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**Title IX Regulations**  
**One Year Later**  
2021 Annual Title IX Training



MIAMI UNIVERSITY

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# Today's Agenda

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- Introductions & University Title IX structure
- Title IX Fundamentals
- Formal Complaints of Title IX Sexual Misconduct
  - Complaints of sexual misconduct in violation of university policy
- Bias, Stereotypes, and Conflicts
- Investigations & Informal Resolutions
- Hearings, Decisions & Appeals
- Questions

# Title IX Training Series

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## **1. Annual Title IX Training**

2. Role training
  - Hearing Officers
  - Advisors
3. Pre-hearing Refresher Training

# Title IX Staff

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# Sexual Misconduct Protocols

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## Sexual Misconduct Protocol for Employees and Other Non-Students

## Interim Sexual Misconduct Protocol for Students

Both the Student Protocol and the Employee/Other Non-Student Protocol address sexual misconduct complaints arising under the U.S. Department of Education's Title IX regulations AND complaints arising under University policy (collectively referred to as Sexual Misconduct violations). Sexual Misconduct is a broad term that includes sexual harassment, sexual violence, dating violence, stalking and sexual exploitation.

The disciplinary process for student respondents is the [Code of Student Conduct](#).

The disciplinary process for employee respondents is dependent on their classification, Faculty [Procedures for Disciplinary Action](#), [Interim Unclassified Discipline Policy](#), and [Interim Classified Discipline Policy](#), as applicable.

# Campus Security Authorities and Mandatory Reporting

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- **Federal:** University officials who have significant responsibility for student and campus activities are designated as Campus Security Authorities. They are responsible for reporting of a crime of which they become aware, including sexual assault, domestic violence, dating violence, and stalking, to the Miami University Police Department immediately.
- **State:** Ohio law (Ohio Revised Code § 2921.22) requires every person, who knows that a felony has been or is being committed, to report it to law enforcement. Failure to report may be a criminal offense.
- **University:** As part of our continuing commitment to creating and maintaining One Miami that promotes responsibility, dignity, and respect for all members of our community, Miami University requires all employees\* to promptly report harassment, discrimination, sexual misconduct and interpersonal violence beginning July 1, 2017.

\*Individuals with a legal privilege of confidentiality and researchers may be exempted from reporting. For more information, please review the policy and protocols.

## Title IX Statute

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- Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs and activities and employment.
  - Covers not only equity in athletic programming, but all forms of discrimination based on sex.
  - Protects students and employees.
  - Applies to all institutions that receive federal financial assistance, either directly or indirectly.
  - Enforced by the Office of Civil Rights (OCR).

# Title IX Timeline

Date	Event
June 23, 1972	<a href="#"><u>Title IX of the Education Amendments of 1972</u></a>
May 24, 1999	<a href="#"><u>Davis v. Monroe Cty. Bd. of Educ.</u></a> , 526 U.S. 629 (1999) (holding that a school can be liable under Title IX for student-on-student sexual harassment, but only if the school is <b>deliberately indifferent</b> to known sexual harassment, the respondent is under the school's disciplinary authority, and the behavior is <b>so severe, pervasive, and objectively offensive</b> that it <b>denies access</b> to the school's program and activities).
April 2011	DOE publishes <a href="#"><u>DCL</u></a> with extensive guidance concerning school responsibilities for preventing and addressing sexual harassment and sexual violence.
Sept. 2017	DOE publishes <a href="#"><u>DCL</u></a> rescinding April 2011 DCL as well as <a href="#"><u>2014 Q&amp;A</u></a> on Campus Sexual Misconduct
Nov. 2018	DOE publishes official version of its <a href="#"><u>proposed TIX rule</u></a> in the Federal Registrar. This is the first significant rule concerning sexual misconduct since 1975.

## Title IX Timeline (cont.)

Date	Event
May 2020	DOE publishes the official version of its <a href="#">final Title IX Rule</a>
Aug. 14, 2020	Effective Date of the new Title IX Rule
March 2021	<a href="#">Executive Order 14021</a> issued initiating a review of all existing regulations, orders, guidance documents, policies, and any other similar agency actions.
June 2021	DOE issued a <a href="#">Notice of Interpretation</a> explaining that it will enforce Title IX's prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity.
July 2021	DOE issued <a href="#">Q&amp;A on the Title IX Regulations on Sexual Harassment</a> clarifying how OCR interprets schools' existing obligations under the 2020 amendments and provides examples of Title IX procedures.
Aug 2021	DOE issued a <a href="#">letter</a> explaining that, pursuant to a court order, postsecondary institutions are no longer subject to the part of Regulation that prohibits decision-makers from considering any statement from a person who did not submit to cross-examination (but still prohibited by university policy).

# The Title IX Regulations

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- Amplify the statute, requiring institutions to:
  - Disseminate a policy which includes a non-discrimination statement.
  - “Respond meaningfully to known reports” of sexual harassment or sexual assault and “to investigate” every formal complaint.
  - Adopt and publish grievance procedures that are prompt and equitable and allow for adequate, reliable, and impartial investigation of complaints.
  - Take action to address and prevent sex-based discrimination.

**Discrimination Based on Sex:** Institutions are obligated to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any form of prohibited sex discrimination occurring against a person in the United States. 34 CFR 106.8(c)-(d).

**Title IX Sexual Harassment:** With or without a formal complaint, institutions with actual knowledge of Title IX sexual harassment occurring in an education program or activity of the school against a person in the United States must respond promptly in a manner that is not deliberately indifferent and complies with 34 CFR 106.44(a).

**Formal Complaint of Title IX Sexual Harassment:** In response to a formal complaint of sexual harassment, institutions must follow a Title IX formal complaint process that complies with the new standards set forth in 34 CFR 106.45.

# The Big Picture

**What are examples of education programs and activities?**

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on campus

Sports teams

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

# Required Definition of Key Terms

Sexual Harassment

Complainant

Respondent

Consent

Actual Knowledge

Supportive Measures

Formal Complaint

## Policy Library

- [Employee Protocol](#)
- [Student Protocol](#)
- [Code of Student Conduct](#)

# Sexual Misconduct prohibited by Title IX and University Policy

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## Sexual Harassment

Conduct on the basis of sex including gender, gender identity or expression, or sexual orientation that meets one of the following:

1. An employee of the University conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (*Quid Pro Quo*)
2. Unwelcome conduct that a reasonable person would determine to be so **severe and pervasive and objectively offensive** that it effectively **denies a person equal access** to the University's education programs or activities; or
3. Cyber-Harassment-the use of the internet, email or other electronic communications to harass a person on the basis of their sex including communicating a threat of harm.

# Sexual Misconduct prohibited by the University

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## Sexual Harassment

Unwelcome conduct on the basis of sex, including gender, gender identity or expression, or sexual orientation, that is **sufficiently severe or pervasive** to adversely impact a term or condition of a person's ability to participate in the University's educational programs or activities. Sexual harassment includes conduct that **unreasonably interferes** with a person's work performance or creates an intimidating, hostile or offensive working, learning or living environment. This also includes cyber harassment as defined in II.B.3.

# Definitions

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## Complainant

Any person who is reported to have experienced a sexual misconduct violation.

## Respondent

Any [individual] alleged to have engaged in conduct prohibited by this policy. A respondent is presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the disciplinary process.

# Definition of Consent

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Consent is when a person agrees or gives permission to another person to engage in certain sexual acts.

- Consent is a knowing and voluntary verbal or non-verbal agreement between both parties to participate in each and every sexual act.
- Consent to one sexual act does not imply consent to other or all sexual acts.
- Conduct will be considered “non-consensual” if no clear consent, verbal or non-verbal, is given.
- The absence of “no” does not mean “yes.”
- A person has the right to change one’s mind at any time. In other words, consent can be withdrawn at any point, as long as the person clearly informs the other party of the withdrawal.
- Taking drugs or consuming alcohol does not relieve the obligation to obtain consent.
- A person is not required to physically or otherwise resist an aggressor.

## Consent...

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A person cannot legally give consent (no matter what they might say) when:

- The person is substantially impaired due to alcohol or drugs, incapacitated, or unconscious.
- The person is physically or mentally disabled or incapacitated.
- The person was coerced due to force, threat of force, or deception or when the person was beaten, threatened, isolated, or intimidated.

## Actual Knowledge

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

### Persons with Authority to Initiate Corrective Action

President	Title IX Coordinator & Deputies
Title IX Investigator	Office of Equity and Equal Opportunity (“OEEO”) Director and Associate Directors
Miami University Police	Provost, Associate Provosts, Assistant Provosts
Vice Presidents, Associate Vice Presidents and Assistant Vice Presidents	Deans, Associate Deans and Assistant Deans, Chairs and Program Directors
Directors, Supervisors, and other heads of offices	Human Resources and Academic Personnel Unclassified Staff

## Supportive Measures defined

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- 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

## Supportive Measures examples

- Academic support services and accommodations, including the ability to reschedule exams and assignments, change in class schedule, or tutoring;
- Short- and long-term housing accommodations (available to Oxford students);
- On-campus counseling services and/or assistance in connecting to community-based counseling services;
- Provide transportation/parking options;
- Assistance connecting to community-based medical services;
- Assistance with completing the process of protecting a individual's contact information at Miami University;
- Work schedule or job assignment modifications (for University employment);
- Mutual No Contact Directive;
- Resource Referral;
- Providing information on obtaining personal protection orders; or
- A combination of any of these measures.

Supportive measures are made available to complainant and respondent

## Interim Measure: Emergency Removal

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Permissible to remove a respondent from campus on an emergency basis, only when:

- the school 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; and
  - provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.
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- Also permissible to place a “non-student employee respondent” on administrative leave during the “pendency of [its] grievance process.”

## Retaliation

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The regulations specifically prohibits retaliation, providing that no school “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 this part.”

# Bias, Stereotypes, and Conflicts

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Title IX Coordinator oversees grievance process and must address known or reported conflicts of interest/bias.

- Parties are asked to raise concerns of conflicts of interest and bias.
- University officials must self-monitor and report conflicts of interest and self-identify and manage their biases.
- We all hold biases. It's important to acknowledge them, talk through them, and recognize if they are getting in the way of coming to a fair decision.

## Examples of impermissible stereotypes

"Anyone who would go into another's bedroom drunk must have wanted to have sex."

"Students can't be trusted because they will just lie for each other."

"People who are dating can't commit sexual assault against each other."

"There are no false reports of rape. Therefore, every complainant must be believed."

[Harvard University: Project Implicit](#)

Required:	Avoid:
<p><b>Impartiality</b> is a principle of justice holding that decisions should be based on objective criteria, rather than on the basis of bias, prejudice, or preferring the benefit to one person over another for improper reasons.</p>	<p><b>Conflict of Interest</b> may occur when an individual has a material connection to a dispute or party such that a reasonable person would question their ability to be impartial.</p>
<p>Treat both parties equally and provide an <b>equal opportunity</b> to present evidence, witnesses, and their versions of the story.</p>	<p><b>Bias</b> is a predisposition or preconceived opinion that prevents one from impartially evaluating facts.</p>
	<p><b>Prejudgment</b> is reaching a conclusion before considering all relevant evidence.</p>

# Addressing conflict of Interest/Bias in Miami's Protocols

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- An investigator/board member may not have a conflict of interest or bias for or against complainants or respondents generally or any individual complainant or respondent.
- If a party believes that any investigator/board member has a conflict of interest or bias that party may within three (3) days of the Notice of Allegation/Hearing, file a request with the Director of the Office of Community Standards, asking that a different investigator/board member be assigned, setting forth in sufficient detail the basis for the request.
- The decision of the Director is final, subject to appeal.

## Formal Complaint (TIX Regs)

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- A written and **signed** document filed by a complainant or signed by the Title IX Coordinator **alleging sexual harassment** against a respondent and **requesting that the recipient investigate** the allegation of sexual harassment.
- At the time of filing a 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.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.

### Report (University Policy)

A verbal or written account of alleged sexual misconduct made to a person with authority to initiate corrective action. A report can be submitted by mail, by email, in person, by telephone, or by using the electronic incident reporting form. Reports may be made at any time, even after regular business hours.

## Responding to Title IX Sexual Harassment (Jurisdiction)

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An institution must respond to sexual harassment, with or without a formal complaint, when:

- the school has actual knowledge of the alleged sexual harassment;
- the alleged sexual harassment occurred in an education program or activity of the school; and
- the alleged sexual harassment was against a person physically located in the United States.

## Mandatory Dismissal

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The formal complaint will be dismissed as a Title IX Sexual Misconduct Case if the conduct:

- would not constitute sexual harassment even if proved;
- did not occur while the complainant was participating or attempting to participate in an educational program or activity of the University; or,
- did not occur within the geographical territory of the United States.

Mandatory dismissals may be appealed in writing within 5 class days of the dismissal by either party to the Director of the Office of Community Standards.

***Cases dismissed as Title IX Sexual Misconduct may be proceed as Non-Title IX Sexual Misconduct if the alleged misconduct meets one of the definitions therein.***

## Permissive Dismissal

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Schools **may** dismiss a formal complaint of sexual harassment if, at any time:

- a complainant notifies the Title IX Coordinator in writing that they would like to withdraw the complaint;
- the respondent is no longer enrolled or employed by the school; or
- specific circumstances prevent the school from gathering sufficient evidence to reach a determination.

## *Elements of a Sufficient Response*

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Institutions must respond “promptly” and “in a manner that is not deliberately indifferent.”

- A school is deliberately indifferent “only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

However, the regulations specify that a Title IX Coordinator must promptly contact the complainant to:

- discuss the availability of supportive measures;
- consider the complainant’s wishes with respect to supportive measures;
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and
- explain to the complainant the process for filing a formal complaint.

A failure to satisfy these specific requirements could be characterized as deliberate indifference.

# Formal Complaint Process

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For the purpose of addressing formal complaints of sexual harassment, a school's formal complaint policy and process (our Protocols) must comply with a wide range of specific requirements set out in the new rule.

Core Requirements	• Details 10 core requirements of formal complaint process
Complaint Dismissal	• Grounds for dismissal and procedural requirements
Consolidation	• Complaint consolidation in specific circumstances
Notice of Allegations	• Requirements for initial and ongoing notice to parties
Investigations	• 7 required elements of formal investigation
Informal Resolutions	• Permits informal resolution where appropriate
Hearings	• Hearing requirements, including cross-x and advisors
Determinations	• Requirements for adjudicators and determinations
Appeals	• Grounds and procedures for appeals
Recordkeeping	• Record maintenance requirements for specified periods

## 10 Core Requirements

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1. Equitable Treatment
2. Objective Evaluation
3. Training of Key Participants
4. Presumption of Innocence
5. Prompt Timelines
6. Sanctions and Remedies
7. Standard of Evidence
8. Appeal Process & Standards
9. Supportive Measures
10. Legal Privilege

## Equitable Treatment

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A formal complaint process must treat complainants and respondents equitably by:

- providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent; and
- by following a complaint process that complies with the new Title IX rule.

Remedies must be designed to restore or preserve equal access to the school's education program or activity.

## Objective Evaluation

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A school's formal complaint process must require an objective evaluation of all relevant evidence and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.

An objective evaluation is one that involves:

- Impartial consideration of available evidence.
- No prejudgment of parties, witnesses, facts at issue, or how facts at issue are presented.
- No deference to recommendations of an investigator.

An investigator's credibility determination involves determining what statements to believe and what statements not to believe, based on the "credibility" of the individual making the statement.

- Decision-makers may believe everything a party or witness says, part of it, or none of it.

In some situations, there may be little to no evidence other than the statements of the parties themselves.

# Training of Key Participants

A school's process must include training for coordinators, investigators, and adjudicators and require that they be free of conflict of interest.

- Materials used to train Title IX Coordinators, investigators, adjudicators, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- [Miami's Title IX Training Materials](#)

Title IX  
Coordinators,  
investigators,  
adjudicators, and  
any person who  
facilitates informal  
resolutions

- Definition of sexual harassment and scope of the school's education program or activity.
- Conducting an investigation and grievance process including hearings, appeals, and informal resolutions.
- Serving impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Investigators

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Adjudicators

- Using technology at live hearings.
- Relevance of questions and evidence, including when questions and evidence about complainant's sexual history are not relevant.

## Presumption of Innocence

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A school's formal complaint process must include a presumption of innocence for the respondent.

- “The presumption does not imply that the alleged harassment did not occur; the presumption ensures that recipients do not take action against a respondent as though the harassment occurred prior to the allegations being proved, and the final regulations require a recipient’s Title IX personnel to interact with both the complainant and respondent in an impartial manner throughout the grievance process without prejudgment of the facts at issue, and without drawing inferences about credibility based on a party’s status as a complainant or respondent.”

## Prompt Timelines

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A school's process must include reasonably prompt timeframes for resolution and allow for temporary delay or limited extension for good cause.

- “Any time frame included by the recipient must be “reasonably prompt,” where the reasonableness of the time frame is evaluated in the context of the recipient’s operation of an education program or activity.”
- “The Department believes that each recipient is in the best position to balance promptness with fairness and accuracy based on the recipient’s unique attributes and the recipient’s experience with its own student disciplinary proceedings...”

## Sanctions and Remedies

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A school's formal complaint process must describe the range of possible sanctions and remedies.

- “Whether and what type of sanctions are imposed is a decision left to the sound discretion of recipients.”
- The new regulations “permit recipients to evaluate such considerations and make disciplinary decisions that each recipient believes are in the best interest of the recipient’s educational environment.”

## Standard of Evidence

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A school's process must detail the standard of evidence that will be used and provide for consistent use in all formal complaints.

- Schools may use either preponderance of the evidence or clear and convincing.
  - Preponderance of the evidence means a particular fact or event was more likely than not to have occurred. **(Miami's Standard)**
  - Clear and convincing means a particular fact or event was highly and substantially more likely than not to have occurred.

## Appeal Process & Standards

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A school's formal complaint process must describe the appeal process and standards.

- Appeals may be granted on the following bases:
  - a procedural irregularity that affected the outcome;
  - new evidence that was not reasonably available at the time the determination or dismissal was made and could affect the outcome; and
  - the Title IX Coordinator, investigator, or adjudicator had a conflict of interest or bias that affected the outcome of the matter.
- Miami's disciplinary processes also permits appeals on the basis of 'inappropriate sanction' which is often the appeal basis for both complainant and respondent.

## Supportive Measures

A school's process must describe the range of available supportive measures

## Legal Privilege

A school's formal complaint process must not require, allow, 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.

Legal privileges protect communications and documents from disclosure. Examples include: Attorney –Client; Priest –Penitent; Doctor –Patient; Spousal.

## Investigation

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- Upon receipt of a formal complaint (or report) alleging a sexual misconduct violation the University will initiate an investigation with a Notice of Investigation.
- At the conclusion of the investigation, investigator determines if a reasonable basis exists to proceed to a hearing and identify specific policy violations that may have occurred.
  - “Reasonable Basis” is not the same as finding someone responsible for a violation. An investigation resulting in a reasonable basis to proceed to a hearing means that sufficient information could be obtained during the investigation upon which a determination regarding responsibility could be made and that the University has not dismissed the complaint.
- Investigator issues an investigative report that fairly summarizes the evidence.
- Investigator is not a prosecutor, rather the investigator gathers and evaluates evidence to be presented to the decision-makers if a hearing proceeds.

# Parties Access to Evidence

Throughout the investigation, institutions must afford both parties equal opportunity to review and inspect any evidence that:

- was obtained as part of the investigation; and
- is directly related to the allegations.

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

Generally	Prior to issuing investigative report	10 days prior to hearing or other determination	At and during any hearing
<ul style="list-style-type: none"><li>• Must provide access early enough that each party can meaningfully respond to the evidence prior to conclusion of the investigation.</li></ul>	<ul style="list-style-type: none"><li>• Must send parties all evidence subject to inspection and review and afford at least 10 days to submit a written response.</li></ul>	<ul style="list-style-type: none"><li>• Must send investigative report to parties for review and written response.</li></ul>	<ul style="list-style-type: none"><li>• Must make all evidence available to parties' and afford equal opportunity to review, including for purposes of cross-ex.</li></ul>

# Investigative Reports

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Goal of the investigative report is **to fairly summarize relevant evidence.**

- Do not reach any conclusions
- Put decision-makers in best position to understand relevant evidence.
- Demonstrate to parties that institution took the allegation seriously and responded appropriately.

## Informal Resolution

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- A school may not, under any circumstance, require a student or employee to waive the right to an investigation and adjudication of formal complaints under Title IX.
- Similarly, a school may not require the parties to participate in the informal resolution of a formal complaint or even offer an informal resolution process unless a formal complaint is filed.
- However, at any time prior to reaching a final determination, a school may facilitate an informal resolution that does not involve a full investigation and adjudication, provided that the school:
  - provides the parties a written notice disclosing (1) the allegations, (2) the requirements of the informal resolution process (3) the circumstances under which it precludes the parties from resuming a formal complaint arising from the same facts, and (3) any other consequences of participating in the informal resolution process, (4) the records that will be maintained or could be shared; and,
  - obtains the parties' voluntary, written consent to the informal resolution.
- Informal resolution is not available to resolve allegations that an employee sexually harassed a student.
- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution and to resume the formal complaint process.

## Student Protocol: XV. Adaptable Resolution

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- Adaptable Resolution ("AR") is a **voluntary**, remedies-based, structured process between or among affected parties that **balances support and accountability without formal disciplinary action** against a Respondent, while focusing on the expressed needs of the harmed party(ies). AR is generally designed to allow a Respondent to **acknowledge harm and take steps to repair harm** (to the extent possible) experienced by the Complainant and/or the University Community.
- The AR process will only be initiated at the Complainant's request after the submission of a Formal Complaint. The request is subject to the approval of the Title IX Coordinator or designee and requires agreement to participate from both the Complainant and Respondent.

# Hearings

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Live hearings with cross-examination are required

- This is not new for those of us in the 6<sup>th</sup> circuit. Since 2018 we have held live hearings with cross-examination.
- ‘If credibility is in dispute and material to the outcome of a university student disciplinary proceeding, due process requires cross-examination.’

[Doe v. Baum, 903 F. 3d 575 \(2018\)](#)

## What is New?

- The role of Advisor

## Order of Hearing

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- Introductory statement by the Board chair
- Respondent's indication of responsibility
- Opening remarks by complainant and respondent
- Witness testimony and questions by parties' advisors and the Board
- Complainant questioned by the Board and the respondent's advisor
- Respondent questioned by the Board and the complainant's advisor
- Closing remarks by complainant and respondent
- Hearing concluded by the Board chair

## Questioning & Cross Examination

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- The Board asks questions first. Board questions do not require a relevancy determination (but questions must be relevant).
- Cross-examination must be conducted directly, orally, and in real time by the **party's advisor** and never by a party personally.
  - If a party does not have an advisor, the school must provide an advisor of its choice, free of charge, to conduct cross-examination.
- The Board Chair makes a determination of relevance for every question posed by an Advisor.
  - Parties/witnesses may not answer until a verbal determination of relevance has been made.
- Parties, Advisors, and all others present at the hearing, are held to the rules of decorum at all times.

# Advisors

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Parties may be accompanied to any investigative interviews and meetings by an advisor of their choice

- Advisor may be anyone willing to serve, including an attorney.
- University policy confines advisor to a passive role during the investigation phase.
- University does not provide an advisor during the investigation phase.
- University provides a university-trained advisor during the hearing process.



Schools must afford the parties equal opportunity to have an advisor during any aspect of the formal complaint process.

Advisors may be an attorney.

Schools may not restrict the choice of advisor or the advisor's presence.

Schools may restrict advisor participation in the proceedings, as long as the restrictions apply equally.

## What is a 'statement'?

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- “‘Statements’ has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person’s intent to make factual assertions, or to the extent that such evidence does not contain a person’s statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.”
- “The prohibition on reliance on ‘statements’ applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination.”

If a party or witness does not appear live at a hearing or refuses to answer cross-examination questions, what evidence can be considered?

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- Statements may not be considered.
- Other evidence, that does not consist of statements, such as video evidence, may be used to reach a determination.
- Decision-maker must not draw any inference about the party's or witness's absence from the hearing or refusal to answer cross-examination questions.
- One party's failure to participate/submit to cross-examination doe **not** mean the participating party 'wins.' Decision still has to be made on the relevant evidence.

# Rules of Decorum

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- Follow directives given by the Board and/or process advisor with regard to relevance of questions, order of procedures, and any disruptive behavior.
- Treat other participants with courtesy and respect.
- Ensure that questioning is relevant, respectful, and not abusive.
- Participants will refrain from yelling, cursing, or otherwise disrupting the disciplinary process.
- Address all participants using their preferred gender pronouns and name.

# Most common standards of proof

The standard that applies depends on the type of case. The more serious the consequences, the higher the standard of proof is likely to be. Potential loss of liberty (jail or prison), for example, involves a higher standard of proof than a lawsuit for money.

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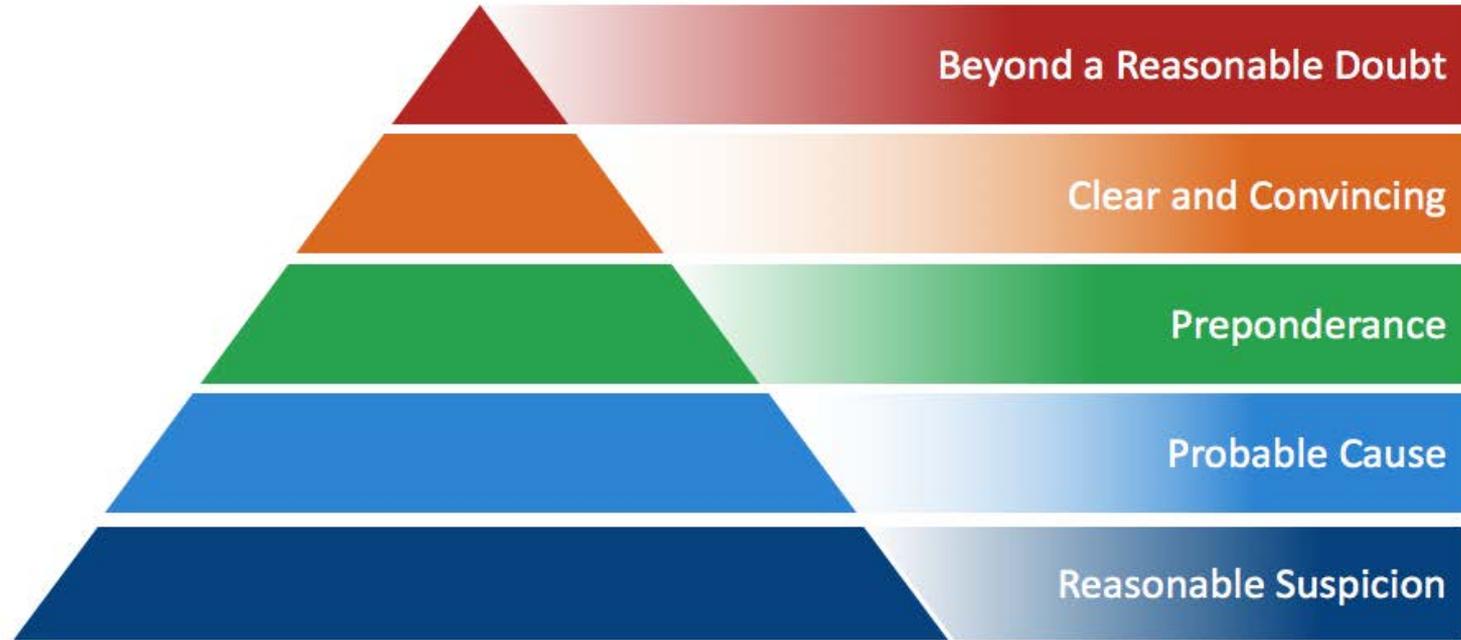
**Reasonable Suspicion and Probable Cause** This standard is most commonly utilized prior to a criminal trial and are most often at issue when responding to motions to suppress evidence. Preliminary hearings also involve a determination of probable cause and search warrants are issued using a probable cause standard.

**Preponderance of the Evidence** The preponderance-of-the-evidence standard is utilized for most civil lawsuits. Preponderance of the evidence is met if the decision-maker believes the evidence shows the person charged is more likely than not—more than 50% likely to be—responsible. This is Miami’s standard of proof for all student conduct matters, including Title IX misconduct.

**Clear and Convincing Evidence** The clear-and-convincing-evidence standard goes by descriptions such as “clear, cogent, unequivocal, satisfactory, convincing” evidence. “Clear and convincing” means the evidence is highly and substantially more likely to be true than untrue; the decision-maker must have an abiding conviction that the truth of the factual contention is highly probable. This standard requires that the evidence show that it is highly probable or probably certain that the thing alleged has occurred.

**Beyond a Reasonable Doubt** “Beyond a reasonable doubt” is the highest legal standard. This is the standard the U.S. Constitution requires the government to meet in order to prove a defendant guilty of a crime. The evidence must be so convincing that no reasonable person would ever question the defendant’s guilt. The standard requires that the evidence offer no logical explanation or conclusion other than that the defendant committed the crime. This highest of standards requires—after consideration of all facts—only one logical conclusion: that the defendant is indeed guilty. Courts sometimes describe this level of confidence in a verdict as a moral certainty.

Standard of proof does not increase with the severity of the incident/charges



# Types of Evidence

## **Physical Evidence:**

- Objects or things used to prove an incident occurred.

## **Documentary Evidence:**

- Any evidence that is written down, on paper or electronically.

## **Demonstrative Evidence:**

- Evidence that represents or preserves a piece of physical evidence.

## **Verbal Evidence:**

- Oral report of memories of a individual's experiences or observations related to the time and place of the incident under investigation.
- Relevant hearsay evidence is included in an investigation report but cannot be considered unless submitted to cross-examination.

## Evidence can be 'direct' or 'circumstantial'

**Direct Evidence:** Doesn't require drawing a conclusion/inference to show that something happened.

- *"I was in the bedroom and saw Nolan push Kelly into the corner and kiss Kelly. I heard Kelly say, "Stop," but Nolan just laughed. Then I saw Kelly smack Nolan and run out of the room crying."*
  - What the witness reports personally seeing and hearing is direct evidence that Nolan assaulted Kelly and was met with Kelly's self-defense.

**Circumstantial Evidence:** Requires drawing a conclusion/inference based the circumstances to show something happened.

- *"I was in the living room when I saw Nolan and Kelly go in the bedroom. A few minutes later, Kelly ran out of the bedroom crying. Then Nolan came out with a big red mark on their cheek."*
  - The witness didn't see/hear what happened in the bedroom, but we **could** conclude/infer from what the witness saw/heard in the living room that Nolan assaulted Kelly in the bedroom, and was struck in self defense.

# What is Relevant?

“The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”

Generally, evidence is relevant if:

- It has any tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in proving or disproving the allegations.

# Exceptions to Relevance

Must consider all relevant evidence EXCEPT:

1. Complainant's sexual behavior (with two narrow exceptions)
2. Information protected by a legal privilege
3. Party's treatment records (absent voluntary written waiver by the party)
4. Statements that are not subjected to cross-examination

# When is sexual behavior relevant?

Cross-examination must **EXCLUDE** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**

- its use is to prove that someone other than the Respondent committed the conduct, OR
- it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

Rape shield protections do not apply to Respondents

- "evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be."

## Determining Relevance:

1. Review the evidence being offered.
2. Consider the allegations of the Title IX complaint.
3. Ask yourself whether the evidence being offered has the potential to prove or disprove an incident under investigation.

Determination of relevance requires you to apply your training, logic, experience, education, and expertise to your decision-making process.

## Determining Relevance: Scenario A

A Complainant has reported that a classmate has sent them unwanted sexually explicit emails and text messages despite requests from the Complainant that the Respondent stop.

The Complainant presents evidence of the text messages and emails as part of their Title IX complaint.

# Initial Relevancy Analysis of Scenario A

**Step 1** (review the evidence):

Emails and text messages between the Respondent to the Complainant.

**Step 2** (consider the Title IX complaint):

The Complainant reported that the Respondent was sending unwanted sexually explicit emails and text messages.

**Step 3** (assess whether evidence potentially proves/disproves an incident of the Title IX Complaint):

Yes –the emails and text messages (which are documentary evidence) could either prove or disprove that the Respondent was sending sexually explicit communications to the Complainant, which are the key allegations of the complaint.

## Factors for assessing credibility

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Demeanor

Logic/ Consistency

Corroborating  
information

Circumstantial  
information

Expertise

Bias

## Weighing the evidence & Effective Deliberations

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The Regs require the decision-maker to **objectively evaluate only relevant evidence** during the hearing and when reaching the determination regarding responsibility.

- » **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- » **Demeanor:** Did the person seem to be telling the truth or lying?
- » **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- » **Motive to falsify:** Did the person have a reason to lie?
- » **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of these factors is determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that they did so again.

## Finding.....

### What goes on the scale?

- Relevant evidence received from credible sources

### What does not go on the scale?

- A claim of ignorance about policies
- The student's motivation or intent
- A student choosing not to answer questions in a hearing
- Assumptions that are based on information that was not presented or available
- Your "gut feeling"



## Purpose of sanctioning

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Maintain standards  
and expectations

Modify future  
behavior

Connect student to  
something positive

Community  
expectations

Identify risky  
behavior

Protect the  
community

Required  
determination  
elements

## Allegations

- Identification of the allegations of sexual harassment.

## Procedural Recitation

- A recitation 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

- Findings of fact supporting the determination.

## Conclusions

- Conclusions regarding the application of the school's sexual misconduct policy to the facts, including a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the school imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the complainant.

Required  
determination  
elements

## Appeal

- Procedures and permissible bases for appeal.

## Considering Appeals

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- All appeals for Title IX and other Sexual Misconduct cases are heard by Dr. Jayne Brownell, VP for Student Life
- Grounds for appeal:
  - A conflict of interest or bias exists on the part of the investigator, Board member(s), or Title IX coordinator;
  - New information exists that was not reasonably available at the time the determination was made that is determined to be substantial enough to have changed the outcome of the hearing;
  - A procedural irregularity in the hearing of the case occurred that is found to be substantial enough to have changed the outcome of the hearing, including failure to objectively evaluate all relevant evidence or error(s) related to determination of relevance; or
  - Inappropriate sanction.

# QUESTIONS

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