

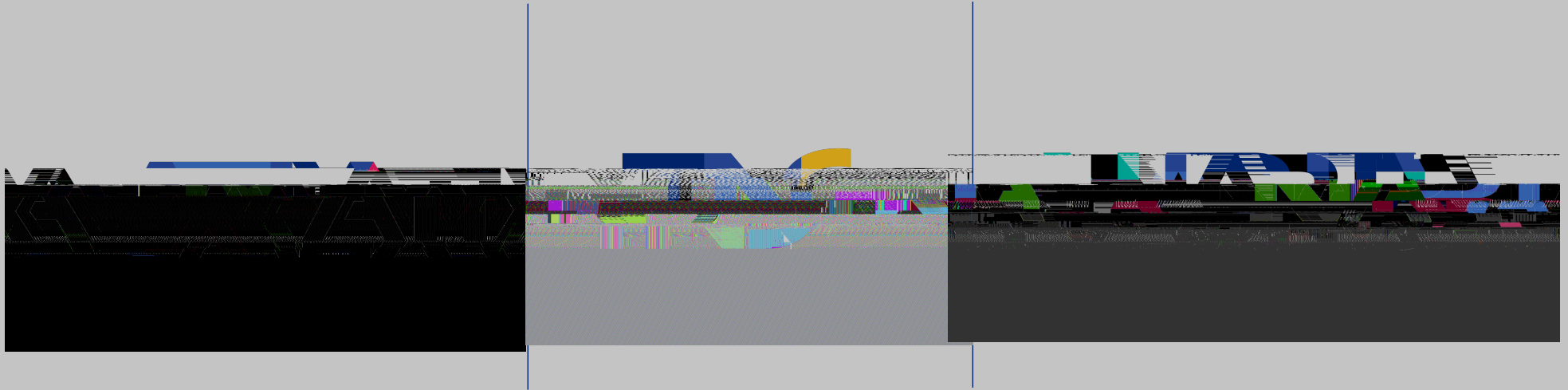
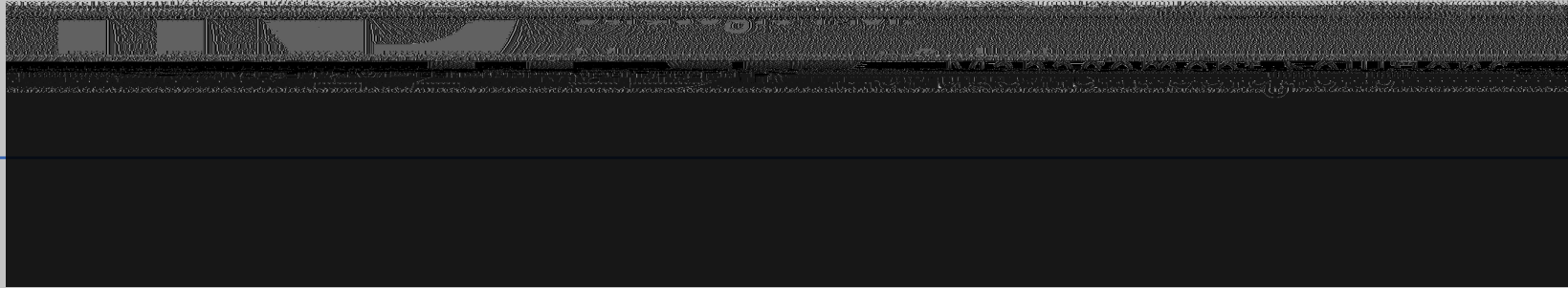


Title IX Hearing Officer and Decision-Maker

Training and Certification Course



TNG



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

(610) 993-0229 | inquiry@tngconsulting.com | www.tngconsulting.com

AGENDA

- 1 Title IX Basics
- 2 Decision-maker Role
- 3 Due Process
- 4 The Title IX Process
- 5 Bias, Conflicts of Interest, & Recusal
- 6 Preparing for the Hearing

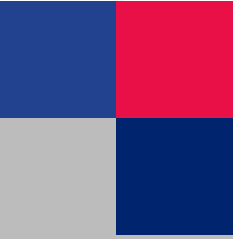
TITLE I

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

"No person in the United States







A

A A

DEC

A E

- Decision-maker Responsibilities
- Decision-maker Competencies

HEARING OFFICER DECISION MAKER RESPONSIBILITIES

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

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

THE GOAL

HAT DOES IT MEAN TO BE A DECISION MAKER

- ! 2020 Title IX regulations require a “Decision-maker” to determine whether a Respondent has violated policy
 - ! May be a single person (a/k/a “Hearing Officer”)
 - ! May be a panel of Decision-makers
 - ! May be internal or external individuals
- ! Required separation of roles
 - ! Title IX Coordinator may not serve as “Decision-maker”
 - ! Investigator(s) may not serve as “Decision-maker”
- ! Appellate Decision

HEN AND HO THE DECISION MAKER WORKS

- ! Required live hearing for colleges and universities
 - ! May take place in person; however, must provide an option for a video conference
 - ! Key new element is that the parties may cross-examine each other and witnesses, through an Advisor

HEARING OFFICER DECISION MAKER COMPETENCIES







REMEMBER, YOU HAVE NO
"SIDE" OTHER THAN THE
INTEGRITY OF THE
PROCESS, AND YOU
REPRESENT THE PROCESS.



HAT IS DUE PROCESS

- ! Substantive and Procedural Due Process (DP)
 - ! Rights-based protections that accompany disciplinary

PROCEDURAL DUE PROCESS ARE OUR FOLLOWING OUR PROCESS

Procedural Due Process:

- ! Consistent, thorough, and procedurally-sound review of all allegations
- ! Substantial compliance with written policies and procedures
- ! Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws
 - ! Clear, written notice of the allegations
 - ! Opportunity to present witnesses and evidence and be heard by the Decision-maker

SUBSTANTIVE DUE PROCESS

DUE PROCESS IN THE DECISION ITSELF

Due Process in Decision

- ! A decision must:
 - ! Be appropriately impartial and fair (both finding and sanction)
 - ! Be neither arbitrary nor capricious
 - ! Be based on a fundamentally fair rule or policy
 - ! Be made in good faith (i.e., without malice, ill-will, conflict, or bias)
 - ! Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence

DUE PROCESS PROCEDURAL RIGHTS IN TITLE I REGULATIONS

Right to:

! Present witnesses, including fact and expert witnesses

2 (f) - 20 Present and examine (29.88-21 (d).8821) 321(e) 210652 ap 91 (g)-3f(a)-75

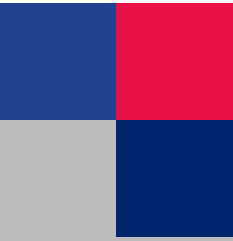
DUE PROCESS PROCEDURAL RIGHTS IN TITLE I REGULATIONS CONT

Right to:

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

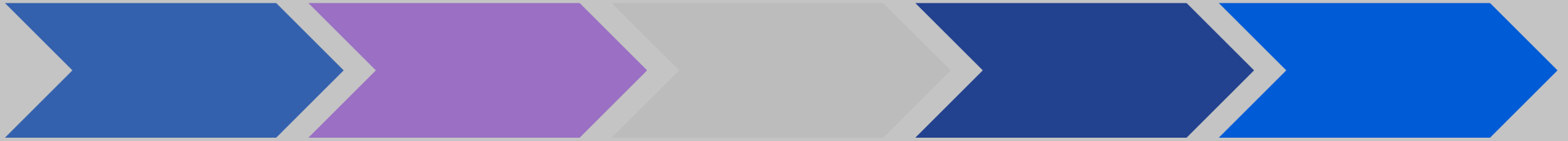
EVIDENTIAR STANDARDS

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



E E CE A
A E ED BEF E A

THE PROCESS



STEPS OF AN INVESTIGATION CONT

7.



EVIDENCE REPORT REVIEW BY PARTIES PART

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

ADVISORS

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





PRESUMPTION OF NON

TRAINING MANDATES

- ! The definition of sexual harassment in § 106.30
- ! How to apply definitions used by the Recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45
- ! Understanding the scope of the Recipient's education program or activity
- ! How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes

TRAINING MANDATES CONT

- ! How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- ! Any technology to be used at a live hearing
- ! Issues of relevance of questions and evidence
- ! Issues of relevance to create an investigation report that fairly summarizes relevant evidence



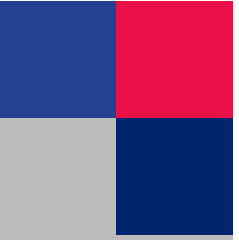


CONFLICT OF INTEREST OBJECTIVITY BIAS

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

RECUSAL

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



E A F
E EA

MUST DO PREP FOR THE HEARING

All Decision-Makers Must Review:

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

MUST DO PREP FOR THE HEARING CONT

All Decision-Makers Must Review:

- ! 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 where you will concentrate your questions

PREPARING QUESTIONS

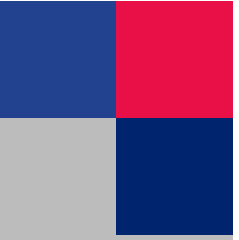
Write down the following as a reminder:

! What do I need to know?

!

PRE HEARING MEETINGS

- ! Although not explicitly required or even mentioned in the Title IX regulations, the Chair or Decision-maker may conduct pre-hearing meetings for each party (in writing, or in person)
 - ! Answer questions about the hearing and its procedures
 - ! Clarify expectations regarding logistics, decorum, the role of Advisors, and technology
 - ! Discuss witness and party participation and cross-examination
 - ! Discern any conflicts of interest/vet recusal requests
 - ! Consider any questions regarding relevance of evidence or proposed questions and may make pre-hearing rulings



EA
C

C

THE HEARING GENERAL LOGISTICS

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

HEARING DECORUM

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



THE HEARING

T ips for Hear ng Off cers/Dec s on-Makers:

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

THE HEARING

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

- ! Determine the relevance and appropriateness of questions. Pause after each question to “rule” on relevance. Must state rationale for the record.
- ! When necessary, the chair provides directives to disregard a question or information deemed irrelevant, abusive, or unduly repetitive
- ! Manage Advisors as necessary, including cross-examination
- ! Maintain the professionalism of all Hearing Officers/Decision-Makers
- ! Recognize positional authority



EVIDENCE

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

ASK OURSELF

Is it e e a ?

Is it **e a b e**?
(Is it credible?)

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

UNDERSTANDING EVIDENCE



RELEVANCE

- ! Evidence is generally considered relevant if it has value in proving or disproving a fact at issue, and relevance means the evidence may be relied upon by the Decision-maker
 - ! Regarding alleged policy violation and/or
 - ! Regarding a party or witness's credibility

!

- 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

OTHER EVIDENCE MAY BE DIRECTLY RELATED

Directly Related Evidence:

- ! Connected to the complaint but is neither inculpatory nor exculpatory and will not be included within the investigation report
- ! Comes to Decision-maker(s) pre-hearing via:





e.g., supportive writings or documents



e.g., photos, text messages, and videos



i.e., physical objects



SPECIFIC EVIDENCE ISSUES UNDER THE TITLE I REGULATIONS

- ! Evidence of the Complainant's sexual predisposition is never relevant.
- ! Evidence about the Complainant's prior sexual behavior is explicitly and categorically not relevant except for two limited exceptions:
 - ! Offered to prove that someone other than the Respondent committed the conduct alleged; or
 - !

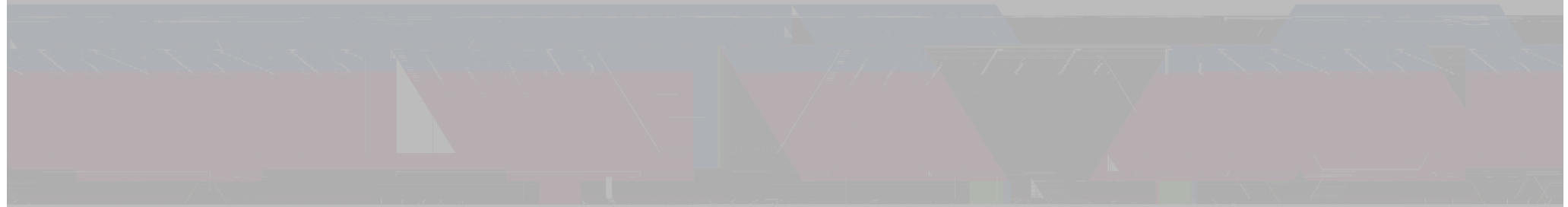
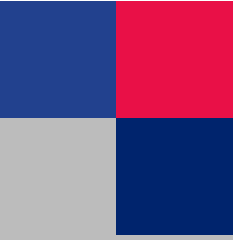
ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE I REGULATIONS

Additional permissions (from the party) required for:

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

ADDITIONAL EVIDENCE CONSIDERATIONS IN HEARINGS

!



E E A C E E E C E

- Ivan and Juanita
- Further Exercises

CASE STUD IVAN JUANITA

CASE STUD IVAN JUANITA

!

CASE STUDY IVAN JUANITA

- ! Ivan was notified via the institution's NOIA letter that it is alleged that he violated the institution's sexual harassment policy, specifically the hostile environment provision.
- ! The definition of Sexual Harassment is conduct on the basis of sex that is:
 - ! unwelcome,
 - ! determined by a reasonable person,
 - ! to be so severe, and
 - ! pervasive, and,
 - ! objectively offensive,
 - ! that it effectively denies a person equal access to the Recipient's education program or activity.

CASE STUDY IVAN JUANITA

You are the Chair of the Hearing Panel. You must determine whether each specific piece of evidence [(You (BT f [50 0.24 b0 (h)

CASE STUDY IVAN JUANITA

Consider whether the following pieces of evidence, if part of the fact-pattern originally provided from the investigation report, would be relevant:

1. Juanita's Advisor's daughter is in the same art class with Ivan and stated that she never had an assignment like that for class.
2. Ivan's friend, Alan, states that Juanita is really not bothered by the photo because he has observed occasions where Juanita flashed her breasts at Ivan a few times before. Juanita also told Ivan and Alan that she wanted breast implants.

CASE STUDY IVAN JUANITA

3. Ivan's high school soccer coach has prepared a written character reference for Ivan, which states that he was an upstanding member of his high school team and community, a four-year leader on the squad, and volunteered many times at the local YMCA youth program.
4. Ivan stated that at the time that the email was sent, he was attending his political science class, which had an in-

RELEVANT OR DIRECTLY RELATED

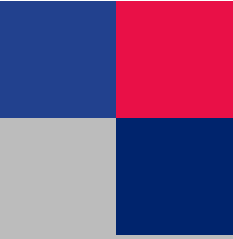
A Complainant writes in her formal complaint that she has been experiencing significant mental health issues since being sexually assaulted, including PTSD (self-diagnosis). Respondent mentions this at the hearing, to argue that one of the reasons Complainant likely misperceived the incident as non-consensual is because she has a self-admitted history of serious mental health concerns.

RELEVANT? DIRECTLY RELATED? NEITHER?
WHICH AND WHY?

RELEVANT OR DIRECTLY RELATED

A Complainant states in her opening statement at the hearing that she did not consent to sex with Respondent. She adds that one of the reasons why she did not consent and would not have consented is because prior to the incident, she was a virgin and had never had sex before.

RELEVANT? DIRECTLY RELATED? NEITHER?
WHICH AND WHY?



DEC A

A

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

QUESTIONING CROSS EXAMINATION

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

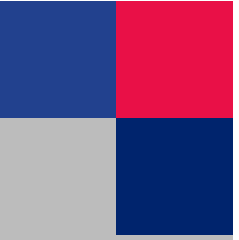
QUESTIONING CROSS EXAMINATION CONT

- ! If an Advisor seeks to ask a question that is potentially answered in the investigation report, that question should typically be permitted, if relevant
- ! If a cross-examination question has already been answered by a witness or party during the hearing, the Decision-maker or Chair may:
 - ! Deny the question as “irrelevant because it has already been answered,” or
 - ! Ask the Advisor why posing the question again is expected to lead to additional relevant evidence



QUESTIONING CROSS EXAMINATION CONT

! First question to ask each party and all witnesses: "Do



DE A D C ED B
E DEC CE

HAT IS CREDIBILIT

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

CREDIBILITY

Inherent plausibility

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

Motive to falsify

- ! Do they have a reason to lie?

Corroboration

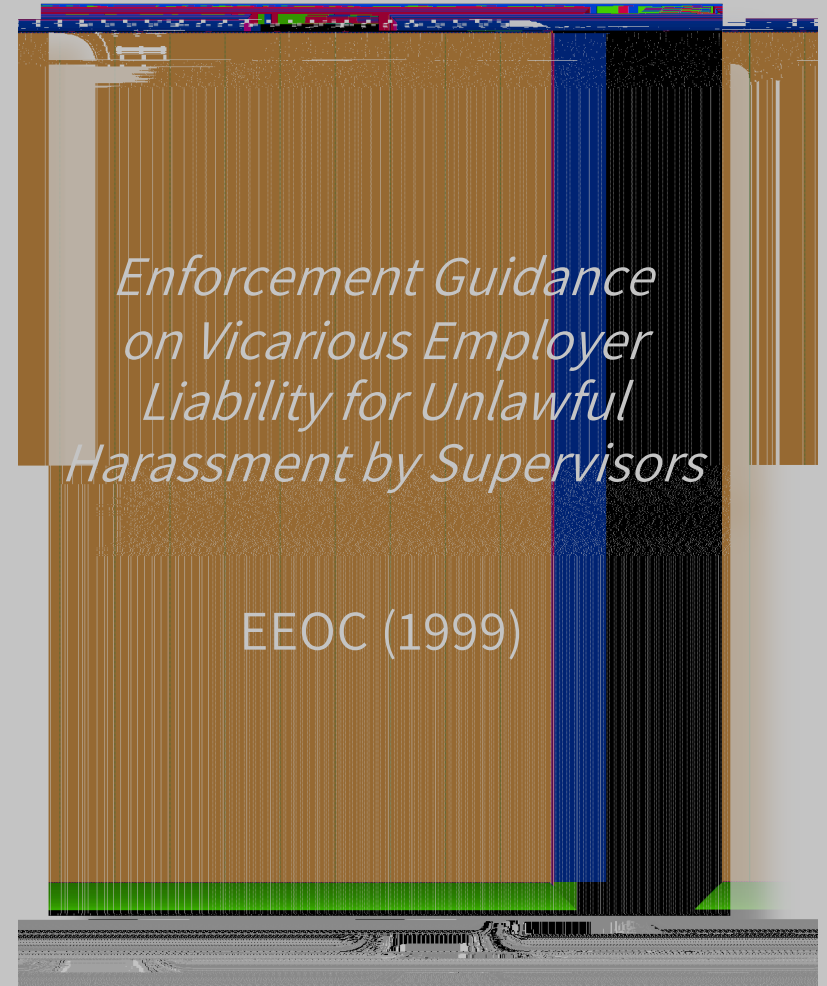
- ! Aligned testimony and/or physical evidence

Past record

- ! Is there a history of similar behavior?

Demeanor (use caution!)

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



FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility

! Does what the party described make sense?

!

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

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

FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

- ! Does the party have a reason to lie?
- ! What's at stake if the allegations are true?
- !

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

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

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

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

FACTORS TO CONSIDER FOR CREDIBILITY

Past Record

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





CREDIBILITY IN THE HEARING

- ! Distinguish performance/presentation skills from believability
- ! Evidence requiring a credibility assessment should be examined in a hearing
 - ! Fundamental to due process
 - ! Failure of a witness/party to participate undermines ability to determine credibility
 - Regulations are quite clear such evidence may not be considered if it relates to a statement previously made
 - Other evidence can be considered
 - What will the effect of that be on the process/decision?



C DEF

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

SEXUAL HARASSMENT POLICY

Title IX regulations require each Recipient to have an umbrella sexual harassment policy and define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:

- ! Quid Pro Quo: An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient



HOSTILE ENVIRONMENT PERVASIVE



HOSTILE ENVIRONMENT TOTALIT OF THE CIRCUMSTANCES CONT

- ! Whether conduct was directed at more than one person
- ! Whether a reasonable person would see/experience/determine the conduct to be SPOO?
 - ! What does it mean to be a reasonable person? Who is?
 - ! A reasonable person sits in the shoes of the Complainant
- ! Whether the statement only amounts to utterance of an epithet that is offensive or offends by discourtesy or rudeness, and thus is not SPOO
- ! Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment, which means it is not sexual harassment





SEXUAL ASSAULT CONT

- ! Sexual Assault with an Object: The use of an object or instrument to penetrate, however slightly, the genital or

SEXUAL ASSAULT CONT

! Incest: Non-forcible sexual intercourse, between persons who are related to each other, within the degrees wherein marriage is prohibited by state law.

!

CONSENT

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

DATING VIOLENCE

Dating Violence, defined as:

! Violence committed by a person who is or has been in a

DOMESTIC VIOLENCE CONT

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

STALKING

Stalking: engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- ! Fear for the person's safety or the safety of others; or
- ! Suffer substantial emotional distress.

For the purposes of this definition—

- ! Course of conduct means two or more acts, including, but not limited to, acts in which the Respondent directly,

STALKING CONT

For the purposes of this definition—

- ! Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
- ! Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

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

OTHER TITLE IX MODEL DEFINITIONS SEXUAL EXPLOITATION

Though not part of the Title IX “Sexual Harassment” definition, other conduct could be prohibited under a campus sexual misconduct policy, including:

Sexual Exploitation: occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute sexual harassment.

Examples include, but are not limited to:

- ! Invasion of sexual privacy
- ! Non

ATI A MODEL DEFINITIONS SEXUAL EXPLOITATION CONT

- ! Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity
- ! Engaging in voyeurism
- ! Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex)
- ! Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person
- ! Intentionally or recklessly exposing one's genitals in non-consensual circumstances or inducing another to expose their genitals
- ! Sexually-based stalking and/or bullying may also be forms of sexual exploitation

OTHER SEX-BASED MISCONDUCT OFFENSES THAT MAY BE ADDRESSED BY POLICE

! Bullying/cyberbullying

!

RETALIATION

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

RETALIATION BASIC LEGAL PRINCIPLES

Protected act v ty under Title IX:

DETERMINING RETALIATION CLAIMS KEYS TO UNDERSTANDING

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

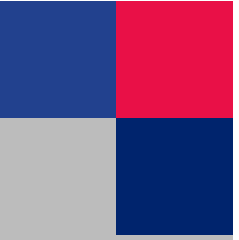
ELEMENTS AND ANALYSIS OF A RETALIATION CLAIM

inference of retaliation

If these three elements are not shown,
there is not a finding of retaliation.

RETALIATION AND ADVERSE ACTION

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



A A C E C C

- Force
- Incapacity
- Consent

CONSENT

! Informed, k4 (f) cministrators

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:

INCAPACIT CONT

! Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity

BEHAVIORAL CUES

Evidence of incapacity context clues:

- ! Slurred speech
- ! The smell of alcohol on the breath in combination with other factors
- ! Shaky equil. ~~3h) 7o) - 4n) - 1 (cm B (C) - 0(U) - 0(E) 42 43(U) - 0(E) 42 43 43(~~

PRIOR KNOWLEDGE CONSTRUCT

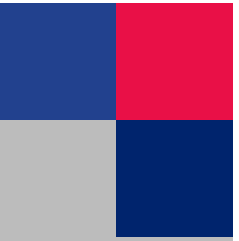
- ! These answers should be in the investigation report if the primary consideration is the out of norm behaviors of the Complainant as a determination of incapacity:
 - ! Did the Respondent know the Complainant previously?
 - ! If so, was Complainant acting very differently from previous similar situations?
 - ! 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

INCAPACIT 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,

CONSENT ANALYSIS

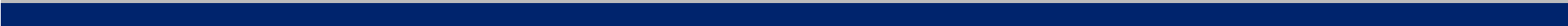
3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?
 - ! Is there any sexual or intimate pattern or history between the parties?
 - ! What verbal and/or non-verbal cues were present during any acts that the parties agree were consensual?
 - ! This is where getting detail and specifics of intimate behaviors is critical



E

DE

E



QUESTIONING

- ! The goal of questioning in the hearing is to ensure that as Decision-maker, you understand information and evidence contained in the report:
!

IF YOU STILL HAVE TO ASK A QUESTION ASK YOURSELF

- ! Is the answer already in the report or documentation I have been provided?
 - ! If not, why not? (Ask the Investigator this!)
 - ! You still will need to ask it again but keep the report in mind
- ! What do I need to know?
 - ! Who is the best person to ask this of?
 - Usually it will be the Investigator, first, and then the original source, if available
 - It may be good to ask the Investigator if they asked it already and what answer they previously received

IF YOU STILL HAVE TO ASK A QUESTION ASK YOURSELF CONT

- ! Why do I need to know it?
 - ! If it is not going to help you decide whether a policy was violated or not and you can explain how, then it is not a good question (though you may not know this until you hear the answer).
- ! What is the best way to ask the question?
- ! Are you the best person to ask this question?

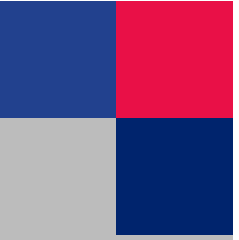


QUESTIONING SKILLS

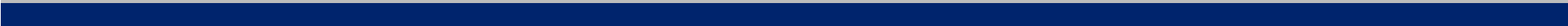
- ! Listen carefully and adapt follow-up questions.
- ! Work from your prepared outline but stay flexible.
- ! Seek to clarify terms (when the report is silent) that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “acted weird,” “sketchy,” or “had a few drinks.”
- ! Be cognizant of the difference between what was “heard” (hearsay), what can be assumed (circumstantial), and what was “witnessed” (facts).
- ! Be aware of your own body language. Stay neutral, even if you hear something you distrust or dislike.

QUESTIONING TIPS

- ! Restate/summarize what was said. Helps validate that you are listening and helps ensure you understand what is being said.
- ! Consider using these phrases:
 - ! “So it sounds like...”
 - ! “Tell me more...”
 - ! “Walk me through”
 - ! “Help me understand”
- ! Frame questions neutrally.
- ! Be on the lookout for “cued” responses or rehearsed or memorized answers.
- ! Handle emotions sensitively and tactfully.
- ! Observe body language, but don’t read too much into it.



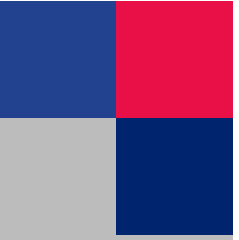
AC^E



QUESTIONING ACTIVITY

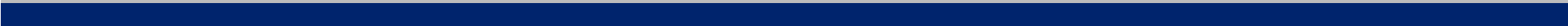
Refer back to the Ivan and Juanita case and develop possible questions for the following:

- ! Questions for the Investigator
- ! Questions for Juanita (Complainant)
- ! Questions for Ivan (Respondent)



A
DEC

A



OVERVIEW OF THE DELIBERATION PROCESS

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

DELIBERATIONS

General Information

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

W d dg e a e e de ce a bee c de ed

DELIBERATIONS

DELIBERATIONS

Findings, Impact Information, and Sanctions

SANCTIONING IN SEQUENTIAL MISCONDUCT CASES

Title IX and case law require:



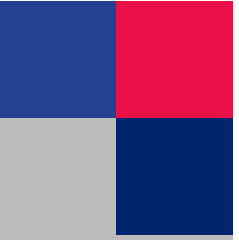
WRITTEN DETERMINATIONS

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

- ! Policies alleged to have been violated
- !

WRITTEN DETERMINATIONS LOGISTICS

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



A EA

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

APPEALS

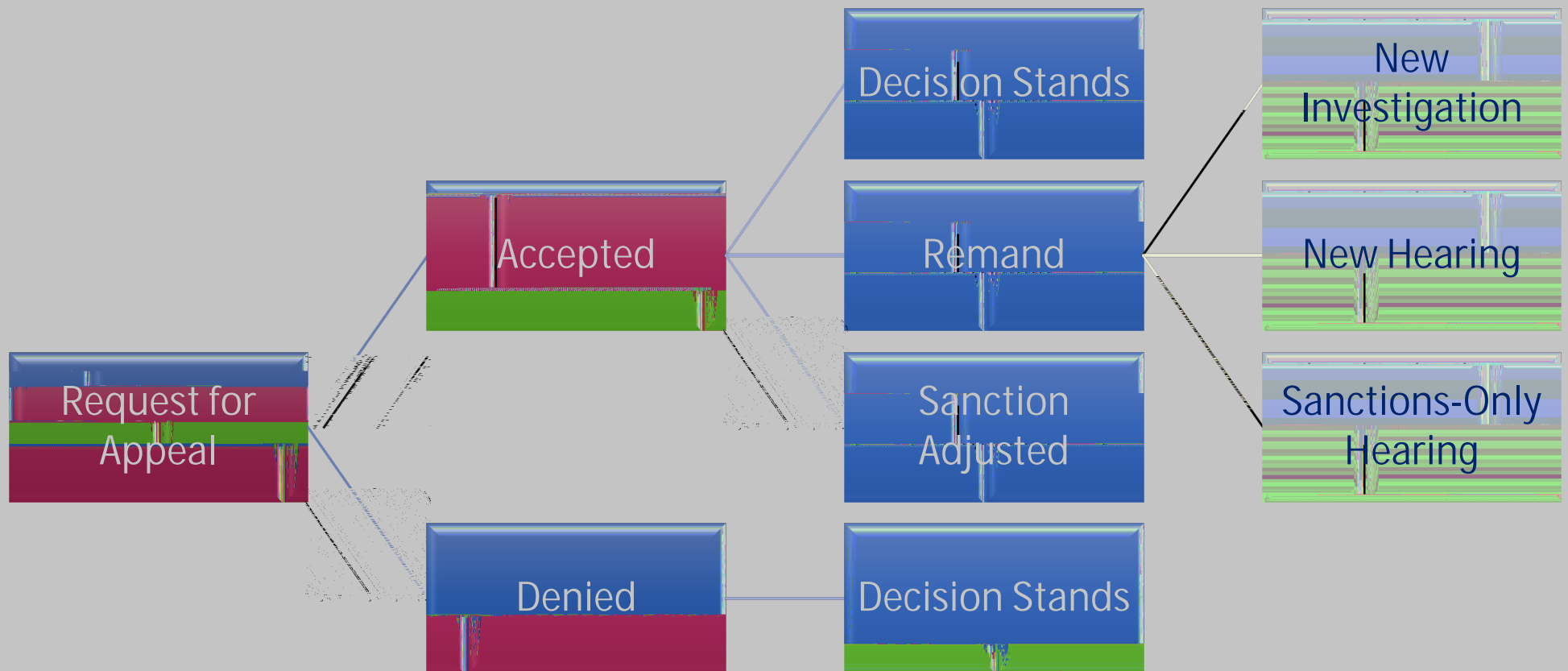
The Appeal Decision-maker may be an individual or a panel

- ! Cannot be the Title IX Coordinator
- ! Cannot be the Investigator or Decision-maker in the original grievance process
- ! Recipient may have a pool of Decision-makers who

BASES FOR APPEAL

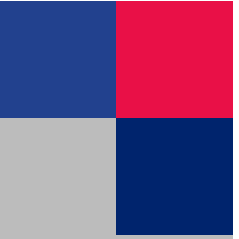
- ! Title IX Regulations specify three bases for appeal:
 - ! Procedural irregularity that affected the outcome
 - ! New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome
 - ! Title IX Coordinator, Investigator, or Decision-maker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

APPEALS THE PROCESS



APPEALS: OTHER ATIXA RECOMMENDATIONS

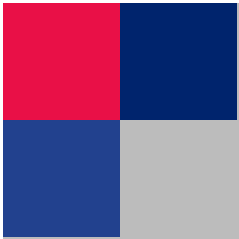
- ! One level of appeal
- ! Short window to request an appeal
 - ! May always grant an extension if necessary
- ! Document-based and recording review
 - ! NOT de novo
 - ! In other words, not a “second-bite of the apple”
- ! Deference to original hearing authority



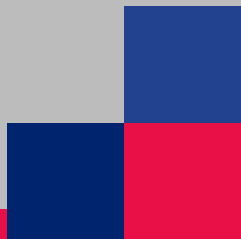
EC D EE A D
D C E A

RECORDKEEPING DOCUMENTATION

seven



Q e n





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