



## LYNN UNIVERSITY

# ADVISOR, CONDUCT, AND APPEALS TRAINING, DAY 1

JANUARY 15, 2021

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## Agenda

- Themes
- The Big Picture: Where Do You Fit In?
- What Does This Process “Look Like”?
- Starting from the End: The Appeals Standard

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## Presentation Rules

- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

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**Posting These Training Materials?**

- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution electronically to post

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**Themes: Title IX Today**

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**Title IX is an Equity Statute**



EQUALITY



EQUITY

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### Ethic of Care



What do you think are the top values of your institution's community?  
Do you think institutional values align between administration, faculty and staff?  
What about students?  
What about the town or city around your institution?

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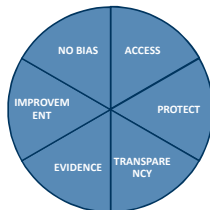
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### Overview of Themes



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### Themes - ACCESS



It is meant to ensure ACCESS to your programs and activities, regardless of sex.  
“What we do for one, we do for the other” (or at least consider whether it is appropriate under the circumstances)  
Why are you treating someone differently?

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### Themes - PROTECT



We have an obligation to **PROTECT** our campus.

- **“They are all our students.”**
- Supportive measures
- Any action by a recipient that results in changes or removal of access to education for respondents require a process to respond (if interim emergency measure) or engage in live cross-examination (if formal process that could lead to disciplinary action).

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### Themes - TRANSPARENCY



**TRANSPARENCY** is key to trusting the process.

- Know your grievance process
- Help them understand next steps.

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### Themes - EVIDENCE



We base decisions on **EVIDENCE**.

- **“Don’t weigh your gut.”**
- We can make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.

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### Themes - IMPROVE



Always be working to **IMPROVE**:

- Yourself as a neutral
- Your campus as a healthy and fair place to be
- Your policy to provide a better process informed by case law, regulations, guidance, and experience
- Your resources for all involved

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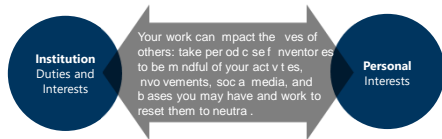
### Themes- NO BIAS



Always be working to avoid actual or perceived:

Conflict of interest:

Bias




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### The Big Picture: Where Do You Fit In?




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### The Policy



- The Sexual Harassment (Title IX) Policy governs the process we will be discussing today.
- It can be found online at: <https://www.lynn.edu/university-policies/volume-i-governance-and-administration/sexual-harassment-title-ix-policy>

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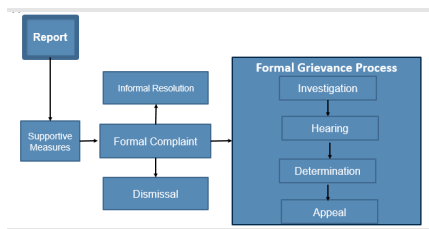
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### The General Outline



Hearing Process




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### Foundations



- Respondent is presumed not responsible for a violation
- The decision as to whether a Respondent is responsible for a violation will be based on a preponderance of the evidence
- Knowingly submitting false statements is a violation of University policy
- Both parties have access to supportive measures
- Retaliation is prohibited

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**Outlining the Process**



- Complainant makes a report to the University
  - University offers supportive measures
- Complainant (or TIXC) files a Formal Complaint
- Respondent receives notice of Formal Complaint
  - University offers supportive measures
- Informal resolution may be tried

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**Outlining the Process - 2**



- Investigation is conducted
- Parties review evidence and investigation report and provide feedback
- Determination is made as to whether Sexual Harassment may have occurred, or whether the case should be “dismissed” from this process and handled through another University process

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**A Note on Retaliation**



Per the new regulations, “retaliation” is defined as:

Intimidating, threatening, coercing, or discriminating against any individual:

- for the purpose of interfering with any right or privilege secured by Title IX, or
- Because the individual made a report/complaint, testified, assisted, or participated or refused to participate in an investigation, proceeding, or hearing

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**A Note on Retaliation - 2**



“Retaliation” also includes:

- Charges against an individual for **code of conduct violations** that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment – for the purpose of interfering with Title IX rights

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**What You May Receive - 1**



• Investigative Report

- Contains:
  - Summary of alleged conduct in violation of the Policy, including a description of the impact or effect alleged to have been caused
  - A summary of the response to the allegations
  - A summary of facts found during the investigation
  - Analysis of the application of this Policy to facts found in the Investigation
- Does not contain:
  - Findings of fact or conclusions

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**What You May Receive - 2**



- Relevant evidence relating to the case
- Responses of the parties to the evidence and the report (if they submitted responses)
- Contact information for your party (complainant or respondent)
- Applicable policy language
- Other relevant communications about the hearing

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**What You May Receive - 3**



- Appeals Officers will also receive:
  - Recording of the hearing
  - Hearing decision
  - Written appeal(s)
  - Response(s), if any, to the appeal(s)

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**What Does a Hearing *Look Like*?**

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**Overview of the Process:  
Hearings – 1 of 2**



- Hearing chair discusses the reasons for the hearing and decorum rules
- Investigator presents investigation report
- Hearing Officer asks questions of investigator
- Party advisors ask question of the investigator
- Complainant makes statement
- Hearing Officer questions complainant
- Respondent's advisor questions complainant

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**Overview of the Process:  
Hearings – 2 of 2**



- Respondent makes statement
- Hearing Officer questions Respondent
- Complainant’s advisor questions respondent
- Witness are called one at a time, with questioning first by Hearing Officer and then by each party’s advisor
- Final questions by Hearing Officer to party
- Closing statement of complainant
- Closing statement of respondent

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**The Decision-Maker’s Role**

1. Make relevancy determinations...before any and all questions at the live cross-examination hearing can be answered
2. Run an orderly and truth-seeking live cross-examination hearing
3. Write a decision: apply the policy, use standard of review, and evaluate relevant evidence still in the record after the hearing

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**The Advisor’s Role**

1. Ask relevant cross-examination questions of the other party and all witnesses
2. Help the decision-maker understand the disputed facts from your party’s perspective
3. If possible, call into credibility the evidence that your party disputes
4. Maintain confidentiality of hearing

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**Starting from the End:  
The Appeals Standard**

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**The Appeals Officer's Role(s)**

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Be able to see the forest and the trees

- Know the process in your policy (how it should function) and know the process as applied (how it actually functioned in each case) from intake to the time it hits your desk.
- Know your big picture role (the limited scope of your review) and know the specific details of your case (the often thick and detailed case file) and be able to move back forth between these perspectives

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**Who Hears Appeals?**

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- Must undergo required training (Title IX + Annual Clergy Training)
- No conflicts, bias, etc.

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## Appeals Standard



Appeals are limited to the following issues:

1. There was an alleged procedural irregularity that **affected** the outcome;
2. There is new evidence that was not reasonably available at the time the determination or dismissal was made, that **could have affected** the outcome (a summary of this new evidence and potential impact must be included);
3. The Title IX Coordinator, investigator, or Hearing Officer had a conflict of interest or bias that **affected** the outcome; or
4. The sanction(s) imposed is/are excessive or inconsistent with the nature of the offense.

Title IX Coordinator determines whether this threshold is met.

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## Procedural Irregularity



Best Practice: Follow your policy. Follow your process. Where it is silent, choose an equitable solution that promotes transparency and fairness and is consistent with your ethic of care.

If something isn't "by the book," did it actually matter?

Examples to discuss:

- Extensions/delays granted
- Failure to provide adequate notice of allegations
- Failure to interview a requested witness

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## New Evidence



Best Practice: If the parties want the evidence to be considered, it needs to be put forward at the investigation stage so that it can be properly considered by the parties before the hearing.

Examples to discuss:

- Witness was abroad and unreachable
- Party didn't realize someone else was in the room and saw what happened, now wants witness to testify
- Party found a way to recover Facebook messages that had been previously deleted
- Party/witness refused to participate in hearing and now would like to do so

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**Conflict of Interest/Bias**



Best Practice: We want to build the trust of the parties by implementing the policy in a neutral manner that focuses on the relevant evidence and not the identity of a particular complainant/respondent or the status of the party as complainant/respondent.

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**Impartiality**

- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally

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**Bias: Concerns raised in comments in preamble**

- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist

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**Perceived v. Actual Bias**

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- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

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**How the Department tried to prevent bias**

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- No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):
- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
  - Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
  - The institution may consider external or internal investigator or decision-maker (30370)

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**Conflict of Interest: Concerns raised in comments in preamble**

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- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

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**Preamble Discussion on Bias and Conflict of Interest 1 of 3**

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- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

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**Preamble Discussion on Bias and Conflict of Interest 2 of 3**

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- No *per se* prohibited conflicts of interest in using employees or administrative staff
  - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process  
(30352-30353)

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**Preamble Discussion on Bias and Conflict of Interest 3 of 3**

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- Example: it is **not** a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead recommends using a reasonable-person test to determine whether bias exists.

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**Example of Unreasonable Conclusion that Bias Exists**

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- “[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)

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**Training, Bias, and Past Professional Experience**

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This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience (30252)

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**Department: Review of Outcomes Alone Does Not Show Bias**

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- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)

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**Examples of Bias (per ED)**

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- An investigator used to supervise one of the parties;
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

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**Avoiding Prejudgment of Facts at Issue**

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A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

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**Conflicts and Bias on a Small Campus**

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Examples to discuss:

- A party has been in your class
- A party is your advisee
- You have disciplined a party before
- A party has complained to your boss about you
- You advise the party’s Greek organization
- You coach the party’s athletic team
- You were the party’s residence hall director
- A party works for your office

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**Conflicts and Bias on a Small Campus - 2**

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Examples to discuss:

- You are on the BIT team that has discussed one or both of the parties
- You were involved with the initial response to the situation
- You have addressed other concerns raised by one or both parties

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**Sanctions: Best Practices**

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Best Practice: Sanction should be in line with other sanctions given with regard to similar violations, and any deviations from past practice should be justifiable based on the specifics of the case.

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**Sanctions: OCR Guidance**

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December 2018 Q&A from OCR:  
To ensure no racial bias in discipline, OCR will examine:

- **Comparative evidence** regarding the treatment of similarly situated students
- **Departures** from the school's standard disciplinary procedures/norms

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**Sanctions: For Appeals**

What has the institution done with regard to sanctions in similar Title IX cases?

- Sexual assault vs. sexual assault
- Can consider cases prior to new regs

What has the institution done with regard to sanctions in similar non-Title IX cases?

- Assault vs. domestic violence
- Stalking (sex-based) vs. Stalking (not sex-based)

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**Sanctions: For Appeals - 2**

Are there good reasons for deviations from the standard in this case? For example:

- Safety issues
- Prior misconduct
- Severity/violence
- Impact on complainant/community
- Risks of leaving respondent in contact with complainant/community

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**Appeal: The Process**

“Paper” process – no live hearing for appeals

Limited to the record in the case, plus:

- May solicit written clarification on any issue in appeal from the Hearing Officer, Title IX Coordinator, Investigator, or a party

Written nature aligns with goal of transparency.

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**Results of an Appeal**

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- Affirm all
- Affirm finding and modify the sanction
- Remand the finding and/or sanction for further investigation or reconsideration at the hearing level
  
- Written decision sent simultaneously to the party and must include the rationale for the result.

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**Questions?**

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