

Decision Maker Training

Policy on Sexual and Gender-Based Harassment and Other Forms of
Interpersonal Violence



Welcome and Introductions

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WOMBLE
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Why you are here:

Decision Makers *must* be trained on:

Issues related to
Title IX
Prohibited
Conduct and
Sexual and
Gender-Based
Prohibited
conduct

Relevancy

How to conduct and
investigation and grievance
process that is fair and
impartial, including
information regarding
hearings, appeals, and
informal resolution
processes, while avoiding
prejudgment of the facts at
issue

Conflicts of
interest

The scope of the
University's
education
program or
activity

Bias

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The Title IX Legal Landscape

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Title IX

"No 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 educational program or activity receiving federal financial assistance. "
20 U.S.C. § 1681 & C.F.R. Part 106 (1972)

The Office for Civil Rights (OCR), under the Department of Education, oversees the compliance standards to be applied in investigations and enforcement of Title IX regarding sexual harassment.

On May 6, 2020, the Department of Education released new Title IX regulations, with mandatory implementation date of August 14, 2020.

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Other Key Federal Laws

Clery

- The Jeanne Clery Act (1990)
- Requires reporting of crimes, timely warnings, education/prevention programs, and policies and procedures for sexual assault

VAWA

- The Violence Against Women Reauthorization Act of 2013
- Amends Clery to expand sexual assault requirements and include dating violence, domestic violence, and stalking; applies to all students and employees

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Features of New Title IX Final Rule

- Provides clear definition of sexual harassment prohibited by Title IX
- Requires live hearings with cross-examination for Title IX offenses
- Cross-examination of parties conducted directly, orally, and in real time by a party's advisor of choice
- Decision-maker determines relevancy of questions during hearing
- Applies to faculty, staff, and students

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Scope of Sexual Harassment Under Title IX

Quid pro quo sexual harassment;

Unwelcome conduct determined by a reasonable person to be severe, pervasive, and objectively offensive that effectively denies a person equal access to the educational program or activity; or

Sexual assault, dating violence, domestic violence, or stalking as defined under the Clery Act and VAWA

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Jurisdiction Under Title IX



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“Education program or activity...”

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

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UVA's Policy

The Policy on Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence

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To Whom the Policy Applies:

Students

- Registered or enrolled
- For credit or non-credit bearing coursework

Employees

- Full-time and part-time
- Faculty, University staff, Student employees, Medical Center employees, wage (including temp), professional research staff, and post-doctoral fellows

Third Parties

- Contractors, vendors, visitors, applicants, guests, or other third parties

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Definitions

Complainant

- A “Complainant” is an individual who is reported to be the subject of conduct that could constitute Prohibited Conduct regardless of whether such person makes a report or files a complaint.

Respondent

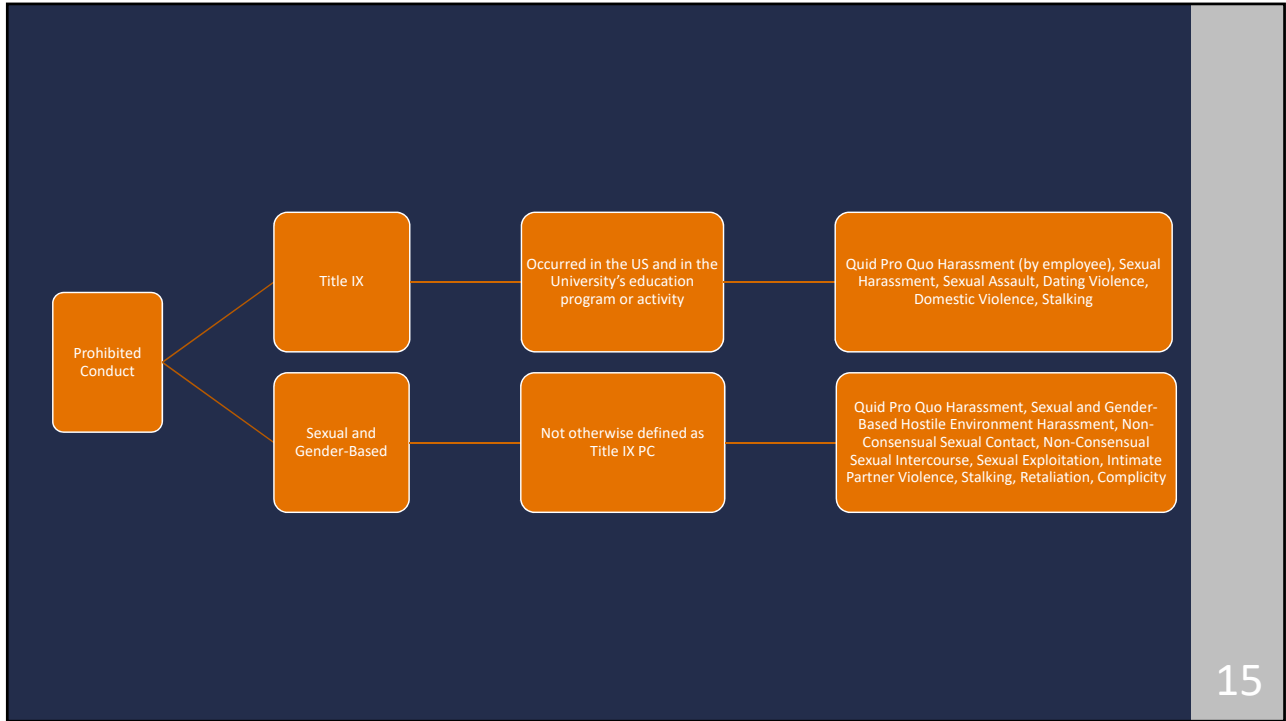
- A “Respondent” is any individual who has been reported to be the perpetrator of conduct that could constitute Prohibited Conduct.

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Effective Date:

- Applies to all reports of Prohibited Conduct occurring on or after August 14, 2020.
- Where the date of the PC precedes August 14, 2020, the definitions in existence at the time are used.
- For all reports after August 14, 2020, the procedures of the new policy will be used to evaluate, investigate, and resolve the complaint, regardless of when the incident occurred.

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Title IX Prohibited Conduct

A dark blue slide with a vertical orange bar on the left side. The text 'Title IX Prohibited Conduct' is centered in white. A grey vertical bar on the right contains the number '16'.

Quid Pro Quo Harassment (Employee-Student)

Quid Pro Quo (i.e., this for that) Harassment (Employee-Student) is conduct where an Employee of the University conditions the provision of an aid, benefit, or service on a student's participating in unwelcome sexual conduct.

Quid Pro Quo Harassment (Employee-Student) applies whether the condition proposed by the Employee is communicated expressly or impliedly.

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Sexual Harassment

Sexual Harassment is:

- unwelcome conduct
- on the basis of sex
- that a reasonable person would determine is so severe, pervasive, and objectively offensive
- that it effectively denies a person equal access to the University's education programs or activities.

Such conduct includes unwelcome conduct of a sexual nature and may include unwelcome conduct based on sex or sex stereotyping.

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Sexual Harassment

In evaluating whether the unwelcome conduct is so severe, pervasive, and objectively offensive that it effectively denies a person equal access, the University uses a reasonable person standard that takes into account the totality of known circumstances in a particular situation, including but not limited to:

- The frequency, nature, and severity of the conduct;
- The age, disability status, and other characteristics of the parties;
- Whether the conduct was physically threatening;
- The effect of the conduct on the Complainant's mental or emotional state;
- Whether the conduct was directed at more than one person;
- Whether the conduct arose in the context of other discriminatory conduct; and
- Whether the conduct unreasonably interfered with the Complainant's educational or work performance and/or University programs or activities.

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Sexual Assault

The following forcible and nonforcible sex offenses:

- Forcible Rape
- Forcible Sodomy
- Sexual Assault with an Object
- Forcible Fondling
- Incest
- Statutory Rape

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Forcible Rape

Forcible Rape is:

Penetration,
No matter how slight,
Of the vagina or anus with any body part or object,
Or oral penetration by a sex organ of another
person,
Without the consent of the Complainant.

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Forcible Sodomy

Forcible sodomy is:

Oral or anal sexual intercourse with another person,
Forcibly
And/or against that person's will (non-consensually) or
Not forcibly or against the person's will (non-consensually) in
instances where the Complainant is incapable of giving
consent because of age or because of temporary or
permanent mental or physical incapacity.

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Sexual Assault with an Object

Sexual assault with an Object is:

The use of an object or instrument to penetrate,
However slightly,
The genital or anal opening of the body of another person,
Forcibly,
And/or against that person's will (non-consensually)
Or not forcibly or against the person's will (non-
consensually) in instances where the Complainant is
incapable of giving consent because of age or because of
temporary or permanent mental or physical incapacity.

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Forcible Fondling

Forcible Fondling is:

The touching of the private body parts of another person
(buttocks, groin, breasts),
For the purpose of sexual gratification,
Forcibly,
And/or against that person's will (non-consensually),
Or not forcibly or against the person's will in instances where
the Complainant is incapable of giving consent because of
age or because of temporary or permanent mental or
physical incapacity.

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Incest

Incest is:

Nonforcible sexual intercourse,

Between persons who are related to each other within the degrees wherein marriage is prohibited by Virginia law. See Va. Code Ann. § 18.2-366.

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Statutory Rape

Statutory Rape is:

Nonforcible sexual intercourse,

With a person who is under the statutory age of consent in the Commonwealth of Virginia, which is 17.

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Affirmative Consent

For all forms of Sexual Assault set forth above under this policy, consent is defined as “Affirmative Consent.”

Affirmative Consent is:

Informed (knowing)

Voluntary (freely given)

Active (not passive), meaning that, through the demonstration of clear words or actions, a person has indicated permission to engage in mutually agreed-upon sexual activity

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Affirmative Consent - Force

Affirmative Consent cannot be obtained by Force. Force includes:

- (a) the use of physical violence,
- (b) threats,
- (c) intimidation, and/or
- (d) coercion.

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Affirmative Consent

What's not affirmative consent:

- Lack of protest
- Lack of resistance
- Silence and/or passivity
- Consent to a different form of sexual activity

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Affirmative Consent - Incapacitation

Affirmative Consent cannot be gained by taking advantage of the incapacitation of another, where the person initiating sexual activity knew or reasonably should have known that the other was incapacitated.

The University asks two questions:

- (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," Affirmative Consent was absent and the conduct is likely a violation of this policy.

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Affirmative Consent - Incapacitation

- Incapacitation means that a person lacks the ability to make informed, rational judgments about whether or not to engage in sexual activity.
- A person who is incapacitated is unable, temporarily or permanently, to give Affirmative Consent because of mental or physical helplessness, sleep, unconsciousness, or lack of awareness that sexual activity is taking place.
- A person may be incapacitated as a result of the consumption of alcohol or other drugs, or due to a temporary or permanent physical or mental health condition.
- Incapacitation is a state beyond drunkenness or intoxication.
- A person is not necessarily incapacitated merely as a result of drinking or using drugs. The impact of alcohol and other drugs varies from person to person.

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Affirmative Consent

Being impaired by alcohol or other drugs is no defense to any violation of this policy

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Affirmative Consent - Withdrawal

- Affirmative Consent may be withdrawn at any time.
- An individual who seeks to withdraw Affirmative Consent must communicate, through clear words or actions, a decision to cease the sexual activity.
- Once Affirmative Consent is withdrawn, the sexual activity must cease immediately.

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Dating Violence

Dating Violence is conduct defined as violence on the basis of sex committed by a person

(A) who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors (1) length of relationship, (2) type of relationship, and (3) frequency of interaction between the persons involved in the relationship.

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Domestic Violence

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

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Stalking

Stalking is conduct on the basis of sex defined as engaging in a course of conduct directed at a specific person (e.g., the Complainant) that would cause a reasonable person to (A) fear for their safety or the safety of others or (B) suffer substantial emotional distress.

"Course of conduct" means two or more acts, including but not limited to acts in which a person directly, indirectly, or through third parties, by any actions, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about another person, or interferes with another person's property.

"Substantial emotional distress" means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

Stalking includes "cyber stalking," a particular form of stalking in which a person uses electronic media, such as the internet, social networks, blogs, cell phones, texts, or other similar devices or forms of contact.

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Sexual or Gender-Based Prohibited Conduct

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Sexual or Gender-Based PC includes:

When one of the forms of PC is alleged and:

Such conduct does not meet the definition of Title IX PC and when:

The PC occurs on University Grounds or other property owned or controlled by the University;

The PC occurs in the context of a University employment or education program or activity;

The PC occurs at the permanent or temporary local residence of a University student, faculty member, employee, visitor, or in the City of Charlottesville, Albemarle County, or the city or county of any University campus; or

The PC occurs off Grounds or outside of a University employment or education program or activity, but has continuing effects on or create hostile environment for Students, Employees, or Third Parties while on University Grounds or other property owned or controlled by the University or in any University employment or education program or activity.

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Quid Pro Quo Harassment

Quid Pro Quo (i.e., this for that) Harassment (**Employee-Employee or Student-Employee**) is conduct where an Employee or Student of the University conditions the provision of an aid, benefit, or service on an individual's participating in unwelcome sexual conduct.

Quid Pro Quo Harassment (**Employee-Employee or Student-Employee**) (applies whether the condition proposed by the Employee or Student is communicated expressly or impliedly.

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Sexual and/or Gender-Based Hostile Environment Harassment

Sexual or Gender-Based Hostile Environment Harassment that is not covered under the Definition of Title IX Sexual Harassment exists when conduct on the basis of **sex, sexual orientation, gender identity or expression, or pregnancy** is sufficiently **severe, persistent, or pervasive** that it unreasonably interferes with, limits, or deprives an individual from participating in or benefitting from the University's programs and/or activities. Conduct must be deemed severe, persistent, or pervasive from both a subjective and objective perspective.

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Sexual and/or Gender-Based Hostile Environment Harassment

In evaluating whether a hostile environment exists, the University will consider the totality of known circumstances, including, but not limited to:

- The frequency, nature and severity of the conduct;
- Whether the conduct was physically threatening;
- The effect of the conduct on the Complainant's mental or emotional state;
- Whether the conduct was directed at more than one person;
- Whether the conduct arose in the context of other discriminatory conduct;
- Whether the conduct unreasonably interfered with the Complainant's educational or work performance and/or University programs or activities; and
- Whether the conduct implicates concerns related to academic freedom or protected speech.

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Non-Consensual Sexual Contact

Non-Consensual Sexual Contact is:

Any intentional (not incidental or accidental),
Sexual, touching,
However slight,
With any object or body part (as described below),
Performed by a person upon another such person, without Affirmative Consent.

Non-Consensual Sexual Contact includes (a) intentional touching of the breasts, buttocks, groin, or genitals, whether clothed or unclothed, or intentionally touching another with any of these body parts; and (b) making another touch you or themselves with or on any of these body parts.

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Non-Consensual Sexual Intercourse

Non-Consensual Sexual Intercourse is:

Any penetration,
 However, slight,
 With any object or body part (as described below),
 Performed by a person upon another person,
 Without Affirmative Consent.

Non-Consensual Sexual Intercourse includes (a) vaginal penetration by a penis, object, tongue, or finger; (b) anal penetration by a penis, object, tongue, or finger; and (c) any contact, no matter how slight, between the mouth of one person and the genitalia of another person.

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Sexual Exploitation

Sexual Exploitation is taking non-consensual or abusive sexual advantage of another for one's own benefit or for the benefit of anyone other than the person being exploited, when that conduct does not otherwise constitute Prohibited Conduct under this Policy.

Examples of Sexual Exploitation include, but are not limited to:

- Causing the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give Affirmative Consent to sexual activity;
- Allowing third parties to observe private sexual activity from a hidden location (e.g., closet) or through electronic means (e.g., Skype or livestreaming of images);
- Engaging in voyeurism (e.g., watching private sexual activity without the consent of the participants or viewing another person's intimate parts (including genitalia, groin, breasts or buttocks) in a place where that person would have a reasonable expectation of privacy);
- Recording or photographing private sexual activity and/or a person's intimate parts (including genitalia, groin, breasts or buttocks) without consent;
- Disseminating or posting images of private sexual activity and/or a person's intimate parts (including genitalia, groin, breasts or buttocks) without consent;
- Prostituting another person; or
- Exposing another person to a sexually transmitted infection or virus without the other's knowledge.

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Intimate Partner Violence

Intimate Partner Violence includes any act of violence or threatened act of violence that occurs between individuals who are involved or have been involved in a sexual, dating, spousal, domestic, or other intimate relationship.

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Stalking

Stalking occurs when a person engages in a course of conduct directed at a specific person, on the basis of sex that is not covered under the Definition of Title IX Stalking, under circumstances that would cause a reasonable person to fear bodily injury or to experience substantial emotional distress.

Course of conduct means two or more acts, including but not limited to acts in which a person directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about another person, or interferes with another person's property.

Substantial emotional distress means significant mental suffering or anguish.

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Retaliation

Retaliation means any adverse action, or any action likely to deter a reasonable person from engaging in future protected activity, taken against a person for making a good faith report of Prohibited Conduct, participating in any proceeding under this policy, and/or acting in good faith to oppose conduct that constitutes a violation of this policy.

Retaliation includes threatening, intimidating, harassing, coercing or discriminating against an individual because the person made a report or complaint, testified, assisted, participated in, or refused to participate in any manner in an investigation, proceeding, and/or hearing.

Retaliation may be present even where there is a finding of “no responsibility” on the allegations of Prohibited Conduct.

Retaliation does not include good faith actions lawfully pursued in response to a report of Prohibited Conduct or the exercise of rights protected under the First Amendment.

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Complicity

Complicity is any act taken with the purpose of aiding, facilitating, promoting or encouraging the commission of an act of Prohibited Conduct by another person.

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Break!

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**The Resolution
Process**

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Options:

Supportive Measures Only – No Formal Complaint necessary

- Non-disciplinary, non-punitive individualized services
- Without fee or charge
- Offered to Complainant - Before or after filing of a Formal Complaint OR where no Formal Complaint has been filed
- Offered to Respondent – after a Formal Complaint has been filed
- Designed to address individual's safety and wellbeing and to preserve or restore equal access to educational opportunities without unreasonably burdening the other party
- Coordinated by the Title IX Coordinator

Informal Resolution

Formal Resolution

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Report and Formal Complaint

A Formal Complaint must be:

- ✓ Filed in person, by mail, or by email (not telephone);
- ✓ Signed by the Complainant OR Title IX Coordinator (physical or digital signature);
- ✓ Alleging Prohibited Conduct against a Respondent; and
- ✓ Requesting that the University investigate.

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After Formal Complaint is filed:

The Title IX Coordinator will:

Seek to honor the resolution preferences of the Complainant wherever possible

Consult with the Evaluation Panel and consider the following factors:

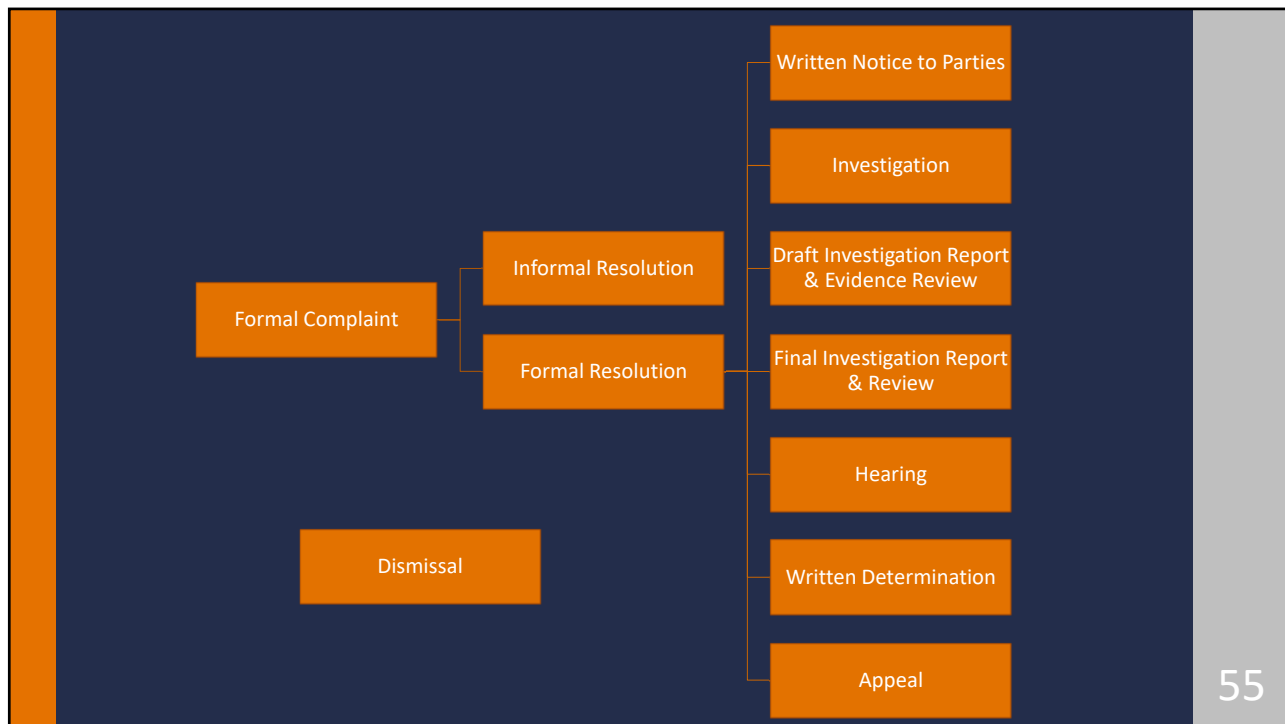
- Totality of the circumstances;
- Presence of any Risk Factors;
- Potential impact of such action(s) on the Complainant;
- Any evidence showing that Respondent made statements of admission or otherwise accepted responsibility for the Prohibited Conduct;
- The existence of independent information or evidence regarding the Prohibited Conduct; and
- Any other available and relevant information.

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Notice to Parties

- Title IX Coordinator will provide parties written notice of the allegations, including sufficient details about the allegations known at the time, and information about both the Formal and Informal Resolution processes.

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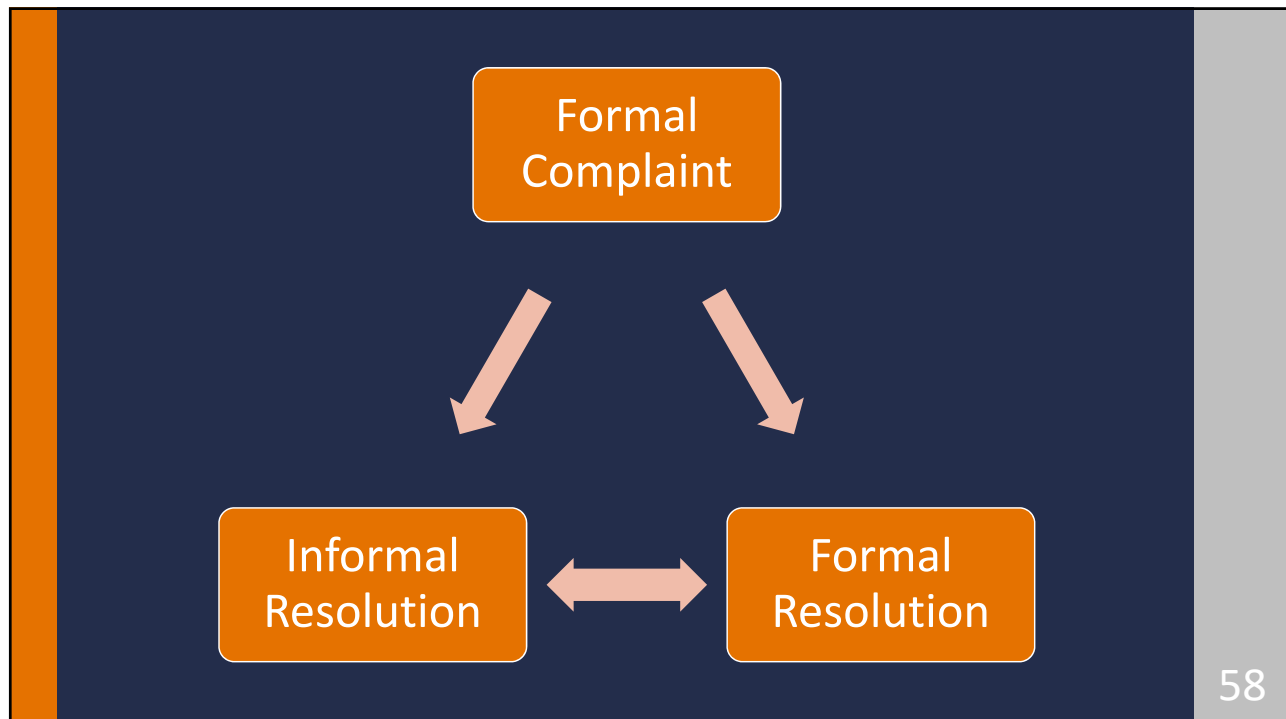


Informal Resolution

Informal Resolution

- A Formal Complaint must be filed
- Both parties must give voluntary written consent, or it proceeds through Formal
- The University has discretion to determine (1) whether Informal Resolution is appropriate considering the allegations in the Formal Complaint, (2) the type of Informal Resolution that may be appropriate, and (3) whether the Formal Complaint should be referred to Formal Resolution at any time
- Administered by trained facilitators who avoid prejudgment of the facts at issue and are free from conflicts of interest and bias
- Informal Resolution is not available where an employee is alleged to have engaged in Prohibited Conduct directed at a student (for Title IX PC)

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Intersection of Formal & Informal Resolution

The parties may request to engage in Informal Resolution at any point after the Written Notice of the Allegations and Investigation is received by the parties and before the commencement of the Hearing, subject to the approval of the Title IX Coordinator.

At any point prior to the resolution of the Informal Resolution, either party may withdraw from the Informal Resolution or the Title IX Coordinator may terminate the Informal Resolution, at which point Formal Resolution will resume.

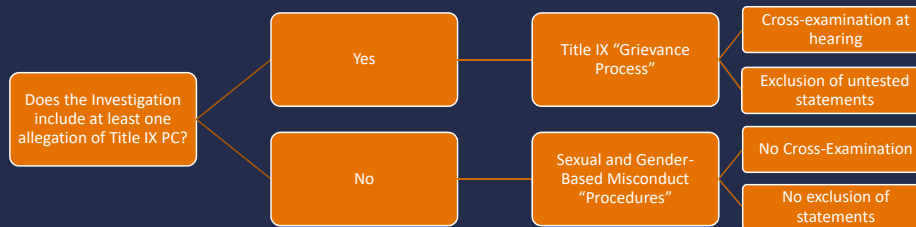
Any information gathered during the Informal Resolution that is not independently discovered during the Formal Resolution may not be considered by the Decision Maker.

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Formal Resolution

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One Policy, Two Processes



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Other Forms of Discriminatory or Harassing Conduct

- If a report of Title IX PC also implicates other forms of discriminatory and/or harassing conduct prohibited by other University policies, the Title IX Coordinator will:
 - Evaluate allegations to determine whether the alleged Title IX PC and the alleged additional discriminatory or harassing conduct may be appropriately investigated together without unduly delaying the resolution of the Title IX PC.
- Other University policies:
 - Policy on Sexual and Gender-Based Harassment and Other Forms of Interpersonal Violence
 - Preventing and Addressing Discrimination, Harassment, and Retaliation (PADHR) Policy
 - Standards of Conduct
 - Faculty Conflicts of Interest Policy

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Investigation

- Neutral fact-gathering process
- Parties have an equal opportunity to be heard, to submit information and corroborating evidence, to identify witnesses who may have relevant information, and to identify topics about which they believe the Investigator should question parties or witnesses
- Respondent presumed to be not responsible - Presumption is overcome only where the Decision Maker concludes that there is sufficient evidence, by a Preponderance of the Evidence, to support a finding that Respondent violated the Policy
- Parties and witnesses not required to participate – Findings of responsibility may not be based solely on a party's decision not to participate

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Participation of Advisors

- Parties have a right to advisor of choice.
- May be any person and may be, but is not required to be, an attorney.
- Choosing an advisor who is also a witness creates potential for bias and conflict of interest, which the Decision Maker may take into account.
- Parties may be accompanied by advisor for any meeting or proceeding related to investigation or resolution.
- Advisors may provide support and advice, but may not speak on behalf of the parties, submit written statements not attributed to the party, or otherwise participate in, or in any matter disrupt, the proceedings except to conduct cross-examination at the hearing (in Title IX Grievance Process).
- Decision Makers should communicate directly with the party through their University-provided email address and copy the advisor on all communications.

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What's relevant to the Investigation?

Investigator has discretion to determine relevance of proffered evidence

Information deemed not relevant by Investigator must still be shared with the parties and the Decision Maker and may be considered at the Hearing

Generally, Investigator should not consider statements of opinion or statements as to a party's general reputation for any character trait.

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What's relevant to the Investigation?

Prior or Subsequent Conduct:

Prior or subsequent conduct of the Respondent may be considered in determining pattern, knowledge, intent, motive, or absence of mistake

Determination of relevance based on assessment of whether the previous or subsequent conduct was substantially similar to the conduct under investigation or indicates a pattern of similar Title IX PC or Sexual and Gender-Based PC.

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What's relevant to the Investigation?

Prior Sexual History:

Sexual history or sexual predisposition of a party will NEVER be used to prove character or reputation.

The prior sexual history of Complainant is not relevant to a determination of a Title IX or Sexual Misconduct Policy violation and will be considered only when:

Offered to prove someone other than Respondent committed the PC described in the Formal Complaint; or

To prove consent in light of specific incidents of prior sexual history between the parties.

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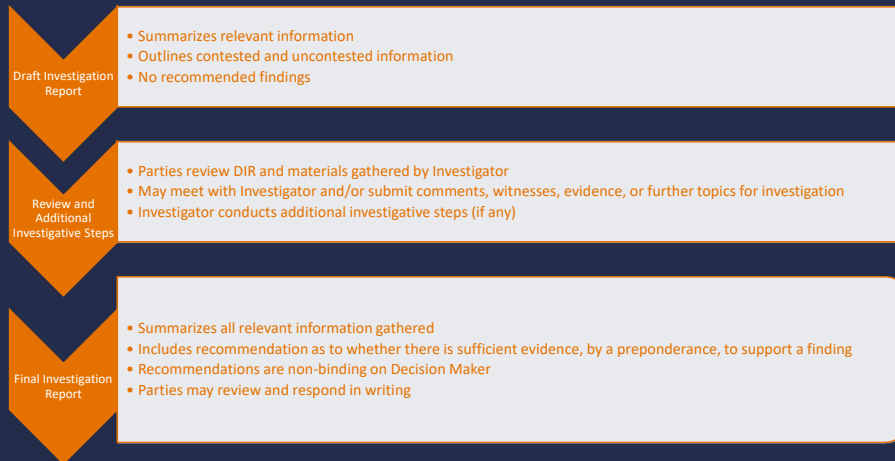
What's relevant to the Investigation?

Privileged Information:

- Information protected by a recognized privileged relationship may not be relied upon WITHOUT:
 - Written permission of the party about whom the record pertains.
- Examples of privileged information:
 - Attorney-client communications
 - Medical care information

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Investigation Report Process



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Impact and Mitigation Statements

- After transmission of the FIR, parties may submit an impact or mitigation statement to the Title IX Coordinator
- Statement will ONLY be considered by the Decision Maker if determination of sanctions is necessary
- Impact statement may contain:
 - Impact of the PC on the Complainant
 - Preference about the sanctions to be imposed
 - Any other information relevant to remedies and sanctions
- Mitigation statement may contain:
 - Factors respondent believes should mitigate or otherwise be considered in determining remedies or sanctions
- NO witnesses or witness statements regarding impact or mitigation allowed without approval of Title IX Coordinator

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Appointment of the Decision Maker

- Decision Maker must be:
 - Impartial
 - Free from actual bias or conflict of interest
- Decision Maker cannot be the investigator assigned to the case or the Title IX Coordinator
- Must receive training on:
 - Issues related to Title IX PC and Sexual and Gender-Based PC
 - Scope of the University's education program or activity
 - Relevancy
 - How to conduct an investigation and grievance process that is fair and impartial, including information regarding hearings, appeals, and informal resolution
 - Avoiding prejudgment of the facts at issue
 - Conflicts of interest and bias
- Will be given a copy of the Final Investigation Report and all evidence which is not protected by privilege

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University-Appointed Advisors

- Party may make a written request to the Title IX Coordinator to be provided an advisor of the University's Choice.
- University obligated to provide an advisor for the parties at the Hearing but may provide an advisor prior to the Hearing.
- A party may not proceed at Hearing without an advisor.
- If a party's advisor will not conduct cross-examination, the University will appoint an advisor who will do so, regardless of the participation or non-participation of the party in the hearing.

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Pre-Hearing Meeting

- Decision Maker may convene with the parties
 - Provide advance notice to the parties
- Preliminary matters related to the hearing are discussed and, if possible, resolved

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Hearing

- Opportunity for the parties to address the Decision Maker about issues relevant to the determination of responsibility
- Decision Maker objectively evaluates all relevant evidence necessary to independently reach a determination regarding responsibility and, if applicable, any appropriate remedies or sanctions
- Presumption of non-responsibility on the part of Respondent continues
- Decision Maker applies a preponderance of the evidence standard
- Each party has the opportunity to:
 - Be heard (opening & closing statements, answer questions)
 - Respond to questions of the Decision Maker
 - Have an advisor cross-examine other parties and witnesses – TIX Grievance Process only
- New evidence and/or new witnesses will not be considered

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Who participates in the hearing?

Always

- Decision Maker
- Court Reporter
- Party Advisors – Participate in cross-examination (TIX Grievance Process only), even if the parties do not attend

Sometimes

- Parties – Not required to participate in order for the hearing to proceed
- Investigators
- Witnesses

If parties or witnesses decline to appear at the Hearing or to subject themselves to cross-examination, the Decision Maker cannot consider their statements (TIX Grievance Process only)

If neither party nor the Decision Maker requests the presence of a witness at the hearing, then any information submitted by that witness may be considered without cross-examination (TIX Grievance Process Only)

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Rules of Order and Decorum

- Apply equally to both parties, to any witnesses, advisors, or to other participants.
- Includes:
 - Hearing Order & Format
 - Guidelines for appropriate cross-examination
 - Guidelines for relevance determinations
 - Procedures for refusal to submit to cross-examination
 - Procedures for no new evidence presented at Hearing
 - Removal for Non-Compliance with the Rules
 - Post-Hearing Information

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Hearing Format

- Decision Maker has the discretion to determine!
- Typically for Title IX Grievance Process:
 - Brief opening remarks by parties
 - Direct and/or cross examination of the parties, Investigator, and any witnesses by the Decision-Maker
 - Cross-examination of the parties, Investigator, and any witnesses by the parties' advisors
 - Brief concluding remarks by the parties
- Typically for Sexual and Gender-Based Misconduct Process:
 - Brief opening remarks by parties
 - Direct examination of parties, Investigator, and any witnesses by the Decision Maker
 - Parties may submit questions to be asked by Decision Maker
 - Brief concluding remarks by the parties

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Direct Examination

- Conducted by Decision Maker
- Ask questions in order to aid the Decision Maker in:
 - findings of fact
 - conclusions regarding the application of the policies to the facts
 - the determination of responsibility
 - Sanctions or remedies

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Cross Examination

- Title IX Grievance Process only!
- Conducted by the parties' advisors
- Conducted directly, orally, and in real time
- May ask all relevant questions and follow-up questions designed to test the veracity and accuracy of party and witness statements, including those challenging credibility
- Before a party or witness answers any question, the Decision Maker must:
 - Determine whether the question is relevant AND
 - Explain any decision to exclude a question as not relevant

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Relevance Considerations

- Where a question is relevant, but includes a party's character or prior bad acts, the Decision Maker cannot exclude or refuse to consider the relevant evidence, but may objectively evaluate that evidence by analyzing the weight or credibility that should be ascribed to that statement
- Decision Maker should apply logic and common sense, rather than the rules of evidence
- The following are irrelevant:
 - Information protected by a legally recognized privilege
 - Any party's medical, psychological, and similar records unless the party has given voluntary, written consent
 - Information about the Complainant's sexual predisposition or sexual behavior
 - Statements by a party or witness who did not submit to cross-examination

80

Failure to Submit to Cross-Examination

- Only statements tested for credibility through cross examination will be considered by Decision Maker in reaching a responsibility determination (TIX Grievance Process only)
- If a party or witness does not submit to cross-examination, the Decision Maker will not rely on that individual's statement, including any statement in:
 - Any interview transcript
 - Any written or verbal statement to the Investigator, Title IX Coordinator, or another party or witness
 - The Formal Complainant
- Decision Maker cannot draw an inference about the determination regarding responsibility based solely on a party or witness's absence from the Hearing or refusal to submit to cross-examination

81

After hearing, Decision Maker must decide...

Additional Investigative Steps Needed

- Remand matter to Title IX Coordinator with instructions for further investigation or other action

Sufficient Evidence to Support Finding of Responsibility

- Determine the appropriate sanctions or remedies

Insufficient Evidence to Support Finding of Responsibility

- Determine whether remedies are appropriate

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Sanctions and Remedies

- Decision Maker may impose one or more disciplinary sanctions on the Respondent and/or provide remedies to the Complainant.
- Sanctions and remedies are designed to eliminate PC, prevent its recurrence, and remedy its effects, while supporting the University's educational mission and legal obligations.
- Remedies are designed to restore or preserve equal access to the University's education program or activity.

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Written Determination

- The Decision Maker must evaluate all evidence independently and must not give deference to the recommended findings of fact, credibility, relevancy or responsibility expressed in the Final Investigation Report.
- Decision Maker simultaneously issues the Written Determination to both parties, with a copy to the Title IX Coordinator
- Written Determination must be issued within 10 BUSINESS DAYS, or such longer time as the Decision Maker may for good cause determine

84

Other Potential Steps:

- **Emergency Removal**
 - Interim Suspension
 - Suspension from employment
 - University will:
 - Undertake an individualized safety and risk analysis to determine whether an immediate threat to the physical health or safety of any student or other individual arising from the allegations of Prohibited Conduct justifies removal, and
 - Provide the Respondent with notice and an opportunity to challenge the removal decision with 48 hours following the removal decision
- **Acceptance of Responsibility**
 - Case referred to Decision Maker to conduct a Hearing or to Informal Resolution
 - If Respondent retracts acceptance (before or during a Hearing) or IR is unsuccessful, Formal Resolution will be resumed.

85

Other Potential Steps:

Mandatory Dismissal (Title IX Grievance Policy) – The University shall dismiss when the alleged conduct, even if proved:

Would not constitute Title IX PC as defined in the Policy;

Did not occur in the University's education program or activity;

Did not occur against a person in the United States; or

The Complainant was not participating in or attempting to participate in a University education or activity at the time the Formal Complaint was filed.

86

Other Potential Steps:

Sexual or Gender-Based Misconduct Procedures: The University shall dismiss a Formal Complaint, or any allegations therein, from the Misconduct Procedures when the alleged conduct, even if proved would not constitute Sexual and Gender-Based Prohibited Conduct as defined in the Sexual Misconduct Policy

87

Other Potential Steps:

Discretionary Dismissal – The University may dismiss if at any time in the Formal Resolution, Informal Resolution, or Hearing:

Complainant notifies the Title IX Coordinator that they would like to withdraw the Formal Complaint or any allegations;

The Respondent is no longer enrolled or employed by the University; or

Specific circumstances prevent the University from gathering evidence sufficient to reach a determination.

Specific Circumstances include:

Formal Complaint made many years after the PC allegedly occurred;

Complainant stops participating in or refuses to participate in the process; or

Formal Complaint contains allegations that are precisely the same as allegations the University has already investigated and adjudicated.

88

Other Potential Steps:

- Dismissal Procedure:
 - Title IX Coordinator determines when dismissal is required or appropriate and sends a Dismissal Letter containing:
 - Written notice of the dismissal;
 - The reasons for the dismissal; and
 - An explanation of the appeals process.
- University may dismiss under the Title IX Grievance Process and take action under the Sexual Misconduct Procedures (Appendix B)
- Both parties have the right to appeal the dismissal.

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Appeal

- Both parties have the right to appeal
- Appeal must be submitted in writing to the Title IX Coordinator and cite the bases for the appeal and the evidence supporting the appeal
- Title IX Coordinator will promptly notify the other party and provide the party with a copy of the appeal
- The non-appealing party has an opportunity to provide a written response
- Reviewed by an Appeal Officer
- Sanctions issued by the Decision Maker will not take effect until the conclusion of the appeal process or the expiration for filing an appeal

90

Four Bases for Appeal

1. Procedural irregularity that affected the outcome of the Formal Complaint

2. New evidence that was not reasonably available at the time the Written Determination was made that could affect the outcome of the Formal Complaint

3. The Title IX Coord., Investigator, or Decision Maker had an actual bias or conflict of interest for or against Complainants or respondents generally or and individual party that affected the outcome of the Formal Complaint

4. Inappropriate disciplinary sanction

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Possible Outcomes of an Appeal

Appeal denied

•The Appeals Officer issues a Final Outcome Letter and the determination regarding responsibility becomes final.

Appeal granted because of procedural irregularity that affected outcome

•The matter may be remanded for further action to remedy the error, depending upon the nature of the procedural error.

Appeal granted because of discovery of new evidence that affected outcome

•The matter may be returned to the Decision Maker for reconsideration of the determination considering the new evidence.

Appeal granted because of bias or conflict of interest that affected outcome

•The matter may be remanded for further action depending on the particular finding of bias or conflict of interest.

Appeal granted because of inappropriate disciplinary sanction

•The Appeals Officer, in consultation with appropriate University employees as necessary to obtain information necessary to make a fully informed decision, determines an appropriate disciplinary sanction and issues a Final Outcome Letter and the determination regarding responsibility becomes final.

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Final Outcome Letter

The Appeals Officer will issue an appeal determination within 10 business days of receiving the Appeal Packet (unless the Appeals Officer requests an extension of time for good cause).



The Final Outcome Letter will describe the result of the appeal and rationale for the decision.



The Final Outcome Letter will be issued simultaneously to both parties.



The decision by the Appeals Officer is final and not subject to further University appeal or grievance.

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Questions?

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Break!

95

**Key Hearing
Issues and
Considerations**

96

Cross Examination and the Relevance Standard

97

Guidelines for appropriate cross-examination:

- Cross examination must be conducted directly, orally, and in real time by a party's advisor.
- Cross-examination must be relevant, respectful, and non-abusive. Questions should be conveyed in a neutral, respectful tone.
- Advisors may not approach the other party or witnesses during cross-examination without first obtaining permission from the Decision Maker.
- Advisors should not ask repetitive questions, including those that have previously been asked by a Decision Maker or another advisor in the process.

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Guidelines for determining relevance:

- 1 The Decision Maker should apply logic and common sense, rather than legal rules of evidence, when making a determination about a question's relevance.
- 2 Where a question is relevant but concerns a party's character or prior bad acts, the Decision Maker cannot exclude or refuse to consider the relevant evidence but may proceed to objectively evaluate that relevant evidence by analyzing the weight or credibility that should be ascribed to that statement.
- 3 Repetitive or cumulative questioning will be deemed irrelevant.

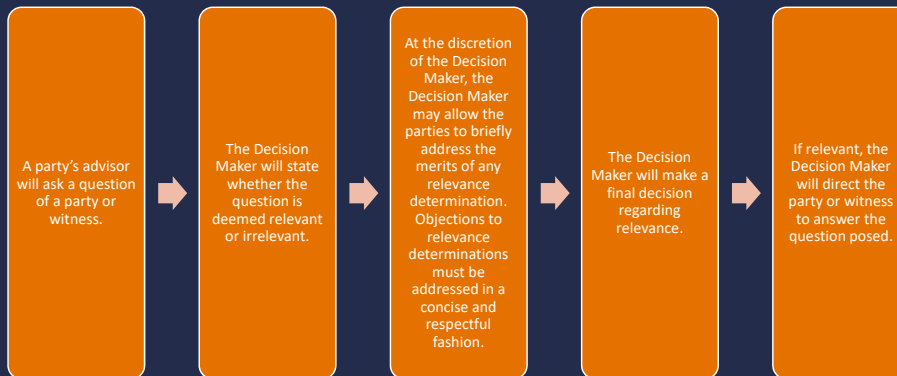
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Evidence which is NOT relevant:

- Evidence protected by a legally recognized privilege;
- Any party's medical, psychological, and similar records unless the party has given voluntary, written consent;
- information about the Complainant's sexual predisposition or sexual behavior (subject to specific exceptions); and
- statements by a party or witness who did not submit to cross-examination at a live hearing (Title IX Grievance Process only).

100

Process for relevance determinations:



101

Relevance Determinations:

- Decision Maker has the discretion to determine the specific process for making objections to the relevance of questions posed in a Hearing.
- Decision Maker is not required to give a lengthy or complicated explanation of a relevance determination.
- Decision Maker may also revise or supplement any explanation of a relevance determination after the conclusion of the hearing.
- When an otherwise relevant question is asked in a manner which violates the Rules, Decision Maker may provide an opportunity for the advisor to re-ask the question at issue in a respectful, non-abusive fashion.

102

Rules of Decorum and Participant Expectations

103

Hearing participants are prohibited from:

- Interrupting other participants;
- Using profanity directed toward another participant;
- Objectively offensive or aggressive actions or gestures;
- Harassment of other participants;
- Yelling, screaming, or badgering;
- Taking action reasonably seen as intended to intimidate a participant or meaningfully modify a person's participation in the process; or
- Engaging in any other behavior to deliberately disrupt the hearing process.

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Removal for Non-Compliance with Rules:

The Decision Maker has the sole discretion to determine if an individual's actions during a Hearing are disruptive to the process or otherwise inconsistent with these Rules. When a Decision Maker determines that these Rules have been violated, they will notify the offending person of any violation of the Rules. The Decision Maker may pause or recess proceedings if necessary to address noncompliant behavior.

Upon a second or further violation of these Rules, the Decision Maker has the discretion to remove the offending person or allow them to continue participating in the hearing or process. The Decision Maker will document any decision to remove a hearing participant in the Written Determination.

If a party's advisor is removed from a Hearing, the University will provide that party with a different advisor to conduct cross-examination on behalf of the party. Reasonable delays may be anticipated should an advisor be removed. A party cannot serve as their own advisor in this circumstance.

105



Case Study #1

Is this cross-examination question relevant?

106

Exclusion of New Information and Witnesses

107

Exclusion of new information

- In the absence of good cause, information, including identification of witnesses, that is discoverable through the exercise of due diligence, will NOT be considered at the hearing if it was not provided to the investigator during:
 - the investigation phase,
 - in response to the Draft Investigation Report,
 - or as part of the supplemental statements submitted in response to the Final Investigation Report.
- For good cause:
 - the Decision Maker may agree to the admission of new evidence at the hearing
 - the Decision Maker may delay the Hearing and instruct that the investigation needs to be re-opened to consider any new evidence

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Bias, Fairness, Impartiality & Conflicts

109

Basic requirements:

Treat parties fairly!

- All rights and opportunities will be made available to parties on equal terms

Be professional!

- Calm, appropriate, polite demeanor
- Maintain balance in approach with each party
- Maintain appropriate sensitivity to presentation of difficult information
- Be mindful of your non-verbal communication

Be prepared!

- Ensure process complies with Grievance Process / Procedures
- Review all materials and policies/procedures

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Evidentiary Considerations:

- All relevant evidence evaluated objectively
- Consider inculpatory and exculpatory evidence
- Apply evidentiary rulings equally

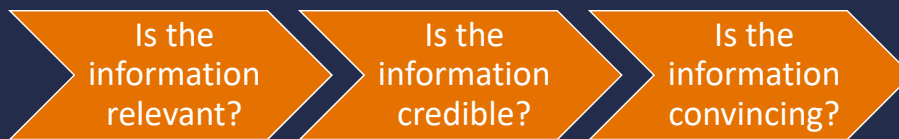
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Avoiding Bias and Prejudgment

- Be careful to avoid making assumptions as to how a person “should” react
- Avoid questions that imply a value judgment
- Avoid putting oneself in the shoes of the Complainant or Respondent
- Avoid gendered assumptions, such as seeing men as perpetrators and women as victims
- Do not allow emotion to impact fair and impartial fact-finding

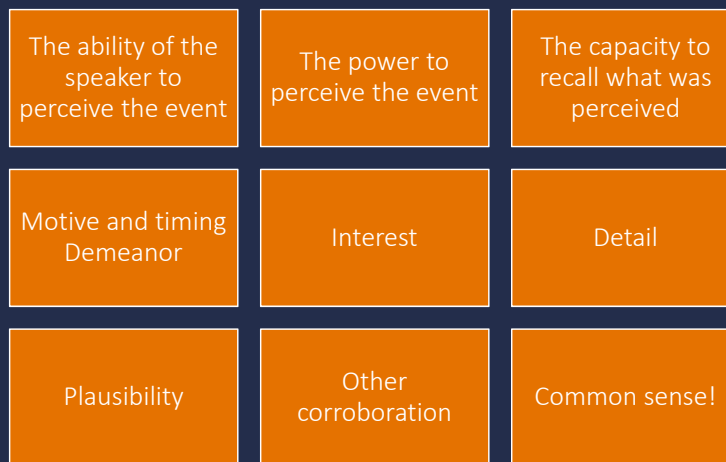
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Evaluating evidence:



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Evaluating Credibility



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Other Considerations:

- Parties may be affected by emotional component of allegations – emotional reactions and behaviors may vary significantly!
- Consider context and history of relationships
- Did the witness have any bias, prejudice, interest in the outcome that could impact statement?
- Consider inherent plausibility of statements in context of known information – does this make sense?

115

Break!

116

Sanctions & Remedies

117

Sanctions & Remedies

- Decision Maker may impose one or more disciplinary sanctions on the Respondent and/or provide remedies to the Complainant designed to restore or preserve equal access to the University's education program or activity.
- Emphasis on remedies in new Title IX Regulations
- Change in UVA policy – no hearing on sanctions
 - Decision Maker should go to Title IX Coordinator if there is a finding of responsibility to obtain:
 - Impact and/or mitigation statements
 - Respondent's criminal and/or University disciplinary history (if any)
- Decision Maker must describe any information obtained or considered in determining the appropriate sanctions or remedies in the Written Determination

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Sanctions & Remedies

- Decision Maker may consult with appropriate University officials, including but not limited to:
 - Vice President for Student Affairs/Chief Student Affairs Officer (or designee)
 - Office of the Dean of Students
 - Chief Human Resources Officer (or designee)
 - Provost (or designee)
 - Supervisor/Manager
 - Title IX Coordinator
 - EOCR Compliance Director
 - Faculty Employee Assistance Program (FEAP)
 - Student Health
 - Counseling and Psychological Services
 - University Counsel
- Decision Maker must independently determine the appropriate sanction and/or remedies

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Potential Sanctions for Students



Potential Sanctions for Employees



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Range of Potential Remedies

Imposition or extension of a No-Contact Directive

Reimbursement for counseling or other medical expenses

Imposition or extension of academic, University housing and/or University employment modifications

Imposition or extension of increased monitoring, supervision and/or security where Title IX PIC occurred or is likely to reoccur

Targeted or broad-based educational programming or training

Restorative remedies to encourage Respondent to develop insight about Title IX PC, etc.

Any other remedial or protective measures

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Key Considerations in Determining Sanctions & Remedies

The severity, persistence, or pervasiveness of the Title IX Prohibited Conduct and any related Sexual and Gender-Based Prohibited Conduct, conduct under the PADHR Policy and/or Standards of Conduct;

The degree of violence (if any) associated with the Title IX Prohibited Conduct and any related Sexual and Gender-Based Prohibited Conduct, conduct under the PADHR Policy, and/or Standards of Conduct;

The impact of the Title IX Prohibited Conduct and any related Sexual and Gender-Based Prohibited Conduct, conduct under the PADHR Policy, and/or Standards of Conduct on the Complainant;

The impact or implications of the Title IX Prohibited Conduct and any related Sexual and Gender-Based Prohibited Conduct, conduct under the PADHR Policy, and/or Standards of Conduct within the University community;

Prior misconduct by the Respondent, including the Respondent's relevant prior disciplinary history, at the University or elsewhere, and any criminal convictions;

Whether the Respondent has accepted responsibility for the Title IX Prohibited Conduct or any related Sexual and Gender-Based Prohibited Conduct, conduct under the PADHR Policy, and/or Standards of Conduct;

The maintenance of a safe, nondiscriminatory, and respectful living, learning, and work environment; and

Any other mitigating, aggravating, or compelling factors.

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Academic Transcript Notations

- Va. Code §23.1-900

The Title IX Coordinator will direct the University Registrar to include a notation on the academic transcript of any student who has (1) been suspended, (2) been expelled, or (3) withdrawn from the University while under investigation for Prohibited Conduct pursuant to the Sexual Misconduct Policy.

The Title IX Coordinator will direct the University Registrar to remove any such notation where (1) the student is subsequently found not responsible for committing an act of Prohibited Conduct pursuant to the Sexual Misconduct Policy, and/or (2) a student who has been suspended for Prohibited Conduct pursuant to the Sexual Misconduct Policy, has (i) completed the terms of the suspension and any conditions thereof, and (ii) has been determined by the University to be in good standing pursuant to all applicable University academic and non-academic standards.

123

Written Determinations

Written Determination must contain:

Identification of the allegations potentially constituting TIX PC and any Sexual and Gender-Based PC, or conduct under the PADHR Policy and/or Standards of Conduct;

Description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearings held;

Findings of fact supporting the determination;

Conclusions regarding the application of the Sexual Misconduct Policy (and, if applicable, other policies) to the facts;

Description of any impact or mitigation statements, or other information obtained and/or considered in determining the appropriate disciplinary sanctions and/or remedies;

A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions imposed on Respondent, and whether remedies will be provided by the University to the Complainant; and

The University's procedures and permissible bases for the parties to appeal.

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Case Study #2

Preparing Written Determinations

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Questions?

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