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Title IX Sex Discrimination and Sexual Harassment Response

Summer 2025

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State of the Regulations

Module 1

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Title IX Regulations

- Contained at 34 C.F.R. §, Part 106 (Department of Education)
- Regulations address a host of subjects, including general non-discrimination, scholarships, athletics, housing, employment, and sexual harassment response
- The “August 2020 regulations” refer to a series of amendments to Part 106 made by the first Trump Administration that addressed sexual harassment response and imposed significant due process requirements (including live hearings)

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Biden-Era Regulations Vacated

- Biden administration proposed multiple revisions to Part 106, including many that addressed procedural response to sex discrimination and sexual harassment
  - Vacated nationwide by *State of Tennessee v. Cardona* (E.D. Ky., Jan. 9, 2025)
  - February 4, 2025, Dear College Letter from ED reverts to August 2020 regulations
  - August 2020 regulations presumably in force through at least 2028

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ACTING ASSISTANT SECRETARY

February 4, 2025

Dear Colleague:

This letter[1] is to clarify that, in light of a recent court decision, the United States Department of Education's (ED) Office for Civil Rights (OCR) will enforce Title IX under the provisions of the 2020 Title IX Rule,[2] rather than the 2024 Title IX Rule.[3] Accordingly, lawful Title IX enforcement includes, *inter alia*, the definition of sexual harassment, the procedural protections owed to complainants and respondents, the provision of supportive measures to complainants, and school-level reporting processes as outlined in the 2020 Title IX Rule.

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Core Elements of the Biden-Era Regulations

- Defined “sex” broadly for purposes of sex discrimination and sexual harassment to include gender identity and sexual orientation
- Addressed sex “separation,” including separation based on gender identity
- Created more elaborate processes for investigating and adjudicating adverse treatment sex discrimination
- Modified and relaxed processes for investigating and adjudicating sexual harassment
- Revised and augmented pre-existing Title IX guidance and regulations on pregnancy discrimination

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August 2020 Regulations

- “Sex” not defined to include gender identity and sexual orientation
- No content addressing separation based on gender identity
- No detailed rules for response to adverse treatment sex discrimination (as opposed to sexual harassment)
- Rigorous procedures for sexual harassment investigations and hearings
- Minimal content on pregnancy discrimination and accommodation

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Questions for Discussion

Did your institution implement a “combined” sex discrimination and sexual harassment policy when the Biden administration’s regulations initially took effect?

Do you intend to keep the combined policy now? Or are you reverting to a sex discrimination policy and a separate sexual harassment policy?

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Practical Point

For the foreseeable future, institutions should implement policies that conform to the August 2020 regulations for addressing sexual harassment. Significant revisions to those regulations are unlikely in the coming years, although Dear Colleague Letters may inform their application in some scenarios.

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Questions

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Title IX Scope and Jurisdiction

Module 2

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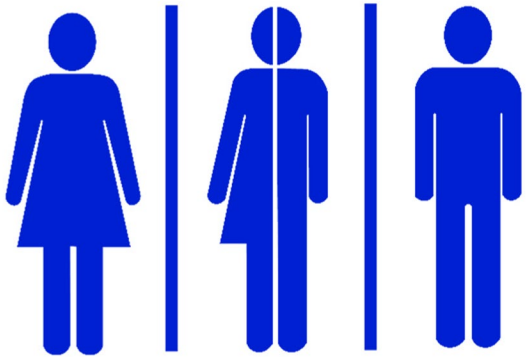
What is Title IX?

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

20 U.S.C. § 1681



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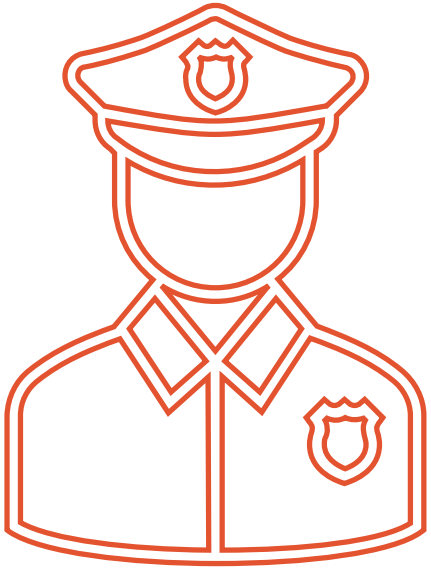
How is Title IX implemented?



- U.S. Department of Education regulations
- Private lawsuits and related court decisions

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To which entities does Title IX apply?

- Entities that receive federal financial assistance, including colleges and universities that participate in U.S. Dept. of Ed. Federal Student Aid funding
  - Not individual persons
    - But institutions are required to adopt policies and procedures to implement Title IX that do apply to individual persons

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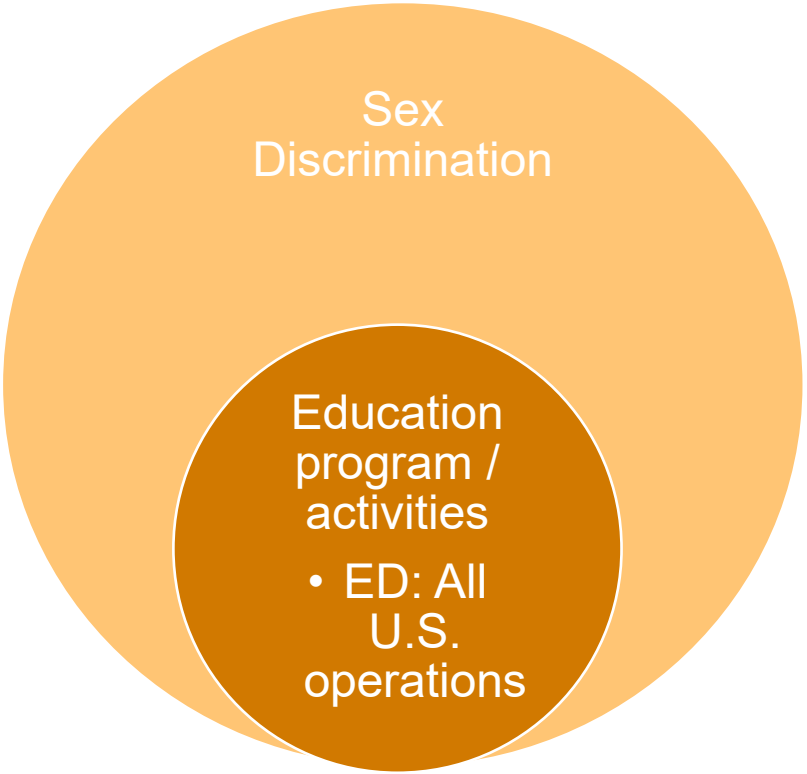
What is the scope of Title IX's reach?

- 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 locations that are not part of education program/activity



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What are examples of education programs and activities?

Admissions	Financial Aid	Athletics	Housing
Academics	Employment	Concerts, Performances, and Events on Campus	Clinical Rotations and Placements
Organized Trips and Volunteer Outings	Sponsored Organization Activities	Online Programs	Activities in Property Owned or Controlled by the Institution

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Does Title IX apply to off-campus misconduct?

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

Yes, if the conduct at issue occurs in location owned / controlled by the institution or officially-recognized student organization

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

No, if it occurs outside the United States

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Example

A local high school student attends a party held at the house of a university-recognized Greek organization. The student reports that she became drunk and was then led upstairs by another attendee who then forced her to have sex. The reporting party believes the other attendee was also a high school student and not a resident of the house.

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Example

Student A and Student B attend a tailgate on campus, get drunk, and flirt with each other. The two then walk to Student A's apartment, located immediately across the street from campus. While on the sidewalk in front of the apartment, Student A begins to grope Student B and refuses to stop when Student B pushes Student A's hands away.

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Scenario

A group of students from state university attend a symposium held at a nearby private college. The students are accompanied by a faculty advisor and travel in a university-owned van. While at the post-symposium reception in private college's alumni center, one student is groped by a drunk attendee.

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Questions for Discussion

Does your institution have a joint program with another institution or with a K-12 school?

Do you have a memorandum of understanding or similar agreement that specifies how Title IX obligations will be addressed?

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What about misconduct that happens abroad?

- Title IX only requires response to sex discrimination and sex-based harassment "in the United States"
- But institutions may investigate things that happen abroad if they are relevant to misconduct occurring in the United States

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Example

Students Kelly and Jimmi attended a study abroad program together in Chile. While in Chile, Jimmi made repeated sexual overtures to Kelly, which Kelly rebuffed. Jimmi also fondled Kelly while the two were riding in a tour bus organized by the program. Upon returning to the United States, Jimmi begins to send Kelly unwanted text messages, leers at Kelly after classes, and begins to appear at Kelly's on-campus apartment at odd hours of night.

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Do Title IX regulations apply to religious educational institutions?

- Yes, if they receive federal funds
- But the regulation contains a self-executing religious exemption that operates on a particularized basis

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What does the religious exemption say?

"This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenants of such organization."

34 C.F.R. § 106.12 (emphasis added)

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Example

A private, Christian college has a statement of faith that includes content indicating that only men can be religious ministers. The college has multiple degrees focused on ministry, but consistent with its statement of faith, only male students are allowed to pursue those degrees. Women are allowed to pursue any other degree at the institution.

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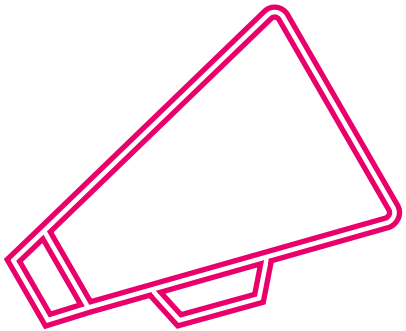
Are there other limitations on the reach of the Title IX regulation?

- Title IX regulations:
  - Do not apply to the extent they conflict with the First Amendment and other Constitutional rights
  - May be limited by the federal Religious Freedom Restoration Act
  - Do not regulate the selection of textbooks or curricular materials



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Example

A public university operates a student newspaper. A journalist for the paper writes an editorial offering the opinion that "most college-aged males are more interested in taking advantage of women than earning a degree." A group of male students files a report accusing the journalist of creating a hostile environment for men generally, through the comments in the editorial.

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Example

An officially recognized student organization at a public university is religious in nature. The organization owns two off-campus houses—one for male leaders and one for female leaders. The organization espouses the religious belief that males and females should not cohabitate unless they are married. A student complains that the organization's housing practice is discriminatory based on gender identity, sex characteristics, and sex stereotypes.

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Example

A faculty member in the English department teaches a course on modern fiction. As part of the course, students are required to read a highly acclaimed novel that contains descriptions of graphic sex scenes and the use of offensive sexual expletives. Students are also required to write an essay about the novel and the phenomenon of sexual fiction as a literary art form. Several students complain that the content of the novel is highly offensive and has created a hostile environment for them.

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Practical Point

Because the Title IX regulation does not apply in any way that would violate Constitutional rights, some Title IX complaints must be dismissed and/or rejected at the outset, without subjecting the respondent to a burdensome process, where it is clear the conduct alleged is constitutionally protected activity.

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Questions

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Prohibited Conduct

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What misconduct does Title IX cover?

- Sex discrimination
  - Sexual harassment

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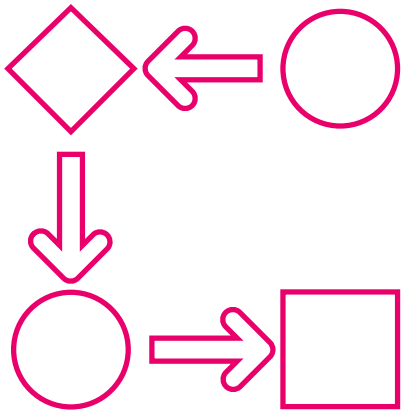
What is sex discrimination?

- Adverse treatment of a person on the basis of sex
- Limits or excludes the person from participating in the institution's education program or activity or denies or limits the benefits thereof



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Programmatic Discrimination

Individualized Discrimination

Sexual Harassment

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What is programmatic discrimination?

- Where discrimination occurs in a systematic way due to an *institutional* policy or practice
- Programmatic discrimination adversely affects persons as a group or by category, rather than by individualized decision
- Programmatic discrimination is usually *not* attributed to an individual perpetrator (e.g. “respondent”)

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Example: Programmatic discrimination

An institution offers a non-credit seminar titled “Self Defense For Women” that focuses on defense techniques that women can use in scenarios where the attacker is bigger, stronger, and (presumably) male. The seminar is only advertised to women and only women are allowed to attend. The institution does not offer a comparable seminar for men.

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Example: Programmatic discrimination

An institution has male and female-designated residence halls. The male halls are either new or newly renovated, and all are configured with "suite style" spaces where small groups share a living room, bathroom, and kitchenette. The female residence halls are old, consist solely of a traditional dormitory room shared by two persons, have communal bathrooms by floor, have no kitchen facilities, and lack air conditioning.

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Scenario: Programmatic discrimination?

An alumnus of the institution's social work school funds an endowed fellowship program that is intended to support male social work students with programming, networking, and job placement services. Only male students are eligible. Participants also receive a $5,000 stipend to support research or travel to a symposium.

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Questions for Discussion

Is this program permissible, despite excluding women, if the intent is to address systematic underrepresentation of men in the social work field?

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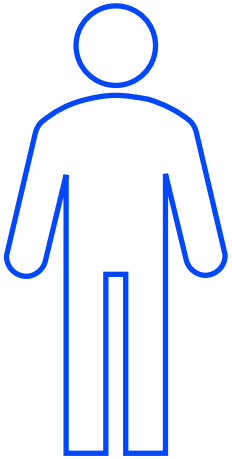
What is individualized discrimination?



- A particular decision is made, or particular action taken, that results in adverse treatment of a particular person that limits or excludes them from participation or denies or limits benefits
- Typically, individualized discrimination has an identifiable “respondent” who makes the discriminatory decision

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Example: Individualized discrimination

As between two finalists for an open position, a supervisor chooses to hire the male candidate over the female candidate because the supervisor prefers working with men.

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Example : Individualized discrimination

A faculty member is consistently more lenient in grading the work product of female students than male students because the faculty member believes women have been historically disadvantaged in higher education.

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Practical Point

Individualized discrimination involves adverse treatment that is taken *because of* or *based on* the target's sex. If a person is treated the same way as similarly situated individuals, *despite* sex, then there is no individualized discrimination, even if the treatment is adverse.

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Example

An engineering class has eight students—seven male and one female. The faculty member awards As to all seven male students but awards a C to the female student. The reason the female student received the lower grade was because she consistently showed up late to lab sessions, resulting in a poor attendance and participation score.

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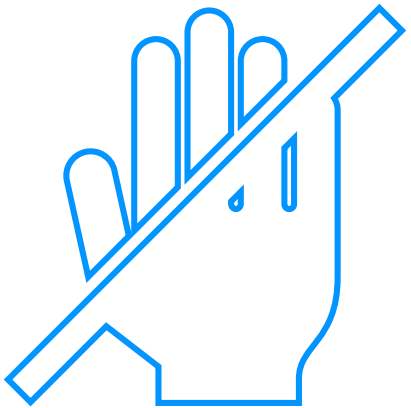
What is sexual harassment?

- Conduct on the basis of sex
- And that constitutes:
  - Quid pro quo harassment
  - Hostile environment harassment
  - Certain specific offenses



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What are the different categories of sex-based harassment?

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

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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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Example: Quid pro quo

A tenured faculty member has a romantic interest in a particular student. The faculty member invites the student to office hours where the faculty member asks unwelcome questions about the student's sex life. The faculty member remarks, "I really like our conversations. . . . If you keep coming to office hours, I can guarantee you'll get an A in this course."

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Practical Point

For there to be a quid pro quo, the sexual conduct must be unwelcome. Consensual sexual interactions between students and faculty are not quid pro quo but may violate other institution policies and standards.

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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: Hostile environment

Male student is repeatedly subject to unwanted conduct from a female TA that includes the TA winking at the student, commenting on the student's "bulge," joking about wanting to "hook up," rubbing the student's shoulders, and offering to give the male student a lock of the TA's hair.

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Example: Hostile environment?

Before class, two male students tell each other crass sexual jokes in the back of the classroom. While the male students only direct their jokes to each other, a female student in the front of the room hears the jokes and finds them offensive. She tells the male students they are "pigs." Embarrassed at being called out, the two male students stop joking and behave in the class for the rest of the semester.

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What factors do we consider in determining a hostile environment?

- The degree to which the conduct affected the complainant's ability to access
- Type
- Frequency
- Duration
- Parties' ages
- Parties' roles and other factors about each party
- Previous interactions
- Location of the conduct and context
- Other sex-based harassment at the institution

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Example: Hostile environment

The coach of the tennis team repeatedly leers at a particular player's chest and genitals, lingers in the locker room whenever the player is present, tells the player unsolicited details about the coach's prior sexual conquests, and rubs the player's shoulders without permission. The player is increasingly affected by the unwelcome conduct and eventually withdraws from the team to avoid the coach's attention.

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Scenario: Hostile environment?

A first-year student is sexually attracted to a graduate student, starts a conversation with the graduate student, and then uses a crude and corny sexual pickup line. The graduate student rebuffs the first-year and asks to be left alone. Two days later, the first-year sends the graduate student an email apologizing for the joke and asking the graduate student to have coffee, like "two responsible adults." The graduate student does not respond and never hears from the first-year again, although they occasionally pass each other on a public sidewalk.

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Question for Discussion

What factors in this scenario weigh against a finding of hostile environment harassment?

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What is sexual assault?

- An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation

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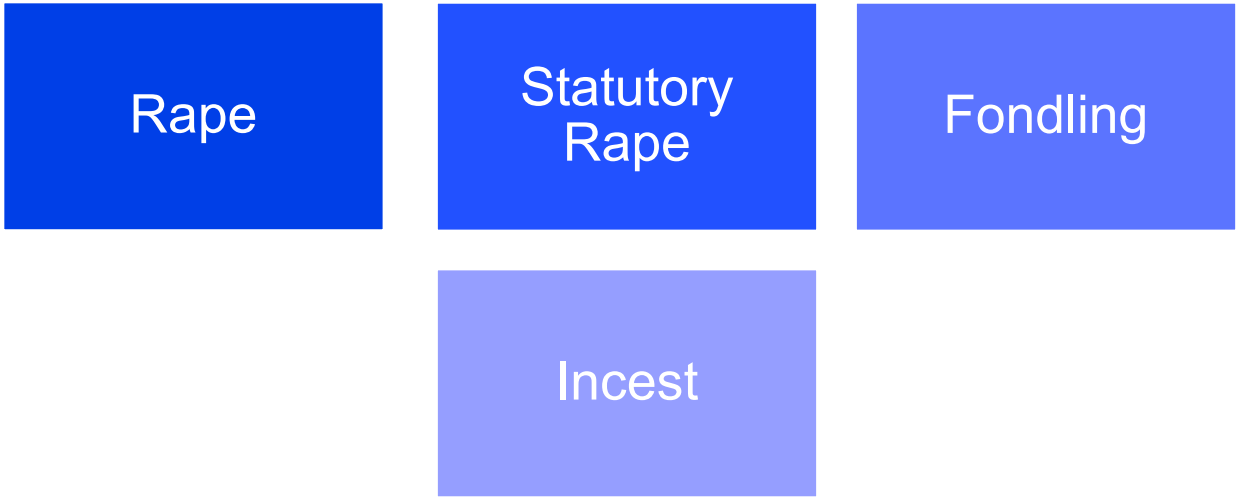

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What is rape?

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes instance in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

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How should we think about consent?

- Consent in fact:
  - Determined by whether the relevant facts establish conduct that amounts to agreement to engage in sexual activity--as agreement is defined by the institution
- Ability to consent:
  - Determined by whether a person has capacity to consent or whether they have lost such capacity

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What is an example definition of consent?

“Consent” means words or actions that a reasonable person would understand as agreement to engage in the specific sexual conduct at issue. Consent must be contemporaneous with the sexual conduct and can be withdrawn at any time. Consent cannot be procured by threats, blackmail, or other improper pressure. If a person is incapacitated due to the use of drugs or alcohol, a physical or mental condition, or because of sleep, the person is incapable of giving consent. A person below the minimum age of consent in the state where the sexual conduct occurs cannot give valid 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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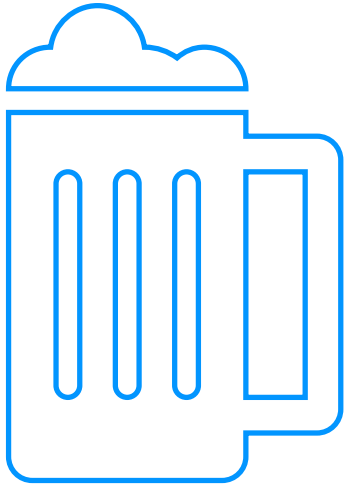
How do we know if a person is incapacitated due to alcohol or drugs?



- Loss of ability to make a reasoned decision and communicate it
- Loss of appreciation of the nature and fact of sexual activity
- Loss of appreciation of the “who, what, when, where, and how”

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What facts may be relevant to determining incapacity due to alcohol or drugs?

- Ability to speak coherently
- Ability to track conversation
- Ability to appreciate and weigh risks and benefits
- Ability to walk or stand
- Ability to engage in behaviors requiring presence of mind
- Time period of consumption
- Nature of alcohol or drugs
- Amount of alcohol or drugs
- Size of the person consuming
- Others?

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Example: Incapacity?

Student A and Student B frequently have sex after drinking and/or doing drugs. Aware of the institution's Title IX policy, the students purport to consent "in advance" to sex, "even if we get incapacitated." One night after Student A and Student B drink and use heroin laced with fentanyl, Student A has sex with Student B while Student B is passed out. Student B later files a Title IX complaint accusing Student A of sexual assault.

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Example: Incapacity?

Damon and Jeremy go to a sports bar after class to watch a basketball game. Over the course of the game, each drinks four beers and has a meal. After the game, Damon and Jeremy walk six blocks to Damon's apartment, where the two proceed to have sex using protection. Shortly thereafter, Jeremy summons an Uber and goes home. While riding in the Uber, Jeremy messages several friends. And upon arriving home, Jeremy punches in a security code to access his complex, walks up two flights of stairs to his apartment, and unlocks his door. Jeremy later accuses Damon of sexual assault, claiming he (Jeremy) was too drunk to consent.

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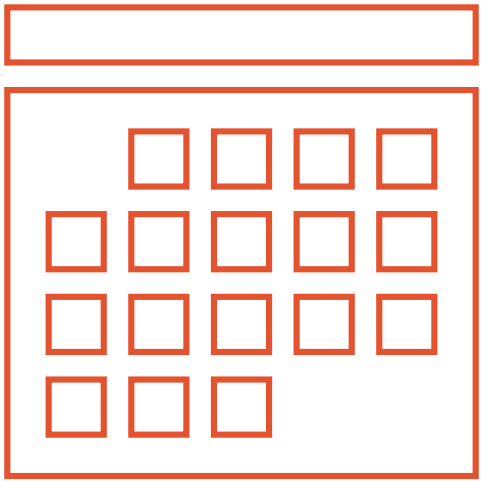
What is statutory rape?

- Nonforcible sexual intercourse with a person who is under the statutory age of consent



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Example: Statutory rape

State law sets a minimum age of consent at 16. The college hosts a summer soccer camp for high school boys at the same time as a summer volleyball camp for high school girls. A male attendee of the soccer camp, who just turned 18, sneaks out of the boys' dormitory to meet his high school girlfriend, who is almost 16 and attending the volleyball camp. The two have intercourse.

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Practical Point

Every state has laws governing the mandatory reporting of child sexual abuse. Depending on state law, sexual assaults of minors may need to be immediately reported to state or local officials, irrespective of what the victim and/or their parents want to do. Institutions should have specific protocols for dealing with reporting issues that arise from programs involving minors on campus.

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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: Fondling

Student A and Student B are romantically interested in each other. While sitting on a futon in Student B's dorm room, Student A places their hand on Student B's crotch. Student B pushes Student A's hand away. Several minutes later, Student A shoves their hand down Student B's crotch and squeezes Student B's genitals.

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What is domestic violence?

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

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What is dating violence?

"Dating Violence" is violence committed by a person:

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

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Example: Dating violence

Rip and Beth are volatile people with a volatile relationship. They spend most evenings together and have sex often. One night while the two are together in Beth's on-campus apartment, Beth gets drunk and throws a glass at Rip's head. Rip bats the glass away but then proceeds to cross the room and backhand Beth.

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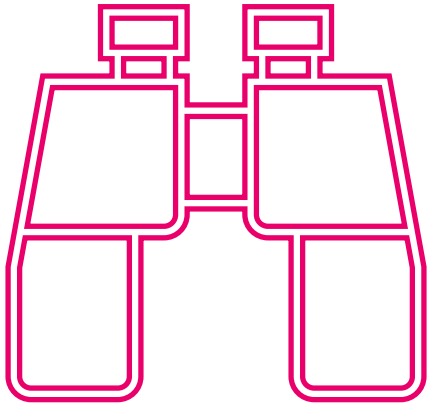
What is stalking?



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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Scenario: Stalking?

Alfredo is sexually attracted to his new TA, Sofia. Alfredo asks Sofia to "hang out", and she appropriately tells him "no." Alfredo then friends Sofia on social media and DMs Sofia asking about her preferences in music and clothing. Sofia does not respond. Alfredo leaves small gifts for Sofia on her desk and has roses delivered to Sofia's apartment on Valentine's Day. After Sofia tells Alfredo to "knock it off," Alfredo DMs Sofia a picture of himself lifting weights. Sofia also spots Alfredo's car in her apartment's parking lot, late at night, on multiple occasions.

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Questions for Discussion

Do these facts satisfy all the elements of stalking?

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Questions

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Retaliation

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What is retaliation?

- 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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Does retaliation require intent?

- “[F]or the purpose of interfering with any right or privilege secured by Title IX . . .”
- Requires a subjective state of mind of the respondent

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Scenario: Retaliation?

Damon is accused of sexual assault but is found not responsible after a hearing where the complainant fails to appear and where Damon testifies the encounter was entirely consensual. While the Title IX Coordinator cannot prove it, she believes Damon must have threatened the complainant and deterred her from attending the hearing. Believing Damon is "getting away with rape," the Title IX Coordinator decides to refer Damon to student conduct for underage drinking, even though the Title IX Coordinator has never referred a complainant or a respondent before.

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Questions for Discussion

Did the Title IX Coordinator engage in retaliation?

What if the Title IX Coordinator always referred instances of underage drinking to student conduct, irrespective of the outcome of the Title IX case?

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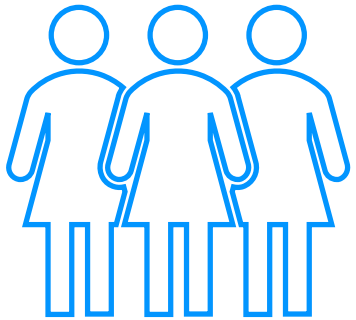
Can peers engage in retaliation?



- Yes
- Complaints of peer retaliation may be appropriate for consolidation with an underlying report of sex discrimination or sex-based harassment

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Example: Peer retaliation

Jane files a Title IX complaint against Jill accusing Jill of dating violence. Jill's two friends, Charlie and Scarlett, share a class with Jane. After class, Charlie and Scarlett tell Jane she's being a "real bitch" and "should drop the complaint." When Jane tells Charlie and Scarlett to "F . .k off," Charlie remarks, "Look, if you want to do it the hard way that's fine. But don't be surprised if those sexy pics you sent Jill get leaked all over campus . . . ."

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Is it retaliation to punish someone for lying during a Title IX proceeding?

- An institution may punish a person for making false statements in a Title IX proceeding
- Provided there is evidence of falsity apart from the outcome of the Title IX proceeding itself

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Is it retaliation if a respondent files a counter-complaint?

- Only if the counter-complaint is made in bad faith for the purpose of interfering with the complainant's exercise of Title IX rights

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Practical Point

Institutions should proceed cautiously and not presume a counter-complaint is retaliatory simply because it comes second. Doing so can create a "race to the Title IX Coordinator" scenario and risks systematic bias against respondents.

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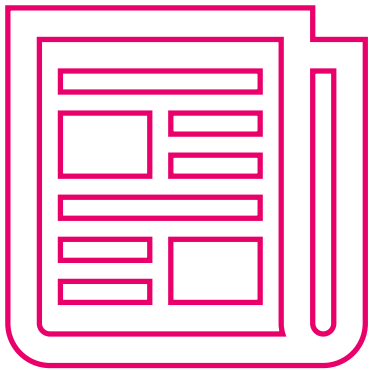
Is there any retaliation that is allowed?



- Some conduct that meets the technical definition of retaliation may be Constitutionally protected
- Freedom of speech
- Freedom of association
- Freedom of religion

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Example: Retaliation and First Amendment

A high-profile student athlete at a public university is accused of sexual assault. The complainant gives an interview with the student newspaper and details the allegations, but the student newspaper protects the complainant's identity by using the pseudonym "Jane Doe." In response, the student athlete submits to an interview and tells the paper that he is innocent, that the allegations are false, and that Jane Doe is retaliating because the student athlete would not share his NIL money with Jane.

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Example: Retaliation?

An adjunct faculty member at a public university is accused of sexually harassing a student. The investigator wants to interview the faculty member within a week, but the faculty member refuses to meet with the investigator because the faculty member does not have a lawyer yet. When the Dean learns that the faculty member has refused to meet within a week as requested, the Dean terminates the faculty member for "failing to cooperate in the investigation."

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The Title IX Coordinator and Team

Module 5

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Who are the Title IX team members?

- Title IX Coordinator
- Deputy Title IX Coordinators
- Investigators
- Decision-makers
- Informal resolution facilitators
- Appellate officers
- Persons responsible for supportive measures

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What are the team members' general qualifications?

- Appropriately trained in their duties and relevant policy
- Competent
- Free of conflicts of interest
- Free of bias and not relying on stereotypes

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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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Examples: Conflict of interest?

An investigator assigned to a case is a first-cousin to the respondent.

A hearing officer previously accused a complainant of plagiarism.

An appeal officer in a case previously had a romantic relationship with the complainant.

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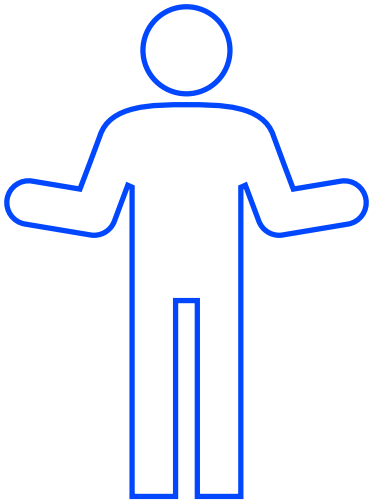
What is bias?



- A prejudice, predisposition, or inclination in favor of or against a thing or person
- Team members must be free of bias against complainants or respondents generally, or a specific complainant or respondent

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Example: Bias

An investigator assigned to a sexual assault case also provides sexual misconduct trainings to various groups on campus. Recently, during a training, an attendee asked the investigator whether there are any "false" reports of rape. The investigator publicly stated in response, "I've never seen a false report. And when hearings have found someone not responsible, I've disagreed with the outcome. I think all these allegations should be believed."

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Practical Point

Title IX team members who have public-facing roles—especially trainers—must be especially careful not to make statements or deliver content that would be perceived as demonstrating bias.

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Example: Bias

A hearing officer (a faculty member) previously had the complainant as a student. As a student, the complainant was the hearing officer's "prize pupil", and the hearing officer wrote several letters of recommendation supporting the student's admission to a prestigious graduate program. In one of those letters, the hearing officer (then faculty member) described the complainant as having "the most integrity of any student I have ever encountered."

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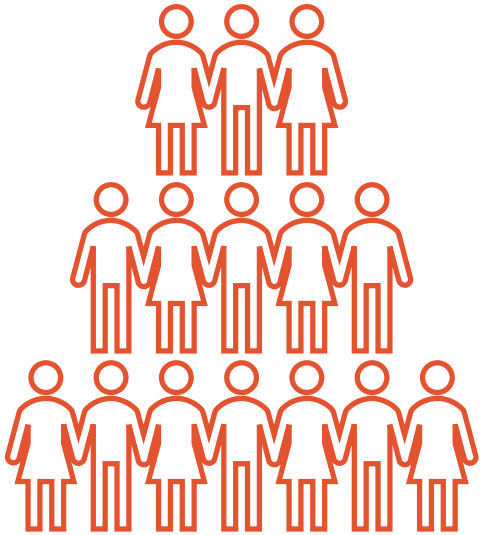
What are stereotypes?

- A form of bias that operates as a preconceived, generalized, and sometimes inaccurate belief about a person based on their membership in a group or some other characteristic



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Example: Impermissible Stereotypes

Members of sports teams and Greek organizations always lie for each other.

Women who wear tight dresses and go to parties are looking to hook up.

Men are always the aggressors in a sexual encounter.

Gay men are always physically weak and “effeminate.”

If a man gives a woman a drink in a bar, it’s likely the drink is drugged.

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What are some of the Title IX Coordinator's responsibilities?

- Coordinate overall Title IX compliance
- Answer questions about Title IX programs
- Coordinate training
- Receive reports and complaints
- Provide information about options and rights to complainants and others
- Coordinate supportive measures
- Provide information about grievance procedures and informal resolution
- Initiate relevant processes
- Screen for conflicts and bias
- Coordinate with disability services staff
- Evaluate efficacy of reporting and barriers to reporting
- Ensure retention of Title IX records

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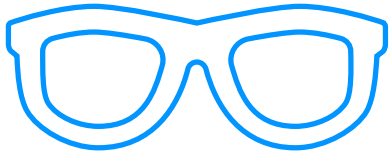
Can the Title IX Coordinator be an investigator?



- No *per se* rule prohibits Title IX Coordinator from being an investigator
- Title IX Coordinator must be especially attentive to actual or perceived conflicts of interest

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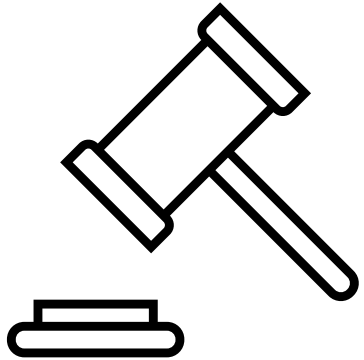
Who can be a decision-maker?



- Cannot be the Title IX Coordinator
- Cannot be the investigator
- Cannot be an informal resolution coordinator
- Cannot be the appeal officer

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Who can serve as an informal resolution facilitator?

- Cannot be the investigator *in the same case*
- Cannot be the decision-maker *in the same case*

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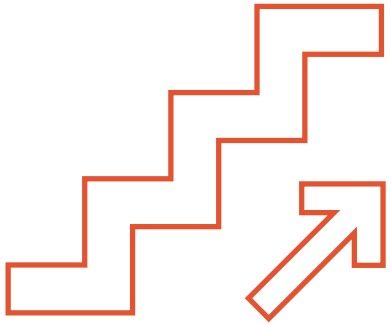
Who can serve as an appeal officer?

- Appeal officer should be a different person(s) than the person whose decision is appealed
- Not decision-maker
- Not determiner of dismissal
- Not decider of supportive measures



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Who administers supportive measures?

- Title IX Coordinator must “coordinate” supportive measures
- Responsibility for determining supportive measures (or some types of them) can be delegated with appropriate oversight

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Reporting

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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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Example: “Actual knowledge”?

A student who missed an important examination comes to the faculty member’s office and discloses that the student missed the examination because she was at the hospital having a SANE examination performed. The student tells the faculty member she was raped by an acquaintance on campus.

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Example: “Actual knowledge”?

A student worker who missed a shift in the student life office comes to the Dean of Students and discloses that the student missed the shift because she was at the hospital having a SANE examination performed. The student tells the Dean she was raped by an acquaintance on campus. The Dean administers the institution’s Code of Conduct and overseas the Housing Department.

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Practical Point

The Title IX Coordinator and deputies, high level administrators, deans, and certain directors (HR, athletics, campus security) are likely to be institutional officials with authority to take corrective action.

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Questions for Discussion

Do you have a policy that requires all (or most) employees to make mandatory reports to the Title IX Coordinator?

Are you considering narrowing it now that the Biden regulations have been vacated?

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Questions

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Intake and Supportive Measures

Module 7

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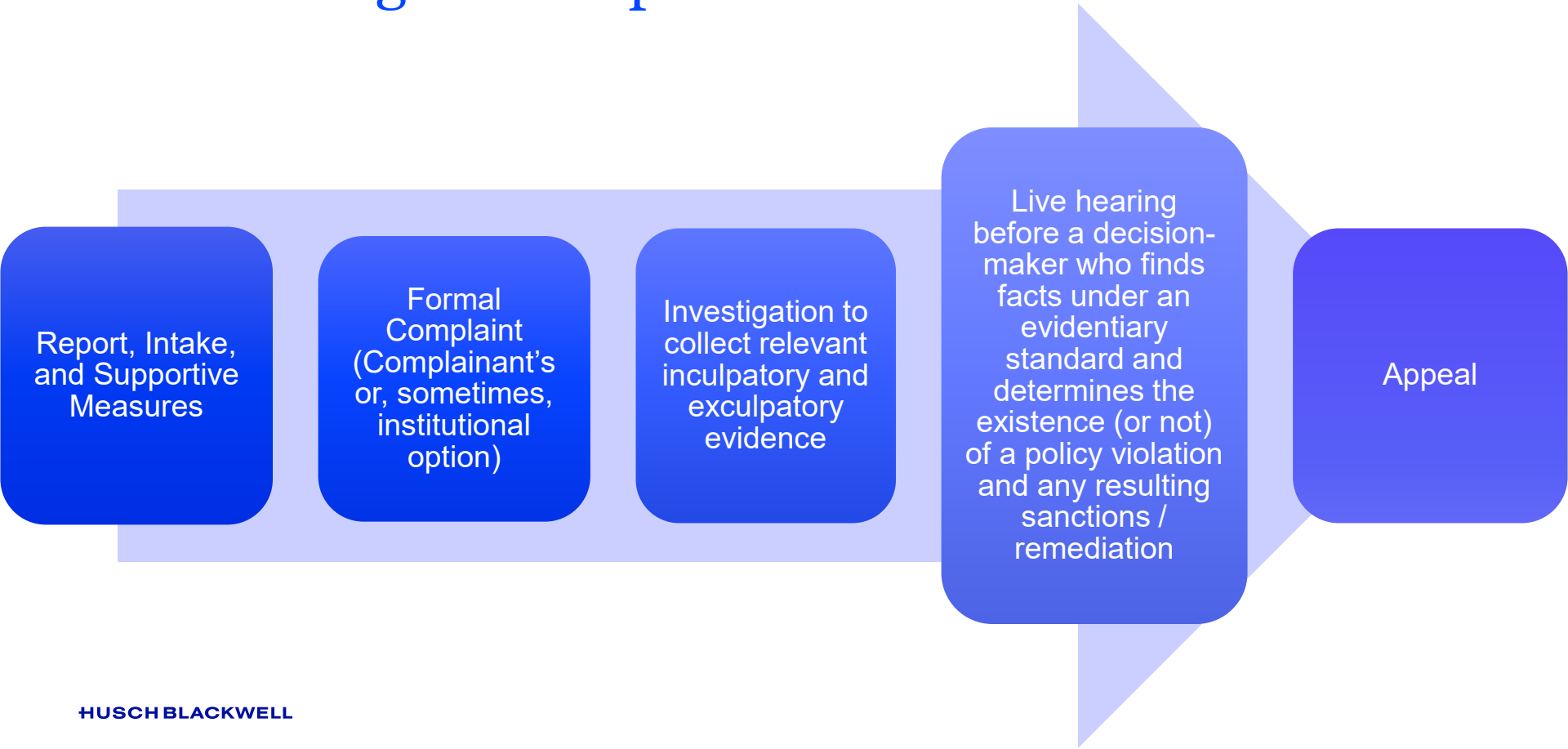
What is the grievance process?



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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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Do we need a “formal complaint” before contacting the alleged victim?

- 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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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: Supportive measures

Employee is the victim of stalking perpetrated by community member who has come to the Employee's office on campus. The Employee requests a designated parking spot that is well-lit and near a call box.

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Example: Supportive measures

A student reports they were sexually assaulted in their residence hall by another member of the residence hall. The reporting student wants released from their housing contract so they can live off-campus for the rest of the semester. The student also wants to be able to use their meal credits at the student union, instead of the cafeteria attached to the residence hall, where the alleged perpetrator dines.

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Scenario: Supportive measures?

A third-year student reports they were sexually harassed by a faculty member during their first year. The student requests a refund of tuition for the entire first year, despite having obtained all As except for two Bs.

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Questions for Discussion

Is a request for refund a supportive measure?

Is this request for refund reasonable?

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Practical Point

Supportive measures are intended to preserve access to programs and activities and maintain the status quo. Remedies that compensate for past harm are not supportive measures and generally should only be determined as part of a final decision.

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Do students and employees have other rights to accommodation?

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

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Example: Rights to accommodation?

Student with pre-existing anxiety disorder accuses a coach of sexual harassment. The student reports that the sexual harassment has aggravated the anxiety disorder and necessitates accommodations of various types, including extra time to complete assignments and tests.

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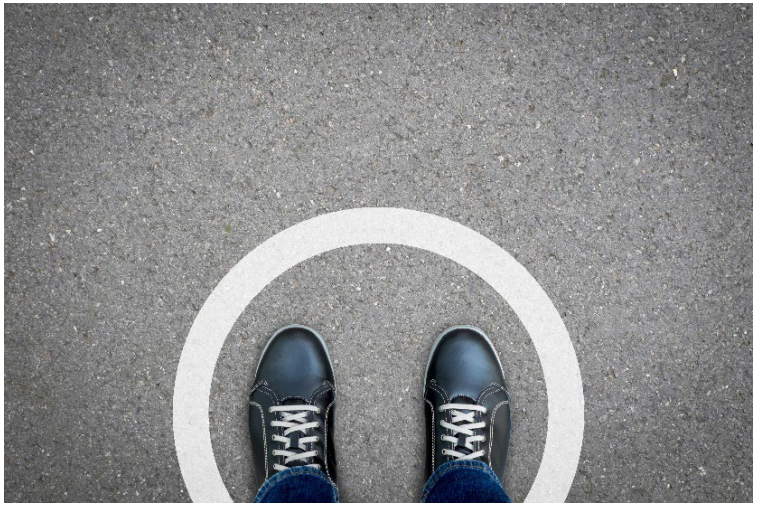
What if the report falls outside Title IX jurisdiction?



- 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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Example: Scope

Student reports that they were sexually assaulted over the summer while in their hometown. The alleged perpetrator has been arrested and a criminal trial looms. The student asks the institution for various accommodations, including free counseling and extra tutoring.

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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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Example: Confidential supportive measures?

Title IX Coordinator receives a call from the father of a student who reported being fondled in the recreation center. The father purports to know about the student's report of fondling and demands to know whether the institution has provided vouchers for his child to attend a private fitness center off 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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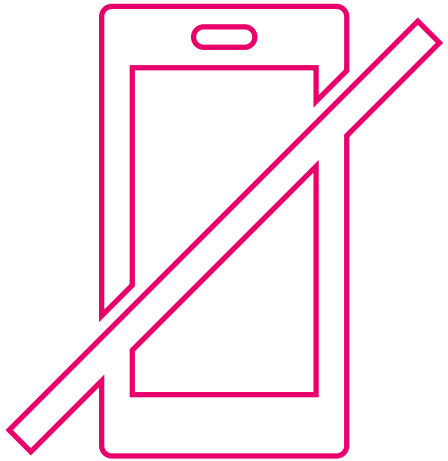
When is a no contact order appropriate as a supportive measure?

- When reasonably available
- When not an unreasonable burden
- When necessary to restore access or preserve safety
- Never for disciplinary or punitive reasons



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Example

Kate has accused Zane of sexual harassment because Zane has repeatedly come up to Kate at various places on campus and asked Kate to “hook up.” Kate rebuffed these overtures, but Zane persisted. Kate wants a no contact order so Zane will leave Kate alone during the investigation and eventual hearing.

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Practical Point

No contact orders should not be imposed as a matter of course. An individualized determination should be made that a no contact order is necessary and appropriate.

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Can we utilize interim removals or suspensions for students?

- Students may be removed on an 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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Example: Interim removal?

Student A reports that Student B forcibly raped Student A and threatened to kill Student A and Student A's family if Student A made a report. While Student B has no Title IX record, Student B has a prior student conduct finding for physical assault and a housing violation for punching a hole in the wall of Student B's dorm 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: Administrative leave

Multiple parents report that an admissions counselor made inappropriate sexual jokes to high school students attending a prospective students' day. The institution places the admissions counselor on partial leave, requiring the counselor to work remotely performing various administrative tasks that involve no student contact.

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Questions

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The Investigation

Module 8

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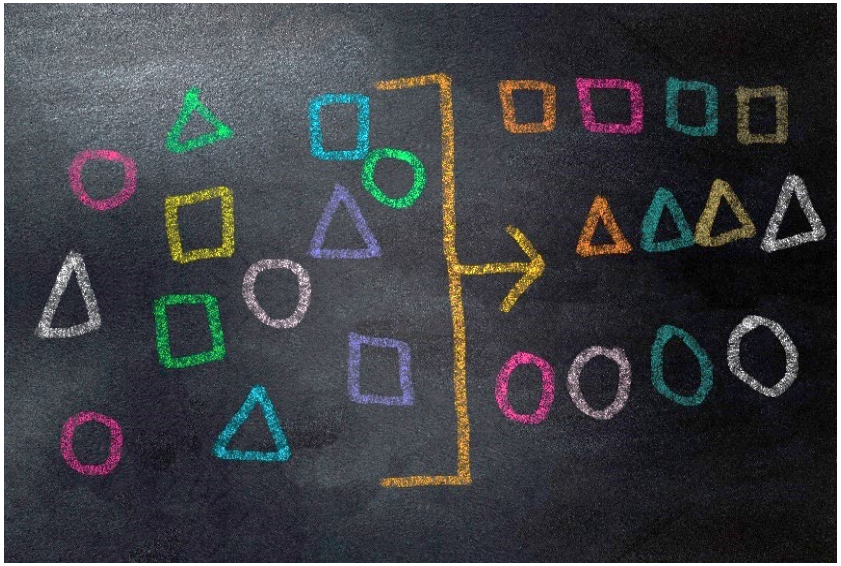
What is the purpose of Title IX investigation?

- 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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What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- 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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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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Example: Dismissal

Student complains that they were fondled by another student while both students were at a bar downtown.

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Example: Dismissal

Student complains that they experienced a “Title IX” violation when a faculty member allegedly made racist comments during class.

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Questions for Discussion

Has your Title IX office received complaints of other forms of protected status discrimination that students incorrectly label as "Title IX"?

Does your institution use the same investigation/hearing process to resolve all types of harassment?

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Example: Dismissal

Former student who graduated ten years ago files a complaint alleging a GTA engaged in quid pro quo by asking for sex in exchange for better grades.

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When may we dismiss a Title IX complaint?

- 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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Example: Withdrawal

A student accuses another student of sexual harassment. While the investigation is ongoing, the complainant graduates and then sends a letter withdrawing the allegations and saying, “This just wasn’t that big of a deal and it’s not worth my time now.”

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Example: Dismissal

A student accuses another student of sexual harassment. After being notified of the complaint, the respondent withdraws from the university and indicates an intent never to return. The alleged misconduct involved verbal comments and no sexual contact.

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Example: Specific Circumstances

A student accuses another student of sexual assault. After filing the written complaint, the complainant refuses to be interviewed and states that they will not attend the hearing. The respondent also declines to be interviewed and indicates they will not attend the hearing. There are no third-party witnesses or other evidence, as the incident allegedly occurred in a dormitory room with no one else present.

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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: Inadequate notice

Title IX Coordinator sends notice of investigation to Respondent stating, “You have been accused of domestic violence by way of committing several violent acts against your dating partner.”

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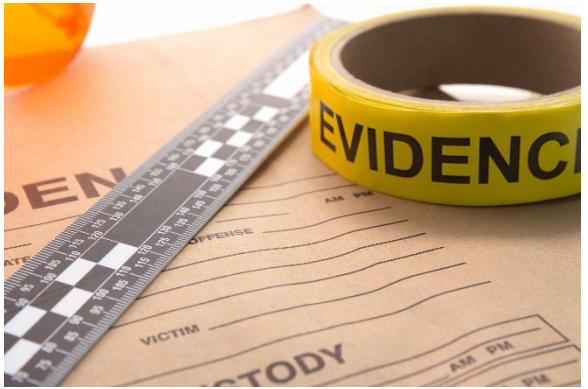
How do we collect evidence in an investigation?

Interviews of parties and witnesses



Collection of non-testimonial evidence

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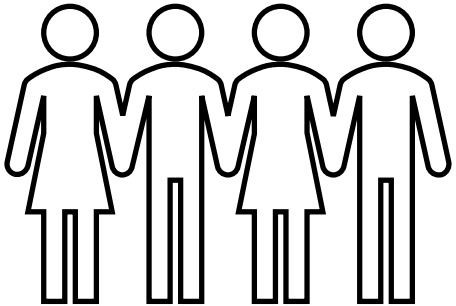
Who do we interview?

- Parties
- Fact witnesses
- Maybe character witnesses
- Maybe experts



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What's the difference between a fact witness and a character witness?

- A **fact witness** has personal knowledge about specific facts that are relevant to determining whether or not a given act of sexual harassment occurred
- A **character witness** does not possess knowledge of specific, relevant facts but instead speaks to a person's general character traits or their general disposition

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Example: Fact witness

Jack has accused Jill of sexually assaulting Jack when Jack was incapacitated. Jack's roommate saw Jack and Jill in the living room, before they went into Jack's room. The roommate will testify that Jack was barely able to walk and was talking nonsense.

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Example: Character witness

Jane has been Jill's friend since high school. Jane was not present at Jack's apartment the night of the alleged assault but will testify that Jill loved Jack and would never do anything to hurt Jack or anyone else because Jill is a caring person.

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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 recognition prompt questions until later (if at all)

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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 what you experienced?”

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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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What does it mean to be "trauma informed"?

- Title IX regulations do not define the term
- There is no standard or commonly accepted definition
- In practice, it means:
  - Prompt provision of supportive measures such as counseling to address the immediate and ongoing effects of trauma
  - Understanding the neurobiology of trauma and its potential impact on a victim's neurobiological functioning
  - Adopting investigation and hearing techniques that minimize the risk of exacerbating trauma while still being fair and impartial

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How do we approach trauma in a Title IX case?

Balance

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

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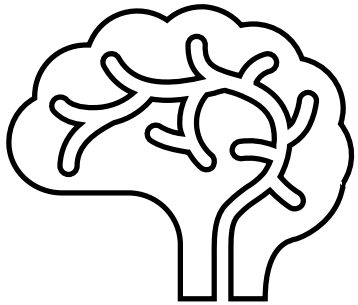
What is a neurobiological effect?



- Experiencing trauma can affect the brain itself by altering chemical processes and brain functioning
- These alterations can affect how a person processes information, what they remember, and how they relay information
- Ignorance of the neurobiological effects of trauma can lead to misconceptions about how victims of sexual violence “act” or “should” act

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Example: Potential trauma effect

Complainant gives a specific description of a song that was playing in the background but cannot initially recall whether the respondent forced oral sex or intercourse first.

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Example: Potential trauma effect

During interview, complainant comments, “Maybe this is all a mistake, and I should drop the whole thing. . . . I just feel so stupid for taking a drink from a stranger. My friend got drugged, and I should have known better based on what happened to her.”

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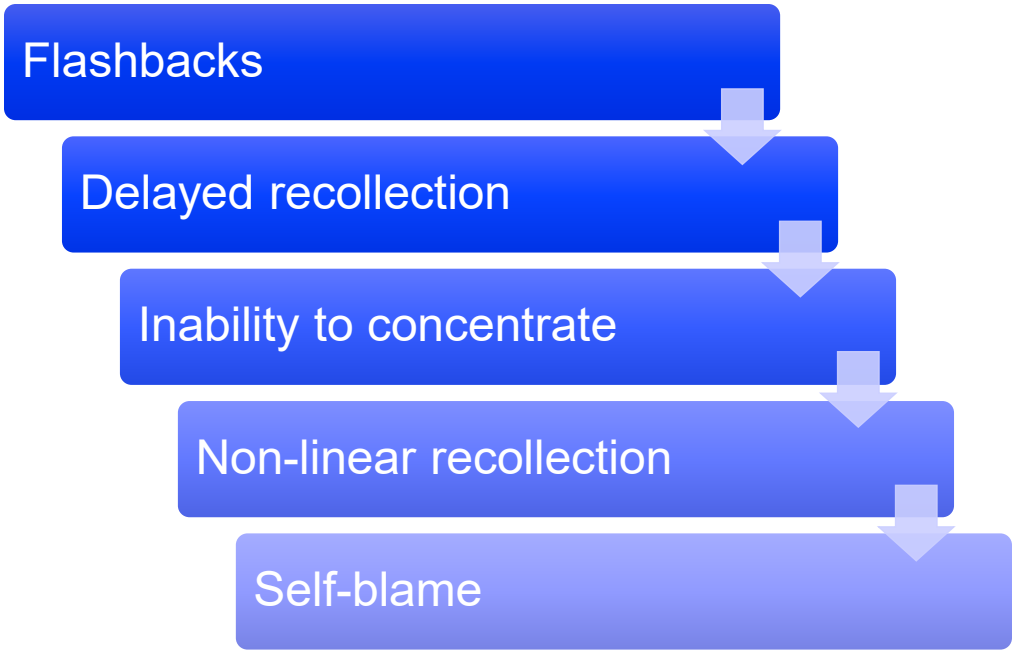
Possible Effects of Trauma

- People who have suffered trauma may experience any or a mix of:



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Trauma and Credibility

- Avoid making assumptions based on the way an individual delivers information
- Understand memory may be clarified in time
- Address inconsistencies

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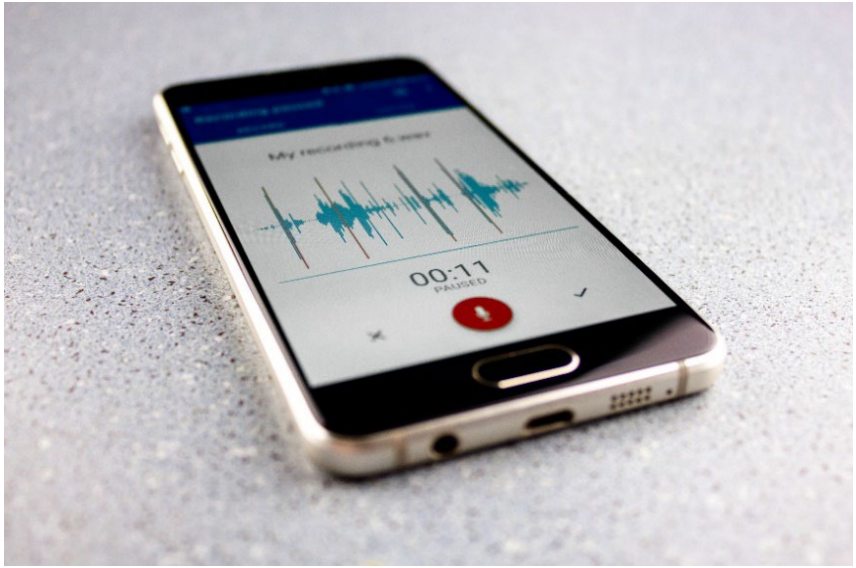
How do we make a record of the interview?

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



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Practical Point

Surreptitious recording of interviews and meetings is becoming increasingly common. Title IX investigators should assume that they are being recorded and conduct themselves with vigilance.

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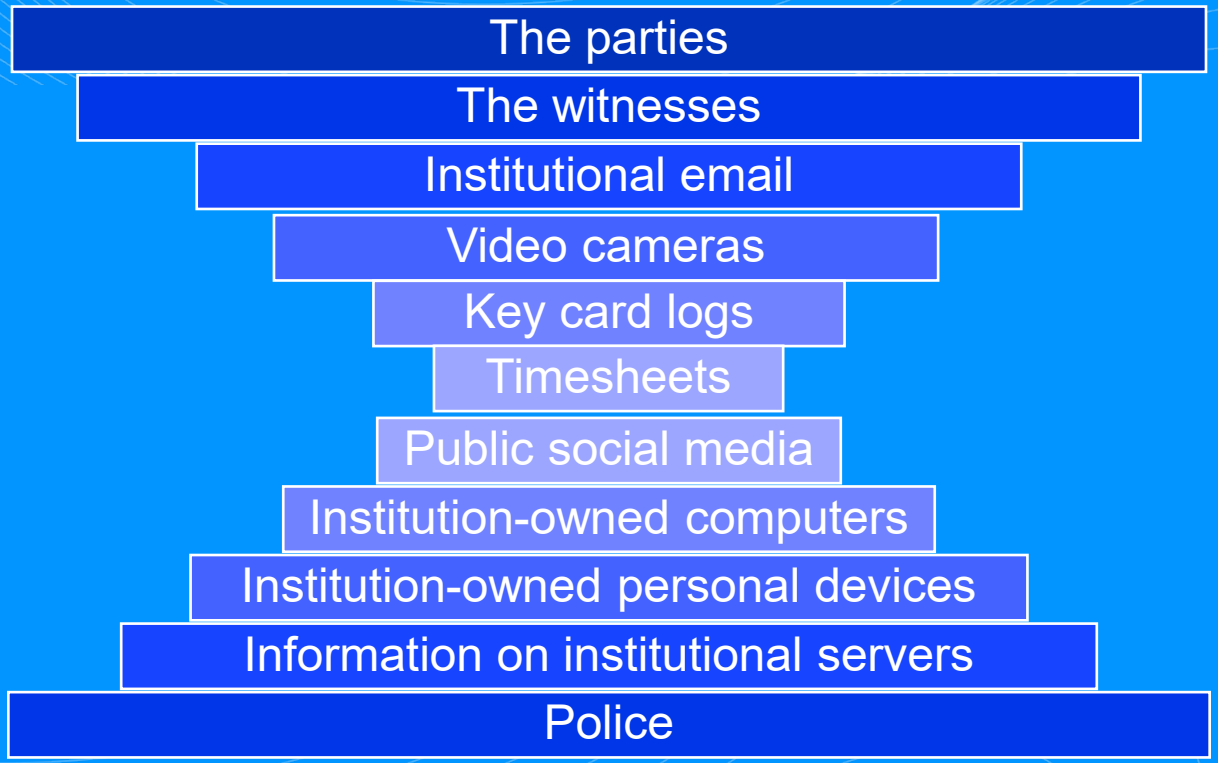
Example sources of non-testimonial evidence



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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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Example: Prohibited

Sally accuses Cade of forced oral sex. Cade wants to testify that Sally performed oral sex on all of Cade's friends and has joked openly that she loves performing oral sex.

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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: Permissible collection

Complainant executes a written HIPAA release authorizing a local hospital to disclose copies of her SANE examination and related medical records to the Title IX investigator.

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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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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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Questions for Discussion

Are there any techniques your institution uses to encourage parties to keep investigation materials confidential?

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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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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—Currently 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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Questions for Discussion

Does your institution have the investigator make a "recommendation" as to what the decision-maker should find?

What are the risks and benefits of having a recommendation?

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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: Advisor conduct

Complainant identifies their mother as an advisor. During the interview, mother attempts to conference call father and the family's attorney, repeatedly speaks for the complainant, criticizes the investigator's questions, and threatens to sue the school.

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Questions

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The Hearing

Module 9

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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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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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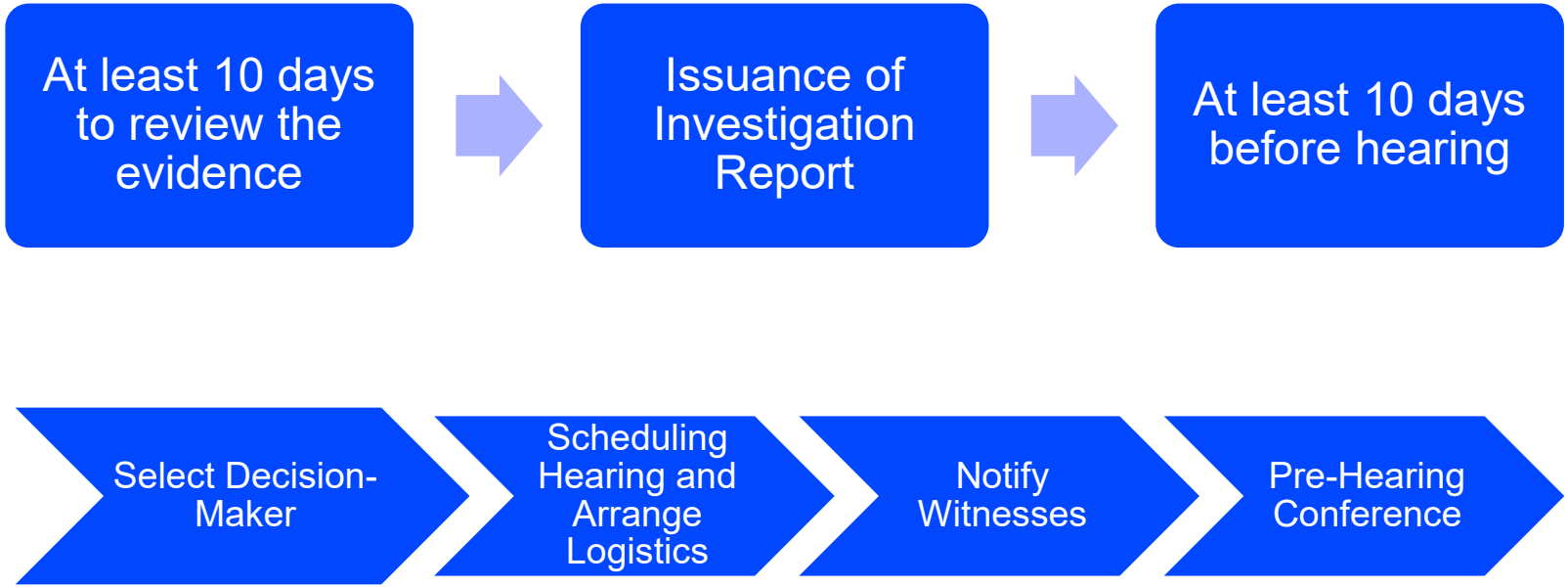

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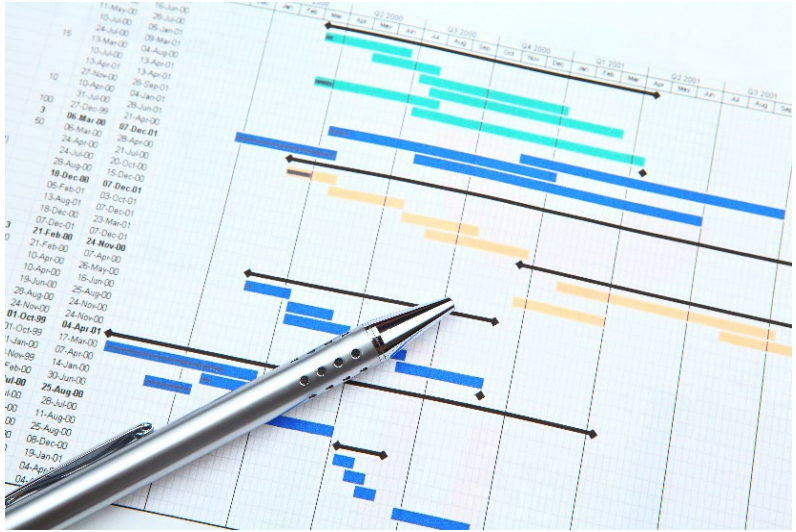
How do we schedule a hearing?



- 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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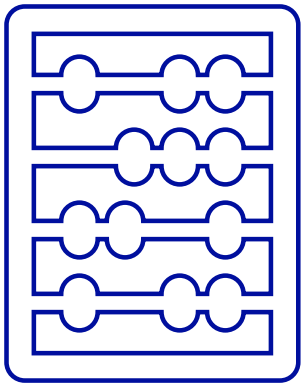
What are some key elements of a hearing?

- Live testimony from witnesses
- Contemporaneous questions from the decision-maker and cross-examination from the advisor for other party
- Decision-maker must screen all questions for relevance and intrusion into prohibited sexual history
- Hearing must be recorded or transcribed
- Steps to separate parties, if requested



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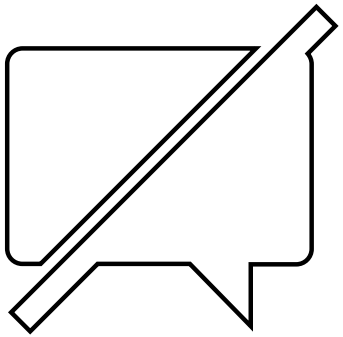
What about the "exclusionary" rule?



- Exclusionary rule contained in 2020 regulation is no longer enforceable
- Decision-maker may consider all statements, even if witness is not subject to cross-examination
- Decision-maker may consider the absence of cross-examination in assigning weight and credibility
- **Note**: Certain public institutions in certain jurisdictions may be required to enforce exclusionary rule as a matter of procedural due process

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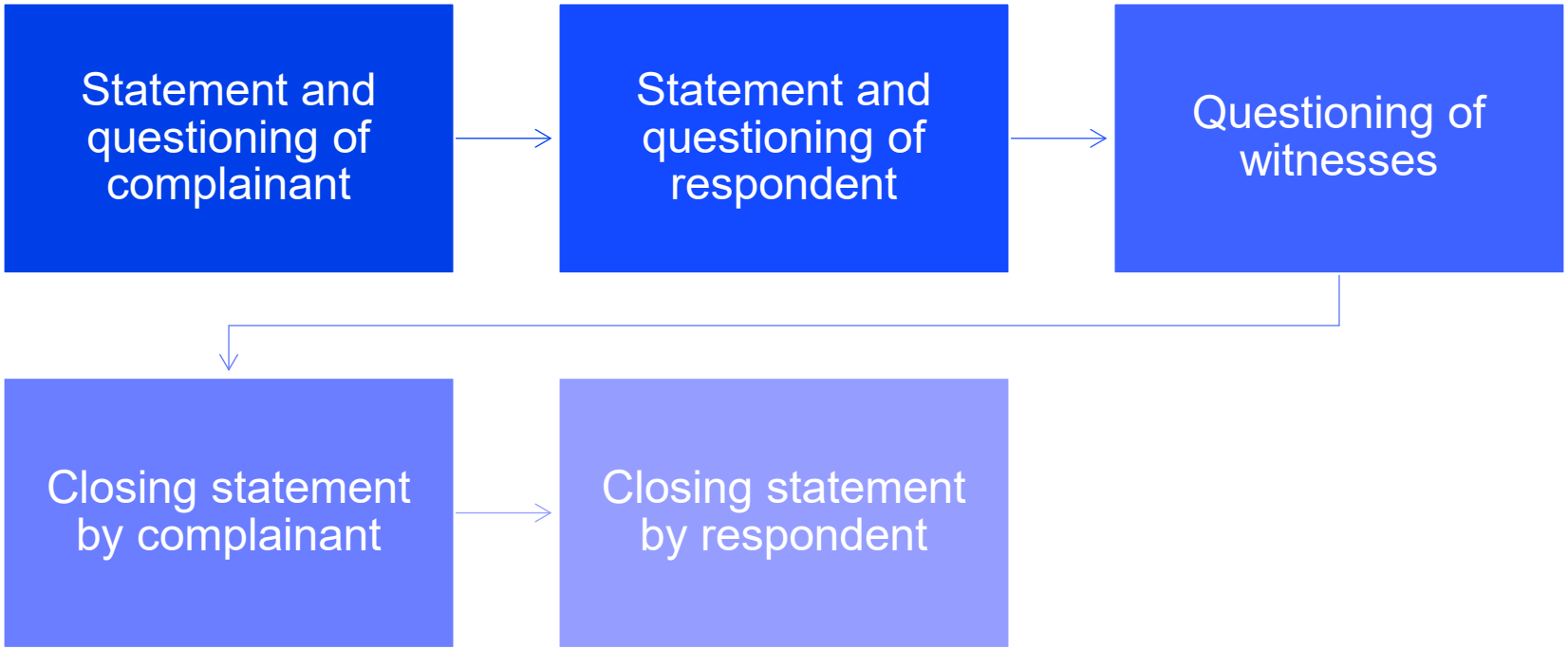
What is a potential hearing sequence?



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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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What is relevance?

Testimony or evidence is relevant if it has a tendency to make the existence of any fact more or less probable than it would be without the evidence and that fact is of consequence in determining the outcome of the matter.

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Scenario: Relevant?

Student A has accused Student B of stalking. Student B's advisor wants to question Student A about a text message Student A sent Student B shortly after Student B sent Student A flowers wherein Student A wrote, "I love the flowers. They make me feel so special!"

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Questions for Discussion

How does one determine relevance?

How does this information relate to the elements of stalking?

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Example: Not relevant

Student A has accused Student B of stalking. Student B's advisor wishes to question Student A regarding whether Student A previously accused Student C of sexual harassment, in an unrelated incident.

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Can we have standards of decorum for hearings?

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

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Scenario: Rules of decorum

Institution conducts all hearings using Zoom and requires all parties to turn on their cameras and mute their sound unless called upon. Parties who wish to speak must use the hand raise function. Parties are prohibited from gesturing in reaction to testimony.

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Questions for Discussion

What if you learn, after the hearing, that one of the parties had a video camera running off screen and recorded to the entire hearing?

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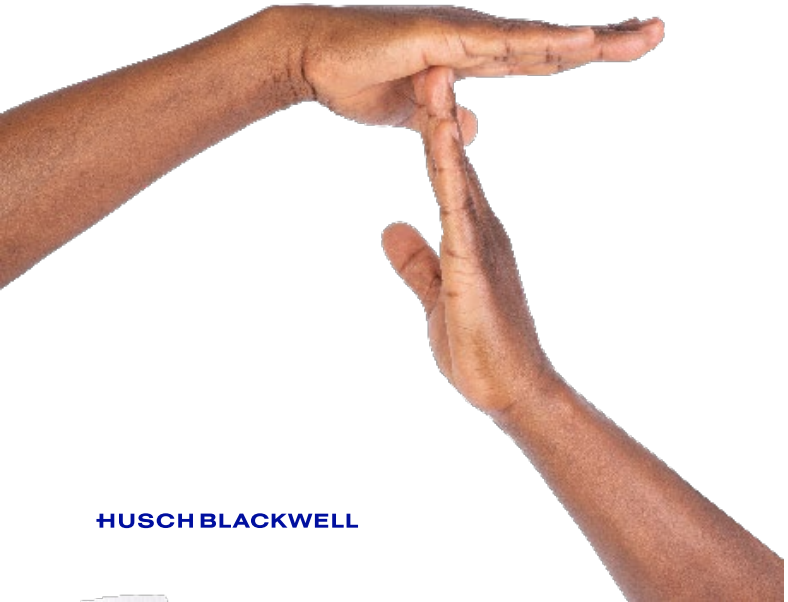
Can we delay or “continue” a hearing once it starts?



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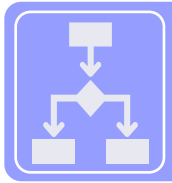
How do(es) the decision-maker(s) decide a case?

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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Assessment of credibility

- Factors (among others)
  - Plausibility—Is the testimony believable and does it make sense?
  - Specificity
  - Motive to falsify—Does the person have a reason to lie (other than mere status as party)?
  - Corroboration/consistency/contrary evidence—Is there testimony or evidence that corroborates the witness account? Are the witness accounts consistent? Are inconsistencies explained? Is there evidence disputing the witness account?
  - Past Record—Does the person have a history of similar behavior?

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What is the outline of a written decision?

- A written document, provided contemporaneously to the parties that:
  - Identifies the allegations of sexual harassment
  - Describes the various procedural steps taken from the time the formal complaint was made
  - States findings of facts supporting the determination
  - Reaches conclusions regarding application of relevant policy definitions to the facts
  - Includes a rationale for each finding for each allegation
  - States the disciplinary sanctions and remedies, if implicated by the determination made, and
  - Explains the procedures and grounds for appeal

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Who determines discipline and remediation?

- 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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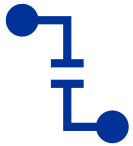
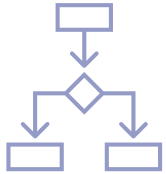
What are the grounds for appeal?

Title IX regulation requires the following permitted grounds for appeal:



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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Example: Appeal

Respondent appeals because the institution failed to provide an advisor for the hearing when respondent notified Title IX Coordinator he could not find or afford one. Respondent argues that effective cross-examination would have resulted in a different outcome.

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Example: Appeal ??

Respondent appeals because the institution failed to provide an attorney advisor for the hearing when respondent notified Title IX Coordinator he could not find or afford one. Respondent argues that the lay advisor the institution provided was not effective and an attorney would have done a better job and "secured an acquittal."

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Questions for Discussion

Has your institution had a case where it was required to provide an advisor for a party?

If so, how what type of advisor did you provide?

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Questions

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Informal Resolution and Other Processes

Module 10

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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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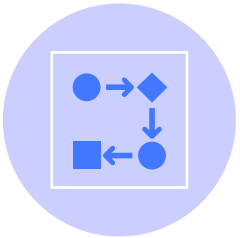
What are the key concepts of informal resolution?

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 informal resolution

A student files a formal complaint accusing their work supervisor of sexually harassing them by repeatedly telling sexual jokes and asking about the student's sex life. The supervisor proposes to apologize and undergo extensive training.

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Example: Permissible informal resolution

Student A accuses Student B of sexual harassment. Student B offers to have no contact with Student A, complete coursework remotely until graduating, and then never set foot on campus again.

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Questions for Discussion

What if a student files a complaint of sexual harassment against an employee and then strongly wants an informal resolution?

Are there any off ramps?

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What are some potential terms of informal resolution?

- Restrictions on contact
- Restrictions on a respondent's participation in certain activities or events
- Training or education
- Withdrawal or resignation
- Apology
- Negotiated discipline or sanctions
- Others?

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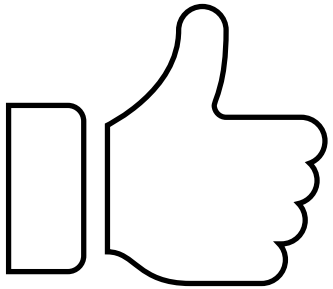
Must an institution allow informal resolution?

- Current regulations permit but do not require informal resolution



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Why approve informal resolution?

- Deference to the parties' wishes
- Often quicker and more efficient
- Removes uncertainty of outcome
- More flexibility and creativity than a disciplinary outcome
- Mitigates litigation risk (for everyone)
- Others?

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Why not approve informal resolution?

- Conduct is too severe or concerning
- Proposed terms are simply inadequate
- Undermines public confidence in Title IX compliance
- No confidence parties will abide by agreement
- Concern a party is being pressured or improperly influenced
- 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: Informal resolution detail

Two students at a small college agree “not to interact with each other while they are at the college.” What does “interact” mean? How will shared spaces be used? What if they are in the same class? What if they have the same friends?

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Example: Informal resolution detail

Student accused of stalking agrees to hire a counselor and follow the counselor's recommendations for treatment. What if the counselor fails to diagnose a condition? How will the counselor's recommendations be known? How will treatment be confirmed?

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Example: Informal resolution detail

Two employees agree to informal resolution in which Respondent will complete 20 hours of community service and retake the Title IX training course for students. Respondent only completes 12 hours and fails to take the course. What is the consequence?

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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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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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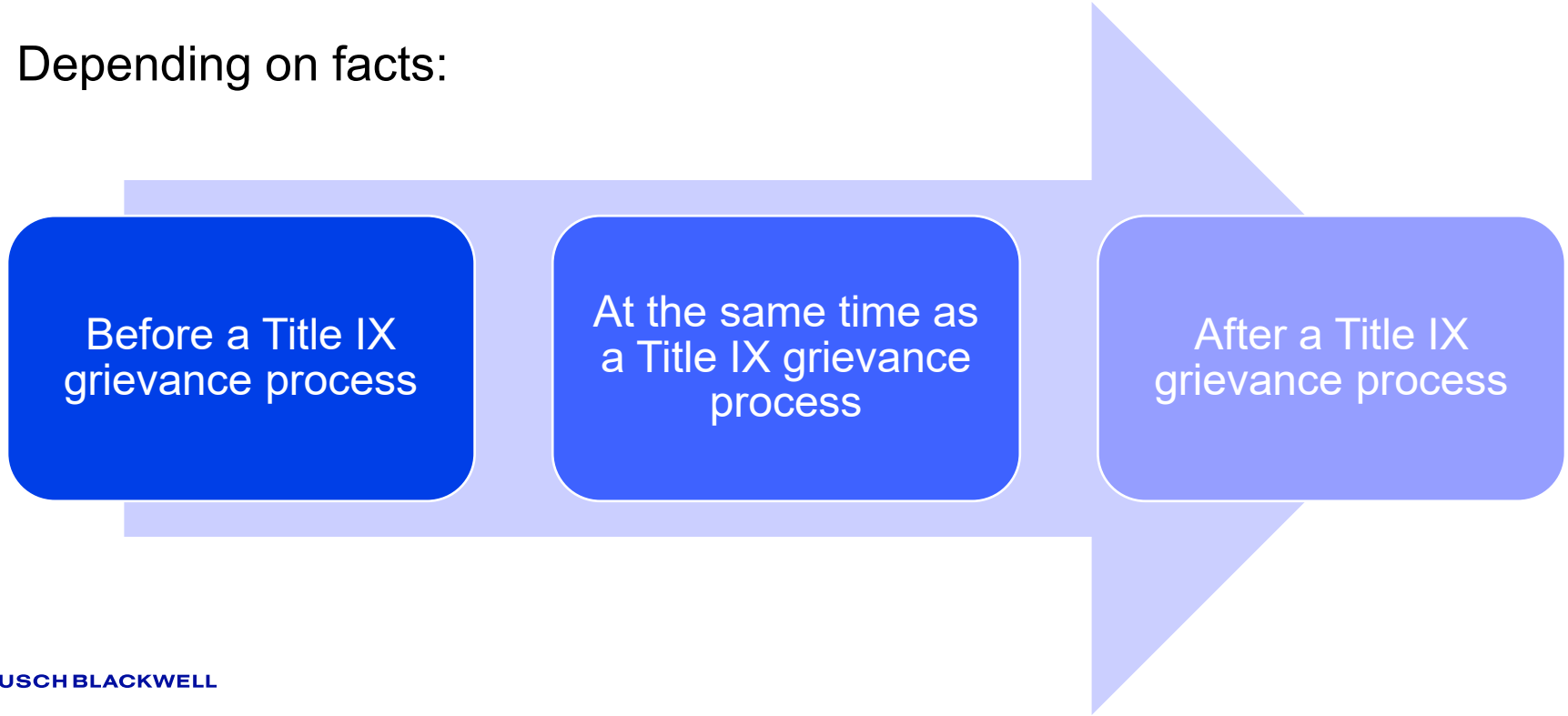
At what point can we use some other policy?

- Depending on facts:



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Example: Before Title IX

Student A accuses Student B of breaking into Student A's dorm room and stealing Student A's blue underwear. Suspecting that Student B might try something like this (because Student B is obsessed), Student A set a hidden camera and captured the entire incident on video, which indisputably shows Student B rifling through Student A's clothes and leaving with a pair of blue underwear.

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Example: During Title IX

Student A accuses Student B of sexually assaulting Student A after Student A become incapacitated from smoking potent marijuana in an on-campus apartment. During the Title IX interview, Student B admits to giving Student A potent marijuana but claims Student A was coherent and consented to sex. The institution is a private, religious college that strictly prohibits all drug distribution.

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Example: After Title IX

Faculty member accuses a Dean of quid pro quo by offering to "guarantee" faculty member a promotion to full professor in exchange for sexual favors. Dean denies ever making such an offer, and a hearing panel finds the quid pro quo allegation unsubstantiated. However, evidence at the hearing shows that faculty member and Dean exchanged dozens of sexual text messages and, in some of them, Dean described odd sexual fantasies.

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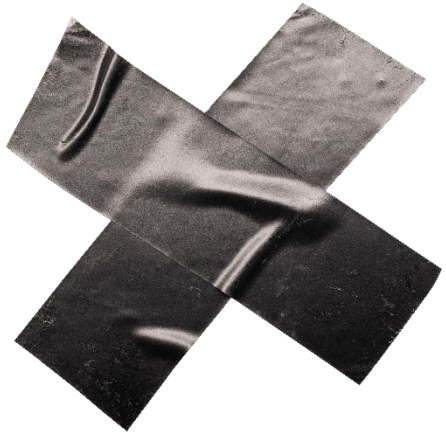
Can we use another process to make the same finding we would otherwise make under Title IX policy?

- 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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Gender Identity Update

Module 11

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Executive Order on Gender Identity 1/20/2025

- Sex is “not changeable” and refers to an “immutable biological classification”
- Agencies must enforce laws “governing sex-based rights” to “protect men and women as biologically distinct sexes”
- Agencies must remove all statements, regulations, guidance, etc. that “promote or otherwise inculcate gender ideology”

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Status of the 1/20/2025 Executive Order

- Executive order is subject to early injunctions in various contexts (e.g., prisons, gender-affirming care, government websites)
- Does not appear to be enjoined in its entirety vis-à-vis education contexts

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Executive Order on Women's Sports 2/5/2025

- ED will continue to comply with the vacatur of Biden-era regulations from E.D. Ky.
- Take action to affirmatively protect all-female athletic opportunities and all-female locker rooms, including through enforcement action
- Prioritize enforcement actions against institutions that deny female students an equal opportunity to participate in sports

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Caselaw is Mixed

- Several decisions hold that Title IX contemplates only a binary, biology-based definition of “sex”
- Several decisions hold that gender identity is included in the concept of “sex” for Title IX purposes
- Only the Supreme Court can resolve the split of judicial authority

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United States v. Skrmetti (U.S. 2025)

- Upholds Tennessee law restricting certain sex transition treatments for minors
- Restriction of such treatments is not subject to heightened scrutiny under the Equal Protection Clause because it does not classify based on gender identity
- Concurring opinion from Barrett says transgender status is not a “suspect class”
- Concurring opinion from Thomas criticizes “so-called expert consensus” on transition treatments
- Does not address Title IX specifically, but suggests wholesale application of *Bostock* to other gender identity scenarios is unlikely

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Idaho and West Virginia Sports Cases

- In 2025-2026, Supreme Court will review the legality of Idaho and Tennessee laws that restrict transgender women from participation on women's-designated sports teams
- Directly implicates the extent to which Title IX incorporates gender identity as a non-discrimination category
- Implicates constitutional analysis, outside the medical context, of state laws affecting transgender persons

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Example

A college has a women's league and men's league for intramural ultimate frisbee. Two transgender women play on a team in the women's league, and the team wins the league easily. No transgender men participate on any of the designated men's teams.

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Example

A classroom building is four floors tall and has a women's and men's restroom on each floor. The institution converts the women's restroom on the first floor into a multi-stall, gender-neutral bathroom, resulting in there being four men's restrooms, three women's restrooms, and one gender-neutral restroom in the building.

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Example

A university permits a transgender female to join the varsity women's volleyball team. The transgender female receives a starting position. All other members of the team identify as "biological" females.

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Examples of Investigations/Enforcement Actions

- Maine Department of Education, et al. (athletics participation)
- San Jose State University (athletics participation, volleyball)
- University of Pennsylvania (athletics participation, swimming)
- Denver Public Schools (restroom)
- Massachusetts Interscholastic Athletics Ass'n (athletics participation, basketball)

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Sex-Based Stereotyping

- Long recognized theory of sex discrimination under Title VII, Title IX, and other civil rights laws
- Current Administration appears to still acknowledge sex-based stereotyping as a viable form of harassment or discrimination *provided* sex is considered an immutable, biological category

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Example

A biological female who is in peak physical condition and an excellent cheerleader is denied a spot on the cheerleading squad because the student has “masculine” physical traits like short hair and broad shoulders and typically wears pants and baggy clothing instead of more “feminine” attire favored by other cheerleaders.

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Example

A biological male applies for an open faculty position in the Department of Gender Studies. While acknowledging his stellar academic credentials, the committee rejects the applicant because it believes the applicant will have trouble "relating to" and "interacting with" a predominantly female student body. One committee member writes on their notepad, "Dresses like a male parent from the insurance commercial . . . . Can't relate to women in this major . . . ."

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Example

A student is subjected to repeated jokes and epithets targeting the student for being gay, and an anti-gay slur is spray-painted on the student's car.

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Example

A gay student is subjected to repeated, explicit jokes and epithets referencing genitals and various sex acts the student is thought to have performed on other students. A graphic depiction of a same-sex scenario is drawn on the student's white board.

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Questions

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