



HUSCH BLACKWELL

Title IX Appeal Officer Training

University of Maryland

Winter 2021



Housekeeping

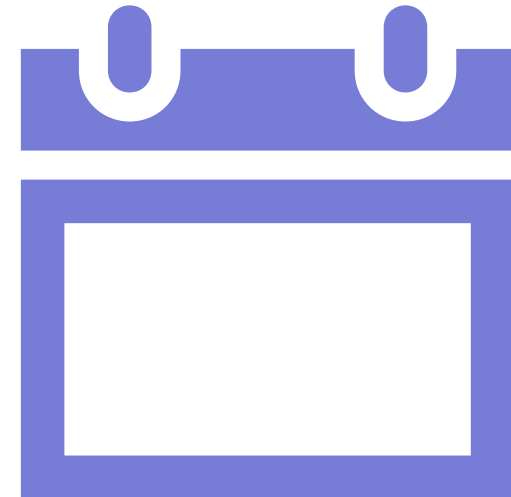
- **Recording is not permitted**
- Slides will be provided by email after the training concludes
- Change Zoom name to match registration
- Raise hand or use chat function to ask questions
- Other breaks—take individually as needed



Agenda



- Title IX Key legal Principles Review
- Applicable Policy Requirements
- Bias, Stereotypes & Conflicts of Interest & Trauma
- Appeal Procedures
- Written Decision



This training is a component of the institution's comprehensive training program which includes other programming and live discussion.

Key Legal Principles Review

Module 1



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





When are the new regs effective?



- August 14, 2020
- Do not apply to Sexual Harassment that allegedly occurred prior to effective date
 - Assessed according to guidance and regulations in place at time alleged conduct occurred

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

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

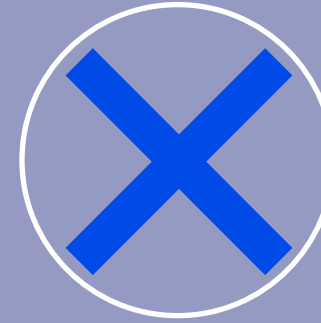
Does Title IX apply to off-campus sexual harassment?



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

Applicable Policy Requirements

Module 2



Scope of Policy

- The University of Maryland is committed to taking the appropriate steps to eliminate Prohibited Conduct, prevent its recurrence and address its effects.
- The policy applies to all members of the University community, including
 - Students, faculty and University of Maryland staff;
 - Contractors and other third parties who are engaged in any University Education Program or Activity; or
 - Who are otherwise interacting with the University including, but not limited to volunteers, vendors, guests and visitors.



UMD's Designated Title IX & Non-Title IX Conduct

UMD Updated Policy

- This Policy also addresses allegations of Other Sexual Misconduct, which includes:
 - Sexual Harassment that occurred against a person outside of the United States or not within an Education Program or Activity;
 - Sexual Coercion;
 - Sexual Exploitation;
 - Sexual Intimidation;
 - Attempted Sexual Assault;
 - Retaliation; and
 - Other Sex-based Offenses.



Standard of Evidence

Preponderance of the evidence

=

“more likely than not”



What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo
harassment

Hostile environment
harassment

Sexual
assault

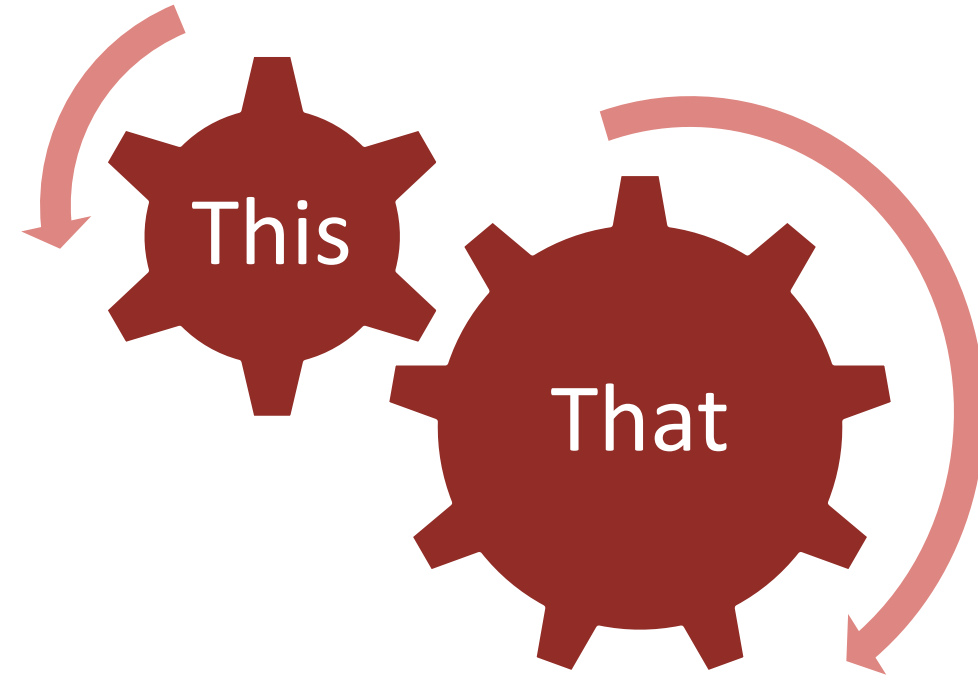
Relationship
violence

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





Example of quid pro quo

Manager tells subordinate employee that subordinate will not get a raise this year unless subordinate performs sexual favors for manager.

Subordinate is in a relationship with another individual and has no interest in performing sexual favors for manager.





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.





How do we determine if a hostile environment exists?

- Consider all the facts and circumstances, such as:
 - The type of misconduct
 - The frequency of the misconduct
 - Where the misconduct occurs
 - Whether a power differential exists, etc.
- From the perspective of a reasonable person



Example of hostile environment

Bookworm student repeatedly gropes Social Butterfly student's buttocks when the two are in the elevator of their shared dormitory. 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 the dormitory.





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 rape?

Having carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. There is “carnal knowledge” if there is the slightest penetration of the vagina or penis by the sex organ of the other person. Attempted rape is included.



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.

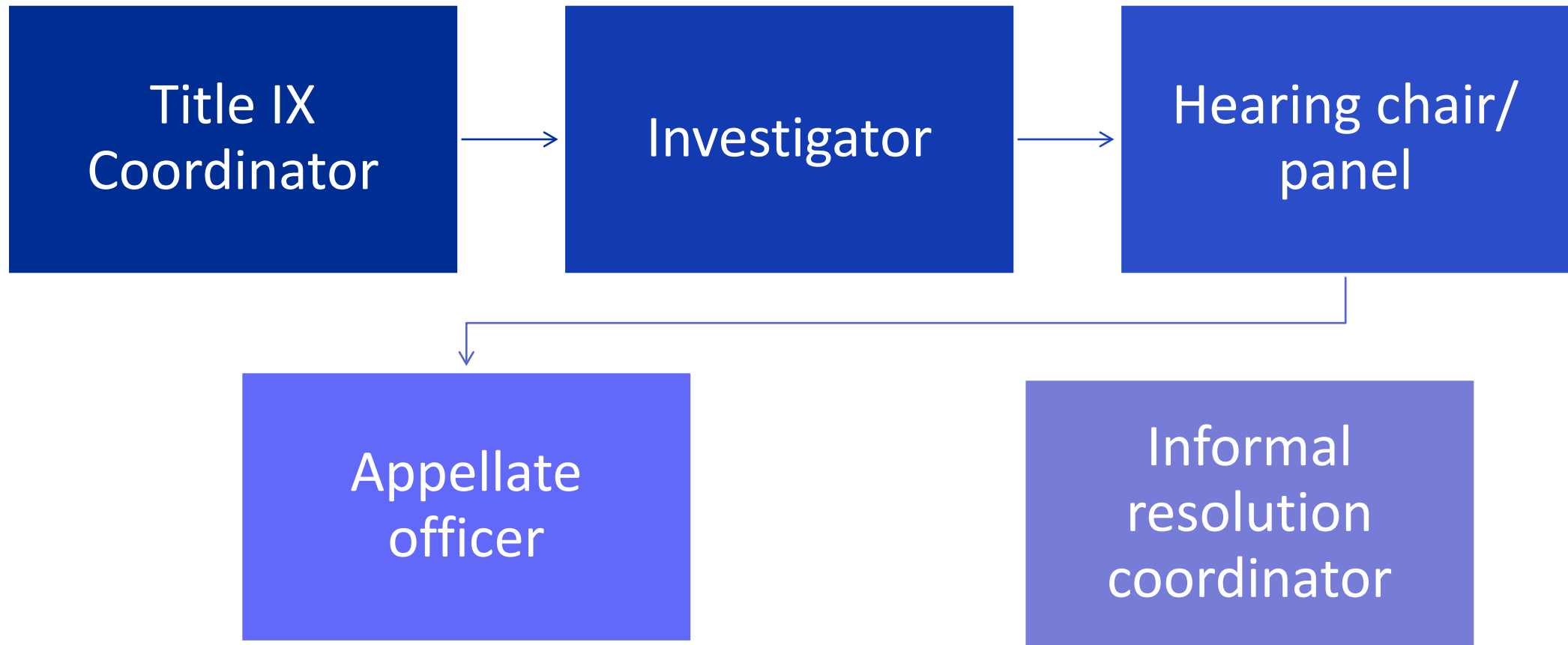




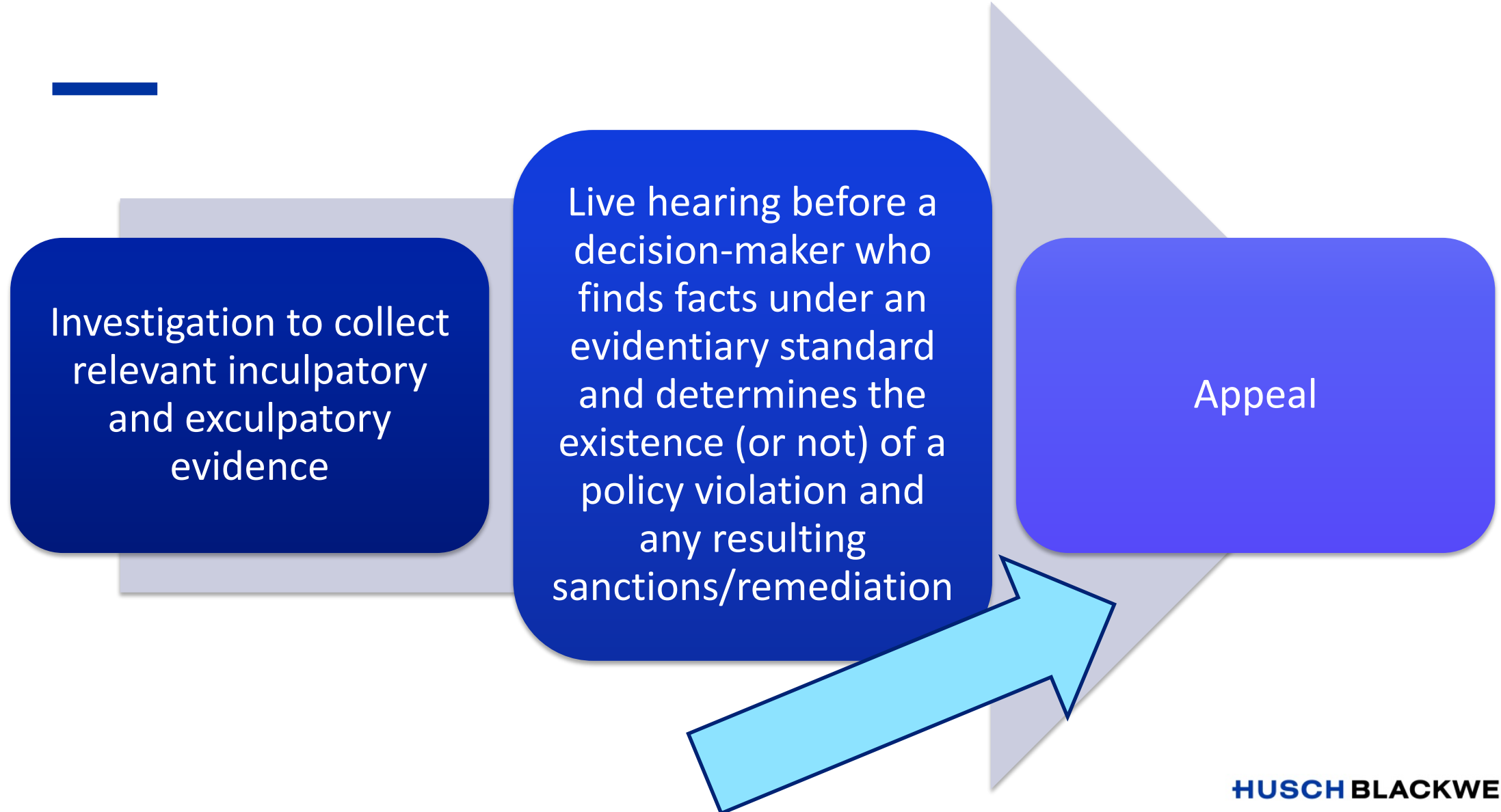
Does Title IX also prohibit retaliation?

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)

Who are the key institutional actors in the grievance process?



What is the grievance process?





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



What steps does due process require under the grievance process?

- Examples of due process safeguards under Title IX include:
 - ***Written notice*** to parties of complaints, dismissals, and rights;
 - ***A meaningful opportunity*** to be heard free of bias or conflicts of interests, including an opportunity for advisors to question witnesses and parties;
 - ***Written explanation*** of the decision-maker's determination; and
 - ***An opportunity to appeal.***

85 Fed. Reg. 30,026, 30,053 (May 19, 2020) (citations omitted).



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





Must a University Appeal Official Maintain Confidentiality?

- Yes
- As a University employee, you must abide by the same confidentiality rules as the University itself, including FERPA
- You must maintain the confidentiality of the process and not disclose information to any third-party except as the process itself requires

Bias, Stereotypes, Conflicts & Trauma

Module 3



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



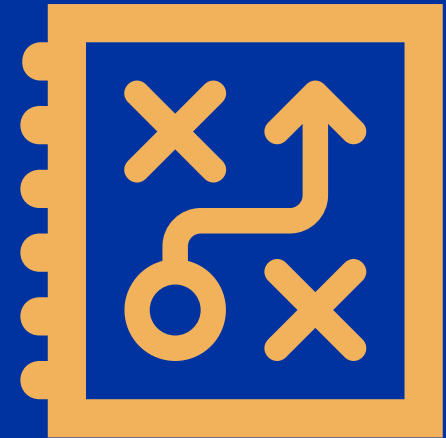
What is a conflict of interest?

- When an individual has a ***material connection to a dispute***, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position



Example of conflict of interest

Student Soccer Goalie files a formal complaint of sexual harassment against a student Lacrosse Midfielder. One of the hearing panel members selected is Midfielder's faculty advisor who has previously written letters of recommendation for Midfielder's application to law school in which faculty advisor wrote that Midfielder is "honest to a fault."



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.”

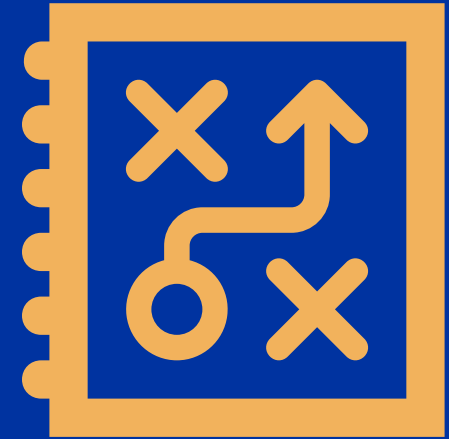
“People who are dating can’t commit sexual assault against each other.”

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



Example of bias

An employee in the gender studies department who is chosen to serve on a hearing panel also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."





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)



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 might affect a party

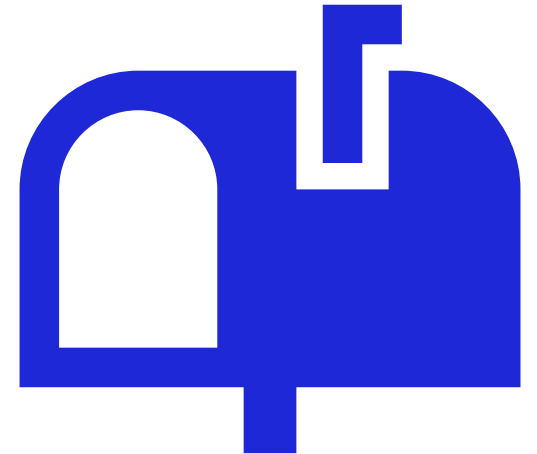
- Not in every case
- Not just one party
- Never assume anyone participating in a hearing has suffered any trauma
- Don't assume information is not credible due to the manner delivered
- Understand memory may be clarified in time

Appeal Procedure

Module 4

Appeal Rights

- Either Party may appeal the Written Notice of Designation.
- The bases for appeal are limited to:
 - Procedural irregularity
 - New evidence
 - Conflict of interest
 - Substantially disproportionate sanction





Appeal Officer Obligations

- All Appellate Officers will have had no previous involvement with the case that the Appellate Officers are assigned to review.
- No conflict of interest





Appeal Bases

- The bases for appeal are limited to:
 - Procedural irregularity
 - New evidence
 - Conflict of interest
 - A decision not based on substantial information



Procedural Irregularity

- In all cases, the procedural irregularity that affected the outcome: meaning it must be ***material***.
- A procedural irregularity affecting the written determination may include, *i.e.*:
 - A failure to follow the University's procedures;
 - A failure to objectively evaluate all relevant evidence, including inculpatory or exculpatory evidence; or
 - A determination regarding what evidence was excluded as irrelevant.





New Evidence

- Evidence that ***was not reasonably available*** at the time ***that could have affected the outcome***.
- Practice Tip: Evidence presented prior to the time the designation or written determination is issued **does not qualify** as new evidence that was not reasonably available





Conflict of Interest

- The Title IX Officer (or designee), Investigator, or hearing panel member and/or University Authority had a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent that affected the outcome.
- Claims of conflict of interest or bias should be based on the current case and process in question and will be assessed accordingly.



Substantially Disproportionate Sanction

- Applicable ***only*** to written determination
- The Sanction set forth in the written determination is substantially disproportionate to the facts of the particular Policy violation.





Procedures

- Appeals will be in writing only
- There will be no hearing
- The appeal deliberation is closed to the parties
- Written decision will include rationale and be issued within 10 days of deliberations
- The appeal decision is final and is not subject to further appeal



Appeal Official Options

- The Appellate Hearing Officer(s) may:
 - Affirm, in whole or part, the decision;
 - Overturn, in whole or part, the decision; or
 - Remand the matter to remedy procedural errors or consider new evidence.





Conclusion of Adjudication

- The determination regarding responsibility for a violation becomes final either:
- On the date that the University provides the Parties with the written decision of the result of the appeal if an appeal is filed, or
- If an appeal is not filed, on the date after which an appeal would no longer be considered timely, subject to any remanded proceedings.



Key Concepts:

- Appeals are not intended to allow for a second review of the same information provided to the campus Title IX office
- An Appellate Officer should not substitute their judgment for that of other decisionmakers.



Practice Point: Stay Within the Scope of the Appeal

- It is best practice for an appeals process to be designed to ***catch errors*** and ensure that the underlying investigation and adjudication process was ***fair and thorough***.
- This is contrast to an appeal process that provides another party the opportunity to second-guess decisions, absent clear error.





Appeal Preparation

- **Step 1: Review relevant policy and procedures**
- **Step 2: Review appeal and any response (and supporting documents)**
 - What arguments have been raised in the appeal
 - What arguments have been raised in the response
- **Step 3: Consider whether the grounds have been satisfied**
 - If yes, proceed; if no, prepare explanation of decision
- **Step 4: Review investigative report, hearing transcript, outcome letter, and any sanction decision**
 - Do you understand what decision was reached and why?



Written Appeal Decisions

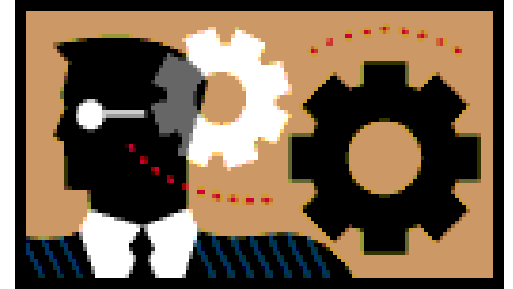
Module 5



Appeal Decision Letter

Structure of a Decision Letter

- ***(I) Background Information***
 - When was complaint submitted?
 - What was alleged?
 - What did the hearing panel find?
 - What sanction was found, if any?
 - When was appeal submitted and was it timely?
- ***(II) Summary of Appeal***
 - What is the appealing party alleging, and is that allowable under policy?
 - Address cross appeals in same way.





Appeal Decision Letter

- **Structure for a Decision Letter**
 - ***(III) Analysis of each basis of appeal, separately***
 - What factors support or contradict the appeal argument?
 - If error is alleged, did an error occur?
 - If an error occurred, would it have been sufficient to significantly impact the outcome of the investigation?
 - ***(IV) Conclusion***
 - Is the appeal granted or denied?
 - If granted, what outcome?





Practical Tips: Documenting the Decision

- Summarizes appeal official's decision, ***upfront***
- Address the appeal grounds
- Address all arguments raised in appeal, cross-appeal, and in any response
- Address all relevant policy definitions and procedural provisions
- Consult with Title IX Coordinator and legal counsel regarding any procedural or legal questions or issues
- ***Show your work:*** explain what decision you reached and why
- **It is a best practice for appeal decision letters to tell the whole story within the “four corners” of the letter.**

Questions



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