



# TITLE IX HEARING OFFICER AND DECISION-MAKER TRAINING & CERTIFICATION COURSE

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September 2020

# TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. PART 106



*"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."*



WHAT IS YOUR  
MISSION AS A  
DECISION-MAKER?

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# WHAT DOES IT MEAN TO BE A “DECISION-MAKER?”



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

# HEARING OFFICER/DECISION-MAKER COMPETENCIES



- The Legal Landscape
- The Conduct/Disciplinary Process
- Understanding Investigations
- Title IX & VAWA Requirements
- Pre-Hearing Evidence Review
- Pre-Hearing Investigation Report Review
- Critical Thinking Skills
- How to Prepare for a Hearing
- Hearing Decorum
- Questioning Skills, including Relevance
- Weighing Evidence, including Relevance
- Analyzing Policy
- Applying Standards of Evidence
- Sexual Misconduct/Discrimination
- Technology Used at Hearing
- Controlling Evidence
- Managing Advisors
- SANE and Police Reports
- Presumption of Innocence
- Due Process and Fairness
- Domestic/Dating Violence
- Bias/Impartiality/Conflicts of Interest
- Stalking/Sexual Assault/Harassment
- Deliberation
- Sanctioning/Remedies
- Understanding the Appeal Process
- Cultural Competency
- Intersection with Mental Health Issues
- Concurrent Criminal Prosecutions
- Impact of Failing to Testify/Answer
- Drawing Inferences?
- Manage Accommodations During Process
- Fixing Procedural Deviations
- Managing Impact Statements
- Writing Decisions/Rationales
- Role in Appeal Process?

# TRAINING MANDATES



- The definition of sexual harassment in § 106.30
- How to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.
- Understanding the scope of the recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
- How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

# ADDITIONAL ROLES OF THE CHAIR\*



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

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



# ADDITIONAL ROLES OF THE CHAIR\*



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

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



# THE CHALLENGE FOR HEARING OFFICERS/DECISION-MAKERS



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

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*Remember, you have no  
side other than the  
integrity of the process.  
And you represent the  
process.*

# BIAS, CONFLICTS OF INTEREST, AND RECUSAL

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

# BIAS AND CONFLICT OF INTEREST



- Conflicts of interest and bias are expressly prohibited in the 2020 Title IX regulations.
- Types of conflicts/bias:
  - Wearing too many hats in the process
  - Legal counsel as investigator or decision-maker
  - Decision-makers who are not impartial
  - Biased training materials; reliance on sex stereotypes
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.
- Also, having disciplined a student or employee previously is often not enough to create a conflict of interest.

# RECUSAL



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



# DUE PROCESS

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

# WHAT IS DUE PROCESS?



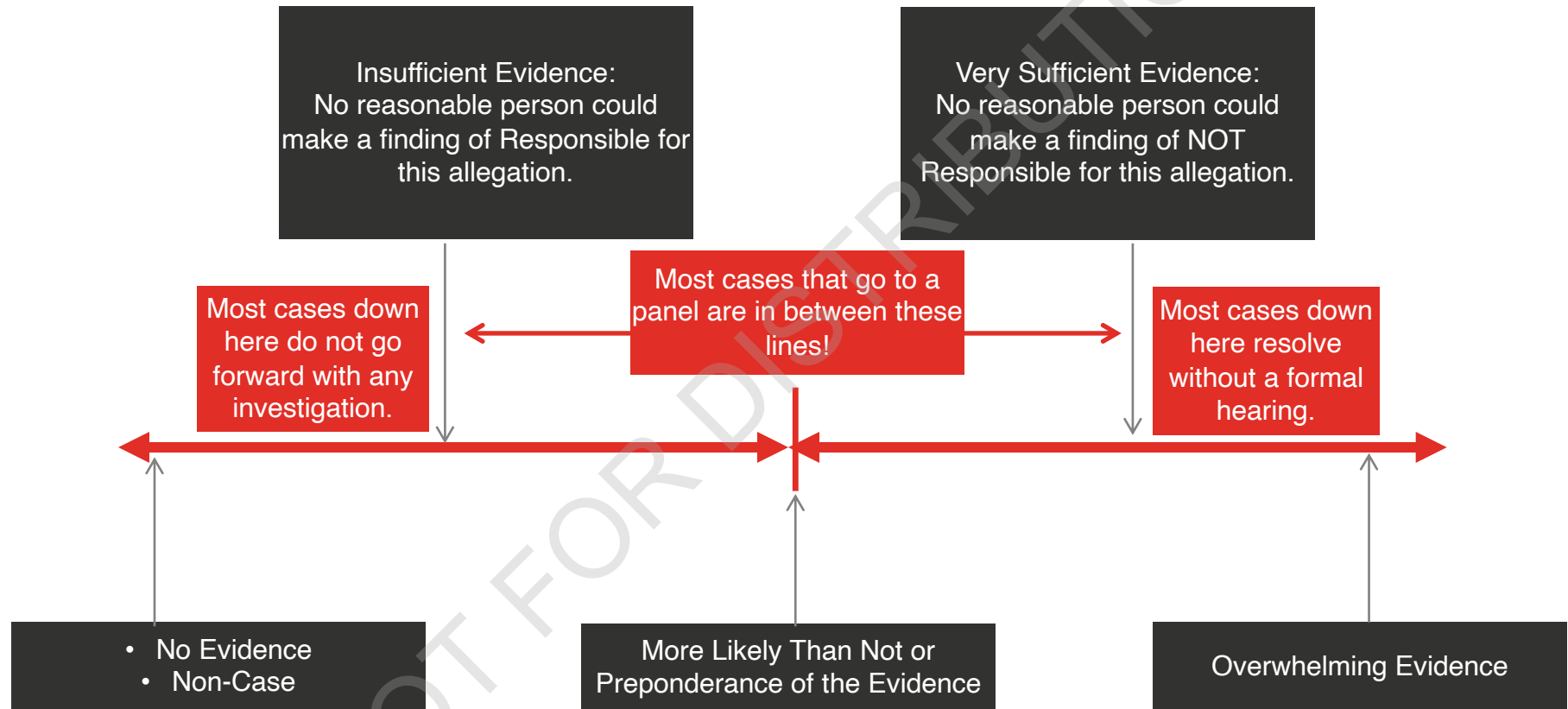
- Due Process (public institutions):
  - Federal and state constitutional and legal protections ensuring no public entity deprives someone of education or employment without substantive and procedural fairness. (5<sup>th</sup> and 14<sup>th</sup> Amendment)
- “Fundamental Fairness” (private institutions):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

# DUE PROCESS PROCEDURAL RIGHTS IN 2020 TITLE IX REGULATIONS



- Right to:
  - Present witnesses, including fact and expert witnesses.
  - Present and know inculpatory and exculpatory evidence.
  - Discuss the allegations under investigation without restriction.
  - Gather and present relevant evidence without restriction.
  - Have others present during any grievance proceeding/meeting.
  - Be accompanied to any related meeting or proceeding by an advisor of their choice, who may be, but is not required to be, an attorney.
  - Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigative interviews or other meetings, with sufficient time to prepare.
  - Inspect and review evidence and draft investigation report before finalized.
  - Right to argue for inclusion of “directly related” evidence at the hearing.
  - Ask relevant questions of the other party and witnesses through an advisor, in the presence of the decision-maker.

# STANDARD OF PROOF/EVIDENTIARY STANDARD



# EVIDENTIARY STANDARD



Clear and convincing evidence: It is highly probable that policy was violated.

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

Preponderance of the evidence: “More likely than not.”

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

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

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

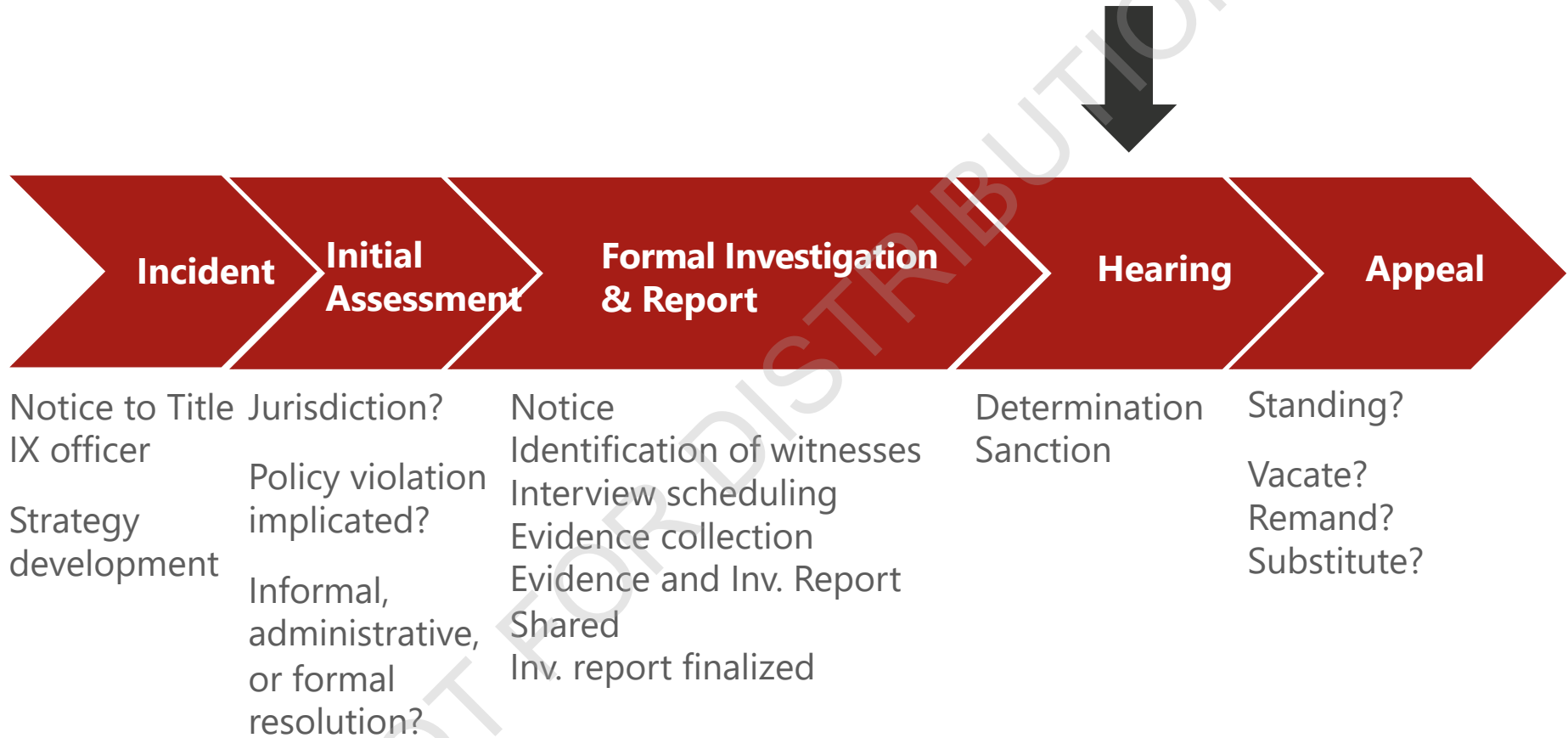
# THE IX COMMANDMENTS



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



# THE PROCESS



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

- Advisors chosen by the party must conduct thorough cross-examination.
- If they refuse, the institution will appoint an advisor who will do so.
- An advisor appointed for the party is required to conduct thorough cross-examination of the other party(ies);
  - Even if the party being advised doesn't want the advisor to do so, and is non-cooperative.
  - The regulations envision that the advisor may not do more than repeat or rephrase questions framed by the party, but in many hearings, expect that the advisor will be far more active and engaged than that.

# POLICY DEFINITIONS

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

# SEXUAL HARASSMENT POLICY



- Title IX regulations require each recipient to have an umbrella sexual harassment policy and define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:
  - **QUID PRO QUO:** An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.
  - **SEXUAL HARASSMENT:** Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the recipient's education program or activity
    - Education program or activity means employment, too!

# "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 (e.g., physical/sexual assaults) are almost always sufficiently severe.
- Consider the circumstances: e.g. the ability for Complainant to remove themselves from 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).



# “OBJECTIVELY OFFENSIVE”



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

# HOSTILE ENVIRONMENT?



Hostile Environment?

# HOSTILE ENVIRONMENT?



Hostile Environment?

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

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

# SEXUAL ASSAULT



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

# SEXUAL ASSAULT



Sex Offenses, Nonforcible: Nonforcible sexual intercourse.

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

# CONSENT



- Consent can be defined per state law or best practices.
  - ATIXA Model Definitions found in *1P1P* or *The Playbook*.
- Although the new regulatory definition of sexual assault is ostensibly consent based, it's not a great analytical tool. Luckily, the wording is generic enough to permit ATIXA best practice interpretations to be fully applicable.
- Be aware that the FBI's definition of rape (upon which the regulatory definition rests) will change again soon, likely in 2021. Your definition will have to shift then as well.
  - “carnal knowledge” coming soon to a campus sexual assault policy near you!

# DATING VIOLENCE



## **Dating Violence** is defined as

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



# DOMESTIC VIOLENCE



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

# DOMESTIC VIOLENCE



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

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# STALKING



- **Stalking** is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - Fear for the person’s safety or the safety of others; or
  - Suffer substantial emotional distress.
- For the purposes of this definition—
  - Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
  - Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
  - Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

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

# TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR SEXUAL HARASSMENT



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

## **The circumstances to consider include:**

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

# TOTALITY OF THE CIRCUMSTANCES



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

# OTHER ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION



- Though not part of the Title IX “Sexual Harassment” definition, other conduct could be prohibited under a campus sexual misconduct policy, including:
  - **Sexual Exploitation**
    - Occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute sexual harassment.

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



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

- Invasion of sexual privacy.
- Non-consensual digital, video, or audio recording of nudity or sexual activity.
- Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.
- Engaging in voyeurism.
- Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex).

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



- Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.
- Intentionally or recklessly exposing one's genitals in non-consensual circumstances or inducing another to expose their genitals.
- Sexually-based stalking and/or bullying may also be forms of sexual exploitation.



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



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

# RETALIATION



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

# ATIXA CONSENT CONSTRUCT

- 
- Force
  - Incapacity
  - Consent

# CONSENT IS...



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

# OVERVIEW OF THE 3 CONSENT QUESTIONS



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

There are four types of force to consider:

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

# INCAPACITY



- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent.
- Incapacitation is a determination that will be made after the incident in light of all the facts available.
- Assessing incapacitation is very fact-dependent.
- Blackouts are frequent issues.
  - Blackout = no working (form of short-term) memory for a consistent period, thus the person is unable to understand who, what, when, where, why, or how
    - But the 2a question must be answered, as blacked out individuals are able to engage in activities that may not make 2a a definitive “yes”
  - Partial blackout or “brownout” possibilities must be assessed as well

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



# INCAPACITY ANALYSIS



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

# BEHAVIORAL CUES



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

# KNOWLEDGE CONSTRUCT



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

# FINAL INCAPACITY ANALYSIS



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

# CONSENT

Question 3 is the Consent question:

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

# CONSENT: RULES TO REMEMBER



- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated – verbally or non-verbally – by the person withdrawing it.

# PREPARING FOR THE HEARING

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# PREPARING FOR THE HEARING



## Always Review:

- The Respondent's written notice (NOIA) to understand all allegations.
- Review the policy alleged to have been violated.
  - Parse all the policy elements (what does it take to establish a policy violation?)
  - Identify the elements of each offense alleged.
  - Break down the constituent elements of each relevant policy.
- Review all the material carefully and thoroughly – get a general overview of the complaint.
- Review it a second time and note all areas of consistency of information.
  - You don't need additional verification or questioning on these issues, of assuming the accuracy of consistent information (but beware of suspiciously consistent stories).
- Read it a third time to identify inconsistencies in the information.
  - Here is where you will concentrate your questions.



# PRE-HEARING MEETINGS



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

# PREPARING FOR THE HEARING



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

# QUICK TIPS ON HEARING LOGISTICS

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# THE HEARING: GENERAL LOGISTICS



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

# HEARING DECORUM



- Be professional, but not lawyerly or judge-like
  - This is not *Law and Order* – this is an administrative process at a school.
  - You are not cross-examining or interrogating, you are striving to determine whether the Respondent(s) violated the institutional policy.
- Be respectful
  - Tone, Manner, Questioning.
  - Sarcasm or being snide are never appropriate.
  - Maintain your composure: Never allow emotion or frustration to show.

# HEARING DECORUM



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

# THE HEARING



## Tips for Hearing Officers/Decision-Makers

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

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

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



# QUESTIONING SKILLS & GUIDELINES

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# QUESTIONING



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

# IF YOU STILL HAVE TO ASK A QUESTION, ASK YOURSELF



- **Is the answer already in the report or documentation I have been provided?**
  - If not, why not? (Ask the Investigator this!)
  - You still will need to ask it again but keep the report in mind.
- **What do I need to know?**
  - Who is the best person to ask this of? Usually it will be the Investigator, first, and then the original source, if available; it may be good to ask the investigator if they asked it already and what answer they got.
- **Why do I need to know it?**
  - If it is not going to help you decide whether a policy was violated or not and you can explain how, then it is not a good question (though you may not know this until you hear the answer).
- **What is the best way to ask the question?**
- **Are you the best person to ask this question?**

# ASKING GOOD QUESTIONS



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

# QUESTIONING SKILLS



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

# QUESTIONING TIPS



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

# DECISION-MAKING SKILLS

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

# ASK YOURSELF



Is it **relevant**?



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



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



# RELEVANCE



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

# RELEVANCE



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

# UNDERSTANDING EVIDENCE



- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible:
  - Documentary evidence (e.g. supportive writings or documents).
  - Electronic evidence (e.g. photos, text messages, and videos).
  - Real evidence (i.e. physical objects).
  - Direct or testimonial evidence (e.g. personal observation or experience).
  - Circumstantial evidence (i.e. not eyewitness, but compelling).
  - Hearsay evidence (e.g. statement made outside the hearing, but presented as important information).
- Decision-makers should typically disregard:
  - Character evidence (generally of little value or relevance).
  - Impact statements (typically only relevant in sanctioning).

# SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS



- Evidence of the Complainant's prior sexual behavior or predisposition is explicitly and categorically **not relevant** except for two limited exceptions:
  - Offered to prove that someone other than the Respondent committed the conduct alleged, or
  - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant.
- Does not apply to Respondent's prior sexual behavior or predisposition.

# ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS



Additional permissions required for:

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

# QUESTIONING & CROSS-EXAMINATION



- The live hearing requirement for higher education allows the parties to ask (direct and) cross-examination questions of the other party and all witnesses through their advisor.
  - Advisor of choice or an advisor provided by the institution, at no cost to the parties.
- Such cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- Permit relevant questions and follow-up questions, including those challenging credibility. You may want an advisor to explain why they think a question is relevant or will lead to a relevant answer.
- Decision-maker must first determine whether a question is relevant and direct party to answer.
  - Must explain any decision to exclude a question as not relevant.
- Managing advisors.

# QUESTIONING & CROSS-EXAMINATION



- If the advisor seeks to ask a question that is potentially answered in the investigation report, that question should typically be permitted if relevant.
- If the question has already been answered by a witness or party at the hearing, the decision-maker or chair may deny the question as “irrelevant because it has already been answered,” or may ask the advisor why posing the question again is expected to lead to relevant evidence.

# QUESTIONING & CROSS-EXAMINATION



- If a party or witness does not submit to cross-examination at the live hearing, policy must clarify that the decision-maker(s) must not rely on any statement of that party or witness (from the investigation or hearing) in reaching a determination regarding responsibility.
  - This can be question-specific if a witness declines to answer questions about a particular statement, topic, or evidence.
- The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
  - What is an inference and how does it work?



# WHAT IS CREDIBILITY?



- Accuracy and reliability of information
- Ultimately the decision-maker's role to determine the credibility of testimony and evidence, and hence its reliability.
- "Credible" is not synonymous with "truthful"
- Memory errors, evasion, misleading may impact
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness.

"Sexual assault" means an offense classified as a forcible or non-forcible sex offense under the uniform crime reporting system of the FBI."

# CREDIBILITY



- Inherent plausibility
  - "Does this make sense?"
  - Be careful of bias influencing sense of "logical."
- Motive to falsify
  - Do they have a reason to lie?
- Corroboration
  - Aligned testimony and/or physical evidence.
- Past record
  - Is there a history of similar behavior?
- Demeanor
  - Do they seem to be lying or telling the truth?

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

EEOC (1999)

# CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS



- Under the 2020 regs, investigators may or may not assess credibility with or without rendering conclusions or making findings related to credibility but will help to roadmap where decision-makers should look for information critical to a determination.
- Language in an investigation report may look like this:
  - “Decision-makers will want to carefully review Mary’s testimony as to whether the conduct was welcome, in light of the testimony of W1.”
  - “Decision-makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first.”

# CREDIBILITY DETERMINATIONS POST-HEARING



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

# MAKING A DECISION

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

# OVERVIEW OF THE DELIBERATION PROCESS



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

# DELIBERATIONS



## General Information

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

**Withhold judgment until all the evidence has been considered.**

## Foundation for Decisions

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



## Findings, Impact Information, and Sanctions

- Separate the “Finding” from the “Sanction.”
  - Do not use impact-based rationales for findings (e.g.: intent; impact on the Complainant; impact on the Respondent, etc.)
  - Use impact-based rationales for sanctions only.
- Complainant and Respondent should share impact statement(s) only if and after the Respondent is found in violation.
- Understand that the question of whether someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation.
- Be careful about not heightening the evidentiary standard for a finding because the sanctions may be more severe.

# SANCTIONING IN SEXUAL MISCONDUCT CASES



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

# WRITTEN DETERMINATIONS: LOGISTICS



- The decision-maker should author the written determination.
  - May follow a template provided by the Title IX Coordinator.
- The written determination should be provided to the parties simultaneously.
  - Follows existing VAWA/Clery requirements for higher education institutions, but now extends both to reach sexual harassment cases as well as applying to all K-12 determinations.
- The determination becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- FERPA cannot be construed to conflict with or prevent compliance with Title IX.
- Will this letter be reviewed by the Coordinator and/or legal counsel?

# APPEALS

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

# APPEALS



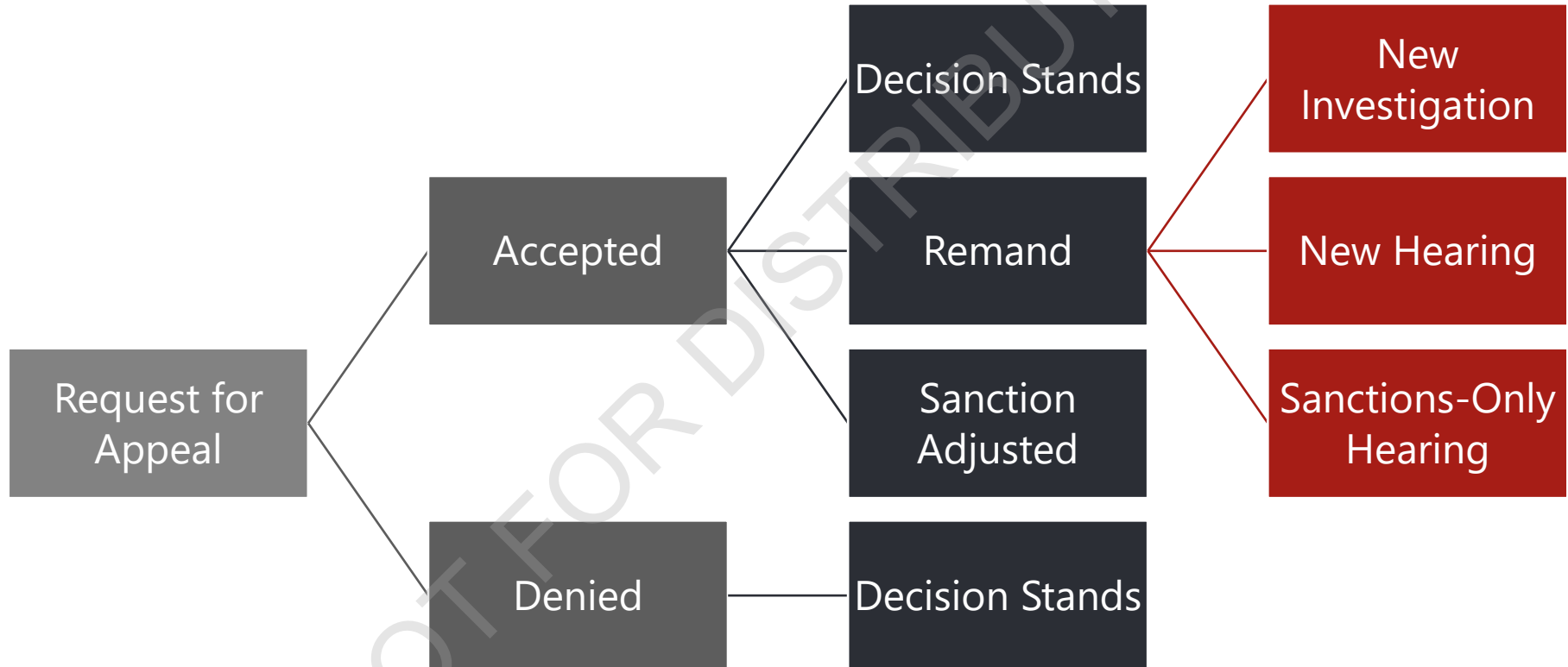
- The appeal decision-maker may be an individual or a panel.
  - Cannot be the Title IX Coordinator.
  - Cannot be the investigator or decision-maker in the original grievance process.
  - Recipient may run a pool of decision-makers who sometimes serve as hearing or appeal decision-makers
  - Recipient may have dedicated appeal decision-makers.
- When an appeal is filed, must notify the other party and implement appeal procedures equally for all parties.
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

# GROUNDINGS FOR AN APPEAL



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

# APPEALS: THE PROCESS



# QUESTIONS?

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# CONTACT INFORMATION

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