



University of Notre Dame

Office of Institutional Equity

Hearing Officer, Hearing Board, and
Equity Panel Training

2020-2021



NOTRE DAME'S SPIRIT OF INCLUSION

The University of Notre Dame strives for a spirit of inclusion among the members of this community for distinct reasons articulated in our Christian tradition. We prize the uniqueness of all persons as God's creatures. We welcome all people, regardless of color, gender, religion, ethnicity, sexual orientation, social or economic class, and nationality, for example, precisely because of Christ's calling to treat others as we desire to be treated.





ROLES IN THE PROCESS

- ***Hearing Officers***
 - Sexual Harassment Procedures only
 - Coordinate with Title IX Coordinator on administrative matters
 - Conduct Pre-Hearing Meeting
 - Oversee Hearing logistics and procedures
 - Rule on evidentiary and process questions
 - Manage questioning in Hearing
 - Serve on Hearing Board
 - Facilitate deliberation
 - In conjunction with Hearing Board, make factual findings about violations of Policy
 - In conjunction with Hearing Board, decide whether a Policy violation occurred and whether to impose Sanctions
 - Issue written decision





ROLES IN THE PROCESS

- ***Hearing Board Members***
 - Sexual Harassment Procedures only
 - Conduct Hearing to hear from the parties and witnesses and weigh evidence
 - Make factual findings about violations of Policy
 - Decide whether a Policy violation occurred and whether to impose Sanctions
- ***Equity Panel Members***
 - Discriminatory Harassment and Other Sex-Based Misconduct Procedures
 - Conduct Equity Panel meeting to hear from the parties and weigh evidence
 - Consult Assistant Vice President for the Office of Institutional Equity and Title IX Coordinator in his or her decision about whether a Policy violation occurred and whether to impose Sanctions





ROLES IN THE PROCESS

- ***Other Roles***
 - Advisors
 - Investigators
 - Resource Coordinators
 - Title IX Coordinator
 - Deputy Title IX Coordinator
 - Parties
 - Witnesses
- **Expectations**





POLICY ON DISCRIMINATORY HARASSMENT, SEXUAL HARASSMENT, AND OTHER SEX-BASED MISCONDUCT



POLICY ON DISCRIMINATORY HARASSMENT, SEXUAL HARASSMENT, AND OTHER SEX-BASED MISCONDUCT

Responsible Executive:
Provost, Vice President of
Human Resources, Vice
President for Student Affairs
Responsible Office:
Office of Institutional Equity
Issued: November 19, 2013
Revised: August 13, 2020

1. INTRODUCTION

The University of Notre Dame strives to maintain a community characterized by a respect for others. At a minimum, this means a community that is free from harassment. Harassment includes Discriminatory Harassment, Sexual Harassment, and Other Sex-Based Misconduct, as defined below. At Notre Dame, our goal is to promote respectful behavior and interactions. Our culture of respect means that no type of harassment is tolerated. Upon receiving a report of alleged violations of this Policy, the University will take prompt action, including a review of the matter and, where appropriate, an investigation and other appropriate action to stop the alleged misconduct. The University is also dedicated to responding quickly and thoroughly to all reported or alleged violations of this Policy, and to enforcing the Non-Retaliation Policy to protect those who report and/or are involved in an investigation of conduct prohibited by this Policy.

2. POLICY STATEMENT

The University of Notre Dame does not tolerate Discriminatory Harassment, Sexual Harassment, or Other Sex-Based Misconduct (as defined in this Policy) by or against any member of its community, nor will it tolerate sexual or discriminatory harassing conduct that affects job or educational benefits or that interferes with an individual's work or academic performance, or that creates an intimidating, hostile, or offensive work or educational environment. All such conduct is expressly prohibited, and individuals who engage in conduct prohibited by this Policy may be subject to disciplinary action, up to and including termination or dismissal.

3. SCOPE

This Policy applies to all faculty, staff, and students. This Policy applies to any allegation of Discriminatory Harassment, Sexual Harassment, or Other Sex-Based Misconduct that is made in the context of an educational program or activity or that otherwise affects the University's work or educational environment. However, the University's investigation may be limited where the alleged conduct occurred outside the context of the University's programs or activities, or work or educational environment.

Nothing in this Policy restricts the University's right to address and take appropriate action with respect to conduct that, while not meeting the definitions of conduct prohibited by this Policy, is nevertheless inconsistent with the University's value of respect for others.

Academic freedom and the associated protections of tenure are fundamental to the scholarly enterprise. Because the University remains committed to the principles of academic freedom as articulated in Article IV/Section 2/Academic Freedom and Associated Responsibilities of





PROHIBITED CONDUCT

- **There are three categories of prohibited conduct under the Policy**
 - **Sexual Harassment**
 - **Discriminatory Harassment**
 - **Other Sex-Based Misconduct**





SEXUAL HARASSMENT

- **Sexual Harassment** as defined and prohibited in this Policy includes conduct on the **basis of sex** that satisfies one or more of the following:
 - An employee or agent of the University **conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct.**
 - Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the University's education program or activity.





SEXUAL HARASSMENT

- **Sexual Harassment** as defined and prohibited in the Policy also includes:
 - Sexual Assault
 - Fondling
 - Incest
 - Dating Violence/Domestic Violence
 - Stalking





SEXUAL HARASSMENT

- Reports of Sexual Harassment will be processed through the Sexual Harassment Procedures
- Such matters will ordinarily involve a Hearing with Advisors and a Hearing Board





OTHER SEX-BASED MISCONDUCT

- **Other Sex-Based Misconduct** may include, but is not limited to, any of the offenses listed below:
 - Sexual touching without Consent
 - Unwelcome sex-based conduct that limits participation in University activities
 - Exposing one's own or another person's private parts without Consent
 - Recording without Consent
 - Sharing recordings without Consent
 - Voyeurism
 - Sex-based cyber-harassment
 - Prostitution





OTHER SEX-BASED MISCONDUCT

- Reports of Other Sex-Based Misconduct will go through the Procedures for Discriminatory Harassment and Other Sex-Based Misconduct





DISCRIMINATORY HARASSMENT

- **Discriminatory Harassment:**
 - (1) unwelcome conduct
 - (2) that is based on an individual's or group's race, color, national origin, ethnicity, religion, genetic information, age, disability, or veteran status and
 - (3) that interferes with performance, limits participation in University activities, or creates an intimidating, hostile, or offensive University environment when viewed from the perspective of both the individual and a reasonable person in the same situation.





DISCRIMINATORY HARASSMENT

- Reports of Discriminatory Harassment will go through the Procedures for Discriminatory Harassment and Other Sex-Based Misconduct





SCOPE OF POLICY

The Policy applies to any allegation of Discriminatory Harassment, Sexual Harassment, or Other Sex-Based Misconduct that is made in the context of the University's **educational program or activity** or that otherwise affects the University's work or educational environment. It **applies to all faculty, staff, and students.**

Notre Dame's educational program or activities include locations, events, or circumstances in which the **University exercises substantial control** over both the respondent and the context in which the alleged behavior occurs.

Where the alleged **conduct occurred outside the context** of the University's programs or activities, or work or educational environment, the University's **investigation may be limited.**





PROCEDURES FOR RESOLVING CONCERNS OF DISCRIMINATORY HARASSMENT, SEXUAL HARASSMENT, AND OTHER SEX-BASED MISCONDUCT



UNIVERSITY OF
NOTRE DAME

Procedures for Resolving
Concerns of
Discriminatory Harassment,
Sexual Harassment, and
Other Sex-Based Misconduct

I. INTRODUCTION

The University of Notre Dame strives to maintain a community characterized by a respect for others. At a minimum, this means a community that is free from harassment. The University's Policy on Discriminatory Harassment, Sexual Harassment, and Other Sex-Based Misconduct ("the Policy") outlines various forms of prohibited conduct. The University will process potential violations of the Policy by University students and employees (including faculty and staff members) in accordance with the reporting and response procedures set forth below.

Section II outlines generally applicable procedures that pertain to Sexual Harassment, Discriminatory Harassment, and Other Sex-Based Misconduct. Section III describes the procedures applicable for Alternative Resolution, which, under certain circumstances, may be available to address allegations of Sexual Harassment, Discriminatory Harassment, and Other Sex-Based Misconduct. The procedures applicable to claims of conduct constituting Sexual Harassment under the Policy that could result in Sanctions are outlined below in Section IV. The procedures applicable to claims of Discriminatory Harassment and Other Sex-Based Misconduct under the Policy that could result in Sanctions for student Respondents are outlined below in Section V.A. The procedures applicable to claims of Discriminatory Harassment and Other Sex-Based Misconduct under the Policy that could result in Sanctions for staff and faculty Respondents are outlined below in Section V.B.

Any changes to this procedures document will take immediate effect and will be applicable to all pending cases.

2. PROCEDURES THAT APPLY GENERALLY

A. How to Report Violations of the Policy

1. Reporting to the University

The University encourages its students, faculty, and staff to report all violations of the Policy. The University is committed to eliminating misconduct, and to do so, the University must be informed of any conduct that violates the Policy. Any person may report conduct prohibited by the Policy, in person, by mail, by telephone, by email or by online form to the Office of Institutional Equity using the contact information listed below or by any other means that results in the Office of Institutional Equity receiving the person's report. A person may make a report at any time, including during non-business hours.

You may report to the Office of Institutional Equity by calling 574-631-0444, emailing equity@nd.edu or using the online incident reporting form at spenakun.nd.edu.





Procedures Overview

- Notre Dame's Procedures for Resolving Concerns of Discriminatory Harassment, Sexual Harassment, and Other Sex-Based Misconduct contain different procedural mechanisms to address alleged violations of the Policy
 - Generally Applicable Procedures
 - Alternative Resolution Procedures
 - Sexual Harassment Procedures
 - Procedures for Discriminatory Harassment and Other Sex-Based Misconduct



Procedures That Apply Generally

- ***Confidentiality***
 - Notre Dame will attempt to protect the confidentiality of the process to the extent reasonably possible.
- ***Resources Notre Dame Provides to Both Parties***
 - Interim Measures
 - No Contact Orders
 - Confidential Resources
 - Counseling Resources
 - Medical Resources
 - Pastoral Resources
 - Resource Coordinators





Procedures That Apply Generally

- *Retaliation*
- *Addressing Student Concerns About Other Violations*
- *Administrative Leave, Emergency Removal, and Information About Student Respondent's Enrollment, Transcript, and Degree*
- *Requests for Anonymity and/or No University Resolution Process*



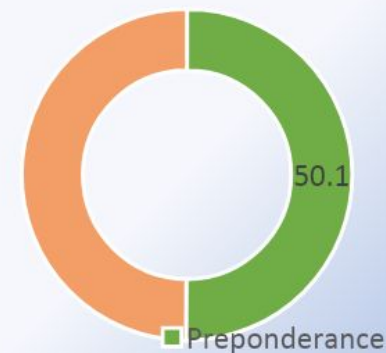


Standard of Evidence

- **Standard of Evidence**

- The University uses the **preponderance of the evidence** standard
Both the Sexual Harassment Procedures and the Procedures for Discriminatory Harassment and Other Sex-Based Misconduct
- This means the Hearing Board or Equity Panel will determine whether it is **more likely than not** that a Policy violation occurred.
- In all cases, the Respondent is presumed to be not responsible

All Evidence





Actual Knowledge

- **Actual Knowledge** means notice of alleged Sexual Harassment to the University's Title IX Coordinator (or any official of the University with authority to institute corrective measures on behalf of the University).
 - Constructive Notice is Insufficient
 - Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.
 - This standard is not met when the only official with actual knowledge is the respondent.
 - The mere ability or obligation to report Sexual Harassment or to inform a student about how to report Sexual Harassment does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.



Procedures That Apply Generally

- ***Academic Freedom***

- Academic freedom and freedom of expression are safeguarded by the University.
- Specific principles of academic freedom supported at the University include: freedom to teach and to learn according to one's obligation, vision, and training; freedom to publish results of study or research.
- Nothing in University policy or procedures shall be construed to restrict academic freedom and the associated protections of tenure, or the University's educational mission.
- The University is committed to the free and vigorous discussion of ideas and issues, which the University believes will be protected by this Policy.





Impartiality: Conflict of Interest

A conflict of interest is a set of circumstances that creates a risk that professional judgment or actions regarding a primary interest will be unduly influenced by a secondary interest.

Identify any of the following connected to the matter:

- Financial motivation
- Personal relationships
- Areas where conflict could arise (even if it doesn't already exist)
- Potential perceptions of conflict





Impartiality: Types of Bias

Cognitive biases can create systematic errors in thinking that occur when people process/interpret information and thus can impact how people make decisions based on that information.

Confirmation
Bias

Memory
Bias

Priming &
Framing

Stereotyping

Anchoring

In-Group
Bias

Attribution
Effect

Implicit
Bias





Impartiality: Mitigating Bias

- Be deliberate, not intuitive (i.e., rely on reason and not your gut)
- Reflect on your own implicit biases and how they might impact your thinking
- Develop and apply a process that is conducive to objectivity. This is important for assessing party/witness credibility and assigning weight to evidence.





Impartiality: Components of Bias

- Stereotypes - Generalizations that society as a whole makes about certain groups
- Prejudice - Your personal feelings towards that group, often influenced by stereotypes
- Discrimination - How your behavior is impacted by your prejudices
- Our Perception – how we see people and perceive reality.
- Our Attitude – how we react towards certain people.
- Our Behaviours – how receptive/friendly we are towards certain people.
- Our Attention – which aspects of a person we pay most attention to.
- Our Listening Skills – how much we actively listen to what certain people say.
- Our Micro-affirmations – how much or how little we comfort certain people in certain situations.





Procedures That Apply Generally

- ***Initial Assessment***

- After receiving a report, the Office of Institutional Equity will gather information about the reported conduct and respond to any immediate health or safety concerns.
- The Title IX Coordinator (or designee) will assess the nature and circumstances of the report to determine whether the reported conduct is within the scope of the Policy, whether the reported conduct raises a potential Policy violation, and the appropriate manner of resolution under these procedures.





Procedures That Apply Generally

Initial Assessment

At the conclusion of the initial assessment:

- If the report alleges conduct that falls within the Policy, the Title IX Coordinator (or designee) will inform the Complainant of what processes are available and the applicable procedures; or
- If the report does not fall within the Policy, the Title IX Coordinator (or designee) will refer the report to an appropriate entity to address the concerns or close the matter.

Depending on the content alleged in the report, the matter may be handled through the Sexual Harassment Procedures or the Procedures for Discriminatory Harassment and Other Sex-Based Misconduct.





Procedures That Apply Generally

- *Moving To or From Different Procedures*

If, during the course of a proceeding under one set of Procedures (i.e., the Sexual Harassment Procedures or the Procedures for Discriminatory Harassment and Other Sex-Based Misconduct), the Office of Institutional Equity determines that the conduct alleged does not fall within the relevant Policy prohibitions or otherwise determines that the chosen set of Procedures are inapplicable, the matter may be referred to the appropriate set of Procedures.





Considerations in Student Cases

(May not be unique to student cases; but most prevalent in student cases)

- Incapacitation vs. Intoxication
Some believe that that one cannot have any alcohol and give consent.
- Understanding how each person defines a term or phrase; terms or phrases can mean different things to different people/subcultures
- Usually cases involve parties from the same friend group; cannot impose “gag orders,” but can encourage information be kept private
- Hook-up Culture
- Addressing Student Concerns About Other Violations
 - Parietals
 - Alcohol



Alternative Resolution

Alternative Resolution is a voluntary, remedies-based, and educational process that is designed to allow a Respondent to accept responsibility for repairing harm and acknowledge harm to the Complainant or to the University community.

•*Circumstances When Alternative Resolution May Be Appropriate*

Alternative Resolution may be available **under either** the Sexual Harassment Procedures or the Procedures for Discriminatory Harassment and Other Sex-Based Misconduct.

*Must still have a Formal Complaint filed for Alternative Resolution for Sexual Harassment Procedures

Alternative Resolution may be used only with the voluntary, informed consent of both parties.





Alternative Resolution

Types of Alternative Resolution

- Mediation
- Indirect Mediation
- Restorative Conference
- Accountability Conference

Alternative Resolution is a voluntary, remedies-based, and educational process

- Allows a Respondent to accept responsibility for repairing harm and acknowledge harm
- The goal of Alternative Resolution is to address allegations of harmful and/or prohibited conduct
- Identify ways that individuals and/or the Community have been impacted
- Develop a resolution to address the impact
- Prevent future behavior
- Disciplinary outcomes are highly unlikely





Break



Bring out *your* champion



INSTITUTIONAL EQUITY



Sexual Harassment Procedures

- ***Formal Complaint Requirement***
 - If a report alleges Sexual Harassment, either a Complainant or the Title IX Coordinator must file a Formal Complaint before either Alternative Resolution or Formal Proceedings under the Sexual Harassment Procedures will occur.





Sexual Harassment Procedures

- *Dismissal of a Formal Complaint*
 - The Department of Education requires universities to distinguish between conduct regulated by Title IX and conduct that is not regulated by Title IX but is still prohibited by University policies or codes.
 - Under Title IX, the University **must** dismiss all or part of a Formal Complaint of Sexual Harassment where the conduct alleged:
 - would not constitute Sexual Harassment as defined in the Policy;
 - did not occur in the University's educational programs or activities; or
 - did not occur in the United States.





Sexual Harassment Procedures

- ***Dismissal of a Formal Complaint***
 - The University **may** dismiss a Formal Complaint of Sexual Harassment if:
 - a Complainant notifies the Title IX Coordinator in writing that he or she would like to withdraw the Formal Complaint;
 - the Respondent is no longer enrolled or employed by the University; or
 - the University is prevented from gathering evidence sufficient to reach a determination.





Sexual Harassment Procedures

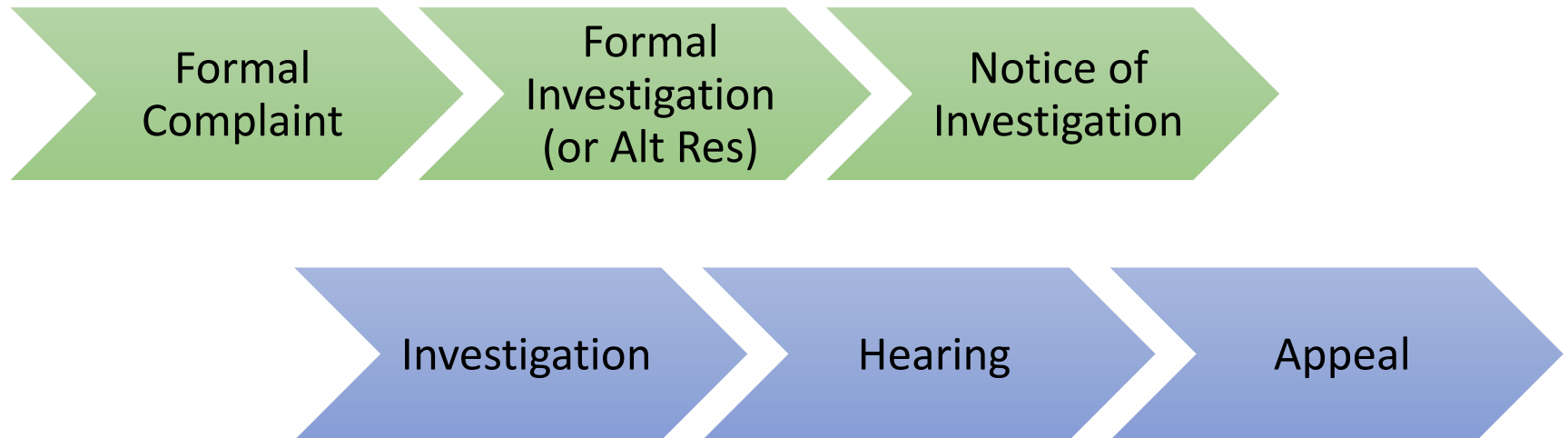
- ***Dismissal of a Formal Complaint***
 - A dismissal pursuant to Department of Education Title IX Regulations, however, does not prevent the University from investigating the matter under otherwise applicable processes in these Procedures.
 - A dismissal does not preclude the University from addressing conduct in any manner the University deems appropriate under other University policies.





Sexual Harassment Procedures

- *Formal Proceedings Overview*





Sexual Harassment Procedures

- ***Formal Proceedings for Sexual Harassment***
 - Formal Proceedings will contain certain elements:
 - Any provisions, rules, or practices the University uses must apply equally to both parties
 - The University must follow a grievance process before the imposition of any Sanctions against a Respondent
 - All decision makers must engage in an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and must not base credibility determinations on a person’s status as a complainant, respondent, or witness
 - The University must ensure that Title IX Coordinators, investigators, decision makers, and those facilitating Alternative Resolution are free from conflict of interest or bias





Sexual Harassment Procedures

- ***Formal Proceedings for Sexual Harassment***
 - Formal Proceedings will contain certain elements (con't):
 - The University must train Title IX Coordinators, investigators, decision makers, and those facilitating Alternative Resolution on the definition of Sexual Harassment, the scope of the University's education program or activity, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - The University must train decision makers on Hearing technology and on issues of relevance, including when evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant
 - Decision makers may not allow or rely on questions or evidence that seeks or discloses legally privileged information, unless the person holding such privilege has waived the privilege
 - The University must train investigators on relevance





Sexual Harassment Procedures

- ***Formal Proceedings for Sexual Harassment***

- Formal Proceedings will contain certain elements (con't):

- The University must include a presumption that the Respondent is not responsible
- The University must include reasonably prompt time frames
- The University must describe the range of possible Sanctions and remedies
- The University must state the standard of evidence to be used to determine responsibility
- The University must include the procedures and permissible bases for the parties to appeal
- The University must describe the range of supportive measures available to complainants and respondents





Sexual Harassment Procedures

- ***Notice of Investigation***
 - After the filing of a Formal Complaint, the University will issue both parties a written Notice of Investigation
 - That Notice of Investigation will include:
 - Notice of Sexual Harassment Procedures, including Alternative Resolution
 - Notice of the allegations of Sexual Harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview
 - Sufficient details include the identities of the parties involved, the alleged conduct, and the date and location of the alleged incident, if known





Sexual Harassment Procedures

- ***Notice of Investigation***
 - That Notice of Investigation will include (con't):
 - A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
 - The written notice must inform the parties that they may have an Advisor of their choice, and may inspect and review evidence obtained in the investigation
 - If, in the course of an investigation, the University decides to investigate allegations about the Complainant or Respondent that are not included in the original Notice of Investigation, the University will issue an Amended Notice of Investigation





Sexual Harassment Procedures

- ***Advisors***

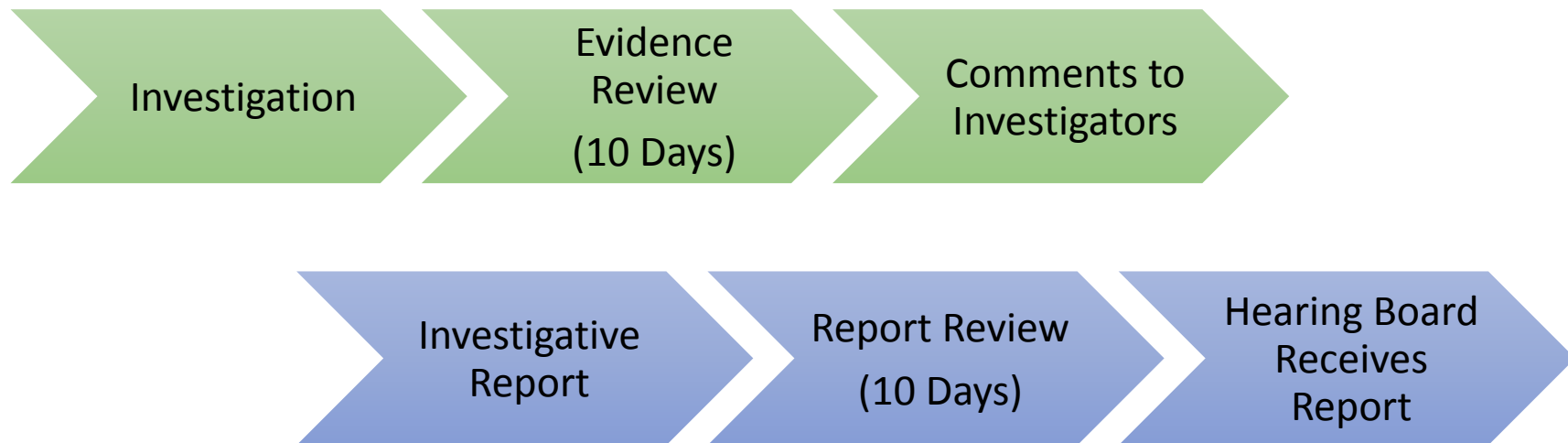
- The Complainant and Respondent will each be permitted to be accompanied by an Advisor of his or her choice at each stage of the Sexual Harassment Procedures in which the party participates.
- Aside from during the Hearing and Pre-Hearing Meeting, as described below, the Advisor role is nonspeaking.
 - The University will communicate directly with the Complainant and Respondent, not through any third party.
- If a party does not have an Advisor to accompany him or her at the Hearing, the Title IX Coordinator (or designee) will appoint such an Advisor of the University's choice.
- If a party does not have his or her own Advisor, the University will appoint an Advisor for purposes of conducting cross-examination of the other party or parties and any witnesses at the Hearing.





Sexual Harassment Procedures

- *Investigation Process Overview*





Sexual Harassment Procedures

- ***Investigation***

- Investigations are aimed at gathering all available, relevant evidence in the form of witness interviews and other information.
- The Complainant and Respondent will be asked to identify witnesses and provide other relevant information, such as documents, communications, photographs, and other evidence.





Sexual Harassment Procedures

- ***Evidence Review***
 - At the conclusion of the information-gathering portion of the Investigation, the Investigator will provide hard-copy or electronic access to all evidence obtained as part of the Investigation to both parties (and their respective Advisors, if any) for their review.
- ***Comments to Investigators***
 - The parties will have ten days to review and provide written responses to the evidence.





Sexual Harassment Procedures

- ***Investigative Report***
 - Following receipt of the parties' written responses, if any, the Investigators will review all relevant information obtained and may conduct additional interviews with the parties and/or witnesses.
 - The Investigators will then draft an Investigative Report.
- ***Report Review***
 - The parties, along with their respective Advisors, if any, will be provided access to review the Investigative Report and all evidence directly related to the allegation at least ten calendar days prior to the date of the scheduled Hearing.
 - The parties may provide a written response in advance of the Hearing.





Sexual Harassment Procedures

- **Hearing**
 - Upon receipt of the Investigative Report, the Title IX Coordinator will convene a Hearing to determine, by a preponderance of the evidence, whether the Respondent violated any provision of the Policy
 - The composition of a Hearing Board depends on the status the Respondent.
 - Each Hearing Board will consist of a Hearing Officer, and two or three other Hearing Board Members.
 - Students may not serve as members of the Hearing Board.
- **Pre-Hearing Meeting**
 - At least three calendar days before the Hearing, the Hearing Officer will convene a Pre-Hearing Meeting among the parties and their Advisors



Sexual Harassment Procedures

- ***Hearing Preparation***

- Before Hearing, consider:

- Reviewing Notice of Investigation, Policy, evidence and Investigative Report
- Meeting with Hearing Board to discuss issues, evidence, and questioning
- Checking for any conflicts of interest
- Drafting key questions to ask at the Hearing



Sexual Harassment Procedures

- **Hearing**
 - The Hearing is an opportunity for the Hearing Board to hear directly from the parties and relevant witnesses and to evaluate all relevant evidence obtained during the Investigation.
 - The Hearing Board has the discretion to determine the specific Hearing agenda.
 - While both parties have the right to be present for the entire Hearing, either party may request alternative arrangements for participating in the Hearing that do not require physical proximity to the other party, including participating through electronic means that permit both parties to simultaneously see and hear each other.
 - Should the Complainant or Respondent fail to attend the scheduled Hearing, the Hearing will be held and a determination will be made despite his and/or her absence.



Sexual Harassment Procedures

- **Hearing**
 - The Hearing Board will communicate directly with the Complainant and the Respondent, not through any third party.
 - Neither the Complainant nor the Respondent will be permitted to engage in direct communication with each other before, during, or immediately after the Hearing.
 - The Hearing Officer will oversee the procedure logistics of the Hearing, including ruling on evidentiary issues.
- **Recording**
 - Proceedings will be recorded by Office of Institutional Equity and may not be recorded by anyone else.





Hearing: Evidentiary Issues

Relevance - Focus on relevant evidence

Irrelevant evidence may be excluded

Cross-Examination - Statements not subject to cross-examination cannot be relied on by the decision-maker

Privileged Information - Information protected by any legally recognized privilege generally cannot be used





Post-Hearing: Analyzing Evidence

(1) Organize

- By allegation, by source, by policy provision, etc.
- Filter out irrelevant evidence (but don't ignore exculpatory evidence)

(2) Assign Weight

- Factor in credibility determinations
- Put the evidence on the appropriate side of the scale

(3) Synthesize

- Take account of unique/complex circumstances
- Identify consistencies/inconsistencies & disputed/undisputed facts
- Goal = making reasoned & deliberate findings of fact, supported by evidence





Post-Hearing: Credibility

- Credible = offering reasonable grounds for being believed (i.e., believable)
- Credibility = the quality or power of inspiring belief (i.e., honesty, reliability)
- Assessing credibility of parties & witnesses
 - Be deliberate, objective, and systematic.
 - Make determinations in good faith and based on a reasonably thorough investigation.
 - Rely on a variety of factors & apply them consistently



Post-Hearing: Credibility Factors

- ❖ Corroboration
- ❖ Opportunity & Capacity to Observe or Know
- ❖ Consistency vs. Inconsistency
- ❖ Inherent Plausibility
- ❖ Motive to Falsify
- ❖ Bias*
- ❖ Character, Past Record & Reputation*
- ❖ Demeanor*





Sexual Harassment Procedures

- ***Determination and Sanctions***

- Following the Hearing, the Hearing Board will make a written determination as to whether, based on a preponderance of evidence, a violation of the Policy has occurred.
 - The written determination will include a **description of the allegations** potentially constituting Sexual Harassment, **findings of fact** supporting the determination, the **rationale** for the Hearing Board's determinations, and any opposing or additional considerations.
- Where there is a finding of responsibility for a violation of the Policy, the Hearing Board may assign one or more Sanctions.
- After a finding of responsibility, Hearing Boards may consult with relevant University officials to determine the appropriate Sanction.





Sanctions – Students

- ***Determination and Sanctions***

- Sanctions for Student Respondents may include:
 - Counseling or Education
 - Verbal or Written Reprimand
 - Written Warning
 - Participation in an University Program or Activity
 - Restorative Justice Conference
 - Alcohol Assessment or Education
 - Substance Abuse Treatment
 - Psychological Assessment
 - Ban from Campus or Specific Location(s) on Campus
 - Loss of Extra-Curricular Privileges
 - Loss of Specific Privileges within a Residential Community
 - Loss of Opportunity to Live in Campus Housing
 - No Contact Order
 - Student Disciplinary Action
 - Disciplinary Probation
 - Dismissal with the Opportunity to Apply for Readmission
 - Permanent Dismissal



Sanctions – Faculty and Staff

- ***Determination and Sanctions***

- Sanctions for Faculty and Staff Respondents may include:
 - Counseling or Education
 - Verbal or Written Reprimand
 - Written Warning
 - Participation in an University Program or Activity
 - Restorative Justice Conference
 - Alcohol Assessment or Education
 - Substance Abuse Treatment
 - Psychological Assessment
 - Ban from Campus or Specific Location(s) on Campus
 - Transfer or Reassignment to another department, position, or schedule
 - Change of Duties and/or Responsibilities
 - Loss of Opportunity for Merit Increase
 - Removal from Positions of Leadership
 - Loss of Employment Privileges
- Faculty and Staff Corrective Action
 - Suspension
 - Demotion, including Demotion in Academic Rank
 - Revocation of Tenure
 - Termination from Employment
 - Reduction of Individual Salary or Pay



Sanctions – Faculty

- ***Sanctioning Considerations for Tenured Faculty***
 - Requirement for a Specific Finding of Proportionality for Severe Sanctions
 - In consideration of academic freedom and the associated protections of tenure, if a Sanction selected by the Hearing Board constitutes a “Severe Sanction” (as defined by the Academic Articles), the Hearing Board must make a determination that the specific Severe Sanction selected is proportionate to the misconduct for which the tenured faculty member was found responsible.





Sexual Harassment Procedures

- ***Appeals***

- Within ten days of being informed of the University's full or partial dismissal of a Formal Complaint or a determination regarding responsibility by a Hearing Board, either a Complainant or a Respondent may request an appeal by filing a written Request for Appeal.
- An Appeal Coordinator appointed by the Office of Institutional Equity will administer the appeal process.





Sexual Harassment Procedures

- ***Appeals***

- A Complainant and/or a Respondent must establish one or more of the following grounds for review:
 1. A procedural irregularity that affected the outcome of matter.
 2. New evidence that was not reasonably available at the time of the determination of responsibility or the dismissal, that could affect the outcome of the matter.
 3. The Title IX Coordinator (or designee), Investigator(s), or Hearing Board member(s) had a conflict of interest and/or bias for or against Complainants or Respondents generally, or against the individual Complainant or Respondent, that affected the outcome of the matter.
 4. The assigned Sanction does not fall within the range of appropriate Sanctions.





Sexual Harassment Procedures

- **Appeals**

- Requests for Appeal that are not submitted by the communicated deadline, or that do not include required information concerning the specified ground(s) for review, may be denied by the Appeal Coordinator.
- A party's Request for Appeal that is submitted within the communicated deadline and that includes the required information concerning the ground(s) for review will be forwarded by the Appeal Coordinator to the other party and the Hearing Board.
 - The other party will have seven days to provide a written response to the Request for Appeal.
 - The Hearing Board will also have the opportunity to provide a written response to the Request for Appeal.





Sexual Harassment Procedures

- **Appeals**

- The Appeal Coordinator will then forward the Request for Appeal, any responses from the other party and/or the Hearing Board, and the case file to one of the following individuals, who will decide the appeal:
 - For student Respondents, the Vice President for Student Affairs or designee.
 - For staff Respondents, the Vice President for Human Resources or designee.
 - For faculty Respondents, a three-member advisory panel will provide a recommendation to the Provost or designee. The Provost or designee will provide a recommendation to the President, to make the decision on the appeal.
 - The advisory panel will consist of three tenured faculty who are elected members of the Academic Council, excluding anyone who was a member of the Hearing Board.
 - President must make a specific finding regarding proportionality for severe sanctions for tenured faculty





Sexual Harassment Procedures

- ***Appeals***

- To the extent that any of the foregoing grounds require an evidentiary determination, the standard of evidence shall be a preponderance of the evidence.
- Upon review, the Vice President for Student Affairs, Vice President for Human Resources, the Provost (or designees), or the President may remand the case for additional formal proceedings, where appropriate.
- The outcome of the Appeal will be communicated to the Respondent and the Complainant via written notification. The appeal decision is final and not subject to further review.





Questions?

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Pre-Hearing Meeting

- At least three calendar days before the Hearing, the Hearing Officer will convene a Pre-Hearing Meeting among the parties and their Advisors
- The Hearing Officer will set the agenda for the Pre-Hearing Meeting, which may include:
 - Explanation of Hearing procedures and logistics, including the process that will be utilized for the presentation of witnesses and evidence
 - Listing of policy provisions at issue
 - Stipulations of fact, if any, to agree to at the hearing
 - Identification of witnesses and listing of witness order
 - Discussion of exhibit lists and potential evidentiary issues
 - Discussion of any issues raised by the parties



Pre-Hearing Meeting

- To minimize cross-examination issues, the Hearing Officer should discuss with the parties and their Advisors what witnesses and exhibits will be needed at the Hearing.
- Hearing Officers should clarify that the parties must identify during the Pre-Hearing Meeting all witnesses that they would like to participate at the Hearing.
- Afterwards, the Hearing Officer should send a written summary of the Pre-Hearing Meeting to the parties and their Advisors.
- The Hearing Officer must record the Pre-Hearing Meeting.

Preparation for Pre-Hearing Meeting will be crucial to ensure efficient and effective Hearings



Evidentiary Issues

Relevance - Focus on relevant evidence

Irrelevant evidence may be excluded

Cross-Examination - Statements not subject to cross-examination cannot be relied on by the decision-maker

Privileged Information - Information protected by any legally recognized privilege generally cannot be used



Evidentiary Issues - Relevance

- Key determination = relevance to alleged facts & policy at issue
- Federal regulations do not define relevance, other than to say “the ordinary meaning of the word should be understood and applied.”
- Treatment of specific types of evidence:
 - Evidence that may be unduly prejudicial, concern prior bad acts, or constitutes character evidence (allowed if relevant; assign appropriate weight)
 - Duplicative evidence (may be excluded as not relevant)
- Complainant’s sexual predisposition or prior sexual behavior is **not relevant**, subject to the following exceptions:
 - To prove someone other than Respondent committed alleged conduct
 - To prove consent, when related to specific incidents of Complainant’s prior sexual behavior with respect to Respondent





Evidentiary Issues

- ***Cross Examination***
 - Hearsay?
 - The Department of Education has stated that it has not imposed a complex set of evidentiary rules, including formal rules of hearsay.
 - To be admitted, any party or witness statement must be subject to cross-examination.
 - Rule: If a party or witness does not submit to cross-examination at the hearing, you must not
 - rely on any statement of that party or witness in reaching a determination regarding responsibility
 - draw an inference on overall responsibility solely on a party's or witness's absence from the hearing or refusal to answer cross-examination or other questions.



Evidentiary Issues

- ***Privileged Information***
 - Information protected by any legally recognized privilege cannot be used unless the holder of that privilege waives it.
 - Similarly, a party's treatment records may not be used without the party's voluntary, written consent.
 - Conversations between a party and his or her Advisor are generally not privileged, but such conversations may often be irrelevant.





Hearing Procedures

1. Introductions and welcome
 - a) Explanation of Hearing Procedure to parties
 - b) Description of case and statement of specific alleged Policy violations
 - c) Explanation of preponderance of the evidence standard
 - d) If agreed to at Pre-Hearing, discussion of stipulated facts/issues and facts/issues in dispute
2. Opening statements from parties, if appropriate
3. Admit Investigative Report
 - a) Either party's Advisor may want to cross-examine the Investigator(s)



Hearing Procedures

4. Witness questioning
 - a) Order depends on case
 - b) Generally, Hearing Board will ask questions first, followed by Advisors
 - c) Witnesses (other than the parties) will not be in Hearing unless they are testifying
 - d) No direct examination by a party's own Advisor, but a party may speak freely before responding to questioning from the Hearing Board or Advisor(s)
5. Closing statements from parties, if appropriate





Evidence and Questioning

- *Access to Evidence*
 - The Hearing Board will make all relevant evidence obtained as part of the Investigation that is directly related to the allegations raised in the Formal Complaint available at the Hearing and will give each party equal opportunity to refer to such evidence.
- *Requirement to Participate in Investigation*
 - There is a presumption that, to be considered in the Hearing, evidence or witness testimony must be part of the Investigation record. The Hearing Board has the discretion to permit evidence or testimony that is not part of the Investigation record to be offered in a Hearing if that evidence is relevant and was previously unknown or unavailable.





Evidence and Questioning

- *Advisor Questioning*
 - Advisors may ask questions under the following procedure:
 - The Advisor will ask a question of the applicable participant.
 - If the Hearing Officer determines the Advisor's question is not relevant to the allegations in the Formal Complaint, then the Hearing Officer must explain any decision to exclude a question as not relevant.
 - If the Hearing Officer allows the question as relevant, the participant will be expected to answer it.
- *Other Procedural Matters*
 - At the Hearing, the Hearing Officer will rule on all procedural and evidentiary matters, including those regarding privilege, relevance, exhibits, and the testimony of Hearing participants.
 - Either a party or an Advisor is permitted to raise such issues with the Hearing Officer.





Evidence and Questioning

- *Cross Examination*
 - All parties and witnesses must testify live, or have their testimony be the subject of a pre-Hearing stipulation for admissibility, for their statements to be admissible.
 - If a party or witness refuses to answer relevant questions about a statement, that statement is inadmissible.
 - If a party needs a witness's testimony or evidence, the Advisor should address it with the Hearing Officer at the Pre-Hearing Meeting to ensure the witness attends the hearing and is willing to answer the questions posed.





Evidence and Questioning

- *Cross Examination*

- All questioners, including Advisors, should be respectful of all parties, witnesses, and the Hearing Board.
- All questioners, including Advisors, should not attempt to intimidate parties or witnesses.
- All questioners, including Advisors, should ask direct questions and avoid asking multi-part or confusing questions.
- All questioners, including Advisors, should remain seated while asking questions.
- All questioners, including Advisors, should be supportive when the party they are advising is subject to questioning. It is permissible to ask for a break, if appropriate.



Additional Considerations

- There is a presumption that any Respondent is not responsible for a Policy violation. That presumption must be overcome by a preponderance of the evidence.
- Hearing Boards are expected to engage in an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence
- Hearing Boards are expected to assess credibility objectively, and such assessments must not be based on a person's status as a complainant, respondent, or witness.





Hearing Logistics and Technology

- **Logistics**

- An OIE-provided Hearing Coordinator will assist with scheduling, logistics, and technology at each Hearing.
- The Hearing Coordinator will work with the Hearing Officer and other relevant groups to schedule the Pre-Hearing Meeting and the Hearing.
- On the day of the Hearing, the Hearing Coordinator will ensure witnesses are available as scheduled and will have access to all exhibits.

It is critical that Hearing Officers use the Pre-Hearing Meeting effectively to ensure that the relevant witnesses and exhibits are prepared.

- **Technology**

- Hearings will be conducted via Zoom, with breakout rooms available for Advisors to meet with the parties and waiting rooms for witnesses to await their time



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Equity Panel Breakout

2020-2021



Procedures for Discriminatory Harassment and Other Sex-Based Misconduct

- ***Application and Alternative Resolution***

- In cases where a University student in Discriminatory Harassment or Other Sex-Based Misconduct under the Policy, the Procedures for Discriminatory Harassment and Other Sex-Based Misconduct apply.
- Alternative Resolution may be available in these cases, so long as the University provides both parties with written notice of the allegations, explains the requirements and consequences of Alternative Resolution, and obtains both parties' voluntary and written consent to participate in Alternative Resolution.

**begins at Section 5 (pg. 25) of Procedures*

(https://titleix.nd.edu/assets/399065/procedures_for_resolving_concerns_of_discriminatory_harassment_sexual_harassment_and_other_sex_based_misconduct_final.pdf)



Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Student Procedures

- ***Administrative Review***
 - Where Alternative Resolution is not pursued and an Initial Assessment determines that an investigative process is appropriate, a report of Discriminatory Harassment or Other Sex-Based Misconduct will go through an Administrative Review.
 - In Administrative Review, the Office of Institutional Equity will investigate complaints and determine whether or not a violation of the Policy occurred.
 - There are different procedures for students and faculty/staff.





Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Student Procedures

- ***Support Persons***

- Student Complainants and Respondents in an Administrative Review are provided the opportunity to consult with a Support Person of their choosing.
- The parties may be accompanied by their respective Support Person at any meeting or interview involved in an Administrative Review, but the Support Person's role is non-speaking, and a Support Person who is disruptive may be required to leave.





Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Student Procedures

- ***Investigation***

- An Investigator will conduct a prompt, thorough, fair, and impartial Investigation.
- During an Investigation, the Investigator will meet separately with the Complainant, Respondent, and relevant witnesses, if any.

- ***Investigative Report***

- After the investigation, the Investigator will prepare an Investigative Report
- The Complainant and the Respondent will be afforded up to five calendar days to review the Investigative Report.





Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Student Procedures

- ***Acceptance of Responsibility***

- After reviewing the Investigative Report, if the Respondent wishes to formally accept responsibility for the alleged Policy violations, the Assistant Vice President for the Office of Institutional Equity may decide to recognize the acceptance of responsibility and forego an Equity Panel proceeding.





Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Student Procedures

- ***Equity Panel Meeting***

- After receiving the Investigative Report, the Assistant Vice President for the Office of Institutional Equity and Title IX Coordinator (or designee) will convene a meeting with and seek advice from a two-member Equity Panel.
- At the meeting, the Equity Panel and the Assistant Vice President for the Office of Institutional Equity and Title IX Coordinator will be afforded the opportunity to ask questions of the Investigator(s) and, if appropriate, the parties.
- A representative may not appear in the place of a Complainant or Respondent; however, parties do have the opportunity to have a Support Person of choice present at the meeting.
 - The Support Person's role is non-speaking.





Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Student Procedures

- ***Determination***

- Following the meeting with the Equity Panel, the Assistant Vice President for the Office of Institutional Equity and Title IX Coordinator (or designee) shall make a written determination whether a violation of the Policy has occurred.
- Where there is a finding of responsibility for a violation of the Policy, the Assistant Vice President for the Office of Institutional Equity and Title IX Coordinator (or designee) may assign one or more Sanctions.



Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Student Procedures

- ***Appeals***

- Within ten calendar days of being informed of a determination that results in a determination of not responsible or a Sanction, either a Complainant or a Respondent may request an appeal by filing a written Request for Appeal.
- Third parties may not file a Request for Appeal on behalf of a Respondent or a Complainant.





Sexual Harassment Procedures

- ***Determination and Sanctions***

- Following the meeting with the Equity Panel, the Assistant Vice President for the Office of Institutional Equity will make a written determination whether a violation of the Policy has occurred.
-
- Where there is a finding of responsibility for a violation of the Policy, the Assistant Vice President for the Office of Institutional Equity may assign one or more Sanctions.
- In assigning Sanctions, the Assistant Vice President for the Office of Institutional Equity may, in his or her sole discretion, consult with the Office of Community Standards.





Sanctions – Students

- ***Determination and Sanctions***

- Counseling or Education
- Verbal or Written Reprimand
- Written Warning
- Participation in an University Program or Activity
- Restorative Justice Conference
- Alcohol Assessment or Education
- Substance Abuse Treatment
- Psychological Assessment
- Ban from Campus or Specific Location(s) on Campus
- Loss of Extra-Curricular Privileges
- Loss of Specific Privileges within a Residential Community
- Loss of Opportunity to Live in Campus Housing
- No Contact Order

- **Student Disciplinary Action**

- Disciplinary Probation
- Dismissal with the Opportunity to Apply for Readmission
- Permanent Dismissal



Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Student Procedures

- *Appeals*

- A Complainant or a Respondent must establish one or more of the following grounds for review:
 1. A **procedural defect** in the Administrative Review that was substantial enough to have changed the determination.
 2. The discovery of **substantive new information** that was unknown or unavailable to the Complainant or Respondent during the Administrative Review and was substantial enough to have changed the determination.
- The Complainant and/or Respondent may also appeal on the basis that the assigned **Sanction does not fall within the range** of appropriate Sanctions.





Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Student Procedures

- ***Appeals***

- Requests for Appeal that are not submitted by the communicated deadline, or that do not include required information concerning the specified ground(s) for review, may be denied by the Appeal Coordinator.
- Compliant Requests for Appeal will be forwarded by the Appeal Coordinator to the other party and the Equity Panel.
 - The other party and the Equity Panel have the opportunity to provide a written response to the Request for Appeal.
- The Appeal Coordinator will then forward the Request for Appeal, any responses from the other party and/or the Equity Panel, and the case file to the Vice President for Student Affairs (or designee), who will decide the appeal.



In Summary...

- Initial Assessment
 - Is Alternative Resolution requested and/or appropriate?
- Administrative Review
 - Investigation
 - Investigative Report
 - Five (5) days to review
 - Ability for Respondent to accept responsibility
 - Equity Panel (if applicable)
 - Determination
 - 10 days to appeal
 - other party has 7 days to respond to appeal request
 - Appeal





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Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Faculty and Staff Procedures

- ***Investigation***

- Where Alternative Resolution is not pursued, an Investigator will investigate the allegations to determine whether or not a violation of the Policy occurred.
- During the course of an Investigation, the University may impose interim measures to protect the integrity of the process and/or to protect the parties, where appropriate.



Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Faculty and Staff Procedures

- ***Determination and Sanctions***

- The University may take the appropriate remedial measures to protect the Complainant and/or to stop any misconduct by faculty or staff members, and may impose any Sanctions, as defined in the Procedures.
- The University's determination as to whether a violation of the Policy occurred will be communicated to the Complainant and the Respondent in writing.





Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Faculty and Staff Procedures

- ***Appeals – Staff***

- A party may request a review of the outcome of the Investigation by submitting a Request for Appeal to the Vice President of Human Resources within ten calendar days of notification of the outcome of the Investigation.
- The Request for Appeal must state with specificity acceptable grounds for seeking a review:
 1. A procedural defect that was substantial enough to have affected the outcome.
 2. The discovery of substantive new information that was substantial enough to have affected the outcome.
- Except in cases of Termination from Employment, the severity of the Sanction is not considered a legitimate ground for review.
- The Vice President of Human Resources (or designee) will provide the parties the University's written response, and this response is final.



Procedures for Discriminatory Harassment and Other Sex-Based Misconduct – Faculty and Staff Procedures

• *Appeals – Faculty*

- A party may request that the Vice President and Senior Associate Provost for Faculty Affairs review the outcome of the Investigation.
- The Request for Appeal must state with specificity acceptable grounds for seeking a review:
 1. A procedural defect that was substantial enough to have affected the outcome.
 2. The discovery of substantive new information that was substantial enough to have affected the outcome.
- The Vice President and Sr. Associate Provost for Faculty Affairs (or designee) will provide a written response to the party seeking a review, and this response is final.
- If a faculty member wishes to appeal the outcome of an Investigation that results in “severe sanctions,” as defined in the Academic Articles, he or she member is entitled to the procedural protections (including the right of appeal) set forth in Article IV, Section 9 of the Academic Articles.



Questions?

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