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Title IX Training for Title IX Team Members

June 2024

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Agenda (1 of 2)

- The Title IX Regulation and Its Implementation
- Sex Discrimination and Sex-Based Harassment
- Retaliation
- The Title IX Coordinator and Title IX Team
- Reporting

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Agenda (2 of 2)

- Supportive Measures
- The Grievance Procedures
- Appeals
- Informal Resolution
- Pregnancy

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The Title IX Regulation and Its Implementation

Module 1

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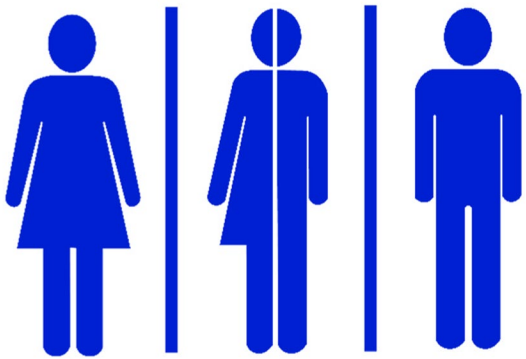
What is Title IX?

"[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. . . "

20 U.S.C. § 1681



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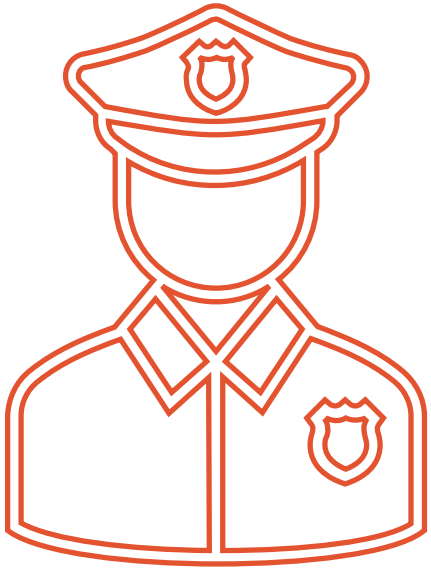
How is Title IX implemented?



- U.S. Department of Education regulations
- Private lawsuits and related court decisions

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Where are the Title IX regulations?

- 34 C.F.R. ("Code of Federal Regulations") Part 106
- Contains dozens of different Title IX regulations, including those that govern appointment of a Title IX Coordinator, publication of institutional policies, and requirements pertaining to grievance procedures
- August 2020 "regulation" amended multiple elements of Part 106 and added new ones

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How does the Department enforce Title IX regulations?

- Largely a complaint-initiated investigation and resolution process led by Office for Civil Rights
- OCR has authority to force compliance through various tools including resolution agreements or initiation of proceedings to revoke financial aid eligibility (last resort)

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What is the “new” Title IX regulation?

- Effective August 1, 2024, a series of revisions to Part 106 that address several issues, including:
  - The scope of sex discrimination and sex-based harassment covered by Title IX
  - The procedures and requirements for addressing complaints of sex discrimination and sex-based harassment
  - Specific content on accommodating pregnancy and pregnancy related conditions

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What portions of the new regulation have garnered the most attention?

- Definition of “sex” to include gender identity and sexual orientation
- Roll-back of some “due process” requirements from August 2020 regulations

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When does the new regulation take effect?

- August 1, 2024
- Those portions of the regulation that govern response to specific instances of sex discrimination and sex-based harassment apply only to incidents that allegedly occurred on or after August 1, 2024
- Earlier incidents are governed by regulations that were in place at the time the misconduct allegedly occurred

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Example

On August 24, 2024, a student is sexually assaulted by a peer in a residence hall on the university's campus. The incident is reported to the Title IX Coordinator the following day.

The new regulations govern the institution's response to this report, including its investigation and determination.

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Example

On August 24, 2024, a student reports that they were sexually assaulted by a peer in a residence hall on the university's campus and that the assault occurred on May 2, 2024.

The August 2020 regulations govern the institution's response to this report, including its investigation and determination.

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Practical Point

Institutions must keep an archive copy of their policies and procedures created in 2020 and apply relevant provisions of those policies and procedures to "transition" cases that are reported after August 1, 2024, but where the alleged incident of misconduct occurred before August 1, 2024.

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Could the courts block the regulation before August 2024?

- Numerous federal lawsuits filed by multiple states, interest groups, and private persons seek to block all or part of the regulations
- Rulings on injunctive relief are likely in July 2024
- A real possibility exists that implementation of all, or a portion of the regulation, could be delayed or blocked

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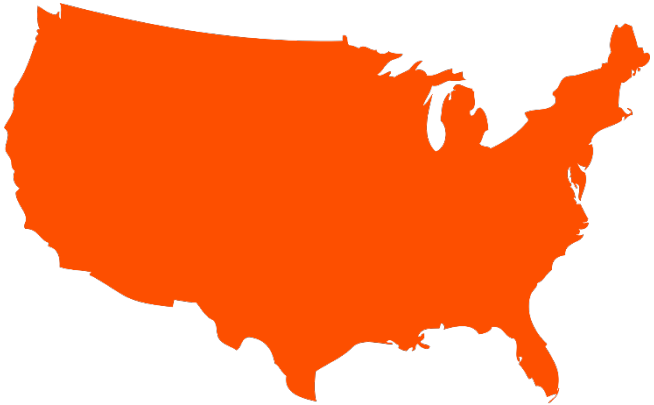
What is the programmatic scope of the new regulation?

- All sex discrimination and sex-based harassment occurring under an institution's education program or activity in the United States



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What is included in education program or activity?

- Any operation of the institution, regardless of location
- Buildings owned or controlled by the institution
- Buildings owned or controlled by an officially recognized student organization (higher education only)
- Conduct that is subject to the institution's disciplinary authority
- The exercise of institutional power or authority by employees and agents regardless of location

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Example

A Texas university operates an online, competency-based degree program. The university's online platform contains several communication tools that allow students in the program to converse with each other. One student, Creed, uses the platform to message another student, Jazz. Creed repeatedly asks Jazz to send Creed "nudes" and forwards Jazz crude memes. Creed lives in North Carolina and Jazz lives in Puerto Rico. Jazz views Creed's messages as unwelcome and offensive.

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Example

A college's student code of conduct prohibits various forms of misconduct and applies to students' actions regardless of their location. For example, the school has used the code to discipline students for using drugs and engaging in underage drinking in their own private apartments.

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Example

One of the university's admissions counselors is friends with a high school student who has applied to attend the university. The two meet for lunch at a local restaurant on a Saturday. During lunch, the counselor offers to "guaranty" the high school student's admission, and scholarship support, in exchange for sexual favors.

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What about misconduct that happens abroad?

- Title IX only requires response to sex discrimination and sex-based harassment “in the United States”
- But institutions must address a “sex-based hostile environment” in their programs and activities even when some contributory conduct occurred abroad

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Example

Students Kelly and Jimmi attended a study abroad program together in Poland. While in Poland, Jimmi made repeated sexual overtures to Kelly, which Kelly rebuffed. Upon returning to campus the next semester, Jimmi continued sexual pursuit of Kelly and began texting and messaging Kelly at odd hours and delivering unwanted gifts to Kelly. Kelly moves off campus and begins to limit time in the recreation center and elsewhere to avoid Jimmi.

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Example (Poll to Follow)

A university and a college jointly operate a study abroad program in Poland. Kelly, a university student, and Jimmi, a college student, attend the study abroad program at the same time. After the program is over, and after Kelly returns to the university, Kelly reports that Jimmi sexually assaulted Kelly in the student residence in Poland. Jimmi has not contacted Kelly since the study abroad program ended. Jimmi's college is located several hundred miles away from the university.

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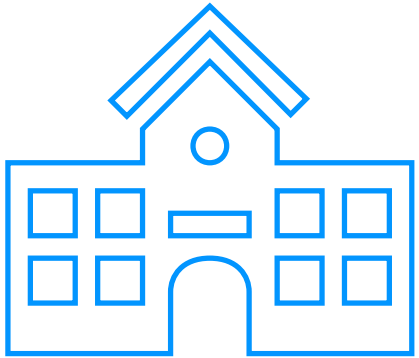
What institutions does the new Title IX regulation apply to?

- Any institution that receives federal funds and operates an education program
- The regulation has some differing requirements for K-12 institutions and “post-secondary” institutions



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Does the Title IX regulation apply to religious educational institutions?

- Yes, if they receive federal funds
- But the regulation contains a self-executing religious exemption that operates on a particularized basis

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What does the religious exemption say?

"This part does not apply to an educational institution which is controlled by a religious organization <u>to the extent</u> application of this part would <u>not be consistent with</u> the religious tenants of such organization."

34 C.F.R. § 106.12 (emphasis added)

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Example (Poll to Follow)

A seminary founded by a conservative church requires all students and employees to agree to an explicit statement of faith. The chair of the seminary's board is the national head of the church, and all board members must be practicing members of the church. Students who graduate from the seminary are ordained and go on to serve as religious ministers. The seminary's statement of faith includes an explicit belief that God created only two sexes—men and women—as defined by their anatomy at birth.

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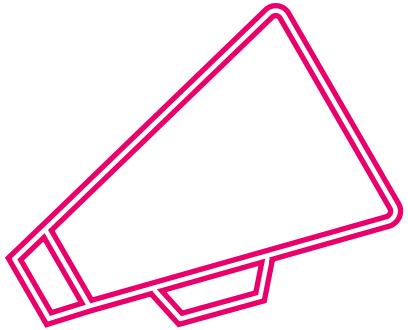
Are there other limitations on the reach of the Title IX regulation?

- Regulation
  - Does not apply to the extent it conflicts with the First Amendment and other Constitutional rights
  - May be limited by the federal Religious Freedom Restoration Act
  - Does not regulate the selection of textbooks or curricular materials



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Example

A public university operates a student newspaper. A journalist for the paper writes an editorial offering the opinion that "most college age males are more interested in taking advantage of women than earning a degree." A group of male students files a report accusing the journalist of creating a hostile environment for men generally, through the comments in the editorial.

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Example

An officially recognized student organization at a public university is religious in nature. The organization owns two off-campus houses—one for male leaders and one for female leaders. The organization espouses the religious belief that males and females should not cohabitate unless they are married. A student complains that the organization's housing practice is discriminatory based on gender identity, sex characteristics, and sex stereotypes.

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Example

A faculty member in the English department teaches a course on modern fiction. As part of the course, students are required to read a highly acclaimed novel that contains descriptions of graphic sex scenes and the use of offensive sexual expletives. Students are also required to write an essay about the novel and the phenomenon of sexual fiction as a literary art form. Several students complain that the content of the novel is highly offensive and has created a hostile environment for them.

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Practical Point

Because the Title IX regulation does not apply in any way that would violate Constitutional rights, some Title IX complaints must be dismissed and/or rejected at the outset, without subjecting the respondent to a burdensome process, where it is clear the conduct alleged is constitutionally protected activity.

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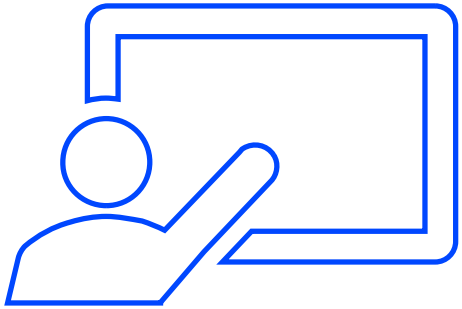
Does the new regulation require training?

- All Title IX “team” members must be trained initially and annually on their respective roles and duties in the Title IX process
- All employees must be trained initially and annually on prohibited conduct and mandatory reporting/information sharing requirements



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When should initial training occur?

- For team members, preferably before August 1, 2024 and certainly before working on any specific Title IX matter post-August 1, 2024
- For all employees, as soon as practical after August 1, 2024, and certainly before widespread interaction with students
- For new employees thereafter, “promptly upon hiring”

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Practical Point

For schools that operate on a traditional academic calendar, annual Title IX training should be part of the "back to school" training package in August or September (depending on the semester's start date) and should be offered in a virtual or small group form thereafter as new employees are added throughout the academic year.

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Questions

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Sex Discrimination and Sex-Based Harassment

Module 2

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What misconduct does the Title IX regulation address?

- Sex discrimination
  - Sex-based harassment

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What does the Title IX regulation include in the concept of “sex”?

- Assigned sex at birth
- “Biological” sex
- Sex stereotypes
- Sex characteristics
- Pregnancy and pregnancy-related conditions
- Sexual orientation
- Gender identity

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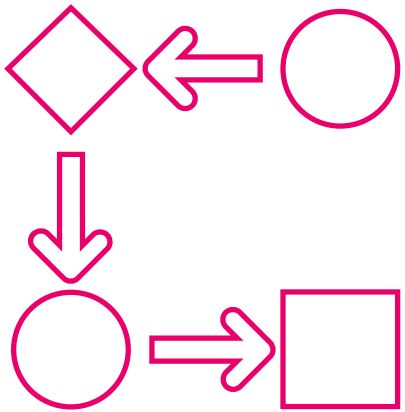
What is sex discrimination?



- Adverse treatment of a person on the basis of sex
- Limits or excludes the person from participating in the institution's education program or activity or denies or limits the benefits thereof

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Programmatic Discrimination

Individualized Discrimination

Sex-Based Harassment

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What is programmatic discrimination?

- Where discrimination occurs in a systematic way due to an *institutional* policy or practice
- Programmatic discrimination adversely affects persons as a group or by category, rather than by individualized decision
- Programmatic discrimination is usually *not* attributed to an individual perpetrator (i.e., “respondent”)

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Example

A college provides brand new facilities, luxury travel, unlimited food, new equipment, new uniforms, and full ride scholarships for most men's sports teams. Women's teams have outdated facilities, ride in vans, eat per-diem, use old equipment and old uniforms, and get only partial scholarships.

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Example

An institution has male and female-designated residence halls. The female halls are either new or newly renovated and all are configured with “suite style” spaces where small groups share a living room, bathroom, and kitchenette. The male residence halls are old, consist solely of a traditional dormitory room shared by two persons, have communal bathrooms by floor, have no kitchen facilities, and lack air conditioning.

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Example

An institution's business school creates a special mentorship program that pairs female students with a female mentor who is a successful business executive. Only female students are allowed to participate. The program significantly improves the odds of a participant receiving a job on graduation. In addition to the mentor relationship, the program includes special seminars held on campus, paid travel to a national summit, a small scholarship, and a plaque awarded to the participant at the program's conclusion.

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Question for Discussion

Is this program permissible, despite excluding males, if the intent is to address systematic underrepresentation of women in the business industry?

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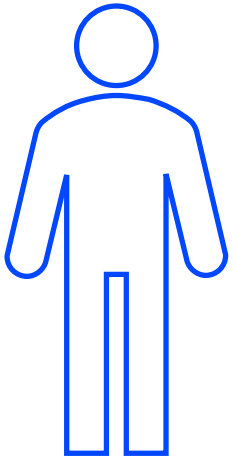
What is individualized discrimination?

- A particular decision is made, or particular action taken, that results in adverse treatment of a particular person that limits or excludes them from participation or denies or limits benefits
- Typically, individualized discrimination has an identifiable “respondent” who makes the discriminatory decision



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Example

A supervisor has interviewed one male candidate and one female candidate for an open position. The supervisor prefers working with men because the supervisor believes women can be "catty" and "emotional." The supervisor decides to hire the man, and not the woman, *because* of his stereotypical beliefs about women.

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Example

A faculty member at a public university opposes same sex relationships. The faculty member purposefully assigns a harsh grade to an openly gay student *because* of the faculty member's animus toward the student's sexual orientation.

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Example

A faculty member at a public university opposes same sex relationships. The faculty member assigns a harsh grade to an openly gay student. However, the faculty member assigns similarly harsh grades to straight students who turn in similarly-deficient work product.

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Practical Point

Individualized discrimination involves adverse treatment that is taken *because of* or *based on* the target's sex. If a person is treated the same way as similarly situated individuals, *despite* sex, then there is no individualized discrimination, even if the treatment is adverse.

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Example

A straight, male student, Rick, is uncomfortable being friends with gay men. When a gay male student, James, invites Rick to join conversations or attend social events with James and others, Rick politely declines. Rick does not direct any unwelcome conduct towards James.

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Question for Discussion

Is Rick engaged in sex discrimination against James?

What if Rick were the president of an officially recognized student group and Rick refused to let James join the group because of Rick's discomfort being around gay men?

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Practical Point

To be sex discrimination under Title IX, adverse treatment based on sex must be coupled with some exclusion from, limitation, or denial of participation in the benefits of an institution's education programs or activities, which is defined broadly to include all the "operations" of an institution.

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Is different treatment or sex-separation ever permitted?

- If it results in no more than *de minimis* harm (i.e., it is not material)
- Or is otherwise explicitly permitted by the statute or regulations, like:
  - Sex-separated living facilities
  - Sex-separated sports teams involving a contact sport or where selection is based on competitive skill
  - Social fraternities and sororities
  - Father-son/mother-daughter activities

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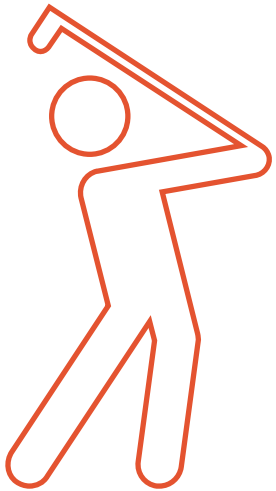
Is there specific guidance on competitive sports teams?

- The Department of Education is planning to issue separate guidance specifically addressing this subject
- Likely no earlier than 2025



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What about separation based on gender identity?

- A policy or practice that prevents a person from participating consistent with the person's gender identity subjects a person to more than *de minimis* harm and is discriminatory
- Unless the separation is specifically permitted by Title IX or the regulation

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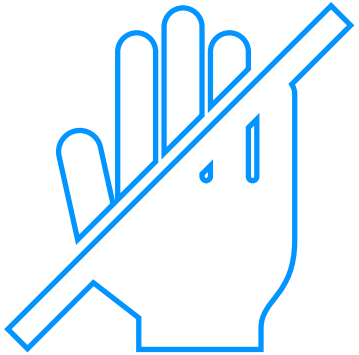
What is sex-based harassment?



- Conduct that is sexual in nature or on the basis of sex
- And that constitutes:
  - Quid pro quo harassment
  - Hostile environment harassment
  - Certain specific offenses

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What's the difference between sexual conduct and conduct that is on the basis of sex?

- "Sexual" means the conduct itself has a sexual nature
- "On the basis of sex" means the conduct is targeted at a person because of their sex

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Example

Jean repeatedly leers at Calvin's genitals, makes crass sexual jokes to Calvin, and propositions Calvin to engage in sexual activity. Calvin is not receptive to any of this and has repeatedly told Jean to stop.

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Example

Calvin repeatedly tells jokes to Jean about how women are "stupid," denigrates Jean's own mental ability as a woman in front of others, and makes incessant, mocking comments to Jean about cooking, cleaning, and raising babies.

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Example

Frankie, a transgender male, is repeatedly pushed, shoved, and subject to physical aggression by a group of other students who live in the same residence hall. The aggressors engage in their conduct *because* of their animus towards Frankie's transgender status.

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What are the different categories of sex-based harassment?

- Quid Pro Quo Harassment
- Hostile Environment Harassment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

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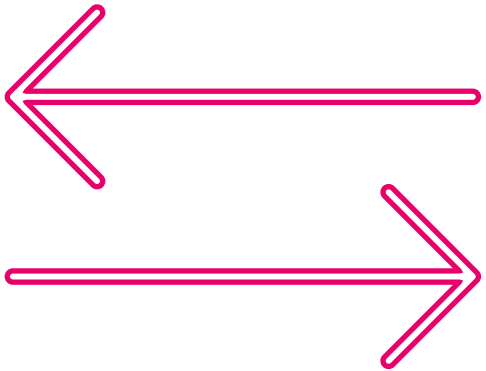
What is quid pro quo harassment?

An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.



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Example

A member of the university's board of trustees offers to secure a student's admission to the university's medical school if the student agrees to perform sexual favors the student would otherwise not want to perform.

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What is hostile environment harassment?

Unwelcome, sex-based conduct that, based on the totality of 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 recipient's education program or activity (*i.e.*, creates a hostile environment).

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What factors do we consider in determining a hostile environment?

- The degree to which the conduct affected the complainant's ability to access
- Type
- Frequency
- Duration
- Parties' ages
- Parties' roles and other factors about each party
- Previous interactions
- Location of the conduct and context
- Other sex-based harassment at the institution

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Example

The coach of the tennis team repeatedly leers at a particular player's chest and genitals, lingers in the locker room whenever the player is present, tells the player unsolicited details about the coach's prior sexual conquests, and rubs the player's shoulders without permission. The player is increasingly affected by the unwelcome conduct and eventually withdraws from the team to avoid the coach's attention.

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Question for Discussion

What factors in this scenario weigh in favor of a finding of hostile environment harassment?

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Example

A first-year student is sexually attracted to a graduate student, starts a conversation with the graduate student, and then uses a crude and corny sexual pickup line. The graduate student rebuffs the first-year and asks to be left alone. Two days later, the first-year sends the graduate student an email apologizing for the joke and asking the graduate student to have coffee, like "two responsible adults." The graduate student does not respond and never hears from the first-year again, although they occasionally pass each other on a public sidewalk.

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Question for Discussion

What factors in this scenario weigh against a finding of a hostile environment harassment?

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What is sexual assault?

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

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Rape

Statutory Rape

Fondling

Incest

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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 any 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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Does the Title IX regulation define consent?

"The Assistant Secretary will not require a recipient to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment."

New Title IX Regulation

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How should we think about consent?

- Consent in fact
  - Determined by whether the relevant facts establish conduct that amounts to agreement to engage in sexual activity--as agreement is defined by the institution
- Ability to consent
  - Determined by whether a person has capacity to consent or whether they have lost such capacity

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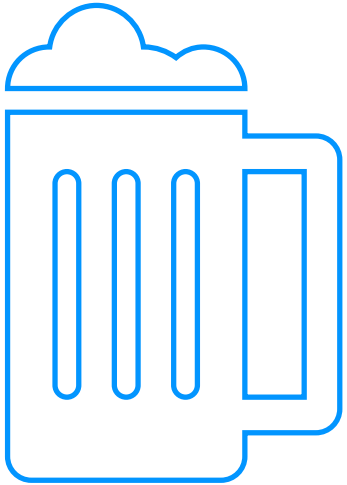
How do we know if a person is incapacitated due to alcohol or drugs?



- Loss of ability to make a reasoned decision and communicate it
- Loss of appreciation of the nature and fact of sexual activity
- Loss of appreciation of the “who, what, when, where, and how”

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What facts may be relevant to determining incapacity due to alcohol or drugs?

- Ability to speak coherently
- Ability to track conversation
- Ability to appreciate and weigh risks and benefits
- Ability to walk or stand
- Ability to engage in behaviors requiring presence of mind
- Time period of consumption
- Nature of alcohol or drugs
- Amount of alcohol or drugs
- Size of the person consuming
- Others?

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Example

Angel went out to a bar with her friends at 9:00 pm and had eight cocktails over the course of two hours. Leaving the bar at 11:00 p.m., Angel was stumbling and had to be supported by friends. Angel attempted to make a call while riding in a car back to campus but could not enter the passcode on her phone. Upon arriving to campus, and before exiting the car, Angel and her friends smoked marijuana. As her friends led her by the hand up to the residence hall's entrance, Angel asked "Where are we?"

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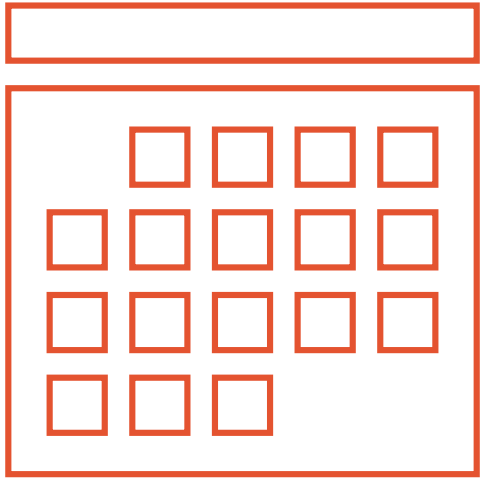
What is statutory rape?

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



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Practical Point

Every state has laws governing the mandatory reporting of child sexual abuse. Depending on state law, sexual assaults of minors may need to be immediately reported to state or local officials, irrespective of what the victim and/or their parents want to do.

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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 domestic violence?

Felony or misdemeanor crimes committed by a person who:

- Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a personal similarly situated to a spouse of the victim
- Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner
- Shares a child in common with the victim, or
- Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction

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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 (Poll to Follow)

Griff and Dane meet at a party and hookup in Griff's on campus apartment. The two do not see each other again for three weeks, until they meet at another party and decide to hookup again. During the second hookup, Griff begins to choke Dane without consent, causing Dane to pass out.

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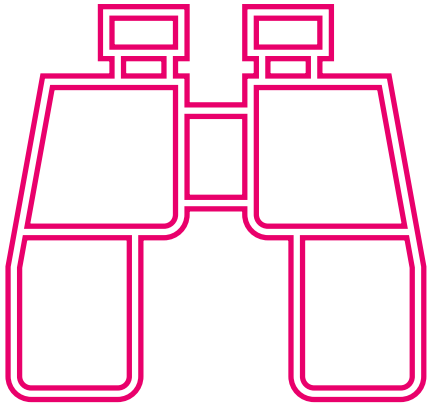
What is stalking?



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

Akilah and Dallas live in the same residence hall. Dallas is romantically attracted to Akilah and asks Akilah to go with Dallas to a club. Akilah declines and indicates she's not interested in Dallas. Dallas then sends Akilah a friend request on social media, and Akilah agrees. A few days later, Akilah posts a photo of herself at a local pool wearing a bikini. Dallas comments on Akilah's social media, "Damn!!! Looking hot !!!". Akilah reports Dallas for stalking.

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Question for Discussion

Do Dallas's actions amount to stalking?

What if, in addition, Dallas repeatedly takes pics of Akilah in the common room and tries to get information on Akilah's interests and hobbies from Akilah's friends?

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Questions

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Retaliation

Module 3

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What is retaliation?

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 [or the Title IX regulation], or 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 [the Title IX regulation] . . . .

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Does retaliation require intent?

- "[F]or the purpose of interfering with any right or privilege secured by Title IX . . ."
- Requires a subjective state of mind of the respondent

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Example

Damon is accused of sexually assaulting Reggie after Reggie got high in a fraternity house with drugs provided by Damon. Damon hires an aggressive attorney as his advisor who engages in highly effective cross-examination against Reggie at the hearing. Damon is found not responsible for sexual assault. Believing Damon would have been found responsible if Reggie could have afforded an attorney to cross-examine Damon, the Title IX Coordinator decides to make a student conduct complaint against Damon for dealing drugs so that Damon will at least be punished for something.

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Question for Discussion

Did the Title IX Coordinator engage in retaliation?

What if the Title IX Coordinator always referred instances of drug distribution to student conduct, irrespective of the outcome of the Title IX case?

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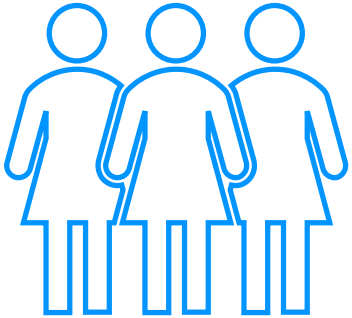
Can peers engage in retaliation?



- "A recipient must prohibit retaliation, including peer retaliation . . ."
- Complaints of peer retaliation may be appropriate for consolidation with an underlying report of sex discrimination or sex-based harassment

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Is it retaliation to punish someone for lying during a Title IX proceeding?

- An institution may punish a person for making false statements in a Title IX proceeding
- Provided there is evidence of falsity apart from the outcome of the Title IX proceeding itself

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Example

Cyrus is accused of fondling Jamie outside a residence hall. At the hearing, Cyrus testifies "I never touched Jamie. We just talked, and I gave Jamie a hug." Jamie testifies that, after Cyrus hugged Jamie, Cyrus then groped Jamie's genitals. The hearing officer finds Jamie more credible and determines a preponderance of the evidence supports that Cyrus fondled Jamie.

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Question for Discussion

Can Cyrus be disciplined for falsely testifying that he didn’t fondle Jamie?

What if, after the Title IX hearing, the institution uncovered security camera footage that clearly depicted Cyrus grabbing Jamie’s crotch, and Jamie pulling away in shock?

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Is it retaliation if a respondent files a counter-complaint?

- Only if the counter-complaint is made in bad faith for the purpose of interfering with the complainant's exercise of Title IX rights

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Practical Point

Institutions should proceed cautiously and not presume a counter-complaint is retaliatory simply because it comes second. Doing so can create a "race to the Title IX Coordinator" scenario and risks systematic bias against respondents.

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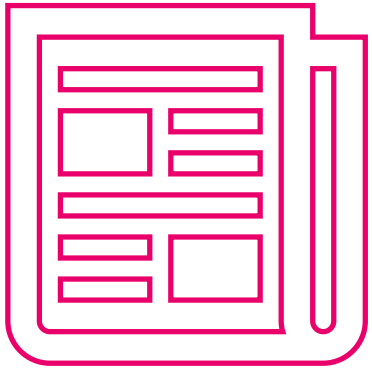
Is there any retaliation that is allowed?



- Some conduct that meets the technical definition of retaliation may be Constitutionally protected
- Freedom speech
- Freedom of association
- Freedom of religion

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Example

A high-profile student athlete at a public university is accused of sexual assault. Over the course of the investigation, it becomes clear the allegations are suspect and may have been the product of delusions from a complainant who was high on drugs and had a mental illness. After the complainant withdraws the allegations, a staffer on the student newspaper writes a scathing editorial accusing the complainant of misusing the Title IX process and making it harder for "real victims" to be believed.

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Example

A chaplain at a private religious institution is accused of sexual assault and refuses to be interviewed by the Title IX investigator. The chaplain's duties primarily involve preaching, providing spiritual advice, leading Bible studies, and teaching theology classes. The institution's president terminates the chaplain's employment solely because the chaplain is refusing to cooperate in the Title IX investigation.

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Can employees be compelled to serve as witnesses?

"Nothing in this definition [of retaliation] . . . precludes a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service . . . to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part."

New Title IX Regulation

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Example

A faculty member who was at a conference in a neighboring city observed a colleague check into a hotel with a student. The student later made a complaint of quid pro quo harassment against the colleague, and the faculty member is identified as a relevant witness. The faculty member does not want to testify and is concerned that doing so will anger other faculty who are allied with the colleague.

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Question for Discussion

May the institution compel the faculty member to attend the hearing and testify?

Why is it necessary for the institution to have the power to compel its employees to participate?

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Questions

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The Title IX Coordinator and Title IX Team

Module 4

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Who are the Title IX team members?

- Title IX Coordinator
- Deputy Title IX Coordinators
- Investigators
- Decision-makers
- Informal resolution facilitators
- Appellate officers
- Persons responsible for supportive measures

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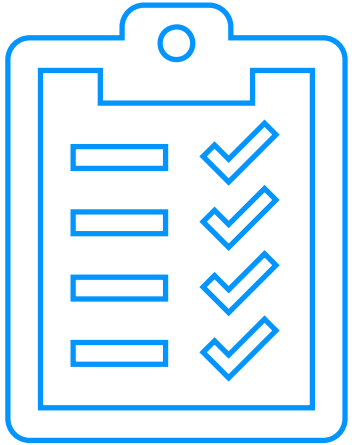
What are the team members' general qualifications?

- Appropriately trained in their duties and relevant policy
- Competent
- Free of conflicts of interest
- Free of bias and not relying on stereotypes



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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 Conflicts

An investigator assigned to a case babysat for the complainant when the complainant was a child as is still close with the complainant's family.

A hearing officer previously wrote a glowing letter of recommendation for the respondent.

An appeal officer in a case previously supervised the complainant and recommended her termination for performance reasons.

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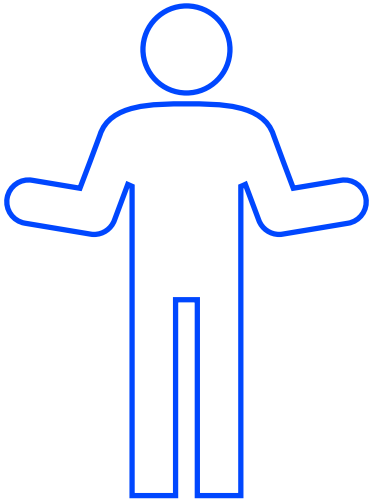
What is bias?



- A prejudice, predisposition, or inclination in favor of or against a thing or person
- Team members must be free of bias against complainants or respondents generally, or a specific complainant or respondent

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Example of Bias

An investigator assigned to a sexual assault case also serves on the board of a local sexual assault advocacy organization. The organization recently announced a new campaign supporting sexual assault victims titled: "Believe them all." As a board member, the investigator voted to approve the campaign. The investigator holds the personal belief that persons who report sexual assault should be believed unless objective evidence proves their allegations to be false.

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Example of Bias

A hearing officer (a faculty member) previously had the complainant as a student. As a student, the complainant was frequently absent from the faculty member's class, which prompted the faculty member to send the student an email accusing the student of having a poor work ethic and threatening to fail the student. The email included the following: "I am singularly unimpressed with your performance. You are, without question, one of the laziest and least attentive students I have had in my career. I fear your future is bleak."

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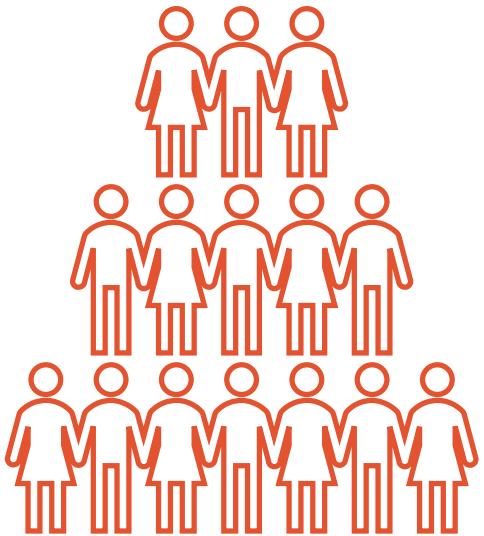
What are stereotypes?

A form of bias that operates as a preconceived, generalized, and sometimes inaccurate belief about a person based on their membership in a group or some other characteristic.



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Examples of Impermissible Stereotypes

Members of sports teams and Greek organizations always lie for each other.

Women who wear tight dresses and go to parties are looking to hookup.

Men are always the aggressors in a sexual encounter.

Gay men are always physically weak and “effeminate.”

Transpeople are looking to draw attention to themselves.

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What are some of the Title IX Coordinator's responsibilities?

- Coordinate overall Title IX compliance
- Answer questions about Title IX programs
- Coordinate training
- Receive reports and complaints
- Provide information about options and rights to complainants and others
- Coordinate supportive measures
- Provide information about grievance procedures and informal resolution
- Initiate relevant processes
- Screen for conflicts and bias
- Coordinate with disability services staff
- Evaluate efficacy of reporting and barriers to reporting
- Ensure retention of Title IX records

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Can the Title IX Coordinator be an investigator?

- No *per se* rule prohibits Title IX Coordinator from being an investigator
- Title IX Coordinator must be especially attentive to actual or perceived conflicts of interest

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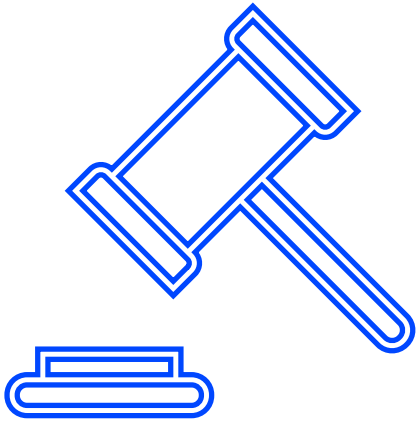
Can the Title IX Coordinator be a decision-maker?

- No *per* se rule prohibits the Title IX Coordinator from being a decision-maker
- Potential for conflicts of interest
- Potential to undermine confidence in Title IX Coordinator's ability to effectively serve



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Practical Point

If the Title IX Coordinator serves as a decision-maker, the Title IX Coordinator may be unfairly portrayed as generally pro-complainant or pro-respondent depending upon the determination. This portrayal may affect perceptions of the institution's overall Title IX efforts (training; reporting; supportive measures; policy) that the Title IX Coordinator is responsible for.

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Who can serve as an informal resolution facilitator?

- Cannot be the investigator *in the same case*
- Cannot be the decision-maker *in the same case*

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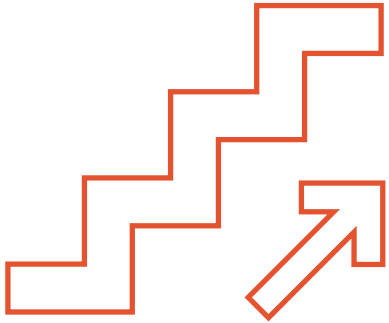
Who can serve as an appeal officer?

- Appeal officer should be a different person(s) than the person whose decision is appealed
- Not decision-maker
- Not determiner of dismissal
- Not decider of supportive measures



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Who administers supportive measures?

- Title IX Coordinator must "coordinate" supportive measures
- Responsibility for determining supportive measures (or some types of them) can be delegated with appropriate oversight

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Questions

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Reporting

Module 5

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What's the difference between a report and a complaint?

- A report is information about potential sex discrimination or sex-based harassment
- A complaint is an oral or written request to investigate and determine alleged sex discrimination or sex-based harassment

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Who can make a report?

Anyone.

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Which employees must report to the Title IX Coordinator?

- All non-confidential employees at K-12 institutions
- In higher education, all non-confidential:
  - Employees with authority to institute corrective measures
  - Administrators
  - Faculty and other teachers
  - Advisors

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What triggers the reporting obligation?

- Information about conduct that reasonably may constitute sex discrimination or sex-based harassment
- This is significantly less than a preponderance (*i.e.,* “likely”) standard

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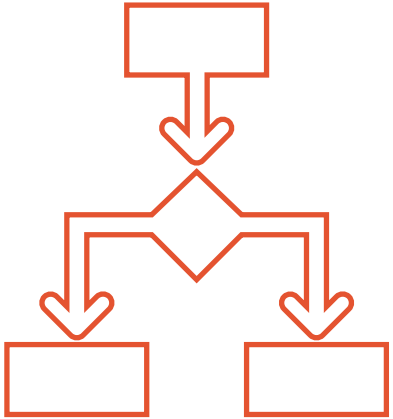
What about non-confidential employees who are not mandatory reporters?

- They must
  - Make a report to the Title IX Coordinator, <u>or</u>
  - Provide contact information for the Title IX Coordinator, and information about how to make a complaint to anyone who provides information about conduct that reasonably could be sex discrimination or sex-based harassment



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Example

John works as a custodian in a residence hall. One day while John is sweeping the tile in a hallway, he sees student Marco run by being angrily chased by student Renea. As Renea passes by John, Renea looks at John as she exclaims “that dude just grabbed my chest!”.

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Question for Discussion

Does John the custodian have an obligation to either report or provide Renea information about the Title IX Coordinator and how to make a complaint?

How confident are you that John will be able to have an adequate conversation with Renea about the Title IX Coordinator and how to make a complaint?

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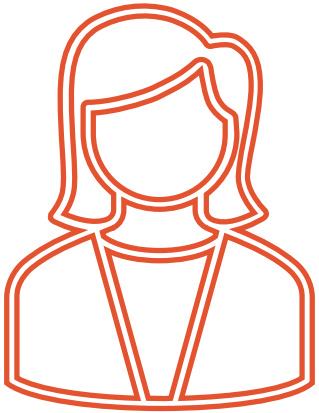
How should student employees be treated for reporting purposes?



- Institution must “reasonably determine and specify whether and under what circumstances” a student-employee is subject to reporting
- Categories of mandatory reporting should, at a minimum, apply to students when acting in an employee capacity
- Whether students who have jobs that aren’t in mandatory categories should report, and when, is within an institution’s reasonable discretion

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Example

Zoe is a student employee who works in the academic advising office. Zoe's job duties include advising students on requirements to earn a degree and how to select a sequence of classes to enroll in. During an advising session with a student, the student remarks to Zoe that they were sexually assaulted.

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Which employees can maintain confidentiality?

- An employee whose communications are privileged or confidential under the law
- An employee designated as confidential for purposes of providing services to persons related to sex discrimination or sex-based harassment
- An employee who is conducting Institutional Review Board-approved human subject research pertaining to sex discrimination or sex-based harassment

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What are some examples of confidential employees?

- Medical doctors and other health care providers
- Psychologists and professional counselors
- Attorneys
- Sexual assault advocates
- Clergy and religious advisors
- Ombudspersons (if designated as such for sex-discrimination matters)

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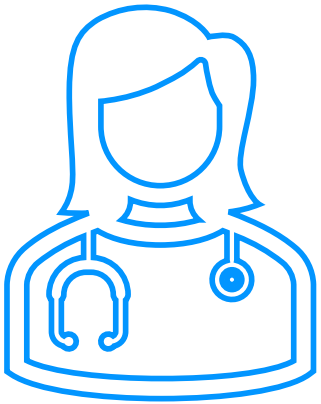
When does confidentiality apply?

- Only when the employee is acting in their confidential capacity
- Information learned in a non-confidential capacity may be subject to mandatory reporting



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Example

A faculty member is conducting an IRB approved human-subject research study designed to study the impact of sexual assault on the academic prospects of victims. One day, a student who is not involved in the research study visits the faculty member during office hours. During the visit, the student remarks that they recently experienced bullying and harassment in their sorority house based on their sex characteristics.

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Do confidential employees have information-sharing obligations?

- A confidential employee must:
  - Notify a person of the employee's confidential status, and
  - How to contact the Title IX Coordinator and make a complaint, and
  - That the Title IX Coordinator may be able to offer supportive measures as well as initiate informal resolution or grievance procedures

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Practical Point

An institution should develop a short handout or pamphlet that confidential employees can provide to persons and that satisfies the confidential employee's information sharing obligation. Using a document, rather than relying on an oral conversation, improves consistency of sharing and accuracy of information.

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What if information is received during an awareness event?

- No obligation to act in response to the information, <u>unless:</u>
  - Imminent and serious threat to health or safety of any person
  - But, consider information in proactive efforts to prevent sex-based harassment

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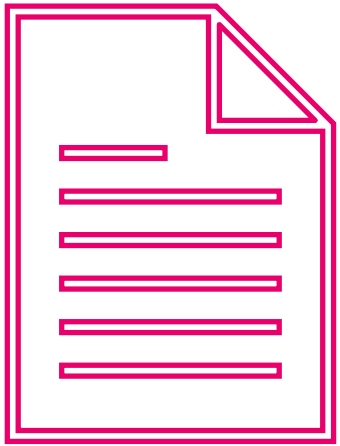
What must the Title IX Coordinator do once they receive a report?



- Offer and coordinate supportive measures to the alleged victim
- Notify the alleged victim, or if unknown, the reporting party, of grievance procedures, including informal resolution, if available and appropriate

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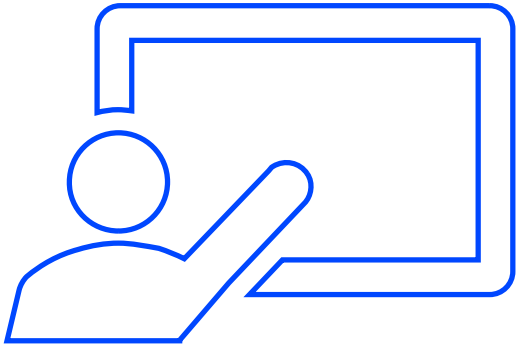
What if no complaint is filed?

- Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur



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What if the report does not implicate Title IX?

- Title IX Coordinator is not required to offer supportive measures and other steps
- If the Title IX Coordinator reasonably determines the conduct
- Could not constitute sex discrimination or sex-based harassment

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Examples

A faculty member requires students to read a book germane to the course that a student finds offensive in subject matter.

A student reports that another student asked them on a date and did nothing else.

A student claims that anti- or pro- abortion protests consistent with the First Amendment are creating a hostile environment.

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Questions

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Supportive Measures

Module 6

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What are supportive measures?

- Individualized measures
- Offered as appropriate
- As reasonably available
- Without unreasonably burdening a party
- Not for punitive or disciplinary reasons
- Without fee or charge
- To restore or preserve access
- Or provide support during the grievance process or informal resolution

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What are examples of supportive measures?

- Counseling
- Academic accommodations
- Housing accommodations
- Security escorts
- Leave of absence
- Increased security or monitoring
- Modified work schedules
- Mutual no-contact order if implicated by facts

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Example (Poll to Follow)

A female employee reports that her male supervisor harbors animus towards women and denied the employee a salary increase based on her sex. The employee requests to receive an immediate pay increase to “restore or preserve” access to the institution’s activity of “employment.”

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Examples

Student Chang reports that student Bo sexually assaulted Chang. Chang claims the assault has made it impossible for Chang to study and attend classes. As a supportive measure, Chang requests to be awarded his degree without having to complete the remaining 15 hours of coursework specified in the catalog.

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Question for Discussion

Is this requested supportive measure "reasonably available"?

What supportive measures are appropriate when a party claims that sex-based harassment has *already* impacted their grades?

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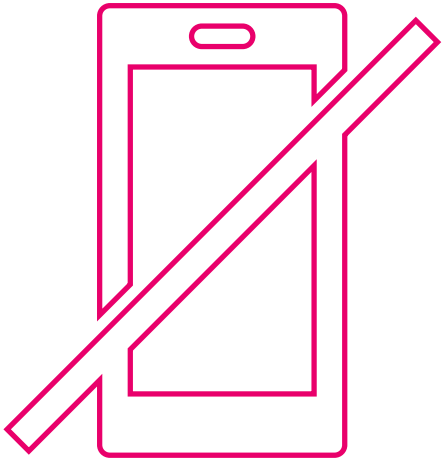
When is a no contact order appropriate as a supportive measure?

- When reasonably available
- When not an unreasonable burden
- When necessary to restore access or preserve safety
- Never for disciplinary or punitive reasons



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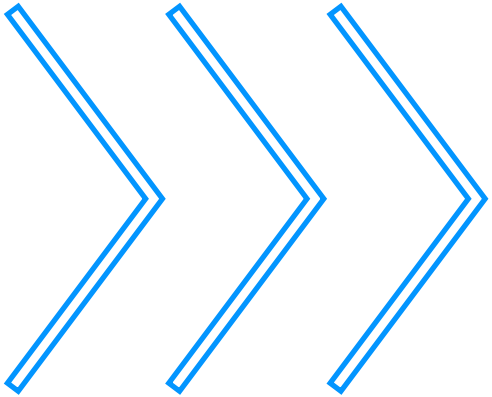
When are supportive measures offered?

- For the alleged victim, promptly after receiving a report
- For the alleged perpetrator, when grievance procedures or informal resolution are initiated



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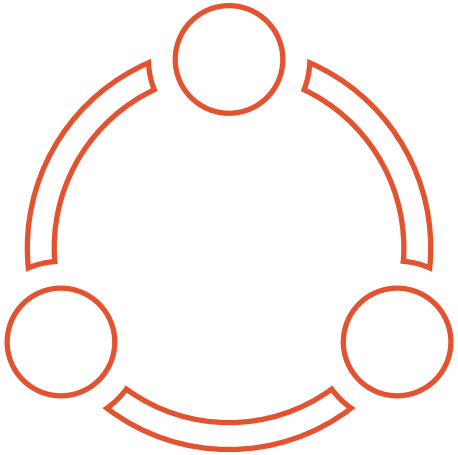
May an institution terminate supportive measures?



- An institution may modify or terminate supportive measures “as appropriate” at the conclusion of grievance procedures or informal resolution
- <u>Or</u> a recipient may continue them beyond that point

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Practical Point

Supportive measures that do not impact a respondent can and often are continued after a determination, for at least some period. Supportive measures that burden a respondent typically either convert to an element of discipline (if a finding of a violation is made) or terminate if a finding of no violation is made.

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What if a party disagrees with a supportive measure decision?

- Institution must provide either party a “timely opportunity” to seek modification or reversal of supportive measure decision applicable to that party
- Appeal goes to an “appropriate and impartial employee” who was not the initial decisionmaker

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Question for Discussion

How detailed does the supportive measure appeal process need to be?

What “grounds” or “standards” govern the supportive measure appeal process?

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Practical Point

If someone other than the Title IX Coordinator made the initial supportive measure decision, the appeal will likely go to the Title IX Coordinator. If the Title IX Coordinator made the initial supportive measure decision, the appeal will likely go to an administrator with jurisdiction over the party in question (i.e., Dean of Students; Provost; Director of Human Resources).

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What if circumstances change?

- Institution must provide a party with the opportunity to seek modification or termination of supportive measures applicable to them
- If circumstances change materially

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Example

Kline reports that Cletus fondled Kline several months ago at an on-campus party. Kline believes a no-contact order is unnecessary because Cletus now lives off campus and Kline rarely sees them. After Cletus is notified of the complaint, Cletus threatens Kline via text message and begins to regularly appear outside Kline's academic building.

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What if a party has a disability?

- If a K-12 student: Title IX Coordinator must consult with IEP team and officials responsible for IDEA and Section 504 compliance
- If a college or university student: Title IX Coordinator may consult, as appropriate, with persons responsible for disability supports and accommodations (e.g., a disability services coordinator)

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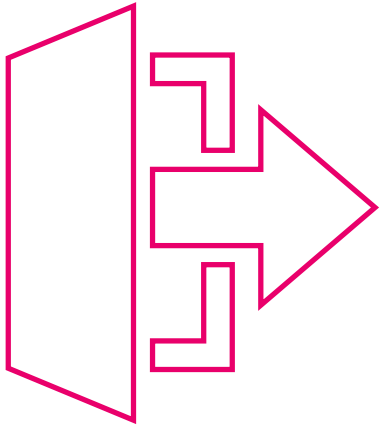
Can a respondent be removed on an emergency basis?



- A respondent can be removed on an emergency basis if <u>individualized</u> analysis finds:
  - Imminent and serious threat to health or safety of another person, and
  - The respondent is provided an immediate opportunity to appeal the removal decision

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Example

Kline makes a complaint that Cletus fondled Kline several months ago at an on-campus party. When Cletus is notified of the complaint, Cletus sends Kline a text message threatening to kill Kline and attaching a picture of Cletus holding an assault rifle and dressed in tactical gear. Kline reports that Cletus owns several guns and has an extreme temper.

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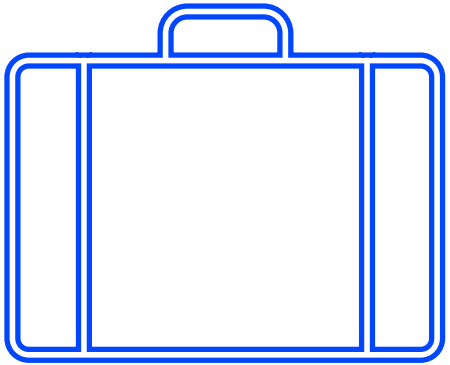
Can an employee respondent be placed on leave?

- An institution may place an employee respondent on administrative leave from their job duties during the pendency of grievance procedures
- Due process, state law, and contractual obligations may be relevant limitations



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Example

A faculty handbook states that faculty may only be placed on administrative leave if the President of the institution certifies in writing that placing the faculty member on leave is necessary to prevent a clear and imminent danger to the university, to other employees, or to students.

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Questions

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The Grievance Procedures

Module 7

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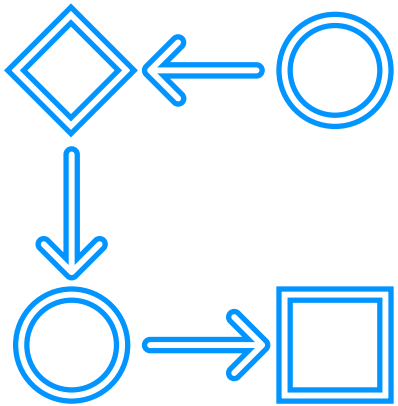
Must an institution have grievance procedures?

- An institution must adopt, publish, and implement grievance procedures
- For the prompt and equitable resolution of complaints
- Alleging <u>any</u> action prohibited by Title IX



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Practical Point

The August 2020 Title IX regulation almost exclusively addressed complaints of sexual harassment. The new Title IX regulation imposes more explicit grievance procedures for complaints of other forms of sex discrimination and sex-based harassment.

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What are the general principles of grievance procedures?

- Prompt and equitable
- Published in writing
- Administered by persons free of conflicts of interest and bias
- Presumption respondent not responsible until a determination is made
- Reasonable steps to protect privacy
- An objective evaluation of all relevant and not otherwise-impermissible evidence
- Credibility determinations not based on a party's status

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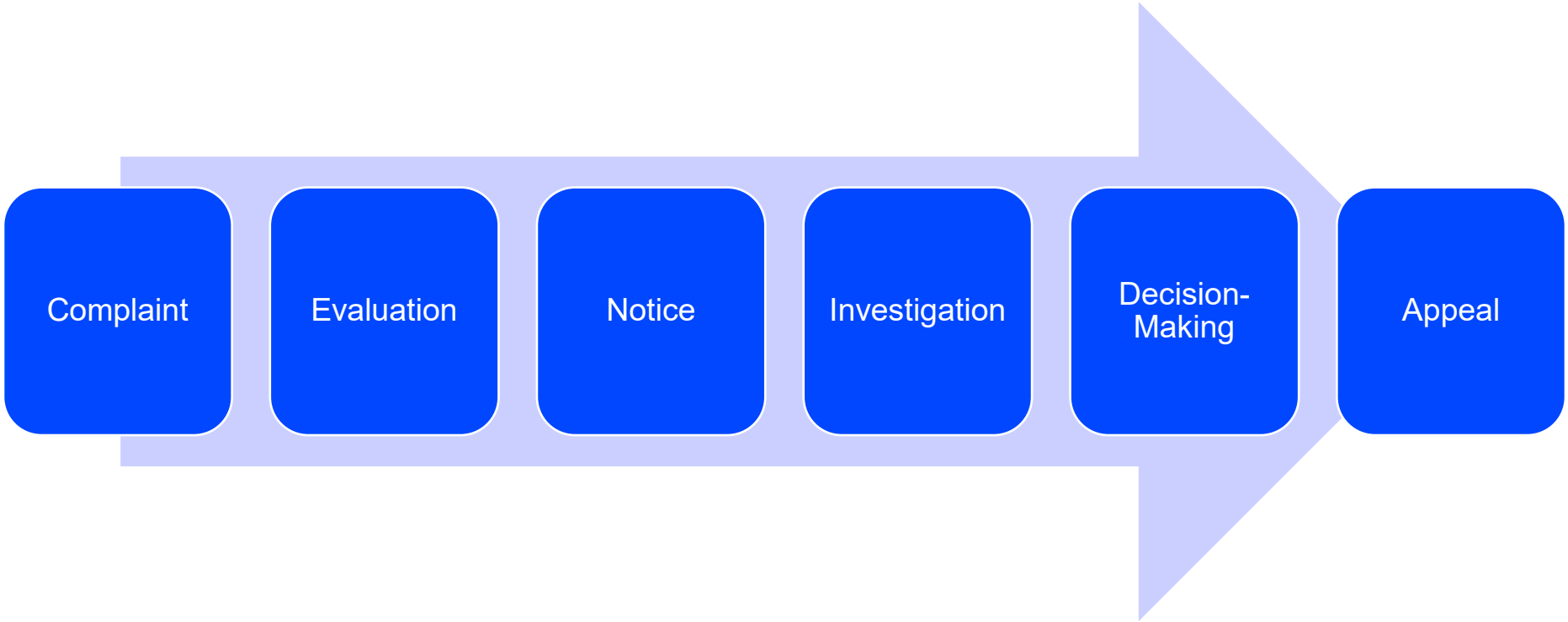
What does the grievance process look like?



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What are the two grievance processes?

- General grievance process in § 160.45
- Minimum grievance process that applies to
- All sex discrimination and sex-based harassment except that covered by *46

- Augmented grievance process in § 160.46
- Applies additional requirements to cases with
- Sex-based harassment involving a college or university student as a complainant or respondent

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The *45 General Process

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Who can make a complaint?

- The alleged victim
- A parent, guardian, or other authorized legal representative with the legal right to act on behalf of an alleged victim
- For sex discrimination other than sex-based harassment, any student or employee, or other person who was participating or attempting to participate at the time of the alleged discrimination, <u>and</u>
- The Title IX Coordinator, subject to certain factors

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Example

A 16-year-old high school student is participating in a summer enrichment program on the university's campus. While on campus, the student is sexually harassed by another program participant. The student's mother may make a complaint of sex-based harassment.

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Example

An assistant coach believes that members of women's sports teams are being discriminated against by receiving poor quality food, old uniforms, few training opportunities, and insufficient facilities, relative to men's teams. The assistant coach can file a complaint, even though it is the players who are allegedly being discriminated against.

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When can the Title IX Coordinator make a complaint?

- In the absence of a complaint, or when any or all allegations in a complaint have been withdrawn
- And provided informal resolution is not ongoing
- And provided a fact specific determination justifies making the complaint

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What facts must the Title IX Coordinator consider?

- The alleged victim's desire not to proceed
- The alleged victim's safety concerns
- The risk misconduct will recur
- Severity of the alleged misconduct
- The likelihood discipline would be removal, if case was proven
- The age and relationship of the parties
- Multiple alleged victims
- Ongoing misconduct or a pattern
- Availability of evidence
- Whether alternatives exist

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Practical Point

It will be an unusual case where the Title IX Coordinator exercises authority to initiate a complaint of sex-based harassment against the alleged victim's wishes. Substantial concerns about an ongoing risk of significant misconduct will often be present.

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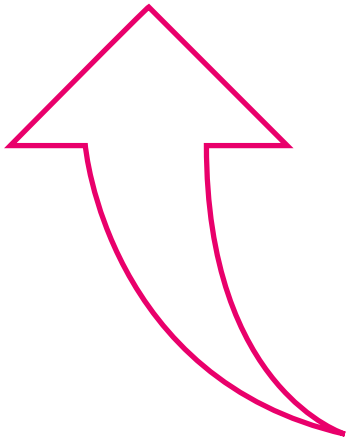
Are complaints evaluated for dismissal?

- Under the new regulation, all dismissals are permissive, rather than mandatory
- But a complaint should still initially be evaluated for dismissal on one or more of several specific grounds



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What are the grounds for dismissal?

- Respondent cannot be identified despite reasonable attempts
- Respondent is no longer a participant and is not employed
- Complainant voluntarily withdraws some or all allegations and the Title IX Coordinator elects not to file a complaint
- The alleged conduct in the complaint (or remaining alleged conduct after withdrawal of some allegations), if proven, would not constitute sex discrimination or sex-based harassment

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Example

Joe, a student, makes a complaint that Joe's sister, Jean, was subjected to discrimination by a faculty member who gave Jean a bad grade solely because the faculty member is trying to weed women out of the field. When Jean is notified of the complaint, Jean states that she was not discriminated against and received a grade merited solely by her deficient work. Jean indicates a desire for the complaint not to proceed.

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Question for Discussion

Has Jean “withdrawn” the allegations?

Should the Title IX Coordinator dismiss the complaint?

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Example

An assistant coach for the track team is accused of sexually propositioning a team member. After being notified of the complaint, the assistant coach resigns and has no remaining relationship with the institution.

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Who receives notice of the dismissal?

- The alleged victim
- And, if the respondent has been notified of the complaint, the respondent too
- The notice can be given orally, or in writing, but if in writing, must be simultaneous

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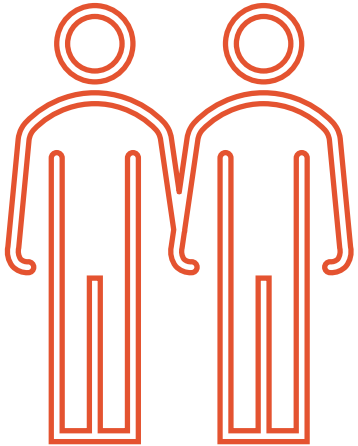
Can a dismissal be appealed?



- Institution must notify the alleged victim that the dismissal can be appealed
- And if the respondent has already been notified, institution must notify the respondent too
- Appeal is permitted on the same specified grounds and procedures that govern a final decision

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Are there obligations after a dismissal?

- Institution must offer supportive measures to the alleged victim, as appropriate
- If the respondent is known, is a current participant or employee, and has already been notified of the complaint, offer supportive measures to the respondent too
- Title IX Coordinator must implement other prompt and effective steps to prevent future sex discrimination and/or sex-based harassment

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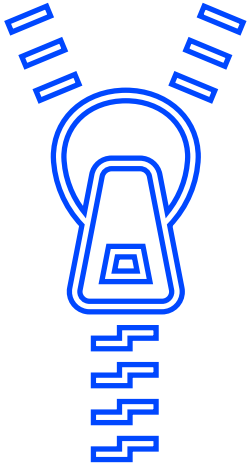
Are complaints evaluated for consolidation?



- Complaints may be consolidated when allegations arise out of the same facts and circumstances
- Can involve multiple parties
- If one party is a post-secondary student alleging or accused of sex-based harassment, *46 procedures apply to the consolidated case

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Example

Jimmi alleges that fellow golf team member Sammi engaged in hostile environment harassment by repeatedly telling sexual jokes about Jimmi to others and referring to Jimmi with sexual epithets. Jimmi also alleges that an assistant coach engaged in sex discrimination by tolerating Sammi's jokes about Jimmi, while stopping members from similarly joking about another student, Rick, who is perceived to be more sexually attractive than Jimmi.

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Example

Crystal alleges that Newt sexually assaulted Crystal one month ago, in Newt's office, when Crystal was too drunk to consent after an employee reception. Separately, Reagan alleges that Newt sexually assaulted Reagan two weeks ago, in Newt's office, when Reagan was too drunk to consent after a donor reception. Crystal and Reagan are aware of each-other's complaints, and both refer to Newt as a "sexual predator."

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Question for Discussion

Can these two complaints against Newt be consolidated?

If they are not consolidated, how would they proceed? And would each complainant be involved in the other's grievance process? If so, how?

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Is there an investigation under *45?

- After a complaint has passed the evaluation stage
- There is an adequate, reliable, and impartial investigation

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What are the key elements of a *45 investigation?

- Burden is on the recipient to gather sufficient evidence
- Parties have equal opportunity to present fact witnesses and other relevant evidence
- Institution must review corpus to determine relevant and not otherwise impermissible evidence
- Provide each party an equal opportunity to access the evidence that is relevant and not otherwise impermissible

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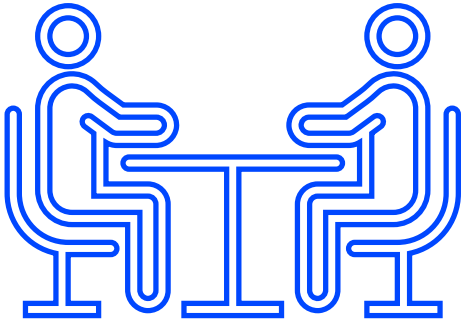
What form will the investigation take?



- Likely interviews of the parties and witnesses with relevant information, unless non-testimonial evidence is dispositive
- Collection of non-testimonial evidence that is relevant and not otherwise impermissible

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What evidence is considered relevant?

- Evidence is relevant if it “may aid a decision-maker in determining whether the alleged sex discrimination occurred”
- Questions are relevant if they seek evidence that may aid in showing whether the alleged sex discrimination occurred

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Example

Jamie has accused Victor of dating violence. Jamie alleges that, while the two were on a date at an on-campus softball game, Victor became enraged and slapped Jamie when Jamie returned from the concession stand without having buttered the popcorn as Victor had asked.

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Question for Discussion

Is it relevant whether Jamie and Victor have had prior interactions with each other?

Would it be appropriate to ask Jamie and Victor whether their prior interactions where romantic, and if so, how?

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Example

Jamie has accused Victor of stalking. Jamie alleges she has never spoken to Victor, but that Victor repeatedly leered at Jamie at the employee dining room, walked behind Jamie in the parking lot, and left "secret admirer" notes under Jamie's door.

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Question for Discussion

Is it appropriate to ask Jamie whether Jamie has ever had a substantive interaction with Victor?

Is it appropriate to ask Jamie whether they have ever received “secreted admirer” notes from someone else?

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What evidence is impermissible, even if it may be relevant?

- Evidence that is protected under a legal privilege, or that was provided to a confidential employee, unless the party voluntarily waives the privilege or confidentiality
- A person's health care records, unless the person gives voluntary, written consent
- Evidence of the complainant's sexual interests and history

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What are examples of evidence subject to a legal confidentiality privilege?

- Attorney-client communications
- Communications with health care providers
- Communications with psychologists, counselors, and social workers
- Communications with a priest or cleric

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Example (Poll to Follow)

At a private, religious institution, the investigator is interviewing a faculty member who serves as an academic advisor to the complainant. The faculty member is also an ordained minister and provides spiritual counseling after chapel hours. The faculty member remarks during the interview: "You know, the *respondent* came to speak to me about this whole thing after chapel . . . ."

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Practical Point

Because the party holding a confidentiality privilege is not typically present when witnesses are interviewed, the investigator must self-police to make sure not to ask questions, or to encourage testimony, that would violate confidentiality.

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How do the regulations define a complainant's sexual history?

- Any evidence that "relates to the complainant's sexual interests or prior sexual conduct", unless:
  - Offered to prove that someone other than the respondent committed the alleged misconduct, or
  - The evidence is about prior, specific sexual incidents with the respondent and offered to prove the presence of consent with regard to allegations of sex-based harassment

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Example

A complainant alleges the respondent coerced the complainant into performing oral sex. During the interview, the complainant states, “I think oral sex is gross. It’s not something I normally do, even with people I’m dating.” May the investigator ask how many times the complainant has voluntarily performed oral sex?

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Example

A complainant alleges the respondent coerced the complainant into performing oral sex, which the complainant considers “gross, and something I just don’t do.” The respondent has claimed oral sex between the two parties was routine, and the complainant often initiated it without being specifically asked to. May the investigator ask the complainant whether the complainant voluntarily performed oral sex on respondent on prior occasions, and if so, whether complainant initiated the incidents?

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Is there a prohibition on asking about the respondent's sexual history?

- No explicit prohibition
- But evidence about the respondent's sexual history must still be relevant, and
- Overall process must still be equitable and fair

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Are there guidelines for questions about a respondent's sexual history?

- Respondent's prior sexual encounters should not be used simply to demonstrate a character trait
- Prior sexual encounters may be relevant to show a *modus operandi*
- Prior sexual encounters may be relevant to show motive, opportunity, intent, absence of mistake, lack of accident or to respond to something the respondent has put at issue

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Example

A complainant alleges the respondent sexually assaulted the complainant after the respondent offered the complainant a single drink at a bar and the complainant quickly passed out. At least two other women have been identified as witnesses, who will describe similar sexual incidents involving the respondent where each believes they were drugged.

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Example

A complainant alleges that a respondent fondled the complainant by groping the complainant's crotch during a dance. The respondent claims the contact was an accident. Ten witnesses have been identified who will testify that, at various dances over the last six months, they experienced similar groping from the respondent.

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How are interviews to be documented/recorded?

- *45 grievance process does not require any particular form of documentation or recording
- “Interviews” could even be written questions and written answers (provided, the investigator is not also the decision-maker—*more on that in a bit*)

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How are parties provided access to the evidence?

- Parties get access to either: (1) the evidence itself, or (2) an “accurate description of this evidence”
- If a description is provided, the institution must allow either party to access the underlying evidence, if requested
- Parties must be given a “reasonable opportunity” to respond before a decision is made

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Question for Discussion

If the parties have the right to see the underlying, relevant and not-otherwise impermissible evidence on request, does it make sense to prepare and give access to a description, initially?

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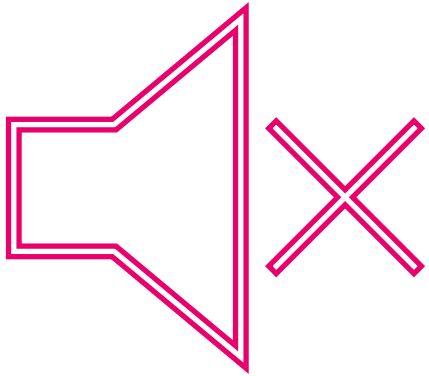
Are the parties required to maintain confidentiality of the evidence (or description)?

- Institution must take reasonable steps to prevent and address parties' unauthorized disclosure of evidence obtained solely through grievance procedures
- Use of evidence for administrative proceedings or litigation related to the complaint itself is authorized



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Example (Poll to Follow)

A complainant alleges that the respondent committed sexual harassment by repeatedly sending the complainant sexual text messages. After the parties are provided access to the investigation evidence, the complainant shares the text messages with several friends.

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Example

A complainant alleges that the respondent committed hostile environment harassment. After the parties have been provided the evidence, and the respondent realizes that the complainant related the allegations of harassment to several friends, the respondent files a defamation lawsuit against the complainant and specifically refers to the witness statements from the interviews in his civil lawsuit petition.

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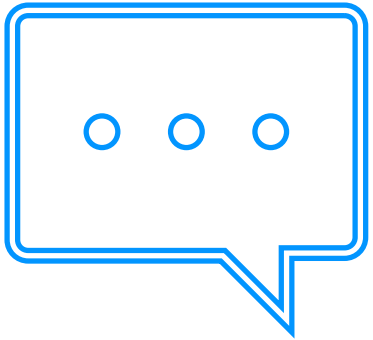
What is a reasonable opportunity to respond?

- “Reasonable” implies both time and form
- Time depends upon complexity of the case, but institutions can set a default rule (i.e., seven days)
- Form could be in writing or in a subsequent meeting



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When does the decision occur?

- After the parties have had a “reasonable” opportunity to respond to the relevant evidence and/or accurate description
- After the decision-maker has had the ability to “question parties and witnesses to adequately assess a party or witness’s credibility <u>to the extent credibility is in dispute and relevant</u>”

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Who is the decision-maker under the *45 process?

- The person who determines whether or not the allegations are supported under the standard of evidence
- The decision-maker <u>can be</u> “the same person as the Title IX Coordinator or investigator”

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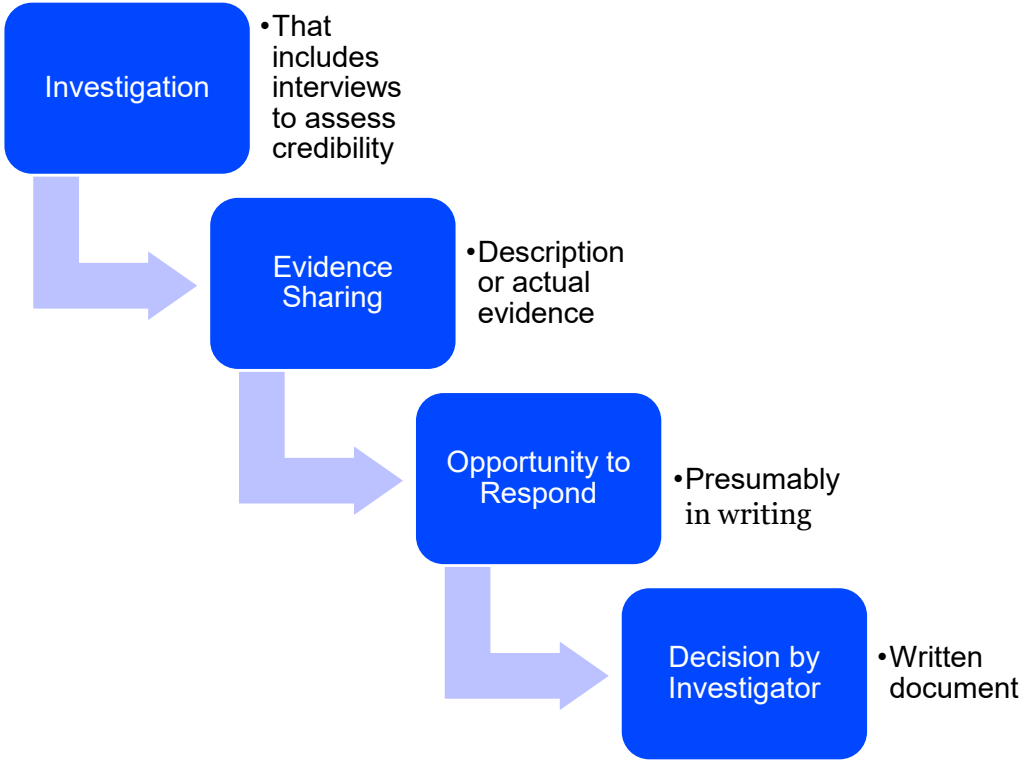
Can you have a *45 "single person" model?



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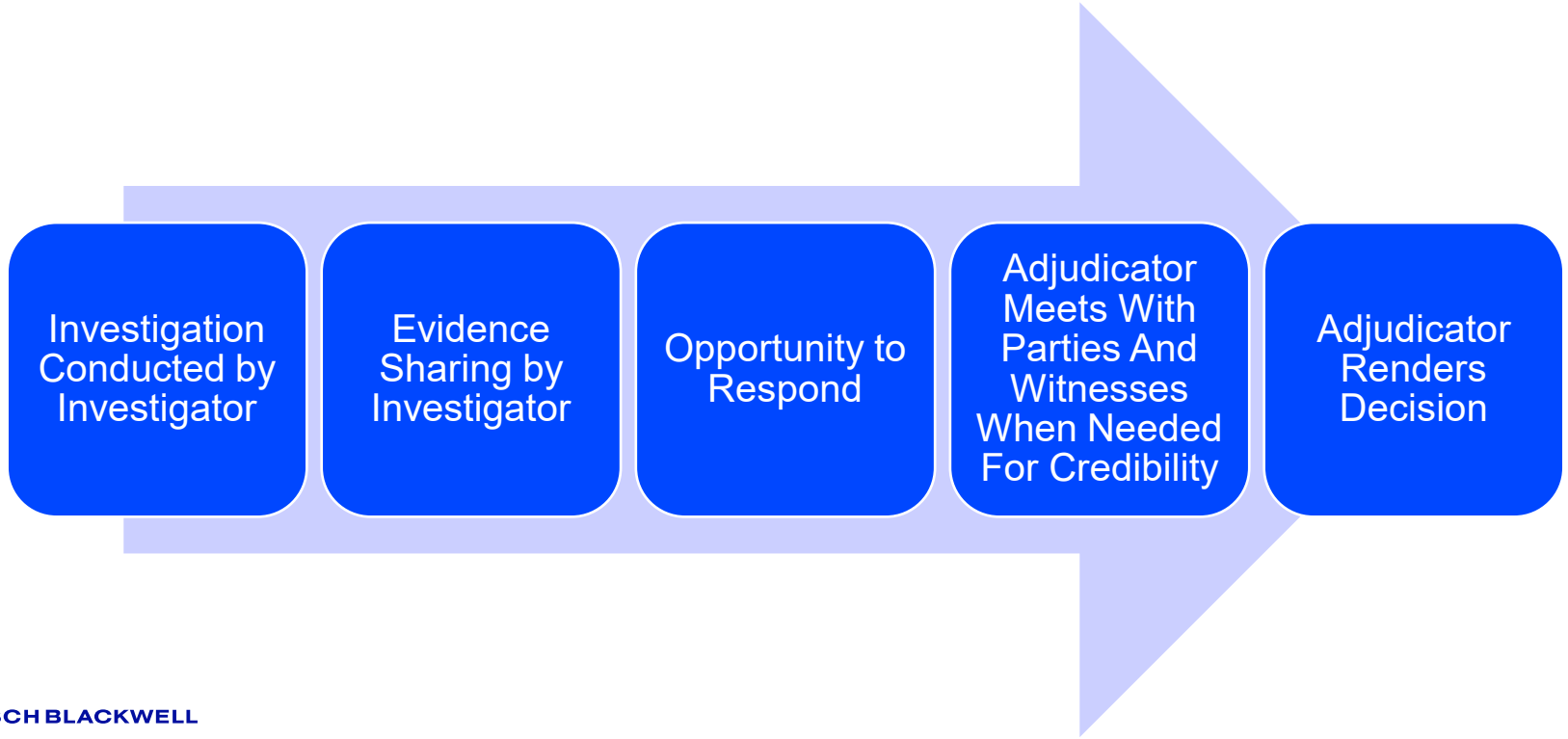
Can you have a *45 “two person” model?



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What rules govern the determination?

- Decision-maker must question parties and witnesses to assess credibility when in dispute and relevant
- Standard used must be preponderance or clear and convincing (only if used in all other comparable proceedings)
- Based solely on relevant and not otherwise impermissible evidence
- Written notice to both parties with certain mandatory elements

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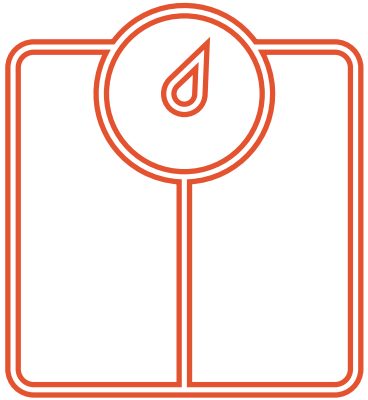
What is a preponderance of the evidence?

- More likely than not
- Greater than 50% likelihood



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What are the written elements to the determination?

- Determination for each allegation
- Rationale for each determination
- Procedures and permissible bases for appeal

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Does the written determination include remedies and discipline?

- "If there is a determination that sex discrimination occurred . . ."
- Title IX Coordinator must coordinate remedies and coordinate imposition of disciplinary sanctions
- Complainant has the right to written notice of the disciplinary sanctions

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Practical Point

The *45 grievance process is flexible enough to allow a disciplinary sanction to be included in the notice issued by the decision-maker, but it also would permit the written notice of discipline to come later and from someone else. Discipline should not be *implemented* until after the appeal is completed (or the time for appeal passes).

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Do parties get advisors in the *45 process?

- Not as far as Title IX is concerned
- Clery Act still requires them for cases involving the specific offenses (sexual assault, dating violence, domestic violence, and stalking)
  - *But* Clery Act does not require advisors to play an active role

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The Post-Secondary Student Sexual Harassment Grievance Process (*46)

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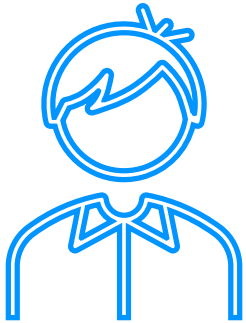
When does the *46 process apply?

- Only <u>required</u> for a sex-based harassment case involving a student complainant or student respondent
- *****Unless due process caselaw says otherwise*****



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What do you mean by due process caselaw?

- Public institutions are subject to the due process clause of the U.S. and State constitutions
- Some courts have held that due process requires public institutions to provide augmented procedures (like those in *46) for cases involving severe misconduct (like sexual assault) and where credibility is in dispute
- This caselaw *may* extend *some* of these augmented procedures to cases even beyond those covered by *46

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How do we tell whether *46 applies if we have a student employee?

- Fact specific determination
- Consider whether primary relationship is that of employee or student
- Consider whether party was performing work when the incident occurred

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Example

Cade is an undergraduate student who works part time in the bookstore on Tuesdays and Thursdays. On Monday night, Cade is sexually assaulted in an on-campus townhouse. Cade's primary relationship is that of student, and the sexual assault did not arise from Cade's employment. The *46 procedures should apply.

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Example

Lindy is a full-time employee who works in athletics. Lindy is also enrolled in the institution's online MBA program. Lindy makes a complaint that her supervisor in athletics offered to give Lindy a pay raise in exchange for sexual favors. The *45 grievance procedures govern.

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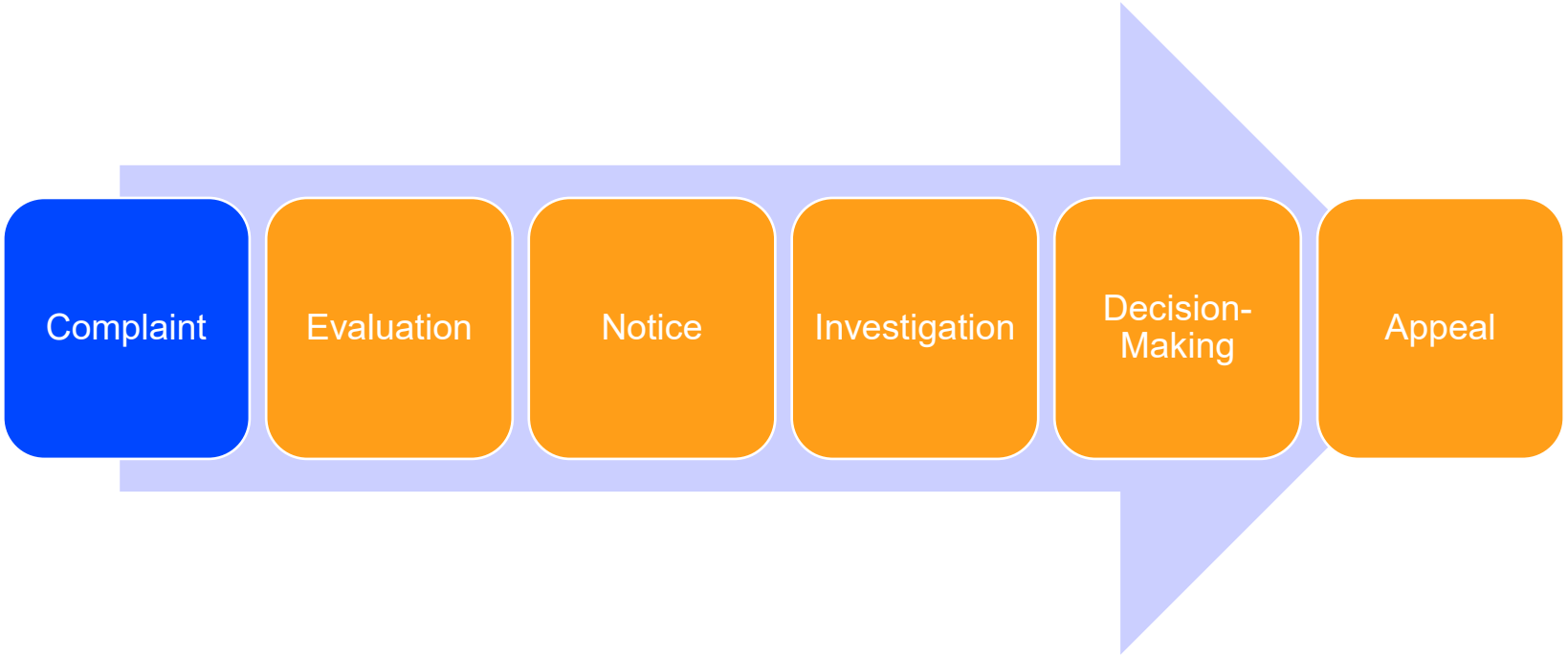
Where do the *46 procedures have augmented requirements?



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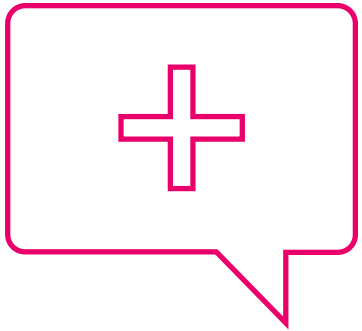
What do you mean by “augmented”?

- Generally, parties in the *46 process have all the rights from the *45 process
- Plus, additional rights



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How is the evaluation phase different?

- Parties get simultaneous, written notice of dismissals, unless respondent has yet to be notified at all, in which case only the complainant gets written notice
- If dismissal is based on withdrawal of all or some allegations, the complainant's withdrawal must be in writing

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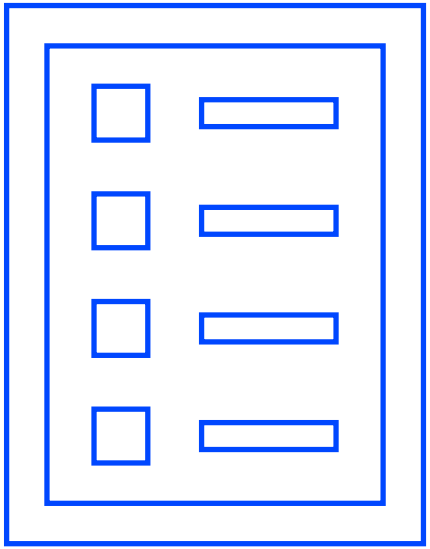
How is the notice different under *46?

- Written notice must be given to both parties
- In sufficient time to prepare before any initial interview
- Must include all required elements of a *45 notice and additional elements



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Practical Point

Many colleges and universities will choose to issue detailed written notices for both *45 and *46 grievance procedures. A fulsome written notice is helpful to document the allegations, head off confusion and surprise, and insulate the institution from certain claims if litigation results later.

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What are the additional notice elements under *46?

- Presumption of non-responsibility until determination
- Before determination, parties will have the opportunity to present relevant evidence to a trained, impartial decision-maker
- The right to an advisor of choice who may be an attorney
- Equal right to access relevant and not impermissible evidence or an investigation report
- Any provision of student code of conduct that prohibits knowingly false statements or submitting false information

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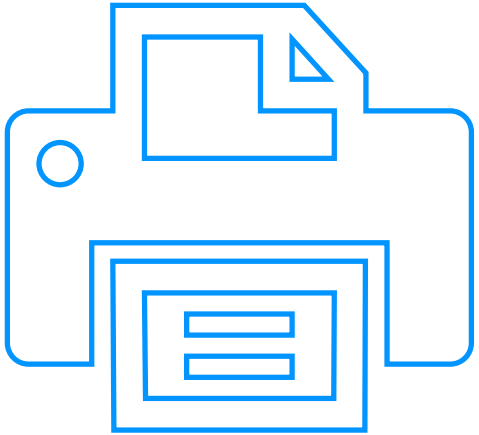
Does the *46 process require supplemental notice?



- If, during grievance process, new allegations are added, that are not included in initial written notice
- Institution must issue a supplemental written notice to the parties

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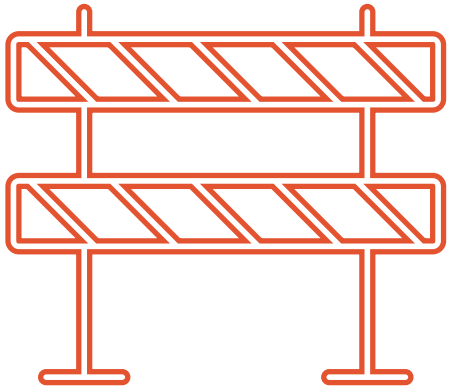
Can the institution delay the written notice?

- Institution may “reasonably delay” in order to address reasonable concerns for the safety of any person <u>as a result of providing the notice</u>
- Concerns must be individualized and not based on speculation or stereotypes



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Example

Sonja makes a complaint that Zeke raped Sonja when Sonja was incapacitated. Sonja makes the complaint on April 30. The institution adjourns for the summer on May 15. Sonja alleges that, after the rape, Zeke sent Sonja a text saying: "Just so we're clear, everything between us was totally consensual, and if you say otherwise, you're a dead woman." Sonja requests that Zeke not be notified until after May 15, when Sonja has her last final and can leave campus to return home.

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How is the *46 investigation different (1 of 2)?

- Parties must always receive prior written notice of any meeting or proceeding wherein their participation is invited or expected
- Parties have the right to be accompanied to investigative meetings by an advisor of choice who may be a lawyer
- Parties must have the same opportunities, if any, to have any person other than an advisor present

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How is the *46 investigation different (2 of 2)?

- Institution has discretion to determine whether the parties may present expert witnesses (as long as presented equally)
- Must allow reasonable extension of timeframes on a case-by-case basis for “good cause”, with written notice given to the parties explaining any delay
- Parties and advisors get access to either: (1) the relevant evidence, or (2) the same investigation report that accurately summarizes the evidence

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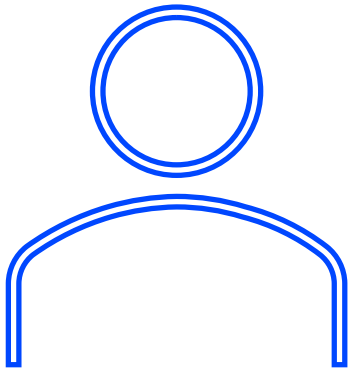
What is the role of an advisor?

- At the investigation phase, under *46, a party merely has the right to be accompanied
- Institution can limit advisor's role and make it passive
- Institution does <u>not</u> have to provide an advisor at the investigation phase



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Practical Point

Most post-secondary institutions require advisors to remain passive in investigative interviews and other investigative meetings. This trend is likely to continue under the new Title IX regulation.

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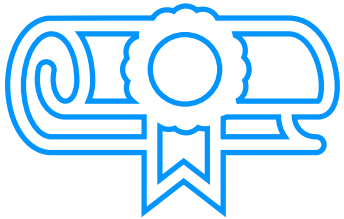
What should we do about expert witnesses?



- Varied positions by institution
- Well-resourced parties often benefit disproportionately from allowance of expert witnesses, who are costly

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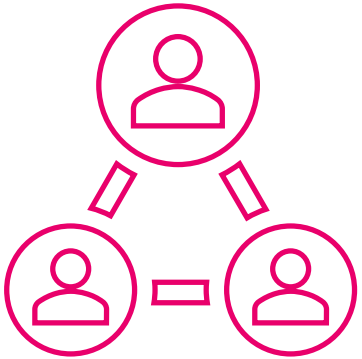
When would parties be allowed to have others present?



- Institution has discretion to allow parties to have persons in addition to an advisor
- Must give parties the same opportunities
- I.e., second advisor; parent; counselor; spiritual advisor

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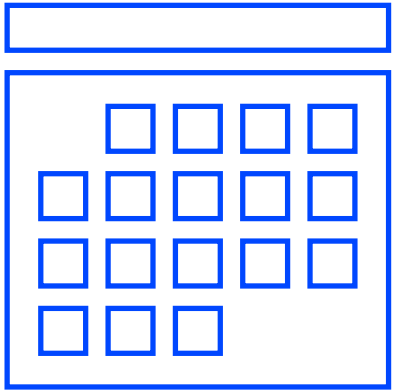
When is there “good cause” for extension of timeframes?

- “Good cause” generally means something other than a mere lack of diligence
- It is important to document and provide written notice of all scheduling changes in *46 cases



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Example (Poll to Follow)

A written notice tells the respondent that she must submit to an initial interview within seven days. The respondent seeks an extension of sixty days because, "My advisor is involved in a trial that just started, and he won't be free until August."

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How does access to the evidence differ?

- Parties and their advisors get access to either: (1) the relevant and not otherwise-impermissible evidence, or (2) a written investigation report that accurately summarizes (rather than simply “describes”) the evidence
- If an institution provides an investigation report, the parties can still ask for and have access to the underlying evidence

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Practical Point

The *46 process does not require preparation of a written, investigation report as did the August 2020 regulations. An institution may simply provide the parties and their advisors with access to the relevant and not otherwise-impermissible evidence.

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How does the decision-making phase differ?

- The decision-maker must be able to question parties and witnesses to assess credibility to the extent credibility is disputed and relevant
- Can be achieved through: (1) a live hearing, <u>or</u> (2) an asynchronous, iterative process

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Live Hearing Option Under *46

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How would the live hearing work?

- A decision-maker (a single hearing officer or hearing panel) runs the hearing
- Synchronous and contemporaneous participation by the parties
- Physically present in the same location or with live virtual technology
- Institution must keep an audio or audiovisual recording, or a transcript

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How would testimony work at a hearing?

- Parties and witnesses testify live
- Questions, including follow-up questions, must all be relevant and not otherwise impermissible and may challenge credibility
- Questions may be asked directly by the decision-maker <u>and</u> . . .

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How do parties ask questions?

- **Option 1**:
- Each party's advisor asks questions
- Never the party themselves
- If a party lacks an advisor, institution must provide one
- Similar to August 2020 regulations

- **Option 2**
- Allow each party to propose questions that they want asked
- Questions are then asked by the decision-maker after being screened
- Under this option, advisors are passive

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How does screening of questions work?

- Under either questioning model, the decision-maker must screen questions to make sure they are relevant and not otherwise impermissible prior to the question being posed
- Questions must also be screened to make sure they are not unclear or harassing
- Any decision to exclude a question must be explained
- The person proposing the question must be given an opportunity to revise it, as necessary

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Example

Institution's hearing procedures state that an advisor must first pose a question to the hearing officer who will rule on its propriety. Only after the hearing officer has ruled the question is appropriate, will the advisor then be allowed to pose the question to the party or witness.

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Practical Point

Because the regulation requires a question to be deemed relevant, not otherwise impermissible, not unclear, and not harassing "prior to [it] being posed," there will have to be a mechanism for each question to be addressed to the decision-maker <u>first</u>, before it is posed to the witness or party. Posing the question to the party or witness initially and assuming the question is appropriate unless there is an objection, will not be consistent with the regulation.

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Example

Institution's hearing procedures state that a party or witness will first be questioned by the hearing chair. After such questioning, the witness will be briefly excused, and each party will be allowed to identify and explain the questions they wish to be posed and the hearing officer shall rule on the propriety of those questions. The witness will then be recalled, and the hearing officer will pose the questions that have been deemed permissible.

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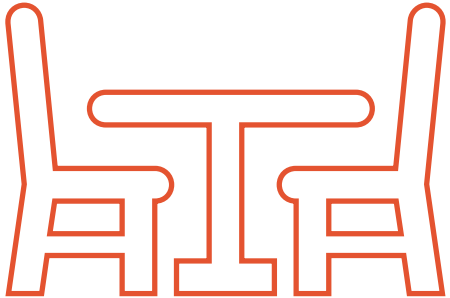
Can other rules of decorum be imposed?

- Reasonable rules of decorum are permissible
- Provided they apply equally to both parties



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What if a party or witness refuses to answer questions at a live hearing?

- If a party or witness refuses to respond to relevant and not otherwise impermissible questions:
  - Decision-maker may choose to “place less or no weight upon” the statements of that party or witness
  - A decision-maker must not draw an inference as to whether or not sex-based harassment occurred based solely on a party or witness’s refusal to respond

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Practical Point

There is no fixed "exclusionary rule" under the *46 procedures. However, decision-makers will have discretion to significantly discount, or reject entirely, statements of a party or witness who refuses to be questioned. The lack of a fixed rule could lead to inconsistent application by different decision-makers.

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Asynchronous, Iterative Option Under *46

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How does the asynchronous, iterative process work?

- Instead of a live hearing
- Investigator or decision-maker asks questions of parties and witnesses, that the investigator or decision-maker wants to ask, in individual meetings
- Each party is allowed to propose questions the party wants the investigator or decision-maker to ask, and have those questions asked, if appropriate
- Investigator or decision-maker must then provide parties with a recording or transcript of the interview with enough time for the party to propose follow-up questions
- And then a follow-up interview must occur where the appropriate follow-up questions are asked
- All questions still must be relevant, not otherwise-impermissible, clear, and not harassing

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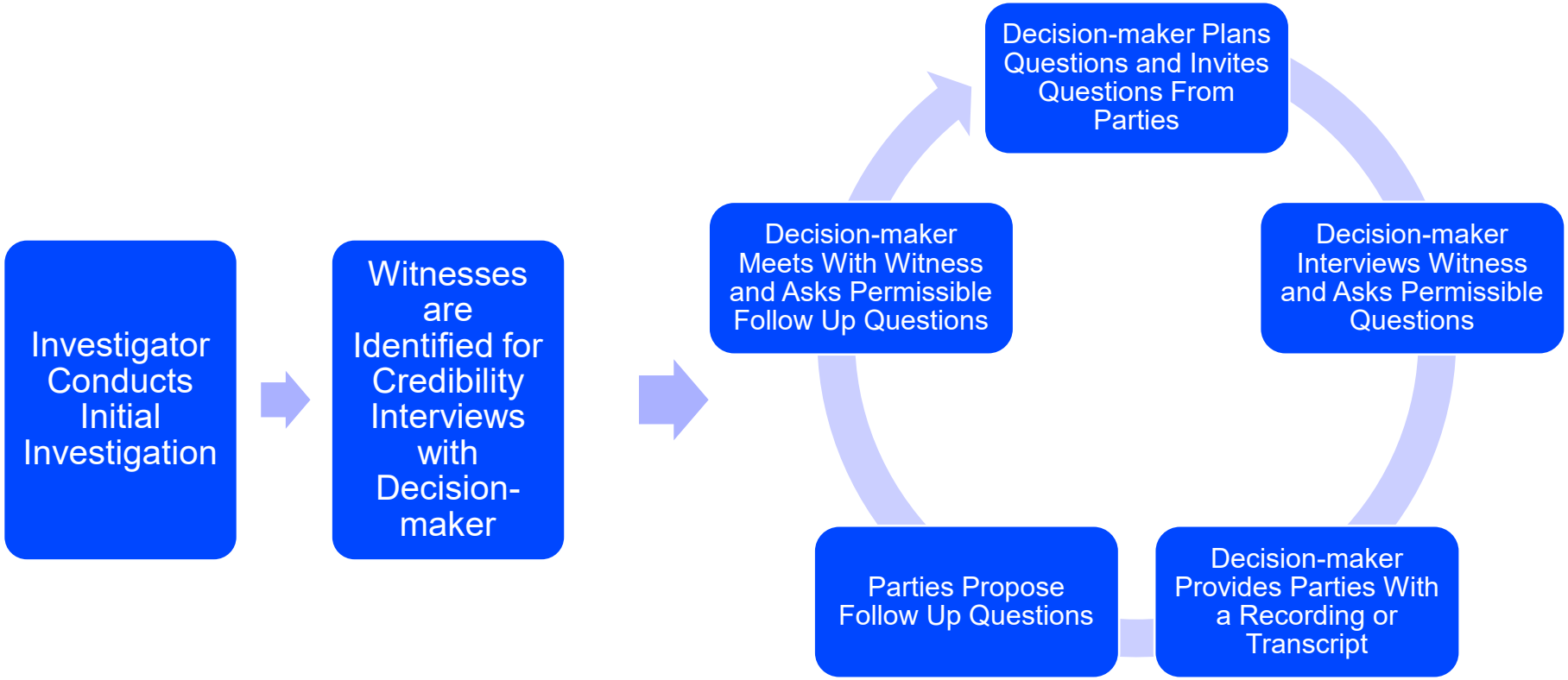

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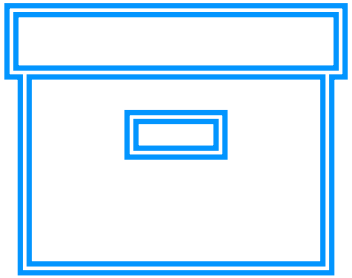
What about the opportunity to respond?

- If the institution uses a live hearing, the hearing itself can be the opportunity to respond to the evidence or investigation report
- If the asynchronous, iterative process is used, an additional opportunity to respond (presumably in writing) prior to determination appears necessary



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How is the determination made?

- Institution must issue a written determination
- Simultaneously
- To both parties
- With certain required elements

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What must the written determination include under *46?

- A description of the alleged sex-based harassment
- Information about the policies and procedures used
- The decision-maker's evaluation of the relevant and not otherwise impermissible evidence
- A determination as to whether or not sex-based harassment occurred
- Sanctions imposed on the respondent (if there is a finding)
- Whether remedies will be provided to the complainant or others
- Procedures for either party to appeal

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Under *46, does the decision-maker determine any sanction?

- The sanction simply has to be included in the written determination
- It can be decided by a different person and included in the determination

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When is the determination final under *46?

- When the appeal is over
- Or the time for appeal has passed

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Appeals

Module 8

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What types of appeals are required?

- Appeals of supportive measure decisions
- Appeals of emergency removals
- Appeals of dismissals in both *45 and *46 processes on specified grounds
- Appeals of final decisions in *45 processes the same as offered for “all other comparable proceedings”
- Appeals of final decisions in *46 processes on specified grounds

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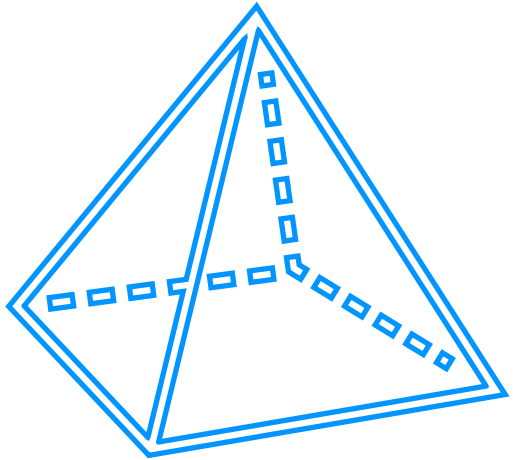
How do supportive measure appeals work?

- A party who disagrees with a supportive measure decision (including a request to modify or eliminate) that affects them
- Can appeal to someone other than the person who made the decision and who has authority to implement a change
- The regulation does not specify the “grounds” for appeal



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Example Language

A party who disagrees with a supportive measure decision, including a decision relating to a request to modify or terminate supportive measures based on materially changed circumstances, may file an appeal with the Vice President. The Vice President may provide, deny, modify, or terminate the supportive measure at issue if the Vice President determines the initial decision was not consistent with this policy.

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How do appeals of dismissals work?

- If a dismissal is appealed, institution <u>must</u>:
  - Notify the parties of the appeal
  - Implement appeal procedures equally
  - Ensure that appellate officer did not take part in the investigation or dismissal
  - Provide parties a reasonable and equal opportunity to make a statement regarding the appeal
  - Notify the parties of the result of the appeal and rationale

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What are the grounds for appeal of a dismissal?

- Procedural irregularity that would change the outcome
- New evidence that would change the outcome and was not reasonably available when the determination of dismissal was made
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that would change the outcome

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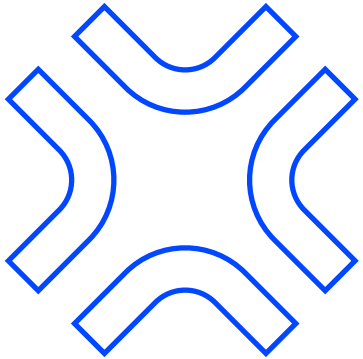
How do final decision appeals work for *45?

- The regulation does not list specified grounds for appeal or procedures for appeal
- Institution must offer an “appeal process that, at a minimum, is the same as it offers in other comparable proceedings, if any”



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Practical Point

It may be difficult to determine what “comparable proceedings” are if an institution has several different policies and procedures, with varied appeal provisions, governing protected status discrimination and harassment. It may be simpler for institutions to utilize the more robust *46 appeal procedure, with specified grounds, for final decisions in *45 cases.

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How do final decision appeals work for *46?

- Offering an appeal is mandatory
- At minimum, the same grounds for appeals of dismissals
- All notice requirements must be met <u>in writing</u>
- Parties must be allowed to submit their statement <u>in writing</u>
- Appeal decision must be provided <u>in writing</u>

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Informal Resolution

Module 9

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What is informal resolution?

- An alternative process to the grievance procedure for resolving a complaint of sex discrimination or sex-based harassment

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When can it be used?

- Any time prior to a final determination under a grievance process
- Unless the accusation is that an employee engaged in sex-based harassment of a K-12 student or informal resolution would conflict with federal, state, or local law

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What are the procedural predicates for informal resolution?

- Must be at least a report of sex discrimination or sex-based harassment
- Institution must determine it is appropriate to offer informal resolution
- Parties must voluntarily consent after receiving notice with certain required elements

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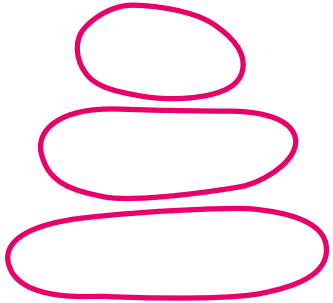
How does the institution consider whether informal resolution is appropriate?



- Institution may, but is not required, to offer informal resolution
- Must consider whether the alleged conduct would present a future risk of harm to others
- Additional factors may be considered

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What other factors my guide institutional decision?

- Severity and nature of the conduct
- Pattern of misconduct
- Likelihood dismissal would be a sanction under grievance procedure if misconduct found
- How long process has already lasted
- Publicity
- Potential effect on campus climate
- Desires of the parties
- Ability of the parties to abide by a resolution
- Likelihood a resolution will result

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Example

A varsity coach is accused of fondling two student athletes. The athletes alleged the fondling occurred at the team hotel after the coach had been drinking in the bar. The athletes request to have an informal resolution because they believe the coach has a drinking problem and should seek treatment. They do not want the coach to be terminated.

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Practical Point

An institution will be less likely to approve informal resolution when an employee is accused of serious misconduct against a student and where the institution would likely face legal liability if the conduct recurred after informal resolution.

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What are the elements of the required notice to the parties?

- The allegations
- The requirements of the informal resolution process
- Each party may withdraw prior to a resolution and return the case to grievance procedures
- Agreement to a resolution would preclude grievance procedures for the same allegations
- Potential terms, including that a resolution is binding only on the parties
- What information will be maintained and how it may (or may not) be used if grievance procedures are resumed

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Must the notice be in writing?

- Notice should be in writing for all cases, <u>but</u>
- Regulation only <u>requires</u> the notice to be in writing for *46 cases

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Question for Discussion

What are the various forms of informal resolution your institution uses?

How would you describe the “requirements” of those informal resolution processes?

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What are some potential terms of informal resolution?

- Restrictions on contact
- Restrictions on a respondent's participation in certain activities or events
- Training or education
- Withdrawal or resignation
- Apology
- Negotiated discipline or sanctions
- Others?

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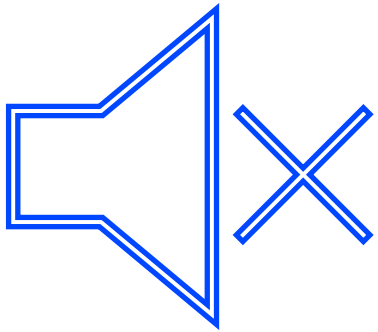
Is information shared during informal resolution confidential?

- Institution may elect to make information shared during informal resolution confidential in the event resolution fails and grievance procedures resume
- Institution may prohibit informal resolution coordinator from serving as a witness in grievance procedures
- The parameters must be disclosed to the parties in the notice



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Example (Poll to Follow)

Asako accuses Ronaldo of raping Asako when Asako was intoxicated. During an informal resolution Ronaldo candidly admits to the Title IX Coordinator, “I should have known better than to have sex with her. But I just didn’t think about it at the time. I’d like to apologize.” Informal resolution fails and the grievance procedures resume.

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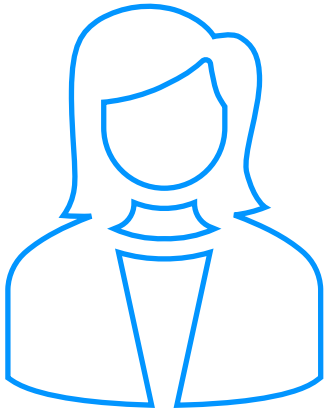
Who manages the informal resolution?



- Informal resolution facilitator
- Cannot be the investigator or decision-maker
- Must be free of conflicts and bias, and appropriately trained on duties and policy provisions

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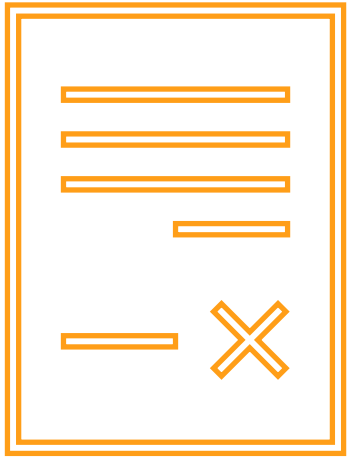
How are informal resolutions documented?

- Informal resolution agreements should be reduced to writing with all essential terms
- Parties should sign, and institution should give written approval



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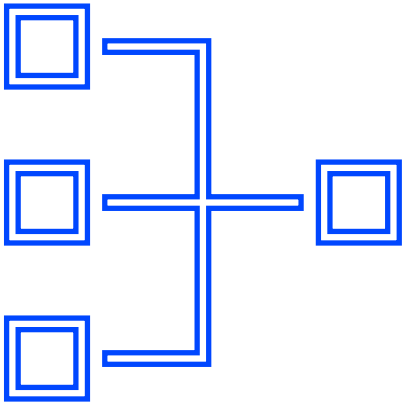
What happens if someone doesn't abide by an informal resolution?

- Regulation states that completed informal resolution forecloses grievance process for the allegations resolved
- Consequences for failure to comply should be addressed in the resolution



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Questions

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Pregnancy

Module 10

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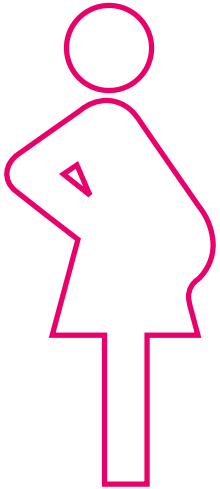
What does the new regulation say about pregnancy?

- Discrimination and harassment based on pregnancy and related conditions is “sex” discrimination and sex-based harassment
- Institutions have a duty to provide certain accommodations to persons with pregnancy and related conditions



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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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Example

A pregnant student experiences pre-term labor that must be controlled with medication and bedrest. The student then gives birth by caesarean section. Four weeks after giving birth, the student is diagnosed with postpartum depression.

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Example (Poll to Follow)

A pregnant student gives birth without complication, fully recovers after six weeks, and returns to her program of study. The student is breastfeeding and is also having challenges finding a babysitter to watch her child while the student attends class.

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Example

A faculty member who teaches a weightlifting course learns that Jane, a student in the course, is pregnant. The faculty member is concerned that strenuous lifting might harm Jane and tells Jane that she may only perform unweighted isometric exercises for the remainder of the course. The faculty member routinely allows other students who have strains, sprains, colds, and the flu to lift heavy weights.

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Question for Discussion

Is the faculty member engaging in prohibited discrimination against Jane?

Does it matter that the faculty member's subjective intention is to protect Jane's health?

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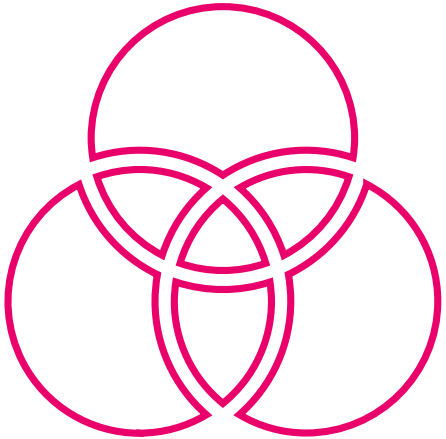
What do we do if pregnancy presents a health concern with a particular program or course?

- For purposes of assessing eligibility, pregnancy must be treated the same as other temporary medical conditions
- It is not discrimination for a pregnant student to voluntarily participate in a “separate portion” of a program if it is comparable



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Example

A faculty member teaches a scuba class. The syllabus specifically notes that persons with compromised breathing, certain cardiac conditions, and conditions that pose a risk of unconsciousness will not be allowed to dive. A pregnant student in the class has developed peripartum cardiomyopathy. The faculty member does not allow the pregnant student to dive. In the past, the faculty member prohibited a male student from diving who had temporary arrhythmia.

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May an institution require a pregnant student to provide a doctor's certification?

- Only when certified level of physical ability or health is necessary
- Such certification is required of all students participating in the class
- Information obtained is not used for discriminatory purpose

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Example

A school operates a military studies program that includes a course that involves physical activity similar to that which one would experience in basic training. All students are required to provide a pre-clearance letter from a physician. The school may require a pregnant student to provide a pre-clearance letter.

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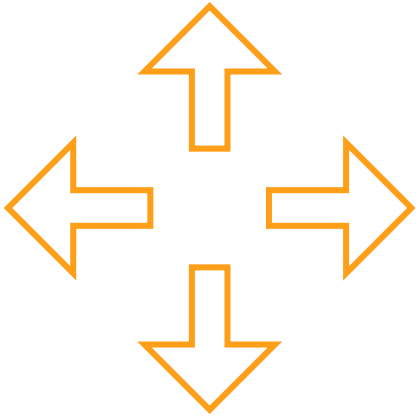
What reasonable accommodations are pregnant students allowed?

- 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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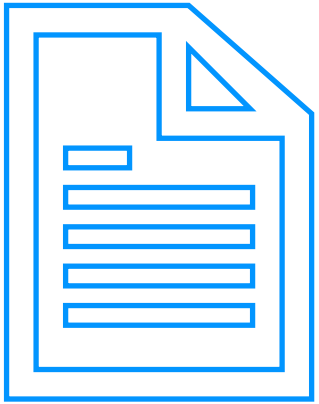
Can we require documentation before granting an accommodation?



- Documentation must not be requested unless it is necessary and reasonable to determine modifications
- Some accommodation needs related to pregnancy are obvious or inherent and need not be documented

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Example

A pregnant student is no longer able to fit into the standard desk used in a particular classroom.

A pregnant student needs to take more frequent bathroom breaks.

A student who recently gave birth has lactation needs.

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Practical Point

Providing accommodations to pregnant students is similar, although not identical, to providing accommodations to students with disabilities. Existing staff who handle accommodations for disabled students may be well-suited to work on accommodations for pregnant students.

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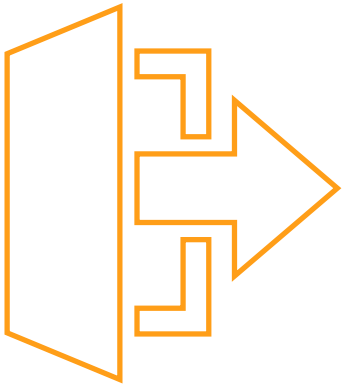
What about voluntary leaves?



- Must allow a pregnant student to take a voluntary leave for at least the period of time medically necessary
- When returning, student must be reinstated to academic status, and as practicable, to the extracurricular status before leave

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Must a school provide lactation space?

- Must provide access to lactation space, other than a bathroom, that is clean and private
- Space must be available both for expressing breast milk or for breastfeeding, as needed

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Are there reporting obligations for the needs of pregnant students?

- When student informs employee of student's pregnancy or related condition
- Employee must promptly provide student with Title IX Coordinator's contact information and inform student of Title IX Coordinator's ability to prevent sex discrimination and ensure equal access

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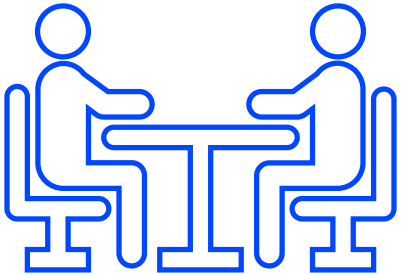
Who is responsible for ensuring accommodations?



- The Title IX Coordinator must "coordinate these actions"
- Title IX Coordinator must ensure that student is provided notification of protections against discrimination and various pregnancy related rights

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Questions

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