Association of
Title IX Administrators

ATIXA Title IX Hearing Decision-Maker Training Manual

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"[A] university is not a court of law, and it is neither practical nor desirable it be one. Yet, a public university student who is facing serious charges of misconduct that expose him to substantial sanctions should receive a fundamentally fair hearing. In weighing this tension, the law seeks the middle ground."[1]

[1] *Gomes v. Univ. of Maine System*, 356 F.Supp.2d 6, 12 (D. Me. 2005).

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The authors have worked diligently to ensure that all information in this Manual is accurate as of the time of publication and consistent with standards of good practice in Title IX compliance. As law and practice evolve, however, standards may change. For this reason, it is recommended that readers evaluate the applicability of any recommendations in light of particular situations and changing regulatory and legal standards.

Introduction – Purpose and Scope of this Manual

INTENDED AUDIENCE

Are you a Decision-maker? If so, this Training Manual is for you. Although institutions use different titles to describe the role — such as hearing officer, hearing panelist, adjudicator, etc. — the content in this Manual is for you if you are responsible for making decisions in hearings or appeals that are subject to Title IX requirements, regardless of your title, and irrespective of whether you are a single Decision-maker or serve on a panel. Throughout this Manual, we'll use the title "Decision-maker" because that is the term adopted by the U.S. Department of Education.

ABOUT THE AUTHORS

So, who are we to train you? Good question. The Association of Title IX Administrators (ATIXA) has a team of in-house Title IX experts who have authored this Manual. Almost all of us have served as Title IX team members on college campuses or in K-12 school districts. Every one of us has served as consultant or legal counsel to institutions during hearings and has served as a Decision-maker and Investigator. Most of us have also served as Advisors to one party or the other. Almost all of us have been Appeal Decision-makers. We have 200+ combined years of experience with sexual misconduct hearings. We've been involved in more than 1,000 campus sexual misconduct complaints and have trained thousands of Decision-makers. We are strongly focused on how to make sound, objective, unbiased decisions on the toughest cases institutions face, and we're intent upon teaching you the rules, techniques, tactics, and rubrics that can help to ensure a high-quality decision, grounded in evidence, that will be legally defensible and honor the equal dignity of all participants.

FOUNDATION OF THIS TRAINING MANUAL

In May 2020, the U.S. Department of Education's Office for Civil Rights (OCR) issued long-awaited federal regulations to guide educational institutions' compliance with Title IX when responding to reports of sexual harassment, sexual assault, stalking, and dating and domestic violence. The regulations are comprehensive, technical, and process heavy. ATIXA has authored a *Comprehensive 2020 Title IX Regulations Implementation Guide* to lead practitioners through a start-to-finish recommended implementation strategy. This Training Manual is not about whether the regulations are good or bad, or how they'll be changed by the Biden Administration. This Manual accepts the regulations as lawful and enforceable unless a court says otherwise and recognizes that the regulations create training obligations that you must fulfill. This Manual is a valuable tool in your toolbox for not just meeting a federal mandate, but for achieving sound, reliable decisions on often-disputed facts.

DUE PROCESS

Due process concepts permeate just about all aspects of OCR's regulatory approach, including its mandate that institutions of higher education must use live hearings to adjudicate complaints under campus sexual harassment policies. Indeed, the very preamble of OCR's draft regulations, published as part of the public comment process, described OCR's efforts as "intended to promote the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment *and ensuring that due process protections are in place for individuals accused of sexual harassment."*[2]

While due process is malleable and can vary from by jurisdiction based on court rulings, state law, and the type of forum, we use the term due process in this Manual to refer to the Title IX regulations' procedural requirements. You are responsible for knowing and applying any additional requirements that exist in your jurisdiction as the result of state law or court rulings.

This Manual is not only a due process "how-to" but also covers all Decision-maker training requirements specified by the regulations. ATIXA aspires to create a Training Manual that honors the regulations' demand for effective due process protections for Respondents while maintaining as humane a process as possible for all parties involved.

This Manual is largely written with colleges and universities in mind and will use terminology and concepts geared toward higher education professionals. This is because the regulations require live hearings for higher education settings, while leaving them optional for K-12 settings.[3] Elementary and secondary schools may choose whether to include a live hearing, but in all cases must provide an opportunity for questioning of each party and any witnesses. In the absence of a hearing, the questioning can be done in writing, so long as it provides an opportunity for parties to pose any relevant questions, including those that challenge a party or witness's credibility, through the neutral decision-maker. Therefore, though the tone and tenor of this document is aimed at satisfying higher education's specific needs in complying with the Title IX regulations, K-12 leaders will also find that this Manual may be useful to understand the substance of high-quality decision-making in K-12 settings.

Some of the considerations and recommendations in this Manual will vary based on institutional policy and state law, and you should always consult with your Title IX Coordinator (TIXC) or legal counsel for any clarifications or questions about applying these concepts at your institution.

[2] 34 C.F.R. Part § 106.
[3] 34 C.F.R. § 106.45(b)(6)(i); § 106.45(b)(6)(ii).

How Did We Get Here? Why is there So Much Emphasis on Due Process in the Title IX Regulations?

Due process is not a concept that is unique to Title IX. ATIXA thought a brief orientation would be helpful, particularly for colleagues who may serving as Decision-makers with little foundation in Title IX processes or exposure to campus disciplinary processes in general.

DUE PROCESS IS A CONSTITUTIONAL CONCEPT: FOUNDATIONS AND APPLICATION

At its core, due process is a concept that flows from the U.S. Constitution. The Fourteenth Amendment's "Due Process Clause" commands that states may not deny any person "life, liberty or property, without due process of law."[4] By extension, disciplinary decisions made by a state (including by public universities and schools) can implicate this constitutional mandate, as a loss of a property right in an education, or more rarely, loss of a liberty right. A student who faces separation-level discipline, such as suspension or expulsion, is entitled to some form of "process" before a deprivation (in the form of disciplinary sanctions) is imposed.[5] According to the Supreme Court, students facing suspension must be given "some kind of notice and afforded some kind of hearing."[6] Due process protections can also operate to safeguard employees, as well.

Yet, student disciplinary hearings must balance the need to provide a fair process against a recognition that educational institutions are not courts and are not and cannot be expected to operate like them.[7] One federal court noted that "a university is not a court of law, and it is neither practical nor desirable it be one. Yet, a public university student who is facing serious charges of misconduct that expose [them] to substantial sanctions should receive a fundamentally fair hearing. In weighing this tension, the law seeks the middle ground." [8] With Title IX's equity mandate, the parties (Complainants and Respondents) typically have the same

[4] U. S. Const. amend. XIV (and see also U.S. Const. amend V, as another source of Due Process rights).
[5] *Goss v. Lopez*, 419 U.S. 565, 575 (1975) (liberty and property interest implicated in high school suspension); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (a student's interest "in pursuing an education is included within the fourteenth amendment's protection of liberty and property").
[6] *Goss*, 419 U.S. at 579.
[7] For example, *Gorman*, 837 F.2d at 12 (stating that due process is "not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation").
[8] *Gomes v. Univ. of Maine System*, 356 F.Supp.2d 6, 12 (D. Me. 2005).

rights and protections, but procedural due process is fundamentally concerned with the Respondent being treated fairly in campus proceedings.[9]

As the saying goes: "the devil is in the details." This is relevant in due process litigation because of the Supreme Court's conclusion in the landmark case of Mathews v. Eldridge[10] that the level of process due fluctuates based on a set of factors that can shift or be weighted differently case-by-case. Thus, over time, courts have continued to grapple with what "due process" should look like and these debates are still unfolding in the courts today, and especially in Title IX litigation.

Because "due process" considerations scrutinize the decisions made by a *state*, "due process" concepts technically only apply formally to public institutions. Yet, for practical purposes, private institutions typically aspire to adhere to similar mandates, though often couched as obligations of "fundamental fairness" or "essential fairness." Although the public/private distinction remains meaningful to the courts, they are eroding the distinction over time. In the Title IX context, the process due under the regulations is identical for public and private institutions. This adds a layer to this discussion, because in addition to the Constitution, OCR also appears to believe that the Title IX statute itself is a source of due process rights that are not necessarily co-extensive with constitutional due process rights. Thus, your process may be subject to constitutional Due Process, but is now unquestionably subject to Title IX due process. As a result, both public and private institutions must always take great care to follow and adhere to their published processes for conducting investigations and adjudicating misconduct under their institutional sexual harassment policies.

Over the past two decades OCR has taken an active role in clarifying federal funding recipients' obligations to respond to sex- and gender-based harassment and discrimination allegations, as well as in shaping expectations for investigation and resolution processes. A result of OCR's active oversight, especially following issuance of the now-rescinded 2011 Dear Colleague Letter,[11] is that institutions began to respond more swiftly and seriously to reported allegations. Although this prompt response is a vast improvement in terms of institutional response and remedying of hostile learning environments, it has now raised concerns by some observers that too many Respondents have been suspended, expelled, or otherwise disciplined without sufficient procedural safeguards.[12]

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[9] Less commonly, courts have also recognized that victims of sex offenses may experience substantive due process deprivations through their assaults.

[10] 424 U.S. 319 (1976).

[11] Dear Colleague Letter 2011.

[12] For a discussion of the public discourse regarding due process issues, *see* Black, N.; Henry, M.; Lewis, W.S.; Morris, L.; Oppenheim, A.; Schuster, S.; Sokolow, B.; Swinton, D.; Due Process and the Sex Police, Whitepaper from The NCHERM Group (2017).

Courts have been setting new due process standards for colleges and universities at a quick clip, too, including pushing institutional processes into looking more and more like courtroom trials. The U.S. Court of Appeals for the Sixth Circuit; governing Kentucky, Michigan, Ohio, and Tennessee; has been especially active in scrutinizing higher education sexual misconduct processes. One particularly substantive example is the introduction of cross-examination rights for live campus hearings. In a significant victory for "due process" advocates, the Sixth Circuit held that when credibility of a party or witness is critical to resolving a case, a public university "must give the accused student or [their] agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."[13] California state courts have reached the same conclusion.[14] Recently, the Third Circuit joined the Sixth Circuit, and for the first time applied its requirements of live hearings and cross-examination to private colleges as well as public institutions.[15] Other federal Courts of Appeal have found live hearing rights but have stopped short of requiring direct cross-examination.

OCR issued its most recent federal Title IX regulations that emphasize due process protections for Respondents against this backdrop of the most recent court cases. In September 2017, then-U.S. Secretary of Education Betsy DeVos delivered a blistering critique of campus sexual misconduct processes. Faulting the Obama Administration's robust sub-regulatory oversight, DeVos argued that colleges and universities had gone "too far" investigating and punishing sexual misconduct, holding hearings that were running roughshod over students' due process rights. She said,

> *Title IX has helped to make clear that educational institutions have a responsibility to protect every student's right to learn in a safe environment and to prevent unjust deprivations of that right.…There is no way to avoid the devastating reality of campus sexual misconduct: lives have been lost. Lives of victims. And lives of the accused.*[16]

Proponents of the 2020 Title IX regulations placed these due process priorities at the center of their regulatory efforts. The regulations state clearly that the rights required therein are not derived from constitutional due process, but from the inherent fairness required by the Title IX statute itself.

[13] *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018).
[14] *Doe v. Allee*, 30 Cal. App. 5th 1036, 1042, 242 Cal. Rptr. 3d 109, 115 (Ct. App. 2019).
[15] *Doe v. Univ. of the Sciences*, 961 F.3d 203 (2020).
[16] Betsy DeVos, U.S. Secretary of Education, Speech at George Mason University (Sept. 7, 2017).

THE FUNDAMENTALS: CORE CONCEPTS OF DUE PROCESS

ATIXA finds it helpful to think about "due process" requirements as applying both to the *procedures* we use as well as to the *substance* of the underlying fairness of our disciplinary decisions.

Due process in procedure requires institutions to address complaints in a manner that is consistent, thorough, and procedurally sound. An institution must implement and follow written policies and procedures and ensure delivery of the rights and procedural protections owed to all parties, but especially the Respondent. Due process in decisions requires institutions to base any discipline on the evidence presented and issue appropriate, fair, and impartial sanctions. Decisions cannot be arbitrary, capricious, or biased, and must be made by objective Decision-makers (who have no conflicts of interest). It is our sense that some Decision-makers believe that their outcomes will be upheld if they follow the procedures, but a fair result is also an important element of due process. Fair outcomes from fair processes should be the motto. The practices listed below facilitate fair and equitable resolution of misconduct complaints:

- Provide the parties written notice of the complaint and offer clear and thorough information about the investigation and hearing/resolution process.[17]
- Allow the parties to present witnesses and contribute evidence.
- Provide the parties with an opportunity to be heard and address the allegations and evidence in a live hearing that affords indirect cross-examination.
- Permit the parties to navigate the process with the support of an Advisor for the hearing, including an attorney, if desired.[18]
- In reaching a decision, the institution should substantially comply with, and adhere to, its policies and procedures.
- Make an appeal available to all parties based on the grounds specified in the policy, which in turn must reflect the three grounds required by the Title IX regulations.[19]

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[17] *Esteban v. Central Missouri State College,* 415 F.3d 1077 (8th Cir., 1969).

[18] *Esteban,* 415 F.3d at 1077 (providing for respondents to have an advisor, including an attorney, present at a hearing for advising purposes); 34 C.F.R. § 668.46(k)(2)(iii) (providing for respondents and complainants to have the same right to have others present).

[19] 34 C.F.R. § 106.45(b)(8); 34 C.F.R. § 668.46(k)(2)(iii). Note that in addition to the 2020 Title IX regulations, other federal procedural requirements regarding institutional disciplinary processes for sexual assault,

- Provide a written notice of outcome to all parties that specifies the rationale for the final determination[20] and any sanctions imposed.

- Sanctions should be reasonable, constitutionally permissible, and proportionate/appropriate to the policy violation(s).

This list is exemplary, not exhaustive. Other nuances and rules imposed by the regulations will be discussed in detail throughout this Manual. Despite all of the new and renewed attention on due process concerns, it is helpful to remember that due process has historically been a requirement of public institution proceedings, and many of the specific requirements of the Title IX regulations, though onerous in their specificity, flow from an expansion or evolution of these core and fundamental due process concepts that have been at the heart of public institution disciplinary proceedings for at least half a century.

Effect of the Title IX Regulations: Live Hearings

Title IX requires that institutions receiving federal financial assistance have a grievance process for investigating and responding to reports of sex- or gender-based harassment or discrimination. Under the Title IX regulations, institutions may use formal or informal resolution mechanisms to respond to reports and complaints.[21] Although processes vary by institution, the general process from receipt of a report to referral for a policy violation determination includes:

- The institution receives a report of an incident or allegation or is otherwise put on notice of a possible policy violation, including receipt of a written complaint.

- The Title IX Coordinator conducts an initial assessment of whether the allegations (if proven) rise to the level of a policy violation, whether institutional policies apply (jurisdiction), and which process is most appropriate including informal or formal resolution. This step in the process can result in accepting a complaint, referring a complaint elsewhere, and/or dismissing a complaint.

dating/domestic violence, and stalking are dictated by the federal comprehensive campus safety act, known as the Clery Act, which was first passed into law in 1990. In 2013, the federal Violence Against Women Act §304 included additional procedural requirements for higher education institutions. Where applicable, those requirements are also referenced in this Manual.

[20] Decision-makers reach both a finding of fact and a final determination (outcome). The finding of fact is a decision – by the standard of proof – as to whether the alleged conduct actually happened. The final determination – again by the standard of proof – answers whether the conduct that is found to have occurred is conduct that violates institutional policy.

[21] 34 C.F.R. § 106.45(b)(9).

- Complaints that follow a formal grievance process involve a hearing unless all parties agree to shift to an informal resolution before the hearing. Prior to a hearing, the Title IX Coordinator typically manages or initiates the following steps:

  - The parties receive written notice (the NOIA – notice of investigation and allegations), including information about the allegations, the alleged policy violations, and the applicable resolution procedure.
  - One or more Investigator(s) conduct an investigation (defined as a thorough, reliable, and impartial, reasonably diligent inquiry), including identifying and interviewing parties and relevant witnesses and collecting and reviewing relevant evidence. The Investigator(s) may interview parties and witnesses multiple times and may consult with expert witnesses when necessary.

  - The parties are invited to suggest witnesses and provide evidence in the investigation.

  - The Investigator(s) share(s) the evidence collected with the parties and their Advisors, who then have an opportunity to review and submit written responses before the investigation report is finalized.

  - The Investigator(s) finalize(s) a written report summarizing the investigation and evidence, which is then shared with the parties and their Advisors for further review and comment prior to the hearing.

Previously, institutions operated different processes for determining whether a policy had been violated. A major shift under the Title IX regulations is that now all higher education institutions must use a live hearing, run by a neutral Decision-maker, to make this determination.[22] ATIXA uses the term "Decision-maker" because under the Title IX regulations, institutions may choose whether to use a single administrator or a panel to serve as "Decision-maker."

ADVISOR OF CHOICE AND CROSS-EXAMINATION

Parties are entitled to an Advisor of their choice at the hearing, including an attorney. If a party does not have an Advisor, and the party wishes to conduct cross-examination at the hearing, the party must select an Advisor or ask that the institution appoint one for that purpose.[23] Parties are permitted to cross examine the other party (parties) and any witnesses, but the cross-examination must be conducted by the parties' Advisors.[24] The parties cannot directly interact with each other at the hearing. The cross-examination is indirect because the Decision-

[22] 34 C.F.R. § 106.45(b)(6); 34 C.F.R. § 106.45(b)(7)(i).
[23] 34 C.F.R. § 106.45(b)(6).
[24] *Id.*

maker must make determinations about whether questions are relevant before the person being questioned is directed to answer. Only relevant questions are permitted, and only the Decision-maker can determine relevance.

We'll return to the due process topic later, in greater detail, but hope the foregoing discussion has provided a useful introduction and helpful context. Now, let's explore a role-clarification exercise. You can take this exercise on your own and/or use it as a facilitation tool when you train Decision-makers as a group.

Values Clarification: What are the Competing Priorities for a Decision-Maker?

A key element of designing and implementing a hearing process is to operate from a place of institutional clarity about the values and priorities that undergird your hearings, and to engage the institution's Decision-makers in conversation about how they view their own work and role. Remember that many Decision-makers, who often come into institutional disciplinary processes from different corners of the institution, may arrive with preconceptions about what their role is. Individuals are almost always motivated to do good work but may view that work as rooted in a variety of different values.

ATIXA often draws upon the following ***Values Clarification Exercise*** as a tool to engage these varied constituents in conversation about the values that undergird your institutional sex- and gender-based misconduct policy and resolution system.

Values Clarification Exercise

Instructions: Individually please take five minutes to rank these responsibilities of a Decision-maker. "1" would be the most important responsibility, and "8" is your least important responsibility. After completing the exercise individually, you may work within a small group to discuss and/or determine if you can find a consensus for the top three responsibilities.

- 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 misconduct

These values can influence both final determinations and sanctioning decisions. Having used this exercise with hundreds of training groups over the years, ATIXA trainers consistently find that a key "outcome" of this brief but impactful exercise is a contrast between truth seekers and those who prioritize making a safe community. Between those who want to punish and those who want to educate. Between those who prioritize fairness and those who want to protect the institution from liability or punish misconduct.

While the contrasts are often fascinating and there is no "answer key" to this exercise, per se, group discussion typically ends up ranking "ensuring a fair process" and "upholding the institution's policy" as non-negotiable priorities. Groups may differ slightly on whether their "top three" include "providing an educational process," "making a safe community," or "providing a just result." Group consensus may wind up being quite different from individually held values. Decision-makers should leave this exercise with an understanding that "finding the truth" may be elusive and perhaps frustrating if they think that truth always emerges from a hearing. It does not. Truth may be relative or driven by perspective. Truth is certainty in a process designed to derive a decision from less than a certainty – either a preponderance of the evidence or clear and convincing evidence – but neither of those has the absolute quality of truth.

Decision-makers strive to make policy determinations based upon available, credible, and reliable evidence, which may or may not result in an ability to discern "the truth" or know what really happened. Perhaps it can be helpful to understand that in this process, truth can be redefined for practical purposes as whatever is enough to satisfy the standard of proof. If you happen to learn more than that, or even learn the definitive true, savor that rare outcome.

"Protecting the institution from liability" should be inherent in the exercise of a well-run process, but Decision-makers should never make individual decisions in any case from a place of fear of litigation or liability. That is a form of bias. For the ATIXA team, we usually come away rating "upholding the institution's policy" as the highest value, knowing that if the policy and procedures are well-crafted, they will help to ensure that all of the other values are also accomplished.

Fitness to Serve as a Decision-maker

TRAINING DECISION-MAKERS

Serving as a Decision-maker in a sex- and gender-based misconduct process requires significant training to assure that hearings are conducted equitably. Highlighted below are some specific training elements resulting from the Title IX regulations. The regulations themselves are surprisingly silent on training requirements; however, the structure of hearings under the

regulations functionally requires certain specific training elements. Be sure that your training includes some treatment of each of these topics:

1. Ensure that Decision-makers understand all applicable policies and procedures, the rules and procedures regarding conflicts of interest, recusals, and the need not to have a bias for or against the parties generally, or against any individual party.[25]

2. Decision-makers must understand the Title IX regulatory mandate requiring a division of labor between the Investigator(s) and the Decision-maker(s). Train Decision-makers to avoid asking (as well as to prevent any party from asking) any questions that call for an Investigator to tread into the province of the Decision-maker. For example, Investigators should not testify about their opinion about whether a Respondent should be found responsible for a policy violation if that is not an appropriate step in your process.

3. Decision-makers will require training on all evidentiary issues addressed under the Title IX regulations, including understanding relevance, when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, how to decide and articulate a rationale, managing Advisors and cross-examination, and in evaluating evidence with a high degree of specificity.[26]

4. Written decision letters and rationales require a high degree of specificity and detail under the Title IX regulations. Decision-makers will need specific training regarding writing compliant and thorough decision and rationale letters.[27]

5. Decision-makers will need training on managing the technology of hearings, especially for remote testimony or virtual hearings.[28]

6. Existing federal Clery Act/Violence Against Women Act (VAWA) Section 304 training mandates also still apply, and that Decision-makers must receive annual training on issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.[29]

Consult with legal counsel to identify any specific training requirements under applicable state law. Remember to retain copies of training materials used with your Decision-makers. Under the Title IX regulations, these materials must be posted publicly on your website.[30]

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[25] 34 C.F.R. § 106.45.
[26] 34 C.F.R. § 106.45(b)(6)(i).
[27] 34 C.F.R. § 106.45(b)(7)(ii).
[28] 34 C.F.R. § 106.45(b)(1)(iii).
[29] 34 C.F.R. § 668.46 (k)(2)(ii).
[30] 34 C.F.R. § 106.45(b)(10)(i)(D).

SELECTING A CHAIR

When a hearing panel is used, selecting the Chair will be an important decision. The Title IX Coordinator often designates the Chair from the available pool of hearing Decision-makers, though sometimes a permanent Chair model is used. Some institutions have the Chair selected by the other Decision-makers.

NEUTRALITY, IMPARTIALITY, CONFLICTS OF INTEREST, AND RECUSALS

Due process concepts generally require that Decision-makers must be neutral, independent, impartial, objective, and must not have a conflict of interest that would result in a biased process or decision. Under the Title IX regulations, Decision-makers must not have a conflict of interest or bias for or against Complainants or Respondents, generally, or against any individual party.[31] Indeed, the very requirement that a Decision-maker must be neither the Title IX Coordinator nor the Investigator is intended to provide a degree of inherent neutrality by providing "fresh eyes" at the point the institution makes a decision regarding whether the Respondent will be found responsible for violating policy.[32] Hearing outcomes should be consistent, reliable, and not vary arbitrarily based upon who happens to serve as Decision-maker. Decisions should not be improperly influenced by gender, race, culture, ethnicity, institutional affiliation, or other similar considerations.

Decision-makers should possess the following qualities:

> Independent: Decision-makers must be independent. A Decision-maker's focus should be on maintaining the integrity of the process, and independence requires that the Decision-maker not be beholden to or unduly influenced by any stakeholders with a vested interest in a particular outcome. If you need to please your boss, avoid a lawsuit, mitigate a public relations disaster, appease an interest group, or accept a call from someone who wants to influence your vote, you should recuse yourself.
>
> Neutral: Decision-makers need to be neutral and maintain their neutrality. If you don't, you'll have a thumb on the scale, and something other than evidence could influence what decision you make. You're not neutral if your philosophy or orientation is to believe survivors or assume victims' complaints are often false. You're not neutral if you think part of a Decision-maker's role should be influenced by rape culture. You're not neutral if you "start by believing" or start by doubting. You're not neutral if anything but the evidence dictates your vote or decision.

[31] 34 C.F.R. § 106.45(b)(1)(iii). *See also* 34 C.F.R. § 668.46(k)(3)(i)(C).
[32] 34 C.F.R. § 106.45(b)(7)(i).

Objective: Decision-makers must evaluate all evidence and testimony without any preconceived notions. Although Decision-makers will have thoroughly reviewed the investigation report before the hearing, they must begin each hearing with a mindset of readiness to receive and analyze all of the information presented in the hearing, question what they think they know, listen carefully, weigh the evidence fairly on its face, ignore politics, trust but verify information, understand what evidence is persuasive and why, and dutifully analyze the facts in light of the policy as written.

Culturally Competent: Decision-makers should have a basic understanding of and/or openness to learn about applicable cultural norms and nuances that may affect the particular facts of a case, as well as the ability to check their own personal privilege, perspective, or assumption/limitations arising from their lived experience that may not be shared by others.

Unbiased: Everyone has biases, so when we say "unbiased," we mean that a Decision-maker should be someone without any disqualifying biases that will impact the outcome of the decision. Minor biases that don't affect the outcome, that a Decision-maker is aware of and can see past, or that still permit objective decision-making, are normal. Bias can represent any variable that could improperly influence a determination. Areas of bias can include the role of alcohol or drugs, student-athletes, fraternity and sorority life, religion or religious beliefs, and any predisposition toward or against a complainant or respondent generally, or toward or against a particular party. Although bias is inevitable, it does not necessarily undermine the fairness or appropriateness of a decision if biases are balanced, on the whole. The key is recognizing the bias and ensuring it does not impact one's decision. Hearing outcomes must be based on evidence, not on personal beliefs.

Multi-partial: A multi-partial Decision-maker is one who serves all parties and the process equitably rather than being partial to a party or to the process. They recognize the presence of power in the process and also acknowledge the identities others bring into the hearing, which may include challenging other participants' or decision-makers' reliance upon dominant narratives about both the process itself as well as the complaint being resolved.

Within several of the above requirements is the implied duty to avoid impermissible conflicts of interest. While conflicts can be hard to define and identify, they can arise from divided loyalties and/or a failure of impartiality. Conflicts can be role- and/or situation-based, as in someone wearing too many decision-making hats at multiple stages of the same process. So, what should you do when a conflict arises or is reasonably perceived? A hallmark of a fair and impartial process is a mechanism that permits Decision-makers to recuse themselves if a conflict of interest precludes their ability to participate impartially. The Title IX Coordinator should vet the

intended Decision-maker(s) for each specific complaint to ensure impartiality by discerning whether there are any actual or apparent conflicts of interest or bias present. Not only should a Decision-maker recuse themselves, but many institutions also have a process that allows the parties to raise objections over issues that may not even be known to the Decision-makers, such as a party planning to take a class with the Decision-maker the very next term.

Thus, parties should have advance notice of the identity of the individual(s) who will hear the complaint. If your policy allows for parties to raise concerns regarding bias or conflict of interest with any specific appointed Decision-maker(s), this should happen before the hearing. Parties with attorney Advisors may seek to probe about Decision-maker biases in advance of the hearing. The Title IX Coordinator should determine whether the proffered concern is reasonable and supportable. If so, another Decision-maker should be assigned to hear the complaint, which will remedy the concern. Hopefully, all of this can be raised pre-hearing, but if not, Decision-makers may need to be prepared to be recused at the hearing, and the Title IX Coordinator should be prepared with one or more alternates or substitutes who can step in to replace them in a way that does not delay the hearing.

Merely speculative conflicts are not typically sufficient to justify recusal. A conflict of interest is one circumstance that may necessitate recusal, although each circumstance should be considered individually. It is important to remember that faculty or staff members who serve as Decision-makers often serve in a variety of roles within the institution. At smaller institutions it is not uncommon for Decision-makers to have some familiarity with the participants as students or colleagues. That familiarity itself does not necessarily constitute a conflict of interest unless it results in biased decision-making. All possible conflicts of interest should be addressed individually, and in consultation with the Title IX Coordinator as needed.

Lastly, Decision-makers should be trained to notify the Title IX Coordinator immediately should they discern that, in their own judgment, they are unable to hear a particular complaint fairly and impartially. Although this will be a rare occurrence, individuals should certainly recuse themselves if they are unable to be fair and impartial. This disclosure should always happen before the hearing begins; however, if a Decision-maker only realizes a conflict or bias during a hearing, they should bring it to the Title IX Coordinator's attention immediately. Individuals who carry biases generally in favor of "one side," or the other are flatly not suitable to serve as part of the pool of Decision-makers and Title IX Coordinators should screen for these general biases as part of their training and selection process.

PRIVACY AND CONFIDENTIALITY

Parties are entitled to a process that ensures privacy and discretion, and that private information will be protected, appropriately. Whether the parties are students or employees, hearings are always closed to the public. To do otherwise would violate the Family Educational

Rights and Privacy Act of 1974, commonly known as FERPA, in student complaints, as well as many state and institutional personnel records laws and policies.

All Title IX records about students likely fall under the protections of FERPA. The privacy required by FERPA need not impede the effective functioning of the hearing itself.[33] Under FERPA, institutional officials who have a legitimate educational interest in the information may read, review, and discuss the information contained in a student's education record,[34] so it is important to create a memo that specifically designates the Decision-makers as appropriate officials for FERPA purposes, whether they are internal employees or external contractors. For example, Decision-makers may permissibly review all case materials. Additionally, Decision-makers may discuss matters pertaining to the complaint in front of individuals who are in the hearing but should take care not to disclose unnecessary information in front of witnesses. If a panel is used, Decision-makers can discuss the complaint, investigation, and hearing with each other.

Some institutions have Decision-makers sign an acknowledgment of campus privacy policies and practices, making it clear that what happens in the hearing stays in the hearing. FERPA, other applicable confidentiality laws, and/or provisions of the Title IX regulations may prevent disclosure of private information outside of the hearing setting. Decision-maker(s) should carefully safeguard any materials they receive related to the hearing, not leave computer screens open and unattended when sensitive information is displayed, avoid side conversations with any individuals involved in the matter, and avoid any discussions with individuals who are outsiders to the complaint.

The parties are entitled to know who is serving as Decision-maker(s) for their complaint; therefore, it is possible that parties may alert others of a person's role as a Decision-maker. It is possible that coaches, club advisors, student affairs professionals, faculty, and others may approach Decision-makers to attempt to discuss the situation. They may have innocuous reasons, such as curiosity or concern about the hearing participants. Sometimes, those motivations strike a different tone, such as attempts to influence a Decision-maker and possibly even threats. There is no valid reason for a Decision-maker to engage in these conversations, and Decision-makers should be advised about how they should handle these situations, beginning with shutting them down quickly and informing the Title IX Coordinator immediately. Similarly, Decision-makers should be advised regarding how to handle/refer media inquiries for high-profile situations. As a general rule, Decision-makers should refrain from any disclosures to outsiders, including a partner or family, the media, the participants' Advisors, or supporters. Remember, too, that students are entitled to "inspect and review" their education records

[33] FERPA, of course, applies to a student's education records. Employment records are typically governed by state personnel records law as well as institutional policy.
[34] 34 C.F.R. § 99.31(a)(1)(i)(A).

under FERPA.[35] Therefore, all records retained by the institution in connection with the matter could be subject to these requests. Take great care with notetaking given that FERPA and litigation discovery mean those records could be produced for others to review. ATIXA recommends that the Title IX Coordinator and legal counsel jointly set out a consistent policy on Decision-maker note-taking, retention, and destruction – whatever it might be – and follow it diligently.

Decision-makers should also be aware that FERPA contains some exceptions to allow institutions to release information about outcomes without a student's consent. For example, information may be disclosed in connection with an enrollment transfer process.[36] Similarly, institutions may publicly release the name of any student found responsible for a violent policy violation, along with the nature of the violation, and the sanction imposed.[37] However, these *permissive* disclosures should be determined by institutional policy (public universities may be required to disclose in response to an open records request), not individual Decision-makers. It is best for Decision-makers to refer any such requests to the Title IX Coordinator, who may consult with legal counsel on the legality of release, state laws that may be applicable, and policies governing release of information regarding student or employee Respondents. No information about Complainants can be released without their express consent.

Overview of the Formal Grievance Process

So, you have been scheduled for your first hearing – now what? Although Decision-makers will often rely significantly on their Title IX Coordinator for the required preparation before the hearing is even "called to order," it is important that all Decision-makers understand some of the key practical and procedural elements that must happen in order to effectively ensure that the hearing itself is conducted properly. Imagine learning at the end of a hearing process that some error was made before you even walked into the room. Your familiarity with regulatory requirements, applicable due process, and procedural mechanisms helps to act as a check and balance on the competence of other aspects of the grievance resolution process. There are a lot of moving parts, and we want you to know not just your part of the process, but to understand the big picture, too. So, let's make sure you understand the anatomy of a resolution, in brief overview.

NOTICE/COMPLAINT/INTAKE

Upon notice or a complaint, the institution conducts intake and initial assessment to make sure the Complainant is safe, to assess whether Title IX applies jurisdictionally, to determine if

[35] 34 C.F.R. § 99.10(a).
[36] 34 C.F.R. § 99.31(a)(3)(ii)(2).
[37] 34 C.F.R. § 99.39.

dismissal requirements of the regulations apply, to consider whether informal resolution is appropriate, and to assess the need for emergency restrictions on the Respondent. While you may learn that an emergency removal or administrative leave is put in place, that is a precautionary measure and should not influence your decision. It is not proof of a policy violation in the same way that the Complainant requesting a room reassignment is not relevant evidence (just as it would be unfair for a Respondent to argue that a failure to request a room change must be proof that the Complainant was not severely impacted). During the intake, the Title IX office reaches out with supportive measures, may attempt to connect the parties to Advisors, and also offers supportive resources and services to the Respondent.

REFERRAL

After the initial assessment, the complaint is referred for investigation, for dismissal, for informal resolution, and/or to another applicable process/office for resolution. The parties are notified accordingly.

INVESTIGATION

Assuming an investigation is conducted, trained Investigators attempt to interview all parties and witnesses and collect relevant evidence. By law, the investigation must be a reasonably diligent inquiry that is thorough, reliable, and impartial. It most commonly results in two work products: the investigation report containing all relevant evidence and the directly related evidence file.[38] The parties and Advisors receive two ten-day opportunities before the hearing to review all of this evidence, and to read and comment on the investigation report.[39]

PRE-HEARING MEETING

Before the hearing, the parties may elect to move the resolution into an informal resolution process, assuming all parties and the Title IX Coordinator agree to do so. If the informal resolution is successful, it avoids a hearing. If not, the hearing will likely still take place. The failure of the informal resolution is not evidence. Many institutions have rules prohibiting details from the informal resolution from being introduced in the hearing.

Often, the Decision-maker or Chair will conduct a pre-hearing meeting with each party and their Advisor. This offers an additional opportunity for them to review and comment on the investigation report and evidence, to address any hearing logistical questions, review proper questioning rules, etc. If this is not done pre-hearing, some of the same issues can and will need to be addressed at the hearing. If the parties and Chair agree to any evidentiary understandings

[38] For a visual depiction of allocation of evidence, please see *The Three Buckets of Evidence*.
[39] For a visual representation of how these review periods often work in practice, please see *Finalizing the Investigation Report*.

pre-hearing, those will be circulated to all parties and Decision-makers by the Decision-maker or Chair in writing and should be considered binding at the hearing. For a panel hearing, ATIXA recommends that the Title IX Coordinator or Chair circulate any pre-hearing decisions to the Decision-makers at least 48 hours prior to the hearing, if not earlier.

HEARING

The live (may be virtual) hearing, in overview, is the opportunity for the Decision-maker(s) to hear from parties and witnesses, to review all evidence, and to reach a finding of fact and final determination. The parties may give opening and/or closing statements, may submit impact statements (usually in writing, to be reviewed prior to sanctioning), and may engage in cross-examination. The Decision-maker assesses all evidence, evaluates conflicting and corroborative information, determines credibility, deliberates, decides (by applying the institutional standard of proof), and reduces the outcome and rationale to writing.

APPEAL

All parties have the right to a timely appeal based on at least three grounds specified by the regulations.[40] The appeal is not a live hearing but is conducted as a written exchange of information before different Decision-maker(s) than those who conducted the hearing. A written determination is issued, upholding the hearing determination or rejecting it, and usually instructing a remand and reconsideration if the determination is rejected. The appeal or the remanded decision may be the final determination of the complaint.

Preparing Participants for the Hearing

The following sections provide greater detail on various logistical and preparedness considerations for the hearing, such as: adequate notice of the hearing, scheduling considerations, the presence/role of Advisors, and preparation by all Decision-makers involved in the hearing.

SCHEDULING

Scheduling a hearing is not a task for the faint of heart. Typically, Title IX Coordinators (or their designees) will take responsibility for wrangling the schedules of all involved (sometimes 20+ people), including the parties, Decision-makers, Advisors, Investigators, and any other necessary witnesses. Communication with the parties may help to determine who is needed at the hearing. For example, perhaps the Investigator(s) interviewed ten witnesses during the

[40] 34 C.F.R. § 106.45(b)(8).

investigation, but the Decision-maker(s) and parties only have questions for one or two of them. It may be possible to streamline the hearing by zeroing in on the issues that remain contested, in consultation with the parties. If it is unclear whether a witness may be needed to give testimony at the hearing, it is better to include them on the schedule than to need them and be unable to reach them.

Once the Coordinator or Chair determines who should attend, the entire roster of participants should be reduced to writing, and that roster will likely be circulated to the parties and Decision-makers. The roster of participants will also facilitate a logistical order to the proceeding to ensure each person is present at the portion of hearing where they are needed, reduce conflicts of interest among the parties and witnesses, and enhance the privacy and professionalism of the hearing. Some Chairs will attempt to create a projected schedule or window for each witness's testimony, to assist in the timing and scheduling logistics. Delays are common, so anticipate that with flexible scheduling.

ADEQUATE NOTICE TO THE PARTIES

Both the Title IX regulations and VAWA Section 304 contain pre-hearing notice requirements. Specifically, the Title IX regulations require that institutions "provide, to the party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings…with sufficient time for the party to prepare to participate."[41] The regulations provide greater specificity than the VAWA Section 304 regulations, which remain in effect, and which require "timely notice of meetings at which the accuser or accused, or both, may be present."[42]

The regulations require that the investigation report that summarizes the relevant evidence be provided to the parties at least ten days prior to a hearing.[43] ATIXA recommends, therefore, that institutions provide notice of the hearing at the same time that access to the final investigation report is given. Ten days will certainly be sufficient time to prepare to participate in most circumstances – especially because the parties will have already had time to review and comment on a draft investigation report and/or evidence file prior to it being finalized. The Title IX Coordinator may extend that timeframe when necessary, and parties may elect to waive that 10-day notice should they desire to have a hearing sooner.

In addition to the formal notice requirements for parties, make sure that all participants are given notice of when and where the hearing will be held and have cleared adequate time on their calendars to attend. The Chair should ensure that timely, written logistical communication

[41] 34 C.F.R. § 106.45(b)(5)(v).
[42] 34 C.F.R. § 668.46(k)(2)(v).
[43] 34 C.F.R. § 106.45(b)(3)(ix).

is sent to all hearing participants. This should include instructions regarding where to go, when they will be asked to participate, where they should wait until being called into the hearing, the approximate duration of their participation in the hearing, any virtual hearing logistical details, and a point-of-contact for emergencies/difficulties. ATIXA also recommends providing witnesses with information about what they will be expected to do in the hearing and whether they will have access to their prior statement(s)/interview transcript(s) prior to or during the hearing. If your institution is large or if the hearing is occurring in an area that may be unfamiliar to the participants, consider providing a map, directions, and instructions for parking.

ADVISORS

Both the Title IX regulations and VAWA Section 304 entitle parties to have Advisors present at all meetings or proceedings, including the hearing itself. The parties have the right to select their Advisor without any restriction whatsoever.[44] For all *other* meetings before and after the hearing, such as interviews with the Investigator(s), Advisors may be restricted from actively participating, but can interact with their advisees as necessary, as long as it is not disruptive. For the hearing specifically, however, the regulations require that the Advisor be the person to conduct cross-examination, which is limited to only the questioning of the other party and witnesses, to include the Investigator(s).[45] If a party does not plan to have an Advisor present at the hearing, but intends to conduct cross-examination, the institution must provide the party with an Advisor to conduct the cross-examination.[46]

It follows, of course, that preparation for the hearing will necessitate clear communication to the parties and Advisors about this specific cross-examination task. We recommend that the Title IX Coordinator remind parties of their right to bring an Advisor to the hearing and note that the Advisor alone will be responsible for asking any relevant questions their advisee wants asked of the other party and any witnesses. We also recommend that institutions prepare a short guide or pamphlet for Advisors about what key logistics they can anticipate at the hearing and how best to be prepared. ATIXA provides a *Guide to Effective Advising in Formal Title IX Proceedings* for your use, as well.

Also consider circumstances where the parties may request to have more than one Advisor attend the hearing. This most frequently occurs when an employee Respondent is accompanied by a union representative but also wishes to have their own preferred Advisor present. Your institution may address these requests in policy or procedure. The guiding principle is that if any party is permitted to have more than one Advisor, then the other party or parties should have the same opportunity.

[44] 34 C.F.R. § 106.45(b)(5)(iv); 34 CFR § 668.46(k)(2)(iii) and (iv).
[45] 34 C.F.R. § 106.45(b)(6)(i).
[46] *Id.*

Throughout this Manual we discuss other issues associated with working with Advisors and managing various aspects of their attendance and participation in hearings.

Reviewing Materials and Preparing for the Hearing

It is critically important for Decision-makers to be sufficiently prepared before the hearing begins. Decision-makers must carefully and thoughtfully review existing policies, procedures, the full investigation report, as well as all relevant evidence that will be considered during the hearing. This can be time-consuming, especially with lengthy investigation reports and evidence files. Plan ahead and allocate sufficient time. It's part of your responsibilities to have read and to be familiar with all materials. Sometimes, that will mean reading them twice. A critical component of the Decision-maker's role is to compare the verbal testimony to the investigation statements. It's part of how credibility is assessed. You're not a passive recipient of information. Plan to dig in, formulate questions, and give due weight to your role as arbiter of what may be one of the worst experiences of someone else's life.

Often, the applicable policies and procedures will be incorporated into the investigation report or attached to the report as an appendix. Decision-makers should review all relevant policies pertaining to the allegations. It is important to ensure that you have the correct version of any policies, as policy can change significantly between terms or even mid-term. Sometimes, older policies may apply to complaints of misconduct reported well after the incident took place. Pay attention to definitions for consent, incapacitation, sexual harassment, stalking, and other relevant terms as dictated by policy. Decision-makers who are seemingly unprepared are certain to trigger due process concerns.[47]

REVIEW THE RELEVANT PROCEDURES

Typically, hearings adhere to the resolution procedures that are in place at the time of the resolution, regardless of when the reported incident(s) occurred. Material conformity to the published resolution procedures is an essential component of due process (at public institutions) and fundamental fairness (at private institutions). Decision-makers will be well-served by reviewing the institution's hearing procedures before each hearing, especially if they are only occasionally asked to hear a complaint. While you may not be the Chair, what if the Chair is suddenly taken ill, and you need to fulfill their duties? All Decision-makers should know the procedures, even if someone else typically serves as Chair. Identify any logistical challenges posed by the procedures and consult with the Title IX Coordinator or Chair to clarify. For

[47] *See, e.g.*, *Doe v. Purdue Univ.*, 928 F.3d 652, 663-64 (7th Cir. 2019) ("To satisfy the Due Process Clause, a hearing must be a real one, not a sham or pretense…[which was not satisfied when] two of the three Decision-makers candidly admitted that they had not read the investigative report, which suggests that they decided that John was guilty based on the accusation rather than the evidence.")

example, it is important to determine who will manage each aspect of communication and coordination with parties, witnesses, and any Advisors.

REVIEW ALL MATERIALS

As noted above, all Decision-makers should set aside sufficient uninterrupted time prior to the hearing to thoroughly review the investigation report. Depending on the complexity of the complaint and the extensiveness of the investigation, the report can comprise only a few pages or can include dozens of pages with appendices. We have seen and authored investigation reports that numbered in the hundreds of pages. The report may include topical material that is emotional and challenging to read at times. Furthermore, some reports will include content that is technical is nature, such as medical reports, expert statements, and police reports, and can include transcriptions of interviews and other information that is time consuming to review.

Never plan to prepare only "an hour before the hearing;" this is nearly certain to be insufficient. You will want to dedicate sufficient time to evaluate issues that are likely to surface during the hearing and have considered how those will need to be addressed. You may also be given a directly related evidence file that was not included in the report. The parties may argue at the hearing that this evidence is relevant and should be considered. Thus, you should be familiar with it. Hopefully, the pre-hearing meeting is robust enough to rule on such questions so that you don't have to do so at the hearing.

Also, decide whether you need to read the report appendices. We've seen these rise to thousands of pages of text messages. The important ones will be highlighted in the report itself. You might peruse the appendices to see what appears salient. Typically, if the report specifically refers to an item in an appendix, you should take the time to read that section prior to the hearing. Otherwise, it may be impossible to read all of the appendices and all of the contents of the directly related evidence file, but you should have general familiarity with them.

Look at the investigation report as the entire narrative surrounding the alleged misconduct. A complete report should do more than simply gather the facts. It should outline the allegations, the implicated policies, and the evidentiary linkage between the evidence and the required elements stated in policy to demonstrate a violation.[48] Most Investigators won't actually make a finding or final determination as to whether a violation occurred. If they do, they are usually in the form of a recommendation. Regardless of form, they are not binding on the Decision-maker(s) at all. Your evaluation is what matters at the hearing. Whether the Investigator(s) found something compelling is not the same as whether you find something compelling. If they determined something was relevant, or directly related, you are able to determine that same

[48] For information on how ATIXA guides investigators on what to include in a final report, please see *How to Manage Investigations Post-Regs*.

evidence is not relevant, or not directly related. Keep in mind that many institutions that use panels will delegate relevance decisions to the Chair, which are binding on the other Decision-makers. How much weight you give each piece of evidence is up to you.

Plan to review the report and materials several times. First, review all of the allegations and ensure understanding of all policy sections that apply to the specific allegations. Second, review the report and material to get an overall feel of the underlying incident(s) as alleged. Next, review the report and evidence a second time and note all areas of consistency of information among the parties and witnesses (hopefully, the Investigators have organized the report to easily facilitate this assessment). Lastly, you may want to read the report a third time with an eye to identifying inconsistencies or key issues in dispute, unless the Investigators have already done so for you. A hearing exists for the purpose of resolving disputed facts. Thus, these will be the areas where you will need to concentrate your questions in the actual hearing. The hearing will give you the opportunity to evaluate which version of events seems most credible and upon which evidence you will rely.

Pre-Hearing Meetings

While we mentioned the Pre-hearing Meeting above, this section allows us to take a deeper dive. Before the hearing, the Decision-maker or Chair should consider holding pre-hearing meetings with each party and their Advisor to ensure mutual understanding of the applicable policies and procedures, the allegations, expectations for the hearing, and appropriate preparation regarding time and physical location or technology logistics. The Decision-maker or Chair shares responsibility with the Title IX Coordinator for ensuring procedures are materially followed, all necessary hearing information is disseminated, and order is maintained. Some institutions may delegate the hearing management role to a Hearing Facilitator or Case Manager. This will be an enormous help to getting the logistics right. If there is a Facilitator or Case Manager available, they should be included in any pre-hearing meetings. Getting everyone on the same page before the hearing commences can greatly increase the likelihood of a smoothly run hearing. If a panel is used, the Chair can also meet with the hearing Decision-makers as a group prior to the hearing to formulate questions and address substantive and procedural issues.

PRE-HEARING MEETING WITH PARTIES AND ADVISORS

Consider whether to have the Decision-maker or Chair, potentially in collaboration with the Title IX Coordinator, meet with the parties and their Advisors prior to the hearing. Think of the meeting as a complete rundown of all the essential elements to be aware of ahead of the hearing and as an opportunity to answer questions and field requests. The meeting can also cover the role of the Advisors and outline expectations and boundaries around Advisors'

hearing participation. This meeting could occur in person, virtually, or by written exchange. Typically, the Decision-maker or Chair would meet once with the Complainant/Advisor and then separately with the Respondent/Advisor. If there are multiple Complainants or Respondents involved in the same hearing, the Decision-maker or Chair will need to decide whether to have separate meetings for each, or to combine all Complainants into one meeting, and all Respondents into another.

If held several days in advance of the hearing, the meeting may also be used to disclose the identity of the Decision-maker(s) to allow for a challenge on the basis of bias or a conflict of interest. Any issues not addressed during the pre-hearing meeting will have to be managed at the hearing, and perhaps present greater complexity than if addressed beforehand (e.g., what will the Chair do if evidence is introduced during the hearing that is out-of-bounds or prejudicial?). As a result of the multitude of housekeeping matters that arise, we at ATIXA are big fans of addressing as much as possible with pre-hearing meetings to save time and make the hearing flow more efficiently. That said, even if some issues are resolved pre-hearing, they may be brought up again by parties or Advisors and may need to be revisited at the hearing if any circumstances have changed.

The regulations provide the parties and Advisors at least ten days prior to the hearing to review and comment on the investigation report and the directly related evidence file, but the regulations do not spell out how this review and comment are to be submitted. Ostensibly, they can be offered at the hearing, but we find the pre-hearing meeting to be the ideal venue to review and address any substantive concerns or comments the parties wish to raise. The parties may want to argue that evidence incorporated into the report is not, in fact, relevant, or that information included in the directly related evidence file is, in fact, relevant, and should be part of the report.

The Decision-maker or Chair will make determinations about relevance for the hearing that are binding, often circulating a memo after the pre-hearing meetings to same-page key participants. If evidence is contained in the report, but the Decision-maker or Chair decides to exclude it pre-hearing, that doesn't really require revisions to the investigation report, though the Decision-maker or Chair could instruct redactions to the report to ensure that other panelists do not become aware of evidence that is to be restricted from introduction at the hearing. Two different philosophies are apparent with respect to evidence that the Decision-maker(s) should not rely on at the hearing. Some schools prefer to redact and limit the panel's access (not the Chair's) to that information. Others expect and anticipate the panelists will learn of excluded evidence (by reading it in the report or hearing it at the hearing) and will simply not rely on it in making the final determination. Obviously, with a single Decision-maker, such shielding is impossible, and the Decision-maker will have access to and know about all evidence, whether to be relied upon or not.

Hopefully, it is readily apparent why conversations about what evidence is to be relied upon make much more sense pre-hearing than at the hearing. It also potentially reduces the amount of evidence a panel will hear at the hearing, but then be instructed by the Chair to disregard. That approach is workable, but it's much cleaner for the Chair to rule in advance and thus not have the evidence raised at the hearing at all, if it is not relevant or admissible.

A major benefit of pre-hearing meetings is the Decision-maker or Chair's ability to conduct a preliminary review of the questions that parties seek to ask during the hearing. Although parties and Advisors cannot be compelled to submit questions in advance, they certainly can be invited to do so. Making explicit relevance determinations, which has not previously been a common practice of Title IX Decision-makers, is now required under the regulations.[49] Relevance determinations, more common in the legal profession, require specific training and practice to master, especially because the special evidence rules in the Title IX regulations are not reflective of the federal rules of evidence. Rather than having to address the relevance determination on the spot at the hearing, the Decision-maker or Chair can benefit from being able to preview the questions and take time to consider their relevance by addressing them at the prehearing meetings. Sometimes, the parties/Advisors will not deem it strategic to preview their questions, and they may always come up with questions at the hearing that are different from or in addition to those they previewed at the pre-hearing meeting.

A Decision-maker or Chair can use a pre-hearing meeting to:

- Meet the parties and their Advisors in advance
- Cover the structure and flow of the hearing with the parties and their Advisors
- Review the decorum expected at the hearing, emphasizing what behaviors will and will not be allowed
- Introduce the Facilitator or Case Manager and explain their role (if applicable)
- Explain applicable rules of evidence and admissibility
- Rule on the relevance of questions submitted by the parties/Advisors before the pre-hearing meeting and/or in advance of the hearing. If a question is deemed not relevant, the Chair will want to formally document the rationale for that decision and circulate it to all parties.
- Rule on any pre-hearing efforts by parties to have evidence from the investigation declared relevant, irrelevant, or directly related, and circulate decisions to all parties
- Ascertain if any party or witness intends not to attend or not to submit to cross-examination, and explain any effect this will have
- Clarify what materials/exhibits will be needed/available during the hearing and how they will be distributed/displayed

[49] 34 C.F.R. § 106.45(b)(6)(i).

- Review any technology logistics of the hearing, and clarify how the parties will communicate remotely with their Advisors during the hearing
- Educate the parties on preparation of opening/closing/impact statements, when they are to be submitted, how they will be exchanged, and how they will be used
- Ensure each party has an Advisor who is willing to conduct cross-examination during the hearing
- Answer any questions the parties/Advisors may have

Recognizing that as of the time of this Manual's publication in 2021, many Decision-makers and Chairs may be new to their roles and to making these determinations, one benefit to pre-hearing meetings is that they create opportunities to slow down and permit more time for relevance determinations. If many evidence and questioning issues arise, this could double the length of the hearing. Addressing most of them pre-hearing will minimize fatigue for all participants. Marathon hearings exhaust everyone. Otherwise, each issue will need to be addressed on the spot during the hearing, which may interrupt the natural flow of the hearing (especially if the Chair or Decision-maker(s) consult with legal counsel) and could increase the likelihood of errors.

Pre-hearing meetings can benefit the parties and Advisors as well. Critics of campus resolution processes have been vocal about the likelihood that live hearings will traumatize the parties. For Complainants, re-traumatization is a conscious or unconscious reminder of past trauma that can be triggered by certain environments that replicate the dynamics of the original trauma. Such dynamics could include loss of power, control, and fear for safety. Respondents, too, can find that participating in an intense formal grievance process, including a live hearing, creates a trauma of sorts, or at least extreme anxiety.

A pre-hearing meeting will not eliminate the emotional impact of the live hearing on the parties, but the more opportunities a Decision-maker or Chair has to prepare for how the hearing will be conducted and to educate the parties and Advisors on the process and relevant issues in advance, the better likelihood of reducing the effects of a long, stressful, and potentially traumatizing hearing.

When a Decision-maker or Chair is well-prepared in advance of the hearing, the hearing will proceed more smoothly, and the Decision-maker or Chair will be less likely to make substantive or procedural errors. As the old adage goes "practice makes perfect."

As noted above, if the pre-hearing meetings are conducted as sequential meetings with each party/Advisor, the Decision-maker or Chair will likely need to memorialize the rulings and understandings established with each and circulate those to the parties and Advisors in writing after the pre-hearing meetings, but before the hearing. Further, the Decision-maker

or Chair may want to disseminate some form of this summary memo to the other Decision-makers if a panel is used. It may also make sense to copy certain Title IX team members.

If specific evidence is to be excluded, it won't make sense to inform the other Decision-makers about that if the point is for them to not even know that the evidence exists, but consider that the information may still be found in the investigation report or the directly related evidence file, unless it is part of the institutional practice to further redact or modify the investigation report or evidence file after the pre-hearing meeting and before the hearing (ATIXA does not recommend this). If so, the panel should only be provided the investigation report and evidence subsequent to the pre-hearing meetings.

DECISION-MAKERS/HEARING PANEL PREP MEETING

Panelist meetings before the hearing are a great opportunity to prepare for the upcoming hearing. The Chair and/or Hearing Facilitator can remind Decision-makers of key and core responsibilities: privacy and confidentiality issues; decorum; neutrality and equitable questioning; bias, conflicts of interest and recusal; the standard of evidence; and guidelines for recording, notetaking, and recordkeeping.

A pre-hearing prep meeting also allows the panel to get organized for the substantive issues that need attention during the hearing. Hearing Decision-makers should begin to develop questions during their review of the investigation report and other materials in advance of the hearing. It is a common practice for a hearing panel to meet in advance of the hearing to discuss issues, formulate questions, and become familiar with the logistics of the hearing. If the pre-hearing meetings with the parties determine that some topics or evidence will not be relied upon by the panelists, the Chair can make this clear in the pre-hearing meeting with the panel, as appropriate. Any other understandings from the pre-hearing meetings that are appropriate to share with the panel can also be shared at this time. If the panel will not meet in person, a version of the memo circulated to the parties by the Chair can also be shared with the panelists.

A group review of the investigation report can be a valuable investment of time for the panel, as it can help the panel identify what needs to be determined at the hearing. The panel can work from its model of proof for each policy section (identifying the elements of each alleged violation), to refine questions (see p. 49 for a section on this, specifically). This can be a chance to clarify policy-based questions and/or interpretation as well.

At this meeting, not only can questions be agreed upon by the panel, but assignments can be made. Will the Chair ask all questions? Will the panel rotate through different questioners (of different races, sexes, etc.)? Might particular question(s) be strategically more effective from one panelist versus others? Who will ask what, of whom? Pre-assigning can make the flow of questions at the hearing much smoother. Meeting prior to the hearing will also allow the Chair

to ensure that Decision-makers avoid asking duplicative questions or questions about information that is contained in the report that is not contested. The hearing cannot function effectively or efficiently if a Decision-maker (and possibly anyone else) wastes time asking questions about information that is unambiguous and/or unchallenged according to the investigation report or materials, unless the purpose of the question is to help ascertain credibility.

Practical Considerations in Running Effective Hearings

The Decision-maker or Chair is responsible for the orderly conduct of the hearing. Having a script or checklist of all hearing flow and logistical items can help to ensure that the hearing is well-run and that you make all pertinent announcements to the hearing participants and attendees at the beginning of the proceedings. Per the regulations, hearing attendance is usually limited to Decision-makers, a Hearing Facilitator, the parties, their Advisors, witnesses (during the time they are testifying, only) and Investigators (who may be present only when testifying, or throughout the hearing). Anyone else in attendance should be specifically approved by the Title IX Coordinator, in advance.

IN-PERSON HEARINGS

While Decision-makers are typically not responsible for making hearing room arrangements, they should be familiar with the physical space being used for the hearing and ensure there is a plan for participants to move from space to space throughout the hearing and breaks. They should also be mindful of ensuring that the parties know how to enter and exit the building in a manner that allows them to avoid contact with each other. Know the location of restrooms, water fountains, and vending machines, including whether participants can avoid contact if multiple individuals exit the hearing space for a break at the same time. *See Appendix C for additional information about in-person hearing logistics and considerations.*

FACILITATING TECHNOLOGY-ENABLED HEARINGS

In many cases the parties will request a remote hearing facilitated via technology, or at least that they may be permitted to participate remotely. This right is assured by the Title IX regulations. Virtual hearings really are now the norm, rather than the exception. Some institutions may require that hearings always occur by videoconference. The Title IX regulations anticipate and permit institutions to conduct hearings using technology to facilitate a "live hearing" even though the parties are not physically present together in the same room.[50] When

[50] 34 C.F.R. § 106.45(b)(3)(vii) ("At the request of either party, the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.")

conducting a technology-enabled hearing, consider providing separate on-campus rooms, such as two small conference rooms, for the parties for the duration of the hearing. Otherwise, the hearing can be fully remote, where the participants are not on campus. In deploying appropriate technology, keep the following due process issues in mind:

- The parties must have "live" access to the testimony of any individual in the hearing, including other parties, witnesses, experts, and Investigators, especially when credibility of their testimony is a determining factor.[51] Each testifying participant must be able to be seen and heard by the other participants.

- At the request of any party, you must provide for cross-examination to occur with the party located in a separate room with technology enabling the Decision-maker(s) and parties to simultaneously see and hear the person answering questions.[52] If one party elects to be present in person, and the other party chooses remote participation, this is acceptable assuming that in-person participation is an option.

- During the hearing, the parties must be able to inspect, review, and refer to any evidence gathered as part of the investigation that is directly related to the allegations, including evidence upon which the Decision-maker(s) or Chair does not intend to rely in reaching a determination.[53] To meet due process and fundamental fairness protections, as well as VAWA Section 304 requirements for "timely and equal access…to any information that will be used during informal and formal disciplinary meetings and hearings," this requirement would typically preclude any evidence that is newly offered at the hearing, unless the parties and Decision-maker(s) agree to include it.[54] If evidence is offered at the last minute, and was previously unknown or unavailable, the Chair may permit the evidence (if the parties assent, or if it is unlikely to be "outcome-determinative"), exclude the evidence, or re-open the investigation and postpone the hearing accordingly. The key is to avoid unfair surprise, which can occur if a party or witness intentionally "sandbags" another by withholding known or available evidence from the investigation to use it by surprise at the hearing. Allowing this may violate a party's right to ten days to review and comment on all evidence in advance of the hearing.

Many institutions use virtual conferencing platforms to meet remote hearing needs.[55] Consult with your IT professionals responsible for providing the appropriate technology to ensure the functionality you will need. For instance, at some points in the hearing, the parties and/or

[51] 34 C.F.R. § 106.45(b)(6)(i).
[52] *Id.*
[53] 34 C.F.R. § 106.45(b)(5)(vi).
[54] 34 C.F.R. § 668.46(k)(i)(B)(3).
[55] *See* ATIXA Virtual Hearing Best Practices – Tips from Practitioners Webinar *(accessible for ATIXA Members)*

Advisors will need to direct questions to the Decision-maker or Chair. The technology must allow for an easy flow of audio among the participants, despite not all being in the same room. The technology may also have the built-in ability to record, which can help to meet the hearing recording requirement.[56] A chat function is also helpful for communicating in writing.

Parties should also have an ability to mute their audio to allow for private consultation with their Advisors. However, if the Advisor is not in the same room with the advisee, they will need an alternate means of communication, and will need to be able to mute their main conference room. Many institutions find it valuable to be able to temporarily place parties and their Advisors in subconferences or breakout rooms to allow consultation. This can also function well as a virtual "waiting room" for witnesses to ensure they do not have connective complications that delay the hearing. Technology must also be sufficiently private and secure, including password protection to control access and prevent unauthorized individuals from gaining access.

The Decision-maker(s) must be comfortable with the technology and/or have someone present to assist. For some institutions, the Facilitator or Case Manager performs this role, but for others, having an IT expert on hand or on call will be beneficial. The participants will typically look to the Chair or Facilitator to resolve any issues that arise. There could be a test run done a few hours – not days – before the hearing. Discuss in advance a plan for a technological failure, including hardware and software failures, and how the hearing will adjust to accommodate, if necessary. Consider backup plans with contingencies and alternatives if needed, such as taking a short recess to repair the issue or adjourning and reconvening at an alternate date. Telephonic communication will not suffice for questioning because of the visibility requirement to enable a credibility assessment.[57]

DECORUM

Although this may seem like a "no-brainer," Decision-makers must always remember how critically important it is to maintain a professional, neutral, and respectful demeanor. Aspire for discussion to be professional, but as conversational and relaxed as possible to avoid coming across as too "judicial."

Decision-makers must actively and carefully listen and should remain emotionally neutral for the duration of the hearing. The goal of the hearing is for Decision-makers to fully understand the parties' accounts of the alleged misconduct and ensure they have the information needed to make a reliable determination. Their demeanor should be calm and respectful, avoiding

[56] 34 C.F.R. § 106.45(b)(6)(i).
[57] 34 C.F.R. § 106.45(b)(6)(i).

snide remarks, sarcasm, sharp retorts, eye-rolling, or other emotive behaviors. Decision-makers should never appear shocked, appalled, frustrated, smug, victorious, or accusatory.

Decision-makers should be prepared to actively listen during the hearing and avoid excessive notetaking when individuals are speaking. Any potentially disruptive behaviors should be kept to a minimum. Phones and other distracting devices should be set aside and silenced. The Decision-maker or Chair should set an expectation for calm, relaxed conversation among the Decision-maker(s) and hearing participants at all times.

Consider providing Advisors a written guide for their behavior during the hearing,[58] and what they should expect of others. In these hearings, emotions may run high. The schedule for each hearing should anticipate the need for breaks and the ability to pause for issues that may arise, such as if emotions emerge and a party or Advisor needs a few moments to gather themselves. Advisors can be helpful at times for discerning when a party would benefit from taking a short break and can make that request.

Always remember that these aspects of decorum are valuable not just for the hearing itself, but for the time period right before and right after the hearing, too. Decision-makers can expect to possibly be observed (and judged) for their demeanor in how they arrive and depart from the building, during break periods and deliberations, and in informal exchanges with parties, witnesses, Advisors, and others in the hallways, restrooms, elevators, and parking lots adjacent to the hearing.

COMFORT WITH LANGUAGE

Decision-makers must make sure that they are comfortable with the subject matter of their purview. The nature of sex- and gender-based harassment and discrimination can be graphic. Not only will you hear words like “penis,” “vagina,” and other such words, but you will be called on to speak them in your questions and deliberations. Though you may strive for a sense of detachment, this may not always be possible. Sexual harassment can be emotional and traumatic for people to experience, but also to hear. Decision-makers must prepare to hear difficult things and have their own emotional boundaries and limits tested. There may be times when Decision-makers decide to take a short break to excuse themselves from the hearing. It may also be valuable to have someone who can help you debrief from the experience afterward. Remember your obligations regarding confidentiality, but also recognize that you may need to express your feelings about the experience. If you need to vent regarding the hearing itself, it may be best to seek out another panel member with whom you have a rapport or the Title IX Coordinator.

[58] ATIXA offers multiple Advisor resources, including the *Guide to Effective Advising in Formal Title IX Proceedings*, in the Title IX Toolkit (TIX Kit).

Another aspect of gaining comfort with language and challenging topics is to acknowledge that Decision-maker(s) may occasionally be called upon to hear complaints that also address issues of racial identity, gender identity, gender expression, or other charged and complex identity-based issues.

DRESS

Decision-makers should dress professionally and comfortably for the hearing. Consider the parties and institutional culture when establishing dress expectations for Decision-makers. For example, excessively formal attire may create an intimidating environment, and may create barriers for students or employees who do not have access to such attire. On the other hand, overly casual clothing may unintentionally suggest that Decision-makers are not taking the proceedings with due seriousness and care. Some campuses use a "uniform" of a specific branded polo shirt for all Decision-makers to set a tone of professionalism without drawing attention to personal dress choices. The Title IX Coordinator should set expectations for Decision-maker dress to be professional and appropriate for a formal institutional meeting.

RECORDING AND DOCUMENTING THE HEARING

The Title IX regulations require at least an audio recording of the hearing. Some institutions prefer audio and video recording. Recordings enable the parties to frame appeals and enable Appeal Decision-makers to review the proceedings if necessary. All parties and witnesses should be informed of the recording when they appear for the hearing. We recommend that your hearing procedures clearly specify that the institution will make a recording and the circumstances under which you will make the recording available to the parties. Be familiar with your institutional policy on whether a party or their Advisor are permitted to record their own version, and if they are prohibited from recording, this should be included in your hearing procedures.

The Decision-maker or Chair should begin each hearing by stating the date, time, and location of the hearing and by inviting a round of introductions of all individuals in the room or videoconference. This will allow subsequent listeners to more readily identify the voices on the recording. Always be sure to stop or pause the recording when taking a break and begin recording again when the hearing resumes. Some hearing protocols call for the Decision-maker or Chair to announce each time the proceedings go on or off the record for the recording.

Invest in a quality audio recording device, have a backup ready, and have a protocol for ensuring that the recordings are timely and properly archived in keeping with your institution's technology procedures and protocols. Recordings should be maintained securely and

preserved as required. The Title IX regulations require that files be preserved for seven years; however, an institution's record retention policy may require a longer retention period.[59]

NOTETAKING AND RECORDKEEPING

Decision-makers must be especially mindful about notetaking and recordkeeping issues. Investigations can often produce voluminous reports and exhibits, which will require care and consideration in reviewing and preparing for a hearing, as well as making a determination. Many Decision-makers will find that they need to make notes in preparation for the hearing, and during the hearing, as part and parcel of doing their job well. On the other hand, all Decision-makers must also understand that the notes that they take before and during the hearing, as well as during the deliberation phase, could possibly be scrutinized at some future point, either as part of an appeal process or in litigation if an aggrieved party were to bring a lawsuit. This could include any notes (marginalia) Decision-makers write on the investigation report reviewed in advance of the hearing. Thus, great care and professionalism must be taken with notes if they are maintained.

If you are unclear on the retention policy, consult with your Title IX Coordinator and/or legal counsel. They may expect you to retain notes and turn them in to the Coordinator, maintain them for a period of time and then destroy them or destroy them after the hearing/appeal. You should follow your institutional protocol, whatever it is.

The Hearing

With all your thoughtful and careful preparation now behind you, it's time for the actual hearing. ATIXA wants Decision-makers to feel comfortable with all the mechanics involved in running a hearing, as well as how to problem-solve and manage the challenges that will inevitably arise.

OPENING THE HEARING, ROLE OF THE CHAIR, AND OPENING REMARKS

During the hearing**,** the Decision-maker or Chair is responsible for ensuring the institution follows published procedures, maintains process integrity and efficiency, and makes all necessary administrative decisions during the hearing. The Title IX Coordinator should have a plan for what occurs if a procedural issue arises that that Decision-maker or Chair does not know how to address. Decision-maker(s) should always have an option to take a break to review written procedures or contact the Title IX Coordinator or legal counsel for guidance. Consider how Decision-maker(s) should seek clarification in these circumstances, whether a protocol is needed, and how to address any other circumstances that require immediate attention. Be

[59] 34 C.F.R. § 106.45(b)(10).

mindful that if the Title IX Coordinator served as the Investigator for a complaint, they should not be providing consultation regarding hearing procedures for the same complaint.

The Decision-maker or Chair should plan on making opening remarks that clearly outline the hearing process. As noted above, this is a routine recitation of key elements, often outlined in an actual script to follow. Articulating these details clearly "on the record" at the outset of the hearing serves to confirm that due process was respected. Opening remarks should:

- Review the allegations and clearly indicate each alleged policy violation as outlined in the hearing notice. Some institutional procedures include a recitation of each alleged policy violation followed by a verbal exchange with the Respondent about whether they accept responsibility for each of the allegations.

- Outline the procedures that will be used during the hearing, as well as the order of the proceedings. Confirm with all participants that there are no anticipated interruptions or delays. Any needed adjustments should be made quickly and be communicated to witnesses and others who might be affected by the altered schedule. Some Decision-makers confirm verbally that no condition or substance use would interfere with the ability of any participant to give testimony. Although procedural questions should have been addressed in pre-hearing meetings with either the Decision-maker, Chair, or Title IX Coordinator, the hearing should offer an opportunity for any last-minute questions or clarifications about the procedure.

- Identify all Decision-makers, parties, Advisors, witnesses, Investigators, and any others who are scheduled to appear. Indicate, on the record, that the Decision-maker(s) or Chair has reviewed the investigation report and all relevant evidence provided by the Investigator(s).

- Review all technology that is being used, describe how the proceedings are being recorded, and describe any record retention policies.

- Indicate how parties and their Advisors can confer during the hearing and any opportunities for breaks in the proceedings.

- Ensure that the parties and Advisors have reviewed and understood the guidelines for decorum during the hearing. The Decision-maker or Chair should reiterate that excessive disruptive behavior may result in removal of Advisors or postponement of the proceeding.

- Although "swearing in" is generally not a component of Title IX hearings, it is appropriate for the Decision-maker or Chair to discuss expectations of truthfulness and any consequences for the submission of false or misleading information or fabricated evidence (which could be an aggravating factor that impacts on sanctioning and/or the basis for referral to another process). This information should be repeated for each witness as they join the hearing.

PARTIES' OPENING (AND CLOSING) STATEMENTS

If your institution's procedure allows for it, each party may be granted time to make a brief opening statement. The order of party statements is usually Complainant then Respondent and typically mirrors the same sequence at the opening and closing of the hearing. Some processes allow for a mid-point summary statement, though this strikes us as overkill. Opening and closing statements can be made, read, submitted in writing, read into the record by the Decision-maker or Chair, or at their discretion, by a party Advisor. If written submissions are made, those should be circulated between the parties, usually post-hearing.

If opening/closing statements are permitted, parties should be able to deliver their remarks without interruption, with very few exceptions. There is a chance that character attacks, unnecessary levels of antagonism or combativeness, or irrelevant information may be shared during these statements, in which case the Decision-maker or Chair should be prepared to pause the hearing to clarify the applicable guidelines. Barring this occurrence, however, opposing parties do not have the right to interject during the other party's statement. Usually, parties are informed during the pre-hearing meeting that opening and closing statements should focus on evidence, not impact. It is customary to provide a brief break after all evidence to provide the parties and their Advisors a period of time to refine closing statements before presenting them to the Decision-maker(s).

ORDER OF WITNESSES AND PRESENTATION OF EVIDENCE

Although sequencing of the hearing may be done in a number of effective ways, ATIXA recommends determining a typical ordering for witnesses and the presentation of witnesses and using it consistently across all hearings. Generally speaking, ATIXA recommends the following order for most routine hearings:

1. Investigation report summarized by the Investigator(s) and questioning of the Investigator(s) by the Decision-maker(s) then the parties' Advisors

2. Complainant makes an opening statement[60]Questioning of the Complainant by the Decision-maker(s), **OPTIONAL** questioning of the Complainant by their Advisor,[61] and then questioning of the Complainant by the Respondent through the Respondent's Advisor
3. Respondent makes an opening statement
4. Questioning of the Respondent by the Decision-maker(s), OPTIONAL questioning of the Respondent by their Advisor, and then questioning by the Complainant of the Respondent through the Respondent's Advisor
5. Questioning of any witnesses by Decision-maker(s), and then questioning by the parties through their Advisors (usually Complainant, then Respondent)
6. Complainant makes a closing statement
7. Respondent makes a closing statement
8. Decision-maker or Chair closes proceeding and opens deliberation

The Decision-maker, Chair, or Facilitator/Case Manager is responsible for managing the order of the witnesses and presentation of evidence. Your hearing procedures should be drafted flexibly to permit modification to the order when appropriate given certain circumstances, such as a witness who has unusually limited availability. Frequently, testimony in the hearing will begin with a statement or executive summary by the Investigator(s). Investigators are often the most fully informed people in the hearing as it relates to the allegations because of the significant time they have spent collecting evidence and speaking to the parties and relevant witnesses. The Investigator(s)' narrative is typically a helpful starting point to frame the hearing and is most beneficial when it summarizes the evidence that is not contested, and the evidence that is contested by the parties, which will be the primary focus of the hearing.

Decision-makers may have to adjust to different presentation formats and styles. Some participants will not communicate as clearly as others, who may have training and experience in public speaking. Decision-makers should not diminish the weight of a participant's evidence because of their shyness or lack of skill at making clear arguments. Decision-makers may need to assist them in bringing out relevant information by asking questions, if the information sought is not brought out or sufficiently clarified by the participants.

EFFECTIVE AND APPROPRIATE QUESTIONING

Questions from the Decision-maker(s) should be specific and designed to elicit information that is relevant to the allegations. Questioning should focus on areas of inconsistency, discrepancy, disputes, or gaps in the investigation report.

[60] Your institution may or may not allow opening and closing statements, per institutional policy.
[61] Your institution may or may not allow direct examination by a party's own Advisor, per institutional policy.

Furthermore, questions should be asked in a non-adversarial manner. Asking effective questions is critically important to a well-run hearing. As a strategy to consider, comprehensive questioning by the Decision-maker(s) before any cross-examination will likely render many Advisor-led questions to be ruled redundant (thus irrelevant), thus taking some of the adversarial edge off of the proceedings. Decision-makers are not prosecutors and questioning from Decision-makers should avoid the posture or tone of cross-examination. That said, tough questions are what they are, and while being mindful of tone and the need to avoid gratuitous re-traumatization, if something must be asked it must be asked, no matter how difficult the question.

Also keep in mind that if the Decision-makers are asking questions to pre-empt them being asked as part of cross-examination, as described above, some of those question may feel more interrogation-like, as they would when posed by an Advisor. We could hope that having that question come from a Decision-maker would be a softer blow than it coming from an opposing Advisor, but it still may sting and take the Decision-maker into a questioning mode to which they may be unaccustomed. This pre-emptive questioning isn't a required practice, but one many institutions are hoping will, to some extent, shield the parties from the full force of adversarial questioning by a talented lawyer or Advisor who is well-schooled in cross-examination techniques and tactics. Paying attention to tone may soften some of the sting of tough questions from the Decision-maker or Chair.

As described above, Decision-makers will have reviewed the investigation report and directly related evidence file and will arrive prepared with questions. However, do not allow prepared questions to limit the questions asked in the hearing. Remain flexible and adapt follow-up questions as needed. Always remember that questions from the Decision-maker(s) should be focused on the following:

- Relevant facts about what happened during the incident(s)
- Any related events
- Any corroborating information or other information that could illuminate the credibility or validity of evidence and/or testimony
- Facts necessary to establish the timeline
- Background information about the situation, the parties, and the witnesses that provides relevant context

When developing and crafting questions, consider the following:

- What do I need to know?
- Is the answer already in the investigation report or documentation that has been provided? If so, do I need to re-confirm it?
- Am I the best person to ask this question? If not, who is the best person to ask it?

- Is this the best witness or party to ask this question of, or may another witness or party be a better source?
- Why do I need to know it? (If it is not going to help you decide whether a policy was violated, then it is probably not a good question.)
- What is the best, most succinct way to ask the question?

Decision-maker(s) should use questions to elicit details, eliminate vagueness, and fill in the gaps where information seems to be missing. Remember: questioning for questioning's sake is not useful. We sometimes refer to this as "chasing the rabbit into Wonderland." Ask whether it is really necessary to pose a particular line of questions, just because you can.

Instead, ensure that areas that remain as questions following the completion of the investigation report and party statements are necessary to make a determination. For example, if the Investigator(s) did not provide sufficient information on issues of consent or alcohol or drug use, did not provide specificity regarding the severity or pervasiveness of the alleged conduct, or did not clarify terms that may have multiple meanings, the Decision-maker(s) will want to seek clarification for any issues that will be important when making a determination.

In addition to questioning the parties and witnesses, the Decision-makers(s) may have questions for the Investigator(s), including discussions of relevant evidence or probing the motivation to ask certain questions, to interview certain witnesses, or obtain certain evidence during the investigation. Similarly, Decision-maker(s) may question why the Investigator(s) opted to not pursue a line of questioning or did not attempt to collect certain evidence. Go where you need to go with questioning the Investigator(s), but a hearing is not the right venue to show them up or use the record simply to underscore a shoddy or insufficient investigation. Often, the parties and witnesses will be better resources to get the information you need than will the Investigator(s).

NEUTRALITY AND EQUITABLE QUESTIONING

Relevant questions should generally be posed equitably to all parties, meaning that if you ask something of one party, ask it of the other(s) when it is logical to do so. Transparency, precision, and forthrightness are often reflected in the type, number, and manner of questions. Thus, if the Respondent was very forthcoming during the investigation, but the Complainant was not, it could be logical to expect the Decision-maker(s) to have more questions for the Complainant at the hearing. Or, if the Respondent said more during their interview, there may be more to question them about at the hearing. Thus, Decision-makers should derive questions from the available evidence and the evidence needed. There is no need to ask an equal number of questions of each party, but if there is a significant disparity, it should be explainable. Questions for witnesses often follow a common template, where each witness is likely to be asked the

same questions as others. A Decision-maker might think they already have an answer but might get a different answer by asking the same question of a different witness.

If Decision-makers expect a certain level of specificity from one party, the same expectation should apply to other parties. Decision-makers should not appear sympathetic to one side or the other in either demeanor or form. Decision-makers, or anyone asking questions, should be prepared to explain their rationale for asking a question (the question might be challenged as part of the appeal).

OVERSEEING APPROPRIATE ADVISOR PARTICIPATION

Decision-makers or Chairs need to take an active role in managing Advisors' participation in the hearing. The Advisor role should be clearly outlined in the institution's policy. Notwithstanding policy language, the likelihood is high that Advisors, and especially those who are attorneys, will seek to have an active role in the hearing. Recall that under the Title IX regulations, the Advisor role is constrained to *only* asking questions of the other party or witnesses during cross-examination and to advising their advisee.[62] Institutional policy will further dictate the role of Advisors and their degree of participation in the hearing; however, most institutions will desire to limit Advisor participation as much as possible to avoid hearings becoming too "court-like." Restrictions are permitted if equitably applied to all parties, as long as they do not interfere with the Advisor's ability to advise.

Advisors will have the opportunity to question the opposing party or parties and witnesses, and the Decision-maker or Chair will oversee that questioning to ensure that it is not abusive, unduly repetitious, or used to elicit irrelevant information. The Title IX regulations specify that information about a Complainant's sexual predisposition is always irrelevant and also contain limitations on when questions may be asked about a Complainant's sexual history.[63] In addition, Investigators should have documented any questions posed by the parties or their Advisors during the investigation phase, and whether those questions were asked "as is," modified, or rejected, and included this information as an appendix to the investigation report. Although this information is not controlling during the hearing, it may be useful for the Decision-maker(s) to consider. It may be most appropriate to query the Investigator(s) at the hearing to see if they already asked a particular question and what answer they received.

If a question posed by an Advisor on cross-examination is disallowed by the Decision-maker or Chair, they should articulate the reason for the restriction and direct the witness and hearing panel, if applicable, to disregard the question and any answer given. Pursuant to the Title IX

[62] 34 C.F.R. § 106.45(b)(5)(iv). Remember, too, that a few states have enacted additional state laws to permit greater attorney-Advisor participation, and that institutional policy must also adhere to any applicable state law requirements.
[63] 34 C.F.R. § 106.45(b)(6)(i).

regulations, if a proposed question is excluded, the Chair must give a rationale for why the question is not relevant. Some Decision-makers or Chairs will also rule on any relevant questions, just to get the party or witness being questioned into the habit of pausing before answering to give the Decision-maker or Chair a chance to rule.

Because of the enhanced potential for intimidation and re-traumatization under the live hearing mandate, carefully consider guidelines for the parties and Advisors regarding physical movement limitations, especially during cross-examination. Nothing prohibits an institution from requiring Advisors to remain seated when asking cross-examination questions, as long as the Advisor and the party can see the person being questioned. The Decision-maker(s) should be satisfied that there is no potential for the parties or Advisors to antagonize, intimidate, or physically confront another party. If they try, immediately cut them off and give them one warning. Further bullying should result in dismissal from the hearing. The Decision-maker or Chair will then need to decide whether to provide a substitute Advisor or postpone the hearing until the party can select another Advisor.

Overseeing Advisors in the hearing is a nuanced exercise that takes practice. Be sure to equitably enforce institutional policy across all participating Advisors, regardless of whether the individual is an attorney. Non-attorney Advisors, especially parents, can also attempt to be zealous advocates and may need to be reminded of the appropriate boundaries of their role. Advisors who participate more actively than allowed should first be reminded gently but firmly by the Decision-maker or Chair of the rules governing their participation and attendance at the hearing. Ensure this gentle but firm reminder is audibly documented in the hearing recording. If an Advisor persists in violating the procedures, we recommend the Decision-maker or Chair take a brief recess to review the Advisor's role with both Advisors. If an Advisor still continues to push the boundaries, then the Decision-maker or Chair must determine whether to postpone the hearing or to continue the hearing with a substitute Advisor.

This is not an easy decision to make and will certainly raise due process concerns from Respondents. However, the Decision-maker or Chair must take care to kindly but firmly continue to control the institution's process and avoid allowing any Advisor to behave inappropriately throughout the hearing.

GUIDANCE FOR MANAGING "OBJECTIONS"

An obvious lingering question in the context of the Title IX regulations is how the Decision-maker or Chair should manage the issue of parties and/or Advisors wanting to raise "objections." Although hearings are *not* court proceedings, the nature of hearings will inevitably raise procedural questions and/or concerns for parties as the hearing proceeds. For example: "Why is this question deemed relevant?" or "I believe I have a permissible basis to ask about past sexual history, may I?" We've had situations as Chairs where we've needed to ask an

Advisor, “Why is that question relevant?” or “Where are you going with that question?” because relevance isn’t immediately apparent, or the line of questioning could head in a potentially relevant direction, or a potentially irrelevant one. If we ask one Advisor about relevance, some Advisors have suggested we need to allow both Advisors to comment. We’ve had experiences as Chairs where our decisions on relevance have been challenged at the hearing by attorney Advisors who want to argue relevance or even argue against the fairness of the regulations. Giving an Advisor a little rope can quickly spiral out of control if a Decision-maker or Chair is not careful. Decision-makers and Chairs have to own the hearing, take responsibility for its control, and take back control if they start to lose it by asserting their knowledge, expertise, and finality of their rulings. More than once, we’ve had to end a back-and-forth by insisting, “The ruling stands, but you can raise your concerns on appeal.”

Institutional practices here should aim to strike a balance. It’s good risk management to allow parties to respectfully raise procedural concerns during the hearing itself, because that may allow the institution to protect itself from appealable procedural issues after the hearing. However, in order to maintain appropriate decorum, and to prevent the hearing from becoming overly antagonistic, the Decision-maker or Chair absolutely must preclude any direct or combative questioning of parties.

During the hearing, all procedural questions or concerns must *always* be directed at the Decision-maker or Chair. Parties who are unaccustomed to such a formal structure of questioning may slip up here and should be gently reminded to direct questions to the Decision-maker or Chair. Follow institutional policy as to whether procedural questions may be asked by the Advisor or whether the question must come from the parties themselves. If your procedures require that the parties be the ones to ask procedural questions, obviously they may be doing so at the quiet urging of their Advisor. This will allow the Decision-maker or Chair to consider the question, consider a response from the other party (if any), followed by a decision with clear instructions to the parties. If an issue seems particularly contentious, nothing precludes the Decision-maker or Chair from taking a brief recess to consult procedures or legal counsel and return with a decision before the hearing proceeds.

CONCLUDING THE HEARING

At the conclusion of the hearing, the Decision-maker or Chair should advise the parties of next steps, including the anticipated time frame for a determination and how they will be notified of the determination. If the hearing takes place in person, the Decision-maker or Chair may wish to consider slightly staggering the dismissal of the parties to avoid any uncomfortable or contentious interactions immediately outside the hearing, such as in elevators, stairwells, or parking lots.

THE SPECIAL COMPLEXITIES OF HEARINGS WITH MULTIPLE RESPONDENTS

In some instances, a complaint may identify more than one Respondent for the same offense arising from the same or a very similar set of operative facts, as in a multiple assailant sexual assault, where there is a single Complainant (or occasionally more than one). In such a case, the Decision-maker(s) must make separate and independent findings as to each Respondent, even if only one hearing is held. If there are multiple Complainants, and if the facts are essentially identical, it may also be efficient to conduct their hearings together as joint Complainants.

Decision-makers must be exceedingly careful with their final determinations, with respect to each element of each offense involving each Complainant and Respondent. A determination that one person is responsible for violating policy does not necessarily mean that the others are all also automatically responsible, and vice-versa.

POSTPONEMENTS, RESCHEDULING, AND OTHER HICCUPS

Despite all the careful planning and preparation before a hearing, problems may still arise. For example, consider what steps you will take if a party or witness fails to appear for the hearing despite your best efforts. While the Title IX regulations state that if a party or witness does not submit to cross-examination at the hearing, the Decision-maker(s) cannot rely on any statement of that party or witness in reaching a determination regarding responsibility, that provision has been vacated by a Massachusetts federal district court and is no longer enforceable by OCR.[64]

Providing clear direction to parties and witnesses about their expected attendance and the repercussions of non-attendance, sending reminders, and having someone available in person to greet them upon arrival at the hearing will help to ensure that they appear and await their appointed time to participate. Although the Title IX regulations clearly anticipate that the parties will be present for the entire hearing, witness participation has more flexibility, and the Decision-maker or Chair may wish to devise some creative solutions if a witness fails to appear. For example, a remote hearing appearance through videoconference may be possible. If not, the Decision-maker(s) may decide to proceed without the witness or plan to adjourn until the witness can be reached and the hearing can be reconvened or rescheduled. It is important to note that the regulations prohibit institutions from retaliating against any individual "for

[64] 34 C.F.R. § 106.45(b)(3)(vii). *See Victim Rights Law Center v. Cardona*, No. CV 20-11104-WGY WL 3185743 (D. Mass. July 28, 2021). A federal district court judge in Massachusetts held that the evidence exclusionary rule contained in the Title IX regulations (§106.45(b)(6)(i)) is unlawful. Consult legal counsel regarding whether to include or remove the exclusionary rule from policy. Decision-makers cannot draw an inference (positive or negative) solely from a party or witness' absence from the hearing or failure to participate fully/answer questions.

refus[ing] to participate in a[]…hearing," which includes taking any disciplinary action for non-participation.[65]

Considering and Evaluating Evidence

The Title IX regulations make it clear that Decision-makers must make reasoned policy determinations by carefully evaluating the evidence that is gathered during the investigation, and any additional information, such as a determination about a party or witness's credibility, that comes from the hearing itself.

STANDARD OF EVIDENCE: "PREPONDERANCE OF THE EVIDENCE" OR "CLEAR AND CONVINCING EVIDENCE"

The Title IX regulations require that institutions choose between two possible standards of evidence: "preponderance of the evidence" or "clear and convincing evidence."[66] The preponderance standard is defined as whether it is "more likely than not" that the Respondent violated the policy. In contrast, the "clear and convincing evidence" standard requires *more* evidence. Under a clear and convincing evidence standard, the evidence must prove a high degree of probability that the Respondent violated the policy. The regulations further require that institutions use the same standard in all sexual harassment complaints, for all faculty, students, and staff.[67] For preponderance, the greater weight of the evidence is 51%, or even 50.01%; legal scholars have pegged clear and convincing evidence as somewhere between 60-90%, usually toward the middle of that range.

Preponderance has been described as "50 percent plus a feather." In this sense, Investigators and Decision-makers are feather hunters, trying to find any feathers and weigh them on the scale. A feather can weigh as much as a real feather, or as much as a cinder block, depending on the nature of the evidence, but it must be there, or there is no policy violation. With clear and convincing evidence, the feather needs to be bigger, or there needs to be more of them. The question is not what happened, but what can be proven to have happened. At the hearing, if the evidence is 50/50, there is not enough evidence to support that a policy violation occurred. Every time. Decision-makers may feel deep down that the Respondent did what was alleged, but Respondents can't be held accountable based on a gut feeling. It's not what you know, but what you can show — with reliable, relevant, and credible evidence.

The institution will already have decided which standard to adopt as part of any policy revision following the passage of the Title IX regulations. The key task for Decision-makers is to know,

[65] 34 C.F.R. § 106.71.
[66] 34 C.F.R. § 106.45(b)(1)(vii).
[67] *Id.*

understand, and adhere to the standard articulated in the institution's policy regardless of who the Complainant is, who the Respondent is, how close they are to graduating or retirement, or what consequences they may face.

WORKING WITH EVIDENCE

Under Title IX regulations, the burden of gathering evidence falls to the institution, not to the Complainant or the Respondent.[68] Furthermore, the investigation into the allegations that preceded the hearing must be thorough. The investigation report that the Decision-maker(s) receive(s) in advance of the hearing should include all evidence gathered by Investigators or provided by the parties during the investigation phase that is deemed relevant to a policy violation determination by the Investigator(s).[69]

Evidence is generally considered *relevant* if it has value in proving or disproving a fact at issue. Remember that formal rules of evidence do not apply to the hearing. If information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered. As a result, hearsay evidence is often admissible. Relevance determines whether evidence can be considered; credibility determines how much weight it is given.

The Title IX regulations provide that Decision-maker(s) must objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence.[70] Inculpatory evidence is evidence that tends to be "incriminating" meaning in the campus context that it tends to prove a violation occurred. In contrast, exculpatory evidence tends to "exonerate" an individual, helping to prove a violation did not occur. Inculpatory evidence might be a text from the Respondent to the Complainant, stating, "I'm sorry I went further than you told me I could." Exculpatory evidence could include testimony as to mistaken identity, or an airtight alibi. As noted above, it is essential that all Decision-makers review the investigation report prior to the hearing and are familiar with all evidence that it contains. The parties will have had access to inspect and review evidence prior to the hearing and may reference it in the hearing.[71]

[68] 34 C.F.R. § 106.45(b)(5)(i).
[69] 34 C.F.R. § 106.45(b)(5)(vii).
[70] 34 C.F.R. § 106.45(b)(1)(ii).
[71] 34 C.F.R. § 106.45(b)(5)(vi).

Forms of evidence could include:

- Interview notes
- Written statements
- Interview transcripts
- Copies or screenshots of text messages or social media postings
- Voicemail messages or transcripts
- Photographs
- Video or audio recordings
- Video surveillance
- Receipts
- Diaries/journals/blogs
- Polygraph results
- Expert sources
- Public safety/police reports
- Forensic exam (SANE) reports
- Incident reports from residence life
- Human Resource reports
- Medical records

At the hearing, the relevance of evidence, including testimonial evidence, is determined by the Decision-maker or Chair. It is their duty to inform those testifying if the information they are providing is irrelevant and inadmissible, if there is a need to make that clear in the hearing to avoid prejudicing the process. Otherwise, irrelevant evidence can be heard, but disregarded by the Decision-maker(s). Under the regulations, no evidence is really strictly inadmissible, it just cannot be relied upon if not relevant, though it may factually be admitted and heard. Decision-makers and Chairs will want to be diligent about noting on the record if evidence is admitted that cannot be relied upon. In addition to noting it during the hearing, the written rationale issued for the final determination should not all evidence that was introduced or admitted, but which the decision did not rely upon.

Often, it is possible to anticipate such testimony, and cut it off so that it is not revealed at the hearing. Sometimes, Decision-makers will not recognize that testimony is irrelevant until after it is given. When this happens, the Decision-maker(s) must strive to disregard the testimony in deliberations and refuse to allow it to impact its decision. Although “unhearing” something is difficult once heard, it is a discipline that all Decision-makers should endeavor to achieve.

As noted above, a party or witness may attempt to introduce new evidence at the hearing that they did not bring forward during the investigation. Should this occur, Decision-makers must review policies or procedures for direction. If the policy is silent on this issue, the Decision-maker or Chair may conclude that any evidence that reasonably was available prior to the commencement of the hearing may not be introduced at this stage. At the Decision-maker or Chair’s discretion, the evidence may be admitted, if it is of minor significance, or it can be excluded, or the Decision-maker or Chair may query the opposing party as to whether they object to the introduction of the evidence. If they do not, it can be admitted. If not, and if the Decision-maker or Chair determines that the evidence has or may have high probative value, they may postpone the hearing and request that the investigation be re-opened to consider the newly offered evidence. This is likely to set back the hearing schedule, at least partially, as each 10-day pre-hearing review period will recommence, unless waived by the parties. Thus, to avoid

this, the onus is on parties and the Investigator(s) to ensure that all available evidence is gathered and considered in the initial investigation phase.

"Expert" testimony may be offered by the parties at the investigation phase and at the hearing, if relevant. The Investigator(s) may also have arranged for expert testimony to inform the Decision-maker about a complex and/or technical issue. Where "dueling experts" offer opposing testimony, the credibility of the expert may sway the Decision-maker(s). Experts may submit reports, or their interview with the Investigator(s) may serve to adequately summarize their testimony. Like all other witnesses, they must testify at the hearing for their statements to be relied upon. Ask experts questions and ensure that they are truly testifying to an area in which they have the requisite expertise. Recently, for a hearing we chaired, an expert was called to give testimony on the issue of incapacity, for which they were well-qualified, but also testified that the incapacity meant the Complainant was raped, a conclusion which they were not qualified to make at all, and which was not relied upon.

EVIDENCE OF A COMPLAINANT'S PRIOR SEXUAL BEHAVIOR

The temptation to wander into irrelevant lines of questioning regarding a Complainant's prior sexual behavior is common. The Title IX regulations specify that evidence regarding a Complainant's prior sexual behavior is irrelevant and inadmissible unless questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.[72]

Outside of these two exceptions, Decision-maker(s) should not ask questions about a Complainant's past sexual history or behavior. Subsequent or simultaneous sexual behavior is admissible, if relevant. A Complainant cannot introduce their own prior sexual behavior unless an exception above is met. The parties and Advisors should be very clear on this before the hearing. Nevertheless, it may be introduced, and if so, must be disregarded by the Decision-maker(s).

Any attempt to introduce information or solicit such questions or evidence by the parties or witnesses, either through testimony or evidence, should be promptly curtailed and admonished by the Decision-maker or Chair, who should clarify the rules regarding the admissibility of such evidence and require the party attempting to introduce the evidence to articulate whether it fits an exception. When it does not, it is disallowed.

[72] 34 C.F.R. § 106.45(b)(1)(iii).

Information regarding a Respondent's prior sexual history is permitted if relevant and may often be relevant when considering the presence of a pattern.

EVIDENCE OF A COMPLAINANT'S SEXUAL PREDISPOSITION

Unlike the rule regarding prior sexual behavior, evidence related to a Complainant's sexual predisposition is never permitted. There are no exceptions. Whether a Complainant is inclined to have multiple sexual partners, is not inclined to hook up, is not inclined toward sex outside of marriage, is not disposed to be intimate with women, is gay and thus inclined to have sex only with men, etc. are all examples of evidence that cannot be admitted or relied upon if they reveal a Complainant's sexual predisposition, even if a Complainant wants to introduce this information about themselves.

Similar to the rule about prior sexual behavior, information regarding a Respondent's sexual predisposition is permitted if relevant.

MEDICAL EVIDENCE

Generally, relevant medical testimony or evidence can be admitted in a hearing. How it is admitted is often the issue. The person whose record it is (meaning the patient/client)) can testify to it, if relevant. A medical provider can testify if their client/patient consents. The regulations specify that the institution cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, which are made and maintained in connection with the provision of treatment to the party, unless the institution obtains that party's voluntary, written consent to do so.[73]

If a medical or counseling record contains a statement of a party, the party must be willing to submit to cross-examination about it at the hearing, or it cannot be relied upon. If the medical or counseling record contains a statement of the provider, the provider must be willing to submit to cross-examination about the statement at the hearing, or it cannot be relied upon. If the medical record contains non-statement diagnoses or test results that are factual, the record can vouch for that information without the live testimony of the person who created the record.

LAW ENFORCEMENT TESTIMONY

Law enforcement testimony is often important in sexual assault, dating/domestic violence, or stalking cases, and local or campus police department officers may be called on at a hearing to

[73] 34 C.F.R. § 106.45(b)(5)(i).

answer questions or discuss evidence gathered during a criminal investigation, which is commonly separate from the institution's Title IX investigation. Generally, police officers are trained and experienced in giving testimony, and will competently discuss evidence, investigations, and key issues. The Decision-maker(s) should ensure that police officers establish their own jurisdiction and authority on the record. A key issue to be wary of is possible biases in testimony, and of opinion testimony. Any time a police officer testifies to something the factual basis of which is unclear, question it and allow the officer to establish the fact, if they can. If they utter an opinion of any kind, question it, and allow the officer to substantiate the basis for the opinion, if possible. If the officer appears to be favoring one person's version of events over another's, this should be the basis for questioning, scrutiny, and skepticism.

If evidence from law enforcement has been collected during the institution's investigation, a police officer may need to testify as to the type of evidence, its characteristics, its significance, how it came to be in the possession of the police, that its condition is substantially the same as it was when it was first obtained by the police, and in whose custody the evidence has been placed since it was obtained. They may need to discuss any tests (fingerprinting, DNA, toxicology, etc.) performed on it, and the results of those tests. If written results of tests are available, those results should have been gathered by the institution's Investigator(s). If any of these elements are not established by the officer, questions should attempt to elicit these details. If any of these questions are not answered to the satisfaction of the Decision-maker(s), that evidence may not be relevant or may lack credibility. Officers can testify about pretext phone calls, admissions, protection from abuse orders, and the like.

Models of Proof

Creating a "model of proof" is simply the process of taking a policy definition and breaking it down into its constituent elements – those components that must be present and supported by credible evidence in order to determine that policy has been violated. The "checklist" of elements should serve as a guide to help Decision-makers during the hearing, by zeroing in on what information is needed in order to make a determination about a potential policy violation, and at the analysis or deliberation stage, to ensure that the assessment of the facts tracks precisely with the requirements of institutional policy. Models of proof are designed to help Decision-makers move past a "gut assessment" of the facts, and to a fully analytical assessment by matching facts to policy elements. For this reason, all of ATIXA's model policies are written as models of proof or broken into models of proof.[74] Two styles of models are provided below, as examples, one written in the style of question-dialogue for Decision-makers to process, and the other in a more stripped-down elemental checklist style.

[74] *See* the ATIXA 1P2P Model Policies and Procedures at www.atixa.org.

For example, per the Title IX regulations, Dating Violence is defined as violence, on the basis of sex, committed by a person, who is in or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—

i. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

ii. Dating violence does not include acts covered under the definition of domestic violence.

Here it is broken down as bulleted elements:

- Violence (including, but is not limited to, sexual or physical abuse or the threat of such abuse),
- on the basis of sex,
- committed by a person who is in or has been in a social relationship of a romantic or intimate nature with the Complainant, WHERE
- the definition of domestic violence does not also apply.

Based on this definition, the question-dialogue style model of proof for dating violence gives us a rubric for determining a policy violation that comprises four questions (at a minimum):

1. Did violence or abusive behavior occur? *If no, there is no policy violation.*

   If Yes…

2. Was it on the basis of sex or sexual in nature? *If no, there is no policy violation.*

   If Yes…

3. Was it committed by a person who is in or has been in a social relationship of a romantic or intimate nature with the Complainant? If no, there is no policy violation. If yes, there is a policy violation, unless…

4. The conduct meets the definition of domestic violence, in which case, there is not a dating violence policy violation.

A FOUR-PRONG ANALYSIS

To make a finding of responsibility for an allegation of dating violence, one must establish, by the applicable standard of evidence, all four prongs of the definition referenced above, namely that: (1) the Respondent committed a form of violence or abuse upon the Complainant, (2) the Respondent did so on the basis of sex, (3) the relationship between the parties is one of an intimate or romantic nature or has been in the past, (4) the behavior does not meet the definition of domestic violence.

You could also create the model of proof with more granular questions as shown below.

1. Did violence occur? **OR**

2. Did abusive behavior occur?

    - If **Yes** to at least one…

3. Was it on the basis of sex? **OR**

4. Was it sexual in nature?

    - If **Yes** to at least one…

5. Was it committed by a person who is in social relationship of a romantic nature with the Complainant? **OR**

6. Was it committed by a person who has been in a social relationship of a romantic with the Complainant? **OR**

7. Was it committed by a person who is in a social relationship of an intimate nature with the Complainant? **OR**

8. Was it committed by a person who has been in a social relationship of an intimate nature with the Complainant?

    - If **Yes** to at least one, there is a policy violation, unless...

9. The behavior meets the definition of domestic violence.

    - If **Yes**, there is not a dating violence policy violation (but see and apply the definition of domestic violence)

Here are the other regulations-based offenses, as checklist style models of proof. Decision-makers are welcome to create a question-dialogue style for each, if the approach shown above is a helpful decisional tool.

SEXUAL HARASSMENT:

Quid Pro Quo:

- ❑ an employee of the recipient
- ❑ conditions (directly or indirectly) the provision of:
  - an aid, **OR**
  - benefit, **OR**
  - service of the recipient
- ❑ on an individual's participation in unwelcome sexual conduct

Hostile Environment:

- ❑ unwelcome conduct
- ❑ on the basis of sex (or that is sexual)
- ❑ determined by a reasonable person (a person who sits in the shoes of the Complainant and shares an objective perspective)
- ❑ to be severe, **AND**
- ❑ pervasive, **AND**
- ❑ objectively offensive (that effectively denies a person equal access to the Recipient's education program or activity)

Sexual Assault:

- ❑ Any sexual act
- ❑ directed against another person (i.e., the Complainant)[75]
- ❑ without the consent[76] of the Complainant
  - including instances in which the Complainant is incapable of giving consent

[75] This would include having another person touch you sexually, forcibly, and/or without their consent.

[76] This would then invoke a model of proof for whatever your institutional definition of consent is. For more on consent, please refer to the ATIXA Playbook in the ATIXA Member Library. Here is an example. Consent is:

- ❑ knowing, and
- ❑ voluntary, and
- ❑ clear permission
- ❑ by word or action
- ❑ to engage in sexual activity

Forcible Rape:

- ❑ The carnal knowledge of a person (penetration of the Complainant)
- ❑ forcibly **AND/OR**
- ❑ against that person's will (non-consensually) **OR**
- ❑ not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of temporary or permanent mental or physical incapacity

Forcible Sodomy:

- ❑ Oral or anal sexual intercourse with another person (the Complainant)
- ❑ forcibly **AND/OR**
- ❑ against that person's will (non-consensually) **OR**
- ❑ not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity

Sexual Assault with an Object:

- ❑ The use of an object or instrument to penetrate
- ❑ however slightly
- ❑ the genital or anal opening of the body of another person (the Complainant)
- ❑ forcibly **AND/OR**
- ❑ against that person's will (non-consensually) **OR**
- ❑ not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity

Forcible Fondling:

- ❑ The touching of the private body parts of another person (buttocks, groin, breasts of the Complainant)
- ❑ for the purpose of sexual gratification
- ❑ forcibly **AND/OR**
- ❑ against that person's will (non-consensually) **OR**
- ❑ not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity

Incest:

- ❑ Non-forcible sexual intercourse
- ❑ between persons who are related to each other
- ❑ within the degrees wherein marriage is prohibited by [insert state] law

Statutory Rape:

- ❑ Non-forcible sexual intercourse
- ❑ with a person (the Complainant) who is under the statutory age of consent of [insert age in your state]

Domestic Violence:

- ❑ violence
- ❑ on the basis of sex
- ❑ committed by a current or former spouse or intimate partner of the Complainant who are more than two people just living together as roommates **OR**
- ❑ by a person with whom the Complainant shares a child in common **OR**
- ❑ by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner **OR**
- ❑ by a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of [insert your state here] **OR**
- ❑ by any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here]

Stalking:

- ❑ engaging in a course of conduct
- ❑ on the basis of sex
- ❑ directed at a specific person (the Complainant), 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, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

- *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.

Weighing Evidence

All evidence should be evaluated. This includes factual evidence provided by the parties and witnesses through statements, interviews and other materials, witness observations of the incident(s) witness opinions about the incident(s), and circumstantial evidence that supports or negates a party's statements or has bearing on the credibility of the party or a witness. As a Decision-maker, you will be weighing evidence to determine its relevance, reliability, validity, credibility, and the amount of weight to be given to the submitted evidence. For institutions that use a panel with a Chair, the Chair may take on the primary work of evaluating the evidence or the entire panel may work together to do so. Obviously, where there is only one Decision-maker, this is a solo responsibility.

As you've probably gathered from reading above, the regulations require a somewhat tortuous path for evidence to get to a Decision-maker's desk. To review, for clarity, the regulations instruct investigators to collect all evidence, lump it all together, deliver it to the parties, and to work with them and their Advisors to sift it. The sifting separates the evidence into three piles or buckets. Bucket #1 is the relevant evidence summarized in the investigation report by the Investigator(s). Bucket #2 contains all the directly related evidence (DRE) excluded from the report (at least – it may also contain all relevant evidence as well but should clearly identify which evidence is relevant and which is DRE). Bucket #3 is for essentially discarded evidence that has no bearing on anything. Decision-makers probably won't even see what Investigators discard into Bucket #3.

There are many variations on this theme with which Decision-makers will have to contend. In some cases, Investigators deliver the evidence to the parties for the first 10-day review period in a lump. Other Investigators sift the evidence into a draft report and a file of DRE. Then, the parties review and comment. Where the Investigators have gone with the lump approach, at the end of the 10-day review period, they then write the final report, segregating the relevant evidence into the report, and the DRE into its own file. This could take days or weeks. Then, the final report is delivered to the parties/Advisors, and the second 10-day review period commences. That culminates in further review and comment by the parties/Advisors to the Decision-maker(s), either pre-hearing or at the hearing.

For Investigators who avoid the lump approach, they deliver a draft report and a DRE file at the beginning of the first 10-day review period. Then the parties/Advisors review and comment on those materials for the Investigator(s) by the end of the 10 days. Then, the Investigator(s) incorporate(s) their comments and feedback, finalize(s) the report, and deliver(s) it to the parties/Advisors. It is then transmitted to the Decision-maker(s), starting the second 10-day pre-hearing review period. The final report and/or DRE file may also have been circulated to the Title IX Coordinator and/or legal counsel for their review and comment, before the Decision-maker

sees it. That feedback would also have been incorporated by the Investigator(s) into the final report.

This approach often results in a more refined work product in comparison to Investigators who use the lump approach. Indeed, sometimes the investigators are not well-trained or uncertain, and thus put all the evidence in the report, leaving it to the Decision-maker(s) to segregate into relevant and DRE buckets. If that task is dumped on the Decision-maker(s), they'll either have to undertake it, or send the report back to the Investigator(s) insisting that they appropriately separate the evidence. They may or may not be up to the task, so Decision-makers need to be ready to do it so that by the hearing, the parties/Advisors have a clear understanding of what evidence will be relied on, and what evidence the Decision-maker(s) have determined is DRE that will not be relied upon.[77] The pre-hearing meetings are the best way to sift this evidence with input from the parties, but if it is not done pre-hearing, it will have to be done at the hearing, so prepare for a potentially very long hearing!

As the Decision-maker(s) process(es) the evidence, they may want to consider and assign weight to different types of evidence:

- 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 relevant information)
- Character evidence (generally of little value or relevance, but admissible if relevant)
- Impact statements (typically only admitted during the sanctioning phase)

In reviewing the evidence, there may be circumstances in which the Decision-maker(s) need(s) to consult with an expert in order to verify or interpret proffered evidence. Some evidence will need to be authenticated, where doubt exists about the evidence's reliability. For example, texts, social media postings, and other forms of evidence can be fabricated with relative ease, and although it is most likely that the investigation report will address this, the Decision-maker may be required to verify evidence or arrange for an expert to testify at the hearing on occasion. Ideally, the Investigator(s) will identify this need and interview the expert as part of the investigation process, like all other witnesses. If not, and the Decision-maker(s) identify the need after the report is completed, consider sending the investigation report back to include the expert interview. That may also reset both 10-day review periods.

[77] For a visual depiction of allocation of evidence, please see *The Three Buckets of Evidence*.

Here are some examples of when experts may be useful. In some cases, colleagues in the IT department can serve in this role. In addition, some forms of evidence, especially medical reports including Sexual Assault Nurse Examiner reports (SANE reports) and polygraph results can be difficult for laypeople to understand due to their technical language. In these cases, the Decision-maker(s) may need to consult with experts to make sure the evidence is evaluated properly.

PATTERNS

ATIXA defines an alleged *pattern* to include allegations or other evidence that one person has engaged in two or more substantially similar incidents or behaviors toward one or more targets. A confirmed pattern exists when the standard of proof supports that the alleged acts actually occurred. The similarity can be in the type of act, commonality of chosen targets, location, consistency of premeditation, and/or signature or *modus operandi* (method of operation) of the perpetration.

Under Title IX, an investigation can occur within three different frameworks: incident, pattern, or climate/culture. When one behavior by one individual is being investigated, the institution investigates an incident. When more than one similar behavior by one individual is being investigated, the institution is investigating a possible pattern. And, when an entity, institution, department, and/or the actions of multiple individuals are being investigated, the institution is usually investigating the potential for a hostile climate or culture.

This taxonomy of investigation types is crucial to understand because it is important to recognize the framework for the hearing determination at the outset, when possible. Decision-makers may be working with more than one framework at a time, and, as an investigation unfolds, it may need to shift frameworks. What starts with an investigation of an incident can become an investigation of a pattern or climate (or vice-versa) as Investigators learn more and more incidents become known. Or the institution may start off thinking it may have a pattern, but it turns out to be only an incident. Similarly, initial information about a pattern can turn into a larger investigation of a climate and vice-versa.

While certainly an inexact science, recognizing patterns within the evidence of good faith reports involving the same Respondent requires thorough investigation and careful vetting by Decision-makers. Through careful investigative methods or hearings, repeat elements or details may emerge and those details may be sufficiently similar to create a pattern, represent a method or *modus operandi*, and/or, when considered in the aggregate, evidence an overarching theme. This is pattern evidence. If pattern evidence is identified, Decision-makers consider this evidence in two ways: in evaluating the information obtained in the current complaint (to aid in credibility assessments and/or to aid in determining whether the evidence

makes the current reported misconduct more likely to have occurred) and in assessing appropriate sanctions (pattern sanctioning is discussed in the Sanctioning section of this Manual).

OCR alluded to pattern behavior in the now-withdrawn 2001 guidance. For example, in discussing pattern as a basis for finding a hostile environment, OCR said to consider "[t]he type, frequency, and duration of the conduct. In most cases, a hostile environment will exist if there is a pattern or practice of harassment, or if the harassment is sustained and nontrivial."[78]
OCR further noted:

> *In addition, by investigating the complaint to the extent possible including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action.*

And footnote 77 of the 2001 Guidance, excerpted in its entirety below, is quite concrete about pattern:

> *For example, a substantiated report indicating that a high school coach has engaged in inappropriate physical conduct of a sexual nature in several instances with different students may suggest a pattern of conduct that should trigger an inquiry as to whether other students have been sexually harassed by that coach. See also Doe v. School Administrative Dist. No. 19, 66 F.Supp.2d 57, 63-64 and n.6 (D.Me. 1999) (in a private lawsuit for money damages under Title IX in which a high school principal had notice that a teacher may be engaging in a sexual relationship with one underage student and did not investigate, and then the same teacher allegedly engaged in sexual intercourse with another student, who did not report the incident, the court indicated that the school's knowledge of the first relationship may be sufficient to serve as actual notice of the second incident).*

OCR has also suggested, in correspondence with ATIXA, that pattern could be broadly construed, and prior good faith allegations and/or findings of any of the behaviors on the sex- or gender-based harassment or discrimination continuum could be evidence that helps to prove current allegations. This is quite a different approach than the student conduct model, which typically only considers previous findings in determining sanctions. But pattern can and should impact the underlying finding as discussed further below.

[78] 2001 Revised Sexual Harassment Guidance by the U.S. Department of Education Office for Civil Rights

To remedy hostile environments, institutions must look for evidence of patterns and address them if they are discernible; patterns contribute to and exacerbate a hostile environment and may indicate the possibility of future recurrence. But assessing whether individuals engage in pattern behavior and deciphering which elements create a pattern is not often a straightforward task.

While there is no definitive OCR policy statement on how to incorporate or assess pattern evidence, two judges' opinions offer valuable insight into what "sufficiently similar" means so as to establish a pattern and how pattern evidence is used. Both opinions occurred in the criminal legal context where due process requirements exceed those of colleges and schools. Courts follow articulated, established rules of evidence and years of precedential case law – a very different arena from institutional proceedings. Despite these distinctions, the below summaries provide some framework for considering pattern evidence as existing within the construct of due process, rather than as a violation of it. If this evidence is admissible in criminal courts, it likely can be considered in the less formal environment of a college or school proceeding. Unlike the prior sexual history and predisposition rules discussed above, which protect only Complainants, the Title IX regulations do not protect Respondents the same way, specifically so that previous patterns of misconduct can be considered by Decision-makers.

In a sexual assault case litigated against an ex-Michigan State University football player in 2018, prosecutors sought to admit as evidence information relating to several earlier incidents involving the player.[79] The judge allowed details related to two prior incidents, one in 2013 and the other in 2014, to be admitted as evidence. In each of these interactions, the alleged victim had informed police that the football player had pulled down their pants and used force during their respective sexual assaults. Because these reports had similar details to the report in the present case, the judge allowed these prior reports into evidence. The judge ruled that two additional incidents were *not* sufficiently similar to the allegations at issue to be admitted: in one of the incidents, the football player allegedly grabbed a woman and asked her about sex, but she pushed him away and left; in the other, the player allegedly told a woman he was going to rape her but didn't take further action. This opinion establishes helpful parameters for determining what conduct is considered by the courts to be sufficiently similar.

Of course, institutional proceedings are not bound by the same evidentiary constraints as the courts, though they must observe basic due process. To put a fine point on this – though it may conflict with what you may hear from the Respondent – consideration of pattern evidence can be required by (rather than violative of) the principles of due process and basic fairness. How Decision-makers review pattern evidence is more flexible and dependent on both circumstances and policy provisions. Where there are two or more individuals who report

[79] Mencarini, Matt. "Past rape reports against ex-MSU football player Robertson can be used in trial." *Lansing State Journal* 2 May 2018. 6 Jul. 2018.

separate incidents involving the same Respondent, and, after investigation, there is a potential pattern of behavior, there are three primary avenues by which to proceed:

- Combine the resolutions into hearings with two (or more) distinct phases, provided that institutional procedures allow for this. In this process, each phase consists of a hearing involving a separate Complainant; the testimony provided may both support the determination of the existence of a pattern and may also contribute to meeting the standard of proof and responsibility finding for the other Complainant, assuming the pattern is present with substantially similar incidents, targets, premeditation, approaches, etc. That a similar act occurred with Complainant A makes it more (highly?) likely that the similar act is proven as to Complainant B (and potentially vice-versa). They corroborate each other. You could think of this as a joint hearing with each complaint considered back-to-back.

- Hold two (or more) hearings with the same Decision-maker(s) for each complaint, but then conjoin the complaints when it is time to make the final determinations and impose any sanction.

- Hold two (or more) hearings with differing Decision-makers. Allow each Complainant to be a witness at the hearing of the other. Make separate findings, and bring together for sanctioning, if appropriate. Keep in mind that this approach requires the Complainants to testify multiple times, which is not ideal and may contribute to re-traumatization, and may not enable comprehensive pattern consideration, making it the least viable model.

Care must also be taken with respect to privacy and confidentiality to ensure that each Complainant only learns information about the other that is permitted by FERPA and laws and/or policies governing personnel records and/or necessary to satisfy Title IX. In applying pattern rules, a final caution is not to confuse validated patterns with the aggregation of unsubstantiated allegations. This is also known as the “if there is smoke there must be fire” approach. However, if a student engaged in offensive conduct in a residence hall that did not rise to the level of an objectively hostile environment and then later engaged in offensive conduct in another residence hall that also did not rise to the level of an objectively hostile environment, you can’t combine the two separate instances to conclude by a preponderance of the evidence that the responding party’s conduct created a hostile environment. Put another way, 49% + 49% ÷ 2 = 49%, not a preponderance proving a substantiated pattern of misconduct, and certainly not enough to meet a clear and convincing evidence standard.

A last consideration in this section is about prior acts, rather than two simultaneous allegations. With prior violations, they are admissible and should be considered when substantially similar to the current complaint. When prior substantially similar allegations (either criminal or

institution-based) were not determined, they can still be introduced as evidence, but should only be weighed as evidence of a pattern if each incident can be said to meet the standard of proof, even if that has not been formally decided by the institution. Thus, if a prior incident is introduced at the hearing, and that alleged victim testifies as a witness (but perhaps not a Complainant), and that witness's allegation is believed by the Decision-maker(s) by the standard of proof, then it can be used as evidence that contributes to meeting the standard of proof in the current complaint under consideration by the Decision-maker(s). Think of it as a hearing within a hearing.

ASSESSING CREDIBILITY

In the context of investigations, credibility is the cumulative result of accuracy, consistency, corroboration, and reliability of evidence. Credibility is not the same thing as honesty, as one can lie credibly. To assess credibility, you must evaluate the source, the content, and the plausibility of what is offered. When source, content, and plausibility are strong, credibility is strong. Credibility exists on a 100 percent point scale, with the most credible evidence being 100 percent, and the least credible being zero percent. Evidence is rarely 100 percent credible or zero percent credible — most evidence lies somewhere in between. Decision-maker(s) must figure out where the evidence falls on the scale, often with an assist or recommendation from the Investigator(s). Accurate credibility assessment becomes especially critical in situations where the available evidence is evenly split and the finding hinges on the credibility of the parties.

According to the Equal Employment Opportunity Commission's (EEOC) *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* dated June 18, 1999, factors to include in credibility assessments are:

- **Inherent Plausibility:** Is the testimony believable on its face? Does it make sense?
- **Motive to Falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eyewitnesses, people who saw the person soon after the alleged incident(s); or people who discussed the incident(s) with the parties around the time that they occurred); or physical evidence (such as written documentation) that corroborates the party's testimony?
- **Consistency:** Is the person's testimony materially consistent over time? Is it consistent between interviews? With witnesses? With law enforcement? Etc.
- **Past Record:** Does the Respondent have a history of similar behavior in the past?
- **Effect on the Complainant:** While not determinative, what is the effect of the incident(s) on the Complainant's behavior? How might a reasonable person react to the situation (Note that there is no "right way" to respond to an incident, but an adverse reaction by the Complainant immediately following an incident can bolster credibility).

- **Demeanor:** Did the person seem to be telling the truth or lying?

Credibility is best established through corroboration and consistency. Corroboration is provided through sufficient independent evidence to support the fact at issue. Corroboration is not merely a statement another witness who agrees with the first witness (they could be lying to support each other), that witness must be a credible source. There should be evidentiary support for what the witness contends, evaluating source, content, and plausibility together. Also, look for subtle bias, which the witness may not even be aware of, including "victim-blaming" attitudes, group defensiveness (think teams, student organizations, and arts performance groups), or whether the witness fears getting in trouble or getting someone else in trouble. Lack of proximity detracts from credibility. What was seen in person is most valuable.

What someone heard from the Respondent about the incident after the fact is less compelling than an eyewitness account, and what someone learned after the fact from the Respondent's best friend about what the Respondent told them is even less so. Demeanor is at the bottom of the list for a reason. Avoid trying to analyze micro-expressions and gestures. Crossing limbs, looking up to the right, and other so-called telltales are not evidence, though a departure from the interviewee's baseline behavior is often a prompt to ask additional questions to determine whether there is something more to be learned. Demeanor alone is rarely, perhaps never, enough to determine someone is or is not credible.

Consistency is provided by analyzing the steadfastness of the information provided by individuals across their accounts. If a party or a witness provides an account in one interview, then provides a different account that conflicts with their previous account, that can undermine credibility. Major inconsistencies in testimony would likely detract from credibility. Minor inconsistencies usually would not detract from credibility. Even lying is not a 100-percent credibility killer. We all lie. The job of the Investigator(s) is to determine why the individual is lying, or what the lie is about. For example, lying about alcohol consumption to avoid an alcohol violation does not prove or disprove an underlying dating violence allegation.

Trauma can impact consistency. Recognizing that an incident may have triggered a trauma-based response makes the inconsistency understandable, but it does not excuse the inconsistency. Put succinctly, the presence of trauma isn't a substitute for the presence of evidence. Those who experienced trauma may provide varying or inconsistent accounts or have material memory gaps, but Investigators never have a way to determine why memory was not encoded or retrievable. Maybe it's trauma. Maybe it's alcohol. Maybe it's just not paying attention. Maybe it's that memory is never 100 percent retained or retrievable. This doesn't negatively impact the credibility of the information provided, but it also adds no points to the 100-point scale to enhance credibility. Missing information won't be held against someone, if it is missing as the result of trauma, but trauma itself doesn't provide a rationale for adding points to the credibility scale. This should not be viewed as a value judgment or as victim-blaming; it

is an unbiased assessment of the consistency and accuracy of the information. If evidence is available, weigh it. If not, don't, no matter what the reason is for why it may be missing or incomplete.

As an example, let's suppose you've found a Complainant's credibility to amount to 40 points on the 100-point scale. The Complainant would likely have a score above 50 points if they could fully recall the details of what happened, but the Complainant can't. Even if trauma is the reason why, the Complainant is still at 40 points on the scale because of what the Complainant could recall. We don't give the Complainant an extra 11 points and chalk it up to trauma, nor do we take 11 points away for lack of recall. The Complainant can provide what they can provide, and that has the indicia of credibility or it doesn't. To approach it otherwise allows trauma to be a thumb on the scale, and to excuse (rather than explain) the absence of evidence.

Every piece of relevant evidence must be evaluated for its credibility. If a piece of evidence is more credible than not, then it is considered accordingly and can impact the broader standard of evidence analysis, at least to some degree. If evidence is not credible (i.e., less than 50 percent credible), it does not tip the scale in favor of that evidence. Importantly, treating a piece of evidence as not credible does not mean the evidence has no impact on the finding. Evidence that is not credible may tip the scale in the opposite direction if it undermines the credibility of other evidence. For example, if one of the parties puts forth a witness who provides testimony that is patently false, depending on how far along the continuum the witness's testimony is toward zero percent, that witness's testimony may also have a negative impact on the credibility of the party who provided the witness. Evidence often intertwines to form a complex web of interrelated parts. When one aspect of evidence lacks credibility, that can impact the credibility and weight of other aspects. However, credibility is not an on/off switch; usually parties and witnesses provide evidence that is a mixture of credible and not credible. One false or noncredible statement does not necessarily mean Investigators or Decision-makers can't believe anything the person says.

Some aspects of credibility are positional/locational. Could witnesses hear what they say they heard? See what they say they saw? Know what they claim to know? Some aspects of credibility are based on credentials/knowledge/expertise, but those factors need to be established, not assumed. Some aspects of credibility are weighted based on neutrality, impartiality, and objectivity. The more loyal or partisan a witness is based on relationships to one party, the more biased their evidence may be, but do not assume that because someone is biased that the evidence they provide is not credible. A witness may be objective despite their loyalties. Neutral witnesses may be more objective than partisan witnesses, overall.

Let's explore credibility in context to get a better feel for how credibility assessment works in practice.

EXAMPLE: *The harassing behavior continued* after the Respondent was informed that the behavior was unwelcome. If established, this would add credibility to the Complainant's account as corroborative.

EXAMPLE: *A delay in reporting harassment* does not detract from credibility. Individuals may delay reporting because of fear of retaliation, not knowing or trusting the policy, fear of being blamed for causing the harassment, not understanding it was harassment, not being ready to report, etc.

EXAMPLE: *Changes in the Complainant's behavior* after the harassment might add to credibility. For example, after being harassed, the Complainant cried; was upset; avoided class, meetings, or certain areas; the student's grades or performance deteriorated; etc. While this might bolster credibility for the Complainant, it likely can't tip the scales, without more. Corroborating conduct could mean that an incident occurred, but it could also be that Complainant has convinced themselves that the conduct occurred or knows what to do to convince you. This view may be cynical but is a possibility. Could a Complainant fill in gaps in their memory because they know you will doubt them if their memories are incomplete? The phenomenon of the party or witness trying to please the Investigator(s), Decision-maker(s), or in some instances a parent/guardian or other authority figure, is not unheard of.

However, if none of these things occurred, it would not mean that the allegation was not credible, only that the individual who alleged discrimination was perhaps affected differently, less intensely than others might be, or did not openly express emotions. The absence of commonly expected Complainant responses should not be seen as damaging their credibility, because there are no textbook responses to sex offenses. Similarly, the Complainant could be displaying behaviors consistent with traumatic response because that individual sincerely believes an incident happened, but that is not empirical proof that it happened, only that the individual is sincere in their belief. This may be infrequent, but still must be considered by Investigator(s) and Decision-maker(s).

Documents such as emails, text message exchanges, diaries, calendar entries, journals, notes, or letters describing the incident(s) can add to credibility but can also be manufactured after the fact. The adage "trust but verify" applies.

Telling another person about the harassment may add to credibility, but if the accounts provided to others vary meaningfully, that can also undermine credibility.

Other allegations about the Respondent could add to credibility of the allegation because they help to prove a pattern of misconduct.

The fact that a relationship was at one time or in some respects consensual does not detract from credibility nor is it a defense against a subsequent charge of sexual harassment. Consensual relationships can be followed by sexual harassment, for example, when one person tries to end the relationship and the other person uses their power to intimidate the former partner into staying in the relationship. People can be assaulted after consensual sexual acts or engage in consensual sexual acts after having been assaulted.

Motivation to lie, exaggerate, or distort information should be assessed when there are differences in what was reported or questions about veracity or accuracy exist.

A decision can be made by the Decision-maker(s) that harassment occurred when the evidence of the allegation(s) is credible, even if there were no witnesses to the harassment. Put another way, a preponderance can be established simply because the Decision-maker(s) believe one party and not the other, based on assessment of credibility of the party and the evidence provided.

The fact that the Respondent did not intend to harass the Complainant is not a defense to an allegation of sexual harassment. It is the act itself that is important, not the intent of the person who engaged in the behavior. Depending on the circumstances, exceptions may include accidental or incidental contact with someone's "private part" (e.g., grazing your hand over someone's buttocks while passing by them in a crowded hallway), or causing your intimate partner accidental physical harm (e.g., an errant elbow while changing positions during sex).

Not knowing that the behavior was offensive and unwelcome is not a defense to an allegation of sexual harassment. The standard is whether a reasonable person (in the shoes of the Complainant) would deem the behavior offensive (i.e., objectively offensive). That said, incidents do not happen in a vacuum or in the world of the theoretical reasonable person, meaning that the Complainant must also have deemed the behavior unwelcome and offensive, subjectively.

The fact that the person who made the allegation(s) did not tell the alleged harasser that the behavior was offensive and/or unwelcome does not, on its own, affect credibility. Many people are fearful or hesitant to do so out of safety concerns, power imbalances, social repercussions, threats, or a myriad of other reasons. Additionally, there is no obligation for the Complainant to inform the Respondent that behavior is offensive and/or unwelcome.

The following do NOT add or detract from credibility of the Respondent because they are irrelevant:

- **Character witnesses who do not have relevant knowledge.** Most character witnesses are not relevant because character ("*He is such a good kid; I know he would*

never do that.") is not relevant. Where character is relevant, the testimony is probably more about pattern than character.
- **Popularity with staff and students.** ("Everybody likes them; I just don't believe they would do that.")
- **No history of past problems.** ("She's never been in trouble before.")
- **Academic performance.** ("But he's a really good student. His professors really like him.")
- **Sexual orientation of the Respondent.** ("They're asexual. They couldn't have sexually assaulted someone.")

The following do NOT add or detract from credibility of the Complainant:

- **Clothing.** ("*Just look at what she was wearing."*) Clothing does not cause sexual harassment, nor does it give anyone permission to touch another person or make sexual remarks.
- **Appearance.** ("She is so pretty no wonder he did it," or "She is so unattractive! I don't believe anyone would do that to her.")
- **Flirting behavior.** ("He's always flirting with the boys, what did he expect?")
- **Male Complainants.** ("He should have realized she meant it as a compliment.")
- **Sexual orientation of Complainant.** ("Listen, he came out of the closet and told everyone. He should have expected that people would act like this.")

Additionally, external and/or political considerations including athletics participation, concern about the team, concern about "getting a good student in trouble," a faculty member who is the constant thorn in the side of the administration, being a donor, a legacy, and/or from an influential family, whether someone is a last semester senior, tenured, close to retirement, is needed for their work performance or research funding despite their problematic behavior, etc., cannot and should not impact investigation integrity or decisions about whether a policy has been violated.

Deliberations and Making a Determination

Once the hearing has concluded, the Decision-makers must assess and review the facts to decide whether policy has been violated, and if so, what is the appropriate outcome. Although solo Decision-makers may very well need time to review materials and make a decision, a formal deliberation phase is more common with a hearing panel, where members discuss and evaluate the evidence in a collaborative way.

Deliberations involve all members of the panel and are led by the Chair. All parties and witnesses, including the Investigator(s), should be dismissed before deliberation begins. The

Title IX Coordinator may be present or available to answer questions related to the policy and/or process but should not have a substantive role in the decision. Deliberations should not be recorded.

There are three classic styles that define different ways of deliberating toward a determination:

- Hierarchical: Chair or prominent member of the panel leads discussion; often shown deference.
- Consensus: Build to a shared, often unanimous conclusion, but avoid negotiating or compromise
- Adversarial: Opposing viewpoints debated until a majority is clear

The institution's policy should clearly specify if a decision is made by consensus or a majority vote. Usually, consensus is a goal, but majority is the rule. There is no specific order that deliberations must follow, and each Decision-maker should have an opportunity to provide their independent evaluation of the complaint.

- When: Deliberations should occur as soon as reasonably possible once the hearing concludes. This could be immediately following the hearing, later the same day, the next day, or some other day close to the conclusion of the hearing. Promptness is key when scheduling deliberations.

- Where: Deliberations should occur in a private space where the deliberations are not overheard, and the information cannot be inadvertently revealed to include via videoconference. It may be most useful to use the same space that was used for the hearing, to take advantage of any technology put in place for the hearing.

- Duration: There is no time limit on the length of deliberations. Decision-makers should take the time necessary to reach a decision that is based on, and logically flows from, the evidence presented in the hearing. Deliberations may require multiple meetings.

- Subject Matter: Deliberations must center on the allegations provided to the Respondent in the notice of investigation and allegations. All evidence and testimony relevant to those allegations must be considered and weighed. This includes information from the investigation report as well as information presented in the hearing. Outside information and information deemed not relevant should not be considered.

There may be disagreement between Decision-makers. It will be up to the members of the panel to sway other members until a clear majority is reached. Some members of the panel may have

stronger views than others, who may be undecided, and may attempt to persuade fellow Decision-makers to agree with their viewpoint. The Chair should ensure the viewpoints of all Decision-makers are addressed, including neutralizing any power imbalances among Decision-makers. For example, if one panel member is dominating the conversation or has a higher position at the institution, the Chair should ensure that others have a full opportunity to provide their perspectives. The Chair should not dominate or lead the deliberation in a specific direction.

On occasion, certain Decision-makers may offer viewpoints that are based on emotional grounds, preconceived notions about sexual behavior or rape myths, or evidence that was not properly brought forward. Decision-makers should regulate themselves and remind each other that deliberations properly rest upon a review and analysis of the relevant evidence, credible opinions, and weighty circumstantial information offered during the investigation or at the hearing, and not on personal feelings. Decision-makers must apply the technical letter of the policy, even if they disagree with the policy or believe mitigating circumstances apply. Remember, mitigating circumstances are properly considered at the sanctioning stage, but not at the finding deliberation stage.

If deliberations become contentious, look to models of proof for grounding. It may be useful to commit significant facts and evidence to paper, so that it may be examined in concrete form. Discuss and assess each key fact on which the complaint hinges. Reach consensus by finding areas of commonality and build outward until dissent is raised. Fully discuss each conflict. It may be helpful to take straw polls on individual key facts to gauge where the panel stands on those issues. Breaking the issues up into manageable pieces may help to reduce the often-overwhelming effect of taking on the entire matter at once. Applying models of proof will make the task clearer, especially if there are multiple policies in play. Take the broadest or most serious policy first, and then work through each policy element. Then do that for the next broadest or most serious policy, and so forth. The Chair should keep a record of decisions made as discussions unfold. Make sure that each issue is given its due. For example, in a recent complaint, the Complainant made allegations of non-consent and withdrawal of consent, but the panel only focused on the withdrawal. Both issues need to be examined.

Typically, deliberations will benefit from making two separate decisions for most offenses, a finding and then a final determination.

- ***Finding:*** A conclusion by the standard of proof that the conduct did or did not occur as alleged (as in a “finding of fact”).

- ***Final Determination:*** A conclusion by the standard of proof that the alleged conduct did or did not violate policy.

If the Decision-maker(s) find that the conduct did not occur as alleged, then there is no need to make a final determination, because the finding removes the need to continue (this functions as a late stage dismissal, really). If there is a finding that the conduct occurred as alleged, then the next step is to determine if that conduct violates policy. Sometimes the finding and the final determination are one-in-the-same for certain offenses, such as dating violence/domestic violence. Consent-based offenses will require two steps. Did a sexual act occur? If so, was it consensual?

PRECEDENT

The application of precedent is important. It may be that your institution has already dealt with a complaint that is similar to the one at issue, or you may have participated in a decision in a complaint that involved similar allegations. It would not be appropriate to produce widely disparate results for similar complaints absent significant aggravating or mitigating factors. Therefore, it is sound risk management to consult with the Title IX Coordinator regarding previous similar complaints. Of course, Decision-makers may only be privy to limited information based on privacy considerations. But where there is precedent, it is a consideration. Decision-makers need not blindly adhere to precedent if they disagree strongly with the outcome of the precedential complaint. Bad precedent should not be followed. And, they are not required to follow the Coordinator's guidance, and in fact must be independent from it. Coordinators should know to take a light touch, advising without guiding. But, where a previous complaint is similar, well-argued, and soundly decided, Decision-makers should pay it heed depending on the degree of similarity. If Decision-makers depart from precedent, document well not only the reasons for the decision, but the reasons for departing from the previous approach, or line of cases. Precedent operates in the background of decision-making, but its presence should be felt and acknowledged.

Sanctioning

If the Decision-maker(s) determines that the Respondent is responsible for a policy violation, sanctions and/or remedies must be assigned.[80] The Title IX regulations are largely silent on the subject of sanctioning, simply echoing the existing VAWA Section 304 requirement that the

[80] Common student sanctions include a warning, probation, loss of privileges, counseling, no contact restrictions, residence hall relocation, residence hall expulsion, limited access to school/campus, service hours, online education, parental notification, alcohol and drug assessment and counseling, training/education, suspension, and expulsion. Common employee sanctions include a verbal warning, a written warning, probation, performance improvement/management process, training (e.g., sensitivity training or sexual harassment training), counseling, loss of privileges, reduction in pay, loss of annual raise, loss of supervisory or oversight responsibilities, paid or unpaid leave, suspension, tenure revocation, and termination.

written determination provided to the parties includes a statement of, and rationale for, any sanctions imposed on the Respondent.[81]

Variations exist as to how sanctions are assigned. At some schools or institutions, the Decision-maker(s) will determine the sanctions as well as making the final determination. At others, a separate "sanctioning authority or panel" may be involved. Typically, the Title IX Coordinator is not involved in sanctioning, but has a role in overseeing the sanctioning process. The identity of the Respondent as a student or employee will also come into play, as faculty disciplinary processes and collective bargaining processes complicate the sanctioning of employees. When faculty are found responsible, sanctions often must be affirmed by a faculty committee, dean of the faculty, department chair, provost, academic vice president, or the governing board of the institution. Sometimes the Decision-maker will need to collaborate with a dean of students or director of student conduct on student sanctions or submit recommended sanctions for their approval. Whatever the process is, the rationale letter for the final determination and sanctions must be issued at the same time and must include this sign-off, from whomever has the sanctioning authority.

Whomever determines sanctions, it is critical to remember the key tenets of sanctioning.[82] Title IX and case law require that sanctions are designed to:

- **STOP.** Bring an end to the discriminatory conduct.
- **PREVENT.** Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct.
- **REMEDY.** Restore the Complainant (and community) as best you can to their pre-deprivation status.

Sanctions must be proportional to the severity of the violation(s), and, if applicable, the cumulative conduct record of the Respondent. They must align with any progressive discipline principles applicable to employees. Similarly, sanctions must bear a rational relationship to the nature of the misconduct: they can be neither arbitrary nor capricious. They should be designed to stop the misconduct, prevent its recurrence, and remedy its effects. If sanctions don't serve

[81] The written determination must also include whether remedies are being provided to the Complainant that are designed to restore or preserve access to the education program or activity. 34 C.F.R. § 106.45(b)(7)(ii)(E); 34 C.F.R. § 668.46(k)(1).

[82] ATIXA's 2018 Whitepaper, *The ATIXA Guide to Sanctioning Student Sexual Misconduct Violations* contains more detailed information on sanctioning and includes proposed sanctioning ranges for each sexual misconduct offense as well as common mitigating and aggravating circumstances specific to each policy violation. This Whitepaper is helpful, but as of this publication, it has not yet been updated to reflect the offenses as defined by the 2020 Title IX Regulations.

some or all of these purposes, the rational relationship to the underlying misconduct will be in doubt, as will the efficacy and the value of the sanctions themselves.

When considering consistency, the goal is to avoid being gratuitously inconsistent across or within cases. Courts reviewing assigned sanctions will tolerate inconsistency when there is a rational basis for deviating from prior sanctioning practice, or sanctions administered in similar cases, especially when the rationale for determining the sanctions is well-developed in the outcome notification letter. Consistency encompasses the added obligation of equitable sanctioning imposed by Title IX. Typically, sanctions should not vary based on the sex (including sexual orientation) or gender of the Complainant or Respondent. Sanctioning rubrics (which your institution may or may not have) are designed to help improve consistency but need to be flexible enough to allow Decision-makers to depart from the guidelines where there is a compelling justification to do so.

Separate incidents constituting violations of the same policy often arise out of markedly different circumstances, sometimes including various aggravating and/or mitigating factors. These factors may make a particular offense more or less egregious or suggest that a Respondent is more or less of a continuing threat to the institutional community. Accordingly, Decision-makers must carefully consider these circumstances in order to identify and implement the most appropriate, equitable, and effective sanctions.

It is important to note that these considerations are wholly independent from, and should be made subsequent to, the analysis of whether a Respondent is responsible for violating policy. In other words, the fact that a particular instance of misconduct can—based on articulable mitigating factors—be considered relatively less egregious than other instances of the same misconduct, should not impact the determination of whether that behavior more likely than not violated policy. Occasionally, Decision-makers mistakenly use mitigating circumstances as evidentiary support for determining whether a Respondent violated policy, rather than properly applying the standard of evidence, and then considering any relevant mitigating factors during sanctioning.

When a student is found responsible, Decision-makers typically impose a primary sanction (commonly referred to as a status sanction) ranging from probation to suspension, and in some cases, expulsion. Probation and suspension are durational in nature, and can be conditional, while expulsion is permanent.[83] Generally, additional sanctions, often more educational, preventative, and/or rehabilitative in nature, are imposed alongside the primary sanction.

[83] Some community colleges allow re-enrollment after a period of expulsion. Other, typically open-enrollment focused institutions, may also allow an individual to petition for re-enrollment a certain amount of time after being expelled.

When an employee is found responsible, sanctions tend to range from a written reprimand to termination, depending on sanctioning considerations.

SANCTIONING CONSIDERATIONS

Rarely are two incidents identical, thus requiring institutions to tailor sanctions to the context and circumstances of the particular behavior. Proper sanctioning for sex- and gender-based harassment or discrimination violations requires careful review of numerous factors. Some factors are specific to the Respondent, such as a prior history of misconduct, evidence of a pattern of behavior, and/or multiple violations within the same occurrence. Other factors relate to the circumstances surrounding or contributing to the violation, such as the inherent severity of the incident, the intentionality or premeditation of the behavior, and/or whether the conduct involved physical violence or the use of a weapon. Institutions must also assess these considerations in light of the obligation to stop, prevent, and remedy incidents of discrimination and harassment.

MITIGATING, AGGRAVATING AND COMPOUNDING FACTORS

"Mitigating" and/or "aggravating" factors tend to render a violation either more or less egregious than other violations of the same policy. As a result, a one-size-fits-all approach, such as expelling all students who violate a particular policy, can be disproportionately harsh or lenient, is often ineffective at discouraging misconduct, and fails to consider the circumstantial differences that contribute to behavior that violates policy. Instead, each violation should allow for a range of sanctions, where a violation that is more egregious receives more severe sanctions within the allotted range and a less egregious violation results in less severe sanctions within the same range. Even with an established sanctioning range for each violation, certain factors can have a "compounding" effect on sanctioning, in that they render the sanctioning range for a particular violation insufficient to properly address the totality of the circumstances. These factors are often specific to each Respondent, such as a prior conduct history or cumulative violations, and can "bump" the sanction range higher to include more severe sanctions, enhanced sanctions, and/or longer sanctions.

SEVERITY AND EGREGIOUSNESS

Decision-makers will need to evaluate the inherent severity and egregiousness of each violation relative to other instances of the same violation, with a goal of sanctioning a Respondent in proportion to the severity of the conduct.

For instance, in violations involving penetration, it would be reasonable for a Decision-maker to consider an enhanced sanction for a student who deliberately and surreptitiously plied someone with alcohol or drugs, when compared with a situation where the Complainant had

self-incapacitated. Both instances will likely result in a finding of a policy violation, but the first instance is objectively more severe, or egregious, than the second. Similarly, a Respondent's use of force, physical violence, or a weapon to compel a Complainant into engaging in sexual intercourse may be subject to enhanced sanctions as compared to a Respondent who, despite seemingly good intentions, nevertheless fails to obtain clear consent. Similarly, stalking cases often exist on a spectrum, and if institutional policy fails to distinguish stalking that involves threats or menacing conduct from stalking that does not, it is important to consider these variables when considering sanctions. The intent of the party engaged in the stalking behavior can be relevant to sanctioning if it can be determined. For example, imposing harsh sanctions on a student who is on the Autism spectrum, who isn't reading social cues accurately, and who is engaged in what is more likely socially awkward lurking than invasive stalking — with no intent to harm anyone — may be both excessive and ineffective.[84]

CUMULATIVE VIOLATIONS

It is not uncommon for complaints to include more than one potential policy violation. For example, incidents of dating violence can also involve a sexual assault component, and incidents of sexual harassment can include general conduct violations such as threats or drug or alcohol use.

Cumulative violations may also arise when addressing a repeat offender. Examples of these scenarios include the Respondent engaging in:

- Multiple violations of the same policy in a single incident
- Multiple violations of different policies in a single incident
- Multiple violations involving the same Complainant over multiple incidents, either of the same policy or of different policies
- Violations of the same policy involving different Complainants, either in a single incident or over multiple incidents
- Violations of multiple policies involving different Complainants, either in a single incident or over multiple incidents

The key to sanctioning cumulative violations is to sanction per violation. Each violation must first be assessed independently, then considered within the broader context. Cumulative violations should be considered as an aggravating factor, but, depending on the circumstances, they can also constitute a compounding factor, serving to bump the sanctioning range. Other violations are determined "in the alternative" and are not intended to be cumulative and result simply from the fact that multiple policies define the same behavior as violative. Typically, when

[84] The overbroad federal stalking definition can result in technical violations like this. A therapeutic diversionary approach might be better and more effective for all involved in a situation like the example above, but some institutions feel obligated to apply the federal standard as written, no matter how problematic it may be.

a single violation is technically a violation of multiple policies, a single appropriate sanction will suffice.

PRIOR MISCONDUCT

Another common sanctioning consideration is a Respondent's prior conduct history. Although conduct history is usually not considered during the investigation itself or the Decision-making process unless it evidences a pattern of behavior, prior conduct history is highly relevant to the sanctioning phase. This history serves as both an aggravating and compounding factor that may bump the sanctioning range. The magnitude of the bump will depend on the extent and composition of the conduct history. A shorter/minor conduct history should have only a minor effect, if any at all in some cases, but a longer/more serious conduct history can result in a more pronounced bump to the sanctioning range. Decision-makers must also consider whether the prior conduct violation(s) involved behaviors that are directly related to the present violation(s). If so, this can indicate a possible pattern of behavior. The existence of related, prior misconduct may also suggest a Respondent's proclivity for engaging in sex- or gender-based misconduct. Either should engender a more substantial bump to the sanctioning range than prior, unrelated misconduct. It is usually the responsibility of the Title IX Coordinator and/or sanctioning authority to ensure that Decision-makers are supplied with any applicable prior conduct history, at the appropriate time (usually after the final determination, but before sanctions are finalized).

PATTERNS OF BEHAVIOR

When a Respondent's prior conduct history shows a pattern of behavior where the Respondent was previously found responsible sex- or gender-based misconduct, this pattern is an aggravating and compounding factor that serves to bump the sanctioning range. When the behaviors appear to be escalating in severity over time or with each subsequent offense, that escalation constitutes an even greater aggravating factor and should bump the sanctioning range commensurately. However, a significant number of reported incidents of sexual harassment do not proceed through a formal investigation and resolution process, often at the request of the Complainant. Thus, these reports do not result in findings and do not exist in a Respondent's prior conduct history. During the Obama administration, OCR noted that when good-faith reports of alleged sex- or gender-based misconduct indicate a possible pattern of behavior, these reports should be considered an aggravating factor. At the time of publication, OCR's position on this matter is unclear. Courts weigh in on this issue from time to time, and seem to abide by a tighter framework, acknowledging a pattern only when there are previous findings of substantially similar offenses. Enhancing the sanction within the range for previous allegations (not findings) is a debatable practice best resolved in consultation with legal counsel, as factors like private/public status and state law come into play.

COMPLAINANT'S REQUEST FOR ENHANCED/LESSER SANCTIONS

At some point during the process, a Complainant may ask for a particular sanctioning outcome ranging from, "I don't want them to get kicked out of school," to "I never want to see them on campus again." While the Complainant's wishes are in no way dispositive in terms of sanctioning, they should also not be wholly disregarded. Instead, they may be considered along with the other relevant circumstances and factors to ensure a proportionate response that is able to stop, prevent, and remedy.

RESPONDENT'S ATTITUDE

A Respondent's attitude regarding a violation can also be considered as either a mitigating or aggravating factor. However, be careful not to confuse Respondents' rights to defend themselves with a brazen refusal to acknowledge and take responsibility for a clear policy violation. When the weight of the evidence lands just above a preponderance, a Respondent's refusal to take responsibility should likely not be considered an aggravating factor. On the other hand, a Respondent's lack of contrition when their act of physical violence was captured by surveillance cameras can be an aggravating factor. If two Respondents are engaged in exactly the same misconduct, but one refused to accept any responsibility while the other owned their misconduct and was completely contrite and sincere, Decision-makers could reasonably assign sanctions at the top and bottom of the sanction range, respectively, even if the underlying misconduct was identical. Where the standard of evidence is clear and convincing evidence, that may impact on the imposition of sanctions, accordingly. For example, if a violation is found, it will often be on the basis of more evidence, or more solid evidence than a finding on the basis of a preponderance of the evidence, and thus may justify sanctions at the higher end of an applicable range.

CONDITIONS FOR A STUDENT'S RETURN

Suspension can be a highly effective disciplinary tool, in that it is stringent, but impermanent. Respondents feel the gravity of their misconduct, but suspension is a sanction from which they can recover. If a Respondent's misconduct merits a suspension, institutions should try to take steps to prevent recurrence once that Respondent returns to the institution by levying "conditions for return" which the Respondent must complete either prior to re-enrollment or within a specified timeframe after they return. Failure to do so will result in denial of reenrollment/employment or trigger a "Failure to Comply" violation, which might extend the suspension for an additional period of time or until the conditions are satisfied. Examples of these types of conditions include required counseling assessment, completion of service hours, completion of prevention training, completion of drug/alcohol or psychoeducational courses, pre-readmission interview, violence risk assessment by a BIT, and/or completion of a sexual harassment/sensitivity training.

"CLOSE CALLS"

Decision-makers often find it difficult to truly detach the findings from the sanctions. This manifests most commonly when Decision-makers have rightfully determined by the standard of evidence that a violation occurred but feel like the finding was a "close call". In these cases, Decision-makers tend to, even subconsciously, assign sanctions somewhere on the lower end of the sanctioning range. With this practice, Decision-makers essentially treat their lack of confidence in the decision or their lack of overwhelming evidence as a mitigating factor for the purpose of sanctioning. In fact, comingling a policy violation finding with consideration of the appropriate sanctions is discouraged, and doing so can actually undermine both analyses.

When a Respondent has been found responsible, the parties often are given an opportunity to provide or read impact statements, which may be an additional consideration when determining sanctions. An impact statement is an opportunity for the participants to give the Decision-makers some insight into how the incident in question (and/or the resolution process) has affected their lives. Much of the evidence at the hearing will concern the complaint, rather than giving a more global account of how the participants have been changed by the incident(s). Making an impact statement allows the participants to address these issues, which might not otherwise be strictly relevant. It may be advantageous to limit the impact statements to a reasonable amount of time, though many are submitted in writing rather than being delivered verbally. Try not to allow participants to bring otherwise prejudicially inadmissible evidence to the attention of the Decision-maker(s) through the vehicle of the impact statement. You may need to warn a party or cut off a statement in order to prevent the abuse of this privilege.

Writing Decisions/Rationales

Writing a rationale that connects the sanctions to the policy violation(s) takes skill and practice. The written rationale issued by the Decision-maker(s) must connect the sanctions to the misconduct. It will take time and attention to get this right.

After the hearing and deliberation phases, the Decision-maker(s) or Chair must issue a written determination regarding responsibility that is provided to the parties.[85] The Title IX regulations specify that the Decision-maker, not the Title IX Coordinator, who writes this rationale, though it is part of a larger notification of outcome letter that is sent by the Coordinator.[86] If you are a sole Decision-maker, it will fall to you to construct the written determination. If there is a hearing panel, the panel will need to decide who has the primary responsibility for drafting the written determination and for asking the other Decision-makers for their feedback or approval. It will often be the Chair who takes on the drafting, but it need not be. ATIXA does not recommend

[85] 34 C.F.R. § 106.45(b)(7).
[86] 34 C.F.R. § 106.45(b)(7)(i).

that the writing be divided up, however, as it often fails to convey one clear voice. For very simple allegations, 1-2 pages will suffice. Most complaints require 3-5+ pages, but we have seen outcome rationales that go to 12-15 pages for complex complaints, especially with multiple Complainants and/or Respondents. Make sure to write a rationale for the finding, the final determination, and for sanctions (including an explanation of why some sanctions were not considered or were determined to not be appropriate).

The Title IX regulations require that written determinations of responsibility must be shared simultaneously with the parties and must provide specific information about the decisions made and the rationales supporting them.[87] The regulations expand on what was already required of higher education institutions under the Clery Act; however, the requirement now extends to all Title IX complaints, including sexual harassment, and expands the requirement to K-12.[88] Using the applicable standard of evidence, the Decision-maker must issue a written determination regarding responsibility for *each* section of the policy alleged to have been violated.[89] The written document must include several specific items:[90]

- The section(s) of the policy alleged to have been violated
- A description of all procedural steps taken from the receipt of the complaint through the determination, including any notifications made to the parties; interviews with parties and witnesses; site visits; other methods of gathering evidence; and the date(s), times, and locations of hearings held
- Specific descriptions of all "findings of fact" that support the determination
- Conclusions regarding the application of the "findings of fact" to the alleged violation(s)
- A statement and rationale with respect to each allegation, including a determination regarding responsibility, what sanctions apply to the Respondent, and whether remedies are being provided to the Complainant designed to restore or preserve access to the educational program or activity
- Procedures for any available appeal, including the bases upon which the parties may appeal

Some of the items above will need to come from the Coordinator, but others can be pulled from the investigation report and/or the NOIA. The Title IX Coordinator may provide the Decision-maker or Chair with a (sometimes partially completed?) template for the written determination, but drafting, revising, proofreading, and finalizing the letters will likely be a somewhat time-intensive process. Plan accordingly.

[87] 34 C.F.R. § 106.45(b)(7)(ii); § 106.45(b)(7)(iii).
[88] 34 C.F.R. § 668.46(k)(2)(v).
[89] 34 C.F.R. § 106.45(b)(7)(ii)(E).
[90] 34 C.F.R. § 106.45(b)(7)(ii).

It will take time to thoughtfully craft an explanation, supported by citations to specific evidence reviewed in the hearing, for why each determination was made. Connecting the allegations to a determination of whether policy was violated, and effectively documenting that connection, takes time and practice, and allowing sufficient time is important. There should be no dissenting opinions included in rationales. This is not court. Ensure that the rationale is detailed as to what evidence the Decision-maker(s) relied upon to reach the finding/final determination, and also what evidence was not relied upon, because it was not relevant, was not credible, was barred by the regulations, etc. Please find a sample rationale in Appendix F.

Decision-makers or Chairs should expect that Title IX Coordinators and/or legal counsel will want to review rationales and offer feedback. Feedback is welcome (preferably without a paper trail), redlining less so. While Title IX Coordinators and/or legal counsel should know to take a light touch so as not to interfere with Decision-maker independence, that is likely honored more in the breach than actually practiced. Make sure that the Decision-maker's words and thoughts are still represented even after the editing. If there are substantive changes suggested, and Decision-maker agrees to incorporate them, it will be necessary to re-circulate those changes to any other panelists to ensure that they are still comfortable with issuing the rationale as their work product.

When and How to Provide Notification to the Parties

Under the Title IX regulations, the written determination must be made simultaneously to all parties, which remains consistent with VAWA Section 304.[91] "Simultaneous notification" was previously understood to mean notification made without substantial delays between notifications, but it remains to be seen how literal OCR will interpret "simultaneous notification" under the Title IX regulations. Literal simultaneous notification can practically be achieved in several ways, and institutions will want to strategize about how to do so effectively. Options include:

- A Decision-maker or Title IX Coordinator announces the decision to the parties in person, while sharing the written determination at the same time or later.
- A Decision-maker or Title IX Coordinator shares the decision with the parties telephonically at the same time, while sharing the written determination as an electronic communication at the same time or later.
- Separate but coincidental notifications are made – to each party – perhaps by different members of a same hearing panel or by staff members in the Title IX office.

[91] 34 C.F.R. § 106.45(b)(7)(iii); 34 C.F.R. § 668.46 (k)(2)(v).

Even though hearings are optional for most K-12 schools (depending on state law), written determinations are required in K-12 settings, too.[92] Although school administrators are already accustomed to documenting discipline outcomes, this degree of specificity will require more detail both in terms of the written determination, as well as the investigation materials that undergird a rationale. This shift will require specific training for K-12 administrators.

Additionally, the requirement that the written determination be given to *all* parties, including the *outcome* of the complaint (including the sanctions, if any) will be a radical departure from current practices in most K-12 settings. The letters can vary slightly between the version sent to the Complainant versus the Respondent, as necessary, but should not deviate gratuitously. So, for example, in a letter of outcome to the Complainant if there are multiple Respondents, you might include the finding with respect to all Respondents, but the letters to the Respondents will only include the finding with respect to each individual Respondent, not all. Or there may be remedies or other responsive actions that are not shared with a party based on privacy protections.[93]

Other Considerations for Conducting Hearings: Working with Special Populations

WORKING WITH INDIVIDUALS WITH DISABILITIES, INCLUDING MENTAL HEALTH CONCERNS

Decision-makers will encounter parties and witnesses who may self-identify as disabled.[94] Decision-makers will encounter parties and witnesses who require or request some sort of accommodation to effectively participate in a hearing, or who do not, but raise the failure to accommodate as an issue in the appeal. Decision-makers may also confront parties who claim that an underlying disability, including perhaps a mental health condition, may have had a role in the underlying conduct constituting the allegations, and/or that their disability is a mitigating factor in how Decision-makers should think about their circumstances. Decision-makers will have to work through these issues carefully.

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[92] 34 C.F.R. § 106.45(b)(7).

[93] Consult with legal counsel regarding what information should be included in hearing outcome letters to ensure the parties have the necessary information to request an appeal if desired without also violating individual privacy protections.

[94] Data suggest that sexual assault is more prevalent among college students who self-identify as having a disability. Students with disabilities were victims of sexual assault on campus more often than students without disabilities. *See* AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct, Jan. 17, 2020. *See also* National Council on Disability Not on the Radar: Sexual Assault of College Students with Disabilities, Jan. 30, 2018.

Decision-makers need remember that the institution has a process for providing reasonable accommodations to students and employees with disabilities under the Americans with Disabilities Act and related federal, state, and local laws. Decision-makers are not authorized to approve accommodations and should not provide them without going through the appropriate procedures. When accommodations are authorized, the Decision-maker should help to ensure they are provided to parties, witnesses, panelists, Advisors, etc. The Title IX office will likely make it very clear to participants how they can request accommodations, but it can't hurt for Decision-makers to reiterate that offer in pre-hearing meetings.

In higher education settings, the responsibility lies with the student or employee to self-identify confidentially, of course, to whatever office authorizes accessibility services.[95] The student or employee typically provides documentation of their underlying disability, which is reviewed by that office first to determine whether the individual qualifies for accommodations. If so, that office assesses the necessity and appropriateness of accommodations required to ensure equitable education access. Some common accommodations in academic and employment settings could conceivably be applicable in hearing settings, such as interpreters, additional time to review materials prior to a hearing, and the ability to do so in a distraction-free setting.

Disability law is clear, however, that the institution's conduct expectations are "necessary nonacademic technical standards" toward a student earning their degree.[96] In other words, reasonable accommodations never require modification or excusing of conduct standards. Decision-makers must always remember to "stay in their lane" and recall that their role is to make factual findings surrounding allegations and to determine whether a Respondent violated policy, and if so, determine what is an appropriate outcome or remedy. Decision-makers should not be grappling with whether a student is disabled, whether the conduct is caused by a disability, or whether accommodations were implemented properly at some other point in the process. If a Respondent places their disability "at issue," the proper time to consider the impact of a disability on a Respondent's conduct is at sanctioning. A disability could be a mitigating factor to consider, but don't jump to that conclusion too readily.

WORKING WITH INTERNATIONAL STUDENTS AND EMPLOYEES

Decision-makers may encounter international students or employees in hearings, as well. Obviously cultural differences may affect their ability to understand or meet behavioral conduct expectations. Language barriers may create misunderstandings and exacerbate communication issues. Such increasingly common challenges necessitate recruiting Decision-makers who demonstrate a high degree of cultural competence and who understand that

[95] Note that the onus on the student or employee to self-identify is different than in K-12 settings, where schools have a legal obligation to identify students who require special education services and support.
[96] 42 U.S.C. § 12131(2).

community norms must be enforced regardless of an individual's culture or upbringing. We can respect that culture while insisting that Respondents conform to our norms. Decision-makers will want to elicit information about cultural norms for international Respondents and Complainants and also gather information about their understanding of community expectations for the institution. These issues may, in rare cases, serve as mitigating or aggravating factors for sanctioning.

Additional specific concerns for international students and employees may emerge for Decision-makers regarding whether disciplinary consequences will affect an individual's visa status, and therefore their lawful presence in the United States. Although it is impossible (and unwise) to offer a global answer to this question, know that many students and employees on institution-sponsored visas (typically F-1 or J-1 student visas or J-1 or H1-B employee visas) may face severe immigration consequences if they are suspended, dismissed, expelled, or their employment is terminated in a disciplinary proceeding. The institution will be required to report the change of status to federal immigration authorities, who typically require the individual to leave the United States immediately. Typically, participation in an internal appeal process will have the effect of postponing a change to a visa status.

RACE AND OTHER IDENTITY CHARACTERISTICS

Finally, be mindful that in American society people of color are disproportionately impacted by institutional disciplinary systems. To the extent that decisions are influenced by race, rather than conduct, we must all strive to eradicate the biases that can lead to such unfair outcomes. A Respondent is not more or less likely to have violated policy based on the color of their skin. A Complainant is not more likely to have been victimized if their skin color is different than that of the person whom they have accused. Our systems of resolution will stand for integrity when they are do not allow race to improperly influence evidence, and Decision-makers are the guardians of that integrity. The same can and should be said for LGBTQIAA2SP+ members of our communities. They deserve the protections of a fair process, and to not worry that their orientation, identity, and/or expression will discriminatorily influence how they are treated as a party or witness in the institutional Title IX resolution process.

Appeals

After the written hearing determination is issued and relayed to the parties, the parties have a right to appeal the decision, in whole or in part.

As a Decision-maker, it is unlikely you will have an active role in reviewing any submitted appeals, because the Title IX regulations specify that the Appeal Decision-maker may not be the

same person as any Investigator or Decision-maker involved in the original decision.[97] Some institutions will use a common pool of faculty and staff as Appeal Decision-makers, and those individuals may call on hearing Decision-makers with questions about the appeal. Typically, those exchanges occur in writing. While hearing Decision-makers will want to defend their process and their decisions, anyone is capable of making a mistake. Hearing Decision-makers need to be open to the fact that the appeal process is a check-and-balance to guard against errors, and to correct them to ensure fairness.

This "distance between" the hearing Decision-maker and the Appeal Decision-maker emphasizes how crucial it is to thoroughly document the hearing procedure and the rationale that supported the decision. Where a mistake has been made, the appeal process affords an opportunity for correction that is far cheaper and less time consuming than a lawsuit. That said, hearing Decision-makers often dedicate significant time and attention to the hearing and decision-making process, take pride in their decision, and can be frustrated by a reversal or remand on appeal. Ensuring that Decision-makers have adequately documented the procedure they followed and the rationale that underlies the decision helps to ensure that the appeal Decision-maker understands the decision that was made and why it was made. Hopefully, they'll uphold it. If not, Decision-makers need to learn from reversals to ensure they happen less often.

Parties who desire an appeal must typically articulate one or multiple narrow bases for an appeal defined in policy. Appeal grounds required by the Title IX regulations include:[98]

- Procedural irregularity that affected the outcome of the matter
  New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator, Investigator(s), or Decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter

Appeals should be submitted in writing within a specified time period, often between three and seven days of being notified of the hearing decision. All parties are permitted to offer information in writing to the Appeal Decision-maker to consider regarding the appeal. Typically, institutional policy will require that Appeal Decision-makers to be deferential to the original decision, making changes on the findings and decision of responsibility only when there is a clear error, and/or making changes to the sanctions/remedies only if there is a compelling reason to do so. When appeals uncover procedural errors or new evidence, the Appeal Decision-

[97] 34 C.F.R. § 106.45(b)(8)(iii)(B).
[98] 34 C.F.R. § 106.45(b)(8)(i).

maker may consider whether to remand the matter to the original Investigator(s) or hearing Decision-maker(s) for reconsideration or even re-hearing. They will usually provide specific instructions for how to cure any deficiencies in the process.

A Decision-maker could be asked to participate in the appeal process for a complaint they heard by providing any or all of the following kinds of information:

- What information the Decision-maker or panel considered in making its decision
- What information the Decision-maker or panel excluded, and the rationale for doing so
- How information was analyzed and considered
- What rationale supported the decision or decisions
- The reasons behind any deviations from procedure and how those deviations were communicated to the parties
- Responses to assertions of bias

Appeals must result in a written decision describing the result of the appeal and the rationale supporting it, and the parties must receive the written decision simultaneously.[99]

Conclusion

Decision-makers have embarked on an important task. Institutions literally could not comply with the regulations without talented, wise, analytical people to serve in the Decision-making role. Keep a few key precepts in mind:

- Treat all participants with equal dignity, care, and respect
- Follow all policies and procedures, and clarify them when unclear
- Remain unbiased, impartial, objective, and free of conflicts of interest
- Do what's fair under the circumstances
- Remember your training, stay committed to professional development, and get involved in ATIXA

We have confidence that Decision-makers who study this Manual diligently will emerge as Decision-makers who are capable of fair and well-reasoned decisions. If you want to go beyond the skills outlined in this Manual, ATIXA offers fantastic training and certification opportunities for Decision-makers. We also serve as external Decision-makers should you have a temporary vacancy. Our courses include:

- ATIXA Hearing Officer and Decision-maker Certification
- ATIXA Mock Hearing Certification Experience

[99] 34 C.F.R. § 106.45(b)(8)(iii).

- ATIXA Rationale Writing Workshop
- ATIXA Coordinator Level Five: Bias and Cultural Competencies

More details can be found at www.atixa.org

APPENDIX A

SYSTEM DESIGN CONSIDERATIONS: SHOULD WE USE A SINGLE DECISION-MAKER OR A PANEL?

A key question for institutions is how best to structure and staff this new hearing model. The Title IX regulations require that the Decision-maker not be the same person as the Title IX Coordinator or the Investigator(s).[100] Very small or resource-constrained institutions will face specific challenges to not only change their model to incorporate live hearings, but they may also need to identify new individuals to participate in these processes, especially if the Title IX Coordinator is currently conducting investigations and participating in the adjudication process in some fashion.

Remember that the Decision-maker may be a single person, often dubbed a "hearing administrator," or be a panel of individuals. A panel may include as few as two people, with no upward limit of the number of members. When considering the options that your institution has for staffing hearings, consider the full slate of duties that accompany administering a hearing, including the following:

- Greeting everyone
- Managing logistical considerations including providing a waiting area or multiple waiting areas for participants as needed and limiting discussions/interaction between participants
- Answering questions about the procedure
- Managing materials, including providing parties with access to evidence and making copies
- Running the proceedings, including videoconferencing technology and/or audio recording functions
- Managing Advisors as necessary
- Making sure the parties can hear AND see each other, as required by the regulations
- Ensuring notetaking, recording, and documentation of the hearing
- Ensuring institutional procedures are substantively and materially followed
- Managing breaks
- Ensuring the parties are able to ask all relevant and appropriate questions
- Ensuring the parties and witnesses apply appropriate policies and definitions in questioning
- Facilitating questioning between the parties
- Determining the relevance and appropriateness of questions

[100] 34 C.F.R. § 106.45(b)(7).

- Documenting the rationale for any excluded questions
- Maintaining the professionalism of the hearing
- Addressing and making findings for each alleged policy violation individually
- Drafting a rationale for the decision
- Sharing the written decision to the parties simultaneously

Whether an institution opts for a single Decision-maker, a panel of three (a pretty standard format and ATIXA's recommendation), or a larger panel, there are benefits and drawbacks to any arrangement. For example, a single Decision-maker may have an easier time with scheduling the hearing because there are fewer calendars to coordinate. In addition, when the hearing has concluded and deliberations begin, a single Decision-maker retains autonomy to make a determination on their own, without needing to build consensus.

However, solo Decision-makers may struggle with simultaneously listening, answering questions, overseeing the process, and addressing disruptions. Comparatively, a panel is able to divide labor. Furthermore, a panel permits for collaborative and participatory discussions at the deliberation phase, which can be beneficial in making a reliable determination. Also, having a panel, including a cadre of possible Decision-makers, provides flexibility should an absence occur or a conflict of interest require someone's recusal. However, scheduling a panel is undoubtedly more complicated and results in delays, may distract more employees from their regular duties, and may necessitate the Chair of the panel to manage conflicts or disagreements among Decision-makers.

The size and culture of a particular institution may further impact options for structure, along with the number of hearings likely to be held and the general ages of the population. For institutions that use a single Decision-maker, having administrative support available can ensure that the process runs smoothly. Regardless of which format an institution chooses, it may be helpful to create a checklist of tasks to review prior to each hearing to ensure that they are all covered. If a panel is chosen, it is important to appoint a Chair. Institutions will also find it essential to assign all evidentiary admissibility issues to the Chair, rather than trying to have the entire panel referee such questions.

Who serves as a Decision-maker varies among institutions, and the Title IX regulations are silent on who should serve in these roles. This allows institutions significant discretion in appointing Decision-makers. Many institutions use volunteer faculty and staff members to serve as Decision-makers. Some provide stipends or other recognition for doing so. Faculty and staff often are familiar with institutional policy and procedure, are (hopefully) accustomed to interacting with others with professionalism, and are familiar with the physical logistics, dynamics, and customs of the institution and its population. Additionally, institutional administrators often are supportive of the role faculty and staff play in hearings, adjusting work schedules and obligations as needed.

Some institutions are moving toward employing a full-time, dedicated professional Decision-makers, recognizing that hearings will become more frequent, and that consistency in decision-making is vital. This helps to ensure the Decision-makers are experienced and well-trained. Faculty members as hearing Decision-makers are a mixed bag, in our experience. Their analytical and critical thinking acuity can be a benefit, but they often lack sufficient time for training, and their independence can occasionally mean that they don't apply the lessons of the training they have received. Some have a due process agenda and others have a social justice agenda. While those with such agendas might not be disqualified from a panel (they would be questionable as a solo Decision-maker), they certainly need to be balanced on a panel. Also, if your data show that faculty presence on panels might serve as a disincentive for students to report offenses, you should take this into careful consideration. Plenty of institutional climate surveys have revealed this potential impediment because of concerns related to confidentiality and future interactions. Overall, whether faculty serve on a panel or not, care should be taken to try to balance panel composition with respect to gender, race, politics, etc., so that the result is objective and neutral decision-making.

Although institutions generally do not permit students to serve as a sole Decision-maker or as the Chair of a hearing panel, some do include students as members of hearing panels at the college or university level, particularly when the case involves students as the parties. Some institutions report that students are best able to question other students and are most familiar with the attitudes and practices of their contemporaries, particularly around drug and alcohol use and sexual behavior. Generally, however, including students on hearing panels is not considered to be a best practice, largely due to possible concerns about confidentiality and privacy of the hearing participants. Multi-million-dollar litigation can result from these hearings. Some deliberate thought should go into whether you want students, or undertrained staff, or amateurs of any kind, or people with strong loyalties to the institution, etc. on your panels versus using trained, experienced professionals, sourced either internally or externally.

External Decision-makers can be a valuable and flexible option for some institutions, either in routine application or on an as-needed basis (often as Chair), such as when a complaint involves a high-level administrator, a hot-button topic, or dynamics that may prove challenging for internal adjudicators. The costs associated with engaging an external Decision-maker can be a deterrent, although proficiency and reliability may offset those costs in certain cases. Often, the internal options are either proficient at hearing mechanics and management or subject matter expertise, but rarely both. External professionals who are engaged should be expected to bring both skill sets to the role.

APPENDIX B

TRAINING DECISION-MAKERS

The most important consideration in staffing hearings may be to assure that the Decision-makers understand their responsibilities, have been appropriately and thoroughly trained, can demonstrate competence in the skills needed to ensure a reliable result, and are committed to upholding the integrity of the process. ATIXA experts commonly say that the most important component of building a hearing model is training. The decision about whether to use a single Decision-maker or a panel, as well as deciding how many Decision-makers and who fills those roles may very well turn on your institution's ability to effectively train your intended Decision-makers. The effectiveness of hearings depends on the competence of the participants, and competence relies in large part on training. *See Appendix A for a discussion of single vs. panel Decision-makers.*

Training Decision-makers is typically best accomplished at the end of the spring term or during the summer, in order to be prepared for cases that could occur shortly after orientation and fall opening. A number of institutions use ongoing training models, which can also be very effective, and allow for timely updates as new guidance or court decisions are issued. Consider, too, whether Decision-makers who are prepared to hear complaints may be needed during the summer for complaints arising from orientation programming or summer courses. Summer is also a good time, if it is practical, for a Decision-maker pool to meet for training, because it may be easier to schedule large blocks of time during summer terms rather than during traditional academic terms. As a less-than-ideal but viable alternative, training can be planned for a period just before or just after the fall term begins, with perhaps a booster training in early spring to refresh and expand on initial training content.

Many institutions train with videos, in-house seminars, and/or professional trainers. Some train intensively for a few days, other spread sessions out over weeks or months. With any of these permutations, the key to successful training is to prepare Decision-makers thoroughly and rigorously, to work toward the attainment of specific learning outcomes, and to have some process to assess the success of the training process. Continuity and contiguity of training sessions is important to the degree of success of the training. As with any skill, competence and excellence come with concentration; sporadic trainings may not be sufficient for adequate skill-building and procedural familiarity. Remember, too, that Appeal Decision-makers also require sufficient training.

An excellent training program will build the skills discussed in detail throughout this Manual. A first step is to help Decision-makers gain familiarity with the theory that underlies each topic, so that they cognitively grasp each concept. Cognitive understanding is best followed with

opportunities to practice applying concepts. Scenario vignettes and case studies can offer tests of procedural rules and decisions that Decision-makers will need to make, such as the admissibility of evidence. Case studies should progressively increase in difficulty and offer curveballs to keep trainees on their toes.

Once Decision-makers show competence with individual technical issues of hearings, consider offering more holistic scenarios to build case analysis skills. These scenarios should cause participants to grapple with the definitions in your institutional policy, apply facts to the policy elements, assess witness testimony and credibility, analyze evidence, practice questioning skills, rehearse deliberation and consensus building, and ensure bias reduction. More advanced trainings can focus on problem-solving and the unique challenges of especially complex cases.

Finally, consider concluding your training with a mock hearing in its entirety. Although mock hearings take substantial time and energy to organize and conduct, they are incredibly important to helping Decision-makers translate learning to practice so that they feel prepared and competent to take on their first actual hearing. Occasional follow-up and refresher sessions throughout the year should be used to keep the Decision-maker pool current and up on the latest developments in the field and/or in litigation.

APPENDIX C

ROOM SELECTION AND LOGISTICS FOR AN IN-PERSON HEARING

Room logistics and considerations are particularly important to enhance the sensitivity and comfort of what can feel like an adversarial proceeding. Hearings are typically held in campus conference rooms, but large offices or small classrooms could be appropriate if they are sufficiently private. Be sure that you pick a room that is large enough to hold all Decision-makers, parties, and Advisors comfortably, as well as any other individuals who will be present for all or part of the hearing, such as the Title IX Coordinator or witnesses. This will help you to keep the "sides" a reasonable and humane distance from each other. A room that is too large, however, will run the risk of seeming needlessly cold and sterile, or may create audio/auditory/recording issues. Consider the comfort of the furniture in the space, especially if any hearing participants may need larger, sturdier, or armless seats to support their personal needs. Ensuring there is a working clock visible to Decision-makers and participants will also help limit the need to check cell phones during the proceeding.

If the parties are comfortable being in the same room together, consider how to organize the room to minimize the proximity and contact among parties (separate entrances can be helpful). If no-contact orders are in place, typically those terms must still be respected in the hearing. Consider some of the space considerations surrounding your location choice, too. Is it in a relatively private place on campus or will it be readily apparent to other individuals who pass by what is going on inside? Consider, too, whether there any institutional events coinciding nearby that will provide inappropriate distractions during the hearing that might merit consideration in your site selection (e.g., marching band practice, weekly step show on the quad, etc.). Consider any accessibility concerns for parties, Decision-makers, or other individuals. Can you work the flow so that during breaks or room switches, the parties do not pass each other closely when coming or going? Have you made the same considerations for their separate entry and exit from the building, and those of parents/guardians? Even timing the use of restrooms and traversing hallways can be sequenced to avoid contact.

You'll need to consider more than just the hearing room itself. Are there nearby private rooms for parties to meet with their Advisors during break periods? What about places for non-Advisor individuals who wish to be nearby, such as a party's parent or guardian? And there should be rooms for each witness to be able to wait until it is their turn to participate.

Considering the layout of the rooms in advance helps to ensure that the parties have the ability to confer privately with their Advisors during the hearing, helps to ensure comfort for all participants, and anticipates the need to minimize the potential for antagonistic confrontations. Will you need to have food delivered or available, and if so, is there an adjacent

area for managing food delivery and set-up? If not, during the prehearing meeting the Chair can encourage the parties to plan to bring their own snacks and beverages, if they will want them. Sometimes, hearings can run for many hours, and it will be vital for all participants to have access to refreshments, tissues, personal items, etc.

Your space should have restrooms nearby, in sufficient number and privacy, including ideally a restroom designated as all-gender. Over time, you will get a feeling for which administrative buildings at your institution are good choices for hearings. No space is perfect, but room/venue choice can greatly impact the success of your hearings.

Anticipate that regardless of what space you use, you will want to build a "checklist" of standard items to have available at each hearing. Be sure to have water (at least for your panel) and tissues available for the parties. Have a white/noise sound machine, too, if you need to ensure that no individuals outside of the hearing room can hear what is occurring inside. Consider what access you might need to administrative services/equipment during the course of the hearing. Do you have ready access to a printer and copier? Telephones if needed? What about any technology needs within the hearing, such as needing to play or show any video or audio media? If you're the Decision-maker or Chair, how will you contact legal counsel during the hearing, if needed?

Thinking through these types of logistical questions before the hearing begins will often help make the entire hearing run more smoothly and will give the hearing participants greater confidence in the institution's ability to manage a well-run process.

APPENDIX D

SAMPLE PANEL HEARING SCRIPT

Hearing Logistics (for virtual hearings)

Before we begin with the formal part of the hearing and facilitate introductions, I would like to review a few details of the [videoconferencing platform] tools we will use today. As legally required for these proceedings, we expect that all participants will keep their video on for the duration of the hearing. If you do not wish to see other participants, you are not required to watch the images. [You may choose to pin specific individuals so that you see one person; you might want to use a post-it-note to cover the image of the person or persons you do not wish to see; or you may choose to minimize the screen so you are not able to view the videos. Some individuals also find viewing themselves distracting, and you have the option to select "Hide Self View" by clicking the three dots in the upper right-hand corner of the box where you see yourself if you would like to do so.]

Once the formal hearing begins, we will be recording the proceedings as required by law and [College/University] policy.

If you are not speaking, please keep your microphone muted. [At the top right of your video window you should see a blue mute/unmute button. When muted you will see your microphone appear in red on the lower left of your video screen. If you selected to hide your self-view, you may also mute and unmute yourself by clicking on the microphone icon at the lower left corner of your screen.]

We encourage you to use a platform other than the [videoconferencing platform] chat for communication between the Parties and their Advisors. [If you need a moment with each other to make these arrangements, please let us know now and we can put you into a private [videoconferencing platform] Room while you work that out. Some options might include text messaging, phone calls, or another online platform such as [Microsoft Teams or Google Chat]. Do any of you need a moment to work out the logistics?] *Wait for responses*

I ask you to be mindful of your visual and audio background and the impact it could have on those in attendance.
[We are currently in a breakout room. If you need to leave this room for any reason, [Hearing Facilitator Full Name] is going to be in the main room and can offer any assistance you might need including getting you assigned to a private room for a party and/or their advisor(s), if necessary. Just let them know what your needs are. If for any reason you lose connection, when you log back in, you will return to the main room and they will ensure you get back to the correct

breakout room for the hearing. If you are unable to log back in, please call [Administrator Full Name] at [Phone] for assistance.]

Chairperson Introductory Statement

Good [morning/afternoon]. Today is [Date]. This is a formal hearing before the [Recipient] [Hearing Body]. My name is [Chairperson Full Name], and I serve as today's hearing chairperson. The [Hearing Body] has been convened for the purpose of hearing information regarding a complaint involving Respondent [Respondent's Full Name], who has been charged with allegedly violating the [College/University]'s [Policy]. This hearing is designed to allow all relevant information to come forward to the [Hearing Body] before determining whether [College/University] policy has been violated. All [Hearing Body] members have reviewed the investigation report and all associated materials prior to the beginning of today's hearing.

At this time, I would like the members of the [Hearing Body] and all other participants in the hearing to introduce themselves and their role for recording purposes.

My name is [Chairperson's Full Name] and I am serving as the Chair of this hearing.

I will now ask my fellow [Hearing Body] members to introduce themselves.

I will ask the remaining participants to introduce themselves in the following order:
[Hearing Facilitator]
Complainant
Complainant's Advisor
Respondent
Respondent's Advisor
Investigator(s)
[Title IX Coordinator]
[Legal Counsel]

Acknowledgement of Recording & Confidentiality Expectations

The [Hearing Body] members, the Respondent, the Complainant, their Advisors, the Investigator(s), and all others present are reminded that the [College/University] maintains the confidentiality of this hearing. This hearing is being recorded. This recording will be the only official record of the live hearing.

This recording is the property of the [Recipient] and will be maintained in compliance with federal and state law and the [College/University] records retention policy. After this matter concludes, any party wishing to review this recording should submit a written request to the

[Title IX Coordinator or Administrator]. The [Title IX Coordinator or Administrator] has the authority to grant that request as permitted by law.

There are to be no recordings made other than the official recording made by the institution. I ask that each participant please affirm for me that you are not making a separate recording of this meeting [, and that no unauthorized persons are present with you or able to see/hear this hearing]. [*Obtain an audible confirmation from everyone before proceeding.*] All personally identifiable information of students on this recording is protected under the Family Educational Rights and Privacy Act as part of their education record.

Hearing Procedures

This is an administrative hearing and not a court of law. Our goal is to ensure that all parties have a fair opportunity to have their information presented. As Chair, I am here to facilitate this process and serve as a voting member of this [Hearing Body]. I reserve the right postpone this hearing and/or dismiss anyone from this hearing who is disruptive, noncooperative, uncivil, or behaves in manner that interferes with the [Hearing Body]'s ability to hear and make a decision regarding this complaint. Please do not interrupt those trying to speak. If you have a question, wait for an appropriate pause and then ask for any clarification you need.

The Investigator is present to provide an overview of the investigation and respond to questions from the [Hearing Body] and parties regarding any evidence, information, or testimony collected during the investigation. Although the Investigator will have an opportunity to address the [Hearing Body], we reserve the right to ask the Investigator clarifying questions at any time during this hearing. The investigator will be the only witness who remains present for the entirely of the hearing.

Advisors, you are present to advise your party and conduct cross-examination of the parties and any witnesses who appear at this hearing. You do not have an active role in this hearing beyond this role and may not provide evidence, interrupt the hearing process, or object to questions posed to your advisee. You may speak to the party you are advising but you must do so in a manner that is not disruptive. If you choose to behave in a manner that is disruptive, you may be dismissed from this hearing. The parties may request breaks and/or to confer privately with advisors at any time during the hearing.

Everyone who is participating in this hearing has a duty to be honest and truthful. If it is determined that the Respondent, Complainant, [registered student organization], or [student witnesses] have made intentional false or misleading statements in this hearing, the student or student organization may be subject to potential disciplinary actions under the [Policy]. [Any employee determined to have made intentional false or misleading statements in this hearing may be subject to potential disciplinary action under the [Policy].]

This portion of the hearing will not include impact statements from the Complainant or Respondent. These statements will be read by the [Hearing Body] prior to the sanctioning portion of deliberation only if a violation of [College/University] policy is found to have occurred. Please do not introduce any impact evidence during this portion of the hearing. [You may go ahead and submit impact statements to me now, if you have not done so already, for the [Hearing Body]'s potential consideration after a finding is made.]

The procedure for this hearing will be to have the Investigator first introduce the complaint, the subsequent investigation, and provide a summary of the evidence that is contested and the evidence that is agreed upon by the parties. The Investigator will then be questioned by the [Hearing Body] and then by the Complainant and the Respondent through their respective Advisors.

[Complainant's Full Name] will then be given the opportunity to make an opening statement. [Complainant's First Name] will then be questioned by the [Hearing Body], by their Advisor, and then by [Respondent's First Name] through their Advisor.

[Respondent's First Name] will then be given an opportunity to make an opening statement, and they will be questioned by the [Hearing Body], by their Advisor, and then by [Complainant's First Name] through their Advisor.

Each individual witness will then be asked to present any information they have about the reported incident(s), in the established order provided to you, pre-hearing. Each witness will then be questioned by the [Hearing Body]. [Complainant's First Name] and [Respondent's First Name] will each be given an opportunity to question each witness through their respective Advisors.

Each question must be approved by the Chair before a participant may respond. I reserve the right to rephrase and/or not allow questions that are not relevant to the charges or which have already been answered by the participant. I will remind all parties and witnesses to pause after each question before answering, to allow me to rule on the relevance of the question.

Both [Complainant's First Name] and [Respondent's First Name] will be given the opportunity to make any closing statements before the [Hearing Body] begins its deliberation.

At the conclusion of the hearing, the [Hearing Body] will deliberate in closed session to determine if the information provided during the hearing substantiates that [Respondent's Full Name] violated the [College/University]'s [Policy]. by [Standard of Evidence]. If one or more violations are determined, the [Hearing Body] will then review any submitted impact statements and decide on sanctions.

Are there any questions regarding this procedure?

Formal Charges

[Respondent's Full Name], you have been charged with allegedly violating the following sections from the [College/University]'s [Policy]:

[Insert full text of alleged policy violations]

These charges stem from a report alleging that you were involved in [description of alleged conduct] on [Date] [at/in] [Location]. [Add additional information regarding the alleged conduct as appropriate. EXAMPLE: It is alleged that these activities occurred while [Complainant's Full Name] was incapacitated from alcohol and/or drugs. [Complainant's First Name] further alleges that you may have provided them with alcohol such to cause their incapacity.]

[Respondent's First Name], it is the [Hearing Body]'s understanding that you [accept/do not accept] responsibility for these violation(s), is this correct? *require audible response*

Investigator's Case Introduction

At this time, we will ask Investigator [Investigator's Full Name] to introduce the complaint.
Investigator's statement

I will now open the floor to the [Hearing Body] members for questions for the Investigator.
Questioned by [Hearing Body]

[Complainant's First Name], your Advisor may now proceed with asking the investigator any questions you may have.
Questioned by Complainant's Advisor

[Respondent's First Name], your Advisor may now proceed with asking the investigator any questions you may have.
Questioned by Respondent's Advisor

Are there any additional questions for the Investigator from the [Hearing Body] or any party at this time?
Additional questions

Thank you for your time, [Investigator's First Name], we ask that you remain for the duration of the hearing to respond to additional questions should they arise.

Testimony of Parties and Witnesses

At this time, we will proceed with opening statements, first from the Complainant and then from the Respondent.

[Complainant's Full Name], you may now make your opening statement.
Complainant's opening statement
I will now open the floor to the [Hearing Body] members for questions for [Complainant's First Name].
Questioned by [Hearing Body]

[Complainant's First Name], your Advisor may now proceed with asking any questions they may have for you.
Questioned by Complainant's Advisor

[Respondent's First Name], your Advisor may now proceed with asking [Complainant's First Name] any questions you may have.
Questioned by Respondent's Advisor

Are there any additional questions for [Complainant's First Name] from the [Hearing Body] or any party at this time?
Additional questions

At this time, we will now ask Respondent [Respondent's Full Name] to make their opening statement.
Respondent's opening statement

I will now open the floor to the [Hearing Body] members for questions for [Respondent's First Name].
Questioned by [Hearing Body]

[Respondent's First Name], your Advisor may now proceed with asking any questions they may have for you.
Questioned by Respondent's Advisor

[Complainant's First Name], your Advisor may now proceed with asking [Respondent's First Name] any questions you may have.
Questioned by Complainant's Advisor

Are there any additional questions for [Respondent's First Name] from the [Hearing Body] or any party at this time?
Additional questions

At this time, we will ask our first witness, [Witness Full Name], to join us.
Hearing facilitator admits witness to the hearing

[Witness Full Name], thank you for joining us for this hearing. [As a [Recipient] [student/employee]] you are expected to tell the truth during this proceeding. [If it is determined that you made intentional false or misleading statements in this hearing, you may be subject to potential disciplinary actions under the [Policy].] I would also like to remind you that as a witness you are required to provide only information that is relevant to the allegations. If your statement becomes repetitive or irrelevant, I reserve the right to redirect your statement. Please note that as the Chair I need to make a ruling regarding the relevance of each question before you respond. I ask that you pause for my decision before answering each question.

[Witness First Name] please start with explaining if and how you know [Complainant's Full Name].

Please explain if and how you know [Respondent's Full Name]. You may now make any statement you wish to provide.

I will now open the floor to the [Hearing Body] members for questions for [Witness First Name].
Questioned by [Hearing Body]

[Complainant's First Name], your Advisor may now proceed with asking any questions they may have for this witness.
Questioned by Complainant's Advisor

[Respondent's First Name] your Advisor may now proceed with asking any questions you may have for this witness.
Questioned by Respondent's Advisor

Are there any additional questions for [Witness First Name] from the [Hearing Body] or any party at this time?
Additional questions

[Witness First Name], thank you for your time and participation. You are now dismissed from the hearing.
Hearing facilitator ensures witness exits the hearing

[REPEAT FOR EACH WITNESS]

After hearing the testimony of all participants, are there any additional questions for Complainant [Complainant's Full Name] from any [Hearing Body] members at this time?
Questioned by [Hearing Body]

[Complainant's First Name], does your Advisor have any additional questions for you?
Questioned by Complainant's Advisor

[Respondent's First Name], does your Advisor have any additional questions for [Complainant's First Name]?
Questioned by Respondent's Advisor

After hearing the testimony of all participants, are there any additional questions for Respondent [Respondent's Full Name] from any [Hearing Body] members at this time?
Questioned by [Hearing Body]
[Respondent's First Name], does your Advisor have any additional questions for you?
Questioned by Respondent's Advisor

[Complainant's First Name], does your Advisor have any additional questions for [Respondent's First Name]?
Questioned by Complainant's Advisor

Break for Closing Preparation

Now that the questioning portion of the hearing has concluded we will take a short break to allow the parties time to prepare their closing statements with their Advisors. Closing statements will be given first by the Complainant and then by the Respondent.

Closing Statements

[Complainant's Full Name], you may now make your closing statement.

[Respondent's Full Name], you may now make your closing statement.

Thank you to the participants for the information presented in today's hearing. At this time, the [Hearing Body] will meet in closed session to deliberate whether the Respondent is responsible for violating the [College/University]'s [Policy]. The recording will be turned off during these closed deliberations. Per [College/University] policy, the Chair of the [Hearing Body] will inform the [Title IX Coordinator or Administrator] of the decision(s) made by the [Hearing Body] and

the rationale for each decision and for any sanctions imposed in writing. The [Title IX Coordinator or Administrator] will communicate the outcome to the parties in writing, simultaneously, within [number] days of the end of the hearing.

Thank you all for your participation today. At this time, everyone but the [Hearing Body] members are dismissed.

Deliberation

At this time, I ask all [Hearing Body] members to take a few minutes to gather their thoughts about the information presented during the hearing prior to beginning the deliberation discussion.

Pause for processing

As Chair, it is my responsibility to ensure that every member of this [Hearing Body] actively participates, at least to some degree, in the deliberation process. During the deliberation period, we, the [Hearing Body] members, should confer with one another openly, candidly, and respectfully. It is important that we ponder the language of each relevant policy provision as it relates to the facts presented, discuss the significance of each piece of evidence, and assess credibility. At some point during deliberations, each [Hearing Body] member should make a point to verbally express their opinion of whether the Respondent is responsible or not responsible for each of the alleged violations of [College/University] policy. Our standard of evidence is [Standard of Evidence].

Let us begin the discussion with all general thoughts, concerns, and considerations. Then we will move to deliberation of each specific allegation within each specific policy. Once discussion has concluded, we will move to a vote on each allegation. [While a consensus is desirable, the majority vote will rule.] I will tally the vote and complete the [Statement of Finding and Rationale Form, which I will circulate to each of you for edits/approval].

The floor is now open for discussion.

APPENDIX E

HEARING DECISION-MAKER PREPARATION CHECKLIST

- ❑ Does the Title IX Coordinator (TIXC) run communication protocols with the parties, or does the Decision-maker (DM)?
    - If DM does, is TIXC copied? If TIXC does, is DM copied?
- ❑ Will TIXC provide their own letter templates? If so, what latitude does the DM have to make changes to the template language?
- ❑ For Panel Hearings: Does the TIXC expect the DM to meet with the panel pre-hearing? When? Purpose?
- ❑ Does institutional policy allow for pre-hearing meetings?
- ❑ Date/time of pre-hearing meetings?
    - Does a member of the TIX Team attend?
    - Can parties vet questions with the DM during the pre-hearing?
    - Is a memo to all parties after the pre-hearing meetings sufficient to inform them of any evidentiary rulings prior to the hearing?
        - Who writes pre-hearing outcome memo, TIXC or DM?
    - Are pre-hearings recorded?
- ❑ Do questions pre-planned by DM need to be vetted through the TIXC/legal counsel first?
- ❑ Does the TIXC have a hearing script to be used? If not, can the DM use their own? Should it be pre-approved by the TIX office?
- ❑ Does institution share hearing script with parties before hearing?
- ❑ How is date/time of hearing set, by TIXC or DM?
- ❑ Who is responsible for setting up any technology?
    - Do you do pre-hearing tech test?
- ❑ How are exhibits/screen sharing arranged?
- ❑ What is TIXC's recording protocol? Who runs that protocol?
- ❑ Will institution have staff present to serve as a hearing facilitator?
- ❑ How is the witness list/order chosen?
- ❑ Who orchestrates witness appearance?
- ❑ If a delay of hearing is requested by a party, who has authority to authorize, and on what basis?
- ❑ If hearings run long, is the expectation to continue them for as long as they go or reconvene?
- ❑ If evidence is introduced at the hearing without being vetted during the investigation, how does TIXC expect DM to address that?
- ❑ Is investigator expected to remain present for the full hearing?
- ❑ If policies/procedures are silent/vague, does DM have discretion to interpret, or should they check with TIXC/legal counsel first?
- ❑ Does DM have access to legal counsel for questions during process?

- ❑ Will DM be informed of whether parties have advisors, and for how long they have been engaged?
- ❑ Will DM have party contact information?
- ❑ Does TIXC want to know if DM has any party contact?
- ❑ Can parties submit opening/closing statements in writing, in advance? To whom?
- ❑ Do parties get to know whether other party has advisor, and who that advisor is?
- ❑ How much interaction is DM permitted to have with advisors during hearing?
- ❑ If advisor raises procedural challenges, how is DM to respond?
- ❑ Are impact/mitigation statements permitted?
    - Timing?
    - In writing? Oral?
    - How are they exchanged between the parties, if at all?
- ❑ What information will be provided to DM regarding sanction precedent or minimum sanctions?
- ❑ What is the protocol for collaboration with client on sanction?
- ❑ How will DM be made aware of prior conduct/disciplinary history?
- ❑ For Panel Hearings: Is vote by majority or unanimity?
    - Are dissenting rationales permitted?
- ❑ What is the protocol for sharing the outcome with the parties?
    - Immediately post-deliberation?
    - After the complete rationale is written?
    - In person, via telephone, in writing only?
- ❑ Will DM be told if appealed, and appeal results?
    - Does DM interact with appeal decision-maker during appeal?
- ❑ Does the DM maintain or destroy their hearing notes?
- ❑ Where have parties/advisors been advised to park?
- ❑ Where are restrooms? Water fountains? Vending machine?
- ❑ Where are building exits?

HEARING DECISION-MAKER MATERIALS CHECKLIST

- ❑ Investigation Report (for self and copies for the parties)
- ❑ Directly Related Evidence File
- ❑ Copies of witness statements/transcripts for witness use
- ❑ Pen
- ❑ Paper
- ❑ Recording Device
- ❑ Facial Tissues
- ❑ Water/Beverages
- ❑ Snacks
- ❑ Layers if room is chilly or warm
- ❑ White noise machine
- ❑ Contact info for parties, advisors, witnesses, panelists, TIXC, and legal counsel

APPENDIX F

SAMPLE RATIONALE

Introduction

The University Sexual Assault Hearing Board (comprised of Harry Houdini, John Doe, and Jane Roe) met on [date] to hear the sexual assault complaint filed by [Complainant] against [Respondent].

Both parties participated in the hearing, as did five invited witnesses and both investigators. Each party was given a full and fair opportunity to introduce evidence, make open and closing statements, and respond to questions.

The Board applied a presumption that the Respondent is not responsible for a violation of University policy unless a preponderance of the evidence proved that a violation of the Policy occurred. The Board unanimously determined that Respondent is responsible for violating both Policy Sections X and Y.

Overview Of Allegations

Complainant alleged that Respondent had non-consensual sexual contact with her breasts, buttocks, and groin, including penetration of her vagina with his fingers, that he caused her to have non-consensual contact with his penis, and that he attempted to insert his penis into her vagina without her consent. Complainant also alleged that she was incapacitated while this conduct occurred, which impacted her ability to give consent.

Findings

Complainant asserted she was incapacitated by alcohol and tiredness, and that her lack of capacity impacted on her ability to give consent. The Board found by a preponderance of the evidence that Complainant was not incapacitated as that term is defined in University policy: *"Incapacitated" means lacking the physical and/or mental ability to make informed, rational judgments. A person may be Incapacitated for a variety of reasons, including but not limited to being asleep or unconscious, having consumed alcohol or taken drugs, or experiencing blackouts or flashbacks*.

The Board found that Complainant had the ability to make informed, rational judgments, demonstrated by her described intentional decisions to repeatedly turn away from Respondent during their sexual interaction, her decision to tell Respondent from the outset that she did not want to have sex that night, and her decision to firmly say stop to Respondent and push him off

of her once she was aware of his intent to penetrate her with his penis. Complainant stated during the hearing, "When you wake up in the middle of the night you don't always make the best decisions." While potentially true, this also suggests that she *was* making decisions, and *was* capable of doing so, even if they were not the best decisions.

The Board found a preponderance of the evidence that Respondent had sexual contact for purposes of his own sexual gratification with Complainant's breasts, buttocks, and vulva, and caused her to touch his penis with her hand for purposes of his own sexual gratification, and that he penetrated her vagina with his fingers.

The Board was unable to determine that a preponderance of the evidence proved that Respondent attempted to penetrate Complainant with his penis. The evidence from the parties was equally compelling to the Board on this allegation, meaning that neither account was determined to be more likely than the other. The Board concluded there was sufficient evidence of Respondent's intent to have intercourse (by his own admission at the hearing), but not that he attempted to do so. To intend to do something and to attempt to do it are distinguishable and the Board made that distinction in its findings.

Credibility

The Board carefully weighed the credibility of the parties. The Board generally found the Complainant to be credible. Her testimony was cogent, consistent, and corroborated after the fact, to an extent, by her disclosures to several witnesses, most importantly LR, to whom Complainant disclosed most details on the day after the incident.

The Respondent was found to be less credible than the Complainant in some of his testimony, though there were many elements of his testimony that were credible. The Respondent's answer to why he stayed in Complainant's room after she told him she was going to sleep was both off-point (the bed was not too small for him) and inherently implausible (he stayed because she did not tell him to leave). The Board also found it inherently implausible when Respondent testified both that he was concerned that things were rushing too fast, and that he "needed to make a move." These statements are inconsistent with each other. The Board read a quote from the Respondent on the very bottom of p. 128 of the investigation report about how cautious he was to be sure to get consent, which Respondent agreed that he told the investigators. When Respondent was asked repeatedly by the Board why, despite this quote, he never asked Complainant specifically about any sexual behavior, Respondent was unable to reconcile this inconsistency between his statement and his actions to the satisfaction of the Board. This damaged his credibility and made the Board feel as if he was telling us what he thought we wanted to hear. He later testified — inconsistently with the above statements about the care he took to ensure consent — that he believed intercourse would have been consensual based on the interactions the parties engaged in so far, and what it was leading up to. This

shows that he believes consent to one form of sexual activity can imply consent to other forms of sexual activity. Yet, p. 11 of the Policy says exactly the opposite.

The Respondent's testimony that he did not finger (digitally penetrate the vagina of) the Complainant because doing so was weird or unfamiliar to him did not strike the Board as being inherently plausible, especially when juxtaposed with Complainant's certainty that she felt "at least two fingers" inserted into her vagina and Respondent's testimony at the hearing that "his 'love language' is touch." The Board concluded that a person knows what it feels like when they are being penetrated internally versus rubbed externally and found the Complainant believable in this testimony. Respondent's credibility issues were compounded by his assertion at the hearing that Complainant spread her legs apart to facilitate his access to her genitals, especially as this was an added fact revealed at the hearing that Respondent had not disclosed to investigators.

The Board also concluded that Complainant was credible that she told Respondent at the outset of that morning that she did not want to have sex with him, which was inherently plausible in light of testimony from witness KW about boundaries Complainant set for herself when she first arrived at the university. Respondent's credibility also suffered because he denied that Complainant turned away from him multiple times, but Complainant's assertion that this occurred was more believable, given that she was able to offer the corroborating details of what Respondent said to her when she turned away, and how he "coaxed" her to turn back toward him by saying that they did not have to do anything she did not want to do, told her to "just breathe" and said, "it's okay." This level of recall and precision on detail makes Complainant's testimony about turning away from Respondent inherently plausible and more credible than his testimony that she did not turn away from him.

Respondent indicated in the hearing that to him, Complainant's "okay" in response to his statement about not having to do anything they did not want to do indicated her consent to all behaviors occurring before and after she said this. This "okay" is not sufficient to meet the "clear and unambiguous" standard as will be discussed in the Final Determination section below.

Respondent testified that Complainant was wearing a shirt and pants to bed, whereas Complainant claimed she never wears pants to bed, and was wearing a t-shirt and her underwear. This description by Complainant was corroborated by W2, who volunteered that she knows that Complainant always wears a t-shirt and underwear to bed. This made Complainant more credible on this point, and bolstered her credibility overall, with independent corroboration.

Finally, Respondent told the Board that he was never on top of Complainant. Complainant stated multiple times in the investigation report that he was on top of her. To bolster his testimony, Respondent offered that he could not have been on top of Complainant, effectively

straddling her, while also taking his underwear down. Respondent stated that that position would have made it completely impossible for him to remove his underwear. The Board considered this statement and determined it was inherently implausible and lacked credibility because it is entirely possible to lower one's underwear in such a position. Generally, all witnesses were found to be reasonably reliable and without significant credibility concerns. Their testimony was credited.

Evidence Not Relied Upon

- Any evidence regarding Complainant's relationship with "Joe"
- Any evidence regarding conversation between the parties about Complainant's dog
- Any evidence regarding Respondent's character
- Any evidence of the Complainant's sexual predisposition
- How Complainant's parents reacted when she told them what happened
- Any evidence related to Complainant's interactions with witness WW
- That Complainant invited Respondent to join a group going to dinner sometime after the incident
- Evidence shared that Respondent's family members had experienced sexual assault

The Board determined that none of this evidence was relevant to its determination.

Final Determination

The Board determined by a preponderance of the evidence that:

- Respondent had contact with Complainant's buttocks that was non-consensual and done for purposes of his own enjoyment (because it was non-consensual).
- Respondent had contact with Complainant's vulva that was non-consensual and done for purposes of his own enjoyment (because it was non-consensual).
- Respondent's penetration of Complainant's vagina with his fingers was without consent.

At the hearing, the Respondent was asked what words or actions by the Complainant gave him permission to touch her buttocks. He hedged by trying to redefine the location of the buttocks and his hands, but that's because he had no answer to how he had permission other than from his overall sense of the interaction and the fact that they were kissing. Consent to kissing does not imply consent to fondling. That is not enough to meet the Policy standard of a "clear and unambiguous agreement" between the parties. Complainant did not reciprocate this act.

At the hearing, the Respondent was asked what words or actions by the Complainant gave him permission to touch her vulva. Respondent shared that Complainant moaned softly while he touched her and spread her legs apart. While these could be actions demonstrating consent, physical sensation is not the same thing as permission. Acts may feel pleasurable because of anatomy, but still be non-consensual. Further, the Board determined that Complainant's

demonstrated responses, even if true (she disputed them) did not meet the standard of a "clear and unambiguous agreement" between the parties to engage in that activity.

The above two paragraphs are equally applicable to the Board's determination regarding penetration by Respondent's fingers. He denied this action, but for the reasons noted in the credibility analysis above and in our finding, the Board determined it was more likely than not that penetration occurred as the Complainant alleged. For the reasons stated in the above two paragraphs that make the touching of Complainant's vulva non-consensual, so too is Respondent's penetration of her vagina with his fingers.

The Board found that the evidence for the other allegations made by Complainant was not sufficient to meet the preponderance of the evidence. The evidence indicates that Complainant continued the kissing and intimate encounter with Respondent after he touched her breasts, making it ambiguous whether his touching of her breasts was without consent. Respondent placed Complainant's hand on his penis, which was without consent, but Complainant testified that she continued to touch his penis thereafter and was not compelled to do so by him. She stated she did so unenthusiastically, but University policy does not require enthusiasm for a sexual act, only that words or actions demonstrate permission. Here, Complainant's actions demonstrate consent, however grudgingly she described it to be at the hearing.

Overall, the Board's conclusion was rooted in the credibility analysis above, but also in our sense that Respondent has a fundamental misunderstanding of how consent works. He was able to verbalize it accurately at the hearing, but in practice with the Complainant, he demonstrated that he was willing to stop when he met resistance but unwilling to clearly obtain permission before he acted. Respondent repeated this misconception at the hearing several times, showing that he could not conceptualize or operationalize the difference between the obligation to get a "yes" and the willingness to stop when he got a "no." University's consent policy is not resistance-based, and stopping when you get a "no," while necessary and expected, is not enough.

As noted above, the Board did not find that Respondent attempted to sexually penetrate Complainant with his penis. Because of that finding, the Board need not determine if that act was consensual. Complainant's description was too vague as to whether Respondent touched her with his penis, attempted to place it in her vagina, or in fact did so, for the Board to determine what the preponderance of the evidence showed. She was clear that she pushed him off of her, and he stopped. Respondent testified that he intended to penetrate Complainant with his penis, and his testimony made it clear he assumed he had consent to do so, rather than that he in fact obtained clear and unambiguous permission to do so. He neither asked nor checked with her to ensure his act would be okay with her. He did not penetrate her with his penis.

The Board agreed that had Complainant not stopped him and had he proceeded at that time he would have raped Complainant. Yet, Respondent testified that he intended to use a condom that he brought with him and had in his wallet (he reasonably corroborated this at the hearing by producing the unused condom from his wallet), and that the wallet was across the room. Thus, it was possible that Respondent's removal of his penis from his underwear and his actions to touch her with it (if that occurred) preceded his intent to get up, get the condom, and put it on, all of which would have given Complainant an opportunity to express non-consent, though it is also clear she did not express consent. The Board was unable to conclude whether this testimony about the condom was more likely than not what would have transpired had Complainant not stopped the Respondent.

The testimony of both parties corroborated Complainant's allegations in that she would not have needed to say stop and push Respondent off if she did not reasonably perceive that he was about to penetrate her. Yet, we cannot conclude that he actually made that attempt, though it is clear he intended to, at some point (perhaps after obtaining the condom) and in some fashion (protected or unprotected).

Sanction Recommendations

The Board recommends that Respondent be sanctioned according to the following terms, largely based on the Board's perception that while Respondent did not have consent, he was persuasive that he believed that he did:

- Respondent to be suspended from University for a minimum of one year, starting at the end of the Spring 2021 term.
- Respondent will be eligible to petition to return for the 2022-2023 school year upon a demonstration acceptable to the Title IX Office that he understands the University Sexual Misconduct Policy and has internalized and can operationalize how consent is to be requested, given, and received with future sexual partners.
- Respondent to complete appropriate consent education as directed by the Title IX Office.
- Respondent, upon any return to University as a student, shall be ineligible to hold any elected or appointed office of responsibility.

These sanctions were chosen by the Board as proportional to the severity of the violation and in consideration of the safety of the campus community and the Complainant's safety as she completes her education on campus. The Board determined that it is important that the Respondent takes time away from campus to address his behavior before being eligible to return to the campus community. The Board did not see evidence that he should remain on campus at this time. The Respondent has indicated that he intends to transfer to another institution. Regardless of whether he attempts to return at some point, or goes elsewhere, the

Board wants him to understand that it unanimously believes that his understanding of consent is fundamentally deficient. The Board hopes that he will take this message to heart and reform the ways that he communicates with, checks in with, asks, and respects his sexual partners, especially in light of the career path his impact statement indicates he has mapped out for himself.

APPENDIX G

SAMPLE NOTIFICATION OF OUTCOME LETTER – RESPONDENT

[Date]

Complainant: [Complainant Full Name]
Case Number: [Case Number]
[Respondent Full Name]
[Mailing Address and/or E-mail]

[Mode of Delivery (e.g., E-mail, hand delivery etc.)]

Dear [Respondent First Name]:
This serves as official correspondence from the [Recipient] regarding the outcome of the formal hearing held on [Date]. The Complainant submitted a formal complaint to the Title IX Coordinator on [Date] alleging that you engaged in behaviors that violate the [Recipient] *[Policy]* on [Date] [in/at] [Physical Location]. Specifically, it is alleged that you engaged in [insert specific, detailed allegations]. [Investigator(s) Full Name(s)], [Investigator(s) Title(s)] conducted a formal investigation of the Complainant's allegations, and the final investigation report served as the basis for the formal hearing held pursuant to the [College/University]'s policy.

[Insert detailed timeline of actions taken from intake through investigation including implementation of supportive measures which were made known to the Respondent (e.g., No Contact Directives); date of NOIA; dates of interviews; dates of site visits; dates and methods of evidence obtainment; etc.]

The parties [and their advisors] were provided with an opportunity to review all information gathered during the investigation that was directly related to the allegations. This information, along with a copy of the draft investigation report, was provided by the investigators to the parties [and their advisors] in an electronic format from [dates available; note any holidays or other adjustments]. The Respondent [submitted a written response to the draft report on [Date] OR did not provide a response to the draft report by the [Date] deadline].

A copy of the final investigation report and the directly related evidence file were provided to the parties [and their advisors] [along with the formal hearing notice] on [Date].

[Insert information about any pre-hearing meetings or communication.]

The [Recipient] convened a hearing on [Date] to review information provided in the investigation report and information provided by the parties and witnesses (if any). [The

parties, [number] witnesses identified in the investigation report, and the investigator all participated in the formal hearing OR indicate those who were present and those who were not present]. Based on the information presented at the hearing, the [Decision-maker] has made the following findings of fact:

[Insert specific, detailed findings of fact.]

The [Decision-maker] also evaluated the credibility of [the parties and witnesses]. [Insert specific evaluations of credibility for the participants.]

Using the [standard of evidence] standard, the [Decision-maker] has found the Respondent **responsible** for violating the following section(s) of the *[Policy]*:

[Insert full text of policy violations]

[Insert rationale demonstrating how the Decision-maker applied the findings of fact to the specific policy violations.]

OR

Using the [standard of evidence] standard, the [Decision-maker] has found the Respondent **not responsible** for violating the following section(s) of the *[Policy]:*

[Insert rationale demonstrating how the Decision-maker applied the findings of fact to the specific policy violations.]

[As a result of the [Decision-maker]'s findings, [and in consideration of the Respondent's prior conduct OR employee discipline history (if any)], the following sanction(s) have been assigned:
[Insert full text of sanctions including any applicable deadlines]
The rationale provided for the assigned sanction(s) is as follows:
[Insert rationale demonstrating how the Decision-maker determined appropriate sanctions including prior conduct/disciplinary history; aggravating, mitigating, and/or compounding factors; severity of the behavior; cumulative violations; behavior patterns; Complainant's request(s); acceptance or non-acceptance of responsibility; policy minimums; precedent; etc.]
[Further remedies to restore and preserve the Complainant's access to the [Recipient]'s education programs and activities will be provided and determined through consultation between the Complainant and the Title IX Coordinator.

A record of this matter will be maintained as part of the Respondent's [education OR employment] record pursuant to [College/University] policy [and will be considered as prior conduct history if the Respondent is found responsible for any future policy violations].

Failure to successfully complete the sanction(s) by the assigned deadline(s) will result in [consequences e.g., your student account being placed on hold. A hold on your account may prevent you from seeking readmission, enrolling, dropping a class, adding a class, processing of formal transcript requests, etc. Once the hold is in place, it will not be removed until all sanctions are satisfactorily completed].

The parties are afforded the opportunity to appeal this decision one time within the [College/University]'s process detailed in the *[Policy]*. If you wish to appeal this decision, you must submit the appeal request via the [online] [Appeal Request Form] [weblink text] no later than [number] [business] days following the date of this letter ([Deadline]).

You will be notified in writing if an appeal request is received regarding this matter. If no appeal requests are received by the conclusion of the [number] [business] day period, this decision will constitute final [College/University] action with respect to this matter. Please refer to the *[Policy]* for additional information regarding the appeal process.

The [Recipient] maintains the confidentiality of this outcome, and only releases information as permitted or required by law. The Complainant will receive a copy of this notification. Finally, you are again reminded that the [Recipient]'s policies on retaliation are in effect and will be enforced should any adverse action be taken toward any participant in the resolution process.

If you have any questions regarding the grievance process and procedures related to the *[Policy]*, or the contents of this letter, you may contact [TIXC Full Name], [TIXC Title] at [Phone] or [E-mail].

Sincerely,
[Decision-maker/Chair Full Name]
[Decision-maker/Chair Title]

CC: Title IX Coordinator

APPENDIX H

SAMPLE NOTIFICATION OF OUTCOME LETTER – COMPLAINANT

[Date]

Respondent: [Respondent Full Name]
Case Number: [Case Number]
[Complainant Full Name]
[Mailing Address and/or E-mail]

[Mode of Delivery (e.g., E-mail, hand delivery etc.)]

Dear [Complainant First Name]:

This serves as official correspondence from the [Recipient] regarding the outcome of the formal hearing held on [Date]. You submitted a formal complaint to the Title IX Coordinator on [Date] alleging that Respondent [Respondent Full Name], a [Recipient] [student/employee] engaged in behaviors that violate the [Recipient] *[Policy]* on [Date] [in/at] [Physical Location]. Specifically, it is alleged that the Respondent engaged in [insert specific, detailed allegations]. [Investigator(s) Full Name(s)], [Investigator(s) Title(s)] conducted a formal investigation of the allegations, and the final investigation report served as the basis for the formal hearing held pursuant to the [College/University]'s policy.

[Insert detailed timeline of actions taken from intake through investigation including implementation of supportive measures which were made known to the Respondent (e.g., No Contact Directives); date of NOIA; dates of interviews; dates of site visits; dates and methods of evidence obtainment; etc.]

The parties [and their advisors] were provided with an opportunity to review all information gathered during the investigation that was directly related to the allegations. This information, along with a copy of the draft investigation report, was provided by the investigators to the parties [and their advisors] in an electronic format from [dates available; note any holidays or other adjustments]. You [submitted a written response to the draft report on [Date] OR did not provide a response to the draft report by the [Date] deadline].
A copy of the final investigation report and the directly related evidence file were provided to the parties [and their advisors] [along with the formal hearing notice] on [Date].

[Insert information about any pre-hearing meetings or communication.]

The [Recipient] convened a hearing on [Date] to review information provided in the investigation report and information provided by the parties and witnesses (if any). [The parties, [number] witnesses identified in the investigation report, and the investigator all participated in the formal hearing OR indicate those who were present and those who were not present]. Based on the information presented at the hearing, the [Decision-maker] has made the following findings of fact:

[Insert specific, detailed findings of fact.]
The [Decision-maker] also evaluated the credibility of [the parties and witnesses]. [Insert specific evaluations of credibility for the participants.]

Using the [standard of evidence] standard, the [Decision-maker] has found the Respondent **responsible** for violating the following section(s) of the *[Policy]*:

[Insert full text of policy violations]

[Insert rationale demonstrating how the Decision-maker applied the findings of fact to the specific policy violations.]

OR

Using the [standard of evidence] standard, the [Decision-maker] has found the Respondent **not responsible** for violating the following section(s) of the *[Policy]:*

[Insert rationale demonstrating how the Decision-maker applied the findings of fact to the specific policy violations.]

[As a result of the [Decision-maker]'s findings, [and in consideration of the Respondent's prior conduct OR employee discipline history (if any)], the following sanction(s) have been assigned:

[Insert full text of sanctions including any applicable deadlines]

The rationale provided for the assigned sanction(s) is as follows:
[Insert rationale demonstrating how the Decision-maker determined appropriate sanctions including prior conduct/disciplinary history; aggravating, mitigating, and/or compounding factors; severity of the behavior; cumulative violations; behavior patterns; Complainant's request(s); acceptance or non-acceptance of responsibility; policy minimums; precedent; etc.]

[The Title IX Coordinator will be in contact with you to determine any further remedies to restore and preserve your access to the [Recipient]'s education programs and activities.]

A record of this matter will be maintained as part of the Respondent's [education OR employment] record pursuant to [College/University] policy [and will be considered as prior conduct history if the Respondent is found responsible for any future policy violations].

The Respondent's failure to successfully complete the sanction(s) by the assigned deadline(s) will result in [consequences e.g., their student account being placed on hold. A hold on their account may prevent them from seeking readmission, enrolling, dropping a class, adding a class, processing of formal transcript requests, etc. Once the hold is in place, it will not be removed until all sanctions are satisfactorily completed].

The parties are afforded the opportunity to appeal this decision one time within the [College/University]'s process detailed in the *[Policy]*. If you wish to appeal this decision, you must submit the appeal request via the [online] [Appeal Request Form] [weblink text] no later than [number] [business] days following the date of this letter ([Deadline]).

You will be notified in writing if an appeal request is received regarding this matter. If no appeal requests are received by the conclusion of the [number] [business] day period, this decision will constitute final [College/University] action with respect to this matter. Please refer to the *[Policy]* for additional information regarding the appeal process.

The [Recipient] maintains the confidentiality of this outcome, and only releases information as permitted or required by law. The Respondent will receive a similar notification.

Finally, you are again reminded that the [Recipient]'s policies on retaliation are in effect and will be enforced should any adverse action be taken toward any participant in the resolution process.

If you have any questions regarding the grievance process and procedures related to the *[Policy]*, or the contents of this letter, you may contact [TIXC Full Name], [TIXC Title] at [Phone] or [E-mail].

Sincerely,
[Decision-maker/Chair Full Name]
[Decision-maker/Chair Title]

CC: Title IX Coordinator

APPENDIX I

HEARING OFFICER/DECISION-MAKER CERTIFICATION LEARNING OUTCOME ATTAINMENT ASSESSMENT SCENARIOS[101]

Instructions: The following scenarios are designed to test learning outcomes attainment for the policy application section of the ATIXA Hearing Officer/Decision-Maker Certification Training. These scenarios are intended to test different competencies, based on their titles, and are designed to provoke indications of bias, confirmation bias, and other failures to adhere to policy and apply it correctly. Any hearing officer who cannot score at least 80% on this assessment should not be considered competent to serve, and while a score of 90% is sufficient, still indicates a need for additional training/debriefing on these scenarios. We need to get it right 100% of the time.

Sexual Harassment/Quid Pro Quo

Kristen is trying to decide which professor to take for her Advanced Social Work Practice course this term, so she goes onto RateMyProfessor.com to learn more about the professors. Kristen comes across a picture of Dr. Dunn and decides to register for his course because she thinks he is so attractive. Once the term begins, Kristen makes sure she arrives to class early so she can get a seat in the front row. As he lectures, Dr. Dunn seems to often look at Kristen and give her a little wink. Kristen always blushes and gives a slight smile in response. Dr. Dunn often walks around the classroom to monitor the students' progress as they complete assignments. He frequently stops behind Kristen's chair where he puts his hand on her shoulders and leans in to speak with her. Kristen doesn't mind.

One day after class, Dr. Dunn tells Kristen that he needs to see her in his office. Kristen goes to his office where Dr. Dunn proceeds to tell Kristen that he has concerns about her performance in the course, as she did not do well on the last test and is on track to earn a "D" for the term. Dr. Dunn tells Kristen they can talk over coffee about how she can pass the class. Kristen agrees. While at the coffee shop, they have a conversation, which Kristen finds to be engaging. Dr. Dunn then tells Kristen it's not often that he has students in his class who are as beautiful as she is. Kristen thanks him and tells him she finds him attractive too and admits that is the reason she registered for his class. Dr. Dunn reiterates that he wants to help Kristen pass his class and asks if she is open to a little non-traditional extra credit. Kristen says that she will take any help she can get to pass his class. The two continue talking for a little while, in a flirty manner, and end up going to Dr. Dunn house where they kiss and undress each other and proceed to have intercourse. Kristen returns to campus and tells her roommate that she just had a date with the

[101] Additional case studies focused on relevant vs. directly related evidence and severe, pervasive, and objectively offensive behaviors are available in the TIX Toolkit.

hottest professor on campus. The following week, Dr. Dunn gives a test which Kristen passes with flying colors. Throughout the term, Kristen and Dr. Dunn go out on occasion and have intercourse a few more times. At the end of the term, Kristen ends up passing the course with a 94%, which is the highest grade in the class.

Policy

Sexual Harassment, as an umbrella category, includes the offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking, and is defined as:

Conduct on the basis of sex that satisfies one or more of the following:

1) Quid Pro Quo:
   i) an employee of the recipient,
   ii) conditions the provision of an aid, benefit, or service of the recipient,
   iii) on an individual's participation in unwelcome sexual conduct; and/or

2) Sexual Harassment:
   i) unwelcome conduct,
   ii) determined by a reasonable person,
   iii) to be so severe, and
   iv) pervasive, and
   v) objectively offensive,
   vi) that it effectively denies a person equal access to the Recipient's education program or activity

Unwelcome Kissing

Jane and Anisha met freshman year when they lived on the same floor in the same residence hall. They became new members of the same sorority and spent a lot of their down time playing video games or studying together. Sophomore year, Anisha lived in the sorority house and Jane lived in an off-campus house with friends. One Saturday night after a large party at a fraternity, people went to Jane's house to continue partying. As the party began to wind down there were just a couple of people left in the house, including Jane and Anisha, who were playing a video game on the couch. They were talking about being so drunk and "slap happy" because it was so late. Jane beat Anisha at the game, and Anisha tackled Jane on the couch. Both were laughing and wrestling and Anisha was "giving Jane shit" about always beating her. Jane had her arms around Anisha and said, "I love you, bitch." Anisha said, "I love you, too," and kissed Jane on the mouth. Jane pushed Anisha away and jumped off the couch, spitting and wiping her mouth on her arm. Jane said, "What the fuck, dude? Are you a lez or something?" Anisha responded, "I'm sorry. I thought…I'm sorry." Anisha left the house quickly after that and has not heard from Jane again.

Jane reported Anisha for sexual assault the following Monday. She reported Anisha was drunk, pinned her down on the couch, and kissed her. In conversation with investigators, Jane acknowledged that Anisha likely did not tackle her with the intent of kissing her. Jane explained that when she said, "I love you, bitch," she did not mean it with any romantic connotation, and she expected Anisha to know that. Jane says the kiss was unwelcome and Anisha should know that it's not okay to do that. She also wants Anisha to stay away from her.

Anisha says it was a simple misunderstanding. She wasn't sure if Jane knew Anisha was bisexual, but she thought the situation (arms around each other, saying "I love you") gave her an opportunity and she took it. She's embarrassed and realizes now that Jane didn't mean it the way Anisha thought.

Policy

Sexual Harassment, as an umbrella category, includes the offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking, and is defined as:

Conduct on the basis of sex that satisfies one or more of the following:

1) Quid Pro Quo:
   i) an employee of the recipient,
   ii) conditions the provision of an aid, benefit, or service of the recipient,
   iii) on an individual's participation in unwelcome sexual conduct; and/or

2) Sexual Harassment:
   i) unwelcome conduct,
   ii) determined by a reasonable person,
   iii) to be so severe, and
   iv) pervasive, and
   v) objectively offensive,
   vi) that it effectively denies a person equal access to the Recipient's education program or activity

3) Sexual assault, defined as:
   i) Any sexual act
   ii) directed against another person
   iii) without the consent of the Complainant
   iv) including instances in which the Complainant is incapable of giving consent

a) Forcible Rape:
   i) The carnal knowledge of a person (penetration),
   ii) forcibly, and/or
   iii) against that person's will (non-consensually), or
   iv) not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of temporary or permanent mental or physical incapacity

b) Forcible Sodomy:
   i) Oral or anal sexual intercourse with another person,
   ii) forcibly,
   iii) and/or against that person's will (non-consensually), or
   iv) not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

c) Sexual Assault with an Object:
   i) The use of an object or instrument to penetrate,
   ii) however slightly,
   iii) the genital or anal opening of the body of another person,
   iv) forcibly,
   v) and/or against that person's will (non-consensually),
   vi) or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

d) Forcible Fondling:
   i) The touching of the private body parts of another person (buttocks, groin, breasts),
   ii) for the purpose of sexual gratification,
   iii) forcibly,
   iv) and/or against that person's will (non-consensually),
   v) or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Sexual Harassment/Hostile Environment

Travis was a new member of the school's lacrosse team and thrilled to be on the team. After the first day of practice, Justin, the team captain, came up to Travis and told him how happy he was that Travis made the cut. In the middle of the second week, as Travis was changing in the locker room, Justin came up to Travis, placed his hand on Travis's bare back, and told Travis that he

was into guys and thought Travis was too. Travis replied that he was but noted that Justin was not his type. Justin said he got it.

Two weeks later, when most of the team was at wing night at the local brewery, Justin approached Travis with a drink for him, said he thought Travis should give them a chance because they would make a really hot couple and he could make sure Travis felt good. Travis said no thanks, that he was interested in someone else, and went to find another freshman player to talk to.

That weekend, at a team party after they had won a game, Travis went to get his jacket in one of the apartment's bedrooms and physically bumped into Justin when he was leaving the bedroom. Travis laughed nervously and tried to get out of the way, but Justin leaned in and kissed him. The following week, as Travis was showering after practice, Justin seemed to appear out of nowhere next to him, standing too close. He whispered to Justin, "I really am your type," and proceeded to corner Travis along one wall of the shower room and tried to grab Travis's buttocks. Travis didn't say anything, and he didn't touch Justin. He left the shower room, quickly finished getting dressed, and left the locker room. He did not tell anyone about the incident immediately afterward, but the following day, he told the coach he was quitting the team.

Policy

Sexual Harassment, as an umbrella category, includes the offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking, and is defined as:

Conduct on the basis of sex that satisfies one or more of the following:

1) Quid Pro Quo:
   i) an employee of the recipient,
   ii) conditions the provision of an aid, benefit, or service of the recipient,
   iii) on an individual's participation in unwelcome sexual conduct; and/or

2) Sexual Harassment:
   i) unwelcome conduct,
   ii) determined by a reasonable person,
   iii) to be so severe, and
   iv) pervasive, and
   v) objectively offensive,
   vi) that it effectively denies a person equal access to the Recipient's education program or activity

3) Sexual assault, defined as:
   i) Any sexual act
   ii) directed against another person
   iii) without the consent of the Complainant
   iv) including instances in which the Complainant is incapable of giving consent

   a) Forcible Rape:
      i) The carnal knowledge of a person (penetration),
      ii) forcibly, and/or
      iii) against that person's will (non-consensually), or
      iv) not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of temporary or permanent mental or physical incapacity

   b) Forcible Sodomy:
      i) Oral or anal sexual intercourse with another person,
      ii) forcibly,
      iii) and/or against that person's will (non-consensually), or
      iv) not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

   c) Sexual Assault with an Object:
      i) The use of an object or instrument to penetrate,
      ii) however slightly,
      iii) the genital or anal opening of the body of another person,
      iv) forcibly,
      v) and/or against that person's will (non-consensually),
      vi) or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

   d) Forcible Fondling:
      i) The touching of the private body parts of another person (buttocks, groin, breasts),
      ii) for the purpose of sexual gratification,
      iii) forcibly,
      iv) and/or against that person's will (non-consensually),
      v) or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Discriminatory harassment constitutes a form of discrimination that is prohibited by Recipient policy. Discriminatory harassment is defined as unwelcome conduct by any member or group of the community on the basis of actual or perceived membership in a class protected by policy or law.

Recipient does not tolerate discriminatory harassment of any employee, student, visitor, or guest. Recipient will act to remedy all forms of harassment when reported, whether or not the harassment rises to the level of creating a "hostile environment." A hostile environment is one that unreasonably interferes with, limits, or effectively denies an individual's educational or employment access, benefits, or opportunities. This discriminatory effect results from harassing verbal, written, graphic, or physical conduct that is severe or pervasive and objectively offensive.

Sexual Violence

Alex and Diane are in a romantic relationship and live together. Diane came home after a night out and was very intoxicated. Alex was on the couch watching TV. Diane sat down on Alex's lap, embracing and kissing him. She began to feel dizzy and sick and told Alex she wasn't feeling well and was going to bed. Alex began to kiss Diane's neck, rubbing his hand up her inner thigh under her skirt. Diane did not mind, but as the dizziness persisted, she pushed him away and said she had to go to bed.

Diane went into the bedroom, removed all of her clothing, and got into bed. She began to fall asleep, feeling dizzy and nauseous. She was mildly aware of Alex getting into bed a short time later. Alex scooted up behind Diane and she could tell he was also naked and erect. He put his arm around her, cupping her breast, and began pushing his penis into her buttocks. Diane did not object and murmured "mmm," but when Alex moved his hand to her vulva, she pushed him away. Diane said, "I don't feel so good." Alex started to rub Diane's back, and after about ten minutes, he put his hand back around her and started rubbing her vaginal area. After a minute, Diane said, "Seriously, I might be sick, let's just touch each other," referring to digital penetration.

Diane turned to face Alex and they both began to touch each other's genitals. Diane became more vocal and, it seemed to Alex through her sounds, was enjoying the interaction. After a few minutes, Alex moved on top of Diane, kissed her neck, held her hands above her head, and penetrated her vagina with his penis. This was how they sometimes had sex in the past. Although she said, "Please, stop," after a few seconds, she made sounds that indicated to Alex that she was enjoying the intercourse. Diane then said, "Ow," which Alex understood as communicating she didn't want him to penetrate her as deeply, and so he pulled out and ejaculated on the bed. After he ejaculated, he kissed Diane. She got out from under him and

went to the bathroom. Alex followed. He asked Diane if she was okay. She said, “What do you think?” angrily and went back to bed.

Policy

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Conduct on the basis of sex that satisfies one or more of the following:
1) Quid Pro Quo:

i) an employee of the recipient,
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iii) on an individual’s participation in unwelcome sexual conduct; and/or

2) Sexual Harassment:

i) unwelcome conduct,
ii) determined by a reasonable person,
iii) to be so severe, and
iv) pervasive, and
v) objectively offensive,
vi) that it effectively denies a person equal access to the Recipient’s education program or activity

3) Sexual assault, defined as:

i) Any sexual act
ii) directed against another person
iii) without the consent of the Complainant
iv) including instances in which the Complainant is incapable of giving consent

a) Forcible Rape:
    i) The carnal knowledge of a person (penetration),
    ii) forcibly, and/or
    iii) against that person’s will (non-consensually), or
    iv) not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because of temporary or permanent mental or physical incapacity

b) Forcible Sodomy:
   i) Oral or anal sexual intercourse with another person,
   ii) forcibly,
   iii) and/or against that person's will (non-consensually), or
   iv) not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

c) Sexual Assault with an Object:
   i) The use of an object or instrument to penetrate,
   ii) however slightly,
   iii) the genital or anal opening of the body of another person,
   iv) forcibly,
   v) and/or against that person's will (non-consensually),
   vi) or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

d) Forcible Fondling:
   i) The touching of the private body parts of another person (buttocks, groin, breasts),
   ii) for the purpose of sexual gratification,
   iii) forcibly,
   iv) and/or against that person's will (non-consensually),
   v) or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

4) Dating Violence, defined as:
   a) violence,
   b) on the basis of sex,
   c) committed by a person,
   d) who is in or has been in a social relationship of a romantic or intimate nature with the Complainant.
      i) The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition
      ii) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
      iii) Dating violence does not include acts covered under the definition of domestic violence.

5) Domestic Violence, defined as:

a) violence,
b) on the basis of sex,
c) committed by a current or former spouse or intimate partner of the Complainant,
d) by a person with whom the Complainant shares a child in common, or
e) by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
f) by a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of [insert your state here], or
g) by any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

*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.

Consent is:

- knowing, and
- voluntary, and
- clear permission
- by word or action
- to engage in sexual activity.

Individuals may perceive and experience the same interaction in different ways. Therefore, it is the responsibility of each party to determine that the other has consented before engaging in the activity.

If consent is not clearly provided prior to engaging in the activity, consent may be ratified by word or action at some point during the interaction or thereafter, but clear communication from the outset is strongly encouraged.

For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct. Reasonable reciprocation can be implied. For example, if someone kisses you, you can kiss them back (if you want to) without the need to explicitly obtain *their* consent to being kissed back.

Consent can also be withdrawn once given, as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time. Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be

consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not sufficient to constitute consent.

Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the Recipient to determine whether its policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar and previous patterns that may be evidenced.

Consent in relationships must also be considered in context. When parties consent to BDSM or other forms of kink, non-consent may be shown by the use of a safe word. Resistance, force, violence, or even saying "no" may be part of the kink and thus consensual, so the Recipient's evaluation of communication in kink situations should be guided by reasonableness, rather than strict adherence to policy that assumes non-kink relationships as a default.

Incapacitation: A person cannot consent if they are unable to understand what is happening or is disoriented, helpless, asleep, or unconscious for any reason, including by alcohol or other drugs. As stated above, a Respondent violates this policy if they engage in sexual activity with someone who is incapable of giving consent.

It is a defense to a sexual assault policy violation that the Respondent neither knew nor should have known the Complainant to be physically or mentally incapacitated. "Should have known" is an objective, reasonable person standard that assumes that a reasonable person is both sober and exercising sound judgment.

Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent (e.g., to understand the "who, what, when, where, why, and how" of their sexual interaction). Incapacitation is determined through consideration of all relevant indicators of an individual's state and is not synonymous with intoxication, impairment, blackout, and/or being drunk.

This policy also covers a person whose incapacity results from a temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs.

Preponderance

Omar and Devya have been friends since freshman year. Devya texted Omar and they met up at Devya's apartment before a party one weekend and took several shots. Devya felt comfortable with Omar because he was gay, and she asked him to help her pick her outfit for the evening,

taking her clothes off in front of him multiple times as she tried different combinations. Omar would pull on and adjust her clothes as he considered each outfit, but Devya wasn't bothered by the physical contact, even when he pressed her breasts together to try to improve the appearance of her cleavage in one shirt.

When they got to the party, Devya lost track of Omar for a bit. She was happy to find him a little later, and they had fun dancing. Devya said Omar "grinded" on her, which was fine, but then he started putting his hands on her and groping her, which she was not okay with. They had danced together before, but this night felt different to her. Devya said Omar was much more drunk than she had ever seen him, and even though she continued to pull his hands away from her, he wouldn't stop touching her body, including grabbing her breasts. Devya could feel Omar's erect penis through his pants when he rubbed against her.

At one point, Devya took Omar's hands into hers so they would be off her body, shouted, "Stop!" and they danced while they were holding hands. After a little bit, he put his hands back on her and rubbed her butt and started pretending to spank her. He wasn't hitting her hard, and it was clear he thought it was funny, but she didn't. She took his hands in hers and started dancing again. After a few minutes, a friend came up to Devya and asked if she was okay because she looked upset. Devya and her friend left the dance floor and her friend drove Devya home. During the drive, the friend mentioned that she saw what Omar was doing and that he seemed out of control. Devya talked to the same friend a little the next day, and they agreed that Devya should report Omar.

Omar denies the allegations. He agrees with Devya's account of the evening but does not remember the groping and grinding. He just remembers them dancing and having fun, and said that they were both touching each other, but "just in a fun, playful way." Omar doesn't remember Devya's friend, he just remembered that all of a sudden, Devya was gone. He texted to see where she went, but she never responded. Omar agrees that he drank a lot, but says he remembers the whole evening and thinks Devya is blowing it out of proportion. "Plus," he says, "I'm gay." One of Omar's texts to Devya from after the party said, "Hey, where did you go? We were having sooo much fun. Want to grab sushi tonight?" Devya wants Omar to understand what he did was wrong. He was out of control and he made Devya feel like a piece of meat with no control over her own body. She wants Omar to stay away from her.

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   i) unwelcome conduct,
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   iv) pervasive, and
   v) objectively offensive,
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   i) Any sexual act
   ii) directed against another person
   iii) without the consent of the Complainant
   iv) including instances in which the Complainant is incapable of giving consent

   a) Forcible Rape:
      i) The carnal knowledge of a person (penetration),
      ii) forcibly, and/or
      iii) against that person's will (non-consensually), or
      iv) not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of temporary or permanent mental or physical incapacity

   b) Forcible Sodomy:
      i) Oral or anal sexual intercourse with another person,
      ii) forcibly,
      iii) and/or against that person's will (non-consensually), or
      iv) not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

c) Sexual Assault with an Object:
   i) The use of an object or instrument to penetrate,
   ii) however slightly,
   iii) the genital or anal opening of the body of another person,
   iv) forcibly,
   v) and/or against that person's will (non-consensually),
   vi) or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

d) Forcible Fondling:
   i) The touching of the private body parts of another person (buttocks, groin, breasts),
   ii) for the purpose of sexual gratification,
   iii) forcibly,
   iv) and/or against that person's will (non-consensually),
   v) or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Retaliation

Richard was a star player on the men's basketball team. He was dating Davina, a member of the women's basketball team. Davina would talk with Richard about how annoyed she was that the men's team was treated better than the women's team – the men's team had better practice times, better uniforms, and more counselors to help the team members with their academics. Davina reported her concerns to the Title IX Coordinator, and the school started an investigation. During the investigation, a handful of male players were interviewed – Richard was among them. Richard also posted on Twitter, "Come out to the women's bball game! Let's support our women." On the night of the game, Richard posted, "What the literal fuck?! Shabby uniforms won't hold these ladies back! LET'S GO!"

The Athletic Director contacted Coach Roop, the men's basketball coach, and asked him to tell Richard to stop posting about the women's team. The Athletics department had a social media policy that forbade obscenities, although many students still posted curse words and, as long as they weren't directed at individuals, the coaches and the AD had never addressed the issue.

The Athletic Director also told Coach Roop that he had seen Richard leaving the Title IX Coordinator's office and that the Coach needed to do something to make sure his team was on the right track. Coach Roop decided to bench Richard for the next three games. When Richard asked why, Coach told him it was because of his profane posting and they needed him to think

about the effect he was having on his teammates and the game. After Richard was benched, he filed a complaint for retaliation against the Athletic Director and Coach Roop.

Policy

Protected activity under this policy includes reporting an incident that may implicate this policy, participating in the grievance process, supporting a Complainant or Respondent, assisting in providing information relevant to an investigation, and/or acting in good faith to oppose conduct that constitutes a violation of this Policy.

No one may take or attempt to take materially adverse action by intimidating, threatening, coercing, harassing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by law or policy, 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 this policy and procedure.

Dating Violence

Students Robert and Brooke have dated off and on for the past two years. Last Saturday, Robert and Brooke attended the Spring Formal, after having a few drinks together at her on-campus apartment. During the evening, Brooke grew increasingly agitated because Robert spent the evening being the center of attention on the dance floor, leaving Brooke by herself, even though she had specifically told him she wanted them to stick together that night. Annoyed and in tears, Brooke left and went back to her apartment.

A few hours later, Robert pounded on her apartment door. Brooke let him in, and they began to argue. Brooke noticed Robert had clearly been drinking since she left the formal. His words were slurred, and his eyes were bloodshot. This made Brooke even more upset. Brooke grabbed Robert's phone out of his hand to see whether he had been texting with Jackie, his ex-girlfriend whom he regularly went back to whenever Brooke and Robert were broken up. As Brooke grabbed for the phone, Robert pushed Brooke away and she toppled backward, hitting her head on the coffee table as she fell to the ground. Robert grabbed the phone which had fallen on the ground and walked over to Brooke. He reached out his hand to help her up, but she swatted it away and kicked wildly, shouting, "Get away from me!" and "Don't touch me!" Two of her kicks landed on Robert's stomach and chest. The Police Department responded to Brooke's apartment after a neighbor made a noise complaint. The police arrested Robert and reported the incident to the Title IX Coordinator.

Policy

4) Dating Violence, defined as:

a) violence,
b) on the basis of sex,
c) committed by a person,
d) who is in or has been in a social relationship of a romantic or intimate nature with the Complainant.
e) The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition
f) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
g) Dating violence does not include acts covered under the definition of domestic violence.

Stalking

Lee and Mel are both freshman at The College of Knowledge. They were assigned to the same orientation group and instantly became friends. They began to flirt with each other at parties during welcome week. However, by the second week of classes, Lee had met some other friends and felt Mel was coming on too strong. Mel was romantically interested in Lee and was hoping they could take their friendship to another level.

Mel invited Lee to a party for the College's LGBTQIA2SP+ Alliance, but Lee declined saying they were sick. Mel then noticed that Lee had blocked them on Facebook. Confused, the next day Mel waited for Lee outside of the classroom. When Lee saw Mel, they instantly took up talking to another classmate, so they were in full conversation when Lee walked passed Mel, pretending they hadn't seen them. That night, Lee saw Mel waiting outside Lee's door in the residence hall. Scared to return, Lee decided to sleep at a friend's room. Mel texted Lee that night, saying, "I guess that's it?" A week later, Mel texted Lee, "I'm rly just confused, what did I do wrong" Two weeks later Mel texted Lee again saying, "You could have just told me you didn't like me," followed with another text, "I can SEE you've read my text, omg, respond!!"

This morning Lee came into the Title IX Coordinator's office indicating Mel was stalking them. Lee showed the Title IX Coordinator a text from Mel from that morning that said, "I hope you are happy, all of my former friends now go out with you and party every night." Lee is concerned with how it is that Mel knows that they have been going out every night since they haven't talked in several weeks.

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2) Sexual Harassment:
   i) unwelcome conduct,
   ii) determined by a reasonable person,
   iii) to be so severe, and
   iv) pervasive, and
   v) objectively offensive,
   vi) that it effectively denies a person equal access to the Recipient's education program or activity

3) Stalking, defined as:
   a) engaging in a course of conduct,
   b) on the basis of sex,
   c) directed at a specific person, that
      i) would cause a reasonable person to fear for the person's safety, or
      ii) the safety of others; or
      iii) Suffer substantial emotional distress.

For the purposes of this definition—

i) Course of conduct means two or more acts, including, but not limited to, acts in which the Respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
ii) Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
iii) Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

Sexual Harassment

Deb is a faculty member working with a small team of seven student research assistants who meet each morning to check-in with each other and the status of their grant projects in the university lab. Amaya is a student team-member who has recently announced that she is pregnant.

One morning, Amaya texted Deb that she was going to miss the morning meeting. Deb announced to the group that they should get started because Amaya wouldn't be joining the meeting that day. A third student researcher, Paulie, responded with a snort, and said, "I bet she has morning sickness. Too bad; her breasts are getting to be GINORMOUS, and I was looking forward to having a peek this morning." Several team members laughed hard at this joke, while a couple of others chuckled uncomfortably.

Deb was livid, and immediately began to wonder how she could work with a team of people who objectify women like this. After the meeting she stormed into the Title IX office to complain about Paulie's conduct. She explained how uncomfortable she felt by the incident, how she no longer could work with Paulie, stating that he should be terminated from the grant-funded position and that the other students who laughed should be put on probation.

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Discriminatory harassment constitutes a form of discrimination that is prohibited by Recipient policy. Discriminatory harassment is defined as unwelcome conduct by any member or group

of the community on the basis of actual or perceived membership in a class protected by policy or law.

Recipient does not tolerate discriminatory harassment of any employee, student, visitor, or guest. Recipient will act to remedy all forms of harassment when reported, whether or not the harassment rises to the level of creating a "hostile environment." A hostile environment is one that unreasonably interferes with, limits, or effectively denies an individual's educational or employment access, benefits, or opportunities. This discriminatory effect results from harassing verbal, written, graphic, or physical conduct that is severe or pervasive and objectively offensive.

Sexual Harassment

Jamal is a new student at the state's flagship university who quickly gained a reputation in his first-year orientation group for making provocative political arguments. In the first few weeks of his first semester, he could often be found in the common room of his residence hall discussing and debating hot political topics with his new friends.

Jamal delighted in the intellectual debate with his peers, even though he knew some of his new friends were frustrated with his views and accused him of just trolling people for fun. Jamal was invited to start serving as a monthly columnist for the campus's conservative newspaper, *The Voice*. For his first column, he authored a rousing defense of traditional marriage roles. In his column, which he titled, "Consider This: A Woman's Place is in the Home," he argued that women's empowerment and liberation had gone too far, and he raised a number of arguments in support of women returning to what he described as more "traditional roles" of home keeping and childrearing.

Jamal's first column definitely caused a stir on campus. Samantha, President of the Women's Leadership Association, a registered student organization on campus, published letters to the editor in both *The Voice* as well as the mainstream campus newspaper condemning Jamal's column and demanding his censure by the student government. Within two days, the entire campus was embroiled in conversation about Jamal's column, Samantha's response, and whether the campus government should censure Jamal. Samantha was incensed to see some other male students giving Jamal a "high five" in the dining hall. Some of those same students came up to Samantha and tried to argue with her about her letter and how nobody wanted to hear what she had to say. Someone – Samantha didn't know who – posted a borderline misogynistic cartoon on the outside of Samantha's door. Samantha stormed up to Jamal and began to read him the riot act, telling him that his backwards views were causing real harm to the community. Jamal laughed, and responded, "You need to calm down, sweetie. This is why women don't belong in stressful work environments; you just can't handle it."

Samantha decided she had enough. She emailed the Title IX Coordinator that evening, demanding swift action for the hostile education environment that Jamal was creating on the basis of sex. She also asked if she could receive an extension on a huge term paper due the next day, because she was so upset, she couldn't possibly finish it on time.

Policy

Discriminatory harassment constitutes a form of discrimination that is prohibited by Recipient policy. Discriminatory harassment is defined as unwelcome conduct by any member or group of the community on the basis of actual or perceived membership in a class protected by policy or law.

Recipient does not tolerate discriminatory harassment of any employee, student, visitor, or guest. Recipient will act to remedy all forms of harassment when reported, whether or not the harassment rises to the level of creating a "hostile environment." A hostile environment is one that unreasonably interferes with, limits, or effectively denies an individual's educational or employment access, benefits, or opportunities. This discriminatory effect results from harassing verbal, written, graphic, or physical conduct that is severe or pervasive and objectively offensive.

APPENDIX J

HEARING OFFICER/DECISION-MAKER CERTIFICATION
LEARNING OUTCOME ATTAINMENT ASSESSMENT ANSWERS

Sexual Harassment/Quid Pro Quo

1. What elements do you consider to determine whether Dr. Dunn is in a position of power or authority over Kristen?
    a. Dr. Dunn is the professor of record for Kristen's class and determines her grade in the course. It appears his grading contains some level of subjectivity, empowering the professor and placing him in a strong position of authority.

2. What facts do you consider when assessing whether this was welcomed or unwelcomed conduct?
    a. Kristen signed up for the course because she found Dr. Dunn attractive. When he touched her shoulder in class, she didn't mind. After Dr. Dunn proposed non-traditional extra credit, she continued to talk with him in a flirty manner. They undressed each other and engaged in intercourse voluntarily. She tells her friend that she went on a "date" with him. There is no evidence here to indicate that this was unwelcome conduct.

3. For purposes of this question, assume the conduct was unwelcome. What additional information could help inform whether Dr. Dunn's statement about "non-traditional extra credit" implicates either an explicit or implicit condition for her grade?
    a. More facts here could clarify what was meant by "non-traditional extra credit." The hearing officer should evaluate the timeline of when he said this versus when he initiated sexual contact. Were there other statements that created context to this being an implicit term or condition for her grade?

4. Has Dr. Dunn violated the Sexual Harassment/Quid Pro Quo Policy?
    a. While this may be a violation of other policies, it appears that this behavior does not violate the Sexual Harassment policy. Quid Pro Quo harassment requires the conduct to be "unwelcome" and nothing here indicates this was unwelcome sexual conduct. An element of the relevant policy cannot be overlooked in assessing the conduct at issue.

Unwelcome Kissing

1. Did Anisha sexually assault Jane? What additional information would assist in this analysis?
    a. One unwelcome kiss is generally not sufficient to constitute sexual assault. While the kiss was unwelcome, an analysis should be conducted to determine whether the kiss was, in fact, sexual or sex-based. Even accepting for the sake of argument that it was, the forcible fondling definition below does not include "mouth" as an articulated private body-part. Kisses are regularly used to convey affection that is not necessarily meant as sexual in nature.

2. Does the behavior constitute sexual harassment? If so, does it rise to a level of sexual harassment that warrants discipline?
    a. Although a kiss may, depending on the circumstances (see above) constitute unwelcome sexual/sex-based physical conduct, one kiss does not rise to the level of a hostile environment. Anisha immediately stopped and left when Jane pushed her away. Nothing in these facts indicates the behavior was persistent (there was only one incident) or pervasive. The kiss also does not seem objectively offensive and is unlikely to deny Jane's access to educational opportunities.

3. Did Anisha engage in force? What evidence do you consider?
    a. While Jane characterized Anisha's action as "pinning her down," which could indicate force in certain circumstances, Jane acknowledged Anisha did not tackle her with the intent to kiss her. Nothing in these facts indicates that force was used to obtain sexual access.

Sexual Harassment/Hostile Environment

1. Does Title IX obligate a response to the incidents between Travis and Justin?
    a. Yes. Title IX covers sex-based discrimination, including same-sex sex discrimination.

2. At what point in this scenario are policies implicated?
    a. A decision-maker should begin to take note of when Justin kisses Travis at the apartment and regarding the locker room incident. Before the apartment incident, Justin had inquired about Travis's interest and Travis conveyed he was not interested. This behavior is common and within the bounds of acceptable interpersonal interaction.

3. Does Justin's behavior create a hostile environment? What information would assist in your determination?
    a. Justin's behavior appears to be escalating and is repeated. More facts should be collected to determine the circumstances of the kiss at the apartment. Was Travis cornered and unable to move away? If so, it could weigh toward being more severe. The locker room incident is likely severe. Justin cornered Travis and attempted to grab his buttocks. The incident occurring in a locker room shower, a place of vulnerability, weighs in favor of severity and objective offensiveness. Justin's behavior likely has created a hostile environment because of the repetition and inclusion of a physical assault, but it's probably an example of the most minimal conduct that could satisfy the standard.

4. Has Justin interfered, denied, or limited Travis' benefit of/access to educational programming?
    a. Justin likely has impacted Travis's access to the lacrosse team. A decision-maker should evaluate why Travis left the team; however, Justin's repeated and increasingly severe behavior, coupled with Travis's decision to leave them team, supports a determination that as a result of Justin's conduct, Travis was denied access to playing lacrosse, an educational program.

Sexual Violence

1. Did Alex engage in dating violence and/or domestic violence? What do you assess in determining this?
    a. Likely not. Alex and Diane are in an intimate relationship, as they are romantic and have a sexual history. They also live together as romantic partners. It does not appear that Alex has engaged in abuse. Although physically restraining someone could certainly constitute violence and/or abuse, the fact pattern notes that they sometimes had sex with Alex holding Diane's hands above her head. Considering the conduct in the context of the relationship and the facts as presented here, there likely is not a preponderance of evidence to support a determination that dating or domestic violence occurred from the physical restraint. However, because the dating violence definition includes sexual abuse, the dating violence policy would be violated if there is a determination that Alex is responsible for sexual assault.

2. What about forcible fondling? What do you assess to determine this?
    a. Although Diane told Alex that she didn't feel well, the facts support a finding that Diane consented to some of the sexual activity. She told him, "Let's just touch each other," and the facts support the idea that she was actively engaged in touching Alex's genitals during the interaction. However, for the reasons

included below, the intercourse was not consensual, and because intercourse includes contact, there is a preponderance of the evidence to show that the forcible fondling provision was violated, based on the definition and the fact that this type of activity is normally done for the purpose of sexual gratification. No other purpose for the action was provided.

3. What evidence do you consider in assessing whether the conduct constituted forcible rape?
    a. Consider Diane's communications to Alex. In this interaction, Diane articulated a limit of activity, suggested an alternative, never communicated permission for intercourse, and immediately objected. Her sounds are irrelevant because they were not mutually understandable permission.

4. Was Diane able to consent to sexual activity?
    a. Likely yes. Diane was intoxicated; however, individuals who are intoxicated can consent to sexual activity. The question is whether Diane was incapacitated. Did she understand the who, what, when, where, why, and how of the situation? Although Diane told Alex she was feeling ill, and the facts indicate that she was feeling dizzy and nauseous, the details indicate that Diane was coherent and able to understand the situation. She was capable of making rational, reasonable decisions. This is clearly shown by her imposition on a limit of what they would do, and a suggestion to engage in alternate conduct that was acceptable to her. There is no indication that Diane was not able to understand the implications of the situation or could not remember what happened. The preponderance of evidence does not support a determination that she was incapacitated.

Preponderance

1. If Omar doesn't remember the specifics of what happened, can he be held responsible?
    a. Yes. Failing to remember the details of reported misconduct does not negate potential responsibility. He engaged in a sexual assault (forcible fondling) without Devya's consent. That's a policy violation.

2. What are some considerations for interviewing Devya's friend who approached her at the party?
    a. What exactly did she see occur between Devya and Omar?
    b. What did she mean when she said, "It didn't look good?"
    c. What did she and Devya talk about the day after the party?

3. How do the facts that Omar is gay and thought they were having a good time affect your assessment of whether a policy violation occurred?
    a. Although motive and intent may be relevant in considering the entirety of the circumstances, sexual assault can occur when one party believes the conduct is welcomed and it can also occur regardless of the parties' sexual orientations.

Retaliation

1. Must Richard be the recipient of the original sex discrimination for Title IX to apply?
    a. No. Retaliation itself is a discriminatory act that is prohibited under Title IX. When an institution retaliates against a person because they complain of sex discrimination, or participate in an investigation of discrimination, it is considered intentional discrimination on the basis of sex and Title IX applies.

2. What other conduct could constitute protected activities in the context of a Title IX retaliation claim?
    a. Protected activity includes reporting an incident that may implicate Title IX, participating in a resolution process, supporting a Complainant or Respondent, or assisting in providing information relevant to an investigation.

3. What pieces of information would assist in assessing whether the actions taken against Richard constitute retaliation?
    a. Did Coach Roop know that Richard participated in the investigation into Davina's Title IX complaint? Did the Athletic Director's comments lead Coach Roop to take adverse action against Richard? Is the "violation of social media policy" just a pretext for the retaliatory conduct? Had the Athletic Director ever directed Coach Roop to take adverse action against another individual who had posted and violated the social media policy? Typically, this would be found to be a violation because the proffered legitimate non-retaliatory reason isn't credible, it's pretextual (because the policy was not enforced in other situations), and because the adverse act is close in time to the protected activity, raising an inference of retaliatory motive.

Dating Violence

1. Assume Brooke is the Complainant. Should Robert be held responsible for violating the dating violence policy?
    a. Likely yes. Brooke and Robert are in an intimate relationship. They have been dating on-and-off for two years. Robert pushed Brooke and she fell over the couch hitting her head. Although the fact that she hit her head seemed to be an accident, there are sufficient facts to support by a preponderance of the evidence that Robert engaged in violent conduct by pushing Brooke.

2. What if Robert makes a report about Brooke? What are the relevant considerations?
    a. A decision-maker's role is to consider all evidence in a non-biased, fair, and impartial manner. The decision-maker must evaluate all evidence and determine whether the policy has been violated. If Robert makes a report, the institution and decision-maker need to consider the validity of the report and whether there is a preponderance of evidence to support his account. Here, Brooke may argue that she was acting in self-defense, and the outcome may depend on whether institutional policy treats self-defense as an excuse for violence or as a mitigating factor affecting sanctions. The decision-maker will want to evaluate how that claim and these specific facts implicate the relevant policy prohibitions.

Stalking

1. Does Mel's behavior constitute stalking? What facts do you consider to assess this?
    a. Likely not. While Mel's behavior is repetitive, and there is some evidence that Mel was interfering with Lee's peace/safety (see below), there is no evidence from the fact pattern that supports the determination that this was conduct that would cause a reasonable person to feel fear or substantial emotional distress. There were no threats, express or implied, only the possibility that Mel knew Lee's habits of going out, which could be known from social media, normal observation, third-party accounts, etc.

2. What analysis needs to be conducted to apply the sexual harassment policy to the facts to assess whether Mel's behavior constitutes sexual harassment?
    a. Is there a denial of Lee's ability to access the institution's education program?
    b. Is this behavior:
        i. Unwelcome
        ii. Sex/gender-based or of a sexual nature. While Mel was interested in Lee, it seems the context of the texts are much more about understanding why Lee refuses to talk to Mel.

c. Does Mel's behavior meet a severe, pervasive, objectively offensive standard? It is not severe, pervasive, or objectively offensive.

3. If a policy violation is not found, how else might the institution respond and proceed in this situation?
    a. At Lee's request, the institution may communicate to Mel clear messaging to stay away from Lee. If Mel continues to communicate with Lee or otherwise interfere with Lee's peace/safety after such a directive, these may be additional facts to support a finding of stalking. In addition, Mel would be violating the directive of an institutional official, which is often an element of each institution's student conduct code.

Sexual Harassment

1. Can Deb file a Title IX Complaint for sexual harassment?
    a. Yes. Although Deb herself was not the subject of the behavior, she witnessed the behavior and thought it was inappropriate.
2. Does Paulie's joke rise to the level of creating a hostile environment?
    a. No. Paulie's joke is not pervasive or severe.

3. If Amaya found out about the joke, could she bring a Title IX claim, and would that change the analysis of the conduct?
    a. The analysis of whether Paulie's behavior violated policy would be the same. While pregnancy status is included in Title IX, it does not follow that every off-color joke about pregnancy or breasts qualifies as sexual harassment.

4. Has Deb's access to education or employment programs been limited by Paulie's joke?
    a. There do not appear to be facts, aside from Deb feeling uncomfortable, to indicate she has been denied access to education or employment programs. Being uncomfortable does not equate to being denied access to the educational/employment program.

SEXUAL HARASSMENT

1. Have Jamal's written statements created a hostile environment for Samantha?
    a. Although Samantha – and others – may feel and believe otherwise, nothing in the facts presented indicate that Jamal has created a hostile environment. While Jamal's views may be inflammatory to some students and make them uncomfortable, that alone does not create a hostile environment as articulated in the discriminatory harassment policy.

2. What are the policy elements that you need to apply to the facts at hand?
    a. Denial/limitation of someone's ability to participate in/benefit from educational program
    b. Conduct that is (all of the below)
        i. Unwelcome, and
        ii. Based on actual or perceived membership in a protected class, and
        iii. Severe *or* pervasive, and
        iv. Objectively offensive

3. What elements are most in dispute by the facts presented?
    a. Objectively offensive
    b. Severe or pervasive

4. What about Jamal's verbal statements directed at Samantha?
    a. Nothing in his statements to Samantha changes the analysis. While off-putting, sexist, and possibly inflammatory, his comments still need to be assessed through the lens of the relevant policy elements (above) and do not constitute a hostile environment.

5. Should the institution consider Samantha's request for an extension on her assignment?
    a. Yes. While Jamal's behavior does not rise to the level of a policy violation, the institution can and should consider and provide reasonable support to Complainants if administrators conclude that an allegation is made in good faith.