

Sexual Misconduct Appellate Officer Training

Krista Anderson, Systemwide Title IX Coordinator
Sean Flammer, Assistant General Counsel

October 2020

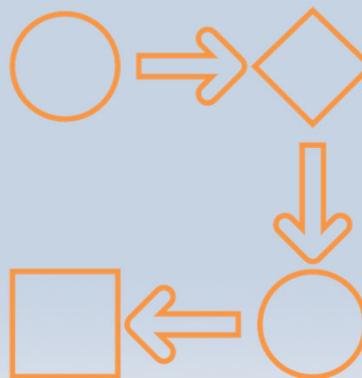


THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

1

Agenda

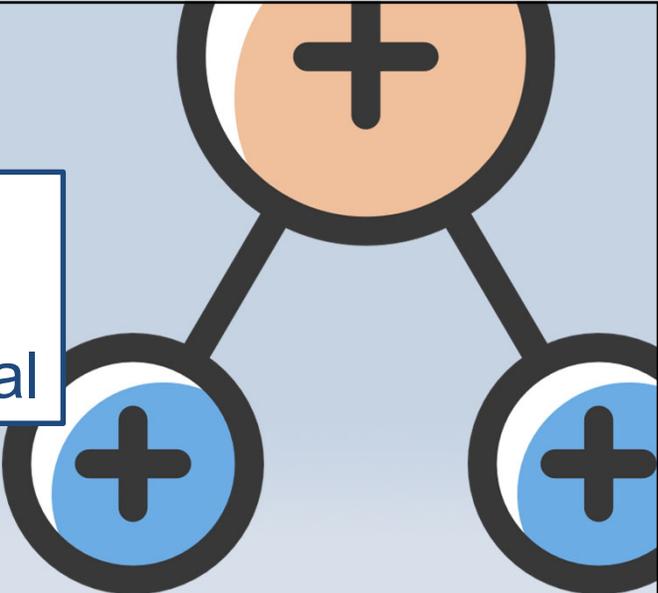
1. Background & Appellate Officer Role
2. Appeals following:
 - Formal Complaint Dismissals
 - Hearing Determinations
 - Administrative Dispositions
3. Grounds for Appeal
4. Appeal Resolution Options
5. Special Issues



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

2

2



Background:
The Process
Before the Appeal



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

3

3

Definition of “Sexual Harassment”

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the institution’s education program or activity; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct (2020)

4

“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: Title IX Regulations (2020)

5

Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is

1. Verbal conduct (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that they created a Hostile Environment, as defined in the Model Policy.
2. Physical conduct.



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: UT System Model Policy for Sexual Misconduct (2020)

6

Definition of “Other Inappropriate Sexual Conduct” (Cont.)

Potential Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.

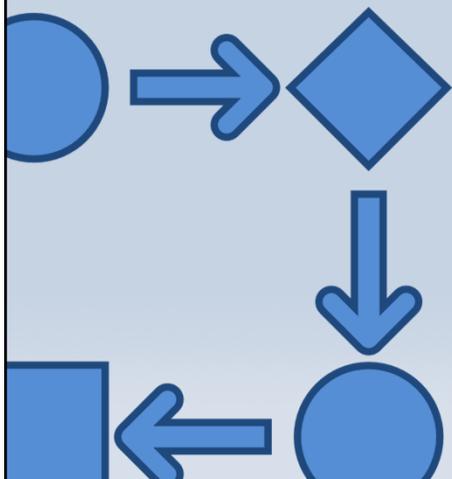


THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: *UT System Model Policy for Sexual Misconduct (2020)*

7

Appeals following:



- Formal Complaint Dismissals
- Hearing Determinations
- Administrative Dispositions



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

8

8

Mandatory Formal Complaint Dismissals

Under Title IX regulations, universities are **required** to distinguish between prohibited conduct that is “under Title IX” and prohibited conduct that is a violation of university policy. Under Title IX, the University **must dismiss** a Formal Complaint or the part of the allegations in a Formal Complaint, if applicable, where:

Sexual Harassment is alleged and where:

- The conduct alleged does not meet the definition of Sexual Harassment;
- The alleged conduct did not occur in the University’s education program or activity; or
- The alleged conduct did not occur against a person in the United States.

Note: A dismissal under this provision only applies to allegations of Sexual Harassment under Title IX. In such an instance, the University may still investigate a Formal Complaint for allegations of Sexual Harassment under this Policy. The University may also investigate allegations of prohibited conduct under this Policy but it will not technically be “under Title IX.”



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: *UT System Model Policy for Sexual Misconduct (2020)*

9

The University may dismiss a Formal Complaint, at its **discretion**, under this Policy’s Grievance Process for any of the following circumstances:

- If the Complainant requests in writing to dismiss a Formal Complaint (e.g. withdraws the Formal Complaint or any allegations therein), as outlined in Section 4 of this Policy;
- If the Respondent is an employee and no longer employed by the University at the time the Formal Complaint is filed;
- Any specific circumstances that prevent the University from gathering evidence sufficient to reach a determination as to the Formal Complaint or any allegations therein; or
- The conduct alleged does not meet the definition of any prohibited conduct under this Policy.

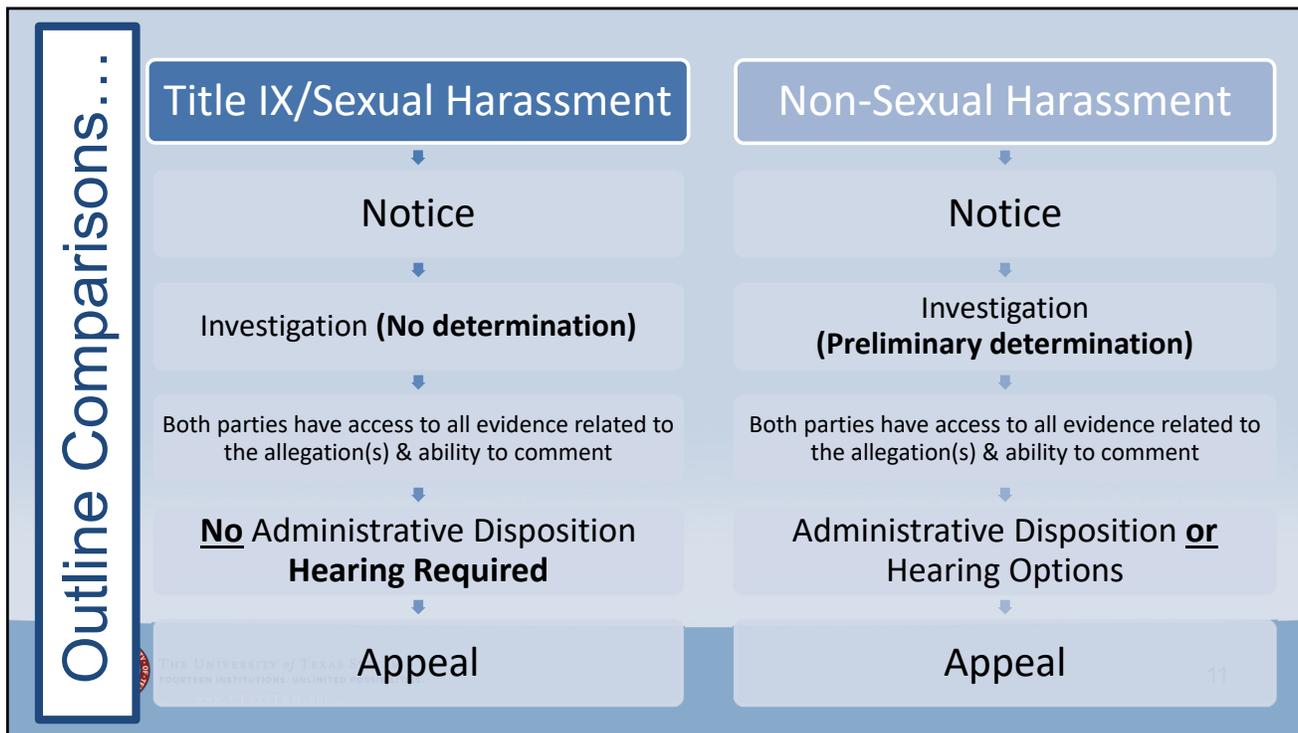
Discretionary Dismissals



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: *UT System Model Policy for Sexual Misconduct (2020)*

10



11

Appellate Officer's Role in Process

Final Decision-Maker



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

12



Grounds for Appeal



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

13

Grounds for Appeal



- A **procedural irregularity** that affected the outcome of the matter;
- There is **new evidence** that was not reasonably available at the time of the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; **or**
- The Title IX Coordinator, investigator(s), or hearing officer had a **conflict of interest** **or bias for or against the parties** (generally, or specifically in this matter) that affected the outcome of the matter.



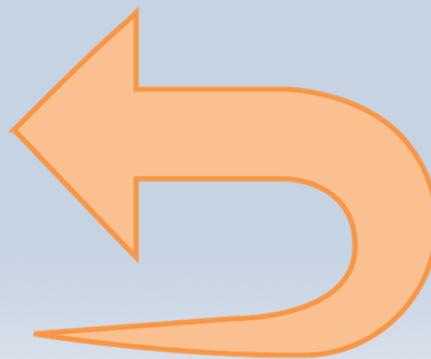
THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

14

14

Appeal of Sanctions: Administrative Dispositions

“Agree to the determination of responsibility for each of the applicable allegations, appeal (in writing) the sanctions and/or remedies outlined in the administrative disposition, and waive the option of a hearing...”

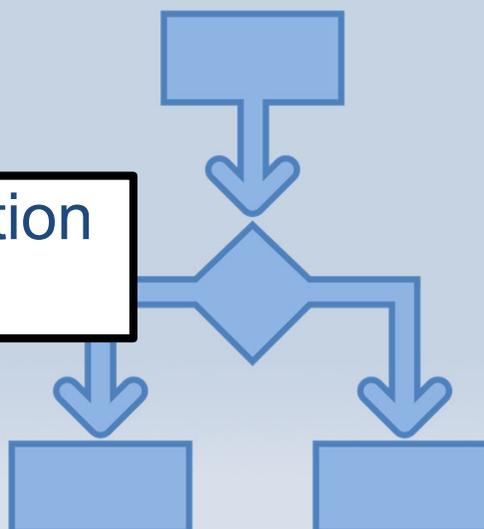


THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: *UT System Model Policy for Sexual Misconduct (2020)*

15

Appeal Resolution Options



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

16

Appeal Resolution Options

1. Affirm the hearing officer's determination regarding the Respondent's responsibility and affirm the disciplinary sanctions and remedies, if applicable;
2. Affirm the hearing officer's determination regarding the Respondent's responsibility and amend the disciplinary sanctions and remedies, if applicable;
3. Remand the process back to the hearing stage for the hearing officer to remedy any procedural irregularity or consider any new evidence;
4. Reverse the hearing officer's determination of the Respondent's responsibility and amend the disciplinary sanctions and remedies, if applicable; or
5. Affirm or amend the sanctions and/or remedies outlined in the administrative disposition.

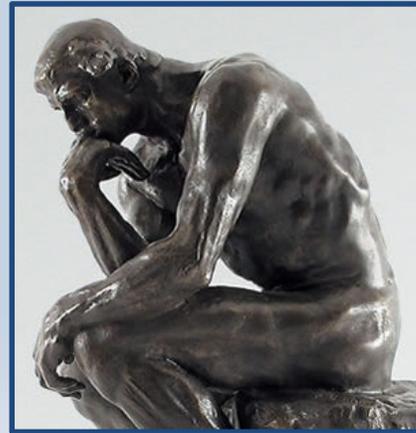


THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: *UT System Model Policy for Sexual Misconduct (2020)*

17

Making Your Decision...



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

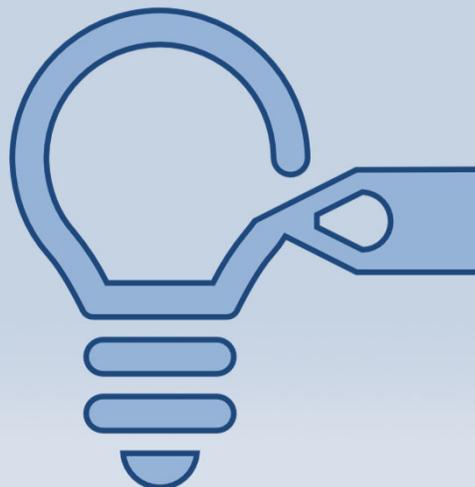
[This Photo](#) by Unknown Author is licensed under [CC BY](#)

18

18

In Making Your Decision:

- Review the materials.
- Review the policy.
- What is the **ground or argument** on appeal?
- What is the **reasoning** in the initial decision-maker's letter or disposition?



19

Look at the Provision(s) at Issue:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



20

Look at the Provision(s) at Issue:

Engaging in a (1) **course of conduct** (2) **directed at a specific person** that would (3) **cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.**

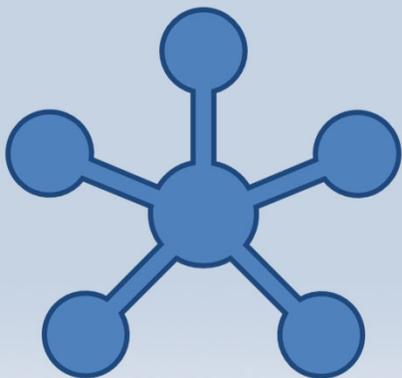
For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

21

21

Considerations:



- A **procedural irregularity** that **affected the outcome of the matter**;
- There is **new evidence** that was not reasonably available at the time of the determination regarding responsibility or dismissal was made that **could affect the outcome of the matter**; **or**
- The Title IX Coordinator, investigator(s), or hearing officer had a **conflict of interest or bias for or against the parties** (generally, or specifically in this matter) that **affected the outcome of the matter**.

22

22



Special Issues



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

23

23

Relevant Evidence



Evidence is **relevant** if:

- The evidence has any tendency to make a **fact** more or less probable than it would be without the evidence; **and**
- The **fact** is of consequence in determining the action.



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

24

24

Relevance: Prior Sexual History



A Complainant's sexual predisposition or prior sexual behavior are not relevant **except** where questions and evidence about a Complainant's prior sexual behavior are offered to prove that **someone other than the Respondent committed the alleged conduct** charged by the Complainant **or** if the questions or evidence **concern specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove the Complainant's consent** of the alleged conduct.



25

Exclusion of Privileged Information unless Waived



No person will be required to disclose information protected under a legally recognized privilege. The hearing officer must not allow into evidence or rely upon any questions or evidence that may require or seek disclosure of such information, unless the person holding the privilege has waived the privilege. This includes information protected by the attorney-client privilege.



26

Consent Definition

A voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: *UT System Model Policy for Sexual Misconduct (2020)*

27

27

Incapacitation Definition

Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: *UT System Model Policy for Sexual Misconduct (2020)*

28

28

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

*If the answer to either of these questions is “**YES**,” consent was absent and the conduct is likely a violation of this Policy.*

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: UT System Model Policy for Sexual Misconduct (2020)

29

29

Implicit Bias:



- Your **role** as an appellate officer is:
 - **Neutral, impartial, & fair**
- Fairness & the **appearance of fair.**

Goal: To **listen** to both parties equally and that they both leave **feeling heard** by the appellate officer.



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

30

30

Implicit Bias (Cont.)

[T]he Department [of Education] ..cautions that a training approach that encourages Title IX personnel to “**believe**” one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate § 106.45(b)(1)(ii) precluding credibility determinations based on a party’s status as a complainant or respondent.



Implicit Bias (Cont.)

The Department takes no position on whether “start by believing” should be an approach adopted by non-Title IX personnel affiliated with a recipient, such as counselors who provide services to complainants or respondents. The Department wishes to emphasize that parties should be treated with equal dignity and respect by Title IX personnel, but doing so does not mean that either party is automatically “believed.” The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of “profiles” or “predictive behaviors” to particular cases. (Preamble, p. 836)



Tips to Avoid Bias

- Test to address any potential implicit bias.
 - What is the **essence** of potential policy violation?
 - Create **hypothetical** that includes that “essence.” Then flip or change the genders.
 - You must have **fair & consistent considerations**, regardless of gender.
- When making your decision: List out the evidence favorable to both sides to ensure **evidentiary support** (as opposed to bias).



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: Title IX Preamble (2020)

33

33

Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias** for CP & RP



Nobody gets a “head start.”



THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

Source: Title IX Regulations (2020)

34

Exclusion of Statements

Not submitting to cross-examination:

If a **party or witness** refuses to submit to any cross-examination questions during the hearing, the **hearing officer will not** rely on any statement of that party or witness, when reaching a responsibility determination.

The **hearing officer will not** draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer questions.



35

Possible Exclusions:

- Statements against interest by RP
- Statements made by CP
- Statements made by nurse as author of SANE exam
- Statements made by any person who does not attend hearing
- Emails/Texts



36

Possible Exclusion (Example)

- W1: Hey, how was the party last night?
- RP: I got too drunk. LOL.
- W1: Did you see CP?
- RP: Yeah, but I did something stupid. I pinched CP's butt.



37

Possible Exclusion (Example)

- W1: Hey, how was the party last night?
- RP: ~~I got too drunk. LOL.~~
- W1: Did you see CP?
- RP: ~~Yeah, but I did something stupid. I pinched CP's butt.~~



38

But, An Exception on Exclusions...

“A respondent’s alleged verbal conduct that itself constitutes the sexual harassment at issue is not the respondent’s ‘statement’ as that word is used [in the regulations] because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself.”

- OCR Blog, May 22, 2020



39

Exclusion Exception (Example)

- RP: If you go out with me, I’ll give you an A in the course.

Because this is the underlying conduct and it is not a “factual assertion to prove or disprove the allegations,” this remark may be considered by the hearing officer even if the RP does not submit to cross examination.



40

No Inference Based on Absence or Refusal



“[T]he decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”



41

Communications:



No Ex Parte Communications

- CC all parties (& advisors) on response (if emailed by one party)



42

Your Appellate Decision Letter:

Look at your draft with a **critical eye**. Pretend the person who will be most *unhappy* with your decision is in the room with you reading the draft with you. With each sentence or paragraph, consider:

“What would that person say?”

Then revise.



Appellate Decision Letter (Cont.)

Acknowledge parties' arguments.

Deal with issues **contrary** to your decision:

- If you don't, it looks like you didn't consider or hear the argument, that you weren't paying attention, or that the process is unfair.





Q & A

 THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

45

Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Assistant General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu

 THE UNIVERSITY of TEXAS SYSTEM
FOURTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
WWW.UTSYSTEM.EDU

46

46