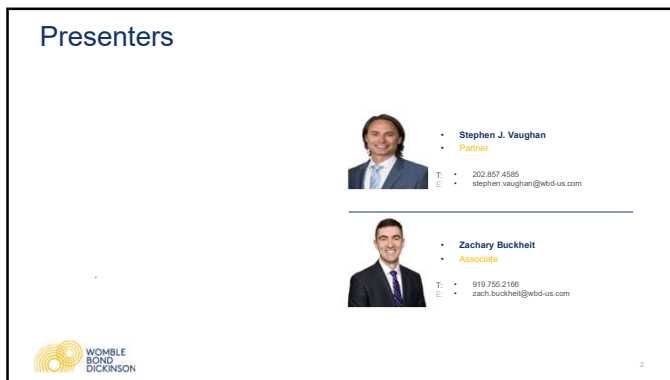
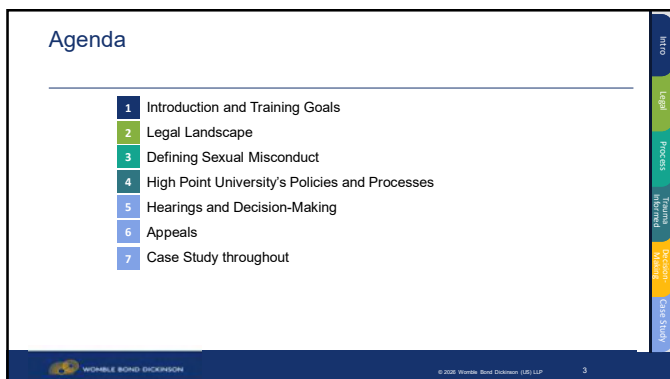




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Introduction

- Welcome
- About us
- About you
- About the work we all do
- Breaks!

The Womble Way

- Collaboration
- Honor institutional mission and values
- Practicality
- Draw upon on first-hand experience from team members who work in this area and have served in these roles

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Training Goals: Going Beyond What is Required by Title IX and VAWA

- Training Requirements for Decision-Makers:
 - Definition of sexual harassment
 - Institution's Policies and Procedures
 - Scope of your programs/activities
 - How to conduct and investigation and grievance process, including hearings and appeals
 - How to serve impartially and without bias and without prejudgment
 - Relevant evidence and how it should be used during a proceeding
 - Proper techniques for questioning witnesses
 - Issues of relevance to draft reports that fairly summarize evidence"
 - Conducting hearings that protect complainant's safety and promote accountability (impact of trauma)"
 - Technology to be used at any hearing
 - Training cannot rely on sex stereotypes and must promote impartial investigations and adjudications

Maintain training records (7 years) and post on website

*VAWA only

The logo of Vanderbilt University, featuring a red and white shield with a cross and the word "VANDERBILT" below it.

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The Legal Landscape



Legal

Process

Training

Informal

Formal

Complaint

Resolution

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What “Legal” Covers

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- Title IX
- Clery Act
- Violence Against Women Reauthorization Act (amendment to the Clery Act)
- Sexual Misconduct defined
- Interaction with Other Laws

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Some Key Terms Before We Get Started

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- Complainant and Respondent
- Witness
- Reports and Third-Party Reports
- Formal Complaints
- Grievance Process
- Interim and Supportive Measures

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Legal Requirements – Title IX (20 U.S.C. § 1681)

“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”

and

34 CFR Section 106, last amended on October 31, 2025, contains the regulations that effectuate Title IX. Those regulations establish that Title IX:

- Applies to all institutions that receive federal funds, including financial assistance.
- Covers students, employees, and third parties.
- Includes all forms of discrimination based on sex such as sexual harassment and differential treatment.
- Is enforced by the Office for Civil Rights and courts.

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Decision Making

Law School

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Legal Requirements – Clery Act

- Requires the reporting of accurate, timely, and complete information
- For certain types of crimes or incidents
- Occurring on or adjacent to campus (“Clery geography”)
- The Clery Act also requires that colleges and universities publish an annual security report (“ASR”) that reflects campus crime statistics, attempts to improve campus safety, and institutions’ relevant policy statements, such as their policy on crime reporting, alcohol and drug use, and prevention of/response to sexual assault.
- Clery Act Enforcement is conducted by the Clery Compliance Group of the US Department of Education’s Office of Federal Student Aid.

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Legal Requirements: Interplay Between Clery and Title IX

A Venn diagram with two overlapping circles. The left circle is labeled 'Clery' and the right circle is labeled 'Title IX'. The overlapping area in the center is labeled 'Other'.

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Law School

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Legal Requirements – Violence Against Women Act (“VAWA”)

- Amended Clery Act through the Campus Sexual Violence Act (“SaVE Act”) provision, Section 304
- Added domestic violence, dating violence, and stalking to the Clery crimes (which already included sexual assault)
- Requires adoption of institutional policies, procedures, and programs to address and prevent campus sexual violence.
- Requires training of institutional personnel and students and prevention and awareness programs

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Adjudication

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General Title IX Regulations & VAWA Requirements

“Recipients” of federal funds must:

- Disseminate a policy that includes a Notice of Nondiscrimination
- Designate a Title IX Coordinator
- Adopt, publish, and follow grievance procedures that are equitable, prompt, and effective and provide for adequate, thorough, reliable, fair, and impartial investigations and adjudications
- Take action to address and prevent sex-based discrimination
- *Train individuals serving in specified roles*

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Legal Requirements: The Fundamental Obligation

Under Title IX, an institution is obligated to respond when: it has “actual knowledge” of “sexual harassment” involving a person who is participating or attempting to participate in an “education program or activity” of the institution and when the sexual harassment is directed against a person in the United States

VAWA:

- Allegation of sexual assault, dating violence, domestic violence, or stalking
- Involving student or employee
- Regardless of location and participation in program/activity

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Other Applicable Laws

- Family Educational Rights and Privacy Act (FERPA)
 - Limits access to educational records
 - Exceptions under Title IX and VAWA for files shared during the process that permit disclosure of materials the laws require to be shared
 - Remedies are not shared except as necessary to enforce them (Title IX exception is for sharing the fact remedies were provided but not the details)
- Title VII (prohibiting discrimination in employment based on categories, including sex)
- Americans with Disabilities Act & Section 504 of the Rehabilitation Act
- Mandatory reporting laws requiring the reporting of child abuse and neglect
- State laws

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Title IX Response:

Actual Knowledge

Sexual Harassment

Education Program or Activity

In the United States

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Legal Requirements: Actual Knowledge and Officials with Authority

“means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the university who has the authority to institute corrective measures on behalf of the recipient”

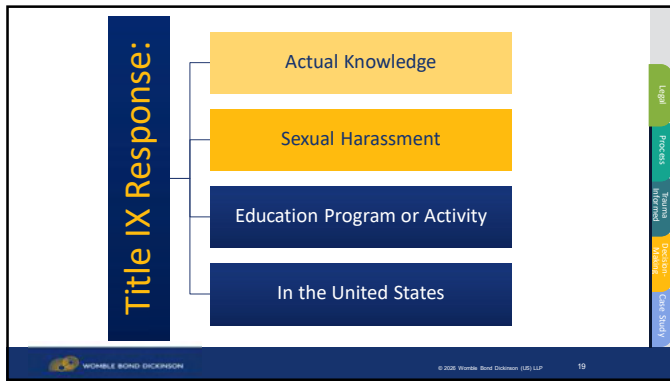
- Notice need not be in the form of a Formal Complaint
- Constructive notice or vicarious liability “are insufficient to constitute actual knowledge”
- Mere ability or obligation (by policy) to report sexual harassment does not make you an official with authority
- Having been trained to report sexual harassment does not make you an official with authority

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Legal Requirements: Title IX Sexual Harassment Defined

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

- (1) **Quid pro quo**: an employee conditions an aid, benefit, or service of recipient on an individual's participation in unwelcome sexual conduct;
- (2) **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; or
- (3) **"sexual assault," "dating violence," "domestic violence," or "stalking"**

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Legal Requirements: Title IX Sexual Harassment Defined

Sexual Assault: any sexual act direct against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. This includes:

- **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.
- **Sodomy**: oral or anal sexual intercourse with another person, 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 or physical incapacity.

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Legal Requirements: Title IX Sexual Harassment Defined

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Sexual Assault (cont.):

- Criminal Sexual Contact:** The intentional touching of the clothed or unclothed body parts without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation. The forced touching by the victim of the actor's clothed or unclothed body parts, without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation. This offense includes instances where the victim is incapable of giving consent because of age or incapacity due to temporary or permanent mental or physical impairment or intoxication for the purpose of sexual degradation, sexual gratification, or sexual humiliation.
- 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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Legal Requirements: Title IX Sexual Harassment Defined

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- Dating violence:** any act of 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 is determined based on a consideration of the length, type, and frequency of interactions between the persons involved in the relationship.
- Domestic violence:** 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 receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

** The VAWA crimes as defined in the Clery Act*

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Legal Requirements: Title IX Sexual Harassment Defined

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- Stalking:** 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
- Course of conduct:** 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:** a reasonable person under similar circumstances and with similar identities to the Complainant
- Substantial emotional distress:** significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling

** The VAWA crimes as defined in the Clery Act*

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Title IX Coordinator's Role beyond Sexual Harassment

- Sex discrimination, including in recruitment, admissions, financial aid, and counselling
- Gender equity in athletics, including student interests and abilities, athletic benefits and opportunities, athletic facilities, and athletic financial aid
- Pregnant and parenting students
- Discipline
- Employment

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Title IX Response:

Actual Knowledge

Sexual Harassment

Education Program or Activity

In the United States

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Legal Requirements: Education Program or Activity

- Locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs
 - On campus or
 - Off campus, when:
 - Part of the recipient's operations
 - Occurs at any building owned or controlled by an officially recognized student organization (e.g., fraternities and sororities)

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Important Qualifier

- Complainant/Reporting Party must be **“participating or attempting to participate”** in the institution’s education program or activity at the time the Formal Complaint is filed
- If Respondent is not affiliated with the institution, then HPU has limited ability to take action under Title IX
 - But HPU can still actions to ensure Complainant is able to participate in education programs and activities
- Ask yourself:** who was involved, how are they related to HPU, what was the nature of the conduct, and where did it occur

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Legal Requirements: Response to Sexual Harassment

If recipient has actual knowledge, Recipient/Title IX Coordinator must:

- Respond promptly in a manner that is not **deliberately indifferent**, meaning the response cannot be clearly unreasonable in the known circumstances
- Follow the Title IX Regulations “Grievance Process”
- Promptly contact the Complainant to discuss availability of **supportive measures**
- Consider Complainant’s wishes with respect to the supportive measures
- Inform Complainant of availability of supportive measures regardless of whether a formal complaint is filed
- Explain the process of filing a Formal Complaint
- Provide written notice of rights and options for allegations of sexual assault, dating violence, domestic violence, and stalking (VAWA)
- Notify Complainant of right to report to law enforcement and offer assistance (VAWA)

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Recordkeeping — Title IX

Must maintain certain records for seven years, including:

- For each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required by the Regulations, any disciplinary sanctions imposed on the Respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the education program or activity
- Any appeal and the result
- Informal resolution
- Supportive measures
- Training materials for Title IX Coordinators, Investigators, decision-makers, and those who facilitate informal resolution (and post on website)
- Actions taken in response to a report or formal complaint sufficient to document why the response was not deliberately indifferent

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What if Title IX Does Not Apply?



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Other Authorities and Legal Obligations – HPU Policies

- Procedures for Sexual Misconduct (for conduct that does not meet the Title IX requirements)
- Student Guide to Campus Life
- Faculty and Employee Handbook
- Other policies

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HPU Policy: Non-Title IX Sexual Harassment

Non-Title IX Sexual Harassment is unwelcome conduct of a sexual nature or based on sex, including sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal, nonverbal, or physical conduct or communication of a sexual nature when:

- Submission to or rejection of that conduct or communication is made a term or condition, either explicitly or implicitly, of an individual's educational experience or employment; (Quid Pro Quo);
- Unwelcome conduct determined by a reasonable person to be so severe or pervasive or objectively offensive that it unreasonably interferes with an individual's functioning or creates an intimidating, hostile, or abusive working or learning environment. (Hostile Environment).
- Examples of non-Title IX Hostile Environment Harassment may include the same type of conduct listed for Title IX Hostile Environment Harassment, when such conduct (1) does not rise to the level of being so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; (2) does not occur in the University's education program or activity; or (3) occurs outside of the United States.

• The same investigation process applies for Formal Complaints alleging Title IX Prohibited Conduct and Non-Title IX Prohibited Conduct

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Appeals
Complaints
Sanctions

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HPU Policy: Sexual Exploitation

Sexual Exploitation is taking non-consensual or abusive sexual advantage of another for one's own benefit or for the benefit of anyone other than the person being exploited, including extending the bounds of consensual contact without the knowledge or consent of the other person. Sexual Exploitation is conduct that does not otherwise constitute Prohibited Conduct under this Policy. Examples of Sexual Exploitation include, but are not limited to:

- Causing the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity
- Allowing third parties to observe private sexual activity from a hidden location or through electronic means.
- Engaging in voyeurism (e.g., watching private sexual activity without the consent of the participants or viewing another person's intimate parts (including genitalia, groin, breasts, or buttocks) in a place where that person would have a reasonable expectation of privacy).
- Recording or photographing private sexual activity and/or a person's intimate parts, including genitalia, groin, breasts, or buttocks, without consent, or reviewing such content without consent.
- Disseminating or posting images of private sexual activity and/or a person's intimate parts (including genitalia, groin, breasts, or buttocks) without consent.
- Forcing a person to take an action against that person's will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity.
- Using artificial intelligence or other technology to create realistic images of another's intimate parts, including genitalia, groin, breasts, or buttocks, without consent.
- Publishing, viewing, or disseminating images of another's intimate parts, including genitalia, groin, breasts, or buttocks, created by using artificial intelligence or other technology to create realistic images of another's intimate parts, including genitalia, groin, breasts, or buttocks, without consent.
- Prostituting or sex trafficking another person.
- Exposing another person to a sexually transmitted infection or virus without the other person's knowledge.

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HPU Policy: Related Definitions - Retaliation

Intimidation, threats, coercion, or discrimination against any person by the University, a student, or an employee or other person authorized by the University to provide aid, benefit, or service under the University's education program or activity for the purposes of interfering with any right or privilege secured by HPU's Policy, or because the person has reported information, made a complaint, testified, assisted, or participated, or refused to participate in any manner in an investigation, proceeding, or hearing, including in an informal resolution process, in grievance procedures, and in any other actions taken by the University.

Retaliation is prohibited under HPU's Title IX policies.

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Other Statutory Definitions?

Consent? { • Not required.

Incapacitation? { • Not required.

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HPU Policy: Related Definitions (Consent)

- **Consent** is a clear expression in words or overt actions by a person affirmatively communicating a freely-given, present agreement to engage in a particular form of sexual contact. Words or overt actions clearly communicate consent when a reasonable person in the circumstances would believe those words or actions indicate a willingness to participate in the mutually agreed-upon sexual contact. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and obtaining consent.
- All parties to a particular form of sexual contact must provide consent, and such consent must be present throughout the activity. Individuals may experience the same interaction in different ways. Therefore, it is the responsibility of each party to determine that the other has consented before engaging in the activity.
- Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not, by itself, sufficient to constitute consent. In cases of prior relationships, the manner and nature of prior communications between the parties and the context of the relationship may be factors in determining whether there was consent.
- Silence or the absence of resistance alone is not consent. Although resistance is not required, it is a clear demonstration of a lack of consent.

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HPU Policy: Related Definitions (Consent)

- If an individual expresses conditions on their willingness to consent (e.g., use of a condom) or limitations on the scope of their consent, those conditions and limitations must be respected.
- Even when consent is given, it may be withdrawn at any time. When consent is withdrawn, the sexual contact for which consent was initially provided must stop immediately. Any words or overt actions can communicate withdrawal of consent. As is the case with communicating the existence of consent, verbal communication is usually the clearest way of communicating withdrawal of consent.
- Consent cannot be obtained, expressly or implicitly, by use of physical force, threats, intimidating behavior, or coercion, as defined by the Policy.
- An individual known to be—or who should be known to be—incapacitated, as defined by this Policy, cannot consent to sexual activity.

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HPU Policy: Related Definitions (Consent – Coercion/Force)

- Coercion or Force includes conduct, intimidation, and expressed or implied threats of physical or emotional harm that would reasonably place an individual in fear of immediate or future harm and that are used in order to compel someone to engage in sexual contact.
- Any sexual contact occurring after a person has engaged in coercion or force will be presumed non-consensual, even if the particular sexual contact that occurs is different from the form of sexual contact in which the individual was attempting to engage, and even if the other individual uses words or actions that would otherwise appear to convey consent.
- Examples of coercion or force include causing the deliberate incapacitation of another person; conditioning an academic benefit or employment advantage on submission to the sexual contact; threatening to harm oneself if the other party does not engage in sexual contact; or threatening to disclose an individual's sexual orientation, gender identity, gender expression, or other personally sensitive information if the other party does not engage in the sexual contact.

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HPU Policy: Related Definitions (Consent and Incapacitation)

- Incapacitation** means the physical and/or mental inability to understand the fact, nature, or extent of the sexual situation. Incapacitation may result from mental or physical disability, sleep, unconsciousness, involuntary physical restraint, or from the influence of drugs or alcohol. With respect to incapacitation due to the influence of alcohol or other drugs, incapacitation requires more than being under the influence of alcohol or other drugs; a person is not incapacitated just because they have been drinking or using other drugs. Where alcohol and other drugs are involved, incapacitation is determined based on the facts and circumstances of the particular situation, looking at whether the individual was able to understand the fact, nature, or extent of the sexual situation; whether the individual was able to communicate decisions regarding consent, non-consent, or the withdrawal of consent; and whether such condition was known or reasonably should have been known to the Respondent or a reasonable, sober person in the Respondent's position. Use of drugs or alcohol by the Respondent is not a defense to any violation of this Policy.

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HPU Policy: Related Definitions (Consent and Incapacitation)

- Because the impact of alcohol or other drugs varies from person to person, evaluating whether an individual is incapacitated can be difficult.
- There are common signs that should alert a reasonable sober person as to whether an individual might be incapacitated.
- Those signs might include slurred or incomprehensible speech, disorientation of time, place, or location, clumsiness, difficulty walking, combativeness, emotional volatility, vomiting, or incontinence.
- A person who is incapacitated may not be able to understand some or all of the following questions: "Do you know where you are?" "Do you know how you got here?" "Do you know what is happening?" "Do you know who I am?"
- If there is any doubt as to the level or extent of one's own or the other individual's intoxication or incapacitation, the safest course of action is to forgo all sexual contact.

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Developing Title IX (and Sexual Misconduct) Policies and Procedures



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General Principles (not requirements)

- **Stay current:**
 - Ensure updated policy and procedures are published broadly to: students, employees, applicants (admissions and employment), referral sources, and other organizations
 - Ensure team members and contact information on website and posted internally are accurate
 - Update any changes to resources or supportive measures
 - Verify that cross-references in handbooks, catalogs, and policies are up-to-date
 - Maintain consistency with handbooks, catalogs, and policies
 - Remove prior versions from website and elsewhere
- **Be Effective:**
 - Use clear and plain language intended to be understandable from the perspective of those who are least familiar with such policies and procedures (typically students)
 - Make policies and procedures available in format accessible to the entire community, including English language learners and those with disabilities

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General Principles (not requirements)

- **Be Prepared to Make Policy and Procedural Changes, as Necessary:**
 - Maintain prior versions
 - Understand who in your community is required or should be chosen to participate in the development of your policies and procedures
 - Determine who is responsible for drafting
 - Is it more effective to collect higher-level or issue specific feedback from those in campus leadership?
 - Work to obtain input from key stakeholders and engage with a range of administrators in the process (ambassador effect)
 - Receive and engage with those community members providing feedback in the midst of a process
 - Provide opportunities for feedback prior to finalizing changes
 - Coordinate revisions with changes to other, related policies and procedures
 - Take stock of issues that arise over the course of the year

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Some Important Policy Decisions to Consider

- **Required Policy Definitions for Sexual Harassment:** *Quid pro quo*; hostile environment; sexual assault (various); dating violence; domestic violence; and stalking
- **How will you address Non-Title IX Sexual Harassment and VAWA crimes?**
 - Definitions?
 - Same or similar process from notice through appeals for Title IX, Non-Title IX, and VAWA?
- **Decision Points for Non-Title IX:**
 - Title IX requirements regarding sharing of evidence and hearing with cross-examination
 - Length of process
 - Desire to use a single, uniform process affording the most process/due process
 - Desire to exercise more/less discretion
 - FERPA concerns for non-Title IX sexual harassment
 - Interplay with other campus processes, especially student conduct and employment

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Typical Policy Framework

- Introduction and Scope
- Notice of Nondiscrimination
- Title IX Team and roles (and conflict interest/bias)
- Definitions (required and beyond)
- Reports and Complaints
- Resources and Supportive Measures
- Emergency Removal/Administrative Leave
- Grievance Process (informal, investigations, determinations, and appeals)
- Timelines for the phases and good cause for delay
- Parties' Rights (written notices, presumption of non-responsible, advisors, permissible evidence, access to evidence, review investigative report, response to report, and written decisions with rationale)
- Potential Sanctions and Remedies



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Typical Policy Framework

- Parties' Rights:
 - Written notices
 - Presumption of non-responsible
 - Advisors
 - Permissible evidence
 - Access to evidence
 - Review and response to investigative report
 - Written decisions with rationale
- Potential Sanctions and Remedies



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Other Content for Consideration

- Reservation of flexibility
- Participation in good faith
- Nondisclosure and advisor agreements
- Amnesty
- Process for alleged violations of no-contact orders, remedies, sanctions, and good faith
- Process for allegations of retaliation
- Consensual Relationships Policy
- Applicable substantive definitions and procedures to use for delayed reports
- Evidentiary issues for non-Title IX matters, including expert reports, medical and privileged information, character evidence, and lie detector results
- How the institution will handle investigation information from those who do not testify at the hearing



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Title IX Team and Coordinating the Process

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High Level Roles and Responsibilities

Title IX Coordinator	Investigator	Hearing Officer
<i>Position of authority, autonomy, and seniority</i> Implements legally compliant policy and procedures Oversees response to reports and formal complaints Supportive measures/Resources Oversees grievance process Role in sanctions and remedies Delineating roles and responsibilities Training and programming Climate surveys Recordkeeping Non-sexual harassment duties	Employees or external Conduct fair, prompt, and impartial investigations Identify fact issues Collect sufficient evidence Compile evidence, including interviews, data, and documents Draft investigative report Recommendations? Maintain records during investigation Work with Title IX Coordinator throughout the process Impartial and bias free Annual training	Employees or external Review investigative report and responses Participate in live hearing Determine whether Policy has been violated using preponderance of the evidence standard Issue a notice of determination that includes rationale for the findings and any sanctions Make credibility determinations Impartial and bias free Annual training

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More Process Duties for the Title IX Coordinator (or Designee)

- **Calling all deputies and team members!**
- Intake/information meetings
- Evaluate report/complaint
- Safety and risk assessment
- Outreach
- Process determination
- Dismissals
- Notice of allegations and investigation
- Evaluating requests from parties, witnesses, and advisors
- Adherence to accommodations and coordination of supportive measures
- Communication strategy during investigation, determination, and appeals
 - Timelines, delays for good cause, supportive measures, accommodations

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More for the Title IX Coordinator (or Designee)

- **Calling all deputies and team members!**
- Obtaining nondisclosure and advisor agreements
- Adherence to Policy and grievance process steps throughout the process
- Considering applicability of informal resolution
- Evaluating allegations of other violations or related complaints
- Impartiality: maintaining a process with participants who are free from bias and conflicts of interest
- Training community members
- Spreading the word



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Easing the Burdens—Recommended Tools

- Checklists and scripts for conversations/communications with parties, witnesses, and other community ("concerned" faculty) and non-community members (Mom?)
- Templates for communications during the process:
 - Outreach
 - Initial meeting requests
 - Notices to parties (investigation, meetings, delays for good cause, case events, close of evidence)
 - Communications to campus partners (e.g., accommodations requests)
 - Advisor agreements
 - Nondisclosure agreements
 - FERPA waivers
 - Notifications for reviews and determinations
 - Informal resolution
- Internal communication protocols
- Use of case management and tracking system
- Confidential resources
- Flip it



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High Level Roles and Responsibilities

Appeal Officer

Employees or external
Review pertinent investigative and hearing materials
Determine whether Policy appeal grounds have been met by preponderance of the evidence standard
Issue written decision that includes the rationale for the findings
Impartial and bias free
Annual training

Facilitator of Informal Resolution

Employees or external
May be the Title IX Coordinator
Coordinate appropriate process with Title IX Coordinator in conjunction with Policy requirements
Participate in creation of written agreement, as applicable
Impartial and bias free
Annual training



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High Level Roles and Responsibilities—Advisors

- Parties have the right to an **advisor of choice** in any meeting and throughout the process
 - Can be attorneys, advocates, family, friends, employees, and other students
 - Employees **not** required to accept
- Institution required to provide advisor at hearing to conduct cross-examination if the party does not have one (no training requirement, no requirement regarding bias/conflict)
- Advisors can be removed or disqualified based on conduct—consider having guidelines/advisor agreements to set parameters



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Understanding Roles — Title IX Dividing Lines

- Title IX Coordinator can be an investigator but cannot be a decision-maker
 - Can make recommendations regarding findings
- Investigator cannot be a decision-maker (no single investigator model)
 - Can make recommendations regarding findings
- **BUT** decision-maker, regardless of recommendations, must **independently and objectively evaluate the relevant evidence** (no deferential treatment)



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Decisions on Bias and Conflict of Interest

- Serving impartially: avoiding prejudgment of facts and disclosing conflicts of interest
- Implicit and explicit
- Common biases (often protected categories):
 - Gender, Gender Identity, Gender Expression
 - Sexual orientation
 - Race
 - Ethnicity
 - National origin
 - Culture
 - Religion
 - Age
 - Disability
 - Pregnancy
 - Marital or relationship status
 - Veteran status



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Decisions on Bias and Conflict of Interest

- Case-by-case examination of the "particular facts"
- Recipients are encouraged to "apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased."
- If someone has a material connection to a dispute, or the parties involved, and a reasonable person would question that person's ability to be impartial
- **Could be** based on a number of factors or connections, including prior or existing relationships, past advocacy (survivor or respondent groups), prior interactions or involvement, professional experience and activities, areas of study, the decision-maker's position on campus, or financial and reputational interests of employee that aligns with the institution
- "assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents" is unreasonable
- Cannot make decisions based on characteristics of the parties—must be based on the facts of the case



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Response Requirements



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Reports vs. Formal Complaints

- Some** process begins upon the receipt of information containing allegations of sexual harassment, a "report"
- Often made to others outside the Title IX team
 - Faculty, staff, employees, and student employees (including those "Responsible employees")
 - Confidential resources
 - Friends, fellow students, and family members
 - Title IX Coordinator or designee determines the required (and equitable) response and promptly contacts Complainant.
 - Reports can be made anonymously, but formal complaints cannot.
 - Anyone can report, whether they were the victim or not.



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Employee Reporting Responsibilities

- **HPU has deemed all employees (faculty, staff, and administrators), and some student employees as *Responsible Employees*, with the exception of on-campus Confidential Resources**
- Responsible Employees must promptly report disclosures of any alleged conduct that reasonably may constitute sexual harassment or misconduct, **including all the details known**, to the Title IX Coordinator or a Deputy Title IX Coordinator
- Responsible Employees are encouraged to report the information directly and should not attempt to investigate or gather any additional details about the alleged incident, in the moment or subsequently, beyond the information shared with them
- Promptly reporting the information to the Title IX office is important to helping the University provide timely support and assistance to those affected by the conduct
- Responsible Employees are not permitted to report anonymously
- Responsible Employees are encouraged to use HPU's online reporting system for Employees, which can be found on HPU's website



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HPU Policy Addresses Time Limits and Delays

- No time limitation on providing reports/complaints.
- "However, if the Respondent is no longer subject to the University's jurisdiction and/or significant time has passed, the ability to investigate, respond, and/or provide remedies may be more limited or impossible."
- "Acting on reports/complaints significantly impacted by the passage of time (including, but not limited to, the rescission or revision of policy) is at the discretion of the Title IX Coordinator, who may document allegations for future reference, offer supportive measures, remedies, and/or engage in informal or formal action, as appropriate."
- "When reports/complaints are affected by significant time delay, HPU will typically apply the policy in place at the time of the alleged misconduct and the procedures in place at the time of complaint."



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HPU Policy Addresses Time Limits and Delays

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Response Obligations

If recipient has actual knowledge, Recipient/Title IX Coordinator must:

- Respond promptly in a manner that is not *deliberately indifferent*, meaning the response cannot be clearly unreasonable in the known circumstances
- Follow the Title IX Regulations "Grievance Process"
- Promptly contact the Complainant to discuss availability of *supportive measures*
- Consider Complainant's wishes with respect to the supportive measures
- Inform Complainant of availability of supportive measures regardless of whether a formal complaint is filed
- Explain the process of filing a Formal Complaint
- Provide written notice of rights and options for allegations of sexual assault, dating violence, domestic violence, and stalking (VAWA)
- Notify Complainant of right to report to law enforcement and offer assistance (VAWA)



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Response

Varies by Role:

- Title IX Coordinator/officials have a legal duty
- Responsible or Designated Employees are required by Policy to report
- Confidential Resources
 - Not required to report details to institution (may have state law or Clergy obligations)
 - Licensed counselors and medical providers
 - Pastoral counselors
 - Others with state law privilege
- Should provide information to potential complainant, including: reporting options, Title IX rights, rights to law enforcement, available medical services, retaliation protections, supportive and interim measures, the importance of identifying and preserving evidence, and a handoff to the Title IX office



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Title IX Coordinator Response

Ground level, upon receipt of a report/complaint:

- Review of report and/or formal complaint (or explain process for filing formal complaint)
- Outreach and meeting with Complainant
- Safety and risk analysis (Complainant and community)
 - Removal process, if applicable (very rare)
- Written notice of rights to Complainant and preservation of evidence (VAWA compliant)
- Notification of right to contact law enforcement (and note differences in that process)
- Notification of right to obtain medical treatment
- Supportive/Interim measures
- Evaluate availability of informal resolution
- Evaluate potential grounds for dismissal
- Upon receipt of Formal Complaint, decision about whether to move forward with an investigation
- Determination of which policy/process will be followed for any investigation



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Outreach and Meeting with Reporting Party

Tips for Outreach:

- Send form outreach letter offering an initial meeting or conversation
- Identify reason for contacting them
- Include resources
- Explain policy against retaliation
- Address confidentiality
- Explain impact of delay
- Let them know you will be there if they need additional time

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Outreach and Meeting with Reporting Party

Initial Meeting/Conversation

- Use your established checklist, covering:
 - Right to report to law enforcement
 - Available grievance process (including informal) or other applicable process
 - Rights afforded by process
 - Details about formal complaints
 - Time to decide (and available confidential resources)
 - Preservation of evidence
 - Supportive measures and resources and how to obtain them
 - Plan for follow-up
 - If going forward with no-contact order or process, outreach to Respondent
- Determine whether you need to notify others: campus safety/security, Clery reporting, BIT or TAT teams, or whether Emergency Removal is necessary

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Supportive/Interim Measures

Non-disciplinary, non-punitive, individualized services offered, as appropriate, as reasonably available, and without fee or charge to the Complainant or Respondent before or after the filing of a Formal Complaint or where none has been filed.

- Designed to restore or preserve equal access to the recipient's 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
- Must maintain as confidential to the extent that doing so would not impair the ability to provide them
- Also known as "interim measures" for sexual assault and VAWA crimes
- *If the action is listed in your policy as a **sanction**, it is likely **disciplinary or punitive***

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Supportive/Interim Measures

Title IX Regulations, they may include:

- Mutual no contact orders—*most common*
- Counseling and other health resources
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Changes in work or housing locations
- Changes to parking or transportation
- Leaves of absence
- Increased security or monitoring of certain areas of the campus
- Or other similar measures chosen by recipient
 - Or third parties who can provide services (MOUs)
- *Must consider Complainant's desires for the options*

Process

Training

Investigation

Resolution

Appeal

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Emergency Removal/Administrative Leave

Emergency removal process is permitted, when:

- after an individualized safety and risk analysis, recipient determines there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment
 - Must provide Respondent notice and opportunity to immediately challenge decision
- A recipient may place a non-student employee on administrative leave during the pendency of a grievance process.

Process

Training

Investigation

Resolution

Appeal

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High Point University's
Grievance Process



Process

Training

Investigation

Resolution

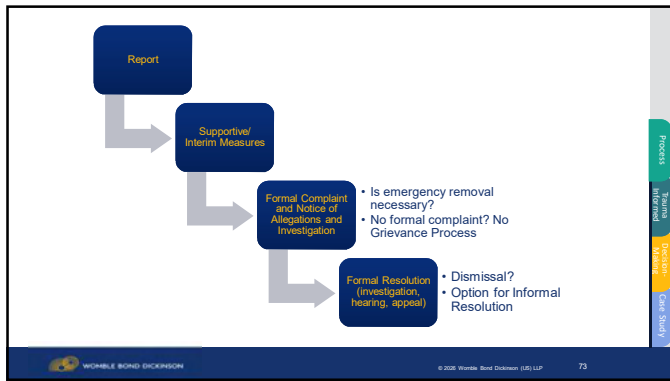
Appeal

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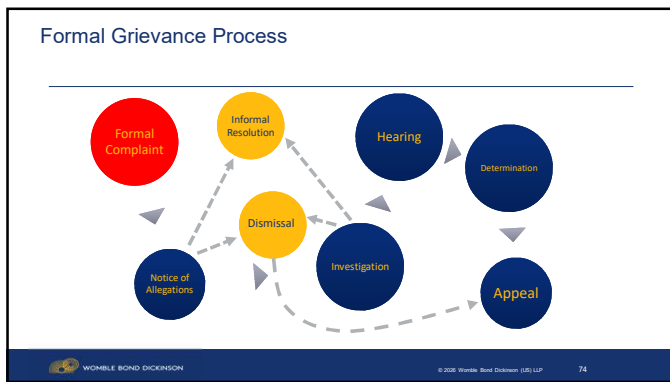
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Title IX "Formal Complaint" Initiates Grievance Process

Formal Complaint under Title IX (but not required by VAWA):

1. Document;
2. Filed by a Complainant (or parent/guardian with legal right to do so) or signed by the Title IX Coordinator;
3. Alleging Sexual Harassment against a Respondent; **and**
4. Requesting an investigation of an allegation of Sexual Harassment.

Important!

- Cannot be filed anonymously
- Can be filed in person, by mail, email using Title IX Coordinator's contact information or any other method designated (e.g., online reporting form)
- Must have digital signature or other confirmation for Complainant
- Title IX Coordinator who signs a Formal Complaint is not a "party"
- Complainant's identity, if known, must be disclosed to Respondent (in contrast to a "report")
- Complainant must be participating/attempting to participate in program or activity
- No statute of limitations
- Consolidation of Formal Complaints permitted for cases arising out of same facts or circumstances

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Formal Grievance Process

Basic Requirements:

- No bias or conflicts of interest (as to party type generally or individuals)
 - Training required for specified roles (Coordinator, Investigator, Decision-Maker)
- Treat parties equitably
 - Participation in process and submission of evidence
 - Advisors and limits to participation (cannot limit cross-examination)
 - Access to directly related and relevant evidence
- Follow Grievance Process to its conclusion before imposing sanctions or other non-supportive measures
- Remedies designed to restore or preserve access to education or activity (need not be non-disciplinary or non-punitive) – occurs after a determination of responsibility

Process

Training

Advisors

Decision-Making

Final Appeal

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Formal Grievance Process

Basic Requirements (cont.):

- Describe range of supportive measures
- Remedies are often extensions of supportive/interim measures Complainant received during process
- Presumption of not responsible
- The standard of evidence is the preponderance of the evidence. This means that the information needs to show that it is “more likely than not” that a policy violation occurred.
- Cannot seek to collect information protected by legally recognized privilege unless the privilege has been waived
- Same for medical treatment records unless voluntary, written consent

Process

Training

Advisors

Decision-Making

Final Appeal

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Formal Grievance Process

Basic Requirements (cont.):

- Reasonably prompt timeframes (temporary delays for good cause)
 - For each phase of the process (some are specified in the Regs)
 - With written notice to the parties citing reasons for delay and upon resuming investigation
- **Good cause** includes: absence of party, advisor or witness unavailable; language assistance/disability accommodation; or concurrent law enforcement activity (brief, for fact gathering, not criminal prosecution)—workload of DM is *not* included as an example
- Objective evaluation of all evidence, inculpatory and exculpatory
 - Credibility determinations cannot be based on status as Complainant, Respondent, or witness
- Describe range of sanctions and remedies
- Procedures and grounds for appeals
- *Plus any provisions, rules, or practices adopted by institution*

Process

Training

Advisors

Decision-Making

Final Appeal

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More about Bias and Conflicts of Interest

- Case-by-case examination of the “particular facts”
- Recipients are encouraged to “apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased.”
- If someone has a material connection to a dispute, or the parties involved, and a reasonable person would question that person’s ability to be impartial
- **Could be** based on a number of factors or connections, including prior or existing relationships, past advocacy (survivor or respondent groups), prior interactions or involvement, professional experience and activities, areas of study, the decision-maker’s position on campus, or financial and reputational interests of employee that aligns with the institution
 - “assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents is unreasonable”
- Cannot make decisions based on characteristics of the parties—must be based on the facts of the case

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More about Bias and Conflicts of Interest

- You are asked to serve as a decision-maker in a case involving Harper and Noah. When the Title IX Coordinator shares the party names with you, you recall that Harper was a student in one of your classes last year. You decide not to say anything to the Title IX Coordinator because the experience was uneventful; you do not even remember what grade Harper received in your class. Any concerns?
- You recognize Noah’s name because one of his teammates on the swim team came to you and told you that he was worried about his friend Noah. When asked, he told you Noah was going through a hard time because Noah recently had sex for the first time with a girl who he caught feelings for, but she was “pretty horrible” to him and was trying to extort him. He said Noah was thinking about leaving the university. Any concerns?

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More on the Right to an Advisor

- Both parties have the right to be accompanied by advisor to any meeting or proceeding during the investigation (Title IX and VAWA)
- Recipient may not limit the presence or choice
- But may establish restrictions around advisor participation in meetings or proceedings, as long as applied equally to both parties
 - Gag orders NOT permitted
 - May set parameters through advisor agreements
 - Nondisclosure agreements (NDAs)
 - Potted plant during process and interviews and no direct communication with recipient
 - Avoid direct engagement with advisor, address party and advise party of consequences
 - Involve Title IX Coordinator in decisions about advisor conduct
 - Take the same approach for all advisors, in all cases
- Recipient not required to provide an advisor at any time prior to hearing
 - May not restrict advisor’s role in cross-examination

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HPU Policy on Advisors

- The parties may select whoever they wish to serve as their Advisor as long as the Advisor is available. This means the party cannot insist on an Advisor who simply does not have inclination, time or availability.
- The Advisor may be a friend, mentor, family member, attorney, or any other individual a party chooses to advise, support, and/or consult with throughout the Resolution process. The parties may choose Advisors from inside or outside of the HPU community.
- Advisors should not have institutionally conflicting roles, such as being a Title IX administrator who has an active role in the matter, or a supervisor who must monitor or implement sanctions.
- The Title IX Coordinator will also offer to assign a trained Advisor to any party if the party so chooses. If the parties choose an Advisor from the pool available from the university, the Advisor will have been trained by the university and be familiar with the university's Resolution Process.
- If the parties choose an Advisor from outside the pool of those identified by the university, the Advisor may not have been trained by the university and may not be familiar with university policies and procedures.
- Choosing an Advisor who is also a witness in the process creates potential bias which will be explored by the hearing decision-maker(s).



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HPU Policy on Advisors

- Parties also have the right to choose not to have an Advisor in the initial stages of the Resolution Process, prior to a hearing.
- The parties may be accompanied by their Advisor in all meetings and interviews at which the party is entitled to be present, including intake and interviews. Advisors should help the parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith.
- Advisors should not address HPU officials or investigators in a meeting or interview unless invited to do so (e.g., asking procedural questions). The Advisor may not make a presentation or represent their advisee during any meeting or proceeding and may not speak on behalf of the advisee to the investigator(s) or hearing decision-maker(s) except during a Title IX hearing during questioning. If a party selects an attorney as an Advisor, the Advisor's participation in the complaint resolution process is in the role of an advisor and not as an attorney representing a party.
- The parties are expected to ask and respond to questions on their own behalf throughout the investigation phase of the Resolution Process. Although the Advisor generally may not speak on behalf of their advisee, the Advisor may consult with their advisee, either privately as needed, or by conferring or passing notes during any Resolution Process meeting or interview. For longer or more involved discussions, the parties and their Advisors should ask for breaks to allow for private consultation.



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HPU Policy on Advisors

- All Advisors are subject to the same HPU policies and procedures, whether they are attorneys or not, and whether they are selected by a party or assigned by the university. Advisors are expected to advise their advisees without disrupting proceedings. Advisors are required to sign HPU's advisor agreement form.
- Any Advisor who oversteps their role as defined by this Policy, or who refuses to comply with the HPU's established rules of decorum for the grievance process, will be warned. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting/interview/hearing may be ended, or other appropriate measures implemented, including HPU requiring the party to use a different Advisor or providing a different HPU-appointed Advisor. Subsequently, the Title IX Coordinator will determine how to address the Advisor's noncompliance and future role.
- HPU expects that the parties may wish to have HPU share documentation and evidence related to the allegations with their Advisors. HPU provides a consent form that authorizes HPU to share such information directly with a party's Advisor. The parties must either complete and submit this form to the Title IX Coordinator or provide similar documentation demonstrating consent to a release of information to the Advisor before HPU is able to share records with an Advisor.



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HPU Policy on Advisors

- Advisors appointed by the institution will not be asked to disclose details of their interactions with their advisees to hearing decision-maker(s).
- Advisors are expected to maintain the privacy of the records shared with them. These records may not be shared with third parties, disclosed publicly, or used for purposes not explicitly authorized by HPU. As part of the grievance process, **advisors will be asked to sign HPU's Advisor Agreement form**.
- HPU may restrict the role of any Advisor who does not respect the sensitive nature of the process or who fails to abide by the HPU's privacy expectations.
- HPU generally expects an Advisor to adjust their schedule to allow them to attend HPU meetings/interviews/hearings when planned, but HPU may change scheduled meetings/interviews/hearings to accommodate an Advisor's inability to attend, if doing so does not cause an unreasonable delay.
- HPU may also make reasonable provisions to allow an Advisor who cannot be present in person to attend a meeting/interview/hearing by telephone, video conferencing, or other similar technologies as may be convenient and available.



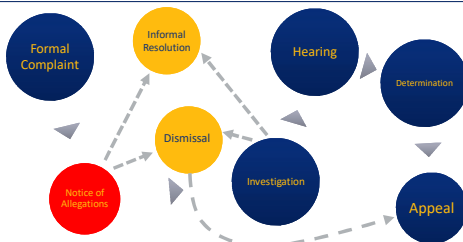
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Formal Grievance Process



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Notice of Allegations and Investigation

Upon receipt of the Formal Complaint, must send parties

Written Notice:

- Explaining grievance process
- Containing sufficient details known **at that time** (and supplement later as necessary) and provided with sufficient time to prepare a response before any interview, including:
 - identities of the parties (if known)
 - conduct constituting sexual harassment
 - date and location of alleged incident(s) (if known)
- Stating that respondent is presumed not responsible until a determination



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Notice of Allegations and Investigation

- Determination regarding responsibility is made at conclusion of the process
- Informing parties of any policy provision that prohibits participants from knowingly making false statements/submitting false information
- Informing parties of their right to an advisor of their choice and that the advisor may, but need not be, an attorney
- Right of advisor to inspect and review evidence as stated in the applicable policy (most institutions have a branched approach, one for Title IX and one for non-Title IX allegations)
- Appeal rights



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Consolidation Guidance

34 CFR 106.45(e) states:

"A recipient may consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances."



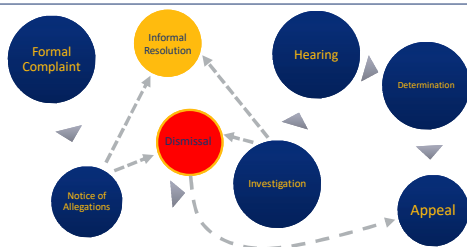
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Formal Grievance Process



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Formal Grievance Process — Dismissals

Two types:

1. Mandatory dismissal of Title IX Formal Complaint, when:

the allegation, even if proved, would not need meet sexual harassment definition;

did not occur in education program or activity;

did not occur against a person in the U.S.; or

The complainant was not participating in or attempting to participate in the education program or activity of the University at the time of filing.

2. Discretionary dismissal (at any time), if:

Complainant provides written notice to Title IX Coordinator of withdrawal of Formal Complaint or allegations

Respondent no longer enrolled in or employed by recipient

specific circumstances prevent recipient from gathering sufficient evidence to reach a determination as to the Formal Complaint

In either case, recipient must promptly send a written notice of dismissal and the specific reasons for it, simultaneously to the parties (appealable)

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Formal Grievance Process

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graph TD; NA[Notice of Allegations] --> FC[Formal Complaint]; FC --> IR[Informal Resolution]; FC --> D[Dismissal]; IR --> H[Hearing]; H --> D[Determination]; D --> A[Appeal]; I[Investigation] --> A; H -.-> IR; I -.-> D
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HPU Informal Resolution or Informal Resolution Process ("IRP")

Voluntary process that must be agreed upon by all parties and HPU, initially and throughout, through written consent

Formal complaint is required

Can be requested at any time prior to the decision-maker has made a final determination, including prior to, during, and after the completion of an investigation

Party must submit a form requesting IRP

Can take many forms, including facilitated discussions, shuttle diplomacy, mediation, restorative practices, or acceptance of responsibility, among others

Can be in-person, virtually, or even electronically, as determined by the Title IX Coordinator

Can be concluded by any party or HPU

If IRP is unsuccessful, IRP submissions should not be shared with investigator (but that does not mean the underlying factual information cannot be provided during the investigation)—the point being to keep the process separate

Completed through a resolution agreement or a return to the formal process

BUT not available when respondent is an employee and complainant is a student

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IRP Considerations

- Are there allegations for which it is not appropriate in your community
- What factors impact the Title IX Office's decision to permit or not permit it
- Given what the institution know of the parties and circumstances, how likely is it that IRP will be successful
- Will it resolve all matters involving the parties
- What information will be shared during this process
- Are we taking steps in the outcome to stop the harassment, prevent its occurrence, and address its effects?
- Should these outcomes be consistent from Formal Complaint to Formal Complaint
- Impact on the investigation process
- Can the outcome be used in future process
- Recordkeeping



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Common Outcomes

- No-contact order
- Nondisparagement
- Changes in classes, residence halls, extracurricular activities
- Removal from leadership positions
- Counseling, training, and education requirements
- Probation
- Reimbursement for expenses
- Pay for property damage
- Agreement not to sue
- Suspension
- No admission of responsibility
- Apology



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The Decision-Making Process



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Whose Responsibility Is It?

The **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties.

Decision-Making

Post-Decision

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Understanding Roles — Title IX Coordinator

High level, directly or through designee:

- Coordinating the recipient's response to discrimination on the basis of sex, including sexual harassment and misconduct
- Ensuring process is free from known or reported conflicts of interest or bias
- Responding to reports alleging sexual harassment
- Determining the appropriate process
- Overseeing the grievance process
- Ensuring the process is user-friendly
- Coordinating the effective implementation of supportive/interim measures
- Overseeing training requirements
- Separating roles and responsibilities
- Ensuring process is compliant and effective

Decision-Making

Post-Decision

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Understanding Roles — Title IX Coordinator

Ground level, upon receipt of a report/complaint:

- Receipt of report and/or formal complaint
- Meeting with Complainant
- Safety and risk analysis (Complainant and community)
 - Removal process, if applicable (very rare)
- Written notice of rights to Complainant and preservation of evidence (VAWA compliant)
- Notification of right to contact law enforcement (and note differences)
- Notification of right to obtain medical treatment
- Supportive/Interim measures
- Evaluate availability of informal resolution
- Evaluate potential grounds for dismissal
- Decision to move forward with an investigation
- Determination of which policy/process will be followed

Decision-Making

Post-Decision

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Understanding Roles — Investigator's Work

- Undertake a "thorough search for relevant facts and evidence" pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt timeframes and without powers of subpoena."
- Such conditions limit the extensiveness or comprehensiveness of the efforts to gather evidence while reasonably expecting you to gather evidence that is available
- Culminating with the Final Investigative Report and investigation file
 - Summary of "directly related" evidence (must be available at the hearing)
 - Final report containing relevant evidence
 - With copies of both to the parties and advisors for review and response
- For VAWA: only access to information used by decision-makers

Investigative
Work

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Review and Summarize Evidence

Title IX (*only*):

- Both parties must be given equal opportunity to inspect and review any evidence obtained during the investigation that is directly related to the allegations in the formal complaint, including:
 - evidence upon which recipient does not intend to rely in reaching a responsibility determination
 - inculpatory and exculpatory evidence obtained from a party or other source
 - and all must be available at the hearing as well
- Evidence must be **sent to each party**, and their advisors (if any), in an electronic format or hard copy
- Party must be given ten (10) days to submit a response in writing to the "directly related evidence"
- Investigator must consider any response before finalizing investigative report

Investigative
Work

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"Directly Related" Evidence

- May take many forms and generally includes most of the evidence gathered
 - A file containing all of the pertinent evidence
 - Draft** investigative report and documentary evidence
- Interviews: interview summaries or rough transcripts for recorded interviews
- Documentary evidence:
 - Employment or student records
 - Text messages, group chats, apps, emails, photos, videos, social media posts
 - Campus police or other law enforcement records
 - Data: key fob, Wi-Fi, surveillance footage
 - Other documents: medical records, diagrams, bank statements, receipts, and maps
- Sexual disposition/history is included *if* directly related (and even if not "relevant")
- Medical and privileged materials not included without a waiver (may redact)
- Prior to sharing evidence with parties: review final contents with Title IX Coordinator
 - Document the decisions made and reasons for excluding certain evidence

Investigative
Work

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More on Evidentiary Exclusions

Remember explicit Title IX exclusions (evidence that is always “not relevant”):

- Prior *sexual predisposition* or *sexual behavior* of the *Complainant*, unless:
 - The questions (or evidence) are related to prior sexual contact with the respondent and are offered to prove consent, or
 - Respondent alleges someone else committed the conduct
- Privileged records:
 - Medical, psychological, or similar treatment records
 - Attorney-client
 - Clergy
 - Spousal
- Privilege can be waived through “voluntary, written consent”

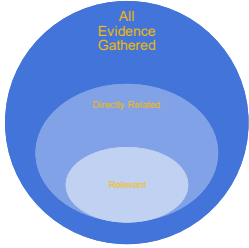
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“Directly Related” and Relevant Evidence



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Checklist for Closing Investigation Process

- Confer with investigator about timing and mechanics of providing “copies” to parties *and their advisors* for review (Title IX)
 - Can be provided in electronic form, including, for example, a link to the files
 - *If a VAWA case not proceeding under the Title IX policy or procedures, this probably occurs in conjunction with providing parties access to the final investigative report*

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Checklist for Protecting the File

Prior to providing the “directly related” evidence (or the report for VAWA) to the parties, build in protections:

- Remove or redact information that is not “directly related”
- Require parties and their advisors to use the evidence and any report only for the purposes of the institution’s process
- Prohibit parties and advisors from sharing the documentation or disclosing the information to others
- Non-disclosure agreement?
- Use digital encryption to protect privacy
- Use party-specific watermarks
- *Use the same practices for the final report*

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Finalize Investigative Report

After the review and response period:

- Title IX
 - Create an investigative report that fairly summarizes **relevant evidence**, and
 - at least 10 days prior to a hearing, send the report to each party **and** their advisor (if any) for their review and written response (in an electronic format or a hard copy)
 - Investigator cannot be the decision-maker
 - Share report and responses with decision-maker and make available at hearing
- VAWA:
 - Provide the **party with access** (can be supervised access to review)
 - to the information to be used in the decision-making process
 - Investigator can be the decision-maker

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Finalize Investigative Report

Relevant evidence:

- “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
- “Focus investigations and adjudications on **evidence** pertinent to *proving whether facts material* to the *allegations* under investigation *are more or less likely to be true* (i.e., on what is relevant).”

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Understanding Roles — Staying in Your Lane

Recipient's Role

- Complying with legal obligations
- Establishing and overseeing grievance process (bias and conflict free)
- Intake
- Notice of rights
- Dismissals and removal
- Clery/timely warnings/ASR
- Supportive/interim measures
- Providing support resources
- Establishing advisor parameters
- Conducting compliant investigation
- Extending case deadlines
- Coordinating hearing process

Hearing Officer's Role

- Participating in required trainings
- Identifying conflicts or bias concerns
- Reviewing investigative report and responses
- Preparing for the hearing
- Prehearing meeting?
- Prehearing evidentiary rulings?
- Scripts?
- Conducting hearing
- Asking questions of parties and witnesses
- Making relevancy and evidentiary rulings
- Making credibility determinations
- Making a finding
- Determining sanctions?

Decision Maker

Staying in Your Lane

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Understanding Roles — Staying in Your Lane

Appeal Officer

- Employees or external
- Review pertinent investigative and hearing/decision-making materials
- Determine whether Policy appeal grounds have been met by preponderance of the evidence standard
- Issue written decision that includes the rationale for the findings
- Impartial and bias free
- Annual training

Facilitator of Informal Resolution

- Employees or external
- May be the Title IX Coordinator
- Coordinate appropriate process with Title IX Coordinator in conjunction with Policy requirements
- Participate in creation of written agreement, as applicable
- Impartial and bias free
- Annual training

Decision Maker

Staying in Your Lane

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Understanding Roles — Coordination Between Decision-Maker and Title IX Coordinator

- Who will:
 - Decide when the case events, such as the hearing, will occur
 - Decide who participates in the hearing
 - Communicate with the parties, including issuing timely notice of meetings to the parties for pre-hearing, hearing, or related events
 - Communicate/arrange for witness participation
 - Arrange and conduct any Pre-hearing meeting
 - Decisions about delay for good cause and send notices of delay
 - Responsibility for technology during the hearing
 - Prepare opening scripts or remarks for the hearing
 - Ensure compliance with timeframes in policy and required by Title IX

Decision Maker

Staying in Your Lane

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Understanding Roles — Title IX Dividing Lines

- Title IX Coordinator can be an investigator but cannot be a decision-maker
 - Can make recommendations regarding findings
- Investigator cannot also be a decision-maker (no single investigator model)
 - Can make recommendations regarding findings
- **BUT** decision-maker, regardless of recommendations, must ***independently and objectively evaluate the relevant evidence*** (no deferential treatment)

Decision Maker

Investigator

Coordinator

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Trauma Informed



Trauma Informed

Investigator

Coordinator

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Neurobiology of Sexual Assault



Trauma Informed

Investigator

Coordinator

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Neurobiology of Sexual Assault

The Neurobiology of Sexual Assault

Neurobiology of Sexual Assault

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Neurobiology of Sexual Assault:
Trauma and Impact on the Brain

Brain Regions Impacted by Trauma

CEREBRAL CORTEX
Controls voluntary motor, sensory, and cognitive functions. It is the largest and most complex part of the brain.

HIPPOCAMPUS
Responsible for learning and memory. It is located in the temporal lobe.

AMYGDALA
Responsible for processing emotions, particularly fear and aggression. It is located in the temporal lobe.

HYPOTHALAMUS
Responsible for regulating the body's internal state, including hunger, thirst, and sleep. It is located below the cerebral cortex.

PITUITARY
Responsible for releasing hormones that control the function of other endocrine glands. It is located below the hypothalamus.

PINEAL
Responsible for releasing melatonin, which regulates the body's circadian rhythm. It is located behind the hypothalamus.

ENDOCRINE SYSTEM
A system of glands that release hormones into the bloodstream to regulate the body's functions.

BRAINSTEM
Responsible for controlling basic life functions, such as breathing, heart rate, and blood pressure. It is located at the base of the brain.

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Neurobiology of Sexual Assault:
Trauma and Impact on the Brain

Brain-Body Regions Impacted by Trauma

HPA Axis

Balances body following stress by releasing of various hormones/chemicals

HYPOTHALAMUS
Releases corticotropin-releasing hormone (CRH) to stimulate the pituitary gland.

PITUITARY
Releases adrenocorticotropic hormone (ACTH) to stimulate the adrenal glands.

ADRENAL GLANDS
Release cortisol and other stress hormones in response to ACTH.

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Neurobiology of Sexual Assault:
Trauma and Impact on the Brain

Brain-Body Regions Impacted by Trauma

Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

Oxytocin: Promotes good feelings



Diagram illustrating the impact of trauma on the brain and body. The diagram shows the brain with labels for the Hypothalamus, Pituitary, Adrenal Glands, and the body with labels for the Heart, Lungs, and Muscles. Arrows indicate the flow of hormones and the impact of stress on these systems.

SOURCE: Southwick et al., 2008

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Trauma
Memory
Trauma
Memory
Trauma
Memory

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Neurobiology of Sexual Assault:
Trauma and Impact on Memory

Brain Regions Impacted by Trauma

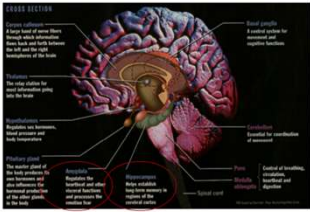


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SOURCE: Southwick et al., 2008

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Trauma
Memory
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Trauma
Memory

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Neurobiology of Sexual Assault:
Trauma and Impact on Memory

Memory Processes Impacted by Trauma

Hippocampus processes information into memories

Encoding = Organizing sensory information

Consolidation = Grouping information into memories and storing them

Amygdala specializes in the processing of emotional memories (works with the hippocampus)

Both structures are VERY sensitive to hormonal fluctuations



Diagram illustrating the flow of information from sensory input to memory storage and processing. The diagram shows a sequence of steps: Sensory Input, Encoding, Consolidation, and Storage. Arrows indicate the flow of information between these steps.

SOURCE: Southwick et al., 2008

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Trauma
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Neurobiology of Sexual Assault:
Trauma and Impact on Memory

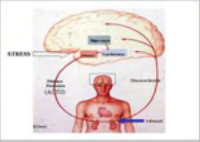
Like These . . .

Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

Oxytocin: Promotes good feelings



THESE HORMONES IMPAIR MEMORY CONSOLIDATION

SOURCE: Southwick et al., 2005

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Neurobiology of Sexual Assault:
How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault

Amigdala Detects Threat

Activates Hypothalamus

HPA Axis Kicks In
Hormonal Flood

SOURCE: Banks, 2003; Southwick et al., 2005

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Neurobiology of Sexual Assault:
How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault

Catecholamines Increase

Opioids Increase

Corticosteroids Decrease

Impairs rational thought

Causes flat affect

Reduces energy

SOURCE: Banks, 2003; Southwick et al., 2005

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Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault

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graph LR; A[Amygdala Detects Threat] --> B[Activates Hypothalamus]; B --> C[HPA Axis Kicks In Hormonal Flood]; C --> D[Can Trigger a Complete "Shut Down" in the Body];
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SOURCE: Banks, 2002; Southwick et al., 2003

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Sex Study

Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

Tonic Immobility (TI)

- AKA: "Rape-induced paralysis"
- Autonomic (uncontrollable) mammalian response in extremely fearful situations
- Increased breathing, eye closure, paralysis
- 12-50% rape victims experience TI during assault
- TI is ~more common in victims who have been assaulted before (childhood, adolescence, or adult)

SOURCE: Pope et al., 2007; Gidycz et al., 1993; Hirsch et al., 2003

Recap

- Flight/Flee – Try to run or get away from the threatening situation
- Fight – Body tries to fight back against the traumatic event
- Limits Rational Thought Process
- Flat Affect
- Freeze – Unable to move or fight back

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Executive
Topic
Discussion
Analysis
Market

Neurobiology of Sexual Assault: What Happens in Terms of Memory?

What Happens During A Sexual Assault

The Neurobiology of Sexual Assault

Neurobiological changes may result in flat affect or perceived "strange" emotions

Neurobiological changes may impact memory consolidation and recall

- Slowed recall
- Disorganized and fragmented
- Memory piecemeal
- If alcohol was involved the memory may not be retrievable

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Neurobiology of Sexual Assault: What Happens in Terms of Memory?

What Happens During A Sexual Assault

The Neurobiology of Sexual Assault

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- Slowed recall
- Disorganized and fragmented
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Neurobiology of Sexual Assault: What Does This Mean For Practitioners?

- Neurobiological changes may result in flat affect or perceived "strange" emotions
- Neurobiological changes may impact memory consolidation and recall
 - Slowed recall
 - Disorganized and fragmented
 - Memory piecemeal
 - If alcohol was involved the memory may not be retrievable

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Related Concepts to Consider

Secondary Victimization

- "the victim-blaming attitudes, behaviors, and practices that exacerbate sexual assault survivors' trauma" or cause them to relive it
- "made them feel guilty, depressed, anxious, distrustful of others, and reluctant to seek further help"
- questions about decision-making, alcohol consumption, sending mixed signals, or appearance/clothing

Use of sensory information to help recall memory affected by experiencing trauma

- Asking about what the person could see, smell, taste, feel, or hear

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Related Concepts to Consider

Secondary Victimization

Use of sensory information to help recall memory affected by experiencing trauma

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Trauma Informed Education

Experience and research reveal:

- Sexual assault on campus often involves people who know each other
- Complainants frequently blame themselves
- Complainants commonly delay in reporting or do not report
- Cases often involve friendship groups
- Different people respond to trauma differently
- Alcohol is frequently involved
- Appearing to display symptoms of trauma does not mean that trauma was suffered

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Trauma Informed Education

Experience and research reveal:

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Thank You

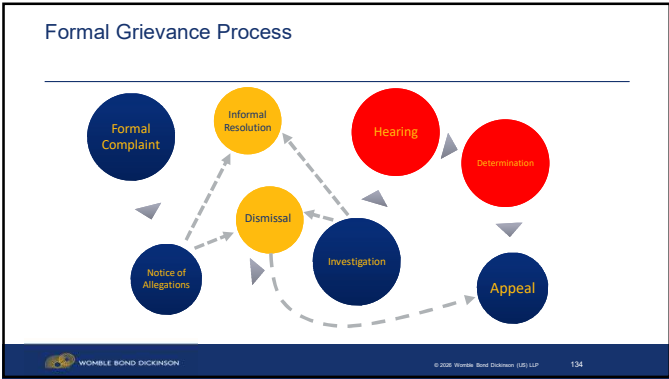
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- Title IX Legal Requirements — Hearings**
- Live hearing, in-person or virtual (with security measures)
 - At the request of either party, hearing to take place with *parties* in separate rooms with technology enabling the decision-makers to simultaneously *see and hear the person answering questions*
 - Parties entitled to an advisor of their choice
 - advisor role can be limited (to asking questions), but advisors are entitled to conduct a cross examination of the other party.
 - if party does not have advisor or advisor does not attend the hearing, institution must provide without charge (if party refuses, loses the right)
 - no requirement that institution-provided advisor be an attorney or have experience or training ("read" party's questions)
 - not required to be free from bias or conflicts
 - Party can also be accompanied by others if "required by law" (e.g., language assistance or disability)
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Title IX Legal Requirements — Hearings

- Providing for cross-examination:
 - of parties and witnesses by allowing each party's advisor of choice to ask "all relevant questions and follow-up questions," including those challenging credibility
 - conducted directly, orally, and in real time by the party's advisor and never by the party personally
- During questioning, neither a Party nor witness can be compelled to respond to any question posed. The Hearing Board may choose to place less or no weight upon statements by a Party or witness who refuses to respond to questions deemed relevant and not impermissible. The Hearing Board will not draw an inference about whether a Policy violation occurred based solely on a Party's or witness's refusal to respond to such questions
- Institution cannot require party or witness to participate
- Decision-maker cannot draw inference "solely" based on lack of participation or testimony

Decision-Maker

Part 3: Title IX

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Title IX Legal Requirements — Hearings & Cross Examination

- Before a question can be answered, the hearing officer must determine whether it is relevant and explain any decision to exclude a question that is not relevant:
 - Mechanics: question posed, pause, hearing officer makes relevancy determination, and, if permitted, question answered
 - Can decide that duplicative questions are not relevant
 - Questions that assume facts not in evidence, are prejudicial, or appear misleading are to be permitted, if relevant
- Can permit discussion about the relevancy determination
 - Otherwise, the parties can address it through an appeal
- Must create an audio recording, audiovisual recording, or transcript of the live hearing and make it available to the parties for review and inspection

Decision-Maker

Part 3: Title IX

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Title IX Legal Requirements — Hearings & Cross Examination

Remember specific Title IX exclusions (evidence that is "not relevant"):

- Prior **sexual predisposition** or **sexual behavior** of the *Complainant*, unless:
 - The questions (or evidence) are related to prior sexual contact with the respondent and are offered to prove consent, or
 - Respondent alleges someone else committed the conduct
- Privileged **records**:
 - Medical, psychological, or similar treatment records
 - Attorney-client
 - Clergy
 - Spousal
- Privilege can be waived through "voluntary, written consent"

Decision-Maker

Part 3: Title IX

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Plan in Advance

Hearings are difficult and unpredictable. Common challenges include:

- Parties and witnesses who do not attend or seek to cancel at the last minute
- Parties who do not answer some or all questions
- Long, nonresponsive answers to questions
- Long, layered cross-examination questions
- Advisors who do not abide by the rules of decorum
- Attempts to introduce new evidence for the first time at the hearing
- Technology issues



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The Decision-Making Phases



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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Make Determination
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals



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Decision-Making Phases

1) Prepare for hearing

2) Conduct hearing

3) Make Determination

4) Sanctions and remedies

5) Draft notice of determination

6) Appeals

Decision-Making Phases

1) Prepare for hearing

2) Conduct hearing

3) Make Determination

4) Sanctions and remedies

5) Draft notice of determination

6) Appeals

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Decision-making Phases: Prepare for Hearing

Preparation (Procedural):

• Complete decision-maker training

• Complete institution-specific training on policies and hearing technology

- Know who will have what technology responsibilities during the hearing

• Understand the roles and procedural rules of order for the hearing

- Know who the hearing participants are and each person's role
- Hearing panel? Single hearing officer? Chair?
- Know the hearing mechanics: Opening and closing statements? Direct exam? Investigator testify?
- Who will make relevancy determinations and what are the expectations or requirements?
- Who is charged with enforcing procedural rules?
- Who coordinates witnesses and testimony?
- Who pushes hearing along from one action to the next?
- Time limits?

Decision-Making Phases

1) Prepare for hearing

2) Conduct hearing

3) Make Determination

4) Sanctions and remedies

5) Draft notice of determination

6) Appeals

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Decision-making Phases: Prepare for Hearing

Preparation (Procedural):

• Know decorum requirements, such as

- Participants required to be respectful and professional
- One person speaks at a time
- Do not interrupt testimony or hearing officer
- No additional recordings
- Wait for hearing officer to rule before answering questions

• Cross-examination to be respectful, non-abusive, and cannot be used to intimidate party or witness

• Parties are permitted to consult with advisor during hearing (Title IX requirement)

• Roles of advisors

Decision-Making Phases

1) Prepare for hearing

2) Conduct hearing

3) Make Determination

4) Sanctions and remedies

5) Draft notice of determination

6) Appeals

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Decision-making Phases: Prepare for Hearing

Preparation (Procedural):

- Will the hearing be a "closed record"
- Know if there are limits to the evidence to be presented
 - Only "directly related" evidence collected by the investigator?
 - Only evidence contained in the investigative report?
 - Permitted to present new evidence at the hearing?
- Who is responsible for having all "directly related evidence" available to use at the hearing
- What is the process, if any, for deciding party objections about directly related evidence not included in the final report
- How are decisions about who testifies, in what order made

Decision-making Phases: Prepare for Hearing

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Decision-making Phases: Prepare for Hearing

Preparation (Substantive):

- Review file, which should include:
 - Notice of investigation
 - Final Investigative Report and exhibits ("directly related evidence")
 - Party responses (and anticipate arguments for hearing)
 - Policies and definitions—know the elements of the applicable policy
 - Pertinent pre-hearing conference information
- Review file....
- Determine what factual questions need to be decided
 - Evaluate all related, existing evidence
 - Identify consistencies and inconsistencies in material information and the sources
 - Identify information gaps and sources to fill them
- Determine what witnesses you want to question
- Draft questions (and confer with other panelists and/or counsel)

Decision-making Phases: Prepare for Hearing

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Decision-making Phases: Prepare for Hearing

Preparation (Substantive):

Relevant evidence:

- "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied."
- "Focus investigations and adjudications on **evidence** pertinent to **proving whether facts material** to the **allegations** under investigation **are more or less likely to be true** (i.e., on what is relevant)."

Decision-making Phases: Prepare for Hearing

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Decision-making Phases: Prepare for Hearing

Preparation (Substantive):

- Recall that:
- During questioning, neither a Party nor witness can be compelled to respond to any question posed.
- The Hearing Board may choose to place less or no weight upon statements by a Party or witness who refuses to respond to questions deemed relevant and not impermissible.
- The Hearing Board will not draw an inference about whether a Policy violation occurred based solely on a Party's or witness's refusal to respond to such questions.

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Decision-making Phases: Prepare for Hearing

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Decision-making Phases: Prepare for Hearing

Preparation (Substantive):

- Recall that certain evidence is always **irrelevant** under **Title IX**:
- Complainant's sexual predisposition or prior sexual behavior (unless one of the two exceptions apply)
- Medical, psychological, or treatment records (without voluntary, written consent)
- Information protected by legally recognized privilege without a waiver, such as attorney client privilege, patient-doctor privilege, clergy-penitent privilege, etc.

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Decision-making Phases: Prepare for Hearing

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Case Study



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Case Study

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Harper and Noah: Notice of Allegations

On October 8, 2025, Harper filed a formal complaint with the Title IX Coordinator. On October 15, 2026, the Coordinator sent the parties a Notice of Allegations, which identified the investigator, and stated, in part:

On October 8, 2025, Harper submitted a complaint alleging that Noah (1) digitally penetrated Harper in her hotel room without Harper's consent on October 7, 2025, and (2) engaged in sexual exploitation by creating and/or distributing images of Harper engaging in sexual activity without her consent.



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Case Study

Harper and Noah

Notice of Allegations

Investigator

Investigation

Resolution

Appeal

Final Decision

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Case Study



Subsequently, on November 21, 2025, the Title IX Coordinator issues an Amended Notice of Allegations alleging that Noah: (1) engaged in nonconsensual sexual intercourse with Harper in her hotel room on October 7, 2025; and (2) engaged in sexual exploitation by creating and/or distributing an AI-generated video of someone with Harper's face and no clothes on engaging in sexual activity.



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Case Study

Harper and Noah

Amended Notice of Allegations

Investigator

Investigation

Resolution

Appeal

Final Decision

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Case Study: Definition of Sexual Assault

The term “**sexual assault**” is defined by HPU as follows:

- **Sexual Assault** is sexual contact with another person who does not or cannot give consent. This may or may not include force. Sexual assault includes, but is not limited to:
 1. **Rape** is penetration, regardless of how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another individual, or by a sex-related object, without consent. A Complainant may be a person who is penetrated without consent or a person who is forced to penetrate another person without consent.
 2. **Nonconsensual Sexual Contact** is the intentional or forced touching of clothed or unclothed body parts without consent for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

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Case Study

Harper and Noah

Definition of Sexual Assault

Investigator

Investigation

Resolution

Appeal

Final Decision

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Case Study: Definition of Consent

- Sexual activity of any kind requires "consent," which HPU defines as follows:
- Consent is a clear expression in words or overt actions by a person affirmatively communicating a freely-given, present agreement to engage in a particular form of sexual contact. Words or overt actions clearly communicate consent when a reasonable person in the circumstances would believe those words or actions indicate a willingness to participate in the mutually agreed-upon sexual contact. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and obtaining consent.
- All parties to a particular form of sexual contact must provide consent, and such consent must be present throughout the activity. Individuals may experience the same interaction in different ways. Therefore, it is the responsibility of each party to determine that the other has consented before engaging in the activity.
- Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not, by itself, sufficient to constitute consent. In cases of prior relationships, the manner and nature of prior communications between the parties and the context of the relationship may be factors in determining whether there was consent.
- Silence or the absence of resistance alone is not consent. Although resistance is not required, it is a clear demonstration of a lack of consent.

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Case Study: Definition of Consent (cont.)

- If an individual expresses conditions on their willingness to consent (e.g., use of a condom) or limitations on the scope of their consent, those conditions and limitations must be respected.
- Even when consent is given, it may be withdrawn at any time. When consent is withdrawn, the sexual contact for which consent was initially provided must stop immediately. Any words or overt actions can communicate withdrawal of consent. As is the case with communicating the existence of consent, verbal communication is usually the clearest way of communicating withdrawal of consent.
- Consent cannot be obtained, expressly or implicitly, by use of physical force, threats, intimidating behavior, or coercion, as defined by the Policy.
- An individual known to be—or who should be known to be—incapacitated, as defined by this Policy, cannot consent to sexual activity.

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Case Study: Definition of Consent (cont.)

- Coercion or Force includes conduct, intimidation, and expressed or implied threats of physical or emotional harm that would reasonably place an individual in fear of immediate or future harm and that are used in order to compel someone to engage in sexual contact.
- Any sexual contact occurring after a person has engaged in coercion or force will be presumed non-consensual, even if the particular sexual contact that occurs is different from the form of sexual contact in which the individual was attempting to engage, and even if the other individual uses words or actions that would otherwise appear to convey consent.
- Examples of coercion or force include causing the deliberate incapacitation of another person; conditioning an academic benefit or employment advantage on submission to the sexual contact; threatening to harm oneself if the other party does not engage in sexual contact; or threatening to disclose an individual's sexual orientation, gender identity, gender expression, or other personally sensitive information if the other party does not engage in the sexual contact.

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Case Study: Definition of Consent and Incapacitation

- Incapacitation means the physical and/or mental inability to understand the fact, nature, or extent of the sexual situation. Incapacitation may result from mental or physical disability, sleep, unconsciousness, involuntary physical restraint, or from the influence of drugs or alcohol. With respect to incapacitation due to the influence of alcohol or other drugs, incapacitation requires more than being under the influence of alcohol or other drugs; a person is not incapacitated just because they have been drinking or using other drugs. Where alcohol and other drugs are involved, incapacitation is determined based on the facts and circumstances of the particular situation, looking at whether the individual was able to understand the fact, nature, or extent of the sexual situation; whether the individual was able to communicate decisions regarding consent, non-consent, or the withdrawal of consent; and whether such condition was known or reasonably should have been known to the Respondent or a reasonable, sober person in the Respondent's position. Use of drugs or alcohol by the Respondent is not a defense to any violation of this Policy.

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Case Study: Definition of Consent and Incapacitation (cont.)

- Because the impact of alcohol or other drugs varies from person to person, evaluating whether an individual is incapacitated can be difficult. There are common signs that should alert a reasonable sober person as to whether an individual might be incapacitated. Those signs might include slurred or incomprehensible speech, disorientation of time, place, or location, clumsiness, difficulty walking, combativeness, emotional volatility, vomiting, or incontinence. A person who is incapacitated may not be able to understand some or all of the following questions: "Do you know where you are?" "Do you know how you got here?" "Do you know what is happening?" "Do you know who I am?" If there is any doubt as to the level or extent of one's own or the other individual's intoxication or incapacitation, the safest course of action is to forgo all sexual contact.

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Case Study: Definition of Sexual Exploitation

- HPU defines "**Sexual Exploitation**" as taking non-consensual or abusive sexual advantage of another for one's own benefit or for the benefit of anyone other than the person being exploited, including extending the bounds of consensual contact without the knowledge or consent of the other person. Sexual Exploitation is conduct that does not otherwise constitute Prohibited Conduct under this Policy.

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Case Study: Definition of Sexual Exploitation (cont.)

Examples of Sexual Exploitation include, but are not limited to:

- Causing the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity.
- Allowing third parties to observe private sexual activity from a hidden location or through electronic means.
- Engaging in voyeurism (e.g., watching private sexual activity without the consent of the participants or viewing another person's intimate parts (including genitalia, groin, breasts, or buttocks) in a place where that person would have a reasonable expectation of privacy).
- Recording or photographing private sexual activity and/or a person's intimate parts, including genitalia, groin, breasts, or buttocks, without consent, or reviewing such content without consent.
- Disseminating or posting images of private sexual activity and/or a person's intimate parts (including genitalia, groin, breasts, or buttocks) without consent.
- Forcing a person to take an action against that person's will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity.
- Using artificial intelligence or other technology to create realistic images of another's intimate parts, including genitalia, groin, breasts, or buttocks, without consent.
- Publishing, viewing, or disseminating images of another's intimate parts, including genitalia, groin, breasts, or buttocks, created by using artificial intelligence or other technology to create realistic images of another's intimate parts, including genitalia, groin, breasts, or buttocks, without consent.
- Prostituting or sex trafficking another person.
- Exposing another person to a sexually transmitted infection or virus without the other person's knowledge.

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Review Investigative Materials



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Case Study

So . . .



- What issues will you have to ultimately decide in this case?
- Did the investigator collect the evidence necessary for you to make a fully informed decision?
- What additional evidence do you wish you had?
- Who do you want to hear from at the hearing?
- What concerns do we have about witnesses heading into the hearing?

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On the morning of the hearing, you receive an email from Harper's advisor stating that her car has broken down and she can only attend on her cell phone but wants to go ahead with the hearing.



Adjourn the Hearing?


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Case Study



On the morning of the rescheduled hearing, you receive an email from Noah's advisor stating that Noah is having second thoughts about the hearing and wants to talk to you right away.



What do you do?


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Decision-Making Phases

1) Prepare for hearing

2) Conduct hearing

3) Make Determination

4) Sanctions and remedies

5) Draft notice of determination

6) Appeals


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Decision-Making Phases: Conduct Hearing

Suggested practices:

- Follow your scripts
- Follow your institution's processes and procedures for the phases of the hearing absent unusual circumstances
- Ensure whomever you might need is reachable (Title IX Coordinator, counsel, back-up advisors, IT assistance)
- Be consistent in procedures and in-hearing decisions:
 - Relevancy determinations
 - Use of evidence
 - Breaks
 - Your manner and demeanor
 - Any latitude to parties or advisors should be equal
- If you are concerned about what to do in the moment, pause the proceedings to seek assistance

CONDUCT HEARING

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Decision-Making Phases: Conduct Hearing —Convey Impartiality

Beyond **being** impartial and not prejudging, take steps to help **communicate** your impartiality:

- Avoid confusion: explain and establish your role clearly and early and return to it as needed throughout the hearing
 - Remember, you are not a judge and this is not a courtroom
- Demonstrate impartiality through neutral language
 - Do not use conclusory language about contested or unknown facts
 - Do not appear to take sides or even agree with the party/witness account
 - Use terms "account" or "experience," not "story" or "version"
- Maintain your calm demeanor
 - Do not react or supply energy to the information received or generally (words or expressions/body language)
 - Stay engaged, visually and verbally (as appropriate)

CONDUCT HEARING

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Decision-making Phases: Hearing Opening Script

Describe hearing procedures and order

- Openings; direct/narrative; questions of parties and witnesses; closings?
- Investigator testimony?
- Advisors and hearing officer(s) to ask questions (and order of questioning)
- Opportunity for party to explain relevancy of some questions (or is the decision final)
- Roles of advisors
- Scope of evidence at hearing
- Time limits
- Breaks
- Amnesty

CONDUCT HEARING

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Decision-making Phases: Hearing Opening Script

- The basics:
 - Date and time
 - Parties
 - Closed hearing (If remote, their locations are considered an extension of the hearing room)
 - Note the recording (confirm they are not? Pan the room?)
 - Purpose of the hearing
- Explain hearing officer or panel's role
- Rules of decorum
- Policy against retaliation
- Confirm review of contents of investigative report and role of the report in the hearing (do not need to repeat the information)

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Decision-making Phases

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Decision-making Phases: Hearing – Complainant Opening Script and Complainant Questioning

Following an opening statement, the hearing panel will ask the Complainant questions.

Prior to any party or witness testimony:

- Script transitions for each phase of the hearing
- State who they are or ask that they identify themselves
- Advise of recording and confirm that they are not
- Explain who will ask them questions and the process (pause before answering)
- Explain that may be difficult questions about sensitive matters
- Ask them not to read anything into the questions
- Tell them they can ask for a break, if needed
- Tell them to let you know if any question is unclear, confusing, or difficult to understand
- For witnesses, instruct them to keep information confidential
- Reminder of any amnesty provision
- Ask for their commitment to tell the truth
- Begin hearing panel questioning.

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Decision-making Phases

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Decision-Making Phases: Conduct Hearing —Asking Questions

In advance, determine the critical issues:

- What do I need to know
- Why do I need to know it
- How do I obtain the information

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Decision-making Phases

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Decision-Making Phases: Conduct Hearing —Asking Questions

- Better to use open-ended questions, in most instances
- Listen carefully to the answers to know what follow-up questions are necessary
- Be careful about relying on party responses to poorly worded questions by advisors on critical issues
- Seek details to close information gaps
- Seek clarity for information or evidence that is vague or non-specific
- Know the difference between information that is necessary and information that might satisfy curiosity
- Understand the source of the information (personal knowledge v. hearsay)
- Be very careful about giving any weight to demeanor

Conduct Hearing

Ask Questions

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Decision-Making Phases: Conduct Hearing —Questions by Advisors and Relevancy

- Once the hearing panel has completed its questioning, the advisor may cross examine the party or witness.
- The hearing chair will determine if the question(s) are relevant and will explain any decision to exclude a question as not relevant.

Follow the same process for each question:

- Question asked
- Witness must pause (you will have to remind them)
- Determine and communicate whether the question is relevant and can be answered
- "The basic test for relevance is whether the question posed is probative of the question of responsibility. In determining whether a question is relevant, the Department explains that the decision-maker must focus on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true."
- If relevant, use consistent form: e.g., "you can answer," "please answer," "go ahead," or "OK" (notify parties/witnesses/advisors)

Conduct Hearing

Ask Questions

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Decision-Making Phases: Conduct Hearing —Questions by Advisors and Relevancy

- Can exclude/deem the question not relevant (must articulate reasons) if:
 - Harassing
 - Duplicative/repetitive
 - Irrelevant (remember that you can later decide the appropriate weight)
 - **Form language:** "It is sufficient, for example, for a decision-maker to explain that a question is irrelevant because . . . the question asks about a detail that is not probative of any material fact concerning the allegations."
- Know whether your policy/procedures permit party/advisor to weigh-in on the issue (*recommended*)?
- Regs deem the question irrelevant/prohibit answers:
 - Regarding prior sexual behavior or predisposition of Complainant (unless offered to prove consent or to show someone other than respondent committed the alleged conduct)
 - **Form language:** "It is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions."
- Regs prohibit: Privileged records or medical/treatment records without consent or written authorization

Conduct Hearing

Ask Questions

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Decision-Making Phases: Conduct Hearing —Questions by Advisors and Relevancy

The Regs do **not** permit you to categorically exclude questions that:

- Are compound
- "Assume facts not in evidence"
- Lack foundation
- Are unreliable or hearsay
- Are unclear
- Are prejudicial
- Hearsay

But:

- You are charged with assigning the appropriate weight to the answer or evidence

Conduct Hearing

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Decision-making Phases: Hearing - Closing Script for Testimony

When a witness's testimony has concluded:

- *Ask the parties if they have any further questions for the witness*
- Reminders about confidentiality and retaliation
- Thank witness for their time

Conduct Hearing

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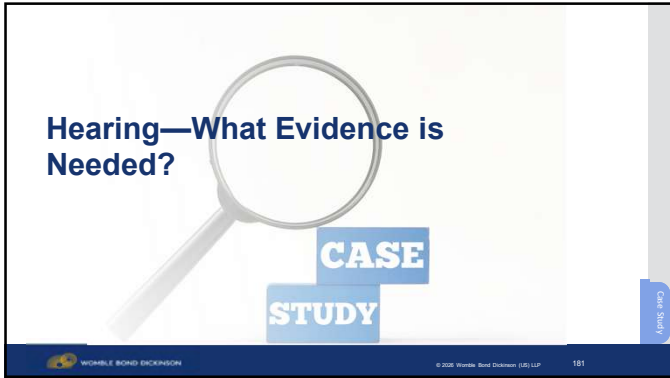
Decision-making Phases: Hearing — Closing Script for Hearing

- Inform the parties of any additional deadlines.
- Inform the parties that they will be notified, in writing, of the outcome of the hearing.
- Remind the parties about retaliation policy.
- Contact appropriate officials with any further questions about the process
 - Hearing Coordinator
 - Title IX Coordinator

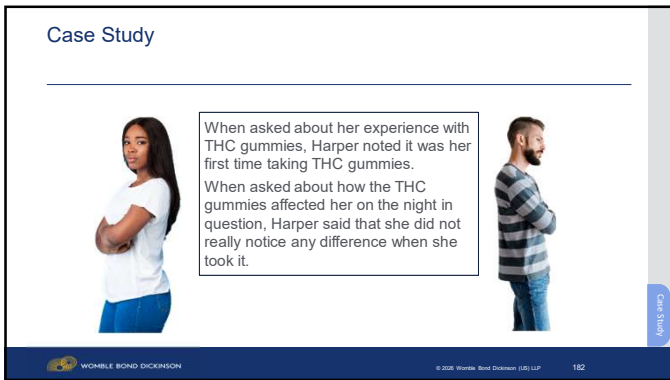
Conduct Hearing

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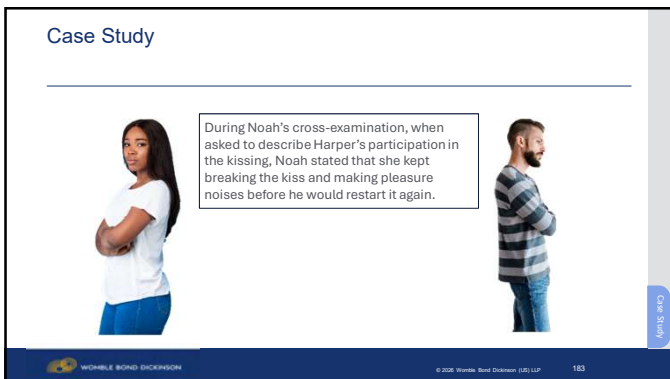
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Case Study



During the hearing, Noah stated that Harper moved his hand right to her vagina and guided his finger to it.

When asked about this account at the hearing, Harper said her memory was coming back and she vaguely recalled putting her hand over her vagina and trying to move his hand away, but it was dark and hard to know exactly what he was doing.




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Case Study



During the hearing, the panel asked Noah for more details about how the sexual intercourse began. Noah stated that he inserted his penis into her vagina. He further stated that it was not easy to penetrate Harper because "she was a little dry or maybe tight" but he kept pushing until it worked.




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Case Study



Riley testifies at the hearing. When asked if she ever thought it was Harper in the video, Riley stated that "the video was a little dark and you could not see the person's face until the camera zoomed in on it. Once the camera zoomed in it was definitely Harper's face and it definitely looked like she was in a hotel room. The woman's body was also very similar to Harper's, too. I mean we are all swimmers and we see each others' bodies all the time. I would not have been able to say for sure that it was or was not Harper's body."




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Case Study



After about an hour of cross-examination, Noah responds that he is done answering questions until Harper's ex Jack is allowed to testify to show that Harper has a history of making false accusations.

What do you do?



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Case Study



Harper's advisor insists that she be able to continue asking Noah questions, even if he is unwilling to answer them. But that she is willing question Jack as well if the parties agree to a recess.

What do you do?



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Case Study



By the end of the hearing, the following information has been solicited from Harper regarding her potential incapacitation:

- Harper is adamant that she was incapacitated and that Noah must have known she was incapacitated. Because she fell asleep on the ride back to the hotel, needed help walking and opening her door, only invited Noah in so he could use the bathroom, and immediately went to her bed and went to sleep.
- During the hearing, Harper was asked to rate her level of intoxication when she arrived at her hotel room. She stated that she was a "9.99" because she was not passed out yet but was about to be. She further stated that her entire body felt so tired and she just wanted to get in bed and go to sleep.



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Case Study



By the end of the hearing, the following information has been solicited from Noah regarding Harper's potential incapacitation:

- Noah is adamant that Harper was not incapacitated and that he could not have known Harper was incapacitated.
- Noah highlighted that Harper told him she had only had three drinks, was not asleep on the ride back to the hotel because she opened the door herself, did not need help walking into the hotel, clearly invited him into her hotel room, and told him to go to the bathroom "first," as in before having sex.



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Case Study



By the end of the hearing, the following information has been solicited from Noah and Harper regarding their intoxication levels.

- Noah reports having 5 or 6 drinks and being a 6 or 7 out of 10, with 10 being passed out.
- Harper reports have 4-5 drinks and a THC gummy of unknown strength and being a 9.99 out of 10, with 10 being passed out.



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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Making Determinations**
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

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Phase: Decision-Making — Making Determinations

Fundamentals:

- Are you making the decision alone or with others?
 - Know the mechanics of your deliberations
 - What records, if any for the deliberations
- Following the hearing, determine whether additional information or investigation is needed
 - How is that decided
 - What process is in place
 - With whom would you confer

Decision-Making

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Phase: Decision-Making — Making Determinations

Fundamentals:

- Burden of proof is on the institution, not on the parties
- Presumption of not responsible
- *Must objectively evaluate and weigh all relevant evidence necessary to independently reach a determination regarding responsibility and, if applicable, any appropriate remedies or sanctions*

Decision-Making

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Phase: Decision-Making — Making Determinations

Breadth of potential relevant evidence:

- Statements, accounts, and testimony (direct and indirect)
- Texts, chats, and other electronic messages/communications
- Photos and videos
- Voicemails
- Recordings
- Emails
- Social media posts
- Surveillance video
- Access data: Wi-Fi, key card
- Police report
- Medical and treatment records (must have a written waiver)
- Employment/student records
- Diagrams, maps, and drawings

Decision-Making

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Phase: Decision-Making — Making Determinations

Evidence that is always **irrelevant** under **Title IX**:

- Complainant's sexual predisposition or prior sexual behavior (unless one of the two exceptions apply)
- Medical, psychological, or treatment records (without voluntary, written consent)
- Information protected by legally recognized privilege without a waiver
 - *Know your current policy*

Decision-Making

Phase 2

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Phase: Decision-Making — Making Determinations

For Title IX, cannot categorically exclude evidence, including:

- Lie detector results
- Expert reports
- Medical records, including rape kits (but must have written consent)
- Character evidence
- Prior bad acts
- Witness statements submitted by party or their advisor
- *Unduly prejudicial/evidence "whose probative value is substantially outweighed by the danger of unfair prejudice"*

Decision-Making

Phase 2

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Phase: Decision-Making — Making Determinations

Keep in mind what must be decided:

- Make a decision about whether the policy was violated
 - For sexual harassment: determine what conduct occurred and whether it was **welcomed or unwelcomed**
 - For sexual contact: what conduct occurred and was it with **consent or without consent**
- Using the applicable **standard of evidence**
- With rationale for finding on each allegation

Decision-Making

Phase 2

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Phase: Decision-Making — Making Determinations

High Point University's Standard of evidence:

Preponderance of the Evidence: more likely than not that respondent violated the policy or insufficient evidence to conclude it is more likely than not

Decision-Making

Phase 2

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Phase: Decision-Making — Making Determinations

Determine **weight** to be given to relevant evidence:

- Regs require consideration of both inculpatory and exculpatory—what does that mean?
 - Weigh evidence that supports the finding/conclusion
 - Weigh certain evidence that does not support the finding/conclusion—acknowledge and address it (including witness or party statements)
- Will need to explain factors for some evidence “outweighing” other evidence—what are the reasons?
- Employ common sense – does the evidence make sense?
 - On its own and in reference to other evidence (plausibility)
- Matters that feel like one person’s word versus another’s?
How do you evaluate **credibility**?

Decision-Making

Phase 2

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Phase: Decision-Making — Making Determinations

Credibility:

- Credibility cannot be based on status (complainant, respondent, or witness)
- Is there corroborating evidence and information
 - Objective documentation
 - Contemporaneous accounts and information
- Is it based on firsthand knowledge—how did the person obtain the information
- Is the information “plausible”? Common sense?
- How strong is their recollection or confidence in the accuracy of the information
- Was the person forthcoming with the material information and what was the timing of the disclosure?

Decision-Making

Phase 2

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Phase: Decision-Making — Making Determinations

Credibility (cont.):

- Does the person have a reason to not be truthful about that information
 - In both directions: self-serving statements and statements against interest (if the fact is harmful to the person but they disclose it anyway)
- Relationship of person providing information to each of the parties
- Other factors impacting believability?
 - Prior bad acts or pattern of this conduct
 - Substantially similar and distinct conduct? Allegations or determinations?
 - Timing?
- Demeanor? (risky)

Decision-Making

Phase 3

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Decision-making Phases: Making a Determination

- High Point University's policies require that the written determination be simultaneously sent to both parties and contain:
 - A description of the alleged Prohibited Conduct;
 - Information about the policies and procedures that the University used to evaluate the allegations;
 - The Hearing Board's evaluation of the relevant and not otherwise impermissible evidence and determination whether Prohibited Conduct occurred;
 - Disciplinary sanctions for determinations of responsibility, whether remedies other than the imposition of disciplinary sanctions will be provided by the University to the Complainant, and, to the extent appropriate, other students identified by university to be experiencing the effects of the Prohibited Conduct;
 - The Hearing Board's rationale for its decision and any sanctions and remedies; and
 - Procedures and permissible bases for the Complainant and Respondent to appeal.

Decision-Making

Phase 3

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Make your Determination About Whether the Policy Was Violated and Provide Rationale

CASE STUDY

Decision-Making

Phase 3

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Decision-Making Phases

1) Prepare for hearing

2) Conduct hearing

3) Make Determination

4) Sanctions and remedies

5) Draft notice of determination

6) Appeals

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Determinations— Sanctions and Remedies

- Know your role.
- Separate the finding on responsibility from the sanctions and remedies
 - If credibility is part of the sanctions determination, whomever makes credibility determinations should decide sanctions
- Know your process
 - Based solely on the investigation and hearing files?
 - Parties to submit impact statements?
- Sanctions and remedies should align with the determination
 - "Close evidentiary calls" do not warrant lesser sanctions
 - evidentiary standard should not be raised because of the severity of the sanctions
- Designed to stop the discriminatory conduct, prevent its recurrence, and address its effects

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Phase: Decision-Making — Sanctions

- Range of possible sanctions are listed in the University's policy
 - Sanctions must be specific, including the type and length of suspension and reinstatement requirements
 - Sanctions must be included in notice of determination
 - Any information relied upon by decision-makers must be available to parties
- Sanctions must be included in the singular Notice of Determination (Title IX)

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Phase: Decision-Making — Sanctions and Remedies

Potential Considerations for Sanctions:

- The specific misconduct at issue
- The circumstances accompanying any lack of consent (e.g., force, additional violence, threat, coercion, intentional incapacitation, misunderstanding);
- Respondent's state of mind;
- Respondent's prior disciplinary history;
- The safety of the University community; or
- Impact or mitigation statement by one or both parties

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Decision-Making

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Decision-making Phases: Sanctions

- The University's policy states that when there is a finding of responsibility on one or more of the allegations, the decisionmaker(s), the parties, their Advisors, and appropriate administrators of High Point University may then consider the previously submitted party impact and/or mitigation statement(s) in determining appropriate sanction(s).
- Each of the parties must be given an opportunity to review any submitted impact and/or mitigation statement(s).
- As part of the determination of sanctions and remedies, the Title IX Coordinator may, in their discretion, provide the decisionmakers with information regarding previous conduct violations by the Respondent.

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Decision-Making

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Decision-making Phases: Sanctions

- Not all forms of Prohibited Conduct are deemed equally serious offenses and, as a result, different remedies or sanctions may be imposed depending on the severity of the offense and any previous conduct violations.

Common sanctions options:

- Reprimand/warning;
- Disciplinary letter;
- Changing the Respondent's academic or employment schedule;
- Disciplinary probation;
- Revocation of honors or awards;
- Loss of privileges;
- Imposition of conditions of employment;
- Restricting access to facilities or activities, including student activities and campus organizations;
- Mandatory training;
- Service hours;

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Decision-Making

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Determinations— Sanctions and Remedies

Sanctions Options (cont.):

- Alcohol and/or drug assessment or counseling;
- Issuing a “no contact” order to the Respondent or requiring that an existing order remain in place;
- Moving the Respondent’s residence on campus;
- Loss of leadership positions;
- Dismissal, termination, or restriction from employment;
- Ineligibility for hire or rehire;
- Removal from student housing;
- Demotion or other removal from a management, supervisory, or leadership role(s);
- A full or partial ban from campus (either limited time or indefinite);
- Transcript notations;



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Determinations— Sanctions and Remedies

Sanctions Options (cont.):

- Deferred suspension;
- Restriction from sponsored or affiliated events;
- Pay reduction;
- Loss of raise;
- Loss of supervision or oversight duties;
- Referral for further sanctioning pursuant to applicable policies and/or procedures;
- Employment record notations;
- Suspension;
- Expulsion; and
- Revocation of degree.



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HPU Policy— Sanctions and Remedies

- Minimum sanctions for Dating Violence, Domestic Violence, Forcible Fondling, Incest, Stalking, Retaliation, Sexual Harassment, Sex/Gender-Based Harassment, [281](#) Interference with Procedures, Nonconsensual Viewing, Recording, Dissemination, and Sexual Exploitation are: disciplinary probation, suspension, or expulsion.
- Minimum sanctions for Forcible Rape, Forcible Sodomy, Sexual Assault with an Object, and Statutory Rape are: suspension or expulsion.
- Other sanctions may be utilized in response to any of the above violations: Loss of privileges, residential and/or campus bans, No Contact Order, withholding or revoking a degree, restitution, educational program/project/class, housing relocation, housing termination, counseling referral, educational conversation with faculty or staff, fines, residence hall expulsion/eviction, community service, any other University sanctions, or any other appropriate reformative sanctions.



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Slide 213

ZB1 This feels like it's the result of client discussion. Should we re-confirm the current posture on these offenses?

Buckheit, Zach, 2026-03-16T19:54:05.438

Phase: Decision-Making — Remedies

- Remedies for the Complainant (and others) are designed to restore or preserve equal access to the University's education program or activity. Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent. Remedies, accommodations, and protective measures for the Complainant include implementing or extending supportive interim measures, including, without limitation, the following examples:
- A mutual or one-sided no-contact order; Prohibiting an individual involved from being on University property; Prohibiting an individual involved from participating in University-sponsored events; Changing an individual's on campus residency, dining, or transportation arrangements; Special parking arrangements; Changing an individual's student or employee status or job responsibilities; Changing an individual's work or class schedule; Providing academic accommodations or providing assistance with academic issues; Providing security escorts; Access to counseling; Making information about orders for protection and harassment restraining orders available to a complainant; and/or Assistance identifying an advocate to help secure additional resources or assistance, including off campus and community advocacy, support, and services.

Decision-Making

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Decision-Making Phases

- 1) Prepare for hearing
- 2) Conduct hearing
- 3) Make Determination
- 4) Sanctions and remedies
- 5) Draft notice of determination
- 6) Appeals

Decision-Making

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Phase: Decision-Making — Draft Notice of Determination

Title IX and VAWA require a written Notice of Determination (policy determines whether it is required for non-Title IX sexual harassment)

Format of Notice of Determination (which aligns with Regs):

- Summary of allegations
- Summary of procedures
- Policy Provisions Section
- Findings of Fact
- Decision
- Rationale for the Decision
- Sanctions, Rationale, and Remedies
- Appeal Process

Decision-Making

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Phase: Decision-Making — Draft Notice of Determination

Title IX requires that it include:

- Identification of allegations potentially constituting sexual harassment
 - Summarize the allegations contained in the Formal Complaint
 - All allegations, for both parties, in a factual and concise manner
- Description of the procedural steps from formal complaint through determination, including all:
 - Notifications to parties,
 - Interviews with parties and witnesses,
 - Site visits,
 - Methods used to gather other evidence,
 - Any hearing held
- Include information about who was present and their roles

Decision-Making

Phase 3: Draft Notice of Determination

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Phase: Decision-Making — Draft Notice of Determination

Policy Provision Section:

- Identify the policies at issue
- Include applicable definitions
 - Regarding conduct (e.g., sexual assault, consent, incapacitation) and the elements
 - Standard of proof
 - Burden of proof
 - Presumption of not responsible
 - Retaliation, if applicable

Decision-Making

Phase 3: Draft Notice of Determination

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Phase: Decision-Making — Draft Notice of Determination

- Findings of fact supporting the determination
- Conclusions regarding application of policy to the facts
- Statement of, and rationale for, the result as to each allegation, including determination regarding responsibility, sanctions, and whether remedies designed to restore or preserve equal access to education program/activity to complainant

In practice:

- Discuss of all the material facts;
- Apply the policy definition and standard of proof to the facts;
- To reach conclusions that are;
- Explained through the evidence available: how it was *weighed*, and how it supports, or does not support, the outcome (including credibility)

Decision-Making

Phase 3: Draft Notice of Determination

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Phase: Decision-Making — Draft Notice of Determination

Findings and Rationale (cont.)

- Sanctions and rationale
 - And procedure for failing to abide by them
- Remedies provided
 - Notify Complainant of the remedies
 - Notify Respondent of whether remedies (generally) have been provided (Title IX provides this FERPA exception) but not the details
 - For VAWA, there is no FERPA exception to permit disclosure of information about remedies that do not involve the Respondent (like no contact orders)

Decision Making

Draft Notice of Determination

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Phase: Decision-Making — Draft Notice of Determination

- Procedures and basis for appeal
 - Explain the process, general requirements, roles, and the timeframes
 - Title IX grounds for appeal
 - Plus any other grounds listed in the policy
 - How to file it
 - On what timeline
 - To be decided by whom (by name, title, or otherwise)

Decision Making

Draft Notice of Determination

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Phase: Decision-Making—Draft Notice of Determination

Delivery of the Notice of Determination (Title IX):

- Know in advance who is responsible for delivering the notice to the parties
- Must be a written notice
- Must be provided to the parties simultaneously

VAWA crimes:

- Simultaneous notice, when the decision becomes final
 - AND for any change to the results prior to it becoming final

Effective Date (Title IX Regs):

- Final at conclusion of appeal or, if no appeal is filed, on the date on which the appeal would no longer be considered timely

Decision Making

Draft Notice of Determination

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Decision-Making Phases

1) Prepare for hearing

2) Conduct hearing

3) Make Determination

4) Sanctions and remedies

5) Draft notice of determination

6) Appeals

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Formal Grievance Process

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graph TD; FC((Formal Complaint)) --> NOA((Notice of Allegations)); NOA --> IR((Informal Resolution)); NOA --> I((Investigation)); IR --> D((Dismissal)); IR --> H((Hearing)); I --> D; I --> H; D --> FC; D --> A((Appeal)); H --> D; D --> A;
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Decision-Making — Appeals

- Must be offered to both parties for the final determination of responsibility and the dismissal of formal complaints
- Appeal bases must include:
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time the determination regarding responsibility (or dismissal) was made, that could affect the outcome
 - Title IX Coordinator, Investigator, or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
- Plus, any other grounds listed in the policy

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Decision-Making — Appeals

Additional Requirements (Title IX):

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
- Decision-maker for appeal cannot be:
 - Decision-maker on the determination of responsibility or dismissal
 - Investigator who investigated
 - Title IX Coordinator
- Comply with prohibitions on bias and conflict of interest
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Issue a written decision describing the result of the appeal and the rationale
- Provide the written decision simultaneously to the parties

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HPU Appeal Grounds

Same as Title IX minimum requirements:

- (1) Procedural irregularity that would change the outcome;
- (2) New evidence that would change the outcome and that was not reasonably available when the determination or dismissal was made; and
- (3) The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome

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Decision-Making — Appeals

- Generally, the purpose of an appeal is not for the decision-maker to review all evidence and make a decision about responsibility
- An appeal is not a re-deciding of the determination and the Decision-Maker should not substitute their own judgment for that of those who made the determination
- Determine whether or not an error occurred, by the applicable standard of evidence

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Decision-Making — Appeals

VAWA:

- No appeal requirement but, if provided, it must be offered equally to the parties with the same procedural protections as provided throughout the process

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HPU Appeal Process

- Either party can appeal a determination of responsibility or decision to dismiss a complaint.
- Student appeals of a decision to dismiss a Title IX complaint must be submitted within **3 days** of the receipt of the dismissal by using the online form included with the Notice of Dismissal.
- Student appeals of determinations regarding responsibility must be submitted within **5 days** of the receipt of the determination by using the online form included with the Notice of Determination.
- If an appeal is not timely filed, the decision is considered final and sanctions will go into effect immediately following the expiration of the parties' time to appeal.
- For Title IX Prohibited Conduct, the determination regarding responsibility becomes final either on the date that the University 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.
- For Non-Title IX Prohibited Conduct, the Hearing Board will specify whether the determination becomes final on the date of the decision, on the date that the University 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. HPU's timeframe for the determination process of allegations of Prohibited Conduct is typically twenty (20) business days from the conclusion of the hearing. The University will not discipline a Party, witness, or others participating in the Grievance Process for making a false statement or for engaging in Prohibited Conduct based solely on the determination whether the Prohibited Conduct occurred (or did not occur).

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Decision-making Phases: Appeals (cont.)

- The Title IX Coordinator may remove or redact any portions of the appeal statement that exceed the word limit or that otherwise exceed the scope of information that may be considered in the Grievance Process (such as treatment records without consent, information subject to a legal privilege without a waiver, or evidence relating to the Complainant's prior sexual history if an exception does not apply).
- If the Title IX Coordinator determines that the appeal states a permissible ground for appeal, the non-appealing party will be notified of the appeal and provided an opportunity to review the appeal statement and submit a written response in support of the outcome.
- Any written response from the non-appealing party in support of the outcome must be submitted to the Title IX Coordinator within five (5) business days of receiving notice of the appeal.
- While the party may be assisted by their advisors in preparation of the responsive appeal statement, the responsive appeal statement must be submitted by the party, must be the party's own statement, and may not be used to submit the statements of others on the party's behalf.
- Parties cannot address statements to one another in their appeal statement.
- The Title IX Coordinator will review any responsive appeal statement and may remove or redact any portions of the statement that exceed the word limit or that otherwise exceed the scope of information that may be considered in the Grievance Process (such as treatment records without consent, information subject to a legal privilege without a waiver, or evidence relating to the Complainant's prior sexual history if an exception does not apply).

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Decision-making Phases: Appeals (cont.)

- The Executive Council will decide the appeal.
- The Executive Council will be properly trained and not be the Title IX Coordinator or anyone who has had any other previous involvement in the matter.
- If a Party has any concern that a member of the Executive Council has a conflict of interest, such concern should be reported to the Title IX Coordinator, in writing with sufficient detail about the basis, within two (2) business days after receiving the notice of the assigned members.
- The Title IX Coordinator generally will compile an appeal file, which may consist of any information, documents, or other evidence. Such information will include, the appeal statement, any response, the notice of determination, the adjudication file in its entirety or in part, any previously undiscovered evidence (if discovery of new evidence is a ground for the appeal), and any other information determined to be necessary for the Executive Council's decision, at the Title IX Coordinator's discretion.

Decision-making

Appeals

Phase 8

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Decision-making Phases: Appeals (cont.)

- The Executive Council will review the file to determine whether the appeal has merit.
- The Executive Council will not rehear the case but will review the appeal file and consider whether it is more likely than not that any of the above-listed grounds for appeal have been satisfied.
- The appeal file will be made available for review by the Complainant and Respondent.
- The Title IX Coordinator will provide a reasonable period for the Complainant and Respondent to have access to review the appeal file.
- The parties and their advisors may use the appeal file reviewed at this step and any additional information reviewed during the consideration of the appeal (see below), only for purposes of participating in the Grievance Process and are prohibited from disseminating or otherwise sharing the appeal file or additional information with any other individual.
- Prior to being provided access to the appeal file or any additional information, the parties and parties' advisors will be required to agree to the conditions on access to this confidential and protected information. A violation of this agreement may be subject to disciplinary action, including termination or expulsion.

Decision-making

Appeals

Phase 9

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Decision-making Phases: Appeals (cont.)

- In reviewing any appeal, the Executive Council can:
 - affirm the decision,
 - overturn the decision, or
 - remand the matter, with instructions, for further investigation and adjudication by the same or different investigators, decisionmakers, or Hearing Board or Adjudication Panel members, as applicable.
- The written decision describing the result of the appeal and the rationale for the result will be simultaneously issued to the parties.
- The University will strive to complete the appeal within twenty (20) business days following the Executive Council's receipt of the appeal file from the Title IX Coordinator; however, in some cases, more time may be required.

Decision-making

Appeals

Phase 10

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Procedural Irregularity

- Was a material procedure not followed?
- Did the decision-maker not consider material evidence, including inculpatory and exculpatory evidence?
- Was relevant evidence excluded?
 - "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied."
 - "Focus investigations and adjudications on **evidence** pertinent to **proving whether facts material** to the **allegations** under investigation **are more or less likely to be true** (i.e., on what is relevant)."
- Did the decision-maker omit rationale for any of the determinations made?

Decision-Making

Final Decision

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New Evidence

- Was new evidence presented for the first time on appeal?
- Was the evidence not available at the time of the determination?
- What is the explanation for why it was not?
- Would that evidence impact the outcome?

Decision-Making

Final Decision

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Conflict of Interest or Bias

- Has the appealing party specifically referenced evidence or factual support for the alleged conflict or bias?
- Is the evidence material?
- Is the conclusion reasonable?
- Has the appealing party explained how it impacted the outcome?
- Did the party voice concerns about bias or conflict prior to the decision?

Decision-Making

Final Decision

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Decision Making

Final Check

Decision Making

Final Check

Decision-making Phases: Appeals of Complaint Dismissals

- If a party appeals a **Notice of Dismissal**, the Executive Council will review the appeal submissions, the Formal Complaint, the Notice of Dismissal and other relevant information to determine whether the appeal has merit.
- In reviewing any appeal, the Executive Council has the ability to affirm the dismissal or overturn the decision and remand the matter for further investigation and adjudication.
- The Executive Council will strive to simultaneously issue to both Parties a written decision describing the result of the appeal and the rationale for the result within ten (10) business days after receipt of all appeal documents, however in some cases more time may be required.

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Decision Making

Final Check

Decision Making

Final Check

Decision-making Phases: Appeal Steps

- Review pertinent policy and procedures
- Review the appeal and any response filed:
 - Understand the appealing party's position
 - Understand the responding party's position
- Review pertinent policy and procedures (*not a typo!*)
- Review Notice of Determination to understand each decision reached and the underly basis for it and, as applicable, the hearing or transcript, investigative report, and evidence
- Determine whether appeal grounds are met and explain the decision in a written outcome

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Decision Making

Final Check

Decision Making

Final Check

Decision-making Phases: Written Appeal Decisions

- Background information:
 - who filed the appeal, dates and timelines for appeal filings and determination being appealed
- Summary of the underlying allegations and determination made
- Summary of appeal grounds
- Identify appeal decision officer(s) and the scope of the role (which is not to rehear or re-decided the case)
- Summary of the decision

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Decision-making Phases: Written Appeal Decisions

- Findings, analyzing each appeal ground, by category
 - Walk the parties through your decision
 - Explain the factors that support or did not support the appeal
 - Using the preponderance of the evidence standard (more likely than not)
 - Finding on whether the appeal ground is satisfied and, if so,
 - Finding on whether it substantially affected the outcome
 - Be sure to address all arguments and stay within the scope*
 - Resist temptation to go beyond the scope*
- Conclusion:
 - Are the appeal grounds satisfied?
 - If granted: what is the outcome?

Decision-making Phases

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Decision-making Phases: Written Appeal Decisions

- Having trouble?**
 - These can be difficult decisions
 - Consult with legal counsel on legal questions
 - Use the Title IX Coordinator as a resource for procedural questions and past decisions, especially for those situations in which appeal is granted
 - Self care

Decision-making Phases

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Post-Grievance Process Actions

- Ensure parties understand process has ended
- Monitoring sanctions
- Checking-in on effectiveness of remedies and supportive measures
- Community-wide prevention efforts
- Recordkeeping

Post-Grievance Process Actions

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Recordkeeping — Title IX

Must maintain certain records for seven years, including:

- For each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required by the Regulations, any disciplinary sanctions imposed on the Respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the education program or activity
- Any appeal and the result
- Informal resolution
- Supportive measures
- Training materials for Title IX Coordinators, Investigators, decision-makers, and those who facilitate informal resolution (and post on website)
- Actions taken in response to a report or formal complaint sufficient to document why the response was not deliberately indifferent



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Appeal

CASE
STUDY



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Q & A



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