



Los Angeles Community College District
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YOUR FACULTY



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AGENDA



Day One

- I. What is Covered Under IX
 - a. Jurisdiction
 - b. Covered Programs
 - c. Covered Individuals
 - d. Subject Matter
- II. Navigating First Amendment Protections
- III. Types of Sexual Harassment
 - a. Hostile Environment
 - b. Quid Pro Quo
 - c. Retaliatory Harassment
- IV. Intersection of Title VI, Title VII & Title IX
- V. Due Process
 - a. Legal Foundation
 - b. What is Due Process?
 - c. Current Issues
- VI. Overview of Civil Rights Investigation & Resolution Model
 - a. The IX Commandments
 - b. Equality vs. Equity
 - c. Overview of Models
 - d. The Process & Ten Steps

AGENDA



Day One (con't)

VII. Notice to the Institution

- a. Actual & Constructive
- b. Responsible Employee
- c. Privileged vs. Confidential vs. Private
- d. When to investigate
- e. Timeframes

e. PPTVWM

b. Interim and Support Measures

c. Informal Resolution

IX. Case Study

VIII. Preliminary Inquiry

- a. Gatekeeping
- b. Information for Reporting Party
- c. Requests for Confidentiality
- d. Reluctance to Report

WHAT IS COVERED UNDER TITLE IX

- Jurisdiction
- Covered Individuals
- Covered Programs
- Issue Spotting

TITLE IX

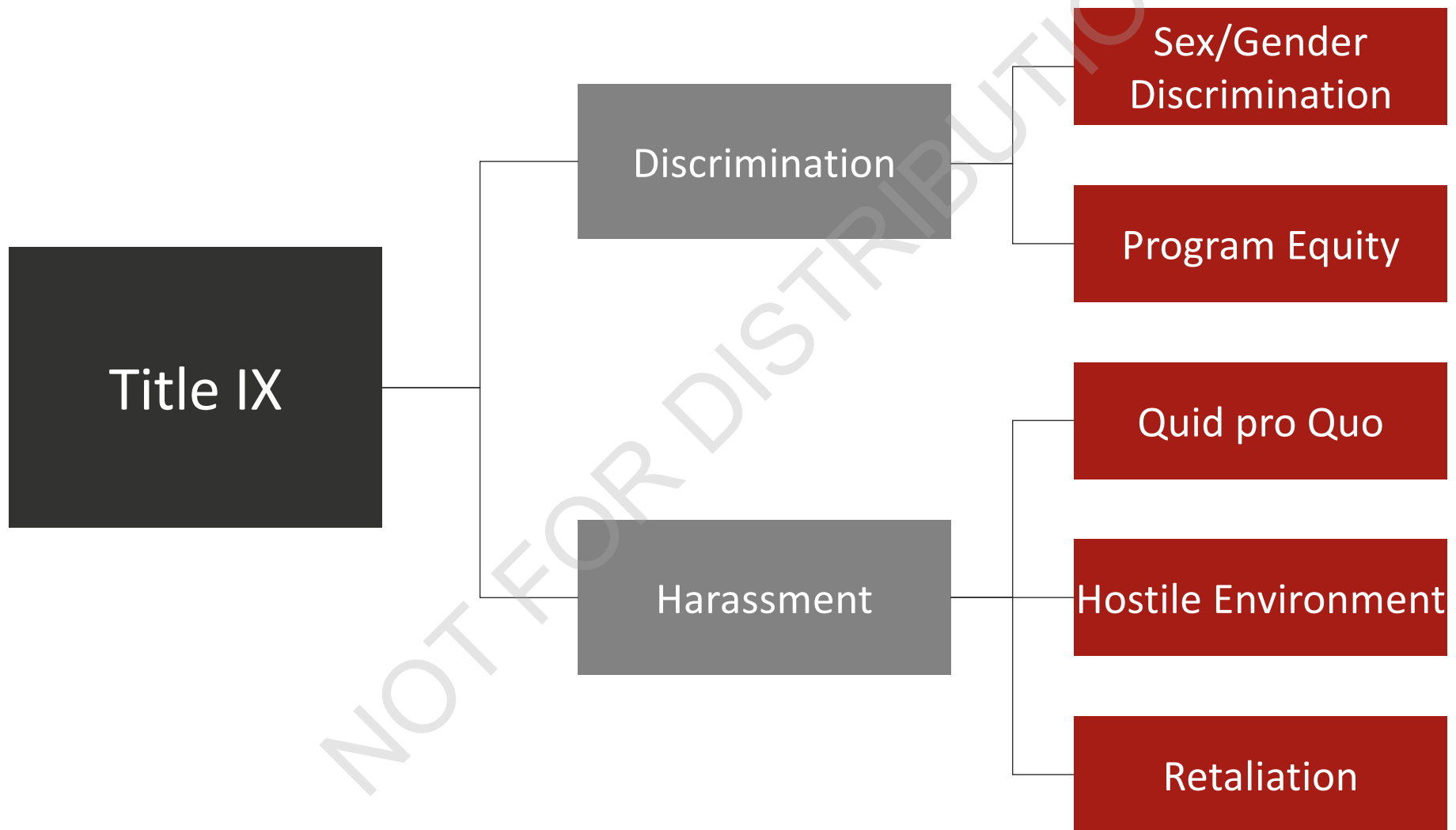
20 U.S.C. § 1681 & 34 C.F.R. PART 106 (1972)



“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.”



TITLE IX



WHEN DOES TITLE IX APPLY?



- The *Davis* standard is that Title IX applies and jurisdiction is required when the institution has:
 - Control over the harasser (discriminator); AND
 - Control over the context of the harassment (discrimination).
 - *King v. Eastern Mich. Univ.*, 221 F. Supp. 2d 783 (2002).
- When is a student a “student”?
 - Upon **application** to the institution?
 - Once **admitted** to the institution?
 - Once **registered**?
 - Upon **matriculation**?
 - What about winter and summer **breaks**?
- When is an employee and employee?
 - Exempt vs. Non-Exempt Employees

WHEN DOES TITLE IX APPLY?



Jurisdiction for Off-Campus Incidents:

- For Sexual Harassment and Discrimination cases.
 - There is an expectation that you should exercise SOME jurisdiction over off-site/off-campus incidents - “Nexus.”
- If Title IX jurisdiction is not present, the behavior could still violate:
 - Institutional harassment/discrimination policies.
 - Student Handbook/Conduct policies.
 - Technology/Acceptable Use policies.
 - Employee Handbook/Policies.
 - Professionalism standards.

WHEN DOES TITLE IX APPLY?



Jurisdiction for Off-Campus Incidents:

- This means you will be taking discretionary jurisdiction over incidents off-campus or on non-school property.
 - See, e.g. *Simpson v. Colorado*.
- When?
 - Whenever your policy says.
 - Nexus.
 - When the behavior occurs on property you own or control.
 - When the behavior occurs in programs/events you sponsor.
 - When the downstream effects of purely off-site conduct cause a discriminatory impact at school/on campus.

WHEN DOES TITLE IX APPLY?



Jurisdiction over incidents outside of the United States:

- Current OCR may not enforce extraterritorial complaints (under proposed regs).
- Campus policy may clearly exercise jurisdiction.

WHEN DOES TITLE IX APPLY?



Covered Programs

- All programs run by a federal funding recipient.
- It does not matter whether the program receives federal funding or not, **all** institutional programs are covered.
- All programs using facilities of the funding recipient.
 - (e.g. camps using your fields/stadium).
- Includes hospitals, residency programs, branch, or satellite campuses.

WHEN DOES TITLE IX APPLY?



Covered Individuals

- Students – In-school/On-campus & online/distance.
- Dual Enrollment students.
- Faculty.
- Staff.
- Campers.
- Medical Residents.
- Subcontractors, vendors.
- Guests/visitors (as either Reporting or Responding Party).

WHEN DOES TITLE IX APPLY?



- If Responding Party is not affiliated in any way with the institution, the institution lacks authority to take disciplinary action.
 - Employee of an outside company (e.g.: vendor, construction worker, etc.).
 - Guest or invitee.
 - Prospective student.
 - Former student.
 - Former employee.
 - Student from another institution.

WHEN DOES TITLE IX APPLY?



- Examples where institution lacks disciplinary authority:
 - A student is sexually harassed by a student from another institution.
 - A student withdraws, or an employee resigns in the midst of an investigation.
- Institution must still:
 - Provide support and resources to the reporting party and the community.
 - Determine if there are patterns or institutional variables that contributed to the alleged incident.
 - Take what action it can (e.g.: trespass the person).

WHEN DOES TITLE IX APPLY?



Subject Matter

- Unwelcome sex-based and gender-based conduct.*
- Unwelcome conduct of a sexual nature.*
- Sex discrimination.
- Gender discrimination.
 - Including gender identity discrimination; and
 - Sexual orientation discrimination that implicates gender.
- Pregnant and parenting student (employee?) discrimination.

*Unwelcome conduct must create a discriminatory effect and create a hostile environment, Quid pro Quo, or retaliation

WHEN DOES TITLE IX APPLY?



Subject Matter

- Hostile environment sexual harassment.
- *Quid Pro Quo* sexual harassment.
- Retaliatory harassment.
- Sexual violence.
- Intimate Partner Violence/Relationship violence.

WHEN DOES TITLE IX APPLY?



Subject Matter

- And, sex/gender-based:
 - Stalking.
 - Hazing.
 - Bullying.
 - Vandalism.
 - And any other policy violation that is sex/gender based that causes a discriminatory effect.

CASE STUDY: JURISDICTION?



- A student attends a fraternity event at a location near campus.
- At the party, the student is raped multiple times by two different fraternity members, multiple people.
- The student reports the rapes to the local police department.
- The student also reported the rapes to the school, but the school took no action to investigate.
- However, the school did subsequently suspend the fraternity for violation of their alcohol policy based on the student's report of alcohol use at the party.
- Does the institution have jurisdiction over the sexual assault?

CASE STUDY: JURISDICTION?



- Several female students express objections to the institution's decision to authorize male-only fraternities.
- The students are subsequently subjected to offensive and threatening anonymous messages posted on social media.
 - The posts refer to the female students as “femicunts, feminazis, cunts, bitches, hoes, and dikes”
 - Includes threats to “euthanize,” “kill,” and “[g]rape” them.
 - Some posts name specific students and report the location of one student in hopes that she would be confronted on campus.
- The female students express concern for their safety due to online posts.
- Does the institution have jurisdiction?

CASE STUDY: IS IT A IX?



- An employee reports to her supervisor that a colleague, Janet, is being physically abused by her partner, Robert, a full-time employee in Facilities Management.
- The employee indicates that Janet seems noticeably withdrawn lately and that Janet recently came to work late, had red puffy eyes and looked as though she had been crying.
- The employee says Janet was walking with a limp last week and, when asked about it, told people she twisted her knee after slipping on some ice in her driveway.
- Later that same day the employee said someone overheard Janet on the phone saying, “But I’m scared of what he would do if I tried to leave him.”

CASE STUDY: IS IT A IX?



- According to the employee, Janet missed a few days of work last month and returned to work wearing a sling. Janet claimed that she sprained her shoulder while working in the yard.
- Yesterday Janet showed up over an hour late to work and had some swelling around her eye and her bottom lip. When asked, Janet said she got up to the bathroom last night in the dark and walked right into the edge of her open closet door.
- The employee says that yesterday afternoon, Robert and Janet got into a loud argument in the parking lot and that Janet was crying in the bathroom afterwards.
- Is this a Title IX issue the employer needs to address?

WHEN DOES TITLE IX APPLY?



Subject Matter

- Limitations:
 - Actions/conduct/speech protected by **academic freedom**.
 - Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research.
 - Actions/conduct/speech protected by the **First Amendment**.
 - Merely offensive conduct cannot be disciplined at a public (or CA) university.
 - Must be **severe, pervasive (persistent), and objectively offensive**.
 - Subjectively offensive conduct cannot be disciplined at a public (or CA) university unless it is also objectively offensive.
- May still provide support and resources to the Reporting Party and the community as appropriate.

NAVIGATING FIRST AMENDMENT PROTECTIONS



“Congress shall make no law...abridging the freedom of speech...”

- An important concern for all public institutions and any private campuses impacted by state law and constitutions (e.g. California and New Jersey).
- Impacts policy language regarding expression.
 - Pay heed to vagueness and over-breadth concerns.
 - Avoid incorporating “intent” or “purpose” language.
- ED reaffirms First Amendment protections in Proposed Regs.

NAVIGATING FIRST AMENDMENT PROTECTIONS



- Issues to consider:
 - Time, place, and manner.
 - Open forum, limited open forum, and closed forum.
 - Confluence with academic freedom (faculty/teachers).
 - Unprotected speech.
 - Incitement of disruption and breach of peace.
 - Defamation.
 - True threat.
 - Obscenity.
 - Outside speakers.
 - Hate speech.

TYPES OF SEXUAL HARASSMENT

- Hostile Environment
- Quid Pro Quo
- Retaliatory Harassment

THREE TYPES OF SEXUAL HARASSMENT



1.
Hostile
Environment

2.
Quid Pro Quo

3.
Retaliatory
Harassment

UNDERSTANDING THE THREE FORMS OF SEXUAL HARASSMENT



Sexual Harassment is:

Unwelcome conduct of a sexual nature or that is sex or gender-based

Based on power differentials
(*quid pro quo*),

The creation of a *hostile environment*, or

Retaliation

ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- A hostile environment is created when sexual harassment is:
 - *Sufficiently severe, or*
 - **Persistent or pervasive, and**
 - **Objectively offensive** that it:
 - *Unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the university's educational [and/or employment], social, and/or residential program.*
- From both a subjective (the Reporting Party's) and an objective (reasonable person's) viewpoint.

ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
 - The frequency (persistent or pervasive), nature, and severity of the conduct.
 - Whether the conduct was physically threatening.
 - Whether the conduct was humiliating.
 - The identity of and relationship between the Responding Party and the Reporting Party.
 - The age and sex of the Responding Party and the Reporting Party.
 - The size of the school, location of the incidents, and context in which they occurred.
- *See OCR's 2001 Revised Sexual Harassment Guidance.*

ATIXA MODEL DEFINITIONS: HOSTILE ENVIRONMENT



- Totality of the circumstances to consider:
 - The effect on the Reporting Party's mental or emotional state.
 - Whether the conduct was directed at more than one person.
 - Whether the conduct unreasonably interfered with the Reporting Party's educational or work performance.
 - Whether the statement was an utterance of an epithet which was offensive, or offended by discourtesy or rudeness.
 - Whether the speech or conduct deserves the protections of academic freedom or the First Amendment protection.
 - "Constellation of surrounding circumstances."
- *See OCR's 2001 Revised Sexual Harassment Guidance.*

“SEVERE”



*“The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.”
—(2001 Guidance)*

- Physical is more likely to be severe without need for repetition:
 - “attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks” (2001 Guidance).
- Non-consensual sexual intercourse or contact are almost always sufficiently severe.
- Consider the circumstances: E.g. the ability for Reporting Party to escape the harassment.
- Accompanied by threats or violence.

“PERVASIVE”



- Widespread.
- Openly practiced.
- Well-known among students or employees — reputation of a department etc.
- Occurring in public spaces (more likely to be pervasive).
- “Harassment is pervasive when incidents of harassment occur either in concert or with regularity” (2001 Guidance – Footnote 44).
- Frequency of the conduct is often a pervasiveness variable.
 - Intensity/duration.
- Unreasonable interference.
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986).

“PERSISTENT”



- Repeated.
 - Intensity.
 - Duration.
 - Welcomeness.
- Defined:
 - Continuing to do something or to try to do something even though other people want you to stop.
 - Continuing beyond the usual, expected, or normal time; not stopping or going away (Merriam-Webster.com).

“OBJECTIVELY OFFENSIVE”



- Reasonable person standard in context.
- “I know it when I see it...”
- Age and relationships of Reporting and Responding Parties.
- Number of persons involved.
- Frequency.
- Severity.
- Physically threatening.
- Humiliation.
- Intimidation.
- Ridicule.
- Abusive.

SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



- Student-based examples: Do these create a Hostile Environment?
 - Female student “sexts” pictures of herself to a male classmate.
 - A student draws a penis on the whiteboard at the front of the class. What about a whiteboard on the student’s residence hall door or in a student’s locker?
 - “Revenge porn” pictures posted online?
 - A student viewing porn on a computer in the library?
 - A student calling another a C-nt?

Student-Based Examples: Do these create a Hostile Environment?

HOSTILE ENVIRONMENT?



Hostile Environment?

HOSTILE ENVIRONMENT?



Hostile Environment?

SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



- Faculty-Based Examples: Do these create a Hostile Environment?
 - Giving a student a back-rub.
 - Require students to read *50 Shades of Grey* and give an assignment to compare their own experiences against those from the book.
 - Female faculty member repeatedly referring to male students as “penises.”
 - Repeatedly telling “dirty” jokes in class.
 - Calling a colleague a “bitch” in a meeting.

SEVERE? PERVASIVE? PERSISTENT? OBJECTIVELY OFFENSIVE?



- Staff-Based Examples: Do these create a Hostile Environment?
 - Telling dirty jokes: In common area? Staff meeting? To a single individual?
 - Sending porn to a colleague?
 - Rolling eyes and making masturbation motion with hand at comments during a staff meeting?
 - Repeated staring at a colleague of the opposite sex; accompanied by occasional winking?
 - A supervisor repeatedly mentioning how much they like a supervisee's outfits?

Staff-Based Examples

ATIXA MODEL DEFINITIONS: QUID PRO QUO SEXUAL HARASSMENT



- **Quid Pro Quo** harassment is:
 - *Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,*
 - *By a person having power or authority over another constitutes sexual harassment when:*
 - *Submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational [or employment] progress, development, or performance.*
 - This includes when submission to such conduct would be a condition for access to receiving the benefits of any educational [or employment] program.

ATIXA MODEL DEFINITIONS: RETALIATION



- **Retaliation** is defined as:
 - *any adverse action taken against a person participating in a protected activity because of the person's participation in that protected activity.*
- Also includes retaliation against the Reporting Party by the Responding Party. Could also include by the Responding Party's friends or others.
- Also can include retaliation directed toward third parties because of their participation in the process or for supporting the parties.

ATIXA MODEL DEFINITIONS: RETALIATION



- Common definition of adverse action:
 - Significantly disadvantages or restricts the Reporting Party as to their status as a student or employee, or their ability to gain the benefits or opportunities of the program; or
 - Precluded from pursuing 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**.

INTERSECTION OF TITLE VI, TITLE VI AND TITLE IX

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NOT FOR DISTRIBUTION

INTERSECTION OF TITLE VI, TITLE VII AND TITLE IX



- **Title VI of the Civil Rights Act of 1964:** prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance
 - Applies to employment when “primary objective” of the federal assistance is to provide employment
- **Title VII of the Civil Rights Act of 1964:** prohibits discrimination on the basis of race, color, religion, sex, national origin in employment
- **Title IX:** prohibits discrimination on the basis of sex in programs and activities receiving federal financial assistance
 - Applies to students and employees



INTERSECTION OF TITLE VI, TITLE VII AND TITLE IX



- Title IX consciously modeled on Title VI and borrowed heavily from Title VII.
- Courts generally apply standards established under Title VII for guidance in how to establish a Title IX violation.
- Employees can use both Title VII and Title IX to pursue the same violations.



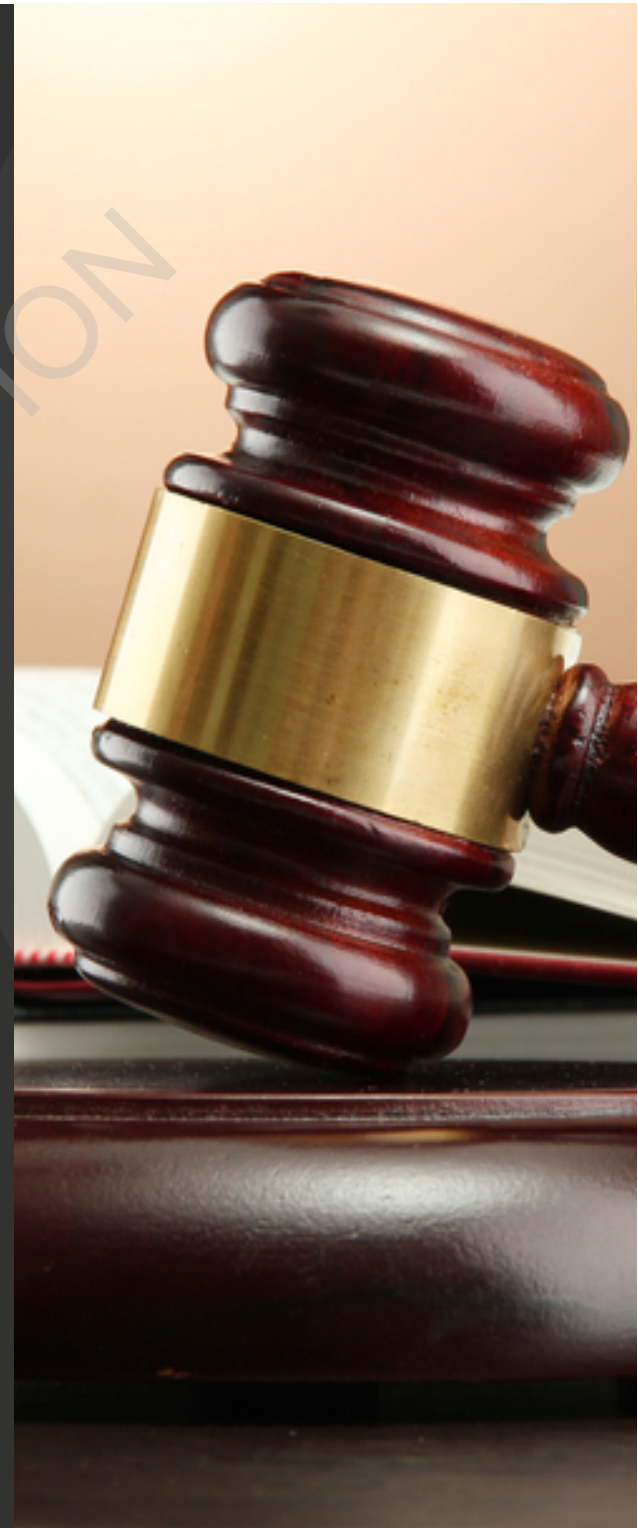
TITLE VI, TITLE VII AND TITLE IX IN INVESTIGATIONS



- Consider:
 - Role of institutional equity/AA/EOP officer.
 - Human resources/faculty/teachers.
 - Coordinator of school/campus conduct.
- Oversight of deputy coordinators/investigators.
- Ability to merge/combine investigatory and hearing processes.
- Additional rights afforded to employees under Title IX
- What happens when employee is a student or student is an employee?
 - Coordination of remedies in student/employee and employee/student resolution processes.

DUE PROCESS

- Legal Foundation
- What is Due Process
- Due Process in Procedure
- Due Process in Decision
- Current Key Issues in Due Process



DIXON V. ALABAMA STATE BD. OF ED. **294 F. 2D 150 (5TH CIR., 1961)**



- In February of 1960, six black students sat in at a public (all white) lunch counter and were arrested.
- Alabama State summarily expelled all of them without any notice of the charges or of a hearing, and no opportunity to provide evidence or defend themselves.
- 5th Cir. Court decision established minimum due process. (reiterated by U.S. Supreme Court in *Goss v. Lopez* (1975)).
 - Students facing expulsion at public institutions must be provided with at least **notice of the charges** and an **opportunity to be heard**.
 - Ushered in most campus disciplinary and hearing-based processes.

DIXON V. ALABAMA STATE BD. OF ED. **294 F. 2D 150 (5TH CIR., 1961)**



- Specifically, the court set forth a number of due process-based guidelines, including:
 - Notice, with an outline of specific charges.
 - A fair and impartial hearing.
 - Providing names of witnesses to accused.
 - Providing the content of witnesses' statements.
 - Providing the accused an opportunity to speak in own defense.
 - The results and findings of the hearing presented in a report open to the student's inspection.

ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE 415 F.2D 1077 (8TH CIR. 1969)



- Written charge statement, made available 10 days prior to hearing.
- Hearing before a panel with authority to suspend or expel.
- Charged student given opportunity to review information to be presented prior to hearing.
- Right of charged student to bring counsel to furnish advice, but not to question witnesses.
- Right of charged student to present a version of the facts through personal and written statements, including statements of witnesses.

ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE 415

F.2D 1077 (8TH CIR. 1969)



- An opportunity for the charged student to hear all information presented against him and to question adverse witnesses personally.
- A determination of the facts of the case based solely on what is presented at the hearing by the authority that conducts the hearing.
- A written statement of the finding of facts.
- Right of charged student to make a record of the hearing.

GOSS V. LOPEZ

419 U.S. 565 (1975)



- Nine high school students were suspended for 10 days for non-academic misconduct.
- The court held that since K–12 education is a fundamental right, students were entitled to at least a modicum of “due process.”
- Reiterating the 5th Circuit, it noted that the minimum due process is notice and an opportunity for a hearing.

GOSS V. LOPEZ

419 U.S. 565 (1975)



- The court further stated that the hearing could be informal and need not provide students with an opportunity to obtain private counsel, cross-examine witnesses, or present witnesses on their behalf.
- Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests.

WHAT IS DUE PROCESS?



- Due Process (public institutions):
 - Federal and state constitutional and legal protections against a state institution taking or depriving someone of education or employment.
- “Fundamental Fairness” (private institutions):
 - Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures.

WHAT IS DUE PROCESS?



- Ultimately, both are the set of 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.
- Due process in criminal and civil courts vs. due process within an institution.
- Due process analysis and protections have historically focused on the rights of the responding party.

WHAT IS DUE PROCESS?



- Two overarching forms of due process:
 - **Due Process in Procedure:**
 - Consistent, thorough, and procedurally sound handling of allegations.
 - Institution substantially complied with its written policies and procedures.
 - Policies and procedures afford sufficient Due Process rights and protections.
 - **Due Process in Decision:**
 - Decision reached on the basis of the evidence presented.
 - Decision on finding and sanction appropriately impartial and fair.

WHAT IS DUE PROCESS?



- **Due Process in Procedure** – An institution's process should include (at a minimum):
 - Notice — of charges and of the hearing/resolution process.
 - Right to present witnesses.
 - Right to present evidence.
 - Opportunity to be heard and address the allegations and evidence.
 - Right to decision made based on substantial compliance and adherence to institutional policies and procedures.
 - Right to a hearing? (TBD; yes in CA)
 - Right to appeal (recommended).

WHAT IS DUE PROCESS?



- **Due Process in Decision** - A decision must:
 - Be based on a fundamentally fair rule or policy.
 - Be made in good faith (i.e., without malice, partiality, or bias).
 - Based on the evidence presented.
 - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
 - Not be arbitrary or capricious.
 - Sanctions must be reasonable and constitutionally permissible.

DUE PROCESS: CURRENT ISSUES



- Due Process is at the heart of current litigation and OCR regulatory guidance. Processes are becoming increasingly complex
- Current key issues:
 - Standard of Proof
 - Preponderance vs. Clear and Convincing
 - Detailed Notice of Allegations/Investigation
 - With sufficient detail to allow meaningful opportunity to prepare
 - In advance of any meeting
 - Hearings & Investigations
 - Investigator separate from decision-maker
 - Hearing required when facing serious discipline (CA)
 - Cross-examination
 - During hearing; when credibility is at issue (CA)
 - Direct vs. Indirect

DUE PROCESS: CURRENT ISSUES



- Current key issues (con't):
 - Attorney involvement
 - Already allowed per VAWA
 - Role in meetings vs. hearing
 - Providing copies of report and evidence for review
 - Throughout and before hearing
 - Inculpatory and exculpatory evidence (proposed regs)
 - Bias by Investigators, Hearing Officers, Appellate Officers
 - Must be separate
 - Process to address conflicts of interest
 - Improper influences impacting decision (e.g.: Athletics; Social Media; Power/Position)
 - Training
 - Biased training
 - Insufficient training

CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

- Civil Rights Investigation Model
- Investigation & Hearing Panel Model
- The Process & Ten Steps

THE IX COMMANDMENTS



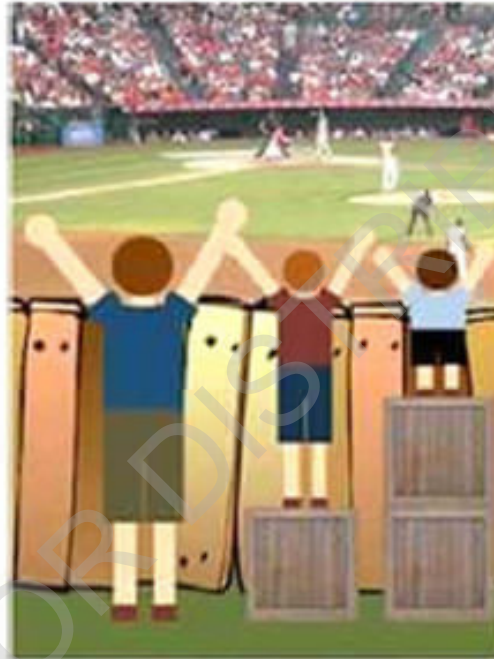
Thorough	Reliable	Impartial	Investigation (prompt & fair – VAWA Sec. 304)
Prompt	Effective	Equitable	Process
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

EQUALITY V. EQUITY

EQUALITY VERSUS EQUITY



In the first image, it is assumed that everyone will benefit from the same supports. They are being treated equally.



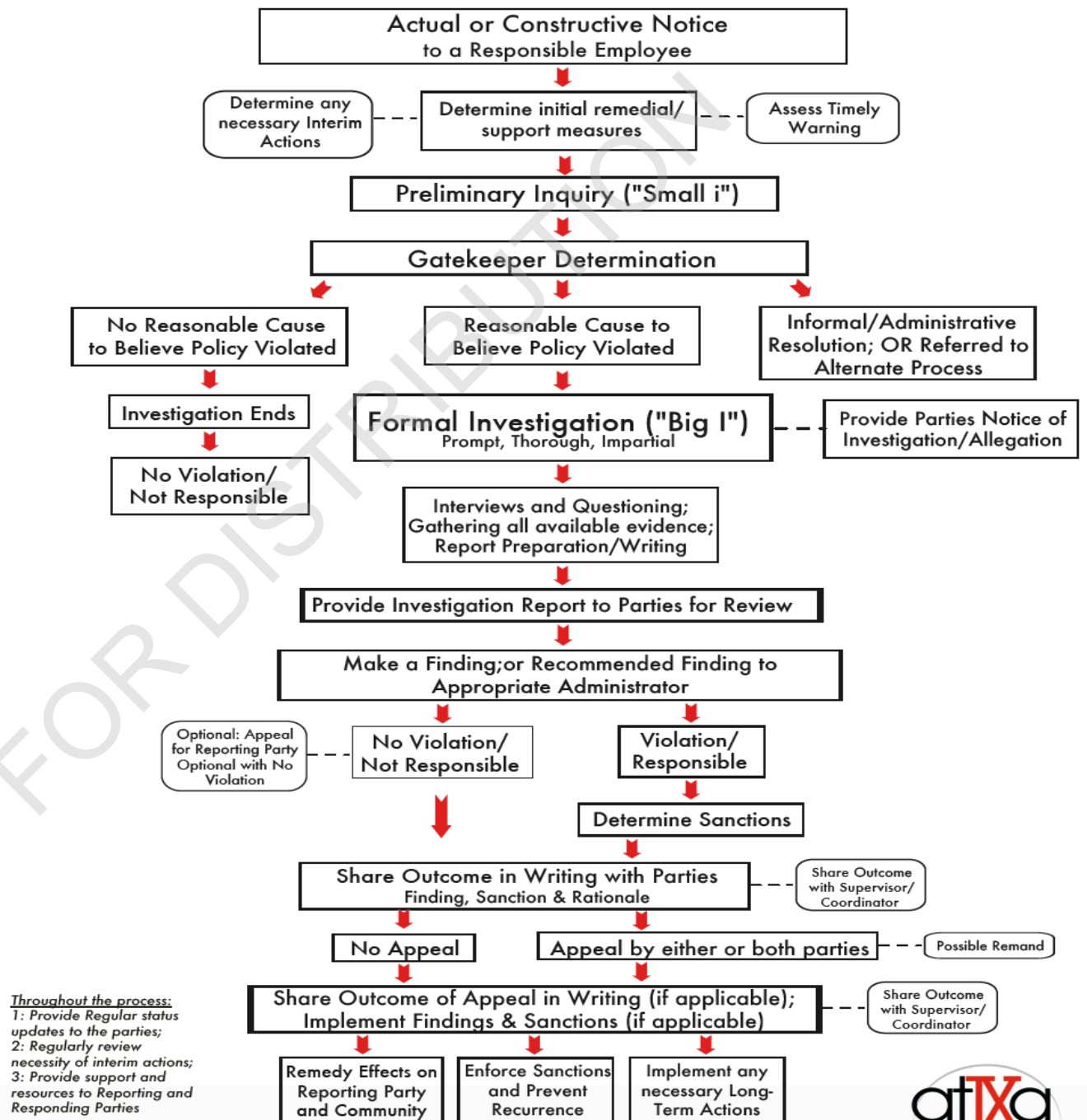
In the second image, individuals are given different supports to make it possible for them to have equal access to the game. They are being treated equitably.



In the third image, all three can see the game without any supports or accommodations because the cause of the inequity was addressed. The systemic barrier has been removed.

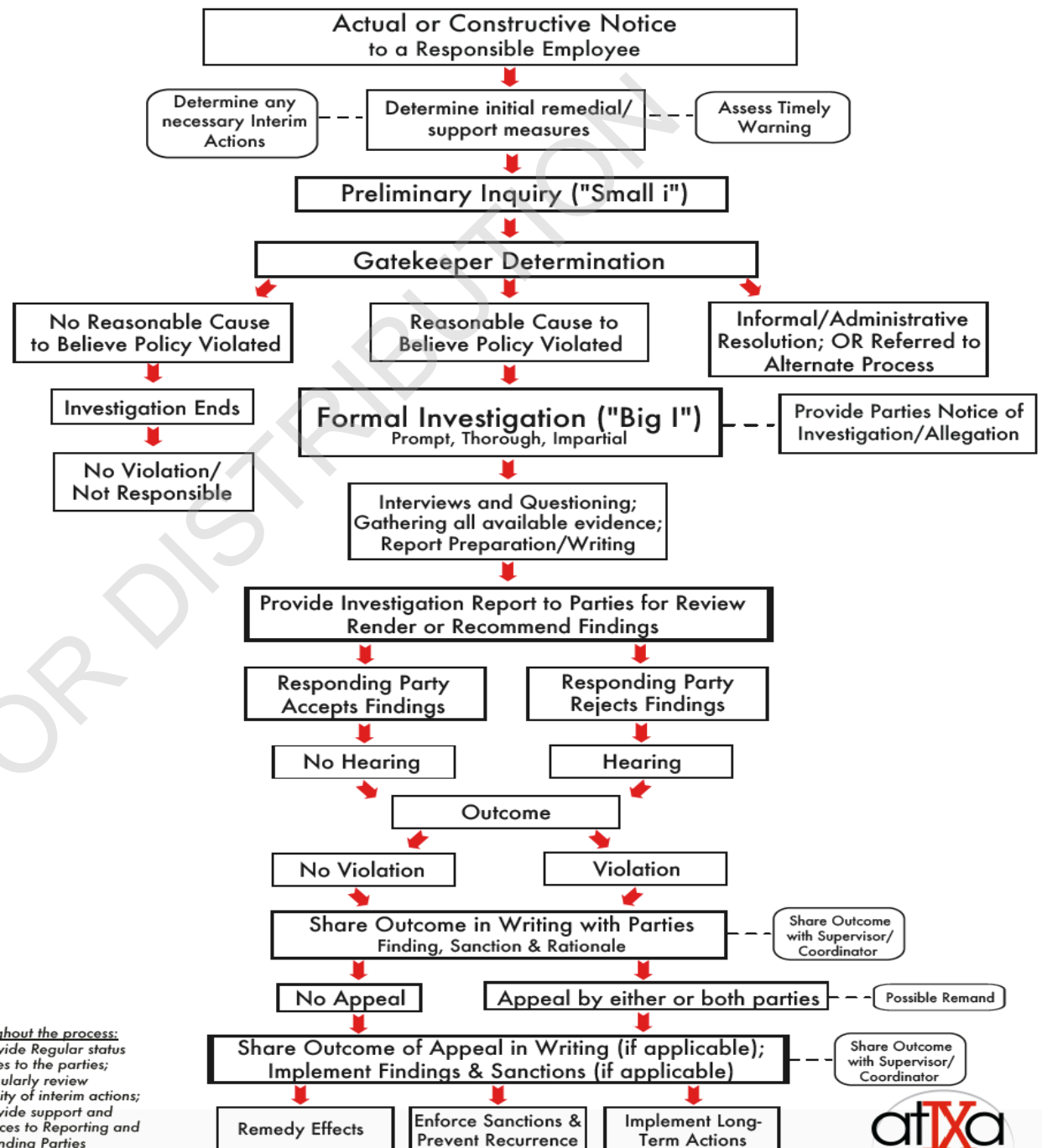
CIVIL RIGHTS INVESTIGATION MODEL

ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART



INVESTIGATION AND HEARING PANEL HYBRID MODEL

INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



Throughout the process:
 1: Provide Regular status updates to the parties;
 2: Regularly review necessity of interim actions;
 3: Provide support and resources to Reporting and Responding Parties

THE PROCESS



CIVIL RIGHTS INVESTIGATION PROCESS IN 10 STEPS



1. Allegation (complaint) or notice.
2. Preliminary inquiry (initial strategy).
3. Gatekeeper determination (earliest point).
4. Notice of investigation and/or allegation to the parties (earliest point).
5. Strategize investigation.
6. Formal comprehensive investigation.
7. Interviews of parties and witnesses.
8. Evidence gathering.
9. Report Writing (including a review of the report by parties).
10. Finding (followed by resolution and remedies).

**provide support and resources to the parties throughout*

NOTICE TO THE INSTITUTION

- Actual & Constructive Notice
- Responsible Employee
- Privileged vs. Confidential vs. Private
- When do you Investigate?

NOTICE TO THE INSTITUTION



- In the context of harassment, a school has notice if a responsible employee knew, or in the exercise of reasonable care, should have known about the sexual harassment or violence.
- OCR enforcement of Title IX currently uses both an actual notice and constructive notice standard because OCR investigations are an administrative enforcement process – different than a civil lawsuit for monetary damages.
- But note that 2019 Proposed Regs would do away with constructive notice as basis for OCR enforcement

Actual Notice

- Individual files a Title IX grievance.
- Individual notifies the Title IX coordinator or other responsible employee.
 - In PreK-12, this includes all teachers.
- Individual complains to school police or security official.

Constructive Notice

- Broader standard
- Knew or should have known

RESPONSIBLE EMPLOYEE



- A **Responsible Employee** includes any employee who:
 - Has the authority to take action to redress the harassment; or
 - Has the duty to report harassment or other types of misconduct to appropriate officials; or
 - Someone a student could reasonably believe has this authority or responsibility;

! Institutions must ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.

RESPONSIBLE EMPLOYEE



- Proposed Regs shift Responsible Employee definition to:
 - Anyone who has the authority to take action to redress the harassment
 - All PreK-12 teachers when conduct is student-on-student
- This is only the standard for when OCR would deem a school to have received actual notice that creates an obligation to act.
- It is the bare minimum requirement.
- ATIXA still recommends that institutions require all employees to report harassment or discrimination, unless confidential

OTHER LAWS THAT DETAIL REPORTING REQUIREMENTS



- Supervisors and Managers (per Title VII).
 - Mandated to report harassment or other misconduct of which they are aware.
- Abuse or Suspected Abuse of Minors.
 - All employees are required to report abuse or suspected abuse of minors consistent with the law of the state. This generally includes reporting immediately to law enforcement and to the state's child welfare agency.
- Any additional state reporting requirements.

PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



- “Privileged”
 - Granted by laws and professional ethics.
 - Examples: Attorneys, Licensed professional counselors, Medical professionals, Pastoral counselors.
 - To be confidential, these individuals must be:
 - Acting in the capacity for which they are employed
 - Acting within the scope of their license, and
 - Receive the disclosure during the scope of that employment.
 - Key exception is child abuse reporting.

PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



- “Confidential”
 - Designated by the institution.
 - Do not have to report harassment or discrimination of which they become aware.
 - Allows for provision of services and support without concern of reporting.
 - Examples: Victim advocates/sexual assault-related services, gender-based resource centers, Advisors during resolution processes, Ombuds.

* ATIXA recommends schools still report aggregate, non-identifiable data for Clery and Title IX purposes.

PRIVILEGED VS. CONFIDENTIAL VS. PRIVATE



- “Private”
 - Institution’s obligation to only share information with people who have a need to know
 - Anyone who does not meet the definition of a Responsible Employee.
 - This number will expand significantly under the Proposed Regs given more restrictive Responsible Employee definition.
 - Notice to them does not constitute “Actual Knowledge” requiring an investigation.
 - May report incidents without identifying the parties.
 - Examples: Administrative Assistants, Non-supervisory employees.

ATIXA'S RECOMMENDED APPROACH



- ATIXA recommends that all employees report.
 - Enables institution to best support those who have experienced harassment or discrimination.
 - Better enables tracking patterns.
 - Gets information to those trained to handle it.

WHEN DO YOU INVESTIGATE?



- Upon receipt of a formal, written, signed complaint
- When the Coordinator deems an investigation is warranted
- Rumors, gossip, social media, etc. can be notice
 - Investigating on these bases is discretionary, but often recommended).
 - OCR may not think they are, but will a court agree?
- Once actual notice exists, then further action is required.
 - Small “i” preliminary inquiry, and maybe...
 - Big “I” comprehensive investigation.

PROMPT TIMEFRAMES FOR RESOLUTION




- 60 days to resolution is a good guide for more complex cases in higher ed.
 - Timeline starts from notice, not from the incident itself.
 - No set requirement, other than to have prompt, designated timeframes in your procedures.
 - Goal is to avoid undue delay.
 - What about injunctions? Summer break? Sabbatical? FMLA? Winter break? Studying abroad?
- Ensure that all steps in the investigation are conducted according to the timelines in the institution's procedures.
 - Procedures should provide some flexibility to timeframes
- Document and communicate unavoidable delays.
- Provide notice of extensions.

PRELIMINARY INQUIRY

- Gatekeeping
- Information for Reporting Party
- Requests for Confidentiality
- Reluctance to Report
- PPTVWM
- Interim and Support Measures
- Informal Resolution


PRELIMINARY INQUIRY



- 
- A large, stylized red number '1' with a circular dot above it, positioned on the left side of the slide.
- This is an initial inquiry to determine if a comprehensive investigation is desired or necessary.
 - Checking background, obvious patterns, indicia of predatory, violent, or threatening behavior.
 - Can we remedy informally or without discipline?
 - How much involvement does reporting party want?
 - Give reporting party as much control as possible in the process.
 - May help to determine if there is reasonable cause to move process forward, and for what policy violations should the responding party receive notice.

PRELIMINARY INQUIRY



- 
- A large, stylized red number '1' with a circular dot above it, serving as a visual indicator for the first point.
- Establish a preliminary timeline for the investigation.
 - Investigate all allegations to determine:
 - The extent of the harassment.
 - The acuity of the threat it represents to students or employees.
 - What might be necessary to put an end to it.
 - Be able to show that a comprehensive civil rights investigation was completed and documented.
 - Responding to anonymous reports:
 - Determine if a trend or pattern may be apparent.
 - You may have a duty to attempt some form of remedial response, even to an anonymous report.

GATEKEEPING IN PRELIMINARY INQUIRY



- Gatekeeping determines the extent and development of the investigation and whether it should be moved from a preliminary to a full investigation.
 - Equity, due process, essential fairness, and equal dignity all demand substantiating evidence before dragging a reporting party through the entire process.
 - A charge (complaint) must be supported by reasonable cause to permit its **full** pursuit.

VAWA SECTION 304 INFORMATION FOR REPORTING PARTY



- Applies to the “Big 4” – Sexual Assault, IPV, Stalking
- Reporting parties should receive written information regarding:
 - Procedures for resolution
 - Interim measures (e.g. academic, living, transportation, work).
 - Services available on and off-site (e.g., counseling, advocacy, health, etc.)
 - Reporting options (e.g. campus police, local police, student conduct, HR, etc.)
 - Protection options (e.g. order of protection, no-contact orders, etc.)

NOTE: While not required under VAWA, should provide same to reporting party

PROVIDING POLICY AND PROCEDURE COPIES



- Each party should receive a copy of:
 - The specific policies alleged to have been violated (not a link), including any sub-parts or sections.
 - The procedures that will be used to resolve the complaint, including the rights that extend to the parties (not a link).
- Consider providing parties with your non-retaliation provision/policy.
- Keep copies of the applicable policies and procedures in the investigation file.

SETTING UP REASONABLE EXPECTATIONS



- Be sure reporting and responding parties understand parameters of the policy, what it does and does not cover, how the process plays out, and what the process can and cannot accomplish.
- Provide ample opportunity for the reporting party and the responding party to ask questions.

NOT FOR DISTRIBUTION

REQUESTS FOR CONFIDENTIALITY



- If a Reporting Party requests confidentiality and/or does not want the institution to investigate:
 - The institution should take all reasonable steps to respond and investigate consistent with that request.
 - So long as doing so does not prevent the institution from responding effectively and preventing the harassment of other students or the Reporting Party.
 - Institution will offer support and resources.
 - Proceeding without a Reporting Party's participation has due process implications for the Responding Party.

REQUESTS FOR CONFIDENTIALITY



- The institution should explain to the Reporting Party that:
 - Its responsive action/remedial abilities may be limited based on the level of confidentiality or privacy requested by Reporting Party.
 - It cannot guarantee privacy if doing so would jeopardize the safety of the reporting party or others.
 - Only those with a need to know will be informed.
 - Train those who will be informed about confidentiality expectations
 - **If the Responding Party is an employee, the institution may need to proceed due to Title VII**

RELUCTANCE TO REPORT



- The Reporting Party should be notified as to their options:
 - That the process will still be available to them, regardless of how long they wait.
 - That the institution will support them in any way it can (e.g. housing, classes, no contacts, etc.). Engage in ways to limit the effect of the behavior on the Reporting Party.
 - That, if information is brought to the attention of the institution that may involve a threat to the community, the institution may be forced to proceed with an investigation, but that the reporting party will be notified of this process.

ANALYZING A REPORTING PARTY REQUEST FOR CONFIDENTIALITY



- Institution may need to proceed if any of the following are present:
 - PPTVWM
 - Pattern
 - Predation
 - Threat
 - Violence/Weapon.
 - Minors (will always be reported to proper authorities)

- Pattern, Predation, Threat, Violence, Weapon, or Minors
 - Additional complaints of sexual violence involving the same Responding Party.
 - Whether the sexual violence was committed by multiple individuals.
 - Whether the Responding Party has a history of arrests or records from a prior school indicating a history of violence.
 - Whether the student's report reveals a pattern of behavior at a given location or by a particular group.

ANALYZING A REPORTING PARTY REQUEST FOR CONFIDENTIALITY



- Pattern, Predation, Threat, Violence, or Weapon (cont.)
 - Whether the Responding Party threatened further sexual violence or violence against the student or others.
 - Whether a weapon facilitated the sexual violence.
 - Age of the Reporting Party.
 - Whether the school possesses other means to obtain relevant evidence (e.g. security cameras or personnel, or physical evidence).
- If institution proceeds, it should notify the Reporting Party and utilize appropriate interim measures to protect the Reporting Party.

INTERIM AND SUPPORT MEASURES



- Throughout process:
 - Investigate.
 - Stop behavior.
 - Prevent re-occurrence.
- Tailored to address impact to the parties and campus community
- *Remember to provide support and resources to reporting and responding parties throughout the process.*

COMMON INTERIM AND SUPPORT MEASURES



- Providing a campus escort.
- Minimizing interaction between reporting party and responding party (e.g.: shifting classes, work, etc.).
- Relocating to a different classroom, residence hall, work space, course group, etc.
- Providing counseling services.
- Providing medical services.
- Providing academic support services, such as tutoring.
- Transportation options.
- Offering no-contact orders.
- Arranging for the reporting and/or responding party to re-take a course/withdraw from a class without penalty.
- Reviewing any disciplinary actions taken with respect to reporting party to assure they are non-retaliatory.
- Holding school-wide training and education initiatives.
- Interim suspension.
- Change supervisor.

INFORMAL RESOLUTION

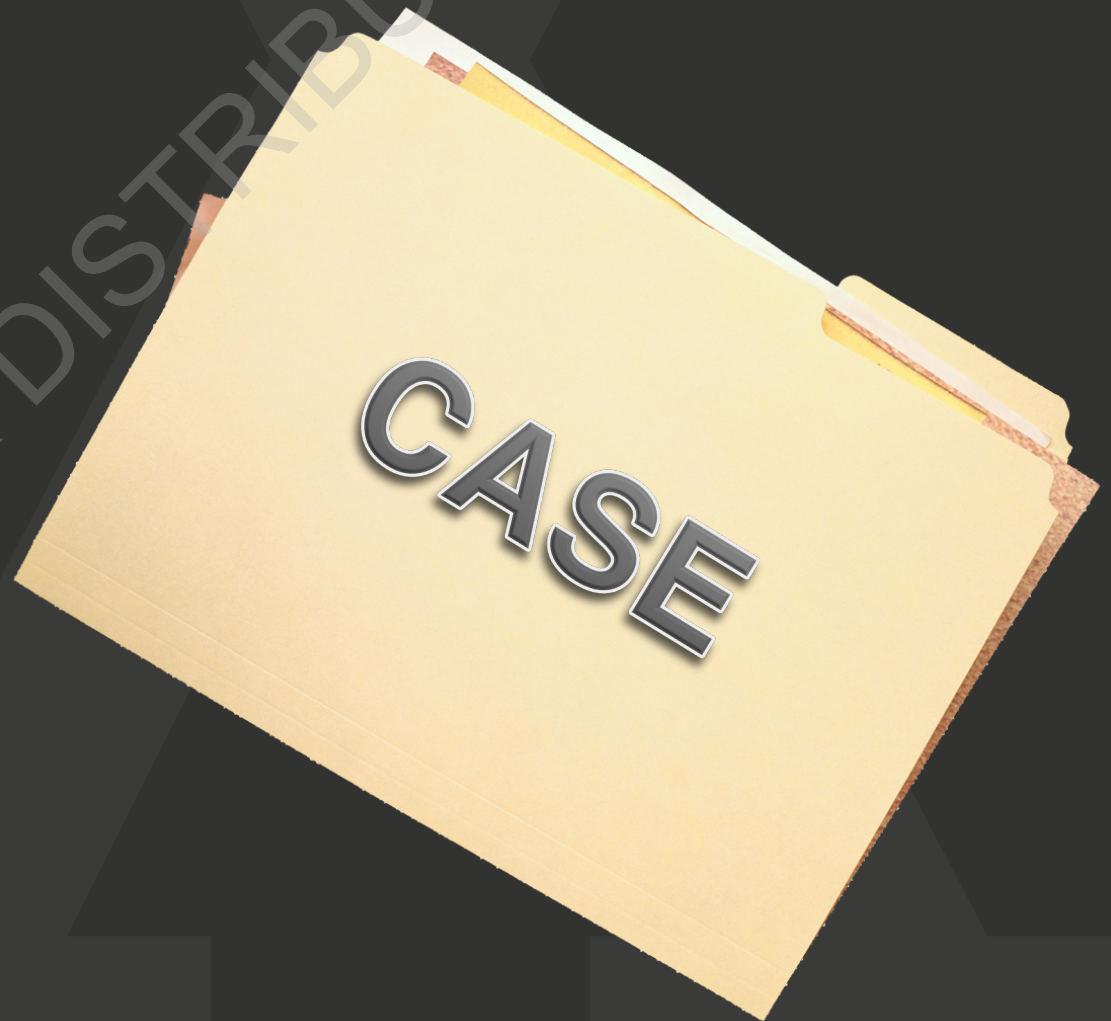


OCR endorses and encourages informal resolution, and we believe it is a best practice, when voluntary.

- Some minor incidents can be resolved through confrontation, documentation, and/or intervention.
- More significant discrimination can also be resolved informally, by process in which responding party accepts responsibility, and/or by some forms of ADR or conflict resolution.
 - Mediation is **typically not** appropriate or effective as a stand-alone resolution mechanism for sexual assault or violence.

- Prepare and deliver the notice of investigation (and possibly notice of allegation, if appropriate) on the basis of the initial inquiry.
 - Should provide sufficient detail of the allegations to allow the parties to meaningfully prepare for their meetings.
 - Also include applicable policies and procedures.
 - Notice of investigation should be shared verbally and sent in writing to all parties.
 - Notice of allegation (charge) should also be shared with all parties.
 - Usually notice is given in advance (e.g. minimum of 2-3 days), and Proposed Regs would limit surprise interviews.

CASE STUDY: IVAN & JUANITA



CASE STUDY: IVAN & JUANITA



- Juanita Morales, an active member of the women's soccer team, made a Title IX report directly to the Title IX Coordinator.
- On the morning of October 11, one of the soccer players was checking her email and yelled for Juanita to come look at something on the computer.
- Juanita saw an email sent from the men's soccer team's generic email address, menssoccer@university.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.
- Everyone in the room knew it wasn't Juanita, but they all laughed anyways.
- Juanita ran from the room crying, embarrassed that others would think it was her.

CASE STUDY: IVAN & JUANITA



- Juanita immediately called Ivan, a member of the men's soccer team, who she believed sent the email.
- Earlier in the semester, 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 did this to hurt and embarrass her.

CASE STUDY: IVAN & JUANITA



- You now have to conduct a preliminary investigation:
 - What actions would you take?
 - What are the potential policy violations?
 - Who would you want to interview at this stage?
 - Do you have enough yet to move forward with a formal investigation?
 - Against whom?

CASE STUDY: IVAN & JUANITA



- You decide to interview Ivan. Ivan believes Juanita is blowing the whole matter out of proportion.
- Ivan says Juanita always flashes her breasts and told him she wanted breast implants.
- 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 brothers. 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.”
- Ivan showed the photo to a couple teammates but did not send the email.
- The men’s soccer email account is for official team business. The team captains and coaches have the password; the captains have shared it broadly within the team.

CASE STUDY: IVAN & JUANITA



- You decide to interview 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.
- 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.
- Ivan said that when he doesn't have his laptop with him, it is typically locked in his bedroom, and he signs out. No one else knows his password.

CASE STUDY: IVAN & JUANITA



- Do you need to gather any additional evidence/information?
 - Who else might you interview?
 - What other evidence might you want to gather?
- Do you have enough yet to move forward with a formal investigation?
 - Against whom?
 - What are the potential policy violations?

AGENDA



Day Two

- I. Formal Investigation
 - a. Formal Comprehensive Investigation
 - b. Civil Rights Investigation Model
 - c. The Process & Ten Steps
 - d. Notice to the Parties
 - e. Investigation Report
- II. Post-Investigation Stage
 - a. Hearing
 - b. Role of Investigator
- III. Questioning
 - a. Goals of Questioning
 - b. Questioning Skills
 - c. Questioning Exercise
- V. Making a Determination
 - a. Standard of Proof
 - b. Understanding the Evidence
 - c. Credibility
 - d. Making a Finding
- VI. Sanctioning
- VII. Appeals Process
- VIII. Prevention & Remediation
- IX. Record-Keeping and Documentation
- X. Recent Case Law: Lessons Learned

FORMAL INVESTIGATION

- Overview of Process
- Notice to the Parties
- Strategize the investigation



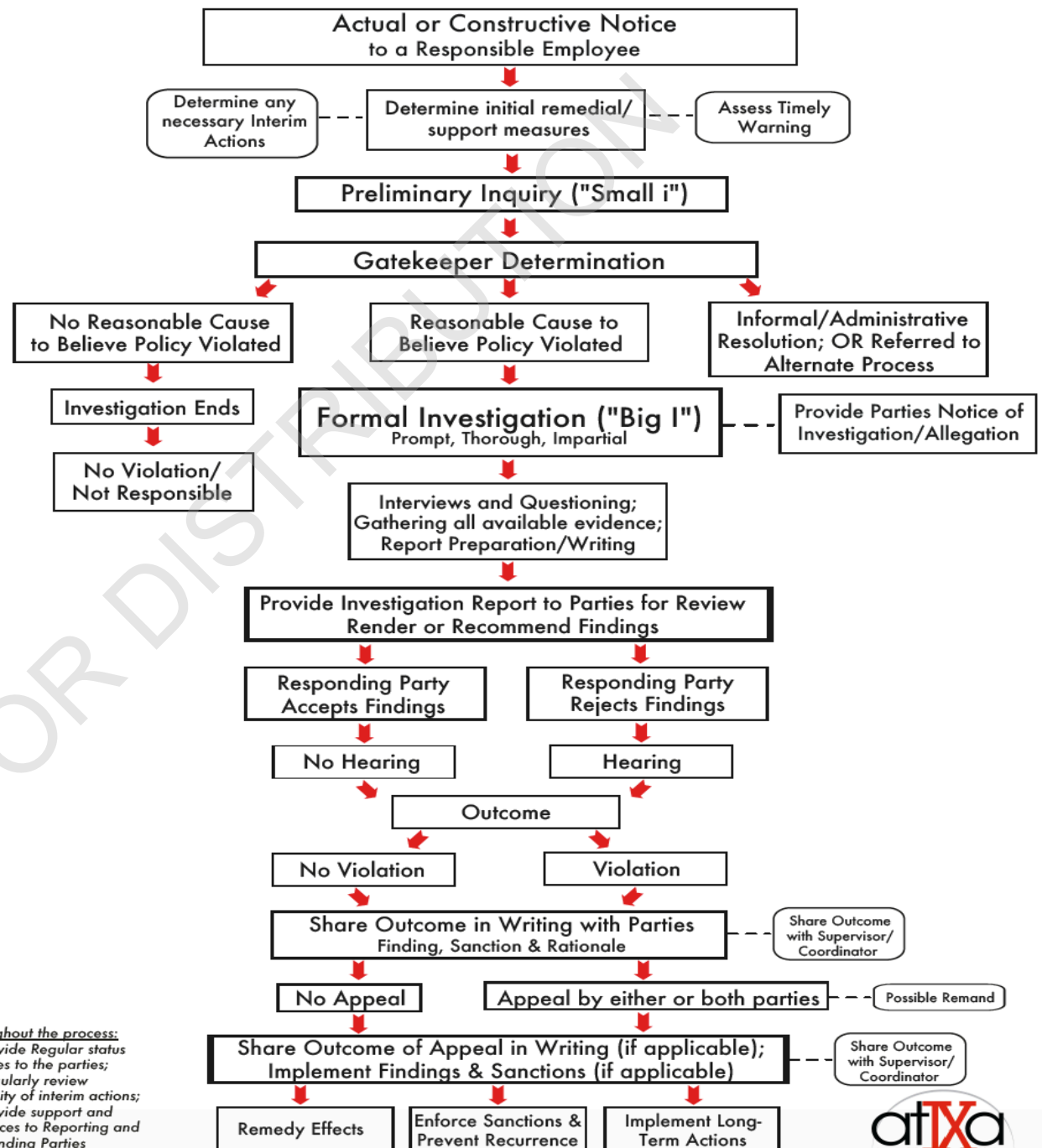
FORMAL COMPREHENSIVE INVESTIGATION



- Commence a thorough, reliable, impartial, prompt and fair investigation.
- Determine the strategy for the investigation.
 - Witness interviews.
 - Evidence gathering.
 - Intended timeframe to complete the investigation.
 - Finding.
 - Presentation of finding.
- Complete the investigation promptly, and without unreasonable deviation from the timeline.

INVESTIGATION AND HEARING PANEL HYBRID MODEL

INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



THE PROCESS



CIVIL RIGHTS INVESTIGATION PROCESS IN 10 STEPS



1. Allegation (complaint) or notice.
2. Preliminary inquiry (initial strategy).
3. Gatekeeper determination (earliest point).
4. Notice of investigation and/or allegation to the parties (earliest point).
5. Strategize investigation.
6. Formal comprehensive investigation.
7. Interviews of parties and witnesses.
8. Evidence gathering.
9. Report Writing (including a review of the report by parties).
10. Finding (followed by resolution and remedies).

**provide support and resources to the parties throughout*

NOTICE TO THE PARTIES



- In a civil rights model, notice has many phases, some or all of which may come to pass (equitably):
 - Notice of initial meeting.
 - Post-gatekeeper phase, notice of allegation and/or investigation.
 - Post-investigation, notice of hearing (if applicable).
 - Updates on status of investigation (ongoing).
 - Notice of outcome and sanctions.
 - Notice of appeal.
 - Notice of final determination.

THE INVESTIGATION REPORT



- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Results of interviews with parties and witnesses.
 - Summary of other information collected, (i.e. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of text, email and social networking messages, etc.).
 - Highlights key factual findings for each allegation.
- Can provide analysis, credibility determinations, recommendations, etc.
- Used by appropriate administrator for implementation, hearing and/or sanctioning.

POST-INVESTIGATION STAGE

- The Investigation Report
- Standard of Proof
- Analysis and Determination
- Who Makes the Determination?
- In-Person Hearing?

WHAT ABOUT AN IN-PERSON HEARING?



- A formal in-person hearing, whether with a panel or an administrator, is increasingly viewed as necessary in higher education by the courts and OCR.
 - PreK-12 remains TBD
- Hearings facilitate the parties ability to review all available evidence and ask questions of witnesses and each other.
- A well-conducted civil rights investigation can result in an accepted determination and waiver of hearing by the responding party.
 - Waivers must be freely decided and non-coerced.
- CA- hearing required when facing serious discipline (suspension or expulsion)

WHAT ROLE CAN THE INVESTIGATOR PLAY IN AN EVENTUAL HEARING?



- The investigator is often the key witness at any hearing.
- The investigation report is admitted as evidence (redacted).
- Other witnesses can be called, or the investigator may summarize their testimony instead.
- If credibility must be assessed, it needs to be assessed in person by the decision-maker(s).
- The investigator's determination should not influence the hearing, so may be appropriate to withhold/redact that information and allow the decision-maker to be fully objective/impartial.

QUESTIONING

- Goals of Questioning
- Questioning Skills
- Questioning Exercise

GOALS OF QUESTIONING



- What are the goals of questioning?
 - Learn the facts.
 - Establish a timeline.
 - Understand each party's perception:
 - Of the event and of the process.
 - Try to learn what is more likely than not to have happened
- NOT the goals of questioning...
 - Curiosity.
 - Chasing the rabbit into Wonderland.
- The “Gotcha” moment won’t typically come. Not your role. You are not law enforcement or prosecutors.

GOALS OF QUESTIONING



- To consider before asking questions:
 - What are the relevant issues?
 - What do I need to know?
 - Why do I need to know it?
 - What is the best way to ask the question?
 - Am I minimizing the re-traumatization potential?
 - Am I avoiding blaming or biased questions?
 - Am I the right person to ask this?

QUESTIONING SKILLS



- Open-ended questions (tell us...who, what, how?)
- Close-ended questions (Did you, were you?)
 - Use infrequently, but when needed to drill down on a specific issue.
- Careful with Compound Questions
 - I have two questions, First..., Second...
- Try not to ask Multiple Choice Questions
 - Were you a), b), c)
- Avoid gratuitous use of leading questions – (Isn't it the case that...?)

QUESTIONING SKILLS



- Take the allegations from start to finish through a process of broad to narrow questions and issues that need to be addressed.
- Ask questions about the allegations, the evidence, and the policy elements.
- Focus on areas of conflicting evidence or gaps of information.
- Drill down on timelines and details.
- Don't leave a question or gap unanswered.
- Pay attention to alcohol/drug consumption and timing of consumption, if relevant.

QUESTIONING SKILLS



- Have a purpose for asking every question.
- Listen carefully and adapt follow-up questions.
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “fooled around,” and “had a few drinks.”
- Be cognizant of the difference between what is “believed” (conjecture) and what was “witnessed” (facts).
- Avoid evaluative responses to a person’s answers unless needed to establish rapport, draw someone out, or convey empathy.
 - E.g.: that’s too bad; I’m glad you said that.

QUESTIONING SKILLS



- Do not ask questions that invite a reporting party to second-guess their actions, as this may be perceived as blaming.
- Be sure to ask a question, not make a speech.
- Don't be accusing or argumentative.
- Don't allow your skepticism to show; keep your cards close to your vest.
- If you ask a bad question, take it back.

QUESTIONING EXERCISE



Please critique the following questions:

- What effect did your actions have on others? On the community? On yourself?
- Explain what you hoped to accomplish through your actions.
- Why did you choose to drink so much if you knew it was risky?
- Did you sign the Honor Code during orientation?
- I have a couple of questions: First, do you know what incapacitated means?; Second, could you tell she was incapacitated?; and Third, why did you give her another drink when evidence from witnesses indicates she was already really drunk?

QUESTIONING EXERCISE



Please critique the following questions:

- What other options were there for you in this situation?
- How would you feel if others were engaged in similar behavior?
- How might you react if such a situation were to come up again?

NOT FOR DISTRIBUTION

TRAUMA-INFORMED RESPONSE

- Brain's Response to Trauma
- Trauma-Informed Response

THE BRAIN'S RESPONSE TO TRAUMA



In response to the anticipated trauma, hormones can be released into body which impact:

- Ability to react physically.
- Ability to think rationally.
- Ability to consolidate or group memories.

This is a neurobiological response, not a choice.

TRAUMA-INFORMED RESPONSE



- Recognize the impact of trauma on a cognitive, physical, psychological, emotional, and neurobiological level.
- Recognize potential for both parties to be impacted by trauma.
- Prioritize developing rapport and building trust.
- Physical aspects of interview/meeting (light, access, comfort, etc.).
- Be cognizant of why someone may have responded in a “counterintuitive” manner.
- Use non-judgmental/non-blaming language.

TRAUMA-INFORMED RESPONSE



- Be mindful that recall may be difficult and slow following trauma.
 - May provide varying and/or inconsistent accounts
- It does NOT mean that you cannot or do not question the credibility of the party.

NOT FOR DISTRIBUTION

TRAUMA-INFORMED RESPONSE



- Avoid:
 - Re-traumatization (but still recognizing need to ask necessary questions)
 - Taking control any more than you have to.
 - Escalating the situation.
 - Defining or labeling a party's experience.
 - Interrupting or barraging with questions.
 - Asking why questions (i.e. "Why did you . . . ?").
 - Verbalizing judgment in the moment.

MAKING A DETERMINATION

- Standard of Proof
- Understanding the Evidence
- Credibility
- Making a Finding

WHAT IS THE APPROPRIATE STANDARD OF PROOF?

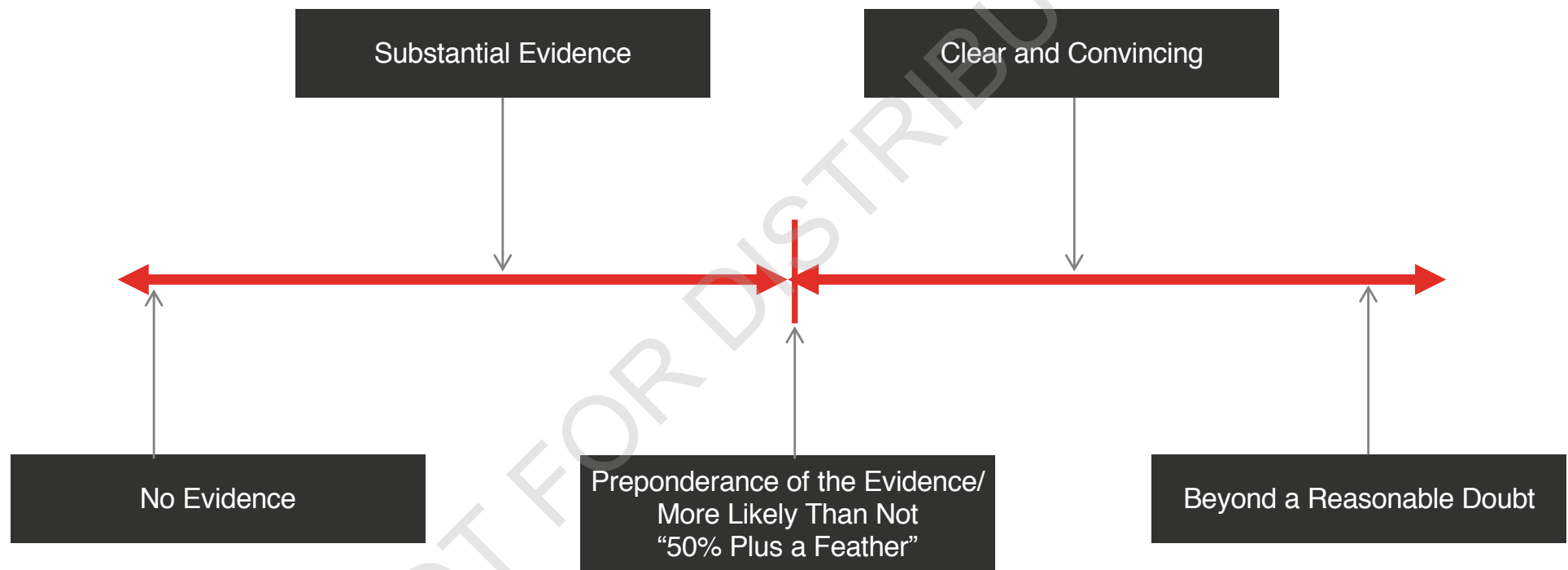


- Different Standards: What do they mean? Why do they exist?
 - Beyond a reasonable doubt.
 - Clear and convincing evidence.
 - **Preponderance of the evidence.**
- The Proposed Regs skew toward the Clear and Convincing Evidence standard (without fully requiring it), but ATIXA prefers Preponderance of the Evidence as the most equitable standard.
- If you use C&C, be able to clearly articulate and define it.
 - See: *ATIXA Guide to Choosing Between Preponderance of the Evidence and Clear and Convincing Evidence*; located at <https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf>

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



UNDERSTANDING EVIDENCE



- Formal rules of evidence do not apply.
- If the information is considered relevant 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 charges.

UNDERSTANDING EVIDENCE



- You may assign weight to evidence based on:
 - Documentary evidence (e.g. supportive writings or documents).
 - Electronic evidence (e.g. photos, text messages, and videos).
 - Real evidence (i.e. physical object).
 - 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).
 - Character evidence (generally of little value or relevance).
 - Impact statements (typically only relevant in sanctioning).

- Credibility is largely a function of corroboration and consistency.
- To assess credibility is to assess the extent to which you can rely on a witness testimony to be accurate and helpful in your understanding of the case.
 - Credible is not synonymous with truthful.
 - Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading.
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies.

FACTORS TO CONSIDER FOR CREDIBILITY



- Non-cooperation.
 - Look for short, abrupt answers or refusal to answer.
- Logic
 - Does this make sense; inherent plausibility
 - E.g.: “I’m struggling to develop a timeline based on your statements. Could you clarify...?”
- Consistency
 - Consistency of accounts over time
 - Consistency of story — substance and chronology of statements.

FACTORS TO CONSIDER FOR CREDIBILITY



- Corroborating evidence.
 - Is evidence supported by other evidence?
 - Look for the amount of detail (facts) provided. Factual details should be assessed against general allegations, accusations, excuses, or denials that have no supporting details.
- Demeanor.
 - Pay attention to non-verbal behavior
 - Demeanor issues should be your cue to ask more questions.
 - Rarely should be relied upon to draw any conclusions

MAKING A FINDING



- Review the institutional policies that apply.
- **Parse the policy.**
 - Provide specific findings for each violation and for each responding party.
- Review the evidence and what it shows (relevance).
- Assess the credibility of evidence and witness statements as factual, opinion-based, or circumstantial.
- Make a determination as to whether a policy violation is more likely than not.
- Cite concretely the reasons for this conclusion.
- Move to sanctioning.

SANCTIONING

- Sanctioning in Sexual Misconduct Cases
- Common Sanctions
- Post-Finding Considerations
- Communicating Outcomes

SANCTIONING IN SEXUAL MISCONDUCT CASES



- Title IX and case law requires:
 - Stop: Bringing an end to the discriminatory conduct.
 - Prevent: Taking steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct.
 - Remedy: Restoring the Reporting Party as best you can to pre-deprivation status.
- Tension between “educational” and “developmental” sanctions of student conduct processes.
- Title IX Coordinator is typically not sanctioning, but oversees process.
- Proposed regs would *require* that Coordinator and decision-maker be separate persons.

SANCTIONING IN SEXUAL MISCONDUCT CASES



- The sanction must be reasonable and reflect the severity of the behavior.
 - May consider prior misconduct.
 - The role of precedent.
 - May consider attitude.
 - Should be educational (i.e.: targeted to stop and prevent)
 - What best compensates for loss or injury to college or persons?
 - Compliant with laws and regulations (e.g. Title IX).

SANCTIONING



- Investigation alone is not sufficient to overcome a deliberate indifference claim.
- There must be a nexus between the sanctions and the discriminatory conduct that led to the sanction(s).
- What is appropriate?
 - Separation/expulsion.
 - Suspension.
 - Lesser sanctions.
- Conduct a risk assessment audit and mitigation process.
- OCR says institutions should consider impact on the responding party's education when determining a sanction.

SANCTIONING



- Ensure that remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- Take immediate steps to protect Reporting Parties even before the final outcome of investigations (e.g. through no-contact orders, etc.).
- Ensure that remedies are equitable.
- Consider restorative justice as part of your remedial process.
- Monitor for retaliation and respond immediately to allegations.
- Review policies, procedures, and practices regularly to ensure they are in accordance with best practices, and state, and federal case law.

COMMON STUDENT SANCTIONS



- Warning.
- Probation.
- Loss of privileges.
- Counseling.
- No contact.
- Residence hall relocation, suspension or removal.
- Limited access to school/campus.
- Service hours.
- Online education.
- Parental notification.
- Alcohol and drug assessment and counseling.
- Training/Education
- Discretionary sanctions.
- Alternative Placement
- In-school suspension (PreK-12).
- Suspension.
- Expulsion.

COMMON EMPLOYEE SANCTIONS



- Warning – verbal; written.
- Probation.
- Performance improvement/management process.
- Training (e.g. sensitivity training).
- Counseling.
- Loss of privileges.
- Reduction in pay.
- Loss of annual raise.
- Discretionary sanctions.
- Loss of supervisory or oversight responsibilities.
- Paid or unpaid leave.
- Suspension.
- Termination.

CONSIDERATIONS POST-FINDING



- Provide remedies for the reporting party and community
 - Ensure remedies are not clearly unreasonable in light of the known circumstances.
 - Engage in strategic education and training as remedies.
- Avoid undue delays.
- Consider restorative justice as part of remedial process.
- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices and state and federal case law.
- Monitor for retaliation and respond immediately to allegations.

COMMUNICATING OUTCOMES



- Title IX requires institutions to apprise parties of the status of investigations, **determinations, sanctions** (or remedial actions) **and supporting rationale**.
 - Provide this information in writing and place no conditions on receiving or sharing it.
- FERPA, the Clery Act/VAWA, and OCR 2019 Regs are the primary sources of mandates for outcome notification.
 - Clery/VAWA disclosure of “Big 4” outcomes/sanctions.
 - FERPA re-disclosure restrictions lifted in 2008.
 - FERPA cannot be construed to conflict with or prevent compliance with Title IX.

VAWA SECTION 304

SIMULTANEOUS NOTICE TO PARTIES



- Reporting and responding parties must be simultaneously informed in writing of:
 - **The outcome**...that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking.
 - The institution's procedures for appeal.
 - Any change to the results that occurs prior to the time that such results become final.
 - When such results become final.

APPEALS PROCESS

- Key Elements
- Grounds for Appeal
- Process

APPEALS: KEY ELEMENTS



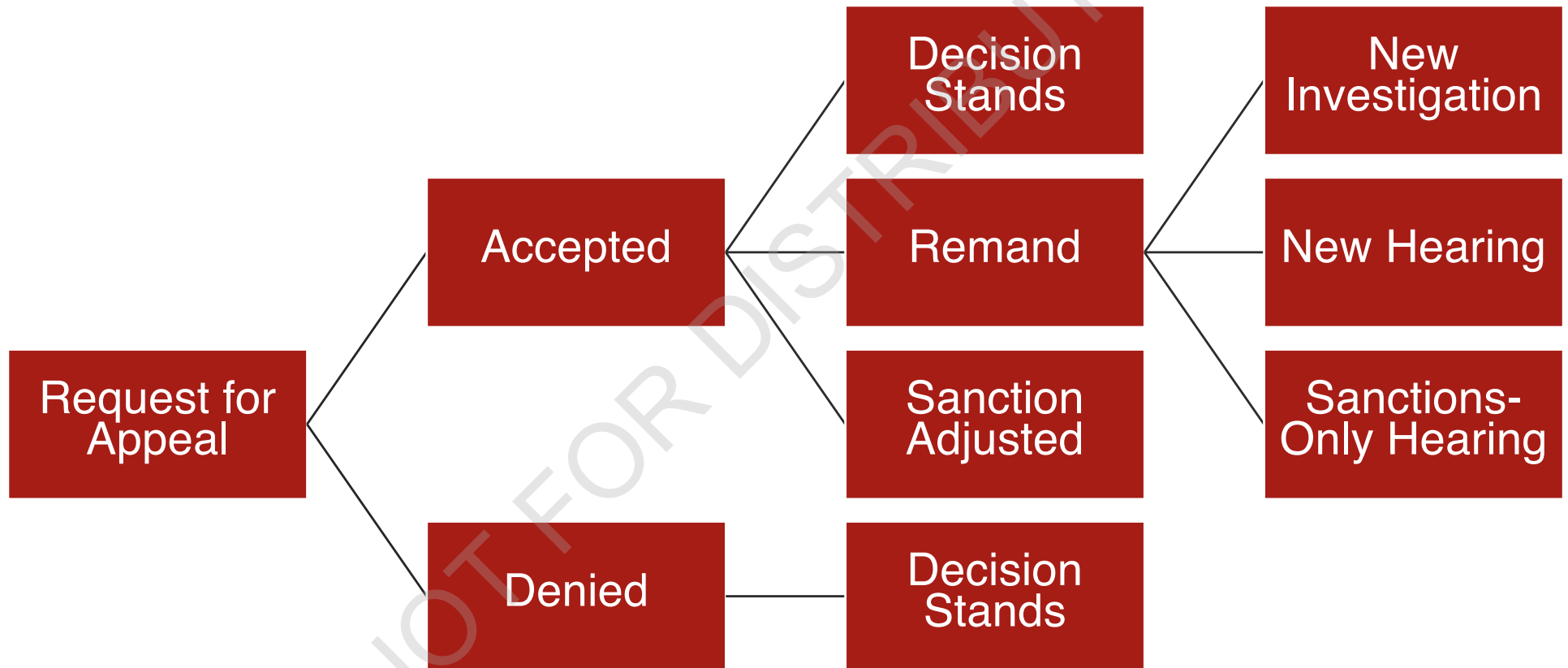
- One level of appeal.
- Limited grounds for appeal (see next slide).
- Deference to original hearing authority.
- Short window to request an appeal.
 - Can always grant an extension if necessary.
- Document-based review.
 - NOT *de novo*.
- Request for an appeal.

APPEALS: GROUNDS FOR APPEAL



- A procedural error or omission occurred that significantly impacted the outcome of the hearing.
 - E.g.: Insufficient evidence to warrant the finding, substantiated bias, material deviation from established procedures, etc.
- To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction.
 - A summary of this new evidence and its potential impact must be included.
- The sanctions imposed are substantially disproportionate to the severity of the violation (or the sanctions fall outside the range of sanctions the university/college has designated for this offense).

THE APPEALS PROCESS



PREVENTION AND REMEDATION

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PREVENTION AND REMEDIATION OF GENDER DISCRIMINATION



- Prohibition of:
 - Sexual misconduct.
 - Gender discrimination.
 - Sexual harassment.
 - Retaliation.
 - Intimate partner/relationship violence.
 - Stalking.
- Applies to other behaviors when gender-based.
- Obligation to recognize and respond consistent with Title IX.

PREVENTION AND REMEDIATION OF GENDER DISCRIMINATION



- Equity in programs and operations.
 - Access and admissions.
 - Academic programs.
 - Recruitment, promotion, and hiring.
 - Compensation and benefits.
 - Discipline and discharge.
 - Athletics (more on this later).
 - Including, intercollegiate, interscholastic, intramural, and club sports.
 - All student organizations and activities.
 - Fraternities and sororities are exempted from membership equity.

PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT



- Ensure appropriate sexual harassment language in institutional policy.
- Remediation may include:
 - Mediation (not for physical harassment/assault).
 - Educational programs.
 - Policy revision.
 - Training.
 - Course or work adjustments.
 - In addition to remedies for other forms of sexual misconduct.

PREVENTION AND REMEDIATION OF SEXUAL HARASSMENT



- Training and prevention efforts are increasingly expected and needed to prevent and remedy.
- Title IX Coordinator should oversee and assure school/district/system prevention efforts (similar to training oversight)
 - Design of prevention strategy.
 - Funding of prevention strategy.
 - Implementation of prevention strategy.
 - Assessment of learning outcomes.
 - Assessment of behavior change.

PREVENTION AND REMEDIATION OF INTIMATE PARTNER AND RELATIONSHIP VIOLENCE



- Ensure remedies consistent with Title IX.
 - Consider no-contact order implications.
 - Trespassing someone from campus or school.
 - Consider importance of advocacy and safety planning.
 - Also use community/off-site resources.
- Recognize complexities of IPV cases
- Clery/VAWA Sec. 304 specifically targets and highlights issues of “domestic violence” and “dating violence.”
- Caution regarding PPTVW analysis (see ATIXA’s 2015 Whitepaper).

CLERY ACT (VAWA 2013 – SEC. 304): PREVENTION PROGRAM REQUIREMENTS



- The institution's prevention programming (both for incoming students/employees and ongoing campaigns) must include:
 - The applicable jurisdiction's “**definition of consent** in reference to sexual activity.”
 - “A statement that the institution...prohibits the crimes of...”
 - Dating Violence, Domestic Violence, Sexual Assault, Stalking.
 - Definitions of consent, dating violence, domestic violence, sexual assault, and stalking “in the applicable jurisdiction.”
 - “A description of safe and positive options for **bystander intervention**.”

RECORD-KEEPING AND DOCUMENTATION

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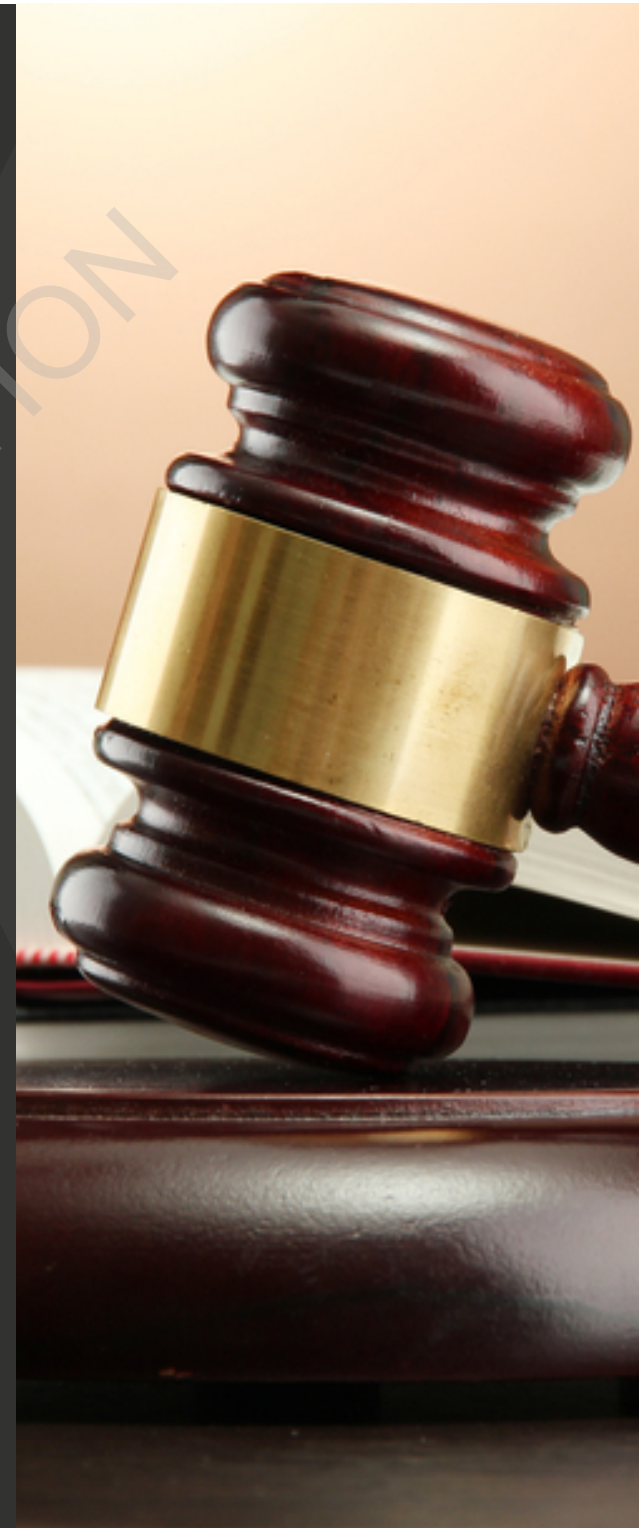
RECORD-KEEPING AND DOCUMENTATION



- Documentation of all steps throughout the process is essential. Includes, but is not limited to, the following:
 - Notices
 - Interim and support measures
 - Interview transcripts
 - Investigation report and evidence gathered
 - Outcome
 - Sanctions/Remedies
 - Implementation of sanctions/remedies
- Title IX Coordinator should be the final repository for all case documents
- Know your institution's record retention policies/practices
- Case management system to track cases, actions taken, and patterns

RECENT CASE LAW: LESSONS LEARNED

- Doe v. UC San Diego (2015)
- Doe v. UC San Diego (2016)
- Doe v USC (2016)
- Doe v Glick (2017)
- Doe v. UC Santa Barbara (2018)
- Doe v. Claremont McKenna (2018)
- Doe v. USC (2018)
- Doe v. Allee (2019)
- Doe v. Carry (2019)
- Doe v. White (2019)
- Doe v. CSUF (2019)



DOE V. UCSD (2015)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, (CAL. SUPER. CT. JUL 10, 2015)



FACTS:

- John Doe and Jane Roe – both students at UCSD. While laying in Roe’s bed, Doe touched Roe’s vagina and attempted to digitally penetrate her.
- Roe reported the conduct and UCSD initiated an investigation.
- Roe stated she was not opposed to sexual activity with Doe, but did not find the interaction pleasurable at that time. Roe also stated “that she physically wanted to have sex with [Doe] but mentally wouldn’t.”
- UCSD’s investigators interviewed the parties (no other witnesses or evidence) and prepared a report, recommending a finding of responsibility.
- At the live hearing, UCSD allowed both parties to question each other through the Panel Chair. A university representative also questioned both parties. Panel found Doe responsible.

DOE V. UCSD (2015)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, (CAL. SUPER. CT. JUL 10, 2015)



- Hearing Panel initially suspended Doe for one quarter and mandated internal sexual misconduct training and a counseling assessment.
- Doe appealed finding to the Dean, who affirmed decision. The Dean increased the sanction to one year (forcing Doe to reapply), placed Doe on non-academic probation, and mandated additional ethics training.
- Doe appealed again, to the Council of Provosts, who also affirmed the finding. The Council increased the sanction to suspension for one year and one quarter.
- Doe challenged the outcome in state court in CA.

DOE V. UCSD (2015)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, (CAL. SUPER. CT. JUL 10, 2015)



HOLDING:

- The court held that Doe was denied a fair hearing and the finding was not supported by substantial evidence. The court ordered UCSD's findings and sanctions to be set aside.
 - Procedural deficiencies with UCSD's hearing and appeal
 - Hearing did not afford Doe a meaningful opportunity to confront Roe.
 - Of 32 submitted questions, the Panel Chair asked Roe nine. The chair allowed Roe to give insubstantial/unresponsive answers to at least two of the questions with no opportunity for Doe to follow-up.
- Court observed that Doe was unable to confront **ALL** the evidence against him.
 - Investigation report was not included as part of hearing, but Panel clearly relied on the investigation report, per administrative record.

DOE V. UCSD (2015)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, (CAL. SUPER. CT. JUL 10, 2015)



- Court found several other features of UCSD's hearing and appeal process problematic:
 - Investigation report provided substantial evidence and testimony, but Doe was unable to confront this evidence, partially because the investigator did not attend the hearing.
 - Investigation report included a responsibility determination, despite the fact that it was the hearing panel's job to make a determination of responsibility.
 - Doe invoked his right against self-incrimination, which appeared to inappropriately damage his credibility with the panel.
 - Doe's sanction was increased at each appeal without any rationale.
 - Appearance that Doe was being retaliated against for appealing.

DOE V. UCSD (2015)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, (CAL. SUPER. CT. JUL 10, 2015)



TAKEAWAYS:

- Cross-examination is important; err on side of permitting relevant questions; provide rationale for any rejected questions.
- Hearing chairs must be *well trained* to ensure all parties have a meaningful opportunity to confront all the evidence and testimony upon which a determination will rely.
- The panel, and particularly the chair, must understand what evidence is permissible for consideration and what should be excluded.
- Investigators are still the star witnesses. They and their reports must be available at a hearing for questioning by the hearing panel and the parties.
- Determinations and sanctions, including at the appeal level, must be supported by substantial evidence and clearly articulated.
- Investigators should not usurp decisions-maker's independent role.

DOE V. UCSD (2016)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, 5 CAL.APP.5TH 1055 (NOV. 22, 2016)



FACTS:

- Regents of UCSD appealed the Superior Court's 2015 decision (see preceding slides) granting John Doe's petition to reverse and remove UCSD's finding that Doe was responsible for sexual misconduct.
- UCSD's appeal emphasized three points:
 1. UCSD's decision to find Doe responsible was based on substantial evidence.
 2. The hearing did not deny Doe any due process.
 3. The sanctioning process was not an abuse of discretion.
- The Appeals Court agreed with UCSD's appeal and reversed the Superior Court's decision, reinstating the finding and sanctions against Doe.
- The California Supreme Court declined to review the Appeals Court's decision.

DOE V. UCSD (2016)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, 5 CAL.APP.5TH 1055 (NOV. 22, 2016)



HOLDING:

- The court found that UCSD's decision was based on substantial evidence.
 - “[The administrative agency’s] findings come before us ‘with a strong presumption as to their correctness and regularity.’ We do not substitute our own judgment if the [agency's] decision ‘is one which could have been made by reasonable people.’”
 - Jane Roe’s statements and the findings in the investigation report constituted substantial evidence that the policy was violated.
- The court found that UCSD did not abuse its discretion in sanctioning.
 - Lower Court incorrectly assumed hearing panel’s recommended sanctions were actual sanctions Doe received. Hearing merely made recommendation. Dean who sanctioned Doe followed sanctioning guidelines recommended for the infraction.
 - Record does not indicate that slight increase in sanction during the appeal was an abuse of discretion.

DOE V. UCSD (2016)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, 5 CAL.APP.5TH 1055 (NOV. 22, 2016)



- The court found that limiting Doe's attorney's participation or Doe's ability to cross-examine Roe did not deprive him of due process.
 - Although Doe's counsel could not participate in the hearing, he meaningfully participated in every other part of the investigation, including outside communication with the investigator and other administrators.
- Doe had opportunity to question Roe through submission of written questions and when asked at hearing if he had further questions for Roe.
 - The chair's decision to rephrase or decline certain questions submitted by Doe was based on reasonable rationale.
- The court found that UCSD did not withhold evidence from Doe.
 - Doe had opportunity to call investigator as witness but chose not to.
 - Because hearing panel's decision relied on information in investigation report, not the notes from the investigator's interviews, Doe was not entitled to those notes.

DOE V. UCSD (2016)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, 5 CAL.APP.5TH 1055 (NOV. 22, 2016)



- The court found that UCSD appropriately considered Doe's 5th amendment invocation.
 - Doe did not remain silent in the hearing. He denied allegation.
 - When asked follow-up questions, he didn't answer, citing 5th amdt.
- When asked about consent in the context of his relationship with Roe, he declined to answer.
- Fifth Amendment protection does not apply because Doe offered some testimony and refused to answer follow-up questions or provide supporting evidence upon request.
- "The [hearing] panel properly could consider his refusal to provide more information as bearing on John's credibility."

DOE V. UCSD (2016)

DOE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA, SAN DIEGO, 5 CAL.APP.5TH 1055 (NOV. 22, 2016)



TAKEAWAYS:

- Although it ruled in favor of UCSD...
 - The court was concerned about the limited cross-examination available to Doe given the reliance on credibility, indicating – yet again - the importance of a meaningful opportunity to question the other party.
 - The court was concerned that Doe did not have access to the investigator's complete interview notes with Jane. When providing information to the parties, make sure to provide all relevant information so that the parties can have a meaningful opportunity to review and respond to the evidence obtained.
- The court felt the increased sanction after the appeal was appropriate due to Doe's "lack of compunction" and the way he berated Jane in a post-hearing document; remorse/lack thereof may be considered for sanctioning purposes.

DOE V. USC (2016)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, 246 CAL.APP.4TH 221 (APR. 5, 2016)



FACTS:

- John Doe was accused of sexual misconduct and conduct code violations stemming from two sexual encounters in the same evening with Jane Roe, the reporting party, and Students 1 & 2, Doe's high school friends.
- Doe and Student 1 engaged in a consensual sexual encounter with Roe. Doe and Roe engaged in a separate consensual sexual activity shortly thereafter. Students 1 & 2 were also in the room during this encounter and roughly penetrated Roe with their fingers and penises while she was engaged in consensual sexual activity with Doe.
- One Student slapped Roe hard on the buttocks. Several seconds later she was again slapped hard on the buttocks. Roe began to cry, and the men disengaged from sexual activity and quickly left the room.

DOE V. USC (2016)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, 246 CAL.APP.4TH 221 (APR. 5, 2016)



- USC found that Doe violated nine sections of the student conduct code. A USC Appeals Panel overturned all but two of the violations:
 - he “encouraged or permitted” others to slap Roe on the buttocks during sexual activity, and he endangered Roe by leaving her alone in the bedroom.
- Superior Court affirmed that there was sufficient evidence that Doe encouraged or permitted non-consensual behavior, but determined there was insufficient evidence that Doe endangered Roe.
- Doe appealed, claiming he was denied a fair hearing by USC and that there was insufficient evidence to support the Appeals Panel’s finding that Doe encouraged or permitted non-consensual behavior.
- USC cross-appealed that there was sufficient evidence to support the Appeals Panel’s finding that Doe endangered Roe.

DOE V. USC (2016)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, 246 CAL.APP.4TH 221 (APR. 5, 2016)



HOLDING:

- Appeals Court held that USC did **not** afford a fair hearing to Doe.
 - The two violations did not align with investigative theory communicated by USC. The investigation focused on non-consensual sexual acts, but John was found responsible for conduct code violations for which he did not prepare.
- Court ruled USC's procedures were insufficient despite fact that initial notice of charges included violations of the conduct code which John was eventually found to have violated.
 - The court reasoned that simply listing the charge was not sufficient to provide notice and a fair opportunity to defend.

DOE V. USC (2016)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, 246 CAL.APP.4TH 221 (APR. 5, 2016)



TAKEAWAYS:

- The responding party must be informed of the **factual basis** for the specific charges. “If notice is to be meaningful, it must include information about the basis of the accusation.”
- Access to and opportunity to review information must be provided equitably. The responding party did not have meaningful access to the evidence upon which USC intended to rely – Roe was provided copies of investigators’ “notes relating to every witness....” Doe, however, “did not receive any information regarding the other witnesses’ testimony.”
- Policy language matters: USC’s policy mandates that students “confront and prevent the misconduct, notify an appropriate university official..., or remove [themselves] from the situation.” The “or” negated Doe’s obligation to report the misconduct and, in the court’s opinion, absolved him of any violation of this section because he left the room during the sexual activity.

DOE V. GLICK (2017)

DOE V. GLICK, ETC., ET AL., NO: BS163739 (CAL. SUPER. CT. MAR 16, 2017).



FACTS:

- John Doe, a student at Pomona College, and Jane Roe met up at a “day party.” Roe claimed that after the party, Doe told her he needed to use the restroom but instead “tricked” her into accompanying him to his room.
- According to Roe, once in his room, she panicked. Despite her reported resistance and lack of consent, Doe digitally penetrated her vagina.
- According to Doe, Roe removed her shirt voluntarily and moved Doe’s hand to her vaginal area, which Doe interpreted as consent for sexual touching and digital penetration.
- After Roe left Doe’s room, she met Friend A and Friend B at the college’s dining area and reported to them that she “felt pressured” by Doe and he had “fingered her” without her consent.

DOE V. GLICK (2017)

DOE V. GLICK, ETC., ET AL., NO: BS163739 (CAL. SUPER. CT. MAR 16, 2017).



- During Pomona's investigation, Roe produced a text message exchange with Friend A from around the time of the interaction with Doe, in which Friend A wrote, "Are you sure you want to do this with him?" and Roe replied, "Yea I'll be fine but let's meet at the coup at 5:45" to which Friend A responded, "Hahaaha [cry-laughing emoticon] Fuck that boy."
- Although Roe did not attend the hearing, Pomona found Doe responsible for sexual misconduct and implemented a two-semester suspension. Despite Doe's appeal, the sanction was upheld.

DOE V. GLICK (2017)

DOE V. GLICK, ETC., ET AL., NO: BS163739 (CAL. SUPER. CT. MAR 16, 2017).



HOLDING:

- The Superior Court assessed Doe's assertion that the external adjudicator demonstrated bias by "incorporating the investigation report by reference and reaching illogical conclusions about who removed Roe's clothing."
- Doe also stated that the proceedings were unfair because verbatim witness statements were not created by the investigator, which resulted in unreliable evidence.
- The court was unmoved by both of these contentions, stating that "bias [is] never implied and must be established by clear averments." Doe's disagreement with the conclusions reached does not establish bias.
- Lack of verbatim witness interviews also did not prove problematic, as the investigator maintained notes from witness interviews, which were provided to both parties in advance of the hearing.

DOE V. GLICK (2017)

DOE V. GLICK, ETC., ET AL., NO: BS163739 (CAL. SUPER. CT. MAR 16, 2017).



- However, Judge Strobel did ultimately order Pomona College to dismiss the finding of responsibility as well as Doe's two-semester suspension.
- Citing *Doe v. UCSD* (5 Cal.App.5th 1055 (2016)), Judge Strobel determined that the disciplinary process unlawfully denied Doe a fair hearing and pointed to Pomona's failure to allow Doe the opportunity to question Roe, either directly or indirectly, at the hearing.

DOE V. GLICK (2017)

DOE V. GLICK, ETC., ET AL., NO: BS163739 (CAL. SUPER. CT. MAR 16, 2017).



TAKEAWAYS:

- When a situation turns on credibility, which many do, make sure that the parties have a meaningful opportunity to ask questions of the other, either directly or indirectly.
 - Failure to provide such an opportunity significantly disadvantages the party unable to pose questions and, depending on your jurisdiction, may constitute an unfair hearing.
- When one party does not attend the hearing, make every effort possible to ensure that the other party is able to pose questions through some means, even if through video conference.
- Issues of cross examination are, for now, quite jurisdiction-specific, but cross-examination and hearing rights are clearly now applicable to CA suspension/expulsion cases for public AND private institutions.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



FACTS:

- Jane Roe attended a party at John Doe's apartment, which he shared with his girlfriend (Witness 1) and roommate (Witness 2). Roe had been drinking and wasn't feeling well. Witness 1 directed her to lay down on a mattress close to the couch she and Witness 2 were sitting on.
- Doe arrived home from another party, where he had been drinking. Doe lay down, fully clothed, on the same mattress.
- Roe reported to UCSB that Doe roughly touched and sucked her breasts and digitally penetrated her vaginally and anally. At first, Roe was unable to say anything and felt paralyzed. She eventually said, "whoever's behind me is hurting me badly."
- Roe reported that Witness 1 said Roe must be having a bad dream but when she saw Roe's buttocks were half-bare, she screamed and told everyone to get out of the apartment.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



- Roe was medically examined by the Santa Barbara County Sexual Assault Response Team (SART). The report indicated that Roe had bruising and a laceration in her anal area. The report also indicated that Roe was on a prescription antidepressant.
- Three months later, Doe was placed on interim suspension.
- Eight months later, Doe was notified by UCSB that a hearing would take place in 12 days. The hearing was subsequently delayed for a month to allow the committee time to consult with counsel.
- Doe's objection to the delay was denied. For the hearing, Roe submitted a list of witnesses and two pages from the SART report – a cover page and a page that listed her current medications.
- The committee found Doe responsible for sexual assault and suspended him for eight semesters.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



HOLDING:

- The court found Doe was denied a fair opportunity to cross-examine witnesses.
 - Doe was denied access to the full SART report. A detective testified about one line in the report but failed to answer Doe’s further questions about the remaining content of the report.
- The court cited the best evidence rule (now “secondary evidence” rule in CA) which precludes oral testimony to prove the content of a writing.
- The court also cited the rule of completeness, which should have allowed Doe to see the entire SART report.
 - Without the opportunity to inspect the report, Doe was unable to determine whether valuable information was not disclosed.
 - Doe was unable to properly cross-examine and properly prepare his defense.
 - The court found the Committee relied on the report to corroborate Roe’s testimony that she was penetrated with fingers and/or a penis.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



- The court also found the Committee inconsistently applied policies and procedures and selectively applied formal rules of evidence.
 - Doe was unable to secure an expert to testify about the side effects of mixing antidepressants with alcohol because he was only provided the name of the medication Roe was taking the night before the hearing.
 - Doe's mother attempted to testify about the side effects but her testimony was excluded.
 - The Committee allowed the detective's testimony about the SART report, which indicated that the physical injuries were consistent with the allegations, even though she was not an expert, did not conduct the examination, and did not write the SART report.
 - The Committee also allowed UCSB's general counsel to actively participate in the hearing and make formal evidentiary objections but denied Doe's counsel the opportunity to actively participate in the hearing.

DOE V. UCSB (2018)

DOE V. REGENTS OF THE UNIV. OF CALIFORNIA, ET AL., 28 CAL. APP. 5TH 44 (2018)



TAKEAWAYS:

- Inequities in access to evidence, cross-examination, and ability to introduce counterevidence corrupt the hearing and its outcomes.
- California courts are increasingly citing formal rules of evidence and expecting decision-makers to apply these rules equally.
- When documented evidence exists, decision-makers should rely on that evidence, rather than relevant testimony about that evidence.
- An entire document should be produced if and where any portion of that document is relied upon in the hearing.
- Parties are entitled to sufficient time to access an expert or allow non-expert testimony where the testimony relates to a viable theory.
- General counsels should not actively participate in a hearing where parties' counsel is denied the opportunity to actively participate.

JOHN DOE V. CLAREMONT MCKENNA COLLEGE CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



FACTS:

- May 2015, John Doe was found responsible for nonconsensual sexual intercourse with Jane Roe, a student from Scripps College.
- He was suspended for one year.
- The decision was made as a result of an “Investigation Findings and Review” committee – two CMC faculty/staff and the investigator.
- Procedures for the Committee “meeting” did not allow for questioning by the Committee or the parties.
- Jane Roe did not attend the Committee meeting.
- The Investigator also did not ask Roe the questions Doe requested the investigator ask.

JOHN DOE V. CLAREMONT MCKENNA COLLEGE

CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



- Doe petitioned in state court for a writ of administrative mandate to set aside the decision.
- Trial court denied the petition. Appellate court reversed.
- Court approvingly cited 6th Circuit's Cincinnati decision regarding credibility determinations and the ability of the parties to pose questions to each other.
 - *“We hold that where, as here, John was facing potentially severe consequences and the Committee’s decision against him turned on believing Jane, the Committee’s procedures should have included an opportunity for the Committee to assess Jane’s credibility by her appearing at the hearing in person or by videoconference or similar technology, and by the Committee’s asking her appropriate questions proposed by John or the Committee itself. ”*

JOHN DOE V. CLAREMONT MCKENNA COLLEGE CAL. CT. APP., 2ND DIST. (AUGUST 8, 2018)



HOLDING:

- Court recognized: a college is not a court, cannot compel people to appear at hearing, the burden of added procedures on the college, and the possibility of intimidating/retraumatizing the reporting party.
 - *“In light of these concerns we emphasize...that the school’s obligation in a case turning on the complaining witness’s credibility is to “provide a means for the [fact finder] to evaluate an alleged victim’s credibility, not for the accused to physically confront his accuser.”*
 - *“While we do not wish to limit the universe of ideas of how to accomplish this, we note that the mechanism for indirect questioning in *Regents*, including granting the fact finder discretion to exclude or rephrase questions as appropriate and ask its own questions, strikes a fair balance among the interests of the school, the accused student, and the complainant.”*

TAKEAWAYS:

- Different courts have approached the issue of cross examination differently. The judge's reference to a 6th Circuit Court of Appeal ruling involving a public school is notable because that ruling is not binding on California state courts and CMC is a private institution.
- While live, in-person cross-examination is not required by this decision, this ruling continues the pattern of judges who have underlined the importance of ensuring a) the ability of one party to question the other party and b) the ability of the decisionmaker to assess the parties' credibility.
- This ruling is just one example of why it's so important to keep up to date on the current state of caselaw in your particular jurisdiction.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



FACTS:

- Jane Roe and John Doe attended a “paint” party, which involved throwing paint at each other. After the party, Doe accompanied Roe back to her apartment. According to Roe, Doe then engaged in nonconsensual vaginal and anal assault. The next day, Roe visited a rape treatment center and also spoke with LAPD officers.
- After Roe reported the interaction to USC on April 30, 2014, Dr. Kegan Allee, who was both the investigator and adjudicator in the matter, began investigating. In May, an outside attorney replaced Dr. Allee as the investigator. Although the attorney interviewed several critical witnesses, when the matter was transferred back to Dr. Allee on June 5, Dr. Allee did not re-interview these individuals.
- In August, Dr. Allee determined that Doe knew or should have known that Roe was too drunk to consent to the sexual interaction. Dr. Allee noted that although Roe could not remember much of the evening, Roe had reconstructed the events after speaking with three witnesses.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



- All 3 witnesses had been interviewed by the outside attorney, but not by Dr. Allee.
- In her determination, Dr. Allee assessed the credibility of other witnesses and determined they were not “sufficiently reliable.”
- Doe was expelled from USC. Although he appealed on several bases, the university denied his appeal.
- Doe petitioned for a writ of mandamus to set aside his expulsion, asserting procedural and substantive challenges. Doe asserted that USC’s findings were not supported by substantial evidence and the investigation was unfair. Doe stated that USC did not provide him with a fair hearing or an independent adjudicator.
- He pointed primarily to the facts that he was unable to cross-examine witnesses, had to rely on Dr. Allee, and Dr. Allee did not interview the three central witnesses, but instead relied on interview summaries by the outside investigator.
- The trial court denied his petition.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



HOLDING:

- The court of appeals reversed the trial court's decision.
- Because Dr. Allee's investigative report and adjudication turned on witness credibility, Dr. Allee should have interviewed all critical witnesses either in person or by videoconference to let her to observe the interviewees. This was especially important here where there were significant inconsistencies and a dispute over whether the substances observed in Roe's apartment after the sexual encounter were blood or paint from the party.
- Additionally, USC did not comply with its own procedures to conduct a fair and thorough investigation by failing to request that Jane provide her clothes from the incident and her consent to release her medical records from the rape treatment center.

DOE V. USC (2018)

DOE V. UNIVERSITY OF SOUTHERN CALIFORNIA, NO. B271834 (CAL. CT. APP. 2018)



TAKEAWAYS:

- When there are investigations that turn on credibility (as many do), the finder of fact needs to be able to observe the witnesses' demeanor to appropriately render determinations of credibility. Relying on another individual's report(s) is simply insufficient, according to the court.
- When you are aware that evidence exists or may exist, ask for it! The court made it quite clear that even though Roe may have refused consent to disclose her medical records from the rape treatment center, the university was still obligated to request it.
- While there is no obligation for a party to provide it, your institution may come under significant scrutiny for failing to follow up on potentially probative evidence.
- Asking for all relevant evidence (such as clothes or medical reports that have been discussed during the interviews) is vital to ensuring that you are conducting a thorough investigation.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



FACTS:

- John Doe, a USC student-athlete, was accused of non-consensual sexual acts stemming from an incident with Jane Roe, a senior athletic trainer.
- Roe had been drinking in anticipation of attending a party. After Doe and Roe texted about his plans, she went to his apartment to smoke marijuana. When she arrived, they went out to get some food. Roe reported that when they returned to Doe's apartment, Doe pushed himself on her, held her hand down, pulled her hair, put his hand over her mouth, and engaged in intercourse. Doe reported it was consensual and cited her moans and facial expressions as evidence that that she was actively participating and enjoying the interaction.
- In an investigative interview, Doe described a previous sexual encounter with Roe during which Doe "fingered" Roe. Roe did not initially remember the encounter and became visibly upset when a Title IX investigator shared that Doe reported digitally penetrating her.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



- USC began an investigation into Roe's original allegations, and Doe was subsequently notified that the additional encounter he mentioned during the interview was added to the investigation.
- Doe suggested that Roe fabricated the allegation so she wouldn't be fired as an athletic trainer.
 - The investigator did not pursue this theory. The investigator also disregarded testimony that Roe had been disciplined for having sex with a football player and had signed an agreement not to do so in the future.
 - The investigator did not inquire about the athletics consensual relationships policy, nor determine if Roe had previously signed an agreement.
- Doe was found responsible for non-consensual sexual acts stemming from the initial reported incident, and was found not responsible for the additional incident disclosed during interviews. His expulsion was upheld by an internal appeal.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



HOLDING:

- The superior court upheld USC's action and Doe filed an appeal. While the appeal was pending, Doe was expelled from USC for unrelated conduct code violations.
- The appeals court vacated USC's findings against Doe on several grounds:
 - If credibility is a central issue and potential sanctions are severe, fundamental fairness requires a hearing, with cross-examination, before a neutral adjudicator with power to independently judge credibility and find facts.
 - Fundamental fairness dictates the factfinder cannot be a single individual with divided and inconsistent roles.
 - The investigator should fully explore theories that may shine light on credibility of a witness and not solely rely on the parties' lists to identify witnesses.

DOE V. ALLEE (2019)

DOE V. ALLEE, ET AL., NO. B283406 (CAL. CT. APP. JAN. 4, 2019)



TAKEAWAYS:

- USC's system placed a "single individual in the overlapping and inconsistent roles of investigator, prosecutor, fact-finder, and sentence." The investigator here had "unfettered discretion" to determine what evidence to consider, which witnesses to interview, and what determination and sanction to impose.
- Consider the levels of checks and balances present in your process and make sure there is a decision-maker who is at least one step removed from the investigator.
- Do not solely rely on the parties for witnesses. A thorough investigation will likely result in additional witnesses which should be interviewed to ensure a complete review of all available evidence.
- The investigator should fully explore all theories that may shine light on the credibility of the parties.

DOE V. CARRY (2019)

DOE V. CARRY, ET AL., NO. B282164 (CAL. CT. APP. JAN. 8, 2019)



FACTS:

- John Doe, a student at USC, reportedly engaged in sexual intercourse with Jane Roe while she was incapacitated by alcohol.
- USC investigated, gathering information from over a dozen witnesses, text messages, and video footage taken over the course of the evening.
- Roe consumed the equivalent of four shots of vodka, a cup of wine, and additional alcohol. Six witnesses described Roe as “obviously intoxicated,” “really drunk” and “swaying,” “stumbling and slurring her words” as the evening wore on. Seven other witnesses, however, reported that she did not seem visibly impaired, at least no more so than many of the other attendees.
- Doe stated that during the evening, Roe suggested they go to a nearby bedroom, where they had sex. Doe described her as “functional, coherent [and] aware the whole time.”

DOE V. CARRY (2019)

DOE V. CARRY, ET AL., NO. B282164 (CAL. CT. APP. JAN. 8, 2019)



- According to Doe, Roe stood on her knees on the bed to remove her skinny jeans, agreed to Doe's suggestion to get a condom, and was an "active participant."
- Various witnesses saw Doe and Roe in the bedroom.
 - One friend asked if Roe was okay - Roe replied yes.
 - Another expressed concern to Doe about Roe's intoxication but did not attempt to intervene in or stop the sexual activity.
- Afterward, a friend told Roe they should leave. Doe and the friend had different accounts of how easily Roe was able to dress herself.
- Surveillance video of Roe and a friend leaving the apartment showed that it took the women almost nine minutes (as opposed to the expected one minute) to reach the elevator. Roe was swaying and stumbling in the hallway and at one point she fell and lay motionless for about a minute.

DOE V. CARRY (2019)

DOE V. CARRY, ET AL., NO. B282164 (CAL. CT. APP. JAN. 8, 2019)



- Doe was provided with a written notice pursuant to USC policy. The investigator concluded that Roe lacked the capacity to consent, that Doe knew or should have known of her incapacity, and under a preponderance of evidence standard, engaged in unwelcome sexual conduct that ranged from fondling to vaginal penetration.
- The investigator recommended that Doe be expelled. Doe appealed on several grounds. The Appeals Panel could not conduct a *de novo* review or make new findings of fact, and policy required that it must defer to the findings if there was substantial evidence to support them.
- The sanction may be altered only if it was unsupported by the findings or was grossly disproportionate. The Appeals Panel recommended that the sanction be changed to a three-year suspension and no-contact order.
- The Vice Provost of Student Affairs ultimately upheld the expulsion.

DOE V. CARRY (2019)

DOE V. CARRY, ET AL., NO. B282164 (CAL. CT. APP. JAN. 8, 2019)



HOLDING:

- The court held that USC's process has fundamental flaws and denied Doe's right to a fundamentally fair hearing. USC's single investigator model improperly permitted a single investigator to act in overlapping and conflicting capacities as both prosecutor and decision-maker in imposing discipline.
- The limited authority of the Appeals Panel's review exacerbated the harm to fundamental fairness, because the panel could not independently make credibility determinations or new factual findings. The panel could essentially never set aside an investigator's findings without a procedural error.
- The court held that Doe was entitled to cross-examine Roe and all witnesses before a neutral adjudicator (who was not the investigator) with the authority to make findings of credibility and fact.

DOE V. CARRY (2019)

DOE V. CARRY, ET AL., NO. B282164 (CAL. CT. APP. JAN. 8, 2019)



TAKEAWAYS:

- California institutions, both private and public, need to abandon the single-investigator-adjudicator model.
- The responding party has a right to cross-examine the reporting party and witnesses, either directly or through an indirect mechanism.
- The credibility determination and findings of fact must be made by a neutral decisionmaker who is not the investigator.
- Doe also made arguments of insufficient evidence and gender bias, but the court declined to reach those arguments because of its holding on due process. It remains to be seen, therefore, whether those arguments could ultimately succeed on a different set of procedural facts.

DOE V. WHITE (2019)

DOE V. TIMOTHY P. WHITE ET AL., NO. BS171704 (CAL. SUPER. CT. FEB. 7, 2019)



FACTS:

- John Doe was a student at Cal Poly. His roommate was alleged to have sexually assaulted Jane Roe in their on-campus apartment while she was incapacitated by alcohol.
- Doe served as a witness in the investigation. When Doe described a telephone conversation that he had with Roe's friend, the investigator heard Doe say, "I assume she found out about me and my roommate having sex with her."
- Doe explained that it was a misstatement and that he was "very tired." Doe denied having sex with Roe.
- Doe became a responding party, and the final investigation report including a finding that Doe was responsible for sexual misconduct.

DOE V. WHITE (2019)

DOE V. TIMOTHY P. WHITE ET AL., NO. BS171704 (CAL. SUPER. CT. FEB. 7, 2019)



- The investigator referenced Doe's inculpatory statement in the first interview as "most compelling," and that his statement of being "tired" was not credible.
- Doe appealed, arguing that the investigation findings were not supported by the evidence and that his ADHD should have been considered.
- Initially, Doe received disciplinary probation with a suspension held in abeyance. Both Doe and Roe appealed. The appeals officer denied Doe's appeal, granted Roe's appeal, and expelled Doe from all CSU campuses.
- While Doe's petition to California Superior Court was pending, the California Court of Appeals decided *Doe v. Allee*.
- After *Allee*, CSU vacated the findings and discipline and ordered a new investigation consistent with the guidance from *Allee*.

DOE V. WHITE (2019)

DOE V. TIMOTHY P. WHITE ET AL., NO. BS171704 (CAL. SUPER. CT. FEB. 7, 2019)



HOLDING:

- The court reviewed the merits of Doe's due process arguments. Applying the procedural requirements set forth in *Doe v. Regents, Claremont McKenna*, and *Allee*, the court concluded that the process provided to Doe should have included an opportunity for the decision-maker to assess Roe's credibility by an in-person appearance or via technology.
- Under *Allee*, the investigator of the original allegations could not serve as the neutral adjudicator in Doe's process, because that individual needed to serve as a witness to Doe's verbal statements in the first interview.
- A fair adjudication of the allegations against Doe inherently turned on the credibility determinations of Roe, Doe, Doe's roommate, and the original investigator.

DOE V. WHITE (2019)

DOE V. TIMOTHY P. WHITE ET AL., NO. BS171704 (CAL. SUPER. CT. FEB. 7, 2019)



TAKEAWAYS:

- The investigator in this case was in the fairly unique position of being the primary witness to Doe's alleged confession. Even so, adherence to the essential elements of a civil rights investigation would have cured many of CSU's procedural errors. Careful attention to impartiality and conflict is imperative.
- A recorded interview or more than one investigator may have helped definitively establish whether Doe did, in fact, make the inculpatory statement.
- When *new* allegations emerge during an interview, the investigator must immediately confer with the TIXC regarding the investigator's role in the current investigation and the potential new charge(s) and investigation.

DOE V. CSUF (2019)

DOE V. THE TRUSTEES OF THE STATE OF CALIFORNIA, ETC., ET AL., NO. BS167329 (CAL. SUPER. CT. FEB. 7, 2019)



FACTS:

- An individual reported that John Doe, a CSUF student, was drugging womens' drinks at parties and having sex with them. Two women, Roe 1 and Roe 2, moved forward with the formal process. Roe 2 was not an enrolled student.
- The interim TIXC commenced an investigation and concluded in her report, which she did not provide to Doe, that he engaged in non-consensual sexual intercourse with both Roes. Both women were determined to have been incapacitated (Roe 1 due to her age).
- The original NOI included reference to sexual assault and sexual harassment involving the two female students on the pertinent dates. A Notice of Investigation Outcome (NOIO) was written, informing him that the allegations were substantiated; however, the NOIO was inadvertently never sent.
- Doe was found responsible for sexual misconduct violations and notified that the sanctions under consideration were suspension or expulsion. The notification made no mention of appeal rights.

DOE V. CSUF (2019)

DOE V. THE TRUSTEES OF THE STATE OF CALIFORNIA, ETC., ET AL., NO. BS167329 (CAL. SUPER. CT. FEB. 7, 2019)



- At the sanctions hearing, Doe was told that because he did not appeal findings, they were not up for review. He then appealed findings, but the appeal was untimely.
- Doe was notified that he would be expelled. His appeal of the sanction based on prejudicial errors and new evidence was denied.
- Chancellor's office discovered that the NOIO had not been sent and directed CSUF to issue a new NOIO, provide a copy of the report, the names of all complainants and witnesses, and instructed that Doe's "untimely" appeal be "reopened."
- CSUF reopened the investigation of Roe 2's report. The appeal re: Roe 1's matter was denied - Doe had acknowledged in appeal hearing that Roe 1 was a minor at the time of intercourse.
- The original investigator completed an amended investigation report, which affirmed the original findings for both incidents. Doe received an NOIO, including information that he could appeal. He appealed the amended findings and was denied. He was expelled again after a sanction hearing; he did not appeal the sanction.

DOE V. CSUF (2019)

DOE V. THE TRUSTEES OF THE STATE OF CALIFORNIA, ETC., ET AL., NO. BS167329 (CAL. SUPER. CT. FEB. 7, 2019)



HOLDING:

- The court observed that CSUF's sexual misconduct policy did not articulate appropriate jurisdiction to adjudicate Roe 2's report because an "unenrolled student" is not a "student" pursuant to the policy.
- CSUF failed to notify Doe that the report pertaining to Roe 1 found incapacitation due to her age. The original allegation related to incapacitation due to intoxication. The investigator found Doe responsible based on Roe's age. Doe did not receive notice of the allegation relating to Roe's age until after the initial sanctions decision.
- Applying *Doe v. Allee*, CSUF must provide an opportunity for cross-examination and a neutral decision-maker to assess the credibility of the reporting party and witnesses. *Allee* dictates that the investigator cannot also serve as the fact-finder.

DOE V. CSUF (2019)

DOE V. THE TRUSTEES OF THE STATE OF CALIFORNIA, ETC., ET AL., NO. BS167329 (CAL. SUPER. CT. FEB. 7, 2019)



TAKEAWAYS:

- The court advanced the same proposition as OCR's proposed TIX regulations: the notice of allegations and investigation must include enough facts and details to properly put the responding party on notice prior to an interview. The notice in this matter should have referenced the possibility of incapacity due to age and intoxication.
- The TIXC must ensure major steps (including required notices) are successfully completed.
- Policy must contemplate and define the parameters of jurisdiction. Ensure policy is drafted so that your institution may take discretionary jurisdiction whenever the institution's interests would be best served.
- Current investigatory models which allow the TIXC to serve as an investigator, or which allow a single investigator to render determinations must be significantly overhauled.

QUESTIONS?



CONTACT INFORMATION

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