

HUSCH BLACKWELL

Title IX Sex Discrimination and Sexual Harassment Response

2026-2027 Academic Year

Agenda

1. Title IX Foundations and Legal Framework
2. Defining Sex Discrimination
3. Issues in Programmatic Compliance
4. General Grievance Process
5. Sexual Harassment
6. Sexual Harassment Grievance Process Overview
7. Institutional Notice, Intake, and Supportive Measures
8. The Formal Complaint and Evaluation
9. Informal Resolution
10. Investigations
11. Hearings and Appeals
12. Other Federal Laws

Title IX Foundations and Legal Framework

Module 1

Title IX

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

20 U.S.C. § 1681



Title IX's Origins

- Passed in 1972 during Civil Rights era
- To address widespread sex-based barriers in education for women
- Broad bipartisan support
- Signed into law by President Nixon



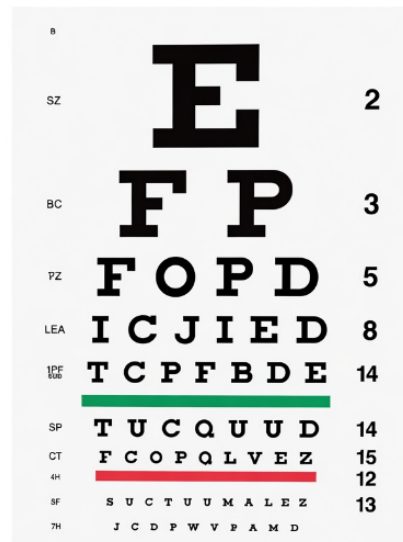
Title IX as Spending Clause Legislation



- “Spending Clause” of U.S. Constitution allows Congress to tax and spend for the “common Defense and general Welfare”
- Moneys given to public and private entities in exchange for statutorily imposed conditions
- Operates in the nature of a contract
- Failure to comply could result in loss of funds

Consequences of Spending Clause Origin

- Terms must have been clear to the institution at the time it decided to accept federal dollars
- Damages in lawsuits are limited to “contract”-type damages (excluding emotional distress and punitive damages)



Title IX Regulations



- Promulgated by U.S. Department of Education
- 34 C.F.R. Part 106
- Broad range of subjects
 - Admissions, athletics, housing, employment, pregnancy, grievance process, etc.

Operative Regulations For Grievance Process

- August 2020 Trump-era regulations govern sexual harassment response
- Heavy due process focus with required “live hearings” for formal complaints in higher education
- Biden-era regulations vacated by courts and no longer in effect

August
2020

Administrative Enforcement -- Historically

- U.S. Department of Education Office for Civil Rights (OCR)
- Complaint driven or “directed” investigation
- Broad supervisory power to demand documents, assess compliance, compel (or coerce) changes through resolution agreements



Administrative Enforcement -- Today



- OCR dramatically reduced in size and enforcement activity
- More limited OCR enforcement prioritizes Title VI (race and national origin) and disability
- Within Title IX, emphasis on programmatic compliance instead of sexual harassment
- Complaint evaluation and investigation being shifted to Department of Justice

Judicial Enforcement

- Private “right of action” recognized in *Cannon v. University of Chicago* (1979)
- Aggrieved persons can obtain:
 - Injunctions to prospectively block discrimination
 - Damages to recover economic injury from past intentional discrimination



Example A: Judicial Enforcement

A university systematically provides women's sports teams with inferior facilities, old uniforms, bus-only travel, limited food allowances, and pays female coaches the lowest salaries in the conference. Men's teams have new arenas, multiple new uniforms, travel by plane, and have highly compensated staff. A group of female athletes sue in a class action lawsuit seeking an injunction requiring the institution to provide equitable athletics opportunities and support.



Example B: Judicial Enforcement

A student reports being sexually assaulted after class by a faculty member. The Title IX Coordinator fails to respond to the complaint, and several weeks later the faculty member sexually assaults the student again. The student drops out of school and sues the institution for its deliberate indifference to her report. She seeks to recover damages for her tuition, medical treatment, and the loss of the value of her degree.



Intentional Discrimination

- Institutional policy or explicit decision to treat persons adversely based on sex, or
- Deliberate indifference by institutional officials to sexual harassment by third-parties (e.g., students, guests, employees acting against policy)



Deliberate Indifference



- Institutional official with authority to take corrective action
- Has actual knowledge of potential sexual harassment
- Responds to that knowledge in a clearly unreasonable way, and
- As a result, the victim experiences or is made vulnerable to further harassment that excludes or limits their participation in education programs and activities

Limits of Judicial Enforcement

- Institutional liability only
- Title IX Coordinators and other institutional officials cannot be personally liable under Title IX
- Individual bad actors (i.e., “discriminators”) can’t be liable under Title IX either (but may be, under tort law)



Enforcement of Title IX

Title IX

Administrative Pathway



Complaint filed with federal agency



Agency investigates



Agency issues findings

Judicial Pathway



Litigant files lawsuit



Court hears case



Court issues ruling

Religious Exemption

- Title IX contains a self-executing religious exemption for religious institutions
- Title IX does not apply to the extent its application would “not be consistent with” the religious tenants of the institution

34 C.F.R. § 106.12



Example: Religious Exemption

A private Catholic university believes that only men can be ordained to the priesthood. The university has multiple degrees focused on theology and ministry, but consistent with its statement of faith, only male students are allowed to pursue the priestly formation programs. Women are allowed to pursue any other degree at the institution.

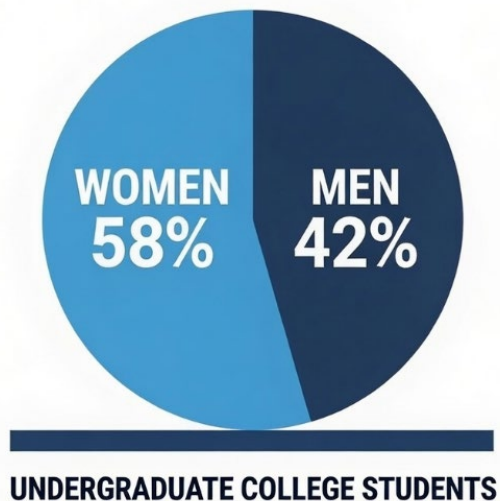


Title IX's Accomplishments

- Dramatic increase in women's athletic participation and funding and opportunities for women's sports
- Dramatic increase in women's participation in higher education and professional fields
- Robust institutional compliance programs to address sexual harassment



Ongoing Challenges



- Significant decline in male college participation (both relative and absolute)
- Concentration of athletic funding in revenue generating sports (football and basketball)
- Women and men remain underrepresented in specific degrees and fields (e.g., engineering; nursing)
- Evolving forms of sexual harassment are more challenging to prevent and remediate (AI deep-fakes, cyberstalking, etc.)

Questions for Discussion

- **Is Title IX perceived at your institution primarily (or exclusively) as a protection for women?**
- **Have you seen a rise in men utilizing the protections of Title IX at your institution?**



Questions

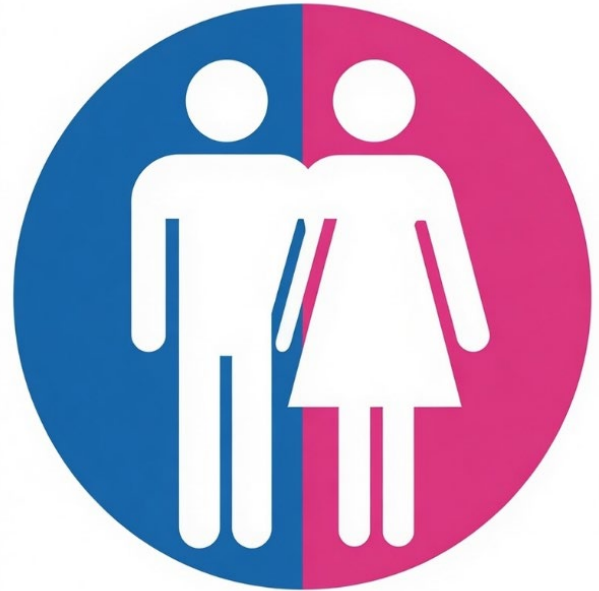


Defining Sex Discrimination

Module 2

The Meaning of “Sex”

- “[N]o person in the United States shall, on the basis of sex . . .”
- Dueling interpretations of “sex” between Trump and Biden administrations
- Trump = “biological sex”
- Biden = sex assigned at birth and gender identity and sexual orientation



West Virginia v. B.P.J. (2026)



- Idaho and West Virginia pass state laws limiting participation on women's designated sports teams to "biological" women
- Lower federal courts enjoin (block) the state laws as violating Title IX and Equal Protection Clause (adopting Biden view)
- Lower courts reason that Title IX protects gender identity and that "biological" separation without accommodation amounts to gender identity discrimination

Supreme Court's Holding

- Title IX permits separate teams defined by biological sex
- In 1972 when the law was passed, and when the first Title IX regulations were issued in the 1970s, the term “sex” could not “plausibly be interpreted to refer to anything other than biological sex”
- “The ordinary meaning of the term ‘sex’ at the time of enactment . . . was biological sex and not gender identity, particularly in the sports context”
- “[T]he Title IX regulations allowed separate sports teams precisely because of biological differences between the sexes”

Justice Gorsuch

- Wrote separately to explain why Title IX is not controlled by *Bostock* decision
- Title IX is Spending Clause legislation
- “Nothing in Title IX clearly and unambiguously alerts funding recipients that they are prohibited from restricting a school-sponsored sports team to biological women or girls”
- *Bostock* dealt with employment termination, which is clearly discrimination; having separate teams is not discrimination under Title IX
- Acknowledges that sex-based stereotyping can still supply the necessary “causal” element *if* the adverse action at issue amounts to discrimination

Example: Sex Separation

A school separates its intramural rugby teams into men's and women's divisions. Only biological women are permitted to play on the women's team. The school's rationale is that biological men generally enjoy inherent physical advantages over biological women, and permitting biological men to play on the women's team for a contact sport could result in increased incidence of physical injury for biological women.



Question for Discussion

- **What if a particular transgender woman demonstrates that she has been on hormone therapy since before puberty and, therefore, is not larger and stronger than the typical biological woman? Is it discrimination to preclude her participation on the women's team?**



Example: Gender Stereotyping

A supervisor holds a stereotypical view that women should wear makeup, have long hair, and wear professional dresses or skirts. A biological female subordinate wears short hair, no makeup, and frequently wears slacks. The supervisor denies the subordinate promotions and pay increases because she refuses to dress and appear the way the supervisor believes a woman should dress and appear. If a similarly-situated biological male subordinate had worn short hair, no makeup, and slacks, the supervisor would have given promotions and pay increases.



Takeaways

- Title IX permits separation based on biological sex in sports teams, and presumably locker rooms, bathrooms, housing facilities, and certain other scenarios where inherent physical differences are relevant
- Gender identity and sexual orientation are not themselves protected categories under Title IX, but could still be relevant to demonstrating sex discrimination in certain contexts not involving separation based on physical differences



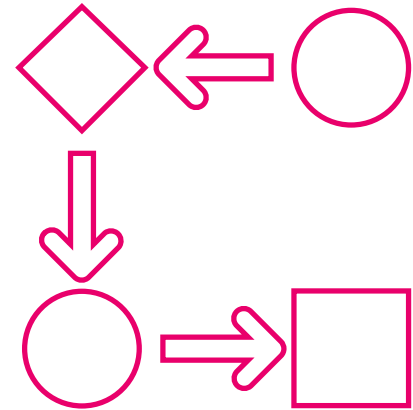
Questions for Discussion

- **Does this mean that LGBTQ persons enjoy no protection under Title IX?**
- **Under what scenarios does the “biological” sex dichotomy still result in protection for LGBTQ persons?**



Sex Discrimination

- Adverse treatment of a person on the basis of sex (“because of” biological sex)
- Limits or excludes the person from participating in the institution’s education program or activity or denies or limits the benefits thereof



**Programmatic
Discrimination**

**Individualized
Discrimination**

Sexual Harassment

Programmatic Discrimination

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

Examples: Programmatic Discrimination

- **Intentionally providing female athletes with fewer opportunities and less benefits than male athletes**
- **Systematically and intentionally paying female employees less than male employees for comparable work**
- **Having sex-separated residence halls and then maintaining women's halls in good condition while knowingly failing to repair men's halls**
- **Offering scholarships and fellowships that are only open to female applicants or, vice versa, only open to male applicants**



Questions for Discussion

- **What if an institution creates “men’s” and “women’s” designated safe spaces on campus and only permits entry by persons of the designated biological sex?**
- **What if the institution’s code of conduct prohibits women from being topless in co-education residence halls but permits men to be topless?**



Tagami v. City of Chicago (7th Cir. 2017)

- Local public-nudity ordinance prohibits female toplessness in public but not male toplessness
- “This intermediate level of scrutiny recognizes that sex has never been rejected as an impermissible classification in all instances Physical differences between men and women . . . are enduring: [T]he two sexes are not fungible”
- Law upheld

Free the Nipple v. City of Fort Collins (10th Cir. 2019)

- Local public-nudity ordinance prohibits female toplessness in public but not male toplessness
- “The ordinance discriminates against women based on the generalized notion that, regardless of a woman’s intent, the exposure of her breasts in public . . . is necessarily a sexualized act. Thus, it perpetuates a stereotype engrained in our society that female breasts are primarily objects of sexual desire whereas male breasts are not.”
- Law struck down

Individualized Discrimination



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

Example A: Individualized Discrimination

The Math Department currently has six male professors and one female professor. A male and female candidate are equally qualified for an open faculty position, but the Chair elects to hire the female candidate to “improve the faculty gender balance.”



Example B: Individualized Discrimination

The University has an internal committee that nominates three students each year to compete for a prestigious international scholarship funded by the estate of a South African mining magnate. Although the committee agrees the most qualified candidates are all women, it decides to nominate one man to “balance out” the slate.



Practical Point

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

Example: Similarly Situated

There are ten students in a nursing class, eight women and two men. Seven of the women receive passing grades, but one fails. One of the men receives a passing grade, but the other fails. The male student who failed accuses the faculty member of discrimination because, “87% of the women passed, but only 50% of the men passed.” Yet, the failing male student’s coursework and test scores are very similar to the work of the failing female student.



Question for Discussion

- **Under current Title IX caselaw and regulations, may a school give preference to persons of a given biological sex to address gender imbalance in a specific field or industry? For example, may a school give preference to female applicants for an engineering program or preference to male applicants for a nursing program?**



Practical Point

When multiple persons of different sexes are competing for some fixed amount of institutional benefit, privileging one person based on sex necessarily discriminates against a person of the other sex.

Sexual Harassment

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



Different Categories of Sexual Harassment

Quid Pro Quo
Harassment

Hostile Environment
Harassment

Sexual Assault

Domestic Violence

Dating Violence

Stalking

Defining Feature

- Sexual harassment generally involves conduct that is *sexual* in nature, that arises from a *romantic* setting, or that otherwise meets the elements of a *crime*
- Differential treatment based on biological sex is not required to show sexual harassment



Conduct that is “Sexual” in Nature

- Asking for sex
- Talking about sex
- Expressing sexual or romantic desire
- Telling sexual jokes
- Physical touch of a romantic nature (e.g., rubbing shoulders or hair)
- Sexual acts
- Sexual blackmail
- Creating sexual deepfakes
- Violence within a romantic relationship
- Leering, skulking, following because of romantic interest

Example: Sexual Conduct

Over several years, a faculty member has pursued sexual relationships with both female and male students. In each instance, the faculty member has offered to give the student in question better grades and/or a recommendation if the student will perform sexual acts with the faculty member. In each case, the student in question viewed the offer as unwelcome but submitted to it anyway to obtain a good grade.



Questions



Issues in Programmatic Compliance

Module 3

Admissions

- Sex-based preferences in admission and recruitment are generally prohibited
- Private, undergraduate institutions are exempted, but Title IX fully applies after admission



Example A: Admissions

Public university operates a prestigious School of Social Welfare. Students are 75% female and 25% male. The admissions committee, seeking to improve the “gender balance,” agrees amongst itself to make sure that at least 40% of admitted students for the next cycle are male.



Example B: Admissions

Public university operates a prestigious School of Engineering. Students are 80% male and 20% female. Applicants are admitted based on high school curriculum, GPA, standardized test scores, and other non-sex based criteria. A female applicant denied admission complains that the school's admissions practices violated Title IX based on their “disparate impact” on female applicants.



Disparate Impact



- Department of Justice currently says disparate impact is not a viable Title IX theory; intentional discrimination is required
- Some (but not all) courts agree with the Department's view

Housing

- Title IX permits institutions to separate housing based on sex
- *B.P.J.* suggests it is not necessary to accommodate gender identity
- Quality of housing must be comparable



Example A: Housing

A private college has men's and women's designated residence halls. The men's halls have all been renovated to suite-style arrangements with private bathrooms and include exercise facilities and numerous amenities. All female halls are traditional "dorm" style with communal bathrooms and no air conditioning.



Example B: Housing

A private college has an equal number of men's and women's designated residence halls. The college's residence life handbook states that halls are "designated as either men's or women's halls based on biological sex." The college's residence halls are at capacity with dozens of students of both sexes on the wait list. A student who identifies as a transgender woman wishes to live in a women's designated hall.



Question for Discussion

- **Would accommodating the transgender woman by allowing her to live in the women's designated residence hall amount to discrimination against biological women seeking to live in the residence halls?**



Locker Rooms and Bathrooms



- Title IX regulations expressly permit sex-separated “toilet, locker room, and shower facilities”
- Facilities must be of comparable size, number, accessibility, and quality

Example A: Restrooms

A public university has an ROTC building on the edge of campus that is a five-minute walk from any other facility. The building has two large men's restrooms with several urinals in each. There is a single use “women's” restroom in the basement that contains a single toilet. The ROTC program is 60% men and 40% women.



Example B: Restrooms

A public university wishes to accommodate transgender students who are uncomfortable using a sex-designated restroom inconsistent with their gender identity. Instead of permitting transgender students to use the restroom consistent with their gender identity, the university converts numerous sex-designated restrooms into single-stall, gender neutral restrooms. After the conversion, 50% of restrooms are “male”, 40% are “female,” and 10% are gender neutral. The university’s student population is 55% biological female and 45% biological male.



Example: Locker Room

A private college operates a student recreation center with men's and women's locker rooms. The college permits persons to use the locker room consistent with their gender identity. Biological women who use the women's locker room file a formal complaint of hostile environment harassment after a transgender woman enters the locker room and sees the biological women in various states of undress.



Administration's Position



- OCR is actively investigating several K-12 schools on a theory that allowing biological males to access women's restrooms/locker rooms potentially constitutes hostile environment harassment
- Court outcomes are currently mixed, with the ultimate outcome uncertain, especially given *B.P.J.*

Classes

- Title IX generally prohibits colleges and universities from having sex-separated classes
- Exception for P.E. classes that involve significant physical contact
- P.E. classes can also be separated based on objective standards of performance (e.g., “Advanced Weightlifting”)
- Choir classes can be separated based on vocal range



Example A: Separated Classes

A college offers men's and women's sections of Judo 101. A female student who practiced judo in high school seeks to enroll in the men's section, arguing that she is more skilled and capable than physically stronger males who lack experience. She offers to sign a waiver absolving the institution from any liability if she is injured.



Example B: Separated Classes

A college wishes to offer a non-credit self-defense workshop where a retired law enforcement officer will provide self-defense tips and demonstrate certain techniques on a partner presenter. Students will watch, but they will not engage in any physical activity. The institution plans to hold separate men's and women's sections of the workshop given the different self-defense “scenarios” that men and women might encounter. Is this permissible?



Scholarships

- Title IX generally prohibits the use of sex as an eligibility criteria for scholarships
- For athletics equity purposes, proportional allocation of athletics scholarships based on sex is required
- Pool and match is a narrow exception to permit the use of endowed funds restricted by a gift instrument (or similar legal document)



Example A: Scholarships

The university's business school wants to increase the percentage of students who are women. The school's dean persuades a wealthy alumna to donate \$1 million, which will be used to provide automatic \$500 scholarships to all admitted female students. The \$500 scholarship will “stack” on top of all other scholarships that are awarded without regard to sex.



Example B: Scholarships

The university's business school receives a gift of \$1 million from a wealthy alumnus pursuant to a gift agreement specifying, "The funds shall be used to fund scholarships for female business students." The school has a "Dean's Scholarship" program that provides scholarships to admitted students based solely on GPA and standardized test scores. The school plans to use the \$1 million to fund Dean's Scholarships that are awarded to female students in the ordinary course.



Questions for Discussion

- **Is this second structure permissible?**
- **What if there are no female awardees in a particular year?**
- **What if the number of female awardees for a particular year exceeds what a 5% draw on the \$1 million corpus can sustain?**



Question for Discussion

- **As far as Title IX is concerned (setting aside state law concerns), could a school have a scholarship that conditions eligibility on LGBTQ status?**



Fellowships



- Title IX generally prohibits fellowships and similar programs where sex is an eligibility criteria
- Title IX also prohibits institutions from providing significant assistance to third-party groups that engage in sex discrimination

Example A: Fellowships

Seeking to encourage male students to enter the nursing profession, the College's School of Nursing starts the "Daddy Warbucks Fellowship." Only male nursing students can apply. Participants get to attend special seminars focused on dynamics faced by males in the nursing profession, are paired with a licensed nurse as a mentor, and get to attend a national nursing convention once per year paid for by the College.



Example B: Fellowships

The Business School is approached by a third-party organization called the “Mommy Warbucks Foundation.” The Foundation has established a robust fellowship program for female college students pursuing a career in business. The program includes special training, mentorship pairing, a stipend, and critical networking. The Foundation wants the Business School to host Foundation events on campus and facilitate its female students joining the program.



Athletics

- 34 C.F.R. Part 106 contains extensive athletics regulations
- Benefits, opportunities, and treatment
- Athletic scholarships and financial assistance
- Meeting interests and abilities



Example: Benefits, Opportunities, Treatment

The college spends dramatically more money on men's sports, providing men's teams with new facilities, elite travel, new uniforms, fresh swag, more trainers, better NIL support, etc. Women's teams play in old facilities, re-use last year's uniforms, eat in the main dining hall with other students, travel by van or bus, struggle to see the trainers, and have to secure NIL deals entirely on their own.



Example: Athletic Scholarships

55% of the university's student athletes are male, and 45% are female. Yet, 75% of total athletic scholarship dollars go to male athletes, while only 25% of total athletic scholarship dollars go to female athletes. The university reasons this disparity is permissible because female athletes generally qualify for more academic scholarship dollars, based on their higher incoming GPAs and standardized test scores.



Example: Interests and Abilities

The university's overall undergraduate population is 60% female and 40% male. However, for the last decade, the university has operated ten men's varsity teams and only eight women's varsity teams, resulting in 60% of varsity athletes being male and only 40% female. The university does not offer women's varsity soccer, although the university's conference has several women's soccer teams and the university has robust participation in club women's soccer.



Sex-Separated Teams



- Regulation permits sex-separated teams where selection for teams is based on competitive skill or the activity is a contact sport
- *B.P.J.* confirms the separation can be based on “biological sex”

Example: Sex Separated Teams

The university wishes to accommodate the interests of transgender student athletes and so permits transgender women to try out for women's designated competitive teams. Several transgender women win roster spots and starting positions.



Question for Discussion

- **Does this scenario constitute discrimination against biological women who would otherwise have received the roster spots occupied by transgender women?**



B.P.J. Majority Opinion

“Allowing a biological male athlete to compete on a girls’ team *necessarily* displaces or disadvantages a female athlete—replacing her on the roster, knocking her out of the starting lineup, reducing her playing time, depriving her of a medal, and the like.”



Questions



General Grievance Process

Module 4

Baseline Rule

- Institutions must have published procedures
- That provide for the “prompt and equitable” resolution of discrimination complaints
- Applies to all manner of discrimination complaints except sexual harassment, which has more detailed rules



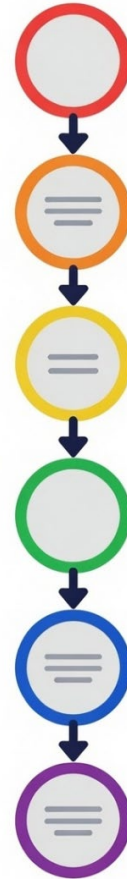
Prompt and Equitable



- No unreasonable delay
- Evidence-based
- Some consistent standard of evidence (e.g., preponderance)
- Fair opportunity to be heard
- Free of bias and stereotypes
- Based on reasoned decision-making

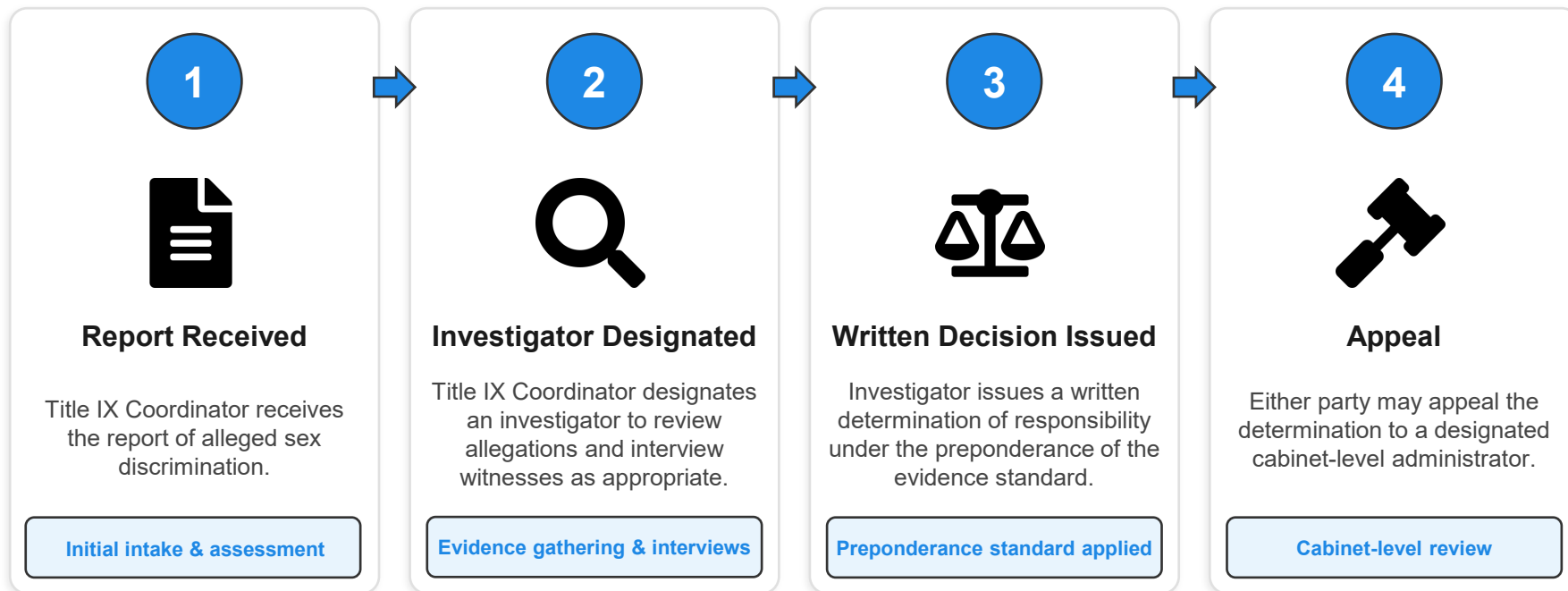
Policy Minimums

- Identify Title IX Coordinator and contact information for receiving complaints
- Specify a standard of evidence
- Specify some method to gather evidence that includes giving both the complainant and respondent a chance to tell their side of the story
- Specify a decision-making method
- Specify appeal method (if any)
- Prohibit retaliation



Example General Title IX Grievance Process

Simplified Four-Step Flowchart



Note: This is a simplified illustration of the core grievance process steps. More specific procedures apply to sexual harassment complaints. Actual institutional procedures may include additional required notices, supportive measures, and procedural protections under applicable Title IX regulations and institutional policy.

Examples of Complaints Subject to General Process

- **Faculty member is accused of discriminatory grading**
- **Supervisor is accused of discriminatory hiring of student workers**
- **A subordinate claims she is being paid less than comparable male employees because she is a woman**
- **A student alleges they were denied admission to a graduate program because of their sex**



Questions for Discussion

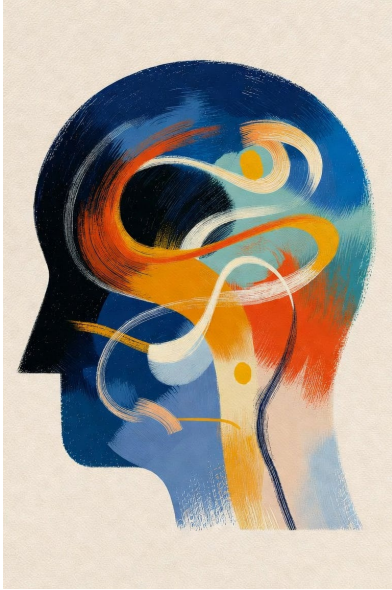
- **How would a Title IX grievance process work if a non-community member filed a complaint?**
- **How would a Title IX grievance process differ if a person made a complaint of programmatic (as opposed to individual) discrimination?**



Retaliation

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

Retaliatory Intent



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

Example: Peer Retaliation

Laena files a complaint of sex discrimination against the cross-country coach, alleging the coach ignores female runners, dismisses their concerns, and is more likely to get angry at them, while favoring and coddling male runners. One of Laena's teammates texts Laena, "WTF Laena . . . that's total BS. Coach is great with us. You're a real bi*ch." The teammate then begins referring to Laena as a "rat" in practice and leaves plastic rats in Laena's locker and bag. When Laena confronts the teammate, the teammate says, "Drop your stupid complaint, and this can all come to an end."



Question for Discussion

- **What if teammate had simply sent a text message that read, “WTF Laena???? Totally disagree with you. Coach is great—and FAIR.”**



Retaliatory Discipline

- Application of general conduct rules can be retaliatory when done with retaliatory intent
- E.g., drug and alcohol violations, severity of punishment

Example: Retaliatory Discipline

Several days after filing her complaint, Laena shows up ten minutes late to practice. The assistant coach immediately comes up to Laena and says, “Don’t bother suiting up today since you couldn’t show up on time. And, since you couldn’t practice today, you won’t be running in the meet this weekend.” Other teammates who have showed up late were typically required to do extra calisthenics.



Questions



Sexual Harassment

Module 5

Different Categories of Sexual Harassment

Quid Pro Quo
Harassment

Hostile Environment
Harassment

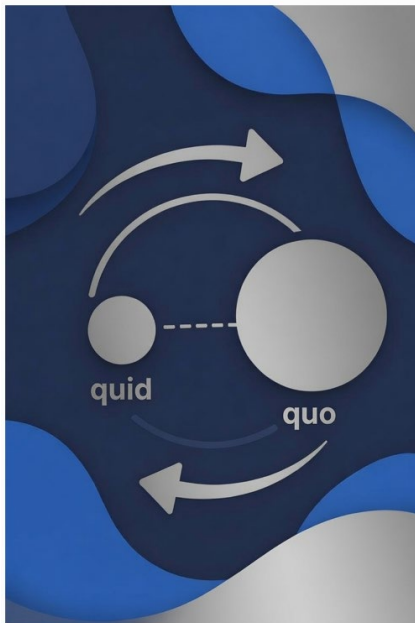
Sexual Assault

Domestic Violence

Dating Violence

Stalking

Quid Pro Quo Harassment



- 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

Examples: Quid Pro Quo

A graduate teaching assistant offers to “make sure” an undergraduate student earns a “top grade” if he will send her “nude pics.”

A coach offers an athlete more playing time if he will have sex with her.

A supervisor threatens to deny a subordinate a pay increase unless she tells him her “deepest sexual fantasies.”



Hostile Environment Harassment

- 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



Example A: Hostile Environment

A biological male student, Jensen, is openly gay. Other male students in the residence hall frequently whistle and cat call when Jensen walks by and make crass comments about sexual acts Jensen has supposedly engaged in with his boyfriends. These male students leave sex objects outside Jensen's door, write "gay sex jokes" on Jensen's white board, and often slap Jensen on the behind when he walks by in the hallway.



Example B: Hostile Environment

A female student Luisa works part time in the library. Her male supervisor repeatedly comments on Luisa's appearance, asks Luisa about her sex life, rubs Luisa's shoulders and hair, leers at Luisa's chest, and occasionally references sexual acts he would like to perform on Luisa, "If I weren't your boss and you didn't have a boyfriend."



Example C: Hostile Environment

Claudius takes a photo of Giselle from her Instagram feed, pastes it into an AI tool, and generates a fake image depicting Giselle nude in the shower. Working on his laptop in the College's library, Claudius then uses an anonymous email service to send a copy of the picture to Giselle, threatening to release it to “all the frat guys on campus” in three days unless she sends \$1,000 in Bitcoin.



Sexual Assault

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



Sex Offense Categories

Key Categories Under VAWA / Clery Act

Rape

Statutory
Rape

Fondling

Incest

Rape

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

Consent

- ***Consent in fact:***

- Determined by whether the relevant facts establish conduct that amounts to agreement to engage in sexual activity--as agreement is defined by the institution

- ***Ability to consent:***

- Determined by whether a person has capacity to consent or whether they have lost such capacity

Example Definition of Consent

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

Example: Consent In Fact

Jonah and Eloise have been dating for several months. One night while “making out,” Jonah says, “I want to have sex with you.” Eloise responds, “I don’t know if I’m ready. . . .” The two continue to make out for several more minutes, until Jonah unbuttons Eloise’s pants. Eloise then lifts her hips up and helps Jonah pull off her pants and underwear. The two then have sexual intercourse.



Incapacity



- 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: Incapacity

Charlie and Kelly meet at a “frat” party where Kelly has six shots and does two keg stands. Charlie carries Kelly up the stairs to the sleeping room because Kelly cannot walk. Kelly is having trouble keeping their eyes open and repeatedly mutters, “where am I?” Charlie says to Kelly, “Are you okay with this?,” and Kelly slurs, “Okay..” and then closes their eyes. Charlie starts to have sex with Kelly and realizes mid-act that Kelly’s eyes are closed and Kelly’s mouth is agape. Charlie proceeds to finish anyway.



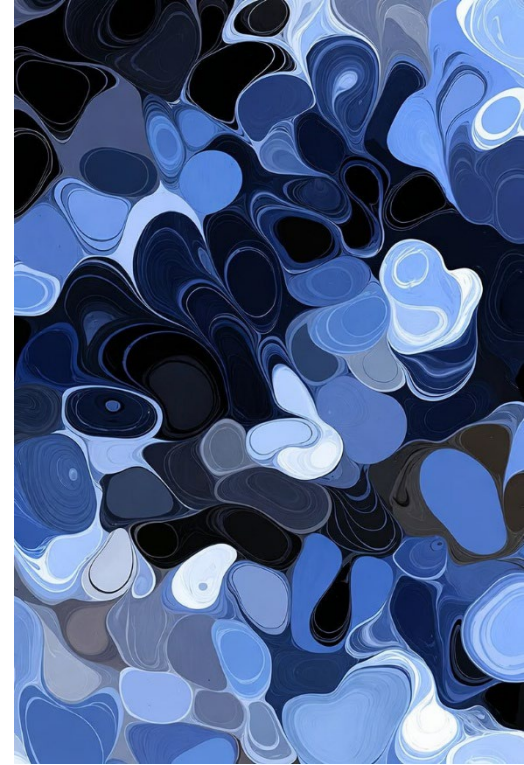
Questions for Discussion

- **Is Kelly incapacitated?**
- **What factors in the scenario lead you to that conclusion?**

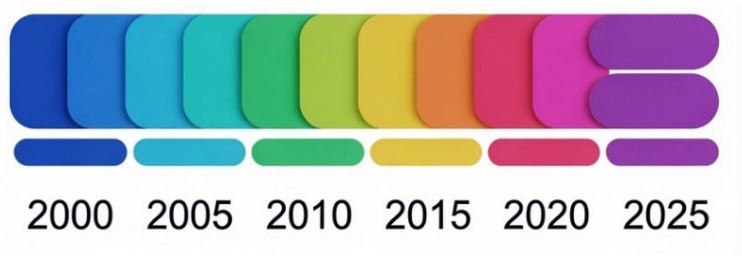


Identifying Incapacity

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



Statutory Rape



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

Example: Statutory Rape

The college admits an extraordinarily gifted 16-year-old, Samuel, as a first-year student, and permits the student to live on campus in a single occupancy dorm room. Samuel is over six feet tall, has a strong build, and wears a mustache, causing many people to mistake him as being older. Samuel “hooks up” with a 20-year-old third-year student in her dorm room. Samuel’s parents learn of the encounter and report it to the Title IX Coordinator.



Practical Points

Every state has laws governing the mandatory reporting of child sexual abuse. Depending on state law, sexual assaults of minors may need to be immediately reported to state or local officials, irrespective of whether a formal Title IX complaint is filed and pursued.

Fondling

- “Fondling” includes:
 - The intentional touching of the clothed or unclothed body parts without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation
 - The forced touching by the victim of the actor’s clothed or unclothed body parts, without consent of the victim, for the purpose of sexual degradation, sexual gratification, or sexual humiliation
 - This offense includes instances where the victim is incapable of giving consent because of age or incapacity due to temporary or permanent mental or physical impairment or intoxication for the purpose of sexual degradation, sexual gratification, or sexual humiliation

Example: Fondling

Kip and Kel are on the dance floor at a party in the student union. Kip's friends dare Kip to grope Kel's genitals, which all of them know will be embarrassing and humiliating to Kel. Kip comes up from behind Kel, gropes Kel's crotch, and then runs out of the building laughing. Kel is mortified, begins to cry, and leaves embarrassed.



Domestic Violence

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

Dating Violence

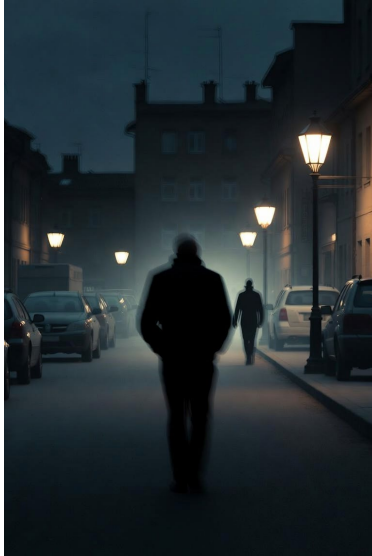
- ***Violence committed by a person:***
 - Who is or has been in a social relationship of a romantic or intimate nature with the victim, and
 - Where the existence of such a relationship will be determined based on consideration of the following factors:
 - The length of the relationship
 - The type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

Example: Dating Violence

Rip and Beth are romantically involved and have slept together multiple times in the last year. Beth is intensively possessive of Rip. One day, while in the on-campus cafeteria, Beth catches Rip texting with one of his old girlfriends. Beth flies into a rage, batters Rip's phone out of his hand, and then aggressively slaps Rip in the face. Having had enough of her possessiveness, Rip breaks up with Beth and files a formal complaint of dating violence.



Stalking



- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for their safety or the safety of others, or
 - Suffer substantial emotional distress

Example: Stalking

Inez is sexually attracted to Yuna, who won't give Inez the time of day. After Yuna rebuffs Inez's repeated requests to go on a date, Inez starts to follow Yuna around campus, appearing outside of her classrooms when Inez has no other reason to be there. Inez also drives by Yuna's apartment at night, which Yuna notices. Next, Inez takes Yuna's photo off her social media page and uses AI to alter it—creating an image of Yuna in a revealing swimsuit, which Inez sets as her home screen. Yuna notices the photo when Inez comes up to her (again) trying to initiate a conversation. Yuna then reports Inez for stalking.



Question for Discussion

- **What if Inez never interacted with Yuna, but still created the AI picture and set it as her home screen? Assuming Yuna found out, would she have a viable complaint of sexual harassment? If so, what form of sexual harassment?**



AI-Generated Sexual Content

- Not a separately defined form of sexual harassment under the regulation
- Could constitute hostile environment harassment or stalking
- May separately violate state laws prohibiting sexual exploitation or “deepfakes”
- Consider listing AI scenarios as examples in Title IX policy



Questions

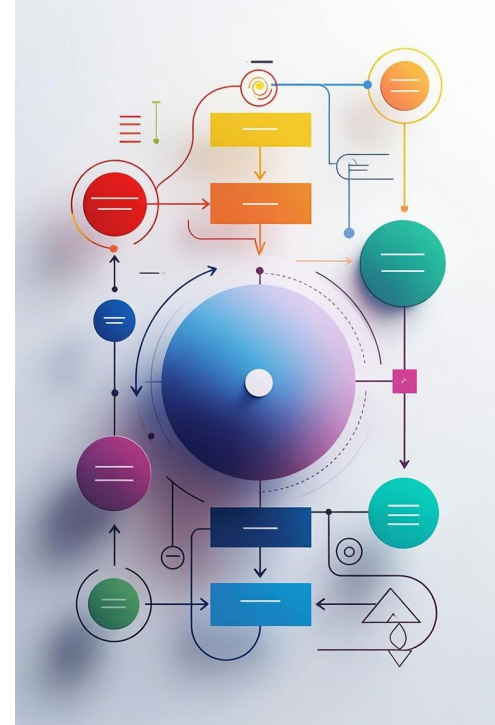


Sexual Harassment Grievance Process Overview

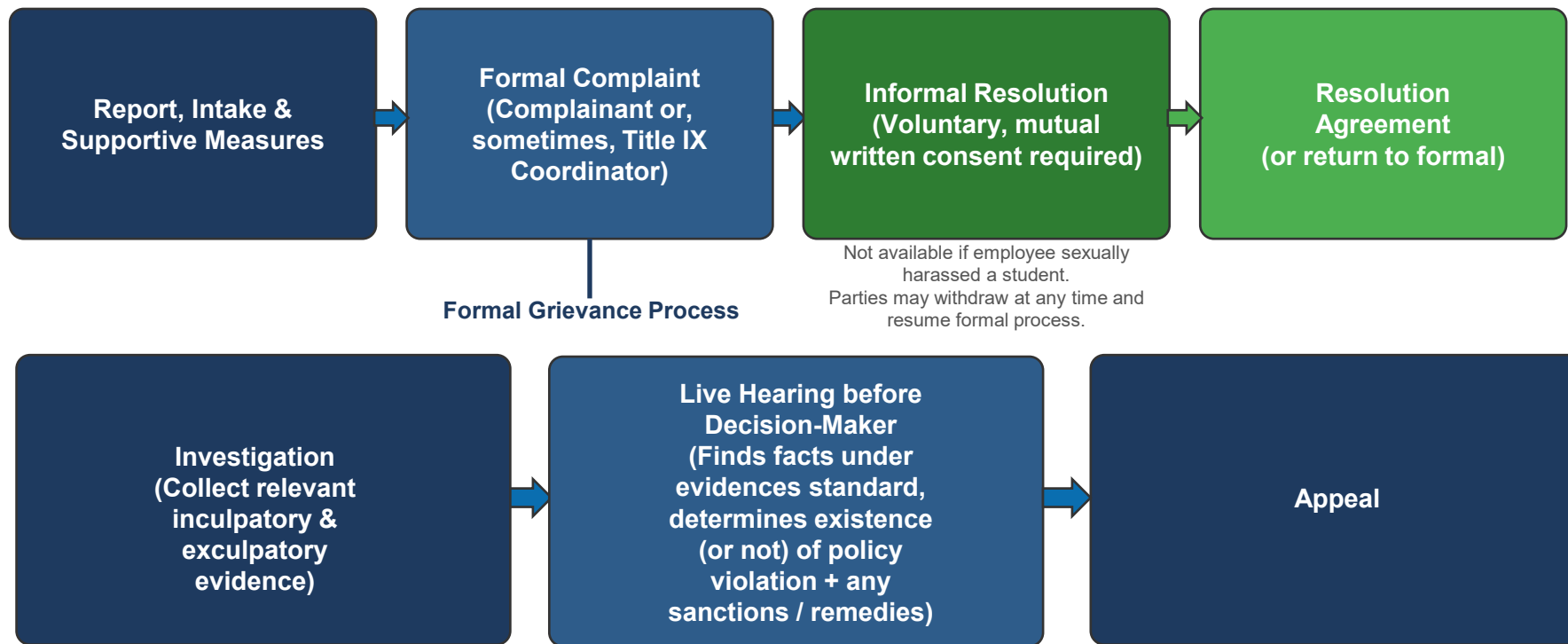
Module 6

Applicability

- Resolution of sexual harassment allegations in post-secondary setting
- August 2020 regulations specify significantly more detail, rigor, and due process than general grievance process



Sexual Harassment Grievance Process Flow



Note: This is a simplified illustration. Actual institutional procedures may include additional required notices, supportive measures, and procedural protections under Title IX regulations and institutional policy.

Title IX Team Members

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



Qualifications



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

Conflict of Interest

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



Examples of Conflicts of Interest

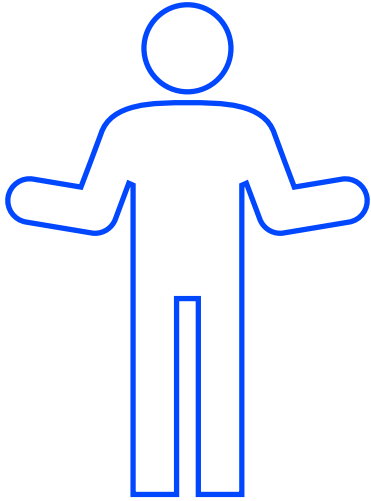
An investigator assigned to a case used to date the brother of the respondent

A hearing officer attends the same church as the complainant and serves with the complainant on the church council

An appeal officer is the subordinate of the hearing panel chair



Bias



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

Example: Bias

While actively serving as an investigator, the same individual maintains a professional social media profile and occasionally posts or reshapes content about campus Title IX work. One recent post (still visible when a new case is assigned to them) states:

“After years of doing this work, I’ve concluded that the ‘false accusation’ narrative is almost always a myth pushed by respondents and their lawyers. When a student comes forward, the real risk is that the institution will protect the accused athlete or fraternity brother. My job is to make sure that doesn’t happen.”



Stereotypes

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



Examples: Impermissible Stereotypes

Women who drink heavily or party hard are more likely to fake sexual assault claims out of regret

Men cannot be victims of sexual assault or rape

Only promiscuous women get sexually assaulted

Transgender or non-binary students are more likely to make false reports because they are “looking” to be offended

Male athletes are inherently more aggressive and more likely to commit sexual violence



Question for Discussion

- **Are there other stereotypes you have frequently encountered in your work?**



Questions



Institutional Notice, Intake, and Supportive Measures

Module 7

Institutional Notice – “Actual Knowledge”



- Institutional official with authority to take corrective action
- Observes or receives report of conduct that could be sexual harassment in the institution’s programs and activities

Example A: Actual Knowledge

A student reports to the Director of Residence Life that they were sexually assaulted in their residence hall two nights ago. The Director of Residence Life oversees operation of the residence halls, can enforce the terms of leases and relieve students of their lease obligations, and can make temporary or permanent housing reassignments.



Example B: Actual Knowledge?

An employee who works in financial aid is friends with a mid-level supervisor who works in the maintenance department. The employee discloses to the mid-level supervisor that the employee was sexually propositioned by her boss. The mid-level supervisor has no authority over the employee or the respondent but does have a duty to report sexual harassment to the Title IX Coordinator.



Example Institutional Officials

- Title IX Coordinator
- Deputy Title IX Coordinator
- Director of Athletics
- Director of Human Resources
- Director of Residence Life
- Dean of Students
- Provost
- President/Chancellor
- Chief Operating Officer
- Dean of a College
- Director of Campus Security/Chief of Police

“Mandatory Reporting”

- Institutional policy that requires certain employees to escalate reports of sexual harassment to the Title IX Coordinator
- At a minimum, must require Institutional Officials to escalate reports to the Title IX Coordinator



Outreach 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



Victim Agency



- Title IX regulations incorporate a strong preference for victim agency
- Victim agency is empowered by sharing of information

Supportive Measures

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



Examples



Counseling



Academic accommodations



Housing accommodations



Security escorts



Leave of absence



Increased security or monitoring



Modified work schedules



Mutual no-contact order when implicated by facts



Example A: Supportive Measures

Employee who works in the business office has accused supervisor of quid pro quo harassment and requests to be allowed to work remotely and be reassigned to a different supervisor in the same office. Employee is allowed to work remotely for at least two weeks, with reassessment thereafter, and is reassigned to a different supervisor for the pendency of the investigation and resolution with the potential for a permanent reassignment depending on the outcome.



Example B: Supportive Measures

A student reports their boyfriend engaged in dating violence. Student's boyfriend lives in the same housing complex on campus. Student wishes to be relocated to a new housing complex, but no student spots are currently available. Institution temporarily relocates student to an empty RA apartment until a student spot opens in the alternative complex.



Example C: Supportive Measures

Jasmine accuses Mun of sexual harassment by repeatedly asking Jasmine out, giving Jasmine unwelcome gifts, and telling Jasmine crude, sexual pickup lines. Institution imposes a “no contact” order directing Jasmine and Mun that reads, “You are prohibited from having substantive communications or interactions with each other until further notice. Incidental interactions (such as passing one another on the sidewalk) are not a violation of this order. However, you are both strongly encouraged to avoid being physically proximate to each other whenever possible.”



Practical Point

Supportive measures are intended to preserve access to programs and activities and maintain the status quo while the grievance process is ongoing. Whether and to what extent they are extended after the grievance process concludes depends on the outcome.

Example D: Supportive Measures

Jasmine's allegations against Mun proceed to a hearing. The hearing officer finds as a matter of fact that Mun asked Jasmine to go out only once, used a single corny pickup line from a Letterman "Top Ten" list, and apologized to Jasmine when she made it clear she wasn't interested. The hearing officer finds no sexual harassment, and the outcome is affirmed on appeal.



Confidentiality

- Supportive measures are generally confidential
- Shared only with institutional employees who have a job-related reason to know
- Shared only with the other party when necessary to effectuate the supportive measure (e.g., no contact order)



Emergency Removals



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

Example: Emergency Removal

Reggie and Yuri are in a dating relationship. In an on-campus townhouse, Reggie and Yuri get into a heated argument. Reggie repeatedly beats Yuri with a baseball bat. Yuri is hospitalized. Reggie is arrested and released on bond after 48 hours. Yuri is released from the hospital after 72 hours and returns to campus.



Administrative Leave

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

Example: Administrative Leave

A tennis player reports that the assistant coach professed his love for the player and sent the player graphic images of his genitals. The player provides the Title IX coordinator with some of the messages and offers to cooperate in recovering deleted messages from her phone. The team is about to leave for a five-day trip to play in a tournament.



Questions

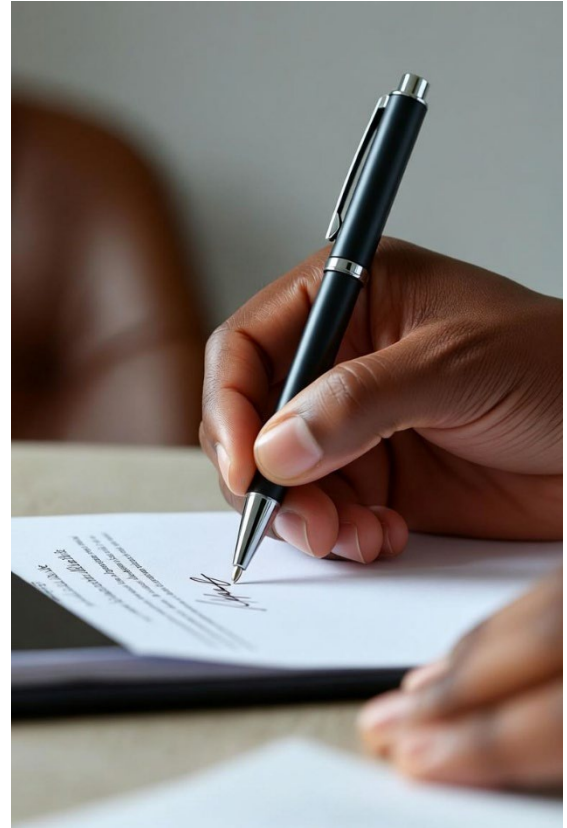


The Formal Complaint and Evaluation

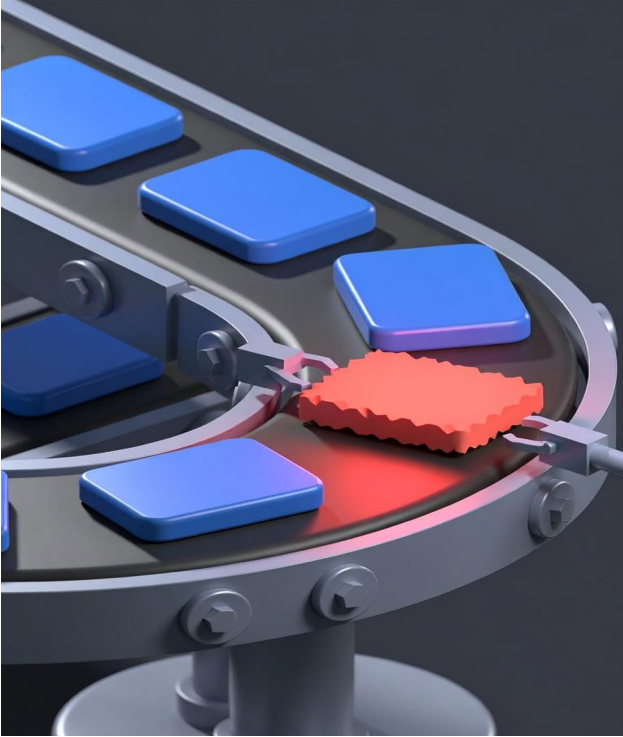
Module 8

Formal Complaint

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



Mandatory Dismissal



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

Example A: Mandatory Dismissal?

Charlie files a formal complaint accusing Jed of sexual assault. Charlie's complaint alleges that Charlie and Jed both went to a party at the "White House"—a large, off-campus house known for holding parties every weekend. Charlie alleges he was too drunk to consent, but that Jed led him upstairs and then performed oral sex on Charlie while Charlie was "in a stupor." The "White House" is occupied by six students who each lease a bedroom. The "White House" is owned by Richie Rich, a local real estate mogul who owns twenty different rental houses near campus.



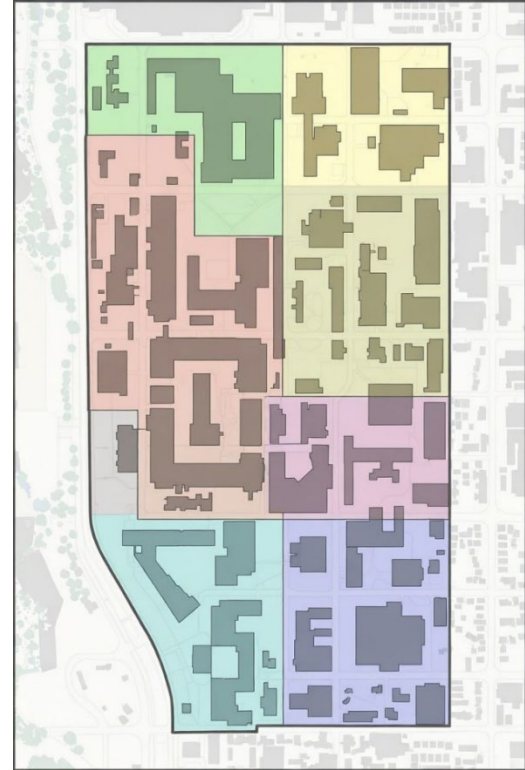
Question for Discussion

- **What if the “White House” was occupied entirely by members of the registered student organization “Future Billionaires of America,” and the organization hosted its meetings there and had a prominent sign over the door with the “FBofA” logo?**



Education Programs and Activities

- Sexual harassment in the “operations” of the institution, wherever they occur in the USA
- Sexual harassment on campus, or any other property owned or controlled by the institution
- Sexual harassment in the houses of registered student organizations



Example B: Mandatory Dismissal?

Lindy files a formal complaint that Sly used AI to create a fake video of Lindy engaging in sex acts. Lindy alleges Sly is sharing the video through an encrypted communication app. Lindy learned of the video when Lindy's friend, Zeb, received a message from Sly containing the video. Zeb received the message while Zeb was sitting in the on-campus cafeteria at lunch.



Example C: Mandatory Dismissal?

A male student files a formal complaint alleging that the institution's hosting of the production "The Vagina Monologues" has created a sexually hostile environment for men.



Example D: Mandatory Dismissal?

Telly files a formal complaint alleging that three years ago, Professor Ludo propositioned Telly for sex when Telly was a student in Ludo's class. Telly graduated last year and lives in a distant state. Telly's complaint says, "I'm filing this complaint now so that no other students experience what I did." Ludo is still an active faculty member.



Title IX Coordinator's Authority

- May sign a formal complaint when the alleged victim is unwilling or unable to
- Authority should not be used to override victim agency unless there is a strong justification



Permissive Dismissal



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

Example A: Permissive Dismissal

Corlys files a formal complaint accusing co-worker Vic of stalking. Two days before Corlys filed the complaint, Vic resigned to take a position at another institution.



Example B: Permissive Dismissal

Nat files a formal complaint accusing Lex of dating violence. When the investigator interviews Nat, Nat refuses to answer questions and says, “I just want to withdraw this,” but never withdraws the complaint in writing. Nat then “goes dark” and won’t respond to emails or phone calls over the course of several weeks. After notifying Nat the case may have to be dismissed if Nat won’t submit to an interview or otherwise engage, Nat fails to respond, and the Title IX Coordinator dismisses the complaint.



Written Notification



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

Additional Elements of Notice

- 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

Questions



Informal Resolution

Module 9

Informal Resolution

- A voluntary process that resolves a formal complaint without the matter proceeding to a decision after hearing
- May or may not involve the investigation phase of the grievance process



Forms of Informal Resolution in Title IX Matters



Mediation

Neutral third-party mediator facilitates structured dialogue between parties to reach a mutually agreed upon resolution.



Facilitated Exchange by Title IX Coordinator

Title IX Coordinator or designee shuttles communications and proposals between parties without them meeting face-to-face.



Restorative Justice

Structured process focused on accountability, repairing harm, and restoring relationships through facilitated dialogue and agreements.



Negotiation with Lawyers

Parties' attorneys negotiate terms of resolution (e.g., no-contact, training, withdrawal) on behalf of their clients.



Administrative Decision in Lieu of Live Hearing

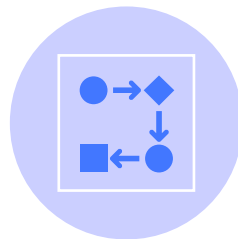
Parties agree to accept an administrative determination of responsibility and sanctions without a live hearing or full adjudication.

Note: All forms require voluntary, informed written consent of the parties after a formal complaint (per 34 C.F.R. § 106.45(b)(9) and institutional policy).
Not available for employee-on-student sexual harassment.

Key Requirements



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

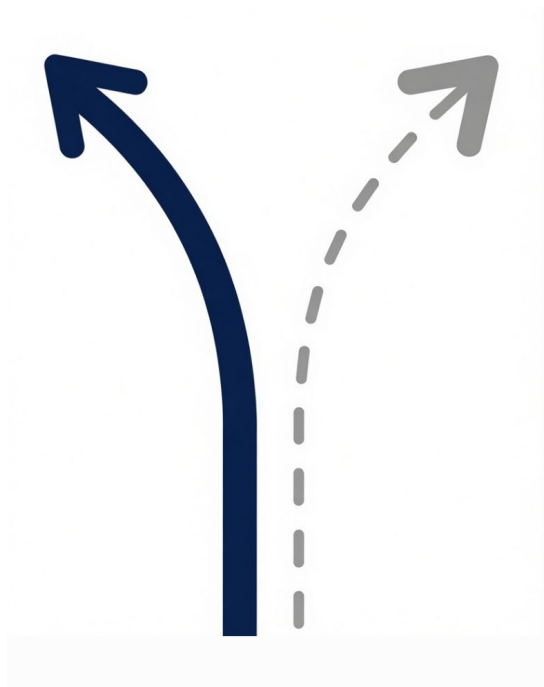


The parties must voluntarily agree to participate in writing



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

Limitation



- Informal resolution is not permitted where employee is accused of sexually harassing a student
- Once filed, such a complaint must either be adjudicated after hearing or dismissed

Example: Informal Resolution?

A student files a formal complaint of sexual harassment against a resident director, alleging the resident director created a hostile environment by rubbing the student's shoulders and making repeated comments about the student's "sexy" dress. The resident director admits their actions, attributes it to a "profound" lapse in judgment, apologizes, and offers to undergo training. The student tells the Title IX Coordinator she does not want to get anyone fired and "would very much like to avoid a hearing."



Questions for Discussion

- **Can the Title IX Coordinator allow this formal complaint to be resolved on the terms proposed by the resident director?**
- **What if the student demands a resolution and refuses to attend the hearing?**
- **What if *the student* threatens to sue the institution unless the Title IX Coordinator allows informal resolution?**



Institutional Approval

- Title IX regulation allows informal resolution, but does not require institutions to offer it
- Institutions may determine that certain classes of complaints are not eligible for informal resolution or that certain cases are not eligible for informal resolution



Example A: Institutional Approval?

A school's Title IX sexual harassment policy states, "While informal resolution is generally permitted unless an employee is accused of sexually harassing a student, informal resolution will not be allowed for any matter involving an allegation of rape or statutory rape. Furthermore, the Title IX Coordinator may determine that informal resolution is inappropriate for a specific case after considering the totality of circumstances."



Example B: Institutional Approval?

Rip and Beth have each made several reports to the Title IX Coordinator of alleged dating violence over the last three years. The couple are known to have a volatile relationship—frequently breaking up and getting back together—and consume a significant amount of student affairs “bandwidth” with their relationship troubles. Most recently, Beth filed a formal complaint accusing Rip of slapping her. Rip filed a countercomplaint accusing Beth of throwing a ceramic vase at his head.



Questions for Discussion

- **If you were the Title IX Coordinator, would you permit informal resolution to resolve this case?**
- **What would you do if Beth and Rip each withdrew their respective complaint, in writing?**

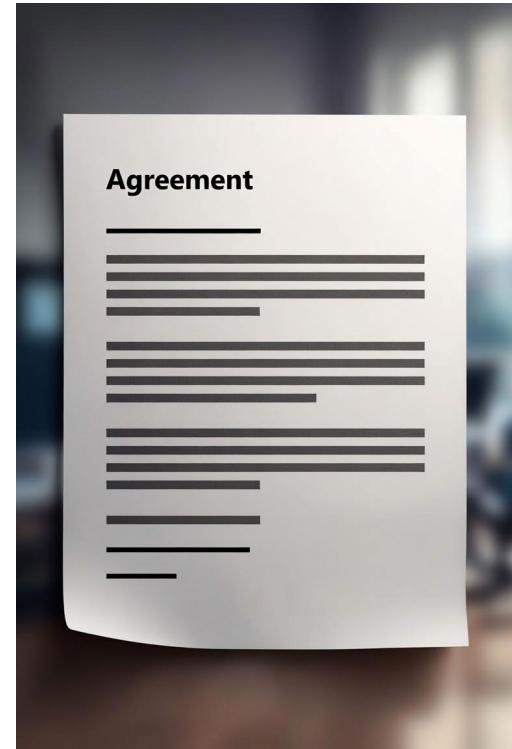


Potential Elements of an Agreement

- Restrictions on contact
- Physical separation
- Agreed training
- Agreed counseling or anger management
- Apology
- Transfer
- Withdrawal
- “Going remote” until graduation
- Negotiated sanction or discipline
- Restrictions on activities
- Others?

Documenting the Agreement

- Written, resolution agreement
- Articulating all material terms
- Articulating verification and enforcement mechanisms
- Indicating disposition of formal complaint
- Signed by the parties
- Approved by the Title IX Coordinator



Question for Discussion

- **At your institution, what happens if a party fails to abide by the terms of an informal resolution? Revive the Title IX complaint? A violation of the code of conduct?**



Questions

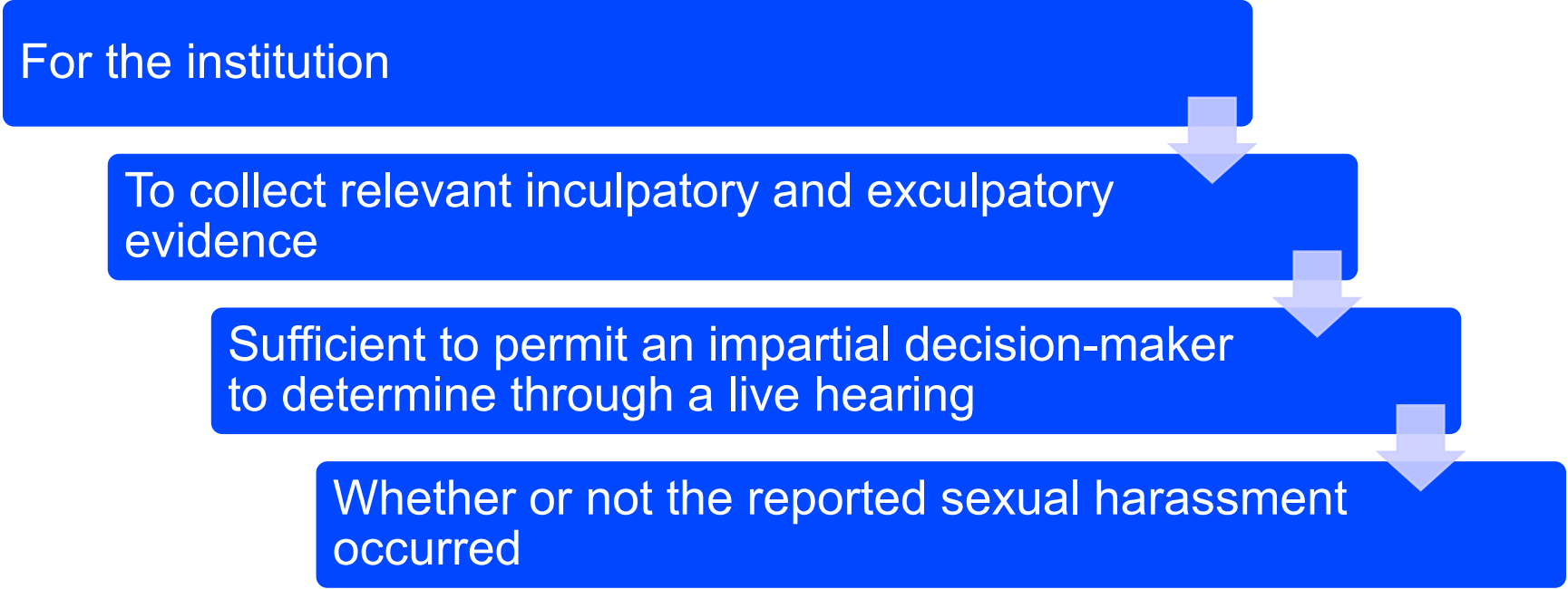


Investigations

Module 10

Purpose of the Investigation

For the institution



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graph TD; A[For the institution] --> B[To collect relevant inculpatory and exculpatory evidence]; B --> C[Sufficient to permit an impartial decision-maker to determine through a live hearing]; C --> D[Whether or not the reported sexual harassment occurred];
```

To collect relevant inculpatory and exculpatory evidence

Sufficient to permit an impartial decision-maker to determine through a live hearing

Whether or not the reported sexual harassment occurred

General Principles

- Parties must have sufficient notice
- Parties have an equal opportunity to participate and to review and comment on evidence
- Institutional duty to seek out and collect evidence
- Investigation is evidence-gathering, not decision-making



Core Elements of the Investigation

INTERVIEWS



Parties

Complainant and Respondent interviews (and any advisors present)



Fact Witnesses

Individuals with firsthand knowledge of relevant events or context



Experts (if allowed and relevant)

SANE examiners, digital forensics, medical, or other subject-matter experts

NON-TESTIMONIAL EVIDENCE



Electronic & Documentary

Emails, texts, DMs, social media, photos, videos, documents



Access & Records

Key swipes, door logs, camera footage, academic/HR records



Forensic & Official

SANE exams, police reports, medical records, lab results

Note: Both interviews and non-testimonial evidence must be collected, preserved, and evaluated fairly and impartially.

Fact Witness vs. Character Witness

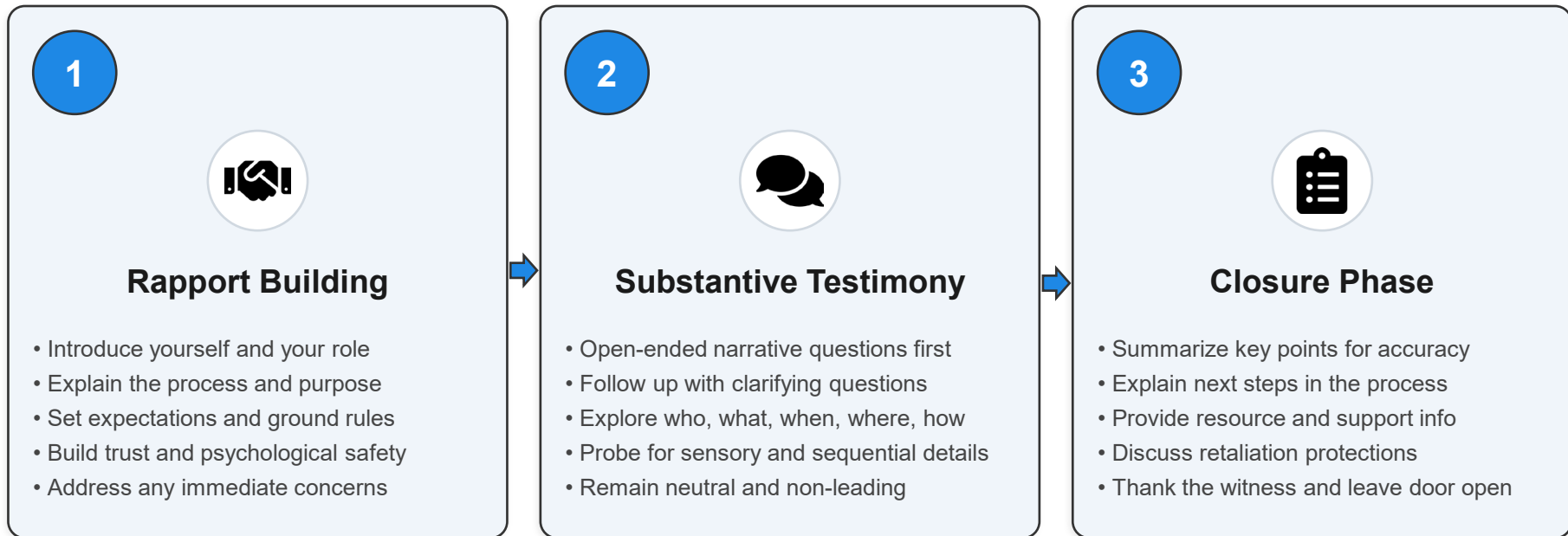
- A **fact witness** has personal knowledge about specific facts that are relevant to determining whether or not a given act of sexual harassment occurred
- A **character witness** does not possess knowledge of specific, relevant facts but instead speaks to a person's general character traits or their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

Example: Witnesses

During an investigation into an alleged rape in a residence hall, the investigator interviews two students. Jordan, a hallmate, states she walked into the suite at 1:15 a.m. and saw the complainant crying on the couch while the respondent stood nearby adjusting his clothing, and that she also heard the complainant say, “I told you to stop.” Alex, a longtime friend of the respondent, states only that the respondent is “a really respectful guy who has never been anything but a gentleman around women, and everyone who knows him would say the same thing.” Jordan is a fact witness because she has personal knowledge of specific events and statements related to the incident itself; Alex is a character witness because his testimony concerns only the respondent’s general reputation and character rather than any facts of the alleged incident.



Interview Structure



Questioning Technique



Open-Ended Questions

Invite free narrative

"Tell me everything that happened..."
"What happened next?"
"Describe that for me in as much detail as you can."
"What else do you remember about that?"

Start broad; let the witness control the narrative.



Facilitator Words

Minimal encouragers

"Uh-huh..." / "Go on..."
"Then what happened?"
"I see..." / "Okay..."
"Tell me more about that."

Keep the flow going without interrupting or leading.



Cued Invitations

Focused follow-ups

"You mentioned the hallway... tell me more about that."
"Earlier you said he grabbed your arm... what happened right after?"
"You used the word 'uncomfortable'... what did that look like?"

Use the witness's own words as the cue.



What to Avoid

Common pitfalls

Leading: "He forced you, right?"
Closed: "Did he touch you?" (yes/no only)
Compound: "When, where, and who else was there?"
'Why' questions that sound blaming: "Why did you accept the drink?"

These reduce accuracy and can feel adversarial.

Note: Effective questioning techniques help gather accurate, detailed information while maintaining a supportive and non-adversarial tone.

Trauma-Informed Approach

- Safety and predictability
- Clarity and transparency
- Party agency (where appropriate)
- Equal application to complainants and respondents





HUSCH BLACKWELL

Potential Trauma Effects in Interviews

- Non-linear or incomplete memory
- Difficulty with precise timelines
- Flat effect or strong emotional response
- Apparent inconsistencies that later make sense
- Self blame
- Precise memory of smell, sound, inconsequential details

Example A: Trauma Effect?

When asked to describe what happened the night of the incident, the complainant begins mid-event, “I remember being against the wall and telling them to stop.” She then jumps to leaving the apartment, then back to earlier in the evening when they were drinking, and only later mentions how they ended up in the bedroom. When the investigator asks for the sequence, she becomes frustrated and says, “I know it doesn’t make sense in that order, but that’s how it comes to me.”



Example B: Trauma Effect?

A respondent describes a sexual encounter that the complainant has characterized as non-consensual. He speaks in a calm, almost detached tone, with little facial expression or change in voice, even when describing physical details. The investigator notes that his demeanor seems “oddly flat” given the seriousness of the allegations. Later, when asked how he is doing, he becomes briefly tearful and says he has been having nightmares.



Example C: Trauma Effect?

During the interview, the complainant describes the encounter and then repeatedly returns to their own actions, “I should never have gone to the room. I was drinking and I know better. I kept thinking if I had just left earlier none of this would have happened. I feel like I brought this on myself.”



Recording Interviews



- Audio recording or virtual recording (enterprise software) is typical
- Making a record only with notes is legally permissible but becoming less common

Practical Point

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

Sources of Non-Testimonial Evidence

FROM PARTIES & WITNESSES



Parties & Witnesses

Documents, photos, videos, texts, and other items they provide or identify



Public Social Media

Public posts, stories, photos, and comments (careful with privacy settings)



Police & External Agencies

Police reports, body-worn camera, 911 recordings, medical/SANE records

INSTITUTIONAL SYSTEMS & RECORDS



Institutional Email & Messaging

Outlook, Teams chat, Slack, institutional messaging platforms



Video Cameras & Access Logs

Security cameras, door/key card logs, entry/exit records



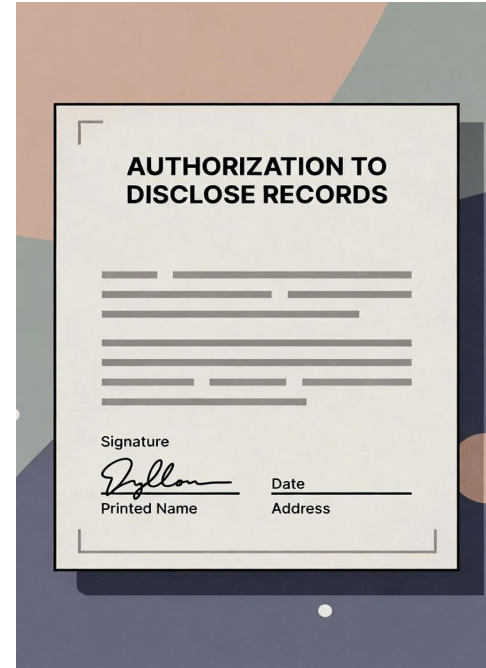
Institution-Owned Devices & Servers

Computers, phones, tablets, servers, cloud storage, timesheets

Note: Always consider privacy laws, institutional policies, and chain of custody when collecting non-testimonial evidence.

Specific Limitations on Investigation

- Prohibition on collecting irrelevant sexual history
- Collect privileged records only with written permission



The image shows a stylized representation of a document titled "AUTHORIZATION TO DISCLOSE RECORDS". The document is white with a black border and is set against a background of overlapping geometric shapes in shades of brown, grey, and blue. The title is in bold, uppercase letters at the top. Below the title are several horizontal lines for text entry. At the bottom, there are four fields: "Signature" with a handwritten signature, "Date", "Printed Name", and "Address".

Example: Complainant's Sexual History

During the respondent's interview, he tells the investigator:

“You need to ask her about all the other guys she's slept with in the dorm this semester — everyone knows she's been with half the floor.” The investigator responds that questions about the complainant's prior sexual behavior or sexual predisposition are generally irrelevant and prohibited under Title IX, unless they fall within one of the two narrow exceptions (to prove that someone other than the respondent committed the alleged conduct, or to prove consent with this specific respondent). The investigator explains that she will not pursue that line of inquiry and redirects the interview back to the events involving the respondent on the night in question. The respondent's suggestion is noted in the file but is not acted upon.



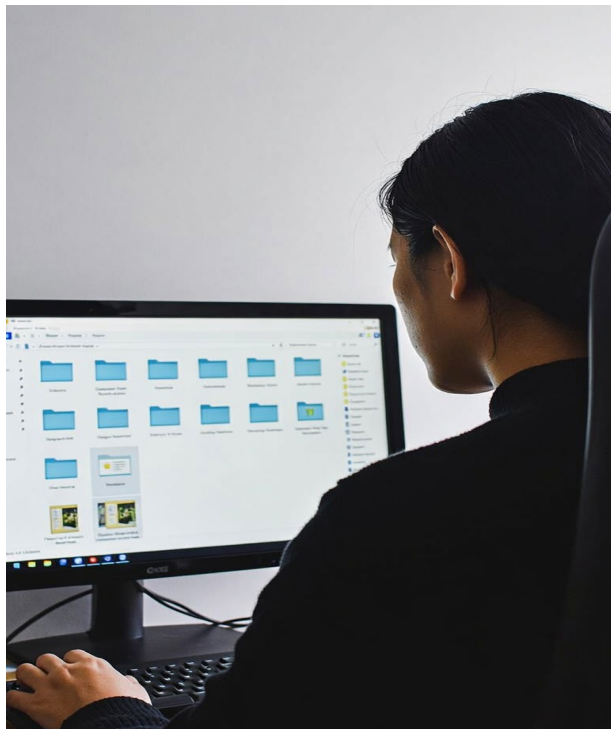
Example: History Regarding Consent

During the respondent's interview, he says, "We've had sex several times before this night. Every time, including last weekend, she initiated it by coming to my room after midnight, and we used the same safe word if either of us wanted to stop. That night she came over the same way and never used the safe word or said stop."

The investigator is permitted to explore this line of questioning (and later question the complainant about it), because it concerns specific prior sexual incidents between the same two parties and is being offered to prove consent.



Access to the Evidence



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

Response to the Evidence

- Through the 10th day, parties are permitted to submit a written response to the evidence
- Response should be considered and evaluated before investigation report is issued
- Investigation concludes with written report that “fairly summarizes” the inculpatory and exculpatory evidence

Questions for Discussion

- **Does your institution have the investigator make written observations regarding the “credibility” of the parties and witnesses?**
- **What are the risks and benefits of this approach?**



Advisors

- 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



Example: Disruptive Advisor

An institution's policy prohibits parties from making recordings of Title IX interviews. The institution alone makes the recording and provides it to the parties prior to conclusion of the investigation. A respondent's advisor, who is an attorney, attends the interview and insists on trying to record the interview with a digital recording device. The attorney rants, "I can't believe this. I demand you call your supervisor. My client's not speaking until this gets resolved."



Questions for Discussion

- **How would you resolve this advisor's behavior?**
- **If the advisor continues, can the party be required to get a new advisor?**



Questions



Hearings and Appeals

Module 11

Purpose of the Hearing

To hear testimony and receive non-testimonial evidence so that



The decision-maker can determine facts under a standard of evidence



Apply those facts to the policy, and



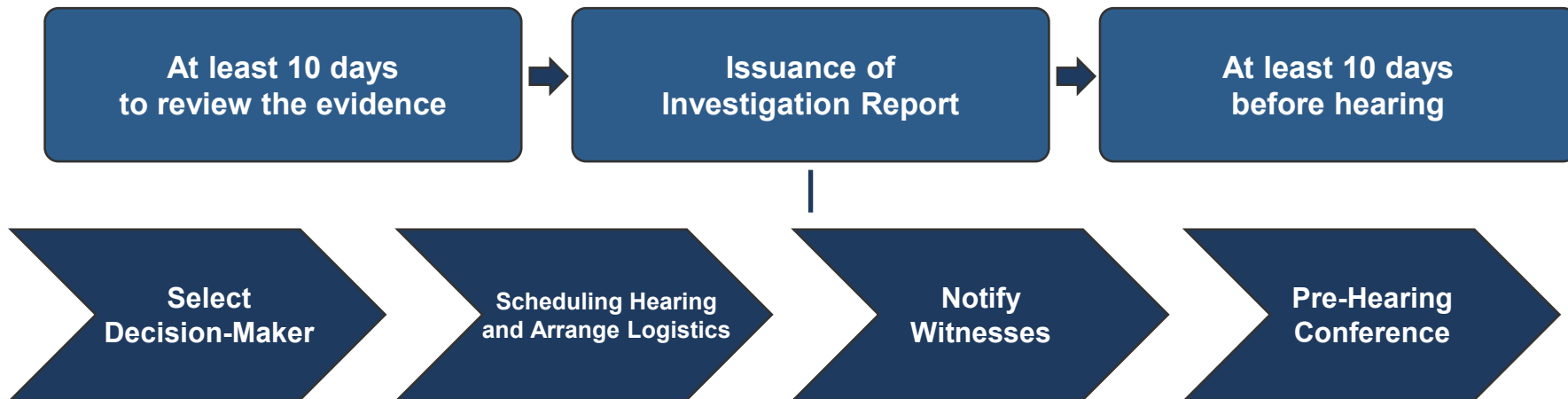
Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

Standard of Evidence

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



Procedural Flow: Investigation to Hearing



Note: The parties must be given at least 10 days to review all evidence and the investigation report before any hearing. The decision-maker must be properly trained and free from conflicts of interest or bias.

Notifying Parties and Witnesses



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

Advisor

- Both parties must be accompanied by an advisor
- Default is that party brings an “advisor of choice”
- If a party does not have an advisor, institution must provide one for cross-examination purposes



Key Elements of Hearing



Live Testimony

Witnesses provide testimony live during the hearing



Questions & Cross-Examination

Decision-maker asks questions, advisors conduct cross-examination of the other party



Relevance Screening

Decision-maker screens all questions for relevance and excludes prohibited sexual history



Recording or Transcript

The hearing must be recorded or transcribed



Party Separation

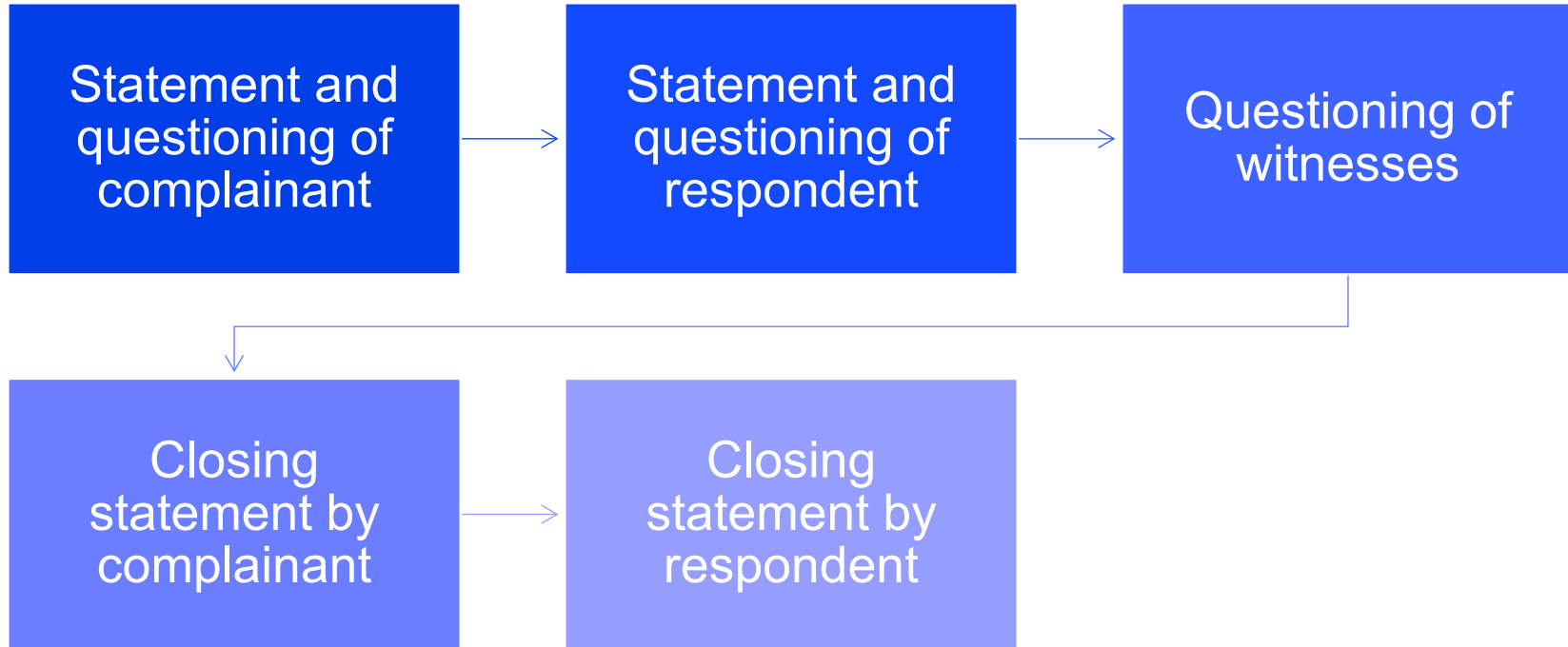
Separate rooms or virtual separation available upon request

The Exclusionary Rule



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

Potential Sequence



Relevance



- Decision-maker(s) must screen questions for relevance and resolve relevance objections
- Decision-maker(s) must explain any decision to exclude a question as not-relevant

Example A: Relevance?

Olivia accuses her roommate, Isabella, of sexual harassment after an incident in their shared dorm room where Isabella allegedly kissed her without consent and later pressured her for sex.

Isabella's advisor wants to ask Olivia about a series of flirtatious text messages the two exchanged in the weeks leading up to the incident, including messages in which Olivia referred to Isabella as "babe" and said she was "looking forward to some alone time."



Example B: Relevance?

Ava has accused her ex-boyfriend, Noah, of sexual assault after an incident at a party. Noah's advisor wants to question Ava about how many people she has had sex with since breaking up with Noah and whether she has a reputation on campus for being "easy."



Example C: Relevance?

Emma Vargas has accused her supervisor, Ryan Brooks, of creating a hostile work environment through repeated unwanted sexual comments. Ryan's advisor wants to question Emma about her history of filing complaints against previous employers and whether she has a pattern of making similar accusations when she doesn't get promoted.



Standards of Decorum



Respect & Civility

All participants must treat each other with professionalism and respect at all times.



No Interruptions

Do not interrupt when another party, witness, or advisor is speaking.



Question Pacing

All questions must be paced so that the decision-maker can determine relevance; “rapid fire” questions are prohibited.



No Harassment or Badgering

Advisors may not harass, badger, or argue with parties or witnesses.



Decision-Maker Authority

Decision-maker may remove anyone who violates decorum or disrupts the hearing.



Orderly Proceedings

The hearing will be conducted in a fair, orderly, and impartial manner.

Note: These rules help ensure a fair, respectful, and orderly hearing process for all participants.

Question for Discussion

- **What if you learn, after a virtual hearing, that one of the parties had several friends sitting off camera in violation of the rule that a party could only be accompanied by a single advisor?**



Deciding the Outcome



Deliberate on All Evidence

After the hearing, decision-maker(s) must carefully consider all admissible testimony and admissible non-testimonial evidence.



Weigh Evidence & Credibility

Evaluate the evidence for its weight and assess the credibility of witnesses and parties.



Resolve Disputed Facts

Resolve disputed issues of fact using the standard of evidence adopted by the institution (preponderance or clear and convincing).



Apply Policy Definitions

Using the facts as found, apply the policy's definitions to determine whether sexual harassment occurred.

Assessing Credibility



Plausibility

Is the testimony believable and does it make sense?



Specificity

Did the testimony provide details? Or was it vague and generic?



Motive to Falsify

Does the person have a reason to lie (beyond mere status as a party)?



Corroboration & Consistency

Is there supporting or contrary evidence? Are accounts consistent? Are inconsistencies explained?



Past Record

Does the person have a history of similar behavior?

Note: Credibility determinations must be based on the evidence and not on stereotypes or assumptions about how a victim or respondent “should” behave.

Written Decision

- Identifies the allegations
- Describes the various procedural steps
- States findings of facts
- Reaches conclusions regarding application of relevant policy
- Includes a rationale for each finding for each allegation
- States the disciplinary sanctions and remedies
- Explains the procedures and grounds for appeal



Grounds for Appeal



Procedural Irregularity

A procedural irregularity that affected the outcome of the matter.



New Evidence

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



Conflict of Interest or Bias

The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Example: Procedural Error

Respondent appeals because the institution failed to include certain key evidence in the evidence file that was disclosed to the respondent prior to conclusion of the investigation. The Respondent was not even aware of the evidence until it appeared in the hearing and argues she would have called a witness to refute it, had she been notified of its existence.



Example: New Evidence?

Complainant accused respondent of drugging and sexually assaulting him. A hearing officer finds for the respondent. Complainant then appeals, arguing that he has since heard from two others who say they were sexually assaulted by the respondent too.



Questions for Discussion

- **Assume you conclude this is not a viable “new evidence” appeal. What should the Title IX Coordinator do with the information?**
- **What landmines exist for the Title IX Coordinator?**



Questions



The Clery Act, FERPA, Title VII, and Other Federal Laws

Module 12

The Clery Act

- Requires tracking and annual reporting of certain crimes, including sex crimes
- Requires issuance of timely warnings and emergency notifications
- Mandates certain policy provisions and resources pertaining to sexual assault and VAWA crimes



Campus Security Authorities



- Institutional personnel whose knowledge of crimes is imputed to the institution for reporting purposes
- Title IX Coordinators and Deputy Title IX Coordinators are CSAs
- Necessitates annual statistical reconciliation and disclosure to campus safety officials

Timely Warnings

- Required when a reported Clery crime poses a serious or continuing threat to campus community
- Issued promptly with details and tips intended to help community members protect themselves
- May be implicated by Title IX reports, especially sexual assault and VAWA crimes

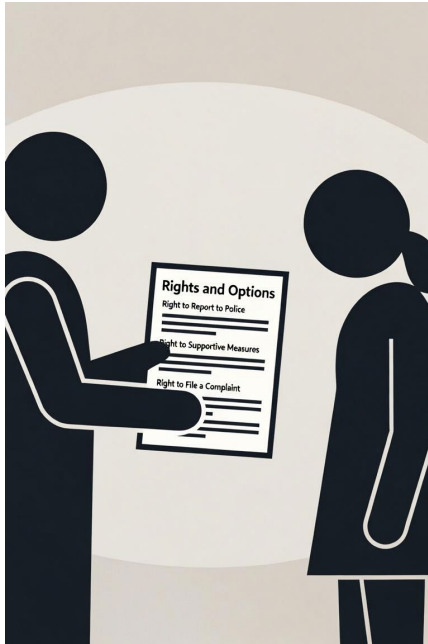


Example: Timely Warning

The Title IX Coordinator receives two reports from women living in an on-campus sorority house. Each reports seeing a male figure lurking outside the sorority house at night peering into bedroom windows. One reports seeing the individual take photographs using a camera with an electronic “scope.”



Rights and Options



- As amended by VAWA, Clery Act requires institution to provide written statement of rights and options to VAWA-crime victims
- To be provided as soon as practicable after a report
- Essential to include document as part of initial Title IX outreach

FERPA

- Requires institutions to maintain the confidentiality of student education records
- Defined as records personally identifiable to the student and “maintained” by the institution
- Certain limited exceptions for third-party disclosure



Example: FERPA and Parents

A student files a formal complaint with the Title IX Coordinator accusing a faculty member of quid pro quo harassment. The student's mother calls the Title IX Coordinator, with the "family's attorney" on the phone, demanding a copy of the formal complaint so the mother can "help my child obtain a restraining order."



Example: Health and Safety Exception

A student is violently beaten by their spouse in an on-campus apartment. An ambulance is summoned, and the student is taken to the hospital with life threatening injuries. The Title IX Coordinator learns of the matter through an emergency email sent to key institutional leaders. Shortly thereafter, the student's father calls the Title IX Coordinator's institutional cell phone to express concern that his daughter is in an unsafe relationship and may be at risk of domestic violence.



Written Authorization

- FERPA always permits disclosure consistent with written authorization by the student
- Best practice is to require a written FERPA authorization before discussing a Title IX case with any parent

**FERPA
authorization**

Student Signature

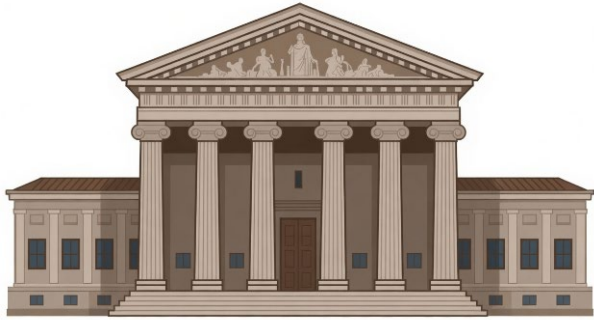
Date

Title VII

- Prohibits protected-status discrimination—including sex discrimination—in employment
- Has a broader definition of hostile environment sexual harassment
- Trigger for institutional knowledge (and thus institutional action) not as stringent as Title IX



Title IX and Employment Discrimination



- Current view—Title IX applies to employment discrimination in education programs and activities
- *Crowther v. Board of Regents* will decide whether Title VII supplies the exclusive private cause of action for plaintiffs to sue over employment discrimination

Hostile Environment Definitions

Title VII:

- Severe or
- Pervasive and
- Objectively offensive

Title IX:

- Severe and
- Pervasive and
- Objectively offensive

Example: Title VII Hostile Environment

An employee is approached by a supervisor in the breakroom. The supervisor places their hands on the employee's buttocks and whispers in their ear, "You're looking hot today. I'd love to ** you right now." No further interactions occur. The employee is now terrified to be alone with the supervisor.**



Title VII Triggering Knowledge

- Misconduct by supervisor may result in direct liability
- “Knew or should have known” for third-party, non-supervisor actions



Example: Should Have Known Standard

An employee is approached by a supervisor in the breakroom. The supervisor places their hands on the employee's buttocks and whispers in their ear, "You're looking hot today. I'd love to **** you right now." No further interactions occur. The employee tells several co-workers, and it is quickly common knowledge in the Department that the supervisor is a "creep." The employee never files a formal complaint, although the Director of Human Resources senses the supervisor may pose a risk and has heard vague rumors he is a "perv."



Procedural Interaction



- Title IX and Title VII policies and processes exist independently
- Pendency of a Title IX process does not prevent a Title VII process from moving forward

Rehabilitation Act/ADA

- Prohibit discrimination against persons who are disabled or perceived as disabled
- Require reasonable accommodations for persons who are disabled through an “interactive process”



Reasonable Accommodations



- Change or adjustment that permits a person with a disability to participate
- Cannot result in a fundamental alteration
- Institution must generally bear the expense/inconvenience unless it presents an “undue hardship”

Example A: Reasonable Accommodation

A student-respondent James suffers from diagnosed anxiety disorder. Under the institution's procedures, each party may be accompanied at the hearing only by their advisor. The student-respondent, however, requests that a family member also be allowed to sit with him during the hearing. He provides a note from a doctor with the diagnosis and recommending the accommodation because, "unless James is accompanied by a trusted person, such as a family member, he is likely to suffer an anxiety attack and be unable to proceed with the hearing."



Example B: Reasonable Accommodation?

A student-respondent James suffers from diagnosed anxiety disorder. Under the institution's procedures, each party attending a hearing is required to submit to questioning from the hearing panel and cross-examination from the advisor for the other party. James requests not to be questioned at all and provides a doctor's note stating, "If James is questioned in real time in this setting, he is likely to have an anxiety attack, jeopardizing his health."



Questions for Discussion

- **Is this a reasonable accommodation, or would it result in a fundamental alteration?**
- **How does the fact that the “exclusionary rule” is no longer in effect play into the analysis?**
- **What if James also sought to be free from “any adverse inference drawn from the fact that I cannot submit to questions”?**



Example C: Reasonable Accommodation?

Charlie files a formal complaint accusing Olivia of sexual assault. When the investigator seeks to interview Charlie, he provides a doctor's note indicating he has experienced PTSD as a result of the assault and "will not be in a position to be interviewed or participate in an investigation until his treatment is complete, which is anticipated to be at least six months from now." Olivia has been notified of the formal complaint and is the subject of a no contact order.



Stop Campus Hazing Act

- Establishes federal requirements for hazing prevention, reporting, and transparency
- Necessitates adoption and publication of hazing policies
- Publication of hazing transparency report
- Inclusion of hazing in Clery Act ASR



Definition of Hazing

Hazing is an act that is:

Intentional,
knowing, or
reckless

Committed by a
person (alone or
in concert with
others)

Against another
person or people
(regardless of
the other
person's/
people's
willingness)

In the course of
an initiation into,
an affiliation with,
or the
maintenance of
membership in a
student
organization, and

Causes or
creates a risk of
physical or
psychological
injury

Example: Team Hazing

Each year the lacrosse team hosts a “back to school” party at a local lake. The event is organized by seniors. Coaches are aware of the event but don’t participate in it. The event historically has included a light-hearted initiation ritual for freshman—like singing the school fight song acapella. However, this year, freshman are told they must remove their clothes, put on skimpy thong swimsuits, and then waterski. Some upperclassmen take photos and videos of the skiing freshman and post them online. One freshman files a Title IX complaint, alleging hostile environment harassment.



Differences

- ***Title IX:***

- Focused on determining individual accountability
- Rigorous due process and live hearing
- Confidential

- ***Hazing Policy:***

- Must address both individual and group accountability
- Greater flexibility on process
- May result in publication of group hazing on institution's website

Hazing Transparency Report



- Summarizes findings of hazing by established or recognized student organizations
- Does not include personally identifying information of particular students
- Must be located in a prominent location on the institution's website and updated at least twice per year

Questions



The logo consists of a white stylized symbol on the left, resembling a cross with rounded ends, followed by the text "HUSCH BLACKWELL" in a bold, white, sans-serif font.

HUSCH BLACKWELL