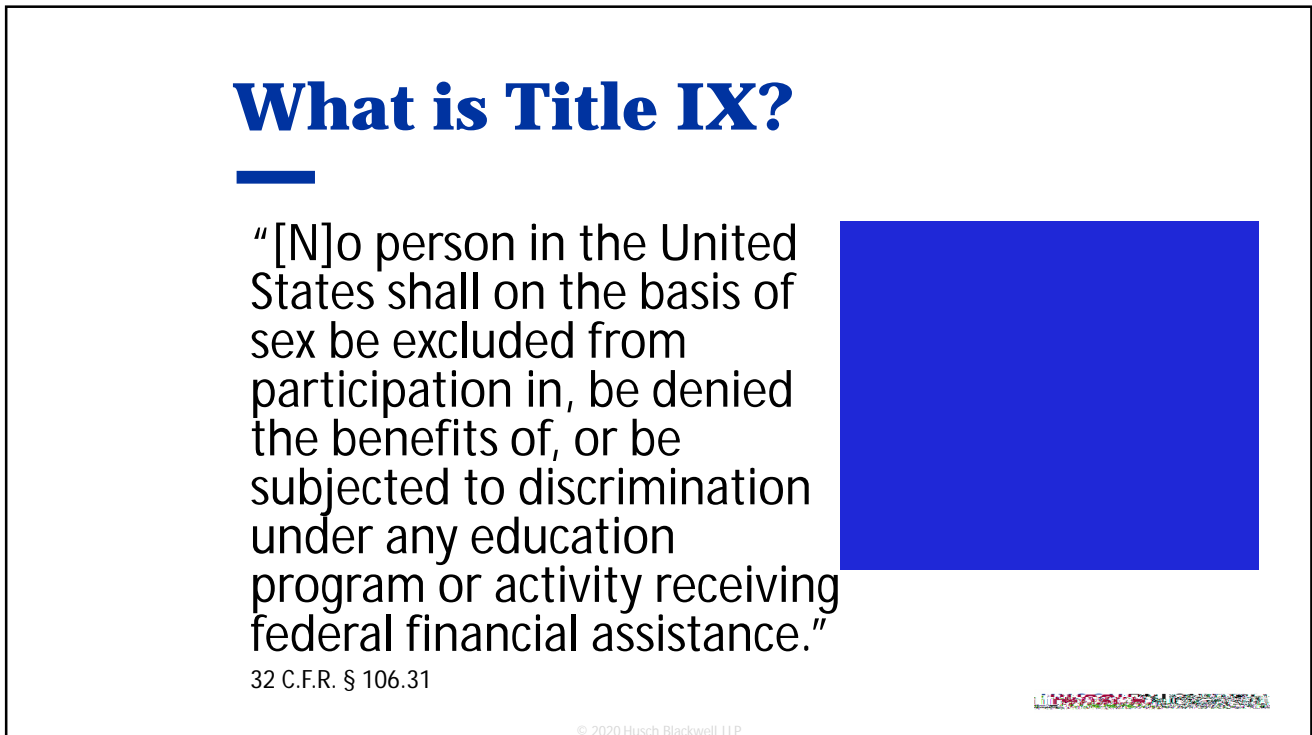


Title IX & Sexual Harassment Response



3



4

Title IX & Sexual Harassment Response



Admissions	Hiring	Workplace
Academic instruction	Residence life	Amenities on campus
Sports teams	Work-study	Games, concerts, and speeches

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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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Another example of quid pro quo

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

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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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Example of hostile environment

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

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Another example of hostile environment

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

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Another example of hostile environment

Student A obtains a nude picture of Student B from Student B’s former romantic partner. Student A threatens to post the nude picture on social media unless Student B poses nude for Student A in Student A’s dorm room. Student B poses for Student A to avoid the nude picture being circulated. Student A is not an employee.

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What is consent?

- Institutional definitions may vary
- Words (only) do not define consent

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



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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

Student A and Student B attend a dance held in the student union. While on the dance floor, Student A gropes Student B's groin without Student B's permission. Student B does not

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Example of dating violence

Employee A and Employee B are engaged to be married but live separately and have no children in common. Employee A and Employee B get into an argument in Employee A's car in the university's parking lot. During the argument, Employee A slaps Employee's B's face and tells Employee B to "shut your mouth."

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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:

-

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Example of retaliation

Employee A testifies at hearing in support of Employee B's complaint of sexual harassment against manager. After institution finds that manager sexually harassed Employee B, manager demotes Employee A to punish Employee A for testifying against manager.

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What about state laws governing sexual harassment on campus?

- Institutions must still comply with state laws unless
- They conflict with some element of the new Title IX regulation in which case
- State law is preempted

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**Group
Scenario**

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

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HUSCH BLACKWELL**Title IX &
Other Policies**

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Examples of Policies with Related Concepts

Discrimination <ul style="list-style-type: none">• Sexual Harassment• Other non-discrimination statement & policies	Relationships <ul style="list-style-type: none">• Workplace• Employee - student
Conduct <ul style="list-style-type: none">• Student• Faculty/Employee	Discipline <ul style="list-style-type: none">• Student• Faculty• Employee

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How do Title IX and Title VII standards compare?

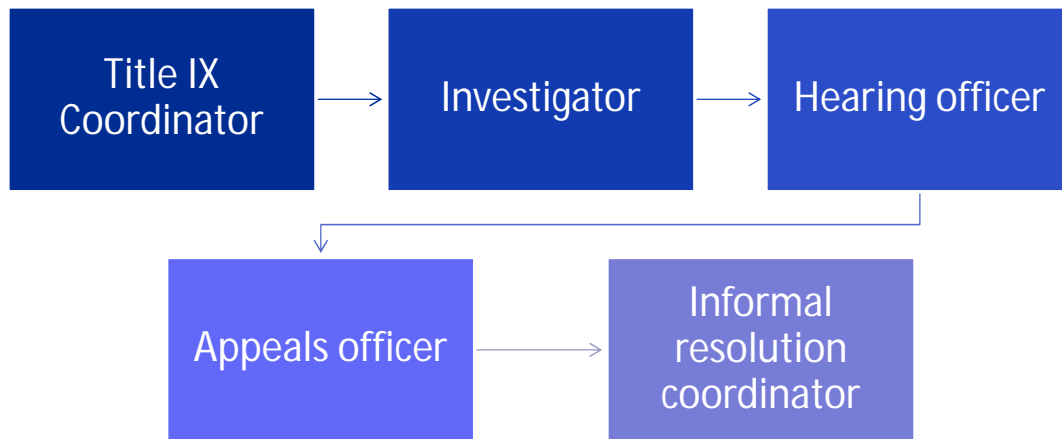
“Neither Federal non-sex discrimination civil rights law represents a ‘zero-tolerance’ policy banning all sexual harassment.” – Preamble to 2020 Title IX Regulations

Title VII Sexual Harassment		Title IX Sexual Harassment		
Quid pro quo	Sufficiently severe <u>or</u> pervasive	Any quid pro quo by employee	Unwelcome <u>and</u> Sufficiently severe and pervasive <u>and</u> objectively offensive	Any sexual assault/DV /stalking

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Who are the key institutional actors in the grievance process?



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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

When do we reach out to the alleged victim?

- After institution has actual knowledge of

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What are supportive measures?

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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 admin2(h)1.9v12.9(v)13.7(r)1nem409.7()JTJ

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What is a formal complaint?

What	Who	How
<ul style="list-style-type: none">• Document• Alleging sexual harassment• Requesting an investigation / resolution under grievance procedures	<ul style="list-style-type: none">• <u>Signed</u> by<ul style="list-style-type: none">• Alleged victim or• The Title IX Coordinator• If filed by alleged victim, alleged victim must be current or attempted participant in education programs and activities• Third-parties may not file formal complaints on behalf of an alleged victim	<ul style="list-style-type: none">• E(u)-4.7(s)Bfi494.8(e)-1.2(r)16.2()

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Example of dismissal

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

When may we dismiss a formal complaint?

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



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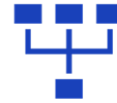
Can we consolidate the complaints?

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

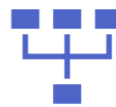


Multiple respondents

Multiple complainants



Multiple allegations against a single respondent



Multiple allegations from a single complainant

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Example of permissible consolidation

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

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Example of impermissible consolidation

Student A files a formal complaint that Student B sexually assaulted Student A two years ago after Student A was incapacitated by drinking. Student C, Student B's present romantic partner, files a formal complaint that Student B committed dating violence by slapping Student C during an argument a month ago.

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What is the grievance process?

Investigation to collect relevant inculpatory and exculpatory evidence

Live hearing before a decision-maker who finds facts under an evidentiary standard and determines the

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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."



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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.

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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

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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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How long does a grievance process take?

- There is no firm deadline, and the length of the grievance process varies depending on a variety of factors
- Institution must be reasonably prompt, advise parties of timelines

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What do we do if we find sexual harassment occurred?

- If grievance process results in a finding of sexual harassment:
 - Discipline for the respondent as determined by those with authority over the respondent
 - For complainant, grant remedies reasonably necessary to restore or preserve access to education programs and activities

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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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What is inculpatory evidence?

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

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What is exculpatory evidence?

- Evidence tending to support that the

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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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How do we collect evidence in an investigation?

Interviews of parties and witnesses

Collection of non-testimonial evidence

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Another example question

- From a party: "I want to tell you something 'off-the-record.' Is that okay?"

-

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How do you build rapport?

- Take the time to learn basic information about the interview subject before conducting the interview
-

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“Tell me what happened that night.”

“Will you walk me through what you remember?”



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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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How do we make a record of the interview?

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

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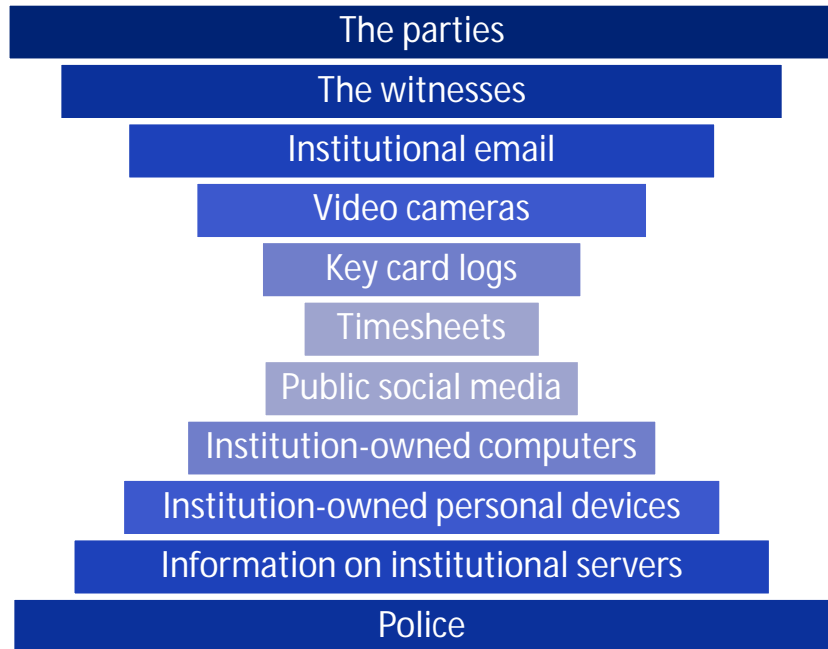
Do parties/witnesses have a right to record the interview themselves?

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

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Example sources of



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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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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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Example of permissible use

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

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Example of impermissible use

Respondent tells investigator he met with an attorney the day after the alleged sexual assault. The investigator demands that the respondent reveal what he told his attorney. When the respondent declines, the investigator states he will note that in the report and advise the hearing panel to draw an adverse inference against the respondent for “failing to cooperate.”

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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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Does the investigation report make findings?

- No – the investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the new Title IX regulation, 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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What if the advisor breaks the rules?

- Institution may impose limits on the advisor's role and certain behavior standards
- Must be applied equally for both parties
- Institution may exclude advisor who violates rules, but must pause the

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Example of advisor breaking the rules

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

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Example of advisor breaking the rules

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

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

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



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Example of permissible conduct

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

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Example of impermissible conduct

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

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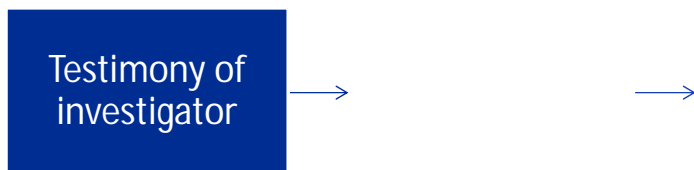
Student accuses Graduate Teaching Assistant of using a power differential to coerce student into performing oral sex. Student has received counseling since the incident and tells the investigator the counselor has diagnosed PTSD. GTA denies the oral sex was coerced. GTA claims that student consented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

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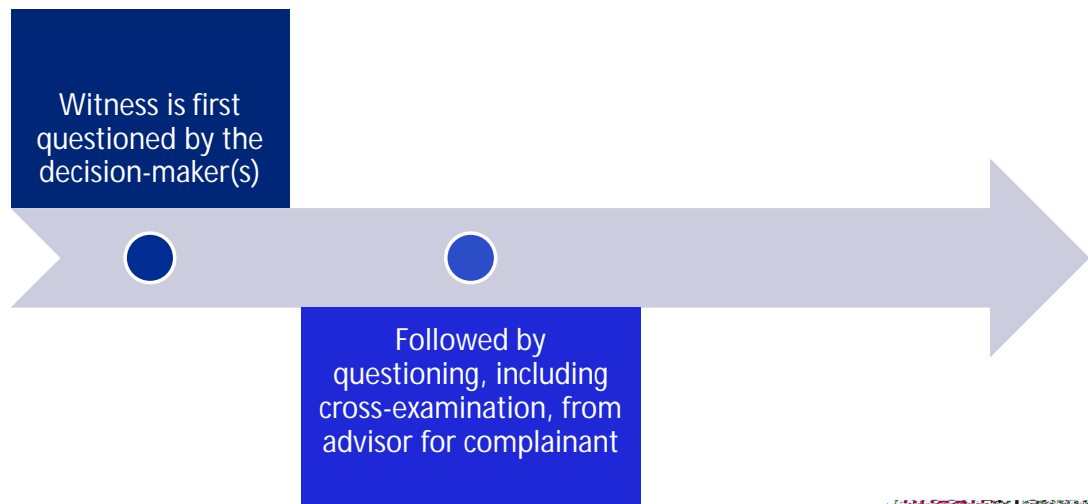
Title IX & Sexual Harassment Response

What is a potential sequence?



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How might questioning of witnesses take place?



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What is relevance?

Evidence is relevant if:

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

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Title IX & Sexual Harassment Response

Example (not relevant)

Student A has accused Student B of sexual assault. Advisor for Student A asks Student B: "Were you convicted for driving under the influence when you were a sophomore in high school?"

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Is sexual history considered?

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

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Example (impermissible)

Student A has accused a faculty member of sexual harassment. Advisor for the faculty member asks Student A: "How many men did you sleep with in the month before you claimed the faculty member sexually harassed you?"

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Example (permissible)

Student A has accused Student B of sexual assault. Student A testified that Student B had intercourse with Student A without using a condom, which Student A states Student A would never have agreed to because Student A always requires protection. Advisor for Student B asks Student A: "But didn't you have unprotected sex with Student B a week prior? And didn't you tell Student B it was 'okay' that Student B didn't wear a condom?"

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Title IX & Sexual Harassment Response

Example (excluded)

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

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Example (not-excluded)

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

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Can we set standards of behavior for hearings?

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



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Example (permissible)

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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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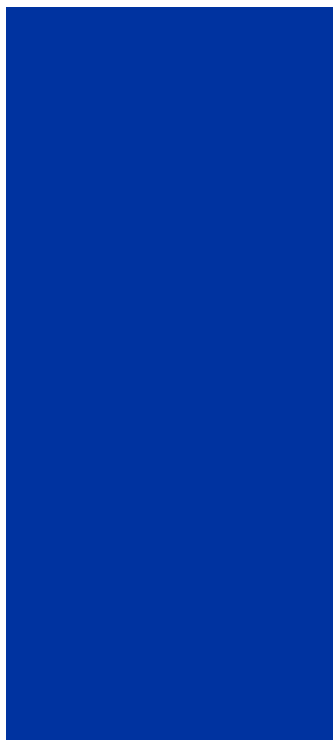
What does it mean to weigh evidence?

- 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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What is the purpose of the appeal?

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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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Example (new evidence)

After determination is made, new evidence is discovered that was not available at the time of the hearing.

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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?

Provided to
Parties

Written decision must be provided simultaneously to parties

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Can we require an appealing party to explain their appeal?

Yes – an institution can require that the appealing party state the grounds for appeal and also explain, with some level of specificity, why the appeal should be granted.

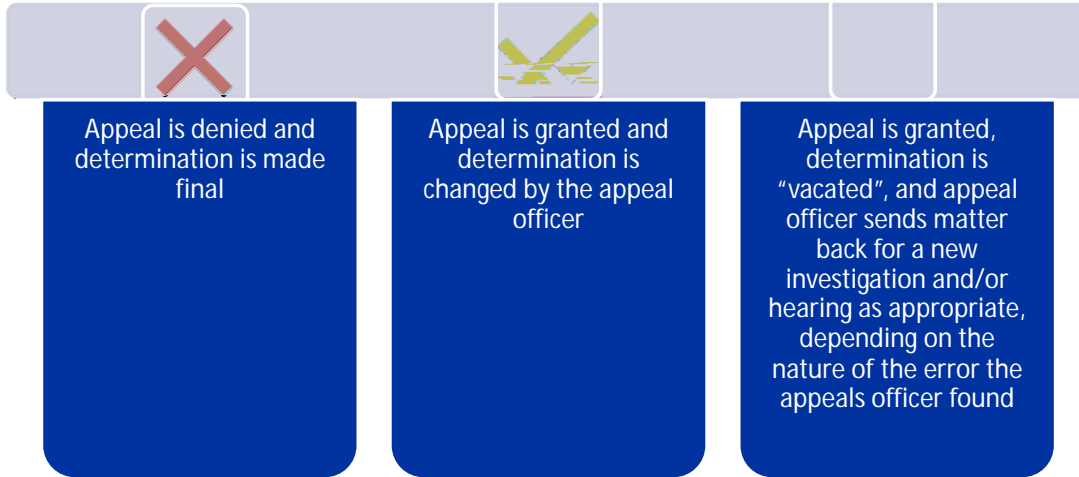
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How does the appeal officer make their decision?

- Appeal officer's review is limited in scope to the grounds stated for appeal
- Appeal officer does not hold a new hearing
-

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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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Is there further review after appeal?

Unless policy expressly provides for second level appeals (not recommended), President and Board should not entertain pleas for additional review.



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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



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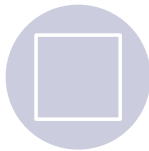
What are the key concepts of informal resolution?



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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Example

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

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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)

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

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How would the prior example be resolved?

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Who facilitates an informal resolution?

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

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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 a Title IX Coordinator

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Is an informal resolution final?



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Confidentiality



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Are sexual harassment cases confidential?

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

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Example (institution may restrict)


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

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Are interviews and hearings confidential?

- Institution should restrict access to investigations and hearings to those persons whose attendance is required to effectuate policy
- Parties may be accompanied by advisors of choice and potentially others if justified by the need for a

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Student A is being investigated for sexually assaulting Student B. Student A contacts various individuals who were present at a party immediately before the sexual assault and asks the individuals to sign a declaration attesting that Student B was sober and fondling Student A in front of others. One such individual is a friend of Student B's and complains to the Title IX Coordinator. Later, when Student A is given access to the investigation evidence before the conclusion of the investigation, Student A posts the entire