Addressing Sexual Misconduct as Defined by the Federal Title IX Regulations
In this module

> How to avoid bias
> How to avoid conflicts of interest
> How to avoid the prejudgment of facts
> How to conduct a hearing and training about technologies used at hearings
In this module

> Relevant Questions and Evidence
  – Including evidence about prior sexual history
> How to conduct an appeal
Department of Education issued new regulations, effective August 14, 2020—Apply to formal complaints made on or after August 14, 2020, and alleged conduct that occurred on or after August 14, 2020.

> Replaced prior guidance regarding management of Title IX.
EDFR definition

Department of Education Federal Regulations (EDFR) means federally defined policies addressing sexual harassment under Title IX
How to Avoid Bias
Identifying bias

> Biases come in various forms
> Avoiding bias requires self-reflection to identify individual biases
> You may explore your own implicit biases through these online tests
Confronting bias

> Questions to consider:
  – Where is this assumption coming from?
  – Is this assumption impacting how I might be thinking about evidence or testimony? If so, in what way?
  – What can I do to prevent the bias from impacting how I am thinking about this case?
  – If I am not able to prevent the bias from impacting me, what do I need to do?
How to Identify Conflicts of Interest
What are conflicts of interest?

Types of conflict of interest
- Structural
- Personal
Structural conflicts of interest

> Based on position within the university
> Decision makers should not have supervisory relationships with each other
> Title IX Coordinators cannot oversee or participate in adjudication process
Personal conflicts of interest

> Decision makers should not have relationships or circumstances that would influence their decisions
How to Address Conflicts of Interest
Addressing conflicts of interest

- Disclose conflict of interest to a supervisor
- Consult with your assigned Assistant Attorney General
- Recuse yourself from acting as a decision maker in a specific case
How to Avoid Prejudgment of Facts
Prejudgment of facts

- Involves making decisions prior to reviewing the entire matter
- Can influence a decision maker’s perspective
How to Conduct a Hearing
How to conduct a hearing

> The following includes a description about how the University conducts a hearing under Title IX regulations; the hearing may also be called a “full hearing”
Initiating a Hearing
Initiating a hearing

> Cases involving EDFR-based allegations will always involve a hearing

> Investigators will engage in fact finding and provide the results of their investigation to the hearing officer for consideration
**Initiating a hearing**

- Hearing officer assigned
- Investigator provides the record to hearing officer and the other parties
Prehearing Process
Prehearing process goals

- Resolve issues about the hearing
  - Including those about witnesses and evidence
- Educate the parties about how the hearing process works
Scheduling notice

- Date and location of hearing
- Date and location of prehearing meeting, if held
- Any other prehearing deadlines
Record for the hearing

> Submission of Evidence form
> Submission of Witnesses form
> Other proposed evidence or witnesses
Prehearing meeting

> Answer questions about the hearing process, particularly for the students involved
> Allow the parties to talk about any concerns about the submissions and objections regarding evidence and witnesses
> Address any other prehearing matters
Prehearing order

> Documents the hearing officer’s decisions related to the hearing
> Establishes the hearing record
Hearing
Preponderance of Evidence

In order for a respondent to be held responsible for a violation of the student conduct code, the hearing officer must conclude, based on all of the evidence in the record (including the testimony of witnesses), that it is more likely than not that the respondent engaged in an act or acts of conduct prohibited by the code.
Who is involved?

- Parties
- Advisors (up to two)
- Other witnesses
Role of the hearing officer

> Hearing officer will:
  - Ensure parties have opportunity to present evidence
  - Determine admissibility
  - Document reasons for decisions
Flow of a hearing

> Hearing officer speaks about the hearing process and what to expect
> Initial remarks from parties (if any)
> Testimony from witnesses, including parties and conduct officer/investigator
> Closing remarks from parties (if any)
Initial Order

> Identification of allegations and procedural history
> Findings of fact
> Conclusion about whether respondent is or is not responsible for prohibited conduct as well as rationale for the conclusion
> If found responsible, the sanction and remedies
Initial Order

- The parties may request an administrative review of the initial order within 21 days of the initial order.
- If no request is made within 21 days, the order becomes final.
Essential technology at hearings

> Zoom teleconferencing
> Email
> Microsoft OneDrive
Relevant Questions and Evidence
Relevant questions and evidence

- General concepts relating to evaluating evidence
- The types of evidence that would typically be contained in the record
Evidence

> In applying the code, due consideration shall be given to the fact that student conduct proceedings are administrative and not judicial in nature

> With respect to allegations of conduct prohibited by the EDFR, the predominant determining factor for whether evidence is admissible is whether it is relevant

> Relevant evidence is evidence which helps a decision-maker determine whether an important fact is more or less likely to be true
Evaluating Evidence
Relevant evidence

> The hearing officer will determine the admissibility and relevance of all evidence

> The presiding officer may exclude:
  – Evidence that is not relevant, including duplicative or unduly repetition
  – Evidence that is excludable on other grounds
    > Related to prior sexual history
    > Protected by legally-recognized privilege
Evidence

Relevance (filter)

Admissible evidence
Weighing evidence
Preponderance of Evidence
Charge 2  Charge 1

Preponderance of Evidence
Burden of proof

- Rests with the University
- Requires sufficient evidence (a preponderance of evidence) to support a finding of responsibility
Types of Evidence
Types of evidence

> Documentary evidence
  – Documents, videos, texts, objects, etc.

> Testimony
  – Statements
Documentary evidence

- Texts
- Emails
- Postings on social media
- Photographs
- Videos
- Objects
Documentary evidence

> If no issues are raised with evidence, it can typically be relied upon as authentic
> If issues are raised with evidence, the conduct officer and/or hearing officer will perform further review
Statements

> Written statements typically prepared by the investigator
> Person making statement given opportunity to correct
> May also be taken as live testimony in a hearing
Testimony

Verbal or interpersonal interactions:

- Even if no documentary evidence
- If interactions are not contested, may not need documentary evidence
- If disputed, presiding officer must weigh credibility
Hearsay

- Testimony that someone told a party or witness something
- Offered as the truth
- Without personal knowledge
Hearsay in student conduct proceedings

> Hearsay is admissible if:

– For cases involving allegations of federal regulations prohibited conduct, the hearsay is “relevant”
– For cases involving allegations of prohibited conduct defined in part II of the Student Conduct Code, the admissibility depends on the judgment of the presiding officer. Then, it is admissible if it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs
Hearsay in statements

> During a hearing, parties and witnesses will be asked to review the summary of their interview with the investigator

> They will then be asked whether the summary is accurate, and—if so—whether they wish to adopt it as part of their testimony
Findings based on hearsay

When considering conduct prohibited by part II of the Student Conduct Code, the hearing office may not base a finding solely on hearsay, unless doing so would not abridge parties’ opportunities to confront witnesses and rebut evidence.
Law enforcement records

> Consideration depends on allegations at issue and whether the author of the record(s) testifies

> It is possible that law enforcement records may be considered
Self-incrimination

> Parties will not be compelled to give self-incriminating evidence
> A negative inference will not be drawn from choosing not to testify
> Hearing officer may reach a finding based on other available and admissible evidence
Assessing Credibility of Statements
Assessing credibility of statements

> Hearing officer will weigh credibility
> Findings based on assessment of credibility will be noted in initial order
> Finding certain aspects of statements less credible does not mean the presiding officer will disregard that person’s entire statement
Assessing credibility of statements

> Common considerations:
  – The opportunity of the individuals to observe or know the things they testify about
  – The ability of the individuals to observe accurately
Assessing credibility of statements

- Any bias, prejudice, or personal interest demonstrated through a witness’s testimony
- The reasonableness or plausibility of a witness’s statements in light of other evidence
- Whether the witness’s testimony is corroborated by other evidence
Character Evidence
Character evidence

> Definition: evidence submitted to prove that a person acted or did not act in a particular way on a particular occasion based on the character or disposition of the person

> Generally not considered relevant
Evidence about Prior Sexual Behavior
Evidence about prior sexual behavior

> Evidence about a complainant’s sexual predisposition or prior sexual history are not relevant
  
  – Two exceptions:
    > To show that someone other than respondent engaged in the conduct
    > To show that consent was either present or absent based on the sexual history of the complainant and respondent
Evidence & Bias, Conflicts of Interest, and Prejudgment of Facts
Evidentiary decisions can help eliminate other bias or conflict

- Careful evidentiary evaluations help eliminate problems like bias, conflicts of interest, and prejudgment of facts
- Evidence helps decision-makers properly determine what happened and explain their conclusions
How to Conduct an Appeal
Overview

> The process and standards for completing an appeal
> Possible outcomes of an appeal
Two types

- Appeal of dismissals by investigators
- Appeal of initial order from hearing officer
Requests from dismissal of formal complaint

> A formal complaint must be dismissed if:
  – Complaint does not alleged conduct prohibited by the federal Title IX regulations
  – University does not have jurisdiction

> A formal complaint may be dismissed if:
  – Complainant requests withdrawal of their complaint
  – Respondent leaves UW
  – There is insufficient evidence to pursue an investigation
Review of an appeal of a dismissal

A staff member will review the appeal request

Outcomes are limited:

- If the dismissal was not correct
  > Refer back to the investigator for investigation
- If the matter was properly dismissed
  > Uphold dismissal of formal complaint or specific allegation originally included in formal complaint
Standards and Outcomes for Appeals from Hearings
### Possible outcomes

<table>
<thead>
<tr>
<th>Question</th>
<th>Outcome</th>
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<tbody>
<tr>
<td>Disqualification?</td>
<td>Remand</td>
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<tr>
<td>Procedural irregularity?</td>
<td>Remand</td>
</tr>
<tr>
<td>New Evidence?</td>
<td>Remand</td>
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<tr>
<td>Material Error?</td>
<td>Depends on facts</td>
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<tr>
<td>None of the above?</td>
<td>Final order</td>
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Reviewing Requests for Disqualification
Disqualification can be requested on the basis of bias, prejudice, interest, or any other cause.

The burden to establish that bias, prejudice, or interest was sufficient to impact the outcome of the proceeding is on the party seeking the disqualification.
Reviewing for disqualification

> If the panel concludes that the hearing officer or individual whose disqualification was requested should have granted the request for disqualification, the matter should be remanded.
Reviewing Procedural Error
Procedural error

Procedural error is something in the exercise of the process that may have impacted the outcome.
Reviewing Newly Discovered Evidence
Newly discovered evidence

> Newly discovered evidence is evidence that was not reasonably available during the fact finding

> This could be evidence the party was not aware of or did not have access to
Newly discovered evidence

Possible Outcomes:
- If new evidence could impact the outcome: remand
- If new evidence would not alter the outcome: continue review
Reviewing for Material Error
Material error

> Material error includes mistakes in the administration of the process or in interpretation of evidence that could reasonably affect the overall outcome of the investigation or decision-making

> In Initial Order:
  – Background information
  – Factual findings
  – Analysis and conclusions
  – Sanctions and reasoning
Additional resources

> Department of Education Webinar
  – https://www.youtube.com/watch?v=yQ4-S5_Jahw
> ATIXA - https://atixa.org/
> TIX Education Specialists - https://www.tixedu.com/
> T9 Mastered - https://t9mastered.com/
Additional resources

> NACUA - https://www.nacua.org/
> National Center for Campus Public Safety - https://www.nccpsafety.org/