



USC'S SEXUAL MISCONDUCT HEARING PROCESS



USC University of
Southern California

December 8, 2020

HONORING NATIVE LANDS

We acknowledge that we are on the traditional land of the Tongva people. For thousands of years, the Tongva people lived on this land we occupy today, and were considered the most powerful indigenous peoples to inhabit the Los Angeles basin. Along with the Tongva, we also recognize the Chumash, Tataviam, Serrano, Cahuilla, Juaneno, and Luiseno People, for the land that USC also occupies around Southern California. We pay respects to their elders past and present. Please take a moment to consider the many legacies of violence, displacement, migration, and settlement that bring us here today. And please join us in uncovering such truths at any and all events.



PRESENTER INTRODUCTIONS

WHAT WE WILL COVER

- Brief Overview: Title IX Landscape
- USC Policy and Prohibited Conduct
- Alcohol, Drugs, and Incapacitation
- USC Sexual Misconduct Resolution Process
- The Live Hearing: Before, During, and After
- Role of the Advisor of Choice/Hearing Advisor
- Sanctioning and Appeals





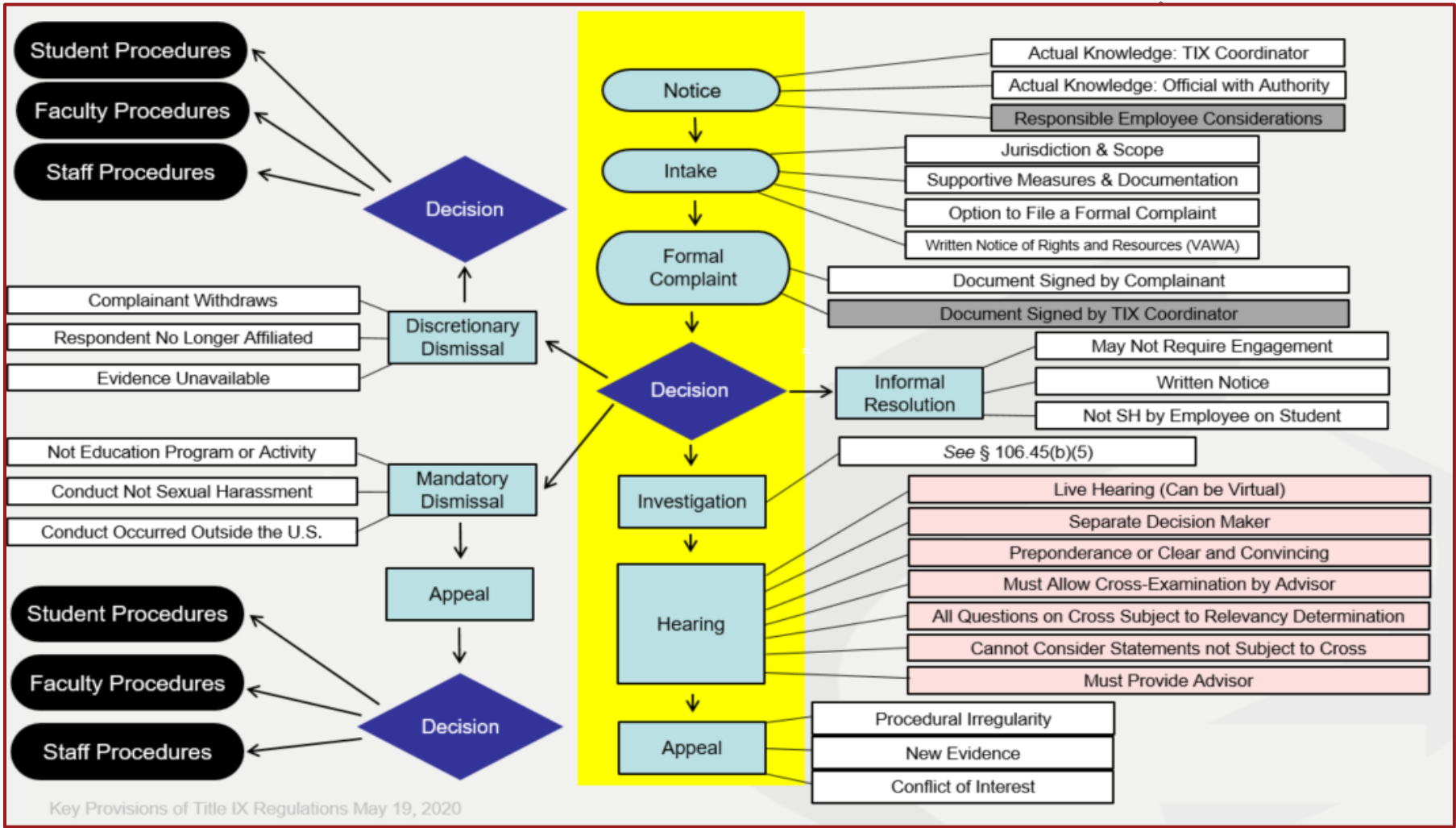
A BRIEF OVERVIEW: TITLE IX, CLERY, AND VAWA



The Law:

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.

20 U.S.C. § 1681



Core Tenets:

Definition of Sexual Harassment

SEXUAL HARASSMENT means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. § 12291(a)(10), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).

Title IX Regulations, May 19, 2020, § 106.30 (a)

Core Tenets:

Response to Sexual Harassment

A recipient with actual knowledge of sexual harassment in an **education program or activity** of the recipient against a person **in the United States**, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances ... A recipient's response must treat complainants and respondents equitably by offering **supportive measures** as defined in § 106.30 to a complainant, and by following a **grievance process** that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Title IX Regulations, May 19, 2020, § 106.44 (a)

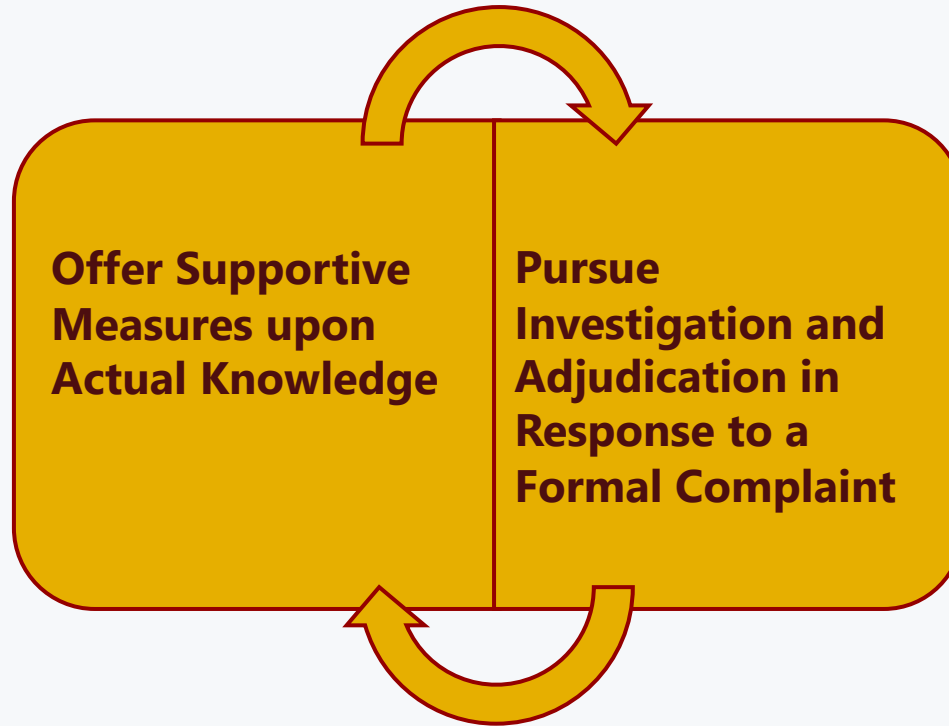
Core Tenets:

Education Program or Activity

For the purposes of this section, §§ 106.30 and 106.45, “education program or activity” includes locations, events, or circumstances over which the recipient 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 a postsecondary institution.

Title IX Regulations, May 19, 2020, § 106.44(a)

Understanding Key Provisions

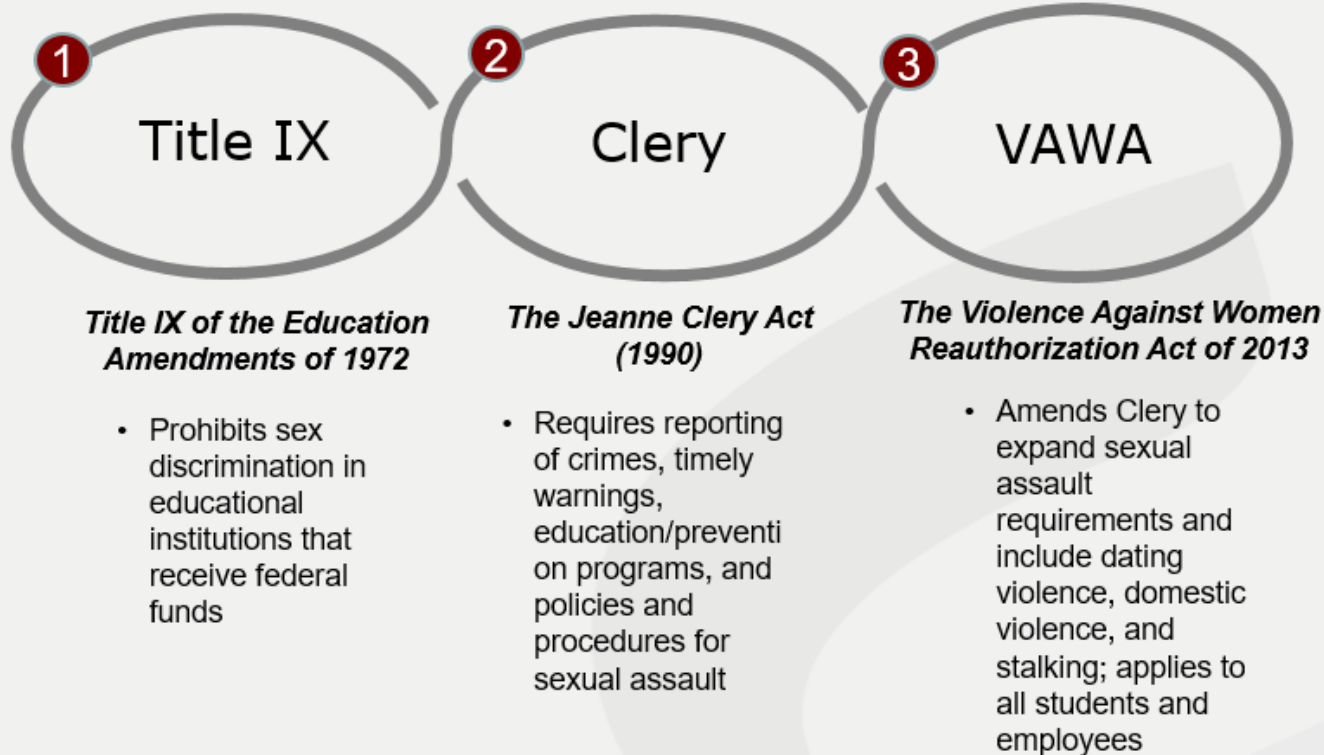


Core Tenets:

Treat reporting parties and respondents equitably by providing **remedies** to a reporting party where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures, as defined in § 106.30, against a respondent.

Title IX Regulations, May 19, 2020, §§ 106.44 (a) and 106.45 (b)(1)(i)

Federal Regulatory Framework





USC POLICY ON PROHIBITED DISCRIMINATION,
HARASSMENT, AND RETALIAION

To Whom the Policy Applies

SCOPE:



Students



Staff



Faculty



Third Parties

Two Formal Resolution Tracks

If the **Formal Complaint** alleges **only** Discrimination (either Disparate Treatment or Disparate Impact), Hostile Environment Harassment (based on a protected class other than sex or gender), Quid Pro Quo Harassment (based on a protected class other than sex or gender), and/or Retaliation not relating to Sexual Harassment.

Investigation by a trained investigator free of conflict of interest or bias. During the investigation, both parties provided an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

Evidence Review: Parties may review and respond to all information gathered in the investigation that is directly related to the allegations.

Investigative Report issued to both parties, which includes a determination regarding responsibility.

Sanctioning Panel convenes if there is a finding of responsibility to determine an appropriate sanction. Panel determined by status of Respondent.

Appeal for: (1) procedural irregularity, (2) new evidence, or (3) conflict of interest or bias. Appellate authority determined by status of Respondent.

If the **Formal Complaint** alleges any of the following Prohibited Conduct:

- Title IX Sexual Harassment, including Sexual Assault, Dating and Domestic Violence, and Stalking; Sexual and Gender-Based Harassment; Nonconsensual Viewing, Recording and Dissemination; Exposure; Other Forms of Dating and Domestic Violence; and/or Retaliation relating to Sexual Harassment.

Evidence Review: Parties may review and respond to all information gathered in the investigation that is directly related to the allegations.

Investigative Report issued to both parties, which includes a determination whether the conduct alleged, if substantiated, requires a hearing with cross-examination.

Live Hearing with: (1) cross-examination by the parties' advisors, and (2) rules that limit what evidence that may be considered in making a determination of responsibility.

Notice of outcome issued to the parties that includes a determination regarding responsibility.

Sanctioning Panel convenes if there is a finding of responsibility to determine an appropriate sanction. Panel determined by status of Respondent.

Appeal for: (1) procedural irregularity, (2) new evidence, or (3) conflict of interest or bias. Appellate authority determined by status of Respondent.

Title IX's implementing regulations define Sexual Harassment as conduct on the basis of sex that satisfies one or more of the following:

A University employee conditions the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity; or

Sexual Assault, Dating Violence, Domestic Violence, Stalking, and Retaliation.

Sexual Harassment

- **Sexual Harassment** also includes any sexual advance, request for sexual favors, or other unwelcome conduct of a sexual nature, whether verbal, non-verbal, graphic, physical, electronic, or otherwise when one or more of the following conditions are present:

Quid Pro Quo

- Submission to or rejection of such conduct is either an explicit or implicit term or condition of, or is used as the basis for decisions affecting, an individual's educational environment, employment, living environment, appointment, admission, or academic evaluation.

Hostile Environment

- The conduct is sufficiently severe, pervasive, or persistent that it has the purpose or effect of unreasonably interfering with, limiting or depriving an individual from participating in or benefiting from the University's learning, working, or living programs under both a subjective and objective perspective.

Prohibited Conduct: Other Forms of Sexual Misconduct

Gender-Based Harassment

- **Gender-Based Harassment** is any act of intimidation or hostility, whether verbal or non-verbal, graphic, physical, or otherwise based on sex or gender, sexual orientation, gender identity, or gender expression, even if the acts do not involve conduct of a sexual nature; when one or more of the following conditions are present:

Quid Pro Quo

- Submission to or rejection of such conduct is either an explicit or implicit term or condition of, or is used as the basis for decisions affecting, an individual's educational environment, employment, living environment, appointment, admission, or academic evaluation.

Hostile Environment

- The conduct is sufficiently severe, pervasive, or persistent that it has the purpose or effect of unreasonably interfering with, limiting or depriving an individual from participating in or benefiting from the University's learning, working, or living programs under both a subjective and objective perspective.

Sexual assault is having or attempting to have sexual contact with another individual without consent or where the individual cannot consent because of age or temporary or permanent mental incapacity (see below for definition of consent and incapacitation).

Sexual contact includes:

- a. sexual intercourse (anal, oral, or vaginal), including penetration with a body part (e.g., penis, finger, hand, tongue) or an object, or requiring another to penetrate themselves with a body part or an object, however slight; or
- b. sexual touching of the private body parts, including, but not limited to, contact with the breasts, buttocks, groin, genitals, or other intimate part of an individual's body for the purpose of sexual gratification.

Consent must be affirmative. "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is positive cooperation in act and attitude made with knowledge and agreement to the nature of the act.

Consent cannot be obtained through physical force, threats, or coercion, or by taking advantage of another person's incapacitation. Coercion is conduct, including intimidation or express/implied threats of immediate or future physical, emotional, financial, or reputational harm to the Reporting Party or another, which would place a reasonable person in fear they will be injured or harmed if they do not submit.

It is the responsibility of each individual involved to ensure they have the affirmative consent of the other(s) to engage in each act of sexual activity.

Domestic Violence includes any act of violence committed by a current or former spouse or intimate partner of the Reporting Party, by an individual with whom the Reporting Party shares a child in common, by a person who is cohabitating with, or has cohabitated with, the Reporting Party as a spouse or intimate partner, by a person similarly situated to a spouse of the Reporting Party under California state law, or by any other individual against an adult or minor Reporting Party who is protected from that individual's acts under California state law.

Dating Violence includes any act of violence committed by an individual:

- a. who is or has been in a social relationship of a romantic or intimate nature with the Reporting Party; 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 individuals involved in the relationship.

Other Forms of Dating and Domestic Violence: In addition to the definitions above, which require an act of violence to establish Dating Violence or Domestic Violence, the University also prohibits non-physical conduct that would cause a reasonable person to be fearful for their safety. Examples include economic abuse and behavior that intimidates, frightens, or isolates; conduct can involve one act or an ongoing pattern of conduct.

In evaluating non-physical conduct, the University considers whether the conduct is sufficiently severe, persistent or pervasive that it:

- (i) unreasonably interferes with, limits, or deprives an individual from participating in or benefitting from the university's education or employment programs, activities, or living environment or
- (ii) causes substantial emotional distress.

The totality of known circumstances, including the nature, frequency, intensity, location, context, and duration of the conduct, will be considered from both a subjective and objective perspective.

Stalking occurs when an individual engages in a course of conduct directed at a specific individual under circumstances that would cause a reasonable person to fear for their own safety or the safety of others or suffer substantial emotional distress.

“Course of conduct” means two or more instances, including but not limited to unwelcome acts in which an individual directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about an individual, or interferes with an individual’s property.

“Substantial emotional distress” means significant mental suffering or anguish.

Stalking includes the concept of cyber-stalking, a particular form of stalking in which electronic media such as the internet, social networks, blogs, cell phones, texts, or other similar devices or forms of contact are used.

Nonconsensual Viewing, Recording, and Dissemination:

This type of conduct involves one or more of the following behaviors committed for any purpose, including sexual arousal or gratification, financial gain, or other personal benefit:

- i. Observing or recording by any means the nudity or sexual activity of another without the knowledge and consent of all individuals involved;
- ii. Allowing another to observe or record the nudity or sexual activity of another without that person's knowledge and consent;
- iii. Sharing images or recordings of the nudity or sexual activity of another without that person's knowledge and consent.

Exposure: Exposure of the genitals to another without that individual's consent under circumstances where there is not a reasonable expectation of privacy.

Retaliation means any adverse action, intimidation, threat, coercion, or discrimination against an individual taken for the purpose of interfering with any right or privilege secured by this Policy or federal, state, or local laws or ordinances, and their implementing regulations (e.g., protesting, making a report), or because the individual has made a report or Formal Complaint of Prohibited Conduct, testified, assisted, or participated or refused to participate in any manner in any investigation, proceeding or hearing under this policy.

Retaliation includes such conduct through associates or agents of a Reporting Party, Respondent, or participant in any investigation or proceeding related to this Policy.



ALCOHOL, DRUGS, AND INCAPACITATION



The Role of Alcohol

- Central nervous system depressant
- Impairs cognition and psychomotor skills
- Progressively impairs all body functions
- Decreases inhibitions
- Impairs perceptions
- May cause blackouts or loss of consciousness
- May cause memory loss
- Effects exacerbated when mixed with other drugs

- Intoxication breeds vulnerability
- A person may be less likely to think someone is trying to sexually assault him/her
- A person intent on harming another may not need to use physical force
- A person may not realize incident has occurred
- A person may delay in reporting for multiple reasons
- No toxicological evidence of BAC/impairment level due to delay in report

- Lack of memory
- Inability to give detail
- Person may have been unconscious or in and out of consciousness
- Delay in reporting because:
 - May not know event occurred
 - May not recognize it as lack of consent
 - Feeling of “contributory negligence”
 - Concerns over conduct policy consequences

Incapacitation: Consent cannot be obtained by taking advantage of another individual's incapacitation. Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual who is incapacitated is not capable of giving valid, affirmative consent.

Incapacitation means an individual cannot understand the fact, nature, or extent of the sexual activity. An incapacitated individual lacks the physical and mental capacity to make informed, reasonable judgments about whether or not to engage in sexual activity. An individual who is incapacitated may not be able to understand where they are, whom they are with, how they got there, or what is happening.

In evaluating affirmative consent in cases involving incapacitation, the University considers the totality of available information in determining two issues:

1. Did the Respondent know the Reporting Party was incapacitated? or, if not,
2. Would a sober, reasonable individual in a similar set of circumstances as the Respondent have known that the Reporting Party was incapacitated?

- Be aware that questions about drugs and alcohol are often subject to misinterpretation
- Explain amnesty
- Commit to clarity on why you are asking
- Explain the reasons for your questions
 - Assessing for incapacitation
 - Evaluating the “lens” through which the party or witness observed the events (opportunity to see, hear, understand, and remember)
- Explain that you will ask similar questions of all witnesses
- Invite the witness to ask questions before you go further

- Timeframe of consumption (first drink, last drink, spacing)
- Number of drink
- For each drink:
 - Type (beer, wine, liquor – with specific brand, if possible)
 - Was it mixed with anything? Who mixed it?
 - How was it served? (Bar or restaurant will lead to more available information)

- List of others present and when they were there
- Other factors that affect the impact of alcohol:
 - Food consumed before, during, and after and whether food intake was normal or abnormal for the person
 - Height and weight
 - Medications
 - Different sleep patterns
 - Illness
 - Low hydration
 - History of blackouts

- Reporting Party's experience of their own intoxication (subjective):
 - Loss of consciousness/lack of memory – get the “bookends” of memory
 - Physical impairments – walking, standing, sitting, grasping, keeping head upright, ability to text, ability to remove one's own clothing, incontinence, vomiting
 - Cognitive impairments – dizzy, foggy, sleepy, giggly, hyperactive, sluggish, nonsensical
 - Verbal impairments – slurring, inability to talk, volume regulation
 - Any other effects

- Others' observations of Reporting Party (objective):
 - Observations of Reporting Party's consumption – when, where, what, who else was there?
 - Physical impairments
 - Cognitive impairments
 - Verbal impairments
 - Any other effects

Other information that can establish timeline, assist in assessing level of impairment, and provide corroboration of either party's account:

- History of relationship between the parties
- Witness's knowledge of Reporting Party's sober behavior
- Parties' communications or interactions with each other (compare pre- and post-incident)
- Parties' descriptions of the incident to others – context, content, demeanor
- Text/social media messages sent before, during, and after the incident

Considerations

Avoid	Why?	Try this instead
Asking about intoxication on a scale (e.g. "from 1-10")	There is no universal understanding of what the numbers on the scale mean	Asking about the impacts of alcohol on a person physically, cognitively, verbally, and otherwise; Asking for specific observations regarding conduct
Committing to a determining a specific BAC	It is very difficult to pinpoint a person's BAC after the fact. Additionally, BAC is only one data point and does not correlate precisely to a person's subjective experience or objective indicia of intoxication/incapacitation.	Use BAC when it is available in medical records. Otherwise, avoid attempting to pinpoint the BAC and rely instead on the subjective and objective indicia of intoxication/incapacitation.
Failing to obtain or ignoring medical evidence or observations of first responders, when they are available	Such witnesses are (generally) sober, trained observers who are paying close attention to the parties and surroundings. Their observations are critical, but it may necessitate coordination with external law enforcement or medical personnel.	Be attendant to mentions of first responders or medical personnel and try to obtain as much information about them as you can. Witnesses may remember, for example, that the EMT was female and had short brown hair. Work with your local agencies to identify such personnel and ascertain whether they can be made available for an interview.
Failing to fully contextualize witnesses' observations through use of a timeline	Witness statements taken out of context do not help answer the critical question: whether the Respondent knew or should have known that the Complainant was incapacitated.	Create a visual timeline of events that shows the parties' alcohol consumption, witness observations, and the alleged incident. Circle or highlight the timeframe when the parties were in each other's presences.

Creating a Universal Timeline

Using information gathered in the investigation, create a timeline that captures both parties' actions and show the timeframe when they were in the same place (below in gold)

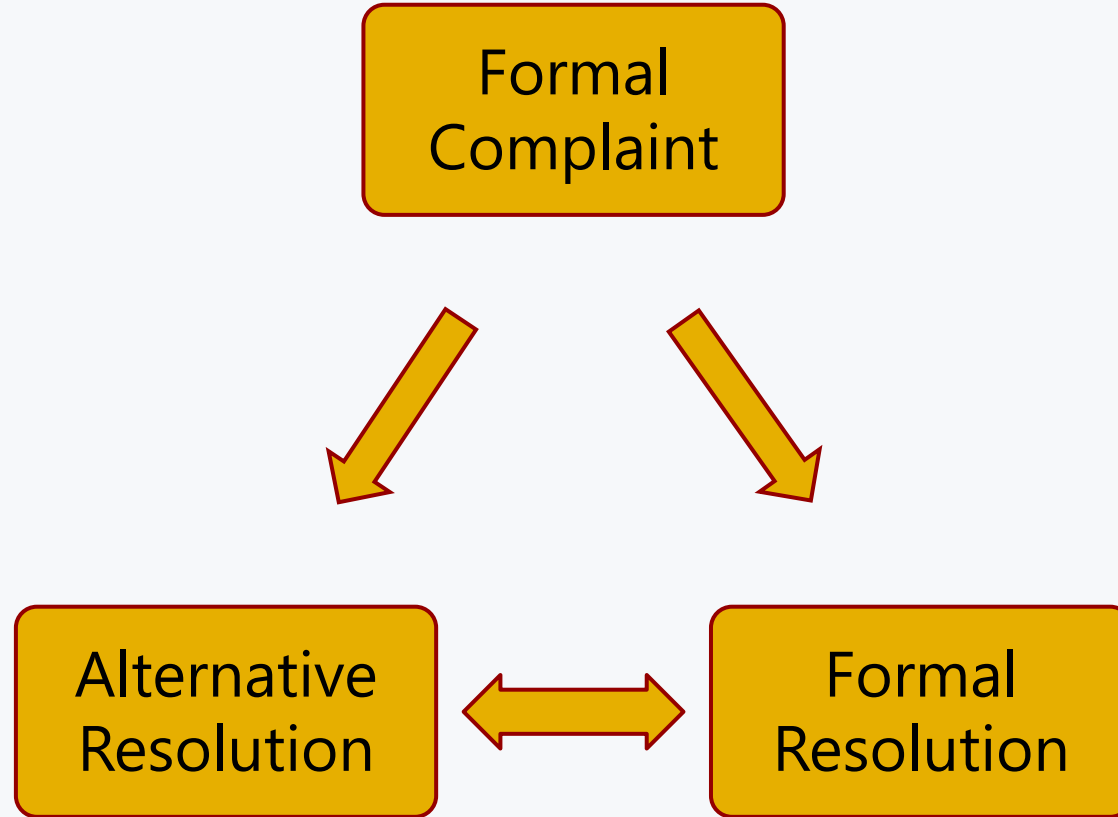
Complainant	Source(s)		Respondent	Source(s)
Reporting Party and C "pre-gamed" at A's apartment. Drank 3 shots Jim Beam and ate chips and guacamole. Walked from A's apartment to second "pre-game" at B's apartment. Drank 2 shots of Ciroc Peach and threw up in B's sink.	C interview A interview B interview C's photos w/ date/time	8:00 PM	Respondent arrived at party by himself. Filled one 16-ounce cup with beer and drank it quickly.	R interview
		8:30 PM	Saw friends X, Y, Z. Z gave Respondent keys to his room where Z kept hard liquor. Respondent retrieved a 750 ml bottle of Fireball and drank approximately 1/4 of it himself over the course of about an hour and a half. X and Y each had about 2 shot glasses full.	R interview X interview Y interview Z interview
		9:00 PM		
Reporting Party arrived at party with A, B, C. Complainant's friend D got her a 16-ounce cup of "jungle juice" which she drank slowly over the course of about an hour.	C interview A interview B interview D interview	9:30 PM		
		10:00 PM		
Reporting Party went upstairs to check out the view from the roof. As she was walking back downstairs, she took the last sip of her "jungle juice" and saw Respondent. Reporting Party texted her mom, "addfa."	C interview C's texts C's photos w/ date/time	10:30 PM	Respondent texted Z "thanks for the fireball. Let me know where I can meet you to give you your key back." Respondent saw Reporting Party coming down the stairs.	R interview R's texts
Reporting Party reported a complete memory loss from about 10:30 until the next morning.	C interview	11:00 PM	Reporting Party and Respondent went upstairs into the bathroom. Respondent's friend W walked in as they were kissing and undressing.	R interview W interview
Reporting Party's friend A saw her leaving the bathroom with her shirt on backwards. A escorted Reporting Party home.	A interview	11:30 PM	Respondent left the bathroom and texted Z "I just got laid!"	R interview Z interview R's texts



USC SEXUAL MISCONDUCT RESOLUTION PROCESS



Resolution Process



Basic Requirements



Treat reporting parties and respondents equitably by providing **remedies** to a reporting party where a determination of responsibility for sexual harassment has been made against the respondent, and by following a **grievance process** that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Relevant Regulations Sections:

Equitable Treatment: §§ 106.44(a) and 106.45(b)(1)(i)

Supportive Measures Only

- Parties may receive supportive measures **with or without** the filing of a Formal Complaint
- **Non-disciplinary**, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to either party.
- Designed to restore or preserve equal access to the University's education program or activity **without unreasonably burdening** the other party.

Alternative Resolution

- Initiated with the filing of a **Formal Complaint**
- Must give **written notice** to the parties as described in the Policy and § 106.45(b)(9)
- Both parties must give **voluntary written consent**
- Administered by trained facilitators who are free from conflicts of interest or bias
- Not available to address allegations that an employee sexually harassed a student

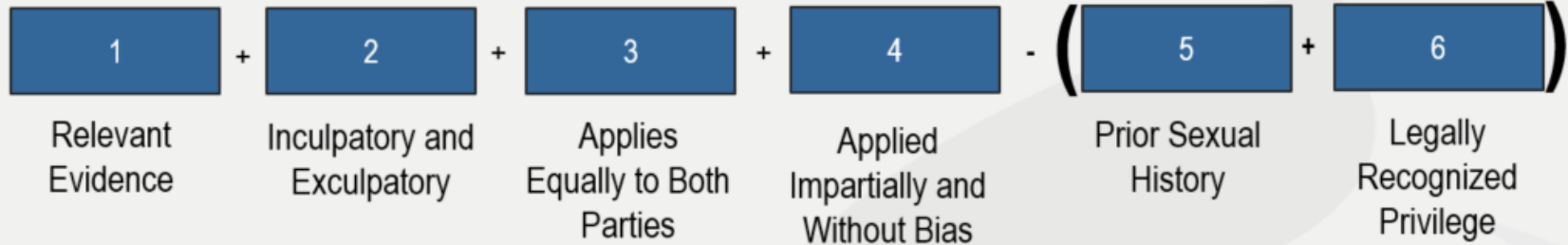
Formal Resolution

- Initiated with the filing of a **Formal Complaint**
- Must give **written notice** to the parties as described in the Policy and § 106.45(b)(2)(i)
- Follows **prescribed grievance process** described in the Procedures and § 106.45
- Administered by trained investigators and decision-makers who are free from conflicts of interest or bias

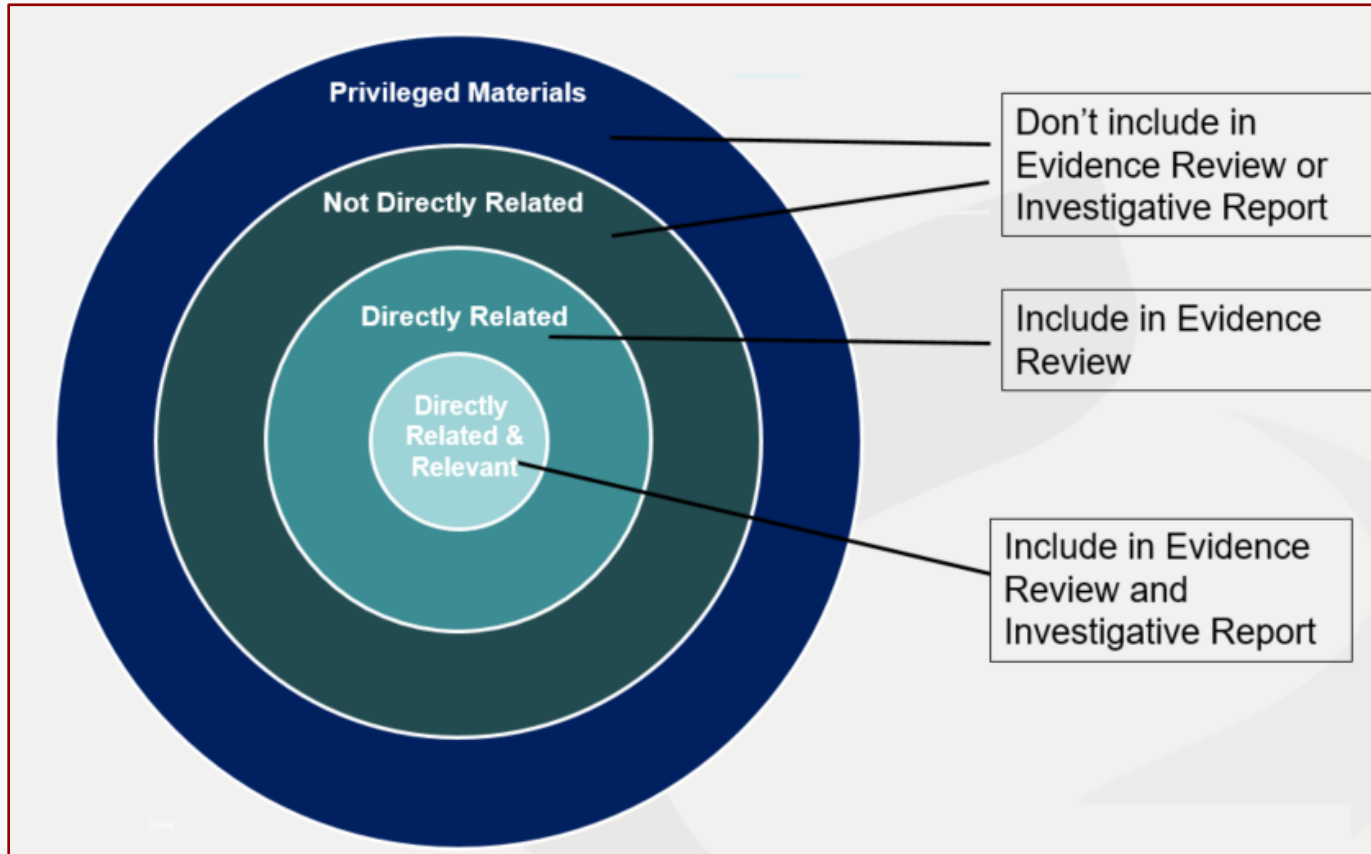
Overview of Investigation Requirements



Evidentiary Rules You Must Consider



Evidentiary Levels for Inclusion




May not seek or obtain
legally-privileged
documents or information,
unless:

The person holding such
privilege has waived the
privilege by:


Signing a written consent,
acknowledging that any
record provided to the
Investigator will be
available for review by the
other party.

Prior Sexual History of a Reporting Party

A Reporting Party's prior sexual history is generally not relevant, although evidence **may be admitted** if determined relevant in the following **two circumstances only**:



(1) To show that someone other than Respondent committed the alleged Sexual Misconduct; and



(2) Where Respondent alleges the sexual contact was consensual, and the evidence is offered as to the manner and nature of how the parties communicated consent in the past, as relevant in assessing whether consent occurred with respect to the alleged Sexual Misconduct at issue

Prior Sexual History ≠ Existing Dating Relationship



"Scenarios described by commenters, where a respondent might wish to prove the [reporting party] had a motive to fabricate or conceal a sexual interaction, do not require admission or consideration of the [reporting party's] sexual behavior."

"Respondents in that scenario could probe a [reporting party's] motive by, for example, inquiring whether a [reporting party] had a dating or romantic relationship with a person other than the respondent, without delving into a [reporting party's] sexual behavior; sexual behavior evidence would remain irrelevant in such circumstances."

Title IX Regulations, May 19, 2020, §§ 106.45(b)(1)(iii) and 106.45(b)(6), Preamble at p. 30351

Prior or Subsequent Conduct of the Parties May be Relevant

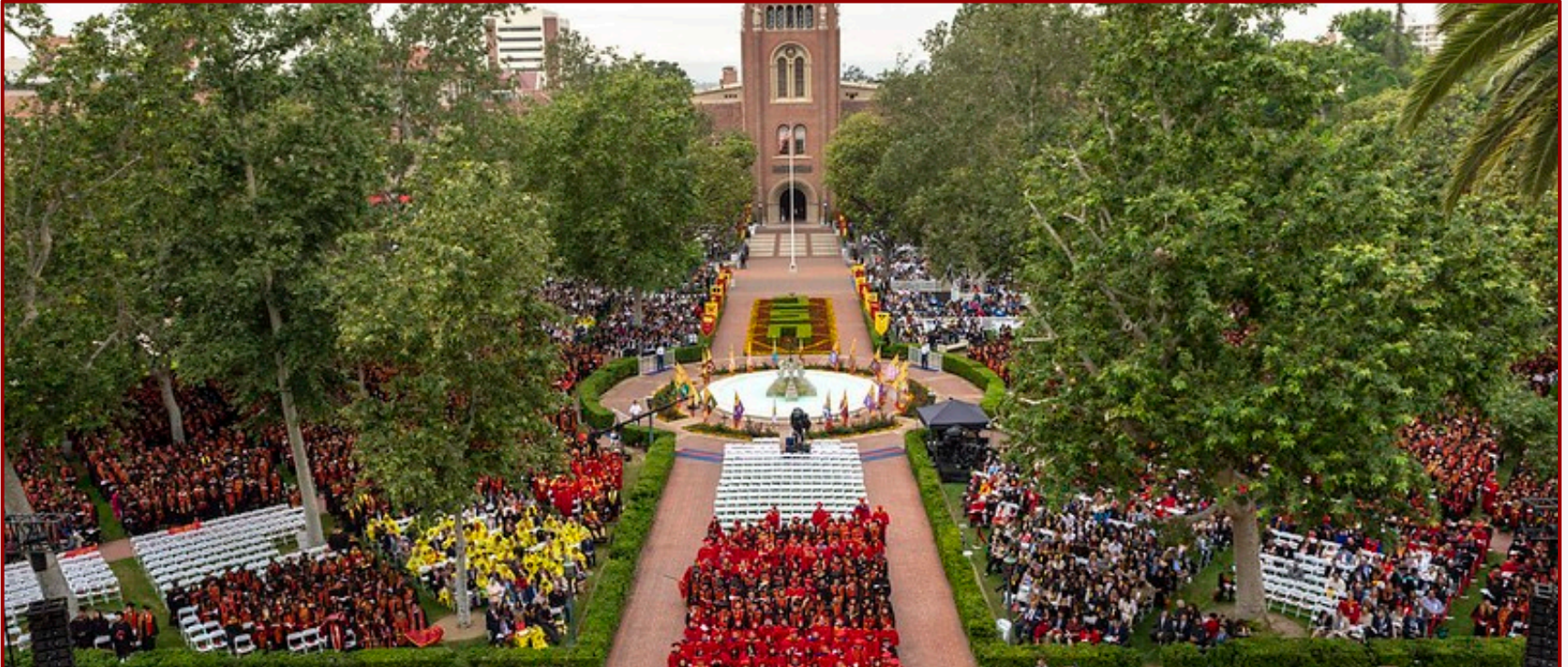


In gathering information, the Investigator may also consider other reports of, or findings of responsibility for, the same or substantially similar conduct by the **Respondent** to the extent such information is relevant and available.

Such information may be relevant in determining motive, intent, absence of mistake, pattern, or another material fact.

For example, where there is evidence of a pattern of conduct the same or substantially similar in nature by the Respondent, either prior to or subsequent to the conduct in question, **regardless of whether there has been a finding of responsibility**, this information may be relevant and probative to the determination of responsibility and/or sanctioning, as applicable.

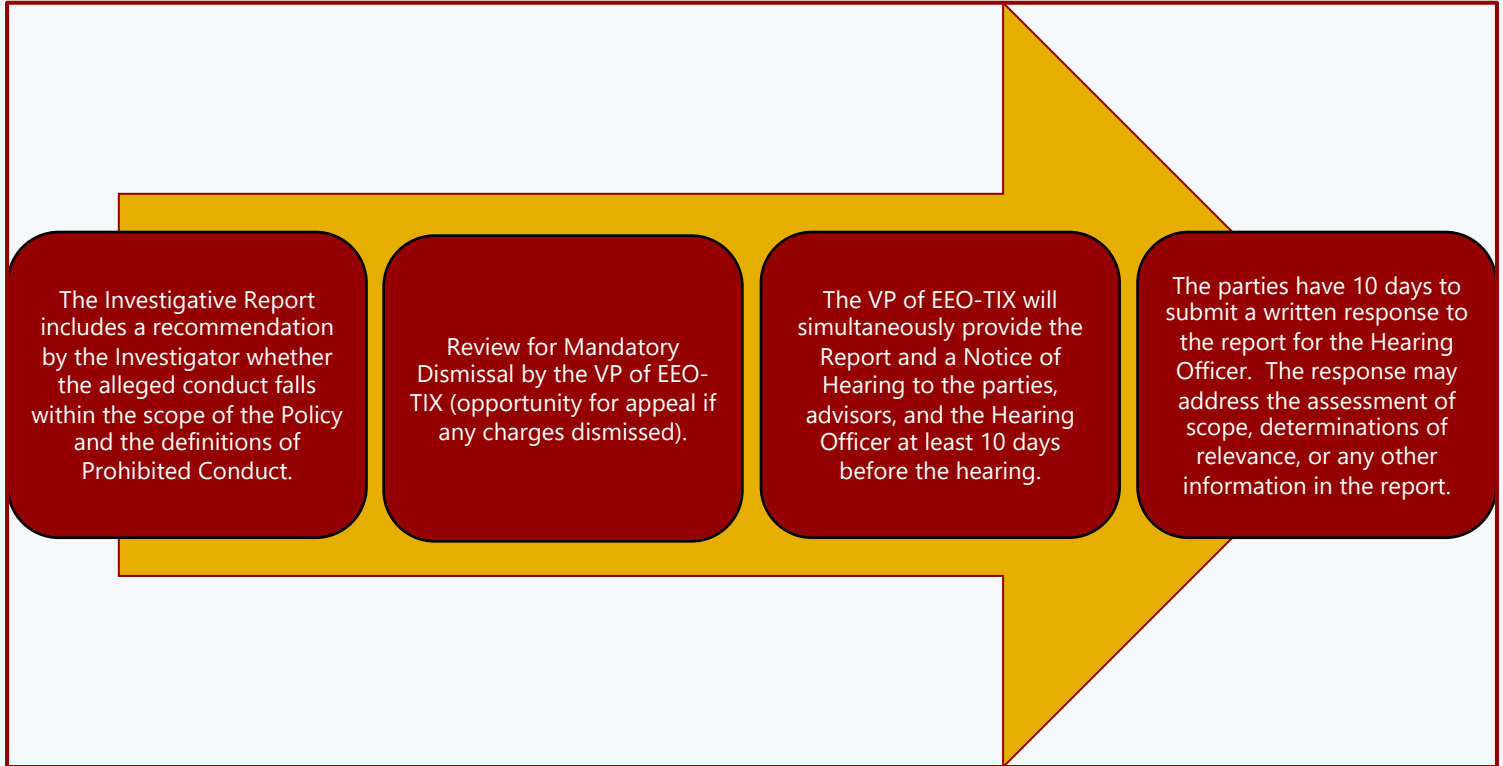
Similarly, prior or subsequent conduct of a **Reporting Party**, even when it involves conduct that may violate University policy, may be considered when relevant.



THE LIVE HEARING



What to Expect Before the Hearing



KEY SECTIONS OF INVESTIGATIVE REPORT

- Procedural background
- Overview of investigation
- Information about parties/witnesses
- Evidence review (including responses by parties)
- Potential policy violations (with elements)
- Summary of relevant evidence
- “The Road Map” (i.e., synthesis in narrative/chart form of disputed/not disputed evidence, including inculpatory and exculpatory)

The Notice of Hearing

1

- The specific Policy violations that will be the subject of the hearing

2

- The date, time, and location of the hearing

3

- The name of the Hearing Officer with instructions on how to challenge participation of the Hearing Officer on the basis of conflict of interest or bias

4

- A statement that all evidence that is directly related to the allegations, as shared in evidence review, will be available to enable each party an equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination

5

- A statement that the parties have the right to have an advisor present at the hearing, who will conduct questioning on the party's behalf

6

- A statement that the University will provide a hearing advisor, without fee or charge, to conduct questioning on behalf of the party at the hearing, if the party does not already have an advisor present for the hearing

7

- Information regarding how to request that witnesses be present at the hearing

8

- Information about the hearing format

9

- Information regarding the right to request reasonable accommodations for disability or language diversity at the hearing

The Hearing Officer

The Hearing Officer is typically an external, trained professional, although it may be a campus administrator.

A Hearing Officer is a fair and impartial decision-maker free of conflict of interest or bias for or against either party.*

The Hearing Officer must be trained on:

- how to serve as an informed and impartial decision-maker,
- any training content provided to investigators,
- any technology to be used at a live hearing, and
- issues of relevance of questions and evidence.

*The Reporting Party and Respondent will be provided the name of the Hearing Officer in advance and have the opportunity to raise a challenge for bias or conflict of interest to the VP of EEO-TIX prior to the hearing. The VP of EEO-TIX will render a determination in writing on any such challenge.

Advance Hearing Preparation is Critical



Carefully review the Investigative Report

Review all of the evidence gathered during the investigation










Read the parties' responses to the Investigative Report to anticipate the arguments they will make at the hearing

Know the elements of all of the Policy violations at issue



Identify gaps, issues, necessary witnesses, and prepare questions in advance of the hearing.

The Role of the Hearing Officer

- 
- Review the investigative report and any written statements provided by the parties in response to the investigative report, all exhibits, and any additional relevant evidence introduced at the hearing.
- 
- Determine the format of the hearing.
- 
- Provide all parties with an equitable opportunity to be heard and to reach a full and fair determination as to responsibility and imposition of any sanction, should there be a finding of responsibility.
- 
- Determine the relevance of every question posed by the parties' advisors and briefly explain any decision to exclude a question as not relevant.
- 
- Determine whether there is sufficient evidence, by a preponderance of the evidence, to support a finding of responsibility as to each element of each Policy violation at issue.
- 
- Reach credibility determinations if appropriate, but do not base credibility determinations on a person's status as a Reporting Party, Respondent, or witness.
- 
- Prepare a written decision, which includes the finding of responsibility or non-responsibility and rationale for your decision.

Hearing Logistics



The hearing will be live and require the participants to simultaneously see and hear each other.

A hearing may be conducted with all parties physically present in the same geographic location.

- Alternatively, at the discretion of the VP of EEO-TIX, any or all parties, witnesses, or other participants may appear at the hearing virtually, with technology enabling participants simultaneously to see and hear each other.

Either party may request that the parties be located in separate rooms or locations for the hearing, with technology enabling the Hearing Officer and parties to simultaneously see and hear the party or witness answering questions.

- Such a request should be submitted to the VP of EEO-TIX at least two (2) calendar days prior to the hearing.

Nothing in this section requires the parties to appear in-person before the Hearing Officer and the hearing may proceed with all parties participating virtually as appropriate and necessary.

The hearing will be **audio-recorded** by the University.

The Hearing Format, Generally

1 • Opening statements from the Reporting Party and Respondent.

2 • The Reporting Party will respond to relevant questions from the Hearing Officer and then the Respondent's advisor.

3 • The Respondent will respond to relevant questions from the Hearing Officer and then the Reporting Party's advisor.

4 • The Hearing Officer will also hear from relevant witnesses, including the Investigator.

5 • Each party will have the opportunity to question the witnesses, including the Investigator, through their advisor of choice.

6 • After all parties and witnesses have been heard, the parties will have an opportunity to provide a closing statement.

- *NEW* anticipated position at USC
- Will ensure timely access to all necessary evidence, case files, and documentation for parties and Hearing Officer
- Will serve as key logistical EEO-TIX support for all steps related to the pre-hearing phase; the live hearing, including scheduling parties and witnesses; and for any sanctioning panel and appeal
- Will provide advance and real-time tech support for and during live hearings

The parties are permitted to have an advisor of their choice accompany them to a meeting or hearing pursuant to the University's Policy on Prohibited Discrimination, Harassment, and Retaliation (Policy).

The advisor may be any person, including an attorney, but need not be an attorney.

A party may decline to use an advisor for all stages of the formal or alternative resolution process, with the exception of the hearing, where any questioning of the other party must be conducted by the party's advisor.

If a party does not have an advisor for the hearing, the University will provide an advisor, free of charge.

This University-appointed advisor may be, but is not required to be, an attorney, and will attend the hearing and conduct questioning on behalf of that party.

The Role of the Advisor of Choice

1	Accompany their advisee to all meetings or proceedings related to the investigation and resolution of a report under the University's Policy.
2	May provide support and advice to the advisee at any Sexual Misconduct Process-related meetings and proceedings.
3	May receive copies of all correspondence from the EEO-TIX office to the advisee with consent from the advisee.
4	May not speak on behalf of the advisee during any interview or meeting, except at hearing and only in capacity of conducting cross-exam on behalf of advisee.
5	May not submit written position statements on behalf of the advisee to be included in the record. All statements must be made directly by the advisee.
6	May not disrupt meetings or proceedings or fail to follow the rules of the hearing, and, in such cases, the advisor can be asked to leave.
7	Must have sufficient flexibility to attend interviews, receive documentation, and attend the hearing (if desired by the advisee).
8	Should be knowledgeable about the University's relevant policies and procedures.

The Role of the USC-Appointed Hearing Advisor

1	Accompany their advisee to all meetings or proceedings related to the hearing (approximately 10 days out from hearing).
2	May provide support and advice to the advisee at any meetings related to the hearing (e.g., pre-hearing conference).
3	May receive copies of all correspondence from the EEO-TIX Title IX office to the advisee with consent from the advisee.
4	May not speak on behalf of the advisee during any interview or meeting, except at hearing and only in capacity of conducting cross-exam on behalf of advisee.
5	May not submit written position statements on behalf of the advisee to be included in the record. All statements must be made directly by the advisee.
6	May not disrupt meetings or proceedings or fail to follow the rules of the hearing, and, in such cases, the advisor can be asked to leave.
7	Must have sufficient flexibility to receive documentation and attend the hearing (if desired by the advisee).
8	Should be knowledgeable about the University's relevant policies and procedures.



The Mechanics of Cross-Examination at the Hearing

Each party will have the opportunity to question the other party, the witnesses, and the Investigator through their advisor of choice – or hearing advisor provided by the University – directly, verbally, and in real-time.

The University will make all evidence directly related to the allegations, as shared in the evidence review, available to the parties at the hearing to give each party an equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

The cadence of cross-examination at the Hearing:

Only relevant questions may be asked of a party or witness. Before a Reporting Party, Respondent, or witness responds to a question, the Hearing Officer will first determine whether the question is relevant and briefly explain any decision to exclude a question as not relevant, as defined in the Sexual Misconduct Resolution Process.

Advisor to perform cross-examination:

If a party does not have an advisor present at the live hearing, the University will provide an advisor, free of charge, who may be, but is not required to be, an attorney, for questioning on behalf of that party.

USC's Rules of Decorum for Hearings

- 1 •Participants are expected to treat one another respectfully and conduct themselves professionally and in accordance with the Policy.
- 2 •All participants should speak one at a time and avoid talking over one another.
- 3 •Parties should wait until their allotted time to talk and not interrupt witnesses, the Hearing Officer, etc.
- 4 •Parties should have their statements and parties' advisors should have their questions prepared in advance of the hearing.
- 5 •Parties and witnesses are not permitted to record the hearing.
- 6 •Parties and witnesses should not answer any question until the Hearing Officer has determined whether the question is relevant.
- 7 •Parties are permitted to consult with their advisors during the hearing.
- 8 •Advisors will be given one warning when their conduct violates these Rules and will be removed or dismissed from the hearing upon a second violation of these Rules.
- 9 •Parties and advisors should direct all inquiries about the hearing process should be directed to the VP of EEO-TIX.

If a party or witness does not submit to questioning by the other party's advisors at the hearing, the Hearing Officer may not rely on any statement of that party or witness in reaching a determination regarding responsibility for a Policy violation.

The Hearing Officer may not draw any adverse inference from the decision of a party or witness to not participate at the hearing.

It's a Bright Line Rule:

If a party or witness does not submit to cross-examination at the live hearing, the [Hearing Officer] **must not rely on any statement** of that party or witness in reaching a determination regarding responsibility; provided, however, that the [Hearing Officer] cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. See Title IX Regulations May 19, 2020; § 106.45(b)(6)(i).

- Assessing credibility factors:
 - Demeanor
 - Interest
 - Detail
 - Corroboration
 - Common sense
- Testing inherent plausibility in light of the known information, relationships, and circumstances of the disclosure

- Demeanor may be informative, not determinative
- Assessing demeanor requires individual assessment as to how demeanor supports or detracts from overall reliability of information
- Fact-finders should not place undue reliance on demeanor as an indicator of candor or evasion
- Demeanor is one factor to observe in the context of the totality of the information

- Reporting party/Respondent may be affected by emotional component of sexual assault allegations
- Range of behaviors and emotional reactions vary
- Elicit and consider information from witnesses as to demeanor after the reported incident, during the disclosure, and in response to the report
- Note changes in demeanor and explanations for significant changes
- Consider demeanor during proceedings

- If parties know each other:
 - Understand the context and history of any prior relationships
 - Understand significant events or markers in relationship
- Explore effects of incident:
 - Emotional: fear, intimidation, worry, anxiety
 - Actual: financial, time, participation in the process
- Is there any particular animus/motive/ill will for/or against any party or witness?

- How will the party/witness be impacted by their participation in the process?
 - Was information provided “against” interests?
- How will the party/witness be impacted by any particular outcome?
 - Will information shared impact current or future relationships?

- Freeze frame and explore critical junctures
- Cross-reference Reporting Party and Respondent accounts with all other evidence and witnesses' statements
- Look to attendant details and behavior pre- and post-incident by both parties
- Focus on resolution of conflicts through believable evidence and common sense
- Outline case by issue and cross reference with all available evidence, including timelines

- Consider other attendant details such as:
 - Size, age, power, authority and/or social status differential for Reporting Party and Respondent
 - Location of incident
 - Isolation of Reporting Party
 - Potential witnesses or reasons for lack of witnesses
 - Any change in either party's demeanor, personality, or routine after the incident

- Explore all circumstances of each account
- Understand the who, what, and where of the interview
- Ask the “why” (without asking why); questions to explore:
 - State of mind
 - Life circumstances at the time
 - Perception of interviewer/process
 - Changes in interest or motivation
- Inquire directly about inconsistencies
- Attempt to reconcile where possible

- A process where an individual reveals abuse or assault
- On-going, not a one time event
- Stages of Disclosure:
 - Denial
 - Tentative
 - Active
 - Recantation
 - Reaffirmation
- Triggers for Disclosure
 - Accidental – e.g., person's secret is found out
 - Purposeful – e.g., person makes decision to tell

- Testing inherent plausibility of the conflicting accounts in light of the known information
- How does it all fit together?
- Does it make sense in the context of:
 - These individuals?
 - The setting?
 - The community?
 - The activity?
 - The relationships?

Dynamics of Sexual Assault	Informed understanding of dynamics of sexual and gender-based harassment and interpersonal violence.
Demeanor	<p>Did the witness speak in a convincing manner? Was he/she uncertain, confused, self-contradictory or evasive?</p> <p>How did he/she look, act and speak while testifying / reporting?</p>
Interest / Motive / Bias	Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect his/her testimony?
Detail	<p>Use direct quotes from testimony or statements.</p> <p>How well could the witness remember and describe the things about which he/she testified?</p> <p>Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth or old age or by any physical, mental or intellectual deficiency?</p>
Corroboration	<p>How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?</p> <p>Was it contradicted or supported by the other testimony and evidence?</p>
Common Sense	<p>Does it all add up? (Gut check)</p> <p>Is there something missing?</p>

- Was the witness able to see, hear, or know the things about which they testified?
- How well could the witness remember and describe the things about which they testified?
- Was the ability of the witness to see, hear, know, remember, or describe those things affected by youth or old age or by any physical, mental, or intellectual deficiency?
- Were there inconsistencies or discrepancies in the witness's testimony?

- Did the witness have any interest in the outcome of the case, bias, prejudice, or other motive that might affect their testimony?
- Did the witness stand to receive any benefit from a particular outcome?

- Did the witness testify in a convincing manner?
- How did the witness look, act, and speak while testifying?
- How did the witness's nonverbal communications (posture, gestures, facial expressions, eye contact) match their verbal communications (voice, expression)?
- Was the testimony uncertain, confused, self-contradictory, or evasive?

- How well did the testimony of the witness square with the other evidence in the case, including the testimony of other witnesses?
- Was it contradicted or supported by the other testimony and evidence?

Does it make sense?

(i.e., Does it have the ring of truth?)

- Personal Preparation: Be Objective
 - Identify and set aside personal biases and prejudices
 - Be careful to avoid making assumptions as to how a person “should” react
 - Avoid putting oneself in the shoes of the complainant or the respondent
 - Recognize emotional impact, if any, but do not allow emotion to impact fair and impartial fact-finding

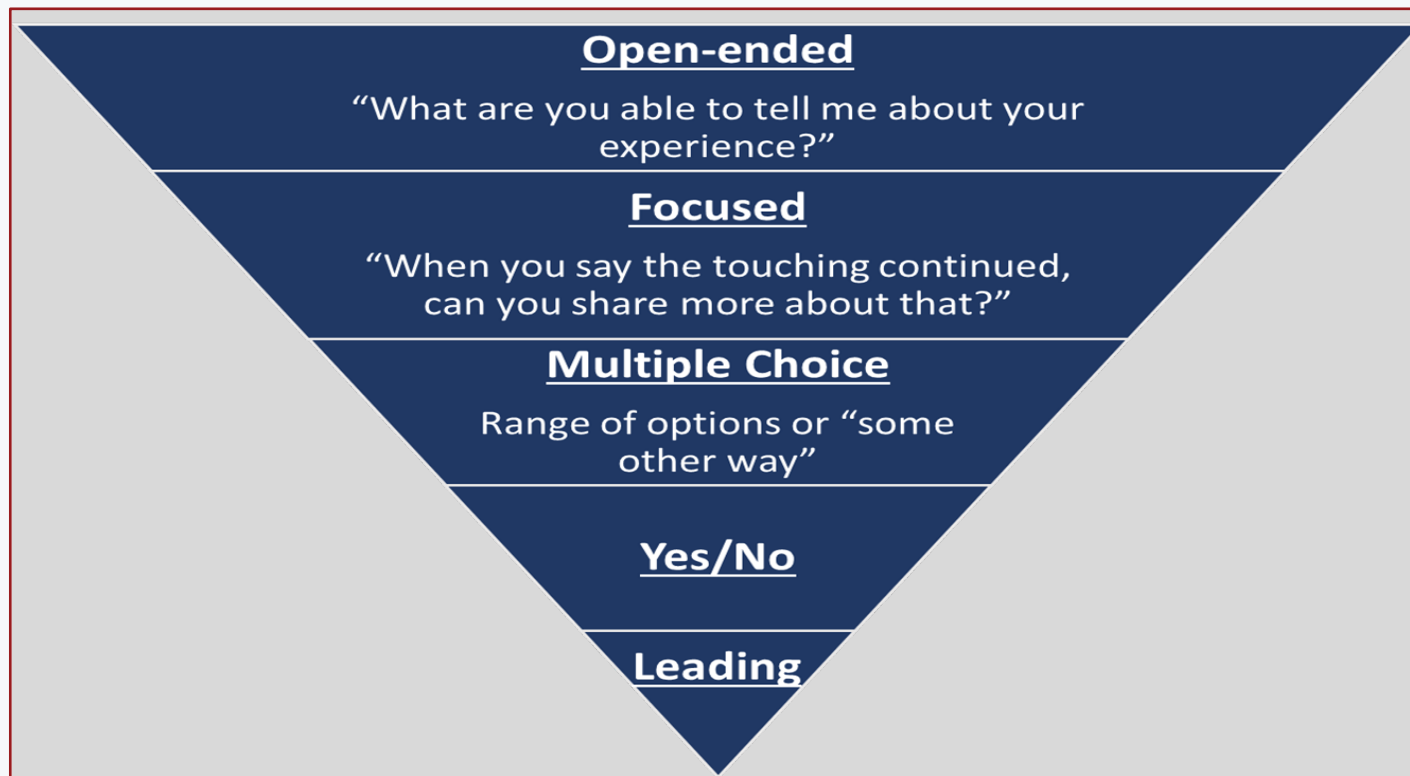
- Personal Preparation: Be Professional
 - Maintain a calm, appropriate demeanor at all times
 - Be polite and respectful to all parties
 - Maintain balance in approach with parties
 - Maintain appropriate sensitivity to presentation of difficult information
 - Prepare for the hearing by reading and annotating all materials
 - Outline areas of inquiry in advance
 - Consider wording of questions in advance

- Participation Techniques
 - Be alert to your non-verbal communication
 - Pay attention to tone of voice and volume level
 - Avoid asking questions that imply a value judgment
 - Maintain attentive posture and good eye contact
 - Exercise reflective listening in framing next question

What to Ask:

- Do I need to know the information?
- When questions arise, it can be helpful to walk yourself through the following set of questions:
 - Will an answer to my question help me decide the appropriate outcome or sanction?
 - Will getting an answer to this question influence my decision?

Questioning Techniques



Post-Hearing



The Hearing Officer will deliberate to determine whether there is sufficient evidence, by a ***preponderance of the evidence***, that Respondent engaged in conduct that violated the Policy.

The Hearing Officer will draft a written notice of determination and provide to the VP of EEO-TIX/Title IX Coordinator:

Where there is a finding of non-responsibility, the VP of EEO-TIX/Title IX Coordinator will issue a written notice of determination.

Where there is a finding of responsibility for a Policy violation, the VP of EEO-TIX/Title IX Coordinator will initiate the sanctioning process.

- Gather all documents and exhibits in advance
- Use cross-referencing grids/matrices
- Identify specific elements of alleged misconduct from policy definitions
- Begin by identifying areas of agreement as to evidence
- Identify conflicts and prioritize
- Discuss each conflict individually
- Articulate your position and support it from the evidence

The Written Notice of Outcome Must Include:

1

- Identification of the allegations potentially constituting Sexual Misconduct;

2

- A description of all procedural steps, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

3

- Findings of fact supporting the determination;

4

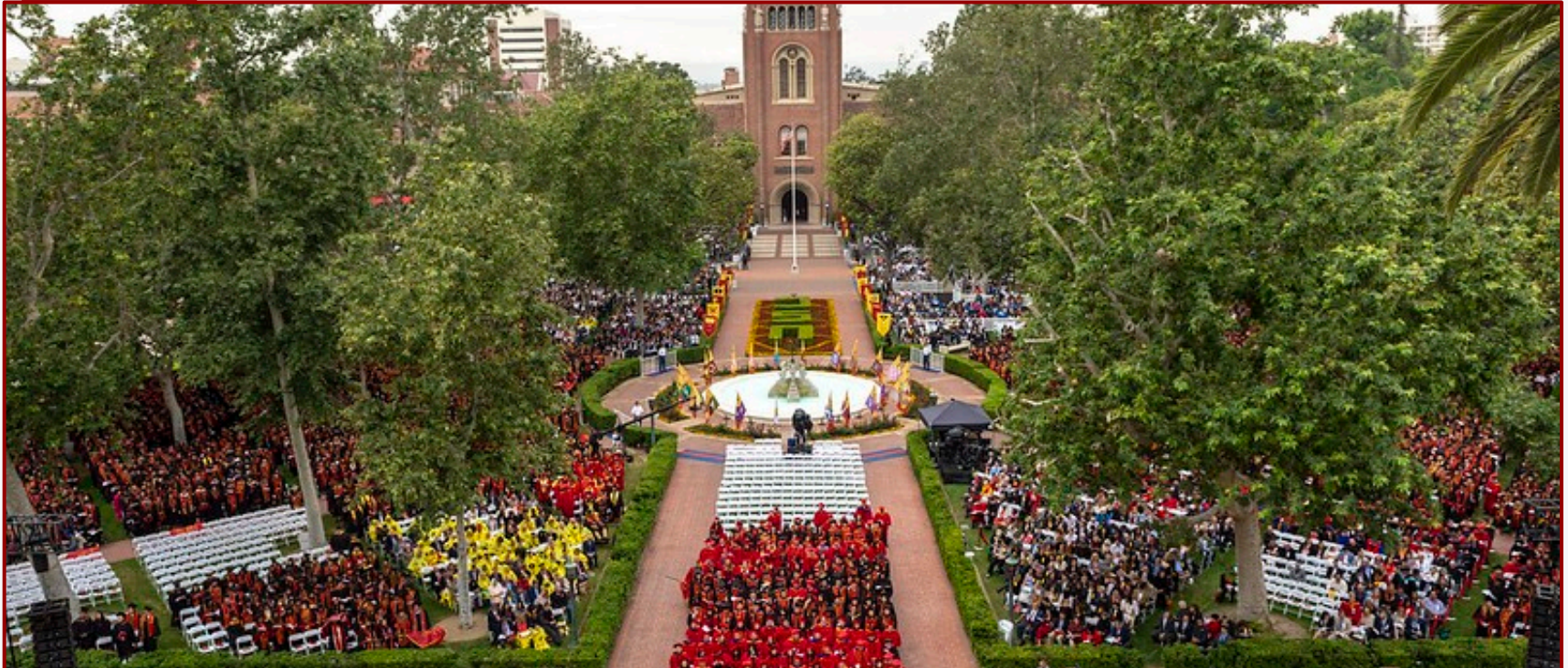
- Conclusions regarding the application of the Policy to the facts;

5

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;

6

- The procedures and permissible bases for the Reporting Party and Respondent to appeal.



THE SANCTIONING PANEL



The Sanctioning Panel



Student Respondents:

The Sanctioning Panel will be composed of two employees appointed by the Provost and Senior Vice President for Academic Affairs, and one student appointed by the Vice President for Student Affairs.

Faculty Respondents:

The Committee on Professional Responsibility will serve as the Sanctioning Panel.

Staff Respondents:

The Sanctioning Officer is a delegate of the Senior Vice President of Human Resources.

Timing:

The Sanctioning Panel/Officer will convene no later than 10 calendar days following the referral of the Hearing Officer's finding of facts and determination of responsibility.

Impact and Mitigation Statements



Impact Statement: The Reporting Party may submit a written statement describing the impact of the Sexual Misconduct on the Reporting Party.

Mitigation Statement: The Respondent may submit a written statement explaining any factors that the Respondent believes should mitigate or otherwise be considered in determining the sanctions(s) imposed.

The VP of EEO-TIX will provide any statements to the Sanctioning Panel/Officer. Each party has the opportunity to view the other party's statement prior to the imposition of sanctions.

Factors for Consideration



- the nature and severity of the conduct;
- the impact of the conduct on the Reporting Party;
- the impact or implications of the conduct on the community or the University;
- prior misconduct for which the Respondent has been found responsible, including the Respondent's relevant prior discipline history, both at the University or elsewhere (if available), including criminal convictions;
- whether the Respondent has accepted responsibility for the conduct;
- maintenance of a safe and respectful environment conducive to learning, including whether there is a continued hostile environment on campus caused by the Respondent's conduct;
- presence or absence of bias as a motivation for the Respondent's conduct;
- protection of the University community requiring extended protective measures or other sanctions; and
- any other mitigating, aggravating, or compelling circumstances in order to reach a just and appropriate resolution in each case.

The Written Notice of Outcome Must Include:

1

- Identification of the allegations potentially constituting Sexual Misconduct;

2

- A description of all procedural steps, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

3

- Findings of fact supporting the determination;

4

- Conclusions regarding the application of the Policy to the facts;

5

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;

6

- Any disciplinary sanctions imposed on the Respondent, and any remedies to the Reporting Party;

7

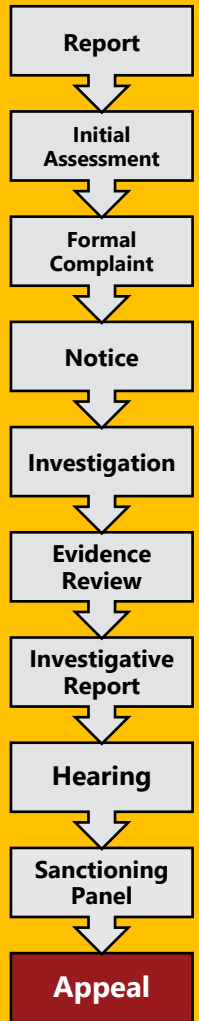
- The procedures and permissible bases for the Reporting Party and Respondent to appeal.



THE APPEAL PROCESS



What to Expect Before the Appeal



The appeal must be submitted to the VP of EEO-TIX/Title IX Coordinator within seven (7) calendar days following delivery of the written notice of outcome.

Written requests for appeal submitted by one party will be shared with the other party.

The non-appealing party has seven (7) calendar days to respond in writing to any appeal submitted by the other party.

Grounds for Appeal by Either Party



1

- **Procedural irregularity** that affected the outcome of the matter.

2

- **New evidence**, not reasonably available at the time of the hearing, regarding responsibility or dismissal of the Formal Complaint, that could affect the outcome of the matter.

3

- The VP of EEO-TIX/Title IX Coordinator, Investigator(s), Hearing Officer, or Sanctioning Officer/Panel had a **conflict of interest or bias** for or against Reporting Parties or Respondents generally, or the individual Reporting Party or Respondent, that affected the outcome of the matter.

The Appellate Authority Depends on Status of Respondent



Student
Respondent

- A delegate of the Vice President of Student Affairs who is not otherwise involved in any step of the process, or an external professional.

Faculty
Respondent

- A delegate of the Provost who is not otherwise involved in any step of the process, or an external professional.

Staff
Respondent

- A delegate of the Senior Vice President of Human Resources who is not otherwise involved in any step of the process, or an external professional.

The Scope of the Appellate Review



The Appellate Authority will review:

- (1) the written appeal submissions by the parties,
- (2) the investigative report (including all exhibits and related materials), and
- (3) the written notice of outcome.

In reaching a decision, the Appellate Authority has the discretion to consult with relevant stakeholders.

The Appellate Authority may:

- (1) affirm the findings or determination of responsibility;
- (2) affirm or modify the sanction(s); or
- (3) remand the matter for reevaluation or further investigation.

The decision by the Appellate Authority is final.

Possible Outcomes Following the Appeal



Appeal granted due to procedural irregularity:

- The matter may be remanded for further process to remedy the error (based on the nature of the procedural error).

Appeal granted due to the discovery of new evidence:

- The matter may be returned to the same Hearing Officer for reconsideration in light of the new evidence.

Appeal granted due to bias or conflict of interest:

- The matter should be remanded for further action consistent with the appellate finding.

Appeal denied:

- The Appellate Authority issues its written decision and the determination regarding responsibility becomes final.

The Timing of the Appeal



The Appellate Authority will issue a simultaneous written decision to the parties within 10 calendar days of receipt of the appeal.

The time frame for filing an appeal based on newly-discovered information may be extended at the discretion of the VP of EEO-TIX where the evidence could not reasonably have been discovered within the time frame and a compelling justification exists for its consideration.

Catherine Spear

Vice President and Title IX Coordinator
USC Office for Equity, Equal Opportunity, and Title IX
(EEO-TIX)

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