

CEDARVILLE UNIVERSITY

TITLE IX TEAM TRAINING

SEPTEMBER 21, 2020

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Agenda



- Themes
- Impartiality, Conflicts of Interest, and Bias
- New Definition of Sexual Harassment (106.30)
- Scope of your Education Program/Activity
- Overview of your Policy/Process
- Intake
- Conducting an Investigation
- Conducting a Hearing
- Appeals
- Informal Resolution

Posting these Training Materials



- Yes, you may post these slides.
- The University is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website

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Themes

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Themes (1 of 2)



- Title IX meant to ensure equitable access, regardless of sex
- We have an obligation to protect our community – including both parties
- Transparency in the process encourages participation, reduces stress, and increases trust in the outcome

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Themes (2 of 2)



- Use language of the policy (complainant, respondent, report), not language of criminal law (victim/survivor, perpetrator, allegation)
- Be incredibly mindful not to prejudge the outcome of the case
- Base decisions on evidence, not your “gut”

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Impartiality, Conflicts of Interest, and Bias

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Regulations



Title IX Team must be trained on “how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.” 34 CFR 106.45(b)(1)(iii)

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Being Impartial



A decision-maker needs to recognize that a party **should not be** “unfairly judged due to inability to recount each specific detail of an incident *in sequence*, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory.”

(30323)

Bias: Response of Department to Perceived v. Actual Bias



- Department declined to determine whether bias has to be actual or if perceived is sufficient to create an issue
- Each specific bias issue requires a fact-specific analysis

(30252)

Bias: How the Department tried to minimize bias



No single-investigator model for Title IX SH

- Decision-maker (or makers if a panel) cannot have been the same person who served as the Title IX Coordinator or investigator (30367)
- Prevents the decision-maker from **improperly gleaning information from the investigation** that isn't relevant that an investigator might be aware of from gathering evidence (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

Preamble Discussion: Bias and Conflict of Interest (1 of 2)



- No *per se* prohibited conflicts of interest from using employees and administrative staff, including supervisory hierarchies (30352)
 - but see portion about decision-makers and Title IX Coordinator as supervisor
- No *per se* conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process (30353)

Preamble Discussion: Bias and Conflict of Interest (2 of 2)



The preamble discussion:

- Provides as an example that it is **not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence** (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead recommends **using a reasonable-person test** to determine whether bias exists

Example in Discussion for Unreasonable Conclusion that Bias Exist



“[F]or example, **assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)**

Discussion Regarding Training's Role



“[T]he **very training required by 106.45(b)(1)(iii)** [that you are sitting in right now] is intended to

- provide Title IX personnel with the tools needed to serve impartially and without bias
- such that the prior professional experience of a person whom a recipient would like to have in a Title IX role
- need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”

(30252)

Examples in Discussion for Unreasonable Conclusion that Bias Exist: Review of Outcomes



- Department also **cautioned** parties and recipients from **concluding bias** or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained that this means, **the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.”**

(30252)

Examples of Bias



- Situations where a decision-maker has already heard from a witness or party in a prior case and has made a credibility determination re: that person;
- Situations where information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

Avoiding Pre-Judgment of Facts at Issue



A good way to avoid bias and ensure impartiality:
avoiding prejudgment of facts

Remember:

- **Keep an open mind** as a decision-maker and actively listen to all the facts presented as subjected to cross-examination
- If a party or witness does not submit to cross-examination, may not be able to consider statements in the record
- Each case is unique and different

Concerned?



If you believe you are biased or a conflict of interest, you should recuse yourself immediately.

If you believe that you may be *perceived* to have such a bias or conflict of interest by one or both parties (but you actually do not), talk with the Title IX Coordinator to consider next steps.

New Definition of Sexual Harassment (106.30)

Sexual Harassment - IX



- **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:
 - [**Quid pro quo**] An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
 - [**Unwelcome conduct**] 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 University's education program or activity; or
 - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

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SH – IX (continued)



- **Sexual Assault – Section II(B) of Policy**
 - Rape (non-consensual penile/vaginal penetration)
 - Sodomy (non-consensual oral/anal penetration)
 - Sexual Assault with an Object (penetration with object or body part other than genitalia)
 - Fondling – Must be done “for the purpose of sexual gratification”
 - Incest – Closer in kin than second cousins
 - Statutory rape – Complainant is under age 13, or under age 16 and the respondent is 18 or older

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Data and Statistics



- Should not influence your decision in any particular Title IX case
- Included in the Preamble, but with caveats
- We didn't do the research ourselves and can't vouch for it
- Okay but really, this SHOULD NOT influence your decision in any particular Title IX case

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Sexual Assault Data

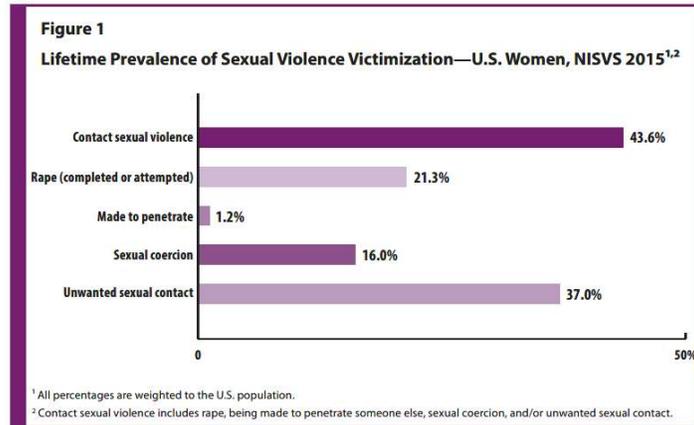


- 43.6% of women and 24.8% of men experienced some form of contact sexual violence in their lifetime, with 4.7% and 3.5% experiencing such violence in the 12 months preceding the survey.

Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, [available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html](https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html) (last visited June 2020).

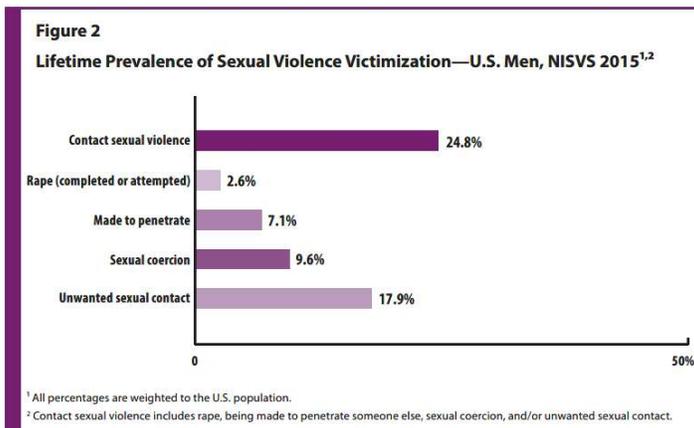
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Sexual Assault Data - 1



Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, [available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html](https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html)

Sexual Assault Data - 2



Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, [available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html](https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html)

Sexual Assault Data: Prevalence Data for Postsecondary Institutions



- More than **50 percent** of college sexual assaults occur in **August, September, October, or November**, and students are at an increased risk during the first few months of their first and second semesters in college.

Preamble, p. 30076 (Official) notes that "Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>."

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Sexual Harassment: Dating Violence



"**Dating Violence**" means an act of violence committed on the basis of sex by a person who is or has been in a romantic or intimate relationship with the complainant. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

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Sexual Harassment: Domestic Violence



“Domestic violence” is an act of violence committed on the basis of sex by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person’s acts under the domestic/family violence laws of the jurisdiction

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Data: Intimate Partner Violence



“Nearly **1 in 5 women** and about **1 in 7 men** report having experienced **severe physical violence** from an intimate partner in their lifetime.”

“41% of female IPV survivors and 14% of male IPV survivors experience some form of **physical injury** related to IPV.”

“**1 in 6 homicide victims** are killed by a current or former intimate partner.”

Source: CDC.gov, “Preventing Intimate Partner Violence” fact sheet, accessed Sept. 20, 2020.

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Sexual Harassment: Stalking



“Stalking” is engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person’s safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

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Stalking: Course of Conduct



“Course of Conduct”

- Under VAWA regulations: 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.

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Stalking: Reasonable Person



“Reasonable person”

Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

Stalking: Substantial Emotional Distress



“Substantial emotional distress”

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Stalking Data - 1



- **4.5 million** women and **2.1 million** men are stalked in one year in the United States.
- Over 85% of stalking victims are stalked **by someone they know**.
- **61%** of female victims and **44%** of male victims of stalking are stalked by a **current or former intimate partner**.

- First statistic: National Intimate Partner and Sexual Violence Survey: 2015 Data Brief (CDC)
- Second and third statistics: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

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Stalking Data - 2



- **11%** of stalking victims have been **stalked for 5 years or more**.
- **46%** of stalking victims experience **at least one unwanted contact per week**.

[Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011", (referenced in Preamble, p. 30079 fn 366 (Official))

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7] (referenced in Preamble, p. 30079 fn 366 (Official))

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJS, 2009).]

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Impact of Stalking on Victims



- **46%** of stalking victims fear not knowing what will happen next.

[Baum et al., (2009). "Stalking Victimization in the United States." BJS.]

- **29%** of stalking victims fear the stalking will never stop.

[Baum et al.]

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More Impact of Stalking



- **1 in 8** employed stalking victims **lose time from work** as a result of their victimization and **more than half** lose **5 days of work or more**.
- 1 in 7 stalking victims move as a result of their victimization.

[Baum et al.]

- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims.

[Eric Blauuw et al. "The Toll of Stalking," Journal of Interpersonal Violence 17, no. 1(2002):50-63.]

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Scope of Education Program/Activity

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Jurisdiction



“Education program or activity”

“includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. “ §106.30(a)

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Education Program or Activity



Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

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Off Campus? (1 of 2)



Any of the three conditions must apply to extend Title IX jurisdiction off campus:

(1) Incident occurs as part of the University's "operations"

(2) If the University exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus;
and

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Off Campus? (2 of 2)



(3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution

- Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
- Must investigate in these locations (30196-97)

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Not an Education Program or Activity



Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

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Education Program or Activity

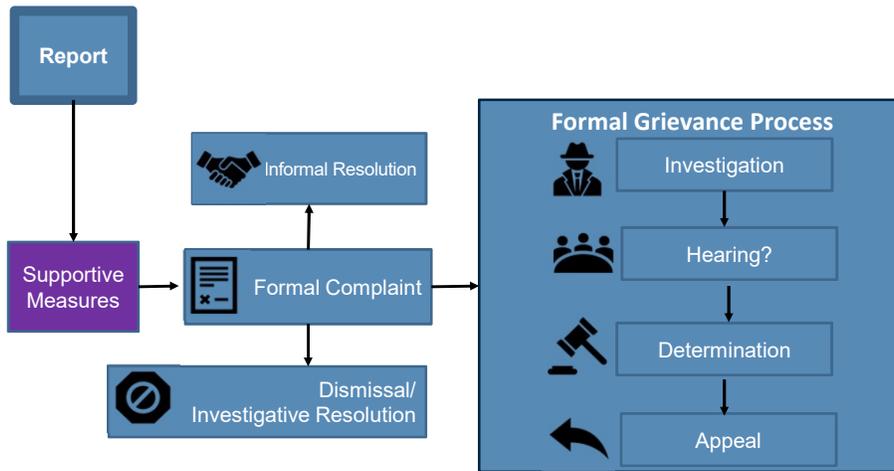


Depends on fact-analysis under “substantial control”:

- Conventions in the United States
- Holiday party for an academic department
- Professor has students over to house

Overview of Your Policy/Process

Overview of the Process



Intake

Overview of the Process: Supportive Measures (1 of 5)



- Non-disciplinary and non-punitive
- Individualized
- “As reasonably available”
- Without fee or charge to either party
- Available at any time (regardless of whether a formal complaint is filed)

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Overview of the Process: Supportive Measures (2 of 5)



Designed to:

- ***restore or preserve access*** to the University’s education program or activity, without unreasonably burdening the other party;
- protect the safety of all parties and the University’s educational environment; and
- deter sexual harassment

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Overview of the Process: Supportive Measures (3 of 5)



- Counseling
- Extensions of deadlines (course-related adjustments)
- Modifications of work/class schedules
- Campus escort services
- Mutual contact restrictions
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- “and other similar measures”

Overview of the Process: Supportive Measures (4 of 5)



Role of the TIXC upon receiving a report:

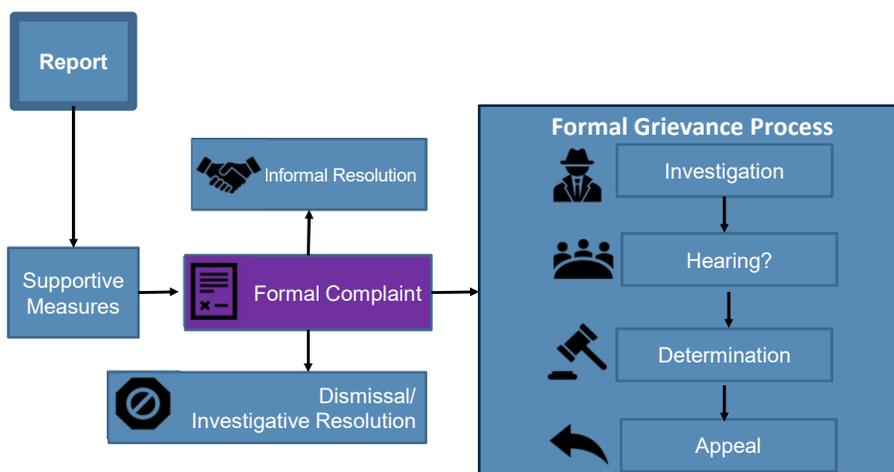
- promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
- consider the complainant’s wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint

Overview of the Process: Supportive Measures (5 of 5)



- Must maintain confidentiality to the greatest extent possible
- Note: Title IX Coordinator may ask you to help with accommodations and may not be able to tell you all the details as to *why*.

Formal Complaints



Overview of the Process: Formal Complaint (1 of 2)



A document filed by a complainant or signed by the Title IX Coordinator alleging Prohibited Conduct against a respondent and requesting the University investigate the allegations

- In response to a formal complaint, University must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

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Overview of the Process: Formal Complaint (2 of 2)



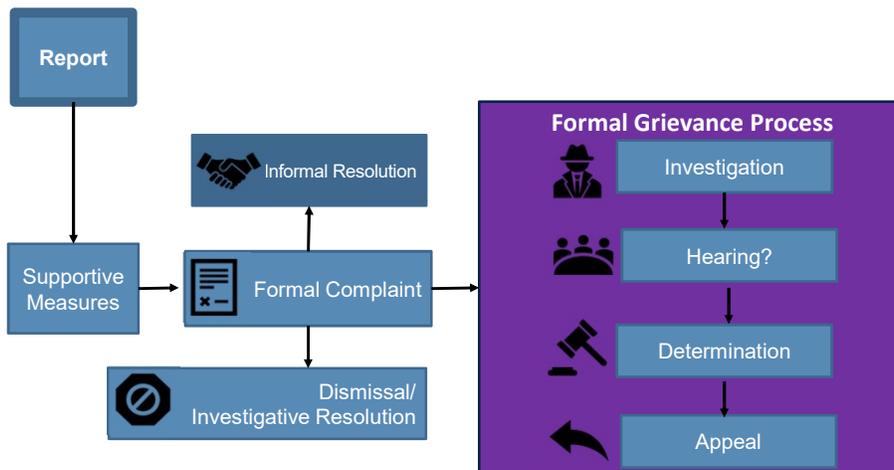
Once a Formal Complaint is filed, there are four possibilities:

- Informal Resolution
- Formal Grievance Process (Hearing)
- Mandatory Dismissal from Hearing Process and Resolution through Investigative Process
- Formal Complaint is withdrawn

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Conducting an Investigation

Formal Process



Overview of the Process: Formal Grievance Process



Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

Includes the presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process

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Overview of the Process: Written Notice



- University's grievance **process** and informal resolution process
- **Allegations** with sufficient time for review with sufficient detail, such as date, location if known
- Parties may have an **advisor of choice**

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Overview of the Process: Investigation (1 of 4)



- Only of a formal complaint
- Burden of proof and evidence gathering rests with University
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)

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Overview of the Process: Investigation (2 of 4)



- Provide equal opportunity for parties to present inculpatory and exculpatory evidence
- Not restrict ability of either party to discuss or gather and present relevant evidence
- Provide parties same opportunities to have others present during the grievance process, including advisor of choice

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Overview of the Process: Investigation (3 of 4)



- Provide written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare
- Provide both parties equal opportunity to inspect and review any evidence obtained in the investigation – University must send to party and party’s advisor with at least 10 days to submit a written response before completion of investigation report



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Overview of the Process: Investigation (4 of 4)



- University must make **all** such evidence subject to inspection and review at any hearing
- Create an investigation report at least 10 days before a hearing that fairly summarizes the relevant evidence and send to each party and party’s advisor

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Setting Up the Interview (1 of 2)

You must now provide any party whose participation you seek, with written notice (email) with “sufficient” time to prepare:

- Date
 - Time
 - Location
 - Participants
 - Purpose of interview or meeting
- (106.45(b)(5)(v))

Setting Up the Interview (2 of 2)

- Identify yourself, your role, and a general outline of what you’re investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don’t give up on the interview till you’ve tried at least 3 times, in at least 2 different methods

Set the Stage

- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

Begin Broadly

- Elicit a monologue about the incident
 - What happened earlier that day before the incident?
 - What happened with regard to the incident?
 - What happened next?
 - And then what happened?

Freeze Frames

- Ask the witness to “freeze” on the moment and describe details
 - What could they see? Feel? Smell? Taste? Hear?
 - Where was the other person? How were they positioned?
 - Where were you? How positioned?
 - What did you say to the other person? Them to you?
 - Describe other person’s tone, demeanor, body language

Ask Follow-Up Questions

- Re-review your notes
- Re-review the elements of each charge
 - Have you elicited all of the information this witness might have about each element?
 - Do you have an understanding of how the witness obtained the information they shared?

Credibility

- Gather facts to assist **decision-maker**
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

When Consent is at Issue

- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent

Closing the Interview

- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

Inspection and Review of Evidence

Provide ALL Evidence to both parties and advisors

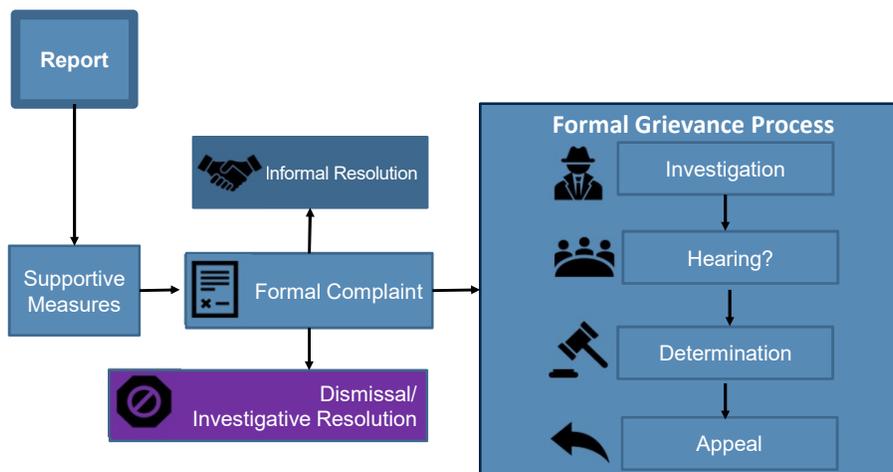
- Include everything related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

(106.45(b)(5)(vi))

Create Investigative Report

- Summarize **evidence collected in the investigation**
- No determination
- Provide to parties and advisors
- Allow 10 days to review prior to hearing

Dismissal/Investigative Resolution



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Dismissal/Investigative Resolution (1 of 3)



- University MUST investigate allegations in a formal complaint
- BUT University MUST dismiss from the hearing process is
 - if conduct alleged would **not** constitute Sexual Harassment – Title IX, even if proven, OR
 - Conduct did not occur within University's education program or activity or in the United States

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Dismissal/Investigative Resolution (2 of 3)



- University MUST investigate allegations in a formal complaint
- BUT University MUST dismiss from the hearing process is
 - if conduct alleged would not constitute Sexual Harassment – Title IX, even if proven, OR
 - Conduct did not occur within University's education program or activity or in the United States

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Dismissal/Investigative Resolution (3 of 3)



- Cases not eligible for a hearing go instead to:
 - Investigation
 - Decision (by investigator, without hearing)
 - Appeal

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Conducting a Hearing

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Overview of the Process: Hearings



- Must provide a live, cross-examination hearing
- Parties must have an advisor and the University must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed

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The Setup



- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- “At recipient’s discretion, can allow any or all participants to participate in the live hearing virtually” (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

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Process (1 of 2)



- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

Process (2 of 2)



- An advisor of choice may be an attorney or a parent (or witness) (30019)
- Discretion to require advisors to be "potted plants" outside of their roles cross-examining parties and witnesses. (30312)

Slide 84

MMC15 What is the reference to the official regs here?

Carleton, Melissa, 6/14/2020

Advisors



If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. (106.45(b)(6)(i) and preamble 30339)

Advisors: But Other Support People?



- Not in the hearing, unless required by law (30339)
- “These confidentiality obligations may affect a recipient’s ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties’ advisors of choice to appear at the hearing.”
- ADA accommodations-required by law
- CBA require advisor and attorney?

Recording the Hearing



- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

The Hearing



- Order of questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

Questioning by the Decision-Maker (1 of 2)



- The neutrality of the decision-maker role is and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- “[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties” (30330)

Questioning by the Decision-Maker (2 of 2)



- BUT “the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspective about the evidence.” (30331)

The Hearing (1 of 2)



- Ruling on relevancy between every question and answer by a witness or party
 - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.

The Hearing (2 of 2)



- Confidentiality appears to preclude support persons other than the advisor from participating in the live-cross examination hearing
 - Perhaps allow support person to meet in waiting rooms or before and after hearing
 - Consistent with providing supportive services to both parties – hearings can be very stressful for both parties

Live Cross-Examination: Theory



According to the Department, the process in 106.45 best achieves the purposes of:

- (1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies
- (2) **reducing and preventing sex bias** from affecting outcomes; and
- (3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness** (30327)

Live Cross-Examination: How it should look



“[C]onducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.” (30319)

Live Cross-Examination: Regulations (1 of 2)



In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

Live Cross-Examination: Regulations (2 of 2)



- **Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant**
- Must audio record, audio-video record or provide a transcript of the hearing

Role of Decision-Maker/questioning by



The preamble discussion provides some additional information on protecting neutrality of the **decision-maker**:

“To the extent that **a party wants the other party questioned in an adversarial manner** in order to further the asking party’s views and interests, that questioning is conducted by the party’s own advisor, **and not by the recipient**. Thus, no complainant (or respondent) need feel as though the recipient is “taking sides” or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.” (30316)

Relevancy



- Per 34 C.F.R. 106. 45(b)(6)(i):
 - “Only **relevant** cross-examination and other questions may be asked of a party or witness.”
- “[C]ross examination **must focus only on questions that are relevant to the allegations in dispute.**” (30319)

Relevancy - Pause



Party or witness **cannot** answer a question until the decision-maker determines whether it is relevant.

- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant (30343)

What is Relevant? (1 of 4)



Decisions regarding relevancy do not have to be lengthy or complicated:

“... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, **or because the question asks about a detail that is not probative of any material fact concerning the allegations.**” (30343)

What is Relevant? (2 of 4)



Questions to consider:

- Does this question, topic, evidence help move the dial under the standard of evidence?
 - **Preponderance of the evidence**: a fact is more likely than not to be true (30373 fn. 1409)
 - **Clear and convincing**: a fact is highly probable to be true (30373 fn. 1409)

What is Relevant? (3 of 4)



Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

What is Relevant? (4 of 4)



Under the **clear and convincing** standard of evidence:

- Does this help me in deciding if a fact is highly probable to be true?
- Does it make it more or less probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Not Governed by Rules of Evidence (1 of 2)



The Rules of Evidence do NOT apply and CANNOT apply

“[T]he decision-maker’s only evidentiary threshold for admissibility or exclusion of questions and evidence is **not whether it would then still be excluded under the myriad of other evidentiary rules and exceptions that apply under, for example, the Federal Rules of Evidence.**” (30343)

Not Governed by Rules of Evidence (2 of 2)



Examples:

- No reliance of statement against a party interest (30345)
- No reliance on statement of deceased party (30348)
- A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (30294)

Relevancy Exclusions



Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

- A recipient may not adopt rules excluding certain types of relevant evidence (lie detector or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and expert witnesses. (30294)

Relevancy: Not Relevant



The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior (except for two narrow exceptions)
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

Relevancy: Regulations' Rape Shield Law-Complainants



- According to 34 C.F.R. 106. 45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**
 - its use is to prove that someone other than the Respondent committed the conduct, OR
 - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

Relevancy: Regulations' Rape Shield Law - Respondents



- Rape shield protections **do not apply to Respondents**
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

Relevancy: Treatment Records



“[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent** to do so for a grievance process under this section.”

Section 106.45(b)(5)(i) (see also 30317).

Relevancy: Legally Privileged Information (1 of 2)



Section 106.45(b)(1)(x):

A recipient's grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of**, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Relevancy: Legally Privileged Information (2 of 2)



Other typical privileges recognized across jurisdictions but with variations (will want to **involve your legal counsel for definitions in your jurisdiction**):

- Attorney-client communications
- Implicating oneself in a crime
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets

Relevancy: Improper Inference



When parties do not participate:

- “If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” 34 C.F.R. 106.45(b)(6)(i).

Relevancy: No Reliance on Prior Statements



When parties elect not to participate, a recipient cannot retaliate against them (30322)

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- “Must not rely on any **statement** of that party or witness in reaching a determination”

Relevancy: No Reliance on Prior Statements - Theory



If parties do not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement**, which is why the decision-maker cannot consider that party's statement.

(30349)

Relevancy: When Parties or Witnesses Do Not Participate



The preamble recognizes that there are many reasons a party or witness may not elect not to participate in the live cross-examination hearing or answer a question or set of questions

- The decision-maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- Relevant questioning by advisor along these lines?

Advisors for Non-Appearing Parties



“[A] party’s advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**” (30346)

“Similarly, where one party does not appear and that party’s advisor does not appear, **a recipient-provided advisor must still cross-examine the other, appearing party,** resulting in consideration of the appearing party’s statements (without any inference being drawn based on the non-appearance).” (30346)

Relevancy: Third-Party Cross



Third party cross-examination of what a non-appearing party stated **does not count** as statements tested on cross-examination. (30347)
(provides examples of family and friends showing up on behalf of the non-appearing party)

“[A] rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.” (30347)

Relevancy: The Statement is the Conduct



When statement IS the sexual harassment...

“Thus, a respondent’s alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not the respondent’s “statement” as that word is used in § 106.45(b)(6)(i), because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself.”

- If you don’t already follow the blog, add it to your favorites bar: <https://www2.ed.gov/about/offices/list/ocr/blog/index.html> (May 22, 2020 blog post)

Relevancy: Inferences



“[E]ven though the refusing party’s statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness’s absence from the hearing or refusal to answer cross-examination (or other) questions.” (30322)

Example: “[W]here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination” (30328)

Relevancy: No Reliance on Prior Statements- Examples



- But, if a party or witness does not submit to cross examination and makes a statement in a video, cannot consider that statement in the video to reach a decision on responsibility (30346)
- Remember: No rules of evidence can be imported

Relevancy: No Reliance on Prior Statements – SANE and Police Reports



- This expressly means no statements in police reports, no SANE reports, medical reports, or other documents to the extent they contain statements of parties or witnesses who do not submit to cross examination(30349)
- If non-cross-examined statements are intertwined with statements tested by cross-examination, can only consider those that have been cross-examined (30349)

Issues of Relevancy



“[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (30294)

BUT

“[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (30293)

Decorum (1 of 5)



The preamble to the Title IX Regulations contains many discussions of an institution’s discretion to set rules to maintain decorum throughout hearings and to remove non-complying advisors, parties, or witnesses.

Decorum (2 of 5)



“Recipients may adopt rules that govern the **conduct and decorum of participants at live hearings** so long as such rules comply with these final regulations and **apply equally to both parties**... These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answer questions about sexual harassment.”
(30315)

Decorum (3 of 5)



“[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically ‘leans in’ to the witness’s personal space)**, the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.”
(30331)

Decorum (4 of 5)



“The Department acknowledges that predictions of **harsh, aggressive, victim-blaming** cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as interrogation. However, recipients retain discretion under the final regulations to educate a recipient’s community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (**that apply equally to both parties**) to oversee cross-examination to **ensure that questioning is relevant, respectful, and non-abusive.**” (30316 see also 30315; 30340)

Decorum (5 of 5)



- “[T]he essential function of cross-examination is **not to embarrass, blame, humiliate, or emotionally berate a party**, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.” (30319)
- Nothing in this rule prevents recipient from enforcing decorum rules in the hearing and “the recipient may require the party to use a different advisor” if the advisor does not comply and may provide a different advisor to conduct cross examination on behalf of that party (30320)

More Reminders



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

Reminders



- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

Overview of the Process: Determinations (1 of 3)



- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
 - Allegations
 - Procedural steps taken from receipt of formal complaint

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Overview of the Process: Determinations (2 of 3)



- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant

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Overview of the Process: Determinations (3 of 3)



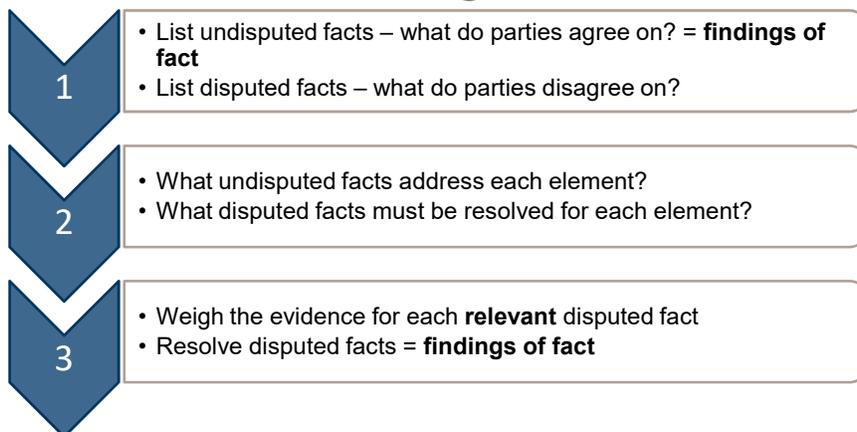
- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously



Resolving Disputes



Fact Finding Process:



Goals



- Be consistent in terminology
- Be clear as to the source of information.
Compare:
 - “Bob stated that this happened.”
 - “This happened.”

Unambiguous



- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

Relevancy



- Include any decisions made that exclude information as not relevant and the explanation given in hearing
- Check to ensure that your report does not contain any information you are prohibited from including?

Sensitive



- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- Maintain neutral, evidence-driven tone.

Empathetic



- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

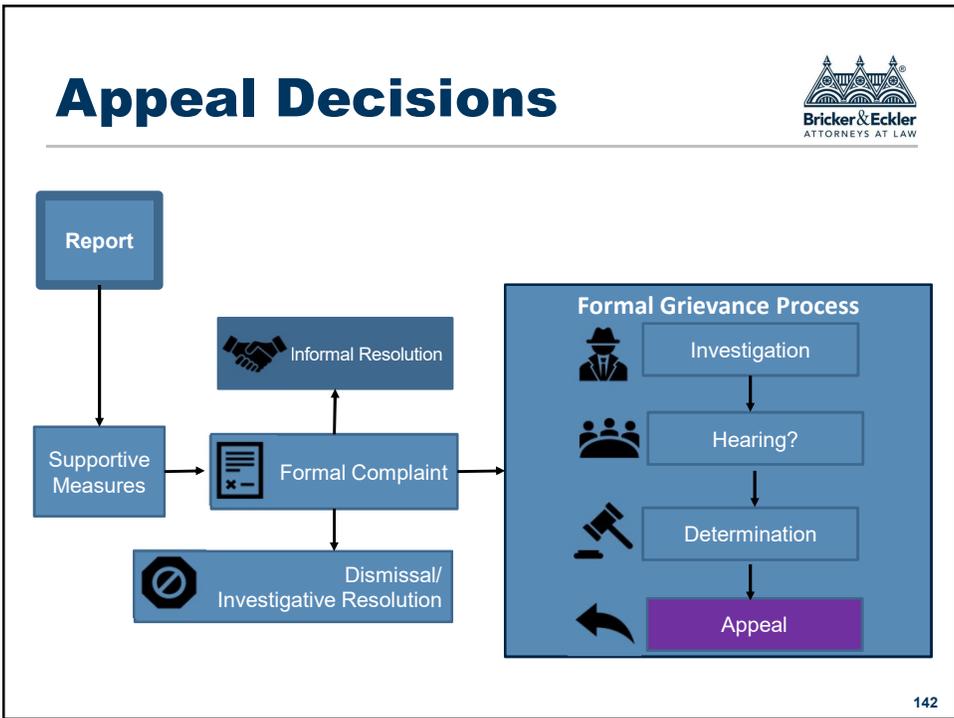
Specific



- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like
- Be careful of pronoun usage so that we always know who is saying or doing what

Appeals

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Overview of the Process: Appeals (1 of 2)



- University must offer to both parties the following bases of appeal:
 - Procedural irregularity that affected outcome
 - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
 - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

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Overview of the Process: Appeals (2 of 2)

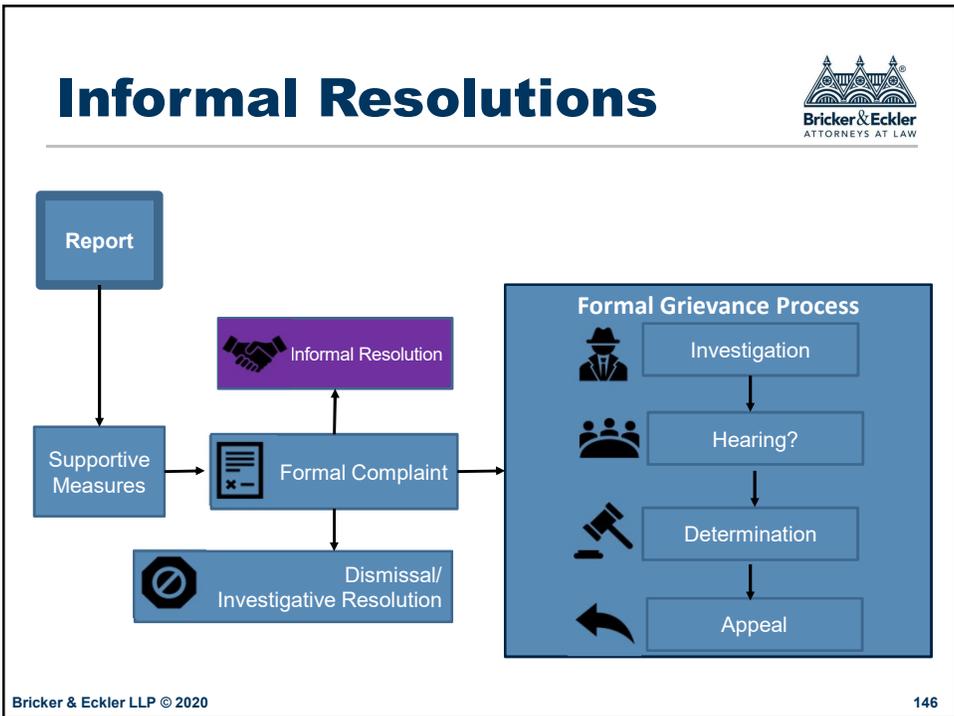


- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

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Informal Resolution

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Overview of the Process: Informal Resolution (1 of 2)



- At any time prior to the determination regarding responsibility, the University may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- University cannot require this and also cannot offer unless a formal complaint is filed



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Overview of the Process: Informal Resolution (2 of 2)



- University can offer informal resolution if:
 - Provides written notice to the parties
 - Obtains the parties' voluntary, written consent to the informal process

University cannot offer this option in certain cases of employee sexual harassment of a student



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Questions?