

Fairleigh Dickinson University

Title IX Training for Coordinators, Investigators, Advisors and Adjudicators

Angelo A. Stio III

October 7, 2021



Agenda

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Title IX Regulatory Framework



FDU's Title IX Sexual Harassment Policies and Procedures



Definitions – Prohibited Conduct

Prohibited Conduct = Title IX Sexual Harassment

Title IX Sexual Harassment: Conduct on the basis of sex that involves an employee of FDU conditioning the provision of an aid, benefit, or service of FDU on an individual's participation in unwelcome sexual conduct; or an individual engaging in unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to FDU's education program or activity. Title IX Sexual Harassment also includes:

- Title IX Sexual Assault
- Title IX Dating Violence
- Title IX Domestic Violence
- Title IX Stalking

Definitions – Prohibited Conduct

Title IX Sexual Assault: Any of the following Prohibited Conduct –

- 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 alleged victim.
- The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the alleged victim.
- Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- Non-forcible sexual intercourse with a person who is under the statutory age of consent.

Definitions – Prohibited Conduct

Title IX Dating Violence: Violence, including sexual or physical abuse or the threat of such abuse, committed by a person (a) who is or has been in a social relationship of a romantic or intimate nature with the alleged victim; and (b) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) the length of the relationship, (ii) the type of relationship, and (iii) the frequency of interaction between the persons involved in the relationship.

Title IX Domestic Violence: Violence committed by a current or former spouse or intimate partner of the alleged victim, by a person with whom the alleged victim shares a child in common, by a person who is cohabitating with or has cohabitated with the alleged victim as a spouse or intimate partner, by a person similarly situated to a spouse of the alleged victim under the domestic or family violence laws of New Jersey, or by any other person against an adult or youth alleged victim who is protected from that person's acts under the domestic or family violence laws of New Jersey.

Definitions – Prohibited Conduct

Title IX Stalking: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others, or suffer substantial emotional distress.

For purposes of this definition:

- *Course of conduct* means two or more acts, including, but not limited to, acts in which the alleged 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; and
- *Substantial emotional distress* means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



Definitions – Prohibited Conduct

But, must meet Title IX jurisdictional requirements:

In order to constitute Title IX Sexual Harassment, the alleged misconduct must have occurred:

- In the United States, and
- In FDU's education program or activity, which is defined as locations, events or circumstances over which FDU exercised substantial control over both Respondent and the context in which the misconduct occurred, or any building owned or controlled by a student organization officially recognized by FDU.

What are FDU's programs and activities?



Reporting Potential Prohibited Conduct

Anonymous Reporting

Reports to Authorized and Responsible Employees

A disclosure or report of Prohibited Conduct made to an Authorized Employee (regardless of whether the disclosure is made by the Complainant or a third party):

- Constitutes a report to FDU (*i.e.*, actual knowledge), triggering a response under this Policy.
- Must be promptly reported to the Title IX Coordinator.

A disclosure or report of Prohibited Conduct made to a Responsible Employee (regardless of whether the disclosure is made by the Complainant or a third party):

- Does not constitute a report to FDU (*i.e.*, is not “actual knowledge”) triggering a response under this Policy.
- Must be promptly reported to the Title IX Coordinator.

Supportive Measures

What are supportive measures?

Non-disciplinary, non-punitive individualized services that may be provided to Complainants or Respondents, either upon request (when deemed by the Title IX Coordinator to be appropriate and reasonably available) or at the initiative and in the sole discretion of the Title IX Coordinator.

What is the purpose of supportive measures?

To restore or preserve equal access to FDU's educational programs and activities, without unreasonably burdening the other party.

When are supportive measures available?

Beginning at any time after the submission of a report of Prohibited Conduct.



Emergency Removals

If at any point following the receipt of a report of Prohibited Conduct, FDU determines that the Respondent poses an immediate threat to the physical health or safety of the Complainant or any other person(s), including the Respondent, FDU may temporarily remove the Respondent from any or all of its programs or activities.

Remember:

- There is a high burden to satisfy in order for an emergency removal to occur.
- An emergency removal is not a finding of responsibility
- An Emergency Removal may involve the denial of access to some or all of FDU's campus facilities, academic program, or other programs or activities.
- Non-punitive actions taken as Supportive Measures (e.g., changes in housing) do not constitute Emergency Removals.



Emergency Removals

Five Step Process:

1. **Conduct a prompt and individualized safety and risk assessment**
2. **Make findings to support the emergency removal**
 - A. Is there an “immediate threat”?
 - B. Does it implicate the “physical health or safety of Complainant or any other person(s), including the Respondent”?
 - C. Does the emergency situation arise from the allegations of sexual harassment?
3. **Are disability laws implicated?**
4. **Can supportive measures address the issue in lieu of a removal from campus or an FDU program?**
5. **Has the Respondent received notice of the emergency removal and an immediate opportunity to challenge the action?**

Formal Complaint and Resolution Process



Formal Complaints

What is a Formal Complaint?

A document submitted by a Complainant and bearing the Complainant's physical or digital signature, or otherwise indicating that the Complainant is the one filing the Formal Complaint, requesting that the FDU investigate the allegations of Prohibited Conduct.

The Title IX Coordinator also may sign a Formal Complaint, but does not become the Complainant by doing so.

In order to file a Formal Complaint, a Complainant must be participating in or attempting to participate in FDU's education program or activity at the time a Formal Complaint is filed.

- A Complaint cannot be filed anonymously.
- A Complaint must allege sexual harassment.
- A Complaint must identify the Respondent.



Formal Complaints – Notice of Allegations

Upon the submission of a Formal Complaint, the Title IX Coordinator will provide written notice to the Parties, including the following:

- The Policy
- Notice of the allegations of conduct that may constitute Prohibited Conduct, with sufficient detail for the Respondent to prepare a response before any initial interview.
- The presumption that the Respondent is not responsible for the alleged Prohibited Conduct unless a determination of responsibility is reached at the conclusion of the Formal Resolution Process.
- Notice of the Parties' entitlement to an Advisor of choice.
- The identity of the Investigator.
- Notice that the Parties may inspect and review evidence gathered during the investigation.
- **[If applicable]** Notice that FDU's policies prohibit knowingly making false statements or knowingly submitting false information.

Update notice of allegations throughout investigation, if necessary.



Mandatory and Discretionary Dismissals

Mandatory Dismissal of a Complaint:

- Even if proved, the alleged misconduct would not constitute Title IX Sexual Harassment;
- The alleged misconduct did not occur in FDU's education program or activity; or
- The alleged misconduct did not occur in the United States.

Discretionary Dismissal of a Complaint:

- Complainant notifies the Title IX Coordinator in writing that Complainant wishes to withdraw the Formal Complaint or any allegation in it;
- Respondent is no longer enrolled or employed at FDU; or
- Specific circumstances prevent FDU from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegation.



Informal Resolution

1. Available only when:

A. Formal Complaint has been filed;

B. Parties agree (in writing) – and the Title IX Coordinator agrees – to use informal resolution; and

C. Formal Complaint does not allege Title IX Sexual Harassment of a student by an employee.

2. Prior to initiating Informal Resolution, the Title IX Coordinator will provide the Parties with written notice disclosing the allegations, the requirements of the process, the right to withdraw from Informal Resolution to pursue formal resolution, the use of any information exchanged in the Informal Resolution, and any consequences of participation (e.g., as it relates to any subsequent formal resolution if Informal Resolution is not achieved).

3. Informal Resolution can be commenced at any point prior to the conclusion of a Hearing and may be terminated by the Complainant, Respondent, Title IX Coordinator or Facilitator at any time prior to its completion. If Informal Resolution is terminated, the Formal Resolution Process will promptly commence or resume, as appropriate.

Informal Resolution

4. Must be voluntary.

5. Should be completed in 30 calendar days.

6. Facilitated by objective and trained neutral party.

- Explain roles (i.e., parties determine whether there is a resolution, not the neutral)
- Explain rules of decorum – not adversarial, challenging, intimidating
- Bring parties together to facilitate discussion
- Get to know participants
- Confidentiality
- Goals
- Parties can discontinue the process at any time
- End-Game – Resolution Agreement

Informal Resolution - Preparation

- Understand the policy/definitions/allegations
- Understand what facts are undisputed, contested, unknown
- Identify strengths and weaknesses
- Identify issues (e.g., consent; conduct in question, proofs)
- Understand if the parties agree on the issues
- Get a sense of what parties hope to accomplish

Informal Resolution - Setup

- Non-intimidating setting (location/video)
- Protect confidentiality
- Break out rooms for private conversations
- Sufficient room for participants
- Resources to memorialize agreement, review documents



Conducting the Investigation – FDU’s Policy

FDU strives to resolve Formal Complaints within 90 calendar days of the Formal Complaint.

Either Party may object to the Investigator on the grounds of conflict of interest or bias.

The Investigator will conduct an investigation of the allegations in the Formal Complaint, and is responsible for interviewing the Parties and witnesses, and gathering relevant inculpatory and exculpatory evidence.

- The Investigator may not access, consider or use records that are made or maintained by a physician, psychiatrist, psychologist or other recognized professional or paraprofessional in connection with the provision of treatment to a party without that party’s voluntary written consent.
- All Parties will have an equal opportunity to identify witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence, for the Investigator.
- Parties will be provided with written notice of the date, time, location, participants and purpose of all investigative interviews in which they are expected to participate.
- Parties may be accompanied by an Advisor of their choice at any investigative interview.

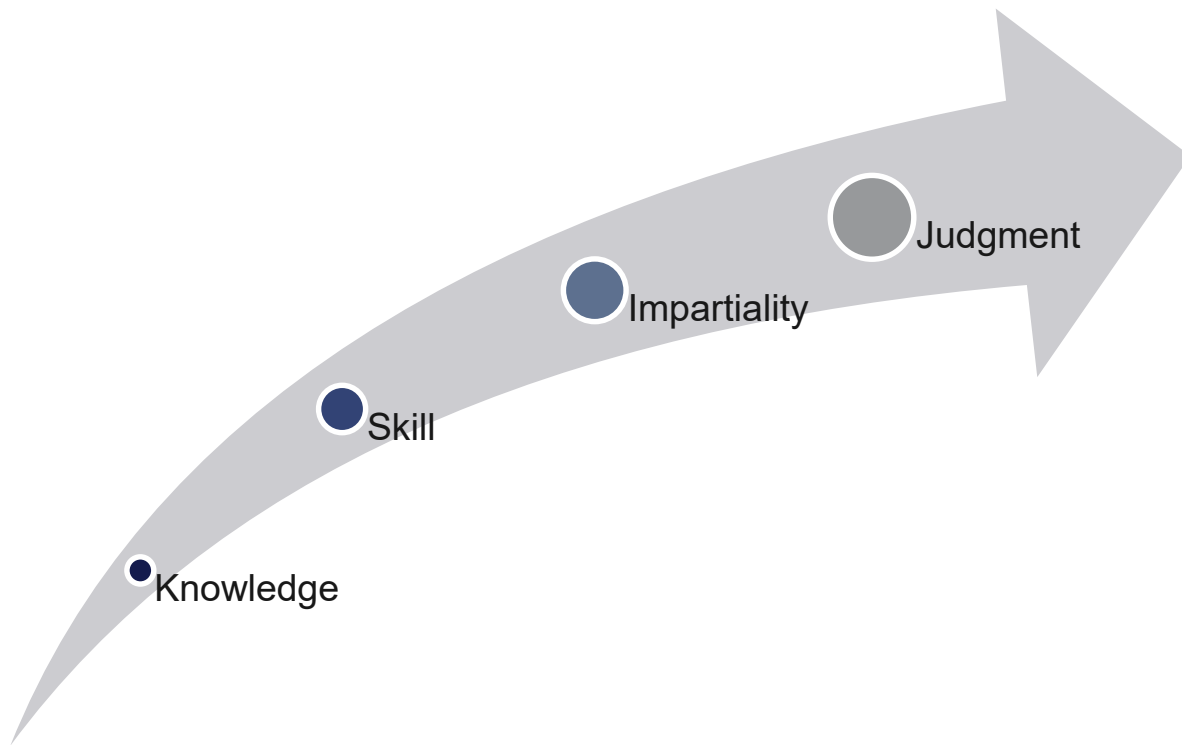


Speaking of Advisors ...

- Party's Advisor may accompany them to all interviews, hearings, and other meetings held in connection with a Formal Complaint.
- Parties are responsible for identifying their own Advisor, if they wish to have one, **but** parties must have an Advisor for purposes of conducting cross-examination at a Hearing. If a Party has not identified an Advisor, FDU will provide one for that limited purpose.
- Advisors may not speak aloud during any meeting, interview or hearing, but may confer with the individual whom they are advising quietly, by means of written notes or during brief recesses at the sole discretion of the FDU representative conducting the meeting, interview or hearing.
- Advisor whose presence is deemed improperly disruptive or inconsistent with established rules of decorum will be required to leave and may be prohibited from participating in future proceedings.
- While FDU may consider short delays in scheduling to reasonably accommodate an Advisor's availability, doing so is in the sole discretion of the FDU representative responsible for the event.



Conducting the Investigation – Investigator's Toolkit



Role of the Investigator

- **The University takes the lead**

1. Not the burden of the Complainant or Respondent

- **Goals:**

1. Gather the relevant facts
2. Listen with an earnest intent to understand
3. Learn. Do not assume
4. Search for corroboration
5. Assess credibility

- **A good investigator should be:**

- Objective
- Fair
- Impartial
- Open-minded
- Professional
- Appropriate in demeanor
- An active listener
- Polite and respectful to *all* parties



The Initial Interview (Complainant and Respondent)

Before the interview

Provide sufficient notice

Explain the right to an advisor

Allow sufficient time

Communicate the availability of supportive measures/resources

Develop a plan

- Interviews (who?)
- Documents (emails/texts/social media/letters/building logs)
- Recordings (video/audio)
- Medical evidence
- Timeline



The Initial Interview (Complainant and Respondent)

At the start of the interview

- Communicate the availability of supportive measures/resources
- Discuss policy and process
- Reiterate the role of the advisor
- Invite questions



Conducting the Interview: The Fundamentals

Develop rapport with an open and conversational style.

Demonstrate respect.

Use reflective listening.

Avoid asking questions that imply a value judgment.

Be alert to your non-verbal communications.

- Tone and volume level
- Facial expressions
- Posture and eye contact

Solicit all exculpatory and inculpatory information.



Conducting the Interview

Start as general as possible – “tell me what happened.”

Refrain from interrupting the initial narrative with clarifying or follow up questions.

Continue to return to the narrative to get all details.

Ask varied questions on the same topic.

Save tough or uncomfortable questions for later in the interview.





Conducting the Interview

Avoid stereotypes and bias.

Understand all communications between the parties.

Question inconsistencies in a non-confrontational manner.

Explore areas of inquiry that can be corroborated.

Focus on sensory details.

Ask what the other might say.

Don't shy away from the uncomfortable questions.

Be OK with breaks and stretches of silence.

Be persistent.

Be thorough.



Conducting the Interview: The Closing

Give the interviewee a final (for that meeting) opportunity to provide information.

“Is there anything I haven’t asked that you think I should know?”

“If you were me who would you interview?”

“What documents would you want to see?”

“It’s not uncommon to think of something after you leave. If you think of something, will you please contact me?”

Ask if they have questions.

Discuss supportive measures/resources.

Thank the interviewee for their time.



The Report

To: titleix@university.edu

From: Jenna

Date: October 1, 2020

Michael came over to my apartment after a party back in early September. He knew I was drunk. He slept over and when I woke up the next morning, I realized he raped me.



Jenna's Initial Interview Narrative

I was at a party downtown with a group of friends in early September when I saw Michael. I don't really know him, but we had Econ 101 together last year. He came over and was hanging out with me and my friends. We were all talking, drinking and dancing in a big group. At some point, Michael and I started kissing.

I was feeling pretty buzzed and decided to leave around midnight. My roommate, Molly, didn't want to leave so Michael offered to walk me back to my suite. When we got there, he followed me into my bedroom and sat down on my bed. I really just wanted to go to sleep, but I didn't want to be rude. We talked for a bit. I started to feel a little sick and told him I wanted to go to sleep. He laid down next to me on my bed.

I think I fell asleep for a bit, but woke up when Michael started kissing me. We made out for awhile but then I rolled away from him. He rolled me back over. We made out a bit longer and he unbuttoned my shirt. I let him take my shirt off. At that point, I was really uncomfortable but was scared of what he'd do if I told him to leave. I told him that I didn't want to have sex though.

The rest is fuzzy for me. He left sometime early in the morning. When I woke up around 7 a.m., I saw a condom wrapper on the floor and remembered us having sex.



What are Your Follow-Up Questions?





Developing the (“Living”) Investigation Plan

Who should be interviewed?

In what order?

What other (non-witness) evidence may be available?

Develop your timeline.



Michael's Initial Interview Narrative

I got to the party around 11 p.m. and saw Jenna dancing with friends. She waved me over. We had an Econ class together the prior semester. I knew she was interested in me last spring, but I had a girlfriend. We hung out for maybe an hour and kissed a couple times. I think we were both buzzed, but not bad. Around midnight, she said she was going home. Her friend didn't want to leave yet, so I offered to walk her.

When we got to Jenna's building, we ran into my friend Steve in the stairwell and talked with him for a couple minutes. When we got to Jenna's suite, we walked straight back to her bedroom. We sat down on her bed. She asked for my cell number and put it into her phone.

After a few minutes, we laid down and started kissing. At first she said she didn't want to hook up, but then she took her shirt off and helped me take off my jeans. We had sex and fell asleep. I woke up and left around 5 a.m.

Jenna sent me a text later that day wanting to talk. I didn't respond right away because I wanted to get back together with my ex-girlfriend and felt bad about hooking up with Jenna. Jenna and I texted a couple times over the next couple days, but that was it.



What are Your Follow-Up Questions?





Steve's Initial Interview Narrative

I was in the stairwell of my dorm at around 1 a.m., when Michael and Jenna came through. We talked for a couple minutes. Michael and I hung out with a group of guys at the beach back in June, but I hadn't seen him yet this year. So, we just talked about how the rest of our summers went and what our schedules look like this fall.

The whole run-in was kind of awkward. Jenna and I were both orientation advisors back in August, so I got to know her a bit. We were both at a party downtown one of the nights of orientation. Everyone was pretty drunk. Jenna's roommate, Molly, was there and we were dancing. Out of nowhere, she stuck her hand down my shorts, pretty much right there in the middle of the basement. I'm not into her and told her so. Jenna got involved and said I was making a big deal out of nothing. The whole thing was embarrassing.



What are Your Follow-Up Questions?



An Unexpected Detour





Back on Course – What's Next?





The Investigation Report





The Investigation Report

Summarizes all relevant evidence and excludes all non-relevant evidence, as well as any evidence not subject to disclosure (e.g., medical records regarding which the Party has not authorized disclosure).

Prior to completing the investigation report, the Investigator will send to the parties and their advisors all evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint, regardless of whether it is anticipated that the evidence will be used at the hearing.

- Parties will have 10 calendar days to provide a written response, including identifying additional evidence for the Investigator's consideration prior to completing the investigation report.

At least 10 calendar days before the hearing, the Investigator will provide the parties and their advisors a copy of the investigation report.

- Parties will again have the opportunity to respond.



Hearing – The Hearing Officer (Decision-maker)

How does the hearing officer get ready?

Self-identify conflict of interest and bias.

Prepare, prepare, prepare.

Read the report carefully and repeatedly.

Understand the conduct at issue and the elements of the alleged violations.

Did the investigator explore and consider all the relevant evidence – what areas require further inquiry?

Identify the areas of agreement.

Identify the areas of disagreement.



Hearing – The Hearing Officer (Decision-maker)

What is the hearing officer's role?

Prior to the hearing, notify the parties which witnesses will testify and entertain additions.

At the hearing:

- Ask questions and elicit information from the parties and witnesses to aid in obtaining inculpatory and exculpatory relevant evidence.
- Ensure the parties have equal rights to present evidence.
- Manage the hearing.
- Make relevancy determinations.
- Evaluate credibility.
- Weigh the evidence.
- Enforce rules of decorum.
- Make a decision on responsibility and, if appropriate, sanctions.



Hearing – Advisors

What is the Advisor's role?

- Provide support and advice to the party.
- Understand the purpose and scope of cross-examination.
- Ask questions that elicit relevant information.
- Wait for relevancy determinations.
- Adhere to rules of decorum.



The Hearing – FDU’s Policy and Procedures

Allow opening statements.

Hear from the Complainant, Respondent and witnesses.

Each Party will have the opportunity to provide relevant evidence to the Hearing Officer.

The Hearing Officer may ask relevant questions of each Party and witness, either before, during, or in follow-up to their testimony .

Facilitate each Party’s advisor asking relevant cross-examination questions.

- NOTE: If a Party does not submit to cross-examination, the Hearing Officer must not rely on any statement of that Party in reaching a determination regarding responsibility. Additionally, the Hearing Officer cannot draw an inference regarding responsibility based solely on a Party’s absence from the Hearing or refusal to answer questions.
- The Hearing Officer will determine whether questions are relevant prior to the Party or witness answering the question. If the question is deemed not relevant, the Hearing Officer will provide a brief explanation and the question will be precluded. The Hearing Officer’s decision is not subject to challenge or objection during the Hearing.



Is it relevant?

Ask: Is it probative of any material fact?

Certain evidence is specifically deemed not relevant:

Questions and evidence about Complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than Respondent committed the conduct alleged or, if concerning specific incidents of Complainant's conduct with Respondent, offered to prove consent.

Records that are made or maintained by a physician, psychiatrist, psychologist or other recognized professional or paraprofessional in connection with the provision of treatment to a party, except where the party has consented to their access and use.

Statements of a party or witness, where that individual is not subject to cross-examination.

Questions also may be deemed not relevant when they are duplicative of other evidence already in the record.



Is it Credible?

Even where it appears to be a “draw,” it seldom is – one person is usually more credible than the other.

Everyone’s credibility is at issue – there are no “perfect” Complainants, Respondents or witnesses

Consider the following to determine credibility:

- Is the testimony believable?
- Does it make sense?
- Is it convincing?
- Is there a level of detail and specificity?
- Does the testimony feel rehearsed/memorized?

Look to

- Demeanor
- Corroboration

Inconsistencies may or may not be important

Is there a reasonable explanation?

Is the point significant or trivial?

Is the variation something that might result from memory lapse?



Determining Responsibility: Weighing the Evidence

Information may be direct (establishes a fact) or indirect (requires an inference)

Ask

- Is the information relevant?
- Is the information credible?
- Is the information convincing?

Standard of Evidence – Preponderance of the Evidence



Preponderance doesn't mean who has more witnesses.

It's the quality of the evidence, not the quantity.

Issues that Could Arise in the Hearing

What if:

- A party's advisor doesn't show up?
- A party asks for a break to confer with advisor every 45 minutes?
- Tech problems will not allow the recording material to work?
- A party's advisor (who is an attorney) asks the complainant the same question 3 times?
- A party refers to evidence not included in the investigation report as relevant?



Hearing Outcome Letter

The Hearing Outcome Letter will include:

- A description of the allegations that led to the Hearing, as potentially constituting Prohibited Conduct;
- A description of the procedural steps taken from the receipt of the Formal Complaint through the determination;
- A statement of factual findings supporting the determination;
- A statement of the conclusions regarding the application of the policy to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
- An explanation of the disciplinary sanctions imposed on the Respondent, if any;
- Statement of whether remedies designed to restore or preserve equal access to FDU's education program or activity will be provided to the Complainant; and
- The procedures and permissible bases for the Complainant and Respondent to appeal.

Appeals

Either Party may appeal a determination of responsibility (or non-responsibility) based on only one of the following:

- A procedural irregularity that affected the determination of responsibility;
- The existence of new evidence that was not reasonably available at the time of the Hearing that could affect the outcome of the matter; and
- The Title IX Coordinator, Investigator or Hearing Officer 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.
- Dismissal of a Formal Complaint alleging Title IX Sexual Harassment.

Non-appealing party may respond, but no further exchange of positions is permitted.

The Appeal Officer will evaluate the appeal on the written record and recording of the Hearing, and may seek input from the Title IX Coordinator, Investigator and/or Hearing Officer as deemed appropriate in the Appeal Officer's sole discretion.

Questions, Answers and Discussion

