



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

---

September 2020 | Virtual Instructor-Led Training

# AGENDA: DAY ONE



- I. Title IX Basics
- II. Mission/Role of Decision-Maker
- III. Due Process
  - Due Process in Procedure
  - Due Process in Decision
  - Procedural Rights in 2020 Regulations
  - Standard of Evidence
- IV. The Title IX Process
  - Steps leading up to a Hearing
- V. Bias, Conflicts of Interest, and Recusal
- VI. Preparing for the Hearing
- VIII. Decision-Making Skills, Part One
  - Understanding Evidence
  - Relevance
  - Relevance and Evidentiary Restrictions
  - “Three Buckets” of Evidence
- IX. Relevance Exercise
- X. Decision-Making Skills, Part Two
  - Reliability/Credibility
  - Cross-Examination

# AGENDA: DAY TWO



## I. Policy Terms

- Sexual Harassment
  - Quid pro Quo
  - Hostile Environment
  - Sexual Assault
  - Domestic Violence
  - Dating Violence
  - Stalking
- Other forms of sexual misconduct
- Retaliation

## II. ATIXA Consent Construct

## III. Questioning Skills

## IV. Questioning Activity

## V. Making a Decision

- Deliberations
- Analyzing information
- Sanctions
- Written Determinations

## VI. Appeals

## VII. Recordkeeping and Documentation

## VIII. Scenarios: Learning Outcome

Attainment (discussion if time allows or self-test)

# TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. PART 106



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



# THE IX COMMANDMENTS



<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>	Investigation (prompt & fair – VAWA Sec. 304)
<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>	Process
Not act unreasonably to end the discrimination	Not act unreasonably to prevent recurrence	Act equitably to remedy effects	Remedies



WHAT IS YOUR MISSION  
AS A DECISION-MAKER?

---

# HEARING OFFICER/DECISION-MAKER RESPONSIBILITIES



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

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



# THE GOAL



AN EQUITABLE RESULT FROM  
AN EQUITABLE PROCESS



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



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

# WHEN AND HOW THE “DECISION-MAKER” WORKS



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

# HEARING OFFICER/DECISION-MAKER COMPETENCIES



- The Legal Landscape
- The Conduct/Disciplinary Process
- Understanding Investigations
- Title IX & VAWA Requirements
- Pre-Hearing Evidence Review
- Pre-Hearing Investigation Report Review
- Critical Thinking Skills
- How to Prepare for a Hearing
- Hearing Decorum
- Questioning Skills, including Relevance
- Weighing Evidence, including Relevance
- Analyzing Policy
- Applying Standards of Evidence
- Sexual Misconduct/Discrimination
- Technology Used at Hearing
- Controlling Evidence
- Managing Advisors
- SANE and Police Reports

# HEARING OFFICER/DECISION-MAKER COMPETENCIES (CONT.)



- Presumption of Innocence
  - Due Process and Fairness
  - Domestic/Dating Violence
  - Bias/Impartiality/Conflicts of Interest
  - Stalking/Sexual Assault/Harassment
  - Deliberation
  - Sanctioning/Remedies
  - Understanding the Appeal Process
  - Cultural Competency
  - Intersection with Mental Health
- Issues
- Concurrent Criminal Prosecutions
  - Impact of Failing to Testify/Answer
  - Drawing Inferences?
  - Manage Accommodations During Process
  - Fixing Procedural Deviations
  - Managing Impact Statements
  - Writing Decisions/Rationales
  - Role in Appeal Process?

# THE CHALLENGE FOR HEARING OFFICERS/DECISION-MAKERS



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

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



# WHAT IS DUE PROCESS?



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

# “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.
  - Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigative interviews or other meetings, with sufficient time to prepare.
  - Inspect and review evidence and draft investigation report before finalized.
  - Right to argue for inclusion of "directly related" evidence at the hearing.
  - Ask relevant questions of the other party and witnesses through an advisor, in the presence of the decision-maker.

# EVIDENTIARY STANDARD



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

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

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

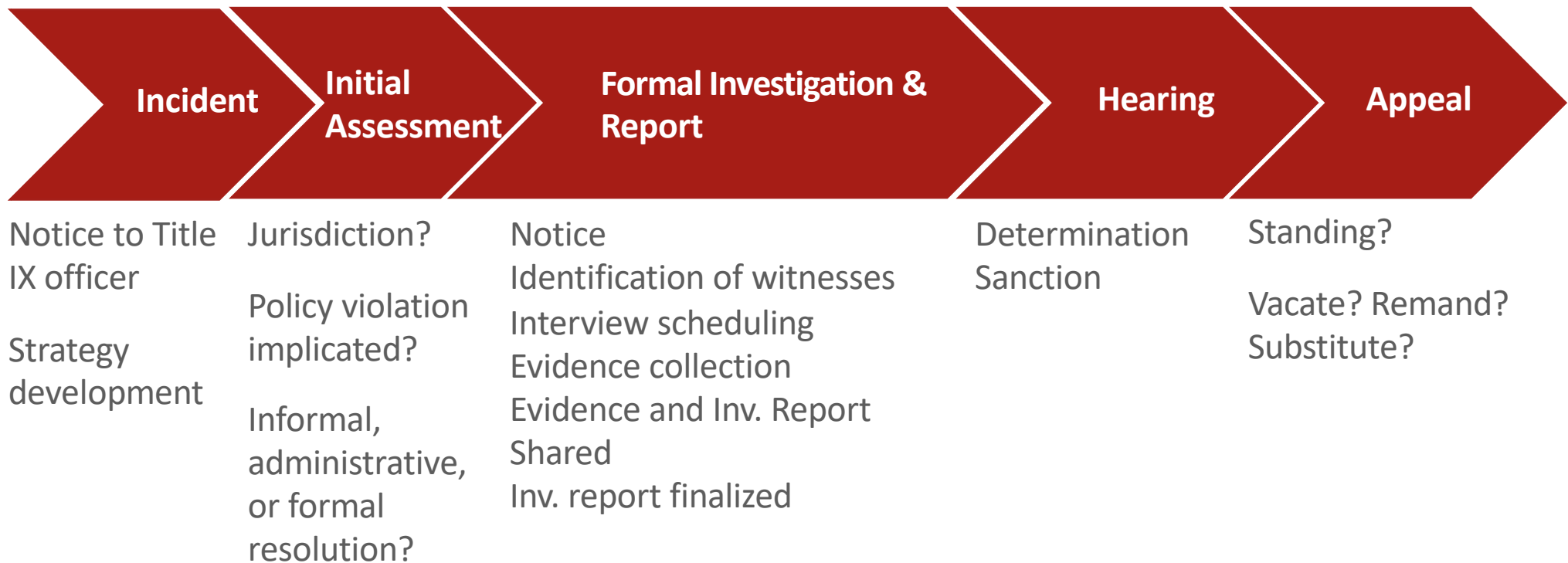
- The only equitable standard
- 50.1% (50% plus a feather)
- The “tipped scale”

# THE “TITLE IX PROCESS:” WHAT HAPPENED BEFORE IT GOT TO A HEARING?

- 
- Title IX
  - The IX Commandments
  - The General Phases of a Title IX Process
  - Ten Steps of an Investigation
  - Key Elements from new Title IX regulations



# THE PROCESS



# 10 STEPS OF AN INVESTIGATION



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

# 10 STEPS OF AN INVESTIGATION (CONT.)



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

# EVIDENCE REVIEW PERIODS



# CIVIL RIGHTS INVESTIGATION MODEL VERSUS STUDENT CONDUCT MODEL



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

- Advisors chosen by the party must conduct thorough cross-examination, but the extent to which they do so may be influenced by strategy.
- Thus, they can opt not to ask any questions.
- If they refuse to ask questions their advisee wishes them to ask, the institution will appoint an advisor who will do so.
- An advisor appointed for the party will conduct cross-examination of the other party(ies) and witnesses, if that is the agreed upon strategy.
  - The regulations envision that the advisor will not do more than repeat or rephrase questions framed by the party, but in many hearings, expect that the advisor will be far more active and engaged than that.



# PRESUMPTION OF NON-RESPONSIBILITY



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

# TRAINING MANDATES



- The definition of sexual harassment in § 106.30
- How to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.
- Understanding the scope of the recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
- How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

# LIVE HEARING



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

# BIAS, CONFLICTS OF INTEREST, AND RECUSAL

---

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

# CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS



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



# BIAS



- Among the most significant problems for hearing decision-makers
- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
  - Pre-determined outcome
  - Partisan approach by investigators in questioning, findings, or report
  - Partisan approach by hearing board members in questioning, findings, or sanction
  - Intervention by senior-level institutional officials
  - Not staying in your lane
  - Improper application of institutional procedures
  - Improper application of institutional policies
  - Confirmation bias
  - Implicit bias
  - Animus of any kind

# BIAS AND CONFLICT OF INTEREST



- Types of conflicts/bias:
  - Wearing too many hats in the process
  - Legal counsel as investigator or decision-maker
  - Decision-makers who are not impartial
  - Biased training materials; reliance on sex stereotypes
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.
- Also, having disciplined a student or employee previously is often not enough to create a conflict of interest.

- Decision-makers may determine that they need to recuse themselves from hearing a particular case or a party might seek a decision-maker's recusal.
- This is why having an alternate decision-maker on hand is always wise.
- Your policy should define the process and circumstances by which a party may seek to recuse a decision-maker.
- Typically the Title IX Coordinator determines whether or not to honor the request.
- If you yourself discern that you are not able to hear a case impartially, please let your Title IX Coordinator know immediately.

# PREPARING FOR THE HEARING

---

# PRE-HEARING MEETINGS



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

# PRE-HEARING PREPARATION



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

# MUST DO: PREP FOR THE HEARING



## All Decision-Makers Must Review:

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

# PREPARING QUESTIONS



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



# PREPARING FOR THE HEARING



- Dress professionally – Jeans, t-shirts, shorts, or sandals are not appropriate
- Arrive prepared and early
- Bring snacks and water/drinks
- Turn off your phone! And put it away!
- Bring a pen and paper or note-taking device
- Clear calendar after the hearing – deliberation could take 30 minutes or it could take much longer.
- Note-writing tips
  - Less is better; record what you need to make a determination.

# QUICK TIPS ON HEARING LOGISTICS

---

# THE HEARING: GENERAL LOGISTICS



- Recording
    - how, by whom, etc.
  - Attendance by parties and witnesses
  - Location and Room set-up
    - Comfort items (water, tissues, meals if needed)
    - Privacy concerns; sound machine
  - Seating arrangements
  - Materials
- Access to administrative support if needed (phones, copiers)
  - Advisors
  - Parties and witnesses waiting to testify
  - Breaks
  - Use of A/V
  - Waiting for a decision

# HEARING DECORUM



- Be professional, but not lawyerly or judge-like
  - This is not *Law and Order* – this is an administrative process at a school.
  - You are not cross-examining or interrogating, you are striving to determine whether the Respondent(s) violated the institutional policy.
- Be respectful
  - Tone, Manner, Questioning.
  - Sarcasm or being snide are never appropriate.
  - Maintain your composure: Never allow emotion or frustration to show.

# HEARING DECORUM



- Work to establish a baseline of relaxed conversation for everyone in the room.
- Maintain good eye contact; “listen with your eyes and your ears”
- Listen carefully to everything that is said.
  - Try not to write too much when people are talking
  - If questioning, focus on the answer, rather than thinking about your next question
- Nod affirmatively
- Do not fidget, roll your eyes, or give a “knowing” look to another panel member
- Do not look shocked, smug, stunned, or accusing

## Tips for Hearing Officers/Decision-Makers

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

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

- Determine the relevance and appropriateness of questions. Pause after each question to “rule” on relevance. 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 Hearing Officers/Decision-Makers.
- Recognize positional authority.

# DECISION-MAKING SKILLS, PART ONE

- 
- Understanding Evidence
  - Relevance



# UNDERSTANDING EVIDENCE



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

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

# ASK YOURSELF



Is it **relevant**?



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



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

# RELEVANCE



- Evidence is generally considered *relevant* if it has value in proving or disproving a fact at issue.
  - Regarding alleged policy violation and/or
  - Regarding a party or witness's credibility.
- The investigator will have made initial relevance “decisions” by including evidence in the investigation report...
- But relevance is ultimately up to the decision-maker, who is not bound by the investigator's judgment.
- **All** relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory.

- If the investigator indicates an opinion on credibility, outcome, whether policy was violated, how evidence should be weighed, etc., that opinion or recommendation is not binding on the decision-maker.
- The decision-maker may consider it, but has to be objective and independent, and is free to accept or reject any recommendation of the investigator (or ask them not to make one)
  - Should you ask for it or ask the investigator to clarify their recommendations?

# UNDERSTANDING EVIDENCE



- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible:
  - Documentary evidence (e.g. supportive writings or documents).
  - Electronic evidence (e.g. photos, text messages, and videos).
  - Real evidence (i.e. physical objects).
  - Direct or testimonial evidence (e.g. personal observation or experience).
  - Circumstantial evidence (i.e. not eyewitness, but compelling).
  - Hearsay evidence (e.g. statement made outside the hearing but presented as important information).
  - Character evidence (subject to a relevance determination, but often not probative of the underlying allegation).
- Decision-makers should typically disregard:
  - Impact statements (typically only relevant in sanctioning).

# SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS



- Evidence of the Complainant's prior sexual behavior or predisposition is explicitly and categorically **not relevant** except for two limited exceptions:
  - Offered to prove that someone other than the Respondent committed the conduct alleged, or
  - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant.
- Does not apply to Respondent's prior sexual behavior or predisposition.

# ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS



Additional permissions required for:

- Records made or maintained by a:
  - Physician
  - Psychiatrist
  - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission.
  - This is complex in practice because you won't know to ask for permission unless you ask about the records first.



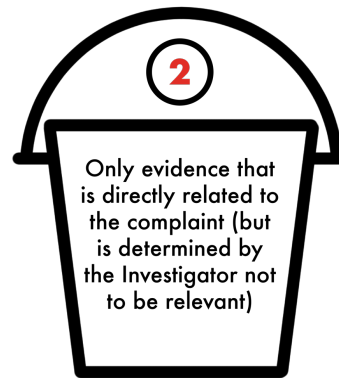
# THREE BUCKETS OF EVIDENCE



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.

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 1 or 3.

Once finalized, this evidence should be provided to the Parties/Advisors/Chair in a separate file via secure technology.

Evidence is directly related when it is connected to the complaint, but is neither inculpatory (tending to prove a violation) nor exculpatory (tending to disprove a violation) and will not be relied upon by the investigation report.



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

© 2020 ATIXA. All Rights Reserved.

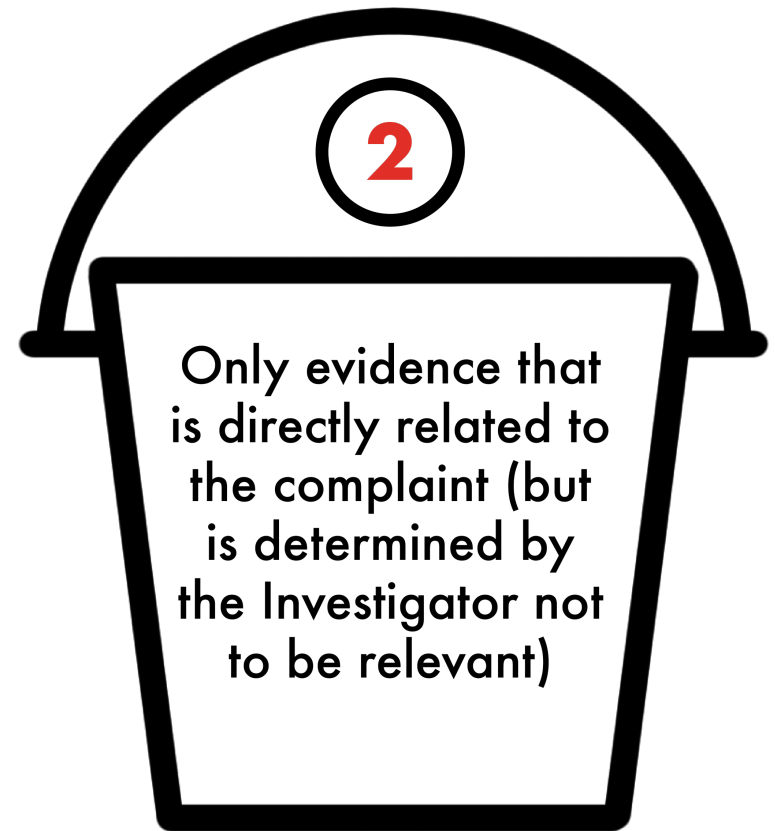
# BUCKET 1

- 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.
- Evidence is relevant when it tends to prove or disprove an issue in the complaint.



# BUCKET 2

- 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/Chair in a separate file via secure technology.
- Evidence is directly related when it is connected to the complaint, but is neither inculpatory (tending to prove a violation) nor exculpatory (tending to disprove a violation) and will not be relied upon by the investigation report.



## BUCKET 3

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



# OTHER EVIDENCE MAY BE DIRECTLY-RELATED



- Evidence is directly-related when it is connected to the complaint but is neither inculpatory (tending to prove a violation) nor exculpatory (tending to disprove a violation) and will not be relied upon by the investigation report.
- This evidence comes to the Decision-maker(s) pre-hearing, in Bucket #1 (the investigation report) or in Bucket #2, the evidence file of what is considered directly-related.
  - How will you want investigators to address records that combine elements of both relevant and directly-related evidence?
- Although the investigator has initially sifted the evidence into these buckets, the Decision-maker makes the final allocation of what evidence will be relied upon and what will not.

# ADDITIONAL EVIDENCE CONSIDERATIONS IN HEARINGS



- In court, we often see issues of “admissibility,” which means the question of whether evidence can be seen, heard, and/or considered by Decision-makers.
- In the Title IX hearing, we are often going to see Bucket #1 and #2 evidence “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 to answer certain questions.
- However, the Decision-makers and/or Chair need to determine whether the evidence can and will be relied upon if it is introduced, and there will be a decent amount of trying to “unhear” what is introduced, because even though you know it, you can’t consider it.

# RELEVANCE EXERCISE

---

# CASE STUDY: IVAN & JUANITA



- Juanita Morales, a freshman member of the women's soccer team, made a Title IX report directly to the Title IX Coordinator.
- On the morning of October 11, her teammate, who was checking her email in the computer lab, yelled for Juanita to come and look at something on the computer.
- Juanita saw an email sent from the boy's soccer team email address, menssoccer@school.edu, which said "Greetings new freshman, meet the girl next door"
- The email included a photo of Juanita's face photoshopped onto a naked body with huge breasts.



# CASE STUDY: IVAN & JUANITA



- Everyone in the lab knew it wasn't Juanita, but they all laughed anyway.
- Juanita ran from the room crying, embarrassed that others would think it was her.
- She immediately called Ivan, a member of the men's 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.

# 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, not a porn picture or anything. 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. In fact, the First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

# CASE STUDY: IVAN & JUANITA



- Ivan stated that he showed the photo to a couple of teammates but did not send the email.
- The email account is for official team business. The coaches and captains have the password; one captain has shared it broadly with all the seniors on the team.
- The investigator also consulted with John Wang, assistant director of information technology.
- John was able to confirm that someone using the computer lab computer sent the picture from the men's soccer team email account.

# CASE STUDY: IVAN & JUANITA



- The picture was inserted into the email via a flash drive and he was unable to determine which student had logged in.
- 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.
- He said that when he doesn't have his laptop with him, it is typically inside his locker. Ivan also told him that he hasn't given anyone else his laptop password.

# EXERCISE: IS IT RELEVANT?



- Ivan was notified via the institution's NOIA letter that it is alleged that he violated the institution'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.

# WARMUP: IS IT RELEVANT?



You are the Chair of the Hearing Panel. You must determine whether the following questions seek relevant information and/or whether the specific piece of evidence is relevant.

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

- Ivan is a member of the men's soccer team?
- Juanita is a member of the women's 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 lab computer?
- Ivan consented to letting John from IT inspect his laptop?

# 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.
- Ivan’s high school soccer coach has prepared a written character reference for Ivan, which states that he was an upstanding member of his high school team and community, a four-year leader on the squad, and volunteered many times at the local YMCA youth program.

# IS THIS RELEVANT?



- Ivan stated that at the time that the email was sent, he was attending his poli sci class, which had an in-class exam 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.
- Ivan's advisor wants to ask Juanita about her academic progress during the fall term. Ivan and his advisor believe that Juanita was in danger of failing her chemistry course.



# POP QUIZ: RELEVANT OR DIRECTLY RELATED?



- The Complainant writes in her online written formal complaint form narrative that she has been experiencing significant mental health issues since being sexually assaulted, including PTSD (self-diagnosis). Respondent brings this up at the hearing, 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?
- Complainant states in her opening statement at the hearing that she did not consent to sex with 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?

# DECISION-MAKING SKILLS, PART TWO

- 
- Reliability/Credibility
  - Cross-Examination
  - Analyzing the Information

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



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

# QUESTIONING & CROSS-EXAMINATION



- The live hearing requirement for higher education allows the parties to ask (direct and) cross-examination questions of the other party and all witnesses through their advisor.
  - Advisor of choice or an advisor provided by the institution, at no cost to the parties.
- Such cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- Permit relevant questions and follow-up questions, including those challenging credibility. Decision-makers may ask an advisor to explain why they think a question is relevant or will lead to a relevant answer.
- Decision-maker must first determine whether a question is relevant and direct party to answer.
  - Must explain any decision to exclude a question as not relevant.
- Managing advisors.

# QUESTIONING & CROSS-EXAMINATION



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

# QUESTIONING & CROSS-EXAMINATION



- If a party or witness does not submit to cross-examination at the hearing, the decision-maker(s) must not rely on any statement of that party or witness (from the investigation or hearing) in reaching a determination regarding responsibility.
  - This means that a party or witness must answer *all* relevant cross-examination questions that are posed. One refusal will trigger the prohibition that the decision-maker may not rely on any statements.
  - First question to ask each party and all witnesses: “Do you intend to answer all questions directed to you today?”
- The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.
  - What is an inference and how does it work?

# WHAT IS CREDIBILITY?



- Accuracy and reliability of information.
- Ultimately the decision-maker's role to determine the credibility of testimony and evidence, and hence its reliability.
- “Credible” is not synonymous with “truthful.”
- Memory errors, evasion, misleading may impact credibility.
- Primary factors: corroboration and consistency.
- Avoid too much focus on irrelevant inconsistencies.
- Source + content + plausibility.
- Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness.

“Sexual assault” means an offense classified as a forcible or non-forcible sex offense under the uniform crime reporting system of the FBI.”

# CREDIBILITY



- Inherent plausibility
  - “Does this make sense?”
  - Be careful of bias influencing sense of “logical.”
- Motive to falsify
  - Do they have a reason to lie?
- Corroboration
  - Aligned testimony and/or physical evidence.
- Past record
  - Is there a history of similar behavior?
- Demeanor
  - Do they seem to be lying or telling the truth?

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

EEOC (1999)



# 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

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

## Inherent plausibility

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

## Inherent plausibility

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

# TRIANGULATING CREDIBILITY



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

# TRIANGULATING CREDIBILITY



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

# FACTORS TO CONSIDER FOR CREDIBILITY



## Motive to falsify

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

# FACTORS TO CONSIDER FOR CREDIBILITY



## Past record

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



# FACTORS TO CONSIDER FOR CREDIBILITY



## Demeanor

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

# CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS



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

# CREDIBILITY IN THE HEARING



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

# CREDIBILITY DETERMINATIONS POST-HEARING



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

# POLICY DEFINITIONS

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

# SEXUAL HARASSMENT POLICY



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

# HOSTILE ENVIRONMENT: “SEVERE”



*“The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. Indeed, a single or isolated incident of sexual violence may create a hostile environment.”*  
—(Q&A: A-3)

(2001 Guidance).

- Physical is more likely to be severe without need for repetition:
  - Sexual assault or forcible fondling cases are almost always sufficiently severe.
  - Consider the circumstances: E.g., the 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.
- Well-known among students or employees – reputation of a department, person, etc.
- Occurring in public spaces (more likely to be pervasive).
- “Harassment is pervasive when incidents of harassment occur either in concert or with regularity” (2001 Guidance: Footnote 44).
- 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).



# HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”



- Reasonable person standard in context.
- “I know it when I see it...”
  - Age and relationships of accuser and accused.
  - Number of persons involved.
  - Frequency.
  - Severity.
  - Physically threatening.
  - Humiliation.
  - Intimidation.
  - Ridicule.
  - Abusive.
- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”

# 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.
- Was there an effective denial of education or employment access?
- If SPOO, a discriminatory effect is presumed (proven)

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES



- 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, and applying the standard of evidence, then the Respondent is “not responsible.”
  - Hostile environment cases 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.
- 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.

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

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

# SEXUAL ASSAULT



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

## Sex Offenses, Nonforcible: Nonforcible sexual intercourse.

- **Incest:** Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by state law.
- **Statutory Rape:** sexual intercourse with a person who is under the statutory age of consent of [age in your state].
  - This offense only applies if conduct is “consensual” with minor. If forced or against will of victim, revert to Forcible Rape definition.

# CONSENT



- Consent can be defined per state law or best practices.
  - ATIXA Model Definitions found in *1P2P* or *The Playbook*.
- Although the new regulatory definition of sexual assault is ostensibly consent based, it's not a great analytical tool. Luckily, the wording is generic enough to permit ATIXA best practice interpretations to be fully applicable.
- Be aware that the FBI's definition of rape (upon which the regulatory definition rests) will change again soon, likely in 2021. Your definition will have to shift then as well.
  - “carnal knowledge” coming soon to a campus sexual assault policy near you!



## Dating Violence is defined as

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant.
- The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- For the purposes of this definition,
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.

# DOMESTIC VIOLENCE



- **Domestic Violence** is defined as a felony or misdemeanor crime of violence committed:
  - By a current or former spouse or intimate partner of the Complainant;
  - By a person with whom the Complainant shares a child in common;
  - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
  - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

# DOMESTIC VIOLENCE



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

# STALKING



- **Stalking** is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - Fear for the person’s safety or the safety of others; or
  - Suffer substantial emotional distress.
- For the purposes of this definition—
  - Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
  - Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
  - Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

**Please, please, please, don’t interpret this to violate anyone’s First Amendment rights.**

# OTHER ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION



- Though not part of the Title IX “Sexual Harassment” definition, other conduct could be prohibited under a campus sexual misconduct policy, including:
- **Sexual Exploitation**
  - Occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute sexual harassment.

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



Examples of sexual exploitation include, but not limited to...

- Invasion of sexual privacy.
- Non-consensual digital, video, or audio recording of nudity or sexual activity.
- Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.
- Engaging in voyeurism.
- Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex).

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



- Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.
- Intentionally or recklessly exposing one's genitals in non-consensual circumstances or inducing another to expose their genitals.
- Sexually-based stalking and/or bullying may also be forms of sexual exploitation.

# OTHER SEX-BASED MISCONDUCT OFFENSES THAT MAY BE ADDRESSED BY POLICY



- Bullying/cyberbullying.
- Hazing.
- Threatening or causing physical harm.
- Conduct which threatens or endangers the health or safety of any person.
- Discrimination.
- Intimidation.



# RETALIATION



- No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
  - Does this now apply to private colleges?
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation if it is based on more than evidence that a Respondent violated the sexual harassment policy.

# RETALIATION BASIC LEGAL PRINCIPLES



*Title IX regulations prohibit recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX.*

- Protected activity under Title IX:
  - Reporting sex discrimination, including sexual harassment and assault.
  - Filing a discrimination complaint.
  - Assisting someone in reporting discrimination or filing a complaint.
  - Participating in any manner in an investigation of discrimination, for example as a witness.
  - Protesting any form of sex discrimination (e.g. lack of equity in athletics).

# DETERMINING RETALIATION CLAIMS: KEYS TO UNDERSTANDING



- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate.
- Someone's intention is rarely displayed openly. Therefore, the policy framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

# 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.

# RETALIATION AND ADVERSE ACTION



- Common definition of **adverse action**:
  - Significantly disadvantages or restricts the individual as to their status as students or employees, or their ability to gain the benefits or opportunities of the program; or
  - Precluded from their discrimination claims; or
  - Reasonably acted or could act as a deterrent to further protected activity.
  - The U.S. Supreme Court and the federal courts have defined adverse action **very broadly**.

# ATIXA CONSENT CONSTRUCT

- 
- Force
  - Incapacity
  - Consent

# CONSENT IS...



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

# OVERVIEW OF THE 3 CONSENT QUESTIONS



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



There are four types of force to consider:

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

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

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

# INCAPACITY ANALYSIS



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

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

# KNOWLEDGE CONSTRUCT



- The evidence might also include contextual information to analyze any behaviors by the Complainant that seem “out of the norm” as part of a determination of incapacity:
  - Did the Respondent know the Complainant previously?
  - If so, was the Complainant acting very differently from previous similar situations?
  - Review what the Respondent observed the Complainant consuming (via the report’s timeline).
  - Determine if Respondent provided any of the alcohol to the Complainant.
  - Consider other relevant behavioral cues.
- What if the Respondent experiences memory loss, too?
  - Failing to remember the details of reported misconduct does not negate potential responsibility.

# FINAL INCAPACITY ANALYSIS



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

# CONSENT



Question 3 is the Consent question:

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



# CONSENT: RULES TO REMEMBER



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

# QUESTIONING SKILLS & GUIDELINES

---



# 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 received previously.
- **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 ACTIVITY



# QUESTIONING ACTIVITY



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

# MAKING A DECISION

---

- Deliberations
- Analyzing Information and Making Findings
- Sanctioning
- Written Determination

# OVERVIEW OF THE DELIBERATION PROCESS



- Only decision-makers attend the deliberations.
  - Parties, witnesses, advisors, and others excused.
  - If Title IX Coordinator is present, they do not participate and only serve as a resource to the decision-makers.
  - ATIXA recommends they not participate. Same with legal counsel.
- Do not record; recommend against taking notes.
- Parse the policy again; remind yourselves of the elements that compose each and every allegation.
- Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial.
- Determine whether it is more likely than not that policy has been violated or determine whether highly probable if C&C standard applies.

## General Information

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

**Withhold judgment until all the evidence has been considered.**

## Foundation for Decisions

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

## Findings, Impact Information, and Sanctions

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

# SANCTIONING IN SEXUAL MISCONDUCT CASES



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

# COMMON STUDENT SANCTIONS



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



# WRITTEN DETERMINATIONS



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

# WRITTEN DETERMINATIONS: LOGISTICS



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

# APPEALS

---

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

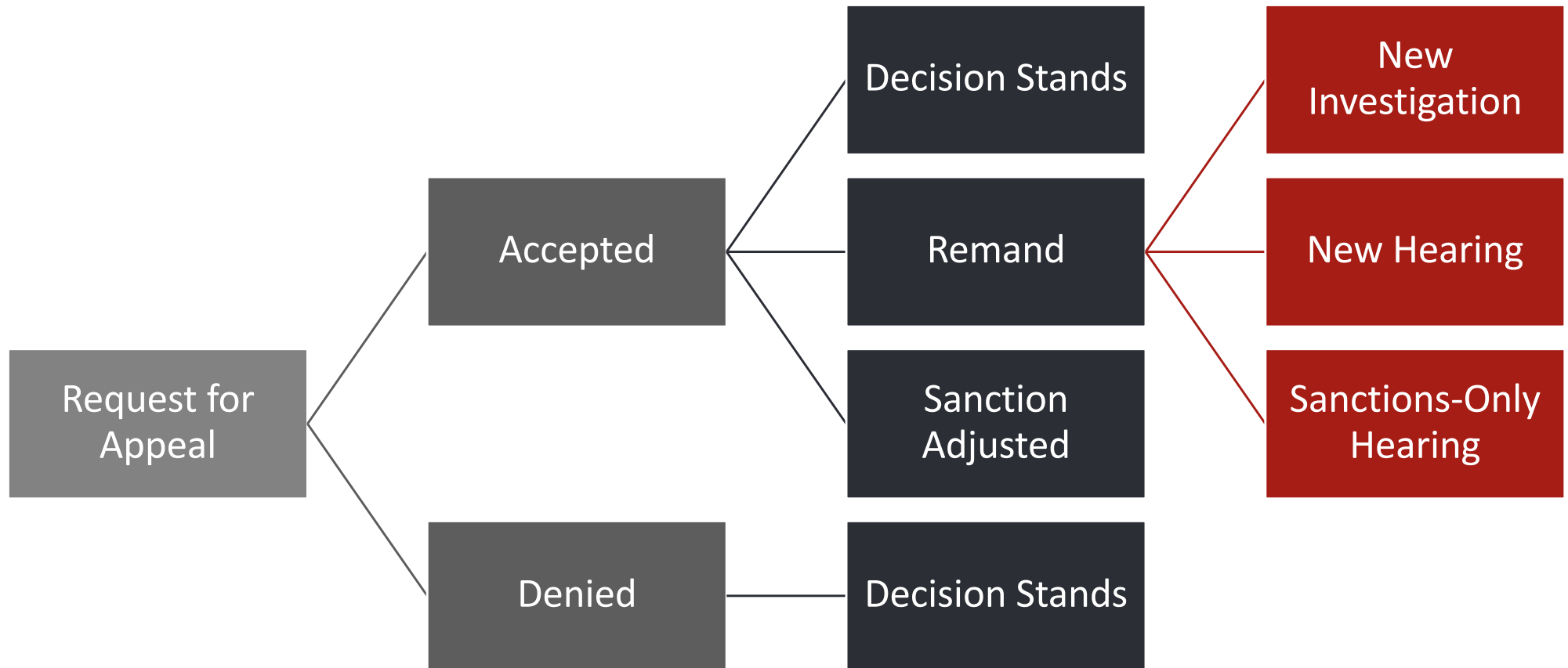
- The appeal decision-maker may be an individual or a panel.
  - Cannot be the Title IX Coordinator.
  - Cannot be the investigator or decision-maker in the original grievance process.
  - Recipient may run a pool of decision-makers who sometimes serve as hearing or appeal decision-makers
  - Recipient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

# GROUNDINGS FOR AN APPEAL



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

# APPEALS: THE PROCESS



# APPEALS: OTHER ATIXA RECOMMENDATIONS



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

# RECORD-KEEPING AND DOCUMENTATION

---



# RECORD-KEEPING AND DOCUMENTATION



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

# LEARNING OUTCOME ATTAINMENT SCENARIOS

---

# SCENARIO 1: SEXUAL HARASSMENT/ QUID PRO QUO



- Kristen is trying to decide which professor to take for her Advanced Social Work Practice course this semester, so she goes onto RateMyProfessor.com to learn more about the professors. Kristen comes across a picture of Dr. McDreamy and decides to register for his course because she thinks he is so attractive. Once the semester begins, Kristen makes sure she arrives to class early so she can get a seat in the front row. As he lectures, Dr. McDreamy seems often to look at Kristen and give her a little wink. Kristen always blushes and gives a slight smile in response. Dr. McDreamy often walks around the classroom to monitor the students' progress as they complete assignments. He frequently stops behind Kristen's chair where he puts his hand on her shoulders and leans in to speak with her. Kristen doesn't mind.
- One day after class, Dr. McDreamy tells Kristen that he needs to see her in his office. Kristen goes to his office where Dr. McDreamy proceeds to tell Kristen that he has concerns about her performance in the class, as she did not do well on the last test and is on track to earn a "D" for the course.

# SCENARIO 1: SEXUAL HARASSMENT/ QUID PRO QUO



- Dr. McDreamy tells Kristen they can talk over coffee about how she can pass the class. Kristen agrees. While at the coffee shop, they have a conversation which Kristen finds to be engaging. Dr. McDreamy then tells Kristen it's not often that he has students in his class who are as beautiful as she is. Kristen thanks him and tells him she finds him attractive too and admits that is the reason she registered for his class. Dr. McDreamy reiterates that he wants to help Kristen pass his class and asks if she is open to a little non-traditional extra credit. Kristen says that she will take any help she can get with passing his class. The two continue talking for a little while, in a flirty manner, and end up going to Dr. McDreamy's house where they kiss and undress each other and proceed to have intercourse. Kristen returns to campus and tells her roommate that she just had a date with the hottest professor on campus. The following week, Dr. McDreamy gives a test which Kristen passes with flying colors. Throughout the semester, Kristen and Dr. McDreamy go out on occasion and have intercourse a few more times. At the end of the semester, Kristen ends up passing the course with a 94%, which is the highest grade in the class.

# SCENARIO 1: SEXUAL HARASSMENT/ QUID PRO QUO



- What elements do you consider to determine whether Dr. McDreamy is or is not in a position of power or authority over Kristen?
- What facts do you consider when assessing whether this was welcomed or unwelcomed conduct?
- For purposes of this question, assume the conduct was unwelcome. What additional information could help inform whether Dr. McDreamy's statement about "non-traditional extra credit" implicates either an explicit or implicit condition for her grade?
- Has Dr. McDreamy violated the Sexual Harassment/Quid Pro Quo Policy?

## SCENARIO 2: UNWELCOME KISSING



- Jane and Anisha met freshman year when they lived on the same floor in the same residence hall. They became new members of the same sorority and spent a lot of their down time playing video games or studying together. Sophomore year, Anisha lived in the sorority house and Jane lived in an off-campus house with friends. One Saturday night after a large party at a fraternity, people went to Jane's house to continue partying. As the party began to wind down there were just a couple of people left in the house, including Jane and Anisha, who were playing a video game on the couch. They were talking about being so drunk and "slap happy" because it was so late. Jane beat Anisha at the game, and Anisha tackled Jane on the couch. Both were laughing and wrestling and Anisha was "giving Jane shit" about always beating her. Jane had her arms around Anisha and said, "I love you, bitch." Anisha said, "I love you, too," and kissed Jane on the mouth. Jane pushed Anisha away and jumped off the couch, spitting and wiping her mouth on her arm. Jane said, "What the fuck, dude? Are you lez or something?" Anisha responded, "I'm sorry. I thought...I'm sorry." Anisha left the house quickly after that and has not heard from Jane again.

# SCENARIO 2: UNWELCOME KISSING



- Jane reported Anisha for sexual assault the following Monday. She reported Anisha was drunk, pinned her down on the couch, and kissed her. In conversation with investigators, Jane acknowledged that Anisha likely did not tackle her with the intent of kissing her. Jane explained that when she said, “I love you, bitch,” she did not mean it with any romantic connotation, and she expected Anisha to know that. Jane says the kiss was unwelcome and Anisha should know that it’s not okay to do that. She also wants Anisha to stay away from her.
- Anisha says it was a simple misunderstanding. She wasn’t sure if Jane knew Anisha was bisexual, but she thought the situation (arms around each other, saying “I love you”) gave her an opportunity and she took it. She’s embarrassed and realizes now that Jane didn’t mean it the way Anisha thought.

# SCENARIO 2: UNWELCOME KISSING



- Did Anisha sexually assault Jane? What additional information would assist in this analysis?
- Does the behavior constitute sexual harassment? If so, does it rise to a level of sexual harassment that warrants discipline?
- Did Anisha engage in force? What evidence do you consider?



# SCENARIO 3: SEXUAL HARASSMENT/ HOSTILE ENVIRONMENT



- Travis was a new member of the school's lacrosse team and thrilled to be on the team. After the first day of practice, Justin, the team captain, came up to Travis and told him how happy he was that Travis made the cut. In the middle of the second week of practice, as Travis was changing in the locker room, Justin came up to Travis, placed his hand on Travis's bare back, and told Travis that he was into guys and thought Travis was too. Travis replied that he was but noted that Justin was not his type. Justin said he got it.
- Two weeks later, when most of the team were at wing night at the local brewery, Justin approached Travis with a drink for him, said he thought Travis should give them a chance because they would make a really hot couple and he could make sure Travis felt good. Travis said no thanks, that he was interested in someone else, and went to find another freshman player to talk to.

# SCENARIO 3: SEXUAL HARASSMENT/ HOSTILE ENVIRONMENT



- That weekend, at a team party after they had won a game, Travis went to get his jacket in one of the apartment's bedrooms and physically bumped into Justin when he was leaving the bedroom. Travis laughed nervously and tried to get out of the way but Justin leaned in and kissed him. The following week, as Travis was showering after practice, Justin seemed to appear out of nowhere next to him, standing too close. He whispered to Justin, "I really am your type," and proceeded to corner Travis along one wall of the shower room and tried to grab Travis's buttocks. Travis didn't say anything, and he didn't touch Justin. He left the shower room, quickly finished getting dressed, and left the locker room. He did not tell anyone about the incident immediately afterward, but the following day, he told the coach he was quitting the team.

# SCENARIO 3: SEXUAL HARASSMENT/ HOSTILE ENVIRONMENT



- Does Title IX obligate a response to the incidents between Travis and Justin?
- At what point in this scenario are policies implicated?
- Does Justin's behavior create a hostile environment? What information would assist in your determination?
- Has Justin interfered, denied, or limited Travis' benefit of/access to educational programming?

# SCENARIO 4: SEXUAL VIOLENCE



- Alex and Diane are in a romantic relationship and live together. Diane came home after a night out and was very intoxicated. Alex was on the couch watching TV. Diane sat down on Alex's lap, embracing and kissing him. She began to feel dizzy and sick and told Alex she wasn't feeling well and was going to bed. Alex began to kiss Diane's neck, rubbing his hand up her inner thigh under her skirt. Diane did not mind, but as the dizziness persisted, she pushed him away and said she had to go to bed.
- Diane went into the bedroom, removed all of her clothing, and got into bed. She began to fall asleep, feeling dizzy and nauseous. She was mildly aware of Alex getting into bed a short time later. Alex scooted up behind Diane and she could tell he was also naked and erect. He put his arm around her, cupping her breast, and began pushing his penis into her buttocks. Diane did not object and murmured "mmm" but when Alex moved his hand to her vulva, she pushed him away. Diane said, "I don't feel so good." Alex started to rub Diane's back and after about ten minutes, he put his hand back around her and started rubbing her vaginal area. After a minute, Diane said, "Seriously, I might be sick, let's just touch each other," referring to digital penetration.

# SCENARIO 4: SEXUAL VIOLENCE



- Diane turned to face Alex and they both began to touch each other's genitals. Diane became more vocal and, it seemed to Alex through her sounds, was enjoying the interaction. After a few minutes, Alex moved on top of Diane, kissed her neck, held her hands above her head, and penetrated her vagina with his penis. This was how they sometimes had sex in the past. Although she said, "Please, stop," after a few seconds, she made sounds that indicated to Alex that she was enjoying the intercourse. Diane then said, "Ow," which Alex understood as communicating she didn't want him to penetrate her as deeply, and so he pulled out and ejaculated on the bed. After he ejaculated, he kissed Diane. She got out from under him and went to the bathroom. Alex followed. He asked Diane if she was okay. She said, "What do you think?" angrily and went back to bed.

# SCENARIO 4: SEXUAL VIOLENCE



- Did Alex engage in dating or domestic violence? What do you assess in determining this?
- What about forcible fondling? What do you assess to determine this?
- What evidence do you consider in assessing whether the conduct constituted forcible rape?
- Was Diane able to consent to sexual activity?

# SCENARIO 5: PREPONDERANCE



- Omar and Devya have been friends since freshman year. Devya texted Omar and they met up at Devya's apartment before a party one weekend and had several shots. Devya felt comfortable with Omar because he was openly gay, and she asked him to help her pick her outfit for the evening, taking her clothes off in front of him multiple times as she tried different combinations. Omar would pull on and adjust her clothes as he considered each outfit, but Devya wasn't bothered by the physical contact, even when he pressed her breasts together to try to improve the appearance of her cleavage in one shirt.

# SCENARIO 5: PREPONDERANCE



- When they got to the party, Devya lost track of Omar for a bit. She was happy to find him a little later, and they had fun dancing. Devya said Omar “grinded” on her, which was fine, but then he started putting his hands on her and groping her, which she was not okay with. They had danced together before, but this night felt different to her. Devya said Omar was much more drunk than she had ever seen him, and even though she continued to pull his hands away from her he wouldn’t stop touching her body, including grabbing her breasts. Devya could feel Omar’s erect penis through his pants when he rubbed against her.



# SCENARIO 5: PREPONDERANCE



- At one point, Devya took Omar's hands into hers so they would be off her body, shouted, "Stop!" and they danced while they were holding hands. After a little bit, he put his hands back on her and rubbed her butt and started pretending to spank her. He wasn't hitting her hard, and it was clear he thought it was funny, but she didn't. She took his hands in hers and started dancing again. After a few minutes, a friend came up to Devya and asked if she was okay because she looked upset. Devya and her friend left the dance floor and her friend drove Devya home. During the drive, the friend mentioned that she saw what Omar was doing and that he seemed out of control. Devya talked to the same friend a little the next day, and they agreed that Devya should report Omar.

# SCENARIO 5: PREPONDERANCE



- Omar denies the allegations. He agrees with Devya's account of the evening but does not remember the groping and grinding. He just remembers them dancing and having fun, and said that they were both touching each other, but "Just in a fun, playful way." Omar doesn't remember Devya's friend, he just remembered that all of a sudden, Devya was gone. He texted to see where she went, but she never responded. Omar agrees that he drank a lot, but says he remembers the whole evening and thinks Devya is blowing it out of proportion. "Plus," he says, "I'm gay." One of Omar's texts to Devya from after the party said, "Hey, where did you go? We were having sooo much fun. Want to grab sushi tonight?" Devya wants Omar to understand what he did is wrong. He was out of control and he made Devya feel like a piece of meat with no control over her own body. She wants Omar to stay away from her.

# SCENARIO 5: PREPONDERANCE



- If Omar doesn't remember the specifics of what happened, can he be held responsible?
- What are some considerations for interviewing Devya's friend who approached her at the party?
- How do the facts that Omar is gay and thought they were having a good time affect your assessment of whether a policy violation occurred?

# SCENARIO 6: RETALIATION



- Richard was a star basketball player on the men's basketball team. He was dating Davina, a member of the women's basketball team. Davina would talk with Richard about how annoyed she was that the men's team was treated better than the women's team – the men's team had better practice times, better uniforms, and more counselors to help the team members with their academics. Davina reported her concerns to the Title IX Coordinator, and the school started an investigation. During the investigation, a handful of male players were interviewed – Richard was among them. Richard also posted on Twitter, “Come out to the women's bball game! Let's support our women.” On the night of the game, Richard posted, “What the literal fuck?! Shabby uniforms won't hold these ladies back! LET'S GO!”

# SCENARIO 6: RETALIATION



- The Athletic Director contacted Coach Roop, the men's basketball coach, and asked him to tell Richard to stop posting about the women's team. The Athletics department had a social media policy that forbade obscenities, although many students still posted curse words and, as long as they weren't directed at individuals, the coaches and the AD had never addressed the issue.
- The Athletic Director also told Coach Roop that he had seen Richard leaving the Title IX Coordinator's office and that the Coach needed to do something to make sure his team was on the right track. Coach Roop decided to bench Richard for the next three games. When Richard asked why, Coach told him it was because of his profane posting and they needed him to think about the effect he was having on his teammates and the game. After Richard was benched, he filed a complaint for retaliation against the Athletic Director and Coach Roop.

# SCENARIO 6: RETALIATION



- **Must Richard be the recipient of the original sex discrimination for Title IX to apply?**
- **What other conduct could constitute protected activities in the context of a Title IX retaliation claim?**
- **What pieces of information would assist in assessing whether the actions taken against Richard constitute retaliation?**

# SCENARIO 7: DATING VIOLENCE



- Students Robert and Brooke have dated off and on for the past two years. Last Saturday, Robert and Brooke attended the Spring Formal, after having a few drinks together at her on-campus apartment. During the evening, Brooke grew increasingly agitated because Robert spent the evening being the center of attention on the dance floor, leaving Brooke by herself, even though she had specifically told him she wanted them to stick together that night. Annoyed and in tears, Brooke left and went back to her apartment.

# SCENARIO 7: DATING VIOLENCE



- A few hours later, Robert pounded on her apartment door. Brooke let him in and they began to argue. Brooke noticed Robert had clearly been drinking since she left the formal. His words were slurred, and his eyes were bloodshot. This made Brooke even more upset. Brooke grabbed Robert's phone out of his hand to see whether he had been texting with Jackie, his ex-girlfriend whom he regularly went back to whenever Brooke and Robert were broken up. As Brooke grabbed for the phone, Robert pushed Brooke away and she toppled backward, hitting her head on the coffee table as she fell to the ground. Robert grabbed the phone which had fallen on the ground and walked over to Brooke. He reached out his hand to help her up, but she swatted it away and kicked wildly, shouting, "Get away from me!" and "Don't touch me!" Two of her kicks landed on Robert's stomach and chest. The Police Department responded to Brooke's apartment after a neighbor made a noise complaint. The police arrested Robert and reported the incident to the Title IX Coordinator.



# SCENARIO 7: DATING VIOLENCE



- Assume Brooke is the Complainant. Should Robert be held responsible for violating the dating violence policy?
- What if Robert makes a report about Brooke? What are the relevant considerations?

# SCENARIO 8: STALKING



- Lee and Mel are both freshman at The College of Knowledge. They were assigned to the same orientation group and instantly became friends. They began to flirt with each other at parties during welcome week. However, by the second week of classes, Lee had met some other friends and felt Mel was coming on too strong. Mel was romantically interested in Lee and was hoping they could take their friendship to another level.
- Mel invited Lee to a party for the campus's LGBTQIA2SP+ Alliance, but Lee declined saying they were sick. Mel then noticed that Lee had blocked them on Facebook. Confused, the next day Mel waited for Lee outside of the classroom. When Lee saw Mel, they instantly took up talking to another classmate, so they were in full conversation when Lee walked passed Mel, pretending they hadn't seen them.

# SCENARIO 8: STALKING



- That night, Lee saw Mel waiting outside Lee's door in the residence hall. Scared to return, Lee decided to sleep at a friend's room. Mel texted Lee that night, saying, "I guess that's it?" A week later, Mel texted Lee, "I'm rly just confused, what did I do wrong?" Two weeks later Mel texted Lee again saying, "You could have just told me you didn't like me," followed with another text, "I can SEE you've read my text, omg, respond!!"
- This morning Lee came into the Title IX Coordinator's office indicating Mel was stalking them. Lee showed the Title IX Coordinator a text from Mel from that morning that said, "I hope you are happy, all of my former friends now go out with you and party every night." Lee is concerned with how it is that Mel knows that they have been going out every night since they haven't talked in several weeks.

# SCENARIO 8: STALKING



- Does Mel's behavior constitute stalking? What facts do you consider to assess this?
- What analysis needs to be conducted to apply the sexual harassment policy to the facts to assess whether Mel's behavior constitutes sexual harassment?
- If a policy violation is not found, how else might the institution respond and proceed in this situation?

# SCENARIO 9: SEXUAL HARASSMENT



- Deb is a faculty member working with a small team of seven student research assistants who meet each morning to check-in with each other and the status of their grant projects in the university lab. Amaya is a student team-member who has recently announced that she is pregnant.
- One morning, Amaya texted Deb that she was going to miss the morning meeting. Deb announced to the group that they should get started because Amaya wouldn't be joining the meeting that day. A third student researcher, Paulie, responded with a snort, and said, "I bet she has morning sickness. Too bad; her breasts are getting to be GINORMOUS, and I was looking forward to having a peek this morning." Several team members laughed hard at this joke, while a couple of others chuckled uncomfortably.

# SCENARIO 9: SEXUAL HARASSMENT



- Deb was livid, and immediately began to wonder how she could work with a team of people who objectify women like this. After the meeting she stormed into the Title IX office to complain about Paulie's conduct. She explained how uncomfortable she felt by the incident, how she no longer could work with Paulie, stating that he should be terminated from the grant-funded position and that the other students who laughed should be put on probation.
- **Can Deb file a Title IX Complaint for sexual harassment?**
- **Does Paulie's joke rise to the level of creating a hostile environment?**
- **If Amaya found out about the joke, could she bring a Title IX claim and would that change the analysis of the conduct?**
- **Has Deb's access to education or employment programs been limited by Paulie's joke?**

# SCENARIO 10: DISCRIMINATORY HARASSMENT



- Jamal Hewson is a new student at the state's flagship university who quickly gained a reputation in his first-year orientation group for making provocative political arguments. In the first few weeks of his first semester, he could often be found in the common room of his residence hall discussing and debating hot political topics with his new friends.
- Jamal delighted in the intellectual debate with his peers, even though he knew some of his new friends were frustrated with his views and accused him of just trolling people for fun. Jamal was invited to start serving as a monthly columnist for the campus's conservative newspaper, *The Voice*. For his first column, he authored a rousing defense of traditional marriage roles. In his column, which he titled, "Consider This: A Woman's Place Is In The Home," he argued that women's empowerment and liberation had gone too far, and he raised a number of arguments in support of women returning to what he described as more "traditional roles" of home keeping and childrearing.

# SCENARIO 10: DISCRIMINATORY HARASSMENT



- Jamal's first column definitely caused a stir on campus. Samantha Mullen, President of the Women's Leadership Association, a registered student organization on campus, published letters to the editor in both *The Voice*, as well as the mainstream campus newspaper, condemning Jamal's column and demanding his censure by the student government. Within two days, the entire campus was embroiled in conversation about Jamal's column, Samantha's response, and whether the student government should censure Jamal. Samantha was incensed to see some other male students giving Jamal a "high five" in the dining hall. Some of those same students came up to Samantha and tried to argue with her about her letter and how nobody wanted to hear what she had to say. Someone – Samantha didn't know who – posted a borderline misogynistic cartoon on the outside of Samantha's door. Samantha stormed up to Jamal and began to read him the riot act, telling him that his backwards views were causing real harm to the community. Jamal laughed, and responded, "You need to calm down, sweetie. This is why women don't belong in stressful work environments; you just can't handle it."



# SCENARIO 10: DISCRIMINATORY HARASSMENT



- Samantha decided she had enough. She emailed the Title IX Coordinator that evening, demanding swift action for the hostile education environment that Jamal was creating on the basis of sex. She also asked if she could receive an extension on a huge term paper due the next day, because she was so upset she couldn't possibly finish it on time.
- **Have Jamal's written statements created a hostile environment for Samantha?**
- **What are the policy elements that you need to apply to the facts at hand?**
- **What elements are most in dispute by the facts presented?**
- **What about Jamal's verbal statements directed at Samantha?**
- **Should the institution consider Samantha's request for an extension on her assignment?**

# QUESTIONS?

---



# CONTACT INFORMATION


---

Brett A. Sokolow

*Brett.Sokolow@atixa.org*

Kimberly A. Pacelli

*Kim.Pacelli@tngconsulting.com*



---

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