



Association of
Title IX Administrators

Special Topics for Title IX Hearing Officers and Decision-Makers

University of Nebraska-Lincoln
October-November 2021

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Strategic Risk
Management Solutions



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CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty and examples may emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

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 IX

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

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



THE IX COMMANDMENTS

INVESTIGATION

(plus prompt & fair per VAWA Sec. 304)




Thorough	Reliable	Impartial
Prompt	Effective	Equitable
Act reasonably to stop discrimination	Act reasonably to prevent recurrence	Act equitably to remedy effects

PROCESS



REMEDIES





**REMEMBER, YOU HAVE NO
“SIDE” OTHER THAN THE
INTEGRITY OF THE
PROCESS, AND YOU
REPRESENT THE PROCESS**

THE GOAL



**AN EQUITABLE RESULT FROM
AN EQUITABLE PROCESS**



ATIXA CONSENT CONSTRUCT

- Force
- Incapacity
- Consent

CONSENT

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- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally

OVERVIEW OF THE THREE QUESTIONS

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

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

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

FORCE

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

FORCE (CONT.)

Types of force to consider:

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

FORCE (CONT.)

Types of force to consider:

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

INCAPACITY

2. Was the Complainant incapacitated?

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

INCAPACITY (CONT.)

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
- Incapacitation is a determination that will be made after the incident **in light of all the facts available**
- Blackouts are frequent issues
 - Blackout ≠ 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

BEHAVIORAL CUES

Evidence of incapacity context clues:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Passing out
- Throwing up
- Appearing disoriented
- Unconsciousness
- Known blackout
- Outrageous or unusual behavior (requires prior knowledge)

PRIOR KNOWLEDGE CONSTRUCT

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

INCAPACITY ANALYSIS

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

CONSENT ANALYSIS

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



BIAS, CONFLICTS OF INTEREST, & RECUSAL

CONFLICT OF INTEREST, OBJECTIVITY, & BIAS

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

BIAS

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

BIAS (CONT.)

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

BIAS AND CONFLICT OF INTEREST

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

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



DECISION-MAKING SKILLS, PART ONE

- Understanding Evidence
- Relevance

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 YOURSELF

Is it relevant?

Is it reliable?
(Is it credible?)

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

UNDERSTANDING EVIDENCE

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

BUCKET 1: RELEVANT EVIDENCE



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

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
- The Investigator will have made initial relevance “decisions” by including evidence in the investigation report
- Relevance is ultimately up to the Decision-maker, **who is not bound by the Investigator's judgment**
- **All** relevant evidence must be objectively evaluated and considered – both inculpatory and exculpatory

BUCKET 2: DIRECTLY RELATED, BUT NOT RELEVANT EVIDENCE



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

OTHER EVIDENCE MAY BE DIRECTLY RELATED

Directly Related Evidence:

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

BUCKET 3: NEITHER RELEVANT NOR DIRECTLY RELATED EVIDENCE



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

WEIGHTING EVIDENCE

- Decision-maker may consider and assign weight to different types of evidence, when relevant and credible (see next slide)
- Decision-makers should typically only consider impact statements during sanctioning

Documentary
Evidence

e.g., supportive writings or documents

Electronic Evidence

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

Real Evidence

i.e., physical objects

Direct or Testimonial
Evidence

e.g., personal observation or experience

Circumstantial
Evidence

i.e., not eyewitness, but compelling

Hearsay Evidence

e.g., statement made outside the hearing but presented as important information

Character Evidence

subject to relevance determination; often not probative of the underlying allegation

SPECIFIC EVIDENCE ISSUES UNDER THE TITLE IX 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
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition

ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS

Additional permissions (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

- In the Title IX hearing, Bucket #1 and Bucket #2 evidence is often “admitted” in the sense that it is not excluded and/or Decision-makers are not shielded from hearing/knowing it
- Some evidence can be excluded, or witnesses can be directed not to answer certain questions
- However, the Decision-makers and/or Chair need to determine whether the evidence can and will be relied upon if it is introduced
 - There will be a decent amount of trying to “unhear”/disregard what is introduced, because even though you know it, you can’t consider it



RELEVANCE EXERCISES

- Ivan and Juanita
- Further Exercises

CASE STUDY: IVAN & JUANITA

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

CASE STUDY: IVAN & JUANITA

- Everyone in the lab knew it wasn't Juanita, but they all laughed anyway.
- Juanita ran from the room crying, embarrassed that others would think it was her.
- She immediately called Ivan, a member of the men's soccer team, who she believed sent the email.
- Earlier in the year, Ivan asked Juanita out several times, but she didn't like him.
- Juanita found him really annoying, and while she knows it wasn't nice, she called him a total loser in front of his friends.
- She knows that he sent the email to hurt and embarrass her.

CASE STUDY: IVAN & JUANITA

- Ivan told the investigator that he believes Juanita is blowing the whole matter out of proportion.
- He admits to creating the photo for a class project. He reports:
 - “It was only meant to be a joke. I never put her name on it, so what’s the big deal? This is a work of art that I created for my class, not a porn picture or anything. I only showed my artwork, which by the way is protected by the First Amendment, to a few of my teammates. I know my rights very well since my dad is a lawyer. In fact, the First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

CASE STUDY: IVAN & JUANITA

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

CASE STUDY: IVAN & JUANITA

- The picture was inserted into the email via a flash drive, and he was unable to determine which student had logged in to the computer.
- The assistant director received Ivan's consent to inspect his laptop. The photo was on his hard drive but was not sent out via email to anyone.
- Ivan said that when he doesn't have his laptop with him, it is typically inside his locker. Ivan also told the assistant director that he hasn't given anyone else his laptop password.

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 is relevant.

Starting with evidence from the investigation report. Is it relevant that:

1. Ivan is a member of the men's soccer team
2. Juanita is a member of the women's soccer team
3. There was "history" between Ivan and Juanita
4. Juanita called Ivan "a loser" earlier in the year in front of his friends
5. Ivan admitted to creating the image for his class
6. Ivan showed the image to a few teammates
7. The image was sent from a computer lab computer
8. Ivan consented to letting IT staff inspect his laptop

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-class exam that day.
5. Juanita provided a screenshot of Ivan's Twitter feed, which showed that he retweeted an announcement from his favorite band just two minutes prior to the precise time that the email was sent.
6. Ivan's Advisor wants to ask Juanita about her academic progress during the fall term. Ivan and his Advisor believe that Juanita was in danger of failing her chemistry course.

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?**



QUESTIONING SKILLS & GUIDELINES

QUESTIONING

- The goal of questioning in the hearing is to ensure that as Decision-maker, you understand information and evidence contained in the report:
 - Relevant evidence about what happened during the incident
 - Any related events
 - Any corroborating information
- Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing
- Your goal is not:
 - Satisfying your curiosity
 - Chasing the rabbit into Wonderland
- Do not expect the “Gotcha” moment. That is not your role. You are not prosecutorial.

IF YOU STILL HAVE TO ASK A QUESTION, ASK YOURSELF

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

ASKING GOOD QUESTIONS

- Generally, use open-ended questions (tell us...,who..., what..., how...)
- Try to avoid close-ended questions (Did you..., were you...)
- Don't ask Compound Questions
 - “I have two questions; First,..., Second,...”
- Don't ask Multiple Choice Questions
 - Were you a or b?
- Avoid suggesting an answer in your question

QUESTIONING SKILLS

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

QUESTIONING TIPS

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

QUESTIONING ACTIVITY

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)

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.)

- If a party or witness is not willing to submit to live cross-examination by the other party's Advisor during the hearing, the Decision-maker(s) must not rely on **any statement** of that party or witness (from the investigation or hearing) in reaching a determination regarding responsibility
 - This means that a party or witness must answer **all** relevant cross-examination questions that are posed
 - One refusal will trigger the prohibition that the Decision-maker may not rely on **any** statements
 - Refusing to answer irrelevant questions is permitted
 - This only applies to cross, not direct examination
 - If someone is willing to submit, but no questions are asked, their testimony and statements can be relied upon
 - This rule only applies to statements

QUESTIONING & CROSS-EXAMINATION (CONT.)

- **First question to ask each party and all witnesses:** “Do you intend to answer all questions directed to you today?”
 - Recommend asking before parties make opening statements to avoid having to “un-ring the bell”
- The Decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.
 - What is an inference?
 - How does it work?

QUESTIONING & CROSS-EXAMINATION (CONT.)

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





ADVISORS

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

ADVISORS (CONT.)

- Institutions may limit the role of Advisors during the hearing except for cross-examination and conferring with the party
- Advisors in place throughout the process
- Advisors **chosen by** the party should conduct cross-examination
 - Can opt not to ask any questions
 - If they refuse to ask questions their advisee wishes them to ask, the institution will appoint an Advisor who will
- An Advisor **appointed for** the party will conduct cross-examination

ADVISORS (CONT.)

- The regulations envision that the Advisor will not do more than repeat or rephrase questions framed by the party, but in many hearings, expect that the Advisor will be far more active and engaged than that
- Advisor behavior
- Not a court of law
- Help keep the party focused and calm



UNDERSTANDING CREDIBILITY IN THE DECISION PROCESS

WHAT IS CREDIBILITY?

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

CREDIBILITY

Inherent plausibility

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

Motive to falsify

- Do they have a reason to lie?

Corroboration

- Aligned testimony and/or physical evidence

Past record

- Is there a history of similar behavior?

Demeanor (use caution!)

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

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

EEOC (1999)

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility

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

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
 - Could they have heard what they said they heard?
 - Were there other impediments? (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?
 - Think academic or career implications
 - Personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the Complainant – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they 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

FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

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

CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

Regulations permit Investigators to make credibility recommendations

- Can serve as a roadmap for Decision-maker but is not binding
- Language in an investigation report may look like this:
 - “Decision-makers will want to carefully review Mary’s testimony as to whether the conduct was welcome, in light of the testimony of W1.”
 - “Decision-makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first.”

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 fully assess credibility
 - Other evidence can be considered
 - What will the effect of that be on the process/decision?



MAKING A DECISION

- Deliberations
- Sanctioning
- Written Determinations

“SUBSTANTIVE DUE PROCESS” - DUE PROCESS IN THE DECISION ITSELF

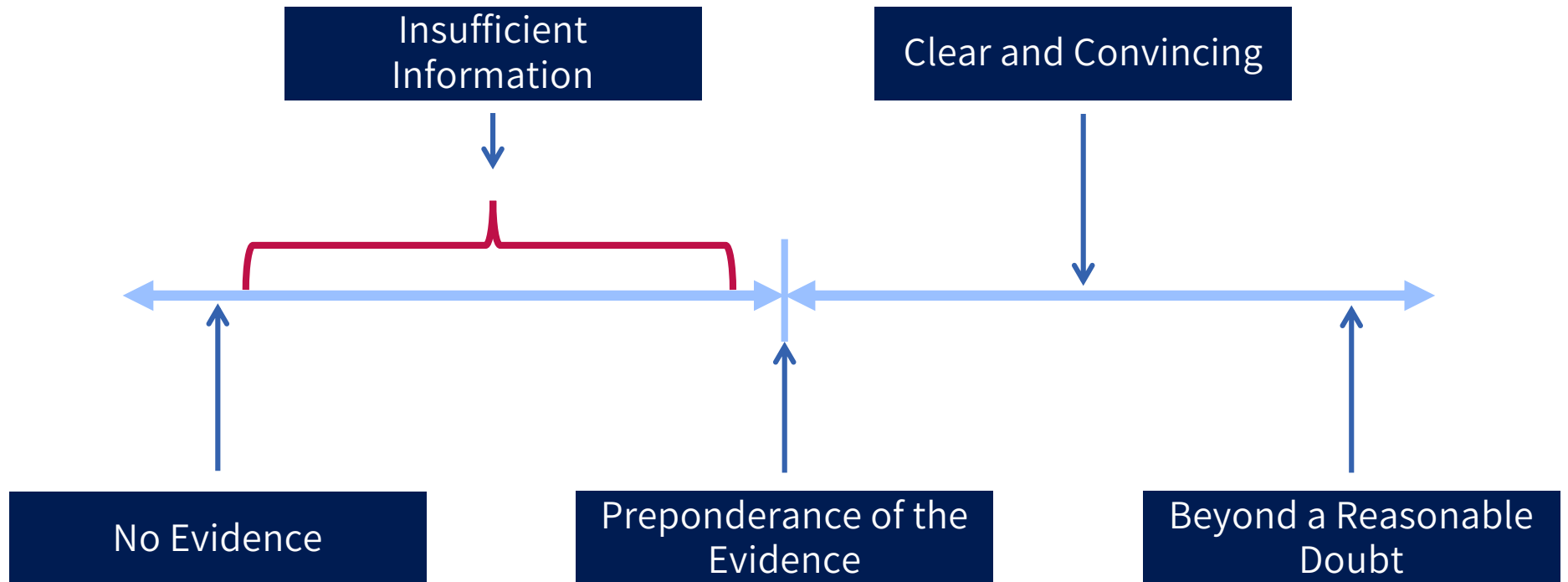


Due Process in Decision

- 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



EVIDENTIARY STANDARDS



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

Withhold judgment until all the evidence has been considered.

DELIBERATIONS

Foundation for Decisions

- Decisions must be based only upon information/evidence in the investigation report or presented at the hearing
- Do not turn to any outside “evidence”
- Parse the policy (break it down by its constituent elements)
- Assess evidentiary weight. Measure with the following questions:
 - Is the question answered with fact(s)?
 - Is the question answered with opinion(s)?
 - Is the question answered with circumstantial evidence?

DELIBERATIONS

Findings, Impact Information, and Sanctions

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

SANCTIONING IN SEXUAL MISCONDUCT CASES

Title IX and case law require:

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

ADDITIONAL FACTORS FOR DETERMINING SANCTIONS

- The nature, severity of, and circumstances surrounding the violation(s)
- The Respondent's disciplinary history
- The impact on the parties
- Any other information deemed relevant by the Decision-maker(s)
- Finding and Sanction are separate determinations
 - For sanctioning, even if they did not vote accordingly, Board sanctions based on the finding

Important: Should not sanction less because evidence is closer to preponderance.

COMMON STUDENT SANCTIONS

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

WRITTEN DETERMINATIONS

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

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

WRITTEN DETERMINATIONS (CONT.)

- Sanctions imposed on Respondent (if any) and rationale for sanctions chosen (or sanctions not chosen)
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the Recipient to the Complainant
- Procedures and bases for any appeal

The decision-maker should author the written determination

- May follow a template provided by the Title IX Coordinator

WRITTEN DETERMINATIONS: LOGISTICS

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



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Questions?



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