

# TITLE IX

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FALL 2023



# AGENDA

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- Title IX Scope and Jurisdiction
- Title IX and Other Policies
- College Response to Sexual Harassment
- Investigations
- Hearings
- Appeals
- Informal Resolution
- Confidentiality
- Proposed Regulations 2023

# WHAT IS TITLE IX?

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“No 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.”



# WHAT SEXUAL HARASSMENT DOES TITLE IX APPLY TO?

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



WHAT ARE  
EXAMPLES OF  
EDUCATION  
PROGRAMS AND  
ACTIVITIES?

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Admissions

Hiring

Workplace

Academic  
Instruction

Residence  
Life

Amenities on  
Campus

Sports  
Team

Work-Study

Games, concerts,  
and speeches  
On-campus

Off-campus trips or  
experiences organized  
by the institution

Sponsored  
organization  
activities

Anything else  
that happens  
on-campus



# DOES TITLE IX APPLY TO OFF-CAMPUS SEXUAL HARASSMENT?

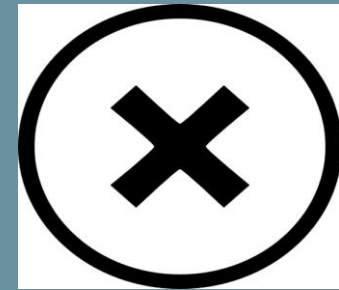
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Yes, if the conduct at issue occurs in the context of an education program or activity



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



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

# EXAMPLE (INCLUDED IN EDUCATION PROGRAM & ACTIVITY)

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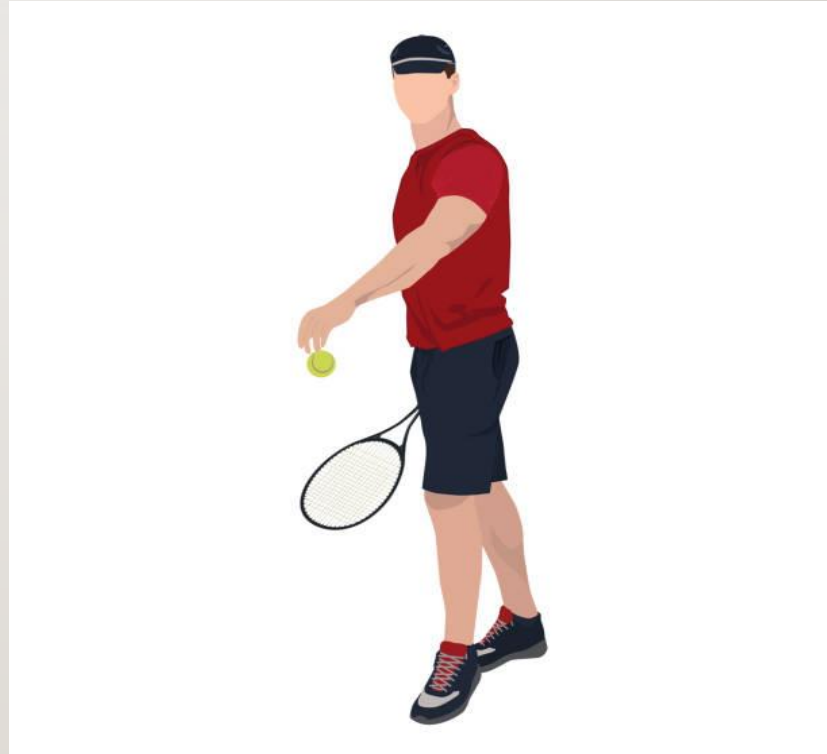
Student is sexually assaulted in a residence hall on-campus. The sexual assault occurs on a Saturday evening. The identify of the perpetrator is not immediately known.



# EXAMPLE (INCLUDED IN EDUCATION PROGRAM & ACTIVITY)

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





# EXAMPLE (EXCLUDED FROM EDUCATION PROGRAM & ACTIVITY)

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



# DOES TITLE IX APPLY TO SEXUAL HARASSMENT IN OTHER COUNTRIES?

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

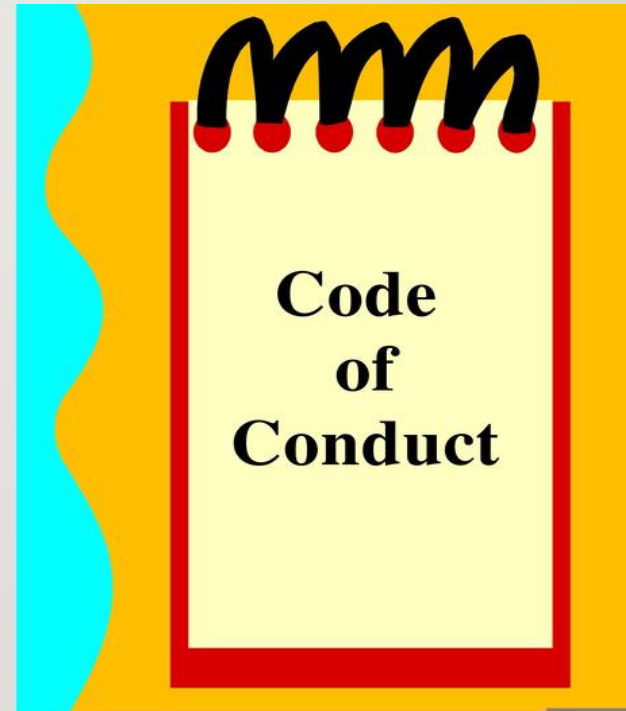


# DOES OUR INSTITUTION HAVE OTHER POLICIES THAT MIGHT APPLY?

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- Institutions are free to use:
  - Student Code of Conduct
  - Faculty/Employee Handbooks
  - Ethics
  - State laws
  - Other policies

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



# WHAT IS SEXUAL HARASSMENT?

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Conduct on the basis of sex that is:

Quid pro  
quo  
harassment

Hostile  
environment  
harassment

Sexual  
assault

Dating  
violence

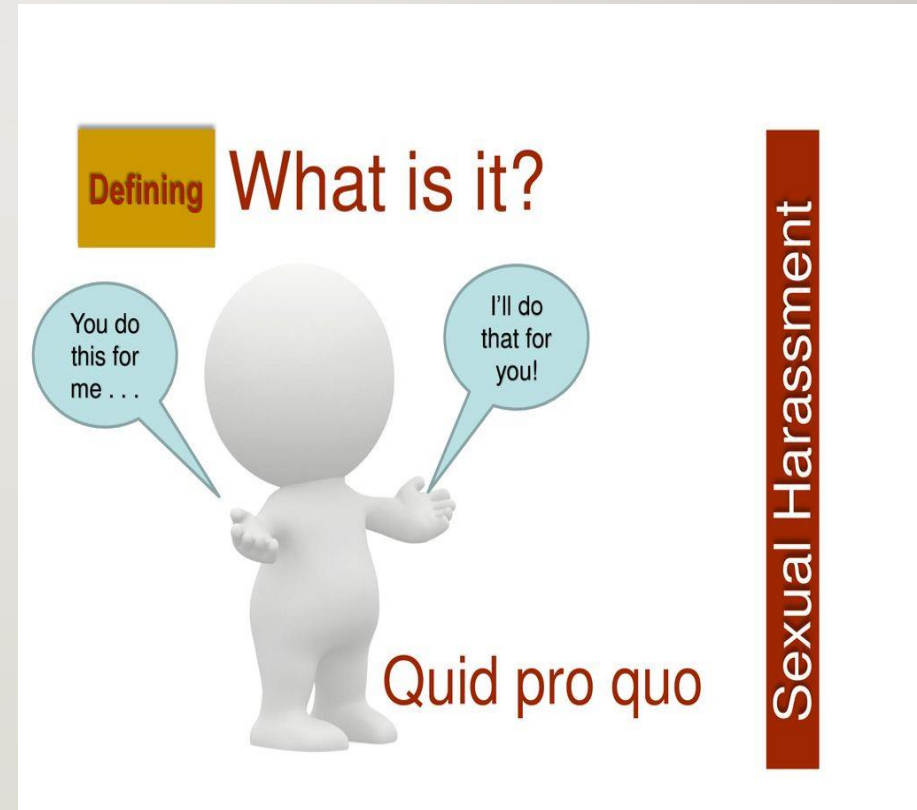
Domestic  
violence

Stalking



# WHAT IS QUID PRO QUO?

- Quid quo pro (this for that) harassment occurs when someone in a position of authority over another (i.e., manager) directly or indirectly demands sexual favors in exchange for some benefit (promotion, pay increase, etc.) or to avoid some detriment (termination, demotion, etc.) in the workplace.
  - Often arises in the employment context or where an employee holds a position of authority over a student

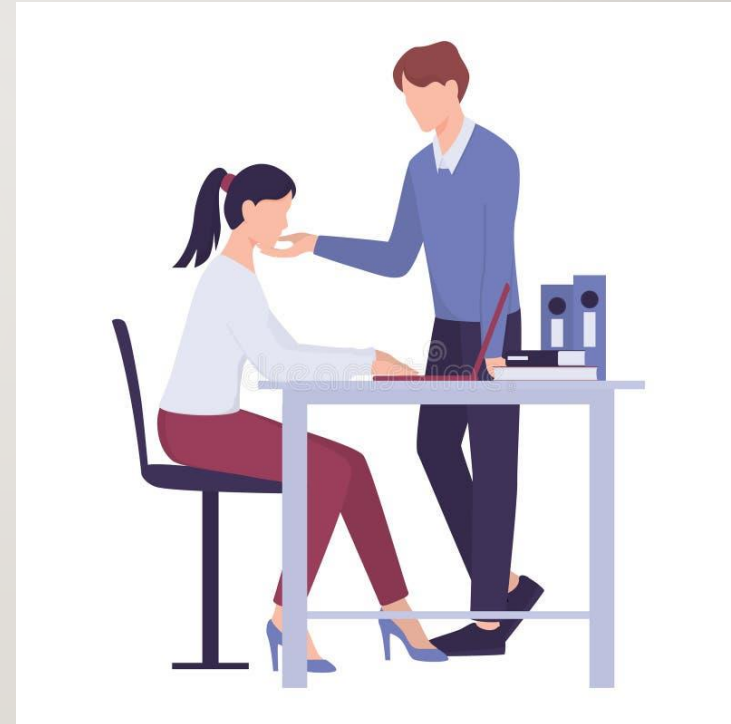




# EXAMPLE OF QUID PRO QUO

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Manager tells subordinate employee that subordinate employee will not get a raise this year unless subordinate employee performs sexual favors for manager. Subordinate employee is in a relationship with another individual and has no interest in performing sexual favors for manager.



# ANOTHER EXAMPLE OF QUID PRO QUO

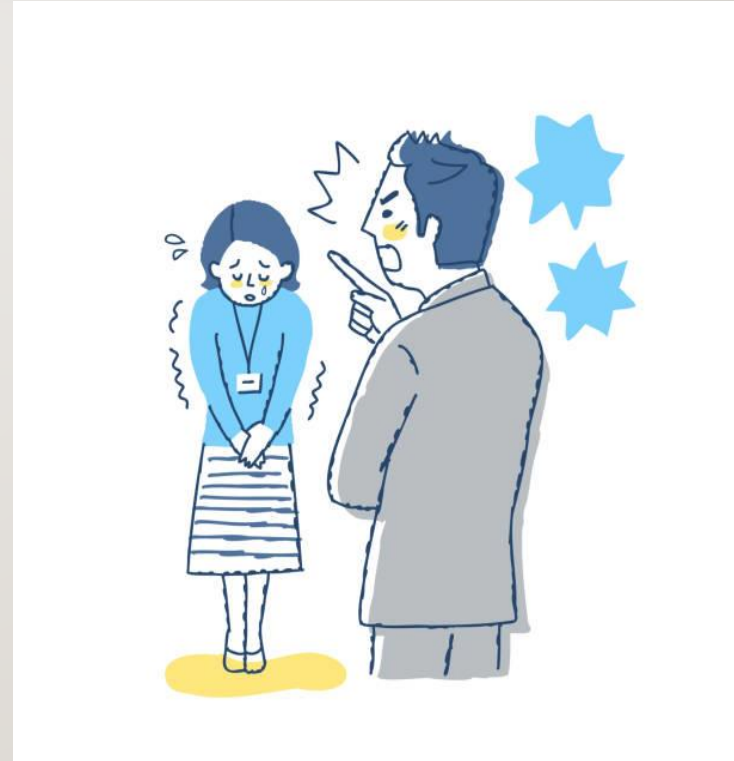


A faculty member tells a student that the student can increase the student's grade from a "B" to an "A" if the student wears revealing clothing that is "more pleasing" to the faculty member's eye.

# WHAT IS HOSTILE ENVIRONMENT?

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



# HOW DO WE DETERMINE IF A HOSTILE ENVIRONMENT EXISTS?

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



# EXAMPLE OF HOSTILE ENVIRONMENT

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





# ANOTHER EXAMPLE OF HOSTILE ENVIRONMENT

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

# ANOTHER EXAMPLE OF HOSTILE ENVIRONMENT

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Student A obtains a nude picture of Student B from Student B's former romantic partner. Student A threatens to post the nude picture on social media unless Student B poses nude for Student A in Student A's dorm room. Student B poses for Student A to avoid the nude picture being circulated. Student A is not an employee.



# DOES THE FIRST AMENDMENT MATTER?

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- 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
- The behavior must limit someone's educational or work pursuits
- Each incident must be considered separately
- Behavior is not cumulative

# EXAMPLE (NOT-HOSTILE ENVIRONMENT)

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



# WHAT IS SEXUAL ASSAULT?

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

Rape

Sodomy

Sexual assault  
with an object

Fondling

Incest



# WHAT IS RAPE?

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Having carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

There is “carnal knowledge” if there is the slightest penetration of the vagina or penis by the sex organ of the other person. Attempted rape is included.

# WHAT IS CONSENT?

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- Sexual permission, given through verbal permission
- Clear, unambiguous, and voluntary communication of "YES"
- Consent cannot be present if there is any use of force
- Consent must be on-going and can be withdrawn at any time
- It is the responsibility of the person initiating the sexual act to obtain permission
- Consent cannot be given if:
  - Unconscious or incapacitated due to drugs, alcohol, or disability
- Legal age of consent – In Illinois is 17 years old

# WHAT IS INCAPACITY?

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



# EXAMPLE (INCAPACITATED)

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Student A has had ten cocktails over the course of two hours. Student B takes Student A to Student B's apartment. Student A cannot walk without support, forgets Student B's name, and passes into a stupor when Student B places Student A on Student B's bed. Student B then has sex with Student A.





# EXAMPLE (NOT-INCAPACITATED)

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



# DEFINITIONS

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## **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.

# DEFINITIONS CONTINUED

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## **What is fondling?**

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

## **Example of Fondling**

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

# DEFINITIONS CONTINUED

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## **What is incest?**

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

## **What is statutory rape?**

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

# WHAT IS DOMESTIC VIOLENCE?

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



# WHAT IS DATING VIOLENCE?

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“Dating Violence” is violence committed by a person:

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

# EXAMPLE OF DATING VIOLENCE

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Employee A and Employee B are engaged to be married but live separately and have no children in common. Employee A and Employee B get into an argument in Employee A's car in the college's parking lot. During the argument, Employee A slaps Employee's B's face and tells Employee B to "shut your mouth."

# STALKING

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## **What is stalking?**

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

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

## **Example of Stalking**

Student A is infatuated with Student B, who has rebuffed Student A's romantic advances. Thereafter, Student A dresses in black and sneaks up to the window of Student B's Greek house at night in an attempt to see Student B. Student A does this twice before being caught in the act during Student A's third attempt.

# DOES TITLE IX ALSO PROHIBIT RETALIATION?

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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.

## **Example of Retaliation**

Employee A testifies at a hearing in support of Employee B's complaint of sexual harassment against manager. After institution finds that manager sexually harassed Employee B, manager demotes Employee A to punish Employee A for testifying against the manager.



# WHAT ABOUT STATE LAWS GOVERNING SEXUAL HARASSMENT ON CAMPUS?

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- Institutions must still comply with state laws unless
- They conflict with some element of the new Title IX regulation in which case
- State law is preempted



# SCENARIOS

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# HOW DO TITLE IX AND TITLE VII STANDARDS COMPARE?

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Title VII Sexual Harassment

Title IX Sexual Harassment

Quid Pro Quo

Sufficiently severe or pervasive

Any quid pro quo by employee

Unwelcome and Sufficiently severe and pervasive and objectively offensive

Any sexual assault/ DV/ stalking

# HOW DO REGULATIONS CONSIDER THESE POLICIES?

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

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



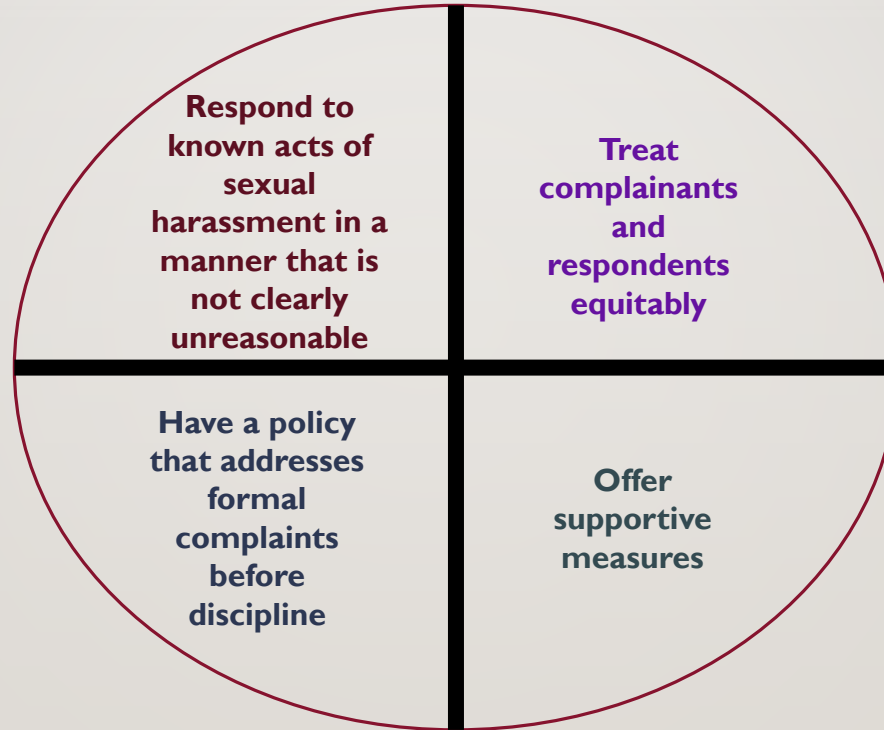
# WHAT IS A LIABILITY FOR EMPLOYER'S UNDER TITLE VI/VII?

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

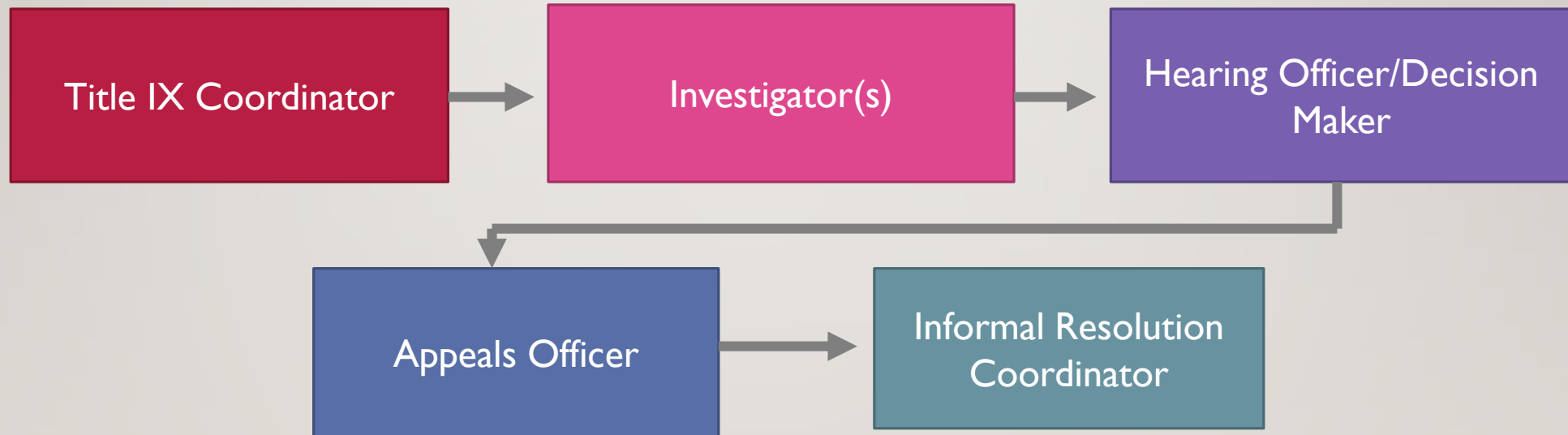
# WHAT ARE THE INSTITUTION'S OVERALL DUTIES?

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# WHO ARE THE KEY INSTITUTIONAL ACTORS IN THE GRIEVANCE PROCESS?

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# HOW DOES AN INSTITUTION GET NOTICE OF SEXUAL HARASSMENT?

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Sexual Harassment response is triggered when an 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



# WHEN DO WE REACH OUT TO THE ALLEGED VICTIM?

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- After the 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.
- If the victim cannot be identified, Title IX coordinator should perform an inquiry to attempt to identify the victim. If not possible, the attempt should be recorded and documented.

# WHAT ARE SUPPORTIVE MEASURES?

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

# EXAMPLES OF SUPPORTIVE MEASURES

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Counseling



Academic Accommodations



Housing Accommodations



Security Escorts



Leave of Absence



Increased security or monitoring



Modified Work Schedule



Mutual no-contact orders

# CAN WE UTILIZE INTERIM REMOVALS OR SUSPENSIONS FOR STUDENTS?

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

## **Example of immediate threat to physical health or safety**

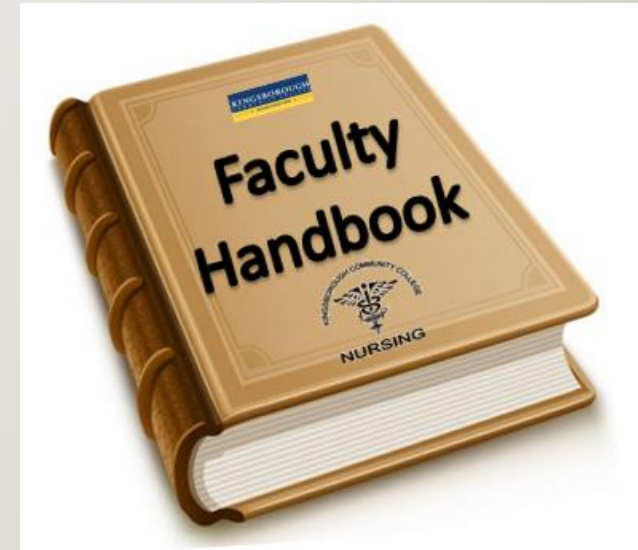
Student A is reported to have raped Student B at gunpoint. Police engage in hot pursuit and apprehend Student A attempting to flee campus. When apprehended, Student A is found in possession of a loaded and unregistered firearm.



# CAN WE PLACE EMPLOYEES ON ADMINISTRATIVE LEAVE?

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



# WHAT IS A FORMAL COMPLAINT?

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## What

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

## Who

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

## How

- Either physical or electronic submission

# WHEN MAY THE TITLE IX COORDINATOR FILE A FORMAL COMPLAINT?

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

# WHEN MUST WE DISMISS A FORMAL COMPLAINT?

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- If filed by the alleged victim, and the alleged victim is not a current or attempted participant in education programs and activities.
- Complaint does not allege sexual harassment in the institution's education programs or activities
- Complaint alleges sexual harassment abroad
- The incident does not meet the criteria for Title IX sexual harassment
- Documentation must be in file for why a formal complaint is dismissed



# EXAMPLES OF DISMISSAL

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

Student A makes a sexual harassment complaint against a faculty member requires students in English class to read a "Confederacy of Dunces" which contains sexual content that Student A finds immoral and obscene. Student A has no other basis for the complaint but the required reading of the book.

# WHEN MAY WE DISMISS A FORMAL COMPLAINT?

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

## ***Example of Permissive Dismissal***

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

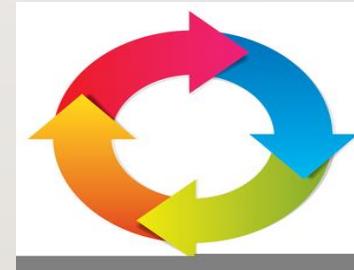
# NEXT STEPS ONCE A FORMAL COMPLAINT IS SIGNED – INFORMAL RESOLUTION

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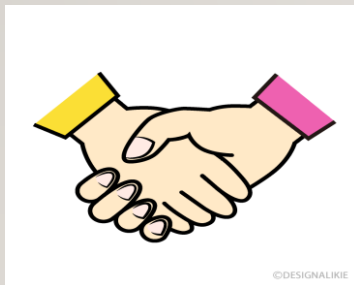
What are the key concepts of Informal Resolution?



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



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



The parties must voluntarily agree to participate in writing



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

# WHAT ARE THE LIMITATIONS?

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- Informal resolution cannot be used where a faculty or staff member of an institution is accused of sexually harassing a student
- Informal resolutions cannot be used in the absence of a formal complaint
- Institutions cannot require persons to consent to informal resolutions as a condition of employment or enrollment



## WHAT ARE SOME EXAMPLES OF INFORMAL RESOLUTIONS?

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Facilitated exchange of resolution offers

Mediation

Arbitration

Restorative justice

Settlement with the involvement of attorneys

# INFORMAL RESOLUTIONS

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## How long can an informal resolution take?

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

## Is an Informal Resolution final?

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

# EXAMPLE

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



# HOW IS AN INFORMAL RESOLUTION DOCUMENTED?

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- Agreements should be will-documented by the informal resolution facilitator
- Ideally, parties will sign the agreement or provide some other form of written confirmation
- Formal settlement agreements are typically required unless they are resolving legal claims that have been asserted



# FORMAL INVESTIGATIONS

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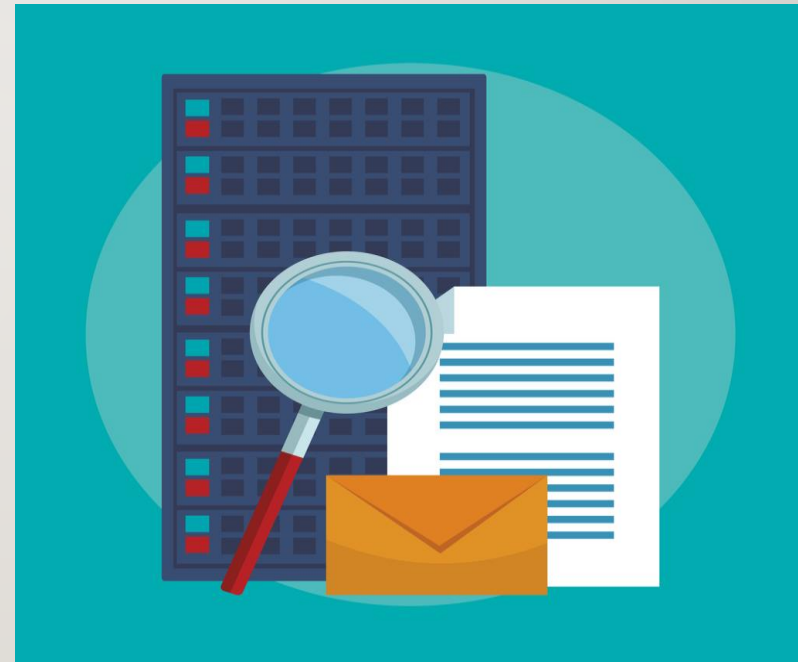
## **What is the purpose of an Investigation?**

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

# WHAT IS INCULPATORY EVIDENCE?

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



# WHAT IS EXCULPATORY EVIDENCE?

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





# WHAT ARE THE GENERAL PRINCIPLES OF AN INVESTIGATION?

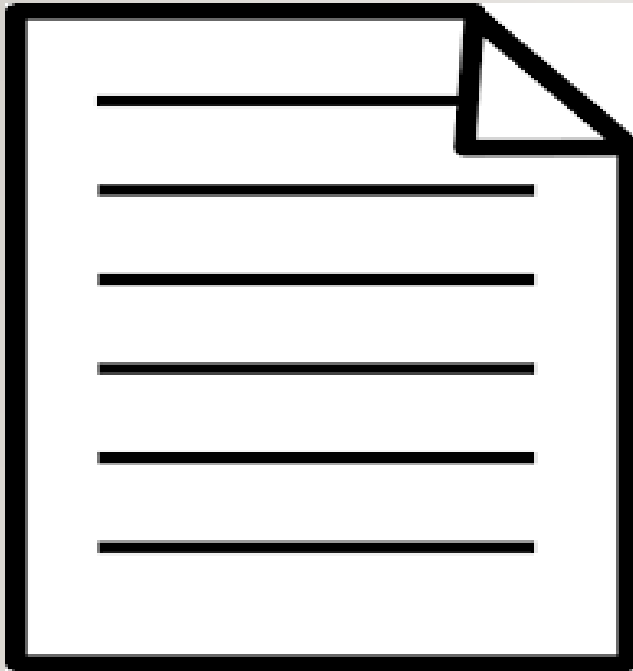
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- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator(s) has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence,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



# HOW DO WE TELL THE PARTIES ABOUT AN INVESTIGATION?

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- Institutions must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how”
- Written notice must also include:
  - Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
  - That parties have the right to an advisor of their choice
  - That parties have the right to inspect and review evidence
  - Any prohibition on providing knowingly false statements or information

# HOW DO WE COLLECT EVIDENCE IN AN INVESTIGATION?

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Interviews of parties and witnesses



Collection of non-testimonial evidence

# WHAT ARE SOME GENERAL PRINCIPLES ABOUT INTERVIEWING?

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## Timing

Conduct interviews as soon as reasonably possible to maximize the most accurate memories

## Setting

Choose a private and quiet setting

## Role

Maintain role as fact-gatherer; not a prosecutor; not a defense attorney

## Prepare

Anticipate questions that you will be asked and have responses ready

# HOW DO YOU STRUCTURE AN INTERVIEW?

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Rapport building/information providing phase

Substantive testimony collection

Closure/information providing phase



# HOW DO YOU BUILD RAPPORT?

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

# EXAMPLE OF RAPPORT BUILDING

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“I saw in the directory that you are from Colorado. My family likes to go white water rafting on the Arkansas River. Do you know of any other good places to raft?”



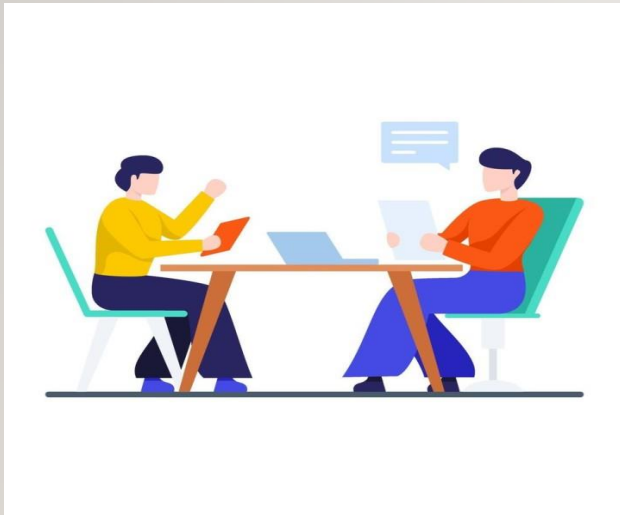
# THINGS HELPFUL TO SAY IN EVERY INTERVIEW...

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

# HOW DO I ASK QUESTIONS IN THE SUBSTANTIVE PHASE?

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



## EXAMPLES OF OPEN INVITATIONS

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“Tell me what happened that night”

“Will you walk me through what you remember?”

“Tell me more about that.”

“What happened next?”

## EXAMPLES OF CUED INVITATIONS

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

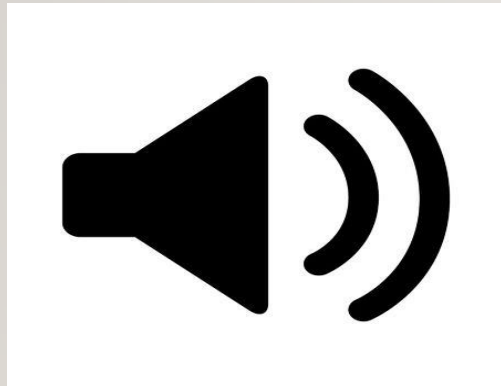
“You said that....  
What did you mean?”

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

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

## EXAMPLES OF RECOGNITION PROMPTS

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“What did she say?” (directive)

“What day did that happen?” (directive)

“Did it hurt?” (option choosing)

“Was he slurring words?” (option choosing)



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## EXAMPLES OF SUGGESTIVE QUESTIONS (AVOID)

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

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

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



# MAY AN INVESTIGATION COLLECT AND RELY ON PRIVILEGED RECORDS?

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

# DO THE PARTIES HAVE ACCESS TO THE EVIDENCE?

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



# DO THE PARTIES GET TO RESPOND TO THE EVIDENCE?

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

# INVESTIGATION

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## **How is the investigation concluded?**

- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing

## **Does the investigation report make findings?**

- No – the investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing



# ADVISOR

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## May parties have an advisor during the investigation?

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

## What if the advisor breaks the rules?

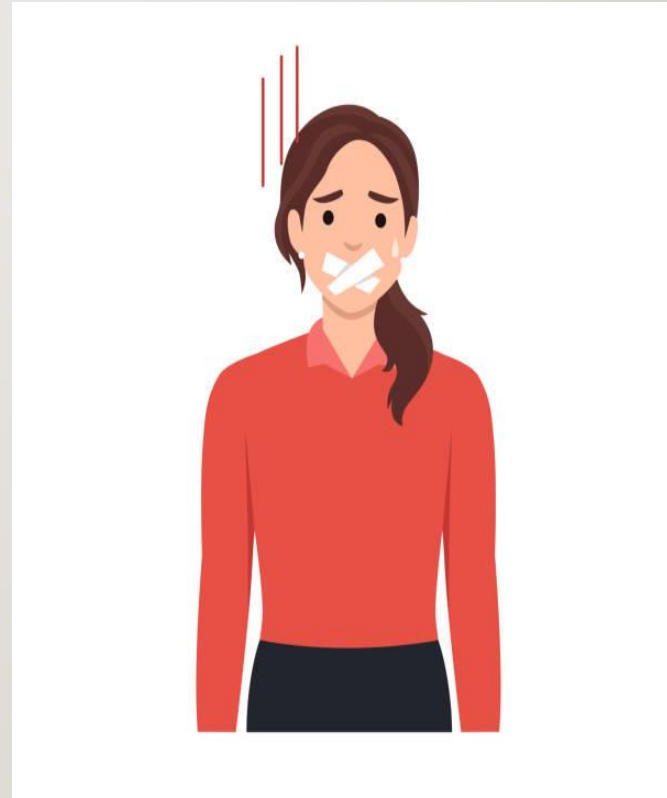
- Institutions may impose limits on the advisor's role and certain behavior standards
- Must be applied equally for both parties
- Institutions may exclude the advisor who violates rules, but must pause the relevant interview, meeting, or interaction until the party has a new advisor



# ARE PARTIES SUBJECT TO A “GAG” ORDER DURING THE INVESTIGATION?

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



# HEARINGS

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## **What is the purpose of the hearing?**

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



# WHO ATTENDS A HEARING?

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- The decision-maker
- Other necessary institutional personnel or institutional advisors (i.e., attorneys)
- The Complainant and Respondent
- Each party's advisor
- Witnesses as they are called to testify



# HOW DOES THE HEARING ACTUALLY WORK?

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- Required elements include:

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

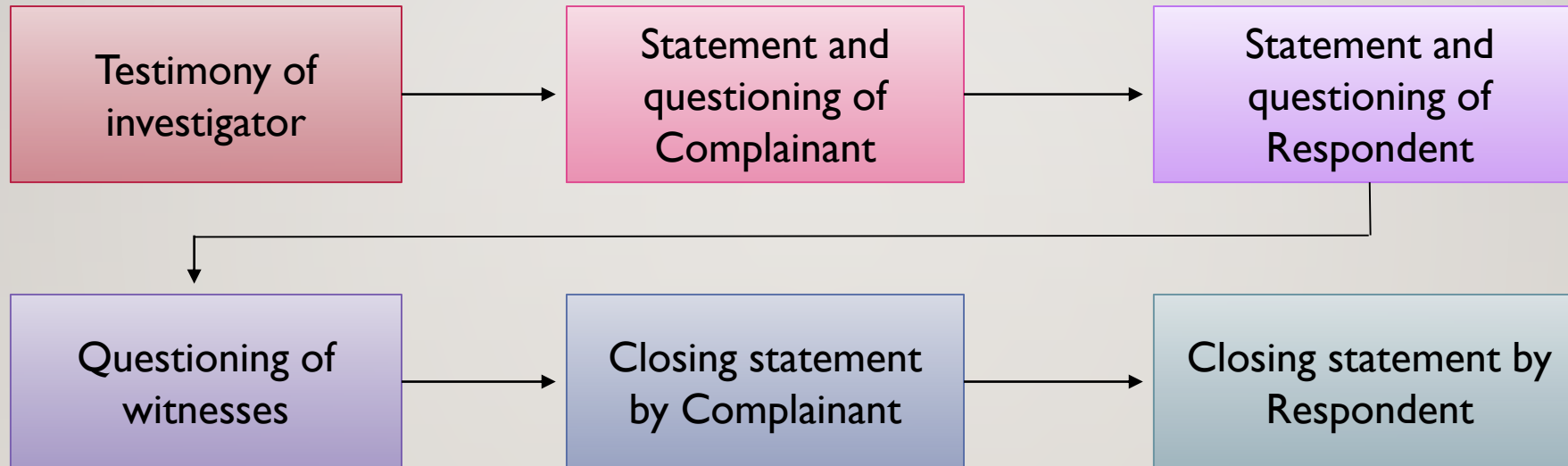
Party's advisors must be allowed to conduct live questioning of other party and witnesses

Party or witness who refuses to submit to live questioning from other party's advisor must have their testimony excluded

Questioning of sexual history generally not permitted

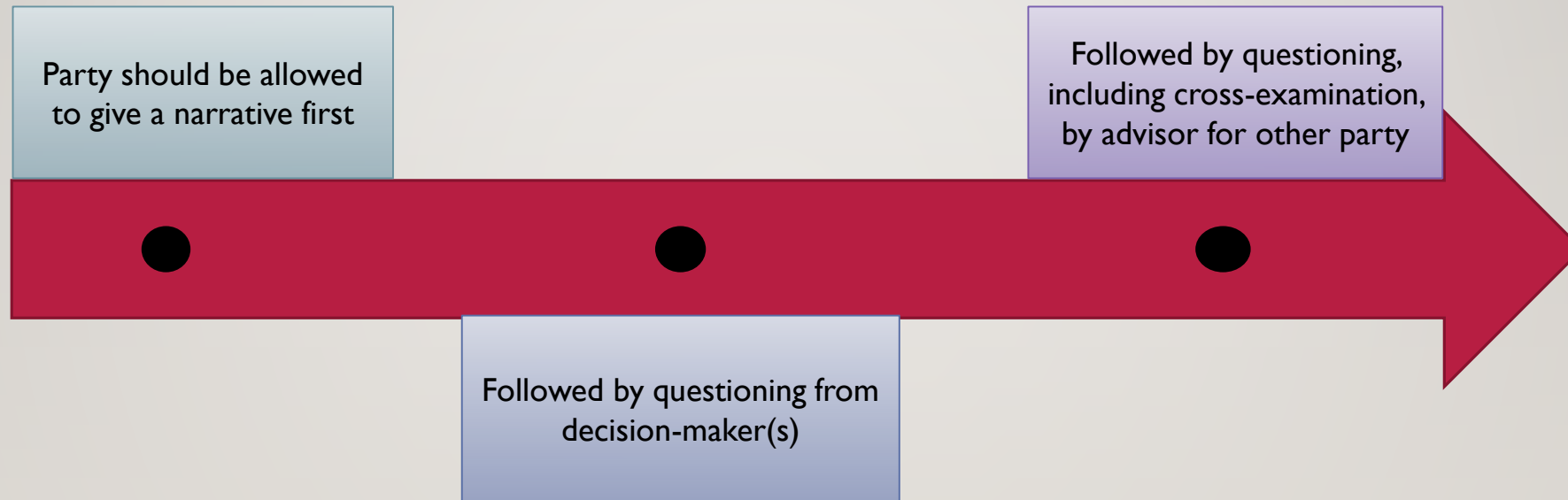
# WHAT IS A POTENTIAL SEQUENCE?

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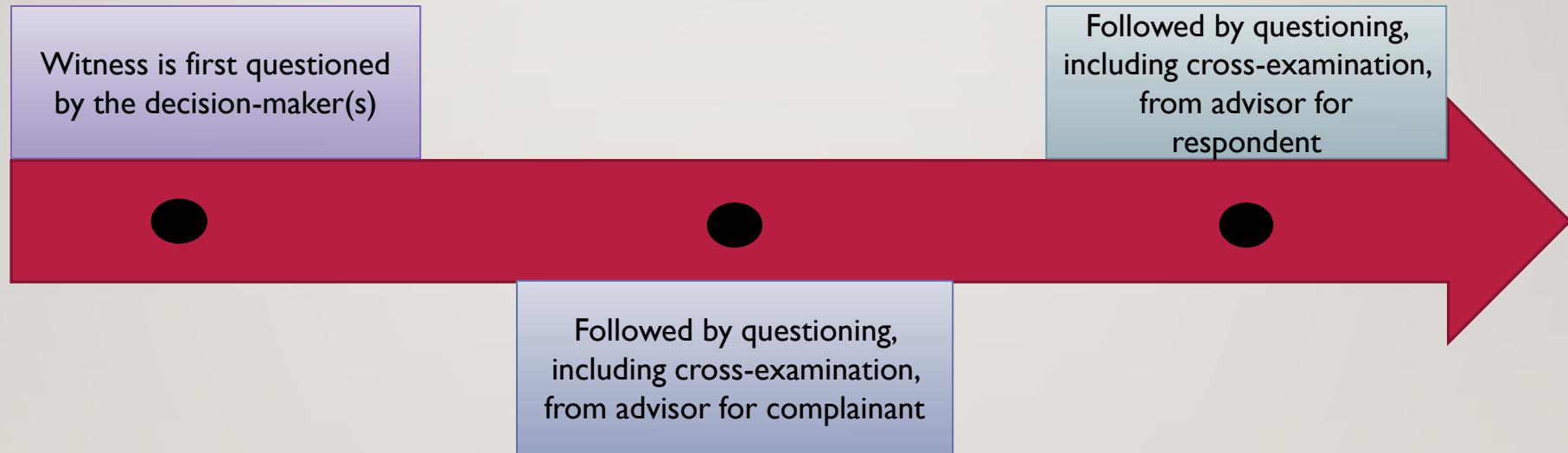
# HOW MIGHT QUESTIONING OF PARTIES TAKE PLACE?

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# HOW MIGHT QUESTIONING OF WITNESSES TAKE PLACE?

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# RELEVANCE

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## Who determines relevance?

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

## What is relevance?

Evidence is relevant if:

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

# EXAMPLE (RELEVANT)

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Student A has accused Student B of sexual assault by having sex with Student A while Student A was incapacitated by alcohol consumption after a party. Advisor for Student B asks Student A: “Did you send any text messages or make any phone calls during the party?”



# EXAMPLE (RELEVANT)

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Coach is accused of sexually propositioning Student B in exchange for more playing time. Advisor for complainant asks the Coach: “Didn’t you tell one of the trainers that Student B is a ‘very attractive young woman?’”

# EXAMPLE (NOT RELEVANT)

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Complainant alleges boyfriend/respondent engaged in dating violence by kicking complainant during an argument. Advisor for boyfriend/respondent asks complainant: “Isn’t it true that you are only dating boyfriend/respondent because of his family’s money?”

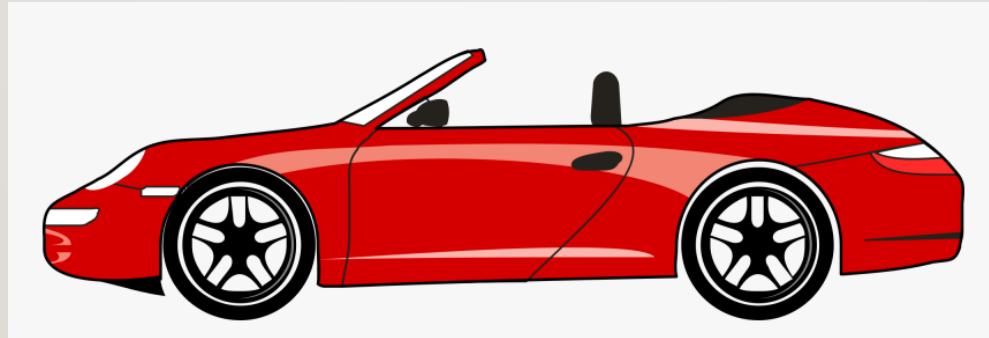




# EXAMPLE (NOT RELEVANT)

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Student A has accused Student B of sexual assault. Advisor for Student A asks Student B: “Were you convicted for driving under the influence when you were a sophomore in high school?”



# IS SEXUAL HISTORY CONSIDERED?

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

# EXAMPLE (IMPERMISSIBLE)

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Student A has accused a faculty member of sexual harassment. Advisor for the faculty member asks Student A: “How many men did you sleep with in the month before you claimed the faculty member sexually harassed you?”

## EXAMPLE (PERMISSIBLE)

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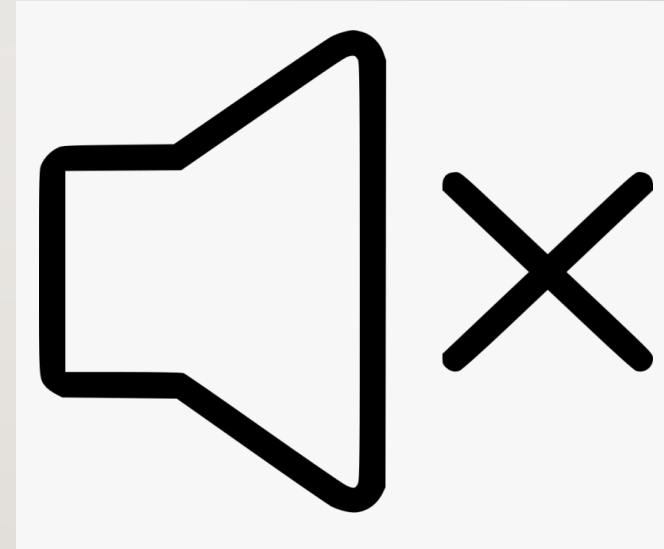
Student A has accused Student B of sexual assault. Student A testified that Student B had intercourse with Student A without using a condom, which Student A states Student A would never have agreed to because Student A always requires protection. Advisor for Student B asks Student A: “But didn’t you have unprotected sex with Student B a week prior? And didn’t you tell Student B it was ‘okay’ that Student didn’t wear a condom?”



# DOES ANY TESTIMONY GET EXCLUDED?

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- Yes – Decision-maker(s) must exclude the statements of any party or witness who refuses to submit to cross-examination from the other party's advisor



# EXAMPLE (EXCLUDED)

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Complainant gives emotional account of sexual assault and answers questions from hearing panel chair. Complainant then answers only one question from respondent's advisor before breaking down and refusing to answer any more. After a break is taken, complainant tells hearing panel chair complainant cannot endure cross-examination. Complainant leaves the hearing.

# EXAMPLE (EXCLUDED)

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Witness gives statement to investigator that witness observed complainant right before alleged sexual assault. Witness told the investigator that complainant was too drunk to stand up. Witness fails to attend hearing. Investigator is prepared to relay what witness told investigator.

# HOW LONG DOES A HEARING LAST?

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- Decision-maker(s) have the ability to set reasonable time limits on the hearing
- Parties must have a reasonable opportunity to conduct questioning/cross-examination, but do not have the right to question/cross-examine witnesses as long as they want
- Decision-maker(s) should set an overall length to the hearing in advance and keep parties on schedule



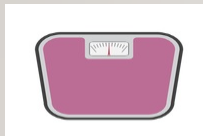


# HOW DO(ES) THE DECISION-MAKER(S) DECIDE A CASE?

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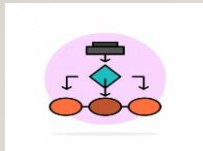
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



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

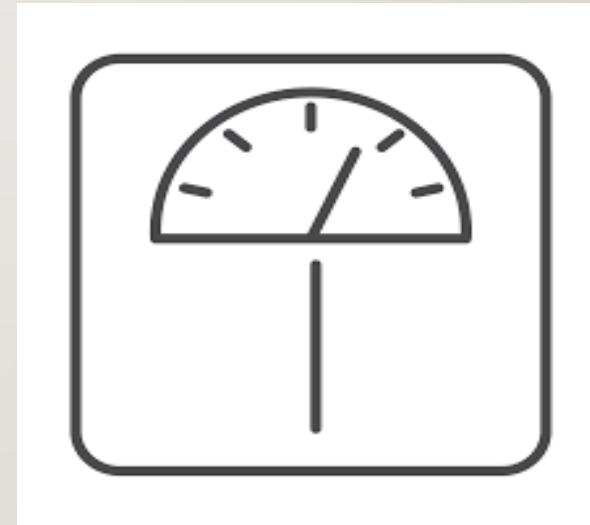


Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred

# WHAT DOES IT MEAN TO WEIGH EVIDENCE?

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



# EXAMPLES OF EVIDENCE

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- Considerable Weight

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

- Less Weight

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

# HOW DOES THE DECISION-MAKER ISSUE A DECISION?

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- In a written document, delivered to the parties simultaneously. The Written Determination will include:
  - An identification of the allegations of potentially constituting a policy violation;
  - A description of the procedural steps taken from the time the formal complaint was made;
  - Findings of facts supporting the determination;
  - Conclusions regarding the application of the policy to the facts;
  - A statement of, and rationale for, each finding for each allegation;
  - Disciplinary sanctions the school imposes on the respondent;
  - Procedures and grounds for appeal



# WHO DETERMINES DISCIPLINE AND REMEDIATION?

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- The Decision-Maker will review the impact statements and any pertinent conduct history provided by the Equity (Title IX) coordinator and will determine the appropriate sanction(s) for Students.
- For employees, the Decision-Maker will recommend the appropriate sanctions(s), in consultation with other appropriate administrators, as required (such as the Director Personnel).

# APPEALS

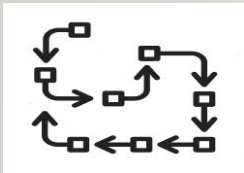
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- Appeals must be submitted in writing to the Equity (Title IX) coordinator within seven (7) business days of the delivery of the Written Determination.
- Title IX regulations require that either party be allowed to appeal.
- Third-party persons cannot file appeals on behalf of a party.
- The Appeal Decision-Maker will be appointed by the Equity coordinator.
- The Appeal Decision-Maker cannot be the same as the investigator(s), Equity Coordinator, or Hearing Chair.

# WHAT ARE THE GROUNDS FOR APPEAL?

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Title IX regulations require 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 was made, that could affect the outcome of the matter; or



Equity (Title IX) coordinator, investigator, or decision-maker had a conflict of interest or bias against complainant or respondent generally or the specific complainant or respondent that affected the outcome of the matter.

# CONFIDENTIALITY

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- Sexual harassment cases should be treated as confidential by the institution, with information only shared as necessary.
- The Title IX regulations contain an express preemption, permitting FERPA-protected material to be used as required by Title IX itself.
- Title IX regulations prohibit an institution from restricting the ability of a party to discuss the allegations under investigation or to gather or present evidence.
- First Amendment additionally limits public institutions' ability to restrict speech about a case.



# PROPOSED REGULATIONS

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EFFECTIVE OCTOBER 2023