



Association of  
Title IX Administrators

# Equity Hearing Panel Training Refresher

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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.



# CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary Title IX practitioners encounter in their roles including slang, profanity, and other graphic or offensive language.



# AGENDA

- 1 Title IX Basics
- 2 Decision-maker Role
- 3 Due Process
- 4 Policy Definitions & Terminology
- 5 Bias, Conflicts of Interest, & Recusal
- 6 Preparing for the Hearing



# AGENDA

7

Decision-making Skills Part I

8

Questioning & Decision-making Skills Part II

9

Making a Decision

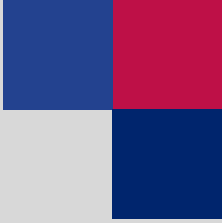
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Appeals

11

Questions





# **TITLE IX BASICS**

- Title IX
- The Process



# TITLE IX

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

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





# THE IX COMMANDMENTS

## INVESTIGATION

(plus prompt &  
fair per  
VAWA Sec. 304)



**Thorough**

**Reliable**

**Impartial**

## PROCESS



**Prompt**

**Effective**

**Equitable**

## REMEDIES



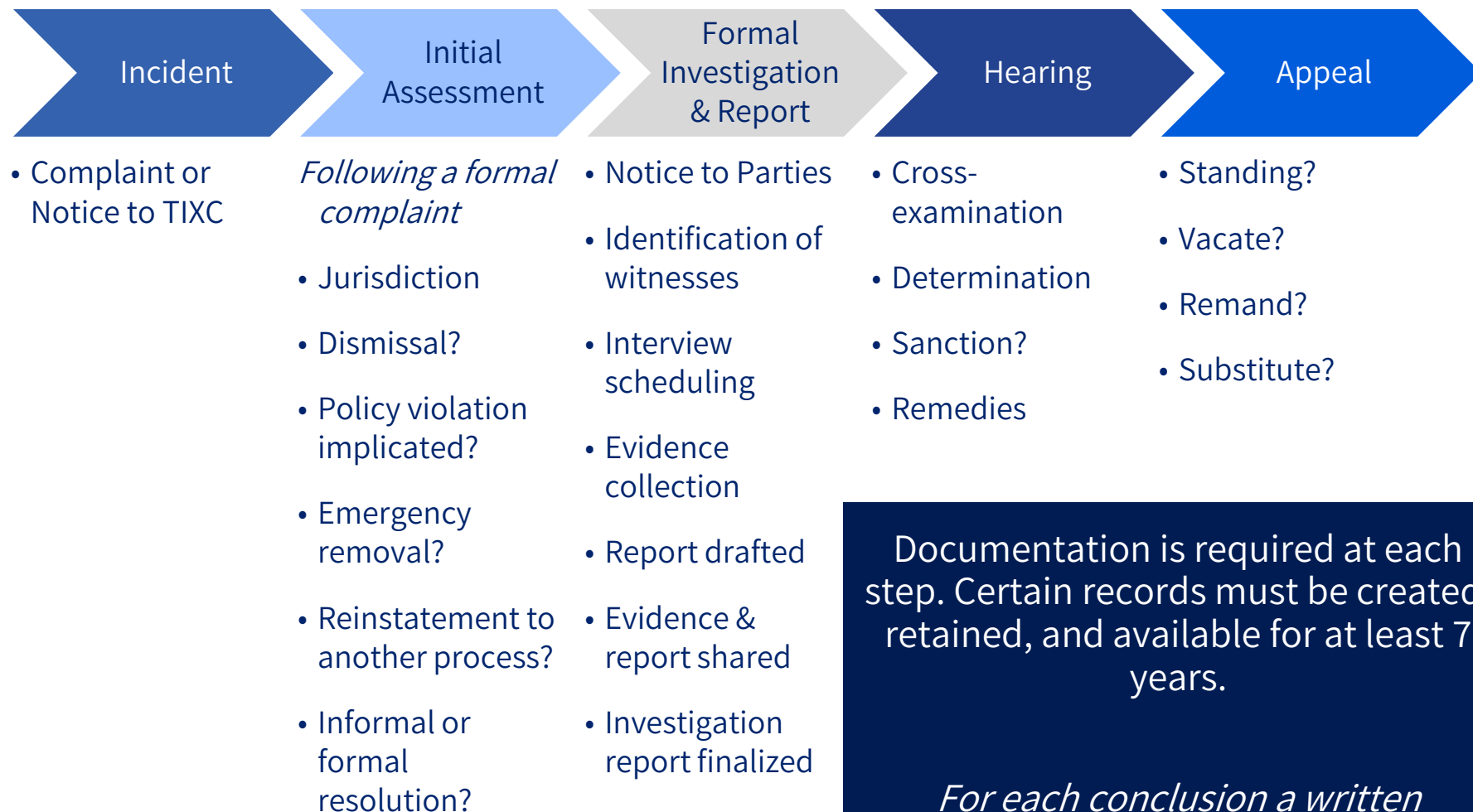
Act reasonably  
to stop  
discrimination

Act reasonably  
to prevent  
recurrence

Act equitably  
to remedy  
effects



# THE PROCESS



Documentation is required at each step. Certain records must be created, retained, and available for at least 7 years.

*For each conclusion a written rationale must also be created*





# WHAT IS YOUR MISSION AS A DECISION-MAKER?

- Decision-maker Responsibilities
- Decision-maker Challenges



# 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 (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”
- Appeal Decision-maker is a separate role
  - May also be a single person or panel; previously uninvolved



# THE CHALLENGE FOR HEARING OFFICERS/DECISION-MAKERS

- Community standards identify what constitutes sexual harassment within the institutional 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
- Decision-maker's role is to impartially uphold the integrity of the process
- A Decision-maker may not agree with institutional policy, but they 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

- Substantive Due Process
- Procedural Due Process
- Due Process in the 2020 Regulations



# WHAT IS DUE PROCESS?

- **Substantive** and **Procedural** Due Process (DP)
  - 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



# “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



# “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



# 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



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

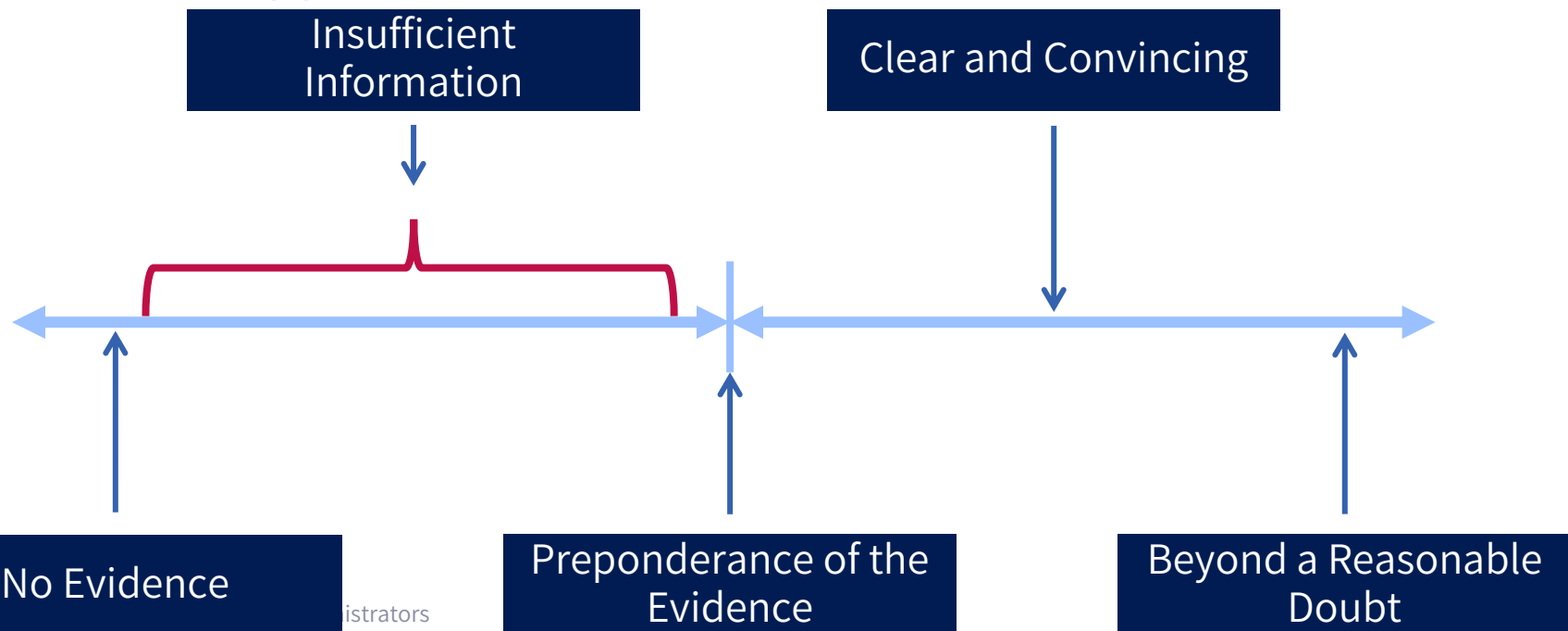
## Right to:

- 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
- 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

- **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”





# 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
  - How will they be cross-examined?
- 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



# 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 new; evidence should have always driven determinations
- What would it mean to presume neither “guilt” nor “innocence?”
  - How does a 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 a presumption?



# LIVE HEARING

- Regulations mandate live hearing for higher education
  - Virtual hearings are permitted
- Must create audio/audiovisual recording, or transcript, of hearing and make it available to the parties for inspection and review
- Must allow live cross-examination to be conducted exclusively by each party's Advisor (separate rooms still allowed)
- Questions come from Advisors, panel (if any), and Chair
- Will there be a facilitator role? Who? What do they do?





# **POLICY DEFINITIONS**



# 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!



# HOSTILE ENVIRONMENT: “UNWELCOME”

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



# 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



# HOSTILE ENVIRONMENT: “SEVERE”

- Physical conduct is more likely to be severe without need for repetition
  - Sexual assault and many dating/domestic violence incidents are almost always sufficiently severe
  - Other physical conduct that does not meet the 34 C.F.R. § 106.30 definitions for sexual assault or dating/domestic violence may also rise to the level of “severe”
- Consider the circumstances (e.g., ability for Complainant to escape the harassment)
- Assess whether accompanied by threats or violence
- Assess whether there was a degree of embarrassment or humiliation



# HOSTILE ENVIRONMENT: “PERVASIVE”

- Widespread
- Openly practiced; occurring in public spaces
- Well-known among students or employees – reputation of a department, person, etc.
- Frequency, intensity, and duration of the conduct
- Unreasonable interference with school or job
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986)
- Incidents occurring in concert or with regularity are more likely to be considered pervasive
- Consider the specific circumstances and facts



# 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
  - Humiliating
  - Intimidating
  - Ridiculing
  - Abusive



# 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.

## **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
- Effective denial of education or employment access
- If SPOO, a discriminatory effect is presumed (proven)



# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

- 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



# PUTTING IT ALL TOGETHER: HOSTILE ENVIRONMENT SEXUAL HARASSMENT

- The role of the Decision-maker is to determine whether all the elements of a hostile environment are present
  - Requires a “totality of the circumstances” analysis, which is the key role for the Decision-maker
  - When conduct does not meet the elements, applying the standard of evidence, then the Respondent is “not responsible”
  - Hostile environment complaints may often, therefore, lend themselves to informal resolution processes and may not ultimately come before Decision-makers, unless they are connected to other forms of sexual harassment, such as sexual assault, dating violence, domestic violence, and/or stalking.



# PUTTING IT ALL TOGETHER: HOSTILE ENVIRONMENT SEXUAL HARASSMENT (CONT.)

- Remember that the sex, gender identity, gender expression, and/or sexual orientation of the individuals do not matter in how we apply the relevant evidence to the policy elements



# SEXUAL ASSAULT

- **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.
- **Fondling** – The touching of the private body parts of the Complainant (buttocks, groin, breasts) **for the purpose of sexual gratification**, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental incapacity.
- **Incest** – Sexual intercourse between persons who are related to each other, within the degrees wherein marriage is prohibited by [insert state] law.



# SEXUAL ASSAULT (CONT.)

- **Statutory Rape** – Sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

**Note:** Sexual Assault also includes having another person touch you sexually, forcibly, and/or without their consent.

\* This definition set is not taken from the FBI Uniform Crime Reporting (UCR) system verbatim. ATIXA has substituted Complainant for “victim,” has removed references to his/her throughout, and has defined “private body parts.” These are liberties ATIXA thinks are important to take with respect to the federal definitions, but practitioners should consult legal counsel before adopting them.



# CONSENT

- Consent can be defined per state law or best practices.
  - ATIXA Model Definitions found in *1P2P* or *The Playbook*
  - SCU Language: Consent is conscious, knowing, voluntary and clear permission by word or action to engage in sexual activity.
- 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.
- The FBI's definition of rape (upon which the regulatory definition rests) now incorporates the term "carnal knowledge"



# CONSENT CONSTRUCT

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 cannot 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?



# 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.



# 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].



# 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.



# 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.**



# 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 conduct code 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.



# OTHER OFFENSES ADDRESSED BY POLICY

- Sexual Exploitation
- Bullying/cyberbullying
- Hazing
- Threatening or causing physical harm
- Discrimination
- Stalking (broadly)

*Review SCU's Discrimination, Harassment, and Sexual Misconduct Policy for applicable definitions*





# **BIAS, CONFLICTS OF INTEREST, & RECUSAL**



# BIAS

- Among the most significant problems for Decision-makers
- Bias can represent any variable that improperly influences a decision
- 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



# BIAS (CONT.)

- Not staying in your lane
- Improper application of institutional policies or procedures
- Confirmation bias
- Implicit bias
- Animus of any kind, including race, religion, disability, etc.



# BIAS AND CONFLICTS OF INTEREST

- Types of conflicts/bias:
  - Wearing too many hats in the process
  - Legal counsel as Investigator or Decision-maker
  - Decision-maker who is not impartial
  - Biased training materials; reliance on sex or gender stereotypes
- 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



# RECUSAL

- A conflict of interest might necessitate recusal, or party may request it
- Identify and train an alternate Decision-maker/Chair
- Procedures should define the process and circumstances by which a party may seek to recuse a Decision-maker
- Typically, the Title IX Coordinator determines whether recusal is necessary
- If you feel you cannot hear a case impartially, notify Title IX Coordinator immediately





# **PREPARING FOR THE HEARING**



# MUST DO: PREP FOR THE HEARING

## All Decision-Makers Must Review:

- Written Notice of Investigation and Allegations (NOIA)
- Policy (policies) alleged to have been violated
  - 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.
- All the materials carefully and thoroughly
- Review and re-review the investigation report
  - Review multiple times
    - Note consistencies, inconsistencies, questions



# PRE-HEARING MEETINGS

- Although not explicitly required or even mentioned in the Title IX regulations, the Chair or Decision-maker may conduct pre-hearing meetings for each party (in writing, or in person)
  - Answer questions about the hearing and its procedures
  - Clarify expectations regarding logistics, decorum, the role of Advisors, and technology
  - Discuss witness and party participation and cross-examination
  - Discern any conflicts of interest/vet recusal requests
  - Consider any questions regarding relevance of evidence or proposed questions and may make pre-hearing rulings



# DAY OF THE HEARING

- Dress professionally; layer if needed
- Arrive prepared and early
- Bring snacks and water/drinks
- Silence or turn off your phone and put it away
- Bring a pen and paper or note-taking device
  - Less is better; note what you need to make a determination
  - Be clear on policy/expectations for keeping/destroying written notes
- Clear calendar after the hearing – deliberation could take as few as 30 minutes or it could take much longer



# THE HEARING: GENERAL LOGISTICS

- Recording
    - How, by whom, etc.
    - Redundant devices?
  - 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, email)
  - Advisors
  - Parties and witnesses waiting to testify
  - Breaks
  - Use of technology
  - Waiting for a decision



# HEARING DECORUM

- Be professional, but avoid lawyer-like approach
  - This is not court – 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 institutional policy
- Be respectful
  - Tone, manner, questioning
  - Sarcasm or being snide is never appropriate
  - Maintain your composure; never allow emotion or frustration to show
  - De-escalate or take breaks if emotions/tensions are running high



# HEARING DECORUM (CONT.)

- Work to establish a baseline of relaxed conversation for everyone in the room
- Use active listening skills
- Listen carefully to everything that is said
  - Try not to write too much when people are talking
  - Track questions/answers to avoid permitting too much repetition, and in case you need to repeat a question back
  - If questioning, focus on the answer, rather than thinking about your next question
- Nod affirmatively
- Do not fidget, roll your eyes, or give a “knowing” look to another panel member
- Do not look shocked, smug, stunned, or accusing



# THE HEARING

## **Tips for Hearing Officers/Decision-Makers:**

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



# THE HEARING (CONT.)

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

- Determine the relevance and appropriateness of questions. Pause after each question to “rule” on relevance. Must state rationale for the record.
- When necessary, the Chair provides 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 Decision-Makers.
- Recognize positional authority.





# **DECISION-MAKING SKILLS, PART ONE**

- Understanding Evidence
- Relevance



# 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
- Institution cannot limit 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

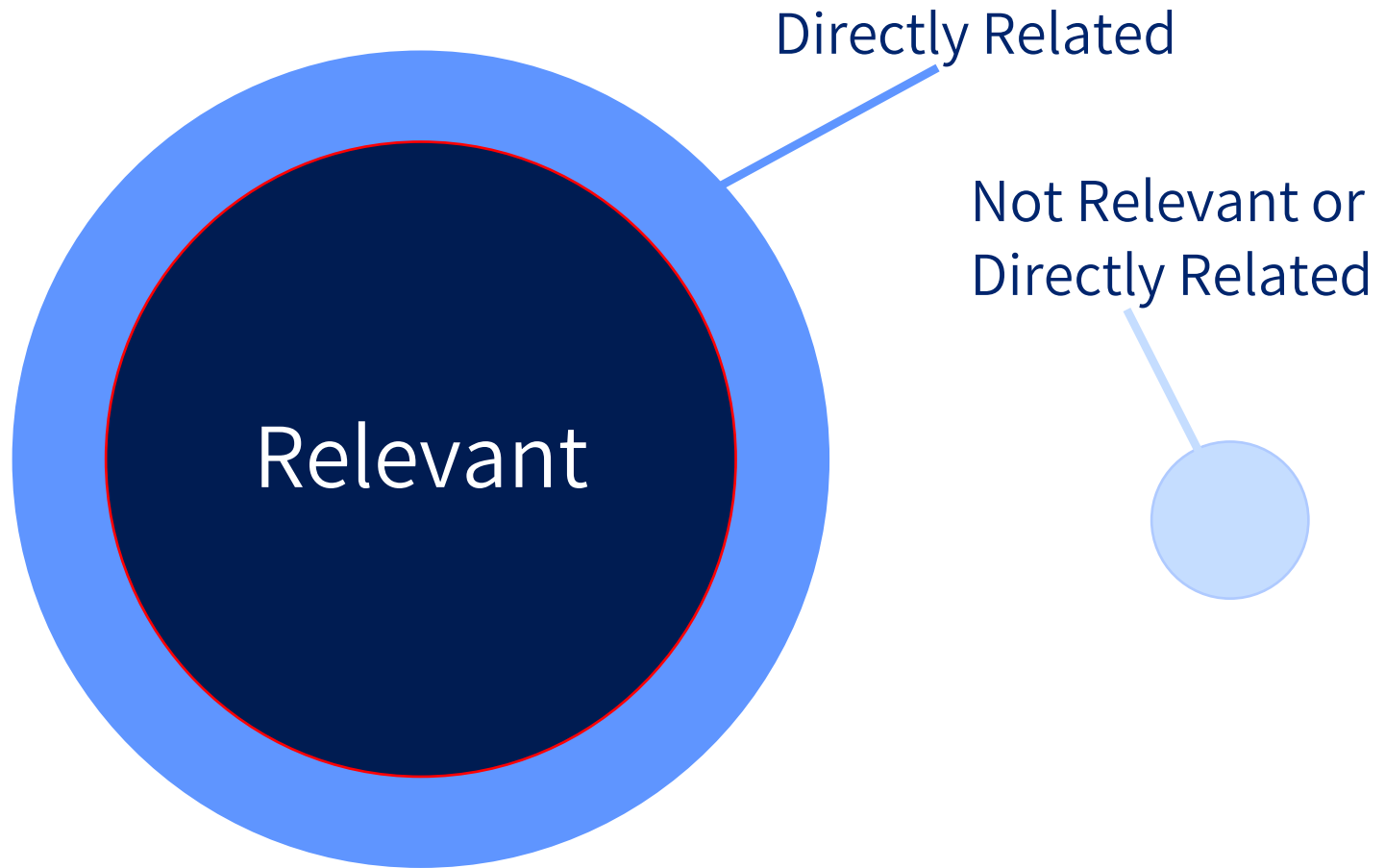


# UNDERSTANDING EVIDENCE

- The formal federal rules of evidence do not apply in Title IX hearings, but rules crafted by OCR for Title IX complaints do
- If the information helps to prove or disprove a fact at issue, it should be admitted because it is relevant
- 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
- **Relevance → admissibility of the evidence**
- **Credibility → how much weight admissible evidence is given**



# UNDERSTANDING EVIDENCE





# RELEVANCE

- Evidence is generally considered **relevant** if it has value in proving or disproving a fact at issue, and relevance means the evidence may 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



# OTHER EVIDENCE MAY BE DIRECTLY RELATED

## Directly Related Evidence:

- Connected to the complaint but is neither inculpatory nor exculpatory and will not be included within the investigation report
- Comes to Decision-maker(s) pre-hearing via:
  - Bucket 1: (the investigation report); or
  - Bucket 2: evidence file of what is considered directly related
- How do you handle records that combine elements of both relevant and directly related evidence?
- While the Investigator has initially sorted the evidence into these buckets, the Decision-maker makes the final allocation of what evidence will be relied upon and what will not.



# WEIGHING EVIDENCE

- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible (see next slide)
- Decision-makers should typically only consider impact statements during sanctioning



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

Character Evidence

subject to relevance determination; often not probative of the underlying allegation



# SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS

- Evidence of the Complainant's sexual **predisposition** is never relevant.
- Evidence about the Complainant's **prior sexual behavior** 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 (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



# ADDITIONAL EVIDENCE CONSIDERATIONS IN HEARINGS

- In the Title IX hearing, Relevant and Directly Related evidence is often “admitted” in the sense that it is not excluded and/or Decision-makers are not shielded from hearing/knowing it
- Some evidence can be excluded, or witnesses can be directed not to answer certain questions if not relevant, directly related, or not permissible subject matter (e.g.: Complainant’s sexual history)
- However, the Decision-makers and/or Chair need to determine whether the evidence can and will be relied upon if it is introduced
  - There will be a decent amount of trying to “unhear”/disregard what is introduced, because even though you know it, you can’t consider it





# **QUESTIONING & DECISION-MAKING SKILLS, PART TWO**

- Questioning
- Cross-Examination
- Reliability/Credibility



# QUESTIONING

- The goal of questioning in the hearing is to ensure that as Decision-maker, you understand information and evidence contained in the report:
  - Relevant evidence 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 previously received



# IF YOU STILL HAVE TO ASK 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?**
- **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.



# 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 respective Advisors
- 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



# QUESTIONING & CROSS-EXAMINATION (CONT.)

- If an Advisor seeks to ask a question that is potentially answered in the investigation report, that question should typically be permitted, if relevant
- If a cross-examination question has already been answered by a witness or party during the hearing, the Decision-maker or Chair may:
  - Deny the question as “irrelevant because it has already been answered,” or
  - Ask the Advisor why posing the question again is expected to lead to additional relevant evidence



# QUESTIONING & CROSS-EXAMINATION (CONT.)

- In August 2021, a federal district court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a Decision-maker from relying on statements that are not subject to cross-examination during the hearing:
  - “If a party or witness does not submit to cross-examination at the live hearing, the [D]ecision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility....”
- If a party or witness does not appear at the hearing, the Decision-maker must rely upon their earlier statements and assess their credibility and weight based on the totality of the information provided\*



# QUESTIONING & CROSS-EXAMINATION (CONT.)

- A party or witness may choose to not answer one or more questions
- 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?
  - How does it work?





# **UNDERSTANDING CREDIBILITY IN THE DECISION PROCESS**



# 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



# 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 telling the truth?

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

EEOC (1999)



# CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

## **Regulations permit Investigators to make credibility recommendations**

- Can serve as a roadmap for Decision-maker but is not binding
- 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
- Evidence requiring a credibility assessment should be examined in a hearing
  - Fundamental to due process
  - Failure of a witness/party to participate undermines ability to fully assess credibility
    - Other evidence can be considered
    - What will the effect of that be on the process/decision?





# MAKING A DECISION

- Deliberations
- Sanctioning
- Written Determinations



# OVERVIEW OF THE DELIBERATION PROCESS

- Only Decision-makers attend and participate in the deliberations
  - Parties, witnesses, Advisors, and others excused
  - ATIXA recommends that TIXC and legal counsel do not participate
  - Facilitator may observe
- Do not record; recommend against taking notes (Chair may)
- Parse the policy (elements that compose each allegation)
- Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial
- Apply evidentiary standard to determine if policy has been violated



# DELIBERATIONS

## General Information

- Must provide detailed, written 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.**



# DELIBERATIONS

## Foundation for Decisions

- Decisions must be based only upon information/evidence in the investigation report or presented at the hearing
- Do not turn to any outside “evidence”
- Parse the policy (break it down by its constituent elements)
- 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?



# DELIBERATIONS

## 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)
  - Use impact-based rationales/evidence for sanctions only
- Impact/mitigation statement(s) should only be considered if and after the Respondent is found in violation
- Whether Respondent violated policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful – do not heighten the evidentiary standard 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
- Recipients to act reasonably to bring an end to the discriminatory conduct (**Stop**)
- Recipients to act reasonably 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



# WRITTEN DETERMINATIONS

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

- Policies 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 and conclusions



# WRITTEN DETERMINATIONS (CONT.)

- Sanctions imposed on Respondent (if any) and rationale for sanctions chosen (or sanctions not chosen)
- 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



# 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?





# APPEALS

- Elements Under the 2020 Regulations
- Grounds for Appeal



# 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 have a pool of Decision-makers who sometimes serve as hearing or appeal Decision-makers
- Recipient may have dedicated Appeal Decision-makers



# APPEAL RESPONSE & RECOMMENDATIONS

- 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
- The Chair may be called upon by the Appeal Decision-maker to inform the appeal process
  - Likely a paper exchange; not in-person
- 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 Decision-maker(s)



# 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 additional bases for appeal so long as they are offered equally to both parties





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# Questions?





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