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Title IX Sexual Harassment Training

Troy University – May 2024

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Housekeeping

- Not recording & recording is not permitted
- Let's discuss! Raise hand or just jump in
- Breaks throughout, but please feel free to take individually as needed



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Group scenarios



Breakout groups

- Scenarios will be discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Presenter will ask Breakout Groups to provide responses

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Agenda

- Title IX Scope & Jurisdiction
- Response to Sex Discrimination
- Managing Trauma, Conflicts of Interest, and Bias
- Grievance Procedures
- Informal Resolution and Other Processes
- Pregnancy
- Troy University's Policy on Harassment and Discrimination



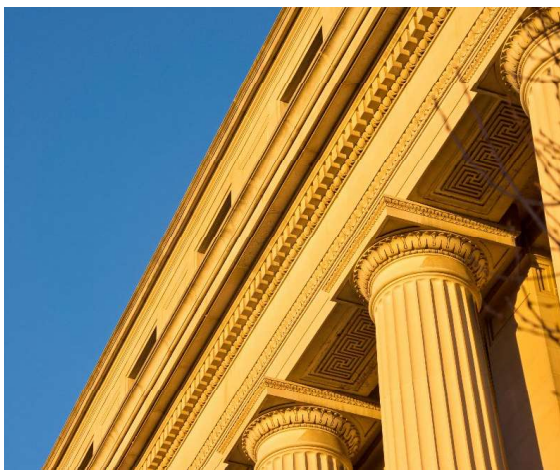
What happened?

- Final version of regulations was released Friday, April 19
- Regulations will take effect August 1, 2024
- Regulations cover sex discrimination, sexual harassment, pregnancy accommodations, and grievance procedures
- Regulations do not explicitly cover sex-separated sports teams
- What now?
 - Revise policies and procedures (and documents) and train key personnel on changes

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Will there be lawsuits?



- Almost certainly
- Anticipate suits challenging:
 - Rulemaking process
 - Due process elements (or alleged lack thereof)
 - Definition of “sex” to include gender identity and other categories

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Title IX Scope & Jurisdiction

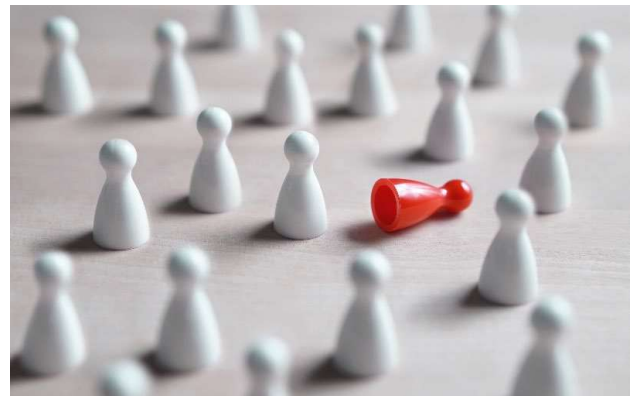
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What is Title IX?

“[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.”

34 C.F.R. § 106.31



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Broader Scope

- Detailed procedural requirements for adverse treatment and programmatic sex discrimination
- Expanded geographic scope to include more off campus conduct (connected to hostile environment on campus; subject to disciplinary authority)
- Broader understanding of “sex” to include sexual orientation, gender identity, and pregnancy

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To which entities does Title IX apply?

Entities that receive federal financial assistance, including colleges and universities that participate in U.S. Dept. of Ed. Federal Student Aid funding

- Not individual persons
 - But institutions are required to adopt policies and procedures to implement Title IX that do apply to individual persons



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What sex discrimination does Title IX apply to?

- Title IX applies to sex discrimination in the “education program or activity” of a federal funding recipient
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to Sex Discrimination that occurs outside the scope of the education programs and activities



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What are examples of education programs and activities?

Admissions	Financial Aid	Athletics	Housing
Academics	Employment	Concerts, Performances, and Events on Campus	Clinical Rotations and Placements
Organized Trips and Volunteer Outings	Sponsored Organization Activities	Online Programs	Activities in Property Owned or Controlled by the Institution

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Recent Change: Expanded Scope of Conduct Subject to Heightened Regulatory Requirements



New regulation requires grievance procedures for all forms of sex discrimination



New regulation continues to require more rigorous procedures for “sex-based” harassment

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Does Title IX apply to sexual harassment in other countries?

- Typically no – except where conduct contributes to a hostile environment in the University’s education programs and activities
- Other countries may have laws that govern sexual harassment



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What other policies might apply?

Institutions are free to use:

- Student code of conduct
- Faculty handbooks
- Other policies

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

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Example

Student A accuses Student B of committing a sexual assault during a study abroad program. Student A alleges that, after returning to campus in the USA, Student B sent Student A unwanted, provocative text messages.



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What is sex-based harassment?

Conduct on the basis of sex that is:

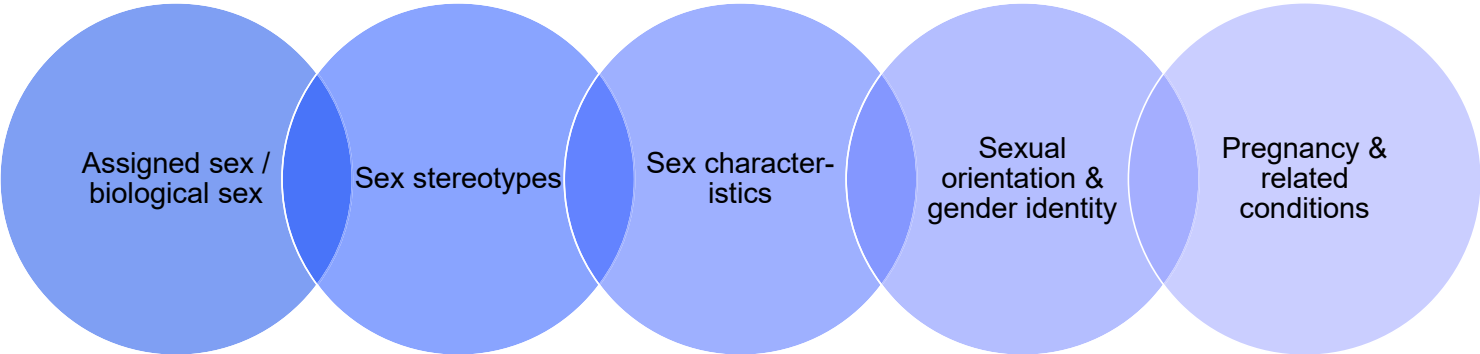


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Recent Change: “On the Basis of Sex”

- “On the basis of sex” includes:



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Modified Definitions

- “Quid pro quo” harassment expansion
- Adoption of Title VII definition of “hostile environment”
- Clarification of “retaliation”
- Sexual assault and VAWA definitions from August 2020 regulation are essentially the same

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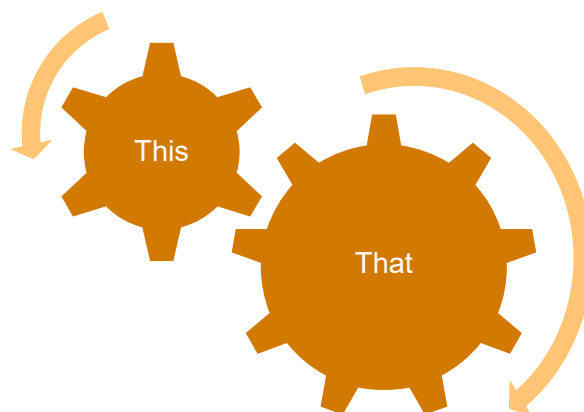
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What is quid pro quo?

An employee, agent or other person authorized by 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 or other employee

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What is hostile environment?

Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the university's education programs or activities.



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Example

Lane comes back to the residence hall in a drunken stupor, approaches a group of students gathered in the common space, and displays Lane's genitals for several seconds.



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How do we determine if a hostile environment exists?

Consider all the facts and circumstances, such as:

- The degree to which the conduct affected the person’s ability to access the University’s Education Programs or Activities.
- The type, frequency, and duration of the conduct.
- The parties’ ages, roles within the University’s Education Programs or Activities, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct.
- The location of the conduct and the context in which the conduct occurred.

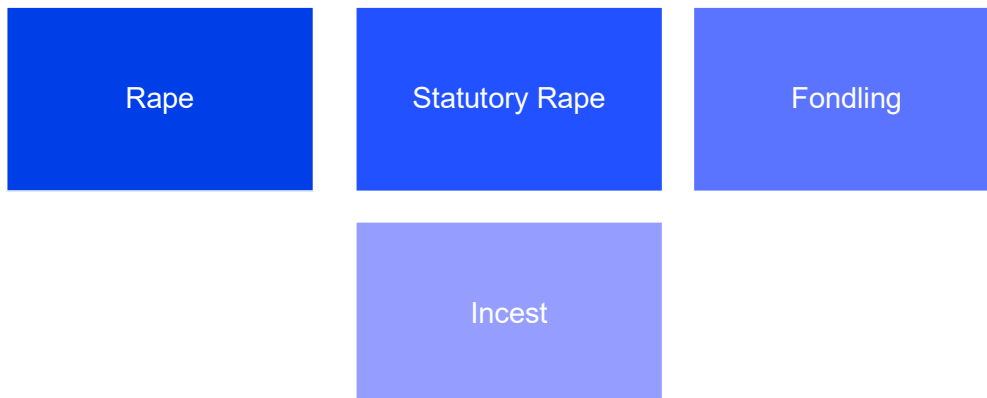
From the perspective of a reasonable person

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What is sexual assault?

Title IX regulations define “sexual assault” as incorporating the following classes of conduct from FBI’s NIBRS:



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What is rape?

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes instance in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

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What is consent?

- Words or actions that a reasonable person in the respondent's perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent (16)

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What is statutory rape? (Revised NIBRS)



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

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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.



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What is fondling?

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

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What is incest?

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

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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.

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What is dating violence?

“Dating Violence” is violence committed by a person:

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

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EXAMPLE: Dating violence

Kace and Jamie have hooked up, occasionally spend the night at each other's apartments, and text each other frequently. One night, during an argument, Jamie throws Kace's phone at Kace. The phone misses Kace but hits the wall and is destroyed.



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What is stalking?

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

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



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EXAMPLE: Stalking

Alfie and Hana broke up after Alfie took an interest in Mira. Hana sends Alfie dozens of text messages each day begging Alfie to dump Mira and return to Hana. In the messages, Hana uses expletives and threatens to kill Mira. One night, while Alfie and Mira are having dinner at a sports bar, Hana loudly confronts Alfie and Mira and throws a drink in Alfie's face.



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Does Title IX also prohibit retaliation?

- Yes. A recipient must prohibit retaliation, including peer retaliation, in its education program or activity. (34 C.F.R. § 106.71)
- Retaliation means intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX ...because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding or hearing under this part.

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Retaliation



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EXAMPLE: 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.



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Group Scenario

Jasper and Kris are members of College’s mock trial club and are partners for an upcoming competition at Big City University. The club is student-run and has no advisor. Students arrange and pay for their own travel to competitions. College covers only the entrance fee.

During one on-campus practice with the whole team present, Jasper tells a raunchy sexual joke that Kris finds offensive. Once, while Jasper and Kris are practicing on their own at Kris’s off-campus apartment, Jasper comments “If we didn’t have to practice, I’d like to have sex with you right now.”

The day before the competition, Jasper and Kris drive to Big City in Kris’s car. Jasper and Kris each have their own hotel room that each independently paid for. Kris comes to Jasper’s room for a final run-through. In the hotel room, Jasper repeatedly comments on Kris’s appearance and eventually places their hand on Kris’s groin area. Kris slaps Jasper and leaves the room.

The next morning, Jasper wakes up to find that Kris has left the hotel and returned to College. Without a partner, Jasper is forced to withdraw and take a ride-share back to College. Kris eventually files a Title IX complaint against Jasper.

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Questions:

Group Scenario

1. What potential forms of sexual harassment are implicated by Jasper’s actions?
2. Does College’s Title IX policy apply to some or all of Jasper’s actions? How would you analyze this, and what key facts would you consider?
3. Are there facts that you would like to have, that are not present in the scenario, to determine whether the College’s Title IX policy applies?

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Response to Sex Discrimination

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Administrative Contacts

- Complaints, reports, or notice of alleged policy violations should be made to:

Grace Wagstaff, Title IX Coordinator

229 Trojan Center

Troy, AL 36082

334-808-6403

gwagstaff@troy.edu

titleixforms@troy.edu

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How does an institution get notice of sexual harassment?



Sexual harassment response is triggered when institution has knowledge of conduct that reasonably may constitute sex discrimination in its education programs or activities.

Institution must respond promptly and effectively.

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Mandatory Reporting

- Many higher education employees are reporters:
 - Authority to institute corrective measures
 - Administrators
 - Faculty
 - Advisors

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When do we reach out to the alleged victim?

- After institution has received a report of sex discrimination, 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



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

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

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Supportive Measures


- Prohibits their imposition for punitive or disciplinary reasons
- Imposes a least restrictive means limitations
- Allows parties to appeal supportive measure decisions and seek revisions if circumstances change


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Examples of supportive measures




 Counseling


 Academic accommodations


 Counseling accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order implicated by facts

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EXAMPLE: Reasonable supportive measure

Employee is the victim of domestic violence perpetrated by their spouse in the college's parking lot. Employee requests time off from work for one hour every Thursday for six weeks to attend counseling sessions.



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EXAMPLE: Reasonable supportive measure?

Student reports they were sexually assaulted by a peer 18 months ago. Student requests a refund of tuition for the last three semesters and a change of all grades to "Pass."



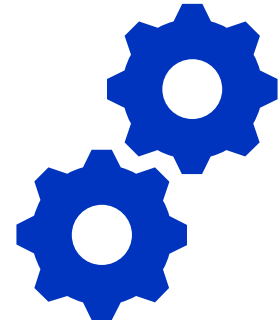
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Do students and employees have other rights?

Yes—other laws may trigger accommodations when a medical condition or disability is present:

- Americans with Disabilities Act
- Family and Medical Leave Act
- Section 504 of the Rehabilitation Act
- Title IX pregnancy accommodation provisions



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Can supportive measures affect the respondent?

- **Yes**, but cannot create an unreasonable burden
- Cannot be a form of *de facto* discipline
- Supportive measures are not a substitute for the investigation and hearing process

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Are supportive measures confidential?



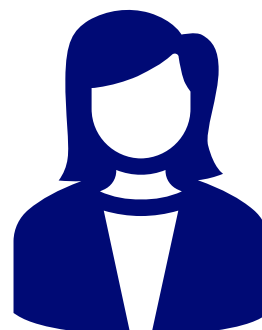
- Generally, yes
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with employees who have a legitimate need to know

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Who is responsible for supportive measures?

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



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Interim Removals

- Interim student removals are possible when there is an immediate or serious threat to “health or safety”
- Eliminates requirement of a threat to “physical safety”
- Individualized safety and risk analysis
- Student is given immediate notice and opportunity to contest the removal



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Can we utilize an already existing process for interim removals?

Yes, if that process complies with the Title IX standard.

Common examples include:

- Threat assessment policy
- Critical Incident Response Team (“CIRT”)
- Interim suspension provisions of a Code of Conduct



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Can we place employees on administrative leave?

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

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EXAMPLE: Administrative leave

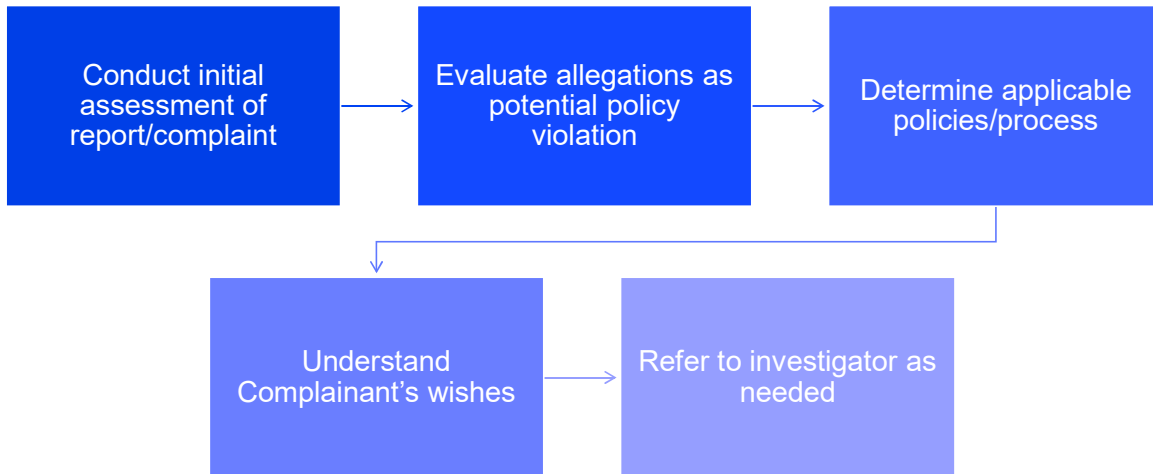
Maintenance worker is accused of lingering near the restroom and glancing at students in various stages of undress. Maintenance worker was accused of similar behavior five years prior. Maintenance worker is not accused of physical violence. Institution places worker on administrative leave pending results of the investigation.



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Intake process

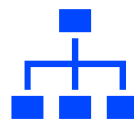


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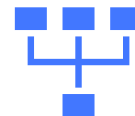
Can we consolidate the complaints?

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

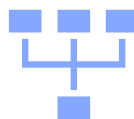


Multiple respondents

Multiple complainants



Multiple allegations against a single respondent



Multiple allegations from a single complainant



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Complaints

- “Formal” compliant concept is eliminated; complaints can be made verbally and without signature
- Alleged victim need only to have been a participant at the time of the misconduct to make a complaint of harassment
- Persons with legal authority to act on behalf of a victim are allowed to file complaints of harassment
- Wider group of potential complainants for sex discrimination other than sexual harassment

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Example

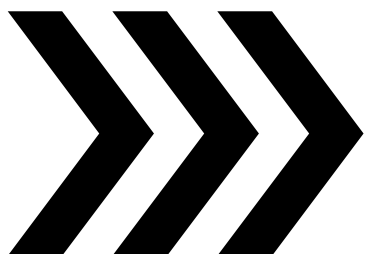
Chaz graduated from the University two years ago. Chaz calls the Title IX Coordinator to report that, while Chaz was a student, Assistant Coach propositioned Chaz for sex. Chaz says: “You should look into this and fire the coach.”



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Dismissal



- Rigid mandatory dismissals are eliminated
- Permissive dismissal, which would be unusual and taken only after additional steps to clarify

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EXAMPLE: Dismissal

After student files a verbal harassment complaint against assistant coach, assistant coach resigns and takes a job at another institution. Institution codes the former assistant coach as a “no rehire” in its system and dismisses the complaint.



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Managing Trauma, Conflicts of Interest, and Bias

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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

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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

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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."

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An employee who is chosen to serve as an appellate officer 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: Bias



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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

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What is trauma's impact on the brain?



- Brain senses threat and sets off alarm
- Thinking brain assesses
- Thinking brain shuts down
- Emotional brain
 - Fight, flight, freeze
- Thinking brain comes back online, turns off alarm, helps calm down
- Emotional brain may continue to sound the alarm, overwhelming the system going forward

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What does it mean to be “trauma informed”?

- Title IX regulations do not define the term
- There is no standard or commonly accepted definition
- In practice, it means:
 - Prompt provision of supportive measures such as counseling to address the immediate and ongoing effects of trauma
 - Understanding the neurobiology of trauma and its impact on a victim's neurobiological functioning
 - Adopting investigation and hearing techniques that minimize the risk of exacerbating trauma while still being fair and impartial

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When does trauma affect a person?

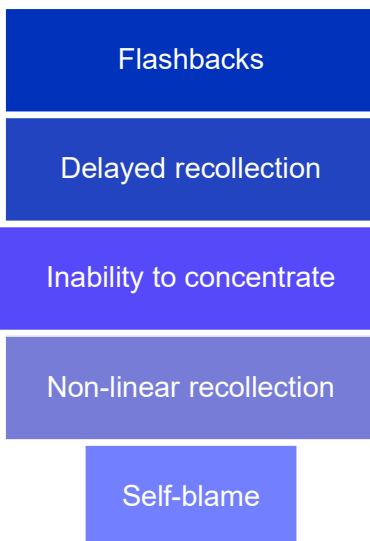
- Not in every case
- Never *assume* anyone participating has suffered any trauma
- Trauma may arise before, during, or after alleged Title IX misconduct, and may impact an individual's response during proceedings
- Not just complainant

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Possible trauma impact

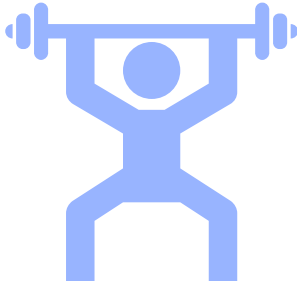
People who have suffered trauma may, but may not, experience any or a mix of the following:



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Physical reaction



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

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Trauma-informed interviews

- Provide information to the individual
- Acknowledge the difficult situation
- Describe the process
 - Your role
 - Policy
 - Communication
- Avoid requiring recitation of information already provided, if possible

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Investigating & 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



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Trauma-informed interviews Cont'd

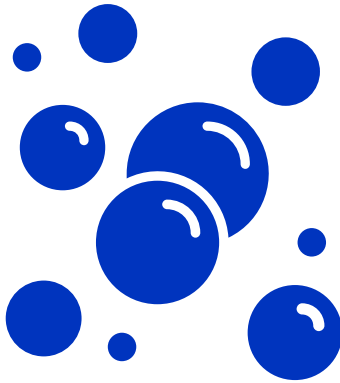
Important to focus on: What are you *able* to tell me about your *experience*?

- Allow individual to begin where they want
- Allow an uninterrupted statement
- Use follow-up questions (non-leading)

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Trauma-informed interviews (cont.)



- Instead of asking “why,” ask about what witness was thinking during the experience
- Consider asking about memories associated with the senses:
 - Sights
 - Smells
 - Feelings

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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

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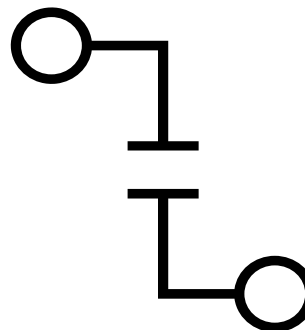
Grievance Procedures

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Grievance Procedures

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



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General Procedures

- Include fairness, equity, notice, presumption, and relevance elements similar to August 2020 regulations
- Require fewer elements to be in writing and does not require an investigation report
- Does not require the use of advisors
- Does not require a hearing, although “decisionmaker” must be allowed to question parties and witnesses where necessary to determine credibility

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Grievance Procedure Requirements

- Grievance procedures or prompt and equitable resolution of complaints of sex discrimination must be in writing and include specific provisions
 - Treat parties equitably
 - Free of conflicts of interest and bias
 - Presumption on non-responsibility
 - Establish reasonably prompt timeframes
 - Take reasonable steps to protect privacy
 - Objective evaluation of relevant evidence and exclusion of certain evidence

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Higher Education Student/Harassment Procedures

- Require written notice of allegations similar to August 2020 regulations
- Allow parties to be accompanied by advisors
- Right to appeal dismissals
- Must include a mechanism that permits decisionmaker to question parties and witnesses where credibility is in dispute
- Allows an augmented investigator model, investigator/adjudicator model, or live hearing for decision-making

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Augmented Investigator-as-Decisionmaker-Model

- Investigator must be allowed to ask parties and witnesses relevant questions, including those that bear on credibility
- Must allow parties to propose questions to be asked of other party and witnesses by the investigator
- Must provide parties a recording or transcript of initial interview in time to propose follow-up questions
- Investigator can then issue a written decision, after parties have been presented with evidence or a summary thereof and been given a chance to respond

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Investigator/Adjudicator Model

- Investigator conducts the investigation and provides the parties access to the evidence or a report, including recordings or transcripts of interviews
- A separate person is appointed as decisionmaker, who holds subsequent meetings with parties and witnesses, asks questions bearing on credibility, and asks questions (including follow up questions) proposed by the parties
- Decisionmaker then issue a written decisional document.

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Live Hearing Model

- Similar to August 2020 concept of a live hearing with some changes:
- Decisionmaker must be allowed to ask questions and
- Party can either:
 - Propose their questions to a decisionmaker to have them asked, or
 - Have an advisor ask questions on their behalf

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Definition of Relevant

- Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures under 106.45 or 106.46
- Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

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Navigating Investigations

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What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity to review and comment on evidence developed

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How do we tell the parties about an investigation?

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



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What else does the notice need to say?

Written notice must also include:

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

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Student accuses Employee of quid pro quo harassment. Prior to sending written notice, Title IX Coordinator appoints investigator who schedules interviews with Employee's co-workers. Only after these interviews are complete, does the investigator send a written notice to Employee.

Example:
(Incorrect)



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Can we gather any information prior to the written notice?

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

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EXAMPLE: Preliminary inquiry

Complainant alleges they were fondled by an unknown individual in the library late at night. Title IX Coordinator secures video footage and card swipe data to determine the identity of the alleged perpetrator.



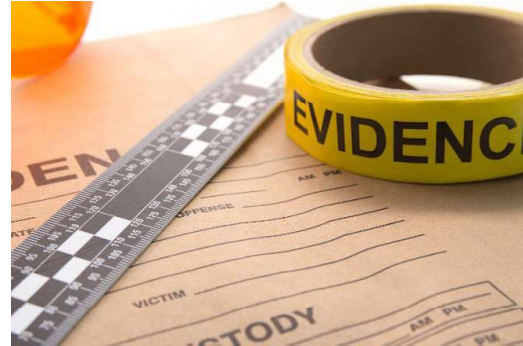
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How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of non-testimonial evidence

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How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



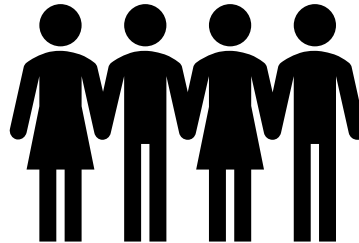
Closure/information providing phase

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Who do we interview?

- Parties
- Fact witnesses
- Maybe character witnesses
- Maybe experts



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What's the difference between a fact witness and a character witness?

- A **fact witness** has personal knowledge about specific facts that are relevant to determining whether or not a given act of sexual harassment occurred
- A **character witness** does not possess knowledge of specific, relevant facts but instead speaks to a person's general character traits or their general disposition

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Recent Change: Experts

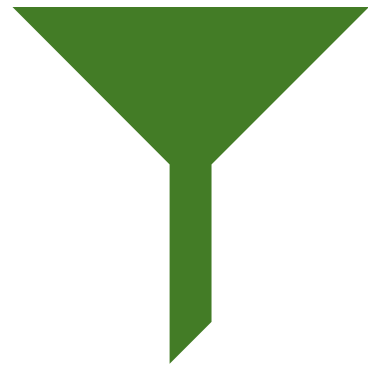
The Final Rule provides that institutions have discretion to allow or not allow expert witnesses, as long as the rule applies equally to the parties.

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How do I ask questions in the substantive phase?

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



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Examples of open invitations



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“Please tell me what happened that night.”



“Walk me through what happened.”



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



“Please tell me everything that happened after you got to the party.”

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Examples of facilitators



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Examples of cued invitations



“You mentioned that Can you tell me more?”

“You said that Can you elaborate?”

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


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


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Examples of recognition prompts



 “What did she say?” (directive)

 “What day did that happen?” (directive)

 “Did it hurt?” (option choosing)

 “Was he slurring words?” (option choosing)

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Complainant has accused respondent of hostile environment sexual harassment. Respondent admits to the alleged conduct, but asserts it “wasn’t that bad.” Complainant alleges being so affected by the conduct that complainant stopped attending work at the institution.

Example: Interview practice



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- What did complainant say about work?
- What did you observe about complainant’s attitude towards going to work?
- Before the respondent’s conduct, did complainant go to work?
- Did you notice any changes in complainant’s behavior after the respondent’s conduct?
- After the respondent’s conduct, did complainant still go to work?
- Are there any records that would show when complainant went to work before and after the conduct? Time cards? Performance reports? Sign-ons?

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Example questions: For witnesses (effective denial of access)



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Respondent is accused of stalking complainant by lurking around complainant's car twice. Respondent has admitted to the first instance but denies the second. Complainant reported clearly seeing the respondent's face the first time at the car but the person was not as clearly in sight the second time.

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- Tell me more about what you saw the second time? Did you actually see the respondent's face? What else do you remember about the person's appearance or attire?
- Does having seen respondent at your car before lead you to believe respondent was there the second time? Could it have been someone else?
- Do you actually know it was respondent the second time?
- Have you had any other interactions with respondent? (Explore each)

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Example: Interview practice



Example questions: For complainants (course of conduct)



- Why do you believe this conduct is directed at you?
- As to either incident, why was respondent at the car? Was there anything suggesting respondent went there to see you? Could there have been other reasons for Respondent's presence?
- What did respondent do at the car each time? What did you do? Did either of you say anything?

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Example questions: For complainants (directed at a specific person)



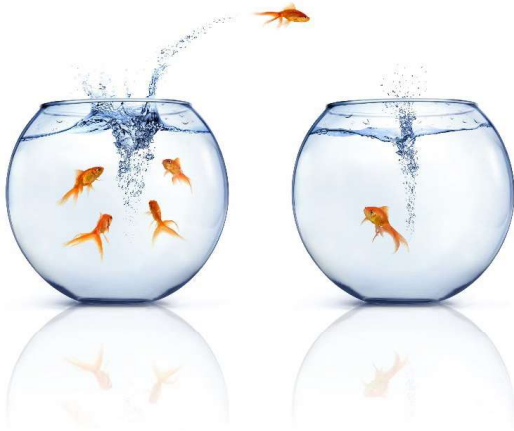
- What day/time did this happen?
- Where did it happen?
- How far was respondent from you?
- Was there anyone else around?
- How tall are you and how much do you weigh? How old are you? Same for respondent
- What has the impact of this been on you? Did you tell anyone about it?

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Example questions: For complainants (Fear/distress)



Group Scenario: Mock Interview



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During a staff training day, Employee, a new mother, asks Supervisor if she can take a 15-minute break during one of the sessions to pump. Supervisor tells Employee she is not allowed to leave a session and says, “I’m so sick of people asking for pumping breaks! Can’t you just give your baby formula instead?” Witness A overhears Supervisor’s comment but does not say anything to employee. Witness A tells Witness B what they overheard. Witness B then goes to Employee and says, “I am not surprised by what Supervisor said. You should hear the stories I have about her from when I was pregnant!” Employee does not take a break, and later that day, files a complaint against Supervisor alleging sex discrimination.

1. How will you prepare for your interview with Witness B?
2. What will you do to build rapport as the interviewer?
3. As the interviewer, how will you build out your outline?
4. As the interviewer, what documents will you review to prepare for the interview? Are there any individuals you will want to talk to before Witness B?

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How do we make a record of the interview?

- Note-taking and audio recording are both appropriate methods of making a record of the interview
- If the investigator takes notes, they should be used to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator’s mind
- If the investigator records the interview, the investigator must be sure to clearly state on the record the time, place, date, and persons involved in the interview

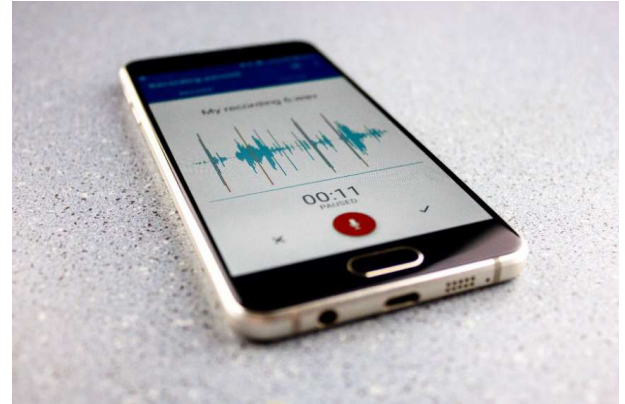


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How do we make a record of the interview?

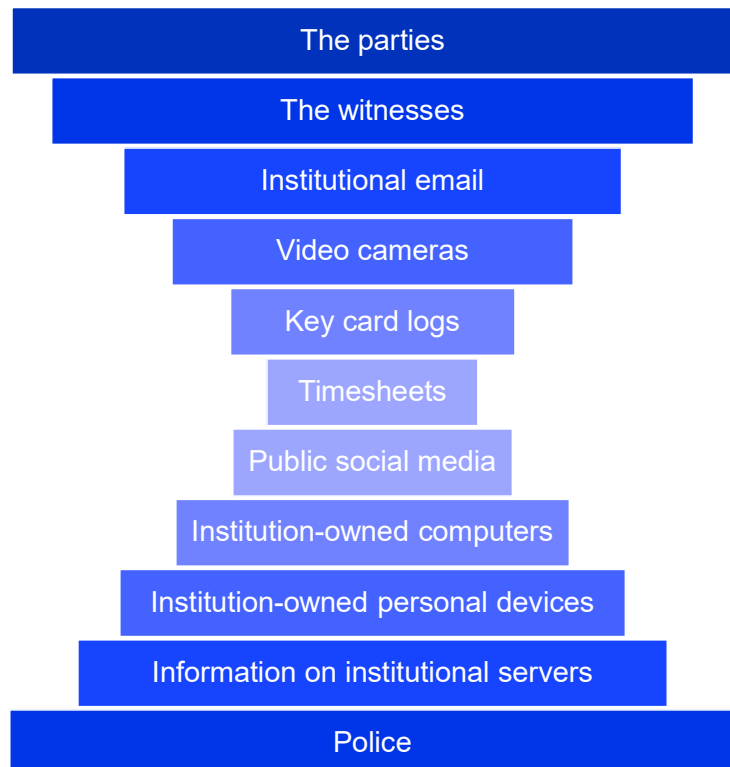
- Trend towards audio recording
- Extensive note taking followed by preparation of a summary is permissible
- Video recording is disfavored



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Example sources of non-testimonial evidence



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May an investigation collect evidence on sexual history?

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.

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May an investigation collect and rely on privileged records?



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

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EXAMPLE: Permissible collection

Complainant executes a written release allowing Title IX investigator to obtain a copy of notes from Complainant's counseling session in which Complainant reported alleged rape to counselor the day after it's occurrence.



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Investigation Report Critical Elements

- Preliminary case information
- History of the case
- Allegations
- Applicable policies/procedures
- Standard of proof
- Evidence gathered/considered
- Evidence/Facts
 - Investigation:
 - Inculpatory and exculpatory evidence
 - Agreed upon and disputed material facts

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Important Language Considerations

- Use objective terms
 - “Complainant” and “respondent” rather than “victim” and “perpetrator”
 - Reference potential “violation of policy” not “guilt” or violation of “law”
 - Keep in mind that decision-makers will generally assess 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”

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Common “Mistakes” in Report-Writing

- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- General lack of clarity/coherence
- Including too much information about irrelevant details
- Insufficient information on important issues
- Speculation

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Do the parties have access to the evidence?

- Parties must be given access to relevant evidence or and investigative report that summarizes the evidence
- Opportunity to review and respond to the evidence or investigative report



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May parties have an advisor during the investigation?

- Yes – parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role



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Are parties subject to a “gag” order during the investigation?

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



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Group Scenario



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Sylvie is being investigated for dating violence against Reece, which allegedly took place in the parking lot following an in-person graduation event on campus. Sylvie contacts various individuals who were present before the assault and asks the individuals to sign a declaration attesting that Reece kicked Sylvie to the ground in front of others. One such individual is a friend of Reece’s and complains to the Title IX Coordinator. Later, when Sylvie is given access to the investigation evidence before the conclusion of the investigation, Sylvie posts the entire evidentiary record online.

1. Is Sylvie permitted to contact potential witnesses?
2. Is Sylvie permitted to ask potential witnesses to sign a declaration?
3. Can Sylvie be disciplined for posting the evidence online?
4. Can the institution make a public statement in response to media inquiries prompted by Sylvie’s publication?

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Questioning Parties and Witnesses/Live Hearings

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Live Hearing Model

- Similar to August 2020 concept of a live hearing with some changes:
- Decisionmaker must be allowed to ask questions and
- Party can either:
 - Propose their questions to a decisionmaker to have them asked, or
 - Have an advisor ask questions on their behalf

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Cross-Examination/Weight



- No strict exclusionary rule
- Decisionmaker may place “less weight or no weight” upon statements where party or witness refuses to respond to relevant questions

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Who is the “decision-maker”?

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



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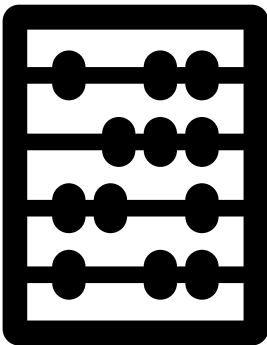
What standard of evidence can be used?

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

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What are some key elements of a hearing?

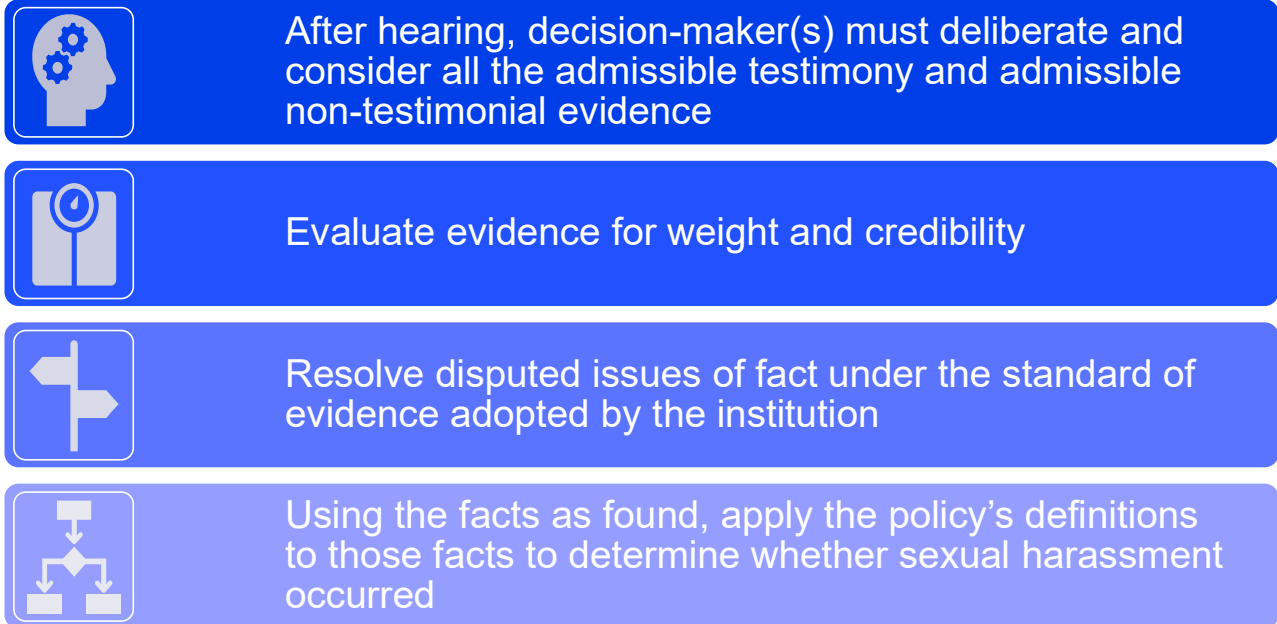


- Live testimony from witnesses
- Contemporaneous questions from the decision-maker and cross-examination from the advisor for the other party
- Decision-maker must screen all questions for relevance and intrusion into prohibited sexual history
- Hearing must be recorded or transcribed
- Steps to separate parties, if requested

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



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Assessment of credibility



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

What does it mean to weigh evidence?

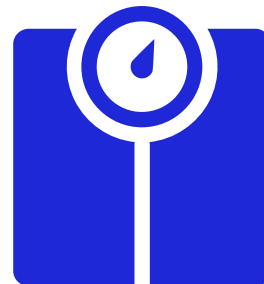
- Not all evidence has equal value
- Some evidence may be more reliable and probative than other evidence
- Weight may vary depending on a range of factors, such as: credibility; corroboration; consistency; level of detail; expertise of the witness; whether a witness is disinterested, etc.

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Weight - Considerations

- Believability/probability/plausibility
- Apparently honest and sincere
- Consistent
- Unrefuted
- Corroboration
- Lacking motive/disinterested
- Expertise
- Level of detail
- Unbiased
- Direct vs. circumstantial
- Personal observation vs. general knowledge or hearsay



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Written Determination

- Must provide determination in writing to parties simultaneously
- With description of the alleged sex-based harassment
- Information about policies and procedures used
- Evaluation of relevant evidence and determination about whether sex-based harassment occurred
- Disciplinary sanctions and remedies
- Appeal procedures

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Who determines discipline and remediation?

- Remedies
 - Measures provided to complainant or another person that recipient identifies as having had their equal access limited—measures provided to restore or preserve access after a recipient determines that sex discrimination occurred
- Disciplinary sanctions
 - Consequences imposed on respondent following a determination under Title IX that respondents violated the recipient's prohibition on sex discrimination
- Some institutions will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
- If referred to someone else, that must occur before the written determination is issued

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What are the grounds for appeal?

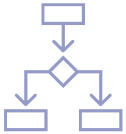
Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter;



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



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

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EXAMPLE: Appeal

Respondent appeals and submits evidence that one member of a three-person hearing panel previously wrote gushing letters of recommendation for complainant. Hearing panel member did not self-disclose the letters when selected to serve on the panel.



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Informal Resolution and Other Processes

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Informal Resolution

- Formal written complaint no longer a predicate
- Now permitted for claims that an employee harassed a college or university student (in institution's discretion and where no conflict with federal, state or local law)
- Investigator cannot facilitate informal resolution

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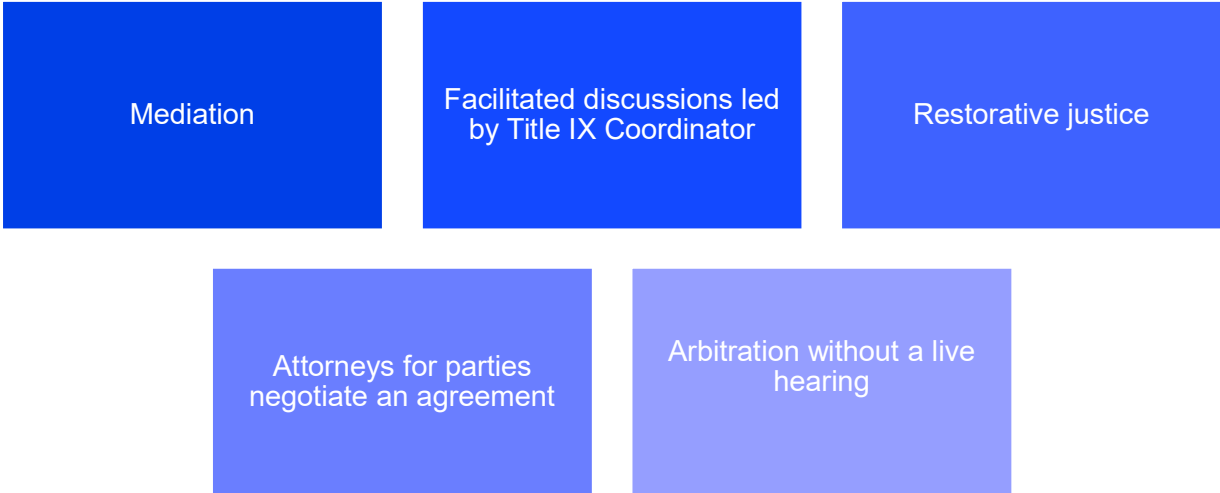
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What is informal resolution?

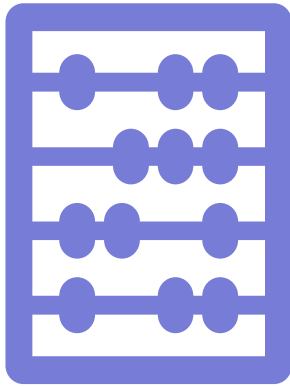
A voluntary process to resolve complaints of sexual harassment through a mechanism other than the default investigation and hearing.



Types of informal resolution



What are considerations around whether informal resolution is appropriate?



- Nature of the alleged offense
- Any ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Any past findings regarding respondent
- Status of the parties
- Good faith participation of the parties

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Who facilitates an informal resolution?

- Any suitably qualified and trained person may facilitate informal resolution, including the Title IX Coordinator
- Facilitator can be a third-party mediator or alternative dispute resolution specialist
- Default rules on conflicts of interest and bias apply

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What is restorative justice?

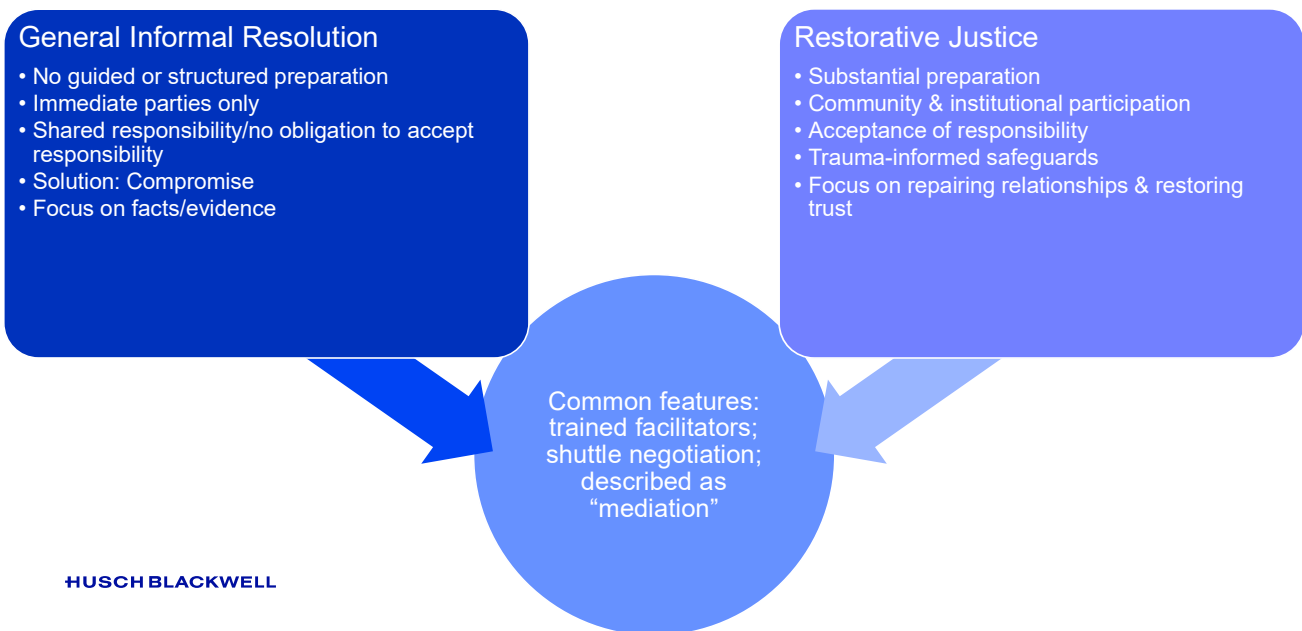
“Restorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”

-Howard Zehr

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How does restorative justice compare to general informal resolution?



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Can a case that is resolved informally be “reopened”?

- It depends upon the terms of the informal resolution
- Title IX Coordinator should ensure that any informal resolution clearly resolves this question



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How is an informal resolution documented?

- Agreements should be well-documented by the informal resolution facilitator
- Ideally, parties will sign the agreement or provide some other form of written confirmation
- Formal settlement agreements are typically not required unless they are resolving legal claims that have been asserted

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May we use another process after Title IX?

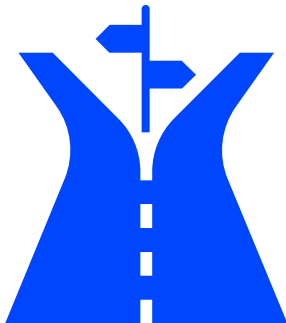
- Yes
- Some conduct may not violate Title IX standards but will violate other standards
- Some conduct may merit additional punishment beyond what is merited by Title IX policy



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May we use two processes at the same time?



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

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What other policies/processes may apply?

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

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May we conduct a “joint” investigation?

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



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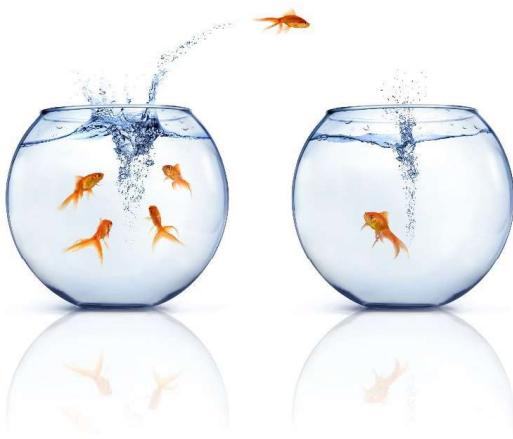
Why would an institution continue with a Title IX process after respondent departure?

- Complainant's wishes
- Desire to avoid "passing the harasser" scenario
- Community expectation
- Large investment of time and resources to date
- Potential for respondent's return in the future
- Other factors possible

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Group Scenarios



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Ali, sophomore walk-on, accuses the captain and All-Conference power forward, Toni, of sexual harassment after Toni kisses Jesse in a hotel room during an in-season basketball away game.

At the intake meeting, in August (outside of basketball season), Jesse explains that Jesse will never informally resolve this issue. Jesse files a Formal Complaint, and proper notices have been sent to the parties and support measures are in place. The day after the basketball season starts, while the investigation is underway, Jesse decides that Jesse wants to proceed informally. Toni is "totally on board."

You are brought in to lead the informal resolution discussions.

1. What issues from the facts above do you want to figure out/dig into more?
2. What questions will you raise with Jesse?
3. What questions will you raise with Toni?
4. Who (if anyone) will you talk to while the informal resolution process is underway?

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Other Topics

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Training

Mandatory basic training for all employees at hiring and annually

Role-specific and more detailed training for persons who play a specific role in Title IX process

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Pregnancy and Pregnancy-Related Conditions

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

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What are pregnancy and related conditions?

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

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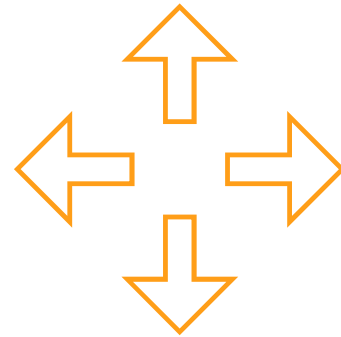
What reasonable accommodations are pregnant students allowed?

Reasonable modifications

Based on individualized needs

Determined after consultation with the student

Fundamental alteration is not required



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What are some common examples of reasonable accommodations?

- Breaks during class to express breast milk or breast feed
- Breaks to attend to pregnancy related needs, including eating, drinking, or using the restroom
- Intermittent absences to attend appointments
- Access to online or homebound education
- Changes in schedule or course sequences
- Extensions of time and rescheduling
- Counseling

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Pregnancy Reporting

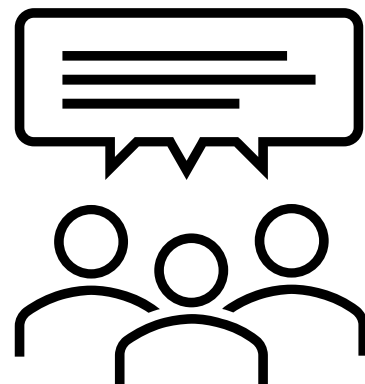
- If a student informs an employee of student's pregnancy or related conditions, employee must provide student with Title IX Coordinator's contact information and inform student of Title IX Coordinator's authority to prevent discrimination and ensure equal access
- Institution must then contact student and inform student of legal rights, including reasonable modifications

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Example

Jane remarks to faculty member after class that Jane is pregnant and will have her first sonogram next week. Jane does not ask faculty member for any accommodations or otherwise indicate a desire for accommodations.



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Salt Lake Community College June 2022

- A student at SLCC found out she was pregnant after the semester began. She told her professor she was pregnant and struggling with morning sickness, which caused her to miss or be late to the professor's classes.
- The student requested academic adjustments from the professor to allow for additional absences and allow her to turn in assignments late.

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SLCC: Background

- The professor told the student that she was concerned the student decided to continue with the class and that she had lowered final grades if missed days were excessive. The professor also told her a late submission penalty would apply to late assignments and advised the student to drop the class because “health is more important than a class.”
- The student contacted the Disability Resource Center on her own to seek formal academic adjustments and provided a note from her treating physician. An Advisor spoke with the student and referred the student to the Title IX Coordinator to discuss her adjustments.
- The Title IX Coordinator determined the student's requested academic adjustments constituted a fundamental alteration to the courses.

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SLCC: OCR Finding

- The professor's alleged comments encouraging the student to drop the class could constitute pregnancy discrimination and therefore merited a prompt and equitable resolution under Title IX grievance procedures (which SLCC did not conduct).
- The Title IX Coordinator did not create an investigatory file, obtain written statements, take notes of his conversations, or issue a notice of the investigation's outcome to the student.

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SLCC: OCR Findings

- The Title IX Coordinator did not respond to the student's allegation the professor encouraged her to drop the class because of her pregnancy, which she viewed as discriminatory.
- SLCC did not engage in the interactive process with the student to determine appropriate academic adjustments in light of her pregnancy.

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SLCC: OCR Findings

- To the extent SLCC determined the student's requested adjustments would have constituted a fundamental alteration, SLCC did not engage in a proper deliberative process in making such determination.
- SLCC did not consider whether the student's pregnancy caused a temporary disability or engage in the interactive process under Section 504.

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SLCC: OCR Findings

- SLCC's failed to excuse the student's absences and tardies caused by her pregnancy in violation of Title IX.
- SLCC's website does not contain information on how a student may file a complaint alleging pregnancy discrimination, nor does SLCC mention pregnancy discrimination in their Student Code.

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SLCC: Voluntary Resolution Agreement

- Revise its nondiscrimination statement
- Revise its grievance procedures
- Conduct investigation
- Conduct training

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Gender Identity

- Included as part of “sex” for purposes of defining discrimination and harassment
- An institution must not engage in different treatment or separation that causes *more than de minimis* harm unless a statutory exception applies (housing; athletics)
- Differential treatment or separation based on gender identity subjects a person to more than *de minimis* harm

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Athletics

- Separation of athletics teams by sex is the subject of a separate notice of proposed rulemaking and not addressed by August 1, 2024 regulations
- Finalized athletics team regulation not anticipated until 2025

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Troy University's Policy on Harassment and Discrimination

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Policy

- Troy University's policy and procedures regarding Title IX can be found in the Policy on Harassment and Discrimination
- But note that this will be updated before August 1, 2024 to comply with the new Title IX regulations
- The Title IX webpage (<https://www.troy.edu/about-us/leadership/student-services-administration/title-ix-save-act.html>) also includes information and resources

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Scope/Jurisdiction

- Applies to all employees, students, applicants, vendors/contractors, visitors, and all others conducting official business with the University
- Jurisdiction covers all programs, policies, procedures and activities conducted by and through the University

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Reporting

- Everyone, including employees, must report alarming/threatening behavior having the potential to negatively impact the Troy community
- If a situation is an emergency or poses an imminent threat, call 911
- Anyone who witnesses an act of harassment or discrimination may refer the incident directly to the Human Resources Department
- Anyone who believes they are being harassed or discriminated against should report the incident to the Department of Human Resources

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Supportive Measures

- The Title IX Coordinator or campus Point of Contact shall determine appropriate adjustments (i.e., supportive measures) such as:
 - No contact orders
 - Academic accommodations
 - Housing accommodations
 - Counseling services
 - Campus escorts
 - Educational or outreach initiatives
- Adjustments may be taken on an interim or permanent basis, and would not be punitive

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Investigation, Review of Evidence, Report

- Investigations will be conducted by the Title IX Coordinator
- Both parties receive notice of the allegations and investigation
- Investigation may include oral interviews and/or written statements from the parties and/or witnesses
- Investigation will be completed in a timely manner but the Title IX Coordinator will strive to complete it in 45 working days

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