

Sexual Misconduct Appellate Officer Training

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Agenda

1. Title IX Intro
2. Background & Appellate Officer Role
3. Appeals following:
 - Formal Complaint Dismissals
 - Hearing Determinations
 - Administrative Dispositions
4. Grounds for Appeal
5. Appeal Resolution Options
6. Special Issues



Distinctions...

Sexual Harassment

vs.

Non-Sexual Harassment

(Ex. Other Inappropriate Sexual Conduct, Retaliation, etc.)



Definition of “Sexual Harassment” Under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. 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 institution’s education program or activity (Hostile Environment); or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.

*Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct*

Definition of “Education Program or Activity” Under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

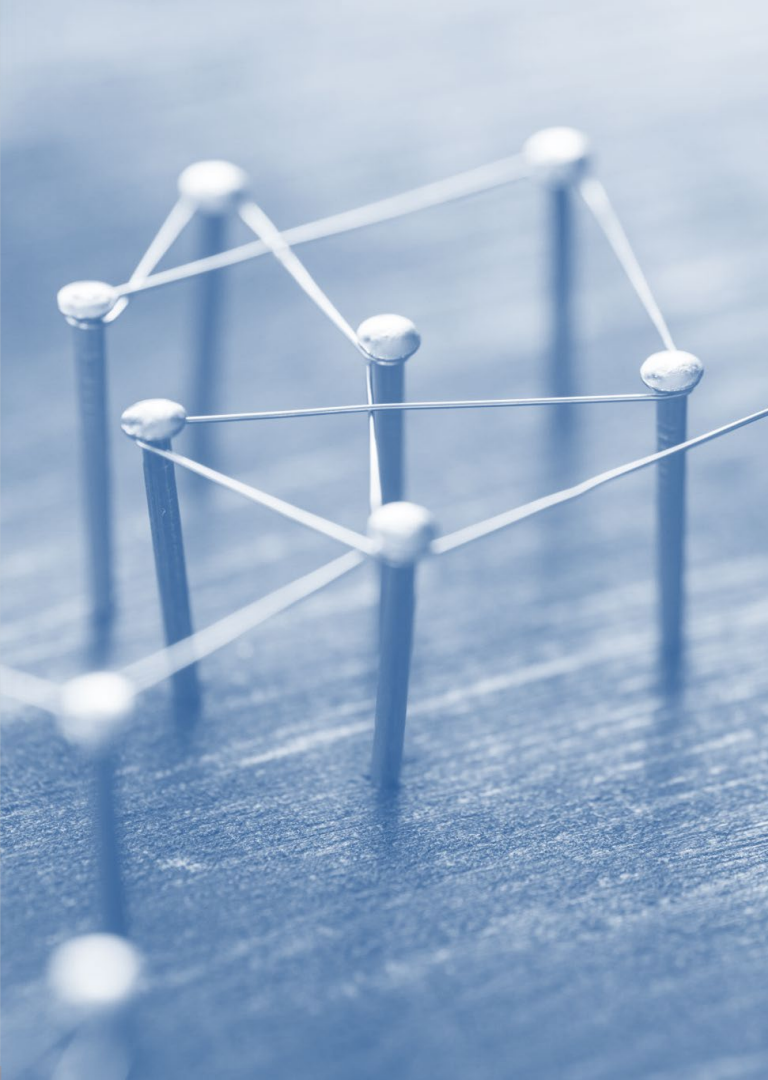
- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.

Source: Title IX Regulations (2020)

Party's Right to Participate in an Appeal

- To be given **equal chance** to participate in a grievance process.
- To be **equally informed** of any **determinations** regarding responsibility, dismissals of formal complaints, and/or a party's filing of an appeal.
- To **appeal** a determination regarding responsibility and/or dismissals of formal complaints.
- To **respond** as the non-appealing party to an appeal of a determination regarding responsibility and/or dismissals of formal complaints





Appeals can follow:

- Formal Complaint Dismissals
- Hearing Determinations
- Administrative Dispositions

Grievance Process Flowchart

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Sexual Harassment/Sexual Misconduct – Appeal Options

Formal Complaint/Investigation

Resolution Options

Adjudication

Informal Resolution

F.C. Dismissal/Appeal F.C. Dismissal

1) Administrative Disposition Option? (if applicable)

Option to Appeal Sanctions Only

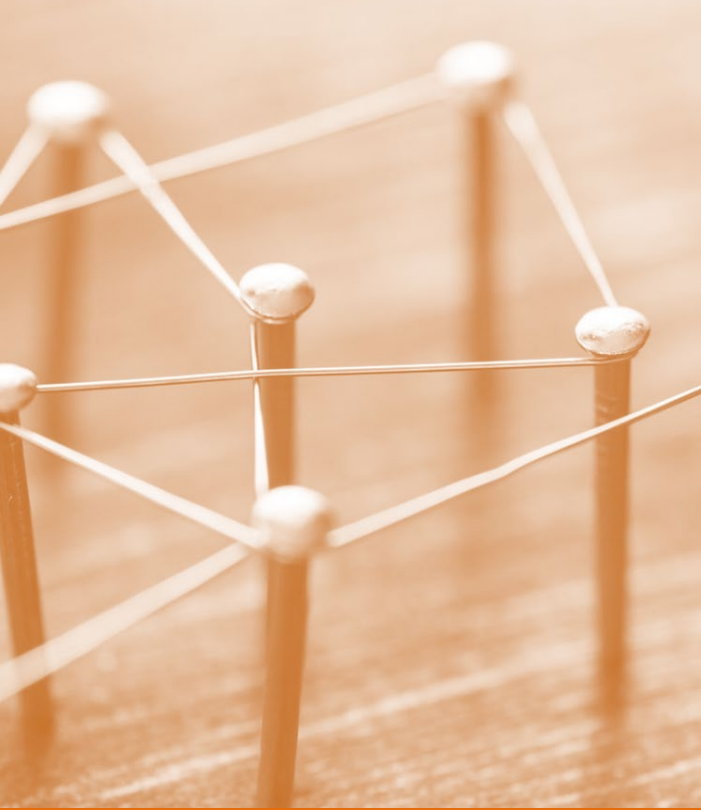
OR

2) Live Hearing

Option to Appeal Hearing Determination



Grounds for Appeal



Grounds for Appeal

- A **procedural irregularity** that affected the outcome of the matter;
- There is **new evidence** that was not reasonably available at the time of the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; or
- The Title IX Coordinator, investigator(s), or hearing officer had a **conflict of interest** or **bias for or against the parties** (generally, or specifically in this matter) that affected the outcome of the matter.

Background:
Formal Complaint
Dismissals and
F.C. Dismissal
Appeals

Mandatory Formal Complaint Dismissals under 2020 Title IX Regulations

Mandatory Dismissals are required when the **definitional** or any element of the **jurisdictional** framework under Title IX is not met.

The background of the slide is a solid green color. Scattered across the green surface are several incandescent light bulbs. Some bulbs are upright, some are lying on their sides, and some are partially visible at the edges of the frame. The bulbs are of various sizes and orientations, creating a textured, layered effect.

Dismissing a Formal Complaint under Title IX doesn't preclude an institution from addressing conduct prohibited under an institution's policy through a fair and equitable grievance process...

Source: Title IX Regulations (2020)

Mandatory Formal Complaint Dismissals under 2020 Title IX Regulations

Under Title IX regulations, universities are **required** to distinguish between prohibited conduct that is “under Title IX” and prohibited conduct that is a violation of university policy. Under Title IX, the University **must dismiss** a Formal Complaint or the part of the allegations in a Formal Complaint, if applicable, where:

Sexual Harassment is alleged and where:

- The conduct alleged does not meet the definition of Sexual Harassment;
- The alleged conduct did not occur in the University’s education program or activity; or
- The alleged conduct did not occur against a person in the United States.

Note: A dismissal under this provision only applies to allegations of Sexual Harassment under Title IX. In such an instance, the University may still investigate a Formal Complaint for allegations of Sexual Harassment under this Policy. The University may also investigate allegations of Prohibited Conduct under this Policy but it will not technically be “under Title IX.”

Source:

UT System Model Policy for Sexual Misconduct

The University may dismiss a Formal Complaint, at its **discretion**, under this Policy's Grievance Process for any of the following circumstances:

- The Complainant voluntarily withdraws any or all of the Formal Complaint allegations and the University determines that the remaining allegations (if any) would not constitute Prohibited Conduct defined in this Policy, even if proven;
- The Complainant submits a written request to the University to not investigate the Formal Complaint filed, and the University determines it can and will honor the request, in accordance with the SHSM Policy and applicable state law;
- The University is unable to identify the Respondent, after the University has taken reasonable steps to do so;

Discretionary Dismissals

The University may dismiss a Formal Complaint, at its **discretion**, under this Policy's Grievance Process for any of the following circumstances (continued):

- The Respondent is no longer employed by the University;
- Any other specific circumstances that prevent the University from gathering sufficient evidence to reach a determination as to the Formal Complaint or any allegations therein;
- The University determines the alleged conduct in the Formal Complaint would not constitute Prohibited Conduct under this Policy, even if proven; or
- The University determines the Formal Complaint does not fall within the scope or applicability of this Policy.

Discretionary Dismissals (Cont.)



Appeal Resolution Options: Formal Complaint Dismissals

1. Affirm the Formal Complaint Dismissal; or
2. Remand the process back to a Formal Grievance Process.

Source:

UT System Model Policy for Sexual Misconduct

Formal Complaint Dismissal (Example #1)

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Formal Complaint (Signed by TIXC)/Notice Issued

Grounds (examples): Serious nature of the allegations; Multiple reports/alleged incidents naming same RP

Initiate Formal Grievance Process (Investigation Stage)

Formal Complaint Dismissed (Close Case)

Basis (example): Specific circumstances that prevent... the gathering [of] evidence sufficient to reach a determination...

Specifically (example): Lack of participation from CP

Notice of F. C. Dismissal Issued (Close Case): Option to Appeal

Procedural Irregularity

New Evidence

Bias/Conflict of Interest

Appeal Resolution Options

Affirm F.C. Dismissal (Close Case)

Remand back to Investigation Stage

Formal Complaint Dismissal (Example #2)

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Formal Complaint (Signed by CP)/Notice Issued

Allegation(s): "Sexual harassment" allegation (e.g. hugs, shoulder touches, "romantic date" requests, comment about CP's appearance)

Initiate Formal Grievance Process (Investigation Stage)

Formal Complaint Dismissed ("Under Title IX") & Cont. Investigation

Basis "Under Title IX" (example): Allegations don't meet "severe, pervasive, and obj. offensive" elements of "sexual harassment" definition

Reason(s) for Continuing (example): Allegations meet definition(s) of other prohibited conduct under SM Policy

Notice of F. C. Dismissal Issued ("Under Title IX"): Option to Appeal

Procedural Irregularity

New Evidence

Bias/Conflict of Interest

Appeal Resolution Options

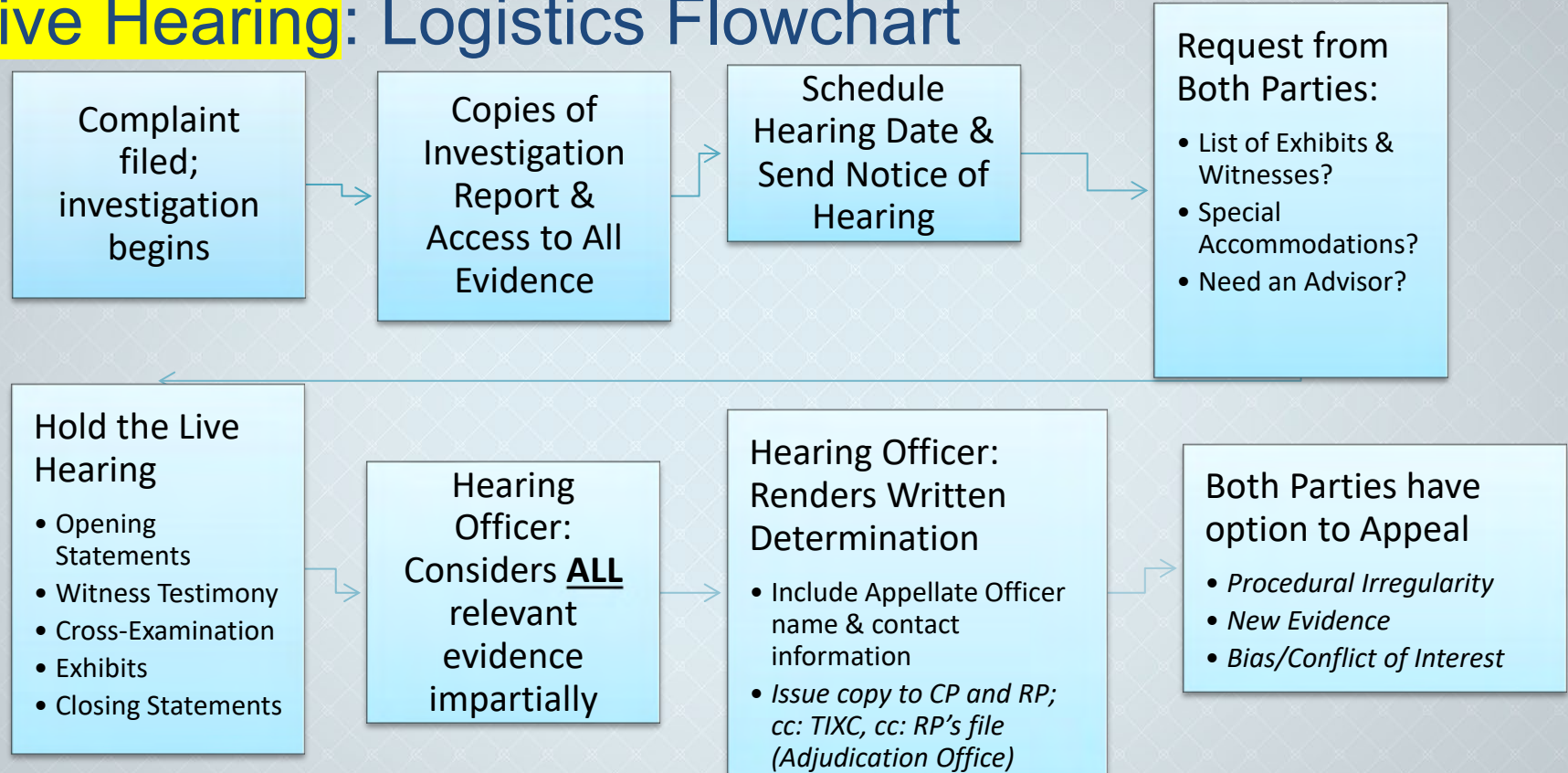
Affirm F.C. Dismissal ("Under Title IX") & Cont. Investigation under SM Policy
(e.g. with "other inapp. sexual conduct" allegations)

Cont. Investigation "Under Title IX"
(e.g. with "sexual harassment" allegations)



Background: Live Hearing Process and Appeal

Live Hearing: Logistics Flowchart



Appeal: Logistics Flowchart

If a Party submits an Appeal to the Appellate Officer...

Provide copy of Appealing Party's Appeal to the Non-Appealing Party for opportunity to respond & deadline to respond.

Appellate Officer:
Consider ALL points of view & relevant evidence impartially

Appellate Officer:
Renders Final Determination
*Issue copy to CP and RP;
cc: TIXC, cc: RP's file
(Adjudication Office)*

Specific deadlines may be published in the institution's policy and/or procedures.

Appellate Officer's Role in the Adjudication Process

Final Decision-Maker



The University of
Texas System





Appeal Resolution Options in Adjudications

Outline Comparisons...

Title IX/Sexual Harassment

Notice

Investigation (**No determination**)

Both parties have access to all evidence related to the allegation(s) & ability to comment

**No Administrative
Disposition **Hearing Required****

Appeal

Non-Sexual Harassment

Notice

Investigation (**Preliminary
determination**)

Both parties have access to all evidence related to the allegation(s) & ability to comment

Administrative Disposition
or Hearing Options

Appeal

When applicable:

A Respondent's determination of responsibility for the finding(s) of policy violation(s) is accepted, but a dispute and appeal of the sanctions and remedies outlined in the administrative disposition is filed...



The University of
Texas System

Source:

*UT System Model Policy
for Sexual Misconduct*



Respondent Disputes
Sanctions in the
Administrative Disposition



Appeal Resolution Options: Final Determination Regarding Responsibility or Final Sanctions of Respondent

1. Affirm the Hearing Officer's determination regarding the Respondent's responsibility and affirm the disciplinary sanctions and remedies, if applicable;
2. Affirm the Hearing Officer's determination regarding the Respondent's responsibility and amend the disciplinary sanctions and remedies, if applicable;
3. Reverse the Hearing Officer's determination of the Respondent's responsibility and amend the disciplinary sanctions and remedies, if applicable; or
4. Affirm or amend the sanctions and/or remedies outlined in the administrative disposition issued under the Policy.

Source:

UT System Model Policy for Sexual Misconduct

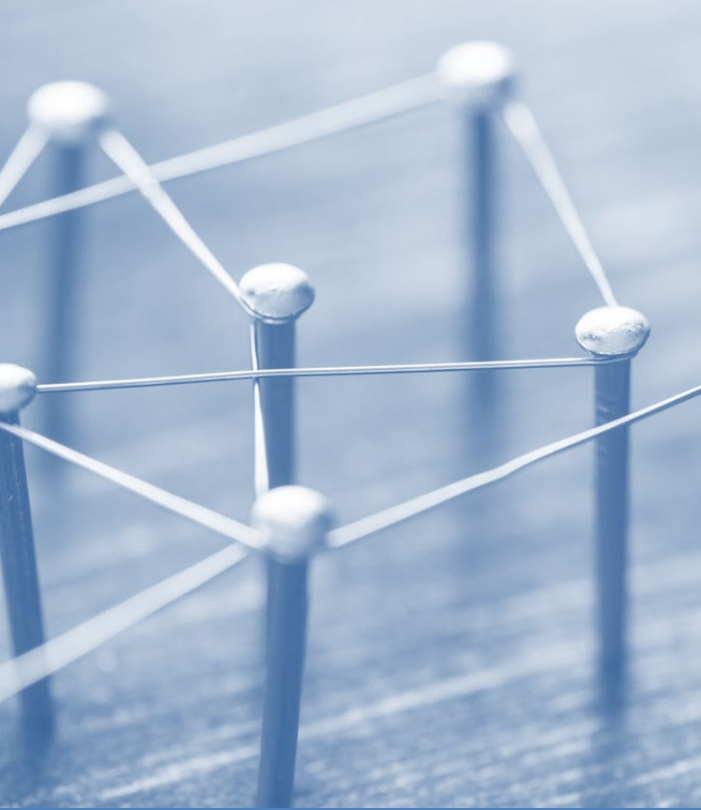
Making Your Decision...



- Review the materials.
- Review the policy.
- What is the **ground or argument** on appeal?
- What is the **reasoning** in the initial decision-maker's letter or disposition?



In Making Your
Decision...



Considerations for Grounds for Appeal

- A **procedural irregularity** that affected the outcome of the matter;
- There is **new evidence** that was not reasonably available at the time of the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; or
- The Title IX Coordinator, investigator(s), or hearing officer had a **conflict of interest** or bias for or against the parties (generally, or specifically in this matter) that affected the outcome of the matter.

Look at the Provision(s) at Issue:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- ***Course of conduct*** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- ***Reasonable person*** means a reasonable person under similar circumstances and with similar identities to the victim.
- ***Substantial emotional distress*** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



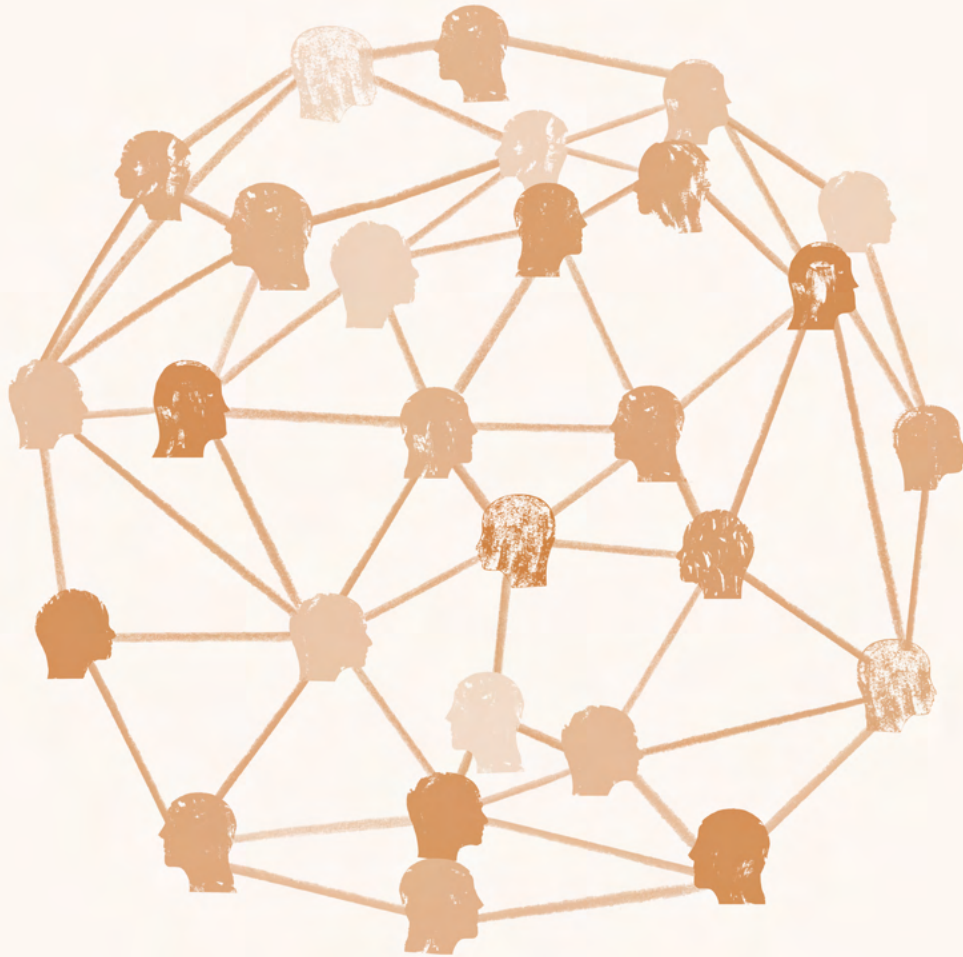
Look at the Provision(s) at Issue:

Engaging in a (1) **course of conduct** (2) **directed at a specific person** that would (3) **cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.**

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.





Special Issues

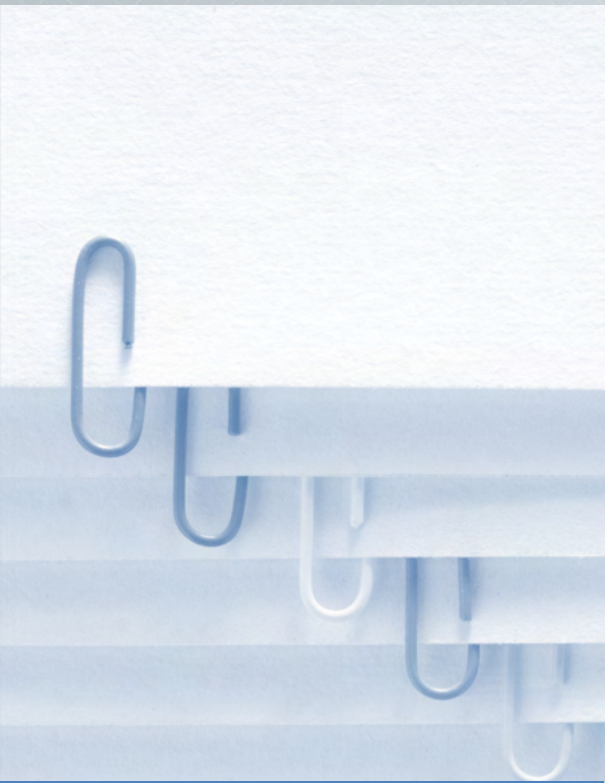
Evidence is **relevant** if:

- The evidence has any tendency to make a **fact** more or less probable than it would be without the evidence; **and**
- The **fact** is of consequence in determining the action.



Relevance: Prior Sexual History

A Complainant's sexual predisposition or prior sexual behavior are **not relevant** **except** where questions and evidence about a Complainant's prior sexual behavior are offered to prove that **someone other than the Respondent committed the alleged conduct** charged by the Complainant **or** if the questions or evidence **concern specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove the Complainant's consent** of the alleged conduct.



Exclusion of Privileged Information Unless Waived

No person will be required to disclose information protected under a legally recognized privilege. The hearing officer must not allow into evidence or rely upon any questions or evidence that may require or seek disclosure of such information, unless the person holding the privilege has waived the privilege. This includes information protected by the attorney-client privilege.

Consent Definition

A voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.

Incapacitation Definition

Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

*If the answer to either of these questions is “**YES**,” consent was absent and the conduct is likely a violation of this Policy.*

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



Implicit Bias



- Your **role** as a hearing officer is:
 - **Neutral, impartial, & fair**
- Fairness & the **appearance of fair.**

Goal: To **listen** to both parties equally and that they both leave **feeling heard** by the hearing officer.

Implicit Bias (Cont.)

[T]he Department [of Education] ..cautions that a training approach that encourages Title IX personnel to “**believe**” one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate § 106.45(b)(1)(ii) precluding credibility determinations based on a party’s status as a complainant or respondent.

Implicit Bias (Cont.)

The Department takes no position on whether “start by believing” should be an approach adopted by non-Title IX personnel affiliated with a recipient, such as counselors who provide services to complainants or respondents. The Department wishes to emphasize that parties should be treated with equal dignity and respect by Title IX personnel, but doing so does not mean that either party is automatically “believed.” The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of “profiles” or “predictive behaviors” to particular cases. (Preamble, p. 836)

Tips to Avoid Implicit Bias



- Test to address any potential implicit bias.
 - What is the **essence** of potential policy violation?
 - Create **hypothetical** that includes those elements. Then flip or change the genders.
 - You must have **fair & consistent considerations**, regardless of gender.
- When making your decision: List out the evidence favorable to both sides to ensure **evidentiary support** (as opposed to bias).

Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias** for CP & RP



Nobody gets a “head start.”

No Ex Parte Communications Permitted



Address the issue:

- CC all parties (& advisors), on all communications (even if emailed by one party)

Your Appellate Decision Letter:

Look at your draft with a **critical eye**. Pretend the person who will be most *unhappy* with your decision is in the room with you reading the draft with you. With each sentence or paragraph, consider:

“What would that person say?”

Then revise.



Appellate Decision Letter (Cont.)

Acknowledge parties' arguments.

Deal with issues **contrary** to your decision:

- If you don't, it looks like you didn't consider or hear the argument, that you weren't paying attention, or that the process is unfair.



Q & A



Contact Information

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