

BEING AN INDEPENDENT DECISION- MAKER OR MEDIATOR FOR TITLE IX AND INTERPERSONAL VIOLENCE & SEXUAL MISCONDUCT CASES

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OFFICE OF EQUAL OPPORTUNITY & REGULATORY COMPLIANCE





UNIVERSITY POLICIES

- ❖ Title IX Policy
- ❖ Interpersonal Violence and Sexual Misconduct Policy (IVSM)



REFRESHER: WHAT IS TITLE IX?



Title IX is a federal law that prohibits discrimination based on sex in educational programs and activities



Prohibited conduct under Title IX includes sexual assault, sexual harassment, and other forms of nonconsensual sexual conduct



Title IX protects all genders

- ❖ Title IX applies only to incidents that occur within a University program or activity.
- ❖ However, the University's Interpersonal Violence and Sexual Misconduct (IVSM) Policy applies to incidents that occur outside of a University program or activity or incidents that are not protected under Title IX.

JURISDICTION

WHAT IS PROHIBITED AT THE UNIVERSITY OF MISSISSIPPI?

- ❖ Sexual harassment
- ❖ Sexual assault
- ❖ Relationship violence
- ❖ Stalking
- ❖ Sexual exploitation
- ❖ Retaliation

SEXUAL HARASSMENT

- ❖ 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; or
- ❖ Unwelcome sexual conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to an educational program or activity of the University.

SEXUAL ASSAULT

- ❖ Rape
- ❖ Sodomy
- ❖ Sexual assault with an object
- ❖ Fondling
- ❖ Incest
- ❖ Statutory rape

EFFECTIVE CONSENT

- ❖ An affirmative agreement—through clear actions or words—to engage in sexual activity
- ❖ The person giving the consent must act freely, voluntarily, and with an understanding of their actions when giving consent.
- ❖ Nonconsensual sexual activity requires a showing that a participant *knew* or *reasonably should have known* that the other party did not consent to the sexual activity.
- ❖ A person who is **incapacitated**—unconscious, unaware, or otherwise physically helpless—cannot give effective consent to sexual activity.
 - Someone is incapacitated when he or she engages in sexual activity and cannot understand or appreciate who, what, when, where, why, or how, with respect to the sexual interaction.

MORE ABOUT CONSENT

- ❖ Consent must be present throughout the sexual activity.
- ❖ Consent can be withdrawn by any participant at any time during the sexual activity.
 - A participant to sexual activity can revoke consent through actions, conduct, or behavior that communicates that they no longer wish to continue the existing sexual activity.
 - Once consent is withdrawn, the sexual activity must cease immediately.
- ❖ Although consent can be non-verbal (e.g. nodding), consent should never be assumed or inferred from silence, passiveness, or a lack of resistance.
 - A lack of protest or the failure to resist does not constitute consent.

DATING AND DOMESTIC VIOLENCE

Physical violence committed against a partner
in an intimate relationship

STALKING

- ❖ Stalking is a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress.

SEXUAL EXPLOITATION

- ❖ Non-consensual videotaping, audiotaping, or photographing of sexual activity even if the sexual act is consensual;
- ❖ Non-consensual posting, publishing, sharing, or displaying of photo, audio, or video of sexual activity even if the activity was originally recorded with effective consent;
- ❖ Voyeurism, which occurs when one individual engages in secretive observation of another for personal sexual pleasure;
- ❖ Any disrobing of another or exposure to another without effective consent; or
- ❖ Any collecting, creating, viewing, and/or distributing of pornography/sexual images of those under the age of eighteen (18)

IMPORTANT NOTE

Title IX does not protect against sexual exploitation, but the IVSM Policy does.

AMNESTY

- ❖ Students **will not be in trouble under the drug and alcohol policy** for voluntary personal use of alcohol or drugs.
 - Applies to all parties, including potential witnesses
 - May be required to undergo alcohol or drug education
 - Amnesty is intended to encourage students to come forward in reporting or responding to an incident of sexual misconduct.

RETALIATION

- ❖ The University **prohibits retaliation** due to reporting a conduct violation, participating or cooperating in an investigation, or pursuing legal action.
- ❖ The University defines retaliation as any adverse action, including intimidation, taken against an individual who has participated in any manner in an investigation, proceeding, or hearing under its policies and procedures.
 - Applies to all parties, including potential witnesses



BEING AN INDEPENDENT DECISION-MAKER (IDM) OR MEDIATOR

- ❖ The Basics
- ❖ Being an IDM Compared to Other Roles

THE BASICS OF BEING AN INDEPENDENT DECISION-MAKER OR MEDIATOR

THE BASICS OF BEING AN IDM

- ❖ The Independent Decision-Maker will preside over the live hearing and is vested with the authority to maintain the order of the parties, participants, and proceedings.
- ❖ **The IDM's main function is to determine whether or not the respondent is responsible for the alleged conduct.**
 - The IDM operates under the 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.

WHAT IS THE IDM EXPECTED TO DO?

- ❖ The Independent Decision-Maker will also:
 - Review the final investigative report prior to a live hearing;
 - Give an overview of the hearing process at the beginning of a live hearing (IDMs are given a script to use throughout a live hearing);
 - Make credibility determinations, so long as those determinations are not based on a person's status as a complainant, respondent, or witness;
 - Make rulings on limited objections, if any, during a live hearing;
 - For IVSM cases, ask questions of parties and witnesses that have been submitted by the parties' advisors;
 - Determine relevancy of direct-examination and cross-examination questions and explain any decision to exclude a question as not relevant; and
 - Ask questions of the parties or witnesses during the live hearing if the IDM feels compelled to do so.

THE BASICS OF BEING A MEDIATOR

- ❖ The Mediator assists and guides the parties toward their own resolution.
- ❖ The Mediator does not decide the outcome, but helps the parties understand and focus on the important issues needed to reach a resolution.
- ❖ Ideally, the Mediator assists the parties in reaching an agreed-upon resolution, which would be memorialized in a mediation agreement that is binding on the parties.

**BEING AN INDEPENDENT
DECISION-MAKER
COMPARED TO OTHER ROLES**

DIFFERENCES BETWEEN AN IDM AND A JUDGE

- ❖ An administrative hearing is not the same as a court procedure.
 - There is no need for parties or their advisors to “preserve arguments for the record” in order to refer to them if an appeal is filed.
- ❖ There are VERY FEW rules of evidence under the Title IX or IVSM policies.
 - These rules will be reviewed later in this training.



OTHER IMPORTANT ROLES IN THE GRIEVANCE PROCESS

- ❖ Advisors
- ❖ Advocates
- ❖ Investigator
- ❖ Hearing Clerk

ADVISORS

- ❖ Both parties have the right to have an advisor of their choice, who may be, but is not required to be, an attorney, present throughout the entire grievance process.
- ❖ At any time during the grievance process, both parties may choose their own advisors or may request that the University provide them an advisor at no cost or fee.

WHAT DO THE ADVISORS DO?

- ❖ The Advisor for either the complainant or respondent may:
 - Accompany the party to any meeting or proceeding during the grievance process;
 - Assist the party with the gathering of evidence during the investigation;
 - Assist the party with inspecting and reviewing evidence gathered by the Investigator;
 - Be asked by the party to assist in making written responses to the information gathered throughout the investigative process;
 - Attend the live hearing and, for Title IX cases, conduct cross-examination, orally and in real time; and
 - Be asked by the respective party to assist in submitting a written statement in support of, or challenging, the outcome of the live hearing, if necessary.

THE MAIN ROLE OF AN ADVISOR

The main role of an Advisor is to *advise* parties about the University process.

UNIVERSITY ADVOCATES

- ❖ The University has two separate advocacy offices on campus, **VIP: Survivor Support** and the **UMatter: Student Support & Advocacy Office**, for complainants and respondents, respectively.
- ❖ **Shelli Poole** is the confidential complainant advocate from Violence Intervention and Prevention Services.
- ❖ **Tiffany Newsome** is the confidential respondent advocate from the U Matter Office.
- ❖ University advocates can:
 - Have confidential conversations with the respective party,
 - Accompany parties to meetings or proceedings,
 - Offer emotional support and other resources, and
 - Provide accommodations and safety measures.

DIFFERENCE BETWEEN AN ADVISOR AND AN ADVOCATE

- ❖ The main difference between the Advisor and the advocate is that advocates offer emotional support and other similar resources.
- ❖ Advisors, on the other hand, are there to help individuals navigate and understand the grievance process, but they are *not* meant to be emotional support for parties.

INVESTIGATOR

- ❖ Investigators conduct thorough and **impartial** investigations into complaints alleging a violation of the University's Title IX Policy or its IVSM Policy.
 - In conducting an investigation, the Investigator will interview parties and witnesses and gather evidence.
- ❖ The Investigator typically manages a case from the initial intake with a complainant to the adjudication or resolution of a complaint.
- ❖ The Investigator will also write a comprehensive **investigative report** based on their investigation and any accompanying evidence collected.

HEARING CLERK

- ❖ The Hearing Clerk's role is to manage and assist in running the live hearings.
- ❖ The individual acting as the Hearing Clerk will be one of the Investigators from the EORC Office, but will *not* be the Investigator who investigated that particular case.
- ❖ The Hearing Clerk will be at the hearing to help the live hearing run smoothly and to assist the IDM if necessary.



THE TITLE IX AND IVSM GRIEVANCE PROCESSES

- ❖ Filing the Complaint
- ❖ The Investigation Process
- ❖ The Resolution of a Complaint
 - Mediation
 - Hearing
- ❖ The Appeal Process



PHASE ONE: FILING THE FORMAL COMPLAINT

FILING THE COMPLAINT

- ❖ Ordinarily, the Office of Equal Opportunity & Regulatory Compliance (EORC) will receive a report about a complainant and will schedule an intake meeting with the complainant.
- ❖ At the intake meeting, the complainant may file a **formal complaint**, which alleges the respondent committed a Title IX or IVSM Policy violation.
- ❖ If what the complainant alleges would constitute a Title IX or IVSM Policy violation if true, the complainant is permitted to file a formal complaint with the University.



NOTICE OF ALLEGATIONS

- ❖ Upon receipt of a formal complaint, the EORC Office will provide written notice to the parties of the allegations contained in the complaint, along with notice of the University's grievance procedures.
- ❖ The **notice of allegations** will include sufficient details about the allegations potentially constituting a policy violation and will provide the parties sufficient time to prepare before any initial interview.
- ❖ The details in the notice of allegations will include, to the extent known:
 - The identities of the parties involved in the incident,
 - The conduct allegedly constituting a policy violation, and
 - The date and location of the alleged incident.

NOTICE OF ALLEGATIONS (CONTINUED)

- ❖ The notice of allegations will also specify that the respondent is presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- ❖ If additional allegations are made after the initial notice is disseminated, or if new details pertaining to the allegations are discovered, all known parties will be given notice of the additional allegations or the newly discovered details.

DUE PROCESS

- ❖ Procedural due process of law requires **notice** and a **meaningful opportunity to be heard**.
- ❖ The Title IX grievance process was designed by the Dept. of Education to be consistent with the constitutional requirement of due process.
 - The University's IVSM Policy was modeled under the Title IX regulations.



PHASE TWO: THE INVESTIGATION

THE INVESTIGATION

- ❖ The Investigator will attempt to interview the complainant and the respondent about the alleged incident.
- ❖ The Investigator will request from both parties any information and evidence that is directly related to the allegations under investigation, including the names of potential witnesses to interview.
- ❖ The complainant and respondent will be given equal opportunity to:
 - Discuss the allegations under investigation with the Investigator;
 - Present witnesses during the investigation process, including fact and expert witnesses; and
 - Present other inculpatory and exculpatory evidence.



THE ROLE OF THE INVESTIGATOR DURING AN INVESTIGATION

- ❖ The role of the Investigator is simply to gather information.
- ❖ While gathering information, the Investigator remains objective. Accordingly, the Investigator:
 - Will *not* make determinations regarding credibility of the parties or witnesses, and
 - Will objectively evaluate evidence.

THE DRAFT INVESTIGATIVE REPORT

- ❖ Prior to the completion of the investigative report, the Investigator will provide both parties an opportunity to inspect and review evidence that has been obtained as part of the investigation that is *directly related to the allegations* raised in the formal complaint.
 - To do this, the Investigator will send both parties a *draft* of the investigative report.
 - The **draft investigative report** will contain all directly related evidence, which includes witness statements and other evidence that has been collected during the investigation.
- ❖ The parties will have ten (10) days under the Title IX and IVSM Policy to submit **a written response** to the draft investigative report, which the Investigator will consider prior to the completion of the final investigative report.

THE FINAL INVESTIGATIVE REPORT

- ❖ The Investigator will create a **final investigative report** that fairly summarizes relevant evidence.
 - The Investigator will work with the Assistant Director of EORC/Title IX Coordinator to determine what evidence is relevant and thus included in the final report.
- ❖ The final investigative report will not contain findings of fact as to whether a policy violation did or did not occur but will instead contain **a summary of the investigation and all relevant documents** submitted by the parties and witnesses.
- ❖ At least ten (10) days prior to a hearing for Title IX and five (5) days prior to a hearing for IVSM, if a hearing is required or provided, the EORC Office will send to each party and the party's Advisor, if any, the final investigative report in an electronic format or hard copy.

PHASE THREE: RESOLUTION OF A COMPLAINT

MEDIATION

THE MEDIATION PROCESS

- ❖ Mediation is a structured, interactive process where an impartial third party assists the disputing parties in resolving a complaint.
- ❖ The mediation process does not typically result in a determination as to whether the respondent is responsible for the alleged conduct.
- ❖ Instead, during mediation, the parties normally discuss the grievances between each other, and what each party is hoping to get out of the mediation process.
- ❖ Any terms that the parties agree to will be contained in a **mediation agreement** and will be binding upon the parties.



MORE ABOUT MEDIATION

- ❖ Before reaching an agreement through mediation, any party has the right to withdraw from the mediation process and resume the grievance process with respect to the formal complaint.
- ❖ If, however, the parties reach an agreement during this process, the terms of the [mediation agreement](#) will be memorialized in writing and will be binding upon the parties.
 - Violation of the written agreement will result in the student being charged with Disregard for University Authority and may result in the agreement being voided.
- ❖ If the parties are unable to reach an agreement through the informal resolution process, the investigation and/or adjudication process will resume.

LIVE HEARING

THE PRE-HEARING CONFERENCE

- ❖ If the parties have not agreed to mediation, the matter will be resolved through a live hearing.
- ❖ Once the final investigative report has been made available to the parties and their Advisors, the EORC Office will schedule an individual **pre-hearing conference** with both the complainant and the respondent and their Advisors.
- ❖ Both parties will also be asked to provide the names of any witnesses who they anticipate will participate in the hearing.

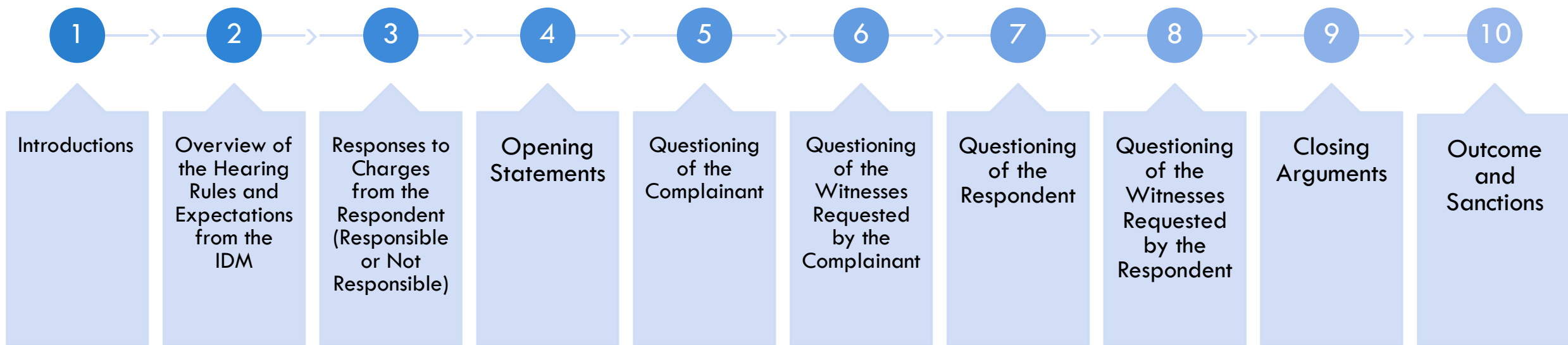
THE HEARING PROCESS

- ❖ During the **hearing**, the complainant and respondent will have the opportunity to:
 - Explain their side of the story,
 - Present and challenge evidence, and
 - Ask questions of the parties and witnesses.



SCHEDULING THE HEARING

The Operations Coordinator from the EORC Office will work with the complainant, respondent, Advisors, witnesses, advocates, and the Independent Decision-Maker to determine the date and time of the live hearing.



MAJOR STEPS OF THE LIVE HEARING

HEARING LOGISTICS

- ❖ Hearings ordinarily take place in a private courtroom located at the University's law school.
 - Each party will be given a designated private room near the hearing room so they will be able to confer with their Advisor and/or advocate during breaks.
- ❖ With respect to time, hearings generally range from 3-6 hours depending on the complexity of the case but may take longer.

OPENING STATEMENTS AND CLOSING ARGUMENTS

- ❖ The complainant and the respondent are permitted to make an opening statement to the IDM at the beginning of the hearing.
- ❖ Similarly, both parties are permitted to make a closing argument to the IDM at the conclusion of the hearing.
- ❖ Either party may elect to have their Advisor make their opening statement, closing argument, or both.
- ❖ The opening statement and closing argument each must not exceed ten (10) minutes in length.

IMPORTANT NOTE

Either party may request to not see the other party or parties during a live hearing. If that is the case, the University must provide that accommodation.

The Hearing Clerk may put up screens in the hearing room or work out another arrangement to ensure the parties do not see one another.

Alternatively, at the request of either the complainant or the respondent, the EORC Office will facilitate the live hearing with the parties located in separate rooms with technology enabling the IDM and the parties to simultaneously see and hear the other party or witnesses answering questions.



SECURITY AT THE HEARING

The EORC Office will make arrangements to have someone from the University Police Department (UPD) present at all hearings to ensure the safety, well-being, and comfort of the hearing participants.

RELEVANCE

- ❖ All evidence presented during the live hearing, as well as all questions asked during the cross-examination portions of the live hearing, must be relevant.
- ❖ A piece of evidence or a cross-examination question is **relevant** if (i) it has any tendency to make a fact more or less probable than it would be without the evidence; and (ii) the fact is of consequence in determining the case.

COMPLAINANT'S SEXUAL BEHAVIOR OR PREDISPOSITION

- ❖ All questions and evidence about the complainant's sexual behavior or predisposition are **irrelevant** and therefore must be excluded from evidence during the live hearing, unless:
 - Such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or
 - The evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent.

RULES OF EVIDENCE

- ❖ Independent Decision-Makers must consider all relevant evidence with the following conditions:
 - A complainant's prior sexual behavior is irrelevant unless it meets one of the two exceptions;
 - Information protected by any legally recognized privilege cannot be used; and
 - No party's treatment records may be used without that party's voluntary, written consent.

CROSS EXAMINATION GENERALLY

- ❖ The Independent Decision-Maker may ask questions and will permit each party's Advisor to ask or submit questions, and follow up questions, including those that challenge credibility, but all questions asked during such cross-examination must be relevant.
- ❖ Before a complainant, respondent, or witness answers a cross-examination or other question, the Independent Decision-Maker must first determine whether the question is relevant and will explain any decision to exclude a question as not relevant.

CROSS EXAMINATION UNDER TITLE IX

- ❖ Under [Title IX](#), cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's Advisor and never by a party personally.
- ❖ Before a party or witness answers a question, the IDM must first determine whether the question is relevant.

CROSS EXAMINATION UNDER IVSM

- ❖ Under the [IVSM Policy](#), there is technically no “cross examination.” Instead, questions are submitted by the parties’ Advisors to the IDM *prior* to the hearing.
 - This allows the IDM to make relevancy determinations ahead of time to increase efficiency during the hearing.
- ❖ When it is time for a party or witness to be questioned, the IDM will ask the questions that have been previously submitted by the Advisors that they have deemed relevant.
- ❖ For additional questions that were not submitted ahead of time, the Advisors will also have the opportunity to submit questions in real time.
 - Each party’s table will be supplied with notecards and pens. To submit a question in real time, a party’s Advisor simply has to write the question down on a notecard and raise their hand, and the Hearing Clerk will retrieve the card from the Advisor and submit it to the IDM.

OBJECTIONS

- ❖ Limited objections to the relevance of questions and evidence are allowed during the hearing.
- ❖ The IDM may decide that objections have become obstructive and are not useful.
 - In that case, the IDM has the ability to discontinue objections for a particular hearing.

STANDARD OF EVIDENCE

- ❖ In reaching a determination regarding responsibility, the Independent Decision-Maker will apply a **preponderance of the evidence** standard.
- ❖ This standard requires a showing that a particular party's evidence is more credible or convincing than that presented by the other party, or a showing that the fact to be proven is more probable than not.

DECISION OF THE INDEPENDENT DECISION-MAKER

- ❖ The decision of the IDM regarding the respondent's responsibility as well as possible sanctions will be determined within five (5) business days of the completion of the live hearing.
 - The IDM should generally try to have a decision by the conclusion of the live hearing, but the IDM will have five (5) business days to create the written determination.

THE WRITTEN DETERMINATION

- ❖ The Independent Decision-Maker will issue a written determination regarding responsibility, which will include:
 - The allegations potentially constituting sexual harassment;
 - A description of the procedural steps taken;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the University's Title IX or IVSM Policy to the facts;
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility and any disciplinary sanctions the University will impose on the respondent, if any; and
 - The procedures and permissible bases for the complainant or the respondent to appeal the decision.
- ❖ The complainant and the respondent will be notified of the determination simultaneously.
- ❖ The IDM will be given a template to use by the EORC Office.

DISCIPLINARY SANCTIONS

- ❖ Depending on the facts and circumstances of a particular case, sanctions resulting from a finding of responsibility may range from a verbal reprimand to expulsion from the University.
- ❖ Sanctions are enforced immediately upon determination of the violation.
- ❖ Though not a disciplinary sanction, the IDM may order remedies from the University that are designed to restore or preserve equal access to the University's education program or activity for the complainant.

POSSIBLE SANCTIONS

❖ The following list encompasses all possible sanctions that may be imposed by the University:

- Oral reprimand
- Written reprimand
- Disciplinary probation
- Loss of privileges
- Restitution
- Community service
- Assessment
- Substance abuse education
- Educational project(s)
- Suspension
- Demotion
- Expulsion
- Termination
- A combination of any of the above sanctions.



PHASE FOUR: THE APPEAL PROCESS

SUBMITTING AN APPEAL

If a party wishes to appeal a determination regarding responsibility, including sanctions, or a dismissal of a formal complaint or any allegations therein, that party may submit a [written appeal](#) to the Appellate Consideration Board for the University within ten (10) business days.

BASES FOR APPEAL

❖ Appeals can be made on the following bases:

- 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, *which could affect the outcome of the matter;*
- The Title IX Coordinator, Investigator, or Independent Decision-Maker 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;*
- The grievance process described in the University's Title IX or IVSM Policy was not followed;
- The conduct alleged does not fall within the jurisdiction of the Title IX or IVSM policies.

AFTER AN APPEAL HAS BEEN FILED

- ❖ The non-appealing party will be notified in writing when an appeal is filed.
- ❖ The complainant and respondent will be provided a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome of the grievance proceeding giving rise to the appeal.
- ❖ The decision-maker for the appeal will not be the Assistant Director of EORC/Title IX Coordinator, the Investigator, nor the Independent Decision-Maker that reached the determination regarding responsibility or dismissal of a complaint giving rise to the appeal.

THE DECISION OF THE APPELLATE CONSIDERATION BOARD

- ❖ The Chancellor of the University has delegated final authority of review to Title IX or IVSM cases involving a [student-respondent](#) to the Appellate Consideration Board.
- ❖ For Title IX or IVSM cases involving a [faculty-respondent](#), appeals must be filed with the Provost.
- ❖ After reviewing the appeal and the documents related to a case, the Appellate Consideration Board or the Provost will make a decision based upon the basis or bases of the appeal.



Questions?



CONTACT THE EORC OFFICE AT ANY TIME!

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