



Strategic Risk  
Management Solutions

# Harassment and Discrimination Decision-Maker and Appeal Officer Training

Boston University Senior Leadership

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# PROTECTED CLASSES AT BU

- Race
- Color
- Natural or protective hairstyle
- Religion
- Sex (including that based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, gender identity or expression and marital or parental status)
- Age (40 or older),
- National origin (including shared ancestry and ethnic characteristics and citizenship/residency in a country with a dominant religion or distinct religious identity)
- Ethnicity
- Physical or mental disability, genetic information
- Military service or veteran status
- Including
  - Title VI and Title VII of the Civil Rights Act of 1964,
  - Sections 503 and 504 of the Rehabilitation Act of 1973
  - Title IX of the Education Amendments of 1972\*\*
  - Other similar laws that prohibit discrimination

Source: Boston University Draft Interim Equal Opportunity and Title IX Policy

# PROHIBITED BEHAVIOR

- Discrimination (Disparate Treatment)
- Harassment (Hostile Environment)
- Sexual Misconduct (2020-Present & General)
  - Quid pro Quo, Sexual Harassment, Sexual Assault (Rape, Fondling, Incest, Statutory Rape), Dating Violence, Domestic Violence, Stalking
- Retaliation
- Deliberately False and/or Malicious Allegations

Source: Boston University Draft Interim Equal Opportunity and Title IX Policy

# 2024 TITLE IX REGULATIONS LITIGATION

- Opponents of the 2024 Title IX Regulations sought, and were granted, **injunctions** to delay or halt implementation of the Regulations
  - Primary concerns are the validity of the gender identity provisions and the hostile environment definition
  - **Note:** Some states also have “Do Not Implement” directives from state officials
  - Massachusetts can enforce 2024 Regs
- Implementation will be unsettled for the foreseeable future



# RETROACTIVITY

- The 2024 Regulations apply **only** to sex discrimination alleged to have occurred **on or after** September 23, 2024\*
  - For conduct alleged to have occurred prior to September 23, 2024\*, the 2020 Regulations apply in perpetuity
- Recipients will need to maintain/update policies, procedures, and training that are compliant with the **2020** Regulations and **2024** Regulations



# REPORTING

- Clery/VAWA
  - Campus Security Authorities must report specific crimes for statistical purposes (non-identifiable information is reported publicly by BUPD)
- Mandated Reporters
  - All non “Confidential Employees” must report incidents to EOO that reasonably may constitute Prohibited Behavior under BU’s Equal Opportunity and Title IX Policy
    - Must report all known details
    - Learned/Observed/gain knowledge of when acting within scope of employment

# DUE PROCESS

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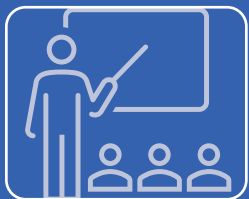
## Title IX Regulatory Requirements

- Flexible procedures for Title IX Resolution Process
- Can have different procedures for students and employees



## Fundamental Fairness for Students in Disciplinary Procedures

- Fundamental fairness concepts (private institutions)
- Constitutional due process protections (public institutions)



## Procedural Protections for Employees

- State law requirements may exist for some or all positions
- May be enhanced by collective bargaining agreements/union contracts



# DUE PROCESS IN PROCEDURE

## **A Resolution Process must be:**

- Consistent, thorough, and procedurally sound review of all allegations
- Substantially compliant with written policies and procedures

## **A Final Determination must:**

- Be appropriately impartial and fair, both in finding and sanction(s)
- Be neither arbitrary nor capricious
- Be based on a fundamentally fair rule or policy and made in good faith
- Have a rational relationship to the evidence

Decision-makers must be aware of due process protections owed to the parties and raise any due process concerns to the Title IX Coordinator if necessary



# CONFLICTS OF INTEREST AND BIAS

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- Decision-makers (DM) must **not have a conflict of interest or bias** for or against the following:
  - Complainants, generally
  - Respondents, generally
  - The parties involved in a complaint
  - Subject matter or details of the complaint itself
- Consider a perception of a conflict or bias, even if none in fact exists
  - Not required, but BU may choose to substitute a DM based on perception alone

# CONFLICTS OF INTEREST

- Evaluated on a case-by-case basis
- Simply knowing a student or employee is **not** enough to generate a conflict of interest, as long as objectivity is not compromised
  - Previously disciplining a student or employee is likewise **not** enough unless it influences the DM's findings
- DM must bring potential conflicts to EOO's attention
- Parties may also alert EOO
- EOO will determine whether to recuse the DM
  - DM may also recuse themselves

# BIAS

- Bias can be a significant problem for DMs:
  - Explicit or implicit
  - The often implicit and unconscious nature can lead to unexpected outcomes
- Formed from stereotypes, societal norms, cultural experiences, and expectations of others
- Can affect our perceptions of any party or witness
- Common pre-conceptions about parties and witnesses
- DM role requires recognition and mitigation of bias
- If DM does not feel they can be impartial, they should notify EOO



# IDENTIFYING AND CORRECTING BIAS

## Strategies to mitigate bias:

- Recognition/Self-Awareness: Be conscious of own biases
  - Counteract them and ensure they do not influence decisions
- Hearing panels vs. individual DM
- Panel members reviewing each other's questions in advance
- Compliance with institutional policy and procedure
- Identify evidentiary gaps and seek relevant evidence to fill gap
- EOO &/or legal counsel reviews the rationale

# FINDINGS

# MAKING A FINDING AS DM

- Finding(s) must be based upon information gathered during the investigation and decision-making phases only
  - No outside information should influence decision-making
- **Separate the “Determination” from the “Sanction”**
  - Do not use impact-based rationales for policy violation findings and determinations
  - Same with prior misconduct, unless a pattern is charged/proven
- A determination of whether the Respondent violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Do not “heighten” the evidentiary standard when anticipating a severe sanction

# KEY ELEMENTS FOR MAKING FINDINGS

- Provide detailed rationale for each finding
- Assess Credibility of evidence and Parties/Witnesses
- Rely on relevant evidence
- Avoid supposition, bias, non-evidentiary considerations
- Apply appropriate Standard of Evidence (Preponderance of the Evidence)
- Presume Respondent not in violation until & unless Standard of Evidence is met

# SANCTIONS



# DETERMINING SANCTIONS

- Consult with EOO
  - Provides consistency, limits bias, harnesses expertise
- Primary purpose should focus on ensuring equity and providing remedies
  - Each sanction should have a rationale
- DM may consider:
  - Nature and severity of the conduct
    - Aggravating or mitigating circumstances
    - Precedent, prior misconduct, proven pattern (if alleged), acceptance of responsibility, collateral violations, or multiple violations
  - Respondent's disciplinary history
  - Stop, Prevent, Remedy
  - The impact on the parties

# SANCTIONING PITFALLS

- Failure to stop, prevent, and remedy
- Conflating the finding, the determination, and the sanction
- Unwillingness to suspend, expel, or terminate
- Inconsistent or disparate sanctions for similar behavior
- Failure to consider aggravating or mitigating circumstances
- Lockstep or prescribed sanctioning; failing to address incident-specific circumstances

# APPEALS

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- A final request from any party to review a Decision-Maker's finding
- Review is very narrow in scope – largely a procedural check
- Determine if a **material/substantive** error occurred in the Resolution Process that needs correction
- Not intended as a rehearing or “do-over,” but if an error is found, may result in remand:
  - Reconsideration
  - Re-investigation (in full or in part)
  - Rehearing
  - New hearing/new decision-making process
- Not an opportunity to substitute judgment or second-guess

# COMMON APPEAL GROUNDS

1

Procedural irregularity that would **change the outcome**

2

New evidence that would **change the outcome** and that was not reasonably available when the determination of whether sex-based harassment occurred, or dismissal, was made

3

TIXC, Investigator, Decision-Maker had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent that would **change the outcome**

**Institutions have the discretion to add additional appeal grounds**



# APPEAL DETERMINATIONS

## Determinations may include:

- **Upholding** the original determination and sanctions (if any)
- **Remanding** the complaint back to the Decision-Maker for reconsideration or to the Investigator for further investigation
- **Modifying** the original determination and/or sanctions (if any)
- **Overturing** the determination (not recommended)



# QUESTIONS?