

Equal Opportunity Policies & Hearings

Training Materials for Participants

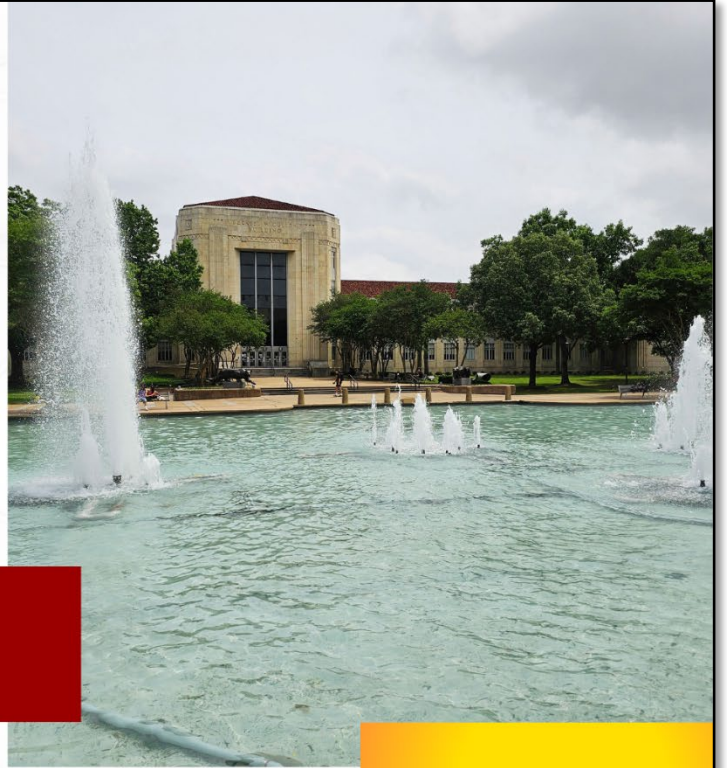
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Section Two

SECTION TWO

This section overviews key terms under equal opportunity policies, including elements of the definitions for types of prohibited conduct.



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Slide Contents:

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Narrator Notes:

(same as above)

Content Roadmap (starting section two)

Learn About the Process

This series will overview the types of concerns covered by EOS policies and the various forms of resolution that may be applicable during EOS review.

1	Introduction to Equal Opportunity Services
2	Definitions of Misconduct Under EOS Policies
3	Preliminary Evaluation and Filing a Complaint
4	After a Formal Complaint: The Investigation Process
5	Understanding the Title IX Officer Hearing Process
6	Understanding the University Panel Hearing Process
7	Hearing Decorum and Preparing for the Hearing



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Learn About the Process (Content Roadmap)

This series will overview the types of concerns covered by EOS policies and the various forms of resolution that may be applicable during EOS review.

1. Introduction to Equal Opportunity Services
2. Definitions of Misconduct Under EOS Policies (you are here about to start this section)
3. Preliminary Evaluation and Filing a Complaint
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5. Understanding the Title IX Officer Hearing Process
6. Understanding the University Panel Hearing Process
7. Hearing Decorum and Preparing for the Hearing

Narrator Notes:

After completing this section, you will have covered two of the seven areas of E.O.S. related topics and procedures.

If you are preparing for a hearing, review this section along with section 5 for Title IX hearings, or section 6 for panel hearings. Then complete your review with section 7 for general hearing topics.

Key Terms



Key Terms

For this section, see the relevant policy for full definitions.

Report or Concern – Information that may implicate an equal opportunity policy and lead to additional review or action(s) to address an experience of a University community member.

- A report does not automatically start a full, formal investigation, and may or may not lead to a formal complaint.
-

Formal Complaint – Document filed by a Complainant and accepted by the University alleging Sexual Misconduct, Discrimination or Harassment against a Respondent and requesting that the University investigate the allegation(s).

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Report or Concern – Information that may implicate an equal opportunity policy and lead to additional review or action(s) to address an experience of a University community member.

- A report does not automatically start a full, formal investigation, and may or may not lead to a formal complaint.

Formal Complaint – Document filed by a Complainant and accepted by the University alleging Sexual Misconduct, Discrimination or Harassment against a Respondent and requesting that the University investigate the allegation(s).

Narrator Notes:

Key Terms (see the relevant policy for full and current definitions).

According to the Anti-Discrimination Policy section 8.2, "A report of a violation of this Policy does not automatically begin the formal grievance procedures outlined in this Policy." The Sexual Misconduct Policy has the same type of provision in section 13.1.

According to the Anti-Discrimination Policy section 3.4, a Formal Complaint is "a document filed by a Complainant and accepted by the Equal Opportunity Coordinator alleging Discrimination or Harassment against a Respondent and requesting that the University investigate the allegation(s)."

The Sexual Misconduct Policy has a similar definition in section 3.7 of "a document filed by a Complainant or signed by the Title IX Coordinator alleging Sexual Misconduct against a Respondent and requesting that the University investigate the allegation(s) of Sexual Misconduct."

Key Terms (Parties)



Key Terms (Parties)

For this section, see the relevant policy for full definitions.

Complainant – Person who may have experienced Sexual Misconduct, Discrimination, Harassment, or Retaliation (claims they were affected).

Respondent – Person alleged to be responsible for potential Sexual Misconduct, Discrimination, Harassment, or Retaliation.

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For this section, see the relevant policy for full definitions.

Complainant – Person who may have experienced Sexual Misconduct, Discrimination, Harassment, or Retaliation (claims they were affected).

Respondent – Person alleged to be responsible for potential Sexual Misconduct, Discrimination, Harassment, or Retaliation (or an administrator over a procedure or policy alleged in a complaint as discriminatory).

Narrator Notes:

Key Terms (Parties).

According to the Anti-Discrimination Policy section 3.1, a Complainant is "an individual who may have experienced Discrimination, Harassment, or Retaliation by a Member of the University Community based on their Protected Class. Bystanders who are not a member of the Protected Class may make reports of alleged Discrimination or Harassment . . . but are not considered Complainants under this Policy."

According to the Anti-Discrimination Policy section 3.10, a Respondent is "a party or person who is designated to respond to a report or Formal Complaint. Generally, the Respondent is the person alleged to be responsible for the prohibited Discrimination, Harassment, or Retaliation alleged in the complaint. The term 'Respondent' may also be used to designate persons with administrative responsibility for procedures and policies in those areas covered in a complaint."

For definitions under the Sexual Misconduct Policy, see sections 3.2 and 3.15 respectively.



Key Terms (Advisors)

For this section, see the relevant policy for full definitions.

Personal Advisor – Support person to a Complainant or Respondent in a report of Discrimination, Harassment, or Retaliation.

- May attend any part of process with the party but may not speak on behalf of the party or be a witness.

Hearing Advisor – Person serving to act on behalf of a Complainant or Respondent in **Title IX Grievance Procedure**.

- Each party has same opportunity to have a Hearing Advisor of their choice present during any Title IX hearing.
- Typically handles cross-examination of opposing party and witnesses.
- May be an attorney, provided at the party's own expense.
- If party has no hearing advisor, the University will provide one (and does not have to be an attorney).

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Hearing Advisor – Person serving to act on behalf of a Complainant or Respondent in Title IX Grievance Procedure.

- Each party has same opportunity to have a Hearing Advisor of their choice present during any Title IX hearing.
- May be an attorney, provided at the party's own expense.
- If party has no hearing advisor, the University will provide one (and does not have to be an attorney).

Narrator Notes:

Key Terms (Advisors)

According to the Anti-Discrimination Policy section 3.7, a Personal Advisor is "an individual serving as a personal advisor or support person to a named party in a report of Discrimination, Harassment, or Retaliation. Any named party is entitled to have one Personal Advisor of their choice present during any meeting or proceeding related to the investigation. This advisor may be an attorney, provided at their own expense, with no cost to the University. Personal Advisors may attend any meeting, proceeding or hearing related to the investigation, but may not speak on behalf of the individual they are advising or be a witness." The Sexual Misconduct Policy has a similar definition in section 3.14, which also allows a Personal Advisor to step into the Hearing Advisor role. Appendix B, Section 3.1.2 also states that, "A Hearing Advisor may present evidence, question witnesses, and will conduct cross examination of the parties and witnesses."

Under the Sexual Misconduct Policy section 3., a Hearing Advisor is "an individual acting on behalf of a named party in Title IX Grievance Procedures. Any named party will have the same opportunity to have a Hearing Advisor of their choice present during any hearing held in accordance with the Title IX Sexual Misconduct Grievance Procedures. This Advisor may be an attorney, provided at the party's expense, with no cost to the University. If an individual is unable to obtain a Hearing Advisor, the University will provide one to any named party at no charge."

Key Terms (Consent and Capacity)

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For this section, see the relevant policy for full definitions.

Consent – an **informed** and **freely** and **affirmatively** communicated willingness to participate in a particular sexual activity by a **capacitated** and legally **competent** person.

- **Words or actions may demonstrate consent**, but silence, lack of protest, or lack of resistance cannot be assumed to show consent.
- A person cannot consent if physical force or violence is used or threatened.

Incapacitation – **unconscious** or otherwise **unable to resist**, is **unaware** that sexual activity is occurring, and/or **without legal capacity** to consent.

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The party initiating the sexual activity has responsibility to confirm consent.

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For this section, see the relevant policy for full definitions.

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- Words or actions may demonstrate consent, but silence, lack of protest, or lack of resistance cannot be assumed to show consent.
- A person cannot consent if physical force or violence is used or threatened.

Incapacitation – unconscious or otherwise unable to resist, is unaware that sexual activity is occurring, and/or without legal capacity to consent.

Narrator Notes:

Key Terms (Consent and Capacity).

According to the Sexual Misconduct Policy section 3.4, consent is "an informed and freely and affirmatively communicated willingness to participate in a particular sexual activity by a capacitated and legally competent person."

This is an affirmative consent definition, and under the policy, consent may be expressed verbally or physically through a party's positive participation in an activity. Of course, force or violence negate consent.

The policy also provides in section 3.12 that:

A person is incapacitated (not legally competent) and cannot consent to sexual activity if the person is unconscious or otherwise unable to resist, is unaware that sexual activity is occurring, and/or does not

have the legal capacity to consent. A person may be unable to consent when they are mentally or physically incapacitated because of the influence of drugs, alcohol, or medication and as a result are rendered temporarily incapable of understanding, appraising, or controlling their conduct. A person's incapacity to understand, appraise, or control their conduct may be analyzed based on surrounding factors including, but not limited to, hallucinations, blackouts, seizures, vomiting, slurred speech, disorientation, or lack of physical or mental coordination. When a Respondent has been accused of engaging in sexual activity with an incapacitated person, the perspective of a reasonable person will be applied to determine whether the Respondent knew or should have known about the Complainant's inability to give consent.

Finally, per section 5.2, "It is the responsibility of the person who wants to initiate a sexual activity to ensure that they have the consent of the other(s) to initiate each instance of sexual activity before they initiate the sexual activity."

Assessing Incapacity

ASSESSING INCAPACITY



Signs of Possible Incapacity

Factors to consider incapacity may include among others, hallucinations, blackouts, seizures, vomiting, slurred speech, disorientation, or lack of physical or mental coordination.



Reasonable Person Standard

Investigations apply the reasonable person standard as to whether Respondent **knew or should have known** about incapacity.

A person who cannot consent due to drugs or alcohol is not just legally intoxicated, but must be "incapable of understanding, appraising, or controlling their conduct."



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Signs of Possible Incapacity

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Reasonable Person Standard

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A person who cannot consent due to drugs or alcohol is not just legally intoxicated, but must be "incapable of understanding, appraising, or controlling their conduct."

Diagram of levels from Sober to Buzzed, Drunk, Incapacity and Unconscious.

Narrator Notes:

Per the Sexual Misconduct Policy section 3.12.2, "A person's incapacity to understand, appraise, or control their conduct may be analyzed based on surrounding factors including, but not limited to, hallucinations, blackouts, seizures, vomiting, slurred speech, disorientation, or lack of physical or mental coordination."

To determine responsibility, the next section explains that, "When a Respondent has been accused of engaging in sexual activity with an incapacitated person, the perspective of a reasonable person will be applied to determine whether the Respondent knew or should have known about the Complainant's inability to give consent."

As the effects of drugs or alcohol affect a person, they may go from being sober, to buzzed (or feeling effects), to drunk (legally intoxicated). According to section 3.12.1 of the Sexual Misconduct Policy, A person who cannot consent due to drugs or alcohol is not just legally intoxicated, but must be “incapable of understanding, appraising, or controlling their conduct.” A person who is incapacitated cannot give consent, and neither may a person who is unconscious whether due to alcohol, drugs or other reasons.

Anti-Discrimination Policy: Protected Classes



The Anti-Discrimination Policy also protects any other legally protected status and prohibits Retaliation.

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Race, color, sex (including gender and pregnancy), genetic information, religion, age (over 40), national origin, ethnicity, disability, military status, sexual orientation, gender identity or status, and gender expression.

The Anti-Discrimination Policy also prohibits Retaliation.

Narrator Notes:

According to the Anti-Discrimination Policy section 3.8, a Protected Class is "a class of persons who are protected under applicable federal or state laws against Discrimination and Harassment on the basis of race, color, sex (including gender and pregnancy), genetic information, religion, age (over 40), national origin, ethnicity, disability, military status, sexual orientation, gender identity or status, gender expression, or any other legally protected status."

For instance, under Texas Government Code Section 448.001, state law also protects individuals from antisemitism which the same law defines as, "a certain perception of Jews that may be expressed as hatred toward Jews. The term includes rhetorical and physical acts of antisemitism directed toward Jewish or non-Jewish individuals or their property or toward Jewish community institutions and religious facilities."

Both policies also prohibit retaliation. According to the Anti-Discrimination Policy section 5.2, "Retaliation . . . includes, but is not limited to, any adverse employment or educational action taken for making a report of unlawful Discrimination or Harassment, making or filing a charge under this Policy, testifying, assisting or participating in any manner in an investigation, proceeding or hearing under this Policy, or for otherwise participating under this Policy." See also Sexual Misconduct Policy section 17 for similar provisions.

Anti-Discrimination Policy: Discrimination

According to the Anti-Discrimination Policy section 3.2, "Discrimination [is] treating an individual or members of a Protected Class less favorably because of their membership in that class or having a policy or practice that has a disproportionately adverse impact on Protected Class members."

Harassment based on a protected class is also prohibited under the same policy and will be discussed in more detail herein.

POLICY ELEMENTS

UH System Anti-Discrimination Policy

Harassment

Based on Protected Class

Harassment of Employees

Unwelcome conduct that is **severe** or **pervasive** enough to:

- alter the conditions of employment and
- create a hostile or abusive working environment.

Harassment of Students

Severe, pervasive, and objectively offensive treatment that denies the student equal access to education.

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Slide Contents:

Harassment of Employees

Unwelcome conduct that is severe or pervasive enough to:

- alter the conditions of employment and
- create a hostile or abusive working environment.

Harassment of Students

Severe, pervasive, and objectively offensive treatment that denies the student equal access to education.

Narrator Notes:

According to the Anti-Discrimination Policy section 3.5, "Harassment [based on a protected class] is either:

1. Subjecting an employee on the basis of their membership in a Protected Class to unwelcome conduct that is severe or pervasive enough to alter the conditions of the employee's employment and create a hostile or abusive working environment; or
2. Subjecting a student on the basis of their membership in a Protected Class to severe, pervasive, and objectively offensive treatment that denies the student equal access to education."

Breakout Parts

Breakout Parts

For more information about these categories of possible sexual misconduct, select the applicable breakout material as you complete this section.

Remember, refer to the appropriate Policy for the full definition.

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For more information about these categories of possible sexual misconduct, select the applicable breakout material as you complete this section.

Remember, refer to the appropriate Policy for the full definition.

- Dating Violence and Domestic Violence.
- Sexual Assault.
- Stalking.
- Sexual Harassment.
- Non-Consensual Sexual Touching.
- Sexual Exploitation.
- Sexual Intimidation.

Narrator Notes:

(same as above)