

HUSCH BLACKWELL

Title IX Institutional Advisor Training

Fall 2020

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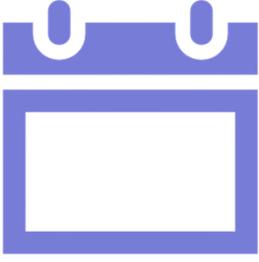
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Agenda

- Title IX Scope, Jurisdiction, and Prohibited Conduct
- Institutional Response to Sexual Harassment
- The Investigation Process
- The Hearing Process and Questioning
- Confidentiality and Other Expectations



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Title IX Scope, Jurisdiction, and Prohibited Conduct

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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.”

32 C.F.R. § 106.31



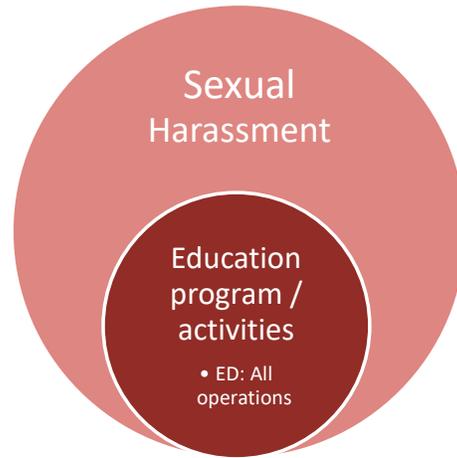
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What sexual harassment does Title IX apply to?

- 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



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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

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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

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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.

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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.



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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.



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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



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What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

Sexual assault

Dating violence

Domestic violence

Stalking

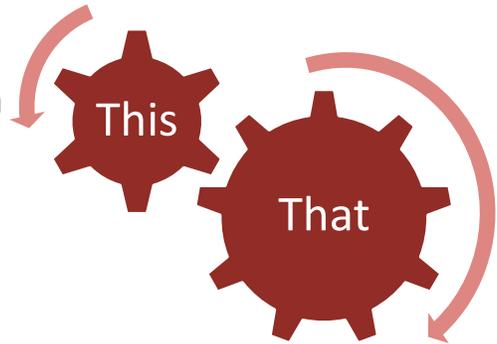
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What is quid pro quo?

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



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Example of quid pro quo

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



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Another example of quid pro quo



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

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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.



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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

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Example of hostile environment

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



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Another example of hostile environment



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

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What is sexual assault?

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

Rape
(including
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Sodomy

Sexual assault
with an object

Fondling

Incest

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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. “Carnal knowledge” means the slighted penetration of the vagina or penis by the sexual organ of another person. Attempted rape is included.

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What is consent?

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

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What is incapacity?

Incapacity refers to a state where a person cannot make an informed and rational decision to engage in sexual contact because the individual lacks conscious knowledge of the “who, what, where, when why or how” of the situation or is physically or mentally helpless.



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Example (incapacitated)

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



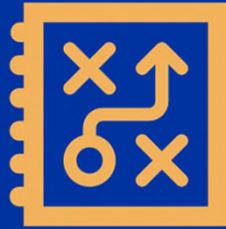
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Example (not-incapacitated)



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

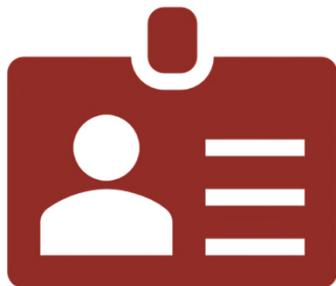
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What is statutory rape?



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

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What is sodomy?

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

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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 offender other than the offender’s genitalia.

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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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Example of fondling

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



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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?

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 of dating violence

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



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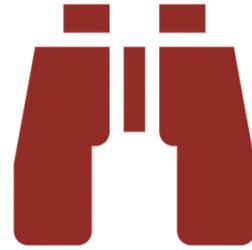
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What is stalking?

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 of stalking



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

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Does Title IX also prohibit retaliation?

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

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Example of retaliation

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

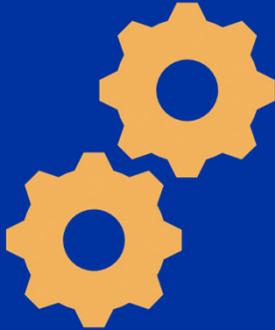


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Group Scenario



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 soccer stadium.

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Institutional Response to Sexual Harassment

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What do we call the parties in a grievance process?

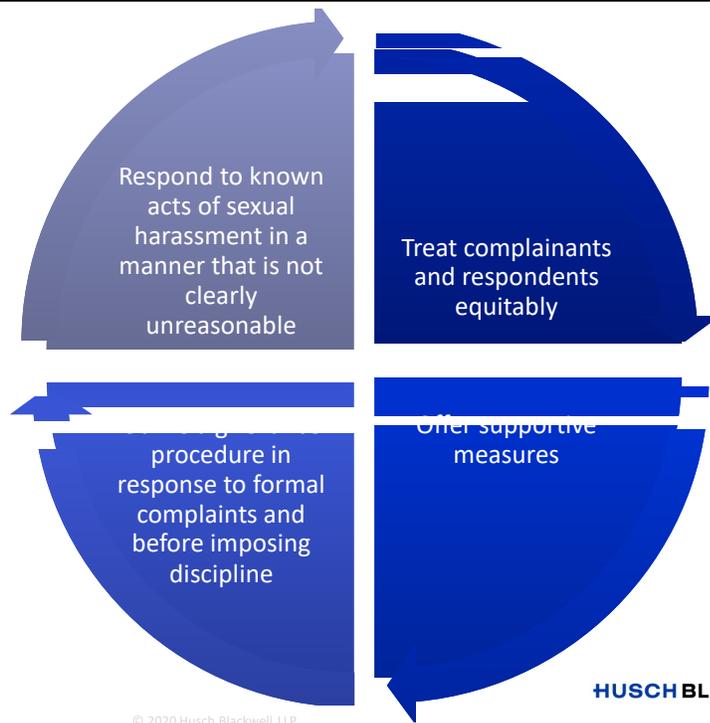
- **Complainant:** The alleged victim of the sexual harassment alleged in the formal complaint
- **Respondent:** The person who is alleged to have perpetrated the sexual harassment alleged in the formal complaint

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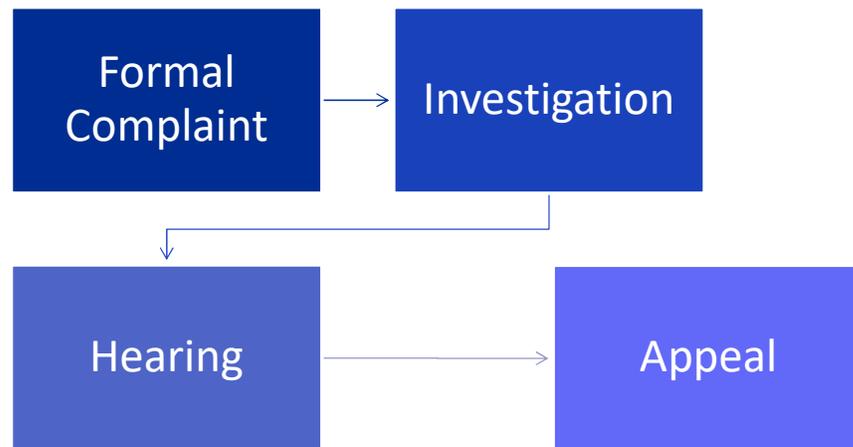
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What are the institution's overall duties?



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Who are the steps in the formal grievance process?



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What general principles govern the grievance process?

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

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Examples of impermissible stereotypes

"Anyone who would go into another's bedroom drunk must have wanted to have sex."

"Greeks 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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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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Example of conflict of interest

Student A files a formal complaint of sexual harassment against Student B. The advisor assigned by the University to assist Student A at the hearing is Student B's faculty advisor who has previously written letters of recommendation for Student B's application to law school in which faculty advisor wrote that Student B is "honest to a fault."



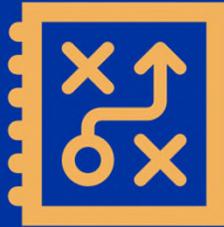
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Example of conflict of interest



Employee A accuses an employee of a food service vendor of sexual harassment. Institution assigns an investigator whose spouse is employed as a manager for the food service vendor and who directly supervises the accused employee.

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Example of bias

Institutional employee chosen to serve on a hearing panel 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."



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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.” He tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”

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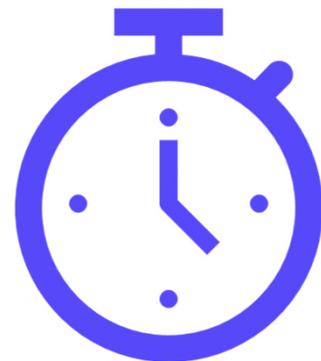
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How long does a grievance process take?

- 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



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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

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Do parties get assistance in the grievance process?

- Yes
- The parties have the right to be accompanied by an advisor of their choice during the investigation and hearing
- The institution must provide the party an advisor for purposes of conducting questioning at the hearing if the party does not have an advisor

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Investigations



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What is the purpose of an investigation?

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

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What is inculpatory evidence?

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



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What is exculpatory evidence?



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

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What are the general principles of an investigation?

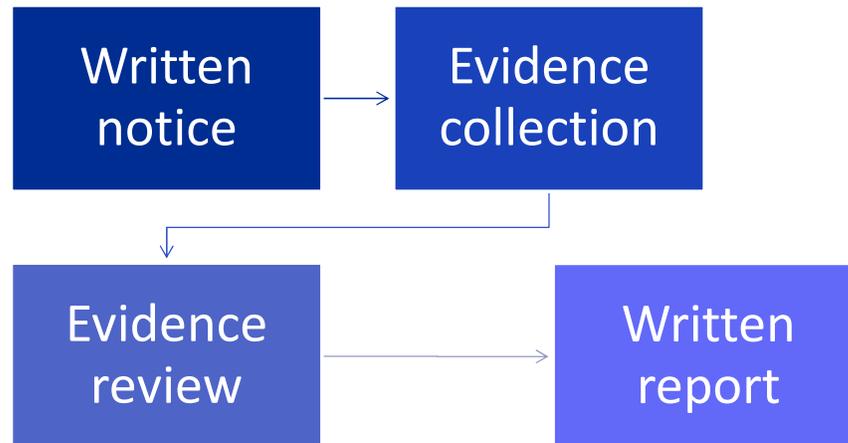
- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity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

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What are the phases of an investigation?



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How do we tell the parties about an investigation?

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



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What else does the notice need to say?

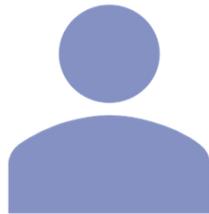
- Written notice must also include:
 - Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
 - That parties have the right to an advisor of their choice
 - That parties have the right to inspect and review evidence
 - Any prohibition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

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How does evidence get collected?



Interviews of parties and
witnesses

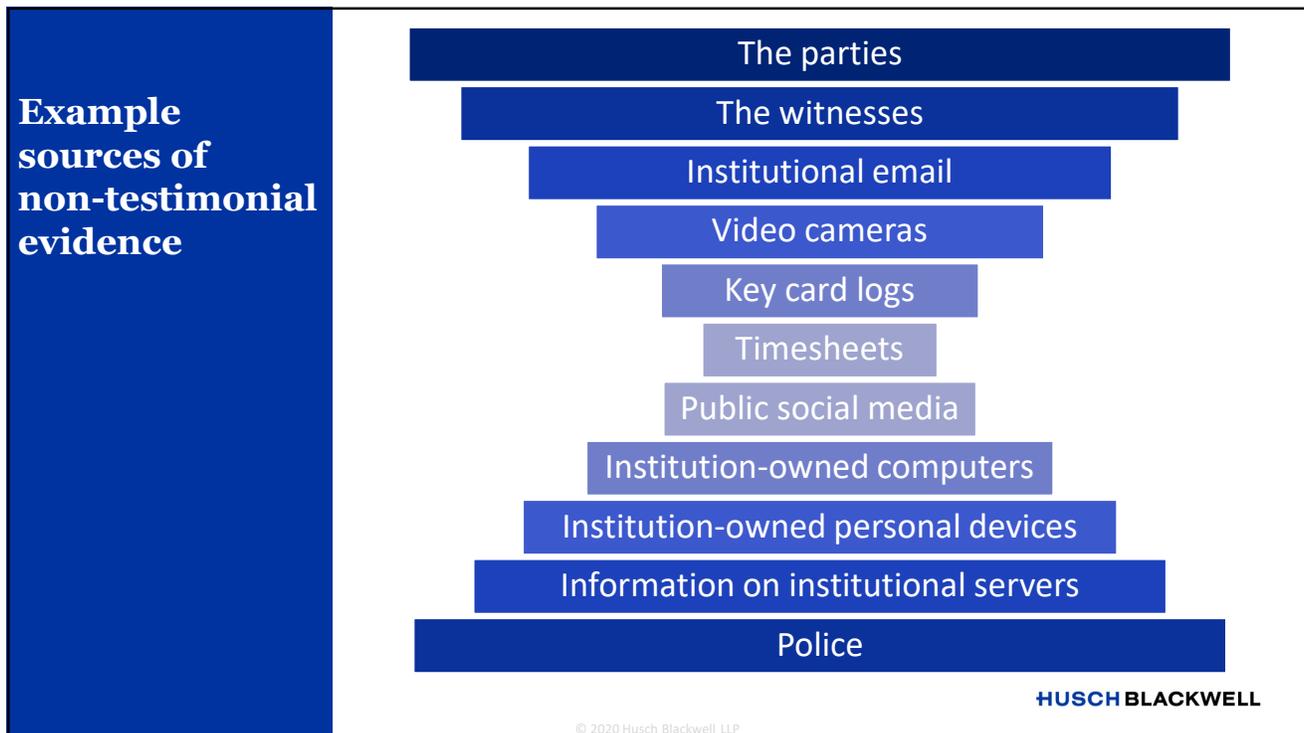


Collection of
non-testimonial evidence

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Do the parties have access to the evidence?

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

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Do the parties get to respond to the evidence?

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



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When is the investigation report finalized?

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

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What is the role of an advisor during the investigation?

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

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What must an advisor not do during the investigation?

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

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What if the advisor breaks the rules?



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

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Example of advisor breaking the rules

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



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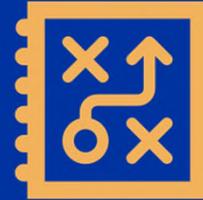
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Example of advisor breaking the rules

A party's advisor tells the investigator the investigator is to communicate solely through the advisor and not send any emails directly to the student. When the investigator emails the student directly to schedule an interview, the advisor calls and verbally attacks the investigator.



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Another example of advisor breaking the rules

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



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Questions



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Hearing Process



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What is the purpose of the hearing?

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

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What does “preponderance” of the evidence mean?

- Preponderance of the evidence
 - “More likely than not”
 - “Greater than 50% likely”



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Who runs the hearing?

- The hearing officer or panel chair
- Decides all procedural issues
- Rules on admissibility of evidence

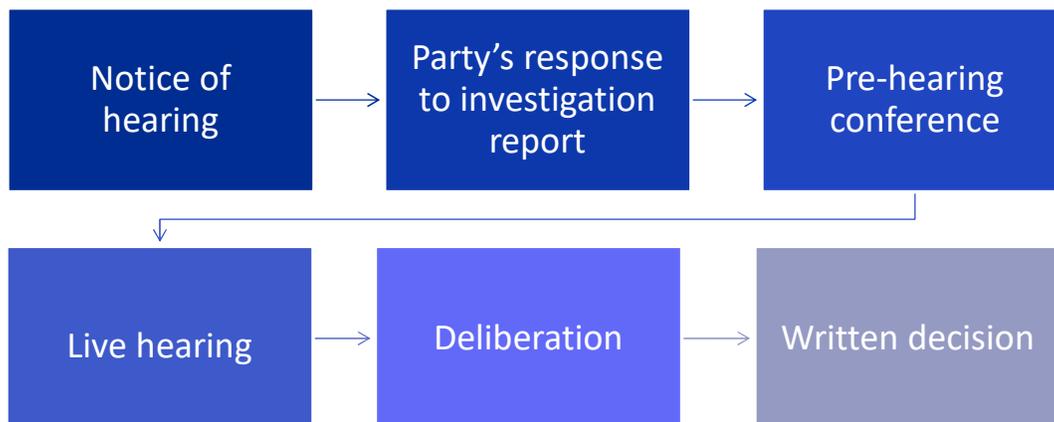


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What are the phases of a typical hearing process?



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

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

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What does the notice say?

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

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What is the pre-hearing conference?

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

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What is a “live” hearing?

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

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Who attends a live hearing?

- The hearing officer or panel
- 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

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What are the logistics of a hearing?

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

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Does the institution provide a party's advisor?

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

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How does the hearing actually work?

- Required elements include:

Hearing officer or panel 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

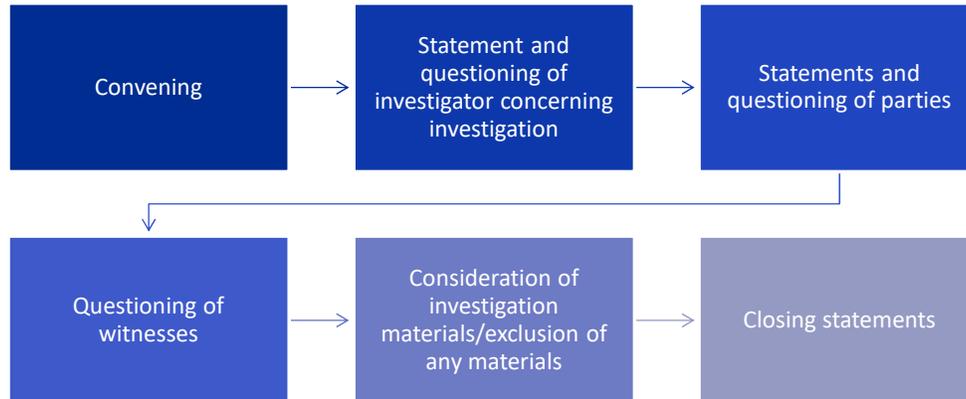
Questioning of sexual history generally not permitted

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What is a potential sequence?

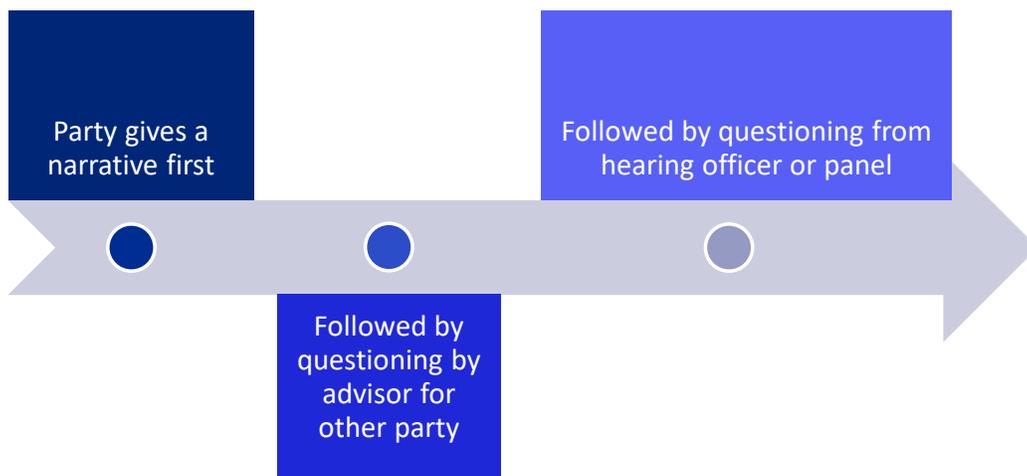


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How might questioning of parties take place?

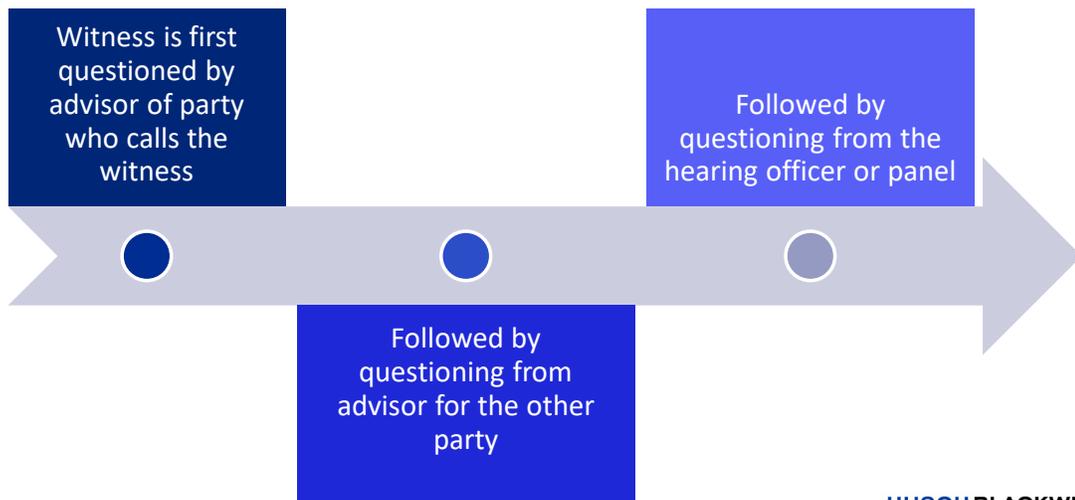


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How might questioning of witnesses take place?



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Who determines relevance?

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

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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
- Relevance must be determined considering the form of sexual harassment alleged

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Example (relevant)

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



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Example (relevant)



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

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Example (not relevant)

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



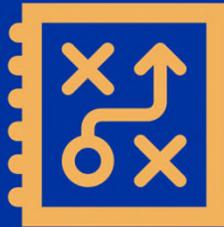
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Example (not relevant)



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

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Is sexual history considered?

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

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Example (impermissible)

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



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Example (permissible)



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

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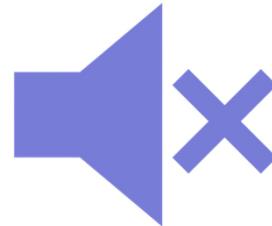
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Does any testimony get excluded?

- Yes – Hearing officer or panel must exclude the statements of any party or witness who refuses to submit to cross-examination from the other party's advisor



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Example (excluded)

Complainant gives emotional account of sexual assault and answers questions from hearing officer. 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 officer complainant cannot endure cross-examination. Complainant leaves the hearing.



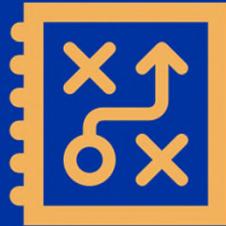
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Example (excluded)



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.

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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.



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Is there a standard of behavior in hearings?

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

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Example (impermissible)

A respondent's advisor smirks, laughs, and throws up her hands during portions of the complainant's testimony that the advisor believes is not credible.



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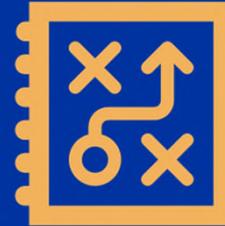
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Example (impermissible)

During questioning of the respondent, a complainant's advisor leaves her table, stands very close to the respondent, points a finger at the respondent, and says "you are a rapist!"



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Example (impermissible)

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



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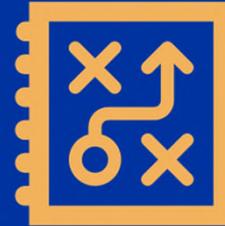
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Example (impermissible)

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



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How long does a hearing last?



- The length of the hearing is set by the hearing officer or panel
- Hearing officer or panel may set time limits for questioning of each witness
- Hearing officer or panel may preclude questioning that is cumulative or duplicative

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How does the hearing officer or panel decide a case?



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



Evaluate evidence for weight and credibility



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



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

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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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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.



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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."



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How does a decision get issued?

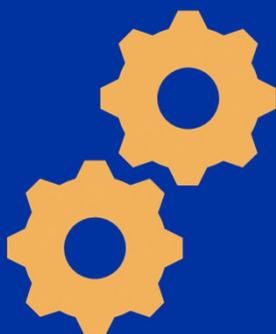
- In a written document, provided contemporaneously to the parties that:
 - Identifies the allegations of sexual harassment
 - Describes the various procedural steps taken from the time the formal complaint was made
 - States findings of facts supporting the determination
 - Reaches conclusions regarding 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

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Group Scenario



Student A accuses Student B of sexual assault. During the investigation, Student C told the investigator Student C saw Student B carry Student A—passed out—into Student B’s dorm room immediately before the alleged sexual assault. Student C does not appear for the hearing as expected. Student A testifies to the hearing officer that Student C saw that Student A was passed out. When Student A testifies to this, Student B’s advocate objects, demands a “mistrial,” and refuses to be silent after the hearing officer declines to exclude the testimony. Later, Student B’s advocate asks Student A whether she’s “ever had drunk sex with anyone else.” Student B’s advocate also asks Student A “What did you tell your counselor about this alleged sexual assault.”

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Questions



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Questioning

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What is the advisor's role in questioning?

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

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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.



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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?

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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.



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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?

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How do I know what questions to ask?

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

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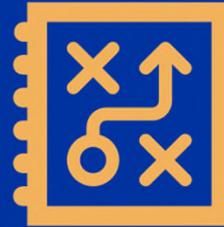
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Example of the elements

Fondling:

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



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Example

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



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Example questions

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

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Example

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



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Example questions

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

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What are the hallmarks of effective questioning?

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

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What is the appropriate manner of asking questions?

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

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

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

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What should you do if your question is deemed irrelevant?

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

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Are you required to make objections?

- If a party believes the other party's advisor is asking an inappropriate question, the party may object
- At most institutions, advisors are not permitted to speak for their advisee, make objections, present arguments, or engage in any other active role except questioning (including cross-examination) of the other party and witnesses

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Are you required to “act like a lawyer”?

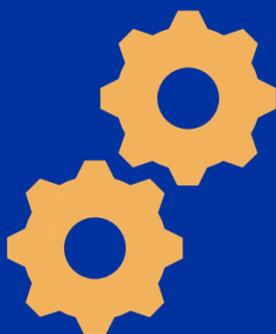
- Your role as advisor is a non-legal role
- You are not providing legal advice
- You are not a prosecutor or a defense attorney
- You are not required to engage in “zealous advocacy” like a private attorney
- You are asking relevant and appropriate questions to reasonably support the case of the party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

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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.

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Confidentiality and Other Expectations



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Are sexual harassment cases confidential?

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



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Must an advisor maintain confidentiality?

- Yes
- If you are an institutional employee, you must abide by the same confidentiality rules as the institution itself, including FERPA
- You should maintain the confidentiality of the process and not disclose information to any third-party except as the process itself permits

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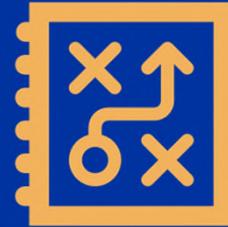
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Example (not permitted)

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



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Example (not permitted)

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



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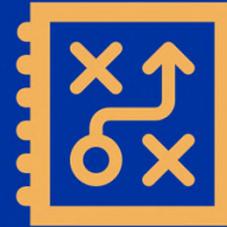
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Example (not permitted)

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



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Are your communications with your party “privileged”?

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

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What if a party is facing criminal charges?

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

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Questions



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