

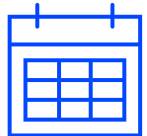
HUSCH BLACKWELL

Title IX UMD Appellate Officer Training

October 14, 2025

Agenda

- Title IX Scope, Jurisdiction, and Prohibited Conduct
- Institutional Response to Sexual Harassment
- The Grievance Process
- Confidentiality and Other Expectations
- Appeal Procedures
- Written Decisions



Definition of Appellate Hearing Officer

*UMD Policy
and Procedures*

- **“Appellate Hearing Officer”** means an individual designated to review decisions concerning responsibility and sanctions, based on the Respondent’s status as a student, staff member, faculty member, or third party.
- Appellate Hearing Officers shall have had no previous involvement with the substance of the Formal Complaint.

Appellate Hearing Officers Based on Status of Respondent

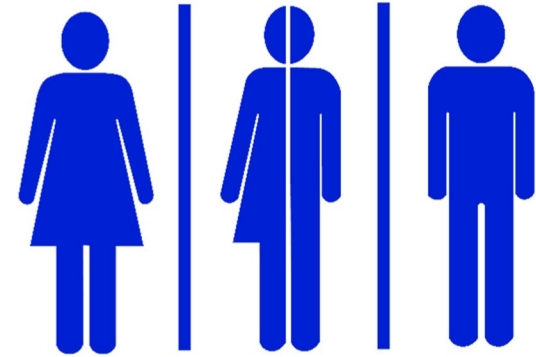
- Appeals involving a **student Respondent** shall be reviewed by a panel of trained Appellate Hearing Officers known as the University Senate Student Conduct Committee.
- Appeals involving a **staff or third-party Respondent** shall be reviewed by the Vice President and Chief Administrative Officer (VP&CAO) or designee. The VP&CAO or designee may appoint trained staff members available to serve as an Appellate Hearing Officer. Appeals involving staff or third-party Respondents may be assigned to one such Appellate Hearing Officer on a rotating case basis.
- Appeals involving a **faculty Respondent** shall be reviewed by the Senior Vice President and Provost (Provost) or designee. The Provost or designee may appoint trained faculty members available to serve as an Appellate Hearing Officer. Appeals involving faculty Respondents may be assigned to one such Appellate Hearing Officer on a rotating case basis.

Title IX Scope, Jurisdiction, and Prohibited Conduct

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. . . .”

20 U.S.C. § 1681



Title IX Regulations

- Contained at 34 C.F.R. §, Part 106 (Department of Education)
- Regulations address a host of subjects, including general non-discrimination, scholarships, athletics, housing, employment, and sexual harassment response
- The “August 2020 regulations” refer to a series of amendments to Part 106 made by the first Trump Administration that addressed sexual harassment response and imposed significant due process requirements (including live hearings)

Biden-Era Regulations Vacated

- The Biden administration proposed multiple revisions to Part 106, including many that addressed procedural response to sex discrimination and sexual harassment
 - Vacated nationwide by *State of Tennessee v. Cardona* (E.D. Ky., Jan. 9, 2025)
 - February 4, 2025, Dear College Letter from ED reverts to August 2020 regulations
 - August 2020 regulations presumably in force through at least 2028



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ACTING ASSISTANT SECRETARY

February 4, 2025

Dear Colleague:

This letter¹ is to clarify that, in light of a recent court decision, the United States Department of Education's (ED) Office for Civil Rights (OCR) will enforce Title IX under the provisions of the 2020 Title IX Rule,² rather than the 2024 Title IX Rule.³ Accordingly, lawful Title IX enforcement includes, *inter alia*, the definition of sexual harassment, the procedural protections owed to complainants and respondents, the provision of supportive measures to complainants, and school-level reporting processes as outlined in the 2020 Title IX Rule.

Core Elements of the Biden-Era Regulations

- Defined “sex” broadly for purposes of sex discrimination and sexual harassment to include gender identity and sexual orientation
- Addressed sex “separation,” including separation based on gender identity
- Created more elaborate processes for investigating and adjudicating adverse treatment sex discrimination
- Modified and relaxed processes for investigating and adjudicating sexual harassment
- Revised and augmented pre-existing Title IX guidance and regulations on pregnancy discrimination

August 2020 Regulations

- “Sex” not defined to include gender identity and sexual orientation
- No content addressing separation based on gender identity
- No detailed rules for response to adverse treatment sex discrimination (as opposed to sexual harassment)
- Rigorous procedures for sexual harassment investigations and hearings
- Minimal content on pregnancy discrimination and accommodation

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 within the geographic boundaries of the United States
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in a 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

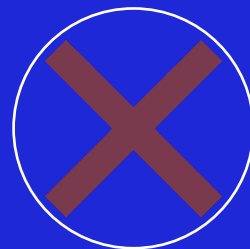
Does Title IX apply to off-campus sexual harassment?



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

Example: Off-campus sexual harassment

A class of graduate students from State University travels with their faculty mentor to a regional academic conference hosted by another university. They travel in a university-marked vehicle and attend a networking dinner in the conference center. During the dinner, a graduate student from State University is inappropriately touched on the lower back and waist by an intoxicated guest from another institution.



What about misconduct that happens abroad?



- Title IX only requires response to sex discrimination and sex-based harassment “in the United States”
- But institutions may investigate things that happen abroad if they are relevant to misconduct occurring in the United States

Example: Misconduct abroad

Students Alex and Morgan participated in a summer internship program in Germany. During the internship, Alex frequently made unwelcome sexual comments toward Morgan, which Morgan consistently rejected. On one occasion, Alex touched Morgan inappropriately during a group outing organized by the program. After returning to campus in the United States, Alex starts sending Morgan persistent, unwanted emails, stares at Morgan in the dining hall, and is seen waiting outside Morgan's residence hall late at night.



UMD Policy - Purpose

UMD Policy and Procedures

The University is committed to:

Creating and maintaining a working and learning environment **free** from all forms of Sexual Harassment.

The University accomplishes this through training, education, prevention programs, policies and procedures that promote:

- Prompt reporting and response;
- Providing support to persons alleged to be victimized;
- Prohibiting Retaliation; and
- The implementation of timely, fair and impartial investigations and resolutions that ensure due process and remedy policy violations.

Scope of Policy

UMD Policy and Procedures

- 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
 - Those who are otherwise interacting with the University including, but not limited to volunteers, vendors, guests and visitors.

Reach of Policy (“Jurisdiction”)

*UMD Policy
and Procedures*

- Acts of ***Prohibited Conduct*** committed by or against students, employees, and third parties when:
 - The conduct occurs ***on*** University premises, in any University facility, or on property owned or controlled by the University;
 - The conduct occurs ***in the context*** of a University Education Program or Activity, including, but not limited to, University-sponsored academic, athletic, extracurricular, study abroad, research, online or internship programs or activities; (*Cont.*)

Reach of Policy (“Jurisdiction”) (Cont.)

- The conduct occurs outside the context of a University Education Program or Activity, but has ***continuing adverse effects*** on or creates a hostile environment for students, employees or third parties while on University premise or other property owned or controlled by the University or in any University Education Program or Activity; or
- Conduct otherwise ***threatens*** the health and/or safety of University members.

Maryland's Title IX & Non-Title IX Conduct (“Other Sexual Misconduct”)

***UMD Policy
and Procedures***

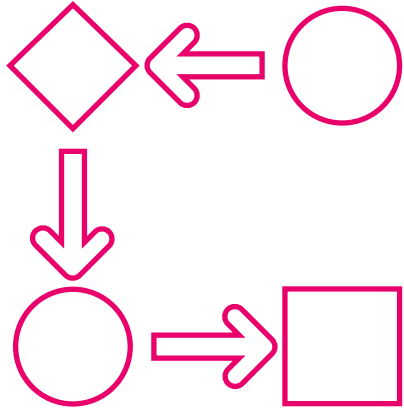
- This Policy also addresses allegations of ***Other Sexual Misconduct***, which includes:
 - Sexual Harassment that occurred against a person outside of the United States or not within an Education Program or Activity;
 - Sexual Coercion;
 - Sexual Exploitation;
 - Sexual Intimidation;
 - Attempted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

What misconduct does the Title IX regulation address?

- Sex discrimination
 - Sexual harassment



What is sex discrimination?



- Adverse treatment of a person on the basis of sex
- Limits or excludes the person from participating in the institution's education program or activity or denies or limits the benefits thereof

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
harass-
ment

Hostile
environment
harassment

Sexual
assault

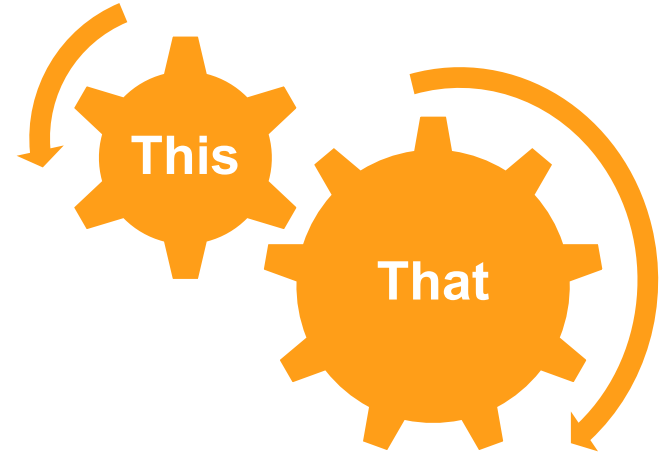
Dating
violence

Domestic
violence

Stalking

What is quid pro quo?

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



What is hostile environment?

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.



What factors do we consider in determining a hostile environment?

- The degree to which the conduct affected the complainant's ability to access
- Type
- Frequency
- Duration
- Parties' ages
- Parties' roles and other factors about each party
- Previous interactions
- Location of the conduct and context
- Other sex-based harassment at the institution

Discussion Question Scenario: Hostile environment

A professor in the biology department persistently makes inappropriate comments about a student's appearance during lab sessions, often remarking on the student's body and clothing in front of others. The professor also frequently sends the student late-night emails with suggestive jokes and stands uncomfortably close during office hours. Despite the student's attempts to avoid the professor, the behavior continues and escalates. As a result, the student feels unable to participate fully in class, skips labs, and ultimately drops the course to escape the professor's attention.



Discussion Question: Hostile environment

What factors in this scenario weigh in favor of a finding of hostile environment harassment?



Discussion Question Scenario: Hostile environment?

A faculty member in the art department develops a romantic interest in a student in their class. After a critique session, the faculty member approaches the student and makes an inappropriate comment about the student's appearance, suggesting they would look better "out of those clothes." The student immediately expresses discomfort and asks the faculty member not to make such comments. The next day, the faculty member sends the student an email apologizing for the remark and inviting the student to dinner to "clear the air." The student does not reply and the faculty member does not contact the student again, though they occasionally see each other in the hallway.



Discussion Question: Hostile environment?

What factors in this scenario weigh against a finding of a hostile environment harassment?



Does the First Amendment matter?

- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment



What is sexual assault?

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.



Rape

**Statutory
Rape**

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. “Carnal knowledge” means the slightest penetration of the vagina or penis by the sexual organ of another person. Attempted rape is included.

What is consent?

- Words or actions that a reasonable person in the perspective of the respondent would understand as agreement to engage in the sexual conduct at issue
- Mere passivity is not sufficient to establish consent
- 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 cannot make an informed and rational decision to engage in sexual contact because the individual lacks conscious knowledge of the “who, what, where, when, why, or how” of the situation or is physically or mentally helpless.

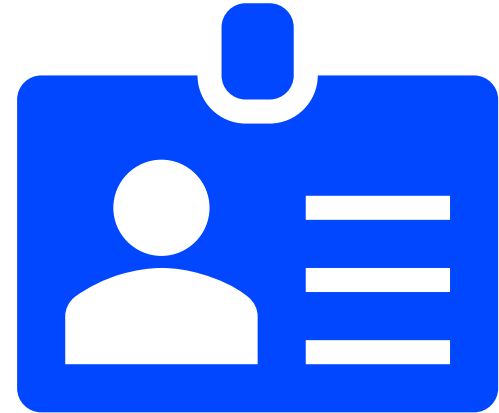


What facts may be relevant to determining incapacity due to alcohol or drugs?

- Ability to speak coherently
- Ability to track conversation
- Ability to appreciate and weigh risks and benefits
- Ability to walk or stand
- Ability to engage in behaviors requiring presence of mind
- Time period of consumption
- Nature of alcohol or drugs
- Amount of alcohol or drugs
- Size of the person consuming
- Others?

What is statutory rape?

Sexual intercourse with a person who is under the statutory age of consent as defined by law.



What is fondling? (Updated June 2025)

- The intentional touching of the clothed or unclothed body parts, without consent of the victim, for the purpose of sexual degradation, sexual gratification, or sexual humiliation; or
- The forced touching by the victim of the other individual's clothed or unclothed body parts, without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation.
- This definition includes instances where the victim is incapable of giving consent because of age or incapacity due to temporary or permanent mental or physical impairment or intoxication for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

Example of fondling

Student A and Student B are studying together in the campus library. During their study session, Student A intentionally touches and rubs Student B's thigh under the table, without Student B's consent, and winks at Student B. Student B feels uncomfortable and did not invite or welcome this contact.

What is incest?

Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

What is domestic violence?

Crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the state.

What is dating violence?

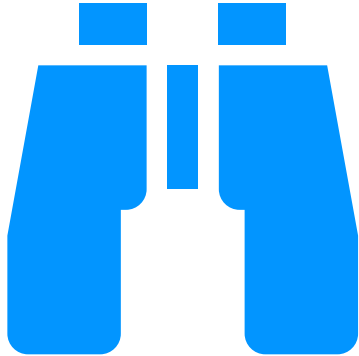
“Dating Violence” is violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship will be determined based on consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.

Student X and Student Y have been dating for several months and often spend time together both on and off campus. One evening, after attending a campus movie screening, Student X and Student Y begin arguing outside the student center. During the argument, Student Y grabs Student X's arm forcefully and shoves Student X against a wall, yelling, "You never listen to me!"

Example of dating violence

What is stalking?



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

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

Example of stalking

Employee A develops an obsession with Employee B after working together on a project. After Employee B makes it clear they are not interested in a personal relationship, Employee A begins showing up uninvited outside Employee B's apartment building late at night, watching from across the street. Employee A also sends multiple anonymous notes to Employee B's office, expressing their feelings. Employee B becomes increasingly anxious and fears for their safety, especially after noticing Employee A waiting near their car in the campus parking lot on more than one occasion.

Does Title IX also prohibit retaliation?

Yes – Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated in or refused to participate in any manner in an investigation, proceeding, or hearing under the institution's policy.

Does retaliation require intent?



- “[F]or the purpose of interfering with any right or privilege secured by Title IX”
- Requires a subjective state of mind of the respondent

A student files a formal complaint alleging sexual harassment by a faculty member, Professor Y. Another faculty member, Professor Z, provides testimony supporting student's account during the investigation. After the University finds Professor Y responsible for sexual harassment, Professor Y—who also serves as the chair of the department—removes Professor Z from a prestigious committee assignment and gives Professor Z a poor performance review. Professor Y has been heard complaining to colleagues about Professor Z siding with a student against a colleague.

Example of retaliation

Questions



Institutional Response to Sexual Harassment

What do we call the parties in a grievance process?

- **Complainant:** The alleged victim of the sexual harassment alleged in the formal complaint
- **Respondent:** The person who is alleged to have perpetrated the sexual harassment alleged in the formal complaint

Title IX Coordinator

Angela Nastase, JD

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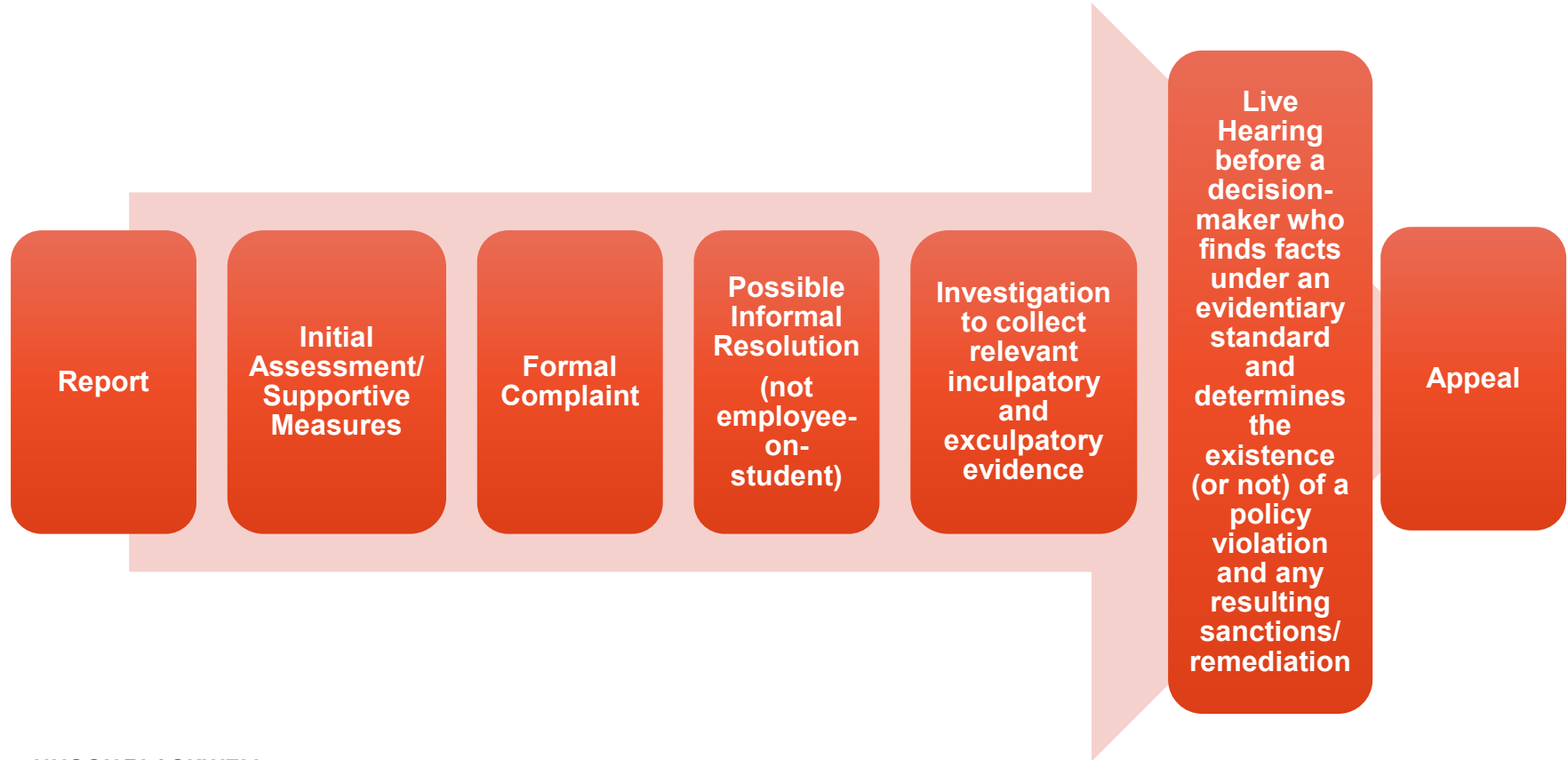
E-mail: anastase@umd.edu

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What are the institution's overall duties?



What is the resolution process?



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

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

How does a decision-maker reach a conclusion?



After gathering all the evidence, the decision-maker should consider all the relevant testimony and 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 a policy violation occurred

What principles do we use to determine remediation?

If a violation is found,

Institution must take steps to restore or preserve the complainant's access to education

Various types of supportive measures may be used after the determination to restore or preserve access

Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable

Discussion Question: University policies and Procedures

Why is it important to follow University policies and procedures in investigations?



Importance of Policy and Procedures

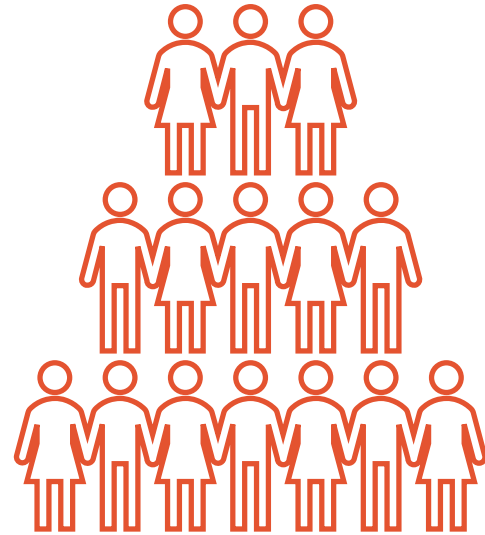
- Risks with deviations from institutional policy and procedures, include but are not limited to the following:
 - The need for internal appeals
 - Increased litigation risk
 - Increased probability of OCR/EEOC complaints/investigations
 - Damage to institutional trust and confidence in fairness of process and proceedings
 - Negative media attention

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
- Fair notice and meaningful opportunity to be heard
- No stereotypes based on a party's status as complainant or respondent
- Conflict and bias-free institutional participants

What are stereotypes?

A form of bias that operates as a preconceived, generalized, and sometimes inaccurate belief about a person based on their membership in a group or some other characteristic



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

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*

Example: Conflict of interest

Biology Student submits a formal complaint of sexual harassment against Chemistry Student. One of the assigned investigators is Chemistry Student's research supervisor, who has previously nominated Chemistry Student for a departmental award, describing them as "a model of integrity and professionalism."



Example: Bias

A university staff member is selected to serve on a hearing panel for a case involving alleged sexual harassment. The staff member also chairs the board of a regional advocacy group focused on preventing sexual harassment. During a recent public seminar, the staff member stated: “In cases of sexual harassment, I believe the accused should have to prove their innocence—otherwise, too many perpetrators will escape accountability.”



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

What do we do if we find sexual harassment occurred?

- If grievance process results in a finding of sexual harassment:
 - Discipline for the respondent as determined by those with authority over the respondent
 - For complainant, grant remedies reasonably necessary to restore or preserve access to education programs and activities

Do parties get assistance in the grievance process?

- Yes
- The parties have the right to be accompanied by an advisor of their choice during the investigation and hearing
- The institution must provide the party an advisor for purposes of conducting questioning at the hearing if the party does not have an advisor

Are the parties entitled to supportive measures?

- Yes
- 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 if implicated by facts

Can supportive measures affect the respondent?

Yes, but cannot create an unreasonable burden



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graph TD; A[Yes, but cannot create an unreasonable burden] --> B[Cannot be a form of de facto discipline]; B --> C[Supportive measures are not a substitute for the investigation and hearing processes];
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Cannot be a form of *de facto* discipline

Supportive measures are not a substitute for the investigation and hearing processes

Can an institution immediately suspend a student?

- 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

Do students and employees have other rights?

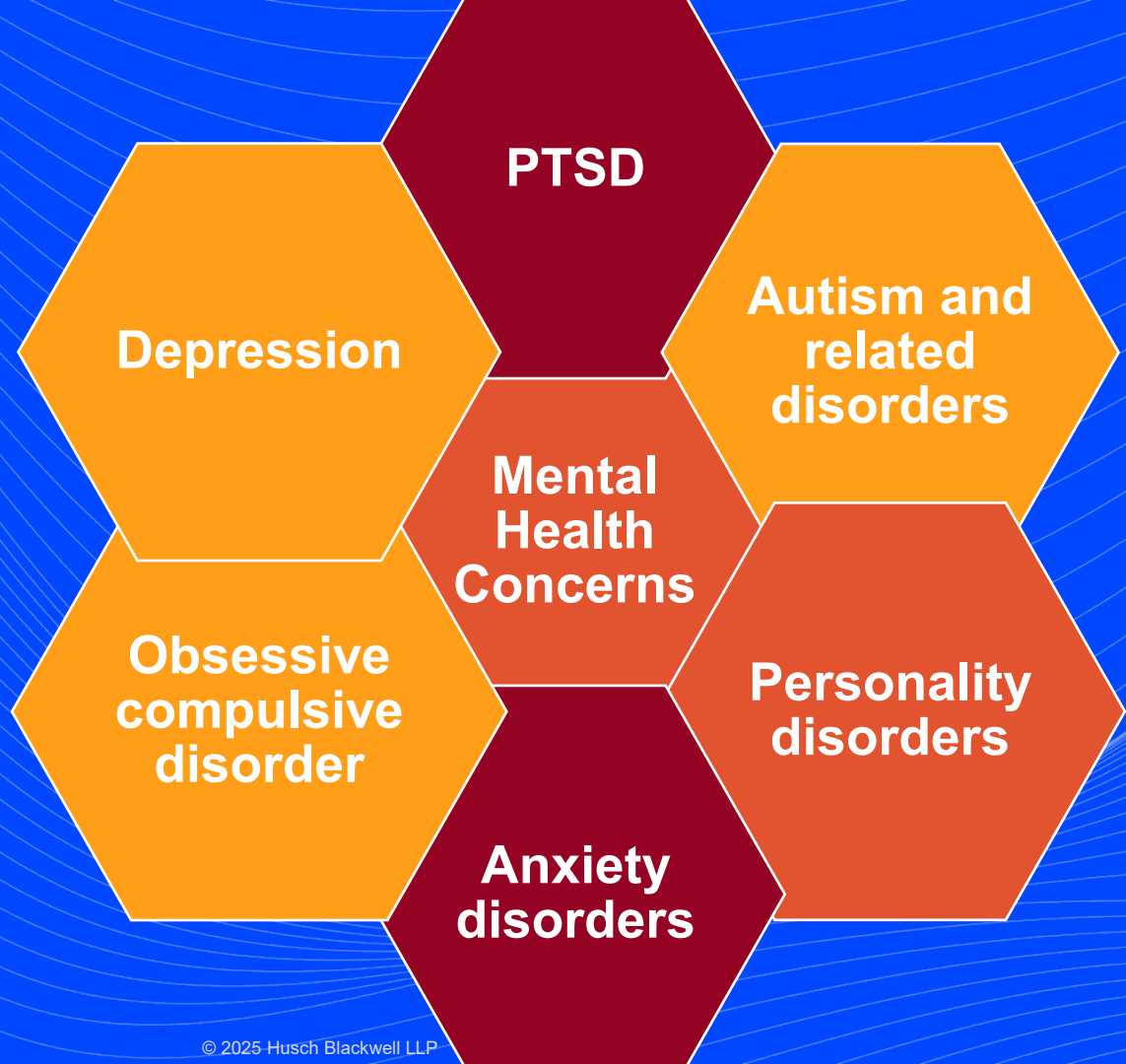
- Yes—other laws may trigger accommodations when a medical condition or disability is present:
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Section 504 of the Rehabilitation Act



Does a “disability” include mental health conditions?

- Yes
- A physical or mental impairment that substantially limits one or more major life activities
- A record of having an impairment that is substantially limiting to a major life activity; or
- Being regarded as having an impairment that is substantially limiting to a major life activity

What are some examples?



What are reasonable accommodations?

- Depends on the nature of the disability, how the disability limits the person, and the fundamental requirements of the program/activity at issue.
- *Practice Point:* Approved accommodations may apply during phases of the grievance process.
- *Example from Policy:* The Parties may contact the Title IX Officer or designee to arrange any disability accommodations, language assistance, and/or interpretation services that may be needed at the Hearing. Such accommodations must be requested at least seven (7) Days prior to the Hearing.

Trauma might affect any party or participant

- Not in every case
- Not just one party
 - Complainant
 - Respondent
 - Witnesses
 - Support persons
- Never assume anyone interviewed or questioned suffered any trauma

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

Self-blame

Non-linear recollection

Trauma & credibility

- Do not assume information is not credible due to the manner delivered
- Understand memory may be clarified in time
- Address inconsistencies
- Ascertain fair and impartial assessment of the facts and give appropriate weight to party and witness statements

What is informal resolution?

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



Types of informal resolution

Mediation

**Facilitated
discussions led by
Title IX Coordinator**

Restorative justice

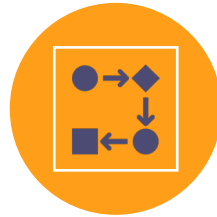
**Attorneys for parties
negotiate an
agreement**

**Arbitration without a
live hearing**

What are the key concepts of informal resolution?



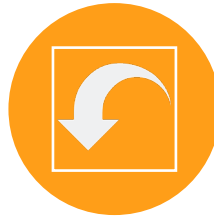
A formal complaint must first have been filed and written notice given to the parties



The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



The parties must voluntarily agree to participate in writing



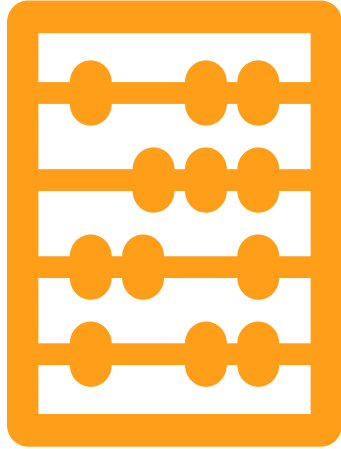
The parties must be allowed to withdraw from informal resolution up until the point it is final

What are the limitations?

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



What are considerations around whether informal resolution is appropriate?



- Nature of the alleged offense
- Any ongoing threat of harm or safety to the campus community (e.g., use of a weapon)
- Any past findings regarding respondent
- Status of the parties
- Good faith participation of the parties

Questions



The Grievance Process

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 are parties provided timely written notice of?

UMD Policy and Procedures

- Reported violation, including the date, time and location (if known), of the alleged violation, and range of potential sanctions
- Rights and responsibilities under the policy and information regarding civil and criminal options
- Date, time, location, participants, and purpose of each Hearing, meeting, or interview the Party is invited or expected to attend, with sufficient time for the Party to prepare
- Final determination by Hearing Officer regarding whether a policy violation occurred and basis for determination
- Sanctions
- Right to appeal and description of appeal process

What are the parties' rights?

UMD Policy and Procedures

- Access to case file and evidence obtained during the investigation or considered by the Hearing Officer
- Opportunity to be heard through the process
- Opportunity to offer testimony at a Hearing
- Opportunity to submit evidence, witness lists, and suggest specific questions to be posed to the other party during the investigation or Hearing
- Opportunity to review testimony
- Opportunity to review and provide written responses to draft and final investigation reports
- Opportunity to participate at Hearing without being in physical presence of other party
- Opportunity to appeal determination and/or sanction
- Notice before the resolution process

What is the purpose of an investigation?

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

What is inculpatory evidence?

- Evidence tending to support the proposition a respondent committed sexual harassment as alleged
- *Example:* An email sent by the respondent to the complainant the day after the incident says: “I know you told me to stop, but I didn’t listen. I regret what happened and I’m sorry for hurting you.”



What is exculpatory evidence?



- Evidence tending to support that the respondent did not commit sexual harassment as alleged
- *Example:* A text message sent by the complainant to the respondent the morning after the alleged incident reads: “I agreed to everything last night and I remember what happened, but I wish things had gone differently between us.”

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 are the phases of an investigation?



Formal Complaint



Written notice



Evidence collection



Evidence review



Written report

How do we tell the parties about an investigation?

Institution must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how”.



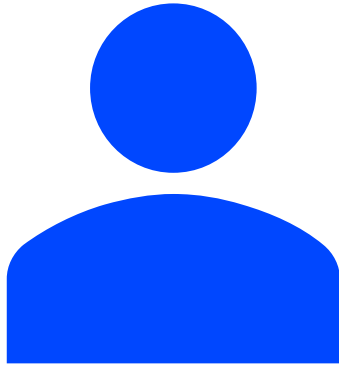
What else does the notice need to say?

*UMD Policy
and Procedures*

Written notice must also include:

- Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
- That parties have the right to an advisor of their choice
- That parties have the right to inspect and review evidence
- Any prohibition on providing knowingly false statements or information

How does evidence get collected?

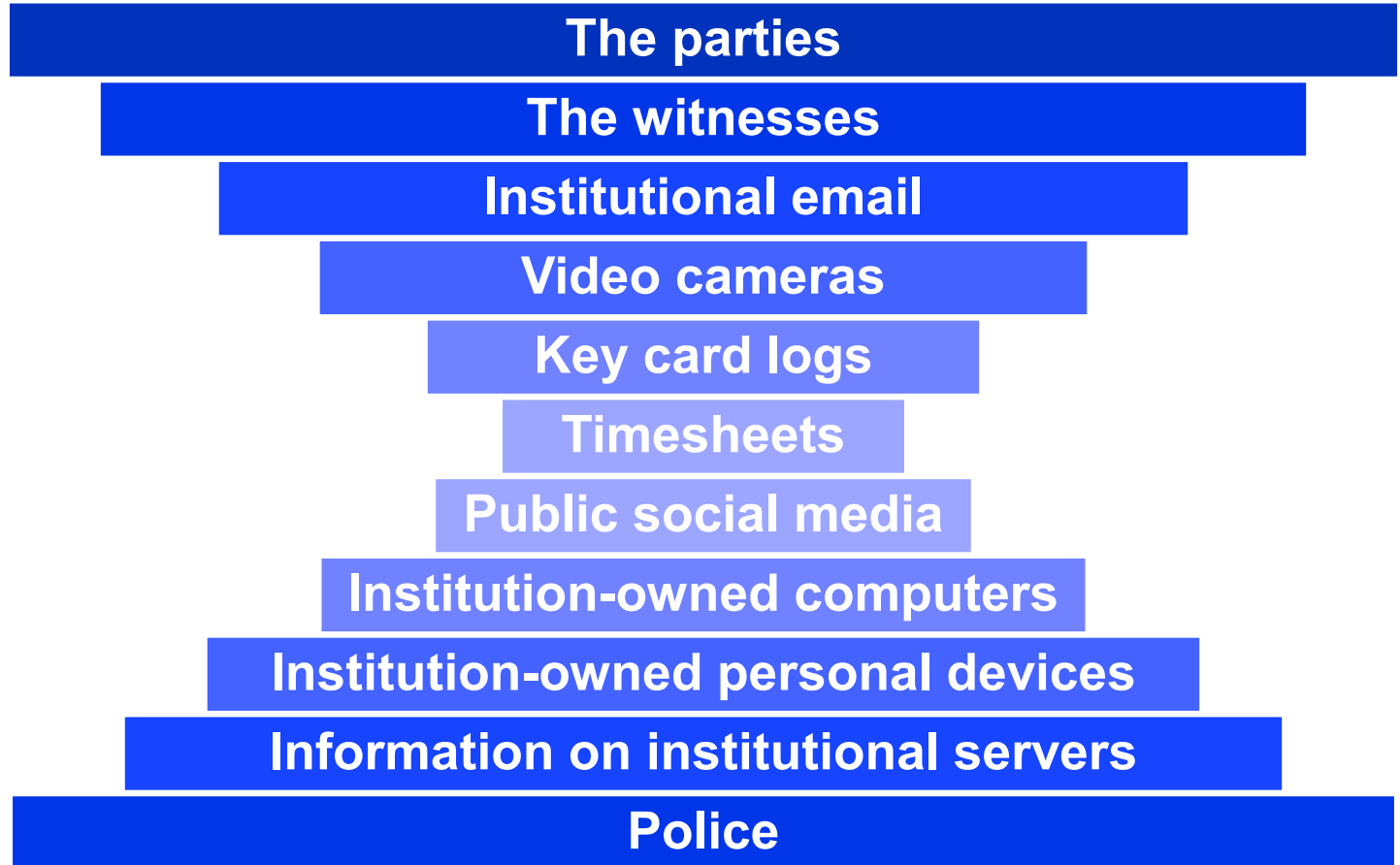


Interviews of parties and
witnesses



Collection of
non-testimonial evidence

Example sources of non-testimonial evidence



Are parties subject to a “gag” order during the investigation?

- Generally, no – the institution may not restrict the ability of parties to discuss the allegations or to gather and present relevant evidence, which includes talking to witnesses
- But institution can still enforce prohibitions on witness intimidation, witness manipulation, false statements, retaliation, harassment, etc.

Scenario for Discussion: Permissible conduct

A student accused of sexual assault sends direct messages to several classmates who were present at the party where the incident allegedly occurred.

The student's message reads: "If you remember seeing Complainant talking and laughing with me that night, can you let me know? I might need your help to clarify what really happened."



May an investigation collect evidence on sexual history?

Generally, no – Evidence of a complainant's prior sexual behavior is relevant 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

May an investigation collect and rely on privileged records?

- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes



Do the parties have access to the evidence?



- 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 finalized
- 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

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

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

Review of Preliminary Investigation Report

- The Investigator will provide the Preliminary Investigation Report to each party.
- The parties will be provided 10 days to review the Preliminary Investigation Report and provide any additional and/or clarifying information to the Investigator. This period of 10 days will be the final opportunity for parties to submit any additional information to the Investigator.



Is the evidence “confidential?”

- Institution may require parties and advisors to agree not to disclose investigation evidence to third-parties
- But cannot prohibit parties from speaking about the allegations themselves



Discussion Question: Confidentiality

Are there any techniques the University uses to encourage parties to keep investigation materials confidential?



How is the investigation concluded?

- 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
- Factual findings and determinations of policy violations are made at a subsequent hearing

What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The hearing officer or panel 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

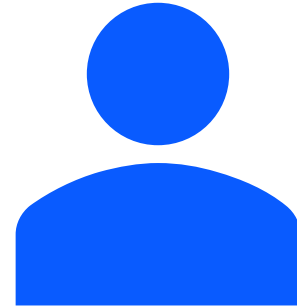
What does “preponderance” of the evidence mean?

- Preponderance of the evidence:
 - “More likely than not”
 - “Greater than 50% likely”



Who runs the hearing?

- The hearing officer
- Decides all procedural issues
- Rules on admissibility of evidence



What are the phases of a typical hearing process?



What does the notice say?

Identity of the hearing officer

Deadline for the parties to submit responses to investigation report

Date for the pre-hearing conference

Date and time for the hearing (no earlier than 10 days after investigation report is issued)

What is the pre-hearing conference?



Discuss hearing procedures



Discuss any stipulations that may be made to expedite the hearing



Discuss what witnesses need to attend



Resolve other matters raised in the party's written responses to the investigation report

What is a “live” hearing?

- A proceeding held by the hearing officer, either in-person or virtually where:
 - Parties are present with their advisors at the same time
 - Parties and witnesses testify with contemporaneous participation (i.e., no “pre-recording”)
 - Parties’ advisors ask live questions of the other party and witnesses

Who attends a live hearing?

- The hearing officer
- Other necessary institutional personnel or institutional advisors (i.e., attorneys)
- The parties
- Each party's advisor
- Witnesses as they are called to testify
- Other support persons for parties, if permitted by institution

What are the logistics of a hearing?



Hearing must be recorded (audio or video) or transcribed



Hearing can be held in a single room or with the parties separated in different rooms



Hearing can be held virtually using suitable software

Does the institution provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing
- If a party does not have an advisor, the institution must supply one for the purpose of questioning the other party and witnesses on behalf of the student in question

How does the hearing actually work?

Required elements include:

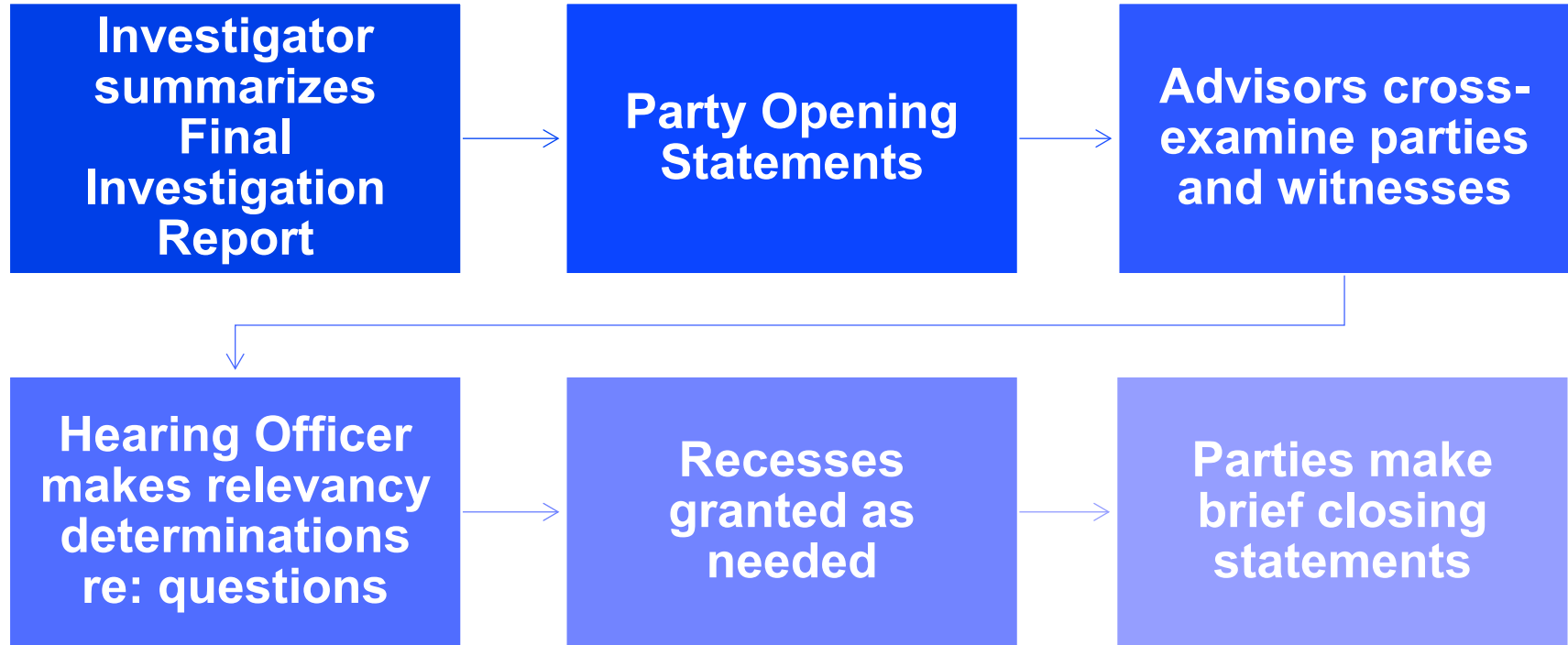
Hearing officer or panel must independently evaluate questions for relevance and resolve relevancy objections

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

If a party or witness refuses to submit to live questioning this may diminish weight and/or credibility

Questioning of sexual history generally not permitted

UMD Policy – Hearing Sequence



Who determines relevance?

- Hearing officer must screen questions for relevance and resolve relevance objections
- Hearing officer must explain any decision to exclude a question as not-relevant

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

Example A: Relevant

Student X has accused Student Y of sexual assault, alleging that Student Y engaged in sexual activity with Student X while Student X was too intoxicated to consent after a campus event. During the hearing, Student Y's advisor asks Student X: "Were you able to walk unassisted or hold a conversation with others during the party?"



Example B: Relevant

A professor is accused of offering better grades to Student A in exchange for romantic favors. During the hearing, the advisor for the complainant asks the professor: “Didn’t you tell a colleague in the faculty lounge that Student A is ‘the most attractive student in your class’?”



Example: Not relevant

A student alleges that her ex-girlfriend/respondent threatened her during a heated argument, constituting dating violence. During the hearing, the advisor for the respondent asks the complainant: “Isn’t it true that you started dating the respondent just to make your previous partner jealous?”



Example: Likely not relevant

Employee X has accused Employee Y of sexual harassment in the workplace. During the hearing, the advisor for Employee X asks Employee Y: “Isn’t it true that you were suspended from your previous job for repeatedly arriving late to work?”



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

Example: Impermissible

Employee A has accused Supervisor B of sexual assault. During the hearing, Supervisor B's advisor asks Employee A: "Can you tell us about your previous sexual relationships with other coworkers before this incident?"



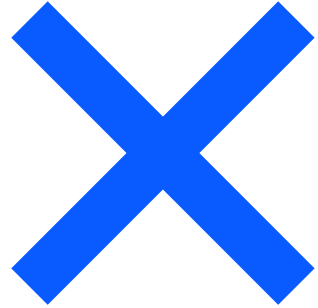
Example: Permissible

Student A has accused Student B of sexual assault, claiming that Student A engaged in sexual activity with Student B in an empty classroom in an academic building and that Student A would never have consented to such conduct in a public area like a classroom. During the hearing, Student B's advisor asks Student A: "But didn't you and Student B engage in consensual sexual activity in a classroom just two weeks before this incident? And didn't you tell Student B at that time that you were comfortable being intimate in that setting?"



Does the “exclusionary” rule still apply?

- The so-called “exclusionary” rule is no longer in effect
- Hearing officer/panel must consider any relevant evidence
- However, testimony that is not subject to cross-examination may be found less credible and/or given less weight



Example A: Exclusionary Rule

The complainant provides a detailed statement about alleged dating violence during the hearing and responds to several questions from the hearing panel. When the respondent's advisor begins cross-examination, the complainant answers only the first question before becoming visibly upset and stating they cannot continue. After a short recess, the complainant informs the hearing officer that they are unable to proceed with further questioning and exits the hearing room, declining to return.



Example B: Exclusionary Rule

A witness gives a statement during the investigation, reporting that they saw the respondent and complainant together immediately after the alleged incident and that the respondent appeared agitated. However, when called to testify at the hearing, the witness does not appear. The investigator is prepared to summarize the witness's statement for the hearing panel.



How long does a hearing last?



- The length of the hearing is set by the hearing officer or panel
- Hearing officer or panel may set time limits for questioning of each witness
- Hearing officer or panel may preclude questioning that is cumulative or duplicative

How does the hearing officer decide a case?



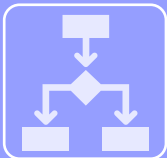
After hearing, the hearing officer must deliberate and consider all the relevant testimony and relevant non-testimonial evidence



Evaluate evidence for weight and credibility



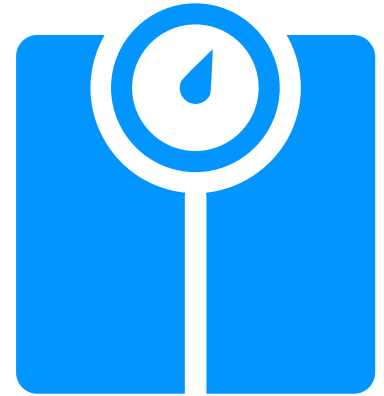
Resolve disputed issues of fact under the standard of evidence adopted by the institution



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

What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative than other evidence
- Weight may vary depending on a range of factors, such as credibility; corroboration; consistency; level of detail; expertise of the witness; whether a witness is disinterested, etc.



Example: Considerable weight

The witness testified that he saw the complainant and the respondent leaving the party at 10:00 pm as he was arriving. The witness stated he recognized both individuals immediately, having been in class with complainant previously and having seen the respondent at other parties.

The witness further testified that he is certain about the time because he checked his watch upon arriving at the party. The witness's phone records corroborate his statement, showing that he sent a text message to a friend at 10:04 pm, mentioning seeing the complainant and respondent together. The witness also described the lighting in the party as bright, and stated he was standing only a few feet away from the complainant and respondent as they exited, allowing him to see their faces clearly.



Example: Less weight

Witness says he saw a couple leaving the party “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 party before that and was “pretty drunk at the time I saw them.”



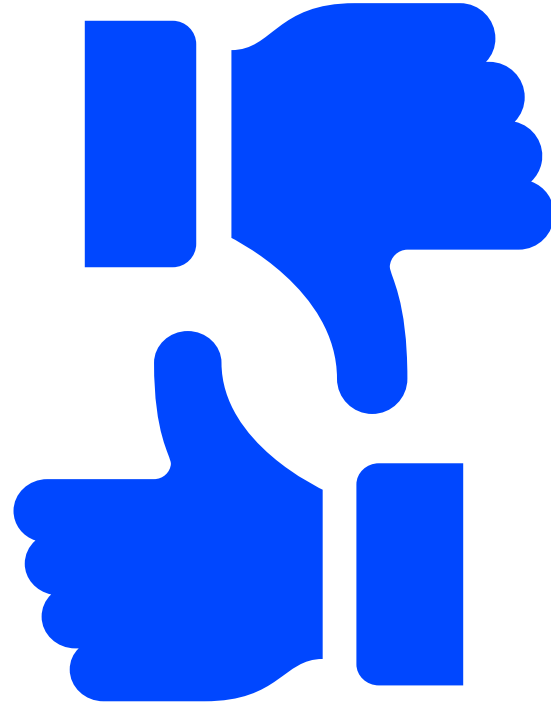
What if evidence is presented at a hearing but not in the investigation?

UMD Procedures

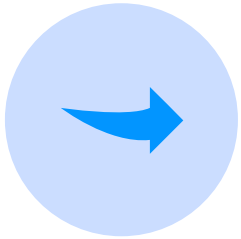
- Any and all information for consideration by the Hearing Officer must be provided to the Investigator during the investigation phase of the process and otherwise will not be allowed during the Hearing.
 - If a Party requests that additional information be considered during the Hearing, the Party must clearly demonstrate that such information was not reasonably available to the Parties at the time of the investigation, or that the evidence has significant relevance to a material fact at issue in the investigation.
 - If a Party provides or identifies evidence after the Final Investigation Report is issued, and the Hearing Officer determines that it was reasonably available to them during the investigation process, the Hearing Officer has the discretion to choose to consider such information and may draw a negative inference from the Party's delay in providing or identifying the evidence.
 - The Hearing Officer may, at their discretion, instruct that the investigation be re-opened to consider the evidence. In such cases, the evidence will be made available to the Parties for their review and comment prior to the Hearing.

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

How does a decision get issued?

*UMD Updated Procedures;
Section VI(D)(7)*

In a written document, provided contemporaneously to the parties that:

- Identifies the allegations of sexual harassment
- Describes the various procedural steps taken from the time the formal complaint was made
- States findings of facts supporting the determination
- Reaches conclusions regarding application of relevant policy definitions to the facts
- Includes a rationale for each finding for each allegation
- States the disciplinary sanctions and remedies, if implicated by the determination made, and
- Explains the procedures and grounds for appeal

Questions



Confidentiality and Other Expectations

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



Family Educational Rights and Privacy Act (“FERPA”)



- Protects student records from impermissible disclosures of their education records **and** provides students rights to access their education records
- How it applies in an investigation context:
 - Records containing identifying information on students are subject to FERPA analysis

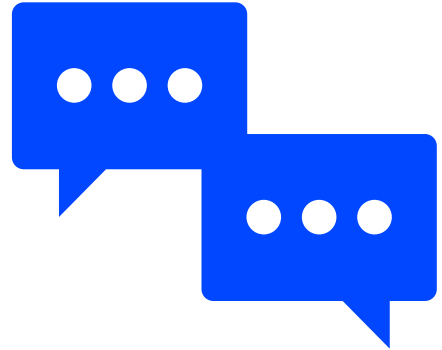
Family Educational Rights and Privacy Act (“FERPA”) (Cont.)

- Discrimination and harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Title IX regulations contain an express preemption provision, permitting FERPA-protected material to be used (and shared) in Title IX proceedings, as required by Title IX itself



Must an appeal official maintain confidentiality?

- Yes
- If you are an institutional employee, you must abide by the same confidentiality rules as the institution itself, including FERPA
- You should maintain the confidentiality of the process and not disclose information to any third-party except as the process itself permits



Example A: Not permitted

Appeal Officer knows that her colleague has served as an appeal officer before and shares information about the matter under appeal in order to get advice about how to properly consider the appeal according to University Policy.



Example B: Not permitted

A parent of a student involved in the case contacts the Appeal Officer by email, inquiring whether the respondent has been sanctioned for violating the University's policy and requesting information about when a final decision on the appeal will be made.



Example C: Not permitted

An appeal officer notifies his supervisor that he has been assigned as an appeal officer and there may be meetings with the parties during working hours. Before excusing the appeal officer's absence of regular job duties, the supervisor demands to know who the parties are and what the nature of the allegations are.



Do advisors have a role in the appeal?



- The University only provides an advisor for purposes of the hearing phase
- If a party wants to utilize an advisor for the appeal, they must secure one on their own and Policy provisions about advisor participation apply

Questions



Appeal Procedures

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



Practice Tip: 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*.
- In contrast to an appeal process that provides another party the opportunity to second-guess decisions, absent clear error.

Appeal Rights

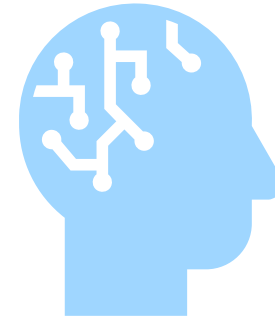
UMD Policy and Procedures

- Either Party may appeal the Written Notice of Designation or Written Notice of Determination within 5 days of receipt.
- Parties will be notified if the other Party files a written appeal statement and given notice in writing of the general grounds for the appeal. The other Party will be given five (5) Days from receipt of the other Party's written appeal statement to submit a written appeal statement in support of the designation or written determination.
- 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*)

Appellate Hearing Officer Obligations

***UMD Policy
and Procedures***

- 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.



Bases for Appeal

Procedural Irregularity

UMD Policy and Procedures

- In all cases, the procedural irregularity must be one that affects the ultimate 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.

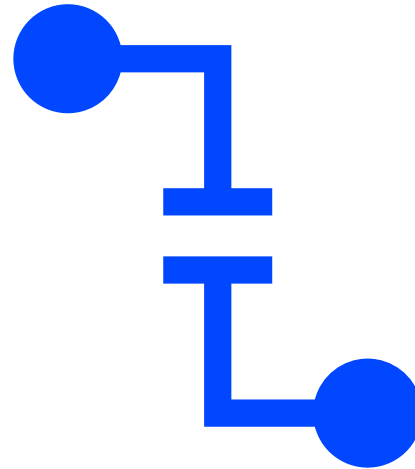
Example: Procedural irregularity

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 that 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



Scenario for Discussion: 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.



Scenario for Discussion: Procedural error

Appellate Hearing 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. Appellate Hearing Officer vacates the adverse finding against the respondent and directs that a new hearing take place after appropriate notices to appear have been issued.



Discussion Question Scenario: Procedural error?

Complainant contends that the investigator failed to interview 19 witnesses who have knowledge of an alleged sexual assault based on discussions with Complainant or Complainant's friends following the incident.

Investigator only interviewed 11 of the witnesses.



Scenario and Discussion Questions: Procedural error?

Respondent contends that the Hearing Officer, in weighing evidence of Complainant's incapacity, unfairly ignored evidence from three witnesses stating that Complainant had propensity to drink alcohol before parties and then slow down the rest of the night to manage her level of intoxication. Each of three witnesses described specific situations they experienced before the night in question of Complainant's habit, and two of those witnesses were present on the night of the alleged sexual misconduct. The written determination did not address such evidence at all.

Is this procedural error?

Should the appellate officer review the hearing recording?



Relevance Determinations: 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”

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

New Evidence

UMD Policy and Procedures

- 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.



Scenario for Discussion: New Evidence

After the determination is made that the respondent did not violate the University's policy, the complainant obtains a previously unknown series of text messages exchanged between the respondent and a mutual friend on the night of the incident. In the messages, the respondent describes actions taken toward the complainant that are consistent with the complainant's allegations. The mutual friend, who had been studying abroad with limited access to communication, only became aware of the case and the need for evidence upon returning to campus after the hearing had concluded.



Scenario and Discussion Questions: New Evidence

Complainant appeals “no responsibility” finding with copies of text messages between Respondent and her best friend suggesting Respondent planned to “lie through his teeth” during the investigation and hearing. Complainant wants texts considered and best friend interviewed.

Can the request for appeal be accepted if this is the only information submitted?

If accepted, could this constitute “new evidence” for purposes of an appeal?



Scenario and Discussion Question: New Evidence

Respondent told investigators his Roommate saw Complainant leaving lobby of her dormitory on date of sexual interaction and talked to Complainant, who was jovial. Complainant confirmed this at hearing. Roommate was never interviewed.

On appeal, Respondent presents new affidavit from Roommate recounting same conversation with Complainant but also stating that Respondent told Roommate about the sexual interaction at issue the night it happened. Respondent had not shared that conversation during investigation or hearing.

Does this constitute “new evidence” or “procedural error” for purposes of an appeal?



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.

Discussion Questions: Conflict of Interest

Do the following circumstances or relationships constitute conflicts of interest?

- **Respondent faculty member and the hearing officer previously disagreed about tenure-promotion decision about one of their departmental colleagues**
- **Complainant is currently a student in a hearing panel member's class**



Substantially Disproportionate Sanction

*UMD Policy
and Procedures*

- 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.



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**

Sanctioning Goals

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



Prior to Issuing the Written Notice of Determination

*UMD Policy
and Procedures*

- Parties have the option to provide written impact statements
- Hearing Officer confers with the Title IX Coordinator or designee and other University administrator—these individuals provide input with respect to recommended sanction
 - Other University administrators may include UHR/Staff Relations and department/unit heads and supervisors for staff, and the Provost's Office/Faculty Affairs and department/unit heads and supervisors for faculty.

Factors Considered Before Imposing Sanctions

*UMD Policy
and Procedures*

- Nature and degree of violence involved in the conduct at issue
- Impact of the conduct on the complainant
- Impact of the conduct on the community and/or the University
- Prior relevant misconduct by the Respondent
- Maintenance of a safe and respectful environment conducive to working and learning
- Protection of the University community
- Any other mitigating, aggravating or compelling circumstances

Range of Sanctions for Students

Degree revocation

Expulsion

Suspension

Disciplinary Probation

Disciplinary Reprimand

Educational Sanctions

Housing Sanctions

No Contact Order

Denial of Access to campus and/or buildings

Range of Sanctions for Faculty and Staff

Separation from employment, up to and including termination and loss of tenure (if applicable)

Suspension without pay

Reassignment

Written reprimand

Education and training

No Contact Order

Denial of access to campus and/or buildings

Practice Tip: Sanctions

Remember to consider factors and processes decision-makers will have already applied to determining the sanctions. When factors have been considered by decision-makers and appropriate administrators have been involved in making determinations, carefully consider whether appeal will be granted.

Appeal Policy and Process

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, and shall be shared with both Parties, within ten (10) 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

**UMD Policy
and Procedures**

- 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 do not?

- 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?

Practice Tips

Do you think you need any additional information:

- **From the investigator? (e.g., why was a witness interviewed or not interviewed?)**
- **From the sanctioner? (e.g., how does this sanction compare to sanctions in other similar cases?)**
- **From either party?**
- **From anyone else?**

What have you learned from any deliberations or discussions with your fellow Appeal Panel members?

Practice Tips

Does the information you have reviewed/gathered:

- **Constitute new evidence or information sufficient to alter initial decision**
 - *Three Issues:* (i) new evidence; (ii) was it reasonably available at time (of investigation/hearing); (iii) does it matter
- **Show that the investigator or hearing officer deviated from procedures in a way that substantially altered outcome**
 - *Two Issues:* (i) procedural error; (ii) does it matter

Written Decisions

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 (Cont.)

Structure of a Decision Letter (Cont.)

- **(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? (Same with new evidence basis)
- **(IV) Conclusion**
 - Is the appeal granted or denied?
 - If granted, what outcome?



Practice Tips: Documenting the decision

- **Summarize appeal 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 administrators 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.**

Scenario and Discussion Question: Appeal

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

Can Appeal Panel continue with drafting written decision? Should the decision address the new complaint?



Questions



The image features the Husch Blackwell logo, which consists of a stylized white plus sign followed by the text "HUSCH BLACKWELL" in a bold, white, sans-serif font. The logo is centered on a solid blue background. The background is decorated with a pattern of thin, white, wavy lines that flow from the top left towards the bottom right, creating a sense of movement and depth.

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