



Association of
Title IX Administrators

December 11 & 17, 2020

Lawrence Tech Title IX Training

Sandra K. Schuster, Esq.
TNG Partner

AGENDA

Day 1

- Title IX Overview
- Notice, Intake, & Formal Complaints
- Initial Assessment
- Informal Resolution
- Advisors in the Process
- Investigation Overview
- Interviewing
- Questioning Skills
- Evidence
- Final Investigation Report

Day 2

- Consent Construct
- Timeline Example
- Case Study
- Hearing Process Overview
- Hearing Details: TIX Cases
- Understanding Credibility in Decision Process
- Making a Decision
- Sanctioning
- Appeals



TITLE IX OVERVIEW

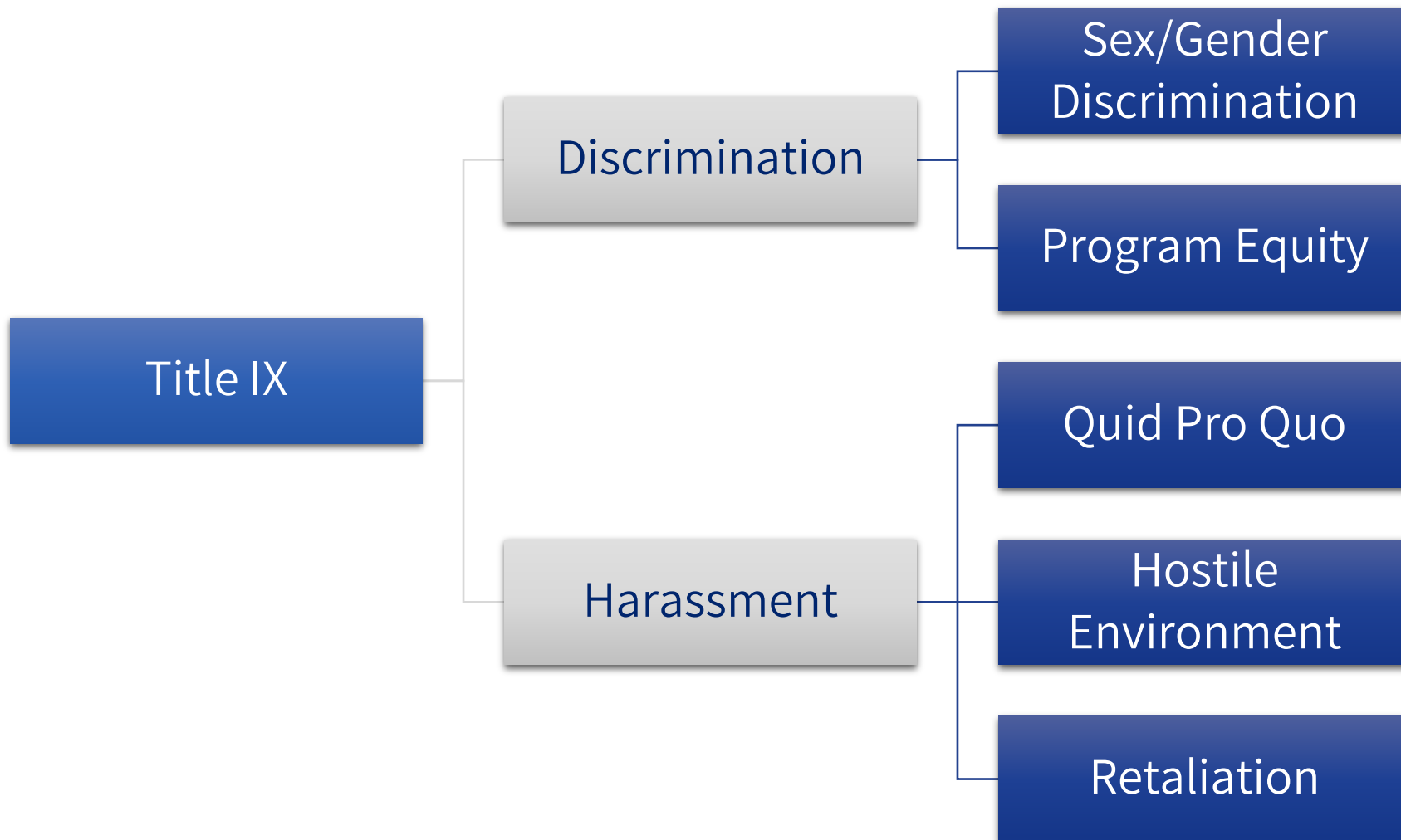
TITLE IX

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

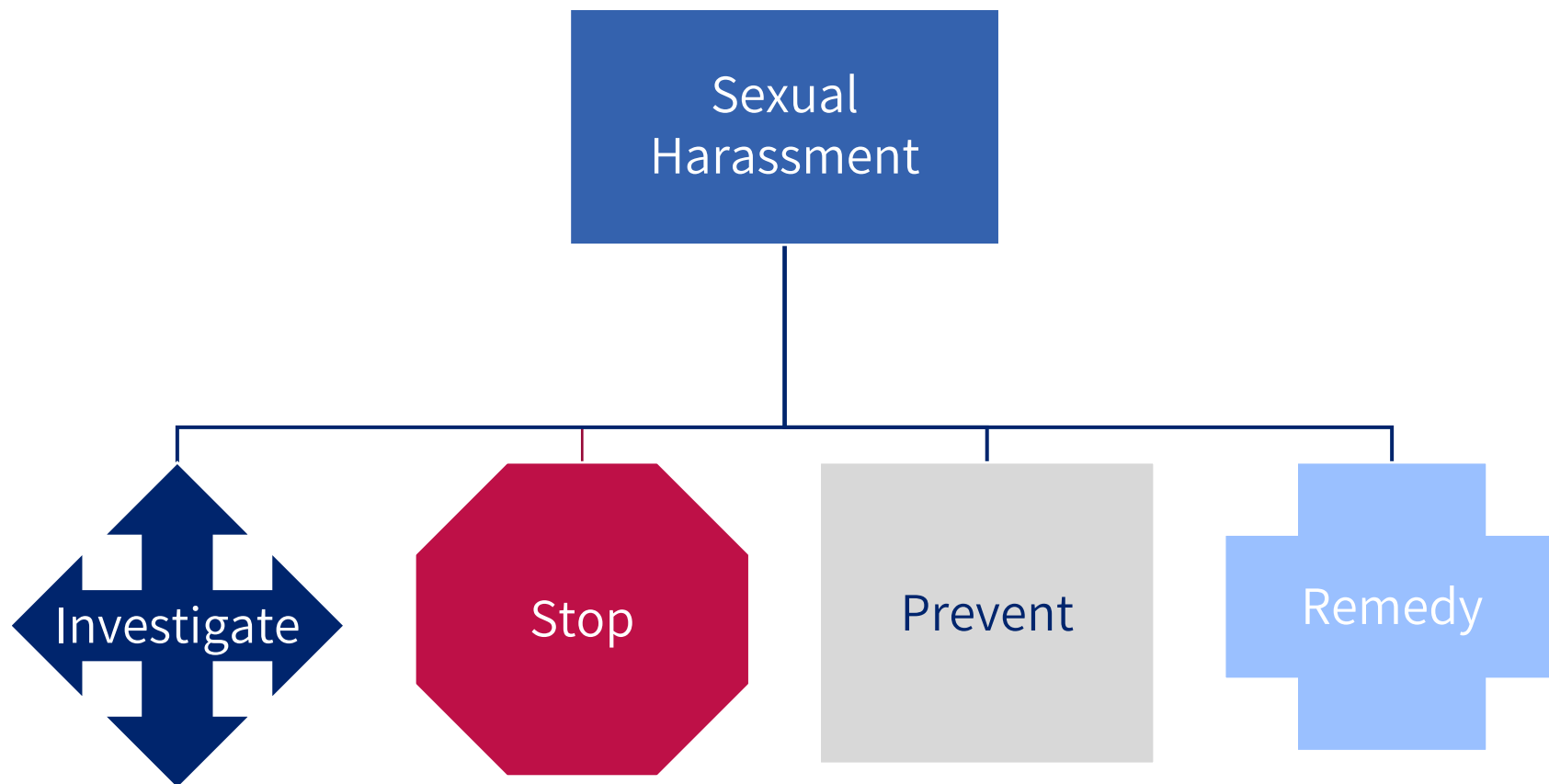
“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”



TITLE IX



OBLIGATIONS UNDER TITLE IX





NOTICE, INTAKE, & FORMAL COMPLAINTS

- Notice
- Report v. Complaint
- Supportive Measures
- Emergency Removal

NOTICE REQUIREMENTS

- Any person may make a complaint
- No Title IX investigation is required unless Complainant files a signed formal complaint to an Official with Authority to implement corrective action (OWA)
 - Who is that at LTU?
 - Different from Mandatory Reporters (formerly Responsible Employees)

REPORT V. COMPLAINT

- Distinguish between a “report” and a “formal complaint”
- Upon receiving a “report” (either from the would-be Complainant or a third party):
 - Reach out
 - Offer supportive and interim measures to the person alleged to have experienced the harassment. May also offer to would-be Respondent.
 - Explain process to make a formal complaint
 - Must be in writing and signed by the Complainant but can be made in any format (on paper or electronic) and made at any time
 - Also explain option to report to law enforcement (VAWA requirement)

REPORT V. COMPLAINT (CONT.)

- Upon receiving a “formal complaint”:
 - Conduct initial assessment to determine conduct and jurisdiction
 - If all elements are met, it triggers obligation to follow Title IX “grievance process” including investigation and live hearing for faculty, staff, and students.

OFFERING SUPPORTIVE MEASURES

The Title IX Coordinator must promptly contact the Complainant to:

- Discuss the **availability** of supportive measures as defined in § 106.30
- Consider the **Complainant's wishes** with respect to supportive measures
- Inform the Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain to the Complainant the process for filing a formal complaint

SUPPORTIVE MEASURES

- Previously referred to as “interim measures”
- OCR defines supportive measures as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Institution must design such measures to restore or preserve equal access to the Recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the Recipient’s educational environment, or deter sexual harassment.

SUPPORTIVE MEASURES (CONT.)

- “Whether an action “**unreasonably burdens**” a [R]espondent is **fact-specific**, but should be evaluated in light of the **nature and purpose** of the benefits, opportunities, programs and activities, of the [R]ecipient in which the [R]espondent is participating, and the **extent to which an action taken as a supportive measure would result in the [R]espondent forgoing** benefits, opportunities, programs, or activities in which the [R]espondent has been participating.”
- Implemented to protect the safety of parties and educational environment and deter harassment
- Must be available before, after, or in lieu of formal complaint

SUPPORTIVE MEASURES (CONT.)

- The Title IX Coordinator is responsible for coordinating the effective implementation of all supportive measures
- The institution must maintain as “confidential” any supportive measures provided to the Complainant or Respondent, to the extent that maintaining such confidentiality would not impair the ability of the Recipient to provide the supportive measures

SUPPORTIVE MEASURE EXAMPLES

- Counseling, medical, and/or other health service referral
- Employee Assistance Program referral
- Visa and immigration assistance
- Student financial aid counseling
- Education to the community or community subgroup
- Altering campus housing assignment
- Safety planning
- Transportation assistance
- Timely warnings
- Altering work arrangements for employees or student-employees
- Providing campus safety escorts
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course-related adjustments
- Increased security and monitoring of certain areas
- Trespass, Persona Non Grata, or Be on the Lookout (BOLO) orders

EMERGENCY REMOVAL

- “Supportive measures are intended to address restoration and preservation of equal educational access, while § 106.44(c) is **intended to apply to genuine emergencies that justify essentially punishing a [R]espondent** (by separating the [R]espondent from educational opportunities and benefits) arising out of sexual harassment allegations **without having fairly, reliably determined whether the [R]espondent is responsible** for the alleged sexual harassment.”
- “Where the standards for emergency removal are met under § 106.44(c), the [R]ecipient has discretion whether to remove the [R]espondent from **all the [R]ecipient’s education programs and activities, or to narrow the removal to certain classes, teams, clubs, organizations, or activities.**”

(Preamble, 85 F.R. 30225)

EMERGENCY REMOVAL (CONT.)

- “Emergency removal under § 106.44(c) **is not a substitute for reaching a determination as to a [R]espondent’s responsibility** for the sexual harassment allegations; rather, emergency removal is **for the purpose of addressing imminent threats** posed to any person’s physical health or safety, which might arise out of the sexual harassment allegations.”

(Preamble, 85 F.R. 30224)

EMERGENCY REMOVAL (CONT.)

- OCR notes that the final regulations expressly allow a Recipient to remove a Respondent on an emergency basis and do not prescribe cross-examination as a necessary procedure during the post-removal opportunity to challenge the removal
- Recipients may also implement supportive measures that restrict students' or employees' contact or communication with others
- Recipients thus have avenues for addressing serial predator situations even where no Complainant chooses to participate in a grievance process

(Preamble at 1176-1177)

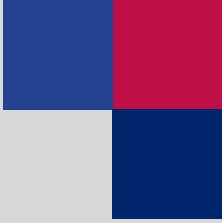
EMERGENCY REMOVAL (CONT.)

A Recipient may remove a student Respondent from the education program or activity on an emergency basis, only after:

1. Undertaking an individualized safety and risk analysis
2. Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
3. Providing the Respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the IDEA, ADA, and Section 504, as applicable

EMPLOYEE ADMINISTRATIVE LEAVE

- May place a non-student employee Respondent on administrative leave, with or without pay, during the pendency of a grievance process under existing procedures
- May not modify any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act
- Leave should be confirmed in writing, stating the reason and the expected duration of the leave (consistent with timeline of the investigation)



FORMAL COMPLAINTS

FORMAL COMPLAINT

- A formal complaint means a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the Recipient investigate the allegation of sexual harassment.
- At the time of filing a formal complaint, a Complainant must be **participating in** or **attempting to participate** in the education program or activity of the Recipient with which the formal complaint is filed.

FILING A FORMAL COMPLAINT

- Complainant is never required to file a formal complaint in order to receive supportive measures
- Other than a Title IX Coordinator, third parties cannot file formal complaints
 - Parent or guardian, who has a legal right to act on a person's behalf, may file a formal complaint for a Complainant
- Formal complaint is required before an informal resolution may begin

WHEN MIGHT THE TIXC FILE THE FORMAL COMPLAINT?

- Complainant's identity is unknown
- Serial sexual predator
- Multiple reports against the same Respondent but no Complainant wishes to file a complaint
- Respondent is not affiliated with the institution but commits sexual harassment in the Recipient's education program or activity
- PPTVWM



INITIAL ASSESSMENT

- Conduct Standards
- Jurisdiction Standards
- Permissive Dismissal

INITIAL ASSESSMENT: CONDUCT STANDARDS

Determine if conduct meets Sexual Harassment Framework

Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:

- 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;
- Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the Recipient's education program or activity; or
- "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v)
"Dating violence" as defined in 34 U.S.C. 12291(a)(10)
"Domestic violence" as defined in 34 U.S.C. 12291(a)(8)
"Stalking" as defined in 34 U.S.C. 12291(a)(30)

INITIAL ASSESSMENT: CONDUCT STANDARDS

Determine if conduct meets Sexual Harassment Framework

- **Sexual Harassment:** is conduct on the basis of sex meeting one of the following conditions:
 - 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;
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient's education program or activity; or
 - "Sexual assault"
 - "Dating violence"
 - "Domestic violence"
 - "Stalking"

INITIAL ASSESSMENT: JURISDICTION STANDARDS

1. Must occur in the United States
2. Must occur in program or activity of institution, or off-campus housing facility owned or controlled by registered student organization
3. Must have control over the harasser
4. Complainant must be participating/attempting to participate in educational program or activity

If conduct and jurisdiction elements aren't met may dismiss to OIE process for employees

All sex/gender cases involving students are addressed through live hearings with cross examination

PERMISSIVE DISMISSAL

- **May** dismiss a complaint or any allegations at any time during the investigation or hearing if:
 - Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein;
 - The Respondent is no longer enrolled or employed by the Recipient; or
 - Specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein
- Written notice to parties required
- Parties may appeal a dismissal



INFORMAL RESOLUTION

INFORMAL RESOLUTION OPTIONS

- Requires a formal complaint to be filed
- Title IX Coordinator and parties will determine when informal resolution is appropriate
 - Does not preclude certain offenses from informal resolution
- DOES preclude informal resolution for allegations that an employee harassed a student
 - Employee-on-employee informal resolution is permissible
- Informal resolution allowed at any time prior to a final determination at discretion of TIXC

INFORMAL RESOLUTION OPTIONS

- Must provide detailed notice to the parties:
 - Allegations, requirements of the process, circumstances that would preclude formal resolution, consequences of participation
- Must obtain voluntary, written consent

INFORMAL RESOLUTION

- Consider a process for Informal Resolution that includes:
 - A response based on supportive measures; and/or
 - A response based on a Respondent accepting responsibility; and/or
 - A response based on alternative resolution, which could include various approaches and facilitation of dialogue.
- Alternative resolution approaches like mediation, restorative practices, transformative justice, etc., are likely to be used more and more often by colleges and universities.

INFORMAL RESOLUTION CONSIDERATIONS

- The Title IX Coordinator may look to the following factors to assess whether Informal Resolution is appropriate, or which form of Informal Resolution may be most successful for the parties:
 - Amenability of the parties to Informal Resolution
 - Likelihood of potential resolution, taking into account any power dynamics between the parties
 - Motivation of the parties to participate
 - Civility of the parties
 - Cleared violence risk assessment/ongoing risk analysis
 - Whether an emergency removal is needed



ADVISORS IN THE PROCESS

- Advisor of Choice
- Institution-Appointed Advisor
- Role of the Advisor

ADVISOR OF CHOICE

- Parties must have the same opportunities to have others present during any proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the Advisor of their choice, who may be, but is not required to be, an attorney
- May not limit the choice or presence of Advisor for either the Complainant or Respondent
 - Don't have to provide an attorney or equivalently educated/trained Advisor to one party just because the other party has one
- Can regulate the extent to which Advisors may participate in the proceedings, if restrictions apply equally to all parties

ADVISOR OF CHOICE

- The Title IX process essentially systematizes two types of Advisors:
 - The Advisor of Choice
 - The Institution-Appointed Advisor
 - Requirement applies only to higher education
 - This Advisor may accompany the party throughout the entire resolution process, but the institution may limit this Advisor to participating in the hearing only and will usually only appoint this Advisor if the party has not chosen one by the time of the hearing

INSTITUTION-APPOINTED ADVISOR

- Advisee isn't the Advisor's "client"
- Conversations unlikely to be governed by any "privilege" regardless of role
- If Advisor is also an institutionally-mandated reporter, what happens if employer asks Advisor to disclose information that has been shared by an advisee?
- Advisors need an ethical code or strong personal/professional integrity to guide them
- Advisors may not like or believe an advisee
- An advisee may not like or trust their Advisor
- Advisors are not required to be aligned with their advisee, but if not, friction can result

WHO CAN SERVE AS AN ADVISOR?

- Friends, family, roommates, faculty, college or school staff members, attorneys, etc.
- Institutional rules will determine if a party may have more than one Advisor
 - Union representation cases
 - When a party wants an Advisor and an emotional support person
- If more than one Advisor is not permitted, one can switch off with the second Advisor, or the advisee can have one Advisor outside the meeting, and one inside with them

WHO CAN SERVE AS AN ADVISOR?

- An individual can't advise both a Complainant and Respondent in the same matter
- Must be eligible and available, meaning that institutional or school employees can refuse to serve as an Advisor for any reason, and should do so if it would place them in the position of a conflict of interest or commitment
- If an individual serves as both an Advisor and has a role as a witness in the matter, they may wind up limiting the efficacy of their testimony as a witness because the Decision-maker may discount their credibility based on their dual roles

ROLE OF THE ADVISOR

Depending upon institutional policy and advisee requests, and Advisor may:

- Accompany their advisee through all phases of the resolution process and explain the process
- Help their advisee decide whether to file a formal complaint and navigate other strategic issues such as whether to participate in informal resolution
- Prepare their advisee to respond to questions during the investigation, even rehearsing beforehand, and determine what evidence to share during an interview
- Help advisee access supportive measures, community resources, and advocacy services
- Help the advisee to review and comment on the investigation report


ROLE OF THE ADVISOR (CONT.)

- **Depending upon institutional policy and advisee requests, and Advisor may:**
 - Help the advisee to advocate for the inclusion or exclusion of evidence from the process
 - Help the advisee prepare for the hearing (documentation, opening statements, closing statements, impact statements, etc.), and must conduct cross-examination at the hearing
 - Help the advisee to frame the appeal and prepare appeal documentation



INVESTIGATION

- Investigation Overview
- Interviewing



**Remember: As an
Investigator or
Decision-maker,
you have no “side”
other than the
integrity of the process!**

STEPS OF A TITLE IX INVESTIGATION

1. Receive Notice/Complaint.
2. Initial Assessment and Jurisdiction Determination
3. Notice of Investigation to Parties/Notice of Formal Allegation
4. Establish investigation strategy
5. Formal comprehensive investigation.
 - Witness interviews
 - Evidence gathering.
6. Create draft report including all relevant evidence

STEPS OF A TITLE IX INVESTIGATION (CONT.)

7. Provide report and all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response.
 - Complete final report.
 - Synthesize and analyze relevant evidence. Identify disputed and non-disputed elements
8. Send final report to parties for review and written response at least 10 days prior to hearing.



INVESTIGATION OVERVIEW

CONSIDERATIONS IN ISSUE SPOTTING

- Engaging in issue spotting based on the Complainant's statement is an important first step in development of your investigation strategy
- You will continue to identify issues as you interview others and gather evidence
- Continuing to revisit the facts gathered and identifying issues is critical to a comprehensive civil rights investigation
- Identifying the issues posed will help to identify the framework of policies in play

STRATEGY IS KEY

- The investigation team, in consultation with the Title IX Coordinator or designated Deputy, strategizes throughout the entire investigation. This includes:
 - What are the issues presented?
 - Are there undisputed facts? Which ones are significant to the investigation?
 - Are there facts in dispute? Which ones are significant to the investigation?
 - What policy(s) elements may have been violated?
 - Who do you need to interview?
 - What should be the order of the interviews?

OTHER ELEMENTS TO CONSIDER IN STRATEGY

- Strategize when to interview Complainant and Respondent
- What are the key issues involved?
 - What additional strategies do you need to address key issues?
- What additional documentary evidence will be important to the investigation?
- Discuss your methodology for this case (what approach will you use?)
- Timeline (within 30-60 days; will vary by case)

WHEN TO INTERVIEW PARTIES AND WITNESSES

- Impact of new Title IX regulations on clear and timely notice to the parties of the allegations and investigation
- Parties and witnesses should be interviewed as soon as possible:
 - For recollections to be as fresh and accurate as possible
 - To secure necessary remedies in a timely manner
 - Should not conduct interviews until parties have received their written notice of the allegations and investigation



INTERVIEWING

ELEMENTS OF THE INTERVIEW

- Greeting – first opportunity to establish rapport and tone (beginning of the “Spiel”):
 - Thank them for coming in
 - Acknowledge difficulty of situation
- Explanation of process:
 - Walk through all steps and what happens in each
 - Use your flow chart if you have one
 - Share the timeline requirements
 - Options after the meeting is over

ELEMENTS OF THE INTERVIEW (CONT.)

- Ask if they have any questions about the process or the procedure
 - Give them a copy of the resource and support guide
- Make sure parties don't leave facts out because they are afraid of getting into trouble
 - Discuss the amnesty provisions (if applicable)
- Create comfort with language and sensitive subjects
 - Let them know that they will not offend or surprise you

EXPLANATION OF PROCESS

- Discuss what happens next
 - Strategy, more meetings with others, etc.
 - Interim actions (supporting, preventing, etc.)
 - How long this may take
 - Other options they have (criminal, other processes, etc.)
- Initial report review and written response period
- Party feedback incorporated into Final Report and distributed before hearing
- Decision-maker (or hearing officer) makes determination and sanction

EXPLANATION OF ROLES

- Explanation as to **your role** in the process
 - Neutral fact-finder
- Explanation of others' roles in the process
 - Decision-makers
 - Title IX Coordinator
 - Advisors (for all parties)
 - Appellate officers

CONDUCTING INTERVIEWS

- Now begin the “interview”
 - Let them talk
 - Give them a starting point if they don’t have one
 - Drill down later
- Interrupt for questions only when you must
- **Note:** some strategies may change based on their demeanor
 - Expressive
 - Angry
 - Resistant
 - Hesitant



QUESTIONING GUIDELINES & SKILLS

QUESTIONING GUIDELINES

Take the complaint from start to finish through a process of broad to narrow questions and issues that need to be addressed.

- Prepare an outline of your questions in advance
 - Ask questions about the allegations, the evidence, and the policy elements
 - Focus on areas of conflicting evidence or gaps of information
 - Drill down on timelines and details
 - Review your questions before ending interview

THE ART OF QUESTIONING

- Listen carefully and adapt follow-up questions
- Work from your outline of your interview questions but be flexible
- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out because they are afraid of getting into trouble for alcohol/drug use, etc.
- Ascertain who the individual is and their relation to the other parties in the case
- Clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “fooled around,” “acted weird,” and “had a few drinks”

RESTATE/REFRAME

- Restate/summarize what is said; helps validate that you are listening
- Do not filter the language
 - Report what is said. Rephrase with caution.
- 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”

INTERVIEW GUIDELINES

- Pay attention to alcohol/drug consumption and timing of consumption (your “horizontal timeline”)
- Be cognizant of the difference between what was “heard” (rumor) and what was “witnessed” (facts)
- Ask who else you should talk to and ask for any relevant documentation (i.e., texts, emails, etc.)
- Let parties know you may need to follow up with them as the investigation progresses
- Discuss non-retaliation
- Discuss FERPA issues

QUESTIONING TIPS

- Avoid “why” questions:
 - Lack of physical resistance
 - Role of alcohol/drugs
 - Inconsistencies/memory loss
 - Delayed reporting
 - Prior relationships
 - “Pre-consent”/flirting
 - Pre-desired outcomes
 - Post-incident consensual acts
 - “What were you thinking” (vs. “feeling”)?

QUESTIONING TIPS (CONT.)

- At the end:
 - What else do you think might be important for us to know?
 - What other questions are there that you thought we might ask that we didn't?
 - Ask who else you should talk to and ask for any relevant documentation (i.e., texts, emails, etc.)
 - Is there anything you want me to ask the other party (or any witness)?
 - If you have not ascertained this, try to determine what Complainant's motivation is for reporting and what Complainant hopes to see as a result – **BE CAREFUL HERE.**

CONCLUDING THE INTERVIEW

- Let them know next steps and when they will hear from you, and that they can contact you anytime with questions or problems
 - Get their contact information
 - Voicemail?
 - Email?
 - Text?
 - Be as specific as possible about timelines



GATHERING THE EVIDENCE

GATHER THE EVIDENCE

- Collect the evidence from all sources
- Organize it according to the investigation strategy and allegations
 - Chronology
 - Geography
 - Policy prohibitions
 - Alleged violations
- Summarize evidence in a written report
- This is the fact-gathering function. It's a function all Investigators have performed since at least 2011, and it's not new or different as a result of regulations.

SYNTHESIZE AREAS OF DISPUTE

- Examine only actions that have a direct relation to the situation under review or a pattern of incidents
- Narrow the scope to areas in dispute or disagreement between the parties
 - Two lists: contested and uncontested facts
- May use evidentiary and report review periods to clarify disputed facts
- Present evidence in report organized around relevant facts relating to alleged policy violations
- Contested facts will form the bulk of the Decision-maker's work in making a determination

EVIDENCE AND REPORT REVIEW BY PARTIES (TITLE IX CASES)

- Upon completion of the draft report...
 - Relevant evidence directly related to allegations must be sent
 - To each party and Advisor
 - In electronic format or hard copy
 - Including evidence upon which the Recipient does not intend to rely
 - Including exculpatory and inculpatory evidence
 - Allow 10 days for written response
 - Consider response prior to completion of report
 - Make this evidence available at hearing

RELEVANCE

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
 - Regarding alleged policy violation
 - 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 – inculpatory and exculpatory

THE INVESTIGATION PROCESS

- **G**ather evidence
 - Organize the evidence so it is useful to the Decision-maker who applies the policy elements
- **A**ssess credibility of parties and witnesses without making ultimate conclusions
 - Point out areas of corroboration and issues that may bear on credibility
 - Assess evidence to determine what is relevant
- **S**ynthesize areas of agreement/areas that are disputed
 - Synthesis may also include an appendix of questions posed, questions rejected, and questions considered.



3 “BUCKETS” OF EVIDENCE

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

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

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



CONSIDERATIONS IN THE FINAL INVESTIGATION REPORT

MORE THAN FACT-GATHERING

- Review the institutional policies that apply.
- Follow G.A.S. model, meaning stop short of making a finding, making a recommendation, or doing anything that influences or usurps the independent role of the Decision-maker.
- In all Title IX based investigations (involving all faculty staff or students), or all student-based sex/gender investigations the Investigator will not render a recommended finding.
- In all civil rights cases that are not Title IX and involve a faculty or staff member the Investigator will conduct an analysis of the evidence and make a recommendation for a finding.

CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

- Under the Title IX regulations 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.”

ASSESS CREDIBILITY

- Accuracy and reliability of information
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading **may** impact
- Primary factors: corroboration and consistency
- Avoid **too much** focus on irrelevant inconsistencies
- Source + content + plausibility
- Trauma-informed approach should be consistent

COMMON ERRORS IN ASSESSING CREDIBILITY

- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
 - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about memory
 - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes



THE CONSENT CONSTRUCT

CONSENT

- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Creates mutually understandable permission regarding the conditions of sexual activity
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally

OVERVIEW OF THE THREE QUESTIONS

1. Was force used by the Respondent to obtain sexual or intimate access?
2. Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated

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

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

FORCE

- 1. Was force used by the Respondent to obtain sexual or intimate access?**
 - Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force.
 - Consider the impact of power dynamics

FORCE (CONT.)

Types of force to consider:

- **Physical violence:** hitting, restraint, pushing, kicking, etc.
 - This may also involve alleged violations of other policies (e.g., harms to persons, violation of law, etc.)
- **Threats:** anything that gets someone to do something they wouldn't ordinarily have done absent the threat
 - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat

FORCE (CONT.)

Types of force to consider:

- **Intimidation:** an implied threat that menaces and/or causes reasonable fear.
 - This requires the same threat analysis as above
- **Coercion** – the application of an unreasonable amount of pressure for sexual access
 - Consider isolation, frequency, intensity, and duration

INCAPACITY

2. Was the Complainant incapacitated?

- Incapacity ≠ impaired, drunk, intoxicated, or under the influence.
- What was the status of the Complainant in terms of:
 - Situational awareness
 - Consequential awareness
- What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non-prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious

INCAPACITY (CONT.)

- 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

BEHAVIORAL CUES

Evidence of incapacity context clues:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Passing out
- Throwing up
- Appearing Disoriented
- Unconsciousness

BEHAVIORAL CUES (CONT.)

Evidence of incapacity context clues:

- Known Blackout
- Although memory is absent in a blackout, verbal and motor skills are still functioning
- Outrageous or unusual behavior (requires prior knowledge)

PRIOR KNOWLEDGE CONSTRUCT

- These answers should be in the investigation report if the primary consideration is the out of norm behaviors of the Complainant as a determination of incapacity:
 - Did the Respondent know the Complainant previously?
 - If so, was Complainant acting very differently from previous similar situations?
 - Evaluate what the Respondent observed the Complainant consuming (via the timeline)
 - Determine if Respondent provided any of the alcohol for the Complainant
 - Other relevant behavioral cues

COMMON FACTORS

- Rate of consumption
- Strength of drink
- Food in the stomach
- Body weight
- Body type – body fat percentage
- Gender
 - E.g., enzymes, hormones, body fat, and water in body
- Functional tolerance
- Medications
- Illness and dehydration
- Fatigue
- Caffeine
- Genetics
- Ethnicity

CREATE A TIMELINE

- First must evaluate if the Complainant was incapacitated.
 - This inquiry will likely be triggered by statements such as:
 - “The next thing I remember was”
 - “I woke up and”
 - “I don’t remember anything after”
 - That is your cue to start a timeline of the events during the incident to make the first-level analysis of whether the Complainant was incapacitated.

TIMELINE CONSTRUCT

- The timeline begins at the time the incident began, starting at the time the Complainant began consuming alcohol/engaging in recreational drug use. Questions included:
 - What were you drinking (e.g. wine, beer, or hard liquor)?
 - How much were you drinking (e.g. shot, 12 oz., or large cup)?
 - How many drinks did you have?
 - Were you using any recreational drugs?
 - When did you eat? What did you eat?
 - Are you on any personal medications?

TIMELINE CONSTRUCT (CONT.)

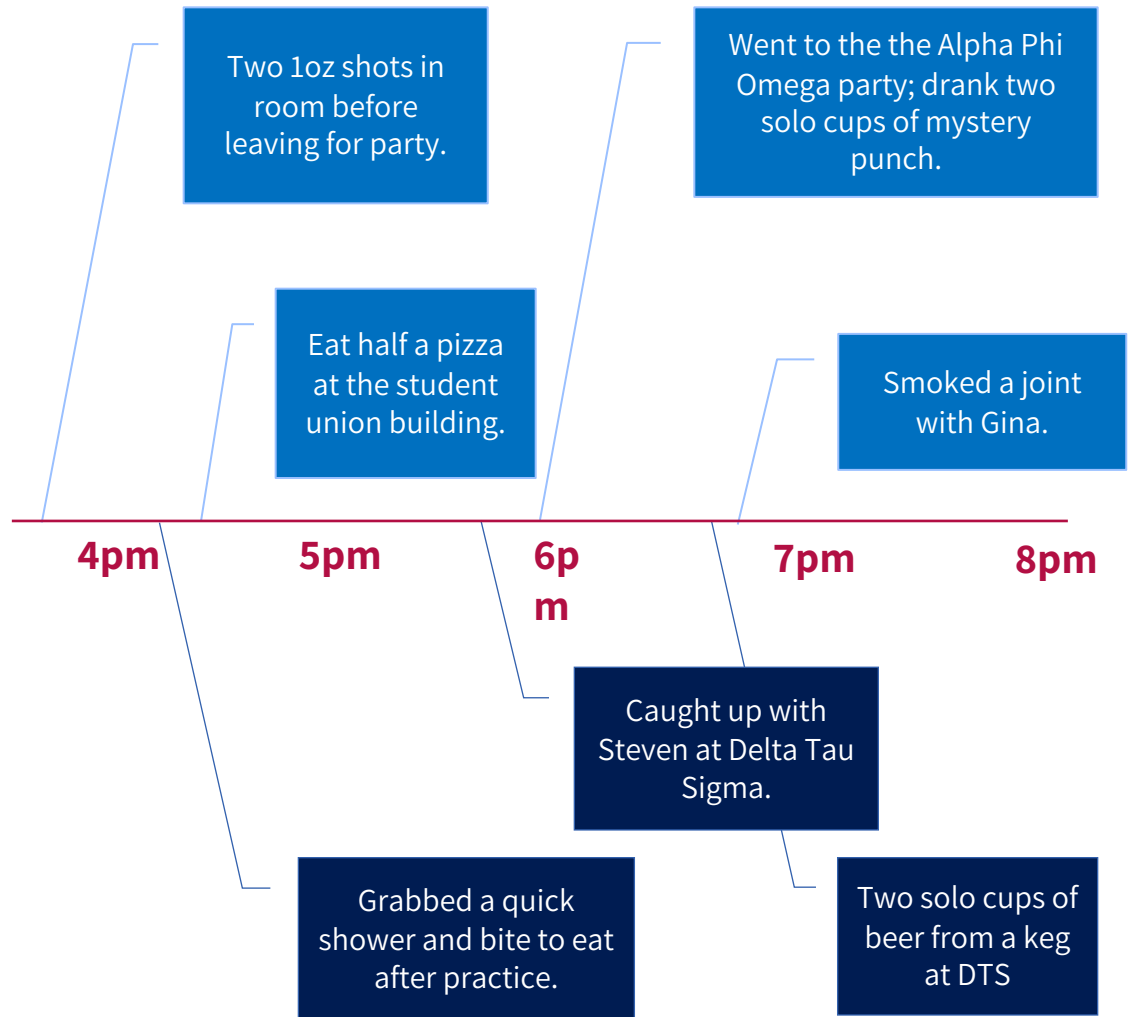
- Repeat the first five questions up until the point in time that Reporting Party indicates he/she cannot remember anything
- **Note:** If Complainant did not have anything to drink, or only had a small amount, consider whether the individual was drugged. You will need to ask:
 - Where were you when you were drinking?
 - Did you leave your drink at any time then resume consuming?
 - Did anyone provide drinks for you?



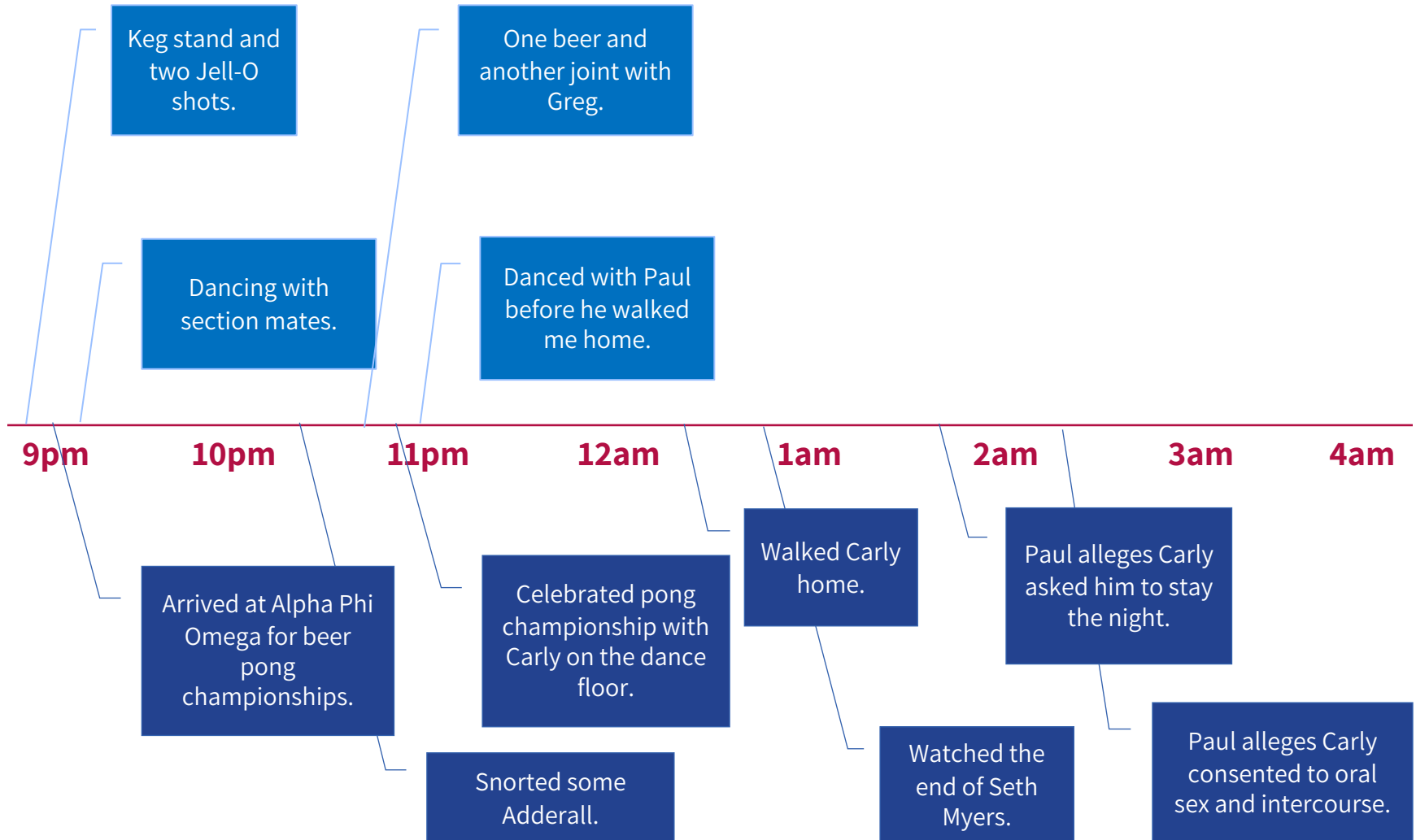
TIMELINE EXAMPLE

CREATING A TIMELINE

- The Decision-maker will use the preponderance of evidence standard
- Use documentary evidence, e.g., texts to establish where, why, when, how, and who
- Match up as many times and locations as possible
- What did the other party observe?



CREATING A TIMELINE



TIMELINE CONSTRUCT

- You will need to make an assessment if, based on the preponderance of the evidence, the Complainant was more likely than not incapacitated
- Conduct the same timeline for the Respondent, superimposed on the Complainant's timeline

INCAPACITY ANALYSIS

- If the Complainant **was not** incapacitated, move on to the Consent Analysis.
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know it, **AND**
 - The Respondent would not have reasonably known it = policy not violated. Move to Consent Analysis.
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it** = policy violation
Sanction accordingly
 - The Respondent **should have known it** = policy violation
Sanction accordingly
 - The Respondent's own intoxication cannot be used as a defense

CONSENT ANALYSIS

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

- Is there any sexual or intimate pattern or history between the parties?
- What verbal and/or non-verbal cues were present during any acts that the parties agree were consensual?
- This is where getting detail and specifics of intimate behaviors is critical

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 prior to or contemporaneously with the sexual activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.



CASE STUDY: KYLE & BOB

KYLE & BOB

- Kyle O'Neil, the Complainant, a first-year student
- Bob Thompson, the Respondent, a second-year student

KYLE O'NEIL'S STATEMENT

It was Friday night and man it had been a long week. I was invited to an off-campus party and was ready to blow off steam. My adjustment to college has been a challenging one. Frankly, I'm struggling with feelings that I had not recognized before and it's scaring me. I just wanted to forget all the stress of school and my personal life and have a good time.

I was dancing and doing some drinking and a guy came up to me and started dancing. I'd seen him on campus and thought he was really good looking. No one seemed to be paring off, so it didn't feel awkward.

Over the next couple hours, I had a blast. Bob got me some more beers and then they started passing out Jell-O shots. I'd never had them before, and they were great. I think I had a bunch.

KYLE O'NEIL'S STATEMENT

I started feeling really nauseous and hit the can cause I knew I was going to be sick. I got sick and decided it was time to head home. I only made it as far as the outside door and got sick again, right there in the bushes. I didn't realize anyone was around, but Bob came up to me and asked if I needed help. I was so glad for someone to help me get back to my dorm.

I remember us coming in my room and I remember hugging Bob (I don't know why--I think I was just so glad to be back). Then I got sick again. Bob was still there when I came back from the bathroom and he encouraged me to lay down. I must have. The rest of the night is a blur. I remember someone rubbing my back, it must have been Bob.

KYLE O'NEIL'S STATEMENT

When I woke up, I was naked and had a terrible hangover and then I saw a note from Bob. I didn't realize he left me one. I also saw a used condom in the trash. I was so confused and didn't know what had happened. I called him to find out just what went on last night and he asked me out! I'm so upset! What did I do? What did he do? I don't know if I want to find out, but I know it's bad. He did this to me, and I want him held responsible. This whole thing is messing with my mind.

BOB THOMPSON'S STATEMENT

On the night of Friday, September 13th, I went to an off-campus party. There was a band, and a lot of alcohol. I got to the party at about 11:00 pm and slammed about three beers in the first hour I was there. It was very crowded, and people were dancing. A lot of people already seemed to be drunk. I hung out around the dance floor with my friend Jami Warren for a while, until I noticed Kyle O'Neil dancing. He was really hot, and I had noticed him on campus a few times. I didn't know if he was into guys, but I was willing to find out. I went up to him and we started talking.

BOB THOMPSON'S STATEMENT

He seemed a little tipsy and in a pretty loose mood. We talked for a while, and he asked me to get us some more drinks. I think I got him about two or three beers over the next hour.

I didn't have anything more to drink because the three beers I slammed were doing the trick just fine. Around 1:00 am, somebody started passing out Jell-O shots spiked with grain alcohol. I didn't want to mix beer and liquor, but Kyle had a few shots.

We danced a lot, and he had a few more Jell-O shots. He went off to the bathroom, and after that I couldn't find him, and that really bummed me out. I waited around to see if he would show up again, but he didn't. I took off and started to walk back to my residence hall.

BOB THOMPSON'S STATEMENT

As I left the party, I heard someone vomiting. I looked over and saw Kyle in the bushes, throwing up. I went over to help him, and he seemed to be in pretty bad shape. I offered to take him home, and he told me where his dorm was and leaned on my arm. When we got to his dorm, I helped him inside, and was about to leave, but he asked me to come up to his room, just to make sure he got there. I took him upstairs, opened the door for him, and let him in.

He asked me to get him a glass of water, and I did. I started to take off again, but he asked me not to go. When I turned around, he hugged me. We hugged for a while, but he wasn't feeling well, and went into the bathroom. When he came out, he said he felt better, but tired.

BOB THOMPSON'S STATEMENT

We crashed on the couch and then started kissing. I started to massage his back, and he fell asleep. He woke up about 20 minutes later, and he started to kiss me, and fondle me. He took off my shirt, and I took off his, eventually we were both naked. I started to give him oral sex, and he said he needed some rest. I asked him if this was OK and if he was OK, and he said he was, he just needed to rest some more. I asked him if he had a condom, and he said he had one in his dresser. I went to get it, and when I got back to the couch, he was asleep again. He woke up after about 20-30 minutes, and I suggested that he just go to sleep. But he said he felt much better and started to give me oral sex.

BOB THOMPSON'S STATEMENT

After a while, he put the condom on and we had sex. It was great. Afterward I gave him my number and left. The next day, he called me to ask me why my name and number was on the pad by his sofa. I told him about meeting him at the party, and about our evening together. He seemed to get upset, and said he remembered meeting me at the party, and me helping him back to his dorm but almost nothing else. I asked if he wanted to go out sometime, and he said, "I'm not gay," and hung up on me. Two days later, I was notified by the Dean that Kyle filed a complaint against me, and here I am.

EXERCISE

- Identify issues present in the allegations
- Note points of disagreement or inconsistency between Kyle and Bob's statements
- Is it more likely than not that Kyle was incapacitated?
- If you determine yes, is it more likely than not that Bob knew? Could Bob have planned or created the incapacitation?



HEARING OVERVIEW PROCESS

WHO RENDERS THE DETERMINATION?

- Decision process:
 - Investigator refers investigation report to Decision-maker(s) without determination
 - Investigator ≠ Decision-maker
- Importance of investigation report
 - How much credibility assessment and analysis to include?
 - Your opinion is not controlling, but you want to point the Decision-maker(s) toward decisive or corroborating evidence w/o telling them how to interpret it

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

- 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

SINGLE DECISION-MAKER VS. HEARING PANEL

- Single Decision-Maker runs the hearing, and it is much like a bench trial
 - Will make a finding
 - Typically makes the sanctioning decision (though some have a different person do that)
- A Hearing Panel:
 - Has a Chair, who is a voting member
 - The Chair runs the proceedings
 - Hearing panel is typically 3 voting members
 - Will make a finding
 - Typically makes the sanctioning decision (though some have a different person or body of individuals do that)

ADVISORS IN TITLE IX HEARINGS

- Advisors chosen by the party must conduct thorough cross-examination in all Title IX cases, 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.
- 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.

ROLE OF THE ADVISOR IN CONFLICT RESOLUTION HEARINGS

- Emotional and moral support
- May accompany party to any meeting
- May assist advisee with preparing questions and statements
- Ask for breaks as-needed
- Otherwise only advise and assist

WHAT ROLE DOES THE INVESTIGATOR PLAY IN A HEARING?

- The Investigator is often a key witness at any hearing
- The investigation report is admitted as evidence
- The Investigator may be questioned and subjected to cross-exam by all parties' Advisors
- The conclusion on credibility needs to be assessed by the Decision-maker(s)
 - Whether someone/some evidence is credible
- The Investigator's opinions regarding a determination should not influence the hearing, so questions about the Investigator's opinions should be avoided; Investigators should not volunteer, and Decision-makers should not probe

EVIDENCE

- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses, including experts
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- 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

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

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)

UNDERSTANDING EVIDENCE (CONT.)

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

ASK YOURSELF

Is it relevant?

Is it reliable?
(Is it credible?)

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

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.

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.



THE HEARING DETAILS: TITLE IX CASES

THE HEARING: TITLE IX CASES

- Mandated live hearings for all Title IX cases including faculty, staff or students
- Parties and witnesses must attend hearing and submit to **live, Advisor-led** cross-examination
 - Otherwise **all statements** submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator, the Investigator, or the Appellate officer
- Provisions for separate rooms, video-based hearing
 - Must be able to clearly hear and see other parties

QUESTIONING & CROSS-EXAMINATION

- **Must allow live cross-examination** to be conducted exclusively by each party's Advisor
 - Verbal, direct, in real time
 - Never by the party personally
- Each party must be permitted to ask the other party and all witnesses all **relevant questions** and **follow-up questions**
 - Including questions challenging credibility
- Decision-maker must first determine whether each question is relevant and direct party to answer or not to answer
 - Must explain any decision to exclude a question as not relevant.

QUESTIONING & CROSS-EXAMINATION

- It's critical to manage disruptive or abusive Advisors
- 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.
- 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.



UNDERSTANDING CREDIBILITY IN THE DECISION PROCESS

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.
- Title IX regulations are quite clear such evidence may not be considered if it relates to a statement previously made. Other evidence can be considered.

CREDIBILITY OVERVIEW

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

Inherent Plausibility

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

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (cont.)

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

FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

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

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they were in class, teacher confirms
 - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (cont.)

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

FACTORS TO CONSIDER FOR CREDIBILITY

Past Record

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

FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

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



MAKING A DECISION

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

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
- Parse the policy; 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

DELIBERATIONS

General Information

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

Withhold judgment until all the evidence has been considered.

DELIBERATIONS

Foundation for Decisions

- Decisions must be based only upon information/evidence in the investigation report or presented at the hearing
- Do not turn to any outside “evidence”
- 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?

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

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
 - 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

WRITTEN DETERMINATIONS (CONT.)

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

- 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.
 - The sanction may be imposed by a separate body but the final determination and sanction must be included in the same outcome letter.
- The written determination should be provided to the parties simultaneously.
 - Follows existing VAWA/Clery requirements for higher education institutions.
- 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.



SANCTIONING

SANCTIONING IN SEXUAL MISCONDUCT CASES

Title IX and case law require:

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

SANCTIONS AND REMEDIES UPON DETERMINATION OF RESPONSIBILITY

- Disciplinary sanctions for Respondent
- “Remedies” to Complainant
- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s)
- Any sanction must be reasonable and proportionate to the severity of the behavior
- The appeal may return a matter to Investigators or consult Investigators on the appealability of certain elements of the file, report, or testimony

COMMUNICATING OUTCOMES

- Title IX requires Recipients to apprise parties of the status of investigations, **determinations, sanctions** (or remedial actions) **and supporting rationale**
 - Recipient provides this information in writing and place no conditions on receiving or sharing it
- Clery Act/VAWA and Title IX regulations are the primary sources of mandates for outcome notification. FERPA also permits disclosure in certain circumstances.
 - Clery/VAWA disclosure of sexual assault outcomes/sanctions
 - FERPA re-disclosure restrictions lifted in 2008
 - FERPA cannot be construed to conflict with or prevent compliance with Title IX

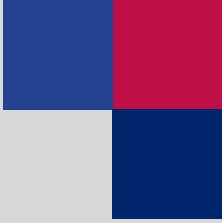
VAWA MANDATES RE FINDING

Institutional disciplinary procedures shall “provide a prompt, fair and impartial investigation and resolution.”

- Parties must be simultaneously informed in writing of:
 - **The outcome**...that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking
 - The Recipient’s procedures for appeal
 - Any change to the results that occurs prior to the time that such results become final
 - When such results become final

FINALITY OF DETERMINATION

- If an appeal is filed, the determination regarding responsibility becomes final on the date that the Recipient provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.



APPEALS

APPEAL REQUIREMENTS

- Offer all parties an appeal from a finding of responsibility, and from a dismissal of a formal complaint 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

APPEAL REQUIREMENTS (CONT.)

- Upon appeal by a party the institution must:
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - Ensure that the Decision-maker(s) for the appeal is not the same person as the Decision-maker(s) that reached the determination regarding responsibility or dismissal, the Investigator(s), or the Title IX Coordinator;
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - Issue a written decision describing the result of the appeal and the rationale for the result; and
 - Provide the written decision simultaneously to both parties.

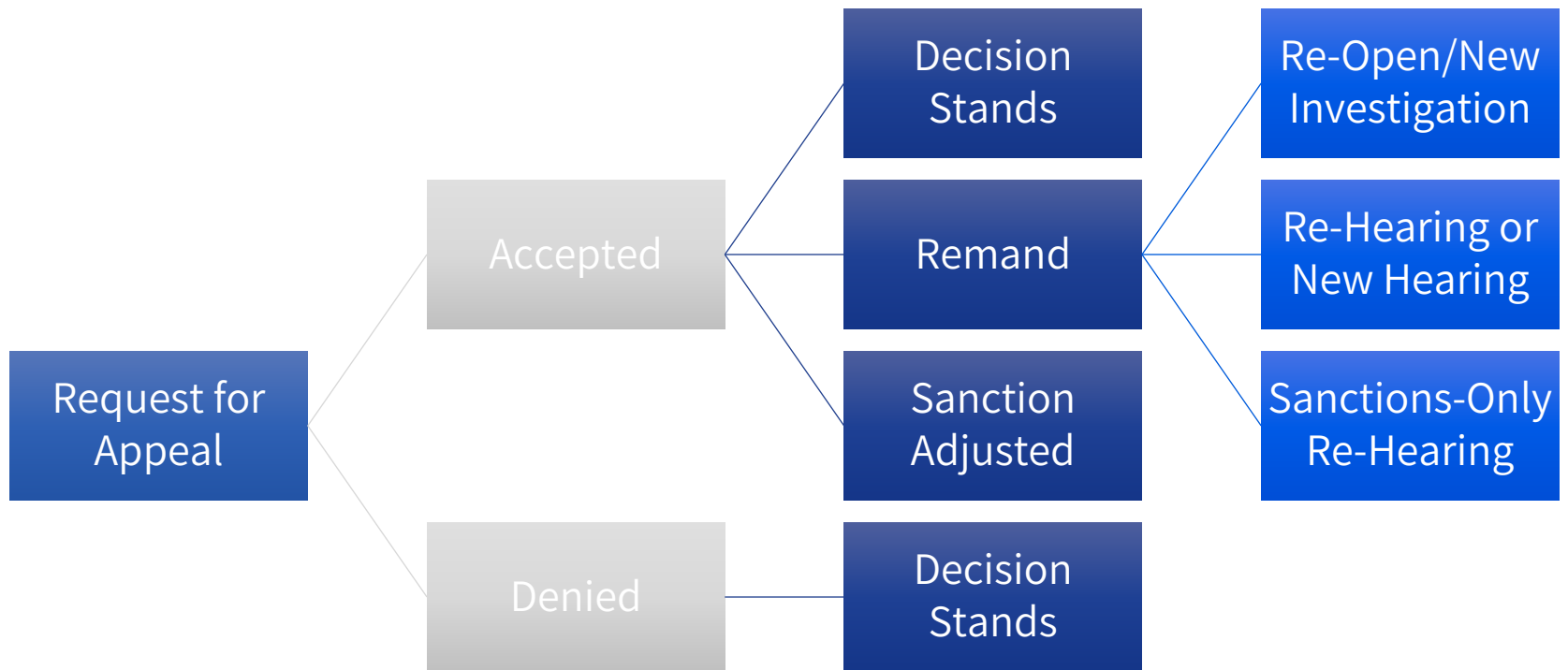
APPEAL BEST PRACTICES

- Appeals are typically done in writing
- A best practice is to have a “gatekeeper” to determine sufficiency of appeal request
- Review the relevant sections that are under appeal of the investigation report, the hearing record, and all available documents
- You may conduct limited interviews with the parties or witnesses as necessary but avoid a full re-hearing. If needed, remand
- Make an independent and impartial determination solely on the grounds that were appealed

APPEAL GUIDELINES

- Make sure the procedures are followed to a fair result
- That result may not be how you would have decided it, but the goal is to show deference on appeal unless there is **clear error**
- Initial investigation and decision should be presumptively sufficient until evidence shows otherwise
- The Appellate decision maker may disagree with sanction, but there must be a **compelling justification** to change it, not mere disagreement
- Sanctions must bring an end to discrimination and reasonably prevent its reoccurrence (Title IX)
- Remedies must repair the harm; make the Complainant whole

RECOMMENDED APPEAL PROCESS



POSSIBLE OUTCOMES

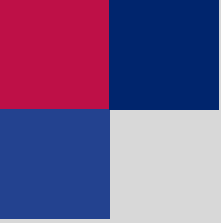
- Request for appeal is denied
 - Decision stands
- Request for appeal is granted
 - Affirm the original decision
 - Remand
 - To correct a procedural error or address new evidence
 - Re-open investigation (full redo uncommon)
 - Re-hearing (usually partial, unless full re-hearing required)
 - To adjust the sanction
- Remand or sanction adjustment by appellate body

APPEAL OUTCOME BEST PRACTICES

- Remand should always be the default action if there was an issue in the procedure
- If there is a problem and you can send it back for reconsideration, do so
- Problems with investigation can be repaired by re-opening the investigation, or in rare cases, by re-investigating
- Problems with hearings can often be fixed by limited re-hearing. Re-dos should be rare.

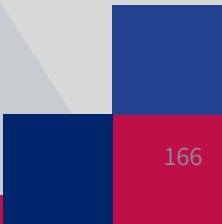
WHEN APPEALS GO OFF THE RAILS

- Interventionist Appellate officers who believe it is their job to second-guess the decision body
- Granting appeals for the chance at an educational conversation/to teach a lesson
- The liability risk of a too strong appellate authority
- Hierarchs as Appellate officers – a common practice and may present challenges
- Failure of adequate training
- Too much deference can also bite you (if the initial decision is wrong, or results from lack of training, you do have to set things right)



Association of
Title IX Administrators

Questions?





CONTACT INFORMATION

Sandra K. Schuster, Esq.
sandra.schuster@tngconsulting.com



Association of
Title IX Administrators

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.