

# TOPICS IN TITLE IX

Northwestern University  
Fall 2022

# PRESENTERS



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# HOUSEKEEPING

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Recording is not permitted

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Slides will be provided by email after the training concludes

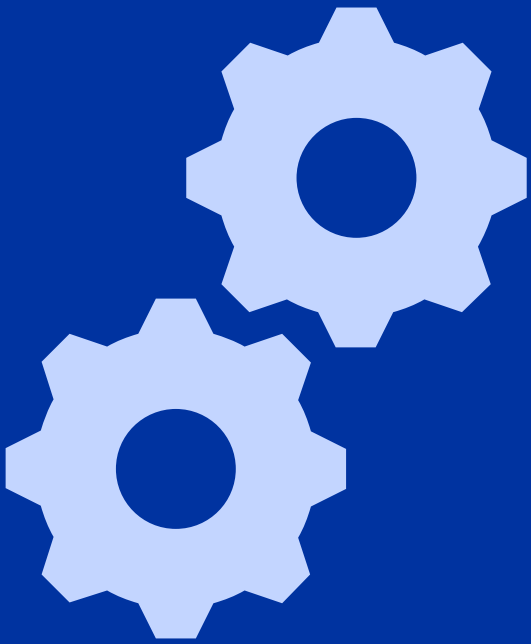
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Change Zoom name to match registration

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Other breaks—take individually as needed

## GROUP SCENARIOS



# 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

# AGENDA

Title IX Scope & Jurisdiction

Resolution Process and Policies

Intake & Supportive Measures

Bias, Conflicts & Trauma

Investigations

Hearings

Sanctioning Considerations

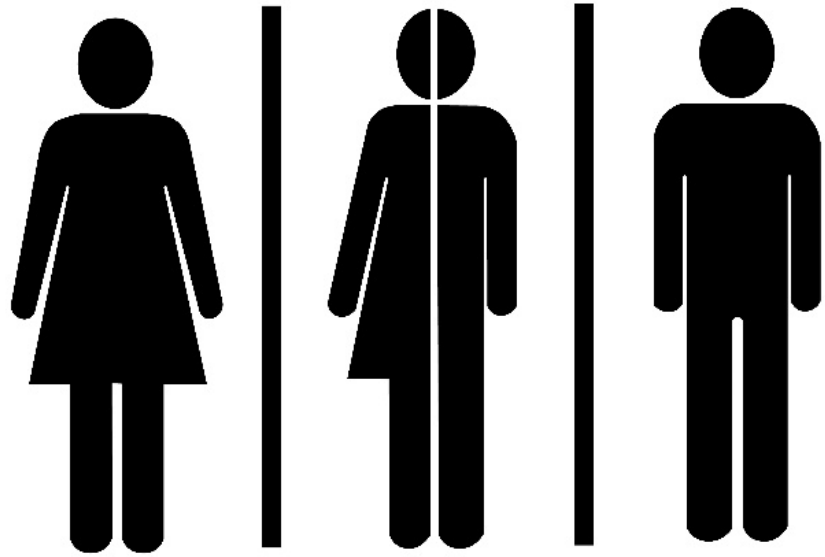
Appeals

## NOTES RE *PROPOSED* TITLE IX REGULATIONS

- This training is based on currently-operative sexual harassment regulations (August 2020)
- We highlight potential changes that may result from proposed regulations that are not yet effective
- The effective date and final language of proposed regulations have yet to be determined
- Litigation is likely to challenge proposed regulations

# TITLE IX SCOPE & JURISDICTION





## WHAT IS TITLE IX?

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

32 C.F.R. § 106.31



# WHERE DOES TITLE IX APPLY?

- Entities that receive federal financial assistance, including colleges and universities that participate in Title IV funding
- Not individual persons
  - But institutions are required to adopt policies and procedures to implement Title IX that *do* apply to individual persons



# ILLINOIS PREVENTING SEXUAL VIOLENCE IN HIGHER EDUCATION ACT

- 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?

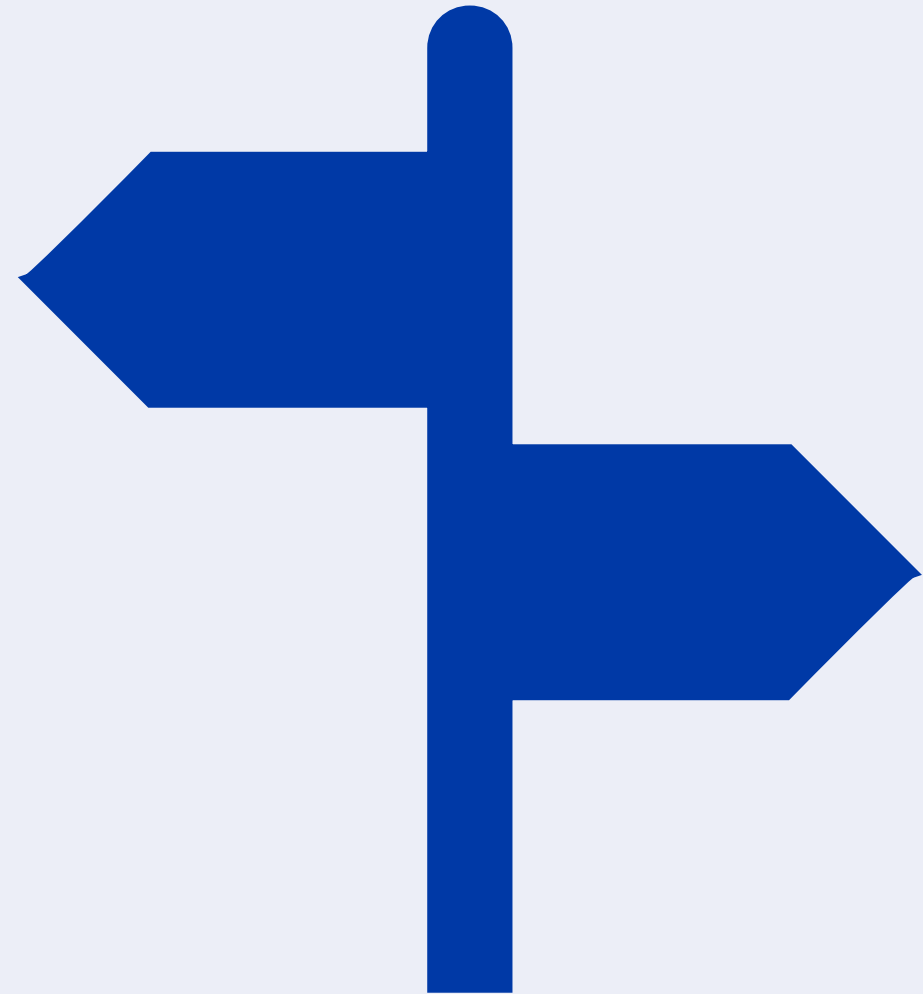
Title IX is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded educational programs and activities.

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.

## POLL QUESTION

- Does Title IX apply only to academic activities and athletic participation?
  - Yes
  - No



# POLITICAL UPDATE – “SEX”

## Mar. 8, 2021 Executive Order

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

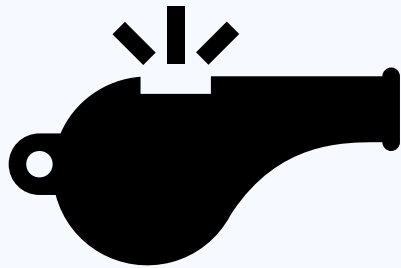
## June 16, 2021 Guidance

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

# REGULATORY UPDATE

- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- 60 days for public comments

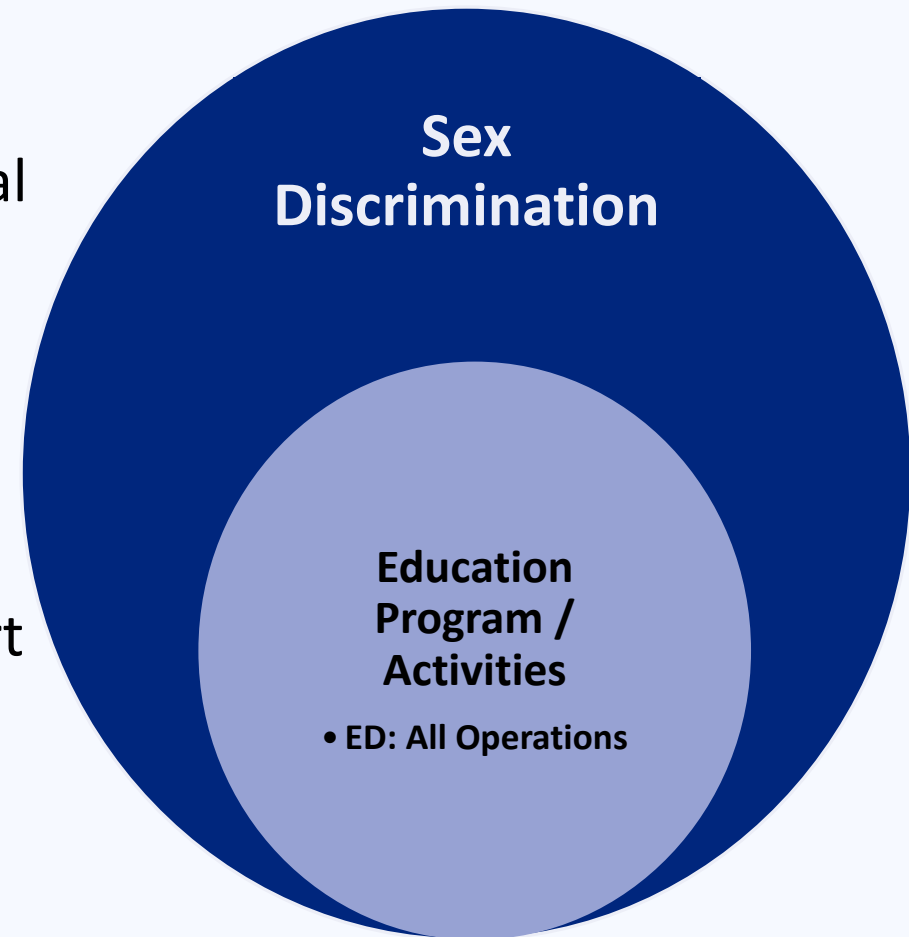
# PROPOSED CHANGE



- Proposed regulation requires grievance procedures for all forms of sex discrimination
- Proposed regulation continues to require more rigorous procedures for “sex-based” harassment

# WHAT SEX DISCRIMINATION DOES TITLE IX APPLY TO?

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





# WHAT ARE EXAMPLES OF EDUCATION PROGRAMS AND ACTIVITIES?

Admissions

Hiring

Workplace

Academic  
instruction

Residence life

Amenities on  
campus

Sports teams

Work-study

Games, concerts,  
and speeches  
on campus

Off-campus trips  
or experiences  
organized by the  
institution

Sponsored  
organization  
activities

Anything else  
that happens  
on campus

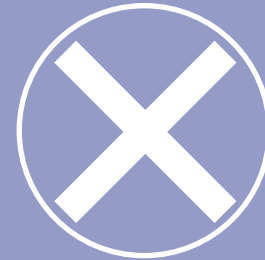
# DOES TITLE IX APPLY TO OFF-CAMPUS SEXUAL HARASSMENT?



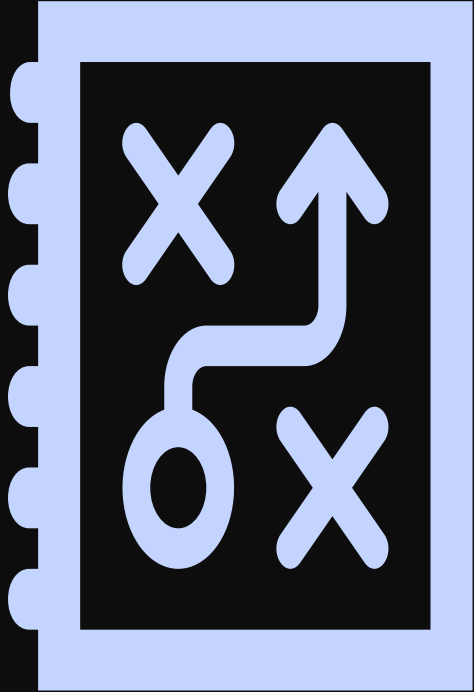
Yes, if the conduct at issue occurs in the context of an education program or activity



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

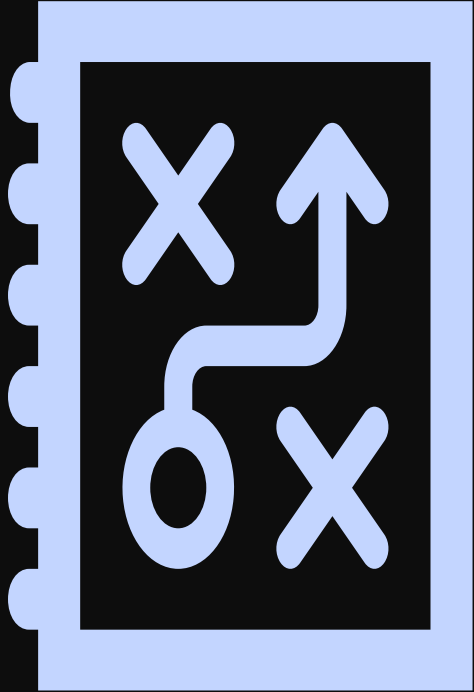


No, if it occurs in a private location and is not part of an institution's education program or activity



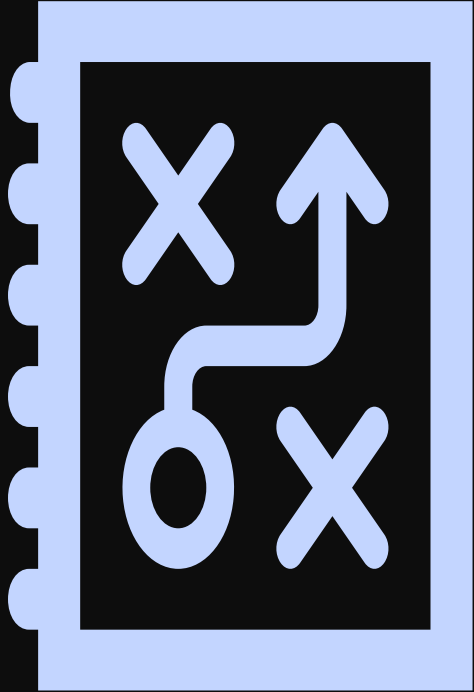
## EXAMPLE (INCLUDED IN EP&A)

Student is sexually assaulted in a library study room on-campus. The sexual assault occurs on a Saturday evening. The identity of the perpetrator is not immediately known.



## EXAMPLE (INCLUDED IN EP&A)

The debate team travels to a different school for a tournament and stays overnight at a hotel. At the hotel where the team is staying, the advisor sexually harasses the team's captain.



## EXAMPLE (INCLUDED IN EP&A)

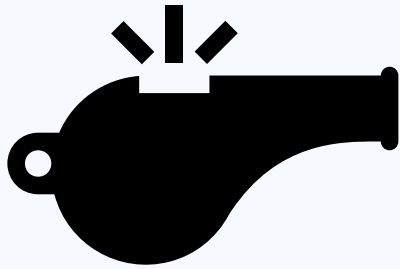
During spring break, two students travel to another state and stay at an all-inclusive resort owned by a prominent hotel chain. The students booked the trip on their own for leisure purposes. While staying at the resort, one student sexually assaults the other student.

# 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



# PROPOSED CHANGE

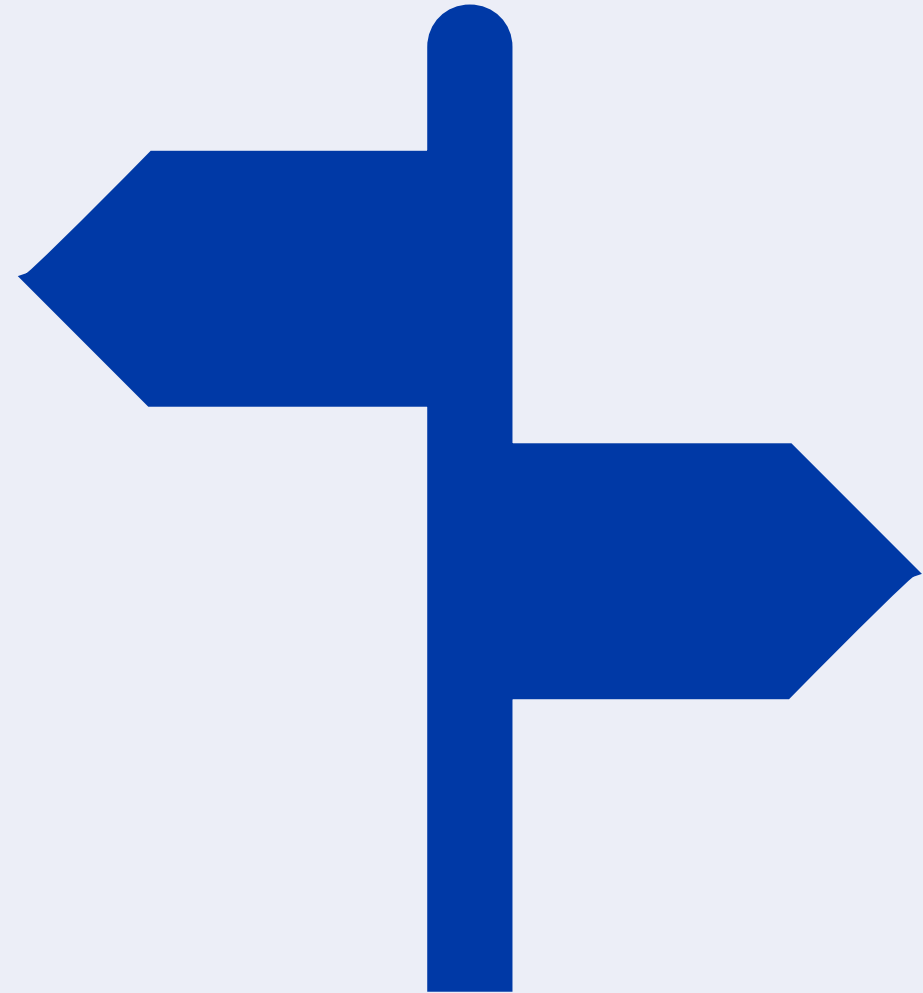


Jurisdiction will extend to off-campus sex discrimination where:

- Respondent represents the institution through their authority
- Respondent is engaged in conduct under the institution's "disciplinary authority"
- Off-campus conduct contributes to a hostile environment within programs and activities

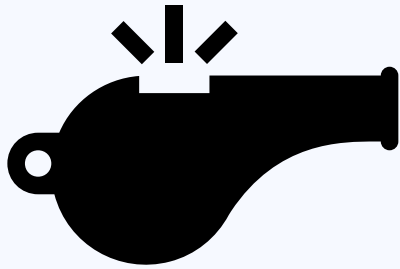
# POLL QUESTION

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





# PROPOSED CHANGE



- Proposed regulations would permit, rather than mandate dismissal
- Regulation commentary suggests that dismissal would be unusual and additional steps may be needed to clarify allegations before dismissal
- Supportive measures and other preventative measures may still be needed even if there is a dismissal

## WHAT OTHER POLICIES MIGHT APPLY?

- 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?

- 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?

- “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

- 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 TITLE IX SEXUAL HARASSMENT?

Conduct on the basis of sex that is:

Quid pro quo  
harassment

Hostile  
environment  
harassment

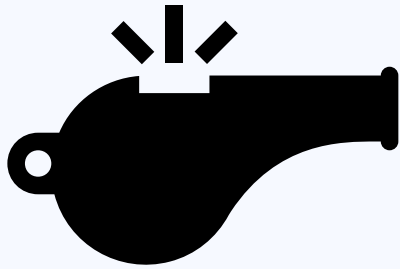
Sexual  
assault

Dating  
violence

Domestic  
violence

Stalking

# PROPOSED CHANGE



“On the basis of sex” includes:

- Assigned sex/biological sex
- Sex stereotypes
- Sex characteristics
- Sexual orientation
- Pregnancy and related conditions



# WHAT IS THE UNIVERSITY'S DEFINITION OF (TITLE IX) SEXUAL HARASSMENT?



Title IX Sexual Harassment is conduct on the basis of sex that satisfies one or more of the following:

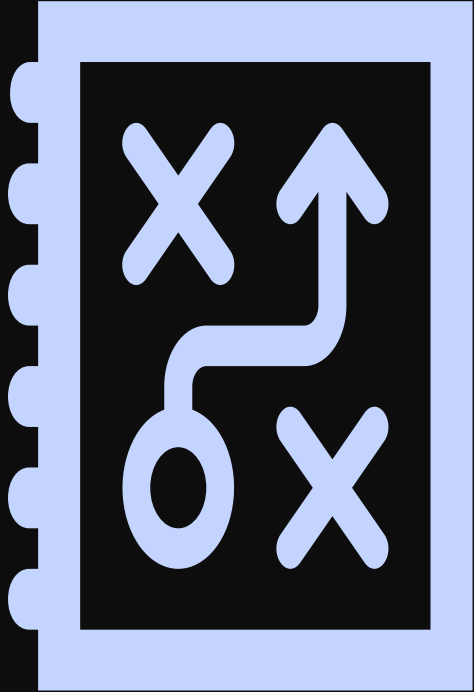
- Quid Pro Quo Sexual Harassment
- Hostile Environment Sexual Harassment
- Title IX Sexual Assault
- Title IX Dating Violence
- Title IX Domestic Violence
- Title IX Stalking

# WHAT IS QUID PRO QUO?

“An employee of Northwestern conditioning the provision of an aid, benefit, or service of the University on an individual’s participation in unwelcome sexual conduct.”

- *NU Interim Policy on Title IX Sexual Harassment*

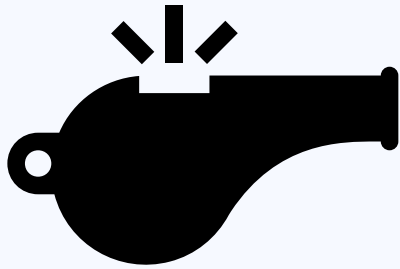
Often arises in the employment context or where an employee holds a position of authority over a student



## 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.

# PROPOSED CHANGE



- “Quid pro quo” could also be committed by a person who is an “agent” or “other person authorized by the recipient to provide an aid, benefit, or service”
- “Conditioning” could be explicit or implicit

# 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?



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.

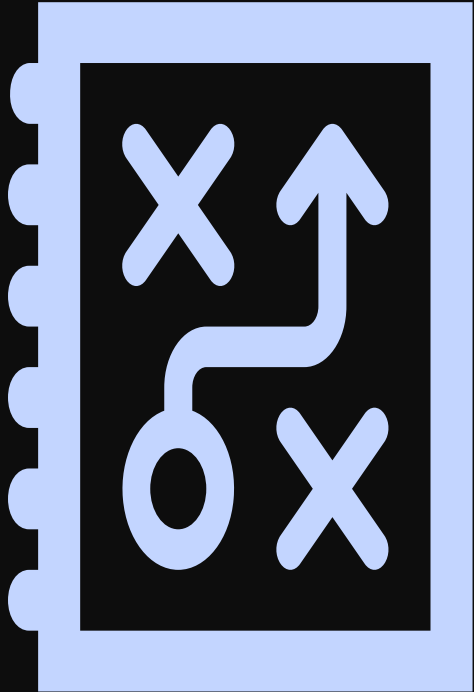
*-NU Policy on Institutional Equity*

# HOW DO WE DETERMINE IF A HOSTILE ENVIRONMENT EXISTS?

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

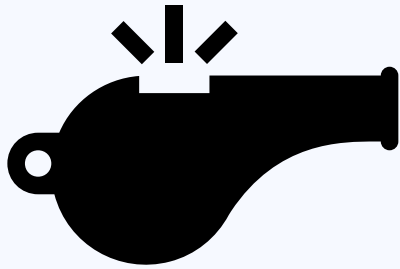


## EXAMPLE OF HOSTILE ENVIRONMENT

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.



# PROPOSED CHANGE



Proposed regulation would alter Hostile Environment to:

- Severe or pervasive
- Evaluated subjectively and objectively
- Denies or limits a person's ability to participate in or benefit from programs and activities
- Considering numerous facts and circumstances

# WHAT IS SEXUAL ASSAULT?

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

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Rape

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Sodomy

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Sexual assault with an object

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Fondling

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Incest

# WHAT IS THE UNIVERSITY'S DEFINITION OF SEXUAL ASSAULT?

- Rape
- Fondling
- Incest
- Statutory Rape

# WHAT IS RAPE (UNIVERSITY DEFINITION)?



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.

*- NU Interim Policy on Title IX Sexual Harassment*



# WHAT IS THE UNIVERSITY'S DEFINITION OF CONSENT?

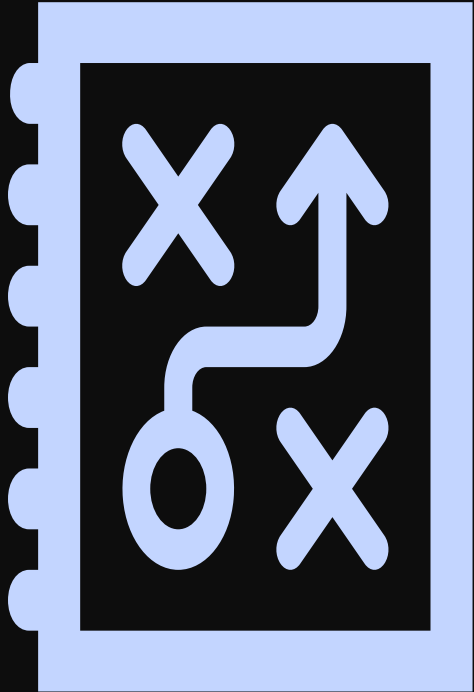
Consent is present when clearly understandable words or actions manifest a knowing, active, voluntary, and present and ongoing agreement to engage in a specific sexual or intimate contact.

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)

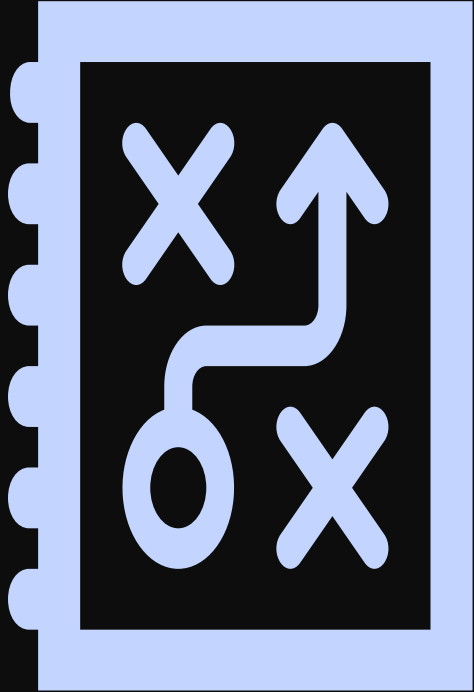
Freshman and Sophomore are drinking shots in Freshman's dorm room and talking. Freshman encourages Sophomore to take several hydrocodone to "loosen up." After 30 minutes, Sophomore cannot stand, calls Freshman the wrong name, and has trouble staying awake. Freshman then has sex with Sophomore who lays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



# WHAT IS STATUTORY RAPE (UNIVERSITY DEFINITION)?

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





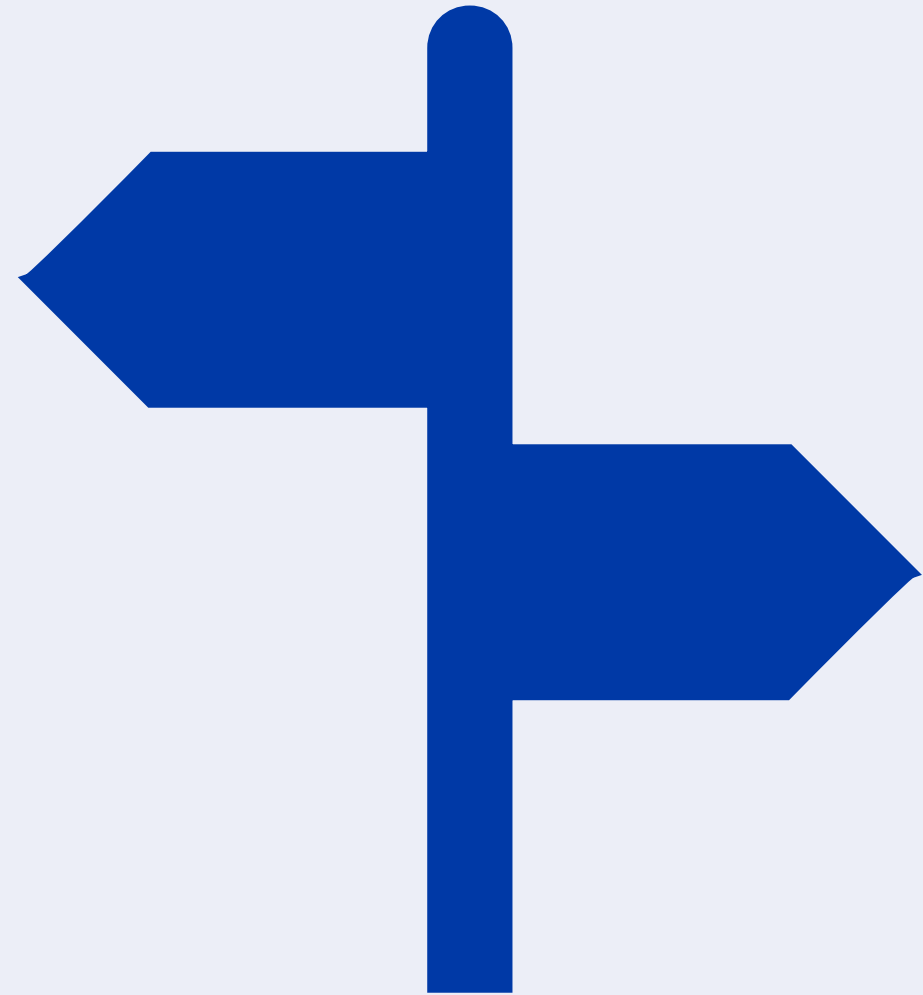
## EXAMPLE

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.

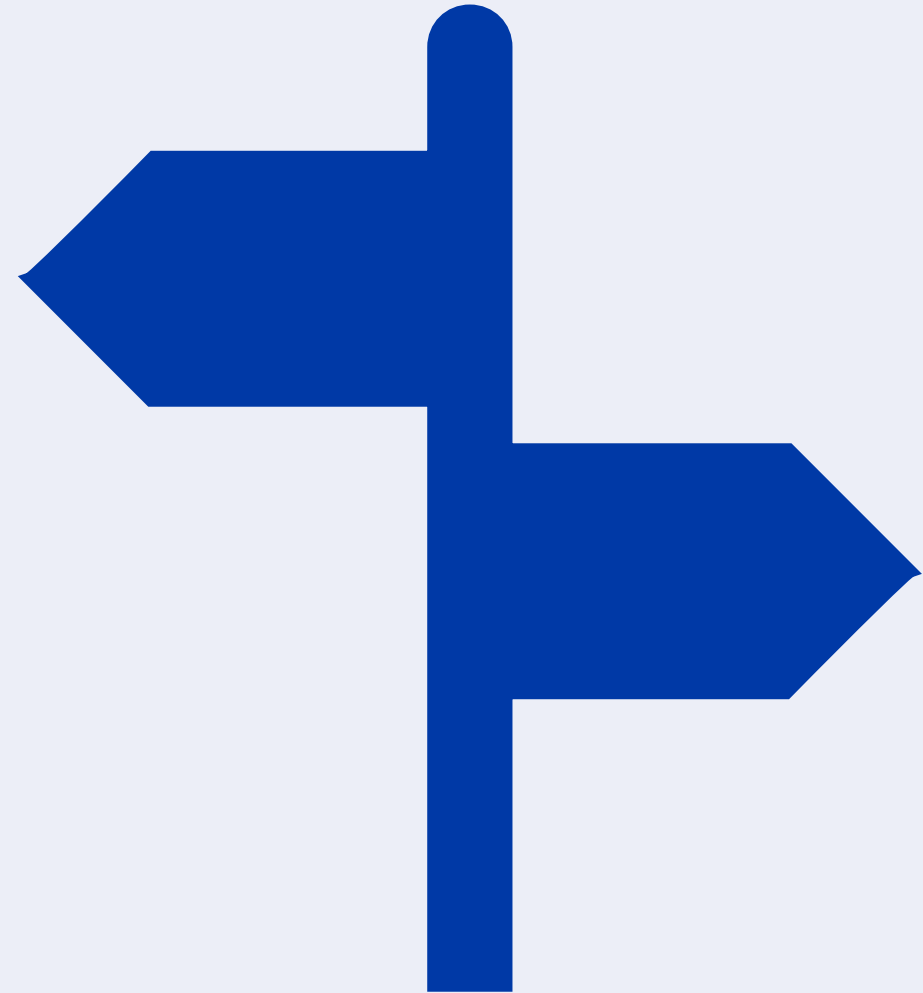
## POLL QUESTION

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



## POLL QUESTION

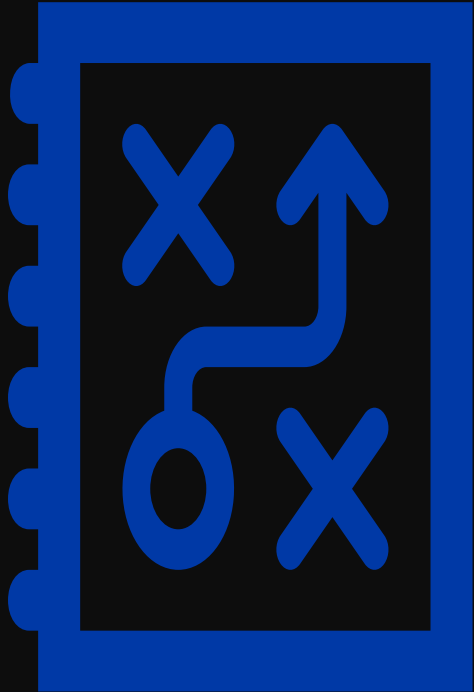
- Must the institution report this situation to local authorities?
  - Yes, they must report
  - Only if the 16-year-old wants them to
  - No, Title IX prohibits disclosure





# WHAT IS FONDLING (UNIVERSITY DEFINITION)?

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

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)?

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.

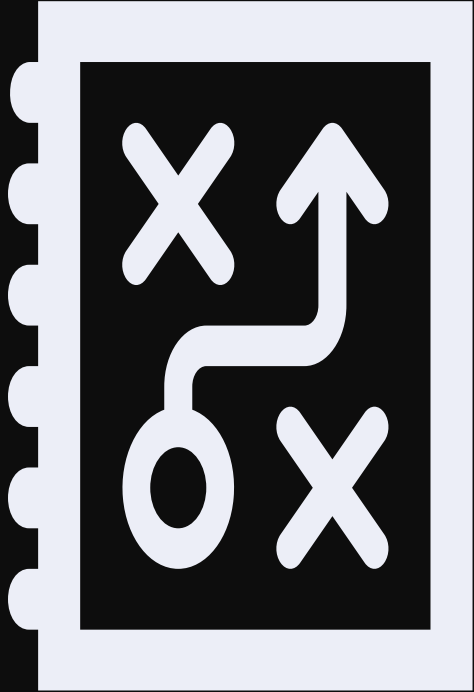
# WHAT IS DATING VIOLENCE (UNIVERSITY DEFINITION)?



“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)?



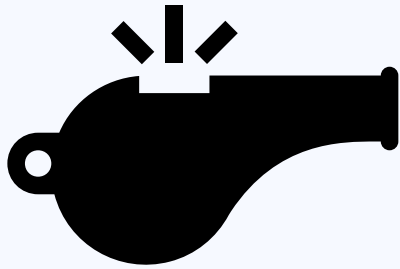
Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

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

# DOES TITLE IX ALSO PROHIBIT RETALIATION?

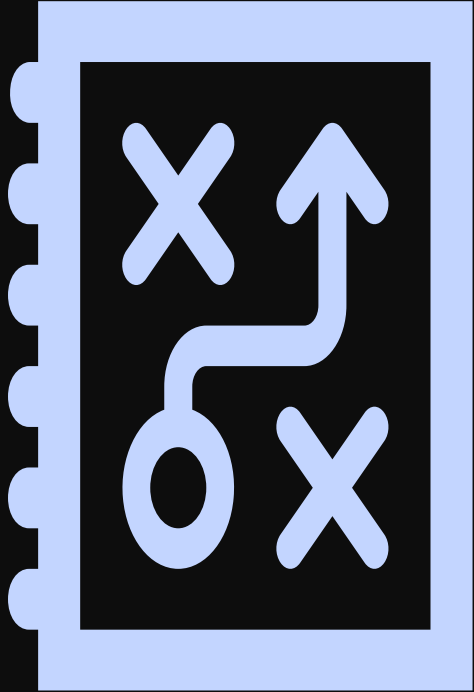
Yes – Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated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

# PROPOSED CHANGE



Proposed regulation would:

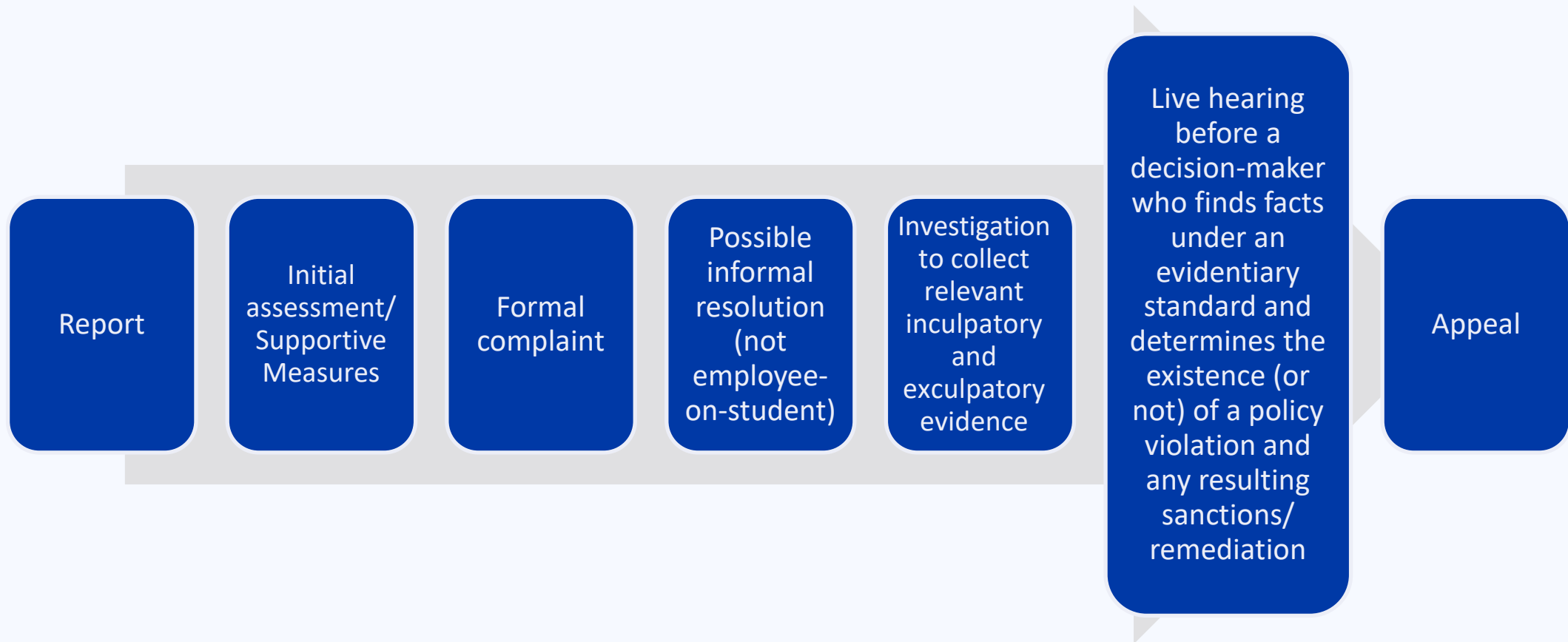
- Clarify that retaliation complaints can be consolidated with related sexual harassment complaints
- Clarify that instituting a code of conduct proceeding against a person for the purposing of interfering with their rights is retaliation
- Clarify that peer-on-peer retaliation is prohibited



## EXAMPLE OF RETALIATION

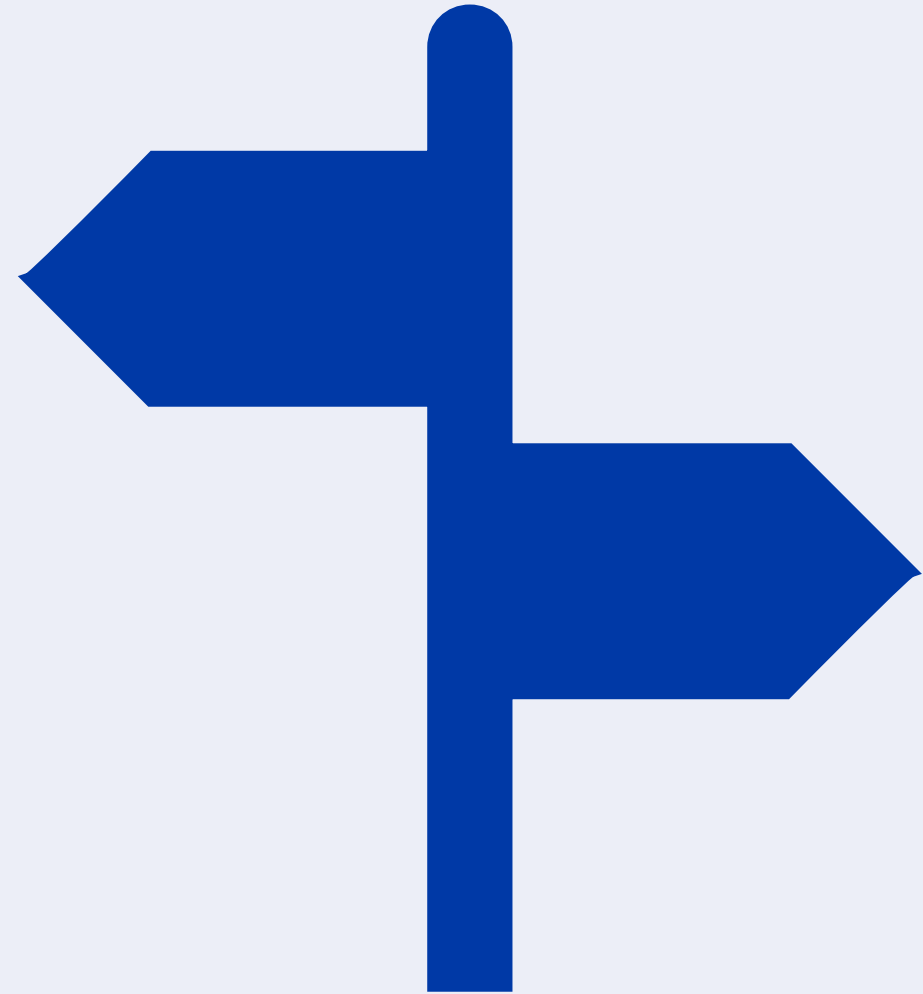
A student reports that another committed sexual assault. Believing that the reporter has filed false accusations, a third student—the roommate of the respondent—spray paints derogatory terms on the reporter's car.

# WHAT IS THE RESOLUTION PROCESS?



## POLL QUESTION

- May we use another process before Title IX?
  - Yes
  - No



# TITLE IX IS NOT THE EXCLUSIVE PROCESS FOR RESOLVING SEXUAL MISCONDUCT

- Title IX does not preclude the use of other policies and processes that may be implicated by a report of sexual misconduct
- Other policies/processes that may apply:
  - Title VII policy
  - Consensual relationships policy
  - Professionalism policies
  - Student code of conduct
  - Threat assessment
  - Employee handbook provisions
  - Faculty handbook provisions
  - Contractual provisions





# MAY WE USE ANOTHER PROCESS BEFORE TITLE IX?

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



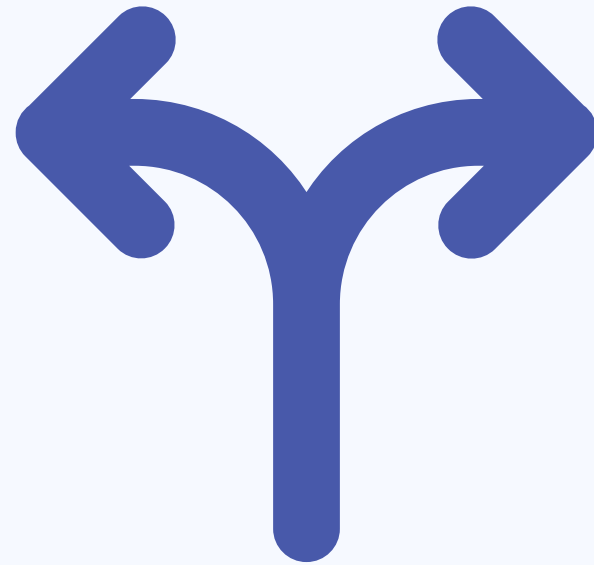
# MAY WE USE ANOTHER PROCESS AFTER TITLE IX?

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



# 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



# CAN WE USE ANOTHER PROCESS TO MAKE THE SAME FINDING WE WOULD OTHERWISE MAKE UNDER TITLE IX POLICY?

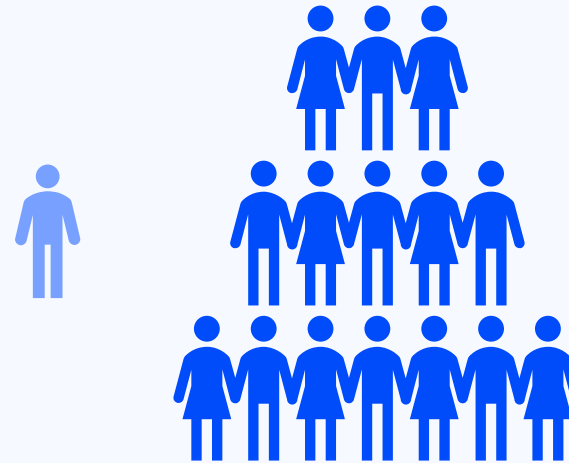
- No
- Title IX regulation requires the use of specific Title IX process for any “sexual harassment” that occurs in institution’s programs and activities



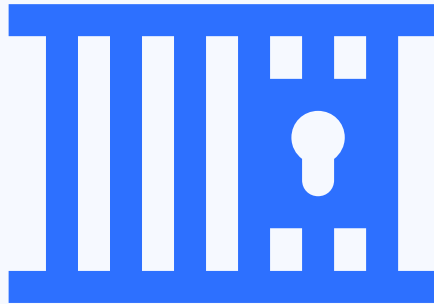
# ADDITIONAL LEGAL CONSIDERATIONS

# TITLE VII OF THE CIVIL RIGHTS ACT

- Prohibits discrimination in employment (private and public) based on:
  - Race
  - Color
  - Religion
  - National Origin
  - Sex



# THE CLERY ACT



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

# VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013 (VAWA)

Codification of Title IX principles

Sexual misconduct policy

Statements of rights and options

Support persons

Training



# APPLICABLE DISABILITIES STATUTES



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

# FERPA

- 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



QUESTIONS?



# POLICIES



# WHAT IS THE SCOPE OF THE UNIVERSITY'S TITLE IX POLICY?

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.

# 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

# WHAT ARE UNIVERSITY REPORTING OPTIONS?

## Contact the Title IX Coordinator or a Deputy Title IX Coordinator

- Interim Title IX Coordinator Contact: Jessica Galanos Location: Office of Equity, 1800 Sherman, Suite 4-500, Evanston, IL 60208 Phone: (847) 467-6165 Email: [jessica.galanos@northwestern.edu](mailto:jessica.galanos@northwestern.edu)  
[equity@northwestern.edu](mailto:equity@northwestern.edu)

## 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 Ombudsperson



# UNIVERSITY AMNESTY PROVISION

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 Interim Policy on Title IX Sexual Harassment*

QUESTIONS?

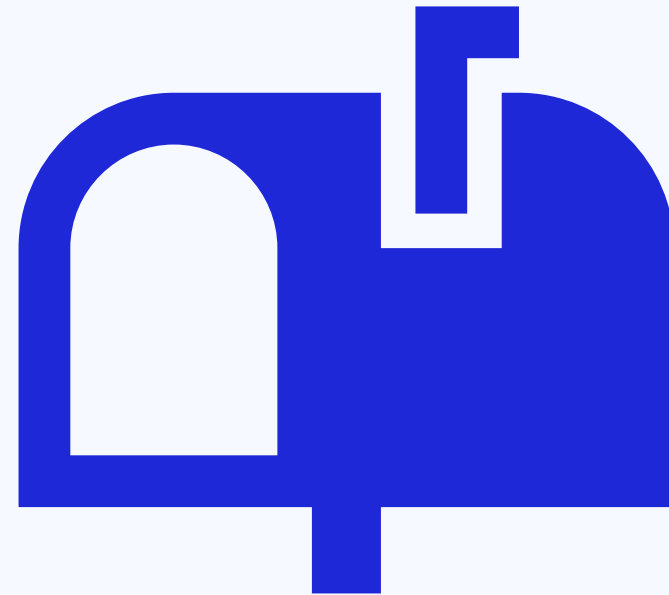


# INTAKE & SUPPORTIVE MEASURES



## HOW DOES AN INSTITUTION GET NOTICE OF SEXUAL HARASSMENT?

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

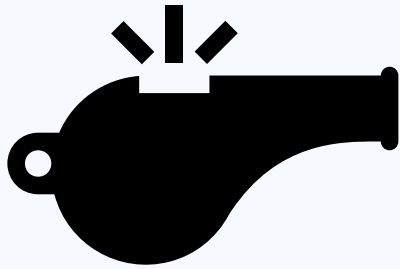


## WHAT IS “ACTUAL KNOWLEDGE”?

“Actual knowledge” occurs when

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

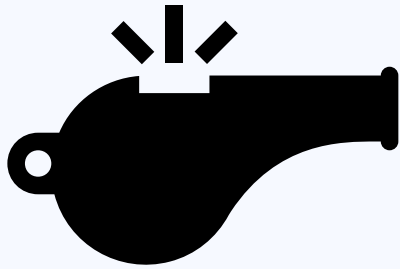
# PROPOSED CHANGE



Proposed regulation would create classes of mandatory reporters:

- Employees with authority to implement corrective measures
- Administrative leaders, teachers and advisors
- Other employees either to report or to provide contact for Title IX Coordinator and information about how to report

# PROPOSED CHANGE



Proposed regulation would:

- Impose affirmative duty on Title IX Coordinator to monitor barriers to reporting and take reasonable steps to address barriers
- Potential methods for monitoring include surveys, targeted feedback, anonymous feedback websites and emails, etc.



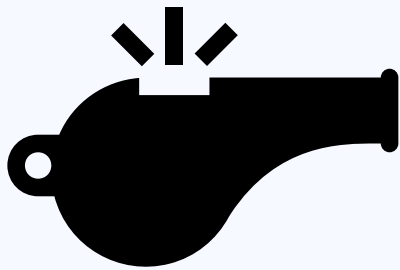
# WHEN DO WE REACH OUT TO THE ALLEGED VICTIM?

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

# WHAT IF WE CAN'T IDENTIFY THE ALLEGED VICTIM FROM A REPORT?

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

# PROPOSED CHANGE



Proposed regulation would:

- Specifically permit dismissal if the identity of the respondent cannot be determined after reasonable inquiry

# INTAKE PROCESS



# WHAT IS A FORMAL COMPLAINT?

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Signed in writing

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From the alleged victim or the Title IX Coordinator

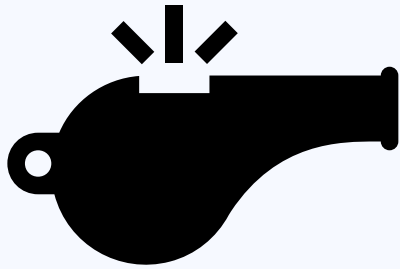
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Alleging sexual harassment

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Indicating desire to initiate the grievance process (i.e., investigation and hearing)

# PROPOSED CHANGE

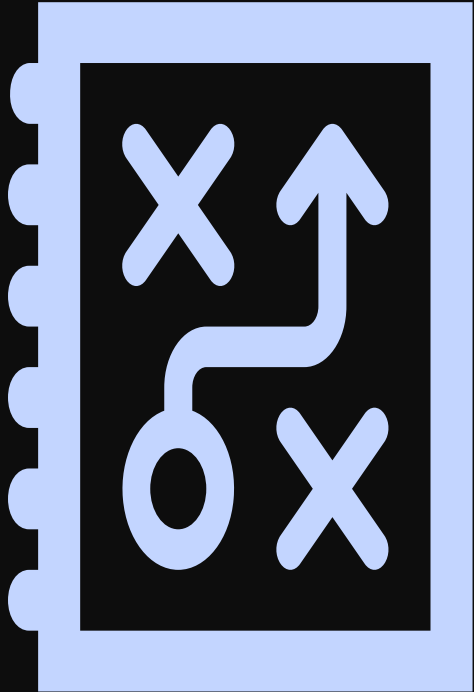


Proposed regulation would eliminate the concept of a “formal” complaint

New regulation recognizes only a “complaint” that can be verbal or written

## WHEN MAY THE TITLE IX COORDINATOR FILE A FORMAL COMPLAINT?

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

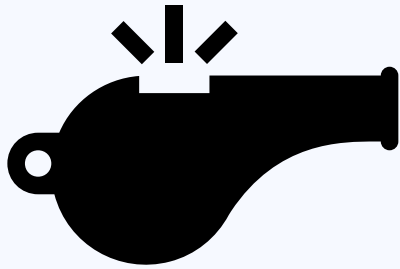


## EXAMPLE OF T9 COORDINATOR FORMAL COMPLAINT

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

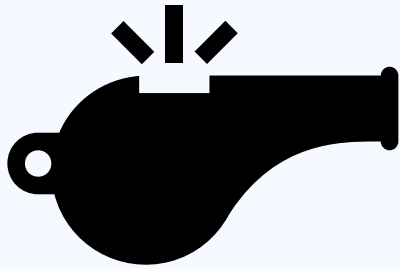


## PROPOSED CHANGE



Proposed regulation would allow complaints from someone who was a participant in education programs and activities at the time of the alleged misconduct

## PROPOSED CHANGE



A person who is legally authorized to act on behalf of a complainant may file a complaint  
E.g., parent, guardian

# WHEN *MUST* WE DISMISS A FORMAL COMPLAINT?

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

*Practice point – duty*

## WHEN *MAY* WE DISMISS A FORMAL COMPLAINT?

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

# CAN WE CONSOLIDATE THE COMPLAINTS?

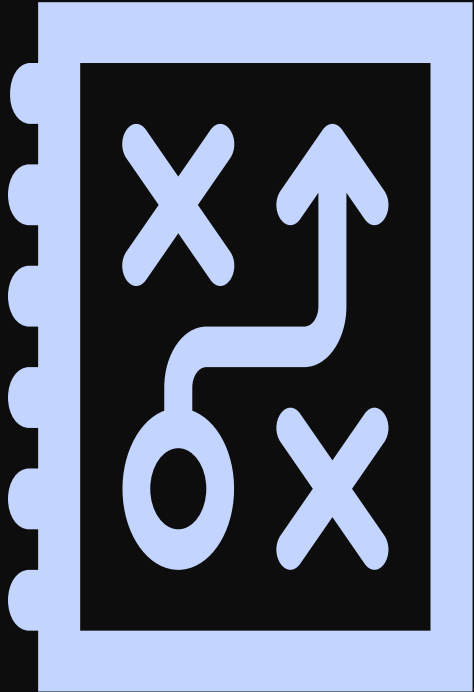
Yes – Complaints can be consolidated if they arise out of the same facts and circumstances

Multiple respondents

Multiple complainants

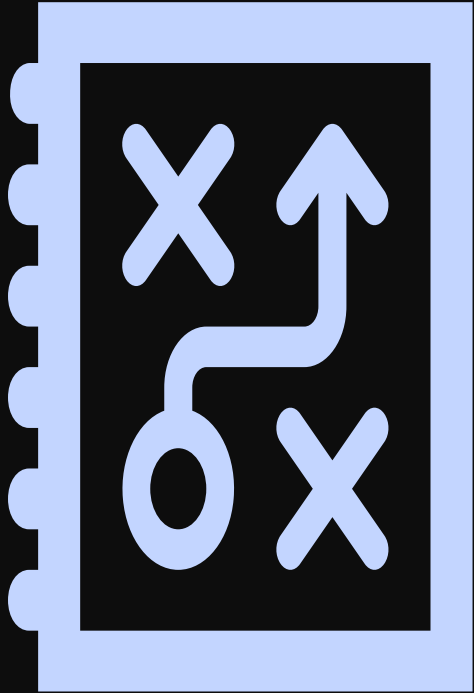
Multiple allegations against a single respondent

Multiple allegations from a single complainant



## EXAMPLE OF PERMISSIBLE CONSOLIDATION

Students A and Student B, who are roommates, allege that Student C barged into their apartment drunk and propositioned them for sex. Student A and Student B each file their own formal complaint of sexual harassment from the same incident.



## EXAMPLE OF IMPERMISSIBLE CONSOLIDATION

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

# WHAT IS THE GRIEVANCE PROCESS?

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 (coordinating with relevant disciplinary officials) resulting sanctions/ remediation

Appeal



# WHAT GENERAL PRINCIPLES GOVERN THE GRIEVANCE PROCESS?

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

# HOW LONG DOES A GRIEVANCE PROCESS TAKE?

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



# WHAT DO WE DO IF WE FIND SEXUAL HARASSMENT OCCURRED?

If grievance process results in a finding of sexual harassment:

- Discipline for the respondent as determined by those with authority over the respondent
- For complainant, grant remedies reasonably necessary to restore or preserve access to education programs and activities

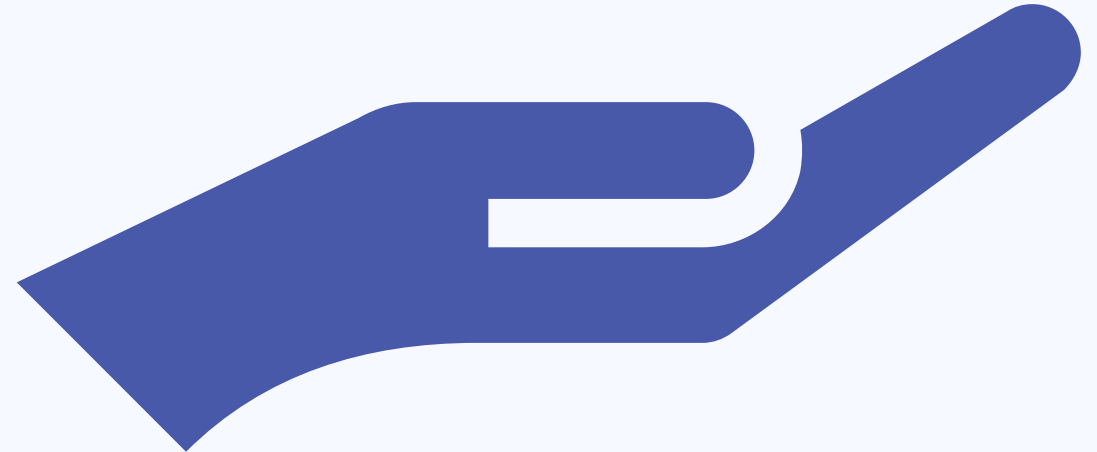
# SUPPORTIVE MEASURES

Must be offered to an alleged victim once an institution has actual knowledge of potential harassment

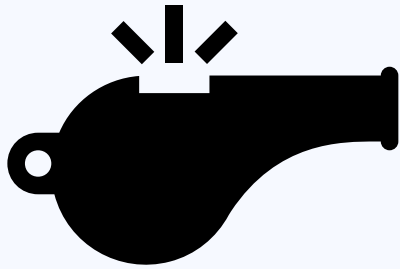
- Must be offered also to respondent once a formal complaint is filed
- Ambiguity as to whether support services must be offered to respondent before formal complaint is filed
- Non-disciplinary in nature; non-disciplinary measures only until end of investigation and grievance process
- Title IX Coordinator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

# WHAT ARE SUPPORTIVE MEASURES?

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

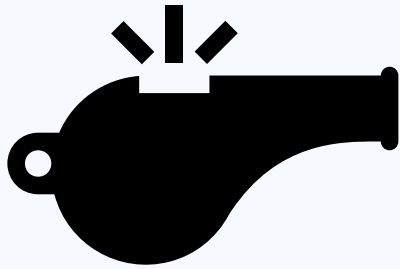


# PROPOSED CHANGE



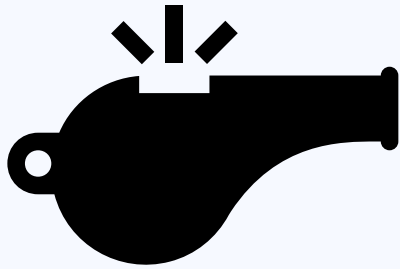
- Supportive measures that burden a respondent must be terminated at the conclusion of the grievance procedures
- May be no more restrictive of respondent than is necessary

# PROPOSED CHANGE



Either party must be allowed to seek modification or termination of supportive measures “if circumstances change materially.”

## PROPOSED CHANGE

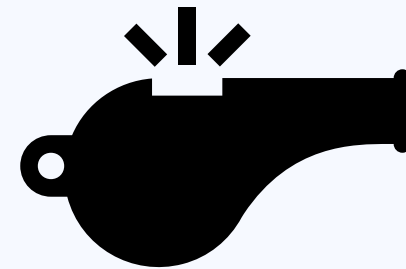


Even if a complaint is dismissed, the institution must provide supportive measures to the complainant, as appropriate, and to the respondent if the respondent has been notified.



## PROPOSED CHANGE

Supportive measures may also be shared with another party “only if necessary to restore or preserve that party’s access to the education program or activity.”



# EXAMPLES OF SUPPORTIVE MEASURES



Counseling



Academic accommodations



Housing accommodations



Security escorts or transportation arrangements



Leave of absence



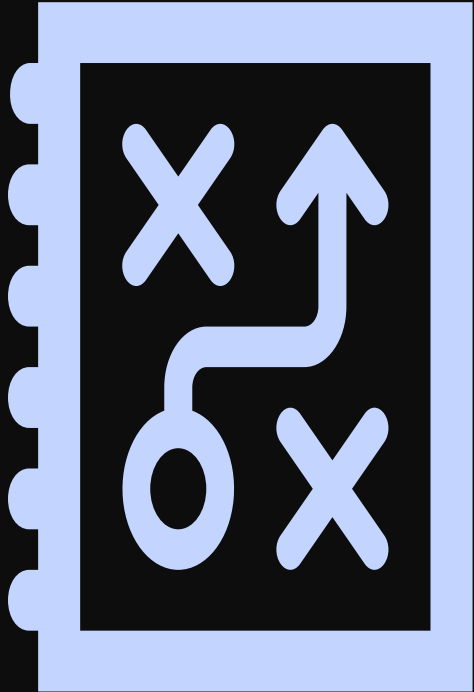
Increased security or monitoring



Modified work schedules

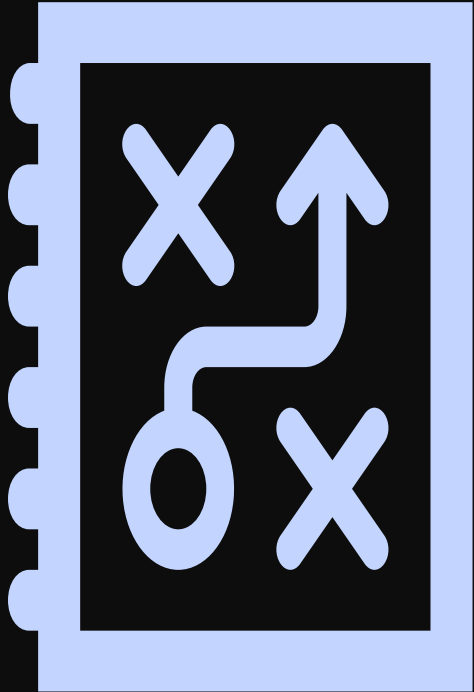


Mutual no-contact order where implicated by facts



## EXAMPLE: REASONABLE SUPPORTIVE MEASURES

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: UNREASONABLE SUPPORTIVE MEASURES

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.

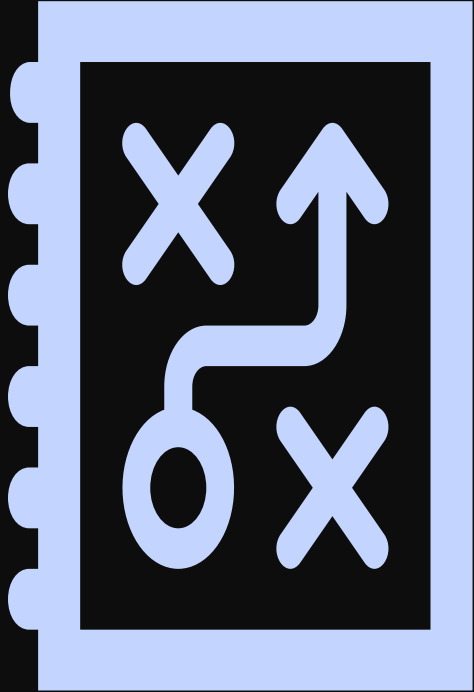
## POLL QUESTION

- Can supportive measures affect the respondent?
  - Yes
  - No
  - It depends



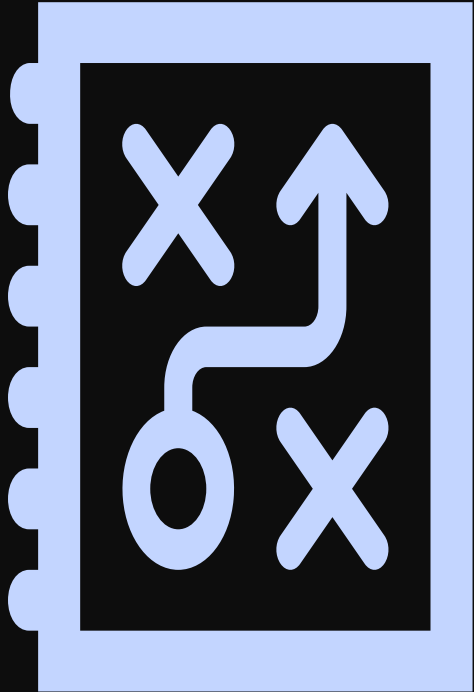
# CAN SUPPORTIVE MEASURES AFFECT THE RESPONDENT?

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



## EXAMPLE: UNREASONABLE BURDEN

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



## EXAMPLE: DISCIPLINARY SUPPORTIVE MEASURE

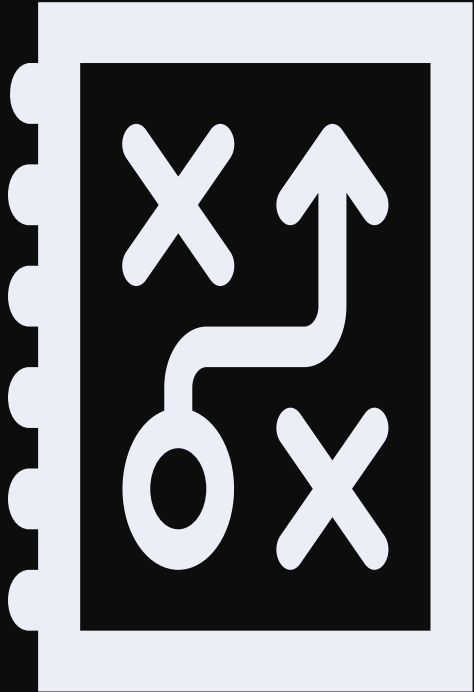
In-State Student accuses Out-of-State Student of sexual assault. In-State requests as a support measure that Out-of-State be removed from all shared classes and prohibited from being on campus after 5:00 pm.



# CAN WE USE INTERIM REMOVALS OR SUSPENSIONS FOR STUDENTS?

*Students* may be removed on emergency basis if:

- Individualized safety and risk analysis
- Determines an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
- Student is given immediate notice and opportunity to contest the removal

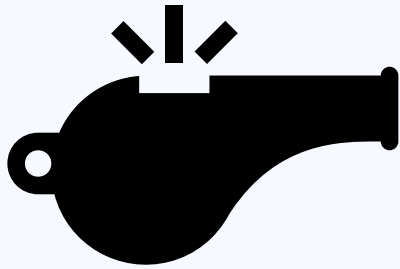


## EXAMPLE – INTERIM REMOVAL OR SUSPENSION?

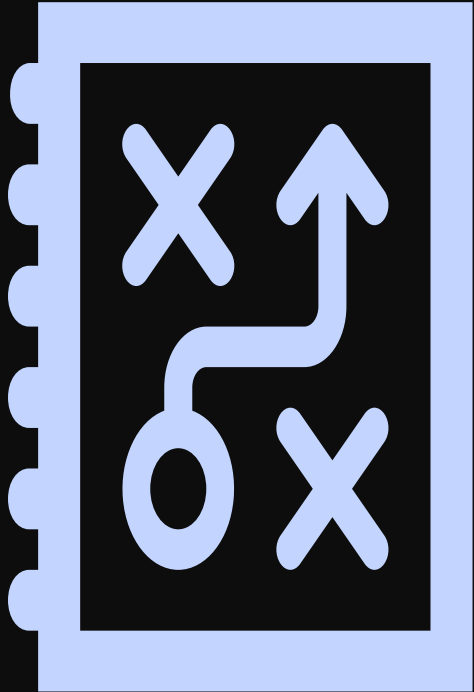
Theology student reports that Ministry student placed a secret video camera in a residence hall bathroom and watched Theology student take a shower, then commented on Theology student's body to several mutual acquaintances, suggesting the two had engaged in consensual sexual activity. There is no allegation of physical contact or threat of physical contact. Institution locates camera and identifies it as belonging to Ministry student.

*What else would you ask if considering interim removal/suspension?*

# PROPOSED CHANGE



- Interim removals or suspensions can be utilized when there is an “immediate and serious threat to health or safety.”
- Requirement of “physical” threat is removed



## EXAMPLE: IMMEDIATE THREAT TO PHYSICAL HEALTH OR SAFETY

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

# CAN WE USE AN ALREADY EXISTING PROCESS FOR INTERIM REMOVALS?

Yes – If that process complies with the Title IX standard

Common institutional examples include:

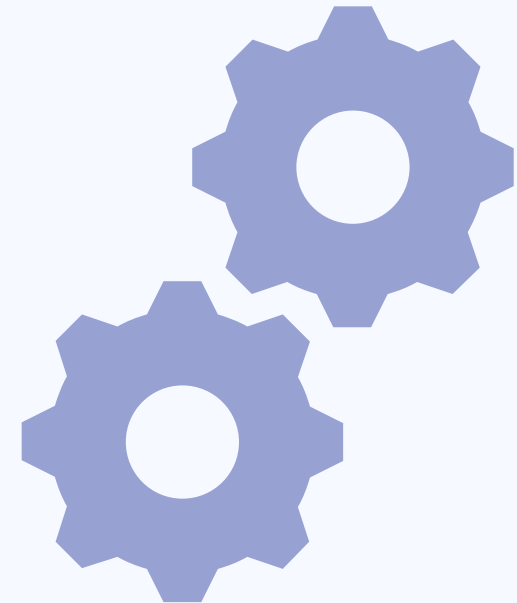
- Threat assessment policy
- Incident response team processes
- Interim suspension provisions of Student Handbook

# CAN WE PLACE EMPLOYEES ON ADMINISTRATIVE LEAVE?

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

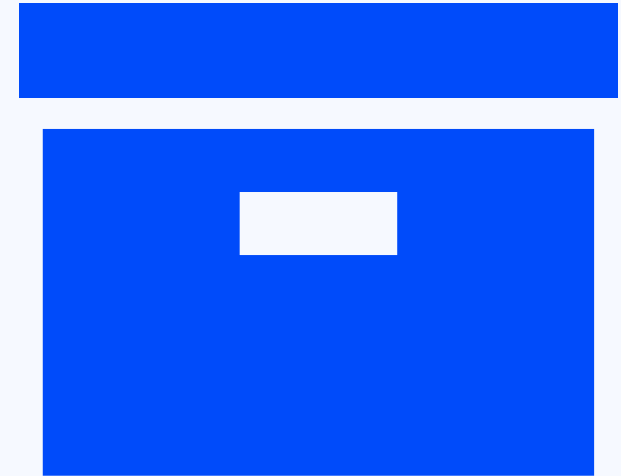
# DO STUDENTS AND EMPLOYEES HAVE OTHER RIGHTS?

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



# 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

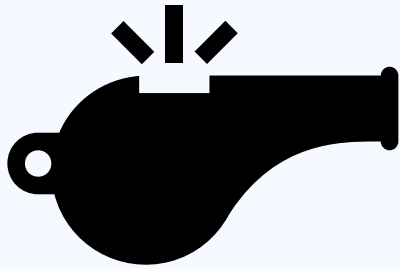




# WHO IS RESPONSIBLE FOR SUPPORTIVE MEASURES?

- 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

# PROPOSED CHANGE



- Remember, proposed regulation allows an appeal to an impartial person of supportive measure decisions
- Important to consider what role Title IX Coordinator plays in decision-making process

# EMERGENCY RESOURCES

## 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

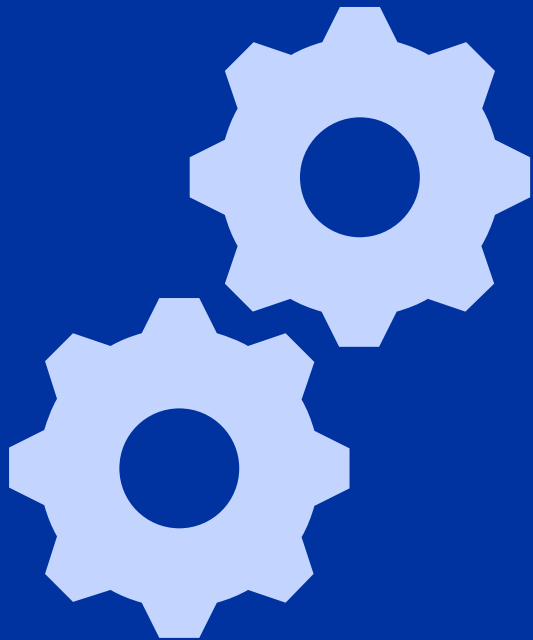
## Evanston Domestic Violence Line (YWCA)

- 877-718-1868

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

- 800-656-HOPE

## GROUP SCENARIO



Casey and Morgan attend a party at a sorority house and consume alcohol. The two go to Morgan's off campus apartment and have sex. The following day, Morgan confides in their faculty advisor that they may have been incapacitated during the encounter. The advisor tells Morgan to talk to the Title IX Coordinator about options. After speaking to the Title IX Coordinator, Morgan requests access to counseling and to be moved out of a class they share with Casey. Weeks later, Morgan sees Casey at an off-campus party. Seeing Casey causes Morgan to have a panic attack and to flee. The next day, Morgan calls the Title IX Coordinator and requests an investigation of the earlier sexual encounter. Morgan also requests that Casey be barred from contacting Morgan and be required to complete the remainder of the semester (three) weeks online so that there is no risk of contact on campus. The Title IX Coordinator imposes a no-contact order and imposes a proximity restriction. The school's code of student conduct prohibits students from committing sexual assault, regardless of location.

## WHAT IS INFORMAL RESOLUTION?

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



# TYPES OF INFORMAL RESOLUTION

**Mediation**

**Facilitated  
discussions led by  
Title IX  
Coordinator**

**Restorative justice**

**Attorneys for  
parties negotiate  
an agreement**

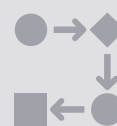
**Arbitration  
without a live  
hearing**



# WHAT ARE THE KEY CONCEPTS OF INFORMAL RESOLUTION?



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



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



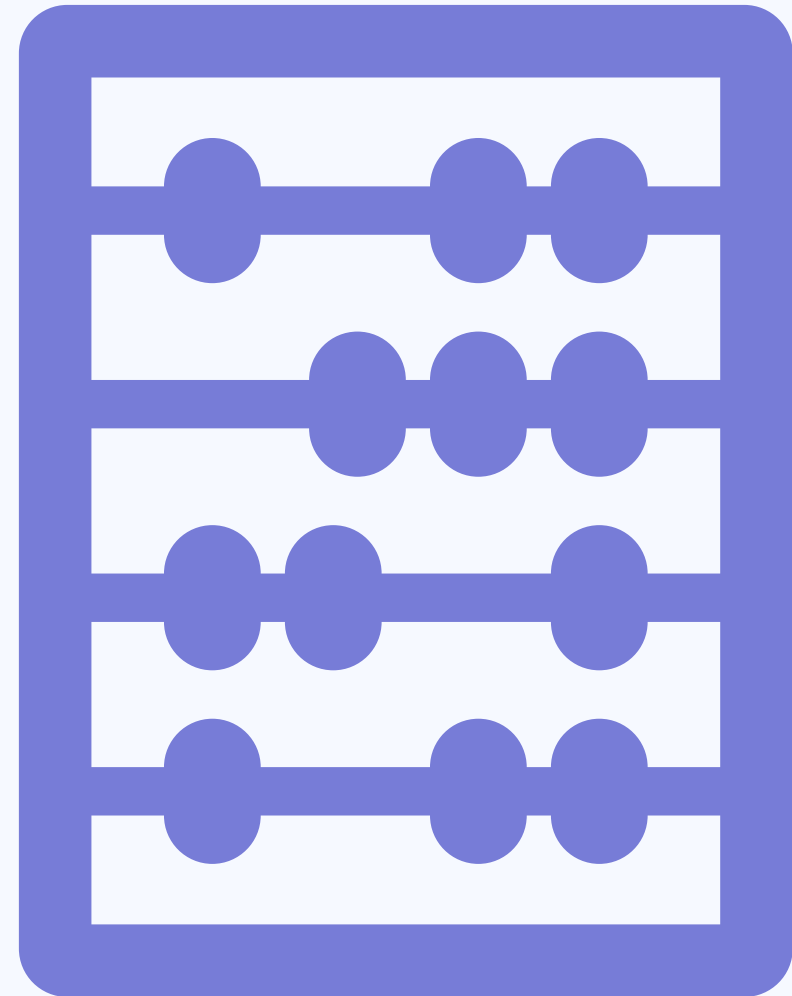
The parties must voluntarily agree to participate in writing



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

## WHAT ARE CONSIDERATIONS AROUND WHETHER INFORMAL RESOLUTION IS APPROPRIATE?

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



# HOW SHOULD WE DOCUMENT INFORMAL RESOLUTION?

As appropriate to each matter:

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Initial consent to participate

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Notice to the parties regarding the allegations

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Consent to agreed upon procedures

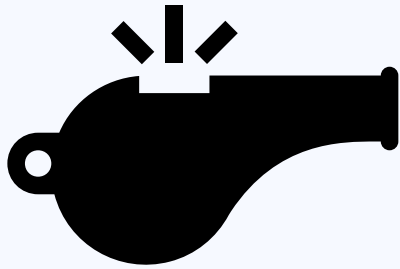
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Any agreement reached through the informal resolution process signed by all parties

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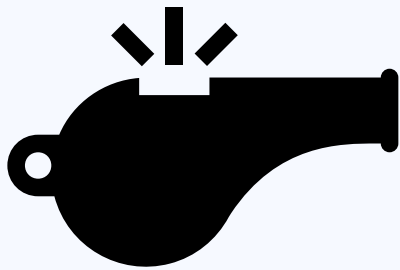
And/or other documentation as appropriate

# PROPOSED CHANGE



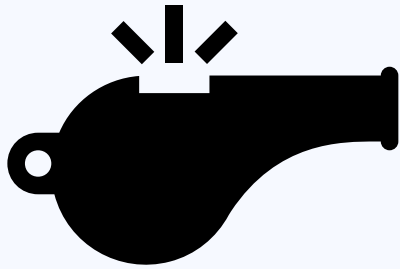
- Formal “written” complaint is no longer required
- Not allowed in any case where an employee is accused of discriminating against or sexually harassing a student.

## PROPOSED CHANGE



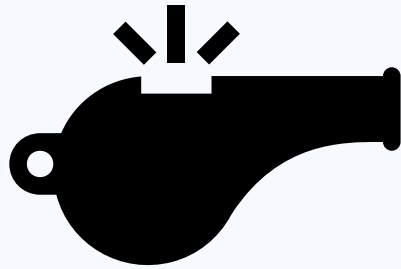
If informal resolution fails and the grievance process resumes, the institution may not use evidence obtained solely through informal resolution in the grievance process.

# PROPOSED CHANGE



- Facilitator of informal resolution cannot be the investigator or decision-maker.
- Facilitator of informal resolution must be free of conflicts of interest and bias.

## PROPOSED CHANGE



Even if a particular case is resolved through informal resolution, Title IX Coordinator must take steps to prevent continuing and recurrence of sex discrimination.

QUESTIONS?





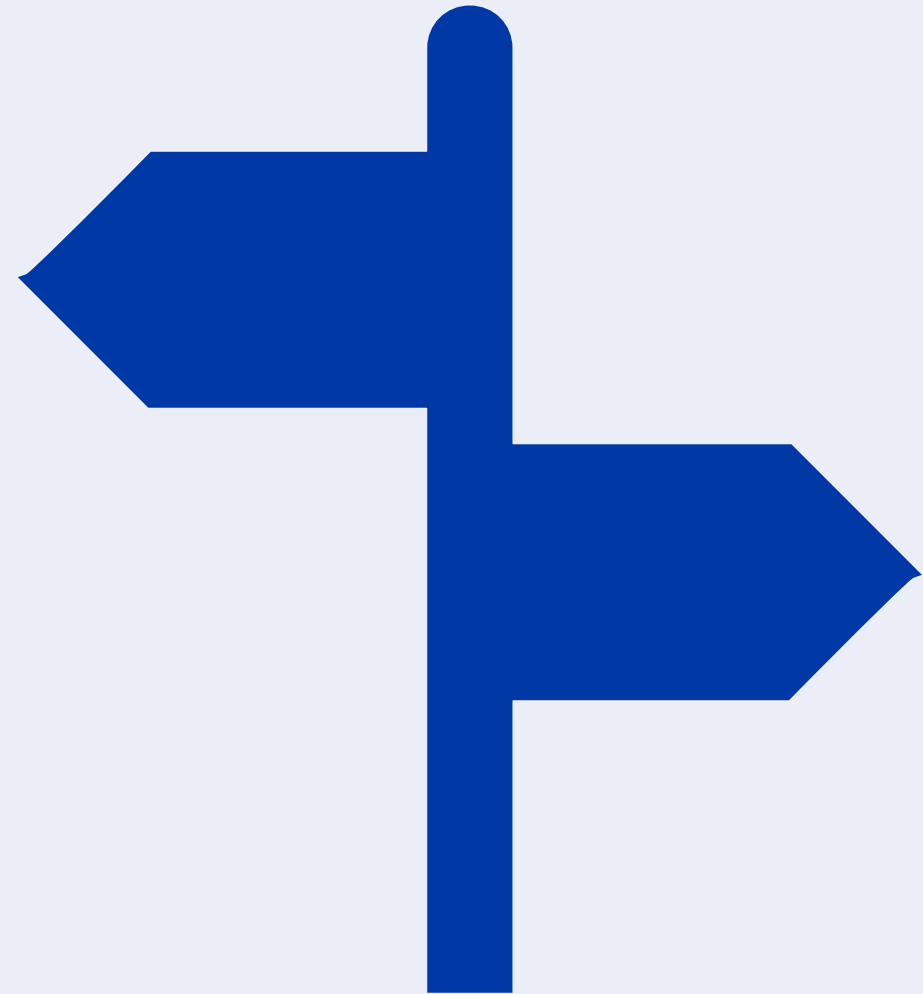
# BIAS, CONFLICTS, TRAUMA



# POLL QUESTION

Who is responsible for identifying conflicts of interest?

- Title IX Coordinator
- Parties
- Those acting on behalf of the institution in the Title IX process
- All of the above



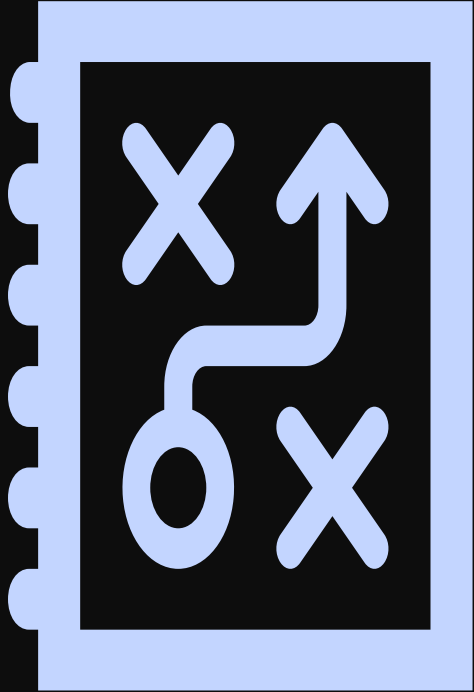
## WHO IS RESPONSIBLE FOR IDENTIFYING CONFLICTS OF INTEREST AND BIAS?

- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also permit parties to raise concerns of conflicts of interest and bias

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

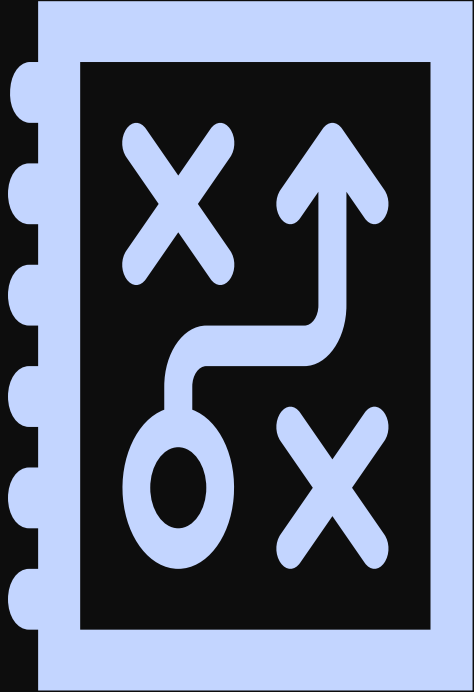
# WHAT IS A CONFLICT OF INTEREST?

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



## EXAMPLE: CONFLICT OF INTEREST

Student Math files a formal complaint of sexual harassment against Student Chemistry. One of the hearing panel members selected is Student Chemistry's faculty advisor who has previously written letters of recommendation for Student Chemistry's application to graduate school in which faculty advisor wrote that Student Chemistry is "honest to a fault."



## EXAMPLE: CONFLICT OF INTEREST

An administrator accuses an employee of an office supply vendor of sexual harassment; matter is investigated. Institution assigns a hearing panel member whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.

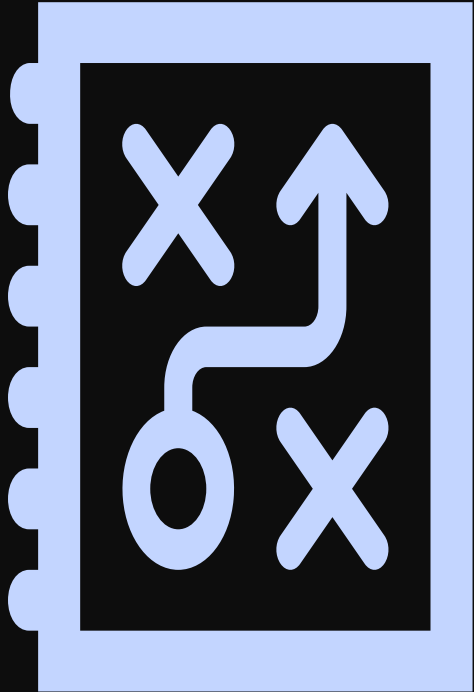
# EXAMPLES OF IMPERMISSIBLE STEREOTYPES

“Anyone who would go into another’s bedroom drunk must have wanted to have sex.”

“Students can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

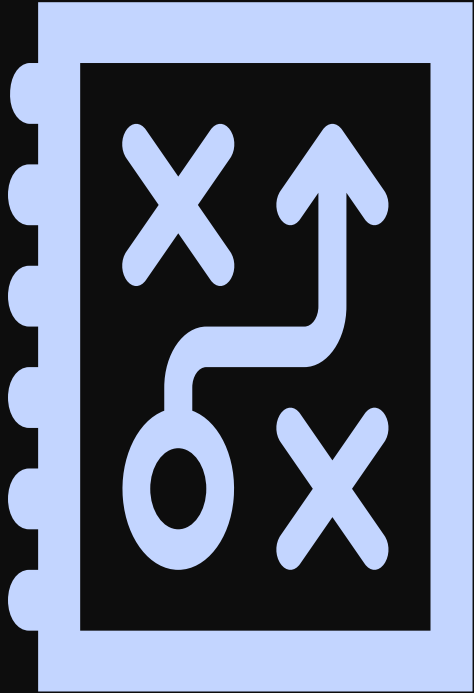
“There are no false reports of rape. Therefore, every complainant must be believed.”



## EXAMPLE: BIAS

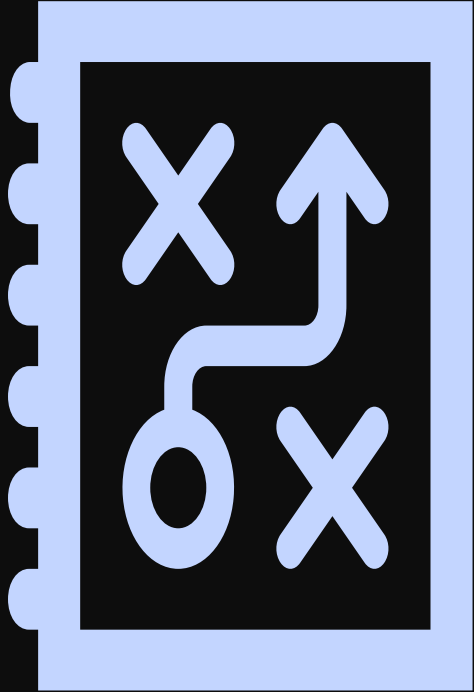
An employee in the gender studies department who is chosen to serve as a decision-maker also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault.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





## EXAMPLE: BIAS

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



## FOR DISCUSSION

Do the following circumstances or relationships constitute conflicts of interest?

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

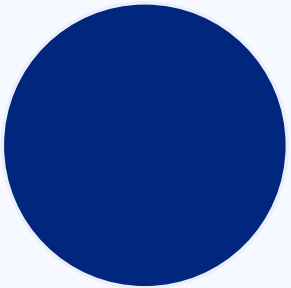
# WHAT IS THE DEFINITION OF TRAUMA?



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

# DSM V DEFINITION

- Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:
  - directly experiencing the traumatic event(s);
  - witnessing, in person, the traumatic event(s) as it occurred to others;
  - learning that the traumatic event(s) occurred to a close family member or close friend (in case of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental);
  - or
  - experiencing repeated or extreme exposure to aversive details of the traumatic event(s)

## SOME “TYPES” OF TRAUMA

**Acute** trauma results from a single incident. (Accidents/Violent Incidents).

**Chronic** trauma is repeated and prolonged, such as domestic violence or abuse.

**Complex** trauma is exposure to varied and multiple traumatic events, often of an invasive, interpersonal nature (civil unrest/war/child abuse/family violence).

## WHAT IS TRAUMA'S IMPACT ON THE BRAIN?

- Brain senses threat and sets off alarm
- Thinking brain assesses
- Thinking brain shuts down
- Emotional brain
- Fight, flight, freeze
- Thinking brain comes back online, turns off alarm, helps calm down
- Emotional brain may continue to sound the alarm, and overwhelming the system going forward



# HOW DO WE APPROACH TRAUMA IN A TITLE IX CASE?

## Balance

- Illinois statute requires trauma-informed approaches (110 Ill. Comp. Stat. § 155/1 et seq.)
- “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)

# WHEN DOES TRAUMA AFFECT A PERSON?

- Not in every case
- Never *assume* anyone participating has suffered any trauma
- Trauma may arise before, during, or after alleged Title IX misconduct, and may impact an individual's response during proceedings
- Not just complainant



# SOURCES OF TRAUMA

- Own experience
- Around event
- Around accusations
- Thoughts in the respondent's mind:
  - Will this be a criminal investigation?
  - Could I go to jail?
  - Could I get kicked out of school?
  - Should I have a lawyer?
  - Should I tell my parents?
  - (You can't answer these questions but must give time and options)

# 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 & MEMORY

- Trauma triggers chemical reaction which can impact
  - Perception
  - Ability to React
  - Memory
- Each individual reacts differently



## TRAUMA-INFORMED INTERVIEWS

- Provide information to the individual
- Acknowledge the difficult situation
- Describe the process
  - Your role
  - Policy
  - Communication
- Avoid requiring recitation of information already provided, if possible

## INVESTIGATING & TRAUMA

- Avoid judgment, impatience, disrespect, misuse of power
- Emphasize
  - Safety/comfort
  - Choices
  - Support for person
    - Personal support
    - Available services
    - Remain objective on facts
  - Trustworthiness/transparency



## TRAUMA-INFORMED INTERVIEWS (CONT.)

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

## TRAUMA-INFORMED INTERVIEWS (CONT.)

- Instead of asking “why,” ask about what witness was thinking during the experience
- Consider asking about memories associated with the senses:
  - Sights
  - Smells
  - Feelings



# TRAUMA & CREDIBILITY

- Don't assume information is not credible due to the manner delivered (e.g., linear, non-linear)
- 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



QUESTIONS?



# INVESTIGATION



# 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

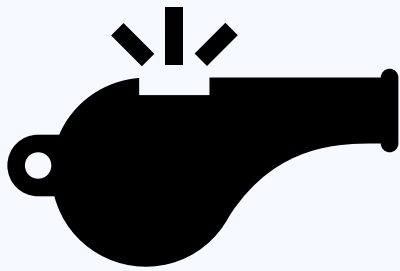
## Others

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

# WHAT IS THE PURPOSE OF AN INVESTIGATION?

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

# PROPOSED CHANGE



- Proposed regulation would allow a combined investigation/decision making model
- But, with more robust rights of the parties to pose questions through the investigator

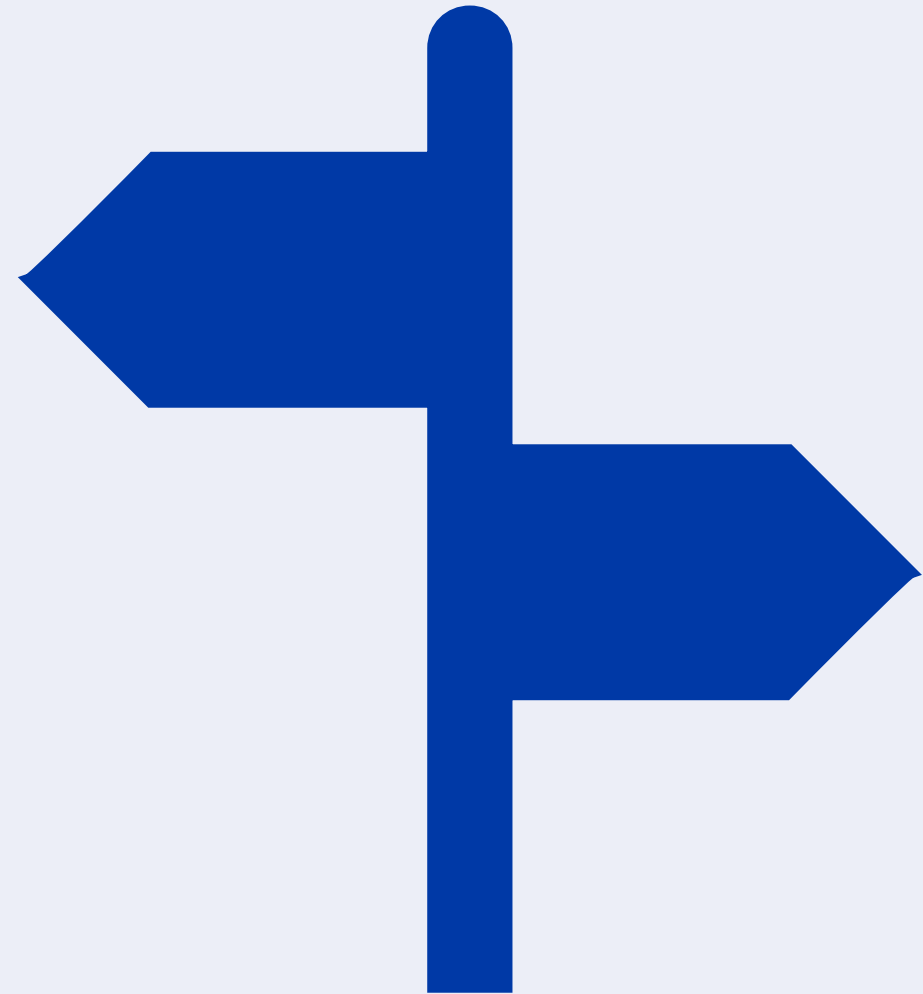
# WHAT ARE THE GENERAL PRINCIPLES OF AN INVESTIGATION?

- 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

## POLL QUESTION

The Title IX Coordinator can begin investigating to determine details in preparing the written notice.

- True
- False



# 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

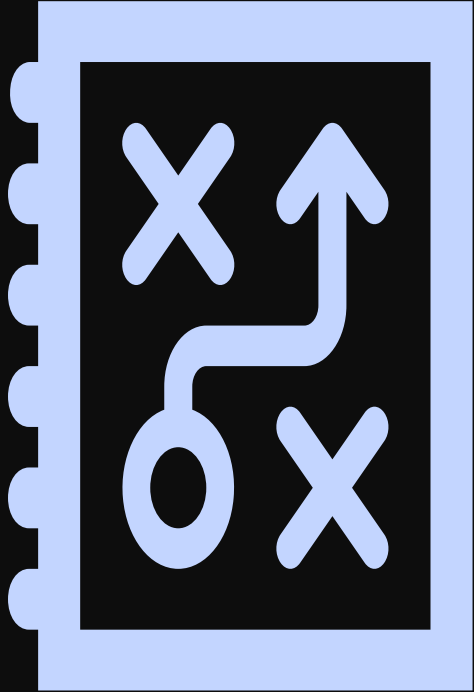




# WHAT ELSE DOES THE NOTICE NEED TO SAY?

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

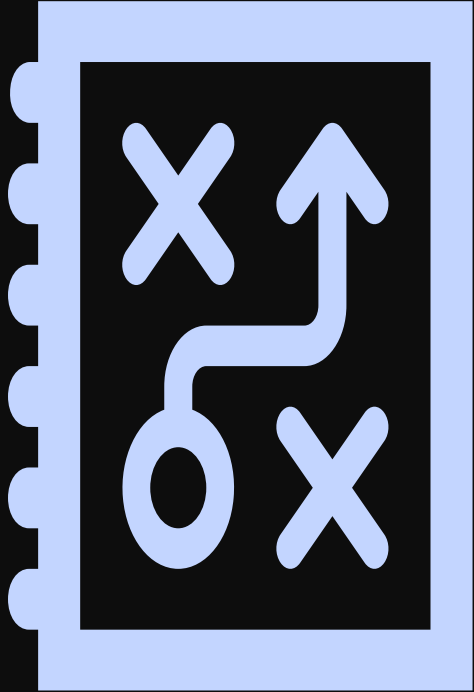


## EXAMPLE: INCORRECT

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.

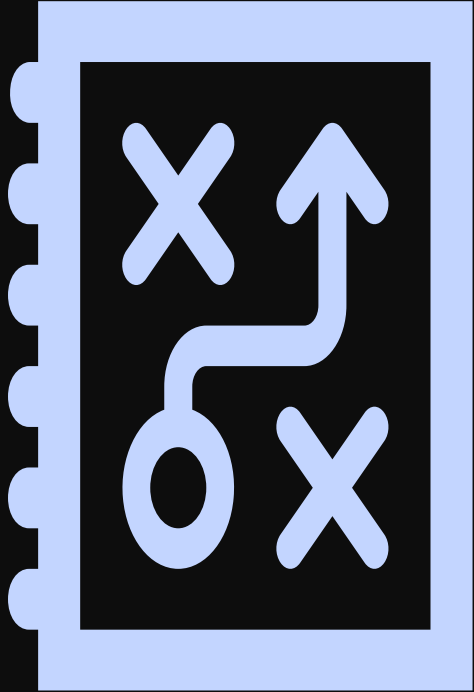
## CAN WE GATHER ANY INFORMATION PRIOR TO THE WRITTEN NOTICE?

- 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

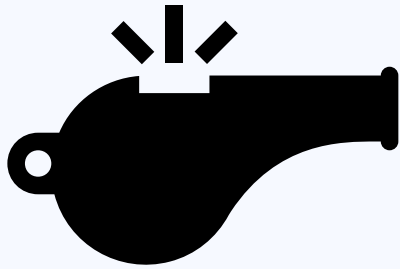


## MAY PARTIES HAVE AN ADVISOR DURING THE INVESTIGATION?

- 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*



# PROPOSED CHANGE



Proposed regulation makes clear that an institution-provided advisor does not have to be an attorney.



# WHAT IS THE ROLE OF AN ADVISOR DURING THE INVESTIGATION?

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

# WHAT MUST AN ADVISOR *NOT* DO DURING THE INVESTIGATION?

Inhibit

Advisor cannot inhibit communication between investigator and party

Disrupt

Advisor cannot disrupt meetings and interviews

Argue

Advisor is not permitted to argue with the investigator

Evidence


Advisor does not present evidence or “make a case”

# WHAT IF THE ADVISOR BREAKS THE RULES?

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



# INVESTIGATION FRAMEWORK

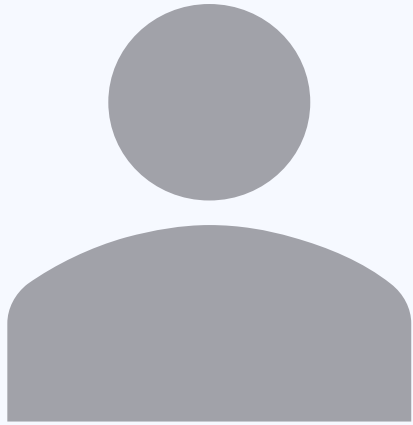


The investigators interview the complainant, respondent, and relevant witnesses.  
The investigators identify and gather evidence.

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.

# HOW DO WE COLLECT EVIDENCE IN AN INVESTIGATION?



**Interviews of  
Parties and Witnesses**



**Collection of  
Non-Testimonial Evidence**

# WHEN MIGHT I BE ASKING QUESTIONS IN AN INVESTIGATION?

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

# HOW MIGHT WE STRUCTURE AN INTERVIEW?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

# HOW DO I KNOW WHAT QUESTIONS TO ASK?

Review the nature of the allegations

Review the definition of the particular type of sexual harassment alleged

Consider facts that would help determine whether a particular element of the alleged violation is satisfied

Focus on relevant evidence (tending to make a *disputed* fact more/less true) and (for investigators) other evidence directly related to allegations

Consider questions that will bear on credibility



## EXAMPLE: SOURCES OF NON- TESTIMONIAL EVIDENCE

The parties

The witnesses

Institutional email

Video cameras

Key card logs

Timesheets

Public social media

Institution-owned computers

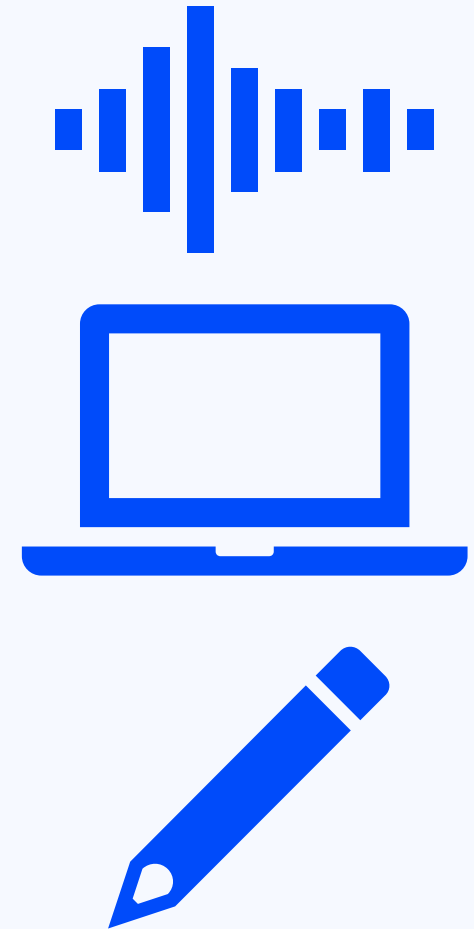
Institution-owned personal devices

Information on institutional servers

Police

# 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



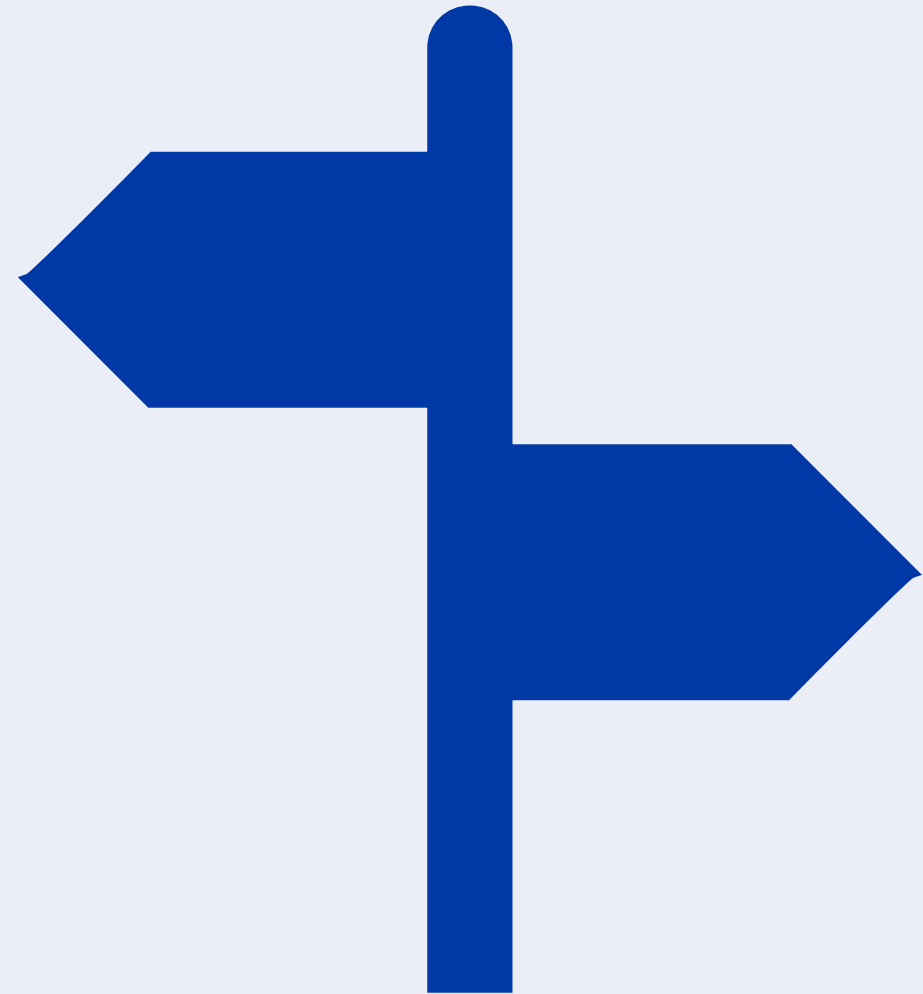
## DO PARTIES/WITNESSES HAVE A RIGHT TO RECORD THE INTERVIEW THEMSELVES?

- 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.

## POLL QUESTION

Do the parties have access to the evidence?

- Yes, only during the hearing
- Yes, at least 10 days before the investigative report is issued
- Not usually
- It depends



# DO THE PARTIES HAVE ACCESS TO THE EVIDENCE?

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

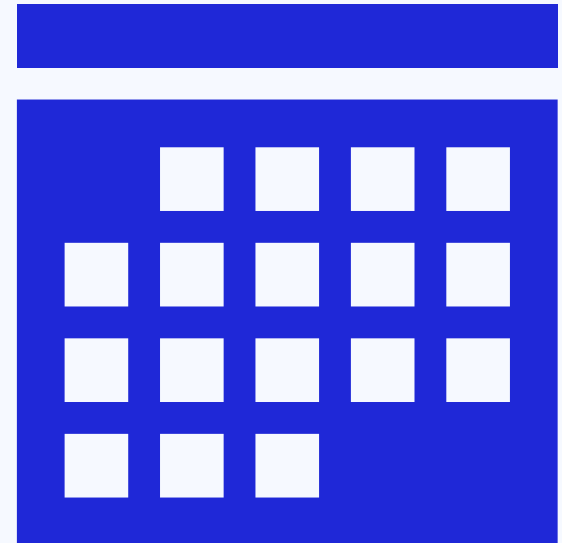


## DO THE PARTIES GET TO RESPOND TO THE EVIDENCE?

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

# WHEN IS THE INVESTIGATION REPORT FINALIZED?

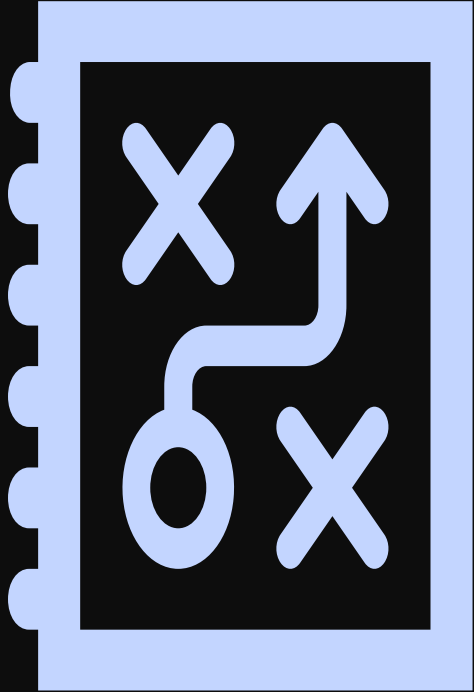
- After the 10-day period to review the evidence expires
- The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the 2020 Title IX regulation, factual findings and determinations of policy violations are made at a subsequent hearing



# WHAT EXACTLY HAS TO BE SHARED?

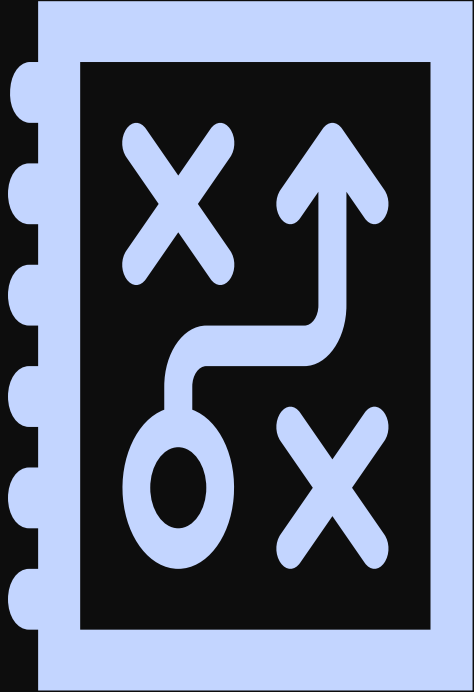
- Anything that has “evidentiary” value
- That is, the information is potentially inculpatory or exculpatory in light of the allegations at issue; or is otherwise potentially relevant
- E.g., witness statements; interview transcripts; text messages; social media posts; photographs; etc.
- Logistical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





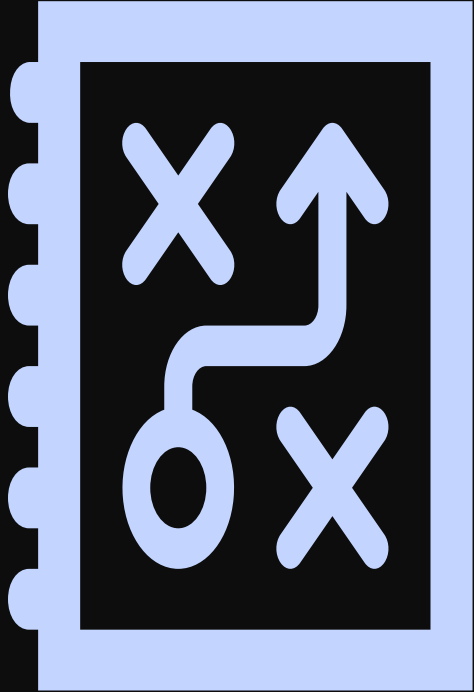
## EXAMPLE

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.



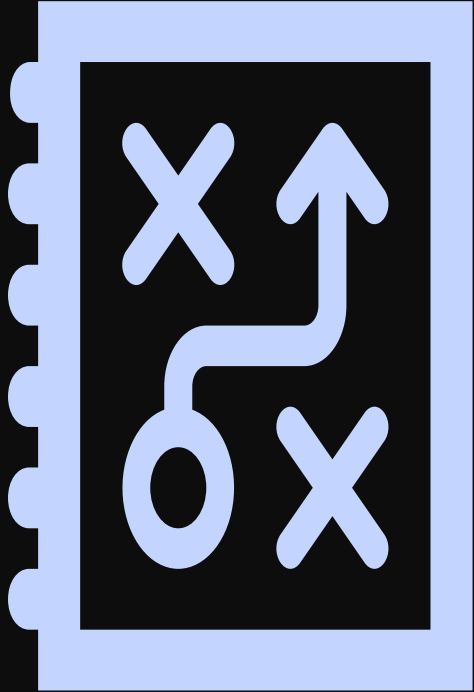
## EXAMPLE

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.



## 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 a copy of the evidence and tells parties they can schedule a time to review it in a conference room without cell phones.

# ARE WE REQUIRED TO ADDRESS A PARTY'S RESPONSE TO THE EVIDENCE?

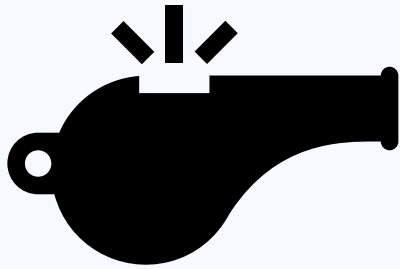
- It depends on whether the party's comments merit a response
- If no response is merited, the party's submission can simply be appended to the final report

# 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



# PROPOSED CHANGE

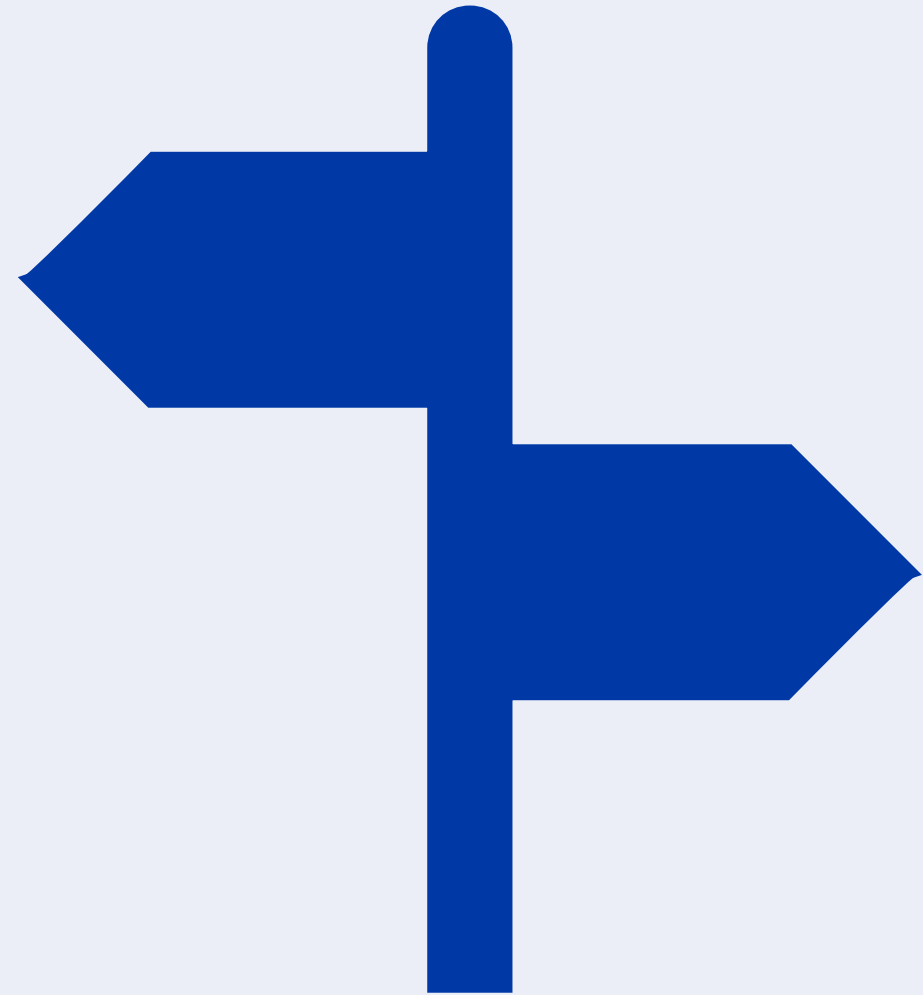


- Investigation report becomes optional
- But minimally parties must have access to the relevant evidence itself
- If adopting single investigator/decision-maker model, investigation report is effectively supplanted by a written decision document

## POLL QUESTION

Does the investigation report make findings?

- Yes
- No
- It depends

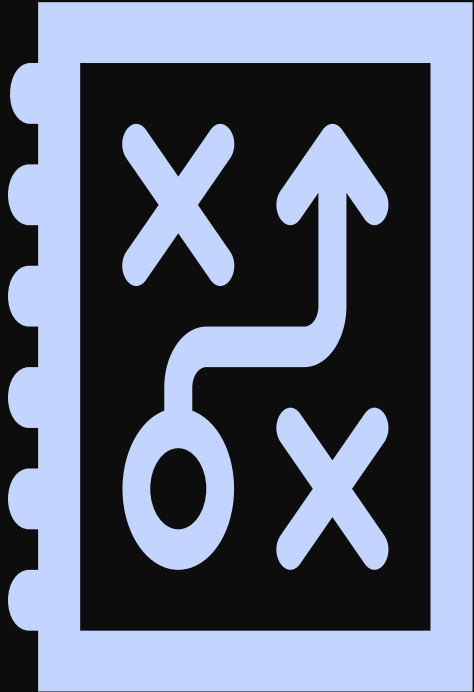




# SHOULD OUR INVESTIGATION REPORT COMMENT ON CREDIBILITY?

- If particularly notable credibility issues arise, report should identify the underlying facts
  - E.g., inconsistencies, relationships between parties and witnesses
- Commentary on credibility of every party and witness is unnecessary given they will testify live at hearing





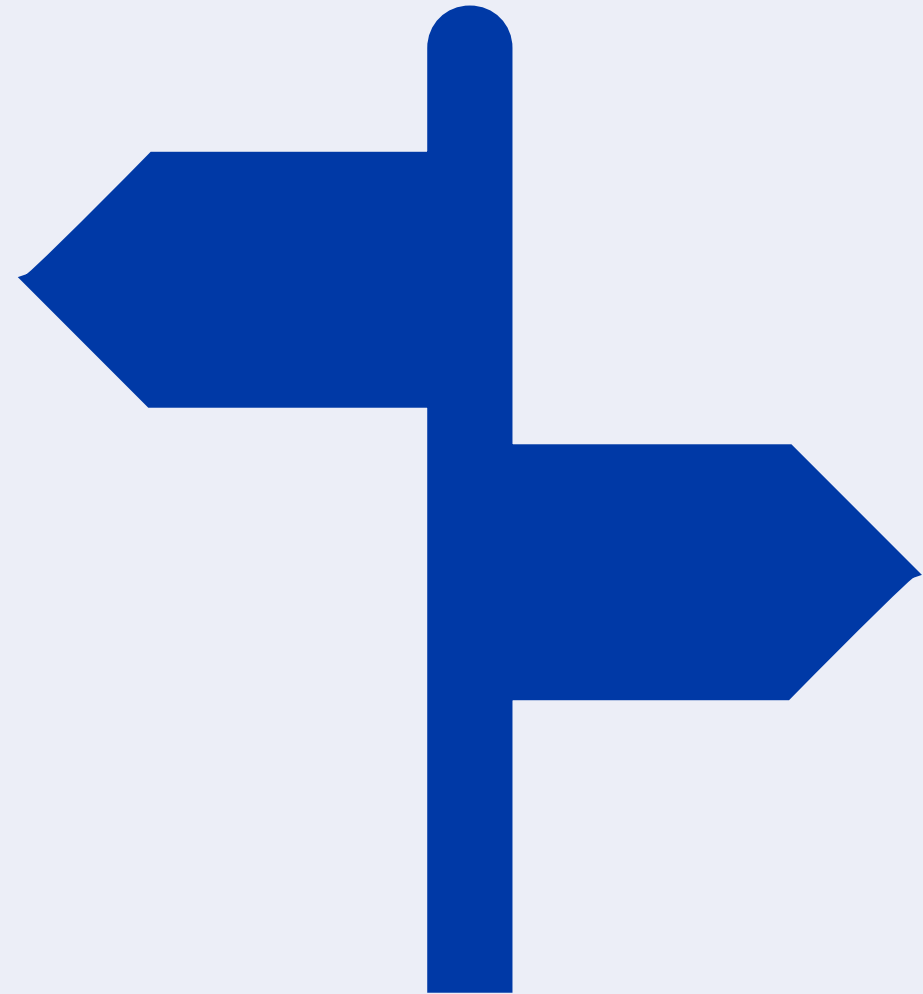
## EXAMPLE

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

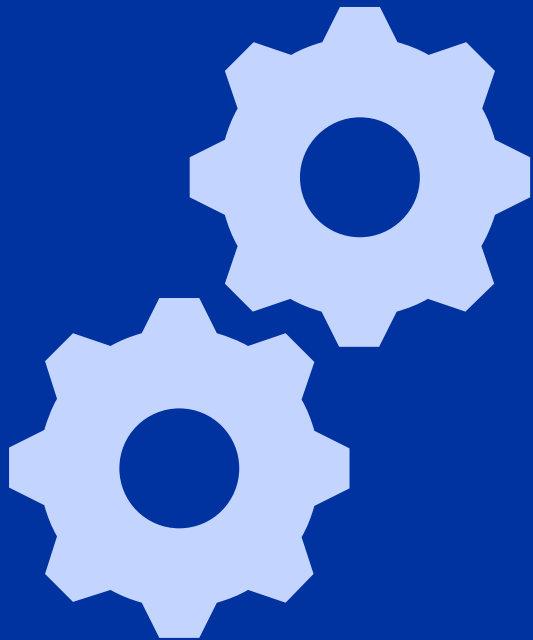
## POLL QUESTION

Do the parties get to comment on the investigation report?

- Yes
- No
- It depends



## GROUP SCENARIO



Accounting Student accuses Management Student of sexual harassment after Management Student repeatedly sends Accounting Student sexual messages on Instagram. Management Student does not respond to investigator's written request for interview. Eventually, attorney for Management Student sends letter to investigator indicating Management Student 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, Management Student's attorney sends a signed declaration from Management Student disputing the allegations and accusing Accounting Student of falsifying the complaint. Management Student's attorney also identifies six other students who Management Student wants interviewed; three will purportedly testify to Management Student's relationship with Accounting Student and the other three will purportedly testify about prior allegedly false allegations against other students made by complainant.

QUESTIONS?



# HEARINGS



# 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

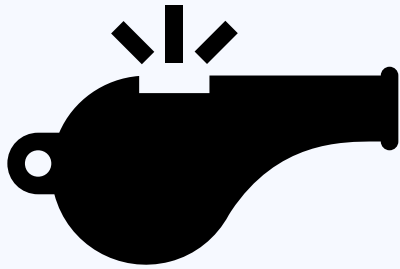
# WHAT IS THE PURPOSE OF THE HEARING?

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



## PROPOSED CHANGE



Clear and convincing standard may be used in a sexual harassment case only if used “in all other comparable proceedings, including proceedings relating to other discrimination complaints.”

# WHAT IS THE PROCESS FLOW AROUND HEARINGS (UNIVERSITY POLICY)?

The Title IX Coordinator appoints a decision-maker to conduct hearing. Parties are notified of appointment.

Parties are given a deadline to submit responses to investigative report, date for pre-hearing conference, and date for hearing.

Decision-maker holds a pre-hearing conference with parties. Following pre-hearing conference, notices of attendance are sent to any witnesses who are University employees or students, of date/time.

Hearing is conducted live, with simultaneous participation by parties and advisors.

During hearing, each party and witness is questioned by decision-maker and subject to cross-examination by parties' advisors.

If party/witness does not submit to cross-examination at live hearing, decision-maker must consider all relevant evidence.

## BALANCING THE PARTIES' INTERESTS

- The Department of Education believes that live hearings with cross-examination serve as a valuable truth-seeking tool in the grievance process
- But the Department recognizes that cross-examination in cases involving violent allegations could be traumatic for complainants
- To balance the two, the Department mandated both parties have the right to a third-party advisor

# 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 assessed



Hearing must be scheduled, and logistics arranged

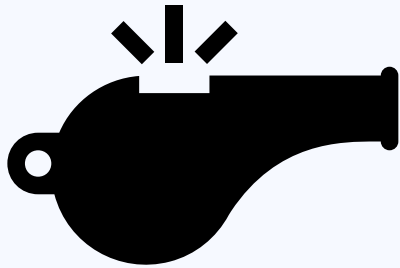


Witnesses must be notified



Pre-hearing conference may be held

# PROPOSED CHANGE



Institution must provide the parties with a “reasonable opportunity to review and respond to the evidence” prior to the determination

May be satisfied simply by allowing the party to respond at the hearing itself

There is no explicit right to respond to an “investigation report”

# WHAT IS THE PRE-HEARING CONFERENCE?

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

# HOW DO WE NOTIFY PARTIES AND WITNESSES?

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



# WHAT DOES THE HEARING NOTICE SAY?

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



# CONSIDER OTHER POTENTIAL POLICIES

- Examples
  - Student code of conduct
  - Staff handbook
  - Faculty handbook
  - Specific policies related to inappropriate use of computers, hazing, etc.
- Ensure appropriate notice has been given if combining proceedings

## LESSON FOR DECISION-MAKERS: *DOE V. PURDUE UNIVERSITY, ET AL.* (2019)

- Denied MTD on due process and Title IX claims
- 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 found material issues of fact and denied MTD, noting:
  - *“... two of the three panel members candidly admitted that they had not read the investigative report ...”*



# HOW SHOULD WE PREPARE FOR A HEARING?

- 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

# WHAT IS A “LIVE” HEARING?

A proceeding held by the decision-maker, either in-person or virtually where:

- Parties are present with their advisors at the same time
- Parties and witnesses testify with contemporaneous participation (i.e., no “pre-recording”)
- Parties’ advisors ask live questions of the other party and witnesses

# WHAT IS THE ROLE OF ADJUDICATORS?

- Conduct hearing (if applicable)
- Make a finding
- Determine sanction (consultation with sanctioning officials as appropriate)
- Explain decision
- Ensure clear record



# WHAT IS THE ROLE OF AN ADVISOR DURING THE HEARING PROCESS?

## Support

Provide personal support to the party throughout

## Preparation

Help the party prepare for pre-hearing conference and live hearing

## Presence

Be present with the party during pre-hearing conference and live hearing

## Questioning

Conduct live questioning of other party and witnesses at the live hearing

## DOES THE UNIVERSITY PROVIDE A PARTY'S ADVISOR?

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

# WHAT ARE THE PHASES OF THE HEARING PROCESS?





# TYPICAL HEARING ELEMENTS

Procedural / housekeeping remarks



```
graph TD; A[Procedural / housekeeping remarks] --> B[Overview / summary of investigation report]; B --> C[Party statements]; C --> D[Questioning / cross-examination of parties & witnesses]; D --> E[Deliberation];
```

The diagram illustrates the typical elements of a hearing in a sequential flowchart. It consists of five horizontal bars, each representing a step in the process. The bars are arranged in a descending staircase pattern from top-left to bottom-right. The first bar is light gray, and the subsequent four bars are in shades of blue and gray, with the final bar being a darker gray. White downward-pointing arrows connect the right side of each bar to the left side of the next bar below it.

Overview / summary of investigation report

Party statements

Questioning / cross-examination of parties & witnesses

Deliberation

# STARTING THE HEARING: SETTING THE TONE

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

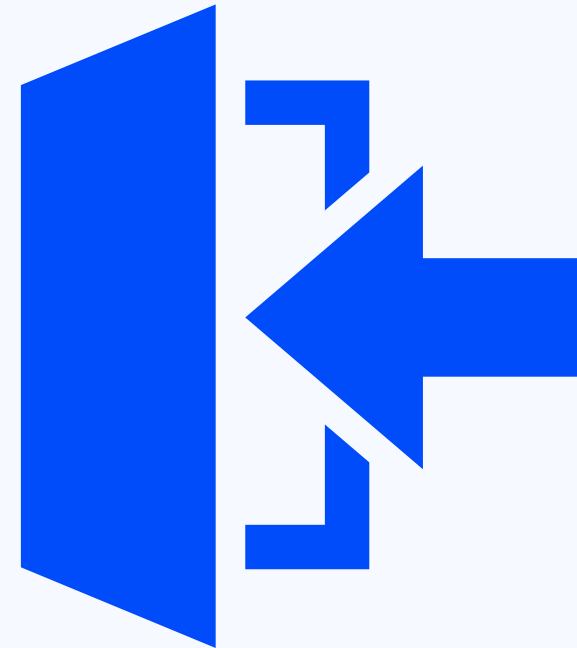


# WHAT ARE COMMON RULES OF DECORUM?

- 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
- 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

# WHO DETERMINES RELEVANCE?

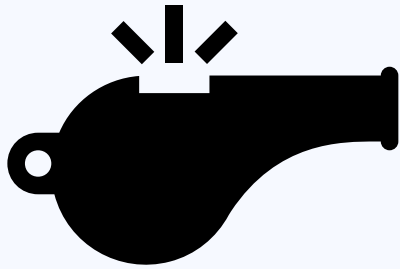
- Decision-maker must screen questions for relevance and resolve relevance objections
- Decision-maker must explain any decision to exclude a question as not relevant



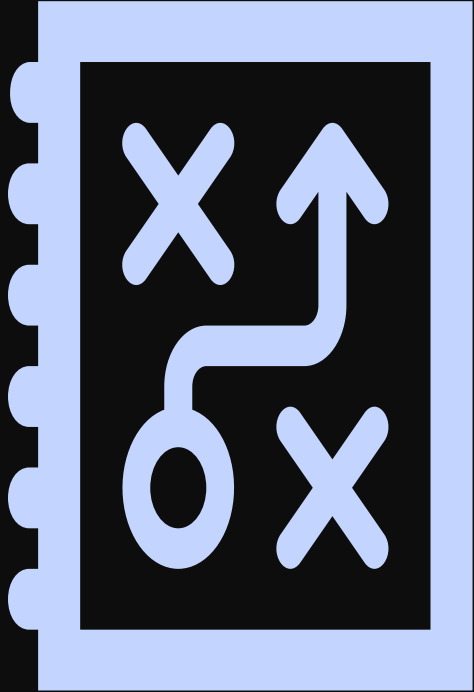
# WHAT IS RELEVANCE?

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

# PROPOSED CHANGE

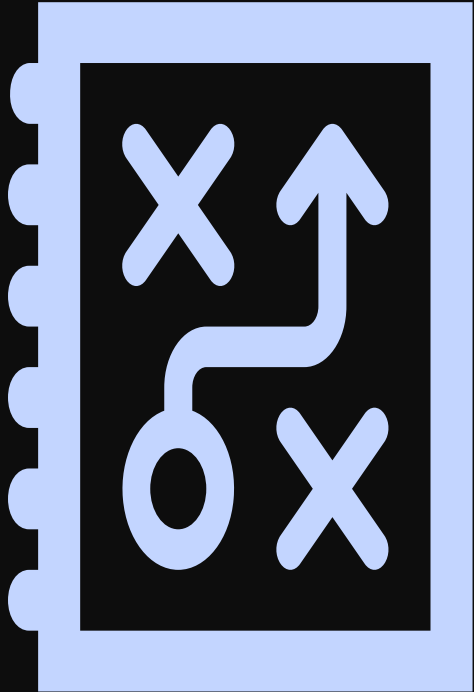


- Proposed regulation would define relevant evidence as that which:
- “May aid a decisionmaker in determining whether the alleged sex discrimination occurred”



## EXAMPLE: RELEVANT

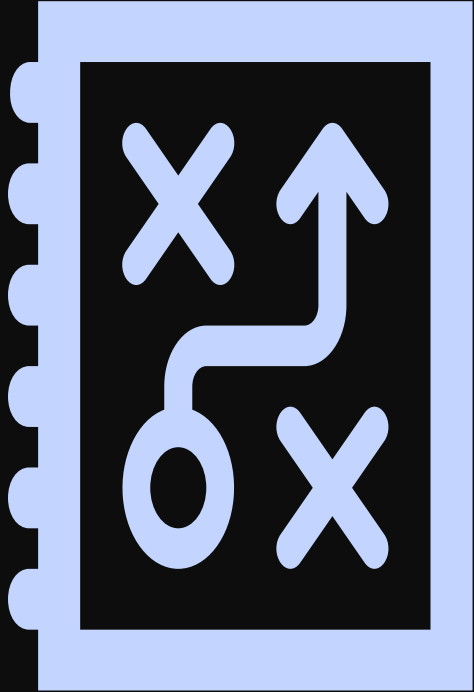
One student has accused another of stalking. Respondent's advisor asks Complainant, "Did Respondent ever threaten to harm you physically?"



## EXAMPLE: RELEVANT

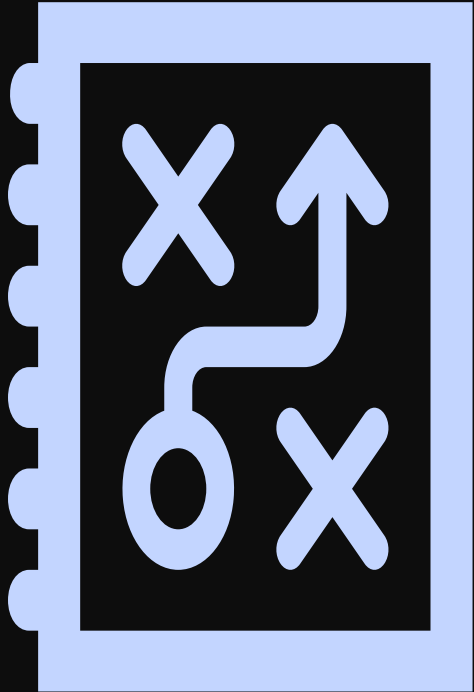
Assistant Provost has complained that Cabinet member created a sexually harassing hostile environment. Advisor for Assistant Provost asks Cabinet member, “Did you tell the Cabinet, in front of the Assistant Provost, that Assistant Provost was better suited to be a sexy stay-at-home parent than to be Assistant Provost?”





## EXAMPLE FOR DISCUSSION

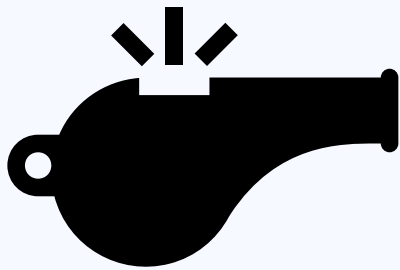
Faculty Member accused Senior of posting negative reviews on RateMyProfessors.com after Faculty Member declined Senior's attempts to instigate a romantic relationship. Advisor for Senior asks Faculty Member, "Haven't you had several negative reviews on RateMyProfessors.com?"



## EXAMPLE FOR DISCUSSION

Student A alleges Student B committed sexual assault when groping Student A's buttocks. Student A's advisor asks Student B, "Haven't you been found responsible for groping two other students?"

## PROPOSED CHANGE



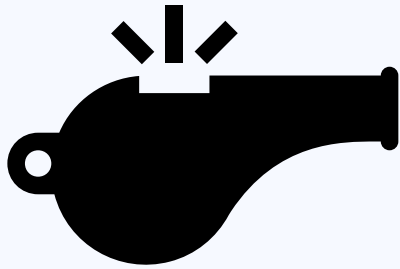
Proposed regulation would also prohibit questions that are “unclear or harassing of the party being questioned.”

## IS SEXUAL HISTORY CONSIDERED?

Generally, **no** – Evidence of a complainant's prior sexual behavior is relevant and appropriately considered only if:

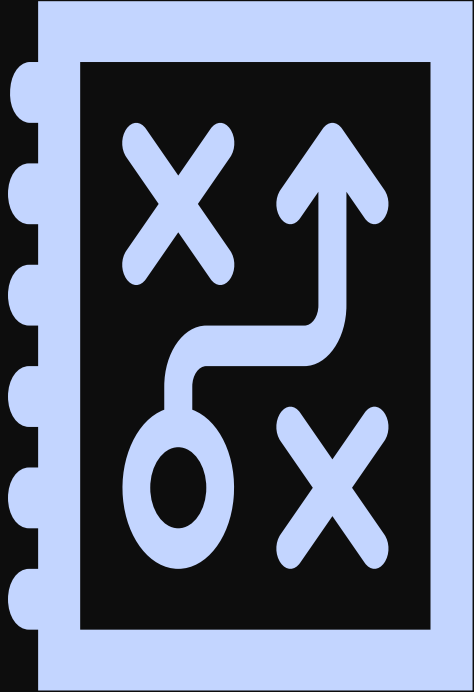
- Offered to prove that someone other than the respondent committed the conduct, or
- If evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent

# PROPOSED CHANGE



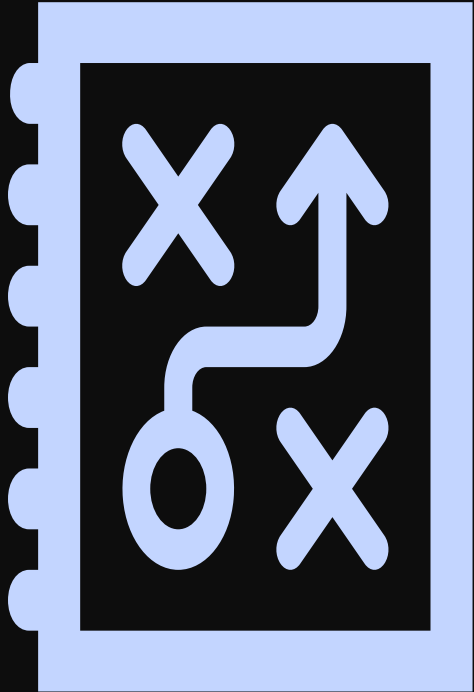
Expanded to prohibit consideration of evidence that

- “Relates to the complainant’s sexual interests or prior sexual conduct” unless
- Showing someone other than respondent committed the act or
- To prove consent with specific incidents between the complainant and respondent



## EXAMPLE: IMPERMISSIBLE

One student has accused another of sexual assault. Complainant testified that Respondent had intercourse with Complainant without using a condom, which Complainant would never have agreed to. Advisor for Respondent asks Complainant: “But didn’t you have unprotected sex with another student a week prior?”



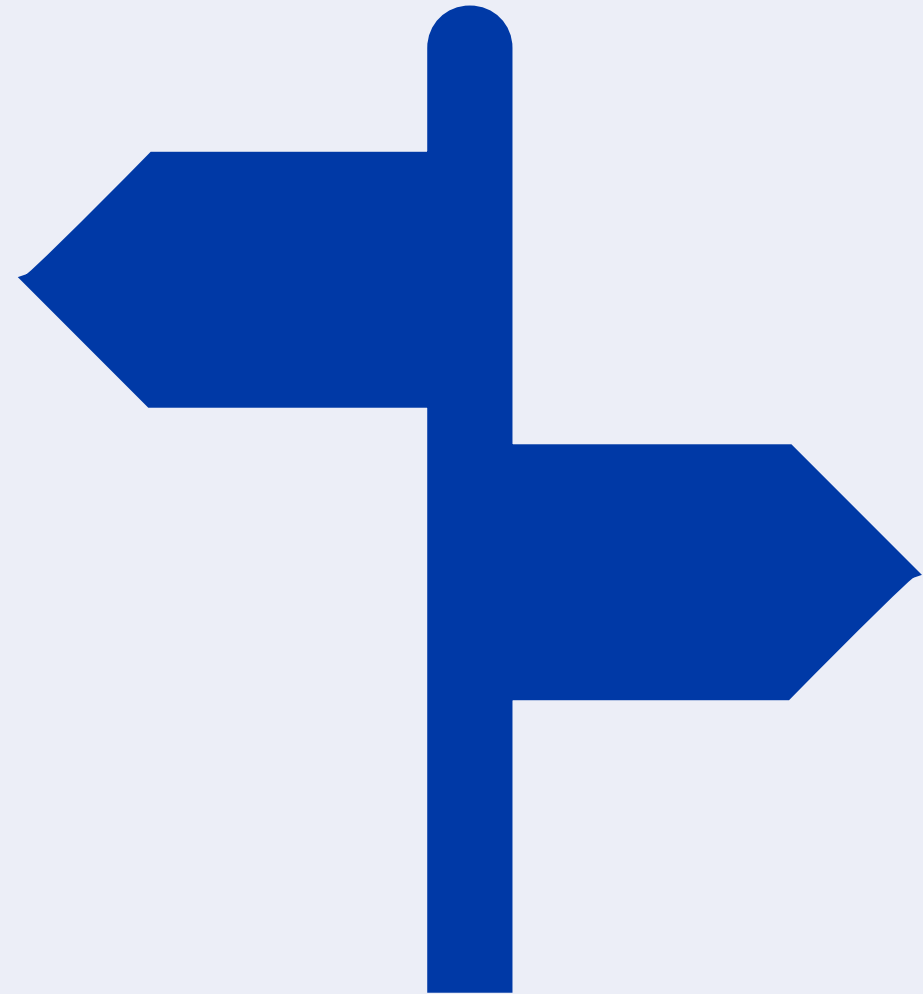
## EXAMPLE FOR DISCUSSION

Literature student has accused Faculty Member of sexual harassment. Advisor for the faculty member asks literature student: “You failed Faculty Member’s course. Didn’t you accuse another professor of sexual harassment after you failed that professor’s course?”

## POLL QUESTION

Must the decision-maker exclude the statements of any party or witness who refuses to attend the hearing and/or submit to cross-examination?

- Yes
- No





*VICTIM RIGHTS LAW CENTER ET AL. V.  
CARDONA (D. MASS. JULY 28, 2021)*

- Struck down part of the 2020 amendments to Title IX regulations
- Vacated regulatory language prohibiting decision-makers at postsecondary institutions from relying on statements by individuals who did not submit to cross-examination during a live hearing
- Department of Education guidance indicates that it will not enforce the vacated language.
- Decision-maker may not make an inference solely from the decision of a party or witness to not participate at the hearing

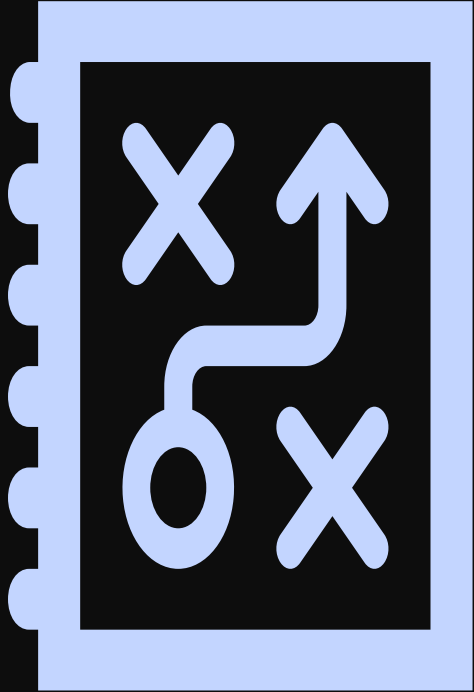


# CAN A POSTSECONDARY INSTITUTION KEEP ITS EXCLUSIONARY RULE?

- No
- To the extent statements made by a party or witness who does not submit to cross-examination at a live hearing are relevant, they must be considered in any Title IX grievance process initiated after July 28, 2021

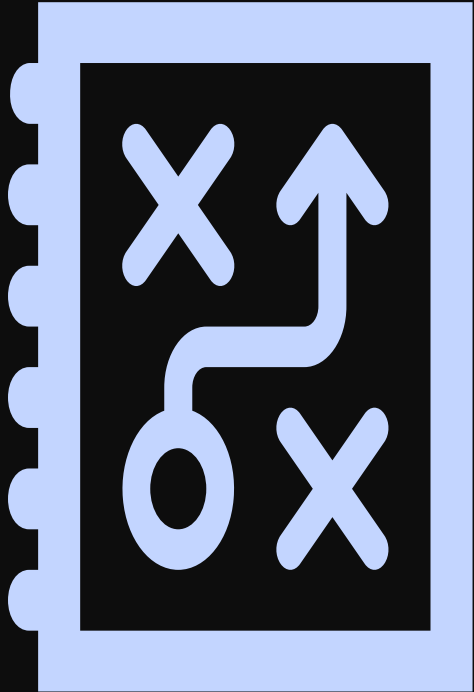
## CAN A DECISION-MAKER RELY ON STATEMENTS OF A PARTY OR WITNESS WHO DOES NOT ANSWER QUESTIONS POSED BY THE DECISION-MAKER?

- Yes
- If a party or witness submits to cross-examination but does not answer questions posed by the decision-maker, the decision-maker still may not draw any inference about the party's credibility based on the party's refusal to answer the questions



## EXAMPLE: NOT-EXCLUDED

Respondent told investigator that respondent could not have committed an alleged assault because Respondent was in a different city that day. Respondent does not appear at the hearing.



## EXAMPLE: NOT-EXCLUDED

Complainant's advisor decides not to ask any questions of Respondent, who is present at the hearing and willing to submit to cross examination, deciding to rest on Respondent's prior statements.

# ASSESSING CREDIBILITY

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



# WHAT DOES IT MEAN TO WEIGH EVIDENCE?

- Not all evidence has equal value
- Some evidence may be more reliable and probative (tending to prove a proposition) than other evidence
- Weight may vary depending on a range of factors



# WEIGHT - CONSIDERATIONS

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



## DIRECT VS. CIRCUMSTANTIAL (DIRECT)

Direct — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference

- E.g.: testimony of a witness who actually observed and perceived event in question (see, hear, touch)

# DIRECT VS. CIRCUMSTANTIAL (CIRCUMSTANTIAL)

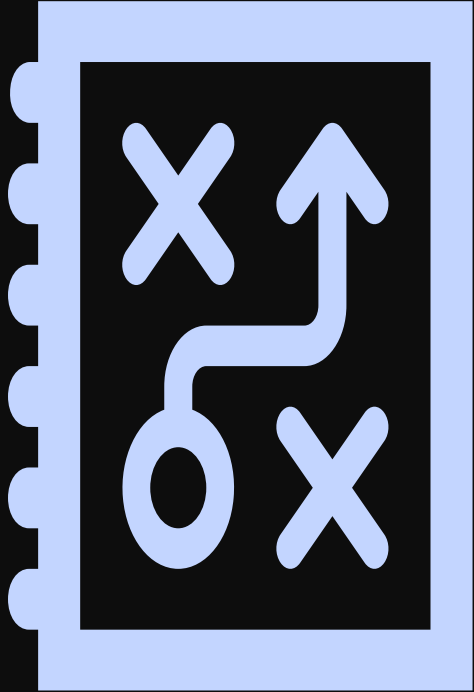
Circumstantial (indirect) — Information which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred

- E.g., witness testimony saw student alleged to have hit someone with bat, with bloody bat an hour after the assault

# “HEARSAY”

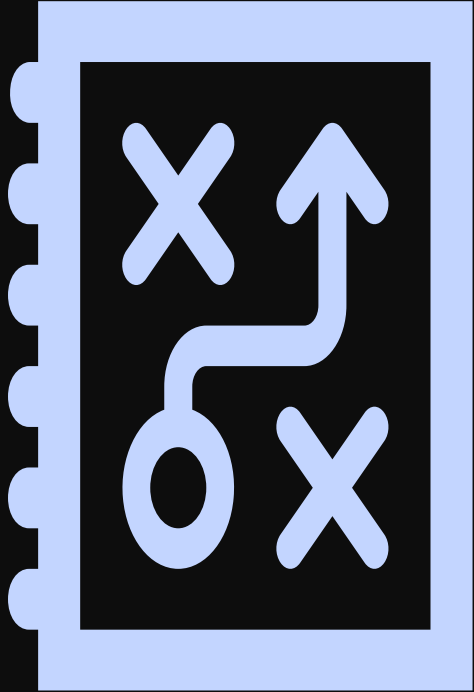
Hearsay — Statement (written or oral) made by a non-available witness offered to prove fact in question

- Longstanding evidentiary principle of when courts can rely on hearsay
  - Court rules do not apply
- Some hearsay is more reliable, e.g.,
  - Statement contemporaneous with the event in question
  - Excitable statement uttered in the moment being perceived
  - See other indicia of credibility



## EXAMPLE: WEIGHT

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



## EXAMPLE: WEIGHT

Witness says he saw a couple leaving the bar “sometime after ten but before midnight” but witness is not “sure exactly” when. Witness testified they “sort of looked” like complainant and respondent and witness is “pretty sure” it was them. But witness also says witness had spent two hours at a different bar before that and was “pretty drunk at the time I saw them.”

# INCAPACITATION & WEIGHT/CREDIBILITY

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



# HOW DO WE ASSESS “I DON’T REMEMBER”?

True loss of memory may occur due to, e.g.:

- Trauma
- Drug/alcohol consumption
- Lack of attention

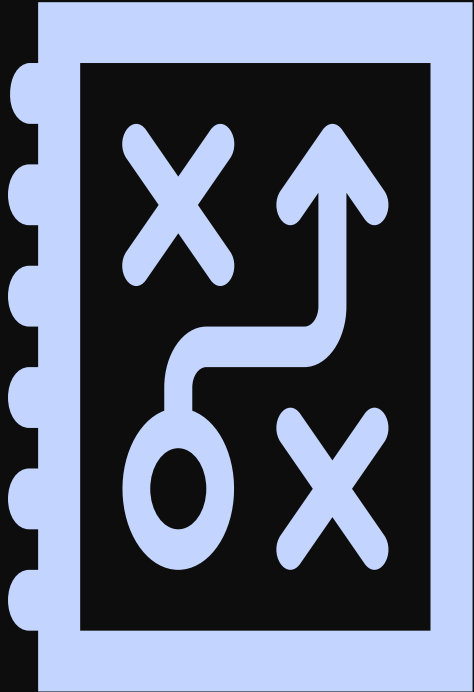
Balance

- Memory loss alone does not equate to a lack of credibility
- Possible to remember some information and not other information
- Memory loss = an absence of information

# EXPERT WITNESSES

- 2022 proposed rule clarifies role of experts
- Role: Clarify, explain, and provide opinions on complex matters that an average person would not typically understand
  - Not to opine on ultimate fact or policy issues





## EXAMPLE: EXPERTS

Blood alcohol level for a typical person the size/weight of complainant after drinking four shots in four hours

- Vs. whether complainant was incapacitated

Whether respondent could have traveled from class to complainant's apartment in order to be present at the time of a stalking incident alleged by complainant

- Vs. whether respondent was stalking

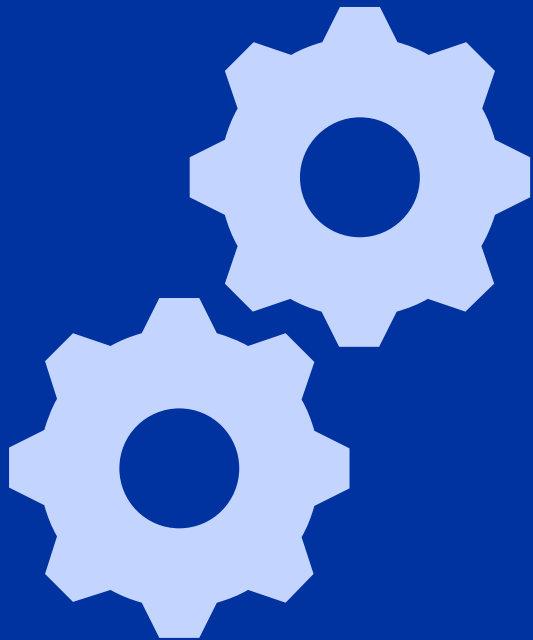
## SOME COMMON QUESTIONS BY DECISION-MAKER

- 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?

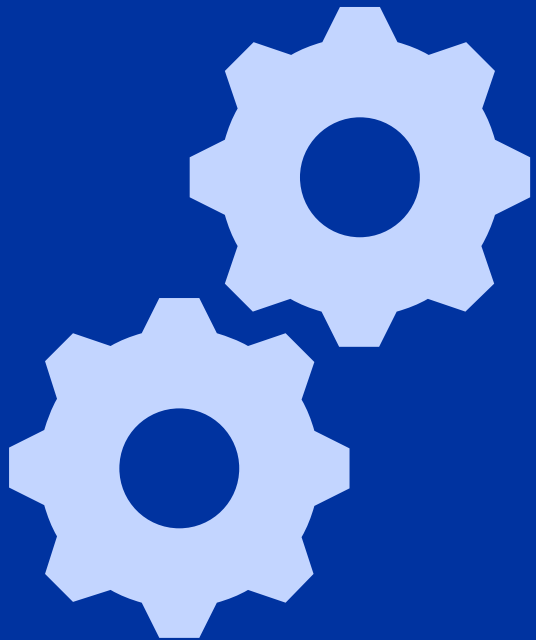
## GROUP SCENARIO - QUESTIONS



Student accuses GTA of using a power differential to coerce the student into performing oral sex in exchange for a better grade. Student states that the oral sex occurred in the library at 9:30 pm on a Saturday in March. GTA claims oral sex occurred between student and GTA in late May at a party off campus, after grades had been assigned. GTA says it was a consensual “hook up.” GTA claims student has falsely accused GTA of misconduct because GTA refused to “date” the student after the hookup.

Video shows the student and GTA leaving the lab together at 9:15 pm on Saturday, March 7. GTA has a text message the student sent the GTA on May 26 stating: “I’m so happy we can finally be together. I want to spend my life with you!” Two student witnesses claim that the GTA repeatedly looked at student during class in a way that was “creepy.” Academic records show the student had a B- average on work performed before March 7 and an A+ average for work performed after March 7.

## GROUP SCENARIO – QUESTIONS



What are the elements of the sexual harassment alleged?

If you were the advisor for the complainant, what questions would you ask the respondent?

If you were an advisor for the complainant, what questions would you ask the student witnesses?

If you were the advisor for the respondent, what questions would you ask the complainant?

If you were the advisor for the respondent, what questions would you ask the student witnesses?

QUESTIONS?



# SANCTIONING CONSIDERATIONS



# HOW DO(ES) THE DECISION-MAKER(S) ISSUE A DECISION?

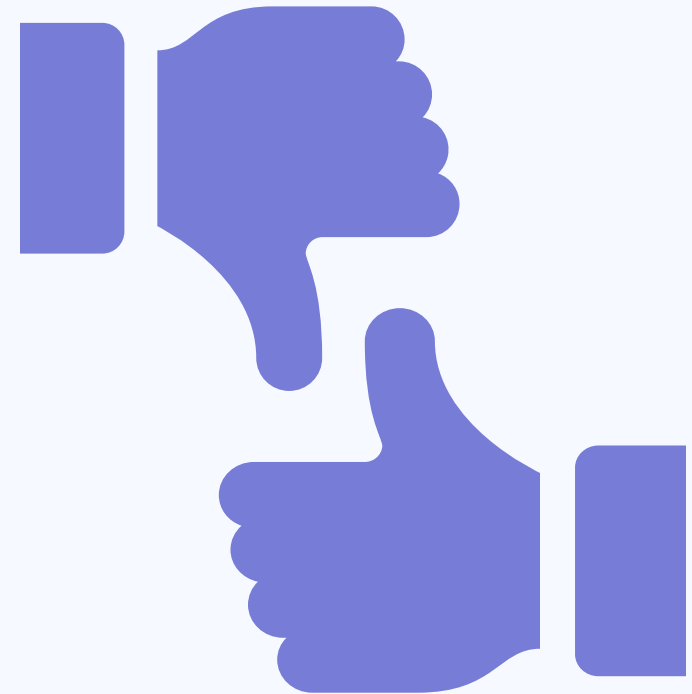
In a written document, provided contemporaneously to the parties that:

- 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?

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



# PURPOSE OF A DETERMINATION

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



## 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 UHAS in consultation with 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

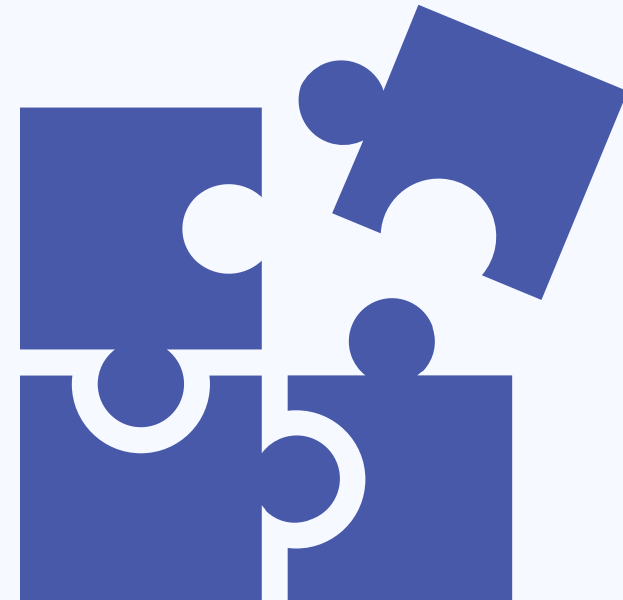
Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable

# DISCIPLINARY PHILOSOPHY

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

# SANCTIONING GOALS

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





# 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

# WHO DETERMINES RESPONSIBILITY AT THE UNIVERSITY?

## 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



# NU'S SANCTIONING POLICY

The range of potential sanctions/corrective actions that may be imposed, among others, are as follows:

- Verbal warnings
- Written warning
- Advisory letter
- Conduct review
- Disciplinary hold on academic and/or financial records
- Performance improvement/management process
- Required counseling or coaching
- Required training or education
- Campus access restrictions
- Referral to the Fitness for Duty process
- No trespass order issued by NUPD
- No-contact directive
- Loss of privileges
- Loss of title and/or honors
- Loss of oversight, teaching or supervisory responsibility
- Probation
- Demotion
- Loss of pay increase
- Decrease in pay
- Transfer (employment)
- Revocation of offer (employment or admissions)
- Disciplinary suspension
- Suspension with pay
- Suspension without pay
- Expulsion
- Termination of employment
- Revocation of tenure
- Termination of contract (for contractors)



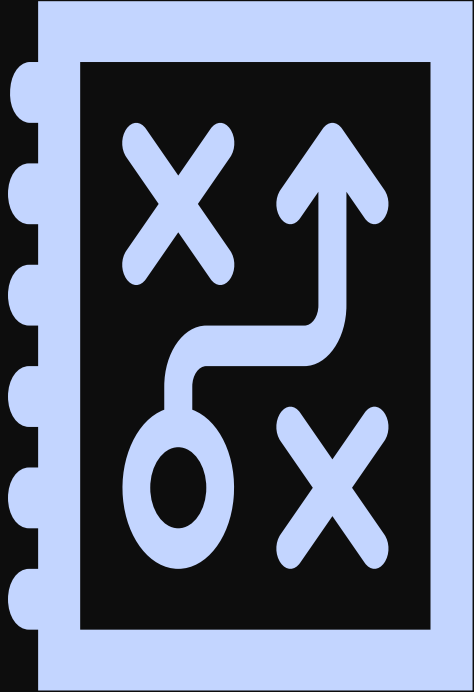
# REMEDIES

- NU's Interim Title IX Policy allows for remedies to be provided to a Complainant when a determination of responsibility under Title IX has been made against a Respondent
- Will be provided as reasonably necessary to restore or preserve access to the University's education programs or activities
- Remedies may include, but are not limited to, counseling, extensions of deadlines or other course related adjustments, modifications of work or class schedules, campus escort services, leaves of absence, and increased security

# WHAT ISSUES CAN ARISE IN SANCTIONING?

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/extra-curriculars)
- Identity of decider if questions arise

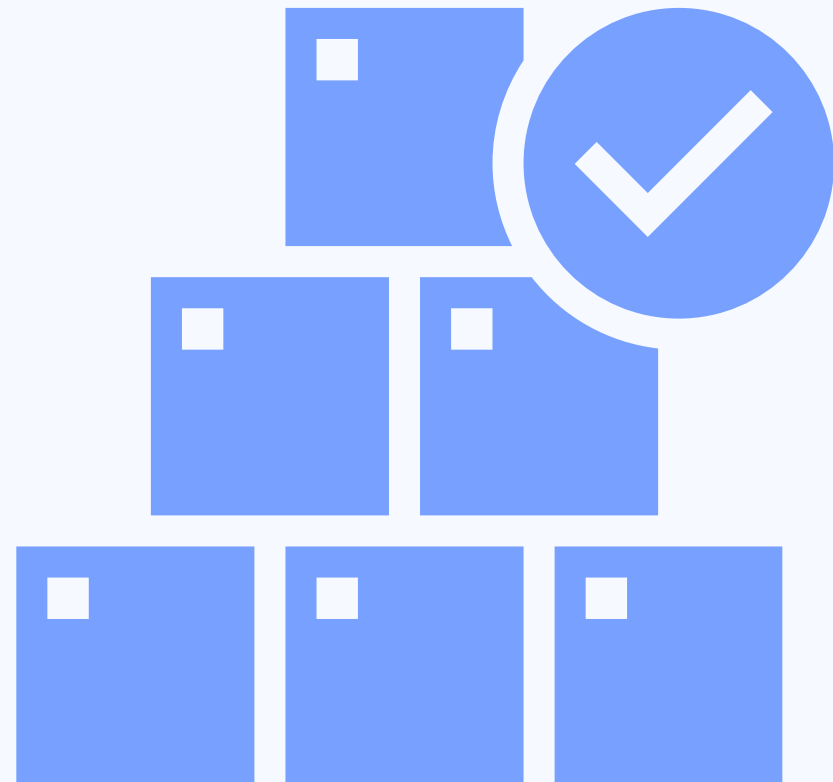


## EXAMPLE: SANCTION DETAIL

Following an investigation, Student is suspended for stalking following a break-up with Partner, also a student. Decision-maker 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.

# INCREASED DETAIL IN SANCTION TERM

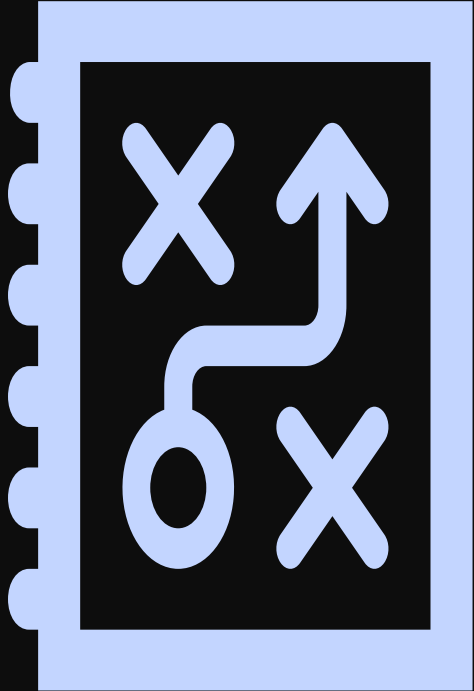
- Ambiguity in sanctions can lead to questions later
- Prevent the problem:
  - Sanctioning official should have addressed the no-contact directive in more detail



# INCREASED DETAIL IN SANCTION TERM, PART 2

- Recommended details:
  - Duration of an ongoing restriction (e.g., how long will a no-contact directive apply)
  - Foreseeable exceptions, if any, and expectations (e.g., work environment, academic classes, athletic teammates, residential etc.)
  - How to handle unforeseeable circumstances that may arise
- It is recommended that restrictions have some endpoint, and not be imposed in perpetuity unless there is an ongoing safety risk





## 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.

# ADDRESSING EXPECTATIONS UPON RETURN FROM SUSPENSIONS

- An emerging best practice is to set expectations for returning students and employees at the sanctioning stage
- Benefit:
  - Eliminates confusion or vagueness as to whether individual has full privileges upon return

## *DOE V. BROWN UNIV.* (1<sup>ST</sup> CIR. AUG. 4, 2022)

- Plaintiff was found responsible for non-consensual sexual contact and was sanctioned with deferred suspension as a freshman in 2013
- An additional allegation was brought against Plaintiff and he was temporarily removed from campus
  - He attempted suicide shortly after
- University officials told Plaintiff he faced multiple additional conduct charges if he did not take voluntary medical leave for a year
- Plaintiff eventually came back to campus and graduated, but filed Title IX claims against the University
- First Circuit found that although allegations against Plaintiff were pursued more rigorously than allegations against comparators, this was warranted because two different students brought misconduct allegations against Plaintiff



# WHAT ARE AGGRAVATING AND MITIGATING FACTORS?

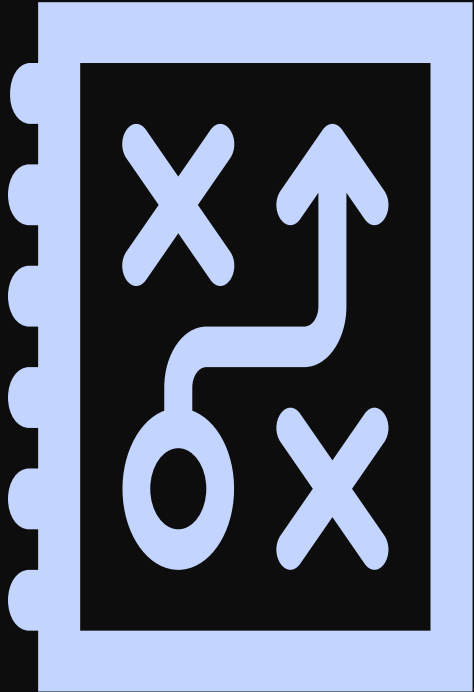
Common factors:

- Egregiousness of misconduct
  - Act of violence
  - Use of a weapon
  - Use of drugs
  - Nature, context, severity, impact
  - Type of physical contact
  - Prior relationship
  - Period of time
  - Power differential
  - Progression of touching

# AGGRAVATING AND MITIGATING FACTORS CONT.

Common factors:

- 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



## EXAMPLE: APPROPRIATE SANCTIONS

Student suspended from University for two years for fondling that occurred on four different occasions between complainant and respondent over the course of one month, and for fondling that occurred on one occasion against a separate complainant and the same respondent during the same month.

# HOW SHOULD WE DOCUMENT SANCTIONS?

Generally, address the following, where applicable:

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

QUESTIONS?





# REPORT EXERCISE



# DISCUSSION QUESTIONS

1. What facts are relevant to making a sanctioning determination?
2. What questions would you ask the decisionmaker before making a sanction determination?
3. What sanction(s) would you recommend? Why?

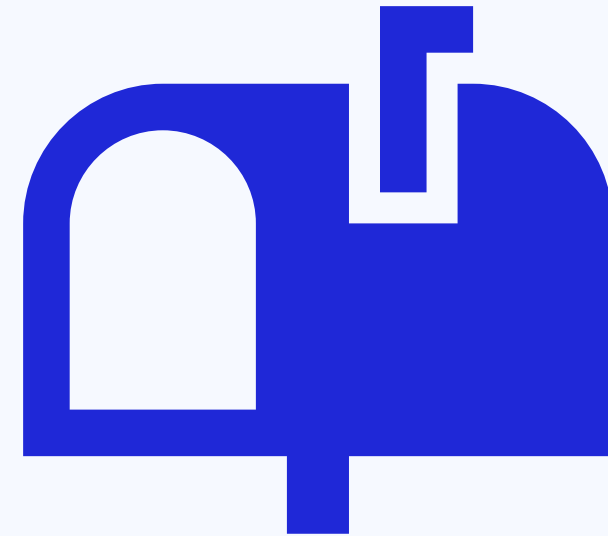


# APPEALS



# APPEAL RIGHTS

- Either Party may appeal the dismissal of a Formal Complaint or any allegations therein or the determination regarding responsibility.
- The bases for appeal are limited to:
  - Procedural irregularity
  - New evidence
  - Conflict of interest
  - Sanction is disproportionate with the violation
  - Institutional Equity: manifestly contrary to greater weight of evidence

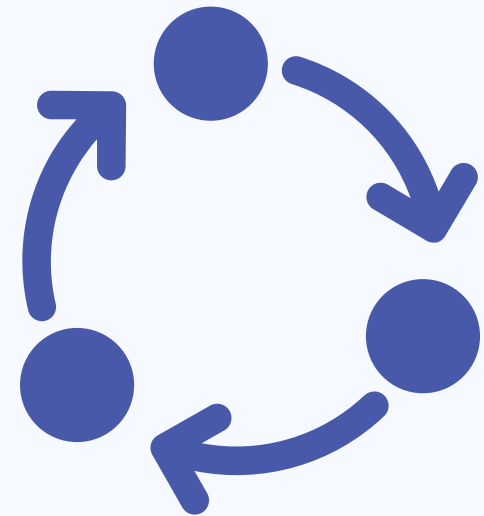


# PROCEDURAL IRREGULARITY

In all cases, the procedural irregularity that affected the outcome: meaning it must be material.

A procedural irregularity affecting the written determination may include, *i.e.*:

- A failure to follow the University's procedures;
- A failure to objectively evaluate all relevant evidence, including inculpatory or exculpatory evidence; or
- A determination regarding what evidence was excluded as irrelevant.



## NEW EVIDENCE

- 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.
- Practice Tip: Evidence presented prior to the time the designation or written determination is issued does not qualify as new evidence that was not reasonably available

# CONFLICT OF INTEREST

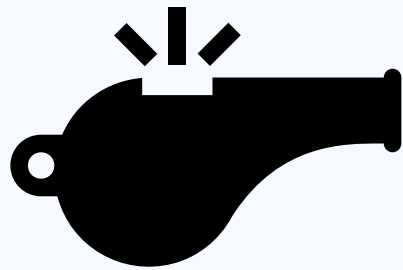
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.
- Claims of conflict of interest or bias should be based on the current case and process in question and will be assessed accordingly.

## DISPROPORTIONATE SANCTION

- The Sanction set forth in the written determination is disproportionate with the violation.
- When an appeal includes the appeal of a sanction, the appeal reviewer will first consult with the appropriate University personnel (listed in the Title IX policy) about sanctions prior to issuing a written decision.



## PROPOSED CHANGE



Similar grounds for appeal but each requires a showing that the outcome “would” have changed, instead of “could” have changed.

# PROCEDURES

- Appeals will be in writing only
- There will be no hearing
- The appeal deliberation is closed to the parties
- Written decision will include rationale and be issued (usually) within 7 days of deliberations
- The appeal decision is final and is not subject to further appeal

# APPEAL OFFICIAL OPTIONS

- The Appellate Hearing Officer(s) may:
  - Affirm, in whole or part, the decision;
  - Overturn, in whole or part, the decision; or
  - Remand the matter to remedy procedural errors or consider new evidence.

## CONCLUSION OF ADJUDICATION

- The determination regarding responsibility for a violation becomes final either:
- On the date that the University provides the Parties with the written decision of the result of the appeal if an appeal is filed, or
- If an appeal is not filed, on the date after which an appeal would no longer be considered timely, subject to any remanded proceedings.

## KEY CONCEPTS

- Appeals are not intended to allow for a second review of the same information provided to the campus Title IX office
- An Appellate Officer should not substitute their judgment for that of other decisionmakers.

# PRACTICE POINT: STAY WITHIN THE SCOPE OF THE APPEAL

- It is best practice for an appeals process to be designed to catch errors and ensure that the underlying investigation and adjudication process was fair and thorough.
- This is contrast to an appeal process that provides another party the opportunity to second-guess decisions, absent clear error.



## 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

- 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

**Step 1: Review relevant policy and procedures**

**Step 2: Review appeal and any response (and supporting documents)**

- What arguments have been raised in the appeal?
- What arguments have been raised in the response?

**Step 3: Consider whether the grounds have been satisfied**

- If yes, proceed; if no, prepare explanation of decision

**Step 4: Review investigative report, hearing transcript, outcome letter, and any sanction decision**

- Do you understand what decision was reached and why?

# WRAP UP



Follow policies



Ensure fairness



Document



Seek assistance  
when needed

QUESTIONS?



