



**HUSCH BLACKWELL**

# **Title IX and VAWA Training**

Creighton University Participants in Sexual  
Harassment Policy Process

Winter 2021



# Housekeeping

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

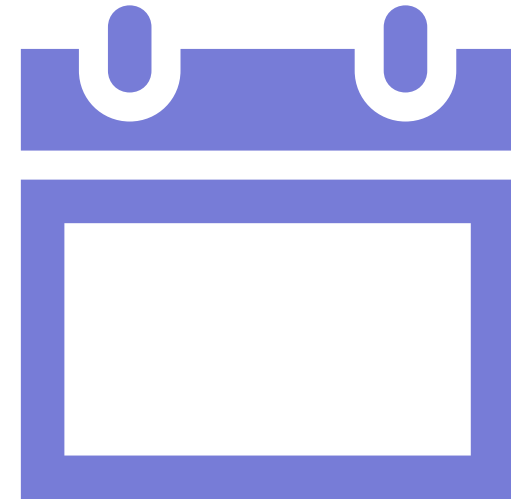
*This training is a component of the University’s comprehensive training program which includes other programming and live discussion.*



# Agenda



- Key Legal Principles and Considerations
- Applicable Policy Requirements
- Resolution Options and Case Processing
- Investigation and Key Issues
- Conflicts of Interest, Bias, and Stereotyping
- Investigative Issues
- Informal Resolutions & Confidentiality





# Goals

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- Understand
  - Title IX
  - New regulations
  - University policies
  - Mapping relevant policies
  - Identify issues for consideration

# Key Legal Principles & Considerations

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Module 1: Including scope, jurisdiction, and reporting

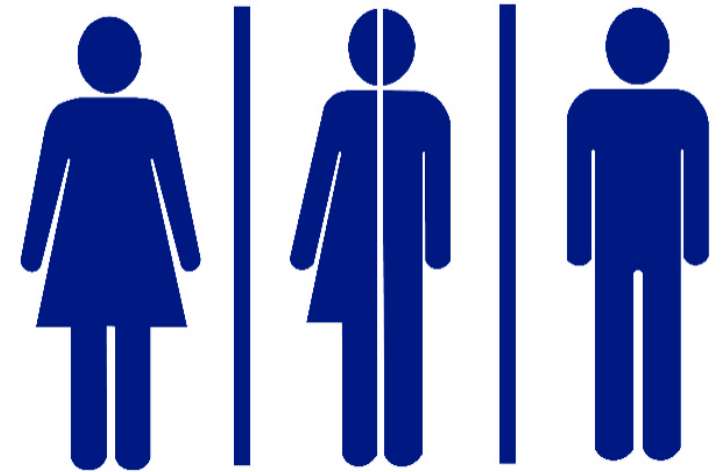


# What is Title IX?

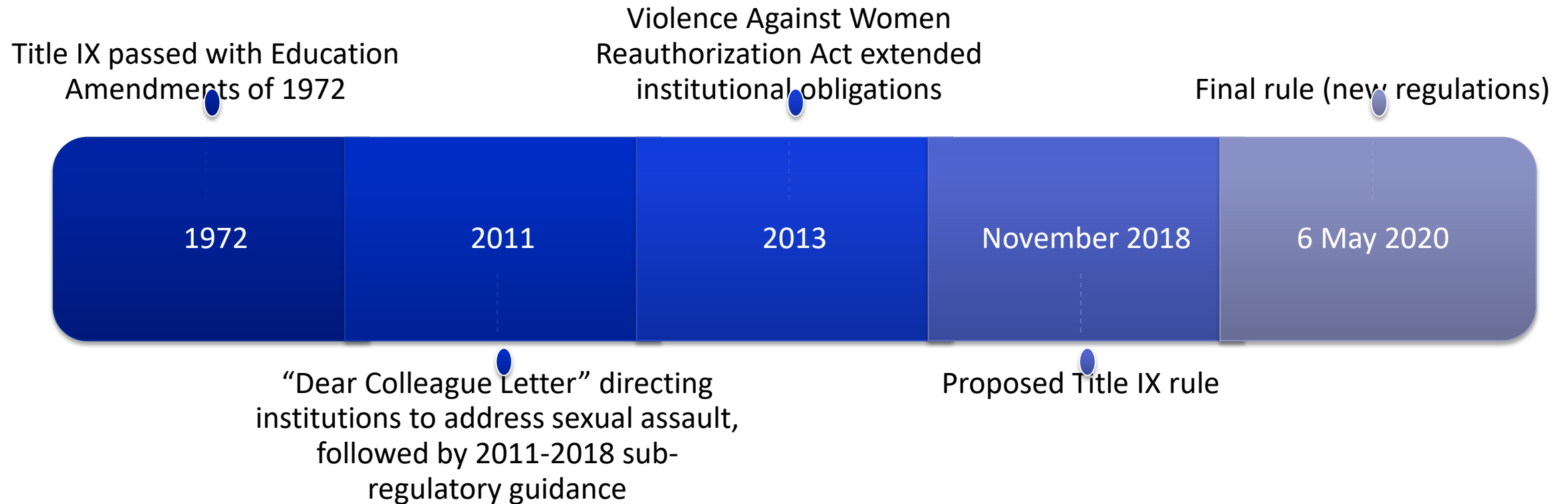
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“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

32 C.F.R. § 106.31



# Why are we talking about this now?





# When are the new regs effective?



- August 14, 2020
- Do not apply to Sexual Harassment that allegedly occurred prior to effective date
  - Assessed according to guidance and regulations in place at time alleged conduct occurred



# Examples of notable provisions

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

Added emphasis on equal rights of parties

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

Revised procedural parameters including

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

Live hearing including

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

# Poll question

- Does Title IX apply only to traditional educational entities (schools, colleges, universities, graduate schools)?
  - Yes
  - No



# Who does Title IX apply to?

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- Entities that receive federal financial assistance, including colleges and universities that participate in Title IV funding
  - Not individual persons
    - But institutions are required to adopt policies and procedures to implement Title IX that *do* apply to individual persons



# What sexual harassment does Title IX apply to?

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



# What are examples of education programs and activities?

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on campus

Sports teams

Work-study

Games, concerts, and speeches on-campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus

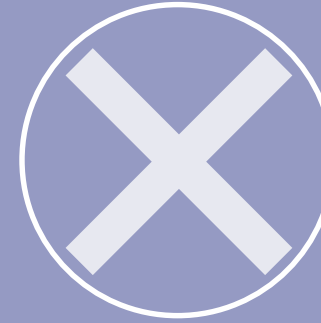
# Does Title IX apply to off-campus sexual harassment?



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



Yes, if the conduct at issue occurs in a house owned or controlled by an officially-recognized Greek organization or other student organization



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



# Example (included in EP&A)

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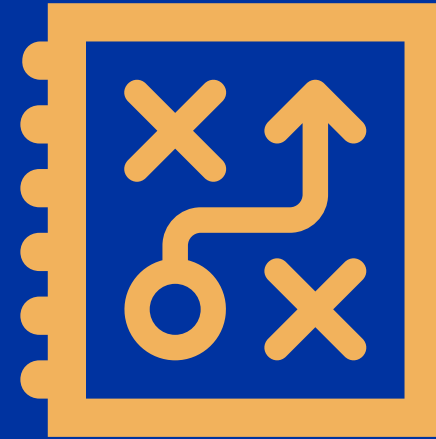
Student is sexually assaulted in a residence hall on-campus. The sexual assault occurs on a Saturday evening. The identity of the perpetrator is not immediately known.



# Example (included in EP&A)

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

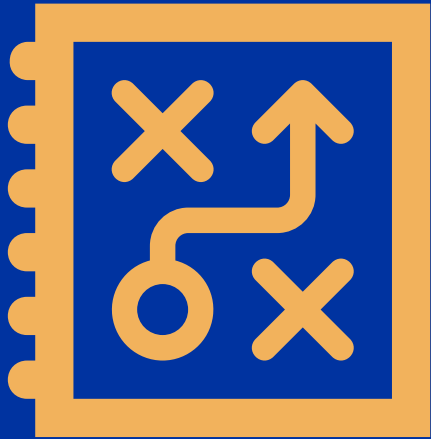






# Example (excluded from EP&A)

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During spring break, two students travel to another state and stay at an all-inclusive resort owned by a prominent hotel chain. The students booked the trip on their own for leisure purposes. While staying at the resort, one student sexually assaults the other student.



# Does Title IX apply to sexual harassment in other countries?

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- No – the Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- Other countries may have laws that govern sexual harassment





# Additional Legal Considerations

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# The Clery Act

- The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 U.S.C. section 1092(f)), a federal law that requires institutions such as Creighton University to collect and publish statistics for certain crimes reported to have occurred on the university's "Clery Geography" (i.e., occurring on campus, on public property within or immediately adjacent to campus, and on other non-campus university property), for the purpose of informing current and prospective students, faculty or staff.



## **Additional Legal Considerations: Violence Against Women Reauthorization Act of 2013**

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- Codification of Title IX principles
- Sexual misconduct policy
- Statements of rights and options
- Support persons
- Training

# Applicable disabilities statutes



- The Americans With Disabilities Act
- Section 504 of the Rehabilitation Act



# Section 504 of the Rehabilitation Act

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



# ADA—Title II

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- Title II: Prohibits disability discrimination by public entities
- “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity”
- A public entity’s programs, activities, and services, viewed in their entirety, must be readily accessible to, and usable by, persons with disabilities





# ADA—Title III

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



# FERPA

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- *Addressed in Confidentiality Section*



# **Standard of Evidence**

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## Legal Standard

Preponderance of the evidence

=

“more likely than not”



*CU Updated Policy*

## Creighton Language:

- “The Title IX Coordinator will make a determination of responsibility using the ***preponderance standard of evidence*** standard.”



# Reporting Requirements

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# Reporting of prohibited conduct

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- The University ***requires*** all faculty and staff with supervisory or leadership responsibilities, or responsibilities related to student welfare as mandatory reporters and are required to report incidents of harassment, discrimination, sexual and/or relationship misconduct to the Office of Equity and Inclusion.
- Student employees, in the administration of their job duties, ***are also considered*** mandatory reporters.
- All other individuals are ***strongly encouraged*** to report concerning behaviors, harassment, discrimination, sexual misconduct, relationship misconduct and crimes.



# Mandatory Reporting Exceptions

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- These individuals are not required to be mandatory reporters but are considered ***voluntary reporters***:
  - The Associate Director for Prevention, Education and Inclusion who serves as a confidential advocate for students, faculty and staff in relation to this policy
  - On-campus licensed professional counselors and staff
  - On-campus health service providers and staff
  - Clergy members during the rite of confession
  - Faculty or staff who are closely related (e.g. sibling, parent, guardian, grandparent or spouse) to the person experiencing or reporting an incident





# Confidential Resources

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## ***On campus:***

- The Violence Intervention and Prevention Center (VIP)
- The Office of Equity and Inclusion (OEI)
- Student Counseling Services
- Employee Assistance Program

## ***Off campus:***

- Women's Center for Advancement

# Applicable Policy Requirements

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Module 2: Including key terms, definitions & retaliation



# **Purpose of Policy**

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## **Creighton University works to:**

- Provide a workplace and an educational environment, as well as other education programs, and activities, that are free from discrimination, harassment and retaliation

## **To affirm its commitment to promoting the goals of fairness and equity...**

- Creighton University has developed internal policies and procedures that provide a prompt, fair and impartial process for those involved in an allegation of harassment, discrimination, and/or retaliation



# Purpose of Policy

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*CU Updated Policy*

- The purpose of this policy is:
  - To communicate processes for investigating complaints in a manner that is fair, equitable, and reasonably protects the privacy of individuals in situations of harassment, discrimination, and/or retaliation;
  - To enable Creighton University in its efforts to provide a workplace and educational environment, as well as other benefits, programs, and activities, that are free from discrimination;
  - To promote compliance with federal and state civil rights laws;
  - To set forth guidance for preventing harassment, discrimination, and/or retaliation;
  - To enable Creighton University in its efforts to take timely corrective action when harassment, discrimination, and/or retaliation is alleged to have occurred; and
  - To establish a consistent process.



# Scope of Policy

- Creighton's policy applies to all faculty, staff and students of the University community.
- Individuals with a faculty appointment, vendors, independent contractors, and others subject to agreement with the University will be expected to comply with this policy



# Reach of Policy

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- The policy applies to all incidents of alleged Harassment, Discrimination and Retaliation as defined by this policy, including incidents which occur off campus or outside of normal work, class, or business hours.
- Creighton may extend jurisdiction to off-campus and/or online conduct when the University determines that the conduct affects a substantial University interest.
- This includes:
  - Any action that constitutes a criminal offense as defined by law. This includes but is not limited to, single or repeat violations of any local, state or federal law;
  - Any situation that in which it is determined that the Respondent poses an immediate threat to the physical health or safety of any student or other individual;
  - Any situation that significantly impinges upon the rights, property, or achievements of oneself or others or significantly breaches the peace and/or causes social disorder; and/or
  - Any situation that is detrimental to the educational interests or mission of Creighton University.



# Creighton's Designated Title IX & Non-Title IX Conduct

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*CU Updated Policy*

- This Policy also applies to incidents of:
  - Sexual Assault;
  - Dating Violence;
  - Domestic Violence; and
  - Stalking.

# What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo  
harassment

Hostile environment  
harassment

Sexual  
assault

Relationship  
violence

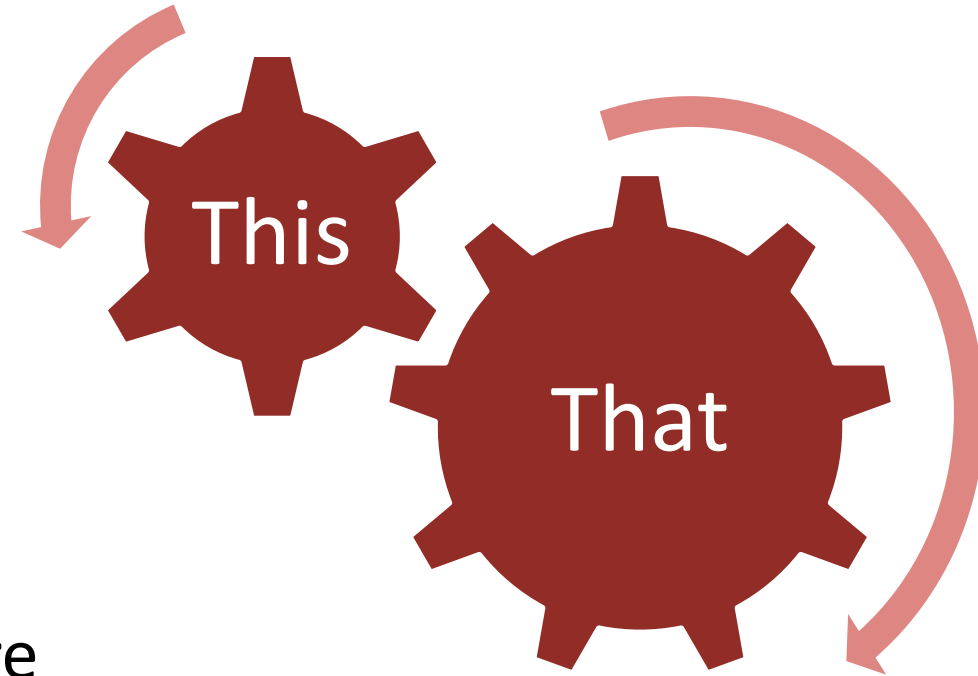
Stalking





# What is quid pro quo?

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





# Example of quid pro quo

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

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



# Another example of quid pro quo

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

# Poll question

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



# What is hostile environment?

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





# How do we determine if a hostile environment exists?

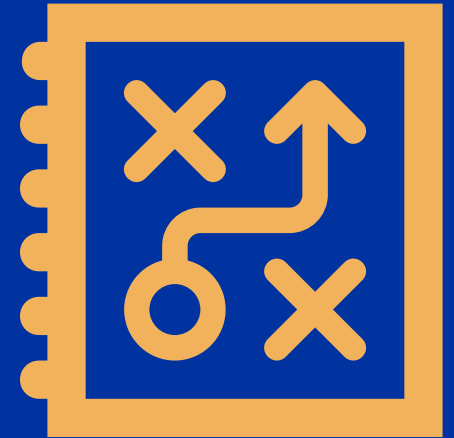
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- Consider all the facts and circumstances, such as:
  - The type of misconduct
  - The frequency of the misconduct
  - Where the misconduct occurs
  - Whether a power differential exists, etc.
- From the perspective of a reasonable person



# Example of hostile environment

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





# Another example of hostile environment

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

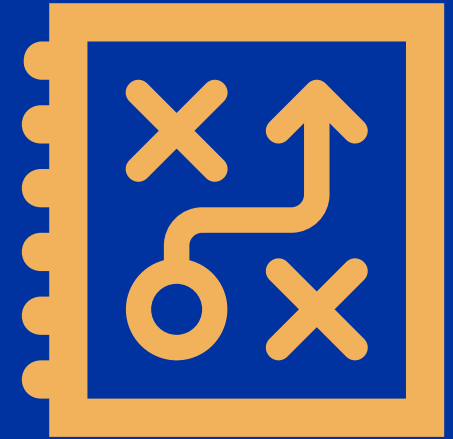




# Another example of hostile environment

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





# Does the First Amendment matter?



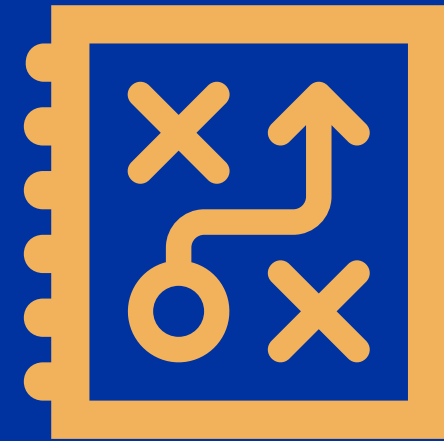
- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment



# Example (not-hostile environment)

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Vocal student actively supports a prominent political candidate who has been accused of sexually harassing campaign staffers. Offended student files a complaint that Vocal student's political support of the candidate has caused a sexually hostile environment on campus.





# What is sexual assault?

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

Rape

Sodomy

Sexual assault  
with an object

Fondling

Incest



# What is rape?

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



# What is consent?

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



# What is incapacity?

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





# Example (incapacitated)

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







# Example (not-incapacitated)



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



# What is sodomy?

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



# What is sexual assault with an object?

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



# What is fondling?

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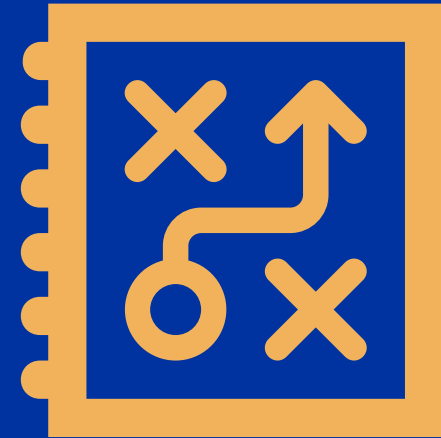
Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



# Example of fondling

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





# What is incest?

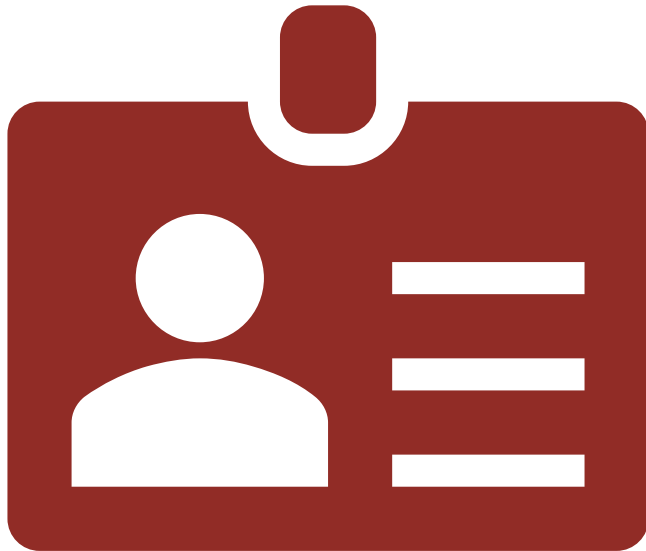
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Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

# Poll question

- What is the age under which no one is considered able to consent to sexual activity in your state?

# What is statutory rape?



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





# What is domestic violence?

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



# What is dating violence?

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“Dating Violence” is :

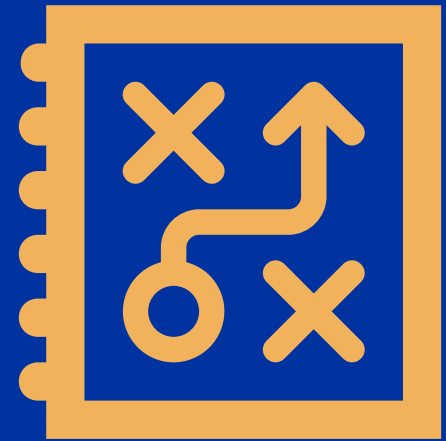
- Actual, attempted or threatened violence by one individual against another individual with whom they are, or have been, in a social relationship of a romantic or intimate nature; or
- Conduct that would constitute a felony or misdemeanor crime of violence by an individual against:
  - A current or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



# Example of dating violence

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





# What is stalking?

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

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





# Example of stalking

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

The logo is a white graphic on a blue background, composed of three stacked elements: a stylized 'm' at the top, a vertical bar in the middle, and a stylized 'T' at the bottom.

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# **Retaliation**

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# Does Title IX also prohibit retaliation?

Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any *individual* for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy (34 C.F.R. § 106.71)



# What is Retaliation?

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- **Retaliation** is an intentional, adverse action taken against a person for making a report of alleged policy violations or for participating in any proceeding under this policy
  - Retaliation can be committed by or directed toward any individual or group, not just the reporting and responding parties
- An **Adverse Action** is any conduct that seeks to discourage, threaten, intimidate, harass, or coerce an individual from engaging in activity protected under this policy





# University Response

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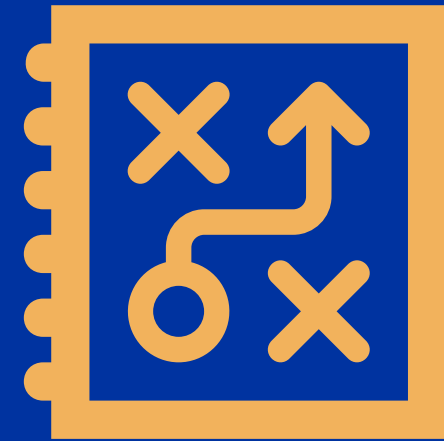
- “In accordance with its history, mission, and credo, Creighton University believes that each individual should be treated with respect and dignity and that any form of harassment, discrimination, and/or retaliation is a violation of human dignity.”
- “The University condemns and prohibits these and will take all reasonable efforts to prevent such conduct and promptly address conduct found to be in violation of this policy”



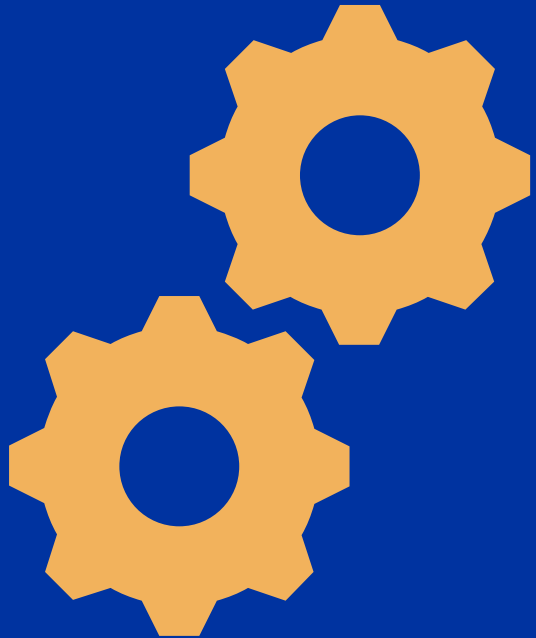
# Example of retaliation

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Groundskeeper testifies at hearing in support of Office Worker's complaint of sexual harassment against Manager. After institution finds that Manager sexually harassed Office Worker, Manager demotes Groundskeeper to punish Groundskeeper for testifying against Manager.



## Group Scenario



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

# Questions





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# Resolution Options & Case Processing

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Module 3: Including Title VII; Response; Supportive Measures; Interim Removals; Bias, Stereotyping & Conflicts

# Examples of Policies with Related Concepts

## Discrimination

- Sexual Harassment
- Other non-discrimination statement & policies

## Relationships

- Workplace
- Employee - student

## Conduct

- Student
- Faculty/Employee

## Discipline

- Student
- Faculty
- Employee



# Understand Title IX and Title VII Procedures

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

# How do Title IX and Title VII standards compare?

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

## Title VII Sexual Harassment

Quid pro quo

Sufficiently severe  
or pervasive

## Title IX Sexual Harassment

Any quid pro quo by  
employee

Unwelcome and  
Sufficiently severe  
and pervasive and  
objectively  
offensive

Any sexual  
assault/DV  
/stalking



# Title VII Sexual Harassment Standard

- Sexual Harassment under Title VII includes:

Hostile environment

Unwelcome subjectively  
and objectively

“severe OR pervasive”

Similar conduct as at  
issue under Title IX

*Quid Pro Quo*

Sexual Violence  
(e.g. assault)



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

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

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



# More From Preamble

- “These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires. Accordingly, recipients may proactively address conduct prohibited under Title VII, when the conduct does not meet the definition of sexual harassment in § 106.30, under the recipient’s own code of conduct, as these final regulations apply only to sexual harassment as defined in § 106.30.”
- “These final regulations do not preclude a recipients’ obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations.”

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

# Example of typical “Title VII” process

Complaint to manager, HR,  
ethics line, etc.

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

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

# Comparison

## Common Title VII Response

Resolution by internal investigation

Formal or informal complaint

Advisor silent supporter

Resolution does not require active complainant

May or may not result in formal report

## Title IX Regs/Requirements

Discipline requires regimented investigation & hearing process

Formal complaint only

Advisor entitled to participate

Need participating complainant

Requires formal report & other documentation



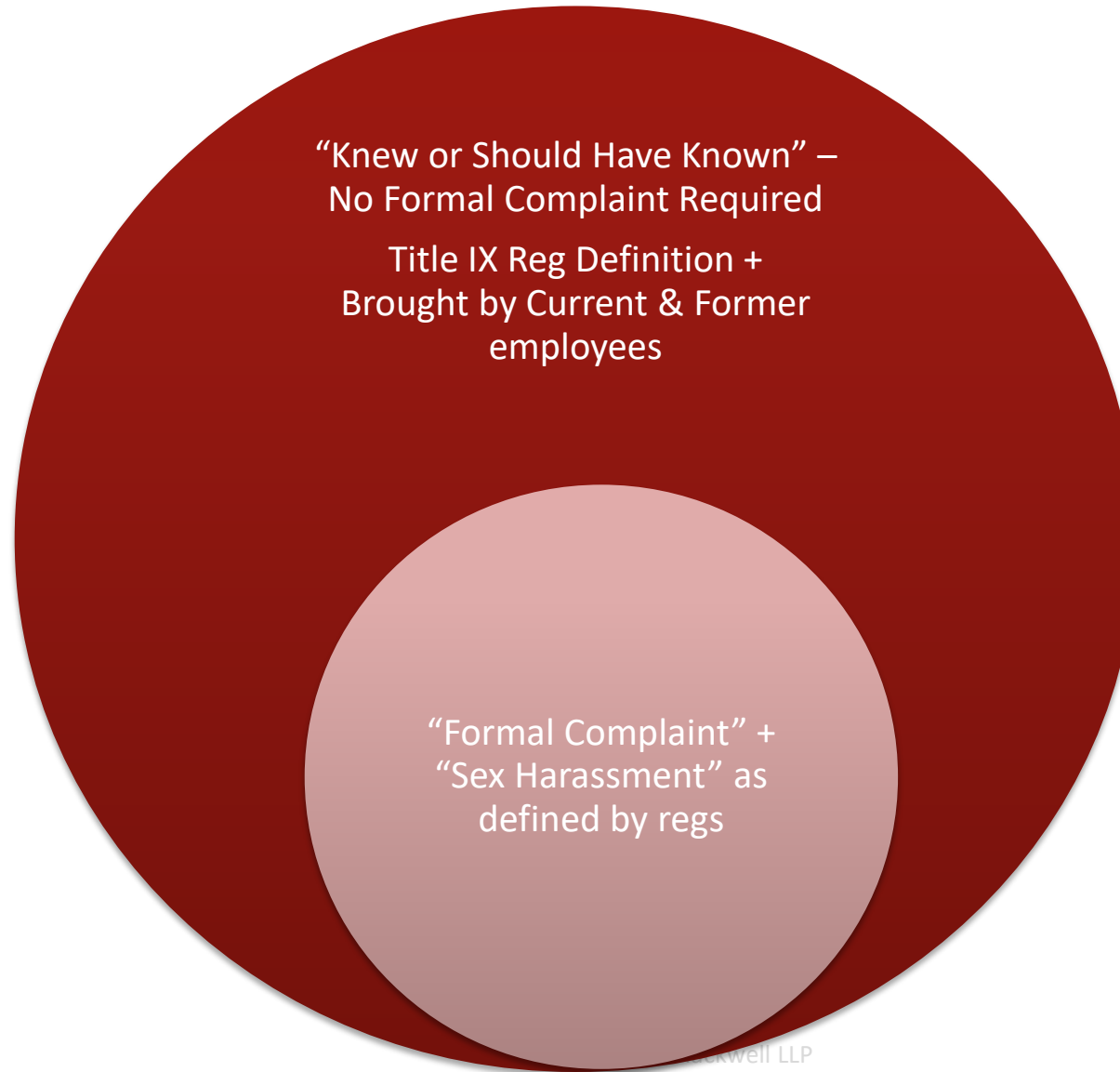
# What triggers an employer's liability for sexual harassment under Title VII?

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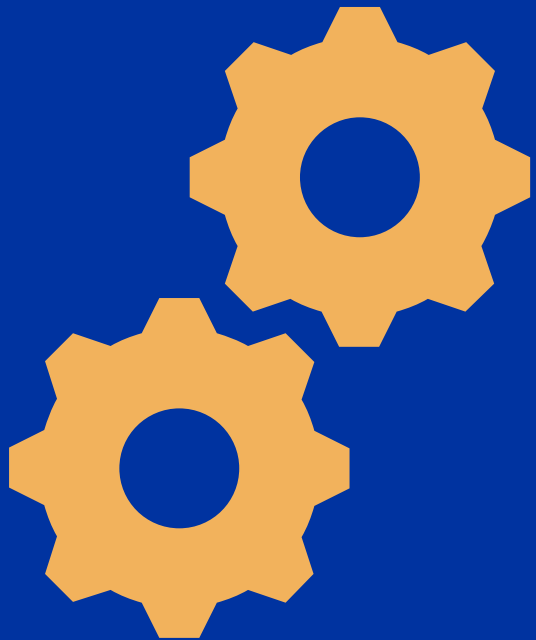
- ✓ An employer, its agent, or its supervisor
- ✓ Knew or should have known
- ✓ About severe **OR** pervasive sexual harassment
- ✓ That a reasonable person would consider intimidating, hostile, or abusive
- ✓ By an employee or non-employee over which it has control and
- ✓ Failed to take appropriate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

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

# What Triggers Obligations for VII vs. IX?



## Group Scenario



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



# Questions





# Categories

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1. VII obligations but no IX obligations (no need to follow IX policies)
  - Should have known of discrimination but no formal complaint
  - Discrimination does not meet IX definition of SH
  - Complainant no longer employed or a student
2. Twin VII and IX obligations
  - Quid pro quo, “severe and pervasive,” VAWA crimes
  - ***Complainant currently employed or a student***
  - Formal complaint



## Example (overlapping policies)

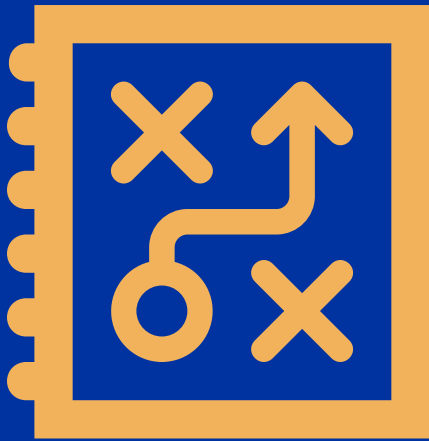
- Employee reports that Dean repeatedly sexually touched Employee and that this sexual touching was witnessed by Dean's Administrative Assistant.
- HR interviews Assistant who confirms that Dean has repeatedly touched Employee in a sexual and unwelcomed way. Assistant does not want to get involved and will not participate in any sort of hearing. Employee also refuses to participate in any hearing.
- How should HR respond in satisfying obligations under VII and IX?





## Example (overlapping policies)

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- Finance office employee claims Supervisor is subjecting employee to pervasive and severe racial and sex harassment.
- Finance office administrator corroborates the claim.
- How should institution respond in satisfying obligations under VII and IX?



# Issues to keep in mind

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- “Me Too” complaints – often historic issues
- Clarify nature of sexual harassment allegations as much as possible at the outset of a case to determine which procedures apply
- In absence of “formal complaint,” usually apply Title VII procedures (unless Title IX Coordinator files one)
- Understand potential “transition points” between procedures

# Potential transition points

Allegation that appeared to be “AND,” when explained more completely, is only “severe OR pervasive” as to hostile environment

Dismissal of Title IX complaint (for any reason)

Formal Complaint withdrawn

Respondent leaves institution

Investigation reveals only “off-campus” conduct

Key witness/party does not testify at hearing

“No responsibility” finding

# Questions



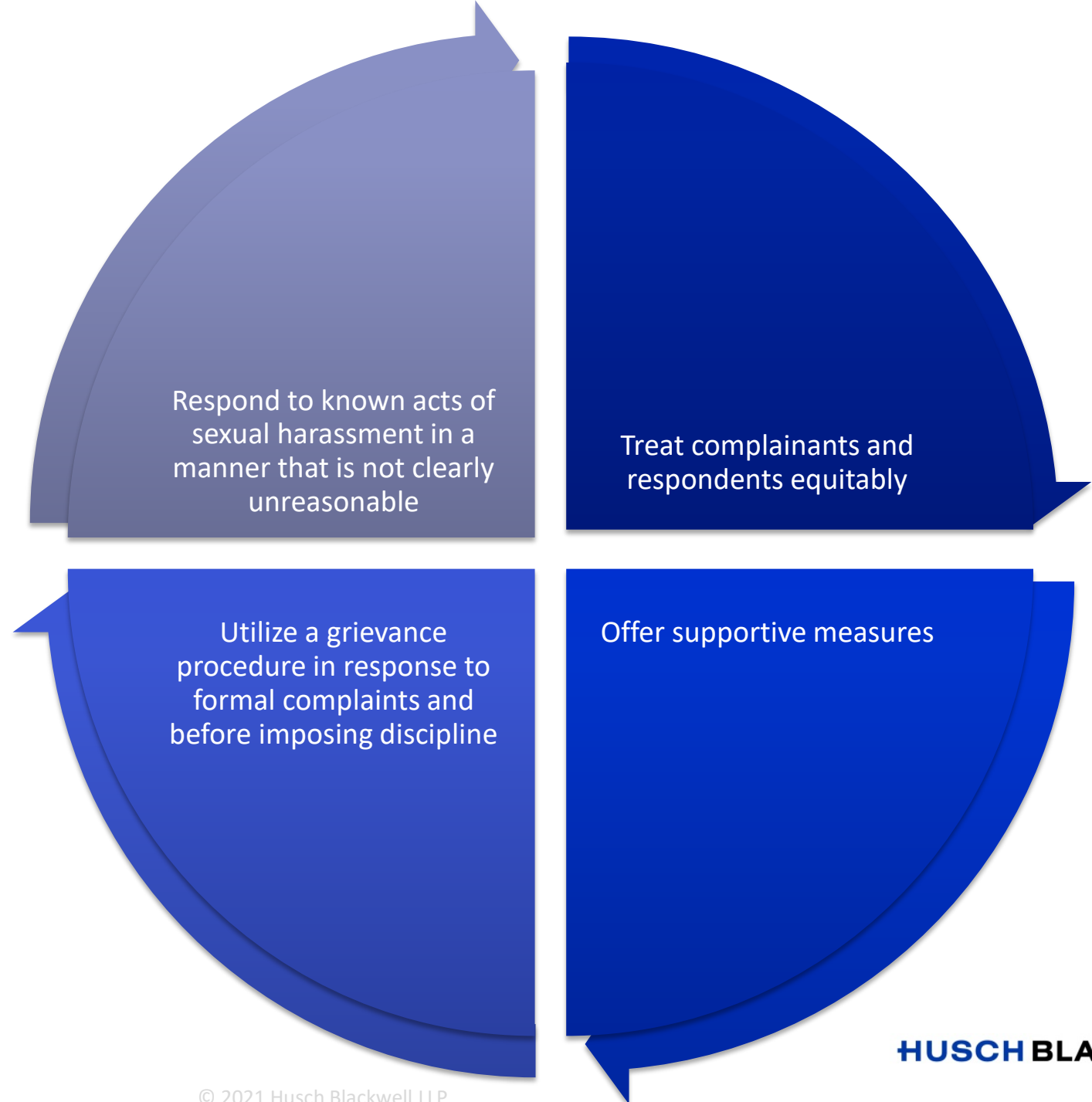


# **Institutional Response to Sexual Harassment**

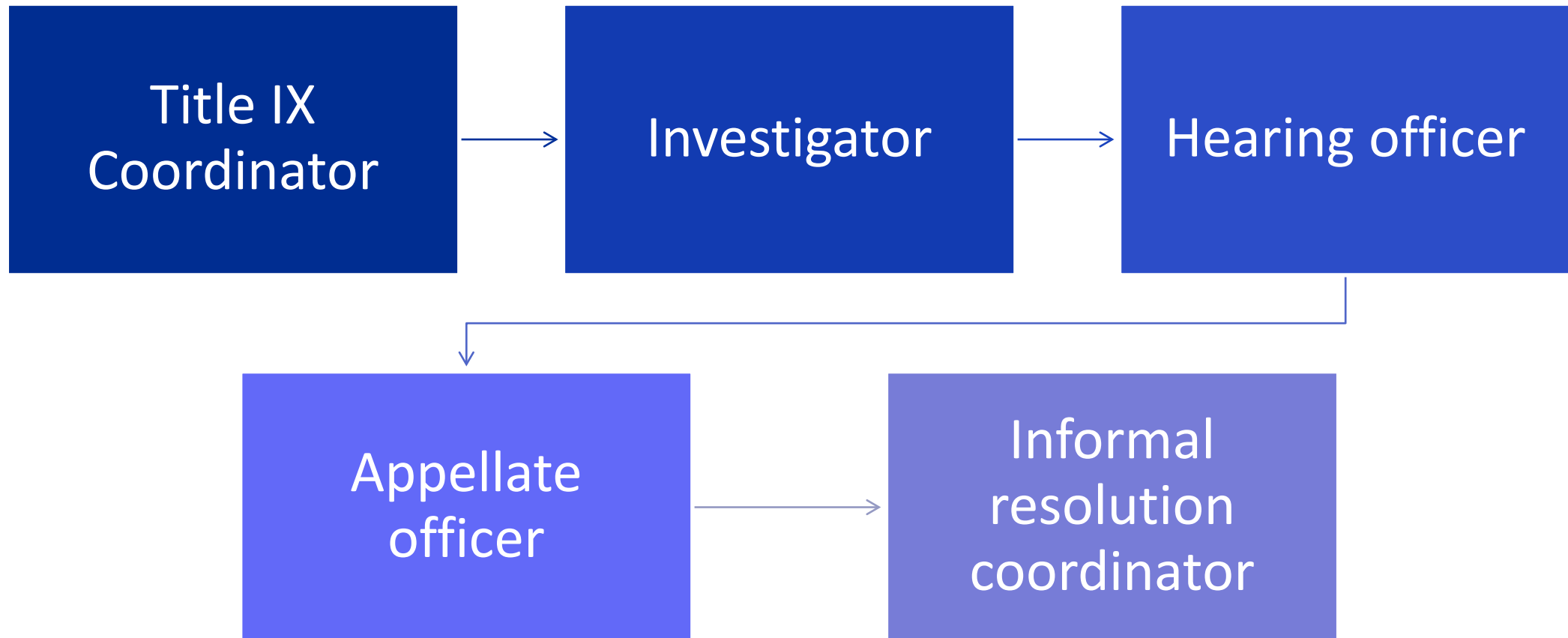
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# What are the institution's overall duties?



# Who are the key institutional actors in the grievance process?





# Defining what is adequate, reliable, and impartial process

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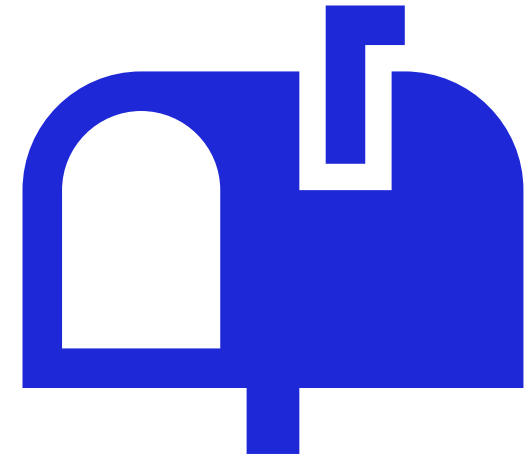
- 34 CFR 106.8(b) requires recipients to “adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints” of sex discrimination under Title IX.
- “Prompt and equitable grievance procedures” in the regulation means investigations of sexual harassment allegations that provide for “Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.”



# How does an institution get notice of sexual harassment?

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





# What is “actual knowledge”?

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- “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



# 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



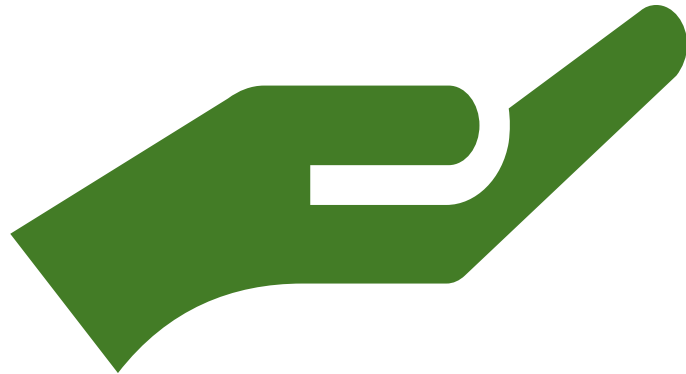
# What if we can't identify the alleged victim from a report?

- 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



# What are supportive measures?

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



# Examples of supportive measures



Counseling



Academic accommodations



Housing accommodations



Security escorts



Leave of absence



Increased security or monitoring



Modified work schedules



Mutual no-contact order where implicated by facts



# Examples of Supportive Measures under Creighton's Policy

*CU Updated Policy*

- Supportive measures may include:
  - Academic Accommodations
  - Housing Accommodations
  - Employment Accommodations
  - Care and Support (e.g. Referral to EAP, facilitating assistance for an individual to obtain medical, healthcare, advocacy and therapy services)
  - Community Education
  - Safety Planning
  - Student Financial Aid Counseling
  - Visa and Immigration Assistance
  - University Referrals
  - Other (e.g. Campus Ban and bar orders, any other actions deemed appropriate by the Office of Equity and Inclusion or Campus Administrator)

**HUSCH BLACKWELL**



# **Notice of Supportive Measures**

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- Complainants and Respondents have the ability to request Supportive Measures from the University.
- Supportive Measures are enacted if they are reasonable and can assist an individual in benefitting from or participating in Creighton's educational programs and activities.



# **Interim Removals**

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# Interim Removal Considerations for Students

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*CU Updated Policy*

- Under the Creighton Policy, the Office of Equity and Inclusion ***reserves the right*** to take any action necessary with respect to a student, staff, or faculty member (including removal from campus) pending the outcome of a preliminary inquiry or formal investigative process.
  - ***For Students:*** The Title IX Coordinator may consult with the Vice Provost for Student Life to implement any such interim measure impacting a student
  - ***For Faculty:*** The Title IX Coordinator may consult with Human Resources, the Provost's Office and the Academic Dean's office to implement any such interim measure impacting a faculty or staff member

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# Can we utilize interim removals or suspensions for students?

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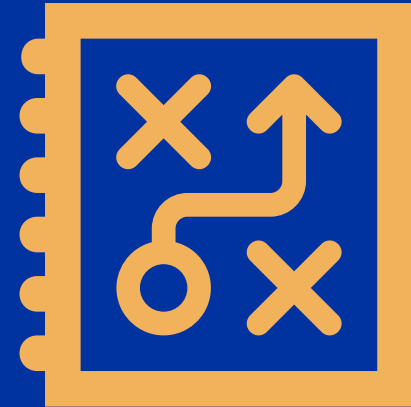
- Students may be removed on a temporary basis only if:
  - Individualized safety and risk analysis
  - Determines that an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
  - Student is given immediate notice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



# Example of immediate threat to physical health or safety

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History student is reported to have raped Sociology student at gunpoint. Police engage in hot pursuit and apprehend Historian attempting to flee campus. When apprehended, Historian is found in possession of a loaded and unregistered firearm.





# Example of no immediate threat to physical health or safety

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





# Can we place employees on administrative leave?

- Yes – employee respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies (i.e., Faculty Handbook)



# Processing Complaints

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# What is a formal complaint?

## What

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

## Who

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

## How

- Either physical or electronic submission



# When may the Title IX Coordinator file a formal complaint?

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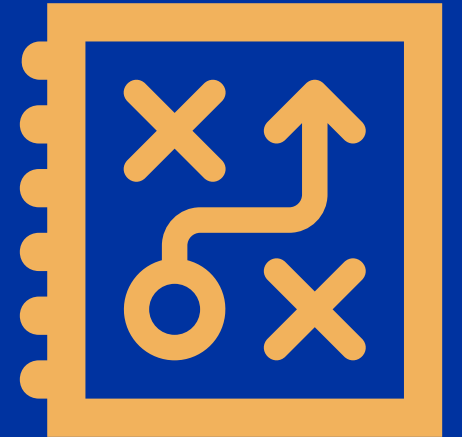
- Typically when there is an important institutional interest in adjudicating a report irrespective of the alleged victim's wishes
- Typically involves serious misconduct, repeated misconduct, or misconduct by employees
- If alleged victim does not wish to file a formal complaint, Title IX Coordinator's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



# Example of T9 Coordinator formal complaint

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Two student members of separate Greek organizations (GGG and PPP) each separately report they were sexually assaulted by a member of Tau Tau Tau. GGG and PPP each suspect they were drugged by TTT. Neither GGG nor PPP wishes to file a formal complaint, but each has indicated they will cooperate with an investigation if the Title IX Coordinator files a formal complaint.





# When must we dismiss a formal complaint?

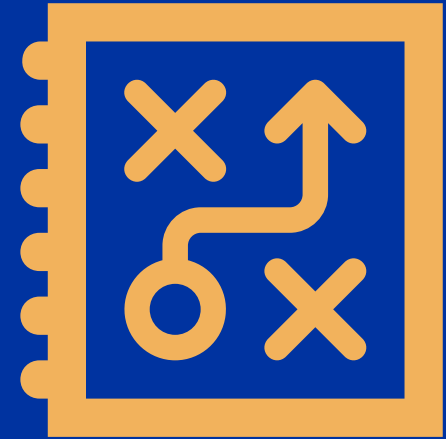
- If filed by the alleged victim, and the alleged victim is not a current or attempted participant in education programs and activities
- Complaint does not allege sexual harassment in the institution's education programs or activities
- Complaint alleges sexual harassment abroad
- Conduct alleged would not amount to sexual harassment even if it occurred as reported
- *Practice point – duty*



# Example of dismissal

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





# Example of dismissal

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





# When may we dismiss a formal complaint?

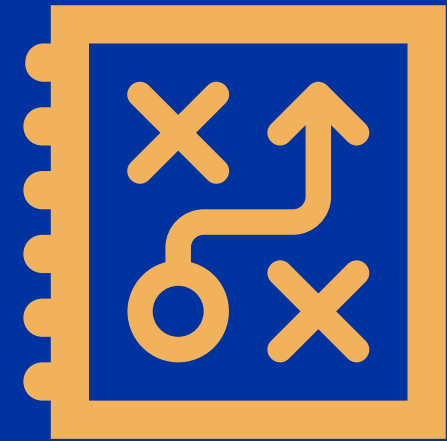
- Alleged victim indicates in writing a desire to withdraw the complaint (or particular allegations)
- Respondent is no longer enrolled in or employed by the institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination



# Example of permissive dismissal

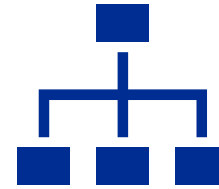
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Prior to investigation being completed, respondent graduates institution and Complainant indicates Complainant will not testify at a hearing because any discipline would be meaningless in light of respondent's graduation. There are no witnesses to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



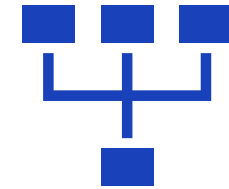
# Can we consolidate the complaints?

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

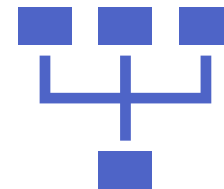


Multiple respondents

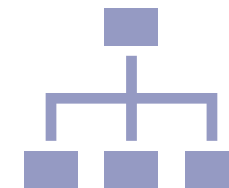
Multiple complainants



Multiple allegations against a single respondent



Multiple allegations from a single complainant





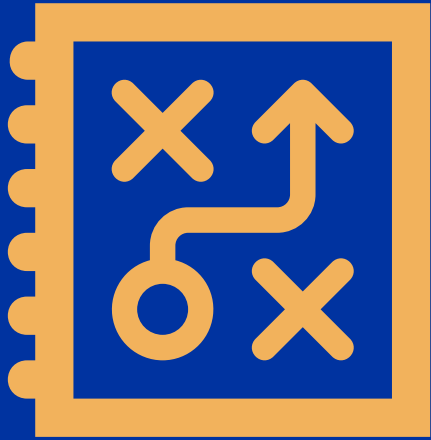
# Example of permissible consolidation

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



# Example of impermissible consolidation



Medical Resident files a formal complaint that Research Fellow sexually assaulted Resident two years ago when Resident was incapacitated by drugs taken to treat a back injury. Undergraduate, Fellow's present romantic partner, files a formal complaint that Fellow committed dating violence by slapping Undergraduate during an argument a month ago.

# What is the grievance process?

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Investigation to collect relevant inculpatory and exculpatory evidence

Live hearing before a decision-maker who finds facts under an evidentiary standard and determines the existence (or not) of a policy violation and any resulting sanctions/remediation

Appeal



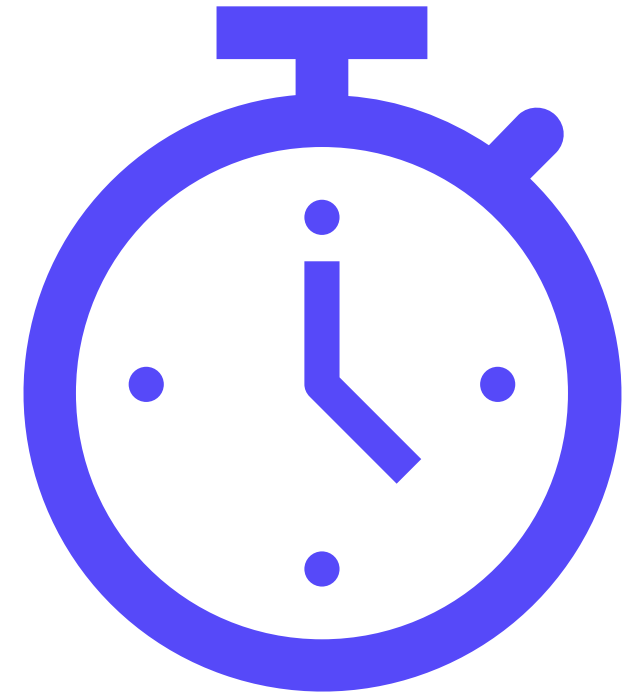
# What general principles govern the grievance process?

- Equitable treatment of complainants and respondents
- No stereotypes based on a party's status as complainant or respondent
- Presumption respondent did not violate policy unless and until a determination is made after hearing
- Conflict and bias-free institutional participants



# How long does a grievance process take?

- There is no firm deadline, and the length of the grievance process varies depending on a variety of factors
- Institution must be reasonably prompt, advise parties of timelines for particular phases of the process, and notify parties of extensions of timelines and the reasons for the same



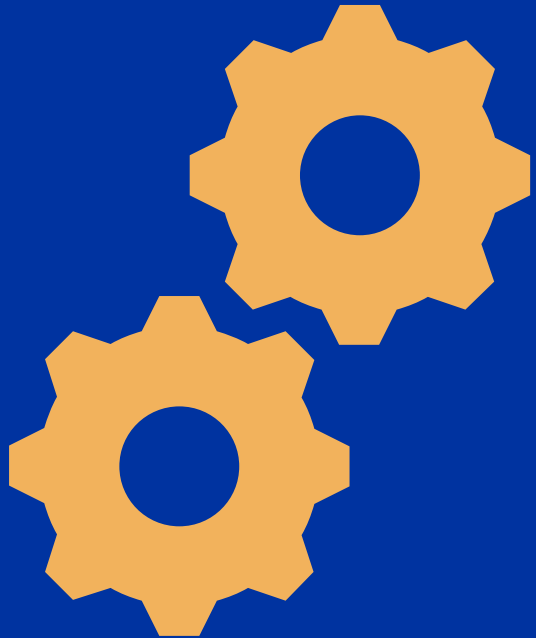




# What do we do if we find sexual harassment occurred?

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

## Group Scenario



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

# Questions





# Bias, Stereotype and Conflicts





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

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

## Examples of impermissible stereotypes

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

“Students can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

“There are no false reports of rape. Therefore, every complainant must be believed.”



# What is a conflict of interest?

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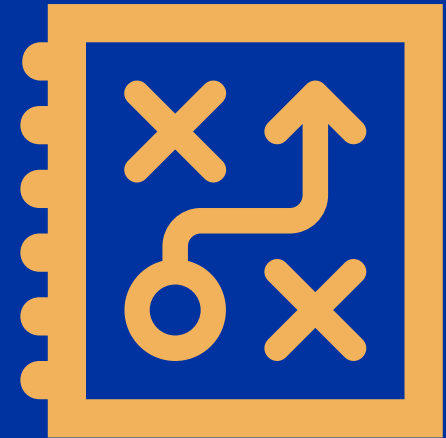
- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of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



# Example of conflict of interest

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

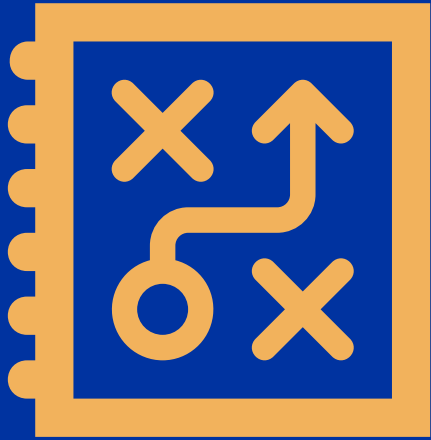






# Example of conflict of interest

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



# Example of bias

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



# Example of bias

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Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.”

Investigator tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”

# Poll question

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- Who is responsible for identifying conflicts of interest?
  - Title IX Coordinator
  - Parties
  - Those acting on behalf of the institution in the Title IX process
  - All of the above



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

---

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

# Resource for consideration: Harvard implicit bias test

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





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# Investigations & Key Issues

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Module 4: Including Questioning, Role of Advisors and  
Trauma



# What is the purpose of an investigation?

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





# Investigative Team

- The investigative team is assigned by the Title IX Coordinator.
- Investigators utilized by the Office of Equity and Inclusion are trained to investigate incidents in a manner that protects the safety and rights of both reporting and responding parties and promotes accountability for individuals in the campus community.



# What is inculpatory evidence?

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





# What is exculpatory evidence?

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



# What are the general principles of an investigation?

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



# What is relevance?

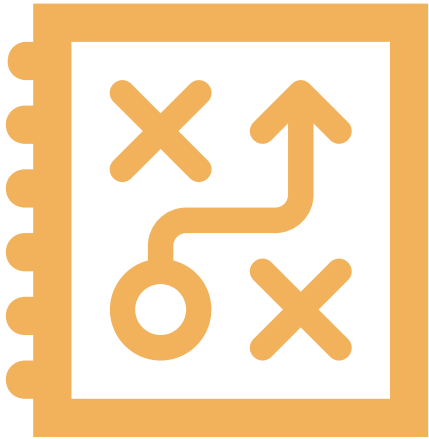
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Evidence is relevant if:

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

# Example (relevant)

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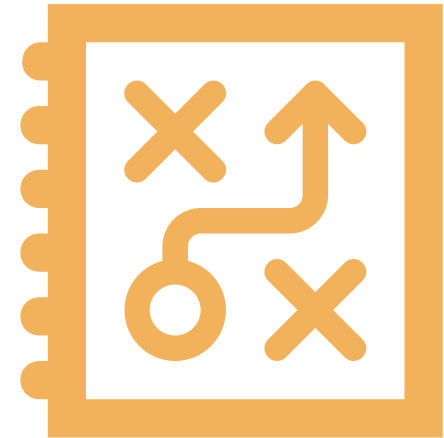
Coach is accused of sexually propositioning Player in exchange for more playing time. Witness states that: “One of the trainers heard Coach say that Player is ‘extremely attractive.’”



# Example (not relevant)

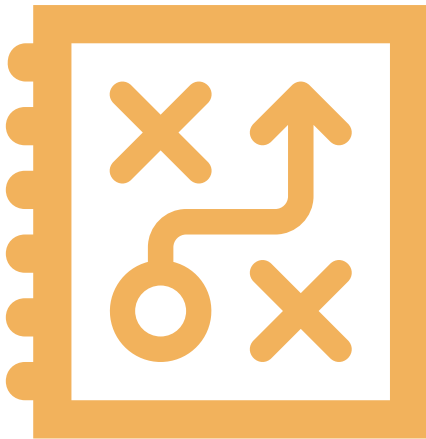
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Complainant alleges Significant Other engaged in dating violence by kicking complainant during an argument. Witness asserts: “Complainant is only dating Significant Other because of the Other family’s money?”



# Example (not relevant)

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





# Is sexual history considered?

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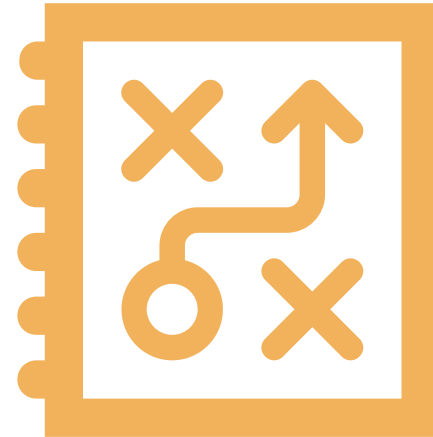
- Generally, no – Evidence of a complainant's prior sexual behavior is relevant only if:
  - Offered to prove that someone other than the respondent committed the conduct, or
  - If evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent



# Example (impermissible)

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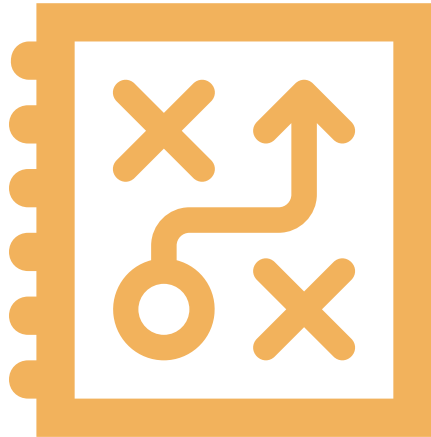
Law student has accused a faculty member of sexual harassment.  
Witness asserts: “Law student slept with a number of individuals in the month before the claim.”





# Example (permissible)

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

# Poll question

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- Which of these do not need to be provided in a notice of investigation to the parties?
  - The who, what, when, where, and how of the allegations
  - Confirmation of the parties' involvement in the institution's programs or activities
  - A statement that the respondent is presumed not responsible until resolution of the Title IX process
  - Information on the right to an advisor



# How do we tell the parties about an investigation?

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

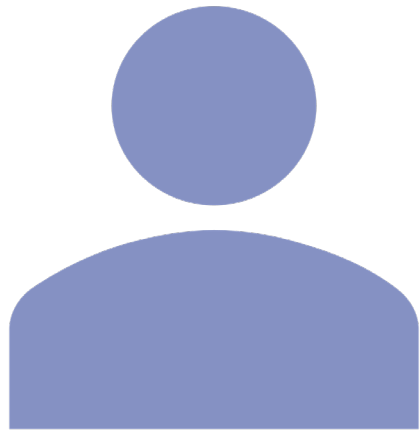




# What else does the notice need to say?

- Written notice must also include:
  - Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
  - That parties have the right to an advisor of their choice
  - That parties have the right to inspect and review evidence
  - Any prohibition on providing knowingly false statements or information

# How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of  
non-testimonial evidence

# What are some general principles about interviewing?

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





# Example question

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

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





# Another example question

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

# How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase



# How do you build rapport?

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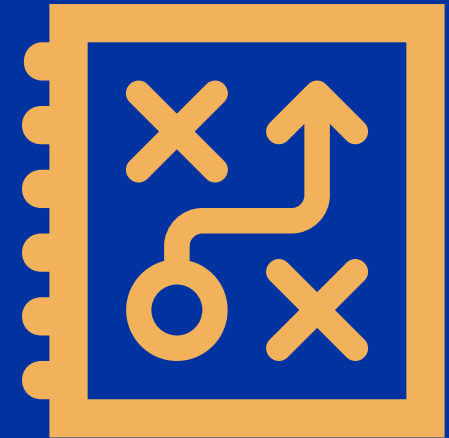
- Take the time to learn basic information about the interview subject before conducting the interview
- Learn something about the subject and share something about yourself; find commonality
- Explain the nature of the investigation, your role, and the rules of the interview
- Explain why you need accurate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



# Example of rapport building

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





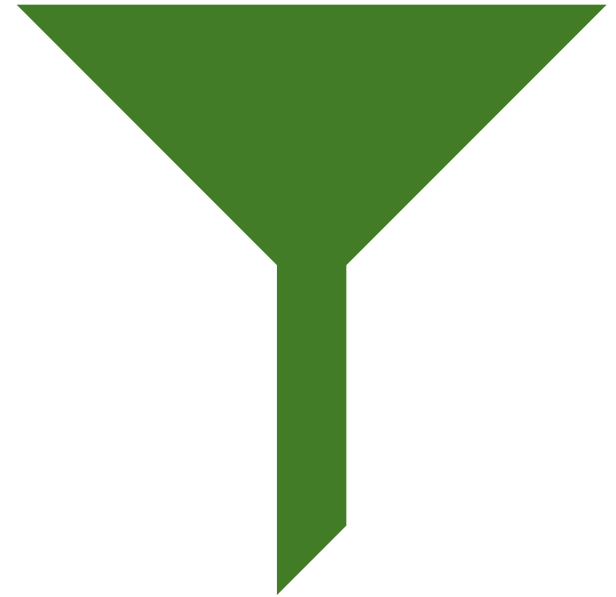
# Things helpful to say in every interview . . .

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



# How do I ask questions in the substantive phase?

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



# Examples of open invitations



“Tell me what happened that night.”



“Will you walk me through what you remember?”



“Tell me more about that.”



“What happened next?”



# Examples of facilitators



## Examples of cued invitations

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

“You said that . . . .  
What did you mean?”

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

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

# Examples of recognition prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

## Examples of suggestive questions (avoid)

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

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

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



# How do we make a record of the interview?

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



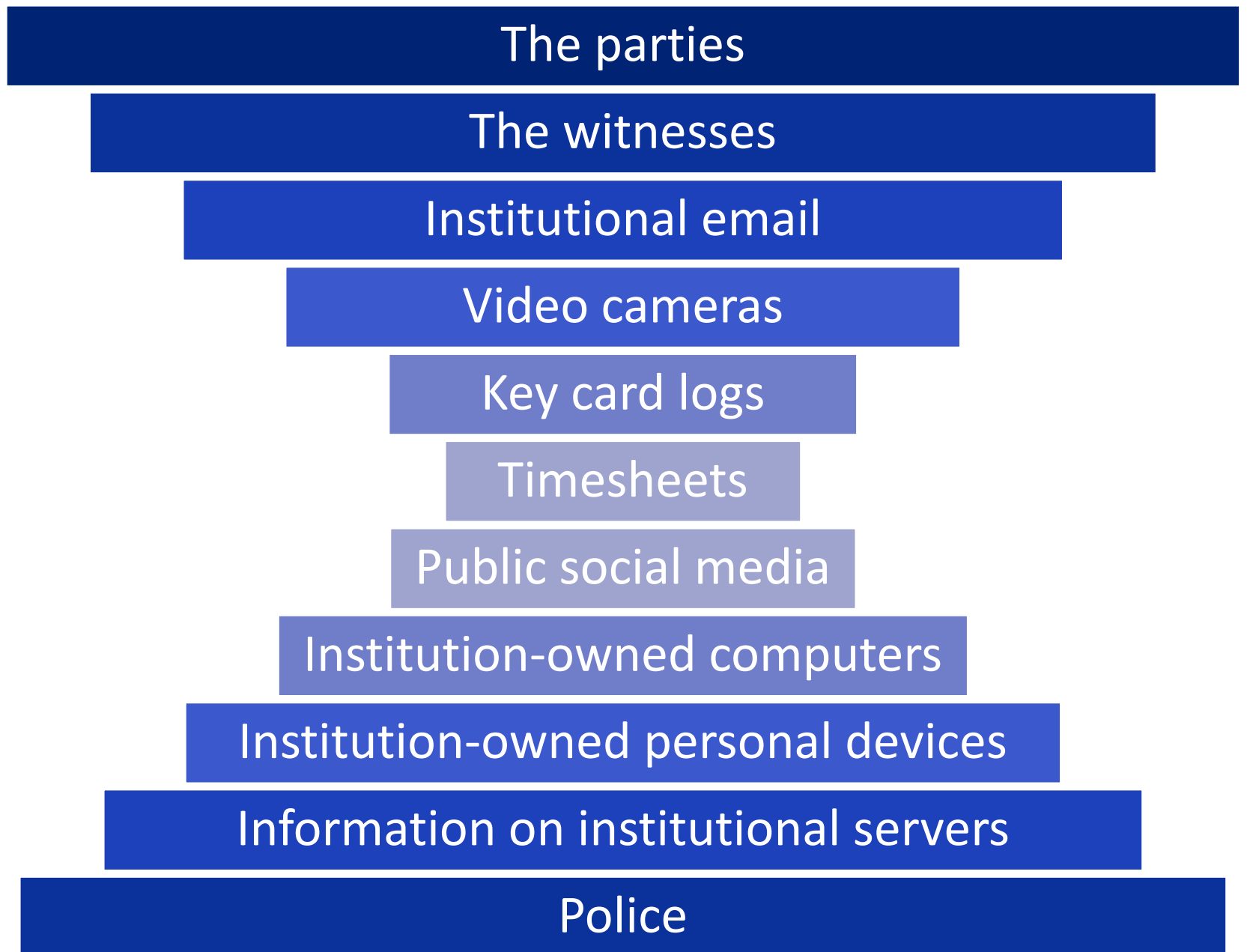


# Do parties/witnesses have a right to record the interview themselves?

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

# Example sources of non-testimonial evidence





# May an investigation collect evidence on sexual history?

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





# May an investigation collect and rely on privileged records?



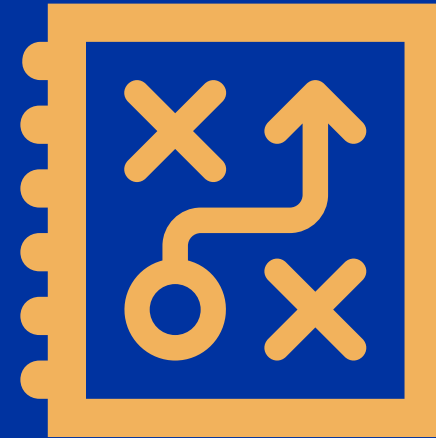
- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes



# Example of permissible use

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





# Example of impermissible use

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



# Do the parties have access to the evidence?

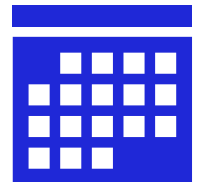
- At a minimum, parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is finalized
- Evidence must be provided to a party and their advisor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





# Do the parties get to respond to the evidence?

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



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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 – not final findings. The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation.
- Under the new Title IX regulation, factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing.



# May parties have an advisor during the investigation?

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







# What if the advisor breaks the rules?



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



# Example of advisor breaking the rules

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

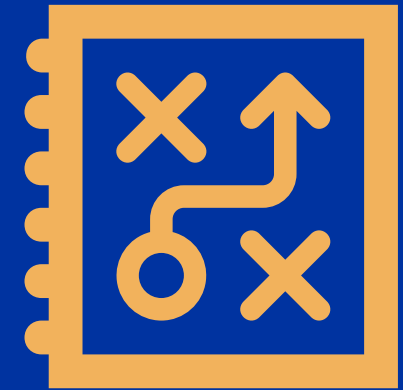




# Example of advisor breaking the rules

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





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

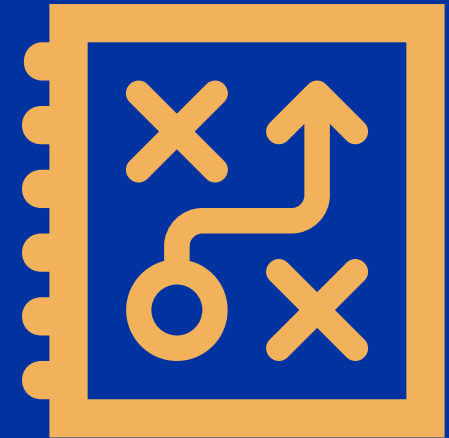
- No – the institution may not restrict the ability of parties to discuss the allegations or to gather and present relevant evidence, which includes talking to witnesses
- But institution can still enforce prohibitions on witness intimidation, witness manipulation, false statements, retaliation, harassment,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



# Example of permissible conduct

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



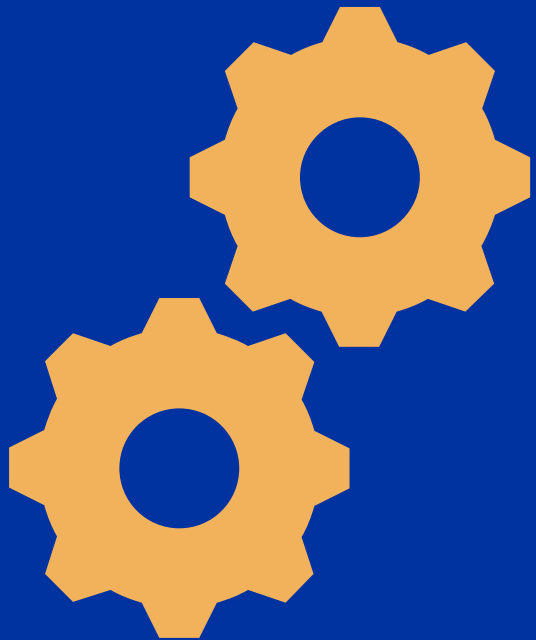


# Example of impermissible conduct



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

## Group Scenario



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



# May parties present expert witnesses?

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



# Questions





# Evidentiary Concepts



## Key Legal Principles

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



# Direct v. Circumstantial

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



# Direct v. Circumstantial

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- **Circumstantial (indirect)** — Series of facts which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred.
  - e.g.: witness testimony saw student alleged to have hit someone with bat, with bloody bat an hour after the assault



# Hearsay

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- **Hearsay** — Statement (written or oral) made by a non-available witness offered to prove fact in question
- Longstanding evidentiary principle of when courts can rely on hearsay
- Some hearsay is more reliable
  - Statement contemporaneous with the event in question
  - Excitable statement uttered in the moment being perceived



# Credibility

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



# What does it mean to weigh evidence?

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



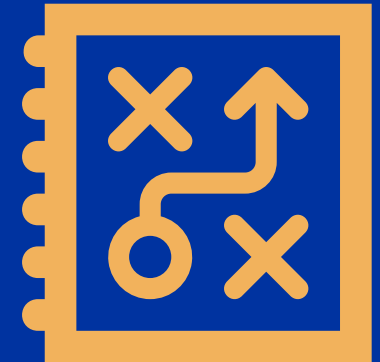




# Example of considerable weight

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Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving. Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring. Witness testified he knows the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.

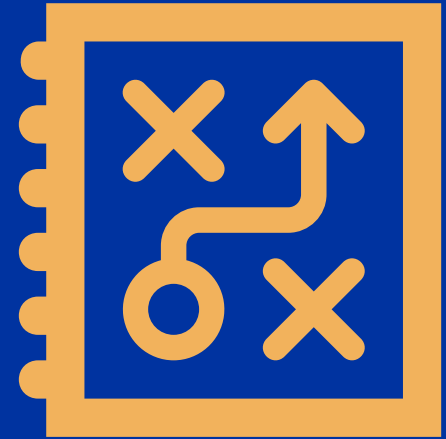




# Example of less weight

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Witness says he saw a couple leaving the bar “sometime after ten but before midnight” but witness is not “sure exactly” when. Witness testified they “sort of looked” like complainant and respondent and witness is “pretty sure” it was them. But witness also says witness had spent two hours at a different bar before that and was “pretty drunk at the time I saw them.”





# Trauma Issues

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# Balance

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



# Trauma might affect a party

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

# Possible trauma impact

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

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame



# Trauma & credibility

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

# What is the definition of trauma?



**Merriam-Webster**: a very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



**English Oxford**: Deeply distressing or disturbing experience



**Wikipedia**: is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience





## Physical reaction

- Brain—Trauma triggers chemical reaction which impacts
  - Perception
  - Ability to React
  - Memory
- Each individual reacts differently



# Investigating trauma

- Avoid judgment, impatience, disrespect, misuse of power
- Emphasize
  - Safety/comfort
  - Choices
  - Support for person
    - Personal support
    - Available services
    - Remain objective on facts
  - Trustworthiness/transparency





# **Trauma-informed interview**

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



# Trauma-informed interview (cont.)

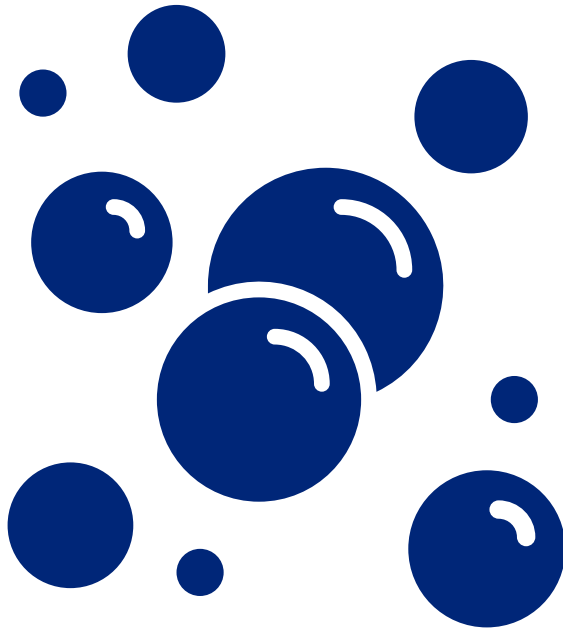
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- Important to focus on two concepts:
- What are you **able** to tell me about your **experience**?
  - Allow complainant to begin where he/she wants
  - Allow an uninterrupted statement
  - Use follow-up questions (non-leading)



# Trauma-informed interview (cont.)

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- Instead of asking “why,” ask about what witness was thinking during the experience
- Ask about memories associated with the senses:
  - Sights
  - Smells
  - Feelings



# Awareness of respondent trauma

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- Own experience
- Around event
- Around accusations
- Thoughts in the respondent's mind:
  - Will this be a criminal investigation?
  - Could I go to jail?
  - Could I get kicked out of school?
  - Should I have a lawyer?
  - Should I tell my parents?
  - You can't answer these questions but must give time and options
- Always offer interim measures and counseling



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# Informal Resolution & Confidentiality



Module 5



# What is informal resolution?

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





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

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



# Informal Resolution

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- The Office of Equity and Inclusion will determine if informal resolution is appropriate based on the alleged conduct and the desire of the parties to reach a mutually agreeable resolution
- The specific manner of the informal resolution process will be determined by the parties and the Title IX Coordinator, in consultation together
- Sanctions are generally not pursued as a result of an informal resolution process, although the parties may mutually agree to appropriate remedies
- The University reserves the right to cancel the informal resolution process if sufficient evidence suggests a formal investigation or other sanctions or remedies may be necessary and appropriate



# Informal Resolution

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- If the parties reach a resolution through the informal Resolution process and the Title IX Coordinator agrees that the resolution is not clearly unreasonable, the Title IX Coordinator will:
  - Reduce the terms of the agreed resolution to writing and present the resolution to the parties for their written signature; and
  - Sign the resolution.
- The Office of Equity and Inclusion will keep records of any informal resolution, although, the outcome of an informal resolution will not become part of a student, staff, or faculty member's official disciplinary record with the University



# Informal Resolution

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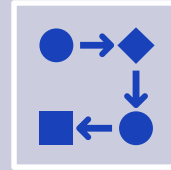
- Informal Resolutions may not be appealed and are considered resolved and will not be subject to further investigation, adjudication, remediation, or discipline by the University
- If a party fails to abide by the terms of the informal resolution, the other party should notify the Executive Director to discuss possible action
- In the case where an agreement is not reached and the Title IX Officer or designee determines that further action is necessary, or if either Party fails to comply with the terms of the informal resolution, the matter may be referred for an investigation and adjudication

# What are the key concepts of informal resolution?

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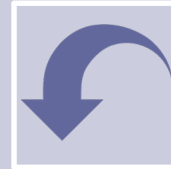
A formal complaint must first have been filed and written notice given to the parties



The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



The parties must voluntarily agree to participate in writing



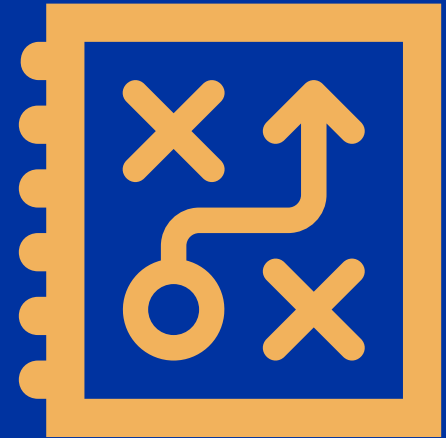
The parties must be allowed to withdraw from informal resolution up until the point it is final



# Example (informal resolution)

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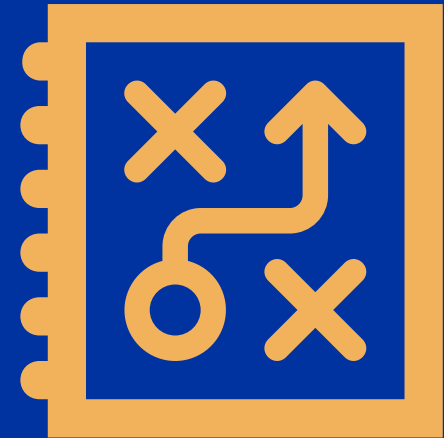
Parties agree to engage in informal resolution in the form of mediation. Parties meet with third-party mediator three times over the course of two weeks and are very near to reaching a complete agreement. The morning of the last session, the complainant indicates a desire to stop mediation and resume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





## Example (cont.) - resolution

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





# What are the limitations?

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



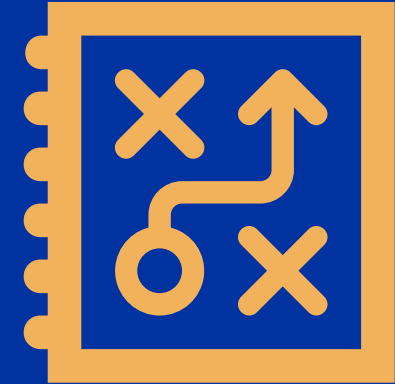




# Example (impermissible)

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





# Example (impermissible)

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



# Who facilitates an informal resolution?

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

# What are some examples of informal resolution?

Facilitated exchange of resolution offers

Mediation

Arbitration

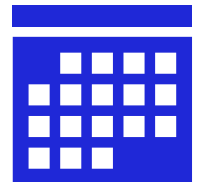
Restorative justice

Settlement with the involvement of attorneys



# How long can an informal resolution take?

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



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# Is an informal resolution final?

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



# Example of Informal Resolution

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



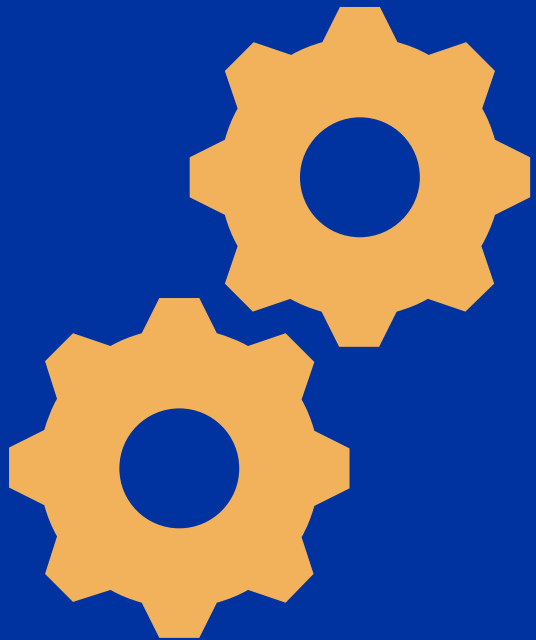


# How is an informal resolution documented?

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



## Group Scenario



Tech Employee makes a report that Faculty Member slapped, punched, and shoved Techie while the two were dating. Techie and Faculty Member verbally agree to engage in informal resolution.

Title IX Coordinator meets separately with each party and mediates a resolution that involves Faculty Member apologizing and attending anger management classes. Each signs a term sheet. Faculty Member attends two weeks of anger management classes and then stops going. Techie then files a formal complaint based on the allegations in the previous report.

# Questions





# Confidentiality



# Are sexual harassment cases confidential?

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





# Are parties allowed to talk about a case?

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



## Example (permitted communication)

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

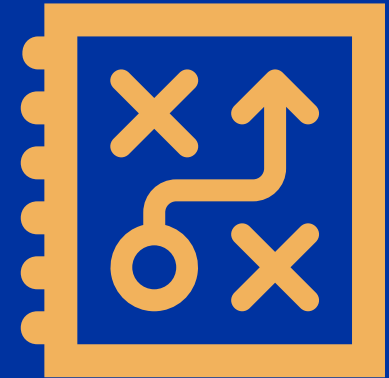




## Example (institution may restrict)

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



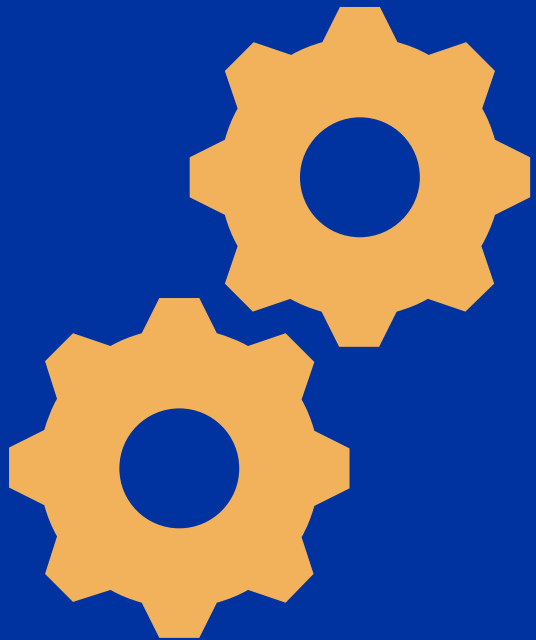


# Are interviews and hearings confidential?

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



## Group Scenario



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

# Questions



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