

Office of Equity Employees: Interim USU Sexual Misconduct Policy and Procedures 339 and 339A



**Office of Equity
Logan Campus
Distance Education, Room 400
435-797-1266**

Updated September 11, 2023

Today's Topics

First

- An overview of Title IX
- USU Interim Sexual Misconduct Policy 339 and 339A related terms

Second

- USU Sexual Misconduct Procedures 339 and 339A

Third

- An overview of bias and conflicts of interest





Part One: **Title IX and USU Policies 339 and 339A**

Key question: What behaviors could be considered sexual misconduct under USU policies?

Title IX of the Education Amendments of 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 education program or activity receiving Federal financial assistance.”

Discrimination based on sex is prohibited by Title IX



Sexual harassment is a form of discrimination based on sex



Sexual assault, dating and domestic violence, and stalking are forms of sexual harassment

USU's Obligations Under Title IX

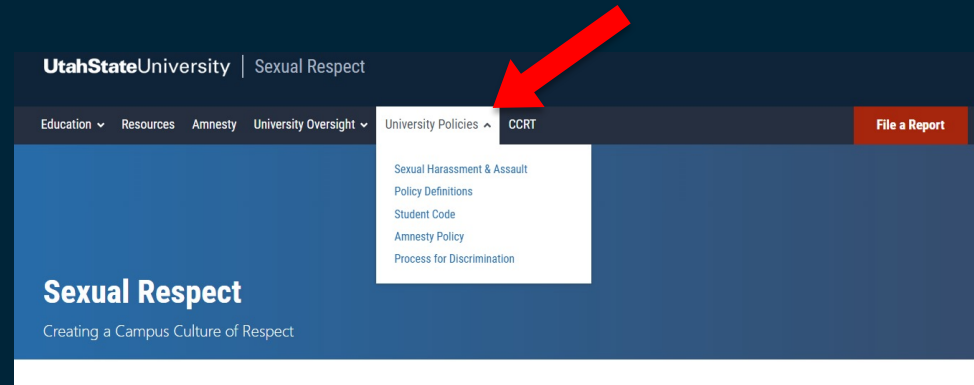
- An institution must respond when it has “actual knowledge” of “sexual harassment” that occurred within the school’s “education program or activity”
 - Actual knowledge: when the University’s Title IX Coordinator or a Reporting Employee has notice of Sexual Misconduct or allegations of Sexual Misconduct
 - Sexual harassment: quid pro quo, hostile environment, sexual assault, dating violence, domestic violence, and stalking
 - Sexual exploitation (Policy 339A)

Employment or Education Program or Activity (Title IX)

- All University operations in the United States including
 - Buildings, locations, events, and University computers, internet networks, and remote learning platforms;
 - Off-campus settings in which the University has substantial control over both the Respondent and the context in which the Sexual Misconduct occurs, including University computers, internet networks, and digital platforms;
 - Off-campus buildings owned or controlled by a student organization officially recognized by the University

Interim Sexual Misconduct Policies 339 (Title IX) and 339A (Non-Title IX)

- **Sexual Misconduct**
 - Sexual Harassment
 - Sexual Exploitation
 - Sexual Assault
 - Relationship Violence
 - Sex-based Stalking
- **Retaliation**



Full definitions can be found in the Sexual Misconduct Policy and on sexualrespect.usu.edu

Sexual Misconduct: Sexual Harassment Definitions, Part 1

Hostile Environment

- Unwelcome sex-based conduct
- Determined by a reasonable person to be so severe, pervasive, and objectively offensive
- That it effectively denies a person equal access to an Employment or Education Program or Activity

Sexual Misconduct: Sexual Harassment Definitions, Part 2

Quid Pro Quo

- An Employee's conditioning
- Of the provision of a University aid, benefit, or service
- On a person's participation in unwelcome sexual conduct

Sexual Harassment: Verbal Conduct Examples

- Sexual comments, references, or jokes
- Asking personal questions about someone's body or intimate relationships
- Talking about your or someone's sex life
- Repeatedly asking someone out when the answer is "No"
- Referring to someone as hunk, doll, babe, honey
- Whistling or catcalling
- Sending sexual language through technology (text, email, social media)

Sexual Harassment: Non-Verbal Conduct Examples

- Sexual gestures with hands or body movements
- Looking at a person up and down (elevator eyes)
- Paying unwanted sexual attention to someone
- Displaying sexually suggestive visuals
- Suggestively making facial expressions – winking, licking lips, etc.
- Sending sexual images through technology (text, email, social media)

Sexual Harassment: Physical Conduct Examples

- Hanging around, standing too close, brushing up against someone
- Touching a person's clothing, hair, massaging neck/shoulders
- Hugging, kissing, patting or stroking
- Touching or rubbing oneself sexually in view of others

Sexual Misconduct: Sexual Exploitation Definition (339A)

- Taking non-consensual sexual advantage of another for one's own advantage or benefit, or to benefit or advantage anyone other than the Claimant.

Sexual Exploitation Examples

- Observing, recording, or photographing nudity or sexual activity of one or more persons without their consent
- Allowing another to observe, record, or photograph nudity or sexual activity of one or more persons without their consent
- Distributing recordings, photographs, or other images of the nudity or sexual activity of one or more persons without their consent
- Aiding someone in committing an act of sexual misconduct, such as forcing someone into non-consensual commercial sexual activity

Sexual Misconduct: Sexual Assault

Rape

- Sexual intercourse with another person without their Consent

Sodomy

- Oral or anal sexual intercourse with another person without their Consent

Sexual Assault with An Object

- The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person without their Consent

Fondling

- The touching of the private body parts of another person for the purpose of sexual gratification without their Consent

Sexual Misconduct: Sexual Assault Cont.

Incest

- Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law (e.g., a sibling or parent/child relationship)

Statutory Rape

- Sexual intercourse with a person who is under Utah's statutory age of Consent (generally, age 18)

Sexual Assault occurs when at least one party does not Consent to the sexual activity

USU Definition of Consent

Consent is an affirmative agreement to do the same thing at the same time in the same way.

An affirmative agreement includes an informed, freely and actively given, mutually understandable exchange of unmistakable words or actions, which indicate an affirmative willingness to participate in mutually agreed upon sexual activity.

Consent can be withdrawn or modified at any time, as long as such withdrawal or modification is clearly communicated.

Consent cannot be assumed based on silence, the absence of “no” or “stop,” the existence of a prior or current relationship, or prior sexual activity. There is no Consent when there is Force, Coercion, or Incapacitation.

Examples of Consensual Behavior

- Verbal statements of “yes” or “okay”
- Head nodding
- Asking someone to engage in the sexual activity

Examples of Non-Consensual Behavior

- Verbal statements of “no” or “I don’t want to”
- Verbal statements of “I don’t know” or “maybe”
- Pushing someone away
- Resisting contact
- Shrugging or other uncertain body language
- Not actively participating in the sexual activity
- No response or silence
- Disengaging from previous consensual behavior
- Force, Coercion, or Incapacitation

Non-Consensual Behavior: Coercion and Force

Coercion

- May consist of intimidation, threats, or other severe conduct that causes a reasonable person to fear significant consequences if they refuse to engage in sexual contact

Force

- Includes the use of physical force or threats of force that affect a person's ability to give consent to sexual contact

Non-Consensual Behavior: Incapacitation, Part 1

- A state in which a person lacks the ability, temporarily or permanently, to give consent because of a disability, drug or alcohol consumption (either voluntary or involuntary), or because the person is unconscious, asleep, immobilized, or otherwise unaware that the sexual activity is occurring
 - A person is not necessarily incapacitated solely as a result of drinking or using drugs; the level of impairment must be significant enough to render the person unable to give consent

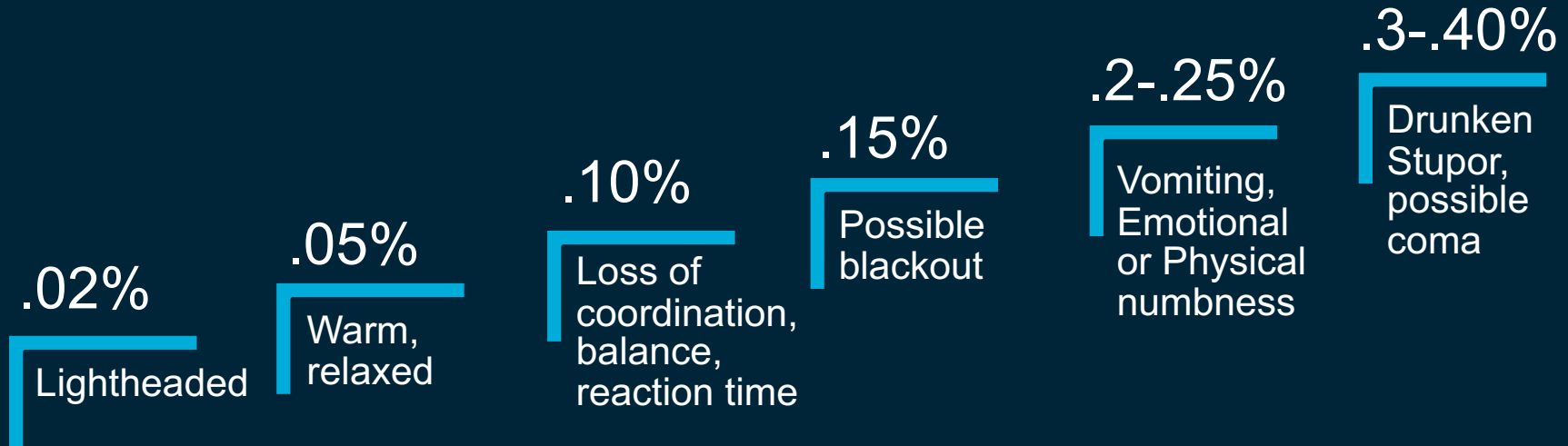
Non-Consensual Behavior: Incapacitation, Part 2

- It is not an excuse that the party initiating sexual contact was intoxicated and therefore did not realize the other person's incapacity
- In evaluating cases involving alleged incapacitation, the University considers whether the person initiating the sexual conduct knew or should have known the other person was incapacitated

Factors that Affect the Impact of Drugs and Alcohol

- Food consumed before, during, and after
 - Whether food intake was normal or abnormal for the person
- Height and weight
- Medications
- Different sleep patterns
- Illness
- Low hydration
- History of blackouts

What Happens When BAC Is ...



Potential Signs of Incapacitation

- Consistently slurred or incomprehensible speech
- Unsteady gait
- Vomiting
- Incontinence
- Bloodshot or unfocused eyes
- Needing assistance to walk/stand
- Outrageous or unusual behavior
- Concern expressed by others about the individual
- Expressed memory loss, disorientation, sleeping, or passed out

Relevant Information for Assessing Incapacitation

- Timeframe of consumption for Claimant (first drink, last drink, spacing; or first use, last use, spacing of other drugs)
- Number of drinks (or amount of drugs used)
- For each drink/drug:
 - Type (beer, wine, liquor – with specific brand, if possible)
 - Was it mixed with anything? Who mixed it?
 - How was it served? (bar or restaurant will lead to more available information)

Sexual Misconduct: Relationship Violence

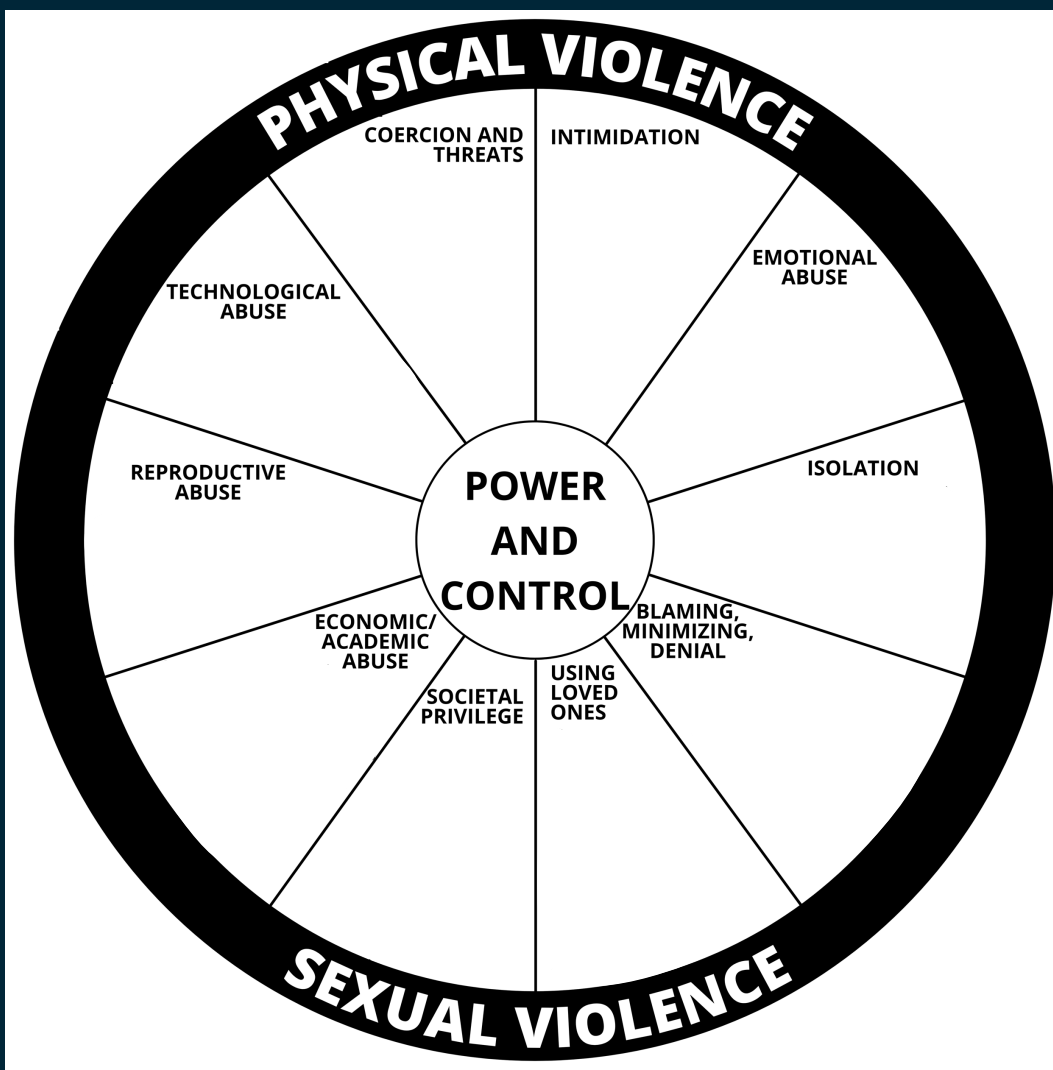
What is Dating Violence?

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Claimant.
- The existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship,
 - The nature of the relationship, and
 - The frequency of interaction between the persons involved in the relationship.

Sexual Misconduct: Relationship Violence Cont.

What is Domestic Violence?

- Felony or misdemeanor crimes of violence committed against the Claimant by
 - A current or former spouse or intimate partner of the Claimant,
 - A person with whom the Claimant shares a child in common,
 - A person who is cohabitating with or has cohabitated with the Claimant as a spouse or intimate partner,
 - A person similarly situated to a spouse of the Claimant under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or
 - Any other person against an adult or youth Claimant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.



Sexual Misconduct: Sex-based Stalking Definition

- Engaging in a course of conduct directed at a specific person or persons based on sex, that would cause a reasonable person to
 - Fear for their safety or for the safety of others or
 - Suffer substantial emotional distress
- A course of conduct is two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through a third party,
 - Follows, monitors, observes, surveils, threatens, intimidates, harasses, or communicates to or about a person, or
 - Interferes with a person's property by telephone, mail, electronic communication, social media, or any other action, method, device, or means

Sex-based Stalking Examples

- Repeated and unwanted phone calls or texts; unwanted contact on social media
- Following or spying
- Showing up somewhere without a legitimate reason to be there
- Contacting friends, family, work, etc. for information
- Posting information or spreading rumors online or by word of mouth
- Using technology to track someone's movements or whereabouts
- Collecting information about patterns, job, classes, friends, etc.
- Monitoring phone calls, emails, social media, etc.

Retaliation Definition (Policy 305)

- Taking adverse action, including any action that might deter a reasonable person from engaging in protected activity,
- Because the individual has made a report or complaint, testified, assisted, participated, or refused to participate in any manner in an investigation, formal or informal proceeding, or other procedure
- A causal relationship between an adverse action and good faith reporting or participation is needed to demonstrate that retaliation has occurred.

Retaliation Examples

- **Adverse employment or educational action**
 - Demoting, terminating, firing
 - Denying a promotion or leave, or making adverse pay decisions
 - Giving a lower grade or performance review than deserved
 - Dismissing someone from a class, program, team, workspace
- **Intimidating, threatening, or harassing actions**
 - Threatening dismissal from a program or expulsion from the university
 - Threatening to disclose confidential information or report an individual to authorities (e.g., immigration authorities)
 - Making intentionally false or misleading statements that would dissuade a reasonable person from making a complaint of Sexual Misconduct

Part One Summary

- Title IX prohibits discrimination based on sex
- USU must respond when it has “actual knowledge” of “sexual harassment” that occurred within the school’s “education program or activity”
- Sexual harassment, sexual exploitation, sexual assault, relationship violence, and sex-based stalking are all types of sexual misconduct
- USU prohibits sexual misconduct and retaliation





Part Two: USU Procedures 339 and 339A

Key question: What happens after Sexual Misconduct is reported to USU?

Who Does What in the Title IX Grievance Process, Part 1/4

USU Employees

- Designated Confidential Resources: provide advocacy and therapy services
- Reporting Employees: must report Sexual Misconduct to Title IX Coordinator and share information with claimants about support resources

Office of Equity and Title IX Coordinator

- Oversee the entire grievance process and ensure a fair and objective process for all parties
- Coordinate supportive measures
- Facilitate alternative resolution process
- Conduct formal investigations

Who Does What in the Title IX Grievance Process, Part 2/4

USUPD and Local Law Enforcement

- Respond to safety threats and concerns
- Conduct criminal investigations
- Enforce no trespass orders and stalking injunctions

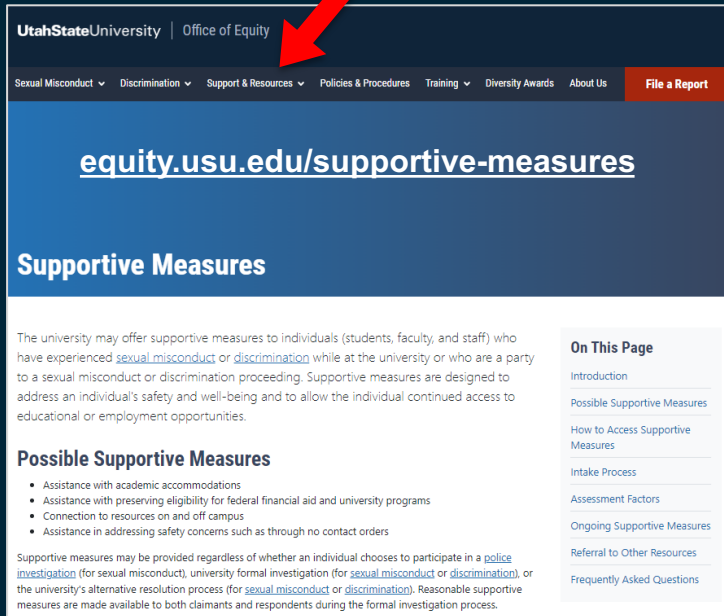
Criminal Process Overview

- A criminal process, which may be coordinated by USU Police or local law enforcement, determines whether a crime has occurred
 - If someone wishes to seek criminal penalties for sexual misconduct that is also a crime or other forms of assistance from law enforcement, they can report to the police
 - Criminal justice procedures use “beyond a reasonable doubt” as the standard of evidence
 - Higher standard than used in USU’s Grievance Process
 - Can be pursued simultaneously with USU’s Grievance Process

Information Sharing Between Office of Equity and Law Enforcement

- If there is a corresponding criminal investigation and claimant wants to proceed with USU's sexual misconduct grievance process, Office of Equity will coordinate with law enforcement
 - Timing – Equity could temporarily delay initial evidence gathering process
 - Information sharing – Equity will notify law enforcement about interim actions involving respondent
- Office of Equity may request law enforcement reports as part of formal investigation process

Supportive Measures Overview



UtahStateUniversity | Office of Equity

Sexual Misconduct ▾ Discrimination ▾ Support & Resources ▾ Policies & Procedures Training ▾ Diversity Awards About Us [File a Report](#)

equity.usu.edu/supportive-measures

Supportive Measures

The university may offer supportive measures to individuals (students, faculty, and staff) who have experienced [sexual misconduct](#) or [discrimination](#) while at the university or who are a party to a sexual misconduct or discrimination proceeding. Supportive measures are designed to address an individual's safety and well-being and to allow the individual continued access to educational or employment opportunities.

Possible Supportive Measures

- Assistance with academic accommodations
- Assistance with preserving eligibility for federal financial aid and university programs
- Connection to resources on and off campus
- Assistance in addressing safety concerns such as through no contact orders

Supportive measures may be provided regardless of whether an individual chooses to participate in a [police investigation](#) (for sexual misconduct), university formal investigation (for [sexual misconduct](#) or [discrimination](#)), or the university's alternative resolution process (for [sexual misconduct](#) or [discrimination](#)). Reasonable supportive measures are made available to both claimants and respondents during the formal investigation process.

On This Page

- Introduction
- Possible Supportive Measures
- How to Access Supportive Measures
- Intake Process
- Assessment Factors
- Ongoing Supportive Measures
- Referral to Other Resources
- Frequently Asked Questions

- Allows an individual continued access to educational or employment opportunities
- Available for:
 - USU students, faculty, or staff who experienced sexual misconduct or discrimination
 - Individuals involved in Office of Equity proceedings
- Addresses an individual's safety and well-being, including referral to on- or off-campus resources

Supportive Measures Implementation

- Available regardless of whether the claimant signs a formal complaint
- Available to a respondent
- Office of Equity Supportive Measures Specialist works with the individual to offer supportive measures
 - Supportive Measures Specialist communicates the requests on behalf of the individual to faculty and/or staff and will only share information on a need-to-know basis

Examples of Potential Supportive Measures

Academic Requests	Financial Aid Requests	USU Employment Requests
<ul style="list-style-type: none">• Extension on an assignment, quiz, or test• Excuse class absence(s)• Receive an “I” for the course• Receive a “W” for the course	<ul style="list-style-type: none">• Appeal for maintenance of FAFSA funding• Refund for “W” courses	<ul style="list-style-type: none">• Excuse job absence(s)• Reassign job or shift(s)• Temporary remote work
	Safety Requests	Housing or Parking Requests
	<ul style="list-style-type: none">• Mutual no contact order	<ul style="list-style-type: none">• Reassign housing• Reassign parking

Grievance Process Overview

- Grievance Process is an administrative process
 - Determines whether, by a “preponderance of the evidence,” a USU student, staff, or faculty member has violated Interim USU Policy 339 or 339A
 - Preponderance of the evidence: a policy violation is more likely than not to have occurred
 - If someone is found responsible for violating USU policy, they may face administrative sanctions

Grievance Process Terms: Parties

Claimant

- A person who is alleged to have experienced conduct that could constitute Sexual Misconduct

Respondent

- An individual who is alleged to have committed Sexual Misconduct

Who Does What in the Title IX Grievance Process, Part 3/4

Support Person

- Any person that the Claimant or Respondent would like to have provide them emotional support during the Grievance Process
- Are expected to adhere to the rules for Support Persons and maintain decorum and respect while participating in the Grievance Process

Who Does What in the Title IX Grievance Process, Part 4/4

Process Advisor

- Any person chosen by a Claimant or Respondent to advise and assist them in any part of the Grievance Process
- A Process Advisor may not actively participate in interviews and meetings with the Office of Equity and may not serve as a proxy for the party
- Will advise and assist the party in the hearing, including in conducting questioning of another party and witnesses on behalf of their party

Presumption of Not Responsible

The University will presume that the Respondent is not responsible for violating Policy 339/339A until either

- The parties reach an Alternative Resolution agreement in which the Respondent admits a violation or
- The Hearing Officer/Panel reaches a Determination at the conclusion of a hearing that Respondent has violated the policy

Grievance Process Components, Part 1/2

Alternative Resolution

- A voluntary process in which parties agree to resolve a Formal Complaint without completing an investigation
- An Alternative Resolution agreement may be facilitated through arbitration, mediation, restorative justice, or another appropriate method that the parties and Title IX Coordinator agree on
- Such an agreement may not include Sanctions or other disciplinary measures unless the respondent agrees to such sanctions or disciplinary measures

Grievance Process Components, Part 2/2

Formal Investigation

- The evidence-gathering process that begins with the filing of the Formal Complaint by a claimant and ends when the Appeal process is complete
- This process includes interviewing parties and witnesses, and gathering other relevant evidence, exculpatory and inculpatory

University-driven Formal Investigation

- A formal investigation of Sexual Misconduct allegations undertaken by the University when there is no participating Claimant
- Title IX Coordinator signs a Formal Complaint to initiate, but neither the Title IX Coordinator nor the University serves as a claimant

Grievance Process Jurisdiction, Part 1/2

1. Initiated by a person participating in, or attempting to participate in, an Employment or Education Program or Activity at the time of the filing of a Formal Complaint;
or
2. A Formal Complaint signed by the Title IX Coordinator

Grievance Process Jurisdiction, Part 2/2

3. Include allegations of Sexual Misconduct; *and*
4. Committed by an Employee, Student, or third party; *and*
5. **USU Policy 339 (Title IX)** – In an Employment or Education Program or Activity in the United States; *or*

USU Policy 339A (Non-Title IX Sexual Misconduct) – Outside an Employment or Education Program or Activity, outside the United States, or inside an Employment or Education Program or Activity (sexual exploitation)

USU Policy 339A Jurisdiction

- Alleged violations of University Policies 339A or 305 by current and former students, applicants and prospective applicants, current employees, former employees, and visitors (who have a formal relationship with the University) to the campus
- The University may initiate an inquiry or investigation of potential discrimination and/or harassment even if a Formal Complaint has not been filed by the Claimant

Formal Complaint Overview

- A signed document that indicates the University will proceed with a Formal Investigation of Sexual Misconduct or an Alternative Resolution
- To initiate the grievance process, the Claimant or Title IX Coordinator must complete and sign the formal complaint

Formal Complaint Policy 339 and Policy 339A Forms

UtahStateUniversity

Formal Complaint of Violation of Utah State University's Sexual Misconduct Interim USU Policy 339

Please complete this formal complaint if you experienced [sexual misconduct](#) in an Employment or Education Program or Activity and want to proceed with an [Alternative Resolution](#) or [Formal Investigation](#) with the Office of Equity. Once you complete this form, an investigator will reach out to you to discuss next steps. For more information about the process, please review Interim USU Policy and Procedures [339](#). As a reminder, you can have a [support person and/or process advisor](#) as part of this process.

[Enable additional features by logging in.](#)

Information

My Name (Required)

I am currently a: (Required)

- Student
- Employee
- Program Participant
- Other

UtahStateUniversity

Formal Complaint of Violation of Utah State University's Sexual Misconduct Interim USU Policy 339A

Please complete this formal complaint if you experienced [sexual misconduct](#) off-campus but the incident is creating adverse effects on-campus and you want to proceed with an [Alternative Resolution](#) or [Formal Investigation](#) with the Office of Equity. Once you complete this form, an investigator will reach out to you in order to discuss next steps. For more information about the process, please review Interim USU Policy and Procedures [339A](#). As a reminder, you can have a [support person and/or process advisor](#) as part of this process.

[Enable additional features by logging in.](#)

Information

My Name (Required)

I am currently a: (Required)

- Student
- Employee
- Program Participant
- Other

Required Dismissal: Policy 339 and Policy 339A

- The Office of Equity must dismiss a Formal Complaint of Sexual Misconduct if:
 1. The facts alleged would not constitute Sexual Misconduct even if proven to be true

Required Dismissal: Policy 339 Only

- The Office of Equity must dismiss a Formal Complaint of Sexual Misconduct if:
 1. The alleged Sexual Misconduct did not occur in an Employment or Education Program or Activity;
 2. The incident did not occur against a Claimant in the United States; or
 3. At the time of filing a Formal Complaint, the Claimant was not participating in or attempting to participate in an Employment or Education Program or Activity

Discretionary Dismissal: Policy 339 and Policy 339A, Part 1/2

- The Office of Equity may dismiss a Formal Complaint or any of the allegations if, at any time during the Grievance Process:
 1. The Claimant is no longer connected to the University (Policy 339A)
 2. Respondent is not an Employee or Student when the Formal Complaint is signed
 - Or the Respondent unenrolls as a Student or leaves employment with the University
 3. The Claimant notifies the Title IX Coordinator they would like to withdraw their Formal Complaint and a University-driven Formal Investigation is not required

Discretionary Dismissal: Policy 339 and 339A, Part 2/2

- The Office of Equity may dismiss a Formal Complaint or any of the allegations if, at any time during the Grievance Process:
 4. No Claimant is identified and/or specific circumstances prevent the University from gathering evidence sufficient to reach a Determination as to the Formal Complaint or the allegations
 5. The Formal Complaint contains allegations against the Respondent that are the same as allegations the Office of Equity has already investigated and adjudicated to a final Determination

Notice of Allegations, Part 1/3

- The Office of Equity will provide all parties with a written Notice of Allegations once a Formal Complaint has been filed
- The Notice of Allegations will include the following details:
 1. The identities of the parties involved in the incident (including the Claimant's name, if known)
 2. A description of the specific conduct allegedly constituting Sexual Misconduct, with a definition of the alleged policy violation(s) and sufficient time to prepare a response before any initial interview
 3. The date and location of the alleged incident, if known

Notice of Allegations, Part 2/3

- The Notice of Allegations will include the following details:
 4. Notice of the Grievance Process, including any Alternative Resolution option
 5. The Sanction range for the alleged Sexual Misconduct
 6. The Respondent is presumed not responsible for the alleged Sexual Misconduct and a Determination about responsibility will be made at the end of the Grievance Process
 7. The parties may have a Support Person and/or a Process Advisor of their choice during the Grievance Process

Notice of Allegations, Part 3/3

- The Notice of Allegations will include the following details:
 8. The parties may inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint
 9. Relevant provisions of University policy that prohibit knowingly making false statements or knowingly submitting false information during the Grievance Process
 10. The parties have 7 Days to raise an Actual Conflict of Interest or Demonstrated Bias for the investigator assigned to the case

Alternative Resolution Overview

- Formal Complaints, except for those involving an Employee Respondent and a Student Claimant, may be resolved via Alternative Resolution
- Factors that the Title IX Coordinator may weigh in considering the appropriateness of the Alternative Resolution process include, but are not limited to
 - The gravity of the allegations,
 - Whether there is an ongoing threat of harm or safety to the campus,
 - Whether the Respondent has multiple allegations or findings of Sexual Misconduct, and
 - Whether the parties are participating in good faith

Alternative Resolution Participation

- No party will be pressured, coerced, or unduly influenced into participating in the Alternative Resolution process
 - The University will not require any party to participate in or pursue an Alternative Resolution, including as a term of enrollment or employment
- Both parties must agree, in writing, within 10 Days of the Notice of Rights and Requirements, that they will voluntarily participate in the Alternative Resolution process
 - If either party does not agree, the Formal Investigation will resume or, if the investigation is complete, the hearing will be scheduled

Alternative Resolution Timeframes

- Alternative Resolution agreements should be finalized within 40 Days of the date of the filing of the Formal Complaint
 - Either party may request a Formal Investigation at any point during this time
- If an agreement is not reached within that timeframe, the case will proceed to a Formal Investigation, unless the University has dismissed the Formal Complaint

Alternative Resolution Withdrawal

- Any party may withdraw from the Alternative Resolution process at any time before an agreement has been signed by both parties
- If a party withdraws from the Alternative Resolution process, the Formal Investigation will resume or, if the investigation is complete, the hearing will be scheduled
- Should the parties withdraw from the Alternative Resolution process, information disclosed or obtained may be incorporated into the Formal Investigation, hearing, and Sanction process

Alternative Resolution Agreement, Part 1/2

- The Title IX Coordinator or their designee must sign and approve the Alternative Resolution agreement
- Once signed by both parties and approved by the Title IX Coordinator, an agreement is binding
- If an agreement is reached, the Office of Equity will electronically share with each party and their Process Advisor, if any, within 7 Days the following:
 - Notice of allegations;
 - Signed agreement to participate in the Alternative Resolution; and
 - Signed Alternative Resolution agreement

Alternative Resolution Agreement, Part 2/2

- The facilitator is responsible for monitoring compliance with the agreement's terms
- If a Claimant or Respondent fails to follow through with the agreement's terms, the Office of Equity may file a report against the non-compliant party with the appropriate disciplinary authority
- When the agreement's terms have been met and the process is complete, the parties' access to the documents will be removed

Alternative Resolution Facilitation, Part 1/2

- An Alternative Resolution may be facilitated via written communication, telephone, videoconferencing, and/or in-person meetings
- An Alternative Resolution may be facilitated by a USU Employee or by an outside facilitator

Alternative Resolution Facilitation, Part 2/2

- Strategies for successful facilitation:
 - Make sure you understand what the parties expect as a result of engaging with the Alternative Resolution process
 - Set expectations early and often about the Alternative Resolution process with both parties

Alternative Resolution: Sanctions-Only Process, Part 1/2

- If the parties enter into an Alternative Resolution agreement that includes an admission that the Respondent violated Policy 339 or 339A, but do not reach an agreement on Sanctions, the case will proceed to the sanctions-only process
- If the case is proceeding only to Sanctions following an agreement, the Office of Equity will electronically share the documents with the Sanctioning Authority no later than 7 Days after both parties sign, and the Title IX Coordinator approves, the agreement

Alternative Resolution: Sanctions-Only Process, Part 2/2

- The parties may provide a sanction statement to the Sanctioning Authority
- In the Sanctions-only process, within 10 Days of the parties issuing their Sanctions statement, the Sanctioning Authority or their designee will issue a Sanction letter simultaneously to the parties and their Process Advisors
- The sanction may be appealed

Alternative Resolution Agreement Remedies

- Following an Alternative Resolution agreement by the parties, the Title IX Coordinator and the Claimant may work towards and reach an agreement about the Remedies the University will provide to the Claimant
- If a term involves the Respondent, then the Respondent will be notified about that specific Remedy

Formal Investigation Overview: Evidence Collection

- The University, through an investigator, has the burden to gather sufficient evidence for the hearing officer/panel to determine whether, by a preponderance of the evidence, the respondent violated policy
- The University will conduct a fair and impartial Grievance Process, free of actual conflicts of interest, demonstrated bias, and discrimination, in which both parties are treated as equitably as possible

Presentation of Relevant Evidence: Title IX Regulation Requirements

- “[T]hroughout the grievance process, a recipient must not restrict the ability of either party . . . to gather and present relevant evidence” §106.45(b)(5)(iii)
- “The recipient must make all evidence [directly related to the allegations] subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination”
§106.45(b)(5)(vi)

What is Relevant Evidence?

- Evidence is relevant if it tends to make the allegations at issue more or less likely to be true
- Relevant evidence can include both exculpatory and inculpatory evidence
 - Inculpatory: evidence that shows, or tends to show, a person's involvement in an act, or evidence that can establish responsibility
 - Exculpatory: evidence that shows, or tends to show, a person's lack of responsibility

Irrelevant Questions and Evidence

- The following evidence is considered “irrelevant”:
 - Duplicative questions
 - Any party’s medical, psychological, and similar treatment records without the party’s voluntary, written consent

Irrelevant Questions and Evidence

- The following evidence is considered “irrelevant”:
 - Any information protected by a legally recognized privilege without a waiver
 - Examples: rape crisis center counselors or advocates, clergy
 - Claimant’s sexual predisposition or prior sexual behavior (“rape shield” exclusion)
 - Subject to two exceptions
 - Office of Equity investigator will indicate if the information fits within an exception in the investigation report

Irrelevant Evidence Exceptions: Prior Sexual Behavior, Part 1/2

- Exception 1: Evidence of prior sexual behavior is permitted if offered to prove someone other than the Respondent committed the policy violation
 - Example: Witness saw Claimant, who was heavily intoxicated, having sex with Claimant's prior partner at the same time Claimant alleged Respondent sexually assaulted them

Irrelevant Evidence Exceptions: Prior Sexual Behavior, Part 2/2

- Exception 2: Evidence of prior sexual behavior is permitted if it is about the Claimant and Respondent's history together AND is offered to prove consent 34 CFR § 106.45(b)(6)
 - Example: Proof of past consensual intercourse between Claimant and Respondent that suggests consent in this case (e.g., Respondent and Claimant had previously established the use of a specific "safe word". During this sexual encounter, Claimant did not use the established safe word. Respondent interpreted this as consent to the sexual activity given their history.)

Asking Questions about Prior Sexual Behavior

- Questions about prior sexual behavior must mirror the two exceptions in the Title IX regulations in order to be relevant
- For a question to be allowed within exception 2, it must be about the parties' prior interactions
 - Irrelevant: “Has the claimant ever shared with you that they have engaged in [specific behavior] in their sexual encounters?”
 - Relevant: “Has the claimant ever shared with you how they gave consent to engage in [specific behavior] in their prior sexual encounters with the respondent?”

Formal Investigation Overview: Record of Evidence, Part 1/5

Incident Report

- A report of alleged sexual misconduct filed to the Office of Equity, Title IX Coordinator, or a reporting employee

Formal Complaint

- A signed document that indicates the University will proceed with a formal investigation of sexual misconduct or an alternative resolution

Notice of Allegations

- A written instrument notifying both parties that a formal complaint of sexual misconduct has been filed and outlining the allegations

Formal Investigation Overview: Record of Evidence, Part 2/5

Claimant Interview

- A recorded interview between the Claimant and the Office of Equity investigator

Claimant Evidence

- Evidence provided by the Claimant to support the allegations raised in the formal complaint

Respondent Interview

- A recorded interview between the Respondent and the Office of Equity investigator

Formal Investigation Overview: Record of Evidence, Part 3/5

Respondent Evidence

- Evidence provided by the Respondent related to the allegations raised in the formal complaint

Other Evidence

- Evidence obtained from parties other than the Claimant or Respondent

Formal Investigation Overview: Record of Evidence, Part 4/5

Preliminary Investigation Report

- Procedural history of the case from the Formal Complaint to the Preliminary Investigation Report
- Summary of the investigation and all relevant evidence gathered
- Summary of the narratives provided by both parties and any relevant witnesses
- Descriptions of relevant evidence submitted and received
- Alleged policy violation(s)

Formal Investigation Overview: Record of Evidence, Part 5/5

Response(s) to the Preliminary Investigation Report

- The Claimant and Respondent may file a written response within 10 days

Response(s) to the Record

- The Claimant and Respondent may file a written response within 10 days

Formal Investigation Overview: Final Investigation Report

- All elements of the Preliminary Investigation Report
- Written responses to the Record and Preliminary Investigation Report
- Range of possible Sanctions for each alleged violation

Does not reach a determination about whether Respondent violated USU policy

Formal Complaints under Policy 339

- The University will not issue a Sanction arising from an allegation of Sexual Misconduct without holding a hearing unless the formal complaint is otherwise resolved through an Alternative Resolution process

Formal Complaints under Policy 339A

- Either party may opt-in to a hearing
- If a party does not opt-in to a hearing, then the party waives their right to a hearing
 - The Hearing Officer/Panel will be appointed and will conduct a review of the Record
 - The Hearing Officer/Panel will issue a Provisional Determination letter within 21 days of appointment and follow other relevant steps in procedures 339A

Scheduling the Hearing

- The hearing is scheduled no sooner than 10 days but within 60 days of the issuance of the final investigation report
- The Case Coordinator will issue a Notice of Hearing to both parties, their Process Advisor(s), their Support Person(s) (if any), and any Witnesses who are attending the hearing
 - The Notice of Hearing will include the names of the Hearing Officer, Hearing Panel members (if any), Sanctioning Authority, as well as the Relevant Witnesses that have been requested at the hearing

Hearing Basic Logistics

- Hearing allows parties to provide an opening/closing statement and cross-examine one another and witnesses (through their Process Advisors)
- Hearings may be conducted in-person or via videoconferencing
 - All participants must be able to simultaneously see and hear each other for the entire time during which they are permitted or required to be present, except for recesses
- Hearing is recorded
- Hearing is closed to the general public
- Hearings are generally scheduled for 4 hours

Hearing Attendees

- Only the following individuals will be allowed into the hearing:
 - Hearing Officer or Hearing Panel Members (if relevant)
 - Case Coordinator
 - Claimant
 - Claimant's Process Advisor and Support Person (if relevant)
 - Respondent
 - Respondent's Process Advisor and Support Person (if relevant)
 - Office of Equity investigator
 - Will be present only at the time of their testimony
 - Witnesses, including fact and expert witnesses
 - Will be present only at the time of their testimony and will not be permitted to hear other witnesses' testimony
 - Other university officials as may be required

Roles During the Hearing

Hearing Officer

- Calls hearing to order, maintains decorum, and directs hearing panel responsibilities (if relevant)
 - Asks relevant questions
 - Makes relevance determinations for each question asked by process advisors and when they find a question is not relevant, states the reason for their decision on the record

Hearing Panel (if relevant)

- Serves as a decision-maker
- Asks relevant questions

Process Advisor

- Conducts questioning of the other party and witnesses on their party's behalf

Hearing Format, Part 1/3

- Hearing Officer opens the hearing and establishes rules and expectations for the hearing
- Claimant Opening Statement (10 minutes)
 - May only reference evidence in the record
- Respondent Opening Statement (10 minutes)
 - May only reference evidence in the record
- Hearing Officer/Panel questions Claimant
- Claimant's Process Advisor questions Claimant
- Respondent's Process Advisor questions Claimant
 - Hearing Officer must determine all questions as relevant or not relevant

Hearing Format, Part 2/3

- Hearing Officer/Panel questions Respondent
- Respondent's Process Advisor questions Respondent
- Claimant's Process Advisor questions Respondent
 - Hearing Officer must determine all questions as relevant or not relevant
- Hearing Officer/Panel questions Witness 1
- Claimant's Process Advisor questions Witness 1
- Respondent's Process Advisor questions Witness 1
- Additional witnesses questioned as listed above
- Claimant Closing Statement (10 minutes)
- Respondent Closing Statement (10 minutes)

Hearing Format, Part 3/3

- A recess may be called at any time during the hearing
- The Hearing Officer will end the hearing
- At the end of the hearing, the Hearing Officer/Panel will deliberate on the evidence presented and move toward a determination and next steps

After a Hearing: Responsibility of the Hearing Officer/Panel and Case Coordinator, Part 1/2

- Within 14 days of the hearing, the Case Coordinator will send the Provisional Determination Letter to the parties, their Process Advisors, the Sanctioning Authority (if there is a finding), and the Title IX Coordinator
- Outlines facts supporting the Determination and the policy violations the Hearing Officer/Panel has found Respondent to have committed, if any
 - The Provisional Determination Letter will also include relevant mitigating, aggravating, and compounding factors

Aggravating, Compounding, and Mitigating Factors

- Factors determined by the Hearing Officer/Panel and considered by the Sanctioning Authority when determining the appropriate Sanction for a violation
 - Aggravating factors: increase the severity or culpability of the policy violation
 - Compounding factors: evidence that the Respondent has previously been found to have violated the Sexual Misconduct Policy or other, similar policies
 - Mitigating factors: reasons as to why the Respondent's punishment for a violation ought to be lessened

After a Hearing: Responsibility of the Parties

- If there is a finding of a policy violation, the parties may provide a sanction statement to the Sanctioning Authority
 - Within 7 days of the issuance of the Provisional Determination Letter
 - Statements should address relevant evidence in the Provisional Determination Letter and describe mitigating, aggravating, and compounding factors that the party feels the Sanctioning Authority should consider for each violation found

Sanctioning Authority

- A University Employee or office that has the authority to determine appropriate Sanctions
 - **Office of Student Conduct & Community Standards**
 - Determine sanctions for student respondents
 - **Supervisors, with Human Resources**
 - Determine sanctions for staff respondents
 - **Provost's Office, with Dean and Human Resources**
 - Determine sanctions for faculty respondents

After a Hearing: Responsibility of the Sanctioning Authority

- Within 7 days of the end of the Sanction statement period, the Sanctioning Authority will issue a Sanction Letter to the Hearing Officer
- Outlines the Sanction that should be ordered for each of the policy violations the Hearing Officer/Panel has found the Respondent to have committed
 - The Sanction must be proportionate to the policy violation(s), considering the parties' Sanctions statement, if any, and Mitigating, Aggravating, and Compounding Factors

Range of Possible Sanctions: Employee Respondents

- Warning up to and including termination of employment
- Finding is documented in Respondent's personnel file
- Student employees will be subject to employee sanctions only if violation(s) occurred in the course of their employment

Range of Possible Sanctions: Student Respondents

- Warning, probation, suspension, or expulsion
- Finding is documented in Respondent's education file
 - Could also be a permanent notation on Respondent's transcript

After a Hearing: Responsibility of the Title IX Coordinator

- Claimant may provide a written impact statement to the Title IX Coordinator within 7 days after the issuance of the Provisional Determination Letter
- Within 15 days of receiving the written Determination from the Hearing Officer/Panel, the Title IX Coordinator will issue a Remedies Letter to the Claimant
- Outlines the Remedies that will be provided to the Claimant for each of the policy violations the Hearing Officer/Panel has found the Respondent to have committed

After a Hearing: Responsibility of the Hearing Officer/Panel and Case Coordinator, Part 2/2

- Within 30 days of the hearing, the Case Coordinator will issue a written Determination to the parties, Process Advisors, the investigator, the Sanctioning Authority, and the Title IX Coordinator, simultaneously
- If the Hearing Officer/Panel finds the Respondent to have violated the policy, the Hearing Officer/Panel will attach the Sanction Letter to its Determination
- If no Appeal is filed, then the Determination is final on the deadline to Appeal

Appeal Basics, Part 1/2

- Within 10 days of the date the Determination is issued by the Hearing Officer/Panel, either party may file a written Appeal of the Determination
 - Can also appeal the sanction if participating in the sanctions-only process of an Alternative Resolution
- The non-appealing party can file a written response to the Appeal within 10 days

Appeal Basics, Part 2/2

- An Appeal is performed “on the record” (there is no hearing) by a 3-person Appeal Panel
 - Scope is limited to the grounds specifically identified in the party’s Appeal
- The Appeal Panel can dismiss the Appeal if it does not meet the grounds for appeal and/or it was not timely filed

Grounds for Appeal of the Determination

1. Procedural irregularity that affected the outcome of the matter
2. New evidence, including witnesses, that was not reasonably available despite due diligence by the close of the response to the Record period and/or at the time of the Determination about responsibility or dismissal was made, that could affect the outcome of the matter
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had an Actual Conflict of Interest or Demonstrated Bias for or against Claimants or Respondents generally or the specific Claimant or Respondent that affected the outcome of the matter

Potential Outcomes of an Appeal of the Determination

- Affirm the Hearing Officer/Panel's Determination
- Modify the Hearing Officer/Panel's Determination
- Remand the Determination to the Hearing Officer/Panel
- Overturn the Determination if the Determination was based on a procedural error(s) and the error(s) resulted in prejudice to the appealing party

Responsibility of the Appeal Panel

- Within 30 days of the date the Appeal is filed by the appealing party, the Appeal Panel will issue a written Appeal Decision
- Sent simultaneously to the Title IX Coordinator, Hearing Officer/Panel, both parties, and their Process Advisors
- Includes the rationale for the Appeal Decision
 - Appeal decision is final and may not be further appealed

After the Appeal Process or If No Appeal is Filed

- If the Respondent has been found to have violated the Sexual Misconduct policy:
 - The Sanctioning Authority helps implement Sanctions
 - The Title IX Coordinator works with the Claimant to implement Remedies

Part Two Summary

- Supportive measures are designed to restore or preserve equal access to the University's Employment or Education Program or Activity without unreasonably burdening the other party
- USU's Grievance Process is an administrative process that determines whether, by a "preponderance of the evidence," a USU student, staff, or faculty member has violated Interim USU Policy 339 or 339A
- The Grievance Process includes Alternative Resolutions, Formal Investigations, and University-driven Formal Investigations





Part Three: Bias and Conflicts of Interest Overview

Key question: How should individuals with roles in the grievance process avoid bias and conflicts of interest?

Bias and Conflicts of Interest

- Anyone involved in the Grievance Process must not have a conflict of interest or bias for or against claimants or respondents generally, or an individual claimant or respondent
- Individuals, including investigators, must objectively evaluate all relevant evidence
 - This includes both inculpatory and exculpatory evidence

Actual Conflict of Interest

- Exists when a non-party individual with a role in the Grievance Process
 - Is in a position to gain a personal or self-serving benefit from an action or decision made in their role or
 - Is otherwise unable to participate with objectivity because of personal or professional relationships with other individuals involved in the process or associated with those involved
- That an individual with a role in the process works for the University alone is not enough, without more, to establish an Actual Conflict of Interest

Responding to Conflicts of Interest Check by Case Coordinator, Part 1/2

- Always identify whether you
 - Have
 - Personal or professional ties to the Respondent,
 - Personal or professional ties to the Claimant, or
 - Prior knowledge of the case
 - That could affect your ability to participate in the grievance process with objectivity
 - Will be able to
 - Disregard each party's status as Claimant or Respondent, and
 - Render impartial judgment based on the evidence presented

Responding to Conflicts of Interest Check by Case Coordinator, Part 2/2

- If your answer is “yes” to question 1 and/or “no” to question 2, you should:
 - Be honest about it
 - Admit that you cannot participate impartially

Demonstrated Bias

- Unfair prejudice in favor of or against one group compared with another, including bias against a particular class of parties (e.g., Respondents in the Grievance Process)
- Individuals with roles in the Grievance Process are prohibited from considering the party's status as a Claimant or Respondent as a negative factor during consideration of the Formal Complaint
- That an individual with a role in the process works for the University alone is not enough, without more, to establish Demonstrated Bias

Avoiding Bias, Part 1/3

- Don't let a party's race, gender, religion, national origin, disability, etc. influence your beliefs about the case, the evidence, or their credibility
 - A party's account should not be more or less believed because of their identities
- Focus on what the evidence (including the parties' and witnesses' statements) tells you
 - Do not focus on what you believe should happen in a situation like this or what you know to have occurred in other similar situations

Avoiding Bias, Part 2/3

- Questions to ask yourself:
 - Have I reached this conclusion or decision based on the evidence, or based on something else?
 - Would I have come to this same conclusion if the Claimant or Respondent had different identities (e.g., race, gender)?
 - Am I making this decision because of bias towards the Claimant or the Respondent, or because of claimants or respondents in general?

Avoiding Bias, Part 3/3

- If you are concerned that your decision is based on something other than the evidence:
 - Go back and look again
 - Ask for input from the Title IX Coordinator or Equity Executive Director

Part Three Summary

- An actual conflict of interest exists when a non-party individual with a role in the Grievance Process is in a position to gain a personal or self-serving benefit from an action or decision made in their role, or is otherwise unable to participate with objectivity because of personal or professional relationships with other individuals involved in the process
- Demonstrated bias is unfair prejudice in favor of or against one group compared with another
- Individuals with a role in the Grievance Process can avoid bias by focusing on what the evidence tells them



Presentation Summary

- USU must respond when it has “actual knowledge” of “sexual harassment” that occurred within the school’s “education program or activity”
- Sexual harassment, sexual exploitation, sexual assault, relationship violence, and sex-based stalking are all types of sexual misconduct
- USU’s Grievance Process is an administrative process that determines whether, by a “preponderance of the evidence,” a USU student, staff, or faculty member has violated Interim USU Policy 339 or 339A

