

MSU Anti-Discrimination Policy Training

Spring 2025

ADP Training Agenda

- What's new?
- Why?
- Who, Where, and When?
- What?
- How?

New Definitions

- **Associational Discrimination or Harassment:** discrimination or harassment directed at an individual based on the protected identity of another individual with whom they have an association. Associational discrimination or harassment may be directed at an individual based on any of the associated member's protected identities.
- **Intersectional Discrimination or Harassment:** discrimination or harassment based on a combination of interconnected protected identities, or their stereotypes or expectations. Non-exhaustive examples may include: discrimination or harassment based on social hierarchy connected to protected identities (e.g., caste membership, etc.); discrimination or harassment based on religion, ethnicity, and/or national origin (e.g., antisemitism, Islamophobia, etc.); discrimination or harassment based on race and gender; discrimination or harassment based on age and disability.
- **Intraclass Discrimination or Harassment:** discrimination or harassment between parties who share the same protected identity and which occurs on the basis of that shared identity. The ADP applies equally to discrimination or harassment between people who share identities and those who do not.

Changes to remember and Which Policy do I use?

- Changes to remember
 - No 180-day timeframe for making complaints
 - Addition of Muldrow language lowering the burden for adverse impact
 - Clarification that burden of production is on the University, not the claimant or respondent
- Which Policy
 - Use the policy/definitions from the time of the conduct
 - Use the current process/user's manual

Changes on the horizon...

- Case processing manual
- New investigation template
- Changes to University assigned advisor availability in ADP matters



Why...does MSU have an Anti-Discrimination Policy?

Why...does MSU have an Anti-Discrimination Policy?

- **Article I. Purpose**
- Michigan State University's scholarly community-building efforts occur within the context of general societal expectations, as embodied in the law. The University, consistent with its policies and governing law, promotes institutional diversity and pluralism through mechanisms such as affirmative action, within an over-arching strategy promoting equitable access to opportunity. The University's commitment to non-discrimination is the foundation for such efforts

Why?

Underlying legal requirements

The ADP is how we comply with MSU's obligation under:

Title VI of the CRA	Race, color or national origin – federal \$
Title VII of the CRA	Race, color, religion, sex, national origin - employer
Title IX of the Education Amendments of 1972	Sex (et al.) – fed \$, including employment
Age Discrimination Act of 1975	Age – fed \$
Age Discrimination in Employment act of 1967	40+ - employer
Civil Rights act of 1991	Provides \$ damages in employment discrimination – employer
Equal Pay act of 1963	Sex based wage discrimination – employer (EEOC)
Exec. Orders 11246 & 13665	Engage in aff. action and not discriminate – race, sex, gender identity, national origin - Government contractor
Genetic Information nondiscrimination act of 2008	Discrimination based on genetic information – employer
Michigan Constitution Art I, S. 206	Prohibits discrimination and preferential treatment – race, sex, color, ethnicity, national origin – public employer, public education, public contractor

Why?

Underlying legal requirements (cont.)

The ADP is how we comply with MSU's obligation under:

Elliot-Larsen Civil Rights Act (MI)	Discrimination religion, race, color, national origin, age, sex, height, weight, marital status – MI employer and public entity
MI persons with Disabilities CRA	Disability – employment, housing, public accommodations, services, educational facilities
Pregnancy Discrimination Act	Pregnancy, childbirth or related medical conditions
Title I of ADA	Disability – employer w/ 15+ employees
Title II of ADA	Disability – public entity including education
Title III of ADA	Disability – place of public accommodation
Section 503 of Rehabilitation Act	Aff Action and discrimination people with disabilities – federal contractor / subcontractor
Section 504 of Rehabilitation Act	People with disabilities – federal \$
Web Content Accessibility Guidelines	Requirement for making web content accessible
Section 1557 of ACA	Discrimination on basis of race, color, sex, national origin, age or disability – health programs or activities

AND how we contribute to an environment of equity, justice and trust in our campus community.

Why?

Overlap between ISR and external civil rights claims


- EEOC claims
- MDCR claims
- OCR claims
- Litigation/pre-litigation

Who, Where, and When? Jurisdiction



Who is covered under the ADP, where, and when? Jurisdiction

- All University community members, including faculty, staff, students, registered student organizations, student governing bodies, the University's administrative units, and to the University's contractors in the execution of their University contracts or engagements
 - All educational, employment, cultural, and social activities occurring on the University campus;
 - University-sponsored programs occurring off-campus, including but not limited to cooperative extension, intercollegiate athletics, lifelong education, and any regularly scheduled classes;
 - University housing; and
 - Programs and activities sponsored by student governing bodies, including their constituent groups, and by registered student organizations.



What?

Protected Categories and Prohibited Treatment/Conduct

What Protected Categories are covered under the ADP?

Age	Color	Gender	(Gender Identity/Expression)	Genetic Information	Disability Status
Ethnicity	Height	Marital Status	National Origin	Political Persuasion	Race
	Religion	Sex (orientation and pregnancy)	Military/Veteran Status	Weight	

Prohibited Conduct/Treatment

- Discrimination
- Harassment
- Treatment of Protected Speech
- Retaliation
- Unequal Pay
- Inappropriate Limitation

Prohibited Conduct/Treatment

Discrimination

Discrimination is conduct that is based on an individual's protected identity or identities that:

- Harms a term or condition of an individual's employment or an individual's access to education or participation in a University program or activity (see definition of Adverse Action);
- Is used as the basis for, or a factor in, decisions of an individual's employment, education or participation in a University program or activity, except as required or permitted by law; or
- Results in differential enforcement of a facially neutral policy or practice.

Prohibited Conduct/Treatment

Disparate Treatment Discrimination

Step 1

- Direct Evidence - where a preponderance of the evidence establishes discriminatory intent without inference or assumption
- Indirect Evidence - whether a preponderance of the evidence establishes that
 - (1) Claimant asserts a claim based on their protected identity;
 - (2) Claimant suffered an adverse action; and
 - (3) other similarly situated individuals outside of the Claimant's protected identity were treated more favorably.

Prohibited Conduct/Treatment

Disparate Treatment Discrimination

Steps 2 and 3

- Evaluate whether there was a legitimate, nondiscriminatory reason for the adverse action
- Evaluate whether the legitimate nondiscriminatory reason was false, or a pretext, and discrimination was actually a motivating factor for the adverse action
 - Had no basis in fact;
 - Did not actually motivate the adverse action;
 - Was insufficient to warrant the adverse action.

Prohibited Conduct/Treatment

Disparate Impact Discrimination

- A facially neutral policy or practice had a disproportionate adverse effect on individuals of a protected identity;
- Whether there was a substantial legitimate justification for the policy or practice; and, if so;
- Whether there was an alternative policy or practice that would achieve the legitimate objective but with less of a discriminatory effect.

Prohibited Conduct/Treatment

Disability Discrimination

Includes:

- Disparate treatment insofar as the requested accommodations or modifications were denied as not reasonable under the applicable policy but were provided to another similarly situated person who does not share Claimant's protected identity;
- A failure or refusal to implement a granted modification or accommodation, and;
- Harassment or retaliation related to a modification or accommodation.

Prohibited Conduct/Treatment

Disability Discrimination

Step 1

Evaluate whether:

- (1) Claimant has a disability;
- (2) Is otherwise qualified to participate in the educational program or perform the essential functions of the job, with or without accommodation; and
- (3) Suffered an adverse action, or was excluded from participation in, denied the benefits of, or subjected to disparate treatment or disparate impact under the program by reason of their disability.

Prohibited Conduct/Treatment

Disability Discrimination

Steps 2 and 3

- Evaluate whether there was a legitimate, nondiscriminatory reason for the decision
- Evaluate whether the legitimate nondiscriminatory reason was false, or a pretext, and discrimination was actually a motivating factor for the adverse action
 - Had no basis in fact;
 - Did not actually motivate the adverse action;
 - Was insufficient to warrant the adverse action.

Prohibited Conduct/Treatment

Disability Discrimination

When there is a failure to accommodate

To demonstrate a failure to accommodate claim, the evidence must demonstrate that

- (1) Claimant has a disability;
- (2) Claimant is otherwise qualified for the job or educational program; and
- (3) Respondent failed to implement the accommodations/modifications in the Accommodation Letter.

Note: Whether an accommodation or modification constitutes a “fundamental alteration” or is “essential to the program of instruction” is decided by the ADA Coordinator in an appeal of the accommodation determination. The ADA Coordinator’s decision is final, and thus, not subject to review in an ADP investigation.

Prohibited Conduct/Treatment

Harassment

Unwelcome conduct that is based on the Claimant's an individual's protected identity or identities that unreasonably interferes with an individual's education or work environment such that it creates a hostile environment.

A hostile environment exists where a preponderance of the evidence establishes that:

- (1) Claimant was or is subject to unwelcome conduct based on a protected identity or identities that;
- (2) Is objectively and subjectively severe, persistent or pervasive; and
- (3) Creates an unreasonable interference with the individual's work or educational experience.

Prohibited Conduct/Treatment

Harassment Considerations

- Totality of the circumstances, including the nature of the behavior and the context in which it occurred, must be considered
- Often a pattern of offensive behavior, but single incident can be harassment based on severity and factors such as the:
 - Degree to which the conduct affected the student's education or the employee's work environment;
 - Type of conduct, and;
 - Relationship between the Respondent and Claimant
- Conduct does not have to be directed at a specific person or persons to constitute harassment
- Conduct must be objectively severe, persistent, or pervasive, and there must be a showing that Claimant subjectively perceived the conduct to be severe, persistent, or pervasive

Prohibited Conduct/Treatment

Harassment Definitions

Severe

- A great degree, significantly more than minimal

Persistent

- Repeatedly engaging in conduct

Pervasive

- Having a widespread presence in or impact on an environment

Unreasonable Interference

- a preponderance of the evidence must establish that the conduct interfered with Claimant's ability to do their job or altered their educational experience, and that this interference was unreasonable. Thus, the interference must be substantially disruptive. The conduct need not be so egregious, however, that it causes economic or psychological injury.

Prohibited Conduct/Treatment

Protected Speech/First Amendment

- ISR will not make a finding of responsibility on the basis of speech or expression that is protected by the First Amendment.
- The University also has an obligation under federal and state law to create an environment free from discrimination. As such, the University will respond, as outlined in this Policy, when the reported behavior impedes an individual's access to the University's programs or activities or creates a hostile environment.
- The University acknowledges that there will be instances where a community member will be impacted by an incident that is otherwise protected by the First Amendment. The University remains steadfast in its commitment to support a safe and inclusive environment for all community members and will, as appropriate, provide individual support to preserve and restore community members' access to the University's programs and activities.

Prohibited Conduct/Treatment

Protected Speech/First Amendment

- What can be protected speech:
 - Protests
 - Class discussions
 - Academic papers
 - Student newspapers
 - Residence halls
 - Performances
 - Bulletin boards
 - Commencement
 - Faculty Meetings
- Committee Meetings
- Staff Meetings
- Alumni Communications

Prohibited Conduct/Treatment

Unprotected Speech

- Incitement to commit violence - Directed to inciting or producing imminent lawless action and is likely to produce such action
- True threats - Serious expression of an intent to commit act of unlawful violence to particular individual or group with proof speaker had some subjective understanding of statement's threatening nature
- Fighting words - Words intended to incite an immediate breach of the peace or inflict injury.
- Obscenity - Typically boils down to whether the work, as a whole, lacks serious literary, artistic, political, or scientific value.
- Defamation - Communication of a false statement that harms the reputation of another.
- Hate Speech? – No exception...“The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar or profane.” (Iota Xi Chapter of Sigma Chi v. George Mason Univ., 1991) (addressing the Fighting Words doctrine).

Prohibited Conduct/Treatment

Retaliation

- A materially adverse action taken because of a person's protected activity.
- Whether a preponderance of the evidence establishes that:
 - (1) Claimant engaged in protected activity;
 - (2) Respondent had knowledge of the protected activity;
 - (3) Claimant suffered a material adverse action or was subject to severe, persistent or pervasive harassment, and;
 - (4) "But for" Claimant's protected activity, the material adverse action or severe, persistent, or pervasive harassment would not have occurred.

"But for" does not require that retaliation be the sole cause of the action.

An adverse action is an action that might have dissuaded a reasonable person from engaging in a protected activity.

Prohibited Conduct/Treatment

Retaliation – Protected Activity


A protected activity includes:

- A report of discrimination or harassment;
- Participation (or reasonable expectation of participation) in any manner in an investigation, proceeding, hearing, or interim or supportive measure under the ADP or RVSMTIX Policy;
- opposition to discrimination or harassment;
- request for accommodation related to disability, religion, pregnancy, childbirth or pregnancy related condition, and/or;
- student request for a modification related to pregnancy, childbirth, pregnancy related condition or parenting status.

Prohibited Conduct/Treatment

Other Covered Categories

- Inappropriate Limitation – Inappropriate limitation of employment or access to facilities and programs on the basis of protected identities.
 - Not directly related to a legitimate University purpose.
 - Includes:
 - Providing for the safety of University community members or the public;
 - Furthering the business of the University,
 - Complying with a legal mandate or another University policy, or;
 - Furthering an educational objective or a core value or the mission of the University.
- Unequal Pay Based on Sex - Requires that employees be paid equal pay for equal work
 - Must show: (1) Employees of the opposite sex were paid different wages; (2) for equal work on jobs requiring equal skill, effort, and responsibility that are; (2) performed under similar working conditions.
 - If shown, must then be a showing that the pay differential was justified by (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; or (4) a disparity based on any factor other than gender.



How...do we comply with and provide support under the ADP?

Process Overview



Reporting/Intake

Initial Assessment

Investigation

Findings, Appeal, Sanctions

Who is responsible	SIT	SIT/Investigator (in consultation with Director)	Investigator (in consultation with Director)	Investigator, Resolution Officer, Appeal Officer, ELR/FASA/OSSA
Goal	Get enough information to classify report; acknowledge report; identify related reports	Determine whether allegations warrant formal investigation	Obtain information necessary to make determination;	Communicate findings, allow appeal, accountability
Requirements	Respond to reports within 5 days	Notification group within 5 days	Notice requirements, share information, regular updates	ERO will give 10 day response window, and provide decision within 18 days after response window closes.
Notes	Sometimes called “informal investigation”			

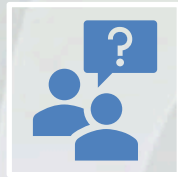
Structure, Purpose, Players

- Role of partners at every stage of the ISR process



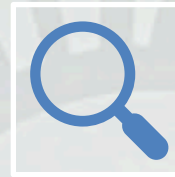
Reporting

- Mandatory/encouraged reporters
- MSU Police & Public Safety



Initial Assessment

- Notification Group
- Alternative Resolution Partners
- Human Resources records
- Unit administration



Investigation

- Notification group
 - Witnesses
- Alternative resolution partners
- Human Resources and other records



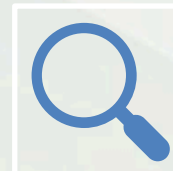
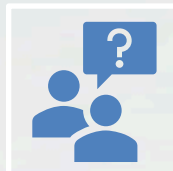
Findings, Appeal, Sanctions

- Equity Review Office
- Resolution Office (blend cases)
- Notification Groups (employee cases)
- Office of Student Support and Accountability

Process:

■ Community values embedded in ADP procedures

Privacy:	<ul style="list-style-type: none"> Investigations are kept as private as practicable. Notice, updates and final reports are shared only with parties and a pre-determined notification group. Information is shared with witnesses and community partners as-needed to facilitate the investigation, explore informal resolution, or implement appropriate supportive measures. ISR does not share information about sanctions arising from an ADP investigation.
Transparency:	<ul style="list-style-type: none"> All parties and witnesses are provided an explanation of ISR's processes and the applicable standard of proof prior to sharing any information with Investigators. All parties and witnesses are provided copies of an Investigator's summary of their statement and given the opportunity to make changes. All parties are provided with bi-weekly updates of case status throughout the investigation.
Parity:	<ul style="list-style-type: none"> Claimants and respondents are provided the same information about the ISR process and given simultaneous notice of case milestones. In a formal investigation, parties are given the opportunity to ask questions of one another through the Investigator.
Support:	<ul style="list-style-type: none"> All parties to an investigation are provided resources and given the opportunity to discuss interim and supportive measures with the Support and Intake Team.
Autonomy:	<ul style="list-style-type: none"> Participation in an investigation under the ADP is voluntary. A party's decision not to participate or not to be interviewed will not be given an adverse inference in the investigation process. A party can choose to pursue informal resolution in lieu of an investigation, with the agreement of all parties to the process.
Accountability:	<ul style="list-style-type: none"> ISR will provide information to the appropriate supervisory and human resources unit (employee respondents) and the Office of Student Support and Accountability (student respondents) with information discovered in the course of an investigation. Information contained in reports and closing letters can be used by these offices to craft sanctions and remedies that are proportional to the situation and consistent across the University community.



Process: Reporting and Intake

- Reporting Form
- Phone calls
- Walk in reports
 - Input (duplicate?)
 - SIT notice?
 - Safety risk?
 - Additional info?
 - Title IX?
 - Outreach (Claimant and reporter)
 - Notice to other units – PD, OISS, HCI
 - Referrals
 - Closure / Assignment



Reporting



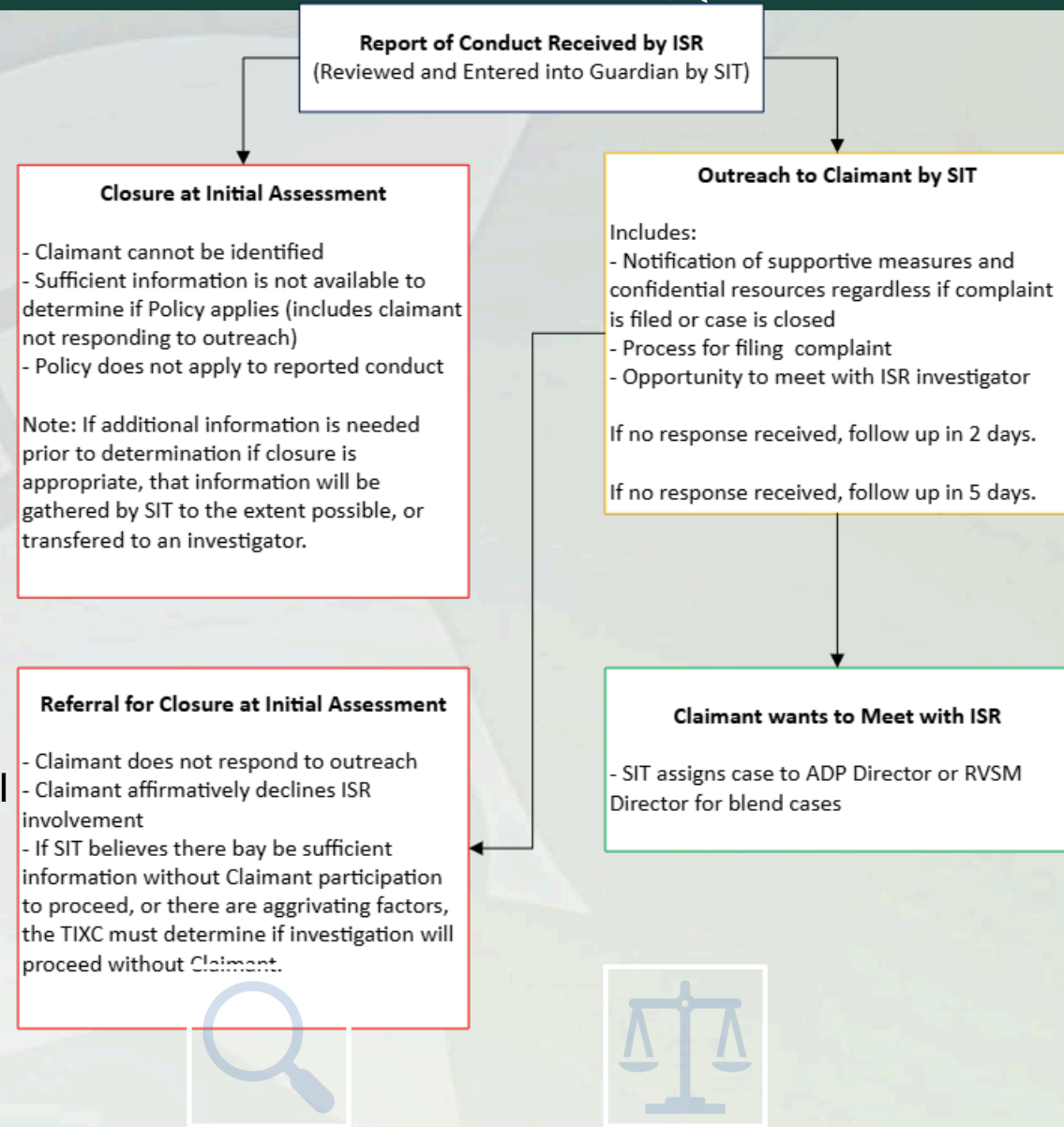
Initial Assessment



Investigation



Findings, Appeal, Sanctions



Process: Initial Assessment (SIT/Investigator)

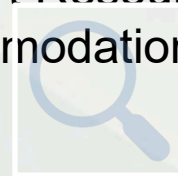
- Notifications
- Claimant Outreach
- Initial Claimant Meeting
- Assignment to Investigator
- ISR role / Party role
- Advisor / Support
- Non-confidentiality and sharing of information
- Interim and Protective Measures
- Informal resolution
- Investigation Process
- Timeline
- Preponderance of the Evidence Standard
- Retaliation
- Support Resources
- Accommodations



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Process:

Initial Assessment: Closing letter / Informal resolution

Closing letter

- Appropriate when the allegations, even if proved, would not violate the ADP.
- Addressed to Claimant
- Recaps the information provided
- Explains the standard being evaluated and analyzes the provided information – stopping where an element is not met.
- Sent to Claimant (and Respondent if interviewed) and notification group
- Cannot be appealed



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Process: Investigation

■ Investigation includes:

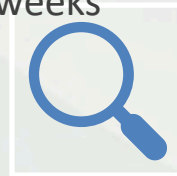
- Interviews of Claimant and Respondent
- Interviews of Witnesses identified by either party.
- Collection and review of relevant documentation and other evidence
- Compilation of Preliminary Investigative Report
- Parties' review of Preliminary Investigative Report
- Final Investigative Report



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Notes / FAQ:

- relevant documentation might include
 - Personnel files
 - Contemporaneous communication
- Do you need to interview everyone suggested?
 - Don't generally use opinion-based "character evidence"
 - Don't need to interview multiple people for the same information unless disputed fact
- Preponderance of the evidence standard
- Updates to parties and notification group every two weeks

Process:

- Findings
- After a formal investigation and FIR, ISR may find either:
 - The Respondent violated the ADP by a preponderance of the evidence
 - Finding that there is insufficient evidence to conclude that the Respondent violated the ADP by a preponderance of the evidence
 - In addition to the outcome, ISR may make factual determinations about what was more likely than not to have occurred- these factual findings may be relevant to the Unit for follow up under other policies

Please Note:

- Regardless of the outcome, the FIR is forwarded to the respondent employee's unit/HR for follow up under other policies as deemed appropriate by the unit
- Generally, ADP FIR's that do not result in a finding are not kept in the employee's personnel file UNLESS there is an issue regarding gender dx/retaliation from gender dx
- See MSU HR Personnel File Policy: <https://u.policies.msu.edu/doctract/documentportal/08DB621230EC5D8A08F7D20AF8DC9F4D>
- ISR's finding that there was no a finding of responsibility is not an "acquittal." These reports are referred to the Unit/HR and there is often follow up under other University policies addressing employee conduct
- Make sure to copy Jenelle Austin (ocr.jenelleaustin@msu.edu) and Equity Review Officer (ero@msu.edu) to any FIR, regardless of the outcome



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Process:

■ Appeal

- All parties have the right to appeal from a formal report (FIR)
 - There is no right to appeal from a close letter
- Appeals are sent directly to the ERO, not the Investigator
 - Equity Review Officer- Aislinn Sapp – ero@msu.edu
- ADP Appeal Procedures can be found here: https://civilrights.msu.edu/_assets/documents/adp-appeal-procedures.pdf
- Appeal info is included in the template to the parties along with the FIR (Make sure you have the right template based on info below ↓)
- The appeal process is slightly different based on the respondent's status and the result:
 - Respondent employee + Finding or No-Finding = appeal within 10 days of FIR to ERO
 - Student Respondent + No Finding = appeal within 10 days of FIR to ERO
 - Student Respondent + Finding = Matter referred to Dean of Students Office for decision on sanction. Within 10 days of the sanction decision, both parties can appeal the ISR decision and the sanction simultaneously to the ERO



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Process:

■ Appeal standards:

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The 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; and/or
- The written decision was arbitrary and capricious. A decision or finding is arbitrary and capricious when the application of the policy has no reasonable basis in fact.
- Other notes with appeals –
 - The burden of proof is on the party filing the complaint
 - New evidence will not be considered at appeal stage unless the party can show that the information is substantive and relevant to the investigation, was previously unavailable to the party submitting it, and the party acted with due diligence to obtain the evidence
 - Requests for extension of any deadlines should be forwarded to the ERO, who will consider such requests



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Process:

■ Potential Outcomes After Appeal-

- Uphold ISR's finding;
- Determine that procedural irregularity occurred and affected the outcome and remand the matter to ISR with instructions to remedy the procedural irregularity;
- Determine that the finding is arbitrary and capricious as written and remand to ISR to issue a revised finding;
- Determine that substantive and relevant new evidence has been presented that warrants additional investigation or review by ISR; or
- Overturn or modify the investigation finding based on a determination that the decision was arbitrary and capricious or resulted from procedural error
- In appeals of a student sanction, the Equity Review Officer may uphold the sanction or alter the sanction if it is determined that the sanction is clearly inappropriate or is not commensurate with the seriousness of the offense.

Process:

■ Sanctions

- Sanctions for Students-
 - Office of Student Support and Accountability (OSSA) determines sanctions for students
 - OSSA will notify parties of the opportunity to submit a sanction recommendation
 - OSSA will make a sanction decision based on a consideration of all circumstances in a particular case, and can include:
 - Warning
 - Educational Program/Activity
 - Change of Residence
 - Probation
 - Restitution
 - Disenrollment
 - Suspension
 - Dismissal



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Process:

- Potential sanctions for Students include-
 - Warning
 - Probation
 - Restitution
 - Change of Residence
 - Disenrollment from a course
 - Suspension
 - Dismissal
 - Other- student may be required to complete an educational program or activity
- Timelines
 - OSSA renders its sanction decision
 - Once notified, the parties have 10 calendar days to appeal OSSA's sanction and the ISR finding to the ERO
 - Sanctions are implemented 7 days after the appeal deadline terms with no filing of an appeal or 7 days from the ERO's decision

Process:

- Sanctions for Employees-
- Sanctions for employees are determined by the unit in consultation with the applicable HR unit (FASA or ELR)
- OCR/ISR does not generally make recommendations about discipline for an employee
- If there is any follow up from an ISR FIR – FASA and ELR will forward that information to ISR to include in ISR's case file
- Any sanction from the unit after a finding from ISR will be documented in the Decision and Sanctions section in Emerald

Similarities and Differences with RVSMTIX

Same

- Reporting Process
- Access to Supportive & Interim Measures
- Retaliation Protections
- Regulated by federal laws
- Aims to protect campus community from harm

Different

- Mandatory reporting across MSU / strongly encouraged
- Timing of notifications
- Availability of advisors
- Hearing / no hearing process
- Students: Governing rules do not allow for sharing of findings/sanctions
- Employees: What is kept in the personnel file
- Sanctioning process for students



Thank you!

