



AMERICAN UNIVERSITY
WASHINGTON, DC

CHALLENGE
ACCEPTED

DECISION-MAKER TRAINING OFFICE OF EQUITY AND TITLE IX



Decision-Makers

WHO YOU ARE:

Decision-makers participate on the Hearing Panels for Title IX cases of sexual harassment. They oversee the hearings, ask questions of the parties, monitor the cross-examination process, and issue the finding of responsibility or non-responsibility for a policy violation in the form of written determinations.

Decision-Maker Duties:

- Participate in trainings
- Review investigative reports and evaluate evidence
- Prepare for hearing
- Oversee hearing
- Ask questions of parties and witnesses
- Make relevancy rulings
- Issue written determination of responsibility



AGENDA

- **Key Title IX Definitions (including sexual harassment and standard of proof)**
- **5-Step Grievance Process**
 1. Notice of Allegation
 2. Investigation & Report
 3. **Live Hearing (your role)**
 4. Sanctions
 5. Appeals
- **Final Determination Report Writing**

What is Title IX ?

Title IX is federal law which prohibits recipients of federal funding from discriminating on the basis of sex or gender in education programs or activities.

Under Title IX, an institution must respond when there is **“actual knowledge” of “sexual harassment”** which involves a person participating (or making attempts to participate in the “education program or activit[ies]” of the institution in the United States. (including “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX coordinator or any official of the university who has the authority to institute corrective measures on behalf of the recipient”).

American University has the responsibility and obligation to:

- **Respond to;**
- **Remedy; and**
- **Prevent future occurrences of sexual harassment, including sexual violence.**

All staff, faculty, students have a responsibility to our community under Title IX.

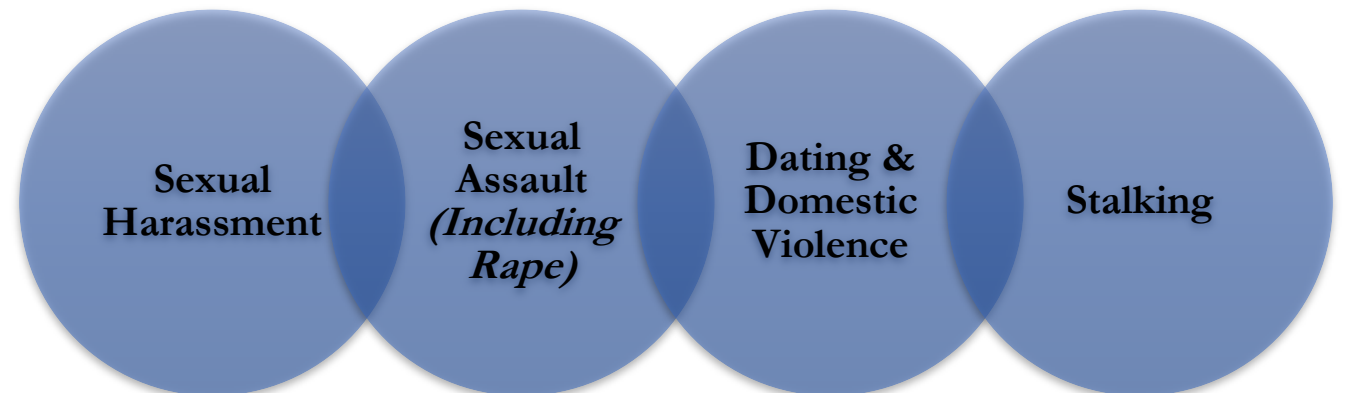
““No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.””



How is Title IX Sexual Harassment defined?

Under Title IX, sexual harassment involves unwelcome sexual conduct or advances (verbal or physical), including:

- Instances in which an AU employee **conditions** the provision of aid, benefits, or services based on an individual's participation in sexual acts (*quid pro quo harassment*);
- Creation of a hostile environment in which unwelcome conduct is **severe, pervasive, AND objectively offensive** in a way that **denies equal access** to education or opportunities;
- Sexual assault, or any sexual act without consent of another person, (including circumstances where a person is incapable of giving consent).





Where/when does Title IX apply to?

Title IX applies to sexual harassment in the “education program or activity” of a federal funding recipient, including “operations”.

Some examples include:

- Admissions
- Hiring
- Residence Life
- Sports Teams
- Work-Study
- Sponsored clubs or organizational activities

Title IX does NOT apply to private conduct occurring in private locations that is not part of education programs/activities.



Title IX Sexual Harassment Considerations: How do we define a hostile environment?

The following factors must be considered from the perspective of a reasonable person:

- The type of misconduct
- The frequency of the misconduct
- Where the misconduct occurs
- Whether a power differential exists

Examples of hostile environments may look like:

- Student A repeatedly grabs Student B's butt when they pass them in the hallway. Student B has repeatedly told Student A to stop but they persist, causing Student B to change their habits to avoid Student A.
- A Student says "no" to a date when they are asked by their Resident Assistant. The RA proceeds to repeatedly send the student vulgar and explicit text messages. The student blocks their RA's number and changes dorms.

Title IX Sexual Harassment: Sexual Assault

Sexual Assault is a type of sexual harassment under Title IX and constitutes any sexual act directed against another person, without consent of the person, including instances in which the person is incapable of giving consent, including:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape



Title IX Sexual Harassment: Dating Violence

Dating Violence is defined as violence committed by a person...

- (i) who is or has been in a social relationship of a romantic or intimate nature with the other person; and
- (ii) where existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship;
 - The type of relationship;
 - The frequency of interaction between the persons involved in the relationship

Example:

Two staff members are married and get into an argument in the University parking lot.

During the argument, one employee slaps the other in the face and tells them to shut up.



Title IX Sexual Harassment: Domestic Violence

Domestic violence is violence committed by:

- A **current or former spouse or intimate partner** of the person
- An individual with whom the person **shares a child** in common
- An individual who is **cohabitating** with or has cohabitated with the person as a spouse or intimate partner
- An individual **similarly situated to a spouse of the person under the domestic or family violence laws** of the jurisdiction in which the crime of violence occurred
- Any individual against the person who is **protected from that individual's acts under the domestic or family violence laws** of the jurisdiction in which the crime of violence occurred.

May include:

- *Physical Abuse*
- *Sexual Abuse*
- *Psychological and Emotional Abuse*
- *Economic Abuse*

Title IX Sexual Harassment: Stalking

Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- (i) Fear for his or her safety or the safety of others; or
- (ii) Suffer substantial emotional distress.

Examples include (but are not limited to)

- Following
- Unwanted communication
- Threats
- Unwanted Gifts
- Trespassing
- Surveillance (or observation)

Additional Definitions: Consent

Through both words and actions, consent is informed and freely given in order to participate in sexual activities.

- Age of consent in DC is 16.
- Silence or lack of resistance does not imply consent.
- Consent for one sexual act does not imply consent for any subsequent sexual activity (**consent must be on-going**).
- If **clear consent** is not given (or if it is inflicted through force, threat, or coercion), the sexual activity does not have consent.
- Does not involve **coercion** (including pressure, threats (expressed or implied), intimidation, physical force (expressed or implied), or impairment through substance).
- If a person is unconscious or does not appear to have the **mental or physical capacity to consent**, the sexual activity does not have consent.



Consent (cont.)

Incapacitation

- Incapacitation is a temporary or permanent state in which an individual is **unable to give consent due to mental, developmental, or physical impairment.**
- Can occur involuntarily through alcohol or drug.
- **Beyond mere intoxication** or impairment of judgement.
- States include:
 - **Sleep;**
 - **Unconsciousness;**
 - **Intermittent Consciousness; or**
 - **Any other state in which an individual is unaware that sexual contact is occurring.**

Example:

Student A has ten cocktails over two hours.

Student B is sober.

Student B takes Student A back to their apartment. Student A cannot walk without being carried, forgets Student B's name, and immediately falls asleep when placed onto the bed.

Student B then engages in sexual activity with Student A.



Retaliation

The University prohibits retaliation against a member of the AU Community for reporting and/or **filing a Formal Complaint** of Title IX Sexual Harassment, **assisting in the reporting** and/or filing of a Formal Complaint, and/or **participating in the investigation or resolution** of a Formal Complaint.

Retaliation is defined as an **adverse action or other form of negative treatment**, including, but not limited to, **intimidation, threats, coercion, discrimination or harassment**, carried out in response to a good-faith reporting of, or opposition to, discrimination, harassment, or related misconduct; an individual's or group's participation, including testifying or assisting in the University's grievance process or response to a Formal Complaint; an individual's or group's refusal to participate in the University's grievance process or response to a Formal Complaint; or other forms of good faith opposition to what an individual reasonably believes to be Title IX Sexual Harassment under this Policy.

To be a Policy violation, **the challenged actions or treatment must be sufficiently serious to discourage a reasonable person from further reporting, participating, or opposing participation**. Charging an individual with a Policy violation for making a materially false statement, in bad faith, in the course of the University's complaint process or in response to a complaint does not constitute Retaliation.



STANDARD OF PROOF

PREPONDERANCE OF EVIDENCE

- Determinations of responsibility with respect to the allegations in the Formal Complaint must be established by the Preponderance of the Evidence.
- Preponderance of Evidence means **a measure of proof that would lead a reasonable person to accept as “more likely than not” that a fact is true** or that an incident occurred.
 - Note: This responsibility is on AU, not on the parties



AMERICAN UNIVERSITY
WASHINGTON, DC

**Questions on
these
definitions?**



INDIVIDUALS INVOLVED IN TITLE IX PROCESS

COMPLAINANT

- AU Community member who is alleged to have been the **subject of conduct** that could constitute Title IX Sexual Harassment.

RESPONDENT

- AU Community member (within the United States) who has been reported to have been the **perpetrator of conduct** that could constitute Title IX Sexual Harassment.

AVP for Equity & Title IX Coordinator

- Oversees the whole process.
- Ensures the investigators, decision-makers, and others involved in the process are properly trained.
- Ensures advisors are available for the live hearings.

Known as the “party/parties”



INDIVIDUALS INVOLVED IN TITLE IX PROCESS

INVESTIGATOR

- Gathers all relevant evidence.
- Organizes relevant evidence into a report.
- **Does not make a determination.**

HEARING PANEL (DECISION-MAKERS)

- Following the hearing, **the Hearing Panel will consider all the evidence and make a determination whether the Respondent has violated the Policy.**
- The advisor will interact most with the hearing panel during the grievance process.

ADVISORS

- Both parties must be accompanied by an advisor at the live hearing.

SANCTIONING PANEL

- The Sanctioning Panel will review the Hearing Panel's written determination letter and determine appropriate sanction(s).



5 STEPS (OF GRIEVANCE PROCESS)

1. Notice of Allegations
2. Investigation & Report
3. Live Hearing
4. Sanctions
5. Appeal



Upon receipt of a Formal Complaint, the Title IX Coordinator will provide a Notice of Allegations to both parties with:

- Notice of **grievance process**.
- Notice of alleged **harm**.
- A statement that the **Respondent is presumed not responsible** for the alleged conduct.
- Notice that **each party may have an advisor** of their choice.
- Parties will be given **equal opportunities to inspect and review evidence**.
- Applicable University policies that **prohibit knowingly making false statements**.
- The University's **prohibition against retaliation**.

Step 1: Notice of Allegations

At this stage, supportive measures may be provided:

- Supportive Measures are **non-disciplinary, non-punitive individualized services** offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a Formal Complaint or where no Formal Complaint has been filed.
- Supportive Measures are designed to **restore or preserve access to the University's education programs and activities**, and to **protect the safety of all parties** and the University's educational environment while not being punitive in nature or unreasonably burdensome to any party.
- The Title IX Coordinator is responsible for ensuring the implementation of Supportive Measures and coordinating the University's response with the appropriate offices on campus.
- The University will maintain the privacy of any Supportive Measures provided under this Policy to the extent that maintaining such confidentiality will not impair the University's ability to provide the Supportive Measures, and the University will promptly address any violation of a Supportive Measure. .

Step 1: Notice of Allegations

The University Investigator will...

- Conduct a **prompt, thorough, fair, and impartial investigation.**
- Does not have the **burden of proof to reach a determination** regarding responsibility.
- **Review all information** gathered or provided by the parties.
- Determine the relevance of the information.

The University Investigator will NOT...

- Make a finding – after the report is finished, it is provided to the parties.

Step 2: Investigation & Report

Step 2: Investigation & Report

Equal Opportunity to Present Evidence

- The **parties will be given equal opportunities** to:
 - Review evidence obtained in the investigation;
 - Be heard;
 - Present relevant evidence; and
 - Identify relevant facts and expert witnesses.

Review of Preliminary Investigative Report and Evidence

- The parties will have 10 calendar days to submit a written response with:
 - Comments or feedback;
 - Additional information;
 - Additional witnesses; and
 - Requests for the collection of other information by the Investigator.

Any response or request for additional investigation will be shared with the other party and will be incorporated into the investigative file. Each party will have 3 calendar days to review and respond to additional information.

Final Investigative Report

- The Investigator will prepare a final investigative report.
- At least 10 calendar days prior to a hearing, the Investigator will send the final investigative report to each party and each party's advisor for their review and written response.

Whatever comes out of investigation process is what the hearing panel receives. The hearing panel (decision-makers) should review this report as part of their final determination.

Step 2: Investigation & Report



What is the purpose of the hearing?

- The purpose of a hearing is for the members of the hearing panel to hear testimony of the parties and so that the hearing panel members can:
 - **Clarify information from the Final Investigative Report;**
 - **Use relevant facts to make a determination;**
 - **Issue a written determination which determines if the formal complaint rises to a policy violation (in order to imposing discipline/remedial measures as necessary).**

A photograph of the Washington Monument in the background, with cherry blossom trees in the foreground and a body of water in the lower portion. The text 'STEP 3: LIVE HEARING' is overlaid in large, bold, dark blue letters.

**STEP 3:
LIVE
HEARING**

Hearing Format

- A Hearing Panel is comprised of three (3) faculty and staff members. The Sanctioning Panel is comprised of three (3) members:
 - If the Respondent is a student, the Panel is comprised of 3 members of the Student Conduct Council (1 student, 2 faculty/staff members).
 - If the Respondent is a faculty member, the Sanctioning Panel is comprised of 3 members of the Faculty Hearing Committee.
 - If the Respondent is a staff member, the Panel will be comprised of 3 members of the Staff Personnel Review Board.
- Note: the Hearing Panel members will NOT be the same members on the Sanctioning Panel.

The Hearing Panel will select one member to be the Hearing Panel Chair.



**STEP 3:
LIVE
HEARING**



Hearing Format – What to expect?

- The **hearing is live**, with all questioning conducted in real time.
- The University will **audio record the hearing for review** and appeal (All other recordings of the hearing are prohibited).
- The hearing will be **closed to the public**.
- The University provides **modifications to the hearing to mitigate harm** through contact by the parties.
 - Ex. **Parties may be located in separate rooms** (or at separate locations) with technology.
- Hearings will be **virtually conducted through Spring 2023**.
- The Hearing Panel Chair may set time limits for questioning of each witness.
- **Hearing panel members should ask questions focused on what gaps they believe may be present from the investigation report.** Hearing officers should also act as active listeners to the responses of the parties for anything that contradicts the investigation report

A photograph of the Washington Monument in the background, with cherry blossom trees in the foreground and a body of water in the lower half. The text 'STEP 3: LIVE HEARING' is overlaid in large, bold, dark blue letters.

**STEP 3:
LIVE
HEARING**



Pre-Hearing Meeting

- Before the meeting, you will receive:
 - Description of **role and responsibilities of the Hearing Panel Chair**;
 - Reminder to **read the investigation report** and **prepare questions that will fill any gaps from the report**;
 - Virtual invitation to the hearing with **log-in details**;
 - Reminder to take the hearing meeting in a space that is **private** and has **good internet**;
 - **Scripts** and other documentation to aid in conducting the hearing procedures.
 - Script will include: **Opening remarks** with format of the hearing, **Notice of recording**, Guidance to ensure **parties' advisors are present** and understand their role, **Review of the allegations** to be examined at the hearing, **Rules of Decorum**, and Reminder to parties to have **documents** in front of them.

A photograph of the Washington Monument in the background, with cherry blossom trees in the foreground and a body of water in the lower half. The text 'STEP 3: LIVE HEARING' is overlaid in large, bold, dark blue letters.

**STEP 3:
LIVE
HEARING**



Who attends a live hearing?

- The Decision-Makers/Hearing Panel, including the Hearing Panel Chair
- The parties
- Each party's advisor
- Witnesses called to testify
- Necessary University administrators

A photograph of the Washington Monument in Washington, D.C., viewed from across a body of water. The monument is tall and white, with its reflection visible in the water. In the foreground, there are trees with vibrant pink and orange cherry blossoms. The sky is clear and blue. The text 'STEP 3: LIVE HEARING' is overlaid in large, bold, dark blue letters on the right side of the image.

**STEP 3:
LIVE
HEARING**

Hearing Panel Chair

- The Hearing Panel will select one member of the panel to be the Hearing Panel Chair. The Hearing Panel Chair will be decided at the Pre-Hearing Meeting.
- The Hearing Panel Chair is responsible for:
 - **Final decisions** on all procedural issues;
 - **Excluding questions** due to relevancy;
 - Acting listening to see if parties say anything that contradicts the investigation;
 - Ensuring a **fair and expedient process** of the hearing; and
 - **Maintaining civility** and **avoiding disruptive behavior** (per Rules of Decorum);
 - Avoid raised voices;
 - Conduct hearing in a respectful manner that promotes fairness;
 - Repeated violations of decorum will result in a break.
 - **Example: during questioning of the respondent, a complainant's advisor shares a Zoom screen reading "liar".**



**STEP 3:
LIVE
HEARING**



Advisors' Role in the Live Hearing

- **Both parties must be accompanied by an advisor.**
 - If one or both parties do not have an advisor, the University will provide an advisor.
- Each party's advisor **must conduct cross-examination** of the other party and witnesses.
- Apart from cross-examination, an advisor's role is limited to consultation.

A photograph of the Washington Monument in Washington, D.C., with cherry blossoms in the foreground and a body of water in the background. The text 'STEP 3: LIVE HEARING' is overlaid on the image in large, bold, blue letters.

**STEP 3:
LIVE
HEARING**

Hearing Procedures

1. Hearing Chair will ask each of the parties to make their opening statements;
2. Questioning of the Complainant by the Hearing Panel Chair;
3. Cross-examination of the Complainant by the Respondent's advisor;
 - Relevant cross-examination follow-up questions must be communicated by the advisor **directly, orally, and in real time**. The party NEVER conducts cross-examination.
4. Questioning of the Respondent by the Hearing Panel Chair;
5. Cross-examination of the Respondent by the Complainant's advisor;
6. Hearing Panel Chair questioning of other material witnesses (if applicable);
7. Cross-examination of other material witnesses by the parties' advisors;
8. Closing comments from the Complainant;
9. Closing comments from the Respondent;
10. Closing statement from Hearing Panel Chair.

Note: Prior to the start of the hearing, the parties have the option of providing the Hearing Panel Chair a proposed list of questions to be asked of the other party and witnesses.



**STEP 3:
LIVE
HEARING**



Asking Questions

- Review the nature of the allegations and the definitions of the type of sexual harassment that occurred (ask yourself: was the definition met or not?)
- Ask questions that focus on gaps from the investigation report
- Avoid requiring the parties to recite information that has already been provided in the investigation report, if possible
- Try to use open-ended questions
- Listen carefully to answers to deem follow up questions
- Try to close information gaps
- Address inconsistencies
- Seek clarity when answers are vague
- Seek information that is necessary (not that satisfies curiosity)
- Understand the information source (personal knowledge vs. hearsay)
- Be careful about relying on demeanor

A photograph of the Washington Monument in Washington, D.C., with cherry blossoms in the foreground and a body of water in the background. The text 'STEP 3: LIVE HEARING' is overlaid on the image in large, bold, dark blue letters.

STEP 3:
LIVE
HEARING

Keep in mind – Trauma-informed Responses

- Trauma might affect a party: Not in every case, not just one party, never assume anyone participating in a hearing has suffered any trauma
- Neurobiological changes during **sexual assault may impact memory**, including:
 - **Slowed recall**
 - **Flashbacks**
 - **Disorganized or fragmented memory**
 - **Lack of memory** (especially with alcohol)
- Survivors of sexual trauma may experience feelings of:
 - **Victim-blaming** (by self or others)
 - **Guilt, anxiety, distrust, or depression**
- **Sensory questions may help** with memory recall:
 - Asking what the person could **see, smell, taste, feel, or hear**

Note: Understand that memory may be clarified in time. Give appropriate weight to party and witness statements.



**STEP 3:
LIVE
HEARING**

Relevancy Determination

- Only relevant cross-examination and other questions may be asked of a party or witness.
 - Questions and evidence about the Complainant's **previous sexual behavior are not relevant**. Questions of a sexual nature may only be used to prove that someone other than the Respondent committed the conduct, or if the questions and evidence prove consent of the Complainant with the Respondent.
- Before the parties or any witness answers a cross-examination or other question, **the Hearing Panel Chair must determine whether the question is relevant** and explain any decision to exclude a question as not relevant.
 - Non-relevant examples:
 - Duplicative questions
 - Questions that assume facts or are misleading
 - Question about medical, psychological, or treatment records (without consent)



**STEP 3:
LIVE
HEARING**

Relevancy Determination (Examples)

- **Example (relevant):**
 - In a case where a student has alleged stalking, it may be relevant for an advisor to ask the Complainant: *“Did you ever receive physical threats of harm from the Respondent?”*
- **Example (impermissible):**
 - In a case where a Complainant has alleged sexual assault and has testified that the Respondent removed the condom without the Complainant’s knowledge: *“Did you ever have unprotected sex with the Respondent before?”*



**STEP 3:
LIVE
HEARING**



Participation of the Parties and Witnesses

- If a party or witness does not participate in the live hearing or refuses to answer questions, **their advisor may still appear** for asking questions of the other party and witnesses.
- If a party's advisor also does not appear for the hearing, **the University will appoint an advisor to ask questions** on behalf of the non-participating party.

A photograph of the Washington Monument in the background, with cherry blossom trees in the foreground and a body of water in the foreground. The text 'STEP 3: LIVE HEARING' is overlaid on the image in large, bold, dark blue letters.

**STEP 3:
LIVE
HEARING**

Determination of Responsibility

- Following the hearing, **the Hearing Panel will consider all of the evidence and make a determination**, by a Preponderance of the Evidence, whether the Respondent has violated the University’s Title IX Sexual Harassment Policy.
 - Reminder: Preponderance of Evidence means that it is **“more likely than not”** that the alleged incident occurred.
- The Hearing Panel should use the investigation report and the information gathered in the live hearing proceedings.
- The Hearing Panel will issue a written determination regarding responsibility to go to the Sanction Panel.



**STEP 3:
LIVE
HEARING**

How do the hearing officers make a determination of responsibility?

- After the hearing has finished, the hearing officers will deliberate and consider of the **relevant testimony shared at the hearing**, as well as **the relevant evidence from the investigative report**.
- The hearing officers must **resolve any disputed issues under the preponderance of evidence**
- Using the facts, the hearing officers must **apply the policy's definitions to the facts** they have in order to determine whether Title IX sexual harassment has occurred

Note: Hearing officers may weigh evidence on the basis of credibility, corroboration; consistency; level of detail; etc.

**STEP 3:
LIVE
HEARING**

Steps 4 & 5

Sanctions and Appeals

- **Appeal Option**
 - If the Hearing Panel finds that there is **insufficient evidence** (by a Preponderance of the Evidence) to support a finding, the findings may be appealed.
- **Sanctions Referral**
 - If the Hearing Panel finds the Respondent responsible (for one or more of the allegations), **the case will be referred to the University's sanctioning process for appropriate remedies and sanctions.** After the Sanctioning Panel, there will also be an appeal option.



STEP 4 &
STEP 5



AMERICAN UNIVERSITY
WASHINGTON, DC

Final Determination Report Writing



AMERICAN UNIVERSITY
WASHINGTON, DC

Any Questions?



shutterstock.com · 1054528985

Contact:

**OFFICE OF
EQUITY AND
TITLE IX**

**equityoffice@
american.edu
202-885-8080**