



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

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July 15<sup>th</sup> & 16<sup>th</sup>, 2019 | Cedar Rapids, IA

# HOUSEKEEPING ITEMS



- Sign in all days of training for certification eligibility
- Access to certificates is available from our CCC system within 7-10 business days following the conclusion of this training, please log-in to [ccc@nchem.org](mailto:ccc@nchem.org) or create an account to obtain information
- Digital badging is also available through Accredible, you will receive a follow-up email within 7 days post training regarding this new feature for your email signatures and business cards
- CEUs are granted on an individual basis by your field's accrediting body
- Materials site will remain available for three months following this training
- If applicable, you will receive your complimentary trial membership within 7 days post training



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Partner, The NCHERM Group  
Advisory Board, ATIXA

## Agenda

- Hearing Officer/Decision-Maker Competencies
- Overview of Title IX
- Hearing Officer/Decision-Maker Overview
- Due Process: Legal Foundations
- Review of ATIXA Due Process Checklist
- VAWA Sec. 304: Institutional Disciplinary Policies and Procedures
- The Hearing
- Questioning

## Agenda

- Consent Construct
- Evaluation of Evidence and Decision-Making Skills
- Deliberations
- Bias, Prejudice & Cultural Competence
- Neurobiology of Trauma
- Sanctioning in Sexual Misconduct Cases
- Appeals

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# HEARING HEARING OFFICER/DECISION-MAKER COMPETENCIES



- The Legal Landscape
- The Conduct/Disciplinary Process
- Investigation and Resolution Procedures
- Title IX & VAWA Requirements
- Critical Thinking Skills
- How to Prepare for a Hearing
- Hearing Decorum
- Questioning Skills
- Weighing Evidence
- Analyzing Policy
- Standards of Proof
- Sexual Misconduct/ Discrimination
- SANE and Police Reports
- Understanding Intimate Partner Violence
- Bias/Prejudice/Impartiality
- Deliberation
- Sanctioning/Remedies
- The Appeals Process
- Cultural Competency
- Intersection with Mental Health issues
- Concurrent Criminal Prosecutions
- Writing Decisions/Rationales

# THE GOAL



**MAKING THE APPROPRIATE DECISION**

# HEARING BOARD VALUES EXERCISE



Rank your Top 3 responsibilities as a Hearing Board member, Identify your least important responsibility

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

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

# OVERVIEW OF TITLE IX

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*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.”

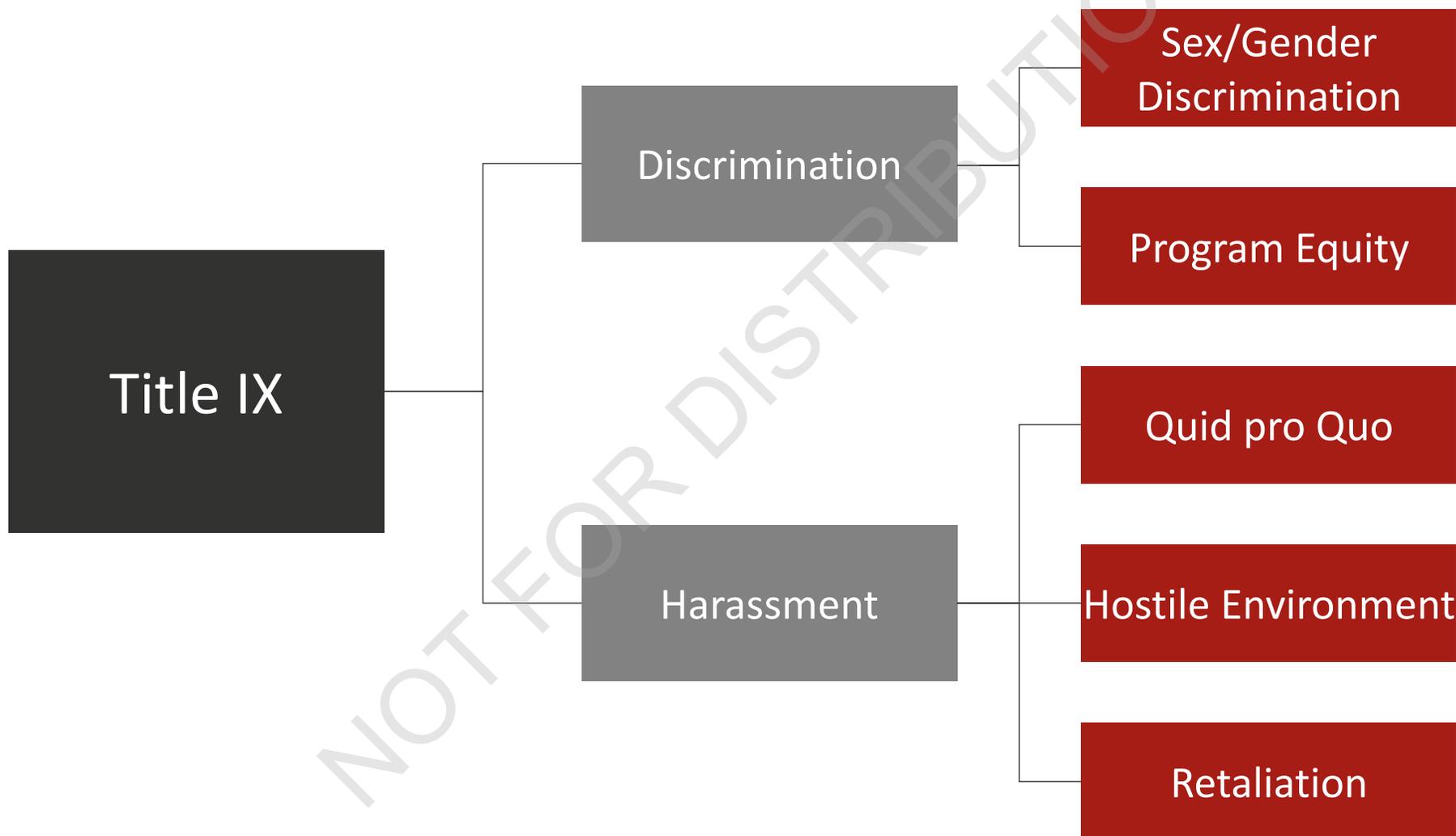
# IMPORTANT STATISTICS



## UE Study: “Confronting Campus Sexual Assault”

- 99% of Perpetrators were men
- 94% of Victims were women
- 54% of Victims were first year students
- 96% Involved acquaintances
- 33% Involved incapacitation
- 29% involved physical force
- 18% involved failed consent
- 13% involved coercion

Source: United Educators – “Confronting Campus Sexual Assault’ 2017



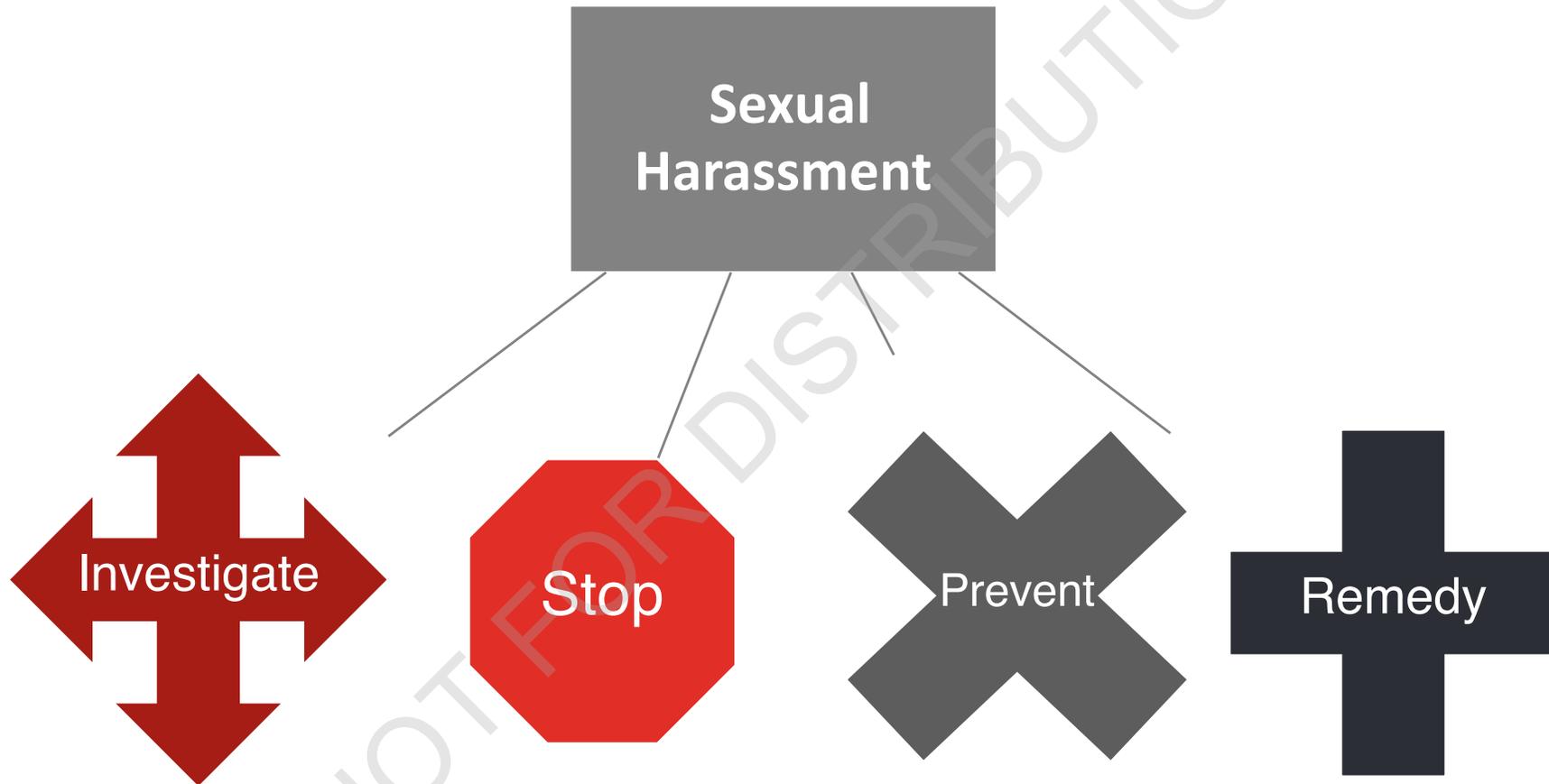
# TITLE IX ESSENTIAL COMPLIANCE ELEMENTS



- Once a “responsible employee” has either actual or constructive notice of sexual harassment/ sexual misconduct, the school must:
  - Take immediate and appropriate steps to **investigate** what occurred
    - The obligation to investigate is absolute, even if just a preliminary inquiry (see *Davis*)
  - Take prompt and effective action to:
    - **Stop** the harassment;
    - **Prevent** the recurrence; and
    - **Remedy** the effects

**NOTE:** This is regardless of whether or not the victim makes a complaint or asks the school to take action

# INSTITUTIONAL OBLIGATIONS UNDER TITLE IX



# THE IX COMMANDMENTS



<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>	<b>Investigation</b> (prompt & fair – VAWA Sec. 304)
<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>	<b>Process</b>
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	<b>Remedies</b>

# HEARING OFFICER/ DECISION-MAKER OVERVIEW

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The Process

Confidentiality

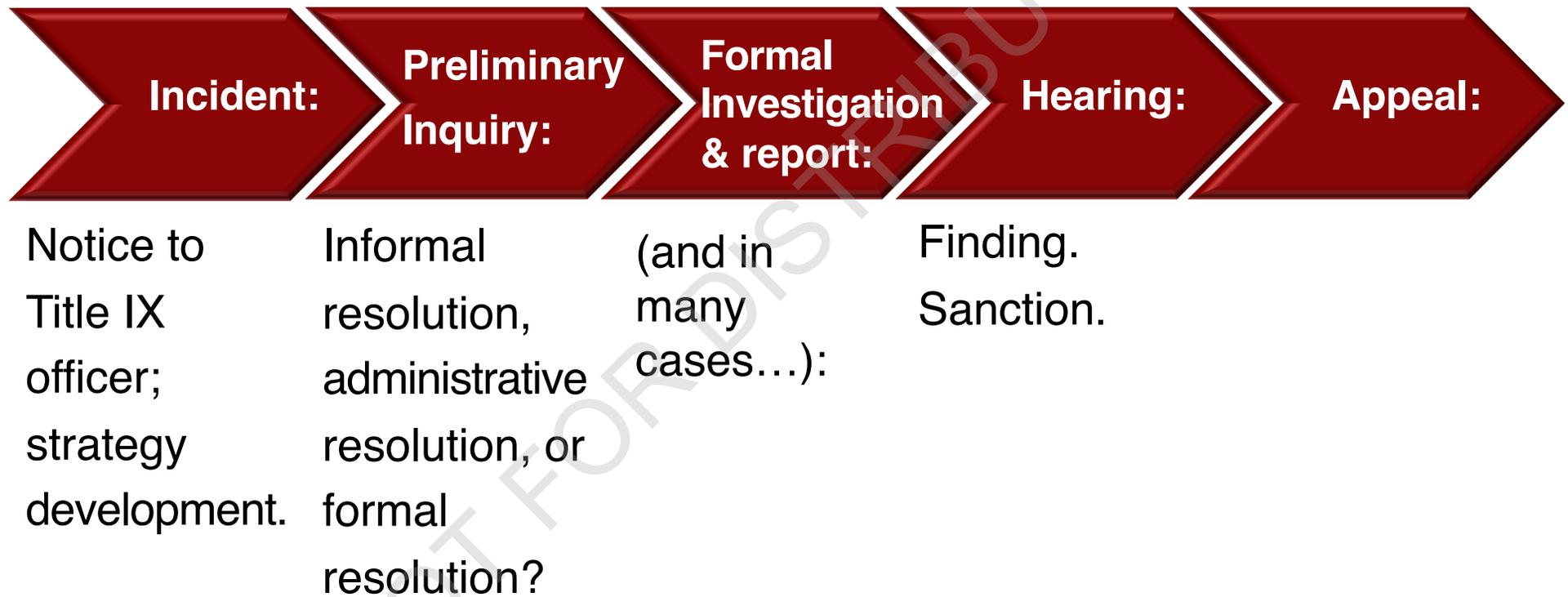
Preparing for the Hearing

Hearing Decorum

Jurisdiction

Standard of Review

# OVERVIEW OF THE TITLE IX PROCESS



# 10 STEPS OF AN INVESTIGATION



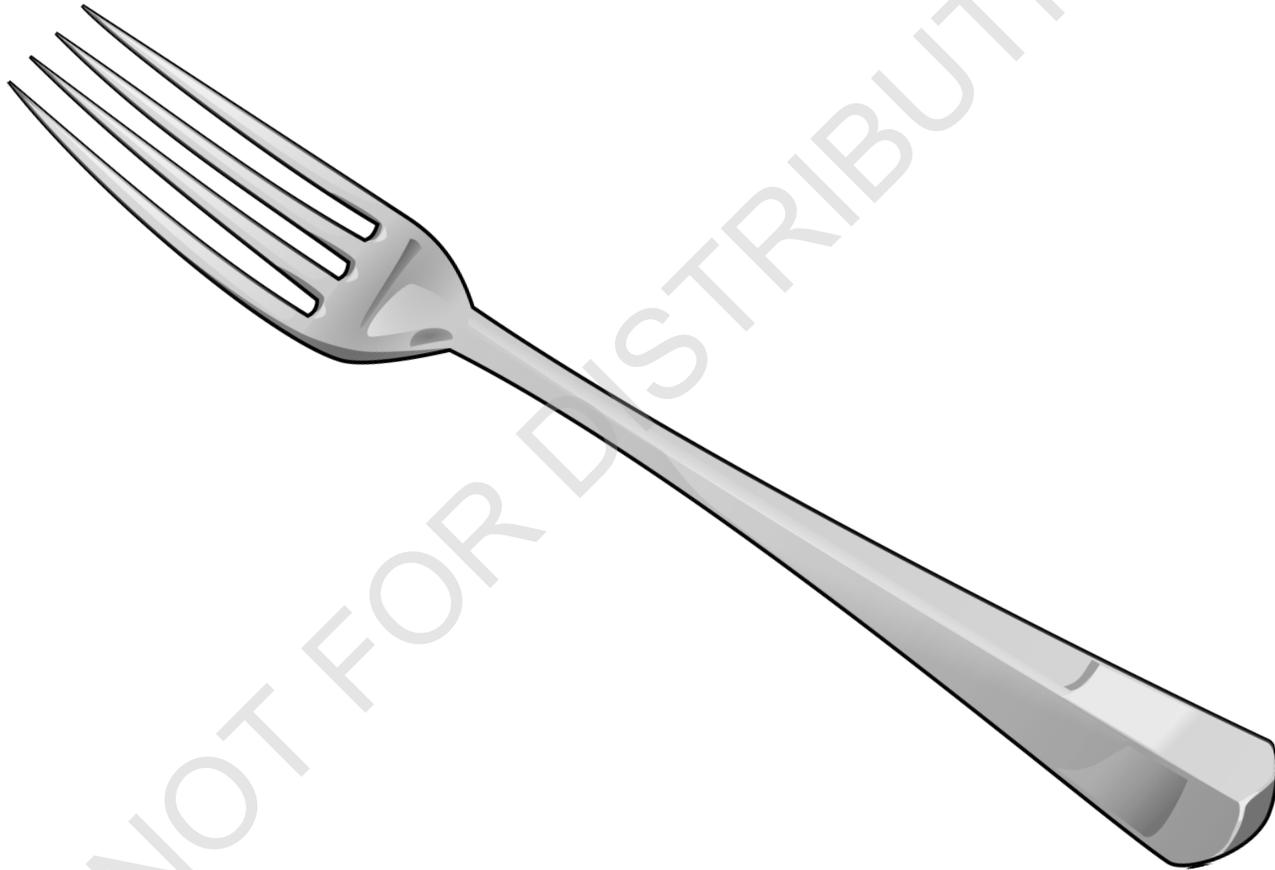
1. Receive Notice or Allegation.
2. Preliminary Inquiry (initial issue-spotting).
3. Gatekeeper determination.
4. Notice of Investigation to Responding Party and Notice of Formal Allegation (“Charge”).
5. Issue spotting by investigators (will continue as new information is added).

# 10 STEPS OF AN INVESTIGATION

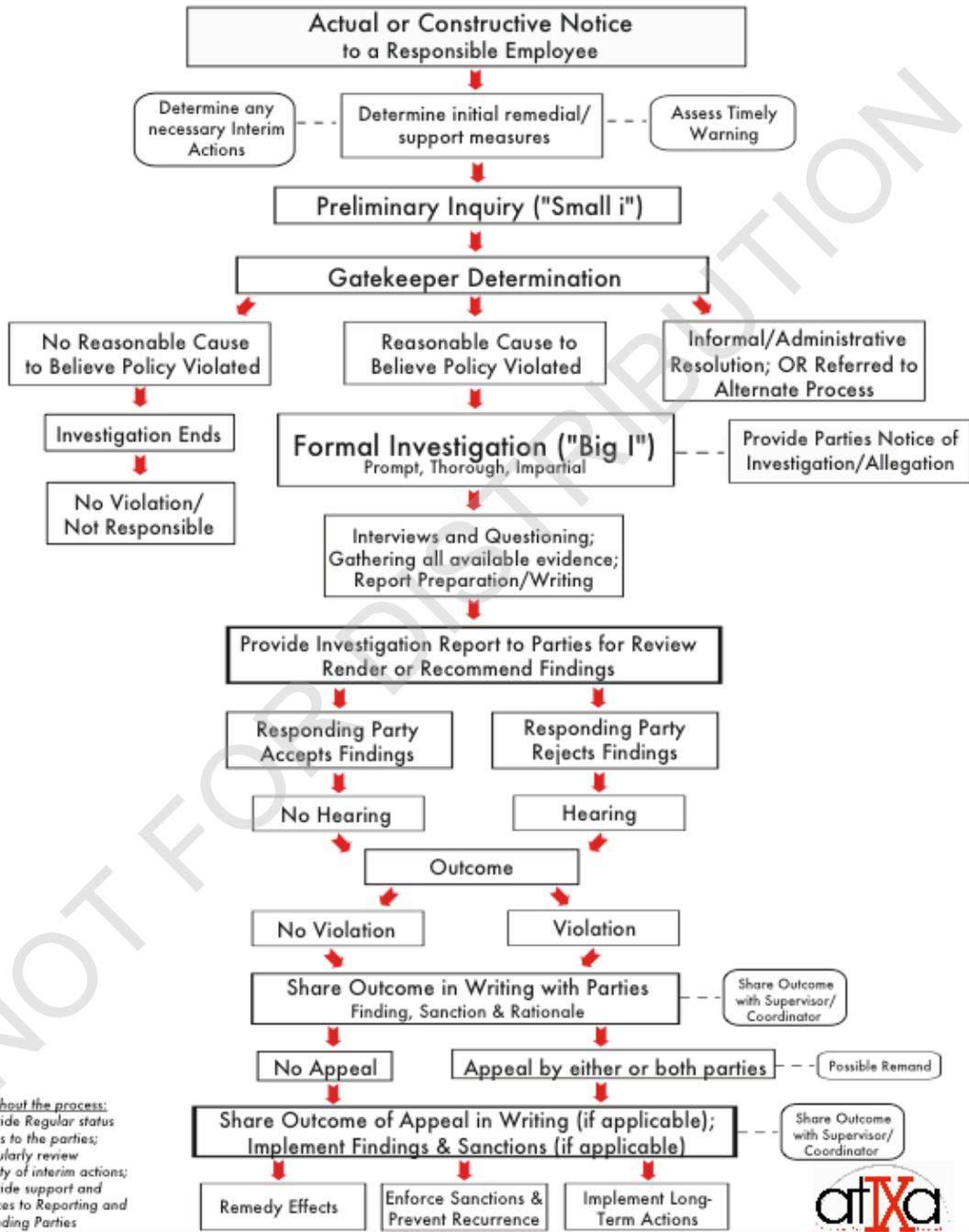


6. Preliminary investigation strategy.
7. Formal comprehensive investigation.
  - Witness interviews
  - Evidence gathering.
8. Write report.
9. Meet with Title IX Coordinator, and then parties, to review report & evidence (follow-up as needed).
10. Synthesize and analyze evidence, including making recommended findings (may vary by institution).

# THE PROCESS



# INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



*Throughout the process:*  
 1: Provide Regular status updates to the parties;  
 2: Regularly review necessity of interim actions;  
 3: Provide support and resources to Reporting and Responding Parties



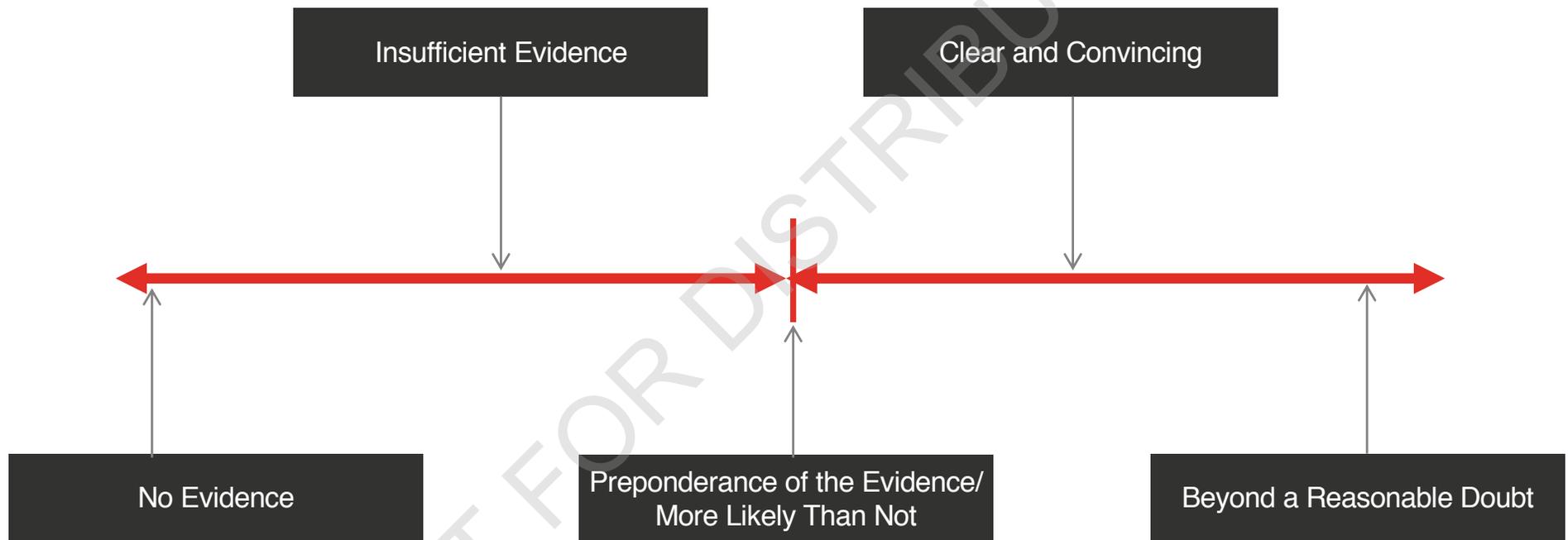
# HEARING BOARD GUIDELINES



# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



# EVIDENTIARY STANDARD



- Different Standards: What do they mean? Why do they exist?
  - Beyond a reasonable doubt
  - Clear and convincing
  - **Preponderance of the evidence**
    - **The only equitable standard**
- Use language the community understands.
  - 50.1% (50% plus a feather)
  - “More likely than not”
  - The “tipped scale”

# HEARING BOARD GUIDELINES



- It is essential that you understand and can apply the “preponderance of the evidence” standard. Be aware of “standard creep” when the potential sanction is serious
- Recognize that understanding the question of if someone violated the policy is distinct from factors that would aggravate or mitigate a sanction
- You must learn to police yourself and others when questioning veers into bias or irrelevance (also a critical role for the panel chair)
- Recognize when there are significant issues that calls for either an expert or special training

# THE CHALLENGE FOR HEARING OFFICERS/DECISION-MAKERS



- Your institutional policy spells out the standards for assessing prohibited conduct in sexual harassment, discrimination and misconduct within your community.
  - The institutional standards are impacted by Title IX requirements.
- It is not a question of right and wrong, or “If Something Happened”; it’s a question of “Is there a policy violation?”
- Your role is to uphold the integrity of the process.
- You may not agree with your policy, but you must be willing to uphold it.

# CHALLENGES FOR HEARING BOARDS



- The challenge of addressing issues of:
  - Focusing your questions to the Investigators and relying on the Investigation Report
  - Understanding “impaired” v “intoxicated” v “incapacitated”
  - Identifying “knew or should have known”
  - Understanding consent
  - Understanding credibility
  - Being able to apply solid analytical skills
  - Measuring your concerns about consequences appropriately

- It is critical that proceedings and cases remain confidential
  - Do not discuss with anyone who is not involved
  - Only discuss cases in a private setting
  - Failure to maintain confidentiality should be grounds for dismissal from Hearing Pool or Appellate role
- FERPA & Education Records
  - Student/parent(preK-12) has a right to review student Record
    - Exercise caution with what you put in writing or in your notes
- Employees Records

# DUE PROCESS: LEGAL FOUNDATIONS

- *Dixon v. Alabama* (1961)
- *Esteban v. Central Missouri State College* (1969)
- *Goss v. Lopez* (1975)

# *DIXON V. ALABAMA STATE BD. OF ED.* 294 F. 2D 150 (5TH CIR., 1961)



- In February of 1960, six black students sat in at a public (all white) lunch counter and were arrested
- Alabama State summarily expelled all of them without any notice of the charges or of a hearing, and no opportunity to provide evidence or defend themselves
- 5th Cir. Court decision established minimum due process (reiterated by U.S. Supreme Court in *Goss v. Lopez* (1975))
  - Students facing expulsion at public institutions must be provided with at least **notice of the charges** and an **opportunity to be heard**
  - Ushered in most campus disciplinary and hearing-based processes

***DIXON V. ALABAMA STATE BD. OF ED.***  
**294 F. 2D 150 (5TH CIR., 1961)**



- Specifically, the court set forth a number of due process-based guidelines, including:
  - Notice, with an outline of specific charges
  - A fair and impartial hearing
  - Providing names of witnesses to accused
  - Providing the content of witnesses' statements
  - Providing the accused an opportunity to speak in own defense
  - The results and findings of the hearing presented in a report open to the student's inspection

# **ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE**

## **415 F.2D 1077 (8TH CIR. 1969)**



- Students were suspended from school following participation in campus riots. They sued MSC and won. The court asserted the school must provide the following elements to satisfy due process:
- Written charge statement, made available 10 days prior to hearing
- Hearing before a panel with authority to suspend or expel
- Charged student given opportunity to review information to be presented prior to hearing
- Right of charged student to bring counsel to furnish advice, but not to question witnesses
- Right of charged student to present a version of the facts through personal and written statements, including statements of witnesses

# ***ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE*** **415 F.2D 1077 (8TH ÇIR. 1969)**



- An opportunity for the charged student to hear all information presented against him and to question adverse witnesses personally
- A determination of the facts of the case based solely on what is presented at the hearing by the authority that conducts the hearing
- A written statement of the finding of facts
- Right of charged student to make a record of the hearing

# *GOSS V. LOPEZ*

## 419 U.S. 565 (1975)



- Nine high school students were suspended for 10 days for non-academic misconduct from various public high schools. None were provided a hearing
- The court held that since PreK–12 education is a fundamental right, students were entitled to at least a modicum of “due process”
- Reiterating the 5th Circuit, it noted that the minimum due process is notice and an opportunity for a hearing and to present your side of the story

# ***GOSS V. LOPEZ***

## **419 U.S. 565 (1975)**



- The court further stated that the hearing could be informal and need not provide students with an opportunity to obtain private counsel, cross-examine witnesses, or present witnesses on their behalf
- Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests

# DUE PROCESS

- What is Due Process?
- Due Process in Procedure
- Due Process in Decision
- Comparative Due Process

# WHAT IS DUE PROCESS?



- Due Process (public institutions):
  - Federal and state constitutional and legal protections against a state institution taking or depriving someone of education or employment (14<sup>th</sup> Amendment)
- “Fundamental Fairness” (private institutions):
  - Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures

# WHAT IS DUE PROCESS?



- Ultimately, both are the set of rights-based protections that accompany disciplinary action by an institution with respect to students, employees, or others
  - Informed by law, history, public policy, culture etc.
- Due process in criminal and civil courts vs. due process within an institution
- Due process analysis and protections have historically focused on the rights of the Responding Party

# WHAT IS DUE PROCESS?



Two overarching forms of due process:

## – Due Process in Procedure:

- Consistent, thorough, and procedurally sound handling of allegations
- Institution substantially complied with its written policies and procedures
- Policies and procedures afford sufficient Due Process rights and protections

## – Due Process in Decision:

- Decision reached on the basis of the evidence presented
- Decision on finding and sanction appropriately impartial and fair

# DUE PROCESS IN PROCEDURE



- **Due Process in Procedure** - A school's process should include (at a minimum):
  - Notice: of charges and of the hearing/resolution process
  - Right to present witnesses
  - Right to present evidence
  - Opportunity to be heard and address the allegations and evidence
  - Right to decision made based on substantial compliance and adherence to institutional policies and procedures
  - Right to appeal (recommended)

- **Due Process in Decision** - A decision must:
  - Be based on a fundamentally fair rule or policy
  - Be made in good faith (i.e. without malice, ill-will, or bias)
  - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence
  - Not be arbitrary or capricious
- Sanctions must be reasonable and constitutionally permissible

# COMPARATIVE DUE PROCESS



- Criminal Court
- Civil Court
- Regulatory Oversight
- Administrative Hearings
- School-based
  - PreK-12
  - Student – Undergraduate; Graduate/Professional
  - Faculty – Tenured vs. Non-tenured
  - Staff
  - At-will
  - Administrators
  - Unionized

# KEY DUE PROCESS ISSUES FOR HEARINGS

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# ATIXA DUE PROCESS CHECKLIST



- Right to:
  - Access to an advisor of your choice throughout the process.
  - Clear notice of any hearing in advance, if there is to be a hearing.
  - Receive COPIES of all reports and access to other documents/evidence that will be used in the determination, reasonably prior to the determination.
  - Suggest witnesses to be questioned, and to suggest questions to be asked of them (excluding solely character witnesses).
  - Decision-makers and a decision free of demonstrated bias/conflict of interest (and advance notice of who those decision-makers will be).

\* Not an exhaustive list; focuses on issues that may arise for decision-makers.

# ATIXA DUE PROCESS CHECKLIST



- Right to:
  - Clear policies and well-defined procedures that comply with state and federal mandates.
  - A process free of (sex/gender/protected class, etc.) discrimination.
  - An investigation interview conducted with the same procedural protections as a hearing would be (because the interview is an administrative hearing).
  - A fundamentally fair process (essential fairness).
  - Know, fully and fairly defend all of the allegations, and respond to all evidence, on the record.

\* Not an exhaustive list; focuses on issues that may arise for decision-makers.

# ATIXA DUE PROCESS CHECKLIST



- Right to:
  - A copy of the investigation report prior to its finalization or prior to the hearing (if there is one).
  - Know the identity of the Reporting Party and all witnesses (unless there is a significant safety concern or the identity of witnesses is irrelevant).
  - Clear timelines for resolution.
  - Have procedures followed without material deviation.
  - Have only relevant past history/record considered as evidence.

\* Not an exhaustive list; focuses on issues that may arise for decision-makers.

# ATIXA DUE PROCESS CHECKLIST



- Right to:
  - A process that conforms to all pertinent legal mandates and applicable industry standards.
  - Have the burden of proving a violation of policy borne by the institution.
  - The privacy of the resolution/conduct process to the extent of and in line with the protections and exceptions provided under state and federal law.
  - A finding that is based on the preponderance of the evidence.
  - A finding that is neither arbitrary nor capricious.

\* Not an exhaustive list; focuses on issues that may arise for decision-makers.

# ATIXA DUE PROCESS CHECKLIST



- Right to:
  - Sanctions that are proportionate with the severity of the violation and the cumulative conduct record of the Responding Party.
  - The outcome/final determination of the process in writing as per VAWA §304 (Higher Ed).
  - A detailed rationale for the finding/sanctions.
  - An appeal on limited, clearly identified grounds.
  - Competent and trained investigators and decision-makers.
  - A written enumeration of these rights.

\* Not an exhaustive list; focuses on issues that may arise for decision-makers.

# VAWA SEC. 304: INSTITUTIONAL DISCIPLINARY POLICIES & PROCEDURES: ASR DISCLOSURES

- Disciplinary Procedures
- Annual Training for Officials
- Advisors
- Simultaneous Notification

# VAWA REAUTHORIZATION & SECTION 304



## Section 304: “Campus SaVE”

- **Section 304** significantly amended the Clery Act.
- **Extensive** policy, procedure, training, education, and prevention requirements for:
  - Sexual assault.
  - Stalking.
  - Dating violence.
  - Domestic violence.
- Prohibits retaliation.

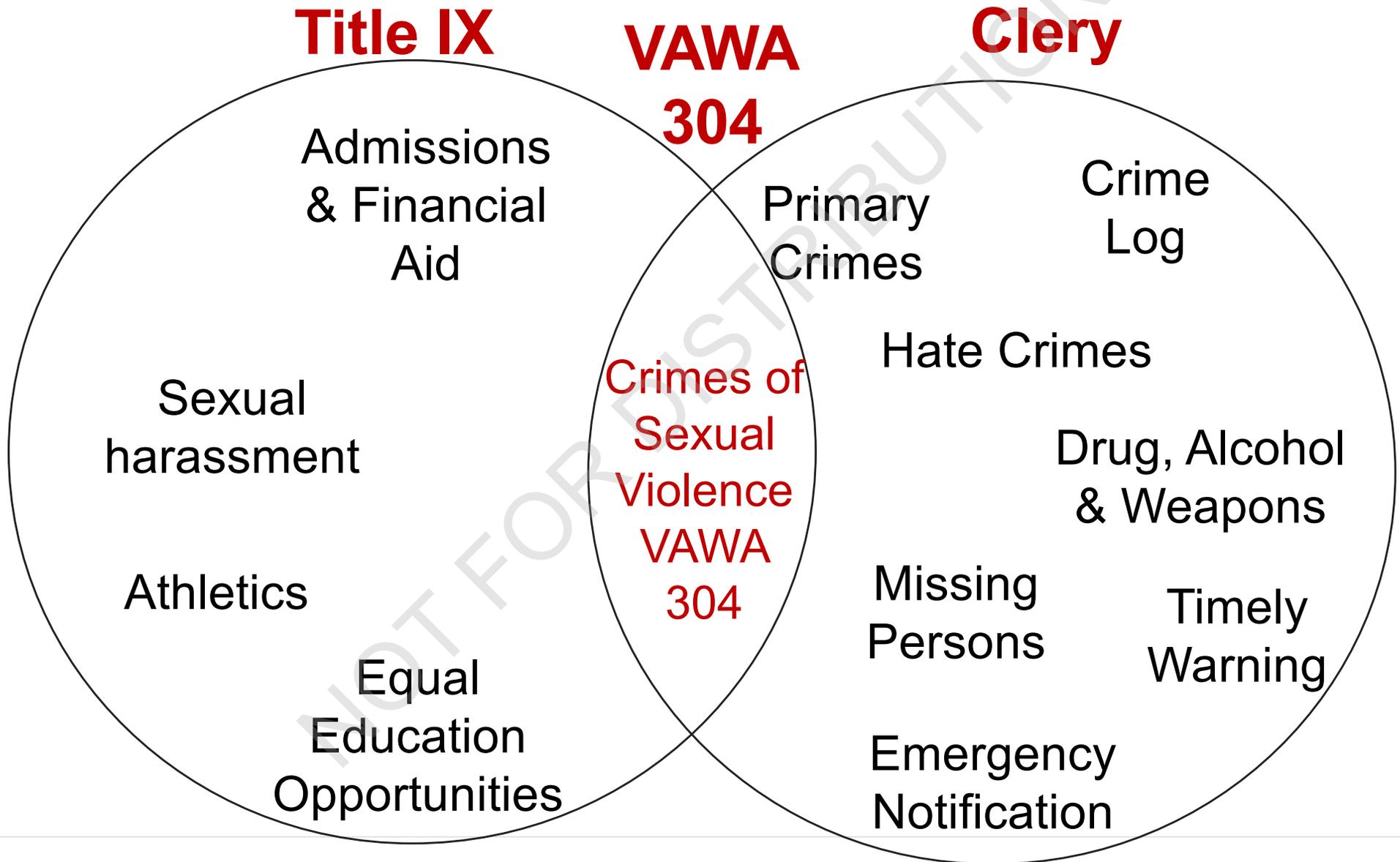
The “Big 4”

# VAWA/THE CLERY ACT & APPLICABILITY



- The Clery Act applies only to Post-Secondary Schools, Colleges, and Universities.
  - There is, however, is increasing traction within Congress to developing a similar mechanism within PreK-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are universal and instructive for all educational institutions, such as:
  - Policy best practices
  - Reporting
  - Transparency
  - Equitable resolution mechanisms
  - Due Process
  - Support for victims, etc.

# TITLE IX, CLERY, VAWA 304



# VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Prompt, Fair, and Impartial Process
  - Prompt, designated timeframes (can be extended for good cause with notice to parties)
  - Conducted by officials free from conflict of interest or bias for either party
  - Consistent with institution's policies
  - Transparent to accuser and accused
  - Timely and equal access to parties “and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings”

# VAWA 2013 SEC. 304 DISCIPLINARY PROCEDURES



- Proceedings must “be conducted by officials who, at a minimum, receive **annual** training” on:
  - Issues related to the four VAWA offenses
  - “How to conduct an investigation and a hearing process that:
    - Protects the safety of victims
    - Promotes accountability”
      - Caution: this does not mean the training should be biased or slanted in favor the reporting party
  - Ensure training is equitable and covers not just victim-based issues, but also those pertaining to a responding party

# VAWA 2013 SEC. 304 ADVISORS



- Provide accuser and accused with the same opportunity to have others present including an advisor of their choice for “any institutional disciplinary proceedings” and “any related meetings”
  - An advisor is “any individual who provides the accuser or accused support, guidance or advice”
  - An advisor is optional and can be **anyone** (including an attorney or a parent)
  - Institutions can restrict role of advisors in proceedings as long as both parties’ advisors have the same restrictions
  - Institutions should notify parties of these restrictions prior to proceedings
  - Institutions can train a pool of advisors the parties can use, but cannot restrict advisors to just the pool
  - Advisors can serve as proxies if an institution so chooses

# VAWA 2013 SEC. 304 SIMULTANEOUS NOTIFICATION



- Require simultaneous notification, in writing, to both accuser and accused, of:
  - The result of any institutional proceeding arising from allegations of VAWA offenses
    - Result “defined as any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution”
    - Result = Finding, Sanction, and Rationale
      - Note: The Clery Handbook contains an explicit FERPA exclusion*
  - Procedures for appeal (if any)
  - Any change to results
  - When such results become final

# VAWA 2013 SEC. 304 SIMULTANEOUS NOTIFICATION



- What must be included in the rationale?
  - How evidence and information presented was weighed
  - How the evidence and information support the result and the sanctions (if applicable)
  - How the institution’s standard of evidence was applied
    - Simply stating the evidence did or did not meet the threshold is insufficient
- Simultaneous: “means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result”

# VAWA 2013 SEC. 304 ANNUAL TRAINING FOR OFFICIALS



- Institutions must describe the annual training
- The training should be “updated regularly to address the latest issues and techniques for conducting proceedings on these topics from beginning to end”
- Training “should include, but not be limited to:
  - Relevant evidence and how it should be used during a proceeding
  - Proper techniques for questioning witnesses
  - Basic procedural rules for conducting a proceeding
  - Avoiding actual and perceived conflicts of interest”

# PRE-HEARING CONSIDERATIONS FOR HEARING BOARDS

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The Process

Confidentiality

Preparing for the Hearing

Hearing Decorum

Jurisdiction

Standard of Review

# PREPARING FOR THE HEARING



- Dress professionally – Jeans, t-shirts, shorts or sandals are not appropriate
- Arrive prepared and early
- Bring snacks and water/drinks
- Turn off your phone! And put it away!
- Bring a pen and paper
- Clear calendar after the hearing – it could take 30 minutes or it could take the entire morning and/or afternoon
- Note-writing tips
  - Less is better

# PREPARING FOR THE HEARING



## SAMPLE PREPARATION PLAN

- Review and understand all charges
- Review all the material carefully and thoroughly – get a general overview of the complaint
- Review it a second time and note all areas of consistency of information
  - You don't need additional verification or questioning on these issues, of assuming the accuracy of consistent information – but beware of suspiciously consistent stories
- Read it a third time to identify inconsistencies in the information
  - This is the area you will need to concentrate your questions

# PREPARING FOR THE HEARING



- Review the policy or section of the policy alleged to have been violated
  - Parse all the policy elements (what does it take to establish a policy violation?)
  - Identify the elements of each offense alleged
  - Break down the constituent elements of each relevant policy
- Identify all Key Elements (that may not be an independent policy violation)
  - Is there corroborating evidence?
- Have applicable policies in-hand

# PREPARING QUESTIONS



- Have the Code section at the top of your note page
- Write down the following as a reminder to you:
  - What do I need to know?
  - Why do I need to know it?
  - What is the best way to ask the question?
  - Am I the best person to ask the question?
- When dealing with conflicting testimony apply a credibility analysis (we will talk about it later)

# THE HEARING

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# HEARING DECORUM



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

# HEARING DECORUM



- Work to establish a baseline of relaxed conversation
- Maintain good eye contact: “listen with your eyes and your ears”
- Listen carefully to the answers to your question
  - Try not to write too much when party/witness is answering
  - Focus on the answer, rather than thinking about your next question
- Nod affirmatively to keep witness talking
- Do not fidget, roll your eyes, or give a “knowing” look to another panel member
- Do not look shocked, smug, stunned, or accusing

# THE HEARING: GENERAL LOGISTICS



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

## Immediately prior to the hearing

- Set aside time to review the investigation report and evidentiary materials
  - Hearing Officers/Decision-Makers should have already received and thoroughly reviewed all relevant information
- Chair answers any procedural questions by panel/board members
- Review key questions pertaining to the allegations
- Determine key questions for the parties and witnesses
- Determine witness order (Chair/Decision-Maker has final discretion)
- Chair/Decision-Maker may greet parties and Advisors and answer any procedural questions prior to the hearing

## Tips for Hearing Officers/Decision-Makers

- Recognize the need for flexibility with the order of witnesses and questioning, depending on the circumstances
- Be familiar with your institution's hearing board procedures
- Recognize the role and function of the Chair/Decision-Maker
- If a procedural question arises that must be addressed immediately, take a short break to seek clarification
- Treat the parties, their advisors, and witnesses with respect
- Apply all appropriate institutional policies, procedures, and standards

# THE HEARING



## Beginning the Hearing

- Start recording (remember to turn it off a breaks)
- Welcome and introductions
- State the allegations (citing each alleged policy violation) and whether the Accused agrees or disagrees with each of the allegations
- Indicate, on the record, that all Hearing Officers/Decision-Makers have reviewed the investigation report and all relevant evidence provided by the investigator(s)
- Discuss Breaks
- Remind all parties and witnesses of expectation of honesty
- Discuss role of Advisors

## Beginning the hearing

- Ask parties about any additional procedural questions and provide answers as appropriate
- Provide an overview of the proceedings
  - Who will testify when
  - Who will ask questions and when; indicate possible need to ask additional questions of witnesses or parties
  - Deliberations
  - Finding
  - Impact Statements
  - Sanction
  - Opportunities to appeal

## Hearing Testimony

- Investigator(s) summarize their investigation and report first
  - Review of report & evidence provided
  - Questions from the Hearing Officer/Decision-Maker
  - Questions from the parties (typically Reporting Party first)
- May allow Reporting Party and Responding Party provide brief opening statements
- Reporting Party provides information (typically)
  - Questions from the Hearing Officer/Decision-Maker
  - Questions from the Responding Party – either through the Chair/Decision-Maker, or directly (if both parties agree to allow for direct questioning)

***\*Order thereafter depends on the situation\****

## Hearing Testimony

- Responding Party provides information
  - Questions from the Hearing Officers/Decision-Maker
  - Questions from the Reporting Party – either through the Chair/Decision-Maker, or directly
- Witnesses provide information
  - Questions from the Hearing Officers/Decision-Maker
  - Questions from the Reporting Party
  - Questions from the Responding Party
- If desired and consistent with your procedures, may provide both parties opportunity to provide closing statements – often provide a short break to prepare (e.g.: 10 minutes)
  - Reporting Party typically goes first, followed by Responding Party
- Deliberations

## Hearing Testimony: The Role of the Chair

- Run the proceedings
- Ensure institutional procedures are substantively and materially followed
- Manage breaks
- Greet each witness, thank them for their participation, and ask them to share information
- Ensure Hearing Officer/Decision-Maker and the parties are able to ask all relevant and appropriate questions
- Ensure hearing board, parties and witnesses apply appropriate policies and definitions in questioning
- Facilitate questioning between the parties (where applicable)

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

- Determine the relevance and appropriateness of questions
- When necessary, provide directives to the board to disregard a question or information deemed unfair or highly prejudicial
- Manage Advisors as necessary
- Make determinations of the relevance of information
- Maintain the professionalism of the Hearing Officer/Decision-Maker
- Recognize your positional authority

# BIAS, PREJUDICE & CULTURAL COMPETENCE

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- Among the most significant problems for hearing boards
- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
  - Pre-determined outcome
  - Partisan approach by investigators in questioning, findings, or report
  - Partisan approach by hearing board members in questioning, findings, or sanction
  - Intervention by senior-level institutional officials
  - Not staying in your lane
  - Improper application of institutional procedures
  - Improper application of institutional policies
- The focus of this section, however, is on the cultural competence-based bias and prejudice.

# “BIAS” DEFINED



- “Biased”
  - A tendency to believe that some people, ideas, etc., are better than others that usually results in treating some people unfairly
  - An inclination of temperament or outlook; especially a personal and sometimes unreasoned judgment (merriam-webster.com)
- “Biased”
  - To cause partiality or favoritism; influence, especially unfairly (Dictionary.com)

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- People do not shed their values, beliefs and life experiences at the hearing room door. Nor should we expect them to
- While bias is inevitable, it does not necessarily undermine the fairness or appropriateness of a hearing board's decision
- The key is recognizing the bias and ensuring it does not impact one's decision because bias that serves as the basis for the outcome of the hearing is improper
- Hearings must be based on evidence, not on personal beliefs about a complaint

# “PREJUDICE” DEFINED



- To “pre-judge”
- “Prejudice”
  - Any preconceived opinion or feeling, either favorable or unfavorable (dictionary.com)
    - Often based on things we have previously read, our own experiences
- Prejudice
  - An unfair feeling of dislike for a person or group because of race, sex, religion, etc.
  - A feeling of like or dislike for someone or something especially when it is not reasonable or logical (merriam-webster.com)

# MULTI-PARTIALITY



- Multi-partiality: You can never be truly “neutral” or “impartial,” but you can work to neutralize your biases
  - Underrepresented populations
  - Religious concerns
  - Power and privilege
  - Adult and Non-traditional students
  - Sexual orientation
  - Disabilities
  - Race
  - Sex and Gender
  - Who is your community?

# BIAS & PREJUDICE: COMMON ISSUES



- Role of Alcohol
- Student Development...
- **Own experiences...**
- Student-Athletes
- Fraternity/Sorority Life
- Disabilities & Mental Illness
- International Students
- Sex/Gender
- Gender Identity
- Race
- Ethnicity
- Nature of the Violation
- Religion or Religious beliefs
- Academic Field of Study/Major
- Veteran Status
- Socioeconomic Status
- Politics
- Attitude
- Pre-disposition towards one party

# QUESTIONING SKILLS & GUIDELINES



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# GENERAL QUESTIONING SKILLS



- What are the goals of questioning?
  - Learn the facts
  - Establish a timeline
  - Understand each party's perception:
    - Of the event and of the process
  - Try to learn the what is more likely than not what happened (is that the truth?)
    - Three sides to every story (or more)
- What are NOT the goals of questioning?
  - Curiosity
  - Chasing the rabbit into Wonderland
- Do not expect the “Gotcha” moment. Not your role. You are not prosecutorial

# QUESTIONING



- Ascertain who each individual is and their relation to the other parties in the case
- Ensure you have a comfort level with explicit language and sensitive subjects
- Pay attention to alcohol/drug consumption and timing of consumption (it may be your cue to create a timeline)
- Be cognizant of the difference between what was “heard” (hearsay), what can be assumed (circumstantial), and what was “witnessed” (facts)

# DEMEANOR DURING QUESTIONING



- Work to establish a baseline of relaxed conversation and establish rapport.
- Maintain good eye contact.
- Listen carefully to the answers to your questions.
  - Avoid writing while party/witness is talking, if possible.
  - Do not be thinking about your next question while party/witness is talking.
- Ask questions in a straightforward, non-accusatory manner.
- Nod affirmatively to keep party/witness talking.

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 and 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.

# WHEN ASKING QUESTIONS



Determine:

1. What do I need to know?
2. Why do I need to know it?
3. What is the best way to ask the question?

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# 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..
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “fooled around,” and “had a few drinks.”

# RESTATE/REFRAME



- Restate/summarize what is said. Helps validate that you are listening.
- Launder the language.
  - Remove negative or inflammatory language and emotions.
- 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”

- Seek to discover:
  - Relevant facts about what happened during the incident
  - Any related events
  - Any corroborating information
  - Facts necessary to establish the timeline
  - Background information about the situation, the parties, the witnesses
- Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing

# QUESTIONING



- Have a purpose for asking every question
- Try to frame questions neutrally
- Don't make questions too long or confusing
- Don't suggest an answer in your question
- Note discrepancies and ask questions based on them
- Be on the lookout for “cued” responses or rehearsed or memorized answers
- Handle emotions sensitively and tactfully
- Observe body language of the person you're interviewing
  - But don't read too much into it
- Be cognizant of your own body language

- Generally use open-ended questions (tell us..., who, what, how)
- Try to avoid close-ended questions (Did you, were you)
  - Use infrequently, only when needed to drill down on a specific issue
- Don't ask Compound Questions
  - I have two questions, First..., Second...
- Don't ask Multiple Choice Questions – The “or” question
  - Were you a, or b?

# OTHER CONSIDERATIONS



- Consider who should ask the question
- Ask open-ended questions first
- Allow time
- Utilize breaks
- Remain calm and professional
- If you ask a bad question, simply apologize, restate, correct, etc.

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# KEY POLICY TERMS

- Sexual Harassment
- Quid Pro Quo Harassment
- Retaliatory Harassment
- Hostile Environment

# SEXUAL HARASSMENT



## Sexual harassment is:

- Unwelcome
- Sexual, sex-based, and/or gender-based verbal, written, online, and/or physical conduct.

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# SEXUAL HARASSMENT DISCIPLINARY STANDARD



- Sexual harassment may be subject to discipline when it takes the form of:
  - Quid Pro Quo harassment;
  - Retaliatory harassment; and/or
  - Creates a hostile environment.

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# 3

## Types of Sexual Harassment

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# QUID PRO QUO SEXUAL HARASSMENT



- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,
- By a person having power or authority over another, when
- Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational [or employment] progress, development, or performance.

# RETALIATORY HARASSMENT



- Any adverse employment or educational action taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct.
- Also includes retaliation against a reporting party by the responding party or that person's friends or others who are sympathetic to the responding party.
- Also can include retaliation directed toward a third party because of that party's participation in a grievance process or for supporting a grievant.

# HOSTILE ENVIRONMENT



- A hostile environment is created when sexual harassment is:
  - Sufficiently severe, or
  - Persistent or pervasive, and
  - Objectively offensive that it:
    - Unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the school's educational [and/or employment], social and/or residential program.

# TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



- Increasing problem of conflating discomfort or being offended with the higher standard of hostile environment
- The frequency (persistent or pervasive), nature, and severity of the conduct.
- Whether the conduct was physically threatening.
- Whether the conduct was humiliating.
- The effect on reporting party's mental or emotional state.

# TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



- Whether conduct was directed at more than one person.
- Whether the conduct **unreasonably** interfered with the reporting party's educational or work performance.
- Whether the statement is an utterance of an epithet which is offensive, or offends by discourtesy or rudeness.
- Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment.

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# NON-CONSENSUAL SEXUAL INTERCOURSE

- **Non-consensual sexual intercourse is:**
  - Any sexual intercourse,
  - However slight,
  - With any object,
  - By a person upon another person,
  - That is without consent and/or by force

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# SEXUAL CONTACT DEFINED



- **Sexual contact includes:**
  - Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; or
  - Any other intentional bodily contact in a sexual manner

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# QUESTIONING ACTIVITY

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# QUESTIONING EXERCISE



# Information from Report



- First-year students Don and Carla met in honors English. They studied together and became close friends. They had a great deal in common and spent hours talking about their families, music, movies, and sports. As the weeks rolled on, their friendship grew, along with their respect and affection for each other. Don finally asked Carla out on a date of pizza and movie. After the movie, they went to the local bar and had beers while they discussed the movie. Over the course of the next few hours, they consumed two pitchers of beer.

# Information from Report



- Carla was quite tipsy, and Don wanted to make sure she arrived at her apartment safely, so he accompanied her to her door. Carla asked Don if he would like to come in to see how she had decorated. Don eagerly agreed. They sat on the couch and talked about how much fun they had that evening, and how glad they both were to get to know each other better. Carla told Don how easy it was to feel comfortable with him. Don was delighted to hear this and put his arms around Carla and kissed her. She eagerly kissed him back. They continued to kiss and touch, and Don gently pushed Carla back on the couch. Carla said, “I think things are going too fast.” Don replied, “We won’t do anything you are not comfortable with.”

# Information from Report



- The two continued kissing with increasing passion. Don, tentative at first, began to unbutton Carla's blouse. She brushed his hand aside but continued kissing him. A short time later, he reached under her blouse and fondled her breast. Carla did not stop him. Don told Carla, "I really want to make love to you." Carla did not respond. Don took this as consent and proceeded to remove Carla's panties (she was fully clothed otherwise). They had intercourse. Don cuddled Carla, who cuddled back but did not say a word. Since it was getting late and Carla was so quiet, Don gave her a kiss, told her he'd call her, and left. In the following days, Carla refused to take Don's calls and did not respond to his text messages.

# Information from Report



- Several weeks later, Carla attended a date rape seminar and felt that she had experienced the same type of behavior as described in the case study presented there. She went her advisor to ask what she should do. They called the campus police and subsequently met with a female officer. The officer reluctantly told Carla that since several weeks had passed, there would be no evidence that would support pressing criminal charges, but she encouraged Carla to file a complaint with the campus conduct officer. Carla met with the assistant dean and made a formal complaint.

# Carla's Story



## Carla's Story:

- Carla, who is from a small town, was excited to break out of the mold of her older sisters and go away to college. She is the first person in her family to attend college. Carla's mother warned her about the dangers that lurk for young women "out there." She repeatedly told her not to be "easy," and that a man would never respect her if she "gave in."

# Carla's Story



- Carla really liked Don. They had so much fun together, and she felt that he was a very nice person who liked and respected her. Yet, if that was the case, why didn't he stop when she told him things were going too fast? He knew her family background and how she felt about casual sex. Yet, they still had sex. Was it her fault? She stated that she just couldn't remember well. She could only remember parts of the evening. Did she have too much to drink? Did she send him a wrong message? Should she have pushed him away so he wouldn't go further? If he really liked and respected her, why didn't he understand her silence and lack of response?

# Carla's Story



- Her mother was right. All men were alike and after just one thing. She knew Don would never respect her now, and she didn't respect herself either. Maybe by holding him accountable for his pushing forward to have sex too soon and not respecting her wishes, he would realize that you can't treat women that way. If only she just didn't still like him so much. She has missed a week of English class because she just can't face him.

# Don's Story



- Don was so happy to meet Carla in English class. He and his long-time high school girlfriend had broken up before he came to college, and he had been lonely since arriving there. Carla was a breath of fresh air. She was from a small town and had good values, and she was so much fun to be with.
- He had been really looking forward to their date and was a little nervous beforehand, but the evening seemed to go so well. They seemed compatible, and their kissing was so passionate. When Carla told him she thought they were going too fast, he even assured her that they wouldn't do anything she didn't want to do.

# Don's Story



- Don and his high school girlfriend had sex for the past year, and before her, there had only been one other girl, but he knew how to please a girl, and he wanted to please Carla, too. Although she brushed him aside, she didn't push his hand away when he fondled her breasts under her blouse, so he thought for sure that it was "cool" to go forward to the next step. He took her lack of response as her not wanting to seem too eager. She even cuddled with him after they had intercourse.

# Don's Story



- So, what went wrong? Why wouldn't she take his phone calls or respond to any of his text messages? Why hasn't she been coming to class? And NOW THIS?! What is going on with this letter about an institutional investigation for alleged non-consensual sexual intercourse?

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# QUESTIONING ACTIVITY FOR CASE STUDY



- Each person in the group should identify a question you want to ask Carla
- CONSIDER:
  - What do I want to know?
  - Why do I want to know it?
  - What is the best way to ask the question?
- Pose the question to the group-get feedback
- Engage in the same set of questioning exercises for Don

# ATIXA RUBRIC

- 
- Force
  - Incapacity
  - Consent

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# CONSENT PREMISE



- Consent must be freely and knowingly given.
- If consent is given against someone's will or if they are incapable of knowingly giving consent then any consent given under these circumstances is not valid consent.

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# OVERVIEW OF THE 3 CONSENT QUESTIONS



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

There are four types of force to consider:

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

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent
- Incapacitation is a determination that will be made after the incident in light of all the facts available
- Assessing incapacitation is very fact-dependent
- Blackouts are frequent issues
  - Blackout  $\neq$  incapacitation, automatically
  - Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how
  - Partial blackout must be assessed as well
- What if the responding party was drunk too?

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

# INCAPACITATION

- To better understand and determine the relationship between the use of alcohol and capacity it's important to understand there are multiple levels of effect of alcohol, along a continuum
  - The lowest level is impairment, which occurs with the ingestion of any alcohol. A synonym for impairment is “under the influence”
  - The next level is intoxication, also called drunkenness, similar to the state's drunk driving limit
    - A person can be drunk but still have the capacity to give consent

# INCAPACITATION

- Incapacity is a level of alcohol consumption in which an individual is incapable of understanding information presented, appreciating the consequences of acting or not acting on that information and making an informed choice
  - Incapacitation is a state beyond drunkenness or intoxication, where decision-making faculties are dysfunctional.
- “Too intoxicated to consent” or “unable to consent as a result of AOD” are too limiting as policy standards, because they cannot cover the blackout situation where ***someone does consent to sex, but does not know that they are.***

# INCAPACITATION

- In order to consent effectively to sexual activity, you must be able to understand Who, What, When, Where, Why **and** How with respect to that sexual activity.
- This is another way of stating the law's expectation that consent be knowing or informed, and any time it is not, consent cannot be effective.
- To be more precise, an incapacitated person cannot give a **valid** consent.

## What was the form of incapacity?

- Alcohol or other drugs.
  - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence.
  - Incapacity = an extreme form of intoxication.
- Administered voluntarily or without reporting party's knowledge.
- Rape drugs.
- Mental/cognitive impairment.
- Injury.
- Asleep or unconscious.

# INCAPACITY (CONT.)



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

# BAC/BAL

- One “drink”  $\approx$  .025 BAL.
  - 12 oz.
  - 5 oz. wine.
  - 1.5 oz. liquor (a typical “shot”).
- Metabolic rate – one drink per hour.
  - .015/hr. (avg.).
  - Dependent on age, gender, height, weight, medications, genetics, experience with drinking, etc.



# CREATE A TIMELINE



- First must determine by a “more likely than not” standard if the reporting party was incapacitated.
  - This inquiry will likely be triggered by statements such as: “The next thing I remembered 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 reporting party was incapacitated (using a preponderance of the evidence standard).

# TIMELINE CONSTRUCT



- Begin the timeline at the time the incident began, starting at the time the reporting party began consuming alcohol/engaging in recreational drug use. Ask:
  - 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.)



- Continue the first five questions up until the point in time that reporting party indicates he/she cannot remember anything.
- **Note:** If reporting party did not have anything to drink, or only had a small amount, you need to consider if 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?

# KNOWLEDGE CONSTRUCT

- Consider:
  - Did the Accused know Complainant previously?
  - If so, ask if Complainant was acting differently from previous similar situations
  - Review what the Accused observed the Complainant consuming (via your timeline)
  - Determine if Accused provided any of the alcohol for the Complainant
  - Consider behavior cues

# BEHAVIOR CUES

- Evidence of incapacity will come from context clues, such as:
  - Did the accused may know how much the other party has consumed?
  - Slurred speech
  - The smell of alcohol on the breath in combination with other factors
  - Shaky equilibrium; stumbling
  - Outrageous or unusual behavior (not making sense, appearing drunk)
  - Falling asleep
  - Throwing up
  - Disoriented
  - Unconsciousness (including Blackout)
    - Although memory is absent in a blackout verbal and motor skills are still functioning.

# FINAL INCAPACITY ANALYSIS



- If the reporting party **was not** incapacitated, move on to the Consent analysis.
- If the reporting party **was** incapacitated, but:
  - The responding party did not know it, **AND**
  - The responding party would not have reasonably known it = policy not violated. Move to Consent analysis.
- If the reporting party **was** incapacitated, and:
  - The responding party **knew it or caused it** = policy violation. Sanction accordingly.
  - The responding party **should have known it** = policy violation. Sanction accordingly.

# CONSENT

Question 3 is the Consent question:

- What clear words or actions by the complainant gave the accused individual permission for the specific sexual activity that took place?
- Equity demands a “pure” consent-based policy, defining what consent is rather than defining it by what it is not (e.g., force, resistance, against someone’s will, unwanted, someone unable to consent, etc.).
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression."

# CONSENT IS...



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

# CONSENT: RULES TO REMEMBER



- No means no, but nothing also means no. Silence and passivity do not equal permission.
- 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.

# EVALUATION OF EVIDENCE AND DECISION-MAKING SKILLS

- Understanding Evidence
- Credibility
- Analyzing the Information
- Making a Finding

# UNDERSTANDING EVIDENCE



- Formal rules of evidence do not apply. If the information is considered relevant 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 charges

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# UNDERSTANDING EVIDENCE



- You may consider and assign weight to evidence based on:
  - Documentary evidence (e.g., supportive writings or documents).
  - Electronic evidence (e.g., photos, text messages, and videos).
  - Real evidence (i.e., physical objects).
  - Direct or testimonial evidence (e.g., personal observation or experience).
  - Circumstantial evidence (i.e., not eyewitness, but compelling).
  - Hearsay evidence (e.g., statement made outside the hearing, but presented as important information).
  - Character evidence (generally of little value or relevance).
  - Impact statements (typically only relevant in sanctioning).

- Credible is not synonymous with truthful.
- Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading.
- Credibility is largely a function of consistency and corroboration.
- Refrain from focusing on irrelevant inaccuracies and inconsistencies.
- Pay attention to the following factors...

# FACTORS TO CONSIDER FOR CREDIBILITY



- Corroborating evidence
- Logic/internal & evidentiary consistency
  - Ask yourself, “Does this make sense?”
  - Be careful of own biases about what is or is not logical
- Inherent plausibility – is the evidence more likely than the alternative?
- Non-cooperation
  - Look for short, abrupt answers or refusal to answer.
  - OK to ask, “You seem reluctant to answer these questions – can you tell me why?”
- Demeanor (careful with this one)
  - Demeanor issues should be cue to ask more questions.

# MAKING CREDIBILITY DETERMINATIONS



- Look at consistency of story – substance and chronology of statements.
- Consider inherent plausibility of all information given.
- Is the evidence provided consistent with other credible evidence?
- Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses, or denials that have no supporting detail.
- Pay attention to non-verbal behavior, but do not read too much into it...this is not *Lie to Me*.

# ANALYZING THE INFORMATION (CONT.)



- Assessing each answer: for each piece of information you have as a result of your analysis and matching your need to assess its evidentiary value. 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?

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

# REVIEW OF PROCESS



- Review the institutional policies in play.
- Parse the policy.
  - Specific findings for each policy and each responding party.
- Review the evidence and what it shows (relevance).
- Assess credibility of evidence and statements as factual, opinion-based, or circumstantial.
- Determine whether it is more likely than not policy has been violated.
- Cite concretely the reasons for your conclusions.

# PARSING THE POLICY

## NON-CONSENSUAL SEXUAL INTERCOURSE



- **Non-consensual sexual intercourse is:**
  - Any sexual intercourse,
  - However slight,
  - With any object,
  - By a person upon another person,
  - That is without consent and/or by force

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# PARSING THE POLICY

## SEXUAL CONTACT DEFINED



- Sexual contact includes:
  - Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; or
  - Any other intentional bodily contact in a sexual manner

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# PARSING THE POLICY

## NON-CONSENSUAL SEXUAL CONTACT



1. Was there sexual contact by one person upon another, no matter how slight, as defined in the policy? If yes →
2. Was it intentional? If yes →
3. Was it by force, as defined in policy? If yes, policy was violated. If no →
4. Was it without consent, as consent is defined in the policy? If yes, there is a policy violation. If no, there is no policy violation.

# DELIBERATIONS

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## General Information

- Deliberations should involve only the Hearing Officer(s)/Decision-Maker(s) – witnesses, investigator and others excused
- Do not record deliberations; recommend against taking notes
- With a Panel, the Chair can be voting or non-voting
- Typically, there is no specific order in which allegations must be addressed, so board can decide what makes sense in each case
- With a hearing panel, we recommend the Chair first obtain a sense as to where panel members stand on each allegation
- Decisions must be based on the specific policy alleged to have been violated

# DELIBERATION INITIAL DECISION



- Consider what model of deliberation you want to use:
  - Hierarchical – Chair or prominent member of the panel leads discussion; often shown deference (is that good?)
  - Consensus – build to a shared, often unanimous conclusion (avoid negotiating or compromise, though)
  - Adversarial – opposing viewpoints argued until a majority is clear (argue issues, but don't make it personal)

## The Role of the Chair of a Board/Panel

- Ensure all viewpoints of board members are addressed
- Ensure board members apply appropriate standards and applicable policies
- Address and make findings for each alleged policy violation individually and parse the policies.
  - Can only address the policies with which the Responding Party was charged.
- Do not allow board members to consider evidence or allegations/charges not provided by investigators or during the hearing
- Neutralize any power imbalance between board members
- Ensure an impartial decision that is free of substantive bias
- Draft a rationale for the decision with the input of board members

## Findings, Impact Information, and Sanctions

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

## Foundation for Decisions

- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report or presented at the hearing
- Decisions must be based on the specific policy alleged to have been violated
- Issue Spotting
  - Look at each element to be assessed in the policy (e.g., intent, sexual contact, voluntary, etc.), separate it out and determine if you have evidence that supports that a violation of that component is more likely than not.

# SANCTIONING IN SEXUAL MISCONDUCT CASES

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# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Title IX and case law require:
  - Bring an end to the discriminatory conduct (Stop)
  - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (Prevent)
  - Restore the Reporting Party as best you can to their pre-deprivation status (Remedy)
- Real clash with the typically educational and developmental sanctions of student conduct processes
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the Reporting Party and the community

# COMMON STUDENT SANCTIONS



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

# WHAT SANCTIONS?



- A student is found responsible for non-consensual sexual intercourse involving another student; the panel determined the Reporting Party was incapacitated and the Responding Party should have known of this incapacity
  - The panel felt that part of the problem was the students' inexperience with sexual matters and poor communication
  - The Responding Party is an excellent student and is well-liked by campus community; he will graduate in a month
  - The Reporting Party indicates that she does not want the Responding Party to be suspended or expelled

# WHAT SANCTIONS?



- The Hearing Board determines that five members of the men's soccer team (Students A, B, C, D, and E) subjected the first-year students to various hazing-related rituals, including paddling and pouring hot sauce on the first-year students' genitals
  - Four students (A, B, C, and D) engaged in the paddling
  - Two students (A and B) poured hot sauce on the genitals of first-year students
  - One student (E) was present throughout, but did not paddle or pour hot sauce on the first-year students

# APPEALS

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- Key Elements
- Where Appeals Go Off the Rails
- Grounds for Appeal
- Appeals Logistics
- Process Flowchart

# APPEALS: KEY ELEMENTS



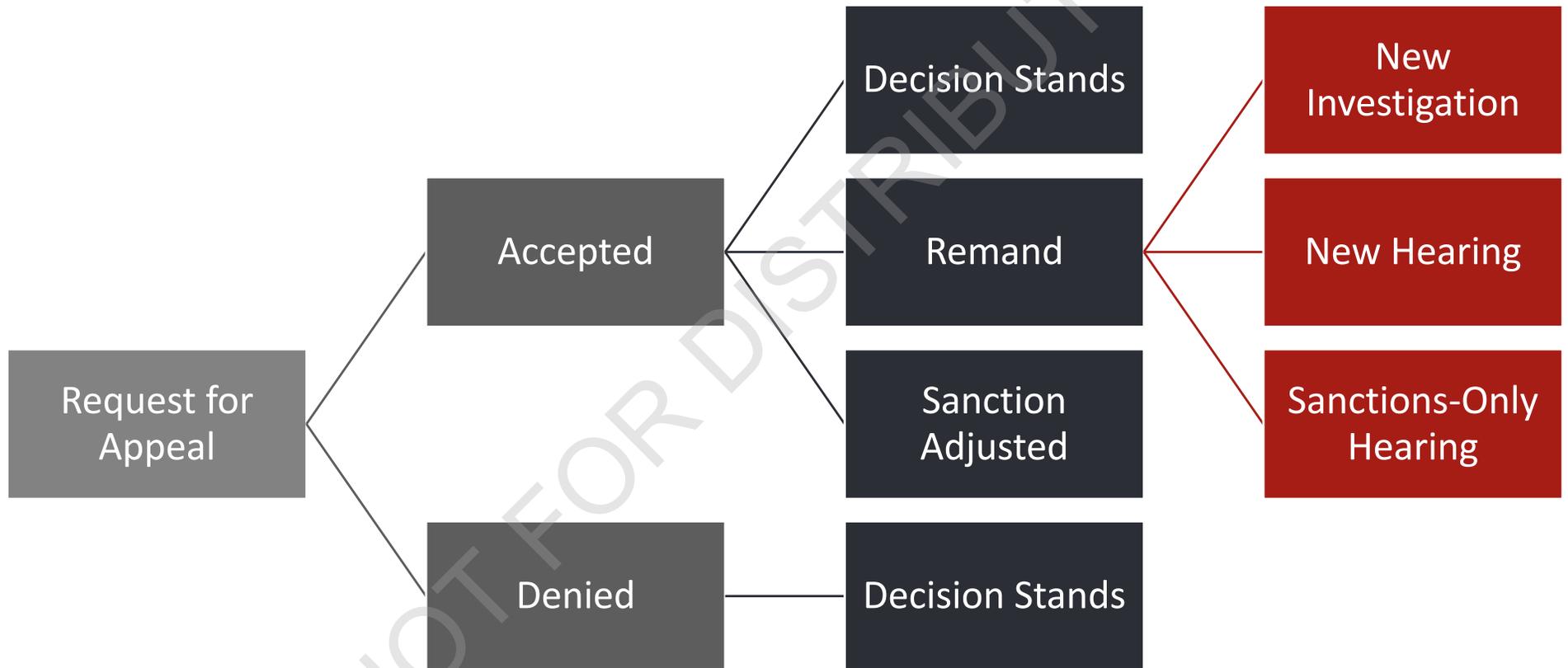
- One level of appeal
- Limited grounds for appeal (see next slide)
- Deference to original hearing authority
- Sanctions take effect immediately
- Short window to request an appeal
  - Can always grant an extension if necessary
- Document-based and recording review
  - NOT de novo
- Request for an appeal

# APPEALS: GROUNDS FOR APPEAL



- **A procedural error or omission occurred that significantly impacted the outcome of the hearing**
  - E.g.: Insufficient evidence to warrant the finding, substantiated bias, material deviation from established procedures, etc.
- **To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction**
  - A summary of this new evidence and its potential impact must be included
- **The sanctions imposed are substantially disproportionate to the severity of the violation** (or: the sanctions fall outside the range of sanctions the university/college has designated for this offense)

# APPEALS: THE PROCESS



# HEARING OVERVIEW

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# INTRODUCTION OF INVESTIGATION REPORT



## NOTICE

- On Monday, August 10, 2018 , the Title IX Coordinator (TIXC) met with Complainant and the Sexual Assault Victim's Advocate. The Complainant reported that on Friday May 2, 2018 the Responding Party engaged in non-consensual penetration of the Complainant while the Complainant was in state rendering the Complainant unable to give consent.
- As a result of this allegation and additional evidence presented at the time of intake, the TIXC asked the Title IX Investigator to conduct a thorough and impartial investigation using the provisions outlined in the University's Grievance Policy and in accordance with Title IX, and following guidelines from the Department of Education Office of Civil Rights.
- Complainant is a sophomore student. Responding Party is a senior student.

# INTRODUCTION OF INVESTIGATION REPORT



## ALLEGATIONS

- The TIXC tasked the investigators with determining whether the Responding Party is responsible for violating the College Grievance policy (using the preponderance of evidence standard) specifically in regards to the allegations below:
- Sexual Harassment
- Non-Consensual Sexual Contact
- Initiating sexual activity with a person who is incapacitated and unable to provide consent due to alcohol and/or drug consumption or other condition
- Non-Consensual Sexual Penetration

## INVESTIGATION SUMMARY

- **Summary of the Complainant's statements and evidence relevant to the case (Note: all pronouns used are gender non-specific "they"):**
- Complainant reported that starting close to 11:00 pm on Friday May 2 through 4:00 am on Saturday, May 3, 2018, the Complainant was at the off-campus residence of the Responding Party.
- Complainant believes that they watched 2-3 episodes of a Netflix series, Stranger Things. While watching this show, they shared a bottle of wine and 3 beers (approximately 2 - 3 hours).
- Complainant is unsure of how many glasses of wine or beer they drank, but believes that they had about the same amount to drink as the Responding Party and not an abnormal amount as compared to other nights.

# INVESTIGATION REPORT



- Complainant left the room one time during the evening to use the restroom. Complainant noted that they shared this information with the police detective that the Complainant spoke to at the hospital and that the detective suggested that the Complainant might have been drugged.
- Complainant recalls that sometime during the third episode of Stranger Things and after they had used the restroom that they started to feel “weird, unable to move normally, dizzy.”
- Complainant recalls the Responding Party began touching the Complainant’s genital region and kissing the Complainant.
- Complainant felt like they were unable to move.
- Complainant recalls that the Responding Party then got up off the couch where they were watching the show and took the Complainant by their hand and led them down the hallway to a bedroom. The Complainant assumed the bedroom belonged to the Responding Party, but was not sure since they had never been to the house before.

# INVESTIGATION REPORT



- Complainant recalls that the Responding Party led the Complainant to the bed and sat the Complainant on the bed.
- Complainant recalls that the Responding Party continued to kiss and touch the Complainant as they had been doing in the room with the television.
- Complainant recalls observing the Responding Party removing their own clothing.
- Complainant recalls the Responding Party asking the Complainant if it was okay if they removed the Complainant's clothing. The Complainant does not remember if they said yes or no or nothing.
- Complainant remembers the Responding Party leaving the room for a short period of time (several minutes), before returning to the room and closing the door behind them. The Complainant remembers the door to the bedroom being open until this time.

# INVESTIGATION REPORT



- Complainant remembers that the lights were also on and that they could hear other people in the house.
- Complainant remembers waking up several hours later confused and dazed and uncertain to what had happened.
- Complainant got up and went to the bathroom and saw bruises on their shoulders and hips and a large bruise on their neck.
- Complainant said they “quietly freaked out” and texted Witness One.
- Complainant described being in pain and feeling like they had to crawl around the room to find all their clothes.
- Complainant remembers getting dressed in the hallway before leaving the house around 4 am. Complainant remembers Witness Two was asleep on the couch when the Complainant left.

# INVESTIGATION REPORT



- Complainant called Witness One who met the Complainant and walked the Complainant to the Student Health Center.
- Complainant also called the Victim's Advocate and was then taken to the hospital for a medical evaluation.
- Complainant met with a police detective who documented the bruises and took a report (Police Report #2017-XX052117).
- Complainant received the SANE kit back from the hospital in late July. Toxicology report only showed high levels of alcohol. Complainant did not share the results of the physical examination from the SANE kit with the Investigator.
- Complainant reported this incident to the College after realizing they were in a class for their major with the Responding Party this fall.
- Complainant provided the investigators with the full text exchange with Witness One. Complainant was unable to provide texts from the Responding Party because they deleted and then blocked the Responding Party shortly after this incident.

# RESPONDING PARTY'S STATEMENT



- **Summary of the Responding Party's statements and evidence relative to the case:**
- Responding Party stated that on Friday, May 2, 2018 they received a Snapchat from the Complainant asking if they wanted to hang out.
- Responding Party recalled that they traded several texts and Snapchats with the Complainant before meeting up near the Campus Center a little before 11 pm.
- Responding Party recalls that they then walked to the Safeway on Rose Street and purchased a bottle of wine, a six pack of beer, and a loaf of bread.
- On the way back from Safeway, the Responding Party asked Complainant if they wanted to "Netflix and chill." The Responding Party reports that the Complainant said "yes."
- Responding Party believes they arrived back to the Responding Party's off-campus house around 11:40 pm.

# RESPONDING PARTY'S STATEMENT



- Responding Party recalls putting the wine, beer and bread in the kitchen and that while they set up their laptop to watch some shows, the Complainant went to the kitchen and opened the wine and beer and brought wine, beer, glasses, and bread back to the living room.
- Responding Party claims they do not like wine so ended up only drinking beer. The Responding Party recalls the Complainant finishing the bottle of wine and having some of the beer the Responding Party was drinking.
- Responding Party recalls Complainant getting up at some point in the evening to go to the bathroom.
- Responding Party denies placing anything in Complainant's glass or being aware of anyone else doing so.
- Responding Party said they started kissing and there was "lots of touching." When asked who initiated the kissing and touching the Responding Party said that they had initiated both.

- Responding Party recalls getting a text from their housemates and so the Responding Party grabbed the Complainant's hand and led the Complainant

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# RESPONDING PARTY'S STATEMENT



- Responding Party recalls getting a text from their housemates and so the Responding Party grabbed the Complainant's hand and led the Complainant down the hall to the Responding Party's bedroom.
- Responding Party recalls taking off their own clothes and then asking the Complainant if they "needed help" taking off their clothes. The Responding Party said that the Complainant asked for help in getting their clothes off and so the Responding Party helped.
- Responding Party recalls that the kissing and touching continued for quite a while.
- Responding Party recalls grabbing a towel off of the back of the door and leaving the room as they heard their roommates return (Witness Two and Three). Responding Party talked with the roommates for a short period of time before going to the bathroom, getting a condom, and returning to the bedroom. The Responding Party thinks they might have been out of the room for up to 5 minutes

# RESPONDING PARTY'S STATEMENT



- When the Responding Party returned to the room, they thought the Complainant was asleep, but once they touched the Complainant's shoulder they woke up.
- The Responding Party then got back up and closed the door.
- The Responding Party reports that the Complainant then began to touch the Responding Party and they took that to mean that the Complainant was interested in engaging further.
- The Responding Party put the condom on and the two began to actively explore each other.
- The Responding Party recalls asking the Complainant if everything was okay and was pretty sure the Complainant said yes

# RESPONDING PARTY'S STATEMENT



- The Responding Party recalls penetrating the Complainant, both the Complainant and Responding Party climaxing and then both laughing as the Responding Party told the Complainant that Witness Two had told the Responding Party to “keep it down.”
- When asked specifically about how consent was obtained the Responding Party said “that just seemed like the way things were going, so that is the way they went.”
- The Responding Party recalls them talking for a while and then falling asleep.
- When the Responding Party woke up around 10 am, the Complainant was gone. The Responding Party texted the Complainant thanking the Complainant for a “wild and fun night.” The Responding Party reports that the Complainant never responded. When asked what the Responding Party contributed the lack of response to, the Responding Party said “then - summer, now - this.”
- The Responding Party was unable to produce any text messages as they accidentally dropped their phone in the river this past summer while water skiing.

# WITNESS #1



- **Witness One** is a sophomore student who has been best friends with the Complainant since middle school. Witness One and Complainant live in the same hall and are planning to live off campus together next year.
- Witness One received a text message from the Complainant at around 4 am on Saturday, May 3, 2018 that was confusing. Witness One did not know where Complainant was. In subsequent texts Complainant indicated that they thought they were at the Responding Party's house. Witness One recalls being afraid for Complainant because Witness One didn't know Responding Party and it seemed out of character for Complainant to hang out with someone that they "didn't know very well."
- Witness One met Complainant walking home near Sherwood and immediately took Complainant to the Student Health Center.
- Witness One described Complainant as "totally out of it."

# WITNESS #1



- Witness One recalls that the Complainant could not recall how much they had had to drink, eat or smoke and so they suggested they go to the hospital. On the way to the hospital Witness One called the Victim's Advocate. The Victim's Advocate met Witness One and the Complainant at the hospital.
- Witness One recalls that the Complainant could not recall how much they had had to drink, eat or smoke and so they suggested they go to the hospital. On the way to the hospital Witness One called the Victim's Advocate. The Victim's Advocate met Witness One and the Complainant at the hospital.
- Witness One reports that while they drove the Complainant to the hospital, they were not in the room during the examination.
- Witness One recalls being afraid for Complainant because Witness One didn't know Responding Party and it seemed out of character for Complainant to hang out with someone that "[they} didn't know very well."

# WITNESS #2



- **Witness Two** is the housemate of the Responding Party. Witness Two and the Responding Party share membership in several student clubs. Witness Two is also a senior.
- Witness Two remembers seeing the Responding Party around 2 am in the house they shared. Witness Two remembers the Responding Party coming out of their room with just shorts on.
- Witness Two recalls joking about Responding Party's luck.
- Witness Two recalls telling Responding Party to try to “keep it down” as Witness Two was going to sleep.
- Witness Two and Three shared text messages from a group chat with the Responding Party in which they debriefed the night.

# WITNESS #3



- **Witness Three** is the housemate of the Responding Party. Witness Three went to high school with the Complainant's older brother. Witness Three and Witness Two play on the same sport team. Witness Three is a junior
- Witness Three remembers seeing the Responding Party around 2 am in the house they shared. Witness Three recalls the Responding Party having a towel wrapped around them.
- Witness Three recalls joking about Responding Party's luck.
- Witness Three recalls walking down the hallway ahead of the Responding Party and seeing the Complainant under the covers of the bed. Witness Three recalled the Complainant seemed very still as though they might be asleep.
- Witness Two and Three shared text messages from a group chat with the Responding Party in which they debriefed the night. One text message from Witness Three read "thanks for keeping it down ha ha -- clearly not -- damn [Complainant] likes it rough - might need to share this with [Complainant's brother] -- he would probably kill you."

# CREDIBILITY ASSESSMENT



- **CREDIBILITY ASSESSMENT**
- The investigators determined that all three witnesses were credible and provided no reason for the investigators to question their credibility.
- The Complainant was equally credible to the extent they could be considering the sporadic gaps in their memory. [Note: Gaps in one's memory is not enough to suggest that the Complainant credibility should be questioned.]
- The Responding Party was found to be less credible. The Responding Party's credibility was questioned in their recounting of the period of time after the Responding Party returned from talking with Witness Three and Two. The Responding Party reported that the Complainant seemed asleep when they returned. Witness Three corroborated this as well. The Responding Party's narrative that the Complainant then became fully awake and willing to engage in "wild" sexual activity, while certainly plausible, seems to advantage the Responding Party's narrative in light of the impending charges of non-consensual penetration.

**THE HEARING PANEL MUST DETERMINE FINDINGS FOR  
EACH POLICY ELEMENT**

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# GROUP WORK



- Gather in groups of 3
- Identify questions to ask each party
- Use the analysis of:
  - What do we want to know?
  - Why do we want to know it? Does it relate to the policy or credibility?
  - What is the best way to ask the question?
- Be prepared to participate in asking questions.

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THANK YOU!  
QUESTIONS?

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# CONTACT INFORMATION

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