

Title IX Hearing Officer/ Decision-Maker Training

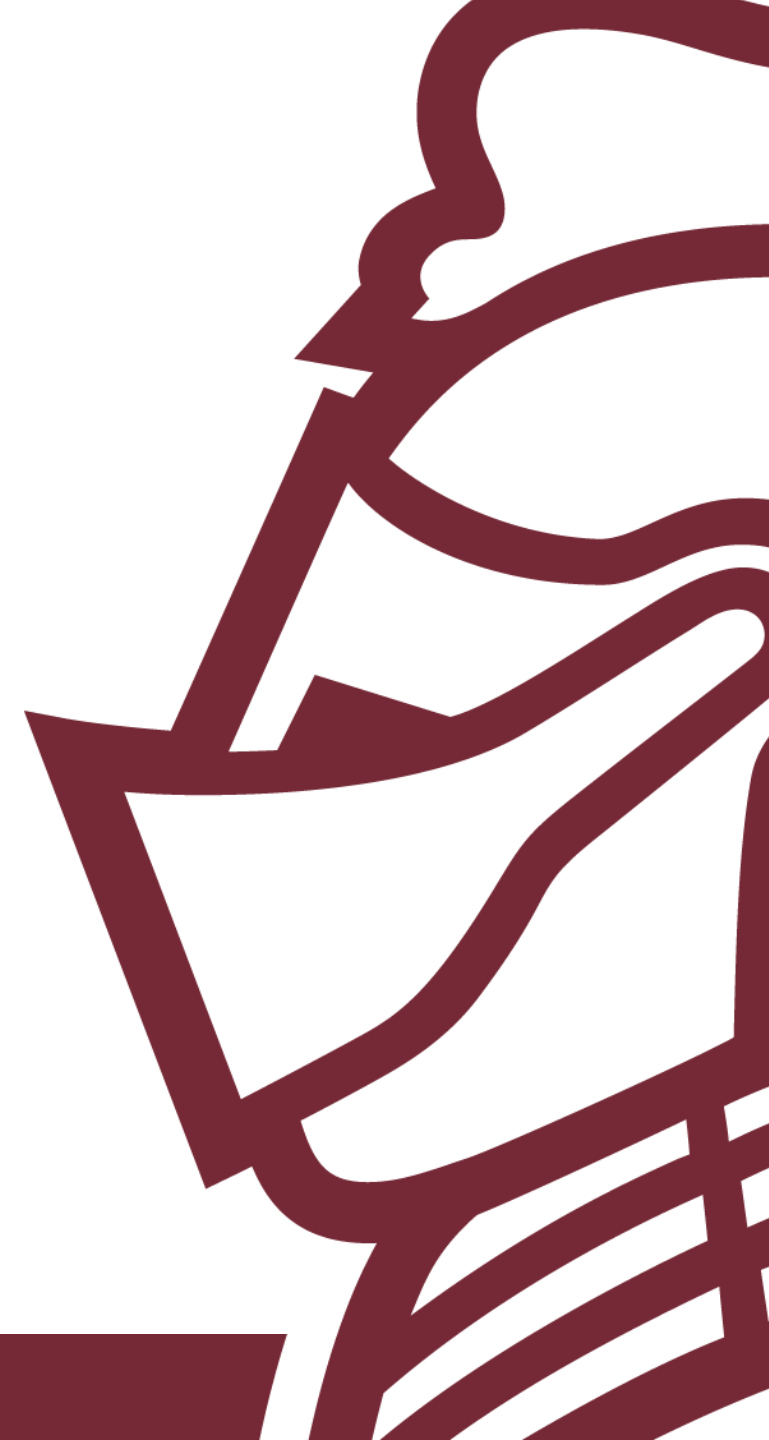
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Content Advisory

This training will address difficult topics including sexual violence, harassment, and discrimination. The content may be triggering and you are welcome to take a break if needed.

Offensive or graphic language, including slang and profanity, may be used to illustrate issues and scenarios that arise in the Title IX realm.



Agenda

- Legal Framework
- Overview of Title IX Team Roles
- Title IX Policy Overview
- Jurisdiction and Definitions
- Title IX Process
- Bias, Conflict of Interest, and Recusal
- Preparing for a Hearing: Evidence, Burden of Proof, etc.
- Hearings
- Decision-Making
- Notice of Outcome

Legal Framework and Overview



Title IX: From 37 Words to Hundreds of Pages

No person in the United States shall, on the basis of 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.



Legal Framework

- Actual Knowledge: Any official with authority to institute corrective measures receives notice of sexual harassment occurring in the University's education program or activity within the United States.
 - Triggers obligations
- Deliberate Indifference: a response that is clearly unreasonable in light of the known circumstances
- Violence Against Women Act
- 6th Circuit precedent



Due Process

- Procedural v. substantive due process
- Court v. University
- Specific NOIA
- Historically Respondent-focused, but also applies to Complainants
- Presumption of not responsible
- Parties discussing cases
- Burden of proof
- Right to Advisor



Title IX Team Roles

- Chief Title IX Officer/Title IX Coordinator
- Deputy Title IX Coordinators
- Investigators
- Hearing Officers/Decision-Makers
- Appeal Officers
- Alternate Resolution Facilitators
- Advisors



Title IX Overview

Bellarmino's Sexual Discrimination and Misconduct Policy prohibits:

- Discrimination on the basis of sex, sexual orientation, gender identity, gender expression, pregnancy/parenting status
- Sexual harassment
- Sexual assault
- Domestic/Dating violence
- Stalking
- Sexual exploitation



Title IX Report Intake and Response

The Title IX Office receives reports from mandatory reporters, friends, peers, and directly from students and employees.

Chief Title IX Officer or Deputy will email the student or employee impacted by the alleged conduct. This email will include resources and an invitation to meet.

They are not obligated to meet, but if they choose to do so the meeting can take place over Teams, Desiree's office, or a place of their choosing on campus. They can bring a friend or support person with them.

Immediate safety concerns are addressed. Resources will be provided. Resolution options will be discussed (if they are ready). A follow up email will be sent with a summary of discussion, resources, and resolution options.

Follow up / Check in



Title IX Intake and Response

Chief Title IX Officer or Deputy Coordinator will conduct an initial inquiry:

- Determination of risk
- Collection of available information
- Jurisdiction/Dismissal
- Retaliation



Resolution Options

Supportive Measures

- Academic adjustments
- Change to room/residence hall assignment
- Security escort, other safety planning
- No contact order
- Campus ban
- Referral to support services
- Assistance reporting to law enforcement or seeking order of protection

Formal Complaint Filed

1. Alternative Resolution
2. Formal Grievance Process

Jurisdiction and Definitions



Jurisdiction

- Title IX applies to applicable behavior that is perpetrated against someone who is participating in or attempting to participate in the University's educational program or activity in the United States.
- Educational program or activity means locations, event, or circumstances over which the University exercises **substantial control**.
- Assessment is completed by CTIXO when a formal complaint is filed, prior to a NOIA being issued.
- Complaints must be dismissed when the alleged conduct would not constitute a qualifying act or the conduct does not fall within Title IX's jurisdiction.

Can be referred to other processes for resolution.



General Definitions

- Consent: permission that is clear, knowing, voluntary, and expressed prior to engaging in and during a sexual act.
- Education program or activity: locations, events, or circumstances where Bellarmine University exercises substantial control over both the Respondent and the context in which the sexual harassment or discrimination occurs and also includes any building owned or controlled by a student organization that is officially recognized by Bellarmine University.
- Official with authority: an employee of Bellarmine University explicitly vested with the responsibility to implement corrective measures for harassment, discrimination, and/or retaliation on behalf of Bellarmine University.



Sexual Harassment Definitions

- Quid Pro Quo: An employee conditioning University educational benefits, aids, or services on participation in unwelcome sexual conduct
- Unwelcome Conduct: Conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity
 - If true, is it SPOO?
 - Reasonable person standard
 - “Severe” is based on the circumstances.
 - Physical or verbal?
 - Ability for Complainant to escape
 - Threats, embarrassment, humiliation?
 - “Pervasive” is also circumstantial.
 - Widespread, open, public
 - Reputation
 - Frequency, intensity, regularity, and duration of conduct
 - Unreasonable interference with school or job
- “Objectively offensive” is something you know when you see.



Sexual Assault Definitions (Forcible)

- Forcible sexual acts directed toward another person without their consent. These include:
- **Rape (includes former definitions of sexual assault with an object, sodomy)**
- **Sexual Contact (formerly known as fondling)**



Sexual Assault Definitions (Non-forcible)

- Non-forcible sexual acts directed toward another person without their consent. These include:
- **Incest**
- **Statutory Rape**
- **Dating Violence**
- **Domestic Violence**
- **Stalking**

Title IX Process



Formal Grievance Process





Formal Complaint, Assigning an Investigator and NOIA

- Cannot be anonymous, must be signed
- Process takes at least 60-90 days
- Investigators are vetted for capacity, comfort, and conflicts before assignment
- NOIA with specificity is issued to both parties



Investigation

- Investigators interview parties and witnesses, and collect other evidence as available.
- Directly related evidence review period
 - Additional investigation if needed or requested
- Final Investigation Report
 - At least 10 days prior to hearing



Hearing

- Hearing Officer or Panel with Chair
- Notice must be given 10 business days in advance
- Questioning investigators
- Questioning and cross-examination of parties
- Closing statements



Written Determination-Notice of Outcome

- Decided by majority vote
- Based on a preponderance of the evidence standard
- Must have a rationale
- If the respondent is found responsible, appropriate sanctions should be applied.



Appeals

- Grounds for appeal are limited:
 - Procedural irregularity that affected the outcome;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - The Chief Title IX Officer, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent that affected the outcome of the matter; or
 - Sanction Proportionality – when either party does not agree that the level of sanctions given match the level of severity of the behavior for which the Respondent was found responsible. There must be a finding of responsibility for sanction proportionality to be considered.

Bias, Conflict of Interest, and Recusal



Mandates and Considerations

- Regulations require impartial processes with fair resolutions.
- Regulations prohibit conflicts of interest and bias with Coordinators, Investigators, and Decision-Makers.
- Simply knowing a party or having previously disciplined them is typically not sufficient alone to create a conflict if objectivity is not compromised.
 - TIXC's preference is to avoid this anyway due to perception
- You can request your own recusal or a party may request it. Final determination on recusal is made by TIXC.



Bias and Prejudice

- Bias
 - Implicit or Explicit
 - Preference or tendency to like or dislike
 - Formed from stereotypes, cultural experiences, and expectations of the people around you
- Prejudice
 - Pre-conceived opinions that are not based on fact, reason, or actual experience
 - Biases and prejudices can be for or against entire groups or specific people



Common Biases in Title IX

- Gender Bias
 - Showing favoritism toward a gender identity/expression
- Racial Bias
 - Showing favoritism toward one race over another or associating negative traits to specific races
- Confirmation Bias
 - Interpreting ambiguous evidence to support one's own opinions/position
- Affinity Bias
 - Unconscious tendency to gravitate toward those who have similar identities to us

Preparing for the Hearing



Reviewing Case File and Meetings

- NOIA
- Policies
- Investigation Report
- Pre-hearing Conferences
 - Answer questions about the hearing and procedures, including logistics, decorum, and the role of the Advisors
 - Discuss witnesses and party participation
 - Pre-screen questions about relevancy



Preparing Questions

- Focus on what matters to proving the violation
- Use trauma-informed and culturally competent practices
 - Trauma responses vary and can be physical, emotional, and psychological
 - Choose your words carefully—what you say matters
 - Do not define anyone's experience
 - Understand varying backgrounds and that impact on an individual's reactions—failure to report to police or pursue legal remedies based on distrust, etc.



Questioning v. Interrogating

- Questions should be conversational and elicit information in a non-accusatory manner.
- Your goals during the hearing will be to learn all relevant facts, establish a timeline, and understand each individual's perception of the events.
- You should never aim to make a party or witness feel intimidated.

Evidence



Evidentiary Standard and Burden of Proof

- Bellarmine utilizes the preponderance of the evidence standard.
 - More likely than not that a policy violation occurred; 50.01%
 - Slightest tip of the scales of justice
- The University bears the burden of proving a policy violation
 - Difference between this and court



Relevance

- Decision-makers can only rely on **relevant** evidence.
- Evidence is relevant if it tends to make a fact at issue more or less likely to be true.
- Relevant evidence is not the same as directly related evidence.
- Relevancy Rulings
 - A relevancy ruling must be made for each question before it is answered. You can do this as you wish, but TIXC suggests a statement at the outset of the hearing providing that you will implicitly make a determination of each question, and unless you say the question is irrelevant, it is deemed relevant.
 - You must provide a rationale for all determinations of irrelevancy.
 - Allow short arguments regarding relevancy



Lack of Restrictions

- **All** relevant evidence must be considered. Court rules of evidence do not apply.
 - Documents, hearsay, etc.
- The University cannot restrict parties from discussing the case with others or impede their ability to gather evidence.
- All parties must have an equal opportunity to present witnesses and evidence, and to inspect all evidence gathered.
- The University cannot impose a limit on the types or amount of evidence offered.



Types of Evidence

- Interviews/Summaries
- Direct testimony
- Physical evidence
- Digital evidence
- Records maintained by the University
- Law enforcement and other records
- **All relevant evidence must be objectively evaluated and considered**, but you must use your discretion in giving weight to each piece.

The Hearing



Hearing Requirements

- Requirements:
 - Live, with the ability to contemporaneously hear and converse with parties and witnesses
 - Recording by the University
- Optional:
 - Panel or single officer
 - Facilitator
 - Location



Decorum

- Everyone should remain professional—stay seated, do not raise voice or be sarcastic. Harassing questions should not be permitted.
- The purpose of cross-examination is to get information, not to interrogate.
- Problems with attorney-advisors and self-selected advisors
- Removing disruptive advisors
 - Rules for removal must be applied equally



Order of Hearing

- Investigator presents Investigation Report
- Parties and witnesses are questioned, beginning with the Complainant and in the order decided by the Chair.
 - Follow-up permitted as needed.
- Take breaks as needed, but not while a question is outstanding



Questions from the Parties

Allowable Questions

- Those not already posed to investigators or answered in the report or prehearing meeting
- Should not contain overarching character questions
- Should not be badgering or harassing in nature

Cross Examination of the Parties

Must be completed by Advisor, should not be questions already posed

Directed to the Chief Hearing Officer who has the right to dismiss questions or allow them.

Decision-Making and Notice of Outcome



Deliberations

- Only decision-makers participate in deliberations
- Not recorded
- Go through each element and determine whether every piece was shown to be violated or not
- Generally, the chair leads deliberations and determines the order the panel addresses each element
- Do not seek or consider outside evidence. Decisions may only be based on information and evidence included in the investigation report or presented at the hearing



Credibility

- Avoid focusing on irrelevant inconsistencies. Instead, focus on themes, corroboration, and consistency.
- Consider the source of the information, the potential motives, the content of the evidence, and the plausibility given the circumstances.
- **NEVER** make a credibility determination based on someone's status as a Complainant, Respondent, Witness, etc. or their sex/gender.
- Credibility will play a large role in assigning weight to evidence and therefore reaching your decision.



Sanctioning

- Title IX, other federal laws, and case law require the University to act reasonably in ending the conduct, preventing the reoccurrence of the conduct, and to restore the Complainant as best as it can to their pre-deprivation status.
- Sanctions should be proportionate to the misconduct.



Notice of Outcome

- Issued promptly after deliberations
- Must include a rationale for findings and sanctions
- Must be provided to all parties simultaneously
- FERPA cannot prevent compliance with Title IX



Appeals (again)

- Grounds for appeal are limited:
 - Procedural irregularity that affected the outcome;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - The Chief Title IX Officer, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent that affected the outcome of the matter; or
 - Sanction Proportionality – when either party does not agree that the level of sanctions given match the level of severity of the behavior for which the Respondent was found responsible. There must be a finding of responsibility for sanction proportionality to be considered.

Questions?

