

Process. What Process?

Understanding Equity & Title IX

December 2023



University of Missouri System

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Equity

Discrimination & Harassment

Scenario for Equity

- Rose has been working for University Hospital's IT department for 15 years and is 57 years old. She reports that her supervisor has made multiple comments about how great it is when “fresh blood” gets into the department, since the millennials are not “old dogs” and *can* learn new tricks. Rose reports that she has requested to attend various IT trainings but is repeatedly turned down and has not received more than a 1% merit raise in 3 years. Rose also reports that new hires are typically between 22-25 years old.



Equity

University of Missouri Statement of Nondiscrimination (CRR 600.010)

The University of Missouri does not discriminate on the basis of:

- **Race**
- **Color**
- **National Origin**
- **Ancestry**
- **Religion**
- **Sex**
- **Pregnancy**
- **Sexual Orientation**
- **Gender Identity**
- **Gender Expression**
- **Age**
- **Disability**
- **Protected Veteran Status**
- any other status protected by applicable state or federal law.



Equity – Discrimination & Harassment

Discrimination or Harassment

Conduct that is based upon protected class that:

1. **Adversely affects** a term or condition of employment, education, living environment or participation in a University activity; or
2. **Creates a hostile environment** by being sufficiently **severe** or **pervasive** and **objectively offensive** that it interferes with, limits, or denies the ability to participate in or benefit from the University's educational programs, activities, or employment.



Equity – Discrimination & Harassment

Discrimination: Treating someone differently based on a protected class or status

- A professor not excusing a pregnant student's absence from class despite the absence being medically necessary due to the student's pregnancy.
- An employee is not permitted to dress in religious garb in accordance with their own religious beliefs because the employer believes it might send the wrong image to its customers.
- A job applicant is not given an interview because the application indicates that the applicant graduated from college in 1974.

Harassment: Engaging in conduct that creates a hostile environment for another because of their protected class

- Jokes, pranks, or negative comments that are hostile or demeaning with regard to a protected category
- Racial slurs
- Repeated requests for dates
- Giving sexually suggestive looks, such as staring or winking, or licking or touching oneself sexually in front of others
- Symbols that are offensive based on race or religion
- Obscene or offensive emails, phone calls, or text messages including “sexting”



Title IX

Sexual Harassment

Scenario for Title IX

- Dorothy met Stan on Snapchat. They decided to meet downtown at Harpo's. Prior to going out, Dorothy had 5 Truly drinks and 2 shots of vodka. Stan did not drink beforehand. Once at Harpo's, they both used their fake IDs to purchase drinks. Dorothy had 2 mixed drinks and Stan had 3 beers. Dorothy did not eat that day, and around 10:30pm, she started to feel sick. Stan offered to walk her back to her dorm room. Dorothy was stumbling during their walk and got confused about which residence hall she lives in. Stan found Dorothy's keycard in her purse, which he used to swipe into the residence hall. Once in Dorothy's room, they began kissing. When Dorothy woke up the next morning, she was only wearing a t-shirt. She doesn't remember anything after kissing but notices a used condom in the trash can. She immediately messaged Stan via Snapchat, asking if they had sex. He responded, "Yes."



Title IX

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.”



Title IX Sexual Harassment

Categories of Prohibited Conduct (that occurs on the basis of sex):

- **Quid Pro Quo**
- **Hostile Environment**
- **Sexual Assault**
- **Dating Violence / Domestic Violence**
- **Stalking**



Title IX Sexual Harassment

Categories of Prohibited Conduct (that occurs on the basis of sex):

- **Quid Pro Quo**
 - **Employee** of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in **unwelcome sexual conduct**
 - EX: Faculty member conditions a student's grade on whether the student will engage in sexual intercourse, despite the student's previous rejection of this idea
- **Hostile Environment**
 - 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's education program or activity
 - EX: Student repeatedly makes lewd and offensive comments to another student about the other student's sexual orientation, such that it causes the other student to transfer to another residence hall
- **Sexual Assault**
 - Rape, sodomy, sexual assault with an object, fondling, incest, statutory rape
 - Fondling = touching of the private body parts of another person for the purpose of sexual gratification, without consent
- **Dating Violence / Domestic Violence**
 - Current/former relationship, current/former spouse, child in common, roommate
- **Stalking (recently updated)**
 - Course of conduct directed at a specific person **knowing or consciously disregarding a substantial and unjustifiable risk** that the course of conduct would cause a reasonable person to (A) fear for their safety or the safety of others; or (B) suffer substantial emotional distress.



Jurisdiction

Power / authority for the University to take action over prohibited conduct

EQUITY

- Occurs on University premises or at University-sponsored or University-supervised functions
- Off campus:
 - To protect physical safety of students, employees, and visitors or other members of University community
 - If effects of conduct interfere with or limit any person's ability to participate in or benefit from the University's educational programs, activities or employment
 - If conduct is related to a faculty member's fitness or performance in the professional capacity of teacher or researcher
 - If conduct occurs when a faculty member is serving in role of a University employee

TITLE IX

- Occurs in an education program or activity
 - Locations, events, or circumstances over which University exercises substantial control over both Respondent and context in which conduct occurs
 - Any building owned or controlled by a student organization that is officially recognized by the University
- Occurs against a person in the United States



Process and Procedure

Report & Intake

How Reports are Made

- Any person can make a report to the Equity / Title IX Offices
- Reports can be made:
 - In person
 - By mail
 - By telephone
 - By email
 - Online
- University employees (unless exempted) are **mandated reporters** – required to report any form of discrimination or harassment of which they are aware to the Equity / Title IX Office.



Supportive Measures

- Upon receipt of a report, the Equity / Title IX Office will reach out to the Complainant, if known, to offer **supportive measures**
 - Offered to either party at no cost
 - Non-disciplinary and non-punitive
 - *Examples:* Mutual restrictions on contact, counseling/support services, adjusting course assignments and/or exam schedules, altering on-campus housing assignments
- Balancing act:
 - Restore or preserve equal access to the University program or activity that the party was enjoying prior to the alleged incident
 - Not unreasonably burdensome to the other party
 - Protect safety of all parties
 - Deter future occurrences of discrimination or harassment



Process and Procedure

Investigation

Who's Who?

- **Complainant:** Individual alleged to have been subjected to conduct that may constitute discrimination or harassment.
- **Respondent:** Individual who has been reported to be the perpetrator of conduct that could constitute discrimination or harassment.
- **[Equity] Support Person:** Individual selected by a party to provide support and guidance throughout the Title IX or Equity Process, including Equity hearings.
- **Advisor:** Individual who will conduct cross-examination and other questioning on behalf of a party at a Title IX hearing.
- **Hearing Officer:** Individual who will preside over and rule on objections and the relevancy of questions and evidence during a Title IX hearing.
- **Hearing Panel Chair:** Individual who will preside over an Equity hearing.
- **Equity Resolution Appellate Officer:** Individual appointed to review a prior decision of decision-maker(s).



Investigation Process

- Report is made
 - Intake by Equity / Title IX Office personnel
-
- **Filing of [Formal] Complaint**
 - Notice of Allegations provided to known parties and Investigation plan developed
 - Fact gathering
 - Parties interviewed
 - Witnesses interviewed
 - Evidence collected
 - Analysis of information and report writing
 - TIX Dismissal / Summary Resolution determination
 - Case resolution/adjudication



Process and Procedure

Which process?

The Processes

Title IX

Informal Resolution

Hearing Panel
Resolution

Academic
Medical Center
(AMC)
Process

Facilitated
Dialogue
or
Mutual
agreement with
specific terms

Administrative
Resolution

Equity

Conflict
Resolution

Administrative
Resolution

Hearing Panel
Resolution



Available Process

Conflict Resolution / Informal Resolution

- Parties must voluntarily agree to use this process
- Available at any time
- Can stop this process at any time and move into the other available processes
- Neutral facilitator will foster dialogue with the Parties to an effective resolution, if possible – includes mutual agreements with specific terms, or mediation.
- Never available to resolve allegations that an employee sexually harassed or engaged in sexual misconduct with a student

Academic Medical Center Process (Title IX)

- Used to resolve Formal Complaints that arise from a University of Missouri Hospital or Clinic or other designated facility
- Process similar to Administrative Resolution
- Single decision-maker

Administrative Resolution

- Single or joint decision-maker
- Both parties must elect to use this process
- Decision-maker can meet with parties
- Parties may provide questions for decision-maker to ask the other party
- Decision-maker will render a decision on responsibility and a decision or recommendation on sanction(s)
- Either party may appeal

Hearing Panel Resolution

- 3-person decision-maker (majority vote)
- Live hearing with testimony and opportunity for questions to be asked of parties/witnesses
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Who is Entitled to What Process?

Title IX

Equity

Informal Resolution*

Hearing Panel Resolution

Academic Medical Center (AMC) Process

Conflict Resolution*
(facilitated dialogue/agreement/mediation)

Administrative Resolution

Hearing Panel Resolution

Facilitated Dialogue/Mediation

Administrative Resolution

Student, Staff, and Faculty Respondents

Handles allegations arising from a designated Academic Medical Center

Student/Student Org, Staff, Faculty, and University Respondents

Student and Faculty Respondents

Student, Staff, and Faculty Respondents

**not available to resolve allegations that an employee sexually harassed or engaged in sexual misconduct with a student*



Process and Procedure

Review & Appeal

Dismissal & Summary Determination

Title IX

- Mandatory Dismissal:
 - Conduct alleged does not constitute sexual harassment, even if proved
 - Conduct alleged did not occur in University's education program or activity
 - Conduct alleged did not occur against a person in the United States
- Permissive Dismissal:
 - Complainant wants to withdraw Formal Complaint or any allegations
 - Respondent is no longer enrolled/employed
 - Specific circumstances prevent University from gathering sufficient evidence to reach a determination
- Either party can **appeal** this decision

Equity

- Equity Officer will review evidence gathered to determine if there is a sufficient basis to proceed with the Complaint that the Respondent is responsible for violating university policy
- If so, the process will continue.
- If not, the process will end, and parties will be provided notice of the Equity Officer's decision.
- Either Party can **request reconsideration** of the Equity Officer's Summary Resolution determination
- If requested, the Equity Resolution Appellate Officer will review the Equity Officer's finding and send notice of their findings.
- Equity Resolution Appellate Officer's decision is final.



Appeals

- Grounds for Appeal:
 1. Procedural irregularity that affected the outcome
 2. To consider new evidence that was not reasonably available previously and could affect the outcome
 3. Title IX Coordinator, Investigator, or Decision-maker had a conflict of interest or bias against a party, specifically or generally, against Complainants or Respondents
 4. Sanctions fell outside the range typically imposed for the offense or for the cumulative record of the Respondent

- Either party may appeal to the Equity Resolution Appellate Officer within 5 days of receiving the decision.

- Decision of Equity Resolution Appellate Officer is final.



Questions?





PRESUMPTIONS, EVIDENCE & BURDENS

DECEMBER 2023

THE PRESUMPTION



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PRESUMPTION OF NON-RESPONSIBILITY

- Respondent is **presumed not responsible** for any violation; determination regarding responsibility should be made *only* at the conclusion of the process after consideration of the relevant evidence.
- Fact-finders are not charged with finding a *particular* outcome.
- Fact-finders should avoid pre-conceived notions and consider *only* the information provided during the process.



EVIDENCE



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TYPES OF EVIDENCE

DIRECT EVIDENCE

- Evidence that directly proves a key fact at issue
- No inference or conclusion has to be drawn to show that something happened.
- *EX:* Eyewitness testimony

CIRCUMSTANTIAL EVIDENCE

- A set of facts that, if true, allows a person to infer the fact at issue
- Requires drawing a conclusion/ inference based on the circumstances to show that something happened.
- *EX:* Witness saw two people emerge from the same room and one was disheveled; could infer that a fight or assault between the two took place.



RELEVANCY & EVIDENCE

- Fact-finders should determine the “facts” based on the relevant evidence presented at the hearing.
- Fact-finders must address conflicting evidence that bears on the outcome of the proceeding.
- Relevancy and admissibility of any evidence offered at the hearing shall be determined by:
 - Title IX → Hearing Officer
 - Equity → If requested by member of Hearing Panel, the question presented by Chair will be decided by majority vote



WHAT IS RELEVANT EVIDENCE?

- Evidence is relevant if:
 - It has a tendency to make a fact more or less probable than it would be without the evidence;
and
 - The fact is of consequence in determining the action. (FRE 401)



TEST FOR RELEVANCY

- To determine the relevancy of evidence that is being offered at a hearing, follow these steps:
 1. Consider the evidence that is being offered.
 2. Consider the allegations of the (Formal) Complaint.
 3. Does the evidence that is being offered have the potential to prove or disprove the allegations?



What Evidence Should (not) be Considered?

- The formal rules of evidence do not apply; but **the evidence must be relevant.**
- Questions and evidence about the **Complainant's pre-disposition or prior sexual behavior are not relevant**, unless offered to prove that someone other than the Respondent committed the alleged conduct.
- Evidence concerning **specific incidents of the Complainant's prior sexual behavior with respect to the Respondent is not relevant** unless it is offered to prove consent.
- **Character evidence is of limited utility** and should not be admitted unless relevant.
- **Incidents or behaviors of a party not directly related to the alleged conduct should not be considered** unless it shows a pattern of related misconduct that is deemed relevant.
- **Records of a party** made or maintained by a physician or similar professional in connection with the provision of treatment to a party may not be used without the party's express consent.
- Information protected **under a legally recognized privilege** shall not be allowed, relied upon or otherwise used unless the person holding the privilege has waived that privilege.



QUESTIONING & CROSS-EXAMINATION UNDER TITLE IX (600.030)

- A Party is subject to direct cross-examination by the other Party's Advisor; the Parties may not directly question each other.
- A Party's Advisor will be permitted to ask the other Party and any witnesses relevant questions and follow-up questions, including those challenging credibility.
- Before a Party or witness answers a question, the Hearing Officer must determine whether the question is relevant.
- If a question is excluded as not relevant, the Hearing Officer must explain the decision to exclude that question.
- Where the Hearing Officer permits a question to be answered, there is a presumption that the Hearing Officer found the question to be relevant.
- The Parties' Advisors may object to questions on limited grounds as set forth in the Rules of Decorum.



QUESTIONING & CROSS-EXAMINATION UNDER TITLE IX (600.030)

- No Party or witness can be forced to participate in the 600.030 process, including testifying at a hearing.
- If a Party or witness fails to submit to cross-examination at a hearing, the Hearing Panel shall not rely on any statement of that Party or witness in reaching a determination regarding responsibility.
- The Hearing Panel shall not draw any inference about the determination regarding responsibility based solely on a Party's or witness's failure to submit to cross-examination.



QUESTIONING UNDER EQUITY

(600.040/600.050)

- Under the 600.040 hearing process:
 - Parties will be provided the opportunity to present facts and arguments in full and question all present witnesses during the hearing.
 - Parties may submit questions for each other to the Hearing Panel Chair, who will determine if the questions are relevant and appropriate, and if so, will ask the questions on behalf of the submitting Party.
 - If both Parties request the opportunity, direct questioning between the Parties will be permitted.
 - Advisors are present solely to advise their Party, and may not participate directly in the hearing.
 - The Chair of the Hearing Panel, in consultation with the Parties and investigators, may decide in advance of the hearing that certain witnesses do not need to be physically present if their testimony can be adequately summarized by the Investigator(s) in the investigative report or during the hearing. All Parties will have ample opportunity to present facts and arguments in full and question all present witnesses during the hearing, though formal cross-examination is not used between the Parties.
- Under the 600.050 process, there is no hearing; Parties may submit questions for the other party to be asked by the decision-makers.



BURDEN OF PROOF



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BURDEN OF PROOF

What is “Burden of Proof?”

The level of certainty and the degree of evidence necessary to establish a violation of policy.



COMMON BURDENS OF PROOF

- *Beyond a Reasonable Doubt*: “firmly convinced”
- *Clear and Convincing*: “substantially more likely than not”
- **Preponderance of the Evidence**: “more likely than not”; 50%+
 - *This is the standard of proof in the Title IX and Equity Resolution processes.*



PREPONDERANCE OF THE EVIDENCE

- This preponderance is based on the **more convincing evidence and its probable truth or accuracy and not on the amount of evidence.** ... A preponderance of evidence has been described as “just enough” evidence to make it more likely that the fact the claimant seeks to prove is true.





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Findings, Sanctions and Remedial Actions

December 2023



Findings of the Hearing Panel

- Standard of proof is **preponderance of the evidence**.
- The written decision should have the following:
 - Identification of the allegations.
 - A description of the procedural steps;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the policies to the facts;
 - Statement of and rationale for the result as to each on each allegation
 - If panel finds Respondent responsible, report should include sanctions and remedies, if any.
 - The procedures and permissible bases for the Complainant and the Respondent to appeal.

Possible Findings

- There is sufficient evidence to find Respondent responsible for the policy violation based on the preponderance of the evidence.
 - It is more likely than not that Respondent violated the policy.
- There is insufficient evidence to find Respondent responsible for the policy violation based on the preponderance of the evidence.
 - It is not more likely than not that Respondent violated the policy.

Sanctions and Remedial Actions

- Factors to consider when finding sanctions or remedial actions include:
 - The nature, severity of, and circumstances surrounding the violation;
 - The disciplinary history of the Respondent;
 - The need for sanctions/ remedial actions to bring an end to the conduct;
 - The need for sanctions/ remedial actions to prevent the future recurrence of the conduct; and
 - The need to remedy the effects of the conduct on the Complainant and the University community.
- Refer to the Sanction Guides for suggested sanctions

Types of Sanctions for Student Respondents

- Warning
- Probation
- Loss of Privileges
- Restitution
- Discretionary Sanctions such as work assignments, services to the University or other related discretionary assignments
- Residence Hall Suspension
- Resident Hall Expulsion
- Campus Suspension
- University System Suspension
- University System Expulsion (not eligible for online courses)

Sanctions for Employees who are Respondents

- Warning
- Performance improvement Plan
- Required counseling
- Required training or education
- Loss of annual pay increase
- Loss of supervisory responsibility
- Recommendation of discipline in a training program
- For Non-Regular Faculty, immediate termination of term contract and employment;
- For Regular, Untenured Faculty, immediate termination of term contract and employment;
- Suspension without pay;
- Non-renewal of appointment;
- For Regular, Tenured faculty, suspension without pay, removal from campus and referral to the Chancellor to initiate dismissal for cause;
- For staff, demotion;
- For staff, termination.

Remedial Actions

- If Complainant is a student:
 - Permitting the student to retake courses;
 - Providing tuition reimbursement;
 - Providing additional academic support;
 - Removal of a disciplinary action; and
 - Providing educational and/or on-campus housing accommodations.
- If Complainant is an employee:
 - Removal of a disciplinary action;
 - Modification of a performance review;
 - Adjustment in pay;
 - Changes to the employee's reporting relationships; and
 - Workplace accommodations.



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Reconsideration Requests, the Right to Appeal & the Appellate Process

December 2023

Recusal of an Appellate Officer

- Appellate Officer **shall not have a Conflict of Interest or Bias** for or against Complainants or Respondents generally or an individual Complainant or Respondent.
- If an Appellate Officer feels that they have a Conflict of Interest or Bias, or cannot make an objective determination, **they must recuse themselves.**

Reconsideration
under 600.040
and 600.050

Both Parties are allowed to request reconsideration of:

- the summary determination ending the process (**Equity**),
- There is no similar process under Title IX (600.030).

Summary
Resolution
under
CRR 600.040
& 600.050

- After review of the investigation and evidence gathered, Equity Officer determines whether there is a **sufficient basis to proceed** with the Complaint that Respondent is responsible for violating University policy.
- If so, the process will continue.
- If not, the Parties will be notified of the Equity Officer's decision and advised of their right to **request reconsideration**.

Request
Reconsideration
under
CRR 600.040
& 600.050

- Either Party may request that the Equity Resolution Appellate Officer reconsider summary determination ending the process
 - Must file written request
 - Must be filed with Appellate Officer
 - Must be filed within 5 business days of notice of summary determination

Reconsideration Requests

- The review of a matter on a Reconsideration Request is a “de novo” review; it is a fresh review by the Appellate Officer without knowledge or consideration of the reasoning for the Equity Officer’s determination.
 - The Appellate Officer is looking at the evidence gathered to determine if there is **a sufficient basis to proceed** with the Complaint.
 - The decision to continue the process lies in the sole discretion of the Appellate Officer and is final.

Request for
Reconsideration
under
CRR 600.040
& 600.050

- If Appellate Officer decides there is sufficient information to proceed with Complaint (reverse EO decision), process will continue pursuant to policy.
- If Appellate Officer decides there is insufficient information to proceed (agrees with EO decision), process ends.
- EITHER DECISION →
 - Appellate Officer must send to Complainant and Respondent *simultaneously* notice of the decision.

The Appeal Process

- An appeal is available to either party in an Equity or Title IX matter (600.030, 600.040 or 600.050) following:
 - The dismissal of all or part of a Formal Complaint under Title IX.
 - The decision of the Hearing Panel under Equity or Title IX.
 - The decision of the decision-maker under the Academic Medical Center process.
 - The decision of the decision-maker(s) following Administrative Resolution.

Grounds for an Appeal

Appeals are limited to the following grounds:

- a. **A procedural irregularity** that affected the outcome of the matter (e.g., material deviation from established procedure, etc.);
- b. **To consider 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;
- c. The Title IX Coordinator / Equity (HR) Officer, 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; or
- d. The **sanctions fall outside the range typically imposed** for the offense, or for the cumulative conduct record of the Respondent.

Appellate Process

- Appeals are not full re-hearings and are intended to be deferential to original findings/ decisions.
 - Record of the Case (i.e., investigative report, exhibits, recordings)
 - Written documentation (i.e., decision-maker(s) determination)
 - Relevant documentation regarding grounds for appeal
- Appellate Officer may grant reasonable extensions to deadlines in the appeal process to a Party, with notice provided to the other Party

Appellate Process

- Requests for appeal must be submitted in writing to Appellate Officer within 5 business days of delivery of notice of dismissal or written determination
- When any Party requests an appeal, opposing party will be notified and receive a copy of the request for appeal
- Non-appealing Party may file a response to the request for appeal within 5 business days of delivery of notice and copy of request for appeal; may argue:
 - Sufficient grounds for appeal have not been met, and/or
 - Merits of the appeal

Appellate Process

- Appellate Officer will review Request for Appeal:
 - Is request timely?
 - Is appeal based on articulated bases for appeal?
 - If viewed in light most favorable to appealing Party, does the appeal state grounds that *could* result in an adjusted finding or sanction?
- If answer to these questions is no, appeal will be rejected.
- Decision to accept or reject an appeal will be made in writing within 15 days; otherwise, deemed accepted.
- If accepted, decision on appeal must be rendered within 10 business days from accepting request for appeal.
- If accepted, Appellate Officer must render written decision.

Appellate Process – Written Decision

PRACTICE POINTER

If you decide to accept appeal, you may combine your decision to accept the appeal & your written decision on appeal into one decision.

(will have to be completed within 15 days)

Written Appellate Decision:

- ✓ Describe procedural history of appellate case
- ✓ List bases for appeal
- ✓ If combining acceptance of request for appeal, include rationale for this:
 - Timely
 - Based on appropriate grounds
 - Viewed in light most favorable, could result in adjusted finding or sanction
- ✓ State standard of review (deference to original findings and to what you are confining your review)
- ✓ State conclusion(s) & rationale for decision(s)
- ✓ Close by indicating that the outcome is final; further appeals are not permitted.

Appeals
under
600.030;
600.040 and
600.050

**The decision of the
Equity Resolution Appellate Officer
is final.**

Appellate Process

❖ Consult with OGC

- ✓ You will be assigned an attorney who did not previously advise on the case
- ✓ Able to assist you as you work through the record on appeal and in writing your decision

❖ Seek logistical assistance from your University's Title IX / Equity Office

Questions?



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