



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

June 18-19, 2020 | Summer Certification Series

YOUR FACULTY



KIMBERLY A. PACELLI, ESQ.
PARTNER, TNG
ADVISORY BOARD, ATIXA



SAUNDRA K. SCHUSTER, ESQ.
PARTNER, TNG
ADVISORY BOARD, ATIXA



BRETT A. SOKOLOW, ESQ.
PARTNER, TNG
PRESIDENT, ATIXA

AGENDA: DAY ONE



- I. Mission/Role of Decision-Maker
- II. Due Process
 - Legal Foundations
 - Due Process in Procedure
 - Due Process in Decision
 - Procedural Rights in 2020 Regulations
 - Standard of Evidence
- III. The Title IX Process
 - Title IX Basics
 - Steps leading up to a Hearing
- IV. Policy Terms
 - Under § 106.45 of Title IX
 - Other
 - Retaliation
- V. ATIXA Consent Construct
- VI. Preparing for the Hearing
- VII. Questioning Skills
- VIII. Questioning Activity

AGENDA: DAY TWO



- I. Quick Tips on Hearing Logistics
- II. Decision-Making Skills
 - Understanding Evidence
 - Relevance
 - Reliability/Credibility
 - Cross-Examination
- III. Mock Hearing
- IV. Deliberations
 - Analyzing information
 - Sanctions
 - Written Determinations
- V. Mock Deliberation
- VI. Appeals
- VII. Recordkeeping and Documentation
- VIII. Conflicts of Interest, Bias, and Recusal

WHAT IS YOUR MISSION
AS A DECISION-MAKER?

NOT FOR DISTRIBUTION

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



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

WHEN AND HOW THE “DECISION-MAKER” WORKS



- New Title IX regulations require that colleges and universities hold a live hearing.
 - May take place in person; however, must provide an option for a video conference.
 - Key new element is that the parties may cross-examine each other and witnesses, through an advisor.
- K-12 schools and other federal funding recipients (such as many hospitals with residency programs), need not conduct a live hearing, but must provide an opportunity for the parties to submit written questions for the other party/witnesses.
 - If a hearing is offered, it does not have to comply with §106.45.

HEARING OFFICER/DECISION-MAKER RESPONSIBILITIES



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

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

THE GOAL



**AN EQUITABLE RESULT FROM
AN EQUITABLE PROCESS**

HEARING OFFICER/DECISION-MAKER COMPETENCIES



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

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.

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

DUE PROCESS: LEGAL FOUNDATIONS

- *Dixon v. Alabama* (1961)
- *Esteban v. Central Missouri State College* (1969)
- *Goss v. Lopez* (1975)
- Title IX regulations (34 CFR Part 106)

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
- Federal appellate court established minimum due process requirements (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.

ADDITIONAL CASES



- ***Esteban v. Central Missouri State College***, 415 F.2d 1077 (8th Cir. 1969) added more specific requirements, Examples included:
 - Notices in writing with time to prepare
 - Hearing before the person or panel with authority to suspend or expel
 - Right to present evidence and witnesses
- ***Goss v. Lopez***, 419 U.S. 565 (1975).
 - U.S. Supreme Court validated the informal hearing requirements and extended to K-12 students informal hearings for students facing suspension.
 - Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests

DUE PROCESS

- 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. (5th and 14th Amendment)
- “Fundamental Fairness” (private institutions):
 - Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures.
 - Outcome neither arbitrary nor capricious; rationally related to facts and evidence.

WHAT IS DUE PROCESS?



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

Substantive Due Process

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

Procedural Due Process:

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

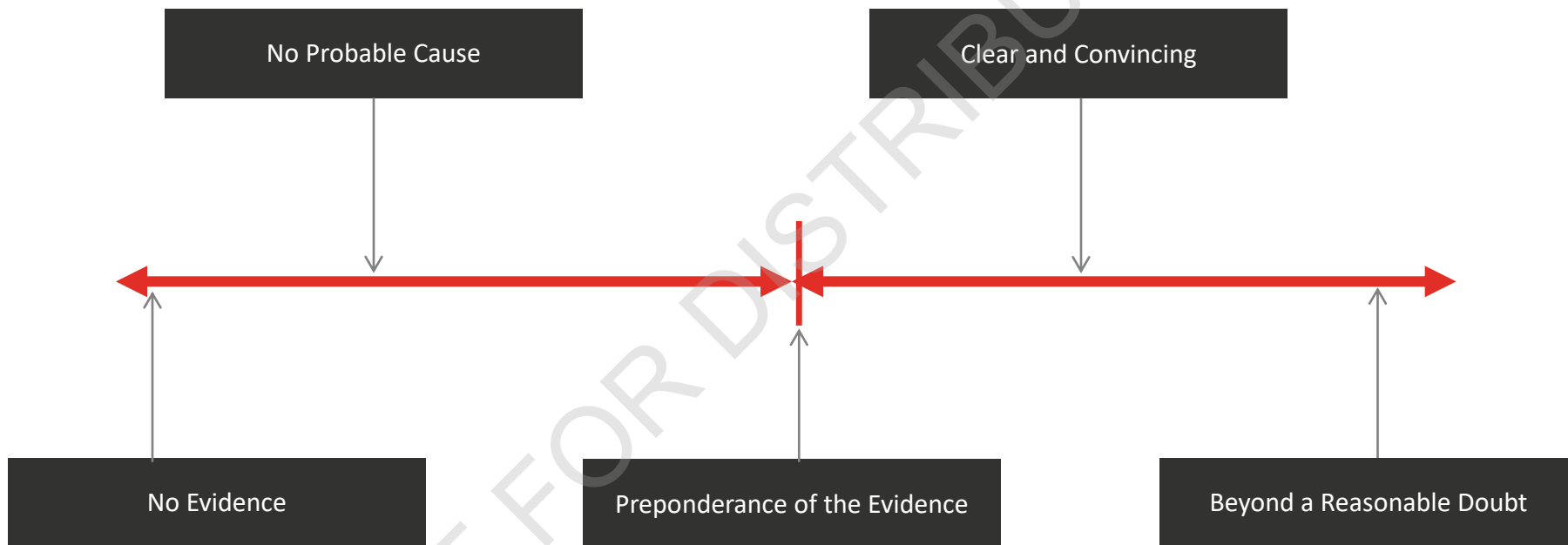
DUE PROCESS PROCEDURAL RIGHTS IN 2020

TITLE IX REGULATIONS



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

EVIDENTIARY STANDARDS



EVIDENTIARY STANDARD



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

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

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

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

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

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.”

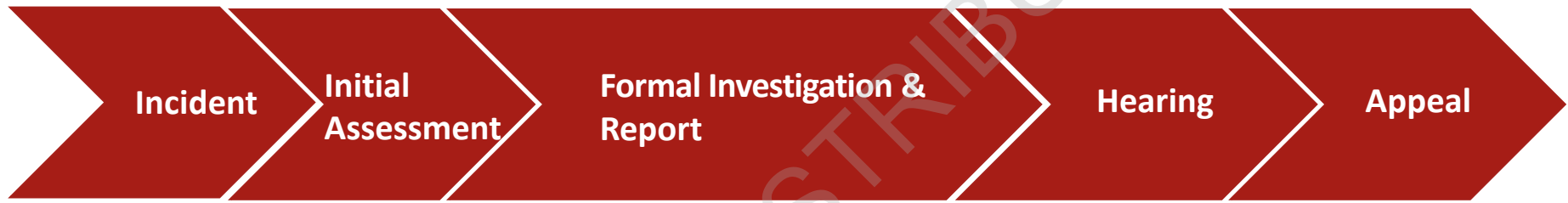
IX

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



Notice to Title IX officer
Strategy development

Jurisdiction?
Policy violation implicated?
Informal, administrative, or formal resolution?

Notice
Identification of witnesses
Interview scheduling
Evidence collection
Evidence and Inv. Report Shared
Inv. report finalized

Determination
Sanction

Standing?
Vacate? Remand?
Substitute?

10 STEPS OF AN INVESTIGATION



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

10 STEPS OF AN INVESTIGATION (CONT.)



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

CIVIL RIGHTS INVESTIGATION MODEL VERSUS STUDENT CONDUCT MODEL



- How does this model differ from the student conduct model?
 - An active gathering of information by the investigator(s); not intended to “build a case.”
 - Does not impact the implementation of informal or alternative dispute resolution approaches.
 - Enhanced due process
 - Characterized by an intentional effort to make procedural and support mechanisms equitable.
 - Provides an appeal for all parties to the report, not just the Respondent.

ADVISORS



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



- 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.

PRESUMPTION OF NON-RESPONSIBILITY



- Title IX regulations require that published grievance procedures include a statement of a presumption of non-responsibility for the Respondent until a final determination is made.
- Hopefully not a change from current procedures, because the determination has always been based on evidence, not presumptions.
- What would it mean to presume neither “guilt” nor “innocence?”
 - How does presumption work in light of an affirmative consent policy?
 - How is presumption of non-responsibility different than no presumption?
 - What does it take to overcome presumption?
 - Should there be an equitable presumption for the Complainant?
 - If so, what would it be?

CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS



- Existing mandate for impartial resolutions with fair procedures.
 - Impartial, objective, unbiased, neutral, independent.
 - Discuss what each of these mean and how we bring these qualities to our decision-making.
- Final regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party.
 - What creates a conflict?
 - How can you assure that you don't have one?

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.

PRE-HEARING PREPARATION



- Could include:
 - “Motions” hearing
 - Meeting of Panel
 - Review of Investigation Report
 - Review of file of “directly related” evidence that was not relied upon by investigators
 - Preparation of questions
- Must include:
 - Vetting of decision-maker/panel
 - Conflicts check
 - Recusal protocol
- What About?
 - Can you meet with investigators?
 - Should you meet with parties/advisors
 - How will you ensure rules of the hearing are followed?

LIVE HEARING



- Final regulations mandate live hearing for higher ed.
 - Virtual hearings are permitted; do not violate due process
- Must create audio/audiovisual recording, or transcript, of hearing and make it available to the parties for inspection and review.
- Parties must attend hearing, otherwise all statements made by absent (or non-testifying) party must be excluded.
 - What are considered “statements” and what effect will this rule have?
- Decision-maker may not be Title IX Coordinator or the investigator.
 - Will there be a facilitator role? Who? What do they do?
- Must allow live cross-examination to be conducted exclusively by each party’s advisor (separate rooms still allowed).

POLICY DEFINITIONS

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

SEXUAL HARASSMENT POLICY



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

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

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

SEXUAL ASSAULT



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

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 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.

NOT FOR DISTRIBUTION

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.

NOT FOR DISTRIBUTION

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.

NOT FOR DISTRIBUTION

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

NOT FOR DISTRIBUTION

CONSENT IS...



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

OVERVIEW OF THE 3 CONSENT QUESTIONS



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

There are four types of force to consider:

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

INCAPACITY



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

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

INCAPACITY ANALYSIS



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

BEHAVIORAL CUES



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

KNOWLEDGE CONSTRUCT



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

FINAL INCAPACITY ANALYSIS



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

CONSENT

Question 3 is the Consent question:

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

CONSENT: RULES TO REMEMBER



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

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.

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.

QUESTIONING SKILLS & GUIDELINES



NOT FOR DISTRIBUTION

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.

NOT FOR DISTRIBUTION

QUESTIONING ACTIVITY

QUESTIONING ACTIVITY



- After carefully reviewing the hearing packet, prepare the following:
 - Questions for the investigator
 - Questions for the Complainant
 - Questions for the Respondent
 - Questions for Witness #1 (if any)
 - Questions for Witness #2 (if any)
 - Questions for Witness #3 (if any)

QUICK TIPS ON HEARING LOGISTICS

NOT FOR DISTRIBUTION

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

Tips for Hearing Officers/Decision-Makers

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

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

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

DECISION-MAKING SKILLS

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

UNDERSTANDING EVIDENCE



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

EVIDENCE



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

ASK YOURSELF



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.

2020 REGS: HEARING OR QUESTIONING (IN K-12)



- For IHEs, at the mandated hearing, the decision-maker must permit each party, through their advisor, to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- For K-12 schools, with or without a hearing, the decision-maker must, after the recipient has incorporated the parties' responses to the investigation report, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses.

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.

NOT FOR DISTRIBUTION

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)

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. 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?

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”

TRIANGULATING CREDIBILITY



- One of the least used and least understood methods of assessing credibility is the triangulation method, which is rooted in abductive reasoning.
- Analysis of credibility often ignores this approach because it is less dispositive than corroboration, but it can still be enough to meet the standard of proof.
- Triangulation is simply being faced with two plausible explanations (B & C) and deciding which is the more plausible (likely) based on the fact that you know A & D to be true. Based on what you know about A & D, B is more likely than C.

TRIANGULATING CREDIBILITY



- It's called triangulation because ABC forms a more coherent triangle than ABD, based on knowing all four data points. It's more of a stretch to draw the line from A-to-D than A-to-C.
- Triangulation has more utility when the standard of proof is preponderance, as opposed to clear and convincing evidence.
- Triangulation is the formal way of processing what leads you to determine why something is inherently plausible.
- When you determine inherent plausibility, it is because you are comparing, and deciding that B is more likely than C as an explanation or a fact to have occurred.

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.

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.

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 ASSESSMENTS IN INVESTIGATION REPORTS



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

CREDIBILITY IN THE HEARING



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

CREDIBILITY DETERMINATIONS POST-HEARING



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

MOCK HEARING

—

NOT FOR DISTRIBUTION

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 or determine whether highly probable if C&C standard applies.

General Information

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

Withhold judgment until all the evidence has been considered.

Foundation for Decisions

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

Findings, Impact Information, and Sanctions

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

SANCTIONING IN SEXUAL MISCONDUCT CASES



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

COMMON STUDENT SANCTIONS



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

WRITTEN DETERMINATIONS



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

WRITTEN DETERMINATIONS: LOGISTICS



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

MOCK DELIBERATION

NOT FOR DISTRIBUTION

APPEALS

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

APPEALS



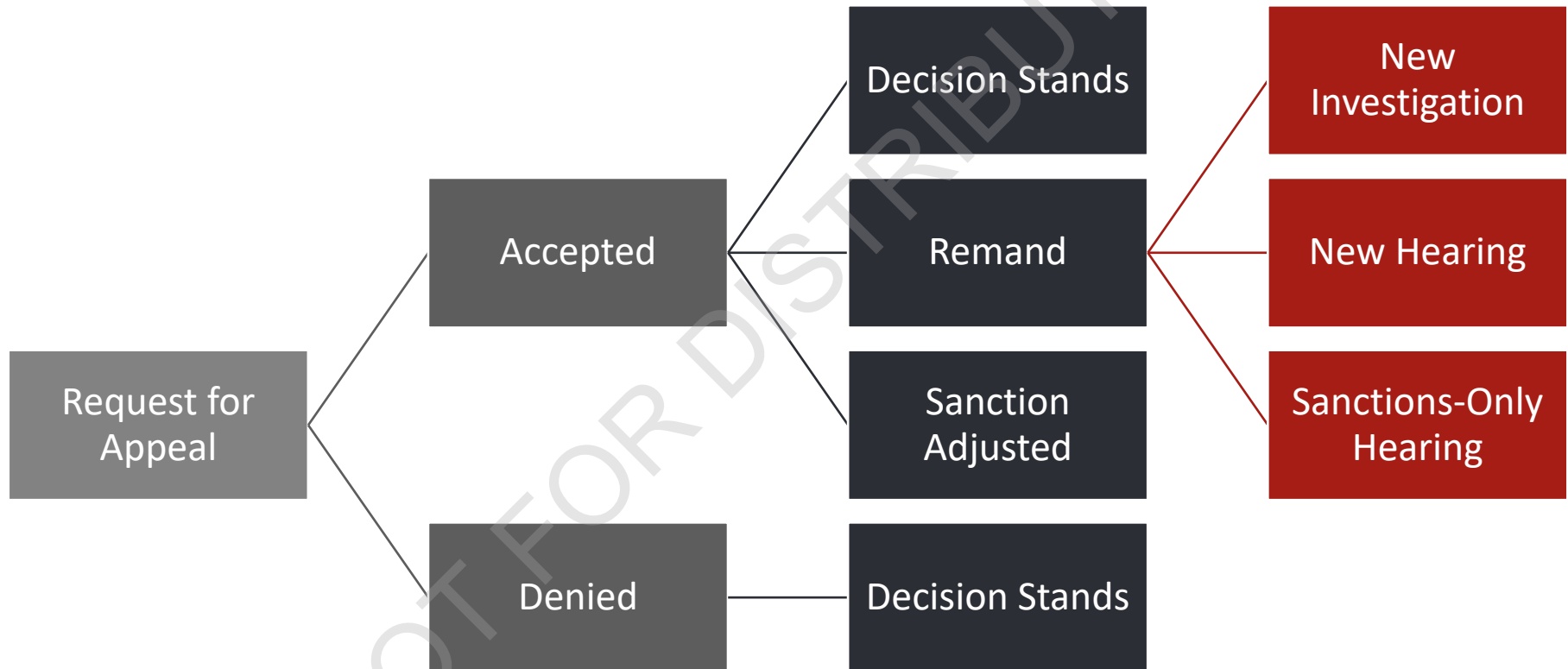
- The appeal decision-maker may be an individual or a panel.
 - Cannot be the Title IX Coordinator.
 - Cannot be the investigator or decision-maker in the original grievance process.
 - Recipient may run a pool of decision-makers who sometimes serve as hearing or appeal decision-makers
 - Recipient may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

NOT FOR DISTRIBUTION

RECORD-KEEPING AND DOCUMENTATION

NOT FOR DISTRIBUTION

RECORD-KEEPING AND DOCUMENTATION



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

BIAS, CONFLICTS OF INTEREST, AND RECUSAL

NOT FOR DISTRIBUTION

**Remember, you have no “side”
other than the integrity of the
process!**

NOT FOR DISTRIBUTION

BIAS



- 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.

QUESTIONS?

NOT FOR DISTRIBUTION



CONTACT INFORMATION

Brett A. Sokolow

Brett.Sokolow@atixa.org

Sandra K. Schuster

Sandra.Schuster@tngconsulting.com

Kimberly A. Pacelli

Kim.Pacelli@tngconsulting.com

—

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.