



Title IX Hearing Officer/Decision Maker  
Training  
December 2021

# Policy 311-A

December 2021

# Introduction

Vermont State Colleges has several policies to address our obligations relating to specific legal challenges: sexual misconduct, discrimination, harassment, and abuse of minors.

This training will provide The Title IX/Policy 311-A Hearing Officer(s) with an overview of these policies, as well as provide specific information regarding a Hearing Officer's role.

# Overview

- Current Title IX regulations effective August 14, 2020
- Policy 311-A (sexual harassment/assault policy)

# TITLE IX REGULATIONS

# Title IX

- Prohibits discrimination on the basis of sex in any federally-funded education program or activity
- Protects ALL students
- Protects ALL employees
- Enforced by Dept. of Education's Office for Civil Rights

# Title IX and Current Regulations

- The definition of Title IX sexual harassment covers:
  - A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called **quid pro quo harassment**)
  - Unwelcome conduct on the basis of sex that is so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school's education program or activity
  - **Sexual assault**, as defined under the Clery Act

# Clery Act: The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

- Requires all colleges and universities that participate in federal financial aid programs to keep and report information about crime on or near their campuses.
- Employees designated as Campus Security Authorities under the Act are required to report certain crimes to their campus Office of Public Safety to comply with the Act.
- The Offices of Public Safety for the member Colleges will include any reported incidents of **dating violence, domestic violence, sexual assault, and stalking, along with other crimes**, in the campus daily crime log and annual security report, as required by the Clery Act.
- Public Safety also responsible to issue timely warnings of crimes or threats to the VSC community or if it becomes aware of such reports made to local law enforcement.
- No personally identifying information is included in the public reports required by the Act.



# Title IX and Current Regulations

Schools obligated to respond to complaints when:

1. The school has actual knowledge of sexual harassment;
2. that occurred within the school's own "education program or activity";

*This means conduct occurs in a location, at an event, or in a circumstance where VSC exercises substantial control over both the respondent and the context in which the conduct occurs*

3. against a "person in the United States."

# POLICY 311-A

# Title IX at VSC: Policy 311-A

VSC addresses Title IX through Policy 311-A, which has the following Policy Statement:

*The VSC is committed to maintaining an educational and working environment free from all forms of sex discrimination, including sexual harassment ... and committed to maintaining an educational and working environment free from sexual exploitation, domestic violence, dating violence, sexual assault, and stalking.*

# Policy 311-A

- VSC Policy 311-A: *Sexual Harassment, Sexual Exploitation, Domestic Violence, Dating Violence, Sexual Assault, and Stalking*
  - Defined **scope of coverage**
  - Includes a prohibition on “retaliation”
  - Terms throughout
    - “complainant”
    - “respondent”

# Policy 311-A: Scope of Coverage

- Controlling definition: **Prohibited Conduct**
  - **Title IX Sexual Harassment**
    - Within VSC “program or activity”
      - » exercises substantial control over both the respondent and the context in which the conduct occurs
      - » in any building owned or controlled by a student organization recognized by VSC
    - Within the United States
  - **Non-Title IX Sexual Misconduct**
    - Nearly identical definitions BUT can include off-campus conduct (outside “program or activity”)

# Policy 311-A: Scope of Coverage

## Title IX & Non –Title IX Sexual Harassment includes:

- Quid Pro Quo Sexual Harassment
- Severe, Pervasive and Objectively Offensive Sexual Harassment
- Sexual Assault
- Domestic Violence
- Dating Violence
- Sex-based Stalking

# Policy 311-A: Scope of Coverage

- **Non-Title IX Sexual Misconduct**
  - Same conduct as Title IX Sexual Harassment, but broader application, outside “programs or activities”

# **POLICY 311-A IMPLEMENTING PROCEDURES**



# Policy 311-A: Implementing Procedures

- Provides supportive measures
- Spells out the process for
  - Receiving reports and initial review of allegations
  - Sending out notice to parties
  - Investigation (interviews, gathering evidence)
  - Drafting and reviewing investigation report
  - Live hearing and adjudication of responsibility
  - Sanctions and appeals

# Policy 311-A: Implementing Procedures

Two Outcomes:

– Formal Decision

– Informal Resolution

- Only if all parties and Title IX Coordinator agree it would be appropriate
- Could use mediation or restorative justice model

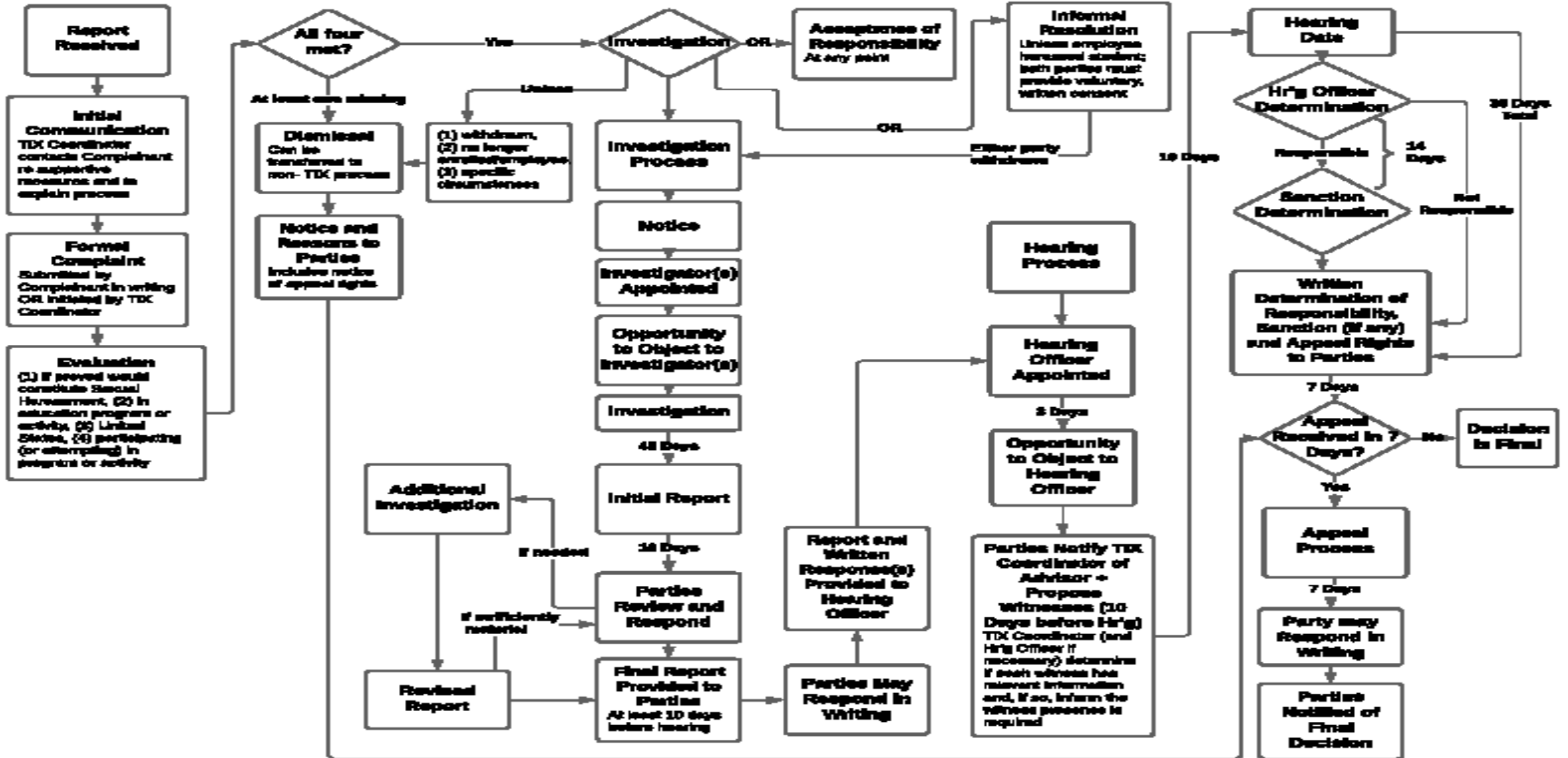
# WHO MAKES THE FORMAL DECISION IN TITLE IX/311-A MATTERS?

Policy designates the Hearing Officer to determine responsibility and the Responsible College Administrators (RCA) to determine sanctions (if appropriate), as follows:

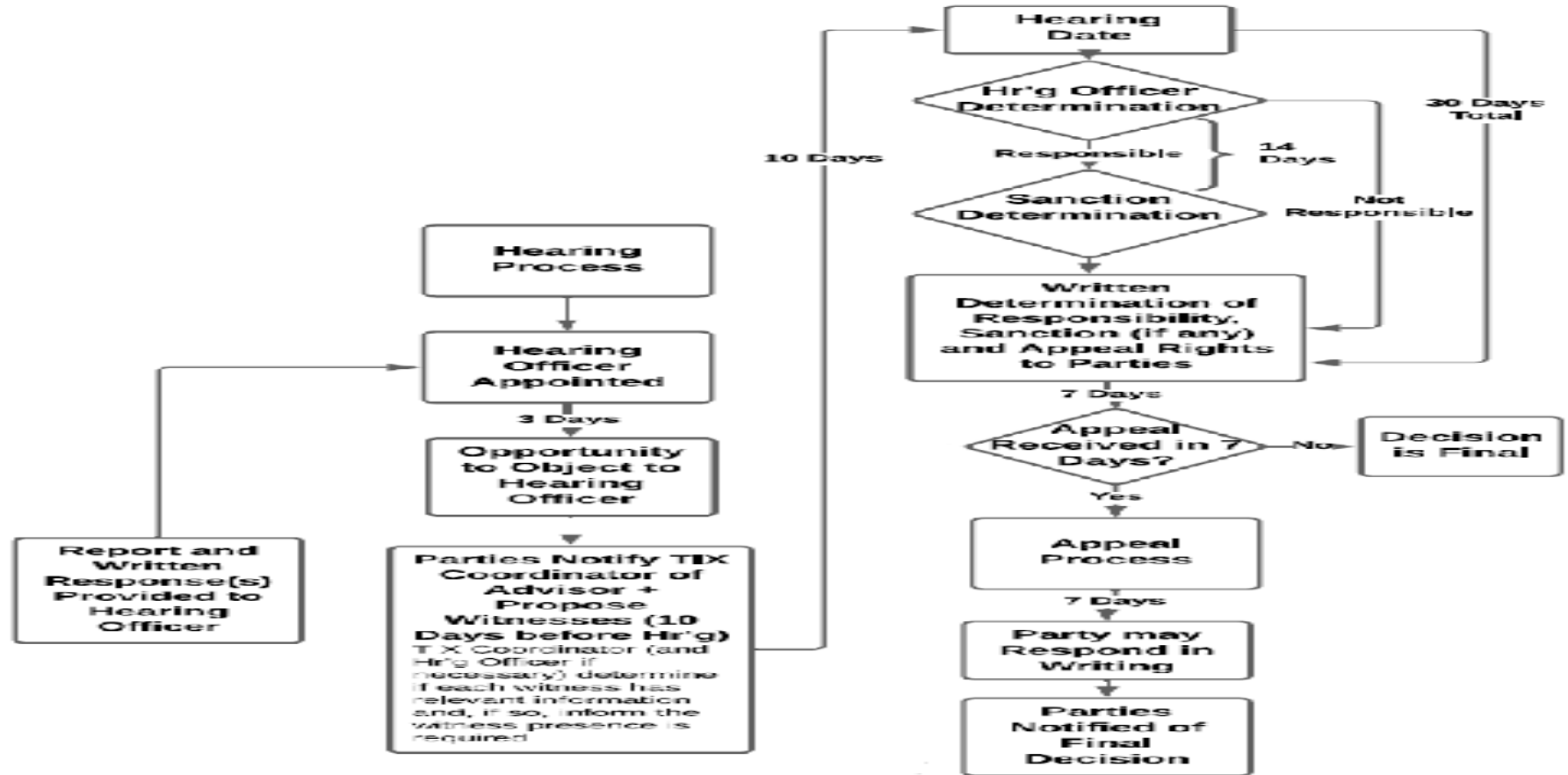
- Complaints involving students → RCA Dean of Students/designee
- Complaints involving employees → RCA President/designee
- Complaints involving Chancellor or Trustee → RCA Board Chair

# PROCESS

# THE PROCESS



# HEARING PROCESS FOCUS



# THE HEARING

# THE HEARING OFFICER

- Serve impartially
  - Avoid prejudgment of the facts at issue, bias, and conflicts of interest
- Preside over the hearing
- Objectively evaluate all relevant evidence
  - Inculpatory & exculpatory
- Independently reach a determination regarding responsibility
  - Cannot give deference to an investigation report



# THE HEARING

- Live – virtual or physically present
- With Cross-Examination
  - *An opportunity for the Hearing Officer to ask questions of parties/witnesses, and to observe how parties/witnesses answer questions posed by the other party*
- Results in a determination of responsibility

# REQUIRED RECORDING

- An audio or audiovisual recording and/or transcript of the live hearing must be created
- The recording or transcript must be made available to the parties for inspection and review
  - This **does not** create an obligation to send the parties a copy of the recording or transcript

# PRESENTATION OF RELEVANT EVIDENCE

# PRESENTATION OF RELEVANT 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.”

# RELEVANCE DETERMINATIONS

- Relevance is not defined in the regulations
- Per the Regulations:
  - Ordinary meaning of relevance should be applied throughout the process
  - Fact determinations reasonable can be made by layperson recipient officials impartially applying logic and common sense
  - Relevant evidence must include inculpatory and exculpatory evidence

# RELEVANCE

- Having significant and demonstrable bearing on the matter at hand
- Affording evidence tending to prove or disprove the matter at issue or under discussion
- Relevant evidence cannot be excluded
- Relevant evidence must be considered
- Irrelevant evidence must not be considered

*\*The hearing officer will not draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.*

# INADMISSIBLE AS IRREVELANT

- 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 (absent two exceptions)

# HEARING OFFICER DISCRETION

If a party or witness does not submit to cross-examination at the live hearing, the hearing officer has discretion, upon evaluation consistent with applicable legal principles, to rely on any statement of that party or witness



# RAPE SHIELD

- Prohibits questions or evidence about a Complainant's sexual behavior, except if:
  - offered to prove someone other than the Respondent committed the alleged offense
  - Except explicitly about the parties and offered to prove consent (cannot include sexual behavior with a person other than the Respondent)
- All questions and evidence of Complainant's sexual predisposition (not defined in regulations) are irrelevant
  - Sexual predisposition may include sexual orientation, sexual preferences, and a person's propensity to engage or not to engage in sexual activity of various types

# RAPE SHIELD RATIONALE

- To protect Complainants from harassing and irrelevant questions
- Does not apply to Respondents. Prior sexual behavior and sexual predisposition questions to Respondent are subject to the relevancy standard.

# POLICY 311-A DEFINITION OF CONSENT

- Words or actions that demonstrate to a reasonable person a knowing and voluntary agreement to engage in mutually agreed-upon sexual activity.
- Cannot be gained by threat, force, coercion or intimidation or by ignoring words or actions that indicate a lack of consent or objection to the activity.
- Consent to one form of sexual activity does not imply consent to other forms of sexual activity.
- Consent can be rescinded at any time.
- Silence, lack of protest, or lack of resistance are not sufficient standing alone to establish consent.

# RELEVANCE APPLIED

- Questions asked must be relevant
- Hearing officer determines whether the question is relevant
  - An explanation is required if the hearing officer deems the question not relevant
- Short explanation is acceptable
- **Before** a party or witness **answers** a cross-examination question, the hearing officer will first determine whether the question is relevant

# CHALLENGING RELEVANCY

Advisors/Parties are NOT permitted to object to hearing officer decisions regarding relevancy DURING a hearing.

*\*Note: Parties must be afforded the opportunity to challenge relevance determinations. However, not during the hearing.*

# CROSS-EXAMINATION AND ADVISORS

- Cross–examination: Advisor asks other party and witnesses relevant questions and follow-up questions, including those challenging credibility
- Hearing Officer must permit cross-examination
- An advisor must be provided by VSC (or member institution) of the party does not have a chosen advisor to conduct cross-examination

# ADVISOR'S ROLE

- Respectful and professional conduct is expected
- Advisors may confer privately and in a non-disruptive manner with their respective party
- Advisors are not allowed to make opening statements or otherwise address the hearing officer or anyone else present at the hearing

# CONDUCT OF HEARINGS

- Subject to the **discretion** of the hearing officer:
    - Hearings will ordinarily begin with introductory remarks by the Hearing Officer
    - Followed by opening statements from any party who wishes to provide one
    - Followed by the Hearing Officer's asking relevant initial questions of the parties as deemed appropriate by the Hearing Officer
- \*During this portion of the hearing, advisors may confer privately and in a non-disruptive manner with their advisee, but they are not allowed to make opening statements or otherwise address the hearing officer or anyone else present at the hearing.



# CONDUCT OF HEARINGS CONT'D

- After the Hearing Officer has asked their initial questions of the parties, the hearing officer will:
  - permit each party's advisor to ask the other party all relevant questions and follow-up questions, including those challenging credibility
  - Subject to the discretion of the hearing officer, questioning of witnesses will generally follow a similar process
- At the discretion of the hearing officer, parties (but not their advisors) will usually be given an opportunity to make a closing statement at the conclusion of the hearing

# ASSESSING EVIDENCE

- Hearing Officer assigns weight and credibility to evidence
  - Ex. Where a cross-examination question is relevant, but concerns a party's character, the Hearing Officer must consider the evidence, but may proceed to objectively evaluate it by analyzing whether the evidence warrants a high or low level of weight or credibility
- Treat parties equally
  - Ex. Hearing Officer must not automatically assign higher weight to exculpatory character evidence than to inculpatory character evidence

# THE DETERMINATION

- Hearing Officer will must make the determination regarding responsibility
- Preponderance of the evidence standard applied
- Prepare a written determination
- Sanction(s) on the Respondent (if necessary) will be imposed by the RCA upon review of, or in collaboration with, the Hearing Officer's determination

# THE DETERMINATION : IMPORTANT CONSIDERATIONS

- Respondent must be presumed not responsible
- Determination is based on an objective evaluation of all relevant evidence (including inculpatory and exculpatory)
- Credibility is not determined by an individual's status as a Complainant, Respondent, or a witness.

# REQUIREMENTS OF WRITTEN DETERMINATION

- Identify the VSC's Policy 311-A alleged to have been violated
- Describe the procedural steps taken from the receipt of the complaint through the determination
- Findings of fact supporting the determination
- Conclusions regarding the application of definition in VSC's Policy 311-A to the facts
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility
- Identify VSC's appeal's basis and process

# VSC's Title IX/Policy 311-A Website

<https://resolve.vsc.edu/>

# VSC

# Questions?