

Title IX Appeal Decision Maker Training

2025 Annual Training Requirement

Office of Compliance, Risk and Ethics

April 2, 2025 (2 hrs)

- Kristen Roe, Title IX Coordinator
- Jasmine Ikard, Investigator
- Sarah Martin, Hearing Officer/Decision Maker

Content Advisory

- The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.
- The trainer may offer examples that emulate the language and vocabulary Title IX practitioners encounter in their roles including slang, profanity, and other graphic or offensive language.

Training Mandates

- The definition of sexual harassment in 34 C.F.R. § 106.30
- How to apply definitions used by the Recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of C.F.R. § 106.45
- Understanding the scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes

Training Mandates contd.

- How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Issues of relevance to create an investigation report that fairly summarizes relevant evidence

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

“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.”



Requirements

■ Investigations:	Thorough	Reliable	Impartial
■ Process:	Prompt	Effective	Equitable
■ Remedies:	Stop discrimination	Prevent Recurrence	Remedy Effects

Also, under VAWA: Investigations must be prompt and fair per VAWA Sec. 304

Challenges of the Role

- It is not a question of right and wrong, but whether there has been a policy violation, proven by the standard of evidence
- Appeal Decision-maker's role is to impartially uphold the integrity of the process
- Appeal Decision-maker may not agree with institutional policy, but they must be willing to uphold it

Remember: you have no “side” other than the integrity of the process, and you represent the process.

Procedural Due Process

- Consistent, thorough, and procedurally sound review of all allegations
- Substantial compliance with written policies and procedures
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws
 - Clear, written notice of the allegations
 - Opportunity to present witnesses and evidence and be heard by the Decision-maker

Due Process in Decision

- A decision must:
 - Be appropriately impartial and fair (both finding and sanction)
 - Be neither arbitrary nor capricious
 - Be based on a fundamentally fair rule or policy
 - Be made in good faith (i.e., without malice, ill-will, conflict, or bias)
 - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence

Due Process Procedural Rights (2020)

Right to:

- Present witnesses, including fact and expert witnesses
- Present and know inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Have others present during any grievance proceeding/meeting
- Be accompanied to any related meeting or proceeding by an Advisor of their choice, who may be, but is not required to be, an attorney

Due Process Procedural Rights (cont.)

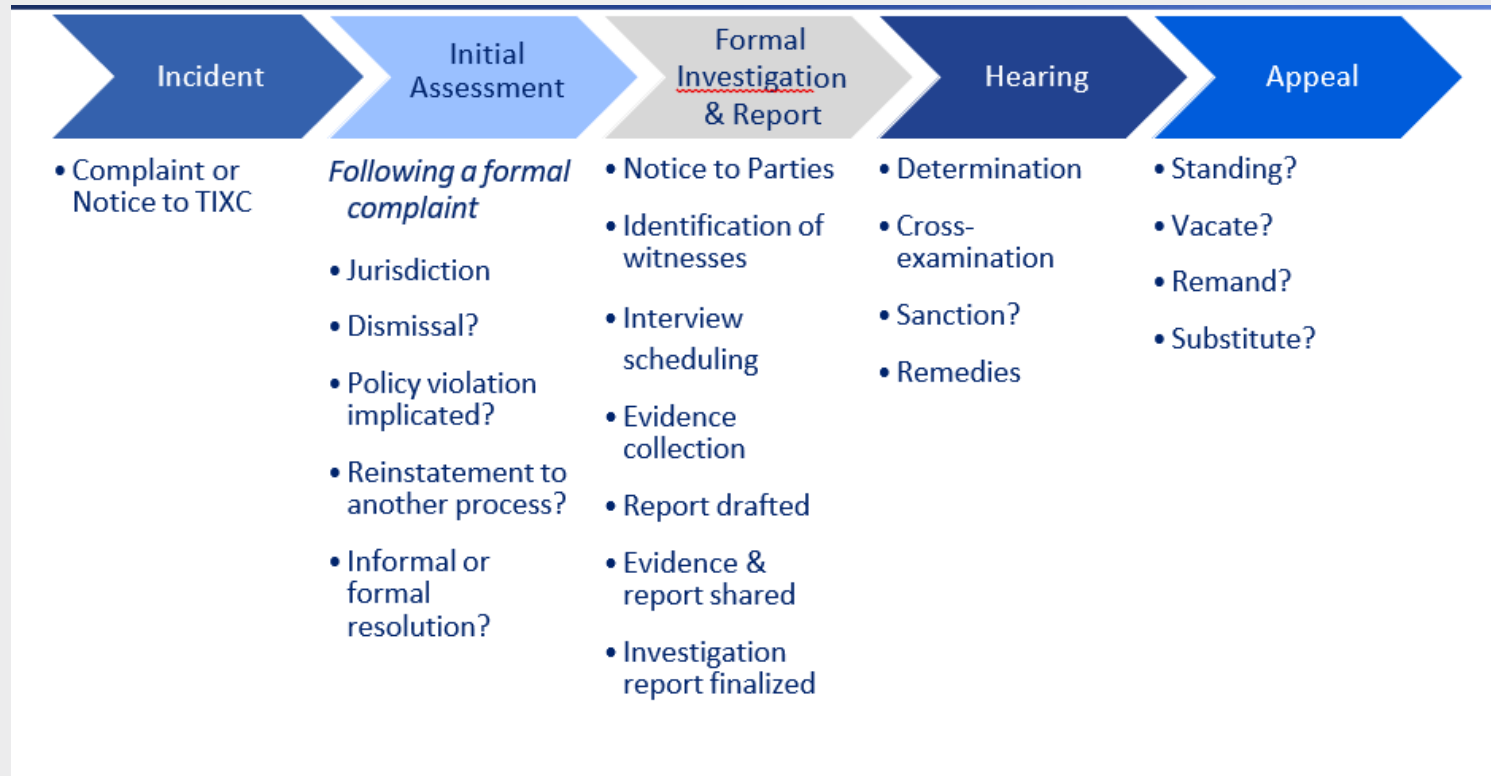
- Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Inspect and review evidence and draft investigation report before finalized
- Right to argue for inclusion of “directly related” evidence at the hearing
- Ask relevant questions of the other party and witnesses through an Advisor, in the presence of the Decision-maker

Evidentiary Standard

Preponderance of the evidence: it is “more likely than not” policy was violated

- The only equitable standard
- 50.1% (50% plus a feather)
- The “tipped scale”

The Title IX Grievance Process



Evidence and Report Review by Parties

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
 - Be sent to each party and Advisor
 - Be in an electronic format or hard copy
 - Include evidence upon which the Recipient does not intend to rely
 - Include exculpatory and inculpatory evidence
 - Be made available at any hearing
- After sending the evidence, the Investigator must:
 - Allow 10 days for written response
 - Consider response prior to completion of report

Evidence & Report Review by Parties

- **At least 10 days prior to making a determination regarding responsibility (hearing):**
- The final investigation report summarizing relevant evidence must be sent:
 - To each party and Advisor
 - In an electronic format or hard copy
 - For the parties' review and written response

Presumption of Non-Responsibility

Title IX regulations require that published grievance procedures include a statement of a presumption of non-responsibility for the Respondent until a final determination is made.

Live Hearing Requirement

- Regulations mandate live hearing for higher education
 - Virtual hearings are permitted and are the default
- Must create audio/audiovisual recording, or transcript, of hearing and make it available to the parties for inspection and review
- Must allow live cross-examination to be conducted exclusively by each party's Advisor (separate rooms still allowed)
- Questions come from Advisors and Hearing Officer/Decision Maker

Policy Definitions

- Sexual Harassment (Umbrella Category)
 - Sexual Harassment (offense)
 - Quid Pro Quo Sexual Harassment
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking
- Retaliation

Sexual Harassment

Title IX regulations require each Recipient to define **sexual harassment** as conduct on the basis of sex that satisfies one or more of the following:

- **Quid Pro Quo:** An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct.
- **Hostile Environment:** Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the Recipient's education program or activity
- *Education program or activity means employment, too!*

Hostile Environment: Factors

- Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)
- “Reasonable Person” standard:
 - Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

Hostile Environment “Severe”

- Physical conduct is more likely to be severe without need for repetition
 - Sexual assault and many dating/domestic violence incidents are almost always sufficiently severe
 - Other physical conduct that does not meet the 34 C.F.R. §106.30 definitions for sexual assault or dating/domestic violence may also rise to the level of “severe”
- Consider the circumstances (e.g., ability for Complainant to escape the harassment)
- Assess whether accompanied by threats or violence
- Assess whether there was a degree of embarrassment or humiliation

Hostile Environment: “Pervasive”

- Widespread
- Openly practiced; occurring in public spaces
- Well-known among students or employees – reputation of a department, person, etc.
- Frequency, intensity, and duration of the conduct
- Unreasonable interference with school or job
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986)
- Incidents occurring in concert or with regularity are more likely to be considered pervasive
- Consider the specific circumstances and facts

Hostile Environment: Objectively Offensive

- Reasonable person standard in context
- “I know it when I see it...”
- Age and relationships of Parties
- Number of persons involved
- Frequency
- Severity
- Physically Threatening, Abusive
- Humiliating, Intimidating, Ridiculing

Hostile Environment: Totality of Circumstances

- There has been an increasing issue of conflating discomfort or being offended with the higher standard of sexual harassment. There is a high bar for meeting this definition.
- **The circumstances to consider include:**
 - The nature, pervasiveness, and severity of the conduct
 - Whether the conduct was reasonably physically threatening
 - Whether the conduct was objectively and subjectively humiliating
 - The objective and subjective reasonable effect on the Complainant's mental or emotional state
 - Effective denial of education or employment access
 - If SPOO, a discriminatory effect is presumed (proven)

Sexual Assault

- **Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.**
 - **Rape** - 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 their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.
 - **Sodomy** - 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 in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Sexual Assault (contd.)

- **Sexual Assault with an Object** – 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 in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- **Fondling** - 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.

Sexual Assault (contd.)

- **Incest** - Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by [insert state] law.
- **Statutory Rape** - Nonforcible sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

Consent (31001-CP)

A knowing, voluntary, and affirmatively communicated willingness to participate in a particular sexual activity or behavior. Only a person who has the ability and capacity to exercise free will and make rational, reasonable judgment can give Consent. Consent may be expressed either by words and/or by actions as long as those words and/or actions create a mutually understandable agreement to engage in specific sexual activity. It is the responsibility of the person who wants to engage in sexual activity to ensure that they have consent from the other party, and that the other party is capable of providing consent.

Consent (contd.)

- Lack of protest or resistance is not consent, nor may silence, in and of itself, be interpreted as consent. For that reason, relying solely on nonverbal communication can lead to misunderstanding.
- Consent to any one form of sexual activity cannot automatically imply consent to any other forms of sexual activity.
- Previous relationships, including past sexual relationships or prior consent cannot imply consent to future sexual acts.
- Consent must be present throughout sexual activity and may be withdrawn at any time. If there is confusion as to whether there is consent or whether prior consent has been withdrawn, it is essential that the participants stop the activity until the confusion is resolved.
- In order to give effective consent, one must be of legal age, as defined by applicable Maryland law.

Consent (contd.)

- Sexual activity that is forced or coerced is by definition non-consensual. Force is the use of physical violence and/or imposing on someone physically to gain sexual access. Force also includes threats, intimidation (implied threats) and coercion that overcome resistance or produce consent. There is no requirement that a party resist the sexual advance or request, but resistance is a clear demonstration of non-consent. Coercion is unreasonable pressure for sexual activity. Coercive behavior differs from seductive behavior based on the type of pressure used to obtain consent. Frequency, intensity, isolation, and duration of the behavior will be considered in making a determination of whether coercion occurred. When a party makes clear that they do not want to engage in sex, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive. Coercing someone into sexual activity violates this Policy in the same way as physically forcing someone into sex.

Consent (contd.)

It is a violation of Policy 31001 to engage in sexual activity with someone whom one should know to be — or based on the circumstances should reasonably have known to be — mentally or physically incapacitated. To be incapacitated means that a person's decision-making ability is impaired such that they lack capacity to understand the “who, what, where, why, or how” of their sexual interaction. Incapacitation may result from sleep or unconsciousness, temporary or permanent mental or physical disability, involuntary physical restraint, or the influence of drugs or alcohol.

Consent Construct for Analysis

- Was force used by the Respondent to obtain sexual or intimate access?
- Was the Complainant incapacitated?
 - If so, did the Respondent know, or
 - Should the Respondent have known that the Complainant was incapacitated
- What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?
- Note: The intoxication of the Respondent cannot be used as a reason they did not know of the Complainant's incapacity.

Incapacity

- Incapacity ≠ impaired, drunk, intoxicated, or under the influence
 - What was the status of the Complainant in terms of:
 - Situational awareness
 - Consequential awareness
 - What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non- prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious

Incapacity (contd.)

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
- Incapacitation is a determination that will be made after the incident **in light of all the facts available**
- Blackouts are frequent issues
 - Blackout ≠ incapacitation (automatically)
 - Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how
 - Partial blackout must be assessed as well

Incapacity Analysis

- If the Complainant **was not** incapacitated, move on to the Consent Analysis
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know it, **AND**
 - The Respondent would not have reasonably known it = policy not violated, move to Consent Analysis.
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it** = policy violation; sanction accordingly
 - The Respondent **should have known it** = policy violation; sanction accordingly
 - The Respondent's own intoxication cannot be used as a defense

Consent Analysis

- **What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?**
 - Is there any sexual or intimate pattern or history between the parties?
 - What verbal and/or non-verbal cues were present during any acts that the parties agree were consensual?
 - This is where getting detail and specifics of intimate behaviors is critical

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition —

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

Domestic Violence

A felony or misdemeanor crime of violence 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 has cohabitated with, the Complainant as a spouse or intimate partner;
 - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
 - 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 Maryland.
- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates.
 - The people cohabitating must be current or former spouses or have an intimate relationship.

Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to —
 - Fear for the person’s safety or the safety of others; or
 - Suffer substantial emotional distress.
- For the purposes of this definition:
 - **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.

Stalking (contd.)

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- **Don't interpret this to violate anyone's First Amendment rights.**

Retaliation

- No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a conduct code violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation if it is based on more than evidence that a Respondent violated the sexual harassment policy.

Bias, Conflicts of Interest & Recusal

- Mandate for impartial resolutions with fair procedures
 - Impartial, objective, unbiased, neutral, independent
- Regulations prohibit conflicts of interest or bias
 - Bias can represent any variable that improperly influences a decision
- Forms of Bias:
 - Not staying in your lane
 - Improper application of institutional policies or procedures
 - Confirmation bias
 - Implicit bias – reliance on sex or gender stereotypes
 - Animus of any kind, including race, religion, disability, etc.
 - Intervention by senior-level administrators or external sources

Bias and Conflicts of Interest

- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised
- Having previously disciplined a student or employee is often not enough to create a conflict of interest

Recusal

- A conflict of interest might necessitate recusal, or party may request it
- Typically, the Title IX Coordinator determines whether recusal is necessary
- If you feel you cannot hear a case impartially, notify Title IX Coordinator immediately

Mandatory Dismissal

- **The TIX Coordinator MUST dismiss the complaint at any time if the alleged conduct:**
 - Would not constitute sexual harassment as defined (five offenses in § 106.30), even if proved
 - Did not occur in the Recipient's education program or activity
 - Did not occur against a person in the United States
 - The Complainant is not participating or attempting to participate in Recipient's program at time of complaint

Permissive Dismissal

- **The TIX Coordinator MAY dismiss the complaint if at anytime prior to a determination:**
 - Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations
 - Respondent is no longer enrolled or employed by Recipient
 - Specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations

Appeal of Dismissal

- Written notice of dismissal to both parties is required
 - Dismissal (or non-dismissal) of formal complaint may be Appealed
- Upon dismissal, the Recipient may institute action under another provision of the code of conduct or other policies.

Basis for an Appeal of Outcome

- Title IX Regulations specify three bases for appeal:
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available when the determination of responsibility or dismissal was made that could affect the outcome
 - Title IX Coordinator, Investigator, or Decision-maker had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome.
- 31001-CP Provides One Additional Grounds for appeal: The recommended Corrective Actions are substantially disproportionate to the severity of the violation or fall outside the range of sanctions the College has designated for purposes of its 31001 - Sexual Misconduct Policy.
- Note: Document Based and Recording Review; Deference to Original Decision Maker

Appeal Response

- When an appeal is filed, the Recipient must notify the other party and implement appeal procedures equally for all parties
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- The Hearing Officer/Decision Maker may be called upon by the Appeal Decision- maker to inform the appeal process
 - Likely a paper exchange; not in-person
 - Hearings, except deliberations, are recorded for review in event of an appeal

31001-CP Appeals

The Reviewing Official, or his/her designee, may, in his/her sole discretion, ask the Title IX Coordinator, the investigator, or the Hearing Officer to clarify the Investigation report, hearing procedure and deliberative report, or perform additional investigation concerning any new evidence identified in the appeal or to assist in determining whether there was, in fact, a procedural error, if such Reviewing Official or his/her designee believes such an alleged error may have affected the outcome of the Investigation/Hearing and the Findings/Determination by the Hearing Officer.

31001-CP Appeals

If the Reviewing Official or his/her designee determines in the course of his/her review that there was a procedural error that substantially affected the outcome of the Investigation to the material prejudice of the person or persons filing the appeal, or that other circumstances exist requiring additional Investigation and hearing, the Reviewing Official shall order the Investigation and hearing to be reopened subject only to direction/supervision by and any terms/conditions imposed by the Reviewing Official (including, in any case in which substantial bias was present, appointment of a new Investigator or Hearing Officer). No disciplinary action may be carried out prior to the Reviewing Official or his/her designee expressly so directing in his/her final written determination.

31001-CP Appeals

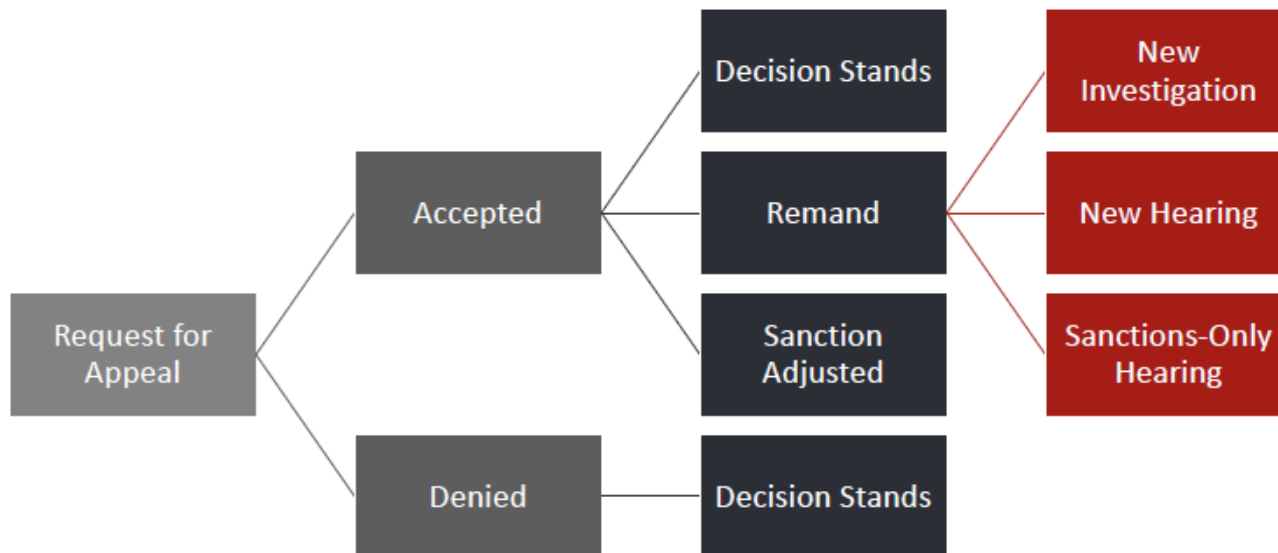
Within fifteen (15) days after the Reviewing Official receives the appeal, the Reviewing Official or her or his designee shall issue a final written determination either upholding the Hearing Findings and Determination and recommended Corrective Action of the Hearing Officer or reversing the Hearing Findings and/or Determination and/or recommended Corrective Action, and providing specific reasons for such reversal. The written determination of the Reviewing Official shall be final and will be forwarded simultaneously to the Complainant, Respondent, the Title IX Coordinator, appropriate Senior Vice President, campus Vice President and Provost, and the General Counsel.

Finality of Determination

- If an appeal is filed, the determination regarding responsibility becomes final on the date that the Recipient provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.
 - Per 31001-CP the duration is 10 working days

Appeals: The Process

APPEALS: THE PROCESS



Understanding Relevance of Evidence

- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses, including experts
 - Present evidence
 - Inspect all evidence, including evidence not used to
- support determination
- Institution cannot limit types/amount of evidence that may be offered except that it must be relevant
- Parties may have access to all gathered evidence that “directly relates” to the allegations available for reference and use at the hearing, but they must make the case for its relevance

Understanding Evidence

- The formal federal rules of evidence do not apply in Title IX
- hearings, but rules crafted by OCR for Title IX complaints do
- If the information helps to prove or disprove a fact at issue, it should be admitted because it is relevant
- If credible, it should be considered
 - Evidence is any kind of information presented with the intent
- to prove what took place
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly
- **Relevance**  **admissibility of the evidence**
- **Credibility**  **how much weight admissible evidence is given**

Relevance

- Evidence is generally considered **relevant** if it has value in proving or disproving a fact at issue, and relevance means the evidence may be relied upon by the Decision-maker
 - Regarding alleged policy violation and/or
 - Regarding a party or witness's credibility
- The Investigator will have made initial relevance “decisions” by including evidence in the investigation report
- Relevance is ultimately up to the Decision-maker, **who is not bound by the Investigator's judgment**
- **All** relevant evidence must be objectively evaluated and considered – both inculpatory and exculpatory

Record Keeping and Documentation

Certain records must be created, retained, and available to the parties for at least **seven** years:

- Sexual harassment investigations including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
- Any appeal and related result(s)
- Any informal resolution implemented
- Any supportive measures implemented
- For each formal complaint, must document the basis for why the institutional response was not deliberately indifferent
- For each conclusion, must document the rationale
- Must document measures taken to preserve/restore access to education programs/activity

Resources

- Teams Folder
 - Training
 - Guides
 - Flowcharts
 - Training Records
 - Templates

What's on the Horizon?

