

**HUSCH BLACKWELL**

# **Title IX & Sexual Harassment Response**

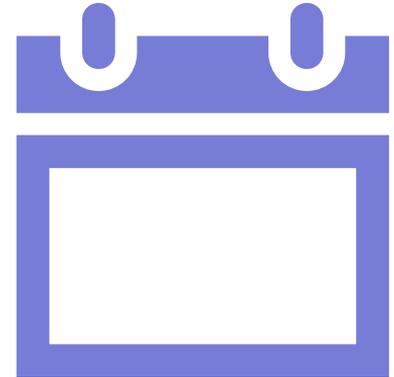
Participants in Title IX Sexual Harassment  
Policy Process

Fall 2021

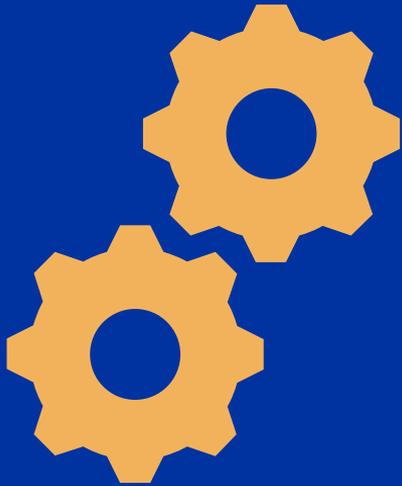


## Agenda

- Title IX Status, Scope & Jurisdiction
- Privacy & Confidentiality
- University Reporting
- Supportive Measures & Interim Restrictions
- The Investigation Process
- Alternative & Parallel Processes
- The Hearing Process
- Decision Making
- Appeals

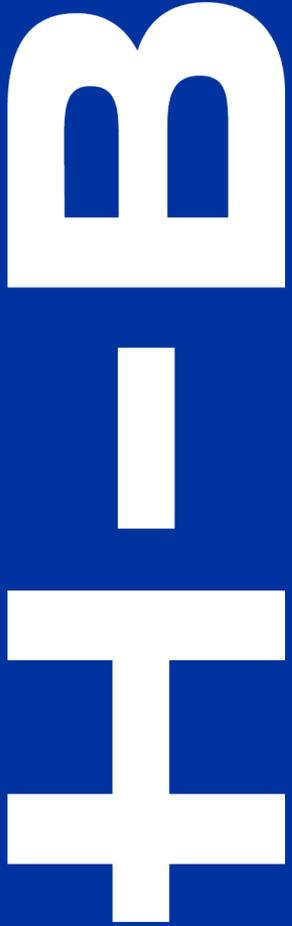


## Group Scenario



# Breakout Groups

- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Cameras on for breakouts



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**Title IX Status,  
Scope &  
Jurisdiction**



# Why do I need to know about Title IX basics?

Office of Equity, Investigators,  
Decision-makers, & Others

- Refresher
- Key definitions necessary for your work
- Some updates
- New scenarios

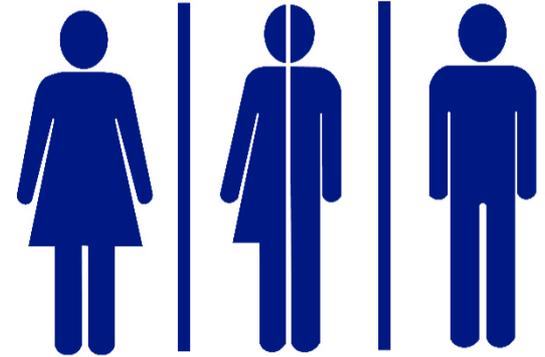


# What is Title IX?

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“[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.”

32 C.F.R. § 106.31





# Illinois Preventing Sexual Violence in Higher Education Act

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- Student rights and options
- Confidential advisors (including specified provided information)
- Procedural requirements
- Required training



# What is the scope of the University's Title IX policies?

Title IX is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded educational programs and activities.

Pursuant to US Department of Education regulations, the Interim Policy on Title IX Sexual Harassment applies to conduct occurring in the University's Education Programs or Activities that is committed by a student, faculty member, staff member, or third party affiliate and that occurs in the United States on or after August 14, 2020.

Conduct outside of the purview of the Interim Policy on Title IX Sexual Harassment may be addressed under the University's Policy on Institutional Equity.



# What's happened around Title IX lately?

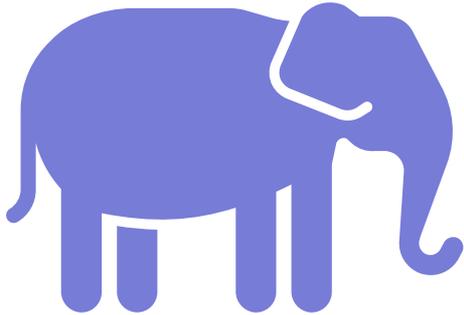
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- Most notably, U.S. Department of Education regulations effective August 2020
  - Include live hearing requirement for certain types of misconduct covered by Title IX



# Have the Title IX regulations been rescinded?



- No
- The 2020 Title IX regulations remain in effect and institutions must continue to abide by them
- Court challenges to the regulations have been unsuccessful (to date)
- Current administration cannot rescind or alter regulations without rulemaking process



# Will the Title IX regulations be rescinded?

- Changes are likely but wholesale rescission is not
- ED is currently engaged in a “comprehensive review” of Title IX regulations
  - Internal review of regulations and guidance
  - Public hearings with comments and feedback from stakeholders
- Any changes likely will not take effect until 2022-2023 academic year at the earliest



# Is there guidance in the interim?

- Yes
- July 2021 ED Q&A document on Title IX sexual harassment guidance
- Q&A articulates ED's interpretation of existing regulations and does not have the force and effect of law
- Includes sample language for key policy provisions



# Are there key points from the Q&A? (1 of 7)

- Regulatory application
  - Regulations apply to sexual harassment occurring on or after August 14, 2020
  - Sexual harassment in online/virtual operations of an institution is covered by Title IX
  - A school's Title IX obligations continued despite COVID-19

# Poll question

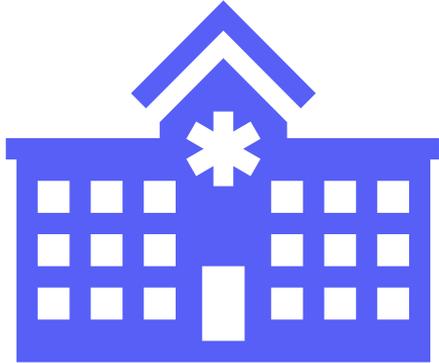
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- What is the most common “financial assistance” trigger for Title IX?
  - Government supported research
  - Subsidized grants and loans for students
  - Work study
  - COVID-19 emergency funding



# Can Title IX apply to entities other than colleges and universities?

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- Yes
- If those entities have an educational program and receive federal financial assistance
- E.g., K-12 schools; charter schools; hospitals

# What sexual harassment does Title IX apply to?

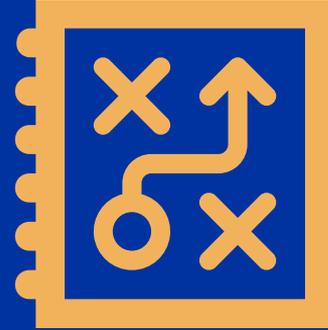
- Title IX applies to sexual harassment in the “education program or activity” of a federal funding recipient
  - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in private location that is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



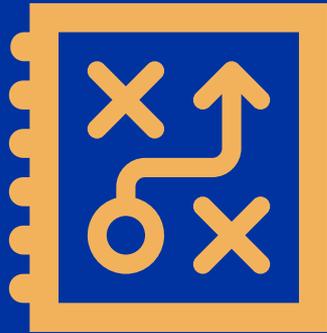


# Example (included in EP&A)

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One student in an online College course conducted by Zoom repeatedly sends vulgar and propositioning messages to another student using the Zoom private chat feature. The two students are physically in different places during the course.

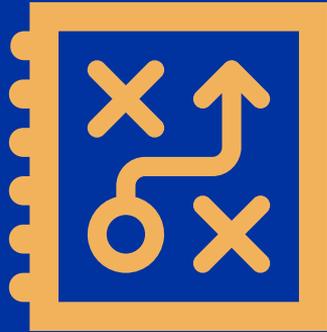


# Example (included in EP&A)



Student is sexually assaulted by teammates in a locker room after a practice that takes place at the University's on-campus field house. The teammates are all the same sex and gender.

# Example (included in EP&A)



Two students in the nursing program are in clinical rotations at a local hospital supervised by a preceptor who receives compensation from the University. One student sexually harasses the other in a breakroom commonly used by students in the program.

# Example (excluded from EP&A)



On a Saturday night, two students meet at a local bar and eventually go to a local hotel to “hook up.” One student exceeds the bounds of consent by attempting to choke the other student during the sexual encounter, despite having never discussed it.

# Example (excluded from EP&A)



A student parks on the far side of a public street adjacent to campus and is kidnapped by a former romantic partner while leaving for the day. The former drives the student to a secluded location across town and refuses to let the student leave until the student agrees to renew their relationship.



# Does Title IX apply to sexual harassment in other countries?

- No – the Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- Other countries may have laws that govern sexual harassment



# Poll question

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- May an institution still investigate and discipline reported sexual harassment occurring abroad?
  - Yes
  - No
  - It depends



# When must we dismiss a Title IX complaint?

- Alleged sexual harassment occurred outside education programs or activities
- Alleged misconduct could not be sexual harassment even if true
- Complainant who is not participating or attempting to participate in education programs and activities files a formal complaint



# What other policies might apply?

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- Institutions are free to use
  - Student code of conduct
  - Faculty/employee handbooks
  - Other policies

to address sexual harassment that does not occur in an education program or activity



# What other University policies may apply?

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- Conduct outside of the purview of the Interim Policy on Title IX Sexual Harassment may be addressed under the University's Policy on Institutional Equity.
- Harassment based on membership in a protected class is also Prohibited by the Policy on Institutional Equity
- General bullying or uncivil behavior that is not based on a protected class may implicate other University expectations and policies
  - Civility and Mutual Respect
  - Standards for Business Conduct
  - Student Handbook



# What standards do we apply to Title IX processes?

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- “Grievance procedures that provide for the prompt and equitable resolution of student and employee complaints” of sex discrimination under Title IX. 34 C.F.R. § 106.8(b)
- “Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.” 2020 Regulations



# 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
- Conflict and bias-free institutional participants



# Presumption of no responsibility

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- A “presumption that the respondent is not responsible for the alleged conduct [unless and] until a determination regarding responsibility is made at the conclusion of the grievance process”
- “[T]he presumption does not imply that the alleged harassment did not occur,” or that the respondent is truthful or a complainant is untruthful
- Designed to ensure that investigators and decision-makers serve impartially and do not prejudge that the respondent is responsible for the alleged harassment

See July 2021 Q&A



# What is a conflict of interest?

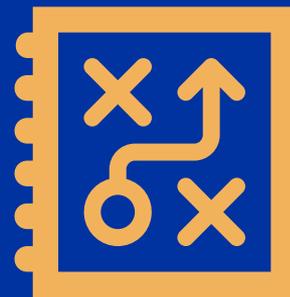
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- A material connection to a dispute, the parties involved, or a witness, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior relationship; professional interest; financial interest; prior involvement in a matter; or nature of position

## Example

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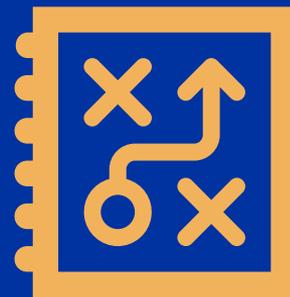
The University hires an outside attorney to serve as an investigator. The outside attorney currently represents the respondent's father in a personal injury lawsuit.



## Example

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The College assigns a faculty member to serve on a hearing panel. The faculty member previously wrote a glowing letter of recommendation for the complainant and has recently advised the complainant on graduate school applications.





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

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

# What is Title IX sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

Sexual assault

Dating violence

Domestic violence

Stalking



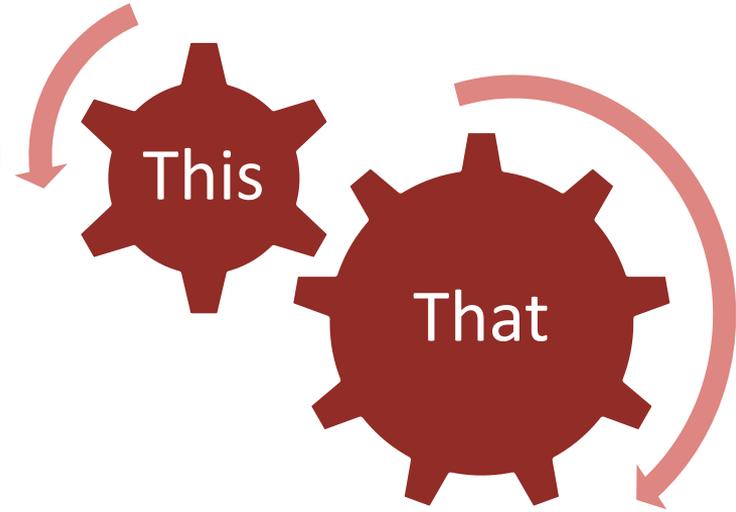
# What is the University's definition of (Title IX) Sexual Harassment?

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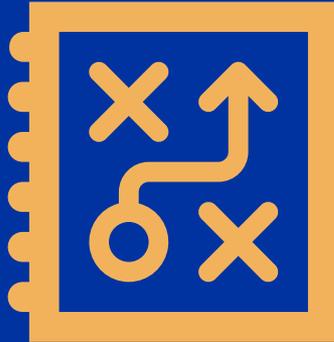
- Title IX Sexual Harassment is conduct on the basis of sex that satisfies one or more of the following:
  - Quid Pro Quo Sexual Harassment
  - Hostile Environment Sexual Harassment
  - Title IX Sexual Assault
  - Title IX Dating Violence
  - Title IX Domestic Violence
  - Title IX Stalking

# What is quid pro quo?

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



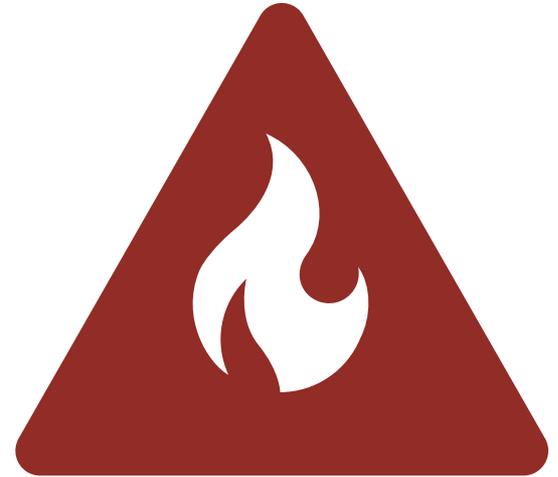
# Example of quid pro quo



A graduate student gives an undergraduate a failing grade on a lab exercise. When the undergraduate visits during office hours, the graduate student indicates a willingness to improve the grade if the undergraduate performs sexual favors.

# What is hostile environment?

Unwelcome conduct on the basis of sex 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.





## Does the University have another definition of sexual harassment under other policies?

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- Prohibited harassment is verbal or physical conduct or conduct using technology directed toward someone because of their membership (or perceived membership) in a protected class that has the purpose or effect of:
  - Substantially interfering with, limiting or depriving a member of the community from accessing or participating in the academic or employment environment, and/or substantially interfering with an individual's academic performance or work performance; or
  - Creating an academic or working environment that a reasonable person would consider to be intimidating, hostile, or offensive.
    - *-NU Policy on Institutional Equity*



# How do we determine if a hostile environment exists?

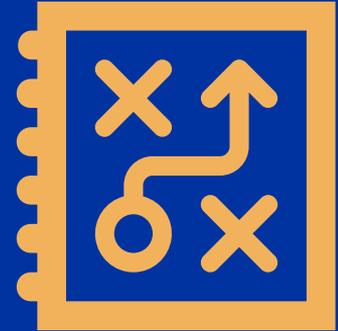
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- Consider all the facts and circumstances, such as:
  - The type of misconduct
  - The frequency of the misconduct
  - Where the misconduct occurs
  - Whether a power differential exists, etc.
- From the perspective of a reasonable person

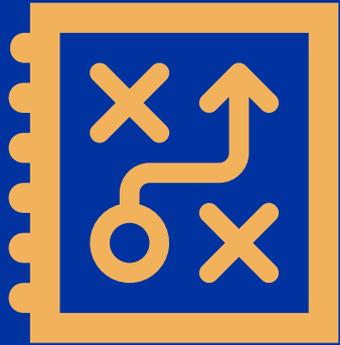


# Example of hostile environment

Political Science student repeatedly jokes and denigrates Business student based on Business student's gender expression. These jokes occur in class, in the bookstore where both students work, and in the residence hall at night. Political Science student always tells the jokes in the presence of others.



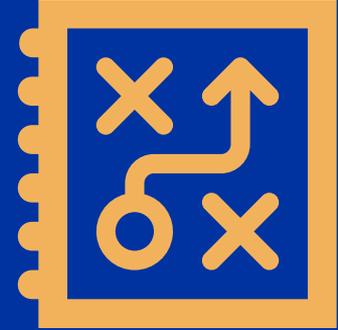
# Another example of hostile environment



Business office employee repeatedly rubs the business office employee's own genitals in the presence of an office colleague, to whom the business office employee is attracted. The business office employee also repeatedly touches the colleague's shoulders and hair, without asking. The two work in the same room. The colleague is "grossed out" and gets stressed about what the business office employee might try next.

# Another example of hostile environment

Art student expressed a desire to have sex with Math student, who declines. Thereafter, at numerous Greek parties attended by both, Art student asks if Math student is “ready to fu\*k yet.” Math student stops going to Greek parties to avoid being confronted by Art student.





# Does the First Amendment matter?

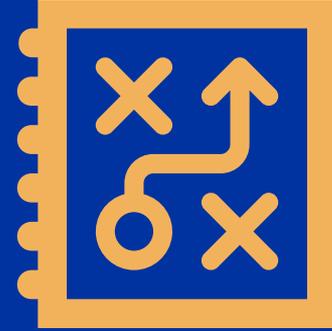


- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment (institutional policies on free expression for private institutions)
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment



## Example (not-hostile environment)

—  
Student, a cis-female, leads an on-campus protest opposing the institution's switch to gender-neutral housing and gender-neutral bathrooms. During the protest, Student holds a sign that reads: "I don't want to shower with dudes!"

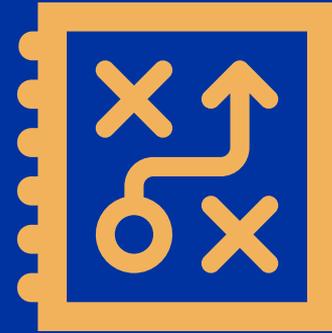




## Example (not-hostile environment)

—

During a University forum on gender issues, Student argues that another student is a bigot and part of “the patriarchy” because the other student rejects the entire construct of gender identity. Looking at the other student, Student says: “I don’t have to dress or behave a certain way just because I have a pu\*\*y!!!.”



# What is sexual assault?

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

Rape

Sodomy

Sexual assault  
with an object

Fondling

Incest



# What is the University's definition of Sexual Assault?

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- Rape
- Fondling
- Incest
- Statutory Rape



# What is rape (University definition)?

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The penetration, no matter how slight, of the vagina or anus with any body part or object or instrument, or oral penetration by a sex organ of another person, without the consent of the victim or where the victim is incapable of giving consent, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity. Attempted rape is included. An “object” or “instrument” is anything used by the offender other than the offender’s genitalia.



# What is the University's definition of consent?

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Consent is present when clearly understandable words or actions manifest a knowing, active, voluntary, and present and ongoing agreement to engage in a specific sexual or intimate contact.

Consent is not present when an individual does not have the capacity to give consent due to age, alcohol, drugs, sleep, or other physical condition or disability.

# 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.





# Example (incapacitated)

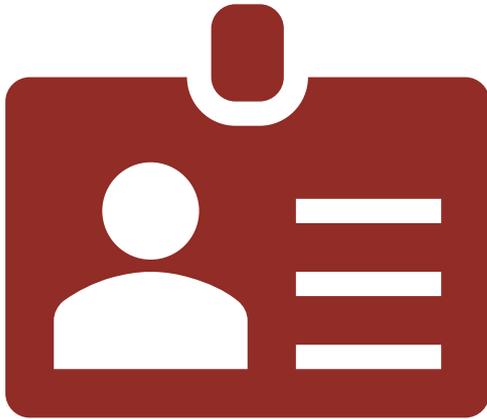
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Freshman and Sophomore are drinking shots in Freshman's dorm room and talking. Freshman encourages Sophomore to take several hydrocodone to "loosen up." After 30 minutes, Sophomore cannot stand, calls Freshman the wrong name, and has trouble staying awake. Freshman then has sex with Sophomore who lays unresponsive and does not wake up for six hours.



# What is statutory rape (University definition)?

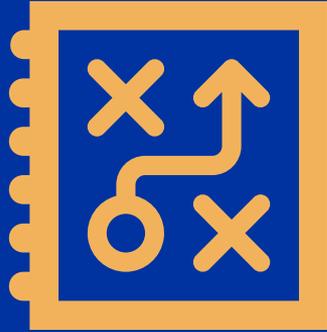
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Non-forcible sexual intercourse with a person who is under the statutory age of consent.



# Example



Short Student and Tall Student meet at a tailgate party, go to Short's dorm room after the football game, and have sex. Both are sober. Unbeknownst to Short, Tall is a dual-enrolled high school student who is 16. Short is 22. Tall's parents learn of the sexual encounter and make a report to the Title IX Coordinator.

# Poll question

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- Would the outcome change if Tall wanted to continue in a relationship with Short?
  - Yes
  - No

# Poll question

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- Must the institution report this situation to local authorities?
  - Yes, they must report
  - Only if the 16-year-old wants them to
  - No, Title IX prohibits disclosure



# What is fondling (University definition)?

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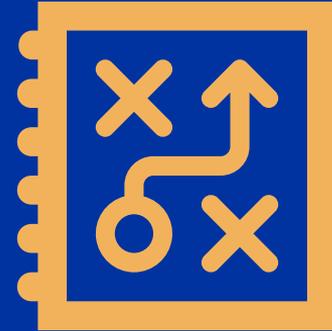
The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.



# Example of fondling

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Nursing Student and Student Body President are “making out” for the first time. Nursing Student begins to “feel up” President’s chest from outside the clothing. President pushes Nursing Student’s hands away. After more kissing, Nursing Student places their hands up President’s shirt and touches President’s bare chest. President responds: “I said no. Stop.”





# What is incest (University definition)?

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Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.



# What is domestic violence (University definition)?

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



# What is dating violence (University definition)?

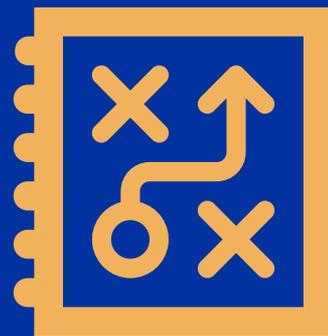
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“Dating Violence” is violence committed by a person:

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

# Example of dating violence

Two students have been dating for several months. One walks in on the other making out with a coworker on the sofa in the coworker's on-campus office. The student who walked in loudly shouts derogatory expletives at the other, threatens to "kill you both," and forces/yanks the other student by the arm and off the sofa.



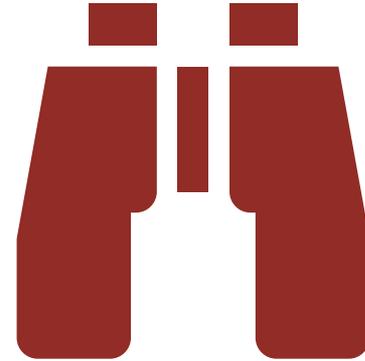


# What is stalking (University definition)?

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

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



# Example of stalking



Housing employee breaks up with Facilities employee. Facilities employee repeatedly shows up at the Housing office crying and asking for Housing employee. Facilities employee repeatedly instant messages Housing employee during work to talk about their relationship. Housing employee rebuffs Facilities employee. One night, Facilities employee follows Housing employee home by car from the institution's parking lot, prompting Housing employee to call police.



# Does Title IX also prohibit retaliation?

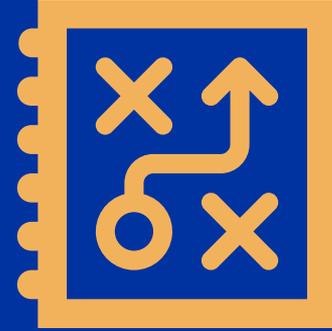
Yes – Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated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



# Example of retaliation

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A student reports that another committed sexual assault. Believing that the reporter has filed false accusations, a third student—the roommate of the respondent—spray paints derogatory terms on the reporter's car.

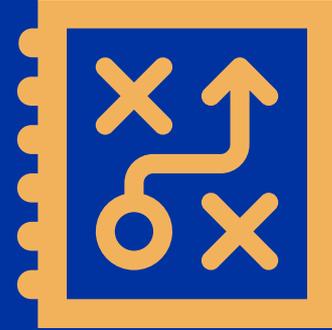




# Example of Retaliation????

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A student reports that another committed sexual assault. Respondent's lawyer sends the reporter a letter stating that the report is false and that the reporter is committing defamation. The letter demands the reporter retract the report or respondent will sue.



# Poll question

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- Is this retaliation?
  - Yes
  - No

# What is the resolution process?

Report

Initial  
assessment  
/  
Supportive  
Measures

Formal  
complaint

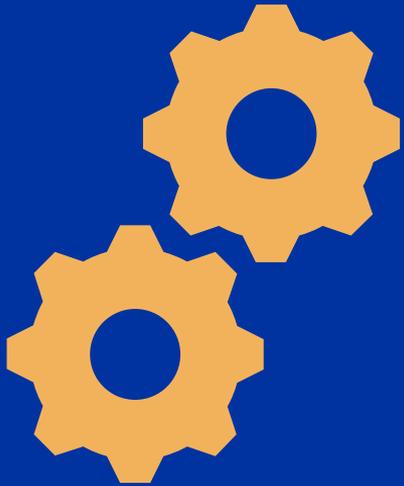
Possible  
informal  
resolution  
(not  
employee  
-on-  
student)

Investigation  
to collect  
relevant  
inculpatory  
and  
exculpatory  
evidence

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

Appeal

## Group Scenario



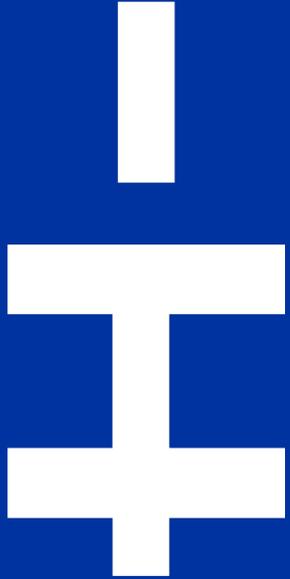
On-Campus Student and Online Student connect on Tinder. They meet in a campus parking lot where they take several shots of hard alcohol and anti-depressants that On-Campus brought. The two students kiss in the car for 30 minutes before driving to an off-campus hotel room where they have oral sex and intercourse without incident.

The two students connect again a week later and meet in On-Campus's dorm room. At Online's request, On-Campus supplies alcohol and anti-depressants. The two engage in various forms of sexual activity over the course of an hour. Online then gets on top of On-Campus and initiates intercourse. However, before the act is complete, Online passes out and slumps over.

After some time, On-Campus carries Online to On-Campus's car in order to drive Online back to Online's off-campus apartment. Online comes-to in the car and becomes violent, striking On-Campus, throwing items at On-Campus, and demanding to know what On-Campus did "while I was out." The next day, Online files a formal complaint, accusing On-Campus of sexual assault by incapacitation with respect to both encounters. On-Campus files a counter-complaint alleging sexual assault and dating violence with respect to the second encounter. Online then files a counter-counter complaint accusing On-Campus of retaliation by having brought a frivolous counter-complaint.

# Questions





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**Privacy &  
Confidentiality**

# Why do I need to know about Privacy?



## Office of Equity

- Reports/complaints
- Supportive measures
- Informal resolution

## Investigators

- Interacting with witnesses
- Evidence sharing
- Report writing & sharing

## Decision-makers

- Exclusionary rule
- Appropriate discussion of evidence
- Decision writing

## Others

- General understanding of sensitive nature of subject matter



# What do we do with reporter requests to remain anonymous?

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- Attempt to honor, if possible
- In cases of complainants seeking anonymity, will consider facts and circumstances
- University will not compel an individual to participate



# FERPA

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



# Are parties allowed to talk about a case?

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- Title IX regulation prohibits an institution from restricting the ability of a party 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 (speech policies at private institutions)
- Witness manipulation and intimidation can still be addressed by institution



# Are interviews and hearings confidential?

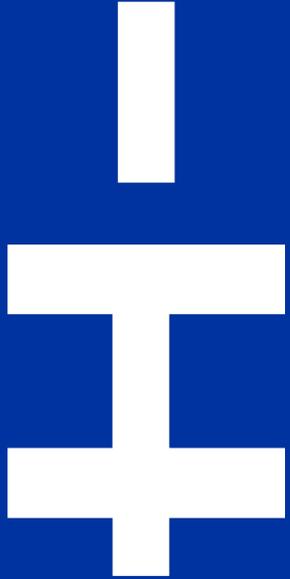
- Institution should restrict access to investigations and hearings to those persons whose attendance is required to effectuate policy
- Parties may be accompanied by advisors of choice and potentially others if justified by the need for a reasonable accommodation
- Media should not be granted access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



# Are an advisor's communications with a party “privileged”?

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- Not absent a privileged relationship (e.g., not if advisor is an employee with no special relationship—engaged as attorney, treating healthcare provider, pastor serving in that role—to party)
- Communications are generally not found protected from discovery in criminal and civil legal processes
- Advisors should not disclose communications with a party to a third-party unless FERPA/privilege/policy allows it
- An institution may require advisors to disclose communications to another institutional official in certain circumstances (e.g., health/safety emergency)



HUSCH BLACKWELL

University  
Reporting



# Why do I need to know about reporting?

## Office of Equity

- Obligation to manage reports

## Investigators

- Potential referrals
- Potential need to revise notice

## Decision-makers

- Confirming notice
- Ensuring misconduct reported = misconduct considered
- Potential referrals/re-routing

## Others

- Understand your duties
- Potential referrals

# Who manages Title IX prevention and response at the University

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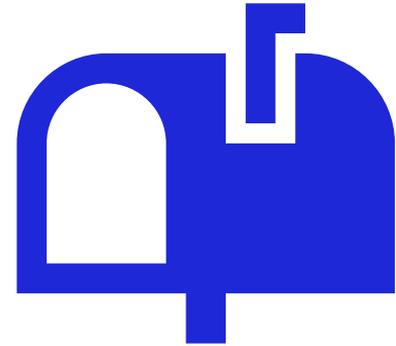
- Colleen Johnston, Title IX Coordinator
  - 847-491-3881
  - [colleen.johnston@northwestern.edu](mailto:colleen.johnston@northwestern.edu)
- Amanda DaSilva, Deputy Title IX Coordinator (for complaints involving students)
  - 847-467-6571
  - [amanda.dasilva@northwestern.edu](mailto:amanda.dasilva@northwestern.edu)
- Karen Tamburro, Deputy Title IX Coordinator (for complaints involving faculty and staff)
  - 847-491-6697
  - [karen.tamburro@northwestern.edu](mailto:karen.tamburro@northwestern.edu)



# How does an institution get notice of sexual harassment?

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





# What is “actual knowledge”?

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- “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

# What are University reporting options?

Contact the Title IX Coordinator or a Deputy Title IX Coordinator

Sexual Misconduct Reporting Form

- [bit.ly/NUReportSexualMisconduct](https://bit.ly/NUReportSexualMisconduct)

EthicsPoint

- 866-294-3545
- [www.northwestern.edu/ethics](http://www.northwestern.edu/ethics)

Law enforcement (NU Police/Evanston Police)

# Who are University “responsible employees”?

- All University employees (including student employees) and graduate students with teaching or supervisory authority are obligated to promptly report sexual misconduct of which they become aware in the scope of their work for the University to the Office of Equity
  - Unless they are a resource not obligated to report as identified in the Interim Policy on Title IX Sexual Harassment
- Employees are encouraged to fulfill their reporting obligations by completing the Sexual Misconduct Reporting Form available at [bit.ly/NUReportSexualMisconduct](https://bit.ly/NUReportSexualMisconduct)

# Who/what are University confidential resources?

## Center for Awareness, Response, and Education (CARE)

(provides support, advocacy, and education to students)

## Counseling and Psychological Services (CAPS)

(provides counseling services to students)

## Office of Religious and Spiritual Life

(provides spiritual counseling and advice to members of the University community)

## Employee Assistance Program

(provides crisis intervention and short-term counseling to faculty and staff as well as their household family members)

## Faculty Wellness Program

(provides free consultations for faculty members to identify appropriate resources for personal and professional concerns)



# University amnesty provision

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*To encourage reporting, an individual who makes a good-faith report of Title IX sexual harassment that was directed at them or another person will not be subject to disciplinary action by the University for a conduct or policy violation that is related to and revealed in the sexual misconduct report or investigation, unless the University determines that the violation was serious and/or placed the health or safety of others at risk.*

-NU Title IX Resource Guide



# When do we reach out to the alleged victim?

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



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

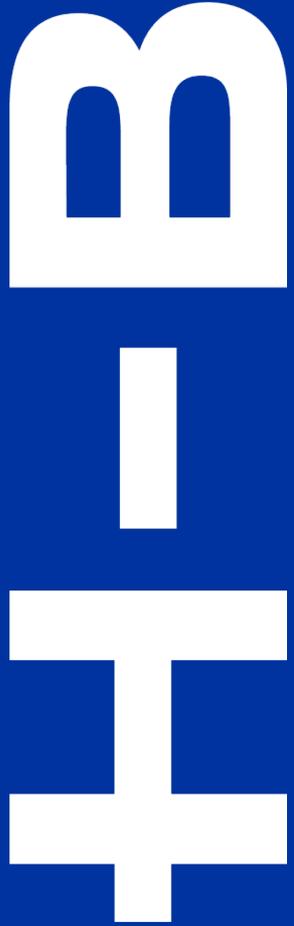
- Title IX Coordinator should oversee preliminary investigation to determine identity of alleged victim
- If identity of alleged victim cannot be discerned after reasonable inquiry, matter should be documented and consideration given as to whether other policies (such as student code of conduct) are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



# What should we tell the alleged victim about the process?

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- Amount of information will depend on your role (e.g., responsible employee vs. Office of Equity)
- Refer to policies, procedures, and resources



HUSCH BLACKWELL

**Supportive  
Measures & Interim  
Restrictions**





# Why do I need to know about Supportive Measures



## Office of Equity

- Responsible for initial outreach regarding supportive measures and overseeing implementation of same

## Investigators

- Parties may request supportive measures throughout process and may have questions or concerns; refer to Title IX Coordinator

## Decision-makers

- Parties may request supportive measures throughout process and may have questions or concerns; refer to Title IX Coordinator

## Others

- Parties may request supportive measures throughout process and may have questions or concerns; refer to Title IX Coordinator



# Do we need a formal complaint?

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



# Supportive measures

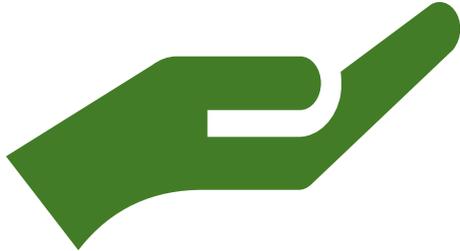
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- Must be offered to an alleged victim once an institution has actual knowledge of potential harassment
  - Must be offered also to respondent once a formal complaint is filed
  - Ambiguity as to whether support services must be offered to respondent before formal complaint is filed
  - Non-disciplinary in nature; no-disciplinary measures until end of investigation and grievance process
  - Title IX Coordinator has responsibility to oversee offering and implementation



# What are supportive measures?

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- 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

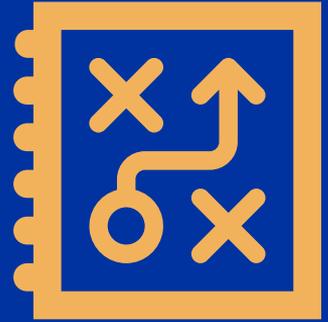
 Mutual no-contact order where implicated by facts



# Example of reasonable supportive measure

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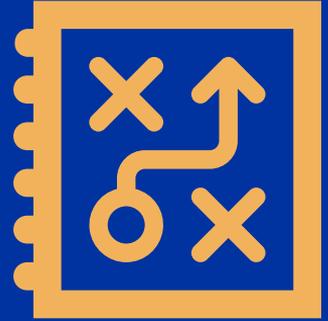
Grad Student reports that Undergrad Student sexually harassed Grad by repeatedly propositioning Grad until Grad's brother intervened. Grad would like to receive counseling but does not wish to file a formal complaint. Grad does not believe Undergrad poses a physical threat.





# Example of reasonable supportive measure

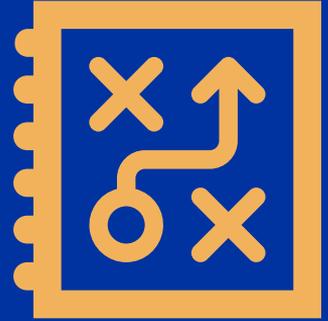
History student in History 101 reports that another student, also in History 101, sexually assaulted History student two weeks ago. History student is uncertain whether to file a formal complaint but wants assistance transferring to a different section of History 101.





# Example of reasonable supportive measure

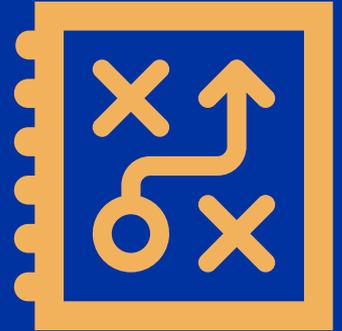
Graduate student reports that supervising faculty member has propositioned the graduate student for sex, multiple times. Graduate student wants assistance finding a different supervising faculty member. The department is large but does not have other faculty members with the faculty member's precise expertise.





# Example of unreasonable supportive measure

One student reports the other of a sexual assault three years ago between the two when they were first years. The reporter has received strong academic marks since then. The reporter requests a refund of all tuition and housing charges for the last three years and a waiver of tuition and charges until the reporter completes graduate school.

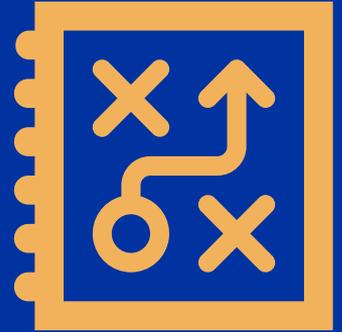




# Example of unreasonable supportive measure

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.



# Poll question

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- Is the prior scenario different if the complaining employee alleges they have anxiety disorder and PTSD as a result of the misconduct?
  - Yes
  - No



# Can supportive measures affect the respondent?

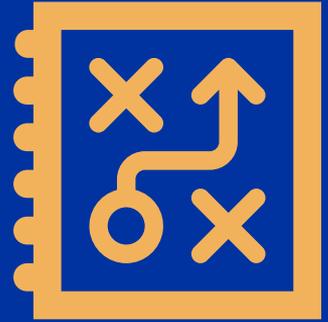
- Yes, but cannot create an unreasonable burden
- Cannot be a form of *de facto* discipline
- Supportive measures are not a substitute for the investigation and hearing process



# Example of unreasonable burden

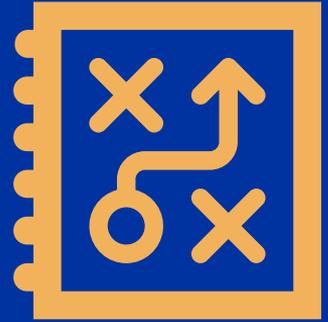
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Student Worker accuses Colleague of sexual harassment. Institution imposes proximity restriction that prohibits Worker and Colleague from being within 200 meters of each other pending investigation and hearing.



# Example of disciplinary supportive measure

In-State Student accuses Out-of-State Student of sexual assault. In-State requests as a support measure that Out-of-State be removed from all shared classes, removed from shared dormitory and made to live off campus, and prohibited from being on campus after 5:00 pm.





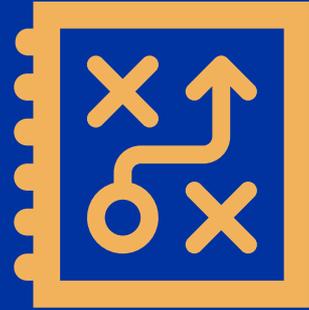
# Can we use interim removals or suspensions for students?

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- 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

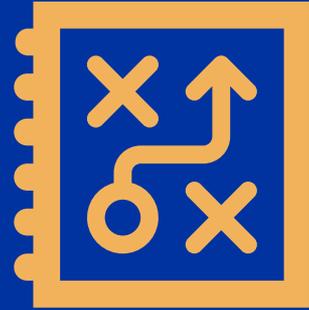
# Example of immediate threat to physical health or safety

Mechanic Student is reported to have raped Tech Student after providing Tech with a large quantity of heroin. Tech explains that Mechanic keeps heroin 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.



# Example of immediate threat to physical health or safety

Student reports that another slapped and beat the reporter when the broke up with the other student. The reporter says the respondent has since threatened to kill the reporter and anyone the reporter might date. The breakup occurred two days ago. The reporter has visible injuries.



# Example of no immediate threat to physical health or safety



Engineering Student reports that Philosophy Student committed sexual assault by having sex with Engineer while Engineer was incapacitated after the two were drinking. The incident occurred two years ago. Philosopher has no disciplinary record. Engineer reports minimal but positive interactions with Philosopher since the incident.



# 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
  - Critical Incident Response Team (“CIRT”)
  - Interim suspension provisions of Student Handbook



# Can we place employees on administrative leave?

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

# Example of administrative leave



Faculty member is accused of having sex in on-campus office with Undergraduate Student currently in the faculty member's class. Undergraduate alleges the encounter was non-consensual. Faculty member admits to sex but denies it was coerced or otherwise non-consensual. Institution temporarily suspends faculty member from teaching but continues pay and administrative duties.

# Example of administrative leave



Athletics department trainer is accused by multiple student athletes of unwelcome and unnecessary touching of genitals. Institution removes trainer from having any contact with student athletes pending investigation.



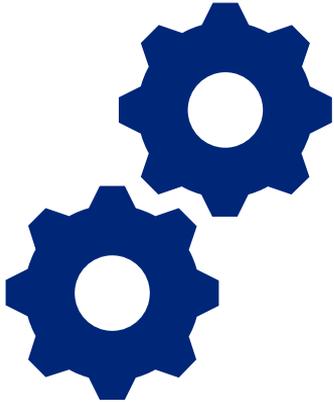
# Clery ⇔ supportive measures

- Rights and options
  - Statements about disciplinary proceedings
  - Notification about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid and other services available for victims, both within the institution and in the community
- Required by VAWA
  - Must be given in writing to the reported victim of any VAWA crime
  - Consider equitable access to supportive measures information for respondents



# Do students and employees have other rights?

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- 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



# Are there key points from the Q&A? (2 of 7)

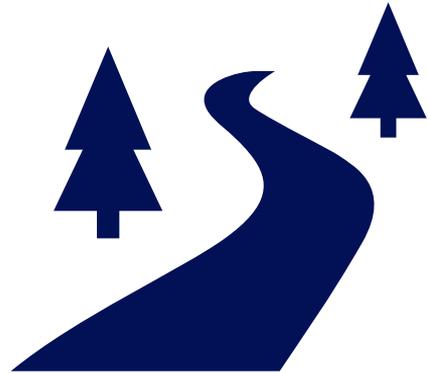
- Combatting sexual harassment
  - Schools should take steps to affirmatively prevent sexual harassment in addition to the grievance process
  - Schools can take additional steps to combat sexual harassment as long as those steps don't conflict with regulations



# What if the report falls outside Title IX jurisdiction?

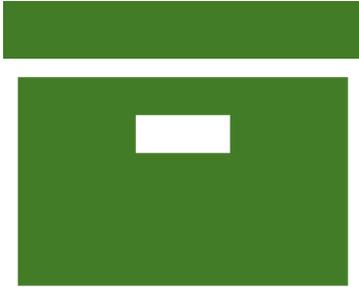
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- Title IX requires supportive measures for reported sexual harassment covered by Title IX
- Institution may provide supportive measures for reported conduct that falls outside Title IX's scope





# Are supportive measures confidential?



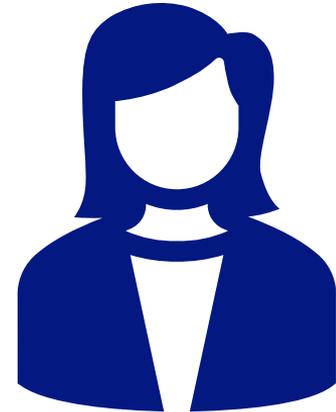
- Generally, yes
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with institutional employees who have a legitimate need to know



# Who is responsible for supportive measures?

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



# Emergency Resources

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## Northwestern University Police Department

- (has officers who are specially trained to work with victims of sexual violence)
- 847-491-3456 (Evanston)
- 312-503-3456 (Chicago)
- [www.northwestern.edu/up](http://www.northwestern.edu/up)

## Evanston Police

- 911 or 847-866-5000
- [www.cityofevanston.org/police](http://www.cityofevanston.org/police)

## Chicago Police

- 911 or 312-744-4000
- [home.chicagopolice.org](http://home.chicagopolice.org)

# Medical Resources

## Northwestern University Health Service

- 847-491-8100  
(Evanston)
- 312-695-8134  
(Chicago)

## NorthShore University Health System/Evanston Hospital

- 847-570-2111

## Northwestern Memorial Hospital (Chicago)

- 312-926-5188

## Presence Saint Francis Hospital (Evanston)

- 847-316-4000

# 24-hour Services

## Counseling and Psychological Services (CAPS)

- (Provides counseling services to Northwestern students)
- 847-491-2151 (24 hours)
- [www.northwestern.edu/counseling](http://www.northwestern.edu/counseling)

## Chicago Metro Rape Crisis Hotline (YWCA)

- 888-293-2080

## Chicago Domestic Violence Line

- 877-863-6338

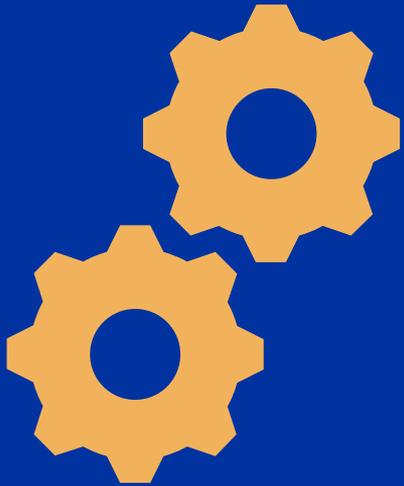
## Evanston Domestic Violence Line (YWCA)

- 877-718-1868

## Rape, Abuse, and Incest National Network (RAINN)

- 800-656-HOPE

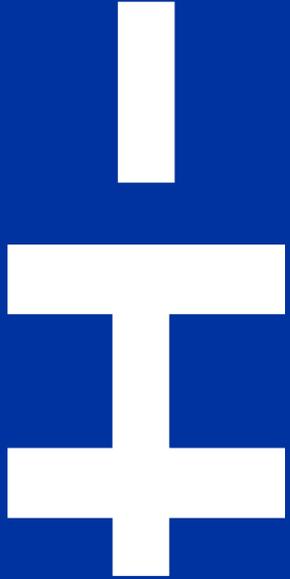
## Group Scenario



Future Oncologist and Future Psychiatrist are both in their third year of medical school. Oncologist reports that Psychiatrist sexually harassed Oncologist by repeatedly propositioning Oncologist at a school-sponsored happy hour. Oncologist has not decided whether to file a formal complaint. Oncologist requests several supportive measures, including free counseling; the ability to complete the semester remotely; never to be in the same class or clinical rotation with Psychiatrist; and for Psychiatrist to participate in supplemental sexual harassment training and a substance abuse prevention program. Oncologist submits a doctor's note indicating Oncologist suffers from anxiety and PTSD when in Psychiatrist's presence. Unbeknownst to Oncologist, another student accused Psychiatrist of similar sexual harassment a year prior but did not make a formal complaint. The Dean reports that the school has never allowed a student in their third year to study remotely and that required in-person experiences cannot be replicated remotely. The Dean also reports that, due to the small size of the class, it would be impossible to guarantee Oncologist and Psychiatrist would never be in the same class or clinical rotation.

# Questions





HUSCH BLACKWELL

# Alternative & Parallel Processes



# Why do I need to know about Alternative/Parallel Processes?

## Office of Equity

- Critical to assessing reports and educating parties about resolution mechanism and options

## Investigators

- May receive requests for alternative resolution during investigation
- May obtain information that requires referral to Title IX Coordinator or other University offices

## Decision-makers

- May obtain information that requires referral to Title IX Coordinator or other University offices

## Others

- May obtain information that requires referral to Title IX Coordinator or other University offices





# Informal Resolution

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# What is informal resolution?

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

# Types of Informal Resolution

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Mediation

Facilitated  
discussions led by  
Title IX  
Coordinator

Restorative justice

Attorneys for  
parties negotiate  
an agreement

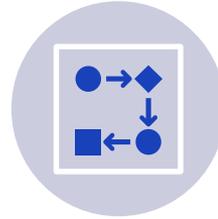
Arbitration without  
a live hearing

# What are the key concepts of informal resolution?

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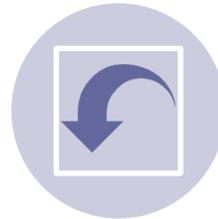
A formal complaint must first have been filed and written notice given to the parties



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



The parties must voluntarily agree to participate in writing



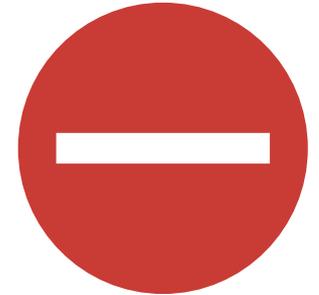
The parties must be allowed to withdraw from informal resolution up until the point it is final



# What are the limitations?

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- 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





# Are there key points from the Q&A (4 of 7)?

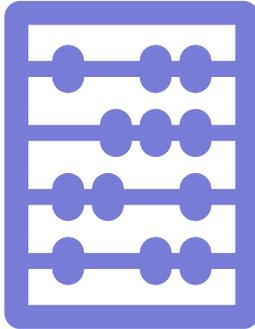
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- Informal Resolution
  - Regulations leave the term “informal process” undefined to allow schools discretion to adopt processes that serve the needs of their communities
  - Schools may exercise discretion to make fact-specific determinations about whether to offer informal resolution in response to a particular complaint
  - Whether to participate in a particular form of informal resolution is a decision for each party to make, and parties should not be pressured to participate



# What are considerations around whether informal resolution is appropriate?

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- 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



# What is restorative justice?

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“Restorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”

-Howard Zehr

# How does restorative justice compare to general informal resolution?

## General Informal Resolution

- No guided or structured preparation
- Immediate parties only
- Shared responsibility/no obligation to accept responsibility
- Solution: Compromise
- Focus on facts/evidence

## Restorative Justice

- Substantial preparation
- Community & institutional participation
- Acceptance of responsibility
- Trauma-informed safeguards
- Focus on repairing relationships & restoring trust

Common features: trained facilitators; shuttle negotiation; described as “mediation”

# Can a case that is resolved informally be “reopened”?

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- It depends upon the terms of the informal resolution
- Title IX Coordinator should ensure that any informal resolution clearly resolves this question





# Parallel Processes

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

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- 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?

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- 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 two processes at the same time?



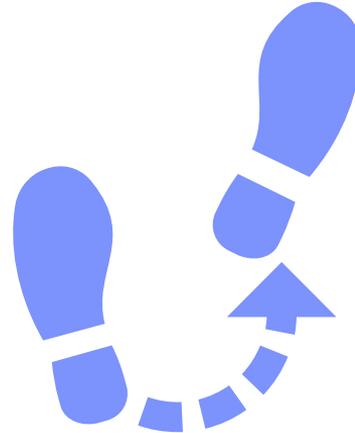
- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ



# May we use another process before Title IX?

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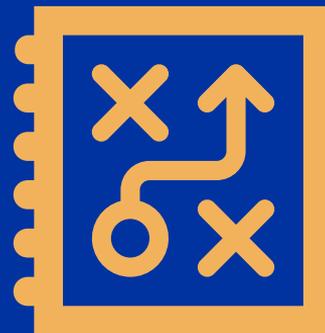
- Yes
- Some processes do not require a formal complaint and may be initiated prior to Title IX
- Other policy violations may be apparent prior to Title IX



## Example

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Student makes a verbal report that resident director provided alcohol to underage Student and then attempted to grope Student before Student fled the room. Resident director admits to providing alcohol but denies any attempted groping.



# Poll question

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- May the institution terminate the resident director's employment for violating its drug and alcohol policy even if there is no formal Title IX complaint?
  - Yes
  - No



# May we use another process after Title IX?

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- 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





# Are there key points from the Q&A? (5 of 7)

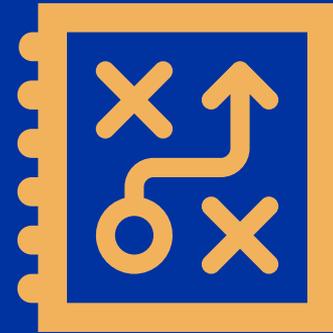
- Other policies
  - Schools may address conduct that falls outside the scope of the regulations through other policies
  - A school may use its code of conduct to address sexual harassment where the complainant is not a participant at the time the complaint is filed
  - Forms of sex discrimination other 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

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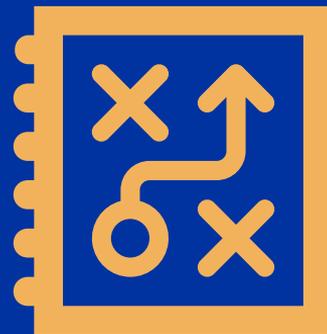
Medical Student accuses Physical Therapy Student of sexual assault after Physical Therapy Student rendered Medical Student incapacitated by providing Medical Student with illegal drugs. Title IX hearing officer concludes Physical Therapy Student provided Medical Student illegal drugs but that Medical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



## Example

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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 conduct a “joint” investigation?

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- 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



# Poll question

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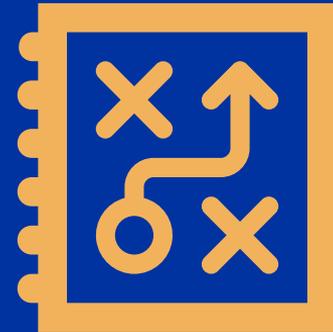
- Can the resolution of a non-Title IX process result in the termination of a Title IX process?
  - Yes
  - No



# Example

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Student complains that Graduate Assistant harassed Student by sending Student an email with a pornographic video attached from GA's University laptop. GA claims the video was sent to Student by accident; Student's email account was close to the intended recipient's email account, which was mistyped. Institution terminates GA for violating institutional prohibition on accessing pornography from institutional computers.

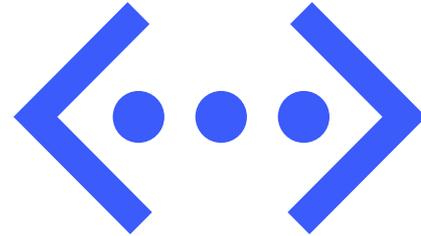




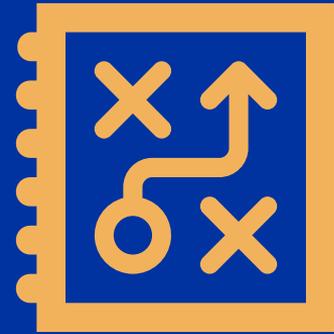
# Can two institutions have jurisdiction at the same time?

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



# Example



Multiple schools collaborate to share classroom and dormitory space for a “semester in D.C.” program where students take classes and live while working in a government internship. One student from College sexually harasses a student from University in the classroom space.



# 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



# What does University policy say about dismissals?

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- Office of Equity conducts an initial inquiry to assess:
  - whether the allegations, if substantiated, would rise to the level of a violation of University Policy;
  - determine the specific policy implicated;
  - assess appropriate University response.
- Includes mandatory dismissal provisions
- Written notice and opportunity to appeal
- May refer to other University offices
- May make non-punitive, educational outreach to those involved



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

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- 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



# Are there key points from the Q&A?

## (6 of 7)

---

- 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 a finding of Title IX Sexual Harassment?

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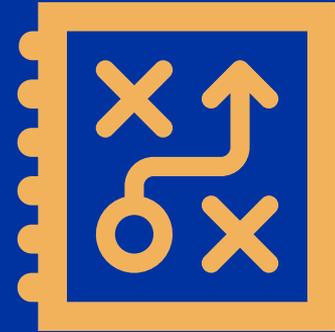


- No
- Title IX regulation requires the use of specific Title IX process for any “sexual harassment” as defined by Title IX that occurs in institution’s programs and activities

## Example

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Dorm Resident files formal Title IX complaint against Student Security Officer alleging that Officer engaged in sexual harassment by masturbating in the hallway outside Resident's room. Resident withdraws Title IX complaint to avoid being cross-examined at hearing. Institution then charges Officer with lewd conduct under student code of conduct, which does not use a hearing process.



# Poll question

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- Is it permissible to charge respondent with lewd conduct in this scenario?
  - Yes
  - No
  - It depends



# What if a party refuses to be interviewed?

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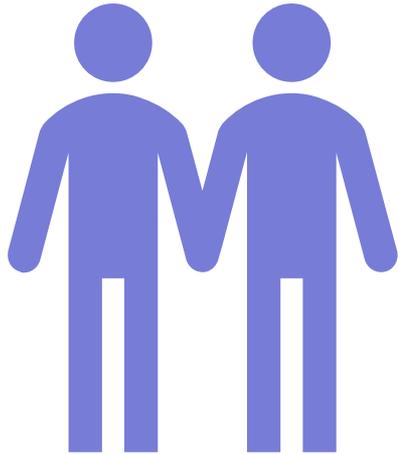
- Institution cannot compel a party to submit to a Title IX interview
- Institution may evaluate whether to proceed if complainant refuses
- Investigation should proceed despite respondent's refusal
- May dismiss if other sufficient evidence is unavailable





# What if a party refuses to be interviewed without their lawyer?

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- Party may be accompanied by an advisor of choice, including a lawyer
- Institution may require its lawyer to be present during interview

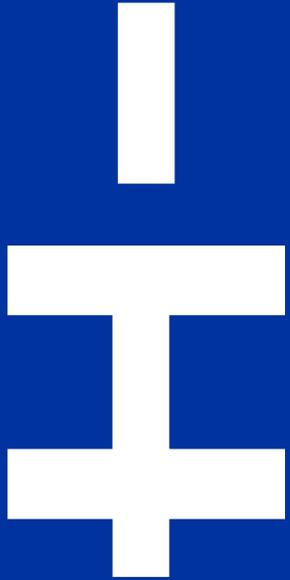
# Questions





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# The Investigation Process





# Why do I need to know about Investigations?

## Office of Equity

- 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 Title IX investigation?

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



# What are the general principles of an investigation?

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

# Investigation Framework

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The investigators interview the complainant, respondent, and relevant witnesses.

The investigators identify and gather evidence.

At the conclusion of evidence gathering, the investigators give the parties an equal opportunity to inspect and review evidence obtained.

After the parties have provided their written response, the investigators will create a written investigative report summarizing the relevant evidence collected.

# Poll question

---

- What is the first step in the investigation process?
  - Receiving a written, formal complaint
  - Issuing a written notice to the parties
  - Scheduling interviews
  - Collecting emails and text messages
  - Notifying the hearing officer that there is a new case



# What is a formal complaint?

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

# Poll question

---

- May an alleged victim who has already graduated file a formal complaint?
  - Yes
  - No
  - It depends



# How do we tell the parties about an investigation?

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





# What else does the notice need to say?

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

## Example (incorrect)

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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.

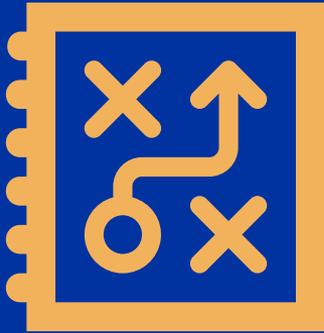


## Can we gather any information prior to the written notice?

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- 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, investigator meets with the complainant and asks for more specific information about what happened—the “who, what, when, where, and how.”

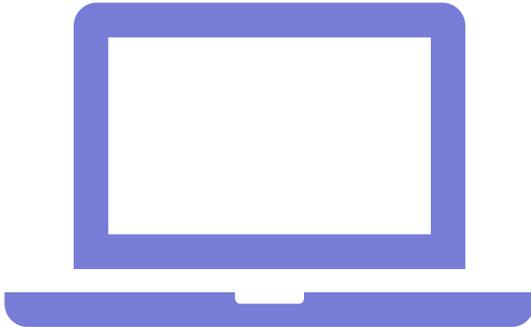
# Example (preliminary inquiry)



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.



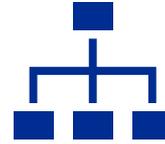
## May we take steps to preserve information before sending the written notice?



- 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

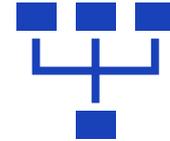
# Can we consolidate the complaints?

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

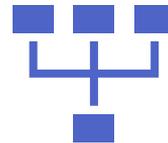


Multiple respondents

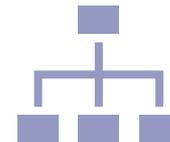
Multiple complainants



Multiple allegations against a single respondent



Multiple allegations from a single complainant





# Advisors

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# May parties have an advisor during the investigation?

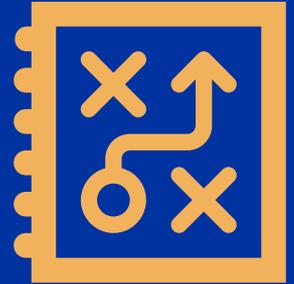
- Yes – parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role during the investigation phase
- Institution is not required to provide an advisor during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





## Example

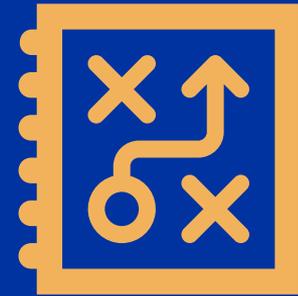
The institution sends a written notice of investigation to respondent requesting an interview. The advisor (an attorney) responds and indicates respondent will not submit to an interview. The advisor submits a legal brief seeking “dismissal” of the complaint and giving the respondent’s factual narrative. The document is on law firm letterhead and signed only by the advisor.



## Example

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A complainant identifies a sexual assault victim's advocate as advisor. The advocate indicates by email complainant will only respond to written questions that are pre-screened by the advocate and revised, as necessary, so as not to re-traumatize the complainant. Advocate tells investigator not to communicate with complainant directly.

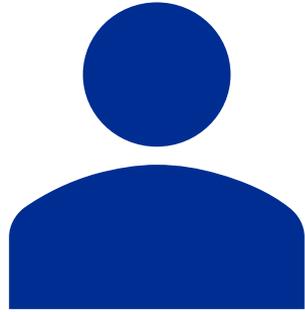




# Collecting information

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# How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of non-testimonial evidence

# How do you structure an interview?

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Rapport building/information providing phase



Substantive testimony collection

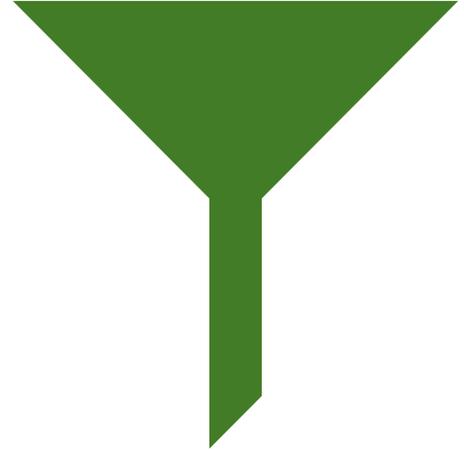


Closure/information providing phase



# How do I ask questions in the substantive phase?

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



# Examples of open invitations



“Please tell me what happened that night.”



“Can you walk me through what happened?”



“In your own words, tell me what occurred.”



“Can you tell me everything that happened after you got to the party?”

# Examples of facilitators



## Examples of cued invitations

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

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

“You said they  
'coerced' you. Can you  
tell me what they did?”

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

# Examples of recognition prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)



# Active Listening

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- 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 that content
- Active listening requires a set of skills that you can employ; focus on employing the same skills you would apply when trying to understand information in an emergency situation



# Active Listening

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- 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

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- 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.
  - Check perceived emotions
    - To check your perception of the feelings of someone else, state what you perceive that person to be feeling.
      - Adapted with permission from “Essentials of Active Listening” – Written by Dean of University of Missouri Kansas City Law School



# Active Listening

Ineffective	Effective
<b>NON VERBAL BEHAVIOR</b>	
Listener looks bored, uninterested or judgmental; avoids eye contact; displays distracting mannerisms (doodles, etc.)	Listener maintains positive posture; avoids distracting mannerisms; keeps attention focused on speaker; maintains eye contact; nods and smiles when appropriate.
<b>FOCUS OF ATTENTION</b>	
Listener shifts focus of attention to self: “When something like that happened to me, I...” (attention may focus internally, as when thinking about how you would feel, respond, etc.)	Listener keeps focus on speaker: “When that happened, what did you do?”
<b>ACCEPTANCE</b>	
Listener fails to accept speaker’s ideas and feelings: “I think it would have been better to...”	Listener accepts ideas and feelings: “That’s an interesting idea, can you say more about it?”
<b>EMPATHY</b>	
Listener fails to empathize: “I don’t see why you felt that...” (or, more commonly, simply silence or ignoring feelings)	Listener empathizes, “So when that happened, you felt angry.”

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# Active Listening

PROBING	
Listener fails to probe into an area, to follow up on an idea or feeling	Listener probes in a helpful way (but does not cross examine) “Could you tell me more about that? Why did you feel that way?” “A few minutes ago you said...”
PARAPHRASING	
Listener fails to check the accuracy of communication by restating in his own words important statements made by the speaker	Listener paraphrases at the appropriate time.
SUMMARIZING	
Listener fails to summarize	Listener summarizes the progress of the conversation from time to time
ADVISE	
Listener narrows the range of alternatives by suggesting the “Solution”	Listener broadens the range of ideas by suggesting (or asking the speaker for) a number of alternatives

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Written by Dean of University of Missouri Kansas City Law School



# How do we make a record of the interview?

- Note-taking and audio recording are both appropriate methods of making a record of the interview
- If the investigator takes notes, they should be used to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator's mind
- If the investigator records the interview, the investigator must be sure to clearly state on the record the time, place, date, and persons involved in the interview



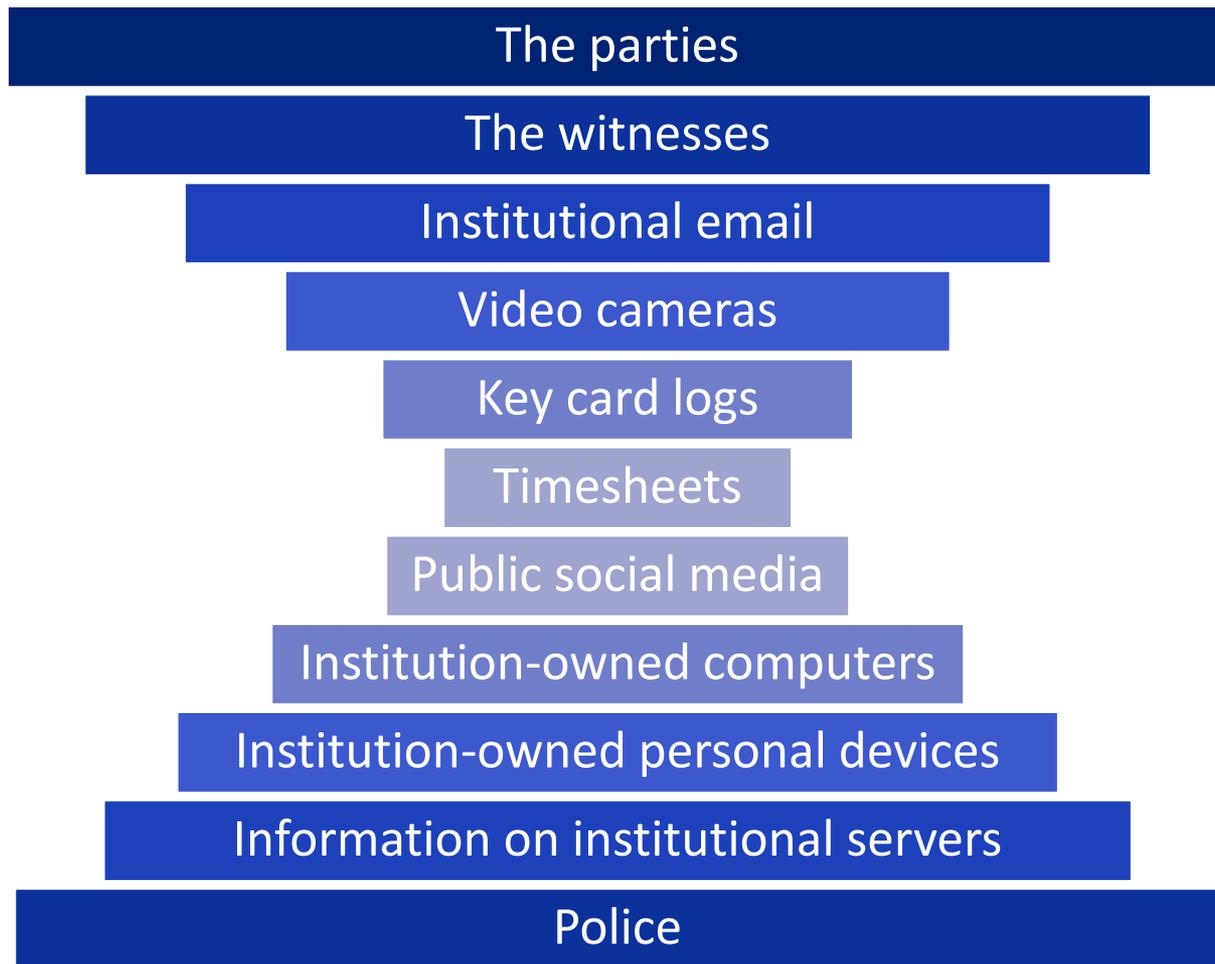


# Do parties/witnesses have a right to record the interview themselves?

---

- Investigation meetings are not audio or video recorded by the University and may not be recorded by any participant.
- Parties and witnesses may take notes during investigation meetings.

**Example  
sources of  
non-testimonial  
evidence**





# Potential Trauma

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# How do we approach potential trauma?

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- “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)

# 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



# Trauma might affect a party

- Not in every case
- Not just one party
- Never assume anyone participating in a hearing has 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

---

- Don't 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



# Are there key points from the Q&A? (3 of 7)

- Process
  - A school may use a “trauma-informed” approach as long as it does not adopt improper presumptions or stereotypes
  - Presumption of no responsibility does not mean a presumption that the complainant is lying or that alleged harassment did not occur



# Particular Types of Information

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# May an investigation collect evidence on sexual history?

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



# May an investigation collect and rely on privileged records?

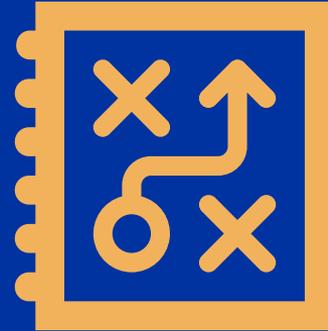


- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes



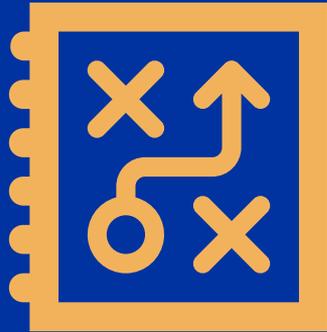
# Example of permissible use

—  
Student who makes report of sexual assault executes release allowing disclosure of counseling records demonstrating student sought an emergency counseling session the morning after the alleged sexual assault



# Example of impermissible use

—



Employee accuses Student of sexual assault and reports that Student transmitted an STD. Student denies sexual encounter occurred. Investigator unilaterally contacts student health center seeking records to determine whether Student has been treated for STD.



# Does the University allow information from experts?

---

- Complainants and Respondents **may identify potential factual and/or expert witnesses** but may not present character witnesses.
- Investigator retains discretion to limit the number of witness interviews by considering:
  - if testimony would be unreasonably cumulative,
  - if the witnesses are offered solely as character references and do not have information relevant to the allegations at issue,
  - or if the witnesses are offered to render testimony that is categorically inadmissible, such as testimony concerning sexual history of the Complainant.



# Concluding Investigations

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# Do the parties have access to the evidence?

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





# 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



# Example



Transcript of interview with complainant contains 10 minutes of initial discussion about complainant's supportive measures and access to counseling. Investigator redacts this portion of the transcript before sharing with the parties.



# Example



Investigator had 12 emails with respondent and advisor attempting to negotiate a time and place for interview. Investigator excludes the 12 emails from the evidence made available to the parties.

# Poll question

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- If we have complete transcripts of the interviews, do we have to share the audio recordings too?
  - Yes
  - No

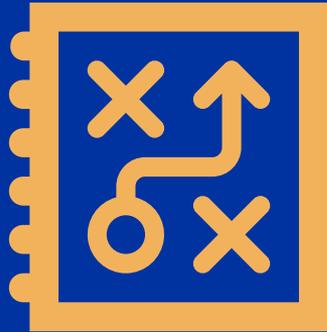


# Do the parties get to respond to the evidence?

- Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
  - NU: Each party can submit up to 20 pages of feedback within 10 days after the evidence is made available for review
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report



# Example (permissible)



After completing all interviews, investigator uploads interview transcripts and other evidence to a secure file sharing program and sends individual links and passwords to each party and their advisor.

# Example (impermissible)

—



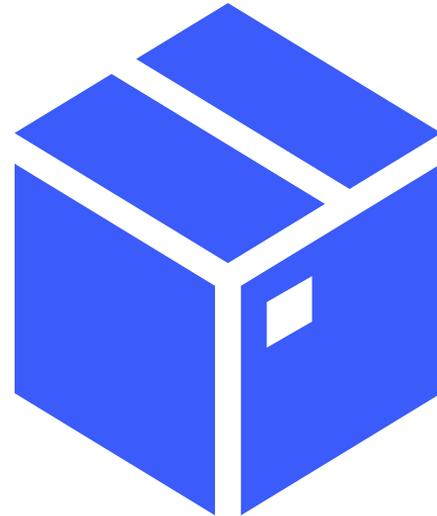
After completing all interviews, investigator prints copy of the evidence and tells parties they can schedule a time to review it in a conference room without cell phones.



# How should we make the evidence available to parties?

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- Regulation requires the evidence be sent to each party and advisor in
  - Electronic format or
  - Hard copy



# Poll question

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- If a party's response to the evidence prompts more investigation, does the institution have to re-do the ten-day period after the new evidence is in?
  - Yes
  - No



# 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



# Example

---



Party responds to evidence that investigator failed to interview Key Witness, who party says personally observed the alleged sexual harassment at issue. Investigator should either conduct the interview or explain in final report why it was not conducted.



# 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?

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



# Should our investigation report comment on credibility?

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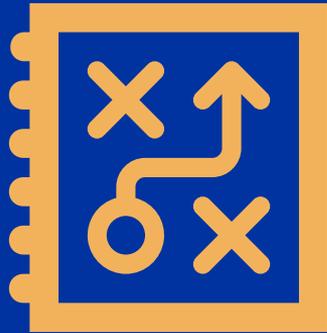
- If particularly notable credibility issues arise, report should identify them
- Commentary on credibility of every party and witness is unnecessary given they will testify live at hearing





# Example

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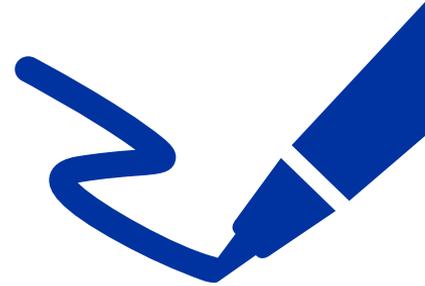
During interview, a party gives one factual account. When confronted with a text message contradicting the account, the party admits to the investigator the party was not being truthful and revises the party's account. Investigator may note the party's admission in investigation report.



# Do the parties get to comment on the investigation report?

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- Yes
- Parties are permitted to “review” and provide “written response” to investigation report

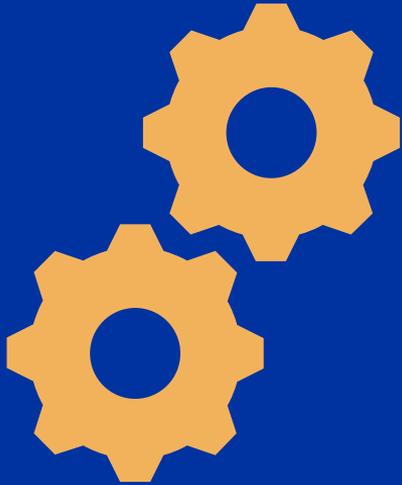


# Example

## Written Response to Investigation Report Checklist

- To the extent the party disagrees with the investigation report, any argument or commentary regarding such disagreement;
- Any argument that evidence should be categorically excluded from consideration at the hearing based on privilege, relevancy, the prohibition on the use of sexual history, or for any other reason;
- A list of any witnesses that the party contends should be requested to attend the hearing pursuant to an attendance notice issued by the hearing officer;
- A list of any witnesses that the party intends to bring to the hearing without an attendance notice issued by the hearing officer;
- Any objection that the party has to the institution's Hearing Procedures;
- Any request that the parties be separated physically during the pre-hearing conference and/or hearing;
- Any other accommodations that the party seeks with respect to the pre-hearing conference and/or hearing;
- The name and contact information of the advisor who will accompany the party at the pre-hearing conference and hearing;
- If the party does not have an advisor who will accompany the party at the hearing, a request that the University provide an advisor for purposes of conducting questioning.

## Group Scenario



Student athlete accuses teammate of sexual harassment after teammate kisses student athlete in a hotel room at an out-of-season summer tournament in which some team members are playing with coach's encouragement. Teammate does not respond to investigator's written request for interview. Eventually, attorney for teammate sends letter to investigator indicating teammate will not submit to interview and demanding complaint be dismissed because the incident occurred outside Title IX jurisdiction. After investigator completes other interviews and makes the evidence available, teammate's attorney sends a signed declaration from teammate disputing the allegations and accusing student athlete of falsifying the complaint. The teammate's attorney also identifies six student athletes who teammate wants interviewed; three will purportedly testify to teammate's activities on the night in question and the other three will purportedly testify about prior allegedly false allegations against other students made by complainant.

# Questions

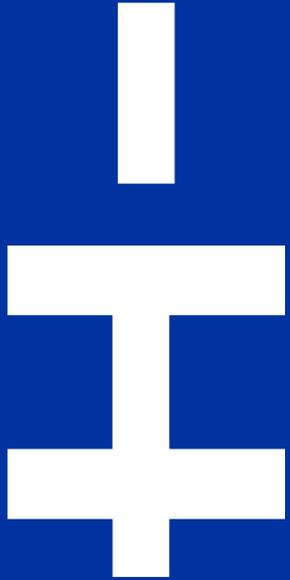




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# The Hearing Process

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# Why do I need to know about hearings?



## Office of Equity

- Explain process to parties
- Support process

## Investigators

- Understand relevant information
- Know how report / evidence will be used

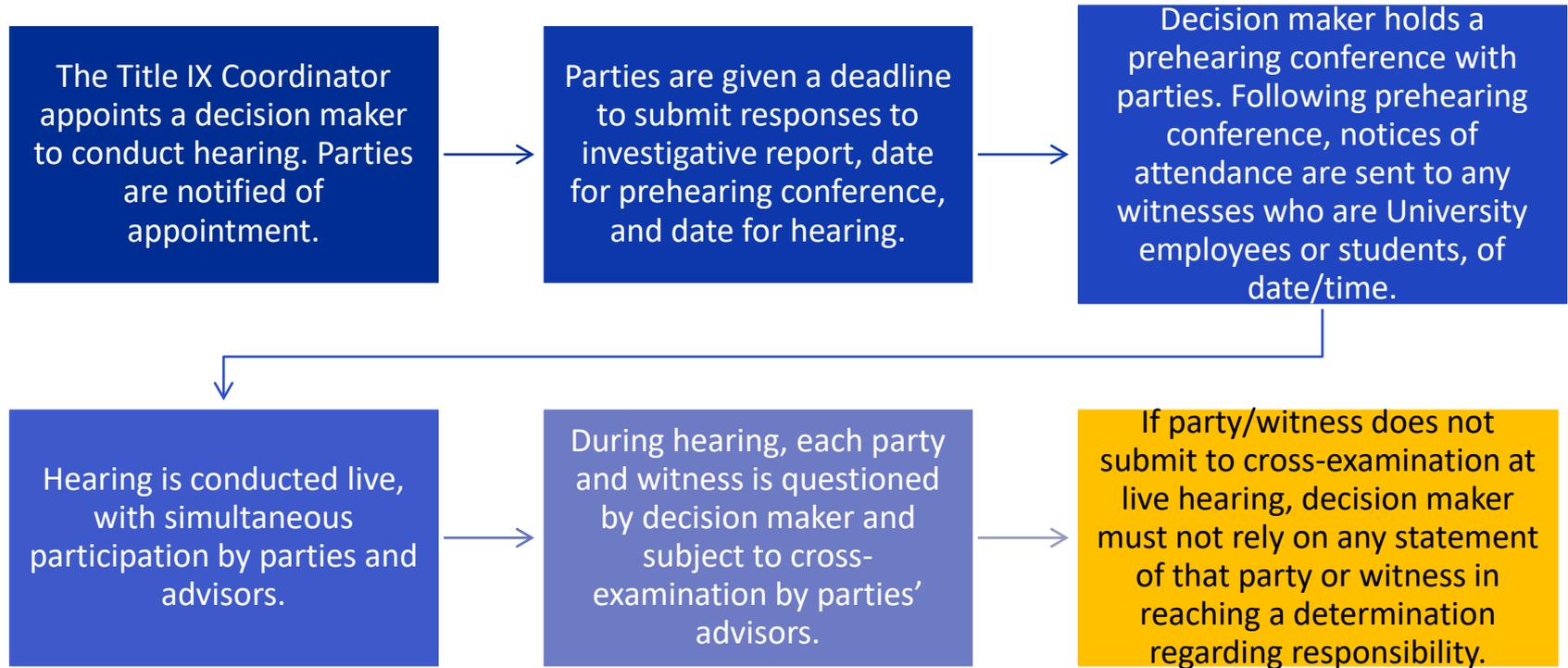
## Decision-makers

- Conduct hearings
- Deliberate fairly & effectively
- Reach appropriate decisions re responsibility, sanction, appeal

## Others

- Understand use of evidence
- Understand procedures

# What is the process flow around hearings (University policy)?





# So, everything's settled then?

- *Victim Rights Law Center v. Cardona* (D. Mass. August 2021)
  - Exclusionary rule vacated
  - Arbitrary and capricious
- ED did not consider likely consequences: “No attorney worth her salt recognizing that – were her client simply not to show up for the hearing – an ironclad bar would descend, suppressing any inculpatory statements her client might have made to the police or third parties, would hesitate to so advise.”





# August 24, 2021 – Dear Students, Educators, and Other Stakeholders Letter

- ED will cease enforcement of exclusionary rule
- Institutional decision makers may now consider (otherwise permitted) statements made by parties/witnesses, even if they do not participate in cross-examination

# What is the purpose of the hearing (University policy)?

---

- The purpose of the hearing is for the University's decision maker to
  - Resolve any outstanding issues of contested facts,
  - Assess the credibility of parties and witnesses, and
  - Using a preponderance of the evidence standard,
    - Determine whether it is more likely than not that a policy violation or violations occurred

# Who is the “decision-maker” at the University?

—



- A single hearing officer
  - Different from Title IX Coordinator and Investigator

# Poll Question

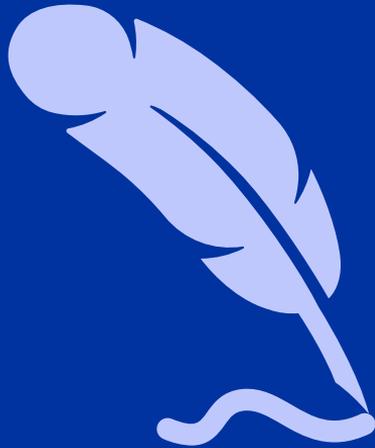
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- The decision-maker must apply a preponderance of the evidence standard.
  - True
  - False

# What standard of evidence does the University use?



- Preponderance of the evidence
- (NOT “clear and convincing evidence”)





# What happens before the hearing?

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



# How do we schedule a hearing?

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

# Poll Question

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- May an institution set an overall time limit for the length of a hearing?
  - Yes
  - No

# Example

## Prehearing Conference Checklist

- Recording /consent/prohibition on recording and screen clips
- Purpose of meeting
- Hearing logistics (including any accommodations)
- Discuss impact of any no-contact orders
- Confirm notices
- ID each party's advisor & witnesses
- ID other parties present
- Address conflict/bias concerns
- Discuss roles
- The hearing procedures and order
- Rules of decorum
- Impact of not appearing
- Scope of hearing (conduct/policies at issue)
- Matters raised in the parties' written responses to the investigation report, as the meeting leader deems appropriate
- ID any evidence and/or exhibits to be presented
- Discuss witnesses parties plan to bring without notice
- Any stipulations may be made to expedite the hearing
- Arguments that evidence identified in the final investigation report as relevant is, in fact, not relevant (and vice versa)
- Any pre-submitted questions



# What are other pre-hearing conference considerations?

- The pre-hearing conference may (under regulations) be two separate meetings—one with each party and advisor; but follow up notification may be required
- The pre-hearing conference may be conducted virtually
- Advisors should be allowed to attend although their role can still be passive if the institution desires
- The pre-hearing conference is not required but is a best practice that facilitates a smooth hearing



# When should a pre-hearing conference be held?

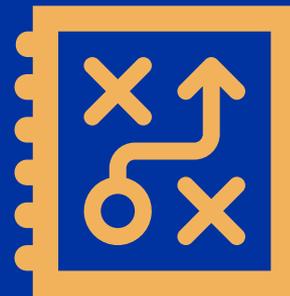
- Any time after the final investigation report is issued;
- The decision-maker is identified; and
- Sufficient time exists to address issues raised in the pre-hearing conference before the hearing actually occurs



## Example

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The investigation report issues, the institution identifies the hearing officer, and a hearing is scheduled to take place in 14 days. The institution schedules a pre-hearing conference 3 days before the hearing is set to occur.





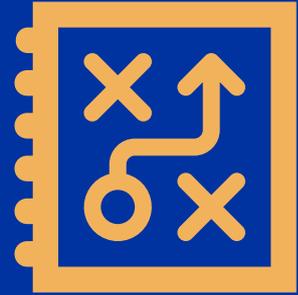
# How do we notify parties and witnesses?

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

## Example

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Based on investigation report and in consultation with the parties, hearing officer issued letters to 8 witnesses advising them of the hearing date and time and requesting their presence at the identified location.



# Poll Question

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- May an institution compel a witness to attend the hearing?
  - Yes
  - No

# Poll Question

---

- May an institution compel faculty and supervisors to relieve a witness of obligations that would otherwise prevent them from attending a hearing?
  - Yes
  - No



# Who attends a hearing?

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

# How does the hearing actually work?

- Title IX regulation is largely silent on specific elements
- Required elements include:

Decision-maker(s) must independently evaluate questions for relevance and resolve relevancy objections

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

Party or witness who refuses to submit to live questioning from other party's advisor must have their testimony excluded

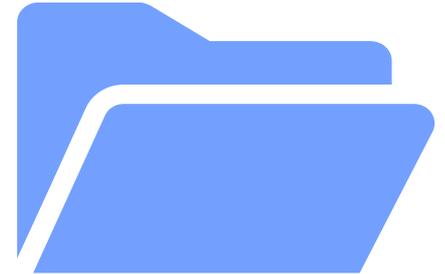
Questioning of sexual history generally not permitted



# How should we prepare for a hearing?

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- Know who's coming (parties, witnesses, advisors, others)
- Consider potential conflicts of interest
- Review relevant policies
- Review investigative report
- Review hearing procedures
- Review rules of decorum
- Review any responses to report by parties
- Prepare “must ask” questions
- Anticipate questions and issues



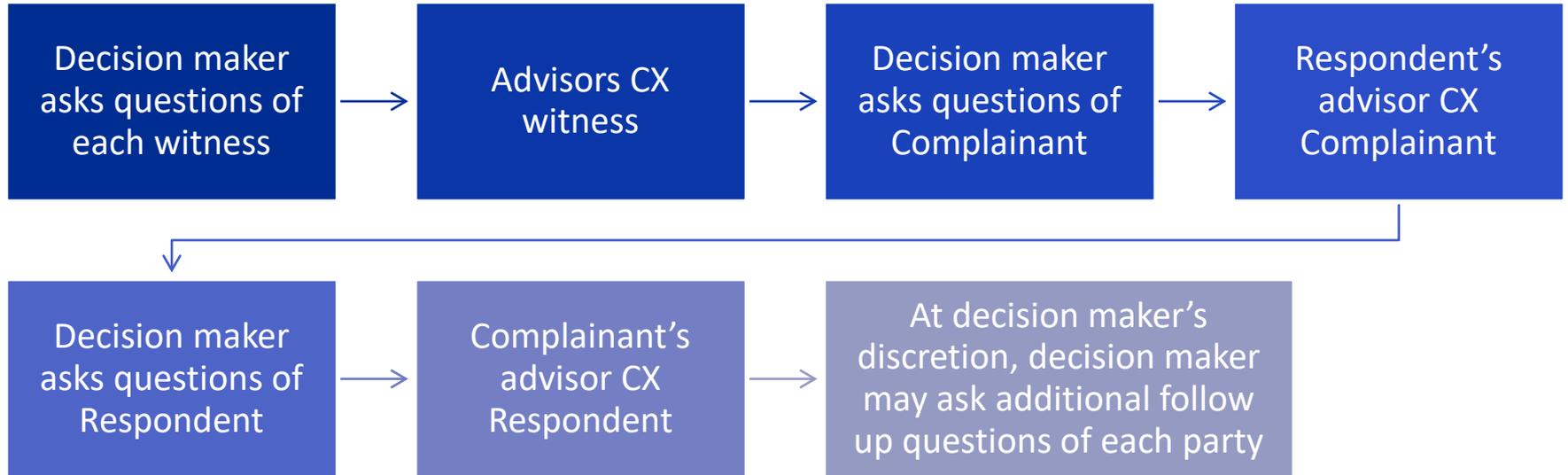
# Example: Doe v. Purdue University

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- Student suspended with conditions; later expelled
- Student claimed due process was inadequate, e.g.:
  - Not provided with investigative report
  - No opportunity for cross-examination
  - Complainant & witnesses found credible by committee, but not interviewed in person by fact-finder
- Court noted, “[T]wo of the three panel members candidly admitted that they had not read the investigative report ...”
- Court let case proceed on due process and Title IX claims



# What is a common sequence (University policy)?





# What are other common hearing procedures?

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- Those covered at prehearing conference
- Parties have access to investigation report and evidence
- Pause after question asked (limit “objections”)
- If a question is excluded as not relevant, the decision will be explained
- Decision-maker(s) have discretion to interpret, apply, and modify hearing procedures in any manner that is not clearly unreasonable and inconsistent with the policy



# Can we set standards of behavior for hearings?

Yes, provided they are applied equally to participants and do not violate explicit guarantees from the Title IX regulation.



# Starting the Hearing: Setting the Tone

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- Affirm notice
- Discuss purpose of hearing/goals: expectations of what hearing is for/not for
- Discuss role of hearing panel/administrator
- Explain ground rules
- Address standard of evidence
- Welcome questions
- Take breaks as needed





# What are common rules of decorum?

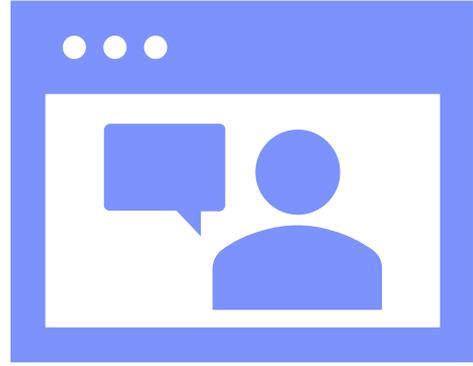
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- Vary in discretion of institution within bounds of regulations
- All present required to act professionally, maintain decorum, and abide by the institution's policies, procedures and any decision maker rules and directives
- Cameras must remain on during speaking/questioning
- Other than conducting questioning, advisors are not permitted to speak for their advisee, make objections, present arguments, or engage in any other active role
- Advisors may speak (via quiet consultation or notes) with the parties they represent; if lengthy private discussions are required, a break may be requested
- Any abusive, intimidating, or disrespectful way of questioning will be prohibited
- Advisors violating rules of decorum may be asked to leave the hearing and may be excluded (and/or limited) from participation in any subsequent meeting or hearing
- Institution will appoint a different advisor for a party whose advisor is removed, does not appear, or if the party does not select an advisor
- All participants in the hearing process are expected to provide complete and truthful information and may be subject to disciplinary action for failing to provide truthful information

# Separating the Parties

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- Video/ audio conferencing
- Separate rooms
- Screens





# How should we field these?

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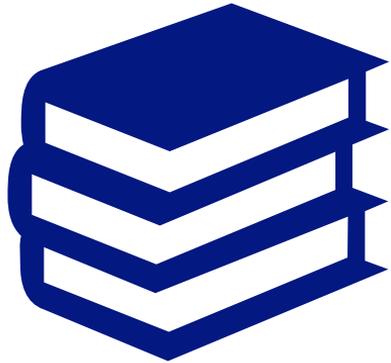
- When curve balls arise during a hearing, ADDRESS THEM
  - Late/new evidence
  - Conflicts of interest
  - Heightened emotions
  - Potential trauma-impact





# Do the rules of evidence apply at a hearing?

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- Limited rules apply:
  - Obsolete for ED (note policy): The cross-examination exclusionary rule – ED ceased enforcement
  - The relevance rule
  - The prohibition on use of sexual history; and
  - Limits on the use of privileged materials



# Who determines relevance?

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



# What is relevance?

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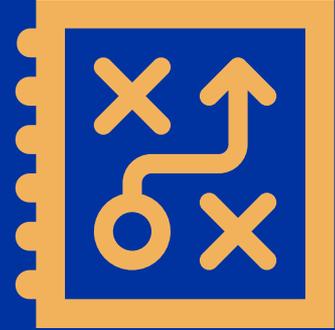
Evidence is relevant if:

- 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



## Example (relevant)

—  
Student has accused another student of dating violence by way of slapping Student. Advisor for respondent asks complainant how many dates complainant and respondent went on before the slapping incident.



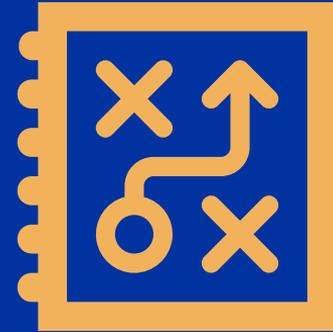
# Example (relevant)



Faculty member is accused of engaging in quid pro quo harassment by rounding up a student's final grade in exchange for a sexual favor. Complainant's advisor asks faculty member whether he rounded up any other student's grade.

# Example (not relevant)

—  
Employee accuses another employee of sexual harassment by telling sexual jokes in the workplace. Advisor for complainant asks respondent whether respondent had an affair with a co-worker three years prior.





# Is sexual history considered?

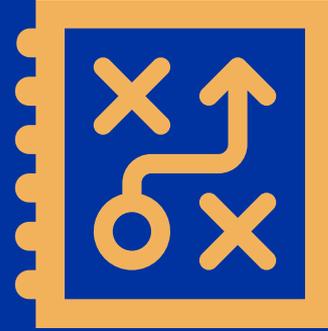
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- Generally, no – Evidence of a complainant’s prior sexual behavior is relevant only if:
  - Offered to prove that someone other than the respondent committed the conduct, or
  - If evidence of specific incidents of the complainant’s prior sexual behavior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



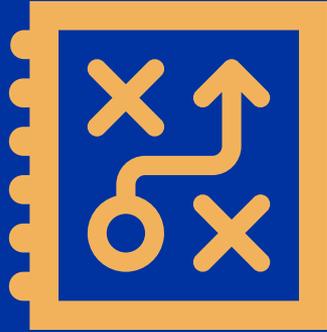
# Example (impermissible)

—  
Student has accused another student of sexual assault by incapacitation. Advisor for respondent asks complainant how many times complainant has had “drunk sex” with other persons.



# Example (permissible)

—



Student has accused another student of sexual assault by way of incapacitation. Advisor for respondent asks complainant whether complainant had any other sexual encounters with respondent when they were drunk.



# What does the University's policy say about relevance?

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- Only relevant questions may be asked
- Decision maker will determine relevancy before question is answered
- Parties/advisors may not challenge relevancy determinations during hearing



# May we have a list of questions that are usually irrelevant?

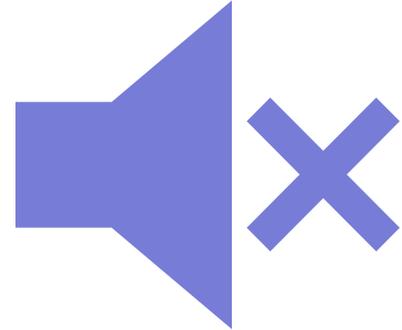
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- Past romantic or sexual history or predisposition unrelated to the allegations - unless offered as evidence that someone other than the respondent committed the alleged misconduct, or offered as history relevant to the issue of consent
- Evidence proffered solely to show reputation or character
- Questions about prior conduct allegations (unless relevant as evidence of substantially similar prior conduct or pattern)
- Medical and mental health history and/or records or other records protected by a legally recognized privilege (unless determined relevant and the party consents);
- Harassing or badgering questions
- Repetitive or duplicative questions
- Foundational questions seeking information already in evidence, not in dispute, or which do not go to credibility



# Does any testimony get excluded?

- Obsolete: ED not enforcing (note policy)
- “Exclusionary rule”
  - Decision-maker(s) must exclude the statements of any party or witness who refuses to submit to cross-examination from the other party’s advisor



## Examples (not excluded – ED not enforcing exclusionary rule)

### What



- Emails
- Texts
- Social media
- Police reports
- SANE documents
- Medical reports

### When



- Prior to investigation
- During investigation
- After investigation



# Are there key points from the Q&A? ( 7 of 7)

- Hearings
  - Obsolete (note policy): The cross-examination exclusionary rule does not apply to statements that are themselves alleged to be harassment; otherwise, no exceptions
  - An advisor may fulfill their cross-examination duty simply by restating questions their party wants asked



## Do we provide a party's advisor?

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



# Is an advisor allowed to question their own party?



- Not unless the institution chooses to allow it
- The Title IX regulation requires cross-examination, but not “direct” examination



# Should advisors act like lawyers?

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- Unless an attorney is used, the role of an advisor is a non-legal role
  - Advisors are not providing legal advice
  - Advisors are not a prosecutor or a defense attorney
  - Advisors are not required to engage in “zealous advocacy” like an attorney
  - Advisors are asking relevant and appropriate questions to reasonably support the case of the party they are supporting



# Are there “objections” at hearings?

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



# Is an advisor required to ask questions a party wants asked?

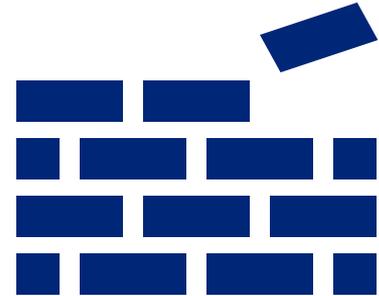
- Advisors should consult with their party and consider their preferences for what questions to ask
- But an advisor must exercise their own reasonable judgment and is never required to ask questions that the advisor knows are improper (e.g., invade sexual history)
- An advisor may consult the decision-maker if a party demands the advisor ask a question that advisor is uncertain is appropriate



# What are the hallmarks of effective advisor questioning?

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- Advisor questions should be:
  - Clear and precise
  - Advance a party's position with respect to one or more elements of the sexual harassment alleged
  - Asked in a purposeful order





# How do we facilitate effective cross examination?

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- Ensure parties have opportunity to hear/review what other parties and witnesses offer
- Enforce structure
- Enforce rules of decorum



# How should questioning proceed?

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- Respectfully
- Open ended questions
  - Generate more information
- Closed-ended questions
  - Clarify specifics
  - Provide clarification
  - Often result in yes/no responses that often don't offer much additional information
- Pause for relevance consideration as needed





# What do we do with awkward silences?

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- Give the witness time to answer
- Before answering, witnesses should pause to allow for relevance rulings



# What are some questioning guidelines for University officials?

- Ask the difficult but relevant questions: Give both parties an opportunity to address your concerns
- Credibility: If you have concerns that a witness is not providing complete and accurate testimony, respectfully explain the relevant basis for your concern and indicate that you are interested in hearing the individual's response to your concern (e.g., "Help me understand...")



# When Asking Questions . . .

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- Consider impact of both
  - Nonverbal communications
    - Make eye-contact
    - Convey appropriate attitude
    - Attention to all parties/witnesses
  - Verbal communications
    - Avoid questions implying pre-judgment
    - Avoid questions implying blame/judgment
    - Use formal/medical terms for clarification

# Example decision maker questions



What do you want to have happen?



Is there something you feel we should take into consideration that is not already before us?



Is there any evidence that the other party provided or anything they said that you feel you haven't had an opportunity to respond to?



Are there specific questions you feel should be presented to the other party or witnesses that have not been asked?

# Example decision maker questions (cont.)



Were you given an opportunity to review the investigative report?



Were you given an opportunity to respond to the report? In your own words, can you describe your response to the report?



What fact or circumstance about this matter do you feel we should concentrate on in our deliberations?



Is there anything else you wish to add?

# How long does a hearing last?



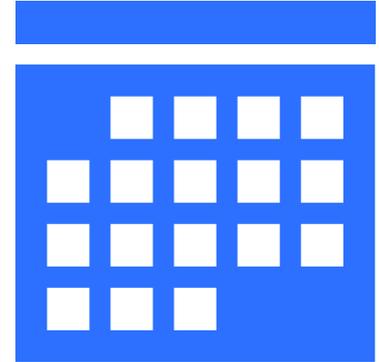
- Decision-maker(s) have the ability to set reasonable time limits on the hearing and its constituent parts
- Parties must have a reasonable opportunity to conduct questioning/cross-examination, but do not have the right to question/cross-examine witnesses as long as they want



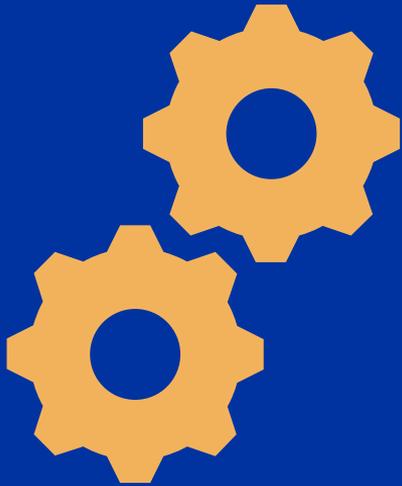
# Can we delay or “continue” a hearing once it starts?

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



## Group Scenario



Respondent is accused of sexually harassing a minor at a sports camp. Institution uses a hearing panel. In advance of the hearing, institution provides the hearing panel a copy of the investigation report and all evidence disclosed to the parties, including witness statements.

At the hearing, the investigator testifies briefly about the nature of the formal complaint and the timing of various stages of the investigation.

Advisor for the respondent then seeks to cross-examine the investigator about specific questions investigator asked or did not ask in interviews. The hearing chair rules the questioning irrelevant.

When complainant is cross-examined by respondent's advisor, complainant takes long pauses and asks for several breaks before answering questions. The hearing officer permits this.

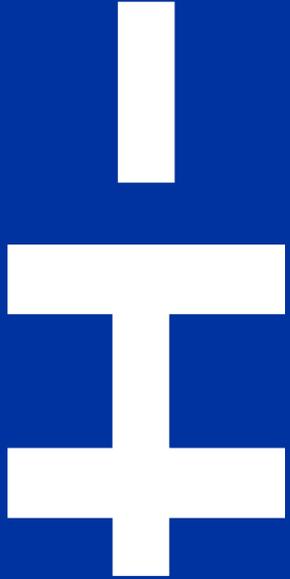
Later, advisor for the complainant seeks to cross-examine respondent about whether respondent has been diagnosed with pedophilia. The respondent refuses to answer.

Three witnesses who gave statements in the investigation do not appear at the hearing.



HUSCH BLACKWELL

# Decision Making



# Why do I need to know about sanctions and remedies?

## Office of Equity

- Explain process to parties
- Support process

## Investigators

- Understand relevant information
- Know how report / evidence may be used

## Decision-makers

- Consider range of sanctions
- Understand mitigating / aggravating circumstances
- Consider consistency

## Others

- Role:
  - Sanction decision making
  - Implementation
  - Advising stakeholders
  - Holistic approach to related affairs



# How do(es) the decision-maker(s) decide a case?



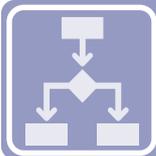
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



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



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



# Who determines responsibility at the University?

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## Title IX

- Decision maker
  - Input from relevant resources for students/faculty, staff re sanctions/remediation

## Non-Title IX

- Office of Equity
  - Sanctions/remediation determined separately by relevant resources under handbook procedures



## Direct v. circumstantial evidence

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- Direct — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference
  - e.g.: videotape
- 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.: party's phone records show party's phone at scene of alleged misconduct
- Either may be relevant

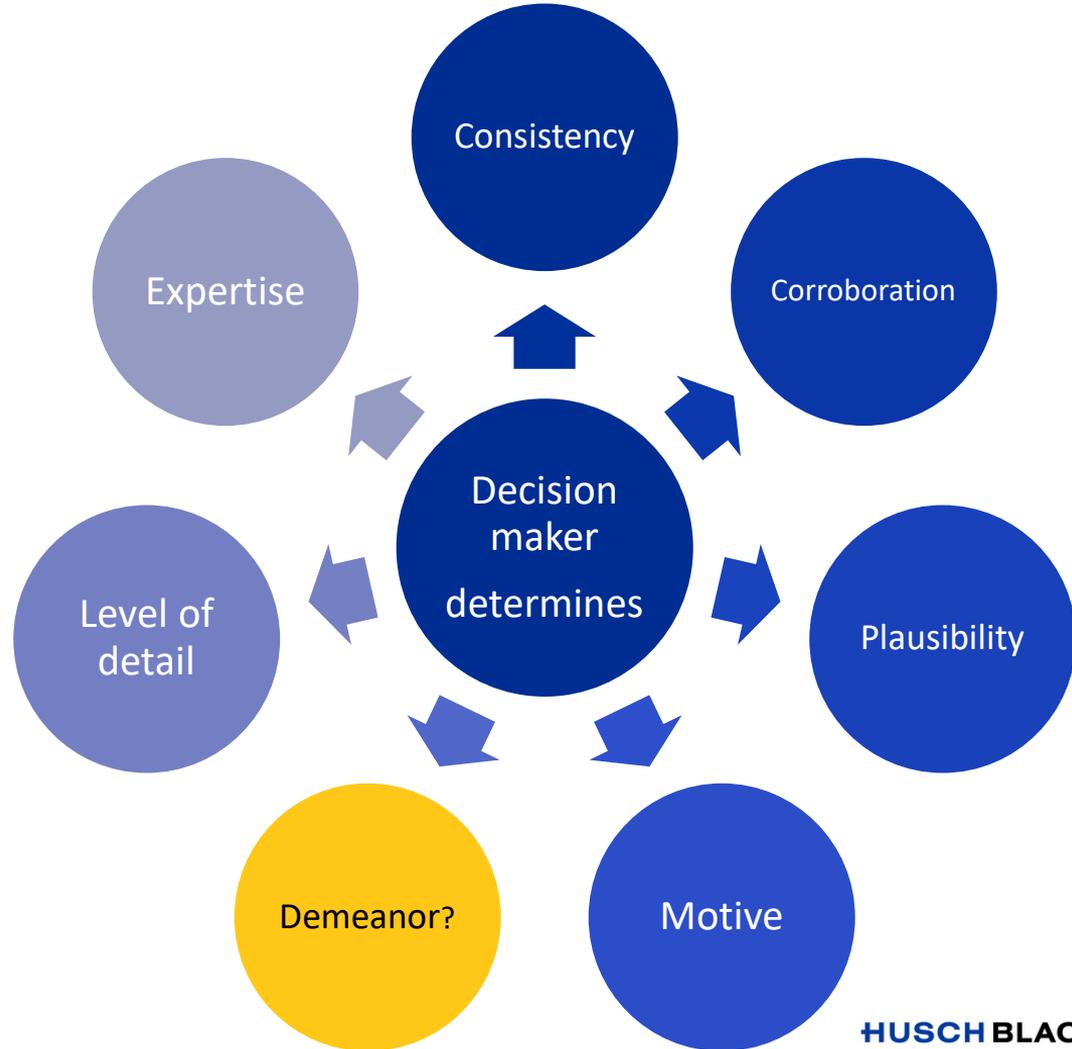


# Hearsay

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- Hearsay — Statement (written or oral) made by a non-available witness offered to prove fact in question
- Longstanding evidentiary principles of when courts can rely on hearsay—some types of hearsay more reliable
- All may be relevant

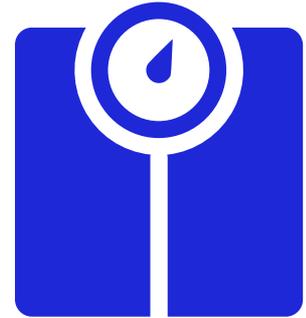
# Credibility





# What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and more relevant to issues at hand than other evidence



# For discussion – Credibility & weight

—



- Prior allegations by a party with no finding vs. prior finding party made false allegations
- Printed text messages from party vs. from phone company
- Offhand comment at time of event vs. statement after formal complaint
- Observation of disinterested stranger based on brief encounter vs. party's friend who was present throughout alleged conduct



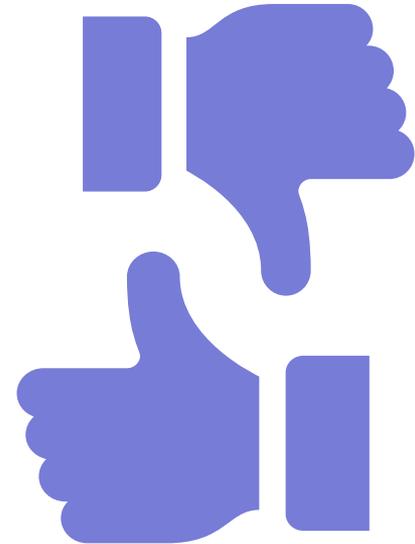
# How do(es) the decision-maker(s) issue a decision?

- 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

# What Is a determination?

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- 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

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- Moves matter to next procedural step
- Record of following process
- Documents fair process
- Provides parties and subsequent decision makers with information



# 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



# How does the University determine discipline?

- Title IX
  - Decision maker determines responsibility
  - Prior to written decision
    - Consult appropriate University personnel with disciplinary authority (UHAS for students, HR business partner for staff, faculty sanctioning panel for faculty)
    - Consult Title IX Coordinator re ongoing Supportive Measures or other remedies
- Non-Title IX
  - Investigator determines responsibility
  - Per relevant handbooks,
    - Discipline/remediation determined by Office of Community Standards for students, HR and Respondent's manager for staff, faculty member's dean and department chair as well as associate provost for faculty



# 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

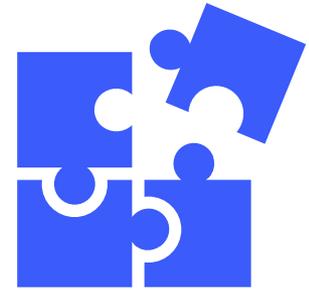
Various types of supportive measures may be used after the determination to restore or preserve access

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

# Sanctioning Goals

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



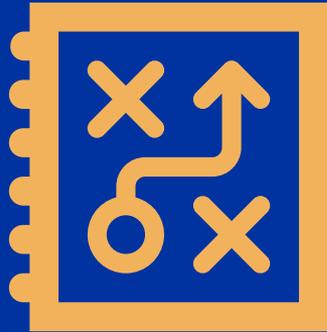


# What issues can arise in sanctioning?

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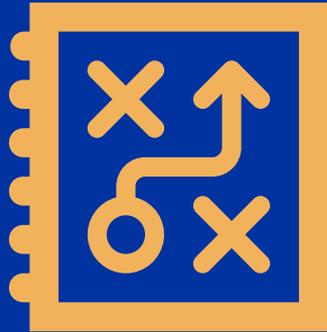
- Common problems:
  - Ambiguity in sanction
  - Lack of clear explanation (and written record) of why sanctions should differ in similar circumstances
  - Failure to address expectations for returning students and/or employees following disciplinary action (e.g., participation in athletics/extracurriculars)
  - Identity of decider if questions arise

# Example (sanction detail)



Following an investigation, Student is suspended for stalking following a break-up with Partner, also a student. Sanctioning panel issues a no-contact directive to both students. Student returns to campus following a suspension to learn that the (now-ex) Partner is enrolled in the same lab course, which is offered only once a semester.

# Example (sanction detail)



Student suspended for engaging in dating violence “will not be permitted to participate in band upon return to campus for two academic years.” 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.

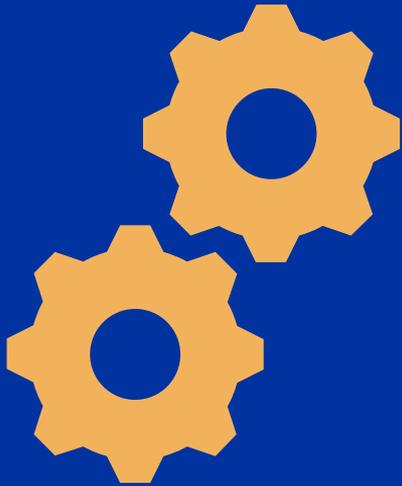


# What are aggravating and mitigating factors?

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- 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

## Group Scenario



Actor is the lead in a for-credit university theatrical production. Director (also a student) developed feelings for Actor and the two went on 2-3 dates following rehearsals. Actor then ended the relationship.

Director was incensed and began relentless criticism of Actor's performance during rehearsals. Actor ultimately decided to withdraw from the production, planning to take an incomplete in the class.

On 3-4 subsequent occasions, Director tweeted about play, mentioning that Actor quit because Actor was "soft" and couldn't stand any legitimate criticism of Actor's performance.

Director also followed Actor home one night and confronted Actor in a parking lot, first begging Actor to return to the cast and then threatening further public derision.

Actor ultimately returned to the production and finished the class, but switched majors the following semester to avoid future contact with Director.

At the hearing, Director claims to have been "just testing" and "pushing" Actor to motivate actor to develop thick skin. Director adds that Director was "off my meds," but has fixed that. Director acknowledges "the situation could have gone better."

# Report-Writing Considerations

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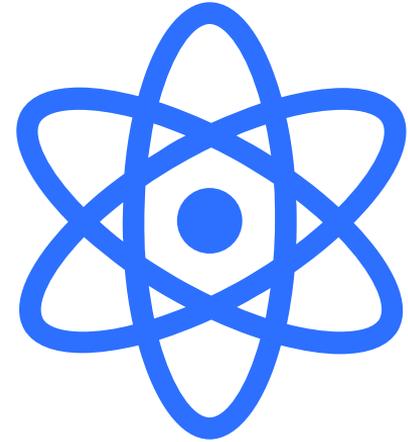


# What are common report elements?

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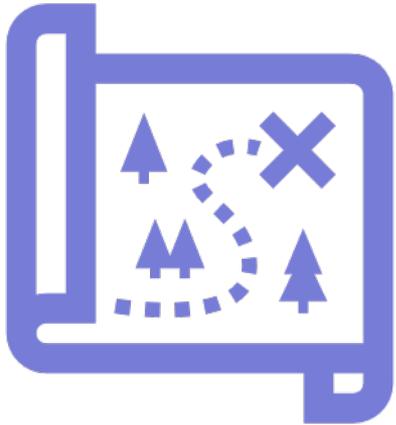
\*May incorporate investigative report for some or much of the following:

- Preliminary case information
- History of the case
- Allegations
- Applicable policies/procedures
- Standard of evidence
- Evidence considered
- Factual findings
- Analysis and conclusion
- Sanctions/remedies
- Procedures/basis for appeal



# What are some report-writing tips?

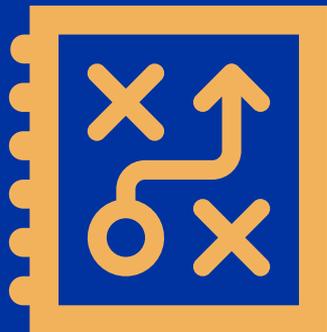
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- Use objective terms
  - “Complainant” and “respondent” rather than “victim” and “perpetrator”
  - “Violation of policy” rather than “guilty” or violation of “law”
- Discuss each allegation
- Explain reasoning: E.g., conflicting evidence; credibility
- Address inconvenient facts
- Do not include speculation
- Do not include irrelevant points and discussion
- Be thoughtful about objective tone
- Avoid vague phrasing like “had sex”

# Example (report detail)

—



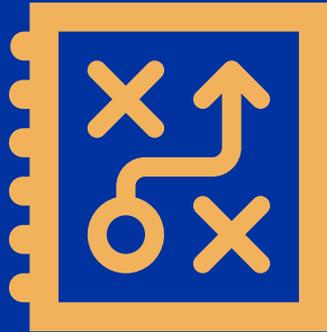
“Runner alleges that Card Player had sex with Runner without consent.”

vs.

“Runner alleges that Card Player laid on top of Runner, forcefully removed Runner’s underwear with one hand while pressing Player’s other hand on Runner’s hands, penetrated Runner’s vagina with a vibrator, and pinned Runner down.”

# Example (conclusion)

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“The preponderance of the evidence does not support a finding of a policy violation as to the allegation of X.”

or

“The preponderance of the evidence falls short of demonstrating that it is more likely than not that the alleged X occurred.”



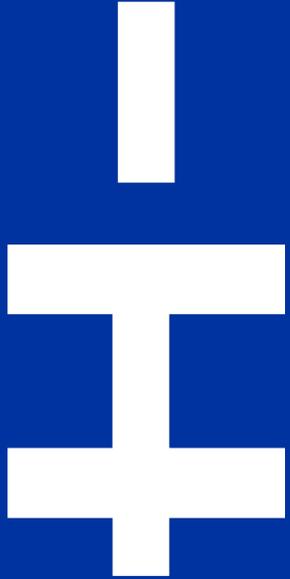
# How should we document sanctions?

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- 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



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Appeals

# Why do I need to know about Appeals?



## Office of Equity

- Responsible for overseeing appeal process (from dismissal or findings)

## Investigators

- Understanding bases for appeals helps to conduct solid investigation (void of conflicts and procedural errors)

## Decision-makers

- Understanding bases for appeals helps to conduct solid decision-making process (void of conflicts and procedural errors)

## Others

- Appeals Officers require clear understanding of bases for appeal and options during appeal review



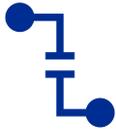
# What is the purpose of the appeal?

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



# What are the grounds for appeal?

Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter



New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal, that could affect the outcome of the matter; or



Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

# What are grounds for appeal at the University?

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- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter
- The sanction is disproportionate with the violation.



# Policy on Institutional Equity Appeals

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- Two tracks depending on whether separation from the University is a possible outcome
- If potential for separation exists, Appellate Panel is appointed



# What are the potential outcomes on appeal?

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- If the reviewer does not find that any of the three grounds for appeal are present in the case, the outcome will be upheld.
- If the reviewer finds that any of the grounds for appeal are present, they may...



# If the reviewer finds that any of the grounds for appeal are present:

amend the outcome

may issue a new  
outcome, or

may refer the matter  
back to the decision  
maker for further  
consideration.

# Appeal Reviewers

- An appeal of a finding in a complaint against a student should be addressed to:
  - Assistant Dean/Director of Community Standards
  - [lucas.christain@northwestern.edu](mailto:lucas.christain@northwestern.edu)
- An appeal of a finding in a complaint against a faculty member should be addressed to:
  - Associate Provost for Faculty
  - [assoc-prov-faculty@northwestern.edu](mailto:assoc-prov-faculty@northwestern.edu)
- An appeal of a complaint against a staff member or third-party affiliate should be addressed to:
  - Vice President for Human Resources
  - [oeappeals@northwestern.edu](mailto:oeappeals@northwestern.edu)



# What is the purpose of the appeal?

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





# What is the University process for appeals?

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- If either party submits an appeal, the other party will be notified in writing that the appeal has been filed, provided with a copy of the appeal, and given ten (10) calendar days to submit a written response.
  - A written response is limited to fifteen (15) pages.
- The relevant appeal reviewer may adjust the time limit for the appeal and/or response.
- Sanctions will be stayed pending resolution of an appeal.



# What is the University process for appeals? (Con't.)

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- The appeal is solely conducted via written statements.
- Neither the Respondent nor the Complainant will be allowed to request an in-person meeting with the appeal reviewer.
- The appeal reviewer may request an in-person meeting with the Complainant **and** Respondent.



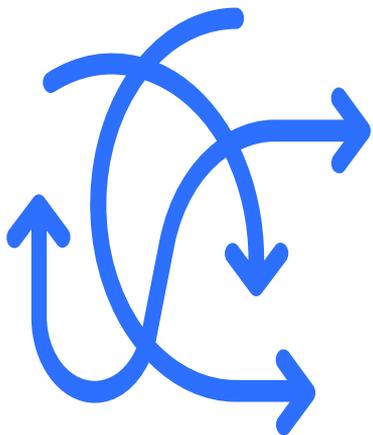
# What is the University process for appeals? (Con't.)

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- The written decision on an appeal will be issued simultaneously to the parties as expeditiously as possible, usually within seven (7) calendar days of making a decision
  - The Staff Handbook provides an additional process for staff members appealing a sanction of termination.
- No further review beyond the appeal is permitted.

# Procedural error

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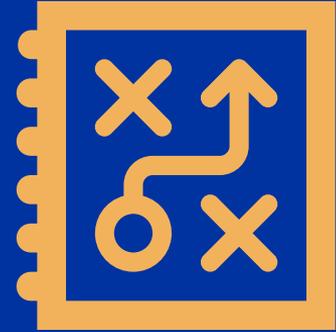
- Typically, the procedural error or omission that impacted the outcome—i.e., it must be material
- A procedural error affecting the outcome may include:
  - A failure to follow the institution's procedures;
  - A failure to objectively evaluate all relevant evidence, including inculpatory or exculpatory evidence; or
  - A determination regarding what evidence was excluded as irrelevant.



# For discussion

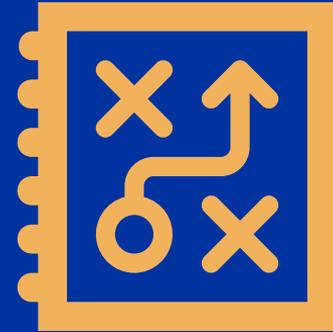
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- Complainant contends that the investigator failed to interview 19 witnesses who have knowledge of an alleged sexual assault based on discussions with Complainant or Complainant's friends following the incident.
- Investigator only interviewed 11 of the witnesses.
- Procedural error?



# For discussion

- Respondent contends that the hearing panel improperly considered statements from Witness Z (who did not testify at the hearing). Written determination found Complainant more credible than Respondent on issue of consent for several different reasons. One reason was Complainant's explanation that Witness Z's posts of selfies from another state on the night of the incident countered Witness Z's statement to investigators that Complainant told Witness Z in person that same night "I loved every second of that hook up." Panel also found Respondent probably talked to Witness Z about what to tell investigators to help Respondent's case, based on Respondent's testimony and text messages.





# Poll Question

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- Does this information support a finding of a material procedural error?
  - Yes
  - No

# New evidence

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- New evidence has come to light that was previously unknown or not reasonably available at the time that has potential to substantially impact the outcome
- Evidence presented to decision maker prior to the time the designation or written determination is issued does not qualify as new evidence that was not reasonably available

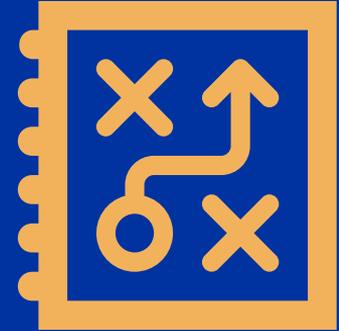




# For discussion

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- Respondent told investigators Roommate saw Complainant leaving lobby of his dormitory on date of sexual interaction and talked to Complainant, who was jovial; Complainant confirmed this at hearing; Roommate was never interviewed.
- On appeal, Respondent presents new affidavit from Roommate recounting same conversation with Complainant but also stating that Respondent told Roommate about sexual interaction at issue the night it happened; Respondent had not shared that conversation during investigation or hearing.





# Poll Question

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- Does this constitute new evidence for purposes of an appeal?
  - Yes
  - No



# Conflict of interest

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- The Title IX officer, investigator, or decision maker had a conflict of interest or bias affecting the outcome:
  - For or against Complainants or Respondents generally or
  - For or against an individual Complainant or Respondent
- Claims of conflict of interest or bias should be based on the current case and process in question and will be assessed accordingly

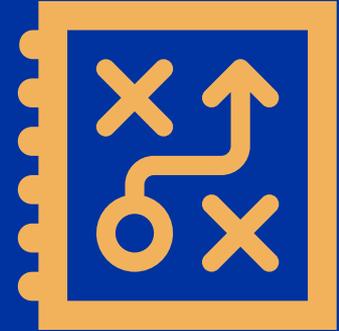


# For discussion

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Do the following circumstances or relationships constitute conflicts of interest?

- Respondent faculty member and the hearing officer previously disagreed about a curriculum matter
- Complainant is currently a student in a hearing panel member's class
- Respondent is a staff member in the Title IX Coordinator's office





# Appeal of a Sanction

- Appeal reviewer consults with the appropriate University personnel with disciplinary authority over the Respondent
  - Student Respondent → UHAS Appeals Panel
  - Staff Respondent → HR Business Partner and manager or unit leader
  - Faculty Respondent → Executive Committee of Faculty Appeals Panel

# Appeal Reviewer obligations

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- No conflict of interest
- In most cases, the appellate review is limited to review of the written decision and the appeal and response documents submitted by the parties
- However, the appellate officer may be allowed to request and review additional information from the Office of Equity





# Appeal preparation

- Review relevant policy and procedures
- Review appeal and any response (and supporting documents)
  - What arguments have been raised in the appeal?
  - What arguments have been raised in the response?
- Consider whether the grounds have been satisfied
  - If yes, proceed; if no, prepare explanation of decision
- Review investigative report, hearing transcript, outcome letter, and any sanction decision
  - Consider decision was reached and reasoning  
Determine whether appealed error occurred and outcome





# What is the format of a typical appeal decision?

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- Structure
  - (I) Background Information
    - When was complaint submitted?
    - What was alleged?
    - What did investigation find?
    - What sanction was found, if any?
    - When was appeal submitted and was it timely?
  - (II) Summary of Appeal
    - What is the appealing party alleging, and is that allowable under policy?
    - Address cross appeals in same way.





# Appeal decision letter format (cont.)

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- (III) Analysis of each basis of appeal, separately
  - What factors support or contradict the appeal argument?
  - If error is alleged, did an error occur?
  - If an error occurred, would it have been sufficient to significantly impact the outcome of the investigation?
- (IV) Conclusion
  - Is the appeal granted or denied?
  - If granted, what outcome?



# What are some best practices for documenting the appeal decision

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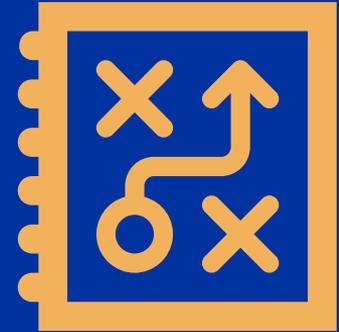
- Summarize appeal official's decision, upfront
- Address the appeal grounds
- Address all arguments raised in appeal, cross-appeal, and in any response
- Review and address all relevant policy definitions and procedural provisions
- Consult with Title IX Coordinator and legal counsel regarding any procedural or legal questions or issues
- Show work: explain what decision and reasoning



# For discussion

Following the submission of all appeal materials but prior to issuing an appeal decision, Appellate Officer learns from new emails that Respondent contacted two potential witnesses during the investigation and convinced them to change their stories prior to meeting with the investigator.

- How should this be addressed in your appeal decision, if at all?



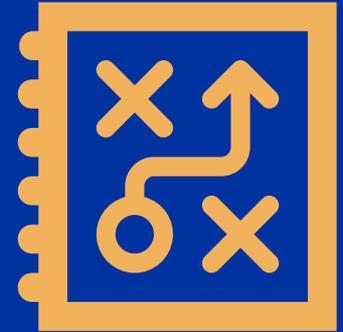


## For discussion

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During consideration of appeal in case where Respondent found not responsible, Appeal Panel member learns from a second Complainant (student in Appeal Panel member's class) of a new allegation of similar sexual misconduct against Respondent. Appeal panel had already reviewed all reports, met to deliberate, and had decided to remand finding for hearing panel to consider evidence it had excluded.

- Can Appeal Panel continue with drafting written decision?



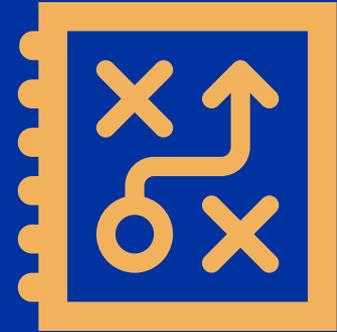
# For discussion

Appeal Panel reviews investigation report, transcript of hearing, and hearing panel's written determination and, while a close call, unanimously believes that credibility determinations underlying a finding of "responsibility" should have gone in Respondent's favor.

During deliberation, hearing panel Chair answers questions and confirms that hearing panel also believed case was a close call on credibility issues and voted 2-1 in favor of "responsibility" finding.

Appeal Panel reviews procedural error issues raised on appeal and determines they are unfounded. No other grounds were raised.

- Appeal Panel would like to remand for further deliberation on the credibility issues – is that permissible?





# Wrap Up

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- Follow policies
- Ensure fairness
- Document
- Seek assistance when needed



# Questions



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**BLACKWELL**