

HUSCH BLACKWELL

University of Illinois Urbana- Champaign Training for Title IX Team Members

August 2024

Housekeeping

Training based on Title IX regulation effective August 1, 2024

Our slides summarize key elements of the regulation necessary for a foundational training

Title IX practitioners should be alert for advice about court decisions that may alter implementation deadline for all or some portions

Hypotheticals are fictitious; to ensure realism, some use fact patterns and language that are direct and challenging



Agenda (1 of 2)

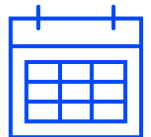
The Title IX Regulation and Its Implementation

Sex Discrimination and Sex-Based Harassment

Retaliation

The Title IX Coordinator and Title IX Team

Reporting



Agenda (2 of 2)

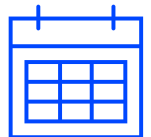
Supportive Measures

The Grievance Procedures

Appeals

Informal Resolution

Pregnancy



Poll Question

I consider myself to be:

An experienced Title IX practitioner

An intermediate Title IX practitioner

A new Title IX practitioner with lots to learn

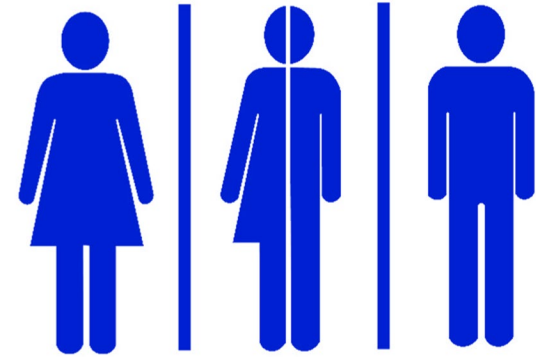


The Title IX Regulation and Its Implementation

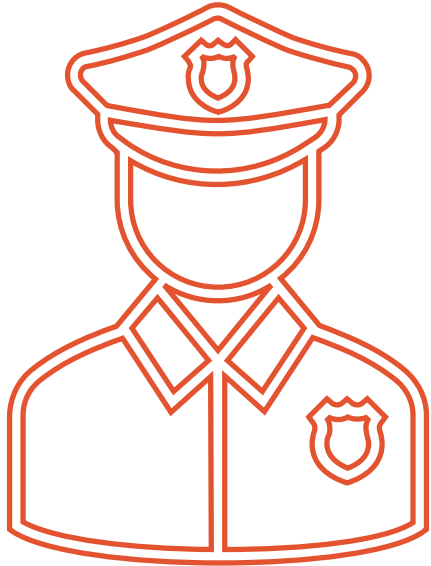
What is Title IX?

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

20 U.S.C. § 1681



How is Title IX implemented?



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

How does the Department enforce Title IX regulations?



- Largely a complaint-initiated investigation and resolution process led by Office for Civil Rights
- OCR has authority to force compliance through various tools including resolution agreements or initiation of proceedings to revoke financial aid eligibility (last resort)

Where are the Title IX regulations?

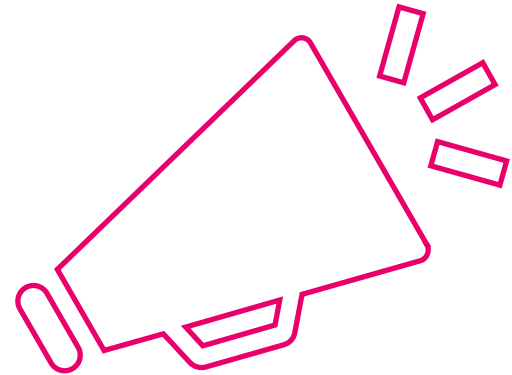
- 34 C.F.R. (“Code of Federal Regulations”) Part 106
- Contains dozens of different Title IX regulations, including those that govern appointment of a Title IX Coordinator, publication of institutional policies, and requirements pertaining to grievance procedures
- August 2020 “regulation” amended multiple elements of Part 106 and added new ones

What is the “new” Title IX regulation?

- Effective August 1, 2024, a series of revisions to Part 106 that address several issues, including:
 - The scope of sex discrimination and sex-based harassment covered by Title IX
 - The procedures and requirements for addressing complaints of sex discrimination and sex-based harassment
 - Specific content on accommodating pregnancy and pregnancy related conditions

What portions of the new regulation have garnered the most attention?

- Definition of “sex” to include gender identity and sexual orientation
- Roll-back of some “due process” requirements from August 2020 regulations



When does the new regulation take effect?

- August 1, 2024
- Those portions of the regulation that govern response to specific instances of sex discrimination and sex-based harassment apply only to incidents that allegedly occurred on or after August 1, 2024
- Earlier incidents are governed by regulations that were in place at the time the misconduct allegedly occurred

Example

On August 24, 2024, a student is sexually assaulted by a peer in a residence hall on the university's campus. The incident is reported to the Title IX Coordinator the following day.

The new regulations govern the institution's response to this report, including its investigation and determination.



Example

On August 24, 2024, a student reports that they were sexually assaulted by a peer in a residence hall on the university's campus and that the assault occurred on May 2, 2024.

The August 2020 regulations govern the institution's response to this report, including its investigation and determination.



Practical Point

The University maintains copy of policies and procedures created in 2020, relevant provisions of which will be applied to “transition” cases that are reported after August 1, 2024, but where the alleged incident of misconduct occurred before August 1, 2024.

University Procedures – pre-August 1 conduct (*differences from new rules*)

- “Jurisdictional” Scope factors
 - Within the United States
 - Physical connection to the University, or denies access
 - Respondent = member of University community
 - Complainant participant or attempting to participate



University Procedures – pre-August 1 conduct

For reports and/or complaints alleging Title IX Sexual Harassment (as defined in the Sexual Misconduct Policy from August 14, 2020 to July 31, 2024) that occurred between August 14, 2020 and July 31, 2024, and the following conditions are met, the University will apply the “Procedures for Addressing Title IX Sexual Harassment Complaints” instead of the procedures in this document.

- a. The conduct took place in the United States of America;
- b. The conduct took place on University premises or property, at a University-sponsored event, or in buildings owned or controlled by the University’s recognized student organizations, or if the alleged conduct effectively deprived someone of access to a University educational program;
- c. The Respondent is a member of the University’s community; and
- d. The Complainant was participating in or attempting to participate in the education program or activity at the time the Formal Complaint was filed.

Procedures (Section 2.2.1)



Could the courts block the regulation before August 2024?

- Numerous federal lawsuits filed by multiple states, interest groups, and private persons seek to block all or part of the regulations
- Current injunctions in several states with implementation of all, or a portion of the regulation, blocked
- Current appeals



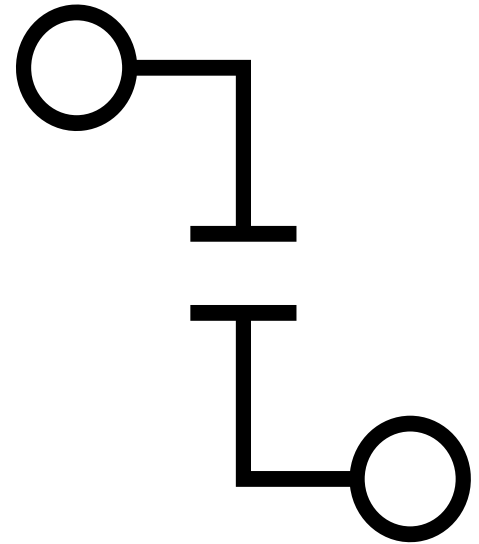
What is the programmatic scope of the new regulation?

- All sex discrimination and sex-based harassment occurring under an institution's education program or activity in the United States



What is the programmatic scope of the new regulation – Grievance Procedures?

- Distinction between which procedures apply to what conduct:
 - General procedures for sex discrimination and most sexual harassment
 - Special procedures certain sexual harassment cases in higher education: those with a student complainant or respondent



General Procedures – sex discrimination (employees and students)

- Apply to sex discrimination, and all non-student sexual harassment cases
- Include fairness, equity, notice, presumption, and relevance elements
- Require fewer elements to be in writing and do not require an investigation report
- Do not require the use of advisors
- Do not require a hearing, although “decisionmaker” must be allowed to question parties and witnesses where necessary to determine credibility

Higher Education Student/Harassment Procedures (student party required)

- Require written notice of allegations similar to August 2020 regulations
- Allow parties to be accompanied by advisors
- Right to appeal dismissals
- Must include a mechanism that permits decisionmaker to question parties and witnesses where credibility is in dispute
- Specific process required – includes live hearing for decision-making (or “*augmented investigator model*” or “*investigator/adjudicator model*”)

Higher Education Student/Harassment Procedures (student party required)

- Procedural issues from August 2020 version now “gone”
 - “Formal complaint”
 - Employee-only case – all “extra” procedures
 - Direct cross-examination
 - Dismissal – “may” and “must”

Grievance Procedures – key factors remain

- University must and will investigate concerns about discrimination/harassment
- Other non-Title IX policies still apply and may overlap
- Goals still two-fold
 1. Address policy violation, stop conduct, discipline where appropriate
 2. Support people regardless of discipline

Education program or activity – what included?

- Any operation of the institution, regardless of location
- Buildings owned or controlled by the institution
- Buildings owned or controlled by an officially recognized student organization (higher education only)
- Conduct that is subject to the institution's disciplinary authority
- The exercise of institutional power or authority by employees and agents regardless of location

Example

The University operates an online, competency-based degree program. The university’s online platform contains several communication tools that allow students in the program to converse with each other. One student, Creed, uses the platform to message another student, Jazz. Creed repeatedly asks Jazz to send Creed “nudes” and forwards Jazz crude memes. Creed lives in North Carolina and Jazz lives in Puerto Rico. Jazz views Creed’s messages as unwelcome and offensive.



Example

The University's student code of conduct prohibits various forms of misconduct and applies to students' actions regardless of their location. For example, the school has used the code to discipline students for using drugs and engaging in underage drinking in their own private apartments.



Example

One of the University’s admissions counselors is friends with a high school student who has applied to attend the university. The two meet for lunch at a local restaurant on a Saturday. During lunch, the counselor offers to “guaranty” the high school student’s admission, and scholarship support, in exchange for sexual favors.



What about misconduct that happens abroad?



- Title IX only requires response to sex discrimination and sex-based harassment “in the United States”
- But institutions must address a “sex-based hostile environment” in their programs and activities even when some contributory conduct occurred abroad

Example

Students Kelly and Jimmi attended a study abroad program together in Poland. While in Poland, Jimmi made repeated sexual overtures to Kelly, which Kelly rebuffed. Upon returning to campus the next semester, Jimmi continued sexual pursuit of Kelly and began texting and messaging Kelly at odd hours and delivering unwanted gifts to Kelly. Kelly moves off campus and begins to limit time in the recreation center and elsewhere to avoid Jimmi.



Example (Poll to Follow)

A university and a college jointly operate a study abroad program in Poland. Kelly, a university student, and Jimmi, a college student, attend the study abroad program at the same time. After the program is over, and after Kelly returns to the university, Kelly reports that Jimmi sexually assaulted Kelly in the student residence in Poland. Jimmi has not contacted Kelly since the study abroad program ended. Jimmi's college is located several hundred miles away from the university.



Poll Question

Does the Title IX regulation require Kelly's university to investigate and determine the allegation of sexual assault?

Yes

No



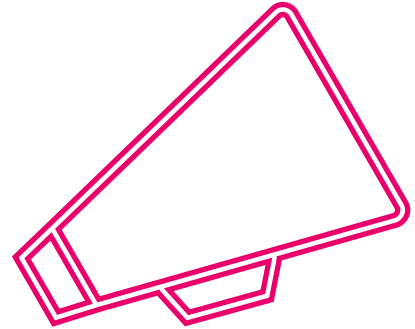
What institutions does the new Title IX regulation apply to?

- Any institution that receives federal funds and operates an education program
- The regulation has some differing requirements for K-12 institutions and post-secondary institutions



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

- Regulation
 - Does not apply to the extent it conflicts with the First Amendment and other Constitutional rights
 - May be limited by the federal Religious Freedom Restoration Act
 - Does not regulate the selection of textbooks or curricular materials



Example

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



Example

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



Example

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

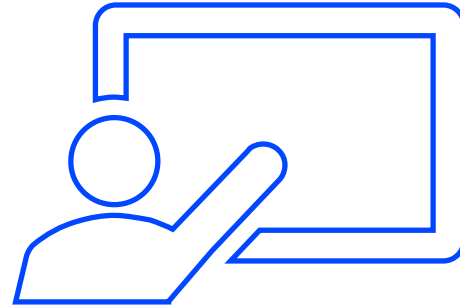


Practical Point

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

Does the new regulation require training?

- All Title IX “team” members must be trained initially and annually on their respective roles and duties in the Title IX process
- All employees must be trained initially and annually on prohibited conduct and mandatory reporting/information sharing requirements
- **Illinois statute** – requires more training



When should initial training occur?

- For team members, before working on any specific Title IX matter post-August 1, 2024
- For all employees, as soon as practical after August 1, 2024, before widespread interaction with students
- For new employees thereafter, “promptly upon hiring”

Practical Point

Follow-up training may be considered, depending on outcome of legal challenges to implementation of 2024 rules, given the real potential for certain aspects of rules to survive and others to be rejected.

Questions



Sex Discrimination and Sex-Based Harassment

What misconduct does the Title IX regulation address?

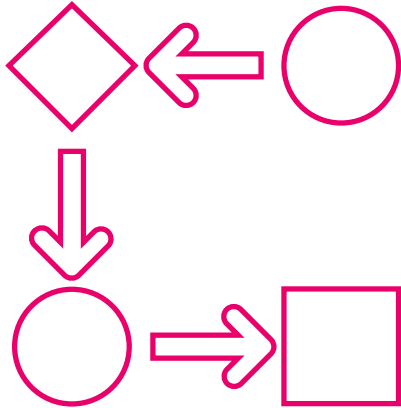
- Sex discrimination
 - Sex-based harassment



What does the Title IX regulation include in the concept of “sex”?

- Assigned sex at birth
- “Biological” sex
- Sex stereotypes
- Sex characteristics
- Pregnancy and pregnancy-related conditions
- Sexual orientation
- Gender identity

What is sex discrimination?



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

Programmatic
Discrimination

Individualized
Discrimination

Sex-Based Harassment

What is programmatic discrimination?

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

Example

A college provides brand new facilities, luxury travel, unlimited food, new equipment, new uniforms, and full ride scholarships for all men's sports teams. Every women's team has outdated facilities, ride in vans, eat per-diem, use old equipment and old uniforms, and get only partial scholarships.



Example

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



Example

An institution's business school creates a special mentorship program that pairs female students with a female mentor who is a successful business executive. Only female students are allowed to participate. The program significantly improves the odds of a participant receiving a job on graduation. In addition to the mentor relationship, the program includes special seminars held on campus, paid travel to a national summit, a small scholarship, and a plaque awarded to the participant at the program's conclusion.



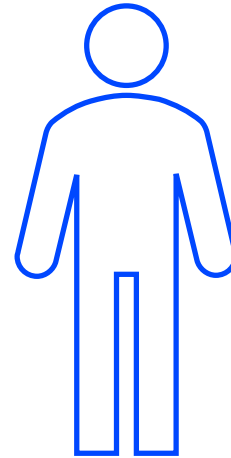
Question for Discussion

Is this program permissible, despite excluding males, if the intent is to address systematic underrepresentation of women in the business industry?



What is individualized discrimination?

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



Example

A supervisor has interviewed one male candidate and one female candidate for an open position. The supervisor prefers working with women because the supervisor believes men can be “stubborn” and “bull-headed.” The supervisor decides to hire the woman, and not the man, *because* of his stereotypical beliefs about gender differences.



Example

A faculty member at a public university posts without explaining in class that a course requires attendance more strictly than other courses. The faculty member notices an openly gay student is tardy a few times and reduces the student's grade without saying anything until final grades are delivered.



Example

The same faculty member at a public university carefully recorded attendance for every student in his class and reduced final grades for every student by the same amount based on an objective sliding scale depending on the number of days each was tardy more than 5 minutes.



Practical Point

“Comparators” really matter.

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

A male student, Rick, is uncomfortable being too friendly with women. When a female student, Juanita, invites Rick to join conversations or attend social events with Junita and others, Rick politely declines. Rick does not direct any unwelcome conduct towards Jaunita.



Question for Discussion

Is Rick engaged in sex discrimination against James?

What if Rick were the president of an officially recognized student group and Rick refused to let Juanita join the group because of Rick's discomfort being around women?



Practical Point

To be sex discrimination under Title IX, adverse treatment based on sex must be coupled with some exclusion from, limitation, or denial of participation in the benefits of an institution's education programs or activities, which is defined broadly to include all the "operations" of an institution.

Is different treatment or sex-separation ever permitted?

- If it results in no more than *de minimis* harm (i.e., it is not material)
- Or is otherwise explicitly permitted by the statute or regulations, like:
 - Sex-separated living facilities
 - Sex-separated sports teams involving a contact sport or where selection is based on competitive skill
 - Social fraternities and sororities
 - Father-son/mother-daughter activities

Is there specific guidance on competitive sports teams?

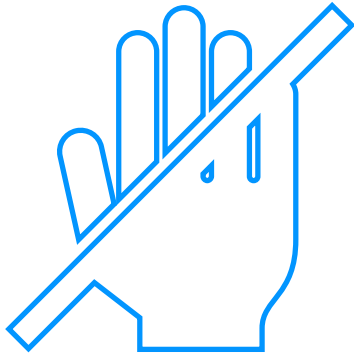
- The Department of Education is planning to issue separate guidance specifically addressing this subject
- Likely no earlier than 2025



What about separation based on gender identity?

- A policy or practice that prevents a person from participating consistent with the person's gender identity subjects a person to more than *de minimis* harm and is discriminatory
- Unless the separation is specifically permitted by Title IX or the regulation

What is sex-based harassment?



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

What's the difference between sexual conduct and conduct that is on the basis of sex?

- “Sexual” means the conduct itself has a sexual nature
- “On the basis of sex” means the conduct is targeted at a person because of their sex

Example

Jean repeatedly leers at Calvin's genitals, makes crass sexual jokes to Calvin, and propositions Calvin to engage in sexual activity. Calvin is not receptive to any of this and has repeatedly told Jean to stop.



Example

Calvin repeatedly tells jokes to Jean about how women are “stupid,” denigrates Jean’s own mental ability as a woman in front of others, and makes incessant, mocking comments to Jean about cooking, cleaning, and raising babies.



Example

Frankie, a transgender male, is repeatedly pushed, shoved, and subject to physical aggression by a group of other students who live in the same residence hall. The aggressors engage in their conduct *because* of their animus towards Frankie's transgender status.



What are the different categories of sex-based harassment?

Quid Pro Quo
Harassment

Hostile Environment
Harassment

Sexual Assault

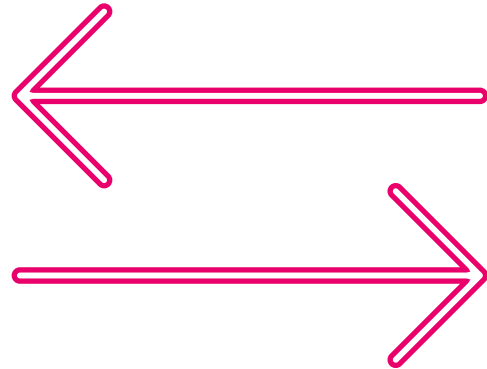
Domestic Violence

Dating Violence

Stalking

What is quid pro quo harassment?

An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.



Example

A member of the university's board of trustees offers to secure a student's admission to the university's medical school if the student agrees to perform sexual favors the student would otherwise not want to perform.



What is hostile environment harassment?



Unwelcome, sex-based conduct that, based on the totality of circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment).

What factors do we consider in determining a hostile environment?

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

Example

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



Question for Discussion

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



Example

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



Question for Discussion

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



What is sexual assault?

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



Rape

Statutory
Rape

Fondling

Incest

What is rape?

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object without consent. This definition also includes any instance in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

Does the Title IX regulation define consent?

“The Assistant Secretary will not require a recipient to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment.”

New Title IX Regulation



How does the University define consent?

Policy (Additional Definitions, Section A)

Consent means mutually understood words or actions indicating a freely given, informed agreement to engage in a particular sexual activity with a specific person or persons. Consent must be voluntarily given and cannot be the result of Coercion. A person's lack of verbal or physical resistance or submission resulting from use or threat of force does not constitute consent. A person's manner of dress does not constitute consent. A person's consent to past sexual activity does not constitute consent to future sexual activity. A person's consent to engage in sexual activity with one person does not constitute consent to engage in sexual activity with another. A person can withdraw consent at any time. A person cannot consent to sexual activity if that person is unable to understand the nature, fact, or extent of the activity or give knowing consent due to circumstances including without limitation the following:

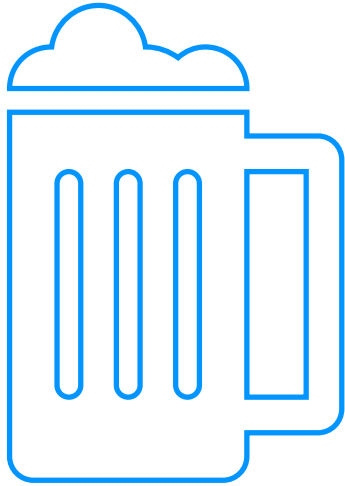
1. the person is incapacitated due to the use or influence of alcohol or drugs;
2. the person is asleep or unconscious;
3. the person is under the legal age to provide consent; or
4. the person has a disability that prevents such person from having the ability or capacity to give consent.

To be found responsible in a case involving a Complainant who could not consent to sexual activity, the Respondent must have known, or should have known, the Complainant was unable to understand the nature of the sexual activity or give knowing consent due to the circumstances. "Should have known" is an objective, reasonable person standard. That is, would a reasonable person have recognized that the Complainant could not consent to the sexual activity.

How should we think about consent?

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

How do we know if a person is incapacitated due to alcohol or drugs?



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

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

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

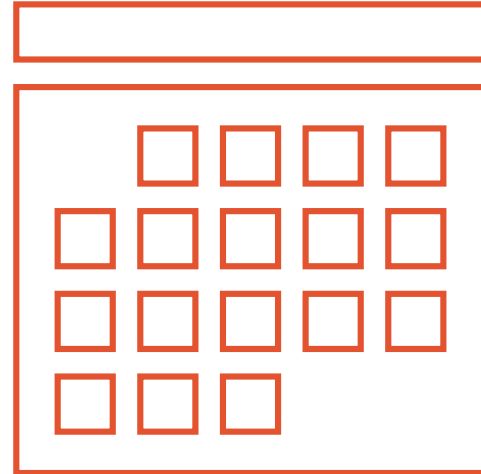
Example

Angel went out to a bar with her friends at 9:00 pm and had eight cocktails over the course of two hours. Leaving the bar at 11:00 p.m., Angel was stumbling and had to be supported by friends. Angel attempted to make a call while riding in a car back to campus but could not enter the passcode on her phone. Upon arriving to campus, and before exiting the car, Angel and her friends smoked marijuana. As her friends led her by the hand up to the residence hall's entrance, Angel asked "Where are we?"



What is statutory rape?

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



Practical Point

Every state has laws governing the mandatory reporting of child sexual abuse. Depending on state law, sexual assaults of minors may need to be immediately reported to state or local officials, irrespective of what the victim and/or their parents want to do.

In Illinois, and under University policy, all university personnel and volunteers are mandated reporters under ANCRA and, as such, are required to report all cases of suspected child abuse or neglect to the Department of Child and Family Services (DCFS).

(Policy: Processes/Procedures/Guidelines)

What is fondling?

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

How does the University define fondling?

Policy (Prohibited Conduct, Section B(3)(a))

Forcible Fondling. Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim. Private body parts include breasts, buttocks, groin, and sex organs.

What is domestic violence?

Felony or misdemeanor crimes committed by a person who:

- Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a personal similarly situated to a spouse of the victim
- Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner
- Shares a child in common with the victim, or
- Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction

What is dating violence?

“Dating Violence” is violence committed by a person:

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

Example (Poll to Follow)

Griff and Dane meet at a party and hookup in Griff's on campus apartment. The two do not see each other again for three weeks, until they meet at another party and decide to hookup again. During the second hookup, Griff begins to choke Dane without consent, causing Dane to pass out.



Poll Question

Has Dane committed dating violence?

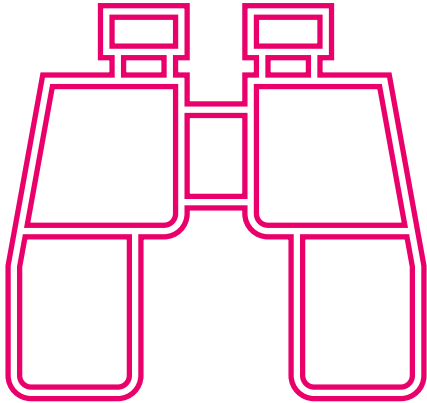
Yes

No

We need more facts



What is stalking?



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

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

What is stalking (continued)?

For purposes of the definition of “stalking”:

- Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
- Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.
- Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Policy (Prohibited Conduct, Section B(6))

Example

Akilah and Dallas live in the same residence hall. Dallas is romantically attracted to Akilah and asks Akilah to go with Dallas to a club. Akilah declines and indicates she's not interested in Dallas. Dallas then sends Akilah a friend request on social media, and Akilah agrees. A few days later, Akilah posts a photo of herself at a local pool wearing a bikini. Dallas comments on Akilah's social media, "Damn!!! Looking hot !!!". Akilah reports Dallas for stalking.



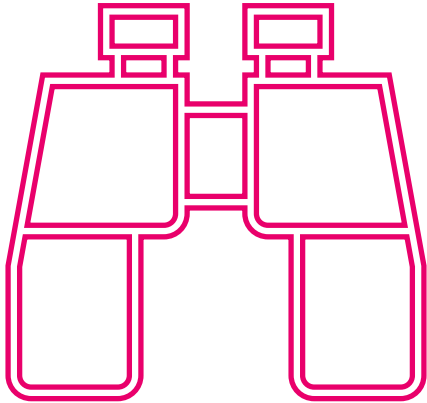
Question for Discussion

Do Dallas's actions amount to stalking?

What if, in addition, Dallas repeatedly takes pics of Akilah in the common room and tries to get information on Akilah's interests and hobbies from Akilah's friends?



What is stalking?



Does such conduct need to be sex-based?

What if actions that cause reasonable fear for safety and create meaningful emotional distress have nothing to do with sex, sexual orientation, gender identity, or pregnancy?

What is stalking?

Policy (Prohibited Conduct, Section B(6)):

This Policy addresses stalking on the basis of sex, including on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. Stalking is generally determined to be sex-based when it:

- Is sexual or romantic in nature;
- Is committed by the victim's current or former partner of an intimate, romantic, or sexual nature; and/or
- Is related to the victim's actual or perceived sex, sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, gender identity, or gender expression (including victim exhibiting or failing to conform to traditional notions of femininity and masculinity)

Questions



Retaliation

What is retaliation?

Intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit or service under the recipient's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX [or the Title IX regulation], or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under [the Title IX regulation]

Does retaliation require intent?



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

Example

Damon is accused of sexually assaulting Reggie after Reggie got high in a fraternity house with drugs provided by Damon. Damon hires an aggressive attorney as his advisor who engages in highly effective cross-examination against Reggie at the hearing. Damon is found not responsible for sexual assault. Believing Damon would have been found responsible if Reggie could have afforded an attorney to cross-examine Damon, the Title IX Coordinator decides to make a student conduct complaint against Damon for dealing drugs so that Damon will at least be punished for something.



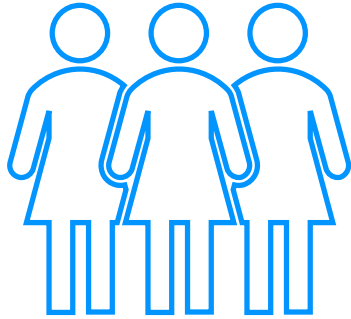
Question for Discussion

Did the Title IX Coordinator engage in retaliation?

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



Can peers engage in retaliation?



- “A recipient must prohibit retaliation, including peer retaliation”
- Complaints of peer retaliation may be appropriate for consolidation with an underlying report of sex discrimination or sex-based harassment

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

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



Example

Cyrus is accused of fondling Jamie outside a residence hall. At the hearing, Cyrus testifies “I never touched Jamie. We just talked, and I gave Jamie a hug.” Jamie testifies that, after Cyrus hugged Jamie, Cyrus then groped Jamie’s genitals. The hearing officer finds Jamie more credible and determines a preponderance of the evidence supports that Cyrus fondled Jamie.



Question for Discussion

Can Cyrus be disciplined for falsely testifying that he didn't fondle Jamie?

What if, after the Title IX hearing, the institution uncovered security camera footage that clearly depicted Cyrus grabbing Jamie's crotch, and Jamie pulling away in shock?



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

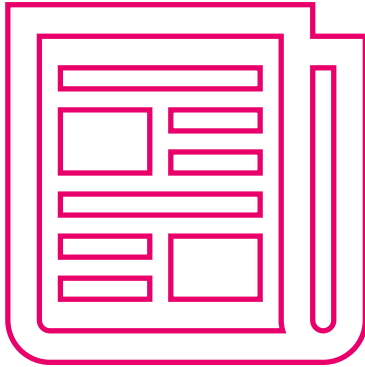
- Only if the counter-complaint is made in bad faith for the purpose of interfering with the complainant's exercise of Title IX rights



Practical Point

Always proceed cautiously and without presuming a counter-complaint is retaliatory simply because it comes second. Doing so can create a “race to the Title IX Coordinator” scenario and risks systematic bias against respondents.

Is there any retaliation that is allowed?



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

Example

A high-profile student athlete at a public university is accused of sexual assault. Over the course of the investigation, it becomes clear the allegations are suspect and may have been the product of delusions from a complainant who was high on drugs and had a mental illness. After the complainant withdraws the allegations, a staffer on the student newspaper writes a scathing editorial accusing the complainant of misusing the Title IX process and making it harder for “real victims” to be believed.



Example

A confidential counselor is accused of sexual assault and refuses to be interviewed by the Title IX investigator. The counselor's duties primarily involve providing therapy sessions and teaching a couple of classes. The institution's president terminates the counselor's employment solely because the counselor is refusing to cooperate in the Title IX investigation.



Can employees be compelled to serve as witnesses?

“Nothing in this definition [of retaliation] . . . precludes a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service . . . to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.”

New Title IX Regulation

Example

A faculty member who was at a conference in a neighboring city observed a colleague check into a hotel with a student. The student later made a complaint of quid pro quo harassment against the colleague, and the faculty member is identified as a relevant witness. The faculty member does not want to testify and is concerned that doing so will anger other faculty who are allied with the colleague.



Question for Discussion

May the institution compel the faculty member to attend the hearing and testify?

Why is it necessary for the institution to have the power to compel its employees to participate?



Questions



The Title IX Coordinator and Title IX Team

Who are the Title IX team members?

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

What are the team members' general qualifications?

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



What is a conflict of interest?

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



Examples of Conflicts

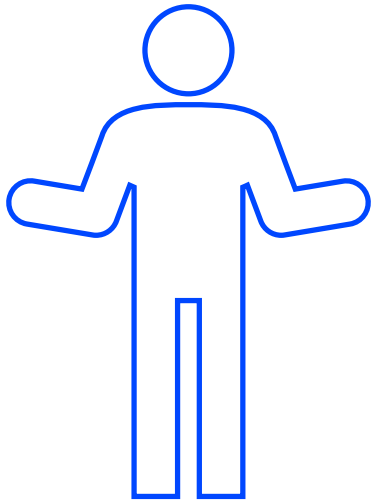
An investigator assigned to a case babysat for the complainant when the complainant was a child as is still close with the complainant's family.

A hearing officer previously wrote a glowing letter of recommendation for the respondent.

An appeal officer in a case previously supervised the complainant and recommended her termination for performance reasons.



What is bias?



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

Example of Bias

An investigator assigned to a sexual assault case also serves on the board of a local sexual assault advocacy organization. The organization recently announced a new campaign supporting sexual assault victims titled: “Believe them all.” As a board member, the investigator voted to approve the campaign. The investigator holds the personal belief that persons who report sexual assault should be believed unless objective evidence proves their allegations to be false.



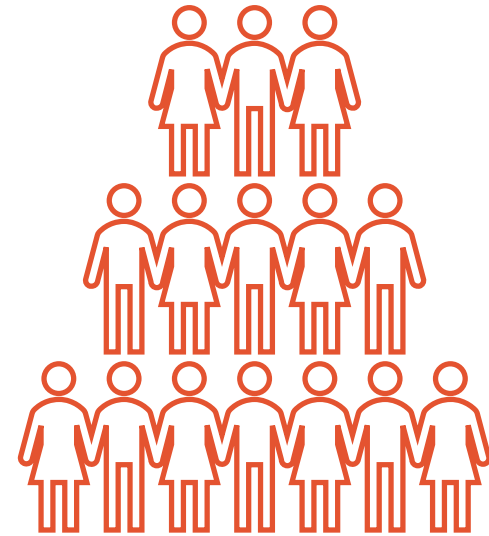
Example of Bias

A hearing officer (a faculty member) previously had the complainant as a student. As a student, the complainant was frequently absent from the faculty member's class, which prompted the faculty member to send the student an email accusing the student of having a poor work ethic and threatening to fail the student. The email included the following: "I am singularly unimpressed with your performance. You are, without question, one of the laziest and least attentive students I have had in my career. I fear your future is bleak."



What are stereotypes?

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



Examples of Impermissible Stereotypes

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

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

Men are always the aggressors in a sexual encounter.

Gay men are always physically weak and “effeminate.”

Transpeople are looking to draw attention to themselves.



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

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

Who administers supportive measures?



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

Practical Point

If the Title IX Coordinator serves as a decision-maker, the Title IX Coordinator may be unfairly portrayed as generally pro-complainant or pro-respondent depending upon the determination. This portrayal may affect perceptions of the institution's overall Title IX efforts (training; reporting; supportive measures; policy) that the Title IX Coordinator is responsible for.

Questions



Reporting

What's the difference between a report and a complaint?

- A report is information about potential sex discrimination or sex-based harassment
- A complaint is an oral or written request to investigate and determine whether alleged sex discrimination or sex-based harassment occurred

Who can make a report?

Anyone.

Which employees must report to the Title IX Coordinator?

- In higher education, all non-confidential:
 - Employees with authority to institute corrective measures
 - Administrators
 - Faculty and other teachers
 - Advisors
- University has defined “Responsible Employee” as:
 - With the exception of Confidential Employees, all staff, faculty, and certain student employees [] are Responsible Employees. A Responsible Employee is any University employee who is required to immediately report allegations or disclosures of Prohibited Conduct under the Sex-Based Misconduct Policy to the Title IX Coordinator.

[Policy \(Processes/Procedures/Guidelines\)](#)

[FAQs about Employee Reporting Obligations](#)

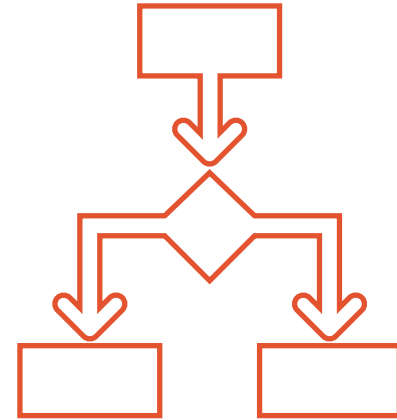
What triggers the reporting obligation?

- Information about conduct that reasonably may constitute sex discrimination or sex-based harassment
- This is significantly less than a preponderance (*i.e.*, “likely”) standard
- What report?
 - “all known details of actual or suspected” policy violation



What about non-confidential employees who are not mandatory reporters?

- They must
 - Make a report to the Title IX Coordinator, or
 - Provide contact information for the Title IX Coordinator, and information about how to make a complaint to anyone who provides information about conduct that reasonably could be sex discrimination or sex-based harassment



Example

John works as a custodian in a residence hall. One day while John is sweeping the tile in a hallway, he sees student Marco run by being angrily chased by student Renea. As Renea passes by John, Renea looks at John as she exclaims “that dude just grabbed my chest!”.



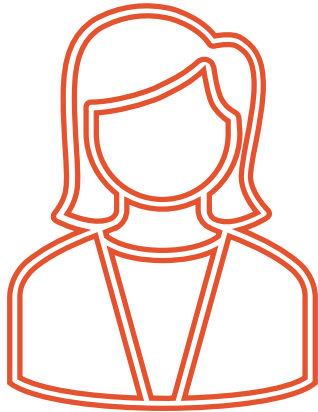
Question for Discussion

Does John the custodian have an obligation to either report or provide Renea information about the Title IX Coordinator and how to make a complaint?

How confident are you that John will be able to have an adequate conversation with Renea about the Title IX Coordinator and how to make a complaint?



How should student employees be treated for reporting purposes?



- Institution must “reasonably determine and specify whether and under what circumstances” a student-employee has a reporting obligation
- Categories of mandatory reporting should, at a minimum, apply to students when acting in an employee capacity
- Whether students who have jobs that aren’t in mandatory categories should report, and when, is within an institution’s reasonable discretion

University Policy

- The following groups of student employees are also Responsible Employees:
 - All graduate student employees
 - Undergraduate student employees who are Resident Advisors, Teaching Assistants, and Student Patrol Officers
- Student employees, unless designated a confidential employee, must report to the Title IX Office if they learn about prohibited conduct under the Sex-Based Misconduct Policy during the course of their employment. “During the course of their employment” means becoming aware of an incident during and through the course of their work, such as someone disclosing to the student employee because of their role as a Resident Advisor, Teaching Assistant, or Tutor, for example.

[Policy \(Processes/Procedures/Guidelines\); FAQs about Employee Reporting Obligations](#)

Example

Zoe is a student employee who works in the academic advising office. Zoe's job duties include advising students on requirements to earn a degree and how to select a sequence of classes to enroll in. During an advising session with a student, the student remarks to Zoe that they were sexually assaulted.



Which employees can maintain confidentiality?

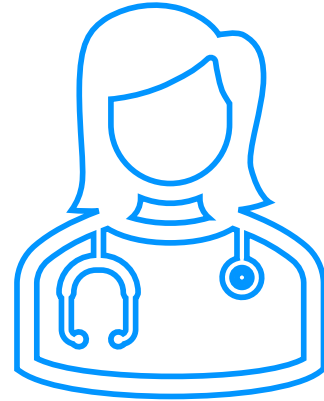
- An employee whose communications are privileged or confidential under the law
- An employee designated as confidential for purposes of providing services to persons related to sex discrimination or sex-based harassment
- An employee who is conducting Institutional Review Board-approved human subject research pertaining to sex discrimination or sex-based harassment

What are some examples of confidential employees?

- Confidential Advisors
- Medical doctors and other health care providers
- Psychologists and professional counselors
- Attorneys
- Sexual assault advocates
- Clergy and religious advisors
- Ombudspersons (if designated as such for sex-discrimination matters)
- IRB-approved researcher about sex discrimination (only if received from study)

When does confidentiality apply?

- Only when the employee is acting in their confidential capacity
- Information learned in a non-confidential capacity may be subject to mandatory reporting



Example

A faculty member is conducting an IRB approved human-subject research study designed to study the impact of sexual assault on the academic prospects of victims. One day, a student who is not involved in the research study visits the faculty member during office hours. During the visit, the student remarks that they recently experienced bullying and harassment in their sorority house based on their sex characteristics.



Do confidential employees have information-sharing obligations?

- A confidential employee must:
 - Notify a person of the employee's confidential status, and
 - How to contact the Title IX Coordinator and make a complaint, and
 - That the Title IX Coordinator may be able to offer supportive measures as well as initiate informal resolution or grievance procedures

Practical Point

An institution would be well-served by developing a short handout/pamphlet that confidential employees can provide to people and that satisfies the confidential employee's information sharing obligation. Using a document, rather than relying on an oral conversation, improves consistency of sharing and accuracy of information.

What if information is received during an awareness event?



- No obligation to act in response to the information, unless:
 - Imminent and serious threat to health or safety of any person
 - But, consider information in proactive efforts to prevent sex-based harassment

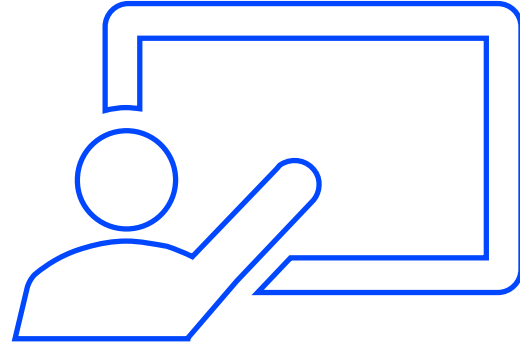
What must the Title IX Coordinator do once they receive a report?



- Offer and coordinate supportive measures to the alleged victim
- Notify the alleged victim, or if unknown, the reporting party, of grievance procedures, including informal resolution, if available and appropriate

What if no complaint is filed?

- Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur



What if the report does not implicate Title IX?

- Title IX Coordinator is not required to offer supportive measures and other steps
- If the Title IX Coordinator reasonably determines the conduct
- Could not constitute sex discrimination or sex-based harassment

Examples

A faculty member requires students to read a book germane to the course that a student finds offensive in subject matter.

A student reports that another student asked them on a date and did nothing else.

A student claims that anti- or pro- abortion protests consistent with the First Amendment are creating a hostile environment.



Questions



Supportive Measures


What are supportive measures?

- Individualized measures
- Offered as appropriate
- As reasonably available
- Without unreasonably burdening a party
- Not for punitive or disciplinary reasons
- Without fee or charge
- To restore or preserve access
- Or provide support during the grievance process or informal resolution

Are supportive measures “confidential”?

- As much as possible
- But cannot impair ability to provide them
- University will:
 - “act to ensure as minimal an academic/occupational impact on the Parties as possible”
 - “implement measures in a way that does not unreasonably burden any party”

What are examples of supportive measures?


 Counseling

 Academic accommodations

 Housing accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order if implicated by facts

Example (Poll to Follow)

A female employee reports that her male supervisor harbors animus towards women and denied the employee a salary increase based on her sex. The employee requests to receive an immediate pay increase to “restore or preserve” access to the institution’s activity of “employment.”



Poll Question

Must the institution grant the pay increase on a provisional basis to restore access, given that it will not burden or punish the supervisor?

Yes

No



Examples

Student Chang reports that student Bo sexually assaulted Chang. Chang claims the assault has made it impossible for Chang to study and attend classes. As a supportive measure, Chang requests to be awarded his degree without having to complete the remaining 15 hours of coursework specified in the catalog.



Question for Discussion

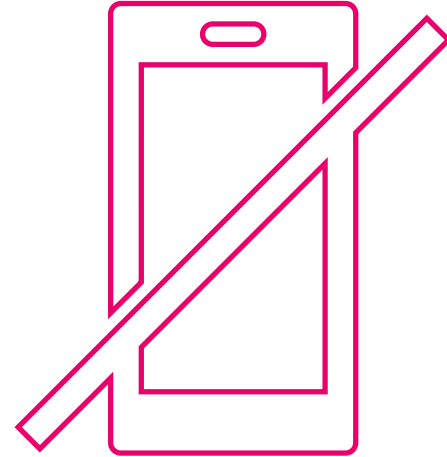
Is this requested supportive measure “reasonably available”?

What supportive measures are appropriate when a party claims that sex-based harassment has *already* impacted their grades?



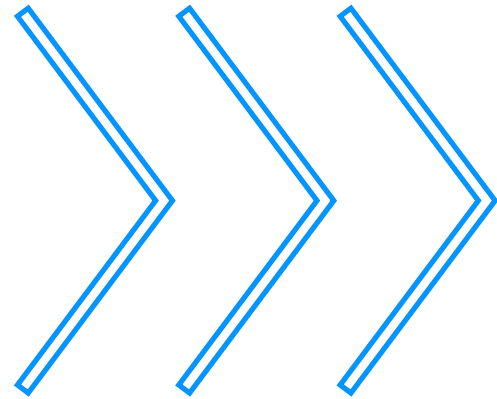
When is a no contact order appropriate as a supportive measure?

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

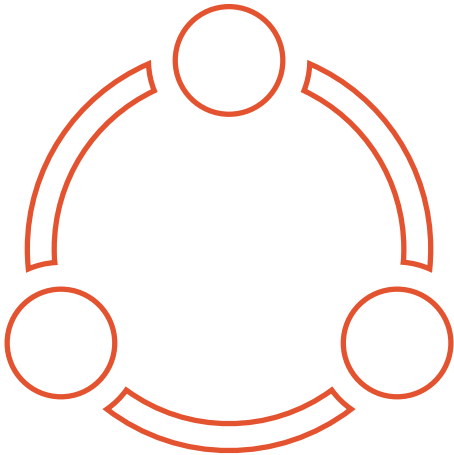


When are supportive measures offered?

- For the alleged victim, promptly after receiving a report
- For the alleged perpetrator, when grievance procedures or informal resolution are initiated



May an institution terminate supportive measures?



- An institution may modify or terminate supportive measures “as appropriate” at the conclusion of grievance procedures or informal resolution
- Or a recipient may continue them beyond that point

Practical Point

Supportive measures that do not impact a respondent can and often are continued after a determination, for at least some period. Supportive measures that burden a respondent typically either convert to an element of discipline (if a finding of a violation is made) or terminate if a finding of no violation is made.

What if a party disagrees with a supportive measure decision?

- Institution must provide either party a “timely opportunity” to seek modification or reversal of supportive measure decision applicable to that party
- Appeal (“Request for Review”) goes to an “appropriate and impartial employee” who was not the initial decisionmaker

Request for Review

Seeking Modification or Reversal

- The Parties are provided with a timely opportunity to seek modification or reversal of the university's decision to provide, deny, modify, or terminate supportive measures applicable to them. A request for review should be made using [the form](#). Parties may also email systemofficetitleIX@uillinois.edu or call (217) 300-0237. The request will be routed to an impartial reviewer who may be the University of Illinois System Title IX Coordinator or an impartial trained designee if they are unavailable. The reviewer may contact the Title IX Coordinator or their designee and other relevant employees, as well as the Parties, to gather information as necessary. The impartial reviewer will have the authority to modify or reverse the decision and will determine whether to provide, deny, modify, or terminate the supportive measures if they are inconsistent with the definition of supportive measures. The Title IX Coordinator or a designee will assist in implementing the impartial reviewer's decision.
- The university typically renders decisions on supportive measures within seven (7) business days of receiving a request and provides a written determination to the impacted party(ies) and the Title IX Coordinator.

Supportive Measures (We Care)

Request for Review (continued)

Material Change in Circumstances

- Parties also have the opportunity to seek additional modification or termination of supportive measures applicable to them if circumstances change materially. Parties should first go to the Title IX Coordinator or their designee who initially assisted them with supportive measures or reach out to their Title IX Coordinator if circumstances change to seek modification or termination of supportive measures. After the university has decided upon the request based on the change in circumstances, the ability to request a review of the decision is preserved.

Supportive Measures (We Care)

Question for Discussion

How detailed does the supportive measure appeal process need to be?

What “grounds” or “standards” govern the supportive measure appeal process?



Practical Point

If someone other than the Title IX Coordinator made the initial supportive measure decision, the appeal will likely go to the Title IX Coordinator. If the Title IX Coordinator made the initial supportive measure decision, the appeal will likely go to an administrator with jurisdiction over the party in question (i.e., Dean of Students; Provost; Director of Human Resources).

What if circumstances change?

- Institution must provide a party with the opportunity to seek modification or termination of supportive measures applicable to them
- If circumstances change materially

Example

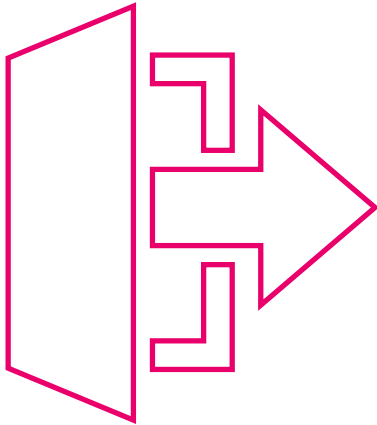
Kline reports that Cletus fondled Kline several months ago at an on-campus party. Kline believes a no-contact order is unnecessary because Cletus now lives off campus and Kline rarely sees them. After Cletus is notified of the complaint, Cletus threatens Kline via text message and begins to regularly appear outside Kline's academic building.



What if a party has a disability?

- Title IX Coordinator may consult, as appropriate, with persons responsible for disability supports and accommodations (e.g., a disability services coordinator)

Can a respondent be removed on an emergency basis?



- A respondent can be removed on an emergency basis if individualized analysis finds:
 - Imminent and serious threat to health or safety of another person, and
 - The respondent is provided an immediate opportunity to appeal the removal decision

(Note: no longer requires threat to physical safety)

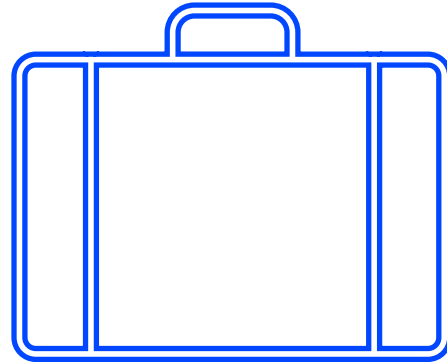
Example

Kline makes a complaint that Cletus fondled Kline several months ago at an on-campus party. When Cletus is notified of the complaint, Cletus sends Kline a text message threatening to kill Kline and attaching a picture of Cletus holding an assault rifle and dressed in tactical gear. Kline reports that Cletus owns several guns and has an extreme temper.



Can an employee respondent be placed on leave?

- An institution may place an employee respondent on administrative leave from their job duties during the pendency of grievance procedures
- Due process, state law, and contractual obligations may be relevant limitations



Example

A faculty handbook states that faculty may only be placed on administrative leave if the President of the institution certifies in writing that placing the faculty member on leave is necessary to prevent a clear and imminent danger to the university, to other employees, or to students.



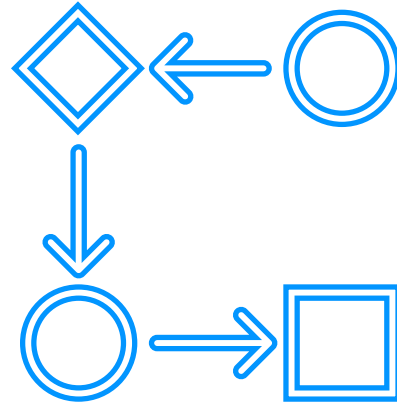
Questions



The Grievance Procedures

Must an institution have grievance procedures?

- An institution must adopt, publish, and implement grievance procedures
- For the prompt and equitable resolution of complaints
- Alleging any action prohibited by Title IX



Practical Point

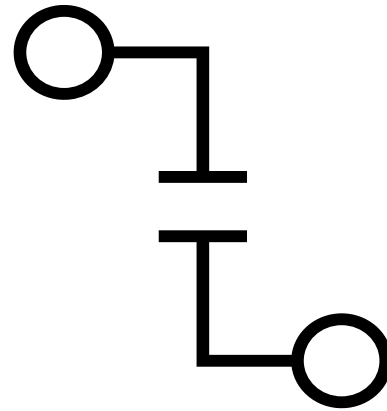
The August 2020 Title IX regulation almost exclusively addressed complaints of sexual harassment. The new Title IX regulation imposes more explicit grievance procedures for complaints of other forms of sex discrimination and sex-based harassment.

What are the general principles of grievance procedures?

- Prompt and equitable
- Published in writing
- Administered by persons free of conflicts of interest and bias
- Presumption respondent not responsible until a determination is made
- Reasonable steps to protect privacy
- An objective evaluation of all relevant and not otherwise-impermissible evidence
- Credibility determinations not based on a party's status

REMINDER: Grievance Procedures

- Distinction between:
 - General procedures for sex discrimination cases and most cases of sexual harassment
 - Special procedures for higher education sexual harassment cases with a student complainant or respondent



What does the grievance process look like?



What are the two grievance processes?

General process § 160.45 –
“Investigation” only

- Essential grievance process that applies to
- All sex discrimination and sex-based harassment except that covered by “Live Hearing” process

Augmented process in § 160.46 –
“Live Hearing”

- Applies additional requirements to cases with
- Sex-based harassment involving a college or university student as a complainant or respondent

Investigation Process (without any hearing)

Who can make a complaint?

- The alleged victim
- A parent, guardian, or other authorized legal representative with the legal right to act on behalf of an alleged victim
- For sex discrimination other than sex-based harassment, any student or employee, or other person who was participating or attempting to participate at the time of the alleged discrimination, and
- The Title IX Coordinator, subject to certain factors

Example

A 16-year-old high school student is participating in a summer enrichment program on the university's campus. While on campus, the student is sexually harassed by another program participant. The student's mother may make a complaint of sex-based harassment.



Example

An assistant coach believes that members of women's sports teams are being discriminated against by receiving poor quality food, old uniforms, few training opportunities, and insufficient facilities, relative to men's teams. The assistant coach can file a complaint, even though it is the players who are allegedly being discriminated against.



Requests for Anonymity, “No Action,” Confidentiality

- Seek to protect “privacy” interests
- Balance against need to address or respond to concern
- **Procedures**: “If the Complainant requests that their name or other identifiable information not be shared, does not wish for an investigation to take place, or does not want a Complaint to be pursued, the Investigator, the Investigator’s direct supervisor, and the Title IX Coordinator shall evaluate such request in light of the duty to ensure the safety of the University and to comply with state and federal law.” (*Procedures Section 6*)

Requests for Anonymity, “No Action,” Confidentiality

Procedures *(Section 10.1):*

The University cannot guarantee confidentiality or anonymity to anyone participating in the investigation process.

Information about Parties and witnesses, including their identity and what information they share with the Investigator is shared with those individuals involved in the investigation and resolution of a complaint who have a need to know.

OAE may share anonymized, aggregated information about complaints with relevant personnel for the purpose of allowing unit, department, college, or University leadership to determine what independent action could be taken to learn about and improve their respective culture and or learning/working environment.

When can the Title IX Coordinator make a complaint?

- In the absence of a complaint, or when any or all allegations in a complaint have been withdrawn
- And provided informal resolution is not ongoing
- And provided a fact specific determination justifies making the complaint

What facts must the Title IX Coordinator consider?

- The alleged victim's desire not to proceed
- The alleged victim's safety concerns
- The risk misconduct will recur
- Severity of the alleged misconduct
- The likelihood discipline would be removal, if case was proven
- The age and relationship of the parties
- Multiple alleged victims
- Ongoing misconduct or a pattern
- Availability of evidence
- Whether alternatives exist

Practical Point

It will be an unusual case where the Title IX Coordinator exercises authority to initiate a complaint of sex-based harassment against the alleged victim's wishes. Substantial concerns about an ongoing risk of significant misconduct will often be present.

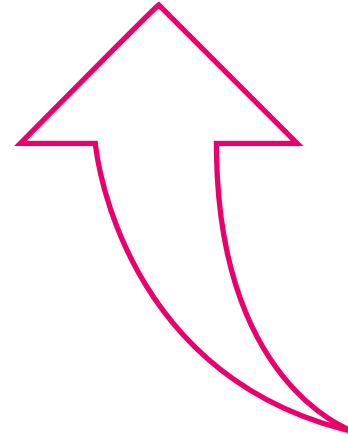
“Initial Assessment” and “Preliminary Inquiry”

Two mechanisms to determine whether resolution process will proceed

- **Initial Assessment (Procedures 8.1):**
 - whether Complainant wants supportive or grievance process
 - If grievance and oral complaint, Investigator drafts written version, Complainant confirms
 - 20 days to complete
- **Preliminary Inquiry (Procedures 8.2):**
 - If requested or upon OAE discretion
 - Purpose: “determine whether there is reasonable suspicion of a policy violation”
 - Gathering evidence and interviewing witnesses
 - Respondent **NOT** contacted

Are complaints evaluated for dismissal?

- Under the new regulation, all dismissals are permissive, rather than mandatory
- But a complaint should still initially be evaluated for dismissal on one or more of several specific grounds



What are the grounds for dismissal?

- Respondent cannot be identified despite reasonable attempts
- Respondent is no longer a participant and is not employed
- Complainant voluntarily withdraws some or all allegations and the Title IX Coordinator elects not to file a complaint
- The alleged conduct in the complaint (or remaining alleged conduct after withdrawal of some allegations), if proven, would not constitute sex discrimination or sex-based harassment

Example

Joe, a student, makes a complaint that Joe's sister, Jean, was subjected to discrimination by a faculty member who gave Jean a bad grade solely because the faculty member is trying to weed women out of the field. When Jean is notified of the complaint, Jean states that she was not discriminated against and received a grade merited solely by her deficient work. Jean indicates a desire for the complaint not to proceed.



Question for Discussion

Has Jean “withdrawn” the allegations?

Should the Title IX Coordinator dismiss the complaint?



Example

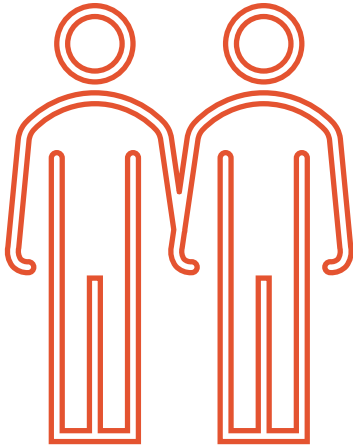
An assistant coach for the track team is accused of sexually propositioning a team member. After being notified of the complaint, the assistant coach resigns and has no remaining relationship with the institution.



Who receives notice of the dismissal?

- The alleged victim
- And, if the respondent has been notified of the complaint, the respondent too
- The notice can be given orally, or in writing, but if in writing, must be simultaneous

Can a dismissal be appealed?

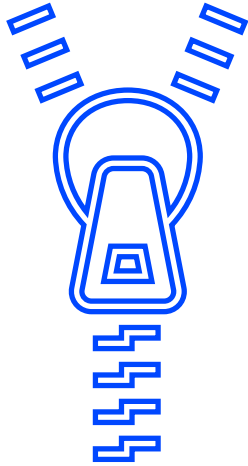


- Institution must notify the alleged victim that the dismissal can be appealed
- And if the respondent has already been notified, institution must notify the respondent too
- Appeal is permitted on the same specified grounds and procedures that govern a final decision

Are there obligations after a dismissal?

- Institution must offer supportive measures to the alleged victim, as appropriate
- If the respondent is known, is a current participant or employee, and has already been notified of the complaint, offer supportive measures to the respondent too
- Title IX Coordinator must implement other prompt and effective steps to prevent future sex discrimination and/or sex-based harassment

Are complaints evaluated for consolidation?



- Complaints may be consolidated when allegations arise out of the same facts and circumstances
- Can involve multiple parties
- If one party is a post-secondary student alleging or accused of sex-based harassment, “live hearing” procedures apply to the consolidated case

Example

Jimmi alleges that fellow golf team member Sammi engaged in hostile environment harassment by repeatedly telling sexual jokes about Jimmi to others and referring to Jimmi with sexual epithets. Jimmi also alleges that an assistant coach engaged in sex discrimination by tolerating Sammi's jokes about Jimmi, while stopping members from similarly joking about another student, Rick, who is perceived to be more sexually attractive than Jimmi.



Example

Crystal alleges that Newt sexually assaulted Crystal one month ago, in Newt's office, when Crystal was too drunk to consent after an employee reception. Separately, Reagan alleges that Newt sexually assaulted Reagan two weeks ago, in Newt's office, when Reagan was too drunk to consent after a donor reception. Crystal and Reagan are aware of each other's complaints, and both refer to Newt as a "sexual predator."



Question for Discussion

Can these two complaints against Newt be consolidated?

**If they are not consolidated, how would they proceed?
And would each complainant be involved in the other's grievance process? If so, how?**



Investigations

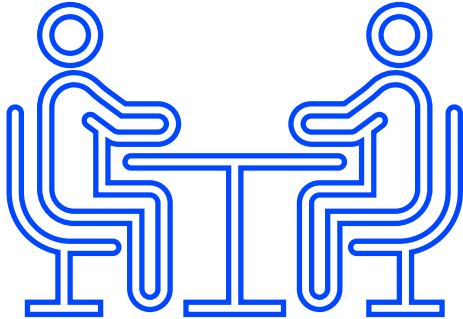
- After a complaint has passed the evaluation stage
- There is an adequate, reliable, and impartial investigation



What are the key elements of an investigation?

- Burden is on the University to gather sufficient evidence
- Parties have equal opportunity to present fact witnesses and other relevant evidence
- Institution must review information to determine relevant and not otherwise impermissible evidence
- Provide each party an equal opportunity to access the evidence that is relevant and not otherwise impermissible

What form will the investigation take?



- Likely interviews of the parties and witnesses with relevant information, unless non-testimonial evidence is dispositive
- Collection of non-testimonial evidence that is relevant and not otherwise impermissible

What evidence is considered relevant?

- Evidence is relevant if it “may aid a decision-maker in determining whether the alleged sex discrimination occurred”
- Questions are relevant if they seek evidence that may aid in showing whether the alleged sex discrimination occurred

Example

Jamie has accused Victor of dating violence. Jamie alleges that, while the two were on a date at an on-campus softball game, Victor became enraged and slapped Jamie when Jamie returned from the concession stand without having buttered the popcorn as Victor had asked.



Question for Discussion

Is it relevant whether Jamie and Victor have had prior interactions with each other?

Would it be appropriate to ask Jamie and Victor whether their prior interactions were romantic, and if so, how?



Example

Jamie has accused Victor of stalking. Jamie alleges she has never spoken to Victor, but that Victor repeatedly leered at Jamie at the employee dining room, walked behind Jamie in the parking lot, and left “secret admirer” notes under Jamie’s door.



Question for Discussion

Is it appropriate to ask Jamie whether Jamie has ever had a substantive interaction with Victor?

Is it appropriate to ask Jamie whether they have ever received “secreted admirer” notes from someone else?



How do we approach trauma in a Title IX case?

Illinois statute (*Preventing Sexual Violence in Higher Education Act*)

Balance

“Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”

- Candace Jackson, Acting Asst. Secretary of ED (2017)

What is the definition of trauma?



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



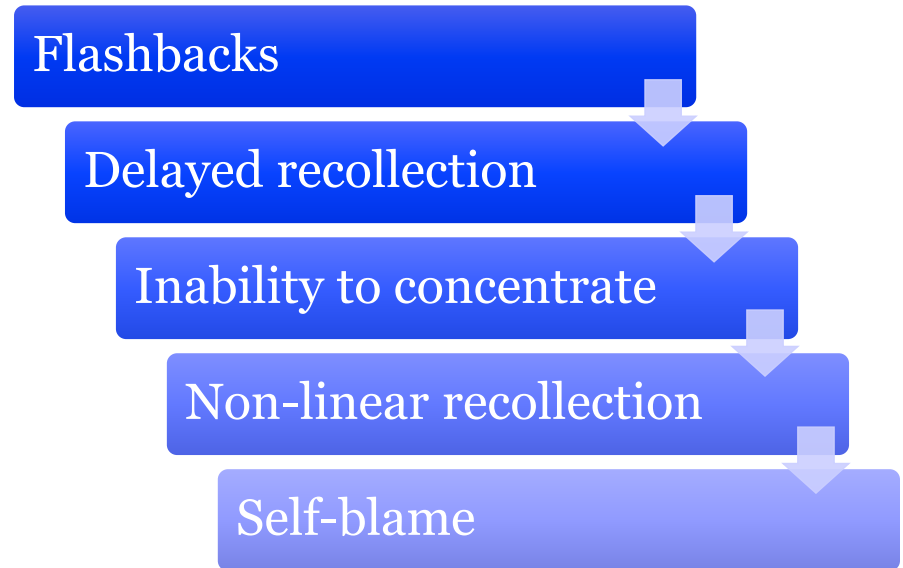
English Oxford: Deeply distressing or disturbing experience



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

Possible trauma impact

- People who have suffered trauma may, but may not, experience any or a mix of:



Trauma & credibility

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

What evidence is impermissible, even if it may be relevant?

- Evidence that is protected under a legal privilege, or that was provided to a confidential employee, unless the party voluntarily waives the privilege or confidentiality
- A person's health care records, unless the person gives voluntary, written consent
- Evidence of the complainant's sexual interests and history

University Procedures re: Impermissible Evidence

The investigator will exclude the following types of evidence, and questions seeking that evidence, as impermissible, regardless of whether they are relevant. The investigation does not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of:

- a. Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality.
- b. A Party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless the University obtains that Party's or witness's voluntary, written consent for use in this process.
- c. Evidence that relates to the Complainant's sexual interests or prior sexual conduct, unless evidence about the Complainant's prior sexual conduct is offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant or is evidence about specific incidents of the Complainant's prior sexual conduct with the Respondent and is offered to prove consent to the alleged Sex-Based Harassment.
- d. Evidence surrounding romantic or social relationships between parties and witnesses may be relevant to determining the credibility of, and the weight to be given to, testimony. This evidence may be introduced if it does not violate this section.

Procedures (Section 8.3.5)

What are examples of evidence subject to a legal confidentiality privilege?

- Attorney-client communications
- Communications with health care providers
- Communications with psychologists, counselors, and social workers
- Communications with a priest or cleric



Example (Poll to Follow)

At a private, religious institution, the investigator is interviewing a faculty member who serves as an academic advisor to the complainant. The faculty member is also an ordained minister and provides spiritual counseling after chapel hours. The faculty member remarks during the interview: “You know, the *respondent* came to speak to me about this whole thing after chapel”



Poll Question

Should the investigator ask the faculty member what the respondent said after chapel?

Yes

No

Only after asking more questions to confirm the capacity the faculty member was acting in



Practical Point

Because the party holding a confidentiality privilege is not typically present when witnesses are interviewed, the investigator must self-police to make sure not to ask questions, or to encourage testimony, that would violate confidentiality.

Impermissible Evidence: How do the regulations define a complainant's sexual history?

- Any evidence that “relates to the complainant’s sexual interests or prior sexual conduct”
- Unless:
 - Offered to prove that someone other than the respondent committed the alleged misconduct, or
 - The evidence is about prior, specific sexual incidents with the respondent and offered to prove the presence of consent with regard to allegations of sex-based harassment

Example

A complainant alleges the respondent coerced the complainant into performing oral sex. During the interview, the complainant states, “I think oral sex is gross. It’s not something I normally do, even with people I’m dating.” May the investigator ask how many times the complainant has voluntarily performed oral sex?



Example

A complainant alleges the respondent coerced the complainant into performing oral sex, which the complainant considers “gross, and something I just don’t do.” The respondent has claimed oral sex between the two parties was routine, and the complainant often initiated it without being specifically asked to. May the investigator ask the complainant whether the complainant voluntarily performed oral sex on respondent on prior occasions, and if so, whether complainant initiated the incidents?



Is there a prohibition on asking about the respondent's sexual history?

- No explicit prohibition
- But evidence about the respondent's sexual history must still be relevant, and
- Overall process must still be equitable and fair



Are there guidelines for questions about a respondent's sexual history?

- Respondent's prior sexual encounters should not be used simply to demonstrate a character trait
- Prior sexual encounters may be relevant to show a *modus operandi*
- Prior sexual encounters may be relevant to show motive, opportunity, intent, absence of mistake, lack of accident or to respond to something the respondent has put at issue

Example

A complainant alleges the respondent sexually assaulted the complainant after the respondent offered the complainant a single drink at a bar and the complainant quickly passed out. At least two other women have been identified as witnesses, who will describe similar sexual incidents involving the respondent where each believes they were drugged.



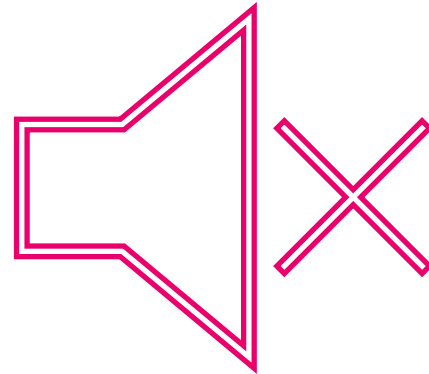
Example

A complainant alleges that a respondent fondled the complainant by groping the complainant's crotch during a dance. The respondent claims the contact was an accident. Ten witnesses have been identified who will testify that, at various dances over the last six months, they experienced similar groping from the respondent.



Are the parties required to maintain confidentiality of the evidence (or description)?

- Institution must take reasonable steps to prevent and address parties' unauthorized disclosure of evidence obtained solely through grievance procedures
- Use of evidence for administrative proceedings or litigation related to the complaint itself is authorized



Example (Poll to Follow)

A complainant alleges that the respondent committed sexual harassment by repeatedly sending the complainant sexual text messages. After the parties are provided access to the investigation evidence, the complainant shares the text messages with several friends.



Poll Question

Has the complainant engaged in an unauthorized disclosure?

Yes

No



Example

A complainant alleges that the respondent committed hostile environment harassment. After the parties have been provided the evidence, and the respondent realizes that the complainant related the allegations of harassment to several friends, the respondent files a defamation lawsuit against the complainant and specifically refers to the witness statements from the interviews in his civil lawsuit petition.



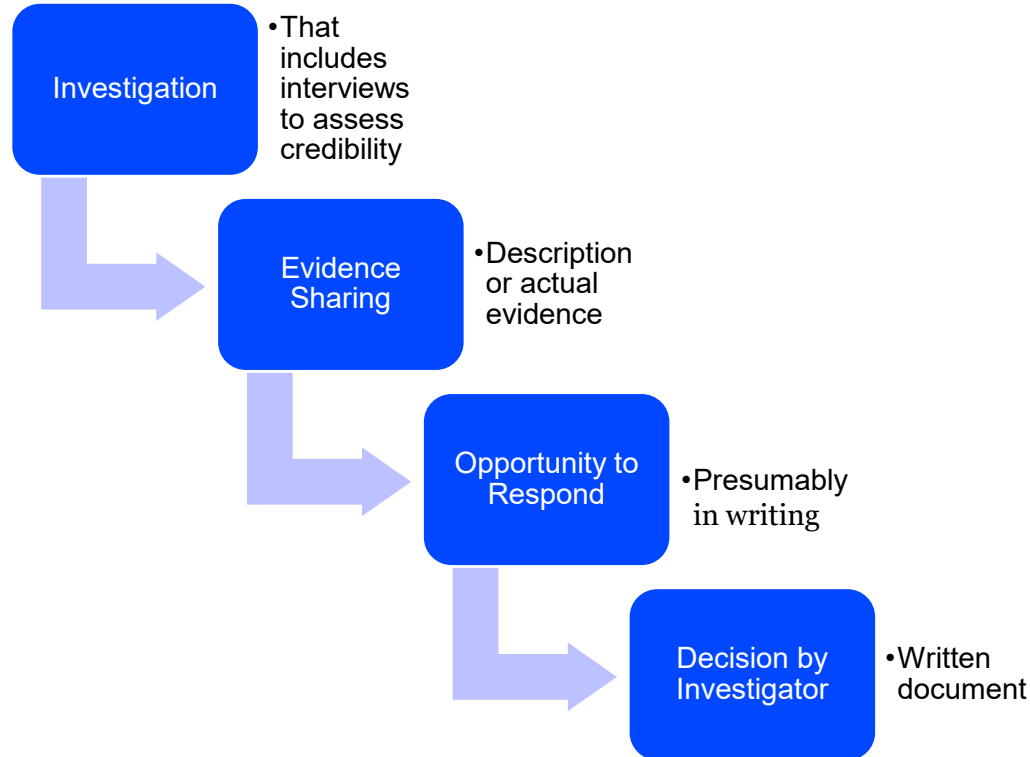
When does the decision occur?

- After the parties have had a “reasonable” opportunity to respond to the relevant evidence and/or accurate description
- After the decision-maker has had the ability to “question parties and witnesses to adequately assess a party or witness’s credibility to the extent credibility is in dispute and relevant”

Who is the decision-maker under the Investigation-only process?

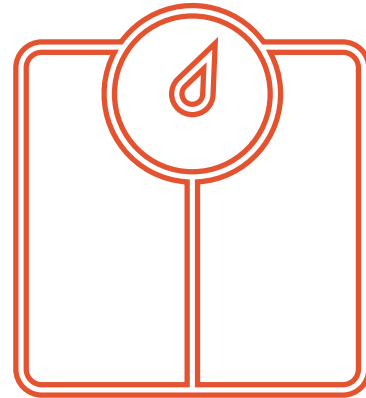
- The person who determines whether or not the allegations are supported under the standard of evidence
- The Investigator

Can you have a “single person” Investigator model?



What is a preponderance of the evidence?

- More likely than not
- Greater than 50% likelihood



Does the written determination include remedies and discipline?

- “If there is a determination that sex discrimination occurred”
- Title IX Coordinator must coordinate remedies and coordinate imposition of disciplinary sanctions
- Complainant has the right to written notice of the disciplinary sanctions

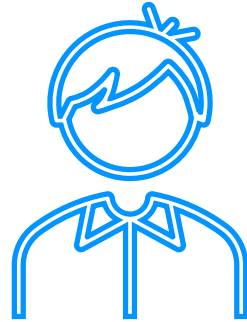
Practical Point

The Investigation-only grievance process is flexible enough to allow a disciplinary sanction to be included in the notice issued by the decision-maker, but it also would permit the written notice of discipline to come later and from someone else. Discipline should not be *implemented* until after the appeal is completed (or the time for appeal passes).

The Live Hearing Process

When does the Live Hearing process apply?

- Only for a sex-based harassment case involving a student complainant or student respondent
- UNLESS: due process caselaw evolves to say otherwise



When does the Live Hearing process apply?

The University will utilize the “Determination by Live Hearing” process [] when the following conditions are met:

- a. The alleged misconduct took place on or after August 1, 2024.
- b. The Complainant was participating in or attempting to participate in the education program or activity of the University at the time the alleged behavior occurred,
- c. The Respondent is a member of the University’s community, which includes but is not limited to employees, visiting scholars, post-doctoral fellows, and other formally affiliated individuals,
- d. The matter involves a student Complainant and/or a student Respondent, and
- e. The complaint alleges that Sex-Based Harassment occurred.

How do we tell whether Live Hearing process applies if we have a student employee?

- Fact specific determination
- Consider whether primary relationship is that of employee or student
- Consider whether party was performing work when the incident occurred

Example

Cade is an undergraduate student who works part time in the bookstore on Tuesdays and Thursdays. On Monday night, Cade is sexually assaulted in an on-campus townhouse. Cade's primary relationship is that of student, and the sexual assault did not arise from Cade's employment. The "live hearing" process should apply.

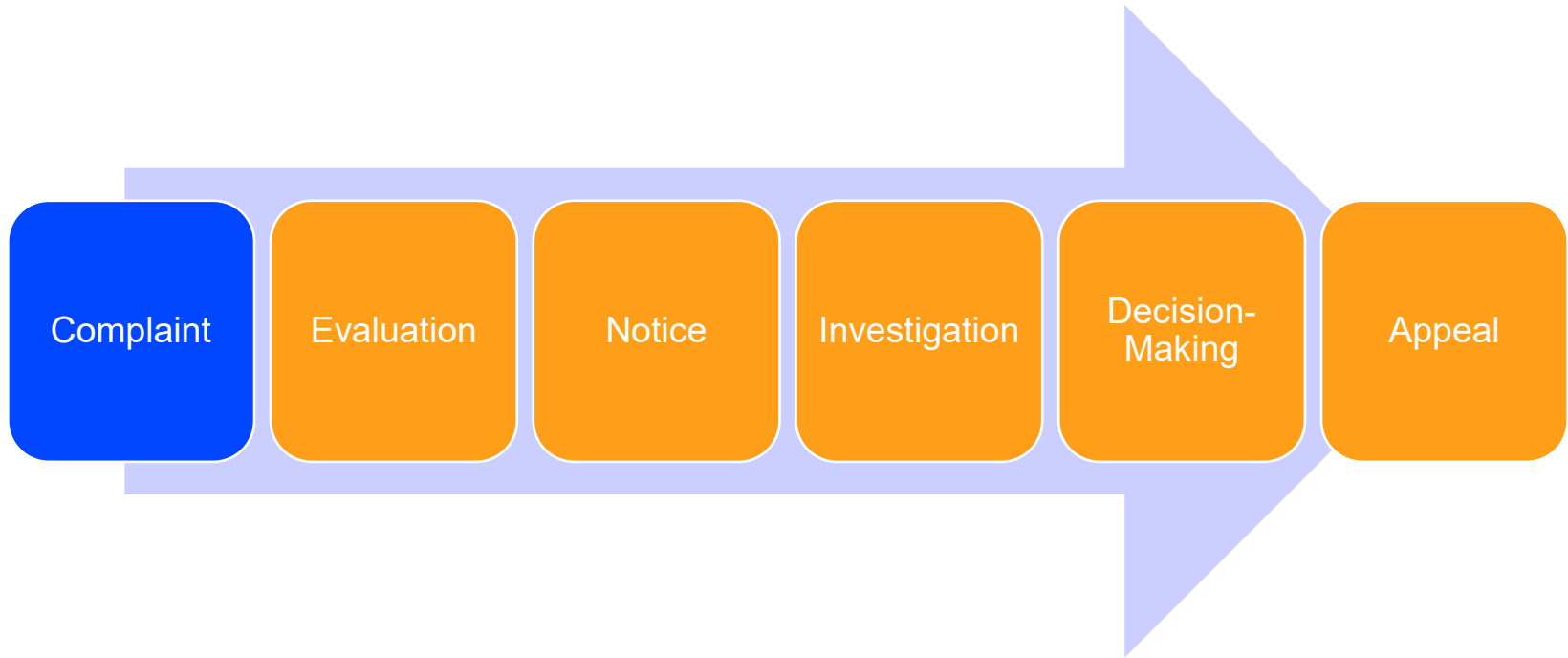


Example

Lindy is a full-time employee who works in athletics. Lindy is also enrolled in the institution’s online MBA program. Lindy makes a complaint that her supervisor in athletics offered to give Lindy a pay raise in exchange for sexual favors. The “investigator-only” process governs.

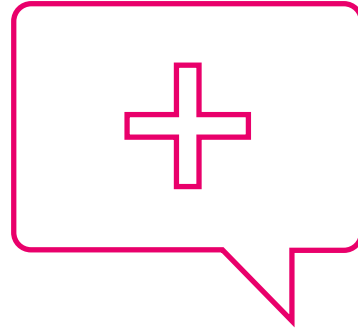


Where do the Live Hearing procedures have augmented requirements?



What meant by “augmented”?

- Generally, parties in the “Live Hearing” process have all the rights from the “Investigation-only” process
- Plus, additional rights

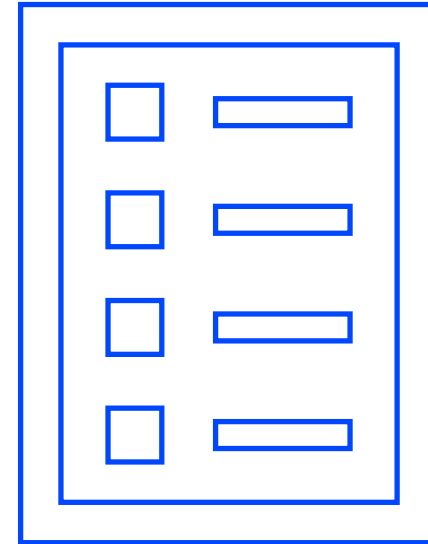


How is the evaluation phase different?

- Parties get simultaneous, written notice of dismissals, unless respondent has yet to be notified at all, in which case only the complainant gets written notice
- If dismissal is based on withdrawal of all or some allegations, the complainant's withdrawal must be in writing

How notice differs under Live Hearing process?

- Written notice must be given to both parties
- In sufficient time to prepare before any initial interview
- Must include all required elements of an Investigation-only notice and additional elements



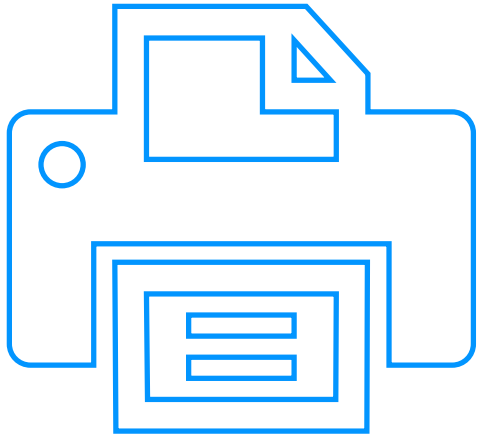
Practical Point

When in doubt, seek advice, but may be prudent to err on the side of providing more detail in notices. A fulsome written notice is helpful to document the allegations, head off confusion and surprise, and insulate the institution from certain claims if litigation results later.

What extra notice elements for Live Hearing process?

- Presumption of non-responsibility until determination
- Before determination, parties will have the opportunity to present relevant evidence to a trained, impartial decision-maker
- The right to an advisor of choice who may be an attorney
- Equal right to access relevant and not impermissible evidence or an investigation report
- Any provision of student code of conduct that prohibits knowingly false statements or submitting false information

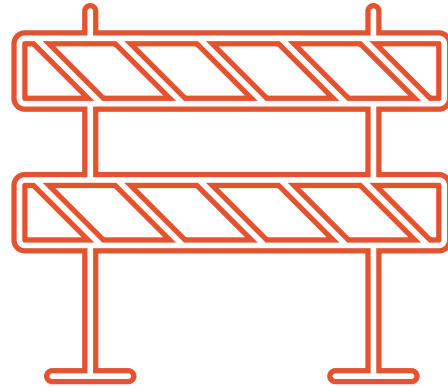
Live Hearing process require supplemental notice?



- If, during grievance process, new allegations are added, that are not included in initial written notice
- Institution must issue a supplemental written notice to the parties

Can the institution delay the written notice?

- Institution may “reasonably delay” in order to address reasonable concerns for the safety of any person as a result of providing the notice
- Concerns must be individualized and not based on speculation or stereotypes



Example

Sonja makes a complaint that Zeke raped Sonja when Sonja was incapacitated. Sonja makes the complaint on April 30. The institution adjourns for the summer on May 15. Sonja alleges that, after the rape, Zeke sent Sonja a text saying: “Just so we’re clear, everything between us was totally consensual, and if you say otherwise, you’re a dead woman.” Sonja requests that Zeke not be notified until after May 15, when Sonja has her last final and can leave campus to return home.



How is Live Hearing investigation different (1 of 2)?

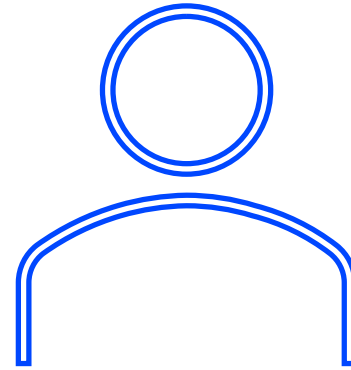
- Parties must always receive prior written notice of any meeting or proceeding wherein their participation is invited or expected
- Parties have the right to be accompanied to investigative meetings by an advisor of choice who may be a lawyer
- Parties must have the same opportunities, if any, to have any person other than an advisor present

How is Live Hearing investigation different (2 of 2)?

- Institution has discretion to determine whether the parties may present expert witnesses (as long as presented equally)
- Must allow reasonable extension of timeframes on a case-by-case basis for “good cause”, with written notice given to the parties explaining any delay
- Parties and advisors get access to either: (1) the relevant evidence, or (2) the same investigation report that accurately summarizes the evidence

What is the role of an advisor?

- At the investigation phase, a party merely has the right to be accompanied
- Institution can limit advisor's role and make it passive
- Institution does not have to provide an advisor at the investigation phase



Practical Point

Most post-secondary institutions require advisors to remain passive in investigative interviews and other investigative meetings. This trend is likely to continue under the new Title IX regulation.

How would the live hearing work?

- A decision-maker (a single hearing officer or hearing panel) runs the hearing
- Synchronous and contemporaneous participation by the parties
- Physically present in the same location or with live virtual technology
- Institution must keep an audio or audiovisual recording, or a transcript

How will testimony work at a hearing?

- Parties and witnesses testify live
- Questions, including follow-up questions, must all be relevant and not otherwise impermissible and may challenge credibility
- Questions may be asked directly by the decision-maker and parties submit questions in writing to decision-maker

Practical Point

Because the regulation requires a question to be deemed relevant, not otherwise impermissible, not unclear, and not harassing “prior to [it] being posed,” there is mechanism for each question to be addressed to the decision-maker first, before it is posed to the witness or party.

How do parties ask questions?

Before the Hearing: “Parties may propose relevant and not otherwise impermissible questions and follow-up questions of the opposing Party and witnesses. These questions may include questions challenging credibility. All cross-examination questions should be submitted to the Decision-Maker at least three (3) days prior to the hearing.”

At the Hearing: “Each Party and witness will first submit to questioning by the Decision-Maker, to include questions submitted by the parties prior to the hearing. Redirect questioning after initial questioning will be permitted at the discretion of the Decision-Maker. Parties will be given a brief recess to draft and send redirect questions to the Decision-Maker in writing. The Parties are not permitted to directly cross-examine or address each other or any witnesses.”

How does screening of questions work?

- The decision-maker must screen questions to make sure they are relevant and not otherwise impermissible prior to the question being posed
- Questions must also be screened to make sure they are not unclear or harassing
- Any decision to exclude a question must be explained
- The person proposing the question must be given an opportunity to revise it, as necessary

What if a party or witness refuses to answer questions at a live hearing?

- If a party or witness refuses to respond to relevant and not otherwise impermissible questions:
 - Decision-maker may choose to “place less or no weight upon” the statements of that party or witness
 - A decision-maker must not draw an inference as to whether or not sex-based harassment occurred based solely on a party or witness’s refusal to respond

Practical Point

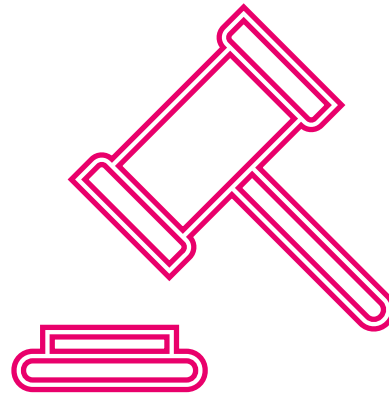
There is no fixed “exclusionary rule” under the “live hearing” procedures. However, decision-makers will have discretion to significantly discount, or reject entirely, statements of a party or witness who refuses to be questioned. The lack of a fixed rule could lead to inconsistent application by different decision-makers.

Evidentiary Restrictions at the Hearing?

- “Newly Offered Evidence” – must be evaluated, may cause pause in hearing
 - Physical evidence not provided to investigator
 - Statements at hearing not made to investigator
- Party or Decision-Maker can object/raise the issue
 - If relevant and not impermissible, hearing adjourned
 - Investigator re-opens investigation
 - Reconvene hearing once updated investigation report provided

How is the determination made?

- Institution must issue a written determination
- Simultaneously
- To both parties
- With certain required elements



What must the written determination include?

- A description of the alleged sex-based harassment
- Information about the policies and procedures used
- The decision-maker's evaluation of the relevant and not otherwise impermissible evidence, including findings of fact and credibility assessments
- A determination as to whether or not sex-based harassment occurred
- Sanctions imposed on the respondent (if there is a finding)
- Whether remedies will be provided to the complainant or others
- Procedures for either party to appeal

After live hearing, does the decision-maker determine any sanction?

- The sanction simply has to be included in the written determination
- It can be decided by a different person and included in the determination



When is the determination final?

- When the appeal is over
- Or the time for appeal has passed



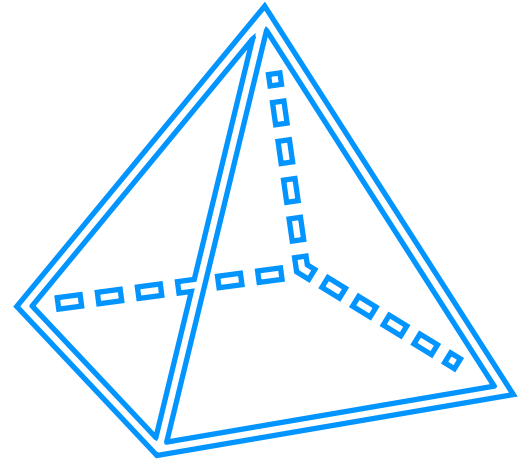
Appeals

What types of appeals are required?

- Appeals of supportive measure decisions
- Appeals of emergency removals
- Appeals of dismissals in both *45 (“investigator only”) and *46 (“live hearing”) processes on specified grounds
- Appeals of final decisions in *45 processes the same as offered for “all other comparable proceedings”
- Appeals of final decisions in *46 processes on specified grounds

How do supportive measure appeals work?

- A party who disagrees with a supportive measure decision (including a request to modify or eliminate) that affects them
- Can appeal to someone other than the person who made the decision and who has authority to implement a change
- The regulation does not specify the “grounds” for appeal



Example Language

A party who disagrees with a supportive measure decision, including a decision relating to a request to modify or terminate supportive measures based on materially changed circumstances, may file an appeal with the Vice President. The Vice President may provide, deny, modify, or terminate the supportive measure at issue if the Vice President determines the initial decision was not consistent with this policy.



How do appeals of dismissals work?

- If a dismissal is appealed, institution must:
 - Notify the parties of the appeal
 - Implement appeal procedures equally
 - Ensure that appellate officer did not take part in the investigation or dismissal
 - Provide parties a reasonable and equal opportunity to make a statement regarding the appeal
 - Notify the parties of the result of the appeal and rationale

Requesting an Appeal

A request for appeal must contain the specific grounds for appeal, the specific outcome requested, and the appellant's reasons in support of the ground identified and outcome requested. The request for appeal must bear the appellant's signature. Oral appeals are not accepted.

If the appellant does not include the specific ground(s) for appeal, the specific outcome requested, reasons in support of the ground identified, and affix their signature, the appeal will not be considered. The Director or AVC will notify the appellant that their appeal is not going to be considered and cite the pertinent deficiencies. Should this communication be necessary, it will not automatically extend the timeframe for filing an appeal.

Procedures (Section 8.6.4)

What are the grounds for appeal?

- Procedural irregularity that would change the outcome
 - If citing this ground for appeal, the appellant is required to cite the section of these procedures that was not followed along with how this irregularity changed the outcome.
- New evidence that would change the outcome and was not reasonably available when the determination of dismissal was made
 - If citing this ground for appeal, the appellant is required to specify what new evidence they are now aware of, why it was not reasonably available to them at the time of investigation, and when they became aware of it along with how this evidence would change the outcome.
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that would change the outcome
 - If citing this ground for appeal, the appellant is required to specify who has a conflict of interest or bias for or against who. The appellant must also specify what the bias is for or against, and the evidence of the bias.

How do final decision appeals work for *45 (the “investigator only” regulation)?

- The regulation does not list specified grounds for appeal or procedures for appeal
- Institution must offer an “appeal process that, at a minimum, is the same as it offers in other comparable proceedings, if any”



How do final decision appeals work for *46 (the “live hearing” regulation)?

- Offering an appeal is mandatory
- At minimum, the same grounds for appeals of dismissals
- All notice requirements must be met in writing
- Parties must be allowed to submit their statement in writing
- Appeal decision must be provided in writing



Informal Resolution

What is informal resolution?

- An alternative process to the grievance procedure for resolving a complaint of sex discrimination or sex-based harassment



When can it be used?

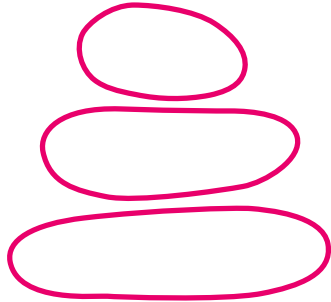


- Any time prior to a final determination under a grievance process
- Unless the accusation is that an employee engaged in sex-based harassment of a K-12 student or informal resolution would conflict with federal, state, or local law

What are the procedural predicates for informal resolution?

- Must be at least a report of sex discrimination or sex-based harassment
- Institution must determine it is appropriate to offer informal resolution
- Parties must voluntarily consent after receiving notice with certain required elements

How does the institution consider whether informal resolution is appropriate?



- Institution may, but is not required, to offer informal resolution
- Must consider whether the alleged conduct would present a future risk of harm to others
- Additional factors may be considered

What other factors may guide institutional decision?

- Severity and nature of the conduct
- Pattern of misconduct
- Likelihood dismissal would be a sanction under grievance procedure if misconduct found
- How long process has already lasted
- Publicity
- Potential effect on campus climate
- Desires of the parties
- Ability of the parties to abide by a resolution
- Likelihood a resolution will result

Example

A varsity coach is accused of fondling two student athletes. The athletes alleged the fondling occurred at the team hotel after the coach had been drinking in the bar. The athletes request to have an informal resolution because they believe the coach has a drinking problem and should seek treatment. They do not want the coach to be terminated.



Practical Point

An institution will be less likely to approve informal resolution when an employee is accused of serious misconduct against a student and where the institution would likely face legal liability if the conduct recurred after informal resolution.

What are the elements of the required notice to the parties?

- The allegations
- The requirements of the informal resolution process
- Each party may withdraw prior to a resolution and return the case to grievance procedures
- Agreement to a resolution would preclude grievance procedures for the same allegations
- Potential terms, including that a resolution is binding only on the parties
- What information will be maintained and how it may (or may not) be used if grievance procedures are resumed

Must the notice be in writing?



- Notice should be in writing for all cases, but
- Regulation only requires the notice to be in writing for “live hearing” cases

Question for Discussion

What are the various forms of informal resolution your institution uses?

How would you describe the “requirements” of those informal resolution processes?

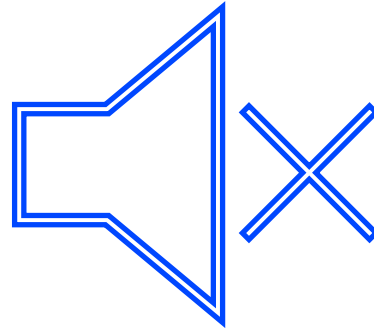


What are some potential terms of informal resolution?

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

Is information shared during informal resolution confidential?

- Institution may elect to make information shared during informal resolution confidential in the event resolution fails and grievance procedures resume
- Institution may prohibit informal resolution coordinator from serving as a witness in grievance procedures
- The parameters must be disclosed to the parties in the notice



Example (Poll to Follow)

Asako accuses Ronaldo of raping Asako when Asako was intoxicated. During an informal resolution Ronaldo candidly admits to the Title IX Coordinator, “I should have known better than to have sex with her. But I just didn’t think about it at the time. I’d like to apologize.” Informal resolution fails and the grievance procedures resume.



Poll Question

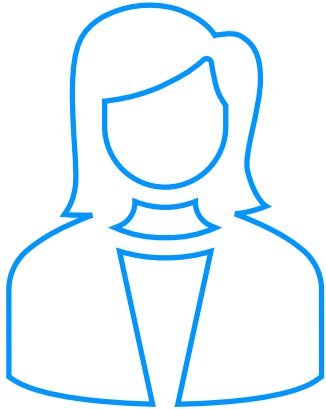
As a matter of policy, is it better to keep Ronaldo's admission confidential or should Asako be able to introduce the admission as evidence to the decision-maker?

Keep confidential

Allow the statement's use



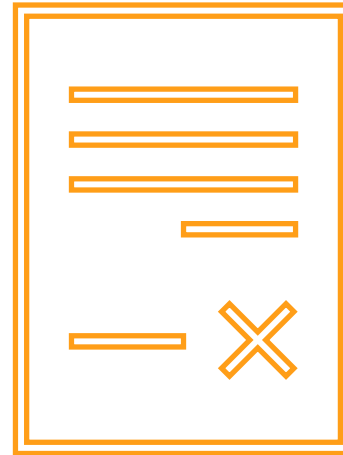
Who manages the informal resolution?



- Informal resolution facilitator
- Cannot be the investigator or decision-maker
- Must be free of conflicts and bias, and appropriately trained on duties and policy provisions

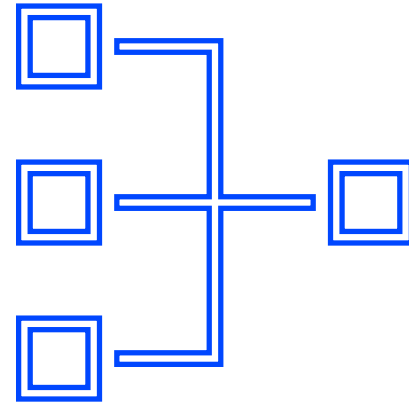
How are informal resolutions documented?

- Informal resolution agreements should be reduced to writing with all essential terms
- Parties should sign, and institution should give written approval



What happens if someone doesn't abide by an informal resolution?

- Regulation states that completed informal resolution forecloses grievance process for the allegations resolved
- Consequences for failure to comply should be addressed in the resolution



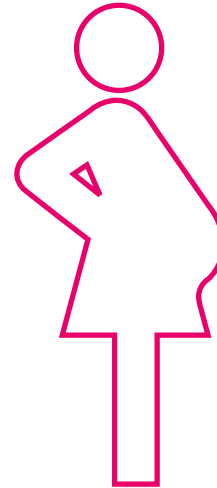
Questions



Pregnancy

What does the new regulation say about pregnancy?

- Discrimination and harassment based on pregnancy and related conditions is “sex” discrimination and sex-based harassment
- Institutions have a duty to provide certain accommodations to persons with pregnancy and related conditions



What are pregnancy and related conditions?

- Pregnancy
- Childbirth
- Termination of pregnancy
- Lactation
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
- Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions

Example

A pregnant student experiences pre-term labor that must be controlled with medication and bedrest. The student then gives birth by caesarean section. Four weeks after giving birth, the student is diagnosed with postpartum depression.



Example (Poll to Follow)

A pregnant student gives birth without complication, fully recovers after six weeks, and returns to her program of study. The student is breastfeeding and is also having challenges finding a babysitter to watch her child while the student attends class.



Poll Question

Must the school provide an accommodation to the student when she is unable to attend class because she cannot find a baby-sitter to watch her child?

Yes

No



Poll Question

Must the school provide an accommodation to the student when she is unable to attend class because she cannot find a babysitter to watch her child if the school has provided accommodations to students who are fathers and who had to miss class because a mother was sick and could not watch a child?

Yes

No



Example

A faculty member who teaches a weightlifting course learns that Jane, a student in the course, is pregnant. The faculty member is concerned that strenuous lifting might harm Jane and tells Jane that she may only perform unweighted isometric exercises for the remainder of the course. The faculty member routinely allows other students who have strains, sprains, colds, and the flu to lift heavy weights.



Question for Discussion

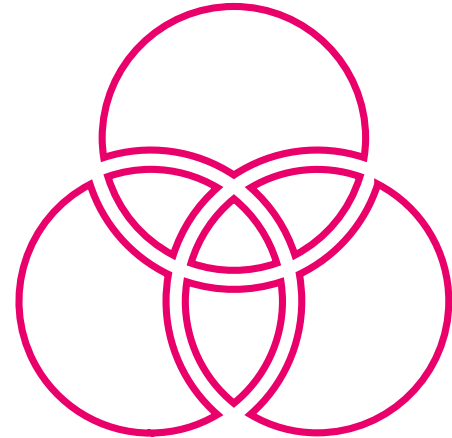
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- It is not discrimination for a pregnant student to voluntarily participate in a “separate portion” of a program if it is comparable



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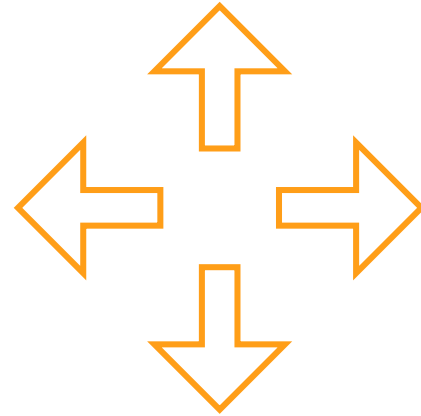
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What reasonable accommodations are pregnant students allowed?

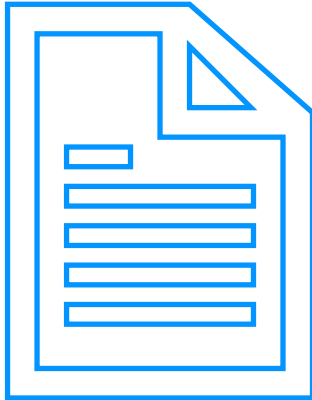
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What are some common examples of reasonable accommodations?

- Breaks during class to express breast milk or breast feed
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Can we require documentation before granting an accommodation?



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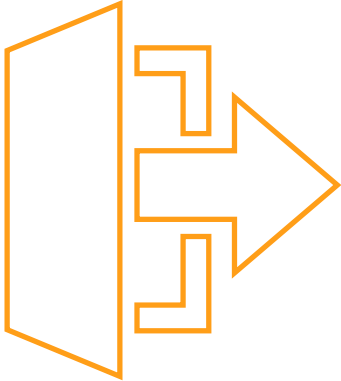
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What about voluntary leaves?



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Must a school allow a mother to keep an infant with them during class and elsewhere on campus so that the mother can breastfeed in the lactation space, when needed?

Yes

No

It depends on state law

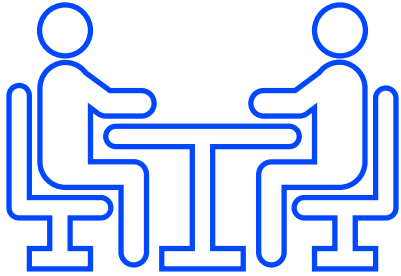


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- The Title IX Coordinator must “coordinate these actions”
- Title IX Coordinator must ensure that student is provided notification of protections against discrimination and various pregnancy related rights

Questions



HUSCH BLACKWELL

HUSCH BLACKWELL

University of Illinois Urbana- Champaign Training - Discrimination Issues/Processes

August 2024

Agenda

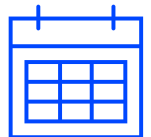
Pregnancy

Parallel Processes

Investigations

Title VI

ADA





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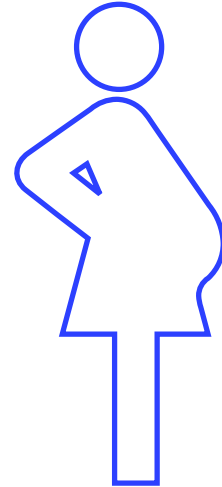
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Pregnancy

What does the new regulation say about pregnancy?

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Pregnancy and Pregnancy-Related Conditions

- Discrimination and harassment based on pregnancy or pregnancy related conditions is prohibited
- Institution must provide reasonable modifications based on individualized needs (do not have to fundamentally alter programs)
- Right of reinstatement to academic status held when leave began
- Explicit requirement for lactation space
- Limitations on document demands to validate conditions of pregnancy and certifications of safety

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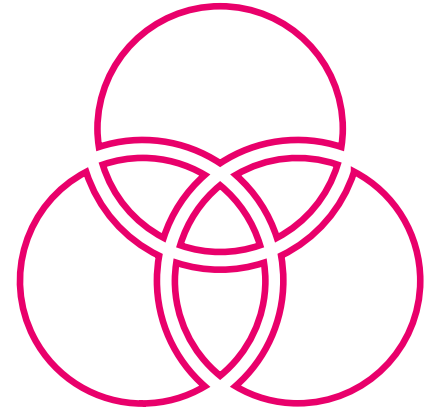
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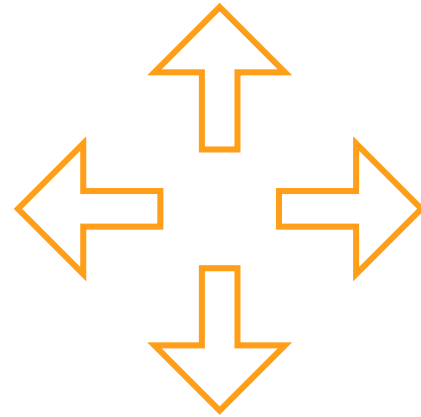
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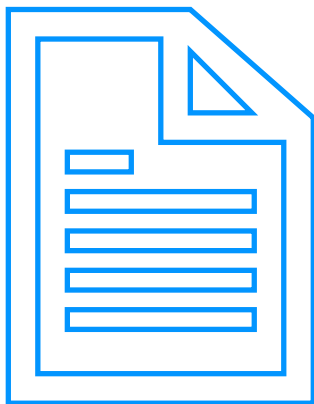
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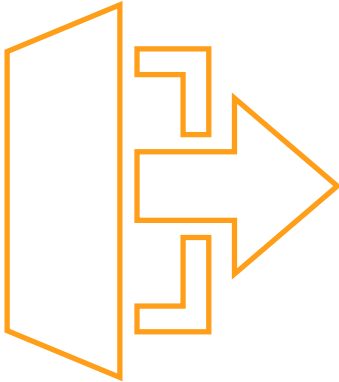
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Poll Question

Join: [vevox.app](https://vevox.com) ID: 126-153-960

POLL
OPEN

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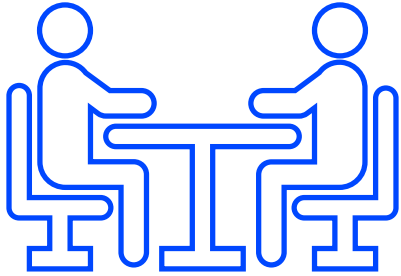
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Questions



Parallel Processes

Title IX the exclusive process for resolving sexual misconduct?



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

Title IX the exclusive process for resolving sexual misconduct?



- Pre-August 1, 2024, conduct
 - Title Sexual Harassment – complex process (e.g., hearing)
 - Non-Title Sexual Harassment – simpler process
 - Other policies
- Post-August 1, 2024, conduct
 - Other policies

What other policies/processes may apply?

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

Example

Employee is accused of hostile environment sexual harassment for conduct during Spring 2024 semester. Title IX process results in a “no violation” finding because harassment is not pervasive. University then initiates process under Title VII policy contending that harassment is severe.

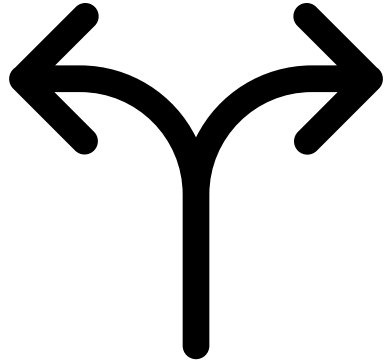


Example

Student makes a verbal report that resident director had sex with student on August 2, 2024. Before investigation process can be completed, resident director confesses that he had sex with student, but says it was consensual. Resident director's contract strictly prohibits all manner of sexual contact between resident director and students, consensual or otherwise.



May we use two processes at the same time?



- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ

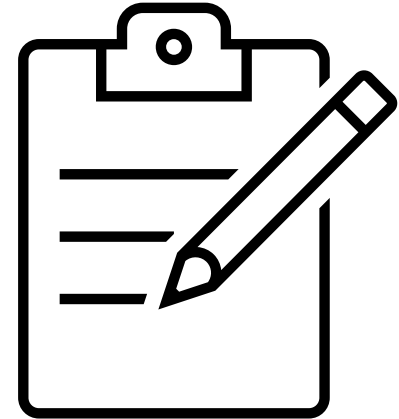
Example

Faculty member at institution with prohibition on faculty/student romantic relationships is accused of serving alcohol to underage student and performing non-consensual oral sex on student. Faculty member contends sex was consensual. Institution initiates Sex-based harassment investigation and parallel investigation of whether faculty member violated professionalism obligations by having sexual encounter with a student.



May we conduct a “joint” investigation?

- Yes
- But any “joint” investigation must satisfy the Title IX standards
- Important to be clear to the parties what is going on
- Important to maintain integrity of Title IX evidence



Can the resolution of one process “moot” a Title IX process?

- Yes
- Title IX permits dismissal of Title IX complaint if respondent is separated from the institution
- Earlier process that results in dismissal (student) or termination (employee) may support dismissal of Title IX complaint

Example

Student complains that adjunct faculty member coerced student into sexual encounter. Faculty member admits sexual encounter but denies it was coerced. Institution promptly terminates faculty member's contract based on institution's prohibition of any sexual relationship between faculty and student and bans faculty member from reemployment. Institution may dismiss Title IX complaint.



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

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



Questions



Investigations

How do we collect evidence in an investigation?



Interviews of parties
and witnesses



Collection of
non-testimonial evidence

How are interviews to be documented/recorded?

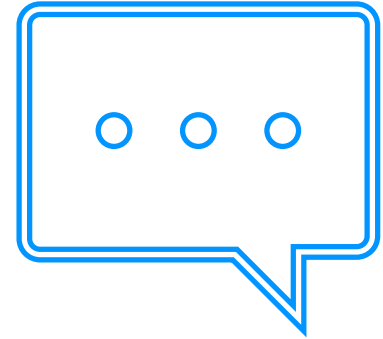
- *45 grievance process (the “investigator-only” model) does not require any particular form of documentation or recording
- “Interviews” could even be written questions and written answers (provided that the investigator is not also the decision-maker)

How are parties provided access to the evidence?

- Parties get access to either: (1) the evidence itself, or (2) an “accurate description of this evidence”
- If a description is provided, the institution must allow either party to access the underlying evidence, if requested
- Parties must be given a “reasonable opportunity” to respond before a decision is made

What is a reasonable opportunity to respond?

- “Reasonable” implies both time and form
- Time depends upon complexity of the case, but institutions can set a default rule (i.e., seven days)
- Form could be in writing or in a subsequent meeting



How are parties provided access to the evidence?

Procedures (section 8.3.3) – 2-step review process:

- “Draft investigation report”
 - Provide electronic copy to the parties before conclusion of investigation, along with “all of the relevant and not otherwise impermissible evidence obtained as part of the investigation for a five (5) day review and comment period.
- “Final investigative report”
 - Same process
- Each response from a party is shared with the other party.
- All BEFORE any “determination” from the investigator

What rules govern the determination?

- Decision-maker must question parties and witnesses to assess credibility when in dispute and relevant
- Standard used must be preponderance of the evidence or clear and convincing evidence (only if used in all other comparable proceedings)
- Based solely on relevant and not otherwise impermissible evidence
- Written notice to both parties with certain mandatory elements

What are the written elements to the determination?

- Determination for each allegation
- Rationale for each determination
- Procedures and permissible bases for appeal

How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

How do I ask questions in the substantive phase?



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

Examples of open invitations

“Please tell me what happened that night.”

“Can you walk me through what happened?”

“In your own words, tell me what occurred.”

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

Examples of facilitators



Examples of cued invitations

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

“You said that
Can you elaborate?”

“You said they
‘coerced’ you. Can
you tell me specifically
what they did?”

“If I understood you
right, you said that
after Can you tell
me what happened in
between?”

Examples of recognition prompts

“What did she say?”
(directive)

“What day did that happen?”
(directive)

“Did it hurt?”
(option choosing)

“Was he slurring words?” (option choosing)

Example sources of non- testimonial evidence

The parties

The witnesses

Institutional email

Video cameras

Key card logs

Timesheets

Public social media

Institution-owned computers

Institution-owned personal devices

Information on institutional servers

Police

May an investigation collect and rely on privileged records?

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



Example: Permissible collection

Complainant provides to the investigator a redacted version of Complainant's gynecological exam, conducted two days after alleged assault and including pregnancy and STD test results.



Example: Impermissible collection

Institution accessed information from Complainant's campus counseling records without Complainant's consent and included them among investigation records shared with Respondent.



What exactly has to be shared?

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

Example: Permissible provision of evidence

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



How is the investigation concluded?

- Issuance of a “determination”
- Determination should fairly summarize the evidence collected, including both inculpatory and exculpatory evidence

Documentation & Title IX Processes

Why document?



Identify opportunities to address open issues



Provide a basis upon which decision-makers can reach a determination



Explain conscious reasoning in decision-making



Demonstrate compliance (for appeals, ED, federal/state courts)



What is the end goal of documenting during the Title IX resolution process?

A document demonstrating:

- Fair process
 - Including alignment of applied process with written institutional policies/procedures
- Thorough investigation
- Reasoned decision-making
 - Under relevant policy language
 - Including findings regarding material disputed facts, credibility, and inconsistencies (as applicable)
- As applicable, informal resolution process and outcome

Starting at the End

Best practices in report and decision writing

Critical elements of an investigation report

Preliminary case information

History of the case

Allegations

Applicable policies/procedures

Standard of proof

Evidence gathered relevant to allegations

Determination:

- Factual findings

- Analysis and conclusion regarding responsibility

- Sanctions

- Procedures/grounds for appeal

Summarizing allegations



Goal: identify and articulate what part of complainant's story, if true, is a violation of the institution's policy

Focus on who, what, where, when, how

Ensure match with noticed allegations

Example: Be specific

“Complainant alleges that Respondent had sex with Complainant without consent.”

vs.

“Complainant alleges that Respondent laid on top of Complainant, pulled Complainant’s underwear down with one hand, while pinning Complainant’s arms with Respondent’s other arm, penetrated Complainant’s vagina with a vibrator, while pushing Complainant against the wall next to the bed so Complainant could not move.”



Facts

Facts that matter

- Consider elements of alleged policy violation
- Facts are relevant to each element?
- Facts are disputed and undisputed?
- Credibility facts

Goals

- Investigators: identifying disputed/undisputed material facts
- Decision-makers: reaching resolution of disputed material facts

How to do this?

- Show your work
- Decision-makers: Explain your credibility assessments

Example: Be specific

“Evidence includes a recording of Pat and Dre in which Pat was drunk”

vs.

“Pat provided a recording of a discussion between Pat and Dre that Pat reported recording at the Bar. In the recording, Pat states loudly, ‘I’m so wasted;’ in the remainder of the two-minute recording, though individual words can be heard, Pat’s speech is unintelligible. Pat stated this was slurring due to intoxication. Dre agreed the recording was of Pat and Dre.”



Determination: Analysis & Conclusion

- Put everything together
- As to each allegation: Analyze whether a violation of policy occurred (not the law)
- Explain your reasoning
- Include the good/bad/ugly
 - Explain decisions about conflicting information
 - *E.g.*, “As discussed above, there is some evidence suggesting that [X], but the preponderance of the evidence supports a finding [of the opposite of X]”
- Address sanctions/remediation



Common “mistakes” in report-writing

- **Chronology of events is hard to follow**
- **Failing to spell out the allegations and relevant policies**
- **General lack of clarity/coherence**
- **Including too much information about irrelevant details**
- **Insufficient information on important issues (e.g., portion of reasons)**
- **Decision-making**
 - **Speculation**
 - **Conclusory determinations and credibility findings**
 - **Not clearly or adequately explaining basis for decision**
 - **Not clearly articulating whether/not the preponderance of the evidence establishes that it is more likely than not that the alleged misconduct occurred**

Assessment of credibility

Line up facts relevant to credibility:

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



Title VI

Title VI

- Title VI prohibits discrimination on the basis of ***race, color, or national origin*** by recipients of federal financial assistance
 - Includes actual or perceived ancestry or ethnicity
- Enforced by OCR
- Prohibited discrimination includes hostile environment harassment

Overlapping Interests of Unique Importance

- First Amendment protections for protest activity
- OCR's focus on "harassment" for national origin, shared-ancestry, or ethnic characteristics
- Fall 2024 expected protest activity
 - Israel/Hamas War
 - Presidential election

Poll Question

Did you have any involvement in managing the response to campus protests in the spring?

1. Yes
2. No

OCR Standard

To establish a violation of Title VI under the hostile environment theory, OCR must find that: (1) a hostile environment based on race, color, or national origin existed; (2) the recipient had actual or constructive notice of the hostile environment; and (3) the recipient failed to take prompt and effective action to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

OCR interprets Title VI to mean that the following type of harassment creates a hostile environment: unwelcome conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from a recipient's education program or activity.

OCR's “harassment” focus

- Directing schools to assess whether cumulative incidents of offensive speech on campus directed at shared ancestry or ethnic characteristics (i.e., Palestinian or Israeli dynamics) created a “hostile environment”
- Complainant complications
 - May not want anything other than supportive measures
 - May have only observed one incident – other incidents observed by other people who have not reported

OCR Standards for Institutional Responsibility

- “Imputed knowledge”
 - If a reasonable inquiry was not conducted,
 - But such inquiry would have unearthed existence of harassment,
 - School will be treated as if it had knowledge of the harassment
- “Constructive knowledge”
 - If the person engaged in conduct determined to be harassing is an agent or employee,
 - It will be assumed that they were acting in agency capacity
- Complainant complications
 - School assumed to “know” of harassment whether anyone complains or not

Complicating Factors: First Amendment Protections

- Some speech directed at shared ancestry or ethnic characteristics may be “political speech” that enjoys strongest First Amendment protections
 - Even “hate speech” is protected by the First Amendment
 - Generally, speech is protected in the absence of any “direct threat”
- OCR view: “harassment” is focus, regardless of speech protections
- Aspect of free speech protections is avoiding “chilling speech”
 - Subjecting someone to investigation for protected speech could create problem

OCR's Resolution Agreements

- Use complaint about one incident to review pattern, establish what amount to new standards
- ***Drexel University August 2, 2024:***

While OCR confirmed that the specific incident prompting the complaint OCR investigated did not involve antisemitic conduct and that the university's response to that incident did not raise Title VI concerns, OCR's investigation reflects that the university generally failed to fulfill its obligations to assess whether incidents of shared ancestry discrimination and harassment reported to it created a hostile environment, and where the university did conduct this assessment it misapplied the legal standard.

OCR's Resolution Agreements Continued: *University of Michigan (June 14, 2024)*

Findings

- Only “investigated” 1 of 67 reports of concern
- Focused on Complainant’s expressed wishes, supportive measures
- Little review of whether “hostile environment” existed for Complainant or others
- Community messaging regarding Israeli-Palestinian conflict included little information about how to report concern about discrimination/hostile environment

Requirements

- New policies
- New training for students and employees (and law enforcement personnel)
- Climate Assessment – ask students/employees for concerns about hostile environment
- File review
 - Every instance during 2023-2024 (67 of them)
 - Investigate whether hostile environment existed
 - Provide report of findings to OCR within 6 months

Title VI – National Origin

- Challenges:
 - OCR “hostile environment” standard involves assessing conduct from multiple people and experienced differently by multiple people
 - Independent of reporting party’s wishes re investigation or not
 - New application of what is “severe or pervasive”
 - Balancing free speech issues is hard to do
 - Different standards than discrimination analysis
 - Specifics of each example of speech critical to understand, hard to learn about

Title VI – National Origin: Expected Fall 2024 Challenges

- Expect more organized protest activity re the Israel-Hamas War and related issues
 - Schools reviewing expressive activity policies
 - Balancing safety, institutional operations, and free speech rights
 - Encampments particularly challenging
 - Employee/faculty involvement pose institutional risk
- Presidential election speech and protests
 - May amplify focus on conflict in Gaza
 - Likely involve discussion of race and national origin issues, immigration, etc.

Title VI – National Origin: What do we do?

- Be Aware
 - Engage in careful analysis upon the receipt of any report of concern regarding national origin, shared ancestry, ethnic characteristics
- “Don’t walk the road alone”
 - Seek help determining how to respond to any such reports
- Carefully document the report and any information received
- Even if protected speech, provide supportive measures

ADA

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ADA



- Prohibits discrimination and retaliation based on disability
- Requires reasonable accommodation of disabled employees and students
- Three primary requirements relate to discrimination, accommodation, non-retaliation
- Embedded requirement of “interactive process”

University Policy: Nondiscrimination Policy

The University of Illinois System will not engage in discrimination or harassment against any person because of race, color, religion, sex, national origin, ancestry, age, marital status, order of protection status, genetic information, disability, pregnancy, sexual orientation including gender identity, unfavorable discharge from the military or status as a protected veteran and will comply with all federal and state nondiscrimination, equal opportunity and affirmative action laws, orders and regulations.

Critical to Understand:

- What is a “disability?”
- Who is protected?
- What are the University’s obligations?
- What is the proper procedure for assessing and granting accommodations?
- What is the proper procedure for investigating complaints about disability-related issues?

What's a disability?

- Medical or mental condition that “substantially interferes” with a major life activity
 - This includes working, living, etc.
 - So it's almost everything that is not temporary
- And it can also encompass side effects of temporary conditions
 - E.g., meningitis is not a disability – but the deafness or balance impairment that may result *is* a disability
 - War wound is not a disability – but permanent medical or mental effects *are* disabilities

What's a disability?

- “Regarded as” standard of discrimination
 - If employee does not actually have a disability, but is “regarded as” being disabled by the employer, that is also disability discrimination
 - Often comes up if employee has some indication of limitation on their ability to function in some way, but it does not substantially limit a major life activity
 - If supervisor believes the employee’s condition limits their ability to do their work, and takes some type of adverse employment action based on that belief, that is discriminatory.
- Example:
 - Manager told employee he either did not know what he was doing at work or had dyslexia, employee then requested accommodations for dyslexia, was fired soon thereafter
 - NO actual dyslexia, but “regarded as” having it.

The Obligation Not to Discriminate Means...

- DO NOT make assumptions
- DO NOT make diagnoses and conclusions about appropriate accommodations without documentation
- DO respect disabled person's privacy and right to ask for accommodations or NOT
- DO treat employee equally (no better, no worse), except in context of request for reasonable accommodation . . .

Reasonable Accommodations

Providing Reasonable Accommodations

- Opposite of nondiscrimination
 - Obligation to treat people differently because of their disability
 - To help them achieve desired results at work or in academic setting
- Only when person requests
 - Never assume someone wants an accommodation
 - “Dignity” interest in self-determination important
- Exception for “obvious” impediment

Providing Reasonable Accommodations

- Goal of accommodations
 - Allow person to perform essential duties of their job with some adjustments
- May result in perceived unfairness from others
 - Co-workers who do not receive same adjustments
 - Questions about whether changes really necessary
 - Confidentiality requirements often reduce communication in ways that may create tension

University Policy

- Reasonable Accommodations Under the ADA policy
- The Accessibility and Accommodations Division of the Office of Access and Equity can assist with accommodations for employees with disabilities
- DRES is “responsible for engaging in the interactive process with students who seek academic accommodations, auxiliary aids and services”

Providing Reasonable Accommodations

- What's reasonable?
 - To modify the way employees perform their role without causing an “undue burden”
- What's not reasonable?
 - To fundamentally alter the essential requirements of a job or change role drastically; OR
 - To place undue hardship or burden upon company
- But these concepts require careful consideration of multiple factors
- And we can't make assumptions about what is essential or burdensome

Use Interactive Process

- A structured exchange with employee with a disability to explore
 - Medical condition and impact on ability to work
 - Particular aspects of job
 - Previous experiences
 - Past use of accommodations, current needs
- Balance what employee reports with other sources
 - Observations
 - External documentation (medical records, etc.)

Use Interactive Process

- Can require medical documentation
- Uniquely fact specific for each situation, even for each request from the same employee
- Best managed by someone other than supervisor/manager
 - Staff with expertise relating to balancing work needs, employee's limitations, and options available to consider as accommodations
 - Consult with managers about whether particular accommodation could or would work
 - Not always necessary to be employee's "chosen" accommodation
 - Centralizing accommodation decisions helps avoid inconsistent decisions across different work units

Disability Discrimination

Poll Question

Is a failure to provide a requested accommodation discrimination?

1. Yes
2. No
3. It might be

University Policy: Nondiscrimination Policy

Complaints or grievances under the Americans with Disabilities Act or the Rehabilitation Act may be submitted to the ADA Coordinator or to the Office for Access and Equity, and will be addressed in a manner consistent with this policy and related procedures, with appropriate consultation from the ADA Coordinator.

University Policy: Nondiscrimination Policy

Discrimination:

- “To be subject to different treatment based on actual or perceived membership in a protected classification, and to thereby experience an adverse employment or academic action or to be excluded from participation in or denied the benefits of a University program.”
- “Discrimination includes the denial of a reasonable accommodation as determined in accordance with university policy (including the Student Code) to which a qualified individual is entitled on the basis of disability; pregnancy, childbirth, or related medical condition[.]”
- Includes harassment

What is Disability Discrimination?

- “Different treatment”
 - This would include adverse treatment based on having a disability or being perceived as having a disability
- What about complaints about accommodations, or whether the “interactive process” related to them was appropriate?
 - “excluded from participation in or denied benefits of a University program”
 - Not receiving an accommodation could fit that portion of the definition

Unique aspects of investigations of accommodation-related complaints

- Not just investigating facts relating to the medical condition or work duties at issue and the accommodations offered
- Need to review the “process” as well
- Expect some back and forth, either in writing or oral discussions, that help demonstrate an “interactive process” of weighing different options and factors occurred
- Confidentiality factors:
 - Not all witnesses may know all information at issue
 - Managers often shielded from medical details
 - Avoid inadvertent disclosures of confidential information when interviewing people

Retaliation

- Another key factor – Retaliation!
- In accommodation cases, be alert for retaliation facts

University Policy: Nondiscrimination Policy

Any action, or attempted action, directly or indirectly, against any person(s), because they have, in good faith, reported or disclosed a violation of this policy, filed a complaint of discrimination, or in any other way participated in an investigation, proceeding, complaint, or hearing under this policy. Retaliation includes, but is not limited to, harassment, discrimination, threats, job termination or other disciplinary action, negative job performance evaluations, adjustment in pay or responsibilities, or actions that have a negative impact on academic progress. Actions are considered retaliation if they have a materially adverse effect on the working, academic, or living environment of a person or if they hinder or prevent the person from effectively carrying out their University responsibilities. Any person or group within the scope of this policy who engages in retaliation is subject to a separate complaint of retaliation under this policy.

What is Retaliation?

Protected Activity

- Report or other disclosure of discrimination
 - Reasonable Belief
- Participation in investigation or other aspect
- Seeking an accommodation is protected activity

Adverse Action

- “Reasonably dissuade”
- “Materially adverse effect”

Causal Link

- Often easier to prove than discrimination

What is Retaliation (continued)?

- Payback for “protected activity”
 - Accommodations can create tension within work units because not everyone is being treated the same
- Common “human” reaction
 - Managers lose degree of authority over work environment
 - Co-workers lack information about why employee treated differently
- Can transform perfectly legal initial decision into actionable claim (e.g., if accommodation process and decision were done well)

Key Issues



- Comparators
 - Not just “was it fair”
 - Applied the same to similarly-situated people?
- Multiple substantive factors
 - Accommodation decisions themselves
 - Process applied to get to decisions
- Retaliation
 - Timing really matters

Questions



The background of the slide is a solid blue color with a pattern of thin, white, wavy lines that create a sense of motion and depth. The lines are curved and flow across the frame, becoming more densely packed in some areas and more sparse in others.

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Report Writing Discussion Scenarios

Hypothetical Complaint

Complainant (Jane Smith) reports that Respondent (Professor Joe James) offered to increase her grade if she went on a date with him.

Investigation

COMPLAINANT'S STATEMENTS IN INVESTIGATION

- “I was having a hard time in my math class – I just didn’t get it – so I stayed after one lecture to talk to the Prof.”
 - “I can’t recall what day exactly, but I think it was a Friday because I know I went to work after, and I usually only work on Fridays”
 - “It would have been shortly after midterms”
- “I asked him what I could do to help my grade, and he was so creepy. He gave me this look, and then said he would be willing to give me ‘extra tutoring’”
 - “I thought maybe he meant like office hours, but then he told me we should start right now, or maybe we could do it over dinner tonight instead.”
 - “It was clear he was hitting on me. He even put his hand on my shoulder deliberately and left it there, as he asked me to dinner.”
 - “When I told him I had a boyfriend, he told me ‘he doesn’t have to know.’”
 - “I basically just left then. I don’t really remember what I said to him next or how it ended.”
- “It definitely felt like he was telling me that if I had sex with him, he’d increase my grade.”
 - “I do remember that he said I needed a B on the final to end with a C. He definitely said that at the beginning, and then I asked about what I could do. But I meant like extra credit assignments. Then he said the thing about extra tutoring, and then the thing about dinner.”
- “I told my coworker about it right away after work. She told me he was a creep and that she could tutor me instead. I actually never went back to class, and still got a C. It was a big lecture, lots of students didn’t really go.”
- “I didn’t report it for a long time, I dunno know why exactly, but then I saw him on campus at the gym, talking to some freshman, and I knew I had to report him.”
- “No one else was around, but I did tell that coworker. I didn’t tell my boyfriend about it because he had a game – he plays football – and I didn’t want it to mess with his head.”

Investigation (continued)

RESPONDENT'S STATEMENTS IN INVESTIGATION

- “I barely even recall this student.”
- “She was getting a D at the midterm. I had to look back to see that. It looks like she finished with a C. She got a B on the final, so that makes sense.”
- “Lots of students come ask me for help. I only remember her because I think she was dating some guy on the football team? She used to wear his jersey a lot. So yeah, I do remember her asking about her midterm grade and wanting to improve it.”
- “I don't really remember what I told her though. It probably was about how she needed to get a B on the final to pull her grade up to passing.”
- “I guess it's possible I offered that she could come to office hours, I used to hold those on Friday afternoons.”
 - “I don't know that I would have called it ‘extra tutoring’”
- “I definitely never asked her on a date. Or for dinner. I'm happily married, why would I do that?”
- “She says I touched her shoulder? I don't remember that. Is that even harassment? I could easily have said her boyfriend would not need to know about our conversation, as issues relating to her grades are private.”
- “I don't remember if she stopped coming to class. Maybe. I don't take attendance. But it wasn't my fault if she did.”
- “It's been a year, why is she reporting this now?”

WITNESS STATEMENTS IN INVESTIGATION

- “I worked with Jane for like 3 months last fall. We didn't work together that often though.”
- “I remember her talking about school a lot.”
- “She was pissed because she was failing math and she thought her parents would blame her boyfriend for being a distraction. She talked about her parents hating her boyfriend a lot.”
- “I do remember that one Friday (day before her boyfriend's next game) she came in and was sort of weirded out, she thought her professor was trying to flirt with her or something?”
 - “I don't recall exactly, but I know it was something about how he had touched her shoulder while telling her about how he could tutor her?”
 - “I don't remember much more about it.”
 - “I don't remember if she told me that he had said something about dinner. That would be kind of weird, right?”
 - “Did she tell me that she thought he wanted to sleep with her in exchange for a grade? I think I would have remembered that. So no.”
- “I do know that I offered to help her with math instead, and she said no.”

The Report

- “Draft report”:
 - Preliminary in nature
 - Summarize the evidence you gathered
 - Avoid making findings or drawing conclusions
- The determination:
 - Contains not just the allegations, but your conclusions about them – the factual findings
 - *E.g.* what actually happened, as supported by the preponderance of the evidence
 - Contains an analysis of whether those findings constitute a violation of University policy
 - *E.g.*, whether it what happened is sufficiently “pervasive”

Draft Report - writing up evidence about the allegations

Inadequate Version:

Complainant, a student, asked Respondent, a professor, for help in class. Complainant alleges that Respondent then hit on her, including touching her shoulder, repeatedly asking her to spend time with him or go to dinner, and talking about how doing so could help improve her grade. She perceived those actions as asking her to engage in sexual conduct of some kind.

Respondent denies hitting on her, is not sure if he ever touched her, said he would not have tried to change her grade for any reason, but acknowledges they probably met in his office around the time she reported.

How would you write it better?

- What facts are missing?
- Are those facts relevant?

Draft report - writing up evidence about the allegations

Better Version:

Complainant and Respondent both report that Complainant was a student in Respondent's class in the fall semester. They both report that she had a D at the midterm and finished with a C. They both remember that Complainant spoke with Respondent after class regarding her grade, but they disagree as to what was discussed.

Complainant reports that she asked Respondent what she could do to help with her grade. She said that he told her she needed a B on the final exam to earn a C in the course. She reported that she then asked him what she could do. She reported that Respondent then said he would be willing to give her "extra tutoring" and that they should start right now or do it over dinner. She reported that while Respondent said this, he put his hand on her shoulder and left it there. Complainant reported that she told Respondent she had a boyfriend, and that Respondent said, "he doesn't have to know." Complainant did not recall how the conversation ended, but said she left. Complainant reported that Respondent was "creepy" during this interaction, and that she got the impression Respondent was, in her words, "telling [her] that if [she] had sex with him, he would increase [her] grade." Complainant reported she stopped going to class after this.

Complainant said she told a coworker about this the same day. The coworker was interviewed during the investigation. The coworker recalled Complainant was "pissed" about failing math, and that one day, she came to work "weirded out" about an interaction with the professor. The coworker recalled that "it was something about how he had touched her shoulder while telling her about how he could tutor her," but did not recall whether Complainant told him that her professor had invited her to dinner.

Respondent reports that he had a conversation with Complainant about her grade, but that he does not recall the details of the conversation. He thought it was "probably" about what grade she needed on the final, and that it was "possible" he invited her to office hours. Respondent denied that he asked her on a date. He neither confirmed nor denied that he had touched her shoulder. Respondent did not recall whether Complainant stopped going to class after this.

Determination - Making Findings of Fact

DON'T CONCLUDE:

- Because it is he said/she said and there are no witnesses, a finding cannot be made.
- “Complainant was more credible than Respondent because she gave more details, and so the preponderance of the evidence supports her story, not his.”

DO:

- Identify where the parties agree
- Identify where the parties disagree, and on each material fact, make a finding
- Present information that can be used to assess credibility across multiple factors, instead of concluding that one party is overall more credible than the other
 - Factors: detail in narrative (and, to the extent narrative is not detailed, rationale for lack of detail); plausibility; consistency across time; corroboration

Draft Determination - writing up evidence about credibility assessment

Inadequate Version:

Complainant's memory of what was allegedly said and how Respondent's comments conveyed request for sexual interaction was poor, her witness did not corroborate much of what Complainant claims to have shared with the witness, and her worries about failing the course seem to cloud her judgment about Respondent's intentions. She is not credible. That leaves Respondent's denials about any attempt to ask her out or arrange for anything other than discussion about her coursework, which make more sense. He is credible.

Because this is a he said/she said case, and Respondent is credible while Complainant is not, there was no quid pro quo harassment.

Factors to address in writing a more developed credibility assessment

- Parties agree that the conversation happened, but disagree on *some* of what was said.
 - Example: “They each reported talking about her need to improve her grade in Respondent’s office, which Complainant said happened on a Friday, and Professor had Friday office hours. Complainant recalled specific comments about “extra tutoring” and “dinner,” while Respondent maintained it was “possible” certain things were said, but denied saying others or asking her out to dinner. Complainant’s version of the comments involved were largely but not entirely corroborated by her co-worker’s statements about what Complainant told her the same day, a Friday. On balance, Complainant’s description of the conversation is more credible, which makes it more likely than not that Respondent offered her “extra tutoring” and then the idea of doing that over dinner on a Friday in response to her request for help with class.”

Factors to address in writing a more developed credibility assessment

- Touching:
 - Example: “Complainant said her professor not only touched her shoulder but left his hand there and did so as he was escalating the romantic nature of his suggestions by asking her to dinner. Respondent did not deny the touching but said he lacked memory of doing that and acknowledged possibly telling her he would not talk to her boyfriend at about the same moment. Complainant’s co-worker also corroborated hearing about a shoulder touching the same day. It is more likely than not based on this evidence, that Respondent deliberately touched Complainant’s shoulder, possibly in a suggestive manner, while asking Complainant out to dinner.”

Analysis and Conclusions of Responsibility

- Inadequate version:

“Even though Complainant is more credible, and there is evidence there was a discussion about romantic interaction in connection with grades, there was no specific quid pro quo arrangement and thus Respondent is determined not responsible.”

Analysis and Conclusions of Responsibility

- Identify the relevant policy provision:
 - *Quid Pro Quo* harassment: An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.
- Write out your assessment of the elements against what you have found to occur:
 - Was Respondent in a position of authority over Complainant regarding her grade?
 - Was there any explicit offer of exchange of grade adjustment for sexual interaction?
 - Is an invitation for a date while discussing adjustments in a grade an implied request to condition a benefit to Complainant's coursework on unwelcome sexual conduct?

Questions



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