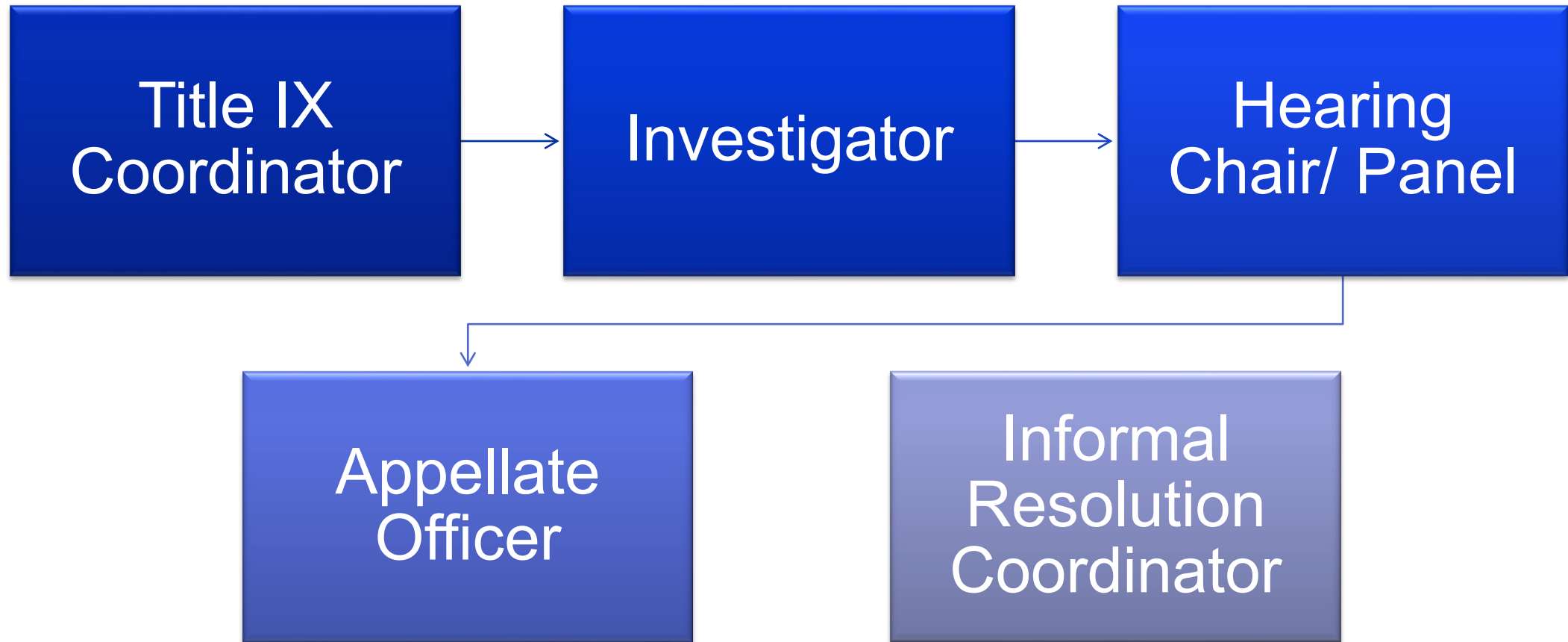
Making Reports

- What?
 - Observed sexual misconduct
 - Sexual misconduct reported to a mandatory reporter
- How?
 - To Title IX Coordinator/Deputy
- When?
 - ASAP

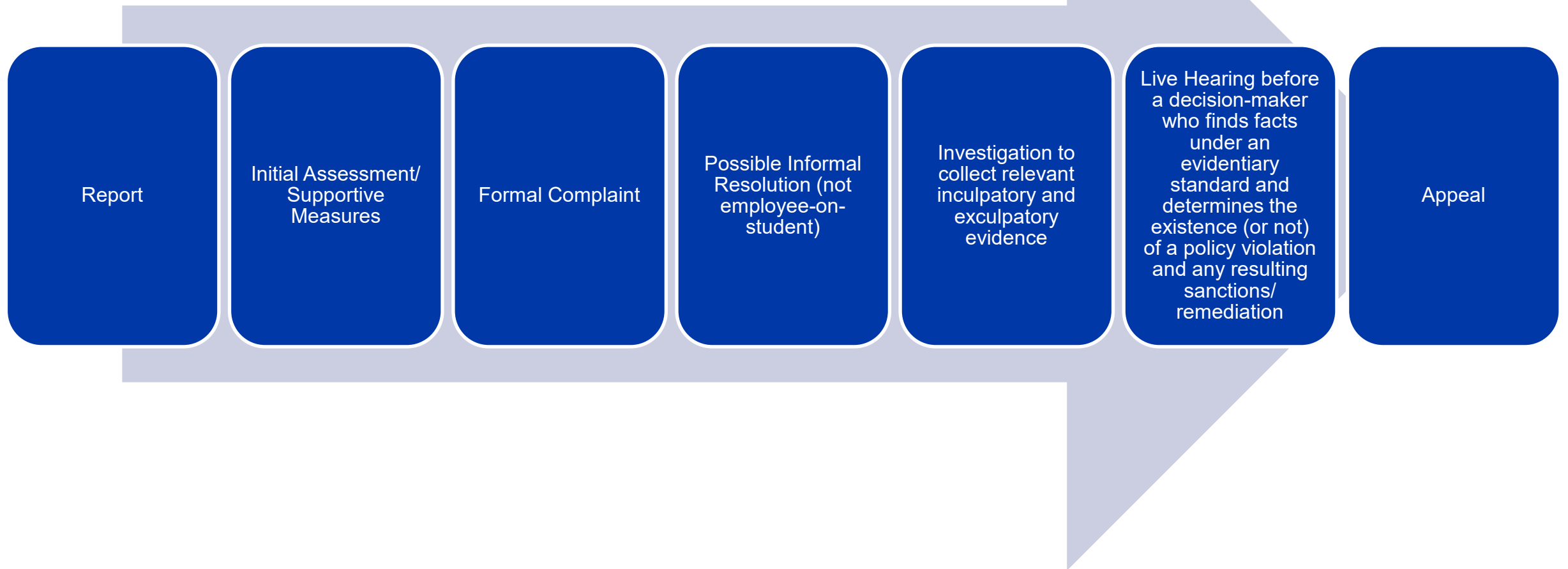
What are the institution's overall duties?



Who are the key institutional actors in the grievance process?



What is the resolution process?



What is a formal complaint?

What

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

Who

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

How

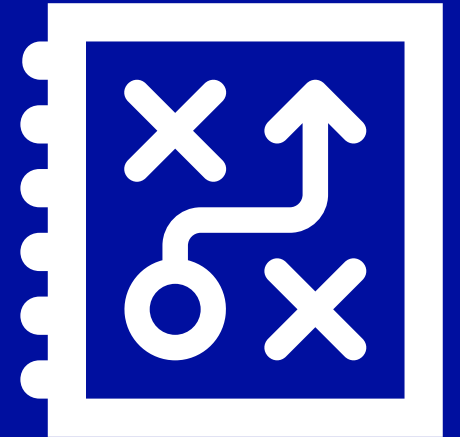
- Either physical or electronic submission

When may the Title IX Coordinator file a formal complaint?

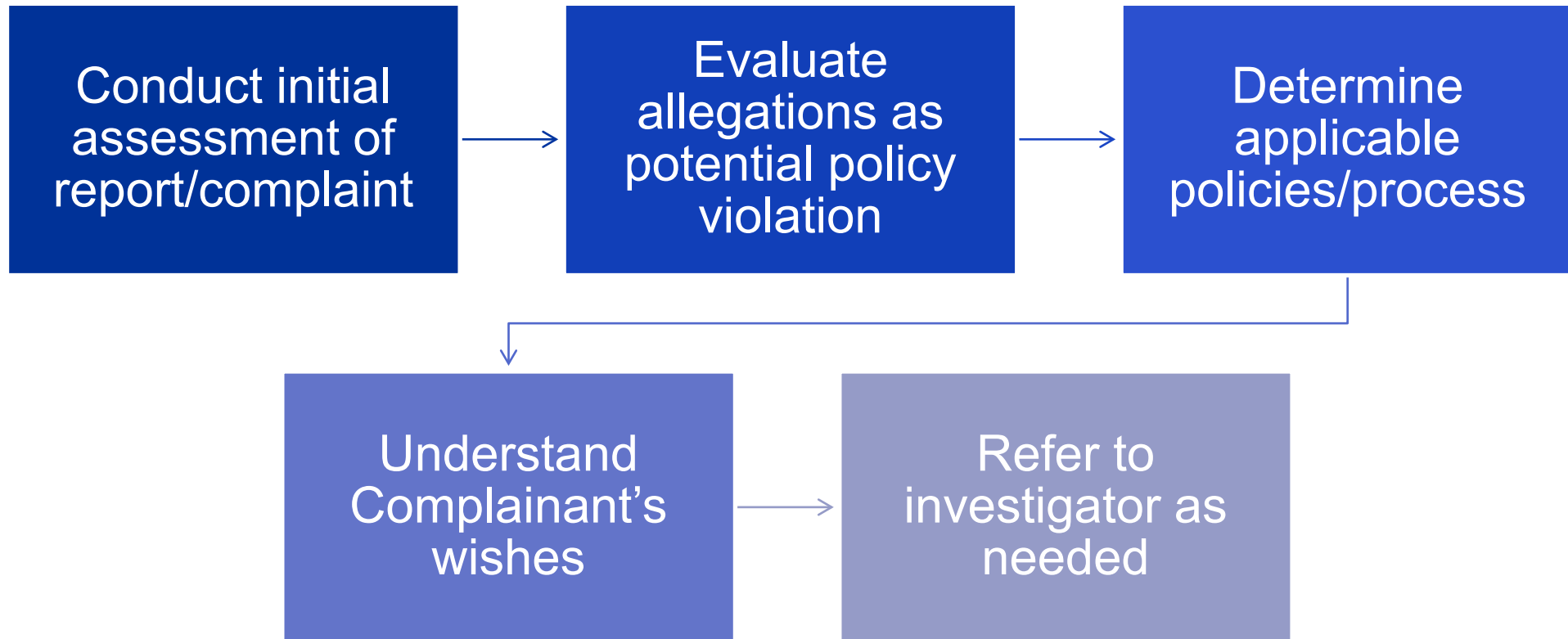
- Typically, when there is an important institutional interest in adjudicating a report irrespective of the alleged victim's wishes
- Typically involves serious misconduct, repeated misconduct, or misconduct by employees
- If alleged victim does not wish to file a formal complaint, Title IX Coordinator's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

Example of T9 Coordinator formal complaint

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



Intake process



When *must* we dismiss a formal complaint?

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

When *may* we dismiss a formal complaint?

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

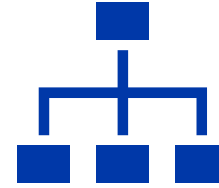
Preliminary Assessment – Under Policies

- After receiving a report of Sexual Harassment, the Title IX Coordinator will conduct a preliminary assessment to determine:
 - Whether the conduct, as reported, falls or could fall within the scope of this policy (see “Scope”); and
 - Whether the conduct, as reported, constitutes or could constitute Sexual Harassment.

If the Title IX Coordinator determines that the conduct reported could not fall within the scope of the policy, and/or could not constitute Sexual Harassment, even if investigated, the Title IX Coordinator will close the matter and may notify the reporting party if doing so is consistent with the Family Educational Rights and Privacy Act (“FERPA”). The Title IX Coordinator may refer the report to other University offices, as appropriate.

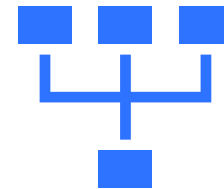
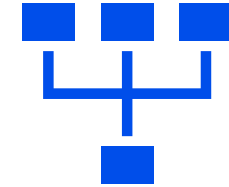
Can we consolidate the complaints?

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



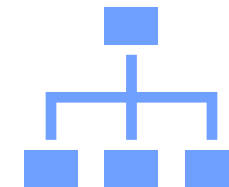
Multiple respondents

Multiple complainants



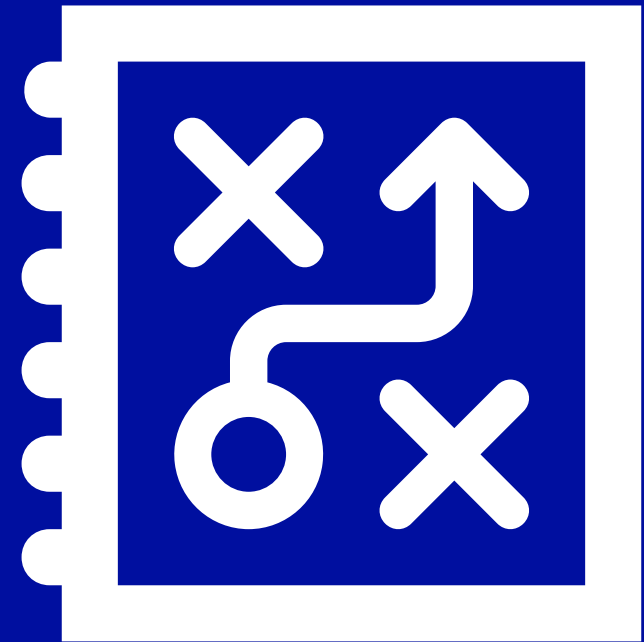
Multiple allegations against a single respondent

Multiple allegations from a single complainant



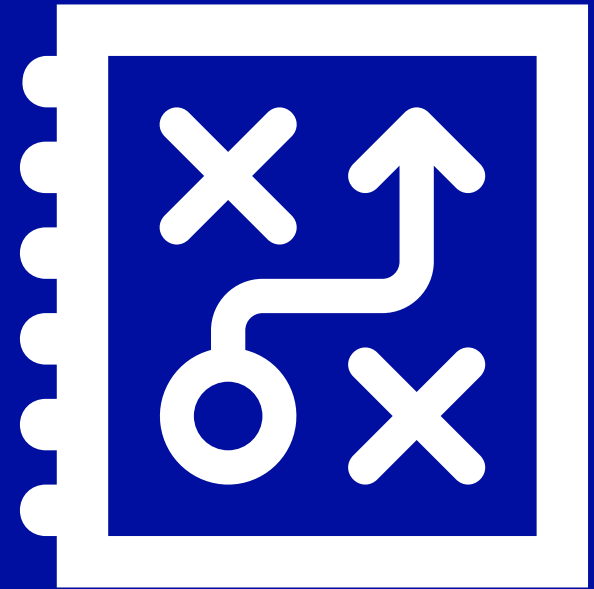
Example of permissible consolidation

Students A and Student B, who are in the same clinical cohort as Student C, allege that Student C has repeatedly propositioned them for sex, in the presence of each other, when they are working together in clinical rotations. Student A and Student B each file their own formal complaint of sexual harassment from the same incident.



Example of impermissible consolidation

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



How do we tell the parties about an investigation?

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



What else does the notice need to say?

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

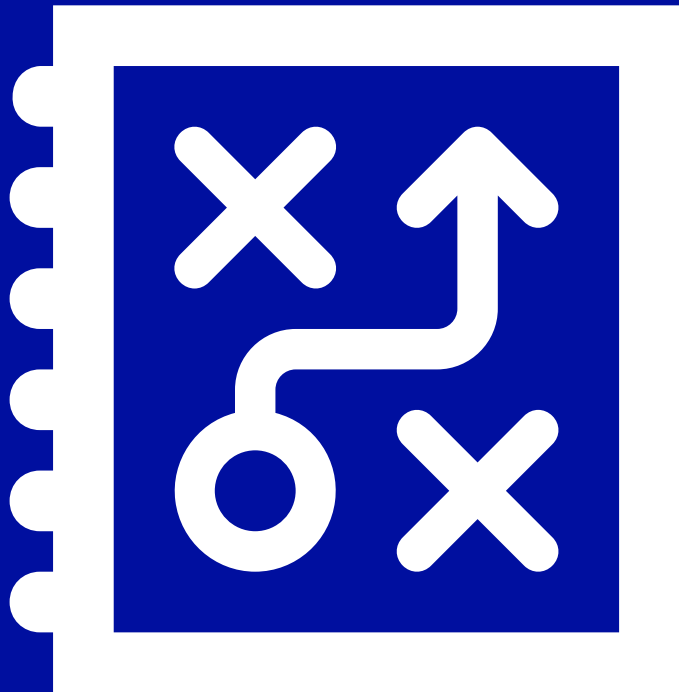
What is the purpose of a Title IX investigation?

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

Can we gather any information prior to the written notice?

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

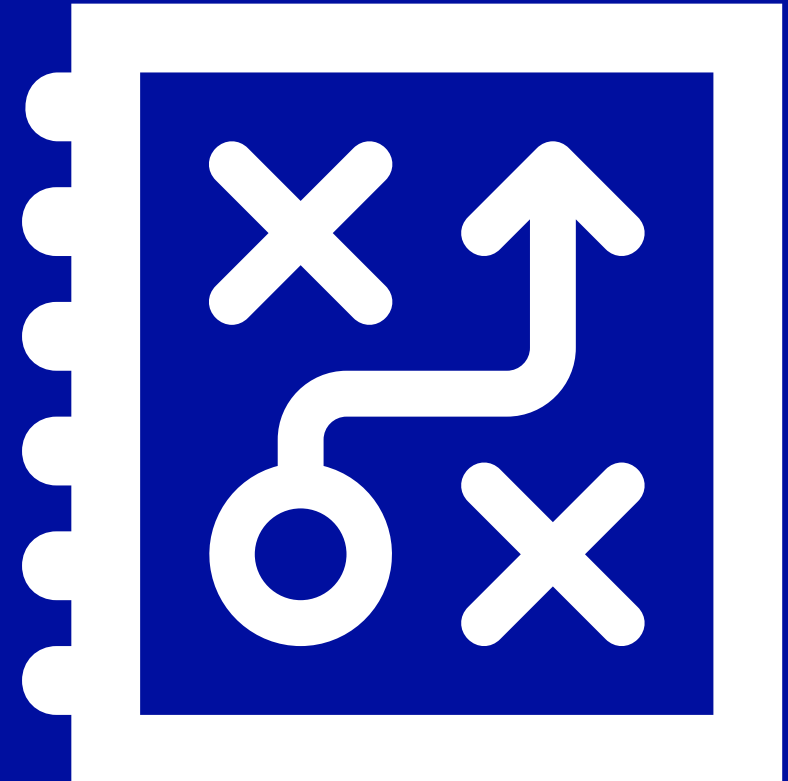
Example: Preliminary inquiry



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

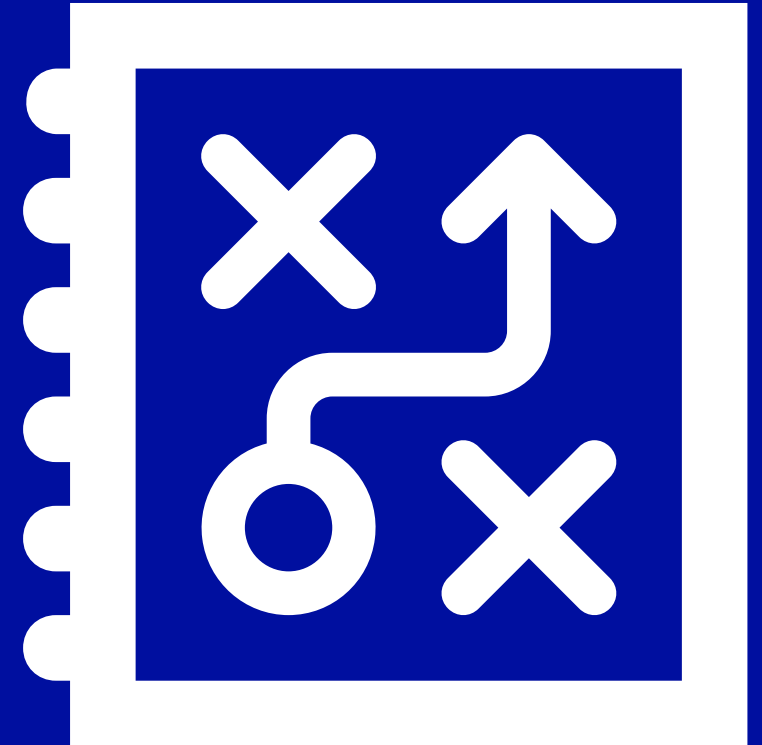
Example: Preliminary inquiry

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



Example: Incorrect

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



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

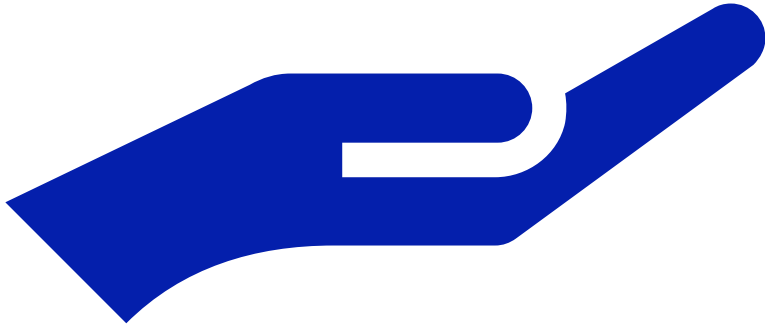
- Yes – If the work isn't investigatory and there is a legitimate concern information will be lost
 - Placing a “hold” on an email account
 - Asking IT to capture server-level data
 - Having campus security suspend auto-delete of security footage



Supportive measures

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

What are supportive measures?



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

Examples of supportive measures



Counseling



Academic accommodations



Housing accommodations



Security escorts or transportation arrangements



Leave of absence



Increased security or monitoring



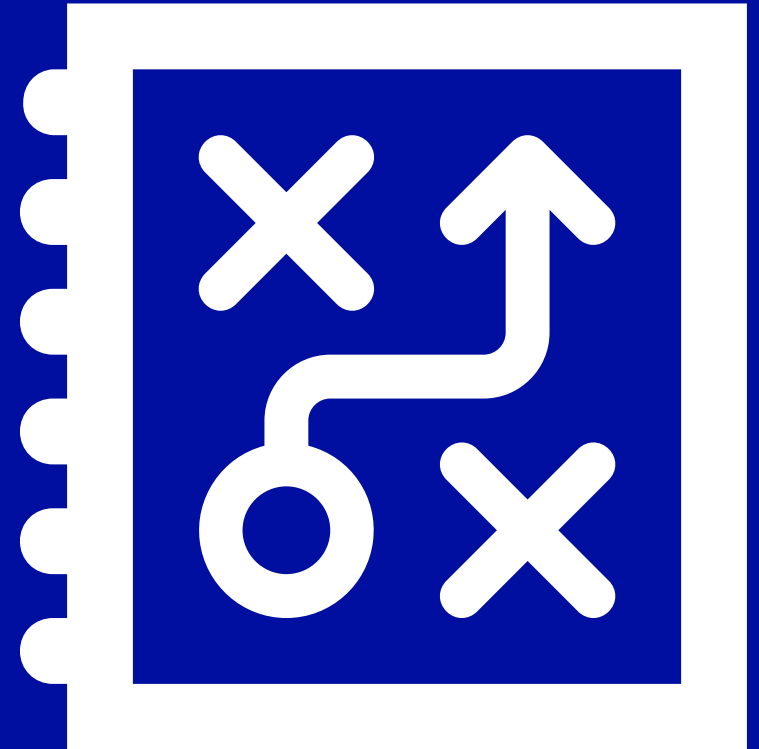
Modified work schedules



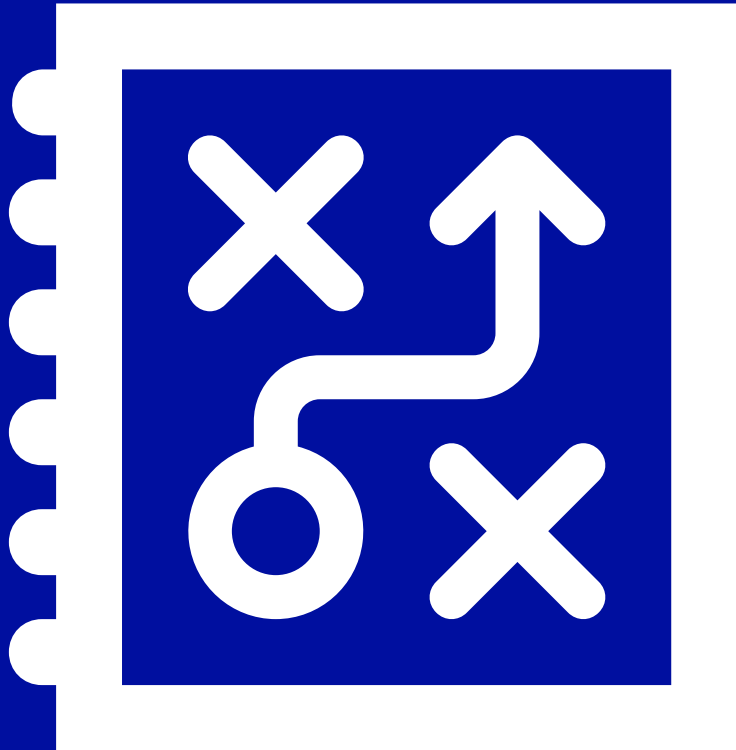
Mutual no-contact order where implicated by facts

Example: Reasonable supportive measure

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



Example: Unreasonable supportive measure

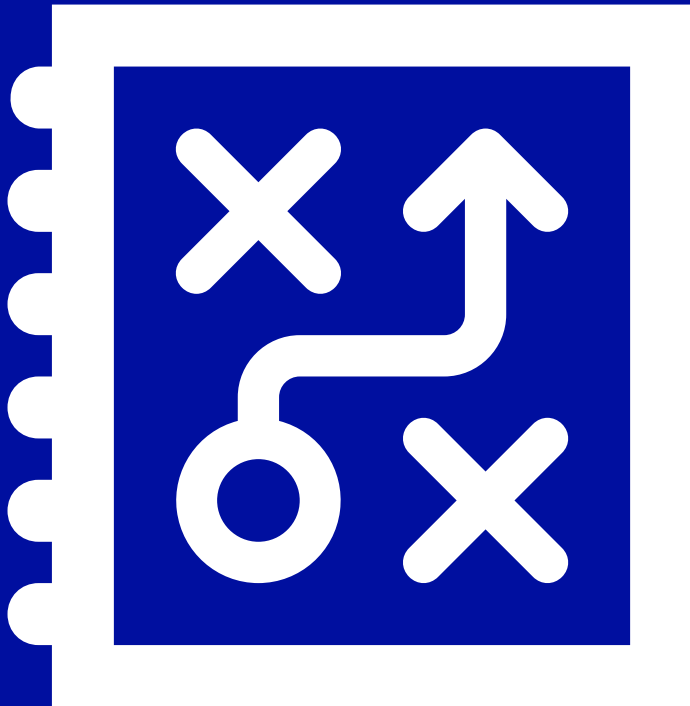


Employee in maintenance department accuses supervisor of sexual harassment by way of making sexualized jokes and remarks. Employee requests to be on indefinite paid leave for the remaining six months of the academic year. Employee could easily be reassigned to work under a different supervisor in a different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

Can supportive measures affect the respondent?

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

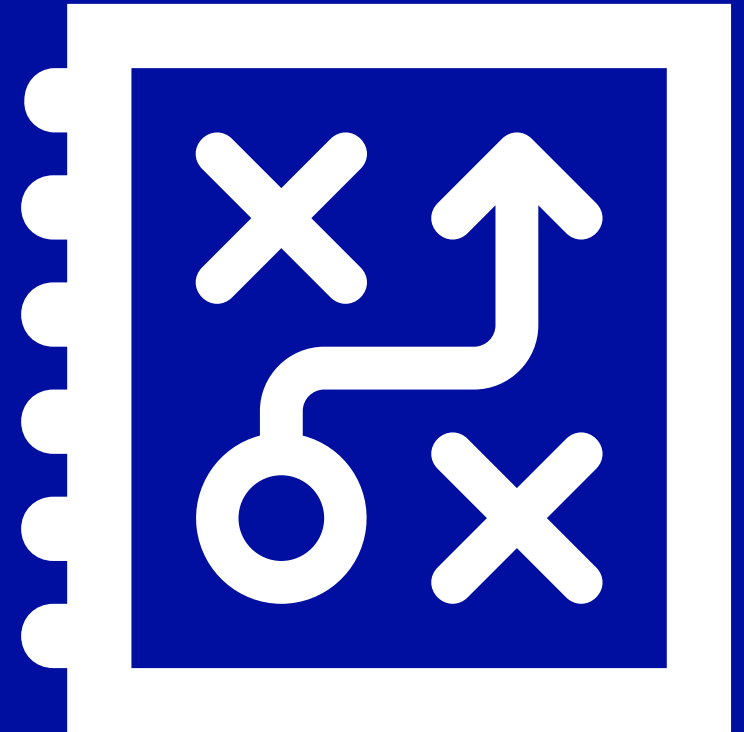
Example: Unreasonable burden



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

Example: Disciplinary supportive measure

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

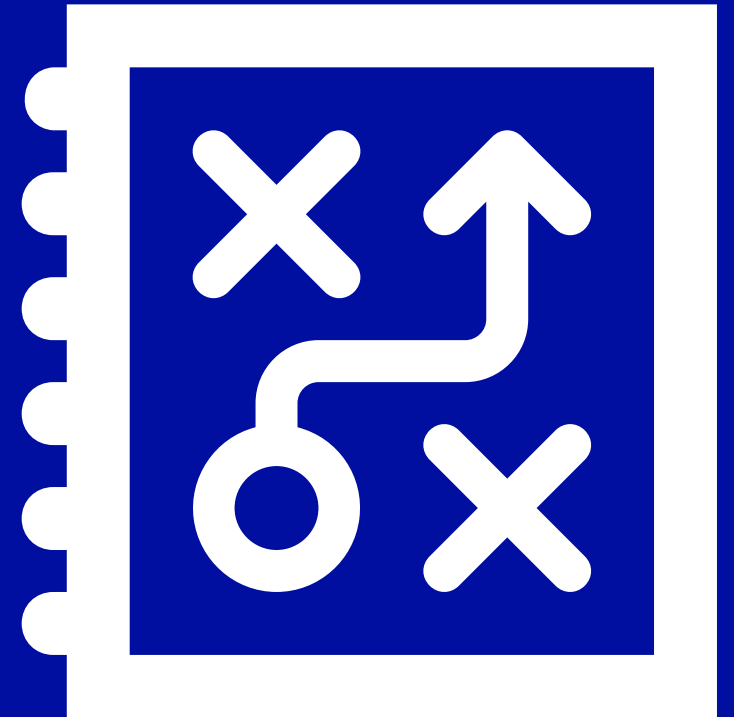


Can we use interim removals or suspensions for students?

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

Example: Immediate threat to physical health or safety

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



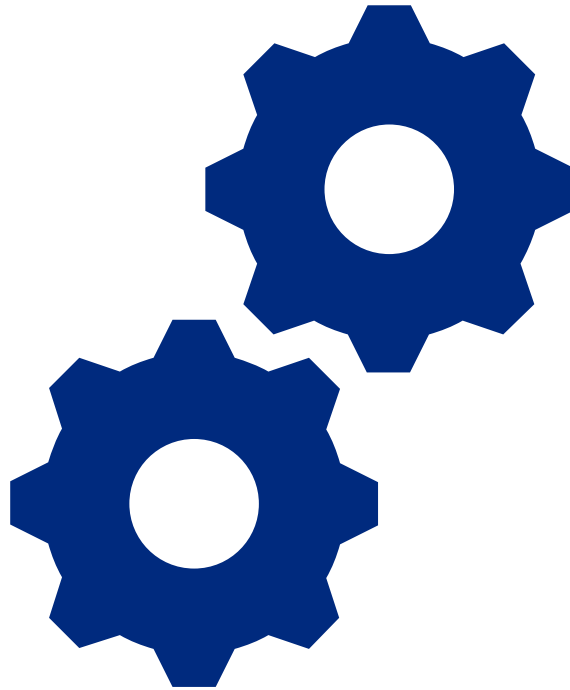
Can we use an already existing process for interim removals?

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

Can we place employees on administrative leave?

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

Do students and employees have other rights?

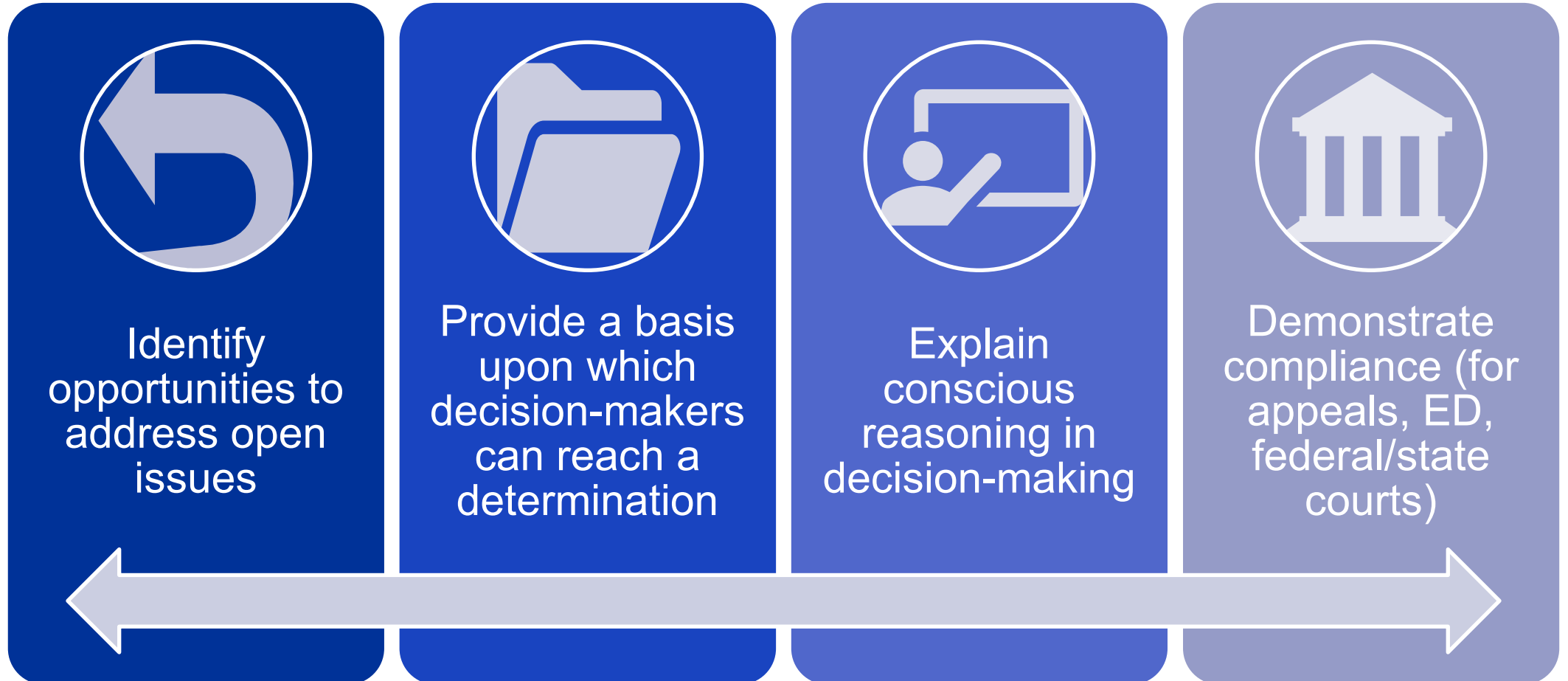


- Yes – Other laws may trigger accommodations when a medical condition or disability is present
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Section 504 of the Rehabilitation Act

What needs to be documented?

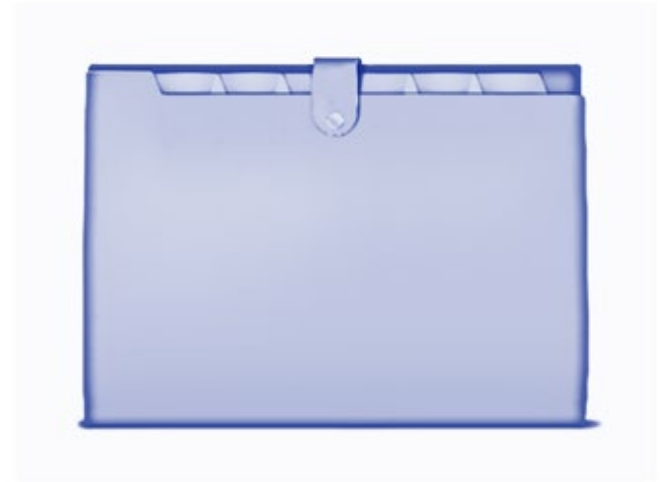
- Initial reports and assessments
- Supportive measures
- Formal complaints or decision not to proceed
- Notices and revised notices; other information provided to parties
- Investigation steps
- Evidence gathered and its origin
- Outcomes
 - Informal resolution
 - Initial decision
 - Appeal decision
- Version of policy/procedure applied

Why document?



What is the end goal of documenting during the Title IX resolution process?

- A document demonstrating:
 - Fair process
 - Including alignment of applied process with written institutional policies/procedures
 - As applicable
 - Informal resolution process and outcome
 - Thorough investigation
 - Reasoned decision-making
 - Under relevant policy language
 - Including findings regarding material disputed facts, credibility, and inconsistencies (as applicable)



Student wishes to proceed on a sexual harassment formal complaint against someone not affiliated with the institution arising from sexual harassment at a speech on campus open to the public. Title IX coordinator documents the decision not to proceed with a formal complaint “because alleged perpetrator is not a member of the University community.”

Example: Documentation of decision not to proceed



Following a formal complaint, employee parties agree to an informal resolution in which they will “stay away from one another.” Title IX office closes the file with a short statement signed by each and no further action. Employee Complainant is then promoted, receiving a new office next door to Employee Respondent. When Employee Complainant explains to Supervisor that this is inappropriate, Supervisor refuses to move either party, citing limited office space.

Example: Documentation of informal resolution



During the course of an investigation noticed to allege stalking, Complainant provides information on a series of events that may also amount to hostile environment sexual harassment. Supplemental notice is not provided. Following the hearing, the decision maker does not find that a reasonable person would fear for safety based on Respondent's conduct, but that Respondent's conduct was severe, pervasive, objectively offensive, and interfered with Complainant's participation in education programs and activities.

Example: Documenting notice



Investigator interviewed all ten witnesses identified by Complainant, but only one of ten identified by Respondent. Investigator's report did not explain the discrepancy.

Example: Documenting investigation reasoning



Module 6: Key Topics: Conflicts of Interest, Bias, Stereotyping, and Trauma

What general principles govern the investigation process?

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



What is a conflict of interest?

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



Conflict of interest example 1



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

Conflict of interest example 2

- An administrator accuses an employee of an office supply vendor of sexual harassment. Institution assigns an investigator whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.



Example - conflict of interest

- Criminal Justice Student files a complaint against Computer Science Student alleging CS engaged in hostile environment sexual harassment. Prof. T is selected for the hearing panel in this matter. Prof. T taught CJ Student in one class 20 months ago.



What is bias?

- Bias is a prejudice (a pre-judgment) in favor or against one thing, person, or group compared with another
- Bias may be explicit or implicit and we are likely not fully conscious of our own biases

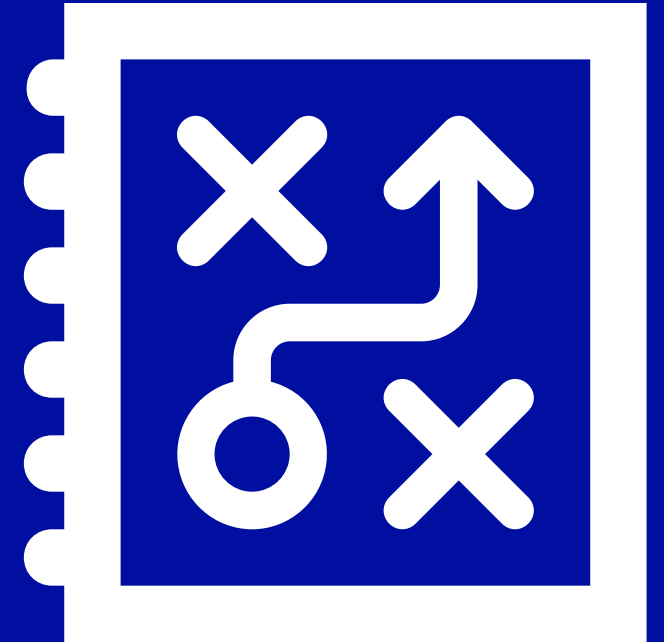
Example of bias

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



Example: Bias

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



Who is responsible for identifying conflicts of interest and bias?

Employee who oversees grievance process and must address known or reported conflicts of interest/bias

Institution must also permit parties to raise concerns of conflicts of interest and bias

*Individual institutional actors should self-police conflicts of interest and self-identify bias

Trauma-informed Investigative Practices

Balance

- “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”
 - Candace Jackson, Acting Asst. Secretary of Ed (2017)

Trauma might affect any party or participant

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

Possible trauma impact

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

Flashbacks

Delayed recollection

Inability to concentrate

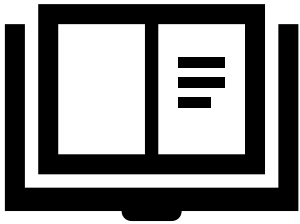
Non-linear recollection

Self-blame

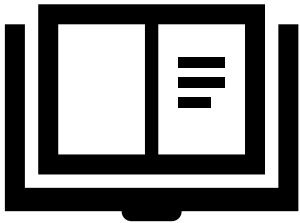
Trauma & credibility

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

What is the definition of trauma?



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



English Oxford: deeply distressing or disturbing experience



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

Physical reaction



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

Trauma-informed interview

- Provide information to the party
 - Your role
 - Policy
 - Communication
 - The process
- Acknowledge the difficult situation
- Provide as many options as possible
- Support for person
 - Personal support
 - Available services
 - Remain objective on facts



Trauma-informed interview (cont.)

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

Active listening

- Active listening – “the most effective tool that exists for demonstrating understanding and reducing misunderstanding”
 - Gerald Goodman, The Talk Book
- When engaging active listening skills, you will hear both factual content, and the feeling accompanying that content



Active listening

- What is required for effective listening
 - Create a listening environment
 - Physical environment
 - Internal environment
 - What word can you make out of the letters of “LISTEN” that is an essential skill for effecting communication?”

Adapted with permission from “Essentials of Active Listening” – Written by Dean of University of Missouri Kansas City Law School

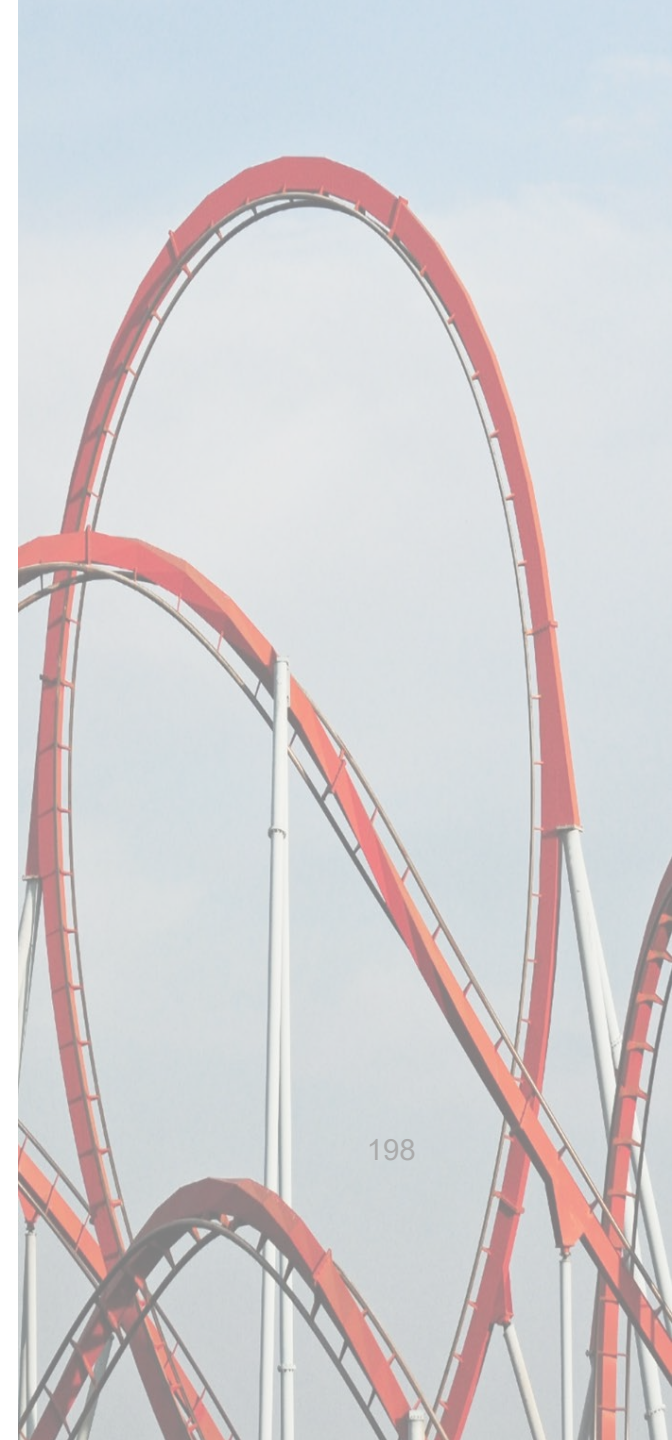
Active listening

- Why listen?
 - To gain information, perspectives, and to understand emotions.
 - To encourage speaker.
 - To build rapport.
 - Why listen actively?
 - To facilitate communication.
 - To diffuse emotions.
 - To translate content.
 - To insure accuracy.
- Adapted with permission from “Essentials of Active Listening” – Written by Dean of University of Missouri Kansas City Law School

Active listening

- Feedback Loops
 - Paraphrase factual content
 - To check your understanding of the ideas, information, or suggestions of others, state the speaker's idea in your own words or give an example that shows what you think the speaker is talking about.

- Adapted with permission from “Essentials of Active Listening” –
Written by Dean of University of Missouri Kansas City Law School



Module 7: Addressing Other Misconduct

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



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

Examples of Policies with Related Concepts

Discrimination

- Sexual harassment
- Other non-discrimination statement & policies

Relationships

- Workplace
- Employee/student

Conduct

- Student
- Faculty/Employee

Discipline

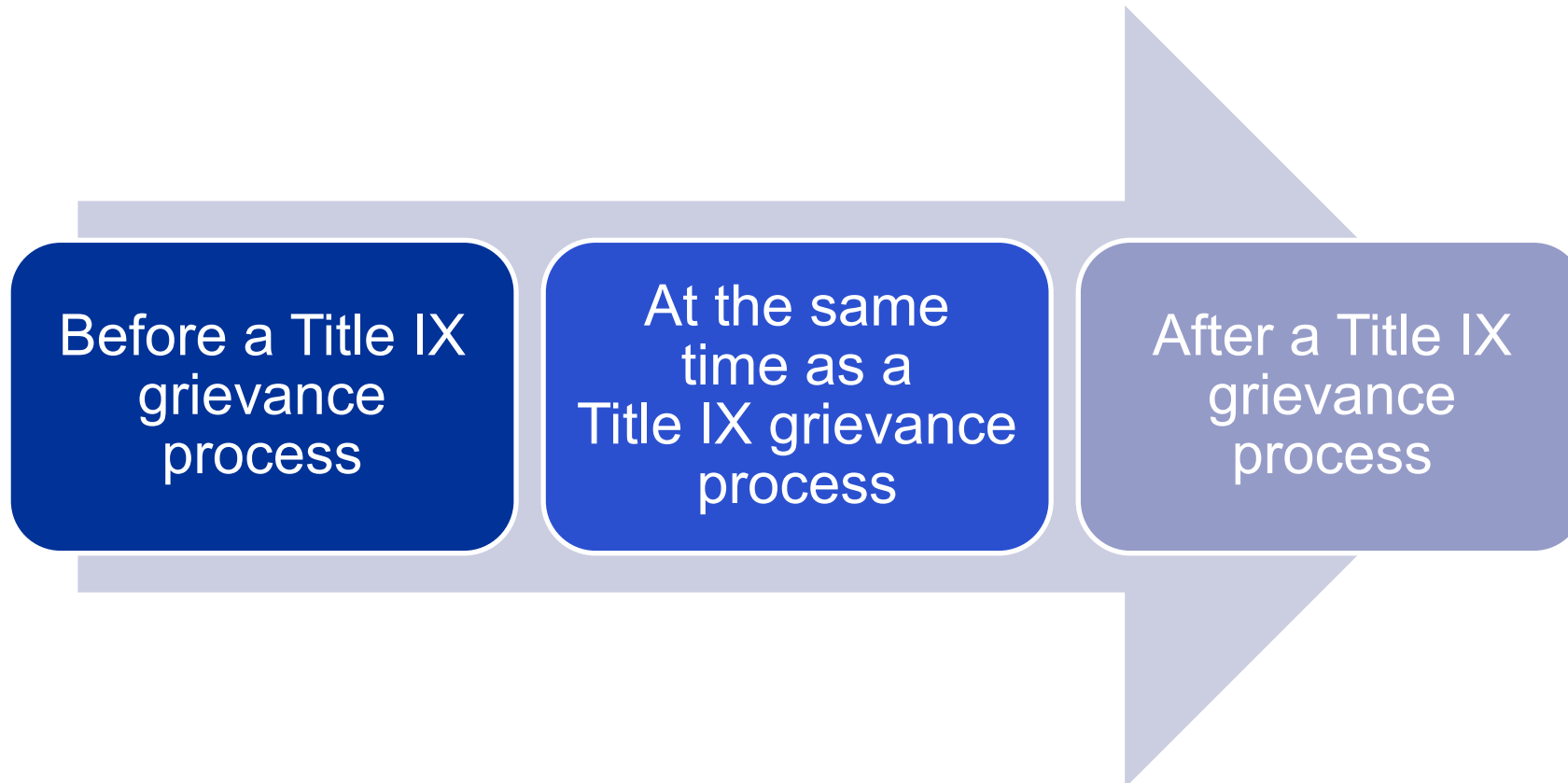
- Student
- Faculty
- Employee

What other policies/processes may apply?

- Sexual Harassment and Sexual Misconduct
- Anti-Harassment
- Violence
- Anti-Retaliation
- Professional Ethics and Academic Responsibility (for faculty)
- Ethics and Responsibilities for UI Staff (for staff and for faculty with administrative roles)
- Faculty Dispute Procedures
- Conflict Management for Staff
- Threat assessment?
- Contractual provisions?

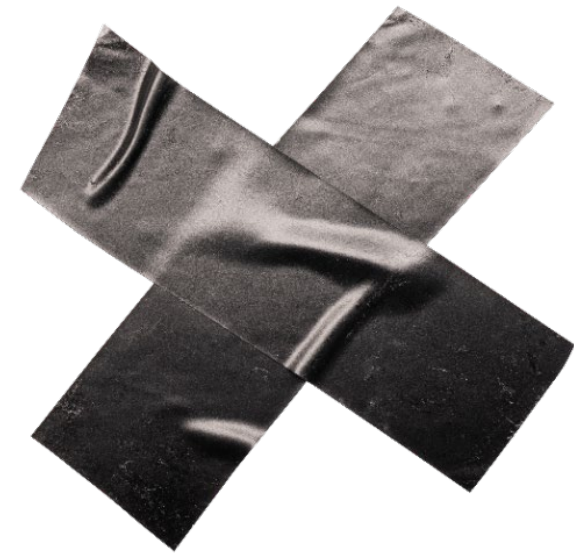
Where a complaint involves alleged conduct prohibited by Title IX, at what point can we use some other policy?

- Depending on facts:



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

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



Discussion scenarios

During an investigation of employee's claim of hostile environment sexual harassment, Complainant states repeatedly that the alleged misconduct did not interfere with Complainant's ability to participate in education programs or activities.



What general principles govern the grievance process?

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

Is Title IX the exclusive process for resolving sexual misconduct?



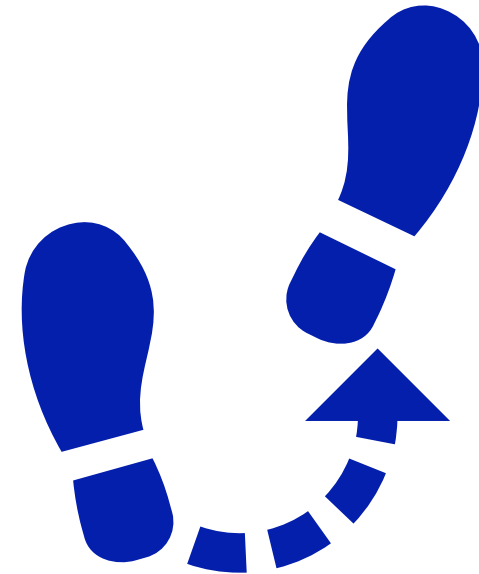
- No
- Title IX does not preclude the use of other policies and processes that may be implicated by a report of sexual misconduct

What other policies/processes may apply?

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

May we use another process before Title IX?

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



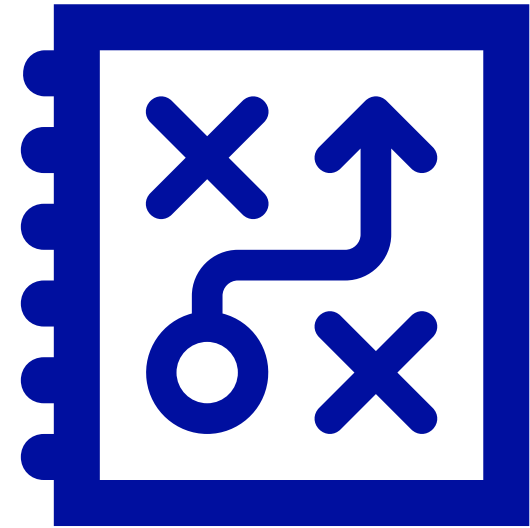
Discussion scenarios



Student alleges that a member of his study group has engaged in sexual harassment against him. He also disclosed that the member of his study group has prior student submissions for a Healthcare Management class and has been submitting prior papers as his own.

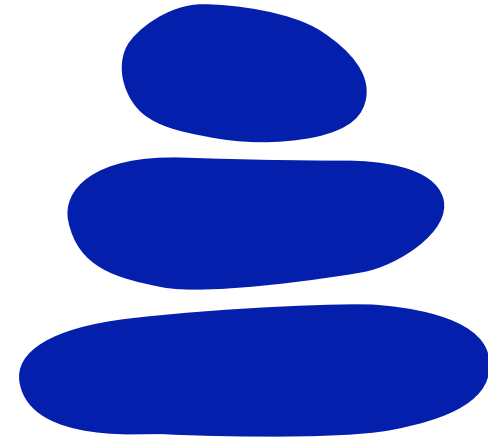
Example

Student A files a formal Title IX complaint accusing Student B of punching and kicking Student A to the point of leaving bruises, and Student A alleges dating violence. Student B admits to punching and kicking Student A but denies there is a dating relationship.



May we use another process after Title IX?

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

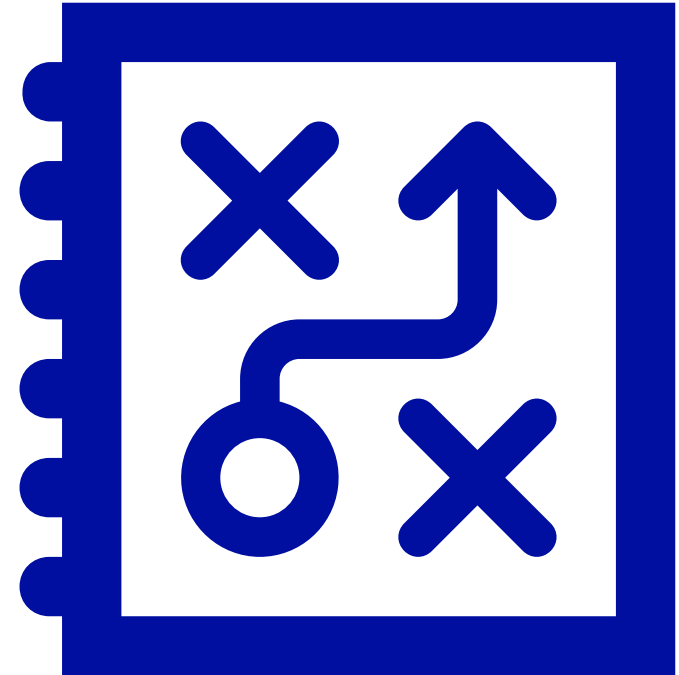


OCR ED Q&A Guidance

- Other policies
 - Schools may address conduct that falls outside the scope of the regulations through other policies
 - A school may use its code of conduct to address sexual harassment where the complainant is not a participant at the time the complaint is filed
 - Forms of sex discrimination other than sexual harassment are not covered by the sexual harassment regulations and may be resolved through a different process that is prompt and equitable

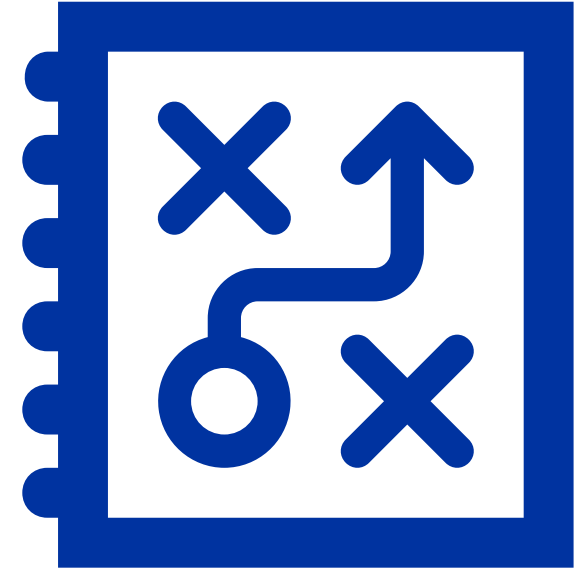
Example

Student A accuses Student B of sexual assault after Student B rendered Student A incapacitated by providing Student A with illegal drugs. Title IX hearing officer concludes Student B provided Student A with illegal drugs but that Student A was not incapacitated.



Example

Employee is accused of hostile environment sexual harassment. Title IX process results in a “no violation” finding because harassment is not pervasive. Institution then initiates process under Title VII policy contending that harassment is severe.



May we use two processes at the same time?



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

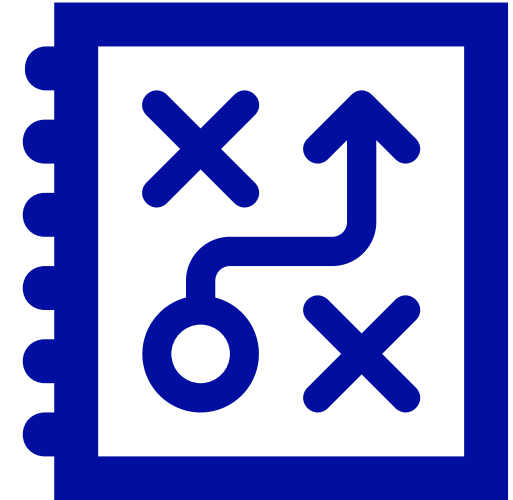
May we conduct a “joint” investigation?

- Yes
- But any “joint” investigation must satisfy the Title IX standards
- Important to be clear to the parties what is going on
- Important to maintain integrity of Title IX evidence



Example

Employee is accused of sexually harassing a co-worker. Institution initiates a Title VII investigation and a Title IX investigation. Title IX investigator and Title VII investigator conduct joint interviews of parties and witnesses.



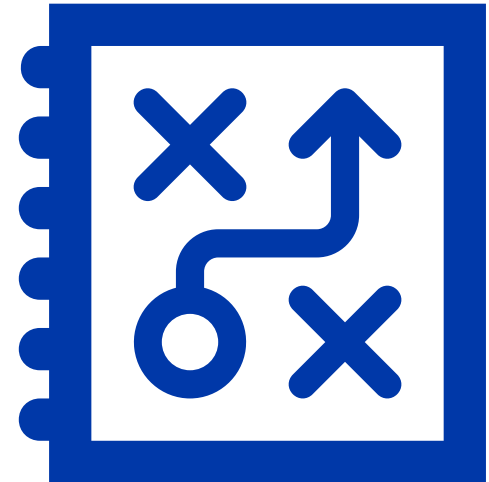
What should a notice say when two policies or processes are relevant?

- Identify relevant policies/procedures
- Provide timeline, where appropriate
- Confirm that all required notice information provided (from all policies/processes)

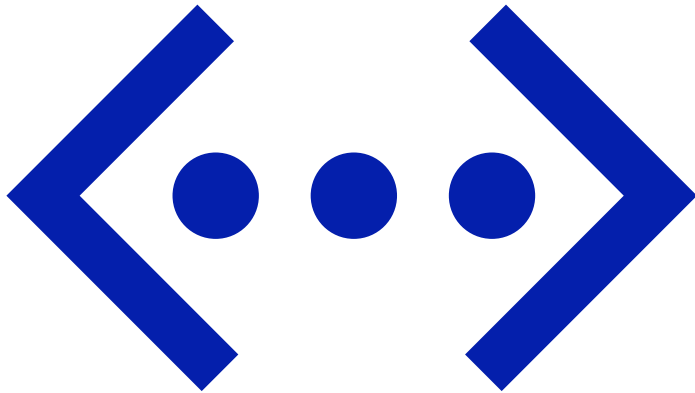


Example

Respondent has been consistently reminded of no-contact order with Complainant but has violated it on two occasions. Respondent denies the underlying sexual assault allegation, but after the violates the no-contact order for a third time, the institution dismisses Respondent.

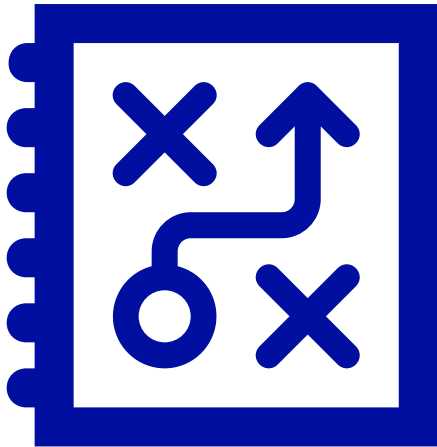


Can two institutions have jurisdiction at the same time?



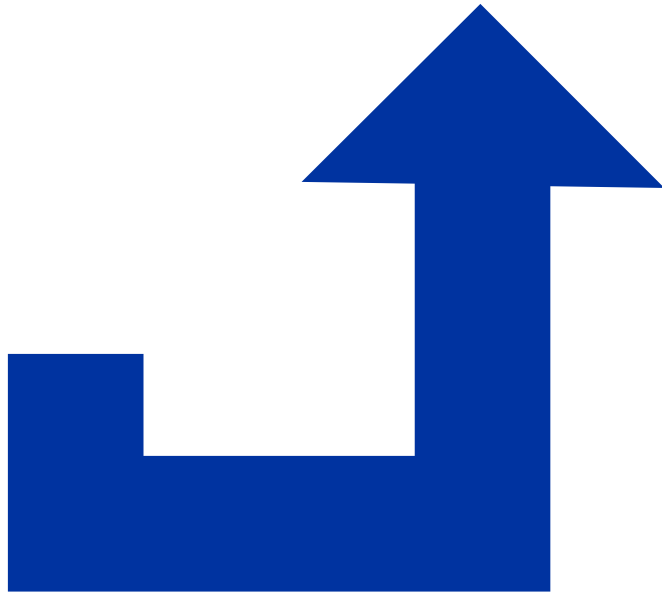
- Yes
- Joint programs or collaborations will often result in dual jurisdiction
- May include dual jurisdiction with non-educational entity such as a hospital

Example



Institution hosts a multi-day forum on campus for Business Administration students, which is open to students from other institutions. Institution Student alleges Visiting Student fondled the student in a private student room during the forum.

What is the procedure if we don't have Title IX jurisdiction?



- If no formal complaint has been filed, refer the matter elsewhere (law enforcement, alternative process, etc.)
- If a formal complaint has been filed, dismiss the formal complaint, notify the parties, and refer the matter elsewhere

When may a case be dismissed?

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

Why would an institution continue with a Title IX process after respondent departure?

- Complainant's wishes
- Desire to avoid “passing the harasser” scenario
- Community expectation
- Large investment of time and resources to date
- Potential for respondent's return in the future
- Other factors possible

OCR ED Q&A Guidance

- Respondent departure dismissals
- Confirms institutions may dismiss in cases of respondent departures
- “Proceeding with the grievance process could potentially allow a school to determine
 - the scope of the harassment,
 - whether school employees knew about it but failed to respond,
 - whether there is a pattern of harassment in particular programs or activities,
 - whether multiple complainants experienced harassment by the same respondent, and
 - what appropriate remedial actions are necessary.”

July 2021 ED Q&A

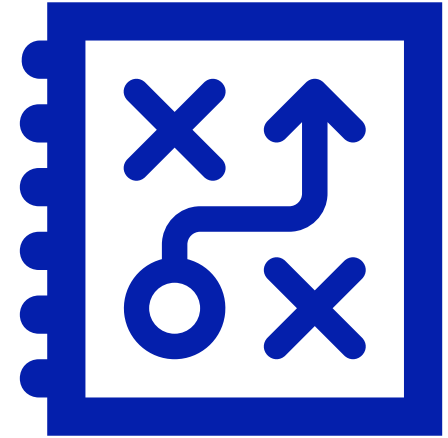
Can we use another process to make the same finding we would otherwise make under Title IX policy?



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

Example (Impermissible)

Student files formal Title IX complaint against Student alleging fondling occurred at a campus location and at a clinical site. Student does not want to participate in a hearing, so institution dismisses Title IX case and re-charges Respondent with harassment under the student code of conduct.



Module 8: Title VII and Title IX

Examples of Policies with Related Concepts

Discrimination

- Sexual Harassment
- Other non-discrimination statement & policies

Relationships

- Workplace
- Employee/student

Conduct

- Student
- Faculty/Employee

Discipline

- Student
- Faculty
- Employee

Understand Title IX and Title VII Procedures

- Title IX Regulations (August 2020) -- Employees
 - Impose additional procedural requirements
 - Only for allegations meeting revised sexual harassment definition
 - Expressly contemplate “dual” compliance approach with Title IX and Title VII

How do Title IX and Title VII standards compare?

“Neither Federal non-sex discrimination civil rights law represents a ‘zero-tolerance’ policy banning all sexual harassment.” – Preamble to 2020 Title IX Regulations

Title VII Sexual Harassment

Quid pro quo

Sufficiently severe
or pervasive

Title IX Sexual Harassment

Any quid pro quo
by an employee

Unwelcome and
Sufficiently severe
and pervasive and
objectively
offensive

Any sexual
assault/DV
/stalking

Proposed Title IX Regulation

- ED's Notice of Proposed Rulemaking released June 2022
- Proposed regulation would alter to:
 - Severe or pervasive
 - Evaluated subjectively and objectively
 - Denies or limits a person's ability to participate in or benefit from programs and activities
 - Considering numerous facts and circumstances

Title VII Sexual Harassment Standard

Sexual Harassment under Title VII includes:

Hostile environment

Unwelcome subjectively
and objectively

“severe OR pervasive”

Similar conduct as at issue under Title IX

Quid Pro Quo

Sexual Violence
(e.g. assault)

How should we treat alleged conduct that may violate Title IX and Title VII policies?

“The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer’s obligations under Title VII and Title IX.”

– Preamble to 2020 Title IX Regulations (also 34 C.F.R. § 106.6(f))

More From Preamble

- “These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires. Accordingly, recipients may proactively address conduct prohibited under Title VII, when the conduct does not meet the definition of sexual harassment in § 106.30, under the recipient’s own code of conduct, as these final regulations apply only to sexual harassment as defined in § 106.30.”
- “These final regulations do not preclude a recipients’ obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations.”

Proposed Title IX Regulation

- Discussion of reports and complaints involving employees
- “The Department tentatively recognizes the need for grievance procedures to ensure that a recipient can respond to reports of employee-on-employee sex-based harassment and other forms of sex discrimination involving employees **promptly and equitably** as required by Title IX, and also comply with its obligations under Title VII, **using a framework that is suited to these types of complaints.**

Employee issues, cont'd.

- Proposed rules discuss complaints about negative affect of grievance procedure requirements on ability to handle complaints of sex-based harassment involving employees
 - Remove grievances entirely from Title IX
 - Revise to be less prescriptive for employees

Proposed Title IX Regulation

- Commentary discusses proposed revised framework
- Proposed § 106.45 contains specific requirements for grievance procedures that would apply to all complaints of sex discrimination
- While a new proposed § 106.46 contains additional requirements that would apply only to complaints of sex-based harassment involving a student complainant or student respondent at a postsecondary institution.
 - The Department also seeks comment on **whether and how** any of the proposed grievance procedures (or any proposed additions from commenters) **should apply differently to various subgroups of complainants or respondents, such as** students or **employees**, or students at varying educational levels.

Example of typical “Title VII” process

Complaint to manager, HR,
ethics line, etc.

HR/manager
collaborate to provide
information to parties,
investigate, and
resolve

HR/manager take any
appropriate corrective
and preventive action,
and protect against
retaliation

Comparison

Common Title VII Response

Title IX Regs/Requirements

Resolution by internal investigation

Discipline requires regimented investigation & hearing process

Formal or informal complaint

Formal complaint only

Advisor silent supporter

Advisor entitled to participate

Resolution does not require active complainant

Need participating complainant

May or may not result in formal report

Requires formal report & other documentation

What triggers an employer's liability for sexual harassment under Title VII?

- ☑ An employer, its agent, or its supervisor
- ☑ Knew or should have known
- ☑ About severe **OR** pervasive sexual harassment
- ☑ That a reasonable person would consider intimidating, hostile, or abusive
- ☑ By an employee or non-employee over which it has control and
- ☑ Failed to take appropriate corrective action
 - U.S. Equal Employment Opportunity Commission, *Harassment* (<https://www.eeoc.gov/harassment>)

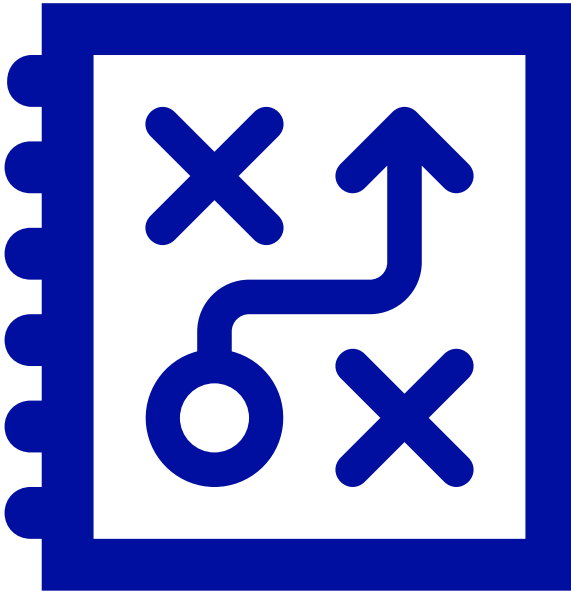
What Triggers Obligations for VII vs. IX?



Categories

1. VII obligations but no IX obligations (no need to follow IX policies)
 - Should have known of discrimination but no formal complaint
 - Discrimination does not meet IX definition of SH
 - Complainant no longer employed or a student
2. Twin VII and IX obligations
 - Quid pro quo, “severe and pervasive,” VAWA crimes
 - Complainant currently employed or a student
 - Formal complaint

Example



- Employee A claims Supervisor is subjecting A to pervasive and severe racial and sex harassment via email in emails relating to work directives.
- Employee B corroborates the claim by saying that she has heard Employee A talk about these messages after receiving them (via Slack) and that she has received some screenshots of such messages from Employee A.
- How should University respond in satisfying obligations under VII and IX?

Issues to keep in mind

- “Me Too” complaints – often historic issues
- Clarify nature of sexual harassment allegations as much as possible at the outset of a case to determine which procedures apply
- In absence of “formal complaint,” usually apply Title VII procedures (unless Title IX Coordinator files one)
- Understand potential “transition points” between procedures

Potential transition points

Allegation that appeared to be “AND,” when explained more completely, is only “severe OR pervasive” as to hostile environment

Dismissal of Title IX complaint (for any reason)

Formal Complaint withdrawn

Respondent leaves institution

Investigation reveals only “off campus” conduct

Key witness/party does not testify at hearing

“No responsibility” finding

Questions



HUSCH
BLACKWELL

HUSCH BLACKWELL

American InterContinental University System (AIUS)

Comprehensive Title IX Training: Day 3

Fall-Winter 2023-2024

Presenters



Julie Miceli
Office Managing Partner
312-526-1521 (Direct)
julie.miceli@huschblackwell.com



Elizabeth Samples
Partner
816-983-8271 (Direct)
elizabeth.samples@huschblackwell.com

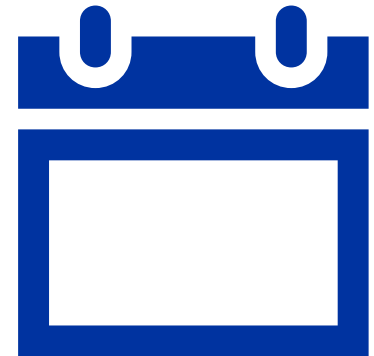
Agenda - Day 3 – Thursday, Nov. 9

Module 9 – Informal Resolution and Confidentiality

Module 10 – Investigations and Key Issues

Module 11 – Evidentiary Concepts

Module 12 – Investigation Reports and Adjudication

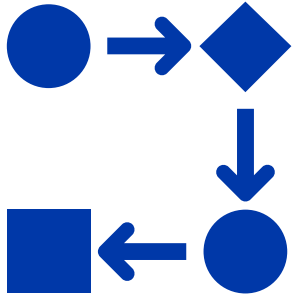


Module 9: Informal Resolution and Confidentiality

What is informal resolution?

- A voluntary process to resolve complaints through a mechanism other than the default investigation and resolution process.

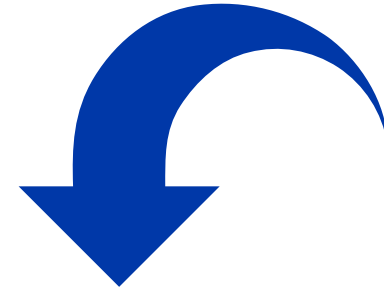
What are the key concepts of informal resolution?



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



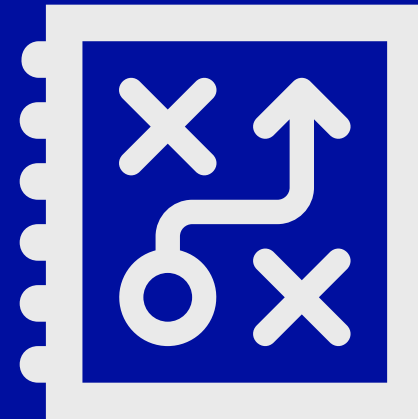
The parties must voluntarily agree to participate in writing



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

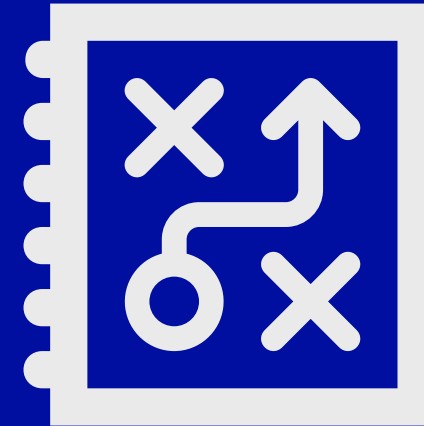
Example (informal resolution)

- Parties agree to engage in informal resolution in the form of mediation. Parties meet with third-party mediator three times over the course of two weeks and are very near to reaching a complete agreement. The morning of the last session, the complainant indicates a desire to stop mediation and resume the formal investigation/hearing process.



Resolution example - continued

- Investigation process would resume
- If complainant withdraws complaint, or refuses to participate, institution might elect to dismiss complaint
- But the institution might also elect to file formal complaint and cause the issue to be adjudicated fully



Who facilitates an informal resolution?

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

What are some examples of informal resolution?

Facilitated exchange of resolution offers

Mediation

Arbitration

Restorative justice

Settlement with the involvement of attorneys

How long can an informal resolution take?

- Informal resolution should be reasonably prompt
- Typically has the effect of suspending any default investigation and adjudication process
- If informal resolution fails or appears futile, institution should promptly resume default investigation and adjudication process

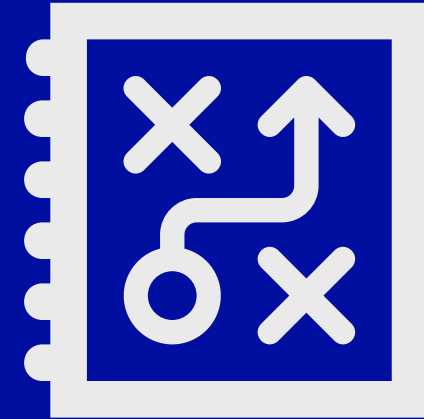


Is an informal resolution final?

- Generally, yes – Most informal resolutions will result in an agreement that resolves the allegations in a definitive and final way
- A party cannot demand an investigation and hearing of the same conduct that has been resolved through informal resolution
- Exception exists if terms of the informal resolution are not final (i.e., contingent) and contemplate a potential return to the formal process

Example of Informal Resolution

- Informal resolution indicates that, in lieu of investigation and hearing, respondent will apologize for respondent's misconduct and attend counseling, but should respondent sexually harass complainant again, complainant will be free to file a formal complaint encompassing the entire range of sexual harassment.

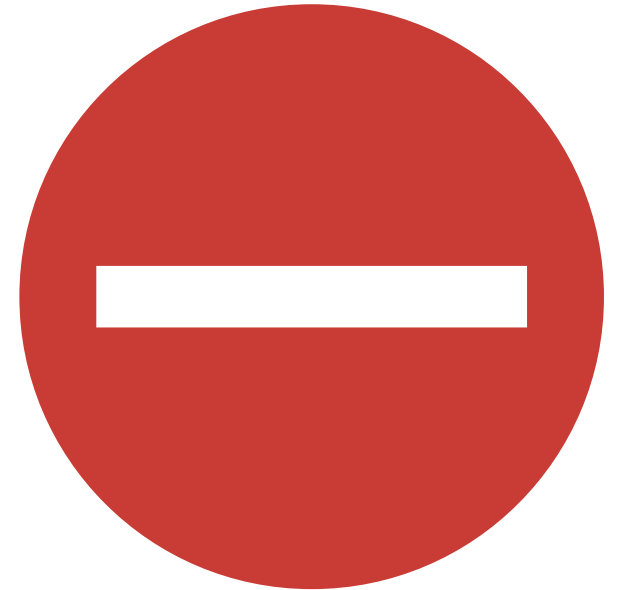


How is an informal resolution documented?

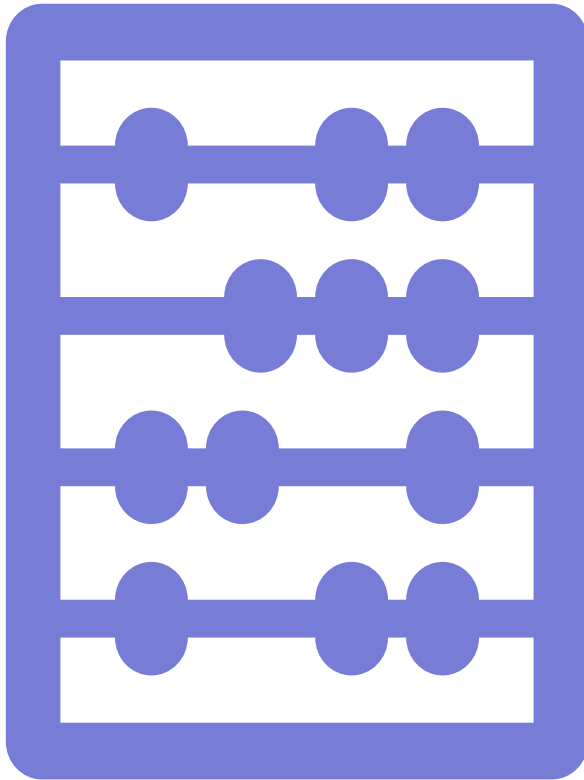
- Agreements should be well-documented by the informal resolution facilitator
- Ideally, parties will sign the agreement or provide some other form of written confirmation
- Formal settlement agreements are typically not required unless they are resolving legal claims that have been asserted

What are the limitations?

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



What are considerations around whether informal resolution is appropriate?



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

How should we document informal resolution?

As appropriate to each matter:

Initial consent to participate

Notice to the parties regarding the allegations

Consent to agreed upon procedures

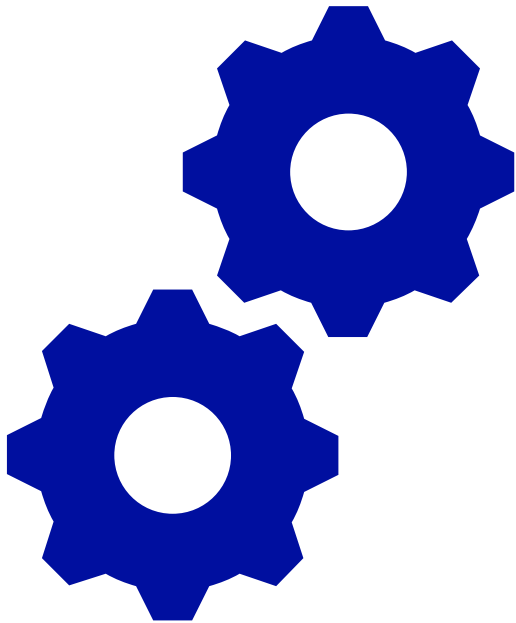
Any agreement reached through the informal resolution process signed by all parties

And/or other documentation as appropriate

Who facilitates an informal resolution?

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

Group Scenario: Informal Resolution



Ali accuses a fellow student, Bernie, of exposing herself during a virtual and live lecture in which they were placed in a breakout room together for a discussion session.

At the intake meeting, in August (prior to the start of Ali's next class session), Ali explains that Ali will never informally resolve this issue. Ali files a Formal Complaint, and proper notices have been sent to the parties and support measures are in place. The day after classes resume, while the investigation is underway, Ali decides that Ali wants to proceed informally. The Respondent is "totally on board."

You are brought in to lead the informal resolution discussions.

1. What issues from the facts above do you want to figure out/dig into more?
2. What questions will you raise with Ali?
3. What questions will you raise with Respondent?
4. Who (if anyone) will you talk to while the informal resolution process is underway?

Are investigations confidential?

- Investigations should be treated as confidential by the institution, with information only shared as necessary to conduct an effective investigations
- Records containing identifying information on students are subject to FERPA analysis

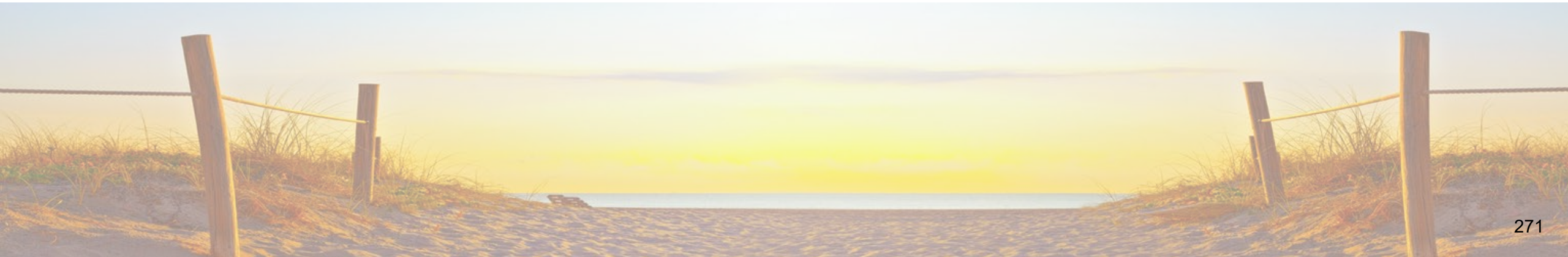


Surreptitious recording

- Surreptitious recording means leaving an unattended camera or recording device without the full and informed consent of the occupiers or their agent
- In the U.S., one party consent laws regarding recording conversations vary from state to state. One party consent laws mean that only one person involved in a conversation needs to give consent for the recording to be legal. Several states have adopted one party consent laws.
 - The one-party consent states include: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

Who should have access to these processes?

- Institution should restrict access to investigations and adjudication processes to those persons whose attendance is required to effectuate policy
- Parties may be accompanied by advisors and potentially others if justified by the need for a reasonable accommodation
- Media should not be granted access to interviews and hearings

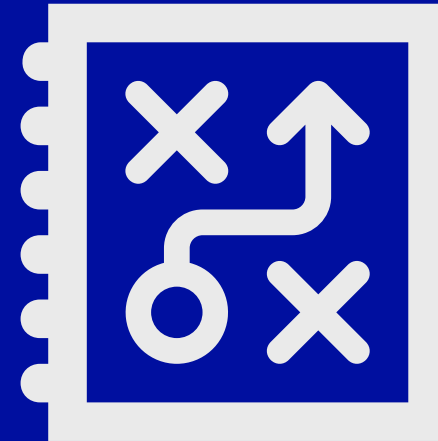


Are parties allowed to talk about a case?

- Due process considerations limit an institution from restricting a party's ability to discuss the allegations under investigation or to gather or present evidence
- First Amendment additionally limits public institutions' ability to restrict speech about a case
- Witness manipulation and intimidation can still be addressed by institution

Example 1

- Respondent is found responsible for sexual harassment and is required to engage in some remedial measures.
- Respondent contacts several witnesses and asks them about their interviews with the investigator.
- Two of the witnesses contact the investigator to complain about this inquiry from Respondent.



Example 2



- A complaint against Heather results in a finding of no policy violation following a full investigation.
- Nevertheless, Heather writes an letter to the editor of her local paper that is critical of the length and burdensomeness of the process.
- Heather's piece does not identify the complainant, but does reveal some of the specific allegations.

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.

Module 10: Investigations & Key Issues

Why do I need to know about Investigations?

Responsible Institutional Office

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

Investigators

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

Decision-Makers

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

Others

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

What is the purpose of an investigation?

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

How do we tell the parties about an investigation?

- Provide the parties notice of a formal complaint
 - Depending on the policy at issue, notice may be required to be in writing (e.g., Discrimination Complaint Procedures)
- Depending on nature of complaint may include the following: sufficient details about the “who, what, when, where, and how”



What else may the notice say?

- Written notice may also include (depending on if Title IX is triggered or not):
 - 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

When might I be asking questions in an investigation?

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

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

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

How does the investigator prepare for the investigation?

- Review applicable policy and potential violations
- Prepare interview outline
- Review prior interviews (if others have been conducted)
- Review other similar investigation reports to see a roadmap of where the investigation is headed
- Have supportive measures been offered/implemented?

Preparing the interview outline

- Review complaint, notices of investigation, notes from other interviews
- Provide interviewee with open ended opportunity to share information, then ask specific questions related to allegations
- Offer supportive measures
- Emphasize prohibition on retaliation

May parties have an advisor during the investigation?

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



What is the role of an advisor during the investigation?

Support

- Provide personal support to the party throughout

Preparation

- Help the party prepare for meetings and interviews

Presence

- Be present with the party during meetings and interviews

Review

- Assist the party in reviewing the evidence prior to the close of the investigation

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

Inhibit

- Advisor cannot inhibit communication between investigator and party

Disrupt

- Advisor cannot disrupt meetings and interviews

Argue

- Advisor is not permitted to argue with the investigator

Evidence

- Advisor does not present evidence or “make a case”

What if the advisor breaks the rules?



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

What general principles govern the grievance process?

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

How long does a grievance process take?

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



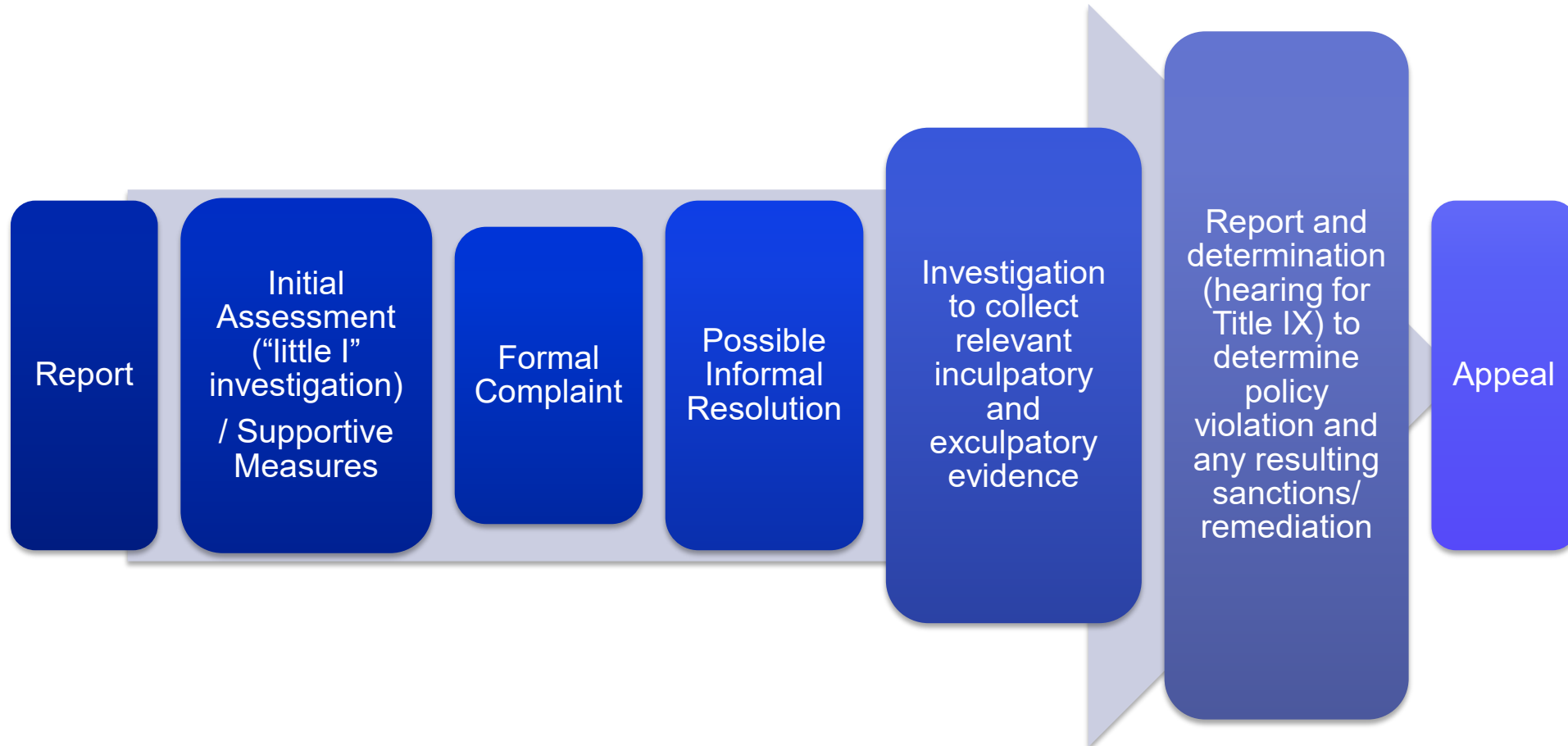
Standard of Evidence

Preponderance of the evidence

=

“more likely than not”

Investigation framework



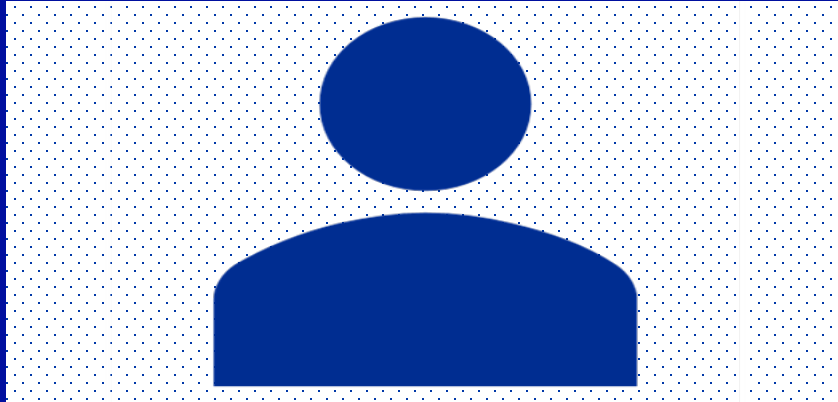
What needs to be documented?

- Initial reports and assessments
- Supportive measures
- Formal complaints or decision not to proceed
- Notices and revised notices; other information provided to parties
- Investigation steps
- Evidence gathered and its origin
- Outcomes
 - Informal resolution
 - Initial decision
 - Appeal decision
- Version of policy/procedure applied

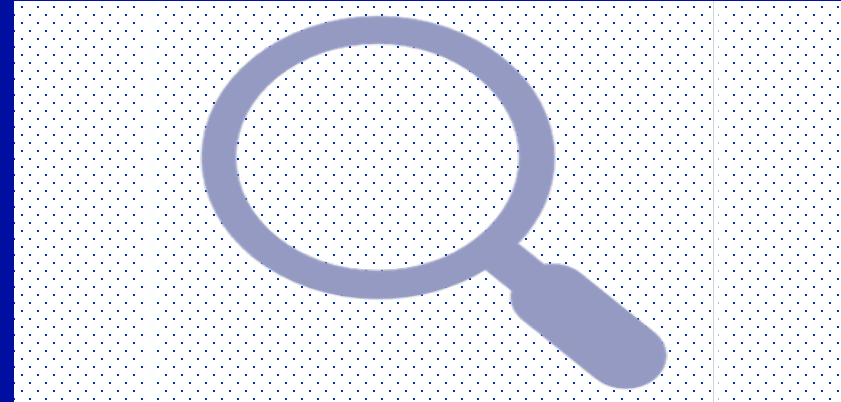
Why document?



How do we collect evidence in an investigation?

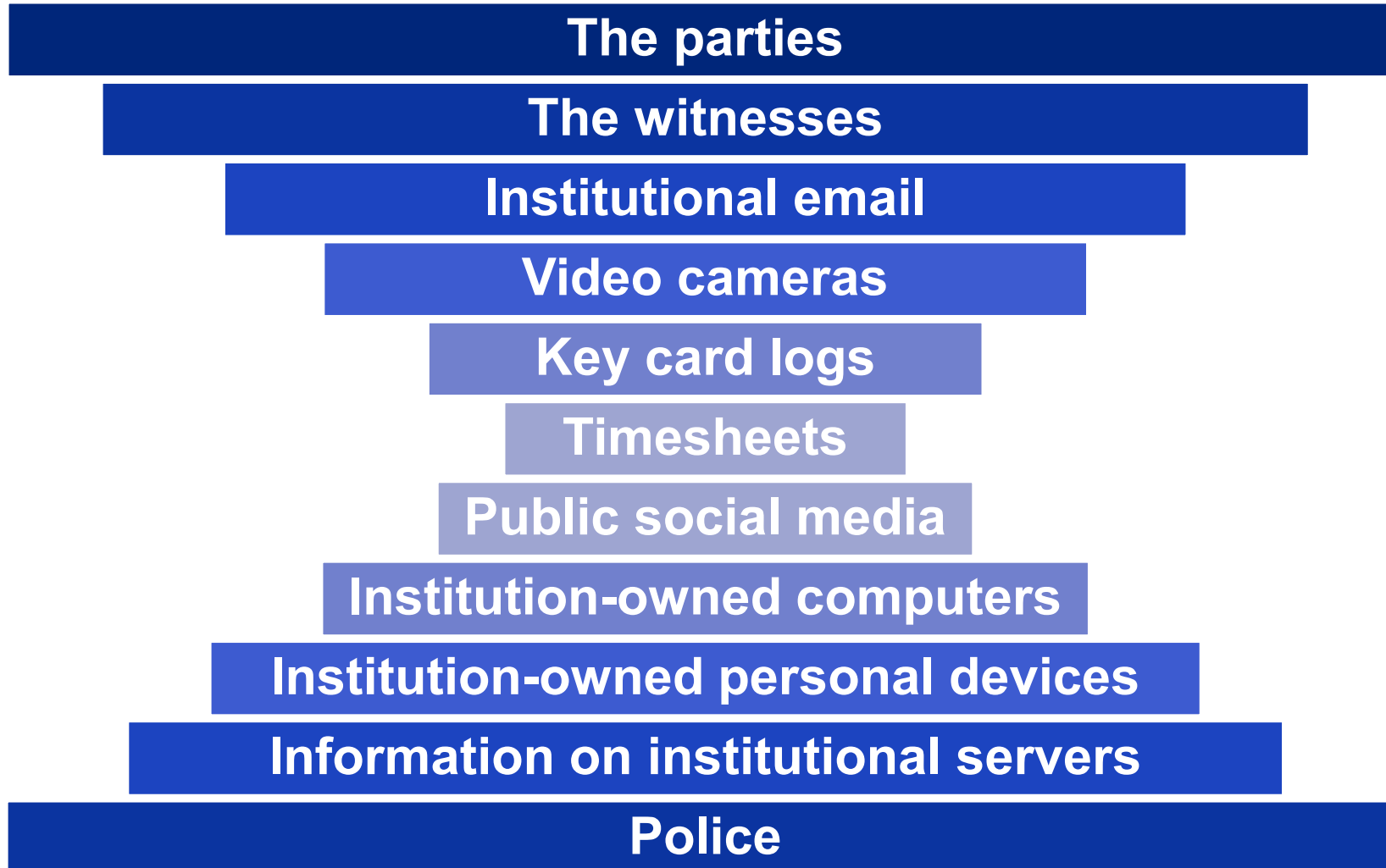


Interviews of Parties and
Witnesses



Collection of Non-Testimonial
Evidence

Example: Sources of Non-Testimonial Evidence



How do I know what questions to ask?

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

Practical Considerations



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

What are some general principles about interviewing?

Timing	Conduct interviews as soon as reasonably possible to maximize the most accurate memories
Setting	Choose a private and quiet setting
Role	Maintain role as fact-gatherer; not a prosecutor; not a defense attorney
Prepare	Anticipate questions that you will be asked and have responses ready

How might we structure an interview?



Rapport building/information providing phase



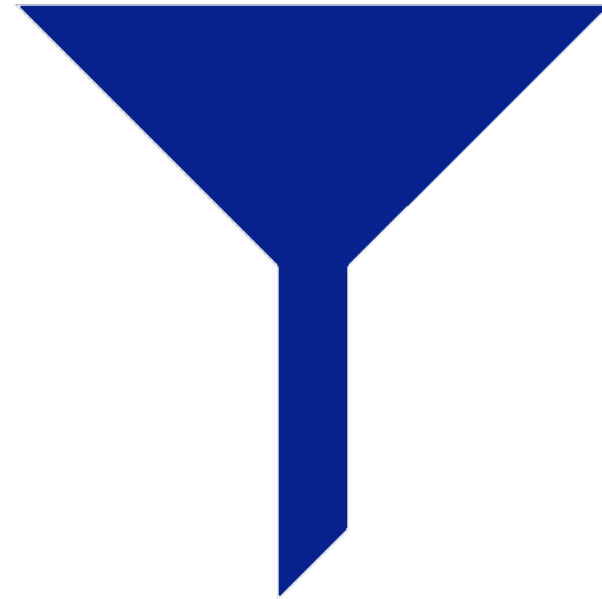
Substantive testimony collection



Closure/information providing phase

How do we structure questions in the substantive phase?

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



Active listening

- Why listen?
 - To gain information, perspectives, and to understand emotions.
 - To encourage speaker.
 - To build rapport.
- Why listen actively?
 - To facilitate communication.
 - To diffuse emotions.
 - To translate content.
 - To ensure accuracy.

Adapted with permission from “Essentials of Active Listening” – Written by Dean of University of Missouri Kansas City Law School

What are the hallmarks of effective questioning?

- Questions should be clear and precise
- Questions should relate to one or more elements of the conduct alleged
- Questions should be asked in a purposeful order
- Questions should be prioritized and edited for greatest effect

General Questioning Guidelines

- Open-ended questions generate more information while closed-ended questions will clarify specifics.
- Close-ended questions result in yes/no responses that often don't offer much additional information. Use close-ended questions to obtain specifics and clarify information you have already received.
- Silence is ok: Give the witness time to answer.



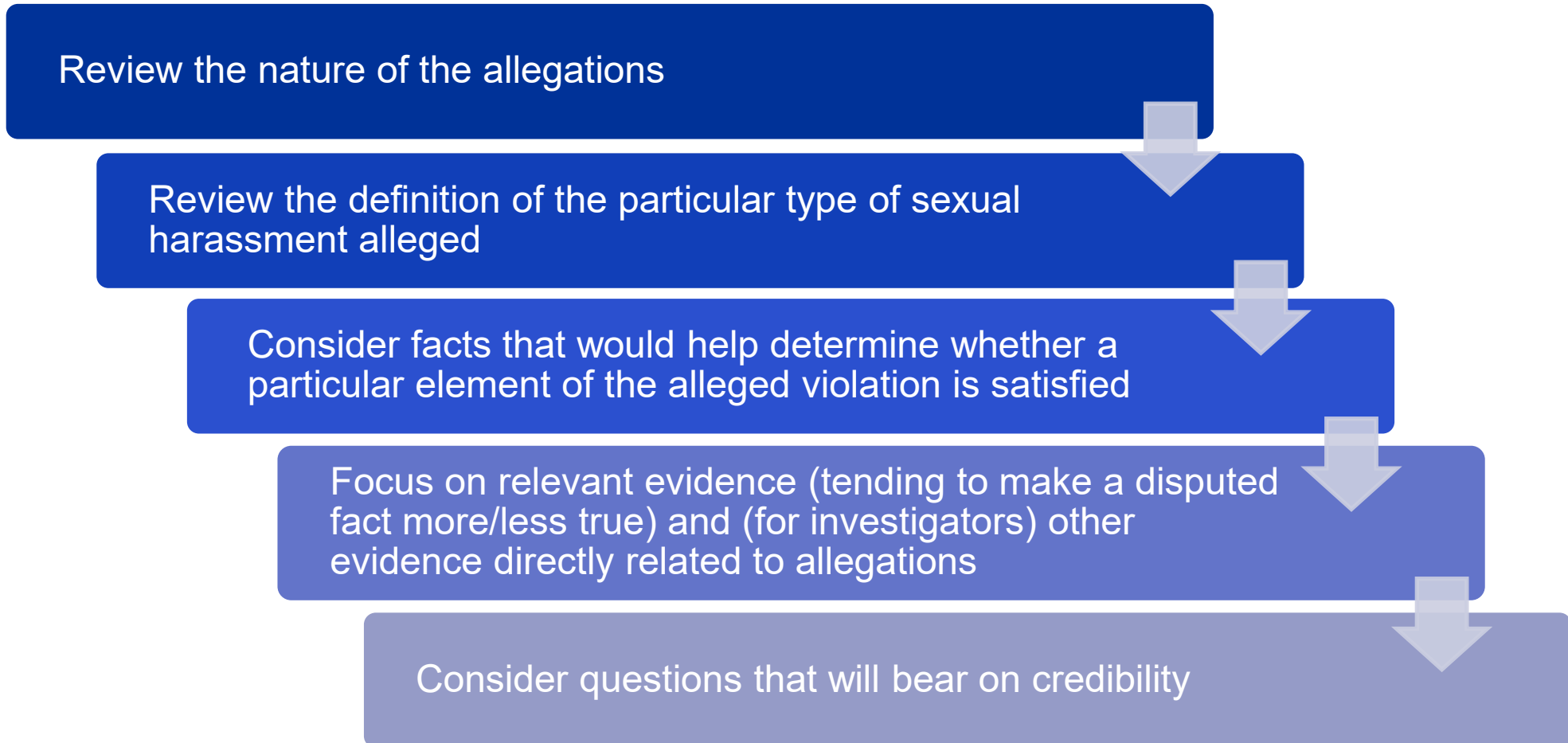
General Questioning Guidelines (more)

- **Credibility:** If you have concerns that a witness is not providing complete and accurate testimony, respectfully explain the reason for your concern and indicate that you are interested in hearing the individual's response to your concern (e.g., "Help me understand...") and address inconsistencies.
- **Be professional and respectful:** Keep in mind that questioning, while sometimes necessary, may put a party or witness on the defensive.
- **Ask the difficult but relevant questions:** Give both parties an opportunity to address your concerns.

When Asking Questions . . .

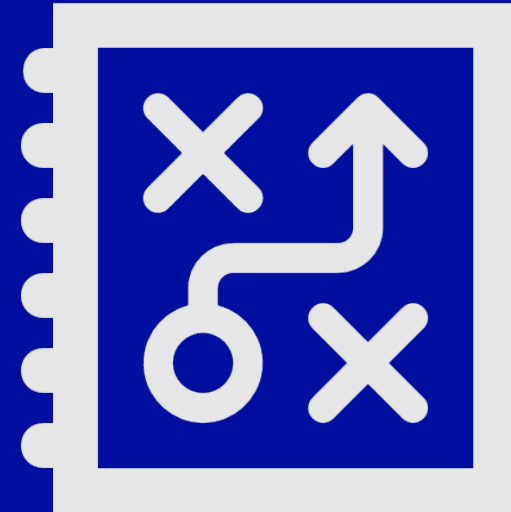
- **Non-verbal communication**
 - Convey care, concern, and interest to both sides
 - Make eye-contact
- **Verbal communication**
 - Avoid questions that imply the alleged conduct occurred or did not occur
 - Avoid questions that blame or judge the complainant
 - Avoid questions that blame or presume violation by respondent

How do I know what questions to ask?



Example – Discussion

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

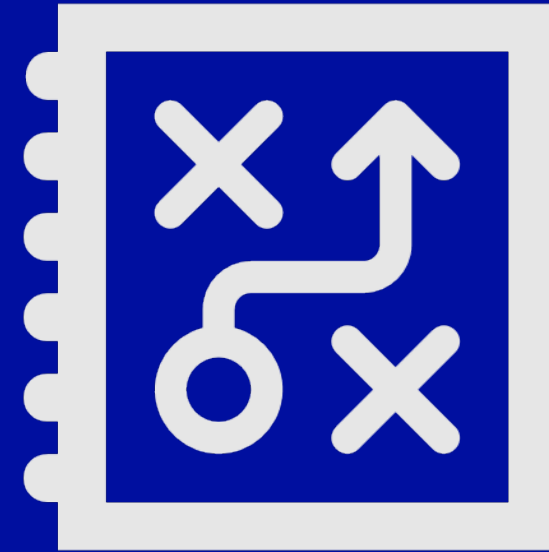


Example Questions (Effective Denial of Access)

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

Example – Discussion

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



Example Questions (Complainant)

Course of conduct

- Tell me about the events/actions preceding each instance when the respondent followed you into the equipment room.
- Were you having a conversation prior to entering the equipment room?
- Have you had any other interactions with respondent? (Explore each)

Directed at a specific person

- Why do you believe this conduct is directed at you?
- Was anyone else in the equipment room at the time?
- Does respondent often talk to other officers in the equipment room?

Fear/distress

- What day/time did this happen?
- Where did it happen?
- Did respondent walk/stand/sit close to you?
- Was there anyone else around?
- What has the impact of this been on you? Did you tell anyone about it?

What questions should we ask to help locate other evidence?

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

How do we make a record of the interview?

- Note-taking during the interview.
- Investigator should use notes to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator's mind.



Do parties/witnesses have a right to record the interview themselves?

- Investigation meetings are not audio or video recorded by the institutions and may **not** be recorded by any participant without notifying the investigator.
- Parties and witnesses may take notes during investigation meetings.

Module 11: Evidentiary Concepts for Investigators

Key Legal Principles

- Direct vs. circumstantial
 - Hearsay
- Weight of evidence
- Assessment of credibility

Direct v. Circumstantial

- **Direct** — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference
 - e.g.: testimony of a witness who actually observed and perceived event in question (see, hear, touch)

Direct v. Circumstantial

- **Circumstantial (indirect)** — Series of facts which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred.
 - e.g.: witness testimony found several deleted posts from respondent to complainant, deleted shortly after time complainant said explicit messages were sent

Hearsay

- **Hearsay** — Statement (written or oral) made by a non-available witness offered to prove fact in question
- Longstanding evidentiary principle of when courts can rely on hearsay
- Some hearsay is more reliable
 - Statement contemporaneous with the event in question
 - Excitable statement uttered in the moment being perceived

What is inculpatory evidence?

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



What is exculpatory evidence?



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

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

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.

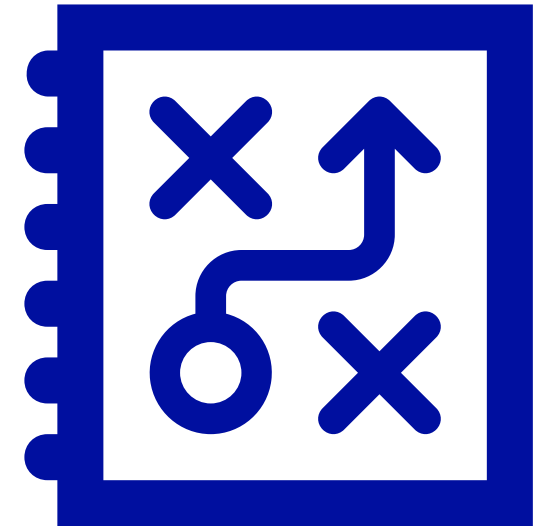


Weight - Considerations

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

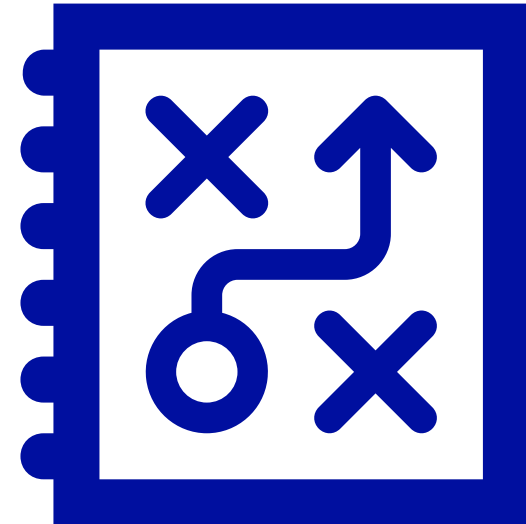
Example of considerable weight

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



Example of less weight

Witness says he saw a couple leaving the classroom “sometime after ten but before noon” but witness is not “sure exactly” when. Witness testified they “sort of looked” like complainant and respondent and witness is “pretty sure” it was them. But witness also says witness had pulled an all-nighter before an exam and was “pretty braindead at the time I saw them.”

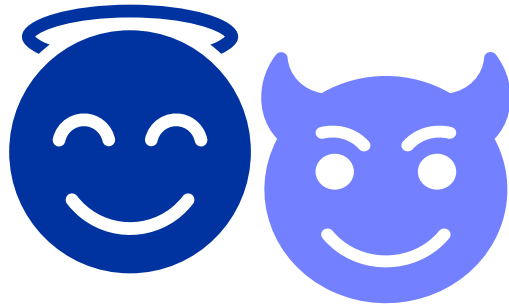


Credibility

To be determined by hearing panel, following hearing and examination of investigative report, evidence and hearing testimony

Assessing Credibility

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



Incapacitation & Weight/Credibility

- Incapacitation alone \neq unreliable or lack of credibility as to facts



Do the parties have access to the evidence in a Title IX investigation?

- At a minimum, parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is issued
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Parties may provide written responses, which may necessitate further investigation
- Written responses considered when drafting final investigation report.



What exactly has to be shared?

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



Do the parties get to respond to the evidence in non-Title IX investigations?

- No, typically parties will only be provided with the final written investigation report.
- Parties may request investigator share evidence, though investigator is not required to do so
- Treat both parties the same – if one party gets access to certain evidence, the other party should get access as well.
- Investigator may choose to share evidence (i.e., text messages shared by one party to discuss with another party)



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

- It depends on whether the party's comments merit a response
- If no response is merited, the party's submission can simply be appended to the final report; nonetheless recommend explaining in final report that response was reviewed, carefully considered, and did not result in any change to the report.

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

What do we do with awkward silences?



- Give the witness time to answer
- Consider whether the question needs to be rephrased or the witness needs a break

Module 12: Investigation Report Writing and Summary of Adjudication through Decision-Making

What is the last step in the investigation?



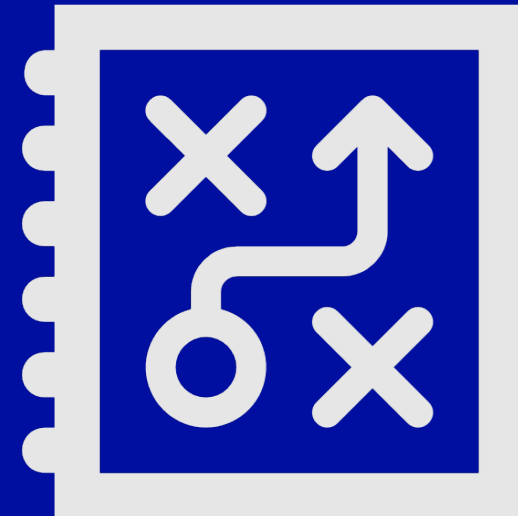
- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing

Does the investigation report make findings?

- It depends on the policy under which the allegations were investigated.
- For ***Title IX investigations***,
 - the investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
 - under the current Title IX regulations, factual findings and determinations of policy violations are made by a Decision-Maker at a subsequent hearing
- For Title VII investigations, the report makes findings and conclusions about whether a policy violation occurred.

Example

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



Critical elements of an investigation report/decision

Preliminary case information

History of the case

Allegations

Applicable policies/procedures

Standard of proof

Evidence gathered relevant to allegations

Decision-Makers (if applicable):

- Factual findings
- Analysis and conclusion regarding responsibility
- Sanctions
- Procedures/grounds for appeal

Preliminary Case Information

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



History of the Case



How did the institution respond to the report?

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



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

What evidence was collected? Any irrelevant evidence?



Provide status

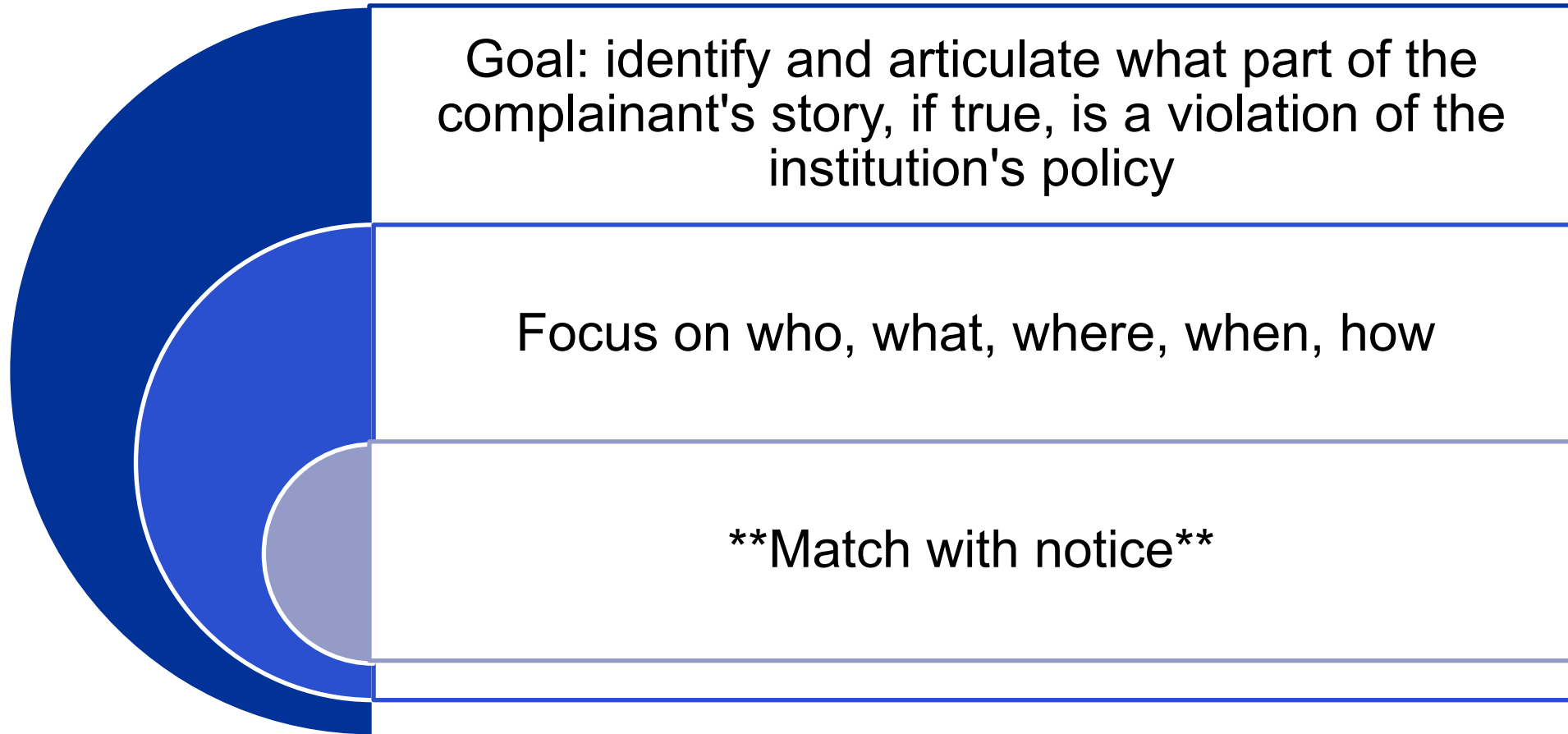
- E.g., parties given access to evidence, opportunity to comment, report, applicable timeline dates



Explain any apparently unreasonable delays



Summarizing Allegations



Applicable Policies & Procedures

Reference applicable policy and procedures, including specific language which is pertinent to the allegation

- E.g., include relevant definitions

[and/or] Attach full copy of policy and procedures to report

Facts

Facts that matter

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

Goals

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

How to do this?

- Show your work
- ***Decision-Makers:*** explain credibility assessments

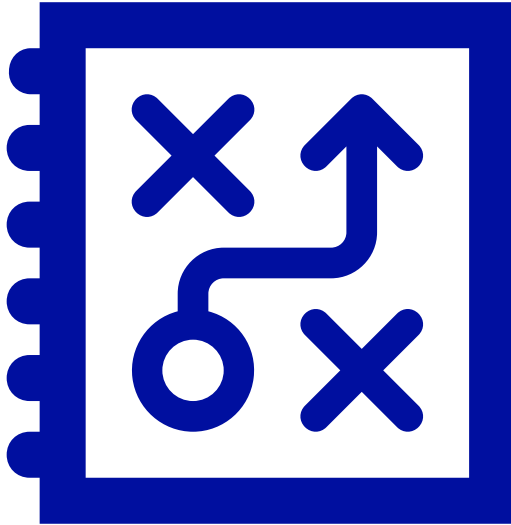
Should our investigation report comment on credibility?

- If particularly notable credibility issues arise, report should identify them
- For Title IX Investigation Reports, commentary on credibility of every party and witness is unnecessary given they will testify live at hearing
- For investigations under other policies, it depends if the investigator is also the Decision-Maker or if there is a hearing process.
 - If investigator is also Decision-Maker, credibility determinations may be included in the investigation report.



Example

Writing about credibility points – Investigative reports



- “Respondent was not reliable when recounting what happened.”
vs.
- “Though Respondent initially said that Respondent could not remember pursuing a sexual relationship with Complainant after meeting through their online course. Respondent told the investigator that Complainant actively pursued a relationship with Respondent through text messages.
- Complainant provided a text message string with Respondent in which Respondent asked Complainant to communicate outside of class, meet the Respondent in a virtual chatroom on multiple occasions and in which Respondent asked the Complainant sexually-charged questions; in each instance, Complainant’s text messages to Respondent decline the invitations.(See Exhibit A.) Complainant denied deleting any portion of the text messages from the string, and the Investigator observed them on Complainant’s phone, showing Respondent’s phone number.”

Important Language Considerations

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

INVEST. Example

Be specific



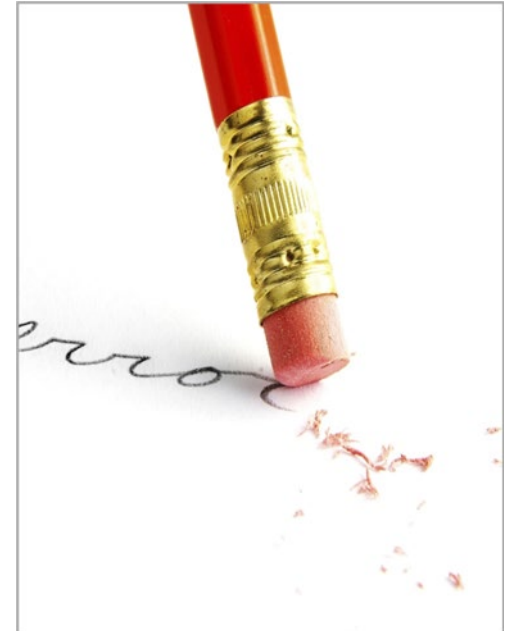
- “Complainant alleges that Respondent engaged in stalking behavior.”

vs.

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

Common “Mistakes” in Report-Writing

- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- General lack of clarity/coherence
- Including too much information about irrelevant details
- Insufficient information on important issues
- Speculation
- Credibility findings



Review of Preliminary Investigation Report (Title IX only)

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

Summary of Post-Investigation Adjudication Process

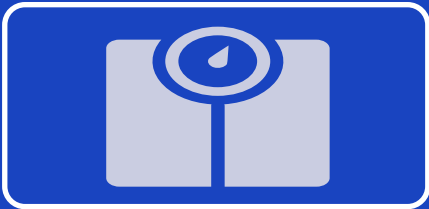
Title IX Hearing (in summary)

- Panel or administrator serves as decision-maker and responsible for setting reasonable parameters on the hearing process, consistent with applicable policy and regulations
- Panel or administrator holds a hearing for purposes of facilitating cross-examination on evidence that goes to credibility
- Advisor of choice ability to ask cross-examination questions
- Panel or administrator also has ability to ask questions
- Panel or administrator deliberates to reach a decision

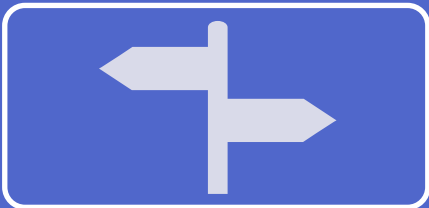
How does the hearing officer decide a case (Title IX only)?



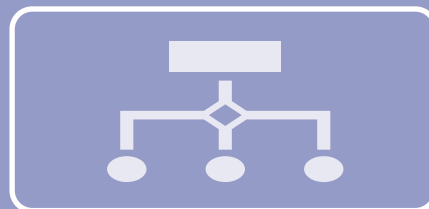
After hearing, the hearing officer must deliberate and consider all the relevant testimony and relevant non-testimonial evidence



Evaluate evidence for weight and credibility



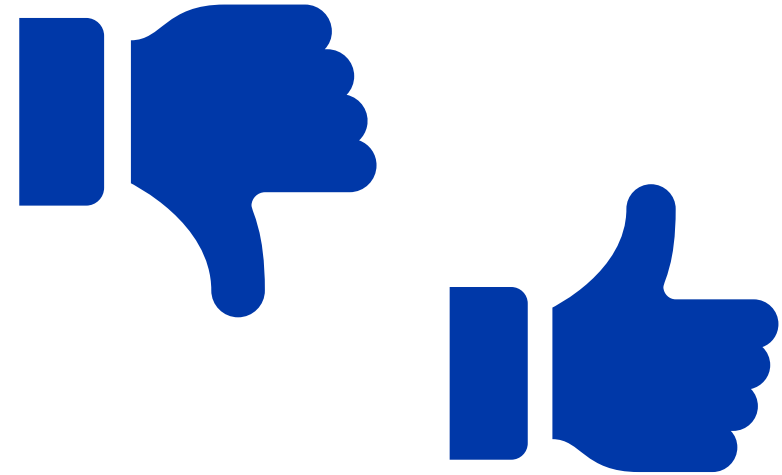
Resolve disputed issues of fact under the standard of evidence adopted by the institution



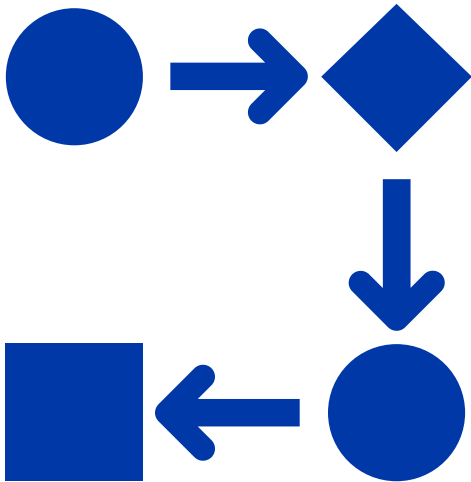
Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred

What 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



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

How does the hearing officer issue a decision?

- 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

Who determines discipline and remediation?

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

Documenting the Decision

- Each decision should be explained in writing in as careful detail as a finding of responsibility. Why?
 - The act of documenting helps a Decision-Maker consider all relevant issues
 - Demonstrates that the decision was informed and not based on actual or perceived bias
 - Demonstrates that the decision was not without thought, arbitrary, or capricious
 - Demonstrates alignment with institution's disciplinary philosophy
 - Provides appeals official and any reviewing court with a reason to grant the sanctioning official discretion in his/her decision
- The decision need not be lengthy

What principles do we use to determine discipline?

Discipline should vary depending on the nature of the violation found considering aggravating and mitigating factors

All things being equal, like violations should have like punishments

Discipline has educational, punitive, and protective elements

What principles do we use to determine remediation?

If a violation is found,

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

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

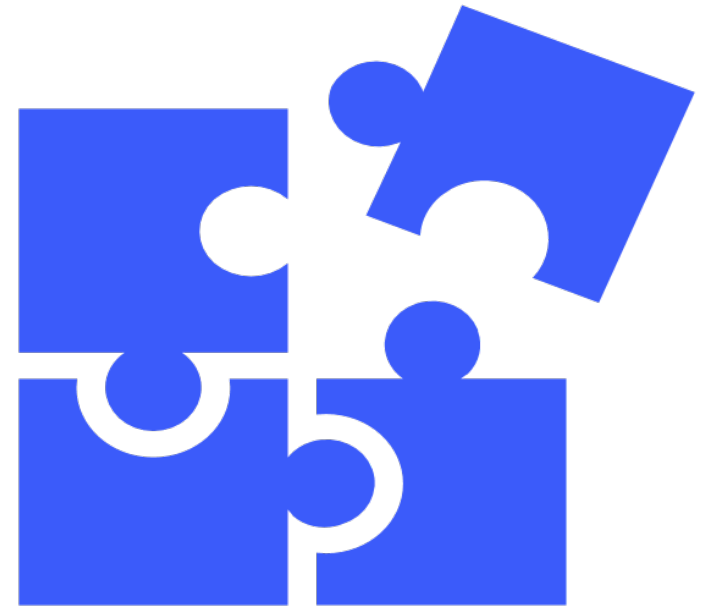
Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable

Disciplinary Philosophy

- Violations of the policy by an individual will be addressed in accordance with applicable university policies and procedures, which may include disciplinary actions up to and including expulsion or termination from the university.
- When determining appropriate sanctions, the university may consider prior findings of misconduct.
- Violations of law will be addressed by law enforcement and may result in criminal penalties.

Sanctioning goals

- Punitive
- Safety
- Reduce recidivism / recurrence
- Advance educational and developmental growth of offender (learning from one's mistake)
- Appropriate fit for circumstances



Example: Sanction Detail



Student suspended for engaging in dating violence will be suspended for one year. The no-contact order will remain in place if the Student reenrolls after the suspension. The Title IX Coordinator will have discretion to identify the appropriate person(s) to resolve any ambiguities related to this sanction that may arise in the future.

What are aggravating and mitigating factors?

Common factors:

- Egregiousness of misconduct (e.g., act of violence, use of a weapon, use of drug)
- State of mind of respondent (bias-motivated, reckless, or negligence)
- Safety risk to the broader community
- Impact statement
- Conduct during the investigation and adjudication (cooperative or less than cooperative)
- Circumstances relating to a lack of consent, force, threat, coercion, intentional incapacitation)
- Position of trust / power differential

How does the decision-maker document sanctions?

Generally, address the following, where applicable:

- Impact statement of complainant and respondent, if any
- Acknowledgment of conduct or impact of conduct by respondent
- Alignment of sanction to institution's disciplinary philosophy
- Potential ongoing safety risk to community (or not)
- Any continuation of no-contact directive, and duration and parameters of that directive

Questions



HUSCH
BLACKWELL