

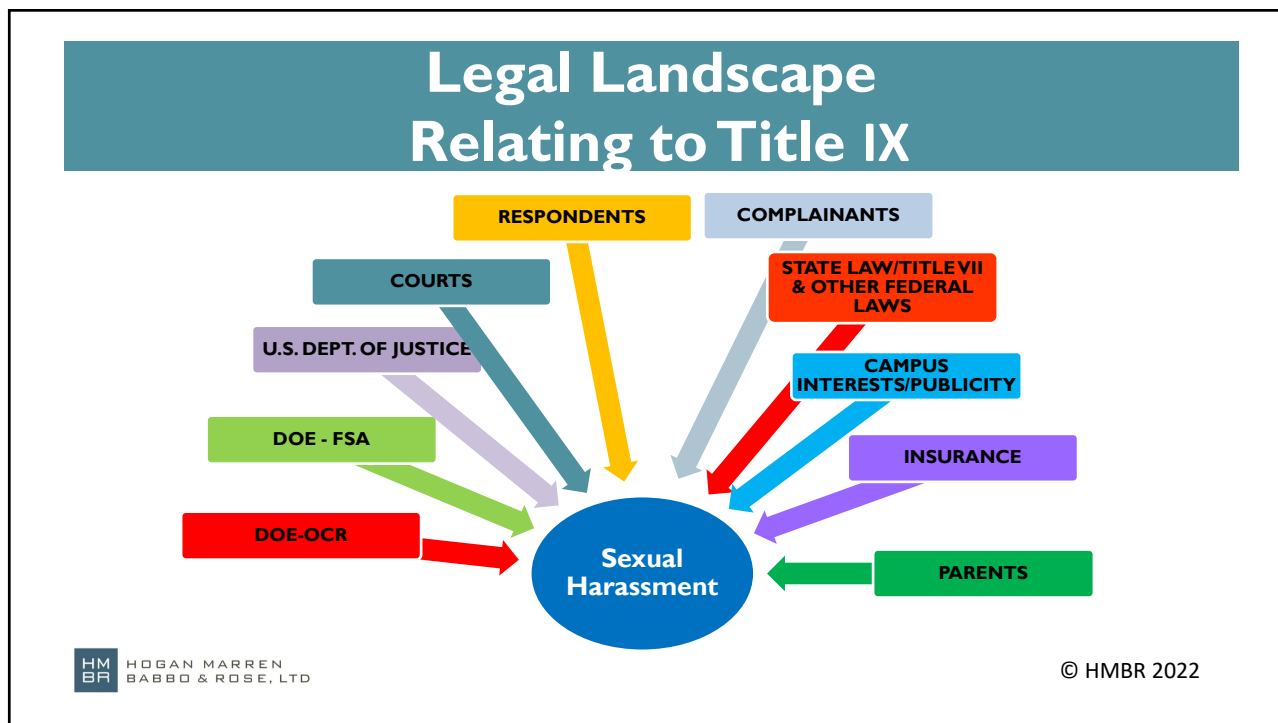
Annual Training on Sexual Harassment, Dating Violence, Domestic Violence and Stalking

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Title IX

Title IX is a federal statute that prohibits sex discrimination in education programs and activities that receive federal financial assistance.

“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.”



Title IX of the Education Amendment of 1972, 20 U.S.C. § 1681(a)

Examples of Civil Litigation Claims

Complainants

- Title IX – deliberate indifference
- Tort law – negligence/duty of care
- Breach of contract
- Intentional infliction of emotional distress

Respondents

- Title IX – gender bias
- Due process
- Breach of contract
- Intentional infliction of emotional distress
- Defamation

Title IX Procedural Requirements

- Title IX Coordinator
- Notice of nondiscrimination
- Grievance procedures
 - General -- Sex Discrimination
 - Specific -- Sexual Harassment
- Recordkeeping



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Title IX Liability Standard – Sexual Harassment

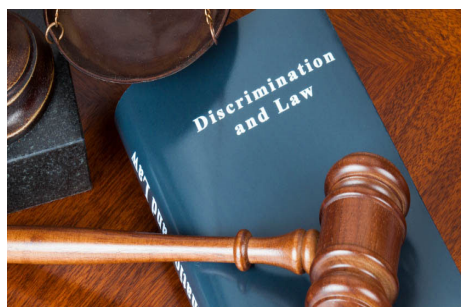
A school with **actual knowledge** of **sexual harassment** in an **education program or activity** of the school **against a person in the United States** must respond in a manner that is **not deliberately indifferent**.



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What is Title IX Sexual Harassment?

1. Quid pro quo
2. Violence Against Women Act (VAWA) categories:
 - Sexual assault
 - Domestic violence
 - Dating violence
 - Stalking
3. Hostile environment



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Title IX Sexual Harassment – Hostile Environment

- Unwelcome conduct
- Of a sexual nature
- As determined by a reasonable person
- That is so severe *and* pervasive *and* objectively offensive
- That it effectively denies a person equal access to an education program or activity



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Ten Requirements -- Title IX Grievance Process for Sexual Harassment

The grievance process must:

1. Treat Complainants and Respondents equitably
2. Require an objective evaluation of all relevant evidence
3. Prohibit bias and conflict of interest
4. Include a presumption that the Respondent is not responsible
5. Include reasonably prompt timeframes, with extensions for good cause



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Ten Requirements for Title IX Grievance Process for Sexual Harassment

6. Include a standard of evidence:
Preponderance (more likely than not)
(required in Illinois)
7. List the possible disciplinary sanctions and remedies
8. Describe the appeal procedures (mandatory)
9. Describe the supportive measures available to both parties
10. Restrict the use of information protected by privilege



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Title IX Retaliation

No school or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by the Title IX statute or regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.



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Title IX Regulations: Retaliation

- Retaliation includes charges against an individual for code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sexual harassment
- Retaliation does not include:
 - Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding, provided that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.
 - Exercising rights protected under the First Amendment

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Title IX Regulations: Retaliation

The school must keep confidential the identity of:

- Any individual who has made a Title IX report or complaint
- Any Complainant
- Any individual who has been reported to be the perpetrator
- Any Respondent
- Any witness

CONFIDENTIAL

Exception: As may be permitted by the FERPA statute or regulations, or as required by law, or to carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding.

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Title IX: Recordkeeping

Must maintain for seven (7) years records of –

- Each sexual harassment complaint and action, including:
 - supportive measures
 - dismissal?
 - any determination regarding responsibility
 - any audio or audiovisual recording or transcript of the hearing or, if applicable, other meetings
 - disciplinary sanctions imposed on Respondent and any remedies provided to Complainant
- Any appeal and the result of the appeal
- Any informal resolution and the result of the informal resolution process
- All Title IX training materials used to train officials involved in the investigation and resolution of Title IX sexual harassment cases



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Illinois Preventing Sexual Violence in Higher Education Act

- University must develop a clear, comprehensive sexual violence policy
- **Response due within 12 hours of receipt of report**
- **Preponderance of the evidence standard**
- Advisor
- **Bill of Rights for student survivors**
- **Amnesty policy**
- Appeal rights
- **Extensive training**
- **Annual reports to Attorney General and IL Dept of Human Rights**
- **NEW: Annual Sexual Misconduct Climate Survey for students**

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Illinois State Law: Consent

Consent is:

- i. a freely given agreement to sexual activity,
- ii. A person's lack of verbal or physical resistance or submission resulting from the use or threat of force does not constitute consent,
- iii. A person's manner of dress does not constitute consent,
- iv. A person's consent to past sexual activity does not constitute consent to future sexual activity,
- v. A person's consent to engage in sexual activity with one person does not constitute consent to engage in sexual activity with another, and
- vi. A person can withdraw consent at any time.

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Illinois State Law: Incapacitation

A person cannot consent to sexual activity if that person is unable to understand the nature of the activity or give knowing consent due to circumstances, including without limitation the following:

- Person is incapacitated due to the use or influence of alcohol or drugs;
- Person is asleep or unconscious;
- Person is underage; or
- Person is incapacitated due to a mental disability.

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What may change under the 2022 Proposed Title IX Regulations?

	2020 Final Regulations	2022 Proposed Regulations
Recipient's Response to Sexual Harassment	A recipient with actual knowledge of sexual harassment in a recipient's education program or activity against a person in the United States must respond in a manner that is not deliberately indifferent. § 106.44(a) and 106.44(b)(2).	A recipient must take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. Proposed § 106.44(a).
	A recipient is deliberately indifferent if its response to sexual harassment is clearly unreasonable in light of the known circumstances. § 106.44(a).	Employees who have authority to take corrective action or, for incidents involving students, has responsibility for administrative leadership, teaching or advising in the recipient's education program or activity, are obligated to notify the Title IX Coordinator. Proposed § 106.44(c).
	Employees with the authority to take corrective measures have knowledge. § 106.30(a).	All other employees are obligated to notify the Title IX Coordinator or provide their contact information and information about reporting, except confidential employees. Confidential employees must provide the Title IX Coordinator's contact information and information about reporting. The institution must provide clear information and training on notice requirements. Proposed 106.44(c).

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What may change?

	2020 Final Regulations	2022 Proposed Regulations
Education Program or Activity	<p>“[E]ducation program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. §106.44(a).</p> <p>If the conduct alleged in the formal complaint ... did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment[.] § 106.45(b)(3).</p>	<p>Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient’s disciplinary authority.</p> <p>A recipient has an obligation to address a sex- based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States. Proposed § 106.11(a).</p>

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What may change?

	2020 Final Regulations	2022 Proposed Regulations
Sexual Harassment	<p>Sexual harassment is sexual assault and quid pro quo harassment, as well as other forms of sexual misconduct that constitute a sexually hostile environment. Added domestic violence, dating violence, and stalking to the definition of sexual harassment, as defined by reference to VAWA.</p> <p>Hostile environment is only unwelcome conduct determined by a reasonable person to be so severe and pervasive and objectively offensive that it effectively denies a person equal access to a recipient’s education program or activity. § 106.30(a).</p>	<p>Employs the term “sex-based harassment” that includes sexual assault, quid pro quo harassment, dating violence, domestic violence, stalking, and hostile environment harassment.</p> <p>Hostile environment harassment is unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity. Proposed § 106.2.</p>

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What may change?


	2020 Final Regulations	2022 Proposed Regulations
LGBTQIA+ Protections	Did not address, <i>but see</i> ED Notice of Interpretation of <i>Bostock v. Clayton County</i> .	Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. Proposed § 106.10.


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What may change?

	2020 Final Regulations	2022 Proposed Regulations
Reporting	Complainant must be a participant or attempting to participate in the education program or activity of the recipient at the time of filing a formal complaint. § 106.44.	Complainants may file a complaint about sex discrimination even after leaving the recipient’s education program or activity. Proposed §§ 106.2 and 106.45(a)(2). Title IX Coordinator must monitor for barriers to reporting information about conduct that may constitute sex discrimination under Title IX. Recipient must take reasonably calculated steps to address reporting barriers identified by the Title IX Coordinator. Proposed § 106.44(b).


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What may change?

	2020 Final Regulations	2022 Proposed Regulations
Grievance Process	Live hearings and cross-examination by a party's advisor are required. § 106.45.	Recipient may, but need not, provide for a live hearing. If a live hearing is available, a party's advisor is allowed to ask certain relevant questions to the other party or any available witnesses. If a live hearing is not available, the decision-maker is allowed to ask certain relevant questions during a meeting with the party to assess the credibility of the parties and witnesses. Proposed § 106.45(g).
Retaliation	Recognizes retaliation as intimidation, threats, coercion, or discrimination for the purpose of interfering with any right or privilege secured by Title IX. § 106.71.	Recognizes "peer retaliation" as a form of retaliation, defined as "retaliation by a student against another student." Proposed § 106.2

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What may change?

	2020 Final Regulations	2022 Proposed Regulations
Pregnant and Parenting Students	<p>Recipients must not apply any rule, relating to potential parental, family, or marital status of a student or applicant that treats individuals differently based on sex.</p> <p>Recipient must not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery.</p> <p>Recipients must treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery in the same manner and under the same policies as any other temporary disability or physical condition.</p> <p>Recipient must not make pre-admission inquiries into an applicant's marital status. Recipient may ask an applicant to self-identify their sex, but only if all applicants are asked and the response is not used as a basis for discrimination. § 106.21(c).</p>	<p>Recipient must not discriminate based on a student's current, potential, or past pregnancy or related conditions.</p> <p>Recipient may permit a student to participate voluntarily in a separate part of its education program or activity, so long as the recipient ensures the separate education program or activity is comparable to what is offered to students who are not pregnancy and who do not have related conditions.</p> <p>When an employee is informed of a student's pregnancy or related conditions, the employee must promptly inform the student (or individual with the legal right to act on behalf of the student) of how they can notify and contact the Title IX Coordinator for assistance, unless the employee reasonably believes that the Title IX Coordinator is already aware. Proposed § 106.40.</p>

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What may change?

	2020 Final Regulations	2022 Proposed Regulations
Pregnant and Parenting Students (Cont.)	(see previous slide)	Identifies “[s]pecific actions to prevent discrimination and ensure equal access.” The Title IX Coordinator must promptly inform the student (or if applicable the person who notified the Title IX Coordinator) that: <ol style="list-style-type: none"> (1) recipient is prohibited from sex discrimination, including sex-based harassment; (2) reasonable modifications to recipient’s policies, practices, and procedures because of pregnancy or related conditions are available to the student ((3) the recipient’s obligation to allow access, on a voluntary basis, to any separate and comparable portion of the recipient’s education program or activity; (4) the recipient’s obligation to allow a voluntary leave of absence; (5) the recipient’s obligation to ensure the availability of lactation space; (6) the recipient’s obligation to maintain grievance procedures that provide for prompt and equitable resolution of complaints of sex discrimination, including sex-based harassment. Proposed § 106.40.

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Avoiding Bias and Ensuring Equity and Due Process in the Title IX Process

- Investigations
- Training
- Outreach



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Obligation to Serve Impartially*

- Avoid prejudgment of the facts at issue
- Presumption for Respondent
- No bias or conflicts of interest
 - For the individual Complainant
 - For the individual Respondent
 - For Complainants or Respondents generally
- Apply the relevant facts to the appropriate policy



*Except for advisors.

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Effects of Trauma



- Possible impact on memory and memory recall
- Inconsistent or incomplete descriptions of facts
- Counterintuitive behaviors

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Effects of Trauma

- Conducting a trauma-informed investigation does not mean that the result is inaccurate or biased in favor of the complainant.
- To the contrary, it helps to ensure that the evidence is considered in a thoughtful and informed manner.



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Explicit and Implicit Bias

Explicit or conscious bias

When a person is very clear about their feelings and attitudes and related behaviors are conducted at a conscious level and with intent.

Implicit or unconscious bias

Bias that operate outside of the person's awareness and can be in direct contradiction to a person's espoused beliefs and values.

<https://nccc.georgetown.edu/bias/module-3/1.php>

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Example of Bias



AP Associated Press AP - Tue Aug 30, 11:31 AM ET

A young man walks through chest deep flood water after looting a grocery store in New Orleans on Tuesday, Aug. 30, 2005. Flood waters continue to rise in New Orleans after Hurricane Katrina did extensive damage when it

Email Photo Print Photo

RECOMMEND THIS PHOTO Recommended Photos Average (138 votes)

Recommend It ☆☆☆☆☆ **★★★★★**



AFP 3:47 AM ET

Two residents wade through chest-deep water after finding bread and soda from a local grocery store after Hurricane Katrina came through the area in New Orleans, Louisiana. (AFP/Getty Images/Chris Graythen)

Email Photo Print Photo

RECOMMEND THIS PHOTO Recommended Photos Average (214 votes)

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RELATED

- Katrina's Effects, at a Glance AP - Tue Aug 30, 1:26 PM ET
- Hurricanes & Tropical Storms

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Another Example of Bias

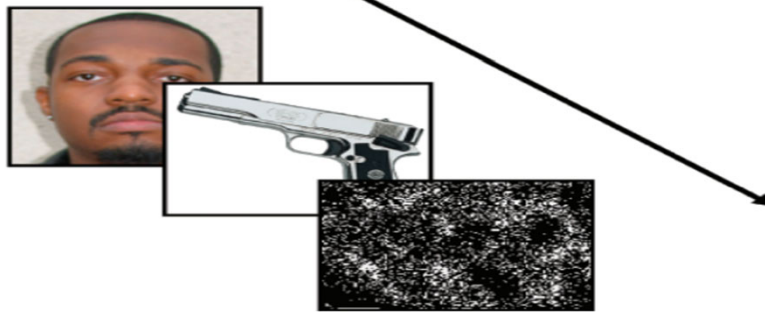


Fig. 1. Schematic illustration of weapons-priming procedure. On each trial, a white or black face appears first, followed by a gun or hand tool, followed by a visual mask. Participants' task is to indicate, as quickly as possible, whether they saw a gun or a tool.

Weapon Bias: Split-Second Decisions and Unintended Stereotyping

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Perspectives: What can we do about it?

- Increase awareness of bias and its impact – but awareness alone is not enough
- Ongoing process – not a onetime session
- Need to manage bias
 - Calling out stereotyped views
 - Give information that contradicts stereotypes
 - Gathering more individualized information about people
 - Reflecting on counter stereotypical examples
 - Increasing interactions with different kinds of people
- Practice new behaviors

Unconscious Bias Training that Works, Harvard Business Review,
<https://hbr.org/2021/09/unconscious-bias-training-that-works>

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Perspectives: What can we do about it?

- Recognize the implicit biases you carry
- Interrupt your automatic thoughts when they occur

Mitigate:

- Perspective taking – empathy
- What assumptions am I making?
 - Would I want someone to make these assumptions about me?
- What evidence support this?
 - Is the evidence reliable?
- What else might be plausible?
- Would I arrive at the same conclusion if the parties' race(s), gender(s), sexual orientation(s), etc. were different?

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The Title IX Complaint Process



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Formal Complaint



- Formal complaints must be signed and filed by a Complainant who is enrolled or employed (or an applicant)
- May also be filed by Title IX Coordinator

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Reports of Sexual Harassment

- Any person may report sexual harassment (whether or not the person reporting is the person alleged to be the victim), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- A report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

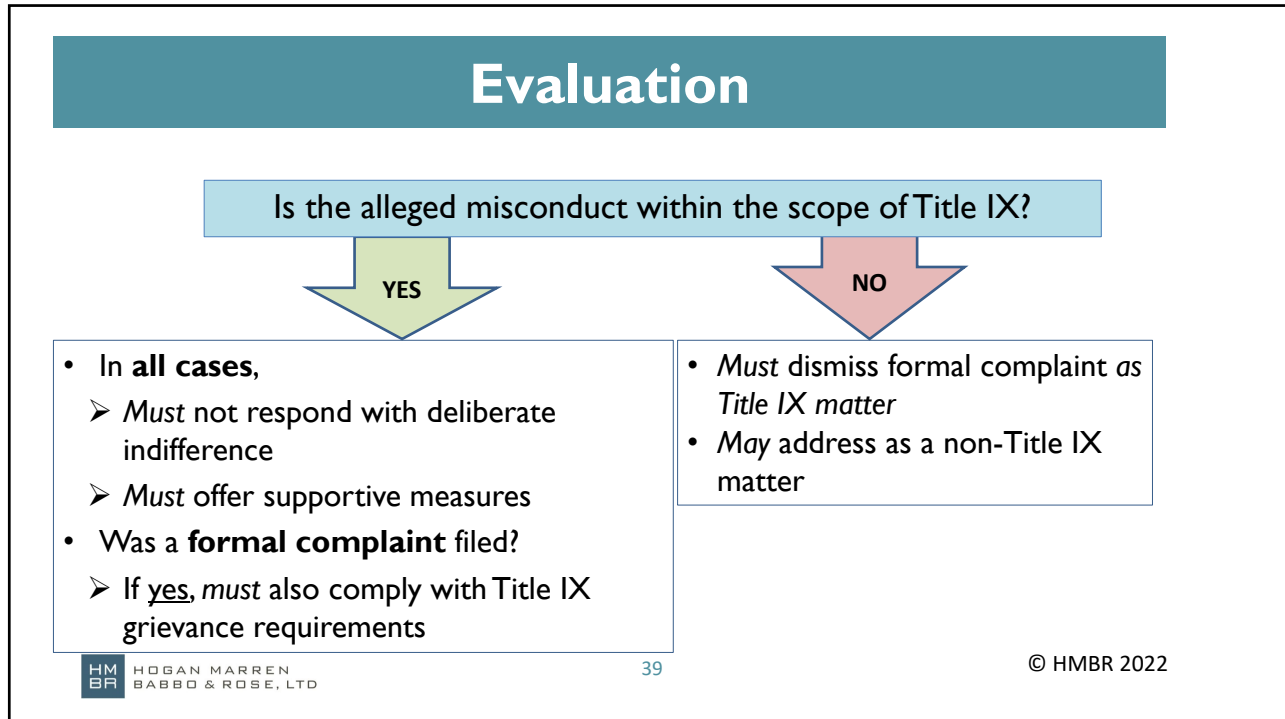
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Evaluation

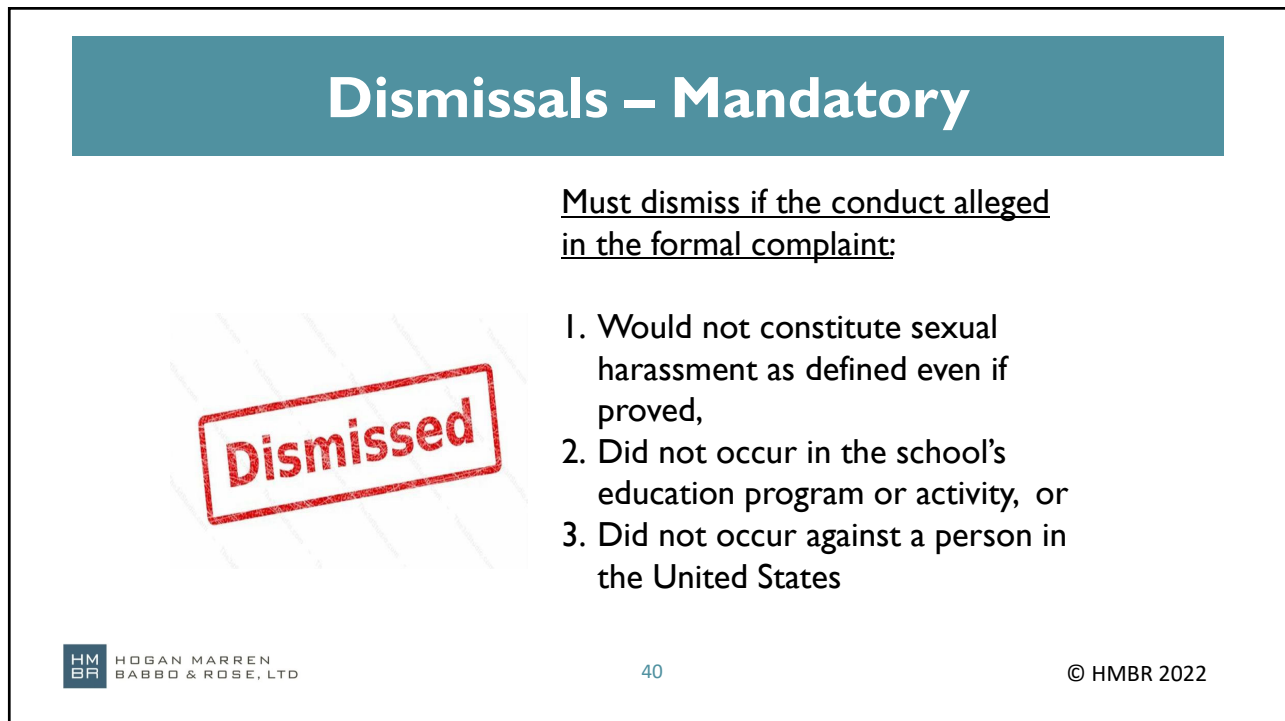
Must determine whether the alleged misconduct is within the scope of Title IX:

1. If no, the Title IX regulations do not apply and the school can dismiss the complaint.
2. If yes, the school must respond in a manner that is not deliberately indifferent.
 - By providing supportive measures in all cases.
 - And, if a formal complaint was filed, by following the specific grievance process requirements.

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Dismissals – Permissive

May dismiss at any time if:

1. The Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein;
2. The Respondent is no longer enrolled or employed by the school; or
3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

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Confidentiality Requests

- Assess!
 - Risk to the student and broader community
 - Provide a safe and non-discriminatory environment for all students
- Factors:
 - Seriousness of the alleged actions
 - Age of the complainant
 - Other complaints against same person
 - Rights of the accused to receive information



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Written Notice of Investigation

The written notice must:

- Describe the grievance process including any informal resolution
- List the allegations, including sufficient details (the identities of the parties, the alleged misconduct, and the date and location of the misconduct).
- Include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the process
- Inform the parties that they may have an advisor of their choice and may inspect and review evidence
- Describe any provision that prohibits knowingly making false statements or knowingly submitting false information
- Be updated as necessary if new or different allegations arise

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Illinois State Law - Written Notice of Rights and Options

The written notice to the Complainant must include:

- The right to report or not report the alleged incident to the higher education institution, law enforcement, or both, including information about the survivor's right to privacy and which reporting methods are confidential;
- The contact information for the higher education institution's Title IX coordinator or coordinators, confidential advisors, a community-based sexual assault crisis center, campus law enforcement, and local law enforcement;
- The right to request and receive assistance from campus authorities in notifying law enforcement;
- The ability to request supportive measures, including an order of protection or no-contact order in State court;
- The institution's ability to provide assistance, upon their request, in accessing and navigating campus and local health and mental health services, counseling, and advocacy services; and
- A summary of the institution's complaint resolution procedures, if a violation of the institution's policy is alleged.

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

Federal regulations are a floor, not a ceiling.

A school's policies and procedures may go *beyond Title IX*.

If the alleged conduct in a formal complaint is outside the scope of Title IX, the school:

- *Must dismiss* the formal Title IX complaint *as a Title IX matter*
- *May address* the conduct with non-Title IX policies and procedures

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Supportive Measures

The Title IX Coordinator must:

- promptly contact and inform the Complainant of the availability of supportive measures
- consider the Complainant's wishes and use an interactive process
- document decisions relating to supportive measures
- coordinate the implementation of supportive measures

Offered to the Complainant and the Respondent

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Supportive Measures

Non-disciplinary, non-punitive individualized services

Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

The school must maintain as confidential any supportive measures provided, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the measures.

Examples of Supportive Measures

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures

Specific Requirements for Investigation

In any investigation, the school must:

1. Ensure that the burden of proof and the burden of gathering evidence rest on the school, not the parties
2. Provide equal opportunity for the parties to present witnesses, including fact and expert witnesses
3. Not impose any gag-orders
4. Allow advisor of choice
5. Provide written notice of hearings, interviews and other meetings

Specific Requirements for the Investigation

6. Provide an equal opportunity for parties to inspect and review evidence
7. Provide the evidence to the parties for review and response prior to the draft investigation report
8. Create an investigation report “that fairly summarizes relevant information” – does not include findings of responsibility
9. Provide the draft investigation report to the parties for review and response prior to the hearing
10. Provide live hearing – no single-investigator model

Issues of Relevancy

- The Investigation Report must fairly summarize the *relevant* information.
- Questions and evidence about the complainant's sexual predisposition and prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that:
 - Someone other than the respondent committed the conduct alleged by the complainant, or
 - If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Adequate, Reliable, and Thorough Investigation

Key Tenets:

- Follow the University's policies and procedures.
- Investigate *all* allegations of sexual violence and sexual harassment.
- Gather sufficient relevant information:
 - Interview all relevant witnesses and, to extent practicable, all witnesses identified by the parties.
 - Obtain relevant physical and documentary evidence, including evidence that corroborates witness statements.

Investigative Plan

At the start of the investigation: Have a *roadmap* for your investigation of what information you need to collect and how you want to collect this information.



At the end of the investigation: Use the roadmap to write the investigation report and written determination.

Investigative Plan

- *Identify elements of policy violation*
- *Identify evidence* – documents and testimony -- needed to complete the investigation and *identify the best sources and means* of obtaining each type of evidence.
- *Identify what you are looking for* – who, what, where, how, when
 - to put together a chronological timeline of the events.

Identifying the elements of a policy violation

Sexual Assault – sexual harassment

Sample Policy Definition:
Unwelcome conduct of a sexual nature determined by a reasonable person to be so severe and pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity.

Elements (example)

1. Unwelcome conduct
2. Of a sexual nature
3. Determined by a reasonable person to be so severe and pervasive and objectively offensive
4. That it creates a sexually hostile environment (where person is effectively denied or limited in access to education program or activity)

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Assessing a Hostile Environment

Considerations

- Totality of the circumstances
- Objective and subjective perspectives
- Type, frequency, duration of conduct
- Identity and relationship between parties
- Number of individuals involved
- Age and sex of parties
- Size of school, location of incident(s), context of incident(s)
- Other gender-based incidents
- Big Question: Was the action sufficiently serious to deny or limit ability to participate or benefit from educational program?

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Types of Evidence – Testimonial

Interview all relevant witnesses and, to extent practicable, all witnesses identified by the parties.


1. Parties and all other individuals with “first-hand” knowledge
2. Individuals with “second-hand” knowledge
3. All of witnesses identified by parties?

Types of Evidence – Physical

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

Interviewing Techniques – Do’s and Don’ts

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



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Interviewing Techniques – Do’s and Don’ts

Basic Interview Questions
<ul style="list-style-type: none"> Who committed the alleged act? Was anyone else involved? What exactly occurred? What was said and by whom? When did the act occur? Where did the act occur? How did you react? How did the incident affect you? Are there other individuals who may have relevant information? Did you talk to anyone of the incident? Ask for available evidence (e.g., social media) What else do you want to tell me about what happened?


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Complainant's Sexual Predisposition and Prior Sexual History

Generally, the Complainant's sexual predisposition and prior sexual history are not relevant, except where offered to prove:

- Someone other than the Respondent committed the misconduct at issue
- The parties have a prior sexual relationship and the information is provided to show consent

Incapacitation

Incapacitation:

- i. The inability to understand the nature of the activity or to give knowing consent;
- ii. The inability to understand the "who, what, when, where, and how" of a situation;
- iii. When a person is sufficiently intoxicated, high, intellectually disabled or the like such that the person is not capable of understanding and appreciating what is happening; or
- iv. The legal inability to give effective consent because of age or declared incompetent.

Consent and Incapacitation

Assess **whether the respondent knew or should have** known that the complainant was incapacitated and unable to give affirmative consent.

Signs of possible incapacitation:

- Slurred or incomprehensible speech
- Unsteady Gait
- Combativeness
- Emotional Volatility
- Vomiting
- Incontinence

Analyzing Consent – General Factors

The following factors can aid in the determination:

- How drunk was the victim? The more intoxicated the victim was, the less likely it is that the person was capable of consenting.
- Was the person conscious or unconscious? Did the person regain consciousness during the sexual assault? Did the person pass out? If so, what did the accused do?
- Did the person black out? Did the person vomit?
- Could the person speak? Was the person slurring? Was the person able to communicate coherently?
- Was the person able to walk or did someone (in particular, the defendant) have to carry the person? Did the person have to lean on someone?

From Missoula County Attorney's Office, *Sexual Assault Policy and Procedure Manual* (2014), at <https://dojmt.gov/wp-content/uploads/SEXUAL-ASSAULT-POLICY-AND-PROCEDURE-MANUAL.pdf>

Investigation Report

1. Allegations potentially constituting sexual harassment
2. Applicable policy
3. Procedural steps (taken from complaint receipt through final investigation report, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence)
4. Findings of fact
 - Accounts provided by parties and witnesses
 - Description of relevant evidence obtained

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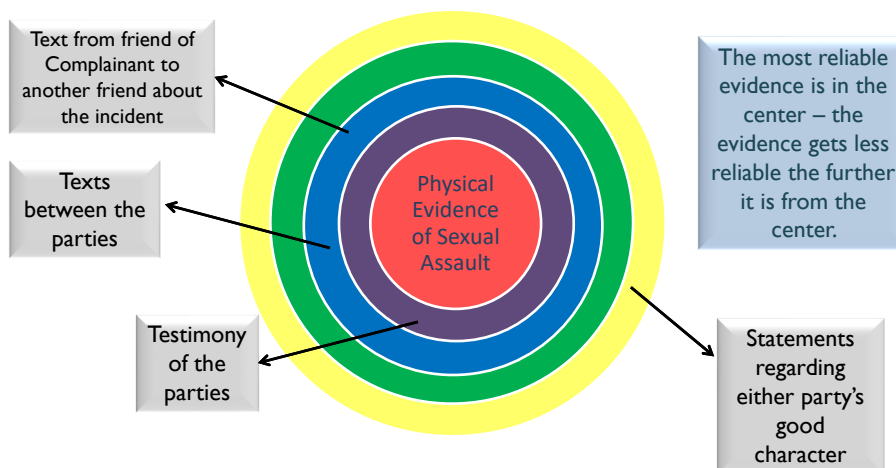
Evaluating the Evidence

- Apply the preponderance of the evidence standard:
 - Which has the greater weight?
 - “More likely than not”
 - 50% and a feather



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Methods for Evaluating the Evidence - Bullseye



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Assessing Credibility

Consider all the information and ask:

- Is the story this person is telling believable?
- Does this person have a reason to lie or to be less than forthcoming?
- Is this person's story consistent with the other evidence in the case? If not, why not?
- Does the witness seem to be telling the truth?
- Are inconsistencies or memory deficiencies the result of trauma?
- Has the respondent engaged in similar behavior in the past?

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Hearing – Location and Logistics



- May be held in the same geographic location or virtually
- Specific location to be determined by the school
- Technology must allow the parties, their advisors and the Hearing Officer to see and hear one another and any witnesses

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Orderly Hearings: Logistics to Think About

- Information parties should have before the hearing
- Any accommodations required by the parties
- Physical space and use of remote technology—before, during and after hearing
- Plan for order of hearing
- Plan for recording hearing
- Plan for handling/keeping evidence
- Have contact information for Title IX Coordinator and General Counsel's office



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Hearing Order

- Hearing Officer opening remarks (including hearing ground rules)
- Opening Statements
 - Complainant
 - Respondent
- Cross-Examination
 - Of Complainant by Respondent's advisor
 - Of Respondent by Complainant's advisor
- Witness testimony and cross-examination
- Closing statements
- Hearing Officer concluding remarks

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Cross-Examination

- Only relevant cross-examination may be asked of a party or witness.
- The Hearing Officer must decide if a question is relevant before it is answered and explain any decision to exclude a question.
- Caselaw: If a party or witness does not submit to cross examination at the live hearing, the Hearing Officer *may* rely upon any statement in reaching a determination regarding responsibility.



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Cross-Examination – Provision of an Advisor

If a party does not have an advisor present at the live hearing, the university must provide without fee or charge to that party, an advisor of the university's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

ADVISOR

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Technology for Hearing

- No specific technology required
- Examples: Zoom; Microsoft Teams meetings
- Must be in real time
- Must enable hearing attendees to see and hear one another
- Be sure the technology has the necessary security protections
- Provide accommodations for individuals with disabilities
- Train Hearing Officer(s) how to use the specific technology for the hearing

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Written Determination

- Must provide the written determination to the parties simultaneously
- The determination regarding responsibility becomes final either on the date that the school provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely



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Written Determination

Determination must include:

- Allegations
- Procedural steps
- Findings of fact
- Conclusions regarding the application of the policy to the facts using the applicable standard of evidence
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the school imposes on the Respondent, and whether remedies will be provided by the school to the Complainant
- Appeal procedures available to both parties and the permissible bases for an appeal

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Sanctions

Student discipline can involve a range of consequences, which may range from supportive measures to suspension and expulsion.

Discipline for employees also includes a range of options, including,

- A letter of reprimand
- Reassignment
- Suspension with or without pay
- Discharge or recommendation for discharge
- Notifying legal authorities
- Taking legal action against the employee

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Appeals



Either the Respondent and/or the Complainant may appeal:

- The dismissal of a formal complaint or any allegations
- A determination regarding responsibility and/or sanctions, if applicable

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Appeal Requirements

Information about appeal option must be included in the dismissal letter and/or the written determination letter

APPEALS

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Basis of Appeals

Appeals may be filed based on the following:

1. Procedural irregularity
2. New evidence
3. Bias or conflict of interest



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Written Appeal Decision

- Appeal Decision-maker issues a written decision describing the result of the appeal and the rationale for the result
- Provides the written decision simultaneously to both parties
- The appeal decision is final



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Informal Resolution - Timing

Informal resolution is available at any time:

- After filing of a formal complaint
- Before a determination of responsibility is reached



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Why Use Informal Resolution?

From the perspective of the parties:

- To achieve more control over the process
- To avoid the formal resolution process, including the investigation and the hearing
 - Less formal
 - Less intimidating
 - Fewer people involved (no witnesses)
- To resolve the matter more quickly
- May be a more fair and equitable result?
- To reach a creative resolution that may not be possible under the formal resolution process (e.g., apology)

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Informal Resolution – Appropriate Uses

Not available for allegations that an *employee sexually harassed a student*



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Informal Resolution – Voluntary

- Informal resolution is voluntary
- The school will obtain the parties' voluntary, written consent to informal resolution
- At any time prior to agreeing to a resolution, any party may withdraw from the informal resolution process and resume the grievance process



Promoting Informal Resolution



It is important to promote the informal resolution option:

- in the training provided to students and employees
- in the institution's written Title IX policy and grievance procedures
- in informational materials relating to sexual harassment
- in discussions between the Title IX Coordinator and each of the parties

Questions and Answers

