



CIVIL RIGHTS INVESTIGATOR/DECISION-MAKER  
TRAINING COURSE

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**Remember: You have no “side” other  
than the integrity of the process!**

# 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.”*

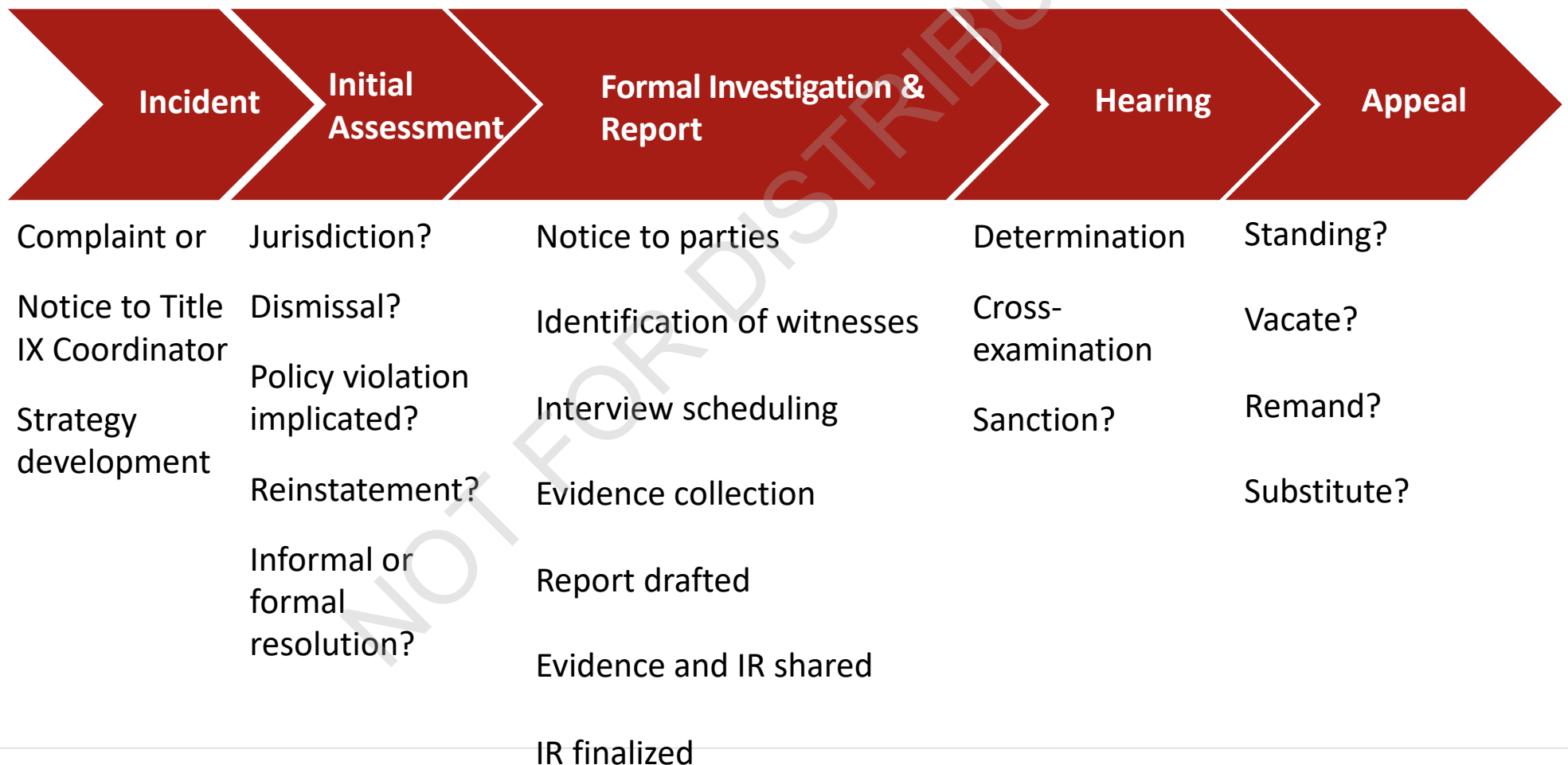


# THE IX COMMANDMENTS



Thorough	Reliable	Impartial	Investigation (+prompt & fair – VAWA Sec. 304)
Prompt	Effective	Equitable	Process
Not act unreasonably to stop discrimination	Not act unreasonably to prevent recurrence	Act equitably to remedy effects	Remedies

# THE PROCESS



# 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.
7. Draft report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence.
9. Provide report 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.
  - Send final report to parties for review and written response at least 10 days prior to hearing.

# CURRENT STATE



- Withdrawn:
  - 2011 Dear Colleague Letter (DCL)
  - 2014 Q&A on Title IX and Sexual Violence
  - 2016 DCL on Transgender Students
- Still in effect:
  - 1975 regs, as amended
  - 2001 OCR Revised Sexual Harassment Guidance (has force and effect of law; conflicts with 2020 regs)
  - 2003 DCL on Title IX and Free Speech
  - 2010 DCL on Harassment and Bullying
  - 2013 DCL on Pregnant and Parenting Students
  - 2015 DCL on the role of Title IX Coordinators
  - 2017 Q&A on Campus Sexual Misconduct issued as interim guidance, still apparently in place

# TRUMPING TITLE IX



- 2020 Title IX regulations
- Issued May 6<sup>th</sup>, 2020 (Publication date May 19<sup>th</sup>, 2020)
- Effective and enforceable August 14<sup>th</sup>, 2020
  - Amend the Code of Federal Regs. and have force and effect of law
  - Some provisions already mandated by due process case law in some jurisdictions
  - Intervening variables (litigation and election) may impact enforcement in the shorter or longer term
  - Lawsuits against regs anticipated from:
    - SSAIS, ACLU, NWLC, etc.
- Regulations are significant, legalistic, surprisingly prescriptive, very due-process heavy, and go well beyond what any court has required under 5<sup>th</sup>/14<sup>th</sup> Amendment case law.



# REGULATIONS HAVE THE FORCE AND EFFECT OF LAW



- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by courts/OCR
- **Federal regulations** promulgated under Title IX have **force and effect of law**, meaning they are enforceable by OCR
- What effect will these regulations have on courts?
  - Controlling weight (substantive/legislative)?
  - Persuasive weight (procedural/interpretive)?
  - Could form the basis of Section 1983 actions (personal liability)
  - Could constitute deliberate indifference (?) or disparate treatment
- OCR “regulatory guidance” or “sub-regulatory guidance”
  - Influential but not strictly enforceable (e.g. DCLs)
- State and local preemption issues – 2020 regs pre-empt state law

# EFFECTIVE INVESTIGATIONS

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- Active Accumulation of Evidence
- Consistent
- Planned/Strategic
- Documented
- Impartial



# CIVIL RIGHTS INVESTIGATION MODEL HALLMARKS



- Identify issues in dispute under policy
- Active identification and strategic gathering of evidence.
- Investigation is a critical part of the Title IX grievance process.
- Emphasizes transparency, communication, and fairness.
- Grounded in the concepts of neutrality and equity.
- Enhanced Due Process protections for parties.
- 2020 Title IX Regulations made substantial changes and additions to grievance resolution processes.

# A NOTE ABOUT TERMINOLOGY



- Formal complaint
- Grievance process
- Recipient
- Complainant
  - Individual(s) affected by alleged conduct or circumstances
- Respondent
  - Individual(s) alleged to be responsible for alleged conduct or circumstances
- Sexual harassment
  - Quid pro quo
  - “Hostile environment”
  - VAWA offenses (sexual assault, domestic and dating violence, stalking)

# TITLE IX REGULATORY FRAMEWORK



- Procedures for notice and formal complaint
- Separation between investigation, hearing, and appeal
- Distinct roles for
  - Title IX Coordinator
  - Investigator
  - Hearing Officer/Decision-Maker
  - Appeal Officer
- Evidentiary review periods
- Investigation report requirements

# DUE PROCESS

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- What is Due Process?
- Due Process in Procedure
- Due Process in Decision
- Procedural Rights under 2020 Title IX Regulations
- Standard of Evidence

# WHAT IS DUE PROCESS?



- Due Process (public institutions):
  - Federal and state constitutional and legal protections ensuring no public entity deprives someone of education or employment without substantive and procedural fairness. (5<sup>th</sup> and 14<sup>th</sup> Amendment)
- “Fundamental Fairness” (private institutions):
  - Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures.
  - Outcome neither arbitrary nor capricious; rationally related to facts and evidence.

# WHAT IS DUE PROCESS?



- Ultimately, both are 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.



# DUE PROCESS CONCEPTS IN TITLE IX PROCESSES



## 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

# DUE PROCESS PROCEDURAL RIGHTS IN 2020 TITLE IX REGULATIONS

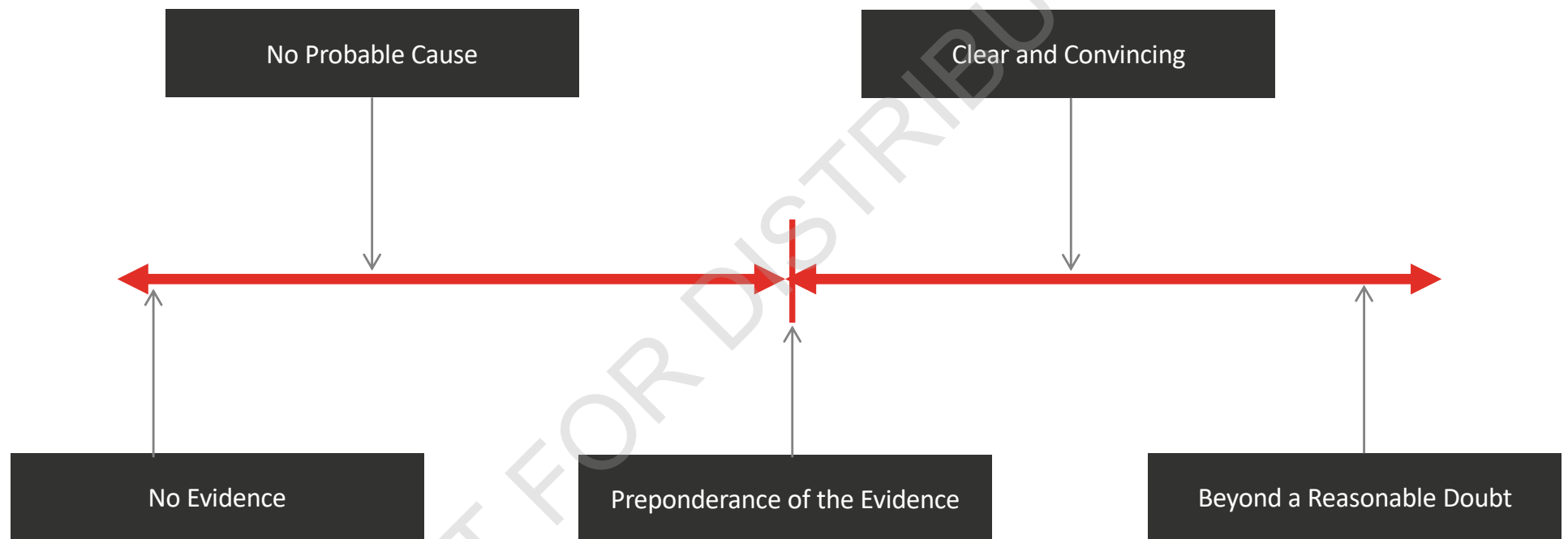


- Right to:
  - Present witnesses, including fact and expert witnesses.
  - Present and know inculpatory and exculpatory evidence.
  - Discuss the allegations under investigation without restriction.
  - Gather and present relevant evidence without restriction.
  - Have others present during any grievance 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.
  - Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigative 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.

## Substantive Due Process

- **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.

# EVIDENTIARY STANDARDS



# EVIDENTIARY STANDARD



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: “More likely than not.”

- The only equitable standard
- 50.1% (50% plus a feather)
- The “tipped scale”

# STRATEGY OF THE INVESTIGATION



- The investigation team, in consultation with the Title IX Coordinator or designated Deputy strategizes throughout the entire investigation. This includes:
  - What are the issues presented?
  - Are there undisputed facts? Which ones are significant to the investigation?
  - Are there facts in dispute? Which ones are significant to the investigation?
  - What Policy(s) elements may have been violated?
  - Who do you need to interview?
  - What should be the order of the interviews?

# OTHER ELEMENTS TO CONSIDER IN STRATEGY



- Strategize when to interview Complainant and Respondent.
- What are the key issues involved?
  - What additional strategies do you need to address key issues?
- What additional documentary evidence will be important to the investigation? (“active accumulation”)
- Discuss your Methodology for this case (what approach will you use?)
- Timeline (within 30-60 days will vary by case).



# WHEN TO INTERVIEW PARTIES AND WITNESSES



- Impact of new Title IX regulations on clear and timely notice to the parties of the allegations and investigation.
- Parties and witnesses should be interviewed as soon as possible:
  - So that recollections are as fresh and accurate as possible.
  - To secure necessary remedies in a timely manner.
  - Should not conduct interviews until parties have received their written notice of the allegations and investigation.

- Use your issues list
- Develop your Strategy
  - Is there undisputed information? Is it relevant to explore?
  - Is there disputed information? Is it relevant to explore?
  - Are there any key issues that aren't policy violations?
  - Are there possible policy violations that were not included in the notice of investigation/allegation?
  - Who do you want to talk with (order of interviews?)
  - What represents your next steps?

# STRATEGY EVOLUTION

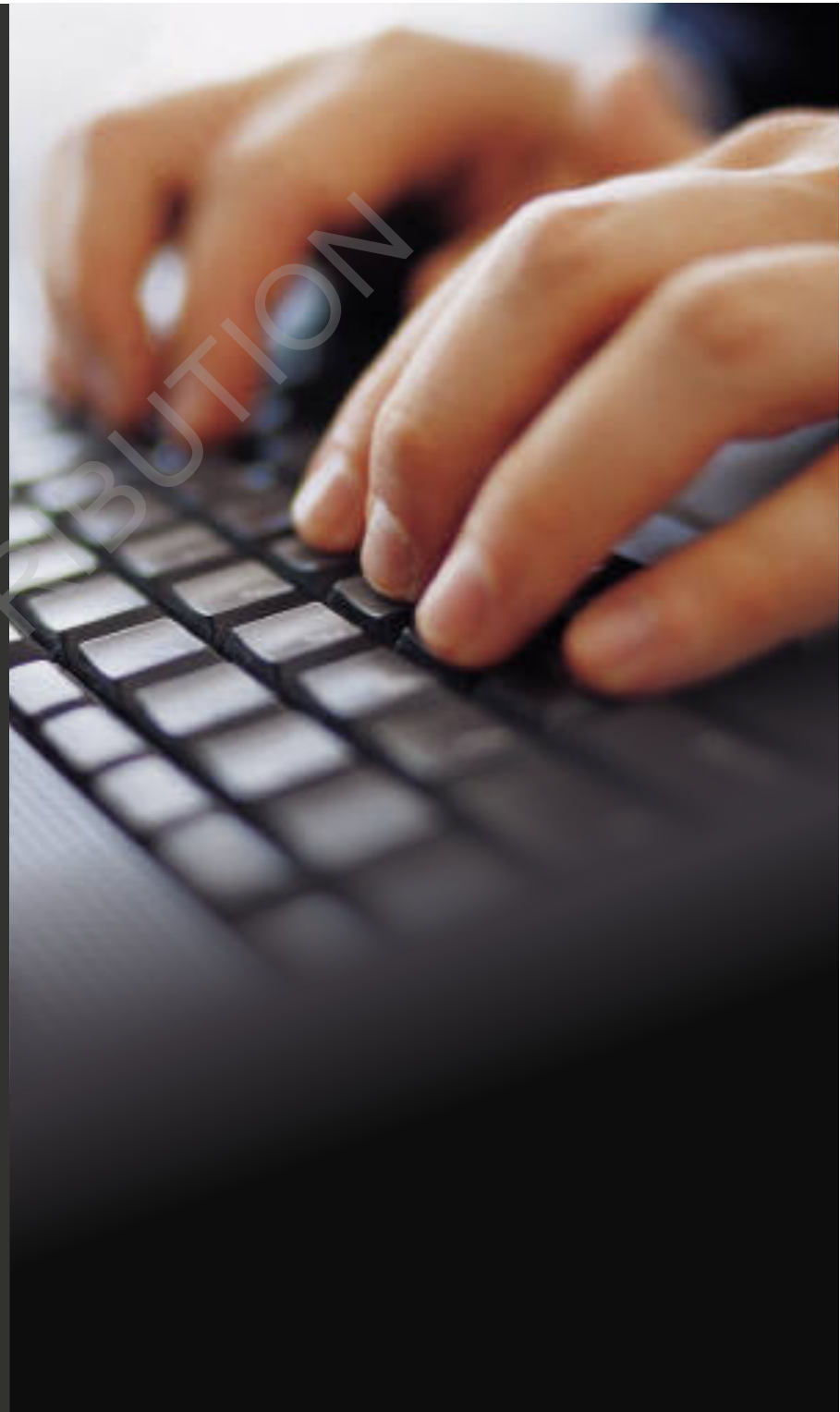


- Find an opportunity to let your subconscious work on the gaps in information.
  - Turn your brain off ... walk away and do something else
  - Use colleagues: co-investigator and others
- If you are too busy analyzing what you know, you will not focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them.
- Look for evidence that should be there that is not, for some reason.

# TAKING NOTES

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- What Kinds Of Notes Should Be Kept?
- Note-Taking



# WHAT KINDS OF NOTES SHOULD BE KEPT?



- Assemble an investigative file and keep it in a secure location.
- Keep a timeline of the steps in the process, including dates of all meetings and interviews.
- Interviews – notes vs. recording.
  - Recording is becoming more common
- Notes – handwritten vs. computer.
- **Interviewee verification.**
- Records of all contacts, including emails and phone calls with all parties.

# NOTE-TAKING



- Taking notes may slow down the interview in a good way.
- Use pre-prepared numbered questions as a framework, but be flexible.
- Note-taking should occur throughout the entire interview, not just when the Respondent makes a pertinent disclosure or an “incriminating” remark.
- Documentation is critical: you are creating the record of the complaint.
- Remember that students have the right to inspect their education record under FERPA.

# NOTE-TAKING



- Notes should be complete and detailed.
  - Important for assessing credibility.
  - Decision may turn on small details.
- Where possible, include verbatim statements on critical issues – Use their words, not yours.
- Keep notes on what is told to the Complainant, Respondent, and witnesses.
- You may want to summarize perceptions of credibility.
  - Recognize, however, that notes and evidence may be subject to review.

# NOTE-TAKING



- Remember that “sole possession” FERPA exception is very limited.
- Date all records and include who was present at any meetings; number pages.
- Review your notes before the interview concludes.
- Clarify anything you are unclear about.
- Document any refusal to answer, evasion, or refusal to participate.
- Capture key quotes.
- Review and finalize notes immediately upon completion of interview.



# RECORD-KEEPING



- Certain records must be maintained 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 conclusion, recipient must document the rationale for its determination
- Recipient must document measures taken to preserve/restore access to education programs/activity

- Considerations for investigator notes
  - Fact-based observations
  - Avoid conclusions or determinations
- “Maintain” applies to what is kept
- Develop and maintain minimalistic note-taking style
- Overwritten notes
- Think about who could potentially read – parties, attorneys, judge, jury, public

# QUESTIONING SKILLS & GUIDELINES

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# QUESTIONING GUIDELINES



Take the complaint from start to finish through a process of broad to narrow questions and issues that need to be addressed.

- Prepare an outline of your questions in advance.
  - Ask questions about the allegations and the evidence and the policy elements.
  - Focus on areas of conflicting evidence or gaps of information.
  - Drill down on timelines and details.
  - Review your questions before ending interview.

# THE ART OF QUESTIONING



- Listen carefully and adapt follow-up questions.
- Work from your outline of your interview questions but be flexible.
- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out because they are afraid of getting into trouble for alcohol/drug use etc.
- Ascertain who the individual is and their relation to the other parties in the case.
- Clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “fooled around,” “acted weird,” and “had a few drinks.”

# RESTATE/REFRAME



- Restate/summarize what is said. Helps validate that you are listening.
- Do not launder the language.
  - Report what is said. Rephrase with caution.
- 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”

# INTERVIEW GUIDELINES CONT.



- Pay attention to alcohol/drug consumption and timing of consumption (your “horizontal timeline”).
- Be cognizant of the difference between what was “heard” (rumor) and what was “witnessed” (facts).
- Ask who else you should talk to and ask for any relevant documentation (i.e. texts, emails, etc.).
- Let parties know you may need to follow up with them as the investigation progresses.
- Discuss non-retaliation.
- Discuss FERPA issues.

# CONDUCTING INTERVIEWS



- Explain that you will be taking notes or recording and why.
- Acknowledge that they may have told others what happened multiple times already.
  - Ask who else they have talked to about the incident.
- Ask if they or others they are aware of have written about this in any fashion:
  - Blog.
  - Facebook/Twitter/Social Media.
  - Journals or other writings.
  - Texts.
  - Video journals.



# CONDUCTING INTERVIEWS CONT.



- Ask if they have any questions about the process or the procedure.
  - Give them a copy of the resource and support guide.
- Make sure parties don't leave facts out because they are afraid of getting into trouble.
  - Discuss the amnesty provisions (if applicable).
- Create comfort with language and sensitive subjects.
  - Let them know that they will not offend or surprise you.

# CONDUCTING INTERVIEWS CONT.



- Discuss interim remedies that have been provided and if any other need to be taken at this time and that you will report this to the Title IX Coordinator for follow-up, ex.:
  - No contact orders.
  - Class changes.
  - Living arrangements.
  - Safety concerns
  - Counseling support
  - Medical Issues
- Discuss non-retaliation.
  - Give examples of retaliation, and to whom it should be reported immediately.

# CONDUCTING INTERVIEWS CONT.



- Now begin the “interview.”
  - Let them talk.
  - Give them a starting point if they don’t have one.
  - Drill down later.
  - Interrupt for questions only when you must.
- **Note:** some strategies may change based on their demeanor.
  - Expressive.
  - Angry.
  - Resistant.
  - Hesitant.

# CONDUCTING INTERVIEWS CONT.



- Avoid “why” questions:
  - Lack of physical resistance.
  - Role of alcohol/drugs.
  - Inconsistencies/memory loss.
  - Delayed reporting.
  - Prior relationships.
  - “Pre-consent”/flirting.
  - Pre-desired outcomes.
  - Post-incident consensual acts.
  - “What were you thinking” (vs. “feeling”)?

# CONDUCTING INTERVIEWS CONT.



- To conclude (some investigators do this earlier to assist with empathy):
  - Find out if academics and/or work have been affected
  - Ask how this has affected them emotionally and/or physically.
    - Discuss counseling options if not already connected.
- **NOTE:** Challenges that this may provide when there is not an advisor present.

# CONDUCTING INTERVIEWS CONT.



At the end:

- What else do you think might be important for us to know?
- What other questions are there that you thought we might ask that we didn't?
- Ask who else you should talk to and ask for any relevant documentation (i.e. texts, emails, etc.).
- Is there anything you want me to ask the other party (or any witness)?
- If you have not ascertained this, try to determine what Complainant's motivation is for reporting and what Complainant hopes to see as a result – **BE CAREFUL HERE.**

# CONDUCTING INTERVIEWS CONT.



- Let them know next steps and when they will hear from you, and that they can contact you anytime with questions or problems.
  - Get their contact information.
    - Voicemail?
    - Email?
    - Text?
  - Be as specific as possible about timelines.
- Interview transcript in final form (to be verified by witness).

# TRAUMA AND THE GRIEVANCE PROCESS

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- Introduction to Trauma
- Neurobiological Impact of Trauma
- Trauma and Interviewing
- Trauma and Credibility



# WHAT IS TRAUMA?



- Exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity.
- May result from war, natural disasters, severely distressing events.
- When the brain senses a threat, releases hormones or chemicals throughout the body to help react to the threat and/or trauma.
- The brain does not distinguish between “types” of sexual assault,
  - E.g. stranger or acquaintance, but interprets them equally as threats to survival.
- The brain also does not typically differentiate between an actual threat and a perceived or subjective threat.
  - Sometimes also a function of prior experiences, rather than the immediate situation.

# MEMORY AND TRAUMA



- Memory is formed in two steps:
  - Encoding: organizing sensory information coming into brain.
  - Consolidation: grouping into memories and storing the stimulus.
- Trauma can interfere with the encoding and/or the consolidation of memory.
- May create fragmented memories.
- Recall can be slower and more difficult.
- Alcohol may interfere further with memory.
- However, sensory information (smell, sound, etc.), may still function properly.

# TRAUMA & INTERVIEWING



- Expecting a Complainant to give a linear account in the days after an incident, or after having been triggered, is not always realistic.
- Memory fragmentation can occur.
- Having “inconsistent” memory, pausing, and stumbling to provide an account are not outside the bounds of what one could expect from a person who has experienced trauma.
- Considerations for credibility?

# TRAUMA & INTERVIEWING



- Allowance for sleep cycles prior to interviews (if within 96-120 hours).
- A non-linear account, with jumping around and scattered memories is not uncommon.
- If alcohol is an additional factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress.
- Use open-ended questions.
- Don't interrupt or barrage with questions.
- Use strategies that pull out fragmented memories.
- Be patient during the interview and allow time.

# TRAUMA & INTERVIEWING



- Empathy is critical.
  - However, remember to remain impartial.
- Tell me more about...
- Help me understand your thoughts when...
- What was going through your mind when...
- What are you able to remember about...?
  - 5 senses
- What were your reactions to this experience?
  - Physically
  - Emotionally
- What, if anything, can you not you forget about this experience?

Source: Partially drawn from Russell Strand, Forensic Experiential Trauma Interview: A Trauma Informed Experience.

# TRAUMA & CREDIBILITY



- Trauma may help explain elements that negatively impact a party's credibility
  - Inconsistencies in a party or witness's statement.
  - Lack of linearity in a party or witness's account or statement.
  - Lack of memory about an incident.
  - Memory errors by a party or witness.
  - Demeanor or affect.
  - Brief answers, or answers lacking in detail.

# TRAUMA & CREDIBILITY



- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them.
  - An assessment of credibility must focus on issues such as the reliability, consistency and believability of the parties.
  - If, for example, a party's account is inconsistent or variable, lacking in detail, or has material memory gaps, it typically lacks credibility.
  - An understanding of trauma and its impact will provide insight as to why some credibility deficits exist, but a trauma-informed understanding should not materially impact a credibility assessment.
- Use caution because actual or perceived trauma may have little or nothing to do with consent.

# HIT THE G.A.S.

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- Gather Evidence
- Assess Credibility
- Synthesize the Information



# GATHER THE EVIDENCE



- Collect the evidence from all sources
- Organize it according to the investigation strategy and allegations
  - Chronology
  - Geography
  - Policy prohibitions
  - Alleged violations
- Summarize evidence in a written report
- This the fact-gathering function. It's a function all investigators have performed since at least 2011, and it's not new or different as a result of regulations.

# ASSESS CREDIBILITY



- Accuracy and reliability of information
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading *may* impact
- Primary factors: corroboration and consistency
- Avoid *too much* focus on irrelevant inconsistencies
- Source + content + plausibility
- Trauma-informed approach should be consistent

# COMMON ERRORS IN ASSESSING CREDIBILITY



- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
  - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about memory
  - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes

# COMMON ERRORS IN ASSESSING CREDIBILITY



- Misplaced focus on the status of the parties
  - No scientific studies support the notion of neurobiological response differences between perpetrators and victims
- Bias in interviews
  - Presumptions of guilt can influence credibility assessments

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# INTERVIEW TACTICS



- Reverse Chronological Order
- Use of a Model Statement
- Asking unexpected questions
- Asking the individual to recall information in unexpected ways, e.g. sketch
- Asking interviewees for details that the investigator can check
  - Truth tellers generally add more “checkable” details
  - Liars provide details that are difficult to verify
- The Funnel

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

*Enforcement Guidance  
on Vicarious Employer  
Liability for Unlawful  
Harassment by  
Supervisors*

EEOC (1999)

# 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

# FACTORS TO CONSIDER FOR CREDIBILITY



## Corroborating evidence

- 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 (ex. the honest roommate)



# CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS



- Indicate where to look to the decision-maker without rendering conclusions or making findings related to credibility.
- NOT GOOD  
~~“The decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons...”~~
- GOOD  
“Mark’s testimony about X contrasts with Mariana’s testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana’s testimony, not Mark’s, during the investigation.”

# SYNTHESIZE AREAS OF DISPUTE



- Examine only actions that have a direct relation to the situation under review or a pattern of incidents.
- Narrow the scope to areas in dispute or disagreement between the parties.
  - Two lists: contested and uncontested facts
- Use evidentiary and report review periods to clarify disputed facts
- Present evidence in report organized around facts relating to alleged policy violations
- Contested facts will form the bulk of the decision-maker's work in making a determination.

# THE INVESTIGATION REPORT



## SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS

*This is just one example that may be useful. You should consult with a licensed attorney in your own jurisdiction before adopting this template.*

University of Knowledge

Date of Report:

This report addresses alleged violations of the Policy Name(s) of the University of Knowledge. Names of Investigators conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the relevant university policy or policies.

### Executive Summary:

*(Summarize findings here.)*

### Procedural History:

*Include the date of the incident, the date on which it was reported, how and to whom (generally) it was reported, the date on which investigators were assigned to it, and the date on which the investigation closed.*

On Month XX, 20XX, Reporting Party met with Name Here in the Office of Victim Assistance at University of Knowledge along with Name Other Present Parties. Reporting Party reported that General Allegations occurred on Month XX, 20XX. Reporting Party has not reported this matter to law enforcement at this time, although she is aware of this option.

This report was referred to Investigators Name Here and Name Here on Month XX, 20XX. Both investigators were present in person for each interview. They alternated questioning and note-taking roles. This investigation was completed on Month XX, 20XX.

### Involved Parties:

Reporting Party is (e.g., a first-year undergraduate female residing in the residence halls).

1. Responding Party is (e.g., a male graduate student and a residence advisor in the residence halls).
2. Witness 1 is (e.g., a freshman female residing in the residence halls and Reporting Party's roommate).
3. Witness 2 is (e.g., a male undergrad living off-campus and a classmate and friend of Reporting Party).
4. Witness 3 is (e.g., an employee of Nearby Bar; employee is not affiliated with the university).

# ELEMENTS OF THE INVESTIGATION REPORT



- Case identification information:
  - Case number, investigator(s), date of notice, date assigned to investigator, and date investigation closed.
- Source of initial complaint/allegation:
  - Source of initial report, information regarding the formal complaint; name and contact information of Complainant, and status; record same for Respondent.
- Details from initial report/complaint:
  - Nature of incident.
  - How initial report and/or formal complaint was received (e.g. security incident report, hotline, in person, Web form, etc.).

## ALSO INCLUDE IN THE INVESTIGATION REPORT



- Results of interviews with parties and witnesses.
- Results of interviews with experts.
- Summary of other information collected (i.e. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.).

# THE INVESTIGATION REPORT



- A skeleton template is helpful
- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Detail the allegations and how they were brought forward.
  - Explain the role of the parties and witnesses, and any relations between them.
  - Results of interviews with parties and witnesses.
  - Results of interviews with experts.
  - Summary of other information collected (i.e. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.).

# FOCUS ON WHAT YOU DON'T KNOW, RATHER THAN WHAT YOU DO KNOW



- Find an opportunity to let your subconscious work on the gaps in information.
- If you are too busy analyzing what you know, you won't focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them.
- Look for evidence that should be there that is not, for some reason.

# CASE STUDY

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Using a case study, attendees should evaluate the available facts, identify issues and evidence (available and still needed), and assess compared to policy prohibitions.





# AMY AND TODD

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On Friday, April 23, I went to an on-campus party. I was doing a lot of drinking and dancing and getting to know people. I had at least four drinks in the first few hours I was there. Then, I met Todd. I remember that he came up to me on the dance floor and started to dance with me. He was really good-looking, and so was the other guy he was with, Jeff, whom I had met at a different party the week before.

We danced and had a lot of fun, and I remember drinking some more and Todd getting me some Jell-O shots, which were really strong and nasty. I wasn't feeling well and went into the bathroom, thinking I might throw up. The bathroom was really crowded, so I went outside for some fresh air instead. I sat on the stoop, feeling sick. Todd came over and helped me out. I remember walking home with him but nothing else.

When I woke up the next day, his name and number were scrawled on a pad by my sofa, and there was a used condom in the toilet. I got scared and called him to find out what had happened. I remembered most of what he said about the party, but when he told me that we came back to my room and had sex, I started to cry. I didn't remember any of it and was afraid I might be pregnant. Todd assured me that he wore a condom and asked me out again. I hung up and cried.

I told everything to my roommate, Sarah, who was sitting on the sofa when I called Todd. She suggested that I call the campus police, but I felt more comfortable talking to you.

On the night of Friday April 23, I went to an on-campus party. There was a band and a lot of alcohol. I got to the party at about 11:00 p.m. and slammed about three beers in the first hour I was there. It was very crowded, and people were dancing. A lot of people already seemed to be drunk. I hung out around the dance floor with my friend Jeff Kwik for a while, until I noticed Amy Craft dancing. She was really cute, and I had noticed her on campus a few times. I went up to her and we started talking. She seemed a little tipsy and in a pretty loose mood. We talked for a while, and I think I got her about two or three beers over the next hour. I didn't have anything more to drink because the three beers I slammed were doing the trick just fine.

Around 1:00 a.m., somebody started passing out Jell-O shots spiked with grain alcohol. I didn't want to mix beer and liquor, but Amy had a few shots. We danced a lot, and then I got her a few more Jell-O shots. She went off to the bathroom, and after that I couldn't find her, which really bummed me out. I waited around to see if she would show up again, but she didn't. I took off and started to walk back to my residence hall. As I left the party, I looked over and saw Amy. She seemed to be in pretty bad shape. I offered to take her home, and she told me her dorm and leaned on my arm.

When we got to her dorm, I helped her inside, and was about to leave, but she asked me to come up to her room, just to make sure she got there. I took her upstairs, opened the door for her, and let her in. She asked me to get her a glass of water, and I did. I started to take off again, but she asked me not to go. When I turned around, she kissed me, hard. We kissed for a while, but she wasn't feeling well and went into the bathroom again. When she came out, she said she felt better, but tired. She lay down and we kissed some more. I started to massage her back, and she passed out. She came to about 20 minutes later and started to kiss me and fondle me. She took off her shirt, and all of my clothes. I started to kiss her all over, and she said she wanted to lay down again. I asked her if she was OK, and she said she was. I asked her if she had a condom, and she said she had one in her dresser. I went to get it, and when I got back to the couch, she was out again.

She woke up after about 20 minutes, and I suggested that she just go to sleep. But she said she felt much better and started to give me oral sex. After a while, she put the condom on me and we had sex. It was great. She was really wild and liked to be on top. Afterward, we talked until the early morning, and I gave her my number and left. The next day, she called me to ask me why my name was on the pad by her sofa. I told her about meeting her at the party and about our evening together. She seemed to get upset, and said she remembered meeting me at the party, but nothing else. I asked if she ever wanted to get together again, and she hung up on me.

WHAT IS YOUR MISSION  
AS A DECISION-MAKER?

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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.

# WHEN AND HOW THE “DECISION-MAKER” WORKS



- New Title IX regulations require that colleges and universities hold a live hearing.
  - 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.
- K-12 schools and other federal funding recipients (such as many hospitals with residency programs), need not conduct a live hearing, but must provide an opportunity for the parties to submit written questions for the other party/witnesses.
  - If a hearing is offered, it does not have to comply with §106.45.

# HEARING OFFICER/DECISION-MAKER RESPONSIBILITIES



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

	<u>Your Rank</u>	<u>Group Rank</u>
• 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	_____	_____

# THE GOAL



AN EQUITABLE RESULT FROM  
AN EQUITABLE PROCESS

# HEARING OFFICER/DECISION-MAKER COMPETENCIES



- The Legal Landscape
- The 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, including Relevance
- Weighing Evidence, including Relevance
- Analyzing Policy
- Applying Standards of Evidence
- Sexual Misconduct/Discrimination
- Technology Used at Hearing
- Controlling Evidence
- Managing Advisors
- SANE and Police Reports
- Presumption of Innocence
- Due Process and Fairness
- Domestic/Dating Violence
- Bias/Impartiality/Conflicts of Interest
- Stalking/Sexual Assault/Harassment
- 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?

# ADDITIONAL ROLES OF THE CHAIR\*



- Meet with parties/advisors pre-hearing to respond to their review/comment on report
- Work with investigator(s) to revise Bucket #1 and Bucket #2, accordingly
- Ensure finalized report is shared with parties and hearing panelists
- Pre-rule on any pre-submitted questions, and share rulings with parties/advisors in advance of hearing
- Clearly establish order of presentation/questioning for all testimony at hearing
  - Circulate to parties/advisors in advance

\* Some of these functions may be provided by the hearing facilitator, if that model is used.

# ADDITIONAL ROLES OF THE CHAIR\*



- Read hearing script sections at the hearing, as necessary
- Preside over questioning at hearing
- Rule on every question's relevance, on the record
- Address any issues of fairness, evidence introduction, bias that are raised at hearing
- Guide deliberations
- Take the lead on drafting the outcome rationale

\* Some of these functions may be provided by the hearing facilitator, if that model is used.

# 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.



# BIAS, CONFLICTS OF INTEREST, AND RECUSAL

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- Among the most significant problems for hearing decision-makers
- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
  - Pre-determined outcome
  - Partisan approach by investigators in questioning, findings, or report
  - Partisan approach by hearing board members in questioning, findings, or sanction
  - Intervention by senior-level institutional officials
  - Not staying in your lane
  - Improper application of institutional procedures
  - Improper application of institutional policies
  - Confirmation bias
  - Implicit bias
  - Animus of any kind

# BIAS AND CONFLICT OF INTEREST



- Conflicts of interest and bias are expressly prohibited in the 2020 Title IX regulations.
- Types of conflicts/bias:
  - Wearing too many hats in the process
  - Legal counsel as investigator or decision-maker
  - Decision-makers who are not impartial
  - Biased training materials; reliance on sex 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.

# RECUSAL



- Decision-makers may determine that they need to recuse themselves from hearing a particular case or a party might seek a decision-maker's recusal.
- This is why having an alternate decision-maker on hand is always wise.
- Your policy should define the process and circumstances by which a party may seek to recuse a decision-maker.
- Typically the Title IX Coordinator determines whether or not to honor the request.
- If you yourself discern that you are not able to hear a case impartially, please let your Title IX Coordinator know immediately.

# 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.
  - **SEXUAL HARASSMENT:** 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!

Define **sexual assault** as (six sub offenses now):

- Sex Offenses, Forcible: 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.

# SEXUAL ASSAULT



- **Sexual Assault With An Object:** To use 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.



# SEXUAL ASSAULT



## Sex Offenses, Nonforcible: Nonforcible sexual intercourse.

- **Incest:** Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by state law.
- **Statutory Rape:** 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.

## **Dating Violence** is 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.

# DOMESTIC VIOLENCE



- Domestic Violence is defined as a felony or misdemeanor crime of violence 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;
  - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
  - 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].

# DOMESTIC VIOLENCE



- 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.

# STALKING



- **Stalking** is defined as 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 stalker 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.
  - 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.**

# TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR SEXUAL HARASSMENT



**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.
- Was there an effective denial of education or employment access?
- If SPOO, a discriminatory effect is presumed (proven)

# TOTALITY OF THE CIRCUMSTANCES



- Determine whether something is sex-based?
- 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.

# 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.



# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



Examples of sexual exploitation include, but not limited to...

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

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



- 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.

# 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.

# 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 code of conduct 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.

# ATIXA CONSENT CONSTRUCT

- 
- Force
  - Incapacity
  - Consent

# CONSENT IS...



- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual or intimate activity.
- Cannot be obtained by use of:
  - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated.

# OVERVIEW OF THE 3 CONSENT QUESTIONS



1. Was force used by the Respondent to obtain sexual access?
2. Was the Complainant incapacitated?
  - a. Did the Respondent know, or
  - b. Should s/he have known that the Complainant was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the Complainant gave the Respondent permission for the specific sexual activity that took place?

There are four types of force to consider:

- **Physical violence** – hitting, restraint, pushing, kicking, etc.
- **Threats** – anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
- **Intimidation** – an implied threat that menaces and/or causes reasonable fear
- **Coercion** – the application of an *unreasonable* amount of pressure for sexual access.
  - Consider:
    - Isolation
    - Frequency
    - Intensity
    - Duration
- Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force



# INCAPACITY



- 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.
- Assessing incapacitation is very fact-dependent.
- Blackouts are frequent issues.
  - Blackout = no working (form of short-term) memory for a consistent period, thus the person is unable to understand who, what, when, where, why, or how
    - But the 2a question must be answered, as blacked out individuals are able to engage in activities that may not make 2a a definitive “yes”
  - Partial blackout or “brownout” possibilities must be assessed as well

- What was the form of incapacity?
  - Alcohol or other drugs
    - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence
    - Incapacity = an extreme form of intoxication (alcohol)
  - Administered voluntarily or without Complainant's knowledge
  - Rape drugs
- Mental/cognitive impairment
- Injury
- Asleep or unconscious

# INCAPACITY ANALYSIS



- First, **was the Complainant incapacitated** at the time of sex?
  - Could the person make rational, reasonable decisions?
  - Could the Complainant appreciate the situation and address it consciously such that any consent was informed –
    - **Knowing who, what, when, where, why, and how.**
- Second, **did the Respondent know** of the incapacity (fact)?
- Or, **should the Respondent have known** from all the circumstances (reasonable person)?

# BEHAVIORAL CUES



- Evidence of incapacity may be taken from context clues in the relevant evidence, such as:
  - Slurred speech
  - The smell of alcohol on the breath in combination with other factors
  - Shaky equilibrium; stumbling
  - Outrageous or unusual behavior
  - Passing out
  - Throwing up
  - Appearing disoriented
  - Unconsciousness
  - Known blackout
    - Although memory is absent in a blackout, verbal and motor skills are still functioning.

# KNOWLEDGE CONSTRUCT



- The evidence might also include contextual information to analyze any behaviors by the Complainant that seem “out of the norm” as part of a determination of incapacity:
  - Did the Respondent know the Complainant previously?
  - If so, was the Complainant acting very differently from previous similar situations?
  - Review what the Respondent observed the Complainant consuming (via the report’s timeline).
  - Determine if Respondent provided any of the alcohol to the Complainant.
  - Consider other relevant behavioral cues.

# FINAL INCAPACITY ANALYSIS



- If the Complainant was not incapacitated, move on to the Consent analysis (Question #3).
- If the Complainant was incapacitated, but:
  - The Respondent did not know it, AND
  - The Respondent could not have reasonably known it then the policy was not violated for this reason. Move on to the Consent analysis.
- If the Complainant was incapacitated, and:
  - The Respondent knew it or caused it then there is evidence to determine that a policy violation occurred.
  - The Respondent could or should have known it then there is evidence to determine that a policy violation occurred.

# CONSENT

Question 3 is the Consent question:

- What clear *words or actions* by the Complainant gave the Respondent permission for each sexual act as it took place?
- If there are clear words or actions (by the standard of proof), there is no sexual assault. If there are no words or actions, or they are not clear, then there is no consent, and the finding is that a sexual assault occurred.
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

# CONSENT: RULES TO REMEMBER



- 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, as long as that withdrawal is clearly communicated – verbally or non-verbally – by the person withdrawing it.



# TIMELINE EXAMPLE

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# TIMELINE CONSTRUCT



- Begin the timeline at the time the incident began, starting at the time the Complainant began consuming alcohol/engaging in recreational drug use. Ask:
  - What were you drinking (e.g. wine, beer, or hard liquor)?
  - How much were you drinking (e.g. shot, 12 oz., or large cup)?
  - How many drinks did you have?
  - Were you using any recreational drugs?
  - When did you eat? What did you eat?
  - Are you on any personal medications?

# TIMELINE CONSTRUCT



- Continue the first five questions up until the point in time that Complainant indicates they cannot remember anything.
- **Note:** If Complainant did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. You will need to ask:
  - Where were you when you were drinking?
  - Did you leave your drink at any time then resume consuming?
  - Did anyone provide drinks for you?

# TIMELINE CONSTRUCT



- Ask the Respondent if Complainant was:
  - Slurring words?
  - Stumbling?
  - Acting unusual (e.g. not making sense, appearing drunk, etc.)?
  - Falling asleep?
  - Throwing up?
  - Disoriented?
  - And, if Respondent knows Complainant, was s/he acting different from the way s/he usually acts?

# TIMELINE CONSTRUCT



- The decision-maker will need to make an assessment if, based on the preponderance of the evidence, the Complainant was more likely than not incapacitated.
- If the answer is “No,” then will proceed to the Consent analysis.
- If the answer is “Yes,” then move to part two of your analysis.
- Conduct the same timeline for the Respondent, superimposed on the Complainant’s timeline.

# CREATING A TIMELINE

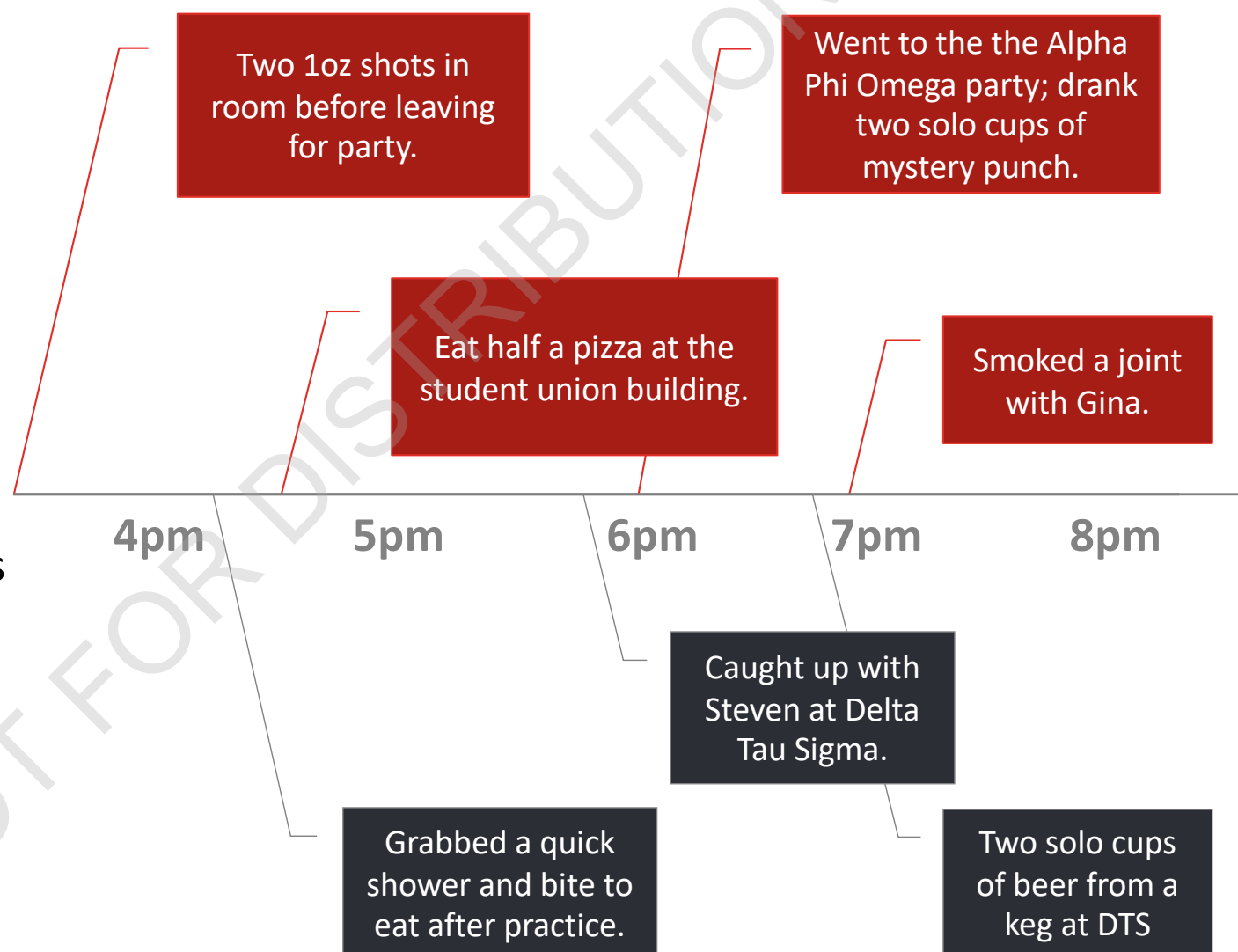


The decision-maker will use the preponderance of evidence standard.

Use documentary evidence, e.g. texts to establish where, why, when, how, and who.

Match up as many times and locations as possible.

What did the other party observe?



# CREATING A TIMELINE



Keg stand and  
two Jell-O  
shots.

One beer and  
another joint  
with Greg.

Dancing with  
section mates.

Danced with  
Paul before he  
walked me  
home.

9pm

10pm

11pm

12am

1am

2am

3am

4am

Arrived at Alpha  
Phi Omega for  
beer pong  
championships.

Celebrated pong  
championship  
with Carly on the  
dance floor.

Snorted some  
Adderall.

Walked Carly  
home.

Paul alleges Carly  
asked him to stay  
the night.

Watched the end  
of Seth Myers.

Paul alleges Carly  
consented to oral  
sex and  
intercourse.

# PREPARING FOR THE HEARING

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# PREPARING FOR THE HEARING



## Always Review:

- The Respondent's written notice (NOIA) to understand all allegations.
- Review the policy alleged to have been violated.
  - Parse all the policy elements (what does it take to establish a policy violation?)
  - Identify the elements of each offense alleged.
  - Break down the constituent elements of each relevant policy.
- Review all the material carefully and thoroughly – get a general overview of the complaint.
- 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.
  - Here is where you will concentrate your questions.

# PREPARING QUESTIONS



- Write down the following as a reminder:
  - What do I need to know?
  - Why do I need to know it?
    - If the answer to this is not that it will help you determine whether or not a policy violation occurred and you can explain a rationale for that; then it is not something you need to know!
  - 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).

# PRE-HEARING MEETINGS



- Although not explicitly required or even mentioned in the Title IX regulations, it may be valuable to conduct pre-hearing meetings for each party.
- Pre-hearing meetings can provide an opportunity to:
  - Answer questions the parties and advisors have about the hearing and its procedures.
  - Clarify expectations regarding logistics, decorum, and technology (when applicable).
  - Clarify expectations regarding the limited role of advisors.
  - Discern whether parties intend to ask questions of any or all witnesses (in order to evaluate which witnesses should be invited to attend the hearing).
  - Invite parties to submit questions in advance, but don't not require it.
  - Discern any conflicts of interest/vet recusal requests.
  - Understand (and perhaps preliminarily field) any questions regarding relevance of evidence or questions.

# PREPARING FOR THE HEARING



- Dress professionally – Jeans, t-shirts, shorts, or sandals are not appropriate
- Arrive prepared and early
- Bring snacks and water/drinks
- Turn off your phone! And put it away!
- Bring a pen and paper or note-taking device
- Clear calendar after the hearing – deliberation could take 30 minutes or it could take much longer.
- Note-writing tips
  - Less is better; record what you need to make a determination.

# QUICK TIPS ON HEARING LOGISTICS

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# THE HEARING: GENERAL LOGISTICS



- Recording
    - how, by whom, etc.
  - 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)
  - Advisors
  - Parties and witnesses waiting to testify
  - Breaks
  - Use of A/V
  - Waiting for a decision

# HEARING DECORUM



- Be professional, but not lawyerly or judge-like
  - This is not *Law and Order* – 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 the institutional policy.
- Be respectful
  - Tone, Manner, Questioning.
  - Sarcasm or being snide are never appropriate.
  - Maintain your composure: Never allow emotion or frustration to show.

# HEARING DECORUM



- Work to establish a baseline of relaxed conversation for everyone in the room.
- Maintain good eye contact; “listen with your eyes and your ears”
- 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



# 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.

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

- Determine the relevance and appropriateness of questions. Pause after each question to “rule” on relevance. State your rationale for the record.
- When necessary, provide 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 your positional authority

# DECISION-MAKING SKILLS

- Understanding Evidence
- Relevance
- Reliability/Credibility
- Cross-Examination
- Analyzing the Information

# UNDERSTANDING EVIDENCE



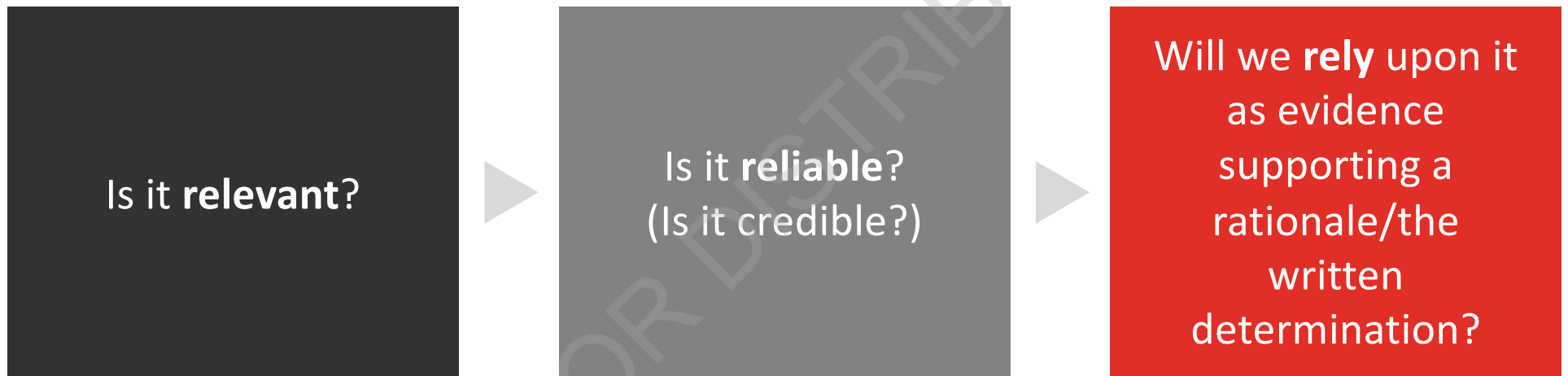
- The formal federal rules of evidence do not apply in Title IX hearings, but rules crafted by OCR for Title IX cases do.
- If the information helps to prove or disprove a fact at issue, it should be admitted.
- If credible, it should be considered.
  - Evidence is any kind of information presented with 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.

# 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.

# ASK YOURSELF



- Evidence is generally considered *relevant* if it has value in proving or disproving a fact at issue.
  - 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...
- But 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 – inculpatory and exculpatory.

- If the investigator indicates an opinion on credibility, outcome, whether policy was violated, how evidence should be weighed, etc., that opinion or recommendation is not binding on the decision-maker.
- The decision-maker may consider it, but has to be objective and independent, and is free to accept or reject any recommendation of the investigator (or ask them not to make one)
  - Should you ask for it or ask the investigator to clarify their recommendations?



# UNDERSTANDING EVIDENCE



- Decision-maker 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).
  - Hearsay evidence (e.g. statement made outside the hearing, but presented as important information).
- Decision-makers should typically disregard:
  - Character evidence (generally of little value or relevance).
  - Impact statements (typically only relevant in sanctioning).

# SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS



- Evidence of the Complainant's prior sexual behavior or predisposition 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.

# ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS



Additional permissions 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.

# 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 advisor.
  - Advisor of choice or an advisor provided by the institution, at no cost to the parties.
- 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. You may want an advisor to explain why they think a question is relevant or will lead to a relevant answer.
- Decision-maker must first determine whether a question is relevant and direct party to answer.
  - Must explain any decision to exclude a question as not relevant.
- Managing advisors.

# QUESTIONING & CROSS-EXAMINATION



- 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 relevant evidence.

# QUESTIONING & CROSS-EXAMINATION



- If a party or witness does not submit to cross-examination at the live hearing, policy must clarify that 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 can be question-specific if a witness declines to answer questions about a particular statement, topic, or evidence.
- 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 and how does it work?

# CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS



- Under the 2020 regs, investigators may or may not assess credibility with or without rendering conclusions or making findings related to credibility but will help to roadmap where decision-makers should look for information critical to a determination.
- 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.”

# CREDIBILITY IN THE HEARING



- Distinguish performance/presentation skills from believability.
  - Make sure key witnesses will be present.
  - Make sure evidence has been verified.
- If any evidence/testimony must be subject to credibility assessment, and the evidence isn't available or the witness/party does not participate, it may violate due process to consider that evidence/testimony and give it weight.
- 2020 regs 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?



# CREDIBILITY DETERMINATIONS POST-HEARING



- The decision-maker determines the greater weight of credibility on each key point in which credibility is at issue.
- First, narrow to the contested facts, and then make a credibility analysis (by the standard of proof) for each.
- Then, weight the overall credibility based on the sum total of each contested fact.
- Credibility exists on a 100 point scale.
- When you write the final determination letter, focus on what facts, opinion, and/or circumstantial evidence supports your conclusion. Offer a cogent and detailed rationale.

# MAKING A DECISION

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- Deliberations
- Analyzing Information and Making Findings
- Sanctioning
- Written Determination

# OVERVIEW OF THE DELIBERATION PROCESS



- Only decision-makers attend the deliberations.
  - Parties, witnesses, advisors, and others excused.
  - If Title IX Coordinator is present, they do not participate and only serve as a resource to the decision-makers.
  - ATIXA recommends they not participate. Same with legal counsel.
- Do not record; recommend against taking notes.
- Parse the policy again; remind yourselves of the elements that compose each and every allegation.
- Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial.
- Determine whether it is more likely than not that policy has been violated or determine whether highly probable if C&C standard applies.

# DELIBERATIONS



## General Information

- Anticipate that the panel/decision-maker must concretely articulate 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.**

## Foundation for Decisions

- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report or presented at the hearing.
- Do not turn to any outside “evidence.”
- Assess each element in the policy (e.g. intent, sexual contact, voluntary, etc.), separate it out and determine if you have evidence that supports that a violation of that element is proven. 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?

## 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.
- Complainant and Respondent should share impact statement(s) only if and after the Respondent is found in violation.
- Understand that the question of whether someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation.
- Be careful about not heightening the evidentiary standard for a finding because the sanctions may be more severe.

# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Title IX and case law require:
  - Decision-maker should also decide sanction if credibility will influence the sanction
  - Not act unreasonably to bring an end to the discriminatory conduct (Stop)
  - Not act unreasonably to prevent the future reoccurrence of the discriminatory conduct (Prevent)
  - Restore the Complainant as best you can to their pre-deprivation status (Remedy)
- This may create a clash if the other sanctions only focus on educational and developmental aspects.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the Complainant and the community.

# 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



# WRITTEN DETERMINATIONS



- Decision-maker issues a written determination regarding responsibility that includes the following:
  - Sections of the policy 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 supporting the determination and conclusions regarding the application of the policy to the facts
  - Sanctions imposed on Respondent
  - Any remedies provided to the Complainant designed to restore or preserve access to the education program or activity
  - Procedures and bases for any appeal

# WRITTEN DETERMINATIONS: LOGISTICS



- The decision-maker should author the written determination.
  - May follow a template provided by the Title IX Coordinator.
- The written determination should be provided to the parties simultaneously.
  - Follows existing VAWA/Clery requirements for higher education institutions, but now extends both to reach sexual harassment cases as well as applying to all K-12 determinations.
- 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 Coordinator and/or legal counsel?

# APPEALS

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

# APPEALS



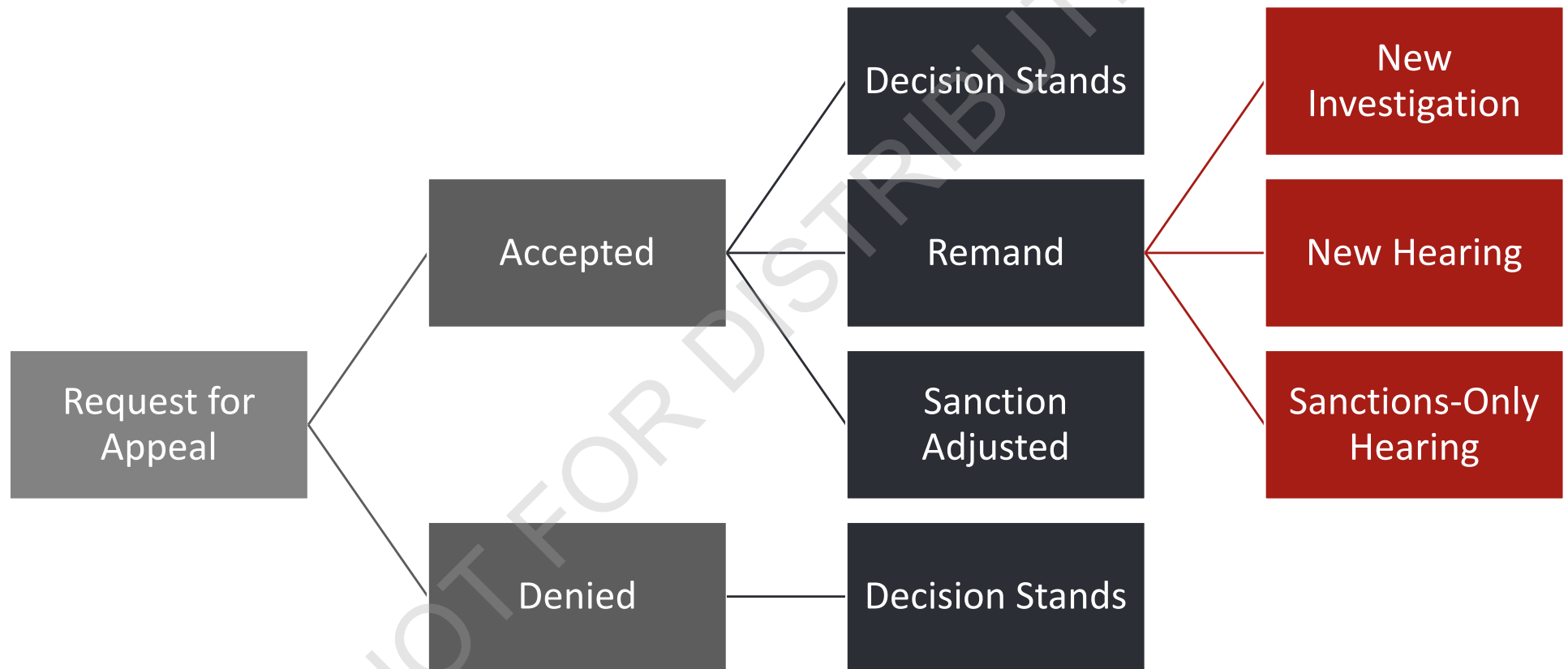
- The appeal decision-maker may be an individual or a panel.
  - Cannot be the Title IX Coordinator.
  - Cannot be the investigator or decision-maker in the original grievance process.
  - Recipient may run a pool of decision-makers who sometimes serve as hearing or appeal decision-makers
  - Recipient may have dedicated appeal decision-makers.
- When an appeal is filed, 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.

# GROUNDINGS FOR AN APPEAL



- All parties may appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - Procedural irregularity that affected the outcome of the matter
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
  - Other additional bases (sanction?), as long as applied to the parties, equitably.

# APPEALS: THE PROCESS



# 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.

# RECORD-KEEPING AND DOCUMENTATION

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# RECORD-KEEPING 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**
- For each conclusion, must document the rationale
- Must document measures taken to preserve/restore access to education programs/activity

# QUESTIONS?

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# CONTACT INFORMATION

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