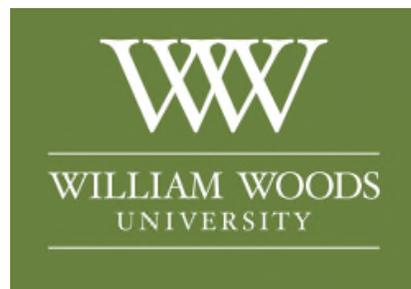


Title IX Sexual Harassment Policy and Procedures Training

SESSION II



Agenda for Session II

- Investigative Process
 - Investigative Report and Review and Comment Procedures
- Hearing Process
 - Written Determinations
 - Sanctions/Remedies
- Appeals Process

Investigation Process



Before an Investigation

- University learns of allegations that may constitute Sexual Harassment under Title IX.
- Title IX meets with Complainant; determines if supportive measures are appropriate.
- Implementation of supportive measures.
- Grievance Process begins if FORMAL COMPLAINT filed.
- Title IX Coordinator will review any Formal Complaints to determine if criteria for *mandatory dismissal* or *discretionary dismissal* exist.

Before an Investigation

- Notice of Formal Complaint is sent to the parties, which should include, if known, the identity of the parties, the conduct alleged to be Sexual Harassment, and the date(s) and location(s) of the incident(s).
- Parties have the right to select an advisor of their choice who may attend meetings and interviews with that party.
- Advisors may confer with their party during meetings and interviews, but generally may not speak on behalf of the party.

Investigation Overview

- Title IX Coordinator will appoint an investigator to conduct a fair, thorough and impartial investigation
 - **Fair** – the investigation is conducted in a manner that is consistent with the University's Policy and transparent to the parties
 - **Thorough** – the investigation includes interviews with all parties and relevant witnesses and reviews all relevant evidence
 - **Impartial** – the investigation is conducted by individuals who do not have a conflict of interest or bias for or against either party, or complainants or respondents generally and who are properly trained

Investigation Overview

- Investigator will meet with both parties and any other witnesses identified in the Formal Complaint and gather relevant evidence.
 - Both parties can identify potential witnesses and submit evidence to the investigators.
 - Burden of proof and burden of gathering sufficient evidence rests on the investigator.
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Investigation Overview

- During the investigation, the investigator should:
 - Develop a strategic investigation plan
 - Provide proper notice for all meetings and interviews
 - Keep parties regularly apprised of the status of the investigation
 - Provide parties with an equal opportunity to present witnesses and evidence
 - Prepare an investigative report

Role of the Investigator

- The investigator acts as a **fact finder**.
- Investigator's role is not to make a conclusion or a determination of responsibility, not even to make a suggested/proposed conclusion or determination.
- Investigator does not make credibility determinations – they only report the facts learned in the investigation.

Investigation Overview

- Important for an investigator to notify the Title IX Coordinator if:
 - Investigator becomes aware that any of the mandatory dismissal criteria apply (not Sexual Harassment under the policy, outside the University education program or activity, against a person outside the U.S.).
 - Investigator becomes aware of a conflict of interest.
 - Investigator learns of additional allegations that need to be investigated so the notice of investigation can be updated.

Special Considerations for Criminal Conduct

- If alleged conduct is also subject to criminal investigation by law enforcement, investigator will need to work with Title IX Coordinator to ensure investigation does not impede law enforcement's efforts.
 - Can be good cause for a brief delay in the investigation.
 - Communications with law enforcement on these issues should be carefully documented.
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Evidence Review and Comment

- At the conclusion of the investigation, the investigator will send a copy of the evidence that is directly related to the allegations in the Formal Complaint to the parties and their advisors for inspection and review.
- The parties will then have 10 days in order to submit a written response to the evidence, if they choose to do so.

Evidence Review and Comment

- The investigator can start preparing the investigative report before the evidence review and comment but cannot finalize the report until the close of the review and comment period.
- The investigator will consider any written response to the evidence before the completion of the investigative report.

Investigative Report

- The report should include a detailed summary of the investigation, including:
 - Summary of the procedural steps in the investigation
 - Summary of all interviews
 - Summary of any physical or documentary evidence
 - Photographs, logs, emails, text messages, police reports, forensic evidence, etc.
 - Attach copies of statements and documents to the report

Investigative Report

- What is the purpose of the Report?
 - It is the University's (not either parties') responsibility to identify information for purposes of the Title IX Sexual Harassment grievance process
 - The report is where the University "shows" its work.
 - Sets out information identified during investigation.

Investigative Report

- What is the purpose of the Report?
 - Allows parties to determine if there is other information that is missing/should be considered.
 - Provides baseline for the hearing decision maker about what information may be available for hearing.
 - Assists parties and the hearing decision maker in preparing for hearing.

Investigative Report

- Investigative Reports will vary depending on the circumstances, but some potential sections that may be included are:
 - Introduction/Background
 - Summary of Allegations/Formal Complaint
 - Relevant Policies
 - Investigation Process
 - Including witnesses interviewed and documents/evidence reviewed
 - Narrative/Summaries of Witness Interviews
 - Exhibits

Review of Investigative Report

The investigator will send a copy of the report to the parties and their advisors at least 10 days prior to any hearing for the parties' review and written response.

Conclusion of Investigation

- The Investigators will make all evidence that is directly related to the allegations available at the grievance hearing.
 - Investigators will provide the investigative report to the hearing decision maker.
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Final Thoughts on Investigations

- Remember – the investigator is NOT the decision maker!
- Be mindful that the process is meant to be fair - be even-handed and impartial
- Be mindful of the impact of the process on all involved

Hearing Process

Overarching Principles

- Complainant and Respondent will be treated equitably.
 - There will be an objective evaluation of all the evidence – both inculpatory and exculpatory.
 - Respondent is presumed not responsible for a policy violation unless a finding of responsibility is made at the conclusion of the grievance process.
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General Provisions

- Grievance process should generally be completed within 90 days.
 - This time frame may be extended when good cause exists for the delay.
 - Hearing decision maker must not have a conflict of interest or bias for or against the Complainant or Respondent, or against complainants or respondents generally.
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Hearing decision maker

- A live hearing will be conducted by a hearing decision maker who will reach a final determination of responsibility.
- The hearing decision maker cannot be the Title IX Coordinator or the Investigator.
- The hearing decision maker will be appointed by the Title IX Coordinator, and may be a University employee(s), or may be an outside individual contracted to serve as hearing decision maker.

Notice

- Parties must have access to the completed investigation report for no less than 10 days prior to the hearing.
 - Parties will also be provided with notice of all meetings, interviews, or hearings at least three (3) business days before any meeting, interview, or hearing.
 - Such notice will include the date, time, location, participants, and purpose of the meeting, interview, or hearing.
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Rules of Procedure and Decorum

- The hearing will be held pursuant to the Rules of Procedure and Decorum.
 - Rules of Procedure will set out in detail the procedures by which the hearing will be held.
 - Rules of Decorum will require all participants to treat each other with respect and provide an enforcement mechanism for those who refuse to comply.
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Hearing Logistics

- Hearing may be conducted in person on campus or may be conducted through video conferencing.
 - May be held through video conferencing if it is not reasonable or feasible to have the parties together in the same room.
 - May be held by video conferencing at the request of either party.
 - Hearing will be recorded.
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Preparing for the Hearing

- The hearing decision maker should:
 - Review the Title IX Sexual Harassment Policy
 - Review the Formal Complaint to identify the allegations
 - Review the investigative report and any evidence provided by the investigator
 - Review the Rules of Procedure and Decorum
 - Address any questions about hearing procedure with the Title IX Coordinator

Overview of the Hearing Process

- The investigator will make all evidence that is directly related to the allegations available at the grievance hearing.
 - All parties may refer to such evidence and may use it in cross examination.
 - The investigator will provide a copy of the investigative report and all evidence that is relevant to the allegations in the formal complaint to the hearing decision maker.
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Overview of the Hearing Process

- However, the hearing decision maker **may not** defer to the investigative report and must objectively evaluate all relevant evidence and independently reach a determination regarding responsibility.
 - Important to keep an open mind going into the hearing.
 - Consider inculpatory and exculpatory evidence.
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Overview of the Hearing Process

- The investigator, Complainant, and Respondent all have the ability to testify and call witnesses at the hearing, and to provide evidence to the hearing decision maker.
 - The hearing decision maker will have the opportunity to ask questions of all parties and witnesses during the hearing.
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Questions from the decision maker

- Hearing decision maker should think of relevant questions to ask when preparing for the hearing.
 - Review the information in the investigative report and all evidence provided by the investigator in advance.
 - But remember to keep an open mind and avoid prejudgment of the facts based on the information in the report.
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Questions from the decision maker

- Consider if there are questions needed to clarify the information in the report.
 - But also remember, the outcome must be based on the evidence that is presented at the hearing and may not rely on the investigative report.
 - **If important information was in the investigative report, but was not presented at the hearing, the hearing decision maker should ask about it.**
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Cross Examination and Relevance Determinations



Cross Examination

- After the hearing decision maker asks their questions, each party's advisor will ask all relevant questions directly to the other party and/or witnesses, including follow-up questions and those challenging credibility.
 - The cross examination at the live hearing must be conducted directly, orally, and in real time.
 - At no time will a Complainant or Respondent be allowed to conduct cross examination of witnesses or the other party personally.
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Cross Examination

- If a party does not have an advisor present at a live hearing, the University will provide an advisor of the University's choice to conduct the cross-examination on behalf of that party.
 - Advisors must abide by the Rules of Procedure and Decorum in questioning parties and witnesses.
 - Any advisor who does not abide by the Rules of Procedure and Decorum will be warned or dismissed from the hearing at the discretion of the hearing decision maker.
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Cross Examination

- **The hearing decision maker cannot rely on statements from any individual who does not submit to cross examination in reaching a determination regarding responsibility.**
 - Decision maker cannot allow a witness to “waive” a question – the party/witness must answer all relevant questions.
 - Decision must be based on evidence at the hearing that is subject to cross examination.
 - Decision maker cannot draw an inference about a determination of responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to submit to cross examination.
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Relevance

- The hearing decision maker will state whether each question is relevant before the question is answered by the party or witness to whom it is directed and explain any decision to exclude a question as not relevant.
 - Questions or evidence that are deemed irrelevant by the hearing decision maker will be excluded from the hearing.
 - Formal rules of evidence shall not apply.
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Relevance in Practice

- The Rules of Procedure will set out more details.
- Generally, for each witness who gives a statement at the hearing, the hearing decision maker will ask questions and the person will answer.
- Then each party's advisor will ask a question, and the hearing decision maker will state whether or not the question is relevant.
 - If the question is relevant, the witness must answer the question.
 - If the question is irrelevant, the hearing decision maker will give a brief explanation as to why the question is not relevant.

Relevance Determinations

- Does this question ask for information that will help the hearing decision maker in deciding whether the allegations are more or less likely to be true?
 - A question cannot be excluded on the basis of relevance solely because it calls for prejudicial evidence or evidence of character.
 - Ask for clarification if the purpose of the question is unclear or you need more information to determine relevance.
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Relevance Determinations

- The following types of evidence must be considered irrelevant by the hearing decision maker:
 - Evidence that is not pertinent to proving whether a fact material to the allegation is more or less likely to be true
 - Information that is protected by privilege (e.g. attorney-client privilege)
 - Any party's medical, psychiatric, psychological, or counseling records without that party's voluntary, written consent
 - Any information about the Complainant's sexual predisposition or prior sexual behavior, unless:
 - 1) it is offered to prove that someone other than the Respondent committed the behavior alleged in the formal complaint, or
 - 2) it involves specific incidents with the Respondent and is offered to prove consent

Hypothetical

Respondent's advisor begins asking questions about what a Complainant was wearing the night of an alleged assault – is this relevant?

Hypothetical

Respondent's advisor is an attorney. During the hearing, Complainant's advisor asks Respondent questions about what the Respondent told her advisor about the incident. Is this relevant?

Hypothetical

During a hearing on a Formal Complaint that Complainant was sexually assaulted by Respondent at his fraternity house following a party, Respondent's advisor asks the Complainant about several prior sexual encounters she had with other members of the Respondent's fraternity – is this relevant?

Hypothetical

During a hearing on a Formal Complaint that Complainant was sexually assaulted by Respondent at his fraternity house following a party, Respondent's advisor asks the Complainant about a prior sexual encounter between Complainant and Respondent where they used a "safe" word to communicate about consent – is this relevant?

Determination of Responsibility



Determination of Responsibility

- After a thorough examination of the evidence and cross examination presented during the live hearing, the hearing decision maker will make a determination of “responsible” or “not responsible” for violations of the Title IX Sexual Harassment policy using **the preponderance of the evidence standard**.

Preponderance of the Evidence

- In other words, the hearing decision maker's final determination indicates if there is sufficient evidence to conclude that **it is more likely than not** the Respondent engaged in conduct that meets the University's definition of Sexual Harassment.
- This standard applies to any Respondent under this policy (student, staff, or faculty).

Determination of Responsibility

- The hearing decision maker is responsible for drafting a Hearing Determination letter, outlining the rationale for the decision.
- The letter will be distributed simultaneously to both the Complainant and Respondent along with information about how to file an appeal.
- The determination will become final and any sanctions will take effect after the resolution of any appeal, or if no appeal is filed, after the deadline to file an appeal has passed.

Determination Letter

- Identification of the allegations constituting Sexual Harassment in the Formal Complaint;
- Description of the procedural steps taken, including any notices, interviews, investigations, and hearings;
- Findings of fact that support the determination;
- Conclusions regarding the application of the policy to the facts; and
- A statement and rationale for the result for each allegation including the determination of responsibility, any sanction, and whether any remedies will be provided to the Complainant
- Acceptable bases for an appeal

Determination Letter

- **Identification of the allegations constituting Sexual Harassment in the Formal Complaint**
 - Review the Formal Complaint and clearly identify each allegation
 - If there are multiple allegations, clearly identify each allegation

Determination Letter

- **Description of the procedural steps taken, including any notices, interviews, investigations, and hearings**
 - Be detailed in describing the procedural steps taken
 - Provide the procedural steps taken for the entire grievance process
 - Include when each step occurred, and who was involved in each step
 - Investigative report can be helpful in preparing this section

Determination Letter

- **Findings of fact that support the determination**
 - Remember that findings of fact must be based on the evidence presented at the hearing and cannot be based on the investigation report alone
 - Include both inculpatory evidence and exculpatory evidence
 - If a witness did not submit to cross examination, their statement cannot be relied upon in making the determination
 - Include an explanation if a witness did not submit to cross examination and their statement was not considered

Determination Letter

- **Conclusions regarding the application of the policy to the facts**
 - This involves applying the definitions in the policy to the facts that were established in the previous section
 - Review the Title IX Sexual Harassment Policy for relevant definitions

Determination Letter

- **A statement and rationale for the result for each allegation including the determination of responsibility, any sanction, and whether any remedies will be provided to the Complainant**
 - Include a clear statement for each allegation stating whether the Respondent is found “responsible” or “not responsible.”
 - Include an explanation of why that is the determination.
 - If the Respondent is found responsible, include any sanctions that will be imposed and any remedies for the Complainant.
 - Be specific about sanctions and remedies and explain why those are being imposed.

Determination Letter

- **Acceptable bases for an appeal of the Hearing Determination**
 - This is from the Title IX Sexual Harassment Policy.
 - Purpose is to make sure the parties are aware of their right to appeal and the grounds on which they can base an appeal.

Determination Letter

- Tips for writing the determination letter:
 - Use clear organization (consider including headings for the required sections)
 - Be as specific as possible – avoid vague terms like “some” or “a lot”
 - Use consistent terminology throughout
 - Focus on the facts and avoid subjective terms

Determination of Responsibility

- If there is a finding of responsibility, the hearing decision maker determines the appropriate sanction and whether remedies should be provided.
 - The Title IX Coordinator will work with others on campus to implement the sanctions and remedies.
 - Sanctions must be appropriate and consistent within the University's policies.
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Potential Sanctions - Students

Disciplinary Probation

Written Warning/Behavioral Agreement

Loss of Privilege

Restitution

Restriction from Employment at the University

Class/Workshop/Training/Program Attendance

Educational Project/Service Hours

University Housing Transfer or Removal

Removal from Specific Courses or Activities

No Contact

Fines

Suspension

Expulsion

Transcript Notation/Hold/Notification to other Institutions

Withholding, delaying, or revoking degree

Potential Sanctions - Employees

Warning

Probation

Suspension with or without pay

Termination

Remedies

- In addition to sanctions imposed on the Respondent, remedies can be offered to the Complainant in order to restore and preserve equal access to the University's educational program and activities.
- Remedies may be, but are not limited to, a continuation of previously offered supportive measures. However, remedies can burden the Respondent.
- The possible remedies that may be offered to a Complainant include:
 - academic accommodations;
 - counseling, education or training;
 - monitoring or other individual support

Appeals Process



Appeals

- A party may appeal the determination of responsibility or a dismissal of a Formal Complaint by submitting a written request to the Vice President and Dean of Student Life (for student complaints) or the Chief Financial Officer (for employee complaints) (hereinafter collectively referred to as the “Appeals Decisionmaker”) within 48 hours of the issuance of the hearing decision maker’s determination of responsibility.
- The request should include a short statement outlining the basis for appeal.

Appeals

- Appeals are limited to the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonable available at the time of the determination of responsibility or the dismissal of the Formal Complaint that would affect the outcome of the matter; or
 - The Title IX Coordinator, Investigator, or hearing decision maker had a conflict of interest or bias for or against complainants or respondents generally that affected the outcome of the matter.
- No appeal may be based only upon dissatisfaction with the determination and/or sanction

Appeals

- The Appeals Decisionmaker will notify the parties in writing that an appeal has been filed.
 - Each party will then have five days to submit a written statement in support of, or challenging the outcome of the hearing.
 - The Appeals Decision Maker will issue a written determination of the outcome of the appeal, describing the result of the appeal and the rationale in support of that decision within five days of the deadline for parties to submit their written statements.
 - The Appeal Decision Maker's written determination will be provided simultaneously to all parties.
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Final Thoughts

- Treat all individuals involved in this process with respect and courtesy
 - Be even handed and impartial – this process is meant to be fair to all involved
 - Remember the impact of the process on those involved and be sensitive to those difficulties
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Thank you for attending!

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