



LACCD TRAINING

September 23 & 24, 2020

TITLE IX

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



“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”



THE IX COMMANDMENTS



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

THE PROCESS



2020 TITLE IX REGULATIONS

- Mandatory/Discretionary Dismissal
- Definition of Sexual Harassment
- VAWA Requirements
- Jurisdiction

NEUTRALITY, CONFLICT OF INTEREST, OBJECTIVITY



- Grievance process must treat parties “equitably”
 - Must be designed to restore or preserve access to education programs
 - Must include enhanced due process protections before disciplinary sanctions are imposed
- Prohibits conflict-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or against an individual party
- All relevant evidence obtained must be **objectively** evaluated
- Mandates training on appropriate investigation, hearing, evidence, credibility, bias, conflict of interest

MANDATORY DISMISSAL OF FORMAL COMPLAINT - OCR 2020 REGS



- **The TIXC must dismiss the complaint if the conduct alleged in the formal complaint:**
 - Would not constitute sexual harassment as defined (in § 106.30), even if proved;
 - Did not occur in the recipient's education program or activity;
 - Did not occur against a person in the United States; or if
 - The Complainant was not participating or attempting to participate in recipient's program at time of complaint.
- Written notice of dismissal to parties required/may be appealed
- **Upon dismissal, the recipient may institute action under another provision of the code of conduct or other policies.**

– Due process requirements for VAWA offenses in alternate process

DISCRETIONARY DISMISSAL OF FORMAL COMPLAINT - OCR 2020 REGS



- TIXC **may** dismiss a complaint or any allegations at any time during the investigation or hearing if:
 - Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein;
 - The Respondent is no longer enrolled or employed by the recipient; or
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein
- Written notice to parties required
- Parties may appeal a dismissal

CLERY ACT AMENDMENT: VAWA REAUTHORIZATION & SECTION 304



VAWA Section 304:

- Section 304 significantly amended the Clery Act.
- Created extensive new policy, procedure, training, education, and prevention requirements for:
 - Sexual assault
 - Stalking
 - Dating violence
 - Domestic violence
- Prohibits retaliation

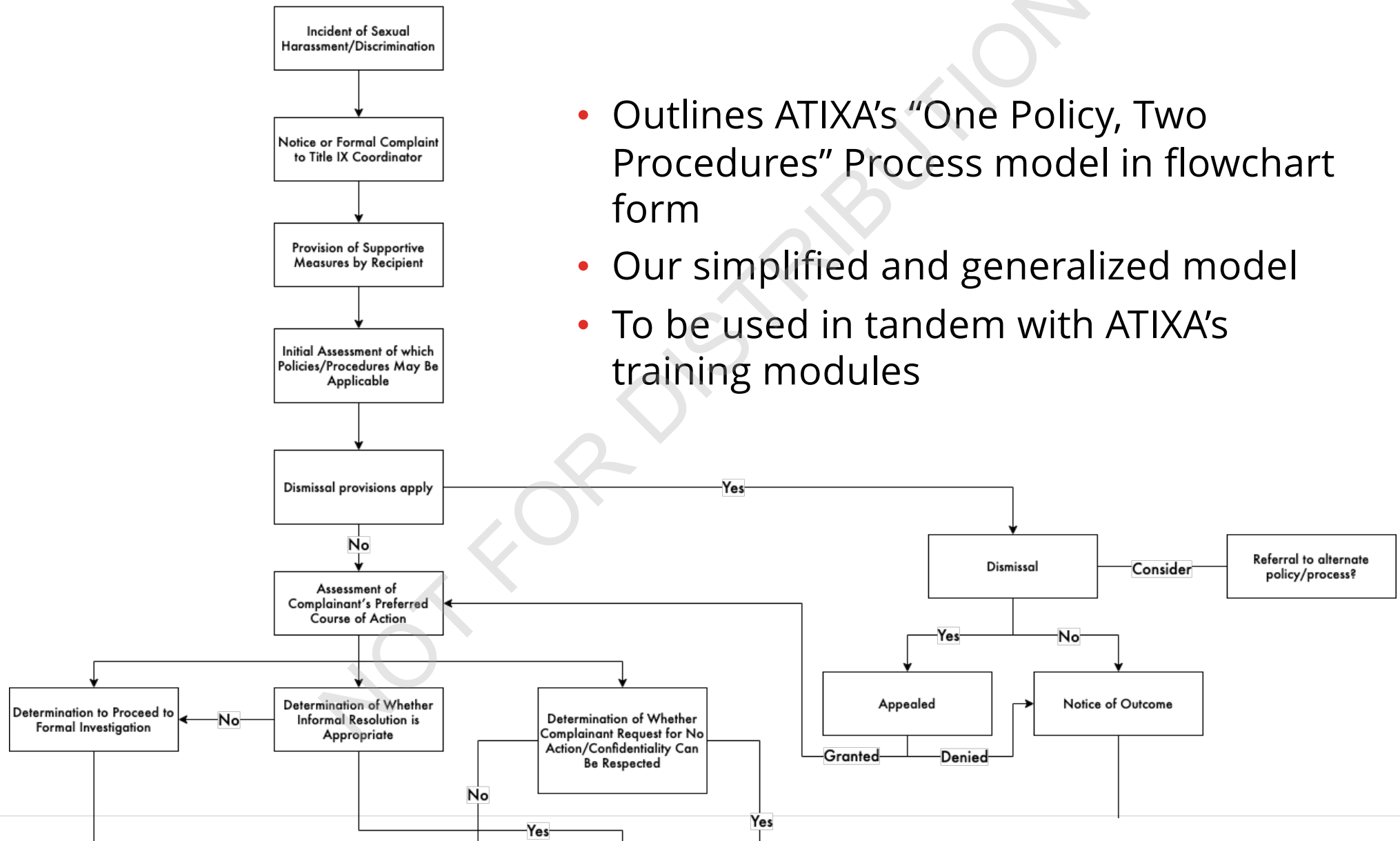
The “Big 4”

CLERY ACT: VAWA 2013 SECTION 304



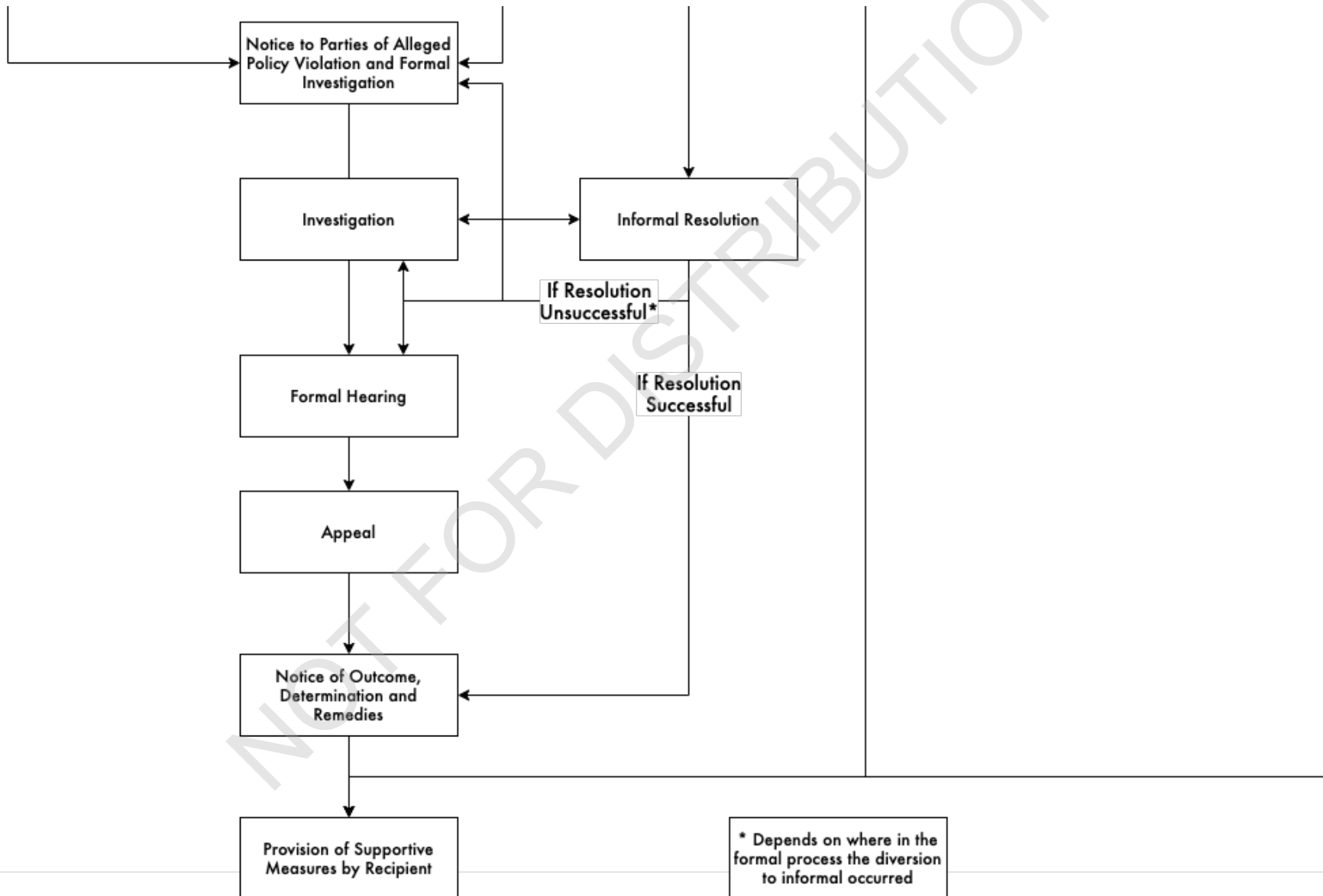
- **Clery Handbook** dramatically updated in June 2016, primarily to incorporate all the VAWA-based elements and additions.
 - <https://www2.ed.gov/admins/lead/safety/handbook.pdf>
- **Key Elements of the 2016 Updates:**
 - Designation of a Clery Coordinator
 - **Significant** focus on providing detailed written information to victims regarding on- and off-campus resources, remedies, interim measures, and resolution mechanisms and options
 - Detailed listing of policy and procedural elements required in the ASR
 - Listing of key training elements and requirements
 - Extensive description of required educational programs and campaigns targeting VAWA-based crimes

ONE POLICY, TWO PROCEDURES (1P2P) FLOWCHART (PART ONE)



- Outlines ATIXA's "One Policy, Two Procedures" Process model in flowchart form
- Our simplified and generalized model
- To be used in tandem with ATIXA's training modules

ONE POLICY, TWO PROCEDURES (1P2P) FLOWCHART (PART TWO)



§ 106.30 DEFINITIONS – SEXUAL HARASSMENT

- Quid Pro Quo
- Hostile Environment Sexual Harassment
- Dating Violence
- Domestic Violence
- Sexual Assault
- Stalking

§ 106.30 – SEXUAL HARASSMENT



Acts of sexual harassment may be committed by any person upon any other person, regardless of the sex, sexual orientation, and/or gender identity of those involved. Sexual Harassment as an umbrella category includes the offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking, defined as:

Conduct on the basis of sex that satisfies one or more of the following:

§ 106.30 – SEXUAL HARASSMENT



- Quid Pro Quo
 - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- “Hostile Environment”
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;

§ 106.30 – SEXUAL HARASSMENT



Sexual assault, defined as:

- 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.

§ 106.30 – SEXUAL HARASSMENT



- Forcible Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) 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 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 or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

§ 106.30 – SEXUAL HARASSMENT



- 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.

§ 106.30 – SEXUAL HARASSMENT



- 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 [insert state] law.
 - Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

§ 106.30 – SEXUAL HARASSMENT



Dating Violence

- 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.

§ 106.30 – SEXUAL HARASSMENT



Domestic Violence

- 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].

*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.

§ 106.30 – SEXUAL HARASSMENT



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

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.
- For the purposes of this definition—
 - Course of conduct means two or more acts, including, but not limited to, acts in which the 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.

ADVISOR OF CHOICE



- Advisor can be anyone – no restrictions in proposed regulations (though the advisor has a choice in the matter)
- Must allow advisor to be present at all meetings, interviews, hearings
 - May not restrict who may serve as advisor
 - May restrict advisor participation as long as applied equally to all parties
- If a party does not have an advisor to conduct cross-examination at hearing, the IHE must provide one
 - No fee or charge
 - Advisor of recipient's choice
 - May be an attorney
 - Can't be "fired" by party, but can be nullified by non-cooperation

LIVE HEARING/QUESTIONING



- Mandated live hearing for higher education
- Parties and witnesses must attend hearing and submit to live, advisor-led cross-examination
 - Otherwise **all statements** submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator, the investigator, or the appeals officer
- Provisions for separate rooms, video-based hearing
 - Must be able to clearly hear and see other parties

LIVE HEARING/QUESTIONING



- **Must allow live cross-examination** to be conducted exclusively by each party's advisor
 - Verbal, direct, in real time
- Each party must be permitted to ask the other party and all witnesses all relevant questions and follow-up questions
 - Including questions challenging credibility
- Each question must be cleared by hearing administrator after being posed
- Questions deemed irrelevant may be excluded with rationale provided (other bases for exclusion allowed? Options other than exclusion?)
- Must exclude complainant's sexual disposition or prior sexual behavior unless specifically relevant

DUE PROCESS: EVIDENCE



- **All** relevant and reasonably available evidence must be considered – inculpatory and exculpatory
- No restrictions on discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence which may be offered, except must be relevant and respect “rape shield” provision
- Includes all evidence directly related to the investigation, even evidence that determination does not, or will not, rely upon

FIRST AMENDMENT PROTECTIONS

—

NOT FOR DISTRIBUTION

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
- Incorporate appropriate standard for context
- ED reaffirms First Amendment protections in 2020 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

PREPARING FOR THE HEARING

—

NOT FOR DISTRIBUTION

PREPARING FOR THE HEARING



Always Review:

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

PREPARING QUESTIONS



- Write down the following as a reminder:
 - What do I need to know?
 - Why do I need to know it?
 - If the answer to this is not that it will help you determine whether or not a policy violation occurred and you can explain a rationale for that; then it is not something you need to know!
 - What is the best way to ask the question?
 - Who is the best person to get this information from?
The investigator? A party? A witness?
- When dealing with conflicting or contested testimony apply a credibility analysis (covered later).

PRE-HEARING MEETINGS



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

DECISION-MAKING SKILLS

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

UNDERSTANDING EVIDENCE



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

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

ASK YOURSELF



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

- 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



- 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).

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

QUESTIONING & CROSS-EXAMINATION



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

QUESTIONING & CROSS-EXAMINATION



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

CREDIBILITY



- 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)

Corroborating evidence

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

FACTORS TO CONSIDER FOR CREDIBILITY



Corroborating evidence

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

Inherent plausibility

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

FACTORS TO CONSIDER FOR CREDIBILITY



Inherent plausibility

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

FACTORS TO CONSIDER FOR CREDIBILITY



Motive to falsify

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

FACTORS TO CONSIDER FOR CREDIBILITY



Past record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
 - Even if found “not responsible,” may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship

FACTORS TO CONSIDER FOR CREDIBILITY



Demeanor

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

CREDIBILITY IN THE HEARING



- Distinguish performance/presentation skills from believability.
 - Make sure key witnesses will be present.
 - Make sure evidence has been verified.
- If any evidence/testimony must be subject to credibility assessment, and the evidence isn't available or the witness/party does not participate, it may violate due process to consider that evidence/testimony and give it weight.
- 2020 regs are quite clear such evidence may not be considered if it relates to a statement previously made. Other evidence can be considered.
- What will the effect of that be on the process/decision?

CREDIBILITY DETERMINATIONS POST-HEARING



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

MAKING A DECISION

- 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.

Foundation for Decisions

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

Findings, Impact Information, and Sanctions

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

SANCTIONING IN SEXUAL MISCONDUCT CASES



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

COMMON STUDENT SANCTIONS



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

WRITTEN DETERMINATIONS

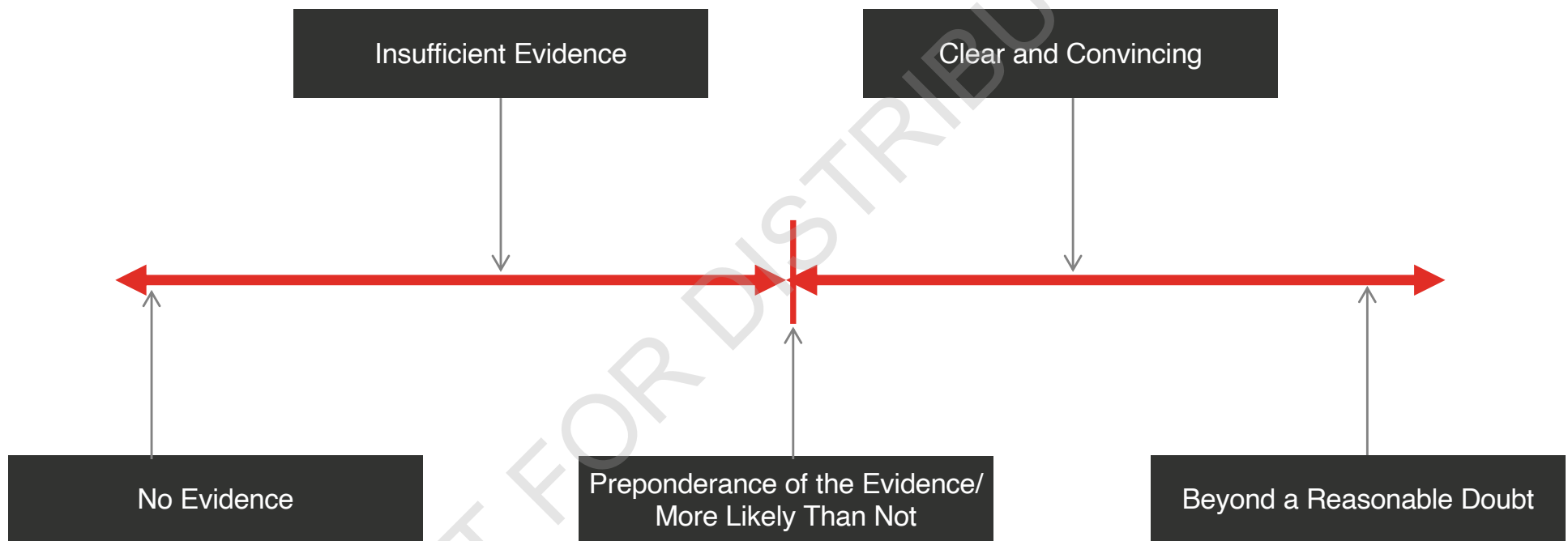


- Decision-maker issues a written determination regarding responsibility that includes the following:
 - Sections of the policy alleged to have been violated
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
 - Statement of and rationale for the result as to each specific allegation
 - Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
 - Sanctions imposed on Respondent
 - Any remedies provided to the Complainant designed to restore or preserve access to the education program or activity
 - Procedures and bases for any appeal

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



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.

SANCTIONS

- Stop
- Prevent
- Remedy

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 Complainant as best you can to pre-deprivation status
- Tension between educational and developmental sanctions of student conduct processes.

STOP, PREVENT, REMEDY



• Prevent Recurrence:

- Identify patterns and systemic problems
- Issue school/campus-wide policy statements, informational campaigns, and other messages that harassment and assault will not be tolerated
- Provide regular training on sex/gender-based misconduct for students and employees
- Conduct periodic surveys of campus climate
- Establish a system for monitoring future incidents and patterns
- Provide technical assistance to school/campus law enforcement on Title IX compliance
- Consider the effect of educational sanctions
- The potential next Complainant is potentially both a Title IX and negligence concern

STOP, PREVENT, REMEDY



- Remedy the Effects:

- Designed to make Complainant whole and return them to the pre-deprivation status
- Take timely steps to confirm and document that the appropriate remedies were implemented
- Make sure the Complainant knows that they should report any difficulties obtaining the remedies and any subsequent harassment

SANCTIONING CONSIDERATIONS



- Sanction(s) must be reasonable and reflect the severity of the behavior
 - May consider prior misconduct
 - What is the role of precedent?
 - May consider attitude
 - May also 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

SANCTIONING



- Ensure that remedies are not clearly unreasonable in light of the known circumstances
- Avoid undue delays
- Interim/supportive measures may be continued in the final sanctions
- Ensure that remedies are equitable
- Monitor for retaliation and respond immediately to formal complaints
- 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 expulsion
- Limited access to school/campus
- Service hours
- Online education
- Parent/guardian notification
- Alcohol and drug assessment, and counseling
- Discretionary sanctions
- In-School Suspension (K-12)
- Suspension
- Expulsion

COMMON EMPLOYEE SANCTIONS



- Warning – verbal or 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

APPEALS

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

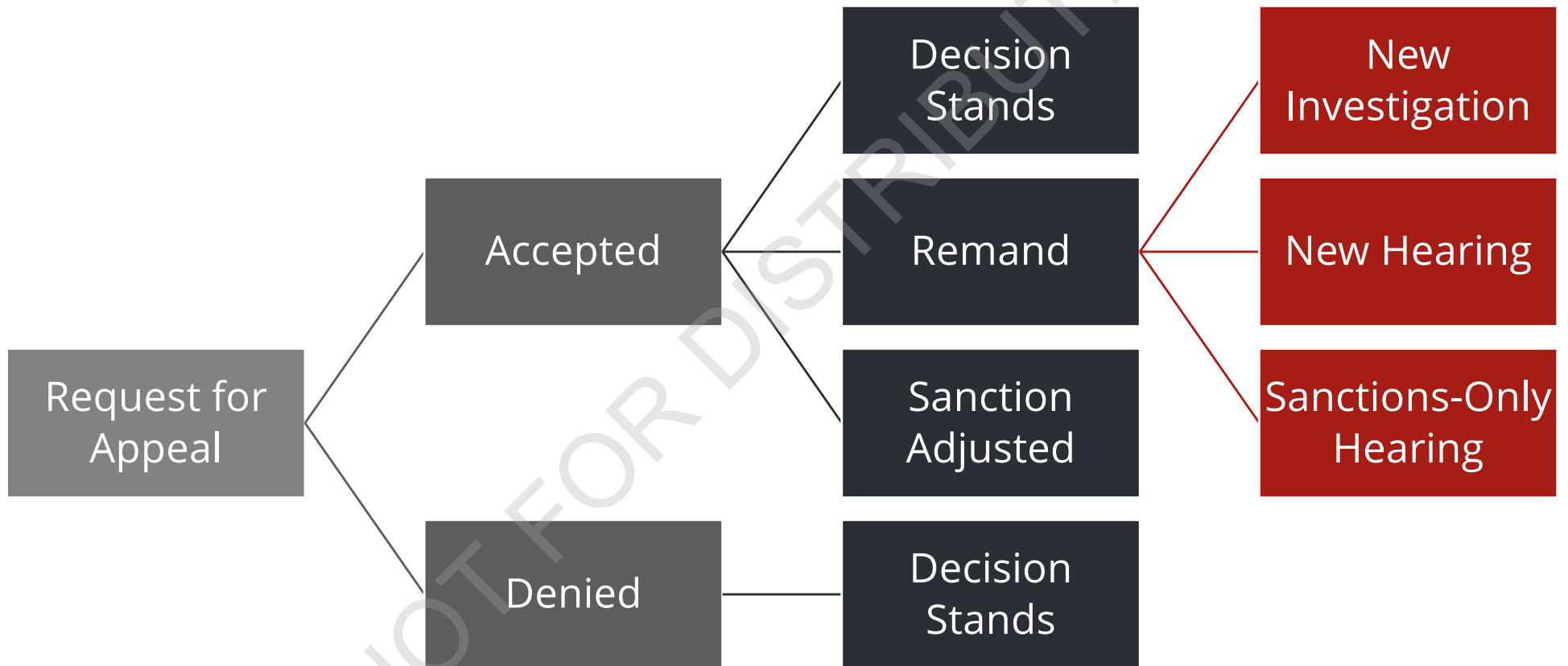
- The appeal decision-maker may be an individual or a panel.
 - Cannot be the Title IX Coordinator.
 - Cannot be the investigator or decision-maker in the original grievance process.
 - Recipient may run a pool of decision-makers who sometimes serve as hearing or appeal decision-makers
 - Recipient may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

GROUNDINGS FOR AN APPEAL



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

APPEALS: THE PROCESS



APPEALS: OTHER ATIXA RECOMMENDATIONS



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

QUESTIONS?



NOT FOR DISTRIBUTION

CONTACT INFORMATION



Brett.sokolow@atixa.org

NOT FOR DISTRIBUTION

DISTRIBUTION

LIMITED LICENSE AND COPYRIGHT. BY PURCHASING, AND/OR RECEIVING, AND/OR USING ATIXA MATERIALS, YOU AGREE TO ACCEPT THIS LIMITED LICENSE AND BECOME A LICENSEE OF PROPRIETARY AND COPYRIGHTED ATIXA-OWNED MATERIALS. THE LICENSEE ACCEPTS ALL TERMS AND CONDITIONS OF THIS LICENSE, AND AGREES TO ABIDE BY ALL PROVISIONS. NO OTHER RIGHTS ARE PROVIDED, AND ALL OTHER RIGHTS ARE RESERVED. THESE MATERIALS ARE PROPRIETARY AND ARE LICENSED TO THE LICENSEE ONLY, FOR ITS USE. THIS LICENSE PERMITS THE LICENSEE TO USE THE MATERIALS PERSONALLY AND/OR INTERNALLY TO THE LICENSEE'S ORGANIZATION FOR TRAINING PURPOSES, ONLY. THESE MATERIALS MAY BE USED TO TRAIN TITLE IX PERSONNEL, AND THUS ARE SUBJECT TO 34 CFR PART 106.45(B)(10), REQUIRING ALL TRAINING MATERIALS TO BE POSTED PUBLICLY ON A WEBSITE. NO PUBLIC DISPLAY, SHARING, OR PUBLICATION OF THESE MATERIALS BY A LICENSEE/PURCHASER IS PERMITTED BY ATIXA. YOU ARE NOT AUTHORIZED TO COPY OR ADAPT THESE MATERIALS WITHOUT EXPLICIT WRITTEN PERMISSION FROM ATIXA. NO ONE MAY REMOVE THIS LICENSE LANGUAGE FROM ANY VERSION OF ATIXA MATERIALS. LICENSEES WILL RECEIVE A LINK TO THEIR MATERIALS FROM ATIXA. THAT LINK, AND THAT LINK ONLY, MAY BE POSTED TO THE LICENSEE'S WEBSITE FOR PURPOSES OF PERMITTING PUBLIC ACCESS OF THE MATERIALS FOR REVIEW/INSPECTION, ONLY. SHOULD ANY LICENSEE POST OR PERMIT SOMEONE TO POST THESE MATERIALS TO A PUBLIC WEBSITE OUTSIDE OF THE AUTHORIZED MATERIALS LINK, ATIXA WILL SEND A LETTER INSTRUCTING THE LICENSEE TO IMMEDIATELY REMOVE THE CONTENT FROM THE PUBLIC WEBSITE UPON PENALTY OF COPYRIGHT VIOLATION. THESE MATERIALS MAY NOT BE USED FOR ANY COMMERCIAL PURPOSE EXCEPT BY ATIXA.