

Title IX Coordinator or Its Deputy, Investigator, Decision-Maker, and Informal Resolution Facilitator Training

Why You Are Here

- Decision-Makers participate on the hearing panels for Title IX grievance procedures
- The Decision-Maker must review investigative reports and evaluate evidence, prepare for hearings, oversee hearings, ask questions of parties and witnesses, make relevancy rulings, and issue written determination of responsibility
- To effectively carry out each of these duties, Decision-Maker's must participate in trainings



Title IX Legal Overview

Title IX of the Education Amendments of 1972

20 U.S.C. § 1681, et seq.

“No person in the United States shall, based on sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Title IX Prohibited Conduct

Definition of Sexual Harassment

- “Sexual Harassment” means conduct **on the basis of sex** that satisfies one or more of the following:
 - **Quid Pro Quo:** An employee of FVI conditioning the provision of an aid, benefit, or service of FVI on an individual’s participation in unwelcome sexual conduct;
 - **Hostile Environment:** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to FVI’s Education Program or Activity; or
 - **Sexual Assault, Dating Violence, Domestic Violence, or Stalking.**

Equal Access to Education Programs and Activities

A decision for the Title IX Coordinator . . . not you.

Whether a reasonable person in the complainant's position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.

Examples:

- Skipping class to avoid a harasser,
- Decline in student's GPA,
- Skipping athletic training sessions, or
- Difficulty concentrating in class.

Denial of equal access to education programs and activities does not require a student to drop out of school, fail a class, have a panic attack, or otherwise reach a "breaking point," or exhibit specific trauma symptoms.

Education Program or Activity

On-Campus or Off-Campus

Another decision for the Title IX Coordinator . . .
not you.

- “Education Program or Activity” means locations, events, or circumstances over which FVI exercised substantial control over both the Respondent and the context in which the Sexual Harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by FVI.

Intersection with Clery Act as Amended by VAWA

Timely Warnings

- The Clery Act crimes include sexual assault, dating violence, domestic violence, or stalking.
- If there is a Clery crime that occurs on Clery geography that presents a serious and ongoing threat to the health or safety of students or employees, then FVI must issue a timely warning to the community.
- The timely warning does not contain the personally identifiable information of a student or employee but must contain details about the incident such as the location and allegations.

Clery Act

- Requires colleges to report crimes that occur “on campus”
- Requires schools to send timely warnings to the community when there are known risks to public safety
- Requires publication of annual security report
- Created additional training and educational requirements
- Enforced by U.S. Department of Education

Violence Against Women Act (VAWA) Reauthorization 2013

- Amended Clery Act to require reporting of domestic violence, dating violence, and stalking
- Prohibited retaliation
- Expanded training requirements
- Provided prescriptions related to certain defined terms:
 - Sexual assault
 - Domestic violence
 - Dating violence
 - Stalking

Major Title IX Decisions

- *Cannon v. University of Chicago*, 441 U.S. 677 (1979)
 - A private right of action exists under Title IX
- *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998)
 - A school is liable under Title IX if it has actual knowledge of sexual harassment but responds with deliberate indifference.
- *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)
 - Defining sexual harassment as unwelcome conduct on the basis of sex that is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”

2020 Title IX Regulations

- Promulgated on May 19, 2020
- Effective for complaints filed on or after August 14, 2020
- Defined hostile environment sexual harassment as “[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”
- Imposed “actual knowledge” and “deliberate indifference” notice/response standards from *Gebser/Davis*
- Allowed schools to address sexual harassment affecting its students or employees that fall outside Title IX jurisdiction in any manner the school chooses.

2020 Title IX Regulations

- No extraterritorial application
- Specified requirements of a grievance process
 - An institution needed only initiate a formal grievance process when a complainant submits a formal complaint
 - Mandated live hearing at postsecondary institutions
 - Permitted parties to cross examine each other and witnesses
 - Decision-maker must be present during the hearing
- Informal resolution permitted but not for allegations by a student against an employee

2020 Title IX Regulations

- Enhanced the role of party-advisors
 - Parties must be permitted to be accompanied by the advisor of their choice, who may be, but is not required to be an attorney
 - Advisors permitted to conduct cross-examination and ask all relevant questions
 - Institutions must appoint advisor for parties that fail to provide one themselves
- Mandated the provision of an appeal on three grounds



Prohibited Conduct

Title IX Prohibited Conduct

- *Quid Pro Quo* Harassment (Employee-Student)
- Sexual Harassment
- Sexual Assault
 - Rape
 - Statutory Rape
 - Sodomy
 - Sexual Assault with an Object
 - Criminal Sexual Contact
 - Incest
- Dating Violence
- Domestic Violence
- Stalking

Quid Pro Quo Sexual Harassment

Conduct where:

- An employee of FVI
- Conditions the provision of an aid, benefit, or service
- On a student's participation in
- Unwelcome sexual conduct
 - Determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a student equal access to FVI's education program or activity

Sexual Harassment

- Unwelcome conduct
- On the basis of sex
- That a reasonable person would determine is so
 - Severe;
 - Pervasive; ***and***
 - Objectively offensive
- That it effectively denies a person equal access to FVI's education program or activity
 - Includes conduct of a sexual nature and conduct based on sex or sex stereotyping

Sexual Assault

- A series of forcible and non-forcible sex offenses, as listed in Clery Act and VAWA.
- The consent standard for the offenses contemplated under sexual assault is “affirmative consent”
 - Note that this may be similar, but it is not identical, to criminal statutes.

Sexual Assault: Consent

“Consent” means knowing, voluntary and clear permission by word or action, to engage in mutually agreed upon sexual activity.

- Informed
 - Knowing
- Voluntary
 - Freely given
- Active
 - Through the demonstration of clear words or actions, a person has indicated permission to engage in mutually agree-upon sexual activity

Sexual Assault: Consent

Since individuals may experience the same interaction in different ways, it is the responsibility of each party to make certain that the other has Consented before engaging in the sexual activity.

For Consent to be valid, there must be a clear expression in words or actions that the other individual Consented to that specific sexual activity.

Sexual Assault: Consent

- Consent cannot be obtained by force, such as through the exertion of
 - Physical violence
 - Threats
 - Intimidation
 - Coercion
- A person who wants to engage in specific sexual activity is responsible for obtaining consent

Sexual Assault: Incapacity to Consent

- Lack of protest, silence, passivity, lack of resistance **does not equate** to consent
- Consent for one activity **does not equate** to consent for another or different activity
- Consent may be withdrawn
- Consent will be evaluated within the context of any relationship at issue

Sexual Assault: Incapacity to Consent

- A person cannot consent if he or she is unable to understand what is happening or is disoriented, helpless, asleep, or unconscious for any reason, including due to alcohol or other drugs.
- An individual who engages in sexual activity when the individual knows, or should know, that the other person is physically or mentally incapacitated has violated the Title IX Policy.
 - It is not an excuse that the individual initiating or furthering the sexual harassment was intoxicated and, therefore, did not realize the incapacity of the other.
- A person cannot consent if they are incapacitated due to a mental disability, voluntary physical restraint, and/or from the taking of incapacitating drugs.

MINORS CANNOT CONSENT

A person who is under
18 years of age
CANNOT CONSENT.

Sexual Assault: Rape

- Penetration, no matter how slight, of the vagina or anus with any body part or object
- Or oral penetration by a sex organ of another person,
- Without the Consent of the Complainant,
- Including instances where the Complainant is incapable of giving Consent because of age or because of temporary or permanent mental or physical incapacity.

Sexual Assault: Statutory Rape

- Sexual intercourse with a person who is under the statutory age for consent.

Sexual Assault: Sodomy

- Oral or anal sexual intercourse with another person,
- Without the Consent of the Complainant,
- Including instances where the Complainant is incapable of giving Consent because of age or because of temporary or permanent mental or physical incapacity.

Sexual Assault: With an Object

- To use an object or instrument
- To unlawfully penetrate, however slightly,
- The genital or anal opening of the body of another person,
- Without the Consent of the Complainant,
- Including instances where the Complainant is incapable of giving Consent because of age or because of temporary or permanent mental or physical incapacity.



Criminal Sexual Contact

The intentional touching of the clothed or unclothed body parts without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation. The forced touching by the victim of the actor's clothed or unclothed body parts, without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation. This offense includes instances where the victim is incapable of giving consent because of age or incapacity due to temporary or permanent mental or physical impairment or intoxication for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

Sexual Assault: Incest

- Sexual intercourse
- Between persons who are related to each other
- Within the degrees wherein marriage is prohibited by law.

Dating Violence

- “Dating Violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant.
- Considerations as existence of an intimate or romantic social relationship
 - the length of the relationship,
 - the type of relationship, and
 - the frequency of interaction between the persons involved in the relationship.

Dating Violence

- For the purposes of this definition, Dating Violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating Violence does not include acts covered under the definition of Domestic Violence.
- Any incident meeting the definition of Dating Violence is considered a crime for the purposes of Clery Act reporting.



Domestic Violence

“Domestic Violence” means a felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the Complainant
- By a person with whom the Complainant shares a child in common
- By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner
- By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred;
- By any other person against an adult or youth Complainant who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
- Any incident meeting the definition of Domestic Violence is considered a crime for the purposes of Clery Act reporting

Sex-Based Stalking

“Stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person’s safety or the safety of others; or suffer substantial emotional distress. For the purposes of this definition:

- Course of conduct means two or more acts, including, but not limited to, acts in which the 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 Complainant.
- Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.
- Any incident meeting the definition of Stalking is considered a crime for the purposes of Clery Act reporting.



Appointment of the Decision-Maker

Qualifications for Appointment

- The Decision-Maker must be impartial
- The Decision-Maker must be free from a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent
- The Decision-Maker **cannot** be the Investigator assigned to the case
- The Decision-Maker **cannot** be the Title IX Coordinator or its Deputy

Training

- The , Title IX Deputy, Investigator, Decision-Maker, and Informal Resolution Facilitator must receive training on
 - Issues related to Title IX Prohibited Conduct
 - Scope of FVI's education program or activity
 - Relevancy
 - How to conduct an investigation and grievance process that is fair and impartial, including information regarding hearings, appeals, and informal resolution
 - Avoiding prejudice of the facts at issue
 - Conflicts of interest and bias



Title IX Reporting Process

Mandatory Reporters for CPS

Children – Persons under the age of 18

All employees of FVI MUST REPORT child abuse or neglect, including sexual abuse or sexual assault within 24 hours to:

Child Protective Services

FVI's Title IX Coordinator or its Deputy

If the child suffered serious physical abuse or sexual abuse or sexual assault, immediately report to the State Police – call 911.

No Time Limitation on Reports

- You should IMMEDIATELY report violations of the Title IX Policy.
- There is no time limitation on the filing of reports.
- If the accused person is no longer subject to FVI's jurisdiction or significant time has passed since the alleged incident, FVI's ability to investigate may be more limited.

FVI's Equitable Response

- If FVI has actual knowledge of sexual harassment in its education program or activity against a person in the United States, FVI shall respond promptly in a manner that is not deliberately indifferent.
 - **Offer Supportive Measures to Complainant and**
 - **Provide a Grievance Process** Prior to Imposing any Sanctions on the Respondent

What Happens After a Title IX Report is Made?

Title IX Coordinator or its Deputy will discuss availability of *Supportive Measures*

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Designed to restore or preserve equal access to FVI's education program or activity without unreasonably burdening the other party, including measures designed to:

- Protect the safety of all parties or FVI's educational environment or
- Deter sexual harassment.

What Happens After a Title IX Report is Made?

Supportive Measures

Supportive Measures are confidential to the extent possible.

The Title IX Coordinator or its Deputy is responsible for coordinating effective implementation of supportive measures.

- Examples: Counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar measures.

Title IX Coordinator or its Deputy's Role

- Discuss the availability of supportive measures,
- Consider Complainant's wishes with respect to supportive measures,
- Inform the complainant of the availability of supportive measures *with or without* the filing of a formal complaint, and
- Explain to the complainant the process for filing a formal complaint.



Title IX Grievance Process

Individuals Involved in the Title IX Process

- **Complainant**

- An individual who is reported to be the subject of conduct that could constitute Prohibited Conduct regardless of whether such person makes a report or files a complaint

- **Respondent**

- Any individual who has been reported to be the perpetrator of conduct that could constitute Prohibited Conduct

- **Title IX Coordinator or its Deputy**

- Oversees the whole process and ensures the investigators, decisionmakers, and others involved are properly trained
- Ensures advisors are available for the live hearing

Individuals Involved in the Title IX Process

- **Investigator**

- Gathers all relevant evidence to organize into a report

- **Decision-Makers**

- Following the hearing, the decision-maker(s) will consider all the evidence and make a determination whether the Respondent has violated FVI's Title IX policies

- **Advisors**

- Both parties must be accompanied by an advisor at the live hearing

- **Appeals Officer**

- Reviews the decision-maker's determination

Resolution Options

- **Informal Resolution**

- At any point prior to reaching a determination regarding responsibility, FVI may facilitate an informal resolution process such as a mediation.
- Parties must provide voluntary, written consent.
- Informal resolution is NOT available to resolve allegations that an employee sexually harassed a student.

- **Formal Complaint**

- **Filed by a complainant or signed by the Title IX Coordinator or its Deputy** alleging Prohibited Conduct and requesting that FVI investigate the allegation.

- **Supportive Measures**

- Designed to address student's safety and well being, and to preserve or restore equal access to educational opportunities without unreasonably burdening the other party

Resolution Options: Informal Resolution

- Parties may request Informal Resolution **at any point** after the Notice of Allegations is received and before the commencement of the Live Hearing
- Subject to the Title IX Coordinator or its Deputy's approval
 - FVI has discretion to determine if Informal Resolution is appropriate, considering the allegations in the Formal Complaint
 - At any point prior to resolution, the Title IX Coordinator may terminate the Informal Resolution, at which point Formal Resolution resumes
- At any point prior to the resolution of the Informal Resolution, either party may **withdraw** from the Informal Resolution, at which point Formal Resolution will commence or resume
- FVI has discretion to determine the type of Informal Resolution that may be appropriate

Resolution Options: Formal Complaint

- **The Formal Complaint commences the process for:**
 - Investigation
 - Live Hearing with cross-examination
 - Appeal
- **The Formal Complaint must be . . .**
 - Document Filed by a Complainant or Signed by the Title IX Coordinator or its Deputy
 - “Filed by a complainant” means a document or electronic submission (such as by e-mail) that contains the Complainant’s physical or digital signature, or otherwise indicates that the Complainant is the person filing the Formal Complaint
 - Alleged Prohibited Conduct against the Respondent
 - Request that FVI investigate the allegation

Resolution Options: Acceptance of Responsibility

- The Respondent may, at any time, elect to resolve the Formal Resolution process by accepting responsibility for the Prohibited Conduct
- The Title IX Coordinator or its Deputy will either refer the matter to a Decision-Maker to conduct a hearing or to Informal Resolution, at the parties' requests
- If the Respondent (1) subsequently retracts this acceptance; (2) declines to accept responsibility under cross-examination during a Hearing; or (3) Informal Resolution is unsuccessful, Formal Resolution will be resumed

Resolution Options: Supportive Measures

- No formal complaint necessary
- Non-disciplinary, non-punitive individualized services
- Offered to complainant before or after the filing of a Formal Complaint **or** where no Formal Complaint has been filed.
- Offered to respondent after a Formal Complaint has been filed
- Coordinated by the Title IX Coordinator or its Deputy

Steps in the Grievance Process

1. Notice of Allegations
2. Investigation & Report
3. Live Hearing
4. Sanctions
5. Appeal

Step 1: Notice of Allegations

- Upon receipt of a Formal Complaint, the Title IX Coordinator or its Deputy will provide a Notice of Allegations to both parties.
- The Notice of Allegations contains
 - Notice of the grievance process
 - Notice of the alleged harm or Prohibited Conduct
 - Statement that the Respondent is presumed not responsible for the alleged conduct.
 - Notice that each party may have an advisor of their choice.
 - Parties will be given equal opportunities to inspect and review evidence.
 - FVI's policies prohibiting knowingly making false statements.
 - FVI's prohibition against retaliation.

Step 2: Investigation

- The Title IX Coordinator or its Deputy will appoint a Title IX Investigator, who will conduct a prompt, thorough, fair, and impartial investigation
- **Role of the Investigator**
 - Conduct a prompt, thorough, fair, and impartial investigation
 - Does not have the burden of proof to reach a determination regarding responsibility
 - Review all information gathered or provided by the parties
 - Determine the relevance of the information
- Investigators **do not** make findings

Step 2: Investigation

Presumption of Non-Responsibility

- The investigation is a neutral fact-gathering process.
- The Respondent is presumed to be not responsible
 - This presumption may be overcome only where the Decision Maker concludes that there is sufficient evidence, by a preponderance of the evidence, to support a finding that the Respondent violated FVI's policy on sexual misconduct
 - This is FVI's burden, not the Complainant's

Step 2: Investigation

Equal Opportunity to Present Evidence

- The parties will be given equal opportunities to:
 - Review evidence obtained in the investigation
 - Be heard
 - Present relevant evidence
 - Identify relevant facts and expert witnesses
- Whatever comes out of the investigation process is what the Decision-Maker receives

From Investigation to Draft Report

Title IX Coordinator designates investigator(s)



Investigator seeks information and statements from parties and witnesses, reviews documents and records, and collects other evidence (e.g., site visits, FVI records, experts, law enforcement)



Investigator transmits draft investigation report to parties

- Will include all information collected not protected by privilege
- Will ***not*** recommend a finding



Parties have 10 business days to respond with comments, identify additional evidence, and/or request further investigation on particular topics

From Review of Parties' Responses to Final Investigation Report

Investigator reviews responses from parties and identifies additional investigative steps



Investigator prepares final investigation report

- The final investigation report includes a recommended finding
- The recommendation is non-binding on the hearing decision-maker



Investigator transmits the draft report to the parties, and includes initial information about the hearing process.



Parties may submit responses within 10 days

How an Investigator Determines Relevance

Investigator has the discretion to determine the relevance of any proffered evidence, and to include or exclude certain types of evidence

In general, will not consider statements of personal opinion, rather than direct observations or reasonable inferences from the facts, or statements as to any party's general reputation for a character trait

Notwithstanding the investigator's discretion, all collected information—including irrelevant information—is shared with parties and decision-maker, and may be considered at the hearing

How an Investigator Determines Relevance

Prior or subsequent conduct may be considered in determining pattern, knowledge, intent, motive, or absence of mistake

If prior or subsequent conduct will be considered, the investigator will make a determination during investigation and inform the parties

Prior sexual history or sexual predisposition of a party will **never** be used to prove character or reputation. It is **only** considered to prove

- Someone other than Respondent committed the conduct
- Consent in light of specific incidents of prior sexual history between the parties

Step 2: Investigation

Impact and Mitigation Statements

- After the Final Investigation Report is sent to the parties, the parties may submit an impact or mitigation statement to the Title IX Coordinator or its Deputy
- Impact statements may contain
 - Impact of the Prohibited Conduct on the Complainant
 - Preference about the sanctions to be imposed
 - Any other information relevant to remedies and sanctions
- Mitigation statements may contain factors the Respondent believes should mitigate or otherwise be considered in determining remedies or sanctions
- No witnesses or witness statements regarding impact or mitigation are allowed without the approval of the Title IX Coordinator or its Deputy

Step 3: Live Hearing

- The hearing is an opportunity for the parties to go before the Decision-Maker to address issues relevant to the determination of responsibility
- The Title IX Coordinator or its Deputy will appoint a Decision-Maker from a pool of trained/experienced individuals
- The live hearing can be conducted in a physical hearing room or virtually with real-time audio and video participation
 - The presumption of non-responsibility still applies until the Decision-Maker concludes that there is sufficient evidence, by a preponderance of the evidence, to support a finding of a violation
- The hearing will still proceed even if a party refuses to participate. The party may not later use their refusal to participate as a ground for appealing the decision.

A Roadmap of the Hearing from Start to Finish

The Title IX Coordinator appoints a Decision-Maker



The Decision-Maker receives the Final Investigation Report and all evidence that the Investigator collected and provided to the parties.



(OPTIONAL) The Decision-Maker may conduct a pre-hearing conference to discuss preliminary matters related to the hearing



The Decision-Maker conducts the hearing

A Roadmap of the Hearing from Start to Finish



The Decision-Maker evaluates all relevant evidence



The Decision-Maker will simultaneously issue a Written Determination to both parties.



- Sufficient evidence = Decision-Maker determines sanctions
- Insufficient evidence = Decision-Maker and Title IX Coordinator may implement supportive measures



Both parties have the right to appeal the Written Determination.

Typical Hearing Format

Brief opening remarks by the parties



The Decision-Maker conducts direct examination of the parties, Investigator, and any witnesses



The parties' advisors conduct cross-examination of the parties, Investigator, and any witnesses



Brief concluding remarks by the parties

The Role of the Decision-Maker

- Request the attendance of the parties and any witnesses that the Decision-Maker intends to question, including the Investigator.
- If a party or witness does not participate in the live hearing or refuses to answer questions, their advisor may still appear and may still ask questions of the other party and any witnesses in attendance. If the advisor also does not appear, FVI will appoint an advisor to ask questions.

The Role of the Decision-Maker

- The Decision-Maker may convene a pre-hearing meeting to discuss preliminary matters related to the hearing and, if possible, to discuss potential resolution
 - Must provide advance notice to the parties
- Ensure that parties have advisors. A party may not proceed at Hearing without an advisor.
 - If a party's advisor will not conduct cross-examination, FVI will appoint an advisor who will do so, regardless of the participation or non-participation of the party at the Hearing
- Only the Decision-Maker may ask questions on direct examination about findings of fact, conclusions regarding application of policy to facts, determination of responsibility, and sanctions

The Role of the Decision-Maker

- Make relevancy determinations as to questions asked of parties, the Investigator, and witnesses at the Hearing
 - Before the parties or any witness answers a cross-examination or other question, the Decision-Maker must
 - Determine whether the question is relevant and
 - Explain any decision to exclude a question as not relevant.
- Apply a **preponderance of the evidence standard** to make a determination of responsibility
- Objectively evaluate all relevant non-excluded evidence to determine whether there is sufficient evidence to support a finding of responsibility on the part of the Respondent for each allegation under investigation
- Issue a Written Determination of findings and recommendations

Rules of Order and Decorum

- The Decision-Maker has the sole discretion to determine if an individual's actions during a Hearing are disruptive or violate the Rules of Order and Decorum
- Upon a second or further violation, the Decision-Maker has the discretion to remove the offending person or allow them to continue participating in the hearing or process
- The Rules apply equally to both parties, any witnesses, advisors, and other participants
- Hearing participants are prohibited from
 - Interrupting other participants
 - Using profanity directed toward another participant
 - Objectively offensive or aggressive actions or gestures
 - Harassment of other participants
 - Yelling, screaming, or badgering
 - Talking action reasonably seen as intended to intimidate a participant or meaningfully modify a person's participation in the process
 - Engaging in any other behavior to deliberately disrupt the hearing process

Guidelines for Asking Questions

▪ Direct Examination

- Only the Decision-Maker conducts direct examination
- The Decision-Maker may ask questions about findings of fact, conclusions regarding application of policy to facts, determination of responsibility, and sanctions

▪ Cross Examination

- Only a party's advisor may cross-examine the parties or any witness
- Cross-examination must be conducted directly, orally, and in real time
- An advisor may ask all relevant questions and follow-up questions designed to test the veracity and accuracy of each party or witness' statements, including questions challenging credibility

Guidelines for Asking Questions

- Use open-ended questions
- Listen carefully to answers to identify follow up questions
- Close information gaps
- Ask clarifying questions when answers are vague
- Ask questions to obtain necessary information (not just to satisfy your curiosity)
- Understand the information source to determine, for example, if the information is personal knowledge or hearsay
- Be careful about relying on the witness' or parties' demeanor in answering questions

Guidelines for Asking Questions

- **Be sensitive about trauma-informed responses**

- The experience of sexual assault or sexual harassment may impact memory, making a person slow to recall information or causing the person to struggle with disorganized, fragmented, or lost memory
- Survivors of sexual trauma may also experience feelings of victim-blaming, guilt, anxiety, distrust, or depression
- Sensory questions may assist witnesses with memory recall
 - For example, ask what the person could see, smell, taste, feel, or hear

Relevance Considerations

- The Decision-Maker is responsible for making relevancy determinations as to questions asked at the Hearing
 - Before the parties or any witness answers a cross-examination or other question, the Decision-Maker must determine whether the question is relevant
- Decision Maker should apply logic and common sense, rather than rules of evidence
- Only relevant cross-examination and other questions may be asked of a party or witness
- Where a question is relevant, but includes a party's character or prior bad acts, the Decision-Maker cannot exclude or refuse to consider the relevant evidence, but may objectively evaluate that evidence by analyzing the weight or credibility that should be ascribed to that statement

Relevance Considerations

- The following are **irrelevant**:
 - Information protected by a legally recognized privilege
 - Any party's medical, psychological, and similar records unless the party has given voluntary, written consent
 - Statements by a party or witness who did not submit to cross-examination
 - Duplicative questions
 - Questions that assume facts
 - Misleading questions

Relevance Considerations

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

Relevance Determinations

- The Decision-Maker has the discretion to determine the specific process for making objections to the relevance of questions posed in a hearing.
- Decision Maker is not required to give a lengthy or complicated explanation of a relevance determination.
- Decision Maker may also revise or supplement any explanation of a relevance determination after the conclusion of the hearing.
- When an otherwise relevant question is asked in a manner which violates the Rules of Order and Decorum, Decision Maker may provide an opportunity for the advisor to re-ask the question at issue in a respectful, non-abusive fashion.

Relevance Determinations

A party's advisor will ask a question of the other party or a witness



The Decision-Maker will state whether the question is deemed relevant or irrelevant



At the discretion of the Decision-Maker, the Decision-Maker may allow the parties to briefly address the merits of any relevance determination.

Objections to relevance determinations must be addressed in a concise and respectful fashion



The Decision-Maker will make a final decision regarding relevance



If relevant, the Decision-Maker will direct the party or witness to answer the question posed

Step 3: Live Hearing

The Decision Maker may consider all relevant evidence.

What Evidence Can A Decision-Maker Consider?

- The Decision-Maker **cannot** consider any information gathered during a failed Informal Resolution, unless that evidence is independently discovered during the Formal Resolution
- New evidence and/or new witnesses will **not** be considered, unless good cause is shown
 - For good cause, the Decision-Maker may agree to the admission of new evidence at the hearing or the Decision-Maker may delay the Hearing and instruct that the investigation be re-opened
- Only consider any impact or mitigation statements submitted by the parties during the investigation process ***if a determination of sanctions is necessary***

After Hearing, the Decision-Maker must . . .

EVALUATE ALL EVIDENCE independently

Must not give deference to any recommended findings of fact, credibility, relevancy or responsibility statements in the Final Investigation Report

Identify appropriate SANCTIONS AND REMEDIES

May impose one or more disciplinary sanctions on the Respondent and/or provide remedies to the Complainant

Issue a WRITTEN DETERMINATION

This is sent simultaneously to both parties, with a copy to the Title IX Coordinator

Written Determination

- Identification of the allegations potentially constituting Prohibited Conduct (and violation of any other University policy, if applicable)
- Description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearings held
- Findings of fact supporting the determination
- Conclusions regarding the application of the Policy (and, if applicable, other policies) to the facts
- Description of any impact or mitigation statements, or other information obtained and/or considered in determining the appropriate disciplinary sanctions and/or remedies
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions imposed on Respondent, and whether remedies will be provided by the University to the Complainant
- The University's procedures and permissible bases for the parties to appeal.

The Decision-Maker's final determination may be to . . .

REMAND the matter to the Title IX Coordinator

if the Decision-Maker finds that additional investigative steps are needed

Determine the appropriate SANCTIONS and/or REMEDIES

if the Decision-Maker finds sufficient evidence to support a finding of responsibility

Determine whether SUPPORTIVE MEASURES are appropriate

if the Decision-Maker finds insufficient evidence to support a finding of responsibility

Recommend to the Title IX Coordinator the DISMISSAL of the case

Mandatory dismissal is proper for certain cases

Dismissal Procedure

Title IX Coordinator determines when dismissal is required or appropriate and sends a **DISMISSAL LETTER**

The Dismissal Letter should contain the written notice of dismissal, the reasons for the dismissal, and an explanation of the appeals process

FVI may dismiss under the Title IX grievance process and take action under the Student Conduct procedures

Both parties have the right to appeal the dismissal

Mandatory Dismissal is Required if the Alleged Conduct, Even if Proved . . .

Would not constitute Title IX Prohibited Conduct;

Did not occur in FVI's education program or activity;

Did not occur against a person in the United States; or

The Complainant was not participating in or attempting to participate in a FVI education or activity at the time the Formal Complaint was filed.

Discretionary Dismissal is Proper if . . .

Complainant notifies the Title IX Coordinator that they would like to withdraw the Formal Complaint or any allegations;

The Respondent is no longer enrolled in or employed by FVI

Specific circumstances prevent FVI from gathering evidence sufficient to reach a determination, such as delay in making the Formal Complaint or the Complainant stops participating in the process

Step 4: Sanctions

- The Decision-Maker may impose one or more disciplinary sanctions on the Respondent and/or provide remedies to the Complainant
- Sanctions and remedies are designed to eliminate the occurrence or recurrence of Prohibited Conduct as well as to remedy its effects, while supporting FVI's educational mission and legal obligations
- Remedies are designed to restore or preserve equal access to FVI's education program or activity

Step 4: Sanctions

In determining sanctions, the Decision-Maker may consider . . .

- The nature of the conduct
- The impact of the conduct on the Complainant or the FVI community
- Prior misconduct by the Respondent, including prior discipline, history at FVI and elsewhere, and any criminal convictions
- Any expression of remorse or acceptance of responsibility
- Protection of the FVI community
- The necessity of any specific action to eliminate the Prohibited Conduct, prevent its recurrence, and remedy its effects on the Complainant or other members of the FVI community
- Any mitigating, aggravating, or compelling circumstances in order to reach a just and appropriate resolution
- Restorative outcomes that allow a Respondent to learn about the impact of the behavior and how to prevent or change the behavior

Step 4: Sanctions

- Sample sanctions in students' cases
 - Admonition
 - Warning
 - Disciplinary Probation
 - Restitution
 - Suspension
 - Expulsion

Step 4: Sanctions

- Sample sanctions in employees' cases
 - Discussion
 - Verbal Warning
 - Written Warning
 - Suspension
 - Termination of Employment

Step 4: Remedies

- Sample remedies
 - No-contact directive
 - Reimbursement for counseling/medical expenses
 - Academic/housing/employment modifications
 - Monitoring, supervision, security at particular locations/activities
 - Education/training
 - Restorative remedies
 - Remedial and proactive measures

Step 5: Appeal

- Both parties have the right to appeal the Written Determination
- **Bases for appeal**
 - Procedural irregularity affected the outcome of the Formal Complaint
 - New evidence not reasonably available
 - Bias or actual conflict of interest

Possible Outcomes of an Appeal

Appeal Denied

The Appellate Officer issues a Final Outcome Letter

- The Decision-Maker's determination regarding responsibility becomes final.

Appeal Granted

Because of procedural irregularity that affected outcome

- The matter may be remanded for further action, depending on the nature of the procedural error.

Appeal Granted


Because of discovery of new evidence that affected outcome

- The matter may be returned to the Decision-Maker for reconsideration of the determination considering the new evidence. Alternatively, the matter may be returned to the Investigator to re-open the investigation.

Appeal Granted

Because of bias or conflict of interest that affected outcome

- The matter may be remanded for further action, depending on the particular finding of bias or conflict of interest.



Bias, Fairness, Impartiality, and Conflicts

The Basics

- Treat parties fairly by making all rights and opportunities available to the parties on equal terms
- Be professional
 - Maintain a calm, appropriate, and polite demeanor
 - Maintain balance in your approach with each party
 - Maintain appropriate sensitivity to the presentation of difficult information
 - Be mindful of your non-verbal communication
- Be prepared
 - Ensure the process complies with FVI's Grievance Process/Procedures
 - Review all materials and policies/procedures

Review Evidence Fairly

- Evaluate all relevant evidence objectively
- Consider both inculpatory and exculpatory evidence
- Apply evidentiary rulings equally
- Ask these questions when evaluating evidence
 - Is the information relevant?
 - Is the information credible?
 - Is the information convincing?

Avoid Bias and Prejudgment

- Avoid assumptions as to how a person “should” react
- Avoid questions that imply a value judgment
- Avoid putting one’s self in the shoes of the Complainant or Respondent
- Avoid sex stereotypes, such as seeing men as perpetrators and women as victims
- Do not allow emotion to impact fair and impartial fact-finding

Factors Affecting Credibility Evaluations

- The ability of the speaker to perceive the event
- The power to perceive the event
- The capacity to recall what was perceived
- The effect that the emotional component of the allegations may have on the parties
- Context and history of relationships
- Did the witness have any bias, prejudice, interest in the outcome that could impact his/her statement?
- Demeanor
- Detail
- Consider inherent plausibility of statements in context of known information
- Other corroboration
- Common sense approach

If you see something, say something

Report Immediately to:

Title IX Coordinator or its Deputy

Confidential Resources

- Counseling Center
- Employee Assistance Program

External Resources



QUESTIONS OR COMMENTS?