

**HUSCH BLACKWELL**

# **Advanced Title IX Training**

Participants in Sexual Harassment policy process  
Spring 2022

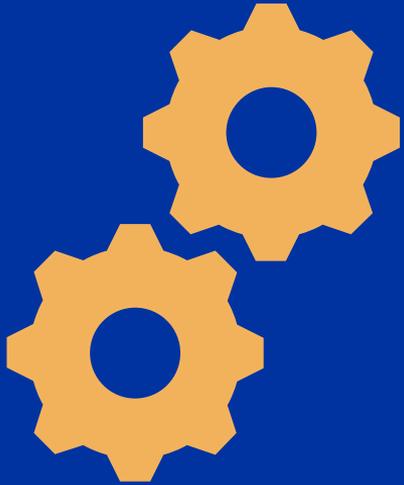


# Housekeeping

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- **Recording is not permitted**
- Change Zoom name to match registration
- Please list your institution with your name
- Raise hand or use chat function to ask questions
- Anticipated break at 3:00 pm
- Other breaks—take individually as needed

## Group Scenario



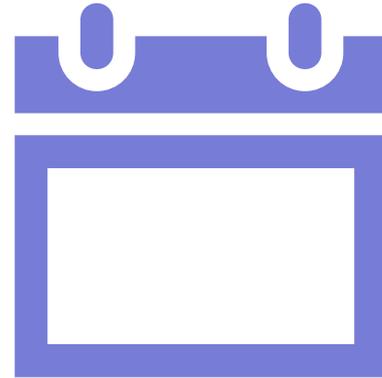
# Breakout Groups

- 4 Scenarios discussed in Breakout Groups
- First group – time to introduce yourselves and select a spokesperson; this will be your group for today’s training
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Add your institution to your displayed name



## Agenda

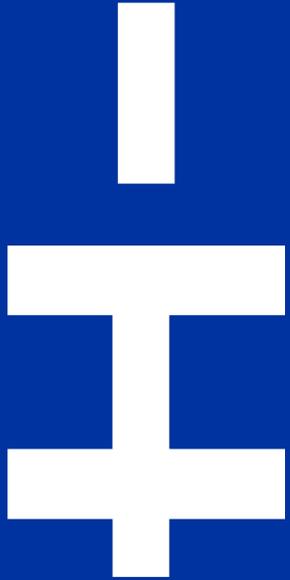
- Reluctant complainants
- No contact orders and other mitigation measures
- Informal resolutions
- Post-decision requests for accommodations and supports





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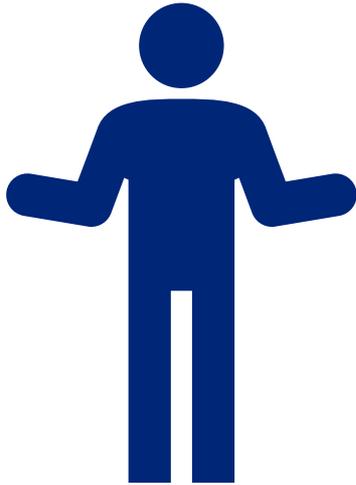
# Reluctant Complainants





# Reasons for reluctance

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- Fear of retaliation
- Loss of control
- Confusion about what happened
- Lack of knowledge about process
- Concern about reputation
- Fear of friends' responses
- What others?

# Points of reluctance

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- Whether to report at all
- Whether to respond to outreach
- Whether to file a formal complaint
- Whether to be interviewed
- Whether to participate in hearing
- What others?





# Practical effects of reluctance

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- Institution may never learn of potential sexual harassment
- Institution may not proceed beyond supportive measures
- Title IX Coordinator may have to file formal complaint
- Formal complaint may have to be dismissed
- Outcome may result in “no violation” finding
- What others?

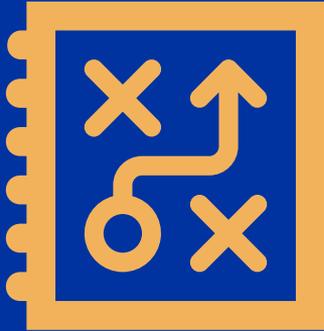
## Example



Student makes cursory formal complaint of sexual assault but then is unwilling to meet with investigator. Student requests that the Title IX process “stop” and that student just be provided counseling.

# Example

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Student makes formal complaint and submits to an interview. But the day before the hearing, the student indicates they will not attend. The respondent adamantly denies the allegations.



# Tools to address reluctance

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- Information
- Advocacy/counseling support
- Time
- No-contact orders and other accommodations
- Others?



# Paths despite reluctance

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- Title IX Coordinator files a formal complaint
- Institution prosecutes other conduct violations/standards
- Title VII process (employment-based sexual harassment)
- Admonishment
- Training
- Others?

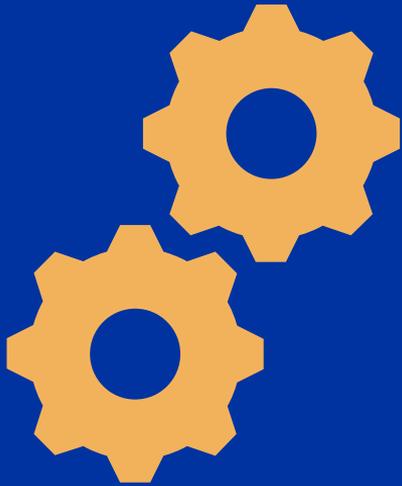


# Example



Student A accuses Student B of providing Student A with alcohol and then having sex with Student A after Student A became heavily intoxicated. Student A is a minor. The institution prohibits alcohol in the residence hall where the alleged sexual assault occurred.

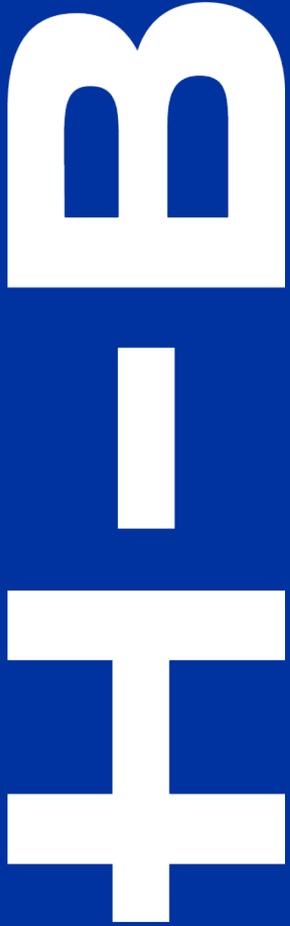
## Group Scenario



Cameron works in the athletics department and is supervised by Blake. Cameron reports to the Title IX Coordinator that Blake has repeatedly touched Cameron in inappropriate ways, commented on Cameron's body, and even suggested that Blake and Cameron should have sex in a locker room. Cameron is reluctant to file a formal complaint. Cameron is concerned that Blake will use Blake's connections to ruin Cameron's prospects of eventually becoming an athletic director at a major institution. Cameron is also concerned that complaining could hinder Cameron's progression in the department itself. Cameron reports that no one witnessed Blake's conduct but there are rumors Blake had an affair with a previous employee who has since left. When the Title IX Coordinator indicates that they may file a complaint on the behalf of the institution, Cameron states that they will deny that anything happened and will not meet with the investigator. Cameron states that they have applied for open positions at other institutions in the hope of being able to leave.

# Questions





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# **No Contact Orders and Other Mitigation Measures**





# The Title IX obligation

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- Upon receipt of actual knowledge of sexual harassment, institution must offer supportive measures to putative victim
- Supportive measures must also be offered to putative respondent when respondent receives notice of report/complaint or otherwise requests them
- Intended to preserve access to education programs and activities

# The tort law obligation

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- If institution is aware of danger posed to students or others on its property
- Institution must act reasonably to protect against danger
- Considers risk to putative victim and to others



## Example

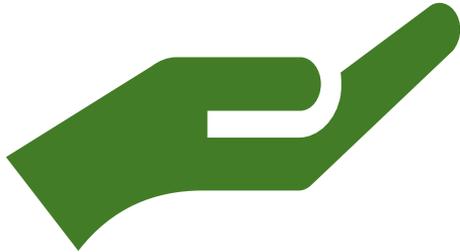


Employee is accused of sexually assaulting co-worker in a parking lot on campus. Institution allows employee to continue working without any restriction. Employee subsequently sexually assaults a second co-worker in the same parking lot.



# What are supportive measures?

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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

# Examples of supportive measures

 Counseling

 Academic accommodations

 Housing accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order where implicated by facts



# No contact orders as a form of supportive measure

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- Cannot be automatically imposed in every case
- May be reasonably necessary where there is a specific concern about ongoing contact or interaction
- Scope of a no contact order can vary substantially depending on the facts

## Example

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Student A accuses Student B of repeatedly contacting Student A by text message to solicit a sexual interaction. Title IX Coordinator prohibits Student B from communicating with Student A by phone, email, or any other electronic device pending completion of the grievance process.

## Example



Employee A accuses Employee B of stalking. Title IX Coordinator prohibits Employee B from having any in-person or electronic communication with Employee A and further prohibits Employee B from entering the building where Employee A works.

## Example



Student A accuses Student B of sexual assault. Title IX Coordinator imposes prohibition on all communication and further prohibits Student B from being within 50 yards of Student A.



# The limitations of interim suspensions

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- Students may be removed on emergency basis if:
  - Individualized safety and risk analysis
  - Determines an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
  - Student is given immediate notice and opportunity to contest the removal

## Example



Student A alleges Student B punched and kicked Student A in Student A's residence hall after the two had a disagreement about whether to engage in sexual activity. Student A reports that Student B has been violent at other times in their relationship.

## Example



Student accuses faculty member of offering a better grade in exchange for sex. Faculty member did not engage in violence or threaten violence. Student has transferred to another section of the class. Faculty member has no history of Title IX Complaints.



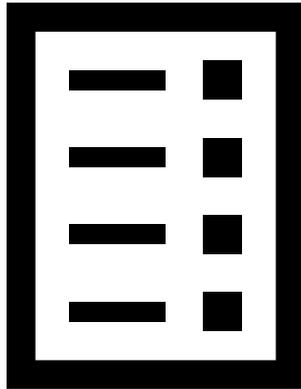
# Administrative leave

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- Under Title IX employees can be placed on administrative leave without a showing of physical danger to any person
- But consider whether contracts and handbooks provide required certain substantive standards or procedural due process to be met

# Other mitigation measures

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- Civil protective orders
- Criminal referrals
- Group training
- Individual training
- Admonishments
- Others?

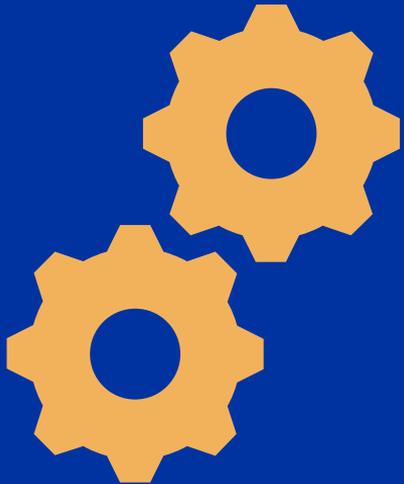


## Example



Student is sexually assaulted by a non-student romantic partner. Student reports to Title IX Coordinator who determines the encounter happened outside Title IX jurisdiction. Title IX Coordinator refers student to victim advocacy organization that helps student file for a restraining order.

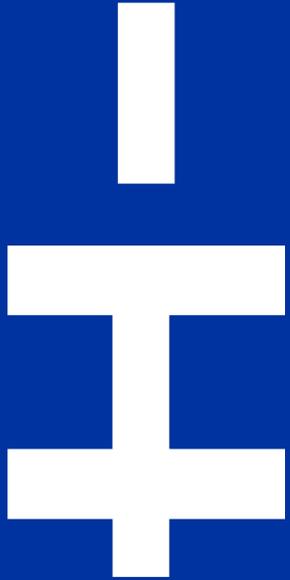
## Group Scenario



Manny and Eric live in an all-male residence hall. The two meet during orientation and begin to hang out regularly. One night the two are drinking alcohol and sitting on the futon when Eric places his hand on Manny's groin and attempts to kiss Manny. Manny pushes Eric and exclaims "I'm not gay! Get the f\*\*\* out!" As Manny shoves Eric out the door, Manny notices that another student is in the hallway and likely heard the commotion. The following morning, Manny tells several other friends that Eric is "gay and tried to molest me." Later that day Manny visits the Title IX Coordinator and makes a formal complaint of sexual assault. He also demands that Eric be removed from the residence hall and that he never have to see Eric again. The Title IX Coordinator arranges a meeting with Eric later that day to assess what interim steps may be needed. At the meeting Eric reports that he "misread the situation" and is "very sorry for what happened." Eric volunteers that he did not ask Manny before touching Manny's groin and should have. Eric agrees not to speak to Manny but reports that Manny has spent the day outing Eric to others in the residence hall.

# Questions





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# Informal Resolutions

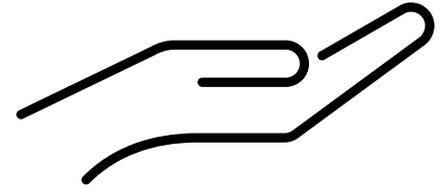




# Informal resolution conceptualized

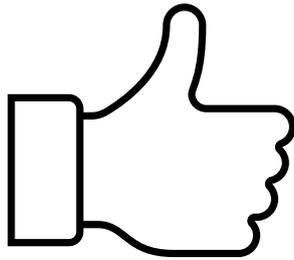
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- Alternative to formal grievance procedures
- Voluntary participation by the parties
- Voluntary approval by the institution
- May or may not determine misconduct



# Institutional approval

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- Institution cannot allow informal resolution where employee is accused of sexually harassing student
- Institution may allow informal resolution for other cases



# Factors considered in approval

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- Severity and nature of the conduct
- Whether respondent is repeat offender
- Presence of other conduct violations
- Public perception
- Confidence in parties' ability to uphold agreement
- Sufficiency of the terms
- Others?



# Example



Student A accuses Student B of secretly recording Student A naked and selling the videos to other students in the same residence hall. The complaint is reported in the news. Student A wants Student B to withdraw, and Student B will do so if the institution approves the agreement.



## Example



Student A accuses Student B of sexual assault resulting from a sexual encounter where both Student A and Student B were drinking heavily; no witnesses were involved. Student A wants Student B to complete coursework online, and Student B will agree if the institution approves.



# Issues to be addressed in the resolution

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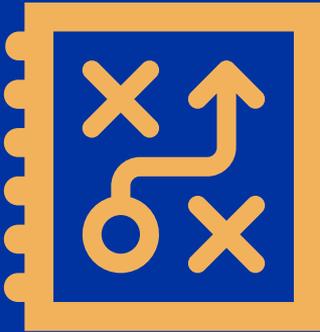
- The substantive terms
- How compliance will be verified
- The punishment for non-compliance
- The effect on the pending formal complaint
- The effect on collateral conduct charges/policy violations
- Others?

## Example



Student A and Student B enter into an informal resolution requiring Student B to receive counseling and to follow the treatment plan of Student B's psychologist. How would this agreement be verified?

## Example



Student A and Student B enter an informal resolution requiring Student B to apologize. How will this requirement be satisfied and verified?

## Example



Employee A and Employee B agree to informal resolution for Employee B to receive anti-harassment training and 10 hours of community service. Employee B receives the training but performs only 5 hours of community service.



# Documenting resolutions

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- Documented in writing
- All essential terms in the same document
- Signed by the parties
- Dated
- Indicating institutional approval
- Indicating closure of grievance procedure

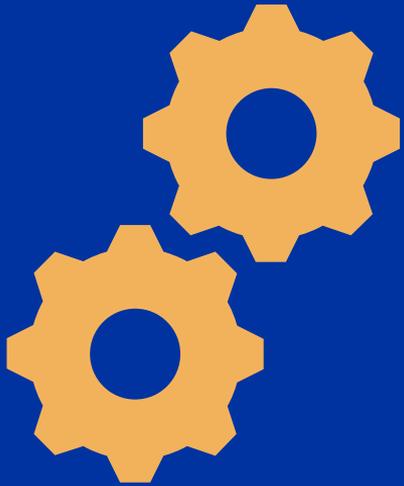


## Example



Student A sends email with proposal for informal resolution. Title IX Coordinator forwards to Student B. Student B responds with a modified proposal that Title IX Coordinator forwards to Student A. Student A replies “okay, I agree to that.” Title IX Coordinator prints the emails and puts them in the file.

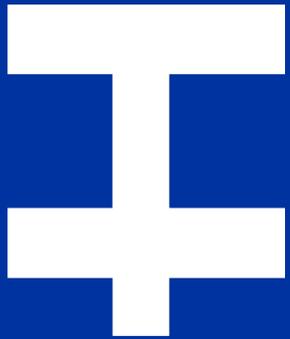
## Group Scenario



Poe and Quinn are sophomores who have been romantically involved for 18 months. After a particularly nasty argument in which Quinn was high on drugs and called Poe the “c word,” Poe filed a formal complaint of dating violence, accusing Quinn of being verbally abusive, forcefully grabbing Poe on two occasions in Poe’s dorm room, and isolating Poe from other friends by monitoring Poe’s phone and emails. Poe indicates they have broken up with Quinn and would prefer never to see Quinn again. Quinn indicates they are devastated by the breakup because they love Poe; Quinn asks if Poe will accept an apology and Quinn’s promise to leave Poe alone if that is truly what Poe wants. When the Title IX Coordinator conveys Quinn’s proposal to Poe, Poe is receptive but questions what will happen if Quinn breaks the agreement. Poe then comments they regret filing the formal complaint in the first place and indicate they still care about Quinn “as a person.”

# Questions





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# Post-Decision Supports and Protections





# The Title IX obligation

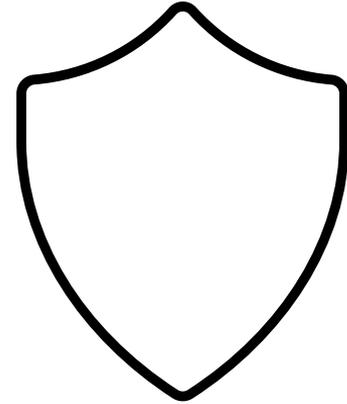
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- Effectively implement remedies for the victim if the respondent is found responsible
- Take not clearly unreasonable steps to prevent the recurrence of sexual harassment

# The anti-retaliation obligation

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- Title IX prohibits retaliation against both parties irrespective of the outcome
- Institution must take not-clearly unreasonable steps to protect against the known risk of retaliation



# B — H

## Example



Student A accuses Student B of sexual assault. Hearing panel finds that Student B did not commit sexual assault. After appeal is final, Student B begins to spread rumors that Student A is promiscuous and releases intimate photos that Student B took while the two were in a relationship.



# Example



Student A accuses Student B of sexual assault. Hearing panel finds that Student B did not commit sexual assault. After appeal is final, Student A prints posters with Student B's face and the caption "rapist" and places them around campus.



# Post-decision accommodations

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- May be required to remedy the effect the sexual harassment had on the victim's participation
- May be required by the institution's mission and values
- May be necessary to mitigate the risk of civil liability



# Potential accommodations

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- Course retakes
- Tuition refunds
- Leaves of absence
- Housing moves
- Counseling
- Academic extensions
- Scheduling assistance
- Parking changes
- Others?



## Example



Student A alleges Student B committed sexual assault that caused Student A to get Cs and Ds for the semester instead of usual As and Bs. After hearing determines sexual assault did occur, Student A requests Cs and Ds be changed to “Pass.”

## Example



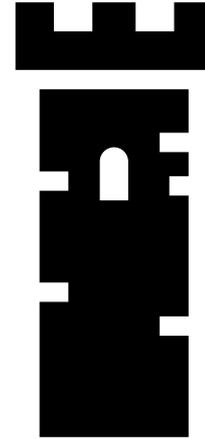
Student A alleges Student B engaged in a single act of fondling at a dance hosted at a Greek house. After a hearing officer finds Student B responsible, Student A requests a refund of on-campus housing charges for the prior academic year.



# Post-decision protections

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- Permanent no contact order
- Permanent proximity restrictions
- Permanent schedule de-conflicting
- Security escorts
- Others?





## Example



Student A reports that Student B engaged in hostile environment harassment by repeated sexual propositioning. After a hearing officer finds Student B responsible, institution imposes no-communication order for the remainder of Student B's time as a student.

# Example

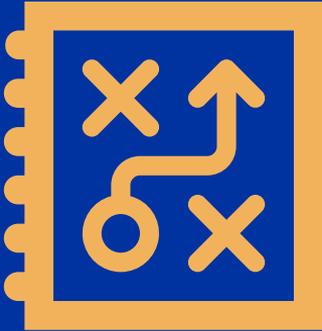
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Student alleges custodial employee repeatedly commented on student's body. Employee was reassigned to clean a satellite building with no students during pendency of investigation. After employee is found responsible, institution mandates training and permanently reassigns employee to clean the satellite building.

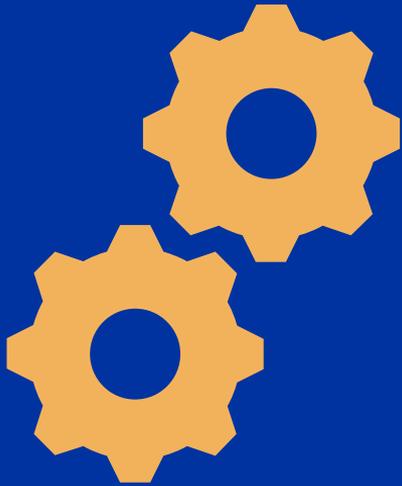


## Example



Student B is found responsible for sexually harassing Student A. The institution imposes a no-contact order on Student B for the remainder of Student B’s senior year. Within two weeks, Student B complains that Student A has sought Student B out at the cafeteria and publicly referred to Student B as a “harasser” in front of Student B’s friends.

## Group Scenario



Oakley complains that Devin sexually assaulted Oakley while Oakley was incapacitated from alcohol. The Title IX Coordinator imposed a mutual no-contact order and restricted Devin from Oakley's residence hall. Devin vigorously denies the complaint and files a counter-complaint, accusing Oakley of making the complaint in bad faith only after Oakley learned that Devin was having sex with someone else. The hearing includes vigorous cross-examination. The hearing officer issues a decision finding a preponderance of the evidence does not support either complaint. After the written decision is issued, the Title IX Coordinator removes both the no-contact order and the residence hall restriction. In response, Oakley's attorney sends the Title IX Coordinator a letter demanding the no-contact order be reinstated and that the restriction be broadened to prohibit Devin from being within 50 yards of Oakley. Oakley also requests that the school release Oakley from the housing contract so Oakley can move off campus where Oakley feels safer.

# Questions



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