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NACUA Online Course
Title IX Coordinator Training

Module 4: Handling a Complaint

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Welcome to Module 4: Handling a Complaint

- Report
- Initial Assessment
- Formal Complaint
- Emergency Removal and Administrative Leave
- Notice of Allegations
- Investigation
- Decision-Making Process
- Appeals
- Informal Resolution

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Submodule 1

What Constitutes a Complaint?

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Formal Complaint

- 34 CFR 106.30(a)
  - Must be a document - can be electronic
  - Must be filed by the complainant or signed by the Title IX Coordinator
    - Complainant must be participating in or attempting to participate in the education program or activity of the recipient at the time of filing
  - Must allege sexual harassment against a respondent
  - Must request that the recipient investigate the allegation of sexual harassment

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Status of Complainant

- Where a Title IX Coordinator files a complaint, that does not make them the "complainant."

- "[T]he complainant will still be treated as a party in such a grievance process." 85 FR 30131

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Best Practices

- Confer with the complainant regarding their wishes
- Ask if they will participate in the process if the Coordinator files a complaint
- Consider whether there is sufficient evidence to support the concern if the complainant does not wish to proceed
- Consider other appropriate factors
- Notify the complainant of your decision and determine whether additional supportive measures will be necessary

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Now that you have a complaint...

- As a Title IX Coordinator, a formal complaint requires action. Your choices:
  - Dismiss the formal complaint to another process
  - Dismiss the formal complaint entirely
  - Offer informal resolution
  - Proceed with an investigation
- We will talk about each of these options in the upcoming submodules.

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Reluctant Complainant Hypothetical

- Complainant student reports that Respondent, their athletic coach, has sexually harassed them.
- Complainant is concerned about filing a formal complaint due to potential retaliation from other team members and coaches.
- Complainant expresses that they do not wish the coach to be fired, but only to stop the behavior.

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Submodule 2

What is an initial assessment?

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Initial Assessment: Hypothetical

- Bob the employee calls your office to indicate that he has received a report from a student, Kai, who has experienced sexual misconduct.
- You reach out to Kai, who agrees to come in.
- Kai accepts supportive measures and verbally indicates they would like to proceed with an investigation into whether Leslie, their partner, sexually assaulted them.
- Kai is highly emotional and unable to communicate specifics of the sexual assault.
- What do you do?

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Initial Assessment Goal

- Get sufficient information to determine:
  - Appropriate supportive measures
  - Whether there are steps that can be taken now to eliminate or prevent additional concerns
  - Whether the policy applies, or whether the case should be referred elsewhere
  - The necessary details to share with the parties in the Notice of Allegations

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Initial Assessment: Considerations

- Does this situation fall under your Title IX policy?
- Does it fall under other policies at the institution?
- What additional information do I need to make such determinations?
- Note: This phase typically occurs prior to sending out the Notice of Allegations

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Initial Assessment: Approaches

- Additional intake meeting to get necessary details?
- Refer complainant for an initial interview with the investigator to minimize repetition of information?

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Initial Assessment: Back to Kai

- Option: Ask Kai to come back in for a meeting.
  - Kai tells you that they were raped on September 1st in a residence hall room.
  - Notice of Allegations is sent.
  - Kai sits for an interview and reveals multiple incidents.
  - Notice of Allegations is amended.
- Option: Send Kai to an investigative interview as part of the initial assessment.
  - Kai sits for an interview and reveals multiple incidents.
  - Notice of Allegations is sent containing all allegations.

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Referring Elsewhere

- What if Kai tells you that Leslie is completely unrelated to the institution?
- What if Kai tells you that this sexual assault occurred prior to either Kai or Leslie arrived at the institution?
- What if Kai describes a sexual assault that occurred on a study abroad trip?

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Combining Cases

- Recipient may consolidate cases 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 arise out of the same facts or circumstances

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Submodule 3

When can you dismiss a complaint, and who hears an appeal?

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Dismissals

- Regulations are specific as to jurisdiction
- If a formal complaint does not meet the strict threshold requirements, there are mandatory dismissal provisions
    - The process to which you dismiss the allegations differs by institution.
    - It can be identical to your Title IX procedure, or it can be very different.
- Institutions can also exercise discretionary dismissals

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Mandatory Dismissal - 106.45(b)(3)

- An institution must dismiss a formal complaint if:
    - The conduct alleged in the formal complaint would not constitute sexual harassment as defined by § 106.30 even if proved
    - The conduct did not occur in the recipient's program or activity
    - The conduct did not occur against a person in the United States
- Mandatory dismissal does not preclude using another institutional policy to address the conduct
- Institution must provide written notice to both parties of the dismissal and the reasons
- No appeal from dismissal is required, but it may be a good practice

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Discretionary Dismissal - 106.45(b)(3)

- An institution may dismiss a formal complaint if:
    - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein
    - The respondent is no longer enrolled or employed by the recipient
    - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein
- Discretionary dismissal does not preclude using another institutional policy to address the conduct
- Institution must provide written notice to both parties of the dismissal and the reasons
- No appeal from dismissal is required, but it may be a good practice

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Exercising Discretion

- If the complainant wishes to withdraw the complaint, should the Title IX Coordinator elect to continue the complaint?
- If the respondent disaffiliates from the institution:
  - Does the complainant wish to go forward?
  - Does the institution have any disciplinary action that can be taken against the respondent?
    - No trespass orders
    - No re-enrollment/re-employment

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Communicating about Dismissal

- If you are dismissing a case, what are the next steps?
- Is the dismissal "the end" of this matter, or is it merely a shift to another process?
- Are the parties still entitled to supportive measures?
- Will you allow for appeal? (This is not required under 2020 regulations.)

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Dismissal Hypothetical #1

- Hunter alleges sex-based harassment against Taylor (a student).
- Leslie alleges sex-based harassment against Taylor.
- Both sets of allegations are similar and violent.
- Taylor, facing criminal charges, withdraws from the institution.
- Do you dismiss?

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Dismissal Hypothetical #2

- Alex, a student, alleges sex discrimination against Casey, a faculty member.
- Alex and Casey reach a private settlement agreement – but not through your informal resolution process. Alex then requests to withdraw the complaint.
- Do you dismiss the complaint?

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Dismissal Hypothetical #3

- Charlie makes an allegation of sex-based harassment against Addison, who then makes allegations of sex-based harassment against Charlie.
- Both parties are struggling with mental health concerns and are admitted separately to residential treatment. This results in both parties taking medical leave from the institution.
- Neither party is available to sit for interviews.
- Do you dismiss?

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Dismissal Appeals

- Choose a trained person that is not otherwise involved with the case and has no conflict of interest or bias.

- Consider whether using this person in this manner may conflict them out of being your appeals officer later down the road.

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Submodule 4

When is an emergency removal appropriate?

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Emergency Removal – 106.44(c)

- May remove a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
- Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

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Considerations

- Is full removal from the entire program truly required, or are lesser options available?
- Can the removal be mitigated in any way to help the respondent continue to access the educational program or activity (i.e. switching to an online program?)

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Appeals

- Choose a trained person that is not otherwise involved with the case and has no conflict of interest or bias.
- Consider whether using this person in this manner may conflict them out of being your appeals officer later down the road.
- The procedure is not clear, but typically would involve notice and an opportunity to be heard.

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Emergency Removal Hypothetical #1

- Jordan is accused of engaging in sexual assault multiple times over the course of their relationship with their partner, Cameron
- Cameron wants Jordan removed from campus
- A no contact order is in place
- Jordan and Cameron are in different educational programs and different residence halls
- Is emergency removal appropriate?

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Emergency Removal Hypothetical cont.

- Jordan is a varsity athlete who is in season at the moment
- Jordan's coach suspends Jordan from the team due to the allegations

- Is this permissible?

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Submodule 5

When is administrative leave appropriate?

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Administrative Leave

- 106.44(d) - A recipient is permitted to place a non-student employee on administrative leave during the pendency of a grievance process.

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Administrative Leave: Factors to Consider

- What are the risks in leaving the employee in their position during the pendency of the grievance proceedings?
  - Exposure to others/ongoing issues?
  - Publicity
  - Ability to continue to perform their job
  - Are any restrictions appropriate if administrative leave is not used?
- Administrative leave is typically with pay and is not disciplinary in nature.
- Consult with an attorney before putting employees on unpaid leave.

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Administrative Leave: Hypothetical #1

- Dakota, an employee, has made a complaint of sex discrimination against their supervisor, Adrian
- No violence is alleged
- Is administrative leave appropriate?
- If you do not put Adrian on administrative leave, what supportive measures should be put in place?

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Administrative Leave: Hypothetical #2

- Jamie, a student, has made allegations of stalking against Arden, a custodian in the building where Jamie takes classes
- Jamie has provided text messages from Arden asking Jamie out on a date
- Is administrative leave appropriate?
- If you do not put Arden on administrative leave, what supportive measures should be put in place?

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Administrative Leave: Hypothetical #3

- Riley and Asher, both student athletes, claims that their coach, Harper, has been engaging in voyeurism while the athletes are showering after practice

- Is administrative leave appropriate?
- If you do not put Coach Harper on administrative leave, what supportive measures should be put in place?

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Submodule 6

What are reasonable timelines?

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Timelines

- 106.45(b)(1)(v) - Recipients must include "reasonably prompt time frames" for the grievance process
- Your policy may provide for temporary delays and limited extensions of time frames for good cause
- Extensions require written notice to the parties of the delay and the reasons for it
- Good cause includes the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities

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What is reasonable?

- Prior 2020, guidance suggested that an entire process (complaint to adjudication) should take less than 60 days.
- This was not always realistic given the schedules of parties, advisors, and witnesses.
- Concurrent criminal cases can affect the availability of evidence, and it can take a while to obtain medical records with consent.
- Under the 2020 regulations, the parties get 10 days to review the draft report/evidence and 10 days to review the final report, which adds an extra 20 days to the process.

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Some thoughts on choosing

- Consider by section:
  - Initial assessment
  - Investigation
  - Hearing
  - Writing the decision
  - Appeals
  - Informal resolution (can run concurrently with other parts of the process)
- How long has your process previously taken?
- Are there times during the year when the process is likely to take longer due to the calendar?

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"Reasonable" is ambiguous

- What is reasonable in a particular situation may be shorter or longer
- Documentation of all delays is helpful in case the situation is challenged later, even where delays occur within the timelines in your policy

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Submodule 7

What goes into a notice of allegations?

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Notice of Allegations Overview

- Notice of Allegations goes to both parties (if known)
- Notice must be provided with a copy of the grievance process, including any informal resolution process
- Notice must be provided "upon receipt of a formal complaint"

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Notice of Allegations Contents

- Must include:
  - Allegations potentially constituting sexual harassment as defined in the regulations
  - Sufficient details known at the time, including:
    - Identities of the parties involved in the incident, if known
    - Conduct allegedly constituting sexual harassment
    - Date and location of the alleged incident, if known
  - 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
- Must be provided with sufficient time to prepare a response before any initial interview

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Notice of Allegations Contents (cont.)

- Must include:
  - Notification that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney
  - Notification that the parties and advisors may inspect and review evidence as provided in Section 106.45(b)(5)(vi)
  - Notification 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

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Amendments

- If in the course of an investigation, new allegations are uncovered, the recipient must provide notice of the additional allegations to the parties whose identities are known

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Things to Consider

- Your investigative report and decision should quote the allegations as cited in this Notice. The Notice starts the process and defines the scope of the case.
- This is an opportunity to demonstrate transparency and build trust at the very beginning of the process.

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Submodule 8

How does informal resolution work?

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Overview – Informal Resolution (1 of 2)

- Informal resolution is available at any time
- Both parties must agree to participate in writing, in a consent form that meets the regulatory requirements
- Informal resolution need not be offered in all cases; the Title IX Coordinator has discretion to determine when it is appropriate
- Because the institution is enforcing the terms of the agreement, it should sign off on the agreement in addition to the parties
- The institution cannot force anyone to participate or reach agreement
- The person conducting the informal resolution must be trained and have no conflict of interest/bias

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Consent to Informal Resolution

34 CFR 106.45(b)(9)

- Allegations
- Requirements of the informal resolution process – including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations
    - The party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

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What does it look like?

- Many options:
    - Shuttle diplomacy
    - Group discussion
    - Restorative justice
- At the end, if successful, the parties have an agreement in hand and the case is closed

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Informal Resolution Hypo #1

- Devin alleges that their partner, Nico, has engaged in dating violence
- Devin and Nico are on the same sports team, live in the same residence hall, and are in the same relatively small major
- How might this be resolved?

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Informal Resolution Hypo #2

- Avery, a student, brings a claim that Professor Jones has engaged in sex discrimination by grading men more stringently than women

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Informal Resolution Hypo #3

- Flynn, a student, alleges that Grey, a student, has been stalking Flynn on campus
- Flynn and Grey successfully reach an informal resolution agreement
- Flynn returns to your office, suggesting that they found Grey on their residence hall stoop, in violation of the agreement
- What do you do next?

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Submodule 9

What is required for investigations?

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Overview of Investigations

- Under Title IX, the institution (not the parties) has the obligation to gather the relevant evidence
- Under the 2020 regulations, the investigator cannot be the person who decides whether the respondent is responsible for a policy violation
- Even if the investigator makes the decision, it is helpful to stay neutral and curious during the investigation phase

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Setting the Potluck

- Picture the investigator as the person who hosts a potluck
- Each party and witness is invited to bring something – but the host cooks too!
- The parties will get a chance to walk around the table and decide what looks good and what doesn't
- Ultimately, the decision-maker will be the person who declares that the meal is complete and it's time to eat
- Make sure the parties have equal access to see what is on the table, to add to it, and to add extra plates for new witnesses

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Duplicate Dishes

- The investigator decides what stays on the table (relevant and not impermissible) and what goes (not relevant or impermissible)
- "If everyone brings what they want, and they all bring potato chips, then we'll only have potato chips and we'll all be happy."
    - If two people bring potato chips, do you remove one? Which one?

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Commenting on the Food

- Before the report is finalized, the parties get a reasonable opportunity to respond to the evidence/description
- Under the 2020 regulations, the parties get another reasonable opportunity to respond to the final report

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What if someone doesn't bring food?

- There is an empty spot on the banquet table where their offering would have been.
- We don't make any assumptions as to why they didn't bring food.

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Investigator Steps

- Contact parties:
  - Request interviews
  - Request witness list
  - Request evidence
- Contact witnesses:
  - Request interviews and evidence
- Seek evidence from other sources
  - Security footage
  - Card swipes
  - Law enforcement records
  - Medical records

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Investigator Steps (cont.)

- Allow parties to review evidence/summary and provide a written response
  - 10 days under 2020 regulations
- Prepare final report
  - 10 days under 2020 regulations to prepare written response
- Decisionmaker phase begins
- See Module 5 for investigative skills

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To Record, or Not?

- No federal rule regarding recordings; check state law
- Be consistent in your chosen practice and consider putting it in your policy
- Always disclose on the recording and get consent at the outset of the interview
- Consider how your decisionmaker can review interview recordings
- When you record hearings, it is incredibly helpful for the decisionmaker to have a transcript when writing the opinion

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Submodule 10

What are the role of advisors and support persons during the process?

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Advisors

- Parties may have an advisor of their choice at every meeting relating to the grievance process
- Parties must have an advisor at the hearing to conduct cross-examination on their behalf
    - If they do not have an advisor of choice, the institution must provide an advisor of its choice

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What can an advisor do?

- They may attend every meeting with their party
- They may review the evidence/description
- They may assist their parties in preparing for the process
- If cross-examination is part of the process, they must conduct the cross-examination on behalf of their party
- Everything else is up to your institution's own rules

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What do most institutions allow?

- Most institutions provide by policy that the advisor is essentially a "potted plant" at all points other than during cross-examination
- Set decorum standards for advisors
- Consider offering a meeting with each advisor to explain process, if they did not sit with their party through intake

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Questions to Consider re: Advisors

- Can advisors submit evidence?
- Can advisors submit witness lists?
- Do advisors give opening/closing statements? (Does anyone?)
- If an advisor has a busy schedule, how long are you willing to wait for them to get things scheduled?

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Remember: FERPA

- Sometimes, students may have an advisor that is not their advisor of choice
- Consider getting written consent from the student party for communications with their advisor

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Dealing with Difficult Advisors

- Set boundaries for behavior

- Remind advisors of their role under your policy
    - It helps to give them information about how they are permitted to help their party, so they can focus their energy in a positive manner
- Remove disruptive advisors after warning(s)

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Submodule 11

What are the best practices for sharing evidence?

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Sharing Evidence

- Must share evidence before the report is finalized, and again after the report is finalized

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Privacy Protections

- No specific requirements are set forth in the 2020 regulations regarding sharing of evidence
    - FERPA still applies to student records
- If the parties feel like their information is not kept private, they may feel less likely to engage

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Sharing: Practices to Consider

- Some schools share using a virtual platform that restricts printing, downloading, sharing, and screenshotting, then remind parties of their obligations
- Some schools allow in-person review only, and require the signing of a non-disclosure agreement to access the documents through a virtual platform
- Some schools watermark every document so that if it is shared, they can determine who shared it

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Submodule 12

What is required for the decision-making process?

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Live Hearings

- Must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility
    - Conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally
    - Is subject to decorum standards set by the institution
- Hearings can be virtual or in person, but the decision-maker and parties must be able to see the party or witness answer questions

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Relevancy

- After each question by an advisor, the decisionmaker determines relevancy and explains any decision to exclude a question as not relevant
    - Preamble indicates that this determination is to be made verbally
- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence are offered to provide 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

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Failure to Participate

- Original regulation: If you don't answer all relevant cross-examination questions, your statements can't be considered
- This was vacated by a court. See Question A from July 2021 Q&A from the U.S. Department of Education (as updated June 28, 2022)
- Check case law in your jurisdiction

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Written Decision Requirements

- Apply standard of evidence
- Identify the allegations potentially constituting sexual harassment
- Describe 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

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Written Decision Requirements (cont.)

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

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Submodule 13

What is the process for appeals?

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Appeals

- 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, on the following bases:
  - Procedural irregularity that affected the outcome of the matter
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
  - Title IX Coordinator, investigator(s), 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 of the matter
- Institutions can provide other bases to both parties equally

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Appeal Procedures

- Appeals officer should not have been previously involved in the case in a meaningful manner
- No conflict of interest/bias
- Set a reasonable deadline for appeal
- Allow non-appealing party to respond by reasonable deadline
- Set a timeline that allows for the review of the entire record
- Decision in writing – explain rationale and result
- Decision goes to both parties simultaneously

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Other Bases for Appeal

- If you want to add more bases for appeal, it is not required, but here are some that are often used:
  - Sanction is not proportionate to the conduct
  - Decision was clearly erroneous based on the evidentiary record
  - Written decision was arbitrary and capricious
- Check case law and state law

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