The logo for Husch Blackwell, consisting of a stylized white 'H' and 'B' on a blue background.

HUSCH BLACKWELL

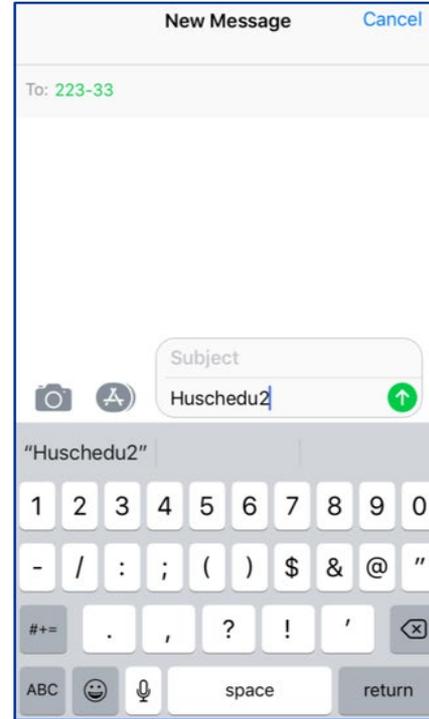
Title IX Sexual Harassment Response

Participants in sexual harassment policy process

Fall 2022

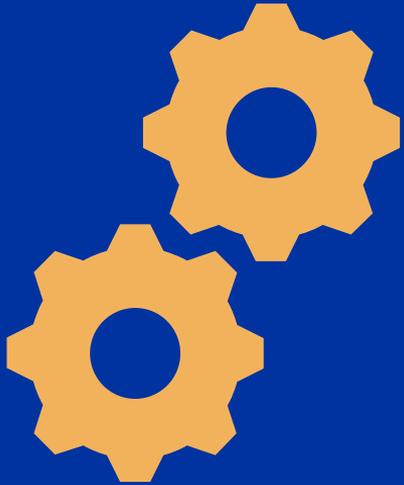


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Group Scenario



Breakout Groups

- 5 Scenarios discussed in Breakout Groups
- First group – time to introduce yourselves and select a spokesperson; this will be your group for today’s training
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!



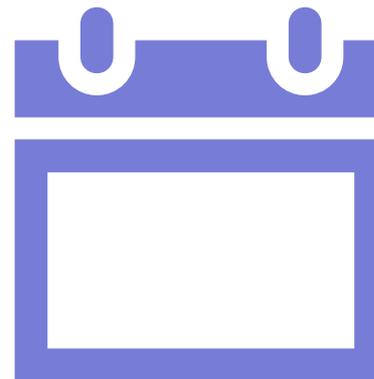
Important Disclaimers

- This training is based on currently-operative sexual harassment regulations (August 2020)
- We highlight potential changes that may result from proposed regulations that are not yet effective
- The effective date and final language of proposed regulations have yet to be determined
- Litigation is likely to challenge proposed regulations



Agenda

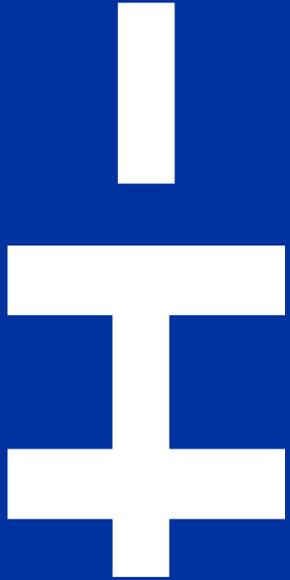
- Title IX Scope & Jurisdiction
- Intake and Supportive Measures
- The Investigation
- The Hearing
- Informal Resolution and Other Processes
- Parallel Processes





HUSCH BLACKWELL

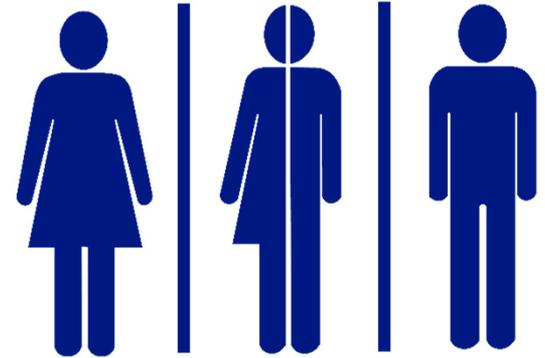
Title IX Scope & Jurisdiction



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.”

32 C.F.R. § 106.31



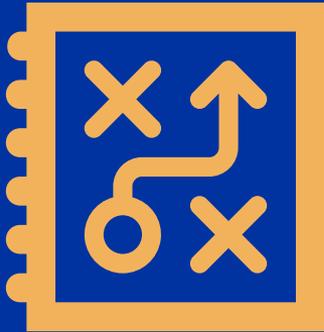


What are the two conceptual types of sex discrimination?

- Adverse treatment discrimination
- Sexual harassment



Example of Adverse Treatment



Supervisor consistently gives male employees promotions while keeping female employees in their positions, despite all employees being similarly situated in terms of responsibility, experience, and performance.

Example of Sexual Harassment



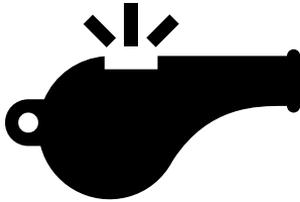
Student tells sexual jokes to peers, displays sexual imagery, propositions them, and frequently comments on whether peers' dress is "sexy."



What is the key distinction between these two concepts?

- Adverse treatment involves adverse action that is motivated by the target's sex and that directly limits or excludes from participation in education program or activities
 - Usually by someone in a supervisory or authoritative position
- Sexual harassment involves unwelcome conduct that is either sexual in nature or sex based and meets the definition of the VAWA crimes.
 - Quid pro quo; hostile environment; sexual assault; domestic violence, dating violence, stalking
 - Sexual harassment is subject to elaborate regulations governing investigation and determination

Proposed Change



- Proposed regulation requires grievance procedures for all forms of sex discrimination
- Proposed regulation continues to require more rigorous procedures for “sex-based” harassment

What is the scope of Title IX's reach?

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



What are examples of education programs and activities?

Admissions

Hiring

Workplace

In-person classes

Dormitories

Recreational amenities on campus

Sports teams

Virtual classes

Performances on campus

Off-campus trips or experiences organized by the institution

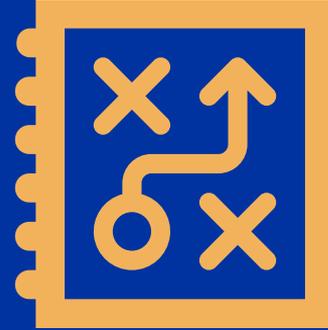
Sponsored organization activities

Anything else that happens on-campus



Example (included in EP&A)

—
One student sends vulgar chat messages and sexual imagery to another student in a class conducted via Zoom.



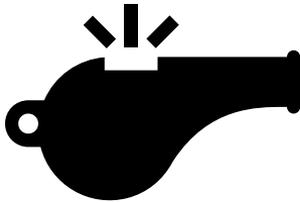
Example (excluded from EP&A)



On a Saturday night, a student is sexually assaulted in the bathroom of a local bar located off campus. The perpetrator is reported to be a “college-age male,” but it is unknown whether the perpetrator is a student of the institution.



Proposed Change



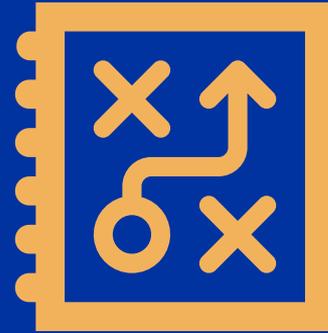
- Jurisdiction will extend to off-campus sex discrimination where:
 - Respondent represents the institution through their authority
 - Respondent is engaged in conduct under the institution’s “disciplinary authority”
 - Off-campus conduct contributes to a hostile environment within programs and activities



Example

—

An assistant coach meets with a softball player at a local batting cage to work on hitting. While there, the assistant coach propositions the player for sexual favors in exchange for increased playing time.



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Does your institution's student code of conduct apply to students regardless of location?

Yes

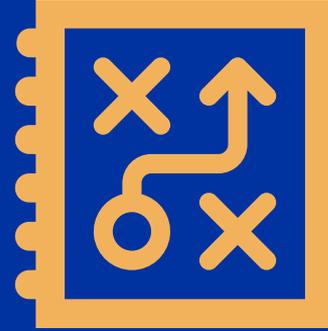
No

I don't know



Example

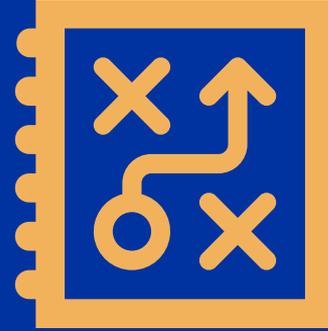
—
Institution's student code of conduct applies to students regardless of their location and prohibits all crimes of violence. Student is accused of sexually assaulting another student at an off-campus apartment.





Example

—
One student sexually assaults another student during spring break in Mexico. After returning, the respondent calls the complainant sexual epithets on campus and repeatedly waits for complainant outside complainant's residence hall.





Does Title IX apply to sexual harassment in other countries?

- No – the Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- **But** sexual harassment that occurs abroad could “contribute” to a hostile environment on campus under proposed regulations



When must we dismiss a Title IX complaint?

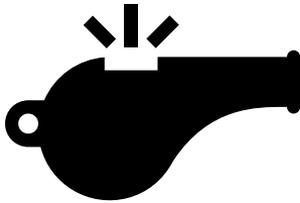
- Alleged sexual harassment occurred outside education programs or activities
- Alleged misconduct could not be sexual harassment even if true
- Complainant is not a current participant in education programs and activities at time of complaint



When may a case be dismissed?

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

Proposed Change



- Proposed regulations would permit, rather than mandate dismissal
- Regulation commentary suggests that dismissal would be unusual and additional steps may be needed to clarify allegations before dismissal
- Supportive measures and other preventative measures may still be needed even if there is a dismissal



What other policies might apply?

- Institutions are free to use
 - Student code of conduct
 - Faculty/employee handbooks
 - Other policies

to address sexual harassment that does not occur in an education program or activity

What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

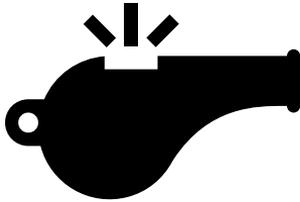
Sexual assault

Dating violence

Domestic violence

Stalking

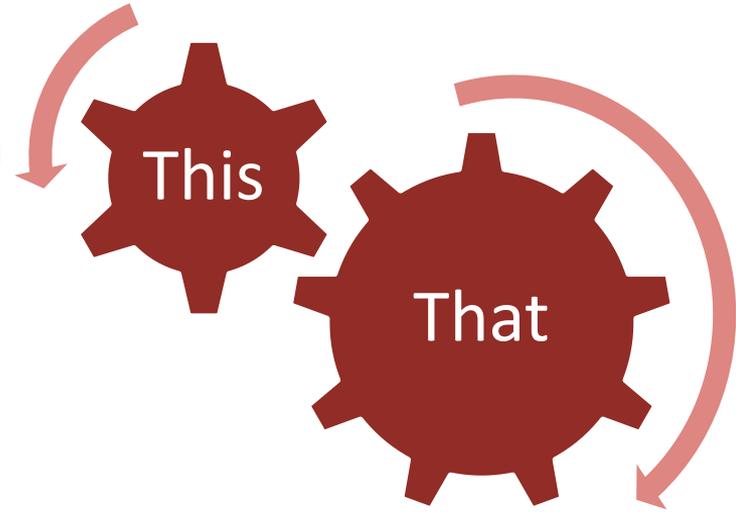
Proposed Change



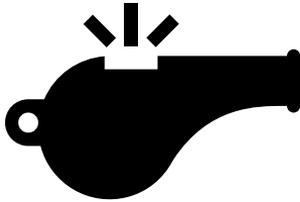
- “On the basis of sex” includes:
 - Assigned sex/biological sex
 - Sex stereotypes
 - Sex characteristics
 - Sexual orientation
 - Pregnancy and related conditions

What is quid pro quo?

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

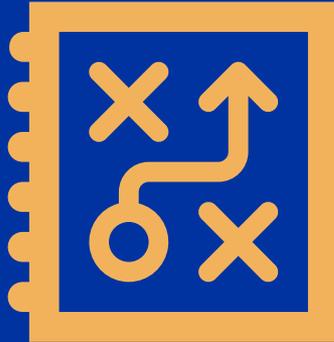


Proposed Change



- “Quid pro quo” could also be committed by a person who is an “agent” or “other person authorized by the recipient to provide an aid, benefit, or service”
- “Conditioning” could be explicit or implicit

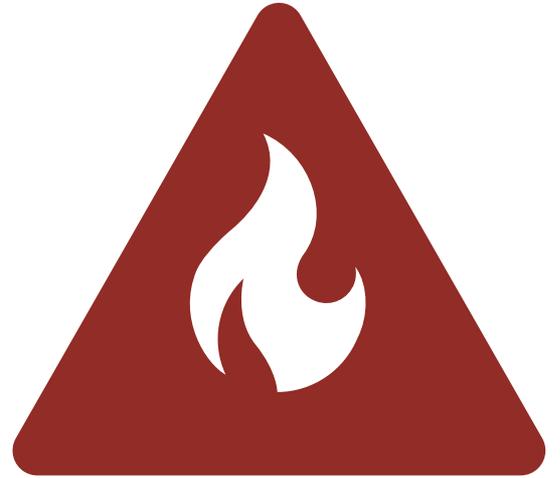
Example of quid pro quo



An unpaid member of the board of trustees of a private college offers to “guaranty” a student’s admission into graduate school if the student performs sexual favors.

What is hostile environment?

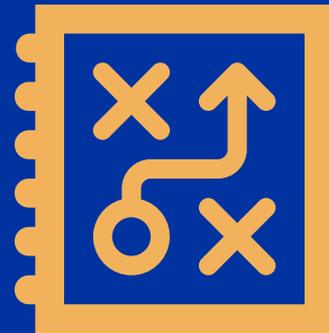
Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.



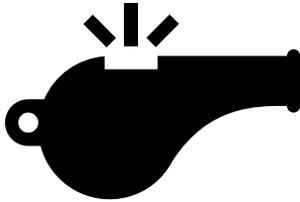


Example of hostile environment

—
Supervisor repeatedly mocks and jokes about transgender employee's manner of dress, hairstyle, tone of voice, and other means of gender expression. The mocking and joking occurs over weeks, in the physical presence of others, and via email.

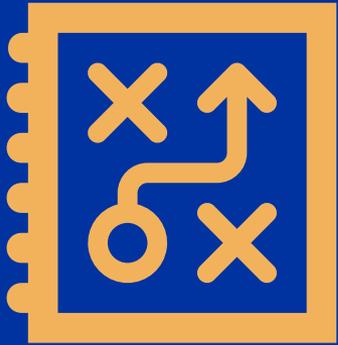


Proposed Change



- Proposed regulation would alter to:
 - Severe or pervasive
 - Evaluated subjectively and objectively
 - Denies or limits a person's ability to participate in or benefit from programs and activities
 - Considering numerous facts and circumstances

Potential example of hostile environment



A public university has recently experienced several physical attacks against gay students on campus. The attacks are widely known and have caused fear and anxiety for LGBTQ students. One day, a gay student who has not been the victim of a physical attack wakes up to find the phrase “all qu**rs must die” written on the white board outside the student’s door.

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Would this incident constitute hostile environment harassment:

Under the currently operative definition?

Under the proposed definition?

Under both definitions?



What about the First Amendment?



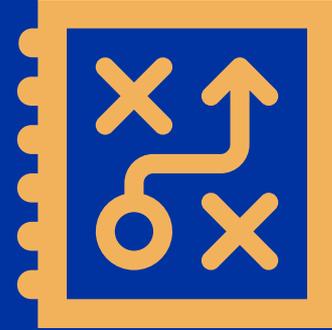
- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment



Example (protected speech)

—

In the leadup to an important election, one candidate is accused of sexual assault. A group of students supporting the accused candidate wear t-shirts on campus with the candidate's logo that state: "All women should not be believed." Several female students complain that the t-shirts are offensive and are indicative of "rape culture."



What is sexual assault?

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

Rape

Sodomy

Sexual assault
with an object

Fondling

Incest



What is rape?

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



What is consent?

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

What is incapacity?

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





Example (incapacitated)

—
Freshman and Sophomore are drinking heavily in a residence hall and take prescription pills before having sex. During sex, sophomore slumps over and passes out. Freshman fails to stop and completes intercourse.



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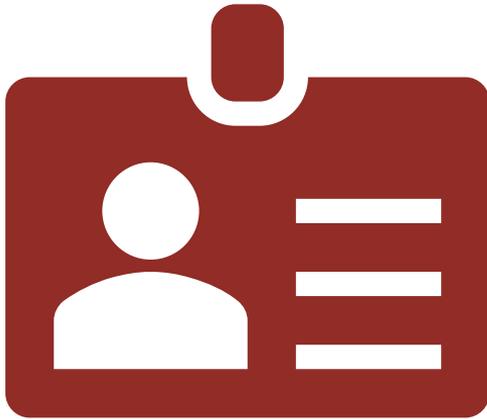
Text **HUSCHEDU2** to **22333** once to join

Is a person incapacitated if they are only slightly impaired by drugs and/or alcohol?

Yes

No

What is statutory rape?

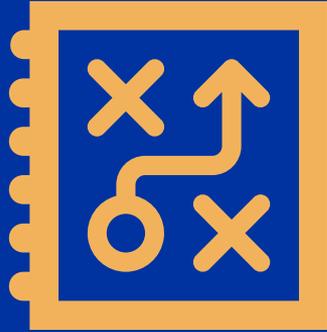


Sexual intercourse with a person who is under the statutory age of consent as defined by law.

(IL: under 17 mostly, can be under 18 in certain circumstances)



Example



State law sets a minimum age of consent at 17. A 16-year-old graduates from high school early and attends college the following fall. 16-year-old's boyfriend from high school, who is 18, also attends college, and the two have sex on campus in 18-year-old's dorm room. Neither student complains. The Title IX Coordinator learns of the incident from an anonymous report

When poll is active, respond at pollev.com/huschedu2

Text **HUSCHEDU2** to **22333** once to join

Is the institution required to initiate and conduct a Title IX investigation?

Yes

No

It depends



What is sodomy?

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



What is sexual assault with an object?

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



What is fondling?

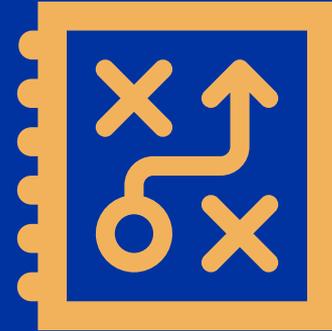
Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



Example of fondling??

—

Two students are dancing together at a party held at the house of a recognized sorority. Student A places their hands on Student B buttocks, outside clothing. The Student B objects and moves Student A's hands up to Student B's hips. The two continue dancing.



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Would you classify this as fondling?

Yes

No



What is incest?

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

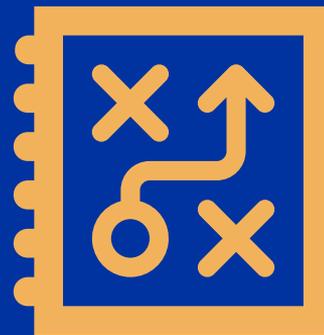


What is domestic violence?

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

Example of domestic violence

Faculty member brings their underage child to campus. A custodian hears the faculty member berating their child in the faculty member's office, walks down the hallway, and observes the faculty member aggressively slap the child's face, causing the child to cry.





What is dating violence?

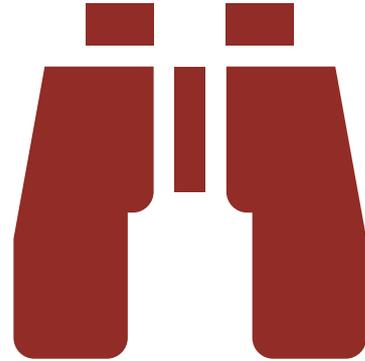
“Dating Violence” is violence committed by a person:

- 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.

What is stalking?

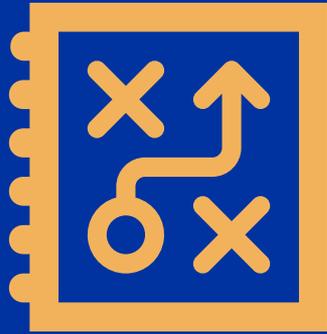
Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

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



Example of stalking

—



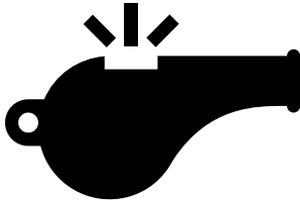
Two students attend a study abroad program in China. While on the program, Student A repeatedly pursues a romantic relationship with Student B, until Student B asks the faculty sponsor to intervene. When the students return to campus next semester, Student A renews efforts to pursue the relationship, including lurking near Student B's residence hall.



Does Title IX also prohibit retaliation?

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

Proposed Change

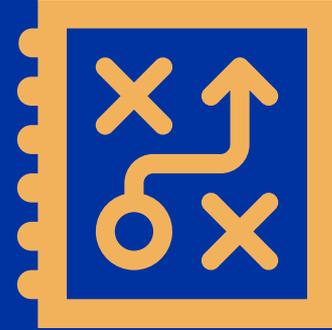


- Proposed regulation would:
 - Clarify that retaliation complaints can be consolidated with related sexual harassment complaints
 - Clarify that instituting a code of conduct proceeding against a person for the purpose of interfering with their rights is retaliation
 - Clarify that peer-on-peer retaliation is prohibited

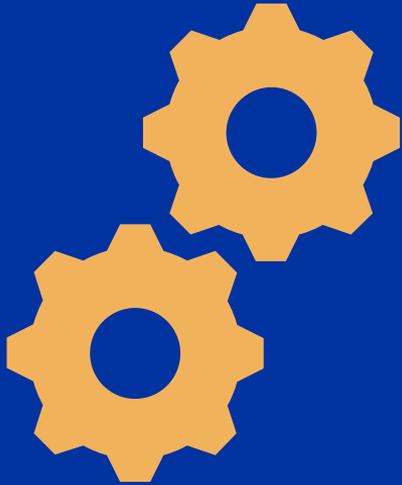


Example of retaliation

—
A student is accused of sexual assault but refuses to participate in a Title IX interview. Angered that the student is not “accepting responsibility,” the Dean of Students files conduct charges against the student for “failing to cooperate with an institutional process.”



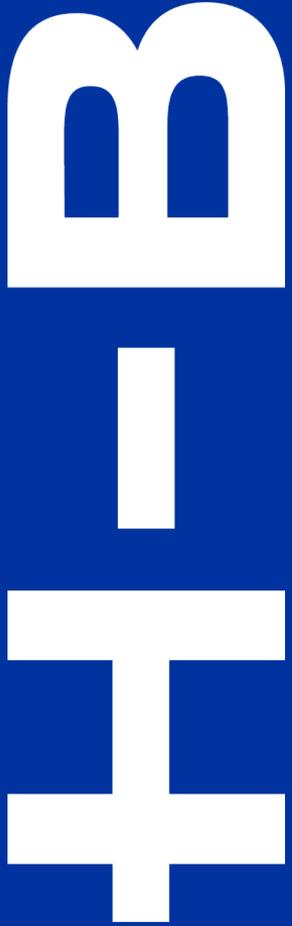
Group Scenario



University has a “summer semester” language program in Spain. Participating undergraduate students receive graded credit. A University faculty member travels with the students and teaches content. While in Spain, the faculty member and a student drink a large volume of sangria and have sex. The next morning while lying in bed, faculty member offers to retroactively change undergraduate’s grade for a one credit hour segment of the course. Undergraduate agrees, and faculty calls the registrar’s office in the U.S. to change the grade. The two have several sexual encounters in Spain and several more upon returning to the U.S. in the fall, until faculty member becomes possessive and repeatedly calls undergraduate derogatory epithets when undergraduate spends time with other students of the opposite sex. Undergraduate files a Title IX complaint alleging sexual assault by incapacitation, quid pro quo, and hostile environment sexual harassment. Two weeks after the investigation begins, undergraduate calls the Title IX Coordinator and “withdraws” her allegations against faculty member.

Questions





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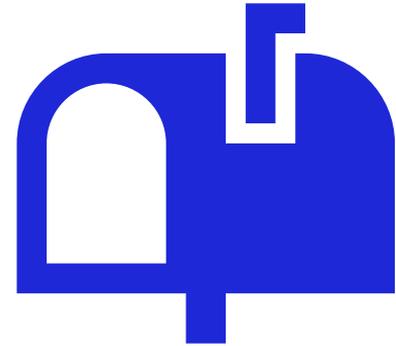
Intake and Supportive Measures





How does an institution get notice of sexual harassment?

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



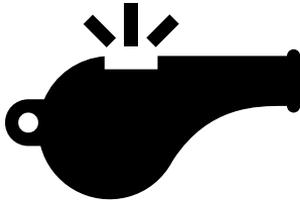


What is “actual knowledge”?

- “Actual knowledge” occurs when
 - An institutional official, with authority to take corrective action
 - Observes or receives a report
 - Of sexual harassment occurring in the institution’s education programs and activities



Proposed Change



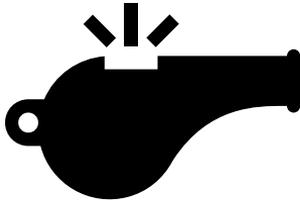
- Proposed regulation would create classes of mandatory reporters:
 - Employees with authority to implement corrective measures
 - Administrative leaders, teachers and advisors
 - Other employees either to report or to provide contact for Title IX Coordinator and information about how to report



University of Illinois – Required Reporters

- All University employees – including tenure and non-tenure track faculty, specialized faculty, academic professionals, visiting academic professionals, postdoctoral research associates and fellows, all graduate student employees, academic hourly, civil service, extra-help, medical or veterinary residents – are deemed responsible employees.
- The following groups of undergraduate student employees are considered responsible employees: resident advisors, multicultural advocates, student patrol officers, and teaching assistants.
- Because the definition of responsible employee is so broad, **you should consider yourself a responsible employee unless you qualify as a confidential resource or you are an undergraduate student employee not holding one of the positions listed above.** Confidential resources, counseling or victim advocacy services, are not required to report the incidents of sexual misconduct to the police or the University. Confidential resources on campus include the Women’s Resources Center, the Counseling Center, and McKinley Health Center. For the full list please visit [Resources for Students](#).

Proposed Change



- Proposed regulation would:
 - Impose affirmative duty on Title IX Coordinator to monitor barriers to reporting and take reasonable steps to address barriers
 - Potential methods for monitoring include surveys, targeted feedback, anonymous feedback websites and emails, etc.



When do we reach out to the alleged victim?

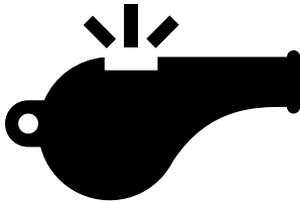
- After institution has actual knowledge of alleged sexual harassment, Title IX Coordinator must contact alleged victim
- Provide information about supportive measures, explain the grievance process and how to file a formal complaint, and discuss the alleged victim's wishes



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

- Title IX Coordinator should oversee preliminary investigation to determine identity of alleged victim
- If identity of alleged victim cannot be discerned after reasonable inquiry, matter should be documented and consideration given as to whether other policies (such as student code of conduct) are utilized

Proposed Change



- Proposed regulation would:
 - Specifically permit dismissal if the identity of the respondent cannot be determined after reasonable inquiry

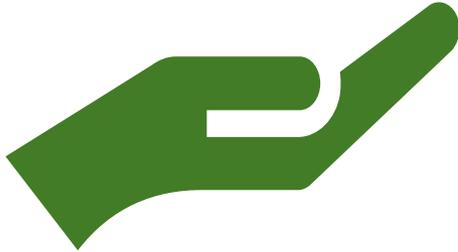


Do we need a formal complaint?

- No. Not in order to contact the alleged victim and begin support services
- The formal complaint is a specific written document that is required to commence the investigation and hearing process

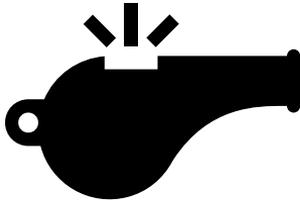


What are supportive measures?



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

Proposed Change



- Supportive measures that burden a respondent must be terminated at the conclusion of the grievance procedures
- May be no more restrictive of respondent than is necessary

Examples of supportive measures

 Counseling

 Academic accommodations

 Housing accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

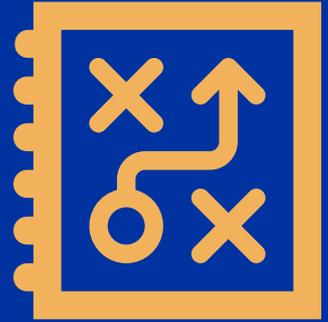
 Modified work schedules

 Mutual no-contact order where implicated by facts



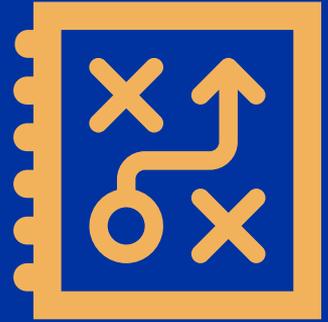
Example of reasonable supportive measure

Undergraduate student who reports a sexual assault seeks one week off from class to attend an in-patient mental health care facility to address effects of trauma. Student is required to make up coursework within a reasonable amount of time after treatment is complete.



Example of reasonable supportive measure

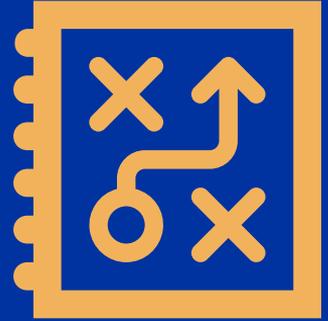
Student worker whose shift ends at 11:00 pm is attacked and beaten by former domestic partner in a dimly lit parking lot. Student worker requests the institution have a security guard present outside the building when she leaves at 11:00 pm.





Example of reasonable supportive measure???

Employee accuses a co-worker of repeatedly pursuing a romantic relationship despite employee's repeated refusals. Employee requests institution ban co-worker from being in the same building as employee.



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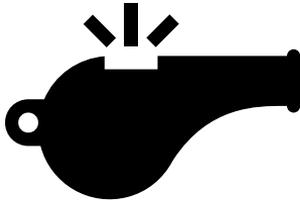
Is this a reasonable supportive measure?

Yes

No

It depends

Proposed Change

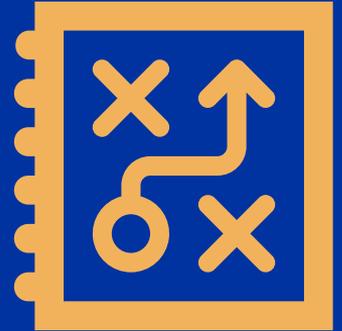


- Either party affected by a decision regarding supportive measures must be allowed to appeal to an impartial employee
- Respondent must be allowed to challenge supportive measures that burden respondent before they are enacted, except in an emergency

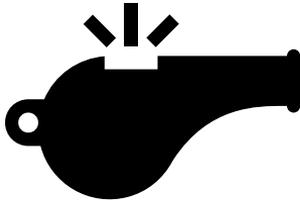


Example of unreasonable supportive measure

One student accuses another student of stalking and requests a no-communication order as a supportive measure. After the order is imposed, the respondent begins lurking outside complainant's residence hall. Complainant then requests a proximity restriction.



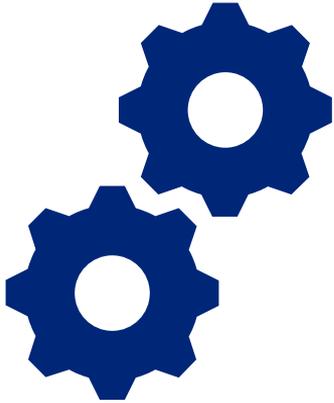
Proposed Change



- Either party must be allowed to seek modification or termination of supportive measures “if circumstances change materially.”



Do students and employees have other rights?

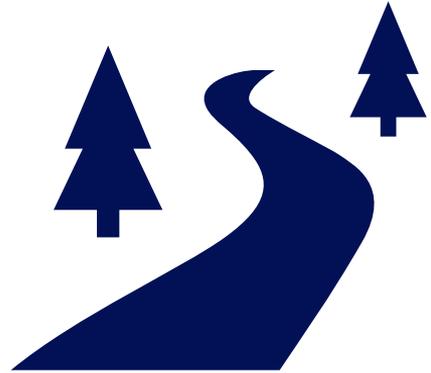


- Yes—other laws may trigger accommodations when a medical condition or disability is present
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Section 504 of the Rehabilitation Act
 - Title IX pregnancy accommodation provisions

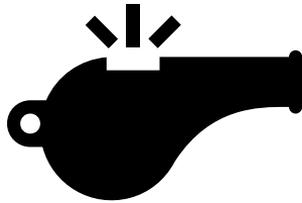


What if the report falls outside Title IX jurisdiction?

- Title IX requires supportive measures for reported sexual harassment covered by Title IX
- Institute may provide supportive measures for reported conduct that falls outside Title IX's scope



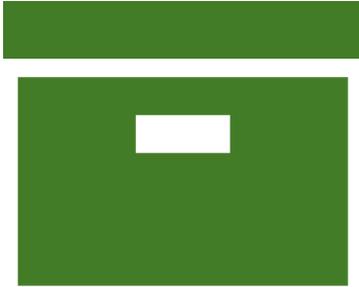
Proposed Change



- Even if a complaint is dismissed, the institution must provide supportive measures to the complainant, as appropriate, and to the respondent if the respondent has been notified.

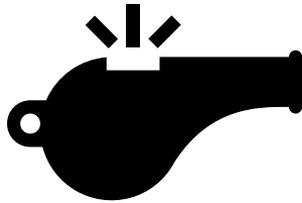


Are supportive measures confidential?



- Generally, yes
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with institutional employees who have a legitimate need to know

Proposed Change



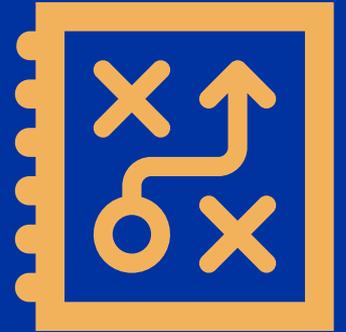
- Supportive measures may also be shared with another party “only if necessary to restore or preserve that party’s access to the education program or activity.”

H-B

Example

Student A accuses Student B of dating violence. Institution requires Student B to meet with a counselor as part of a plan to allow Student B to remain on campus pending investigation.

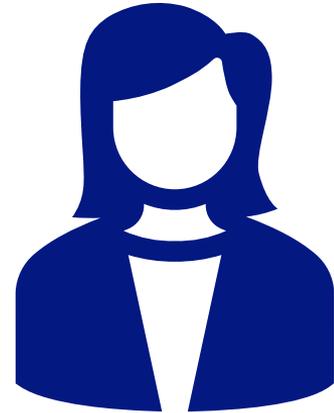
Institution informs Student A that Student B will be evaluated before a decision is made whether Student B may remain on campus.



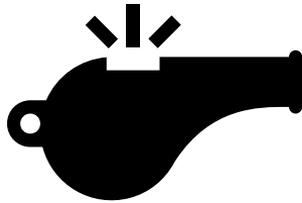


Who is responsible for supportive measures?

- Title IX Coordinator is responsible for “coordinating the effective implementation”
- May be delegated with appropriate oversight
- Typically, a collaborative effort involving more than one institutional office or department



Proposed Change



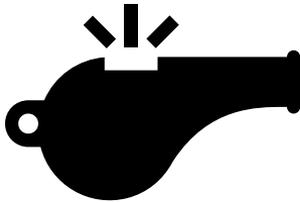
- Remember, proposed regulation allows an appeal to an impartial person of supportive measure decisions
- Important to consider what role Title IX Coordinator plays in decision-making process



Can we utilize interim removals or suspensions for students?

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

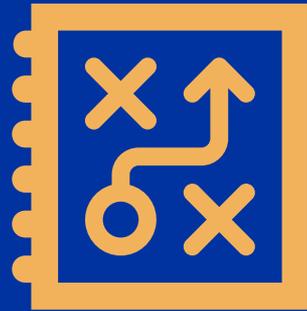
Proposed Change



- Interim removals or suspensions can be utilized when there is an “immediate and serious threat to health or safety.”
- Requirement of “physical” threat is removed

Example of immediate threat to physical health or safety

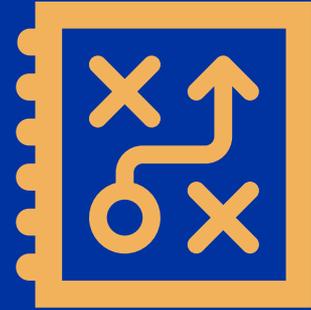
Student A and Student B are in a dating relationship. During an argument, Student B becomes enraged, threatens to kill Student A, and then beats Student A to the point Student A is hospitalized





Example of immediate and serious threat to health or safety

Student A reports that Student B placed a secret video camera in a residence hall bathroom and watched Student A take a shower. There is no allegation of physical contact or threat of physical contact. Institution locates camera and links it back to Student B's room.





Can we utilize an already existing process for interim removals?

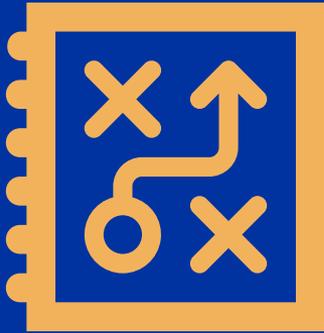
- Yes, if that process complies with the Title IX standard.
- Common institutional examples include:
 - Threat assessment policy
 - Critical Incident Response Team (“CIRT”)
 - Interim suspension provisions of Student Handbook



Can we place employees on administrative leave?

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

Example of administrative leave



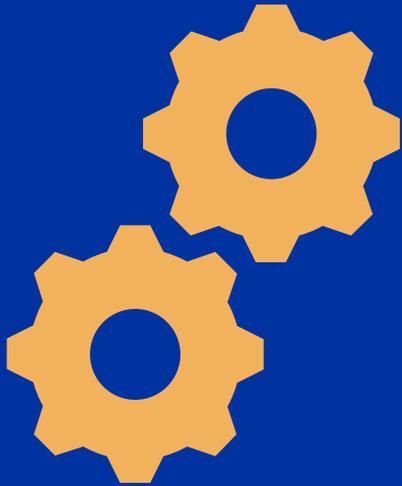
Faculty member is accused of offering a student a better grade in exchange for a sexual favor. The faculty handbook states that faculty may be placed on administrative leave if the President finds there is clear evidence the faculty member's continued presence could cause serious damage to the reputation of the institution.

Example of administrative leave



Employee works in the student recreation center and is an “at will” employee. Student reports that student caught employee stealing student’s underwear from student’s gym bag. Institution places employee on administrative leave pending investigation and determination.

Group Scenario



Monique is a graduate student in biology and Casey is a staff member in the Registrar's Office. They both audited a foreign language class and became friends. Casey and Monique attended a basketball game together and consumed alcohol. The two go to Monique's off campus apartment and have sex. The following day, Monique confides in her faculty advisor that she may have been incapacitated during the encounter. The advisor tells Monique to talk to the Title IX Coordinator about options. After speaking to the Title IX Coordinator, Monique requests access to counseling and to be moved out of a class she shares with Casey. Weeks later, Monique sees Casey at an off-campus bar. Seeing Casey causes Monique to have a panic attack and to flee. The next day, Monique calls the Title IX Coordinator and requests an investigation of the earlier sexual encounter. Monique also requests that Casey be barred from contacting her and be required to complete the remainder of the semester (three) weeks online so that there is no risk of contact on campus. The Title IX Coordinator imposes a no-contact order and imposes a proximity restriction. The school's Sexual Misconduct policy prohibits students and employees from committing sexual assault, regardless of location.

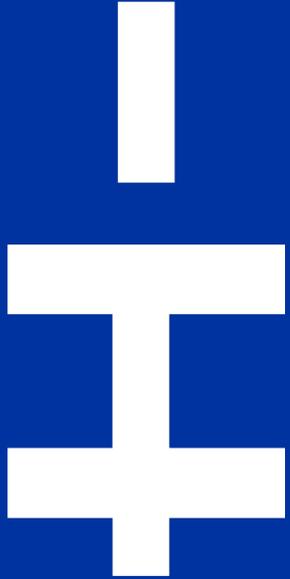
Questions





HUSCH BLACKWELL

The
Investigation

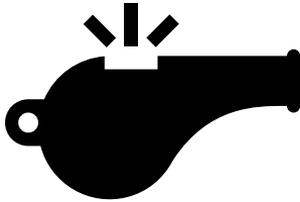




What is the purpose of Title IX investigation?

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

Proposed Change



- Proposed regulation would allow a combined investigation/decision making model
- But, with more robust rights of the parties to pose questions through the investigator



What are the general principles of an investigation?

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



How is a non-Title IX investigation different?

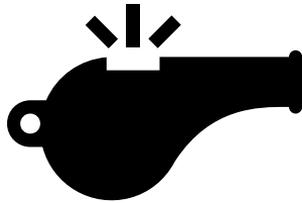
- Similar:
 - collect relevant inculpatory and exculpatory evidence
 - Allow parties sufficient notice and chance to participate
- Different:
 - Investigator is decision-maker about policy violation
 - Investigation is both evidence-gathering and fact-finding, including credibility assessments



What is a formal complaint?

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

Proposed Change



- Proposed regulation would eliminate the concept of a “formal” complaint
- New regulation recognizes only a “complaint” that can be verbal or written

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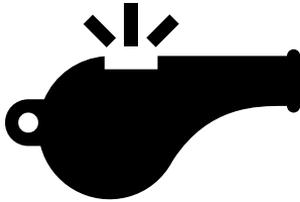
May a putative victim who has already graduated file a formal complaint?

Yes

No

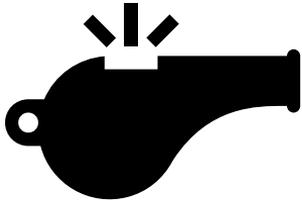
It depends

Proposed Change



- Proposed regulation would allow complaints from someone who was a participant in education programs and activities at the time of the alleged misconduct

Proposed Change



- A person who is legally authorized to act on behalf of a complainant may file a complaint
- E.g., parent, guardian



How do we tell the parties about an investigation?

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



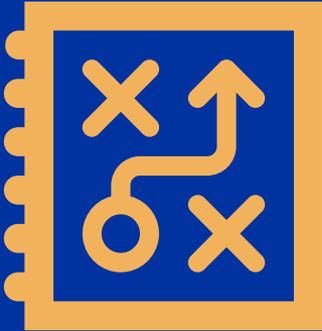


What else does the notice need to say?

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

Example (incorrect)

—



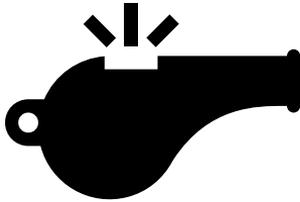
Title IX Coordinator sends notice to respondent stating “you have been accused of committing one or more forms of sexual harassment as defined in the institution’s Title IX policy.”



Can we gather any information prior to the written notice?

- Yes, but only to the extent necessary to determine how the case will proceed
- Typically, this “preliminary inquiry” would involve identifying the putative victim and understanding the scope of the allegations
- Information gathering that seeks to determine whether the allegations are *true* is investigatory and should await the written notice

Proposed Change



- Proposed regulation contemplates preliminary investigation
 - To determine identities of the parties
 - To clarify allegations prior to dismissing on the basis they could not constitute sex discrimination

Example (preliminary inquiry)



Student submits formal complaint via email with a single sentence reading, “I was sexually assaulted in my car last night by Student C. I want the institution to investigate this.”

Example (preliminary inquiry)



Campus visitor reports that they were sexually harassed by a group of students while taking a campus tour. The identity of the students is unknown.

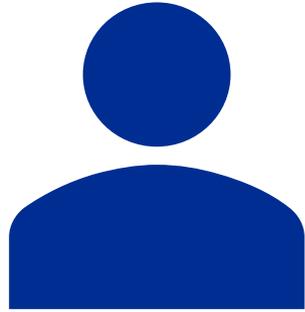


May we take steps to preserve information before sending the written notice?



- Yes, if the work isn't investigatory and there is a legitimate concern information will be lost
 - Placing a “hold” on an email account
 - Asking IT to capture server-level data
 - Having campus security suspend auto-delete of security footage

How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of non-testimonial evidence



How do we approach potential trauma?

- “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



Trauma might affect a party

- Not in every case
- Not just one party
- Never assume anyone participating in a hearing has suffered any trauma

Possible trauma impact

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

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

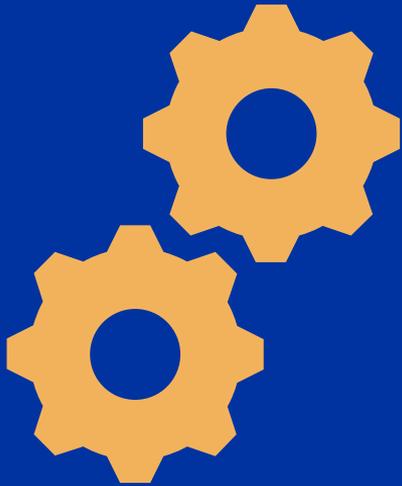
Self-blame



Trauma & credibility

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

Group Scenario



In the fall 2016 semester, Monica is a graduate assistant in Paul’s economics class. Paul frequently discusses the upcoming presidential election, both during class lectures and in conversation with Monica. One day when Monica comes to class, Paul asks her if she has seen the news about a leading candidate. When she says that she has not, he tells her that a video has come out in which the candidate is heard talking about women in lewd terms. Paul goes on to repeat explicit phrases the candidate was heard using. Monica tells Paul, “that’s disgusting” but before anything more can be said, a student comes up to ask them a question about an assignment. Over the next few weeks, Paul repeats the phrases the candidate had been recorded saying on no less than 3 occasions, in the context of telling Monica about how excited he is about having a “real guy” run for office. Monica, who has experienced sexual assault in the past and is very uncomfortable hearing this language repeated, eventually asks Paul, “Can we take a break from the political discussions? I’d like to focus on economics.” Paul tells her of course. However, in class the day after the election, Paul makes a joke about how the candidate “is grabbing the election like he grabs others”, again repeating the lewd phrase the candidate had used previously. Monica files a Title IX complaint, asserting that hearing lewd terms for women’s body parts and, in her words, “a sexual assault described by my professor,” has created a hostile environment. Paul identifies an attorney as his advisor. The attorney sends a letter contending that the investigation itself violates Paul’s rights under the First Amendment, as he was – in his words – merely discussing a matter of public concern. Paul’s advisor sends a second letter indicating that, unless the institution “drops” the investigation, Paul will have no choice but to go to the media.

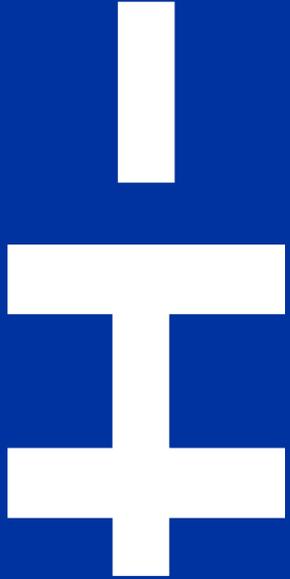
Questions





HUSCH BLACKWELL

The Hearing





What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

Who is the “decision-maker”?



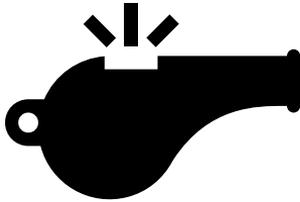
- A single hearing officer; or
- A hearing panel led by a chair



What standard of evidence can be used?

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

Proposed Change



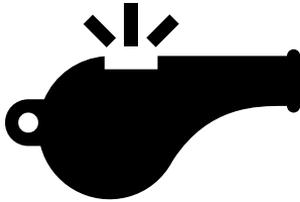
- Clear and convincing standard may be used in a sexual harassment case only if used “in all other comparable proceedings, including proceedings relating to other discrimination complaints.”



What happens before the hearing?

- Parties are provided the final investigation report at least 10 days prior to the hearing
- “Decision-maker” must be identified and clear conflicts of interest assessment
- Hearing must be scheduled and logistics arranged
- Witnesses must be notified
- Pre-hearing conference should be held

Proposed Change



- Institution must provide the parties with a “reasonably opportunity to review and respond to the evidence” prior to the determination
- May be satisfied simply by allowing the party to respond at the hearing itself
- There is no explicit right to respond to an “investigation report”
- Use of an investigation report is optional; parties may simply be provided access to the evidence itself

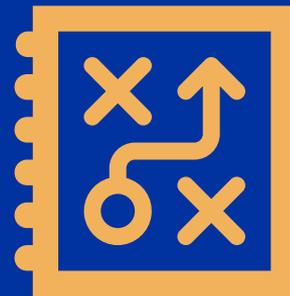


What is a conflict of interest?

- A material connection to a dispute, the parties involved, or a witness, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior relationship; professional interest; financial interest; prior involvement in a matter; or nature of position

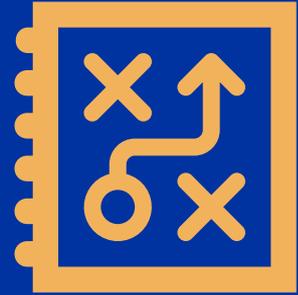
Example

The University identifies a member of the hearing panel whose child previously dated the complainant for two years.



Example

The College assigns as the hearing officer the chair of the School of Education. The case involves allegations of sexual harassment against a faculty member that, if true, will reflect poorly on the School and damage its reputation.





How do we schedule a hearing?

- Set aside sufficient time considering the nature and complexity of the case
- Consider class and work schedules of parties and key witnesses to avoid conflicts
- Consider pre-scheduling a backup or “spill over” date in the event the hearing runs long or must be continued
- Provide letters excusing parties and witnesses from other obligations, as necessary

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What is the appropriate length of time for a Title IX hearing?

Four hours

Eight hours

Two days



How do we notify parties and witnesses?

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

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May an institution compel a witness to attend the hearing under the proposed regulations?

Yes

No



What is a pre-hearing conference?

- A meeting with the parties, decision-maker, and other necessary officials to:
 - Address logistical issues and concerns
 - Discuss the sequence of the hearing and rules of decorum
 - Hear and resolve objections or concerns that can be addressed in advance
 - Take up other issues that will ensure hearing time is focused on testimony



What are other considerations?

- The pre-hearing conference can be two separate meetings—one with each party and advisor; but follow up notification may be required
- The pre-hearing conference can be conducted virtually
- Advisors should be allowed to attend although their role can still be passive if the institution desires
- The pre-hearing conference is not required but is a best practice that facilitates a smooth hearing

How does the hearing actually work?

- Title IX regulation is largely silent on specific elements
- Required elements in the regulation include:

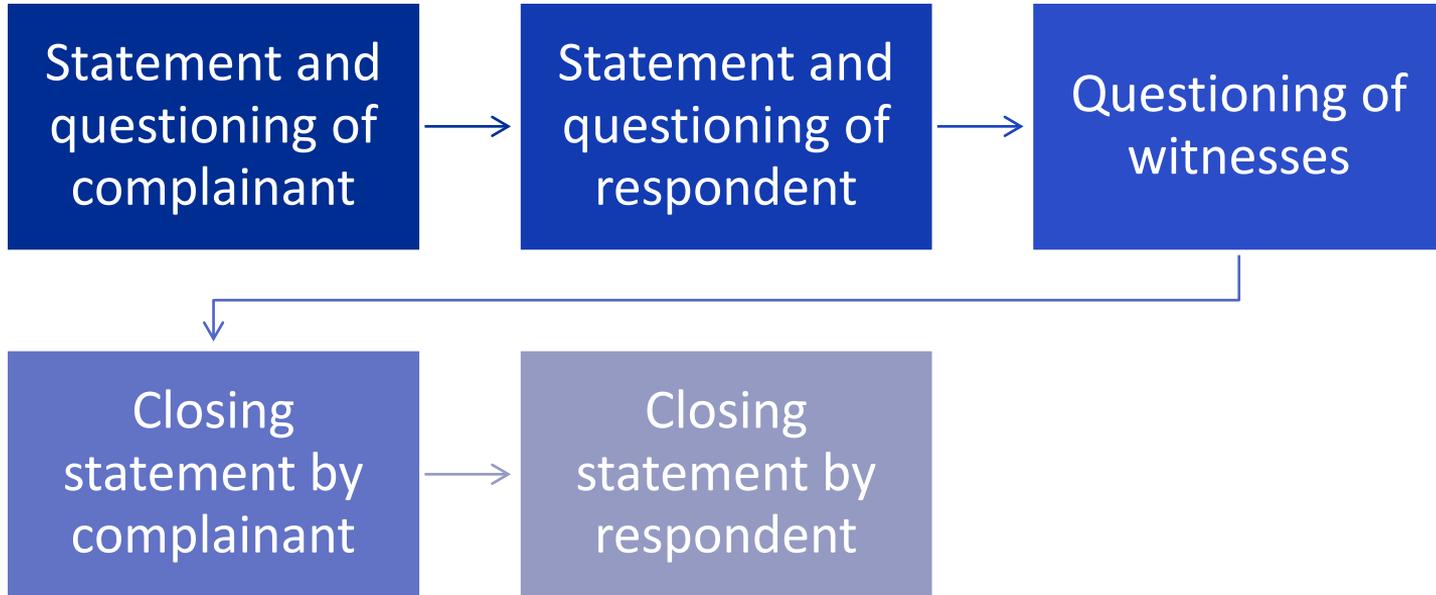
Decision-maker(s) must independently evaluate questions for relevance and resolve relevancy objections

Party's advisors must be allowed to conduct live questioning of other party and witnesses

**EXCLUSIONARY RULE NO LONGER
IN FORCE**

Questioning of sexual history generally not permitted

What is a potential sequence?





Is an advisor allowed to question their own party?



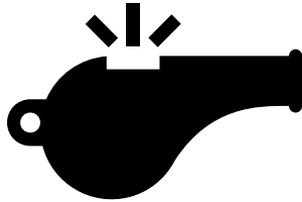
- Not unless the institution chooses to allow it
- The Title IX regulation requires cross-examination, but not “direct” examination



Who determines relevance?

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

Proposed Change

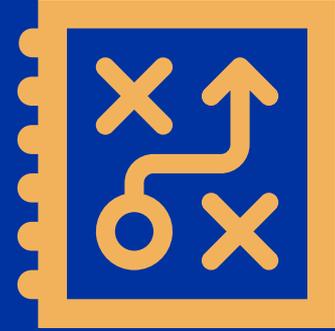


- Proposed regulation would define relevant evidence as that which:
 - “May aid a decisionmaker in determining whether the alleged sex discrimination occurred”

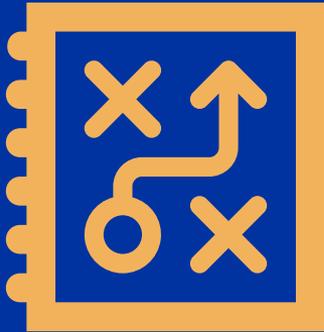


Example (relevant)

—
Student has accused a faculty member of a quid pro quo. Advisor for faculty member asks the student whether they engaged in any sex acts with the faculty member before the faculty member offered to change the student's grade.

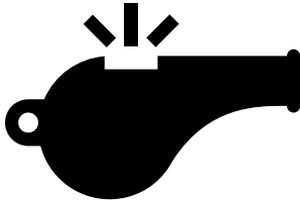


Example (relevant???)



Female student accuses a male student of creating a hostile environment by repeatedly telling jokes about beating women. Female student testifies about her awareness of multiple female victims of dating violence in her residence hall.

Proposed Change

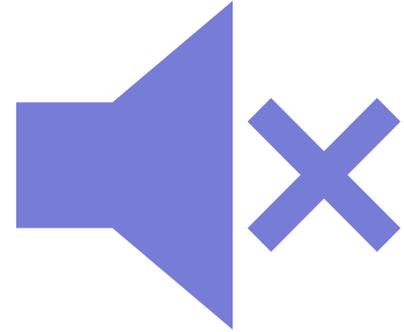


- Proposed regulation would also prohibit questions that are “unclear or harassing of the party being questioned.”



Does any testimony get excluded?

- Evidence excluded if not relevant
- Evidence excluded if impermissible sexual history or confidential/privileged
- Testimony is no longer excluded under the exclusionary rule



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Even though the exclusionary rule is gone, may a decisionmaker assign more credibility to testimony that is subject to cross-examination?

Yes

No

Yes, as long as it is not the sole determiner of credibility

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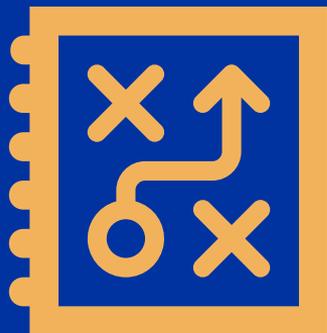
May a hearing officer exclude evidence that could have been presented during the investigation but was not?

Yes

No

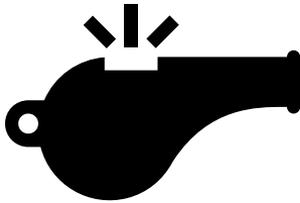


Example



During hearing, respondent claims he could not have committed sexual assault because he was at a friend's house. At investigative interview, respondent said he had no memory of what he was doing that night. How should the hearing officer evaluate?

Proposed Change



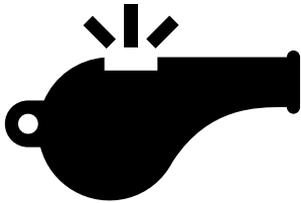
- Proposed regulation would reinstitute a partial exclusionary rule:
- “If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party’s position.”



Is an advisor required to ask questions a party wants asked?

- Advisors should consult with their party and consider their preferences for what questions to ask
- But an advisor must exercise their own reasonable judgment and is never required to ask questions that the advisor knows are improper (e.g., invade sexual history)
- An advisor may consult the decision-maker if a party demands the advisor ask a question that advisor is uncertain is appropriate

Proposed Change

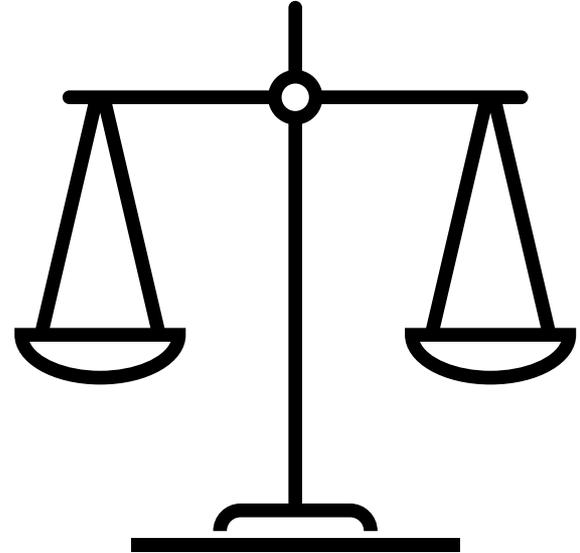


- Proposed regulation makes clear that an institution-provided advisor does not have to be an attorney.

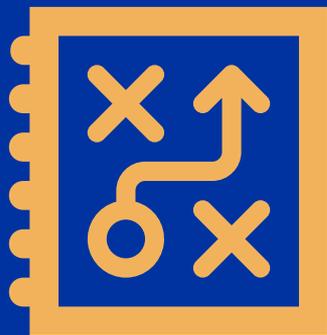


Can we have standards of decorum for hearings?

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



Example (permissible)

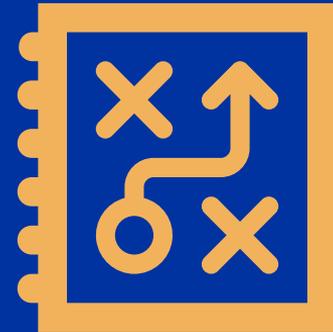


Institution's hearing procedures require all participants to leave their cell phones and other electronic devices with a proctor outside the hearing room.



Example (permissible)

Institution's policy requires all parties and advisors to remain seated and only approach a witness or the hearing chair after first obtaining permission.





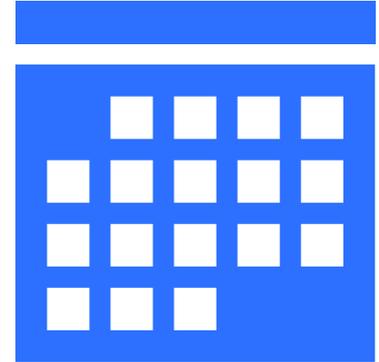
Are there “objections” at hearings?

- Minimally, the institution must allow a party to raise an objection that evidence is not relevant or should be specifically excluded (e.g., sexual history; confidential privilege)
- Institution may permit other objections to be raised
- Institution may limit the right of objection to a *party*



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

- Yes, but only if a delay is not clearly unreasonable
- Consider pre-scheduling an alternative date
- Inconvenience alone should not be the determinative factor; every date will inconvenience someone



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



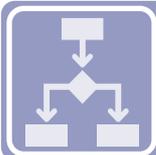
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the institution



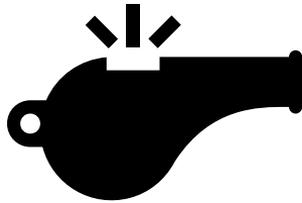
Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



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

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

Proposed Change



- Proposed regulation only requires “information about the policies and procedures” used, instead of a listing of all procedural steps.

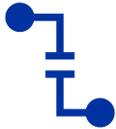


Who determines discipline and remediation?

- Some institutions will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
- If referred to someone else, that must occur before the written determination is issued

What are the grounds for appeal?

Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter

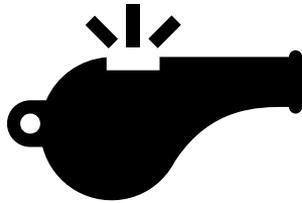


New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal, that could affect the outcome of the matter; or



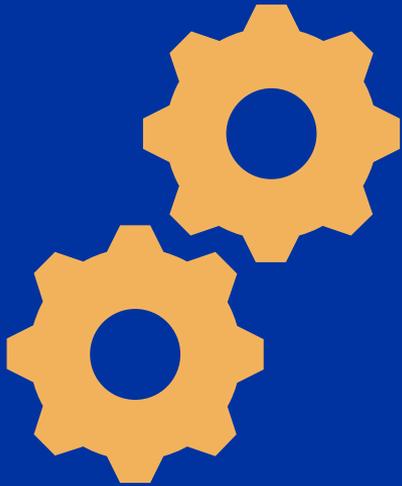
Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

Proposed Change



- Similar grounds for appeal but each requires a showing that the outcome “would” have changed, instead of “could” have changed.

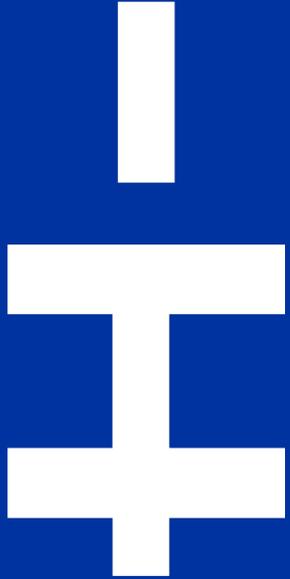
Group Scenario



Jordan accuses Billie of sexual assault by way of incapacitation. During the investigation, Jordan states that Billie gave her four mixed-drinks before sex, which is “way more than I ever have.” A witness, Eliza, tells the investigator that she saw Jordan before Jordan left with Billie, and Jordan “could barely walk.” At the hearing, Billie’s advisor asks Jordan whether she’s ever had sex with another person after drinking at least four mixed-drinks. The hearing officer rules the question improper. Eliza fails to show as a witness. Billie argues that Eliza is openly hostile to men and that Billie should be able to cross-examine Eliza to expose her bias. Billie asks that Eliza’s testimony not be considered. The hearing officer denies Billie’s request. Despite Billie’s testimony that Jordan was sober and initiated sex, the hearing officer finds Billie responsible for sexual assault because the hearing officer finds Jordan to be credible and Jordan’s testimony to be corroborated by Eliza’s statements to the investigator. The day after the decision, Eliza posts a rant on social media in which she uses derogatory language toward men.

Questions





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Informal Resolution and Other Processes





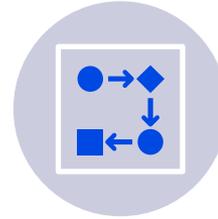
What is informal resolution?

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

What are the key concepts of informal resolution?



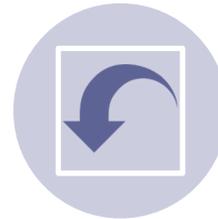
A formal complaint must first have been filed and written notice given to the parties



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



The parties must voluntarily agree to participate in writing

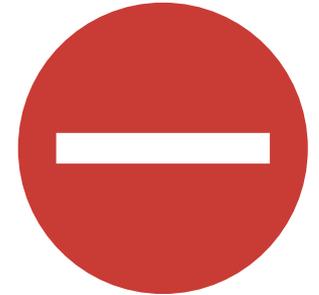


The parties must be allowed to withdraw from informal resolution up until the point it is final



What are the limitations?

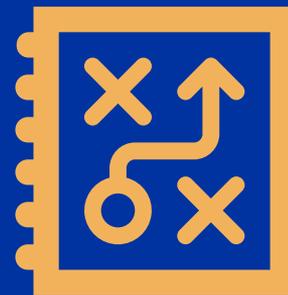
- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment



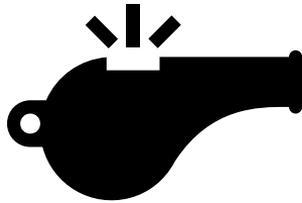


Example (impermissible)

Undergraduate student files a written sexual harassment complaint against a research assistant who also spends 20% of their time taking graduate-level classes. The undergraduate orally requests that the Title IX Coordinator mediate an informal resolution that will include a no contact order.



Proposed Change

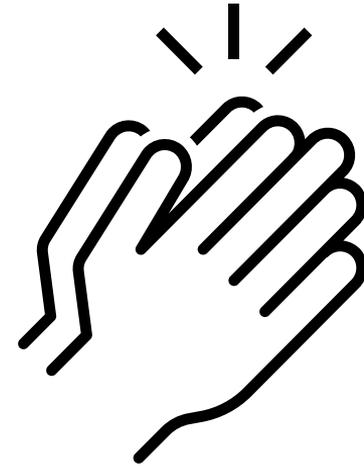


- Formal “written” complaint is no longer required
- Not allowed in any case where an employee is accused of discriminating against or sexually harassing a student.



Must an institution allow informal resolution?

- Current regulations permit but do not require informal resolution
- Proposed regulations indicate institutional approval is discretionary





University's Informal Resolution Standards

- Available if parties consent in writing (except of employee alleged to harass student)
- Can begin any time after Formal Complaint and prior to responsibility finding
- Can involve investigator engaging in preliminary investigative activities
- Seek to conclude within 30 days
- Resolution agreement not appealable



Example



Student A accuses Student B of secretly recording Student A naked and selling the videos to other students in the same residence hall. The complaint is reported in the news. Student A wants Student B to withdraw, and Student B will do so if the institution approves the agreement.

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If you were the Title IX Coordinator, would you approve this informal resolution?

Yes

No



Example



Student A accuses Student B of sexual assault resulting from a sexual encounter where both Student A and Student B were drinking heavily; no witnesses were involved. Student A wants Student B to complete coursework online, and Student B will agree if the institution approves.



What factors should be considered in approval?

- Severity and nature of the conduct
- Whether respondent is repeat offender
- Presence of other conduct violations
- Public perception
- Confidence in parties' ability to uphold agreement
- Sufficiency of the terms
- Others?



What issues need to be addressed in informal resolution?

- The substantive terms
- How compliance will be verified
- The punishment for non-compliance
- The effect on the pending formal complaint
- The effect on collateral conduct charges/policy violations
- Others?

Example



Student A and Student B enter into an informal resolution requiring Student B to receive counseling and to follow the treatment plan of Student B's psychologist. How would this agreement be verified?

Example



Student A and Student B enter an informal resolution requiring Student B to apologize. How will this requirement be satisfied and verified?

Example



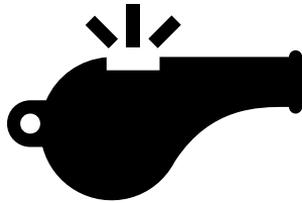
Employee A and Employee B agree to informal resolution for Employee B to receive anti-harassment training and 10 hours of community service. Employee B receives the training but performs only 5 hours of community service. How will non compliance be addressed?



How should we document an informal resolution?

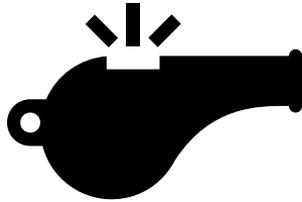
- Documented in writing
- All essential terms in the same document
- Signed by the parties
- Dated
- Indicating institutional approval
- Indicating closure of grievance procedure

Proposed Change



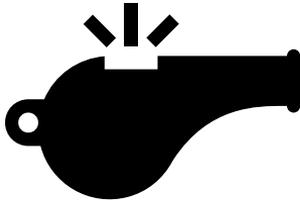
- If informal resolution fails and the grievance process resumes, the institution may not use evidence obtained solely through informal resolution in the grievance process.

Proposed Change



- Facilitator of informal resolution cannot be the investigator or decision-maker.
- Facilitator of informal resolution must be free of conflicts of interest and bias.

Proposed Change



- Even if a particular case is resolved through informal resolution, Title IX Coordinator must take steps to prevent continuing and recurrence of sex discrimination.



Is Title IX the exclusive process for resolving sexual misconduct?



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



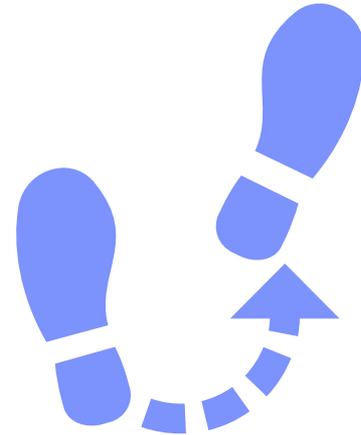
What other policies/processes may apply?

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



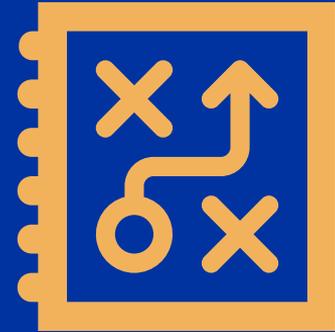
At what point can we use some other policy?

- Depending on the facts
 - Before a Title IX grievance process
 - At the same time as a Title IX grievance process
 - After a Title IX grievance process



Example

Student performing in a musical makes a verbal report that guest catcalled student during performance and has posted bizarre comments on student's social media feed.



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May the institution issue a trespass notice banning the guest from campus without initiating a Title IX grievance process?

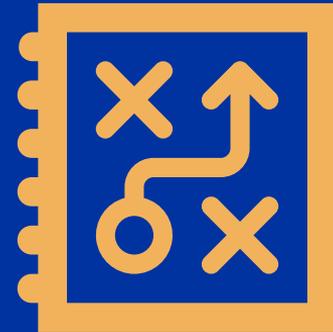
Yes

No



Example

Employee A and Employee B attend a reception on campus that involves alcohol. Employee B gets drunk and sexually propositions Employee A. The next day, Employee A files a sexual harassment complaint.



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May the institution initiate parallel processes to determine whether there is sexual harassment under Title VII and Title IX?

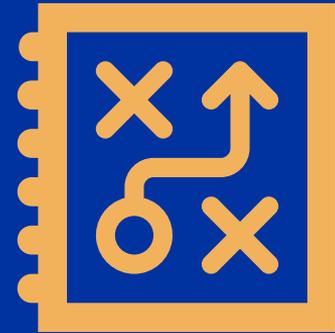
Yes

No



Example

Student decides to host a “porn night” in their dorm room during which they display pornographic videos on their computer screen that depict physical violence against women. Some students make a sexual harassment complaint. The institution’s computer-use policy bans the use of institutional networks to download or play pornography.



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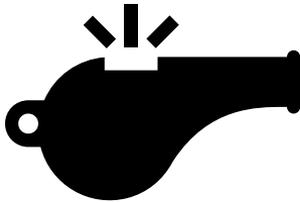
Assuming the Title IX grievance process results in a "no violation" finding, can the institution punish the student for violating the technology use policy?

Yes

No

It depends

Proposed Change



- New definition of retaliation will make clear that conduct charges cannot be used to retaliate against a student for exercising Title IX rights or refusing to participate in Title IX grievance process.

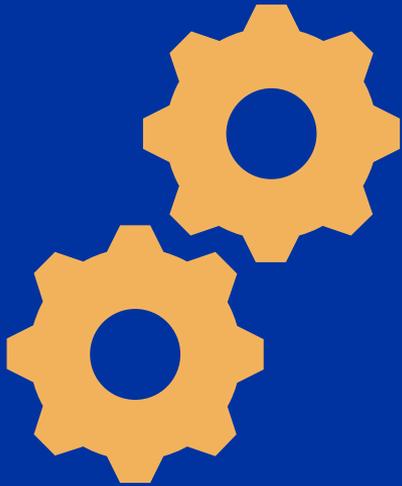


Can we use another process to make the same finding we would otherwise make under Title IX policy?



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

Group Scenario

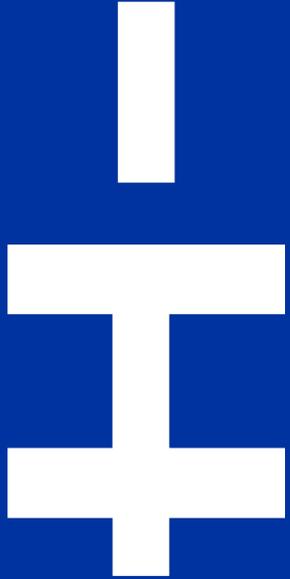


Wren is a trans woman who works as a custodian at the university. Viktor works in the same department and on the same shift as Wren. Viktor purposefully misgenders Wren by referring to Wren as “Caleb” (Wren’s previous name) and using “he/him/his” pronouns when talking to others about Wren. Wren complains to the Title IX Coordinator accusing Viktor of sexual harassment. Wren seeks an informal resolution whereby Viktor would be reassigned to a different shift. Viktor agrees and the Title IX Coordinator approves. A week later, the staff representative of the workplace LGBTQ group emails the Title IX Coordinator and notes that Wren had taken class at the university last semester, so “this agreement never should have been approved under Title IX regulations.” The staff representative also notes that the employee manual prohibits persons from causing “physical or mental injury” to another. The staff representative demands the Title IX Coordinator “unwind” the informal resolution. The staff representative independently emails the department’s supervisor, demanding conduct charges be brought against Viktor for causing mental injury to Wren. The next day Wren also emails complaining that the Title IX Coordinator “pressured” her into the informal resolution.



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Parallel Processes





Is Title IX the exclusive process for resolving sexual misconduct?



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



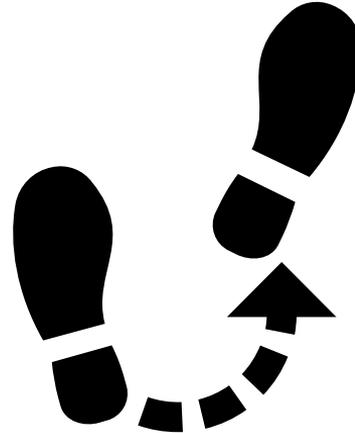
What other policies/processes may apply?

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



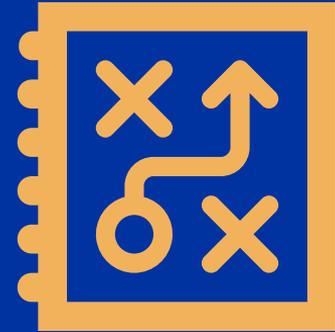
May we use another process before Title IX?

- Yes
- Some processes do not require a formal complaint and may be initiated prior to Title IX
- Other policy violations may be apparent prior to Title IX



Example

Student makes a verbal report that resident director had sex with student. Before student signs a formal complaint, 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.



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May the institution terminate the resident director's employment for violation of contractual duties even though there is no formal Title IX complaint?

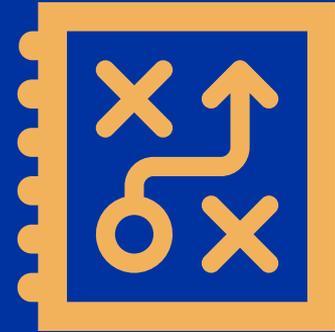
Yes

No



Example

Student A files a formal Title IX complaint, accusing Student B of recording the two having sex without Student A's permission. Student A discloses that she is 17. Student B admits to making the videos but claims Student A consented.



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Can the institution immediately institute a code of conduct proceeding for Student B's making of the videos?

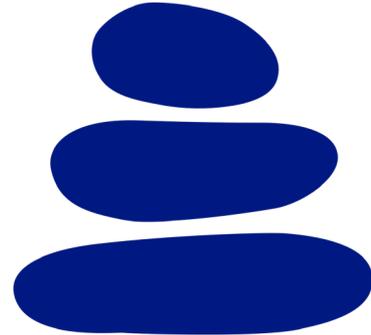
Yes

No



May we use another process after Title IX?

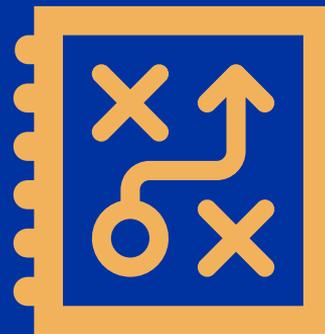
- Yes
- Some conduct may not violate Title IX standards but will violate other standards
- Some conduct may merit additional punishment beyond what is merited by Title IX policy





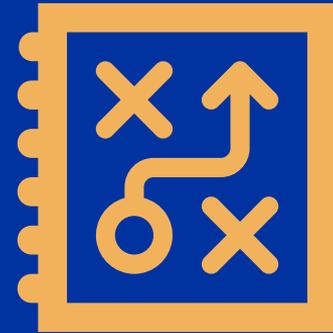
Example

Respondent is accused of sexually assaulting a peer at a department social gathering. During Title IX hearing, Complainant admits the sexual encounter occurred at a private residence not owned by the University. Title IX hearing results in a “no violation” finding because of the location of the incident. Institution then initiates code of conduct charges against respondent.



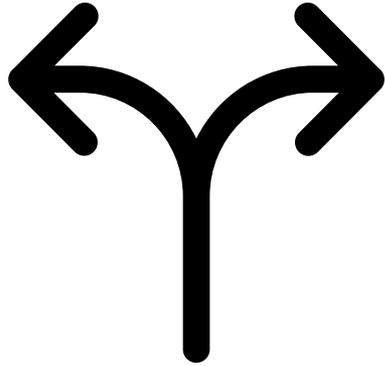
Example

Employee is accused of hostile environment sexual harassment. Title IX process results in a “no violation” finding because harassment is not pervasive. Institution then initiates process under Title VII policy contending that harassment is severe.





May we use two processes at the same time?

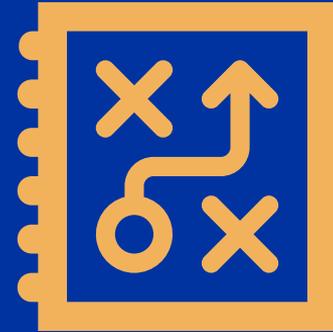


- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ



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 Title IX investigation and parallel investigation of whether faculty member violated professionalism obligations by having sexual encounter with a student.





May we conduct a “joint” investigation?

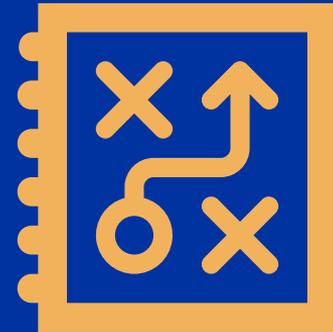
- Yes
- But any “joint” investigation must satisfy the Title IX standards
- Important to be clear to the parties what is going on
- Important to maintain integrity of Title IX evidence





Example

Employee is accused of sexually harassing a co-worker. Institution initiates a Title VII investigation and a Title IX investigation. Title IX investigator and Title VII investigator conduct joint interviews of parties and witnesses.





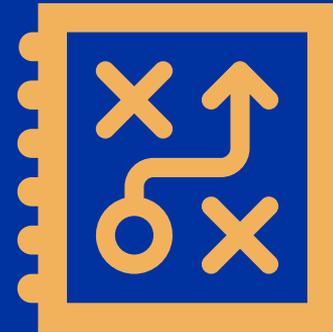
Can the resolution of one process “moot” a Title IX process?

- 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



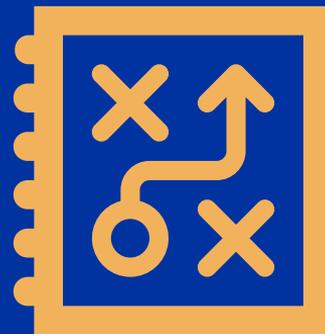
Example

Respondent is accused of sexually assaulting peer at a party at Respondent's house that violates COVID protocols. Respondent has two prior COVID protocol violations. Institution promptly dismisses student for COVID protocol violation using student code of conduct. Institution may dismiss 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.



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Must an institution dismiss a Title IX complaint if an employee is terminated pursuant to some other process?

Yes

No



Must an institution dismiss Title IX complaint if employee is terminated?

- No
- Dismissal is permissive
- Reasons not to dismiss include:
 - Concern about reemployment
 - Public relations concerns
 - Desire of complainant(s) to continue
 - Desire to document sexual misconduct (if supported by evidence) in personnel record.

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

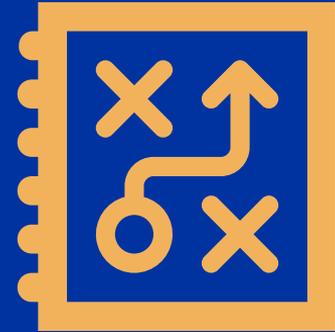


- No
- Title IX regulation requires the use of specific Title IX process for any “sexual harassment” that occurs in institution’s programs and activities



Example (impermissible)

Employee A files formal Title IX complaint against Employee B alleging that Employee B stalked Employee A by following every night for two weeks. When Employee A expresses concern about cross-examination, institution dismisses Title IX complaint and simply charges respondent with “stalking” under non-Title IX policy. Those procedures do not include a live hearing or cross-examination.



Questions



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