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Title IX Training for Title IX Team Members

University of Texas System -- 2024

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132-978-110

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Agenda (1 of 2)

- Caselaw and Litigation Update
- Pregnancy and Parenting
- Employee Reporting
- Case Intake
- Interview and Questioning Techniques
- Investigation Report Writing



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Agenda (2 of 2)

- Credibility Assessments and Live Hearing Determinations
- Appeals
- Sexual Assaults, Consent, and Incapacitation
- Interpersonal Violence and Stalking
- First Amendment Scenarios



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Join at: **vevox.app** ID: **132-978-110**

Question slide

I consider myself to be:

An experienced Title IX practitioner

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An intermediate Title IX practitioner

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A new Title IX practitioner with lots to learn

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An experienced Title IX practitioner



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An intermediate Title IX practitioner



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A new Title IX practitioner with lots to learn



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Caselaw and Litigation Update

Module 1

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What is the "new" Title IX regulation?

- A series of revisions and additions to 34 C.F.R. 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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When was the new regulation supposed to take effect?

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

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What is the state of litigation? (as of 8/1/2024)

- Multiple injunctions imposed affecting 26 states (including Texas)
- One injunction affecting hundreds of K-12 and higher education institutions
- Two circuits have refused to stay injunctions
- Supreme Court review is pending



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What do the injunctions do?

- Preclude the Department of Education from enacting, implementing, and enforcing the regulation
- Do not directly order schools to do anything
- But effect of an injunction is that August 2020 regulations remain fully in place
- And underlying legal rulings in injunction orders construing Title IX have practical consequences

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What about the Texas injunction?

- Preliminarily enjoins the Department of Education from enacting, implementing or enforcing the new regulation to the State of Texas
- A separate preliminary injunction from a different federal judge blocks enforcement of the regulation against Carroll ISD
- Fifth Circuit denied a request to stay the effect of a similar injunction issued in Louisiana

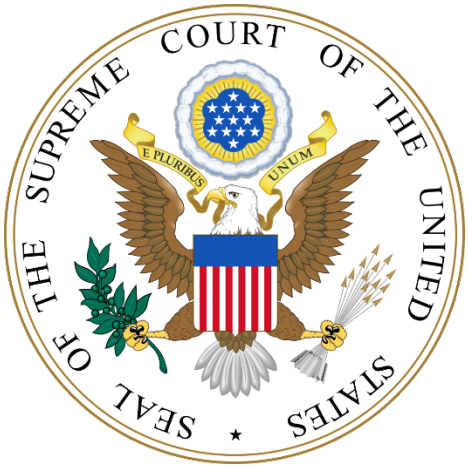
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What is the reasoning of the Texas federal court?

- Title IX's definition of "sex" is rooted in biological distinctions between males and females and does not include gender identity
- New regulation's definition of sex-based harassment likely violates the First Amendment
- Regulation impermissibly requires abortion coverage in health insurance plans
- Some of the changes to grievance procedures are not compliant with due process or otherwise are arbitrary and capricious

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When will the Supreme Court act?

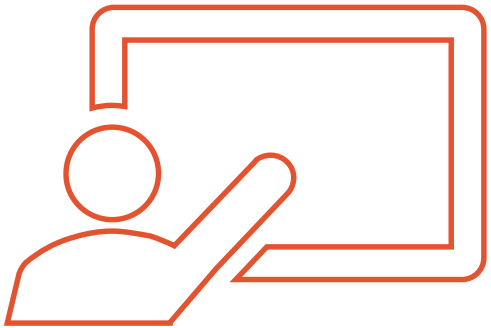


- July 22 Department of Education sought emergency relief from Sixth and Fifth Circuit denials of stay of KY and LA injunctions
- July 26 States responded
- Supreme Court decision imminent

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What should institutions do today?

- For states covered by an injunction, the August 2020 regulation remains in effect
- Institutions should use policies and procedures drafted for compliance with the August 2020 regulation



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Case #1: *Murphy v. Northside Indep. Sch. Dist.* (5th Cir. 2024)

- Plaintiff is a member of girl's cheerleading team
- Team forced to complete "frog jumps" after plaintiff is late to practice, and plaintiff is injured
- Plaintiff alleges district failed to fund boys and girls' teams equitably violating Title IX
- Summary judgment for the district because plaintiff did not tie alleged discriminatory funding to her injury

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What are key takeaways?

- Title IX sex discrimination requires intentional discrimination based on sex
- Intentional discrimination includes far more than sexual harassment
- A plaintiff must be able to tie alleged discriminatory actions to their claimed injury to succeed in a lawsuit

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Case #2: *Van Overdam v. Texas A&M Univ.* (S.D. Tex. 2024)

- Plaintiff found responsible for sexual abuse; non-consensual anal penetration; six month suspension
- Plaintiff returns, graduates, and then sues the school
- Allowed to proceed to discovery on a "selective enforcement theory" alleging anti-male bias
- But summary judgment to the school because plaintiff could not show treated differently than a comparable female student

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What are key takeaways?

- Title IX selective enforcement theory is when a school applies its facially neutral policies and procedures in a discriminatory way
- A plaintiff must show a similarly situated person of the opposite sex was treated differently
- Courts will consider the nature of the alleged misconduct determining whether persons are similarly situated
- All investigatory and adjudicatory decisions should be made without regard to the sex of the affected party

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Join at: **vevox.app** ID: **132-978-110**

Question slide

If a male student briefly grabs a female student's buttocks, the conduct

Is sexual harassment as defined by Title IX

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Is not sexual harassment as defined by Title IX

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Is sexual harassment as defined by Title IX



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Is not sexual harassment as defined by Title IX



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Case #3: *Owens v. Louisiana State Univ.* (M.D. La. 2023)

- Plaintiff is a female student
- Plaintiff alleged LSU policies and procedures were so deficient as to create a general, heightened risk of sexual misconduct
- The conduct plaintiff alleged was rude, bullying, and "play fighting" but not sexual harassment even though perpetrated by a male
- Single-incident of briefly grabbing buttocks is not severe and pervasive so as to constitute sexual harassment

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What are key takeaways?

- Title IX's definition of hostile environment is a high bar not easily met by rude and crass comments and a range of other offensive behavior
- Just because bad behavior is perpetrated against someone by a member of the opposite sex does not make the bad behavior sexual harassment
- Misconduct that clearly does not rise to the level of Title IX sexual harassment can and should be addressed through other standards

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Case #4: *Roe v. St. John's University* (2d Cir. 2024)

- Plaintiff was found responsible for two sexual assaults by university
- Plaintiff sues university under Title IX for anti-male bias and for failing to investigate his claim that one accuser made a false allegation of sexual assault on social media
- Plaintiff also brings breach of contract claim against university
- A 2-1 decision affirms the district court's dismissal of Roe's claims

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What are key takeaways?

- To prove “erroneous outcome” theory of liability, respondent/plaintiff must show sex was motivating factor in decision
- An erroneous outcome and typical procedural errors are not enough, by themselves, to show improper motivation
- A singular alleged false accusation of sexual assault on social media is not severe, pervasive, and objectively offensive
- Judges are deeply divided on Title IX respondent cases

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Case #5: *MacIntyre v. Carroll College* (9th Cir. 2022)

- Plaintiff was former golf coach whose contract was non-renewed after coach complained about Title IX (equity) non-compliance and hostile environment and discrimination by athletic director and president
- School settled plaintiff's internal complaints and agreed to a two-year contract for plaintiff
- When school elected not to extend two-year contract, Pplaintiff sued for retaliation
- Non-renewal of a fixed term contract can be adverse employment action for retaliation

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What are key takeaways?

- Title IX protects employees from retaliation, similar to Title VII
- An adverse action is “one that might have dissuaded a reasonable person” from complaining about discrimination
- It is easier to show adverse action for retaliation purposes than for employment discrimination generally
- A school cannot avoid retaliation by claiming the expiration of a fixed contract is not adverse action

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Case #6: *Parents Defending Education v. Lin Mar Cmty. Sch. Dist.* (8th Cir. 2023)

- K-12 school district enacts policy that says "intentional and/or persistent refusal . . . to respect a student's gender identity is a violation" of bullying and harassment policies
- Parents sue to enjoin policy as violating First Amendment rights of their children
- Policy's prohibition on a refusal to "respect a student's gender identity" is unconstitutionally vague and could prohibit clearly protected speech, such as a minor expressing the opinion that biological sex is immutable

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What are key takeaways?

- Policies that prohibit certain types of speech must be clear so people are on notice of what will constitute a violation
- A policy cannot define harassment or bullying to include clearly protected First Amendment speech
- Policies concerning names and pronouns must be carefully crafted and still are highly susceptible to legal challenge

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Case #7: *Doe v. Ohio University* (S.D. Ohio 2023)

- Plaintiff reported being sexually assaulted while incapacitated
- After making report, plaintiff is allegedly called a liar, poked, prodded, and joked at by friends of the respondent, in class
- Professor and institution allegedly did nothing to stop the peer harassment
- Plaintiff's claim survives summary judgment
- But plaintiff cannot pursue punitive damages or emotional distress damages under *Cummings*

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What are key takeaways?

- Institutions can face Title IX deliberate indifference claims based on peer harassment prompted by a complaint
- The failure to take any action to stop peer-harassment is deliberate indifference
- Supreme Court's *Cummings* decision has substantially narrowed the scope of recoverable damages on Title IX deliberate indifference claims

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Questions



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Pregnancy and Parenting

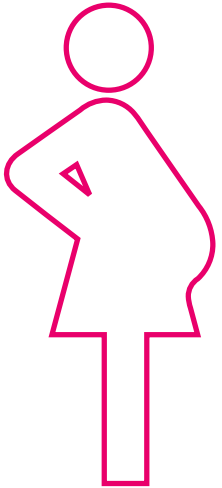
Module 2

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What does Title IX have to 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 conditions are included?

- Pregnancy
- Childbirth
- Termination of pregnancy
- Or recovery from any of the three



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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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Question slide

Does Title IX require the school to provide an accommodation to the student when she is unable to attend class because she cannot find a babysitter to watch her child?

Yes

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No

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Does Title IX require the school to provide an accommodation to the student when she is unable to attend class because she cannot find a babysitter to watch her child?

Yes



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No



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Question slide

Does Title IX require the school to provide an accommodation to the student when she is unable to attend class because she cannot find a babysitter to watch her child if the school has provided accommodations to students who are fathers and who had to miss class because a mother was sick and could not watch a child?

Yes

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No

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Does Title IX require the school to provide an accommodation to the student when she is unable to attend class because she cannot find a babysitter to watch her child if the school has provided accommodations to students who are fathers and who had to miss class because a mother was sick and could not watch a child?

Yes



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No



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What about family and parental status?

A school “shall not apply any rule concerning actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex.”

34 C.F.R. 106.21(c)(1)

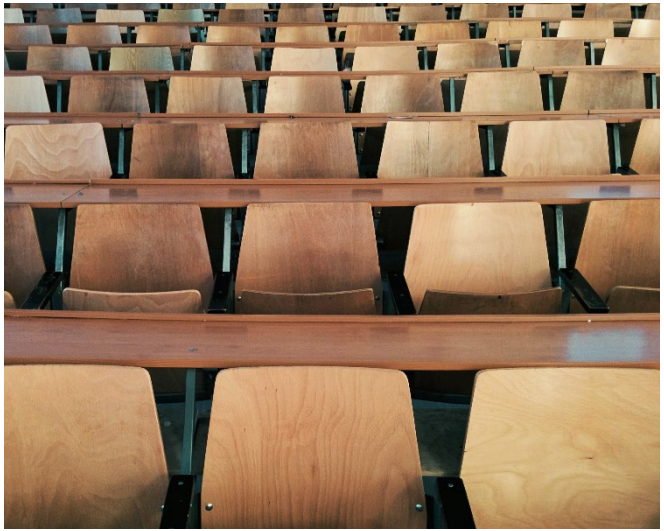
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What does Texas law say?

- Education Code § 51.982
- Includes similar non-discrimination obligations for pregnancy and parenting status
- Includes reasonable accommodation obligations
- Includes provisions regarding leaves and reinstatement
- Mandates adoption of pregnancy and parenting policies

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What about accommodations?



- General rule is to provide reasonable accommodations
- And treat pregnancy and related conditions the same as other temporary disabilities or medical conditions
- Texas law includes reasonable accommodation for health and safety of unborn child

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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, the flu, and other illnesses to lift heavy weights.



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Question for Discussion

Is the faculty member engaging in prohibited discrimination against Jane?

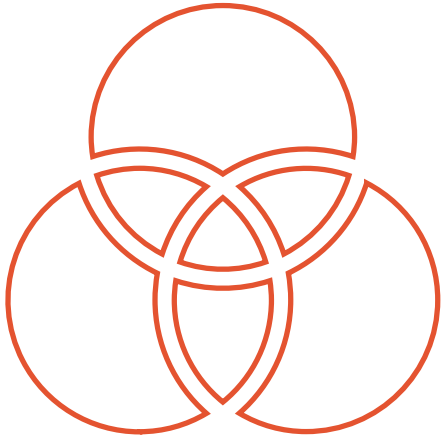
Does it matter that the faculty member's subjective intention is to protect Jane's health through an accommodation?



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What 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 modified program



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Example

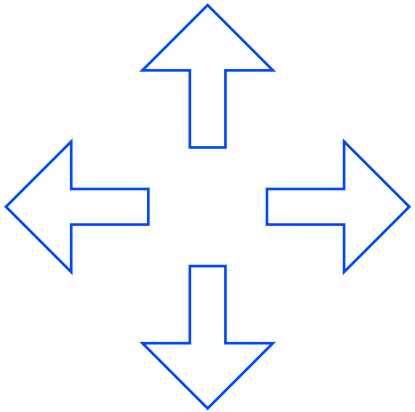
A faculty member teaches a scuba class. The syllabus specifically notes that persons with compromised breathing, certain cardiac conditions, and conditions that pose a risk of unconsciousness will not be allowed to dive. A pregnant student in the class has developed peripartum cardiomyopathy. The faculty 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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What reasonable accommodations are pregnant students allowed?

- Reasonable modifications
- Based on individualized needs
- Determined after consultation with the student
- Fundamental alteration is not required



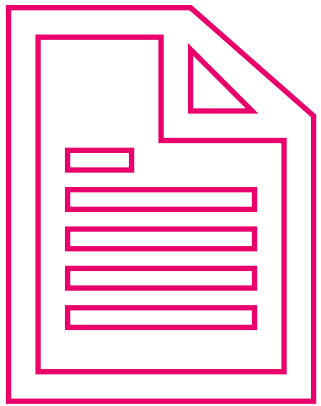
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What are some common examples of reasonable accommodations?

- 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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Should we require documentation before granting an accommodation?



- Documentation may be requested if 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.



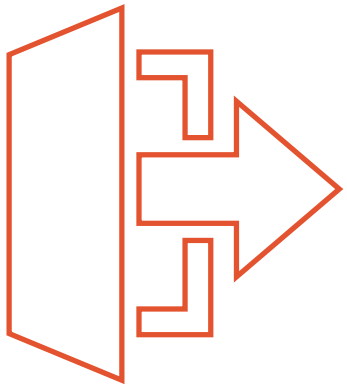
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Practical Point

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?



- Under Title IX, 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
- Texas law sets minimum voluntary leave of at least a semester (without a showing of medical need)

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Must a school provide lactation space?

- Provision of lactation space may be a reasonable accommodation to particular students
- Federal laws governing employment require lactation space



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Must a school allow a mother to keep an infant with them during class and elsewhere on campus so that the mother can breastfeed in the lactation space, when needed?

Yes

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No

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Results slide

Must a school allow a mother to keep an infant with them during class and elsewhere on campus so that the mother can breastfeed in the lactation space, when needed?

Yes



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No



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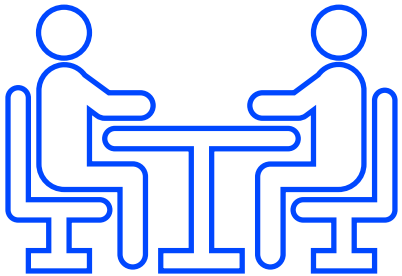
What about early registration?

- Texas law requires this to be offered to parenting students if offered to others
- May also be required as a reasonable accommodation to pregnant students



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Who is responsible for ensuring accommodations?



- Title IX Coordinator should oversee an adequate process for providing pregnancy accommodations
- Texas law specifically requires designation of liaison
- Collaboration with other offices is likely

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Group Scenario

Jane is a nursing student who is pregnant. Jane is currently enrolled in a clinical rotation. Jane develops pre-term labor and must be on bed rest for at least six weeks. The clinical rotation has one week left. Jane requests to complete the remaining week through virtual observation (using Zoom). The clinical rotation requires hands-on work in the ordinary course. Successful completion of the clinical rotation is necessary to complete the next phase of coursework in the program, which can be performed remotely. The program has never allowed a student to deviate from the program sequence. The department chair is adamant that no accommodation should be granted that would not be granted to a licensed nurse practicing in the profession and no licensed nurse would be allowed to interact with hospital patients from her home, via Zoom.



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Group Scenario Discussion Questions



1. How should the student's request for a remote-completion accommodation be assessed?
2. What role, if any, should department leadership and faculty play in the reasonable accommodation process?
3. Is it ever a reasonable accommodation to modify a program sequence?
4. What potential paths forward are there for this student?

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Questions



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Employee Reporting

Module 3

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What does Title IX say about "mandatory" reporting?

- Institutional response obligation is triggered when
  - Institutional official with authority to take corrective action
  - Observes potential sexual misconduct or receives a report
  - Of sexual misconduct occurring in the institution's education programs and activities

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Example

A student visits the Vice President of Student Affairs and reports to the Vice President that the student is being stalked by another student in an on-campus residence hall. The Vice President oversees residence life and the student conduct process.



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What is the consequence of a Title IX failure of mandatory reporting?

- Potential adverse determination by OCR
- Potential civil liability for any subsequent sexual misconduct that occurs due to the failure to respond



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What does Texas law say about mandatory reporting?

- Default rule is that all employees are mandatory reporters
- Must “promptly report” to the Title IX coordinator or deputy when:
  - Witnesses or receives information
  - Reasonably believes constitutes “sexual harassment, sexual assault, dating violence, or stalking” committed by or against a student or employee
  - When information received in the course and scope of employment

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Example

An employee confides in a co-worker that the employee was fondled by a supervisor during an on-campus reception.



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Example

Student comes to a faculty member's office requesting an extension of an academic deadline. When the faculty member asks why, the student discloses they were sexually assaulted at a fraternity house a few days prior.

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Example (Poll to Follow)

A custodian cleaning the floor in a residence hall sees a student run into a common room, flash other students seated on a couch, and run out of the room.



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Does the custodian have a mandatory duty to report potential sexual misconduct?

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Yes



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No

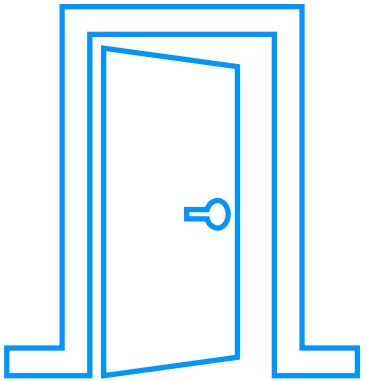


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What are the potential consequencs of failing to make a mandatory report under Texas law?

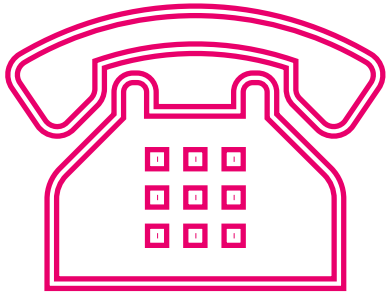
- Termination in accordance with established disciplinary procedures
- Criminal penalties for the non-reporter
- Potential fines for the institution



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What information must be shared?

- All information concerning the incident and known to the reporter that is relevant to the investigation
- Any redress of the incident and the alleged victim's expressed desire for confidentiality, if any



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Example

A student athlete visits a coach after practice to discuss "something personal." Before going further, the student gets the coach to promise "not to discuss this with anyone." The student athlete then discloses that they believe an athletic trainer has inappropriately touched student athletes during examinations. The student athlete wants the coach to insist on a different trainer for the team.



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Example

A faculty member teaches a creative writing course. A student writes an essay about their personal experience as a victim of sexual assault. Details in the essay make clear that the assault occurred on an overnight trip sponsored by the Business School. The faculty member asks the student whether the essay is fiction, and the student says "No."



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Are there exceptions to mandatory reporting?

- A victim not required to report their own, personal experience
- Disclosures at a public awareness event
- Disclosures to confidential reporters acting within their confidentiality*



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Who are confidential reporters?



- Persons designated by institution for whom students may speak confidentially about sexual misconduct
- Persons who have a confidentiality privilege under law

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What must confidential reporters disclose?

- Only information about the type of incident (e.g., a statistical disclosure)
- All identifying information must be withheld absent alleged victim's consent to disclosure
- Any information that must be reported under other state laws (e.g., child abuse or neglect)

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Example

Ray is a counselor who works in the student health center. During a counseling session with a student, the student discloses that a graduate assistant offered a quid pro quo—better grades for sexual favors. Ray discusses various options with the student, including disclosing the matter to the Title IX Coordinator, but the student wishes to keep the matter confidential and simply address it in counseling.



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Example

Ray is a counselor who works in the student health center. Ray has a counseling session with a student who works part time in the on-campus daycare center. The student discloses that he observed a full-time employee groping the genitals of an eight-year-old child in a way the student perceived to be sexual.



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Group Scenario

Zeb is a professor in the PT Department who also works an occasional shift at the associated hospital. Charlie is a student in one of Zeb's courses. Over the course of a week, Zeb observes that Charlie has been late to class and appears distracted. After Charlie fails an important test, Zeb approaches Charlie after class and asks Charlie if anything is wrong. Charlie says, "well, since you're a medical provider, I guess I can tell you . . . . I was raped last weekend, and I've spent the last week meeting with doctors and police." Charlie then solicits Zeb's advice about certain prophylactic medications doctors have prescribed. When Zeb advises Charlie to make a report to the Title IX Coordinator, Charlie says they want to keep the matter confidential.



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Group Scenario Discussion Questions



1. **Is Zeb required to make a mandatory report to the Title IX Coordinator?**
2. **Does Zeb have a dual status as a mandatory reporter and a confidential employee?**
3. **Is there anything Zeb could have done to better manage the conversation with Charlie?**

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Questions



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Case Intake

Module 4

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What is the Title IX grievance process?



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When do we reach out to the alleged victim?

- After institution has actual knowledge of alleged sexual harassment, Title IX Coordinator must contact alleged victim
- Provide information about supportive measures, explain the grievance process and how to file a formal complaint, and discuss the alleged victim's wishes



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Sherman v. The Regents of Univ. of Cal. (N.D. Cal. 2022)

In allowing claim of Title IX deliberate indifference to proceed, court noted the allegation that over four months passed between the former graduate student plaintiff's initial email to the dean about the professor respondent's conduct and U.C. Santa Cruz placing him on leave pending an investigation.



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

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

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What are supportive measures?

- Non-disciplinary, non-punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party



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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

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



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Example

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

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Do students and employees have other rights to accommodation?

- Yes—other laws may trigger accommodations when a medical condition or disability is present. E.g.:
  - Americans with Disabilities Act
  - Family and Medical Leave Act
  - Section 504 of the Rehabilitation Act
  - Title IX pregnancy accommodation provisions

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Are supportive measures confidential?

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



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Example (Poll to Follow)

Title IX Coordinator receives a call from a woman who claims to be the mother of Student A who reported being a victim of sexual assault. Woman demands to know: "What are you doing for my daughter?" and specifically, "Are you providing my daughter with counseling?"



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Title IX Coordinator should:

Answer mom's question because it's a FERPA health and safety emergency

0%

Confirm that Student A reported a sexual assault but say nothing more

0%

Obtain Student A's written permission before sharing any information with mom

0%

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Results slide

Title IX Coordinator should:

Answer mom’s question because it’s a FERPA health and safety emergency



##.##%

Confirm that Student A reported a sexual assault but say nothing more



##.##%

Obtain Student A’s written permission before sharing any information with mom



##.##%

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Who is responsible for supportive measures?

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

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Can we utilize interim removals or suspensions for students?



- Students may be removed on emergency basis if:
  - Individualized safety and risk analysis
  - Determines an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
  - Student is given immediate notice and opportunity to contest the removal

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Example

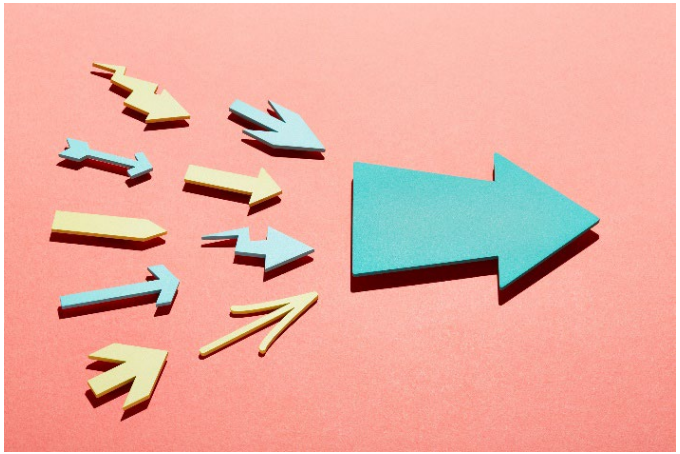
Student A reports that Student B raped Student A after providing Student A with a drink laced with drugs. The alleged incident occurred last night, and Student A is covered in bruises. Student C, an acquaintance of Student A ,reports that they too were drugged by Student B two weeks ago, although a friend walked in and prevented Student B from effectuating the sexual assault.



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Are there other considerations for sexual assault and VAWA crimes?

- Provide statement of rights, options, and resources
- Consider preservation of evidence
- Assistance in contacting law enforcement
- Assistance in obtaining forensic examination
- Consider Clery Act obligations
- Consider potential effects of trauma



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What does it mean to be "trauma informed"?

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

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How do we approach trauma in a Title IX case?

Balance

"Trauma-informed investigation techniques that bleed over into … bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings."

- Candace Jackson, Acting Asst. Secretary of ED (2017)

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What is the definition of trauma?



Merriam-Webster: A very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



English Oxford: Deeply distressing or disturbing experience



Wikipedia: Is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience

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What is a neurobiological effect?



- Experiencing trauma can affect the brain itself by altering chemical processes and brain functioning
- These alterations can affect how a person processes information, what they remember, and how they relay information
- Ignorance of the neurobiological affect of trauma can lead to misconceptions about how victims of sexual violence “act” or “should” act

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Example

Complainant gives a hyper-specific description of the scent of deodorant the perpetrator was wearing but cannot initially recall whether the perpetrator forced oral sex before intercourse or vice-versa.



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Example

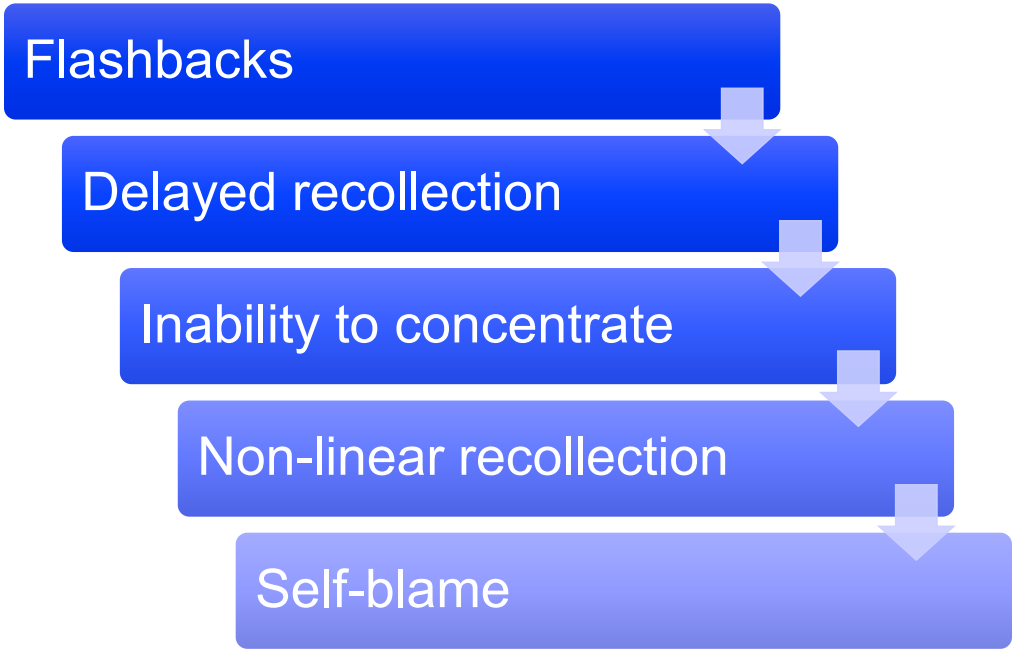
During initial intake, complainant comments that they were “so stupid” to follow perpetrator to their apartment, observes that “I should have said ‘no’ and left as soon as they offered me that drink,” and “my parents are going to kill me when they find out I put myself in this position.”



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What are possible effects on recall?

- People who have suffered trauma may experience any or a mix of:



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How does trauma relate to credibility?

- Avoid making assumptions based on the way an individual delivers information
- Understand memory may be clarified in time
- Address inconsistencies in a respectful and non-accusatory way

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Can we place employees on administrative leave?

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

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Example

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



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What is a formal complaint?



- Signed writing
- From the alleged victim or the Title IX Coordinator
- Alleging sexual misconduct
- Indicating desire to initiate the grievance process (i.e., investigation and hearing)

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What factors should a Title IX Coordinator consider in deciding to file a formal complaint?

- Alleged victim's preference
- Severity of the conduct
- Potential for other victims/repeated conduct
- Availability of evidence
- Status of respondent (e.g., employee)
- Public awareness of the matter
- Effects on campus climate
- Others?

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Example

Undergraduate student reports being sexually propositioned by a faculty member. Student does not wish to file a complaint, fearing retaliation and retribution. Faculty member holds a distinguished professorship. Faculty member has been previously warned, on at least two occasions, about making inappropriate sexual comments to students. Rumors have percolated that faculty member had a sexual relationship with a student ten years ago before the institution banned consensual relationships between faculty and students.



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Example

Student A reports experiencing dating violence from Student B. Student A reports that the two have been "in a volatile relationship" since high school and that Student B frequently berates Student A and recently shoved Student A into a wall. Student A and Student B are both set to graduate in a month. Student A seeks certain academic supportive measures, including extended deadlines for several end-of-semester projects. Student B has no misconduct history.



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Group Scenario

Sage reports to the Title IX Coordinator that their roommate Blair came home after a party, looking disheveled and crying. Sage reports that Blair has not left their apartment and speculates that Blair may have been sexually assaulted. Sage discloses that Blair has made "suicidal comments" in the past.

Title IX Coordinator secures a meeting with Blair, but Blair is guarded and asks questions about confidentiality. Reluctant to share details, Blair discloses only that something "horrible" happened with "Sawyer." Blair comments, "I can't believe I put myself in this situation." Title IX Coordinator encourages Blair to seek counseling.

After the meeting, the Title IX Coordinator confirms that another student recently made a sexual assault report about Sawyer Jones. That student is still deciding whether to make a formal complaint. Registrar confirms there is only one student at the College with the first name "Sawyer."

A day later, Sage calls to report that Blair has started cutting their arms.



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Group Scenario Discussion Questions



1. Is any of Blair's behavior potentially attributable to the effects of trauma?
2. Is there anything the Title IX Coordinator should have done before meeting with Blair?
3. What additional supportive measures would you have discussed with Blair, apart from counseling?
4. What, if anything should the Title IX Coordinator do to address the risk posed by Sawyer?
5. How should the Title IX Coordinator respond to the report of Blair cutting their arms?

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Questions



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Interview and Questioning Techniques

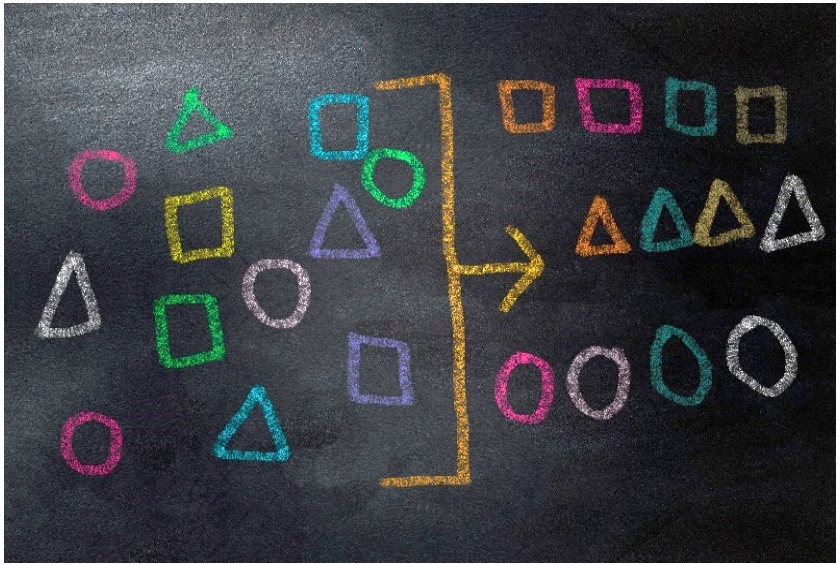
Module 5

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What is the purpose of Title IX investigation?

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



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What are the general principles of an investigation?

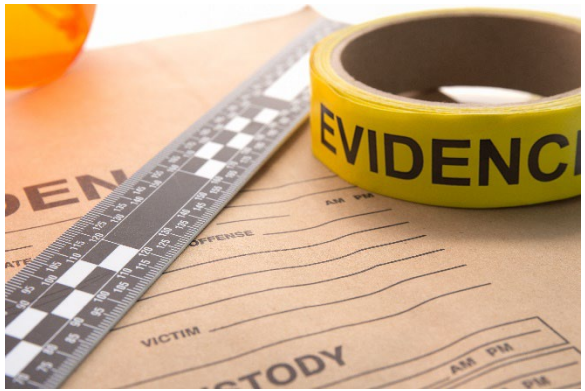
- Parties must have sufficient notice to prepare and meaningfully participate
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have equal opportunity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

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How do we collect evidence in an investigation?



Interviews of parties and witnesses

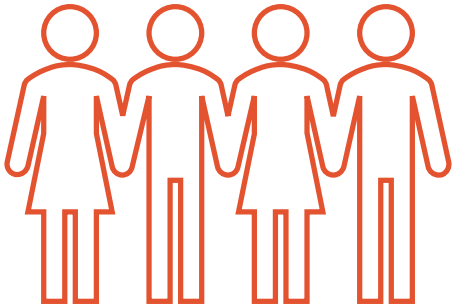


Collection of non-testimonial evidence

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Who do we interview in an investigation?

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



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

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

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Example

Jack has accused Jill of sexually assaulting Jack when Jack was incapacitated. Student witness saw Jack and Jill at a party, shortly before the assault, and observed that Jack could not stand and had to be helped by Jill to a waiting rideshare.



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Example

Jane has been Jill's friend since high school. Jane was out of town the night of the alleged sexual assault. But Jane will testify that Jill is a kind person who would never hurt or take advantage of anyone.

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How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

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What does it mean to build rapport and provide information?



- Establish points of personal connection with the subject of the interview
- Address information deficits that may hinder willingness or ability to provide testimony

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How do I ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use “facilitator” words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of direct and option-choosing questions until absolutely necessary.
- Avoid recognition prompt questions until later (if at all)

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What are “invitation” questions?

- “Can you please tell me what happened that night?”
- “Can you walk me through what happened?”
- “In your own words, can you tell me what occurred?”
- “Can you describe what happened to you?”

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What are “facilitators”?



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What are “cued” invitations?

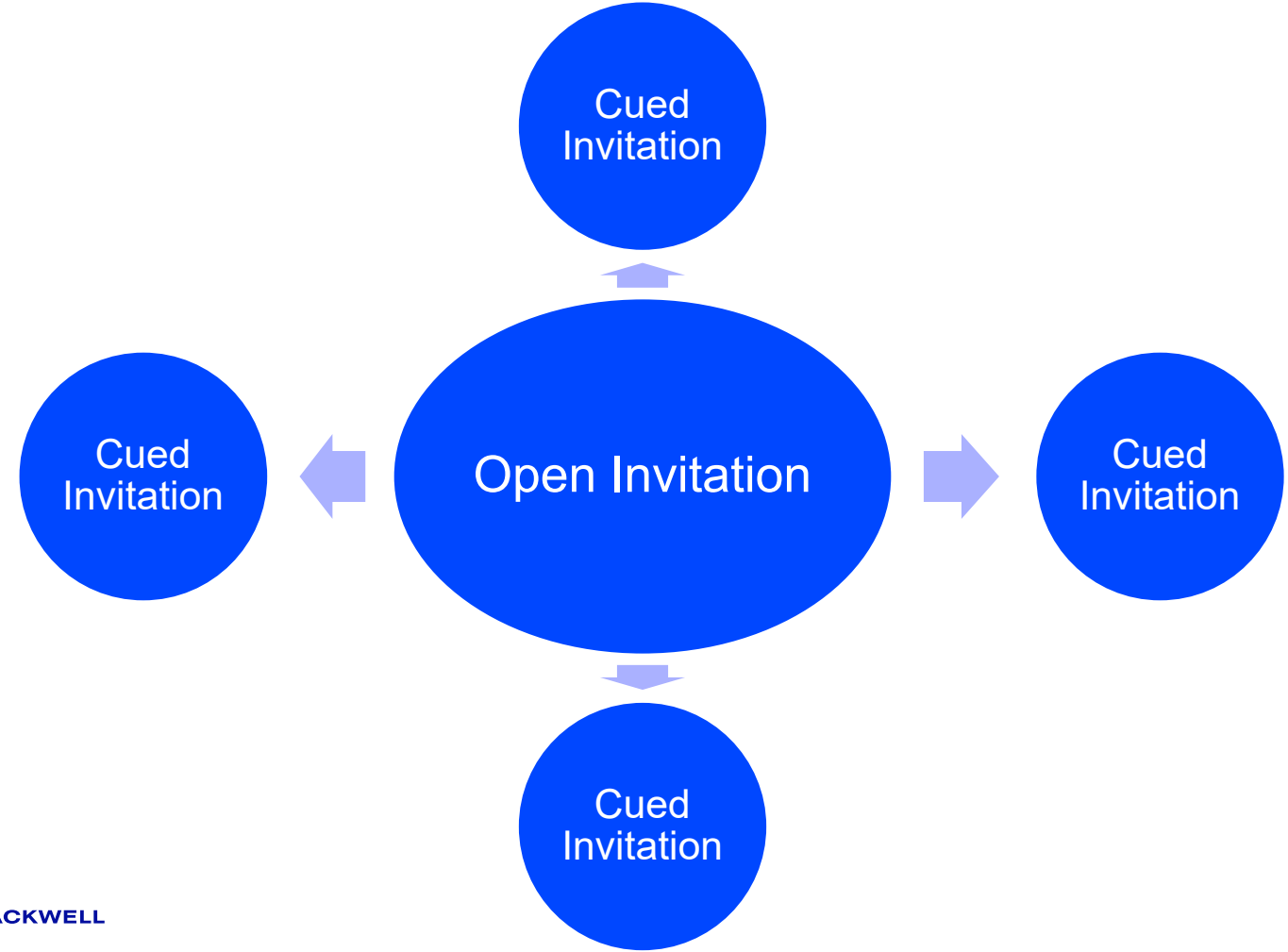
“You mentioned that . . . . Can you tell me more?”

“You said that . . . . Can you elaborate?”

“You said they ‘coerced’ you. Can you tell me more about how they coerced you?”

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

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What are directive and option-choosing questions?



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

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What about leading questions?

- Leading questions imply the anticipated answer through the question itself
- Pose a significant risk of influencing the testimony and compromising impartiality
- Should be avoided by institutional actors (fine for advisors conducting cross-examination)

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Examples

You must have felt shocked and disgusted when he did that, right?

And because they had done that with you before, you must have assumed they consented to do it again?

So, you feel that you could not agree to sexual activity because you were so drunk you couldn’t make an informed decision?



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May an investigation collect evidence on sexual history?

Generally, no – Evidence of a complainant's prior sexual behavior is relevant only if offered to prove that someone other than the respondent committed the conduct, or if evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent.

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Example

Cade accuses Simon of forced oral sex. Simon claims that Cade is experienced at oral sex and urges the investigator to ask Cade how many times Cade has willingly performed oral sex on others in the past.



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May an investigation collect and rely on privileged records?

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

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Example (Poll to Follow)

During the initial investigation interview, the complainant discloses that they went to the counseling center the very next morning. The investigator asks: "What did you tell the counselor? It's important for me to know this, as it could corroborate your account."



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Question slide

The investigator's question is:

Appropriate

0%

Inappropriate

0%

Well intended but should be asked a different way

0%

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The investigator's question is:

Appropriate



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Inappropriate



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Well intended but should be asked a different way



##.##
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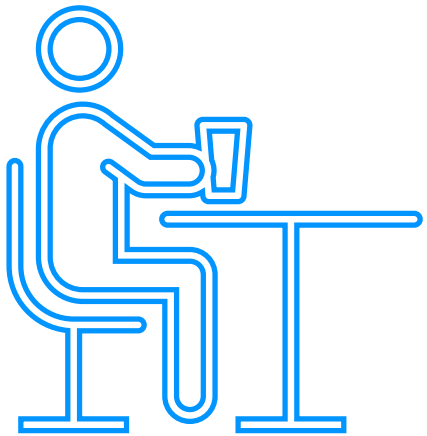
Example

During the initial investigation interview, the complainant discloses that they went to the counseling center the very next morning. The investigator says: "Your conversations with the counselor are confidential, and you have the right to keep them confidential. I'm not going to ask about them, but you do have the right to waive confidentiality if you think there is something important that you want me to know." The complainant asks, "Well, do you think I should waive confidentiality?" The interviewer responds, "I can't answer that for you, but I do think that's something you could discuss with your advisor or your counselor."



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Does the hearing officer ask questions at the hearing?



- Hearing officer may but is not required to
- Hearing officer may ask questions before others but may also wait

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How does questioning by a hearing officer differ from questioning by an investigator?

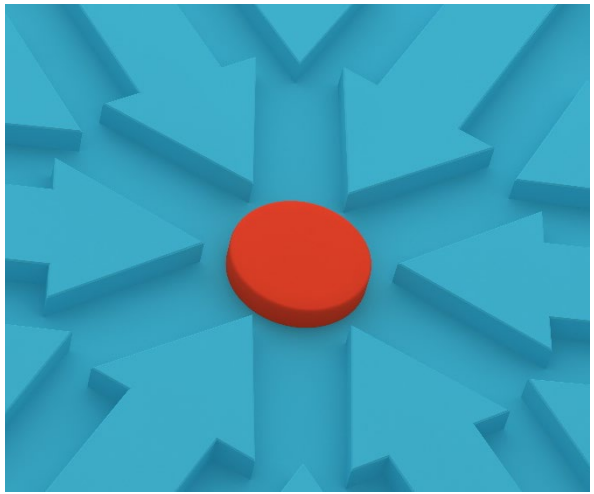


- The matter will be substantially more focused by the time of hearing
- The hearing officer will have access to considerable information from the investigation
- Hearing officer's questions should focus on material disputed facts, issues that go to credibility, and "elements" of the misconduct alleged

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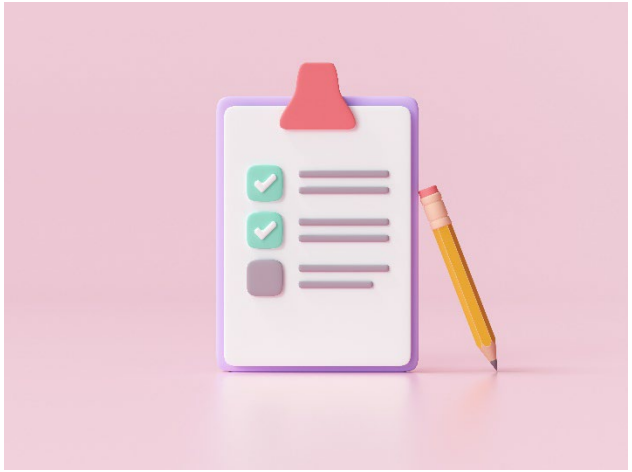
What is a “material” disputed fact?

- Something that matters to the ultimate determination
- Something that the parties do not agree on



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What are the “elements” of the misconduct?



- The components of the definition of the type of misconduct at issue
- All essential points that would be necessary to find a particular type of misconduct occurred as defined by policy

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Example

Student A has accused employee of quid pro quo harassment. The elements are:

1. **The respondent is an employee.**
2. **The employee conditioned an aid, benefit, or service**
3. **On the complainant's participation in**
4. **Unwelcome sexual conduct**



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What are potential landmines for hearing officers?

- Disproportionate questioning of one party over the other
- Being overly solicitous to one party
- Asking questions that create the appearance the hearing officer is a prosecutor or defense attorney
- Crowding out the ability of advisors to question
- Asking questions predicated on stereotypes or bias
- Revealing the likely outcome through questions

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Example

Before questioning complainant, hearing officer says: "I just want to thank you for being here today. I know it takes a lot of courage and that this is likely very difficult for you. I have some questions that I need to ask, but if any of them make you uncomfortable, just let me know. I want you to be as comfortable as possible."

Before questioning the respondent, the hearing officer says simply: "I have a few questions for you. If anything I ask doesn't make sense, I'll expect you to let me know."



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Example

While questioning the respondent, the hearing officer says:

“You received training on the sexual harassment policy, right?”

“And you remember from training that you need affirmative consent to have sex with someone, right?”

“And so you knew, when the complainant told you “no,” that you would be committing a sexual assault if you did it anyway, right?”



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Example

While questioning the complainant, the hearing officer says:

“So you agree that you gave conflicting signals to the respondent, right?”

“And someone in his position could have understood that you were agreeing to have sex, right?”

“And you can see how it might be unfair to hold him responsible, given your lack of clarity as to what you were willing to do?”



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What are best practices for hearing officers?

- Allow the inherently adversarial nature of the hearing to play out, even if it is uncomfortable
- Be scrupulously objective, neutral, and fair in demeanor and questions asked
- Avoid the temptation to predicate questions with handwringing, apologies, or excessive expressions of sympathy or concern

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Doe v. Purdue University (7th Cir. 2019)

Court found respondent pleaded a viable Title IX discrimination claim where, among other things, respondent alleged that committee members failed to read investigatory report prior to hearing and one asked accusatory questions that presumed the respondent's guilt.



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Questions



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Investigation Report Writing

Module 6

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What is the purpose of an investigative report under Title IX?

- Outline/summarize the allegations of potential sexual misconduct
- Describe a timeline of the investigation
- Fairly summarize relevant, inculpatory and exculpatory evidence



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What is the basic structure?

- Framing the core allegations
- Listing the specific forms of sexual misconduct with policy definitions
- Outline the timeline/chronology
- Summary of the complainant's narrative and respondent's response to the same
- Summary of the other evidence

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How do we frame the case?



- Articulate in a single paragraph what the case is about
- An orientating statement that facilitates further review of the document

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Example

Student Jane Doe alleges that faculty member John Roe engaged in quid pro quo harassment. Specifically, Ms. Doe alleges that, when Ms. Doe was taking Dr. Roe's Calculus class in the Spring semester of 2023, Dr. Roe offered to increase Ms. Doe's grade from a C+ to an A if Ms. Doe would send naked pictures to Dr. Roe. Dr. Roe denies that he made any such offer to Ms. Doe and that he assigned Ms. Doe the grade that her work product merited. This report summarizes the investigation of this matter and all relevant evidence, as specified in the Sexual Misconduct Policy.



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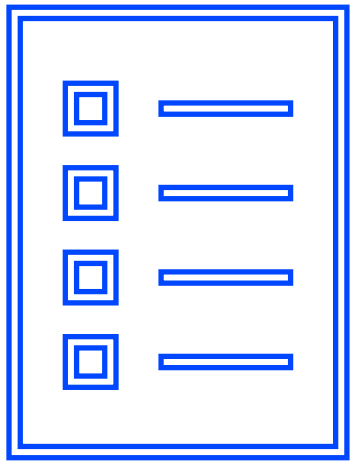
Example

Student Lane Doe alleges that student Royce Roe, Mr. Doe's roommate, engaged in hostile environment sexual harassment and fondling. Specifically, Mr. Doe alleges that, over the course of several weeks in the Fall semester of 2023, Mr. Roe made repeated and unwelcome romantic overtures to Mr. Doe and, after Mr. Doe rebuffed them, began to tell Mr. Doe's friends that Mr. Doe and Mr. Roe were sexually involved when they were not. Mr. Doe also alleges that Mr. Roe fondled Mr. Doe's groin while Mr. Doe was sleeping. Mr. Roe denies that he told anyone that he and Mr. Doe were sexually involved and contends the romantic overtures were innocent and do not rise to the level of harassment. Mr. Roe denies ever fondling Mr. Doe.



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How do we identify the potential violations?



- Identify each potential form of sexual misconduct as defined by the policy
- Restate the policy definition of the forms of sexual misconduct exactly as framed in the policy

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Example

Mr. Doe's complaint implicates two potential forms of sexual misconduct as defined by the policy:

Sexual Harassment By Hostile Environment

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that . . .

Fondling

The touching of the private body parts of another person for the purpose of sexual gratification . . .



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Practical Point

The specific forms of sexual misconduct identified in the investigation report should always match the forms identified in the initial written notice (and any supplemental notices) provided to the parties when the case began.

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How do you describe the chronology?

- Bullet point form beginning with the date of the formal complaint
- Progressing through to issuance of the final investigation report
- Including core procedural elements and dates of interviews



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Question slide

A good chronology includes the date of every written communication, including emails, with both parties

True

0%

False

0%

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A good chronology includes the date of every written communication, including emails, with both parties

True



##.##%

False



##.##%

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Example

1/3/2024: Formal Complaint filed by Mr. Doe

1/7/2024: Initial written notice provided to parties

1/10/2024: Interview of Mr. Doe

1/17/2024: Interview of Mr. Roe

. . .

3/15/2024: Evidence file provided to parties and advisors

3/25/2024: Responses to evidence file received from both parties



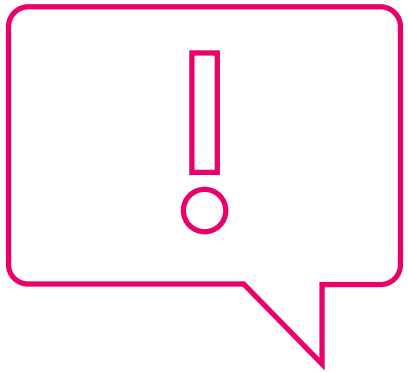
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How do we summarize the party narratives?

- Summary of the complainant's testimony and respondent's testimony should be separately set out
- Summarize *material* facts
- If a transcript of the interview or a full memorandum of interview is included, summary can be relatively brief

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What facts are material?



- Are they facts on which an ultimate decision might turn?
- Are they facts necessary for the reader to understand facts on which an ultimate decision might turn?

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Example

Jane Doe stated that Calculus was a hard class, and she struggled early in the semester. The first assignment for the course was a take home assignment for which Ms. Doe received a grade of 65%. This was the worst grade Ms. Doe had ever received at the university, and she vowed to study harder. The next assignment was an in-class quiz that Ms. Doe says she "bombed" getting a 62%. Ms. Doe considered hiring a tutor to improve her grades but could not afford one. Next . . .



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Example

Jane Doe stated that Calculus was a hard class. Ms. Doe stated that, through the mid-term, she had a grade of 77%, which constitutes a C+. Because she was struggling, she went to see Dr. Roe during office hours on March 6, 2023. Ms. Doe described the interaction between herself and Dr. Roe in his office as follows . . .

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How should other information be included?

- Summaries of witness testimony should be included in a section separate from the parties' testimony
- Non-testimonial evidence should be summarized and all listed in index form and appended as exhibits



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Example

Ms. Doe provided dozens of text messages that she sent to her friends in the days after meeting Dr. Roe during office hours. Those text messages are included as Exhibit 1. Of particular note, is a text Ms. Doe sent to a friend the evening of March 6, 2023, in which Ms. Doe wrote, in pertinent part: "You won't believe what Dr. Roe asked me to do today. That guy is super pervy. CALL ME."



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What are best practices for writing?



- A Title IX investigation is an objective attempt to gather all relevant evidence
- Writing should be objective and professional

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What are some key tips?

- Complete sentences with sound grammar and correct spelling
- Professional font with professional margins and headings
- Use a standard form for all investigation reports
- Avoid sanitizing parties' and witnesses' language; use quotes if needed
- Avoid euphemisms that create ambiguity
- If credibility observations are included, explain the basis for them

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Example

The Complaintant told the respondent she was not ready to go that far with him and wanted to wait until they knew each other more.

vs.

Ms. Roe told Mr. Doe she was not ready to have sexual intercourse at that time and wanted to wait until she and Mr. Doe knew each other better.

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Practical Point

Have another member of the Title IX team proofread the investigation report before it is finalized.

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Example

This font is unprofessional and conveys a sense of silliness and whimsey that is not appropriate in a Title IX investigation.

vs.

This font is professional and conveys that the drafter takes their work seriously and appreciates the gravity of the matter they are investigating.



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Example

According to Ms. Roe, Mr. Doe then indicated a desire to have sexual intercourse. (sanitized)

According to Ms. Roe, Mr. Doe then “shouted” “I’m going to fu you now.” (not sanitized)**

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Example

According to Mr. Doe, while the two were having intercourse, Ms. Roe gave various verbal indications of consent. (sanitized)

According to Mr. Doe, while he was having intercourse with Ms. Roe, Ms. Roe “moaned loudly” and repeatedly shouted “yes!” (not sanitized)



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Example

Mr. Doe then indicated that Mr. Roe touched his privates inappropriately. (euphemism)

Mr. Doe indicated that Mr. Roe then used his free hand to grab Mr. Doe's penis and testicles from outside Mr. Doe's shorts. (No euphemism)



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Example

During the interview, Mr. Roe appeared highly credible.

vs.

During the interview, Mr. Roe was attentive and did not hesitate in answering my questions. Mr. Roe made eye contact throughout and did not refer to notes or any other source. When I asked questions that he did not know the answer to, he readily admitted his lack of knowledge. He did not give contradictory testimony at any point, and his testimony about the core incident was clear and detailed. I found him to be a credible witness.



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Example

During the interview, Mr. Roe gave indications he was not credible.

vs.

Mr. Roe initially stated he arrived at 11:00 pm and did not even know Ms. Doe was going to be there. When I later showed him a timestamped photograph showing him in the living room with friends at 10:00 pm, he would not make eye contact and simply said he "must have had the time wrong." When I showed him a text message provided by his friend, in which Mr. Roe indicated his intent to "hook up" with Ms. Doe at the party, Mr. Roe paused for an extended period of time and said, "well, maybe I expected her to be there, but I just hadn't seen her." Mr. Roe then immediately asked to take a break so he could make a phone call. Based on these reactions, I found Mr. Roe to lack credibility.



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What are some other landmines to avoid?

- Injecting stereotypes or bias
- Including external facts not derived from the investigation
- Including ethical or moral judgments
- Including prohibited content (e.g., sexual history)



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Example

In this investigator's experience, it is common for members of sports teams to support a member who is under investigation for misconduct. Therefore, the testimony given by other team members may be deemed less credible than that given by persons who are not on the team.



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Example

It is common knowledge that first-year students are generally less experienced in navigating difficult situations and thus Mr. Doe may have found it difficult to express his desire not to be romantically pursued by Mr. Roe who was a third-year student.



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Example

According to information the investigator independently located on the website www.healthfacts.com the various medications that Ms. Roe was taking could have exacerbated the effect of the alcoholic drinks she had, making it almost certain she was incapacitated . . .



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Example

At a minimum, Mr. Roe's continued romantic pursuit of Mr. Doe was ungentlemanly, immoral, and not consistent with the institution's expectation that all students will show care and concern for each other. However, Mr. Roe's conduct may also have crossed the line into hostile environment sexual harassment . . . .



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How should you address the parties' response to the evidence?



- Incorporate new or salient points as necessary
- If a party demanded more interviews or collection of other evidence, and you elected not to pursue, explain why

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Example

In her response to the evidence that was shared, Ms. Doe explained that the three cocktails she drank before leaving the bar were "much stronger than normal." Ms. Doe did not explain why she elected not to make this point in her initial interview and in the follow up interview.

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Example

In his response to the evidence, Mr. Doe identified six witnesses from his fraternity who Mr. Doe indicated would provide testimony that Mr. Doe is "respectful of women" and "not the kind of person who would do this." However, because there was no indication any of the six witnesses had relevant knowledge of the incident between Mr. Doe and Ms. Roe, and such generalized character evidence is not relevant to the case, the investigator declined to conduct additional interviews.



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Questions



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Credibility Assessments and Live Hearing Determinations

Module 7

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How does a hearing officer decide a case?



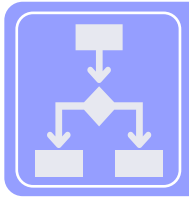
After hearing, must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the preponderance standard of evidence

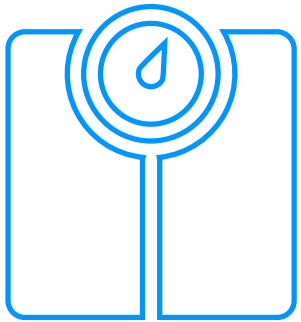


Using the facts as found, apply the policy's definitions to those facts to determine whether sexual misconduct occurred

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What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative (tending to prove a proposition) than other evidence
- Weight may vary depending on a range of factors



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Weight: Considerations

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

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Direct vs. circumstantial: Direct

Direct — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference

- E.g., testimony of a witness who actually observed and perceived event in question (see, hear, touch)

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Direct vs. circumstantial: Circumstantial



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

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Question slide

I think hearsay should

Be allowed in Title IX hearings



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Not be allowed in Title IX hearings



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Results slide

I think hearsay should

Be allowed in Title IX hearings



##.##
%

Not be allowed in Title IX hearings



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RESULTS SLIDE

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“Hearsay”

- Hearsay — Statement (written or oral) made by a non-available witness offered to prove fact in question
  - Longstanding evidentiary principle of when courts can rely on hearsay
    - Court rules do not apply in Title IX cases
  - Some hearsay is more reliable, e.g.,
    - Statement contemporaneous with the event in question
    - Excitable statement uttered in the moment being perceived
    - See other indicia of credibility

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Example: Weight

Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving. Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring. Witness testified he knows the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.



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Example: Weight

Witness says he saw a couple leaving the bar “sometime after ten but before midnight” but witness is not “sure exactly” when. Witness testified they “sort of looked” like complainant and respondent and witness is “pretty sure” it was them. But witness also says witness had spent two hours at a different bar before that and was “pretty drunk at the time I saw them.”



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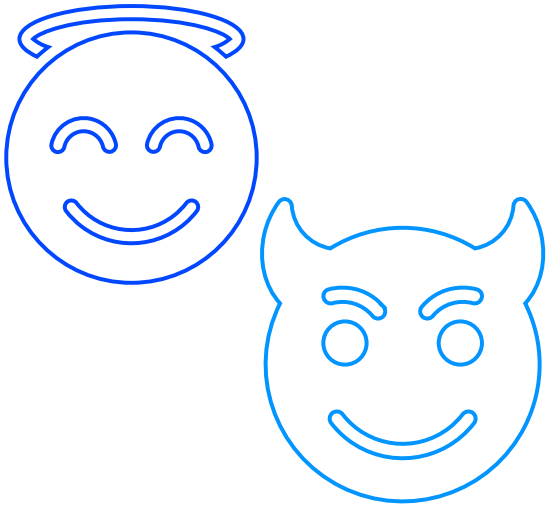
Incapacitation & weight/credibility

- Incapacitation alone ≠ unreliable or lack of credibility as to facts



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Assessing Credibility



- Plausibility—Believable?
- Corroboration—Other evidence?
- Consistency
- Demeanor
- Motive to falsify
- Contemporaneous
- First-hand knowledge
- Influence of others
- Bias (overt/unconscious)
- Behavior after the report

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How do we assess “I don’t remember”?

- True loss of memory may occur due to, e.g.:
  - Trauma
  - Drug/alcohol consumption
  - Lack of attention
- Balance
  - Memory loss alone does not equate to a lack of credibility
    - Recollection/testimony need not be linear
  - Possible to remember some information and not other information
  - Memory loss = an absence of information

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Expert witnesses

- Title IX regulations permit the use of expert witnesses, as long as the institution permits them equally for both parties
- Role: Clarify, explain, and provide opinions on complex matters that an average person would not typically understand
- Not to opine on ultimate fact or policy issues

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Example: Experts

Blood alcohol level for a typical person the size/weight of complainant after drinking four shots in four hours

Vs. whether complainant was incapacitated

Whether respondent could have traveled from class to complainant's apartment in order to be present at the time of a stalking incident alleged by complainant

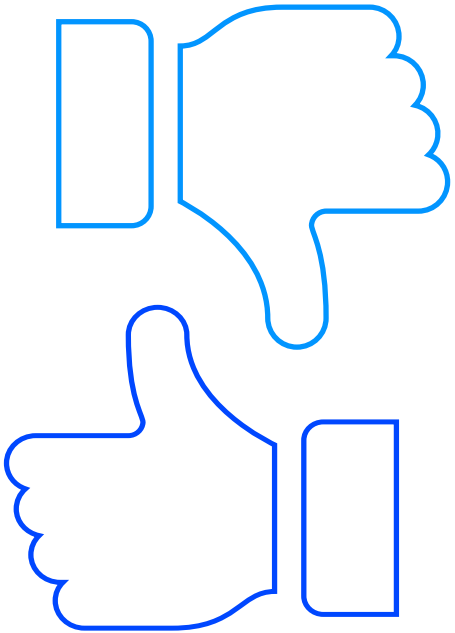
Vs. whether respondent was stalking



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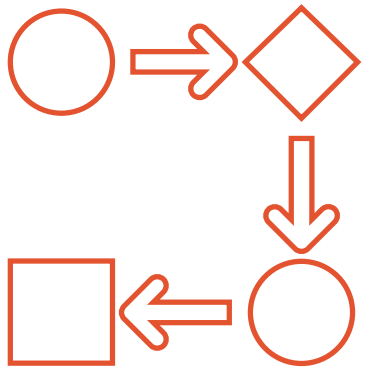
What is a determination?

- The decision as to whether or not prohibited misconduct occurred
- Results in a finding of “violation” or a finding of “no violation” as determined under standard of proof



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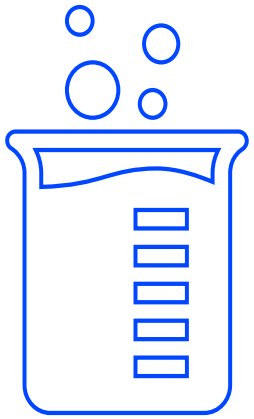
Purpose of a determination



- Moves matter to next procedural step
- Record of following process
- Documents fair process
- Provides parties and subsequent decision-makers with information

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Critical elements



Preliminary case information and Case History

Allegations

Applicable policies/procedures

Standard of proof

Evidence gathered/considered

Evidence/Facts: Factual findings

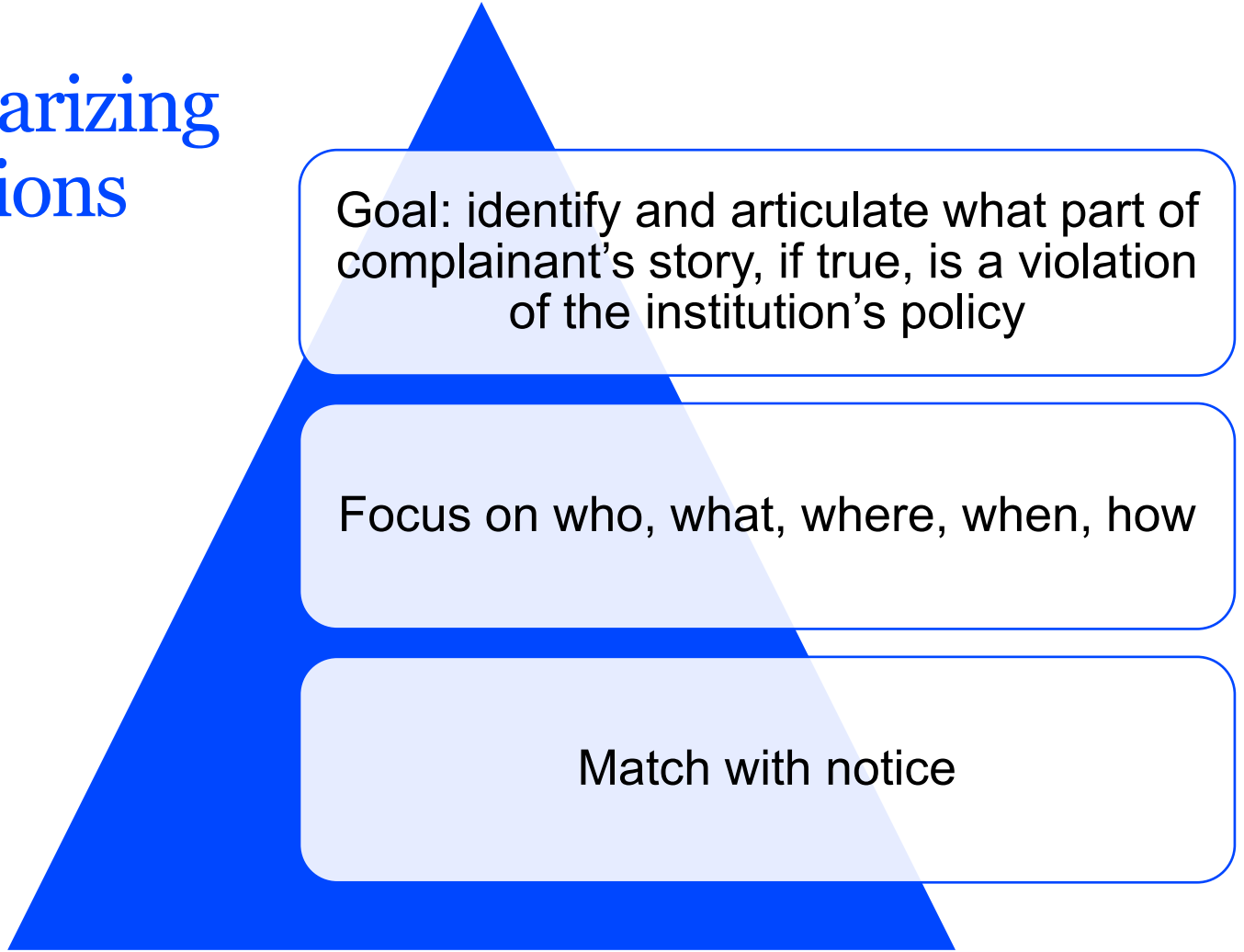
Decision-maker:

- Analysis and conclusion regarding responsibility
- Sanctions
- Procedures/grounds for appeal

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Summarizing allegations



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Applicable policies & procedures

Reference Title IX sexual harassment policy and procedures, including specific language which is pertinent to the allegation

- E.g., include relevant definitions

Attach full copy of Title IX sexual misconduct policy and procedures to report or include a hyperlink

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History of the case



How did the institution respond to the report?

- E.g., rights and options provided, notices provided



When, how, and where were parties and witnesses interviewed?



Provide status

- E.g., parties given access to evidence, opportunity to comment, report, applicable timeline dates



Explain any apparently unreasonable delays

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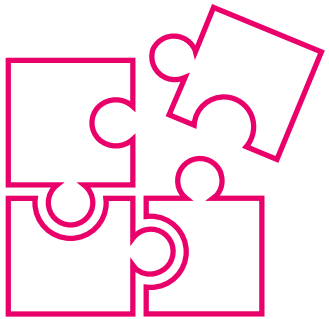
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Facts

Facts that matter	Goals	How to do this?
• Consider elements of alleged policy violation • Which facts are relevant to each element? • Which are disputed and undisputed?	• Investigators: identifying disputed/undisputed material facts • Decision-makers: reaching resolution of disputed material facts	• Show your work • Decision-makers: Explain your credibility assessments

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Analysis & Conclusion



- Put everything together
- As to each allegation: Analyze whether a violation of *policy* occurred (not the law)
- Explain your reasoning
- Include the good/bad/ugly
  - E.g., explain decisions about conflicting information (E.g., “As discussed above, there is some evidence suggesting that [X], but the preponderance of the evidence supports a finding [of the opposite of X]”)
- Address sanctions/remediation

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Example: Be specific

“Complainant alleges that Respondent had sex with Complainant without consent.”

vs.

“Complainant alleges that Respondent laid on top of Complainant, pulled Complainant’s underwear down with one hand, while pinning Complainant’s arms with Respondent’s other arm, penetrated Complainant’s vagina with a vibrator, while pushing Complainant against the wall next to the bed so Complainant could not move.”



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Example: Be specific

“Evidence includes a recording of Pat and Dre in which Pat was drunk.”

vs.

“Pat provided a recording of a discussion between Pat and Dre that Pat reported recording at the Bar. In the recording, Pat states loudly, ‘I’m so wasted;’ in the remainder of the two-minute recording, though individual words can be heard, Pat’s speech is unintelligible. Pat stated this was slurring due to intoxication. Dre agreed the recording was of Pat and Dre.”



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Example: Be specific

“Complainant is credible.”
vs.
“At the hearing, Respondent emphasized that Complainant sent a text saying, ‘Yeah, tonight was good,’ within an hour of the alleged sexual assault. On its face, the text could be construed as inconsistent with Complainant’s report that the sexual activity that occurred the hour before the text was not consensual.
However, Complainant said that, after Respondent drove Complainant home, Complainant was in shock and sent the text in response to Respondent so Respondent would not come searching for Complainant. Complainant explained engaging in the sexual activity despite it being unwelcome by saying Complainant feared for Complainant’s safety. Complainant reported that Respondent had slapped Complainant, creating a red mark, after Complainant refused to kiss Respondent; Complainant said this occurred about 30 minutes before the sexual activity …. Other than the text message, Complainant’s account is consistent with Complainant’s prior statements and the witness account about overhearing the early stages of the fight over the phone. It is also plausible that one who had just experienced sexual assault would send a text to appease one’s assailant.
In contrast, Respondent’s statements have changed repeatedly since the Complaint…
As such, the Hearing Officer finds Complainant’s account more credible than Respondent’s as to what occurred after the sexual activity.”



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Words matter: Language considerations

- Use objective terms
  - “Complainant” and “respondent” rather than “victim” and “perpetrator”
  - “Violation of policy” not “guilty” or violation of “law”
- Do not include speculation
  - Address unknown information as needed
  - Consider whether further investigation is needed
- Do not include irrelevant points and discussion
- Be thoughtful about pronouns
- Avoid vague phrasing like “had sex”

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Common “mistakes” in report-writing

- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- General lack of clarity/coherence
- Including too much information about irrelevant details
- Insufficient information on important issues
- Decision-making
  - Speculation
  - Conclusory determinations and credibility findings
  - Not clearly or adequately explaining basis for decision
  - Not clearly articulating whether/not the preponderance of the evidence establishes that it is more likely than not that the alleged misconduct occurred

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Questions



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Appeals

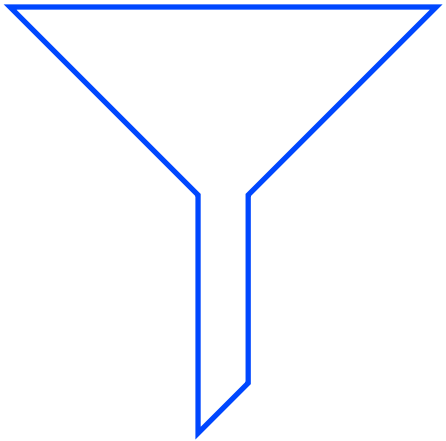
Module 8

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What is the purpose of an appeal?

- To provide the parties a final opportunity to challenge the decision
- On certain narrow grounds



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Question slide

The most important thing for an appeal officer is:

To think about how they would have decided the case if they were the hearing officer

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To focus only on the narrow grounds for appeal permitted by the policy

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Results slide

The most important thing for an appeal officer is:

To think about how they would have decided the case if they were the hearing officer



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To focus only on the narrow grounds for appeal permitted by the policy

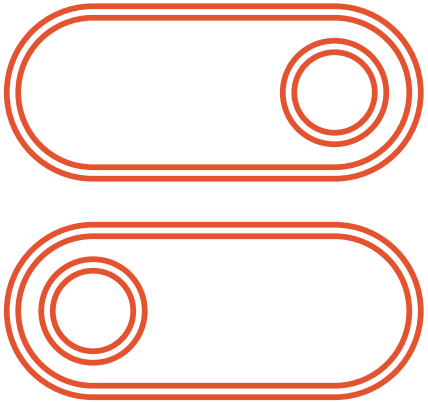


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RESULTS SLIDE

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What decisions may be appealed?



- A hearing officer's final determination regarding a respondent's responsibility
- Dismissal of a formal complaint

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How is an appeal initiated?

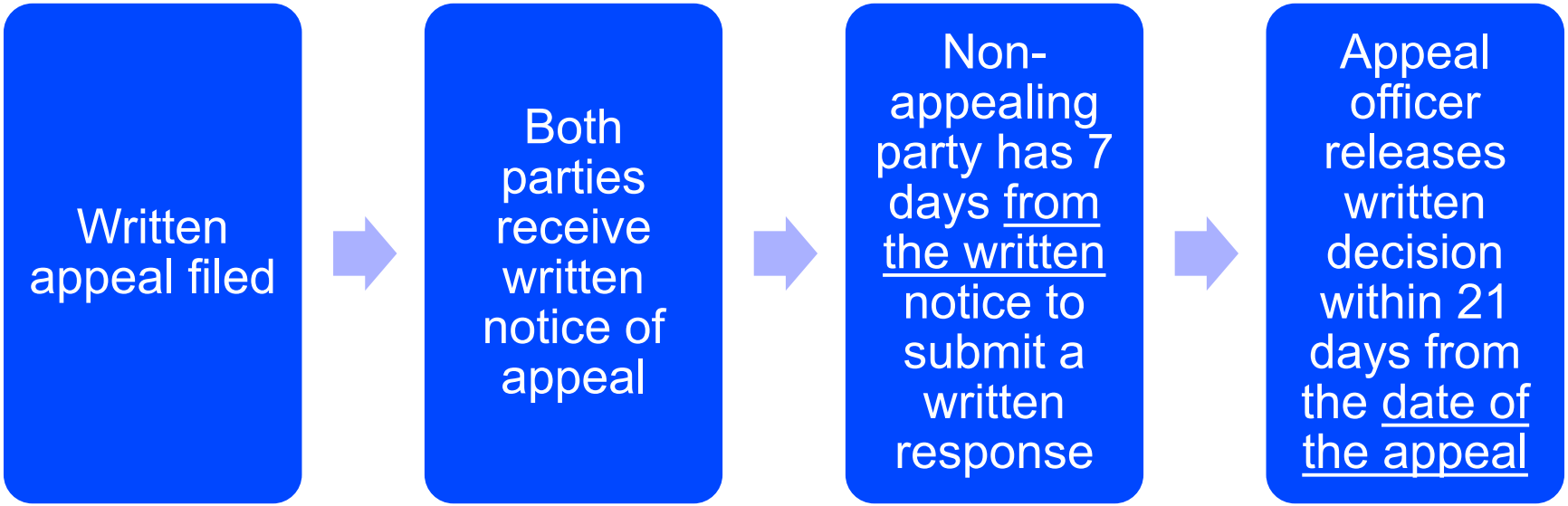
- Either party may appeal
- In writing
- Within ten days of notification of the appealable decision



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What are the steps to an appeal?



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What are the grounds for appeal?



- Procedural irregularity that affected the outcome
- New evidence not reasonably available at the time that could have affected the outcome
- Conflict of interest or bias by Title IX Coordinator, investigator, or hearing officer that affected the outcome

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What is a procedural irregularity?

- In all cases, procedural irregularity must have affected the outcome
- A procedural irregularity may include, for example:
  - A failure to follow the policy and/or procedures
  - A failure to objectively evaluate all relevant evidence, including inculpatory or exculpatory evidence, or
  - A determination regarding what evidence was excluded as irrelevant

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Are all procedural errors appealable?

- No – the procedural irregularity must be one that affected the outcome of the matter
- Errors that affect the outcome can be referred to as “prejudicial” errors
- Errors that do not affect the outcome can be referred to as “non-prejudicial” or “harmless” errors

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Example

During a hearing, the hearing officer denies the respondent's advisor the right to ask questions of a key witness. The respondent appeals, citing this procedural irregularity, and argues that the witnesses' testimony should have been excluded as unreliable because the witness was not cross-examined about her bias. And without such testimony, the outcome cannot be supported.



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Example

Policy provides that parties are to be provided at least ten days to review the evidence gathered during the investigation and to provide a response to it. Due to an error in counting dates on the calendar, the investigator gave the parties only nine days to review the evidence. Neither party noticed the error, and each provided a fulsome response to the evidence. Both had access to all the evidence at the hearing and both had attorneys as advisors. No party contends the investigator failed to interview a witness or otherwise collect relevant evidence.



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What is newly discovered evidence?

- Evidence that was not reasonably available at the time the determination or dismissal was made, that could affect the outcome
- Evidence a party had or reasonably should have had, is not newly discovered

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Example

After determination is made that respondent did not commit sexual assault, complainant secures a previously unknown video made by a bystander that depicts respondent groping complainant and complainant attempting to pull away from respondent in apparent shock. The bystander has been out of the country and only learned of the hearing after returning a few days ago.



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Example

A hearing officer determines the respondent sexually harassed the complainant by repeatedly haranguing the complainant to have sex despite the complainant saying "no" multiple times. After the determination, the respondent learns from a "friend of a friend" that the complainant had sex with multiple partners during the time the respondent allegedly committed sexual harassment. The respondent claims the new evidence will show the complainant did not suffer a hostile environment because the complainant would "have sex with anyone."



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What is a conflict of interest or bias?

- A conflict of interest is a material connection to the matter (including the persons involved) that compromises the conflicted person's ability to be fair and impartial
- A bias is a predisposition toward a person, a group of persons, or a factual situation that compromises the biased person's ability to be fair and impartial

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Example

After a determination is made that respondent committed quid pro quo harassment, respondent learns that the hearing officer was the godmother of the complainant and was seen speaking to the complainant's mother at a deli during a lunch break in the hearing. The hearing officer's decision hinged upon the officer's finding that the complainant's testimony was highly credible while the respondent's was not.



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Example

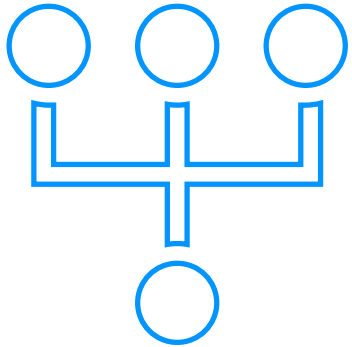
After a hearing officer finds the respondent committed dating violence, the respondent learns that the hearing officer previously worked for a non-profit group that advocated for severe criminal penalties for perpetrators of domestic and dating violence. The respondent finds a letter to the editor in which the hearing officer (then an employee of the non-profit) wrote that "there are almost no false allegations of domestic violence. Survivors have a right to be believed." A central piece of evidence in the case was a security video that showed the respondent shoving the complainant forcefully against a wall. The respondent did not argue self-defense.



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What are potential appellate outcomes?

- Affirm
- Reverse
- Remand
- Some combination of the three



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Example (Poll to Follow)

Appeal officer concludes a formal complaint was incorrectly dismissed because of a procedural error in failing to apply the correct definition of Sexual Harassment.



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Question slide

Which is the appropriate outcome?

The appeal officer should render a decision on whether there was harassment



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The appeal officer should remand for an investigation and hearing



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Which is the appropriate outcome?

The appeal officer should render a decision on whether there was harassment



##.##
%

The appeal officer should remand for an investigation and hearing



##.##
%

RESULTS SLIDE

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Example

Appeal officer concludes a biased and conflicted investigator failed to identify and interview key witnesses which directly resulted in a "no violation" finding by the hearing officer due to a lack of evidence.

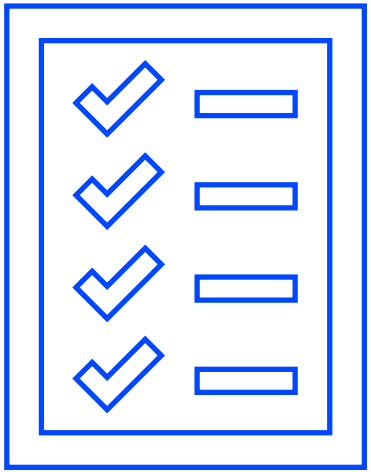
Appropriate outcome?



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How should an appeal decision be documented?

- Written decision
  - Summarize nature of case
  - Restate the asserted grounds for appeal
  - Summarize the arguments
  - Provide rationale and decision
  - Articulate remedy (if any)



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Questions



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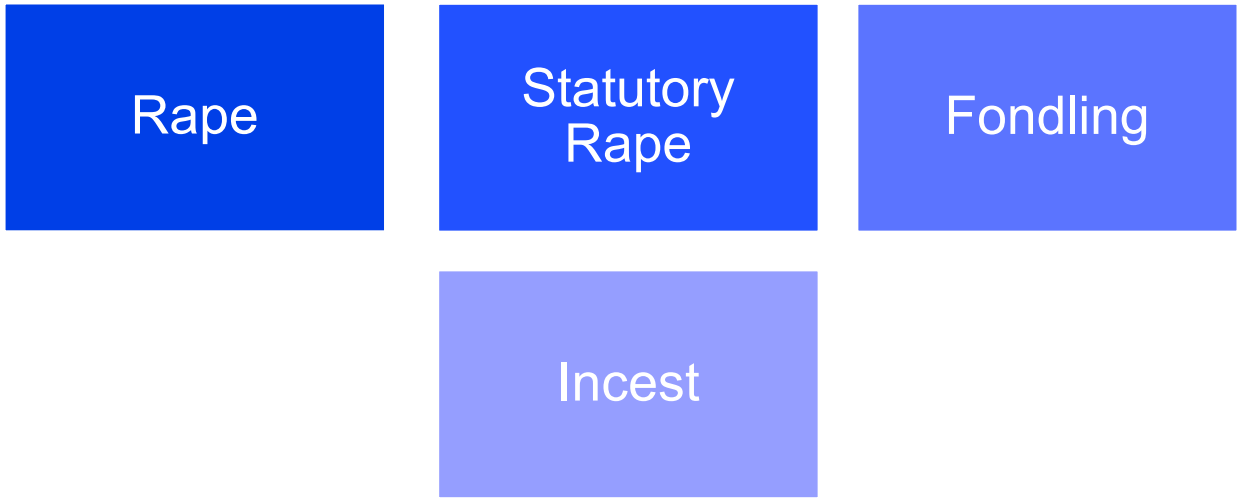
Sexual Assaults, Consent, and Incapacitation

Module 9

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What is sexual assault?



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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 does the model policy define consent?

Consent – A voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.

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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 and any conduct that might otherwise constitute consent in fact is ineffective

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Example

Reece and Emil are making out in an on-campus apartment. Emil removes his and Reece's clothes. Reece then says: "We need to use protection." Emil then penetrates Reece without protection. Reece pushes Emil off, gets dressed, and storms out.



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Example

Reece and Emil are in a dating relationship and have had sexual intercourse numerous times. One night, while making out, Reece begins to remove Emil's clothing. Emil says: "Not tonight. I'm too tired and not into it." Reece nonetheless proceeds to pull off Emil's clothing and fondle Emil.



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How does the model policy define incapacity?

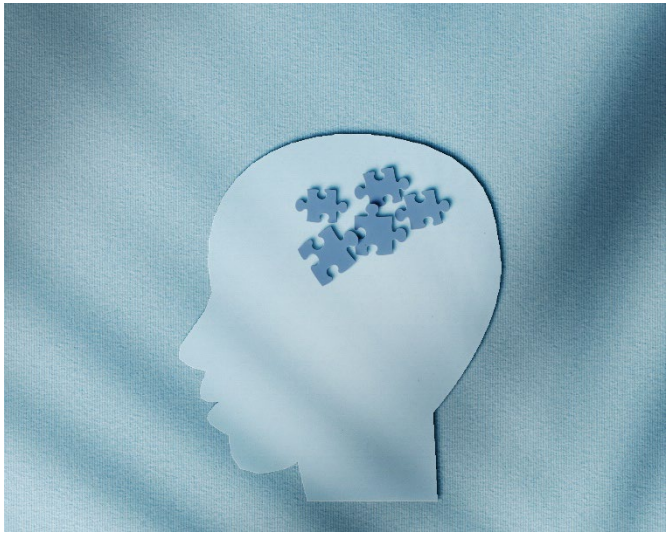
Incapacitation – Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.

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From whose perspective is incapacity assessed?

- Did the respondent know the other party was incapacitated? (actual knowledge)
- Should a sober, reasonable person in the respondent's position have known the other party was incapacitated (constructive knowledge)



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Question slide

A person who has had a lot of alcohol to drink is incapacitated.

True



##.##
%

False



##.##
%

It depends



##.##
%

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A person who has had a lot of alcohol to drink is incapacitated.

True

##.##
%

False

##.##
%

It depends

##.##
%

RESULTS SLIDE

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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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Example

Davis went out to a bar with his friends at 9:00 pm and had four beers over the course of two hours. Leaving the bar at 11:00 p.m., Davis was laughing and giggling but was able to start his car and drive himself and two friends several miles back to campus. Upon arriving to campus, and before exiting the car, Davis realized he had forgotten his pass-card and called a friend in the residence hall to let him and others in.



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Group Scenario

Keisha arrived at a party around 11:00 pm and began to drink a rum and coke. Clay approached Keisha and started talking to her.

Keisha and Clay continued to talk and dance with each other. Clay refilled Keisha's drink three times. Clay then started asking Keisha to come "upstairs". Keisha initially told Clay "no," but eventually relented because Clay seemed like a "nice person I could trust."

Once upstairs, Keisha and Clay starting "making out" and took their clothes off. Just as Keisha and Clay were about to hookup, Keisha started to feel nauseated and said "Can we stop? I don't feel well." According to Keisha, Clay said: "Can't we finish? You can puke when we're done." Keisha recalls that the two then engaged in multiple sex acts. Keisha says she must have then "blacked out" because the next thing she recalls is waking up in bed with Clay the following morning.

Keisha takes an anxiety medication that can exacerbate the effects of alcohol.



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Group Scenario Discussion Questions



1. Was Keisha incapacitated? What facts do you consider important in making this determination?
2. Did Clay know, or should Clay have known, that Keisha was incapacitated?
3. Did Clay coerce Keisha? Where is the line between coercion and boorish behavior

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Questions



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Interpersonal Violence and Stalking

Module 10

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What is dating violence?

"Dating Violence" is violence committed by a person:

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



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Example: Dating violence

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



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Example: Dating violence

Kace and Jamie were dating until Kace broke up with Jamie. A week after the breakup, Jamie approaches Kace in a parking lot on campus, begs Kace to take Jamie back, and when Kace says "no" forcefully shoves Kace into Kace's car causing bruises to Kace's back.



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What is domestic violence? (general definition)

Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the state.

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Example

A faculty member has a young child who the faculty member sometimes brings to their office. One day, while the child is in the office, the child has a tantrum after their video game quits working. The faculty member gets increasingly agitated and violently slaps the child, causing the child's lip to bleed and face to swell. Another faculty member, passing by in the hallway, observes the incident.

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Question slide

Does the faculty member who observed the incident have a mandatory child abuse reporting obligation under state law?

Yes



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No



##.##
%

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Does the faculty member who observed the incident have a mandatory child abuse reporting obligation under state law?

Yes



##.##
%

No



##.##
%

RESULTS SLIDE

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Example

A staff member who works in the athletics department is going through a messy divorce. The soon-to-be-ex spouse comes onto campus and to staff member's office. An argument ensues and culminates in the soon-to-be-ex spouse throwing over a chair and screaming to the staff member: "If you screw me over in this divorce, I'll kill you. And you can count on it!"



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Question for Discussion

What supportive measures or other protections can the institution provide staff member?



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What are some common issues in dating and domestic violence cases?

- Reluctant victims
- No-contact-orders and proximity restrictions
- Interim suspensions and leaves
- Civil protection orders
- Counter-complaints
- Allegation withdrawals
- Messy informal resolutions

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Example

Grace and Lyle have been in a volatile relationship since high school. Lyle visits the Title IX Coordinator and reports that Grace is domineering, frequently takes Lyle's phone to review his calls, threatens to kill herself if Lyle ever leaves her, and shouts and screams at Lyle after she has been drinking. Lyle seeks certain academic accommodations and counseling but does not wish to file a formal complaint. Lyle does not want the Title IX Coordinator to file a complaint either, fearing it will harm Grace. Lyle says he still loves Grace.



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If you were the Title IX Coordinator, would you file a formal complaint?

Yes



##.##
%

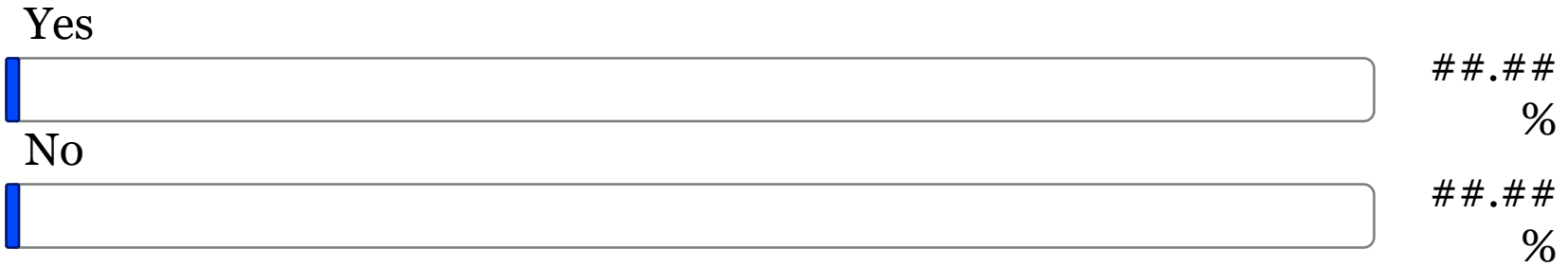
No



##.##
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If you were the Title IX Coordinator, would you file a formal complaint?



RESULTS SLIDE

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Example

Chaz and Manny have each made dating violence complaints against the other. The Title IX Coordinator imposes a mutual no-contact order, but Chaz and Manny both continue to text and call each other. The institution's policy makes clear that violation of a no-contact order is subject to discipline, but neither Chaz nor Manny has complained about the contact. The institution's ability to conduct an investigation has been hampered by the parties' incessant contact with each other.



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Example

Rita and Claude are both employees of the University who live together as a couple. After Rita attacked Claude with a knife at their shared home, Claude obtained an *ex parte* restraining order from a local court and provided a copy to the University's Director of Campus Security. The order specifically prohibits Rita from entering Claude's "place of employment." Rita works in the physical plant and cannot perform any of her duties remotely.

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Question for Discussion

What should the University do with Rita?



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Example

Jade filed a dating violence complaint against Carter after Jade broke up with Carter. The parties enter into an informal resolution whereby Carter agrees not to affirmatively contact Jade and not to enter Jade's residence hall. After the informal resolution is reached, Carter reports to the Title IX Coordinator that Jade has attempted to contact Carter via a mutual friend and that Jade has repeatedly walked by Carter's study carrel and always seems to walk by Carter in the dining hall. Carter believes Jade is trying to provoke Carter into violating the resolution agreement and wants to file a retaliation complaint.



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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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What are common stalking scenarios?

- Bad-breakups
- Infatuations
- Retaliations



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Example

Lex breaks up with Jo. Jo envisioned spending her life with Lex and is distraught. Jo repeatedly calls and texts Lex at all hours of the day. Lex blocks Jo. Jo then repeatedly attempts to talk to Lex at various places on campus, including the rec center and student union. When Lex begins spending time with Rachel, Jo begins posting critical comments on Rachel's social media feeds and mutters expletives whenever Jo passes Rachel on campus. Jo eventually follows Rachel home after class and tries to get Rachel to fight her in the parking lot of Rachel's apartment complex. Jo has been diagnosed with depression and anxiety disorder and has various accommodations.



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Question for Discussion

What effect, if any, do Jo's mental health conditions have?



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Example

Damien is romantically attracted to Candy and asks Candy to go on a date. Candy says "no." A few days later, Damien asks Candy to reconsider, and Candy says "no," again. Damien then leaves a card under Candy's windshield wiper apologizing for annoying Candy and expressing Damien's romantic feelings. Candy has one of her male friends tell Damien to leave Candy alone. Damien then buys flowers and has them delivered to Candy with an apology note and sends Candy a lengthy email at 2:00 am that includes a discussion of Damien's fantasy of having children with Candy.



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Question for Discussion

How do we distinguish between hostile environment sexual harassment and stalking?

Can the same actions constitute <u>both</u> forms of misconduct?



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Example

Carmen accuses Gunther of sexual assault. After Gunther is notified of the complaint, Gunther sends Carmen a nasty email accusing Carmen of making a false claim and threating to ruin Carmen's life. Gunther, who got along well with Carmen's mother, calls Carmen's mother to explain his view of the sexual encounter at issue. Gunther also posts various aggressive comments on Carmen's social media feed and "friends" several of Carmen's social media contacts.



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What are common issues in stalking cases?

- Reluctant victims
- No-contact-orders and proximity restrictions
- Interim suspensions and leaves
- Civil protection orders
- Mental health issues/disability accommodations
- Accommodations at hearings

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Questions



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First Amendment Scenarios

Module 11

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The First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."



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What is speech?

- Spoken words
- Written words
- Expressive imagery, movies, and other works of art
- Songs
- Clothing with messages
- Expressive performance
- Others?



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Hierarchy of Speech



- The most protected forms of speech include:
  - Political speech
  - Religious speech
  - Speech on matters of public concern
- Speech on personal issues and petty grievances least protected

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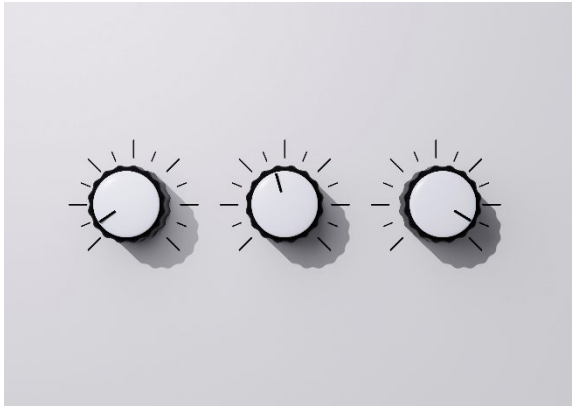
Viewpoint discrimination

- Targeting speech because of the viewpoint that is articulated
- Viewpoint discrimination rarely allowed under First Amendment



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Non-Expressive Qualities



- Expressive speech can be regulated based on its non-expressive qualities
- Reasonable time, place, and manner restrictions

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Unprotected Speech



- Defamation, slander, libel
- “Fighting words”
- “True threats”
- Incitement
- False advertising
- Child pornography
- Obscenity*

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Example: Defamation

Student A publicly accuses Student B of rape. In fact, Student B never had sexual intercourse and wasn't even in the same town with Student A on the night Student A claims the rape occurred.



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Example: Not-Defamation

Student A accuses Student B of “taking advantage” of Student A by pursuing Student A when Student A was “fresh off a breakup and looking for companionship.” Student B admits to pursuing Student A but disagrees that Student A was vulnerable.

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Example: Fighting Words

Faculty member walks into colleague's office, accuses colleague of having an affair with faculty member's wife, grab's colleague by the collar and says "I'm going to beat your ass. Let's go in the hallway right now."



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Example: True Threats

Respondent gets into an argument with a witness in a Title IX case who supports complainant's account of sexual assault. Respondent says: "If you show up and say that at the hearing, I'm going to kill you. I have a .45 in my car, I know how to use it, and I'll shoot you dead as soon as the hearing is over."



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Hate Speech

- No general “hate speech” exception to the First Amendment
- First Amendment allows speech that is subjectively offensive, inappropriate, nasty, etc.



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Bedrock Principle

"If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar, or profane."

Dambrot v. Central Michigan University (E.D. Mich. 1993)

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Example: No Hate Speech Exception

Local religious group comes onto public areas of campus and pickets with signs that have various anti-gay and anti-trans messages, including signs that use vulgar epithets.



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Example: No Hate Speech Exception

Fraternity hosts comedy night that includes an “ugly woman” skit where fraternity members dress as “ugly women” and parade across the stage to whoops and cheers.



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Title IX Codification of Constitutional Supremacy

Nothing in [the Title IX regulations] requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment to the U.S. Constitution;

(2) Deprive any person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

34 C.F.R. § 106.6(d)

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Expression of "offensive" speech

"Free speech rights apply in the classroom (e.g., classroom lectures and discussions...). In addition, First Amendment rights apply to the speech of students and teachers... Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. [T]he offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR."

2003 Revised Sexual Harassment Guidance at 22 (emphasis added)

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Constitutional Jurisdictional Limits

- Constitution generally limits a school's authority to sanction off-campus speech unless (perhaps) it has a disruptive effect on campus or otherwise in operations
- The fact that people are offended or upset about off-campus speech is probably insufficient to establish a disruptive effect
- Special rules may exist for students in certain professional schools that have adopted professional conduct codes (e.g., law; medicine; counseling; social work; nursing)



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Example: Constitutional Limits

Student posts vulgar diatribe on social media attacking feminism and using various expletives to refer to women generally. The post is not directed at any particular person and does not reference the institution. The student made the post at home on a private computer network.



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What is hostile environment?

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.



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Potentially Harassing Speech



- Joking
- Lewd comments
- Sexualized emails and social media exchanges
- Unwelcome display of imagery
- Defacing bulletin boards
- Persistent sexual/romantic pursuit
- False gossip and rumors
- Others?

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Example: Hostile Environment

Jane broke up with Jack. Jack repeatedly calls Jane the “C” word whenever he passes her in the hallway, tells loud jokes about Jane’s alleged promiscuity in the presence of others, and leaves sticky notes and memes on Jane’s door with crass statements about genitals.



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Example: Likely Protected Speech

Jack has had several bad breakups in his life and creates a comedy routine he delivers at a fraternity "talent show" that includes jokes about women, refers to certain types of women as "B" words, and includes content (that may or may not be fictitious) about prior sexual experiences Jack has had but without naming or otherwise identifying his partners.



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Example: Hostile Environment

Blaze is sexually attracted to Kelly. Blaze sends Kelly unsolicited texts and direct messages referencing various sex acts that Blaze would like to perform on Kelly. When Kelly says to stop, Blaze persists, and when Blaze passes Kelly in the hallway, Blaze rubs their own genitals in a sexual way.

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Example: Likely Protected Speech

Blaze publishes an online blog that discusses Blaze's sexual preferences and describes in detail various sex acts and how to perform them. Many view the content of Blaze's blog as demeaning, overly sexualizing, and offensive.



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Example: Hostile Environment

Zeke watches pornography on his laptop, including prior to class while waiting for the instructor to show up. Zeke's classmate Dale, who shows up early, has to watch the pornography, which includes extraordinarily graphic depictions. Dale is so troubled by the display that Dale cannot concentrate in class and sees his grade decline.



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Example: Protected Speech

Zeke works part time at an exotic dance club that is frequented by students. A student who saw Zeke dance nude at the club ends up having a class with Zeke and is uncomfortable in Zeke's presence and decides to drop the class because he cannot concentrate.



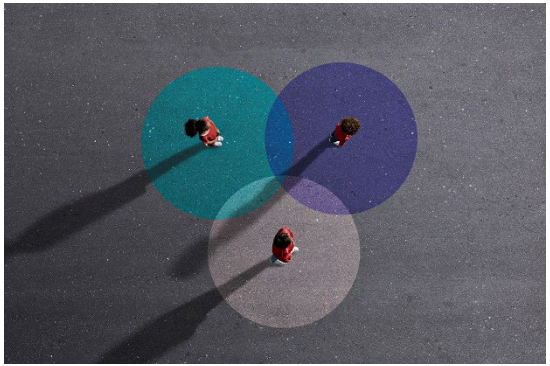
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Examples of Factors that Matter in Distinguishing Harassing Speech from First Amendment Protected Speech

- Whether accompanied by conduct
- Whether effect is more than subjective offense
- Whether speech is targeted at specific persons
- Setting in which speech is made
- Whether the speech relates to a matter of public concern
- Whether the target of the speech is a public figure
- Whether the speaker is an employee or faculty member outside the context of academic freedom
- Whether the subject matter is personalized and petty
- Whether the speech constitutes an unprotected category

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Academic Freedom Protections



- Freedom in research and publication within field of competence
- Freedom in course design and course content within field of competence
- Freedom to set pedagogy and methods of instruction
- Freedom to speak publicly on matters of public concern without fear of reprisal

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Sources of Academic Freedom



- First Amendment to the U.S. Constitution
- Contract Law (i.e., faculty handbooks and policies)

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Example: Freedom in Research

Gender studies professor publishes an article documenting misogyny practiced by founding board members of institution and argues that the institution—like higher education in general—is rooted in patriarchy.



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Example: Freedom in Course Design and Content

Faculty member who teaches modern American history devotes little time to the 20th Century suffrage movement and instead focuses on the civil rights movement and Cold War, which several female students view as underemphasizing the importance of the suffrage movement.

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Example: Freedom in Pedagogy and Instruction

Faculty member who teaches modern American literature requires students to read novels that almost always depict women in domestic roles and include male protagonists. Women in the class believe the novels reinforce obsolete gender stereotypes.



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Group Scenario

Professor Stedman is a tenured faculty member. Stedman teaches "Crisis Comms 101." Stedman's course is structured around scenarios, including a scenario where the CEO of a company is publicly accused of committing a rape when he was in business school. Stedman's scenario includes a fictitious social media post by the rape victim with graphic details. Stedman requires students to work in mixed-gender groups and to prepare a crisis communication plan. The groups must discuss how different factions in a communications audience might perceive the allegations. Stedman also requires students to hold a mock news conference, where randomly chosen students must field aggressive questions. Jane is a sexual assault victim, is distressed by the scenario, and asks to be assigned alternative work. Stedman denies the request saying, "you won't have that option in the real world." Jane is also randomly chosen to answer questions in the press conference. When Jane's turn comes, she breaks down crying and leaves the room when a classmate asks whether "the victim should be believed after all this time has passed." Stedman tells the class that Jane's behavior is unprofessional and that you "have to put your personal history aside." Stedman gives Jane an F on the exercise.



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Group Scenario Discussion Questions



1. Jane files a formal complaint against Stedman accusing him of hostile environment harassment and adverse treatment based on her status as a sexual assault victim. Should these complaints be investigated or should they be dismissed?
2. What aspects of Stedman's behavior are covered by academic freedom? What aren't?
3. Does Stedman have an obligation to accommodate Jane by allowing her to work an alternative assignment?
4. Can the institution compel Stedman to change his pedagogy and course content and use Title IX as a justification?

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Questions



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