

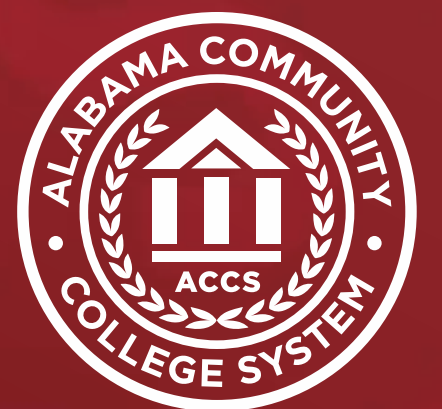
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# ACCS Title IX Training – Decisionmaker (Hearing/Appeals)

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January 2025

**REAL.** *Life.* **EDUCATION.**



# HOUSEKEEPING



- This training will provide information on the 2020 Title IX regulations.
- Any materials used to train Title IX Coordinators, Investigators, Decisionmakers, and any person who facilitates an Informal Resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.



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# **Title IX Grievance Procedures**

# TITLE IX SEXUAL HARASSMENT DEFINITION

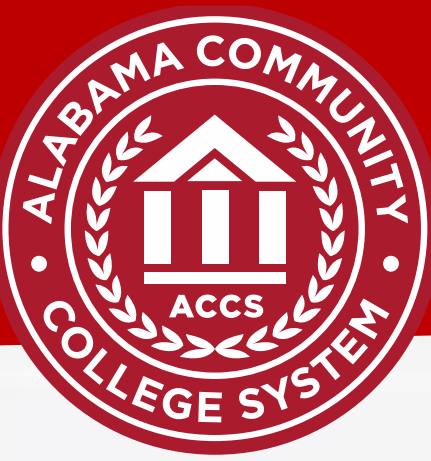


An employee of the recipient (the College) conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity.

Sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act.

# TITLE IX JURISDICTION



- Locations, events, or circumstances (operations) over which the institution exercises substantial control over both the Respondent AND the context in which the sexual harassment occurs (education program or activity)
- Pertains to actions of Prohibited Conduct committed by or against students and employees when:
  - **On campus or property** owned or controlled by the institution, including buildings owned or controlled by a student organization that is officially recognized by the institution
  - **In the context of** an institution's employment or educational program or activity, including, but not limited to, research, online, or internship programs



# TITLE IX GRIEVANCE PROCEDURES



- Reporting of Incident (Notification)
- Initial Assessment/Evaluation/Triage (Supportive Measures, Complaint Dismissals, Emergency Removals/Administrative Leave)
- Formal Investigation & Investigative Report (Notice of Investigation/Allegations)
- Hearing
- Appeal

# TITLE IX INVESTIGATION



- The burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the institution and not on the parties provided that the institution cannot access, consider, disclose or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional...and which are made and maintained in connection with the provision of treatment to the party, unless the institution obtains that party's voluntary, written consent to do so for a grievance process.



# ROLE OF THE DECISIONMAKER (HEARING)



- Be impartial by avoiding prejudgment of the facts at issue, bias, and conflict of interest
- Also referred to as the Hearing Officer as you will oversee and direct the hearing
  - Question parties and witnesses to aid in evaluating allegations and assessing credibility
- Objectively evaluate all relevant evidence, both inculpatory and exculpatory
- Independently reach a determination of whether sexual harassment occurred
- Written determination sent simultaneously to both parties of whether sexual harassment occurred
- Not the Title IX Coordinator or Investigator

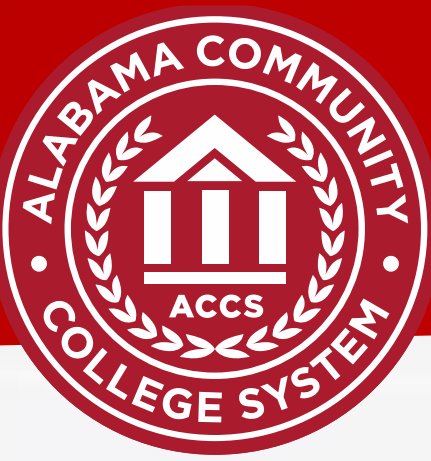


# CONFLICT OF INTEREST



- All Title IX Team members shall not have a conflict of interest for or against Complainants or Respondents generally or an individual Complainant or Respondent. All Title IX matters should be handled impartially.
- Conflict of interest - occurs when an individual's personal interests - family, friendships, financial, or social factors - could compromise their judgment, decisions, or actions in the workplace.
- Any Decisionmaker who believes they may have a potential conflict of interest should notify the Title IX Coordinator as soon as possible.

# BIAS



- All Title IX Team members shall not have a bias for or against Complainants or Respondents generally or an individual Complainant or Respondent. All Title IX matters should be handled impartially.
- Bias - prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair
- Any Decisionmaker who believes they may have a potential bias should notify the Title IX Coordinator as soon as possible.



# BIAS



- **Explicit Bias – refers to the attitudes and beliefs we have about a person or group on a conscious level**
  - Expressed directly
  - Aware of bias
  - Operates consciously
- **Implicit Bias – refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner**
  - Expressed indirectly
  - Unaware of bias
  - Operates subconsciously

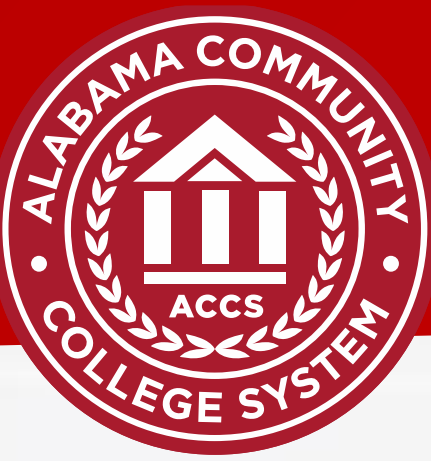
# PRESUMPTION OF NON RESPONSIBILITY



- **“The Respondent is presumed not responsible for the alleged sexual harassment until a determination is made at the conclusion of the grievance procedures... and that prior to the determination, the parties will have an opportunity to present relevant and not otherwise impermissible evidence to a trained, impartial Decisionmaker;”**

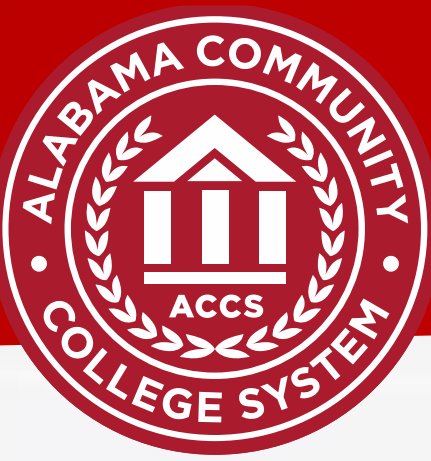


# HEARINGS



- An institution's sexual harassment grievance process **must** provide for a **live** hearing.
- Can hold hearing (either at a party's request or the institution's discretion) in separate rooms using technology
- Must use audio or audio visually record and make the recording available to the parties
- Detailed provisions regarding questions and cross-examination of parties and witnesses

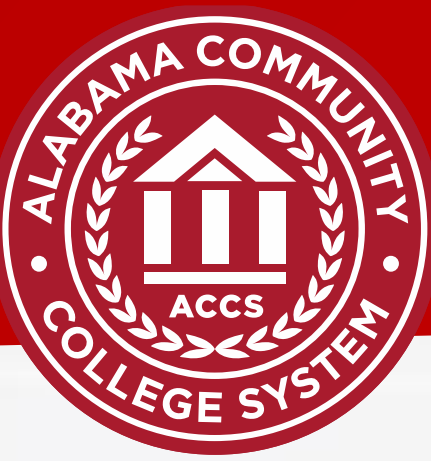
# ROLE OF ADVISORS



- Parties may have Advisors throughout the process and must have them at the hearing.
- If party does not have an Advisor, the institution must provide an Advisor of the institution's choice without fee or charge.
- Advisors must conduct cross-examination on behalf of party.
- Cross examination must be conducted directly, orally, and in real time by the party's Advisor and never by a party personally.



# HEARING



- “A recipient must provide a process that enables the Decisionmaker to question parties and witnesses to adequately assess a party’s or witness’s credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.”
- The Decisionmaker may be the Hearing Officer and will direct the hearing.
- The Title IX Coordinator should only act as the facilitator of the hearing. Their main role should be to handle any logistics/planning of the hearing. The Title IX Coordinator may also handle communications with the parties, witnesses, etc.
- The Title IX Coordinator should ensure that the hearing is audio or audio visually recorded.

# HEARING – DECORUM



- An institution does have discretion to adopt rules governing the conduct of hearings.
- The purpose of rules of decorum is to make the hearing process respectful and professional.
- If Advisor of choice refuses to comply with an institution's rules of decorum, the institution may provide that party with an assigned advisor to conduct cross examination.
- If assigned Advisor refuses to comply with an institution's rules of decorum, the institution may provide that party with a different assigned advisor to conduct cross examination.



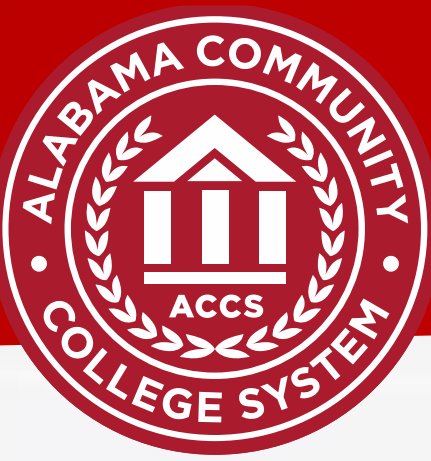
# HEARING – DECORUM



Examples include:

- Rules governing the timing and length of breaks requested by parties or advisors.
- Instructions that the parties and advisors remain seated at all times during the hearing, including during cross examination.
- Requiring any participants in the hearing not involved in current questioning to refrain from disrupting the hearing, making gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during any testimony.
- Prohibiting a list of behaviors like yelling, verbal abuse, disruptive behavior, interrupting or talking over one another, name calling, or using profane or vulgar language (except where such language is relevant).

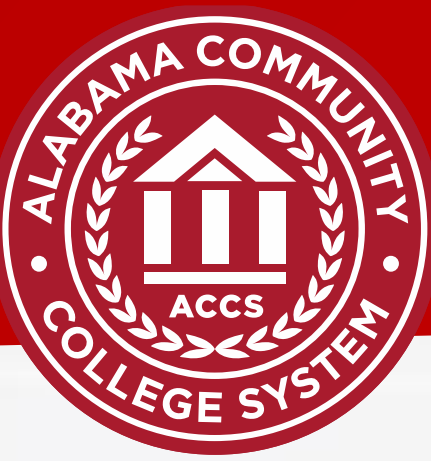
# HEARING – EVIDENCE



- **“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.”**
- **Relevant evidence must include both inculpatory and exculpatory evidence.**
  - **Inculpatory – shows or tends to show a Respondent’s involvement in an act, or evidence that can establish responsibility**
  - **Exculpatory – tends to exonerate Respondent of responsibility; favorable to Respondent**
- **“The Decisionmaker must consider relevant evidence and must not consider irrelevant evidence”**

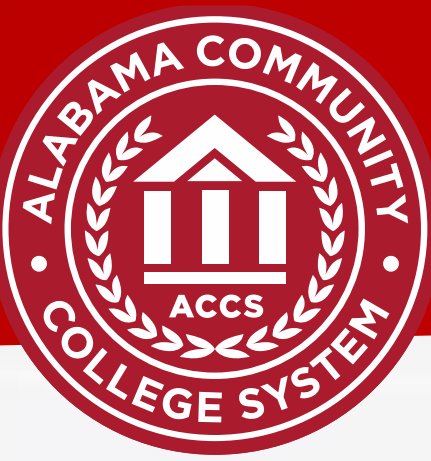


# HEARING – EVIDENCE



- The following evidence is always considered “irrelevant” (or otherwise not admissible):
  - 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 sexual predisposition or prior sexual behavior (subject to two exceptions)
    - There are two exceptions where questions or evidence of past sexual behavior are allowed:
      - Evidence of prior sexual behavior is permitted if offered to prove someone other than the Respondent committed the alleged offense.
      - Evidence of prior sexual behavior is permitted if it is specifically about the Complainant and the Respondent and is offered to prove consent.
        - Does not permit evidence of a Complainant’s sexual behavior with anyone other than the Respondent.

# HEARING – EVIDENCE



- Intended to protect Complainants from harassing, irrelevant questions.
- Does not apply to Respondents
- Questions and evidence about a Respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration, but rather must be evaluated based on relevancy, like any other question or evidence.
- Sexual predisposition - "the victim's mode of dress, speech, or lifestyle." (Advisory comments to Fed. R. Evid. 412)
- Sexual behavior - "connotes all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact." (Advisory comments to Fed. R. Evid. 412)
- Each institution is permitted to adopt its own definition of "consent."
- Thus, the scope of the second exception to the rape shield provision will turn, in part, on the definition of "consent" adopted by the institution.

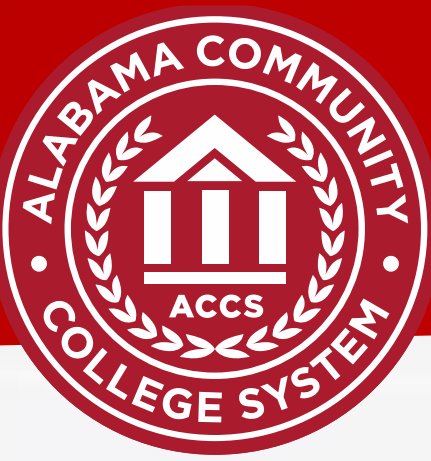


# ACCS – DEFINITION OF CONSENT



- **Must be informed, voluntary, and mutual and can be withdrawn at any time.**
- **There is no consent when there is force, expressed or implied, or when coercion, intimidation, threats, or duress is used.**
- **Whether or not a person has taken advantage of a position of influence over another person may be a factor in determining consent.**
- **Silence or absence of resistance does not imply consent.**
- **Past consent to sexual activity with another person does not imply ongoing future consent with that person or consent to that same sexual activity with another person.**

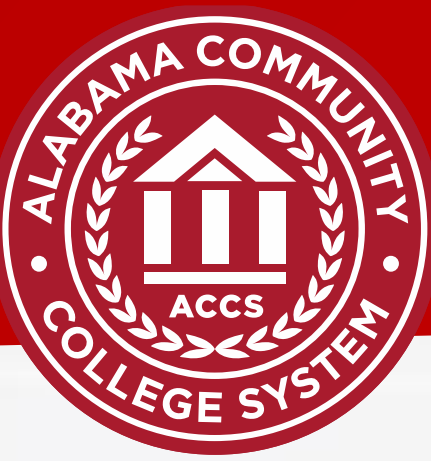
# QUESTIONING OF PARTIES & WITNESSES



- Opportunity for Decisionmaker (Hearing Officer) to ask questions of parties/witnesses, and to observe how parties/witnesses answer questions posed by the other party
- Must determine relevance after each individual question asked and provide an explanation if determine it is not relevant
- Cross-examination: Advisor asks other party and witnesses relevant questions and follow-up questions, including those challenging credibility
  - Decisionmaker must permit each party's advisor to conduct cross-examination of the other party and all witnesses
  - Cross-examination may not be conducted by the parties themselves (only advisors)
  - If a party does not have an advisor present at the hearing to conduct cross-examination, the institution must provide an advisor without fee or charge

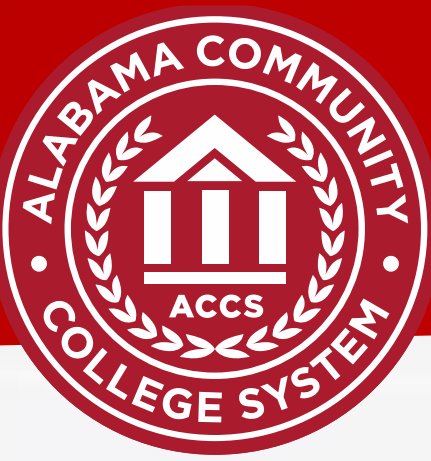


# RELEVANCY



- Not defined in the 2020 regulations
- Does the evidence tend to make a fact more or less likely to be true
- “Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures... Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a Decisionmaker in determining whether the alleged sex discrimination occurred.” (2024)
- Relevance related to questions
- Relevance related to evidence

# RELEVANCY DETERMINATION OF QUESTIONS



- At the hearing, the Decisionmaker may apply “logic and common sense” to reach any conclusions but must explain their rationale
- No “lengthy or complicated explanation” is necessary
  - For example, “the question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions”
  - For example, “the question asks about a detail that does not prove or demonstrate material fact concerning the allegations”



# RELEVANCY OF PRIOR STATEMENTS



**What if a party or witness gave a statement during the investigation but is not participating in cross-examination?**

- **On August 24, 2021, OCR issued guidance regarding this subject.**
- **Specifically, OCR indicated that a Decisionmaker at a postsecondary institution may consider statements made by parties and witnesses even if those witnesses/parties did not participate in cross-examination at the hearing.**
- **A Decisionmaker may not make any decisions about a party's credibility based solely upon their decision not to participate in a hearing or submit to cross-examination.**

# CREDITABILITY ASSESSMENTS



- Collaboration
- Consistency
- Credibility determinations may not be based on a person's status as a Complainant, Respondent, or witness.



# STANDARD OF PROOF



- **Preponderance of the evidence – understood to mean concluding that a fact is more likely than not to be true**
- **“Both standards of proof require the decisionmaker to evaluate relevant and not otherwise impermissible evidence for its persuasiveness; if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sex discrimination occurred.”**

# DETERMINING IF SEX DISCRIMINATION OCCURRED



- At the conclusion of the hearing, the Decisionmaker must make a determination regarding responsibility.
- Decisionmaker assigns weight & credibility to evidence
- Outcome must be based on an objective evaluation of all relevant evidence—including both inculpatory and exculpatory—and not taking into account the relative “skill” of the parties’ advisors.
- The Decisionmaker cannot draw any inference about the responsibility or non-responsibility of the Respondent solely based on a party’s failure to appear or answer cross-examination questions at a hearing.



# WRITTEN DETERMINATION MUST INCLUDE



- Identification of the allegations alleged to constitute sexual harassment as defined
- The procedural steps taken from receipt of the formal complaint through the determination regarding responsibility;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;
- The decision-maker's rationale for the result of each allegation, including rationale for the determination regarding responsibility;
- Any disciplinary sanctions the institution imposes on the Respondent, and whether the institution will provide remedies to the Complainant; and
- Information regarding the appeals process.

# ARTICULATING DECISION/RATIONALE



Articulate what you believe happened based on:

- Standard of evidence
- Elements of alleged violation
  - Connect rationale to each element
  - Identify facts supporting each element(s)
  - Identify facts that do not support the element(s)
- Include any admissions that occur during the hearing



# EXAMPLE: FONDLING



**Fondling:** The touching of the private body part 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.

- Touching
- Private body parts
- Of another person
- For the purpose of sexual gratification
- Without consent of the victim

# EXAMPLE: STALKING

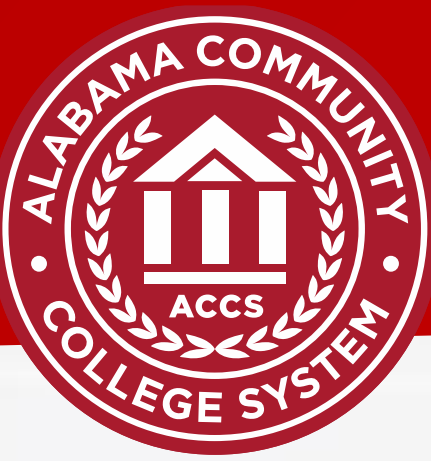


**Stalking:** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to (1) fear for the safety or the safety of others; or (2) suffer substantial emotional distress

- **Course of conduct** – two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property
- **Substantial emotional distress** – significant mental suffering or anguish that may, but does not necessarily, require, medical or other professional treatment or counseling
- **Reasonable person** – a reasonable person under similar circumstances and with similar identities to the victim



# SANCTIONS



- **Disciplinary sanctions means consequences imposed on a Respondent following a determination under Title IX that the Respondent violated the College's prohibition on sexual harassment.**
- **The person who determines the sanctions should be determined by your Policy. In ACCS Policy, the Decisionmaker determines sanctions. Who administers the sanctions should be an institutional decision, but the Title IX Coordinator is responsible for documentation.**
- **The determination regarding responsibility becomes final on the date that the College provides the parties with the written determination of the result of any appeal, or, if no party appeals, the date on which an appeal would no longer be considered timely.**
- **The written determination on responsibility and sanctions, if applicable, are postponed until the decision on the appeal is sent to the parties. Supportive measures will remain in place during the appeal period.**

# DETERMINING SANCTIONS

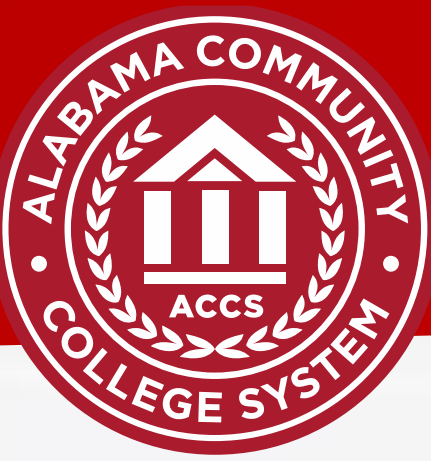


Factors considered by the Decisionmaker when determining sanctions and responsive actions may include, but are not limited to:

- The nature, severity of, and circumstances surrounding the violation(s)
- The Respondent's disciplinary history
- The need for sanctions/responsive actions to bring an end to the discrimination, harassment, and/or retaliation
- The need for sanctions/responsive actions to prevent the future recurrence of discrimination, harassment, and/or retaliation
- The need to remedy the effects of the discrimination, harassment, and/or retaliation on the Complainant and the community
- The impact on the parties
- Any other information deemed relevant by the Decisionmaker
- The sanctions will be implemented upon the outcome of any appeal or the expiration of the window to appeal, without an appeal being requested.



# SANCTIONS



## Students

- Reprimand
- Required Counseling
- Probation
- Suspension
- Expulsion
- Withholding Diploma
- Revocation of Degree
- Other Actions: In addition to, or in place of, the above sanctions, the College may assign any other sanctions as deemed appropriate.

## Employees

- Verbal or Written Warning
- Performance Improvement Plan/Management Process
- Enhanced Supervision, Observation, or Review
- Required Counseling
- Required Training or Education
- Probation
- Denial of Pay Increase/Pay Grade
- Loss of Oversight or Supervisory Responsibility
- Demotion
- Transfer
- Shift or schedule adjustments
- Reassignment
- Delay of (or referral for delay of) Tenure Track Progress
- Assignment to New Supervisor
- Restriction of Stipends, Research, and/or Professional Development Resources
- Suspension/Administrative Leave with Pay
- Suspension/Administrative Leave without Pay
- Termination
- Other Actions: In addition to or in place of the above sanctions/responsive actions, the College may assign any other responsive actions as deemed appropriate.

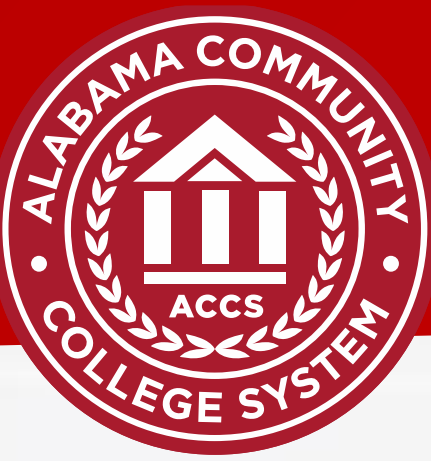
# REMEDIES



- A Complainant must be provided with remedies where the outcome shows the Complainant was victimized by sexual harassment; and a Respondent must be afforded a fair grievance process before disciplinary sanctioning.
- Remedies must be designed to “restore or preserve equal access to the institution’s education program or activity.”
- May include the same services described as supportive measures.
- Unlike supportive measures, though, remedies may in fact burden the Respondent, or be punitive or disciplinary in nature.
- The Title IX Coordinator is responsible for effective implementation of any remedies.



# APPEALS



- Both parties must have the right to appeal a determination of sex discrimination including sexual harassment
- Right to appeal and appeal procedures must be included in the Decisionmaker's written determination of whether sex discrimination occurred.
- Appellate Decisionmaker cannot be the Decisionmaker from the hearing.

# ROLE OF THE DECISIONMAKER (APPEAL)



- Be impartial by avoiding prejudgment of the facts at issue, bias, and conflict of interest
- Objectively evaluate all investigation and hearing materials and evidence
- Independently reach a determination of whether an appeal should be granted or denied per the bases for appeal
- Written determination sent simultaneously to both parties of result of the appeal and the rationale for the result
- Did not take part in an investigation of the allegations or hearing determination of that case



# APPEALS – PREPARATION



**Step 1: Review institution Title IX Policy and Procedures**

**Step 2: Review appeal and any response (and supporting documents)**

- What arguments have been raised in the appeal?
- What arguments have been raised in the response?

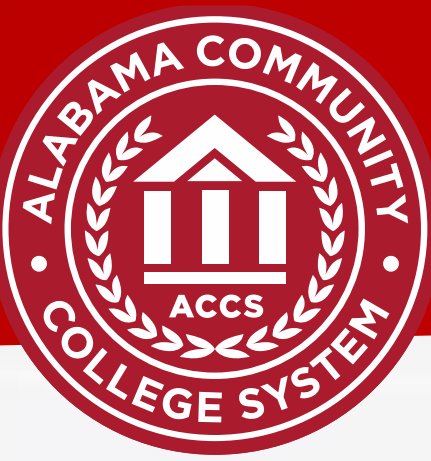
**Step 3: Consider whether the grounds have been satisfied**

- If yes, proceed; if no, prepare explanation of decision

**Step 4: Review investigative report, hearing transcript, outcome letter, and any sanction decision**

- Do you understand what decision was reached and why?

# APPEALS

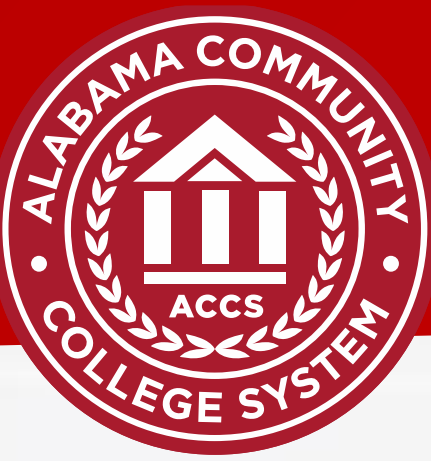


The College will offer an appeal from a determination whether sexual harassment occurred on the following bases:

- Procedural irregularity that would change the outcome;
- New evidence that would change the outcome and that was not reasonably available when the determination was made; and
- The Title IX Coordinator, Investigator, Decisionmaker, or Informal Resolution Facilitator had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that would change the outcome.



# APPEALS



The College will offer an appeal from a determination whether sexual harassment occurred on the following bases:

- Procedural irregularity that would change the outcome;
  - The process in your specific policy
  - The Title IX Coordinator's role
  - The Investigator's role
  - The Decision-Maker's role (relevancy determinations)
  - How to determine if any deviation from the process actually affected the outcome

# APPEAL DETERMINATION



Regarding the appeal of a determination, the Appellate Decisionmaker can:

- uphold or affirm the determination of the Decisionmaker of the hearing; or
- vacate and remand to the Decisionmaker of the Hearing; or
- reverse the determination of the Decisionmaker of the hearing.

Written determination simultaneously to both parties of result of the appeal and the rationale for the result



# APPEAL DETERMINATION



**Written determination simultaneously to both parties of result of the appeal and the rationale for the result**

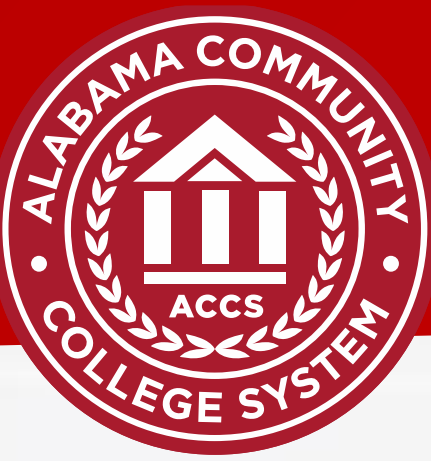
- **Address each basis for appeal individually, with a result and rationale for that result.**
- **Refer back to the policy for support.**
- **Be clear and transparent in the rationale for the result.**

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**Questions?**



# RESOURCES



- 2020 Title IX Regulations (U.S. Department of Education)
- Association of Title IX Administrators (ATIXA)
- Institutional Compliance Solutions (ICS)
- Bricker Graydon
- Saul Ewing Arnstein & Lehr
- Husch Blackwell