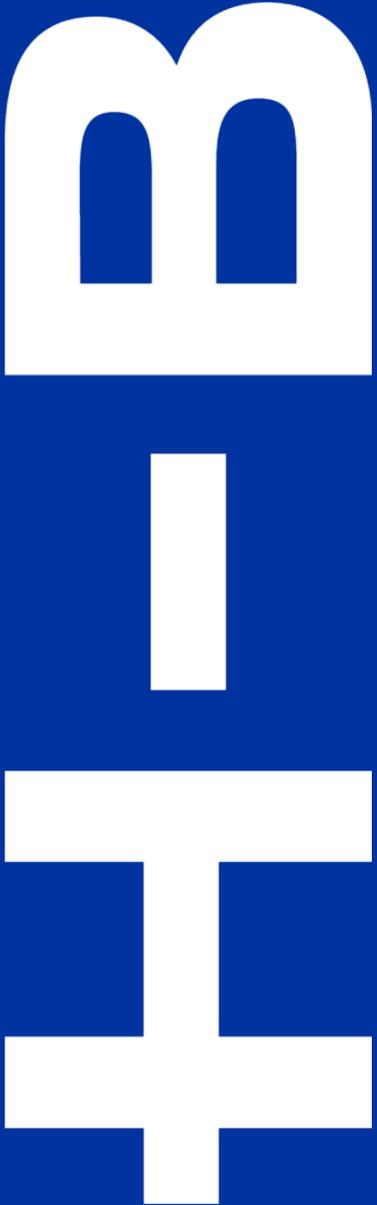


<b>H-B</b> HUSCH BLACKWELL <b>Hearing Officers &amp; Panel Members Training</b> Spring 2021	<b>H-B</b> <b>Agenda</b> <ul style="list-style-type: none"><li>• Background for Hearings</li><li>• Introduction to Hearings</li><li>• Hearing procedures</li><li>• Relevancy and key evidentiary concepts</li><li>• Effective questioning for hearing panel members</li><li>• Facilitating effective cross-examination by advisors</li><li>• Decision-making</li><li>• Sanctioning considerations</li><li>• Report-writing considerations including credibility analysis</li></ul> 	<b>Title IX Background for Hearings</b>	<b>Introduction to Hearings</b>	<b>H-B</b> <b>Complaints</b>
<b>H-B</b> <b>Bias, Stereotypes and Conflicts</b>	<b>H-B</b> <b>Trauma</b>	<b>Hearing Procedures</b>	<b>Relevancy &amp; Key Evidentiary Concepts</b>	<b>H-B</b> <b>Standard of Evidence</b>
<b>H-B</b> <b>Retaliation</b>	<b>H-B</b> <b>Institutional Response to Sexual Harassment</b>	<b>Effective Questioning for Hearing Panel Members</b>	<b>Facilitating Effective Cross-Examination by Advisors</b>	<b>Decision-Making</b>
<b>Sanctioning Considerations</b>	<b>H-B</b> <b>Applying aggravating and mitigating factors</b>	<b>Report-Writing Considerations Including Credibility Analysis</b>	<b>Misc. &amp; Takeaways</b>	

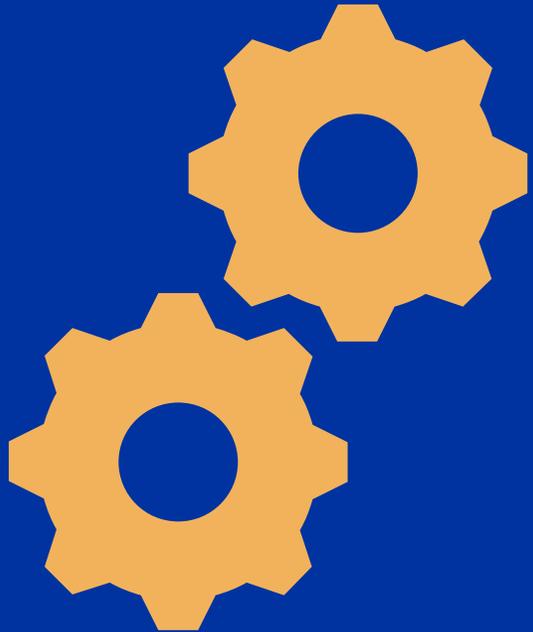
The logo for Husch Blackwell, consisting of a stylized white 'H' on a blue background. The top bar of the 'H' is split into two rounded shapes, and the vertical stem is a single bar. The bottom crossbar is also split into two shapes.

**HUSCH BLACKWELL**

# Hearing Officers & Panel Members 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

---

- Refresh on Title IX
- Understand how Title IX rules impact hearings
- Learn how to prepare for and conduct a hearing
- Provide effective cross-examination
- Identify and avoid common pitfalls and problems
- Apply mitigating and aggravating factors in sanctioning decision
- Understand method for making-decisions and preparing decision

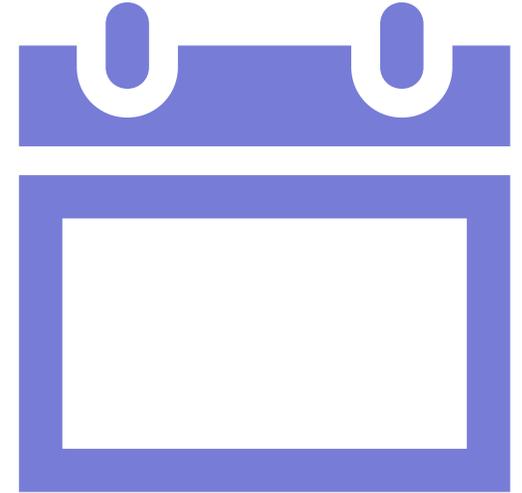




# Agenda



- Background for Hearings
- Introduction to hearings
- Hearing procedures
- Relevancy and key evidentiary concepts
- Effective questioning for hearing panel members
- Facilitating effective cross-examination by advisors
- Decision-making
- Sanctioning considerations
- Report-writing considerations including credibility analysis



# **Title IX Background for Hearings**

---

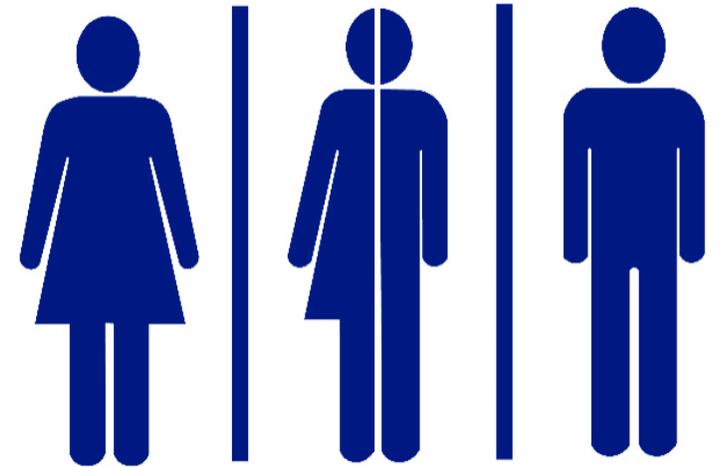


# What is Title IX?

---

“[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



# Why are we talking about this now?





# When are the new regs effective?

---



- August 14, 2020
- Do not apply to Sexual Harassment that allegedly occurred prior to effective date
  - Assessed according to guidance and regulations in place at time alleged conduct occurred

# Examples of notable provisions

Revised definition of the types of sexual misconduct covered by ED's Title IX rules

Added emphasis on equal rights of parties

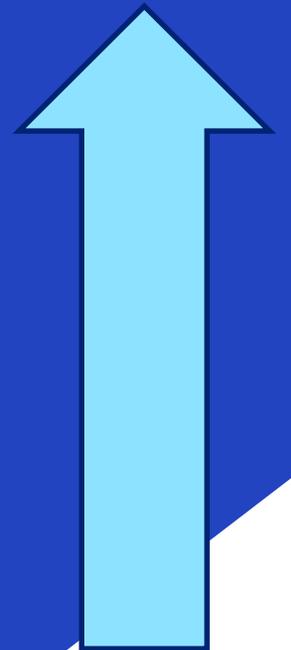
Presumption respondent did not violate policy unless and until a determination is made after hearing

Revised procedural parameters including

- Triggers for institutional responsibility
- Notice requirements
- Proceeding with investigations
- Appeals
- Informal resolution

Live hearing including

- Cross-examination by party advisors
- Relevance rulings by decision maker
- Allowable expert witnesses





# Who does Title IX apply to?

---

- Entities that receive federal financial assistance, including colleges and universities that participate in Title IV funding
  - Not individual persons
    - But institutions are required to adopt policies and procedures to implement Title IX that *do* apply to individual persons



# 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 are examples of education programs and activities?

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on campus

Sports teams

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?



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 Greek organization or other student organization



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

# Example (included in EP&A)

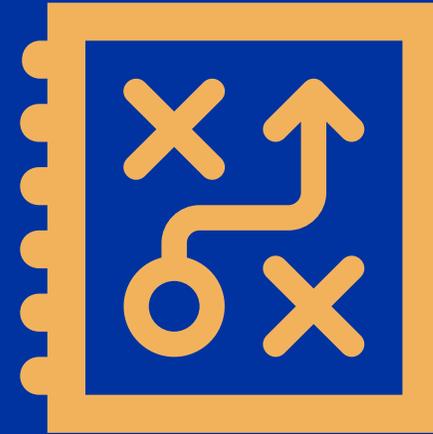


Student is sexually assaulted in a residence hall on-campus. The sexual assault occurs on a Saturday evening. The identity of the perpetrator is not immediately known.



# Example (included in EP&A)

—  
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's manager.





# Example (excluded from EP&A)

---



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.

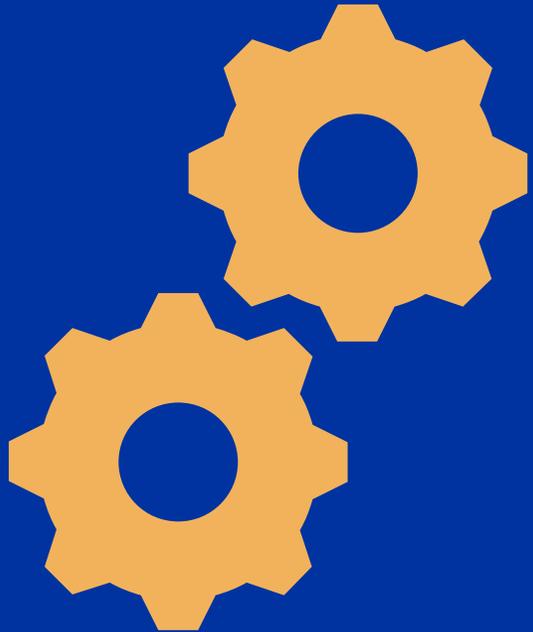


# Does Title IX apply to sexual harassment in other countries?

- 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



## Group Scenario



Student A is being investigated for sexually assaulting Student B. Student A contacts various individuals who were present at a party immediately before the sexual assault and asks the individuals to sign a declaration attesting that Student B was sober and fondling Student A in front of others. One such individual is a friend of Student B's and complains to the Title IX Coordinator. Later, when Student A is given access to the investigation evidence before the conclusion of the investigation, Student A posts the entire evidentiary record online.

# Questions



# Introduction to Hearings

---



# Complaints

# 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



# When may the Title IX Coordinator file a formal complaint?

---

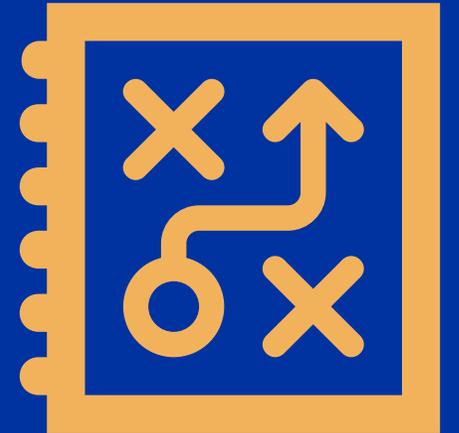
- Typically when there is an important institutional interest in adjudicating a report irrespective of the alleged victim's wishes
- Typically involves serious misconduct, repeated misconduct, or misconduct by employees
- If alleged victim does not wish to file a formal complaint, Title IX Coordinator's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



# Example of T9 Coordinator formal complaint

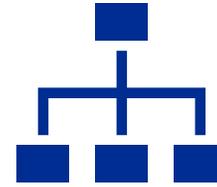
---

Two student members of separate Greek organizations (GGG and PPP) each separately report they were sexually assaulted by a member of Tau Tau Tau. GGG and PPP each suspect they were drugged by TTT. Neither GGG nor PPP wishes to file a formal complaint, but each has indicated they will cooperate with an investigation if the Title IX Coordinator files a formal complaint.



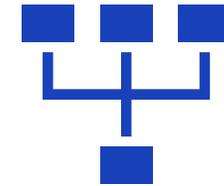
# Can we consolidate the complaints?

Yes – complaints can be consolidated if they arise out of the same facts and circumstances.

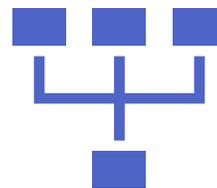


Multiple respondents

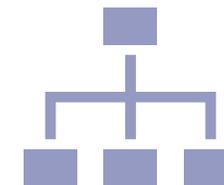
Multiple complainants



Multiple allegations against a single respondent



Multiple allegations from a single complainant

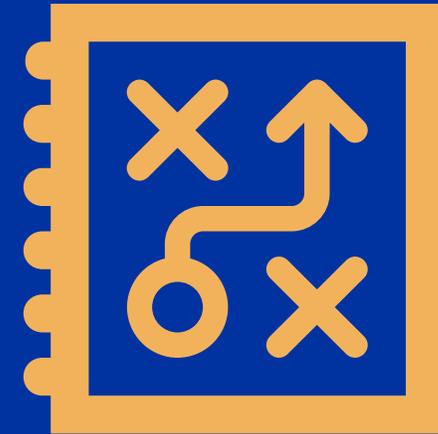




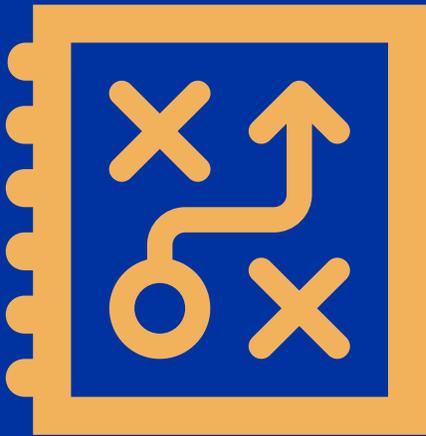
# Example of permissible consolidation

---

Students A and Student B, who are roommates, allege that Student C barged into their dormitory room drunk and propositioned them for sex. Student A and Student B each file their own formal complaint of sexual harassment from the same incident.

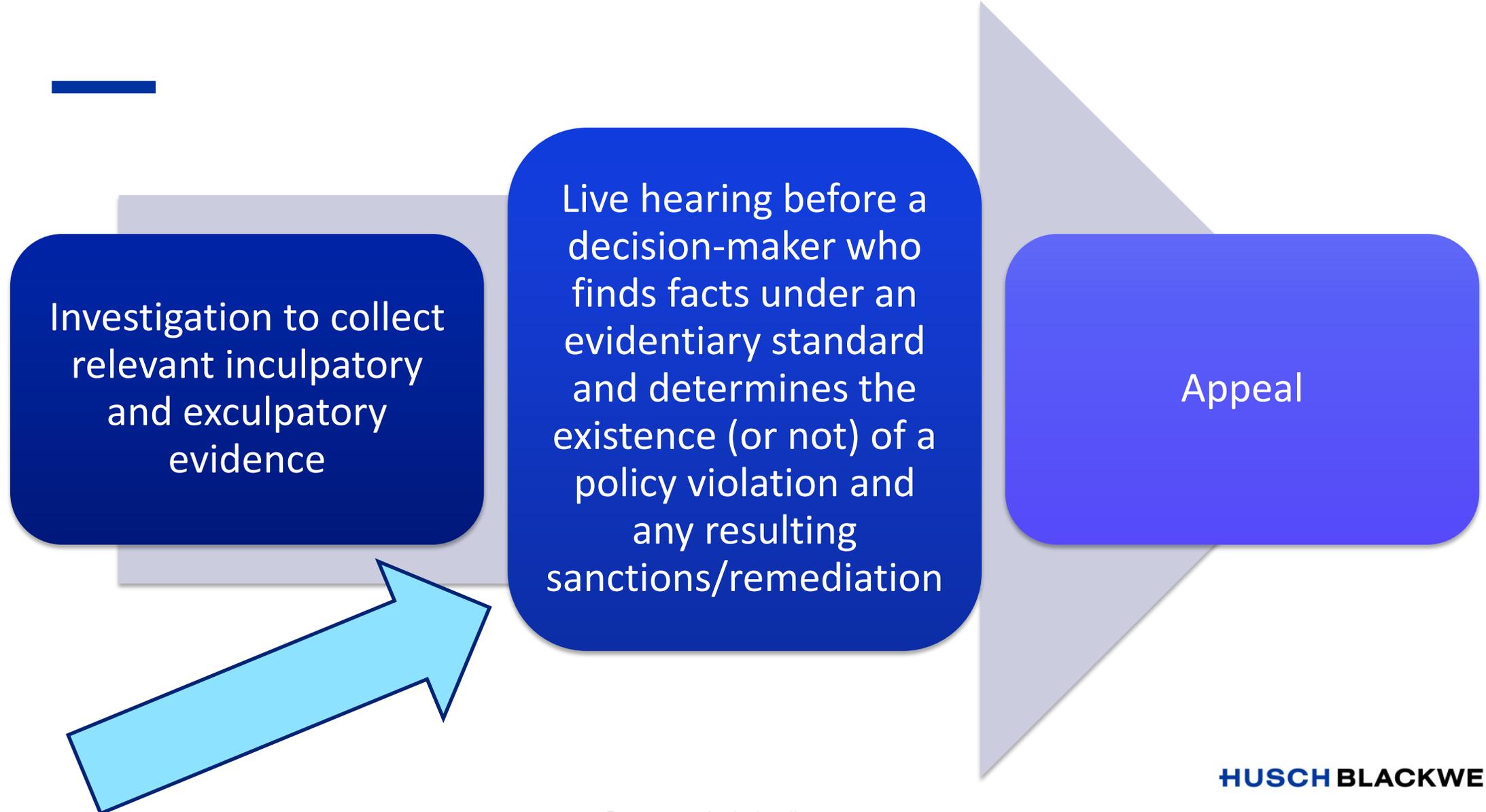


# Example of impermissible consolidation



Medical Resident files a formal complaint that Research Fellow sexually assaulted Resident two years ago when Resident was incapacitated by drugs taken to treat a back injury. Undergraduate, Fellow's present romantic partner, files a formal complaint that Fellow committed dating violence by slapping Undergraduate during an argument a month ago.

# What is the grievance process?





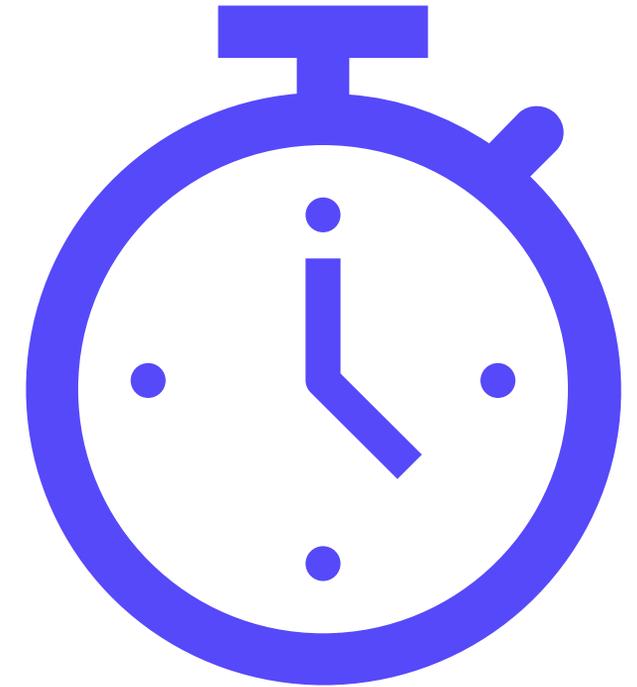
# What general principles govern the grievance process?

- 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



# How long does a grievance process take?

- There is no firm deadline, and the length of the grievance process varies depending on a variety of factors
- Institution must be reasonably prompt, advise parties of timelines for particular phases of the process, and notify parties of extensions of timelines and the reasons for the same





# What do we do if we find sexual harassment occurred?

- If grievance process results in a finding of sexual harassment:
  - Discipline for the respondent as determined by those with authority over the respondent
  - For complainant, grant remedies reasonably necessary to restore or preserve access to education programs and activities



# Bias, Stereotypes and Conflicts

---



# Who is responsible for identifying conflicts of interest and bias?

---

- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also permit parties to raise concerns of conflicts of interest and bias
- \*Individual institutional actors should self-police conflicts of interest and self-identify bias

## Examples of impermissible stereotypes

“Anyone who would go into another’s bedroom drunk must have wanted to have sex.”

“Students can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

“There are no false reports of rape. Therefore, every complainant must be believed.”



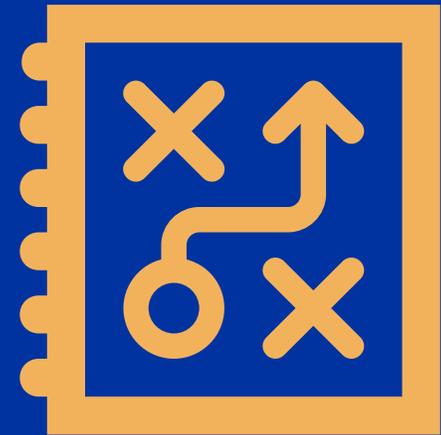
# What is a conflict of interest?

---

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

# Example of conflict of interest

Student Soccer Goalie files a formal complaint of sexual harassment against a student Lacrosse Midfielder. One of the hearing panel members selected is Midfielder's faculty advisor who has previously written letters of recommendation for Midfielder's application to law school in which faculty advisor wrote that Midfielder is "honest to a fault."



# Example of conflict of interest

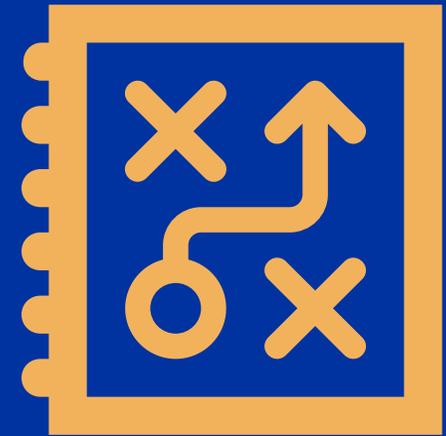


An administrator accuses an employee of an office supply vendor of sexual harassment; matter is investigated. Institution assigns a hearing panel member whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.



# Example of bias

—  
An employee in the gender studies department who is chosen to serve on a hearing panel also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."



# Example of bias



Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.”  
Investigator tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”

# Poll question

---

- Who is responsible for identifying conflicts of interest?
  - Title IX Coordinator
  - Parties
  - Those acting on behalf of the institution in the Title IX process
  - All of the above

# Resource for consideration: Harvard implicit bias test

---

<https://implicit.harvard.edu/implicit/takeatest.html>





# Trauma

---



# Balance

---

- “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”
  - Candace Jackson, Acting Asst. Secretary of Ed (2017)



# 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

# 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

# Hearing Procedures



# What happens before a hearing?

---

- Notice of allegations
- Investigation & report
- Notice of hearing
- Name decision maker(s)
- Share hearing procedures
- \*Optional pre-hearing meeting to
- \*May allow raising/ consideration of evidentiary/  
relevance arguments



# What is the purpose of the hearing?

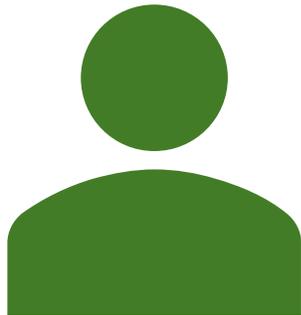
- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary



# Who runs the hearing?

---

- Regulation requires hearing to be administered by “decision-maker(s)”
- Means institution can use a single hearing officer or a hearing panel (presumably, with a chairperson)





## Who are the “decision makers”

- A hearing officer panel (3-5 members)
- A hearing officer or administrator



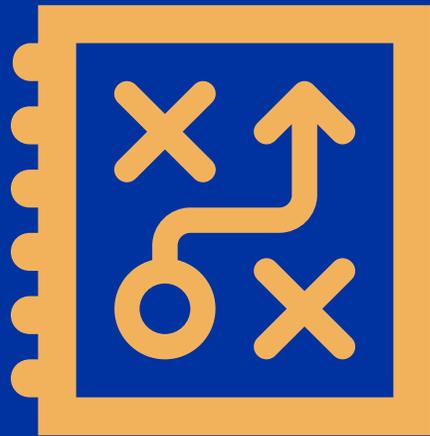
# Can we set standards of behavior for hearings?

Yes, provided they are applied equally to participants and do not violate explicit guarantees from the Title IX regulation.



# Example (permissible)

---



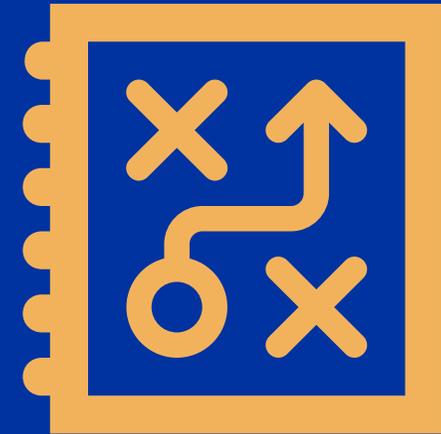
Institution's hearing procedures require all participants to maintain decorum, remain at their respective assigned table at all times, and direct all communications to the hearing officer with the exception of questions posed to the other party and witnesses by each party's respective advisor.



# Example (impermissible)

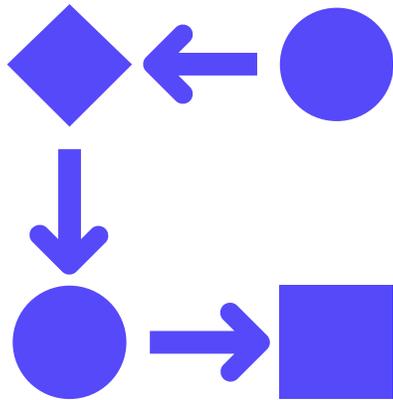
---

Institution's policy prohibits a party or advisor from "doing anything that would make another party uncomfortable or suffer anxiety, including asking questions that may cause a party to relive an experience in a traumatizing way."





# What are the logistics of a hearing?



- Hearing must be recorded (audio or video) or transcribed
- Hearing must have “live”– (i.e., contemporaneous participation by parties and their advisors)
- Hearing can be held in a single room or with the parties separated in different rooms
- Hearing can be held virtually using suitable software



# Who attends a hearing?

---

- The decision-maker(s)
- Other necessary institutional personnel or institutional advisors (i.e., attorneys)
- The parties
- Each party's advisor
- Witnesses as they are called to testify
- Other support persons for parties, if permitted by institution



## Do we provide a party's advisor?

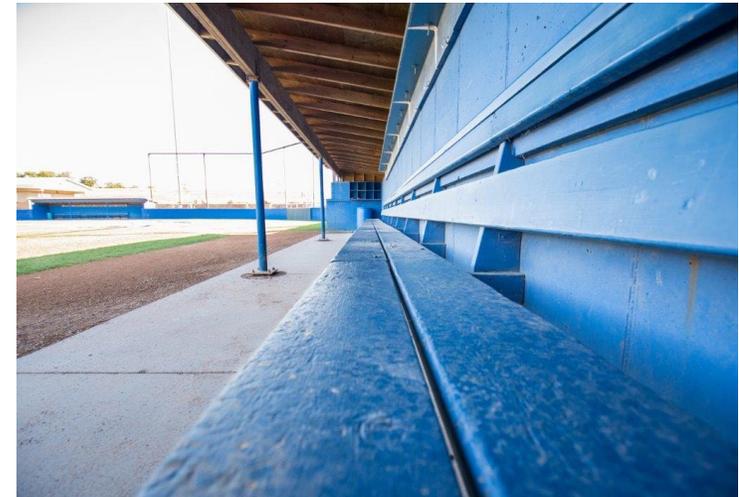
- Default rule is that a party selects and brings an advisor of their choice to the hearing
- Advisor can be, but does not have to be, an attorney
- If a party does not have an advisor, institution must supply one for the purpose of questioning the other party and witnesses on behalf of the student in question



# What is the Role of Adjudicators?

---

- Conduct hearing (if applicable)
- Make a finding
- Determine sanction
- Explain decision
- Ensure clear record



# How does the hearing actually work?

- Title IX regulation is largely silent on specific elements
- 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

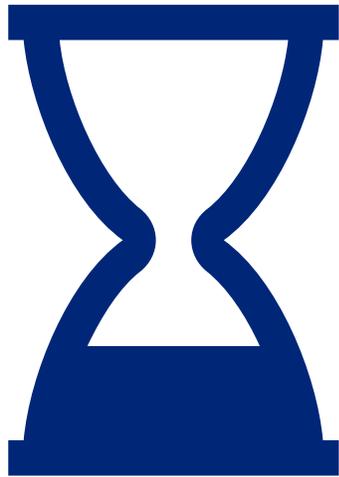
Party or witness who refuses to submit to live questioning from other party's advisor must have their testimony excluded

Questioning of sexual history generally not permitted



# How long does a hearing last?

---



- Decision-maker(s) have the ability to set reasonable time limits on the hearing and its constituent parts
- 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



# Pre-Hearing Conference (model)

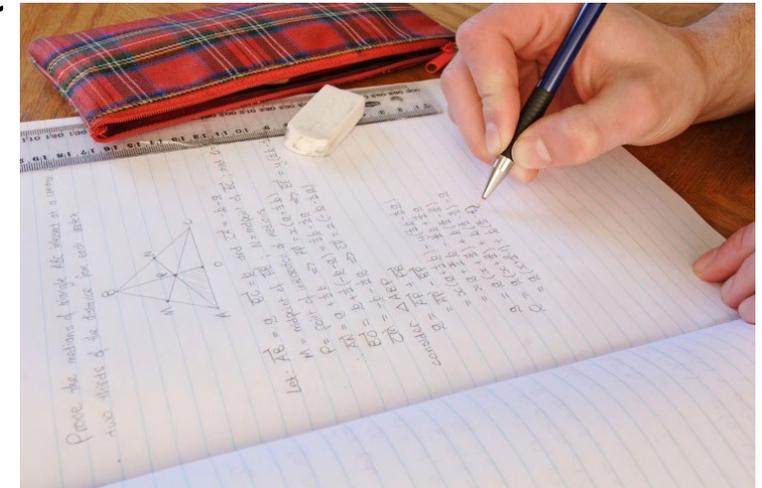
---

- Hearing Chair will convene a pre-hearing conference with each party and/or their Advisor(s)
- Addresses:
  - The hearing procedures
  - Matters raised in the parties' written responses to the investigation report, as the Hearing Chair deems appropriate
  - ID each party's Advisor of Choice & witnesses
  - ID any evidence and/or exhibits to be presented
  - Whether any stipulations may be made to expedite the hearing
  - Arguments that evidence identified in the final investigation report as relevant is, in fact, not relevant (and vice versa)



# Pre-Hearing Homework

- Know who's coming (parties, witnesses, support persons)
- Consider potential conflicts of interest
- Review relevant policies
- Review investigative report
- Review hearing procedures
- Review any responses to report by parties
- Prepare “must ask” questions
- Anticipate questions and issues





# Consider Other Potential Policies in Play

---

- Student Code of Conduct
- Staff Handbook
- Faculty Handbook
- Specific policies related to inappropriate use of computers, hazing, etc.



# Lesson for Panel Members: *Doe v. Purdue University, et al. (2019)*

---

- Denied MTD on due process and Title IX claims
- Student suspended with conditions; later expelled
- Student claimed due process was inadequate, e.g.:
  - Not provided with investigative report
  - No opportunity for cross-examination
  - Complainant & witnesses found credible by committee, but not interviewed in person by fact-finder
- Court found material issues of fact and denied MTD, noting:
  - ***“... two of the three panel members candidly admitted that they had not read the investigative report ...”***



# Typical Hearing Structure

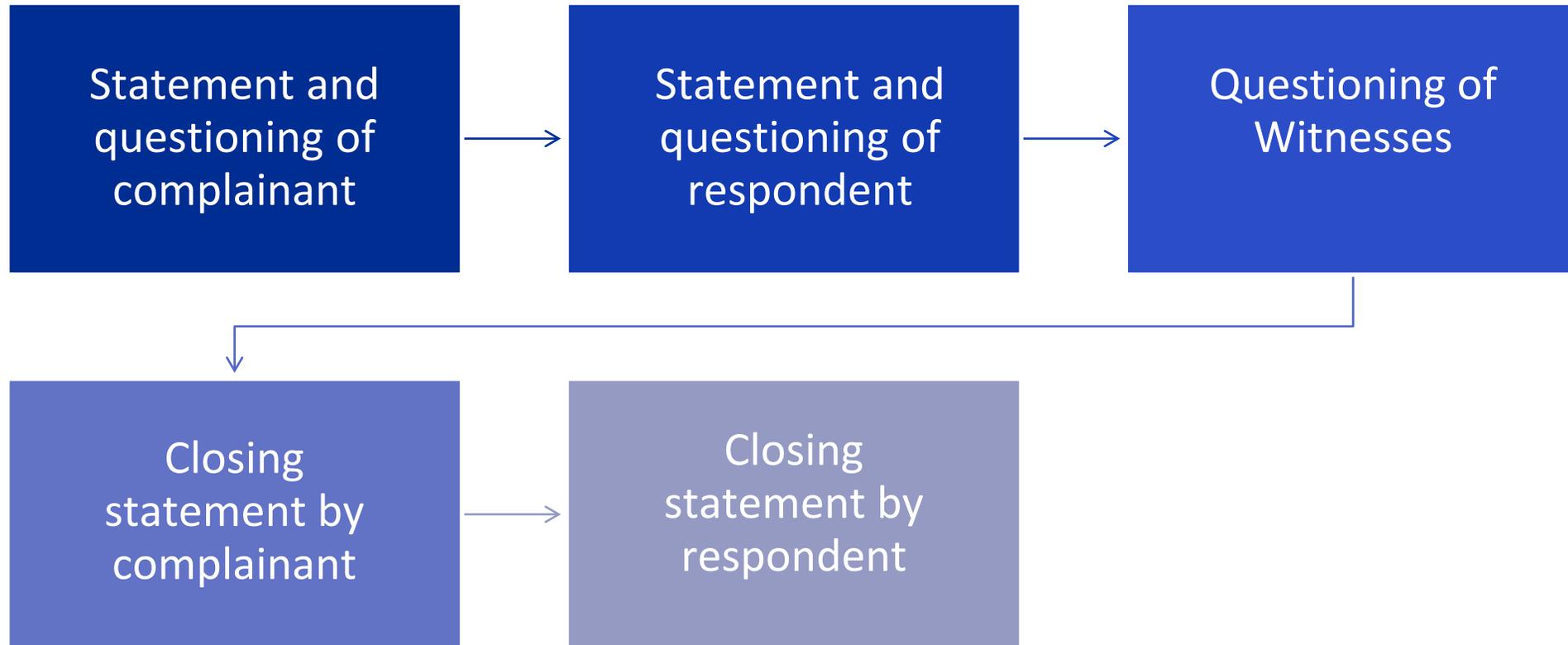
---

- Chair/leader provides opening remarks
- Consider investigation report/summary
- Parties have opportunity to respond to investigation report
- Cross-examination of parties
- Cross-examination of other witnesses
- Questions by panel (anytime)
- Deliberation
- Written determination



# What is a potential sequence?

---





# Starting the Hearing: Setting the Tone

---

- Affirm notice
- Discuss purpose of hearing/goals
- Discuss role of hearing panel/ administrator
- Explain ground rules
- Set expectations of what hearing is for/not for
- Address standard of evidence
- Welcome questions
- Stress telling the truth
- Take breaks as needed



# Common Ground Rules

---

- Allowances (or not) on video/ audio recording
- Expectation of truthfulness
- Role of advisor/support person(s)
- Reasonable time limits
- Explain that if presentation goes beyond scope/time limits, a party may be interrupted



# Separating the Parties

---

- Video/ audio conferencing
- Separate rooms
- Screens





# Unavailable Witnesses

- For Title IX proceedings, if a witness previously interviewed does not testify at hearing cannot rely on that testimony
  - No finding (unless other evidence supports finding)
  - Dismissed, or
  - May transfer to other policy
    - All information gathered during investigation and hearing can be considered
    - Includes statements from witnesses who did not testify at hearing



# Be Ready to Field Curveballs

---

- When curve balls arise during a hearing, ADDRESS THEM.
  - Late/new evidence
  - Conflicts of interest
  - Heightened emotions
  - Potential trauma-impact





# The Art of Fielding

---



*Be ready to respond to curveballs with questions (or recess to regroup)*



Late/new evidence → Why wasn't this presented during the investigation?



Conflicts of interest → Why are these being raised now? What changed?



Heightened emotions → Take a break so hearing can proceed productively



Potential trauma-impact →

Take breaks, rely on support persons, and give opportunity to party potentially impacted to participate in the manner they are most comfortable



# And Fastballs!

---

- **Character witnesses/ statements**
  - Character evidence does not often hold much weight as to whether a policy violation occurred
  - May or may not be allowable, based on policy
  - If allowed, best practice is to impose reasonable limits, and
  - Explain that these are generally considered only as part of sanctioning





# More Curveballs: Advisors

---

- Need to allow advisor to conduct cross-examination, but can enforce reasonable expectations of professionalism
- Need to establish appropriate boundaries with advisors
- Role should be set by policy
- Hearing panel serves as umpire: 3 strikes your out rule
- If ejected from game, generally allow for party to find new support person/advisor



# Relevancy & Key Evidentiary Concepts

---



# Standard of Evidence

---



## Legal Standard

Preponderance of the evidence

=

“more likely than not”

# What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo  
harassment

Hostile environment  
harassment

Sexual  
assault

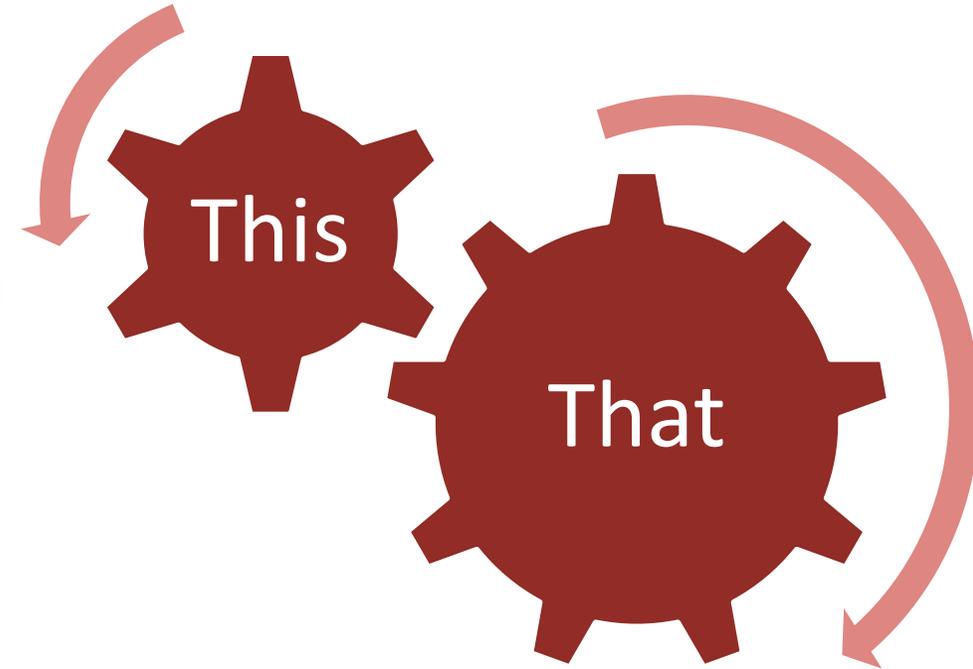
Relationship  
violence

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



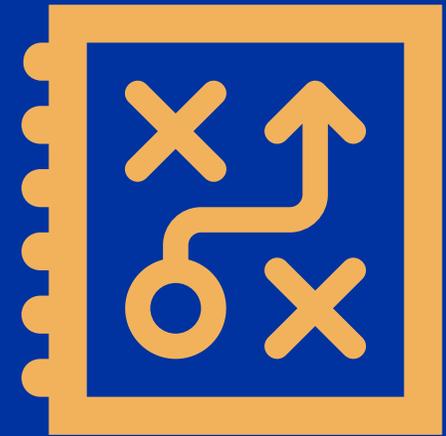


# Example of quid pro quo

---

Manager tells subordinate employee that subordinate will not get a raise this year unless subordinate performs sexual favors for manager.

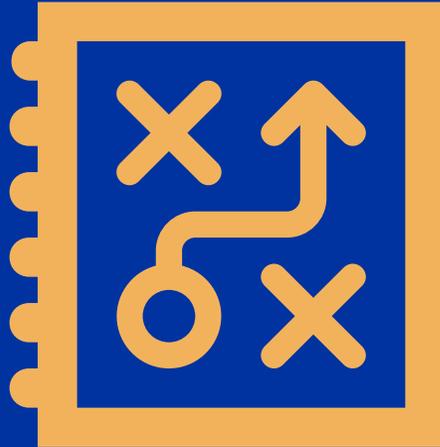
Subordinate is in a relationship with another individual and has no interest in performing sexual favors for manager.





# Another example of quid pro quo

---



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

# Poll question

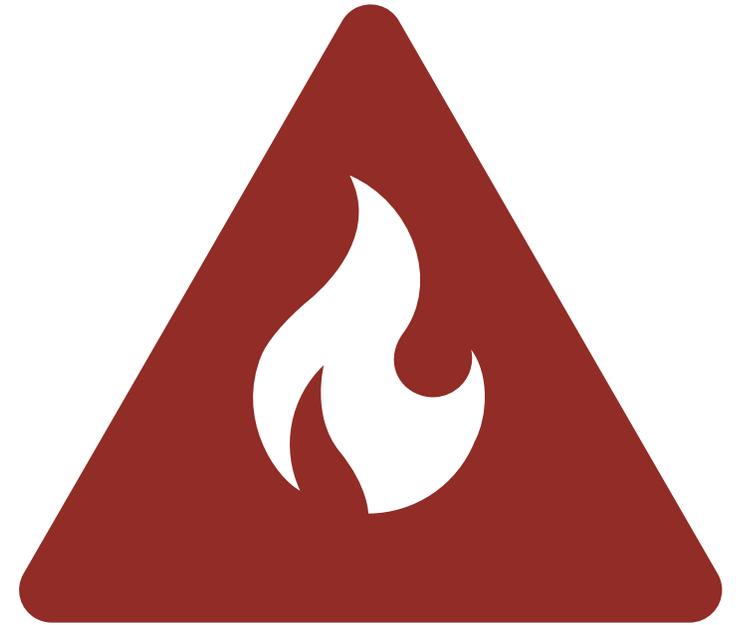
---

- When considering whether a hostile environment exists, whose perspective do we consider?
  - The complainant's
  - A reasonable person's
  - Both



# 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.





# How do we determine if a hostile environment exists?

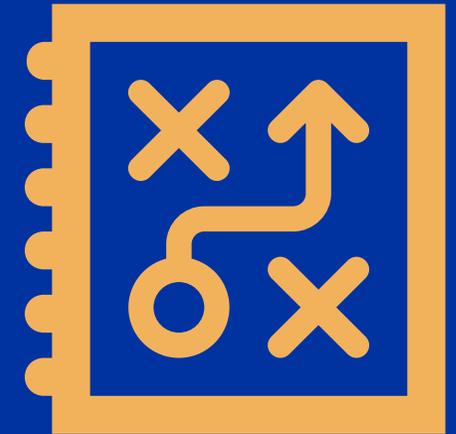
---

- 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

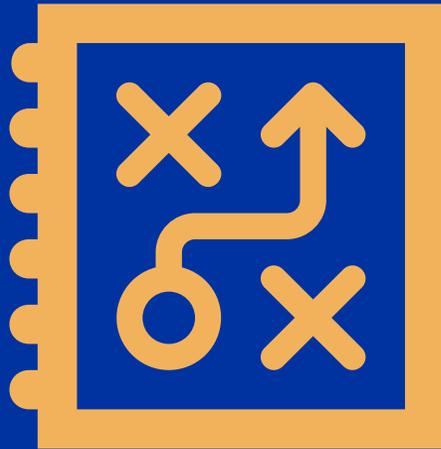
—  
Bookworm student repeatedly gropes Social Butterfly student's buttocks when the two are in the elevator of their shared dormitory. Butterfly has no romantic interest in Bookworm and has told Bookworm to stop. But Bookworm persists, causing Butterfly to use the stairs instead of the elevator and to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





# Another example of hostile environment

---



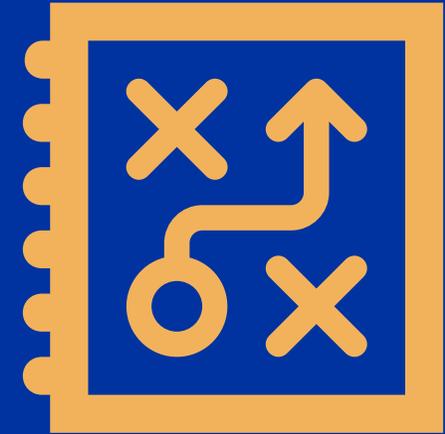
Resident Assistant asks Student to go on a date, and Student says “no.” RA then repeatedly sends Student text messages using various vulgar terms that suggest Student is promiscuous. When RA and Student attend a shared biology class, RA mutters these vulgar terms toward Student, loud enough for others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



# Another example of hostile environment

---

Senior obtains a nude picture of Soccer Player from Player's former romantic partner. Senior threatens to post the nude picture on social media unless Player poses nude for Senior in Senior's residence hall. Player poses for Senior to avoid the nude picture being circulated. Senior is not an employee.





# Does the First Amendment matter?



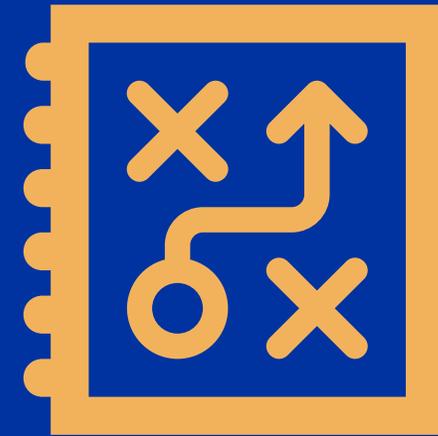
- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment



## Example (not-hostile environment)

—

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





# 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?

---

- Policy definition – read it carefully
- 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.

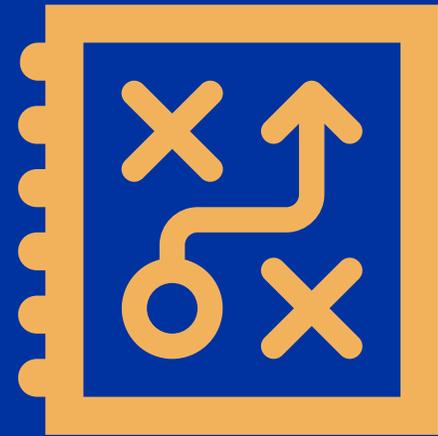




# Example (incapacitated)

---

Short student has had ten cocktails over the course of two hours. Sober student takes Short student to Sober's apartment. Short student cannot walk without support, forgets Sober's name, and passes into a stupor when Sober places Short student on Sober's bed. Sober then engages in sexual activity with Short student.





# Example (not-incapacitated)



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



# 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?

---

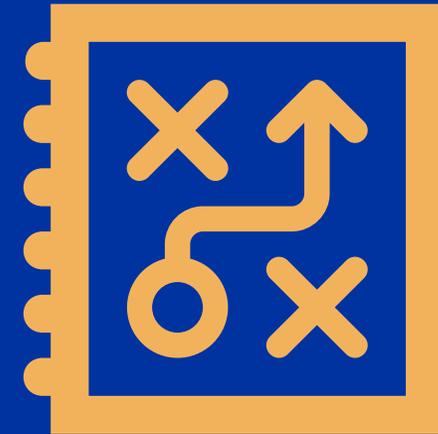
Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



# Example of fondling

---

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





# What is incest?

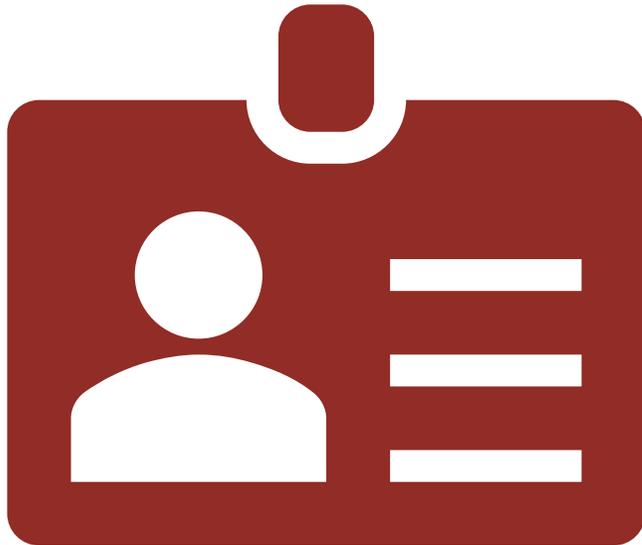
---

Sexual intercourse between persons 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?

—  
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.



# What is dating violence?

“Dating Violence” is :

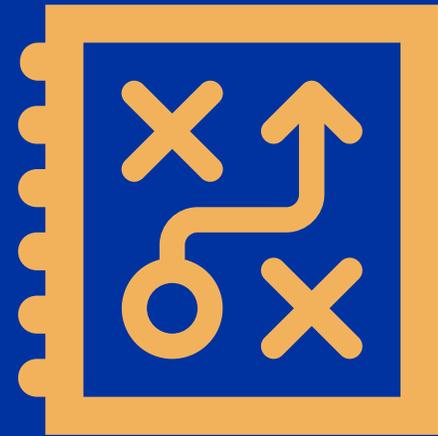
- Actual, attempted or threatened violence by one individual against another individual with whom they are, or have been, in a social relationship of a romantic or intimate nature; or
- Conduct that would constitute a felony or misdemeanor crime of violence by an individual against:
  - A current or former spouse or intimately partner
  - An individual with whom they share a child
  - An individual similarly situated to a spouse under state domestic or family violence laws
  - Any adult or youth who is protected from the individual’s acts under the state domestic or family violence laws



# Example of dating violence

---

President's Chief of Staff and Statistics Department Chair are engaged to be married but live separately and have no children in common. Chief of Staff and Department Chair get into an argument over sex in Chief of Staff's car in the institution's parking lot. During the argument, Chief of Staff slaps Department Chair's face and tells chair to "shut your mouth."



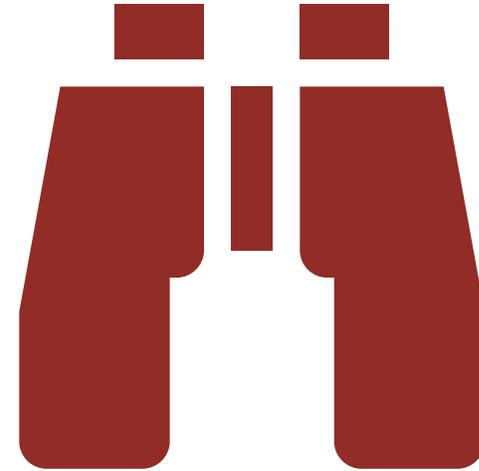


# What is stalking?

---

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

---



Freshman is infatuated with Sophomore who has rebuffed Freshman's romantic advances. Thereafter, Freshman dresses in black and sneaks up to the window of Sophomore's house (owned by sponsored Student Organization) at night in an attempt to see Sophomore. Freshman does this twice before being caught in the act during Freshman's third attempt.



# Retaliation

---



# Does Title IX also prohibit retaliation?

Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any *individual* for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy (34 C.F.R. § 106.71)



# What is Retaliation?

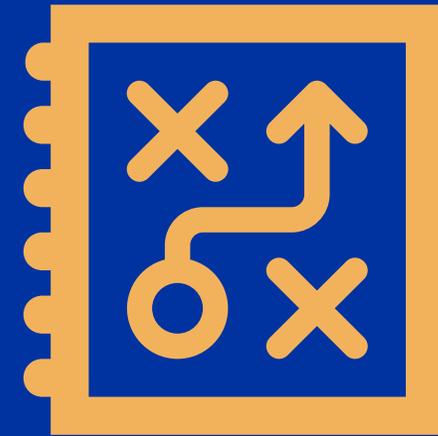
---

- **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 this 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

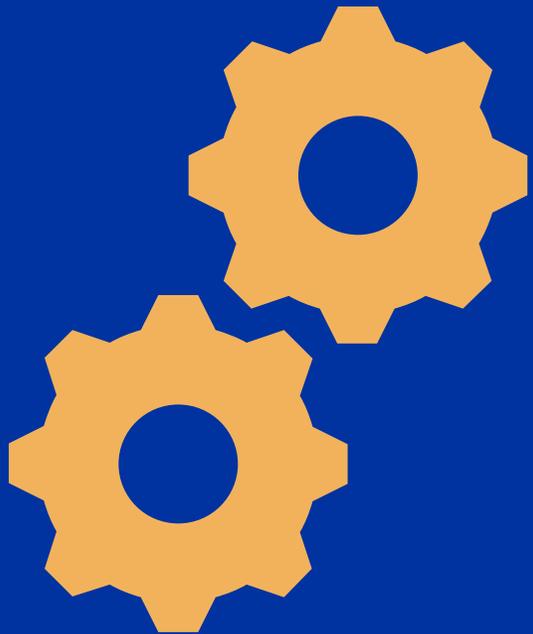


# Example of retaliation

—  
Groundskeeper testifies at hearing in support of Office Worker's complaint of sexual harassment against Manager. After institution finds that Manager sexually harassed Office Worker, Manager demotes Groundskeeper to punish Groundskeeper for testifying against Manager.



## Group Scenario



Student A reports that Student B sexually harassed Student A on two occasions. The first incident consisted of Student B groping Student A's genitals without permission while the two were dancing during a formal hosted by a Greek organization at a local party venue the Greek organization rented. The second incident consisted of Student B attempting to have sexual intercourse with Student A a week later, when Student A was heavily intoxicated at a tailgate party held in the parking lot of a rival institution's football stadium.

# Questions

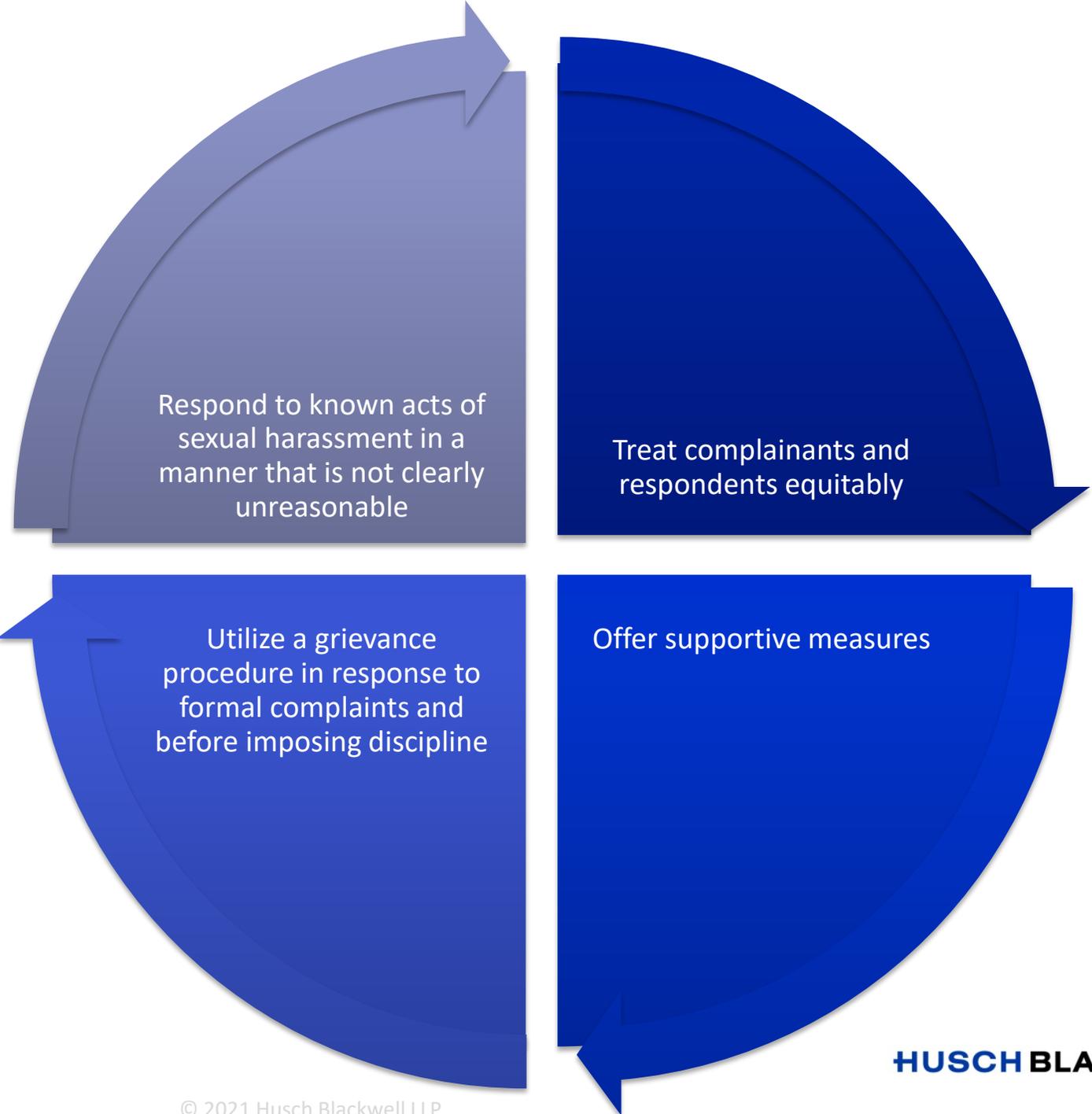




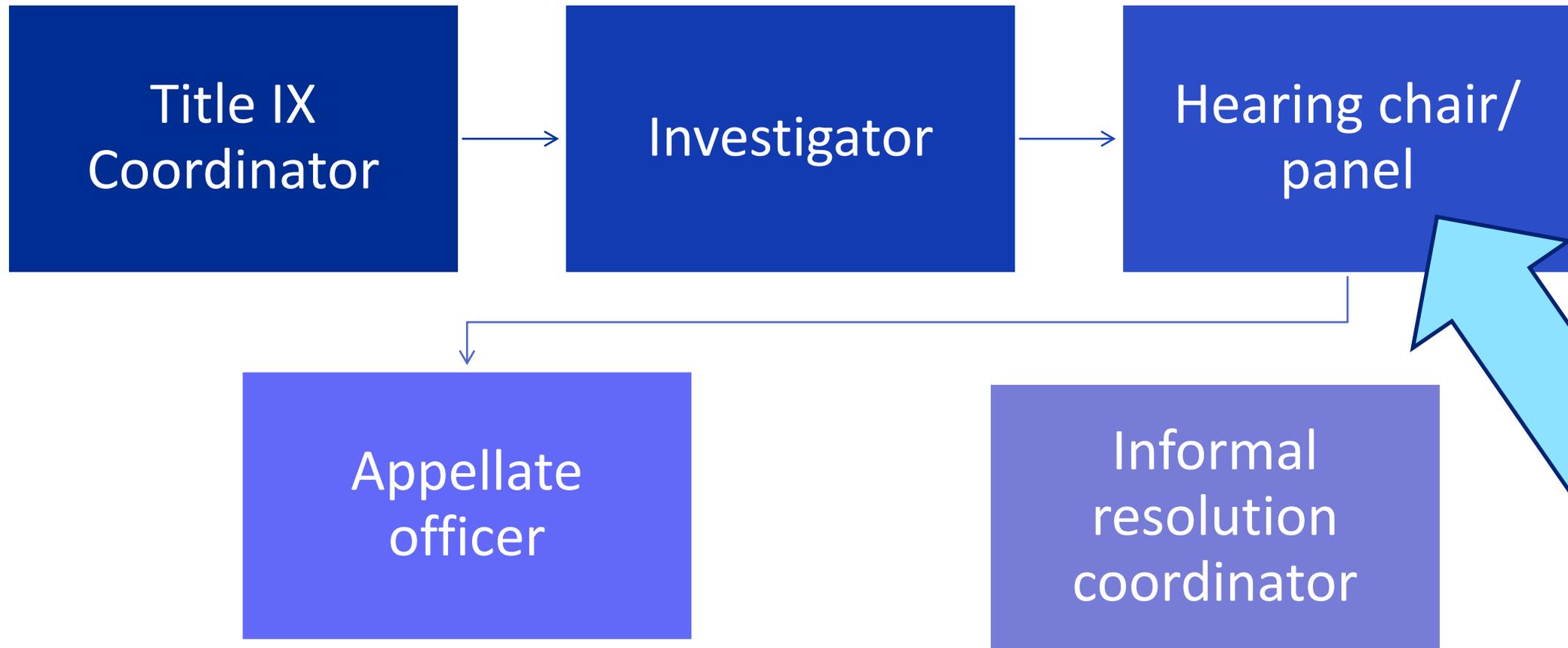
# **Institutional Response to Sexual Harassment**

---

# What are the institution's overall duties?



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





# Defining what is adequate, reliable, and impartial process

---

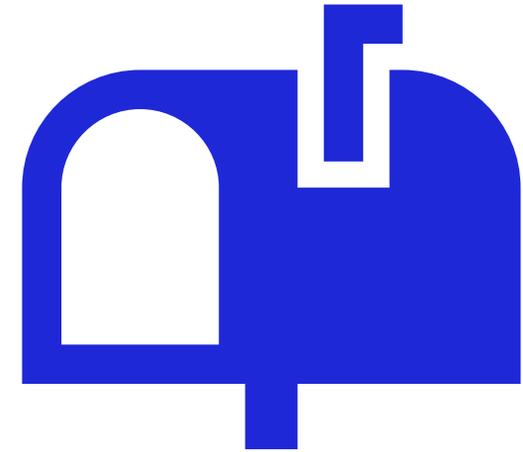
- 34 CFR 106.8(b) requires recipients to “adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints” of sex discrimination under Title IX.
- “Prompt and equitable grievance procedures” in the regulation means investigations of sexual harassment allegations that provide for **“Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.”**



# 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



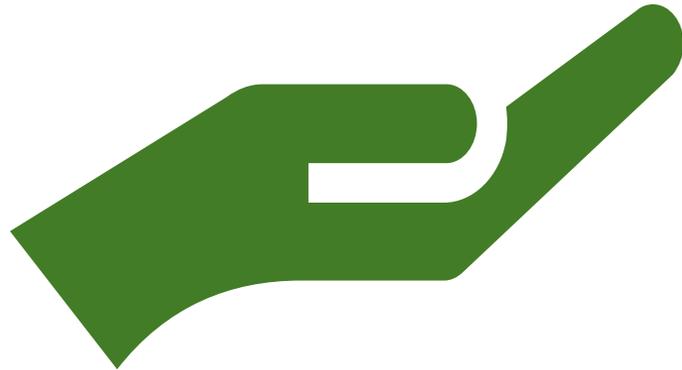
# When do we reach out to the alleged victim?

- 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 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

# 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



# Examples of Supportive Measures

---

- Supportive measures may include:
  - Academic Accommodations
  - Housing Accommodations
  - Employment Accommodations
  - Care and Support (e.g. Referral to EAP, facilitating assistance for an individual to obtain medical, healthcare, advocacy and therapy services)
  - Community Education
  - Safety Planning
  - Student Financial Aid Counseling
  - Visa and Immigration Assistance
  - University Referrals
  - Other (e.g. Campus Ban and bar orders, any other actions deemed appropriate by the Office of Equity and Inclusion or Campus Administrator)



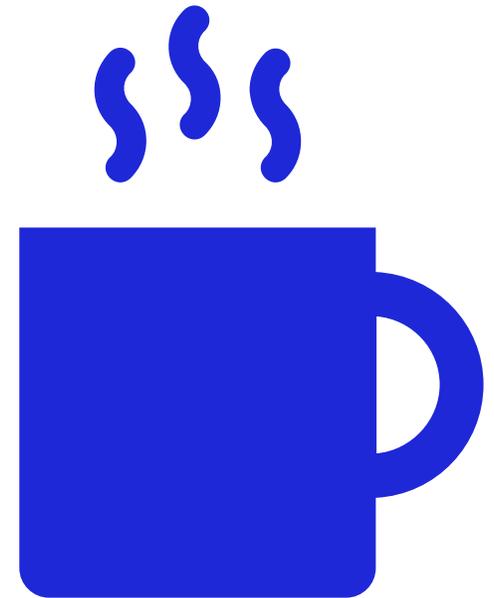
## Physical reaction

- Brain—Trauma triggers chemical reaction which impacts
  - Perception
  - Ability to React
  - Memory
- Each individual reacts differently



# Addressing trauma

- Avoid judgment, impatience, disrespect, misuse of power
- Emphasize
  - Safety/comfort
  - Choices
  - Support for person
    - Personal support
    - Available services
    - Remain objective on facts
  - Trustworthiness/transparency





# Trauma-informed questioning

---

- Provide information to the party
- Acknowledge the difficult situation
- Provide as many options as possible
- For hearing panel, avoid requiring recitation of information already provided if possible
- The process
  - Your role
  - Policy
  - Communication



# Awareness of respondent trauma

---

- Own experience
- Around event
- Around accusations
- Thoughts in the respondent's mind:
  - Will this be a criminal investigation?
  - Could I go to jail?
  - Could I get kicked out of school?
  - Should I have a lawyer?
  - Should I tell my parents?
  - You can't answer these questions but must give time and options
- Institution should always offer interim measures and counseling

# Effective Questioning for Hearing Panel Members

---



# Questioning

---

- Often one of the most critical parts of any hearing
- Provides an opportunity to further clarify facts and evidence, if needed
- The wrong question—or the right question asked the wrong way—can open the door for challenges





# General Questioning Guidelines

---

- Open-ended questions generate more information while closed-ended questions will clarify specifics.
- Close-ended questions result in yes/no responses that often don't offer much additional information. Use close-ended questions to obtain specifics and clarify information you have already received.
- Silence is ok: Give the witness time to answer.



**HUSCH BLACKWELL**



## General Questioning Guidelines (more)

- **Credibility:** If you have concerns that a witness is not providing complete and accurate testimony, respectfully explain the reason for your concern and indicate that you are interested in hearing the individual's response to your concern (e.g., "Help me understand...") and address inconsistencies.
- **Be professional and respectful:** Keep in mind that questioning, while sometimes necessary, may put a party or witness on the defensive.
- **Ask the difficult but relevant questions:** Give both parties an opportunity to address your concerns.





# When Asking Questions . . .

---

- **Non-verbal communication**
  - Convey care, concern, and interest to both sides
  - Make eye-contact
- **Verbal communication**
  - Avoid questions that imply the alleged conduct occurred or did not occur
  - Avoid questions that blame or judge the complainant
  - Avoid question that blame or presume violation by respondent
  - Use medical terms for clarification



# Some Common Questions by Hearing Panel

---

- What do you want to have happen?
- Is there something you feel we should take into consideration that is not already before us?
- Is there any evidence that the [other party] provided or anything they said that you feel you haven't had an opportunity to respond to?
- Are there specific questions you feel should be presented to the other party or witnesses that have not been asked?



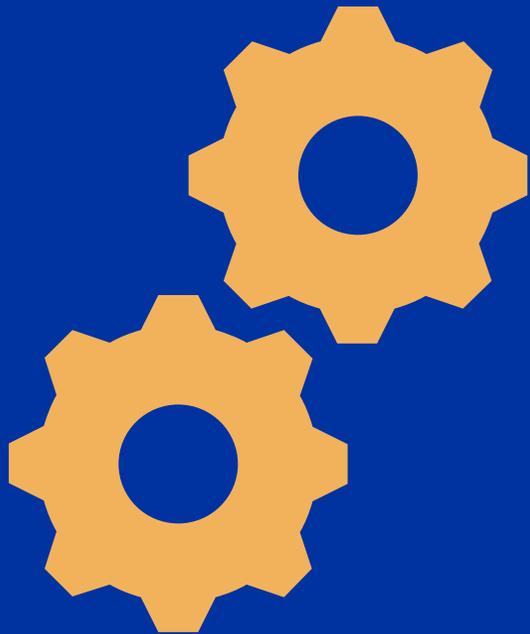
# Some (More) Common Questions by Hearing Panel

---

- Were you given an opportunity to review the investigative report?
- Were you given an opportunity to respond to the report? In your own words, can you describe your response to the report?
- What fact or circumstance about this matter do you feel we should concentrate on in our deliberations?
- Is there anything else you wish to add?



## Group Scenario



Political Science student accuses Graduate Teaching Assistant of using a power differential to coerce student into performing oral sex. Student has received counseling since the incident and tells the investigator the counselor has diagnosed PTSD. GTA denies the oral sex was coerced. GTA claims that student consented and previously performed oral sex on another GTA. GTA tells hearing administrator that GTA has procured an expert witness who will opine student was not coerced and was not influenced by the power differential. Student identifies for the hearing several witnesses who will testify GTA was a “creep.”

# Facilitating Effective Cross-Examination by Advisors

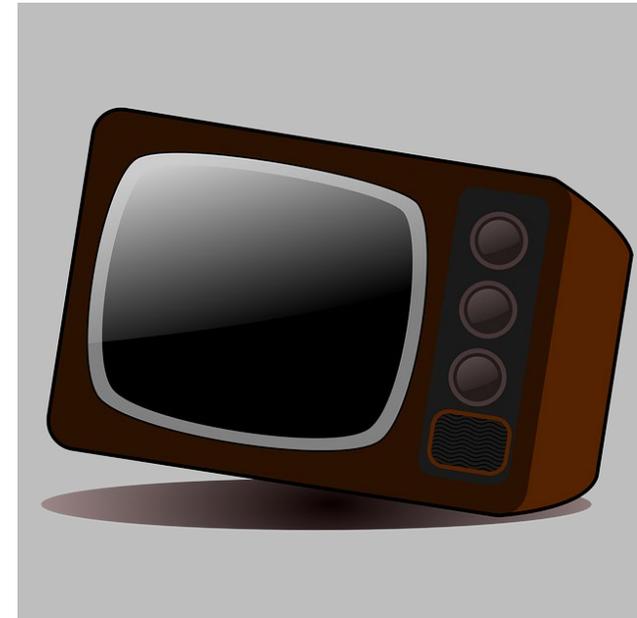




# Facilitating Effective Cross Examination

---

- Different than live cross examination in court (or on TV)!
- The goal is to ensure that each party has an opportunity to hear what the other party and witnesses are offering
- Does not automatically make the process an adversarial one





# Advisors are not required to “act like lawyers”

---

- Unless an attorney is used, the role of an advisor is a non-legal role
  - Advisors are not providing legal advice
  - Advisors are not a prosecutor or a defense attorney
  - Advisors are not required to engage in “zealous advocacy” like a private attorney
  - Advisors are asking relevant and appropriate questions to reasonably support the case of the party you are supporting



# What is the appropriate manner of Advisor questions?

---

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



# What are the hallmarks of effective questioning?

---

- Advisors questions should be:
  - Clear and precise
  - Advance a party's position with respect to one or more elements of the sexual harassment alleged
  - Be asked in a purposeful order



# 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:

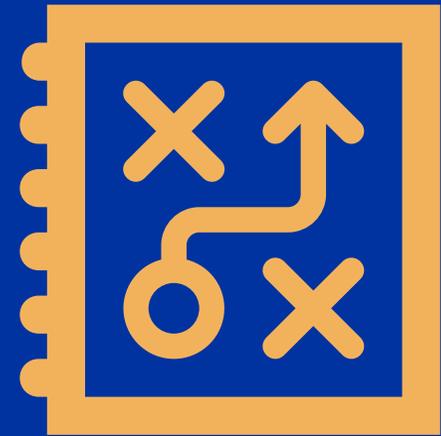
- It has a tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in determining the action



## Example (relevant)

---

Nursing student has accused Physical Therapy student of sexual assault by having sex with Nursing student while Nursing student was incapacitated by alcohol after a happy hour. Advisor for P.T. student asks Nursing student: “Did you send any text messages or make any phone calls during the happy hour?”





# Example (relevant)

---

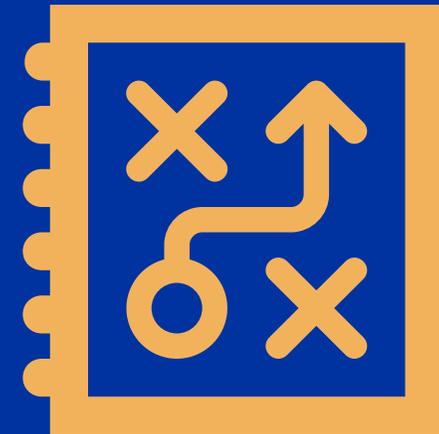


Coach is accused of sexually propositioning Player in exchange for more playing time. Advisor for Player asks the Coach: “Didn’t you tell one of the trainers that Player is ‘extremely attractive?’”



# Example (not relevant)

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





# Example (not relevant)

---



Journalism student has accused Professor of sexual harassment. Advisor for Professor asks Journalist: “Were you convicted for driving under the influence when you were a sophomore in high school?”



# Is sexual history considered?

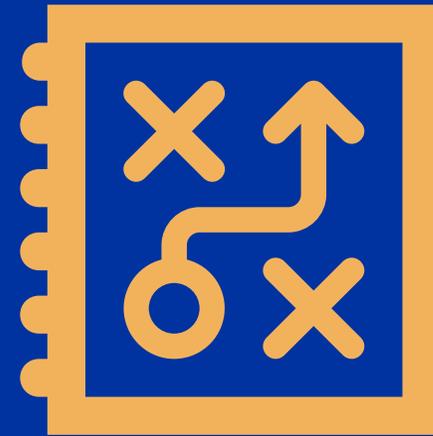
---

- 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 evidence of specific incidents of the complainant’s prior sexual behavior with the respondent are offered to prove consent
- If determined relevant, explain basis for allowing questions

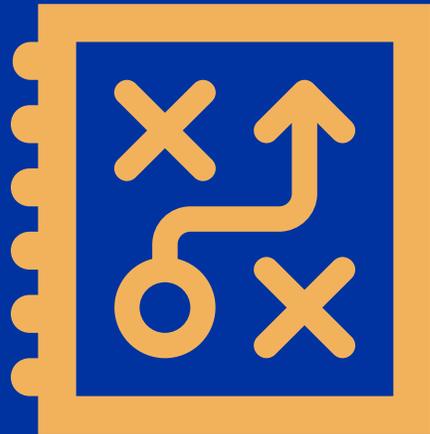


# Example (impermissible)

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



# Example (permissible)

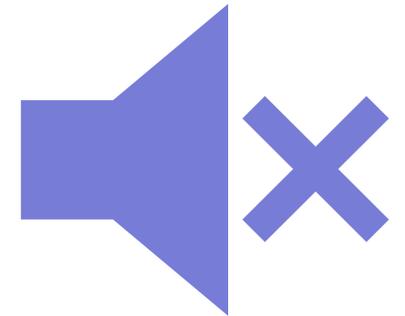


Engineering student has accused Fine Arts student of sexual assault. Engineer testified that Artist had intercourse with Engineer without using a condom without Engineer's agreement--Engineer always requires protection. Advisor for Artist asks Student A: "But didn't you have unprotected sex with Artist a week prior? And didn't you tell Artist it was 'okay' that the two of you didn't use protection?"



# Does any testimony get excluded?

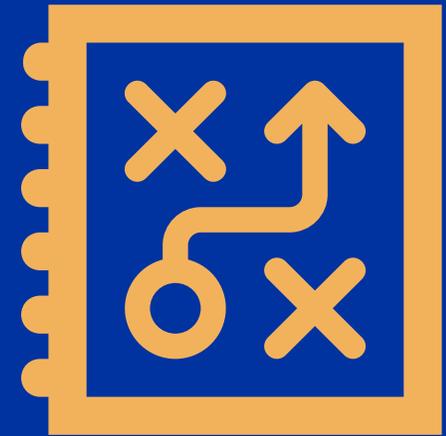
- Yes – Decision-maker(s) must **exclude** the statements of any party or witness who refuses to submit to cross-examination from the other party’s advisor
- “[P]rovided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” (34 C.F.R. § 106.45)





# Example (excluded)

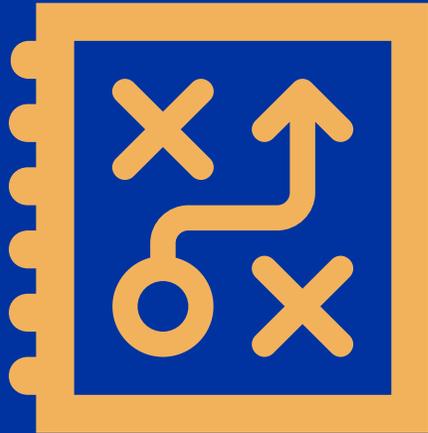
Complainant gives emotional account of sexual assault and answers questions from hearing panel chair. Complainant then answers only one question from respondent's advisor before breaking down and refusing to answer any more. After a break is taken, complainant tells hearing panel chair complainant cannot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





# Example (excluded)

---

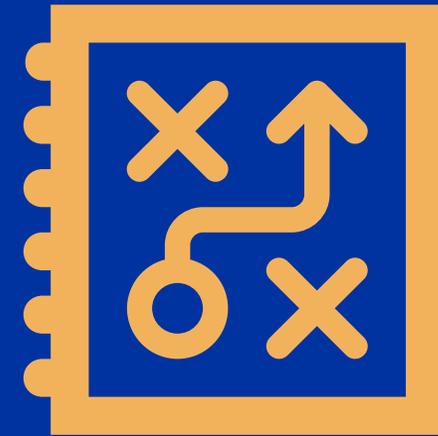


Witness gives statement to investigator that witness observed complainant right before alleged sexual assault. Witness told the investigator that complainant was too drunk to stand up. Witness fails to attend hearing. Investigator is prepared to relay what witness told investigator.



# Example (not-excluded)

—  
Witness answers questions from hearing officer. After consulting with complainant, advisor for complainant says that the advisor has no questions for witnesses. Advisor for respondent then proceeds to cross-examine witness.





# What is the advisor's role in questioning?

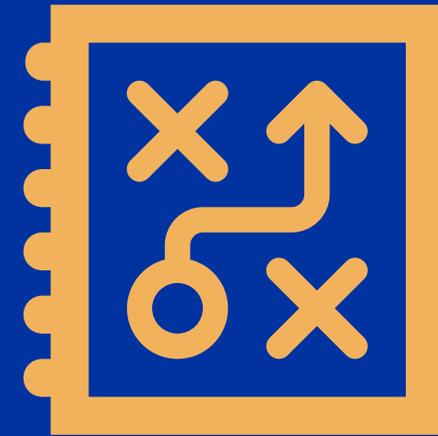
- Asking relevant questions, including those characterized as “cross-examination” of the other party and witnesses
- The questions asked are reasonably intended to support the position of the party who the advisor is supporting



# Example

---

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

---

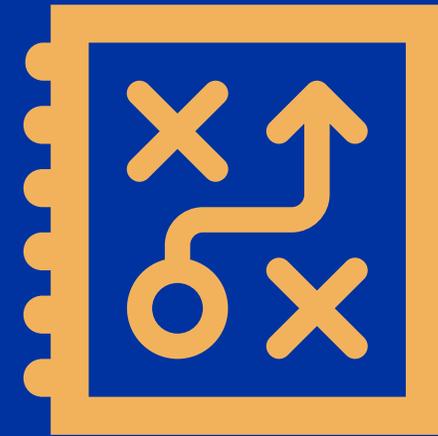
- You walked up the stairs to the respondent's apartment unaided?
- Before the sex started, you stopped the respondent to tell the respondent to use a condom?
- You sent a text message immediately after the sex concluded?



# 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.



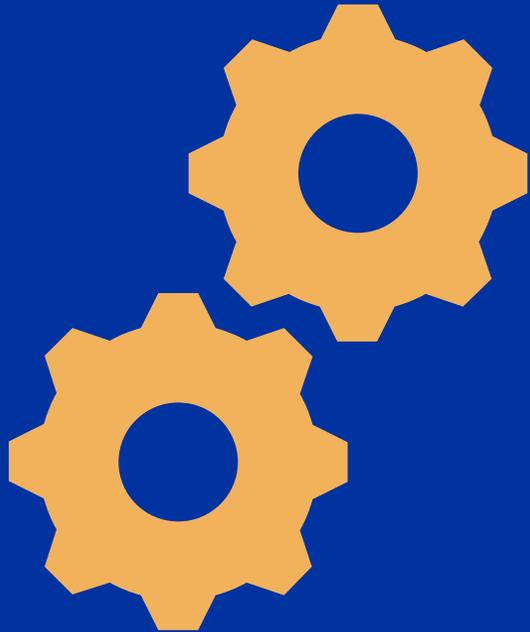


# Example questions

---

- 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?

## 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.

# Decision-Making



# Panel decision-making

---

- Evaluating relevance
- Factual and credibility analysis in support of conclusion
- Consideration and exclusion of statements and evidence
- Deliberating



## Key Principles

- Direct vs. circumstantial
  - Hearsay
- Weight of evidence
- Assessment of credibility



# Direct v. Circumstantial

- **Direct** — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference
  - e.g.: testimony of a witness who actually observed and perceived event in question (see, hear, touch)



# Direct v. Circumstantial

---

- **Circumstantial (indirect)** — Series of facts which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred.
  - e.g.: witness testimony saw student alleged to have hit someone with bat, with bloody bat an hour after the assault



# Hearsay

---

- **Hearsay** — Statement (written or oral) made by a non-available witness offered to prove fact in question
- Longstanding evidentiary principle of when courts can rely on hearsay
- Some hearsay is more reliable
  - Statement contemporaneous with the event in question
  - Excitable statement uttered in the moment being perceived



# Credibility

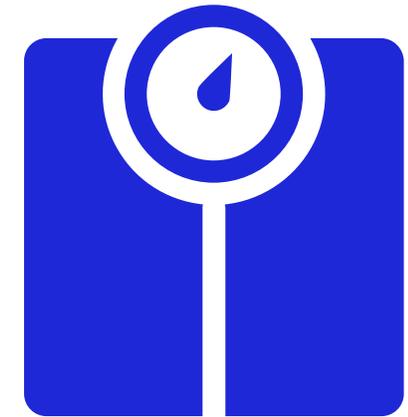
---

- To be determined by hearing panel, following hearing and examination of investigative report, evidence and hearing testimony
- Common factors:
  - Consistency
  - Corroboration
  - Plausibility
  - Motive
  - Demeanor



# 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.

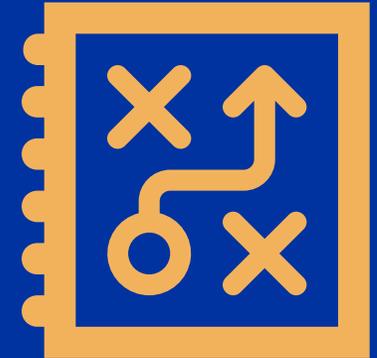




# Example of considerable weight

---

Witness testified he saw complainant and respondent leave the bar at 11:05 pm 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 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.

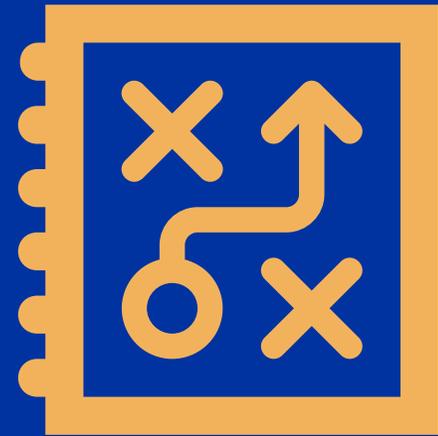




# Example of less weight

---

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



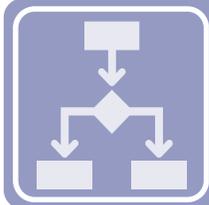
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



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



# What Is a Determination?

---

- The decision as to whether or not sexual harassment occurred
- Results in a finding of “violation” or a finding of “no violation”





# Purpose of a Decision

---

- Sparks some sort of action
- Record of following process
- Documents fair process
- Provides parties and subsequent decision-makers with information



# Sanctioning Considerations

---



# What principles do we use to determine discipline?

- Discipline should vary depending on the nature of the violation found considering aggravating and mitigating factors
- All things being equal, like violations should have like punishments
- Discipline has educational, punitive, and protective elements



# What principles do we use to determine remediation?

- If a violation is found, institution must take steps to restore or preserve the complainant's access to education
- Various types of supportive measures may be utilized after the determination to restore or preserve access
- Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable



# Disciplinary Philosophy

---

- Violations of the policy by an individual will be addressed in accordance with applicable university policies and procedures, which may include disciplinary actions up to and including expulsion or termination from the university.
- When determining appropriate sanctions, the university may consider prior findings of misconduct.
- Violations of law will be addressed by law enforcement and may result in criminal penalties.



# Sanctioning Goals

---

- Punitive
- Safety
- Reduce recidivism / recurrence
- Advance educational and developmental growth of offender (learning from one's mistake)
- Appropriate fit for circumstances



# Determining Sanctions

---

- When determining the appropriate sanctions, consideration shall be given to the nature and severity of the behavior and the existence of any prior incidents or violations



# Avoid Sanctioning Problems

---

- Common problems:
  - Ambiguity in sanction
  - Lack of clear explanation (and written record) of why sanctions should differ in similar circumstances
  - Failure to address expectations for returning students and/or employees following disciplinary action (e.g., participation in athletics/extracurriculars)



# Applying aggravating and mitigating factors

—



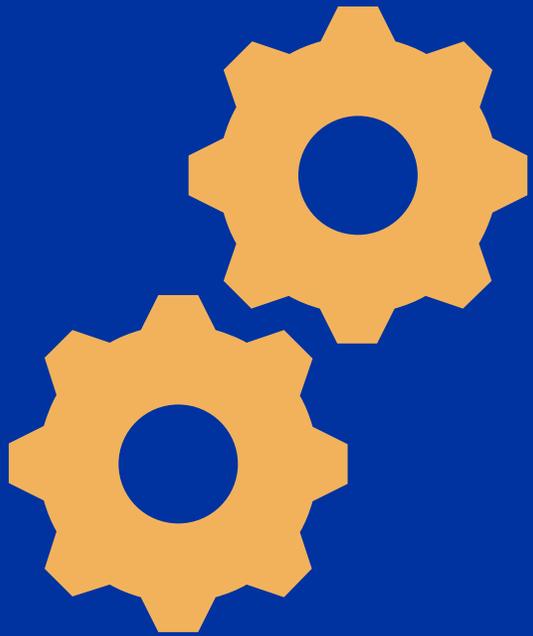
# Aggravating and Mitigating Factors

---

- Common factors:
  - Egregiousness of misconduct (e.g., act of violence, use of a weapon, use of drug)
  - State of mind of respondent (bias-motivated, reckless or negligence)
  - Safety risk to the broader community
  - Impact statement
  - Conduct during the investigation and adjudication (cooperative or less than cooperative)
  - Circumstances relating to a lack of consent, force, threat, coercion, intentional incapacitation)
  - Position of trust / power differential



## Group Scenario



Athlete reports that Chemist stalked Athlete on multiple occasions. The first incident involved several evenings where Chemist followed Athlete after practice to his car, tailgated Athlete's car back to his dorm, and standing outside of Athlete's dorm room for hours watching through the window while Athlete undressed. Another incident consisted of Chemist changing class schedules to be near Athlete in attempt to create a relationship. In the hearing, Chemist explains receiving "friendly signals" from Athlete that support that she did not know her conduct was unwelcome. Athlete presents evidence that Chemist told others that she wanted to hurt Athlete for reporting the stalking.

# Questions





# Increased Detail in Sanction

- Ambiguity in sanctions can lead to questions later
- Example:
  - Following an investigation, student is suspended for stalking following a break up with her boyfriend. Sanctioning panel issues a no-contact directive on both students. The respondent returns to campus following her suspension to learn that the complainant ex-boyfriend is enrolled in the same lab course, which is only offered at that time
- Prevent the problem:
  - Sanctioning official should have addressed the no-contact directive in more detail





# Increased Detail in Sanction

---

- Recommended details:
  - Duration of an ongoing restriction (e.g., how long will a no-contact directive apply)
  - Foreseeable exceptions, if any, and expectations (e.g., work environment, academic classes, athletic teammates, residential etc.)
  - How to handle unforeseeable circumstances that may arise
- Restrictions should have some endpoint, and not be imposed in perpetuity unless there is an ongoing safety risk



# Addressing Expectations Upon Return from Suspensions

---

- An emerging best practice is to set expectations for returning students and employees at the sanctioning stage
- **Example:**
  - Student suspended for engaging in dating violence will not be permitted to participate in band upon their return (participation and representing institution is a privilege, not a right)
- **Benefit:**
  - Eliminates confusion or vagueness as to whether individual has full privileges upon return



# Report-Writing Considerations Including Credibility Analysis

---



# Documenting the Decision

---

- Each decision should be explained in writing in as careful detail as a finding of responsibility. Why?
  - The act of documenting helps a decision-maker consider all relevant issues
  - Demonstrates that the decision was informed and not based on actual or perceived bias
  - Demonstrates that the decision was not without thought, arbitrary, or capricious
  - Demonstrates alignment with institution's disciplinary philosophy
  - Provides appeals official and any reviewing court with a reason to grant the sanctioning official discretion in his/her decision
- The decision need not be lengthy





# Critical Elements

*\*May incorporate investigative report for some or much of the following:*

- Preliminary case information
- History of the case
- Allegations
- Applicable policies/procedures
- Standard of evidence
- Evidence considered
- Factual findings
- Analysis and conclusion
- Sanctions

Periodic Table of the Elements

©2015 TSI Networks  
tsinetworks.org



# Preliminary Case Information

---

- Names of the parties
- Investigators name(s)
- Adjudicator(s) names
- When and how the case was received and assigned
- Key dates



# History of the Case

---

- How did the institution respond to the report?  
*e.g., rights and options provided, notification of respondent*
- Investigation
- When, how, and where were parties and witnesses interviewed?
- Subsequent adjudication
- Explain delays



# Summarizing Allegations

---

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

- Focus on who, what, where, when, how
- Should match notice!





# Factual Findings

Acceptance of undisputed facts?

Goal: Reach conclusion of disputed facts

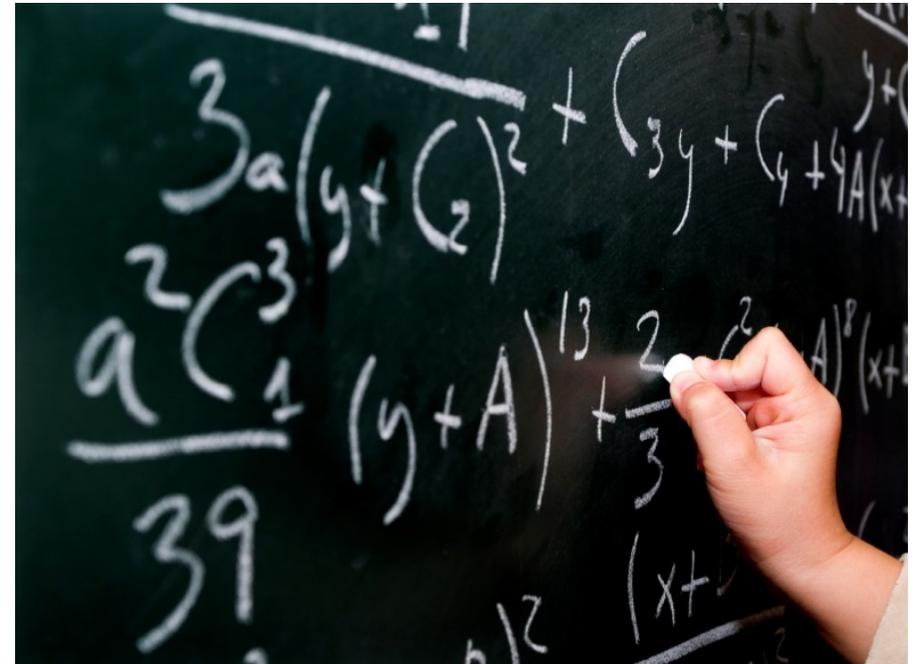
Relevant?

Weight?

Persuasive?

Show your work

Explain your decisions





# Factual Findings (cont.)

## *Resolving credibility*

Is there corroborating evidence?

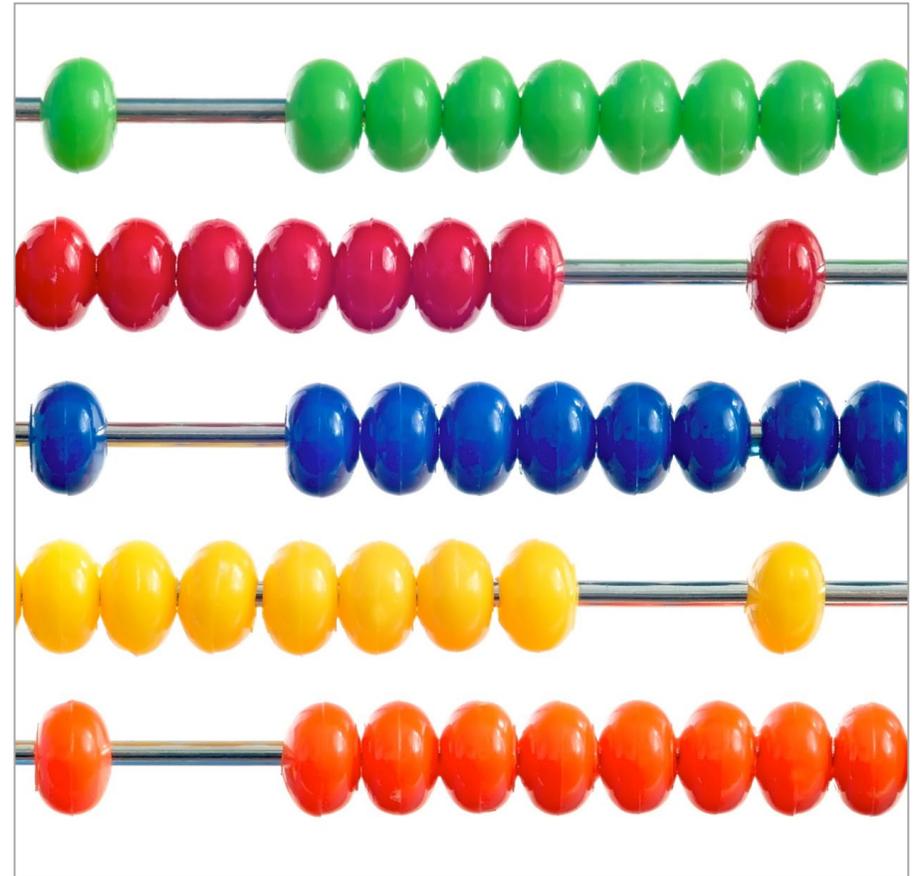
Are there inconsistencies?

Insufficient explanation of inconsistencies?

Consider the logic of a person's narrative

Consider the impact of trauma

Don't assume that a delay in reporting detracts from credibility





# Important Language Considerations

---

Use objective terms

“Complainant” and “respondent” rather than “victim” and “perpetrator”

“Violation of policy” not “guilty” or violation of “law”

Generally, credibility of **facts**, not **witnesses**, as a whole, but-for specific circumstances

Do not include speculation

Do not include irrelevant points and discussion

Be thoughtful about pronouns

Avoid vague phrasing like “had sex”



# Be Specific

---

“Jane alleges that Sara had sex with her without her consent.”

VS.

“Jane alleges that Sara laid on top of her, pulled her underwear down with one hand, while pressing her elbow on her other hand, penetrated her vagina with a vibrator, and held her down so she could not move.”



# Analysis and Conclusion

---

- Put everything together
- Analyzing whether a violation of policy occurred (not the law)
- Discuss each allegation and your decision on each
- Explain your reasoning
- Deal with inconvenient facts and inconsistencies
- Phone a (need-to-know) friend if necessary





# Language for Findings

---

-Adjudicator's task is to determine if preponderance of the evidence supports a finding

-Unless there is an assertion of bad faith or clear error, task is not to determine that conduct did not occur

-Absent clear evidence an allegation is false, **avoid** language such as:

“No violation”

“Innocent”

## Sample language:

“The preponderance of the evidence does not support a finding of a policy violation.”

“The preponderance of the evidence falls short of demonstrating that it is more likely than not the alleged conduct occurred.”



# Check Your Work

- The decision must be able to stand on its own
- Spelling and punctuation matter—have proofread
- Double check that the allegations decided match the notice
- Include the good, the bad, and the ugly
  - Procedural errors (inconsequential or corrected)
  - Delays





# Documenting Sanction: Rules of Thumb

---



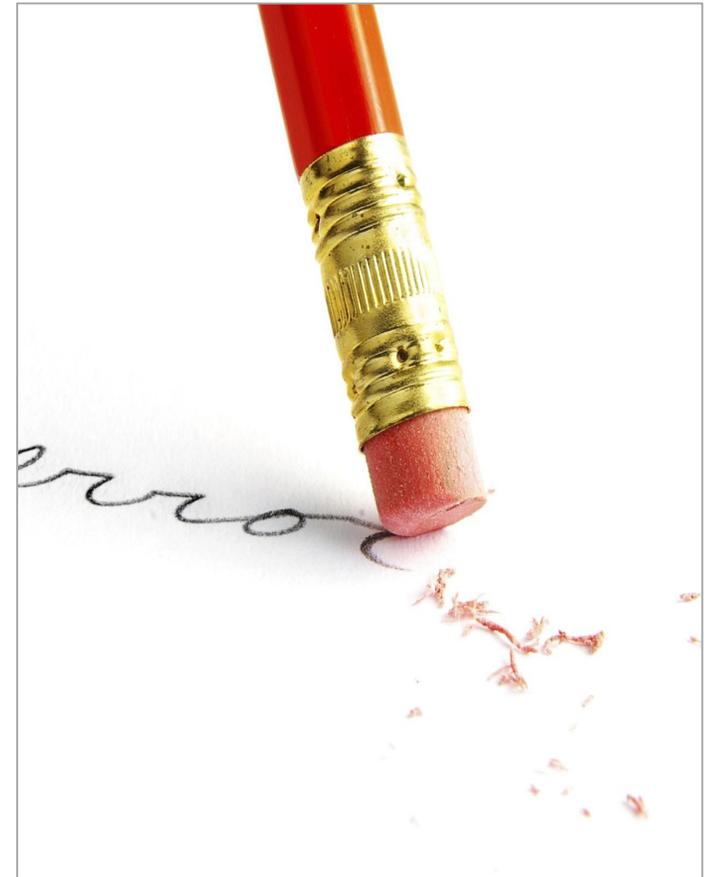
- Should generally address the following factors, where applicable:
  - Impact statement of complainant and respondent, if any
  - Acknowledgment of wrongdoing or impact of conduct by respondent
  - Alignment of sanction to institution's disciplinary philosophy
  - Potential ongoing safety risk to community (or not)
  - Any continuation of no-contact directive, and duration and parameters of that directive



# Avoid Common “Mistakes” with Decision-Writing

---

- Conclusory determinations
- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- Speculation
- General lack of clarity/coherence
- Including too much information about irrelevant details
- Including insufficient information on important issues
- Not clearly or adequately explaining basis for decision



# Misc. & Takeaways

---



# FERPA

---

- 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 as required by Title IX itself





# Are parties allowed to talk about a case?

---

- Title IX regulation prohibits 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
- Witness manipulation and intimidation can still be addressed by institution

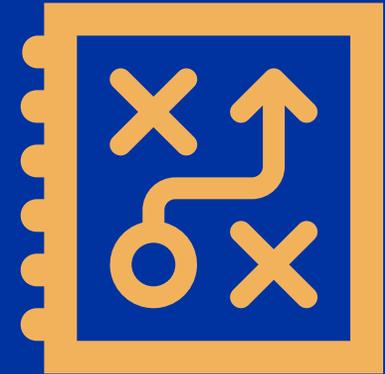
# Example (permitted communication)

Respondent in sexual harassment case affirmatively calls several other students who know complainant. Respondent tells such persons he has been accused of sexual harassment and is attempting to determine whether the complainant discussed the effect of respondent's actions with any of them.



# Example (institution may restrict)

Complainant contacts witness who complainant knows will testify to witness' belief, based on observation, that complainant was not incapacitated and desired to have sex with respondent. Complainant tells witness to ignore investigator's request for an interview, to lie if witness is asked what witness observed, and not to show up at a hearing under any circumstances.





# Are interviews and hearings confidential?

- Institution should restrict access to investigations and hearings to those persons whose attendance is required to effectuate policy
- Parties may be accompanied by advisors of choice and potentially others if justified by the need for a reasonable accommodation
- Media should not be granted access to interviews and hearings

**HUSCH BLACKWELL**