

**HUSCH BLACKWELL**

# **Title IX – Key Legal Principles**

Schiller International University

Winter 2022



# What is Title IX?

---

“[N]o 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.”

32 C.F.R. § 106.31

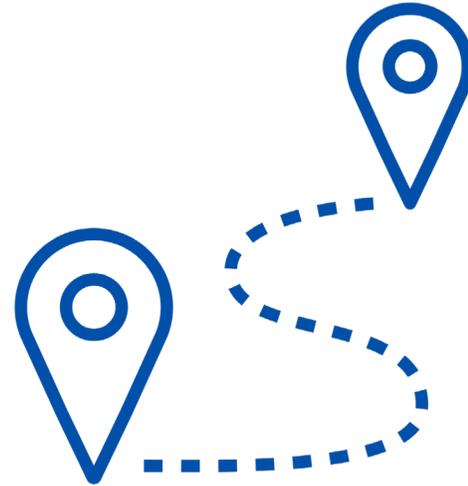




# What are the two conceptual types of sex discrimination?

---

- Adverse treatment discrimination
- Sexual harassment



# What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the “education program or activity” of a federal funding recipient
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



# What are examples of education programs and activities?

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on campus

Extracurriculars

Work-study

Games, concerts, and speeches on-campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus

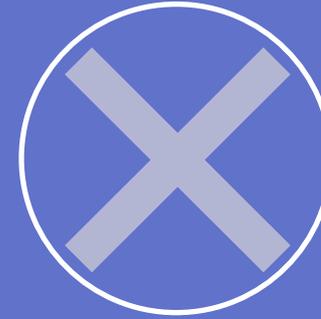
# Does Title IX apply to off-campus sexual harassment?



Yes, if the conduct at issue occurs in the context of an education program or activity



Yes, if the conduct at issue occurs in a house owned or controlled by an officially-recognized Greek organization or other student organization



No, if it occurs in a private location and is not part of an institution's education program or activity



# Can other policies apply if sexual misconduct falls outside Title IX?

---

- Yes, institutions are free to regulate sexual misconduct that falls outside the scope of Title IX through other policies:
  - Student codes of conduct
  - Faculty handbooks
  - Staff handbooks
  - Policies implementing other laws, such as Title VII

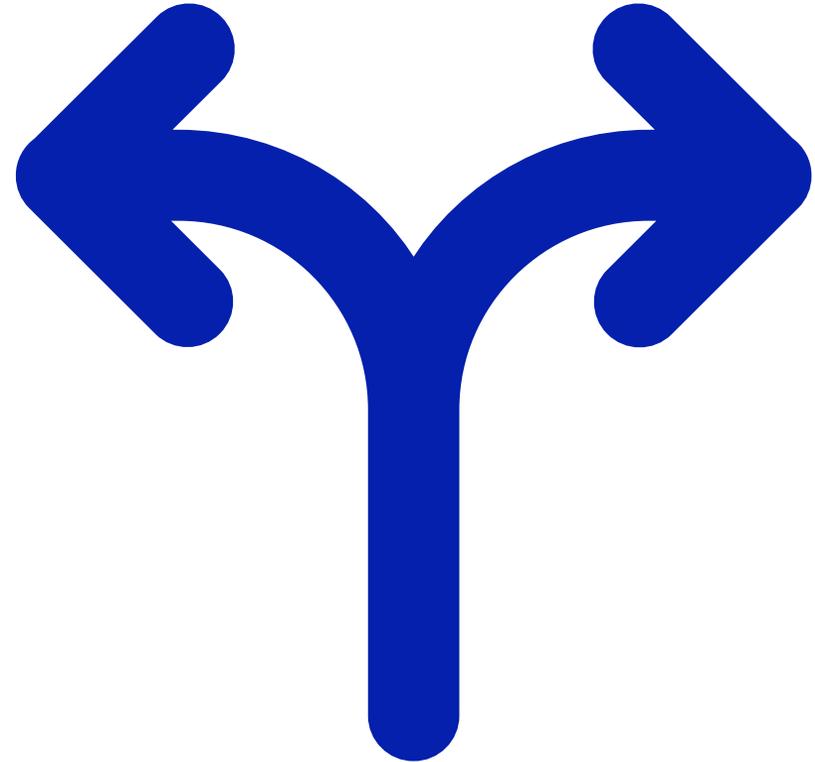




# May we use two processes at the same time?

---

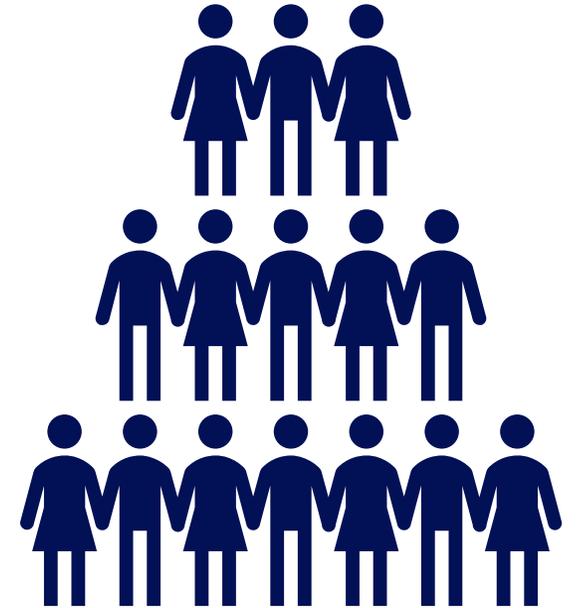
- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ





# Title VII of the Civil Rights Act of 1964

- Prohibits discrimination in employment (private and public) based on:
  - Race
  - Color
  - Religion
  - National Origin
  - Sex





# The Clery Act

---



A federal law requiring institutions to collect and publish statistics for certain crimes reported to have occurred on the university's "Clery Geography" (i.e., occurring on campus, on public property within or immediately adjacent to campus, and on other non-campus university property), for the purpose of informing current and prospective students, faculty or staff.



# Violence Against Women Reauthorization Act of 2013 (VAWA)

---

Codification of Title IX principles

Sexual misconduct policy

Statements of rights and options

Support persons

Training



# Key Policy Requirements

---



# What is Title IX “Sexual Harassment”?

---

Conduct on the basis of sex that is:

Quid pro  
quo harass-  
ment

Hostile  
environment  
harassment

Sexual  
assault

Dating  
violence

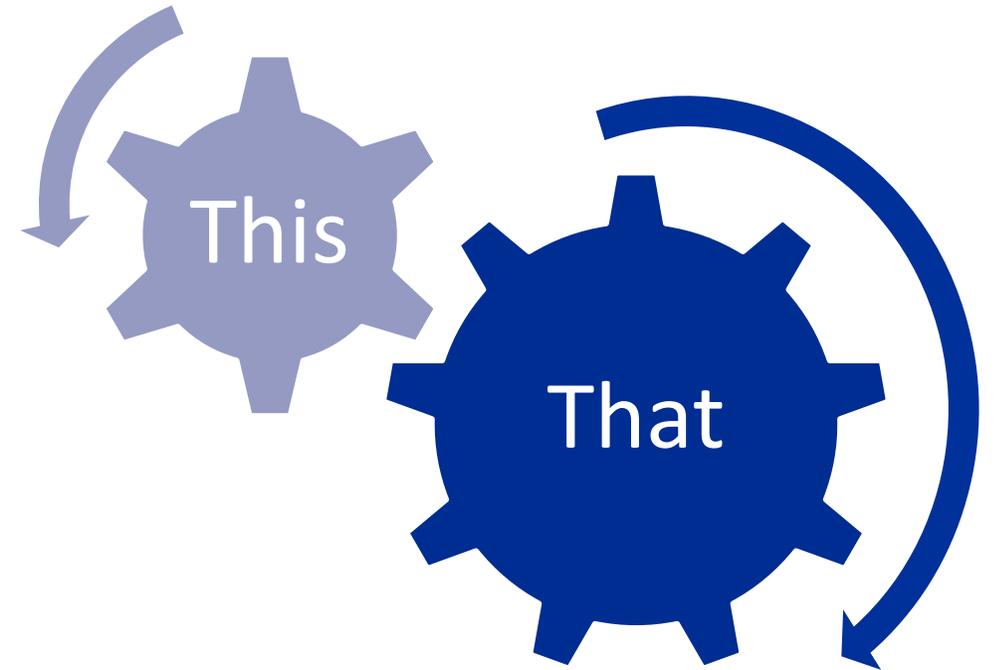
Domestic  
violence

Stalking



# What is quid pro quo?

- **Title IX-Designated**
- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
  - Often arises in the employment context or where an employee holds a position of authority over a student





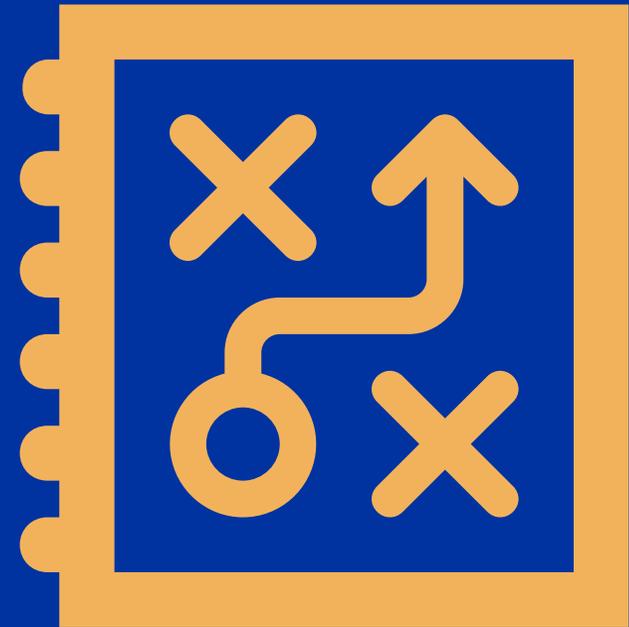
# What is hostile environment?

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.



# Example of hostile environment

Bookworm student repeatedly gropes Social Butterfly student's bottom when the two are in the elevator of the library. Butterfly has no romantic interest in Bookworm and has told Bookworm to stop. But Bookworm persists, causing Butterfly to use the stairs instead of the elevator and to avoid Bookworm in other areas of library and campus buildings.





# What is sexual assault?

Title IX regulations define “sexual assault” as incorporating the following classes of conduct:

Rape

Sodomy

Sexual assault  
with an object

Fondling

Incest



# What is consent?

---

- Policy definition – read it carefully
- Words or actions that a reasonable person in the respondent’s perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent

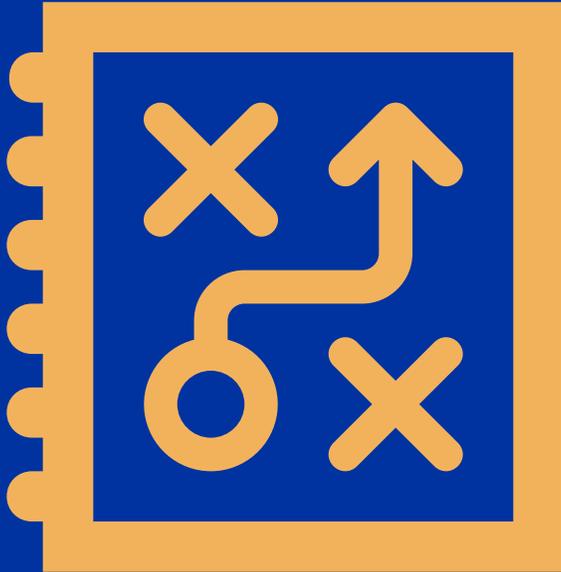


# What is incapacity?

Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.



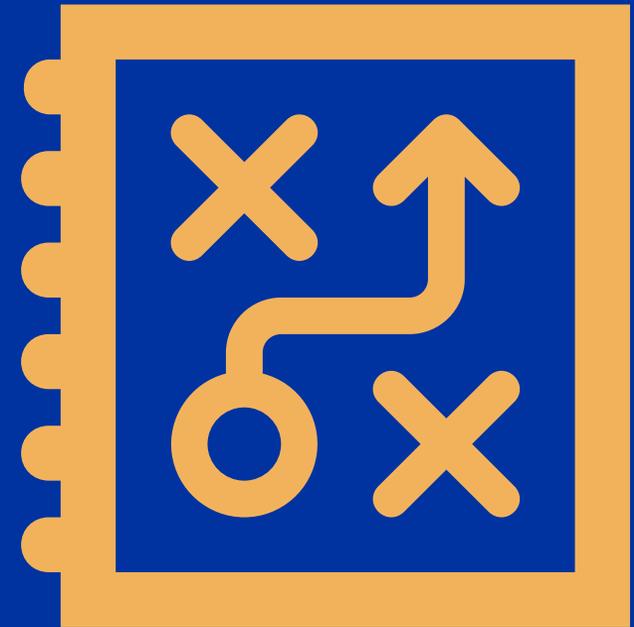
# Example: Incapacitated



Short student has had ten cocktails over the course of two hours. Sober student takes Short student to Sober's apartment. Short student cannot walk without support, forgets Sober's name, and passes into a stupor when Sober places Short student on Sober's bed. Sober then engages in sexual activity with Short student.

# Example: Not-Incapacitated

Tall student had four beers over the course of two hours with dinner. Tall student calls Friend to see if Friend is home. Tall student then drives from campus to Friend's off-campus apartment. Upon arriving, Tall student initiates sexual contact with Friend, and then insists that Friend uses contraception before the two have intercourse. Tall student is an active participant in the intercourse.





# Incapacity – Sample Question Topics

Physical coordination	Ability to understand	Other	Respondent's reasonable knowledge of capacity
<ul style="list-style-type: none"><li>• Walking, dancing, running, maneuvering (e.g., stairs)</li><li>• Speech</li><li>• Dexterity (phone/computer usage, using keys/key cards)</li><li>• Dressing/undressing</li></ul>	<ul style="list-style-type: none"><li>• Topics of conversation</li><li>• What was said and tracking conversation</li><li>• Knowing the who/when/where of the situation</li><li>• Understanding what is happening generally and with regard to the conduct at issue</li></ul>	<ul style="list-style-type: none"><li>• Quantity consumed (not determinative)</li><li>• Vomiting</li><li>• Passing out/blacking out</li><li>• Sleep</li><li>• Disability/age</li></ul>	<ul style="list-style-type: none"><li>• What was respondent able to observe with respect to the above</li><li>• What should respondent have known based on the above</li></ul>



# Does Title IX also prohibit retaliation?

Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any *individual* for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy (34 C.F.R. § 106.71)

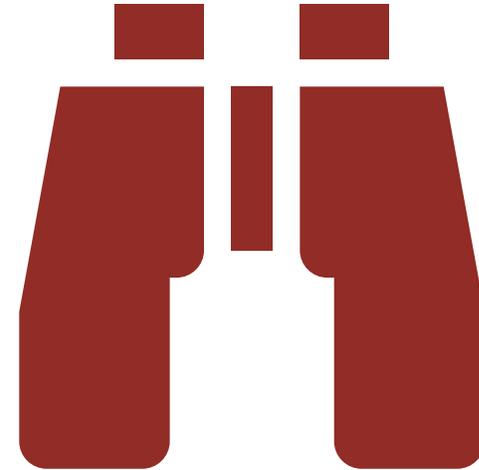


# What is stalking?

---

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for their safety or the safety of others; or
- Suffer substantial emotional distress.





# Example of stalking

---



Freshman is infatuated with Sophomore who has rebuffed Freshman's romantic advances. Thereafter, Freshman dresses in black and sneaks up to the window of Sophomore's house (owned by sponsored Student Organization) at night in an attempt to see Sophomore. Freshman does this twice before being caught in the act during Freshman's third attempt.



# What is dating violence?

“Dating Violence” is :

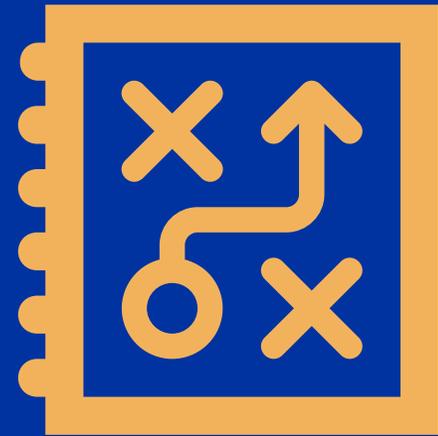
- Actual, attempted or threatened violence by one individual against another individual with whom they are, or have been, in a social relationship of a romantic or intimate nature; or
- Conduct that would constitute a felony or misdemeanor crime of violence by an individual against:
  - A current or former spouse or intimately partner
  - An individual with whom they share a child
  - An individual similarly situated to a spouse under state domestic or family violence laws
  - Any adult or youth who is protected from the individual’s acts under the state domestic or family violence laws



# Example of dating violence

---

President's Chief of Staff and Statistics Department Chair are engaged to be married but live separately and have no children in common. Chief of Staff and Department Chair get into an argument over sex in Chief of Staff's car in the institution's parking lot. During the argument, Chief of Staff slaps Department Chair's face and tells chair to "shut your mouth."

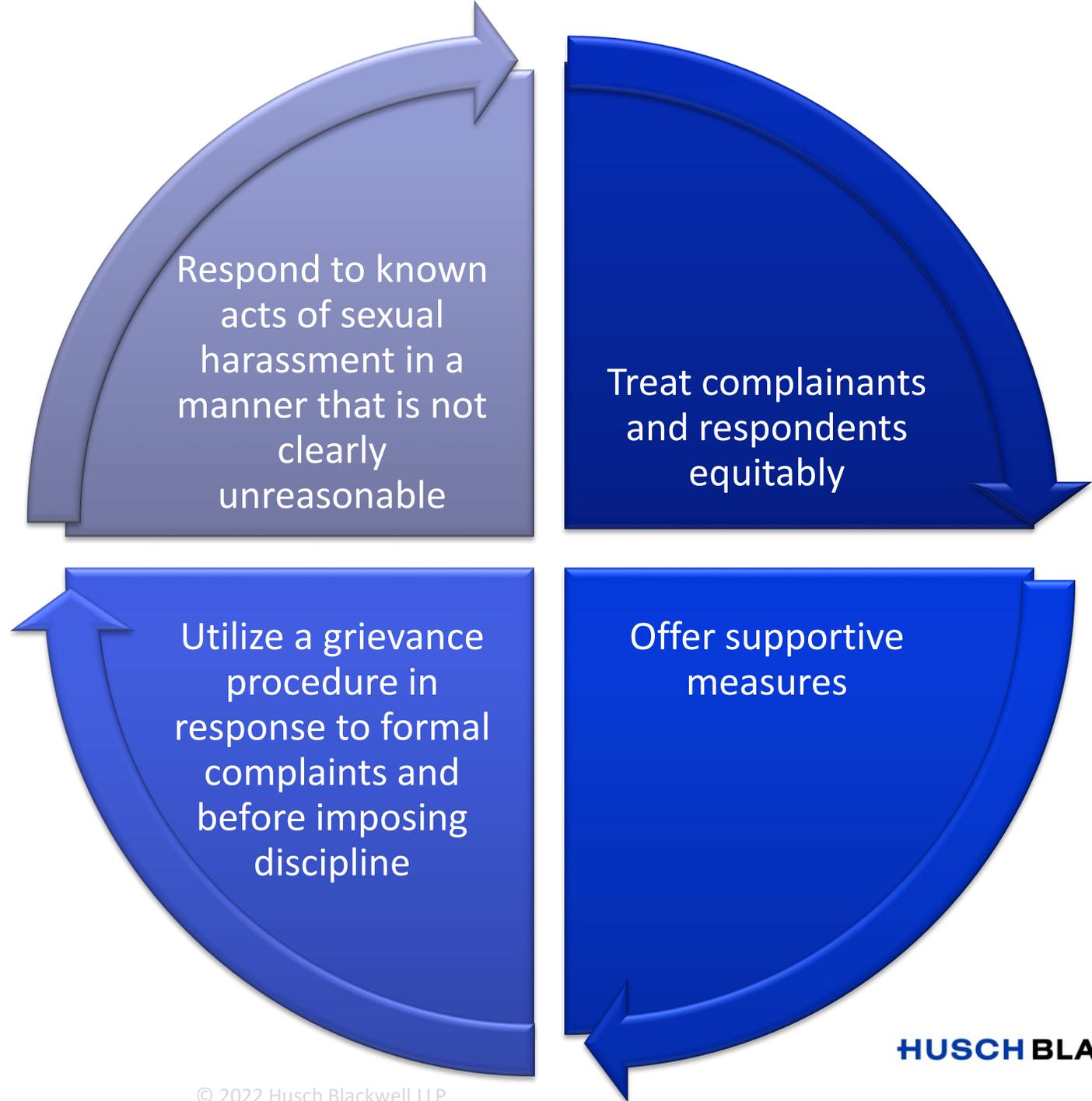




# Institutional Obligations

---

# What are the institution's overall Title IX duties?





# How does the institution address Title IX sexual harassment?

---

- When the institution has ***actual knowledge*** of actual or potential sexual harassment it must:
  - Offer **supportive measures** to the putative victim and information about options.
  - If a formal complaint is filed, **investigate and resolve** the complaint through established grievance procedures.
  - If sexual harassment is substantiated, **impose discipline** on the perpetrator and **provide remediation** to the victim.



# Who has a duty to report Title IX Sexual Harassment?

---

- **“Responsible Employee:** a University employee with authority to take action to redress sexual harassment or who has been given the duty of reporting sexual harassment
- **Many institutions:** All employees (including specified student employees in their employee roles) report to the Title IX Coordinator
- **Exception:** Designated “confidential employees” (e.g., professional counselors)





# Are Sexual Harassment Cases Confidential?

---

- Sexual harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Records containing identifying information on students are subject to FERPA analysis
- The Title IX regulation contains an express preemption, permitting FERPA-protected material to be used only as required by Title IX itself



# What is the resolution process?

Report

Initial  
Assessment/  
Supportive  
Measures

Formal  
Complaint

Possible  
Informal  
Resolution (not  
employee-on-  
student)

Investigation to  
collect relevant  
inculpatory and  
exculpatory  
evidence

Live Hearing before a  
decision-maker who  
finds facts under an  
evidentiary standard  
and determines the  
existence (or not) of  
a policy violation and  
any resulting  
sanctions/  
remediation

Appeal

# What is a formal complaint?

## What

- Document
- Alleging sexual harassment
- Requesting an investigation / resolution under grievance procedures

## Who

- Signed by
  - Alleged victim or
  - The Title IX Coordinator
- If filed by alleged victim, alleged victim must be current or attempted participant in education programs and activities
- Third-parties may not file formal complaints on behalf of an alleged victim

## How

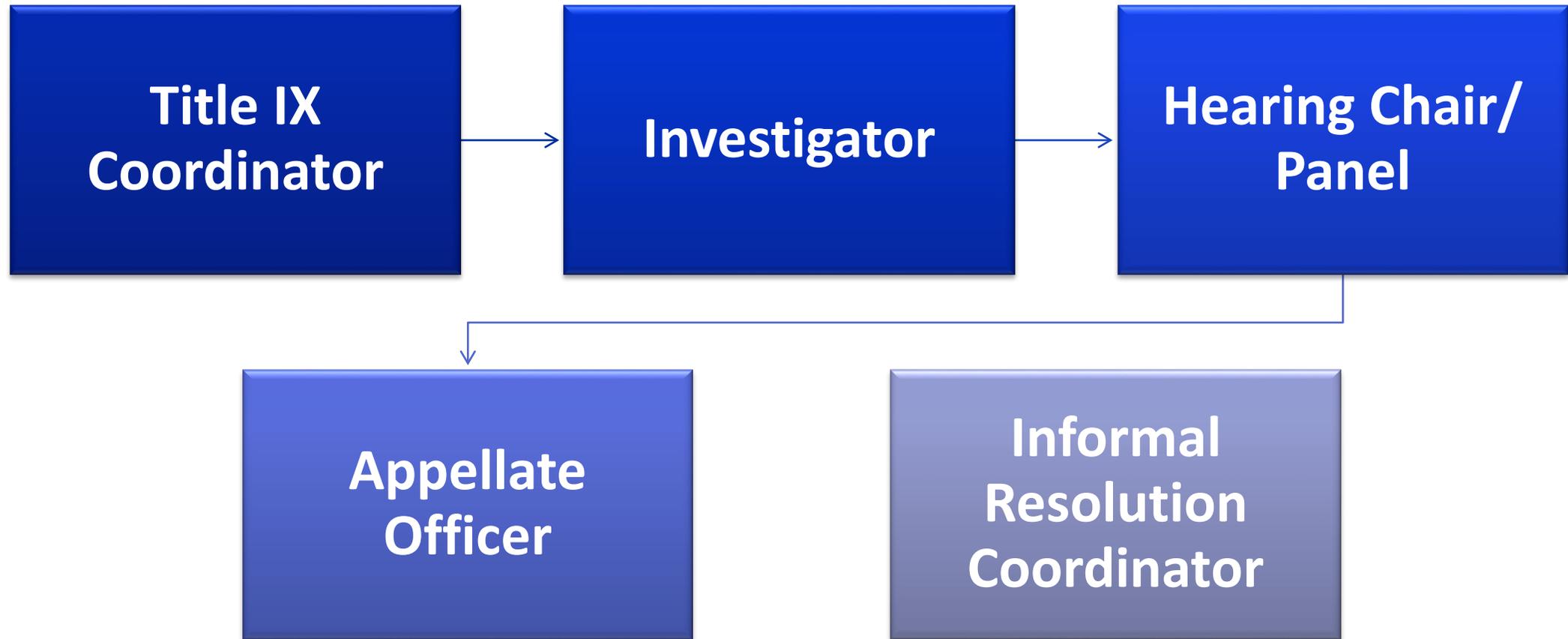
- Either physical or electronic submission



# How does due process apply in Title IX proceedings?

- ***Equitable treatment*** of complainants and respondents
- ***No stereotypes*** based on a party's status as complainant or respondent
- ***Conflict and bias-free*** institutional participants
- ***Presumption*** respondent did not violate policy unless and until a determination is made after hearing
- Trauma-informed

# Who are the key institutional actors in the grievance process?





# Who is responsible for identifying conflicts of interest and bias?

---

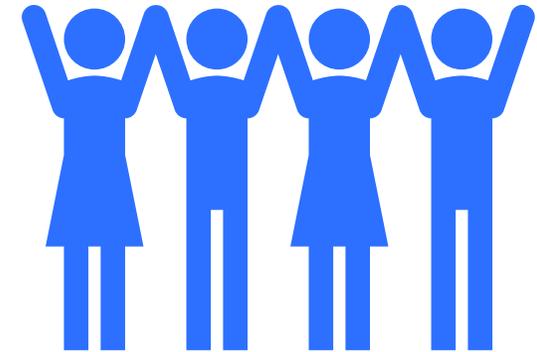
- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also ***permit parties to raise concerns*** of conflicts of interest and bias
- \*Individual institutional actors should ***self-police*** conflicts of interest and self-identify bias



# Who is responsible for supportive measures?

---

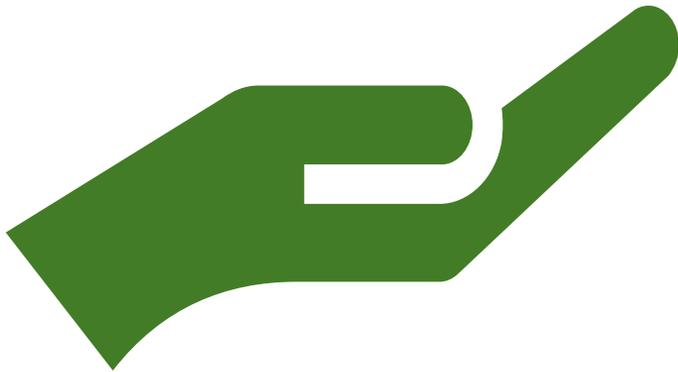
- Title IX Coordinator is responsible for “coordinating the effective implementation”
- May be delegated with appropriate oversight
- Typically, a collaborative effort involving more than one institutional office or department





# What are supportive measures?

---



- Non-disciplinary, non-punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party

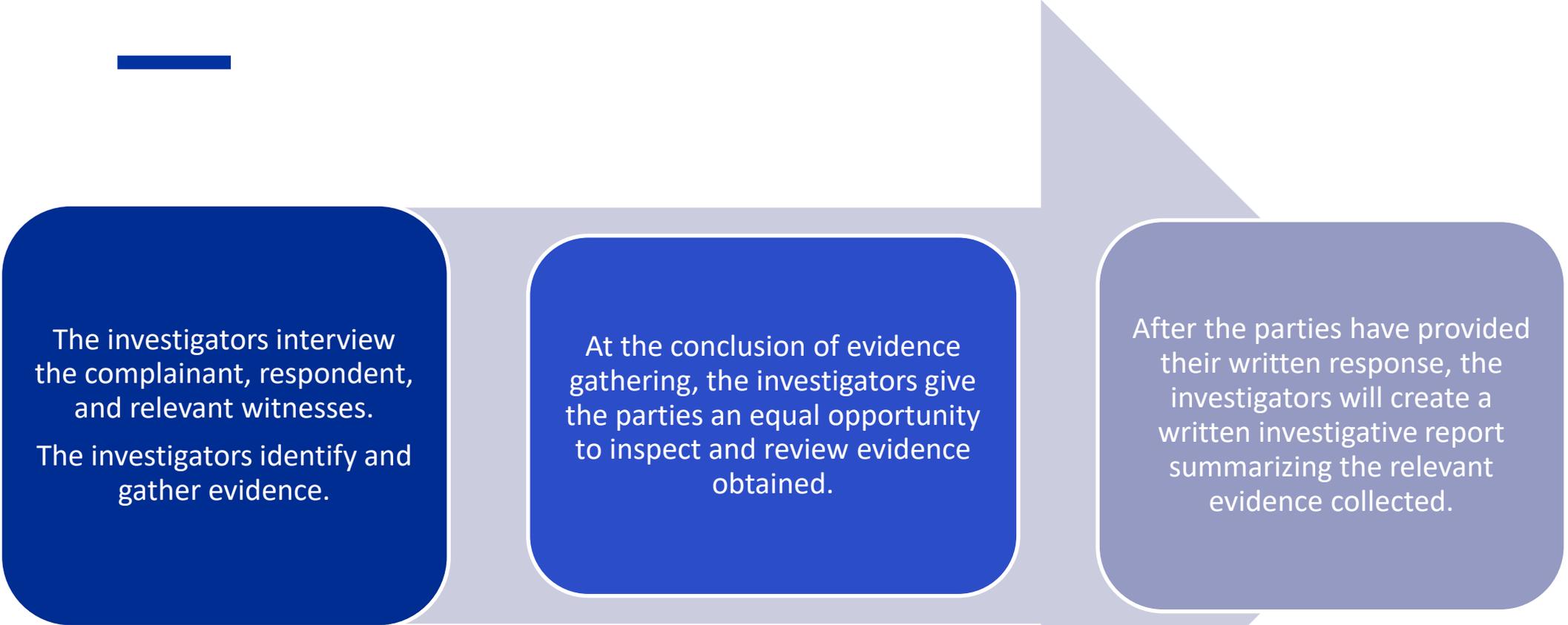


# What is the purpose of an investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine
- Whether or not the reported sexual harassment occurred



# Investigation framework



The investigators interview the complainant, respondent, and relevant witnesses. The investigators identify and gather evidence.

At the conclusion of evidence gathering, the investigators give the parties an equal opportunity to inspect and review evidence obtained.

After the parties have provided their written response, the investigators will create a written investigative report summarizing the relevant evidence collected.



# What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity to review and comment on evidence developed
- Investigation is evidence-gathering; not fact-finding



# How do we approach trauma in a Title IX case?

---

- Balance
- “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”

- Candace Jackson, Acting Asst. Secretary of ED (2017)



# Key Title IX Case Processing Concepts

---

# Possible trauma impact

People who have suffered trauma may, but may not, experience any or a mix of the following:

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame



# Trauma & Credibility

---

- Don't assume information is not credible due to the manner delivered
- Understand memory may be clarified in time
- Address inconsistencies



# Reminder: Applicable disabilities statutes

---

- The Americans With Disabilities Act
- Section 504 of the Rehabilitation Act

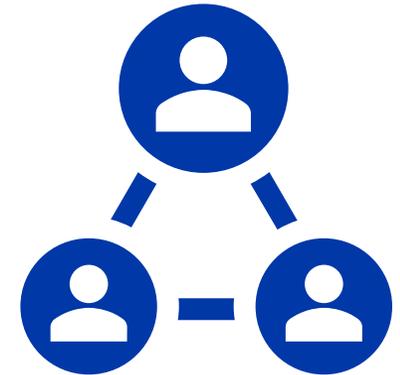




# What is informal resolution?

---

A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.



# Types of informal resolution

---

**Mediation**

**Facilitated  
discussions led by  
Title IX  
Coordinator**

**Restorative justice**

**Attorneys for  
parties negotiate  
an agreement**

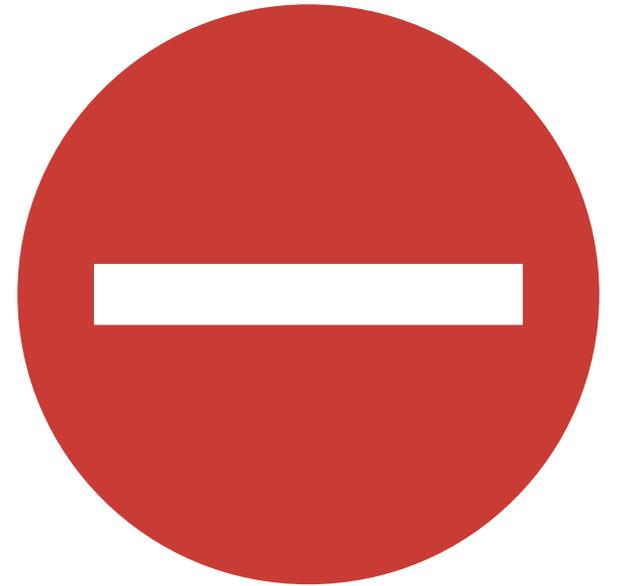
**Arbitration  
without a live  
hearing**



# What are the limitations?

---

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment





# What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary



# **Standard of Evidence**

---

Preponderance of the evidence

=

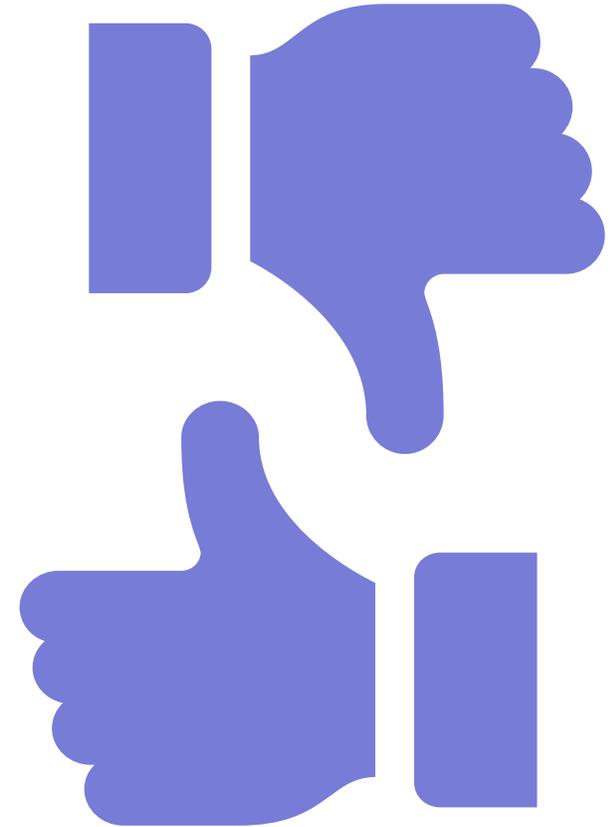
“more likely than not”



# What is a determination?

---

- The decision as to whether or not prohibited misconduct occurred
- Results in a finding of “violation” or a finding of “no violation” as determined under standard of proof



# How do(es) the decision-maker(s) decide a case?



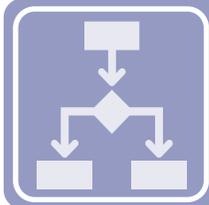
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the institution



Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



# Sanctioning Goals

---

- Punitive
- Safety
- Reduce recidivism / recurrence
- Advance educational and developmental growth of offender (learning from one's mistake)
- Appropriate fit for circumstances





# What is the purpose of the appeal?

- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek “de novo” review





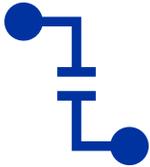
# Who can appeal?

---

- Title IX regulation requires that either party be allowed to appeal
- Third-party persons cannot file appeals on behalf of a party

# What are grounds for appeal?

Title IX regulation requires the following permitted grounds:



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; or



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

# What are the potential outcomes of an appeal?



Appeal is denied and determination is made final



Appeal is granted and determination is changed by the appeal officer



Appeal is granted, determination is “vacated”, and appeal officer sends matter back for a new investigation and/or hearing as appropriate, depending on the nature of the error the appeals officer found



HUSCH BLACKWELL



**Regulatory  
Updates**



# 2020 Amendments and Guidance

---

- 2020 Amendments are legally binding
- Schools can address sexual misconduct that does not meet the 2020 definition of sexual harassment in their codes of conduct
- Guidance documents and the preamble to the 2020 Amendments do not have the force/effect of law





# Highlights from 2021 Guidance

---

- March 2021 Executive Order: Title IX applies to discrimination on the basis of sexual orientation and gender identity
- Schools **may** dismiss a Title IX Complaint when a Respondent leaves the institution
- Questions about a party's medical/mental-health records not permitted unless party has given written consent
- Discretion to offer informal resolution limited by school's obligation to ensure facilitators are impartial
- Updates in July 2022 – Including that schools **may not** maintain exclusionary rule



# Pending Regulations Update

---

- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- Reportedly over 200,000 comments





# Proposed regulation highlights

---

- Expanded definition of Sexual Harassment: Severe “or” pervasive
- Requirement to respond to off-campus activity that leads to on-campus hostile environment
- Express pregnancy protections
- Express gender identity and sexual orientation protection
- Allows “single investigator/decisionmaker” model
- No “live” hearing requirements, absent other requirement (e.g., state law)
- Expanded training requirements

**HUSCH**  
**BLACKWELL**