

GRAND RIVER | SOLUTIONS

Title IX Training

Champlain College

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Your Facilitators

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**Director of Strategic
Partnerships & Client
Relations**



Vision

We exist to help create safe and equitable work and educational environments.



Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.



Core Values

- ❖ Responsive Partnership
- ❖ Innovation
- ❖ Accountability
- ❖ Transformation
- ❖ Integrity

Today's Agenda

01

The Ever-Evolving
Jurisprudence of Title IX

05

Investigating Allegations of
Title IX Sexual Harassment

02

The Title IX Team

06

Adjudicating Allegations of
Title IX Sexual Harassment

03

The Initial Response to
Reports of Sexual
Harassment

07

The Appellate Process

04

Report Resolution





The Ever-Evolving Jurisprudence of Title IX

“If nothing else, Title IX professionals are experts at adapting.”

01

Title IX of the Education Amendments Act of 1972

"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."

20 U.S.C. § 1681 (1972).

Title IX Applies to All Forms of Sex Discrimination

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of Absence and Re-Entry Policies
- Opportunities to Join Groups
- Pay Rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities



The Title IX Regulations

Sexual Harassment Only

1. Narrows the definition of sexual harassment;
2. Narrows the scope of the institution's educational program or activity;
3. Narrows eligibility to file a complaint;
4. Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.

Sexual Harassment: *Section 106.30*

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

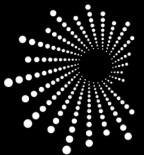
- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).



Covered Geography

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

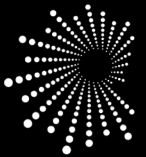
- ✓ On campus or in a building owned or controlled
- ✓ Off-campus incident that occurs as part of the institution's operations
- ✓ Institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
- ✓ The incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution





**Not
Covered**

- Off campus conduct, even if it has an impact on the educational program or activity;
- Conduct that occurs outside of the United States.





Covered Individuals

Eligibility for Title IX's Protections

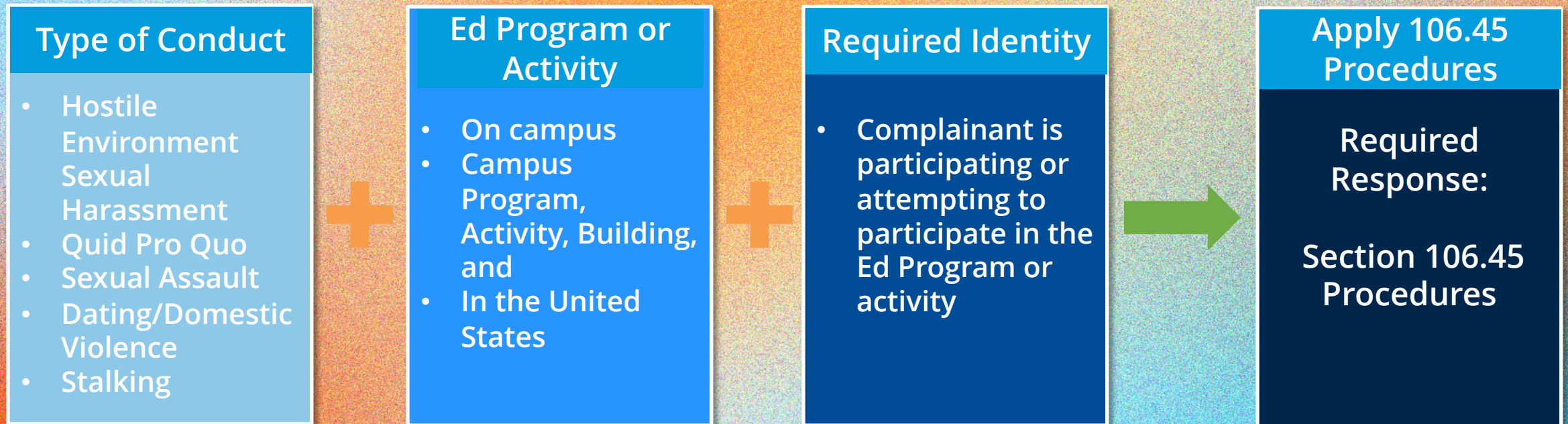
"At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." 34 C.F.R. § 106.30

Applicant

Accepted/Hired

Enrolled/Employed

Title IX Application Post May 2020 Regulations



Conduct Falling Outside the Scope of Title IX

- Other provisions of federal law require that the College respond to conduct falling outside of the scope of Title IX
- The College's sexual misconduct policy, section P, is instructive



Conduct Falling Outside the Scope of Title IX

- In student matters, the Associate Director of Community Standards reviews the report, issues a written decision
- In employee matters, the VP for HR or Academic Affairs reviews the report and issues a written decision



Other Requirements of the Regulations

Designation of
a Title IX
Coordinator

Dissemination
of policy

Separation of
Responsibilities

Training

Impartiality

Record
Keeping



The Title IX Team

Understanding the roles, responsibilities, and the importance of collaborative partnerships

02

The Title IX Team

Title IX Coordinator

Title IX Investigator

Decision Maker

Appellate Reviewers



The Title IX Coordinator

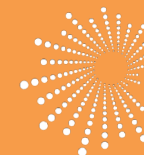
Final Rule, Section 106.8

Designation of Coordinator, Dissemination of Policy, and Adoption of Grievance Procedures

“Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the Title IX Coordinator.”

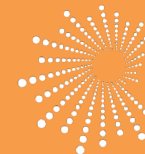
Additionally:

- The recipient must notify [everyone] of the name or title, office address, email address, and telephone number of the coordinator(s).
- Any person may report in person, by mail/email, telephone using the contact information.
- Reports can be made at anytime.



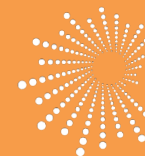
“Responsibilities Required Under Title IX and the Regulations”

- Serve as the primary pathway for receipt of reports of sex discrimination and sexual harassment;
- Upon receipt of a report, promptly contact the complainant to discuss the availability of supportive measures and to explain the process of filing a formal complaint;
- Coordinate the effective implementation of supportive measures;
- Where a report is made, but a formal complaint is not filed by the complainant, determine whether a formal complaint should be filed and sign that formal complaint;
- Effective implementation of any remedies imposed by a decision maker at the conclusion of a grievance process.



Responsibilities Often Delegated to the Title IX Coordinator

- Ensuring that the institutional policies and procedures are compliant with Title IX
- Ensuring dissemination of the policy
- Overseeing the grievance process to ensure it is compliant
- Coordinating a compliant grievance process
- Staffing various roles
- Ensuring training requirements are met
- Record keeping
- Compliance with intersecting federal and state laws
- Education and prevention efforts





The Investigator



Can be the Title IX Coordinator, although that is disfavored.



Collects and compiles evidence.



Writes the investigative report.



Does not make finding of responsibility in Title IX case.



In non-Title IX cases, investigator makes finding.



Title IX Coordinator's Role

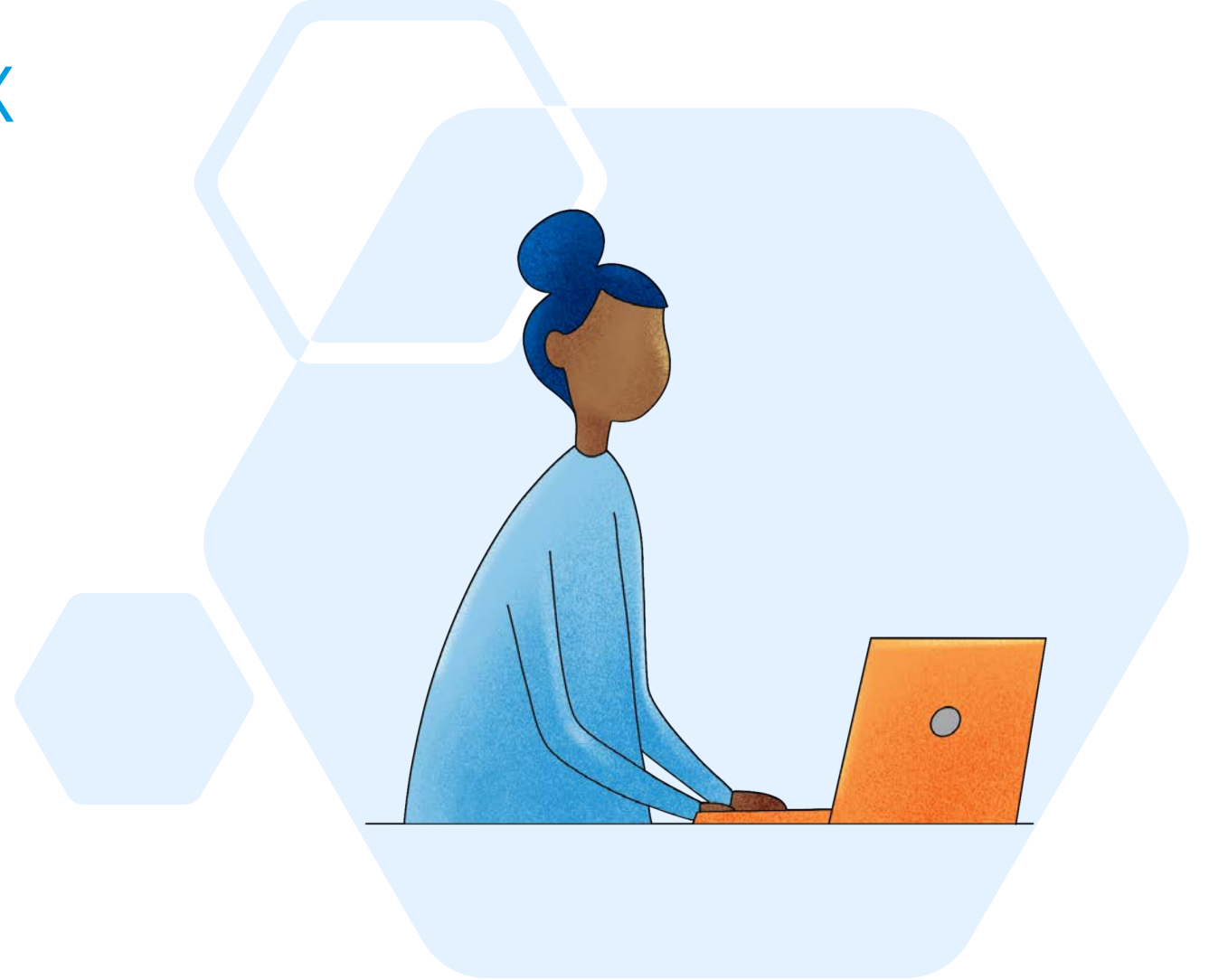
In the Investigation

- Title IX Coordinator is permitted to conduct the investigation, though this is not favored
- If not conducting the investigation, may serve as a support to the investigators
- May serve as a resource to the parties

The Decision-Makers

The Hearing Officer: Title IX Matters

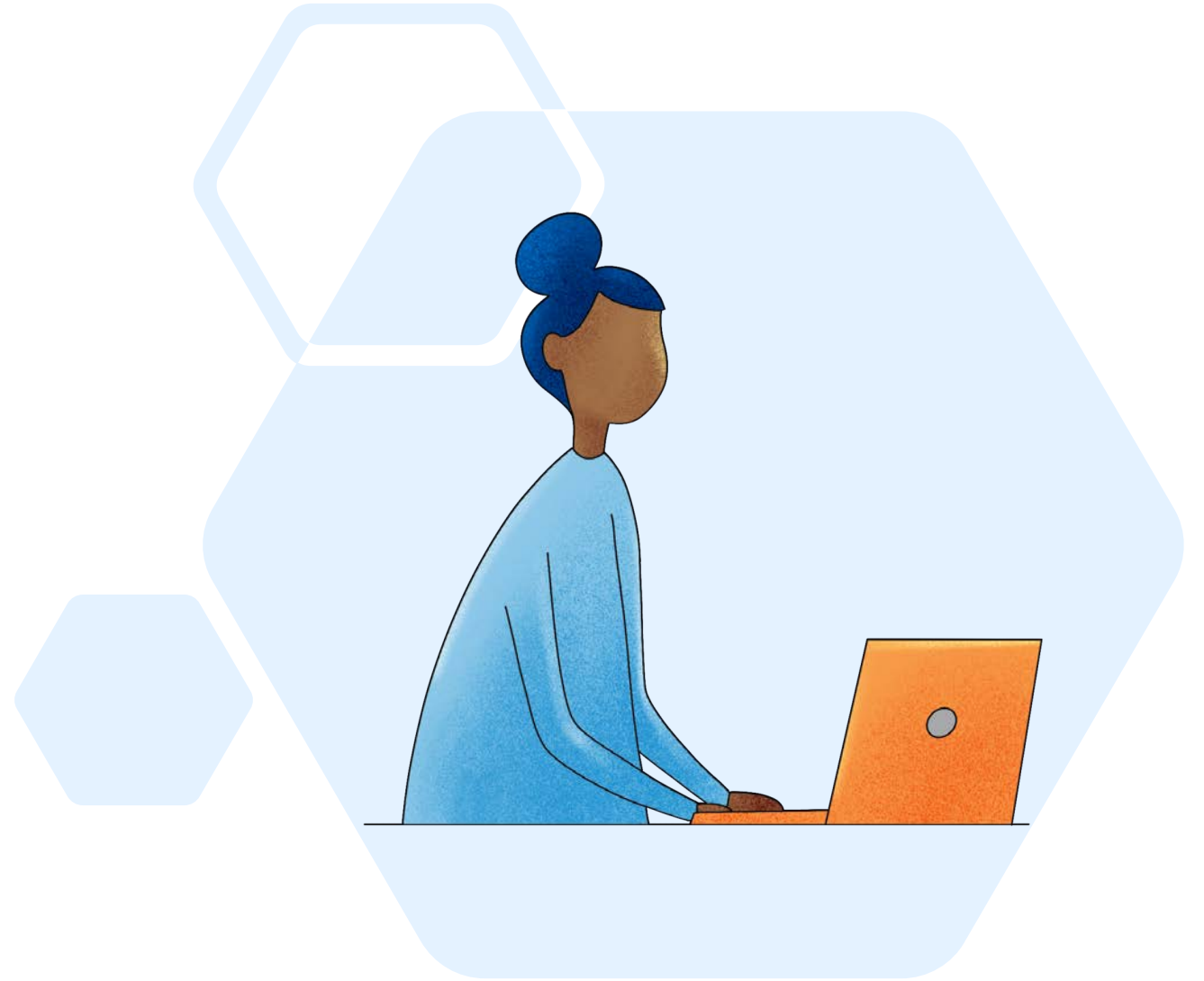
- A single Decision-Maker
- Facilitates the Hearing
- Maintains order and decorum during the hearing
- Makes rulings of relevancy of evidence and questions posed
- Makes finding of responsibility
- Writes the final determination letter



The Decision-Makers

Non-Title IX Matters

- Either the Associate Dean of Students, the VP for HR, or the VP for Academic Affairs reviews the full report of the investigator
- They issue a written decision using a preponderance of the evidence standard
- If appropriate, they include sanction.
- A hearing is not conducted.



The Decision-Makers

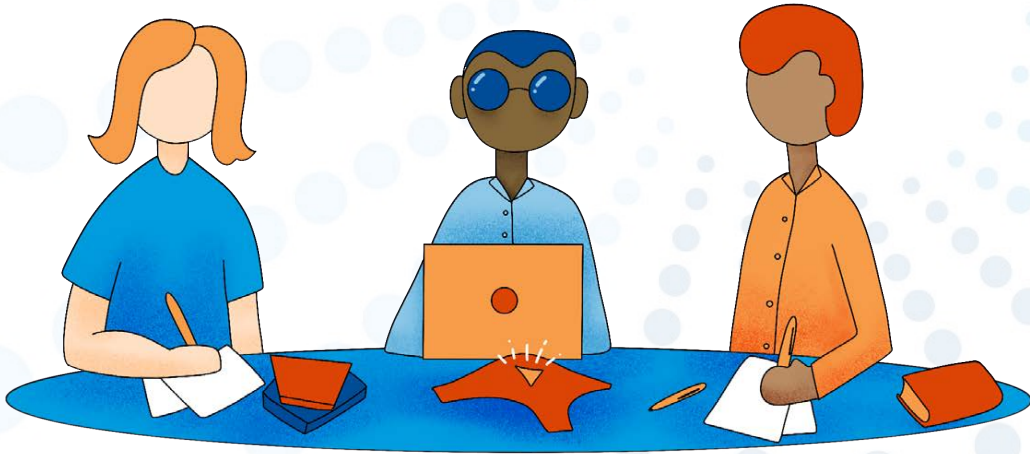
The Sanctioning Officer

- The Dean of Students
 - student respondent
- VP for Academic Affairs or VP of Human Resources
 - faculty respondent
- VP of Human Resources
 - employee respondent



Title IX Coordinator's Role In the Adjudication

- Title IX Coordinator may not serve as the decision-maker
- May serve to support the decision-maker(s)
- May participate in the hearing to provide logistical support to decision-makers
- Can provide sanctioning officers with information about historical practices institutional
- Responsible for effective implementation of remedies imposed



Appellate Officer

Appointed by the Title IX Coordinator.

Reviews the finding of the decision-makers upon request of one or both of the parties.

Review is limited in scope to four grounds in the policy.



Title IX Coordinator's Role In the Appeal

- Title IX Coordinator may not serve as an appellate reviewer
- May serve to support the appellate reviewer/panel
- May provide logistical support
- May coordinate implementation of appellate findings, where appropriate.
- Responsible for effective implementation of remedies imposed

The Requirement of Impartiality



Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution not to have a conflict of interest or bias.

- For or against complainants or respondents generally, or
- An individual complainant or respondent

Impermissible Bias

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.

STOPS

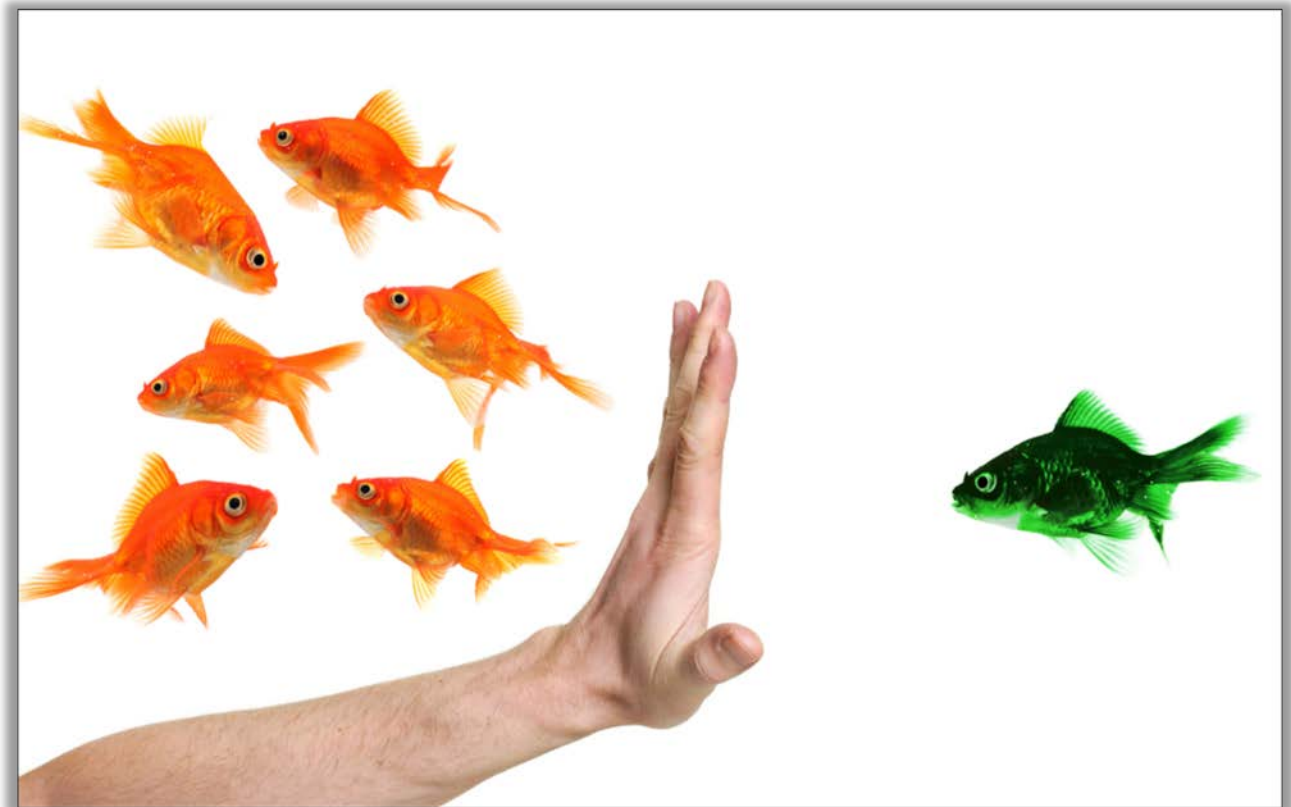
A photograph of a person walking on a sidewalk. The person is wearing dark pants and brown shoes. The sidewalk is light-colored and has the word "STOPS" painted in large, dark blue letters. The background is a blurred blue sky.

What Constitutes Bias?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

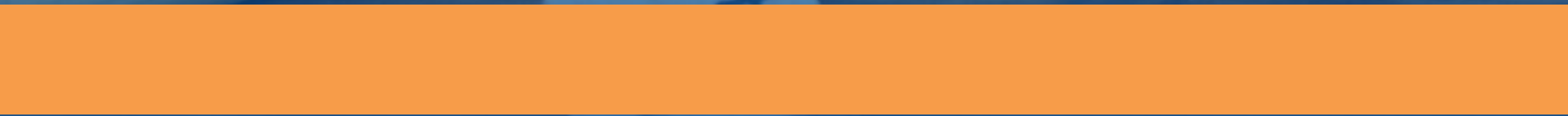
Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts





Conflict of Interest





Avoiding Prejudgment of the Facts

Requires that the Title IX professional refrain from making a judgement on individual facts, the allegations, or whether a policy violation occurred until they have had the opportunity to consider all of the evidence.



The Initial Response to Reports of Sexual Harassment

The Regulatory requirements and best practices for receiving reports, report intake, and providing supportive measures.

03



Reports of Sexual Misconduct: Where Do They Come From?



Receiving Reports and Initiating the Response



Review the report.



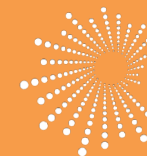
Determine the appropriate initial response.



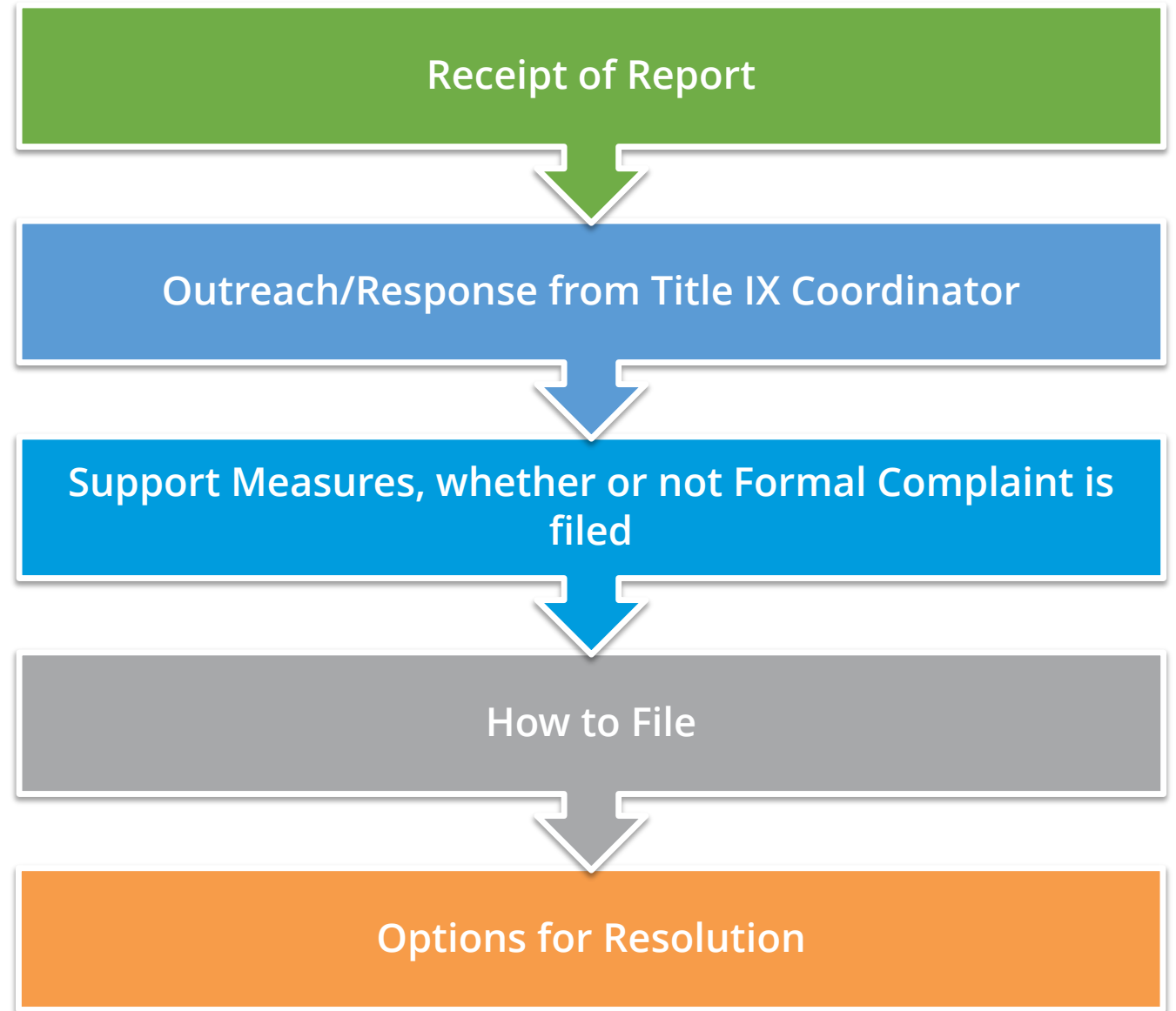
Promptly initiate that response.



Document/record the receipt of the report and the response thereto.



Initial Response Requirements



Initial Outreach

FIRST — SAFETY

Email

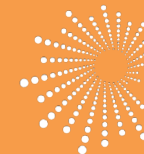
- Create forms

Phone

In person

- Use RA
- Campus safety

Follow-up emails





Let's Try It:
How Might
You Respond?



The Title IX Office receives the following anonymous report via your institution's online reporting form:

Riley Smith is in trouble. I live on their floor in River Hall and I constantly hear fighting and crying coming from their room at night. Every time I see Riley with their partner, they seem really submissive and nervous and I have noticed bruises on Riley the mornings after the biggest fights. The RA and Riley's partner are friend and so the RA doesn't do anything about it. It's getting so bad that some of the other people on the floor are talking about intervening, but we are afraid of Riley's partner too.

The Title IX Office is contact by a professor who forwards the following email from a student to you:

I really don't want to bother you but I'm in a really hard situation.

I and my boyfriend had a row for these days. And he beated me yesterday and this morning that I attached some pictures before XXXX final starts this afternoon because I found out I couldn't hold pencil because of trembling and I couldn't even think in the first thirty minutes. These pictures shows my arms after he twisting them, which doesn't look violent but feel hurt. One hour before lab final started, I told him I'm going to call police after he beated me, then he dragged me from bed to the floor and threatened to kill me if I call police. It was horrible and hard to reminisce. I knew he tends to use violence before and I forgave him some times when he just pinched my chin and dragged my arm. But this time it is too bad. So he took my phone away and restrain me in my room, not letting me go because I told him I would tell my TA about this whole thing after the final. So he just let me go to final after I promised I won't tell school and police.

When I go to two finals today (XXXX and XXXX, especially the latter), I really couldn't think and even hold pen (and I grabbed my bag but almost nothing in it) for the first thirty minutes. Now everything is done, he promised not to show up in my life nor my room, which is good because I don't want to take penalty on anyone. But I couldn't predict what my final shows out. It won't match my work for the whole semester. I don't expect any makeup chance. I just want to let you know since I barely know any American women here, am I doing wrong? Is there anything I can do to fix anything from academics or life?

Sorry for bothering.

The Title IX Office receives the following email from a responsible employee:

My name is Professor Jones. One of my students shared that they were raped last weekend at a party by another student. They don't want the school starting an investigation, and so I am not going to share their name or the details with you. They are thinking about talking to the police but are not sure who to contact. Can you please provide me with information that I can share with the student?



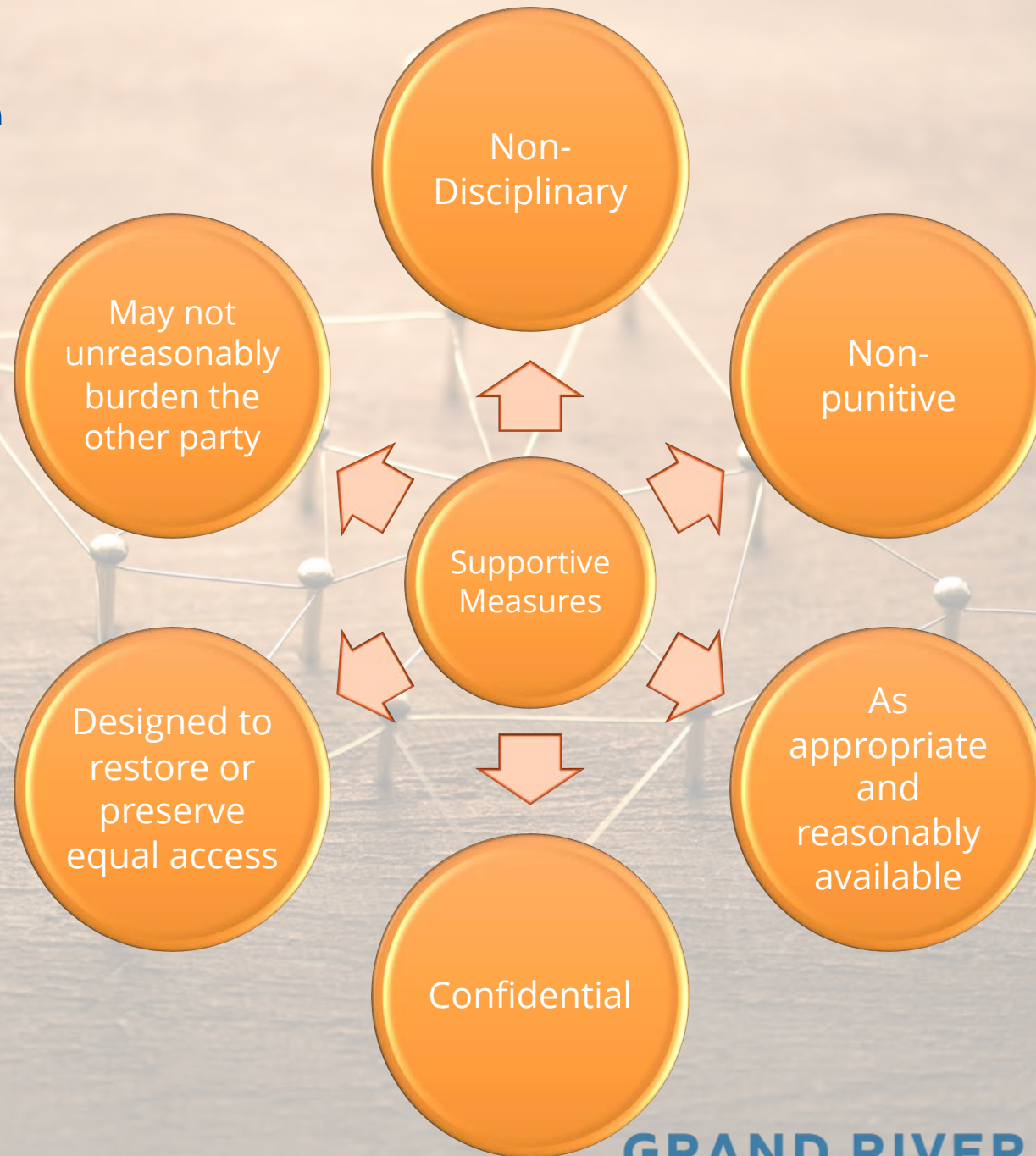
Complaint Intake and Supportive Measures

Initial Meeting with the Complainant

- Discuss available supportive measures
- Options for reporting
- Description of grievance process and their rights
- Answer questions
- Conclude with a discussion of next steps
- Retaliation

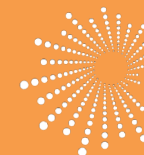


Supportive Measures

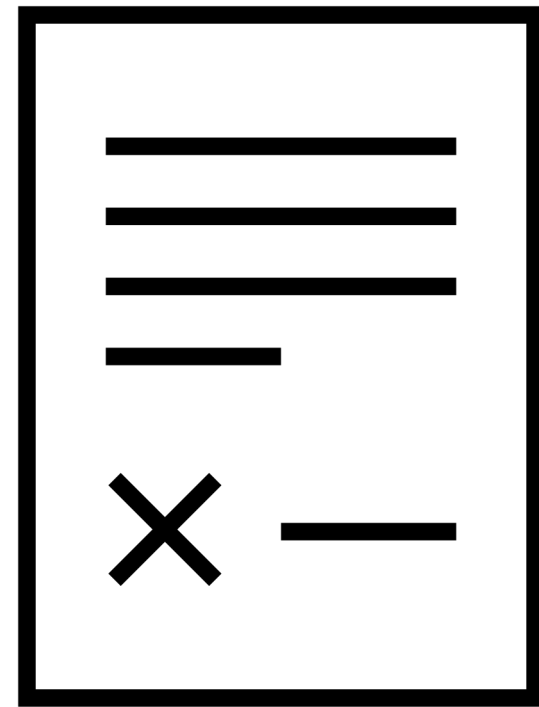
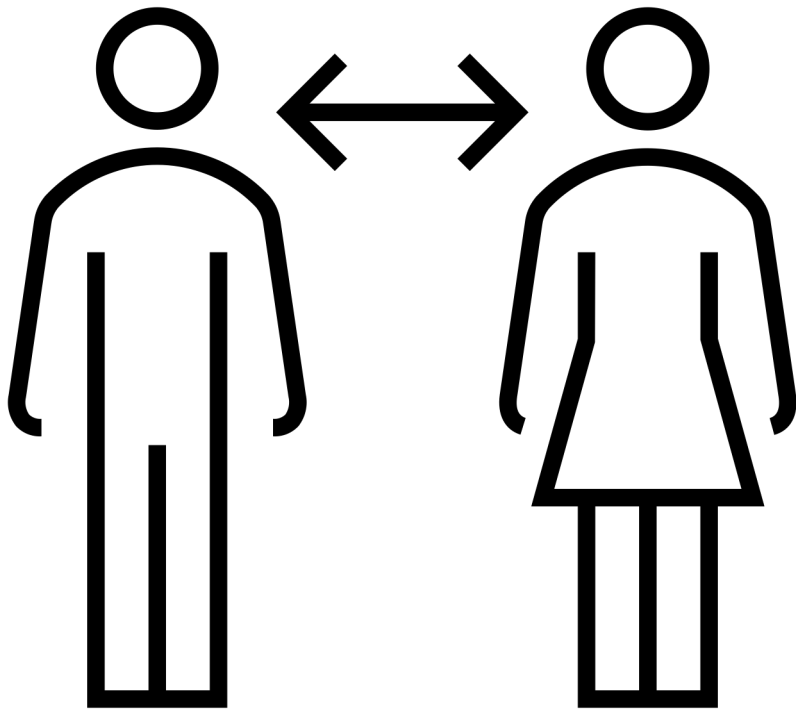


Examples of Supportive Measures

- Assistance obtaining access to counseling, advocacy, or medical services;
- Assistance obtaining access to academic support and requesting academic accommodations;
- Changes in class schedules;
- Assistance requesting changes in work schedules, job assignments, or other work accommodations;
- Changes in campus housing;
- Safety escorts;
- Leaves of absence;
- Mutual restrictions on contact between the Parties (“No-contact” orders).




“Mutual Restrictions On Contact Between the Parties”



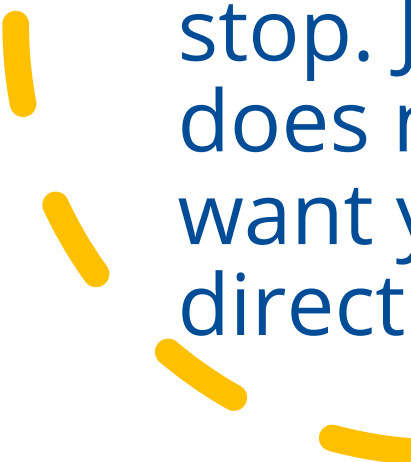


Let's Try It:
How do you
Respond?





Joe reports that Karen is engaging in conduct that makes him uncomfortable. His report includes allegations that she repeatedly asks him out, sends him sexually explicit photographs of herself, and has told people that they are in a relationship. Joe shows you messages wherein he explicitly asks Karen to stop. Joe alleges that behavior is not stopping. Joe does not want to file a formal complaint, but he does want you to intervene and he requests a no contact directive.



Infrastructure for Receiving and Responding to Reports





Report Resolution

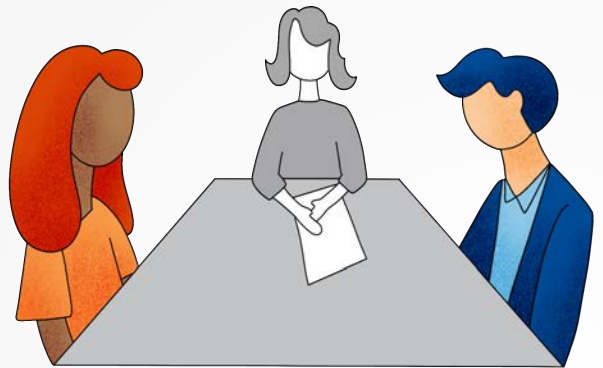
Remedies-Based, Informal, or Formal

04

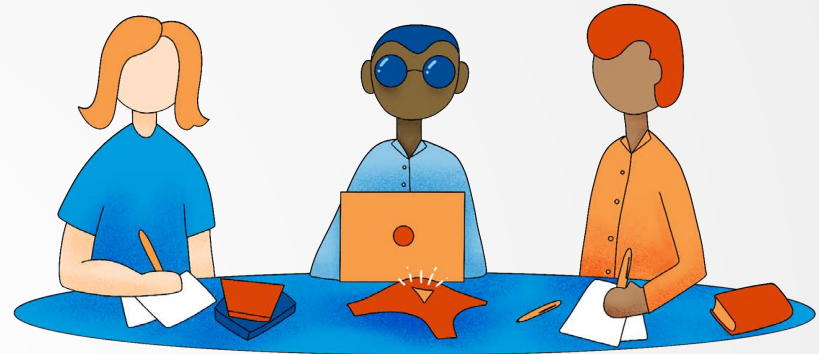
How to Proceed?



Remedies-based
No formal process



Alternative/Informal
Signed agreement;
Voluntary;
What records?



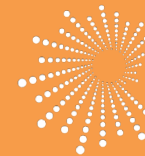
**Formal/ Investigation/
Hearing**
All requirements of 106.45



Formal Complaint Filed

By
Complainant

By the Title IX
Coordinator



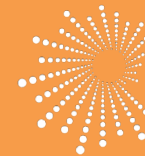
Factors to Consider When Determining Whether to File a Formal Complaint

Allegations of
Violence

Threats

Use of
Weapons

Serial
Predation



Formal Complaint

A Formal Complaint must include:



The Complainant's digital or physical signature, or an indication that the Complainant is the person filing the Formal Complaint;

An allegation of Prohibited Conduct as defined under this Policy. This may include:

- Where the incident(s) occurred; what incident(s) occurred; when the incident(s) occurred;

Identity of Respondent, if known;

A request for a resolution.

Formal Complaints may be made to the Title IX Coordinator by US Mail, email, or in person.

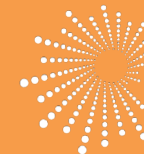
Dismissing Complaints

MANDATORY

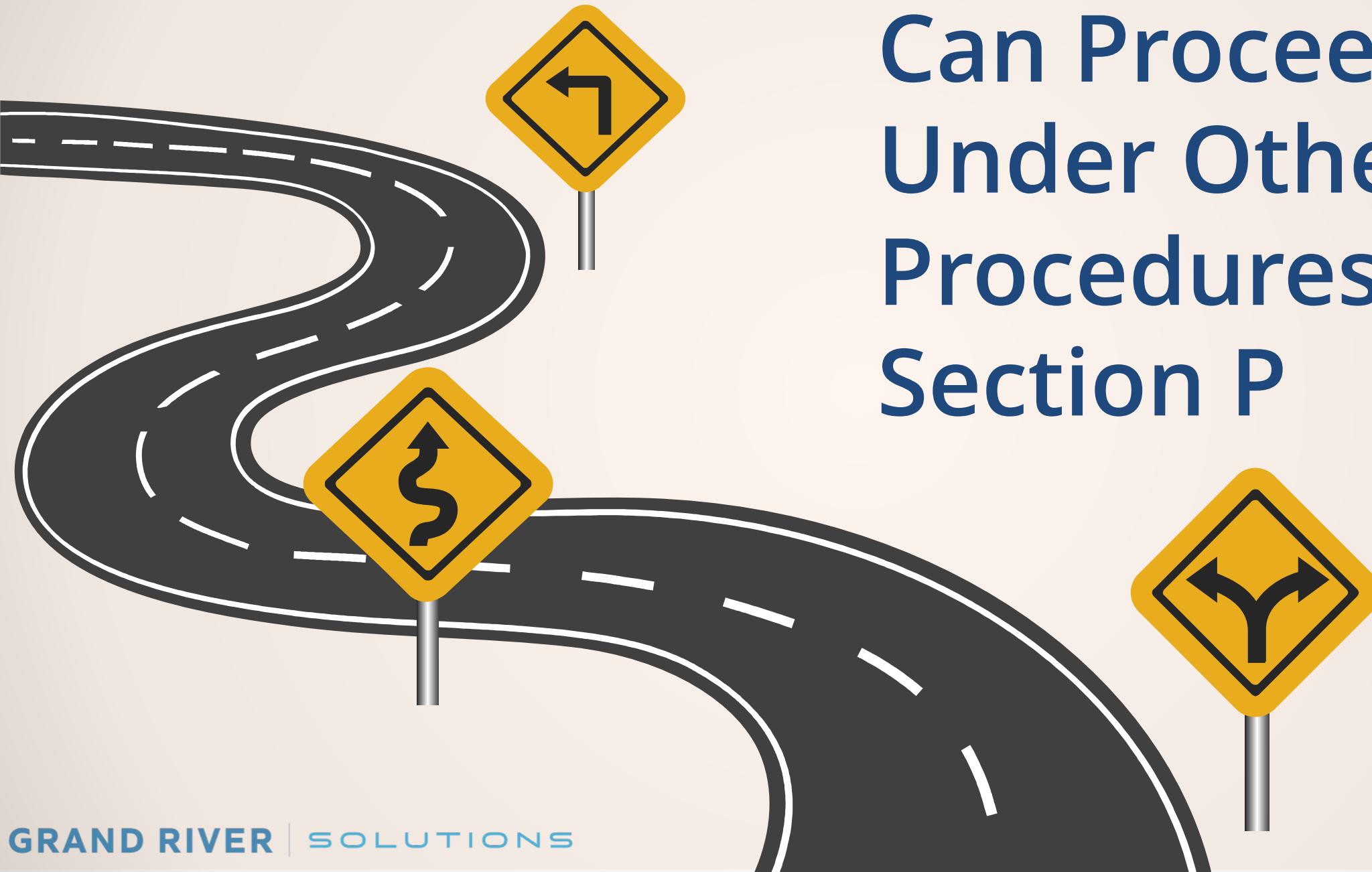
- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info



Can Proceed Under Other Procedures in Section P



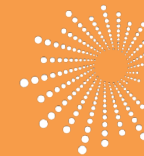
Notice of Allegation Requirements

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

Initial Meeting with Respondent



- Advised of complaint
- Advised of available supportive measures
- Informed of supportive measures provided to complainant that impact them
- Advised of the process and their rights
- Opportunity to ask questions
- Retaliation



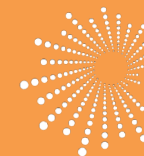
Formal Complaint Resolution

Informal Resolution

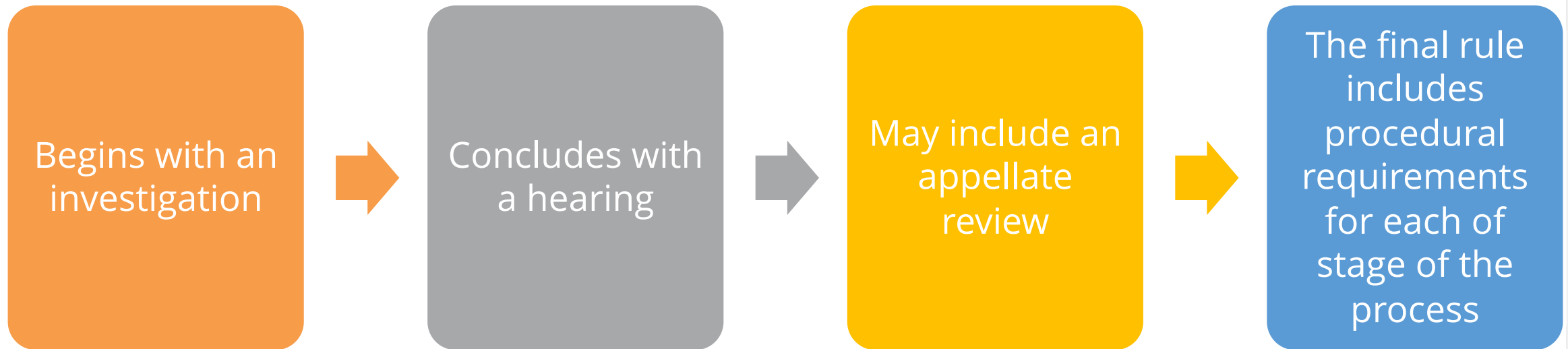
- Formal Complaint required
- Parties must agree
- Can withdraw from process
- Alternate resolution/mediation
- No appeal

Formal Resolution

- Investigation and Adjudication process in compliance with Section 106.45



The Formal Resolution Process: Title IX





Investigating Allegations of Title IX Sexual Harassment

Procedural requirements, best practices, and the development of systems and practices to ensure compliance

05

Procedural Requirements for Investigations



Notice TO BOTH PARTIES



Equal opportunity to present evidence



An advisor of choice



Written notification of meetings, etc., and sufficient time to prepare



Opportunity to review ALL evidence, and 10 days to submit a written response to the evidence prior to completion of the report



Report summarizing relevant evidence and 10 day review of report prior to hearing



Advisor of Choice During the Investigation

The advisor can be anyone, including an attorney or a witness.

Institutions cannot place restrictions on who can serve.

Institutions can create rules and guidelines for participation in the investigation

No specific training required.





Written Notification of Meetings and Sufficient Time to Prepare





Equal Opportunity to Present Evidence



Evidence Review

Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

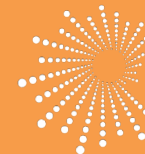
10 days to provide a written response.



Investigative Report and Review

After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.

That report will be shared with the parties and they will have 10 more days to comment.





—

“Directly
Related” and
“Relevant
Evidence”

Directly Related Evidence

Regulations do not define “Directly Related” Evidence.

Preamble states it should be interpreted using its plain and ordinary meaning.

Term is broader than:

- “all relevant evidence” as otherwise used in Title IX regulations, and
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

“Relevant” Evidence

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401
Test for Relevant Evidence:

“Evidence is relevant if:

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

Evidence That is Not “Relevant”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

- unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition.

Who Decides?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance.

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight.

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage.

Essential Steps of an Investigation



Notice of Allegations



Initial Interviews



Evidence Collection



Evidence Review



Additional Evidence Collection/Follow Up Interviews



Report Writing



Let's Try It!

Relevant?

Directly Related?

Irrelevant?





Adjudicating Allegations of Title IX Sexual Harassment

The procedural requirements, best practices, and the development of systems and practices to ensure compliance.

06

Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

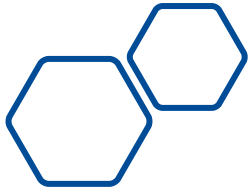
Exclusion of Evidence if no cross examination

Written decision must be issued that includes finding and sanction



Pre-Hearing Tasks





Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays; adjournments

The Decision-Maker(s)



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own



Anticipate the party's questions



Anticipate challenges or issues

The Parties and their Advisors, and the Witnesses

Pre-hearing instructions

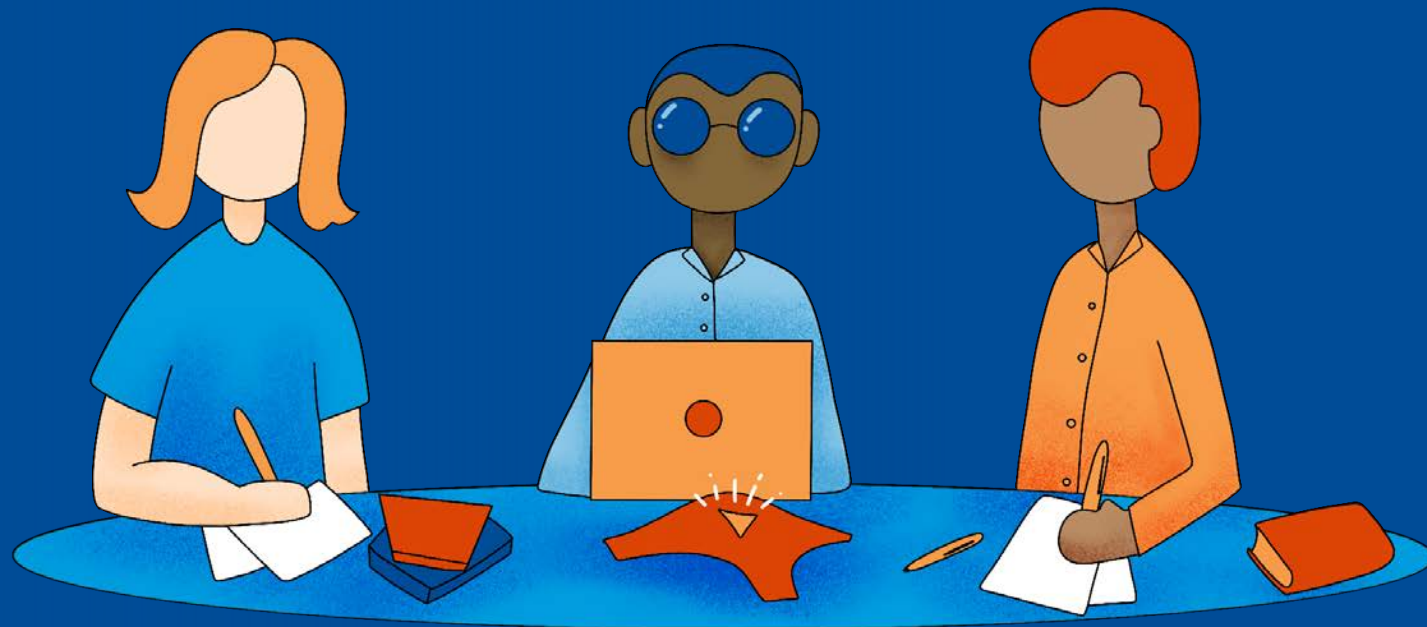
- Via conference or meeting
- In writing

Set expectations

- Format
- Roles of the parties
- Participation
- Evidence
- Decorum
- Impact of not following rules



The Hearing



The Hearing

The hearing officer will determine:

- The order of presentation
- Timing and overall duration of the hearing
- What information and evidence will be heard
- What information and questions are relevant to the determination of the matter
- What cross-examination questions will or will not be permitted.

Opening Instructions by the Hearing Officer

- Set the stage
- Reiterate charges
- Reiterate rules and expectations
- Reiterate logistics for the day

Consider using a script to guide this section.



Opening Statements

This is an opportunity for the parties to outline their account and what they expect the evidence will show.

Not an opportunity to make argument or to discuss impact.

Testimony

Order of testimony is determined by the Hearing Officer.

Order of examination:


- Questioning by the hearing officer
- Cross examination by the advisor
- Follow-up questions by hearing officer and advisors



Cross Examination

Who does it?

- Must be conducted by the advisor.
- If party does not appear or does not participate, advisor can appear and cross.
- If party does not have an advisor, institution must provide one.



Cross Examination

Permissible Questions

- Questions must be relevant.
- Not relevant:
 - Duplicative questions
 - Questions that attempt to elicit information about:
 - Complainant's prior sexual history
 - Privileged information
 - Mental health



Cross Examination

Role of the Hearing Officer

- Rulings by hearing officer required after every question posed.
- Explanation only required where question not permitted.

Closing Remarks by the Hearing Officer

- Conclude the hearing.
- Inform the parties of next steps.
- Set expectations.
- Remind folks of support, resources, prohibition against retaliation, and privacy.

Common Challenges

- Non-appearance by a party or witness
- Non-appearance by an advisor
- Party attempts to offer evidence for the first time at the hearing
- Party or witness appears but declines to answer some (or all) questions
- Disruptions
- Maintaining decorum

Tips for Increasing Efficiency

01

Be prepared

02

Conduct Pre-Hearing Meetings

03

Anticipate barriers and address them in advance/be prepared to address them

04

Have back up plans for technology issues



Deliberations





Weighing the Evidence and Making A Determination

- Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
- Apply the standard of proof and the evidence to each element of the alleged policy violation;
- Make a determination as to whether or not there has been a policy violation.

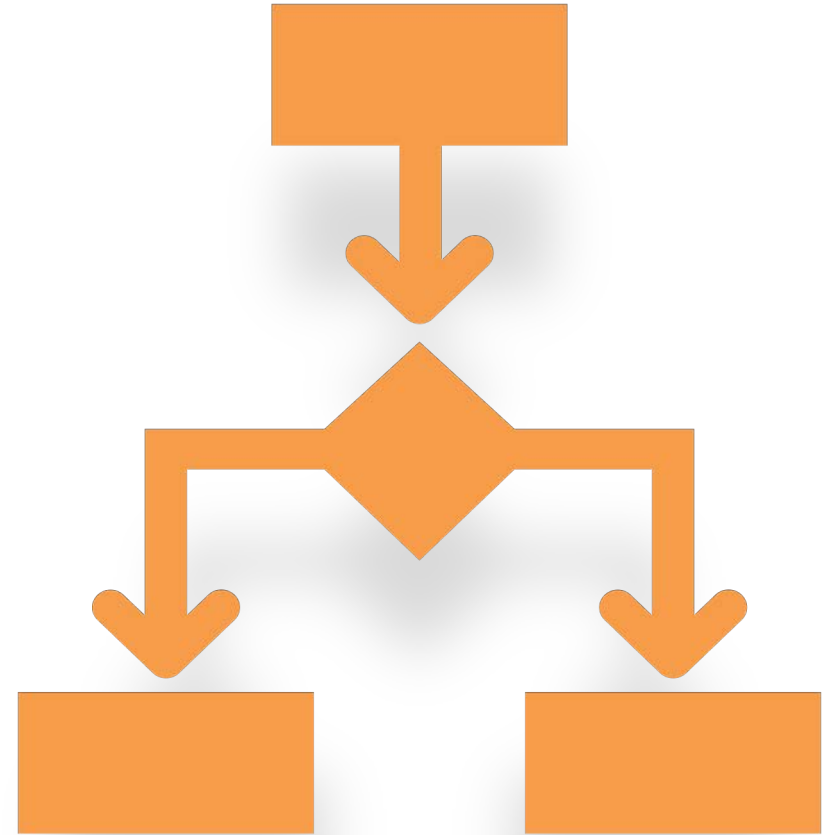
Preponderance of the Evidence

- More likely than not
- Does not mean 100% true or accurate
- A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
- A finding of not responsible = There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated



Policy Analysis

- Break down the policy into elements.
- Organize the facts by the element to which they relate.



Allegation: Fondling

Fondling is the:

1. touching of the private body parts of another person
2. for the purpose of sexual gratification,
3. without the consent of the victim,
 1. including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.

Analysis Grid

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed- Complainant and Respondent Agree that there was contact between Respondent's hand and Complainant's vagina.</p>	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>“we were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants...”</p>	<p>Complainant- drank more than 12 drinks, vomited, no recall Respondent- C was aware and participating Witness 1- observed C vomit Witness 2- C playing beer pong and could barely stand Witness 3- C drunk but seemed fine Witness 4- carried C to the basement couch and left her there to sleep it off.</p>

Apply Preponderance Standard to Each Element

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed- Complainant and Respondent Agree that there was contact between Respondent's hand and Complainant's vagina.</p> 	<p>Respondent acknowledges and admits this element in their statement with investigators.</p>  <p>“we were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants...”</p>	<p>Complainant- drank more than 12 drinks, vomited, no recall Respondent- C was aware and participating</p> <p>Witness 1- observed C vomit Witness 2- C playing beer pong and could barely stand Witness 3- C drunk but seemed fine Witness 4- carried C to the basement couch and left her there to sleep it off.</p> 

Determinations Regarding Responsibility



Must be issued in writing.



Parties must receive simultaneous notification of the outcome on appeal.



The determination that must include six points of information to ensure that it is “adequate for the purposes of an appeal or judicial proceeding reviewing the determination regarding responsibility.” 85 Fed. Reg. 30,389 (May 19, 2020).

Written Determination: Requirements

Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

Findings of fact supporting the determination;

Conclusions regarding the application of the recipient's code of conduct to the facts;

A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

The recipient's procedures and permissible bases for the complainant and respondent to appeal.



Information to Include in the Description of Procedural Steps Taken

- When the parties received the notice of allegations
- Who performed the investigation
- Which witnesses and parties were interviewed and when
- What locations, if any, were visited during the investigation
- What type of evidence was reviewed
- A description of the process undertaken to inspect and review the evidence and disseminate the investigative report, including the adherence to mandated procedural timelines
- Explanation of any delays in the process
- Explanation for why certain evidence was not sought or obtained

Finding of Fact: Supporting the Determination

- The Final Rule requires that the written decision include an analysis and finding as to those facts that are relevant to the determination of responsibility or non-responsibility.
- The written decision does not need to include an analysis of all of evidence presented at the hearing or during the investigation.

Conclusions Regarding the Code of Conduct

When the institution to applies principles or definitions not otherwise required under Title IX, those must be included in and addressed in the written determination.



The Rationale

The decision-maker must make a finding of responsibility or non-responsibility for each allegation in the formal complaint.

The written determination must include the rationale for each finding based on an “objective” evaluation of the evidence presented at the hearing.

Sanction and Remedies

The written determination must also indicate:

- The disciplinary sanctions, if any, that will be applied to the respondent when there is a finding of responsibility for the allegations.
- Whether remedies designed to restore or preserve equal access to the educational program or activity will be provided to complainant.



The Appellate Process



07



“

Final Rule § 106.45(b)(8)

[I]nstitutions must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein.

”

Grounds for Appeal

There was a procedural error that unfairly affected the outcome.

There is new information that was not reasonably available during the investigation and resolution process that would have affected the outcome.

The Title IX Coordinator, investigator, or decision-maker(s) had a conflict of interest or actual bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

The sanctions imposed are disproportionate to the nature and severity of the offense.

Title IX's Procedural Requirements

When one party appeals, the other party must be notified in writing.

The appeal decision-maker(s) must be different from anyone who made the determination regarding responsibility or dismissal and must not be either the investigator or the Title IX Coordinator.

The decision-maker(s) must be free from conflict of interest and bias, receive appropriate training (including anti-bias training), and otherwise comply with the requirements set forth in Final Rule § 106.45(b)(3)(iii).

Any further specific contents of appeal procedures are up to individual institutions to determine.

Title IX's Procedural Requirements

Both parties must be given a reasonable, equal opportunity to submit a written statement in support of, or challenging, the responsibility determination or dismissal.

The outcome of the appeal must be in writing, and must include:

- The appeal ground(s) considered
- The rationale for granting or denying the appeal
- The appellate remedy being imposed
- The rationale for modifying a sanction/remedy

The written decision must be provided simultaneously to both parties.

The College's Appellate Procedures

Appellate Officer is appointed by the Title IX Coordinator

Appeals must be submitted in writing within 10 business days after the written decision

The non-appealing party has 5 business days to respond

The Appeal record is then provided to the Appellate Officer

The Appellate officer will make a finding

Written determination will be provided to the parties

The Appellate Officer/Panel May Not:



Substitute their own findings for the findings of the decision-maker



Consider new evidence



Correct procedural errors on their own



Give the institution a second chance "to get it right"

Appellate Outcomes



Affirm the outcome



Reverse the outcome



Modify the sanction

Appellate Remedies Upon a Reversal

Reinstate the formal complaint

Return the matter for further investigation

- by original investigator to remedy a procedural error
- by original investigator to explore new evidence
- by a new investigator without conflict or bias

Return the matter for a new hearing

- Before the same decision maker(s)
 - To remedy a procedural error
 - To consider new evidence
- Before a new decision maker(s)
 - To cure bias or conflict

Modify Sanction

Conformity and Consistency

Common Challenges

Submission includes information outside the scope of the appellate review

Appeal Panel that exceeds their authority

Conflicts of Interest

Time Constraints



Let's Try It!

Hypothetical A



Procedural Requirements

The policy requires:

- That the parties are provided with an opportunity to review all of the evidence directly related to the allegations in the formal complaint and that they are then given 10 **business days** to respond to the evidence prior to the completion of the investigative report.
- That late submissions will not be received or considered, without good cause.

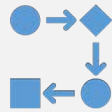
Points Raised on Appeal

1. Complainant alleges that the parties were provided 10 calendar days for their response.
2. Complainant indicates that he submitted his response after the given deadline, but within 10 business days.
3. Complainant indicates that in his response to Respondent's assertions that the allegations are a lie. Complainant submitted a letter from his pastor wherein the pastor swears that Complainant "would never lie about something so serious."
4. Complainant indicates that his response was found to be untimely, and so it was not provided to the decision maker.
5. Complainant asserts that the failure to include his pastor's letter in the evidence ultimately provided to the decision-maker had an impact/affect on the outcome.

Appellate Analysis



Are there procedural errors?



What is/are the procedural error(s)?



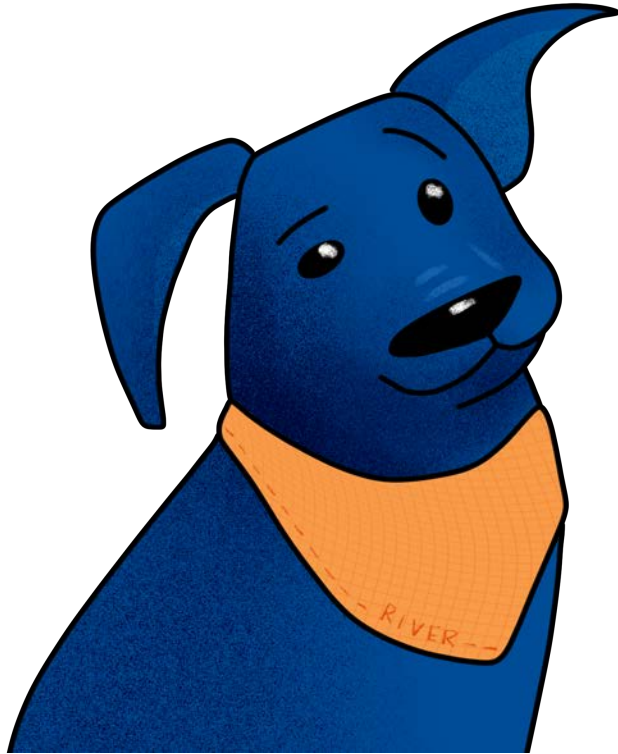
Did the error affect the
outcome of the case?

Why or why not?



What remedy might be appropriate?

Questions?



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