



Association of
Title IX Administrators

Paul Mitchell Advanced Education Hearing Officer & Decision-Maker

Kayleigh Baker, J.D.

Consultant, TNG

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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 Bias, Conflicts of Interest, & Recusal
- 5 Preparing for the Hearing
- 6 Decision-Making Skills, Part I

AGENDA

7

Questioning & Decision-making Skills Part II

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Understanding Credibility

9

Making a Decision

10

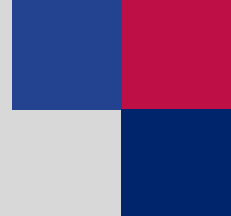
Rationale Writing

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Appeals

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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

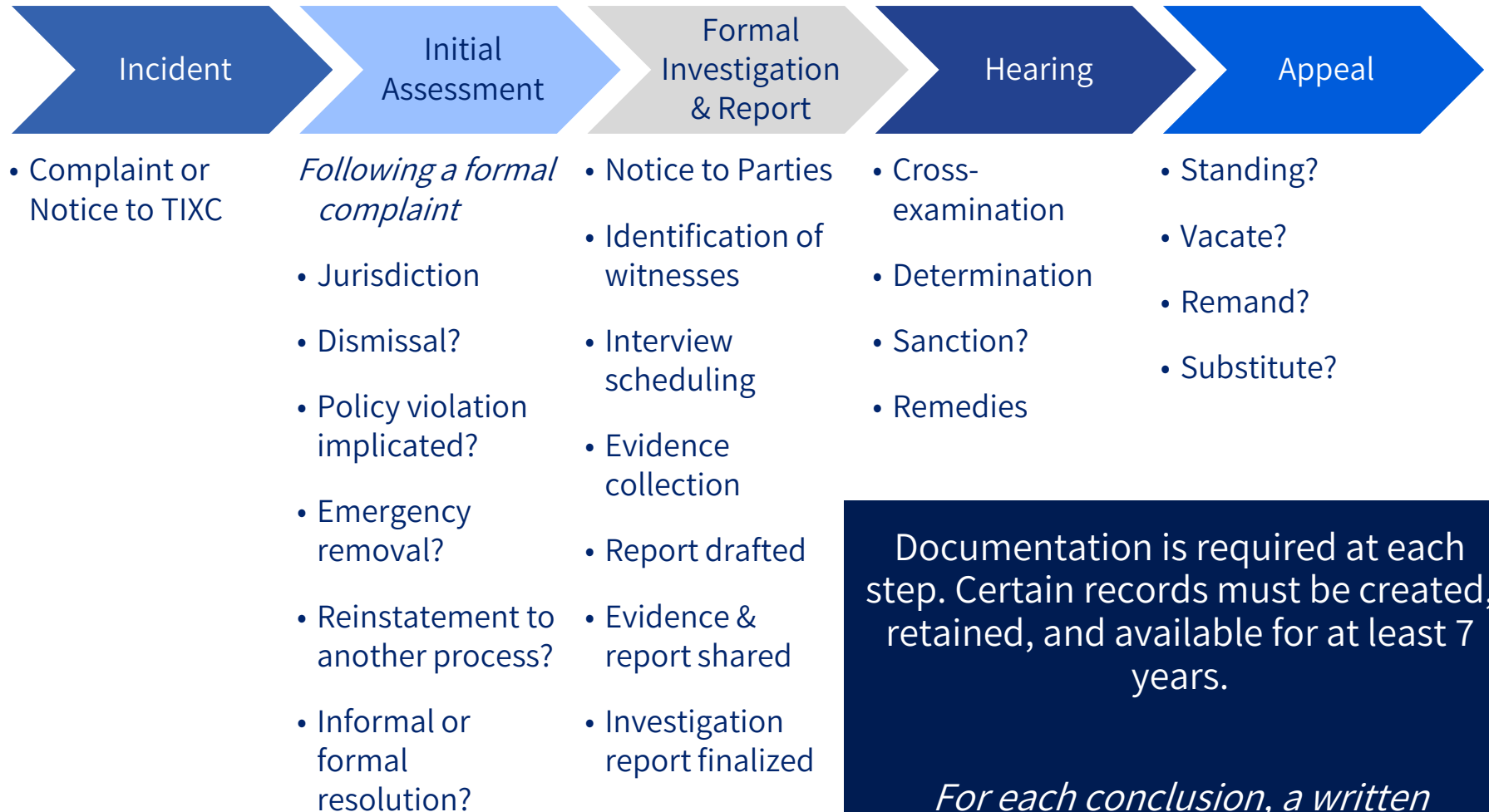


Act reasonably to stop discrimination

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 Future Professionals, Learning Leaders, 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

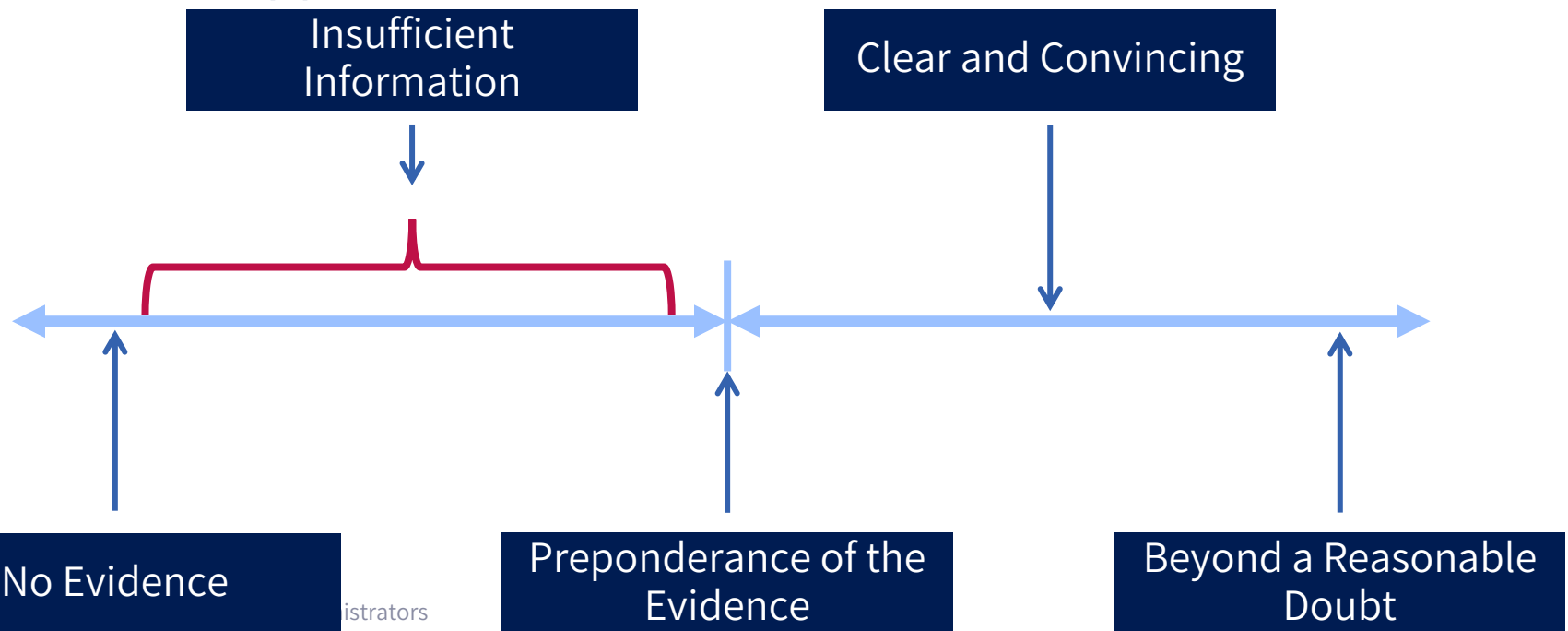
DUE PROCESS PROCEDURAL RIGHTS IN 2020 TITLE IX REGULATIONS (CONT.)

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?



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.)

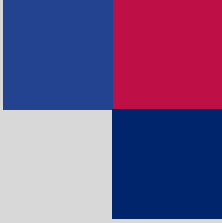
- Not staying in your lane
- Improper application of institutional policies or procedures
- Confirmation bias
- Implicit bias
- Animus of any kind, including race, religion, disability, etc.

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 Future Professional or Learning Leader is typically not sufficient to create a conflict of interest if objectivity not compromised
- Having previously disciplined a Future Professional or Learning Leader 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

HEARING TIPS

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.

ROLE DURING TESTIMONY

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

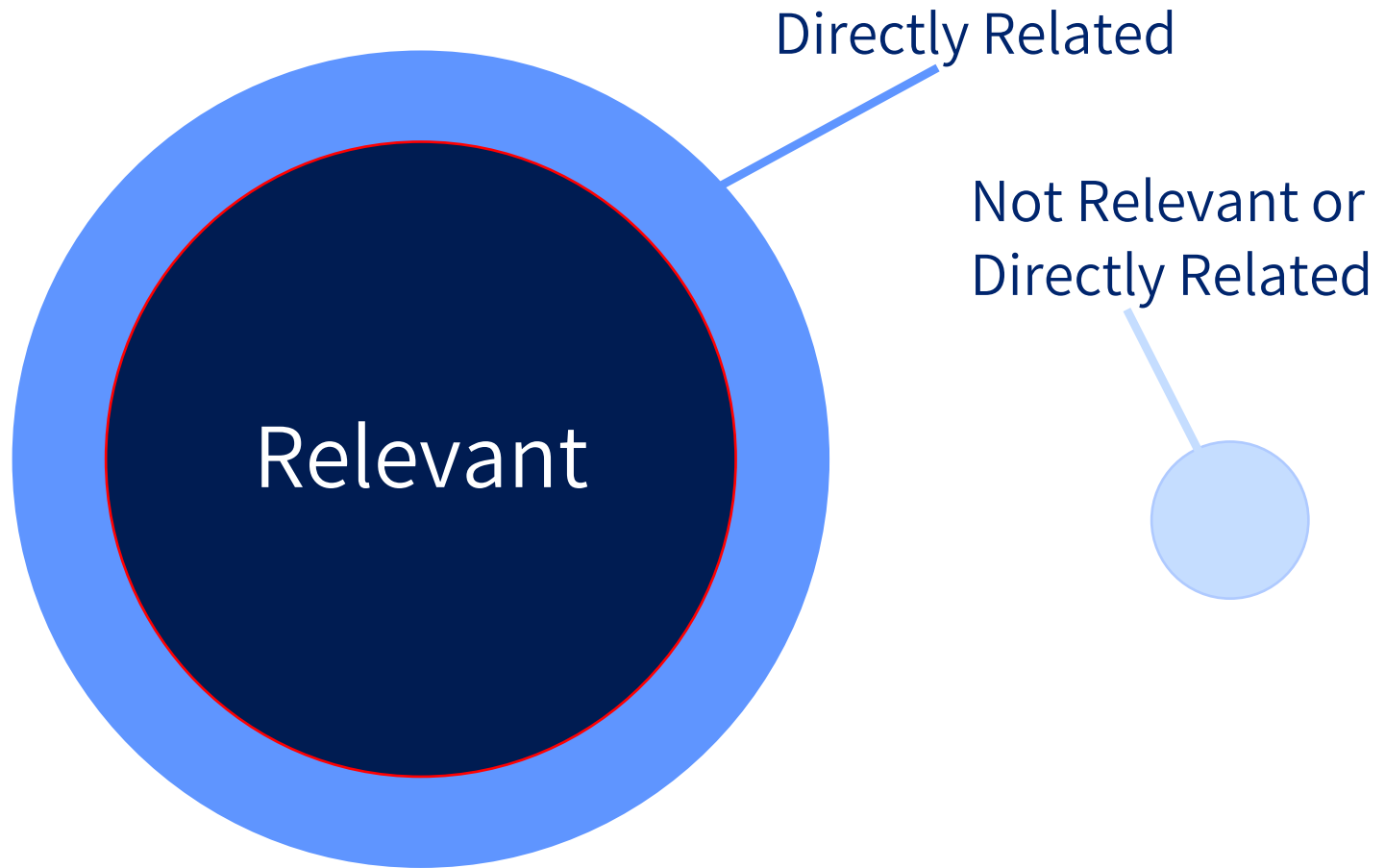
EVIDENCE

- 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)

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?

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

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

FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications
 - 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

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

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

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

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

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

FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

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

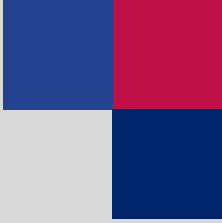
CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

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

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 (CONT.)

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?

FINDINGS VS. SANCTIONS

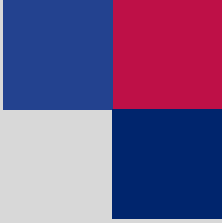
Findings, Impact Information, and Sanctions

- 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



CASE STUDIES

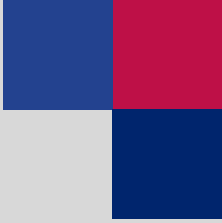
Seth and Caleb

- Seth and Caleb are both Future Professionals in the same program. Seth asked Caleb for their SnapChat account information and then subsequently asked Caleb to have sex. Caleb refused. Seth told Caleb, “C’mon, if you don’t have sex with me I’m just going to have to force you ;)”
- Caleb took a screenshot of Seth’s message and has brought a report to the Learning Leader accusing Seth of attempting to rape them. Caleb also then dropped out of the program after signing a formal complaint.
- During the investigation, none of this information is contested but neither party provided many additional details.
- What’s your determination? How would you decide?

Lance and Darcy

- Lance is a Learning Leader. Lance becomes increasingly informal with his class throughout the semester, both with male and female FPs. Some FPs describe Lance as being a bit “creepy” with the female FPs.
- During the investigation, it was reported that Lance stayed around and had chats about how some FPs, including Darcy, were “hot.” One FP said that Lance had called Darcy a “hot piece of ass.”
- Later in the program, Lance told a room full of FPs that his girlfriend was “very experienced.” That same day, Lance was seen giving Darcy his phone number, “just in case she ever needed a ride home.” As he told her this, he brought his hand into contact with her back and down to the small of her back, leaving his hand in contact with her for 5-10 seconds.
- Tory, a friend of Darcy’s brought this information to PM. Darcy never met with investigators and did not show for the hearing, but many witnesses did.

What’s your determination? How would you decide?



RATIONALE WRITING

DEFINING TERMS

- The **rationale** is the basis for a decision
- In an outcome letter, the rationale includes the explanation of the basis for the finding, the final determination, and any sanctions imposed
- A **finding** is a determination that the facts occurred as alleged, by the standard of evidence
- A **final determination** (also: decision, outcome) is an application of the policy to the evidence in the case, to determine by the standard of evidence whether policy was violated
 - Yes or no question for each alleged policy violation
 - Can be the result of a hearing and/or an appeal

PURPOSE OF THE RATIONALE

- The rationale is either a stand-alone document or a section of a larger document:
 - Rationale for dismissal (or non-dismissal)
 - Rationale for emergency removal
 - Rationale for Investigator's recommended finding/outcome, if included within the investigation report
 - Rationale for hearing final determination and sanctions, within the hearing outcome letter
 - Rationale for appeal decision within appeal outcome letter
- When part of a letter of outcome, there will be other disclosures required by the regulations in that notice
- Rationale should clearly identify what information was used in reaching the finding and final determination, including sanctions

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?

RATIONALES - 2020 TIX REGULATIONS

Required

- Rationale for dismissal (or non-dismissal)
- Rationale for hearing final determination and sanctions
- Rationale for appeal decision

Implied

- Rationale for emergency removal
This rationale is implied by the regulations, since an individualized assessment must be done and can be challenged.

Permitted

- Rationale for Investigator's recommended finding/outcome, if included within the investigation report
If it is provided, it must be non-binding on the Decision-maker(s)

RATIONALE TEMPLATE

- Summarize allegation(s)
- Include all policies potentially violated (per the Hearing Notice)
- Review evidence, then note which evidence was relied upon and which was not
 - If you are relying on evidence to make a determination, it needs to be cited in the rationale
 - Write from the premise that if you don't write it down, you will not get credit for the thoughtfulness of your analysis
 - If you did not rely on something, you need to say so, and state why

RATIONALE TEMPLATE (CONT.)

- Summarize and assess credibility; make a relative credibility comparison and conclusion
- Make and explain your finding (by the standard of evidence)
- Make and explain your final determination (by the standard of evidence)
- State any sanctions imposed and the basis for choosing them
 - Include: precedent, prior history, aggravating and mitigating factors, evaluation of cumulative or collateral violations, pattern behavior, Complainant's request, etc.

RATIONALE DRAFTING PROTOCOL

- Rationale for **dismissal** or **emergency removal** should be written by the Title IX Coordinator or designee (administrator who makes the decision).
 - This rationale can/should be **reviewed** (not written or rewritten) by TIXC and/or legal counsel prior to issuance
- **Hearing rationale** should be written by the Chair or Decision-maker. If more than one Decision-maker, either appoint a writer from panel, or share the writing collaboratively (not recommended).
 - This rationale can/should be **reviewed** (not written or rewritten) by TIXC and/or legal counsel prior to issuance
 - No matter what, all panel members should see, review, and sign off on final version

RATIONALE DRAFTING PROTOCOL (CONT.)

- **Appeal rationale** should be written by Appeal Decision-maker. If more than one Decision-maker, either appoint a writer from panel, or share the writing collaboratively (not recommended).
 - This rationale can/should be **reviewed** (not written or rewritten) by TIXC and/or legal counsel prior to issuance
 - No matter what, all panel members should see, review, and sign off on final version

KEEP YOUR AUDIENCE IN MIND

Write with the following audiences in mind:

- TIXC and/or legal counsel - can/should review all rationales
- The parties (and their Advisors, who are often attorneys) - receive copies of outcome letters
- The hearing Decision-maker(s) and/or Investigator(s) may see rationales from earlier or later stages in the process
- The Appeal Decision-maker - will review all rationales

Assume that what you write can/may be reviewed by parents/guardians, litigation counsel, your insurance company, OCR, reporters, judges, juries, the public, etc.

BEST PRACTICE TIPS

- Write with one voice, not a committee
- All panelists should contribute to and/or review the rationale
- Don't issue dissents, or indicate what the vote was (2 to 1)
- Commonly 1-15 pages in length, depending on complexity
- Write in active voice (Ex. I determined vs. it was determined)
- If more than one Respondent, write a separate rationale for each one
- If the investigation report offers a rationale, and you simply adopt it as the final determination, it will be harder to defend the objectivity of the hearing decision

BEST PRACTICE TIPS (CONT.)

- When there are multiple alleged violations, the rationale should typically flow from analysis of the broadest offense to the narrowest (rather than from most severe to least severe)
 - Include a rationale for each policy violation (if more than one)
- Ensure that the Decision-maker(s) arrive at the rationale independently and impartially. Your TIXC and legal counsel are there as guardrails, and to ask probing questions, but should not exert untoward influence on the outcome (assuming the TIXC is not a Decision-maker, though they may be for dismissals or emergency removal).



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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