

# **IPV LIVE HEARING APPELLATE OFFICER TRAINING**

**Dr. Marc Shook**

**Dean of Students and Interim Title IX Coordinator**



August 12, 2021  
Virtual

# AGENDA

1. How did you get here?
2. How did we get here?
3. How a case will find its way to you: UofSC live hearings
4. Appeals policy
5. Q&A

**HOW DID YOU GET HERE?**

# CURRENT POLICY: EOP 1.06, N.2

- “The appellate authority must be different from anyone who made the dismissal decision or responsibility determination and must not be the investigator or Title IX coordinator. The appellate authority will consist of a three-person panel comprised of a University of South Carolina law professor, and (depending upon the identities of the parties involved in the case) the appropriate deputy Title IX coordinator or designee, and one other person from the appropriate university division or department (student affairs, academic affairs or human resources).”

# NEW PROCEDURES

- **Jurisdiction:** The Interpersonal Violence (IPV) Appeals Committee has appellate jurisdiction over appeals related to decisions made in accordance with EOP 1.06, Interim Sexual Harassment, Sexual Misconduct, and Interpersonal Violence policy (Policy) and the IPV Live Hearing Procedures, specifically decisions made involving dismissals or Live Hearing determinations.

# NEW PROCEDURES

- **Composition:** The IPV Appeals Committee will consist of a three-person panel comprised of a UofSC law professor (who will serve as Chair), the appropriate deputy Title IX coordinator or designee, and one other person from the appropriate university division/department (student affairs, academic affairs, or human resources). Decisions on committee composition will be made by the Title IX Coordinator in consultation with the Deputy Title IX Coordinator from the university division/department where the case arose.

# UofSC IPV LIVE HEARINGS APPELLATE COMMITTEE

- Emily Suski (law school)
- Bob Bockman (law school)
- Alexandra Flippins (HR)\*
- Melissa Arnold (HR)
- Lisa Hammond (Faculty)
- Sandra Kelly (Faculty)\*
- Kirsten Kennedy (student affairs)\*
- Julian Capel (student affairs)

# GROUNDS FOR APPEAL

- An appeal is a request for procedural review, not a new hearing. A Respondent or Complainant may appeal for three (3) reasons:
  - The Title IX Coordinator, investigator(s), or Decision-Maker had a conflict of interest or bias for or against Complainant or Respondent that affected the outcome.
  - A procedural irregularity that affected the outcome occurred.
  - New evidence was discovered that was not available when the dismissal or responsibility determination was made that could affect the outcome.

**HOW DID WE GET HERE?**

# After reports of lap dances, lewd texts, USC bungled sex harassment claims, women say

BY LUCAS DAPRILE

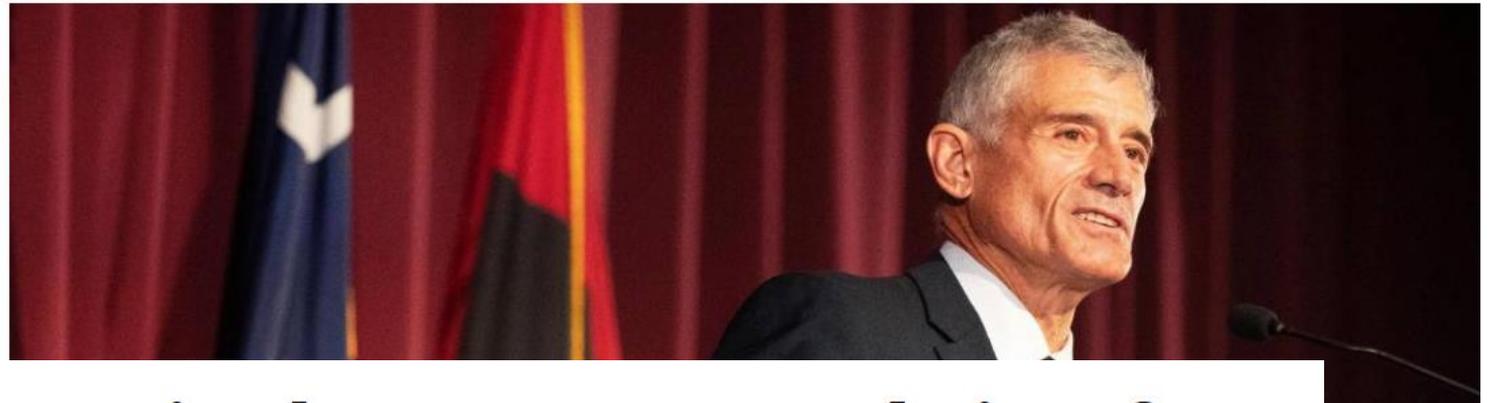
MARCH 12, 2021 11:08 AM, UPDATED MARCH 18, 2021 01:39 PM



## After The State's report, USC announces new steps to address sex harassment cases

BY CHRIS TRAINOR

MARCH 14, 2021 12:34 PM, UPDATED MARCH 14, 2021 01:18 PM



## USC must implement recommendations from sexual harassment task force, advocates say

BY LUCAS DAPRILE

JULY 02, 2021 02:28 PM



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FEDERAL

# Biden Team: Schools Can Go Beyond Trump Rules in Response to Alleged Sexual Misconduct



By [Andrew Ujifusa](#) — July 20, 2021 ⌚ 3 min read

# SETTING THE STAGE

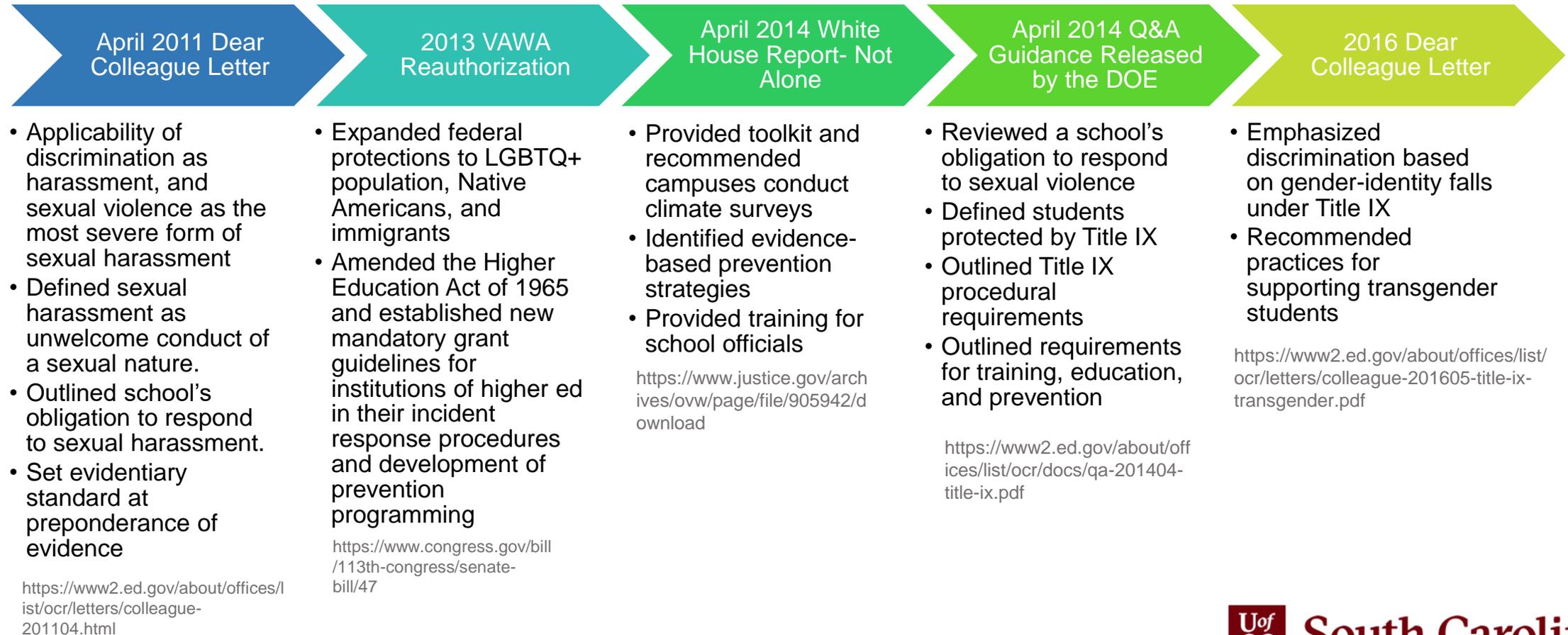
- **Title IX of the Education Amendments of 1972** (Title IX) prohibits sex discrimination in any education program or activity receiving federal financial assistance
- **Title VI of the Civil Rights Act of 1964:** Discrimination based on race, color, or national origin
- **Title VII of the Civil Rights Act of 1964:** Employment discrimination based on race, color, religion, sex, and national origin
- The recognition of sexual harassment as a form of sex discrimination occurred in *Alexander v. Yale University* (2d Cir., 1980)
- Predominant application of Title IX occurred with intercollegiate athletics

# Title IX 20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

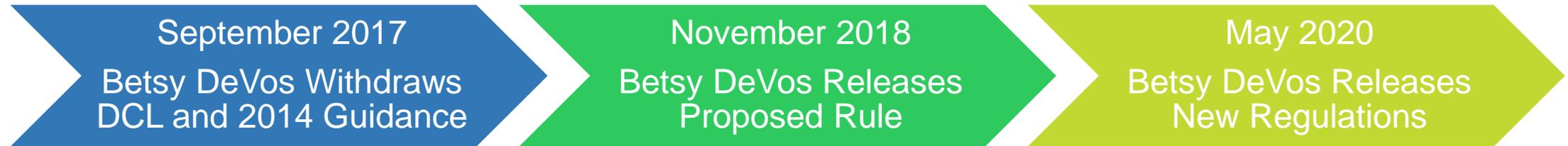
“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”



# OVERVIEW & HISTORY OF TITLE IX- EVOLUTION OF POLICY



# OVERVIEW & HISTORY OF TITLE IX- EVOLUTION OF POLICY



- Emphasis on due process rights
- Released interim guidance with changes to Title IX environment including choosing evidentiary standard, permitting informal resolution, did not set a fixed time under which a school must complete an investigation.

<https://www.acenet.edu/Documents/E-Dear-Colleague-Title-IX-201709.pdf>

- Permitted the public to comment by January 28, 2019

<https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>

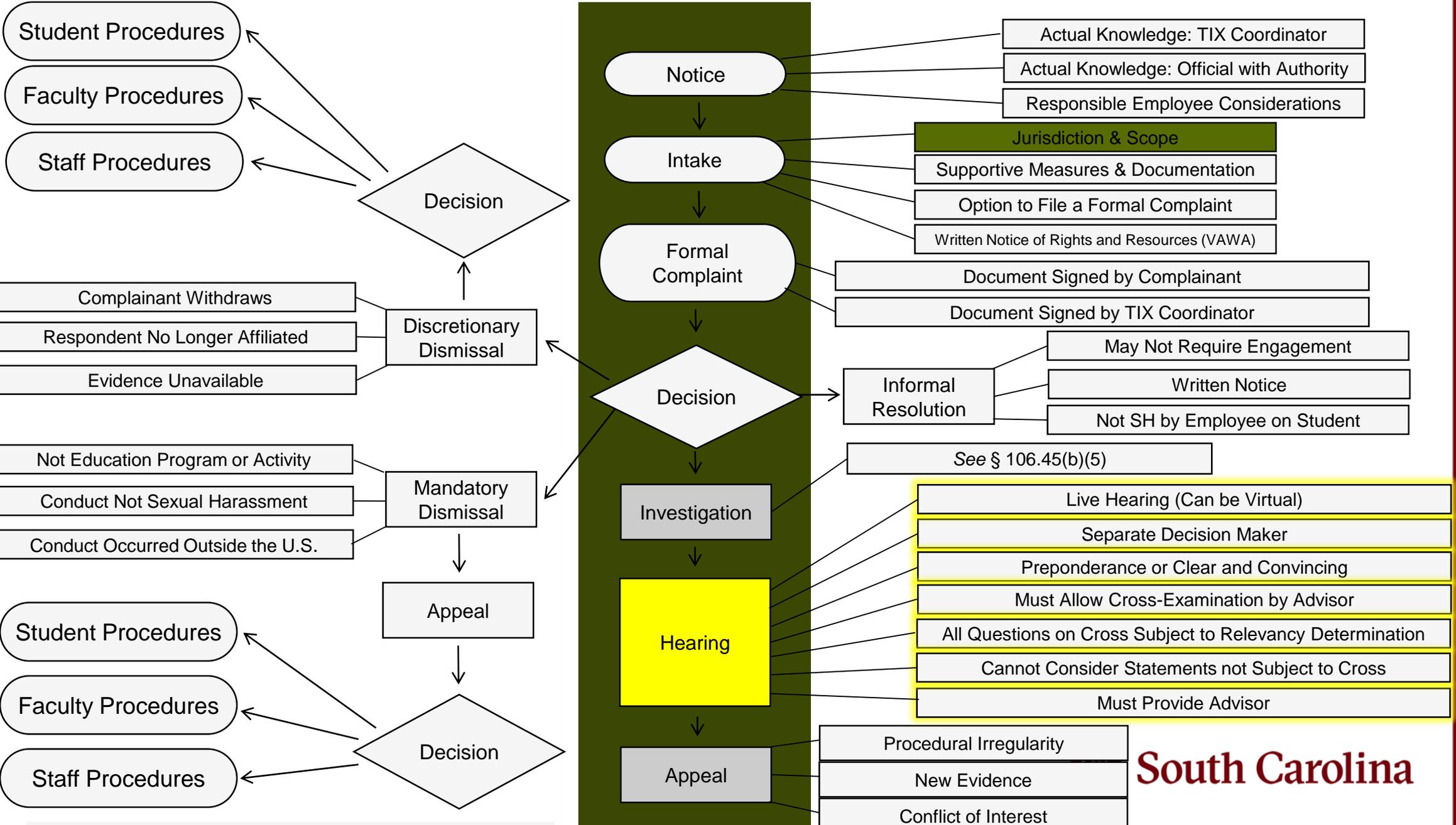
- 554-page document outlining new regulations
- Required implementation by August 14, 2020

<https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

# OVERVIEW & HISTORY OF TITLE IX- NEW REGS

- Due process concerns are at the heart of the 2020 regulations
- Defined sexual harassment for Title IX purposes
  - Severe **and** pervasive **and** objectively offensive conduct, effectively denying a person equal educational access
- Schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States.
  - Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).
- Defined actual knowledge of an incident of sexual harassment
- Permitted informal resolution
- Required live hearings with cross examination
- Requires participation of complainant
- Created Deputy Title IX Coordinators
- Regulations are highly prescriptive with timelines and procedures (quickest timeline for investigation would be about 60 days)

# **HOW A CASE WILL FIND ITS WAY TO YOU: U<sub>of</sub>SC LIVE HEARINGS**



**South Carolina**

**A QUICK LOOK**

**EOP 1.06 DEFINITIONS**

# DEFINING PROHIBITED BEHAVIORS

## What do I mean when I say *interpersonal violence*?

- **Sexual Harassment:** 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 of South Carolina's education program or activity
- **Sexual Assault**
  - Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
  - Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
  - Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
  - Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent.

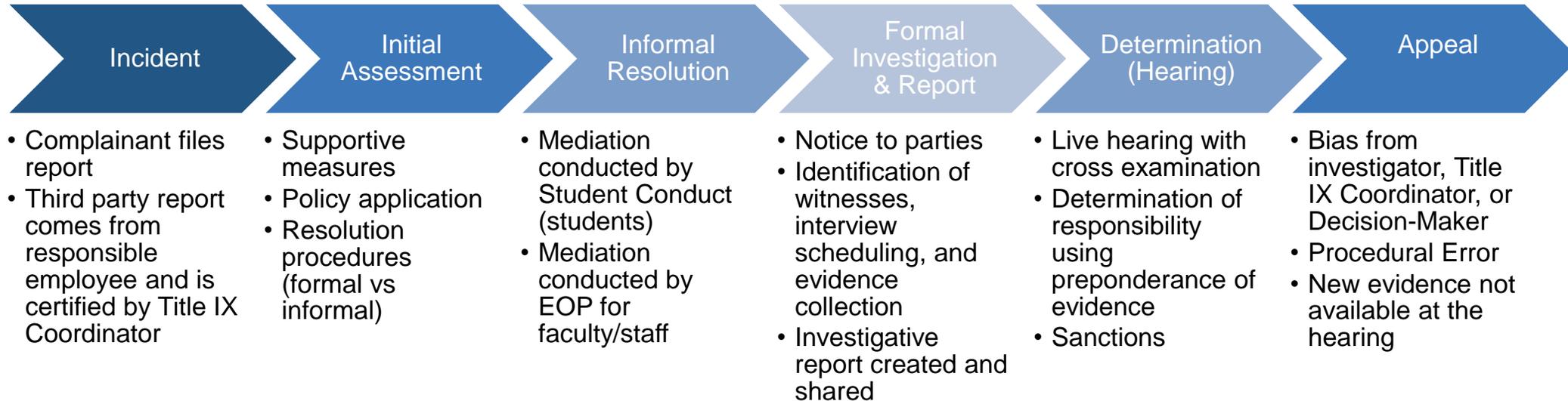
# DEFINING PROHIBITED BEHAVIORS

## What do I mean when I say *interpersonal violence*?

- **Dating Violence:** violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
- **Domestic Violence:** includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
- **Stalking:** engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - fear for their safety or the safety of others
  - suffer substantial emotional distress

# INTERIM PROCESS AT U<sub>of</sub>SC

## EOP 1.06: Interim policy to comply with federal regulations



# UofSC LIVE HEARING FORMAT

1

- Opening statements from the Complainant and Respondent.

2

- The Complainant will respond to relevant questions from the Decision-Maker and then the Respondent's advisor.

3

- The Respondent will respond to relevant questions from the Decision-Maker and then the Complainant's advisor.

4

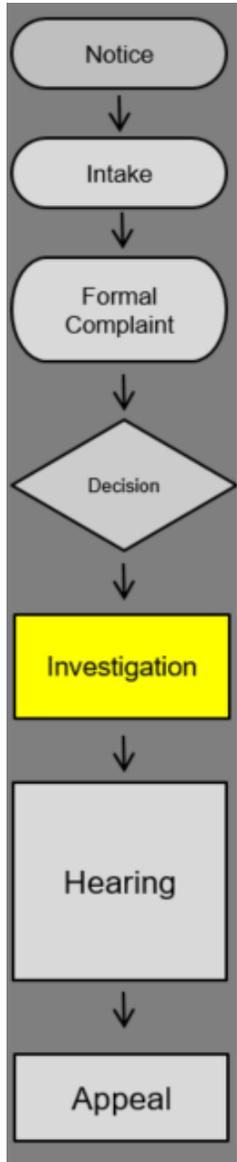
- The Decision-Maker will also hear from relevant witnesses, including the Investigator.

5

- Each party will have the opportunity to question the witnesses, including the Investigator, through their advisor of choice.

6

- After all parties and witnesses have been heard, the parties will have an opportunity to provide a closing statement.



## TRAINING OF ADVISORS NOT REQUIRED

- To allow recipients to meet their obligations with as much flexibility as possible, the Department declines to require recipients to pre-screen a panel of assigned advisors from which a party could make a selection at a hearing, or to require provided advisors to receive training from the recipient.

Title IX Regulations May 19 2020; Preamble at 30340-41

# What to Expect After the Hearing

1

## Deliberate:

The Decision-Maker will resolve all outstanding questions of fact, including the credibility of witnesses and the adequacy of the proof of the allegations, and render a decision.

Apply the **preponderance of the evidence** standard.

2

If the Decision-Maker finds the Policy ***was not violated***:

Proceed to #5

If the DM finds the Policy ***was violated***:

Proceed to #3

3

## Impact and Mitigation Statements:

The TIX Coordinator notifies the parties of the DM's decision and both parties may submit statements for the District's consideration.

4

## Assign a Sanction:

The District assigns a sanction and will consider: (1) Respondent's prior disciplinary history, if any, and (2) sanctioning precedents in similar cases.

5

## Written Determination:

Issue with sanctions and remedies, if appropriate, simultaneously to both parties that includes the process for appeal.

## Sanctions at UofSC

**Students:** Decision-Maker with Recommendations from OSC

**Faculty/Staff:** Decision-Maker Recommends to Unit Leadership

# **SANCTIONS**

# DISCRETION IN SANCTIONING

- Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations **do not restrict a recipient's discretion** to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the recipient's education program or activity.

# Discretion in Sanctioning

- For reasons described elsewhere in this preamble, the Department **does not require any particular disciplinary sanctions** against respondents, because these Title IX regulations are focused on requiring remedies for victims, leaving disciplinary decisions to recipients' discretion.

# Discretion in Sanctioning

- The § 106.45 grievance process is designed for implementation by non-lawyer recipient officials, and the final regulations **do not intrude on a recipient's discretion** to use disciplinary sanctions as educational tools of behavior modification rather than, or in addition to, punitive measures.
- Similarly, these final regulations **do not impose a standard of proportionality** on disciplinary sanctions.

# DISCRETION IN SANCTIONING

- The Department has determined that administrative enforcement of Title IX does not require overriding recipients' discretion to make decisions regarding disciplinary sanctions, and thus these final regulations focus on ensuring that respondents are not punished or disciplined unless a fair process has determined responsibility, but respects the discretion of State and local educators to make disciplinary decisions pursuant to a recipient's own code of conduct.

# APPEALS

# GROUNDS FOR APPEAL

- An appeal is a request for procedural review, not a new hearing. A Respondent or Complainant may appeal for three (3) reasons:
  - The Title IX Coordinator, investigator(s), or Decision-Maker had a conflict of interest or bias for or against Complainant or Respondent that affected the outcome.
  - A procedural irregularity that affected the outcome occurred.
  - New evidence was discovered that was not available when the dismissal or responsibility determination was made that could affect the outcome.

# FILING THE APPEAL & DEADLINES

- Requests for extensions on deadline provided below must be made in writing to the Chair of the IPV Appeals Committee and will be granted or denied at that individual's discretion.
- The party wishing to appeal must file an Intent to Appeal Form online to the Title IX Coordinator no later than five (5) university business days from the date that the dismissal decision or notice of the IPV Live Hearing decision.
- The Title IX Coordinator will then, consistent with this policy, form the committee and notify both parties of the IPV Appeals Committee membership and Committee Chair via email within three (3) university business days of receiving the Intent to Appeal Form.
- No later than ten (10) university business days after the date of the dismissal decision or notice of the IPV Live Hearing decision, the appealing party must submit their Opening Brief as detailed below. The Opening Brief should be sent via email to the Title IX Coordinator and IPV Appeal Committee Chair for the current matter.
- The Title IX Coordinator or designee will share the Appellant's Opening Brief with the other party and that party will have ten (10) university business days to provide the Response Brief as detailed below. The Response Brief should be sent via email to the Title IX Coordinator and IPV Appeal Committee Chair for the current matter.
- The Title IX Coordinator or designee will share the Appellee's Response Brief with the other party and the other party will have five (5) university business days to submit the Reply Brief as detailed below. The Reply Brief should be sent via email to the Title IX Coordinator and IPV Appeal Committee Chair for the current matter.

# CHALLENGE TO APPEALS COMMITTEE MEMBERS

- The Respondent or Complainant may challenge any IPV Appeals Committee member if there is a belief that a member of the Appeals Committee cannot render a fair and impartial result. The Chair of the Appeals Committee will determine if cause exists and will excuse any Committee Member where cause exists. Under no circumstance will an Appeals Committee Member be excluded for a reason that would violate the University's Policy on Discrimination and Harassment. If the Complainant or Respondent challenges the Chair of the Appeals Committee for cause, the Title IX Coordinator or designee, will determine if cause exists.

# APPELLATE BRIEFS

- A briefing schedule will be provided to the parties by the Chair of the IPV Appeals Committee.
  - The Appellant's Opening Brief must not exceed twenty-five (25) pages, double-spaced, with twelve-point type. Prior to filing the Opening Brief, the Appellant and their Advisors have the right to review the hearing file, including any recording or transcript of the hearing, the Investigative Report, and any other evidence considered at the hearing depending on the decision being appealed.
  - The Appellees' Response Brief must not exceed twenty-five (25) pages, double-spaced, with twelve-point type. The Appellees and their advisors have the right to review the hearing file, including any recording or transcript of the hearing, or the Investigative Report, depending on the decision being appealed.
  - The Appellant's Reply Brief must not exceed ten (10) pages, double-spaced.
  - Upon request of any party, the Chair of the Appeals Committee has the discretion to extend deadlines or expand page limits.
  - After receipt of all Briefs, the IPV Appeals Committee will begin its review of the briefs and the record.

# DOCUMENTS

- In considering an appeal, the IPV Appeals Committee will conduct a review of the entire record, including but not limited to:
  - The Final Investigative Report and the evidence provided with the live hearing;
  - Any pre-hearing rulings from the Decision-Maker;
  - The written determination of the Decision Maker;
  - The recording/transcript of the live hearing;
  - Any other materials admitted into evidence by the Decision Maker;
  - The appeal briefs.

# DECISION

- The IPV Appeals Committee shall issue a decision describing the outcome of the appeal and the rationale for the decision; the decision will be sent via within ten (10) university business days of the expiration of the parties' rights to submit written responses. The appellate authority shall affirm the decision or remand the case to the investigator or the Decision-Maker, as appropriate, for further proceedings. For students, the decision of the IPV Appeals Committee is final and binding upon all involved. For employees, the decision of the IPV Appeals Committee may be appealed pursuant to applicable grievance policies.

# **CONFLICT OF INTEREST AND BIAS**

# OCR WEBINAR: JAN. 15, 2021

- But the approach or training has to be consistent with the regulations, which require recipients to train Title IX personnel to serve impartially, without prejudging the facts at issue, and using materials free from reliance on sex stereotypes. The regulations additionally require Title IX personnel to avoid conflicts of interest and bias for or against complainants or respondents generally, or an individual complainant or respondent, in all contexts, regardless of whether a recipient adopts a trauma-informed approach. As a reminder, Title IX personnel include Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions. Thus, for example, a recipient may not provide training that instructs Title IX personnel to assume that complainants are always truthful when filing formal complaints, while respondents are always responsible for sexual harassment once accused. Nor may a recipient train Title IX personnel to scrutinize factual inconsistencies or errors more closely when offered by a respondent than by a complainant. Either of these types of training would be inconsistent with the Title IX regulations' prohibitions on prejudging the facts, conflicts of interest, and bias.

# FINAL RULE REQUIREMENTS

- Sections 106.45(a) & 106.45(b)(1)(iii) require the absence of and training around conflict of interest and bias, but the regulations do not provide a definition for conflicts of interest, bias, or impartiality

# CONFLICT OF INTEREST

University Policy: BTRU 1.18

- Conflict of Interest – means a situation in which an individual has financial, professional, or personal considerations that may directly or indirectly affect, or have the appearance of affecting, an individual's professional judgment in exercising any University duty or responsibility. A conflict of interest may arise when an individual has the opportunity or appears to have the opportunity to influence the University's business, administrative, academic, research, or other decisions in ways that could lead to financial, professional, or personal gain or advantage of any kind, whether the value is readily ascertainable.

# BIAS

- **Bias:** a feeling or preference that interferes with impartial judgement for or against; usually considered to be unfair; more commonly known as prejudice
- Conscious or Explicit
- Unconscious or Implicit

(TMCC Title IX Coordinator Training, n.d.)

In this context, balancing bias with university procedures requesting parties to object beforehand on matters of bias

# STRAIGHT FROM THE HEARING PROCEDURES

- **“Challenge to Decision-Maker:** In the event either party wishes to challenge the appointed Decision-Maker on the basis of conflict of interest or bias, the party must submit the challenge in writing within three (3) university business days of receiving the Notice of Hearing Letter. This challenge must be submitted in writing via email to the Hearing Coordinator. Examples of challenges include conflict of interest and/or bias that would prohibit the Decision-Maker from being able to render a fair and impartial decision. The email must contain specific grounds for the challenge. Upon receipt of any challenge, a determination whether there is sufficient information to find a reason to remove the Decision Maker will be made by the university’s Title IX Coordinator in consultation with the Office of General Counsel.”

# Q&A

Marc Shook

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