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Title IX Sexual Harassment Response

Participants in sexual harassment policy process

Spring 2023

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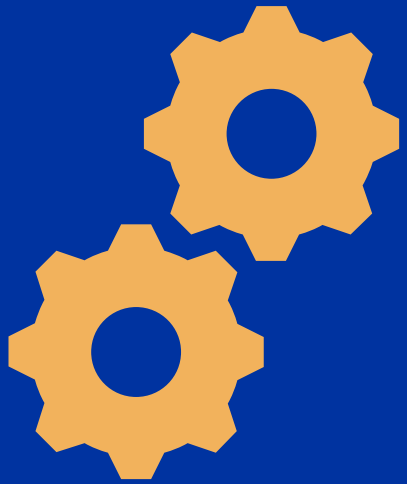
Group Scenario



Breakout Groups

- Scenarios discussed in Breakout Groups
- First group – time to introduce yourselves and select a spokesperson; this will be your group for today's training
- 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!
- Presenters will visit each Breakout Group at some point during the training
- Add your institution to your displayed name

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Important Disclaimers

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

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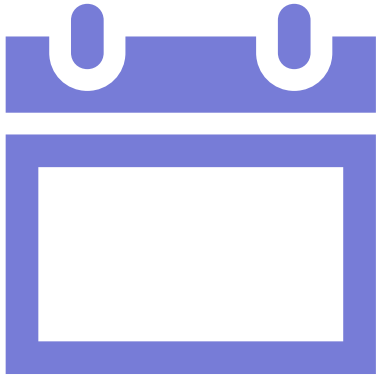
Agenda

- Title IX Scope & Jurisdiction
- Intake and Supportive Measures
- The Investigation
- The Hearing
- Informal Resolution and Other Processes



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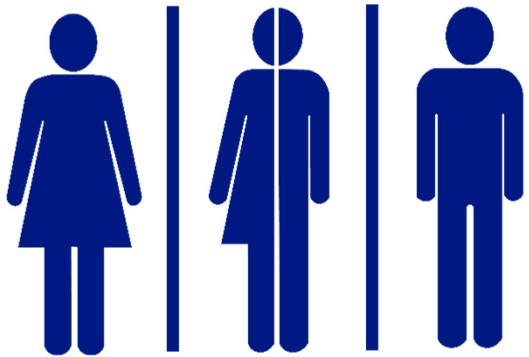
Title IX Scope & Jurisdiction

What is Title IX?

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

32 C.F.R. § 106.31



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What are the two conceptual types of sex discrimination?

- Adverse treatment discrimination
- Sexual harassment

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Example of Adverse Treatment

Supervisor consistently gives male employees promotions while keeping female employees in their positions, despite all employees being similarly situated in terms of responsibility, experience, and performance.

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Example of Sexual Harassment

Student tells sexual jokes to peers, displays sexual imagery, propositions them, and frequently comments on whether peers' dress is "sexy."

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What is the key distinction between these two concepts?

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

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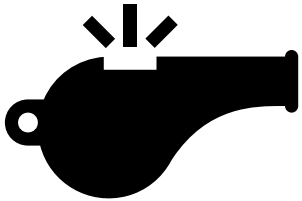
Proposed Change



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

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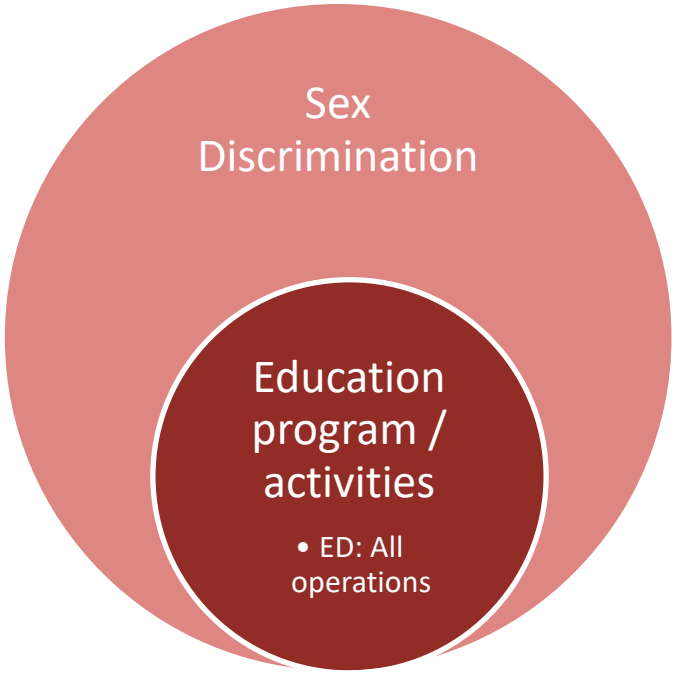
What is the scope of Title IX's reach?

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



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What are examples of education programs and activities?

Admissions	Hiring	Workplace
In-person classes	On-campus housing	Recreational amenities on campus
Sports teams	Virtual classes	Performances on campus
Off-campus trips or experiences organized by the institution	Sponsored organization activities	Anything else that happens on-campus

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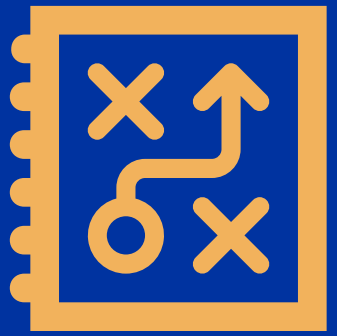
Example (included in EP&A)

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



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Example (excluded from EP&A)

On a Saturday night, a student is sexually assaulted in the bathroom of a local bar located off campus. The perpetrator is reported to be a “college-age male,” but it is unknown whether the perpetrator is a student of the institution.

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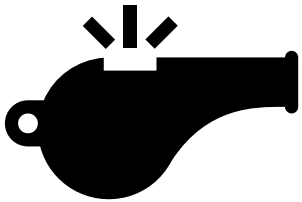

- Jurisdiction will extend to off-campus sex discrimination where:
  - Respondent represents the institution through their authority
  - Respondent is engaged in conduct under the institution's "disciplinary authority"
  - Off-campus conduct contributes to a hostile environment within programs and activities

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Example

An assistant coach meets with a softball player at a local batting cage to work on hitting. While there, the assistant coach propositions the player for sexual favors in exchange for increased playing time.

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Example

Institution's student code of conduct applies to students regardless of their location and prohibits all crimes of violence. Student is accused of sexually assaulting another student at an off-campus apartment.

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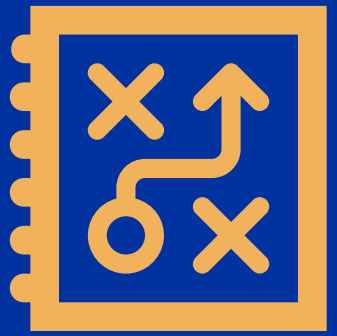
Example

One student sexually assaults another student during spring break in Mexico. After returning, the respondent calls the complainant sexual epithets on campus and repeatedly waits for complainant outside complainant's residence hall.



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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
- **But** sexual harassment that occurs abroad could "contribute" to a hostile environment on campus under proposed regulations

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When must we dismiss a Title IX complaint?

- Alleged sexual harassment occurred outside education programs or activities
- Alleged misconduct could not be sexual harassment even if true
- Complainant is not a current participant in education programs and activities at time of complaint

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When may a case be dismissed?

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

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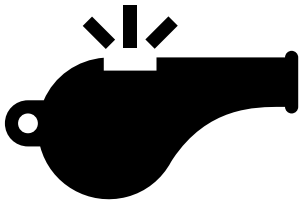

- Proposed regulations would permit, rather than mandate dismissal
- Regulation commentary suggests that dismissal would be unusual and additional steps may be needed to clarify allegations before dismissal
- Supportive measures and other preventative measures may still be needed even if there is a dismissal

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What other policies might apply?

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

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

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What is sexual harassment?

Conduct on the basis of sex that is:

- Quid pro quo harass-ment
- Hostile environment harassment
- Sexual assault
- Dating violence
- Domestic violence
- Stalking

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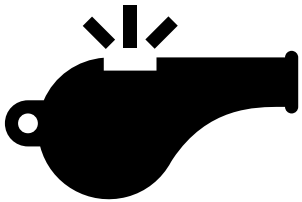

- "On the basis of sex" includes:
  - Assigned sex/biological sex
  - Sex stereotypes
  - Sex characteristics
  - Sexual orientation
  - Pregnancy and related conditions

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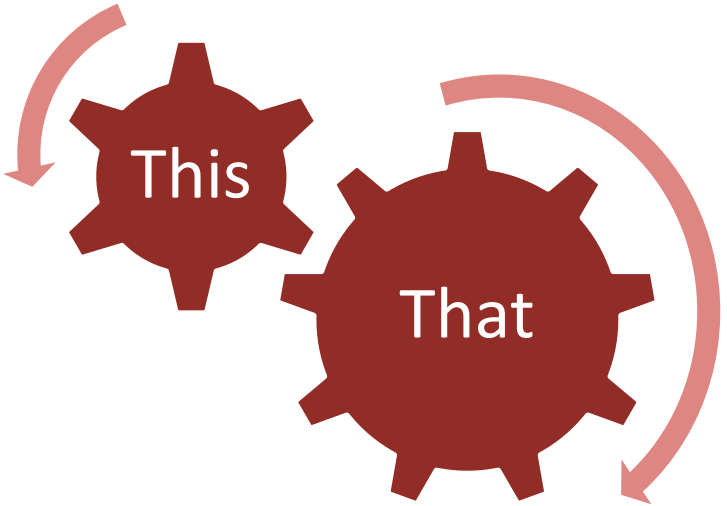
What is quid pro quo?

- 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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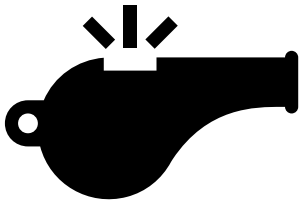

- “Quid pro quo” could also be committed by a person who is an “agent” or “other person authorized by the recipient to provide an aid, benefit, or service”
- “Conditioning” could be explicit or implicit

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Example of quid pro quo

An unpaid member of the board of trustees of a private college offers to “guarantee” a student’s admission into graduate school if the student performs sexual favors.

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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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Example of hostile environment

Supervisor repeatedly mocks and jokes about transgender employee's manner of dress, hairstyle, tone of voice, and other means of gender expression. The mocking and joking occurs over weeks, in the physical presence of others, and via email.

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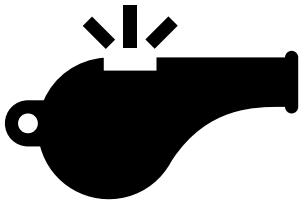

- Proposed regulation would alter to:
  - Severe or pervasive
  - Evaluated subjectively and objectively
  - Denies or limits a person's ability to participate in or benefit from programs and activities
  - Considering numerous facts and circumstances

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Potential example of hostile environment

A public university has recently experienced several physical attacks against gay students on campus. The attacks are widely known and have caused fear and anxiety for gay students. One day, a gay student who has not been the victim of a physical attack wakes up to find the phrase “all qu**rs must die” written on the white board outside the student’s door.

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What about the First Amendment?

- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment

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Example (protected speech)

In the leadup to an important election, one candidate is accused of sexual assault. A group of students supporting the accused candidate wear t-shirts on campus with the candidate's logo that state: "All women should not be believed." Several female students complain that the t-shirts are offensive and are indicative of "rape culture."

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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

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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.

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What is consent?

- 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

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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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Example (incapacitated)

Freshman and Sophomore are drinking heavily in a residence hall and take prescription pills before having sex. During sex, sophomore slumps over and passes out. Freshman fails to stop and completes intercourse.

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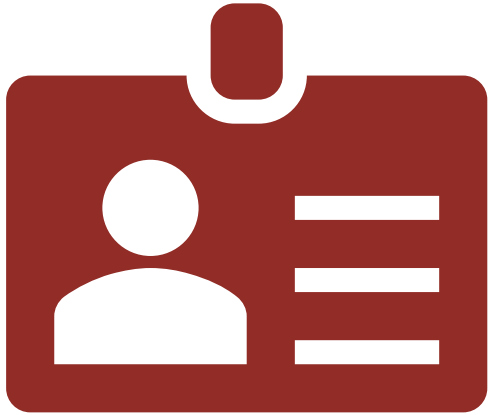
What is statutory rape?



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

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Example

State law sets a minimum age of consent at 17. A 16-year-old graduates from high school early and attends college the following fall. 16-year-old's boyfriend from high school, who is 18, also attends college, and the two have sex on campus in 18-year-old's dorm room. Neither student complains. The Title IX Coordinator learns of the incident from an anonymous report

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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.

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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.

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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.

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Example of fondling??

Two students are dancing together at a party held at the house of a recognized sorority. Student A places their hands on Student B buttocks, outside clothing. The Student B objects and moves Student A's hands up to Student B's hips. The two continue dancing.

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What is incest?

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

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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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Example of domestic violence

Faculty member brings their underage child to campus. A custodian hears the faculty member berating their child in the faculty member's office, walks down the hallway, and observes the faculty member aggressively slap the child's face, causing the child to cry.

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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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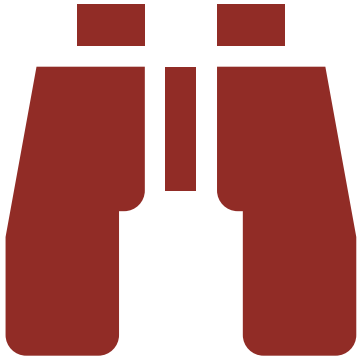
What is stalking?

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.



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Example of stalking

Two students attend a study abroad program in China. While on the program, Student A repeatedly pursues a romantic relationship with Student B, until Student B asks the faculty sponsor to intervene. When the students return to campus next semester, Student A renews efforts to pursue the relationship, including lurking near Student B's residence hall.

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Does Title IX also prohibit retaliation?

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

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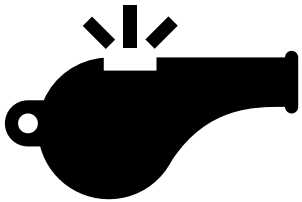
Proposed Change



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

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Example of retaliation

A student is accused of sexual assault but refuses to participate in a Title IX interview. Angered that the student is not "accepting responsibility," the Dean of Students files conduct charges against the student for "failing to cooperate with an institutional process."

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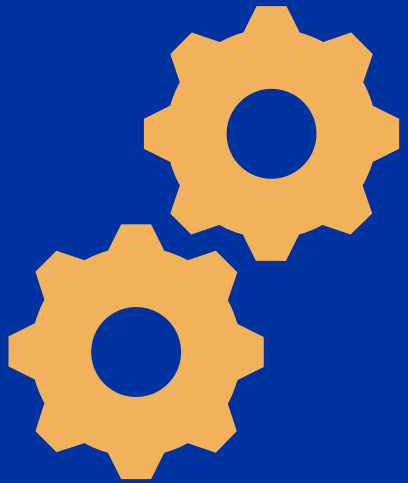
Group Scenario



University has a “summer semester” language program in Spain. Participating undergraduate students receive graded credit. A University faculty member and a graduate student travel with the undergraduate students and teach content. While in Spain, graduate student and undergraduate drink a large volume of sangria and have sex. The next morning while lying in bed, graduate student offers to retroactively change undergraduate’s grade for a one credit hour segment of the course. Undergraduate agrees, and graduate calls the registrar’s office in the U.S. to change the grade. The two have several sexual encounters in Spain and several more upon returning to the U.S. in the fall, until graduate student becomes possessive and repeatedly calls undergraduate derogatory epithets when undergraduate spends time with other students of the opposite sex. Undergraduate files a Title IX complaint alleging sexual assault by incapacitation, quid pro quo, and hostile environment sexual harassment. Two weeks after the investigation begins, undergraduate calls the Title IX Coordinator and “withdraws” their allegations against graduate student.

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Questions

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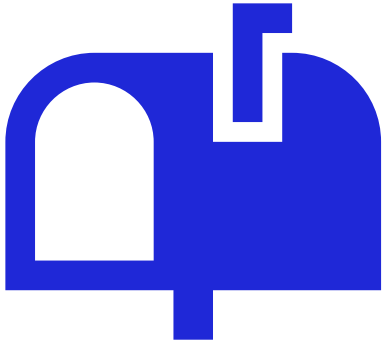
Intake and Supportive Measures

How does an institution get notice of sexual harassment?

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



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What is “actual knowledge”?

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

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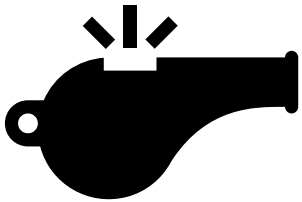

- Proposed regulation would create classes of mandatory reporters:
  - Employees with authority to implement corrective measures
  - Administrative leaders, teachers and advisors
  - Other employees either to report or to provide contact for Title IX Coordinator and information about how to report

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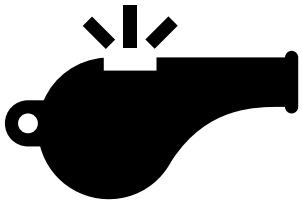

- Proposed regulation would:
  - Impose affirmative duty on Title IX Coordinator to monitor barriers to reporting and take reasonable steps to address barriers
  - Potential methods for monitoring include surveys, targeted feedback, anonymous feedback websites and emails, etc.

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When do we reach out to the alleged victim?

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

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

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

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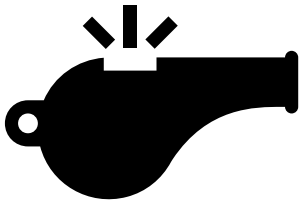

- Proposed regulation would:
  - Specifically permit dismissal if the identity of the respondent cannot be determined after reasonable inquiry

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Do we need a formal complaint?

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

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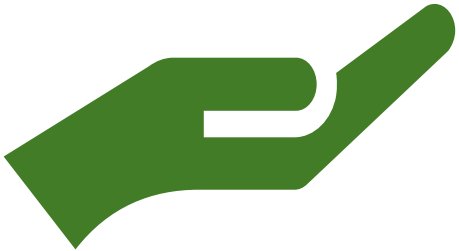
What are supportive measures?



- 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

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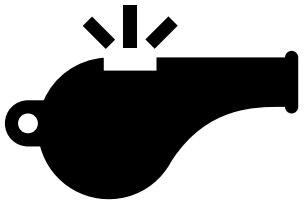

- Supportive measures that burden a respondent must be terminated at the conclusion of the grievance procedures
- May be no more restrictive of respondent than is necessary

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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

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Example of reasonable supportive measure

Undergraduate student who reports a sexual assault seeks one week off from class to attend an in-patient mental health care facility to address effects of trauma. Student is required to make up coursework within a reasonable amount of time after treatment is complete.

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Example of reasonable supportive measure

Student worker whose shift ends at 11:00 pm is attacked and beaten by former domestic partner in a dimly lit parking lot. Student worker requests the institution have a security guard present outside the building when she leaves at 11:00 pm.

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Example of reasonable supportive measure???

Employee accuses a co-worker of repeatedly pursuing a romantic relationship despite employee's repeated refusals. Employee requests institution ban co-worker from being in the same building as employee.

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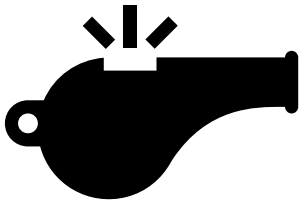

- Either party affected by a decision regarding supportive measures must be allowed to appeal to an impartial employee
- Respondent must be allowed to challenge supportive measures that burden respondent before they are enacted, except in an emergency

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Example

One student accuses another student of stalking and requests a no-communication order as a supportive measure. After the order is imposed, the respondent begins lurking outside complainant's residence hall. Complainant then requests a proximity restriction.

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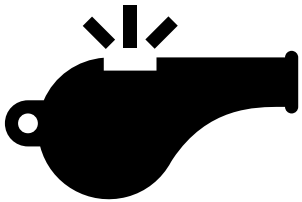

- Either party must be allowed to seek modification or termination of supportive measures “if circumstances change materially.”

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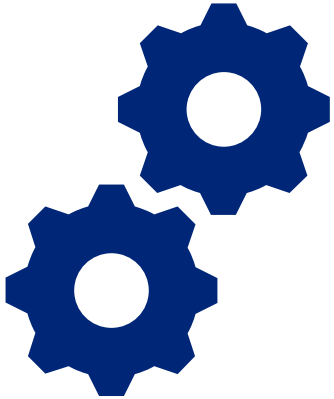
Do students and employees have other rights?



- Yes—other laws may trigger accommodations when a medical condition or disability is present
  - Americans with Disabilities Act
  - Family and Medical Leave Act
  - Section 504 of the Rehabilitation Act
  - Title IX pregnancy accommodation provisions

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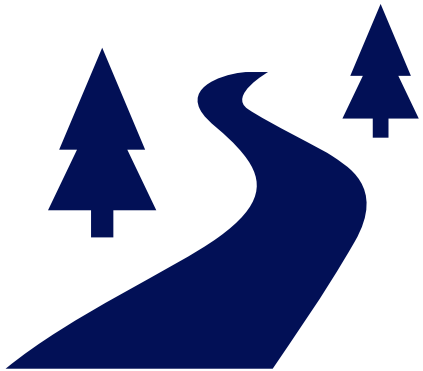
What if the report falls outside Title IX jurisdiction?

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



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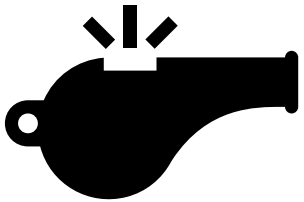

- Even if a complaint is dismissed, the institution must provide supportive measures to the complainant, as appropriate, and to the respondent if the respondent has been notified.

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Are supportive measures confidential?

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

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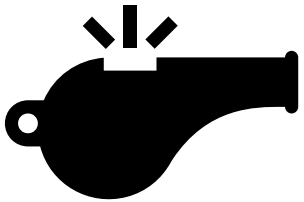

- Supportive measures may also be shared with another party "only if necessary to restore or preserve that party's access to the education program or activity."

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Example

Student A accuses Student B of dating violence. Institution requires Student B to meet with a counselor as part of a plan to allow Student B to remain on campus pending investigation. Institution informs Student A that Student B will be evaluated before a decision is made whether Student B may remain on campus.

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Who is responsible for supportive measures?

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

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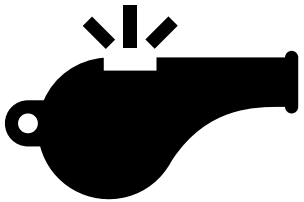

- Remember, proposed regulation allows an appeal to an impartial person of supportive measure decisions
- Important to consider what role Title IX Coordinator plays in decision-making process

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Can we utilize interim removals or suspensions for students?

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

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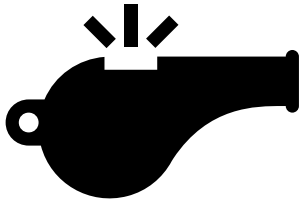

- Interim removals or suspensions can be utilized when there is an “immediate and serious threat to health or safety.”
- Requirement of “physical” threat is removed

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Example of immediate threat to physical health or safety

Student A and Student B are in a dating relationship. During an argument, Student B becomes enraged, threatens to kill Student A, and then beats Student A to the point Student A is hospitalized

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Example of immediate and serious threat to health or safety

Student A reports that Student B placed a secret video camera in a residence hall bathroom and watched Student A take a shower. There is no allegation of physical contact or threat of physical contact. Institution locates camera and links it back to Student B's room.

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Can we utilize an already existing process for interim removals?

- Yes, if that process complies with the Title IX standard.
- Common institutional examples include:
  - Threat assessment policy
  - Critical Incident Response Team (“CIRT”)
  - Interim suspension provisions of Student Handbook

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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 (e.g., Faculty Handbook)

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Example of administrative leave

Faculty member is accused of offering a student a better grade in exchange for a sexual favor. The faculty handbook states that faculty may be placed on administrative leave if the President finds there is clear evidence the faculty member's continued presence could cause serious damage to the reputation of the institution.

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Example of administrative leave

Employee works in the student recreation center and is an “at will” employee. Student reports that student caught employee stealing student’s underwear from student’s gym bag. Institution places employee on administrative leave pending investigation and determination.

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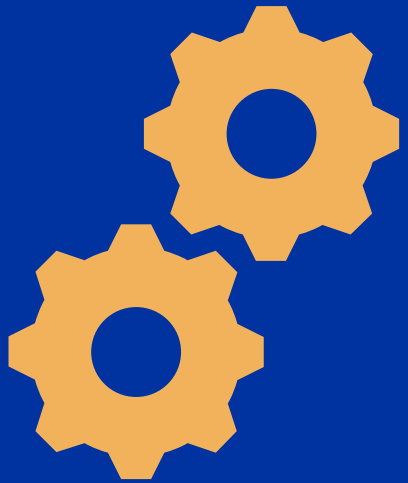
Group Scenario



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

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Questions

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The Investigation

What is the purpose of Title IX investigation?

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

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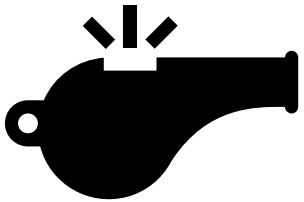

- Proposed regulation would allow a combined investigation/decision making model
- But, with more robust rights of the parties to pose questions through the investigator

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What are the general principles of an investigation?

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

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What is a formal complaint?

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

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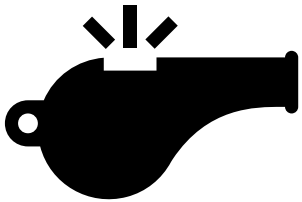

- Proposed regulation would eliminate the concept of a “formal” complaint
- New regulation recognizes only a “complaint” that can be verbal or written

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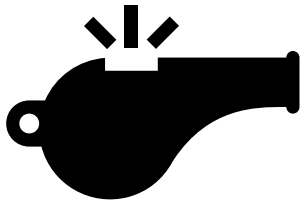

- Proposed regulation would allow complaints from someone who was a participant in education programs and activities <u>at the time of the alleged misconduct</u>

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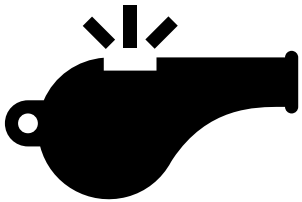

- A person who is legally authorized to act on behalf of a complainant may file a complaint
- E.g., parent, guardian

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How do we tell the parties about an investigation?

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

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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

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Example (incorrect)

Title IX Coordinator sends notice to respondent stating “you have been accused of committing one or more forms of sexual harassment as defined in the institution’s Title IX policy.”

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Can we gather any information prior to the written notice?

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

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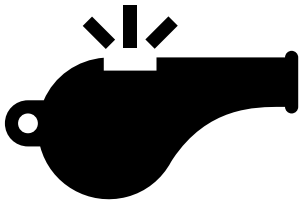

- Proposed regulation contemplates preliminary investigation
  - To determine identities of the parties
  - To clarify allegations prior to dismissing on the basis they could not constitute sex discrimination

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Example (preliminary inquiry)

Student submits formal complaint via email with a single sentence reading, “I was sexually assaulted in my car last night by Student C. I want the institution to investigate this.”

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Example (preliminary inquiry)

Campus visitor reports that they were sexually harassed by a group of students while taking a campus tour. The identity of the students is unknown.

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

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

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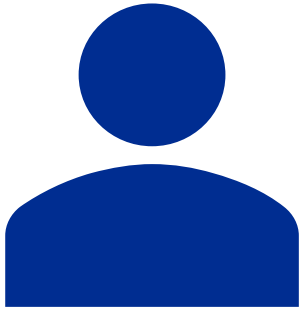
How do we collect evidence in an investigation?



Interviews of parties and witnesses

Collection of non-testimonial evidence

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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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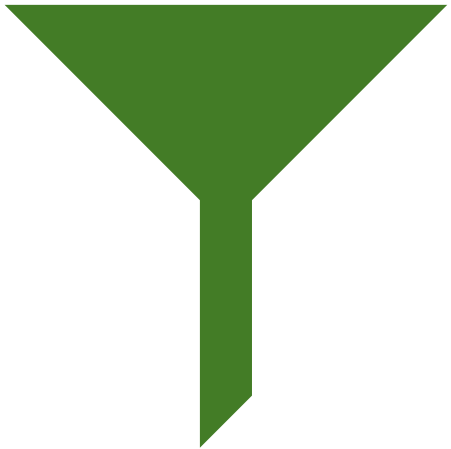
How do I ask questions in the substantive phase?

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



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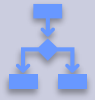
Examples of open invitations

"Please tell me what happened that night."

"Can you walk me through what happened?"

"In your own words, tell me what occurred."



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

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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 . . . . Can you elaborate?"

"You said they 'coerced' you. Can you tell me specifically what they did?"

"If I understood you right, you said that after . . . . Can you tell me what happened 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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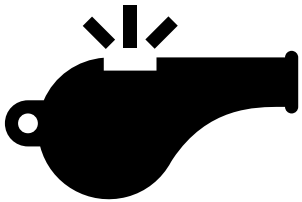

- If not using a live hearing
- Must allow parties to propose relevant and not otherwise impermissible questions and follow up questions for any party or witness

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Break Day 1

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How do we make a record of the interview?

- Trend towards audio recording
- Extensive note taking followed by preparation of a summary is permissible
- Video recording is disfavored

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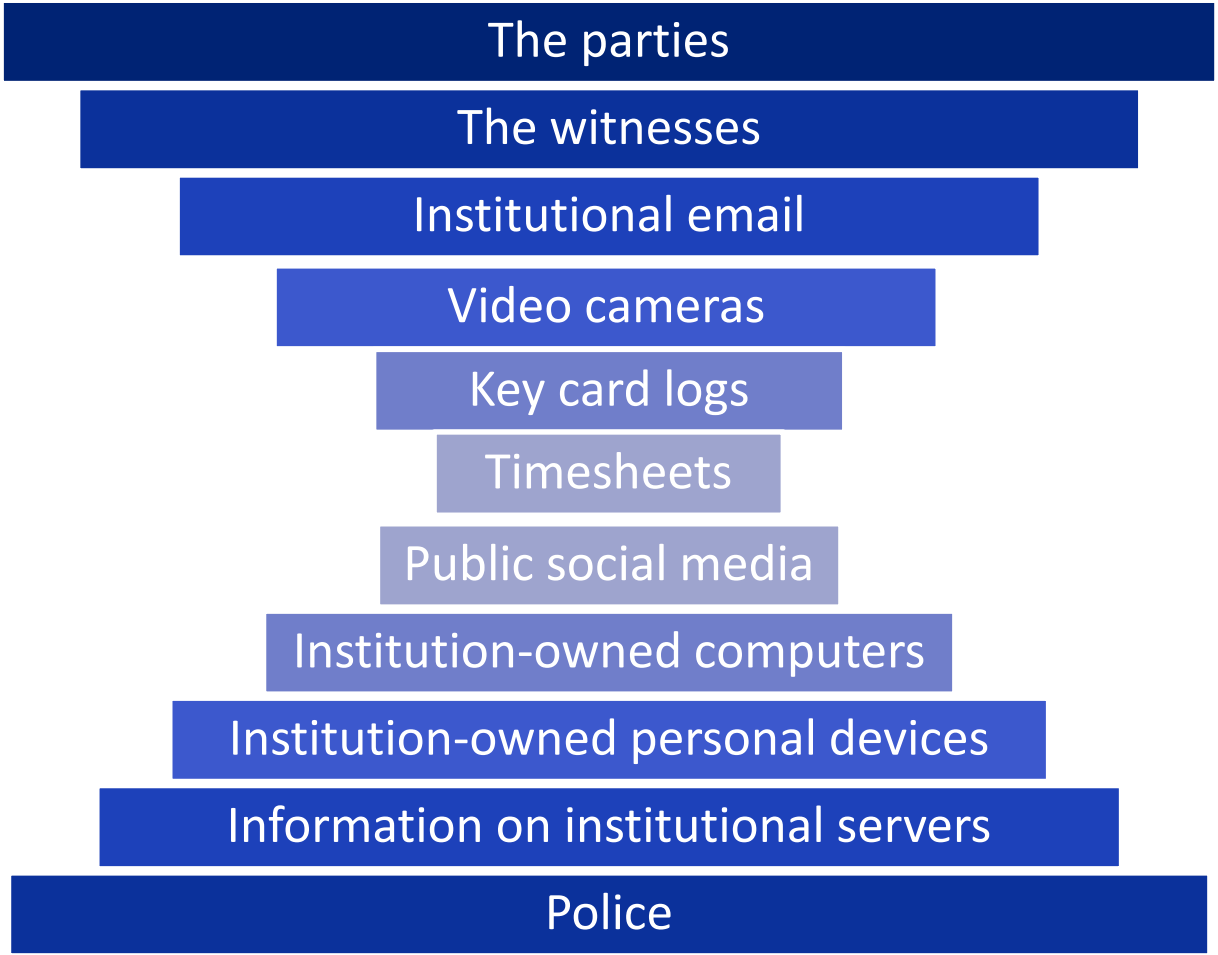
Example sources of non-testimonial evidence



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May an investigation collect evidence on sexual history?

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

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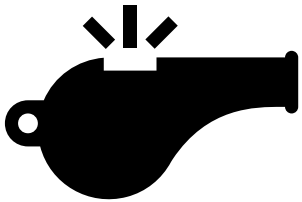

- Expanded to prohibit consideration of evidence that
  - "Relates to the complainant's sexual interests or prior sexual conduct" unless
  - Showing someone other than respondent committed the act or
  - To prove consent with specific incidents between the complainant and respondent

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Example

Student A complains that Student B forced Student A to have oral sex. Student B says it was Student A's idea and Student A consented. Student A says they had never performed oral sex before and wouldn't ever do it because it's "gross." Student B has two witnesses who will say Student A performed oral sex on them.

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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

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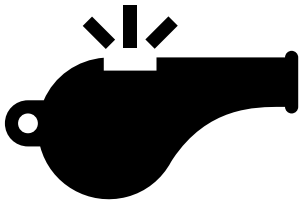

- Confidentiality of health and medical records must be waived in writing
- Confidentiality of other privileged documents and communications can be waived in a manner permitted in the institution's "jurisdiction"

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Example of permissible use

Student who makes report of sexual assault executes a written release allowing disclosure of SANE examination report indicating physical injuries consistent with the use of force.

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Example of permissible use??

During an interview, respondent voluntarily, and without being asked, discloses that he immediately called a criminal lawyer after the sexual encounter because he knew “I was in big trouble and could go to jail for what happened.”

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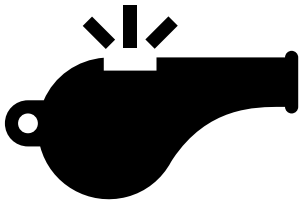

- Institutions have discretion to allow or not allow expert witnesses, as long as the rule applies equally to the parties.

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Do the parties have access to the evidence?

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

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What exactly has to be shared?

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

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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

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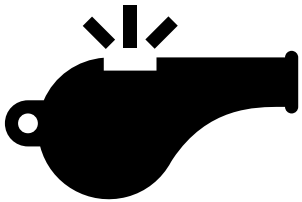

- Institution must provide equitable access to the relevant evidence
- Or to a written investigation report that accurately summarizes the evidence and access to relevant evidence upon request; and
- Must provide a reasonable period of time to respond before determination

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Example (permissible)

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

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Example (impermissible)

After completing all interviews, investigator prints the evidence and tells parties they can schedule a one-hour period to review it with a proctor in the room. Neither is permitted to take notes or photographs of the evidence.

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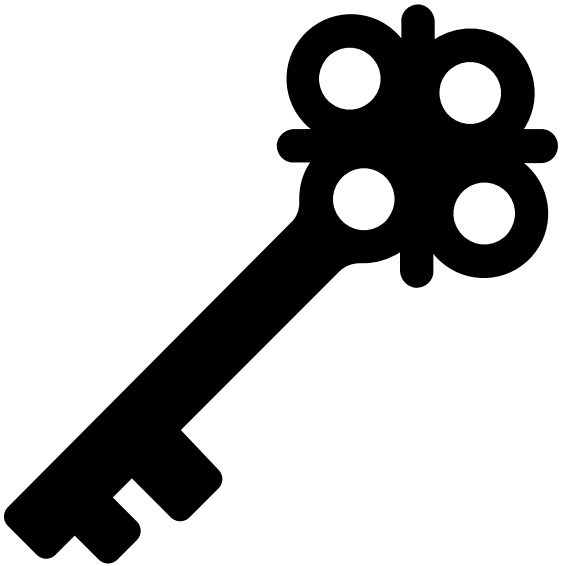
Is the evidence "confidential?"

- Institution may require parties and advisors to agree not to disclose investigation evidence to third-parties
- But cannot prohibit parties from speaking about the allegations themselves



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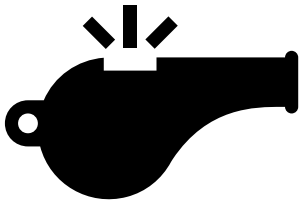

- Institution “must” take reasonable steps to prevent and address “unauthorized disclosure of information and evidence obtained solely through . . . grievance procedures.”

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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

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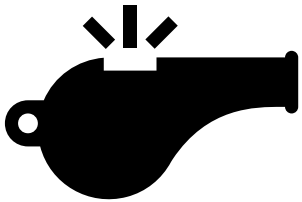

- Investigation report becomes optional
- But minimally parties must have access to the relevant evidence itself
- If adopting single investigator/decision-maker model, investigation report is effectively supplanted by a written decision document

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Does the investigation report make findings?

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

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May parties have an advisor during the investigation?

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

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Example

The institution sends a written notice of investigation to respondent requesting an interview. The advisor, an attorney, demands answers to various procedural questions before he will "allow" his client to be interviewed. Institution's policy states that advisors play a passive role during the investigation phase and may not obstruct communication with the institution's students.

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Example

A complainant identifies their father as an advisor. During the interview, complainant's father becomes emotional and berates investigator for "how the school could let this happen." As complainant is interviewed, father cries periodically and pounds his fist. Investigator must take several breaks for father to compose himself. Institution's policy prohibits advisors from "disrupting" investigative interviews or hearings.

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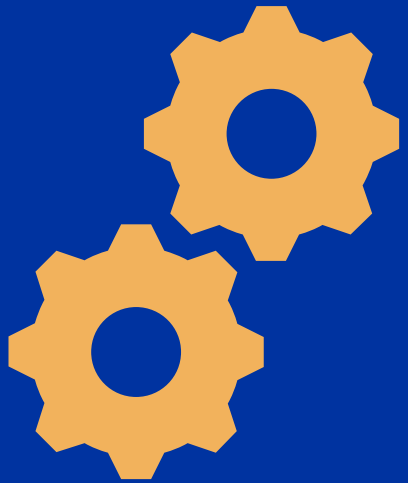
Group Scenario



Students Monica and Alphonso are engaged and have been chaste with each other. Monica becomes pregnant. When Alphonso learns, he ends the relationship and repeatedly makes comments to his friends in the residence hall that Monica is a promiscuous "sinner" and "got herself pregnant with some other guy." Monica files a sexual harassment complaint against Alphonso, alleging that his comments have resulted in a hostile environment for her. Alphonso identifies an attorney as his advisor. The attorney sends a letter contending the investigation itself violates Alphonso's rights under the First Amendment and the state's religious freedom restoration act, which prohibits all state agencies from burdening the exercise of religious rights unless there is a compelling interest and the "least restrictive means" are used. Alphonso's attorney threatens to sue the institution and "any person who seeks to interrogate my client about his religious view of Monica's behavior." Alphonso's friends refuse to be interviewed. During her interview, and without being asked, Monica reveals the identify of the father. Monica also clarifies that she did not actually hear Alphonso talk to his friends about her. She "heard" about it from a friend, who she declines to identify. Alphonso's advisor sends a second letter indicating that, unless the institution "drops" the investigation, Alphonso will have no choice but to go to the media.

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Questions

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The Hearing

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

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Who is the "decision-maker"?

- A single hearing officer; or
- A hearing panel led by a chair

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What standard of evidence can be used?

- Either
  - Preponderance of the evidence or
  - Clear and convincing evidence
- Institution must select a standard and apply it uniformly in all cases, regardless of the identity of the respondent

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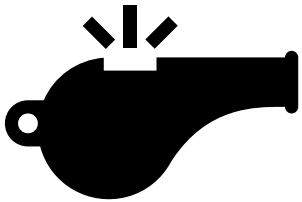

- Clear and convincing standard may be used in a sexual harassment case only if used “in all other comparable proceedings, including proceedings relating to other discrimination complaints.”

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What happens before the hearing?

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

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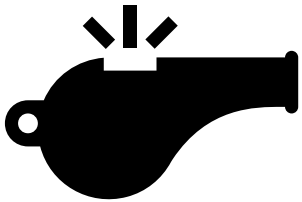

- Institution must provide the parties with a "reasonable opportunity to review and respond to the evidence" prior to the determination
- May be satisfied simply by allowing the party to respond at the hearing itself
- There is no explicit right to respond to an "investigation report"
- Use of an investigation report is optional; parties may simply be provided access to the evidence itself

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What is a conflict of interest?

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

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Example

The University identifies a member of the hearing panel whose child previously dated the complainant for two years.

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Example

The College assigns as the hearing officer the chair of the School of Education. The case involves allegations of sexual harassment against a faculty member that, if true, will reflect poorly on the School and damage its reputation.

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How do we schedule a hearing?

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

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How do we notify parties and witnesses?

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

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What is a pre-hearing conference?

- A meeting with the parties, decision-maker, and other necessary officials to:
  - Address logistical issues and concerns
  - Discuss the sequence of the hearing and rules of decorum
  - Hear and resolve objections or concerns that can be addressed in advance
  - Take up other issues that will ensure hearing time is focused on testimony

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What are other considerations?

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

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How does the hearing actually work?

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

Decision-maker(s) must independently evaluate questions for relevance and resolve relevancy objections	Parties' advisors must be allowed to conduct live questioning of other parties and witnesses
EXCLUSIONARY RULE NO LONGER IN FORCE	Questioning of sexual history generally not permitted

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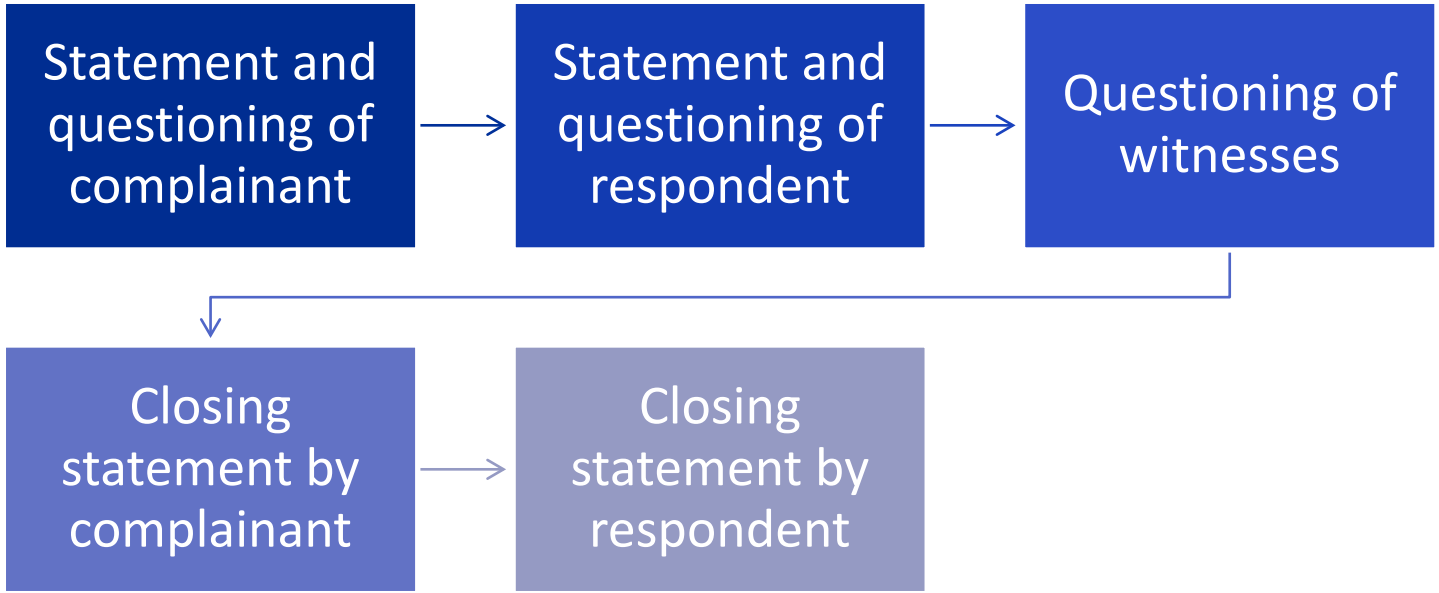
What is a potential sequence?



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Is an advisor allowed to question their own party?

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

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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

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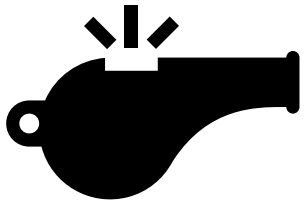

- Proposed regulation would define relevant evidence as that which:
  - "May aid a decisionmaker in determining whether the alleged sex discrimination occurred"

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Example (relevant)

Student has accused a faculty member of a quid pro quo. Advisor for faculty member asks the student whether they engaged in any sex acts with the faculty member before the faculty member offered to change the student's grade.

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Example (relevant???)

Female student accuses a male student of creating a hostile environment by repeatedly telling jokes about beating women. Female student testifies about her awareness of multiple female victims of dating violence in her residence hall.

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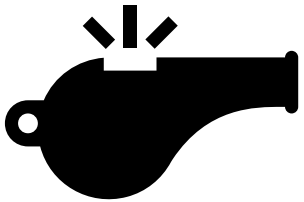

- Proposed regulation would also prohibit questions that are “unclear or harassing of the party being questioned.”

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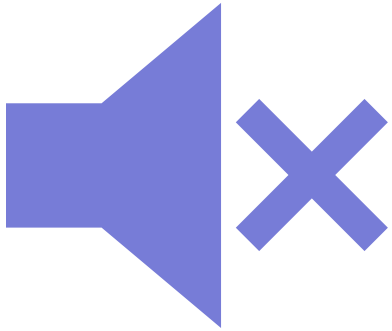
Does any testimony get excluded?

- Evidence excluded if not relevant
- Evidence excluded if impermissible sexual history or confidential/privileged
- Testimony is no longer excluded under the exclusionary rule



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Example

During hearing, respondent claims he could not have committed sexual assault because he was at a friend's house. At investigative interview, respondent said he had no memory of what he was doing that night. How should the hearing officer evaluate?

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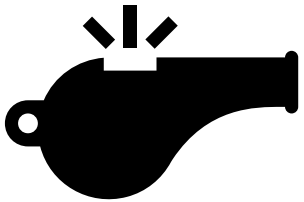

- Proposed regulation would reinstitute a partial exclusionary rule:
- "If a party does not respond to questions related to their credibility, the decision-maker must not rely on any statement of that party that supports that party's position."

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

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

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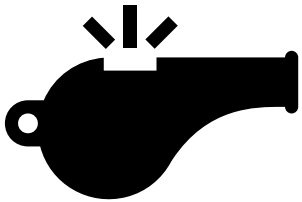

- Proposed regulation makes clear that an institution-provided advisor does not have to be an attorney.

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Can we have standards of decorum for hearings?

- Yes, strongly recommended
- But standards must be applied equally/equitable to both parties

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Example (permissible)

Institution’s hearing procedures require all participants to leave their cell phones and other electronic devices with a proctor outside the hearing room.

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Example (permissible)

Institution's policy requires all parties and advisors to remain seated and only approach a witness or the hearing chair after first obtaining permission.

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Are there "objections" at hearings?

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

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

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

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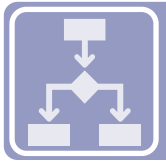
How do(es) the decision-maker(s) decide a case?

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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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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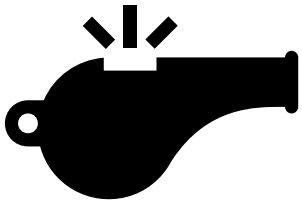

- Proposed regulation only requires “information about the policies and procedures” used, instead of a listing of all procedural steps.

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Who determines discipline and remediation?

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

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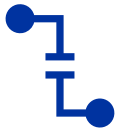
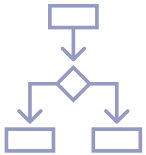
What are the grounds for appeal?

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 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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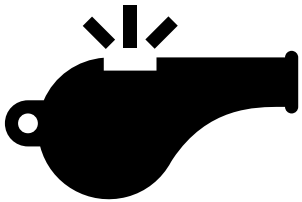

- Similar grounds for appeal but each requires a showing that the outcome “would” have changed, instead of “could” have changed.

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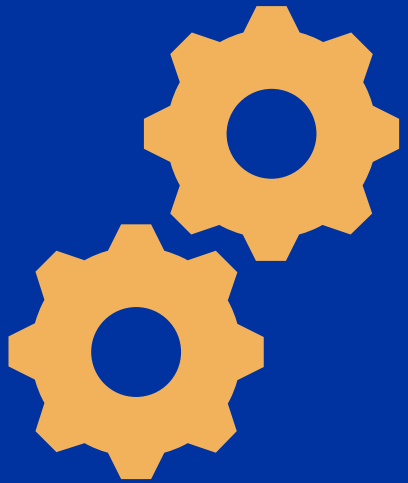
Group Scenario



Jordan accuses Billie (a trans man) of sexual assault by way of incapacitation. During the investigation, Jordan states that Billie gave them four mixed-drinks before sex, which is "way more than I ever have." A witness, Eliza, tells the investigator that she saw Jordan before Jordan left with Billie, and Jordan "could barely walk." At the hearing, Billie's advisor asks Jordan whether they ever had sex with another person after drinking at least four mixed-drinks. The hearing officer rules the question improper. Eliza fails to show as a witness. Billie argues that Eliza is openly hostile to trans people and that Billie should be able to cross-examine Eliza to expose her bias. Billie asks that Eliza's testimony not be considered. The hearing officer denies Billie's request. Despite Billie's testimony that Jordan was sober and initiated sex, the hearing officer finds Billie responsible for sexual assault because the hearing officer finds Jordan to be credible and Jordan's testimony to be corroborated by Eliza's statements to the investigator. The day after the decision, Eliza posts a rant on social media attacking trans people.

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Questions

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Informal Resolution and Other Processes

What is informal resolution?

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

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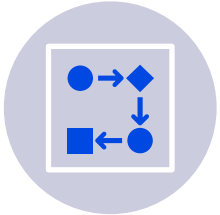
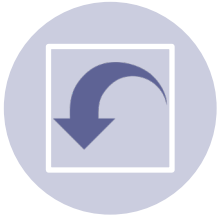
What are the key concepts of informal resolution?

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

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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

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Example (impermissible)

Undergraduate student files a written sexual harassment complaint against a research assistant who also spends 20% of their time taking graduate-level classes. The undergraduate orally requests that the Title IX Coordinator mediate an informal resolution that will include a no contact order.

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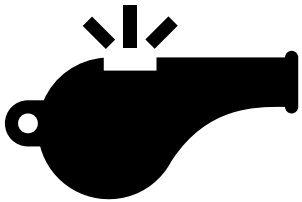

- Formal “written” complaint is no longer required
- Not allowed in any case where an employee is accused of discriminating against or sexually harassing a student.

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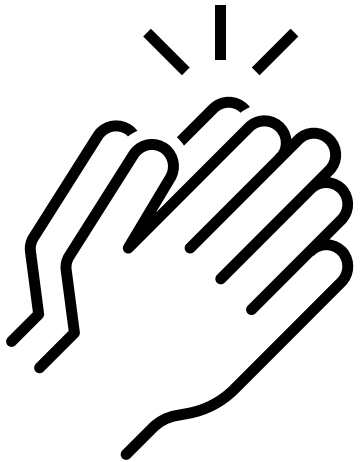
Must an institution allow informal resolution?

- Current regulations permit but do not require informal resolution
- Proposed regulations indicate institutional approval is discretionary



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Example

Institution adopts a policy that informal resolution will be allowed, subject to Title IX Coordinator's approval of specific terms, in all cases except employee-on-student sexual harassment and cases involving sexual assault.

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Example

Student A accuses Student B of secretly recording Student A naked and selling the videos to other students in the same residence hall. The complaint is reported in the news. Student A wants Student B to withdraw, and Student B will do so if the institution approves the agreement.

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Example

Student A accuses Student B of sexual assault resulting from a sexual encounter where both Student A and Student B were drinking heavily; no witnesses were involved. Student A wants Student B to complete coursework online, and Student B will agree if the institution approves.

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What factors should be considered in approval?

- Severity and nature of the conduct
- Whether respondent is repeat offender
- Presence of other conduct violations
- Public perception
- Confidence in parties' ability to uphold agreement
- Sufficiency of the terms
- Others?

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What issues need to be addressed in informal resolution?

- The substantive terms
- How compliance will be verified
- The punishment for non-compliance
- The effect on the pending formal complaint
- The effect on collateral conduct charges/policy violations
- Others?

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Example

Student A and Student B enter into an informal resolution requiring Student B to receive counseling and to follow the treatment plan of Student B's psychologist. How would this agreement be verified?

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Example

Student A and Student B enter an informal resolution requiring Student B to apologize. How will this requirement be satisfied and verified?

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Example

Employee A and Employee B agree to informal resolution for Employee B to receive anti-harassment training and 10 hours of community service. Employee B receives the training but performs only 5 hours of community service. How will noncompliance be addressed?

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How should we document an informal resolution?

- Documented in writing
- All essential terms in the same document
- Signed by the parties
- Dated
- Indicating institutional approval
- Indicating closure of grievance procedure

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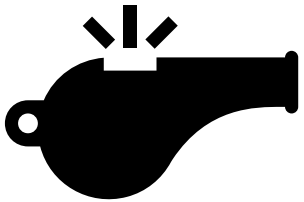

- If informal resolution fails and the grievance process resumes, the institution may not use evidence obtained solely through informal resolution in the grievance process.

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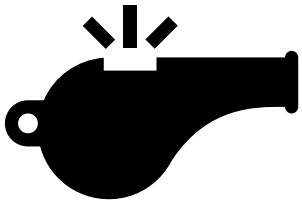

- Facilitator of informal resolution cannot be the investigator or decision-maker.
- Facilitator of informal resolution must be free of conflicts of interest and bias.

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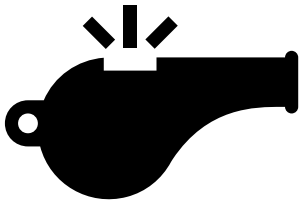
Proposed Change



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

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Is Title IX the exclusive process for resolving sexual misconduct?

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

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What other policies/processes may apply?

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

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At what point can we use some other policy?

- Depending on the facts
  - Before a Title IX grievance process
  - At the same time as a Title IX grievance process
  - After a Title IX grievance process

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Example

Student performing in a musical makes a verbal report that guest catcalled student during performance and has posted bizarre comments on student's social media feed.

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Example

Employee A and Employee B attend a reception on campus that involves alcohol. Employee B gets drunk and sexually propositions Employee A. The next day, Employee A files a sexual harassment complaint.

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Example

Student decides to host a “porn night” in their dorm room during which they display pornographic videos on their computer screen that depict physical violence against women. Some students make a sexual harassment complaint. The institution’s computer-use policy bans the use of institutional networks to download or play pornography.

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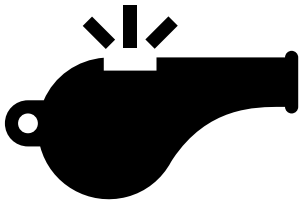

- New definition of retaliation will make clear that conduct charges cannot be used to retaliate against a student for exercising Title IX rights or refusing to participate in Title IX grievance process.

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

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

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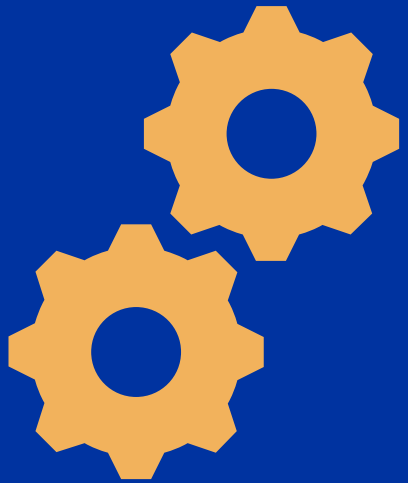
Group Scenario



Wren is a trans woman. Viktor lives in the same residence hall as Wren and purposefully misgenders Wren by referring to Wren as "Jimbo" and using "he/him/his" pronouns when talking to others about Wren. Wren complains to the Title IX Coordinator accusing Viktor of sexual harassment. Wren seeks an informal resolution whereby Viktor would relocate to another residence hall. Viktor agrees and the Title IX Coordinator approves. A week later, a gender studies professor who serves as Wren's academic advisor emails the Title IX Coordinator and notes that Viktor works the front desk of the residence hall and so "this agreement never should have been approved under Title IX regulations." The faculty member also notes that the student code of conduct prohibits students from causing "physical or mental injury" to another student. Faculty member demands the Title IX Coordinator "unwind" the informal resolution. Faculty member independently emails the Dean of Students, demanding conduct charges be brought against Viktor for causing mental injury to Wren. The next day Wren also emails complaining that the Title IX Coordinator "pressured" her into the informal resolution.

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Questions

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