

HUSCH BLACKWELL

**College & University  
Advisors Training**

Spring 2021

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**Title IX Key Legal  
Principles Review**

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**“Due Process” Principles**

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**The Investigation  
Process**

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**The Hearing Process**

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**Questioning**

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**Confidentiality and  
Other Expectations**

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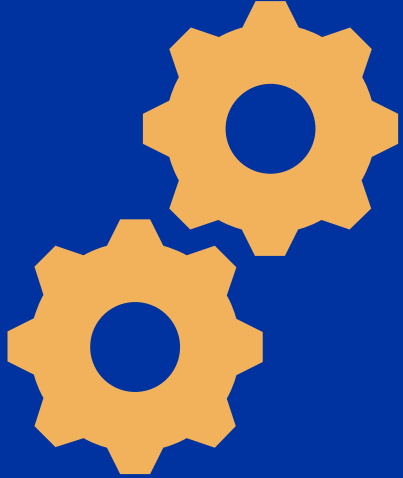


**HUSCH BLACKWELL**

# **College & University Advisors Training**

Spring 2021

## Group Scenarios



# Breakout Groups

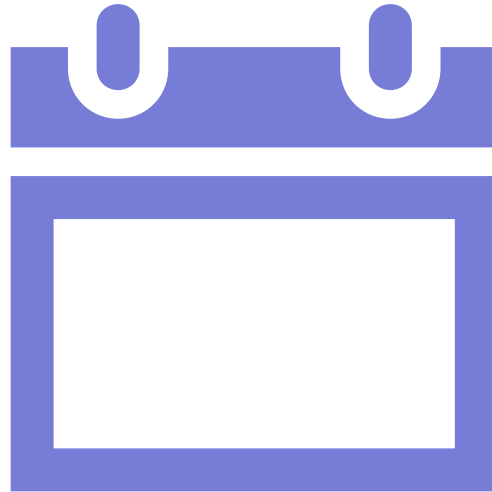
- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Cameras on for breakouts



## Goals for Today's Training

- Title IX fundamentals
- The role of college and university advisors and best practices
- The various forms of prohibited sexual harassment
- How to avoid conflicts of interest, bias and stereotyping
- Relevancy and key evidentiary concepts
- How to prepare for and conduct effective cross-examination at the hearing





## Agenda

- Title IX Key legal Principles Review
- “Due Process” Principles
- The Investigation Process
- The Hearing Process
- Questioning
- Confidentiality and Other Expectations

# **Title IX Key Legal Principles Review**

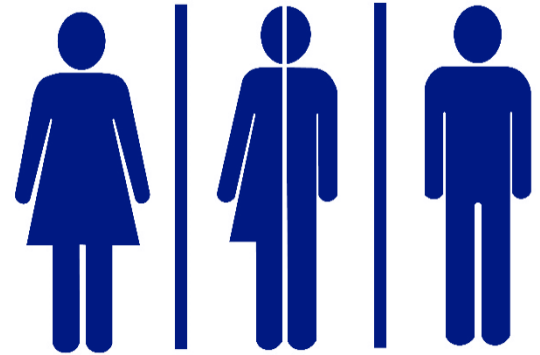
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# What is Title IX?

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

32 C.F.R. § 106.31



# What sexual harassment does Title IX apply to?

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





# What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo  
harassment

Hostile  
environment  
harassment

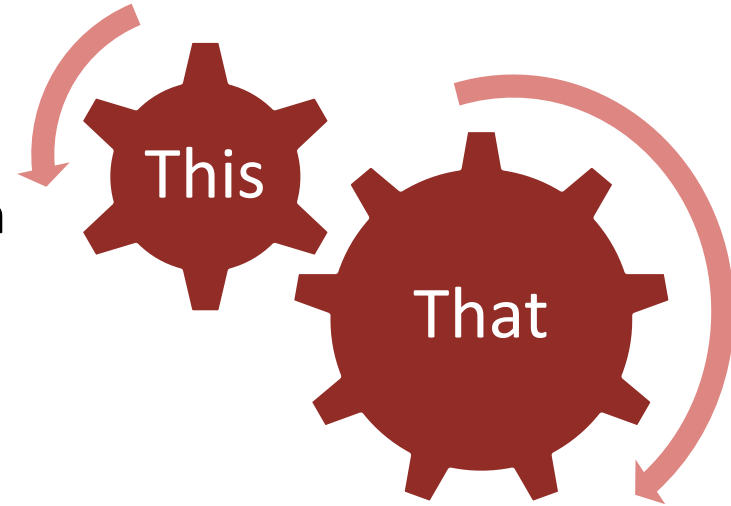
Sexual  
assault

Relationship  
violence

Stalking

# What is quid pro quo?

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



# 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.



# 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 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.





# What is Retaliation?

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



# Burden of Proof

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- An institution's grievance process must...
  - “State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment”

85 Fed. Reg. 30,026, 30,575 (May 19, 2020) (to be codified at 34 C.F.R. § 106.45(b)(1)(vii).

# Standard of Evidence

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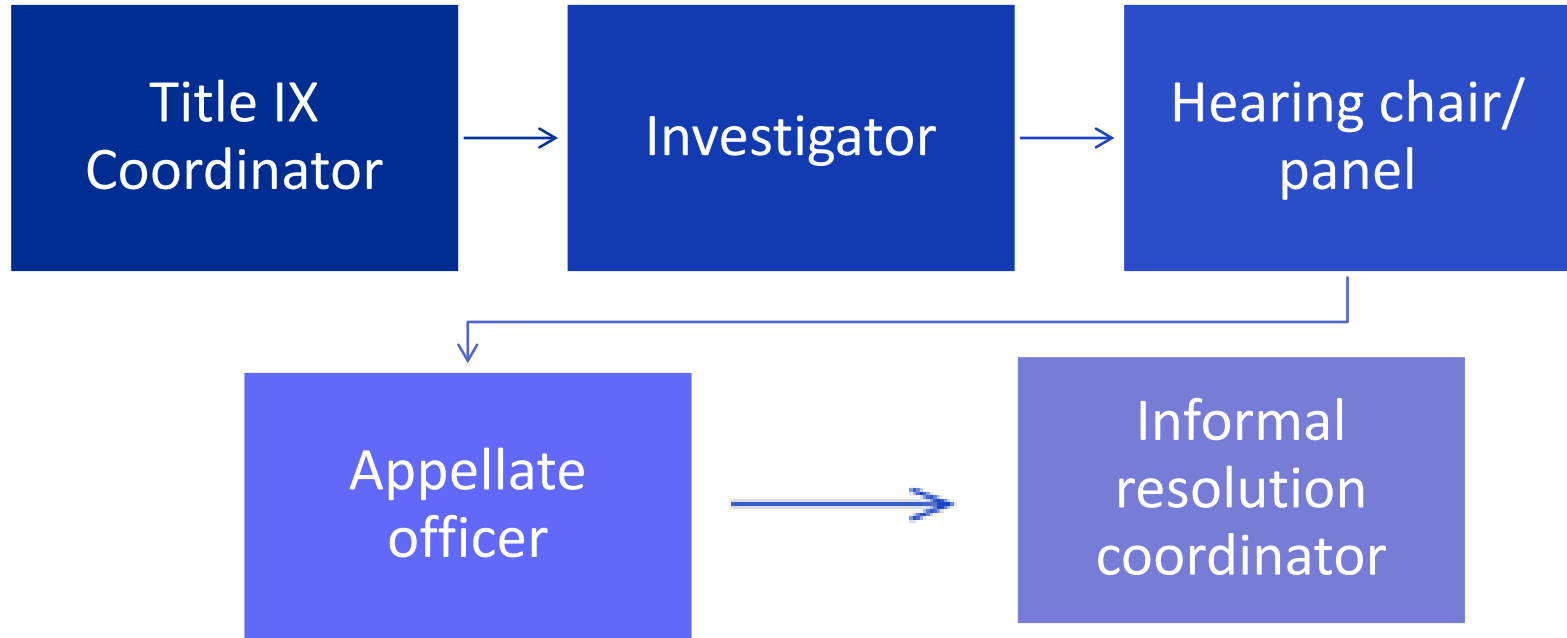
Preponderance of the  
evidence

=

“more likely than not”



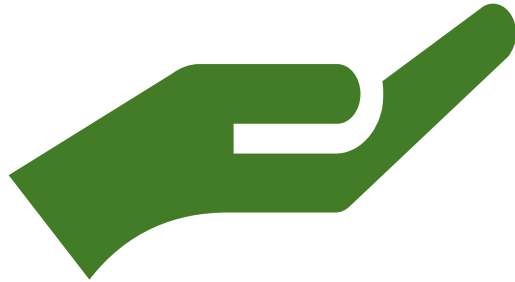
# Who are the key institutional actors in the grievance process?





# 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

# What is a formal complaint?

## What

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

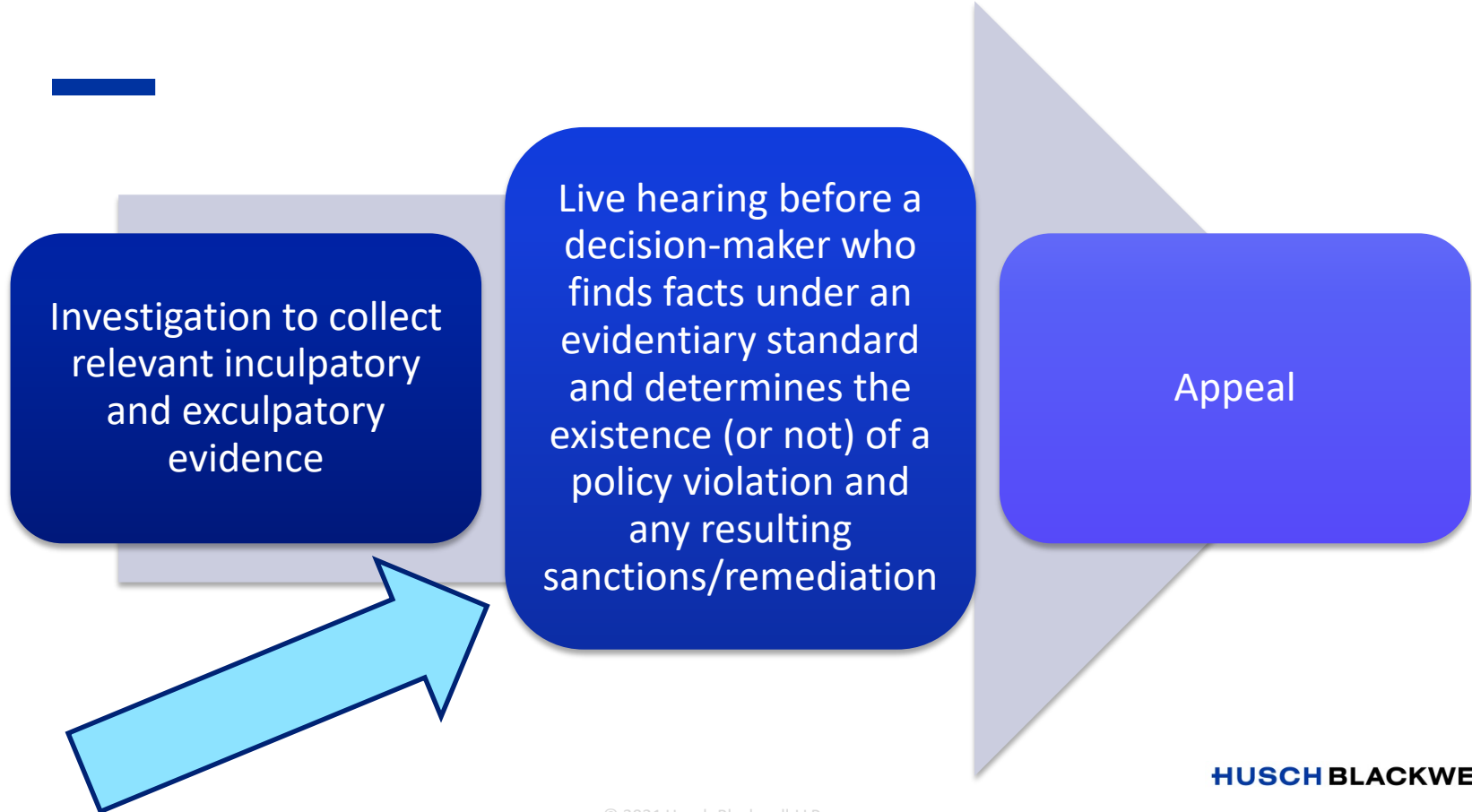
## Who

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

## How

- Either physical or electronic submission

# What is the grievance process?



# “Due Process” Principles

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# Due Process Background

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- Due process (known as fundamental fairness for private institutions) is a critical component of the Title IX regulations.
- The Rule requires institutions to adopt procedures that ensure the Title IX is consistent with constitutional due process and affords students “the benefit of a consistent, transparent grievance process with strong procedural protections regardless of whether the student is a complainant or respondent.”

85 Fed. Reg. 30,026, 30,047 (May 19, 2020)



# What are the principles of due process?

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- Due process is “a principle which is used to generate a number of specific rights, procedures, and practices... [and] may be thought of as a demand that a procedure conform to the requirements of formal justice, and formal justice is a basic feature of our idea of the rule of law.”

85 Fed. Reg. 30,026, 30,050 (May 19, 2020) (citations omitted).



# How does due process apply in Title IX proceedings?

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





# What steps due process require under the grievance process?

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- Examples of due process safeguards under Title IX include:
  - Written notice to parties of complaints, dismissals, and rights;
  - A meaningful opportunity to be heard free of bias or conflicts of interests, including an opportunity for advisors to question witnesses and parties;
  - Written explanation of the decision-maker's determination; and
  - An opportunity to appeal.

85 Fed. Reg. 30,026, 30,053 (May 19, 2020) (citations omitted).

# The Investigation Process

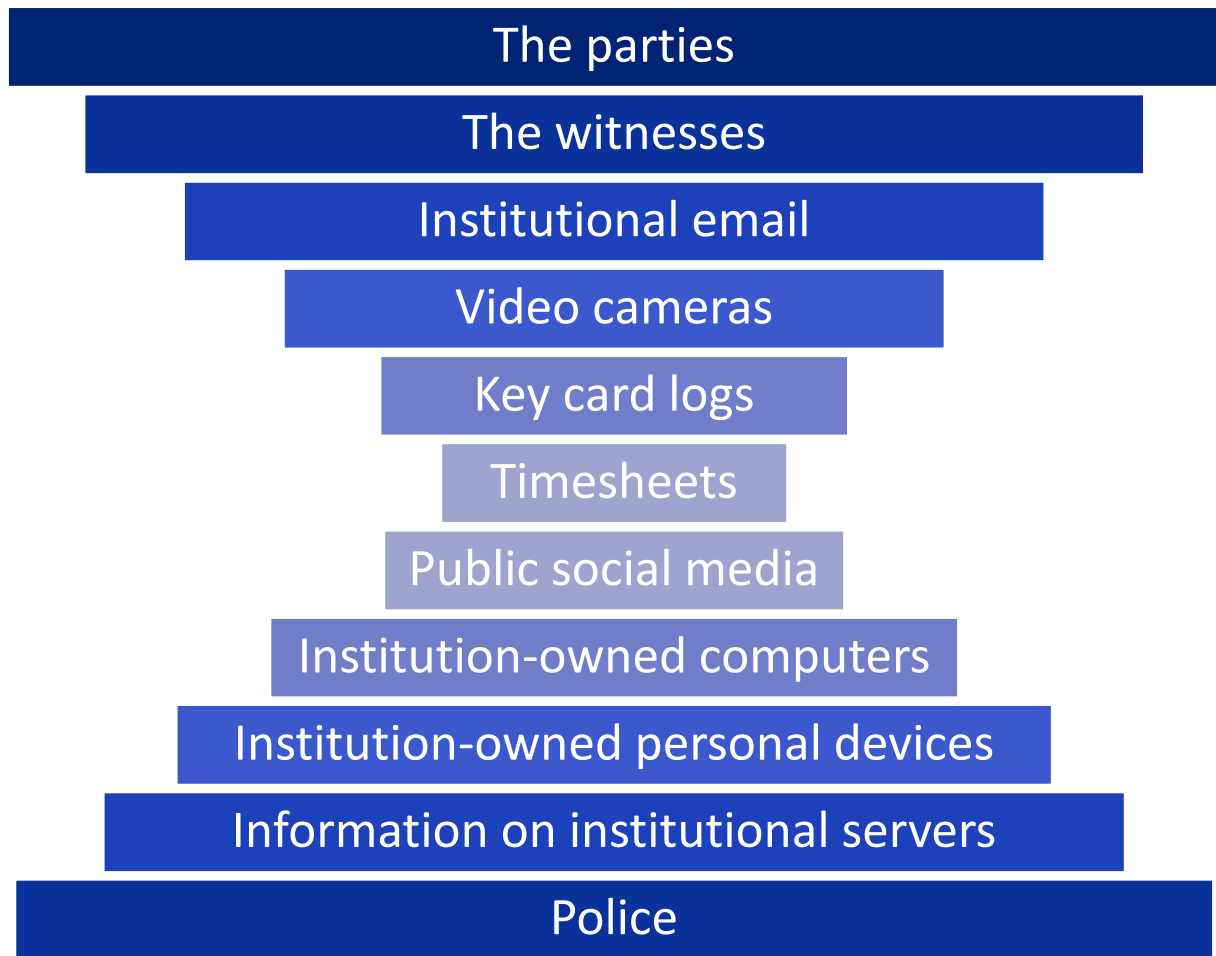
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# What is the purpose of an investigation?

- 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

**Example  
sources of  
non-testimonial  
evidence**





# Do the parties have access to the evidence?

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





# Do the parties get to respond to the evidence?

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





# When is the investigation report finalized?

- After the 10-day period to review the evidence expires
- The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the new Title IX regulation, factual findings and determinations of policy violations are made at a subsequent hearing





# Role of the Advisor: Pre-Hearing

- When investigating a formal complaint and throughout the grievance process, an institution must:
  - Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties...

85 Fed. Reg. 30,026, 30,576 (May 19, 2020) (to be codified at 34 C.F.R. § 106.45(b)(5)(iv)) (emphasis added)



# What is the role of an advisor during the investigation?

Support	Provide personal support to the party throughout
Preparation	Help the party prepare for meetings and interviews
Presence	Be present with the party during meetings and interviews
Review	Assist the party in reviewing the evidence prior to the close of the investigation

# What must an advisor not do during the investigation?

Inhibit	Advisor cannot inhibit communication between investigator and party
Disrupt	Advisor cannot disrupt meetings and interviews
Argue	Advisor is not permitted to argue with the investigator
Evidence	Advisor does not present evidence or “make a case”



# What if the advisor breaks the rules?



- An advisor who violates the rules may be excluded from further participation
- The university may pause the relevant interaction to allow the party to select a new advisor



# Example of advisor breaking the rules

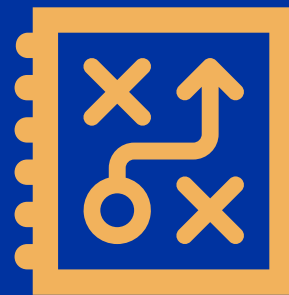
During the interview, a party's advisor repeatedly interrupts the investigator, objects to questions, argues that the investigator should ask different questions, and attempts to present legal arguments citing caselaw.



# Another example of advisor breaking the rules

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At the end of the 10-day period to review the evidence, the advisor writes advisor's own response to the evidence and submits it under advisor's signature to the investigator.



# Questions



# The Hearing Process

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# What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The hearing officer 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





# Balancing the Parties' Interests

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- The Department of Education believes that live hearings with cross-examination serve as a valuable truth-seeking tool in the grievance process.
- But the Department recognizes that cross-examination in cases involving violent allegations could be traumatic for complainants.
- To balance the two, the Department mandated both parties have the right to a third-party advisor.

85 Fed. Reg. 30,026, 30,339 (May 19, 2020)



# Role of the Advisor: Hearings

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- Postsecondary institutions must provide for a live hearing.
- At that hearing, the decision-maker must allow the advisors to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Cross-examination may occur with the parties located in separate rooms at the request of either party.

85 Fed. Reg. 30,026, 30,576 (May 19, 2020) (to be codified at 34 C.F.R. § 106.45(b)(6)(i)).

# What is the role of an advisor during the hearing process?

Support	Provide personal support to the party throughout
Preparation	Help the party prepare for pre-hearing conference and live hearing
Presence	Be present with the party during pre-hearing conference and live hearing
Questioning	Conduct live questioning of other party and witnesses at the live hearing

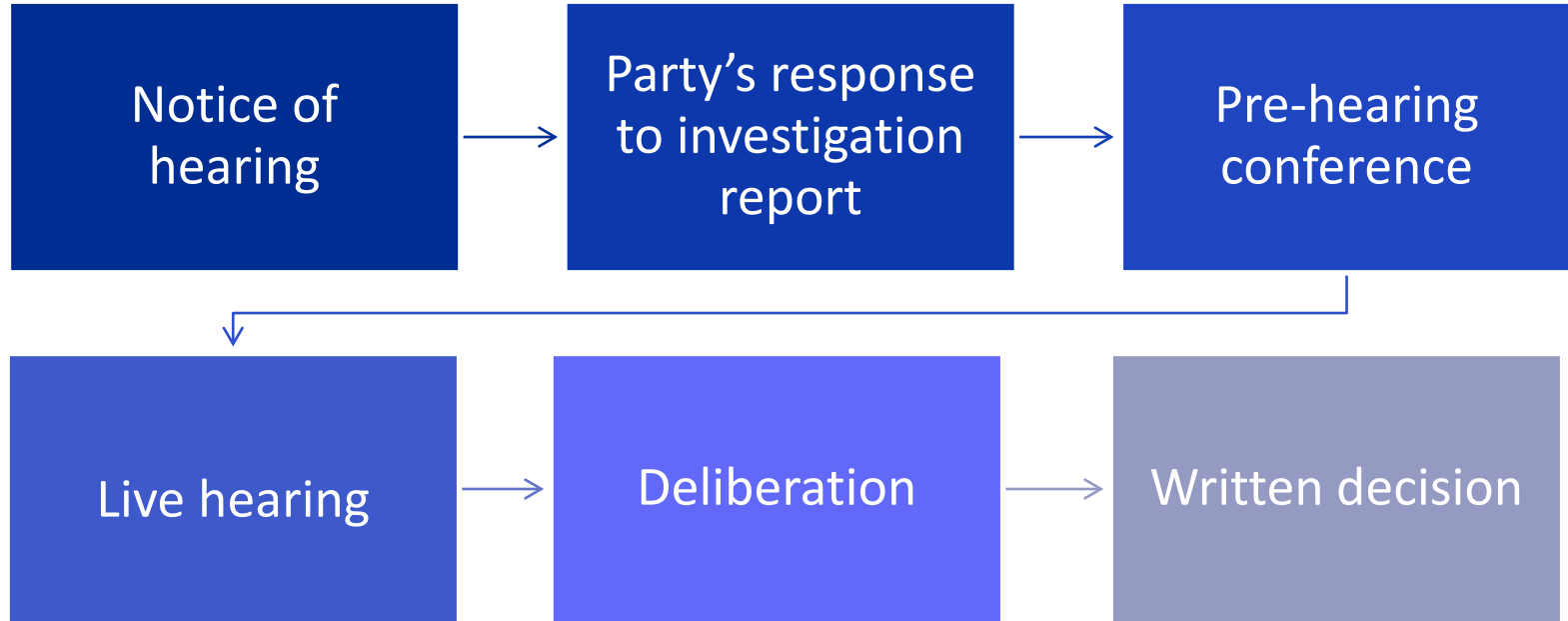


# What does the notice say?

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- Identity of the hearing officers
- Deadline for the parties to submit response to investigation report
- Date for the pre-hearing conference
- Date and time for the hearing (no earlier than 10 days after investigation report is issued)

# What are the phases of the hearing process?





# What is the pre-hearing conference?

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- Discuss hearing procedures
- Discuss any stipulations that may be made to expedite the hearing
- Discuss what witnesses need to attend
- Resolve other matters raised in the party's written responses to the investigation report



# What is a “live” hearing?

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- A proceeding held by the hearing officer, either in-person or virtually where:
  - Parties are present with their advisors at the same time
  - Parties and witnesses testify with contemporaneous participation (i.e., no “pre-recording”)
  - Parties’ advisors ask live questions of the other party and witnesses

# Who attends a live hearing?

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- The hearing board (3-member panel)
- Other necessary institutional personnel or institutional advisors (e.g., attorneys)
- The parties
- Each party's advisor
- Witnesses as they are called to testify
- Other support persons for parties, if permitted by institution







# What are the logistics of a hearing?

- Hearing must be recorded (audio or video) or transcribed
- Hearing can be held in a single room or with the parties separated in different rooms
- Hearing can be held virtually using suitable software



# Does the university provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing
- If a party does not have an advisor, the University will supply one for the purpose of questioning the other party and witnesses on behalf of the student in question

# How does the hearing actually work?

- Required elements include:

Hearing Officer 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



# Who determines relevance?

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- Hearing officer must screen questions for relevance and resolve relevance objections
- Hearing officer must explain any decision to exclude a question as not-relevant



# What is relevance?

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- Evidence is relevant if:
  - It has a tendency to make a fact more or less probable than it would be without the evidence; and
  - The fact is of consequence in determining the action
- Relevance must be determined considering the form of sexual harassment alleged



## Example (relevant)

—  
One student has accused another of stalking. Respondent's advisor asks Complainant, "Did Respondent ever threaten to harm you physically?"



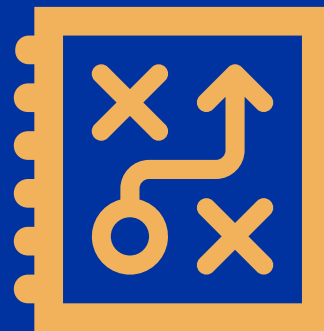
# Example (relevant)



Assistant Provost has complained that Cabinet member created a sexually harassing hostile environment. Advisor for Assistant Provost asks Cabinet member, “Did you tell the Cabinet, in front of the Assistant Provost, that Assistant Provost was better suited to be a sexy stay-at-home parent than to be Assistant Provost?”

# Example (discussion)

Faculty Member accused Senior of posting negative reviews on RateMyProfessors.com after Faculty Member declined Senior's attempts to instigate a romantic relationship. Advisor for Senior asks Faculty Member, "Haven't you had several negative reviews on RateMyProfessors.com?"





# Example (discussion)



Golf player alleges Team Manager committed sexual assault when groping Golfer's buttocks on the bus at a team celebration. Golfer's advisor asks Team Manager, "Haven't you been found responsible for groping two other students during your tenure at the institution?"



# Is sexual history considered?

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

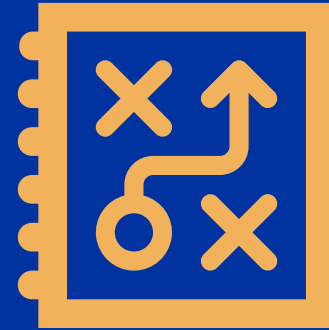
# Example (impermissible)



One student has accused another of sexual assault. Complainant testified that Respondent had intercourse with Complainant without using a condom, which Complainant would never have agreed to. Advisor for Respondent asks Complainant: “But didn’t you have unprotected sex with another student a week prior?”

# Example (discussion)

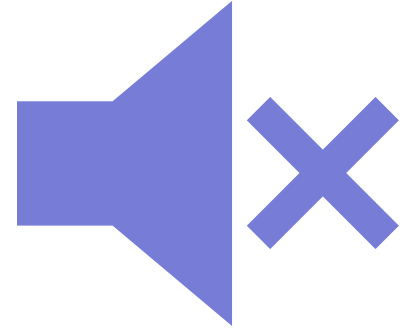
Literature student has accused Faculty Member of sexual harassment. Advisor for the faculty member asks Student A: “You failed Faculty Member’s course. Didn’t you accuse another professor of sexual harassment after you failed that professor’s course?”





# Does any testimony get excluded?

- Yes – Hearing officer 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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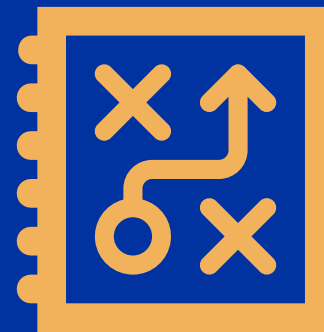


Respondent told investigator that respondent could not have committed an alleged assault because Respondent was in a different city that day. Respondent does not appear at the hearing.



# Example (not-excluded)

—  
Complainant directs Complainant's advisor to not ask any questions of Respondent, who is present at the hearing and willing to submit to cross examination.





# Is there a standard of behavior in hearings?

- Yes
- All parties (including advisors) must:
  - Act professionally
  - Maintain decorum
  - Not disrupt proceedings



## Example (impermissible)

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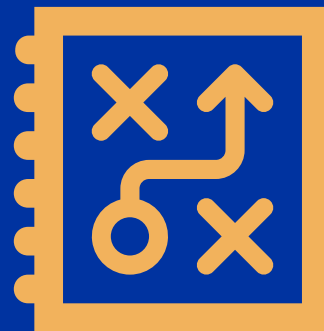
A respondent's advisor interrupts with "strenuously objects" to questions asked by complainant's advisor based on "hearsay," "assumes facts not in evidence" and other bases other than relevance.



## Example (impermissible)

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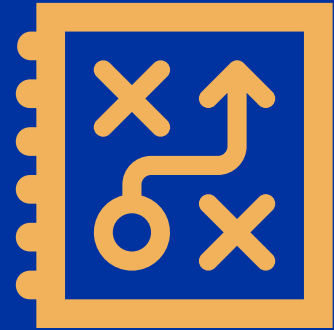
During questioning of the respondent, a complainant's advisor shares a Zoom screen reading "liar."



## Example (impermissible)

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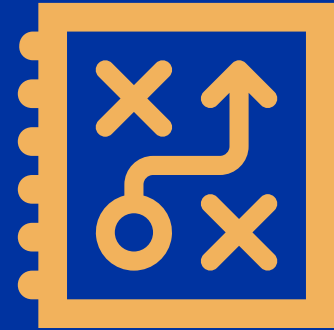
After the hearing officer rules a question is not relevant, the advisor begins to argue with the Hearing officer and exclaims: “I can’t believe how incompetent you are!”



## Example (impermissible)

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As a party is testifying, the advisor supporting them nods his head when the party gives a “good” answer and shakes his head side to side when the party says something unhelpful.



# How long does a hearing last?



- The length of the hearing is set by the hearing officer
  - Ex.: “No hearing will exceed 7 hours absent extraordinary circumstances”
- Hearing officer may set time limits for questioning of each witness
- Hearing officer may preclude questioning that is cumulative or duplicative

# How does the hearing officer decide a case?



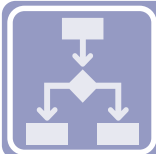
After hearing, the hearing officer must deliberate and consider all the relevant testimony and relevant non-testimonial evidence



Evaluate evidence for weight and credibility



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

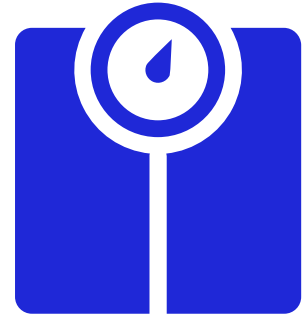


Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



# What does it mean to weigh evidence?

- 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.





# How does the hearing officer 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



# Questions



# Questioning



# What is the advisor's role in questioning?

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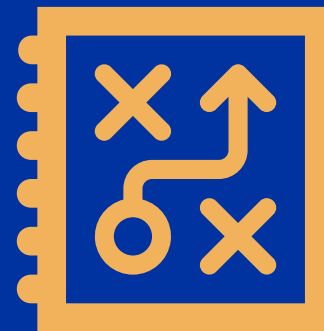
- Ask relevant questions, including those characterized as “cross-examination” of the other party and witnesses
- The questions asked are reasonably intended to support the position of the party who the advisor is supporting



# Example

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Respondent is accused of having sex with the complainant when complainant was incapacitated due to alcohol. Advisor for respondent asks questions that may demonstrate complainant was able to function and fully understand the nature of sexual activity.





# Example questions

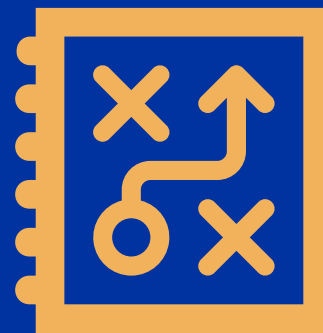
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- You walked up the stairs to the respondent's apartment unaided?
- Before the sex started, you stopped the respondent to tell the respondent to use a condom?
- You sent a text message immediately after the sex concluded?



# Example

—  
Complainant has accused respondent of hostile environment sexual harassment. Advisor for complainant asks questions of a roommate that may show complainant was so affected by the conduct that complainant stopped going to class.





# Example questions

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- You were the complainant's roommate?
- Before the respondent's conduct, did your roommate go to class?
- After the respondent's conduct, did your roommate still go to class?
- Did you notice any changes in your roommate's behavior after the respondent's conduct?



# How do I know what questions to ask?

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- Review the nature of the allegations
- Review the definition of the particular type of sexual harassment alleged
- Consider facts that would support your party's position that a given element of the sexual harassment is either met or not met
- Prioritize your questioning to focus on the most compelling points
- Consider questions that will bear on credibility



# Example of the elements

## Sexual harassment (hostile environment):

- Unwelcome conduct
- Objectively so severe, pervasive, and objectively offensive such that it
- Effectively denies a person
- Equal access
- To the university's education program or activity

# Example of the elements

## Fondling:

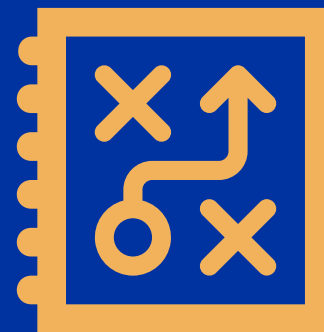
- Touching
- Private body parts
- For purpose of sexual gratification
- Without consent



# Example

—

Respondent is accused of stalking complainant by lurking outside her window. Respondent has admitted to lurking once but denies that he lurked a second time. Complainant has stated she clearly saw the respondent's face the first time but only saw a shadow move outside her window the second time.





# Example questions

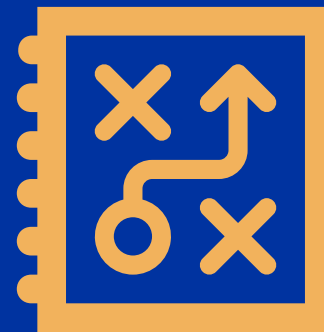
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- In the case of the second incident, you didn't actually see the respondent's face?
- You saw a shadow move outside your window and believe it could have been a person?
- And you are assuming that because you saw the respondent outside your window once before, that person you may have seen could have been the respondent?
- But you actually don't *know* the respondent was outside your window a second time?



# Example

Complainant accused respondent of forcing oral sex when complainant only consented to “making out.” Respondent claims complainant consented to oral sex because complainant “finished” the act after the respondent forced the complainant’s head onto the respondent’s genitals.





# Example questions

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- So you took your hand, placed it on the complainant's head, and pushed the complainant's head onto your genitals?
- And before that, the two of you were only kissing?
- And before that, the two of you had not discussed oral sex, right?
- And you continued to keep your hand on the back of the complainant's head as the oral sex progressed?
- And you never stopped to ask if the complainant was okay with this, right?



# What are the hallmarks of effective questioning?

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- Questions should be clear and precise
- Questions should advance a party's position with respect to one or more elements of the sexual harassment alleged
- Questions should be asked in a purposeful order
- Questions should be prioritized and edited for greatest effect



# What is the appropriate manner of asking questions?

- From your table or podium
- Address the party respectfully using a preferred title of courtesy (i.e., “Mr.” “Ms.” “Dr.” “Professor”) unless requested to use a first name
- Use an even and appropriate tone of voice (i.e., no shouting; no snide tone; no sarcasm; no dramatics)
- Do not invade a witness’s physical space
- Do not use intimidating physical actions (i.e., finger pointing; fist pounding; exasperated gestures; etc.)





# Are you required to ask questions that your party wants you to ask?

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- You should consult with your party and consider their preferences for what questions to ask
- But you are permitted to exercise your own reasonable judgment and are never required to ask questions that you know are improper (i.e., invade sexual history)
- You may consult the hearing officer if your party demands you ask a question and you are uncertain whether it is appropriate



# What should you do if the hearing officer says a question irrelevant?

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- If you understand the scope of the decision, move on to another question
- If you do not understand the scope of the decision, you may respectfully request an explanation
- Advisors are not permitted to argue with the hearing officer like a lawyer



# Are you required to make objections?

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No



If a party believes the other party's advisor is asking an inappropriate question, the party may object



Advisors are not permitted to speak for their advisee, make objections, present arguments, or engage in any other active role except questioning (including cross-examination) of the other party and witnesses

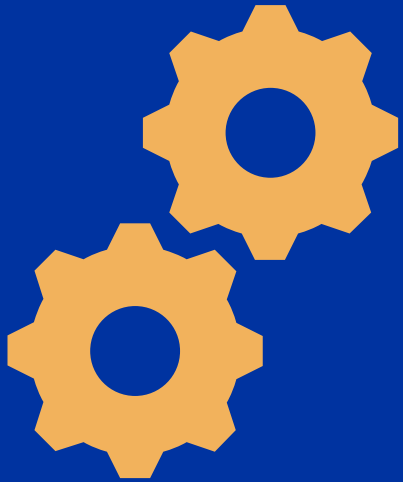


# Are you required to “act like a lawyer”?

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- No
- Your role as advisor is a non-legal role
- You are not providing legal advice
- You are not a prosecutor or a defense attorney
- You are not required to engage in “zealous advocacy” like a private attorney
- You are asking relevant and appropriate questions to reasonably support the case of the party you are supporting

## Group Scenario



Student accuses GTA of using a power differential to coerce the student into performing oral sex in exchange for a better grade. Student states that the oral sex occurred in the laboratory at 9:30 pm on a Saturday in March. GTA claims oral sex occurred between student and GTA in late May at a party off campus, after grades had been assigned. GTA says it was a consensual “hook up.” GTA claims student has falsely accused GTA of misconduct because GTA refused to “date” the student after the hookup. Video shows the student and GTA leaving the lab together at 9:15 pm on Saturday, March 7. GTA has a text message the student sent the GTA on May 26 stating: “I’m so happy we can finally be together. I want to spend my life with you!” Two student witnesses claim that the GTA repeatedly looked at student during class in a way that was “creepy.” Academic records show the student had a B- average on work performed before March 7 and an A+ average for work performed after March 7.

# Questions



# Confidentiality and Other Expectations

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# Are sexual harassment cases confidential?

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







# Must an advisor maintain confidentiality?

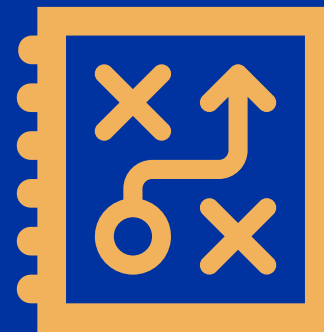
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- Yes
- Advisors must maintain the confidentiality of the process and not disclose information to any third-party except as the process itself requires
- Advisors who are university employees must abide by the same confidentiality rules as the university itself, including FERPA
- Non-employee advisors are bound to confidentiality by the terms of their engagement with the university

# Example (not permitted)

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Advisor for party is contacted by a local news reporter seeking confirmation that the party has been accused of sexual assault and that a hearing is set for next week.

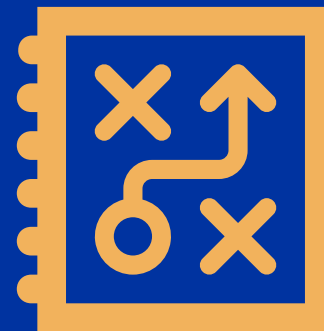




# Example (not permitted)

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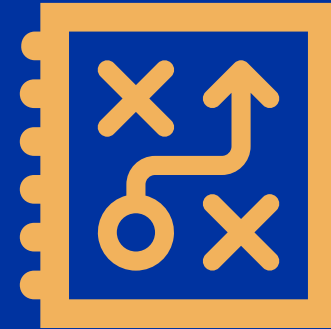
The parent of an advisee emails the advisor requesting to have a phone call to “discuss the case.” The advisee (a student) has not provided written consent for the advisor to speak to a parent.



# Example (not permitted)

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An advisor notifies his supervisor that he has been assigned as an advisor to a hearing that will take place during working hours. Before excusing the advisor's absence of regular job duties, the supervisor demands to know who the parties are and what the nature of the allegations are.





# Are your communications with your party “privileged”?

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- No
- Your communications are not protected from discovery in normal criminal and civil legal processes
- But you should not disclose your communications with an advisee to a third-party unless FERPA allows it
- The university may require you to disclose communications to another university official in certain circumstances (i.e., witness tampering; suicidal ideation; disclosure of other sexual harassment; other legitimate educational purposes)



# What if a party is facing criminal charges?

- Your role is solely that of advisor under the Sexual Harassment Policy
- Do not provide advice about criminal charges or criminal processes
- Parties must seek counsel about criminal matters from a licensed attorney



# What if a party is facing other university charges?

- Your role is solely that of advisor under the Sexual Harassment Policy
- Do not provide advice or counsel to a party about other university processes such as the Code of Conduct; athletics participation; residence life; etc.



## **Do you have a role in the appeal?**

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- The university only provides an advisor for purposes of the hearing phase
- If a party wants to utilize an advisor for the appeal, they must secure one on their own



# Questions



**HUSCH**  
**BLACKWELL**