ATIXA
Association of
Title IX Administrators
March 2021
Title IX Hearing Officer and Decision-Maker
Training and Certification Course

TNG Strategic Risk Management Solutions

Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

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AGENDA

1. Title IX Basics
2. Decision-maker Role
3. Due Process
4. The Title IX Process
5. Bias, Conflicts of Interest, & Recusal
6. Preparing for the Hearing

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AGENDA

7 Hearing Logistics

8 Decision-making Skills Part I

9 Relevance Exercise

10 Decision-making Skills Part II

11 Policy Terminology

12 ATIXA Consent Construct

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AGENDA

13 Questioning Skills

14 Questioning Activity

15 Making a Decision

16 Appeals

17 Recordkeeping and Documentation

18 Scenarios (Time Permitting)

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TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (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 educational program or activity receiving federal financial assistance."

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THE IX COMMANDMENTS

INVESTIGATION (plus **prompt** & **fair** per VAWA Sec. 304)	**Thorough**	**Reliable**	**Impartial**
PROCESS	**Prompt**	**Effective**	**Equitable**
REMEDIES	Not act unreasonably to stop discrimination	Not act unreasonably to prevent recurrence	Act equitably to remedy effects

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WHAT IS YOUR MISSION AS A DECISION-MAKER?

- Decision-maker Responsibilities
- Decision-maker Competencies

HEARING OFFICER/DECISION-MAKER RESPONSIBILITIES

Rank your Top 3 **responsibilities** as a Decision-maker.
Identify what you consider least important

	Your Rank	Group Rank
▪ Finding the truth		
▪ Providing a just result		
▪ Providing an educational process		
▪ Making a safe community		
▪ Upholding the institution's policy		
▪ Ensuring a fair process		
▪ Protecting the institution from liability		
▪ Punishing wrongdoing		

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THE GOAL

AN EQUITABLE RESULT FROM AN EQUITABLE PROCESS

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WHAT DOES IT MEAN TO BE A "DECISION-MAKER?"

- New Title IX regulations require a "Decision-maker" to determine whether a Respondent has violated policy
  - May be a single person (a/k/a "Hearing Officer")
  - May be a panel of Decision-makers
  - May be internal or external individuals
- Required separation of roles
  - Title IX Coordinator may not serve as "Decision-maker"
  - Investigator(s) may not serve as "Decision-maker"
- Appellate Decision-maker is a separate role
  - May also be a single person or panel; previously uninvolved

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WHEN AND HOW THE "DECISION-MAKER" WORKS

- Required live hearing for colleges and universities
  - May take place in person; however, must provide an option for a video conference
  - Key new element is that the parties may cross-examine each other and witnesses, through an Advisor

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HEARING OFFICER/DECISION-MAKER COMPETENCIES

- Legal Landscape
- Conduct/Disciplinary Process
- Understanding Investigations
- Title IX & VAWA Requirements
- Pre-Hearing Evidence Review
- Pre-Hearing Investigation Report Review
- Critical Thinking Skills
- How to Prepare for a Hearing
- Hearing Decorum
- Questioning Skills
- Relevance
- Weighing Evidence
- Analyzing Policy
- Applying Standards of Evidence
- Technology Used at Hearing
- Controlling Evidence
- Managing Advisors
- SANE and Police Reports

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HEARING OFFICER/DECISION-MAKER COMPETENCIES (CONT.)

- Presumption of Innocence
- Due Process and Fairness
- Bias/Impartiality/Conflicts of Interest
- Stalking/Sexual Assault/Harassment
- Domestic/Dating Violence
- Discrimination
- Deliberation
- Sanctioning/Remedies
- Understanding the Appeal Process
- Cultural Competency
- Intersection with Mental Health Issues
- Concurrent Criminal Prosecutions
- Impact of Failing to Testify/Answer
- Drawing Inferences?
- Manage Accommodations During Process
- Fixing Procedural Deviations
- Managing Impact Statements
- Writing Decisions/Rationales
- Role in Appeal Process?

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THE CHALLENGE FOR HEARING OFFICERS/DECISION-MAKERS

- Community standards identify what constitutes sexual harassment within your community
  - The definitions and procedures used may be impacted by Title IX requirements
- It is not a question of right and wrong, but whether there has been a policy violation, proven by the standard of evidence
- Your role is to impartially uphold the integrity of the process
- You may not agree with your policy, but you must be willing to uphold it

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REMEMBER, YOU HAVE NO "SIDE" OTHER THAN THE INTEGRITY OF THE PROCESS, AND YOU REPRESENT THE PROCESS.

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DUE PROCESS

- Substantive Due Process
- Procedural Due Process
- Evidentiary Standards

WHAT IS DUE PROCESS?

- **Substantive** and **Procedural** Due Process (DP)
  - Rights-based protections that accompany disciplinary action by an institution with respect to students, employees, or others
  - Informed by law, history, public policy, culture etc.
- DP in criminal and civil courts vs. DP within an institution
- DP analysis and protections have historically focused on the rights of the Respondent
- A sexual assault can be a legal deprivation of a Complainant's substantive due process rights
- Perceptions of "due process" can be connected to perceptions of legitimacy of a process's outcome

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"PROCEDURAL DUE PROCESS" - ARE YOU FOLLOWING YOUR PROCESS?

Procedural Due Process:

- Consistent, thorough, and procedurally-sound review of all allegations
- Substantial compliance with written policies and procedures
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws
  - Clear, written notice of the allegations
  - Opportunity to present witnesses and evidence and be heard by the Decision-maker

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"SUBSTANTIVE DUE PROCESS" - DUE PROCESS IN THE DECISION ITSELF

Due Process in Decision

- A decision must:
  - Be appropriately impartial and fair (both finding and sanction)
  - Be neither arbitrary nor capricious
  - Be based on a fundamentally fair rule or policy
  - Be made in good faith (i.e., without malice, ill-will, conflict, or bias)
  - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence

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DUE PROCESS PROCEDURAL RIGHTS IN 2020 TITLE IX REGULATIONS

Right to:

- Present witnesses, including fact and expert witnesses
- Present and know inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Have others present during any grievance proceeding/meeting
- Be accompanied to any related meeting or proceeding by an Advisor of their choice, who may be, but is not required to be, an attorney

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DUE PROCESS PROCEDURAL RIGHTS IN 2020 TITLE IX REGULATIONS (CONT.)

Right to:

- Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Inspect and review evidence and draft investigation report before finalized
- Right to argue for inclusion of "directly related" evidence at the hearing
- Ask relevant questions of the other party and witnesses through an Advisor, in the presence of the Decision-maker

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EVIDENTIARY STANDARDS

- **Clear and convincing evidence**: it is highly probable that policy was violated
  - Highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.
  - 65% 75% 85% – part of the problem with this standard is there is no real consensus on how to quantify it.

- **Preponderance of the evidence**: it is "more likely than not" policy was violated
  - The only equitable standard
  - 50.1% (50% plus a feather)
  - The "tipped scale"

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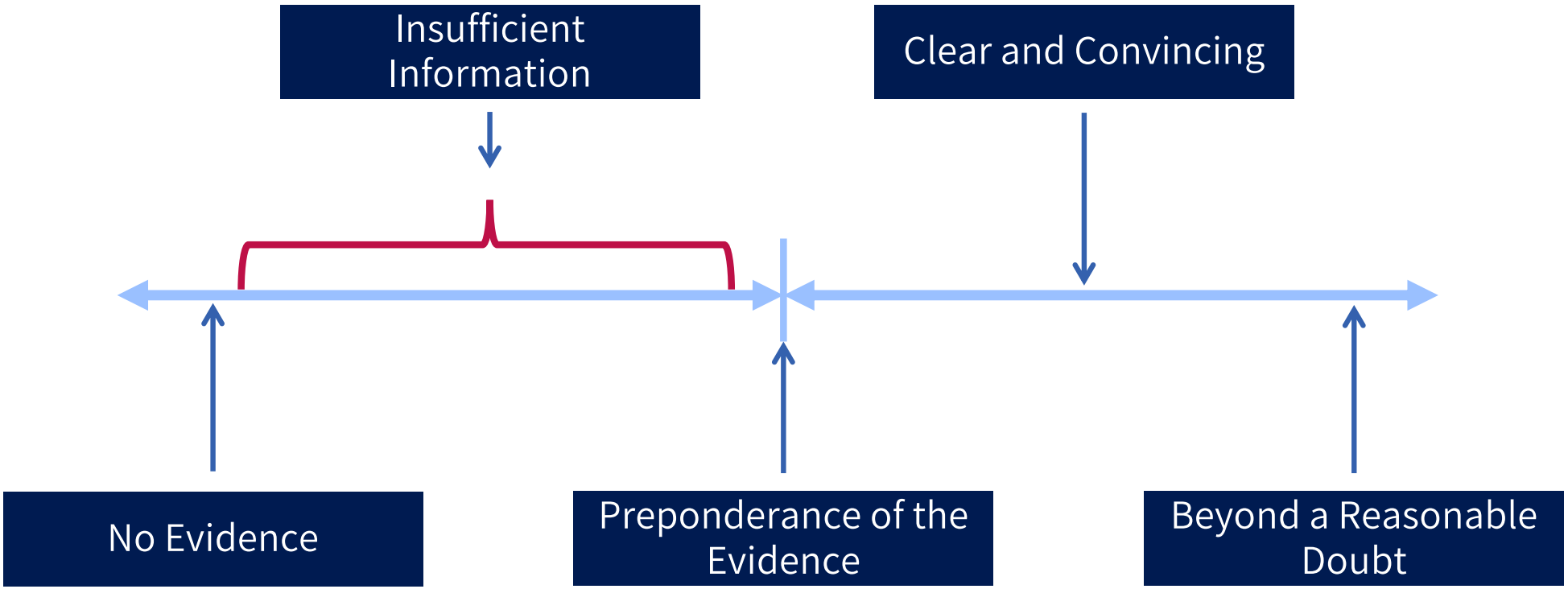
EVIDENTIARY STANDARDS



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THE "TITLE IX PROCESS": WHAT HAPPENED BEFORE IT GOT TO A HEARING?

- The General Phases of a Title IX Process
- Ten Steps of an Investigation
- Key Elements from 2020 Title IX regulations

THE PROCESS

- Complaint or Notice to TIXC
- Strategy development

- Jurisdiction
- Dismissal
- Policy violation implicated?
- Reinstatement?
- Informal or formal resolution?

- Notice to Parties
- Identification of witnesses
- Interview scheduling
- Evidence collection
- Report drafted
- Evidence & report shared
- Investigation report finalized

- Determination
- Cross-examination
- Sanction?
- Remedies

- Standing?
- Vacate?
- Remand?
- Substitute?

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10 STEPS OF AN INVESTIGATION

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation to Parties/Notice of Formal Allegation ("Charge")
5. Establish investigation strategy
6. Formal comprehensive investigation
   - Witness interviews
   - Evidence gathering

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10 STEPS OF AN INVESTIGATION (CONT.)

7. Draft report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report & evidence
9. Provide all evidence directly related to the allegations to parties and their advisors for inspection and review with 10 days for response
10. Complete final report
    - Synthesize and analyze relevant evidence (may include making recommended findings or conclusions)
    - Send final report to parties for review and written response at least 10 days prior to hearing

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 1

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
  - Be sent to each party and Advisor
  - Be in an electronic format or hard copy
  - Include evidence upon which the Recipient does not intend to rely
  - Include exculpatory and inculpatory evidence
  - Be made available at any hearing
- After sending the evidence, the Investigator must:
  - Allow 10 days for written response
  - Consider response prior to completion of report

Source: § 106.45(b)(5)(vi)

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EVIDENCE & REPORT REVIEW BY PARTIES PART 2

At least 10 days prior to making a determination regarding responsibility (hearing):

- The final investigation report summarizing relevant evidence must be sent:
  - To each party and Advisor
  - In an electronic format or hard copy
  - For the parties' review and written response
  - Best Practice: Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties

- For K-12 schools, with or without a live hearing, this review is followed by, or in conjunction with, the exchange of relevant written questions and responses facilitated by the Decision-maker

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ADVISORS

- Advisor can be anyone; no restrictions in the regulations
  - Already required under VAWA
- If a party chooses an Advisor who is also a witness, you will need to assess how that impacts their credibility as a witness
- If a party does not have an Advisor to conduct cross-examination at the live hearing, the institution must provide an Advisor of **the institution's** choice without fee or charge to the party.
  - Not required to be an attorney
  - No prior training required; no mandate for institution to train

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ADVISORS (CONT.)

- Institutions may limit the role of Advisors during the hearing except for cross-examination and conferring with the party
- Advisors **chosen by** the party should conduct cross-examination
  - Can opt not to ask any questions
  - If they refuse to ask questions their advisee wishes them to ask, the institution will appoint an Advisor who will
- An Advisor **appointed for** the party will conduct cross-examination

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ADVISORS (CONT.)

- The regulations envision that the Advisor will not do more than repeat or rephrase questions framed by the party, but in many hearings, expect that the Advisor will be far more active and engaged than that

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PRESUMPTION OF NON-RESPONSIBILITY

- Title IX regulations require that published grievance procedures include a statement of a presumption of non-responsibility for the Respondent until a final determination is made
  - Hopefully this is not new; evidence should have always driven determinations
- What would it mean to presume neither "guilt" nor "innocence?"
  - How does a presumption work in light of an affirmative consent policy?
  - How is presumption of non-responsibility different than no presumption?
  - What does it take to overcome a presumption?

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TRAINING MANDATES

- The definition of sexual harassment in § 106.30
- How to apply definitions used by the Recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45
- Understanding the scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes

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TRAINING MANDATES (CONT.)

- How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Issues of relevance to create an investigation report that fairly summarizes relevant evidence.

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LIVE HEARING

- Regulations mandate live hearing for higher education
  - Virtual hearings are permitted
- Must create audio/audiovisual recording, or transcript, of hearing and make it available to the parties for inspection and review.
- Parties must attend hearing, otherwise **all statements** made by absent (or non-testifying) party must be excluded.
  - What are considered "statements" and what effect will this rule have?
- Will there be a facilitator role? Who? What do they do?

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LIVE HEARING (CONT.)

- Must allow live cross-examination to be conducted exclusively by each party's Advisor (separate rooms still allowed)
- Questions come from Advisors, panel (if any), and Chair

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BIAS, CONFLICTS OF INTEREST, & RECUSAL

CONFLICT OF INTEREST, OBJECTIVITY, & BIAS

- Existing mandate for impartial resolutions with fair procedures
  - Impartial, objective, unbiased, neutral, independent
  - What do each of these mean and how do we bring these qualities to our decision-making?
- Regulations prohibit conflicts-of-interest or bias with Coordinators, Investigators, and Decision-makers against parties generally or an individual party
  - What creates a conflict?
    - How can you assure that you don't have one?
  - Has your institution given you sufficient independence?

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BIAS

- Among the most significant problems for Decision-makers
- Bias can represent any variable that improperly influences a decision
- Forms of bias and prejudice that can impact decisions:
  - Pre-determined outcome
  - Partisan approach by investigators in questioning, analysis, or report
  - Partisan approach by Decision-makers in questioning, findings, or sanctions
  - Intervention by senior-level administrators, or external sources

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BIAS (CONT.)

- Forms of bias and prejudice that can impact decisions:
  - Not staying in one's lane
  - Improper application of institutional policies or procedures
  - Confirmation bias
  - Implicit bias
  - Animus of any kind, including race, religion, disability, etc.

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BIAS AND CONFLICT OF INTEREST

- Types of conflicts/bias:
  - Wearing too many hats in the process
  - Legal counsel as Investigator or Decision-maker
  - Decision-maker who is not impartial
  - Biased training materials; reliance on sex or gender stereotypes
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised
- Also, having disciplined a student or employee previously is often not enough to create a conflict of interest

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RECUSAL

- Conflict of interest might necessitate recusal, or party may request it
- Identify and train an alternate Decision-maker/Chair
- Procedures should define the process and circumstances by which a party may seek to recuse a Decision-maker
- Typically the Title IX Coordinator determines whether recusal is necessary
- If you feel you cannot hear a case impartially, notify Title IX Coordinator immediately

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PREPARING FOR THE HEARING

MUST DO: PREP FOR THE HEARING

All Decision-Makers Must Review:

- Written Notice of Allegations (NOIA)
- Policy (policies) alleged to have been violated
  - What does it take to establish a policy violation?
  - Identify the elements of each alleged offense
  - Break down the constituent elements of each relevant policy.
- All the materials carefully and thoroughly
- Review and re-review the investigation report
  - Note consistency/inconsistency of information – helps Decision-maker(s) know what to focus on in a hearing

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MUST DO: PREP FOR THE HEARING (CONT.)

All Decision-Makers Must Review:

- Review it a second time and note all areas of consistency of information
  - You don't need additional verification or questioning on these issues, of assuming the accuracy of consistent information (but beware of suspiciously consistent stories)
- Read it a third time to identify inconsistencies in the information
  - This is where you will concentrate your questions

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PREPARING QUESTIONS

Write down the following as a reminder:

- What do I need to know?
- Why do I need to know it?
  - Does the question elicit information relevant to whether a policy violation occurred?
- What is the best way to ask the question?
- Who is the best person to get this information from? The investigator? A party? A witness?

When dealing with conflicting or contested testimony apply a **credibility analysis** (covered later).

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PRE-HEARING MEETINGS

- Although not explicitly required or even mentioned in the Title IX regulations, the Chair or Decision-maker may conduct pre-hearing meetings for each party (in writing, or in person)
  - Answer questions about the hearing and its procedures
  - Clarify expectations regarding logistics, decorum, the role of Advisors, and technology
  - Discuss witness and party participation and cross-examination
  - Discern any conflicts of interest/vet recusal requests
  - Consider any questions regarding relevance of evidence or proposed questions and may make pre-hearing rulings

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DAY OF THE HEARING

- Dress professionally; layer if needed
- Arrive prepared and early
- Bring snacks and water/drinks
- Silence or turn off your phone and put it away
- Bring a pen and paper or note-taking device
  - Less is better; note what you need to make a determination
  - Be clear on policy/expectations for keeping/destroying written notes
- Clear calendar after the hearing – deliberation could take as few as 30 minutes or it could take much longer

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QUICK TIPS ON HEARING LOGISTICS

THE HEARING: GENERAL LOGISTICS

- Recording
  - How, by whom, etc.
  - Redundant devices?
- Attendance by parties and witnesses
- Location and room set-up
  - Comfort items (water, tissues, meals if needed)
  - Privacy concerns; sound machine
- Seating arrangements
- Materials
- Access to administrative support if needed (phones, copiers, email)
- Advisors
- Parties and witnesses waiting to testify
- Breaks
- Use of A/V
- Waiting for a decision

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HEARING DECORUM

- Be professional, but not be lawyerly or judge-like
  - This is not court – this is an administrative process at a school
  - You are not cross-examining or interrogating, you are striving to determine whether the Respondent(s) violated institutional policy
- Be respectful
  - Tone, manner, questioning
  - Sarcasm or being snide is never appropriate
  - Maintain your composure; never allow emotion or frustration to show
  - De-escalate or take breaks if emotions/tensions are running high

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HEARING DECORUM (CONT.)

- Work to establish a baseline of relaxed conversation for everyone in the room
- Use active listening skills
- Listen carefully to everything that is said
  - Try not to write too much when people are talking
  - If questioning, focus on the answer, rather than thinking about your next question
- Nod affirmatively
- Do not fidget, roll your eyes, or give a “knowing” look to another panel member
- Do not look shocked, smug, stunned, or accusing

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THE HEARING

Tips for Hearing Officers/Decision-Makers:

- Recognize the need for flexibility with the order of statements and questioning, depending on the circumstances.
- Be familiar with your institution's hearing procedures; review again before each hearing.
- If a procedural question arises that must be addressed immediately, take a short break to seek clarification.
- Will you have legal counsel available by phone/text/in person?
- Apply all appropriate institutional policies, procedures, and standards.

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THE HEARING

Hearing Testimony: The Role of the Chair/Decision-Maker

- Determine the relevance and appropriateness of questions. Pause after each question to "rule" on relevance. Must state rationale for the record.
- When necessary, the chair provides directives to disregard a question or information deemed irrelevant, abusive, or unduly repetitive
- Manage Advisors as necessary, including cross-examination
- Maintain the professionalism of all Hearing Officers/Decision-Makers
- Recognize positional authority

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DECISION-MAKING SKILLS, PART ONE

- Understanding Evidence
- Relevance

EVIDENCE

- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
  - Present witnesses, including experts
  - Present evidence
  - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered except that it must be relevant
- Parties may have access to all gathered evidence that "directly relates" to the allegations available for reference and use at the hearing, but they must make the case for its relevance.

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ASK YOURSELF

Is it **relevant**?

Is it **reliable**?
(Is it credible?)

Will we **rely** upon it as evidence supporting a rationale/the written determination?

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UNDERSTANDING EVIDENCE

- The formal federal rules of evidence do not apply in Title IX hearings, but rules crafted by OCR for Title IX cases do
- If the information helps to prove or disprove a fact at issue, it should be admitted
- If credible, it should be considered
  - Evidence is any kind of information presented with the intent to prove what took place
  - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly

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BUCKET 1: RELEVANT EVIDENCE

- Evidence is relevant when it tends to prove or disprove an issue in the complaint
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 2 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers within the investigation report via secure technology

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RELEVANCE

- Evidence is generally considered **relevant** if it has value in proving or disproving a fact at issue, and relevance means the evidence may be relied upon by the Decision-maker
  - Regarding alleged policy violation and/or
  - Regarding a party or witness's credibility
- The Investigator will have made initial relevance "decisions" by including evidence in the investigation report
- Relevance is ultimately up to the Decision-maker, **who is not bound by the Investigator's judgment**
- **All** relevant evidence must be objectively evaluated and considered – both inculpatory and exculpatory

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BUCKET 2: DIRECTLY RELATED, BUT NOT RELEVANT EVIDENCE

- Evidence is directly related when it is connected to the complaint but is neither inculpatory nor exculpatory and will not be relied upon in the investigation report
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 1 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers in a separate file via secure technology

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OTHER EVIDENCE MAY BE DIRECTLY-RELATED

Directly-related Evidence:

- Connected to the complaint but is neither inculpatory nor exculpatory and will not be included within the investigation report
- Comes to Decision-maker(s) pre-hearing via:
  - Bucket 1: (the investigation report); or
  - Bucket 2: evidence file of what is considered directly-related
- How do you handle records that combine elements of both relevant and directly-related evidence?
- While the Investigator has initially sorted the evidence into these buckets, the Decision-maker makes the final allocation of what evidence will be relied upon and what will not.

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BUCKET 3: NEITHER RELEVANT NOR DIRECTLY-RELATED EVIDENCE

- Evidence should be maintained by the Investigator(s) but disregarded for purposes of the process
- Parties/Advisors/Decision-makers don't get to know about it

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UNDERSTANDING EVIDENCE

Decision-maker(s) may consider and assign weight to different types of evidence, when relevant and credible:

- Documentary evidence (e.g., supportive writings or documents)
- Electronic evidence (e.g., photos, text messages, and videos)
- Real evidence (i.e., physical objects)
- Direct or testimonial evidence (e.g., personal observation or experience)
- Circumstantial evidence (i.e., not eyewitness, but compelling)

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UNDERSTANDING EVIDENCE (CONT.)

Decision-maker(s) may consider and assign weight to different types of evidence, when relevant and credible:

- Hearsay evidence (e.g., statement made outside the hearing but presented as important information)
- Character evidence (subject to a relevance determination, but often not probative of the underlying allegation)

Decision-makers should typically only consider impact statements during sanctioning.

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SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS

- Evidence of the Complainant's sexual **predisposition** is never relevant.
- Evidence about the Complainant's **prior sexual behavior** is explicitly and categorically **not relevant** except for two limited exceptions:
  - Offered to prove that someone other than the Respondent committed the conduct alleged; or
  - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition

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ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS

Additional permissions (from the party) required for:

- Records made or maintained by a:
  - Physician
  - Psychiatrist
  - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission
  - This is complex in practice because you won't know to ask for permission unless you ask about the records first

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ADDITIONAL EVIDENCE CONSIDERATIONS IN HEARINGS

- In the Title IX hearing, Bucket #1 and Bucket #2 evidence is often "admitted" in the sense that it is not excluded and/or Decision-makers are not shielded from hearing/knowing it
- Some evidence can be excluded, or witnesses can be directed to answer certain questions
- However, the Decision-makers and/or Chair need to determine whether the evidence can and will be relied upon if it is introduced
  - There will be a decent amount of trying to "unhear"/disregard what is introduced, because even though you know it, you can't consider it

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RELEVANCE EXERCISES

- Ivan and Juanita
- Further Exercises

CASE STUDY: IVAN & JUANITA

- Juanita, a freshman member of the women's soccer team, made a Title IX complaint directly to the Title IX Coordinator.
- On the morning of October 11, her teammate, who was checking her email in the computer lab, yelled for Juanita to come and look at something on the computer.
- Juanita saw an email sent from the men's soccer team email address, menssoccer@school.edu, which said "Greetings new freshman, meet the girl next door."
- The email included a photo of Juanita's face photoshopped onto a naked body with huge breasts.

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CASE STUDY: IVAN & JUANITA

- Everyone in the lab knew it wasn't Juanita, but they all laughed anyway.
- Juanita ran from the room crying, embarrassed that others would think it was her.
- She immediately called Ivan, a member of the men's soccer team, who she believed sent the email.
- Earlier in the year, Ivan asked her out several times, but she didn't like him.
- She found him really annoying, and while she knows it wasn't nice, she called him a total loser in front of his friends.
- She knows that he sent the email to hurt and embarrass her.

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CASE STUDY: IVAN & JUANITA

- Ivan told the investigator that he believes Juanita is blowing the whole matter out of proportion.
- He admits to creating the photo for a class project. He reports:
  - "It was only meant to be a joke. I never put her name on it, so what's the big deal? This is a work of art that I created for my class, not a porn picture or anything. I only showed my artwork, which by the way is protected by the First Amendment, to a few of my teammates. I know my rights very well since my dad is a lawyer. In fact, the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

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CASE STUDY: IVAN & JUANITA

- Ivan stated that he showed the photo to a couple of teammates but did not send the email.
- The email account is for official team business. The coaches and captains have the password; one captain has shared it broadly with all the seniors on the team.
- The investigator also consulted with John Wang, assistant director of information technology.
- John was able to confirm that someone using the computer lab computer sent the picture from the men's soccer team email account.

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CASE STUDY: IVAN & JUANITA

- The picture was inserted into the email via a flash drive and he was unable to determine which student had logged in.
- John received Ivan's consent to inspect his laptop. The photo was on his hard drive but was not sent out via email to anyone.
- He said that when he doesn't have his laptop with him, it is typically inside his locker. Ivan also told John that he hasn't given anyone else his laptop password.

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CASE STUDY: IVAN & JUANITA

- Ivan was notified via the institution's NOIA letter that it is alleged that he violated the institution's sexual harassment policy, specifically the hostile environment provision.
- The definition of Sexual Harassment is conduct on the basis of sex that is:
  - unwelcome,
  - determined by a reasonable person,
  - to be so severe, and
  - pervasive, and,
  - objectively offensive,
  - that it effectively denies a person equal access to the Recipient's education program or activity.

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CASE STUDY: IVAN & JUANITA

You are the Chair of the Hearing Panel. You must determine whether the specific piece of evidence is relevant.

Starting with evidence from the investigation report. Is it relevant that:

1. Ivan is a member of the men's soccer team
2. Juanita is a member of the women's soccer team
3. There was "history" between Ivan and Juanita
4. Juanita called Ivan "a loser" earlier in the year in front of his friends
5. Ivan admitted to creating the image for his class
6. Ivan showed the image to a few teammates
7. The image was sent from a computer lab computer
8. Ivan consented to letting John from IT inspect his laptop

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CASE STUDY: IVAN & JUANITA

Consider whether the following pieces of evidence, if part of the fact-pattern originally provided from the investigation report, would be relevant:

1. Juanita's Advisor's daughter is in the same art class with Ivan and stated that she never had an assignment like that for class.
2. Ivan's friend, Alan, states that Juanita is really not bothered by the photo because he has observed occasions where Juanita flashed her breasts at Ivan a few times before. Juanita also told Ivan and Alan that she wanted breast implants.

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CASE STUDY: IVAN & JUANITA

3. Ivan's high school soccer coach has prepared a written character reference for Ivan, which states that he was an upstanding member of his high school team and community, a four-year leader on the squad, and volunteered many times at the local YMCA youth program.
4. Ivan stated that at the time that the email was sent, he was attending his political science class, which had an in-class exam that day.
5. Juanita provided a screenshot of Ivan's Twitter feed, which showed that he retweeted an announcement from his favorite band just two minutes prior to the precise time that the email was sent.
6. Ivan's Advisor wants to ask Juanita about her academic progress during the fall term. Ivan and his Advisor believe that Juanita was in danger of failing her chemistry course.

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RELEVANT OR DIRECTLY RELATED?

A Complainant writes in her formal complaint that she has been experiencing significant mental health issues since being sexually assaulted, including PTSD (self-diagnosis). Respondent mentions this at the hearing, to argue that one of the reasons Complainant likely misperceived the incident as non-consensual is because she has a self-admitted history of serious mental health concerns.

RELEVANT? DIRECTLY RELATED? NEITHER?
WHICH AND WHY?

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RELEVANT OR DIRECTLY RELATED?

Complainant states in her opening statement at the hearing that she did not consent to sex with Respondent. She adds that one of the reasons why she did not consent and would not have consented is because prior to the incident, she was a virgin and had never had sex before.

RELEVANT? DIRECTLY RELATED? NEITHER?
WHICH AND WHY?

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DECISION-MAKING SKILLS, PART TWO

- Reliability/Credibility
- Cross-Examination
- Analyzing the Information

QUESTIONING & CROSS-EXAMINATION

- The live hearing requirement for higher education allows the parties to ask (direct and) cross-examination questions of the other party and all witnesses through their respective Advisors
- Such cross-examination must be conducted directly, orally, and in real time by the party's Advisor and never by a party personally
- Permit relevant questions and follow-up questions, including those challenging credibility
- Decision-makers may ask an Advisor to explain why they think a question is relevant or will lead to a relevant answer

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- If the Advisor seeks to ask a question that is potentially answered in the investigation report, that question should typically be permitted, if relevant.
- If the question has already been answered by a witness or party at the hearing, the Decision-maker or Chair may:
  - Deny the question as "irrelevant because it has already been answered," or
  - May ask the Advisor why posing the question again is expected to lead to additional relevant evidence

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- If a party or witness does not submit to live cross-examination by the other party's Advisor during the hearing, the Decision-maker(s) must not rely on **any statement** of that party or witness (from the investigation or hearing) in reaching a determination regarding responsibility
  - This means that a party or witness must answer **all** relevant cross-examination questions that are posed
  - One refusal will trigger the prohibition that the Decision-maker may not rely on **any** statements
- First question to ask each party and all witnesses: "Do you intend to answer all questions directed to you today?"
  - Recommend asking before parties make opening statements to avoid having to "unring the bell."

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- The Decision-maker(s) cannot 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.
  - What is an inference?
  - How does it work?

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UNDERSTANDING CREDIBILITY IN THE DECISION PROCESS

WHAT IS CREDIBILITY?

- Primary factors: corroboration and consistency
- Accuracy and reliability of information
- Decision-makers must determine the credibility of testimony and evidence, and hence its reliability
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading may impact credibility
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Credibility assessment may not be based on a person’s status as a Complainant, Respondent, or Witness

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CREDIBILITY

Inherent Plausibility

- "Does this make sense?"
- Be careful of bias influencing sense of "logical"

Motive to Falsify

- Do they have a reason to lie?

Corroboration

- Aligned testimony and/or physical evidence

Past Record

- Is there a history of similar behavior?

Demeanor (use caution!)

- Do they seem to be lying or telling the truth?

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

EEOC (1999)

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility

- Does what the party described make sense?
  - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- "Plausibility" is a function of "likeliness."
  - Would a reasonable person in the same scenario do the same things? Why or why not?
  - Are there more likely alternatives based on the evidence?

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
  - Could they have heard what they said they heard?
  - Were there other impediments? (e.g., darkness, obstructions)
- How good is their memory?
  - Temporal proximity based on age of allegations
  - "I think," "I'm pretty sure," "It would make sense"

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FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
  - Think academic or career implications
  - Personal or relationship consequences
- What if the allegations are false?
  - Other pressures on the Complainant – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
  - Party says they went to dinner, provides receipt
  - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

- Can include contemporaneous witness accounts
  - More "separate" the witness, greater the credibility boost
- Outcry witnesses
  - Does what party said then line up with what they say now?
- Pay attention to allegiances
  - Friends, roommates, teammates, group membership
  - This can work both directions (e.g., honest roommate)

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FACTORS TO CONSIDER FOR CREDIBILITY

Past Record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
  - Even if found "not responsible," may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship
- Use caution; past violations do not mean current violations

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FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

- BE VERY CAREFUL
  - Humans are excellent at picking up non-verbal cues
  - Humans are terrible at spotting liars
- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source

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CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

Regulations permit Investigators to make credibility recommendations

- Can serve as a roadmap for Decision-maker but is not binding

- Language in an investigation report may look like this:
  - "Decision-makers will want to carefully review Mary's testimony as to whether the conduct was welcome, in light of the testimony of W1."
  - "Decision-makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first."

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CREDIBILITY IN THE HEARING

- Distinguish performance/presentation skills from believability
- Evidence requiring a credibility assessment should be examined in a hearing
  - Fundamental to due process
  - Failure of a witness/party to participate undermines ability to determine credibility
    - Regulations are quite clear such evidence may not be considered if it relates to a statement previously made
    - Other evidence can be considered
    - What will the effect of that be on the process/decision?

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POLICY DEFINITIONS

- Sexual Harassment (Umbrella category)
  - Sexual Harassment (offense)
  - Quid Pro Quo Sexual Harassment
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking
- Retaliation

SEXUAL HARASSMENT POLICY

Title IX regulations require each Recipient to have an umbrella sexual harassment policy and define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:

- **Quid Pro Quo**: An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct.
- **Hostile Environment**: Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the Recipient's education program or activity
  - Education program or activity means employment, too!

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HOSTILE ENVIRONMENT: "SEVERE"

- Physical conduct is more likely to be severe without need for repetition
  - Sexual assault and many dating/domestic violence cases are almost always sufficiently severe
  - Other physical conduct that does not meet the §106.30 definitions for sexual assault or dating/domestic violence may also rise to the level of "severe"
- Consider the circumstances (e.g., ability for Complainant to escape the harassment)
- Assess whether accompanied by threats or violence
- Assess whether there was a degree of embarrassment or humiliation

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HOSTILE ENVIRONMENT: "PERVASIVE"

- Widespread
- Openly practiced; occurring in public spaces
- Well-known among students or employees – reputation of a department, person, etc.
- Frequency, intensity, and duration of the conduct
- Unreasonable interference with school or job
- A "gauntlet of sexual abuse" *Meritor v. Vinson*, 477 U.S. 57 (1986)
- Incidents occurring in concert or with regularity are more likely to be considered pervasive
- Consider the specific circumstances and facts

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HOSTILE ENVIRONMENT: "OBJECTIVELY OFFENSIVE"

- Reasonable person standard in context
- "I know it when I see it…"
- Age and relationships of Complainant and Respondent
- Number of persons involved
- Frequency
- Severity
- Physically threatening
- Humiliation
- Intimidation
- Ridicule
- Abusive

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

There has been an increasing issue of conflating discomfort or being offended with the higher standard of sexual harassment. There is a high bar for meeting this definition.

The circumstances to consider include:

- The nature, pervasiveness, and severity of the conduct
- Whether the conduct was reasonably physically threatening
- Whether the conduct was objectively and subjectively humiliating
- The objective and subjective reasonable effect on the Complainant's mental or emotional state
- Effective denial of education or employment access
- If SPOO, a discriminatory effect is presumed (proven)

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

- Whether conduct was directed at more than one person.
- Whether a reasonable person would see/experience/determine the conduct to be SPOO?
  - What does it mean to be a reasonable person? Who is?
  - A reasonable person sits in the shoes of the Complainant
- Whether the statement only amounts to utterance of an epithet that is offensive or offends by discourtesy or rudeness, and thus is not SPOO.
- Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment, which means it is not sexual harassment.

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PUTTING IT ALL TOGETHER: HOSTILE ENVIRONMENT SEXUAL HARASSMENT

- The role of the Decision-maker is to determine whether all the elements of a hostile environment are present.
  - Requires a "totality of the circumstances" analysis, which is the key role for the Decision-maker.
  - When conduct does not meet the elements, and applying the standard of evidence, then the Respondent is "not responsible."
  - Hostile environment cases may often therefore lend themselves to informal resolution processes and may not ultimately come before Decision-makers, unless they are connected to other forms of sexual harassment, such as sexual assault, dating violence, domestic violence, and/or stalking.

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PUTTING IT ALL TOGETHER: HOSTILE ENVIRONMENT SEXUAL HARASSMENT (CONT.)

- Remember that the sex, gender identity, gender expression, and/or sexual orientation of the individuals do not matter in how we apply the relevant evidence to the policy elements.

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SEXUAL ASSAULT

Sexual Assault: Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.

- **Forcible Rape**: Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.
- **Forcible Sodomy**: Oral or anal sexual intercourse with another person, forcibly, and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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SEXUAL ASSAULT (CONT.)

- **Sexual Assault With An Object**: The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly, and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- **Forcible Fondling**: The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly, and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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SEXUAL ASSAULT (CONT.)

- **Incest**: Non-forcible sexual intercourse, between persons who are related to each other, within the degrees wherein marriage is prohibited by state law.
- **Statutory Rape**: Non-forcible sexual intercourse, with a person who is under the statutory age of consent of [age in your state].
  - This offense only applies if conduct is "consensual" with minor. If forced or against will of victim, revert to Forcible Rape definition.

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CONSENT

- Consent can be defined per state law or best practices.
  - ATIXA Model Definitions found in *1P2P* or *The Playbook*.
- Although the new regulatory definition of sexual assault is ostensibly consent based, it's not a great analytical tool. Luckily, the wording is generic enough to permit ATIXA best practice interpretations to be fully applicable.
- Be aware that the FBI's definition of rape (upon which the regulatory definition rests) will change again soon, likely in 2021. Your definition will have to shift then as well.
  - "Carnal knowledge" coming soon to a campus sexual assault policy near you!

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DATING VIOLENCE

Dating Violence, defined as:

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant.
- The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- For the purposes of this definition,
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.

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DOMESTIC VIOLENCE

Domestic Violence, violence on the basis of sex committed:

- By a current or former spouse or intimate partner of the Complainant;
- By a person with whom the Complainant shares a child in common; or
- By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner; or
- By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here]; or
- By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

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DOMESTIC VIOLENCE (CONT.)

- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates.
- The people cohabitating must be current or former spouses or have an intimate relationship.

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STALKING

Stalking: engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

For the purposes of this definition—

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the Respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

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STALKING (CONT.)

For the purposes of this definition—

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

Please, please, please, don't interpret this to violate anyone's First Amendment rights.

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OTHER ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION

Though not part of the Title IX "Sexual Harassment" definition, other conduct could be prohibited under a campus sexual misconduct policy, including:

Sexual Exploitation: occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute sexual harassment.

Examples include, but are not limited to:

- Invasion of sexual privacy
- Non-consensual digital, video, or audio recording of nudity or sexual activity

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity
- Engaging in voyeurism
- Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex)
- Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person
- Intentionally or recklessly exposing one's genitals in non-consensual circumstances or inducing another to expose their genitals
- Sexually-based stalking and/or bullying may also be forms of sexual exploitation

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OTHER SEX-BASED MISCONDUCT OFFENSES THAT MAY BE ADDRESSED BY POLICY

- Bullying/cyberbullying
- Hazing
- Threatening or causing physical harm
- Conduct which threatens or endangers the health or safety of any person
- Discrimination
- Intimidation

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RETALIATION

- No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
  - Does this now apply to private colleges?
- Charging an individual with a conduct code violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation if it is based on more than evidence that a Respondent violated the sexual harassment policy.

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RETALIATION
BASIC LEGAL PRINCIPLES

The Title IX regulations prohibit Recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX.

Protected activity under Title IX:

- Reporting sex discrimination, including sexual harassment and assault
- Filing a discrimination complaint
- Assisting someone in reporting discrimination or filing a complaint
- Participating in any manner in an investigation of discrimination, for example as a witness
- Protesting any form of sex discrimination (e.g., lack of equity in athletics)

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DETERMINING RETALIATION CLAIMS: KEYS TO UNDERSTANDING

- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate.
- Someone's intention is rarely displayed openly. Therefore, the policy framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

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ELEMENTS AND ANALYSIS OF A RETALIATION CLAIM

The following elements establish an **inference of retaliation**:

1. Did the individual engage in protected activity?
   - Usually straightforward,
   - Unless there is a question of reasonableness of belief or manner.
2. Was the individual subsequently subjected to adverse action?
3. Do the circumstances suggest a connection between the protected activity and adverse action?
   - Did individual accused of retaliation know about activity?
   - How soon after the protected activity did the adverse action occur?

If these three elements are not shown, there is not a finding of retaliation.

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RETALIATION AND ADVERSE ACTION

- Common definition of **adverse action**:
  - Significantly disadvantages or restricts the individual as to their status as students or employees, or their ability to gain the benefits or opportunities of the program; or
  - Precluded from their discrimination claims; or
  - Reasonably acted or could act as a deterrent to further protected activity.
  - The U.S. Supreme Court and the federal courts have defined adverse action **very broadly**.

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ATIXA CONSENT CONSTRUCT

- Force
- Incapacity
- Consent

CONSENT

- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Creates mutually understandable permission regarding the conditions of sexual activity
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally

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OVERVIEW OF THE THREE QUESTIONS

1. Was force used by the Respondent to obtain sexual or intimate access?

2. Was the Complainant incapacitated?
    a. If so, did the Respondent know, or
    b. Should the Respondent have known that the Complainant was incapacitated

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity.

3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

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FORCE

1. **Was force used by the Respondent to obtain sexual or intimate access?**

- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force
- Consider the impact of power dynamics

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FORCE (CONT.)

Types of force to consider:

- **Physical violence:** hitting, restraint, pushing, kicking, etc.
  - This may also involve alleged violations of other policies (e.g., harms to persons, violation of law, etc.)
- **Threats:** anything that gets someone to do something they wouldn't ordinarily have done absent the threat
  - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat

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FORCE (CONT.)

Types of force to consider:

- **Intimidation:** an implied threat that menaces and/or causes reasonable fear.
  - This requires the same threat analysis as above
- **Coercion** – the application of an unreasonable amount of pressure for sexual access
  - Consider isolation, frequency, intensity, and duration

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INCAPACITY

2. Was the Complainant incapacitated?

- Incapacity ≠ impaired, drunk, intoxicated, or under the influence.
- What was the status of the Complainant in terms of:
  - Situational awareness
  - Consequential awareness
- What was the reason for incapacity?
  - Alcohol or other drugs (prescription or non-prescription)
  - Mental/cognitive impairment
  - Injury
  - Asleep or unconscious

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INCAPACITY (CONT.)

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
- Incapacitation is a determination that will be made after the incident **in light of all the facts available**
- Blackouts are frequent issues
  - Blackout ≠ incapacitation (automatically)
  - Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how
  - Partial blackout must be assessed as well

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BEHAVIORAL CUES

Evidence of incapacity context clues:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Passing out
- Throwing up
- Appearing disoriented
- Unconsciousness
- Known blackout
- Outrageous or unusual behavior (requires prior knowledge)

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PRIOR KNOWLEDGE CONSTRUCT

- These answers should be in the investigation report if the primary consideration is the out of norm behaviors of the Complainant as a determination of incapacity:
  - Did the Respondent know the Complainant previously?
  - If so, was Complainant acting very differently from previous similar situations?
  - Evaluate what the Respondent observed the Complainant consuming (via the timeline)
  - Determine if Respondent provided any of the alcohol for the Complainant
  - Other relevant behavioral cues

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INCAPACITY ANALYSIS

- If the Complainant **was not** incapacitated, move on to the Consent Analysis.

- If the Complainant **was** incapacitated, but:
  - The Respondent did not know it, **AND**
  - The Respondent would not have reasonably known it = policy not violated. Move to Consent Analysis.

- If the Complainant **was** incapacitated, and:
  - The Respondent **knew it or caused it** = policy violation Sanction accordingly
  - The Respondent **should have known it** = policy violation Sanction accordingly
  - The Respondent's own intoxication cannot be used as a defense

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CONSENT ANALYSIS

3. **What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?**

- Is there any sexual or intimate pattern or history between the parties?
- What verbal and/or non-verbal cues were present during any acts that the parties agree were consensual?
- This is where getting detail and specifics of intimate behaviors is critical

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QUESTIONING SKILLS & GUIDELINES

QUESTIONING

- The goal of questioning in the hearing is to ensure that as Decision-maker, you understand information and evidence contained in the report:
  - Relevant evidence about what happened during the incident
  - Any related events
  - Any corroborating information
- Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing
- Your goal is not:
  - Satisfying your curiosity
  - Chasing the rabbit into Wonderland
- Do not expect the “Gotcha” moment. That is not your role. You are not prosecutorial.

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IF YOU STILL HAVE TO ASK A QUESTION, ASK YOURSELF

- **Is the answer already in the report or documentation I have been provided?**
  - If not, why not? (Ask the Investigator this!)
  - You still will need to ask it again but keep the report in mind
- **What do I need to know?**
  - Who is the best person to ask this of?
    - Usually it will be the Investigator, first, and then the original source, if available
    - It may be good to ask the Investigator if they asked it already and what answer they previously received

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IF YOU STILL HAVE TO ASK A QUESTION, ASK YOURSELF (CONT.)

- **Why do I need to know it?**
  - If it is not going to help you decide whether a policy was violated or not and you can explain how, then it is not a good question (though you may not know this until you hear the answer).
- **What is the best way to ask the question?**
- **Are you the best person to ask this question?**

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ASKING GOOD QUESTIONS

- Generally use open-ended questions (tell us…,who…, what…, how…)
- Try to avoid close-ended questions (Did you…, were you…)
- Don’t ask Compound Questions
  - “I have two questions; First,…, Second,…”
- Don’t ask Multiple Choice Questions
  - Were you a or b?
- Avoid suggesting an answer in your question

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QUESTIONING SKILLS

- Listen carefully and adapt follow-up questions.
- Work from your prepared outline but stay flexible.
- Seek to clarify terms (when the report is silent) that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “acted weird,” “sketchy,” or “had a few drinks.”
- Be cognizant of the difference between what was “heard” (hearsay), what can be assumed (circumstantial), and what was “witnessed” (facts).
- Be aware of your own body language. Stay neutral, even if you hear something you distrust or dislike.

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QUESTIONING TIPS

- Restate/summarize what was said. Helps validate that you are listening and helps ensure you understand what is being said.
- Consider using these phrases:
  - “So it sounds like…”
  - “Tell me more…”
  - “Walk me through”
  - “Help me understand”
- Frame questions neutrally.
- Be on the lookout for “cued” responses or rehearsed or memorized answers.
- Handle emotions sensitively and tactfully.
- Observe body language, but don’t read too much into it.

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QUESTIONING ACTIVITY

QUESTIONING ACTIVITY

Refer back to the Ivan and Juanita case and develop possible questions for the following:

- Questions for the Investigator
- Questions for Juanita (Complainant)
- Questions for Ivan (Respondent)

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MAKING A DECISION

OVERVIEW OF THE DELIBERATION PROCESS

- Only Decision-makers attend and participate in the deliberations
  - Parties, witnesses, Advisors, and others excused
  - ATIXA recommends that TIXC and legal counsel do not participate
- Do not record; recommend against taking notes (Chair may)
- Parse the policy (elements that compose each allegation)
- Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial
- Apply evidentiary standard to determine if policy has been violated

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DELIBERATIONS

General Information

- Must provide detailed, written the rationale for and evidence supporting its conclusions
- With a panel, the Chair must be a voting member
- Typically, there is no specific order in which allegations must be addressed. When in doubt, start with the most serious.
- Chair should ensure that all viewpoints are heard
- Neutralize any power imbalances among panel members, particularly based upon their position at the institution
- Ensure an impartial decision that is free of substantive bias

Withhold judgment until all the evidence has been considered.

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DELIBERATIONS

Foundations for Decisions

- Decisions must be based only upon information/evidence in the investigation report or presented at the hearing
- Do not turn to any outside "evidence"
- Pare the policy. Assess evidentiary weight. Measure with the following questions:
  - Is the question answered with fact(s)?
  - Is the question answered with opinion(s)?
  - Is the question answered with circumstantial evidence?

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DELIBERATIONS

Findings, Impact Information, and Sanctions

- Separate the "Finding" from the "Sanction"
  - Do not use impact-based rationales for findings (e.g., intent, impact on the Complainant, impact on the Respondent, etc.)
  - Use impact-based rationales for sanctions only
- Impact statement(s) should only be considered if and after the Respondent is found in violation
- Whether Respondent violated policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful – do not heighten the evidentiary standard because the sanctions may be more severe

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SANCTIONING IN SEXUAL MISCONDUCT CASES

Title IX and case law require:

- Decision-maker should also decide sanction if credibility will influence the sanction
- Recipients to not act unreasonably to bring an end to the discriminatory conduct (Stop)
- Recipients to not act unreasonably to prevent the future reoccurrence of the discriminatory conduct (Prevent)
- Recipients to restore the Complainant as best they can to their pre-deprivation status (Remedy)

- This may create a clash if the sanctions only focus on educational and developmental aspects

- Sanctions for serious sexual misconduct should not be developmental as their primary purpose

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COMMON STUDENT SANCTIONS

- Warning
- Probation
- Loss of privileges
- Counseling
- No contact
- Residence hall relocation, suspension, or expulsion
- Limited access to campus
- Service hours
- Online education
- Parental notification
- Alcohol and drug assessment, and counseling
- Discretionary sanctions
- College suspension
- College expulsion

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WRITTEN DETERMINATIONS

Decision-maker/Chair issues a detailed, written determination regarding responsibility that includes the following:

- Policies alleged to have been violated
- A description of the procedural steps taken from the receipt of the formal complaint through the determination including:
  - Any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Statement of and rationale for the result as to each specific allegation.
  - Should include findings of fact and conclusions

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WRITTEN DETERMINATIONS

Decision-maker/Chair issues a detailed, written determination regarding responsibility that includes the following (cont.):

- Sanctions imposed on Respondent (if any)
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the Recipient to the Complainant
- Procedures and bases for any appeal

The Decision-maker should author the written determination.

- May follow a template provided by the Title IX Coordinator

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WRITTEN DETERMINATIONS: LOGISTICS

- The written determination should be provided to the parties simultaneously.
- The determination becomes final either on the date that the Recipient provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- FERPA cannot be construed to conflict with or prevent compliance with Title IX.
- Will this letter be reviewed by the Title IX Coordinator and/or legal counsel?

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APPEALS

- Elements under the 2020 Regulations
- Grounds for Appeal
- Process Flowchart
- Other ATIXA Recommendations

APPEALS

The Appeal Decision-maker may be an individual or a panel

- Cannot be the Title IX Coordinator
- Cannot be the Investigator or Decision-maker in the original grievance process
- Recipient may have a pool of Decision-makers who sometimes serve as hearing or appeal Decision-makers
- Recipient may have dedicated Appeal Decision-makers

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BASES FOR APPEAL

- Title IX Regulations specify three bases for appeal:
  - Procedural irregularity that affected the outcome
  - New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome
  - Title IX Coordinator, investigator, or Decision-maker had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome. Recipients may offer appeals equally to both parties on additional bases.

- Recipients may offer additional bases for appeal so long as they are offered equally to both parties

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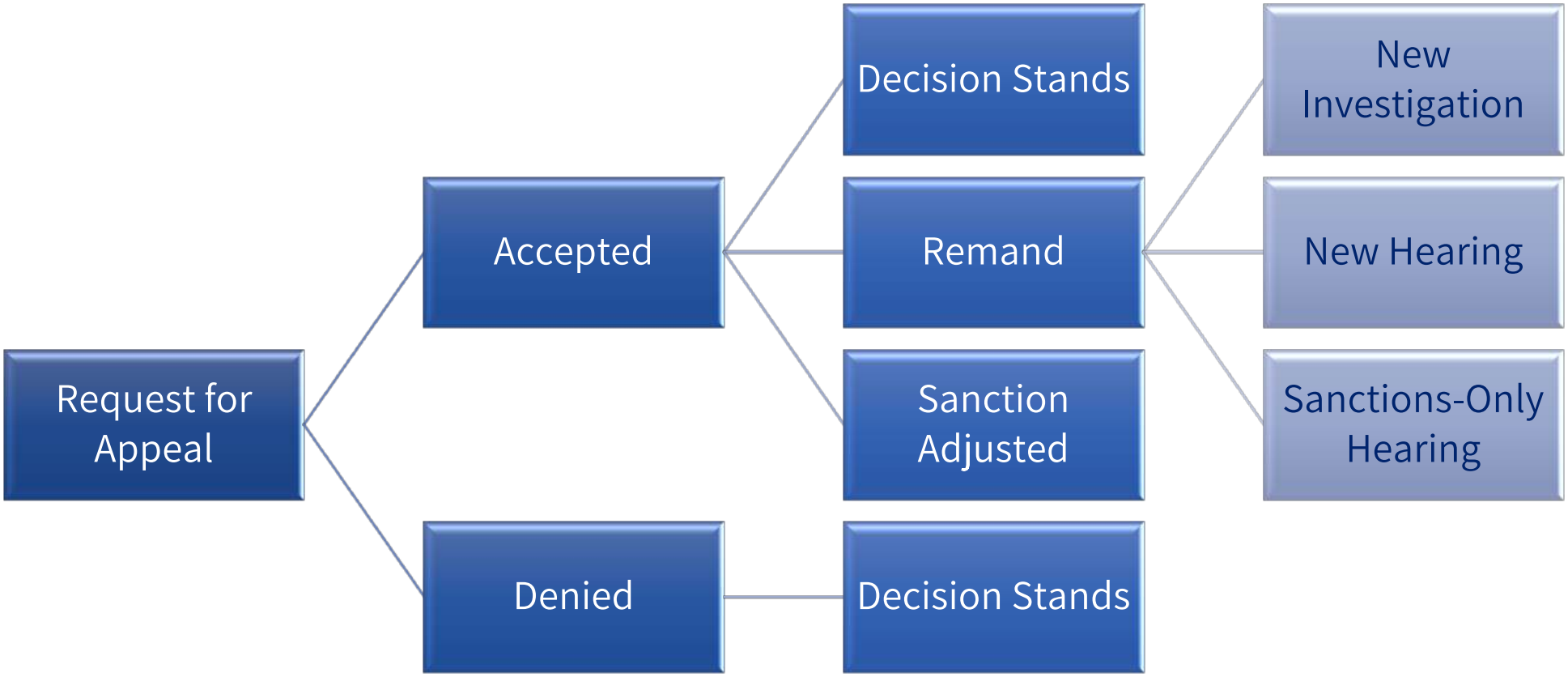
APPEALS: THE PROCESS



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APPEAL RESPONSE

- When an appeal is filed, the Recipient must notify the other party and implement appeal procedures equally for all parties
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- The Chair may be called upon by the Appeal Decision-maker to inform the appeal process
  - Likely a paper exchange; not in-person

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APPEALS: OTHER ATIXA RECOMMENDATIONS

- One level of appeal
- Short window to request an appeal
  - May always grant an extension if necessary
- Document-based and recording review
  - NOT de novo
  - In other words, not a “second-bite of the apple”
- Deference to original hearing authority

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RECORDKEEPING AND DOCUMENTATION

RECORDKEEPING AND DOCUMENTATION

- Certain records must be created, retained, and available to the parties for at least seven years:
  - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
  - Any appeal and related result(s)
  - Any informal resolution implemented
  - Any supportive measures implemented
  - **For each formal complaint, must document the basis for why the institutional response was not deliberately indifferent**

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RECORDKEEPING AND DOCUMENTATION (CONT.)

- For each conclusion, must document the rationale for its determination
- Must document measures taken to preserve/restore access to education programs/activity

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Questions?

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