

# IRO (and HSMB) Training

September 1, 2020

WASHINGTON AND LEE  
UNIVERSITY

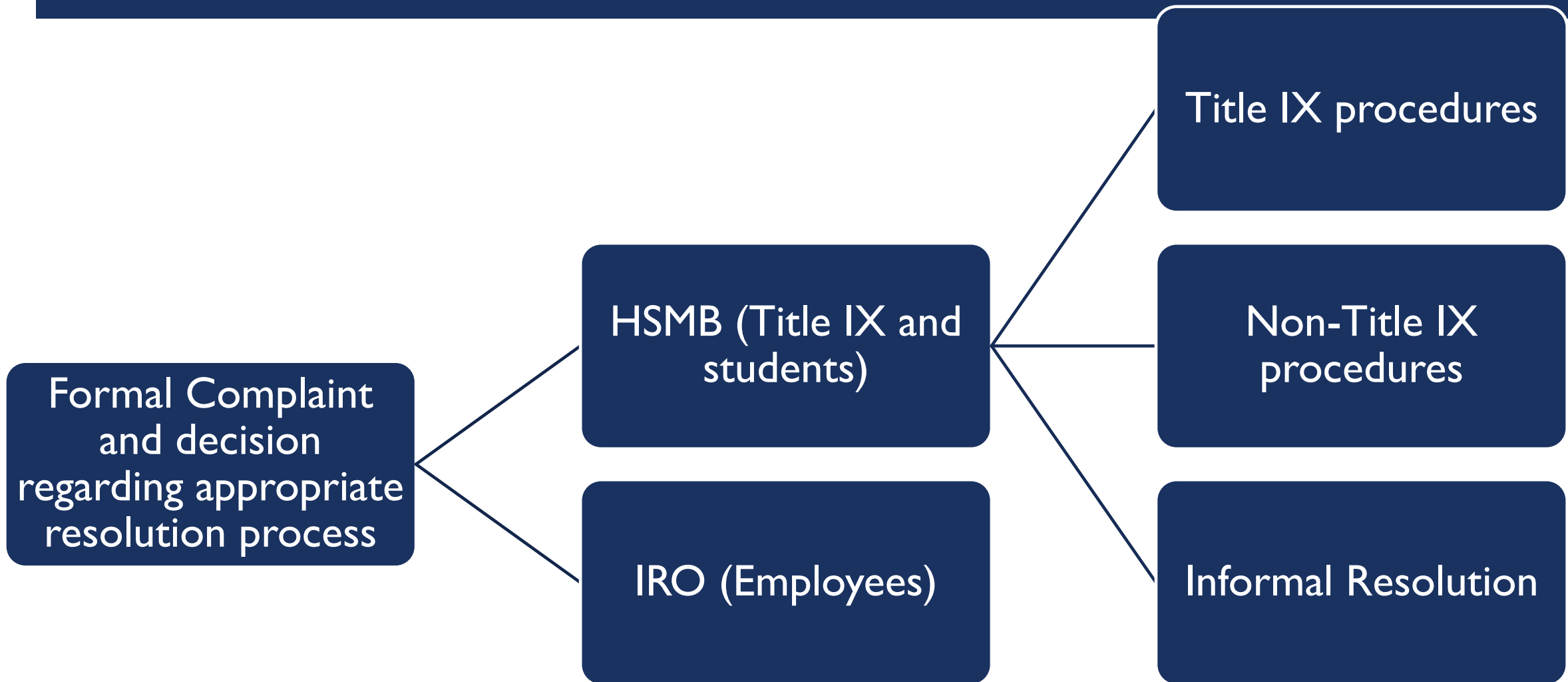
Lexington, Virginia 24450-2116

## GOALS

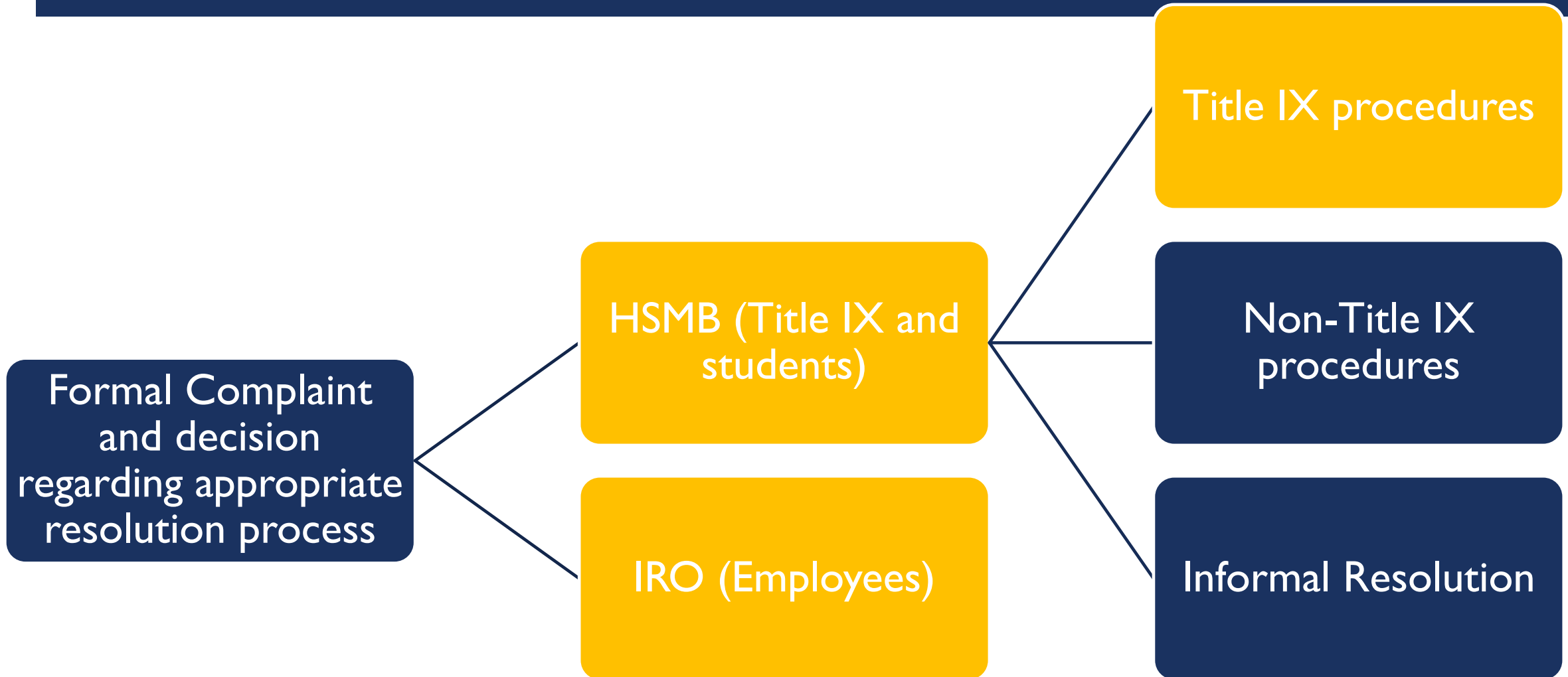
1. Scope of educational program or activity
2. Definition of prohibited conduct
3. Title IX and non-Title IX investigation and hearing process
4. Determining relevance
5. How to serve impartially



# RESOLUTION OPTIONS



# RESOLUTION OPTIONS



## DECISION REGARDING APPROPRIATE GRIEVANCE PROCESS: DOES TITLE IX APPLY?

### Non-Title IX

- The complainant, at the time of the formal complaint, is not participating in or attempting to participate in a University program or activity;
- The conduct, even if proved, would not constitute Title IX sexual harassment
- The conduct did not occur in the University's education program or activity;
- The conduct did not occur against a person in the United States; or
- The respondent(s) is/are an organization or group rather than an individual or individuals.

## APPEAL OF DECISION REGARDING TITLE IX DISMISSAL

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time of the determination regarding dismissal that could affect the outcome of the matter;
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter, and/or
4. The decision regarding the lack of Title IX jurisdiction lacked reasonable basis.

# JURISDICTION

## Our Policy

- On-Campus
- University program or activity (domestic or abroad)
- Continuing adverse effect for Complainant while on campus/participating in a program or activity
- Student committed in Rockbridge County, Lexington, BV

## Title IX

- University program or activity (only in United States)

## UNIVERSITY PROGRAM OR ACTIVITY

(1) Locations, events, or circumstances over which the University exercises substantial control over both the respondent and the context in which the conduct occurs, and (2) also includes any building owned or controlled by a student organization that is officially recognized by the University



## TITLE IX SEXUAL HARASSMENT

Title IX sexual harassment means conduct on the basis of sex that occurs in a University education program or activity, against a person in the United States, and satisfies one or more of the following:

- A University employee conditioning 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;
- Nonconsensual Sexual Penetration;
- Nonconsensual Sexual Contact;
- Incest;
- Statutory Nonconsensual Sexual Penetration;
- Dating violence;
- Domestic violence; and/or
- Stalking.

# SEXUAL HARASSMENT

## Policy

Unwelcome conduct of a sexual nature or unwelcome conduct based on sex, sexual orientation, gender identity, or gender expression, when one or more of the following conditions are present:

- Quid Pro Quo
- The unwelcome conduct is so severe, persistent, or pervasive that it unreasonably interferes with an individual's work or academic performance, or creates an intimidating or hostile academic or work environment under both an objective and subjective standard.

## Title IX

Quid Pro Quo (employees only)

Unwelcome conduct based on sex 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

# SEXUAL HARASSMENT

## Policy

Unwelcome conduct of a sexual nature or unwelcome conduct **based on sex, sexual orientation, gender identity, or gender expression**, when one or more of the following conditions are present:

- Quid Pro Quo
- The unwelcome conduct is so severe, persistent, **or** pervasive that it unreasonably interferes with an individual's work or academic performance, or creates an intimidating or hostile academic or work environment under both an objective and subjective standard.

## Title IX

Quid Pro Quo (**employees only**)

Unwelcome conduct on the **basis of sex** 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



## TITLE IX SEXUAL HARASSMENT: ON THE BASIS OF SEX

Where conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct “on the basis of sex.”

## TITLE IX SEXUAL HARASSMENT: SEVERE, PERVASIVE, OBJECTIVELY OFFENSIVE

“The Department understands that research shows that even ‘less severe’ forms of sexual harassment may cause negative outcomes for those who experience it. The Department believes, however, that severity and pervasiveness are needed elements to ensure that Title IX’s non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient’s community.”

## TITLE IX SEXUAL HARASSMENT

Whether conduct is unwelcome is subjective inquiry

Severity/Pervasiveness is objective inquiry from the perspective of a reasonable person in the complainant's position.

## TITLE IX SEXUAL HARASSMENT: DEPRIVE EQUAL ACCESS

Does *not* require that a complainant has already suffered loss of education

Does *not* require that a person's total or entire educational access has been denied

Evaluate whether Complainant deprived of *equal* access, measured against the access of a person who has not been subjected to the sexual harassment.

Based on reasonable person standard

## TITLE IX SEXUAL HARASSMENT: DEPRIVE EQUAL ACCESS

- Examples (no specific type of reaction/concrete injury required):
  - Wrestler who quits the team but carries on with other school activities
  - Student who attends school, but begins experiencing anxiety symptoms
  - Skipping class to avoid a harasser
  - Decline in grade point average
  - Difficulty concentrating in class





## HARASSMENT AND DISCRIMINATION

### Interim Sexual Discrimination and Misconduct Policy

- Sex
- Sexual Orientation
- Gender Identity
- Gender Expression

### Prohibited Discrimination, Harassment, Retaliation Other Than Sex Policy

- Race
- Religion
- Color
- National or Ethnic Origin
- Disability
- Age, Veteran's Status, Genetic Information

## WHAT IS DISCRIMINATION

- Unequal Treatment
- On the basis of a protected category
- Substantially serious to unreasonably interfere with or limit the individual's opportunity to participate in or benefit from a University program or activity or that otherwise adversely affects a term or condition of an individual's education or living environment.

## WHAT IS DISCRIMINATION?

- Non-Exhaustive Examples:
  - Harsher discipline
  - Negative performance review
  - Less desirable work assignments
  - Lower grades

## WHAT IS HARASSMENT?

1. Unwelcome and offensive conduct
2. Based on a protected category
3. Severe or repeated/pervasive
4. Substantially interferes with someone's work or academic performance, or creates an intimidating, hostile, or abusive academic or work environment (based on subjective and objective evaluation)



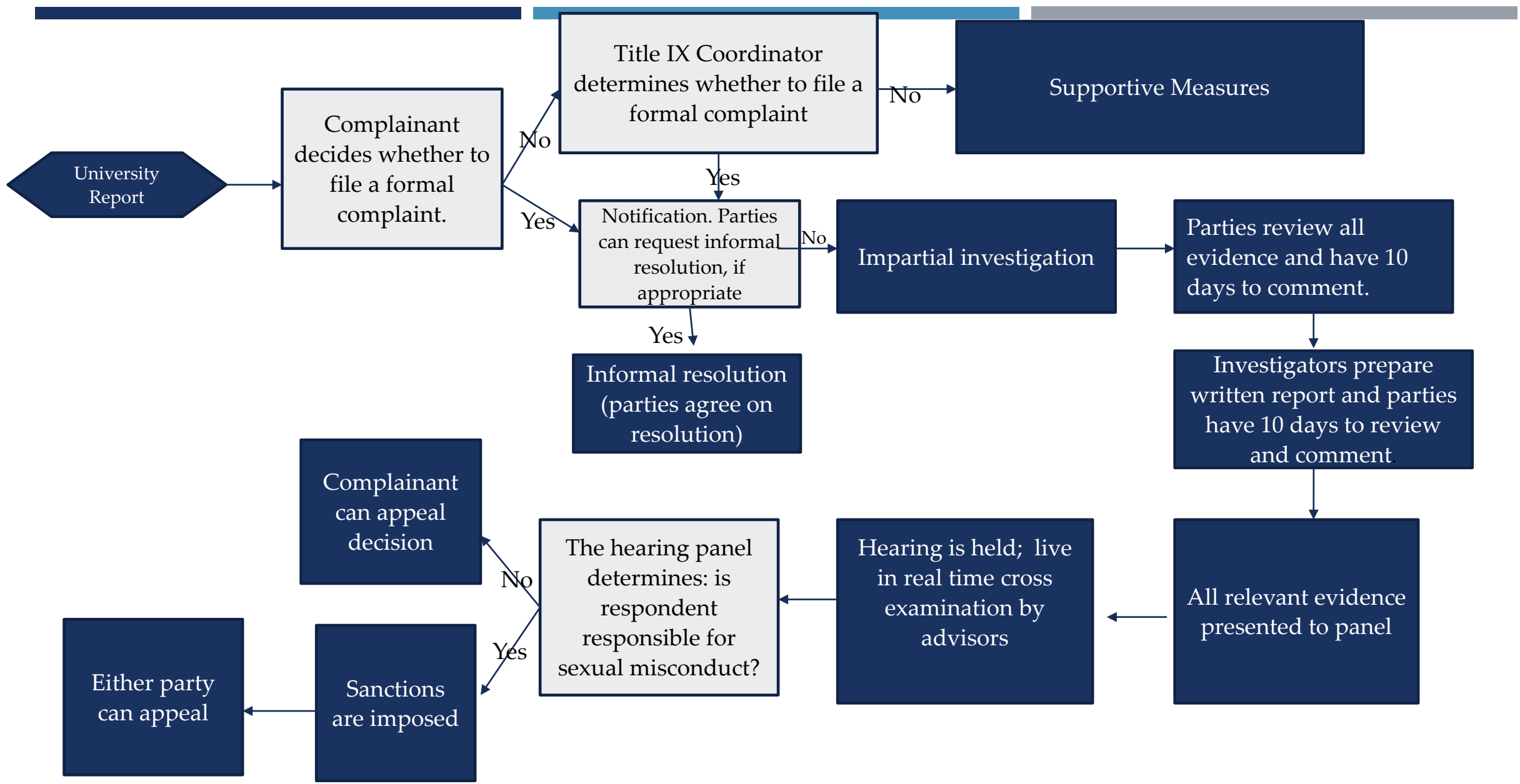
## UNIVERSITY OF CHICAGO: STATEMENT ON FREEDOM OF EXPRESSION

- The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University.
- But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the University's commitment to a completely free and open discussion of ideas. In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose.



## WHAT IS HARASSMENT?

- Directed at a specific person?
- Frequency? Severity?
- Verbal only? Or physical/other conduct?
- Context of the conduct?
- Degree of impact on academic/work performance
- Deserves protections of academic freedom?



## FORMAL COMPLAINT FILED BY TITLE IX COORDINATOR

By filing a formal complaint, the Title IX Coordinator is not determining that the allegations have merit or the policy has been violated, but is merely deciding that, based on the allegations, an investigation must be conducted.



## TITLE IX HEARING PROCESS

- In person or virtual (both parties must be able to see each other)
- Recorded
- Parties have option to give opening/closing statement
- Panel can question parties, witnesses, or investigators
- Cross examination live, oral, in real-time by parties' advisors of choice
- All witnesses and parties must submit to cross examination before statements can be considered
- All relevant evidence with few exceptions considered; no pre-hearing conference; panel determines relevance

## PROFESSIONAL CONDUCT

- Must treat others with courtesy and respect. This rule does not prohibit good faith expressions of dissent or criticism;
- During any cross-examination permitted under the Title IX resolution process, questions only are permitted; an Advisor of Choice may not give any statements, speeches, or objections to relevance decisions;
- Any cross-examination questions or techniques must not be for the purpose to harass or intimidate others;
- Disruptive behavior that hinders the orderly conduct of the meeting or hearing is prohibited;
- Interruptions, sarcasm, cursing, yelling, and insults are prohibited.



### Open-Ended

- Calls for narrative or recall

### Focused

- Directs the witness to a particular issue
- Ex: "I would like to talk to you about when you were in the bedroom. Can you describe it?"

### Multiple Choice

- Provides a range of options
- Ex: "Can you tell me whether the clothes were on, off, or some other way?"

### Yes/No

- Seeks to clarify a specific point
- Ex: "You talked about alcohol. Did you serve alcohol to Nicole?"

### Leading

- Assumes the answer
- Ex: "You served alcohol to Nicole correct?"
- Use sparingly

## QUESTION TECHNIQUES

- Ask for definitions/explanation of any terms/adjectives
- Avoid compound questions
- Know elements of alleged violations and focus questioning on those issues
- Ask hard questions in a non-accusatory/neutral way
  - “Why didn’t you report right away?”
    - “What brought you to report at this time? Did you consider reporting it after the incident? Why or why not?”

## RELEVANT EVIDENCE

University must ensure that “all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).”

## RELEVANT EVIDENCE: PANEL MUST ONLY CONSIDER RELEVANT EVIDENCE

- Relevant evidence must be:
  - Probative
  - Material

## RELEVANT EVIDENCE: PROBATIVE

*Any* tendency to make the existence of *any* material fact more or less probable than it would be without the evidence.



## RELEVANT EVIDENCE: MATERIAL

Evidence is “material” if it is being offered to prove an element of a policy violation or defense that needs to be established for one side or the other to prevail.



## TITLE IX: MUST CONSIDER RELEVANT EVIDENCE WITH FOLLOWING EXCEPTIONS

- Complainant's prior sexual behavior (with two exceptions)
- Information protected by legally recognized privilege
- Party's treatment records cannot be used without party's voluntary, written consent
- Statements not subject to cross-examination cannot be relied upon
- Evidence that is duplicative of other evidence

## PRIOR SEXUAL HISTORY

In general, questions and evidence about the sexual predisposition or prior sexual behavior of the complainant are not relevant and will not be admitted as evidence during an investigation and/or hearing

## PRIOR SEXUAL HISTORY: EXCEPTIONS

1. Where the sexual behavior is used to show that someone other than the respondent committed the conduct alleged by the complainant; or
2. Where if the questions and evidence concern a specific incident of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

## PRIVILEGED INFORMATION

- Cannot require, allow, rely on, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege (attorney client; priest penitent; doctor patient; spousal)
- An individual may disclose his or her medical and/or counseling records voluntarily, but cannot request consent for the release of any medical or counseling records, or require any individual to release any such medical and/or counseling records.

## WEIGHT OF EVIDENCE

- All relevant evidence does not need to be given equal weight. How probative is the evidence?
- Evidence may have *some* tendency to make something more or less probable, but not much

## RELEVANCE EXAMPLE

- In a sexual harassment case, the Respondent's friend says that the Respondent is honest, kind, and treats others with respect.
- Relevant? Weight?

## RELEVANCE EXAMPLE

- Sexual harassment alleged against Respondent by student. Respondent has received accolades for extensive scholarship.
- Relevant? Weight?

## RELEVANCE EXAMPLE

- In sexual harassment case, Respondent discusses the mental toil of investigation and asks to sign waiver to allow statement from counselor about the impact the complaint has had on the Respondent's mental health.
  - Relevant? Weight?



## RELEVANCE EXAMPLE

- In a domestic violence case, the Complainant's counselor diagnosed Complainant with PTSD.
  - Relevant? Weight?

## RELEVANCE EXAMPLE

- In a sexual harassment case, the Complainant made another report of sexual harassment against a different person two years before this report.
- Relevant? Weight?

## TITLE IX CROSS EXAMINATION: WHAT DOES SUBMIT TO CROSS EXAMINATION MEAN?

Answering cross-examination questions by advisor of choice that are deemed relevant by decision-maker

Cannot refuse to answer any question deemed relevant

## TITLE IX CROSS EXAMINATION

Before party/witness answers, the Chair of the HSMB informs whether the question is relevant. If not relevant, the Chair will explain the decision.

Questions, even if relevant, may be excluded if prior sexual history or privilege. Additionally, repetition of the same question may be deemed irrelevant.

## TITLE IX CROSS EXAMINATION: MUST EXPLAIN DECISION TO EXCLUDE ANY QUESTION

Sufficient to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.

## TITLE IX CROSS-EXAMINATION

Can a party's advisor appear and conduct cross-examination even when the party whom they are advising does not appear?

- Yes. Advisor can cross examine the appearing party on behalf of the non-appearing party, resulting in consideration of the appearing party's statements but not the non-appearing party's statements.
- We will provide advisor if party's advisor of choice not available

## EXAMPLE OF IMPACT OF CROSS EXAMINATION IN TITLE IX CASE

### Party/witness submits to cross examination

- Statements at hearing can be considered
- Statements made outside hearing can be considered (i.e., investigation statement, text messages, statements to other witnesses)

### Party/witness does not submit to cross examination

- Cannot rely on any statement of that party or witness in reaching a determination regarding responsibility
- Other evidence that does not consist of statements, such as video/photo evidence may be used to reach a determination
- Cannot draw an inference about determination based solely on a party's or witness's absence or refusal to answer questions

## TITLE IX CROSS-EXAMINATION: WHAT IS A STATEMENT?

- “Statements” has ordinary meaning
- Does not include evidence that do not constitute person’s intent to make factual assertions, or to the extent that such evidence does not contain a person’s statements.
- Police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross examination.
- Does not include situations where the statement itself is the violation (i.e., threats)





# Evaluating Credibility

## Demeanor

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- Did complainant/respondent/witness speak in a convincing manner?
- Was he/she uncertain, confused, self-contradictory or evasive?

## Interest

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- Does complainant/respondent/witness have motive to lie, exaggerate or distort information?

## Detail

- How well could complainant/respondent/witness remember and describe the things about which he/she spoke about? And does recalling that level of detail make sense given the circumstances?

## Corroboration

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- Was the statement of the complainant/respondent/witness contradicted or supported by the other statements and evidence?

## Common Sense

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- Does it all add up? (gut check) is there something missing?
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## CREDIBILITY: MEMORY

- How much time has passed before interview?
- Why does a person remember particular details? Does the amount and nature of details make sense given the circumstances?
- Was the person confident about a fact at the initial telling? Or did the person seem to become more confident about a fact at the investigator's meeting/hearing?
- What events have happened afterwards?
  - How often talk about it? to whom? Did the person spoken with provide information/misinformation?
- Did the person have the opportunity to observe what he/she said he or she did? (lighting of room, location, proximity, etc.)

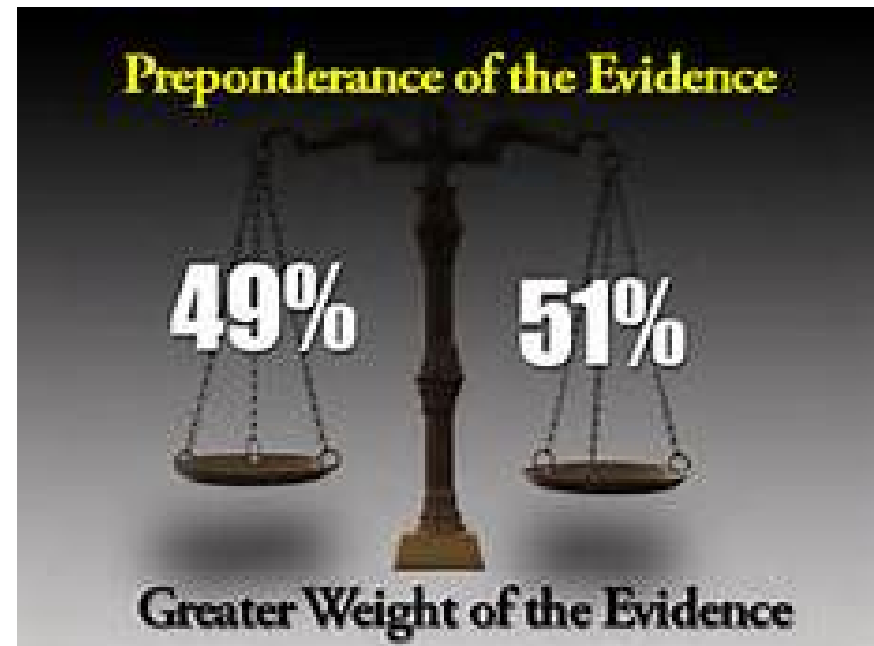
## WHAT IS A “STANDARD OF PROOF” IN GENERAL?

Measure of evidence necessary to find a policy violation



## WHAT IS OUR “STANDARD OF PROOF” UNDER THE POLICY?

- Preponderance of the Evidence
  - “Greater weight of the evidence”
  - “More likely than not” that a policy violation occurred.



## STANDARD OF PROOF – POLICY LANGUAGE

*“The respondent is presumed to be not responsible; this presumption may be overcome only where a Harassment and Sexual Misconduct Board hearing panel concludes that there is sufficient evidence, by a preponderance of the evidence, to support a finding that the respondent violated the policy.”*

## APPLYING THE STANDARD OF PROOF

- Starting point: Respondent is not responsible
- Investigation Report
- Hearing
- Deliberations
- As applied to each disputed fact, it is more likely than not that one version occurred as opposed to the other?
- After the totality of the evidence from all parties has been presented, is it more likely than not that a policy violation occurred?

## SANCTIONS: FACTORS TO CONSIDER

- The parties' impact statements;
- The respondent's prior conduct history;
- The nature and violence of the conduct at issue;
- The impact of the conduct on the complainant;
- The impact of the conduct on the community, its members, or its property;
- Whether the respondent has accepted responsibility;
- Whether the respondent is reasonably likely to engage in the conduct in the future;
- The need to prevent similar conduct by this respondent; and/or
- Any other mitigating or aggravating circumstances, including the University's values.

## HEARING REPORT FORM—TITLE IX

- Identification of the allegations (info in investigation report)
- Procedural steps taken from receipt of formal complaint through determination, including any notification to parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held (info in investigation report)
- Findings of fact supporting the determination
- Conclusions regarding the application of the code of conduct to the facts
- Statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions, and whether remedies will be provided to the complainant
- Procedures and permissible bases for appeal



## TITLE IX VS CONDUCT IN DECISION

- With Title IX Sexual Harassment, you may find that it does not meet the severe AND pervasive standard, but it does meet the severe OR pervasive standard. In that case, you can find not responsible of Title IX Sexual Harassment, but then find responsible for non-Title IX Sexual Harassment in the decision form.

## APPEALS: BASES FOR APPEAL

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter;
3. The Title IX Coordinator, decision-maker(s), or investigator(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter;
4. The sanction lacked reasonable basis; and/or
5. Extraordinary circumstances that affected the outcome of the matter.

## APPEALS

The Appeal Panel will review

- The parties' written request(s) for appeal,
- The parties' written statement(s) in support of or against the appeal(s) (if any),
- The entire written record, and any other documents or evidence (including any recording) that it deems relevant.

## APPEALS

Appeal panel may decide the case based solely upon the written appeal and other documents or evidence it reviews

or

The Appeal Panel may seek additional information from:

1. any person who provided information to the HSMB hearing panel;
2. any person who may have new, relevant information;
3. the Title IX Coordinator;
4. the investigator(s), and/or
5. the original Chair of the HSMB.

## APPEAL

Can affirm decision

Remand to original HSMB hearing (evaluate new evidence, correct procedural error, extraordinary circumstances, no reasonable basis for sanction)

Convene new HSMB hearing (necessary for fundamental fairness, bias/conflict of interest of HSMB panel members)

## A GOOD HEARING PANEL MEMBER....

### Should be:

- Objective
- Fair-minded
- Impartial
- Open-minded
- Professional
- Appropriate in demeanor in and out of the hearing room
- An active listener
- Polite and respectful to all parties

### Should not:

- Make assumptions as to how a person “should” react (counter-intuitive complainant/respondent behaviors)
- Pre-judge the facts
- Put him/herself in the shoes of the complainant or the respondent
- Allow any bias or prejudice affect his/her judgment, including any sex stereotypes
- Consider the potential impact of the decision on either party when deciding whether evidence is sufficient for responsible finding

## YOUR ROLE AS HEARING PANEL

- Conduct an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence
- Keep an open mind until all evidence has been heard. Do not prejudge the facts at issue
- Consider only the evidence that is permissible and relevant
- Make sound, reasoned decisions

## DECISION-MAKERS MUST BE IMPARTIAL

- May not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent
- Whether bias exists requires examination of the particular facts of a situation. Would a reasonable person believe bias exists?
- Cannot make credibility determinations based on a party's status as a complainant, respondent or witness.
- Cannot make decision based on any sex-stereotypes



## CONFIRMATION BIAS

- Tendency to only seek information that confirms your expectations and ignore disconfirming information.



## IMPLICIT BIAS—WHO IS MORE TRUSTWORTHY?



## AVOIDING CONFIRMATION BIAS

- Encourage an atmosphere of open inquiry where the goal is to remain impartial and neutral (keep an open mind to all possibilities).
- When you believe you have come to a conclusion, think about your decision:
  - Why did I draw that conclusion?
  - What am I assuming, and why? Are my assumptions valid?
  - What facts have I relied on and why? Are there other facts I should consider?
  - Bring in the devil's advocate--actively look for facts that disprove your conclusion
    - One of the biggest things you can do to correct confirmation bias is to try to disprove your theories instead of trying to prove them