Association of
Title IX Administrators

February 2021

K-12 Title IX Decision-Maker

Training & Certification Course

Strategic Risk
Management Solutions

Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

(610) 993-0229 | inquiry@tngconsulting.com | www.tngconsulting.com

AGENDA

1. Title IX Basics
2. Mission/Role of Decision-maker
3. Due Process
4. Bias, Conflicts of Interest, and Recusal
5. The Title IX Process
6. Getting Prepared to Make a Decision
7. Policy Definitions

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AGENDA CONT.

8 ATIXA Consent Construct

9 Questioning by Decision-maker

10 Understanding the Evidence

11 Making a Decision

12 Appeals

13 Recordkeeping and Documentation

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TITLE IX BASICS

- The Law
- When Does Title IX Apply?
- The IX Commandments

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."

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WHEN DOES TITLE IX APPLY?

- Emphasizes the standard in *Davis v. Monroe Bd of Ed.*, 526 U.S. 629 (1999)
  - Control over the harasser and the context of the harassment
  - "education program or activity" means…
    - locations, events, or circumstances under substantial control
    - any building owned or controlled by an officially recognized student organization

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WHEN DOES TITLE IX APPLY? (CONT.)

- Regulations specify "harassment …against a person in the United States"
  - Off-campus/out-of-school conduct, study abroad programs, or school-sponsored international trips – "nothing in the regulations would prevent…"
- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)

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THE IX COMMANDMENTS

INVESTIGATION	**Thorough**	**Reliable**	**Impartial**
PROCESS	**Prompt**	**Effective**	**Equitable**
REMEDIES	Not act unreasonably to stop discrimination	Not act unreasonably to prevent recurrence	Act equitably to remedy effects

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WHAT IS YOUR MISSION AS A DECISION-MAKER?

- Roles and Responsibilities of the Decision-Maker
- Training Mandates
- Challenges for the Decision-Maker

DECISION-MAKER RESPONSIBILITIES

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

- Finding the truth
- Providing a just result
- Providing an educational process
- Making a safe community
- Upholding the school's policy
- Ensuring a fair process
- Protecting the school from liability
- Punishing wrongdoing

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THE GOAL

AN EQUITABLE RESULT FROM AN EQUITABLE PROCESS

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WHAT DOES IT MEAN TO BE A "DECISION-MAKER?"

- 2020 Title IX regulations require a "Decision-maker" to determine whether a Respondent has violated policy
  - May be a single person
  - 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

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WHEN AND HOW THE "DECISION-MAKER" WORKS

- After the investigation is completed, the case is referred to a Decision-maker.
- K-12 schools are not required to conduct a live hearing
  - May offer a hearing if required to do so under state law or other school/District policy (e.g., *Goss* hearing when suspension/expulsion is implicated)
  - If a hearing is offered, it does not have to comply with §106.45 (e.g., include cross-examination conducted by Advisors, etc.)

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ROLE OF THE DECISION-MAKERS

- Determine whether District policy has been violated based upon the applicable standard of evidence
  - Facilitate exchange of written questions/responses among parties and witnesses
  - Decisions must be based upon an independent assessment of the evidence gathered during the investigation to include an assessment of the credibility of the parties and witnesses
  - Decisions must be based on the specific policy alleged to have been violated
  - Decisions must be impartial and free of substantive bias

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ROLE OF THE DECISION-MAKERS (CONT.)

- Determine appropriate sanctions/discipline when a policy violation is found
- Draft a written determination that outlines the rationale for the finding(s)

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ROLE OF APPELLATE DECISION-MAKER

- Make determination on a party's request for an appeal
- Review written submissions from parties
- May review investigation report or other evidence gathered during investigation/hearing
- May need to speak with Investigator, parties, and/or witnesses
  - More likely when this will serve as the *Goss* hearing (when suspension/expulsion recommended)

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ROLE OF APPELLATE DECISION-MAKER (CONT.)

- Review of case should be limited to the grounds noted in the appeal request
  - Not a de novo review (exception may be when this will serve as the *Goss* hearing)
- Draft a written determination that outlines the rationale for the outcome

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TRAINING MANDATES – 2020 REGULATIONS

- 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

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TRAINING MANDATES – 2020 REGULATIONS (CONT.)

- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Issues of relevance to create an investigation report that fairly summarizes relevant evidence

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THE CHALLENGE FOR DECISION-MAKERS

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

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BIAS, CONFLICTS OF INTEREST, AND RECUSAL

REMEMBER, YOU HAVE NO "SIDE" OTHER THAN THE INTEGRITY OF THE PROCESS, AND YOU REPRESENT THE PROCESS.

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CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS

- 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?
- 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

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CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS (CONT.)

- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised
- Having previously disciplined a student or employee is often not enough to create a conflict of interest

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BIAS

- Among the most significant problems that can arise from a process under Title IX
- Bias can exist when any variable improperly influences a decision (finding, sanction, dismissal, etc.)
- Forms of bias and prejudice that can impact decisions:
  - Pre-determined outcome
  - Partisan approach by Investigators in questioning, analysis, or report
  - Partisan approach by Decision-makers in questioning, findings, or sanctions
  - Intervention by senior-level administrators, or external sources

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BIAS (CONT.)

- Forms of bias and prejudice that can impact decisions:
  - Not staying in one's lane
  - Improper application of institutional policies or procedures
  - Confirmation bias
  - Implicit bias
  - Animus of any kind, including race, religion, disability, etc.

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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
- Having an alternate Decision-maker on hand is always wise
- 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 to recusal is necessary
- If you determine that you are not able to hear a case impartially, please let your Title IX Coordinator know immediately

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DUE PROCESS

- Due Process in Procedure
- Due Process in Decision
- Procedural Rights in 2020 Regulations

WHAT IS DUE PROCESS?

- Rights-based protections that accompany disciplinary action by a school with respect to students, employees, or others
  - Informed by law, history, public policy, culture etc.
- DP in criminal and civil courts vs. DP within a school
- 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

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"PROCEDURAL DUE PROCESS": ARE YOU FOLLOWING YOUR PROCESS?

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

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"SUBSTANTIVE DUE PROCESS": DUE PROCESS IN THE DECISION ITSELF

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

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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

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DUE PROCESS PROCEDURAL RIGHTS 2020 TITLE IX REGULATIONS (CONT.)

Right to:

- Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Inspect and review evidence and draft investigation report before finalized
- Ask written questions of the other party and witnesses through the Decision-maker
- Appeal a dismissal and/or outcome

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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, this is 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”?

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OVERVIEW OF THE "TITLE IX PROCESS"

- The General Phases of a Title IX Process
- Ten Steps of an Investigation
- Evidence and Report Review

THE PROCESS

- Complaint or Notice to TIXC
- Strategy development

- Jurisdiction?
- Dismissal?
- Policy violation implicated?
- Reinstatement?
- Informal, administrative, or formal resolution?

- Notice to Parties
- Identification of witnesses
- Interview scheduling
- Evidence collection
- Report drafted
- Evidence & report shared
- Investigation report finalized

- Exchange of written questions and responses
- Determination
- Sanction?
- Remedies

- Standing?
- Vacate?
- Remand?
- Substitute?

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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

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 1

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
  - Be sent to each party and Advisor
  - Be in an electronic format or hard copy
  - Include evidence upon which the Recipient does not intend to rely
  - Include exculpatory and inculpatory evidence
  - Be made available at any hearing
- Best Practice: Provide the draft investigation report at the same time
- After sending the evidence, the Investigator must:
  - Allow 10 days for written response
  - Consider response prior to completion of report

Source: § 106.45(b)(5)(vi)

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EVIDENCE & REPORT REVIEW BY PARTIES PART 2

At least 10 days prior to making a determination regarding responsibility (hearing):

- The final investigation report summarizing relevant evidence must be sent:
  - To each party and Advisor
  - In an electronic format or hard copy
  - For the parties' review and written response
  - Best Practice: Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties

- **For K-12 schools, with or without a live hearing, this review is followed by, or in conjunction with, the exchange of relevant written questions and responses facilitated by the Decision-maker**

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GETTING PREPARED TO MAKE A DECISION

PREPARATION

Should include:

- Conflicts check
- Recusal protocol
- Review of applicable policies and procedures
- Review of Investigation Report
- Review of file of “directly related” evidence that was not relied upon by Investigator
- Exchange of questions, responses and follow-up responses between parties/witnesses
- Preparation of any questions you have for parties/witnesses

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PREPARATION (CONT.)

What About…

- Can you talk to the Title IX Coordinator?
- Can you talk to the Investigator(s)?
- Should you meet with parties/Advisors?
- Should you talk to witnesses?

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PREPARATION (CONT.)

Decision-Maker Must Review:

- The Respondent's written notice of allegations and investigation (NOIA) to understand all allegations
- School/District 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 alleged offense
  - Break down the constituent elements of each relevant policy
- Review all the material (investigation report and investigation file) carefully and thoroughly – get a general overview of the complaint

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PREPARATION (CONT.)

Decision-Maker Must Review:

- Review all materials a second time and **note all areas of consistency of information**
  - You don't need additional verification or questioning on these issues, assuming the accuracy of consistent information (but beware of suspiciously consistent stories)
  - Also begin to identify what pieces of evidence address the various policy elements. (Note - this should be fairly well-outlined in the investigation report, but the Decision-maker must conduct an independent assessment and will need to outline this in their written determination.)

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PREPARATION (CONT.)

Decision-Maker Must Review:

- Read it a **third** time to identify **inconsistencies** in the information
  - Here is where you will concentrate any questions you may have
  - Continue to identify what pieces of evidence address the various policy elements

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POLICY DEFINITIONS

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

SEXUAL HARASSMENT

- Title IX regulations require each recipient to 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
  - **Hostile Environment**: 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!

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HOSTILE ENVIRONMENT: "UNWELCOME"

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

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HOSTILE ENVIRONMENT: "REASONABLE PERSON"

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances ("in the shoes of the Complainant"), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

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HOSTILE ENVIRONMENT: "SEVERE"

- Physical conduct is more likely to be severe
- Accompanied by threats or violence
- Consider the circumstances (e.g., the ability for Complainant to remove themselves from the harassment)

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HOSTILE ENVIRONMENT: "PERVASIVE"

- Widespread
- Openly practiced
- Well-known among students or employees – reputation of a department, person, etc.
- Occurring in public spaces (more likely to be pervasive)
- Frequency of the conduct is often a variable in assessing pervasiveness (look to intensity and duration)
- Unreasonable interference with school or job
- A "gauntlet of sexual abuse" *Meritor v. Vinson*, 477 U.S. 57 (1986)

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HOSTILE ENVIRONMENT: "OBJECTIVELY OFFENSIVE"

- Reasonable person standard in context
- "I know it when I see it…"
- Age and relationships of Complainant and Respondent
- Number of persons involved
- Frequency
- Severity

- Physically threatening
- Humiliation
- Intimidation
- Ridicule
- Abusive

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- **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.**
- Hostile environment analysis requires that you evaluate the "totality of the circumstances"
  - The frequency, nature, and severity of the conduct
  - Whether the conduct was physically threatening
  - Whether the conduct was humiliating
  - The identity of and relationship between the Respondent and the Complainant

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

Totality of the circumstances to consider:

- The age and sex of the Respondent and the Complainant
- The size of the school, location of the incidents, and context in which they occurred
- The effect on the Complainant's mental or emotional state
- Whether the conduct was directed at more than one person
- Whether the conduct unreasonably interfered with the Complainant's educational or work performance
- Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
- Whether the speech or conduct deserves the protections of academic freedom or the First Amendment protection

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SEXUAL ASSAULT

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 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.

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SEXUAL ASSAULT (CONTD.)

- **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.
- **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.

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SEXUAL ASSAULT (CONT.)

- **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].

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CONSENT

- No mandated definition of consent under the 2020 regulations
- Consent can be defined per state law or best practices.
  - ATIXA Model Definitions found in ATIXA's K-12 Model Policies and Procedures or *1P2P (higher ed focused)*.
    - ATIXA's Consent Construct (discussed later)

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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.

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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].

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DOMESTIC VIOLENCE (CONT.)

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

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STALKING

- 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.

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STALKING (CONT.)

- **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.

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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.
- 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.

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ELEMENTS AND ANALYSIS OF A RETALIATION CLAIM

- The following elements establish an **inference of retaliation**:
  - Did the individual engage in protected activity?
    - Usually straightforward, unless there is a question of reasonableness of belief or manner
  - Was the individual subsequently subjected to adverse action?
  - Do the circumstances suggest a connection between the protected activity and adverse action?
    - Did individual accused of retaliation know about activity?
    - How soon after the protected activity did the adverse action occur?
  - If these three elements are not shown, there is not a finding of retaliation.

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ATIXA CONSENT CONSTRUCT

- Force
- Incapacity
- Consent

CONSENT

- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Creates mutually understandable permission regarding the conditions of sexual activity
- 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, so long as it is clearly communicated verbally or non-verbally

OVERVIEW OF THE THREE QUESTIONS

1. Was force used by the Respondent to obtain sexual or intimate access?

2. Was the Complainant incapacitated?
    a. If so, did the Respondent know, or
    b. Should the Respondent have known that the Complainant was incapacitated

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity.

3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

QUESTIONING BY DECISION-MAKER

QUESTIONING BY DECISION-MAKER (AND OPTIONAL HEARING)

- Mandated **live hearing not required** for K-12 (unless already required by state law, district policy, board policy, etc.)
- **Live cross-examination not required** for K-12 (unless already required)
  - Questioning may be done indirectly through the Decision-maker
- Parties must be given opportunity to submit written questions for the other party and all witnesses, provide each party with the answers, and allowed additional, limited follow-up questions from each party
  - Including questions challenging credibility

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QUESTIONING BY DECISION-MAKER (AND OPTIONAL HEARING) (CONT.)

- Decision-maker should determine relevance of written questions and explain rationale for excluding/re-wording any questions submitted by the parties
- Decision-maker may ask a party to explain why they think a question is relevant or will lead to a relevant answer
- If the party submits a written question that is potentially answered in the investigation report, that question should typically be permitted, if relevant
  - The Decision-maker may deny the question as "irrelevant because it has already been answered," or may ask the party why posing the question again is expected to lead to additional relevant evidence

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QUESTIONING BY DECISION-MAKER (AND OPTIONAL HEARING) (CONT.)

- The Decision-maker may want to ask the parties and/or witnesses questions after reviewing the investigation report and documentation provided from the investigation
- This can be done through the exchange of written questions and responses or in person/remotely
  - Your school policy should outline how this process will be facilitated
- The Decision-maker should first review the investigation report and documentation provided from the investigation to see if their questions are answered

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IF YOU STILL HAVE A QUESTION, ASK YOURSELF

- **Is the answer already in the report or documentation I have been provided?**
  - If not, ask the Investigator why not
  - If you still need to know this information, ask it
- **What do I need to know?**
- **Who is the best person to get this information from?**
  - 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 received previously.

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IF YOU STILL HAVE A QUESTION, ASK YOURSELF (CONT.)

- **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?**

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GOALS OF QUESTIONING

- The goal of questioning is to ensure that as a Decision-maker, you understand information and evidence contained in the report:
  - Relevant evidence about what happened during the incident(s)
  - Any related events
  - Any corroborating information
- Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing, and resolve conflicting information as it relates to the policy elements

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GOALS OF QUESTIONING (CONT.)

- 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.

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ASKING GOOD QUESTIONS

- Use open-ended questions (Who…, what…, how…)
- Use close-ended questions to drill down on details. (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
- Frame questions neutrally
- Don’t ask blaming or judgmental questions
- Minimize the re-traumatization potential for all parties

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UNDERSTANDING THE EVIDENCE

- Understanding Evidence
- Relevance
- Evidence Issues Under the 2020 Title IX Regulations
- 3 Buckets of Evidence
- Relevance Exercise
- Credibility Determinations

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 relevant and 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.

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EVIDENCE

- No restrictions on discussing case or gathering evidence
- Equal opportunity to:
  - Present witnesses, including fact and expert witnesses
  - Present evidence, including inculpatory and exculpatory evidence
  - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered, except must be relevant and respect “rape shield” and privilege provisions

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ASK YOURSELF

Is it **relevant**?

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

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

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BUCKET 1: RELEVANT EVIDENCE

- Evidence is relevant when it tends to prove or disprove an issue in the complaint
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 2 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers within the investigation report via secure technology

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RELEVANCE

- Evidence is generally considered **relevant** if it has value in proving or disproving a fact at issue, and relevance means the evidence will be relied upon by the Decision-maker
  - 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
- 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 – both inculpatory and exculpatory

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RELEVANCE (CONT.)

- 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?

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BUCKET 2: DIRECTLY RELATED, BUT NOT RELEVANT EVIDENCE

- Evidence is directly related when it is connected to the complaint but is neither inculpatory nor exculpatory and will not be relied upon in the investigation report
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 1 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers in a separate file via secure technology

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BUCKET 3: NEITHER RELEVANT NOR DIRECTLY-RELATED EVIDENCE

- Evidence should be maintained by the Investigator(s) but disregarded for purposes of the process
- Parties/Advisors/Decision-makers don't get to know about it

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UNDERSTANDING EVIDENCE

Decision-maker(s) 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)

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UNDERSTANDING EVIDENCE (CONT.)

Decision-maker(s) may consider and assign weight to different types of evidence, when relevant and credible:

- Hearsay evidence (e.g., statement made outside the hearing but presented as important information)
- Character evidence (subject to a relevance determination, but often not probative of the underlying allegation)

Decision-makers should typically only consider impact statements during sanctioning.

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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

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ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS

Additional permissions (from the party) 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

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EVIDENCE SHARING WITH THE DECISION-MAKER

- This evidence comes to the Decision-maker(s) at least 10 days prior to the Decision-maker making a determination, in Bucket #1 (the investigation report) or in Bucket #2, the evidence file of what is considered directly-related.
- Although the Investigator has initially sifted the evidence into these buckets, the Decision-maker must make an independent evaluation of the evidence to determine what will be relied upon to make your determination.

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RELEVANCE EXERCISES

- Case Study: Ivan and Juanita
- Is it Relevant? Exercise
- Relevant or Directly Related?

CASE STUDY: IVAN & JUANITA

- Juanita, a freshman member of the girls' soccer team, made a Title IX report directly to the Vice Principal.
- On the morning of October 11, her teammate, who was checking her email in the computer lab, yelled for Juanita and the other teammates to look at something on the computer.
- Juanita saw an email sent from the boys' soccer team email address, boyssoccer@school.com, which said, "Greetings new freshman, meet the girl next door."
- The email included a photo of Juanita's face photoshopped onto an image of a naked woman's body with huge breasts.

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CASE STUDY: IVAN & JUANITA

- Everyone in the room laughed and Juanita ran from the room crying, embarrassed that others would think it was her.
- She immediately called Ivan, a member of the boys' soccer team, who she believed sent the email.
- Earlier in the year, Ivan asked her out several times, but she didn't like him.
- She found him really annoying, and while she knows it wasn't nice, she called him a total loser in front of his friends.
- She knows that he sent the email to hurt and embarrass her.

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CASE STUDY: IVAN & JUANITA

- Ivan told the Investigator that he believes Juanita is blowing the whole matter out of proportion.
- He admits to creating the photo for a class project. He reports:
  - "It was only meant to be a joke. I never put her name on it, so what's the big deal? This is a work of art that I created for my class. I only showed my artwork, which by the way is protected by the First Amendment, to a few of my teammates. I know my rights very well since my dad is a lawyer."
  - The email account is for official team business.
  - The coaches and team captains have the password. The captains have shared the password with other seniors on the team.

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CASE STUDY: IVAN & JUANITA

- The Investigator also interviewed John, assistant director of information technology.
- John was able to confirm that someone using the computer lab computer sent the picture from the boys' soccer team email account.
- The picture was inserted into the email via a flash drive and he was unable to determine which student had logged in to the account.
- John received Ivan's consent to inspect his laptop. The photo was on his hard drive but was not sent out via email to anyone.
- John said Ivan told him when he doesn't have his laptop with him, it is typically inside his locker. Ivan also told John that he hasn't given anyone else his laptop password.

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EXERCISE: IS IT RELEVANT?

- Ivan was notified via the school's NOIA letter that it is alleged that he violated the school's sexual harassment policy, specifically the hostile environment provision.
- The definition of Sexual Harassment is:
  - unwelcome conduct,
  - determined by a reasonable person,
  - to be so severe, and
  - pervasive, and,
  - objectively offensive,
  - that it effectively denies a person equal access to the Recipient's education program or activity.

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WARM-UP: IS IT RELEVANT?

You are the Decision-Maker. You must determine whether the following questions seek relevant information and/or whether the specific piece of evidence is relevant.

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WARM-UP: IS IT RELEVANT?

Let's start with some of the evidence from the investigation report. Is it relevant that:

- Ivan is a member of the boys' soccer team
- Juanita is a member of the girls' soccer team
- There was "history" between Ivan and Juanita
- Juanita called Ivan "a loser" earlier in the year in front of his friends
- Ivan admitted to creating the image for his class
- Ivan showed the image to a few teammates
- The image was sent from a computer in the school's computer lab
- Ivan consented to letting John from IT inspect his laptop

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IS THIS RELEVANT?

Consider whether the following pieces of evidence, if part of the fact-pattern originally provided from the investigation report, would be relevant:

- Juanita's Advisor's daughter is in the same art class with Ivan and stated that she never had an assignment like that for class
- Ivan's friend, Alan, states that Juanita really is not bothered by the photo because he has observed occasions where Juanita flashed her breasts at Ivan a few times before. Juanita also told Ivan and Alan that she wanted breast implants.

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IS THIS RELEVANT? (CONT.)

- Ivan's soccer coach has prepared a written character reference for Ivan, which states that he is an upstanding member of his high school team and community, a leader on the squad, and volunteered many times at the local YMCA youth program.
- Ivan stated that at the time that the email was sent, he was in his algebra class and had an in-class test on that day.
- Juanita provided a screenshot of Ivan's Twitter feed, which showed that he retweeted an announcement from his favorite band just two minutes prior to the precise time that the email was sent.

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IS THIS RELEVANT? (CONT.)

- Ivan's Advisor wants to ask Juanita about her academic progress during the first half of the school year. Ivan and his Advisor believe that Juanita was in danger of failing her chemistry class.

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POP QUIZ: RELEVANT OR DIRECTLY RELATED?

The Complainant writes in the narrative of her formal complaint that she has been experiencing significant mental health issues since being sexually assaulted, including PTSD (self-diagnosis). Respondent wants to ask the Complainant about this to argue that one of the reasons Complainant likely misperceived the incident as non-consensual is because she has a self-admitted history of serious mental health concerns.

RELEVANT? DIRECTLY RELATED? NEITHER?

WHICH AND WHY?

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POP QUIZ: RELEVANT OR DIRECTLY RELATED?

When reading the Complainant's full interview transcript, you see that the Complainant stated she did not consent to sex with the Respondent. She adds that one of the reasons why she did not consent and would not have consented is because prior to the incident, she was a virgin and had never had sex before.

RELEVANT? DIRECTLY RELATED? NEITHER?

WHICH AND WHY?

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CREDIBILITY DETERMINATIONS

WHAT IS CREDIBILITY?

- Primary factors: corroboration and consistency
- Accuracy and reliability of information
- Decision-makers must determine the credibility of testimony and evidence, and hence its reliability
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading may impact credibility
- 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

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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 (use caution!)

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

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

EEOC (1999)

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

- Strongest indicator of credibility.
- Independent, objective authentication.
  - Party says they were in class, teacher confirms.
  - Party describes text conversation, provides screenshots.
- Corroboration of central vs. environmental facts.
- Not simply alignment with friendly witnesses.
- Can include contemporaneous witness accounts.
  - More "separate" the witness, greater the credibility boost.

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

- Outcry witnesses.
  - Does what party said then line up with what they say now?
- Pay attention to allegiances.
  - Friends, teammates, group membership
  - This can work both directions (ex. honest teammate)

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FACTORS TO CONSIDER FOR CREDIBILITY

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?
- Is the party's statement consistent with the evidence?

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (cont.)

- 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”

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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
  - Personal or relationship consequences
- What if the allegations are false?
  - Other pressures on the Complainant– failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

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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
- Use caution; past violations do not mean current violations

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FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

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

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CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

- Regulations permit (but not do not require) Investigators to make credibility assessments with or without rendering conclusions or making findings related to credibility
  - Can serve as a roadmap for Decision-makers regarding where to look for information critical to making determination
  - Not binding on the Decision-maker
- 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."

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CREDIBILITY DETERMINATIONS BY THE DECISION-MAKER

- 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
- When you write the final determination letter, focus on what facts, opinions, and/or circumstantial evidence supports your conclusion. Offer a cogent and detailed rationale.

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MAKING A DECISION

- Overview of the Process
- Evidentiary Standards
- Foundations for Decision
- Sanctioning
- Written Determination

OVERVIEW OF THE PROCESS

- Anticipate that you will have to concretely articulate the rationale for and evidence supporting your conclusions
- Parse the policy again; remind yourself of the elements that compose each and every allegation
- Determine 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)
- Ensure an impartial decision that is free of substantive bias

Withhold judgment until all the evidence has been considered.

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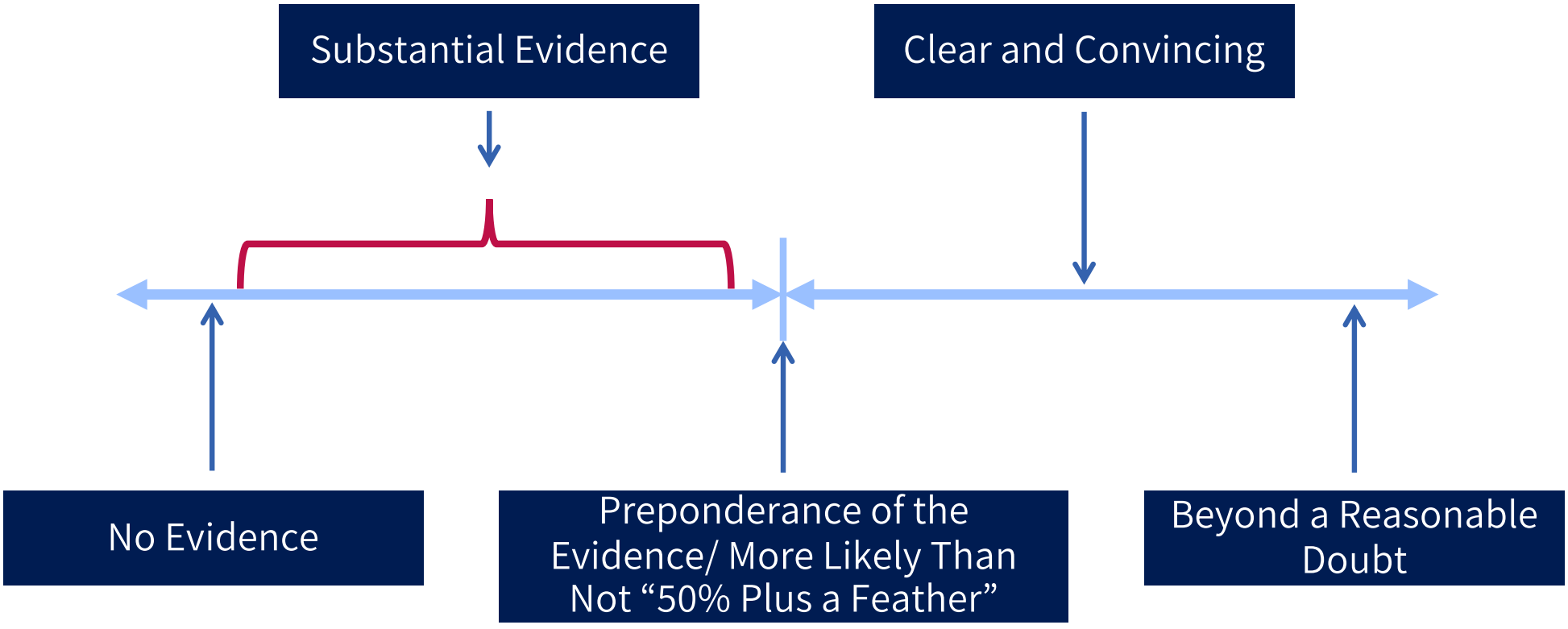
UNDERSTANDING EVIDENCE THRESHOLDS

EVIDENDARY STANDARDS



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EVIDENTIARY STANDARDS

- **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**: it is "more likely than not" policy was violated
  - The only equitable standard
  - 50.1% (50% plus a feather)
  - The "tipped scale"

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MAKING A DECISION

Foundation for Decisions

- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report, submitted in response to the written questions, or presented at a hearing with the Decision-maker
- Do not turn to any outside "evidence"
- Assess each element in the policy (e.g., intent, sexual contact, consent, 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?

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MAKING A DECISION (CONT.)

Findings, Impact Information, and Sanctions

- Separate the "Finding" from the "Sanction."
  - Do not use impact-based rationales for policy violation 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

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SANCTIONING IN SEXUAL MISCONDUCT CASES

Title IX and case law require:

- Decision-maker should also decide sanction if credibility will influence the sanction
- Recipients to not act unreasonably to bring an end to the discriminatory conduct (Stop)
- Recipients to not act unreasonably to prevent the future reoccurrence of the discriminatory conduct (Prevent)
- Recipients to restore the Complainant as best they can to their pre-deprivation status (Remedy)

- This may create a clash if the 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 school community

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COMMON STUDENT SANCTIONS

- Warning
- Detention
- Loss of privileges
- Counseling
- No contact
- Limited access to school activities
- Service hours
- Online education
- Discretionary sanctions
- Alcohol and drug assessment, and counseling
- Alternative Placement
- In-School-Suspension
- Out-of-School Suspension
- Expulsion

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COMMON EMPLOYEE SANCTIONS

- Warning – verbal; written
- Probation
- Performance improvement/management process
- 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

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WRITTEN DETERMINATIONS

Decision-maker issues a detailed, written determination regarding responsibility that includes the following:

- Policy section(s) 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 (if any)
- Statement of and rationale for the result as to each specific allegation.
  - Should include findings of fact and conclusions

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WRITTEN DETERMINATIONS (CONT.)

Decision-maker/Chair issues a detailed, written determination regarding responsibility that includes the following (cont.):

- Sanctions imposed on Respondent (if any)
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the Recipient to the Complainant
- Procedures and bases for any appeal

The Decision-maker should author the written determination.

- May follow a template provided by the Title IX Coordinator

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WRITTEN DETERMINATIONS: LOGISTICS

- The written determination should be provided to the parties simultaneously.
- 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 Title IX Coordinator and/or legal counsel?

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APPEALS

- Elements Under the 2020 Regulations
- Bases 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 policy or Appeal Decision-makers
- Recipient may have dedicated Appeal Decision-makers
- When an appeal is filed, the Recipient 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

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BASES FOR APPEAL

- Title IX Regulations specify three bases for appeal:
  - Procedural irregularity that affected the outcome
  - New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome
  - Title IX Coordinator, Investigator, or Decision-maker had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome. Recipients may offer appeals equally to both parties on additional bases.
- Recipients may offer additional bases for appeal (sanction?) so long as they are offered equally to both parties

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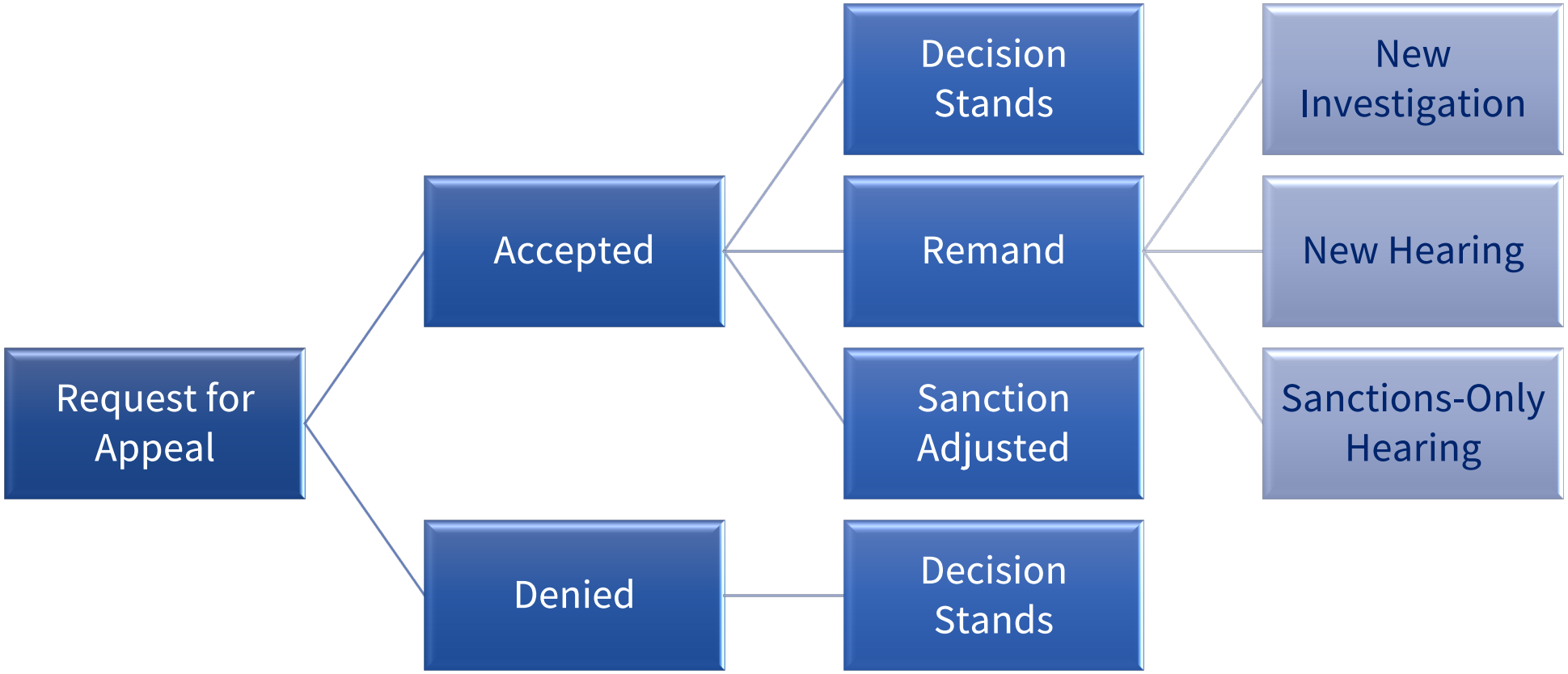
APPEALS: THE PROCESS



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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

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RECORDKEEPING AND DOCUMENTATION

RECORDKEEPING 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

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RECORDKEEPING AND DOCUMENTATION (CONT.)

- For each conclusion, must document the rationale for its determination
- Must document measures taken to preserve/restore access to education programs/activity

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Questions?

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