



Title IX Hearing Officer Training

August 19 & September 1
2022

Road Map

- 1 Title IX Sexual Harassment
- 2 Conducting the Hearing Process
- 3 Serving Impartially
- 4 Written Notice of Outcome
- 5 Appeals



Title IX Sexual Harassment

Conduct on the basis of sex that satisfies one or more of the following:

- (i) an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on **an individual's participation in unwelcome sexual conduct;**
- (ii) 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 recipient's** education program or activity; or
- (iii) “sexual assault” as defined 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 1229(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30)



“Education program or activity”

All operations of the institution, including . . .

“[L]ocations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and . . . any building owned or controlled by a student organization that is officially recognized by a **postsecondary institution.**”

Applies to employees, including employee on employee conduct

§ 106.44(a)



Conducting the Hearing Process

- General overview
- Make relevancy determinations on evidence and cross examination questions
 - Questions should be posed BEFORE answered and explain the exclusion
- Ask questions of parties and witnesses to support a determination by a preponderance of the evidence as to what happened
- Determine whether the Policy was violated



Duke-Specific Procedures

- Advisors
- Electronic Devices
- Technology
- Recording Hearings
- Pre-Hearing Procedures
- Rules of Decorum



Serving Impartially: Prejudgment of facts, conflicts of interest & bias

- Any individual designated as a Title IX Coordinator, investigator, decision-maker, or to facilitate an **informal resolution process, must “not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”**
§106.45(b)(1)(iii)
- **“Whether bias exists requires examination of the particular facts of a situation and the** Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX **role is biased[.]” 85 FR 30248.**
- Provide parties an equal opportunity to present evidence (including their accounts) and witnesses.

Avoiding Appearance of Bias

- Questioning of Parties and Witnesses
 - Tone and Style
- General Engagement with Participants
- Other Best Practices





Relevancy & Evidence

- Hearing Officer makes relevancy determinations concerning evidence and cross examination questions at the hearing
- **“Ordinary meaning of relevance.” 85 FR 30247, n. 1012.**
- Questions asked must be relevant
 - Must explain its reasoning if a question is deemed not relevant. 85 FR 30343.

Irrelevant Evidence

- Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent;
- Any information protected by a legally recognized privilege without waiver;
- **Complainant's prior sexual behavior (subject to two exceptions) or sexual predisposition.**
 - Exception 1: offered to prove someone other than the respondent committed the alleged conduct
 - Exception 2: specifically about the complainant and the respondent and is offered to prove consent. 34 CFR § 106.45(b)(6).



Written Notice of Outcome

- Identification of the allegations potentially constituting Sexual Harassment;
- A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of this Policy to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
- Description of any sanctions imposed on the Respondent and whether remedies designed to restore or **preserve equal access to the university's education Programs or Activities will be provided to the Complainant**; and
- Information about the appeal process.

§106.45 (b)(7)

Duke-Specific Practices re Communication

- OIE: Hearing Packet to Parties
- OIE: Written Notice of Outcome to Parties
- HO: Communication with Parties/Advisors
- HO: Outreach to Witnesses



Appeals: Bases for Appeal

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- 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.

§ 106.45(b)(8)(i)-(ii)

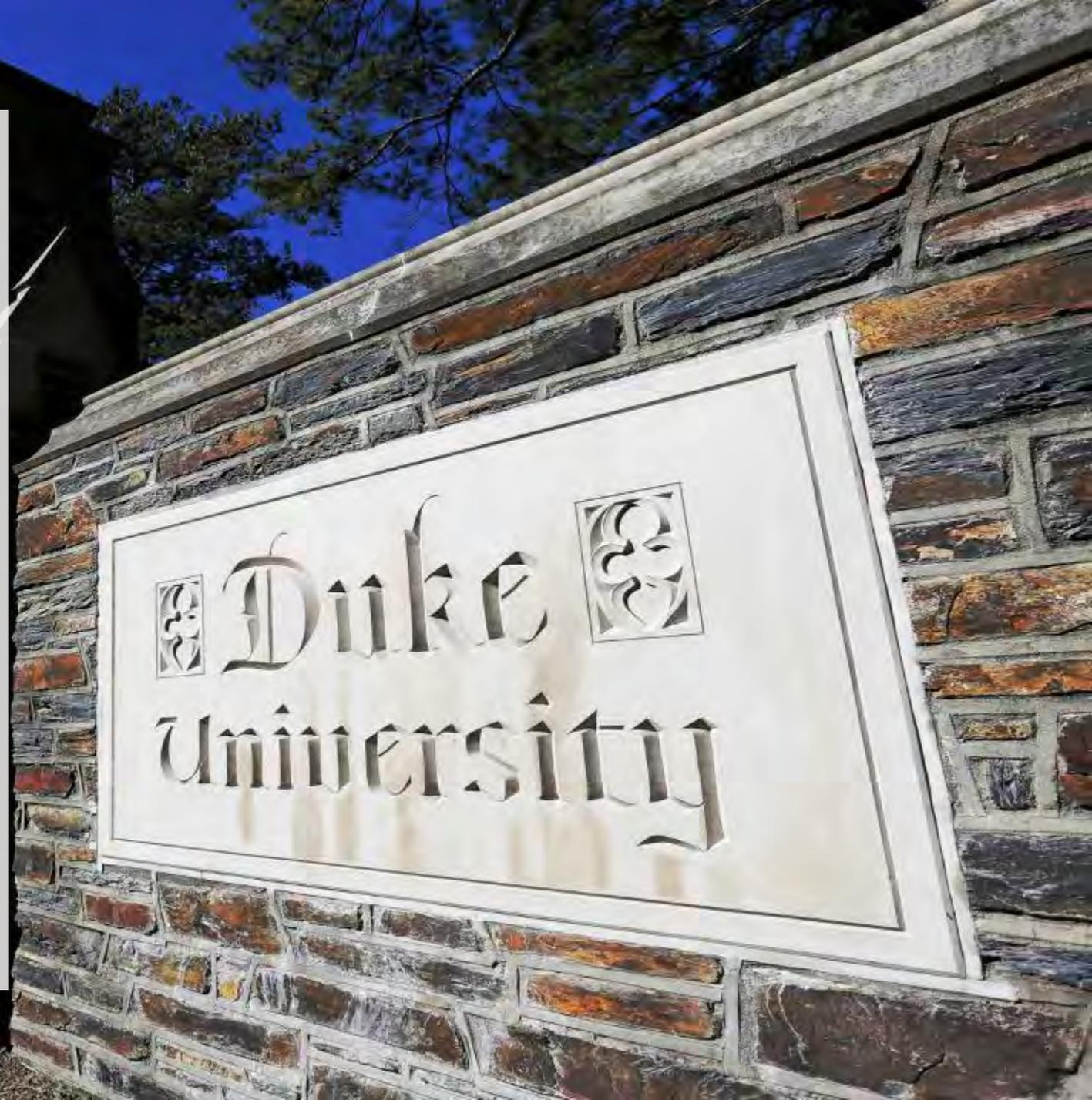


Appeals: Process

- On their own or at the request of the Appellant or Appellee, the appellate officer may convene a meeting to give the parties an opportunity to amplify the reason(s) for the appeal or the response.
- In the event an appeal alleges a procedural error, the appellate officer may request that staff member(s) in OIE, and/or the Hearing Officer attend the meeting to gather more information about the alleged procedural error.

Revisions to Duke's Policy/Procedures

- **Aug 2021: Victim's Law Center decision**
- July 2022: Revised training requirement
- Sept 2022 (forthcoming): Updates/clarifications to policy and procedures



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Q&A