

HUSCH BLACKWELL

Title IX Training for Title IX Team Members

University of Texas System -- 2024

Join the Vevox session

Go to **vevox.app**

Enter the session ID:
132-978-110

Or scan the QR code



Agenda (1 of 2)

Caselaw and Litigation Update

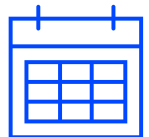
Pregnancy and Parenting

Employee Reporting

Case Intake

Interview and Questioning Techniques

Investigation Report Writing



Agenda (2 of 2)

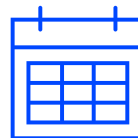
Credibility Assessments and Live Hearing Determinations

Appeals

Sexual Assaults, Consent, and Incapacitation

Interpersonal Violence and Stalking

First Amendment Scenarios





##/##

Join at: **vevox.app**

ID: **132-978-110**

Question slide

I consider myself to be:

An experienced Title IX practitioner

0%

An intermediate Title IX practitioner

0%

A new Title IX practitioner with lots to learn

0%



##/##

Join at: **vevox.app**

ID: **132-978-110**

Results slide

I consider myself to be:

An experienced Title IX practitioner

##.##
%

An intermediate Title IX practitioner

##.##
%

A new Title IX practitioner with lots to learn

##.##
%

Caselaw and Litigation Update

Module 1

What is the “new” Title IX regulation?

- A series of revisions and additions to 34 C.F.R. Part 106 that address several issues, including:
 - The scope of sex discrimination and sex-based harassment covered by Title IX
 - The procedures and requirements for addressing complaints of sex discrimination and sex-based harassment
 - Specific content on accommodating pregnancy and pregnancy related conditions

When was the new regulation supposed to take effect?

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

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

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



What do the injunctions do?

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

What about the Texas injunction?

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

What is the reasoning of the Texas federal court?

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

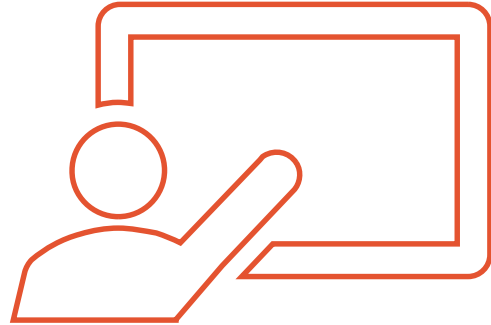
When will the Supreme Court act?



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

What should institutions do today?

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



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

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

What are key takeaways?

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

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

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

What are key takeaways?

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



##/##

Join at: **vevox.app**

ID: **132-978-110**

Question slide

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

Is sexual harassment as defined by Title IX

0%

Is not sexual harassment as defined by Title IX

0%



##/##

Join at: **vevox.app**

ID: **132-978-110**

Results slide

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

Is sexual harassment as defined by Title IX

##.##

%

Is not sexual harassment as defined by Title IX

##.##

%

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

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

What are key takeaways?

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

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

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

What are key takeaways?

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

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

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

What are key takeaways?

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

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

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

What are key takeaways?

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

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

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

What are key takeaways?

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

Questions

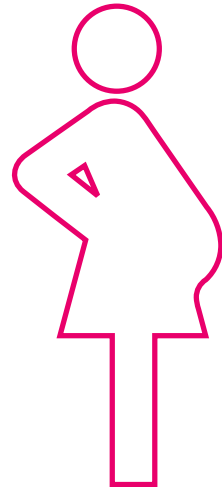


Pregnancy and Parenting

Module 2

What does Title IX have to say about pregnancy?

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



What conditions are included?

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



Example

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



Example (Poll to Follow)

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





##/##

Join at: **vevox.app**

ID: **132-978-110**

Question slide

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

Yes

0%

No

0%



##/##

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

Results slide

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

Yes

##.##
%

No

##.##
%



##/##

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

Question slide

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

Yes

0%

No

0%



##/##

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

Results slide

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

Yes

##.##

%

No

##.##

%

What about family and parental status?

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

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

What does Texas law say?

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

What about accommodations?



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

Example

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



Question for Discussion

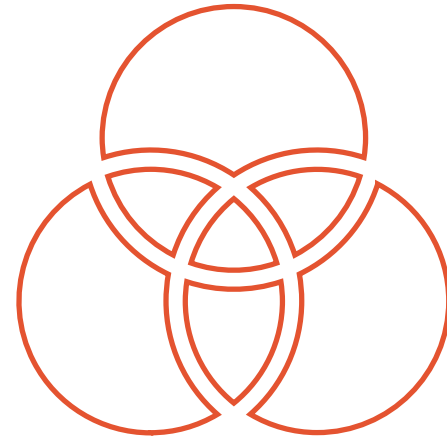
Is the faculty member engaging in prohibited discrimination against Jane?

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



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

- For purposes of assessing eligibility, pregnancy must be treated the same as other temporary medical conditions
- It is not discrimination for a pregnant student to voluntarily participate in a modified program



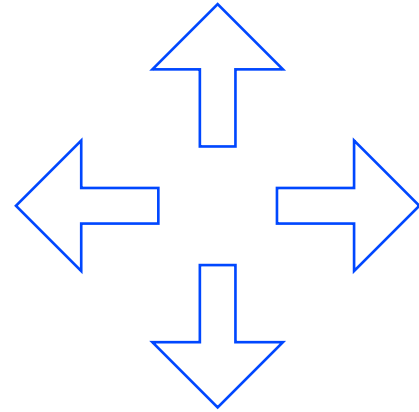
Example

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



What reasonable accommodations are pregnant students allowed?

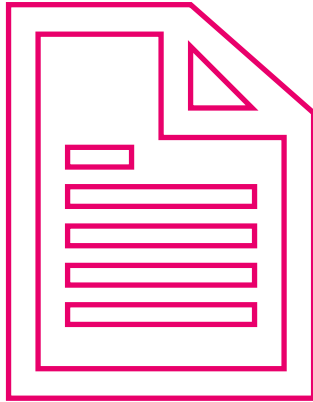
- Reasonable modifications
- Based on individualized needs
- Determined after consultation with the student
- Fundamental alteration is not required



What are some common examples of reasonable accommodations?

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

Should we require documentation before granting an accommodation?



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

Example

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

A pregnant student needs to take more frequent bathroom breaks.

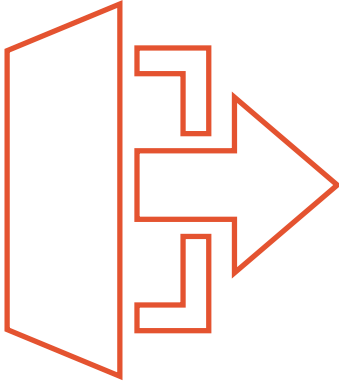
A student who recently gave birth has lactation needs.



Practical Point

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

What about voluntary leaves?



- Under Title IX, must allow a pregnant student to take a voluntary leave for at least the period of time medically necessary
- When returning, student must be reinstated to academic status
- Texas law sets minimum voluntary leave of at least a semester (without a showing of medical need)

Must a school provide lactation space?

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





##/##

Join at: **vevox.app**

ID: **132-978-110**

Question slide

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

Yes

0%

No

0%



##/##

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

Results slide

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

Yes

##.##

%

No

##.##

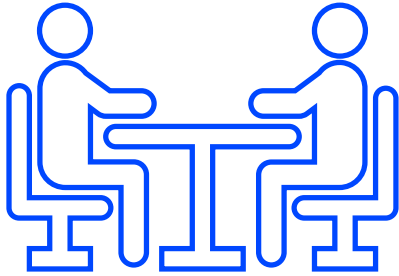
%

What about early registration?

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



Who is responsible for ensuring accommodations?



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

Group Scenario

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



Group Scenario Discussion Questions



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



Questions



Employee Reporting

Module 3

What does Title IX say about “mandatory” reporting?

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

Example

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



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

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



What does Texas law say about mandatory reporting?

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

Example

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



Example

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



Example (Poll to Follow)

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





##/##

Join at: **vevox.app**

ID: **132-978-110**

Question slide

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

Yes

0%

No

0%



##/##

Join at: **vevox.app**

ID: **132-978-110**

Results slide

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

Yes

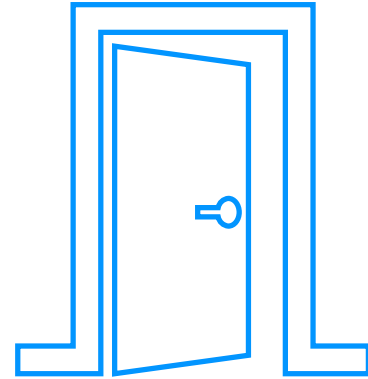
##.##
%

No

##.##
%

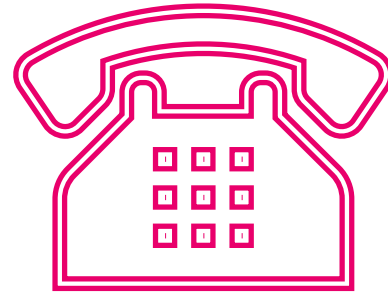
What are the potential consequences of failing to make a mandatory report under Texas law?

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



What information must be shared?

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



Example

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



Example

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



Are there exceptions to mandatory reporting?

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



Who are confidential reporters?



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

What must confidential reporters disclose?

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

Example

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



Example

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



Group Scenario

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



Group Scenario Discussion Questions



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



Questions



Case Intake

Module 4

What is the Title IX grievance process?



When do we reach out to the alleged victim?

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



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

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



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

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

What are supportive measures?

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



What are examples of supportive measures?



Counseling



Academic accommodations



Housing accommodations



Security escorts



Leave of absence



Increased security or monitoring



Modified work schedules



Mutual no-contact order if implicated by facts

Example

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



Example

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



Do students and employees have other rights to accommodation?

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

Are supportive measures confidential?

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



Example (Poll to Follow)

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





##/##

Join at: **vevox.app**

ID: **132-978-110**

Question slide

Title IX Coordinator should:

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

0%

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

0%

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

0%



##/##

Join at: **vevox.app**

ID: **132-978-110**

Results slide

Title IX Coordinator should:

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

##.##

%

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

##.##

%

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

##.##

%

Who is responsible for supportive measures?

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

Can we utilize interim removals or suspensions for students?



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

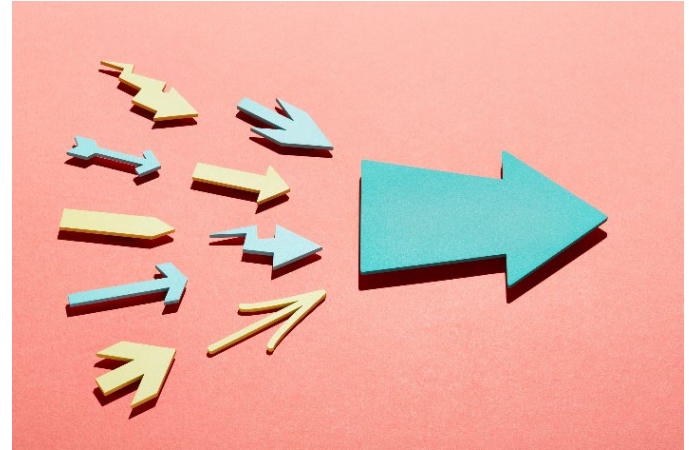
Example

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



Are there other considerations for sexual assault and VAWA crimes?

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



What does it mean to be “trauma informed”?

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

How do we approach trauma in a Title IX case?

Balance

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

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

What is the definition of trauma?



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



English Oxford: Deeply distressing or disturbing experience



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

What is a neurobiological effect?



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

Example

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



Example

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



What are possible effects on recall?

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

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame

How does trauma relate to credibility?

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

Can we place employees on administrative leave?

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

Example

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



What is a formal complaint?



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

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

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

Example

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



Example

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



Group Scenario

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

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

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

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



Group Scenario Discussion Questions



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



Questions

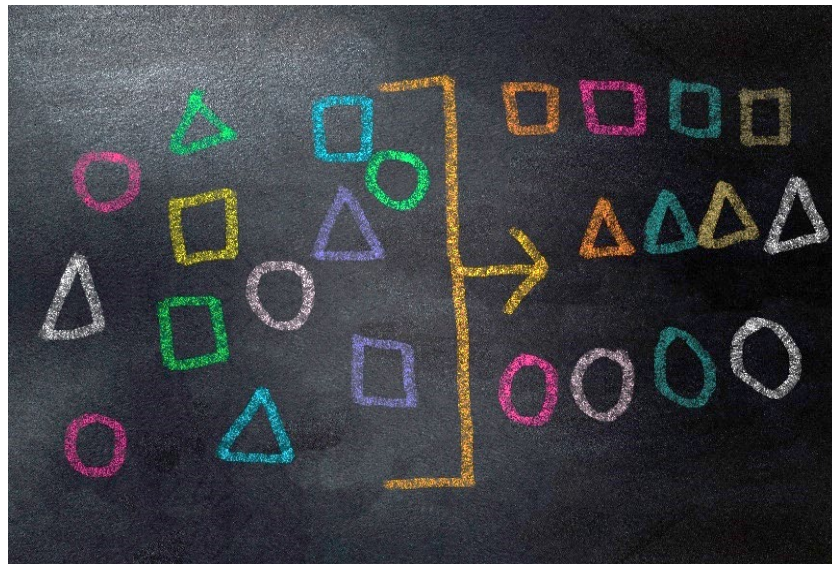


Interview and Questioning Techniques

Module 5

What is the purpose of Title IX investigation?

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



What are the general principles of an investigation?

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

How do we collect evidence in an investigation?



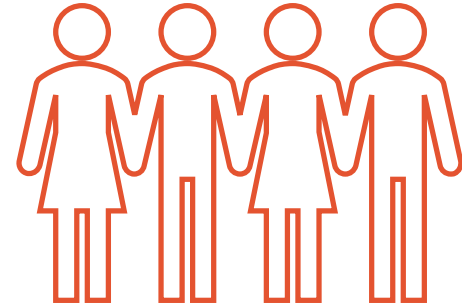
Interviews of parties
and witnesses



Collection of
non-testimonial evidence

Who do we interview in an investigation?

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



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

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

Example

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



Example

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



How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

What does it mean to build rapport and provide information?



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

How do I ask questions in the substantive phase?

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



HUSCH BLACKWELL

What are “invitation” questions?



“Can you please tell me what happened that night?”



“Can you walk me through what happened?”

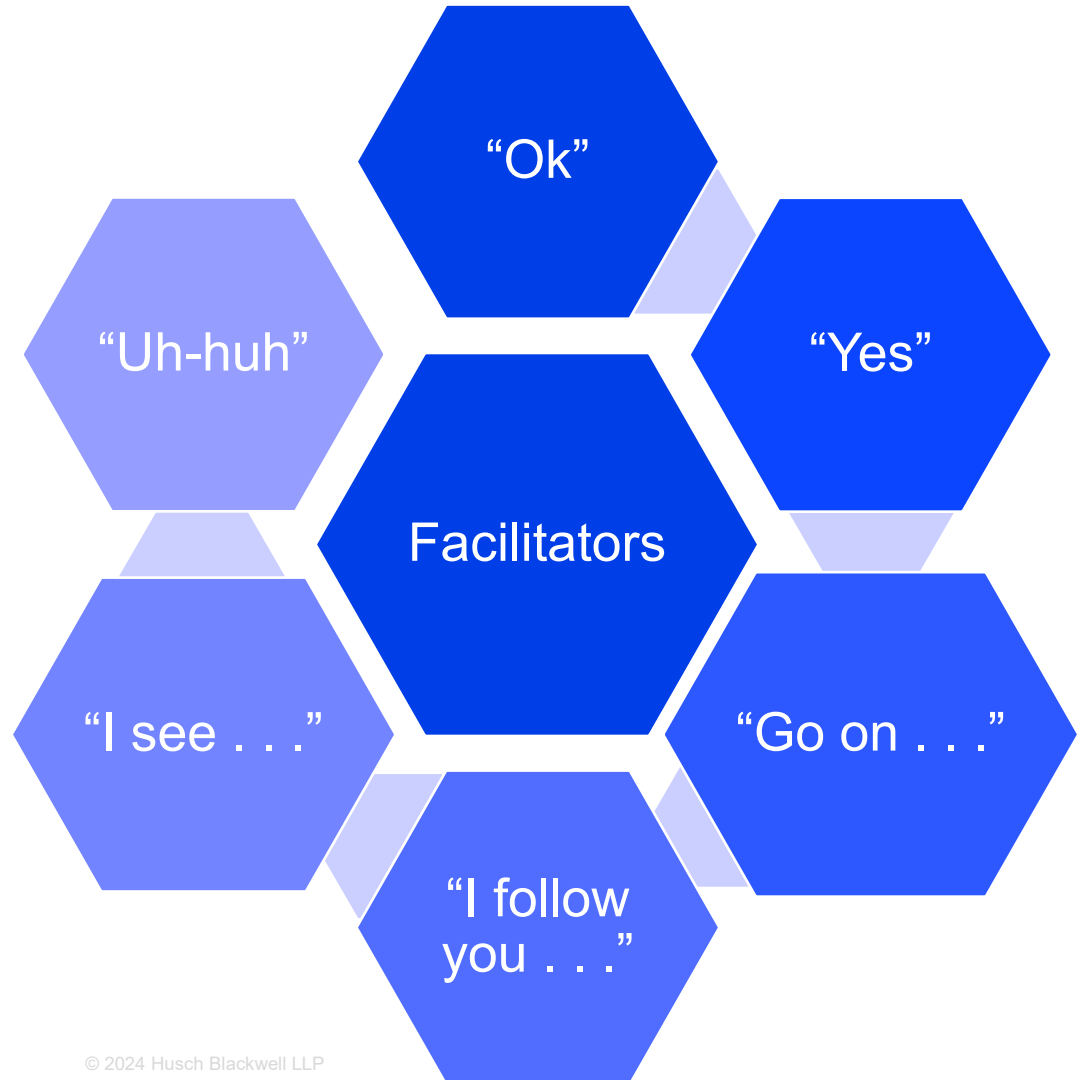


“In your own words, can you tell me what occurred?”



“Can you describe what happened to you?”

What are “facilitators”?



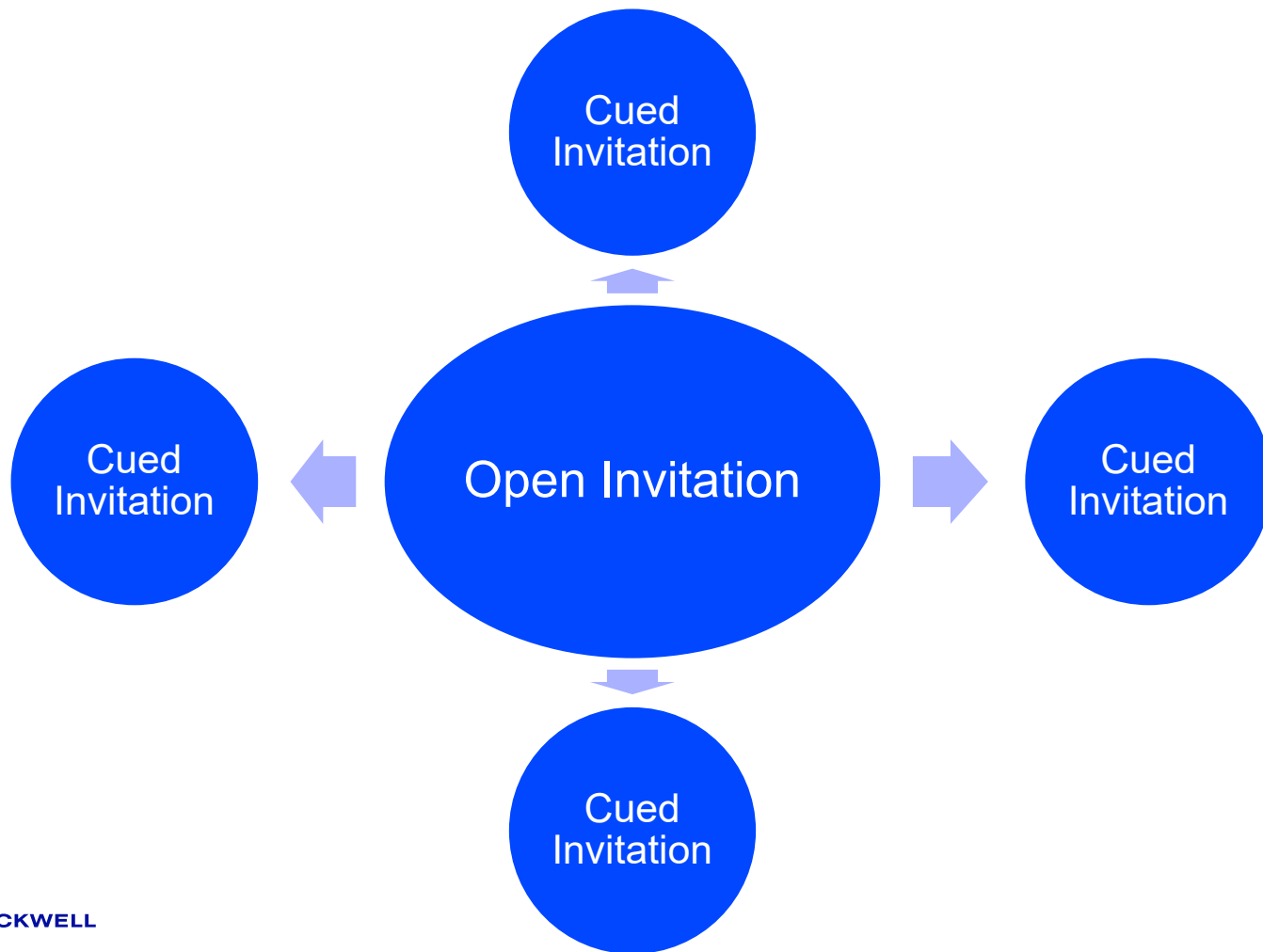
What are “cued” invitations?

“You mentioned that Can you tell me more?”

“You said that Can you elaborate?”

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

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



What are directive and option-choosing questions?



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

What about leading questions?

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

Examples

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

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

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



May an investigation collect evidence on sexual history?

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

Example

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



May an investigation collect and rely on privileged records?

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

Example (Poll to Follow)

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





##/##

Join at: **vevox.app**

ID: **132-978-110**

Question slide

The investigator's question is:

Appropriate

0%

Inappropriate

0%

Well intended but should be asked a different way

0%



##/##

Join at: **vevox.app**

ID: **132-978-110**

Results slide

The investigator's question is:

Appropriate

##.##
%

Inappropriate

##.##
%

Well intended but should be asked a different way

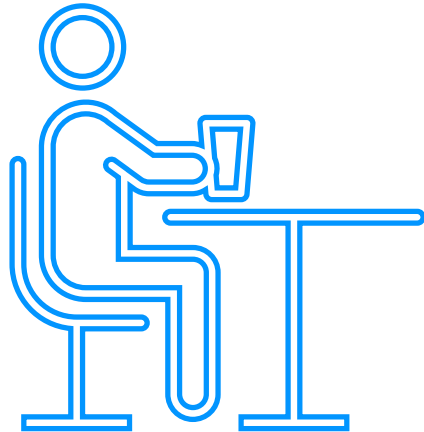
##.##
%

Example

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



Does the hearing officer ask questions at the hearing?



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

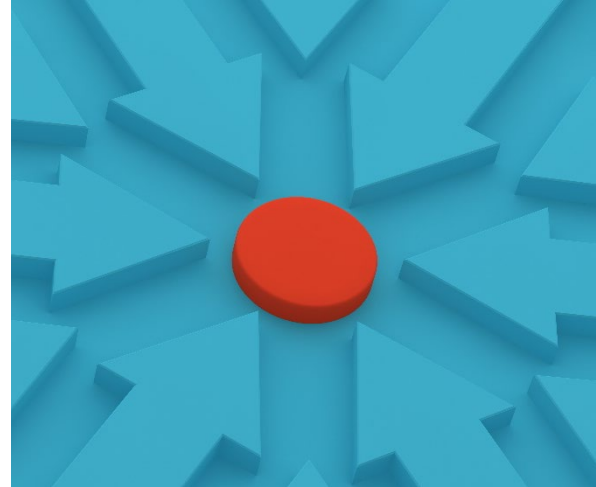
How does questioning by a hearing officer differ from questioning by an investigator?



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

What is a “material” disputed fact?

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



What are the “elements” of the misconduct?



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

Example

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

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



What are potential landmines for hearing officers?

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

Example

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

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



Example

While questioning the respondent, the hearing officer says:

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

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

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



Example

While questioning the complainant, the hearing officer says:

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

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

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



What are best practices for hearing officers?

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

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

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



Questions



Investigation Report Writing

Module 6

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

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



What is the basic structure?

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

How do we frame the case?



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

Example

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

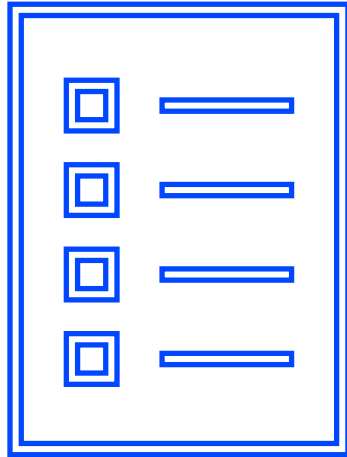


Example

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



How do we identify the potential violations?



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

Example

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

Sexual Harassment By Hostile Environment

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

Fondling

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



Practical Point

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

How do you describe the chronology?

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





##/##

Join at: **vevox.app**

ID: **132-978-110**

Question slide

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

True

0%

False

0%



##/##

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

Results slide

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

True

##.##
%

False

##.##
%

Example

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

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

1/10/2024: Interview of Mr. Doe

1/17/2024: Interview of Mr. Roe

...

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

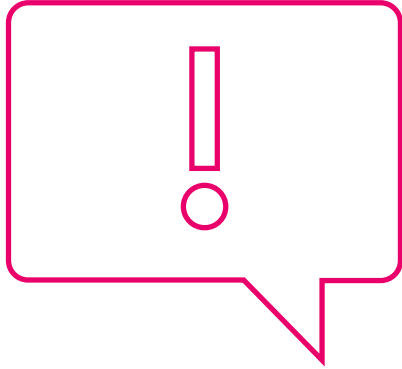
3/25/2024: Responses to evidence file received from both parties



How do we summarize the party narratives?

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

What facts are material?



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

Example

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



Example

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



How should other information be included?

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



Example

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



What are best practices for writing?



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

What are some key tips?

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

Example

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

VS.

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



Practical Point

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

Example

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

VS.

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



Example

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

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



Example

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

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



Example

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

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



Example

During the interview, Mr. Roe appeared highly credible.

vs.

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



Example

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

vs.

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



What are some other landmines to avoid?

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



Example

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



Example

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



Example

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



Example

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



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



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

Example

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



Example

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



Questions



Credibility Assessments and Live Hearing Determinations

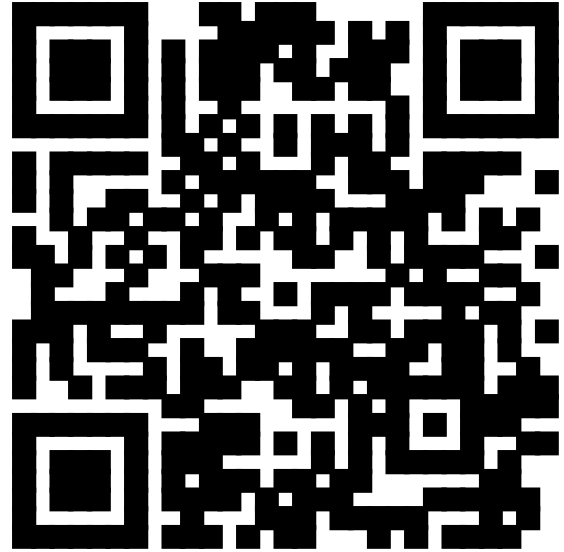
Module 7

Join the Vevox session

Go to **vevox.app**

Enter the session ID:
132-978-110

Or scan the QR code



How does a hearing officer decide a case?



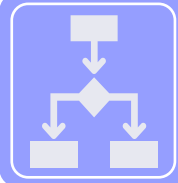
After hearing, must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



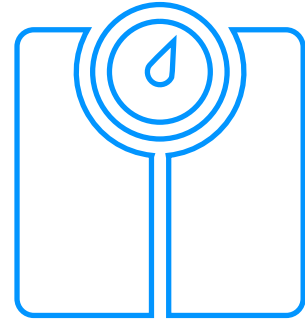
Resolve disputed issues of fact under the preponderance standard of evidence



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

What does it mean to weigh evidence?

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



Weight: Considerations

Believability/probability/plausibility

Apparently honest and sincere

Consistent

Unrefuted

Corroboration

Lacking motive/disinterested

Expertise

Level of detail

Unbiased

Direct vs. circumstantial

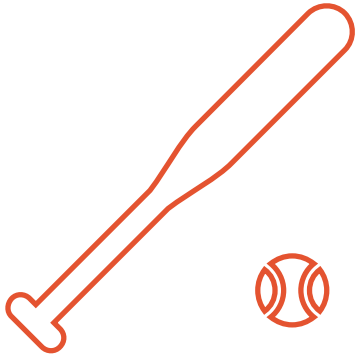
Personal observation vs. general knowledge or hearsay

Direct vs. circumstantial: Direct

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

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

Direct vs. circumstantial: Circumstantial



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



##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Question slide

I think hearsay should

Be allowed in Title IX hearings

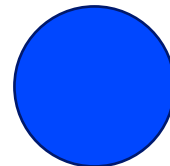
##.##

%

Not be allowed in Title IX hearings

##.##

%





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Results slide

I think hearsay should

Be allowed in Title IX hearings

##.##

%

Not be allowed in Title IX hearings

##.##

%

RESULTS SLIDE

“Hearsay”

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

Example: Weight

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



Example: Weight

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

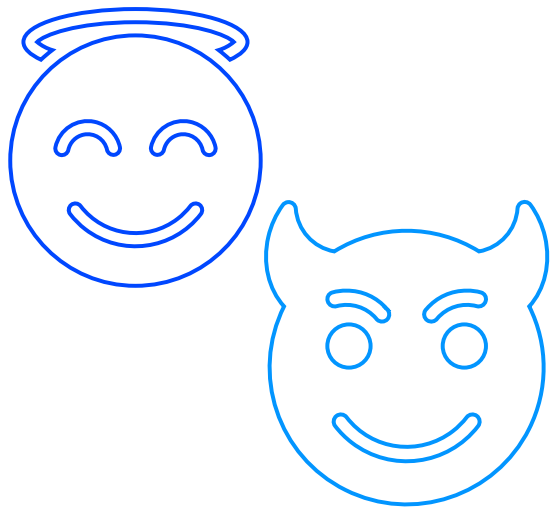


Incapacitation & weight/credibility

- Incapacitation alone \neq unreliable or lack of credibility as to facts



Assessing Credibility



Plausibility—Believable?

Corroboration—Other evidence?

Consistency

Demeanor

Motive to falsify

Contemporaneous

First-hand knowledge

Influence of others

Bias (overt/unconscious)

Behavior after the report

How do we assess “I don’t remember”?

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

Expert witnesses

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

Example: Experts

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

Vs. whether complainant was incapacitated

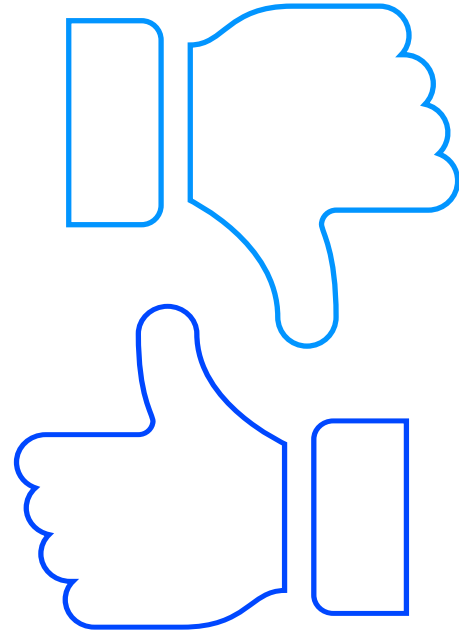
Whether respondent could have traveled from class to complainant's apartment in order to be present at the time of a stalking incident alleged by complainant

Vs. whether respondent was stalking

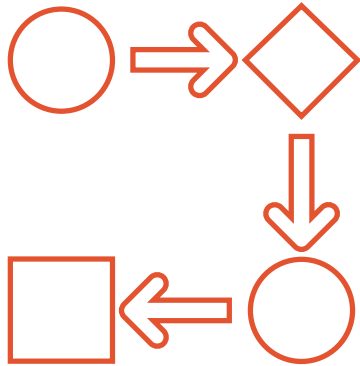


What is a determination?

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

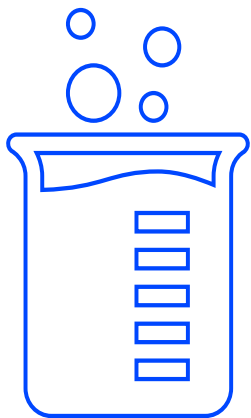


Purpose of a determination



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

Critical elements



Preliminary case information and Case History

Allegations

Applicable policies/procedures

Standard of proof

Evidence gathered/considered

Evidence/Facts: Factual findings

Decision-maker:

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

Summarizing allegations



Goal: identify and articulate what part of complainant's story, if true, is a violation of the institution's policy

Focus on who, what, where, when, how

Match with notice

Applicable policies & procedures

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

- E.g., include relevant definitions

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

History of the case



How did the institution respond to the report?

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



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



Provide status

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



Explain any apparently unreasonable delays



Facts

Facts that matter

- Consider elements of alleged policy violation
- Which facts are relevant to each element?
- Which are disputed and undisputed?

Goals

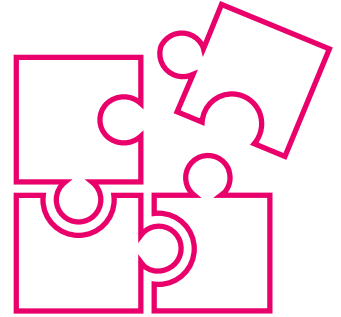
- Investigators: identifying disputed/undisputed material facts
- Decision-makers: reaching resolution of disputed material facts

How to do this?

- Show your work
- Decision-makers: Explain your credibility assessments

Analysis & Conclusion

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



Example: Be specific

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

VS.

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



Example: Be specific

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

vs.

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



Example: Be specific

“Complainant is credible.”

vs.

“At the hearing, Respondent emphasized that Complainant sent a text saying, ‘Yeah, tonight was good,’ within an hour of the alleged sexual assault. On its face, the text could be construed as inconsistent with Complainant’s report that the sexual activity that occurred the hour before the text was not consensual.

However, Complainant said that, after Respondent drove Complainant home, Complainant was in shock and sent the text in response to Respondent so Respondent would not come searching for Complainant. Complainant explained engaging in the sexual activity despite it being unwelcome by saying Complainant feared for Complainant’s safety. Complainant reported that Respondent had slapped Complainant, creating a red mark, after Complainant refused to kiss Respondent; Complainant said this occurred about 30 minutes before the sexual activity Other than the text message, Complainant’s account is consistent with Complainant’s prior statements and the witness account about overhearing the early stages of the fight over the phone. It is also plausible that one who had just experienced sexual assault would send a text to appease one’s assailant.

In contrast, Respondent’s statements have changed repeatedly since the Complaint...

As such, the Hearing Officer finds Complainant’s account more credible than Respondent’s as to what occurred after the sexual activity.”



Words matter: Language considerations

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

Common “mistakes” in report-writing

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

Questions

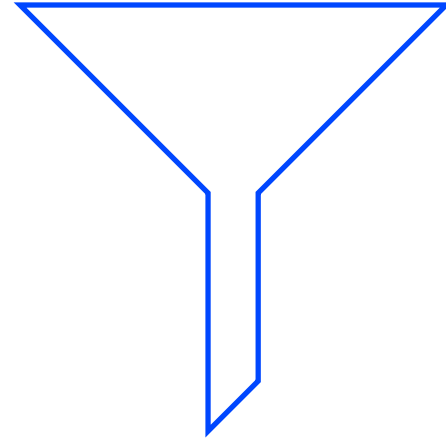


Appeals

Module 8

What is the purpose of an appeal?

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





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Question slide

The most important thing for an appeal officer is:

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

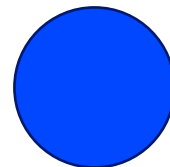
##.##

%

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

##.##

%





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Results slide

The most important thing for an appeal officer is:

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

##.##

%

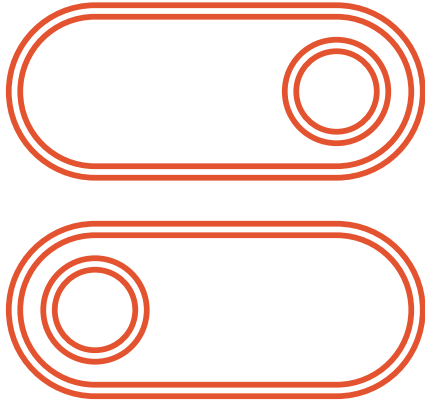
To focus only on the narrow grounds for appeal permitted by the policy

##.##

%

RESULTS SLIDE

What decisions may be appealed?



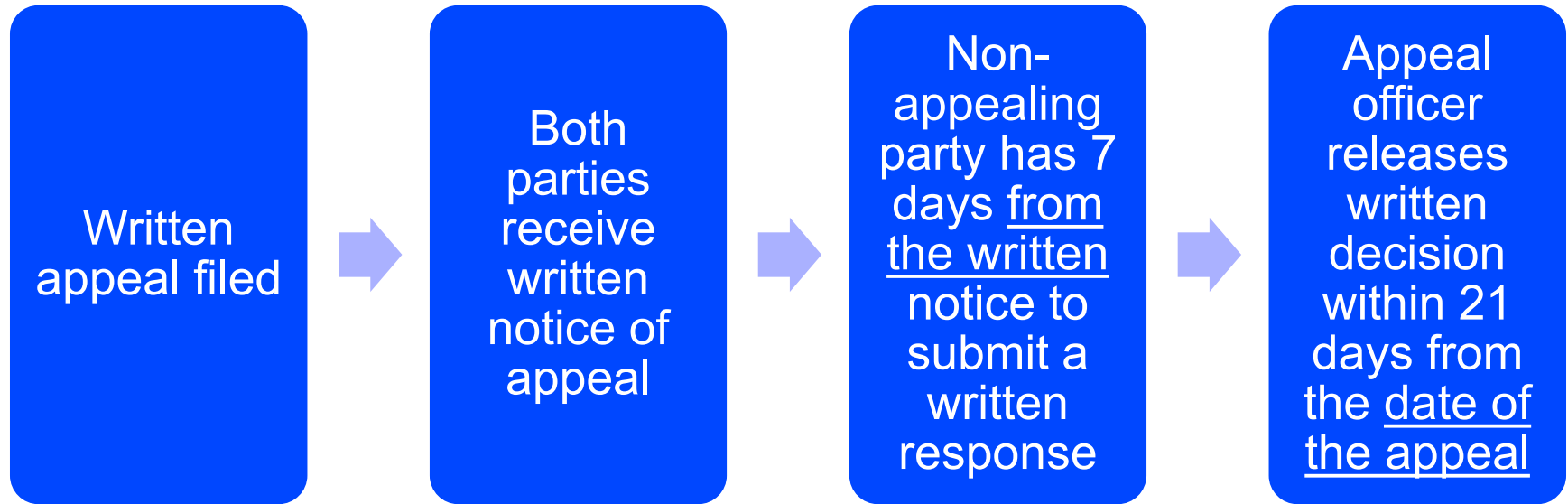
- A hearing officer's final determination regarding a respondent's responsibility
- Dismissal of a formal complaint

How is an appeal initiated?

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



What are the steps to an appeal?



What are the grounds for appeal?



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

What is a procedural irregularity?

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

Are all procedural errors appealable?

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

Example

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



Example

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



What is newly discovered evidence?

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

Example

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



Example

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



What is a conflict of interest or bias?

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

Example

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



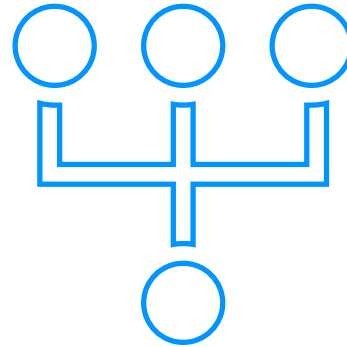
Example

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



What are potential appellate outcomes?

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



Example (Poll to Follow)

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





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Question slide

Which is the appropriate outcome?

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

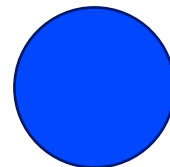
##.##

%

The appeal officer should remand for an investigation and hearing

##.##

%





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Results slide

Which is the appropriate outcome?

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

##.##

%

The appeal officer should remand for an investigation and hearing

##.##

%

RESULTS SLIDE

Example

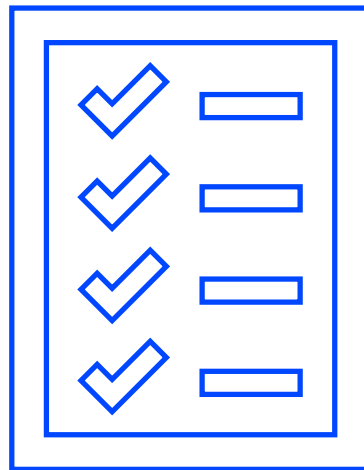
Appeal officer concludes a biased and conflicted investigator failed to identify and interview key witnesses which directly resulted in a “no violation” finding by the hearing officer due to a lack of evidence.

Appropriate outcome?



How should an appeal decision be documented?

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



Questions



Sexual Assaults, Consent, and Incapacitation

Module 9

What is sexual assault?

Rape

Statutory
Rape

Fondling

Incest

Does the Title IX regulation define consent?

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



New Title IX Regulation

How does the model policy define consent?

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

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

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

How should we think about consent?

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

Example

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



Example

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



How does the model policy define incapacity?

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

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

From whose perspective is incapacity assessed?

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





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Question slide

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

True

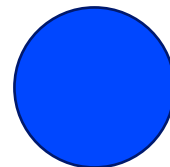
##.##
%

False

##.##
%

It depends

##.##
%





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Results slide

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

True

##.##
%

False

##.##
%

It depends

##.##
%

RESULTS SLIDE

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

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

Example

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



Example

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



Group Scenario

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

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

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

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



Group Scenario Discussion Questions



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



Questions



Interpersonal Violence and Stalking

Module 10

What is dating violence?

“Dating Violence” is violence committed by a person:

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



Example: Dating violence

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



Example: Dating violence

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



What is domestic violence? (general definition)

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

Example

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





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Question slide

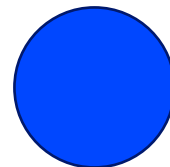
Does the faculty member who observed the incident have a mandatory child abuse reporting obligation under state law?

Yes

##.##
%

No

##.##
%





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Results slide

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

Yes

##.##

%

No

##.##

%

RESULTS SLIDE

Example

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



Question for Discussion

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



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

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

Example

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





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Question slide

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

Yes

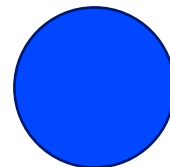
##.##

%

No

##.##

%





##/##

Join at: **vevox.app**

ID: **XXX-XXX-XXX**

Results slide

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

Yes

##.##

%

No

##.##

%

RESULTS SLIDE

Example

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



Example

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



Question for Discussion

What should the University do with Rita?



Example

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



What is stalking?

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for their safety or the safety of others, or
 - Suffer substantial emotional distress



What are common stalking scenarios?

- Bad-breakups
- Infatuations
- Retaliations



Example

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



Question for Discussion

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



Example

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



Question for Discussion

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

Can the same actions constitute both forms of misconduct?



Example

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



What are common issues in stalking cases?

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

Questions



First Amendment Scenarios

Module 11

The First Amendment

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



What is speech?

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



Hierarchy of Speech



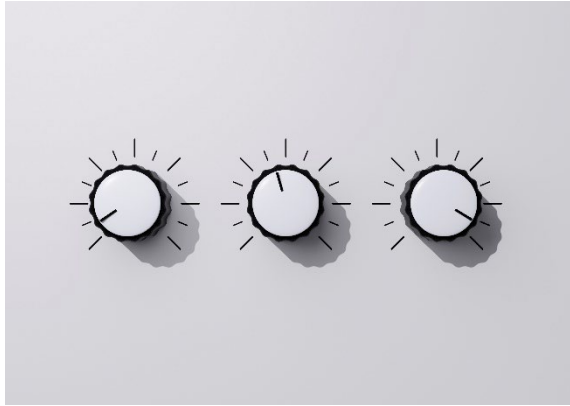
- The most protected forms of speech include:
 - Political speech
 - Religious speech
 - Speech on matters of public concern
- Speech on personal issues and petty grievances least protected

Viewpoint discrimination

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



Non-Expressive Qualities



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

Unprotected Speech



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

Example: Defamation

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



Example: Not-Defamation

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



Example: Fighting Words

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



Example: True Threats

Respondent gets into an argument with a witness in a Title IX case who supports complainant's account of sexual assault.

Respondent says: "If you show up and say that at the hearing, I'm going to kill you. I have a .45 in my car, I know how to use it, and I'll shoot you dead as soon as the hearing is over."



Hate Speech

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



Bedrock Principle

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

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

Example: No Hate Speech Exception

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



Example: No Hate Speech Exception

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



Title IX Codification of Constitutional Supremacy

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

- (1) Restrict any rights that would otherwise be protected from government action by the First Amendment to the U.S. Constitution;
- (2) Deprive any person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or
- (3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

34 C.F.R. § 106.6(d)

Expression of “offensive” speech

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

2003 Revised Sexual Harassment Guidance at 22 (emphasis added)

Constitutional Jurisdictional Limits

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



Example: Constitutional Limits

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



What is hostile environment?

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



Potentially Harassing Speech



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

Example: Hostile Environment

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



Example: Likely Protected Speech

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



Example: Hostile Environment

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



Example: Likely Protected Speech

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



Example: Hostile Environment

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



Example: Protected Speech

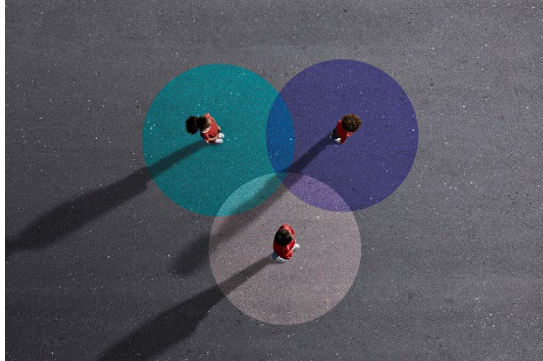
Zeke works part time at an exotic dance club that is frequented by students. A student who saw Zeke dance nude at the club ends up having a class with Zeke and is uncomfortable in Zeke's presence and decides to drop the class because he cannot concentrate.



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

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

Academic Freedom Protections



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

Sources of Academic Freedom



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

Example: Freedom in Research

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



Example: Freedom in Course Design and Content

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



Example: Freedom in Pedagogy and Instruction

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



Group Scenario

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



Group Scenario Discussion Questions



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



Questions



The logo consists of a white stylized cross symbol, which is a vertical line intersected by a horizontal line, with the ends of the lines slightly rounded.

HUSCH BLACKWELL

Sexual Misconduct Hearing Officer Training

Sean Flammer, Associate General Counsel
Krista Anderson, Systemwide Title IX Coordinator

Fall 2024



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

1

1

Agenda

1. Background & Context
2. Distinction between Sexual Harassment Cases & Non-Sexual Harassment Cases
3. Hearing Officer Role
4. Pre-Hearing
5. At the Hearing
6. Special Issues
7. After the Hearing



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

2

2

Background and Context



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

3

3

Purpose of Hearing

- It may be required by law
- Due Process
 - Notice
 - Opportunity to be heard
- Whether the RP committed a university policy violation.
- Determined by Impartial Hearing Officer



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4

Distinctions...

Sexual Harassment

Employee
Quid Pro Quo

Severe
Pervasive
Obj. Offensive

Sexual Assault
Dating Violence
Domestic Violence
Stalking

VS.

Non-Sexual Harassment
Other Inappropriate Sexual Conduct



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

5

5

Definition of “Sexual Harassment”

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (Quid Pro Quo);
2. 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 institution's education program or activity; or
3. “**Sexual assault**,” “**dating violence**,” “**domestic violence**,” or “**stalking**” as defined under Clery/VAWA.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct (2021)

6

6

“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

7

7

What is not “Sexual Harassment” but may be an issue at a hearing?



Example: Other Inappropriate Sexual Conduct



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

8

8

Important Distinction for Sexual Harassment Cases



If the conduct alleged is “**sexual harassment**,” then the advisors will **ask questions** at the hearing.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

9

9

Hearing Officer Role

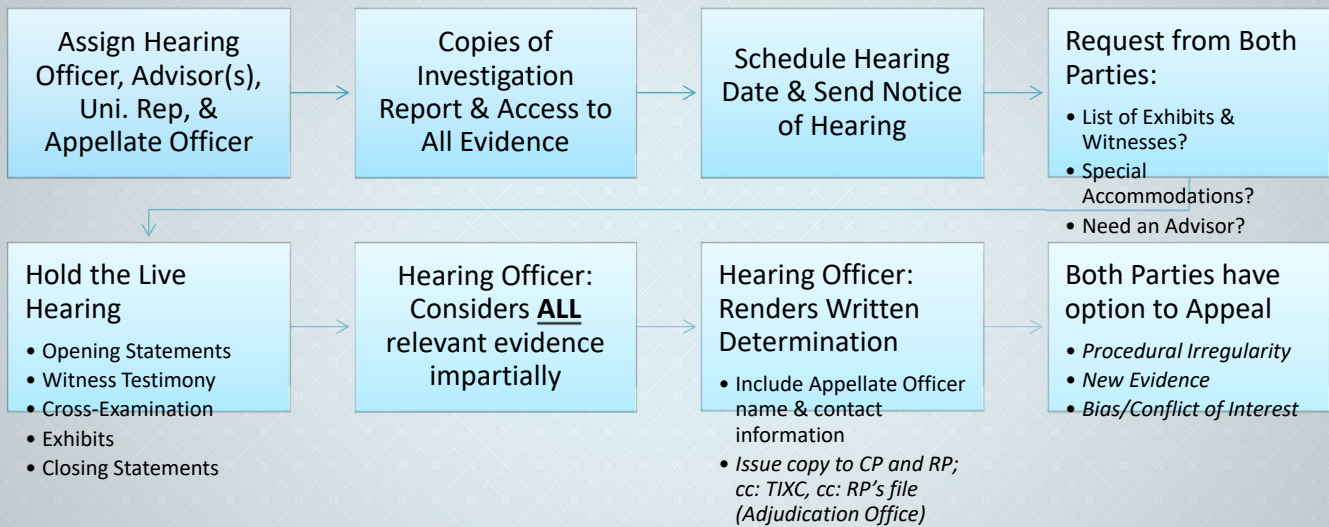


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

10

10

Live Hearing: Logistics Flowchart



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Specific deadlines may be published in the institution's policy and/or procedures.

11

11

Hearing Officer's Responsibilities

1. Preside over the **hearing**.
2. Listen to the evidence presented at the hearing, (read documentary evidence) to determine if by the **preponderance of the relevant evidence** the Respondent violated institutional policy.
3. Impose remedies & sanctions (if applicable).



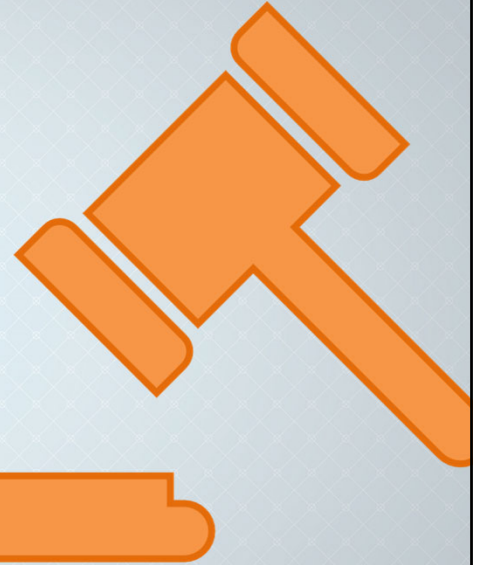
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

12

12

Hearing Officer's Role

You are the Decision-Maker!



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS, UNLIMITED POSSIBILITIES.

13

13

Pre-Hearing

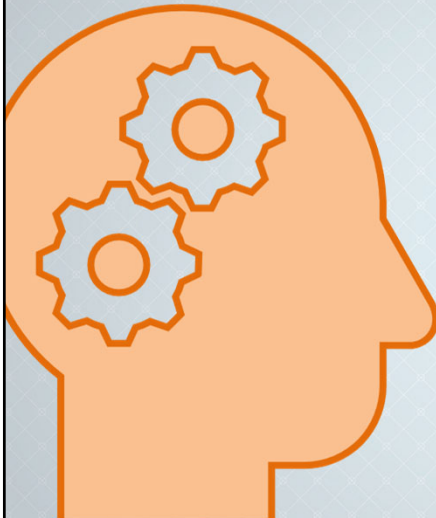


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS, UNLIMITED POSSIBILITIES.

14

14

Before the Hearing:

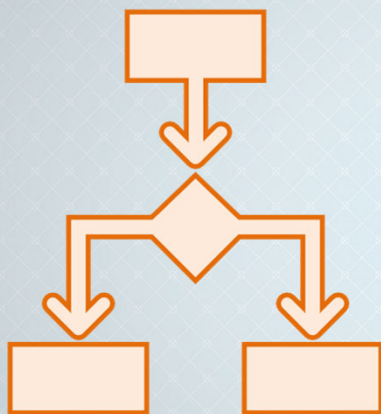


Mindset:

- **Fairness** and **appearance of fair.**
- Parties to **be heard** and **feel heard.**

Remember: This is likely a **major life event** for both the Complainant & Respondent.

Before the Hearing: Notice of the Hearing



- Must give notice of the **hearing at least 10 days** before hearing date.
- Must include the following:
 - Date, time, and place
 - Name of the Hearing Officer
 - List of participants
 - Purpose of the hearing
 - Statement of charges
 - Summary statement of the evidence

Exchange of Witness Lists & Documents



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

[This Photo](#) by Unknown Author is licensed under [CC BY-SA](#)

17

17

Before the Hearing:



- Review materials.
- Review your institution's policy.
- Review & be familiar with the allegations, & what constitutes a policy violation.
- If you have evidence, review it!



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

18

18

Look at the Provision(s) at Issue:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

19

19

Look at the Provision(s) at Issue:

Engaging in a (1) course of conduct (2) directed at a specific person that would (3) cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

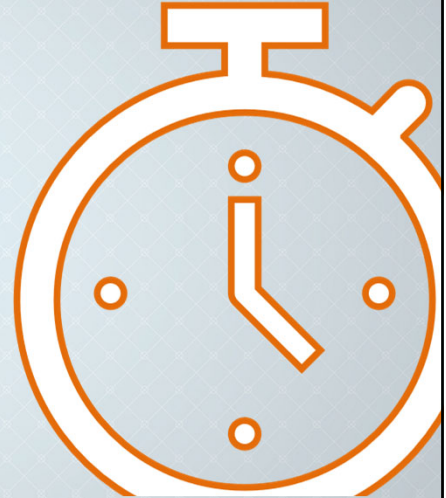
- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

20

20

Before the Hearing: Request to Postpone?

- Always review the policy first! The policy will have most of the answers.
- Common reasons for postponing:
 - An advisor is unavailable at the scheduled hearing time
 - A party acquired a new advisor.
 - Health issues.

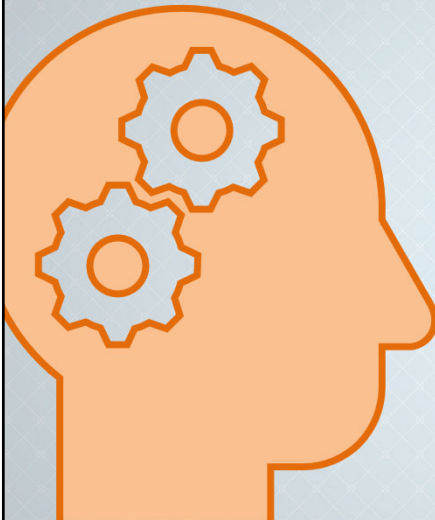


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

21

21

Fairness:



Goal: Fairness and perception of fairness



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

22

22

Communications:



No Ex Parte Communications

- CC all parties (& advisors), including Uni. Representative, on all communications (even if emailed by one party)
- Admonish any communications from the parties (& advisors) regarding facts of the case



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

23

23

Challenge of Hearing Officer's Impartiality

- The Hearing Officer is the **sole judge** of whether he/she/they is capable of considering the evidence and determining the facts with fairness, impartiality, and objectivity.
- Challenge must be by **written request**.
- May be self-initiated.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

24

24



25

Overview of Hearing

The diagram shows a red outline of a person sitting at a desk. An orange line starts from a small orange square at the top left, goes down, then right, then down again, ending in an arrow pointing to an orange circle. This circle is connected by a red line to the person's head, indicating a flow of information or a sequence of steps.

- Opening remarks by Hearing Officer
- Opening Statements
- Questioning of Witnesses
- Closing Statements

In the bottom left corner, there is a small circular seal of The University of Texas System, followed by the text "THE UNIVERSITY of TEXAS SYSTEM" and "THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES." in small blue letters. The number "26" is in the bottom right corner.

26

Presentation of Witnesses & Exhibits



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

27 27

27

Remember:
This is **NOT** a legal proceeding.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

28

28

Presentation of Witnesses and Exhibits

Formal rules of evidence do **not** apply.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

29 29

29

Procedure for Asking Questions

The **advisors** may ask questions under the following procedure:

1. The **advisor** will ask a question of the applicable participant.
2. **Before** the participant answers a question, the **hearing officer** will rule as to whether the advisor's question is **relevant** to the alleged conduct charges.
 - If the hearing officer rules the advisor's question as not relevant, then the hearing officer must **explain any decision** to exclude a question as not relevant.
 - If the hearing officer allows the question as relevant, the **participant** will answer the question.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

30

30

Tips at the Hearing: Questioning Witnesses

- Ask open-ended questions.
- Seek clarity with ***“Tell me more about that...”*** or ***“Help me understand...”***
 - Attempt to clarify inconsistencies from ***all*** parties.
- ***“What was your thought process for ...[insert the clarifying part]?”***
 - ***...During the experience?”***
 - ***...Before the experience?”***
 - ***...After the experience?”***
- ***“What, if anything, do you remember once you...[insert part]...?”***
- ***What did you mean by [blank]?”***
- ***“There are **differences** in your account vs. [blank]...[insert specifics] ...help me understand the reason(s) or rationale for this different account...”***



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

31

31

Tips for the Hearing Officer:

- **Respectful demeanor:**
 - Tone, Volume, Facial Expressions
- **Impartial:** Treat both parties equally
 - Ex: Give same time allotments for opening & closing statements.

Remember the goal:
Fairness and perception of fairness



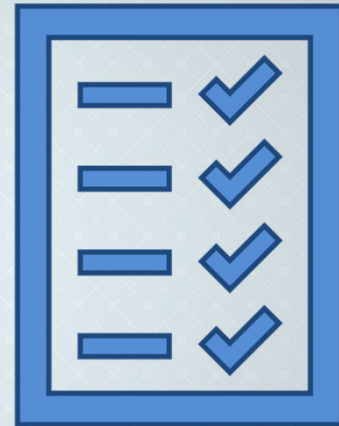
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

32

32

Reminder: OGC Advisor

- Get a **(free)** advisor from UT System's Office of General Counsel
- Feel free to **take breaks** during the hearing to talk with your OGC advisor as needed.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

33

33



Special Issues
at the Hearing



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

34

34

Burden of Proof on the Institution

Preponderance of the Evidence Standard

Note: The Respondent is presumed **not responsible**.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

35

35

Relevant Evidence

Evidence is **relevant** if:

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

36

36

Relevance: Prior Sexual History



A Complainant's sexual predisposition or prior sexual behavior are **not relevant** except where questions and evidence about a Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the alleged conduct charged by the Complainant or if the questions or evidence concern specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove the Complainant's consent of the alleged conduct.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

37

37

Logistics

"At the request of either party, the [institution] 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 & hear** the party or the witness answering questions."



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

38

38

Exclusion of Privileged Information unless Waived



No person will be required to disclose information protected under a legally recognized privilege. The hearing officer must not allow into evidence or rely upon any questions or evidence that may require or seek disclosure of such information, unless the person holding the privilege has waived the privilege. This includes information protected by the attorney-client privilege.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

39

39

Consent Definition

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

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

40

40

Incapacitation Definition

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

41

41

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

If the answer to either of these questions is “YES,” consent was absent and the conduct is likely a violation of this Policy.

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

42

42

- Memory gaps for events that occurred while a person is intoxicated.
- The alcohol consumption for the person is sufficient to block the process of developing memories.
- The amount of alcohol that can trigger “blackouts” can vary from person to person.
- Examples:
 - **Fragmented blackouts:** Spotty memories, missing periods of time in between memories that can be recalled)
 - **Complete amnesia:** Can span hours at a time, where memories didn’t form and typically cannot be recovered later)



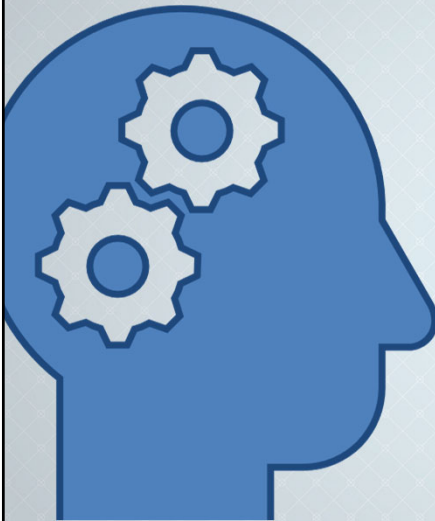
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Alcohol-Induced Blackouts

Source:
NIH’s National Institute on
Alcohol Abuse and Alcoholism

43

Implicit Bias:



- Your **role** as a hearing officer is:
 - **Neutral, impartial, & fair**
- Fairness & the **appearance of fair.**

Goal: To **listen** to both parties equally and that they both leave **feeling heard** by the hearing officer.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

44

44

Implicit Bias (Cont.)

[T]he Department [of Education] ..cautions that a training approach that encourages Title IX personnel to **“believe”** one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate § 106.45(b)(1)(ii) precluding credibility determinations based on a party’s status as a complainant or respondent.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

45

45

Implicit Bias (Cont.)

The Department takes no position on whether “start by believing” should be an approach adopted by non-Title IX personnel affiliated with a recipient, such as counselors who provide services to complainants or respondents. The Department wishes to emphasize that parties should be treated with equal dignity and respect by Title IX personnel, but doing so does not mean that either party is automatically “believed.” The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of “profiles” or “predictive behaviors” to particular cases. (*Title IX Preamble*, p. 836)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

46

46

Tips to Avoid Bias

- Test to address any potential implicit bias.
 - What is the **essence** of potential policy violation?
 - Create **hypothetical** that includes those elements. Then flip or change the genders.
 - You must have **fair & consistent considerations**, regardless of gender.
- When making your decision: List out the evidence favorable to both sides to ensure **evidentiary support** (as opposed to bias).



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Preamble (2020)

47

47

Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias** for CP & RP



Nobody gets a “head start.”



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

48

48



Controlling the Hearing



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

49

49

Controlling the Hearing

- Establish & exercise **authority** early & consistently.
- Be familiar with **policies** & the **allegations**.
- Describe **unacceptable** behavior and **warn** accordingly. Warnings usually correct inappropriate behavior.
- A note about **harassing** or **abusive** questions.
- Establish **time limits** for presenting case.
- **Take breaks.**
- **Stop** the hearing.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

50 50

50

After the Hearing



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

[This Photo](#) by Unknown Author is licensed under [CC BY](#)

51

51

Making A Decision...

- Based solely on the **hearing record**: No *ex parte* discussions or investigations.
- Determine whether a **policy violation** occurred:

Did the RP engage in conduct that violated university policy?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

52

52

In Making Your Decision:

- **You** are the decision maker.
- Review the hearing transcript.
- Review the institution's policy.
- Assess witness credibility:
 - Ex: Demeanor, personal knowledge, bias
- Strength of relevant evidence:
 - Credibility of the relevant evidence
 - Weight of each exhibit
 - Persuasiveness of the evidence



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

53

53

Burden of Proof on the Institution

Preponderance of the Evidence Standard:

Whether the greater weight of the credible evidence establishes that the Respondent engaged in the alleged policy violation.



Note: The Respondent is presumed **not responsible**.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

54

54

Weighing Evidence

Does some evidence weigh more than other evidence? (Is it more persuasive?)

- Plausible—does it make sense?
- Detailed v. vague recollection (but beware of trauma)
- Direct or circumstantial
- Personal observation/knowledge v. hearsay (what somebody told witness)
- Corroboration? Are there objective facts that can corroborate any testimony? (Texts; Phone log; video evidence; emails, etc.)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

55

55

Burden of Proof: The greater weight

Example:

Complainant's testimony was that consent was lacking because Complainant said, "I don't want sex." But Respondent testifies that Complainant said, "Let's have sex."



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

56

56

Credibility Assessment?

- Are there inconsistencies? Is it corroborated?
- Is an explanation plausible?
- What did the witness do? What did they *not* do?
- Are there motives for the witness to be less than truthful?
- Are there motives for the witness to frame the event in a way more favorable to themselves? Are they lying to themselves?
- Is there an opportunity for a good faith mistake?
- What about demeanor? (How much to weigh/cultural stereotypes?)



57

57

Neurological Effect of Trauma

- A. Traumatic events can affect a person's brain chemistry and functioning, which can impact memory recall, information processing, and communication
- B. Possible effects on memory recall:
 - Flashbacks
 - Delayed recollection
 - Difficulty concentrating
 - Non-linear recollection
 - Self-blame

58

58

Potential Pitfalls

- You must let the **evidence** lead you to the **conclusion**, rather than making the evidence “fit” your pre-formed conclusion.
- Focus on the **relevant evidence**.
 - Hint: It's **not** all relevant.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

59

59

The Decision Letter

The hearing officer issues
a written determination.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

60

60

A Good Decision Letter:

- Demonstrates the care and attention given to the **factual findings** and **weighing of the evidence**.
- Shows that the institution reached a **reasoned, good faith conclusion**.
 - It's not enough to reach a conclusion. You must be able to **"show your work."**
- Serves as a **framework** for all future proceedings.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

61

61

Revision Stage: Focus on Clarity

- Focus on ***relevant facts*** in your factual findings. If it is part of the reasoning, say it. Don't omit it.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

62

62

Revision Stage: Focus on Clarity

- Look at your draft with a **critical eye**.
- Pretend the person who will be most *unhappy* with your decision is in the room with you reading the draft with you. With each sentence or paragraph, consider:
“What would that person say?”
- Then revise.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

63

63

Revision Stage: Reminder

Deal with facts **contrary** to your decision:

- If you don't, it looks like you didn't consider or hear the argument, that you weren't paying attention, or that the process is unfair.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

64

64

Analysis: Stalking Example (*Finding*)

As explained above, for conduct to constitute “stalking” under HOP 123, there must be a (1) a course of conduct, (2) directed at a specific person, and (3) the conduct must cause a reasonable person to fear for his or her safety or the safety of other or suffer substantial emotional distress. Here, because RP followed CP on more than five occasions, RP engaged in a course of conduct directed at a specific person. With respect to the third element, each time the RP followed CP, RP drove erratically behind CP, frequently tailgating by only leaving a few feet between their vehicles and flashing RP’s headlights. On two occasions, RP displayed RP’s handgun and on three occasions RP shook RP’s fists. I find that based on this conduct, a reasonable person would fear for his or her safety or the conduct would cause substantial emotion distress. I find, therefore, by the preponderance of the evidence that RP violated HOP 123’s prohibition on stalking.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

65

65

Analysis: Stalking Example (*No Finding*)

As explained above, for conduct to constitute “stalking” under HOP 123, there must be a (1) a course of conduct, (2) directed at a specific person, and (3) the conduct must cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. Here, because RP walked behind CP from the classroom to the bus stop outside the humanities building two times, RP engaged in a course of conduct.

With respect to the second element, there is no evidence that RP “directed” RP’s conduct towards CP. Instead, the evidence is that RP and CP take the same class and ride the same bus home. After class, both CP and RP would walk towards the bus stop and then board the bus. But there is no evidence that RP’s boarding the bus was “directed” towards CP. Further, with respect to the third element, RP did not threaten CP or do anything that would make “a reasonable person fear for his or her safety or the safety of others or cause substantial emotional distress.” In particular, RP was the first person to get off the bus because RP’s apartment complex is the first stop. This fact is consistent with RP’s explanation that RP was just going home and was not following CP. I cannot find, therefore, by the preponderance of the evidence that RP violated HOP 123’s prohibition on stalking.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

66

66




Hearing FAQ's



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.


67

67



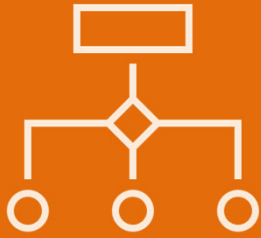
Question 1

What are some examples of types of evidence that a party might consider relevant at the hearing that may draw an objection?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

68



Question 2

The policy states that advisors do not lodge objections or otherwise participate in the hearing except for asking questions.

In the beginning of the hearing, the respondent's advisor asks, "Can I say something?"

Not knowing what the advisor wants to say, you allow the advisor to speak. The advisor objects to the evidence in the investigation report on several grounds and objects to the hearing happening at all because of "procedural irregularities," which the advisor outlines. When the respondent's advisor finishes speaking, the complainant's advisor asks to respond. What do you do?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

69



Question 3

Before the hearing, the parties were told that within 5 days of the hearing, they needed to disclose the names of any witnesses they intended to call and also to identify any exhibits in addition to those attached to the investigation report that they intended to rely on.

At the hearing, the Complainant discloses that the CP has recently obtained documents that the CP would like to be considered at the hearing.

What do you do?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

70



Question 4

A witness is testifying. The questioner asks a question, and you are not sure whether it is relevant or not. What do you do? Do you rule that it is relevant or exclude it?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

71



Question 5

You are presiding at a hearing that started at 9am. It's 11am. You notice that there are still 10 witnesses that the parties plan to call. You wonder if all these witnesses will just be redundant or whether any can bring anything new to your understanding of the incident. What do you do?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

72



Question 6

How do you determine sanctions?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

73

Q & A



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

74

74

Written Determination Required Components

- The **allegation(s)** that potentially constitutes prohibited conduct;
- A description of all of the **procedural steps** of the Grievance Process:
 - From receipt of a Formal Complaint to the determination regarding responsibility of the Respondent, including any notifications of the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
- The **findings of fact** supporting the hearing officer's determination;



Source:

UT System Model Policy for Sexual Misconduct (2021)

75

75

Written Determination Required Components (Cont.)

- The **conclusion(s)** and a **rationale** as to whether the Respondent is responsible for each allegation;
- The disciplinary **sanctions**, if applicable;
- The **remedies**, if applicable, designed to restore the Complainant's access to the education program or activity; and
- The institution's procedures and permissible bases for the parties to **appeal**, if applicable.

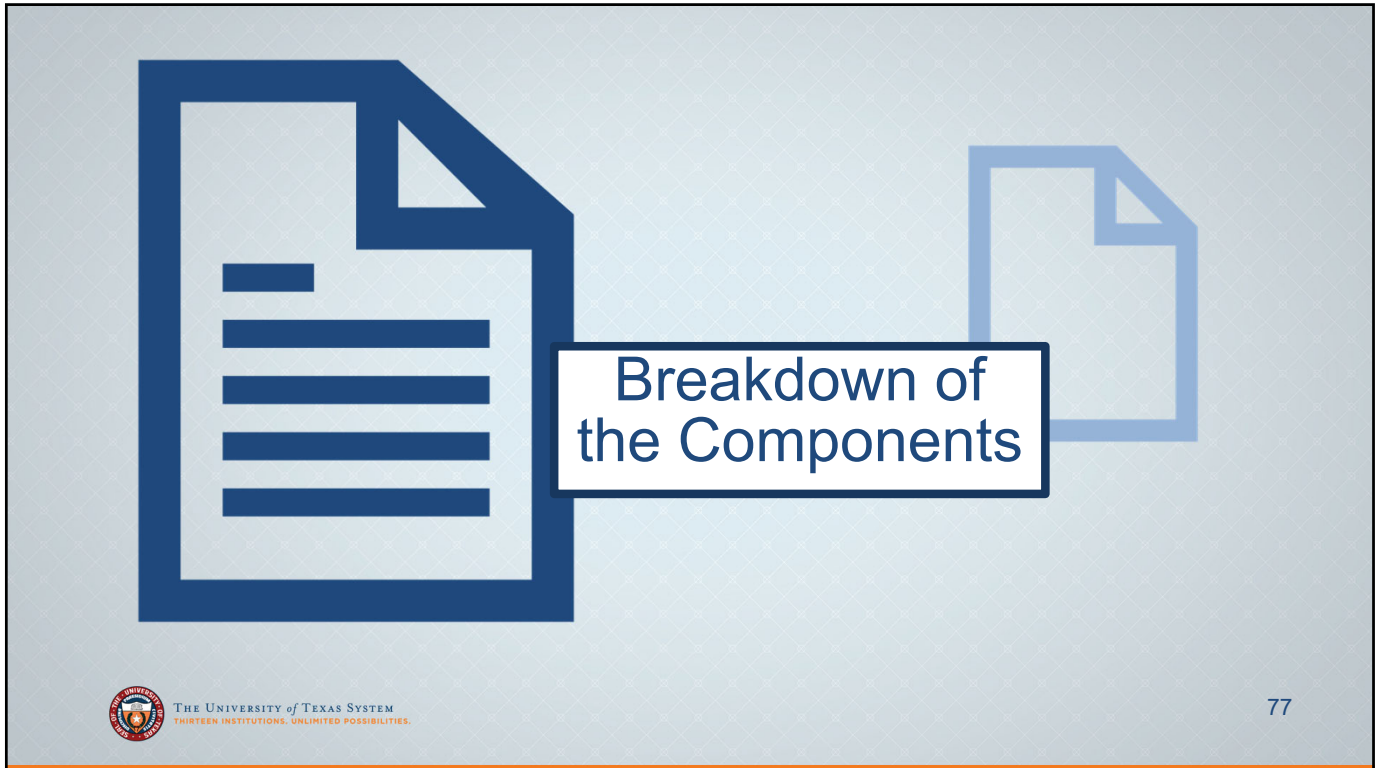


Source:

UT System Model Policy for Sexual Misconduct (2021)

76

76



77

1. Allegation(s) & Applicable Policies & Procedures

- List the **allegation(s)** and the applicable policies & procedures. You can attach documents as exhibits.
- “A description of the **procedural steps** taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held” (Title IX Regulations, 2020)

78

2. Evidence Considered

- Remember the **seriousness** of these matters & the consequences that may come from them.
- You must be able to show that you were **fair, impartial,** and **thorough** in your examinations.
- Include a **summary** of what you heard, saw & reviewed.
- **Don't** fill the letter with irrelevant facts. But when in doubt, **include it.**

3. Evidentiary Standard



- **Preponderance Standard:**
Greater weight of the credible evidence:
 - “More likely than not”
 - 50% “plus a feather”
 - Think of the scales of justice: You need to get beyond the 50-yard-line
 - “Some evidence” doesn’t do it. One side of the scale needs to be heavier.
 - No head starts.

4. Undisputed Facts

- What material and relevant facts are **undisputed**?
 - **How** do we know these facts? Who told us? How were the facts gathered (texts, emails, social media, etc.)?
 - **Why** are we including these facts? What **point** (regarding the allegation(s)) do they help us **resolve**?
 - Are they really **UNDISPUTED**?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

81

81

4. Undisputed Facts

- Use witness **quotes** as much as possible. Don't take statements out of the vernacular.
- Easiest way to make an undisputed fact disputed is to mischaracterize it by trying to summarize.

Examples:

- 👍 **Quote:** Witness 3 stated that the parties “were friends but had been casually hooking up for a few weeks.”
- 👎 **Summary:** The parties were previously in a complicated “friend” relationship.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

82

82

5. Factual Findings: Resolution of Disputed Facts



- Go point by point on the disputed facts:
 - What do you think happened and why?
 - On what **evidence** do you base your conclusion?
 - You **MUST** make **credibility** determinations of witnesses. Basis for someone being more credible than someone else?
 - a. Corroborating evidence?
 - b. Inconsistencies?
 - c. Motives?
 - d. Other factors?
- If you have critical corroborating evidence: **Cite the evidence** in your findings.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

83

83

6. Fact Analysis & Conclusions

- Take factual findings & analyze using the applicable policy. Looking for violations of **policy**.
- Address all allegation(s), one by one.
- Explain your reasoning: **How** did you get to each of your conclusions?
- Use the terms “**responsible**” or “**not responsible**”.

Do **not** use the words “innocent,” “guilty,” or “not guilty.”



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

84

84

7. Sanctions & Remedies



- It is important to take an action sufficient to abate the behavior & improve the learning environment.
- Act consistently with other actions taken by the institution for **similar conduct**.
- Consider the wants or concerns of the Complainant, but that's not determinative.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

85

85

7. Assessing Sanctions (Cont.)

- The institution looks, in part, to past punishment for similar conduct & violations when recommending sanctions
- Consider mitigating circumstances:
 - Accepting responsibility
 - Remorse



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

86

86

7. Thinking Outside the Box with Sanctions

- **Educational**, not criminal process
- Common disciplinary sanctions:
 - Probation
 - Suspension
 - Expulsion
- “Other sanctions as deemed appropriate”
 - Counseling
 - Anger management
 - Training
 - Reflective papers & projects



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

87

87

Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Associate General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

88

88

Investigation Report Writing & Hearing Officer Written Determinations: Best Practices

Sean Flammer, Associate General Counsel

Fall 2024



1

1

Agenda

1. Background
2. Organization
3. Analysis of a Policy Violation
4. Specific Issues

2

2

Background

What types of Investigation Reports?

- Employment Discrimination and Retaliation
- Research Misconduct
- Title IX/Sexual Misconduct (special considerations may apply)
- Student Conduct

3

3

What about Hearing Officer Written Determinations?

Yes!

- Outline and structure are different because the sexual misconduct policy outlines the various parts. No need to repeat that here. This presentation will focus on the structure/organization of an investigation report. But:
- Analysis techniques and best practices are the same.

4

4

Reminders

- Reasonable minds can **disagree** on an approach.
- There is **no** “*right*” or “*wrong*” way to write a report or determination letter.
- The purpose of writing is to **communicate**.
- **Flexibility** is key: Different cases may lend themselves better to different formats.

5

5

Investigation Report Organization: Format Overview

- I. Executive Summary
- II. Allegations & Analysis
 - A. Allegation 1
 - i. Policy at issue
 - ii. Describe allegation (e.g. CP’s complaint, if there is a CP)
 - iii. Response & evidence from witnesses
 - iv. Analysis of whether facts demonstrate a policy violation
 - B. Allegation 2
 - ...
- III. Conclusion



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

6

6

Organization: Format Overview if same facts (Example: SH and OISM)

- I. Executive Summary
- II. Allegations & Analysis
 - A. Allegation 1 and Allegation 2 (if same facts)
 - i. Policy at issue
 - ii. Describe allegation (e.g. CP's complaint, if there is a CP)
 - iii. Response & evidence from witnesses
 - iv. Analysis of whether facts demonstrate a policy violation for Allegation 1
 - v. Analysis of whether facts demonstrate a policy violation for Allegation 2
 - B. Allegation 3
 - ...
- III. Conclusion



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

7

7

I. Executive Summary

- Less than one page? A few paragraphs?
 - Identify the basic nature of allegations
 - Identify Respondent (and Complainant (CP), if applicable)
 - Identify the policy & the policy provision(s) at issue.
 - Identify the conclusion/determination (if applicable)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

8

8

II. Allegations & Analysis: Note

Everything we are talking about now also applies to Hearing Officer Written Determinations

Factual Findings and Analysis



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

9

9

II. Allegations & Analysis

- Outline the **allegations** and analyze each allegation, one-by-one.
- Describe what **evidence** has been obtained and the **facts** learned through the investigation/hearing.
- Describe **analysis**, including potential **credibility** determinations.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

10

10

II. Allegations & Analysis (Cont.)

- Demonstrate that you **heard** all of the individuals interviewed.
- Demonstrate the **care** and **attention** you put into the investigation/hearing.
- Focus only on the **relevant** evidence.
 - Not all evidence is going to be relevant.
 - An “information dump” isn’t going to be effective.
 - Investigators: If *potentially* relevant, include in appendix/exhibits.
(e.g. *interview notes*)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

11

11

Framing the Allegations

- A. *“Respondent allegedly retaliated against Employee.”*
- B. *“Respondent allegedly violated HOP 123.”*
- C. *“Respondent assigned Employee to an undesirable job assignment.”*
- D. *“Respondent is alleged to have violated the anti-retaliation provision of HOP 123 when Respondent assigned Employee to an undesirable job assignment shortly after Respondent learned that Employee participated in a discrimination investigation against Respondent.”*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

12

12

Allegation Components: Stalking Example

Respondent is alleged to have violated the anti-retaliation provision of HOP 123 when Respondent assigned Employee to an undesirable job assignment shortly after Respondent learned that Employee participated in a discrimination investigation against Respondent.

1. Policy implicated
2. Action taken
3. General theory of how conduct relates to policy
(e.g. retaliatory action of assigning an undesirable job duty following protected activity of participating in an investigation)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

13

13

Allegation Components: Academic Dishonesty Example

Respondent is alleged to have committed “academic dishonesty” in violation of the Student Code of Conduct by copying several paragraphs from a book and inserting the text into an assignment without citation.

1. Action taken
2. Policy implicated
3. General theory of how conduct relates to policy
(e.g. copying paragraphs from a book without citation is a form of academic dishonesty under the policy)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

14

14

Framing the Policy at Issue

- After stating the allegation, state the **specific policy at issue**:
“*Provision X of HOP 123*”
- **Not** a general description: “*Policy on research misconduct*”
- There should be **no ambiguity** about exactly what section of the policy is at issue.
- You can cite **whole provision** or just the **key part** that is applicable to the allegations and complaint.

Example:

An employee commits retaliation under HOP 123 when that person “takes an adverse action against another employee because that employee... participated in an investigation.”



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

15

15

Describing the Competing Narratives/Evidence

- If there is a Complainant (CP), what is the CP saying?
- If no CP, what is the evidence that a policy violation occurred (e.g. *inculpatory evidence*, if any)?
- What did the RP say? What is the evidence that a policy violation did not occur (e.g. *exculpatory evidence*, if any)?
- What did the witnesses say? Evidence? Texts? Emails?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

16

16

Describing the Narratives/Evidence (cont'd)

What to include in the Investigation Report and what not to include? General “rules”:

- If **relevant**, **include**. If clearly **irrelevant**, **don't include in report**.
- If provided by a **party** but **not relevant**, include in an **Appendix unless it is part of defense/complaint**.
- If **not sure**, definitely include in the **Appendix**.
- Consider **who** provided the evidence and what is their possible **motivation**?
 - **Important facts** provided by party = **Include** in the report
 - Full party statement = **Appendix**
 - **Explanation provided by RP** but irrelevant = **Include** in the report



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

17

17

Analysis

18

18

Analysis

- Outline whether the **facts** equate to a policy violation using a **preponderance standard**.
- Note: What about Title IX cases?
- What are the **policy provision elements**? Discuss the **relevant evidence** with respect to **each element**.
- **Credibility determination**: *If credibility is part of the analysis and reasoning, say so.*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

19

19

Analysis: Stalking Example (finding)

As explained above, for conduct to constitute “stalking” under HOP 123, there must be a (1) a course of conduct, (2) directed at a specific person, and (3) the conduct must cause a reasonable person to fear for his or her safety or the safety of other or suffer substantial emotional distress. Here, because RP followed CP on more than five occasions, RP engaged in a course of conduct directed at a specific person. With respect to the third element, each time the RP followed CP, RP drove erratically behind CP, frequently tailgating by only leaving a few feet between their vehicles and flashing RP’s headlights. On two occasions, RP displayed RP’s handgun and on three occasions RP shook RP’s fists. I find that based on this conduct, a reasonable person would fear for his or her safety or the conduct would cause substantial emotion distress. I find, therefore, by the preponderance of the evidence that RP violated HOP 123’s prohibition on stalking.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

20

20

Analysis: Stalking Example (no finding)

As explained above, for conduct to constitute “stalking” under HOP 123, there must be a (1) a course of conduct, (2) directed at a specific person, and (3) the conduct must cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. Here, because RP walked behind CP from the classroom to the bus stop outside the humanities building two times, RP engaged in a course of conduct. With respect to the second element, there is no evidence that RP “directed” RP’s conduct towards CP. Instead, the evidence is that RP and CP take the same class and ride the same bus home. After class, both CP and RP would walk towards the bus stop and then board the bus. But there is no evidence that CP’s boarding the bus was “directed” towards CP. Further, with respect to the third element, RP did not threaten CP or do anything that would make “a reasonable person fear for his or her safety or the safety of others or cause substantial emotional distress.” In particular, RP was the first person to get off the bus because RP’s apartment complex is the first stop. This fact is consistent with RP’s explanation that RP was just going home and was not following CP. I do not find, therefore, by the preponderance of the evidence that RP violated HOP 123’s prohibition on stalking.

Analysis: Connecting policy to conduct (Ex. Retaliation)

- The policy says “**adverse action**” is required for a policy violation of Retaliation.
- The employee says RP assigned to an “undesirable job duty.”
- The Investigation Report/Written Determination Letter must attempt to **explain** whether an “undesirable job duty” is an “adverse action.”
- One sentence may do it. But whether the job duty identified is an adverse action may have to be explained...

Analysis: Retaliation/Adverse Action Example (Cont.)

Example:

Employee at grade 9-12 charter school assigned lunch duty Monday through Friday.

III. Conclusion

- State the conclusion.
- Include any next steps in the grievance process (e.g. *sanctions/referrals*, etc.)

Specific Issues



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

25

25

Issue #1: Counter-Arguments and Contrary Evidence

Example #1:

RP broke up with CP and one-month later CP encounters RP with new girlfriend at bar. Next day, CP files a Title IX “sexual assault” complaint alleging one of sexual encounters during their six-month relationship was non-consensual. RP says that CP’s motivation for filing complaint was “retaliation” for RP having a new girlfriend.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

26

26

Issue #1: Counter-Arguments and Contrary Evidence

Example #2:

RP says she assigned Employee lunch duty M-F because students have been having a lot of fights and Employee is the only teacher physically capable of restraining students if a fight breaks out. RP also says she provided Employee an extra five minutes each day to eat lunch.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

27

27

Issue #1 : Counter-Arguments and Contrary Evidence

What happens if you don't include counter-arguments or contrary evidence?

- Allegations of **bias**
- Process seems **“unfair”**
- Participants feel **“not heard”**



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

28

Issue #2: Summarize Each Interview?

Example:

Investigators: You interview 25 witnesses.

Hearing Officers: 12 people testify.

Do you include a summary of each person's statement?



29

29

Issue #3: Credibility Determinations

Sometimes credibility is an issue. Sometimes it is not. If it is, explain why you made the determination you did.



30

30

Issue #4: Your Words Matter

Example #1: *I find there is insufficient evidence—based on the preponderance of the evidence standard—to conclude that RP violated HOP 123’s prohibition of sexual assault. This does not mean that a sexual assault did not occur or that CP did not experience the encounter as a sexual assault. It means that I cannot find under the evidentiary standard that RP sexually assaulted CP.”*

Example #2: *Under the preponderance of the evidence standard, I do not believe that CP was the victim of sexual assault....*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

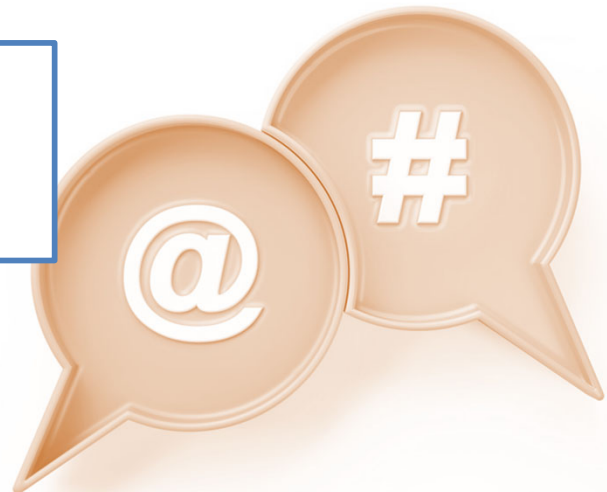
31

31

Issue #5: Use Accurate Terminology

Example #1: *“nether regions”*

Example #2: *“private parts”*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

32

Issue #6: Demonstrate Care and Attention

- Proofread
- Revise, if unclear
- Pretend person who is going to be most unhappy is there with you as you review. *What would they say?* Then, revise to incorporate and explain why you made your decision.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

33

33

Q & A



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

34

34

Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Associate General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

35

Sexual Misconduct Hearing Officer Training

Sean Flammer, Associate General Counsel
Krista Anderson, Systemwide Title IX Coordinator
Fall 2024



1

1

Agenda

1. Background & Context
2. Distinction between Sexual Harassment Cases & Non-Sexual Harassment Cases
3. Hearing Officer Role
4. Pre-Hearing
5. At the Hearing
6. Special Issues
7. After the Hearing



2

2

Background and Context



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

3

3

Purpose of Hearing

- It may be required by law
- Due Process
 - Notice
 - Opportunity to be heard
- Whether the RP committed a university policy violation.
- Determined by Impartial Hearing Officer



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4

Distinctions...

Sexual Harassment

Employee
Quid Pro Quo

Severe
Pervasive
Obj. Offensive

Sexual Assault
Dating Violence
Domestic Violence
Stalking

VS.

Non-Sexual Harassment
Other Inappropriate Sexual Conduct



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

5

5

Definition of “Sexual Harassment”

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (Quid Pro Quo);
2. 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 institution's education program or activity; or
3. “**Sexual assault**,” “**dating violence**,” “**domestic violence**,” or “**stalking**” as defined under Clery/VAWA.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct (2021)

6

6

“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

7

7

What is not “Sexual Harassment” but may be an issue at a hearing?



Example: Other Inappropriate Sexual Conduct



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

8

8

Important Distinction for Sexual Harassment Cases



If the conduct alleged is “**sexual harassment**,” then the advisors will **ask questions** at the hearing.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

9

9

Hearing Officer Role

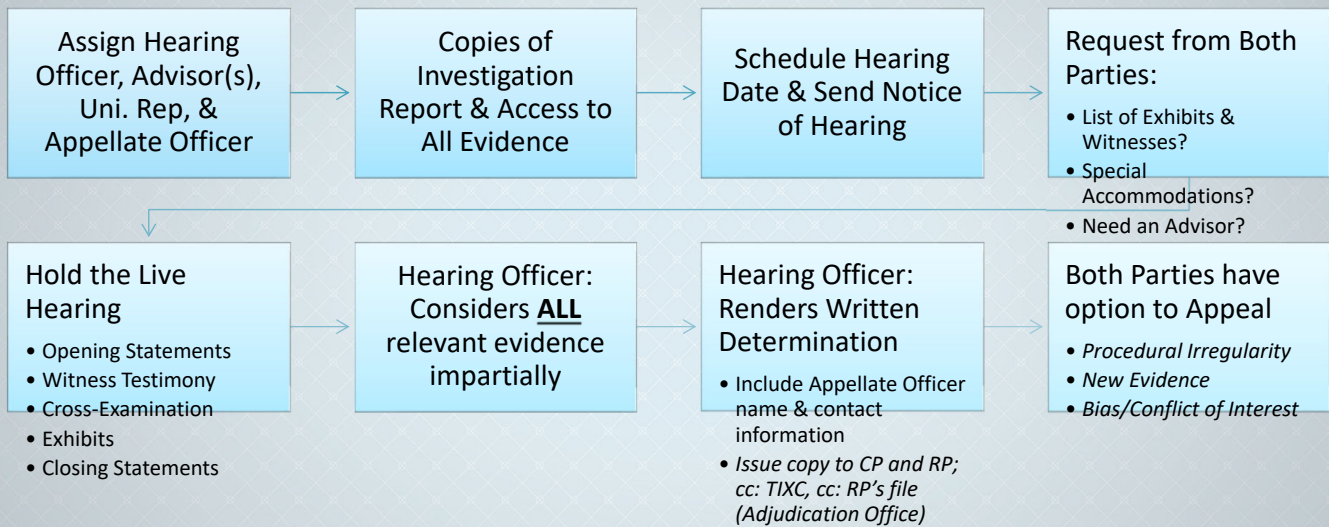


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

10

10

Live Hearing: Logistics Flowchart



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Specific deadlines may be published in the institution's policy and/or procedures.

11

11

Hearing Officer's Responsibilities

1. Preside over the **hearing**.
2. Listen to the evidence presented at the hearing, (read documentary evidence) to determine if by the **preponderance of the relevant evidence** the Respondent violated institutional policy.
3. Impose remedies & sanctions (if applicable).



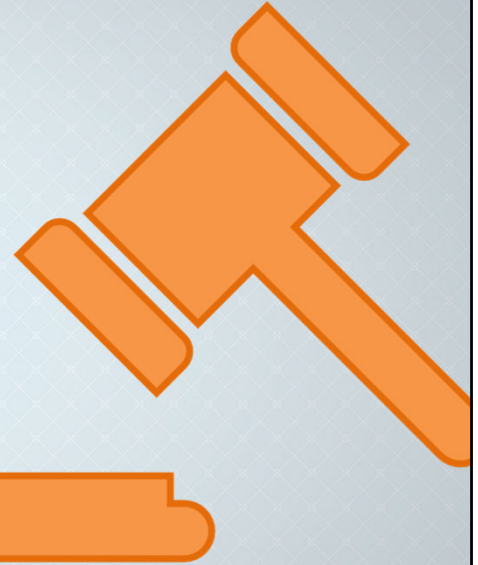
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

12

12

Hearing Officer's Role

You are the Decision-Maker!



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

13

13

Pre-Hearing

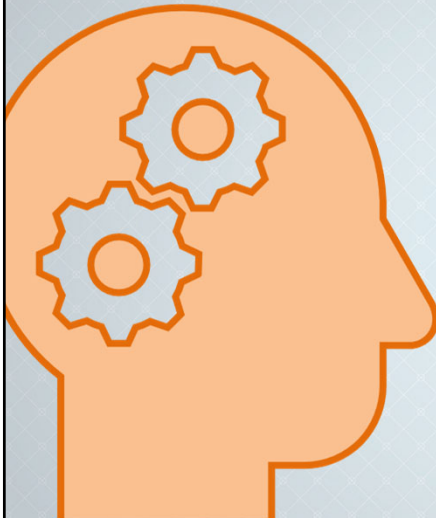


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

14

14

Before the Hearing:

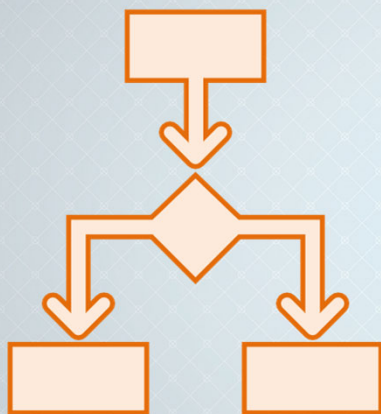


Mindset:

- **Fairness** and **appearance of fair.**
- Parties to **be heard** and **feel heard.**

Remember: This is likely a **major life event** for both the Complainant & Respondent.

Before the Hearing: Notice of the Hearing



- Must give notice of the **hearing at least 10 days** before hearing date.
- Must include the following:
 - Date, time, and place
 - Name of the Hearing Officer
 - List of participants
 - Purpose of the hearing
 - Statement of charges
 - Summary statement of the evidence

Exchange of Witness Lists & Documents



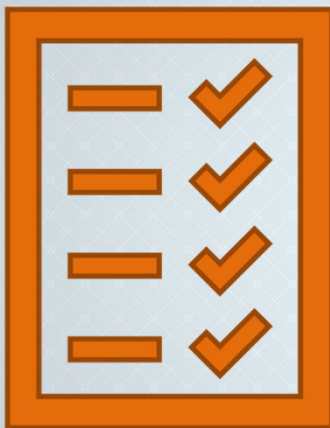
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

[This Photo](#) by Unknown Author is licensed under [CC BY-SA](#)

17

17

Before the Hearing:



- Review materials.
- Review your institution's policy.
- Review & be familiar with the allegations, & what constitutes a policy violation.
- If you have evidence, review it!



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

18

18

Look at the Provision(s) at Issue:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

19

19

Look at the Provision(s) at Issue:

Engaging in a (1) course of conduct (2) directed at a specific person that would (3) cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

20

20

Before the Hearing: Request to Postpone?

- Always review the policy first! The policy will have most of the answers.
- Common reasons for postponing:
 - An advisor is unavailable at the scheduled hearing time
 - A party acquired a new advisor.
 - Health issues.

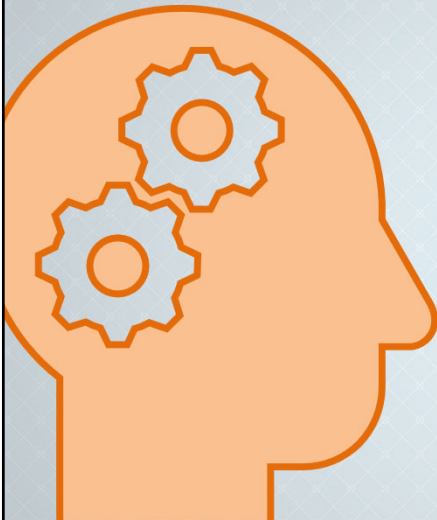


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

21

21

Fairness:



Goal: Fairness and perception of fairness



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

22

22

Communications:



No Ex Parte Communications

- CC all parties (& advisors), including Uni. Representative, on all communications (even if emailed by one party)
- Admonish any communications from the parties (& advisors) regarding facts of the case



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

23

23

Challenge of Hearing Officer's Impartiality

- The Hearing Officer is the **sole judge** of whether he/she/they is capable of considering the evidence and determining the facts with fairness, impartiality, and objectivity.
- Challenge must be by **written request**.
- May be self-initiated.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

24

24



At the Hearing

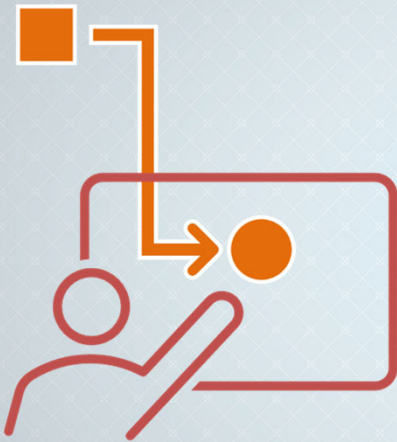


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

25

25

Overview of Hearing



- Opening remarks by Hearing Officer
- Opening Statements
- Questioning of Witnesses
- Closing Statements

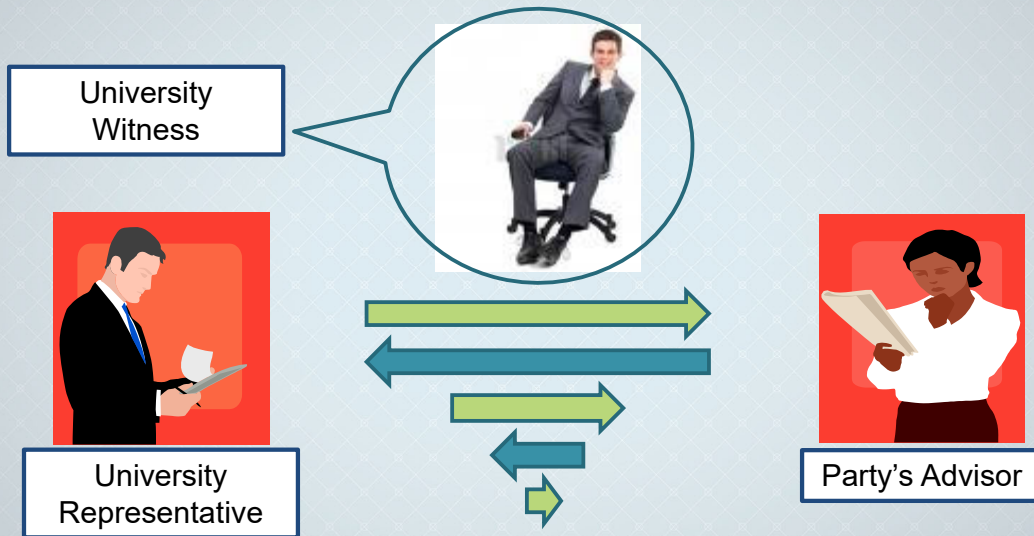


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

26

26

Presentation of Witnesses & Exhibits



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

27 27

27

Remember:
This is **NOT** a legal proceeding.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

28

28

Presentation of Witnesses and Exhibits

Formal rules of evidence do **not** apply.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

29 29

29

Procedure for Asking Questions

The **advisors** may ask questions under the following procedure:

1. The **advisor** will ask a question of the applicable participant.
2. **Before** the participant answers a question, the **hearing officer** will rule as to whether the advisor's question is **relevant** to the alleged conduct charges.
 - If the hearing officer rules the advisor's question as not relevant, then the hearing officer must **explain any decision** to exclude a question as not relevant.
 - If the hearing officer allows the question as relevant, the **participant** will answer the question.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

30

30

Tips at the Hearing: Questioning Witnesses

- Ask open-ended questions.
- Seek clarity with ***“Tell me more about that...”*** or ***“Help me understand...”***
 - Attempt to clarify inconsistencies from ***all*** parties.
- ***“What was your thought process for ...[insert the clarifying part]?”***
 - ***...During the experience?”***
 - ***...Before the experience?”***
 - ***...After the experience?”***
- ***“What, if anything, do you remember once you...[insert part]...?”***
- ***What did you mean by [blank]?”***
- ***“There are **differences** in your account vs. [blank]...[insert specifics] ...help me understand the reason(s) or rationale for this different account...”***



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

31

31

Tips for the Hearing Officer:

- **Respectful demeanor:**
 - Tone, Volume, Facial Expressions
- **Impartial:** Treat both parties equally
 - Ex: Give same time allotments for opening & closing statements.

Remember the goal:
Fairness and perception of fairness



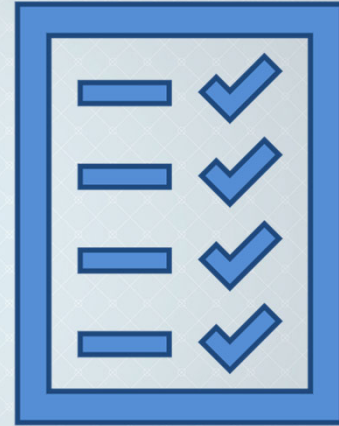
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

32

32

Reminder: OGC Advisor

- Get a **(free)** advisor from UT System's Office of General Counsel
- Feel free to **take breaks** during the hearing to talk with your OGC advisor as needed.



Burden of Proof on the Institution

Preponderance of the Evidence Standard

Note: The Respondent is presumed **not responsible**.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

35

35

Relevant Evidence

Evidence is **relevant** if:

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

36

36

Relevance: Prior Sexual History



A Complainant's sexual predisposition or prior sexual behavior are **not relevant** except where questions and evidence about a Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the alleged conduct charged by the Complainant or if the questions or evidence concern specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove the Complainant's consent of the alleged conduct.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

37

37

Logistics

"At the request of either party, the [institution] 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 & hear** the party or the witness answering questions."



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

38

38

Exclusion of Privileged Information unless Waived



No person will be required to disclose information protected under a legally recognized privilege. The hearing officer must not allow into evidence or rely upon any questions or evidence that may require or seek disclosure of such information, unless the person holding the privilege has waived the privilege. This includes information protected by the attorney-client privilege.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

39

39

Consent Definition

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

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

40

40

Incapacitation Definition

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

41

41

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

If the answer to either of these questions is “YES,” consent was absent and the conduct is likely a violation of this Policy.

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

42

42

- Memory gaps for events that occurred while a person is intoxicated.
- The alcohol consumption for the person is sufficient to block the process of developing memories.
- The amount of alcohol that can trigger “blackouts” can vary from person to person.
- Examples:
 - **Fragmented blackouts:** Spotty memories, missing periods of time in between memories that can be recalled)
 - **Complete amnesia:** Can span hours at a time, where memories didn’t form and typically cannot be recovered later)



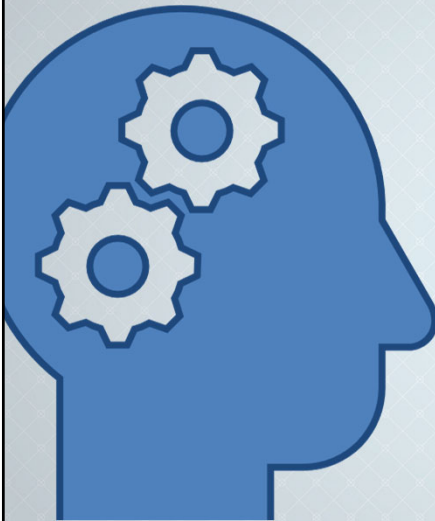
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Alcohol-Induced Blackouts

Source:
NIH’s National Institute on
Alcohol Abuse and Alcoholism

43

Implicit Bias:



- Your **role** as a hearing officer is:
 - **Neutral, impartial, & fair**
- Fairness & the **appearance of fair.**

Goal: To **listen** to both parties equally and that they both leave **feeling heard** by the hearing officer.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

44

44

Implicit Bias (Cont.)

[T]he Department [of Education] ..cautions that a training approach that encourages Title IX personnel to **“believe”** one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate § 106.45(b)(1)(ii) precluding credibility determinations based on a party’s status as a complainant or respondent.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

45

45

Implicit Bias (Cont.)

The Department takes no position on whether “start by believing” should be an approach adopted by non-Title IX personnel affiliated with a recipient, such as counselors who provide services to complainants or respondents. The Department wishes to emphasize that parties should be treated with equal dignity and respect by Title IX personnel, but doing so does not mean that either party is automatically “believed.” The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of “profiles” or “predictive behaviors” to particular cases. (*Title IX Preamble*, p. 836)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

46

46

Tips to Avoid Bias

- Test to address any potential implicit bias.
 - What is the **essence** of potential policy violation?
 - Create **hypothetical** that includes those elements. Then flip or change the genders.
 - You must have **fair & consistent considerations**, regardless of gender.
- When making your decision: List out the evidence favorable to both sides to ensure **evidentiary support** (as opposed to bias).



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Preamble (2020)

47

47

Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias** for CP & RP



Nobody gets a “head start.”



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

48

48



Controlling the Hearing



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

49

49

Controlling the Hearing

- Establish & exercise **authority** early & consistently.
- Be familiar with **policies** & the **allegations**.
- Describe **unacceptable** behavior and **warn** accordingly. Warnings usually correct inappropriate behavior.
- A note about **harassing** or **abusive** questions.
- Establish **time limits** for presenting case.
- **Take breaks.**
- **Stop** the hearing.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

50 50

50

After the Hearing



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

[This Photo](#) by Unknown Author is licensed under [CC BY](#)

51

51

Making A Decision...

- Based solely on the **hearing record**: No *ex parte* discussions or investigations.
- Determine whether a **policy violation** occurred:

Did the RP engage in conduct that violated university policy?



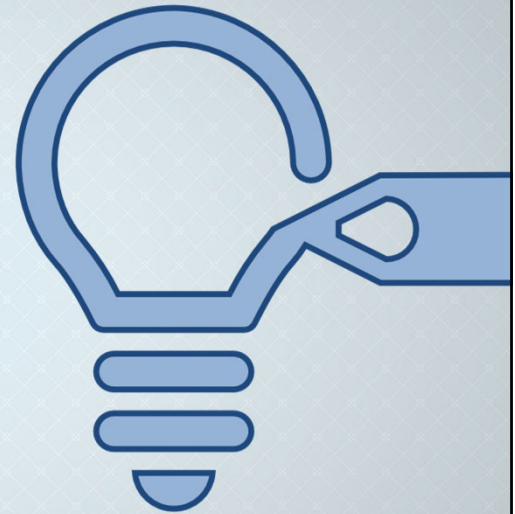
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

52

52

In Making Your Decision:

- **You** are the decision maker.
- Review the hearing transcript.
- Review the institution's policy.
- Assess witness credibility:
 - Ex: Demeanor, personal knowledge, bias
- Strength of relevant evidence:
 - Credibility of the relevant evidence
 - Weight of each exhibit
 - Persuasiveness of the evidence



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

53

53

Burden of Proof on the Institution

Preponderance of the Evidence Standard:

Whether the greater weight of the credible evidence establishes that the Respondent engaged in the alleged policy violation.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Note: The Respondent is presumed **not responsible**.

54

54

Weighing Evidence

Does some evidence weigh more than other evidence? (Is it more persuasive?)

- Plausible—does it make sense?
- Detailed v. vague recollection (but beware of trauma)
- Direct or circumstantial
- Personal observation/knowledge v. hearsay (what somebody told witness)
- Corroboration? Are there objective facts that can corroborate any testimony? (Texts; Phone log; video evidence; emails, etc.)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

55

55

Burden of Proof: The greater weight

Example:

Complainant's testimony was that consent was lacking because Complainant said, "I don't want sex." But Respondent testifies that Complainant said, "Let's have sex."



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

56

56

Credibility Assessment?

- Are there inconsistencies? Is it corroborated?
- Is an explanation plausible?
- What did the witness do? What did they *not* do?
- Are there motives for the witness to be less than truthful?
- Are there motives for the witness to frame the event in a way more favorable to themselves? Are they lying to themselves?
- Is there an opportunity for a good faith mistake?
- What about demeanor? (How much to weigh/cultural stereotypes?)



57

57

Neurological Effect of Trauma

- A. Traumatic events can affect a person's brain chemistry and functioning, which can impact memory recall, information processing, and communication
- B. Possible effects on memory recall:
 - Flashbacks
 - Delayed recollection
 - Difficulty concentrating
 - Non-linear recollection
 - Self-blame

58

58

Potential Pitfalls

- You must let the **evidence** lead you to the **conclusion**, rather than making the evidence “fit” your pre-formed conclusion.
- Focus on the **relevant evidence**.
 - Hint: It's **not** all relevant.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

59

59

The Decision Letter

The hearing officer issues
a written determination.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

60

60

A Good Decision Letter:

- Demonstrates the care and attention given to the **factual findings** and **weighing of the evidence**.
- Shows that the institution reached a **reasoned, good faith conclusion**.
 - It's not enough to reach a conclusion. You must be able to **"show your work."**
- Serves as a **framework** for all future proceedings.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

61

61

Revision Stage: Focus on Clarity

- Focus on ***relevant facts*** in your factual findings. If it is part of the reasoning, say it. Don't omit it.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

62

62

Revision Stage: Focus on Clarity

- Look at your draft with a **critical eye**.
- Pretend the person who will be most *unhappy* with your decision is in the room with you reading the draft with you. With each sentence or paragraph, consider:
“What would that person say?”
- Then revise.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

63

63

Revision Stage: Reminder

Deal with facts **contrary** to your decision:

- If you don't, it looks like you didn't consider or hear the argument, that you weren't paying attention, or that the process is unfair.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

64

64

Analysis: Stalking Example (*Finding*)

As explained above, for conduct to constitute “stalking” under HOP 123, there must be a (1) a course of conduct, (2) directed at a specific person, and (3) the conduct must cause a reasonable person to fear for his or her safety or the safety of other or suffer substantial emotional distress. Here, because RP followed CP on more than five occasions, RP engaged in a course of conduct directed at a specific person. With respect to the third element, each time the RP followed CP, RP drove erratically behind CP, frequently tailgating by only leaving a few feet between their vehicles and flashing RP’s headlights. On two occasions, RP displayed RP’s handgun and on three occasions RP shook RP’s fists. I find that based on this conduct, a reasonable person would fear for his or her safety or the conduct would cause substantial emotion distress. I find, therefore, by the preponderance of the evidence that RP violated HOP 123’s prohibition on stalking.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

65

65

Analysis: Stalking Example (*No Finding*)

As explained above, for conduct to constitute “stalking” under HOP 123, there must be a (1) a course of conduct, (2) directed at a specific person, and (3) the conduct must cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. Here, because RP walked behind CP from the classroom to the bus stop outside the humanities building two times, RP engaged in a course of conduct.

With respect to the second element, there is no evidence that RP “directed” RP’s conduct towards CP. Instead, the evidence is that RP and CP take the same class and ride the same bus home. After class, both CP and RP would walk towards the bus stop and then board the bus. But there is no evidence that RP’s boarding the bus was “directed” towards CP. Further, with respect to the third element, RP did not threaten CP or do anything that would make “a reasonable person fear for his or her safety or the safety of others or cause substantial emotional distress.” In particular, RP was the first person to get off the bus because RP’s apartment complex is the first stop. This fact is consistent with RP’s explanation that RP was just going home and was not following CP. I cannot find, therefore, by the preponderance of the evidence that RP violated HOP 123’s prohibition on stalking.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

66

66




Hearing FAQ's



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.


67

67



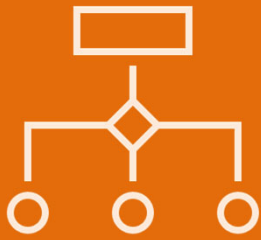
Question 1

What are some examples of types of evidence that a party might consider relevant at the hearing that may draw an objection?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

68



Question 2

The policy states that advisors do not lodge objections or otherwise participate in the hearing except for asking questions.

In the beginning of the hearing, the respondent's advisor asks, "Can I say something?"

Not knowing what the advisor wants to say, you allow the advisor to speak. The advisor objects to the evidence in the investigation report on several grounds and objects to the hearing happening at all because of "procedural irregularities," which the advisor outlines. When the respondent's advisor finishes speaking, the complainant's advisor asks to respond. What do you do?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

69



Question 3

Before the hearing, the parties were told that within 5 days of the hearing, they needed to disclose the names of any witnesses they intended to call and also to identify any exhibits in addition to those attached to the investigation report that they intended to rely on.

At the hearing, the Complainant discloses that the CP has recently obtained documents that the CP would like to be considered at the hearing.

What do you do?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

70



Question 4

A witness is testifying. The questioner asks a question, and you are not sure whether it is relevant or not. What do you do? Do you rule that it is relevant or exclude it?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

71



Question 5

You are presiding at a hearing that started at 9am. It's 11am. You notice that there are still 10 witnesses that the parties plan to call. You wonder if all these witnesses will just be redundant or whether any can bring anything new to your understanding of the incident. What do you do?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

72



Question 6

How do you determine sanctions?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

73

Q & A



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

74

74

Written Determination Required Components

- The **allegation(s)** that potentially constitutes prohibited conduct;
- A description of all of the **procedural steps** of the Grievance Process:
 - From receipt of a Formal Complaint to the determination regarding responsibility of the Respondent, including any notifications of the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
- The **findings of fact** supporting the hearing officer's determination;



Source:

UT System Model Policy for Sexual Misconduct (2021)

75

75

Written Determination Required Components (Cont.)

- The **conclusion(s)** and a **rationale** as to whether the Respondent is responsible for each allegation;
- The disciplinary **sanctions**, if applicable;
- The **remedies**, if applicable, designed to restore the Complainant's access to the education program or activity; and
- The institution's procedures and permissible bases for the parties to **appeal**, if applicable.

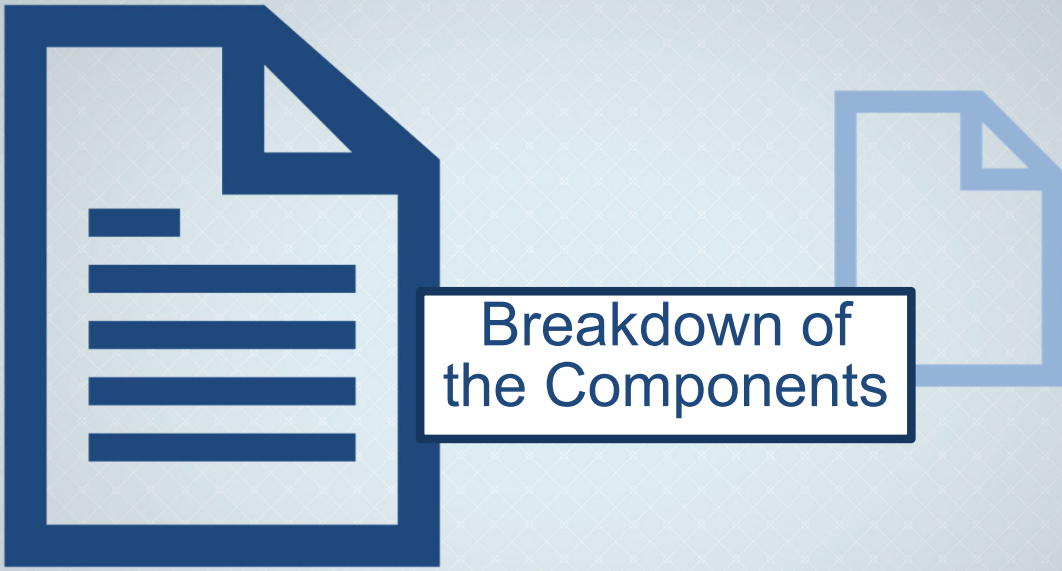


Source:


UT System Model Policy for Sexual Misconduct (2021)

76

76



Breakdown of the Components

 THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

77

77

1. Allegation(s) & Applicable Policies & Procedures

- List the **allegation(s)** and the applicable policies & procedures. You can attach documents as exhibits.
- “A description of the **procedural steps** taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held” (Title IX Regulations, 2020)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

78

78

2. Evidence Considered

- Remember the **seriousness** of these matters & the consequences that may come from them.
- You must be able to show that you were **fair, impartial, and thorough** in your examinations.
- Include a **summary** of what you heard, saw & reviewed.
- **Don't** fill the letter with irrelevant facts. But when in doubt, **include it.**

3. Evidentiary Standard



- **Preponderance Standard:**
Greater weight of the credible evidence:
 - “More likely than not”
 - 50% “plus a feather”
 - Think of the scales of justice: You need to get beyond the 50-yard-line
 - “Some evidence” doesn’t do it. One side of the scale needs to be heavier.
 - No head starts.

4. Undisputed Facts

- What material and relevant facts are **undisputed**?
 - **How** do we know these facts? Who told us? How were the facts gathered (texts, emails, social media, etc.)?
 - **Why** are we including these facts? What **point** (regarding the allegation(s)) do they help us **resolve**?
 - Are they really **UNDISPUTED**?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

81

81

4. Undisputed Facts

- Use witness **quotes** as much as possible. Don't take statements out of the vernacular.
- Easiest way to make an undisputed fact disputed is to mischaracterize it by trying to summarize.

Examples:

- 👍 **Quote:** Witness 3 stated that the parties “were friends but had been casually hooking up for a few weeks.”
- 👎 **Summary:** The parties were previously in a complicated “friend” relationship.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

82

82

5. Factual Findings: Resolution of Disputed Facts



- Go point by point on the disputed facts:
 - What do you think happened and why?
 - On what **evidence** do you base your conclusion?
 - You **MUST** make **credibility** determinations of witnesses. Basis for someone being more credible than someone else?
 - a. Corroborating evidence?
 - b. Inconsistencies?
 - c. Motives?
 - d. Other factors?
- If you have critical corroborating evidence: **Cite the evidence** in your findings.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

83

83

6. Fact Analysis & Conclusions

- Take factual findings & analyze using the applicable policy. Looking for violations of **policy**.
- Address all allegation(s), one by one.
- Explain your reasoning: **How** did you get to each of your conclusions?
- Use the terms “**responsible**” or “**not responsible**”.

Do **not** use the words “innocent,” “guilty,” or “not guilty.”



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

84

84

7. Sanctions & Remedies



- It is important to take an action sufficient to abate the behavior & improve the learning environment.
- Act consistently with other actions taken by the institution for **similar conduct**.
- Consider the wants or concerns of the Complainant, but that's not determinative.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

85

85

7. Assessing Sanctions (Cont.)

- The institution looks, in part, to past punishment for similar conduct & violations when recommending sanctions
- Consider mitigating circumstances:
 - Accepting responsibility
 - Remorse



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

86

86

7. Thinking Outside the Box with Sanctions

- **Educational**, not criminal process
- Common disciplinary sanctions:
 - Probation
 - Suspension
 - Expulsion
- “Other sanctions as deemed appropriate”
 - Counseling
 - Anger management
 - Training
 - Reflective papers & projects



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

87

87

Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Associate General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

88

88

Sexual Misconduct Informal Resolution Training

Krista Anderson, Systemwide Title IX Coordinator

Fall 2024



1

Agenda

1. Title IX Introduction
2. Party's Rights
3. Informal Resolution Process
4. Facilitation Approaches
5. Documentation & Record Keeping

2

2

Introduction

**TITLE
IX**

Key Concepts &
Framework

3

3

Title IX

Sex Discrimination
Sexual Harassment
Retaliation



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4

Institutions must reasonably respond in light of known circumstances...

1. Stop & prevent behavior from continuing or escalating

2. Remedies:
Supportive measures & resources

3. Formal grievance process



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

5

5

Distinctions...

Sexual Harassment

Employee
Quid Pro Quo

Severe
Pervasive
Obj. Offensive

Sexual Assault
Dating Violence
Domestic Violence
Stalking

VS.

Non-Sexual Harassment
Ex. Other Inappropriate Sexual Conduct



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

6

6

Definition of “Sexual Harassment” under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. 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 institution’s education program or activity; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

7

7

#2 Element Examples

- **“Severe”**: Physically threatening or humiliating; effects of the alleged conduct to a reasonable person (using a “reasonable person” standard)
- **“Pervasive”**: Frequency, duration of the alleged conduct
- **“Objectively offensive”**: To a reasonable person (using a “reasonable person” standard)
- **“Reasonable person” standard**: An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.
- **“Effectively denies...equal access”**: Totality of the circumstances

For example, the degree of the alleged conduct’s interference with the CP or effects in an educational setting, type of alleged conduct, frequency and duration of the conduct, knowingly unwelcome in nature⁸

8

“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

9

9

Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is prohibited inappropriate or unprofessional sexual conduct.

Such conduct is:

1. **Verbal conduct** (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.
2. **Physical conduct** that is objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:
UT System Model Policy for Sexual Misconduct (2022)

10

10

“Other Inappropriate Sexual Conduct” Cont.

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature;
- Deliberate physical interference with or restriction of movement; or
- Consensual sexual conduct that is unprofessional and inappropriate, and created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

11

11

Key Pillars: Title IX Process

Impartiality

Respect

Fairness

Equity

For all of the participants
in the process:

Complainants

Respondents

Witnesses

Third-party Reporters



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

12

12

Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias**



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

13

13

Principles for Title IX Process



- Must maintain **complete neutrality & impartiality at all times** in investigating alleged conduct violations of institutional policies.
- Understanding bias & whether it exists: Need to take an “**objective, common sense approach to evaluating whether a person serving in a role is biased.**” (*Title IX Preamble (2020)*)...



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

14

14

Avoiding Bias

- Must **not** treat a party differently:
 - On the basis of the person's **sex**;
 - On **stereotypes** about how men or women behave with respect to sexual violence; and/or
 - On the basis of the person's **protected characteristics**.



Source: Title IX Preamble (2020)

15

15

Party's Rights

16

16

Party's Rights

A **Complainant** and **Respondent** have the following rights during a grievance process:

Information and Support

- To be informed of and have access to counseling, medical, academic, and other applicable **support services**, including **confidential resources**.
- To be informed of the importance of a victim going to a **hospital for treatment** and the **preservation of evidence**, if applicable, as soon as practicable after an alleged incident.
- To be informed of a **notice of formal complaint** to the University, whether filed by a CP or the TIXC.
- To receive information and ask questions about the **formal** and **informal processes**.

Equal Opportunity and Representation

- To receive a **prompt, fair, equitable, and impartial grievance process**
- To be given **equal chance** to participate in a grievance process, including the opportunity to identify witnesses and other relevant evidence and to **choose not** to actively participate in the grievance process, if desired.
- To have an **advisor of choice** present during all meetings and grievance proceedings.
- To have an **advisor provided** for a party at a **hearing** under the Title IX/SH grievance process, if an advisor of choice is not present.
- To have access and equal opportunity to **inspect and review any evidence obtained** as part of the investigation, and to receive a copy of the completed investigation report.
- To be **equally informed** of any **determinations** regarding responsibility, dismissals of formal complaints, and/or a party's filing of an appeal.
- To **appeal** a determination regarding responsibility and/or dismissals of formal complaints.
- To file a report with **local** and/or **campus law enforcement** authorities.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

17

17

Complainant's Rights (related to the Grievance Process)

- To **report** an incident and/or **file a formal complaint** with the University.
- To **request** in writing that the University **not investigate** a reported incident and be **informed** of the **University's decision** whether or not to investigate.
- To **request** in writing a **dismissal** of a formal complaint (e.g. withdraws the formal complaint or any allegations therein).



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

18

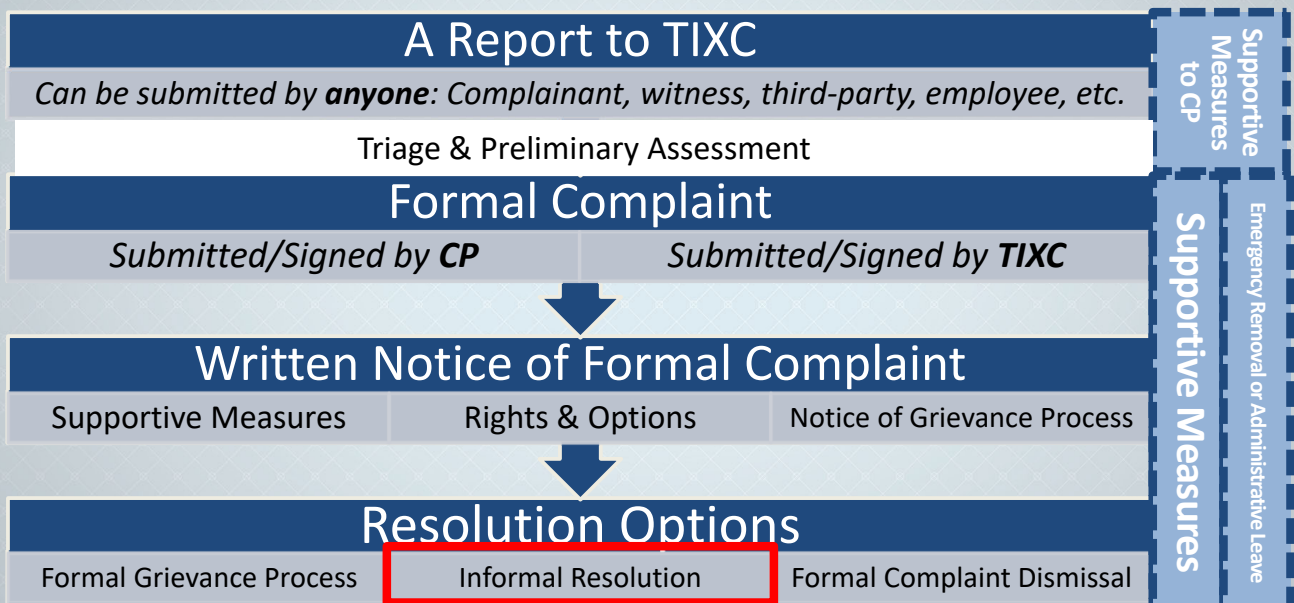
18

Informal Resolution Process

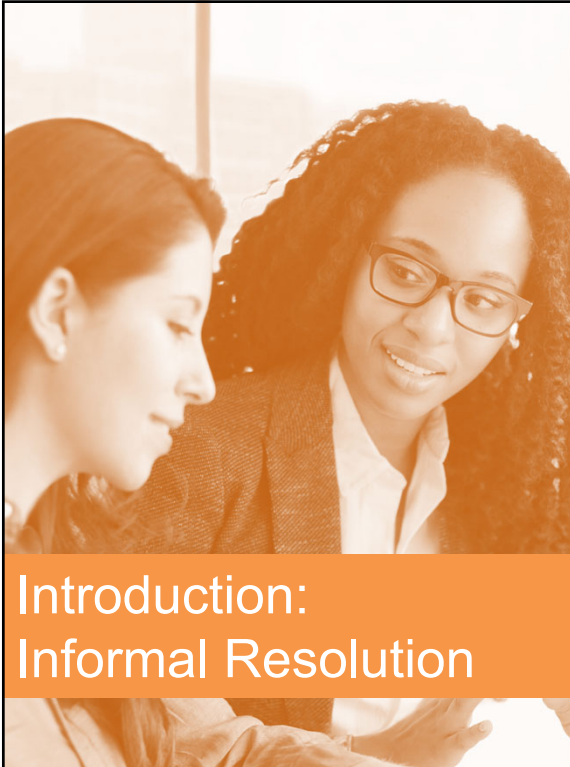
19

19

Resolution Flowchart



20



Introduction: Informal Resolution

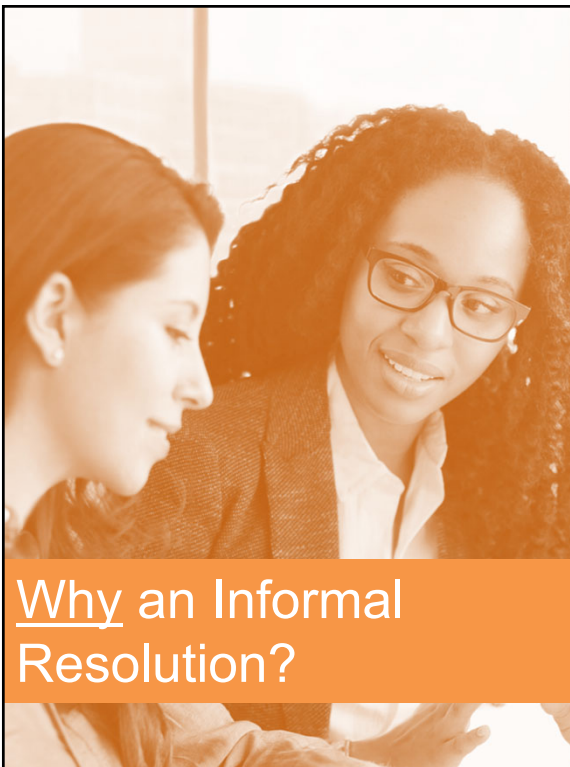
It's an alternative resolution option once a formal complaint is filed.

- **Voluntary agreement** made by both parties, if available.
- Available as an option at any time prior to reaching a determination regarding responsibility.
- Doesn't involve a full investigation & adjudication.
- May be facilitated through mediation (as an example).

Note: Each party has a right to **withdraw** from the informal resolution process and resume the formal grievance process at any point prior to an agreement.

21

21



Why an Informal Resolution?

- Provides an **option** and **choice** for the parties to explore their own voluntary terms for a resolution.
- Opportunity to have a more **satisfactory experience** for the parties, than going through the formal grievance process.
- Opportunity to **remedy** and **repair harm** that was experienced through an **alternative method**.
- Ability to explore **non-punitive** and/or **learning-focused** resolutions, if desired.

22

22

Not Permitted When...

- Not permitted as a resolution option “under Title IX” when an **employee respondent** is alleged of “sexual harassment” by a **student complainant**.
- Examples of other non-applicable reasons* due to seriousness and/or pattern of allegations:
 - Sexual Harassment cases
 - Sexual Violence cases
 - Dating or Domestic Violence cases
 - Stalking cases
 - The same respondent has previous informal resolution agreements

* Check the institution's Sexual Misconduct Policy for specific provisions



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct (2022)

23

23

What's left? “Other Inappropriate Sexual Conduct”

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual's sexual activities or speculation about an individual's sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature;
- Deliberate physical interference with or restriction of movement; or
- Consensual sexual conduct that is unprofessional and inappropriate, and created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:
UT System Model Policy for Sexual Misconduct (2022)

24

24

Required Components

Once a formal complaint is filed...

An Informal Resolution Process must include:

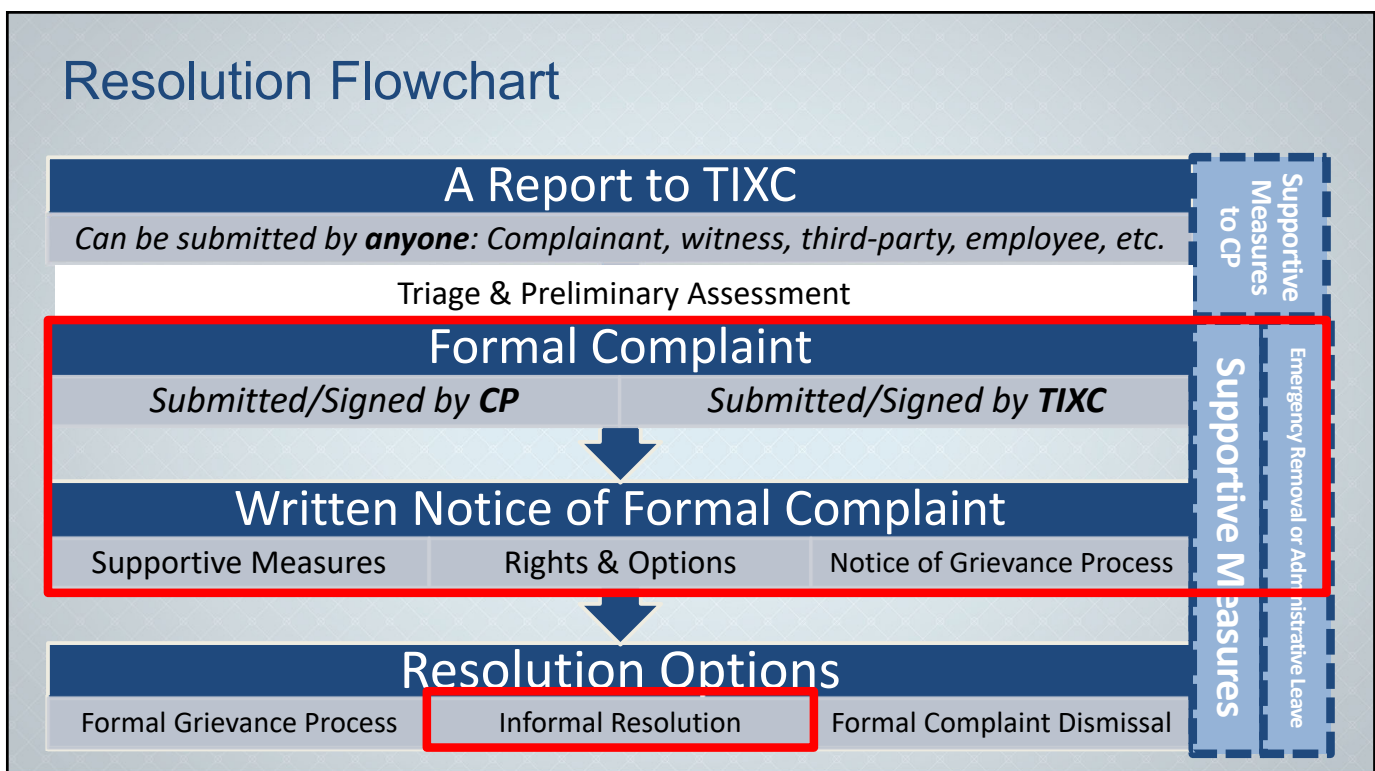
- a) Written notice of allegations;
- b) Required elements of the informal process; and
- c) Any consequences resulting from participating in an informal process



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020) 25

25



26

Written Notice of Allegations



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

27

Written Notice of Formal Complaint

Upon receipt of a formal complaint, promptly send written notice to CP & RP:

- Notice of the grievance process under the policy;
- Notice of the allegations that potentially constitute prohibited conduct under the policy, sufficient details about the alleged conduct: Date(s), time(s), and location(s);
- A statement that the potential policy violations are being investigated;

28

28

Written Notice (Continued)

- A statement that the RP is presumed not responsible for the alleged conduct and that the determination regarding responsibility will be made at the conclusion of the grievance process;
- Both parties may have an advisor of choice, who may be, but is not required to be, an attorney, and may inspect and review all evidence;
- A statement that the parties may review evidence gathered as part of the any investigation;

29

29

Written Notice (Continued)

- A provision of the policy that knowingly making false statements or knowingly submitting false information during the grievance process is prohibited and subject to disciplinary action;
- Any other relevant information for the written notice; and
- A statement that retaliation is prohibited under the policy. (recommended)

30

30

Other **resources** to include with the written notice:

1. **Supportive measures** available for both parties
2. **Campus & local** resources or services
3. **Rights & options** of both parties
4. A copy of the **grievance process & policy**
5. Title IX Coordinator & Investigator(s) **contact information**



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



31

31

Elements of the
IR Process

32

32



Informal Process Considerations

- Under the institution's policy, what is the IR **availability**? What conditions are permissible for an IR agreement?
- What are the **timeframe** parameters to complete an IR agreement?
- Who will **facilitate** IR's?
- What **acknowledgments** are required by both parties before an IR agreement?
- What are the **consequences** resulting from participating in an informal process?

33

33



Preparations

- Formal Complaint and process status?
- I.R. Pre-screening
 - Background information
 - CP: Supportive measures/remedies?
 - RP: Sense of willingness to address their alleged conduct through IR process?
 - Any potential conflicts between the parties?
 - Concerns raised (if any) from the parties?

34

34

Example Acknowledgments & Consequences of Participating in an IR Process

1. Acknowledgment of the **written notice** and allegations therein.
2. Received **rights and options** of both parties.
3. An IR agreement is a **voluntary** option, if available under the institution's policy.
4. Each party has the **right to withdraw** from the IR process and resume the formal grievance process...
5. IR **timeframe** (example: within 45 days of notice)
6. No recording will be made of the IR process...



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

35

35

Example Acknowledgments & Consequences of Participating in an IR Process (Cont.)

7. Any statements made during the IR process may not be used for or against either party... should the parties resume the formal grievance process.
8. The respondent will not be eligible for further IR agreements in the future.
9. An IR agreement will be based on individual needs, and based on specific facts and circumstances available.
10. Documentation & records provisions... 7 years retention...privacy and confidentiality of records...
11. **Terms of Enforcement:** Failure to comply with a provision or term in an IR agreement may result in disciplinary action.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

36

36

Examples of Agreement Terms

Stop engaging in prohibited conduct defined in SHSM policy

Mutual No-Contact Btwn Parties

Apology Letter

Reflection Writing Assignment

SHSM Training or Workshop Assignment

Alcohol EDU Workshop

RP Housing Reassignment

RP Counseling Consultation

RP Course Adjustments

RP On-Campus Work Adjustments

RP Voluntary Leave from Uni

Enforcement Terms

37

37

Agreement Terms

Complainant

Institution

Respondent

Is the Institution satisfied with the I.R. Agreement Terms?

38

38

Compliance Monitoring

Complainant

Institution

Respondent

39

39

IR Documentation Examples

- Documentation Checklists & Forms
- Intake & Initial Assessments
- Case Management Timelines
- Contact & Communications
- Notices & Letters
- IR Acknowledgements
- IR Agreements
- Obtain signatures for the IR Agreement
- Data Systems for Electronic & Hard Copy Records



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

40

40



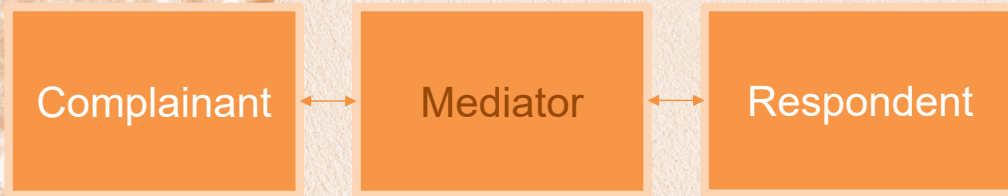
41



42

Indirect Facilitation (Shuttle-Diplomacy)

A mediator acts as a go-between and facilitates impartially the negotiation of proposed terms between the two parties. It doesn't require direct face-to-face interaction between the parties.



Example model

43

43

Rapport-Building Prompts

- ***“Help me understand how you are feeling right now.”***
- ***“What, if anything, can I explain to you about this process before we get started?”***
- ***“What, if anything, do you need right now?”***

Note: Consider possible **barriers** or **concerns** to building trust with a participant.

- Facilitators: How can you minimize or eliminate these factors?



Source:

Forensic Experimental Trauma Interview (FETI)

44

44

General Starting Prompts

- *“I’ve read the formal complaint (and initial statements (if any)) and I am familiar with this case. **Is there anything important you wish to share at this time?**”*
- *“Tell me what you would like to **achieve** through this I.R. process.”*
- ***To CP:** “What types of **remedies** would you like to see in an I.R. agreement?”*
- ***To RP:** “What types of remedies, if any, are you **open** to? What components, if any, you are **willing to agree to?**”*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

45

45

Active Listening Example Prompts

46

Type	Example Prompts	
Validating	• “That sounds difficult.”	• “It’s <u>okay</u> to feel upset.”
Emotional Acknowledgements	• “You seem <u>disappointed</u> right now.”	• “Having to consider different options can be <u>stressful</u> to navigate.”
Reflecting	• “What I’m hearing is...”	• “Sounds like you are saying...”
Summarizing or Restating	• “Let me summarize to check my understanding [Repeat back]... Did I get that right?”	• “[Repeat/rephrase what the other person said]...Is this what you mean?”
Open-Ended Phrases	• “Tell me more about...” • “Explain/describe...”	• “What do you mean when you say...?” • “Help me understand...”
Affirmative Comm	• “Yes” • “I see.”	• “Go on.” • “Right.”

46

Informal Resolution Example Prompts

Purpose	Example Prompts
Draw out ideas	<ul style="list-style-type: none"> • “Tell me what <u>you</u> would like to achieve through this I.R. process.” • “What types of remedies would <u>you</u> like to see in an I.R. agreement?” • “How do <u>you</u> want to approach an IR agreement?” • “What types of remedies, if any, are <u>you</u> open to?” • What components, if any, <u>you</u> are willing to agree to?” • “What are terms or remedies that seem fair to <u>you</u>?” • “What do <u>you</u> think about ____?”
Be open to <u>all</u> <u>types</u> of responses	<ul style="list-style-type: none"> • “How would <u>you</u> like to proceed?” • “What are some applicable takeaways that <u>you</u> can learn and grow from this experience?” • “The decision to accept or not accept certain terms or remedies is up to <u>you</u>.” • “What do <u>you</u> think might be getting in the way of coming to an agreement right now?”



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

47

47

Prompts for Refocusing Conversations

Purpose	Example Prompts
If the person <u>doesn't</u> <u>respond to the</u> <u>relevant prompts</u>...	<ul style="list-style-type: none"> • <u>Rephrase</u> the prompt again. • Acknowledge the shift: “It seems like the discussion is evolving to ____, but we started off exploring ____.”
If the person <u>makes</u> <u>an argument about</u> <u>a different topic</u>...	<ul style="list-style-type: none"> • <u>Acknowledge</u> the concern & attempt to finish the <u>initial discussion</u> first: “I want to talk about that, but let's first finish addressing ____?”
If the person <u>attempts to change</u> <u>the subject</u>...	<ul style="list-style-type: none"> • It might be to <u>vent</u> or release some tension. • <u>Prompt</u> the person to discuss what's on their mind. • Then, use <u>active listening</u> to acknowledge the person's current <u>concerns, emotions, and/or needs</u>. • Try to <u>link</u> the person's concerns with the initial discussion topic.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

48

48

Restorative Considerations for the I.R. Process

- Addresses the conduct, impacts, and/or needs of the individuals
- Provides accountability & support
- Actively engages with the individuals
- Learning/educational component
- Opportunity for closure
- Ability to reintegrate the person back into the community

49

49

Informal Resolution Timeframe (Example)

Informal Resolutions of a formal complaint will be concluded within **45 days** of notice to the institution that both parties wish to proceed with the Informal Resolution process

Note: Circumstances may require a **temporary delay** in this timeframe & the institution may extend this timeframe for good cause.

- Provide **notice** to the parties for temporary delays or extensions



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

50

50

Informal Resolution Documentation

Any final resolution pursuant to the Informal Resolution process will be documented and kept for seven years as required by law. However, no recording of the Informal Resolution process will be made and all statements made during the Informal Resolution process may not be used for or against either party (and the Hearing Officer and Appellate Officer may not consider any such statement made during Informal Resolution) should the parties resume the Grievance Process. Failure to comply with an Informal Resolution agreement may result in disciplinary action.



Source:

UT System Model Policy for Sexual Misconduct (2021)

51

Documentation & Record Keeping

The University (through the appropriate office) will retain all of the documentation included in the Grievance Process (outlined in the SM Policy) for 7 years, in accordance with state and federal records laws and University policy.

All documentation of records are private and confidential to the extent possible under law. Student records of the Grievance Process are disciplinary records under FERPA. Employee records of the Grievance Process are subject to the Freedom of Information Act (FOIA) and the Texas Public Information Act (TPIA), and included in the employee's official employment record.



Source:

UT System Model Policy for Sexual Misconduct (2021)

52



Q & A

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

53

53

Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Assistant General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

54

54

Sexual Misconduct Investigations – Procedural Elements

Krista Anderson, Systemwide Title IX Coordinator
Sean Flammer, Associate General Counsel

Fall 2024



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

1

1

Agenda

1. Title IX Intro
2. Initial Steps
3. Resolution Options
4. Ongoing Elements
5. Closing Steps
6. Transition to Adjudication Stage
7. Documentation & Record Keeping

2

2

Introduction

TITLE IX

Key Concepts & Framework

3

3

Distinctions...

Sexual Harassment

Employee
Quid Pro Quo

Severe
Pervasive
Obj. Offensive

Sexual Assault
Dating Violence
Domestic Violence
Stalking

vs.

Non-Sexual Harassment
Ex. Other Inappropriate Sexual Conduct



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4

Definition of “Sexual Harassment” under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. 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 institution’s education program or activity; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

5

5

#2 Element Examples

- **“Severe”**: Physically threatening or humiliating; effects of the alleged conduct to a reasonable person (using a “reasonable person” standard)
- **“Pervasive”**: Frequency, duration of the alleged conduct
- **“Objectively offensive”**: To a reasonable person (using a “reasonable person” standard)
- **“Reasonable person” standard**: An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.
- **“Effectively denies...equal access”**: Totality of the circumstances

For example, the degree of the alleged conduct’s interference with the CP or effects in an educational setting, type of alleged conduct, frequency and duration of the conduct, knowingly unwelcome in nature ⁶

6

“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

7

7

Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is prohibited inappropriate or unprofessional sexual conduct.

Such conduct is:

1. **Verbal conduct** (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.
2. **Physical conduct** that is objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:
UT System Model Policy for Sexual Misconduct (2022)

8

8

“Other Inappropriate Sexual Conduct” Cont.

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature;
- Deliberate physical interference with or restriction of movement; or
- Consensual sexual conduct that is unprofessional and inappropriate, and created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

9

9

Key Pillars: Title IX Process

Impartiality

Respect

Fairness

Equity

For all of the participants
in the process:

Complainants

Respondents

Witnesses

Third-party Reporters



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

10

10

Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias**



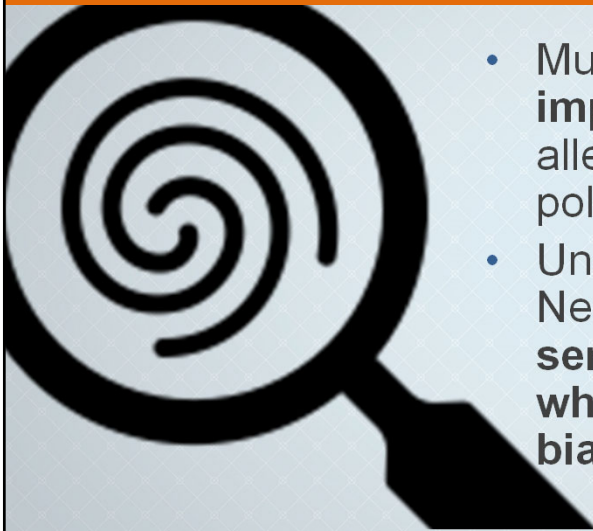
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

11

11

Principles for Title IX Process



- Must maintain **complete neutrality & impartiality at all times** in investigating alleged conduct violations of institutional policies.
- Understanding bias & whether it exists: Need to take an “**objective, common sense approach to evaluating whether a person serving in a role is biased.**” (*Title IX Preamble (2020)*)...



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

12

12

Avoiding Bias

- Must **not** treat a party differently:
 - On the basis of the person's **sex**;
 - On **stereotypes** about how men or women behave with respect to sexual violence; and/or
 - On the basis of the person's **protected characteristics**.



Source: Title IX Preamble (2020)

13

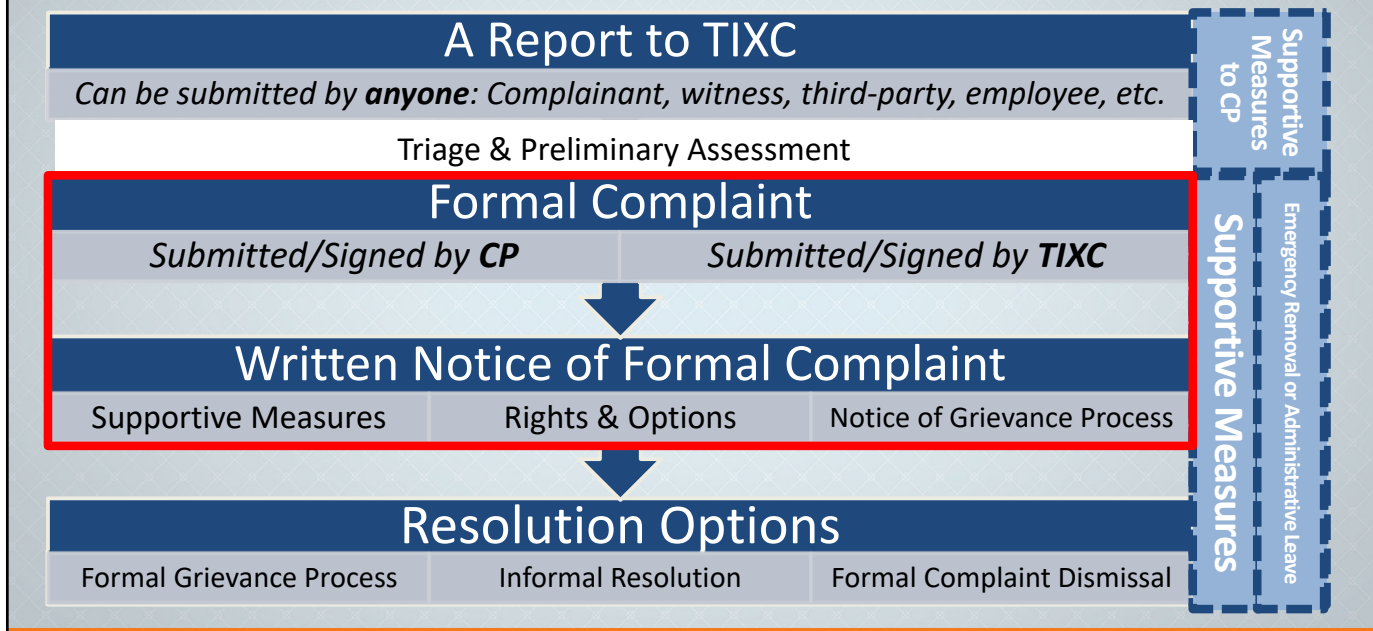
13

Initial Steps of an Investigation

14

14

Resolution Flowchart



15

Written Notice of Formal Complaint

Upon receipt of a formal complaint, promptly send written notice to CP & RP:

- Notice of the grievance process under the policy;
- Notice of the allegations that potentially constitute prohibited conduct under the policy, sufficient details about the alleged conduct: Date(s), time(s), and location(s);
- A statement that the potential policy violations are being investigated;

16

16

Written Notice (Continued)

- A statement that the RP is presumed not responsible for the alleged conduct and that the determination regarding responsibility will be made at the conclusion of the grievance process;
- Both parties may have an advisor of choice, who may be, but is not required to be, an attorney, and may inspect and review all evidence;
- A statement that the parties may review evidence gathered as part of the any investigation;

17

17

Written Notice (Continued)

- A provision of the policy that knowingly making false statements or knowingly submitting false information during the grievance process is prohibited and subject to disciplinary action;
- Any other relevant information for the written notice; and
- A statement that retaliation is prohibited under the policy. (recommended)

18

18

Other **resources** to include with the written notice:

1. **Supportive measures** available for both parties
2. **Campus & local** resources or services
3. **Rights & options** of both parties
4. A copy of the **grievance process & policy**
5. Title IX Coordinator & Investigator(s) **contact information**



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



19

19

Party's Rights

A **Complainant** and **Respondent** have the following rights during a grievance process:

Information and Support

- To be informed of and have access to counseling, medical, academic, and other applicable **support services**, including **confidential resources**.
- To be informed of the importance of a victim going to a **hospital for treatment** and the **preservation of evidence**, if applicable, as soon as practicable after an alleged incident.
- To be informed of a **notice of formal complaint** to the University, whether filed by a CP or the TIXC.
- To receive information and ask questions about the **formal and informal processes**.

Equal Opportunity and Representation

- To receive a **prompt, fair, equitable, and impartial grievance process**
- To be given **equal chance** to participate in a grievance process, including the opportunity to identify witnesses and other relevant evidence and to **choose not** to actively participate in the grievance process, if desired.
- To have an **advisor of choice** present during all meetings and grievance proceedings.
- To have an **advisor provided** for a party at a **hearing** under the Title IX/SH grievance process, if an advisor of choice is not present.
- To have access and equal opportunity to **inspect and review any evidence obtained** as part of the investigation, and to receive a copy of the completed investigation report.
- To be **equally informed** of any **determinations** regarding responsibility, dismissals of formal complaints, and/or a party's filing of an appeal.
- To **appeal** a determination regarding responsibility and/or dismissals of formal complaints.
- To file a report with **local and/or campus law enforcement** authorities.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

20

20

Complainant's Rights

(related to the
Grievance Process)

- To **report** an incident and/or **file a formal complaint** with the University.
- To **request** in writing that the University **not investigate** a reported incident and be **informed** of the **University's decision** whether or not to investigate.
- To **request** in writing a **dismissal** of a formal complaint (e.g. withdraws the formal complaint or any allegations therein).



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

21

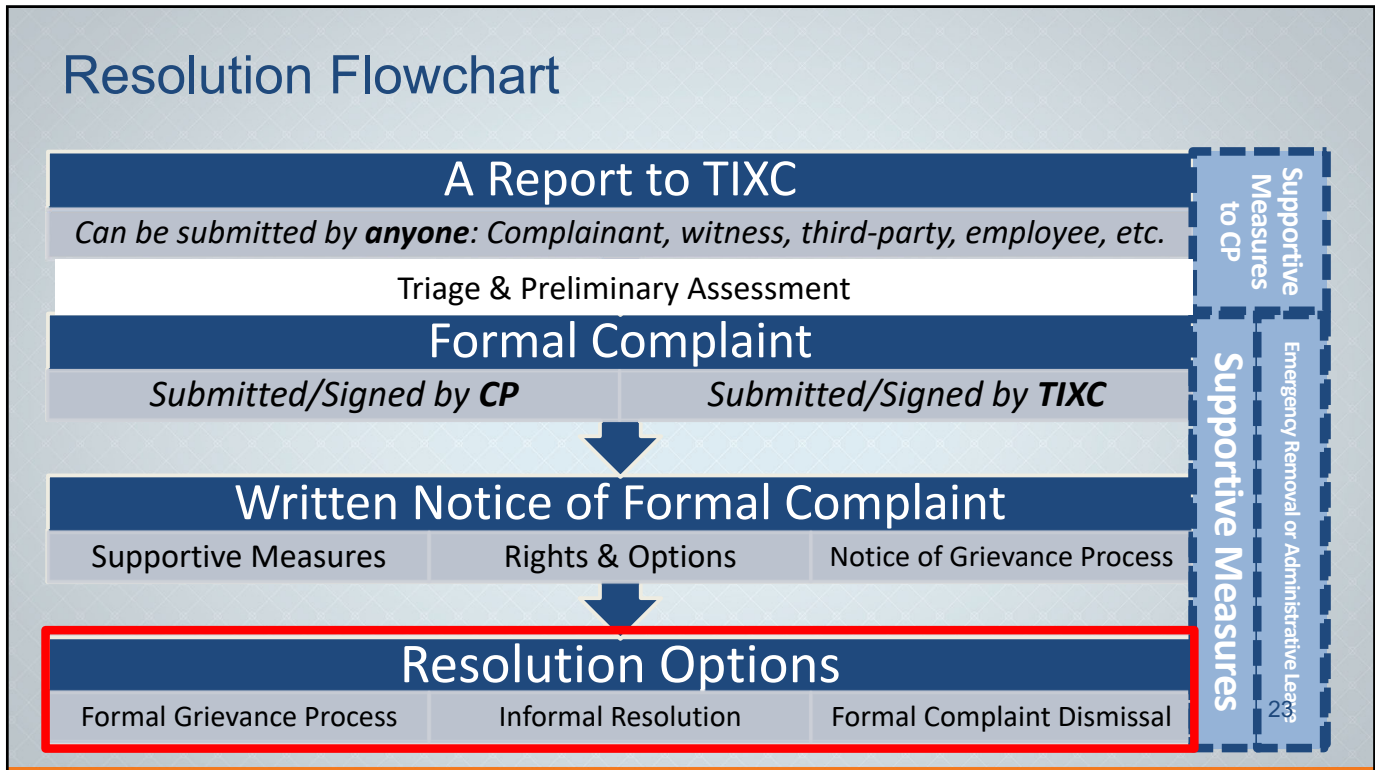
21

Resolution Options

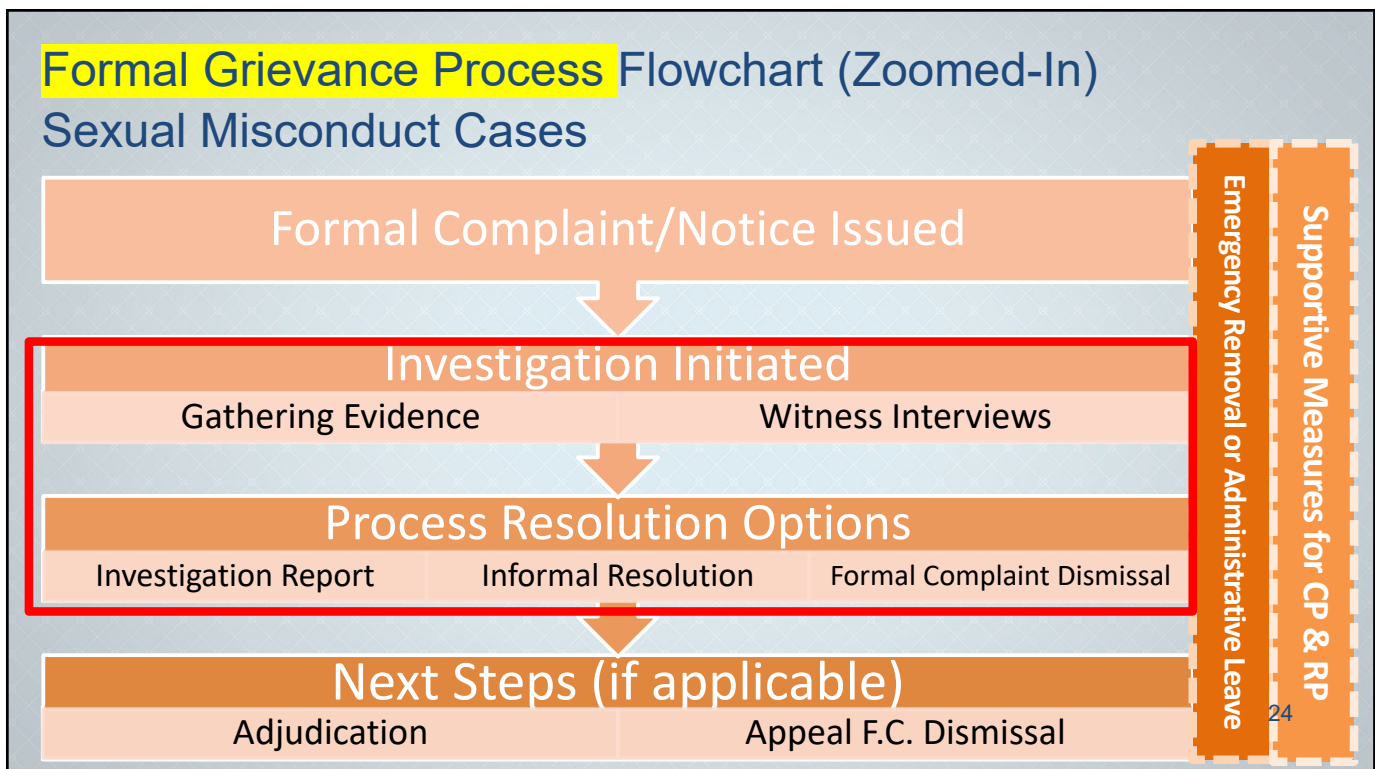
22

22

Resolution Flowchart



Formal Grievance Process Flowchart (Zoomed-In) Sexual Misconduct Cases



Conducting an Investigation: Ongoing Elements

25

25

Investigative Framework

- Establish **facts & timeline(s)**.
- Understand each party's **perception & experiences** of the alleged incident(s).
- Elicit **details & descriptions** of the alleged incident(s) from the parties & witnesses.
- Address **disputed facts or conflicting evidence** (if any) & seek responses from the parties (if applicable).
- Gather **sufficient information available** for a determination of facts, importance, & relevance to the formal complaint.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



26

26



Investigator Considerations

- One or two investigators?
- Roles of each investigator?
 - Facilitator
 - Notetaker
- Interview notetaking or recording?

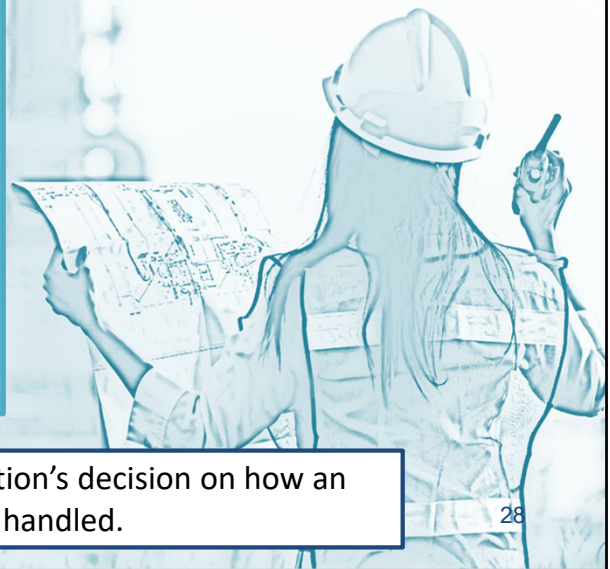
27

27

Investigation Plan: The Foundation

Basis for the investigation?

- Alleged **incident** of prohibited conduct
- Alleged **pattern** of prohibited conduct
- Alleged **climate issue(s)** in an area or department



Note: It is the institution's decision on how an investigation may be handled.

28



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

28

Look at the Provision(s) at Issue:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

29

29

Look at the Provision(s) at Issue:

Engaging in a (1) course of conduct (2) directed at a specific person that would (3) cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

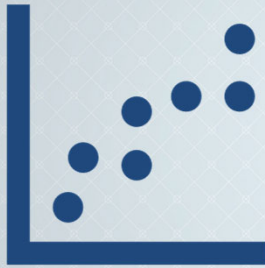


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

30

30

Basis: Pattern Investigations



- **Multiple incidents** of similar type of alleged conduct or circumstances with same RP?
- **Multiple complainants** regarding same or multiple incidents of similar type of alleged conduct or circumstances with same RP?
- **Multiple respondents** regarding same incident or situation?
- **Student organization** allegations?



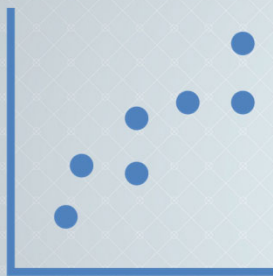
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Note: It is the institution's decision on how a pattern-based investigation may be handled.

31

31

Considerations: Allegation Patterns



- **Reports vs. Formal Complaints?**
 - **Report history** for same RP regarding similar conduct allegations? **Applicability** (if any) to the current investigation?
- **Consolidate pattern allegations** into one investigation?
- May be **larger-scale** in scope.
- **Multiple incidents?** May lend credibility to witness testimony regarding allegations of similar conduct with same RP?
- **Multiple complainants?** Information/privacy waivers, participation?



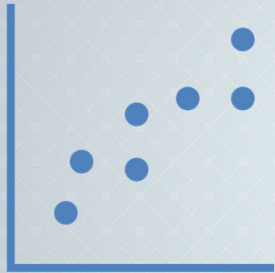
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Note: It is the institution's decision on how a pattern-based investigation may be handled.

32

32

Considerations: Allegation Patterns (Cont.)



- Balance focus on the **individual** and **pattern elements** of consolidated investigations:
 - Based on the **scope of the investigation**, consider **each allegation** on its own merits, with the relevant evidence gathered for each allegation
 - Same grievance process applied
- Document the **justification** for consolidating the investigation, if applicable. Examples might include, but are not limited to:
 - Multiple allegations? Similarity of allegations? How so?
 - Overlapping witnesses?
- **Student-based allegation patterns**: Emergency removal threshold met? (Individualized safety & risk analysis)

Note: It is the institution's decision on how a pattern-based investigation may be handled.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

33

33

Basis: Climate Investigations



- Generalized concerns about the **climate, environment, or policies** in a program or department.
- No specific incidents or allegations with a program or department.
- **Reputational** concerns or **exit interview** statements regarding a program or department.

Note: It is the institution's decision on how a climate-based investigation may be handled.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

34

34

Considerations: Climate Allegations



- May be **larger-scale** and more **open** in scope.
- Without specific RP's for a formal written notice, provide **notice** to the **program director** or **department chair**.
- Invite program or department affiliates as **witness interviews**, general prompts
- As evidence is collected & reviewed, triage & determine if the **basis or scope** needs to be **updated**.



Note: It is the institution's decision on how a climate-based investigation may be handled.

35

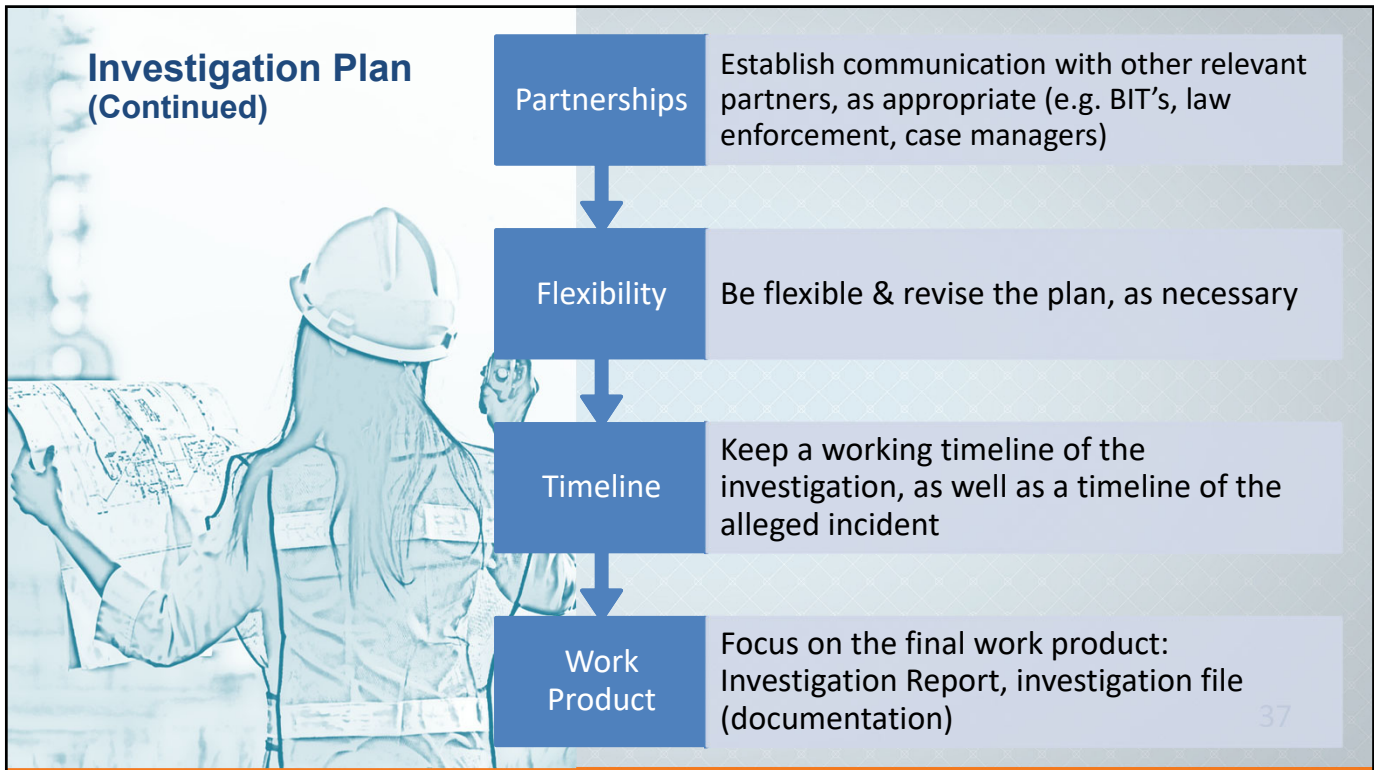
35

Investigation Plan (Continued)



36

36



37

Interview Notice

- Date, time, & location of the interview meeting
- Names of the invited or expected meeting participant(s)
- Purpose of the meeting or investigative interview
- Opportunity to present any information, evidence, and/or witnesses relevant to the formal complaint.
- An advisor of choice may attend, though not required.

38

38

Advisor Considerations

- Is an advisor of choice involved?
- Access to the related evidence & the finalized investigation report (closing steps of the investigation).
- Consider providing an advisor, if an advisor of choice has not been involved.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

39

39

Evidence Collection

- Available body of facts or information:
 1. Tangible objects (real items)
 2. Demonstrative (modeling)
 3. Documentary (written materials)
 4. Testimonial (statements)

...that indicates whether a claim, belief, or proposition may be true or valid.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

40

Closing Steps of the Investigation

41

41

Evidence Pyramid

Relevant
evidence

← Evidence included in the
Investigation Report

Evidence directly related to
the allegations

← Evidence provided to the parties &
advisors for inspection & response

42

42

Medical Records Evidence



Cannot access, consider, disclose, or use a party's **medical or mental health records** as evidence unless the party provides voluntary, written consent to the institution for the grievance process.

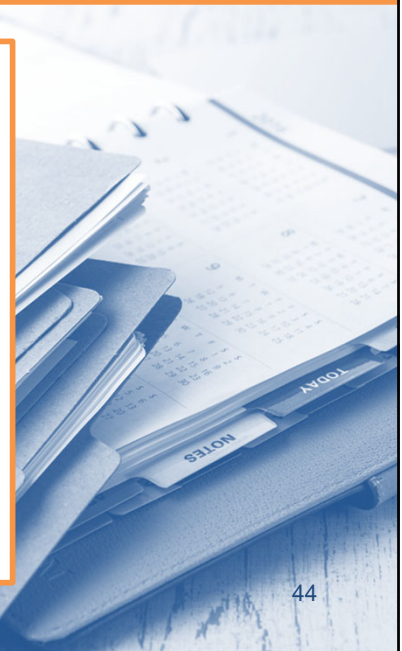
43

43

HIPAA vs. FERPA

The **medical or mental health record** is protected by **HIPAA**, and retained by the healthcare enterprise.

A copy of a medical or mental health record that is submitted to the investigation by the record holder (with voluntary, written consent) becomes protected under **FERPA** (students) and **privacy** provisions of the institution's policies. The documentation is eligible for **access to evidence** by both parties (and their advisors).



44



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

44

Access to Evidence

Equal opportunity to both parties (& the advisors) to **inspect & review any evidence obtained** that is directly related to the allegations in the formal complaint.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



45

45

Access to Evidence: Why?

So that each party can **meaningfully respond** to the evidence prior to the conclusion of the investigation.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



46

46

Access to Evidence: When?

- Upon request from a CP, RP, or an Advisor?
- At the end of the investigation?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



47

47

Access to Evidence (Cont.)

Send each party (& the advisors*) the applicable evidence:

- In hard copy or electronic format
- At least 10 days to inspect, review, & respond to the evidence
- All responses to the evidence must be submitted in writing to the investigator(s)

** Advisor of choice; or the provided advisor by the institution (If applicable)*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

48

48

Access to Evidence (Cont.)

The investigators will consider all timely responses submitted by the parties **prior** to completing the investigation report.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

49

49

Issues of Relevance

50

50

Review of Evidence

- Available body of facts or information:
 1. Tangible objects (real items)
 2. Demonstrative (modeling)
 3. Documentary (written materials)
 4. Testimonial (statements)

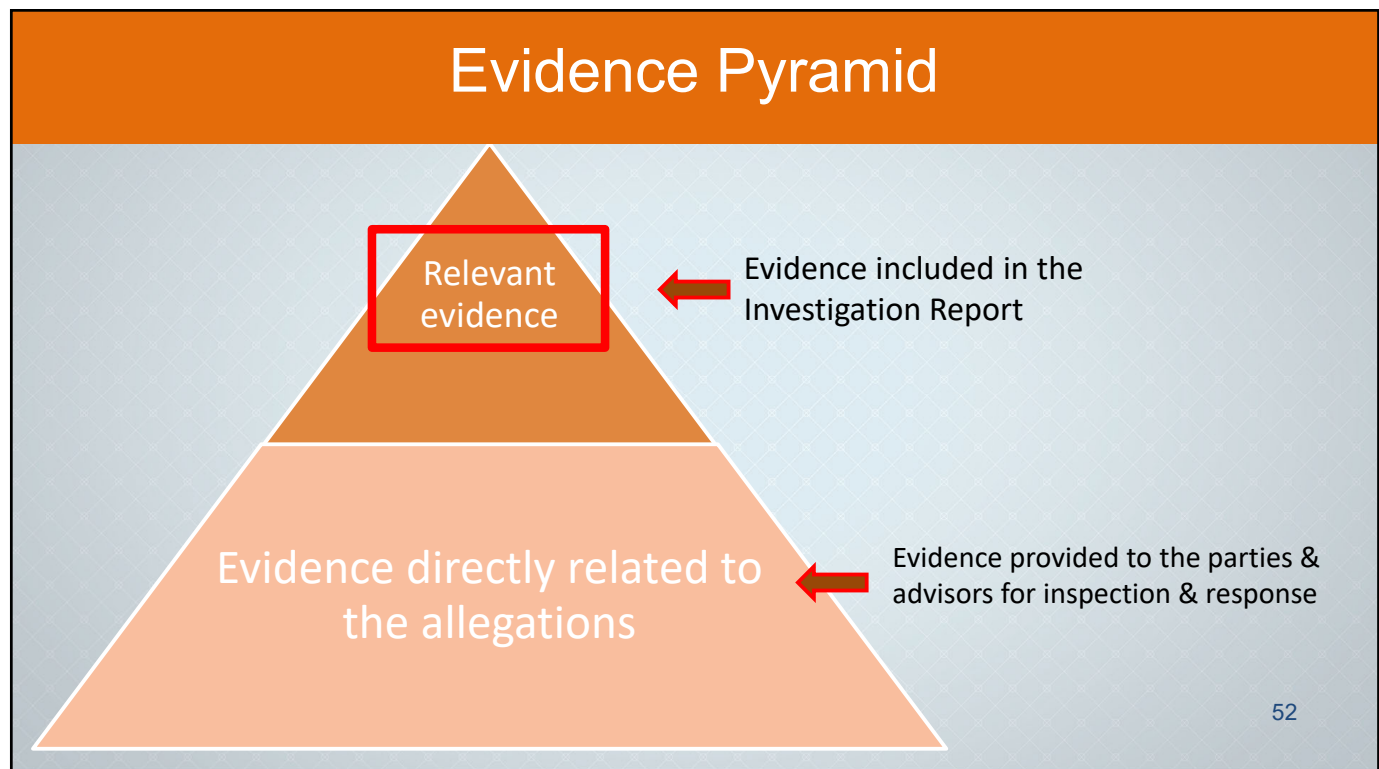
...that indicates whether a claim, belief, or proposition may be true or valid.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

51

Evidence Pyramid



52

52

Relevant Evidence



Evidence is **relevant** if:

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

53

53

Relevant Evidence



Another way to frame it:

- **Exculpatory evidence:** Evidence tending to excuse, justify, or absolve the person of the alleged conduct.
- **Inculpatory evidence:** Evidence that places responsibility on the person of the alleged conduct.

54

54

“Reasonable Person” Standard



Use a “**reasonable person**” standard for weighing all of the evidence:

- An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.

55

55

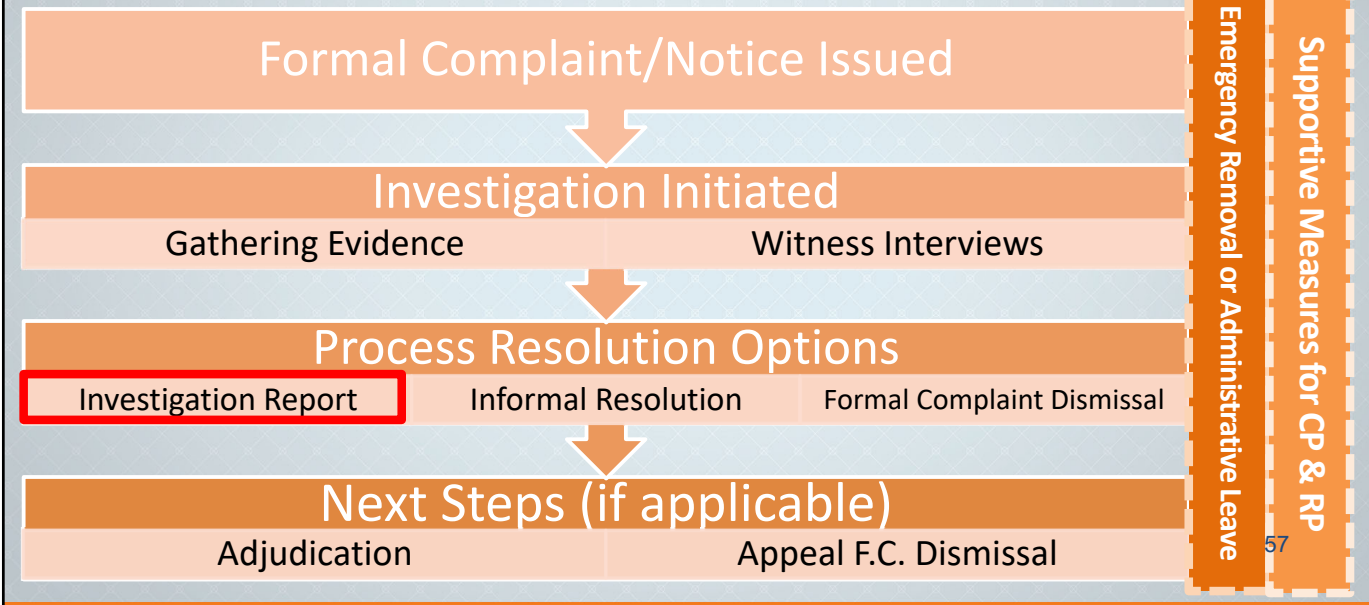


Investigation
Report

56

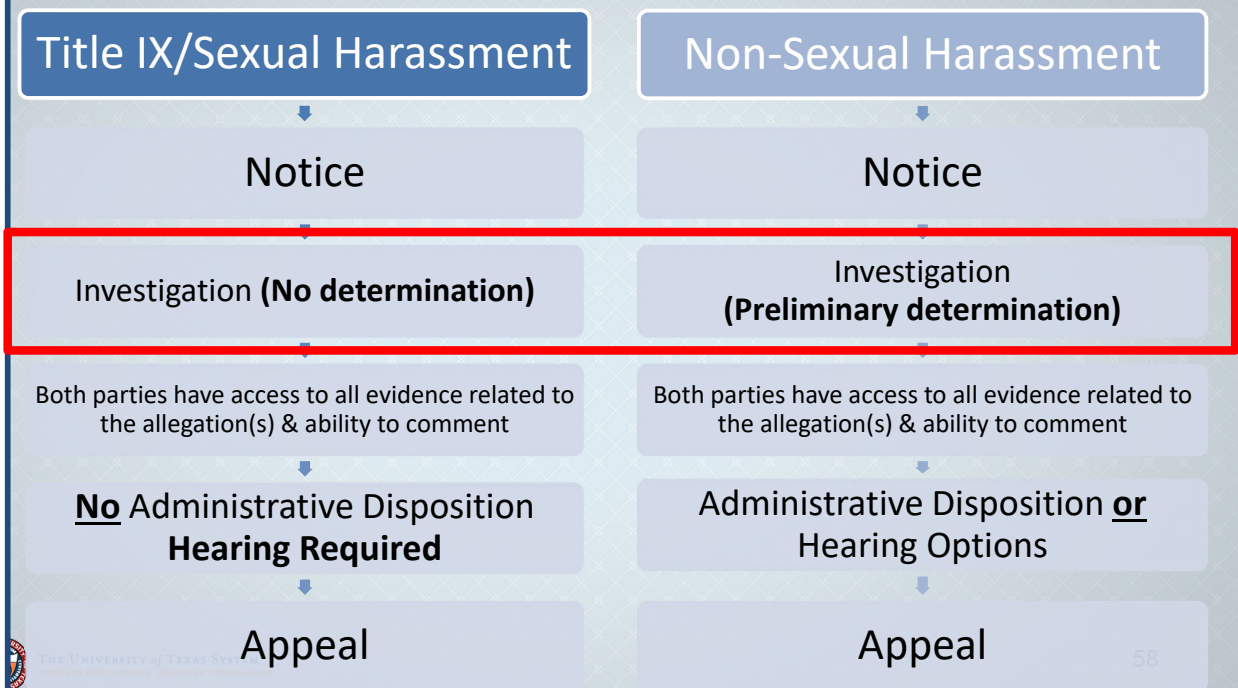
56

Formal Grievance Process Flowchart (Zoomed-In) Sexual Misconduct Cases



57

Outline Comparisons...



58

Draft vs. Completed Investigation Report

FAQ's:

- When should the investigation report be released to the parties (and the party's advisors)?
- Can the institution provide a draft investigation report first?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

59

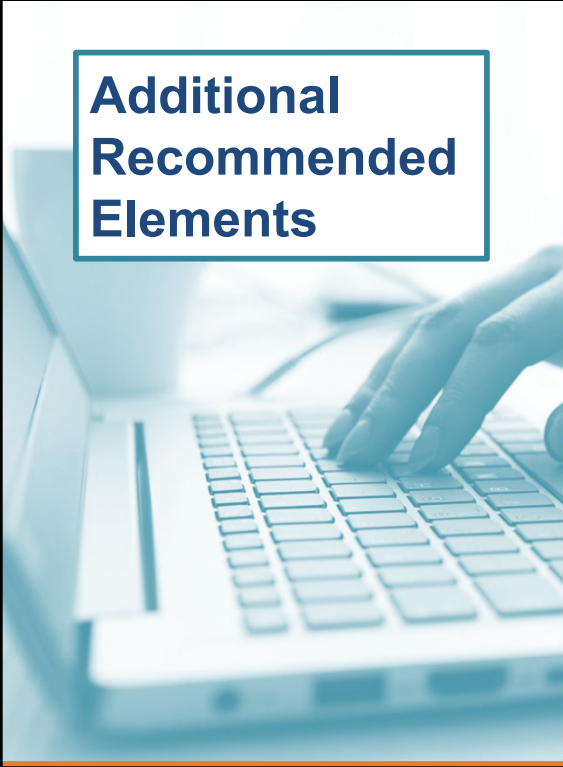
Completed Investigation Report: Sexual Harassment Cases

1. Outline each of the **allegations** that potentially constitutes prohibited conduct under the Policy (required by the Title IX regulations).
2. Provide a **timeline** (e.g. procedural steps) of the investigation. (recommended)
3. **Fairly summarize** relevant evidence, participant statements, and responses to questions (required by the Title IX regulations).
 - **Exculpatory**: Evidence tending to excuse, justify, or absolve the person of the alleged conduct.
 - **Inculpatory**: Evidence that places responsibility on the person of the alleged conduct.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

60



Additional Recommended Elements

- Overview (Summary) of the Investigation
- Institutional Jurisdiction
- Relevant Policies
- Investigators
- Witnesses
- Procedural Next Steps

61

61



What about these Elements?

- **Credibility assessments?**
- **Evidence analysis & rationale?**
- **Preliminary determination regarding responsibility?**

62

62

Access to the Completed Investigation Report

Send each party (& the advisors*) the completed investigation report:

- At least 10 days prior to the scheduled hearing
 - Why? Opportunity for the parties to inspect, review, & respond to the investigation report (at the hearing)
- A copy of the investigation report to the TIXC and hearing officer assigned.

** Advisor of choice; or the provided advisor by the institution (If applicable)*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

63

63

Investigation Timeframe (Example)

The investigation of a formal complaint will be concluded within **90 days** of the filing of a formal complaint

Note: Circumstances may require a **temporary delay** in this timeframe & the institution may extend this timeframe for good cause.

- Provide **notice** to the parties for temporary delays or extensions



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct

64

64

Investigation Documentation Examples

- Documentation Checklists & Forms
- Intake & Initial Assessments
- Case Management Timelines & Decisions
- Contact & Communications
- **Notices, Letters, & Dismissals**
- **Evidence Collection**
- **Investigation Report**
- Data Systems for Electronic & Hard Copy Records



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

65

Documentation & Record Keeping

The University (through the appropriate office) will retain all of the documentation included in the Grievance Process (outlined in the SM Policy) for 7 years, in accordance with state and federal records laws and University policy.

All documentation of records are private and confidential to the extent possible under law. Student records of the Grievance Process are disciplinary records under FERPA. Employee records of the Grievance Process are subject to the Freedom of Information Act (FOIA) and the Texas Public Information Act (TPIA), and included in the employee's official employment record.



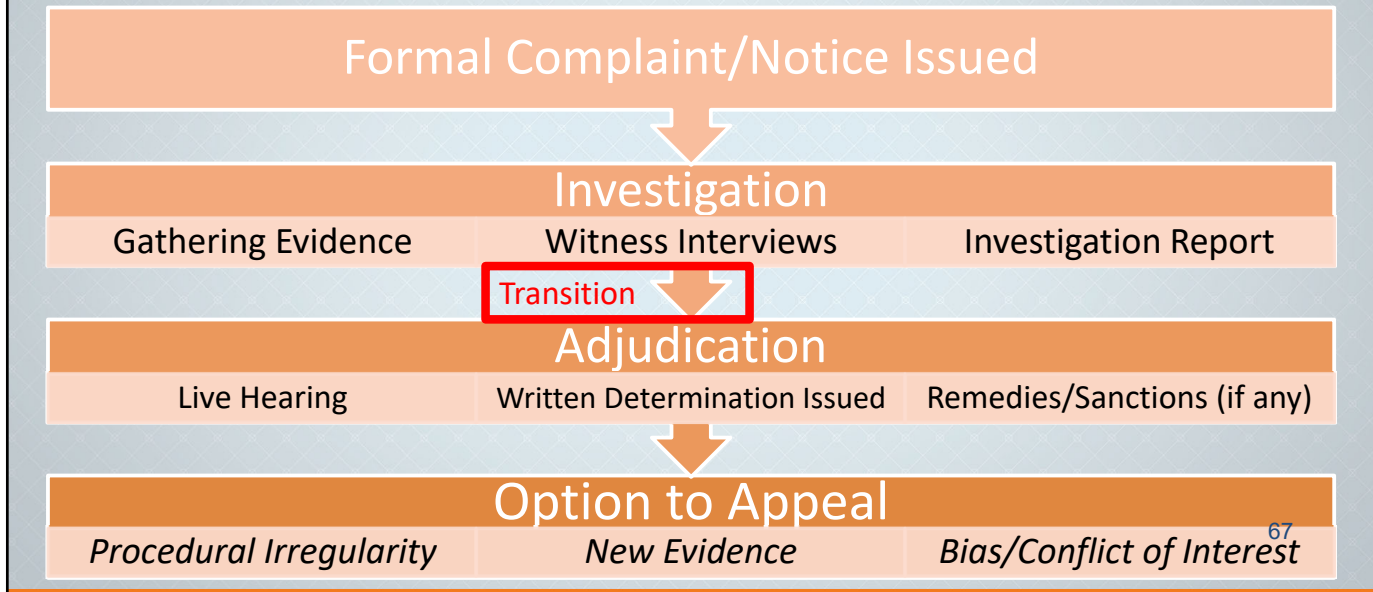
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct

66

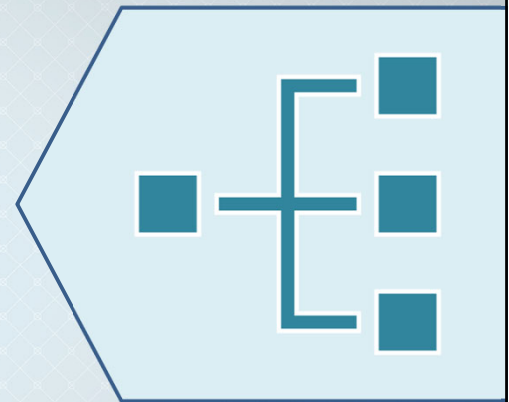
Formal Grievance Process Flowchart (Zoomed-In) Title IX/Sexual Harassment



67

Transition to Adjudication

- Transition process to the adjudication office? Referral?
- An administrative coordinator for the adjudication intake, scheduling, organizing, & communicating the next steps (e.g. hearing) to all participants.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

68

68

Adjudication Intake



Referral Type (RP)	Adjudication Office (Examples)
Student	Student Conduct
Faculty	Provost
Staff	Human Resources



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

69

69

Q & A



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

70

70

Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Associate General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

71

Pregnancy & Other Related Conditions

Krista Anderson, Systemwide Title IX Coordinator

Spring 2025



1

1

Agenda

1. Title IX & State Laws
2. Pregnancy Protections
 - Student Protections & Unique Student Circumstances
 - Employee Protections
3. Other Related Laws
4. Documentations and Case Management

2

2



Title IX (Educational Amendments of 1972)
prohibits discrimination **on the basis of sex** in educational programs or activities receiving federal financial assistance

Anyone participating in or attempting to participate in educational programs or activities



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

3

3

Title IX

Sex Discrimination
Sexual Harassment
Retaliation

Title IX's prohibition of sex discrimination applies to **pregnancy** and **other related conditions...**



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4

SB 412 Pregnancy and Parenting Policy for Students



- Requires IHE to provide **reasonable accommodations** for **pregnant students** relating to pregnancy, childbirth, or any resulting medical status or condition.
- Allows **pregnant or parenting students** (parent or legal guardian of a child under 18 years of age) **academic leave of absence without penalty**, if in good academic standing.
- Requires institutions to have a **policy** addressing pregnant and parenting related discrimination and accommodations available for this student population.
- The Texas Higher Education Coordinating Board (THECB) adopted administrative rules: [19 Tex. Admin. Code § 4.370-4.376](#) (2024)
- SB 412 is effective as of September 1, 2023, and the institution's pregnancy and parenting non-discrimination policy is effective as of **January 15, 2024**.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Tex. Edu. Code, Section 51.982 (effective 9/1/23, institutional policy required as of 1/15/24);
19 Tex. Admin. Code § 4.370-4.376 (2024)

5

5

SB 459 and HB 1361 Student-Parent Eligible Services



- **SB 459** requires institutions to provide **early registration** to **parenting students** (parent or legal guardian of a child under 18 years of age), if the IHE provides early registration for any groups of students.
- **HB 1361** requires institutions to have a designated institutional liaison for **parenting students**, and **institutional reporting requirements** to the THECB **May of each year**.
- The Texas Higher Education Coordinating Board (THECB) adopted administrative rules: [19 Tex. Admin. Code § 4.370-4.376](#) (2024)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Tex. Edu. Code, Section 51.983; Tex. Edu. Code, Section 51.9357 (effective 9/1/23);
19 Tex. Admin. Code § 4.370-4.376 (2024)

6

6



Pregnancy & Parenting Protections & Provisions

7

Title IX prohibits discrimination based on a student or employee's “actual or potential” status:

Parental status

Marital status

Pregnancy

Childbirth

Miscarriage

False pregnancy

Termination of pregnancy

Recovery

Temporary disability resulting from pregnancy



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Title IX 34 CFR § 106.40; § 106.57

8

Texas law provides protections for **pregnant or parenting students**:



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Tex. Edu. Code, Section 51.982

9

Examples of Student Pregnancy-Related Impacts & Needs



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Supporting the Academic Success of Pregnant and Parenting Students,
U.S. Department of Education (OCR), 2013

10

Title IX - Equal Participation



An institution shall not discriminate against any student or exclude any student from its education program or activity, including any class or extracurricular activities, based on such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the person voluntarily participates in a separate program or activity of the institution.

Title IX 34 CFR § 106.40(b)(1)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

11

11

Title IX - Separate Programs

An institution which operates a portion of its education program or activity **separately** for pregnant students, admittance to which is **completely voluntary** on the part of the student as provided in paragraph (b)(1) of this section (*Equal Participation*) shall ensure that the separate portion is **comparable** to that offered to non-pregnant students.

Title IX 34 CFR § 106.40(b)(3)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

12

12

Texas Law Provisions

Institutions may not require a **pregnant or parenting student**, solely because of the student's status as a pregnant or parenting student or due to issues related to the student's pregnancy or parenting, to:

- Take a leave of absence or withdraw from the student's degree or certificate program;
- Limit the student's studies;
- Participate in an alternative program;
- Change the student's major, degree, or certification program; or
- Refrain from joining or cease participating in any course, activity, or program at the institution.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Tex. Edu. Code, Section 51.982(b)

13

13

"Parenting student" is defined as "a student who is a parent or legal guardian of a child under 18 years of age".



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Tex. Edu. Code, Section 51.982

14

Leave of Absence

Unenroll from
the student's
current courses

Eligible to
re-enroll in
future courses
and continue the
academic
program at a
later term or
semester

Excused Absence

Stay enrolled in
the student's
current courses

Opportunity to
make-up
coursework or
exams missed

Earn grades or
credit for these
current classes



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

15

15

Student Leave of Absence Provisions

16

16

Texas Law Leave of Absence Provisions

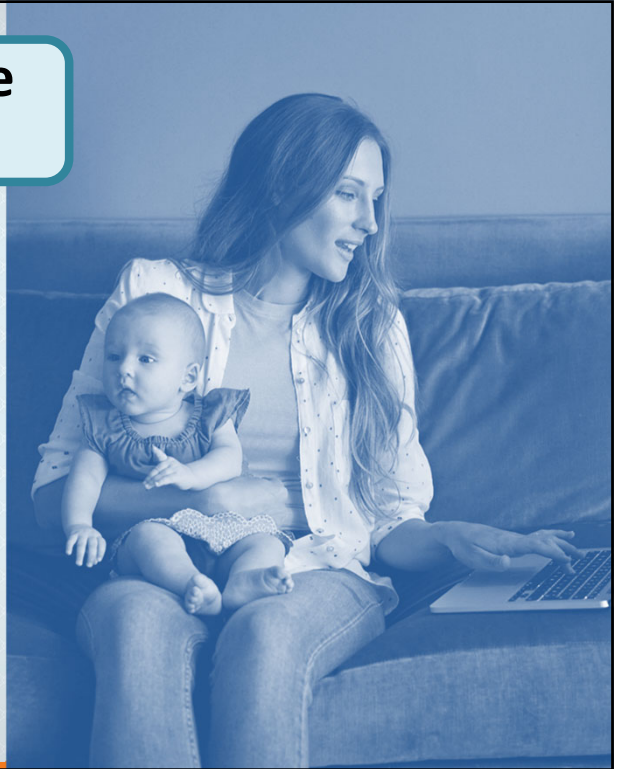
Institutions must allow a **pregnant or parenting student** to:

- Take a leave of absence; and
- If in good academic standing at the time of the leave of absence, return to the student's degree or certificate program in good academic standing without being required to reapply for admission.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

*Tex. Edu. Code, Section
51.982(e)*



17

Excused Absences & Reasonable Accommodations – Student Pregnancy Provisions

18

18

Title IX – Excused Absences & Opportunity to Make-up Coursework

The school must excuse a student's absences due to pregnancy or any related conditions.



A student cannot be penalized for missing class due to pregnancy or other related conditions.

There must be an equal opportunity given to earn credit from missed classes/assignments due to pregnancy.

Student is still **responsible** for earning course credit and completing the necessary coursework.



19

Title IX - Temporary Disability Policies

An institution shall treat pregnancy, childbirth, false pregnancy, termination or recovery therefrom in the **same manner** and **under the same policies** as any other **temporary disability** with respect to any medical or hospital benefit, service, plan or policy which such institution administers, operates, offers, or participates in with respect to **students** admitted to the institution's educational program or activity.

Title IX 34 CFR § 106.40(b)(4)



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



20

20

ADA/Section 504

Federal law prohibits **disability discrimination** and requires institutions to provide reasonable accommodations to qualified individuals with a disability.

Applicable for students and employees.

A **disability** under ADA/504 is

1. A physical or mental impairment that substantially limits one or more **major life activities**;
2. A person who has a history or record of such an impairment; or
3. A person who is perceived by others as having such an impairment.



Pregnancy itself is not a disability, but **complications** from pregnancy or childbirth may qualify.



Under ADA, accommodations that constitute **undue hardship** are not reasonable.

21

21

Texas Law Reasonable Accommodation Provisions

Institutions must provide **reasonable accommodations** to a **pregnant student**, including accommodations that:

- Would be provided to a student with a temporary medical condition; or
- Are related to the health and safety of the student and the student's unborn child, such as allowing the student to maintain a safe distance from substances, areas, and activities known to be hazardous or pregnant individuals or unborn children.



Tex. Edu. Code, Section 51.982(d)

22

22

Texas Law Provisions (Cont.)

Institutions must, for reasons related to a **student's pregnancy, childbirth, or any resulting medical status or condition**:

- Excuse the student's absences;
- Allow the student to make up missed assignments or assessments;
- Allow the student additional time to complete assignments in the same manner as the institution allows for a student with a temporary medical condition; and
- Provide the student with access to instructional materials and video recordings of lectures for classes for which the student has an excused absence (under this section) to the same extent that instructional materials and video recordings of lectures are made available to any other student with an excused absence.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Tex. Edu. Code, Section 51.982(e)

23

23

Documentation?

Under the state law, it's **prohibited** from requiring documentation that the pregnancy-related excused absences are "medically necessary".

If necessary, it is permissible to verify the pregnancy status, but no additional documentation can be required of the student for the student to receive excused absences and the opportunity to make-up coursework.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



24

Considerations for Reasonable Accommodations

Length of absences from classes, clinicals, etc.

Timing of the absences

Course objectives

Content missed as a result?

Are there alternative ways for the student to demonstrate competencies or skills?

Fundamental alteration to the program or accreditation requirements?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITY.

25

25

Examples of Make-up Coursework and Academic Alternatives

Flexible Attendance

Extensions on Coursework Deadlines

Reschedule Exam(s)

Re-weigh Curriculum Coursework %

Alternative Assignments

Independent Study

Extra Credit Coursework

Remote Participation (Zoom/Teams)

Change Course to Pass/Fail Status

Reduced Courseload Status

Not all of these examples may be reasonable or available, depending on the circumstances or course.

26

26

Student Hypothetical Part 1

Jin, a second-year undergraduate student, is in her third trimester and is due at the end of the semester. Jin has been missing classes periodically due to medical issues from the pregnancy and frequent doctor's appointments as a result.

Jin isn't sure how to handle her absences or what accommodations are available.

Check the institution's Student Pregnancy and Parenting Nondiscrimination Policy for requesting reasonable accommodations through the designated office.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

27

27

Student Hypothetical Part 2

Jin is due at the end of the semester. Jin has missed classes and assignments periodically due to ongoing medical issues from the pregnancy. Jin's professors have all provided Jin with multiple opportunities to make-up assignments and exams.

In one of her classes, Jin has only completed about 25% of the coursework, even with the opportunities offered by the professor to allow Jin to make-up the coursework missed. There is only one week left of classes, and Jin is due for delivery at the end of the week. Jin says she is unable to make-up the remaining coursework by the end of the semester and asks for an incomplete for the course so she can make-up the remaining work next semester.

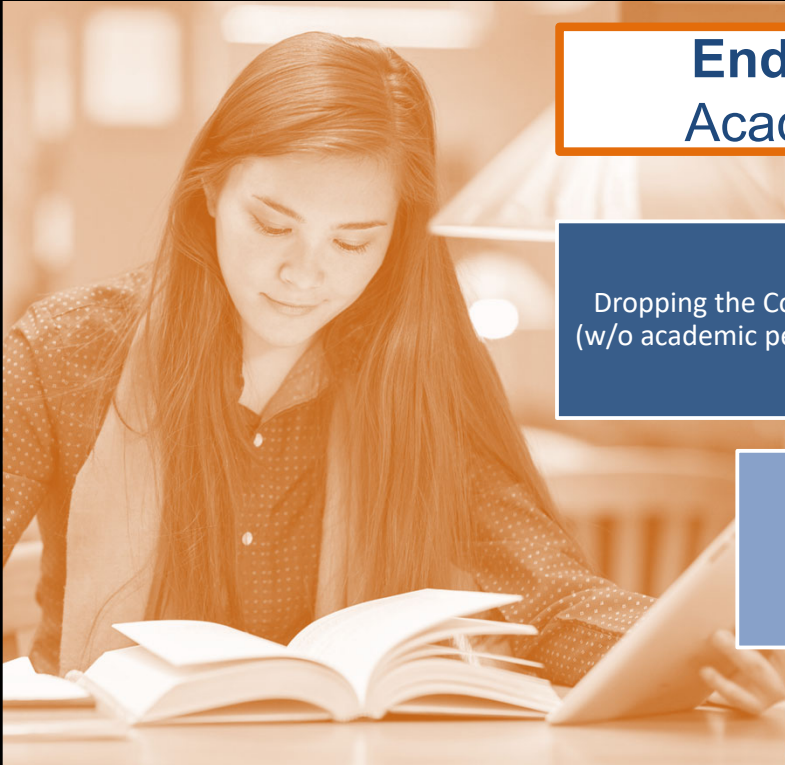
The professor typically only considers giving incompletes when the student has completed more than half (>50% of the coursework) and is unsure what to do.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

28

28

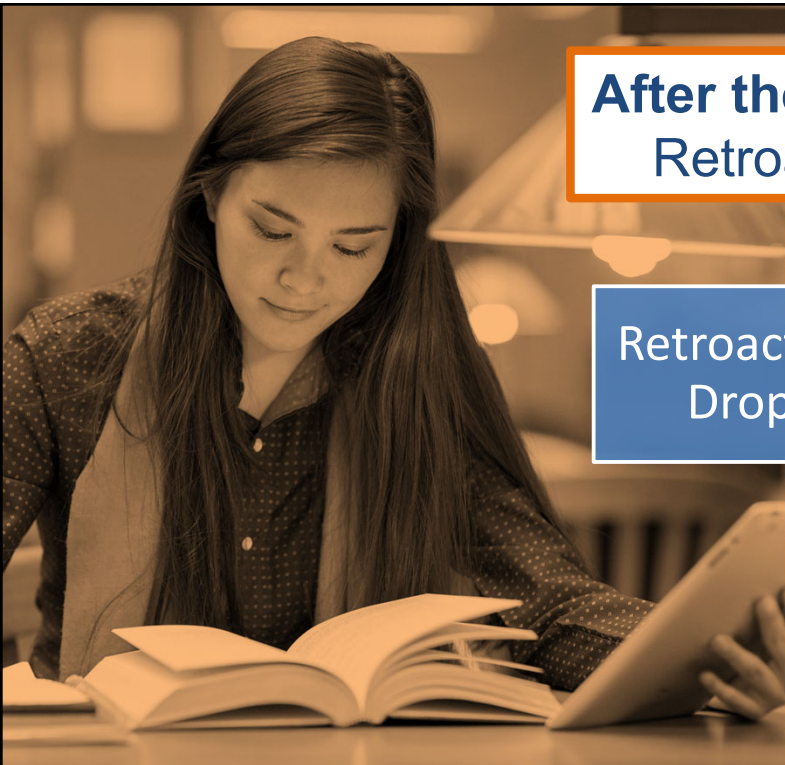


End of Semester Academic Options

- Dropping the Course
(w/o academic penalty)
- Leave of Absence –
Academic Withdrawal
from All Classes
(w/o academic penalty)
- Incomplete Grade
(if available)

29

29



After the Semester Ends Retroactive Options?

- Retroactive
Drop
- Retroactive
Withdrawal

30

30



31

31

Title IX - Medical Certification



An institution may require such a student to obtain the **certification of a physician** that the student is physically and emotionally able to continue participation so long as such certification is **required of all students** for other physical or emotional conditions requiring the attention of a physician.

Title IX 34 CFR § 106.40(b)(2)

32

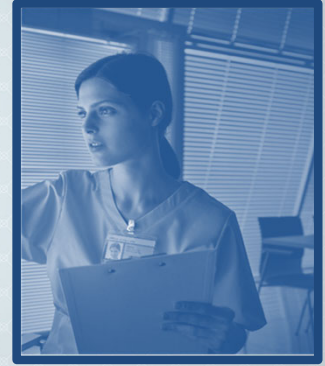


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

32

Clinicals & Cohort Programs

- **Continued Participation:**
 - Pregnant students are allowed to continue participating in off-campus programs.
 - If their program provides opportunities to work in the field, the program cannot deny participation based on pregnancy.
- **Reasonable Accommodations:**
 - Provide **reasonable accommodations** and allow for make-up work, as applicable to the student's circumstances.
 - If situations in class or clinicals are deemed **unsafe** for pregnant students, the student must be allowed to make-up work later or find a reasonable accommodation for the circumstances.
- **Leave of Absence:**
 - The pregnant student can take a **leave of absence** (withdrawal from classes), if clinicals cannot be completed by end of term.
 - The student must be **reinstated** to the status which was held when the leave began.
- **Hospitals and clinics** that have a contractual arrangement formally integrating students through their education program, these facilities must also adhere to Title IX compliance.



33

33

Jamie is enrolled in an accelerated dentistry program. Two months into the year-long program she finds out she is pregnant. The program has a strict absence policy with required classes and clinicals, in accordance with the program's accreditation requirements. If a student misses more than 2 days of classes or clinicals, the student will be dismissed from the program.

Clinical Hypothetical

The absence rule concerns Jamie since she has already missed 2 days of clinicals due to pregnancy-related conditions and she will need to miss a portion of her clinicals again due to additional doctor's appointments related to her pregnancy. Jamie looked at her program's course syllabus and there were no explicit exceptions or modifications addressed regarding pregnancy or related conditions.

Through an interactive process with the student, faculty, and/or the program's coordinator, explore whether reasonable accommodations can be identified based on the student's circumstances.

An alternative can also be a leave of absence (academic withdrawal from classes w/o penalty) and be reinstated to the same academic status before the leave.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

34

34

Student-Athletes

- **Continued Sport Participation:**
 - Pregnant student-athletes may continue participating in their sport or apply for a **red shirt season** (if pregnant).
 - Student-athletes can obtain the **medical certification** of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity.
 - A **student-athlete's physician** should make medical recommendations regarding sports participation, **not the coaches**.
- **Leave of Absence:**
 - The pregnant student-athlete can take a **leave of absence** from the athletics program due to pregnancy or related conditions.
 - The student must be **reinstated** to the student-athlete status which was held when the leave began.
- **Financial Awards:**
 - **Athletic financial awards** cannot be conditioned on not becoming pregnant and are protected during the term of award.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

35

35

Participation Heavy Courses

- **Participation-Based Grading:**
 - If there are "specific points or grades" assigned to **attendance or participation**, a student cannot be penalized when missing classes or participation based on pregnancy or related conditions.
 - Provide **reasonable accommodations** and allow for make-up work due to pregnancy or related conditions, as applicable to the student's circumstances.
 - Academic alternatives to participating in class may be reasonable, if it's not a fundamental alteration to the curriculum or otherwise an undue hardship.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

36

36

Lab Hypothetical

Scout is enrolled in a chemistry course that includes exposure to various chemicals for experiments, and grades are based heavily on attendance and lab participation.

Scout asks the professor to complete their labs remotely (Zoom) with another student facilitating Scout's experiments in person simultaneously in real time, under Scout's direction (to demonstrate her knowledge/comprehension of the course). The professor doesn't usually allow for alternative lab participation but also doesn't think it's safe for a pregnant student to be exposed to chemicals. The professor recommends that Scout drop the course and re-take in the future.

Through an interactive process with the student and faculty, explore whether reasonable accommodations can be identified based on the student's circumstances. Are there any reasonable alternatives available?

Dropping the class or taking a leave of absence (academic withdrawal from classes w/o penalty) are alternatives, voluntary to the student. 37



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

37

Labs/Chemical Exposure

- **Health and Safety Restrictions:**
 - Faculty can recommend but **cannot restrict** pregnant students from chemical or disease exposure in lab settings; cannot impose penalties for pregnant students who choose to abstain from chemical or disease exposure.
 - **Reasonable restrictions** for health & safety are permitted (as determined by a physician or doctor's note, voluntarily provided by the student).
- **Reasonable Accommodations:**
 - Provide **reasonable accommodations** and allow for make-up work, as applicable to the student's circumstances.
 - If situations in class or labs are deemed **unsafe** for pregnant students, the student must be allowed to make-up work later or find a reasonable accommodation for the circumstances.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

38

38

Co-Prospective Parent (Non-Pregnant Person)

- **Co-Prospective Parent:**
 - Under Title IX or state law, there are no provisions that require schools to provide reasonable accommodations to parenting students or the co-prospective parent (non-pregnant person) that is also a student.
 - Under state law, **parenting students** are eligible for a **leave of absence** (academic withdrawal from classes).
- **Other circumstances:**
 - Processes relating to **adoption, fostering, or fertility** are not explicitly addressed under 2020 Title IX Regulations or state law, but schools have discretion on how to apply reasonable accommodations and leaves of absence under these circumstances.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

39

39

Children in the Classroom

- **Childcare:**
 - Under Title IX or state law, there are **no requirements** permitting student's children in the classroom.
 - Children in the classroom can **interfere** with the learning environment.
 - **Childcare**, itself, is not considered "medically necessary" under Title IX.
 - There are **no requirements** under Title IX for schools to provide childcare for students or excuse absences due to lack of childcare available.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

40

40

Employment Pregnancy Laws

TITLE VII
Civil Rights Act

TITLE IX

41

41

2.2

Employee Protections Based on Pregnancy or Related Condition

Title IX prohibits sex discrimination of employees in education programs or activities, including pregnancy or related status.

Title VII as amended by the **Pregnancy Discrimination Act (PDA)**, which prohibits employment discrimination based on:

- Current pregnancy
- Past pregnancy
- Potential or intended pregnancy
- Medical conditions related to pregnancy or childbirth



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

42

42

Examples of Employee-related Impacts & Needs

Work-related
Accommodations due
to pregnancy or
related conditions

Excused Work
Absences (Paid or
Unpaid Leave)

Changes in the Work
Environment

Alternative
Participation Options

Breast Milk
Expression



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

43

Employees: Family Medical Leave (FML)

FML is a benefit that provides eligible employees **up to 12 workweeks of unpaid leave a year** and requires group health benefits to be maintained during leave, as if employees continued to work instead of taking leave.

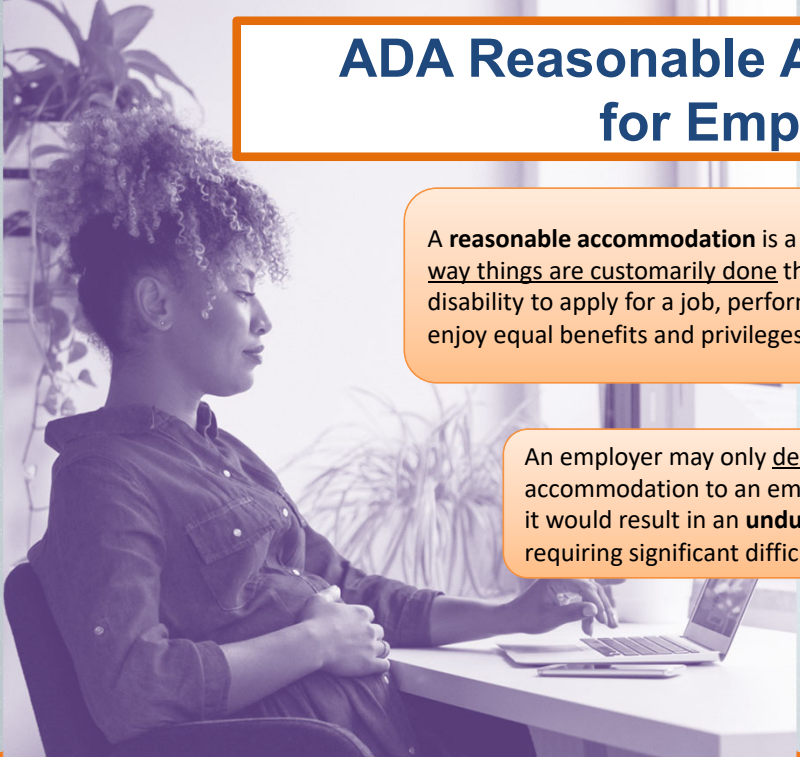
Employees are entitled to return to their **same or an equivalent job** at the end of their FML.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

44

44



ADA Reasonable Accommodations for Employees

A **reasonable accommodation** is a change in the workplace or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.

An employer may only deny a reasonable accommodation to an employee with a disability if it would result in an **undue hardship** (an action requiring significant difficulty or expense).

ADA Amendments of 2008, U.S. Equal Employment Opportunity Commission (EEOC) 45

45

ADA Reasonable Accommodations (Employee-Related Examples)

- Redistributing **marginal functions** (i.e. non-fundamental/non-essential job duties).
- Altering **how** a **job function** is **performed** (e.g. modifying standing, lifting, climbing, or bending requirements).
- Modifying **workplace policies**.
- Purchasing or modifying **equipment** or **devices** (e.g. foot stool, larger desk).
- Modifying **work schedules**.
- Temporary assignment to a **"light duty"** position.

46

Pregnant Workers Fairness Act (PWFA)

- Effective June 2023
- Similar to ADA obligations, requiring **reasonable accommodations** to employees and applicants with **temporary physical or mental limitations** due to pregnancy or related conditions.
- Similar to ADA, incorporates an “**interactive process**” – good faith discussion between employer and employee to try to identify reasonable accommodations.
- **As of February 2024, Texas court issued permanent injunction enjoining the enforcement of the PWFA against Texas.**

47

47

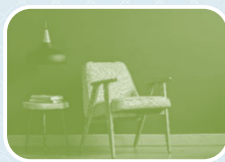
3

Other Related Laws

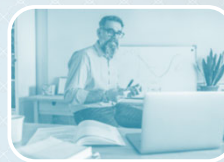
Breastfeeding & Lactation Challenges



Time



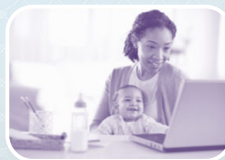
A Safe Space



Accommodations



Free from Harassment



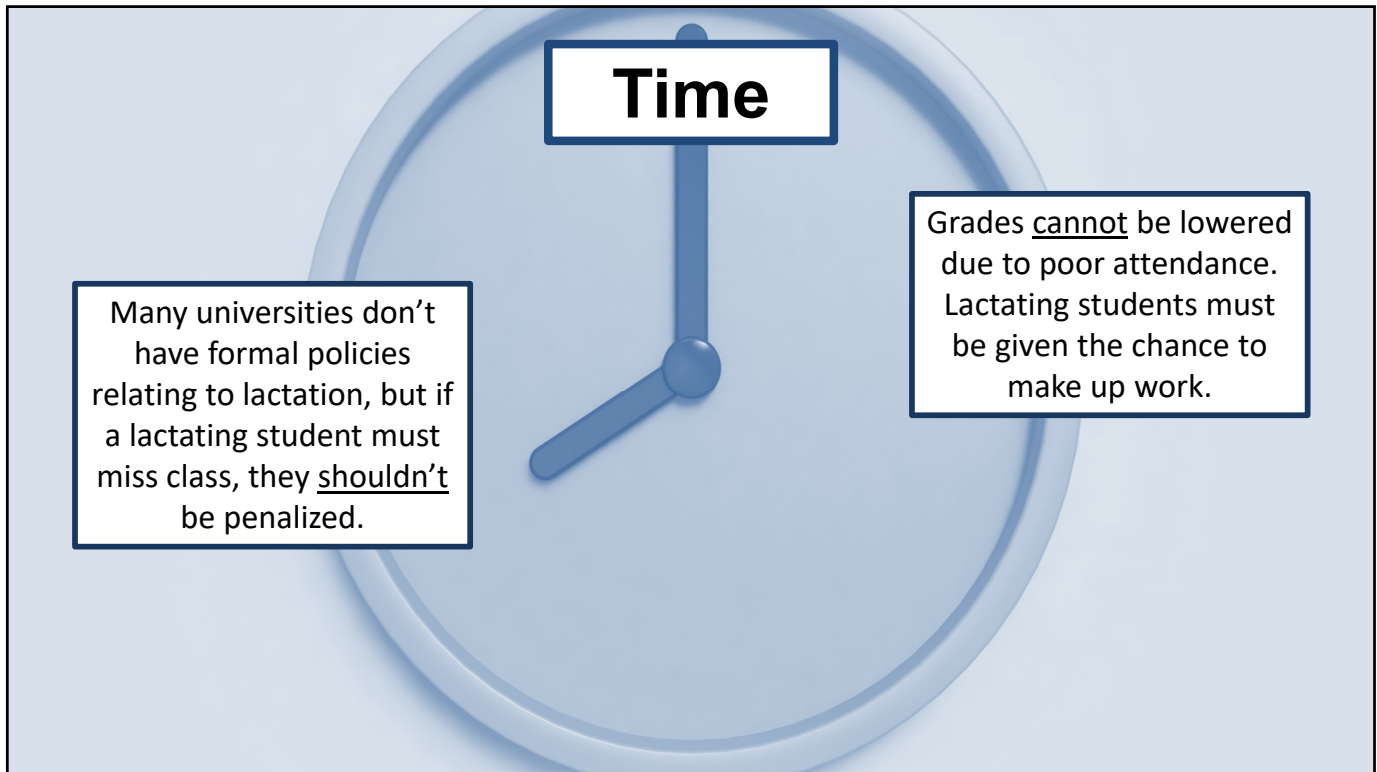
Finding A Pump or Other Support



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

48

48



Time

Many universities don't have formal policies relating to lactation, but if a lactating student must miss class, they shouldn't be penalized.

Grades cannot be lowered due to poor attendance. Lactating students must be given the chance to make up work.

49



A Safe Space

The institution **cannot** delegate a **private room** to pump or breastfeed to be a **bathroom**.

If other students are given access to **private space**, **refrigerators**, or **electrical outlets** to address non-pregnancy/childbirth-related medical conditions, then lactating students should be given the same special services to address their lactation-related needs.

50

50

Employees: PUMP Act (2022)

Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act

- Amended the Fair Labor Standards Act (FLSA) that requires employers to provide:
 - Reasonable break time** for an employee **to express breast milk** as they need to for one year after the child's birth; and
 - A **place**, other than a bathroom, that is shielded from view and free from intrusion for an employee **to express breast milk**.
- Applies to non-exempt and exempt employees; not guaranteed paid break time though.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

51

Accommodations

The school must accommodate any **lactation-related impairments**, such as serious infections, as with other **medical conditions** and accommodations.

52

52

Free from Harassment

The school must protect students from pregnancy or nursing-related harassment or other discrimination, including having **policies** that prohibit sex discrimination, and having **grievance procedures** to respond to complaints.

Comments that may constitute prohibited harassment include, but are not limited to:

- Making sexual comments or jokes about the person's pregnancy;
- Calling the person sexually charged names;
- Spreading rumors about the person's sexual activity;
- Making sexual propositions or gestures toward the person.

53

53

Finding a Pump & Other Support

The **Affordable Care Act** requires most health insurers to cover the cost of a breast pump and counseling on breastfeeding.

The **Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)** also provides pumps and other breastfeeding benefits.

54

54

TIXC Documentation & Record Keeping - Examples

- Professor Notifications
- Supervisor Notifications
- Documentation
- Any other coordinated supportive measures or assistance



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

55

55

Q & A



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

56

56

Contact Information

Krista Anderson

Systemwide Title IX Coordinator

Office of Systemwide Compliance
UT System (Austin, TX)

Phone: 512-664-9050

Email: kranderson@utsystem.edu



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

57

Sexual Assault, Consent, and Incapacitation Scenarios Training

Sean Flammer, Associate General Counsel
Krista Anderson, Systemwide Title IX Coordinator

Spring 2025



1

Agenda

- Introduction & Disclaimers
- Key Definitions in the UTS Model Policy for Sexual Misconduct
- Hypothetical Scenarios & Discussion

2

2

Why Attend This Training?



Disclaimers & Notes about this Training

- **Content Warning:** The content of this training may contain sexually explicit hypothetical scenarios of sexual assault, sexual exploitation, non-consensual sexual contact, and/or other inappropriate sexual conduct.
- **Policy Differences:** For the purposes of this training, the UTS Model Policy for Sexual Misconduct will be the primary policy reference. UT Institutional policies may have some differences.

Definition of “Sexual Assault”

An offense that meets the definition of Rape, Fondling, Incest, or Statutory Rape:

- **Rape:** The causing of 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.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

5

5

Consent Definition

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

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct

6

6

Intimidation Definition

Unlawfully placing another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct

7

7

Coercion Definition

The use of unreasonable pressure to compel another individual to initiate or continue sexual activity against an individual's will. Coercion can include a wide range of behaviors, including psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail that causes the person to engage in unwelcome sexual activity. A person's words or conduct are sufficient to constitute coercion if they eliminate a reasonable person's freedom of will and ability to choose whether or not to engage in sexual activity.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

8

8

Incapacitation Definition

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct

9

9

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

If the answer to either of these questions is “YES,” consent was absent and the conduct is likely a violation of this Policy.

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct

10

10

Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is prohibited inappropriate or unprofessional sexual conduct.

Such conduct is:

1. **Verbal conduct** (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.
2. **Physical conduct** that is objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

11

11

“Other Inappropriate Sexual Conduct” Cont.

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature;
- Deliberate physical interference with or restriction of movement; or
- Consensual sexual conduct that is unprofessional and inappropriate, and created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

12

12

Definition of “Sexual Exploitation”

Conduct where an individual takes non-consensual or abusive sexual advantage of another for their own benefit, or to benefit anyone other than the one being exploited.

Examples of sexual exploitation include, but are not limited to: engaging in sexual voyeurism; forwarding of pornographic or other sexually inappropriate material by email, text, or other channels to non-consenting students/groups; the intentional removal of a condom or other contraceptive barrier during sexual activity without the consent of a sexual partner; threatening to “out” someone based on sexual orientation, gender identity, or gender expression; threatening to harm oneself if the other party does not engage in the sexual activity; threatening to disclose someone’s highly personal images; threatening to disclose sensitive details about one’s sexual preferences, habits, and/or experiences; and threatening to expose someone’s prior sexual activity to another person; and any activity that goes beyond the boundaries of consent, such as recording of sexual activity, letting others watch consensual sex, or knowingly transmitting a sexually transmitted disease (STD) to another.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

13

13

Hypotheticals

14

14

Participant Goals

- **Primary goal:** Based on the information provided in each hypothetical scenario, make a **determination** as to whether or not the preponderance of the evidence is met for a policy violation (if applicable).
- **Secondary goal:** Identify the types of **questions** you would ask during the investigation or in a live hearing to understand the situation further and/or seek clarity?



15

15

Hypothetical Scenario 1

Complainant and Respondent are both students and meet for the first time at an off-campus party. They both consume alcohol “heavily” throughout the evening.

CP & RP start kissing and “making out” at the party. Then, CP & RP walk to CP’s apartment. At the apartment, CP states “*I don’t want sex*” but says “*I’m fine ‘playing around’ a little.*” Then, CP & RP undress their own clothes and begin kissing and touching each other’s bodies on CP’s bed. RP penetrates CP with RP’s fingers. CP shakes head from side to side and whispers “*no no no*” in a quiet but audible voice. RP does not stop immediately.

CP files a Formal Complaint and states that RP “sexually assaulted” CP.



16

16

Consent Definition

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

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

17

17

Hypothetical Scenario 2

Complainant and Respondent are both students in a sexual relationship for about 5 months and both describe the relationship as *"friends with benefits."* Generally each week, either the CP or RP will text the other person to see if the other wants to *"hook up."* *"Hooking up"* usually consists of (a) watching some television together and making small talk; and (b) at some point, one person initiates kissing and sex. Once during the first month, CP & RP had penetrative intercourse. Other than that, all of the sexual contact has been oral.

On the night of the incident, CP invites RP to CP's apartment. CP states that CP intended that they would each perform oral sex on each other just like they had multiple times. When RP arrives at CP's apartment, neither person exchanges any words. Instead, CP and RP begin kissing. CP begins performing oral sex on RP. RP then penetrates CP with RP's penis. CP states that when RP penetrated CP, CP *"froze"* and did not know what to do. CP states that the penetration was not consensual.

CP files a Formal Complaint and states that the penetration on that night lacked any *"consent."* CP cites materials from a campus advocacy organization that states that consent must be verbal and that there must be consent for each sexual act. The next day, RP files a Formal Complaint and states that if the penetration was *"not consensual,"* neither was the oral sex CP performed on RP. Therefore, RP asserts RP *"was the victim of sexual assault"* by CP.



THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

18

18

Consent Definition

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

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

19

19

Hypothetical Scenario 3

Complainant and Respondent are both students. One night they were at Complainant's apartment, and they began kissing. Complainant kissed Respondent first. Respondent reciprocated the kiss and began hugging Complainant, moving Respondent's hands on Complainant's back. Complainant did the same. This continued for a moment before Respondent moved Respondent's hand to Complainant's breasts, over Complainant's clothes. Complainant pushed Respondent's hand away.

They continued kissing for a few more minutes and Complainant began kissing Respondent's neck. Respondent tried to touch Complainant's breasts again. Again, Complainant moved Respondent's hands away while they continued kissing. They kissed for a few more seconds and then Complainant told Respondent Complainant had to study.

The next day, Complainant told a friend about the encounter, who told Complainant that Complainant had been sexually assaulted (touching breasts without consent). Complainant had previously not characterized the event as a sexual assault. But CP now considers the RP's behavior as a sexual assault. CP files a Formal Complaint.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

20

20

Definition of “Sexual Assault”

An offense that meets the definition of Rape, Fondling, Incest, or Statutory Rape:

- **Rape:** The causing of 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.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

21

21

Consent Definition

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

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

22

22

Hypothetical Scenario 4

Complainant and Respondent are both Ph.D. students in their early 30s, married to each other. CP does not want to have children. RP does want children. For years, RP has taken birth control pills and CP knows this. RP decides she wants to get pregnant even if CP does not want children; RP decides to stop taking birth control pills.

CP & RP engage in vaginal intercourse throughout the next two months. Each time, the two discuss whether to have sex and each says “Yes, *I want to have sex*” before any sexual activity occurs. Then, RP becomes pregnant. When CP finds out about the pregnancy, RP confesses that she intentionally stopped taking birth control pills to get pregnant and says that she assumed once she was pregnant CP would share the excitement and decide that he wants a child. CP initiates a separation and files for divorce.

CP files a Formal Complaint and says he was “sexual assaulted” because “*the sex was not consensual.*” He states that he verbally consented to “protected sex, **not unprotected sex.**”



23

23

An offense that meets the definition of Rape, Fondling, Incest, or Statutory Rape:

Definition of “Sexual Assault”

- **Rape:** The causing of 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.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.



Source:

UT System Model Policy for Sexual Misconduct (2022)

24

24

Consent Definition

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

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

25

25

Definition of "Sexual Exploitation"

Conduct where an individual takes non-consensual or abusive sexual advantage of another for their own benefit, or to benefit anyone other than the one being exploited.

Examples of sexual exploitation include, but are not limited to: engaging in sexual voyeurism; forwarding of pornographic or other sexually inappropriate material by email, text, or other channels to non-consenting students/groups; the intentional removal of a condom or other contraceptive barrier during sexual activity without the consent of a sexual partner; threatening to "out" someone based on sexual orientation, gender identity, or gender expression; threatening to harm oneself if the other party does not engage in the sexual activity; threatening to disclose someone's highly personal images; threatening to disclose sensitive details about one's sexual preferences, habits, and/or experiences; and threatening to expose someone's prior sexual activity to another person; and any activity that goes beyond the boundaries of consent, such as recording of sexual activity, letting others watch consensual sex, or knowingly transmitting a sexually transmitted disease (STD) to another.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

26

26

Hypothetical Scenario 5

Complainant and Respondent share a class together. Respondent learns Complainant's name and sends an invite to Complainant to be a "friend" on Instagram, an invitation Complainant accepts.

Respondent captures some of the images of Complainant from Instagram and together with other technologies makes a "deepfake" pornographic video.

To an observer, the video appears to be a naked Complainant engaging in intercourse. Respondent then distributes the video to some friends and eventually the Complainant learns of it.

Complainant files a Formal Complaint and Complainant says they are "horrified."



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

27

27

Definition of "Sexual Exploitation"

Conduct where an individual takes non-consensual or abusive sexual advantage of another for their own benefit, or to benefit anyone other than the one being exploited.

Examples of sexual exploitation include, but are not limited to: engaging in sexual voyeurism; forwarding of pornographic or other sexually inappropriate material by email, text, or other channels to non-consenting students/groups; the intentional removal of a condom or other contraceptive barrier during sexual activity without the consent of a sexual partner; threatening to "out" someone based on sexual orientation, gender identity, or gender expression; threatening to harm oneself if the other party does not engage in the sexual activity; threatening to disclose someone's highly personal images; threatening to disclose sensitive details about one's sexual preferences, habits, and/or experiences; and threatening to expose someone's prior sexual activity to another person; and any activity that goes beyond the boundaries of consent, such as recording of sexual activity, letting others watch consensual sex, or knowingly transmitting a sexually transmitted disease (STD) to another.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:
UT System Model Policy for Sexual Misconduct (2022)

28

28

Hypothetical Scenario 6

Complainant and Respondent meet at a party. CP & RP each drink 5-7 cups of “punch” throughout the evening and decide to go to RP’s apartment. On the way to RP’s apartment, CP stumbles and falls.

When CP & RP arrive at RP’s apartment, RP goes to the kitchen to fix a snack. When RP returns, CP is asleep on the couch. RP begins kissing CP. CP kisses back but then falls asleep again. RP penetrates CP while CP is asleep.

CP files a Formal Complaint and states that the penetration was “*not consensual.*”



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

29

29

Incapacitation Definition

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

30

30

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated, the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated? And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

If the answer to either of these questions is “YES,” consent was absent and the conduct is likely a violation of this Policy.

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

31

31

Hypothetical Scenario 7

Complainant and Respondent meet at a party. They each drink 5-7 drinks throughout the evening. CP's friends state that CP was acting “*drunk*” and was “*loud*” and “*laughing a lot*.” They decide to go to RP's apartment. On the way to RP's apartment, CP vomits.

When they arrive at the apartment, RP begins kissing CP while they sit on the couch, and CP kisses back. CP gets on top of RP and begins undressing RP while kissing. CP then asks RP if they can go to RP's bed. RP responds, “Yes.” CP & RP have sex.

CP files a Formal Complaint and states that the sex was “*not consensual*.” CP has “*little memory of the event*” but does remember asking RP to have sex and RP's response.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

32

32

Incapacitation Definition

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

33

33

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

If the answer to either of these questions is “YES,” consent was absent and the conduct is likely a violation of this Policy.

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

34

34

Hypothetical Scenario 8

Complainant and Respondent meet at a party and spend a lot of time talking and laughing. CP recalls drinking 5 cups of “punch.” CP vomits at the party. When the party ends, CP orders an Uber-ride home. CP gets into the Uber car and the car begins its trip. While in the Uber car on the way to CP’s apartment, there is road construction that confuses the Uber driver. CP directs the driver around the construction to get home using an alternative route. Then, one mile away from CP’s apartment, CP receives a text from RP where RP invites CP to RP’s apartment and provides an address. RP states that RP “*really enjoyed talking with [CP] and would like to spend some more time together.*” When CP tells the Uber driver that CP wants to go to a different address, the driver tells the CP that CP must tell the Uber app what the new address is. CP does so and texts RP when the car gets close to the Main Street address, “*In Uber, turning on Mains Street.*”

According to RP, at RP’s apartment, RP asked CP to have sex and CP said “Yes.” CP, however, does not remember anything after vomiting at the party. The next morning, CP dresses and leaves before RP wakes up. When CP gets home, CP texts RP, asking what happened. RP explained “*We had sex.*” CP states that “*if we had sex, it was not consensual.*” CP files a Formal Complaint.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

35

35

Incapacitation Definition

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

36

36

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated, the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated? And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

If the answer to either of these questions is “YES,” consent was absent and the conduct is likely a violation of this Policy.

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

37

37

Hypothetical Scenario 9

Complainant and Respondent meet at a party and drink “heavily” throughout the evening. CP & RP talk about going back to RP’s apartment.

Once at RP’s apartment, RP asks if CP wants to have sex and CP says “No, I just want to go to bed. But let’s cuddle.” CP & RP go to sleep in RP’s bed, a twin mattress.

In the morning, CP awakes and finds an asleep RP “spooning” CP’s body. One of RP’s hands is touching CP’s breast and RP has an erection that is pressing against CP’s body.

CP believes CP is a victim of sexual assault and files a Formal Complaint.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

38

38

Definition of “Sexual Assault”

An offense that meets the definition of Rape, Fondling, Incest, or Statutory Rape:

- **Rape:** The causing of 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.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.



Source:

UT System Model Policy for Sexual Misconduct (2022)

39

39

Hypothetical Scenario 10

Complainant and Respondent have two classes together and each has been staring at the other during class. However, CP & RP first “meet” at a party. CP & RP each drink 3 drinks throughout the evening and spend most of the night talking to each other. After the party, CP & RP return to RP’s apartment.

CP and RP begin to kiss and “*make out*,” and RP quickly escalates things by undressing CP. CP does not want to have sex but is genuinely interested in perhaps having a relationship with RP. At that moment, if you asked CP if CP wanted to have sex of any kind with RP, CP would respond “No.” However, in RP’s apartment “*making out*” and unclothed, CP felt pressure to please RP and offered to perform oral sex on RP. CP stated that RP is “*larger in size*” than CP, and CP was afraid of what RP would do if CP did not “*give RP what RP wanted*.”

CP filed a Formal Complaint, stating “*I was too intoxicated to perform oral sex, and was coerced*.” RP is surprised by the complaint because RP believed the oral sex was consensual.



40

40

Coercion Definition

The use of unreasonable pressure to compel another individual to initiate or continue sexual activity against an individual's will. Coercion can include a wide range of behaviors, including psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail that causes the person to engage in unwelcome sexual activity. A person's words or conduct are sufficient to constitute coercion if they eliminate a reasonable person's freedom of will and ability to choose whether or not to engage in sexual activity.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

41

41

Hypothetical Scenario 11

Complainant and Respondent have been in a romantic/sexual relationship for two years and live together off-campus. RP usually initiates sexual activity with CP and generally wants to have sex more frequently than CP. Recently, CP has not been feeling like having sex at all. One evening, RP suggests that CP & RP have sex. CP states a lack of desire. RP persists and states that CP's frequent rejections (especially as of late) "*hurt*" RP and RP states that RP wants to have sex because RP "*feels a deep connection through sex.*"

CP hears this and although CP later states "*I did not want to have sex,*" CP reluctantly agreed but only because CP says "*I was coerced*" by RP. In CP's Formal Complaint, CP writes, "*No' means 'no.' When I said 'no,' that was not an invitation to convince me.*"



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

42

42

Coercion Definition

The use of unreasonable pressure to compel another individual to initiate or continue sexual activity against an individual's will. Coercion can include a wide range of behaviors, including psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail that causes the person to engage in unwelcome sexual activity. A person's words or conduct are sufficient to constitute coercion if they eliminate a reasonable person's freedom of will and ability to choose whether or not to engage in sexual activity.



Source:
UT System Model Policy for Sexual Misconduct (2022)

43

43

Hypothetical Scenario 12

Complainant and Respondent are both students and met recently on campus. CP invited RP over one Friday evening to CP's apartment to play board games. Also present were two of CP's roommates and three other friends.

After midnight, the friends went home and the roommates each went into their own rooms after saying goodnight. The RP helped CP clean up and then they began consensual kissing on the couch in the shared living area.

The kissing progressed to "making out" with each putting hands on the other's back and body. RP slowly moved RP's hand onto CP's genital area. CP continued kissing RP but stated, "My roommates will hear us." While still "making out," RP whispered, "I don't care."

While they continued "making out," both began taking their own clothes off. While taking CP's own pants off, CP stated, "I don't have any condoms." RP said that RP had one. The two then engaged in sexual intercourse, changing positions twice.

A few weeks later, the CP filed a Formal Complaint and stated, "The sex was not consensual. I didn't want to have sex that night."



44

44

Consent Definition

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

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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

45

45

Coercion Definition

The use of pressure to compel another individual to initiate or continue sexual activity against an individual's will. Coercion can include a wide range of behaviors, including psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail that causes the person to engage in unwelcome sexual activity. A person's words or conduct are sufficient to constitute coercion if they eliminate a reasonable person's freedom of will and ability to choose whether or not to engage in sexual activity.

Examples of coercion include but are not limited to threatening to "out" someone based on sexual orientation, gender identity, or gender expression; threatening to harm oneself if the other party does not engage in the sexual activity; threatening to disclose someone's highly personal images; threatening to disclose sensitive details about one's sexual preferences, habits, and/or experiences; and threatening to expose someone's prior sexual activity to another person.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

46

46



47

Contact Information	
Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Associate General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu

48

48

Sexual Misconduct Informal Resolution Training

Krista Anderson, Systemwide Title IX Coordinator

Spring 2025



1

Agenda

1. Title IX Introduction
2. Party's Rights
3. Informal Resolution Process
4. Facilitation Approaches
5. Documentation & Record Keeping

2

2

Introduction

**TITLE
IX**

Key Concepts &
Framework

3

3

Title IX

Sex Discrimination
Sexual Harassment
Retaliation



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4

Institutions must reasonably respond in light of known circumstances...

1. Stop & prevent behavior from continuing or escalating

2. Remedies:
Supportive measures & resources

3. Formal grievance process



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

5

5

Distinctions...

Sexual Harassment

Employee
Quid Pro Quo

Severe
Pervasive
Obj. Offensive

Sexual Assault
Dating Violence
Domestic Violence
Stalking

VS.

Non-Sexual Harassment
Ex. Other Inappropriate Sexual Conduct



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

6

6

Definition of “Sexual Harassment” under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. 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 institution’s education program or activity; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

7

7

#2 Element Examples

- **“Severe”**: Physically threatening or humiliating; effects of the alleged conduct to a reasonable person (using a “reasonable person” standard)
- **“Pervasive”**: Frequency, duration of the alleged conduct
- **“Objectively offensive”**: To a reasonable person (using a “reasonable person” standard)
- **“Reasonable person” standard**: An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.
- **“Effectively denies...equal access”**: Totality of the circumstances

For example, the degree of the alleged conduct’s interference with the CP or effects in an educational setting, type of alleged conduct, frequency and duration of the conduct, knowingly unwelcome in nature⁸

8

“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

9

9

Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is prohibited inappropriate or unprofessional sexual conduct.

Such conduct is:

1. **Verbal conduct** (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.
2. **Physical conduct** that is objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:
UT System Model Policy for Sexual Misconduct (2022)

10

10

“Other Inappropriate Sexual Conduct” Cont.

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature;
- Deliberate physical interference with or restriction of movement; or
- Consensual sexual conduct that is unprofessional and inappropriate, and created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

11

11

Key Pillars: Title IX Process

Impartiality

Respect

Fairness

Equity

For all of the participants
in the process:

Complainants

Respondents

Witnesses

Third-party Reporters



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

12

12

Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias**



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

13

13

Principles for Title IX Process



- Must maintain **complete neutrality & impartiality at all times** in investigating alleged conduct violations of institutional policies.
- Understanding bias & whether it exists: Need to take an “**objective, common sense approach to evaluating whether a person serving in a role is biased.**” (*Title IX Preamble (2020)*)...



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

14

14

Avoiding Bias

- Must **not** treat a party differently:
 - On the basis of the person's **sex**;
 - On **stereotypes** about how men or women behave with respect to sexual violence; and/or
 - On the basis of the person's **protected characteristics**.



Source: Title IX Preamble (2020)

15

15

Party's Rights

16

16

Party's Rights

A **Complainant** and **Respondent** have the following rights during a grievance process:

Information and Support

- To be informed of and have access to counseling, medical, academic, and other applicable **support services**, including **confidential resources**.
- To be informed of the importance of a victim going to a **hospital for treatment** and the **preservation of evidence**, if applicable, as soon as practicable after an alleged incident.
- To be informed of a **notice of formal complaint** to the University, whether filed by a CP or the TIXC.
- To receive information and ask questions about the **formal** and **informal processes**.

Equal Opportunity and Representation

- To receive a **prompt, fair, equitable, and impartial grievance process**
- To be given **equal chance** to participate in a grievance process, including the opportunity to identify witnesses and other relevant evidence and to **choose not** to actively participate in the grievance process, if desired.
- To have an **advisor of choice** present during all meetings and grievance proceedings.
- To have an **advisor provided** for a party at a **hearing** under the Title IX/SH grievance process, if an advisor of choice is not present.
- To have access and equal opportunity to **inspect and review any evidence obtained** as part of the investigation, and to receive a copy of the completed investigation report.
- To be **equally informed** of any **determinations** regarding responsibility, dismissals of formal complaints, and/or a party's filing of an appeal.
- To **appeal** a **determination** regarding responsibility and/or **dismissals** of formal complaints.
- To file a report with **local** and/or **campus law enforcement** authorities.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

17

17

Complainant's Rights (related to the Grievance Process)

- To **report** an incident and/or **file a formal complaint** with the University.
- To **request** in writing that the University **not investigate** a reported incident and be **informed** of the **University's decision** whether or not to investigate.
- To **request** in writing a **dismissal** of a formal complaint (e.g. withdraws the formal complaint or any allegations therein).



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

18

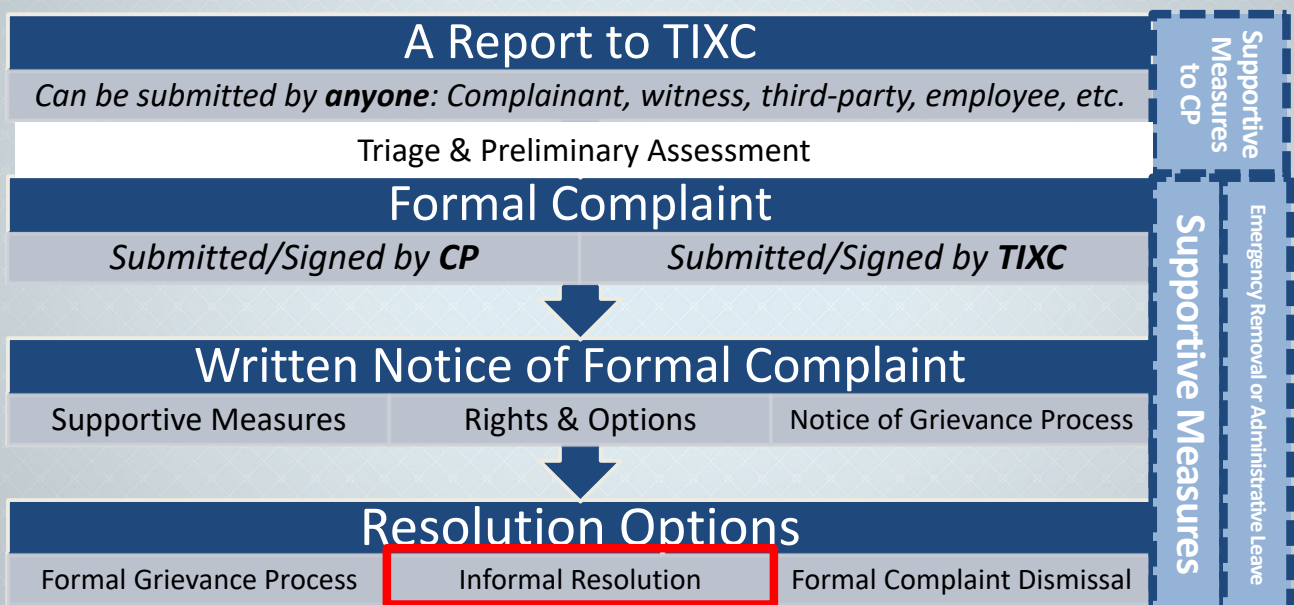
18

Informal Resolution Process

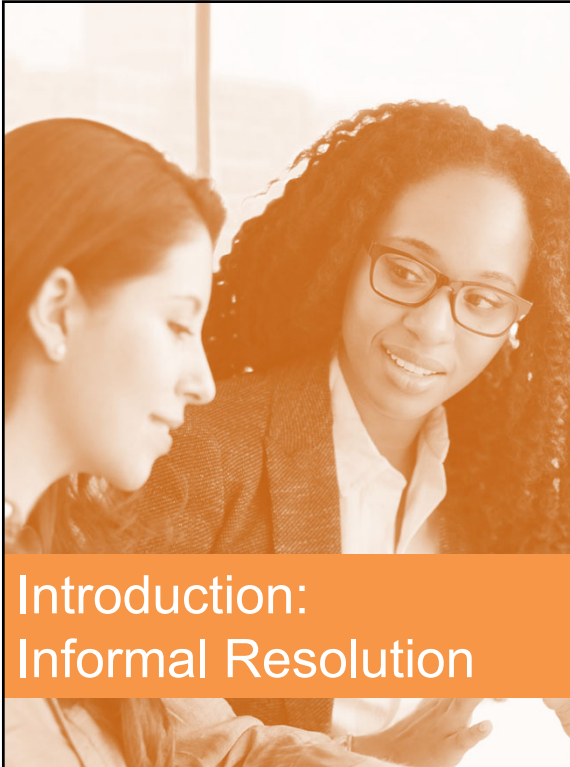
19

19

Resolution Flowchart



20



Introduction: Informal Resolution

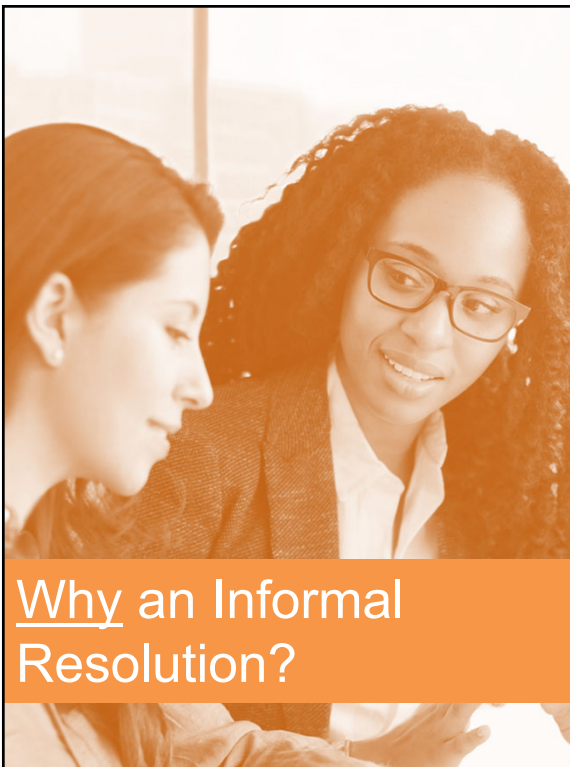
It's an alternative resolution option once a formal complaint is filed.

- **Voluntary agreement** made by both parties, if available.
- Available as an option at any time prior to reaching a determination regarding responsibility.
- Doesn't involve a full investigation & adjudication.
- May be facilitated through mediation (as an example).

Note: Each party has a right to **withdraw** from the informal resolution process and resume the formal grievance process at any point prior to an agreement.

21

21



Why an Informal Resolution?

- Provides an **option** and **choice** for the parties to explore their own voluntary terms for a resolution.
- Opportunity to have a more **satisfactory experience** for the parties, rather than going through the formal grievance process.
- Opportunity to **remedy** and **repair harm** that was experienced through an **alternative method**.
- Ability to explore **non-punitive** and/or **learning-focused** resolutions, if desired.

22

22

Not Permitted When...

- Not permitted as a resolution option “under Title IX” when an **employee respondent** is alleged of “sexual harassment” by a **student complainant**.
- Examples of other non-applicable reasons* due to seriousness and/or pattern of allegations:
 - Sexual Harassment cases
 - Sexual Violence cases
 - Dating or Domestic Violence cases
 - Stalking cases
 - The same respondent has previous informal resolution agreements

* Check the institution's Sexual Misconduct Policy for specific provisions



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct (2022)

23

23

What's left? “Other Inappropriate Sexual Conduct”

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual's sexual activities or speculation about an individual's sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature;
- Deliberate physical interference with or restriction of movement; or
- Consensual sexual conduct that is unprofessional and inappropriate, and created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:
UT System Model Policy for Sexual Misconduct (2022)

24

24

Required Components

Once a formal complaint is filed...

An Informal Resolution Process must include:

- a) Written notice of allegations;
- b) Required elements of the informal process; and
- c) Any consequences resulting from participating in an informal process

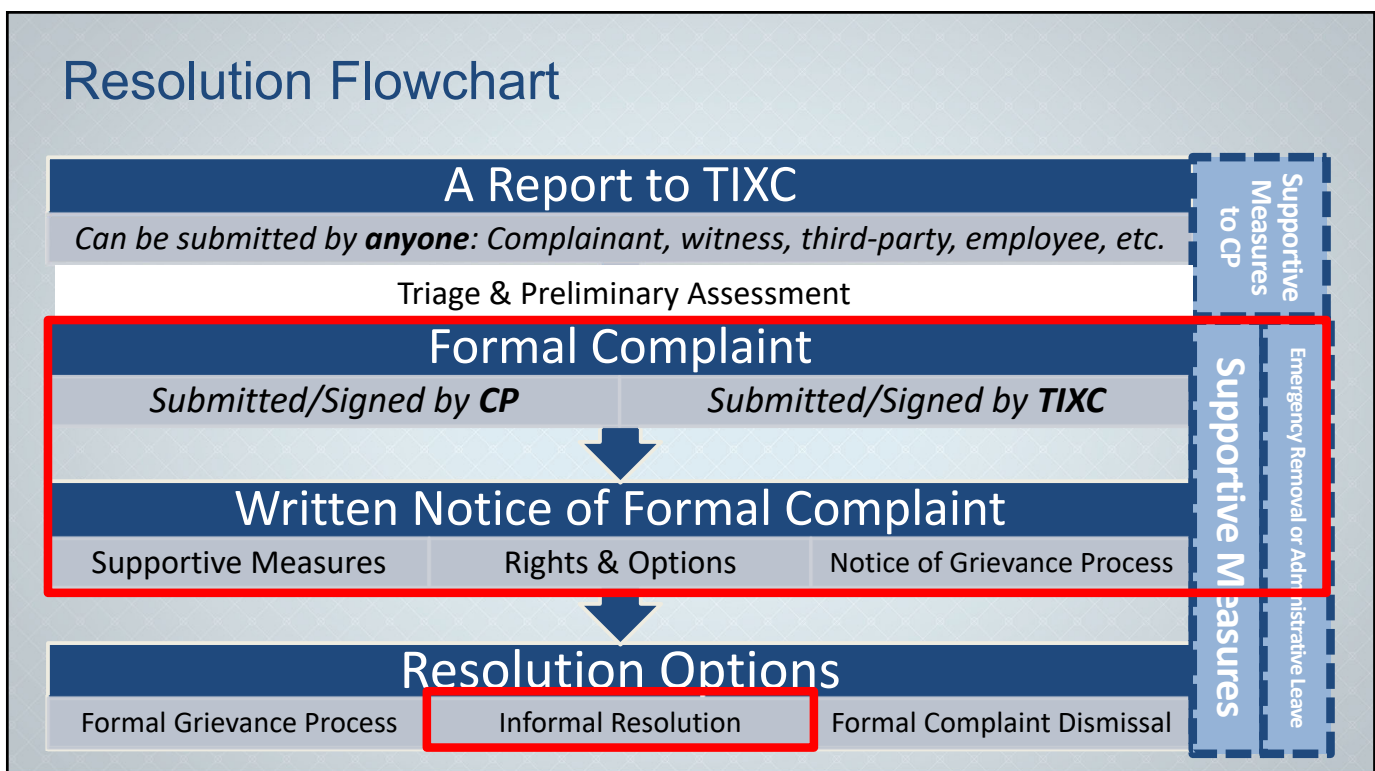


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

25

25



26

Written Notice of Allegations



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

27

Written Notice of Formal Complaint

Upon receipt of a formal complaint, promptly send written notice to CP & RP:

- Notice of the grievance process under the policy;
- Notice of the allegations that potentially constitute prohibited conduct under the policy, sufficient details about the alleged conduct: Date(s), time(s), and location(s);
- A statement that the potential policy violations are being investigated;

28

28

Written Notice (Continued)

- A statement that the RP is presumed not responsible for the alleged conduct and that the determination regarding responsibility will be made at the conclusion of the grievance process;
- Both parties may have an advisor of choice, who may be, but is not required to be, an attorney, and may inspect and review all evidence;
- A statement that the parties may review evidence gathered as part of the any investigation;

29

29

Written Notice (Continued)

- A provision of the policy that knowingly making false statements or knowingly submitting false information during the grievance process is prohibited and subject to disciplinary action;
- Any other relevant information for the written notice; and
- A statement that retaliation is prohibited under the policy. (recommended)

30

30

Other **resources** to include with the written notice:

1. **Supportive measures** available for both parties
2. **Campus & local** resources or services
3. **Rights & options** of both parties
4. A copy of the **grievance process & policy**
5. Title IX Coordinator & Investigator(s) **contact information**



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



31

31

Elements of the
IR Process

32

32



Informal Process Considerations

- Under the institution's policy, what is the IR **availability**? What conditions are permissible for an IR agreement?
- What are the **timeframe** parameters to complete an IR agreement?
- Who will **facilitate** IR's?
- What **acknowledgments** are required by both parties before an IR agreement?
- What are the **consequences** resulting from participating in an informal process?

33

33



Preparations

- Formal Complaint and process status?
- I.R. Pre-screening
 - Background information
 - CP: Supportive measures/remedies?
 - RP: Sense of willingness to address their alleged conduct through IR process?
 - Any potential conflicts between the parties?
 - Concerns raised (if any) from the parties?

34

34

Example Acknowledgments & Consequences of Participating in an IR Process

1. Acknowledgment of the **written notice** and allegations therein.
2. Received **rights and options** of both parties.
3. An IR agreement is a **voluntary** option, if available under the institution's policy.
4. Each party has the **right to withdraw** from the IR process and resume the formal grievance process...
5. IR **timeframe** (example: within 45 days of notice)
6. No recording will be made of the IR process...



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

35

35

Example Acknowledgments & Consequences of Participating in an IR Process (Cont.)

7. Any statements made during the IR process may not be used for or against either party... should the parties resume the formal grievance process.
8. The respondent will not be eligible for further IR agreements in the future.
9. An IR agreement will be based on individual needs, and based on specific facts and circumstances available.
10. Documentation & records provisions... 7 years retention...privacy and confidentiality of records...
11. **Terms of Enforcement:** Failure to comply with a provision or term in an IR agreement may result in disciplinary action.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

36

36

Examples of Agreement Terms

Stop engaging in prohibited conduct defined in SHSM policy

Mutual No-Contact Btwn Parties

Apology Letter

Reflection Writing Assignment

SHSM Training or Workshop Assignment

Alcohol EDU Workshop

RP Housing Reassignment

RP Counseling Consultation

RP Course Adjustments

RP On-Campus Work Adjustments

RP Voluntary Leave from Uni

Enforcement Terms

37

37

Agreement Terms

Complainant

Institution

Respondent

Is the Institution satisfied with the I.R. Agreement Terms?

38

38

Compliance Monitoring

Complainant

Institution

Respondent

39

39

IR Documentation Examples

- Documentation Checklists & Forms
- Intake & Initial Assessments
- Case Management Timelines
- Contact & Communications
- Notices & Letters
- **IR Acknowledgements**
- **IR Agreements**
- **Obtain signatures for the IR Agreement**
- Data Systems for Electronic & Hard Copy Records



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

40

40



41

A slide titled "Exploration & Mediation Tools" with a background of two people walking on a rocky path towards a body of water under a cloudy sky. The title is in blue text on a light blue background. The number "42" is in the bottom right corner.

Exploration & Mediation Tools

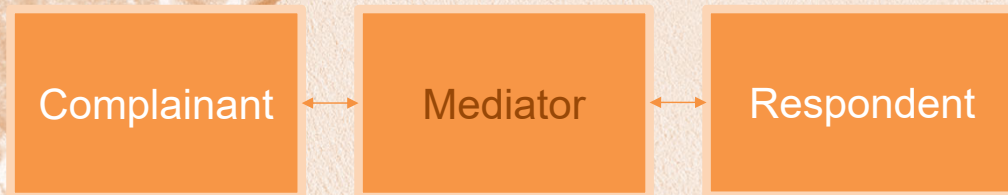
- Rapport-building
- Active listening
- Indirect facilitation (e.g. shuttle-diplomacy)
- Restorative considerations?

42

42

Indirect Facilitation (Shuttle-Diplomacy)

A mediator acts as a go-between and facilitates impartially the negotiation of proposed terms between the two parties. It doesn't require direct face-to-face interaction between the parties.



Example model

43

43

Rapport-Building Prompts

- ***“Help me understand how you are feeling right now.”***
- ***“What, if anything, can I explain to you about this process before we get started?”***
- ***“What, if anything, do you need right now?”***

Note: Consider possible **barriers** or **concerns** to building trust with a participant.

- Facilitators: How can you minimize or eliminate these factors?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

Forensic Experimental Trauma Interview (FETI)

44

44

General Starting Prompts

- *“I’ve read the formal complaint (and initial statements (if any)) and I am familiar with this case. **Is there anything important you wish to share at this time?**”*
- *“Tell me what you would like to **achieve** through this I.R. process.”*
- ***To CP:** “What types of **remedies** would you like to see in an I.R. agreement?”*
- ***To RP:** “What types of remedies, if any, are you **open** to? What components, if any, you are **willing to agree to?**”*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

45

45

Active Listening Example Prompts

46

Type	Example Prompts	
Validating	• “That sounds difficult.”	• “It’s <u>okay</u> to feel upset.”
Emotional Acknowledgements	• “You seem <u>disappointed</u> right now.”	• “Having to consider different options can be <u>stressful</u> to navigate.”
Reflecting	• “What I’m hearing is...”	• “Sounds like you are saying...”
Summarizing or Restating	• “Let me summarize to check my understanding [Repeat back]... Did I get that right?”	• “[Repeat/rephrase what the other person said]...Is this what you mean?”
Open-Ended Phrases	• “Tell me more about...” • “Explain/describe...”	• “What do you mean when you say...?” • “Help me understand...”
Affirmative Comm	• “Yes” • “I see.”	• “Go on.” • “Right.”

46

Informal Resolution Example Prompts

Purpose	Example Prompts
Draw out ideas	<ul style="list-style-type: none"> • “Tell me what <u>you</u> would like to achieve through this I.R. process.” • “What types of remedies would <u>you</u> like to see in an I.R. agreement?” • “How do <u>you</u> want to approach an IR agreement?” • “What types of remedies, if any, are <u>you</u> open to?” • What components, if any, <u>you</u> are willing to agree to?” • “What are terms or remedies that seem fair to <u>you</u>?” • “What do <u>you</u> think about ____?”
Be open to <u>all</u> <u>types</u> of responses	<ul style="list-style-type: none"> • “How would <u>you</u> like to proceed?” • “What are some applicable takeaways that <u>you</u> can learn and grow from this experience?” • “The decision to accept or not accept certain terms or remedies is up to <u>you</u>.” • “What do <u>you</u> think might be getting in the way of coming to an agreement right now?”



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

47

47

Prompts for Refocusing Conversations

Purpose	Example Prompts
If the person <u>doesn't</u> <u>respond to the</u> <u>relevant prompts</u>...	<ul style="list-style-type: none"> • <u>Rephrase</u> the prompt again. • Acknowledge the shift: “It seems like the discussion is evolving to ____, but we started off exploring ____.”
If the person <u>makes</u> <u>an argument about</u> <u>a different topic</u>...	<ul style="list-style-type: none"> • <u>Acknowledge</u> the concern & attempt to finish the <u>initial discussion</u> first: “I want to talk about that, but let's first finish addressing ____?”
If the person <u>attempts to change</u> <u>the subject</u>...	<ul style="list-style-type: none"> • It might be to <u>vent</u> or release some tension. • <u>Prompt</u> the person to discuss what's on their mind. • Then, use <u>active listening</u> to acknowledge the person's current <u>concerns, emotions, and/or needs</u>. • Try to <u>link</u> the person's concerns with the initial discussion topic.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

48

48

Restorative Considerations for the I.R. Process

- Addresses the conduct, impacts, and/or needs of the individuals
- Provides accountability & support
- Actively engages with the individuals
- Learning/educational component
- Opportunity for closure
- Ability to reintegrate the person back into the community

49

49

Informal Resolution Timeframe (Example)

Informal Resolutions of a formal complaint will be concluded within **45 days** of notice to the institution that both parties wish to proceed with the Informal Resolution process

Note: Circumstances may require a **temporary delay** in this timeframe & the institution may extend this timeframe for good cause.

- Provide **notice** to the parties for temporary delays or extensions



Source:
UT System Model Policy for Sexual Misconduct (2021)

50

50

Informal Resolution Documentation

Any final resolution pursuant to the Informal Resolution process will be documented and kept for seven years as required by law. However, no recording of the Informal Resolution process will be made and all statements made during the Informal Resolution process may not be used for or against either party (and the Hearing Officer and Appellate Officer may not consider any such statement made during Informal Resolution) should the parties resume the Grievance Process. Failure to comply with an Informal Resolution agreement may result in disciplinary action.



Source:

UT System Model Policy for Sexual Misconduct (2021)

51

Documentation & Record Keeping

The University (through the appropriate office) will retain all of the documentation included in the Grievance Process (outlined in the SM Policy) for 7 years, in accordance with state and federal records laws and University policy.

All documentation of records are private and confidential to the extent possible under law. Student records of the Grievance Process are disciplinary records under FERPA. Employee records of the Grievance Process are subject to the Freedom of Information Act (FOIA) and the Texas Public Information Act (TPIA), and included in the employee's official employment record.



Source:

UT System Model Policy for Sexual Misconduct (2021)

52



Q & A



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

53

53

Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Assistant General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

54

54

Sexual Misconduct Investigations – Procedural Elements

Krista Anderson, Systemwide Title IX Coordinator
Sean Flammer, Associate General Counsel

Spring 2025



1

1

Agenda

1. Title IX Intro
2. Initial Steps
3. Resolution Options
4. Ongoing Elements
5. Closing Steps
6. Transition to Adjudication Stage
7. Documentation & Record Keeping

2

2

Introduction

TITLE IX

Key Concepts & Framework

3

3

Distinctions...

Sexual Harassment

Employee
Quid Pro Quo

Severe
Pervasive
Obj. Offensive

Sexual Assault
Dating Violence
Domestic Violence
Stalking

vs.

Non-Sexual Harassment
Ex. Other Inappropriate Sexual Conduct



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4

Definition of “Sexual Harassment” under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. 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 institution’s education program or activity; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



Source: Title IX Regulations (2020)

5

5

#2 Element Examples

- **“Severe”**: Physically threatening or humiliating; effects of the alleged conduct to a reasonable person (using a “reasonable person” standard)
- **“Pervasive”**: Frequency, duration of the alleged conduct
- **“Objectively offensive”**: To a reasonable person (using a “reasonable person” standard)
- **“Reasonable person” standard**: An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.
- **“Effectively denies...equal access”**: Totality of the circumstances

For example, the degree of the alleged conduct’s interference with the CP or effects in an educational setting, type of alleged conduct, frequency and duration of the conduct, knowingly unwelcome in nature ⁶

6

“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

7

7

Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is prohibited inappropriate or unprofessional sexual conduct.

Such conduct is:

1. **Verbal conduct** (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.
2. **Physical conduct** that is objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:
UT System Model Policy for Sexual Misconduct (2022)

8

8

“Other Inappropriate Sexual Conduct” Cont.

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature;
- Deliberate physical interference with or restriction of movement; or
- Consensual sexual conduct that is unprofessional and inappropriate, and created a Hostile Environment.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2022)

9

9

Key Pillars: Title IX Process

Impartiality

Respect

Fairness

Equity

For all of the participants
in the process:

Complainants

Respondents

Witnesses

Third-party Reporters



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

10

10

Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias**



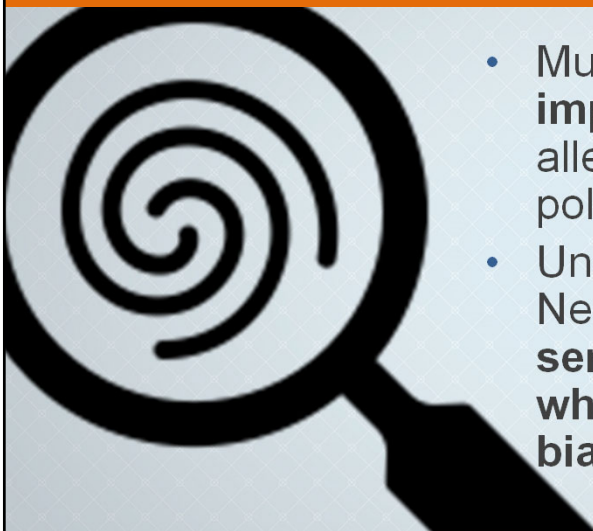
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

11

11

Principles for Title IX Process



- Must maintain **complete neutrality & impartiality at all times** in investigating alleged conduct violations of institutional policies.
- Understanding bias & whether it exists: Need to take an “**objective, common sense approach to evaluating whether a person serving in a role is biased.**” (*Title IX Preamble (2020)*)...



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

12

12

Avoiding Bias

- Must **not** treat a party differently:
 - On the basis of the person's **sex**;
 - On **stereotypes** about how men or women behave with respect to sexual violence; and/or
 - On the basis of the person's **protected characteristics**.



Source: Title IX Preamble (2020)

13

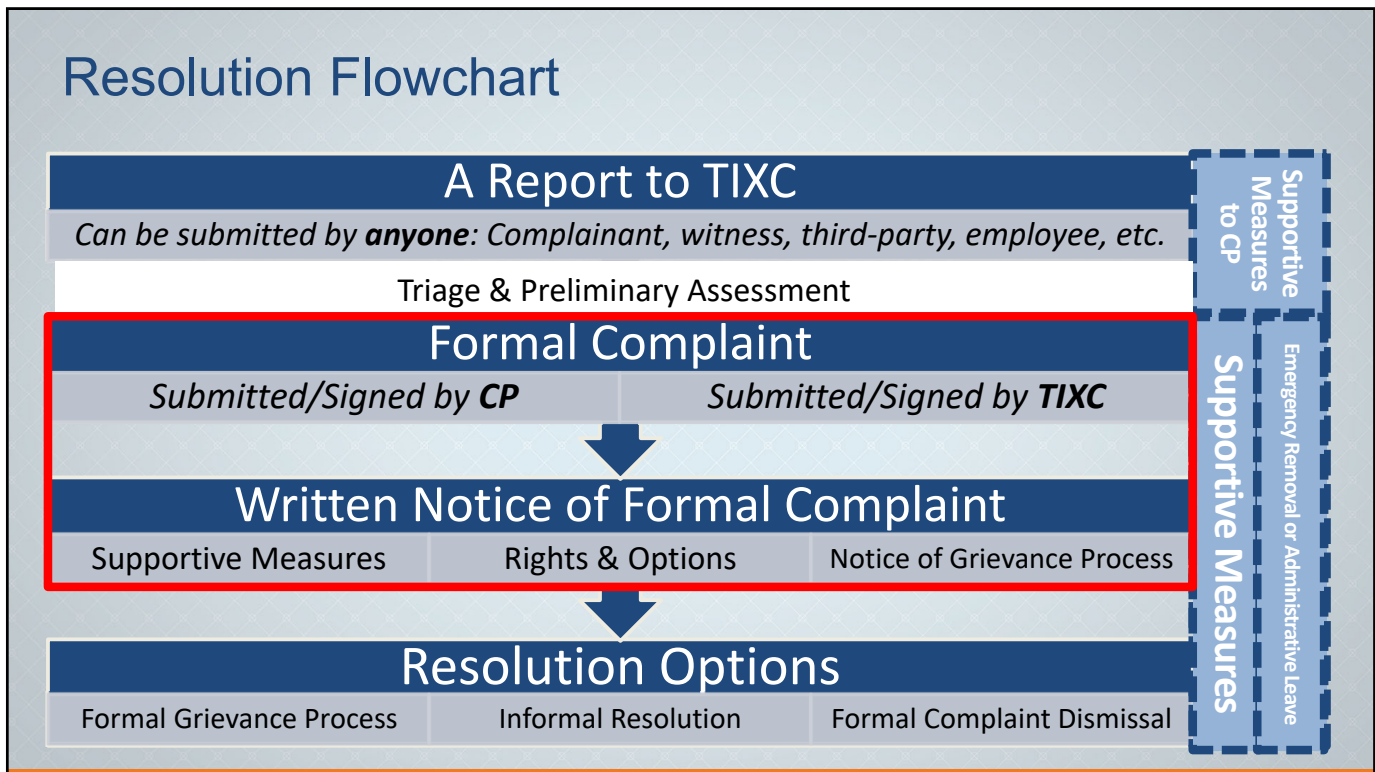
13

Initial Steps of an Investigation

14

14

Resolution Flowchart



15

Written Notice of Formal Complaint

Upon receipt of a formal complaint, promptly send written notice to CP & RP:

- Notice of the grievance process under the policy;
- Notice of the allegations that potentially constitute prohibited conduct under the policy, sufficient details about the alleged conduct: Date(s), time(s), and location(s);
- A statement that the potential policy violations are being investigated;

16

16

Written Notice (Continued)

- A statement that the RP is presumed not responsible for the alleged conduct and that the determination regarding responsibility will be made at the conclusion of the grievance process;
- Both parties may have an advisor of choice, who may be, but is not required to be, an attorney, and may inspect and review all evidence;
- A statement that the parties may review evidence gathered as part of the any investigation;

17

17

Written Notice (Continued)

- A provision of the policy that knowingly making false statements or knowingly submitting false information during the grievance process is prohibited and subject to disciplinary action;
- Any other relevant information for the written notice; and
- A statement that retaliation is prohibited under the policy. (recommended)

18

18

Other **resources** to include with the written notice:

1. **Supportive measures** available for both parties
2. **Campus & local** resources or services
3. **Rights & options** of both parties
4. A copy of the **grievance process & policy**
5. Title IX Coordinator & Investigator(s) **contact information**



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



19

19

Party's Rights

A **Complainant** and **Respondent** have the following rights during a grievance process:

Information and Support

- To be informed of and have access to counseling, medical, academic, and other applicable **support services**, including **confidential resources**.
- To be informed of the importance of a victim going to a **hospital for treatment** and the **preservation of evidence**, if applicable, as soon as practicable after an alleged incident.
- To be informed of a **notice of formal complaint** to the University, whether filed by a CP or the TIXC.
- To receive information and ask questions about the **formal** and **informal processes**.

Equal Opportunity and Representation

- To receive a **prompt, fair, equitable, and impartial grievance process**
- To be given **equal chance** to participate in a grievance process, including the opportunity to identify witnesses and other relevant evidence and to **choose not** to actively participate in the grievance process, if desired.
- To have an **advisor of choice** present during all meetings and grievance proceedings.
- To have an **advisor provided** for a party at a **hearing** under the Title IX/SH grievance process, if an advisor of choice is not present.
- To have access and equal opportunity to **inspect** and **review any evidence obtained** as part of the investigation, and to receive a copy of the completed investigation report.
- To be **equally informed** of any **determinations** regarding responsibility, dismissals of formal complaints, and/or a party's filing of an appeal.
- To **appeal** a determination regarding responsibility and/or dismissals of formal complaints.
- To file a report with **local** and/or **campus law enforcement** authorities.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

20

20

Complainant's Rights

(related to the
Grievance Process)

- To **report** an incident and/or **file a formal complaint** with the University.
- To **request** in writing that the University **not investigate** a reported incident and be **informed** of the **University's decision** whether or not to investigate.
- To **request** in writing a **dismissal** of a formal complaint (e.g. withdraws the formal complaint or any allegations therein).



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

21

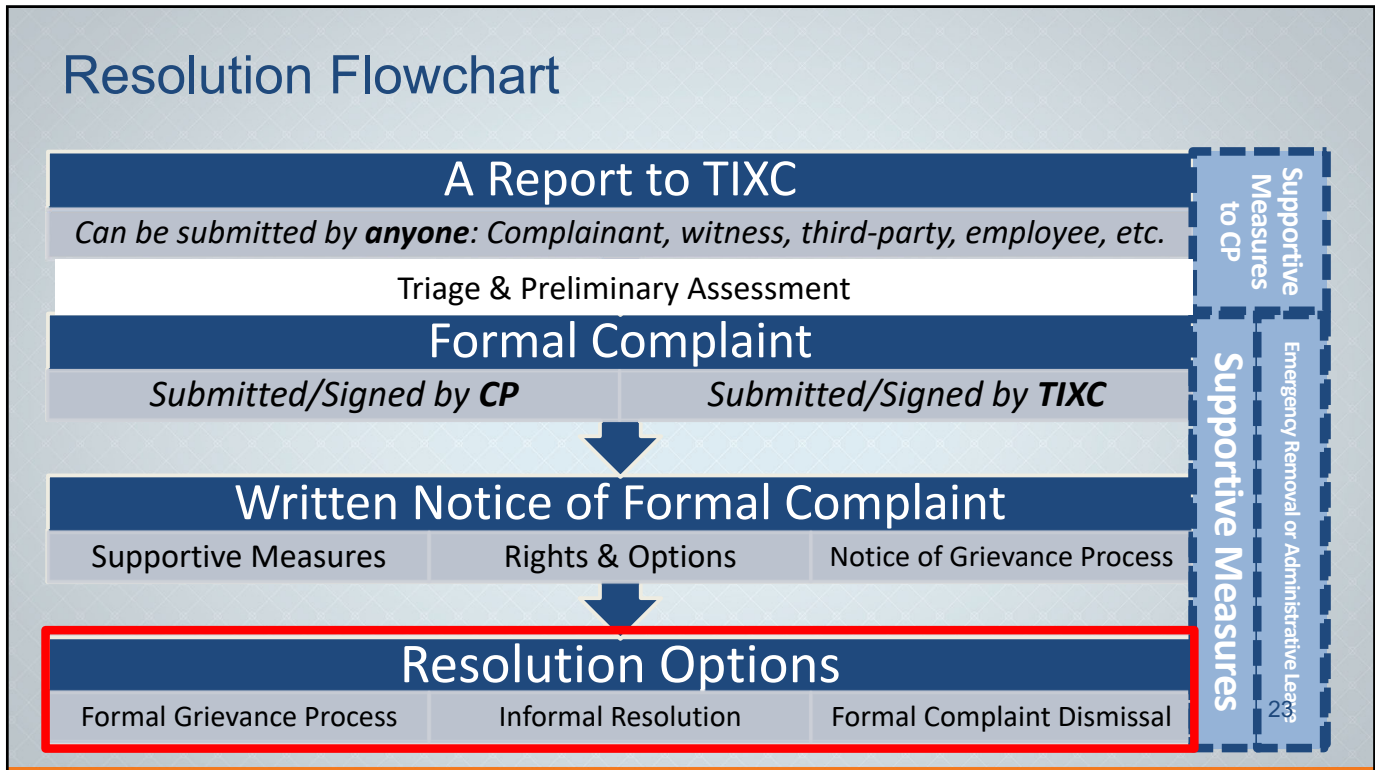
21

Resolution Options

22

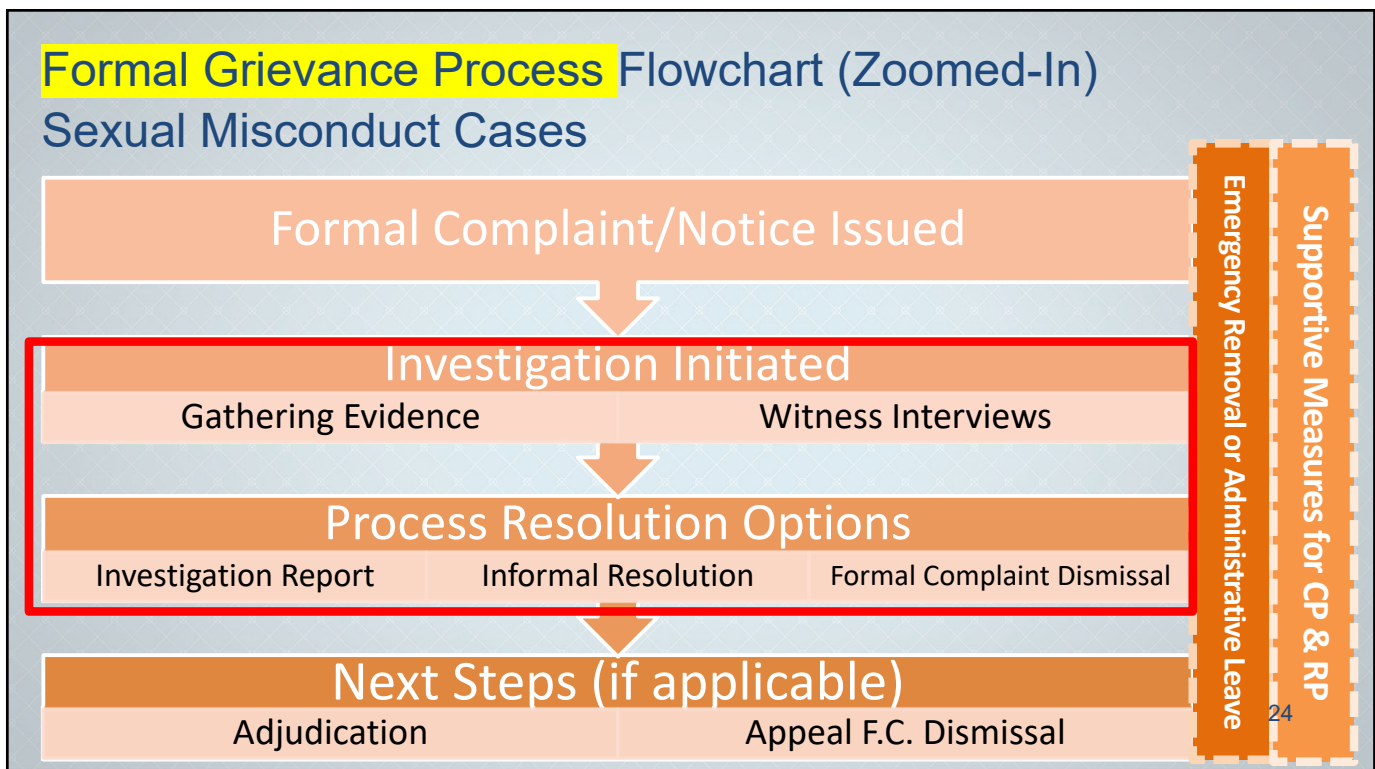
22

Resolution Flowchart



23

Formal Grievance Process Flowchart (Zoomed-In) Sexual Misconduct Cases



24

Conducting an Investigation: Ongoing Elements

25

25

Investigative Framework

- Establish **facts & timeline(s)**.
- Understand each party's **perception & experiences** of the alleged incident(s).
- Elicit **details & descriptions** of the alleged incident(s) from the parties & witnesses.
- Address **disputed facts or conflicting evidence** (if any) & seek responses from the parties (if applicable).
- Gather **sufficient information available** for a determination of facts, importance, & relevance to the formal complaint.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



26

26



Investigator Considerations

- One or two investigators?
- Roles of each investigator?
 - Facilitator
 - Notetaker
- Interview notetaking or recording?

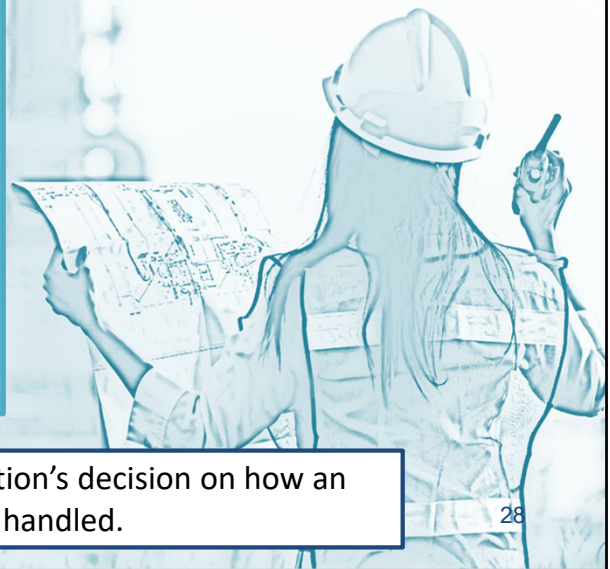
27

27

Investigation Plan: The Foundation

Basis for the investigation?

- Alleged **incident** of prohibited conduct
- Alleged **pattern** of prohibited conduct
- Alleged **climate issue(s)** in an area or department



Note: It is the institution's decision on how an investigation may be handled.

28



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

28

Look at the Provision(s) at Issue:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

29

29

Look at the Provision(s) at Issue:

Engaging in a (1) course of conduct (2) directed at a specific person that would (3) cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

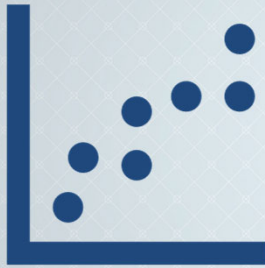


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

30

30

Basis: Pattern Investigations



- **Multiple incidents** of similar type of alleged conduct or circumstances with same RP?
- **Multiple complainants** regarding same or multiple incidents of similar type of alleged conduct or circumstances with same RP?
- **Multiple respondents** regarding same incident or situation?
- **Student organization** allegations?

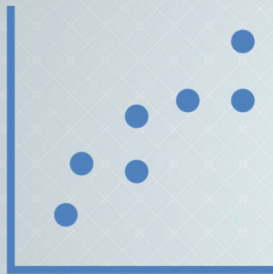


Note: It is the institution's decision on how a pattern-based investigation may be handled.

31

31

Considerations: Allegation Patterns



- **Reports vs. Formal Complaints?**
 - **Report history** for same RP regarding similar conduct allegations? **Applicability** (if any) to the current investigation?
- **Consolidate pattern allegations** into one investigation?
- May be **larger-scale** in scope.
- **Multiple incidents?** May lend credibility to witness testimony regarding allegations of similar conduct with same RP?
- **Multiple complainants?** Information/privacy waivers, participation?

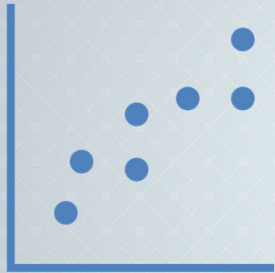


Note: It is the institution's decision on how a pattern-based investigation may be handled.

32

32

Considerations: Allegation Patterns (Cont.)



- Balance focus on the **individual** and **pattern elements** of consolidated investigations:
 - Based on the **scope of the investigation**, consider **each allegation** on **its own merits**, with the relevant evidence gathered for each allegation
 - Same grievance process applied
- Document the **justification** for consolidating the investigation, if applicable. Examples might include, but are not limited to:
 - Multiple allegations? Similarity of allegations? How so?
 - Overlapping witnesses?
- **Student-based allegation patterns**: Emergency removal threshold met? (Individualized safety & risk analysis)

Note: It is the institution's decision on how a pattern-based investigation may be handled.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

33

33

Basis: Climate Investigations



- Generalized concerns about the **climate, environment, or policies** in a program or department.
- No specific incidents or allegations with a program or department.
- **Reputational** concerns or **exit interview** statements regarding a program or department.

Note: It is the institution's decision on how a climate-based investigation may be handled.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

34

34

Considerations: Climate Allegations



- May be **larger-scale** and more **open** in scope.
- Without specific RP's for a formal written notice, provide **notice** to the **program director** or **department chair**.
- Invite program or department affiliates as **witness interviews**, general prompts
- As evidence is collected & reviewed, triage & determine if the **basis or scope** needs to be **updated**.



Note: It is the institution's decision on how a climate-based investigation may be handled.

35

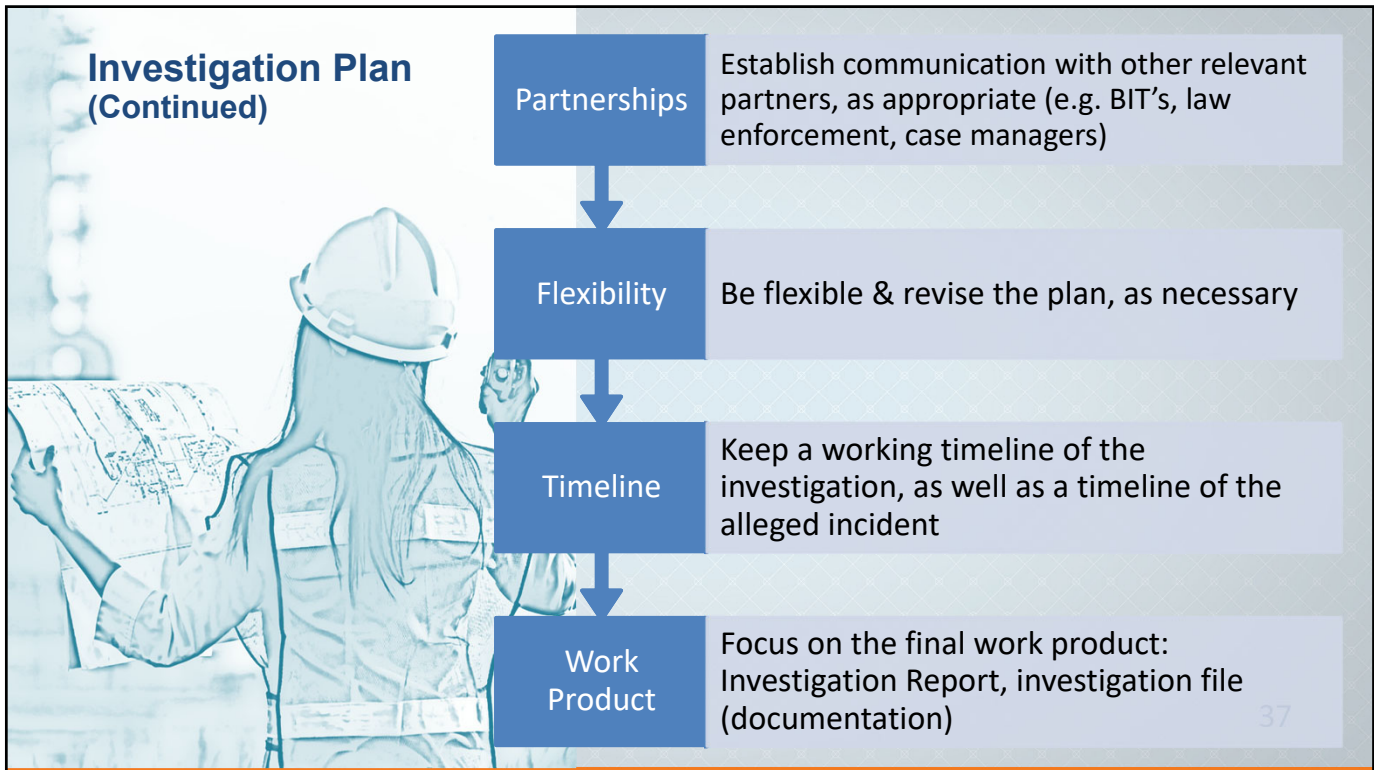
35

Investigation Plan (Continued)



36

36



37

Interview Notice

- Date, time, & location of the interview meeting
- Names of the invited or expected meeting participant(s)
- Purpose of the meeting or investigative interview
- Opportunity to present any information, evidence, and/or witnesses relevant to the formal complaint.
- An advisor of choice may attend, though not required.

38

38

Advisor Considerations

- Is an advisor of choice involved?
- Access to the related evidence & the finalized investigation report (closing steps of the investigation).
- Consider providing an advisor, if an advisor of choice has not been involved.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

39

39

Evidence Collection

- Available body of facts or information:
 1. Tangible objects (real items)
 2. Demonstrative (modeling)
 3. Documentary (written materials)
 4. Testimonial (statements)

...that indicates whether a claim, belief, or proposition may be true or valid.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

40

Closing Steps of the Investigation

41

41

Evidence Pyramid

Relevant
evidence

← Evidence included in the
Investigation Report

Evidence directly related to
the allegations

← Evidence provided to the parties &
advisors for inspection & response

42

42

Medical Records Evidence



Cannot access, consider, disclose, or use a party's **medical or mental health records** as evidence unless the party provides voluntary, written consent to the institution for the grievance process.

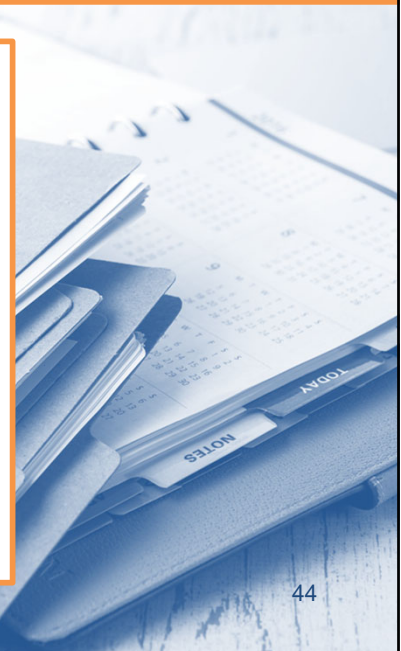
43

43

HIPAA vs. FERPA

The **medical or mental health record** is protected by **HIPAA**, and retained by the healthcare enterprise.

A copy of a medical or mental health record that is submitted to the investigation by the record holder (with voluntary, written consent) becomes protected under **FERPA** (students) and **privacy** provisions of the institution's policies. The documentation is eligible for **access to evidence** by both parties (and their advisors).



44



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

44

Access to Evidence

Equal opportunity to both parties (& the advisors) to **inspect & review any evidence obtained** that is directly related to the allegations in the formal complaint.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



45

45

Access to Evidence: Why?

So that each party can **meaningfully respond** to the evidence prior to the conclusion of the investigation.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



46

46

Access to Evidence: When?

- Upon request from a CP, RP, or an Advisor?
- At the end of the investigation?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.



47

47

Access to Evidence (Cont.)

Send each party (& the advisors*) the applicable evidence:

- In hard copy or electronic format
- At least 10 days to inspect, review, & respond to the evidence
- All responses to the evidence must be submitted in writing to the investigator(s)

** Advisor of choice; or the provided advisor by the institution (If applicable)*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

48

48

Access to Evidence (Cont.)

The investigators will consider all timely responses submitted by the parties **prior** to completing the investigation report.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

49

49

Issues of Relevance

50

50

Review of Evidence

- Available body of facts or information:
 1. Tangible objects (real items)
 2. Demonstrative (modeling)
 3. Documentary (written materials)
 4. Testimonial (statements)

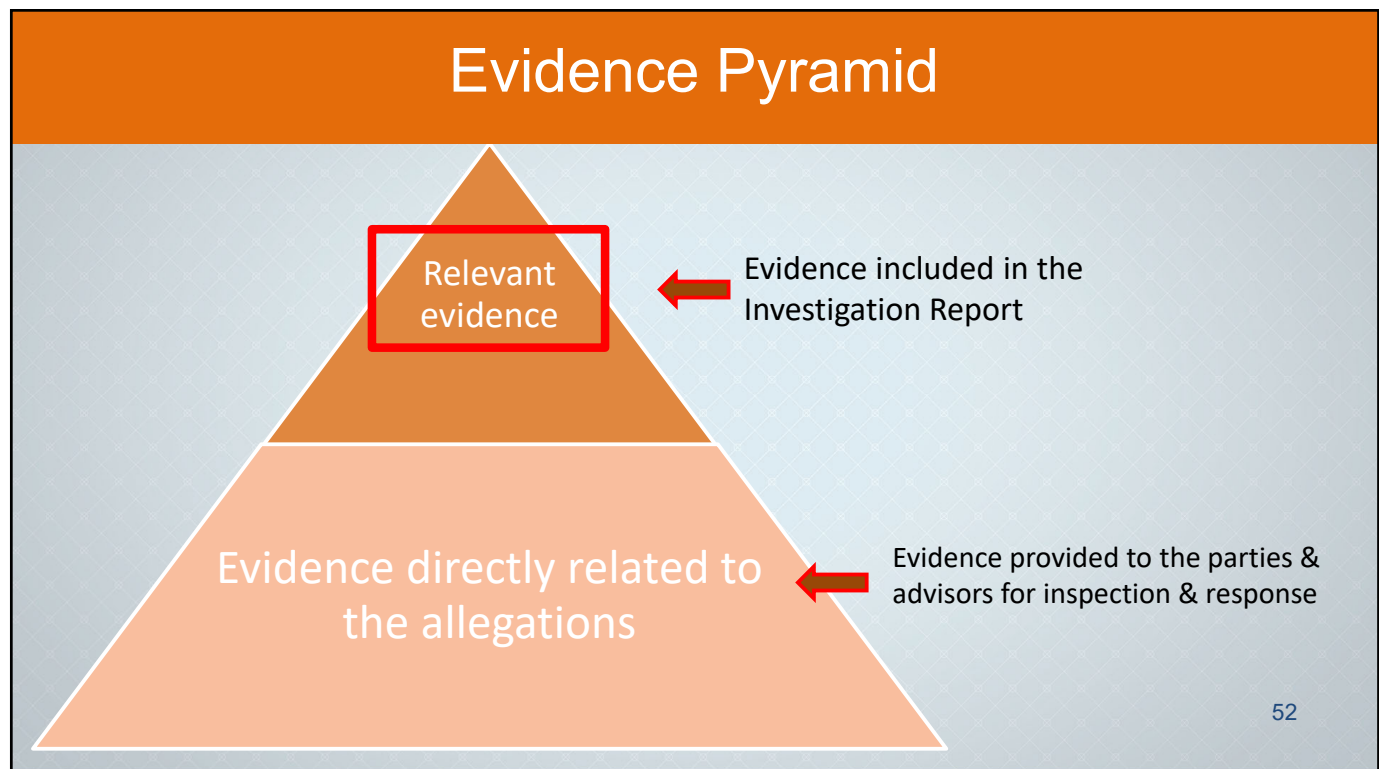
...that indicates whether a claim, belief, or proposition may be true or valid.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

51

Evidence Pyramid



52

52

Relevant Evidence



Evidence is **relevant** if:

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

53

53

Relevant Evidence



Another way to frame it:

- **Exculpatory evidence:** Evidence tending to excuse, justify, or absolve the person of the alleged conduct.
- **Inculpatory evidence:** Evidence that places responsibility on the person of the alleged conduct.

54

54

“Reasonable Person” Standard



Use a “**reasonable person**” standard for weighing all of the evidence:

- An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.

55

55

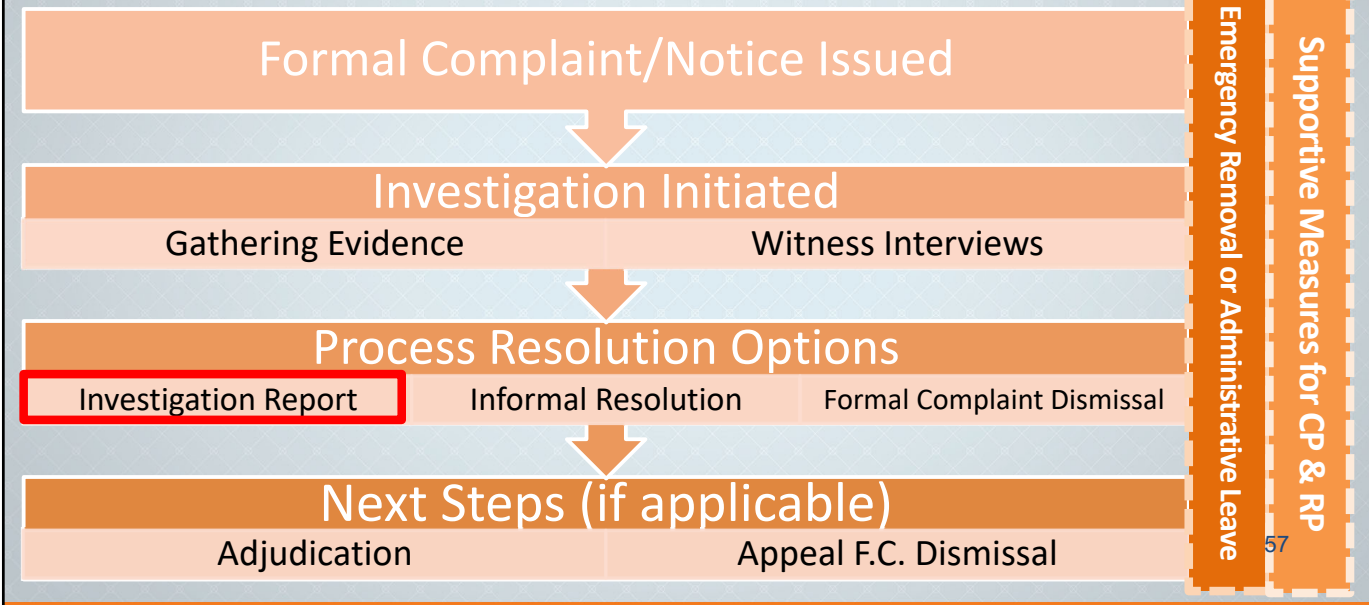


Investigation
Report

56

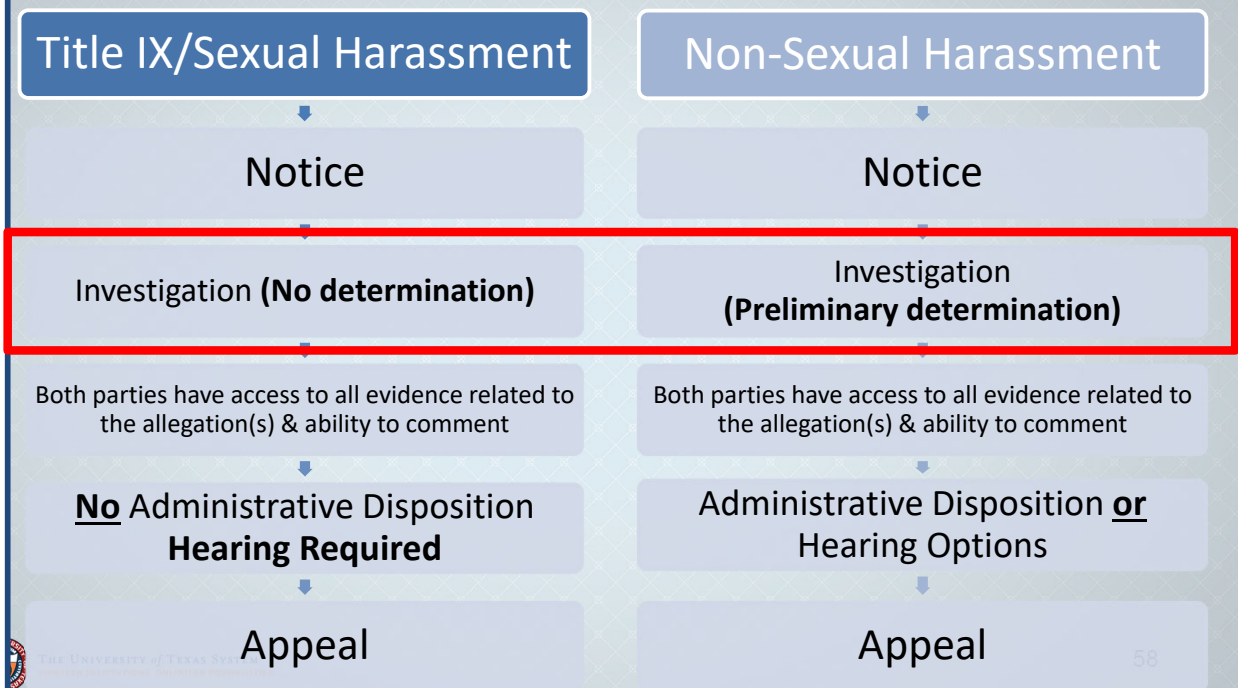
56

Formal Grievance Process Flowchart (Zoomed-In) Sexual Misconduct Cases



57

Outline Comparisons...



58

Draft vs. Completed Investigation Report

FAQ's:

- When should the investigation report be released to the parties (and the party's advisors)?
- Can the institution provide a draft investigation report first?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

59

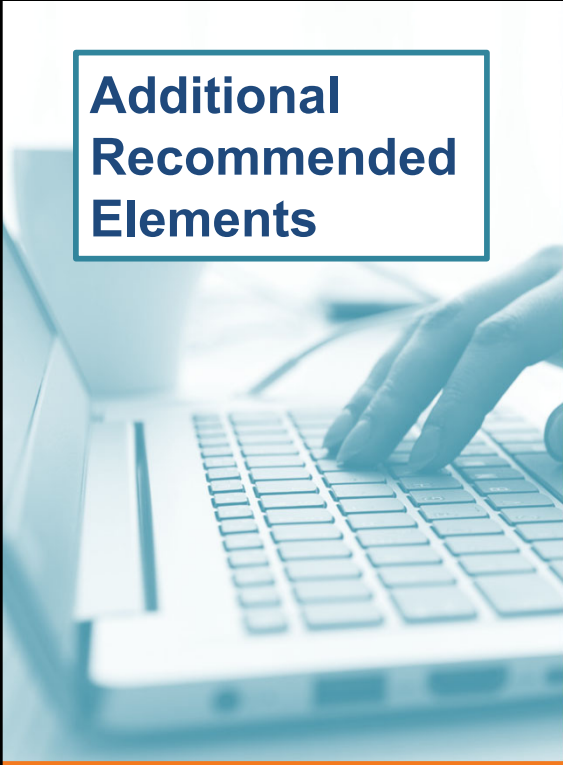
Completed Investigation Report: Sexual Harassment Cases

1. Outline each of the **allegations** that potentially constitutes prohibited conduct under the Policy (required by the Title IX regulations).
2. Provide a **timeline** (e.g. procedural steps) of the investigation. (recommended)
3. **Fairly summarize** relevant evidence, participant statements, and responses to questions (required by the Title IX regulations).
 - **Exculpatory**: Evidence tending to excuse, justify, or absolve the person of the alleged conduct.
 - **Inculpatory**: Evidence that places responsibility on the person of the alleged conduct.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

60



Additional Recommended Elements

- Overview (Summary) of the Investigation
- Institutional Jurisdiction
- Relevant Policies
- Investigators
- Witnesses
- Procedural Next Steps

61

61



What about these Elements?

- **Credibility assessments?**
- **Evidence analysis & rationale?**
- **Preliminary determination regarding responsibility?**

62

62

Access to the Completed Investigation Report

Send each party (& the advisors*) the completed investigation report:

- At least 10 days prior to the scheduled hearing
 - Why? Opportunity for the parties to inspect, review, & respond to the investigation report (at the hearing)
- A copy of the investigation report to the TIXC and hearing officer assigned.

** Advisor of choice; or the provided advisor by the institution (If applicable)*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

63

63

Investigation Timeframe (Example)

The investigation of a formal complaint will be concluded within **90 days** of the filing of a formal complaint

Note: Circumstances may require a **temporary delay** in this timeframe & the institution may extend this timeframe for good cause.

- Provide **notice** to the parties for temporary delays or extensions



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct

64

64

Investigation Documentation Examples

- Documentation Checklists & Forms
- Intake & Initial Assessments
- Case Management Timelines & Decisions
- Contact & Communications
- **Notices, Letters, & Dismissals**
- **Evidence Collection**
- **Investigation Report**
- Data Systems for Electronic & Hard Copy Records



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

65

Documentation & Record Keeping

The University (through the appropriate office) will retain all of the documentation included in the Grievance Process (outlined in the SM Policy) for 7 years, in accordance with state and federal records laws and University policy.

All documentation of records are private and confidential to the extent possible under law. Student records of the Grievance Process are disciplinary records under FERPA. Employee records of the Grievance Process are subject to the Freedom of Information Act (FOIA) and the Texas Public Information Act (TPIA), and included in the employee's official employment record.



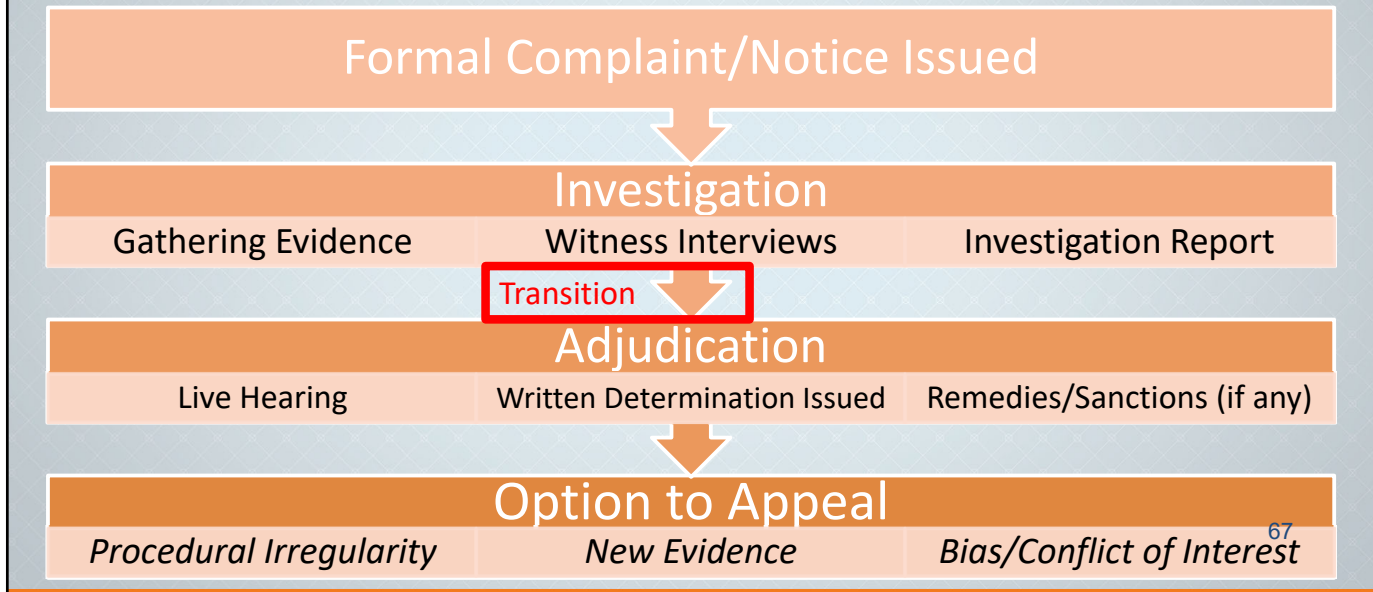
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct

66

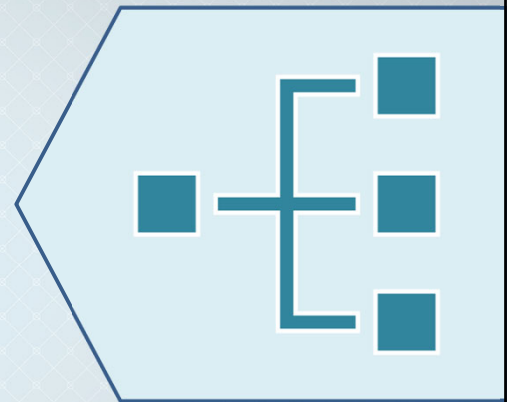
Formal Grievance Process Flowchart (Zoomed-In) Title IX/Sexual Harassment



67

Transition to Adjudication

- Transition process to the adjudication office? Referral?
- An administrative coordinator for the adjudication intake, scheduling, organizing, & communicating the next steps (e.g. hearing) to all participants.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

68

68

Adjudication Intake



Referral Type (RP)	Adjudication Office (Examples)
Student	Student Conduct
Faculty	Provost
Staff	Human Resources



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

69

69

Q & A



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

70

70

Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Associate General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

71