

The logo of Loyola University New Orleans, featuring a stylized white 'L' and 'U' on a blue background.

HUSCH BLACKWELL

Investigator Training

Loyola University New Orleans

Winter 2021

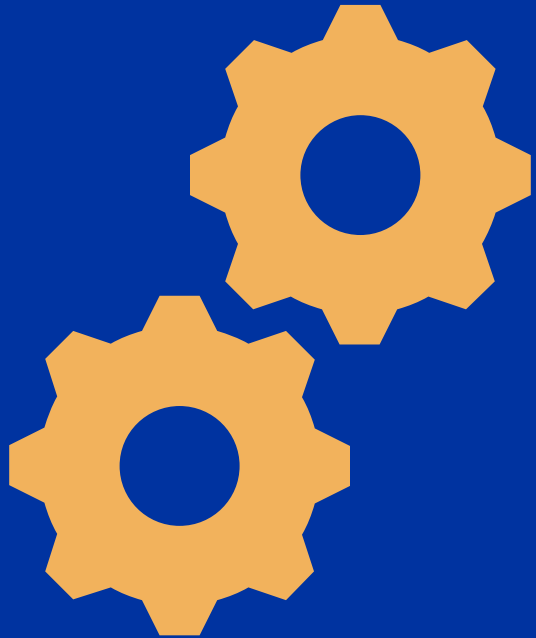


Housekeeping

- **Recording is not permitted**
- Slides will be provided by email
- Update Zoom name with name and role (e.g. “Coord,” “Inv,” “Admin,” “Legal,” etc.)
- Raise hand or use chat function to ask questions
- Anticipated lunch break of 12:00 pm to 12:30 pm
- Other breaks—take individually as needed

This training is a component of the University’s comprehensive training program which includes other programming and live discussion.

Group Scenarios #1



Breakout Groups

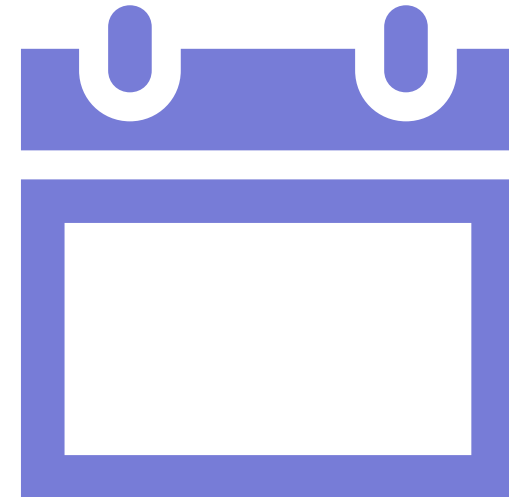
- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Cameras on for breakouts



Agenda



- Key Legal Principles and Considerations
- Applicable Policy Requirements
- Investigations and Key Issues
- Hearings Summary for Investigators
- Investigation Reports
- Trauma, Bias, Stereotyping and Conflicts
- Informal Resolutions & Confidentiality





Goals



- Understand
 - Title IX & new regulations
 - Other relevant laws
 - University policies
 - Identify investigative issues for consideration

Key Legal Principles & Considerations

Module 1



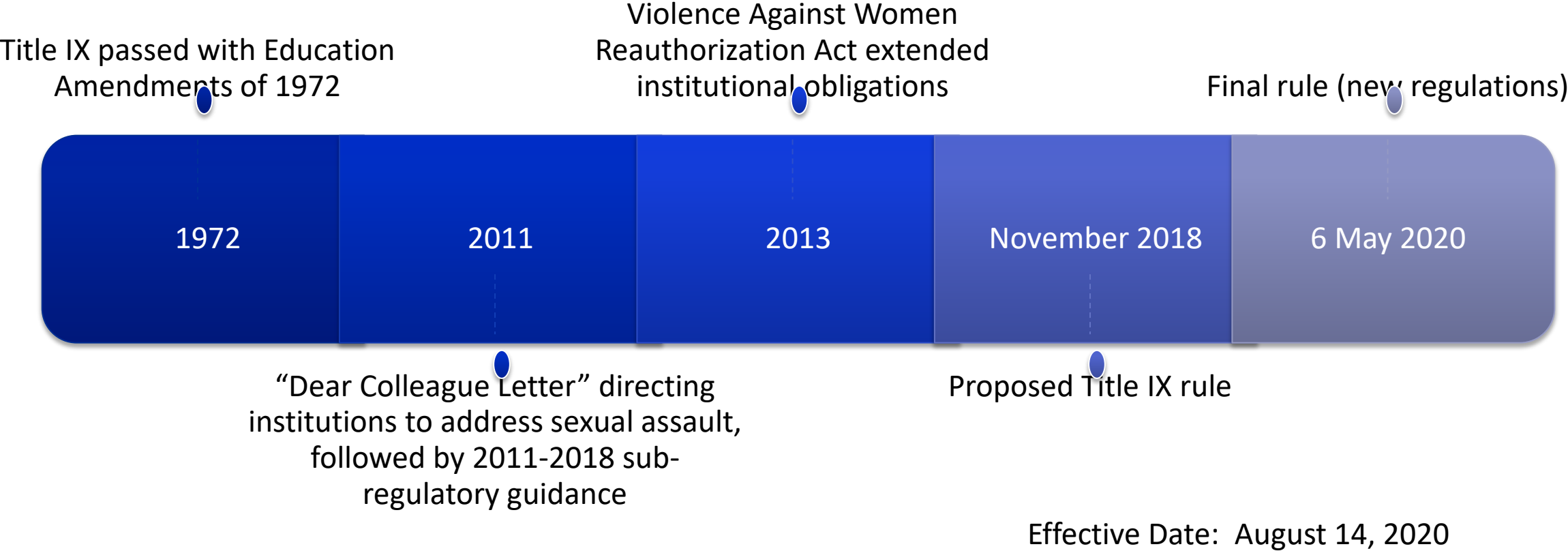
What is Title IX?

“[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



Why are we talking about this now?



Examples of notable provisions

Revised definition of the types of sexual misconduct covered by ED's Title IX rules

Added emphasis on equal rights of parties

Presumption respondent did not violate policy unless and until a determination is made after hearing

Revised procedural parameters including

- Triggers for institutional responsibility
- Notice requirements
- Proceeding with investigations
- Appeals
- Informal resolution

Live hearing including

- Cross-examination by party advisors
- Relevance rulings by decision maker
- Allowable expert witnesses

What sexual harassment does Title IX apply to?

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



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

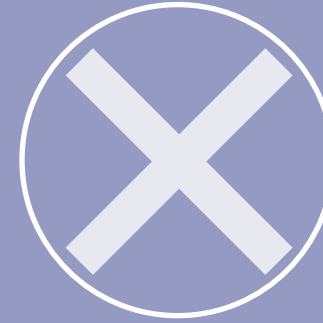
Does Title IX apply to off-campus sexual harassment?



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)

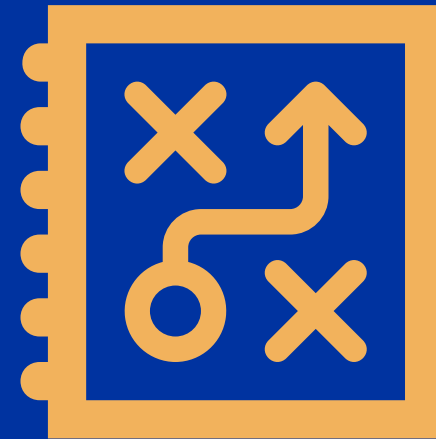


Student is sexually assaulted in a residence hall on-campus. The sexual assault occurs on a Saturday evening. The identity of the perpetrator is not immediately known.



Example (included in EP&A - continued)

—
The tennis team travels to a different school for a tournament and stays overnight at a hotel. At the hotel where the team is staying, the coach sexually harasses the team's manager.





Example (excluded from 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





Does our institution have other policies that might apply?

- Student Code of Conduct
- Faculty Handbook
- Discrimination and Harassment Policy
- Alcohol, Drugs & Controlled Substances, Amnesty Policy



Additional Legal Considerations





The Clery Act

- The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 U.S.C. section 1092(f)), a federal law that requires 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

- 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



Section 504 of the Rehabilitation Act

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



ADA—Title III

- Title III: Prohibits “places of public accommodation” from discriminating “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”
- Colleges and universities are places of public accommodation
- Must make reasonable accommodations in policies, practices, and procedures



Understand Title IX and Title VII Procedures

- New Title IX Regulations -- Employees
 - Impose additional procedural requirements
 - Only for allegations meeting new sexual harassment definition
 - Expressly contemplate “dual” compliance approach with Title IX and Title VII

How do Title IX and Title VII standards compare? (*enforcement standard*)

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

Title VII Sexual Harassment

Quid pro quo

Sufficiently severe
or pervasive

Title IX Sexual Harassment

Any quid pro quo by
employee

Unwelcome and
Sufficiently severe
and pervasive and
objectively
offensive

Any sexual
assault/DV
/stalking

Title VII Sexual Harassment Standard

- Sexual Harassment under Title VII includes:

Hostile environment

Unwelcome subjectively
and objectively

“severe OR pervasive”

Similar conduct as at
issue under Title IX

Quid Pro Quo

Sexual Violence
(e.g. assault)



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

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

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

Example of typical “Title VII” process

Complaint to manager, HR,
ethics line, etc.

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

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

Comparison

Common Title VII Response

Resolution by internal investigation

Formal or informal complaint

Advisor silent supporter

Resolution does not require active complainant

May or may not result in formal report

Title IX Regs/Requirements

Discipline requires regimented investigation & hearing process

Formal complaint only

Advisor entitled to participate

Need participating complainant

Requires formal report & other documentation



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

- ☑ An employer, its agent, or its supervisor
- ☑ Knew or should have known
- ☑ About severe **OR** pervasive sexual harassment
- ☑ That a reasonable person would consider intimidating, hostile, or abusive
- ☑ By an employee or non-employee over which it has control and
- ☑ Failed to take appropriate corrective action

- U.S. Equal Employment Opportunity Commission, *Harassment* (<https://www.eeoc.gov/harassment>)

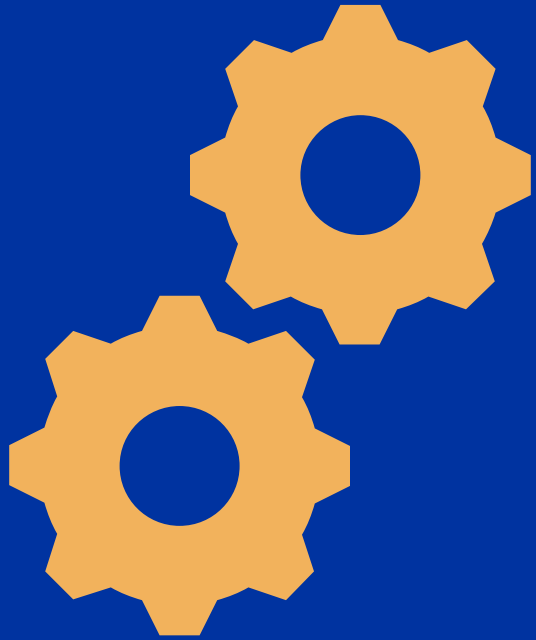
What Triggers Obligations for VII vs. IX?

“Knew or Should Have Known” –
No Formal Complaint Required

Title IX Reg Definition +
Brought by Current & Former
employees

“Formal Complaint” +
“Sex Harassment” as
defined by regs

Group Scenario #2



Employee A reports that Employee B sexually harassed Employee A by installing a program on Employee A's computer that caused pornography to play when Employee A logged on. This occurred only once, after which Employee A had the program removed from Employee A's computer. Employee A makes a formal complaint under the institution's Title IX sexual harassment policy.

Applicable Policy Requirements

Module 2



Standard of Evidence



Legal Standard

Preponderance of the evidence

=

“more likely than not”



Title IX Policy on Non-Title IX Sexual Harassment :

- “This policy does not apply to Sexual Harassment that occurs off-campus, in a private setting, and outside the scope of the University’s Education Programs and Activities; such Sexual Misconduct may be prohibited by the Student Code of Conduct if committed by a student, the Faculty Handbook if committed by a faculty member, or the Human Resources Manual or other University Policies and standards if committed by a staff member.”

What is Title IX sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo
harassment

Hostile environment
harassment

Sexual
assault

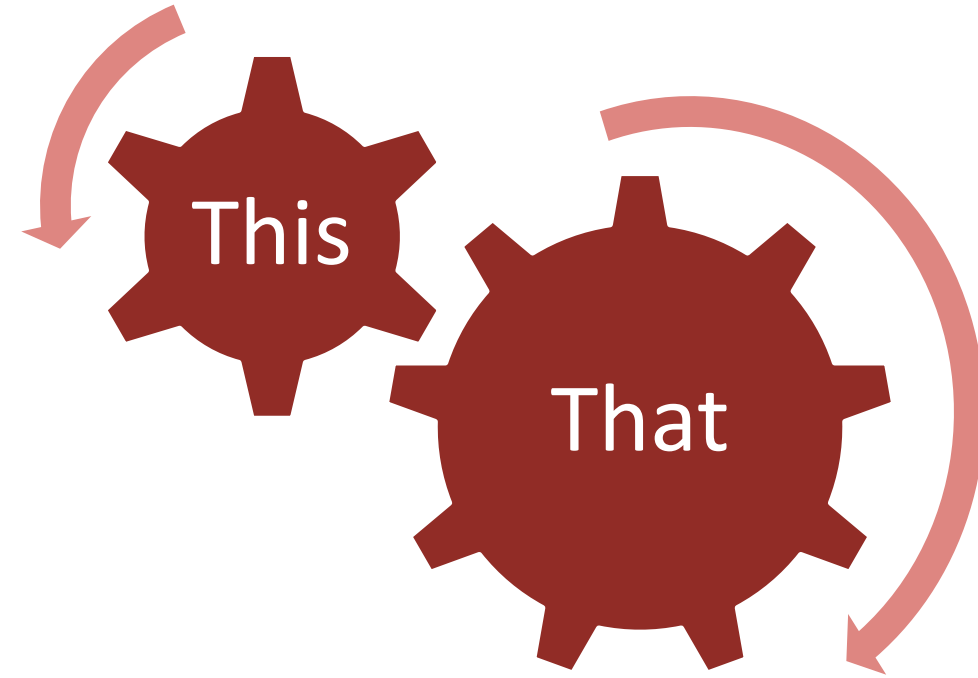
Relationship
violence

Stalking



What is quid pro quo?

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

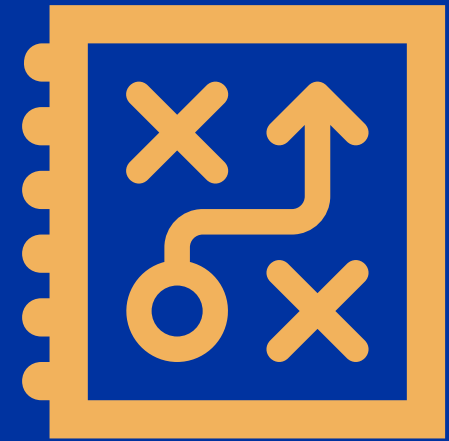




Example of quid pro quo

Manager tells subordinate employee that subordinate will not get a raise this year unless subordinate performs sexual favors for manager.

Subordinate is in a relationship with another individual and has no interest in performing sexual favors for manager.





Another example of quid pro quo



A faculty member tells a student that the student can increase the student's grade if the student wears revealing clothing that is "more pleasing" to the faculty member's eye.

Poll question #1

- When considering whether a hostile environment exists, whose perspective do we consider?
 - The complainant's
 - A reasonable person's
 - Both



What is hostile environment?

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





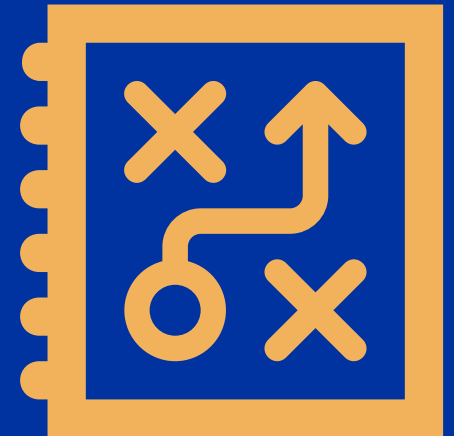
How do we determine if a hostile environment exists?

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



Example of hostile environment

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





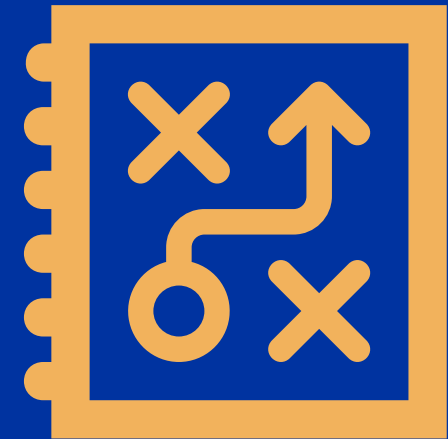
Another example of hostile environment



Resident Assistant asks Student to go on a date, and Student says “no.” RA then repeatedly sends Student text messages using various vulgar terms that suggest Student is promiscuous. When RA and Student attend a shared biology class, RA mutters these vulgar terms toward Student, loud enough for others to hear. Student blocks RA’s phone number and drops the biology class to avoid RA.

One more example of hostile environment

Senior obtains a nude picture of Soccer Player from Player's former romantic partner. Senior threatens to post the nude picture on social media unless Player poses nude for Senior in Senior's residence hall. Player poses for Senior to avoid the nude picture being circulated. Senior is not an employee.





What is sexual assault?

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

Rape

Sodomy

Sexual assault
with an object

Fondling

Incest



What is rape?

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



What is consent?

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



What is incapacity?

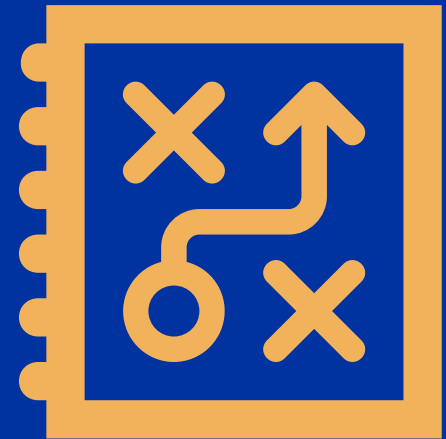
Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.





Example (incapacitated)

Short student has had ten cocktails over the course of two hours. Sober student takes Short student to Sober's apartment. Short student cannot walk without support, forgets Sober's name, and passes into a stupor when Sober places Short student on Sober's bed. Sober then engages in sexual activity with Short student.





Example (not-incapacitated)



Tall student has had four beers over the course of two hours with dinner. Tall student calls Friend to see if Friend is home. Tall student then drives from campus to Friend's off-campus apartment. Upon arriving, Tall student initiates sexual contact with Friend, and then insists that Friend uses contraception before the two have intercourse. Tall student is an active participant in the intercourse.



What is sodomy?

Oral or anal sexual intercourse with another person without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



What is sexual assault with an object?

Using an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. An “object” or “instrument” is anything used by the perpetrator other than the perpetrator’s genitalia.



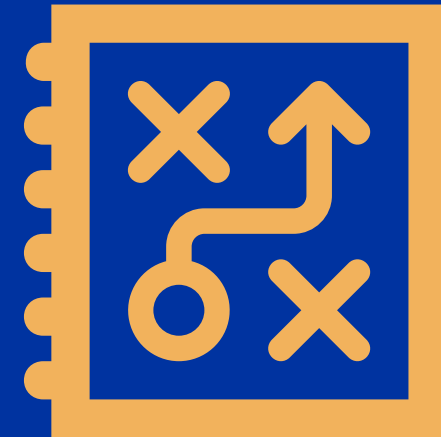
What is fondling?

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 age or because of temporary or permanent mental or physical incapacity.



Example of fondling

Clumsy student and Dance student attend a dance held in the student union. While on the dance floor, Clumsy gropes Dancer's groin without permission. Dancer does not welcome the groping and views it as unwelcome.



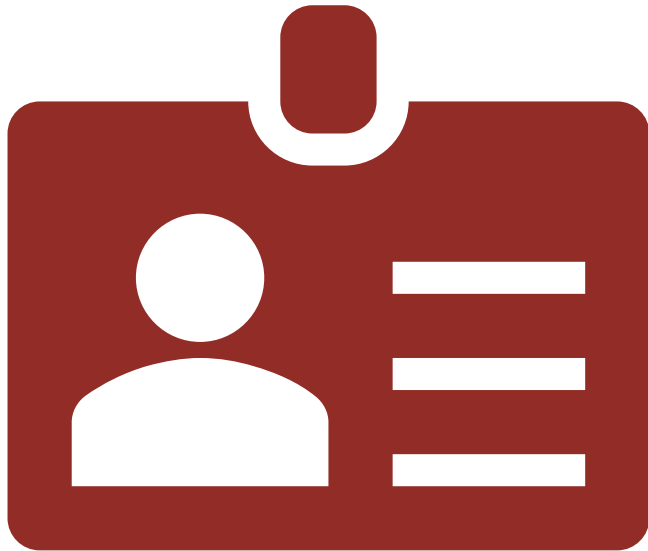


What is incest?

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



What is statutory rape?



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



What is domestic violence?

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



What is dating violence?

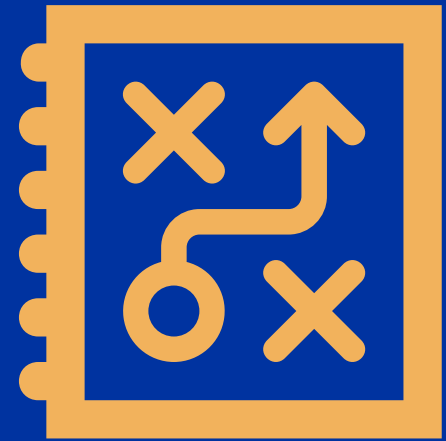
“Dating Violence” is :

- Actual, attempted or threatened violence by one individual against another individual with whom they are, or have been, in a social relationship of a romantic or intimate nature; or
- Conduct that would constitute a felony or misdemeanor crime of violence by an individual against:
 - A current or former spouse or intimately partner
 - An individual with whom they share a child
 - An individual similarly situated to a spouse under LA state domestic or family violence laws
 - Any adult or youth who is protected from the individual’s acts under the LA state domestic or family violence laws



Example of dating violence

President's Chief of Staff and Statistics Department Chair are engaged to be married but live separately and have no children in common. Chief of Staff and Department Chair get into an argument over sex in Chief of Staff's car in the institution's parking lot. During the argument, Chief of Staff slaps Department Chair's face and tells chair to "shut your mouth."

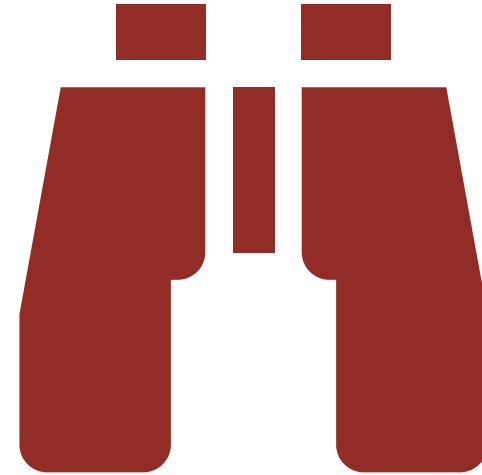




What is stalking?

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

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



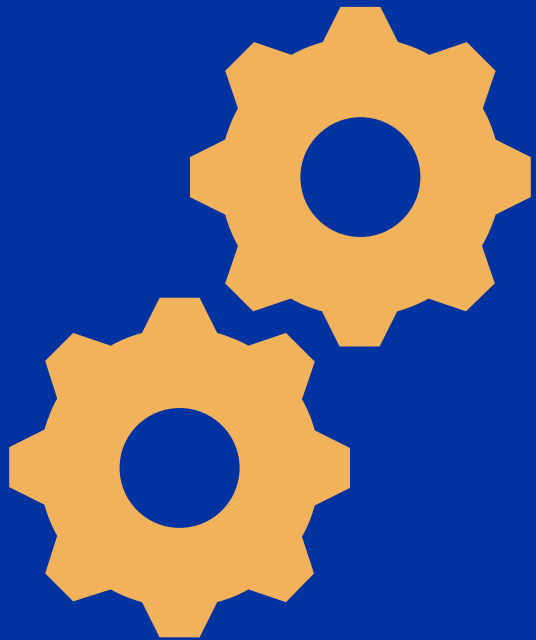


Example of stalking



Freshman is infatuated with Sophomore who has rebuffed Freshman's romantic advances. Thereafter, Freshman dresses in black and sneaks up to the window of Sophomore's house (owned by sponsored Student Organization) at night in an attempt to see Sophomore. Freshman does this twice before being caught in the act during Freshman's third attempt.

Group Scenario #3

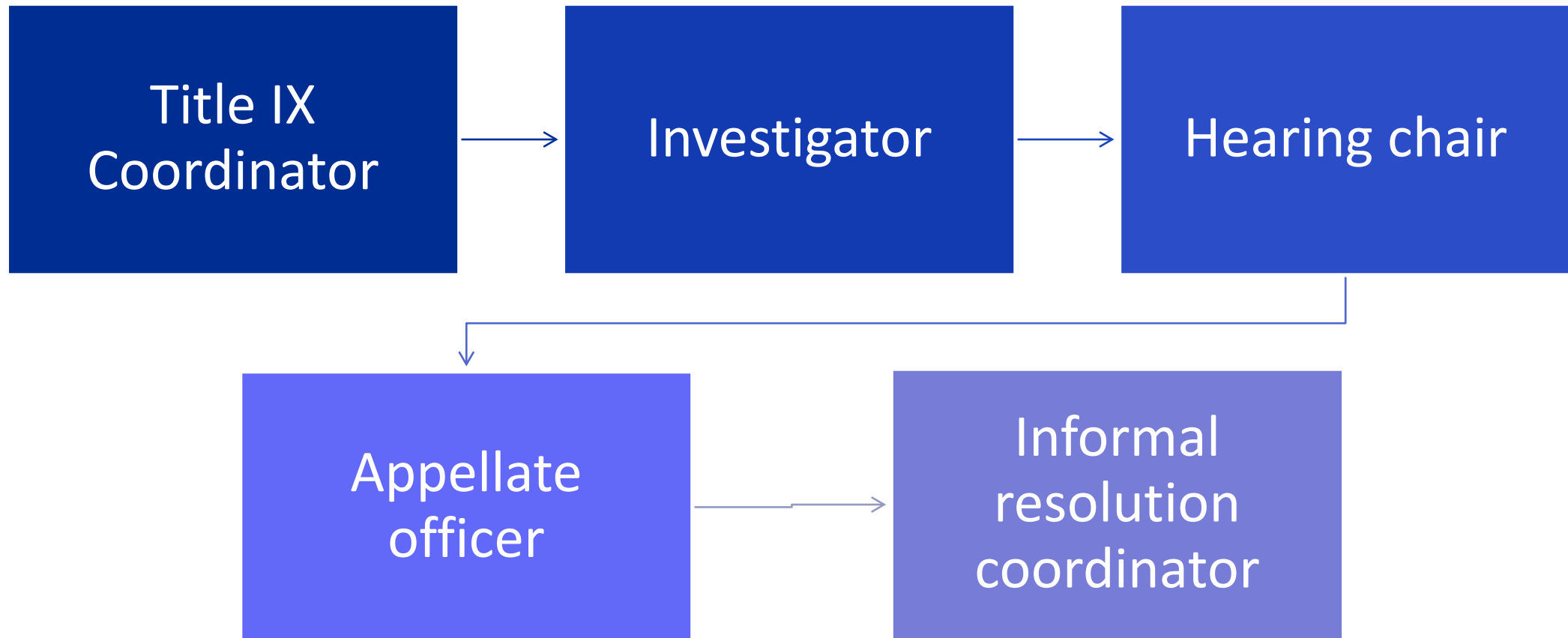


Student A reports that Student B sexually harassed Student A on two occasions. The first incident consisted of Student B groping Student A's genitals without permission while the two were dancing during a formal hosted by a Greek organization at a local party venue the Greek organization rented. The second incident consisted of Student B attempting to have sexual intercourse with Student A a week later, when Student A was heavily intoxicated at a tailgate party held in the parking lot of a rival institution's football stadium.



Case Processing Issues

Who are the key institutional actors in the grievance process?





Defining what is adequate, reliable, and impartial process

- “Prompt and equitable grievance procedures” in the regulation means investigations of sexual harassment allegations that provide for “Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.”

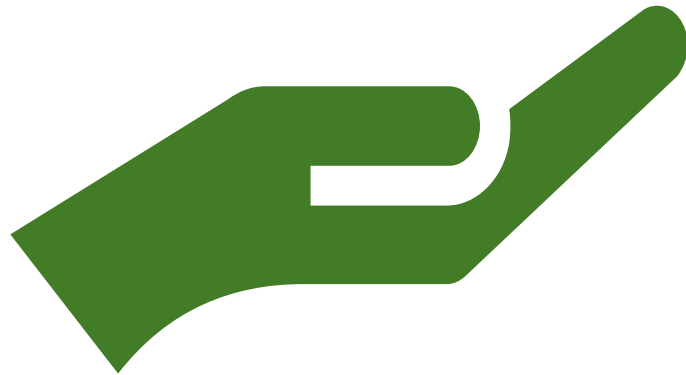


What if we can't identify the alleged victim from a report?

- 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




What are supportive measures?




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


Examples of supportive measures

 Counseling


 Academic accommodations


 Housing accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order where implicated by facts

What is a formal complaint?

What

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

Who

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

How

- Either physical or electronic submission



When may the Title IX Coordinator file a formal complaint?

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



Example of T9 Coordinator formal complaint

Two student members of separate Greek organizations (GGG and PPP) each separately report they were sexually assaulted by a member of Tau Tau Tau. GGG and PPP each suspect they were drugged by TTT. Neither GGG nor PPP 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.





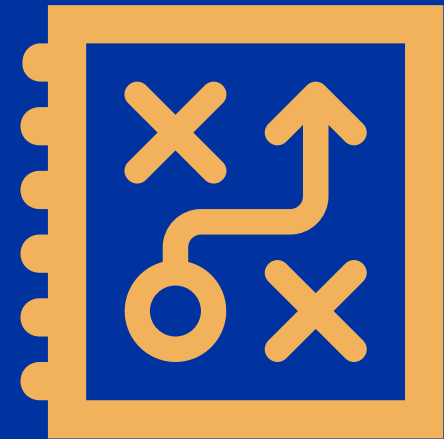
When must we dismiss a formal complaint?

- 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*



Example of dismissal (#1)

Music student reports that Neuroscience student sexually assaulted Musician in their hometown during summer break. The alleged assault occurred in Neuroscientist's house after the two attended a co-ed softball game hosted by a local recreation league. Musician and Neuroscientist have had no contact since the alleged sexual assault.





Example of dismissal (#2)



Literature student makes a sexual harassment complaint against a faculty member because the faculty member requires students to analyze a “Confederacy of Dunces” which contains sexual content that Literature student finds immoral and obscene. Literature student has no other basis for the complaint but the required reading of the book.



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

Example of permissive dismissal

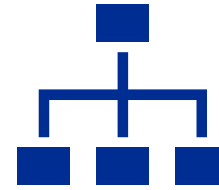
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Prior to investigation being completed, respondent graduates institution and Complainant indicates Complainant will not testify at a hearing because any discipline would be meaningless in light of respondent's graduation. There are no witnesses to the alleged sexual harassment and no non-testimonial evidence, such as video footage.



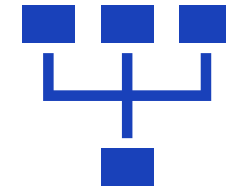
Can we consolidate the complaints?

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

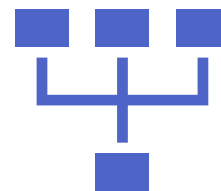


Multiple respondents

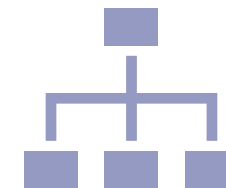
Multiple complainants



Multiple allegations against a single respondent



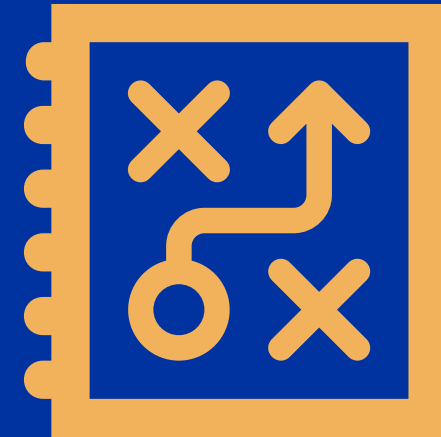
Multiple allegations from a single complainant





Example of permissible consolidation

Students A and Student B, who are roommates, allege that Student C barged into their dormitory room 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



Medical Resident files a formal complaint that Research Fellow sexually assaulted Resident two years ago when Resident 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 resulting sanctions/remediation

Appeal



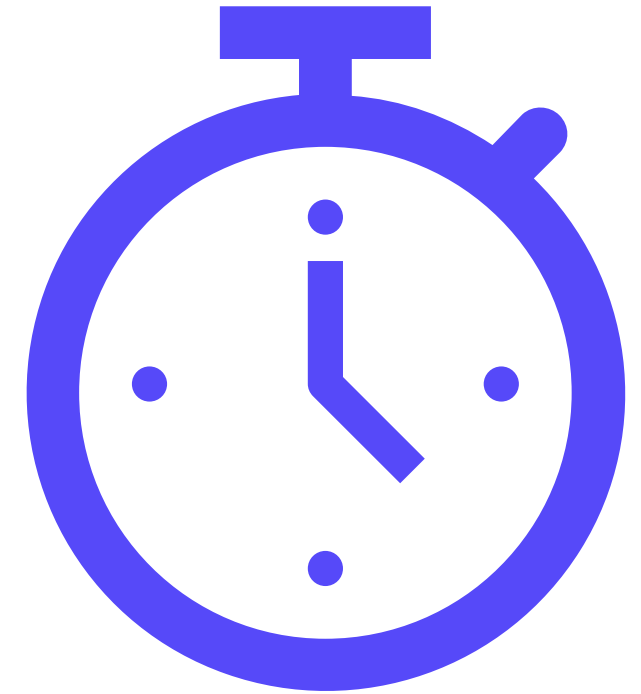
What general principles govern the grievance process?

- 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

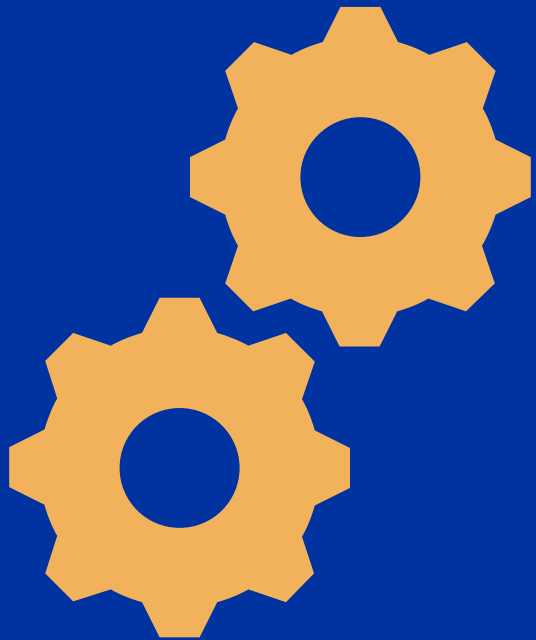


How long does a grievance process take?

- 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



Group Scenario #4



Student A reports that Student B stalked Student A by peeping through Student A's changing room door at the hospital where both are doing rotations, and by stealing Student A's underwear from the laundry at the student lounge at the hospital. Student A seeks supportive measures but does not wish to file a formal complaint and is concerned Student B may retaliate if Student B learns of the report. Student A graduates in two months, while Student B will not graduate for another year. It is unclear whether Student A will testify at a hearing.



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Investigations & Key Issues



Module 3





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 policy violation occurred



What is inculpatory evidence?

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





What is exculpatory evidence?



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



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 ***final*** fact-finding



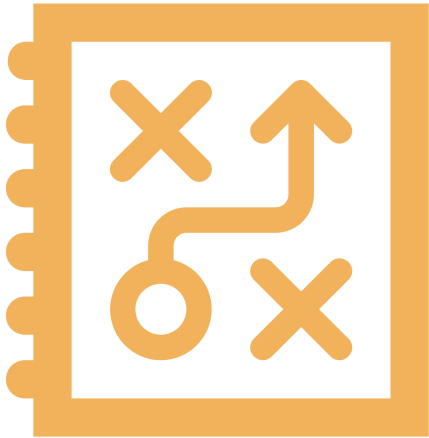
What is relevance? (#1)

Evidence is relevant if:

- It has a tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in determining the action



Example (relevant)

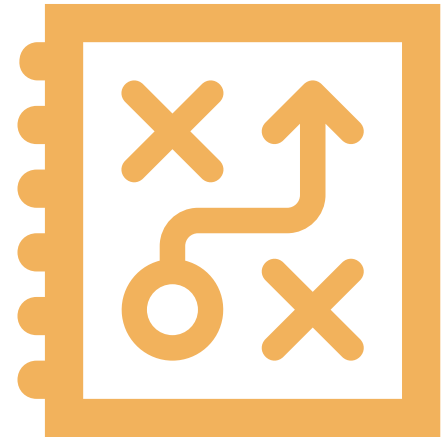


Coach is accused of sexually propositioning Player in exchange for more playing time. Witness states that: “One of the trainers heard Coach say that Player is ‘extremely attractive.’”



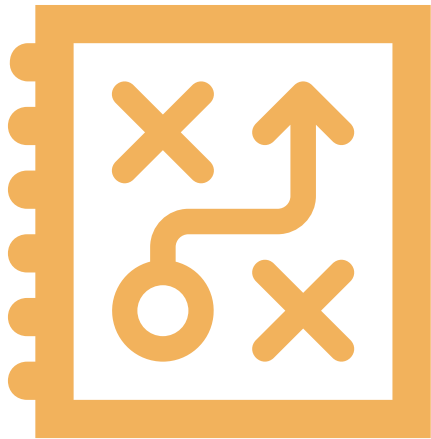
Example (not relevant) (#1)

Complainant alleges Significant Other engaged in dating violence by kicking complainant during an argument. Witness asserts: “Complainant is only dating Significant Other because of the Other family’s money?”





Example (not relevant) (#2)



Journalism student has accused Professor of sexual harassment. Witness says: “Student was convicted for driving under the influence when they were a sophomore in high school.”



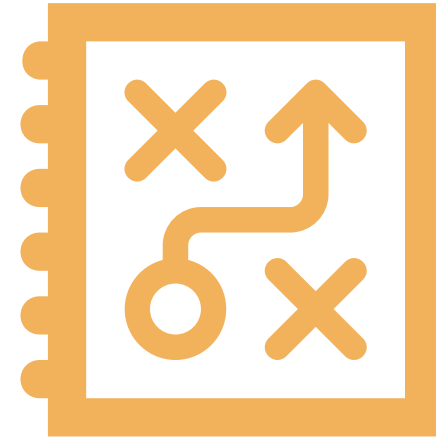
Is sexual history considered? (#1)

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



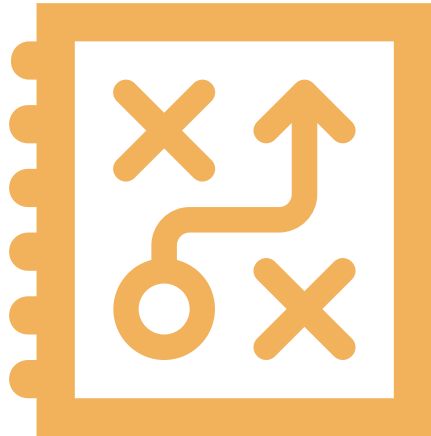
Example (impermissible)

Law student has accused a faculty member of sexual harassment. Witness asserts: “Law student slept with a number of individuals in the month before the claim.”





Example (permissible)



Engineering student has accused Fine Arts student of sexual assault. Engineer states that Artist had intercourse with Engineer without using a condom without Engineer's agreement--Engineer always requires protection. Witness provides "Engineer had unprotected sex with Artist a week prior?"



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”

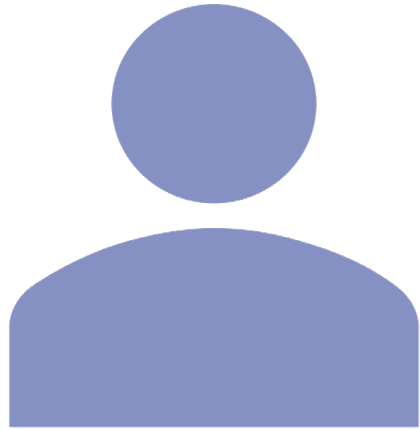




What else does the notice need to say?

- 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

How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of
non-testimonial evidence

What are some general principles about interviewing?

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

Example question

From student witness: “Will I be disciplined if I don’t show up for the hearing?”

Answer: “It’s very important for you to attend so we have accurate and complete information. And I’m personally asking you to attend if your presence is requested. But no, you won’t be disciplined for failing to attend.”





Another example question



- From a party: “I want to tell you something ‘off-the-record.’ Is that okay?”
- Answer: “The nature of the interview is that everything is ‘on-the-record.’ So no, I can’t have an ‘off-the-record’ conversation with you. But you can have a confidential conversation with one of the University counselors.”

How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase



How do you build rapport?

- Take the time to learn basic information about the interview subject before conducting the interview
- Learn something about the subject and share something about yourself; find commonality
- Explain the nature of the investigation, your role, and the rules of the interview
- Explain why you need accurate and detailed information
- Acknowledge the stresses the subject is likely feeling



Example of rapport building

“I saw in the directory that you are from Colorado. My family likes to visit the state. Are there any places you’d recommend we visit?”





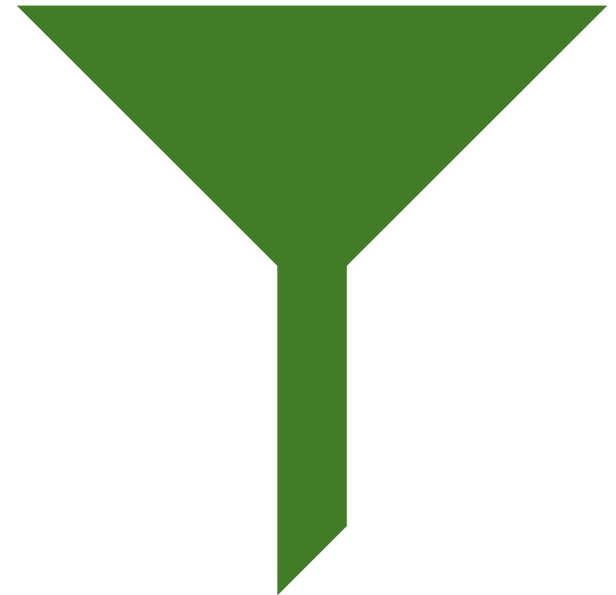
Things helpful to say in every interview . . .

- “If I ask a question you don’t understand, please tell me.”
- “If I ask a question and you don’t know the answer, it’s okay to say you don’t know.”
- “If you think I’ve misunderstood anything you say today, please tell me.”
- “I want to get as much information as possible, so please be detailed in what you share. And if I don’t ask about something you think is important, please tell me.”
- “To do my job, I need accurate information. So I always remind every witness that it’s important to tell the truth.”



How do I ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of recognition prompts as long as possible
- Avoid suggestive or leading questions
- Save externally derived information for last



Examples of open invitations



“Tell me what happened that night.”



“Will you walk me through what you remember?”



“Tell me more about that.”



“What happened next?”

Examples of facilitators



Examples of cued invitations

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

“You said that
What did you mean?”

“You used the word
'pressured' to describe .
. . . . Can you be specific
about what they did?”

“If I understood you
right, you said that after
. . . . Did anything
happen in between?”

Examples of recognition prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

Examples of suggestive questions (avoid)

“I’m sure it’s difficult when you see them on campus. Do you agree?”

“You probably thought that was an invitation to have sex, right?”

“If I were in your position, I would probably feel threatened. Did you?”



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

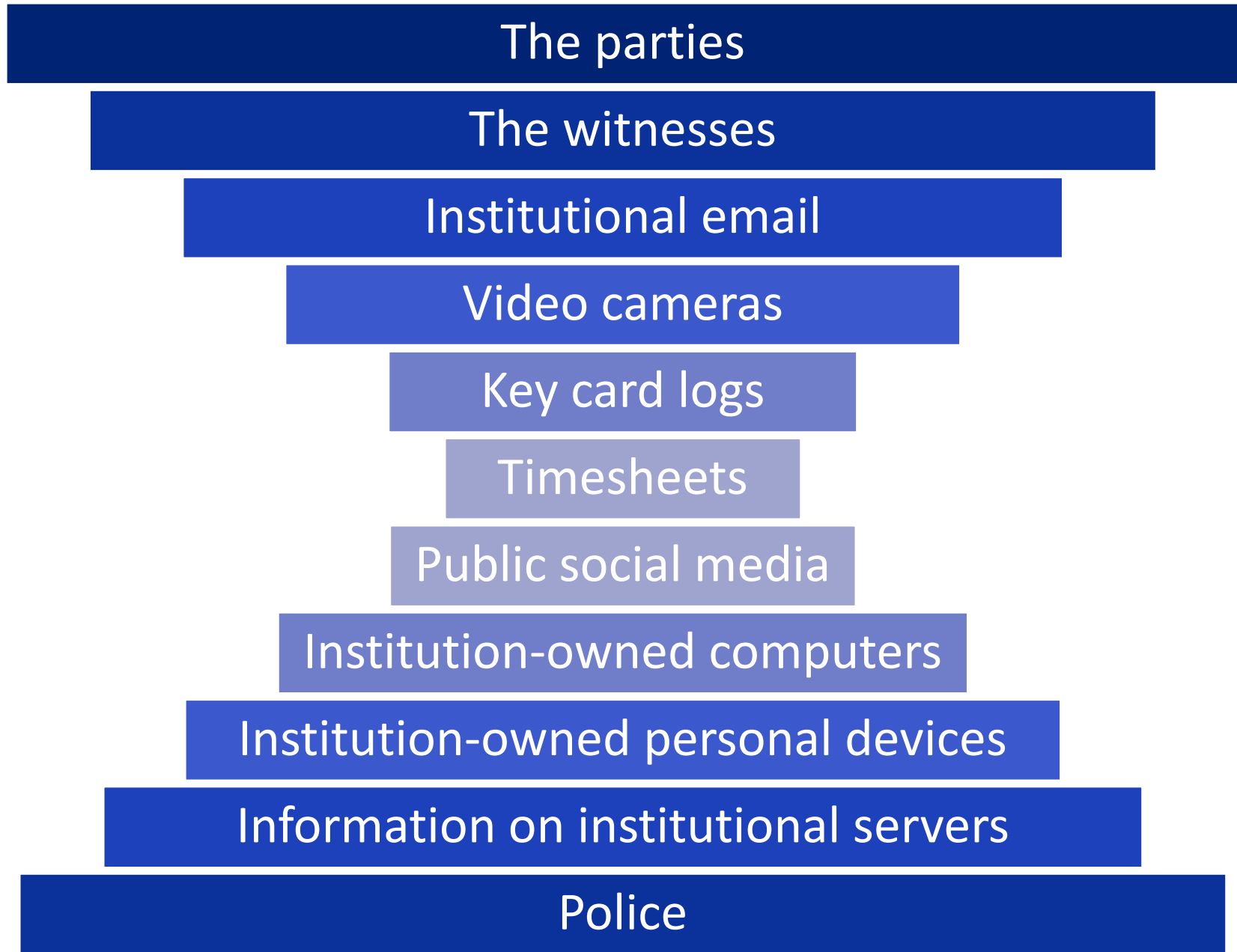




Do parties/witnesses have a right to record the interview themselves?

- No – parties do not have the right to insist on recording an interview
- If the interview is recorded, the institution should make the recording and give the parties access as required at the appropriate time

**Example
sources of
non-testimonial
evidence**





May an investigation collect evidence on sexual history?

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



May an investigation collect and rely on privileged records?



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



Example of permissible use

—
Student who makes report of sexual assault executes a HIPAA-compliant release requesting and authorizing the hospital to provide a copy of a SANE/SART examination to the investigator.



Example of impermissible use



Respondent tells investigator
Respondent met with an attorney the day after the alleged sexual assault. The investigator demands that the respondent reveal what was said to the attorney. When the respondent declines, the investigator notes that in the report and advises the hearing panel to draw an adverse inference against the respondent for “failing to cooperate.”



May parties have an advisor during the investigation?

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





What if the advisor breaks the rules?



- Institution may impose limits on the advisor's role and certain behavior standards
- Must be applied equally for both parties
- Institution may exclude advisor who violates rules, but must pause the relevant interview, meeting, or interaction until the party has a new advisor



Example of advisor breaking the rules (#1)

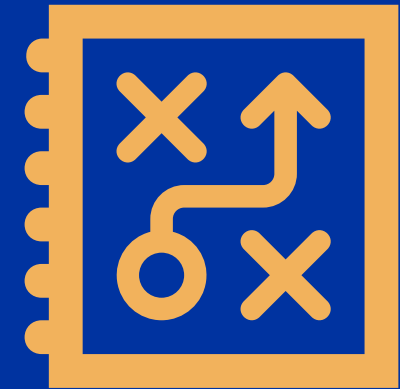
A dining service employee brings an aggressive union representative as an advisor to an interview. The institution's policy states that advisors are to remain passive and not argue on behalf of the parties they are advising. During the interview, the union representative repeatedly interrupts the investigator, objects to questions, argues that the investigator should ask different questions, and attempts to present legal arguments citing caselaw.





Example of advisor breaking the rules (#2)

Psychology student names the student's mother as advisor. The institution's policy states that advisors may not obstruct communications between the institution and a party. The mother tells the investigator the investigator is to communicate solely through the mother and not send any emails directly to the student. When the investigator emails the student directly to schedule an interview, the mother calls and verbally attacks the investigator.





Are parties subject to a “gag” order during the investigation?

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



Example of permissible conduct

Respondent accused of sexual assault sends text messages to various students who may have observed the complainant's level of intoxication on the night in question. Respondent's text says: "Please contact me ASAP if you believe the complainant was sober."

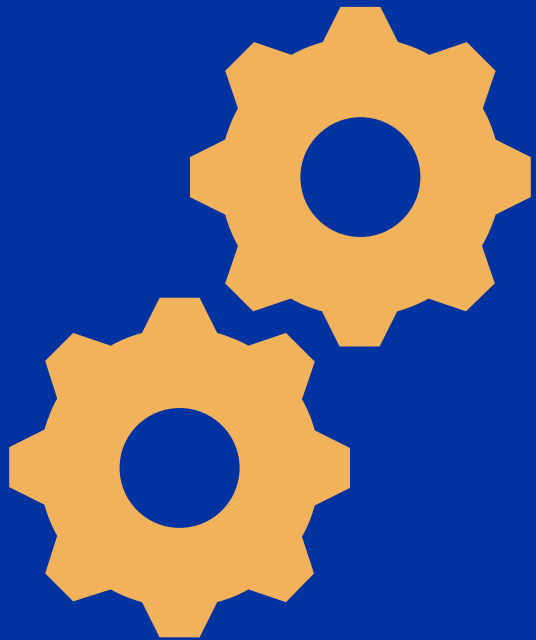


Example of impermissible conduct



Respondent tells roommate that respondent has been accused of sexual assault and “it’s important that we get our stories lined up.” Roommate states a belief that respondent arrived home at 2:00 a.m. Respondent says: “No. You’re going to say you saw me here in bed at 11:00 p.m. That’s what you need to say or I’m screwed. I’ll owe you for this . . .”

Group Scenario #5



Political Science student accuses Graduate Teaching Assistant of using a power differential to coerce student into performing oral sex. Student has received counseling since the incident and tells the investigator the counselor has diagnosed PTSD. GTA denies the oral sex was coerced. GTA claims that student consented and previously performed oral sex on another GTA. GTA tells investigator GTA has procured an expert witness who will opine student was not coerced and was not influenced by the power differential. Student identifies several witnesses who will testify GTA was a “creep.”



May parties present expert witnesses?

- Parties must have equal opportunity to present witnesses, including fact *and* expert witnesses

Hearings Summary

Module 4



What is the purpose of the hearing?

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



What happens before a hearing?

- Notice of hearing
- Name decision maker(s)
- Share hearing procedures
- May allow raising/consideration of evidentiary/relevance arguments



Who determines relevance?

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



What is relevance? (#2)

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



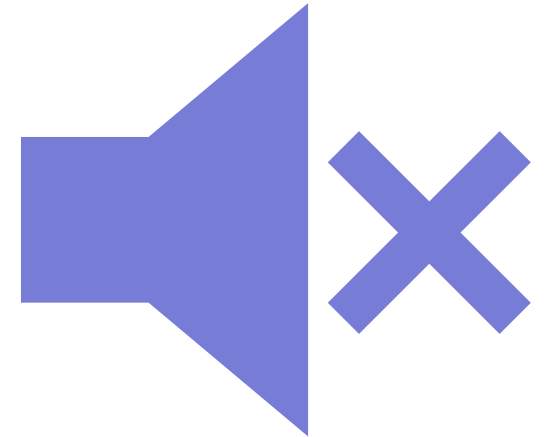
Is sexual history considered?

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



Does any testimony get excluded?

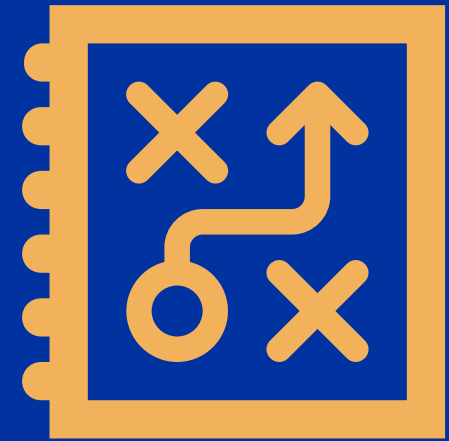
- Yes – Decision-maker(s) must exclude the statements of any party or witness who refuses to submit to cross-examination from the other party’s advisor
- “[P]rovided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” (34 C.F.R. § 106.45)





Example #1 - excluded

Complainant gives emotional account of sexual assault and answers questions from hearing panel chair. Complainant then answers only one question from respondent's advisor before breaking down and refusing to answer any more. After a break is taken, complainant tells hearing panel chair complainant cannot endure cross-examination. Complainant leaves the hearing.





Example #2 - excluded

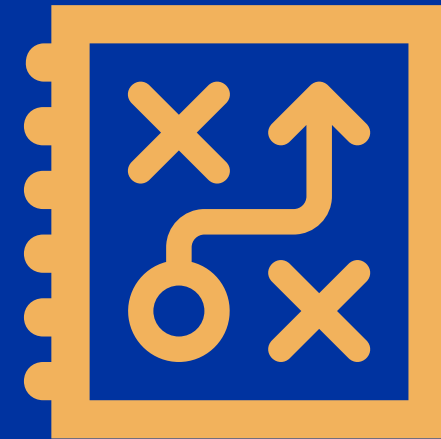


Witness gives statement to investigator that witness observed complainant right before alleged sexual assault. Witness told the investigator that complainant was too drunk to stand up. Witness fails to attend hearing. Investigator is prepared to relay what witness told investigator.



Example (not-excluded)

—
Witness answers questions from hearing officer. After consulting with complainant, advisor for complainant says that the advisor has no questions for witnesses. Advisor for respondent then proceeds to cross-examine witness.



Investigation Reports

Module 5



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 finalized
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally





Do the parties get to respond to the evidence?

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





How is the investigation concluded?

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





Does the investigation report make findings?

- No – not final findings. The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation.
- Under the new Title IX regulation, factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing.



Summarizing Allegations

Goal: identify and articulate what part of complainant's story, if true, is a violation of the institution's policy

- Focus on who, what, where, when, how
- Should match notice!





Important Language Considerations

Use objective terms

“Complainant” and “respondent” rather than “victim” and “perpetrator”

“Violation of policy” not “guilty” or violation of “law”

Generally, credibility of **facts**, not **witnesses**, as a whole, but-for specific circumstances

Do not include speculation

Do not include irrelevant points and discussion

Be thoughtful about pronouns

Avoid vague phrasing like “had sex”



Be Specific

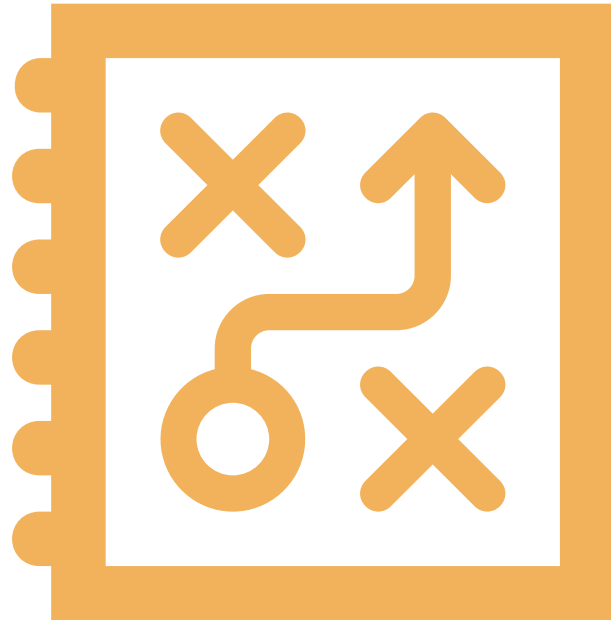
“Jane alleges that Sara had sex with her without her consent.”

vs.

“Jane alleges that Sara laid on top of her, pulled her underwear down with one hand, while pressing her elbow on her other hand, penetrated her vagina with a vibrator, and held her down so she could not move.”



Contents of Investigation Report



1. Fairly summarizes the various steps taken during the investigation
2. Summarizes the relevant evidence collected
3. Lists material facts on which the parties agree, and lists material facts on which the parties do not agree.



Evidentiary Concepts

—
for Investigators to Consider to Inform Hearing Panel Decisions



Key Legal Principles

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



Direct v. Circumstantial

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



Direct v. Circumstantial - continued

- **Circumstantial (indirect)** — Series of facts which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred.
 - e.g.: witness testimony 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
- Some hearsay is more reliable
 - Statement contemporaneous with the event in question
 - Excitable statement uttered in the moment being perceived



Credibility

- To be determined by hearing panel, following hearing and examination of investigative report, evidence and hearing testimony
- Common factors:
 - Consistency
 - Corroboration
 - Plausibility
 - Motive
 - Demeanor

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



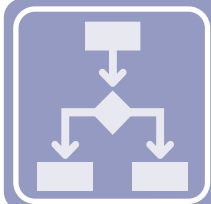
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



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

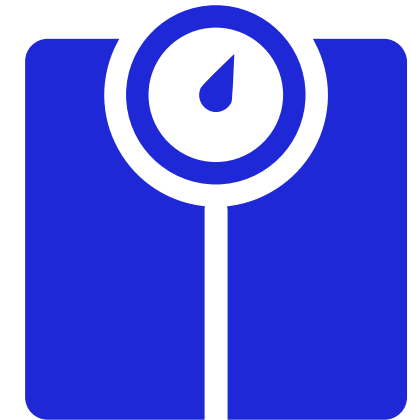


Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



What does it mean to weigh evidence? (#2)

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





Example of considerable weight (#2)

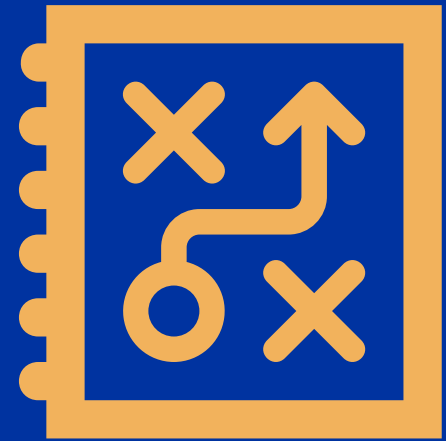
Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving. Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring. Witness testified he knows the time was 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 of less weight (#2)

—
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.”





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

Trauma, Bias, Stereotypes and Conflicts

Module 6



Balance

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



Trauma might affect a party

- Not in every case
- Not just one party
- Never assume anyone interviewed or questioned suffered any trauma

Possible trauma impact

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

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame



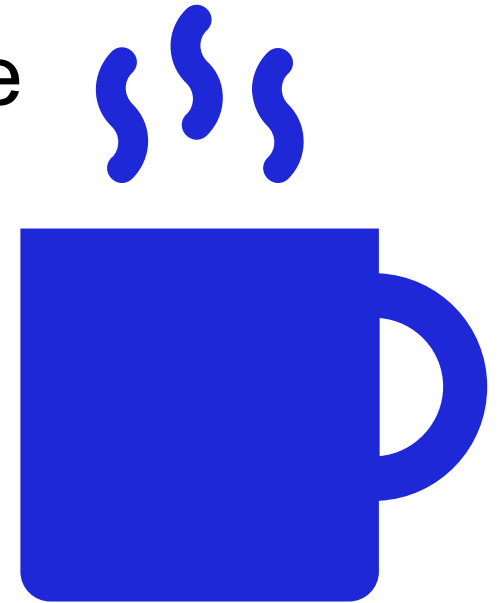
Trauma & credibility

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



Trauma-informed interview

- Provide information to the party
- Acknowledge the difficult situation
- Provide as many options as possible
- The process
 - Your role
 - Policy
 - Communication





Awareness of respondent 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
- Always offer interim measures and counseling



Who is responsible for identifying conflicts of interest and bias? (#1)

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

Examples 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.”

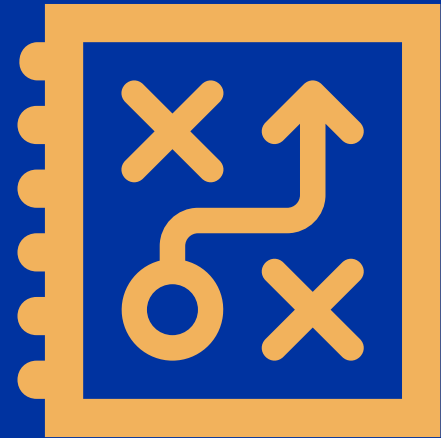


What is a conflict of interest?

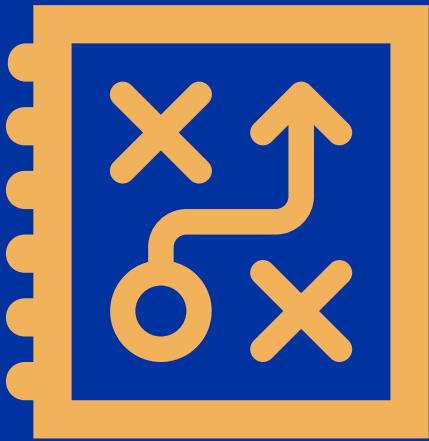
- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of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

Conflict of interest example (#1)

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



Conflict of interest example (#2)

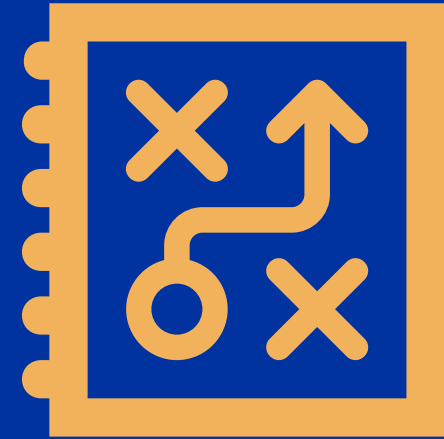


An administrator accuses an employee of an office supply vendor of sexual harassment. Institution assigns an investigator whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.



Example of bias (#1)

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



Example of bias (#2)



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.”

Resource for consideration: Harvard implicit bias test

<https://implicit.harvard.edu/implicit/takeatest.html>





HUSCH BLACKWELL

Informal Resolution & Confidentiality

Module 7



What is informal resolution?

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



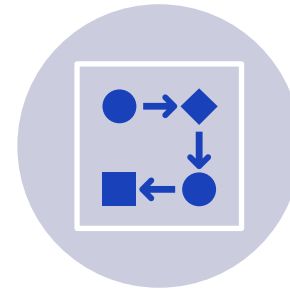
Does every case with disputed facts have to proceed to hearing?

- No – As long as the procedural requirements to enter informal resolution are met, Title IX regulations permit a wide range of alternative models, including a decision by a single individual (i.e., “arbitration”)
- It is especially important to advise the parties of the nature of this type of resolution and how it differs from the default investigation and hearing

What are the key concepts of informal resolution?



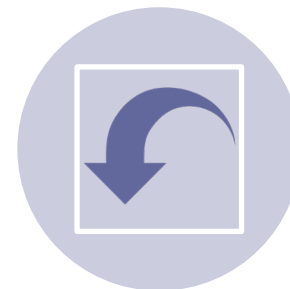
A formal complaint must first have been filed and written notice given to the parties



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



Example (informal resolution)

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





Resolution example - continued

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





What are the limitations?

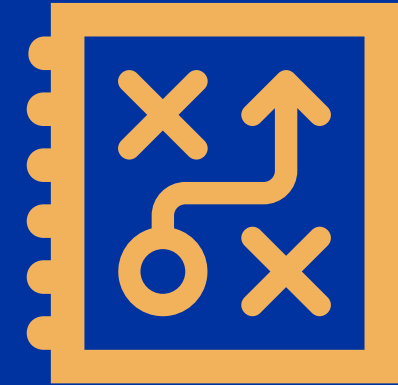
- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment





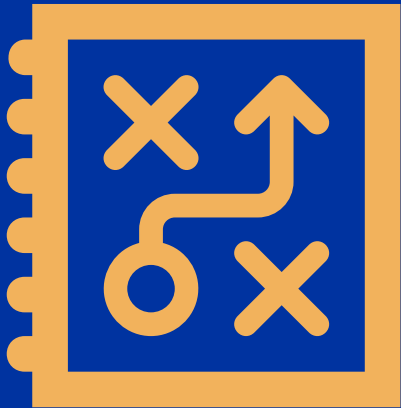
Example #1 (impermissible)

Student files a formal complaint accusing a faculty member of offering to give student better grades in exchange for sexual favors. Faculty member proposes to informally resolve the complaint by apologizing for a “bad joke” and having a colleague grade student’s work product. Student indicates they are amenable to the faculty member’s proposal.





Example #2 (impermissible)



Enrollment agreement for students contains a clause stating: “Student hereby waives their right to a formal investigation and hearing as contemplated by Title IX and instead agrees that all reports of sexual harassment will be summarily resolved by a decision issued by the Dean of Students after an investigation.”



Who facilitates an informal resolution?

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

**What are
some
examples of
informal
resolution?**

Facilitated exchange of resolution offers

Mediation

Arbitration

Restorative justice

Settlement with the involvement of attorneys



How long can an informal resolution take?

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





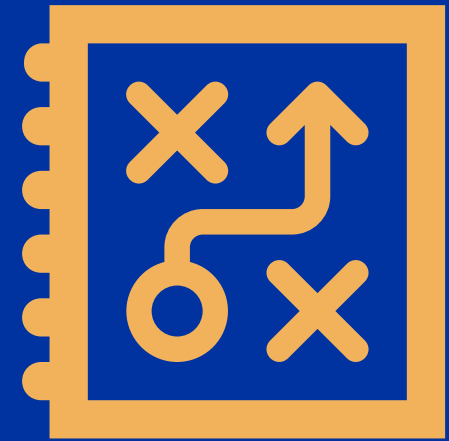
Is an informal resolution final?

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



Example of Informal Resolution

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





How is an informal resolution documented?

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



Are sexual harassment cases confidential?

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



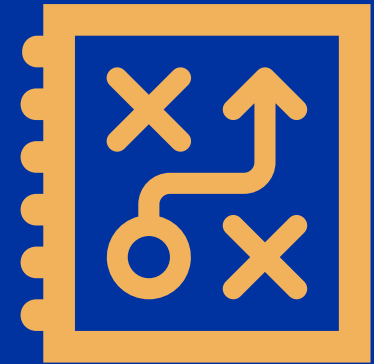


Are parties allowed to talk about a case?

- Title IX regulation prohibits an institution from restricting the ability of a party to discuss the allegations under investigation or to gather or present evidence
- First Amendment additionally limits public institutions' ability to restrict speech about a case
- Witness manipulation and intimidation can still be addressed by institution

Example (permitted communication)

Respondent in sexual harassment case affirmatively calls several other students who know complainant. Respondent tells such persons he has been accused of sexual harassment and is attempting to determine whether the complainant discussed the effect of respondent's actions with any of them.



Example (institution may restrict)

Complainant contacts witness who complainant knows will testify to witness' belief, based on observation, that complainant was not incapacitated and desired to have sex with respondent. Complainant tells witness to ignore investigator's request for an interview, to lie if witness is asked what witness observed, and not to show up at a hearing under any circumstances.





Are interviews and hearings confidential?

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

Questions



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