

# 2020 ANNUAL TRAINING

**ON ISSUES RELATING TO SEXUAL VIOLENCE,  
SEXUAL HARASSMENT, DOMESTIC VIOLENCE,  
DATING VIOLENCE AND STALKING**

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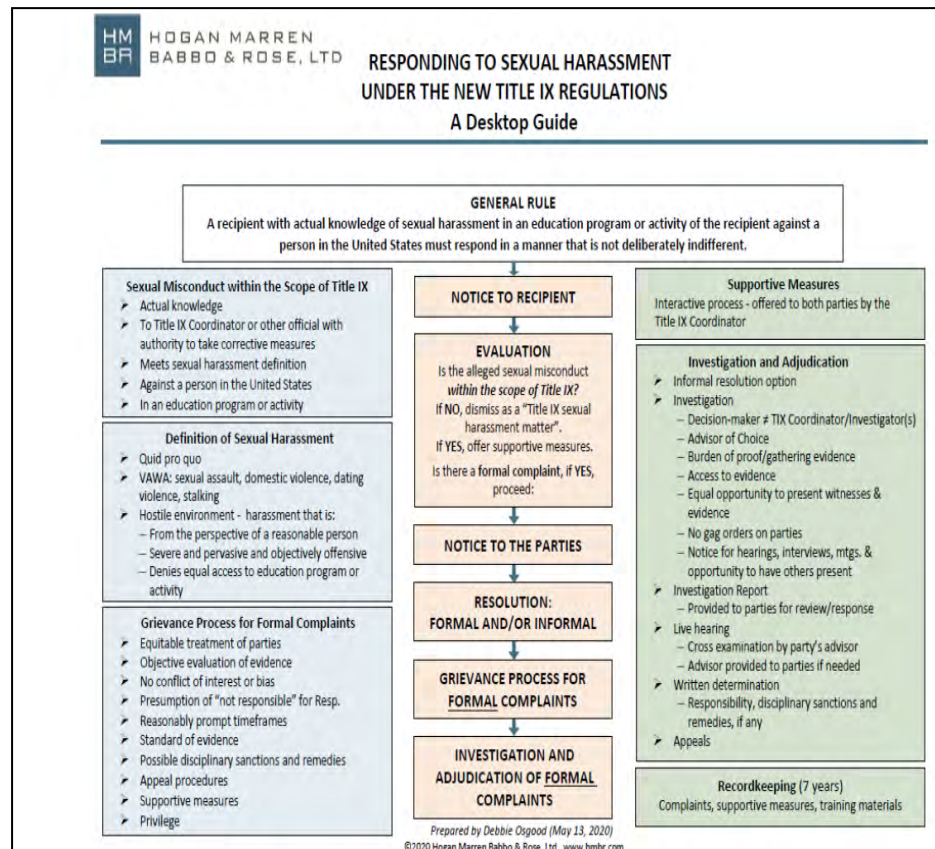
# Agenda

- ✓ Session 1: Overview of the Applicable Federal and State Laws
- ✓ Session 2: Putting Your Knowledge Into Practice
- ✓ Session 3: Investigation and Adjudication
- ✓ Session 4: Do's and Don't in the Title IX Hearing Process
- ✓ Session 5: Best Practices in Informal Resolution and Mediation

# HMBR Resources

**NEW HMBR WEBSITE -- TITLE IX COMPLIANCE:**

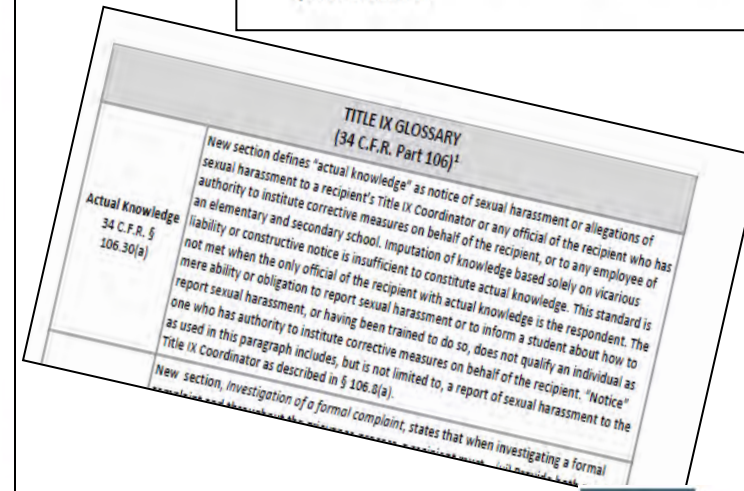
<https://www.hmbr.com/news-insight/title-ix-compliance/>



## HMBR Summary: Key Provisions in the New Title IX Regulations on Sexual Harassment

On May 6, 2020, the U.S. Department of Education released its much anticipated final Title IX regulations on sexual harassment. These new regulations amend the current regulations for implementing Title IX of the Education Amendments of 1972 (Title IX). The effective date of the final regulations is August 14, 2020. The Department's press release, the final regulations and analysis, and related documents, and a video are available [here](#).

We hope that the following summary of the final Title IX regulations will be useful to colleges and universities as they consider what changes are needed to ensure compliance with the final Title IX regulations. Please note that this summary will be posted on our website, and will be updated as appropriate as we continue to closely review the final regulations and analysis. The information provided in this summary is for your general information and is not intended to constitute legal advice for any specific institution.





# SESSION 1

## OVERVIEW OF APPLICABLE FEDERAL AND STATE LAWS



(b) For each campus, a higher education institution's complaint resolution procedures for allegations of student violation of the comprehensive policy shall provide, at a minimum, all of the following:

(1) Complainants alleging student violation of the comprehensive policy shall have the opportunity to request that the complaint resolution procedure begin promptly and proceed in a timely manner.

(2) The higher education institution shall determine the individuals who will resolve complaints of alleged student violations of the comprehensive policy.

(3) All individuals whose duties include resolution of complaints of student violations of the comprehensive policy shall receive a minimum of 8 to 10 hours of annual training on issues related to sexual violence, domestic violence, dating violence, and stalking and how to conduct the higher education institution's complaint resolution procedures, in addition to the annual training required for employees as provided in subsection (c) of Section 30 of this Act.

(4) The higher education institution shall have a sufficient number of individuals trained to resolve complaints so that (i) a substitution can occur in the case

# ILLINOIS STATE LAW TRAINING REQUIREMENTS

(5) The individual or individuals resolving a complaint shall use a preponderance standard to determine whether the alleged violation of the comprehensive policy occurred.



The higher education institution shall design the training to improve the trainee's ability to understand (i) the higher education institution's comprehensive policy; (ii) the relevant federal and State law concerning survivors of sexual violence, domestic violence, dating violence, and stalking at higher education institutions; (iii) the roles of the higher education institution, medical providers, law enforcement, and community agencies in ensuring a coordinated response to a reported incident of sexual violence; (iv) the effects of trauma on a survivor; (v) the types of conduct that constitute sexual violence, domestic violence, dating violence, and stalking, including same-sex violence; and (vi) consent and the role drugs and alcohol use can have on the ability to consent. The training shall also seek to improve the trainee's ability to respond with cultural sensitivity; provide services to or assist in locating services for a survivor, as appropriate; and communicate sensitively and compassionately with a survivor of sexual violence, domestic violence, dating violence, or stalking.

(Source: P.A. 99-426, eff. 8-21-15.)

(110 ILCS 155/75)

Sec. 75. (Amendatory provisions; text omitted).

(Source: P.A. 99-426, eff. 8-21-15; text omitted.)

(110 ILCS 155/80)

Sec. 80. (Amendatory provisions; text omitted).

(Source: P.A. 99-426, eff. 8-21-15; text omitted.)

# ILLINOIS STATE LAW TRAINING REQUIREMENTS

(110 ILCS 155/99)

Sec. 99. Effective date. This Act takes effect upon becoming law.

**Training  
34 C.F.R. §§  
106.45(b)(1)(iii)  
and (b)(10)(i)(D)**

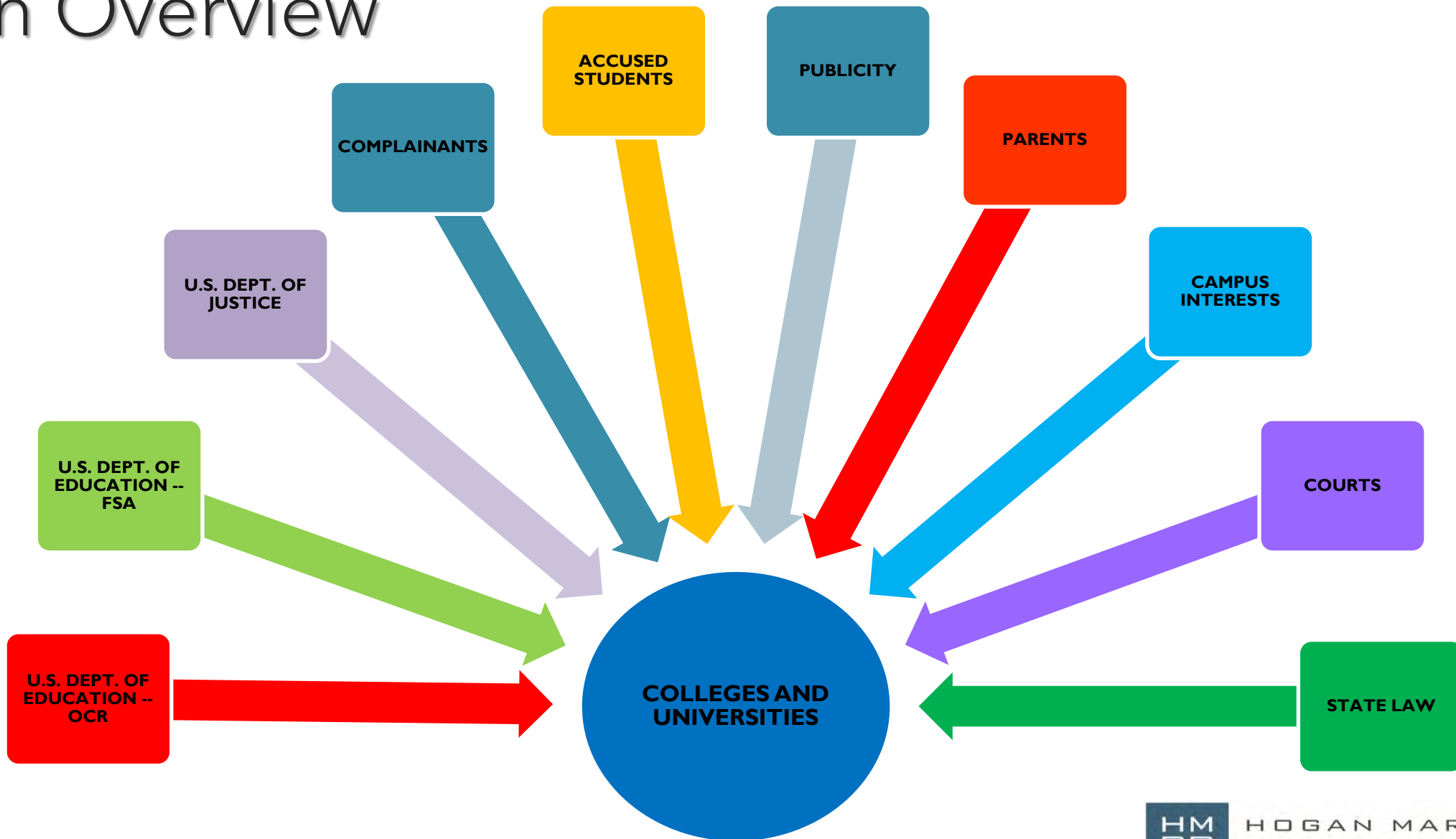
With respect to grievance processes for formal complaints, a school must ensure that **Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process**, receive training on the **definition of sexual harassment in § 106.30, the scope of the school's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.** A school must ensure that decision-makers receive training on **any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant**, as set forth in paragraph (b)(6) of this section. A school also must ensure that investigators receive training on **issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials** used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, **must not rely on sex stereotypes and must promote impartial investigations and adjudications** of formal complaints of sexual harassment.

A school must maintain for a period of **seven years records** of all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A school must make these **training materials publicly available on its website**, or if the school does not maintain a website the school must make these materials available upon request for inspection by members of the public.

# U.S. DEPARTMENT OF EDUCATION TRAINING REQUIREMENTS



# An Overview



# Illinois State Law Public Notice

- On website, must prominently publish, timely update and make the following information easily available:
- “Comprehensive policy”
- Options and resources for “survivors”
- Title IX Coordinator(s) name, contact information
- Explanation of the role, reporting obligations and level of confidentiality for:
  - Title IX coordinator(s)
  - Responsible employees
  - Campus security authorities (Clery)
  - Mandated reporters (state law)
- Contact information for confidential advisors, counseling services, and confidential resources
- Contact information for community-based, State and national hotlines



# Illinois State Law Complaint Procedures

- Procedure should “begin promptly and proceed in a timely manner”
- Names of individuals who will resolve complaints and opportunity to request substitution for conflict of interest or recusal
- Preponderance of the evidence standard
- Information on how to obtain available interim protective measures and accommodations
- Protect privacy of both parties and witnesses in any proceeding, meeting or hearing
- Both parties must have the opportunity to provide or present witnesses
- Parties may not directly cross examine one another, but may - at discretion of the presiding official -- suggest and have questions posed to the other party
- Have an advisor at any meeting or proceeding
- Right to appeal
- School shall not disclose identify of either party, except as necessary to resolve complaint, implement interim measures and accommodations as when provided by State or federal law

# Illinois State Law: Notice of Rights and Options

Must provide complainants with concise written notice “in plain language” of their rights and options, including:

1. The right to report or not report the incident to the school, law enforcement or both, including information about the right to privacy and which reporting methods are confidential;
2. Contact information for the Title IX coordinator(s), confidential advisors, a community-based sexual assault crisis center, campus law enforcement, and local law enforcement;
3. The right to request and receive assistance from campus authorities in notifying law enforcement;
4. The ability to request interim protective measures and accommodations for survivors, including without limitation changes to academic, living, dining, working, and transportation situations, obtaining and enforcing a campus-issued order of protection or no contact order, if such protective measures and accommodations are reasonably available, and an order of protection or no contact order in State court;
5. The school’s ability to provide assistance, upon request, in accessing and navigating campus and local health and mental health services, counseling, and advocacy services;
6. A summary of the school’s complaint resolution procedures, if the complainant reports a violation of the comprehensive policy.



# Illinois State Law: Notice of Rights and Options



## Additional requirements:

- Response due within 12 hours of receipt of report
- Amnesty policy
- Appeal rights
- Extensive training
- Annual reports to state

# Gov. Pritzker signs legislation to protect victims of sexual harassment in workplace



Illinois State  
Law -  
Workplace  
Transparency  
Act



Gov. J.B. Pritzker delivers his first budget address on Wednesday, Feb. 20, 2019 to a joint session of the Illinois House and Senate at the Illinois State Capitol building in Springfield. (E. Jason Wambsgans/Chicago Tribune via AP, Pool)



# What are we talking about when we talk about Title IX?

- Statute
- Regulations
- Federal guidance documents
  - Issued by U.S. Department of Education's Office of Civil Rights ("OCR")
- Federal court cases
- Individual resolution agreements between federal government and institutions



# Title IX of the Education Amendments of 1972

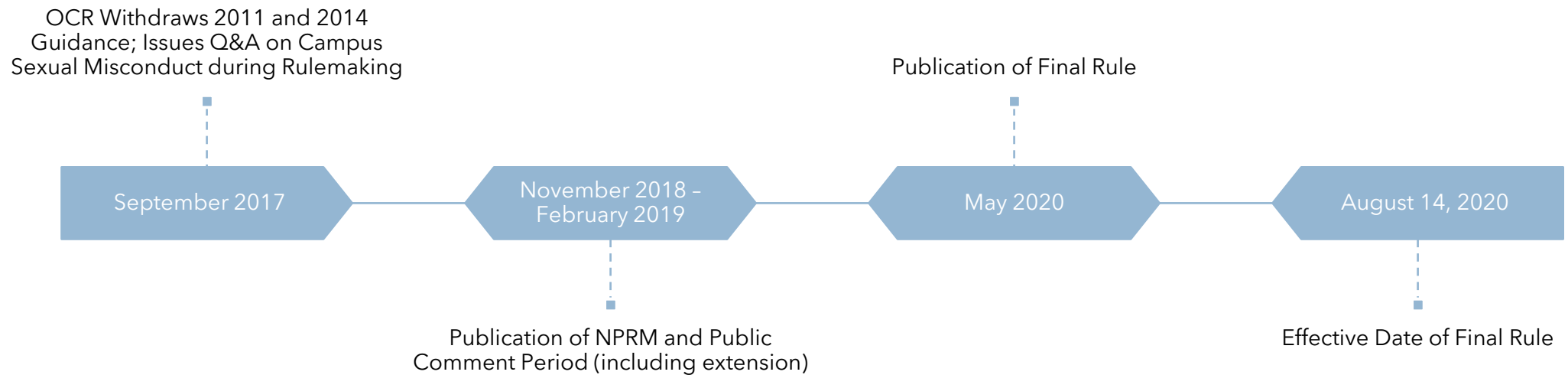
20 U.S.C. § 1681(a)

*"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."*

Regulations at 34 C.F.R. Part 106:

- Nondiscrimination Notice
- Title IX Coordinator
- "Prompt and Equitable" Grievance Procedures
- Prohibition on Sex Discrimination
- Retaliation

# Timeline of New Title IX Regulations





# Announcement of Final Title IX Regulations By Secretary Betsy DeVos May 6, 2020

<https://www.youtube.com/watch?v=hTb3yfMNGuA&t=782s>



# Implementation Date

- August 14, 2020
- Litigation filed
- Deadline for Clery Act Reports extended to end of the year



<p><b>Higher Standard of Liability: Deliberate Indifference</b></p> <p><b>34 C.F.R. § 106.44(a) and 106.44(b)(2)</b></p>	<p>A school with actual knowledge of sexual harassment in an education program or activity of the school against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.</p>
<p><b>Updated Procedural Requirements</b></p> <p><b>34 C.F.R. § 106.8 and 106.71</b></p>	<ul style="list-style-type: none"> <li>• Title IX Coordinator</li> <li>• Notice of Nondiscrimination</li> <li>• Grievance Procedures</li> <li>• Retaliation</li> </ul>
<p><b>New Requirements for "Sexual Harassment"</b></p> <p><b>34 C.F.R. § 106.45</b></p>	<p>Specific new requirements for sexual harassment as defined by regulations:</p> <ul style="list-style-type: none"> <li>• Grievance process</li> <li>• Investigation and Adjudication</li> </ul>
<p><b>Outside the Scope of Title IX</b></p>	<ul style="list-style-type: none"> <li>• Title IX regulations and requirements do not apply</li> <li>• Schools have discretion as to how they handle these matters</li> </ul>

# NEW TITLE IX REGULATIONS – KEY CONCEPTS

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<p><b>Recipient's Response to Sexual Harassment</b>  <b>34 C.F.R. §§ 106.44(a), 106.30</b></p>	<p><b>A school with actual knowledge of sexual harassment in an education program or activity of the school against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.</b></p> <p>A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. This section further states that a school's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.</p> <p>In response to a formal complaint, a school must follow a grievance process that complies with § 106.45. With or without a formal complaint, a school must comply with § 106.44(a).</p>
<p><b>Actual Knowledge</b>  <b>34 C.F.R. § 106.30(a)</b></p>	<p>"Actual knowledge" defined as notice of sexual harassment or allegations of sexual harassment to a school's Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the school with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the school.</p> <p>"Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).</p>

# NEW TITLE IX REGULATIONS – SCHOOL'S RESPONSE AND THE DELIBERATE INDIFFERENCE STANDARD

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**Nondiscrimination  
Notice  
34 C.F.R. §  
106.8(b)**

- Each school must notify persons entitled to a notification under Section 106.8(a) that:
1. The school does not discriminate on the basis of sex in the education program or activity that it operates;
  2. The school is required by Title IX and this part not to discriminate in such a manner;
  3. The requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment; and
  4. Inquiries about the application of Title IX and this part to such school may be referred to the school's Title IX Coordinator, to the OCR Assistant Secretary, or both.

Each school must prominently display the contact information required to be listed for the Title IX Coordinator under Section 106.8(a) and the nondiscrimination policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under Section 106.8(a). The section further states that a school must not use or distribute a publication stating that the school treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX or this part of the Title IX regulations.

**Grievance  
Procedures  
(general) and  
Grievance Process  
(sexual  
harassment)  
34 C.F.R §§  
106.8(c) and (d)  
and 106.45(b)**

Requires that a school adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A school must provide to persons entitled to a notification under § 106.8(a) notice of the school's grievance processes and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school will respond. New § 106.8(d) states that the requirements of § 106(c), Adoption of grievance processes, apply only to sex discrimination occurring against a person in the United States.

For the purpose of addressing formal complaints of sexual harassment, a school's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a school adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

# NEW TITLE IX REGULATIONS – UPDATED GENERAL PROCEDURAL REQUIREMENTS

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**Title IX  
Coordinator  
34 C.F.R. §§  
106.8(a)**

Each school must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part of the Title IX regulations, and that the employee must be referred to as the "Title IX Coordinator." The school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

The Title IX Coordinator(s) cannot be the same as the decision-maker(s) in formal complaints of sexual harassment. This section also states that the Title IX Coordinator(s) are responsible for effective implementation of any remedies.

The Title IX Coordinator(s) cannot be the same as the decision-maker(s) in appeals of a determination regarding responsibility or from a school's dismissal of a formal complaint or any allegations therein.

# NEW TITLE IX REGULATIONS – UPDATED GENERAL PROCEDURAL REQUIREMENTS

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**Retaliation  
34 C.F.R. §  
106.71**

No school or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

The school must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

# NEW TITLE IX REGULATIONS – UPDATED GENERAL PROCEDURAL REQUIREMENTS

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<b>Complainant</b> 34 C.F.R. § 106.30(a)	"Complainant" defined as an individual who is alleged to be the victim of conduct that could constitute sexual harassment. This section also states, under the definition of "formal complaint," that, at the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.
<b>Respondent</b> 34 C.F.R. § 106.30(a)	"Respondent" defined as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. The new regulations, at 34 C.F.R. § 106.45(b)(3), state that a school may dismiss a formal complaint if the respondent is no longer enrolled or employed by the school.
<b>United States</b> 34 C.F.R. § 106.8(d)	The requirements of § 106(c), adoption of grievance procedures, apply only to sex discrimination occurring against a person in the United States.
<b>Education Program or Activity</b> 34 C.F.R. § 106.44(a)	"Education program or activity" includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

*Illinois law: comprehensive procedures for reporting sexual misconduct are required "regardless of where the incident . . . occurred."*

# NEW TITLE IX REGULATIONS – SCOPE

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**Two Key  
Questions**

1. Is the conduct within the scope of Title IX?

- If no, Title IX regulations do not apply.
- If yes, must not respond in a manner that is deliberately indifferent - by providing supportive measures.

2. For conduct within the scope of Title IX, was a formal complaint filed?

- If no, must still provide supportive measures.
- If yes, must also follow specific requirements for the sexual harassment grievance process.

NEW TITLE IX  
REGULATIONS –  
SPECIFIC NEW  
REQUIREMENTS  
FOR SEXUAL  
HARASSMENT

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# Is the alleged misconduct within the scope of Title IX?

YES

- In **all cases**,
  - *Must* not respond with deliberate indifference
  - *Must* offer supportive measures
- Was a **formal complaint** filed?
  - If yes, *must* also comply with Section 106.45 requirements
  - If no, *must* offer supportive measures

NO

- *Must* dismiss formal complaint as *Title IX matter*
- *May* address as a non-Title IX matter



<p><b>Grievance process for Formal Complaints of Sexual Harassment - Basic requirements 34 C.F.R. § 106.45(b)(1)</b></p>	<p>--Informal resolution allowed (except for student complaints against employees)          --Basic requirements for grievance process for formal complaints of sexual harassment:</p> <ul style="list-style-type: none"> <li>(i) Equitable treatment of parties</li> <li>(ii) Objective evaluation of evidence</li> <li>(iii) No conflicts of interest or bias</li> <li>(iv) Presumption of "not responsible" for respondent</li> <li>(v) Reasonably prompt timeframes</li> <li>(vi) Disciplinary sanctions and remedies</li> <li>(vii) Standard of evidence</li> <li>(viii) Appeals</li> <li>(ix) Supportive measures</li> <li>(x) Restrictions relating to privileged information</li> </ul>
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<p><b>Grievance Process for Formal Complaints of Sexual Harassment 34 C.F.R. § 106.45</b></p>	<p>A school's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. A school's treatment of the respondent may also constitute discrimination on the basis of sex under Title IX.</p> <p>The following specific requirements for grievance processes used to address formal complaints of sexual harassment.</p> <ul style="list-style-type: none"> <li>(1) Basic requirements for grievance process (see below);</li> <li>(2) Notice of allegations;</li> <li>(3) Dismissal of a formal complaint;</li> <li>(4) Consolidation of formal complaints;</li> <li>(5) Investigation of a formal complaint;</li> <li>(6) Hearings;</li> <li>(7) Determination regarding responsibility;</li> <li>(8) Appeals;</li> <li>(9) Informal resolution; and</li> <li>(10) Recordkeeping.</li> </ul>
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# NEW TITLE IX REGULATIONS – GRIEVANCE PROCESS

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# Supreme Court Title VII Decision



*Photo by New York Times*

- Landmark decision issued on June 15, 2020
- Title VII protects against discrimination on the basis of sexual orientation or transgender status
- Supreme Court specifically declined to address bathroom and facilities issues

# Civil Litigation

Increased federal and state court action concerning the process and outcome of Title IX grievance procedures:

- Cases filed by complainants *and* respondents
- Possible injunctions and monetary damage awards
- Court decisions generally issued early in the case
- Most cases concern suspensions or expulsions

# Court Challenges by Complainants



- **Title IX:** Deliberate indifference
- **Tort Law:** Negligence/duty of care
- **Other Claims:** Breach of contract, intentional infliction of emotional distress, and more



# Court Challenges by Complainants

- **Title IX (gender bias)**

Do the alleged facts, if true, raise a plausible inference that the university discriminated against the respondent “on the basis of sex”?

- Erroneous outcome: flawed due to sex of a party
- Selective enforcement: similarly situated individuals of different sexes treated differently

- **Due Process**

- **Other Claims**: Breach of contract, intentional infliction of emotional distress, defamation and more

# Key Issues Going Forward - under State and Federal Law

1. Due process, including hearings and cross examination
2. Gender bias
3. Definition of sexual harassment and obligation to respond
4. Standard of evidence
5. Off-campus harassment
6. Trauma-informed investigations
7. Enforcement by federal government

# What Steps Do Schools Need to Take by August 14, 2020?

# Steps to take by August 14, 2020

Assemble a cross-campus team of stakeholders to:

1. Revise your **Policies and Procedures** to comply with the new regulations
2. Have the Right **Organizational Structure** in Place
3. Address your **Campus Climate** through Training and Clear Communications



# Requirements for Title IX Sexual Harassment Policies and Procedures

## 1. Apply Title IX policies to students and employees

- Umbrella or separate policies and procedures?
- State law requirements relating to standard of evidence
- CBA requirements relating to faculty or staff disciplinary action

# Requirements for Title IX Sexual Harassment -- Policies and Procedures

## 2. Define what sexual misconduct is within the scope of Title IX


- 1. Actual notice**
- 2. Sexual harassment**
- 3. In an educational program or activity**
- 4. Against a person in the United States**

# “Sexual harassment” as defined in the Final Title IX regulations


1. Quid Pro Quo -- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct;
2. Violence Against Women (VAWA) categories --
  - Sexual assault
  - Domestic violence
  - Dating violence
  - Stalking
3. 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 school’s education program or activity



<p>Sexual Assault 34 C.F.R. § 106.30(a)</p>	<p>“Sexual assault”, as defined in the Clery Act at 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation (FBI). The FBI uniform crime reporting system defines “forcible rape” as “the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” The FBI uniform crime reporting system defines “forcible fondling” as “the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.”</p>
<p>Domestic Violence 34 C.F.R. § 106.30(a)</p>	<p>“Domestic violence,” as defined by VAWA at 34 U.S.C. §12291(a)(8), includes 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 jurisdiction receiving grant monies, 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 jurisdiction.</p>
<p>Dating Violence 34 C.F.R. § 106.30(a)</p>	<p>“Dating violence,” as defined as defined by VAWA at 34 U.S.C. 12291(a)(10) , means violence committed by a person—</p> <p>(A)who is or has been in a social relationship of a romantic or intimate nature with the victim; and</p> <p>(B)where the existence of such a relationship shall be determined based on a consideration of the following factors:(i)the length of the relationship; (ii)the type of relationship; and (iii) the frequency of interaction between the persons involved in the relationship.</p>
<p>Stalking 34 C.F.R. § 106.30(a)</p>	<p>“Stalking,” as defined by VAWA at 34 U.S.C. §12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—</p> <p>A. fear for his or her safety or the safety of others; or</p> <p>B. suffer substantial emotional distress.</p>



# NEW TITLE IX REGULATIONS – DEFINITION OF SEXUAL HARASSMENT AND VAWA CATEGORIES



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# Requirements for Title IX Sexual Harassment -- Policies and Procedures

## 3. Provide supportive measures - without or without a formal complaint of sexual harassment

- Required when the sexual harassment is within the scope of Title IX
- Non-disciplinary, non-punitive individualized services
- Designed to restore or preserve equal access without unreasonably burdening the other party
- To be provided to both parties
- Use interactive process to determine supportive measures - consider “wishes” of the complainant
- Document decisions relating to supportive measures
- Offer internal grievance process for challenging adequacy or burden of supportive measures

# Requirements for Title IX Sexual Harassment -- Policies and Procedures

4. Make clear what is considered a formal complaint of sexual harassment
  - Formal complaints must be signed and filed by a complainant who is participating (or attempting to participate) in the educational or employment program or activity
  - May also be filed by Title IX Coordinator
  - Recipient may dismiss complaint against a respondent who is no enrolled or employed
  - Make clear if and how sexual misconduct that occurs outside the scope of Title IX will be addressed (e.g., codes of conduct)

# Requirements for Title IX Sexual Harassment -- Policies and Procedures

## 5. Include “basic requirements” in grievance process

- Treat complainants and respondents equitably
- Objective evaluation of all relevant evidence
- No bias or conflict of interest
- Training for Title IX Coordinator(s), investigator(s), and decision-maker(s), and informal resolution facilitator(s)
- Presumption that the respondent is not responsible
- Reasonably prompt timeframes, extensions for good cause
- Standard of evidence: *Preponderance* (more likely than not) or *Clear and Convincing* (highly probable)
- Possible disciplinary sanctions and remedies
- Appeal procedures (newly mandatory)
- Supportive measures available to both parties
- Restrictions relating to privilege

# Requirements for Title IX Sexual Harassment -- Policies and Procedures

## 6. Comply with specific requirements relating to investigation and adjudication, including:

- Initial and continuing written notice to parties
- Burdens of proof and of gathering evidence rest on school
- Equal opportunity for parties to present witnesses, including fact and expert witnesses
- No gag orders
- No single-investigator model
- Advisor of choice
- Live hearing and cross-examination
- Decision-maker cannot be the same as the Title IX Coordinator(s) or investigator(s)
- Access to evidence
- Draft investigation report given to the parties for review and response
- Written determination of responsibility regarding responsibility

# Requirements for Title IX Sexual Harassment -- Policies and Procedures

6. Comply with specific requirements relating to investigation and adjudication, including:

Live hearing with opportunity for cross-examination required

- To be conducted by the Decision-maker, who is either the hearing officer or multiple hearing officers (a hearing panel)
- May be held in the same geographic location or virtually
- Location to be determined by recipient
- Technology must allow the parties (and their advisors) to see and hear one another and any witnesses
- Recording or transcript of hearing required



# Requirements for Title IX Sexual Harassment -- Policies and Procedures

6. Comply with specific requirements relating to investigation and adjudication, including:

Live hearing with opportunity for cross-examination required

- Advisors must be allowed to cross-examine parties and witnesses
- Must be conducted directly, orally, and in real time
- School must provide free advisor for a party at a hearing if the party does not have an advisor for the hearing – just for cross-examination?
- If a party or witness does not submit to cross examination at the live hearing, the hearing officer or panel must not rely upon any statement in reaching a determination regarding responsibility

# Requirements for Title IX Sexual Harassment -- Policies and Procedures

## 7. Comply with additional procedural requirements

- Informal resolution opportunities (New: may not be used to resolve allegations that an employee sexually harassed a student)
- Mandatory Training
- Mandatory Appeals
- Recordkeeping (7 years, including posting training materials on website)
- Recommendation: Build in regular review and revision process

# Requirements for Title IX Sexual Harassment

## -- Organizational Structure

- Lines of authority and responsibility
- Employees - Title IX requirements apply (even to at-will employees)
- Title IX Coordinator
  - Cannot be decision-maker
  - Responsible for coordinating overall Title IX compliance
  - Responsible for implementing "effective" supportive measures
- "Official with authority to take corrective action"
- "Responsible employees"
- Investigator(s)
- Decision-maker(s) - determinations of responsibility; appeals
- Hearing officers or hearing panels - must make determinations of relevancy and keep order over hearing
- Advisors for cross-examination at hearings

# Requirements for Title IX Sexual Harassment

## -- Campus Culture

- New training for:
  - Students
  - Employees, including “those with authority to take corrective action” and “responsible employees”
  - Mandatory training -- to be posted on website -- for:
    - Title IX Coordinator
    - Investigator(s)
    - Decision-maker(s), including hearing officers or panels
    - Informal Resolution Facilitator(s)
- Community expectations - be clear in communications about continued commitment to prevent and address sexual harassment

# Title IX+ Addressing Sexual Misconduct Outside the Scope of Title IX

Final regulations are a floor, not a ceiling

Schools may go *beyond Title IX*

If the alleged conduct in a formal complaint is outside the scope of Title IX (would not constitute sexual harassment or did not occur in an educational program or did not occur against a person in the United States), the school:

*Must dismiss the formal Title IX complaint as a Title IX matter*

*May address the conduct with non-Title IX procedures*



# How Will the DOE-OCR Handle Title IX Complaints Going Forward?

# Next Steps for DOE-OCR

## Harassment Cases

No *retroactive enforcement* of final regulations.

- Open Cases
- Resolution Agreements
- New Complaints

## Technical Assistance

- New OCR technical assistance office: Outreach, Prevention, Education and Non-discrimination Center
- Videos on Final Title IX regulations, by Secretary Betsy DeVos (link above) and OCR Assistant Secretary Kenneth Marcus (<https://www.youtube.com/watch?v=i-BCnhUsJ4s>)

# Questions for Discussion

# Follow-up Questions



- o Title IX and Illinois state law (Preventing Sexual Violence in Higher Education Act)
- o Title IX and Title VII
- o Title IX Coordinator same as Investigator or Informal Resolution Facilitator
- o Staffing new roles: hearing officers, advisors, appeal decision makers; informal resolution facilitators
- o Access to evidence
- o Sexual misconduct outside the scope of Title IX
- o Minors on campus

# External Services and Resources

## SERVICES

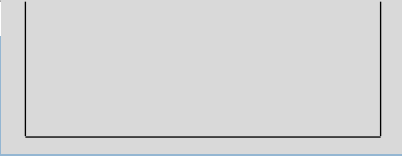
- Model sexual harassment policies and procedures
- External Hearing Officer
- Training, including for hearing officers
- External investigations
- Advisors
- Title IX advice & consult
- Compliance audits
- Independent consultants
- Mediators



## RESOURCES

- *HMBR Title IX Compliance website:*  
<https://www.hmbr.com/news-insight/title-ix-compliance/>
- *HMBR Summary of Final Title IX Regulations*
- *HMBR Desk Top Guide and Glossary on Final Title IX Regulations*
- *HMBR A New Day on Campus for Title IX, Law 360*
- *See also: Joint Guidance on the Title IX Regulations, at*  
<https://system.suny.edu/sci/tix2020/>.





# SESSION 2: PUTTING YOUR KNOWLEDGE INTO PRACTICE

## Work Sheets

A. You are the Title IX Coordinator.

1. Evaluation -- Is this a complaint that triggers the College's obligation to respond?

- a. Under the final Title IX regulations?
- b. Under Illinois state law?
- c. If not a complaint, what elements are missing under the final Title IX regulations?
- d. What should the College do in response to the report?
- e. How should College respond if the report is anonymous?

2. Investigation – If complaint proceeds to investigation,

- a. What information does the letter of notification include?
- b. Who would you interview?
- c. What evidence would you seek?
- d. Are medical records confidential and privileged?
- e. What does the investigation file need to include?

3. Interviews

- a. What information should be included in the introduction to the interview?
- b. Was the format of the questions appropriate?
- c. Was the interview conducted in a culturally sensitive manner?
- d. Was any information missing from the interview that is important to the investigation?

- e. Was it appropriate to ask about the Complainant's prior sexual history?
- f. After each interview, what follow-up information will you seek from the interviewee?
- g. After each interview, are there additional witnesses to be interviewed?
- h. How much did each of the parties and witnesses have to drink on the night in question?
- i. Did the interviewees seem credible? Why or why not?

4. Preparation of Investigative Report

- a. List the inculpatory evidence for the Complainant.
- b. List the inculpatory evidence for the Respondent.
- c. List the exculpatory evidence for the Complainant.
- d. List the exculpatory evidence for the Respondent.
- e. Rank the evidence in terms of reliability (from most reliable to least reliable).
- f. Write the analysis and conclusion, including a conclusion as to whether the preponderance of the evidence supports that the Respondent violated the University policy.

B. You are the hearing officer.

1. What questions do you want to ask at the hearing?

- a. To the Investigator?
- b. To the Complainant?
- c. To the Respondent

- d. To each of the Witnesses?
- e. Is there any information missing from the report?
- f. Is the tone of the report appropriate?
- g. Is the report clearly organized?

2. Prepare an analysis and conclusion to the report

- a. List the inculpatory evidence for the Complainant.
- b. List the inculpatory evidence for the Respondent.
- c. List the exculpatory evidence for the Complainant.
- d. List the exculpatory evidence for the Respondent.
- e. Rank the evidence in terms of reliability (from most reliable to least reliable).
- f. Write the analysis and conclusion, including a conclusion as to whether the preponderance of the evidence supports that the Respondent violated the University policy.

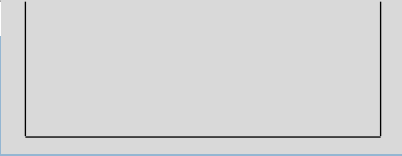


# SESSION 3: INVESTIGATION AND ADJUDICATION



# Steps in the Process





# COMPLAINT EVALUATION

# Complaint Evaluation

- **REPORT RECEIVED**

- **Report Information**

- Dean of College received a call from Joan Atwood (JA), mother of third-year student Megan Atwood (MA), on May 6, 2020. JA reported that MA had been sexually harassment on February 4, 2020 by Archie Miller (AM), also a third-year student. JA stated AM and MA met for the first time on the evening of February 2, 2020 at a sorority party house that is off campus and that the two made out but decided not to take things further. JA states that MA woke up to AM in her bed later in the evening and that MA was patting her hair and JA did not have any clothes on.
- MA sought medical treatment following the incident and filed a police report. The police investigation has concluded with no arrest. JA stated that MA was unsure about if a report to the police would lead anywhere and is now unsure if reporting to the University will change anything.

- **Addendum**

- On May 25, 2020, Title IX Coordinator received an email from Megan Atwood (MA) describing incident that occurred at Siesta Siesta, an off-campus restaurant downtown, wherein Samuel Parris (SP), a third-year student, confronted her and called her a derogatory name. SP is friends with Archie Miller (AM) and MA states that he accosted her because she filed a complaint against his friend. MA describes in her email that SP shouted at her: “Quit your bullshit. Why would you file a school complaint when we all know you’re a slut.”

# Complaint Evaluation – for discussion



Is this a complaint that triggers an obligation to respond?

1. Under the final Title IX regulations?
2. Under Illinois state law?
3. If not a complaint, what elements are missing under the final Title IX regulations?
4. What should the College do in response to the report?
5. How should College respond if the report is anonymous?

# Complaint Evaluation

- o Is it a complaint?
- o Getting preliminary information – how much is enough to go forward to investigation?
- o What are the allegations?
  - o Is this a Title IX Matter?
  - o Does the complaint state a violation of University policy?
- o How to handle confidentiality requests?
- o How to handle anonymous reporting issues?



# Deciding Whether to Investigate

- Under new regulations, must dismiss formal complaint under Title IX if:
  - If conduct alleged would not constitute “sexual harassment” as defined in new regs even if proved,
  - Did not occur in the school’s education program or activity, or
  - Did not occur against a person in the United States
- But, does not preclude action under another provision of the code of conduct
- Under new regulations, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.



**Supportive  
Measures  
34 C.F.R. §§  
106.30(a)  
106.44(a),  
106.45(b)(1)  
(ix), and  
106.45(b)(1)  
0(ii)**

“Supportive measures” defined as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the school’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the school’s educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The school must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

A school’s response to sexual harassment must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

A school's grievance process must describe the range of supportive measures available to complainants and respondents.

A school must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the school must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the school’s education program or activity. If a school does not provide a complainant with supportive measures, then the school must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the school in the future from providing additional explanations or detailing additional measures taken.

# NEW TITLE IX REGULATIONS – SUPPORTIVE MEASURES

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# Confidentiality Requests



## Assess!

- Risk to the student and broader community
- Provide a safe and non-discriminatory environment for all students

## Factors:

- Seriousness of the alleged actions
- Age of the complainant
- Other complaints against same person
- Rights of the accused to receive information

**Formal Complaint**  
**34 C.F.R. §§ 106.30, 106.44(b)(1), and 106.45(b)(9)**

“Formal complaint” defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.

A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the school. The phrase “document filed by a complainant” means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

In response to a formal complaint, a school must follow a grievance process that complies with § 106.45. With or without a formal complaint, a school must comply with § 106.44(a).

**Consolidation of Formal Complaints**  
**34 C.F.R. § 106.45(b)(4)**

A school may consolidate formal complaints for allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.

**Dismissal of a Formal Complaint**  
**34 C.F.R. § 106.45(b)(3)**

If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the school’s education program or activity, or did not occur against a person in the United States, then the school must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the school’s code of conduct.

The school may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the school; or specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the school must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

# NEW TITLE IX REGULATIONS – FORMAL COMPLAINT

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**Notice of  
Allegations  
34 C.F.R. §  
106.45(b)(2)**

Upon receipt of a formal complaint of sexual harassment, a school must provide the following written notice to the parties who are known:

Notice of the school's grievance process that complies with this section, including any informal resolution process.

Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the school's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If, in the course of an investigation, the school decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the school must provide notice of the additional allegations to the parties whose identities are known.

# NEW TITLE IX REGULATIONS – NOTICE

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# Illinois State Law - Notice of Rights and Options

Must provide complainants with concise written notice “in plain language” of their rights and options, including:

1. The right to report or not report the incident to the school, law enforcement or both, including information about the right to privacy and which reporting methods are confidential;
2. Contact information for the Title IX coordinator(s), confidential advisors, a community-based sexual assault crisis center, campus law enforcement, and local law enforcement;
3. The right to request and receive assistance from campus authorities in notifying law enforcement;
4. The ability to request interim protective measures and accommodations for survivors, including without limitation changes to academic, living, dining, working, and transportation situations, obtaining and enforcing a campus-issued order of protection or no contact order, if such protective measures and accommodations are reasonably available, and an order of protection or no contact order in State court;
5. The school’s ability to provide assistance, upon request, in accessing and navigating campus and local health and mental health services, counseling, and advocacy services;
6. A summary of the school’s complaint resolution procedures, if the complainant reports a violation of the comprehensive policy.

# Conducting a Trauma-Informed Investigation


Possible impact  
on memory and  
memory recall

Inconsistent or  
incomplete  
descriptions of  
facts

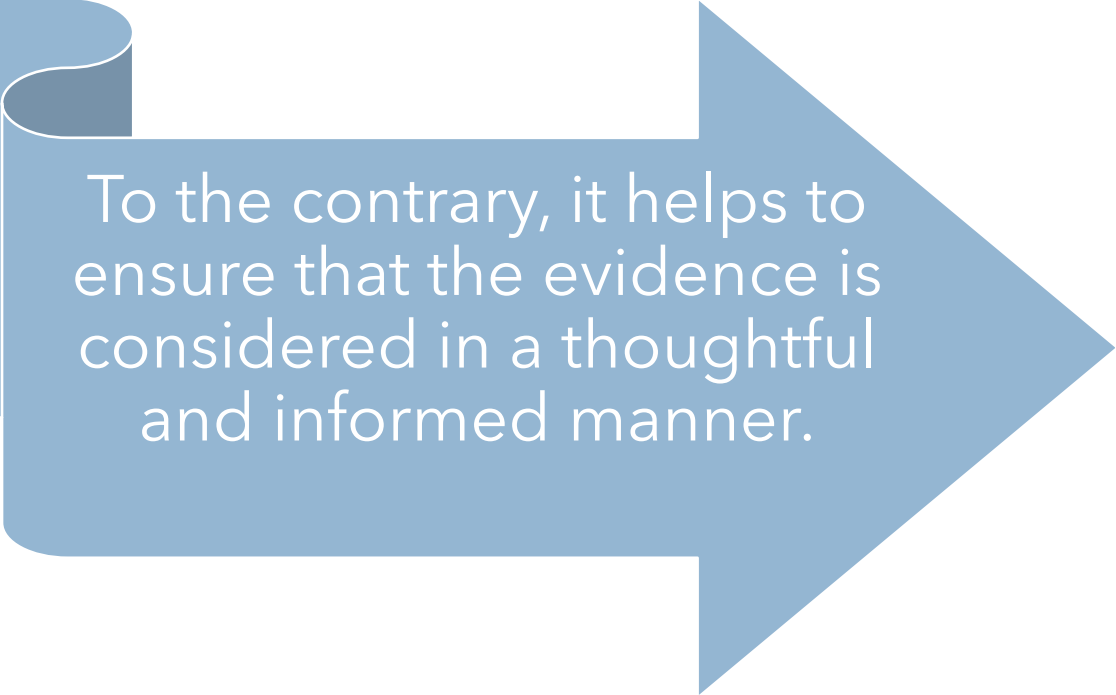
Counterintuitive  
behaviors



# Conducting a Trauma-Informed Investigation



Does not mean that the result is inaccurate or biased in favor of the complainant



To the contrary, it helps to ensure that the evidence is considered in a thoughtful and informed manner.

# What's My Role? Investigator, Adjudicator, Employee

- To make an *impartial* determination as to whether a University policy or procedure was violated
- Temptation to be an advocate
  - For Complainant
  - For Respondent
  - Don't give into it!



# Role of Investigator

- Conduct comprehensive and appropriate interview(s) of the complainant and respondent
- Identify witnesses, and then conduct appropriate interviews with relevant witnesses
- Gather any available physical or documentary evidence
- Prepare summary of evidence collected
- Receive, review and potentially conduct additional investigation into feedback received from the parties on a draft investigation report



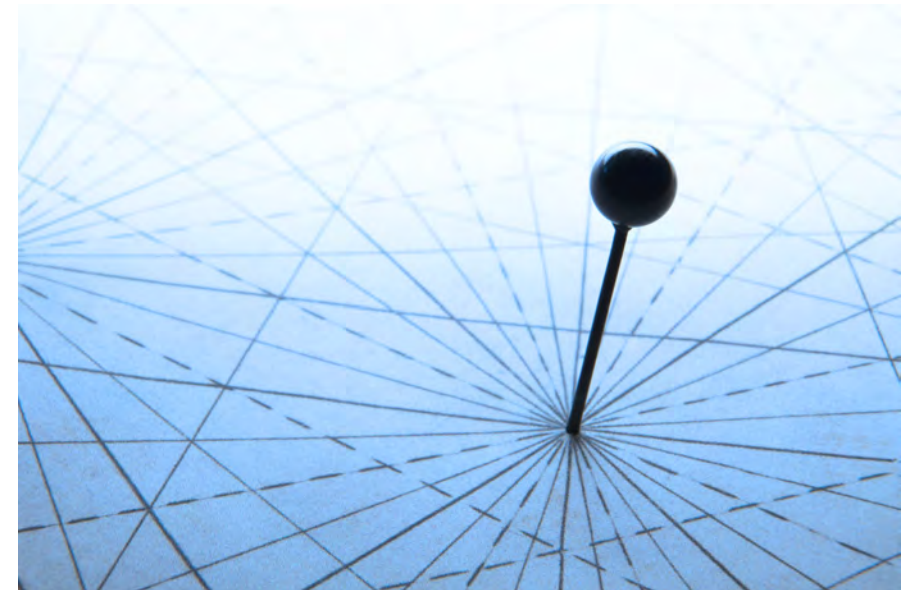
# Investigation Plan and Strategy

- Gathering Sufficient Relevant Information
- Have a roadmap!
- Identify requirements for violation of policy
  - Prohibited conduct
  - Consent
  - Incapacitation
- Identify Evidence
  - Documents and testimony
- What are you looking for?
  - Timelines work
  - Who, what, where, how, and when



# Investigation Plan and Strategy

- Who should be interviewed?
- Conducting effective interviews
  - Interviewing in pairs
  - Recording interviews
  - Asking “good questions”
  - Allowing review and “correction” of interview statements
- Obtaining relevant physical evidence – types?
- Documenting the investigation
  - Obtaining signed statements
  - Evidence identification and records
  - Allowing review and input on investigative report



# Interviews and Documentation – for discussion



1. What information should be included in the introduction to the interview?
2. Was the format of the questions appropriate?
3. Was it appropriate to ask about the Complainant's prior sexual history?



<b>Administrative Leave</b> <b>34 C.F.R. § 106.44(d)</b>	<p>Nothing in this subpart of the Title IX regulations precludes a school from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.</p>
<b>Emergency Removal</b> <b>34 C.F.R. § 106.44(c)</b>	<p>Nothing in this subpart of the Title IX regulations precludes a school from removing a respondent from the school's education program or activity on an emergency basis, provided that the school undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.</p>
<b>Timeframes</b> <b>34 C.F.R. § 106.8(b)(1)(v)</b>	<p>Grievance processes for formal complaints must include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the school offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.</p>
<b>Good Cause</b> <b>34 C.F.R. § 106.45 (b)(1)(v)</b>	<p>"Good cause" is not specifically defined in the new Title IX regulations, but Section 106.45(b)(1)(v) states that, with respect to the extension of timeframes for good cause, good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.</p>

# NEW TITLE IX REGULATIONS ISSUED - LEAVE AND TIMEFRAMES

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**Investigation of  
a Formal  
Complaint  
34 C.F.R. §  
106.45(b)(5)**

New section states that when investigating a formal complaint and throughout the grievance process, a school must—

- (i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties except as specifically noted;
- (ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- (iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the school may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;
- (v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;
- (vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the school must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The school must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and
- (vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

# NEW TITLE IX REGULATIONS ISSUED – INVESTIGATION

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# Collecting Evidence



# Collecting Evidence - Testimonial Evidence

- Interview all relevant witnesses
- To extent practicable, all witnesses identified by the parties
- Tiers of witnesses
  - Parties and all other individuals with “first-hand” knowledge
  - Individuals with “second-hand” knowledge
  - All other witnesses identified by parties

# Collecting Evidence - Physical Evidence

- Closely review complaint or report from complainant
- Obtain relevant physical evidence
  - Medical evidence
  - Swipe cards
  - Emails
  - Phone records (text/voice-mail messages, photos videos)
  - Snapchat, Instagram, Facebook, and other forms of social media
  - Videos from security cameras or residence hall cameras
  - Security or police reports, if any
- Preserve physical evidence

# Interview Questions

## Basic Interview Questions

- Who committed the alleged act?
- Was anyone else involved?
- What exactly occurred?
- What was said and by whom?
- When did the act occur?
- Where did the act occur?
- How did you react? How did the incident affect you?
- Are there other individuals who may have relevant information?
- Did you talk to anyone of the incident?
- Ask for available evidence (e.g., social media)
- What else do you want to tell me about what happened?



# Interview Techniques - Do's and Don'ts

	Do	Don't
<b>General Principles</b>	<ul style="list-style-type: none"> <li>• Be empathetic</li> <li>• Ask open ended questions</li> <li>• Ask questions that address the five senses (sight, hearing, taste, touch, smell)</li> <li>• Listen</li> <li>• Give interviewee plenty of time to answer question</li> <li>• Clarify conflicting information</li> </ul>	<ul style="list-style-type: none"> <li>• Ask leading questions</li> <li>• Ask negative questions</li> <li>• Ask questions that imply judgment</li> <li>• Ask multiple choice questions</li> </ul>
<b>Sample Question Formats</b>	<ul style="list-style-type: none"> <li>• Tell me about ...</li> </ul>	
<b>Examples</b>	<ul style="list-style-type: none"> <li>• Tell me about your thought process when ...</li> <li>• Tell me what you were feeling when ...</li> <li>• Would you be willing to say more about ...</li> <li>• What did you mean when you said ...</li> <li>• What do you remember about ...</li> </ul>	<ul style="list-style-type: none"> <li>• Why didn't you ...</li> </ul>

# Documentation

## Maintain Detailed Records

- Explanations for any delays in the investigation or witnesses not identified
- Circumstances of file documentation (include names and dates)
- Names of complainant, accused student, and witnesses
- Names of individuals involved in handling complaint
- Date of complaint and how filed
- Statements or other evidence submitted or collected
- Interview notes
- Student communications: text messages, social media (Instagram, Snapchat)
- Other evidence: videos

# ASSESSING CREDIBILITY



# Assessing Credibility – for discussion



Did the interviewees seem credible? Why or why not?

# How to determine if a person is credible?

EEOC says  
to consider:



- Inherent plausibility: Is the testimony believable on its face? Does it make sense?
- Demeanor: Did the person seem to be telling the truth or lying?
- Motive to falsify: Did the person have a reason to lie?
- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- Past record: Did the alleged harasser have a history of similar behavior in the past?



# Biases and Other Things to Keep in Mind

## Re: Credibility Assessments



- Confirmation bias: the tendency to interpret new evidence as confirmation of one's existing beliefs or theories
- Stereotypes and assumptions related to:
  - Sexual orientation
  - Race
  - International students/cultural issues
- What does it mean to be “trauma-informed?”
- Be mindful of cultural competency and subjectivity regarding:
  - Plausibility and reasonableness of account
  - Own common sense
- Remember our goal: Fair, balanced and impartial decisions

# Evaluating Consent in Matters Involving Incapacitation

**YES  
MEANS  
YES**



- What evidence is there that the complainant or respondent was incapacitated? (Know your policy's definition of incapacitation.)
- If one party was incapacitated, did the other party know or should they have known about the incapacitation?
- What evidence would you rely upon to evaluate your determinations regarding incapacitation?
- Signs of possible incapacitation





# INVESTIGATION/ INVESTIGATION REPORT

# Investigative Report – for discussion



- a. Does the report fairly summarize the evidence?
- b. List the inculpatory evidence for the Complainant.
- c. List the inculpatory evidence for the Respondent.
- d. List the exculpatory evidence for the Complainant.
- e. List the exculpatory evidence for the Respondent.
- f. Rank the evidence in terms of reliability (from most reliable to least reliable).

# HEARING

# Hearing – for discussion

**You are the hearing officer and have just received this investigation report. The hearing is in three days.**



1. What are the **relevant** questions to be answered at the hearing?
  - To the Investigator?
  - To the Complainant?
  - To the Respondent?
  - To each of the Witnesses?
2. Is there any information missing from the report?
3. Is the tone of the report appropriate?
4. Is the report clearly organized?

<p><b>Access to Evidence</b> Section § 106.45(b)(5)(vi)</p>	<p>When investigating a formal complaint and throughout the grievance process, a school must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the school must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The school must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.</p>
<p><b>Burden of Proof and Burden of Gathering Evidence</b> 34 C.F.R. § 106.45(b)(5)(i)</p>	<p>Grievance procedures for formal complaints must ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties provided that the school cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the school must obtain the voluntary, written consent of a "parent," as defined in 34 CFR § 99.3).</p>
<p><b>Privilege</b> 34 C.F.R. § 106.45(b)(1)(x)</p>	<p>Grievance processes for formal complaints must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.</p>
<p><b>Presumption for Respondent</b> 34 C.F.R. § 106.45(b)(1)(iv)</p>	<p>Grievance processes for formal complaints must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.</p>
<p><b>Standard of Evidence</b> 34 C.F.R. § 106.45(b)(1)(vii)</p>	<p>Grievance processes for formal complaints must state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.</p>

*Illinois State law: Requires use of the preponderance of the evidence standard to determine whether student violated sexual misconduct policy.*

# NEW TITLE IX REGULATIONS ISSUED - EVIDENTIARY CONCEPTS

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# Preponderance of the Evidence







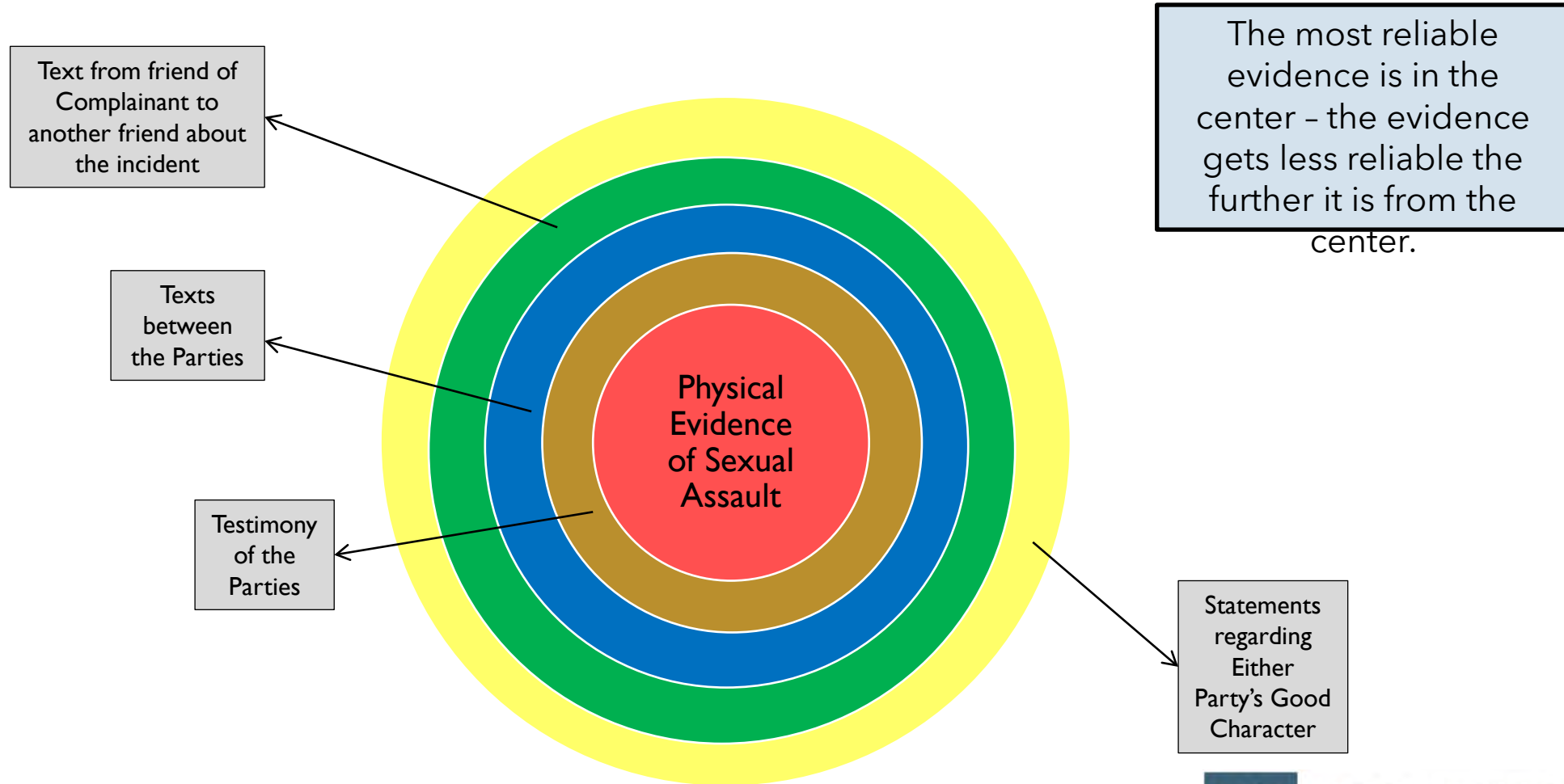
# DETERMINATION

# Determination – for discussion



Write the analysis and conclusion, including a conclusion as to whether the preponderance of the evidence supports that the Respondent violated the University policy.

# Evaluating the Evidence - Bulls Eye



# Evaluating the Evidence



Which has the greater weight?  
"More likely than not"?

# Elements of the Written Determination



1. Date of report, names of parties, investigator
2. Procedural history: From complaint receipt through determination, including notifications to parties, interviews, site visits, supportive measures, methods used to gather evidence, and hearing held
3. Allegation(s)
4. Applicable policies and procedures
5. Information considered during investigation (witnesses questioned, documents and other evidence)

# Elements of the Investigative Report

6. Information considered during investigation (witnesses questioned, documents and other evidence)
7. Interim Measures
8. Findings of fact
9. If required by policy, analysis and conclusion - whether the alleged conduct violated the policy and evidentiary standard -- preponderance of the evidence
10. Responses by complainant and respondent



# SANCTIONS

**Sanctions and Remedies**  
**34 C.F.R. § 106.45(b)(1)(vi)**

Grievance procedures for formal complaints must describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school may implement following any determination of responsibility.

From the Preamble

- o *The Department does not wish to dictate to schools the sanctions that should be imposed when a respondent is found responsible for sexual harassment.*
- o *The final regulations do not impose a standard of proportionality on disciplinary sanctions.*
- o *A respondent's lack of comprehension that conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a victim does not excuse the misconduct, though genuine lack of understanding may (in a school's discretion) factor into the sanction decision.*
- o *Nothing in the final regulations precludes a school from adopting a zero- tolerance policy.*

# NEW TITLE IX REGULATIONS – SANCTIONS

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# APPEALS

**Appeals**  
**34 C.F.R. §§**  
**106.45(b)(1)(viii)**  
**and 106.45(b)(8)**

A school's grievance process for formal complaints must include the procedures and permissible bases for the complainant and respondent to appeal.

A school must offer both parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases:

- A. Procedural irregularity that affected the outcome of the matter;
- B. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- C. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

A school may offer an appeal equally to both parties on additional bases.

As to all appeals, the school must:

- A. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- B. Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- C. Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
- D. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- E. Issue a written decision describing the result of the appeal and the rationale for the result; and
- F. Provide the written decision simultaneously to both parties.

*Illinois law: The [parties] shall have the right to timely appeal findings or imposed sanctions if the party alleges (i) a procedural error occurred, (ii) new information exists that would substantially change the outcome of the finding, or (iii) the sanction is disproportionate with the violation... The [parties] shall receive the appeal decision in writing within 7 days after the conclusion of the review of findings or sanctions or sooner if required by federal or State law.*

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**Decision-maker(s)**  
**34 C.F.R. §§**  
**106.45(b)(7)(i) and**  
**(b)(8)(ii)(B)**

Decision-maker(s) for the appeal must not be the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator.

*Illinois law: Required to have a sufficient number of individuals trained to resolve complaints so that an individual or individuals with no prior involvement in the initial determination or finding hear any appeal brought by a party.*

# NEW TITLE IX REGULATIONS ISSUED - APPEALS

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# SESSION 4: DO'S AND DON'TS IN THE TITLE IX HEARING PROCESS

## Final Title IX Regulations

- Announced by Secretary of Education Betsy DeVos on May 6, 2020
- Scheduled for implementation on August 14, 2020
- Litigation filed challenging new rules





# Title IX Required Training for “Decision-maker”

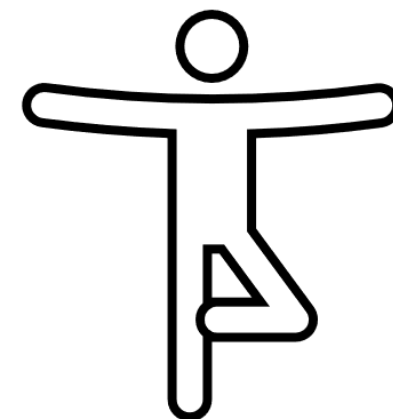
Decision-maker must receive training on:

1. The definition of sexual harassment in the new Title IX regulations;
2. The scope of the recipient’s education program or activity;
3. How to conduct a hearing
4. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
5. Technology to be used at a live hearing
6. Issues of relevance of questions and evidence
7. Training must not rely on sex stereotypes
8. Training must promote the impartial investigation & adjudication of formal complaints

NOTE: Training materials must be posted on website and maintained for 7 years.

# Qualifications of a “Decision-maker”

1. Cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
2. Trained as required by new Title IX regulations
3. No conflict of interest
4. No bias for or against complainants or respondents generally
5. No bias for or against an individual complainant or respondent
6. Knows how to conduct an orderly hearing
7. Knows how to make relevancy decisions
8. Can be an external “decision-maker”



<p>Grievance process for Formal Complaints of Sexual Harassment – Basic requirements 34 C.F.R. § 106.45(b)(1)</p>	--Informal resolution allowed (except for student complaints against employees)
	--Basic requirements for grievance process for formal complaints of sexual harassment:
	(i) Equitable treatment of parties
	(ii) Objective evaluation of evidence
	(iii) No conflicts of interest or bias
	(iv) Presumption of “not responsible” for respondent
	(v) Reasonably prompt timeframes
	(vi) Disciplinary sanctions and remedies
	(vii) Standard of evidence
	(viii) Appeals
(ix) Supportive measures	
(x) Restrictions relating to privileged information	

<p>Grievance Process for Formal Complaints of Sexual Harassment 34 C.F.R. § 106.45</p>	A school’s treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. A school’s treatment of the respondent may also constitute discrimination on the basis of sex under Title IX.
	The following specific requirements for grievance processes used to address formal complaints of sexual harassment.
	(1) Basic requirements for grievance process (see below);
	(2) Notice of allegations;
	(3) Dismissal of a formal complaint;
	(4) Consolidation of formal complaints;
	(5) Investigation of a formal complaint;
	(6) Hearings;
	(7) Determination regarding responsibility;
	(8) Appeals;
(9) Informal resolution; and	
(10) Recordkeeping.	

# NEW TITLE IX REGULATIONS – GRIEVANCE PROCESS

# Role of the “Decision-Maker”

## Potential Structures for Hearing Process

- Hearing Officer (Administrative)
- Hearing Officer (Sole decision maker)
- Hearing Panel Member



# Key Duties

- Sets tone for the hearing
- Communicates with parties – no ex parte communication allowed
- Communicates and oversees advisors at the hearing – if a party does not have an advisor present at the live hearing, the school must provide without fee or charge to that party, an advisor of the school's choice to conduct cross-examination on behalf of that party.
- Coordinates logistics and witnesses with the school
- Maintains order and decorum of hearing
- Ensures hearing follows institution's written procedures



# Key Duties (cont)

- Determines, before a complainant, respondent, or witness answers a cross-examination or other question, whether the question is relevant and explains any decision to exclude a question as not relevant
- Role is limited -- NOT to collect information in the first instance
- Weighs the evidence
- Makes determination of responsibility – whether a preponderance of the evidence supports that the respondent violated the applicable policy
- Determines sanctions (at some schools)
- Prepares written determination
- Issues written determination simultaneously to the parties



# The School's Obligation to Investigate and Adjudicate a Formal Complaint of Sexual Harassment

- A school with actual knowledge of sexual harassment in an education program or activity of the school against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- Actual notice (knowledge) – allegation made to Title IX Coordinator or person with authority to take corrective measures
- For formal complaints of sexual harassment, the school must conduct a investigation and hearing in accordance with the specific Title IX procedural requirements



# “Sexual harassment” as defined in the Final Title IX regulations

1. Quid Pro Quo -- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct;
2. Violence Against Women (VAWA) categories --
  - Sexual assault
  - Domestic violence
  - Dating violence
  - Stalking
3. 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 school’s education program or activity



<p>Sexual Assault 34 C.F.R. § 106.30(a)</p>	<p>“Sexual assault”, as defined in the Clery Act at 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation (FBI). The FBI uniform crime reporting system defines “forcible rape” as “the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” The FBI uniform crime reporting system defines “forcible fondling” as “the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.”</p>
<p>Domestic Violence 34 C.F.R. § 106.30(a)</p>	<p>“Domestic violence,” as defined by VAWA at 34 U.S.C. §12291(a)(8), includes 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 jurisdiction receiving grant monies, 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 jurisdiction.</p>
<p>Dating Violence 34 C.F.R. § 106.30(a)</p>	<p>“Dating violence,” as defined as defined by VAWA at 34 U.S.C. 12291(a)(10) , means violence committed by a person—</p> <p>(A)who is or has been in a social relationship of a romantic or intimate nature with the victim; and</p> <p>(B)where the existence of such a relationship shall be determined based on a consideration of the following factors:(i)the length of the relationship; (ii)the type of relationship; and (iii) the frequency of interaction between the persons involved in the relationship.</p>
<p>Stalking 34 C.F.R. § 106.30(a)</p>	<p>“Stalking,” as defined by VAWA at 34 U.S.C. §12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—</p> <ol style="list-style-type: none"> <li>A. fear for his or her safety or the safety of others; or</li> <li>B. suffer substantial emotional distress.</li> </ol>

# NEW TITLE IX REGULATIONS – DEFINITION OF SEXUAL HARASSMENT AND VAWA CATEGORIES



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# Scope of Education Program or Activity

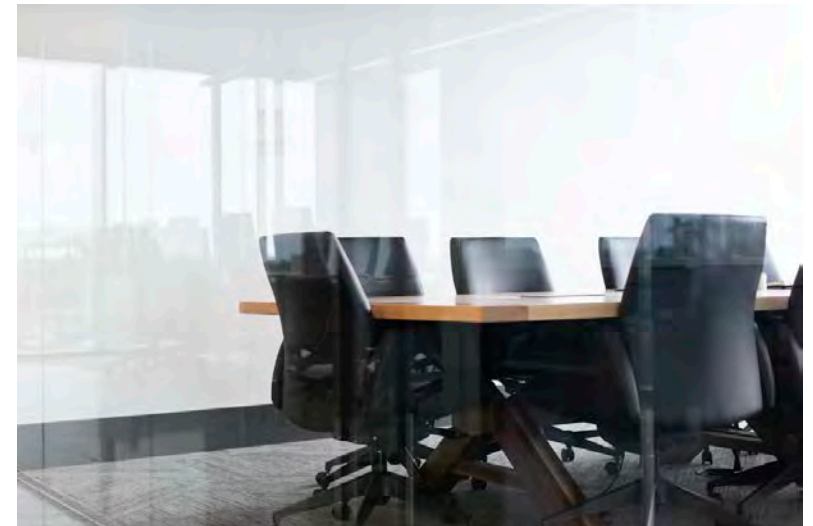
1. “Education program or activity” includes:
  - Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs
  - Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
2. Harassment must be against a person in the United States
3. The Complainant must be participating or attempting to participate in the education program or activity at the time the complaint is filed.
4. The school may dismiss a complaint against a Respondent who is not participating or attempting to participate in the education program or activity.

# How to Conduct a Hearing – The Hearing Location

The hearing may be conducted with

- all parties physically present in the same geographic location or
- *at the school's discretion*, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

At the request of either party, the school must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.



# Technology

- Audio or audiovisual recording, or transcript, of hearing
- Secure portal for sharing relevant documents (Investigative Report, Evidence, Written Determination)
- Video technology for virtual hearings
- On-site training by school of technology



# Issues of Relevance and Evidence

## Legal Definition of Relevance:

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
  
- (b) the fact is of consequence in determining the action.





# Issues of Relevance and Evidence

- Only relevant cross-examination and other questions may be asked of a party or witness.
- Hearing officer must determine whether a question is relevant before a complainant, respondent, or witness answers a cross-examination or other question, and must explain any decision to exclude a question as not relevant.
- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.



# Issues of Relevance and Evidence

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.



# Impartiality

- Importance of serving impartially – making decisions based on the facts and applicable policy
- Avoiding prejudgment of the facts at issue
- No conflicts of interest
- No bias against either party or Complainants or respondents generally
- Presumption of Respondent's non-responsibility



# Retaliation

- Participants in the hearing process are protected from retaliation.
- No school or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.
- Complaints alleging retaliation may be filed according to the applicable school procedures.



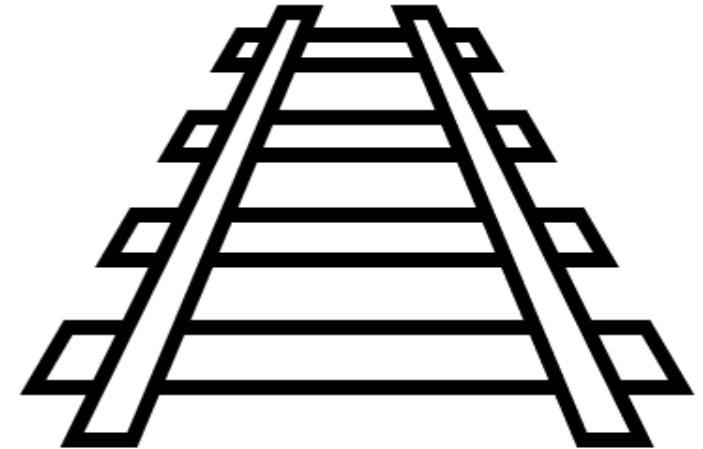
# Pre-Hearing Review and Preparation

## To Review:

- Investigation report
- Submissions by the parties in advance of hearing
- Written questions for other party and witnesses?
- Applicable Policy
- Hearing procedures

## To Prepare:

- Identify areas needing clarification and/or additional questions
- Prepare your opening and closing comments
- Make/review plan for how to handle new evidence
- Make/review plan for how to handle new questions that might arise





# WRITTEN DETERMINATION



# Written Determination

1. Allegation(s)
2. Procedural history (notices to parties, interviews, methods used to gather evidence, hearings held)
3. Applicable policies and procedures
4. Information considered during investigation (witnesses, documents, and any other evidence)
5. Findings of fact supporting the determination

# Written Determination (cont)

5. Conclusions regarding the application of the policy to the facts using the preponderance of the evidence standard
6. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
7. Appeal procedures and bases for appeals



# Sample Letter Language

- “Because the Respondent is presumed not to have violated the policy unless and until the preponderance of the evidence establishes a violation, it cannot be concluded that the Respondent engaged in sexual misconduct.”
- “Based on the totality of the circumstances, it is determined that it is more likely than not that the Complainant was incapacitated at the time of the parties’ sexual interaction.”
- “In consideration of all of the evidence, including ..., it is determined that the preponderance of the evidence does not support the Complainant’s allegation that the Respondent engaged in penetration without his consent.”
- “Both parties presented with credible and reasonable demeanors.”
- “Both parties have provided accounts of the incident that are plausible.”

# Considerations for the Imposition of Sanctions

- The nature of the conduct at issue;
- The impact of the conduct on the Complainant;
- The impact of the conduct on the community or the University, including protection of the University community;
- Prior misconduct by the Respondent, including the Respondent's relevant prior discipline history, both at the University or elsewhere, including criminal convictions;
- Maintenance of a safe and respectful environment conducive to learning;
- Whether the Respondent has accepted responsibility for the conduct, which may be considered as a factor that may lessen, not increase, the severity of the sanctions;
- The necessity of any specific action in order to eliminate the prohibited conduct, prevent its recurrence, and remedy its effects on the Complainant or other University community members; and
- Any other mitigating, aggravating, or compelling circumstances, including those set forth in the parties' impact statements, to reach a just and appropriate resolution in each case.

# Recordkeeping

School must maintain for a period of seven years records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity;
2. Any appeal and the result therefrom;
3. Any informal resolution and the result therefrom; and
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A school must make these training materials publicly available on its website, or if the school does not maintain a website the school must make these materials available upon request for inspection by members of the public.

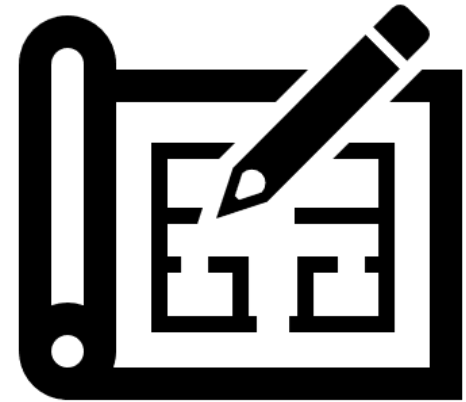


# Best Practices -- Hearing Logistics - to think about beforehand

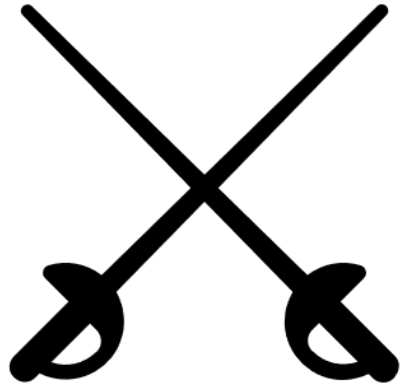
- Information parties should have before the hearing
- Inform yourself of any accommodations required by the parties
- Physical space and use of remote technology—before, during and after hearing
- Plan for order of hearing
- Plan for recording hearing
- Plan for handling/keeping evidence
- Have contact information for Title IX Coordinator/counsel

# Best Practices: Setting ground rules

- Hearing officer has complete authority
- Limitation on participation of advisors, except regarding cross-examinations
- No ex parte communications
- Interact respectfully
- No interruptions
- Limitations on evidence (timing, etc.)
- Direct procedural questions to hearing officer



# Best Practices: Handling Unplanned Situations



- Inappropriate participation of parties, witnesses or advisors
- Attempted introduction of new evidence
- Scope of questions: relevance, ruling on “objections,” and/or inappropriate subject matter
- Defusing high conflict moments
- Handling cross examination
- Witnesses/parties who do not attend hearing

# Best Practices: Asking Questions

- First and foremost, always remember your role
- Rapport-building stage—what does this look like in a hearing?
- Connect your questions to the elements of the prohibited conduct
- If asking a sensitive question, explain why
- Use hearing to get clarification of any aspects of investigation report
- Use the hearing to ask about inconsistencies you noted in the evidence
- Ask why just learning new information now
- Ask the challenging party how/what the investigator got wrong



# Recap – Dos and Don'ts

- Be knowledgeable about your school's policies and procedures or know who to ask questions
- Carefully review and consider all the investigative materials (report and documentation)
- Remain impartial, calm and patient throughout process
- Allow parties to tell their stories
- Make findings decisions based on the evidence and policy
- Write clear and thorough final determination letters



# Recap – Do's and Don'ts

- Prejudge either party
- Allow evidence of prior sexual activity (except in limited circumstances)
- Make public (or private) statements suggesting gender bias
- Be afraid to ask the questions you need to ask
- Breach a confidence
- Unduly delay the resolution





# SESSION 5: BEST PRACTICES IN INFORMAL RESOLUTION

# Title IX Required Training for “Informal Resolution Facilitator”

Must receive training on:

1. The definition of sexual harassment in the new Title IX regulations (above)
2. The scope of the recipient’s education program or activity (above)
3. **How to conduct an informal resolution process;**
4. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias (above)
5. Training must not rely on sex stereotypes (above)
6. Training must promote the impartial investigation and adjudication of formal complaints of sexual harassment (above)

NOTE: Training materials must be maintained for 7 years and posted on school website



# Background: Title IX Policy and Regulations

- 2001 Policy: “In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”
- 2011 Policy: “[I]n cases involving sexual assault, mediation , is not appropriate even on a voluntary basis.”
- 2017 Policy: “If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.
- 2020 Regulations: Informal resolution permitted except to resolve allegations that an employee sexually harassed a student.



# Preamble to the Title IX Regulations

- Informal resolution “empowers the parties by offering alternative conflict resolution systems that may serve their unique needs and provides greater flexibility to recipients in serving their educational communities.”
- “Permitting informal resolution is an appropriate policy development subject to the limitations and restrictions in the final regulations.”
- Provides “recipients an avenue for using the disciplinary process to educate and change behavior in a way that the adversarial formal grievance process might not, in situations where both parties voluntarily agree to participate.”



# Informal Resolution,

## 34 C.F.R. § 106.45(b)(9)

- Must not be used to resolve allegations that an employee sexually harassed a student
- Must not require a waiver of the right to an investigation and adjudication of formal complaints of sexual harassment as a condition of enrollment, continuing enrollment, employment, continuing employment, or enjoyment of any other right.
- Voluntary:
  - Must not require the parties to participate in an informal resolution process.
  - Must obtain the parties' voluntary, written consent to the informal resolution process and provide written notice (as required)
- Timing:
  - Must not offer an informal resolution process unless a formal complaint is filed.
  - May facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility

## NEW TITLE IX REGULATIONS – INFORMAL RESOLUTION

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# Informal Resolution,

## 34 C.F.R. § 106.45(b)(9)

Written notice to the parties must be provided and disclose:

1. the allegations,
2. the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
3. any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

## NEW TITLE IX REGULATIONS – INFORMAL RESOLUTION

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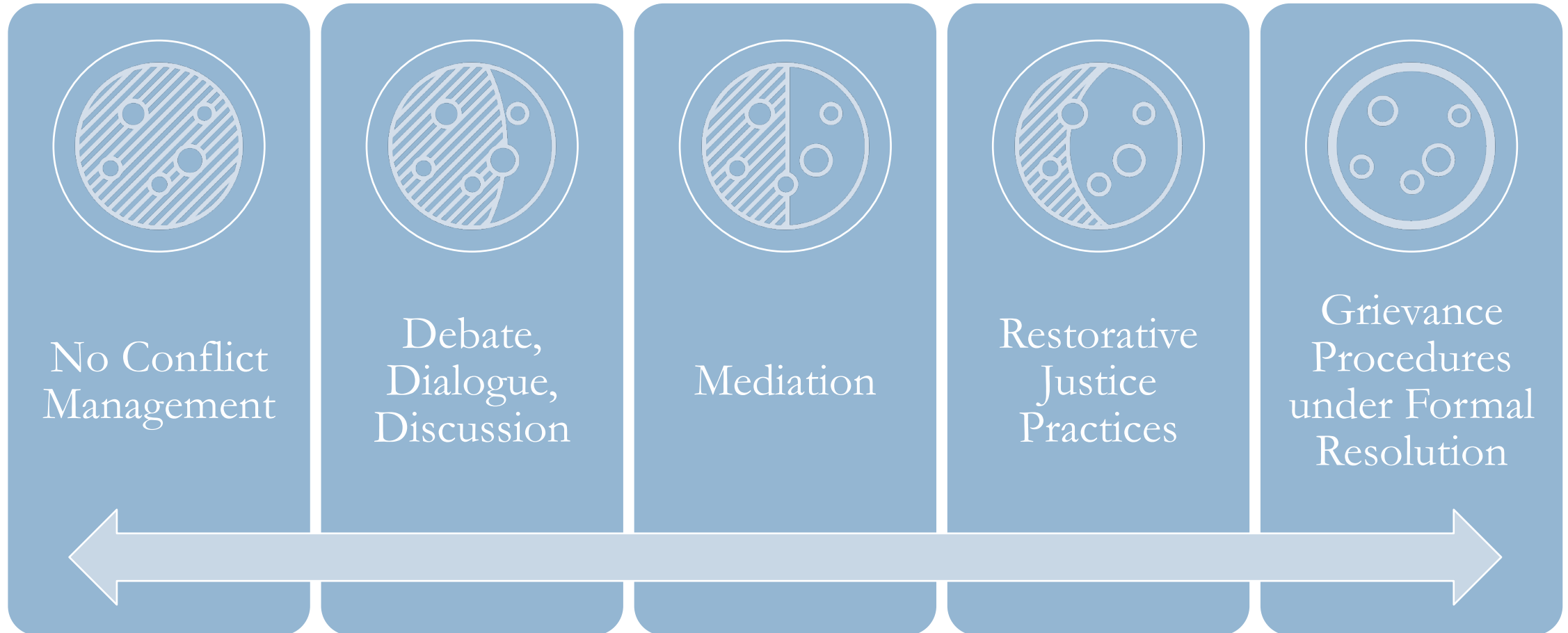
# Qualifications of an Informal Resolution Facilitator

1. Trained as required by new Title IX regulations
2. Expertise and experience with informal resolution techniques
3. Cannot be the same person(s) as the Investigator or Decision-Maker
4. No conflict of interest
5. No bias for or against complainants or respondents generally
6. No bias for or against an individual complainant or respondent
7. Can be an external facilitator



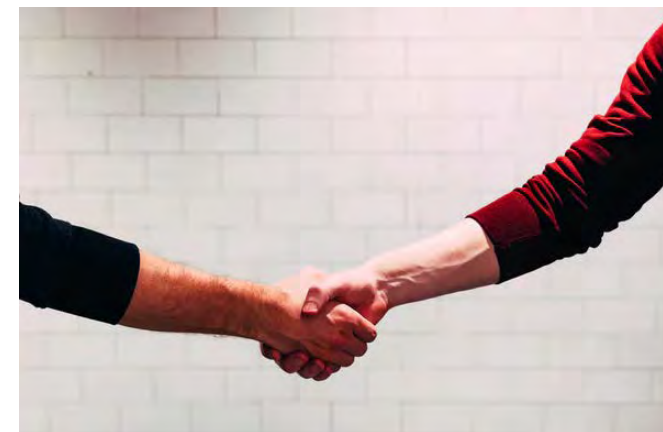
Note: Advisors are permitted to participate in the informal resolution process.

# Spectrum of Conflict Resolution



# Advantages of Informal Resolution Process

- Great control to the parties
- Offers complainants an option other than full investigation
- Respondent may prefer expedited process and be prepared to confess, apologize, get sanctioned
- Avoids adversarial posture of formal process
- Shortens timeframe of Title IX process in many cases
- Frees resources if case resolved informally and more quickly than formal investigation and adjudication process
- Made several changes to address potential risks
- Increased compliance with outcomes
- More customized remedies



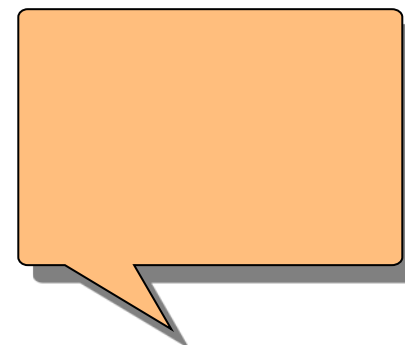
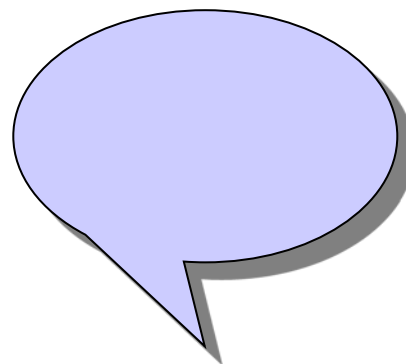
# Considerations relating to Confidentiality

- Important the parties are fully aware of the consequences of participation – that the records relating to informal resolution will be maintained for seven years and records that may or may not be shared
- Title IX Regulations do not include any limitation on the use of confidentiality provisions in an informal resolution agreement (e.g., as a condition of final agreement)
  - Preamble: *“We believe as a fundamental principle that parties and individual recipients are in the best position to determine the conflict resolution process that works for them; for example, a recipient may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report, or may determine that the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved.”*
- Information from informal resolution process cannot be used in any subsequent disciplinary process



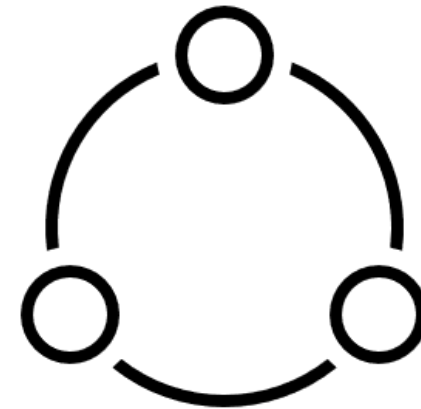
# Types of Informal Resolution (non-exhaustive)

- Mediation
- Facilitated Dialogue
- Restorative Justice
- Circle of Support and Accountability



# The Mediation Process

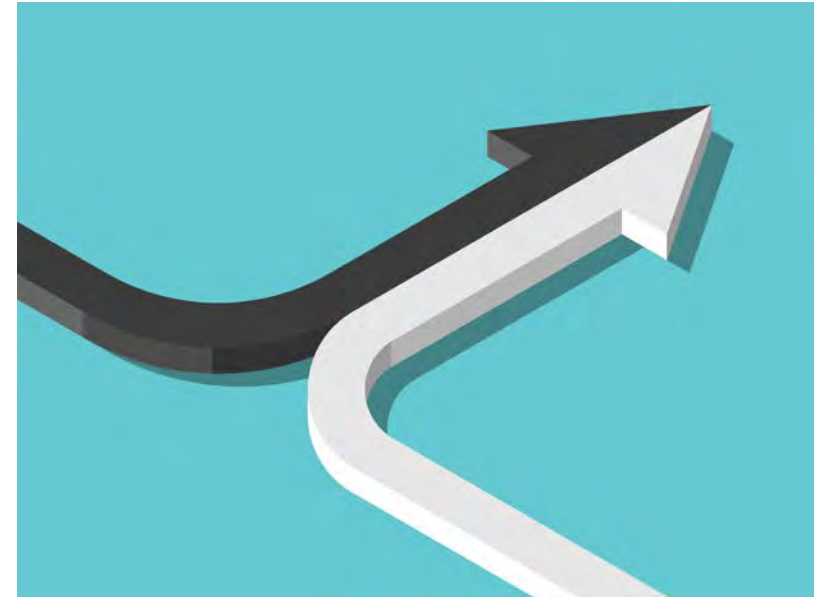
- Mediator's Opening Remarks
- Opening Statements by Parties/Counsel
- Parties Share Perspectives
- Parties Identify Issues
- Parties Generate and Evaluate Options
- Caucuses Taken as Necessary
- Parties Negotiate to Arrive at Mutually Agreeable Resolution
- Mediator Drafts Memo that Captures What Parties Agreed Upon





# Principles of Mediation

- Empower Participants
  - Providing opportunity for dialogue between parties
  - Immediate Parties Only
- Trained Personnel in Mediation
  - Mediator's Role is a True Neutral
- No Blame
- Limited Safeguards
  - Question of confidentiality
- Focus on Shared Interests
- Seek Mutually Satisfying Resolutions



# Facilitated Dialogue

A structured and facilitated conversation between two or more individuals, most often the Complainant, the Respondent, and/or other community members. The focus is often on providing a space for voices to be heard and perspectives to be shared. Depending on stated interests, the participants may sometimes work towards the development of a shared agreement, although working towards an agreement is not always the intended outcome.



-- University of Michigan

# Principles of Restorative Justice

- Acceptance of responsibility
- Focus on repairing the harm caused
- Empower participants: the people most affected by the incident should be able to participate in its resolution
- Providing opportunities for dialogue between parties
- Community and institutional stakeholder participation
- Trauma-informed safeguards



From the  
Preamble:

*A school could use a restorative justice model after a determination of responsibility finds a respondent responsible.*

# The Restorative Justice Process



## Preconference

- Voluntary, complainant-driven
- Preparation and assessment of objectives

## Conference

- What happened from your perspective?
- What have you thought about since?
- What harm was caused? What was the impact?
- How can the harm be addressed?
- How can trust be restored?

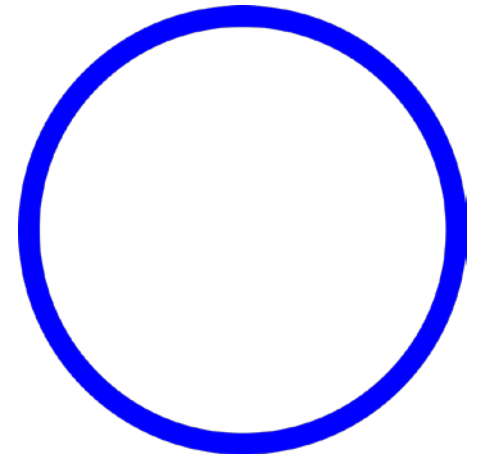
## Post-conference

- - Support for respondent and supervision

# Circle of Support and Accountability

A facilitated interaction between the Respondent and University faculty and/or staff designed to provide accountability, structured support, and the development of a learning plan. The focus is to balance support and accountability for an individual who has acknowledged their obligation to repair harm and willingness to engage in an educational process. This model does not require participation from the Complainant.

-- University of Michigan



# Possible Follow-up Measures

- Alcohol education
- Regular meeting with appropriate University official or office
- Extension of no contact order
- Restriction from participation in specific clubs and/or organizations
- Restriction for participation in particular events
- Completion of an educational plan
- Counselling sessions



# Recordkeeping

School must maintain for a period of seven years records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity;
2. Any appeal and the result therefrom;
3. Any informal resolution and the result therefrom; and
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A school must make these training materials publicly available on its website, or if the school does not maintain a website the school must make these materials available upon request for inspection by members of the public.







# QUESTIONS?

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CARL SANDBURG COLLEGE

# *CERTIFICATE*

OF COMPLETION

*Jan Akright*

TITLE IX HEARING PROCESS TRAINING

Webinar presented by Debbie Osgood on July 16, 2020

10:00 a.m. - 12:00 p.m.



Director of Admissions & Records/  
Title IX Coordinator



*July 29, 2020*

DATE

CARL SANDBURG COLLEGE

# ***CERTIFICATE***

OF COMPLETION

*Jan Akright*

**TITLE IX INVESTIGATOR TRAINING**

**Webinar presented by Debbie Osgood on July 13 & 15, 2020**

**Team workshop conducted on July 14, 2020**

**8 hours of training equal to 0.5 vocational skills credit**



Director of Admissions & Records/  
Title IX Coordinator



*July 29, 2020*

DATE