



TITLE IX UNIVERSITY

Higher Education Decision Maker Training Level 1

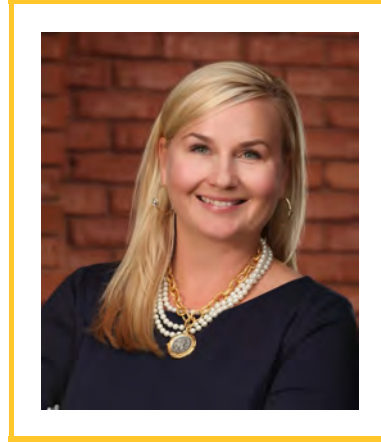
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Introduction

Courtney Bullard

- Creator, Title IX U
- Education Law Attorney
- Founder, ICS



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Overview of the Course



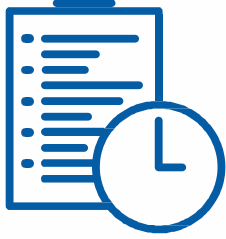
- Lesson 1: Introduction & Overview
- Lesson 2: Title IX Process Under the New Regulations
- Lesson 3: Sexual Harassment and Scope of Education Program/Activity
- Lesson 4: Title IX Grievance Process Overview
- Lesson 5: How to Serve Impartially
- Lesson 6: Role/Responsibilities of Decision Maker
- Lessons 7 and 8: The Hearing Part I and II
- Lesson 9: Determination
- Lesson 10: Wrap Up & Assessment

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Learning Outcomes



- ✓ Understand the law and regulations
- ✓ Explain Title IX process and your role in it
- ✓ Analyze the definition of sexual harassment and scope of education program/activity
- ✓ Recognize conflicts of interest/bias and how to serve impartially
- ✓ Understand role of advisors in a hearing
- ✓ Learn about relevant evidence/questions by advisors
- ✓ Understand requirements in a determination

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THE LAW

TITLE IX

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

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REGULATIONS VS. GUIDANCE

"[The] final regulations represent the Department's interpretation of a recipient's legally binding obligations, rather than best practices, recommendations, or guidance... [and] focus on precise legal compliance requirements governing recipients."
 Regulations are attached as a download.





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Title IX Team




Title IX
Coordinator



- Investigator(s)
- Decision-Maker(s)
- Appellate Member(s)
- Informal Resolution Facilitator(s)?
- Advisors

THE LAW

- Specific Roles
- Discretion of Institution
- No Conflicts of Interest



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INDIVIDUALS IN TITLE IX HEARINGS



COMPLAINANT/
REPORTER



RESPONDENT



ADVISOR
VS.
ADVOCATE



WITNESSES



TITLE IX
COORDINATOR/
INVESTIGATOR

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LANGUAGE



Guilty

Responsible

Trial

Hearing

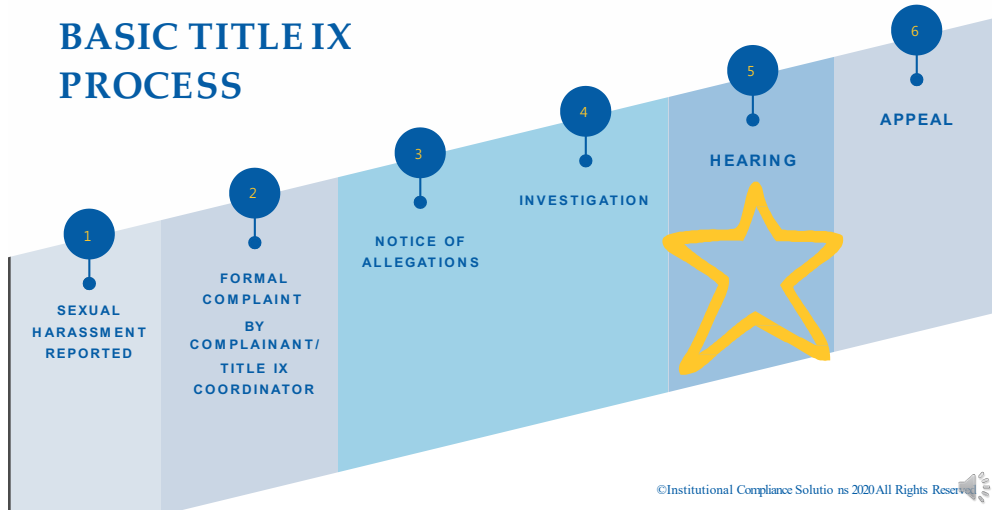
Crime

Violation



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BASIC TITLE IX PROCESS



RESPONSIBLE EMPLOYEES/OFFICIALS WITH AUTHORITY

- Responsible Employee NOT defined in the regulations- replaced with Title IX Coordinator
- Official authority to institute corrective measures
- (106.30)
- Discretion to give authority outside of the Title IX Coordinator
- CSA's ONLY a responsible employee if designated as an official with authority
- Obligation to report or inform on how to report, or having been trained to do so, does not qualify someone
- has having ability to institute corrective measures
- Discretion to decide which employees MUST, MAY, or only with student's consent report sexual harassment to Title IX Coordinator

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PROHIBITED CONDUCT

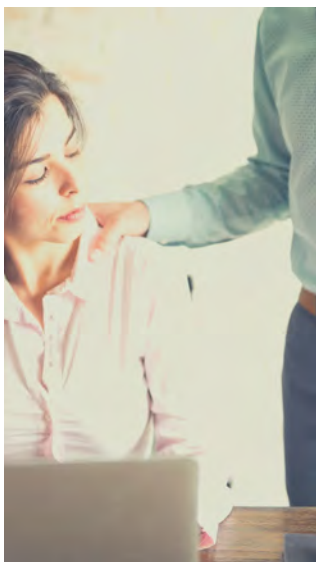
- Conduct reviewed under Title IX under the new regulations
- Refer to your policy
- Look at EACH element

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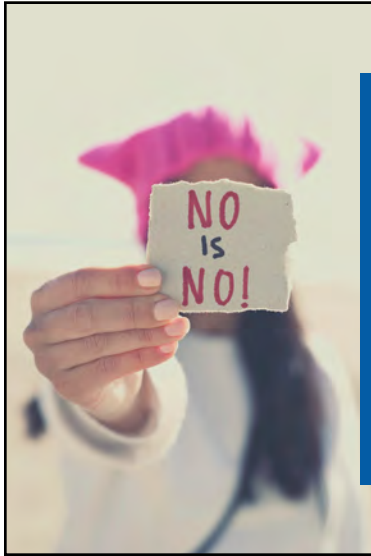


Sexual Harassment (106.30)

- Conduct on the basis of sex that satisfies one or more of the following:
 - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - 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; or
 - "Sexual Assault," "Dating Violence," "Domestic Violence" or "Stalking" as defined in the Clery Act.

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SEXUAL ASSAULT 20 U.S.C. 1092 (f)(6)(A)(v)

Sexual Assault: An offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI's Crime Reporting system.

A sex offense is any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

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.

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Domestic Violence

Domestic Violence (34 U.S.C. 12291 (a)(6): A felony or misdemeanor crime of violence

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

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Dating Violence

Dating Violence (34 U.S.C. 12291 (a)(10): Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be based upon the reporting party's statement with consideration of the following factors:

- (i) The length of the relationship
- (ii) The type of relationship
- (iii) The frequency of interaction between the persons involved in the relationship.

Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

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STALKING

Stalking (34 U.S.C. 12291 (a)(30): Engaging in a course of conduct directed at a specific

person that would cause a reasonable person to
(1) Fear for the person's safety or the safety of others; or
(2) Suffer substantial emotional distress.

For 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.

Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.

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Conduct + Location

IT'S MORE THAN THE BEHAVIOR...
MUST EVALUATE
LOCATION/ JURISDICTION AS WELL

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JURISDICTION

Education Program or Activity

- Locations, events, or circumstances (operations) 20 U.S.C. 1687 and 34 CFR 106.2(h)
- institution exercised substantial control over both the respondent AND the context in which the sexual harassment occurs 106.44(a)
- Includes any building owned or controlled by student organization that is OFFICIALLY RECOGNIZED by institution
- Includes online sexual harassment but it must be analyzed to determine if it occurs in education program or activity
- Does not create or apply a geographic test, does not draw a line between "off campus" and "on campus," and does not create a distinction between sexual harassment occurring in person versus online.

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Jurisdiction Continued

- No single factor to determine exercise of substantial control
- Distinguishable from Clery definitions of non-campus building or property
- May require organization to abide by Title IX policies and procedures
- May have to bifurcate conduct

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DISMISSAL OF A

FORMAL COMPLAINT (106.45 (b)(3)(i))

MUST Dismiss if:

- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.

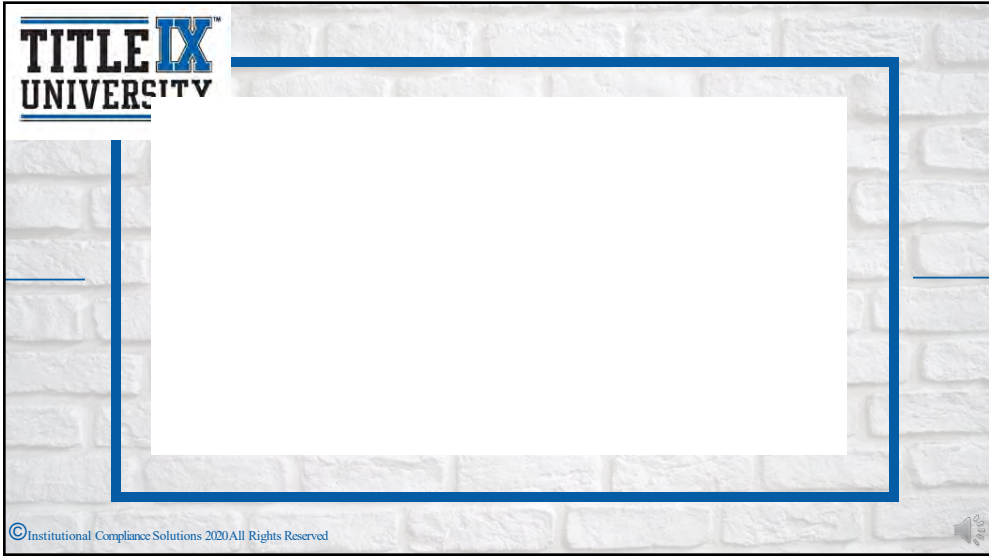
*May act under another provision of code of conduct

May Dismiss if:

- Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw formal complaint or allegations
- Respondent is no longer enrolled or employed by institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

*Must promptly send written notice of dismissal and reasons for dismissal simultaneously to parties





Lesson 4: Title IX Grievance Process Overview



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Response to a Formal Complaint (Grievance Process) – 106.45 (b)(1)(i)-(x)

- Treat parties equitably
- Require an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- No conflict of interest or bias by Title IX Coordinator, investigator, decision-maker or facilitator of informal resolution process
- Trained Title IX Team
- Presumption that respondent is not responsible
- Include reasonably prompt time frames for process and appeals with written notice for limited extensions with good cause (may include absence of party, witness, or advisor, law enforcement activity or the need for language/accommodation of disability)
- Describe range of sanctions and remedies
- Standard of evidence (same for students and employees)
- Procedures and permissible bases for appeals
- Notice of Allegations containing specific information as outlined in regulations

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Investigation of Formal Complaint (106.45 (b)(5))

MUST

- Ensure that burden of proof and burden of gathering evidence with institution, not parties (no medical or counseling records w/o written consent of party)
- Provide equal opportunity to present witnesses (including EXPERT), and inculpatory/exculpatory evidence
- Not restrict ability of either party to discuss the allegations or to gather/present relevant evidence
- Provide opportunity for both parties to have advisor (can be attorney and can restrict the extent to which advisor can participate in the process)
- Provide written notice of date, time, location, participants and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare to participate
- Provide equal opportunity to inspect and review evidence obtained as part of investigation (even if not relied on)- sent to party AND advisor (electronic or hard copy) with 10 days to respond prior to completion of investigative report.
- Create investigative report that fairly summarizes relevant evidence
- Provide report to parties AND advisors 10 days prior to hearing for review and written response.

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Hearings

- Live Hearing (in same room or using technology in separate rooms- not only via telephone)
- Permit ADVISOR to ask the other party and witnesses RELEVANT questions (including those challenging credibility)
- Cross-Examination
 - Directly, orally, in real time by ADVISOR
- Recording (audio, visual, or transcript) made available to parties for inspection and review
- Written determination regarding responsibility and sanctions with rationale
 - Decision provided to parties simultaneously
- Effective implementation of remedies (Title IX Coordinator)
- Burden of proof (Clear and Convincing or Preponderance of the Evidence)



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DECISION-MAKERS AT HEARING

- YOU MUST BE TRAINED (106.45 (b)(1)(iii))
- YOU have specific requirements for the hearing... we will discuss more in detail.

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APPEALS (106.45(b)(8))

- Must be offered for BOTH parties
- Must be a new Decision-maker
- Cannot be the Title IX Coordinator
- Specific Process and institution may limit the basis for appeals...but they must be clearly outlined



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Live Hearings but...



INFORMAL RESOLUTIONS (106.45 (b)(9))

May NOT:

- Be required/condition of enrollment or employment
- Be offered unless Formal Complaint is filed
- Be offered or facilitated when allegations of employee sexually harassing student

May:

- Be facilitated at any time after Formal Complaint and prior to determination regarding responsibility
- Expel if agreed to in Informal Resolution
- Provide Informal Resolution Process (NOT REQUIRED TO PROVIDE)

Must:

- Provide information regarding Informal Resolution Process in initial Notice of Allegations
- Provide parties written notice of informal resolution with
 - allegations
 - requirements of process (including what information/documents will be shared)
 - circumstances which presume Formal Complaint arising from same allegations
 - right to withdraw/resume grievance process
 - consequences-including records kept/shared
- Obtain voluntary, written consent
- Have reasonably prompt time frames

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INFORMAL RESOLUTIONS CONTINUED

Facilitators

- MUST be trained and free from conflicts of interest/bias
- MAY be Title IX Coordinator

Types:

- Arbitration
- Mediation
- Restorative justice
- Other?

Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities

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See you in
Lesson 5!



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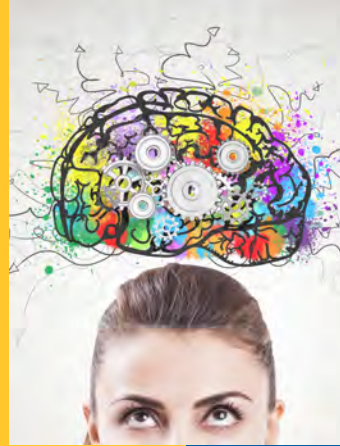
**PROCESS FREE
FROM CONFLICT
OF INTEREST OR
BIAS (106.45(b)(1)(iii))**

- For or against Complainants or Respondents generally
- Related to an individual Complainant or Respondent
- Whether a reasonable person believes a bias/conflict of interest exists

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EXPLICIT BIAS

- "Explicit bias" refers to the attitudes and beliefs we have about a person or group on a conscious level.
 - Expressed directly
 - Aware of bias
 - Operates consciously
- Example: Statement- "I don't think a woman would make a good CEO... Women are too emotional."




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IMPLICIT BIAS

- "Implicit bias" refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.
 - Expressed indirectly
 - Unaware of bias
 - Operates subconsciously
- Example: Assuming that a woman entering a hospital room is a nurse instead of a doctor because of her gender.





CONFLICTS OF INTEREST

- **conflict of interest**
conflict of interest | \ 'kɒn- flɪt- \
- **Legal Definition of conflict of interest**
 - 1: a conflict between the private interests and the official or professional responsibilities of a person in a position of trust
 - 2: a conflict between competing duties (as in an attorney's representation of clients with adverse interests)

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INSTITUTIONAL COMPLIANCE SOLUTIONS

BIAS AND/OR CONFLICT OF INTEREST = BASIS FOR APPEAL!

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AVOID PRE-JUDGMENT OF THE FACTS AT ISSUE

- Suspend your judgment
- Listen to ALL information before making a decision
- More difficult than it sounds

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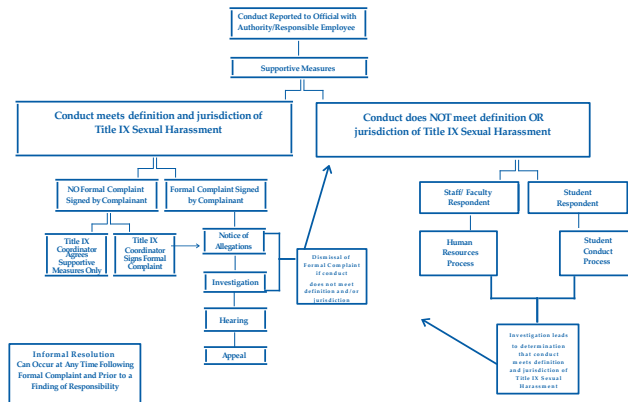
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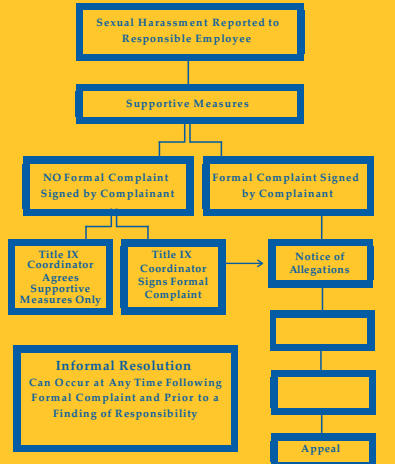
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Title IX Process Flow Chart



General Process Flow Chart




*A Formal Complaint MUST be dismissed if it does NOT meet definition of Sexual Harassment, occur in education program or activity, or in the US.
 *A Formal Complaint MAY be dismissed at request of Complainant, if Respondent no longer at institution or institution is prevented from gathering evidence.
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INVESTIGATIVE TIMELINE



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Decision-Maker Responsibilities

- Review Hearing Packet
- Evaluate evidence
- Hear from witnesses
- Determine if Responsible
- Determine Sanction (if responsible)

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Relevance and Your Role

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RELEVANCY

- Regulations do not define relevancy
- Regulations define some things that are NOT relevant:
 - Treatment unless parties agree
 - Privileged Information
 - Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior unless they are offered to prove that someone other than Respondent committed the sexual harassment, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with the respondent and are offered to prove consent (does not extend to Respondent's)

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Ir relevant

RELEVANCY CONTINUED

- Ordinary Meaning (Not a legal term)
- Does the evidence tend to make a fact more or less likely to be true

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RELEVANT


EXAMPLES OF RELEVANCE

- Relevance related to questions
- Relevance related to evidence

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OBJECTIVE EVALUATION OF RELEVANT EVIDENCE



EXCULPATORY
EVIDENCE


Inculpatory- shows or tends to show a Respondent's involvement in an act, or evidence that can establish responsibility.
Exculpatory- tends to exonerate Respondent of responsibility, favorable to a Respondent

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Credibility determinations cannot be based on a party's role as a Complainant or Respondent

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- **Presumption of NOT RESPONSIBLE (§106.45(b)(2)(i)(B))**
Until a determination is made regarding responsibility at the end of the grievance procedures

REMEDY REQUIREMENTS

No disciplinary sanctions prior to grievance process

Does not include supportive measures

Remedies designed to restore or preserve equal access to education program or activity

May include supportive measures

Remedies need not avoid burdening Respondent

Need not be non-disciplinary or non-punitive

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UNDERSTAND THE TECHNOLOGY TO BE USED IN ALIVE HEARING

- When parties are in the same room?
- When parties are participating virtually
- Recording
 - Audio only?
 - Video and Audio?
 - Transcription?
- Access to documents
- Protection of documents

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KNOW YOUR POLICIES AND PROCEDURES

- Working knowledge of your policies
- Structure of the hearing
- Use policy consistent language
- What are the elements of the alleged violation?
- What are your findings?
- What is your rationale?
- What happens after hearing?



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A large white rectangular area with a blue border, set against a light-colored brick wall background. The text 'TITLE IX UNIVERSITY' is in the top left corner. A small speaker icon is in the bottom right corner.



Lesson 7: The Hearing



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PRE- HEARING PREPARATION

- Review all documents, evidence, statements, information provided to you, as the decision-maker prior to the hearing.
- Do not pre-judge, keep an open mind.
- Review hearing process, rules of decorum, expectations prior to the hearing.
- Test technology prior to the hearing.
- Do not discuss the case.
- Give the hearing your full, undivided attention.
- Use a script if possible.

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CONSOLIDATION OF COMPLAINTS

- Multiple Complainants
- Multiple Respondents
- Multiple Violations
- Violations of Code of Conduct plus Title IX

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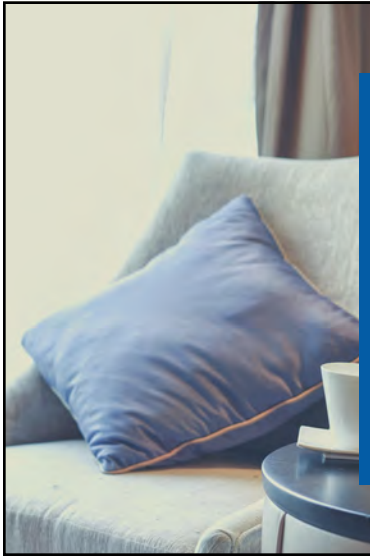
BE PREPARED FOR DELAYS

- Party doesn't appear
- Advisor doesn't appear/dismissed
- Parties move to informal resolution
- Witness doesn't appear
- Panel member doesn't appear
- Technology issues
- Illness
- Emergency
- Other



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Create Comfortable Space

- Private space
- Comfortable
- Quiet
- Convenient
- Access to technology (internet connection)
- Desk/table space
- Sufficient space between parties
- Private room for breaks/discussion with advisor
- Waiting room for witnesses (and virtual waiting rooms if appearing virtually)

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LOCATION

- In same room
- In separate room with technology enabling the parties to simultaneously see and hear the other party/witnesses answering questions



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Recording

- Audio, audiovisual, or transcript
- Available for the parties to inspect/review
- Make sure to TEST IT!

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Set the Tone, Enforce the Rules

- The parties and advisors must abide by the rules of decorum set by the institution
 - Provide the rules to the parties prior to the hearing
- The decision maker must-
 - set the tone for the hearing
 - ensure that the rules are clearly outlined
 - ensure that the rules are explicitly followed
 - have the ability to take breaks as necessary

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ADVISORS (106.45 (b)(5)(iv))

- Of the party's choice
- Attorney? Can be, but doesn't have to be
- Does not have to be trained.
- If none, **MUST** have one provided for purposes of the hearing (cross examination)
- May be present **EVEN** if party is not
- Must follow rules of decorum if you have them
- Potentially slow down the hearing process

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OPENING STATEMENTS

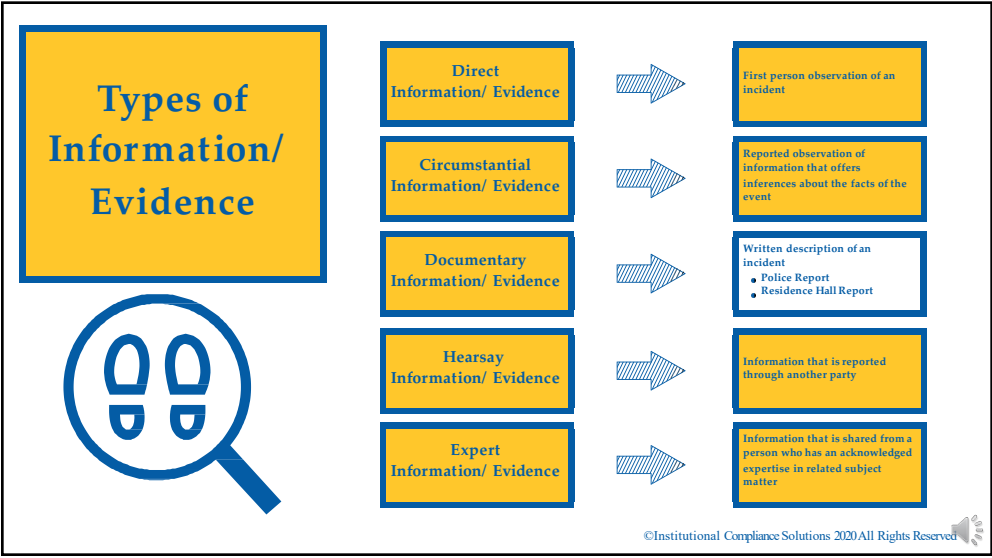
- If process allows, make sure each party has the same access/time limit
- Decide whether parties can use evidence or demonstratives
- Limit interruptions
- Expect nerves



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ALLOW EACH PARTY THE SAME OPPORTUNITY TO PRESENT...

 <p>FACT WITNESSES</p>	 <p>EXPERT WITNESSES</p>	 <p>INCULPATORY/ EXCULPATORY EVIDENCE</p>
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See you in
Lesson 8!



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Lesson 8: The Hearing Part II



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QUESTIONING WITNESSES (106.45(b)(6)(i))

- Advisor must be permitted to ask relevant questions (including follow up questions and questions challenging credibility) of the other party and witnesses.
- Never by a party directly
- Conducted live
- Orally
- In real time
- May be submitted in advance, but not required

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QUESTIONING WITNESSES CONTINUED... DECISION- MAKER

- Decision-maker must decide whether the question is relevant BEFORE it is answered.
- Decision-maker must EXPLAIN any decision to exclude a question as not relevant.
- Decision-maker may ask any additional/follow up questions

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Additional Information regarding questioning

- What if advisors DO NOT ask cross examination questions of opposing party or witness?
- What if a party refuses to answer a decision-maker's question(s)

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CLOSING STATEMENTS

- If process allows, make sure each party has the same access/time limit
- Decide whether parties can use evidence or demonstratives
- Limit interruptions
- Expect emotion

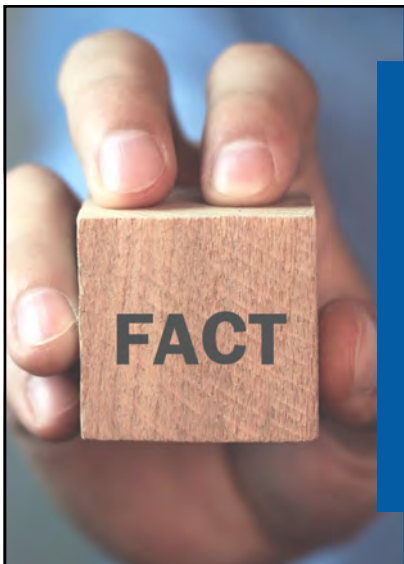


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FACT FINDING

- Was the information a fact?
- Was the information disputed?
 - If no-- this information can be considered "fact"
- Did other evidence corroborate the information?
 - Consistencies
 - Inconsistencies



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EVALUATING WITNESSES/ REVIEWING EVIDENCE

- Focus on behavior, not character
- What information is known?
- What information is unknown?
- What questions could clarify your unknowns?



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See you in Lesson 9!



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RESPONSIBILITY

Decision-maker must issue a WRITTEN DETERMINATION regarding responsibility- using standard of evidence established by the institution. 106.45(b)(7)

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Standards of Proof

- **Preponderance Evidence Standard:** understood to mean concluding that a fact is more likely than not to be true
- **Clear and Convincing Evidence Standard:** understood to mean concluding that a fact is highly probable to be true
 - Definitions provided by Department in preamble to the regulations

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Written Determination MUST Include 106.45(b)(7)(ii):

- Identification of ALL allegations potentially constituting sexual harassment
- Description of the procedural steps taken from the receipt of formal complaint through the determination including:
 - notice to parties
 - interviews with parties and
 - witnesses site visits
 - methods used to gather
 - evidence hearings held
- Findings of fact supporting the determination
- Statement of, and rationale for the result as to each allegation
 - including: determination regarding responsibility
 - any disciplinary sanction
 - whether remedies designed to restore or preserve equal access to the institution's education program or activity will be provided by the institution to the Complainant.
- Institution's procedures and permissible bases for the Complainant and Respondent to appeal

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ARTICULATING DECISION/RATIONALE

- Articulate what you believe happened based on:
 - Standard of evidence
 - Elements of alleged violation
 - Connect rationale to each element
 - Identify facts supporting each element(s)
 - Identify facts that do not support the element(s)
 - Include any admissions that occur during the hearing
 - If using a formula to weigh evidence/information, make sure to follow explicitly

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EXAMPLE: SEXUAL ASSAULT/FONDLING

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.

1. Touching
2. Private body parts
3. Of another person
4. For the purpose of sexual gratification
5. Without Consent (insert definition of consent) of the victim

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APPEALS 106.45(b)(8)

- MUST offer both parties an appeal re: responsibility, recipient dismissal of formal complaint, or any allegations on following bases:
 - Procedural irregularity that affected the outcome of the matter
 - New Evidence
 - Conflict of Interest or Bias by Title IX Coordinator, Investigator(s), Decision-Maker(s)- generally toward complainants or respondent or toward specific party
 - May include additional bases
- Most be included in Notice of Outcome



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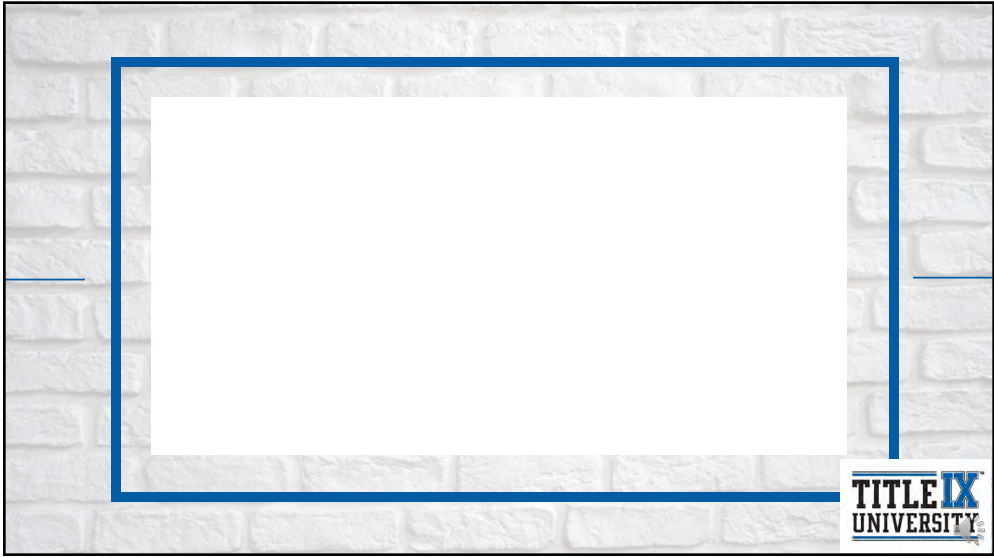


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TITLE IX
UNIVERSITY

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The image features a white brick wall background. In the top-left corner, the logo for 'TITLE IX UNIVERSITY' is displayed in a blue, serif font. A large, empty white rectangle is centered on the page, framed by a thick blue border. At the bottom-left, there is a small copyright notice, and at the bottom-right, there is a small speaker icon.



Wrap Up

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A blue header bar at the top contains a yellow horizontal line on the left and the "TITLE IX UNIVERSITY" logo on the right. Below the header, on the left, is a photograph of a person's hands in a green sweater wrapping a gift in white paper with a geometric pattern. To the right of the photo, the text "Wrap Up" is written in a large, blue, serif font. At the bottom right, there is a small copyright notice: "©Institutional Compliance Solutions 2020 All Rights Reserved" with a small logo.



Learning Objectives



- ✓ Understand the law and regulations
- ✓ Understand Title IX process and your role and responsibilities
- ✓ Recognize and Evaluate Prohibited Conduct and Jurisdiction
- ✓ Identify conflicts of interest/bias
- ✓ Understand how to assess relevancy
- ✓ Identify and weigh evidence
- ✓ Recognize role of advisor/witnesses/parties in a hearing
- ✓ Understand requirements in a Notice of Outcome and Determination

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Questions???



- ❖ We are here for you!
(info@titleixu.com)
- ❖ Contact your Title IX Coordinator

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ASSESSMENT OF KNOWLEDGE

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