Association of Title IX Administrators

January 2021

Title IX Hearing Chairs

Training & Certification Course

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AGENDA

1. Title IX Overview
2. Chair Role & Responsibilities
3. Bias, Conflicts of Interest, & Recusal
4. Advisors
5. Pre-Hearing Preparation
6. Pre-Hearing Meetings
7. The Hearing

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AGENDA

8 Understanding Evidence

9 Questioning & Cross-Examination

10 Credibility

11 Making a Decision

12 Interaction with Appeal Process

13 Recordkeeping and Documentation

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TITLE IX OVERVIEW

- Title IX
- The IX Commandments
- Ten Steps of an Investigation

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TITLE IX

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

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

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THE IX COMMANDMENTS

INVESTIGATION (plus **prompt** & **fair** per VAWA Sec. 304)	**Thorough**	**Reliable**	**Impartial**
PROCESS	**Prompt**	**Effective**	**Equitable**
REMEDIES	Not act unreasonably to stop discrimination	Not act unreasonably to prevent recurrence	Act equitably to remedy effects

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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 and Allegation(s) to parties
5. Establish investigation strategy
6. Formal comprehensive investigation
   - Witness interviews
   - Evidence gathering

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10 STEPS OF AN INVESTIGATION (CONT.)

7. Draft report

8. Investigator meets 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 investigation 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

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WHAT IS YOUR MISSION AS A CHAIR?

- Make key evidence “rulings”
- Manage questioning
- Facilitate deliberation
- Make a finding/final determination (w/panel)
- Draft a notice of rationale

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WHAT DOES IT MEAN TO BE A CHAIR?

Title IX regulations require a "decision-maker" to determine whether a Respondent violated policy

- May be a single person. Thus, you are both Decision-maker and Chair by default.
  - One role is substantive, the other procedural
- May be a panel of decision-makers (often three), with one voting member as Chair to make all rulings on evidence and questions
  - Chair should always be a voting member
- Most institutions will want the Chair to speak for the panel on matters of evidence
- May be internal or external individuals (third-party neutrals)

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THE ROLE OF THE CHAIR

- Title IX regulations require that colleges and universities hold a live hearing
  - May take place in person; however, must provide an option for a video conference
  - Parties may cross-examine each other and witnesses, through an Advisor
- The primary role of the Chair is to evaluate all evidence for relevance, facilitate questioning, rule on questions, and ensure that Advisors observe appropriate decorum and follow all hearing rules

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CHAIR COMPETENCIES

- Legal Landscape
- 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
- Relevance
- Weighing Evidence
- Analyzing Policy
- Applying Standards of Evidence
- Technology Used at Hearing
- Controlling Evidence
- Managing Advisors
- SANE and Police Reports

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CHAIR COMPETENCIES (CONT.)

- Presumption of Innocence
- Due Process and Fairness
- Bias/Impartiality/Conflicts of Interest
- Stalking/Sexual Assault/Harassment
- Domestic/Dating Violence
- Discrimination
- 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?

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THE CHALLENGE FOR 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.

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PRESUMPTION OF NON-RESPONSIBILITY

- Title IX regulations require that published grievance procedures include a statement of a presumption of non-responsibility for the Respondent until a final determination is made
  - Hopefully this is not new; evidence should have always driven determinations
- What would it mean to presume neither "guilt" nor "innocence?"
  - How does a presumption work in light of an affirmative consent policy?
  - How is presumption of non-responsibility different than no presumption?
  - What does it take to overcome a presumption?

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LIVE HEARING

- Regulations mandate live hearing for higher education
  - Virtual hearings are permitted
- Must create audio/audiovisual recording, or transcript, of hearing and make it available to the parties for inspection and review.
- 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?
- Will there be a facilitator role? Who? What do they do?

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LIVE HEARING (CONT.)

- Must allow live cross-examination to be conducted exclusively by each party's Advisor (separate rooms still allowed)
- Questions come from Advisors, panel (if any), and Chair

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BIAS, CONFLICTS OF INTEREST, & RECUSAL

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Remember, you have no "side" other than the integrity of the process!

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CONFLICT OF INTEREST, OBJECTIVITY, & BIAS

- Existing mandate for impartial resolutions with fair procedures
  - Impartial, objective, unbiased, neutral, independent
  - What do each of these mean and how do we bring these qualities to our decision-making?

- Regulations prohibit conflicts-of-interest or bias with Coordinators, Investigators, and Decision-makers/Chairs against parties generally or an individual party
  - What creates a conflict?
    - How can you assure that you don't have one?
  - Has your institution given you sufficient independence?

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BIAS

- Among the most significant problems for Decision-makers
- Bias can represent any variable that improperly influences a decision
- Forms of bias and prejudice that can impact decisions:
  - Pre-determined outcome
  - Partisan approach by investigators in questioning, analysis, or report
  - Partisan approach by decision-makers in questioning, findings, or sanctions
  - Intervention by senior-level administrators, or external sources

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BIAS (CONT.)

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

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BIAS AND CONFLICT OF INTEREST

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

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RECUSAL

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

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ADVISORS

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ADVISORS

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

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ADVISORS

- Institutions may limit the role of Advisors during the hearing except for cross-examination and conferring with the party
- Advisors **chosen by** the party should conduct cross-examination
  - 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
- An Advisor **appointed for** the party will conduct cross-examination
  - 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

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PREPARING FOR THE HEARING

- Pre-Hearing Preparation Checklist
- Preparing Questions

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FIRST 10-DAY EVIDENCE & REPORT REVIEW BY PARTIES

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
  - Be sent to each party and Advisor
  - Be in an electronic format or hard copy
  - Include evidence upon which the Recipient does not intend to rely
  - Include exculpatory and inculpatory evidence
  - Be made available at any hearing

- After sending the evidence, the investigator must:
  - Allow 10 days for written response
  - Consider response prior to completion of report

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SECOND 10-DAY EVIDENCE & REPORT REVIEW BY PARTIES

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

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

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

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PRE-HEARING PREPARATION CHECKLIST

- Provide Notice of Hearing (location, time, Decision-maker identification, conflict check, individuals attending, specific charges) to all parties/Advisors
- Conduct Pre-Hearing Meetings between Chair/Decision-maker and parties/Advisors (optional)
- Make evidence and/or question rulings; circulate to all parties/Advisors (optional)
- Revise/disseminate materials to parties/Panel
- Review investigation reports/materials
- Participant and Decision-maker logistics

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PRE-HEARING PREPARATION CHECKLIST PART II

- Technology arrangements & Technology test
- Obtain assurance that Advisors are in place and willing to cross-examine
- Determine whether any parties/witnesses may refuse to testify at hearing
- Arrange for any necessary alternates (Decision-makers and/or Advisors)
- Allow challenge to any Decision-Maker on basis of bias/conflict and opportunity for self-recusal by any Decision-maker
- Prepare and refine hearing script

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PRE-HEARING PREPARATION CHECKLIST PART III

- Prepare questions from Decision-maker
- Prepare checklist of all applicable policy elements
- Set an "Order of Go" for witness testimony
- Review logistics with parties, Advisors, witnesses, Decision-maker(s), Sanctioning Authorities (if applicable), and/or Hearing Facilitator/Case Manager (if any)
- Arrange for any directly related evidence to be available at hearing
- Inform Parties to prepare Impact Statements for submission at start of hearing
- Check in with Parties for any access, accommodation, interpreter needs, etc.

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PRE-HEARING PREPARATION

Could include:

- "Motions" hearing
- Meeting of Panel (to sift evidence and/or to craft, share, and assign questions)
- Thorough review of Investigation Report
- Review of file of "directly related" evidence that was not relied upon by investigators
- Review of any questions pre-submitted by parties (if they have been invited to do so)
  - Pros and cons of this approach…

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PRE-HEARING PREPARATION (CONT.)

Chair must consider: "Can you un-ring the bell effect"

- Generally, panelists struggle with unhearing or disregarding evidence once they hear it. All "juries" do. It's human nature.
- Consider tracking what evidence cannot be considered (in rationale, too)
- Redaction pre-hearing
- If you work to do this pre-hearing, will you work with the investigator, or make modifications yourself, directly?

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MUST DO: PREP FOR THE HEARING

All Decision-Makers/Chair Should Review:

- Written Notice of Allegations (NOIA)
- Policy (policies) alleged to have been violated
  - What does it take to establish a policy violation?
  - Identify the elements of each alleged offense
  - Break down the constituent elements of each relevant policy.
- All the materials carefully and thoroughly
- Review and re-review the investigation report
  - Note consistency/inconsistency of information – helps you know what to focus on in a hearing

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MUST DO: PREP FOR THE HEARING

All Decision-Makers/Chair Should Review:

- Review and re-review the investigation report
  - Note consistency/inconsistency of information – helps you know what to focus on in a hearing
- What about prequalification or review of the qualifications of any offered expert witnesses?

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PREPARING QUESTIONS

Write down the following as a reminder:

- What do I need to know?
- Why do I need to know it?
  - Does the question elicit information relevant to whether a policy violation occurred?
- 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).

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PRE-HEARING MEETINGS

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PRE-HEARING MEETINGS

Not required or mentioned in the Title IX regulations, BUT it may be valuable to conduct pre-hearing meetings for each party and their Advisors

- ATIXA recommends this practice, because anything you don't do pre-hearing will have to be done at the hearing
- Streamline procedural decisions before a hearing
- Simplify the hearing
- Can be virtual, in person, on paper, and/or with each party (and their Advisors) separately

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PRE-HEARING MEETINGS (CONT.)

Not required or mentioned in the Title IX regulations, BUT it may be valuable to conduct pre-hearing meetings for each party and their Advisors

- To avoid ex-parte* concerns, record pre-hearing meetings, or summarize each meeting in a memo to the parties
- Or, Chairs could meet just with Advisors, but not parties
  - Offer as option, because we shouldn't exclude the parties if they want to participate.

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*an "ex-parte" meeting happens with only one party/advisor without the other party/advisor present

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PRE-HEARING MEETINGS (CONT.)

- Answer questions regarding the hearing and procedures
- Clarify expectations regarding logistics, decorum, and technology
- Clarify role of Advisors and applicable rules
- Pre-rulings: helpful, but not required, to have parties submit questions for rulings in advance
  - Make record of pre-hearing rulings to share with parties
- Discern any conflicts of interest/vet recusal requests
- Understand (and perhaps preliminarily field) any questions regarding relevance of evidence or questions

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PRE-HEARING MEETINGS (CONT.)

- Finalize the determinations of evidence: relevant, directly related, or not relevant ("Buckets of Evidence")
- Address last-minute evidence – be sure your procedures give guidance on this
- Vetting of Decision-maker/Chair/Panel members
  - Is this a Chair function? Who vets the Chair?
  - Conflicts check
  - Recusal protocol
- What About?
  - Can you/should you meet with Investigator(s)?
  - Should there be changes to the investigation report at this point?

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THE HEARING

- General Logistics
- Hearing Decorum
- Managing the Hearing

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DAY OF THE HEARING

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

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THE HEARING: GENERAL LOGISTICS

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

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HEARING DECORUM

- Be professional, but not be lawyerly or judge-like
  - This is not court – this is an administrative process at a school
  - You are not cross-examining or interrogating, you are striving to determine whether the Respondent(s) violated institutional policy
- Be respectful
  - Tone, manner, questioning
  - Sarcasm or being snide is never appropriate
  - Maintain your composure; never allow emotion or frustration to show
  - De-escalate or take breaks if emotions/tensions are running high

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HEARING DECORUM (CONT.)

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

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THE HEARING

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

- Determine the relevance of questions. Pause after each question to "rule" on relevance. Must state rationale for the record. Bases to exclude:
  - Irrelevant
  - Unduly repetitious (and therefore irrelevant)
  - Abusive (and therefore irrelevant)
- Chair can provide a directive to disregard a question or information deemed irrelevant, abusive, or unduly repetitious
  - Keep track of these for deliberations/rationale

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THE HEARING (CONT.)

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

- Manage Advisors as necessary, including cross-examination
- Chair will typically work from a script in terms of flow and order of questioning and witnesses
- The Chair will have to make decisions on (or follow the script/procedure) on issues such as:
  - How much of an evidence introduction an Investigator should do to open the hearing
  - Whether the Chair rules on every question, or just those that are irrelevant
  - Will the Chair also rule on questions from the panel/from the Chair, or just from the Advisors?

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THE HEARING

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

- The Chair will have to make decisions on (or follow the script/procedure) on issues like (cont.):
  - Will the Chair state a rationale for whether a question is relevant or irrelevant?
  - Will the Chair allow Advisors to make a case for why a question should be permitted or not permitted?
  - How will the Chair address evidence that the Decision-makers should not rely upon?
  - When will Decision-maker questions take place? Before cross-examination, after, or both?

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THE HEARING

- How will you manage the last-minute witness or evidence that is introduced at the hearing for the first time?
  - What do your procedures say?
  - What is fair?
- If the Parties assent, can the evidence be introduced last-minute, even if it was held back in bad faith?
  - Re-open the investigation to consider the evidence?
  - Pause the hearing? Or just part of the hearing related to that witness/evidence?
  - How will that work in terms of the two ten-day review/comment periods?
    - Should they be observed?
    - Can parties waive or shorten them?

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DECISION-MAKING SKILLS

- Evidentiary Standards
- Understanding Evidence
- Relevance

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EVIDENTIARY STANDARDS

- **Clear and convincing evidence**: It is highly probable that policy was violated
  - Highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.
  - 65% 75% 85% – part of the problem with this standard is there is no real consensus on how to quantify it.
- **Preponderance of the evidence**: "More likely than not."
  - The only equitable standard
  - 50.1% (50% plus a feather)
  - The "tipped scale"

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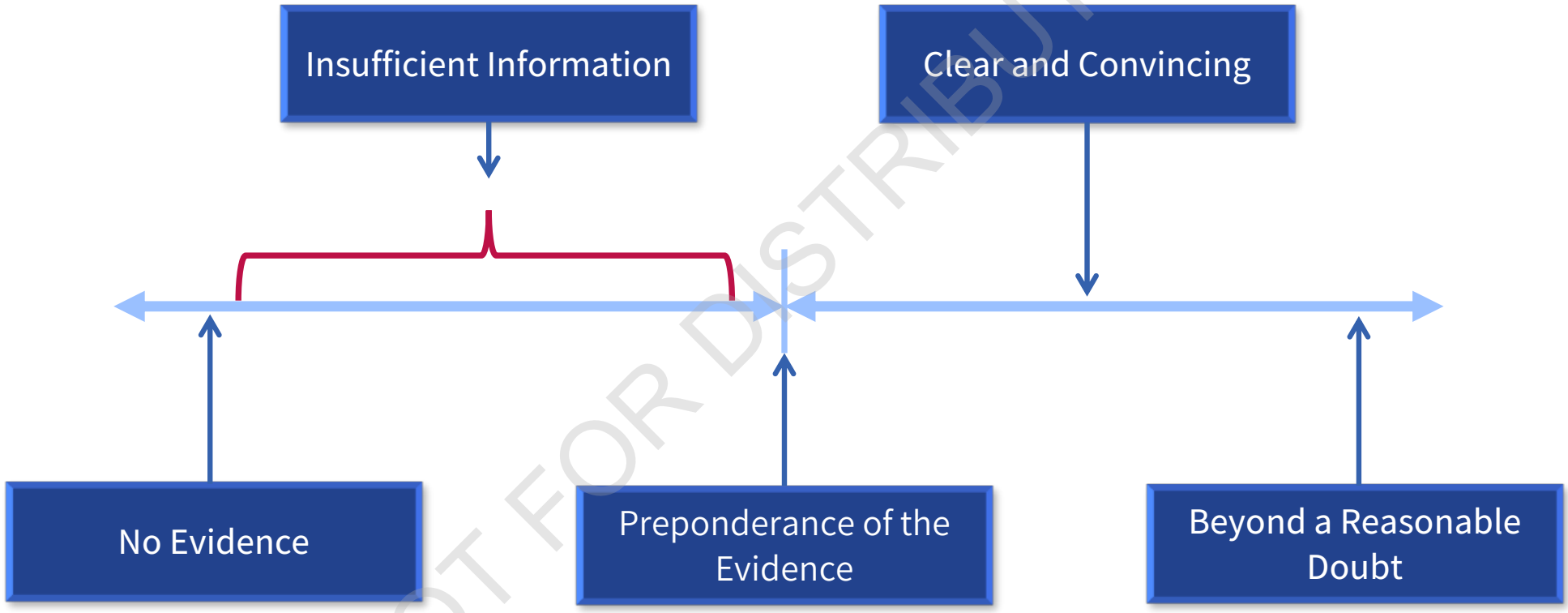
EVIDENTIARY STANDARDS



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UNDERSTANDING EVIDENCE

- Federal Rules of Evidence do not apply
  - 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 because it is relevant**
- If credible, it should be considered
  - Evidence is any kind of information presented with the intent to prove what took place
  - Certain types of evidence may be relevant to the credibility of the party or witness, but not directly to the alleged policy violation
- **Relevance → admissibility of the evidence**
- **Credibility → how much weight admissible evidence is given**

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EVIDENCE (CONT.)

- 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; must make the case for its relevance

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ASK YOURSELF

Is it **relevant**?

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

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

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THREE BUCKETS OF EVIDENCE

- Relevant
- Directly-related, but not relevant
- Not directly related or relevant

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BUCKET 1: RELEVANT EVIDENCE

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

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RELEVANCE

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

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BUCKET 2: DIRECTLY RELATED, BUT NOT RELEVANT EVIDENCE

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

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OTHER EVIDENCE MAY BE DIRECTLY-RELATED

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

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BUCKET 3: NEITHER RELEVANT NOR DIRECTLY-RELATED EVIDENCE

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

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UNDERSTANDING EVIDENCE

- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible:
  - Documentary evidence (e.g., supportive writings or documents)
  - Electronic evidence (e.g., photos, text messages, and videos)
  - Real evidence (i.e., physical objects)
  - Direct or testimonial evidence (e.g., personal observation or experience)
  - Circumstantial evidence (i.e., not eyewitness, but compelling)

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UNDERSTANDING EVIDENCE (CONT.)

- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible (cont.):
  - Hearsay evidence (e.g., statement made outside the hearing but presented as important information)
  - Character evidence (subject to a relevance determination, but often not probative of the underlying allegation)
- Decision-makers should typically only consider impact statements during sanctioning

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SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX REGULATIONS

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

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ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS

Additional permissions (from the party) required for:

- Records made or maintained by a:
  - Physician
  - Psychiatrist
  - Psychologist

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

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ADDITIONAL EVIDENCE CONSIDERATIONS IN HEARINGS

- In the Title IX hearing, Bucket #1 and Bucket #2 evidence is often "admitted" in the sense that it is not excluded and/or Decision-makers are not shielded from hearing/knowing it
- Some evidence can be excluded, or witnesses can be directed 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
  - There will be a decent amount of trying to "unhear"/disregard what is introduced, because even though you know it, you can't consider it

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RELEVANCE EXERCISE

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RELEVANT OR DIRECTLY RELATED?

A Complainant writes in her formal complaint that she has been experiencing significant mental health issues since being sexually assaulted, including PTSD (self-diagnosis). Respondent mentions this 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?

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RELEVANT OR DIRECTLY RELATED?

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?

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QUESTIONING & CROSS-EXAMINATION

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QUESTIONING & CROSS-EXAMINATION

- The live hearing requirement for higher education allows the parties to ask (direct and) cross-examination questions of the other party and all witnesses through their respective Advisors
- Such cross-examination must be conducted directly, orally, and in real time by the party's Advisor and never by a party personally
- Permit relevant questions and follow-up questions, including those challenging credibility
- Manage Advisors to ensure decorum and civility

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- If an Advisor seeks to ask a question that is potentially answered in the investigation report, that question should typically be permitted, if relevant

- If the cross-examination question has already been answered by a witness or party during the hearing, the Decision-maker or Chair may:
  - Deny the question as "irrelevant because it has already been answered," or
  - Ask the Advisor why posing the question again is expected to lead to additional relevant evidence

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- If a party or witness does not submit to live cross-examination by the other party's Advisor during 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

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- First question to ask each party and all witnesses: "Do you intend to answer all questions directed to you today?"
  - Recommend asking before parties make opening statements to avoid having to "unring the bell."

- The Decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
  - What is an inference?
  - How does it work?

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CREDIBILITY

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WHAT IS CREDIBILITY?

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

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CREDIBILITY

Inherent plausibility

- "Does this make sense?"
- Be careful of bias influencing sense of "logical"

Motive to falsify

- Do they have a reason to lie?

Corroboration

- Aligned testimony and/or physical evidence

Past record

- Is there a history of similar behavior?

Demeanor (use caution!)

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

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

EEOC (1999)

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

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

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

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

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility

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

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

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

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FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

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

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FACTORS TO CONSIDER FOR CREDIBILITY

Past Record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
  - Even if found "not responsible," may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship
- Use caution; past violations do not mean current violations

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FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

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

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CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

Regulations permit Investigators to make credibility recommendations

- Can serve as a roadmap for Decision-maker but is not binding

- Language in an investigation report may look like this:
  - "Decision-makers will want to carefully review Mary's testimony as to whether the conduct was welcome, in light of the testimony of W1."
  - "Decision-makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first."

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CREDIBILITY IN THE HEARING

- Distinguish performance/presentation skills from believability
- Evidence requiring a credibility assessment should be examined in a hearing
  - Fundamental to due process
  - Failure of a witness/party to participate undermines ability to determine credibility
    - Regulations 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?

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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, weigh the overall credibility based on the sum-total of each contested fact
- When you write the final determination letter, focus on what facts, opinions, and/or circumstantial evidence supports your conclusion
- Offer a cogent and detailed rationale

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MAKING A DECISION

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

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OVERVIEW OF THE DELIBERATION PROCESS

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

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DELIBERATIONS

General Information

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

Withhold judgment until all the evidence has been considered.

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DELIBERATIONS

Foundation for Decisions

- Decisions must be based only upon information/evidence in the investigation report or presented at the hearing
- Do not turn to any outside "evidence"
- Pare the policy. Assess evidentiary weight. Measure with the following questions:
  - Is the question answered with fact(s)?
  - Is the question answered with opinion(s)?
  - Is the question answered with circumstantial evidence?

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DELIBERATIONS

Findings, Impact Information, and Sanctions

- Separate the "Finding" from the "Sanction"
  - Do not use impact-based rationales for findings (e.g., intent, impact on the Complainant, impact on the Respondent, etc.)
  - Use impact-based rationales for sanctions only
- Impact statement(s) should only be considered if and after the Respondent is found in violation
- Whether Respondent violated policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful – do not heighten the evidentiary standard because the sanctions may be more severe

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SANCTIONING IN SEXUAL MISCONDUCT CASES

Title IX and case law require:

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

- This may create a clash if the sanctions only focus on educational and developmental aspects

- Sanctions for serious sexual misconduct should not be developmental as their primary purpose

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WRITTEN DETERMINATIONS

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

- Policies alleged to have been violated
- A description of the procedural steps taken from the receipt of the formal complaint through the determination including:
  - Any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Statement of and rationale for the result as to each specific allegation.
  - Should include findings of fact and conclusions

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WRITTEN DETERMINATIONS

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

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

The decision-maker should author the written determination.

- May follow a template provided by the Title IX Coordinator

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WRITTEN DETERMINATIONS: LOGISTICS

- The written determination should be provided to the parties simultaneously.
- The determination becomes final either on the date that the Recipient provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- FERPA cannot be construed to conflict with or prevent compliance with Title IX.
- Will this letter be reviewed by the Title IX Coordinator and/or legal counsel?

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APPEALS

The Appeal Decision-maker may be an individual or a panel

- Cannot be the Title IX Coordinator
- Cannot be the Investigator or Decision-maker in the original grievance process
- Recipient may have a pool of Decision-makers who sometimes serve as hearing or appeal Decision-makers
- Recipient may have dedicated Appeal Decision-makers

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APPEALS

- When an appeal is filed, the Recipient must notify the other party and implement appeal procedures equally for all parties
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- The Chair may be called upon by the Appeal Decision-maker to inform the appeal process
  - Likely a paper exchange; not in-person

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BASES FOR APPEAL

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

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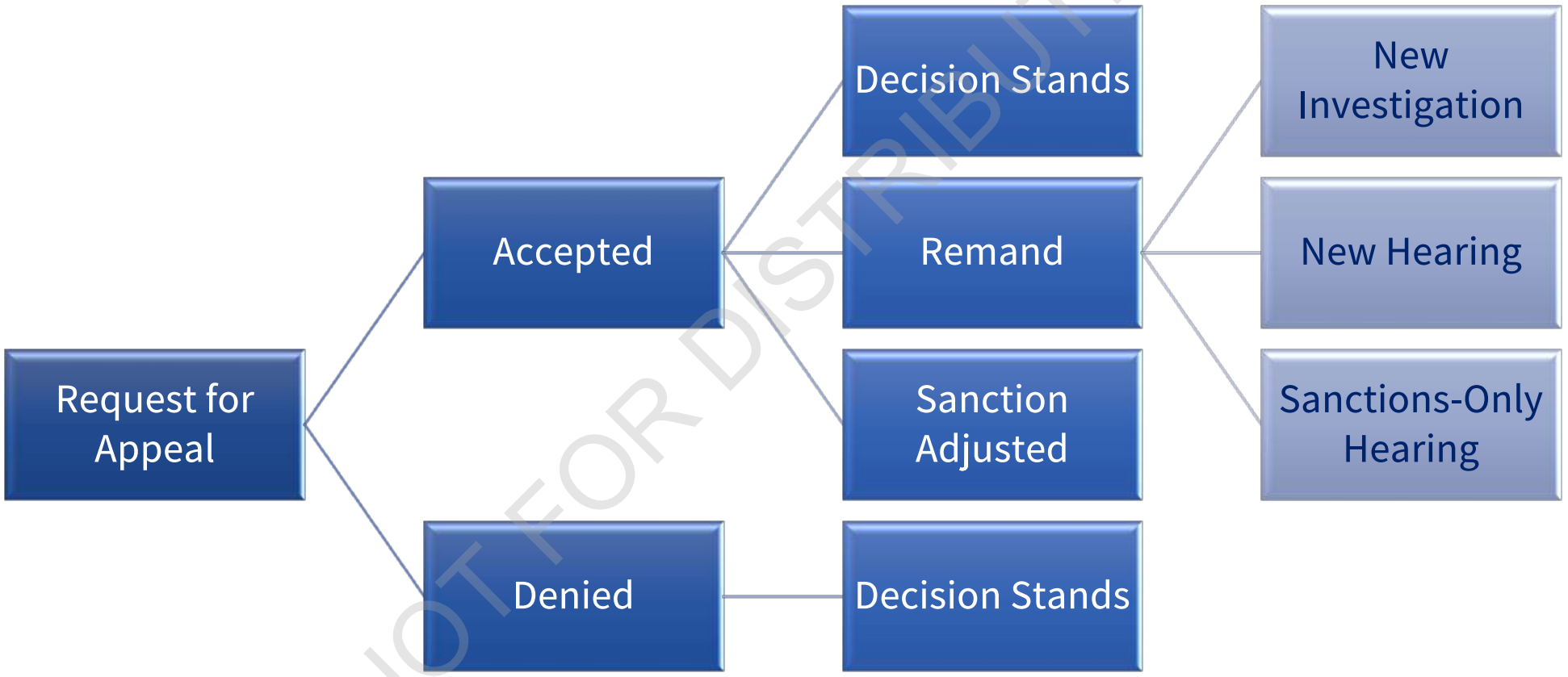
APPEALS: THE PROCESS



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RECORDKEEPING & DOCUMENTATION

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RECORDKEEPING & DOCUMENTATION

- Certain records must be created, retained, and available to the parties for at least **seven** years:
  - Sexual harassment investigations 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**
- Must document measures taken to preserve/restore access to education programs/activity

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Questions?

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