

GRAND RIVER | SOLUTIONS

# Boston University Leadership Training Title IX and Sexual Misconduct; What You Need to Know

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## Your Facilitator



**Jody Shipper, J.D.**

Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor's degree from Georgetown University's School of Foreign Service.

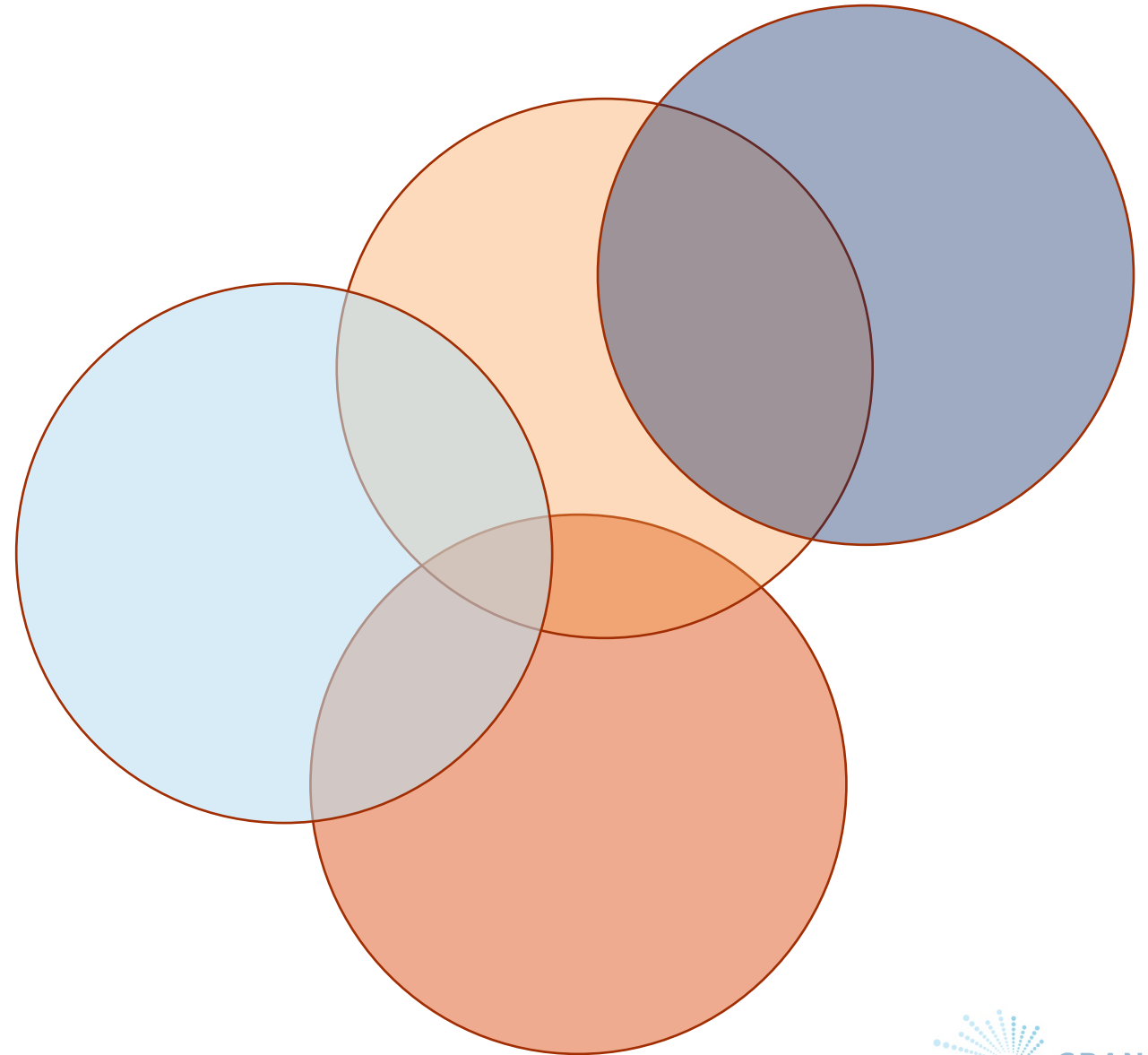


So Many  
Laws . . .

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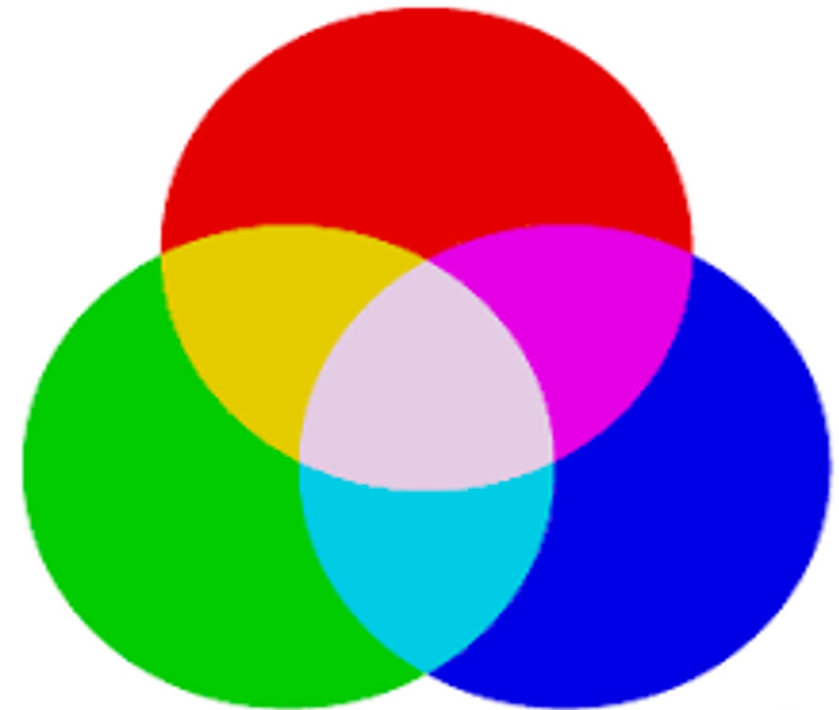
- Title IX 2020 Regulations (still in effect)
- New Title IX Regulations (not yet final)
- VAWA
- Massachusetts law





# What (Mis)Conduct is Covered by the 2020 Title IX Regulations?

- Sexual Harassment. Hostile environment
  - Narrow definition
- Quid Pro Quo (by an employee)
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



# AND... Only Covered, IF:

## Place of Conduct

- On campus
- Campus Program, Activity, Building, and
- In the United States

## Required Identity

- Complainant participating/attempting to participate in Program or Activity, AND
- Control over Respondent

# What (Mis)Conduct is NOT Covered by the 2020 Title IX Regulations?

- Discrimination
- Harassment other than Sex Harassment
- Pay equity
- Retaliation
- Off-Campus
- Not part of program or activity
- Complainant not a member of community
- No substantial control over respondent

# New Title IX Regulations

Broader jurisdiction

Conduct based on sex/gender

- Sex harassment
- DV
- Sex assault

Discrimination

Retaliation

A map of the state of Massachusetts is shown in the background, with the state's outline and major water bodies like Cape Cod and the surrounding ocean visible. The map is rendered in a muted brown and blue color palette.

# Massachusetts State Law

- Sexual harassment (not defined)
- Sexual violence, sexual assault
- Dating violence, domestic violence
- Gender-based violence, violence based on sexual orientation or gender identity or expression
- Stalking (based on gender)
- Retaliation



## Massachusetts State Law, Part 2

Jurisdiction is silent (on or off campus)

Must list range of possible sanctions

7 days, hearing to report

Climate surveys

# VAWA

- Applies to “Clery Crimes” (sex assault, stalking, DV)
- Equal process for both, including communications
- Right to an advisor at all proceedings
- Right to see all evidence that will be relied upon prior to any hearing, but hearing not required
- No rules on hearing processes
- Must list all possible sanctions



# Before This Case Got to You

# Before an Investigation was Launched . . .

- Report
  - Responsible Employees - YOU
  - Can be anonymous (Massachusetts law). Cannot be anonymous (2020 Regs)
- Information on resources, rights, options
  - Must have at least one confidential resource
- Formal complaint (maybe)
- Jurisdiction questions
- Amnesty
- Supportive measures
- BIT team, if appropriate

# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice

Decision maker determines relevancy of questions and evidence offered

Advisor provided if party does not have one

Written decision must be issued that includes finding and sanction (Massachusetts, 7 days)



# Touchstones of any Hearing Process

Character evidence

The role of drugs and alcohol and the ability to consent

Trauma is not evidence of a policy violation

Hearing panel and appeals panels ≠ therapists or psychiatrists

Myths and biases of sexual violence or misconduct

Cultural cues at play

# Written Decision

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



After this  
case

Remedies (Title IX  
Coordinator obligation)

Monitoring

Ensure sanctions  
carried out

# BU's Title IX Team and Participants

*The Title IX Team has expanded to mirror the University Board on Student Conduct. 85 members have been appointed.*

## EOO/OJA staff members

- Title IX Coordinator; 6 – Investigators; 2 – Data Managers/Case support

## Deputy Title IX Coordinators

- Local contacts who provide resources and referrals to the Title IX Coordinator

## Hearing Panel Members

- Faculty, Staff, Students. Two panel members will be appointed to serve with the hearing chair. The hearing chair and panel members will determine whether there has been a policy violation.

## Hearing Chair

- BU has contracted with 2 Boston-based attorneys to serve as the hearing chair.

## Advisors - BU has contracted with Title IX specialists and attorneys

- Grand River Solutions and local attorneys will serve as advisors. We can offer remote-based, and Boston-based advisors for face-to-face meetings. BU will provide an advisor to either party after the investigation should they require one.

## Leadership

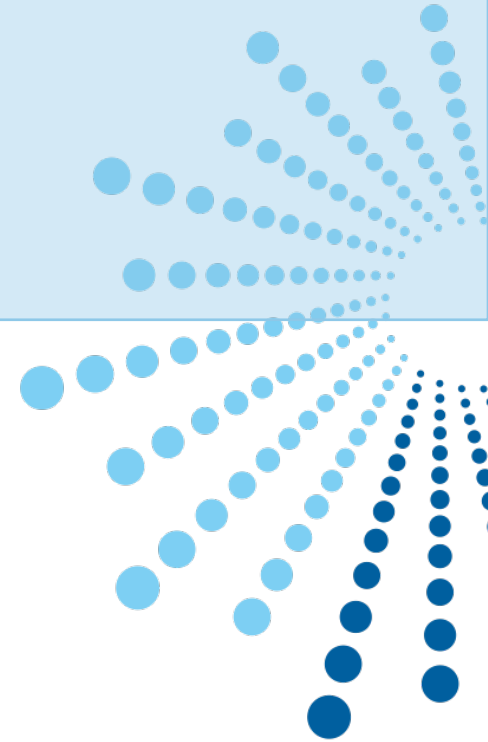
- Determines the sanction and writes the sanction report.

## Hearing Chair

- Drafts the outcome report. The Hearing Chair will send the outcome and sanction report to Title IX Coordinator to share with the parties.



# Sanctioning





# Goals of Sanctions/Discipline

End	Prevent	Remedy
End the harassment	Prevent the recurrence	Remedy the harm, restore equal access



# Sanctioning Considerations

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Expulsion/Termination not required

Must be able to articulate why the action taken is reasonably calculated to end the harassment

Must be able to articulate why the action is reasonably calculated to prevent the recurrence

Remedy: To restore or preserve equal access; implemented by Title IX Coordinator.

# NOT a Consideration

Emergency Removal

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graph TD; A[Emergency Removal] --> B[Strength of the evidence]; B --> C[Delays caused by an advisor]; C --> D[Character (as you see it)];
```

Strength of the  
evidence

Delays caused by an  
advisor

Character (as you see it)

# To Keep in Mind

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Suspension - do you assume all is well upon return?

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Protecting returning person from retaliation

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Is the respondent forever "marked"? Where is room for rehabilitation?

# Algorithms vs. Humans

- Algorithms are more accurate than humans in predicting recidivism
- Algorithm-based tools in some tests approached 90% accuracy
- Human prediction had a 60% accuracy rate



“Pre-sentence investigation reports, attorney and victim impact statements, and an individual’s demeanor all add complex, inconsistent, risk-irrelevant, and potentially biasing information.”



**RISK**

**Sanctioning Is Not...**

A way to indicate  
disagreement with  
the findings

# The Sanction Does Not Undo the Finding



No lesser sanction if  
you disagree with  
findings



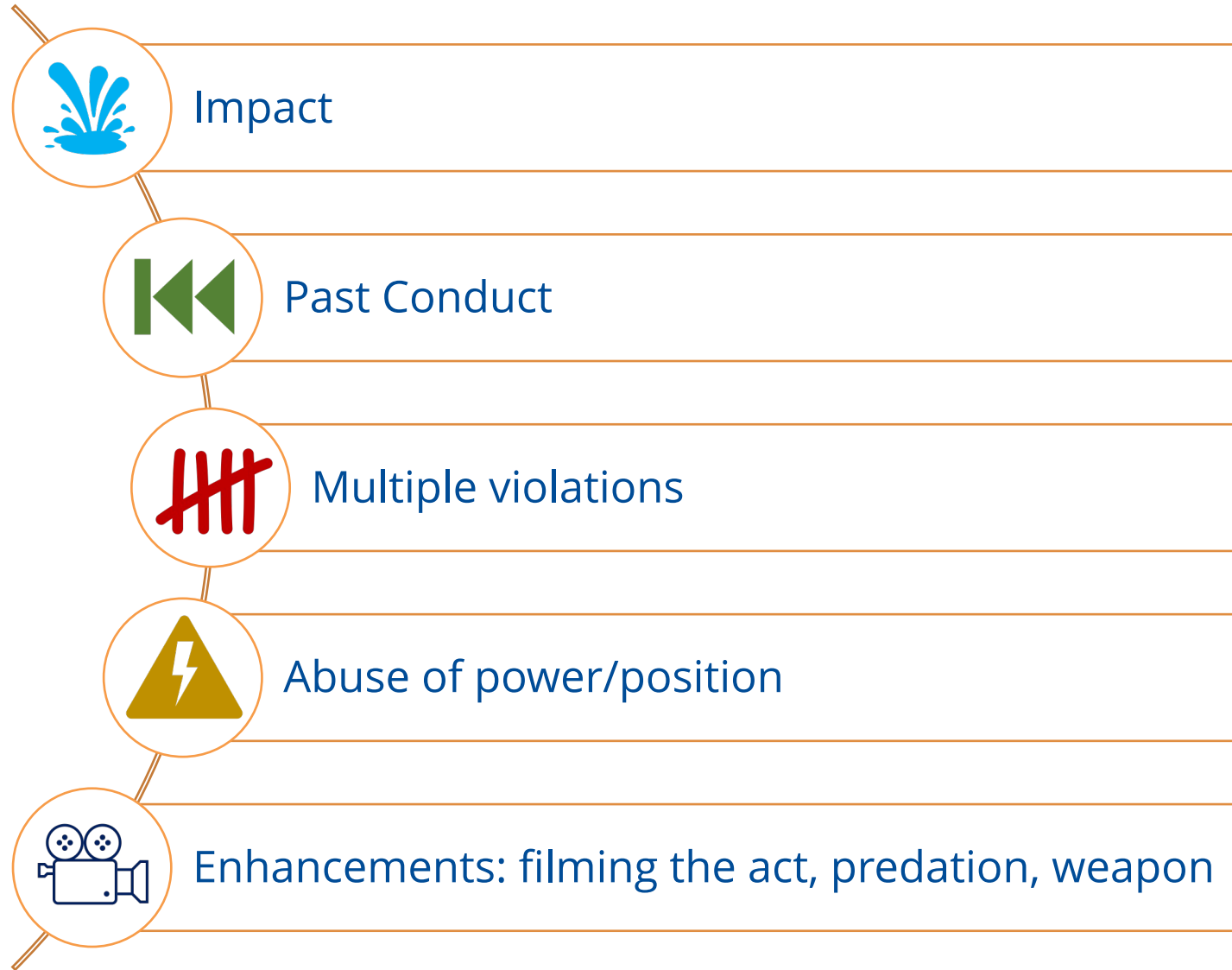
Sanctioning officer  
must assume findings  
are correct

# What Does the Sanction “Say”?

Who is valued,  
who is not?

Community  
values?

# Factors to Consider Considering



# Aggravating Circumstances

Premeditation

Predation

Physical violence

Multiple policy violations in one incident

Harm to others, impact on complainant and/or community

Did the behavior continue after intervention?

Effort to conceal or hide the incident?

Refusal to attend past trainings

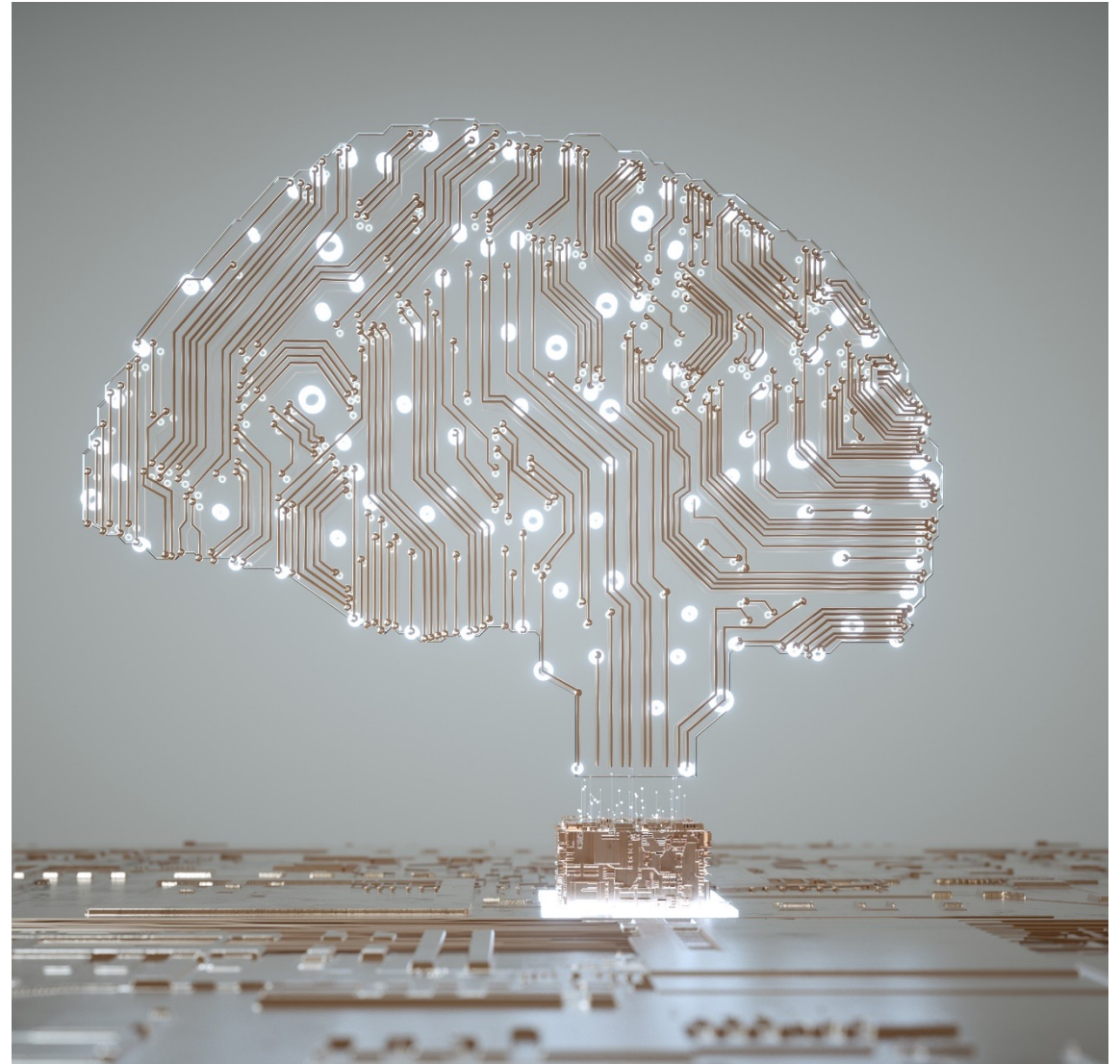
Past failures to comply with directives

# “Mitigating” Circumstances ?

- NOT Mitigating: Respondent could not think rationally at the time due to drugs or alcohol
- NOT Mitigating: Respondent disagrees with conclusions
- NOT Mitigating: Complainant’s behavior

# Decision Making Biases

- Affinity Bias
- Affect Bias
- Confirmation Bias
- Overconfidence Bias
- Anchoring Bias



# Articulating the Rationale as a Way to Reduce Bias?

Does everyone have to get fired/expelled? (Hint: NO)

Can you articulate why the action taken is reasonably calculated to end the harassment?

Can you articulate why the action is reasonably calculated to prevent the recurrence?

Remedy: To restore or preserve equal access; implemented by Title IX Coordinator.



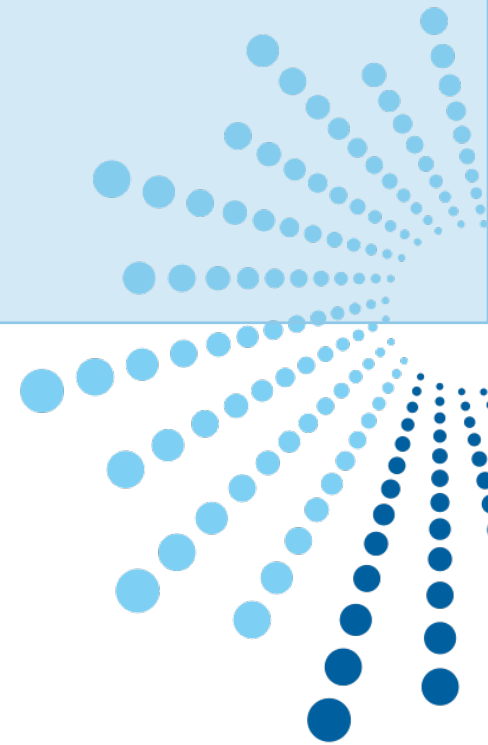
# Communicate Findings

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With sanctions (if any).  
One communication to parties,  
not two.



# Appeals





De Novo Appeals

# Differences in Burden

**UNIVERSITY**

Error correction

**COMPLAINANT  
RESPONDENT**

Persuade and point out error  
with supporting evidence or  
facts



# Your Grounds for Appeal

## Procedural

- **Bias/conflict of interest**
- **Error**

## New information

## Affected the outcome

# Who Can File?

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Either party has the right to file an appeal, which is reviewed by an annually trained appeal reader, who does not have any other role in the process.

University does not have the right to file

# Does a Party Need to Respond to an Appeal?

- An opportunity, not an obligation.
- The decision not to respond is not a statement of agreement with the appeal filed.

# First Step: Was an Appeal Filed?

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds

This step is not to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.



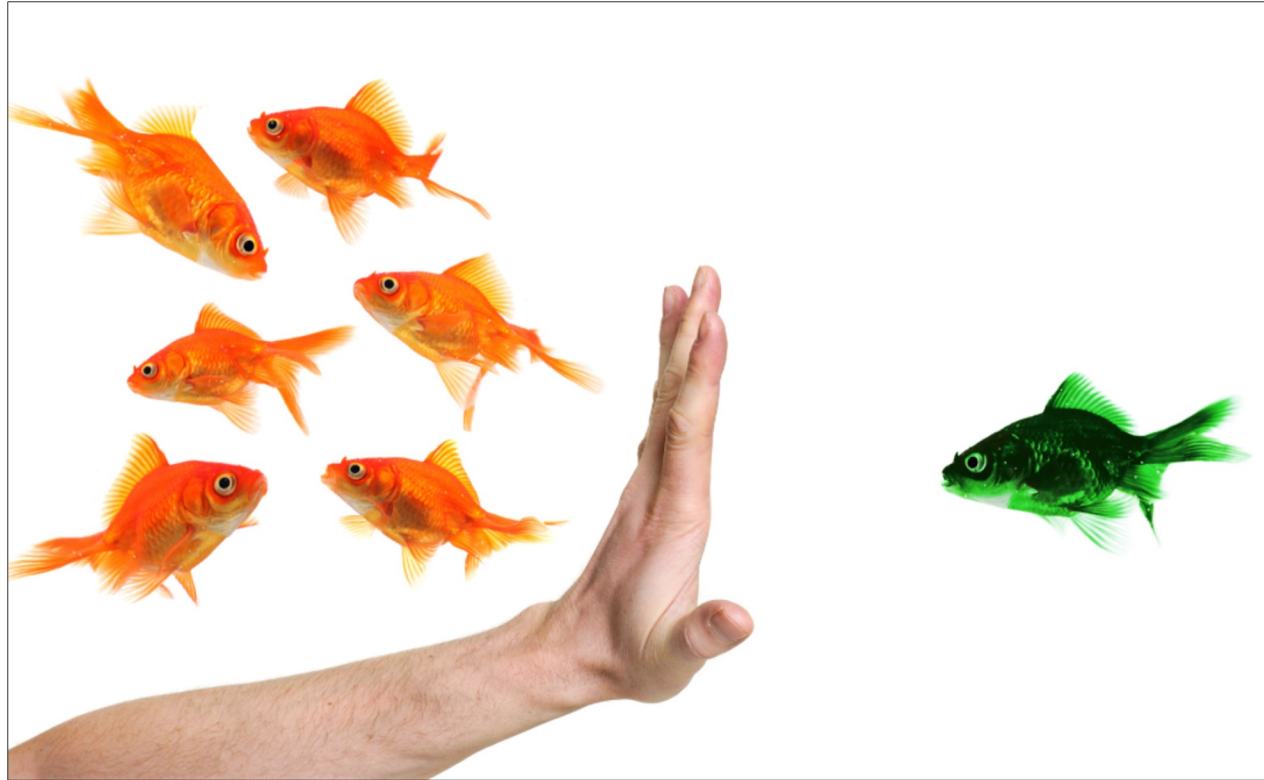


# What Does This Mean?

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- You are reviewing the appeal for what it says, not how it is said.
- You are identifying what the party says went wrong in the process or whether the party has identified new information and IF the party has articulated that what went wrong or what is new, if true, would have led to a different outcome.





# Bias

- What constitutes bias?
- The investigator was biased against me because...
- The investigator was biased against (complainants/respondents generally) because . . .

# Allegations of Bias

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“Pro-victim bias does not equate to anti-male bias.”  
-Doe v. University of Colorado

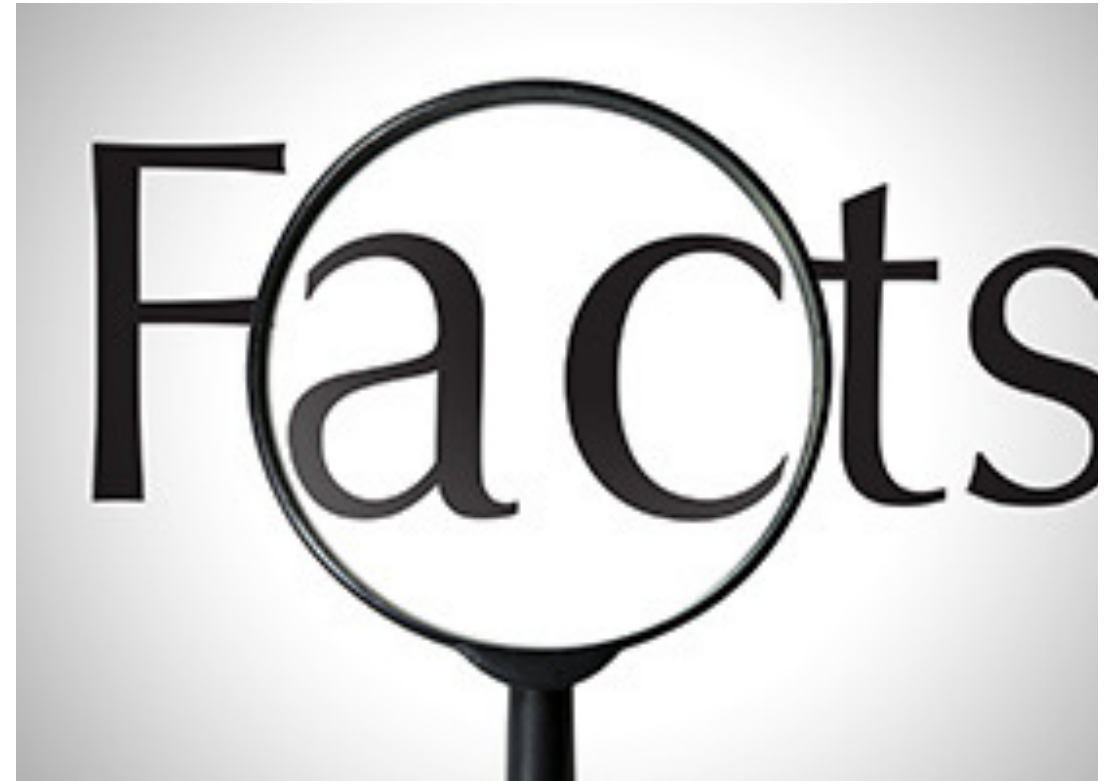
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Anti-violence bias does not equate to anti-male bias.

# Allegations of Bias as the Basis for Appeal

An allegation of bias without factual support “no longer passes muster”.

-Doe v. University of Colorado



# New Information

- Is it really new?
- If it is new, would it change the findings/outcome
- Who investigates new information?
- Timeline



# New Evidence: What Would You Do?

Appeal states there is  
new evidence...

Evidence not provided  
with the appeal

How do you know it is  
new?

It is new but is it relevant  
and reliable?

# Procedural Error?

There was a procedural error in the process that materially affected the outcome.

- Someone was not interviewed
- I was not allowed to cross-examine the complainant
- Burden was put onto me to prove consent
- I was given 9 days to review the evidence, not 10
- I'm the real victim here; I was incapacitated too

# Sometimes Institutions Do the Wrong Thing



- ❖ Missing deadlines for providing materials
- ❖ Misunderstanding of consent or incapacitation
- ❖ Errors at a hearing



# Denial of A Process You Don't Offer



Representation



Discovery



Subpoena / compel  
witnesses

# When a Party Refuses to Participate in the Process but Appeals the Process

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“The Plaintiff waived his right to challenge the process resulting in his expulsion by failing to participate in the process afforded him.”

- Herrell v. Benson





# Common Errors on Appeal



# Evidence

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Direct

Circumstantial

Character



# Evidence – Knowing What to Consider

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Drunk vs. Intoxicated vs.  
Incapacitated

Language matters

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Clarity and consistency of application

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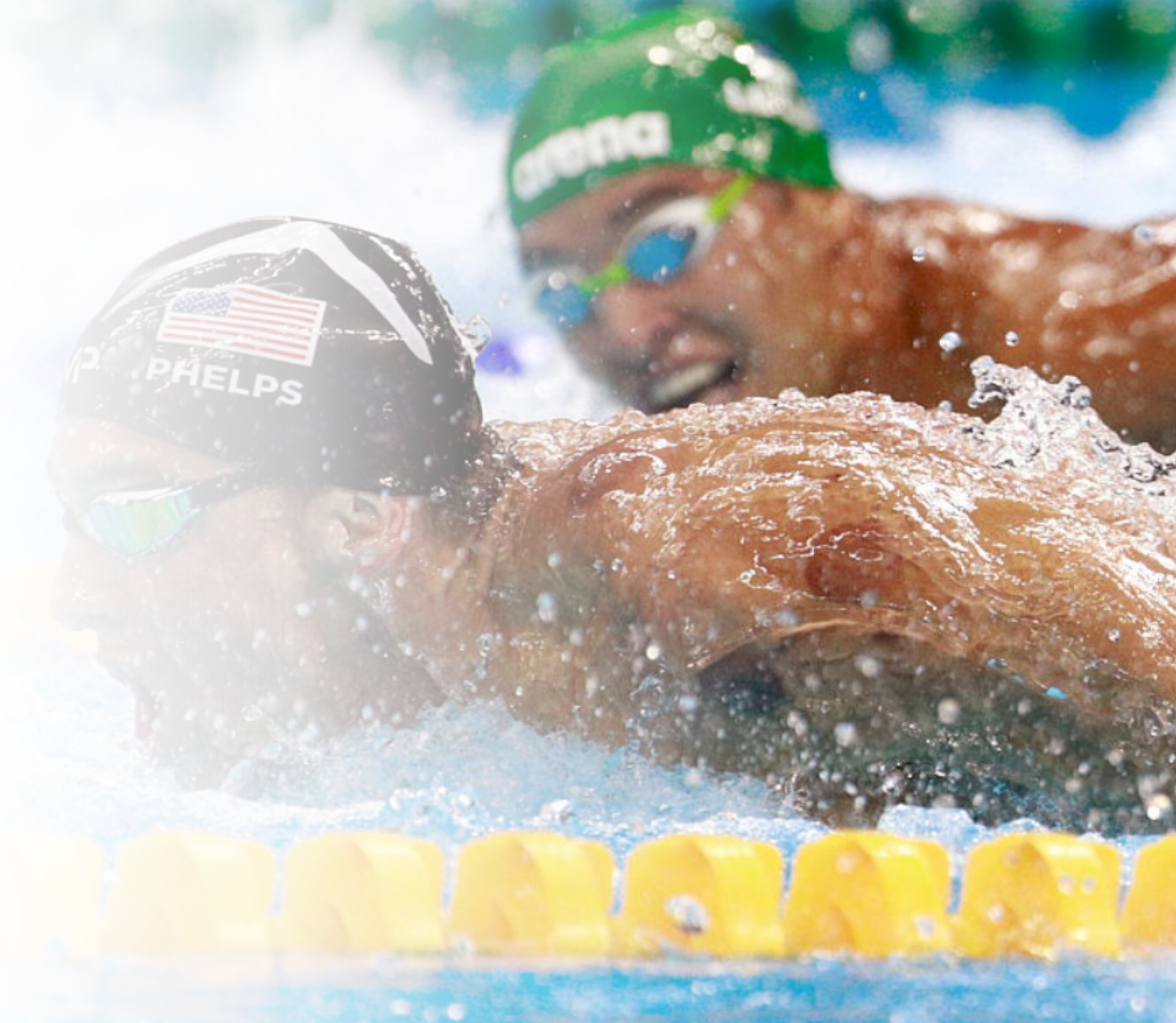
Who has to prove  
consent?

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Know the language of your policy

# Appeals Panels That Exceed Their Authority

- Stay in your lane
- How do you know
- How to correct





# The Appellate Officer/Panel may not:

01

Substitute their own findings for the findings of the decision maker

02

Consider new evidence

03

Correct procedural errors on their own

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# Sanctions Are Now Wrong Because Finding Was Wrong

Appeals officer now sends case back for appropriate determinations





## Solutions When you Err\*

- Re-do and get it right.

## Lesser-Included Charges on Appeal\*\*

- There are no lesser-included charges.
- Reflects lack of notice and opportunity to respond.

## When a Sanction Changes Due to an Appeal\*\*\*

Appeals panel “sua sponte and without any explanation recommended enhancing the penalty to expulsion.”

\*John Doe v. University of Kentucky; Doe v. Alger; \*\*Powell v. St. Joseph’s University; Doe v. U.S.C.; \*\*\*Haug v. SUNY Potsdam



# You've Identified the Problem... What Now?

The parties will receive written decision regarding the appeal describing the results of the appeal and the rationale for each result. If the appeal is granted, the matter shall be either referred to the original Hearing Chair for re-opening of the hearing to allow reconsideration of the original determination or the appeal reader will determine any change in sanction. If an appeal is denied, the matter shall be considered final.

# Documenting the Appeal

## Outcome

- Notification
- Decision
- Rationale
- Record-keeping
- Office of record

# Questions?



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