



HUSCH BLACKWELL

Title IX Appellate Officer Training

University of Maryland

Summer 2023



Agenda



Title IX Background for Appeal Officials

- Mod. 1: Title IX Key Legal Principles Review
- Mod. 2: Applicable Policy Requirements
- Mod. 3: Bias, Stereotypes, Conflicts of Interest & Trauma
- Mod. 4: Grievance Process

Practical Information to Inform Appeal

- Mod. 5: Appeal Procedures
- Mod. 6: Common Issues Raised in Appeal
- Mod. 7: Written Decisions



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



Poll Question

- How familiar are you with Title IX?
 - Brand new
 - I've read our policy
 - Some investigation, hearing, or appeal experience
 - Experienced Title IX professional/counsel's office

Key Legal Principles Review & Background for Appeal Officials

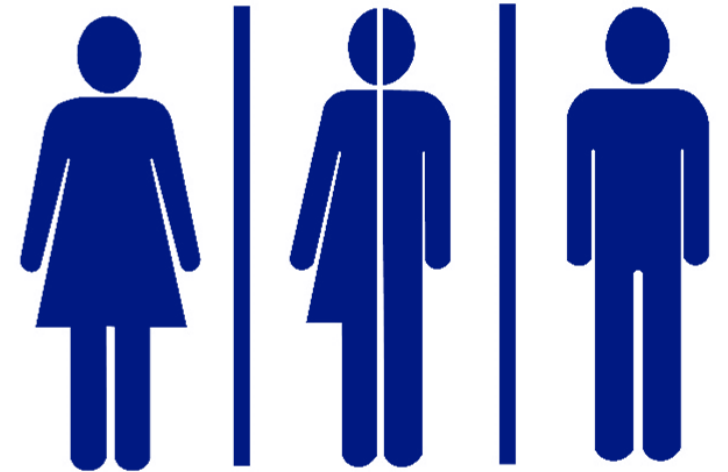
Module 1



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.”

34 C.F.R. § 106.31



To what sexual harassment does Title IX apply?

- 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 a private location that is not part of an 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

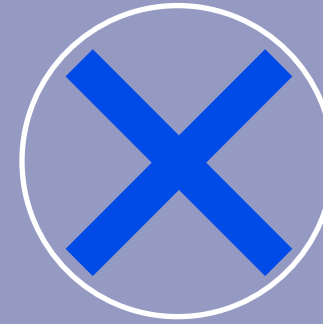
Does Title IX apply to off-campus sexual harassment?



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

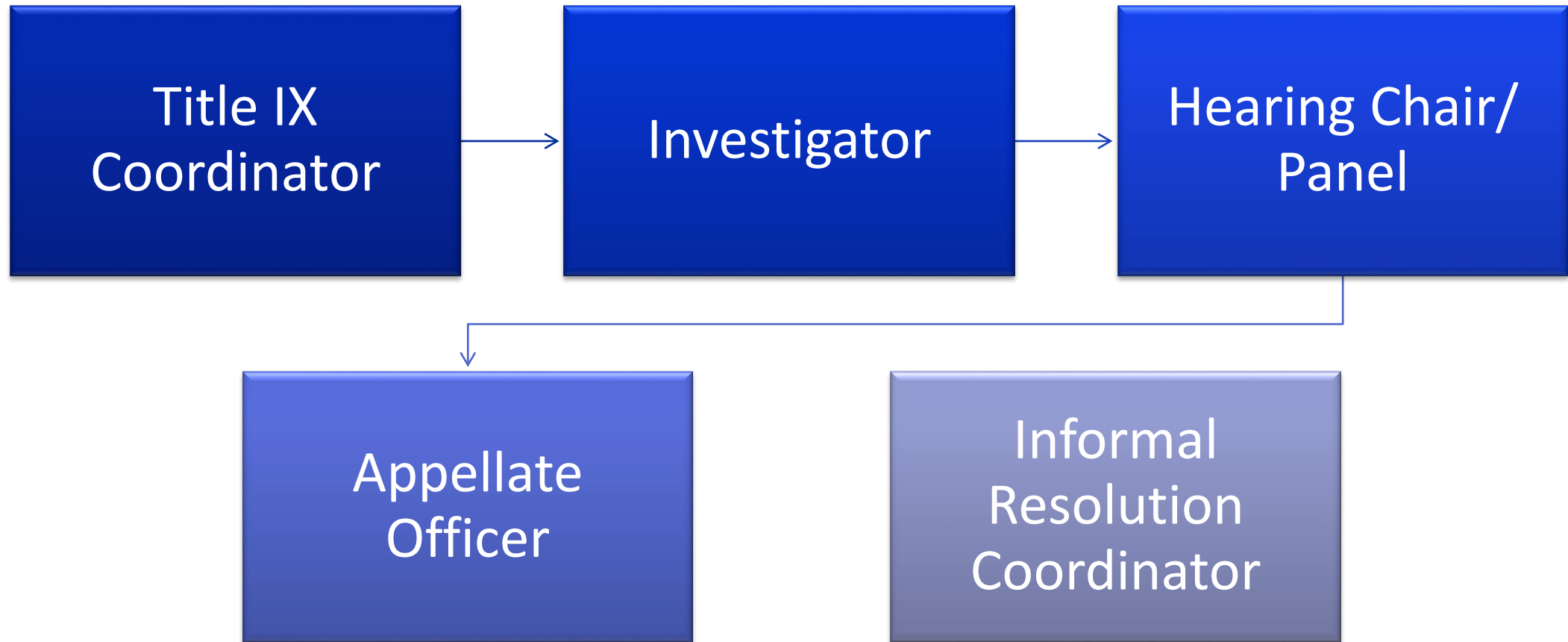
What is the grievance process?

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

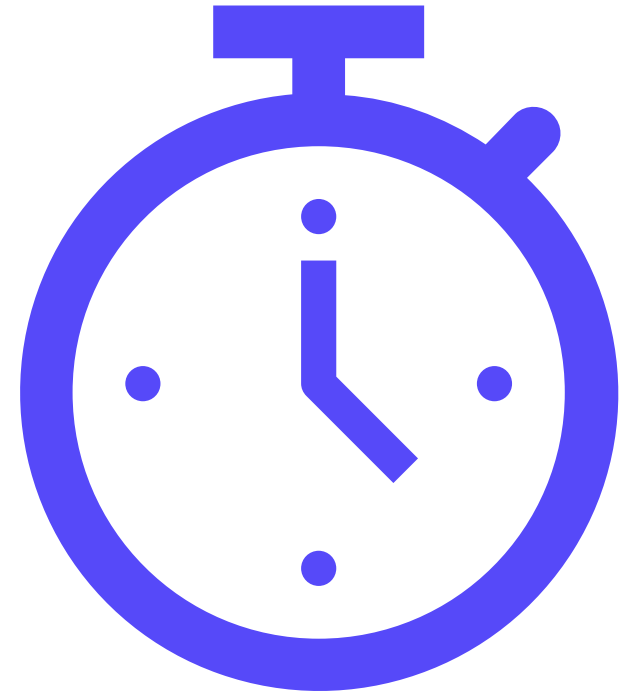
Who are the key institutional actors in the grievance process?





How long does a grievance process take?

- There is no firm deadline, and the length of the grievance process varies depending on a variety of factors
- Institution must be reasonably prompt, advise parties of timelines for particular phases of the process, and notify parties of extensions of timelines and the reasons for the same





Standard of Evidence

Preponderance of the evidence

=

“more likely than not”



What general principles govern the grievance process?

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



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).



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





When must we dismiss a formal complaint?

- If filed by the alleged victim, and the alleged victim is not a current or attempted participant in education programs and activities
- Complaint does not allege sexual harassment in the institution's education programs or activities
- Complaint alleges sexual harassment abroad
- Conduct alleged would not amount to sexual harassment even if it occurred as reported
- *Practice point – duty*



When may we dismiss a formal complaint?

- Alleged victim indicates in writing a desire to withdraw the complaint (or particular allegations)
- Respondent is no longer enrolled in or employed by the institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination



Can an institution set a time limit to appeal?

- Yes – an institution can and should require an appeal to be filed within a reasonable number of days after a dismissal or determination
- Institution may set a secondary deadline for the non-appealing party to elect to file a cross-appeal *after* the first party has appealed





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

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, ***promote*** accountability, 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.



Maryland'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.

What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo
harassment

Hostile environment
harassment

Sexual
assault

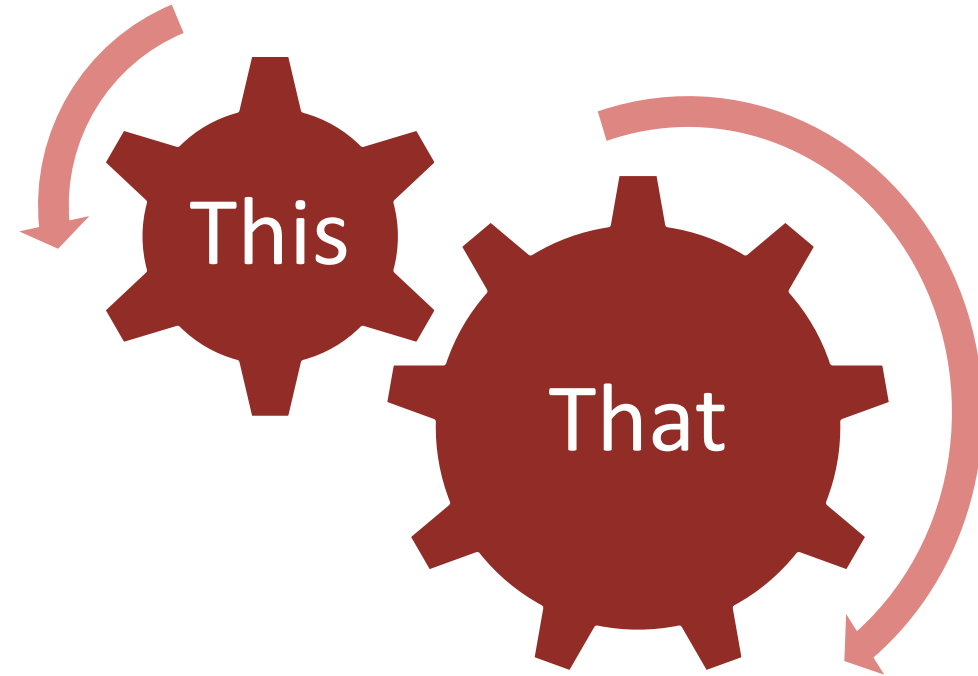
Relationship
violence

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?

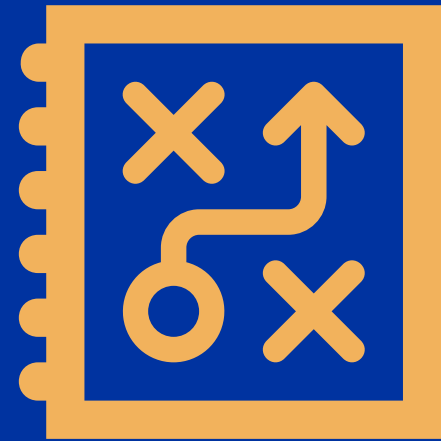
Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.





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)

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

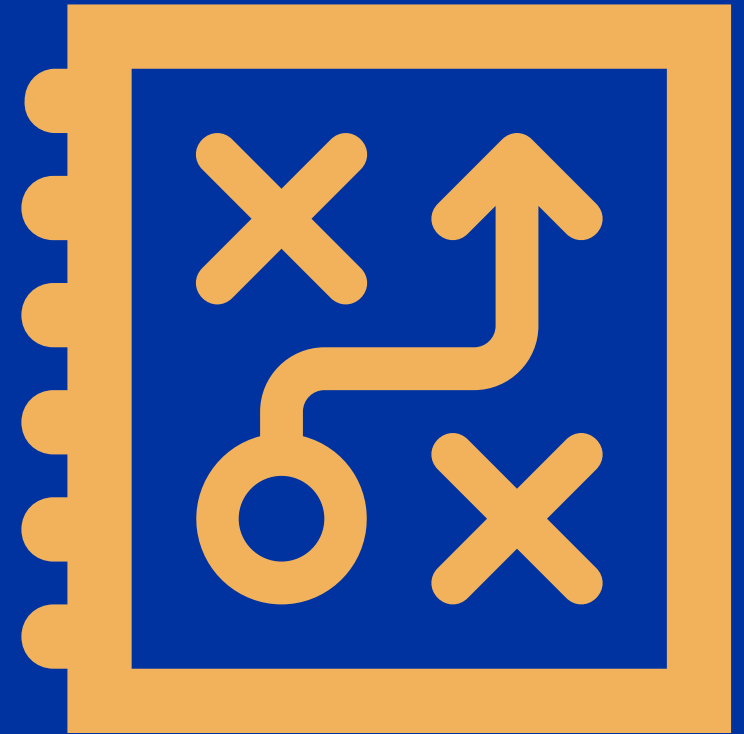


What is a conflict of interest?

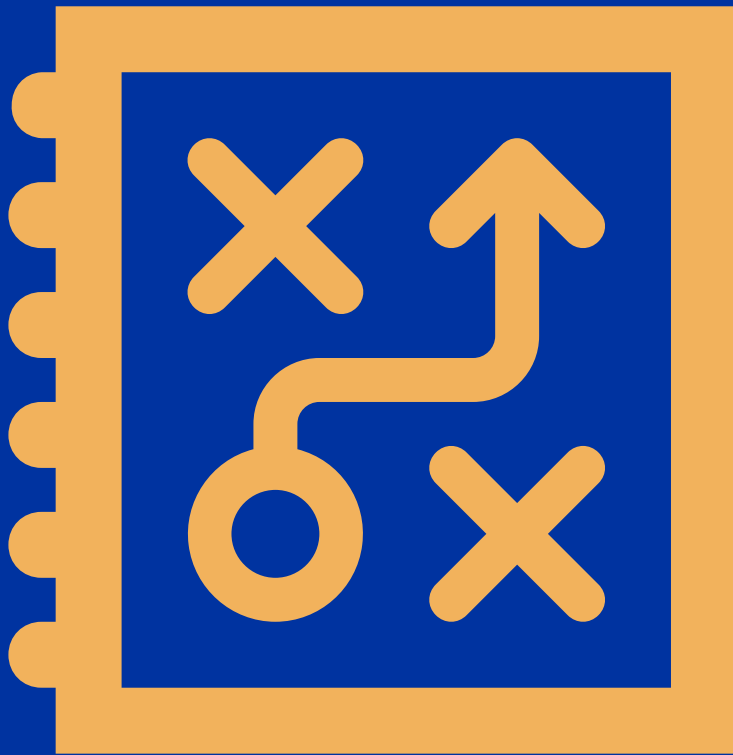
- When an individual has a ***material connection to a dispute***, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature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

Example: Conflict of interest

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



Example: Conflict of interest

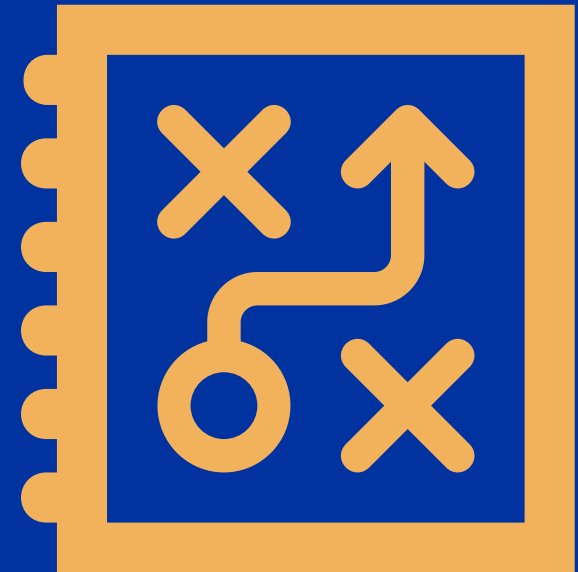


An administrator accuses an employee of an office supply vendor of sexual harassment; matter is investigated, decided at the hearing stage and is now on appeal. Institution assigns an appeal official whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.

For Discussion

Do the following circumstances or relationships constitute conflicts of interest?

- Respondent faculty member and a hearing officer previously disagreed about a curriculum matter
- Complainant is currently a student in appeal officer's class
- Respondent is a staff member in the OCRSM charged with investigating complaints, generally



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.”

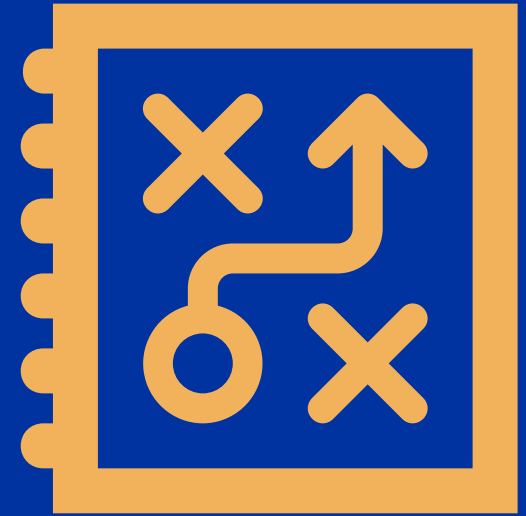
Example: Bias

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."



Example: Bias

Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.” Investigator tells a co-investigator, “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”





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)



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

Grievance Process

Module 4



What is a formal complaint?

Signed in writing

From the alleged victim or the Title IX Coordinator

Alleging sexual harassment

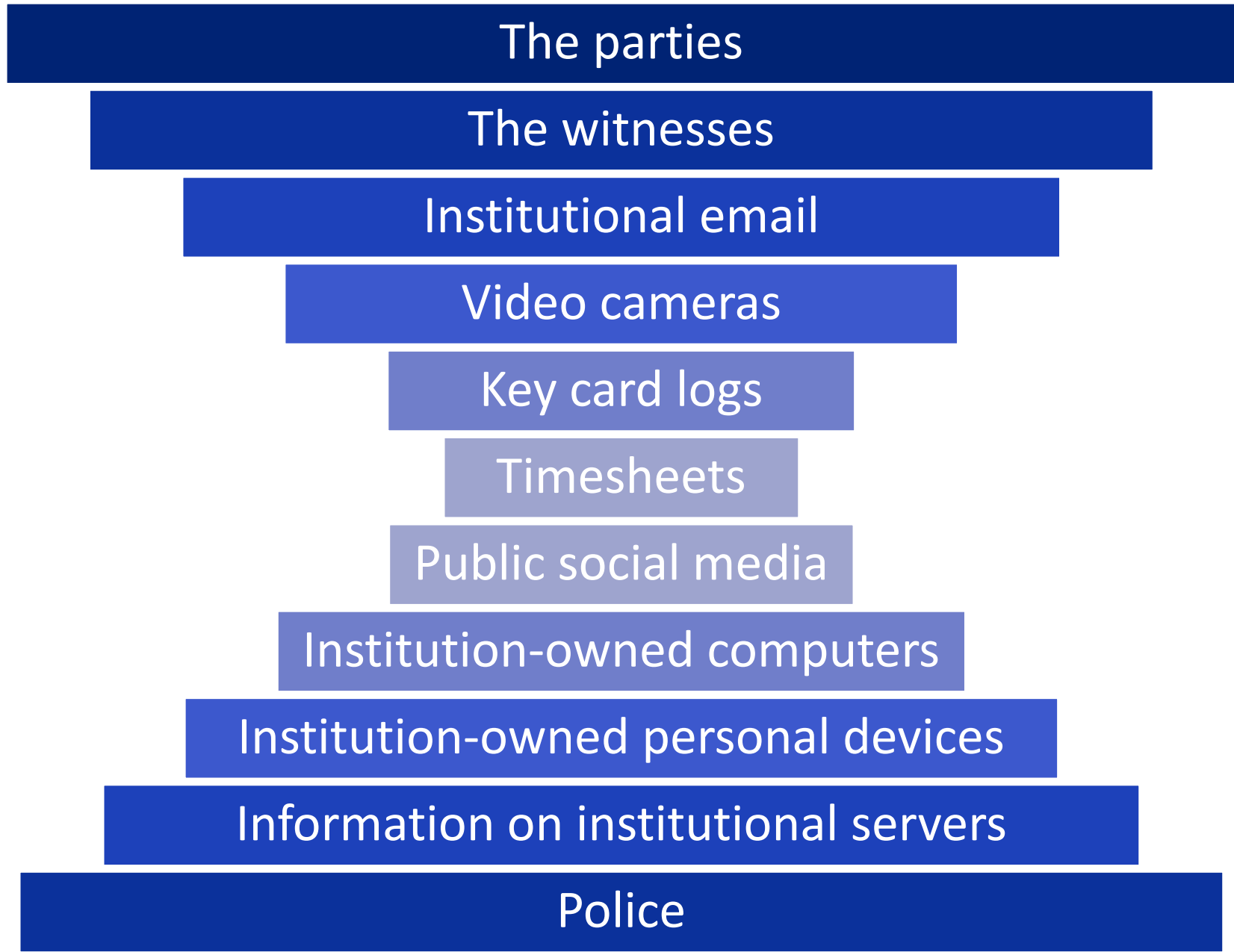
Indicating desire to initiate the grievance process
(i.e., investigation and hearing)



What is the purpose of a Title IX investigation?

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

**Example:
Sources of
Non-
Testimonial
Evidence**



Do the parties have access to the evidence?

- At a minimum, parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is issued
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally



Do the parties get to respond to the evidence?

- Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report



When is the investigation report finalized?

- After the 10-day period to review the evidence expires
- The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the 2020 Title IX regulation, factual findings and determinations of policy violations are made at a subsequent hearing





What exactly has to be shared?

- Anything that has “evidentiary” value
- That is, the information is potentially inculpatory or exculpatory in light of the allegations at issue; or is otherwise potentially relevant
- E.g., witness statements; interview transcripts; text messages; social media posts; photographs; etc.
- Logistical communications; calendar invites; support measure communications generally are not shared



How should we make the evidence available to parties?



- Regulation requires the evidence be sent to each party and advisor in:
 - Electronic format or
 - Hard copy



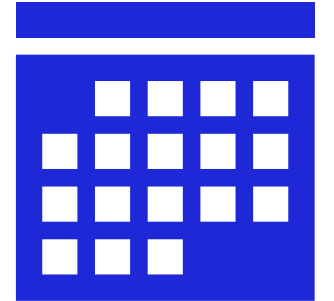
Is an investigator required to address a party's response to the evidence?

- It depends on whether the party's comments merit a response
- If no response is merited, the party's submission can simply be appended to the final investigation report



What is the last step in the investigation?

- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing





What is the purpose of the hearing?

To hear testimony and receive non-testimonial evidence so that:

- The hearing officer 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



Balancing the parties' interests

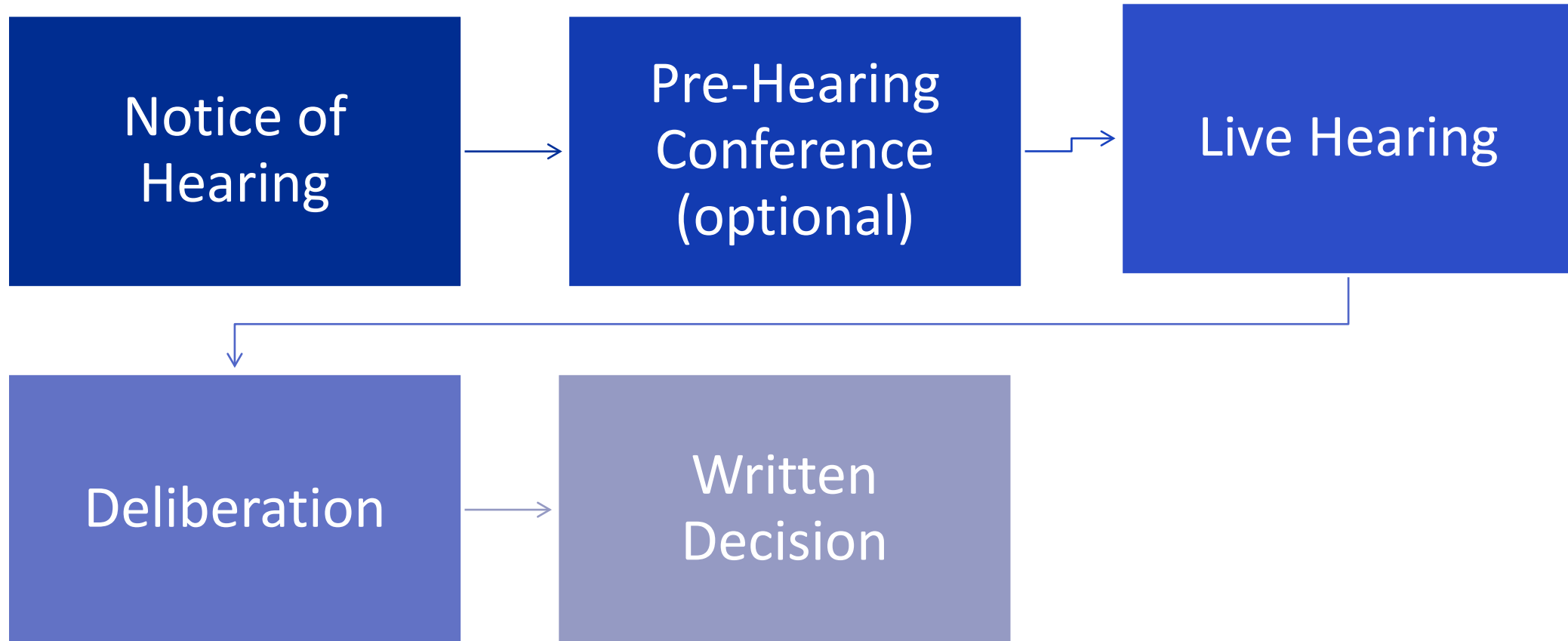
- The Department of Education believes that live hearings with cross-examination serve as a valuable truth-seeking tool in the grievance process
- But the Department recognizes that cross-examination in cases involving violent allegations could be traumatic for complainants
- To balance the two, the Department mandated both parties have the right to a third-party advisor



Live hearing requirement

- Postsecondary institutions must provide for a live hearing
- At that hearing, the decision-maker must allow the advisors to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility
- Cross-examination may occur with the parties located in separate rooms at the request of either party

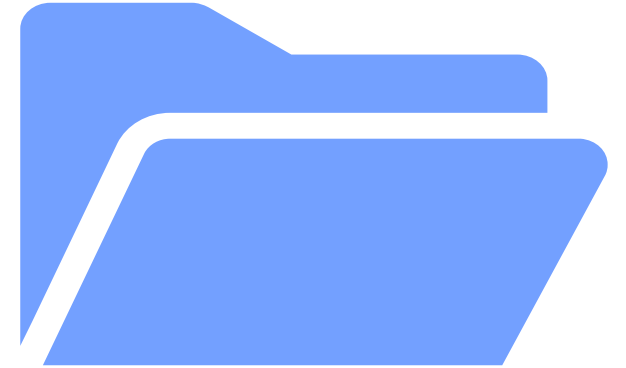
What are the phases of the hearing process?





How should we prepare for a hearing?

- Know who's coming (parties, witnesses, advisors, others)
- Consider potential conflicts of interest
- Review relevant policies
- Review investigative report/file
- Review hearing procedures
- Review rules of decorum
- Review any responses to report by parties
- Prepare “must ask” questions
- Anticipate questions and issues



How does the hearing actually work?

Required elements include:

Hearing Officer must independently evaluate questions for *relevance* and resolve relevancy challenges

Party's advisors must be allowed to conduct live questioning of other party and witnesses

Negative inference may not be drawn from party or witness refusing to submit to live questioning or answer questions

Certain questions excluded (sexual history; health/privileged information unless waived; duplicative/repetitive)



Typical Hearing Elements



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



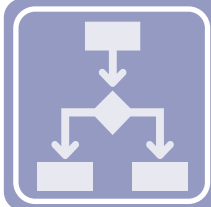
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



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

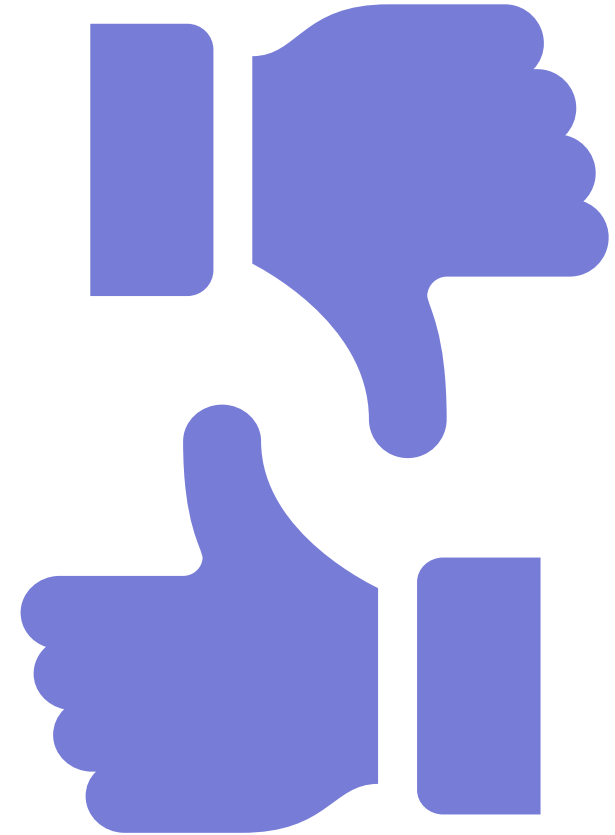


Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



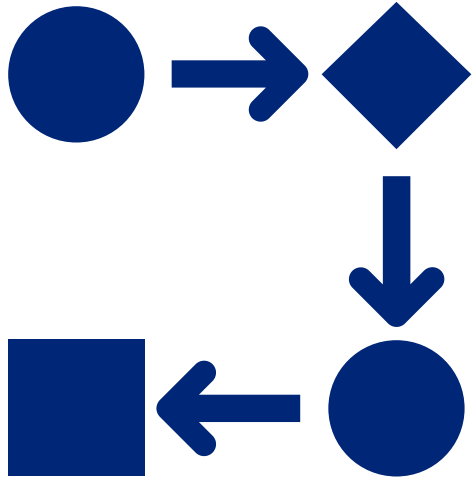
What is a determination?

- 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





Purpose of a determination



- Moves matter to next procedural step
- Record of following process
- Documents fair process
- Provides parties and subsequent decision-makers with information



Critical elements



- Preliminary case information
- History of the case
- Allegations
- Applicable policies/procedures
- Standard of proof
- Evidence gathered/considered
- Evidence/Facts: Factual findings
- Decision-maker:
 - Analysis and conclusion regarding responsibility
 - Sanctions
 - Procedures/grounds for appeal

Appeal Procedures

Module 5



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 in contrast to an appeal process that provides another party the opportunity to second-guess decisions, absent clear error.





Appeal Rights

- Either Party may appeal the Written Notice of Designation or Written Notice of Determination.
- Parties notified of appeal and general grounds for appeal → Other party given 5 days to submit statement
- The bases for appeal are limited to:
 - Procedural irregularity
 - New evidence
 - Conflict of interest or Bias
 - Substantially disproportionate sanction (*applicable ONLY to Written Notice of Determination*)



Appeal Officer Obligations

- All Appellate Hearing Officers will have had no previous involvement with the case that the Appellate Hearing Officer(s) are assigned to review.
- No conflict of interest or bias





Procedural Irregularity

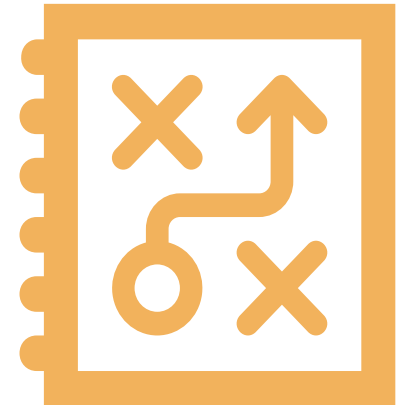
- In all cases, the procedural irregularity must be ***material to the outcome*** of the designation or the written determination.
- A procedural irregularity affecting the designation or the written determination may include:
 - A failure to follow the University's procedures;
 - A failure to objectively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





Example (procedural irregularity)

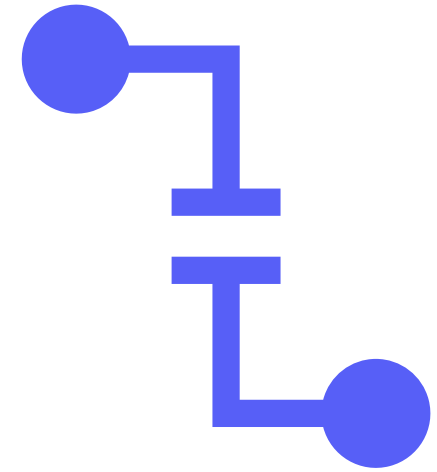
During a hearing, the hearing panel denies the respondent's advisor the right to submit written questions to the witnesses. The respondent appeals, citing this procedural irregularity, and argues that key witness testimony relied on by the hearing panel must be excluded because the witness was not subjected to questioning by the advisor, as required by the policy. And without such testimony, the outcome cannot be supported.





Are all procedural errors appealable?

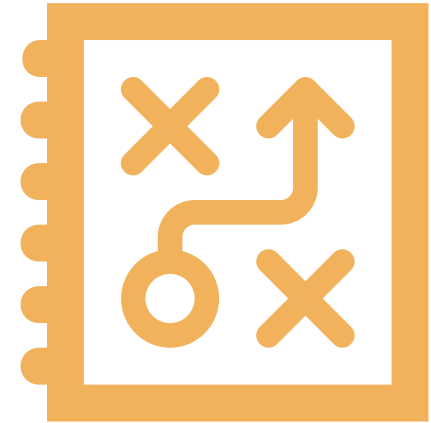
- No – the procedural irregularity must be one that “affected the outcome of the matter”
- Errors that affect the outcome may be referred to as “prejudicial” errors
- Errors that do not affect the outcome may be called “non-prejudicial” or “harmless” errors





Example (harmless error)

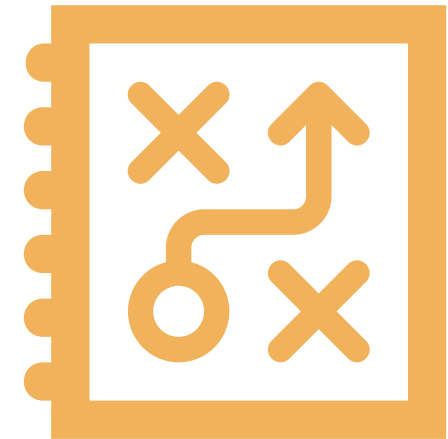
Policy required hearing to be held within 60 days of submission of Complaint. Hearing was held 61 days after submission of Complaint due to a counting error. The evidence would have been the same if the hearing were held a day earlier.





Example (procedural error)

Appeals officer finds there was a prejudicial procedural error because the hearing officer failed to send notices requesting several of the respondent's key witnesses appear. Appeals officer vacates the adverse finding against the respondent and directs that a new hearing take place after appropriate notices to appear have been issued.





New Evidence

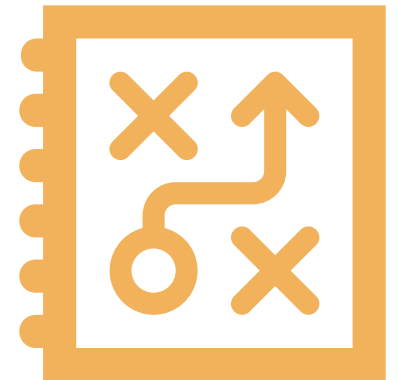
- Evidence that ***was not reasonably available*** at the time the designation or written determination was made, ***that could affect the outcome.***
- Evidence presented prior to the time the designation or written determination is issued **does not qualify** as new evidence that was not reasonably available





Example (new evidence)

After determination is made that respondent did not commit sexual misconduct, complainant secures a previously unknown video made by a bystander at a party that depicts respondent groping complainant and complainant attempting to pull away from respondent. The bystander has been out of the country and only learned of the hearing after returning a few days ago.





Conflict of Interest or Bias

- The Title IX Officer or designee, Investigator, or Hearing Officer had a conflict of interest or bias for or against Complainants or Respondents generally, or the individual Complainant or Respondent, that affected the designation or written determination.
- 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

UMD Updated Policy

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





Appeal Procedures, Generally:

- Appeals will be in writing only
- There will be no hearing
- The appeal deliberation is closed to the parties
- Written decision will be issued including rationale which decision shall be shared with both Parties, within five (5) Days of the deliberations
- The appeal decision is final and is not subject to further appeal



Should we ever dismiss an appeal?

- Yes – dismissal is appropriate if:
 - Appeal is filed after the reasonable deadline set in the policy (5 days)
 - Appealing party does not articulate one of the grounds for appeal



Appeal Official Options

- The Appellate Hearing Officer(s) may:
 - **Affirm** the designation or written determination;
 - **Overturn** the designation or written determination;
 - **Affirm** the determination of responsibility and modify the sanction if disproportionate;
 - **Remand** the case to remedy procedural errors or to 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.



May the institution appeal if the parties don't?

- No – the institution does not take appeals of its own determinations
- In the event a formal complaint is filed by the Title IX Coordinator, the Title IX Coordinator should not have the right to appeal





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?



Common Issues Raised in Appeals

Module 6

Relevance Determinations —



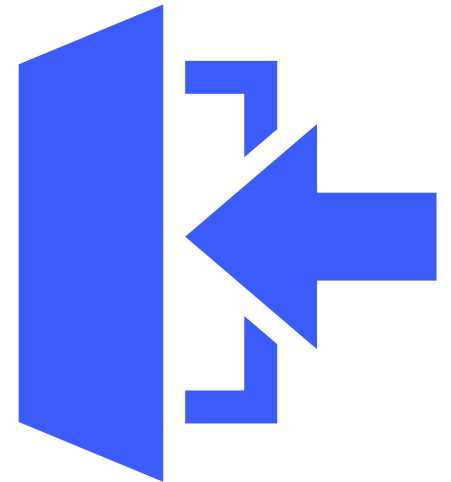
What is relevance?

- Evidence is relevant if:
 - It has a tendency to make *a fact* more or less probable than it would be without the evidence; and
 - The *fact is of consequence* in determining the action
- Relevance must be determined considering the form of sexual harassment alleged



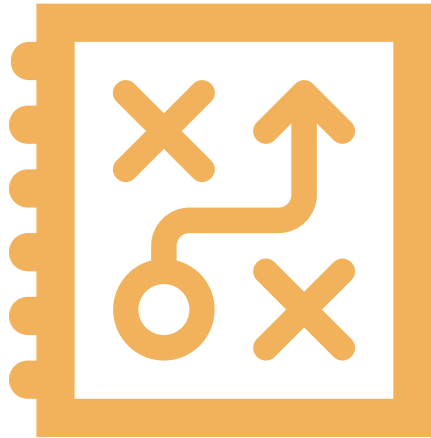
Who determines relevance?

- Hearing officers must screen questions for relevance and resolve relevance objections
- Hearing officer must explain any decision to exclude a question as not relevant
- Common appeal argument is “procedural irregularity”





Example (relevant)



Coach is accused of sexually propositioning Player in exchange for more playing time. Witness states that: “One of the trainers heard Coach say that Player is ‘extremely attractive.’”

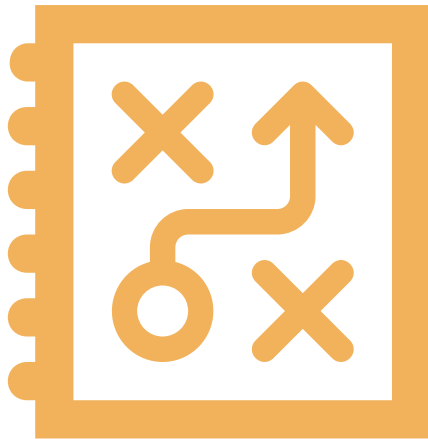
Example: Relevant

One student has accused another of stalking. Respondent's advisor asks Complainant, "Did Respondent ever threaten to harm you physically?"



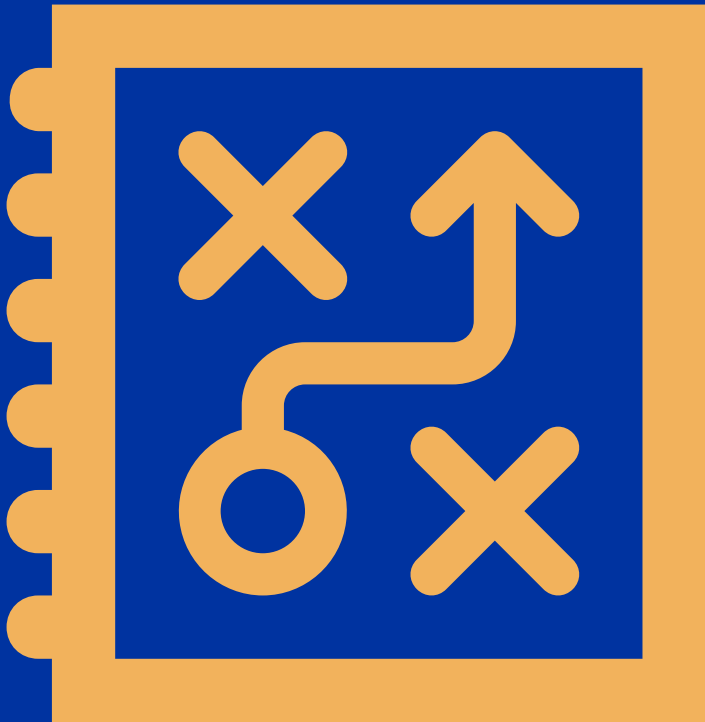


Example (not relevant)



Journalism student has accused Professor of sexual harassment. Witness says: “Student was convicted for driving under the influence when they were a sophomore in high school.”

Example: Relevant

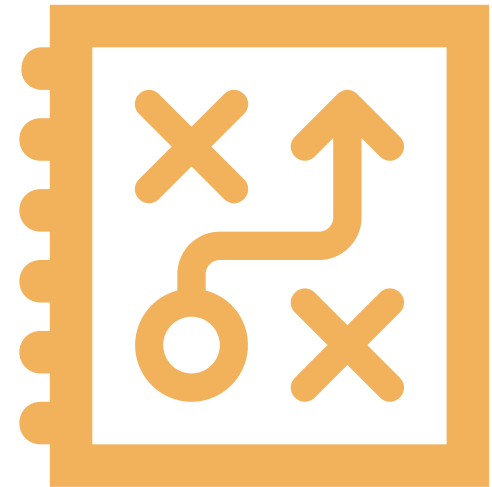


Assistant Provost has complained that Cabinet member created a sexually harassing hostile environment. Advisor for Assistant Provost asks Cabinet member, “Did you tell the Cabinet, in front of the Assistant Provost, that Assistant Provost was better suited to be a sexy stay-at-home parent than to be Assistant Provost?”



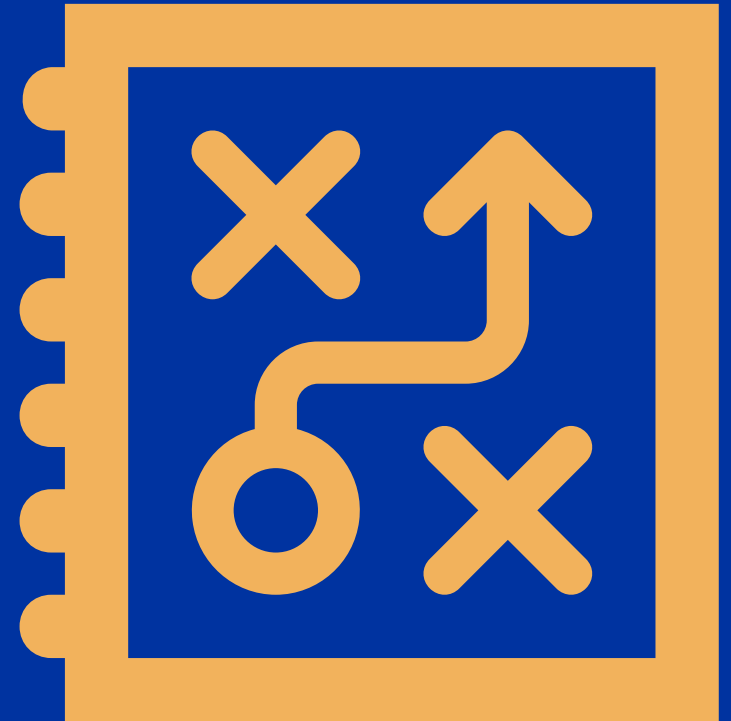
Example (not relevant)

Complainant alleges Significant Other engaged in dating violence by kicking complainant during an argument. Witness asserts: “Complainant is only dating Significant Other because of the Other family’s money?”

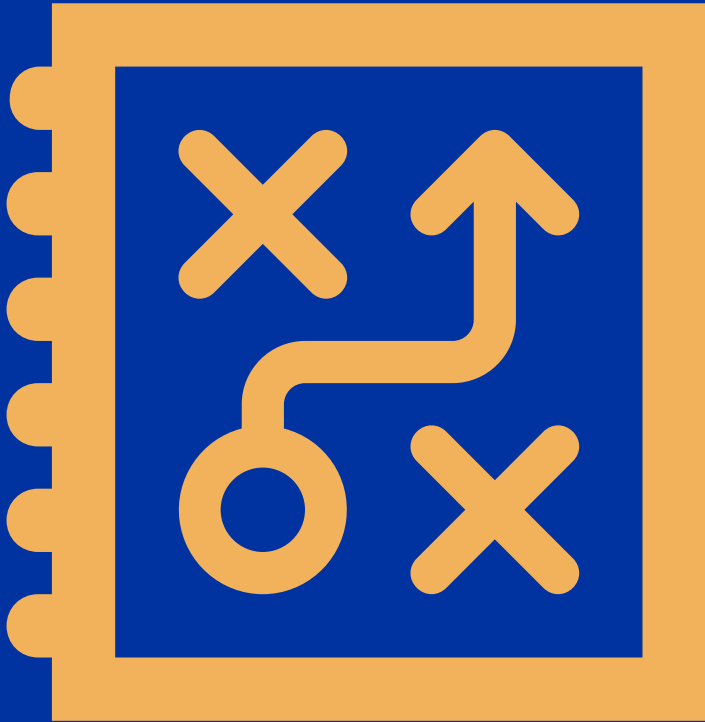


For Discussion: Example

Faculty Member accused Senior of posting negative reviews on RateMyProfessors.com after Faculty Member declined Senior's attempts to instigate a romantic relationship. Advisor for Senior asks Faculty Member, "Haven't you had several negative reviews on RateMyProfessors.com?"



For Discussion: Example



Student A alleges Student B committed sexual assault when groping Student A's buttocks. Student A's advisor asks Student B, "Haven't you been found responsible for groping two other students?"

Allowance or Prohibition of Sexual History





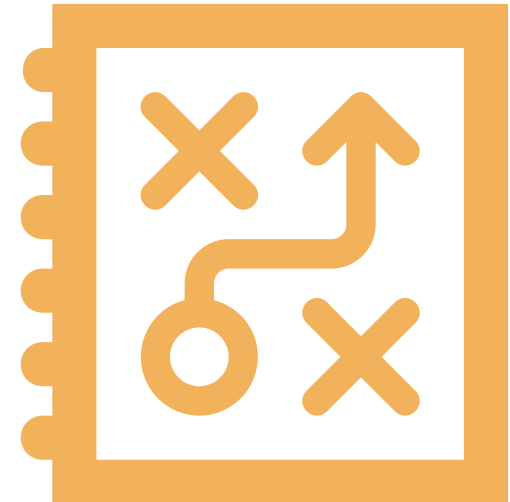
Is sexual history considered?

- Generally, **no** – Evidence of a complainant’s prior sexual behavior is relevant and appropriately considered only if:
 - Offered to prove that someone other than the respondent committed the conduct, or
 - If evidence of specific incidents of the complainant’s prior sexual behavior with the respondent are offered to prove consent



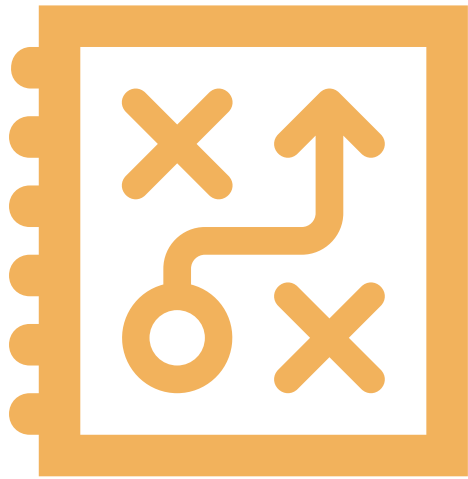
SH Example (impermissible)

Law student has accused a faculty member of sexual harassment.
Witness asserts: “Law student slept with a number of individuals in the month before the claim.”





SH Example (permissible)



Engineering student has accused Fine Arts student of sexual assault. Engineer states that Artist had intercourse with Engineer without using a condom without Engineer's agreement--Engineer always requires protection. Witness provides "Engineer had unprotected sex with Artist a week prior?"

Reliance on Unavailable Witness Statements



Poll Question

Should a hearing officer exclude the statements of any party or witness who refuses to attend the hearing and/or submit to cross-examination?

- Yes
- No



Victim Rights Law Center et al. v. Cardona (D. Mass. July 28, 2021)

- Struck down part of the 2020 amendments to Title IX regulations
- Vacated regulatory language prohibiting decision-makers at postsecondary institutions from relying on statements by individuals who did not submit to cross-examination during a live hearing
- Department of Education guidance indicates that it will not enforce the vacated language.
- Decision-maker may not make an inference solely from the decision of a party or witness to not participate at the hearing





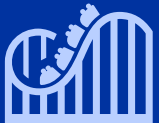
Can a postsecondary institution keep its exclusionary rule?

- No
- To the extent statements made by a party or witness who does not submit to cross-examination at a live hearing are relevant, they must be considered in any Title IX grievance process initiated after July 28, 2021

Updated OCR FAQ Guidance

Question: Despite the court’s decision, may a postsecondary school choose to maintain the prohibition on considering statements made by a party or witness who does not submit to cross-examination at a live hearing as part of its Title IX grievance process?

Answer: No. The 2020 amendments at 34 C.F.R. § 106.45(b)(1)(ii) require “an objective evaluation of all relevant evidence.” To the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation’s relevance rules, they must be considered in any postsecondary school’s Title IX grievance process that is initiated after July 28, 2021.





Can a decision-maker rely on statements of a party or witness who does not answer questions posed by the decision-maker?

- Yes
- If a party or witness submits to cross-examination but does not answer questions posed by the decision-maker, the decision-maker still may not draw any inference about the party's credibility based on the party's refusal to answer the questions

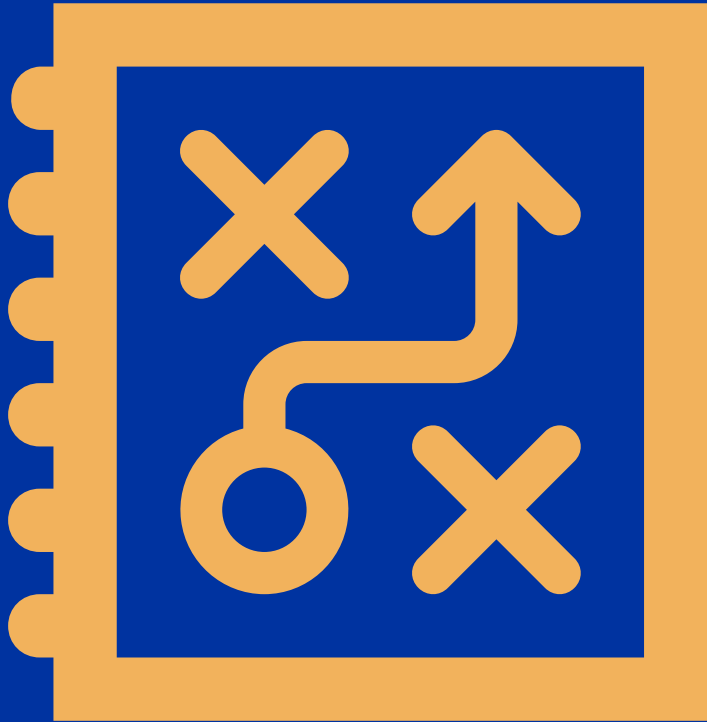
Example: Not-excluded

Respondent told investigator that Respondent could not have committed an alleged assault because Respondent was in a different city that day.

Respondent does not appear at the hearing.



Example: Not-excluded



Complainant's advisor decides not to ask any questions of Respondent, who is present at the hearing and willing to submit to cross examination, deciding to rest on Respondent's prior statements.

Credibility Assessment/ Weighing Evidence



Credibility Factors Used by Decision-Makers

- Plausibility—Believable?
- Corroboration—Other evidence?
- Consistency
- Specificity
- Demeanor
- Motive to Falsify
- Contemporaneous
- First-hand knowledge
- Influence of others
- Bias (overt/unconscious)



Example

Writing about
credibility points –

Investigative Reports

- “Respondent was not reliable when recounting what happened.”
- vs.
- “Though Respondent initially said that Respondent could not remember what happened in Complainant’s room, Respondent later reported recalling X.

Respondent told the Dean that Complainant actively pursued a relationship with Respondent after the night in question through text messages.

Complainant provided a text message string with Respondent in which Respondent asked Complainant to meet Respondent at the library, join Respondent at a restaurant, and come to Respondent’s room on three different occasions; in each instance, Complainant’s text messages to Respondent decline the invitations.(See Exhibit A.) Complainant denied deleting any portion of the text messages from the string, and the Investigator observed them on Complainant’s phone, showing Respondent’s phone number.”



Example

Writing about
credibility points –

Hearing
Determinations



- “The Hearing Officer finds that Witness is not credible.”

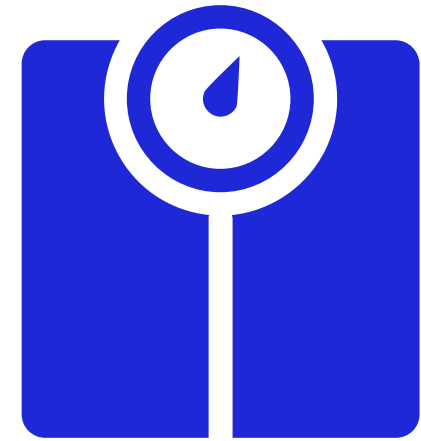
vs.

- “Witness reported arriving at the office at 7 a.m. every morning and never observing Respondent speaking to Complainant before the 9 a.m. office meeting. However, key card records show that Witness did not arrive at the office until 9 a.m. on 23 occasions between March and June, and that, on 18 of those occasions, Complainant and Respondent had both entered the office. Complainant reported that Respondent often harassed Complainant early in the morning, when no one else was present. As such, there were multiple occasions on which Witness was not present to observe whether the parties were not interacting.”



What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative (tending to prove a proposition) than other evidence
- Weight may vary depending on a range of factors





Weight - Considerations

- Believability/probability/plausibility
- Apparently honest and sincere
- Consistent
- Unrefuted
- Corroboration
- Lacking motive/disinterested
- Expertise
- Level of detail
- Unbiased
- Direct vs. circumstantial
- Personal observation vs. general knowledge or hearsay



Direct vs. Circumstantial (Direct)

- Direct — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference
 - E.g., testimony of a witness who actually observed and perceived event in question (see, hear, touch)



Direct vs. Circumstantial (Circumstantial)



- Circumstantial (indirect) — Information which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred
 - E.g., witness testimony saw student alleged to have hit someone with bat, with bloody bat an hour after the assault

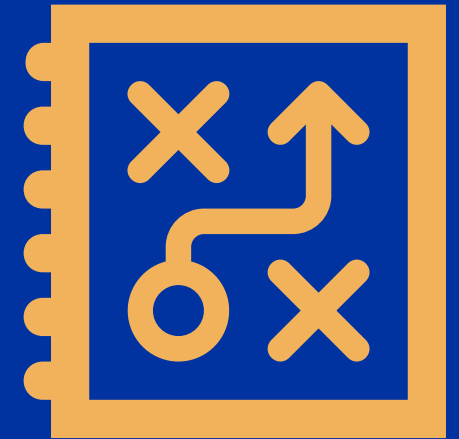


“Hearsay”

- Hearsay — Statement (written or oral) made by a non-available witness offered to prove fact in question
 - Longstanding evidentiary principle of when courts can rely on hearsay
 - Court rules do not apply
 - Some hearsay is more reliable, e.g.,
 - Statement contemporaneous with the event in question
 - Excitable statement uttered in the moment being perceived
 - See other indicia of credibility

Example – Weight

Witness testified he saw Complainant and Respondent leave the bar at 11:05 pm as Witness was arriving. Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the Complainant was wearing and how Respondent had a nose ring. Witness testified he knows the time was exactly 11:05 pm because Witness remembers receiving a phone call right as Witness entered the bar, and Witness's call log indicates the call was received at 11:05 pm.





Example – Weight

Witness says he saw a couple leaving the bar “sometime after ten but before midnight” but Witness is not “sure exactly” when. Witness testified they “sort of looked” like Complainant and Respondent and Witness is “pretty sure” it was them. But Witness also says Witness had spent two hours at a different bar before that and was “pretty drunk at the time I saw them.”



Sanctioning Decisions —



What principles do decision-makers use to determine discipline?

- Discipline should vary depending on the nature of the violation found considering aggravating and mitigating factors
 - All things being equal, like violations should have like punishments
- Appeal officials looking for whether sanctioning decision was unsupported or clearly unreasonable**



Disciplinary Philosophy

- Violations of the policy by an individual will be addressed in accordance with applicable university policies and procedures, which may include disciplinary actions up to and including expulsion or termination from the university.
- When determining appropriate sanctions, the university ***may consider*** prior findings of misconduct.



Sanctioning Goals

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

What are aggravating and mitigating factors used by decision-makers?

Common factors:

- Egregiousness of misconduct (e.g., act of violence, use of a weapon, use of drug)
- State of mind of respondent (bias-motivated, reckless or negligent)
- Safety risk to the broader community
- Impact statement
- Conduct during the investigation and adjudication (cooperative or less than cooperative)
- Circumstances relating to a lack of consent (force, threat, coercion, intentional incapacitation)
- Position of trust / power differential

Written Appeal Decisions

Module 7



Documenting the Decision

- Each appeal decision should be explained in writing in careful detail. Why?
 - The act of documenting helps appeal official consider all relevant issues
 - Demonstrates that the decision was informed and not based on actual or perceived bias
 - Demonstrates that the decision was not without thought, arbitrary, or capricious
 - Demonstrates alignment with institution's disciplinary philosophy, if applicable
 - Provides any reviewing court with a reason to grant the appeal official discretion in his/her decision

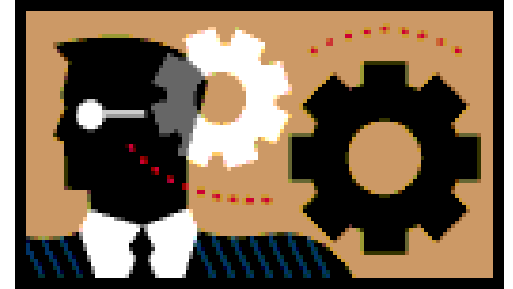




Appeal Decision Letter

Structure of a Decision Letter

- ***(I) Background Information***
 - When was complaint submitted?
 - What was alleged?
 - What did investigation 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?
 - What information/argument was provided to support basis for appeal?
 - If error is alleged, did an error occur?
 - If an error occurred, would it have been sufficient to significantly impact the outcome of the determination?
- ***(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/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.**

For discussion

Following the submission of all appeal materials but prior to issuing an appeal decision, Appellate Hearing Officer learns from new emails that Respondent contacted two potential witnesses during the investigation and convinced them to change their stories prior to meeting with the investigator.

- How should this be addressed in your appeal decision, if at all?



For discussion

During consideration of appeal in case where Respondent found not responsible, Appellate Hearing Officer learns from a second Complainant (student in Appeal Panel member's class) of a new allegation of similar sexual misconduct against Respondent. Officer had already reviewed all reports, deliberated, and had decided to remand finding for hearing panel to consider evidence it had excluded.

- Can Appellate Hearing Officer continue with drafting written decision?



Questions



HUSCH
BLACKWELL