



Equity, Civil Rights, and Title IX Office
Sexual and Interpersonal Misconduct Policy
Hearing and Appellate Officer Training

May 6, 2022





HEARING OVERVIEW



Baylor University
EQUITY, CIVIL RIGHTS, AND TITLE IX OFFICE

Disciplinary Resolution Hearing Overview¹

The goal of the hearing is not to re-present all details that are already in the Investigative Report. The goal is to ensure that the Hearing Officer has an accurate understanding of all party and witness statements and evidence. Questions will focus on clarifying information in the report and assessing credibility of the parties and witnesses. The Hearing Officer may at their discretion consider statements of a party or witness made before or at a hearing and/or other information, regardless of whether the party or witness appears at or answers some or all cross-examination questions at a hearing. The Hearing Officer will determine the appropriate weight for such information based on the totality of available relevant evidence. Hearing Officers will not 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.

1. Logistics: The Hearing will be conducted via Zoom. Virtual breakout rooms will be available for parties to consult privately with their advisors as needed. Breaks will be provided, but parties may ask for breaks as needed.
2. Advisor: You must have an advisor to cross examine the other party and witnesses. Your advisor's role is to ask questions on your behalf. If you do not have an advisor, we will assign a member of our office to serve as your advisor. An assigned advisor will expect you to prepare questions in writing for him/her to read during the hearing. Advisors will not provide you with opinions or guidance in preparing questions.
3. Process: Day 1
 - a. Opening Remarks: Facilitator, Hearing Officer, Parties; Parties' statements will be limited to 10 minutes.
 - b. Questions for Each Party: Hearing Officer, Advisors on Behalf of Parties
 - Only relevant cross-examination questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination question, the hearing officer will first determine whether the question is relevant and explain any decision to exclude a question as not relevant. Neither advisors nor parties are permitted to object to hearing officer decisions regarding relevance during a hearing.
 - Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence

¹ This overview is provided as a general outline and is subject to change. Per the SIM Policy, the hearing officer has broad authority to determine the process, timing, and conduct of a hearing.

concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

- Information protected under a legally recognized privilege will not be admitted unless the person holding the privilege has waived the privilege.
- c. Review of Witness List: The facilitator will go over the list of scheduled witnesses. Parties will be asked to provide updates on any witnesses for whom they do not have cross-examination questions. If parties and Hearing Officer agree on witnesses who can be excused from participating, they will be notified that they do not have to participate as planned.
4. Process: Subsequent Days
 - a. Opening Remarks: Facilitator, Hearing Officer
 - b. Questions for Witnesses: Hearing Officer, Advisors on Behalf of Parties
 - Witnesses will be scheduled in overlapping time blocks.
 - Only relevant cross-examination questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination question, the hearing officer will first determine whether the question is relevant and explain any decision to exclude a question as not relevant. Neither advisors nor parties are permitted to object to hearing officer decisions regarding relevance during a hearing.
 5. Closing Session: The parties will be permitted to submit follow-up questions for the Hearing Officer to consider asking the other party. These will not be considered "cross examination" questions, and they will be asked by the Hearing Officer. The decision to ask these questions is solely at the Hearing Officer's discretion. When all questioning is concluded, each party will have an opportunity to make closing remarks, which can include statements regarding possible sanctions. Statements will be limited to 10 minutes.

Hearing Structure

Pre-Hearing Meeting Outline

Hearing Structure

Additional Information for Hearing Officers

Ask Parties and Witnesses to affirm they had the opportunity to review transcripts and affirm they are an accurate and complete reflection of their interview.

Ask Witnesses to confirm evidence submitted, according to TOC.

Carolyn can screenshare the report.

Hearing Officer can ask his/her own follow-up questions in the closing session.

Can ask questions regarding status at University and impact during closing session in case you will need to assign sanctions.

Hearing Transcripts

Audio Submitted Daily

- Sometimes more than one audio file per day.
- As transcripts are available, they are added to Box, with audio file.

Complete Transcript

- Once all sections are complete, one transcript document will be completed, with TOC and links.
- Can be referenced in Determination Letter.

Accuracy

- Footnote: "This transcript has not been checked for accuracy. Any concerns that the Hearing Officer has about the accuracy during his/her review for the purposes of writing the Outcome Letter can be resolved by comparing the transcript against the hearing audio recordings provided to the Hearing Officer."

Determination Letter



Drafting

- Do not need to re-present all accounts
- Disputed Facts
- Relevant Evidence
- Weight of Evidence
- Credibility (if needed)
- Analysis of Policy



Procedural History

- Updated Checklist to be Provided by Carolyn



Upload to Box

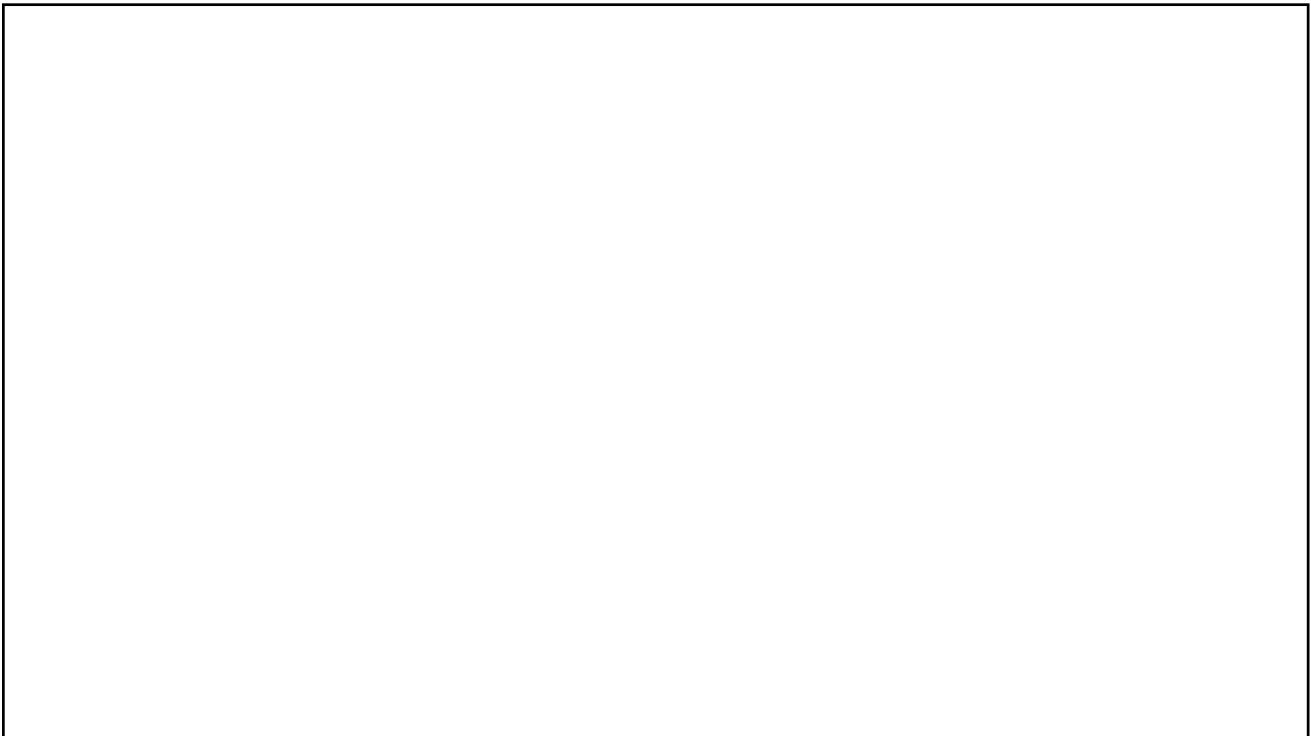
- By 12th Business Day
- Notify David, Laura, and Carolyn
 - Carolyn asks the Investigator to review for factual accuracy
- Emails Exchanged to Provide Updates



Update

- Review Edits and Comments and Update as You See Fit
- Notify Carolyn when Complete

Questions?





HEARING LOGISTICS

Logistics Timeline – Pre-Hearing

As the Final Report is ready to go out, Mike and Carolyn coordinate on potential date range for the hearing

Carolyn reaches out to parties on potential hearing dates, conflicts, and advisor issues

Priority is not to “unduly delay the scheduling” of the hearing

Doodle poll for hearing officers goes out

Try to get a hearing officer assigned within a week of poll being sent out

Set the
Standard

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Logistics Timeline – Pre-Hearing

Once date is set, email goes out to selected Hearing Officer with conflict/bias check. Email also goes out to other Hearing Officer candidates to release the dates

Hearing Officer notice sent to parties who can object to the Hearing Officer

Carolyn communicates with the parties and Hearing Officer for what witnesses they want to question

Christina (ESM) or the Case Coordinator reaches out to the parties with support and assistance once the hearing date is set and the parties are aware of the upcoming hearing

Doodle Poll for Witnesses sent out – work with witnesses to schedule a time that is convenient with their schedule

Set the
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Logistics Timeline – Hearing Schedule

Parties' time in the hearing is scheduled based on input from Carolyn on whether the parties want to question each other

If there is a cross-complainant, additional time is added for additional questions for the parties

Time is added if it is known that the Hearing Officer will have a lot of questions

If there are 3-4 witnesses, we consider whether we can schedule the hearing over one day

Can schedule up to 8 witnesses in a day. We have schedule up to 12 witnesses in one day, but this is risky and not recommended

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Logistics Timeline – Hearing Day

Schedule the witnesses in hour long blocks at half hour intervals.

This is possible because built in breaks after three witnesses in a row

Tell the witnesses that they are scheduled for an hour and to log on to Zoom at a specific time

Hold them in the waiting room for a short time - as long as it is in their "hour" window

Email the parties and advisors with the hearing schedule and Zoom link – once the schedule is finalized

Set the
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Set the Standard

Logistics Timeline – Hearing Day

Parties in the morning of day one – will set aside the whole day in case it is needed

Witnesses in the afternoon if the morning session is short and attempting a one-day hearing

Hold parties in the Waiting Room until the hearing is ready for them – pin camera instructions

Call witnesses who are late to the hearing and persuade them to join the hearing.

Break Out Rooms – set up to move parties and advisors into – can use the Waiting Room for witnesses



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Logistics Timeline – Hearing Day

Disciplinary records check with SCA and BUPD

Disciplinary History Form completed

AVPE and OGC are available to work through any issues that come up during the hearing

Hearing Officer can ask for a break to consult with AVPE and OGC



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Questions ?

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RESPONSIBILITIES OF A HEARING OFFICER

Title IX Hearing Officer Training: An Integrated and Coordinated Approach

Presented By:
Devon Turner Riley, Member

The Institutional Response Group | Cozen O'Connor
Gina Maisto Smith, Chair
Leslie M. Gomez, Vice Chair
Baylor University
May 6, 2022



Agenda

- Regulations
- Relevance
- Managing advisors/attorneys
- Hearing preparation
- Time management

2



TITLE IX AND THE CLERY ACT

3



Understanding Title IX

The Law:

"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 education program or activity receiving Federal financial assistance."

20 USC § 1681

4



VAWA: Prompt, Fair, and Impartial Investigation & Resolution

- **Prompt, fair, and impartial process** from the initial investigation to the final result
- Conducted in a manner consistent with the institution's policies and transparent to the accuser and accused
- The accuser and the accused have **equal opportunities** to have others present, including an **advisor of their choice**
- The accuser and accused are given **timely notice of meetings** at which one or the other or both may be present
- The accuser, the accused, and appropriate officials are given **timely and equal access to information** that will be used during informal and formal disciplinary meetings and hearings

VAWA: Prompt, Fair, and Impartial Investigation & Resolution

- Officials are appropriately **trained** and do not have a **conflict of interest or bias** for or against the accuser or the accused
- The proceeding is completed in a **reasonably prompt timeframe**
- Explicit provision noting that institutions may extend their reasonably prompt deadlines for **good cause** with written notice to the accused and accuser of the delay and the reason for the delay
- The accuser and the accused **receive simultaneous notification**, in writing, of the result of the proceeding, the rationale, sanctions, any available appeal procedures, any change to the results that occurs prior to final resolution and when results become final

PROHIBITED CONDUCT

Title IX

Definition of Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) 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;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Title IX Regulations May 19, 2020, § 106.30(a)

Core
Tenets:

Title IX

Response to Sexual Harassment

A recipient with actual knowledge of sexual harassment in an **education program or activity** of the recipient against a person **in the United States**, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. ... A recipient's response must treat complainants and respondents equitably by offering **supportive measures** as defined in § 106.30 to a complainant, and by following a **grievance process** that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Title IX Regulations May 19, 2020; § 106.44(a)

Core
Tenets:



9

Title IX

Education Program or Activity

For the purposes of this section, §§ 106.30, and 106.45, "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.

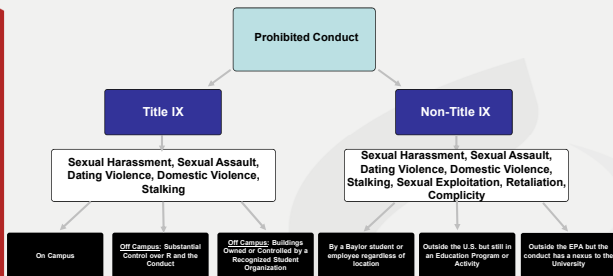
Title IX Regulations May 19, 2020; § 106.44(a)

Core
Tenets:



10

What is Prohibited Conduct?



Sexual and Interpersonal Misconduct Policy



Policy Title: Sexual and Interpersonal Misconduct Policy Policy Number: 022
Date Issued: August 21, 2015 Responsible Executive: Title IX Coordinator
Date Last Revised: September 15, 2021 Responsible Office: The Equity, Civil Rights, and Title IX Office



12

Definitions of Prohibited Conduct

- **Title IX Sexual Harassment**
 - *Quid Pro Quo*
 - *Hostile Environment*
 - *Sexual Assault, Dating Violence, Domestic Violence, Stalking*

13



Definitions of Prohibited Conduct

- **Title IX Sexual Assault**

Sexual assault includes rape, fondling without consent, incest or statutory rape, defined as follows:

- a. Rape is the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral genital contact of another person without consent (as defined below).
- b. Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without consent.
- c. Incest is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- d. Statutory rape is sexual intercourse with a person who is under the statutory age of consent. Under Texas law, individuals younger than 17 years of age are legally incapable of giving consent to sexual penetration or contact by an adult (someone 18 years of age or older) who is three or more years older than the individual.

14



Definitions of Prohibited Conduct

- **Title IX Domestic Violence**

Domestic violence is conduct that constitutes 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 of the jurisdiction in which the crime of violence occurred; 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 the jurisdiction in which the crime of violence occurred.

15



Definitions of Prohibited Conduct

- **Title IX Dating Violence**

Dating violence is conduct that constitutes 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 parties' statements 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.

16



Definitions of Prohibited Conduct

- **Title IX Stalking**

Stalking for purposes of the Title IX Sexual Harassment definition is conduct on the basis of sex that constitutes 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 respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.
- Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling.

17



Definitions of Prohibited Conduct

- **Non-Title IX Domestic Violence and Dating Violence**

- As defined in the Title IX definition that did not reportedly occur in a program or activity of the University in the United States

- **Non-Title IX Stalking**

- As defined in the Title IX definition that did not reportedly occur in a program or activity of the University in the United States, or that otherwise fits within the definition of stalking but does not fall within the Title IX Stalking definition because the reported conduct is not directed at the alleged victim on the basis of sex.

18



Definitions of Prohibited Conduct

- **Sexual Harassment:** Sexual harassment is any unwelcome sexual advance, request for sexual favors, and/or other unwelcome, verbal or physical conduct of a sexual nature when one of the conditions outlined in (a), (b), or (c), below, is present.
- **Gender-Based Harassment:** Gender-based harassment includes harassment based on gender, sexual orientation, gender identity, or gender expression, which may include acts of aggression, intimidation, or hostility, whether verbal or non-verbal, graphic, physical, or otherwise, even if the acts do not involve contact of a sexual nature, when one of the conditions outlined in (a), (b), or (c), below, is present.

19



Definitions of Prohibited Conduct

- (a) Submission to, or rejection of, such conduct is made implicitly or explicitly a term or condition of a person's instruction, academic standing, employment, or participation in any University program, activity, or benefit, but which does not fit within the definition of Title IX *Quid Pro Quo*.
- (b) Submission to, or rejection of, such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions, in circumstances that do not fit within the definition of Title IX *Quid Pro Quo*.

20



Definitions of Prohibited Conduct

- (c) Such conduct creates a hostile environment. Under Texas Education Code §51.281(4) a hostile environment exists:
 - i. in the employment context, when it unreasonably interferes with a person's work performance or creates an intimidating, hostile, or offensive work environment; or
 - ii. in the education context, when it is sufficiently severe, persistent, or pervasive that the conduct interferes with a student's ability to participate in or benefit from the University's educational programs or activities.

Definitions of Prohibited Conduct

• Sexual Exploitation

Sexual Exploitation: Any act where one person violates the sexual privacy of another or takes unjust or abusive sexual advantage of another, but that does not fall within the definition of Title IX Sexual Harassment. Sexual exploitation may include:

- surreptitiously observing another individual's nudity or sexual activity or allowing another to observe consensual sexual activity without the knowledge and consent of all parties involved;
- recording, photographing, transmitting, showing, viewing, streaming, or distributing intimate or sexual images, audio recordings, or sexual information without the knowledge and consent of all parties involved;
- providing alcohol or drugs to a complainant with the intent to facilitate Prohibited Conduct;
- exposing one's genitals or inducing another to expose their own genitals in non-consensual circumstances; or
- knowingly exposing someone to or transmitting an STI or HIV.

Definitions of Prohibited Conduct

- **Retaliation**
- Retaliation means intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations or this policy, 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 regarding Prohibited Conduct (including both Title IX Sexual Harassment and Non-Title IX Misconduct). Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, constitutes retaliation, as does any adverse action taken against a person for making a good faith report of Prohibited Conduct or participating in any proceeding under this Policy.

Definitions of Prohibited Conduct

• Retaliation

- Retaliation may include intimidation, threats, coercion, harassment, or adverse employment or educational actions that would discourage a reasonable person from engaging in activity protected under this Policy. Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance process under this Policy does not constitute prohibited retaliation, provided, however, that a determination regarding responsibility is not alone sufficient to establish that any party made a materially false statement in bad faith.

Definitions of Prohibited Conduct

- **Complicity**
- Any act that knowingly aids, facilitates, promotes, or encourages the commission of Prohibited Conduct by another person.

25



Definitions of Prohibited Conduct

- **Related Definitions:**
 - **Consent:** Consent is the voluntary, informed, and freely given agreement, through words and/or actions, to participate in mutually agreed-upon acts. Consensual activity happens when each partner willingly and affirmatively chooses to participate.
 - Force
 - Coercion
 - **Incapacitation:** Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the activity is occurring. In addition, an individual is incapacitated if they demonstrate that they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in an act.

26



RESPONDING TO A REPORT OF PROHIBITED CONDUCT

27



Options for Title IX Cases at Baylor

Supportive Measures Only

- Parties may receive supportive measures **with or without** the filing of a formal complaint
- **Non-disciplinary**, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to a party.
- Designed to restore or preserve equal access to the education program or activity **without unreasonably burdening** the other party.

Informal Resolution

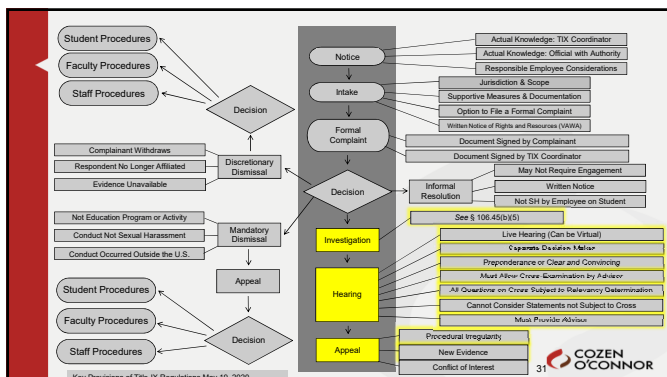
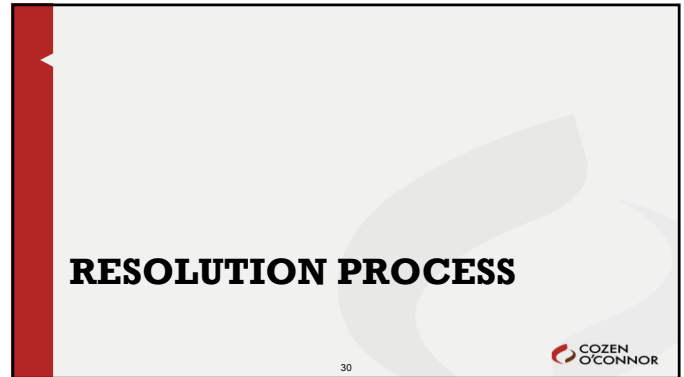
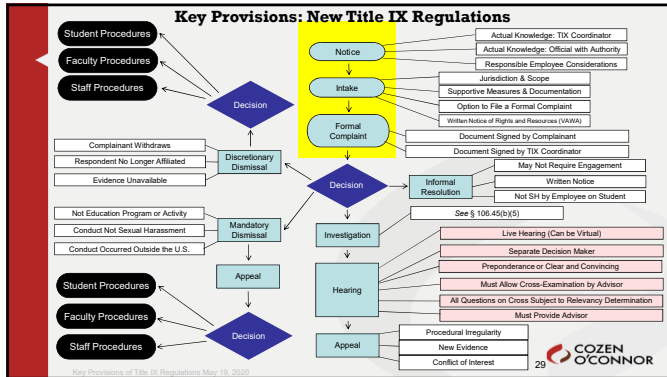
- Initiated with the filing of a **formal complaint**
- Must give **written notice** to the parties as described in § 106.45(b)(9)
- Both parties must give **voluntary written consent**
- Administered by trained facilitators
- Not available to address allegations that an employee sexually harassed a student

Formal Resolution

- Initiated with the filing of a **formal complaint**
- Must give **written notice** to the parties as described in § 106.45(b)(2)(i)
- Follows **prescribed grievance process** described in § 106.45
- Administered by trained investigators and decision-makers who are free from conflicts of interest or bias

28






Basic Requirements

- **Treat complainants and respondents equitably** by providing **remedies** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Relevant Regulations Sections:
Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

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Basic Requirements




- Require an objective evaluation of all relevant evidence
 - Including both inculpatory and exculpatory evidence
 - Credibility determinations may not be based on a person's status
- Implementers must be trained and free from conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Relevant Regulations Sections:
 Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)
 Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)
 Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

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Basic Requirements




- Presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Follow reasonably prompt time frames for conclusion of the grievance process with permissible delay for good cause

Relevant Regulations Sections:
 Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)
 Objective evaluation of all relevant evidence: § 106.45(b)(1)(ii)
 Training and avoidance of conflicts or bias: § 106.45(b)(1)(iii)

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Basic Requirements




- Provide a **standard of evidence** to be used to determine responsibility, applying either the preponderance of the evidence standard or the clear and convincing evidence standard,
 - Apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty
 - Apply the same standard of evidence to all formal complaints of sexual harassment

Title IX Regulations May 19 2020; §§ 106.45(b)(1)(vii) and 106.45(b)(7)(i), 85 F.R. 30275

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Basic Requirements



- Provide procedures and permissible bases for the complainant and respondent to appeal
- Provide a range of supportive measures available
- 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

Relevant Regulations Sections:
 Appeal: §§ 106.45(b)(1)(viii) and 106.45(b)(7)(i)(F)
 Range of Supportive Measures: § 106.45(b)(1)(ix)
 Waiver of Privilege: § 106.45(b)(1)(x)

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Overview of Investigation Requirements



37

Advisor of Choice



- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.
- A recipient may establish restrictions on advisors' participation, as long as the restrictions apply equally to both parties.

Title IX Regulations May 19, 2020; §106.45(b)(5)(iv), 85 F.R. 30576

38

EVIDENTIARY CONSIDERATIONS

39

Evidentiary Considerations

- Privileged Information & Records
- Relevance
- Prior Sexual History
- Prior or Subsequent Misconduct
- Setting Evidentiary Rules

40

Privileged Information

- 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



Title IX Regulations May 19, 2020; § 106.45(b)(1)(x) 85 F.R.30361

Baylor Policy

- "In general, a person's medical and counseling records are confidential and are not accessible to the investigator unless the person voluntarily chooses to share those records with the investigator. The investigator will not access, consider, disclose or otherwise use a party's privileged records without the party's voluntary, written consent to do so, and such information will not be deemed relevant to an investigation or adjudication absent the voluntary, written consent of the party. In those instances, the relevant information from the records must be shared with the other party; it should be noted, however, that irrelevant information may be redacted by the investigator from such records, as appropriate."



Relevance

- Only relevant cross examination and other questions may be asked of a party or witness.
- The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.



Title IX Regulations May 19, 2020; 106.45(b)(6); Preamble at 30247, FN 1018

Relevance

- "While the proposed rules do not speak to
- admissibility of hearsay,
 - prior bad acts,
 - character evidence,
 - polygraph (lie detector) results,
 - standards for authentication of evidence,
 - or similar issues concerning evidence,
- the final regulations require recipients to **gather and evaluate relevant evidence**, with the understanding that . . .



Title IX Regulations May 19, 2020; Preamble at 30247, footnotes omitted

Relevance



- this includes **both inculpatory and exculpatory evidence**, and
- the final regulations deem questions and evidence about a complainant's prior sexual behavior to be **irrelevant** with two exceptions, and
- preclude use of any information protected by a **legally recognized privilege** (e.g., attorney-client)."

Title IX Regulations May 19, 2020; Preamble at 30247, footnotes omitted

Prior Sexual History



- Questions and evidence about the complainant's sexual predisposition or **prior sexual behavior** are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered:
 - To prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6) 85 F.R.30491

Prior Sexual History



- Only applies to complainants
 - The Department reiterates that the rape shield language in this provision 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.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6); Preamble 85 F.R.30353

Prior Sexual History: Motive



- The Department disagrees that the rape shield language is too broad. Scenarios described by commenters, where a respondent might wish to prove the complainant had a motive to fabricate or conceal a sexual interaction, do not require admission or consideration of the complainant's sexual behavior.
- Respondents in that scenario could probe a complainant's motive by, for example, inquiring whether a complainant had a dating or romantic relationship with a person other than the respondent, without delving into a complainant's sexual behavior; sexual behavior evidence would remain irrelevant in such circumstances.

Title IX Regulations May 19, 2020; §§ 106.45(b)(1)(iii) and 106.45(b)(6); Preamble at 30351

Prior or Subsequent Misconduct

- The regulations do not prohibit the use of prior or subsequent misconduct
 - “Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant

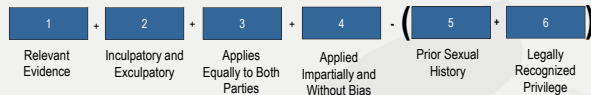
49

Practical Considerations

- Prior or subsequent misconduct may be relevant to demonstrate:
 - Intent/knowledge/state of mind
 - Motive
 - Opportunity
 - Lack of mistake
 - Pattern
 - Identity
 - Information that is inextricably interwoven with the facts

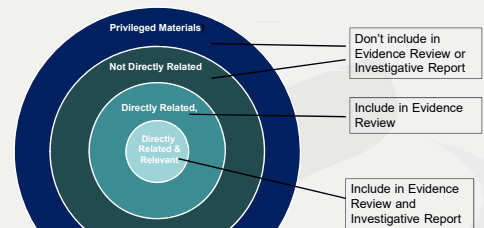
50

Evidentiary Rules Must Consider



51

Evidentiary Levels for Inclusion

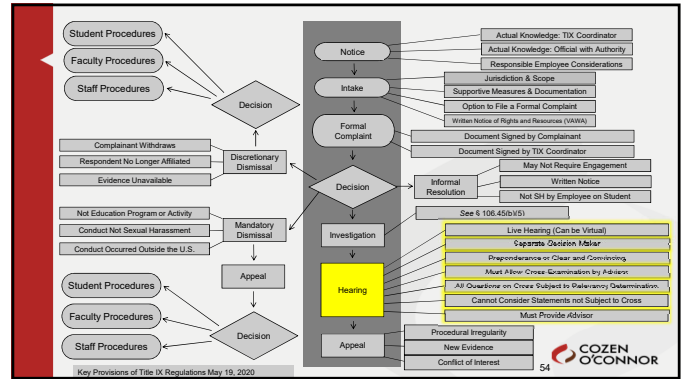


52

HEARINGS

THE FINAL TITLE IX REGULATIONS

53



Hearings

- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

Title IX Regulations May 19, 2020; § 106.45(b)(6)(i)

55



Hearings

- Only relevant cross-examination and other questions may be asked of a party or witness.
- 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.

Title IX Regulations May 19, 2020; § 106.45(b)(6)(i)

56





Cross-Examination by Advisor

- [A] party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.
- Similarly, where one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor must still cross-examine the other, appearing party "on behalf of" the non-appearing party, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance).

Title IX Regulations May 19, 2020; Preamble at 85 F.R. 30346



Hearings

- 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

Title IX Regulations May 19, 2020; § 106.45(b)(6)(i)



Determination of Responsibility

- Decision-maker(s), cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
- Must issue a simultaneous written determination regarding responsibility, including
 - Identification of the allegations
 - Description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the recipient's code of conduct to the facts
 - Rationale
 - Appeal procedures

Title IX Regulations May 19, 2020; § 106.45(b)(7)

Sexual and Interpersonal Misconduct Policy



Policy Title: Sexual and Interpersonal Misconduct Policy	Policy Number: 022
Date Issued: August 21, 2015	Responsible Executive: Title IX Coordinator
Date Last Revised: September 15, 2021	Responsible Office: The Equity, Civil Rights, and Title IX Office

Policy on Hearings

- Hearing officer may not have a conflict of interest or bias against complainants or respondents generally or an individual complainant or respondent
- Hearing officer has broad authority to determine the process, timing and conduct of a hearing
- Hearing officer will receive the investigative report, any attachments, and copies of the parties' written responses to the investigative report
- Information from evidence review will be made available at the hearing
- Hearing officer must first determine the relevance of each cross-examination question before a witness or party may answer, and explain any determination of non-relevance
- Only witnesses who participated in investigation may be called at the hearing
- Hearing officer must apply preponderance of the evidence standard
- Hearing will be recorded
- Within 15 days, issue written determination

61



Policy Language on Written Determination

- "The written determination will include:
 - Identification of the Prohibited Conduct section(s) of this policy, and of any other University policy sections considered in the investigation, alleged to have been violated;
 - A description of the procedural steps taken from the receipt of the complaint through the determination, including but not limited to, as applicable, any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the University's definitions of Prohibited Conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility; and
 - Identification of the University's procedures and permissible bases for the complainant and respondent to appeal."

62



Hearing Format

- Opening instructions
- Opening statements
- Questioning of parties by hearing officer and then the other party's advisor
 - Cross-examination by advisors must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.
- Questioning of witnesses parties by hearing officer and then the parties' advisor
 - Cross-examination by advisors must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.
- Closing statements
- Deliberations

63



Advisors

- Other than cross-examination, advisors may not participate actively in the hearing and may not speak or otherwise communicate on the part of the party that the advisor is advising. However, the advisor may consult privately in a non-disruptive manner with their advisee during and/or at a recess in the hearing.
- The University reserves the right to take appropriate action regarding any advisor who disrupts the process, or who does not abide by the restrictions on their participation as determined in the sole discretion of the hearing officer, which may include exclusion of the advisor from the hearing and the appointment of an alternate University-provided advisor

64



HEARINGS

PRACTICAL IMPLEMENTATION

65



Preparation

- Conduct a conflict check
- Read all materials
- Outline elements of prohibited conduct and map the information to those elements
- Outline elements of credibility and map the information to those elements
- Identify issues in case and topics areas for questioning
- Identify witnesses you want to hear from at the hearing
- Outline relevant/irrelevant information
- Goal is to have all of the available information to deliberate

66



Personal Preparation: Be Objective

- Identify and set aside personal biases and prejudices
- Be careful to avoid making assumptions as to how a person "should" react
- Avoid putting oneself in the shoes of the complainant or the respondent
- Recognize emotional impact, if any, but do not allow emotion to impact fair and impartial fact-finding

67



Personal Preparation: Be Professional

- Maintain an appropriate demeanor at all times
- Be polite and respectful to all parties
- Maintain appropriate sensitivity to presentation of difficult information
- Outline questions ahead of hearing
- Time management

68



Participation Techniques

- Be alert to your non-verbal communication
- Pay attention to tone of voice and volume level
- Avoid asking questions that imply a value judgment
- Maintain attentive posture and good eye contact
- Exercise reflective listening in framing next question

69



What to Ask

- Do I need to know the information?
- When questions arise, it can be helpful to walk yourself through the following set of questions:
 - Will an answer to my question help me decide the appropriate outcome or sanction?
 - Will getting an answer to this question influence my decision?

70



The Continuum Approach



71



Responding to Inadmissible Evidence

- Identify ahead of the hearing
- What if answer includes irrelevant information?
 - Disregard/strike
- Transparently outline admissibility and weight considerations in outcome letter

72



Advisors

- Advisors have a speaking role
- Establish rules of decorum and conduct in the hearing via opening instructions
- Establish tone of professionalism and respectful treatment of parties and advisors
- Promptly and firmly redirect advisors who do not abide by the guidelines you set forth

73



Standard of Proof

- More likely to be true than not
- More probable than not
- The greater weight of the evidence
- Tipping the scale ever so slightly
- 51 %
- Based on the more convincing evidence and it's probable truth or accuracy, not on the amount
- Quality of the evidence, not quantity
- NOT beyond a reasonable doubt

74



Technology Options

- Zoom
 - Ability to see and hear in real time
 - Breakout rooms
 - Recording
- Training webinars

75



DELIBERATIONS

76



Deliberation Techniques

- Gather all documents and exhibits in advance
- Use cross-referencing grids/matrices
- Identify specific elements of alleged misconduct from policy definitions
- Begin by identifying areas of agreement as to evidence
- Identify conflicts and prioritize
- Discuss each conflict individually
- Articulate your position and support it from the evidence

77



The Notification of Decision Letter

- When making the determination as to responsibility
 - Make finding as to sufficiency, by a preponderance, to support finding of responsibility
 - Sufficient or insufficient
 - Not a finding by a preponderance that event did not occur
 - Must provide rationale
 - Roadmap to conclusion
 - Can be concise, but must communicate salient elements of finding
 - Comment on evidence, not the people
 - Avoid extraneous and tangential comments
 - Remain closely tied to the facts and reasonable inferences

78



SANCTIONS

79



Discretion in Sanctioning

- Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations **do not restrict a recipient's discretion** to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the recipient's education program or activity.

Title IX Regulations May 19, 2020, Preamble at 85 F.R. 30224

80



Sexual and Interpersonal Misconduct Policy



Policy Title: Sexual and Interpersonal Misconduct Policy Policy Number: 022
Date Issued: August 21, 2015 Responsible Executive: Title IX Coordinator
Date Last Revised: September 15, 2021 Responsible Office: The Equity, Civil Rights, and Title IX Office

81



Policy on Sanctioning

- Hearing officer determines sanction for student Respondents
- The Provost's Office or Human Resources determines sanction for employee Respondents.

82



Policy on Sanctioning

- Hearing officer has great latitude in the imposition of sanctions tailored to the facts and circumstances of each report, the impact of the conduct on the complainant and surrounding community, and accountability for the respondent.
- The imposition of sanctions is designed to eliminate Prohibited Conduct, prevent its recurrence, remedy its effects and restore or preserve the complainant's equal access to University education programs or activities, while supporting the University's educational mission.
- Sanctions may include educational, restorative, rehabilitative, and punitive components. Some conduct, however, is so egregious in nature, harmful to the individuals involved, and/or so deleterious to the educational process that it requires severe sanctions, including suspension or expulsion.

83



Policy on Sanctioning

- Factors:
 - the nature and violence of the conduct at issue;
 - the impact of the conduct on the complainant;
 - the impact or implications of the conduct on the community or the University;
 - prior misconduct by the respondent, including the respondent's relevant prior discipline or criminal history (if available);
 - maintenance of a safe and respectful environment conducive to learning;
 - protection of the University community; and
 - any other mitigating, aggravating, or compelling circumstances in order to reach a just and appropriate resolution in each case."

84



Policy on Sanctioning

- Community service
- Restriction of Access to Space, Resources, and Activities
- Educational programs
- Warning
- Disciplinary probation
- Restitution
- Residential or other facilities restrictions or removal
- Withholding of degree
- Suspension
- Suspension with conditions
- Expulsion

85



Policy on Remedies

- Hearing officer may recommend additional remedies for the complainant to address the effects of the conduct on the complainant, restore or preserve the complainant's equal access to University programs and activities, and restore to the complainant, to the extent possible, benefits and opportunities lost as a result of the alleged Prohibited Conduct.
- The hearing officer may also identify remedies to address the effects of the conduct on the University community.
- The Title IX Coordinator will review the remedies recommended by the hearing officer and will consider the appropriateness of continuing supportive measures on an ongoing basis. Extended supportive or other measures may be included in the sanctions.

86



Use of Slides

- This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.
- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
- All rights are reserved to Cozen O'Connor.

87



The image is a horizontal composition. The top half shows a blue sky with wispy white clouds. The bottom half shows a city skyline at sunset, with the sun low on the horizon, casting a golden glow over the buildings and creating silhouettes. A white horizontal band runs across the middle of the image, containing the word 'APPEALS' in bold, black, sans-serif capital letters.

APPEALS



Title IX Appeals

by
Sandy Lauro



We Can All Agree . . .

2. All hearing officers and appellate officers must not show _____ or have a _____.

Bias/conflict of interest

or

Patience/neutral mindset

Objectives

1

Review applicable regulation and Baylor policy relating to Title IX Appeals

2

Review the role and responsibility of Appeal Officers in the Title IX Process

3

Review of Baylor Title IX Appeals in 2021

2020 Title IX Regulations - Appeals

Must offer both parties a right to appeal from:

- A dismissal of a formal complaint or any allegations therein; and
- A determination regarding responsibility

Must ensure that the appeal officer is not the same decision maker who made the determination regarding complaint or responsibility

Must give both parties a reasonable and equal opportunity to submit a written statement in support or challenging the outcome

Must issue a written decision describing the result and rationale of the appeal simultaneously to both parties

Limited Regulatory Grounds for Appeals

- **Procedural Irregularity** that affected the outcome of the matter;
- **New Evidence** that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or
- **Conflict of Interest:** Title IX Coordinator, investigator(s), or decision-makers(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

TRUE OR FALSE

The common element in all the grounds for appeal is procedural irregularity. A new element of interest affected the outcome of the appeal. The affected outcome of the appeal.

Quiz!

Baylor
policy
provides
another
basis for
appeal

The decision of the decision-maker
was arbitrary or capricious.



Baylor Policy

Either party to a matter covered by this SIM policy may file an appeal from: 1) a determination regarding responsibility; and/or 2) the Title IX Coordinator's dismissal of a formal complaint or any allegations therein from the Title IX Sexual Harassment process, on four grounds:



- **Procedural Irregularity** that affected the outcome of the matter;
- **New Evidence** that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- **Conflict of Interest:** Title IX Coordinator, investigator(s), or decision-makers(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent **that affected the outcome of the matter.**
- **Arbitrary or Capricious Decision:** The decision of the decision-maker was arbitrary or capricious.

TRUE OR FALSE

Arbitrary or capricious is a standard of review that is commonly used by courts in reviewing administrative decisions.

Quiz!

Arbitrary or Capricious

Arbitrary – "without adequate determining principle," "non-rational," and "willful and unreasoning action, without consideration and regard for facts and circumstances presented."

Arbitrary and capricious – "willful and unreasonable action without consideration or in disregard of fact or law or without determining principle."

Black's Law Dictionary (6th Ed. 1990)

Under Baylor policy, can a party appeal based on an argument that sanctions were excessive?



Baylor Policy

- Parties and advisors are prohibited from contacting the appellate officer for any reason during and after the appeal process.
- Decision of appellate officer to grant or deny the appeal is final. If granted, subsequent determination and/or sanction is final.



Baylor policy also provides:

- Appellate officer may:
 - Deny the appeal;
 - Or, if one or more of the appeal grounds have been met, may
 - Return the case to the original hearing officer for reconsideration;
 - Appoint an alternate decision maker to review the case; or
 - Change or modify the decision.

TIME TO PROVIDE APPEAL DECISION: 20 business days from the appeal receipt deadline.

Doe v. University of Arkansas-Fayetteville, No. 19-1842 (8th Cir. 2020).

Female student filed Title IX complaint of sexual assault by male student – incapacitated/no consent.

- Following investigation, University's Title IX Coordinator issued a decision finding male student not responsible and female student appealed
- Three-person appeal panel reviewed finding “de novo” and found male student had violated sexual assault policy
- Male student filed a lawsuit under Title IX alleging that University disciplined him on the basis of sex – because he was a male in violation of Title IX

Doe v. University of Arkansas-Fayetteville, No. 19-1842 (8th Cir. 2020).

Appellate court reversed the lower court's dismissal of the student's Title IX claim, finding student had alleged several circumstances that stated a plausible claim of sex discrimination:

- The University's Appeal Panel's decision on "incapacitation" "is unexplained and against the substantial weight of the evidence."
- The Appeal Panel's mild sanction, which strayed from usual sanction of expulsion, suggested that the University found student responsible to avoid "further negative media attention."
- The University was under pressure to appear to be taking a hard line on sexual assault because of significant media attention generally and relating to this case in particular.

Appellate Officers

DOs

- Review appeal to determine if it falls within limited grounds
- Have an open and neutral mindset
- Be guided by applicable policy and facts

DON'Ts

- Let bias creep in
- Act like the hearing officer and make your own determination on a preponderance of evidence
- Entertain anything beyond the limited grounds for appeal raised and allowed

BEST PRACTICES FOR APPEAL OFFICERS

1. Ensure no bias or conflict of interest.
2. Address, in some fashion, all appeal grounds raised.
3. Address, in some fashion, any response of party disputing the appeal.
4. Refrain from attacking parties or using any language that could be perceived as biased.
5. Give enough detail in your decision so the parties know you considered the appeal issues with care and objectivity.

Do you have a **Conflict of Interest or Bias?**

- Appeals officers must objectively evaluate the evidence and the grounds asserted for appeal.
- Objectively includes the absence of any personal or professional interest that affects your ability to be fair and impartial to all parties in the proceeding.
- Before you serve as an Appeal Officer, review information about parties, witnesses, and representatives to determine if you have any pre-existing relationship or knowledge that could be perceived as a conflict of interest.

Potential Conflicts or Bias

A family, personal or business relationship (past or present) with a party, advisor, or witness.

Prior knowledge about a party outside of what is learned in the proceeding that may bear on your decision of responsibility

Prior negative interaction with party, witness or advisor

BEST PRACTICE: If anything raises any level of concern about an actual or potential conflict of interest or bias, raise it immediately

Review of Appeals in 2021

- Most common grounds of of appeal were: (i) decision was “arbitrary or capricious,” and (ii) conflict of interest or bias
- Questions relating to whether there was consideration of contradictions/inconsistencies of a party
- Questions of process followed or procedural irregularity

Hearing Officers – Articulate Reasons for Credibility Decisions

In assessing credibility, I considered the details provided by the parties and witnesses; the demeanor of the parties and witnesses at relevant times; any interest, motive or bias of the parties or witnesses that may impact the truthfulness of their account; the presence or absence of corroboration where it would reasonably be expected to exist; the circumstances of the Complainant's disclosure; and the context of the relationship between the parties.

XXX's account is more credible "because it is sufficiently corroborated by other information gathered in the investigation . . .

Protecting Your Determination as a Hearing Officer

1. Consider all evidence and note that you considered both inculpatory and exculpatory evidence

2. Use the templates for the determination Baylor provides

3. Explain your decisions in a non-judgmental or attacking manner and discuss/articulate some reasoning behind any credibility decisions



Open Floor
for Thoughts
and Opinions
from Others

**Many Thanks For Your Time,
Attention, and Participation.**

