


**H-B**

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**Title IX &  
Sexual  
Harassment  
Response**

Fall 2020



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**Agenda**

- Title IX Basics
- Title IX Scope & Jurisdiction
- Investigation of Formal Complaints
- Hearings
- Informal Resolution

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# Title IX Foundations

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## What is Title IX?

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



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## General Obligations: 34 C.F.R § 106.8

- Designate Title IX Coordinator
- Create and disseminate Title IX Policy
- Adopt and publish “grievance procedures that provide for the **prompt** and **equitable** resolution of student and employee complaints”
- For certain “sexual harassment” claims, grievance procedures must comply with § 106.45. . . .

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## What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the “education program or activity” of a federal funding recipient
  - 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



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## What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

Sexual assault

Dating violence

Domestic violence

Stalking

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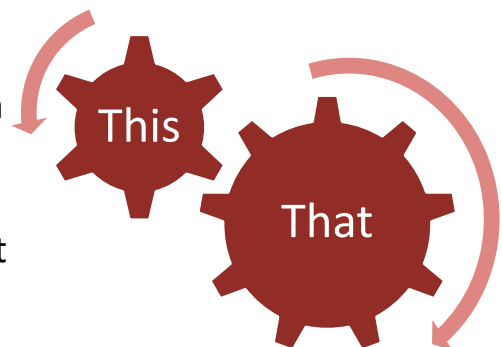
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## What is quid pro quo?

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



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## What is hostile environment?

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



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## 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

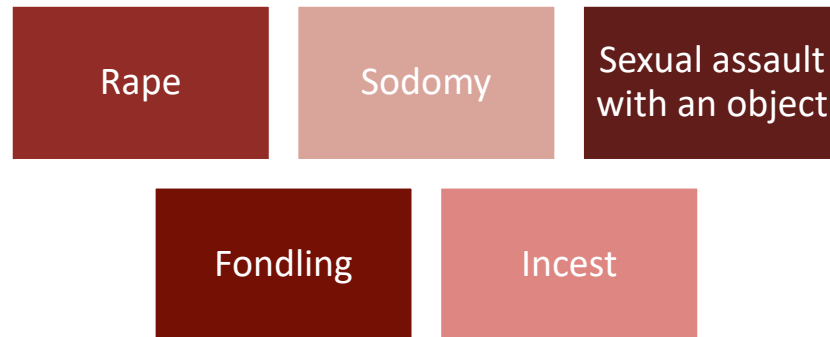
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## What is sexual assault?

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



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## How does TSUS define Consent?

**Consent** is an **informed** and **freely and affirmatively communicated** willingness to participate in a particular sexual activity. Consent can be expressed either by words or by clear and unambiguous actions, as long as those words or actions create mutually understandable permission regarding the conditions of each instance of sexual activity. It is the responsibility of the person who wants to engage in the sexual activity to ensure that s/he has the consent of the other to engage in each instance of sexual activity. . . .

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## TSUS Consent Factors

1. consent is a **voluntary** agreement or assent to engage in sexual activity;
2. someone who is **incapacitated** cannot consent;
3. consent can be **withdrawn** at any time;
4. past consent does not imply future consent;
5. **silence** or an absence of resistance **does not imply consent**;
6. consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
7. **coercion, force, or threat** invalidates consent; and
8. being intoxicated or under the influence of alcohol, drugs, or any other substance is **never an excuse** for engaging in Sexual Misconduct.

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## 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.



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## 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.

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## What is dating violence?

“Dating Violence” is violence committed by a person:

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

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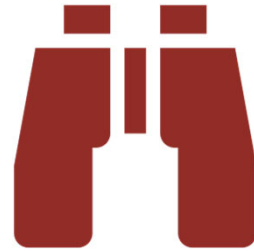


## What is stalking?

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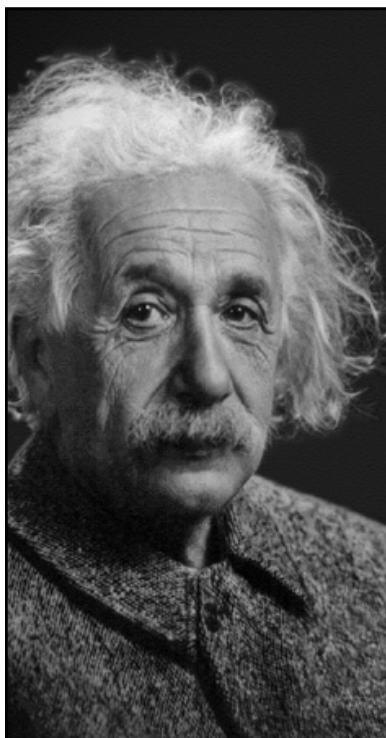
Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

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



## Institutional Response to Sexual Harassment

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## Theory of Applicability

- AK + SH + EP + U.S. = IX
- If any of these elements do not exist, there is no obligation under IX regulations (34 C.F.R. § 106.45)

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## “Actual Knowledge” (AK)

- “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a **recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient . . . .**”
- In the postsecondary context, notice to the Title IX Coordinator always constitutes actual knowledge. The determination of whether another employee is an “official with authority to institute corrective measures” depends upon the institution’s operational structure and the employee’s specific roles and duties.

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## “Sexual Harassment” (SH)

Sexual harassment means conduct *on the basis of sex* that satisfies one or more of the following:

- An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- 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; or
- “Sexual assault” as defined in Clery Act, “dating violence” “domestic violence” or “stalking” as defined in VAWA.

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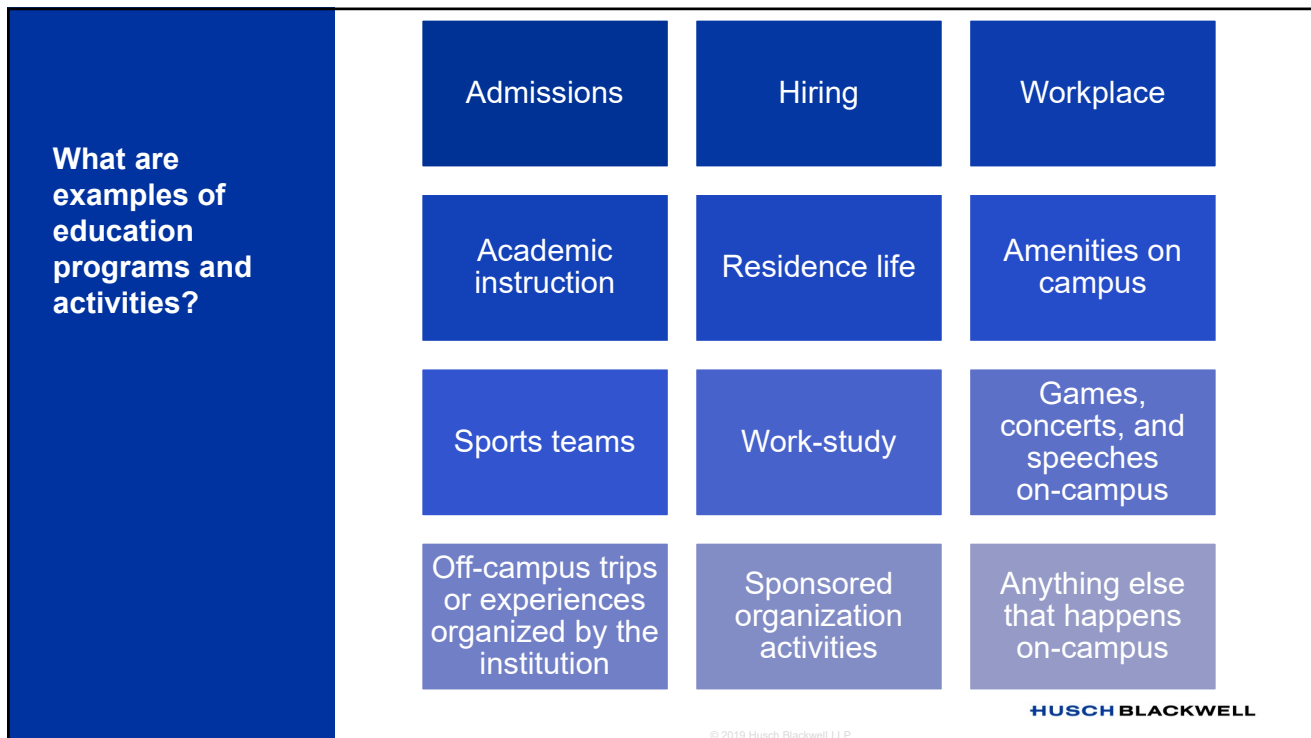
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## “Educational Program or Activity” (EP)

- Locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs
- “**Substantial control**” → while factors “such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred . . . may be helpful or useful for recipients to consider . . . to determine the scope of a recipient’s program or activity, no single factor is determinative.”

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## What about off-campus conduct?

“a recipient’s Title IX obligations extend to incidents of sexual harassment that occur **off campus** if any of three conditions are met:

- the off-campus incident occurs as part of the recipient’s **‘operations’**;
- the recipient exercised **substantial control over the respondent and the context** of alleged sexual harassment that occurred off campus; or
- the incident of sexual harassment occurs at an off-campus building **owned or controlled by a student organization** officially recognized by a postsecondary institution.”

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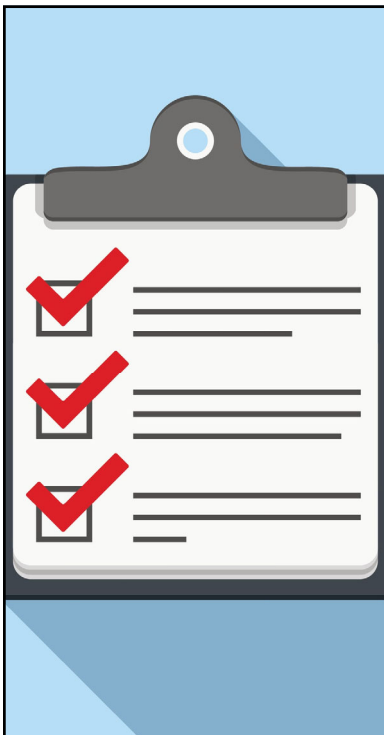
## Hypothetical

Student A reports that Student B sexually assaulted Student A three weeks ago, off-campus in a private apartment complex in an adjacent town. No university student-organizations or employees are involved. There is no claim of any additional misconduct occurring on campus or in university programs or activities.

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## Practical: Theory of Applicability

- AK + SH + EP + U.S. = IX
- If any of these elements do not exist, there is no institutional obligation **under 34 C.F.R. § 106.45**
- Just because it's not IX does not mean we don't deal with it (*see § 106.8*)

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## Application to Employees

The regulation's mandatory requirements for investigation and grievance procedures apply to cases involving students and employees.

### 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

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## Hypothetical

At-will custodial worker is accused of sexually harassing a student in the hallway. The custodial worker was placed on an improvement plan a month ago for being late to work. They have complied with the improvement plan. But for the accusation of sexual harassment, the institution would have continued to employ the custodial worker. Now it is considering terminating his employment.

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## Title IX Coordinator Responsibilities When AK + SH + EP + US

“promptly contact the complainant to discuss the availability of supportive measures”

“consider the complainant’s wishes with respect to supportive measures”

“inform the complainant of the availability of supportive measures with or without the filing of a formal complaint”

“explain to the complainant the process for filing a formal complaint”

“Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party”

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- “Other similar measures”

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## Can we utilize interim removals or suspensions for students?

Students may be removed on a temporary basis only if:

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

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## Example of immediate threat to physical health or safety

Student A is reported to have raped Student B at gunpoint. Police apprehend Student A attempting to flee campus. When apprehended, Student A is found in possession of a loaded and unregistered firearm.



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## Example of no immediate threat to physical health or safety



Student A reports that Student B committed sexual harassment by repeatedly posting pornographic images on Student B's door in a Greek house. Student A does not allege that Student B has engaged in any physical conduct. When notified of formal complaint, Student B agrees to voluntarily remove images and cooperate with investigation.

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## 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 (i.e., Faculty Handbook)

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## “Explain to the Complainant the Process for Filing a Formal Complaint”

- “Formal complaint means a document filed by a complainant or **signed by the Title IX Coordinator** alleging sexual harassment against a respondent **and** requesting that the recipient investigate the allegation of sexual harassment.”
- **Practical Q:** when will Coordinator intervene & what happens next?
- “At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”

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## Hypothetical

Title IX Coordinator receives a complaint from Alumnus A who graduated in 2019. Alumnus A reports that Student B, who is currently a junior, groped Alumnus A's genitals without consent at a party hosted at a fraternity house in the fall of 2018. The fraternity is recognized by the university. Alumnus A is in a graduate program at a different university located several states away.

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## What Happens When It's IX + FC?

- Notice to the respondent "upon receipt of a formal complaint"
- Sufficient details known at the time and with sufficient time to prepare a response before any initial interview → identities of the parties involved, the conduct allegedly constituting sexual harassment, & the date and location of the alleged incident.

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## What Happens When It's IX + FC?

The written notice must:

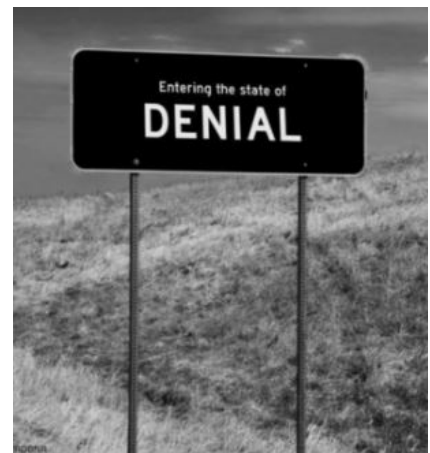
- include a statement that the respondent is presumed not responsible
- inform the parties that they may have an advisor of their choice and may inspect and review evidence
- inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

### What happens if we start investigating other stuff?

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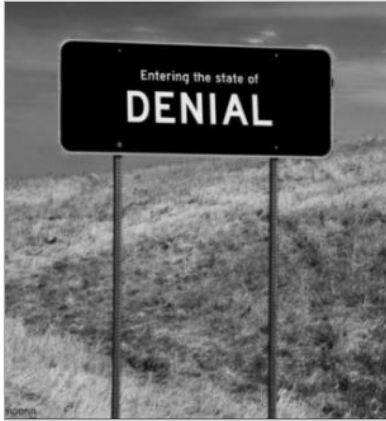
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- “The recipient must investigate the allegations in a formal complaint.”
- If no SH + EP + U.S. then “**must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.”



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“The recipient **may** dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.”

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## Documentation & Recordkeeping

A recipient must maintain for a period of **seven years** records of –

- A. **Each sexual harassment investigation** including any determination regarding responsibility and any audio or audiovisual recording or transcript . . . , any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant . . . ;
- B. **Any appeal** and the result therefrom;
- C. **Any informal resolution** and the result therefrom; and
- D. **All materials used to train** Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

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## Documentation & Recordkeeping

Additionally, “For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, **including any supportive measures**, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient’s education program or activity. **If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable** in light of the known circumstances.”

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## 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

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## Examples of impermissible stereotypes

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

“Greeks 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.”

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## 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

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## Example of conflict of interest

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



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## Example of conflict of interest

Employee A accuses an employee of a food service vendor of sexual harassment. Institution assigns an investigator whose spouse is employed as a manager for the food service vendor and who directly supervises the accused employee.



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## Example of bias



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

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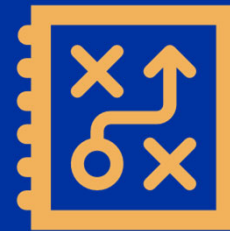
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## Example of bias

Institutional employee chosen to serve on a hearing panel 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.”



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

- Title IX Coordinator 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

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### Group Scenario




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 dormitory. 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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Questions



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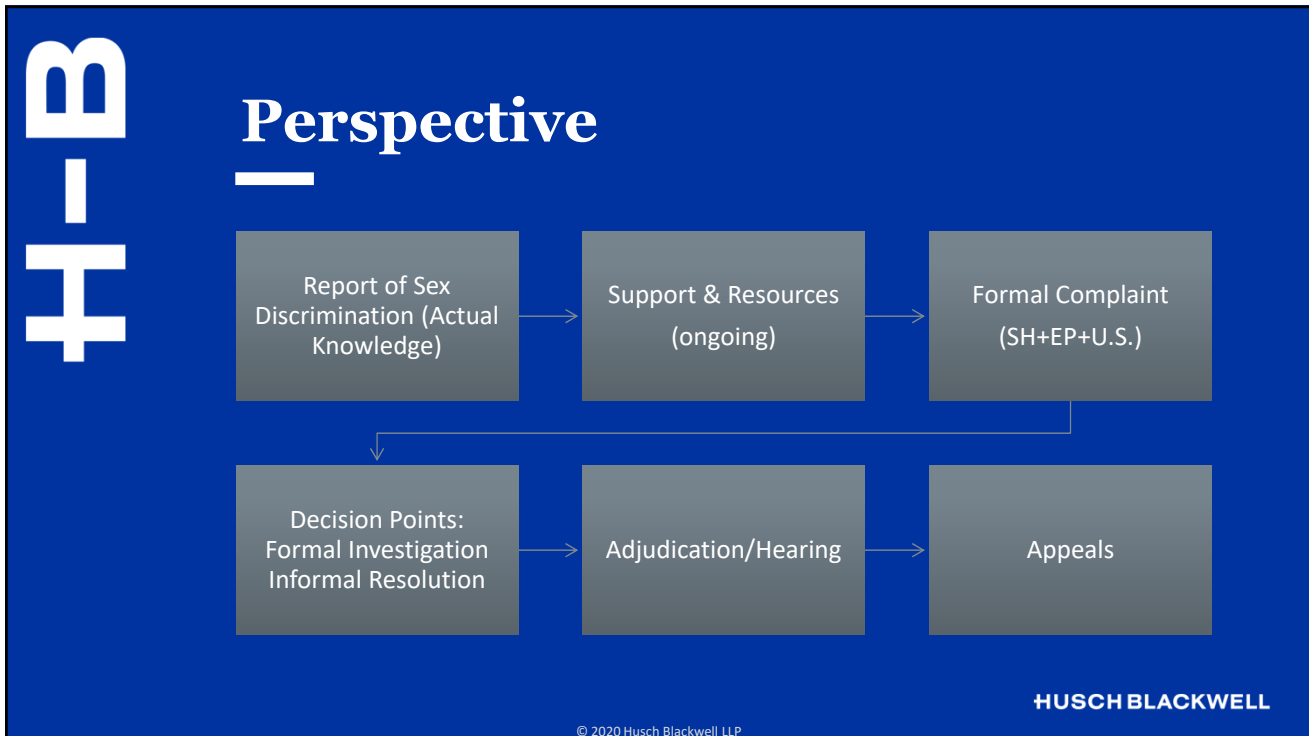
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Investigations

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## Appeal of FC Dismissal

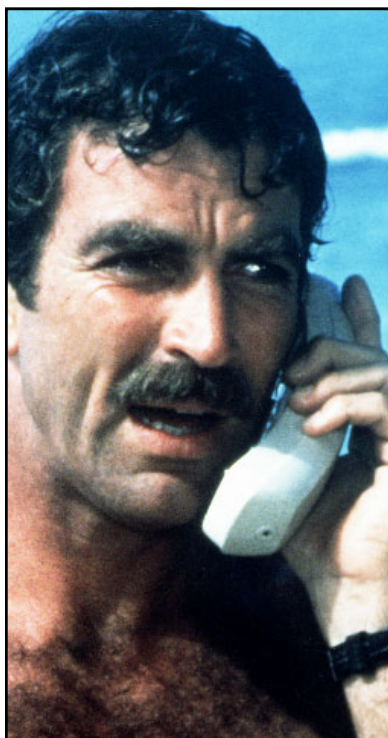
“A recipient must offer both parties an appeal . . . **from a recipient’s dismissal of a formal complaint or any allegations** therein, on the following bases:

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) 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; and
- (C) 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.”

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## If The Formal Complaint Is Not Dismissed . . .

- “The recipient must investigate the allegations in a formal complaint.”
- What is the purpose of the investigation under the Title IX regulations? Organizing for the hearing?

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## Regs Rule 1 of Investigations

“When investigating a formal complaint and throughout the grievance process, a recipient must . . . Ensure that the **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.”

- What does “burden of proof” refer to here?
- Example of what not to do: “Get your friends and witnesses to write statements and send them to me”
- What is still permissible?

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## Regs Rule 1 Practical

- Checklist for common sources of evidence
- Identify relevant information and witnesses in an investigation plan – to the extent it is within our control, get it
- Ask for it in interviews & in writing
- Meticulously document efforts to obtain (especially when you fail)

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## Common Sources of Physical Evidence

1. Text messages
2. Social media posts
3. Card swipes
4. On and off-campus video
5. Police reports
6. Medical reports
7. Teaching evaluations
8. Internal reports
9. Call logs
10. Other disciplinary records

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## Regs Rule 2 of Investigations

“Provided that the recipient cannot **access, consider, disclose, or otherwise use** a party’s records that are made or maintained by a **physician, psychiatrist, psychologist, or other recognized professional or paraprofessional** acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that **party’s voluntary, written consent** to do so for a grievance process under this section.”



#News #Students And Violence

### Staying Confidential

Months after U of Oregon's actions exposed the ability of colleges to seek mental health records of alleged rape victims, the outrage hasn't led to action to prevent others from doing the same thing.

By [Jake New](#) // August 3, 2015

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## Regs Rule 3 of Investigations

“Provide an equal opportunity for the parties to present witnesses, including fact and **expert witnesses**, and other inculpatory and exculpatory evidence”

- “106.45 deems certain evidence and information not relevant or otherwise not subject to use in a grievance process: information protected by a legally recognized privilege; evidence about a complainant’s prior sexual history; any party’s medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross-examination at a live hearing.”
- **Practical Point 1:** Err on side of allowing it & give it the weight its due
- **Practical Question:** How do we ensure that we have provided the parties this equal opportunity?

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## Regs Rule 4 of Investigations

“Not restrict the ability of either party **to discuss the allegations under investigation** or to gather and present relevant evidence”

- “This provision does not, therefore, apply to discussion of information that does not consist of ‘the allegations under investigation’ (for example, **evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation . . . or the investigative report summarizing relevant evidence sent to the parties and their advisors . . .**.)”
- “Where ‘disparaging communications’ are unprotected under the Constitution and violate tort laws or constitute retaliation, such communications may be prohibited without violating this provision.”
- “This provision applies to discussion of “the allegations under investigation” and not to the evidence subject to the parties’ inspection and review under § 106.45(b)(5)(vi).”
- **Remember:** applies to employment

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## Regs Rule 5 of Investigations

“Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and **not limit the choice or presence of advisor** for either the complainant or respondent in any meeting or grievance proceeding; **however**, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”



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## Regs Rule 6 of Investigations

“Provide, to a party whose participation is invited or expected, **written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.**”

- **Practical 1:** How do we demonstrate we complied with this?
- **Practical 2:** What is “sufficient time”?

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## Regs Rule 7 of Investigations

“Provide both parties an equal opportunity to inspect and review **any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source**, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”



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## Regs Rule 8 of Investigations

**“Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.”**



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## Memorializing Witness Statements

- **Option: Recording**
  - Ensures accuracy, allows you to concentrate on conversation, logistically simpler, allows for meaningful feedback
  - Transcript must be provided to all parties
- **Option: Written Statement**
  - A. Convey all information relayed in narrative form
  - B. Use quotes when appropriate (significant statements, jargon)
  - C. Allow parties opportunity to review for accuracy but not make substantive revisions without notations
  - D. Consider “multiple witnesses” to statement

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## Regs Rule 9 of Investigations

- “Create an investigative report that **fairly summarizes relevant evidence** and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, **for their review and written response.**”
- Fair to note undisputed material facts
- Disputed material facts are for hearing



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## Credibility: 7 Factors to Consider

1. Compare verifiable facts to witness statements.
2. Are there major inconsistencies in testimony?
3. Do neutral witnesses corroborate or contradict?
4. Are there documents such as diaries, calendar entries, journals, notes or letters describing the incidents?
5. What have witnesses told others?
6. Have there been similar complaints against the respondent? \*\*\*
7. Do any of the witnesses have a motivation to lie, exaggerate or distort information?

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## Hypothetical

- Professor A is accused of sex assault by a student. The student points out that Professor B witnessed the assault.
- You ask Professor B to sit for an interview. Professor B refuses.
- What options do you have under IX?

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## Retaliation

“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated **or refused to participate in any manner in an investigation, proceeding, or hearing under this part.**”

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## Practical Questions

- Who should conduct the investigation?
- How/when should we communicate to parties about information sharing requirements?
- What are practical steps we can take to ensure investigation is prompt?
- Recordkeeping Requirements (“Each sexual harassment investigation . . . .”

*“(7) Determination regarding responsibility. (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.”*

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## 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


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## How do you structure an interview?

 Rapport building/information providing phase

 Substantive testimony collection

 Closure/information providing phase

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## 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

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## 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.”

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## 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



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## 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?”

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## Examples of facilitators



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## 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?”

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## 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)

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## Examples of suggestive questions (avoid)

“I’m sure it’s difficult when you see him 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?”

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## Group Scenario



Student accuses Graduate Teaching Assistant (GTA) 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.”

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Questions



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Hearings

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## A String of Musts . . .

- “the recipient’s grievance process **must** provide for a live hearing.”
- “At the live hearing, the decision-maker(s) **must** permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”

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## A String of Musts . . .

- “Such cross-examination at the live hearing **must** be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally . . . .”
- “Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) **must** first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”

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## What The Regulations Say...

- “If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.”
- “At the request of **either** party, the recipient **must** provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.”

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## What The Regulations Say...

- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
- **“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, 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.”**
- “Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.”

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## Practical Questions

- What are some of the statements we might not be able to consider?
- How are we going to minimize risk of witnesses not participating?

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## Hypothetical

Respondent is a wealthy member of the law faculty and has hired Paige Duggins-Clay to represent him in a Title IX hearing initiated by a complaint filed by poor freshman student Complainant

**Q1:** how to overcome concerns of Complainant & witnesses about hearing?

**Q2:** Complainant cannot afford an attorney. Who will you provide?

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## Rewind: Regs Rule 7 of Investigations

- “Create an investigative report that **fairly summarizes relevant evidence** and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, **for their review and written response.**”
- Fair to note undisputed material facts
- Disputed material facts are for hearing

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## Investigation Lays Foundation for Smooth Hearing

1. Appoint hearing officer
2. Allow parties meaningful opportunity to challenge for bias – what does this look like?
3. Provide hearing officer a copy of the investigation report and a copy of all evidence transmitted to the parties by the investigator
4. Hearing officer should carefully review in preparation

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## Recommended Next Steps

After the hearing officer is appointed, the hearing officer should:

1. set a deadline for the parties to submit any written response to the investigation report
2. set a date for a pre-hearing conference
3. set a date and time for the hearing
4. provide a copy of the University's Hearing Procedures (if any)

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## Recommended Next Steps

A Party's written response to the investigation report should include:

1. Disagreement with the investigative report
2. What evidence should be categorically excluded
3. A list of any witnesses that the Party contends should be requested to attend the hearing
4. A list of any witnesses that the Party intends to bring to the hearing
5. Any request that the parties be separated physically
6. Any other accommodations that the Party seeks
7. The name and contact information of the advisor
8. If the Party does not have an advisor who will accompany the Party at the hearing, a request that the University provide an advisor for purposes of conducting questioning

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## Recommended: Pre-Hearing Conference

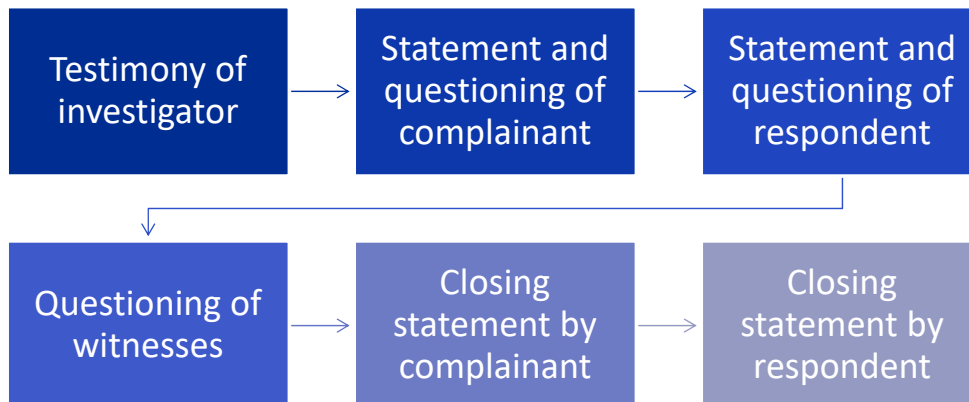
- Discuss the hearing procedures with the parties
- Address matters raised in the parties' written responses to the investigation report
- Discuss whether any stipulations may be made to expedite the hearing
- Discuss the witnesses the parties have requested be served with notices of attendance and/or witnesses the parties plan to bring to the hearing without a notice of attendance



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## What is a potential sequence?



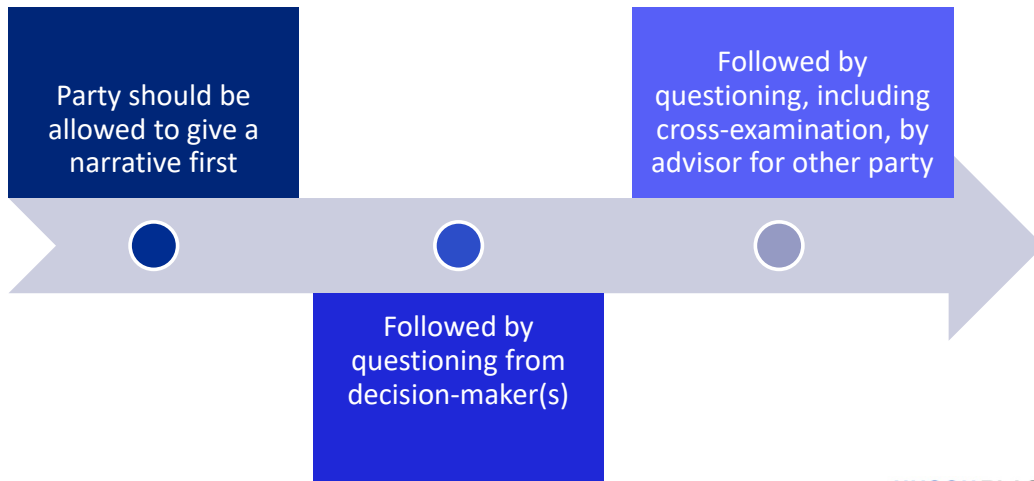
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## How might questioning of parties take place?

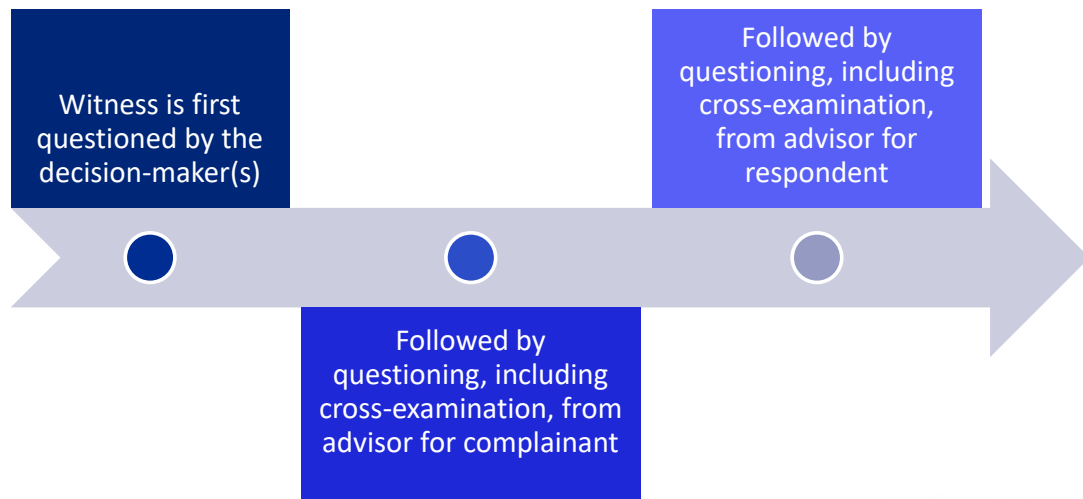


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## How might questioning of witnesses take place?



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# 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

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# What does it mean to weigh evidence?

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



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## 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

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## Who determines discipline and remediation?

- This is a question of institutional choice
- 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

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## 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, similar violations should have similar punishments
- Discipline has educational, punitive, and protective elements

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## What principles do we use to determine remediation?

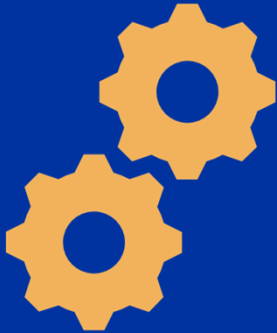
- If a violation is found, institution must take steps to restore or preserve the complainant's access to education
- Various types of supportive measures may be utilized after the determination to restore or preserve access
- Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable

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## Group Scenario



Student A accuses Student B of sexual assault. During the investigation, Student C told the investigator Student C saw Student B carry Student A—passed out—into Student B’s dorm room immediately before the alleged sexual assault. Student C does not appear for the hearing as expected. Student A testifies to the hearing officer that the investigator told Student A that Student C saw that Student A was passed out. When Student A testifies to this, Student B’s advocate objects, demands a “mistrial,” and refuses to be silent after the hearing officer declines to exclude the testimony.

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## Questions



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# Appeals

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## What is the purpose of the appeal?

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



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## What are the grounds for appeal?

Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter



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



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

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## Example (procedural irregularity)

During a hearing, the hearing officer denies the respondent's advisor the right to question witnesses. The respondent appeals, citing this procedural irregularity, and argues that key witness testimony relied on by the hearing officer must be excluded because the witness was not subjected to questioning by the advisor, as required by the policy. And without such testimony, the outcome cannot be supported.



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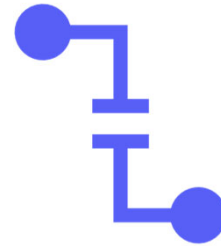
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## Are all procedural errors appealable?

- No – the procedural irregularity must be one that “affected the outcome of the matter”
- Errors that affect the outcome may be referred to as “prejudicial” errors
- Errors that do not affect the outcome may be called “non-prejudicial” or “harmless” errors



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## Example (harmless error)

Policy required hearing to be held within 60 days of submission of Formal Complaint. Hearing was held 61 days after submission of Formal Complaint due to a counting error. The evidence would have been the same if the hearing were held a day earlier.



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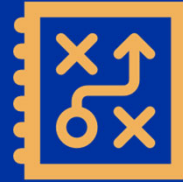
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## Example (new evidence)

After determination is made that respondent did not commit sexual harassment, complainant secures a previously unknown video made by a bystander at the party that depicts respondent groping complainant and complainant attempting to pull away from respondent. The student who took the video has been away studying abroad and only learned of the hearing after returning a few days ago.



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## Example (conflict of interest/bias)

After determination is made that respondent committed sexual harassment, respondent sees social media post by hearing officer stating: "All victims of sexual harassment must be believed. False reports of harassment are exceedingly rare. A person accused of sexual harassment is a guilty person in my book." Respondent argues bias resulted in a sham hearing with the outcome predetermined.

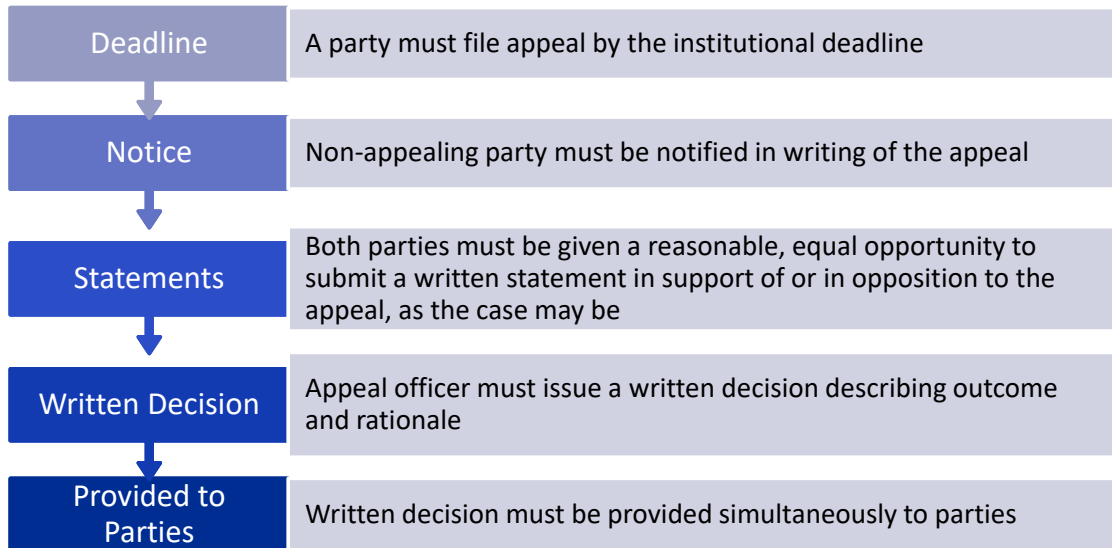


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## What is the appeal process?



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## Should we ever dismiss an appeal?

Yes – dismissal is appropriate if:

- Appeal is filed after the reasonable deadline set in the policy
- Appealing party does not articulate one of the three grounds for appeal

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## How does the appeal officer make their decision?

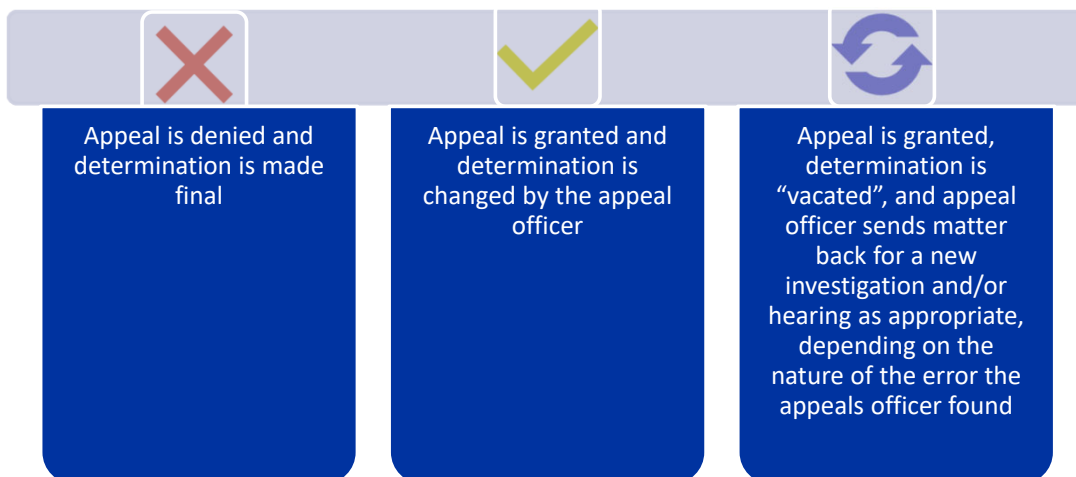
- Appeal officer's review is limited in scope to the grounds stated for appeal
- Appeal officer does not hold a new hearing
- Appeal officer must review the appeal, response, and hearing record (to the extent necessary, depending on the grounds for appeal)
- Appeal officer must then draft a written decision that states the outcome of the appeal and rationale

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## What are the potential outcomes of an appeal?



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## Example

Appeals officer finds there was a prejudicial procedural error because the hearing officer failed to send notices requesting several of the respondent's key witnesses appear. Appeals officer vacates the adverse finding against the respondent and directs that a new hearing take place after appropriate notices to appear have been issued.



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## Group Scenario




After a hearing, a faculty member—who is also a principal investigator in externally funded research—is determined to have sexually harassed a student lab assistant by repeatedly making sexualized comments about the student's physique and manner of dress when the student was performing research duties in the lab. Faculty member appeals on ground that the Title IX Coordinator was biased insofar as faculty member had previously challenged and argued with Title IX Coordinator during faculty trainings about whether the Title IX process was a "kangaroo court." Faculty member did not raise a concern about bias until the appeal. Hearing officer was a retired judge who heard testimony during the hearing from eight students and lab employees who all corroborated the complainant's account.

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**Questions**



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**Informal  
Resolution**

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## Perspective

- ✓ Deep, almost universal dissatisfaction with the investigation/adjudication model for dealing with student misconduct
- ✓ No appetite for return to mishmash of informal practices which reigned pre-2011 DCL
- ✓ Is there an alternative to the investigation/adjudication model which is rigorous and more in line with educational role of colleges and universities?
- ✓ Much discussion about restorative justice but little understanding of how to implement a thoughtful program

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## What are some examples of informal resolution?

Facilitated exchange of resolution offers

Mediation

Arbitration

Restorative justice

Settlement with the involvement of attorneys

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## 34 C.F.R. § 106.45(b)(9) *Informal Resolution*

“[A]t **any time prior to reaching a determination** regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient . . .”

- (i) Provides to the parties a **written notice** disclosing: the **allegations**, the **requirements of the informal resolution process** including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations,
  - provided, however, that **at any time prior to agreeing to a resolution**, any party has the **right to withdraw** from the informal resolution process and resume the grievance process with respect to the formal complaint, and
  - any **consequences** resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- (ii) Obtains the parties’ **voluntary, written consent** to the informal resolution process; and
- (iii) Does **not** offer or facilitate an informal resolution process to resolve allegations that an **employee sexually harassed a student**.

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## Written Notice of Allegations

- Identity of parties involved (if known)
- Specific section of university’s policies that have allegedly been violated
- Alleged conduct constituting misconduct
- Date and location of alleged incident
- Sufficient time for Respondent to prepare a response prior to any formal interviews or process
- Background information regarding informal resolution process

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## 34 C.F.R. § 106.45(b)(1)(iii) Conflict of Interest, Bias, & Training

- **Conflict of Interest/Bias:** Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, **or any person designated by a recipient to facilitate an informal resolution process**, **not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.**
- **Training:** A recipient must ensure that Title IX Coordinators, investigators, decision-makers, **and any person who facilitates an informal resolution process**, **receive training** on the **definition of sexual harassment** in § 106.30, the **scope of the recipient's education program or activity**, how to conduct an **investigation and grievance process** **including** hearings, appeals, and **informal resolution processes**, as applicable, and **how to serve impartially**, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias. . . .
- Any **materials** used to train Title IX Coordinators, investigators, decision-makers, **and any person who facilitates an informal resolution process**, **must not rely on sex stereotypes** and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

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## 34 C.F.R. § 106.45(b)(1)(v) Grievance Process Requirements

Include **reasonably prompt time frames** for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals **and informal resolution processes** if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for **good cause** with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

**Good cause** may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;



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## 34 C.F.R. § 106.45(b)(2)(9) Voluntary Participation

“A recipient **may not** require **as a condition** of

- enrollment or continuing enrollment,
- or employment or continuing employment,
- or enjoyment of any other right,

waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.

Similarly, a recipient **may not** require the parties to participate in an informal resolution process under this section and **may not** offer an informal resolution process **unless a formal complaint is filed.**”

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## How Do We Ensure Participation is Voluntary?

- Educate the parties and the community about informal resolution options
- Provide Notice of Rights & Options, such as:
  - Whether and when the process can be terminated
  - Whether information shared can be used in subsequent conduct matters
  - How IR differs from formal investigation and adjudication
  - Whether the process involves face-to-face interaction
- Participation contingent on successful completion of preparatory meetings
- Require parties to sign a Participation Agreement
- Frequent check-ins and monitoring

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## Final Informal Resolution Agreement

Potential elements of final resolution agreement include:

- Procedural Background
- Sanctions and/or other remediation measures
- Confidentiality agreement/limitations
- Consequences for breach

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## Informal Resolution is Not for All Cases.

Factors to consider:

- The nature of the alleged offense
- Whether there is an ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Whether alleged respondent is a repeat offender
- Whether the person alleged to have caused the harm is participating in good faith

**Remember:** Traditional investigative/adjudicative processes should be used when an accused student *denies* responsibility.

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## Legal Issues

- Very few reported cases analyzing informal resolution practices.
- Courts have been resistant to allowing deliberate indifference claims based on an institution's use of an informal resolution process in general.
- Key issue is **voluntariness**.
- If the institution follows (or makes a good-faith attempt to follow) its policies and procedures, courts appear to be reluctant to second-guess the decision or outcome.

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