Association of
Title IX Administrators

Title IX Advisors

Training & Certification Course

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Strategic Risk Management Solutions

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

CONTENT ADVISORY

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

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

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AGENDA

1. Right to Advisor & Advisor Roles in Title IX Proceedings
2. Know the Process
3. The Advisor's Role Pre-Hearing
4. The Advisor's Role at the Hearing
5. The Advisor’s Role Post-Hearing
6. Title IX Team Expectations
7. When Things Don't Go According to Plan

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TITLE IX

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

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

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OVERVIEW: ADVISOR RIGHTS & ROLES IN TITLE IX PROCEEDINGS

- Advisor of Choice Provision
- Advisor Types, Roles, Expectations, and Limitations
- Considerations for Being an Advisor

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ADVISOR OF CHOICE

- Parties must have the same opportunities to have others present during any proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the Advisor of their choice, who may be, but is not required to be, an attorney
- May not limit the choice or presence of Advisor for either the Complainant or Respondent
  - Don't have to provide an attorney or equivalently educated/trained Advisor to one party just because the other party has one

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ADVISOR OF CHOICE (CONT.)

- Can regulate the extent to which Advisors may participate in the proceedings, if restrictions apply equally to all parties
- The Title IX regulations overlap with similar provisions in VAWA Section 304*
  - VAWA applies to sexual assault, dating violence, domestic violence, and stalking
  - Title IX applies to all four of the above **PLUS** sexual harassment

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*Violence Against Women Reauthorization Act of 2013

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ADVISOR OF CHOICE (CONT.)

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

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INSTITUTION-APPOINTED ADVISOR

- Advisee isn't the Advisor's "client"
- Conversations unlikely to governed by any "privilege" regardless of role
- If Advisor is also an institutionally mandated reporter, what happens if employer asks Advisor to disclose information that has been shared by an advisee?
- What if an advisee asks an Advisor to do something they consider unethical, such as mislead or conceal evidence?
- What if an Advisor knows their advisee is knowingly providing false or misleading information?
- Advisors need an ethical code or strong personal/professional integrity to guide them

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INSTITUTION-APPOINTED ADVISOR (CONT.)

- An Advisor could be called by the other party as a witness and asked about what they know (at Recipient's discretion)
  - Unless an institutional rule prohibits this or confers "confidentiality" on the Advisor
- Advisors may not like or believe an advisee
- An advisee may not like or trust their Advisor
- Advisors are not required to be aligned with their advisee, but if not, friction can result

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WHO CAN SERVE AS AN ADVISOR?

- Friends, family, roommates, faculty, college or school staff members, attorneys, etc.
- Institutional rules will determine if a party may have more than one Advisor
  - Union representation cases
  - When a party wants an Advisor and an emotional support person
  - In K-12, the parties may have an Advisor and parents/guardians also are entitled to participate
- If more than one Advisor is not permitted, the advisee can rotate Advisors during the process, or the advisee can have one Advisor outside the meeting, and one inside with them

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WHO CAN SERVE AS AN ADVISOR? (CONT.)

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

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ROLE OF THE ADVISOR

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

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

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ROLE OF THE ADVISOR (CONT.)

- Help the advisee access supportive measures, community resources, and advocacy services
- Help the advisee to review and comment on the investigation report
- Help the advisee to advocate for the inclusion or exclusion of evidence from the process
- Help the advisee prepare for the hearing (documentation, opening statements, closing statements, impact statements, etc.), and **must** conduct any cross-examination at the hearing
- Help the advisee to frame the appeal and prepare appeal documentation

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INSTITUTIONAL EMPLOYEE AS ADVOCATE VS. ADVISOR

Advocate

- Confidential (**not** privileged)
  - Records belong to the institution
- Supportive and non-directive
- Connection to resources
- Assist with obtaining supportive measures
- Wait for contact from client to initiate follow-up
- Active listening; allow the client to share their story in a narrative fashion based on the client's reality

Advisor

- Private
  - Records belong to the institution
- Supportive and directive
- Assist with navigating the process
- Initiate contact more frequently; sometimes administrative in nature
- Need to ask pertinent questions, including questions that may feel invasive or not based solely on the client's reality
- Responsible for cross-examination during hearing

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ADVISOR EXPECTATIONS

- Get trained
- Learn the applicable policies and procedures
- Understand your role thoroughly and when you don't know something, figure out how to find the answer or who to ask
- Advise with integrity and follow any applicable professional ethics
- Get to know the Title IX Team, if you can, and establish a good rapport
- Be timely, professional, and organized

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ADVISOR EXPECTATIONS (CONT.)

- Don’t try to unnecessarily delay the process. The institution may delay a week or two to accommodate an Advisor’s schedule, but they don’t have to, and many institutions won’t allow an unreasonable delay, or an attempt to run out the clock

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ADVISORS IN K-12 SETTINGS

- Similar role, except that many districts allow Advisor to present evidence on behalf of their advisee, especially when that advisee is very young
- Process may not include a live hearing, but there will still be a decision-making step
  - Advisor can assist with the written questions and answers that are exchanged between the parties and the Decision-maker
  - Ensure that the advisee is heard by the Decision-maker (in writing)

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ADVISORS IN K-12 SETTINGS (CONT.)

- Some K-12 districts have live hearings but may or may not provide the opportunity to cross-examine
- Title IX does not impose a cross-examination mandate even with a live hearing for K-12
  - State law or board policy may do so, and/or define the role of the Advisor in the process

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LIMITATIONS ON THE ROLE OF THE ATTORNEY-ADVISOR

- Parties can select an attorney as Advisor
- The attorney-advisor does not have full representation rights in most college resolution processes
  - Limitations on speaking or acting on behalf of advisee. The role is to advise, not to give evidence.
  - See North Carolina and North Dakota state laws for notable exceptions
- Different colleges and schools use different rules governing Advisors, and this can even vary from investigator to investigator, and hearing to hearing, so be sure to clarify your boundaries with the officials with whom you'll be working. Some may grant Advisors more latitude than others, or more than suggested by institutional policy.

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LIMITATIONS ON THE ROLE OF THE ATTORNEY-ADVISOR (CONT.)

- Some administrators tend to view the advisory role less like a federal right and more like a (sometimes barely) tolerated nuisance
- Some administrators resent the federal interference that has interjected attorneys into their educational (and by-design, non-adversarial) disciplinary proceedings
- Some administrators are intimidated by attorney-advisors
- Some institutions require communication from an attorney-advisor to go through the institution's counsel

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LIMITATIONS ON THE ROLE OF THE ATTORNEY-ADVISOR (CONT.)

- Some administrators will take a negative view of an attorney-advisor's client if the Advisor's advocacy is too zealous
- Consider the impact if attorney-advisor is too pushy, if an Advisor offends an administrator, or an Advisor pushes back against their procedurally-established boundaries
  - This isn't right, but it's real
  - Some colleges permit the party to be disciplined for the transgressions of their Advisor – beware and avoid disrupting the process

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LIMITATIONS ON THE ROLE OF THE ATTORNEY-ADVISOR (CONT.)

- If a no-contact order is in place between the parties, that no-contact order may extend to third parties acting on behalf of the parties – meaning that the Advisor for the Respondent cannot communicate with the Advisor for the Complainant, and vice versa
  - Sometimes, a limited exception can be obtained from the Title IX Coordinator in advance of any such communication

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CONSIDERATIONS FOR BEING AN ADVISOR

- Advisor and advisee may not agree on strategy
- Advisee doesn't have to listen to, and can refuse to cooperate with, their Advisor
- Advisee can request/find a different Advisor
- Advisee can raise concerns or a complaint about the Advisor's work, if an institution-appointed Advisor
  - Could the future include lawsuits that look like "ineffective assistance claims?"
  - Institutionally appointed Advisors should confirm that their employer covers them in the Advisor role with insurance and indemnity

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CONSIDERATIONS FOR BEING AN ADVISOR (CONT.)

- Serving in the Advisor role may be seen as political, if an individual is also an institutional employee
  - Will an individual only work with Complainants?
  - Only with Respondents?
  - With both?
  - Potential conflicts of interest?
    - Consider the present and the future

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KNOW THE PROCESS

- Advisee Rights
- Who's Who in the Title IX Process
- Procedural Steps, Supportive Measures, and Ensuring Fairness

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ADVISEE RIGHTS

- The Title IX Regulations confer many substantive rights on parties.
- Advisors need to be familiar with these rights to help assure that their advisee(s) receive them, and they need to be prepared to advocate for their advisee(s) to receive them if the institution falls short.
- The regulations are enforceable by the U.S. Department of Education (OCR) and the courts as of August 14, 2020.
- According to OCR, the regulations are prospective only, and do not apply retroactively (**but** see recent case law).
- The regulations pre-empt state or local laws or rulings that directly conflict with Title IX.

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WHO'S WHO IN THE TITLE IX PROCESS?

- **Title IX Coordinator** – an official responsible for the Recipient's compliance with Title IX
  - Not a substantive Decision-maker on whether policy was violated
  - May have a role in emergency removals, supportive measures, informal resolution, and/or dismissal decisions
  - May serve as an Investigator
- **Deputy Title IX Coordinator(s)** – administrators who assist and support the Title IX Coordinator in achieving Title IX compliance
- **Investigator(s)** – employees/contractors who gather evidence and compile an investigation report

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WHO'S WHO IN THE TITLE IX PROCESS? (CONT.)

- **Decision-maker(s)** – a single administrator/contractor or a panel (usually 3; including a voting Chair) who renders a finding/determination and determines any sanctions and any recommended remedies
- **Hearing Facilitator or Case Manager** – an administrator who runs the logistics of the hearing (recording, technology, witness timing, copying/distributing materials, etc.)
  - May be the Title IX Coordinator, a Deputy, or another individual otherwise not affiliated with the matter
- **Appeal Decision-maker** – a single administrator/contractor or a panel (usually 3, including a voting Chair) who renders a decision regarding an appeal of a decision or a dismissal

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WHO'S WHO IN THE TITLE IX PROCESS? (CONT.)

- **Advisors** – an individual chosen by a party or appointed by an institution to provide advice and support for a party and conduct cross-examination on behalf of the party during any live hearing
  - Each party is allowed an Advisor
  - Witnesses are typically not allowed to have Advisors
- **Title IX Team** – a pool of individuals who may serve in the roles identified above

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SUPPORTIVE MEASURES

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

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SUPPORTIVE MEASURES (CONT.)

Supportive measures may include:

- Referral to counseling, medical, and/or other health services
- Referral to the Employee Assistance Program
- Visa and immigration assistance
- Student financial aid counseling
- Safety planning
- Education to the community or community subgroup
- Altering campus housing situation
- Altering work arrangements for employees or student-employees
- Providing campus escorts

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SUPPORTIVE MEASURES (CONT.)

Supportive measures may include:

- Providing transportation assistance
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course-related adjustments
- Timely warnings
- Trespass, Persona Non Grata, or Be on the Lookout (BOLO) orders
- Class schedule modifications, withdrawals, or leaves of absence
- Increased security and monitoring of certain areas of the campus
- Others deemed appropriate by the Title IX Coordinator

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SUPPORTIVE MEASURES (CONT.)

- Supportive measures provided to the Complainant or Respondent must remain "confidential," to the extent that maintaining such confidentiality would not impair the ability of the Recipient to provide the supportive measures
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures
- Supportive measures don't have to be provided equally between the parties, but hopefully the institution will strive to be equitable
  - The regulations do not specifically mandate the same measures for Respondents

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SCHOOL/INSTITUTION RESPONSE TO A REPORT OF SEXUAL HARASSMENT

- The Title IX Coordinator must promptly contact the Complainant to discuss the availability of supportive measures
  - Consider the Complainant's wishes with respect to supportive measures
  - Inform the Complainant of the availability of supportive measures with or without the filing of a formal complaint
  - Explain to the Complainant the process for filing a formal complaint

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SCHOOL/INSTITUTION RESPONSE TO A REPORT OF SEXUAL HARASSMENT

- Must respond promptly to actual knowledge of sexual harassment in an education program or activity of the Recipient against a person in the United States in a manner that is not deliberately indifferent
- **Education program or activity** means locations, events, or circumstances over which the Recipient exercises substantial control over both the Respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

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EMERGENCY REMOVAL

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

1. Undertaking an individualized safety and risk analysis
2. Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
3. Providing the Respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.

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EMPLOYEE ADMINISTRATIVE LEAVE

- A Recipient may place a non-student employee Respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act

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PROMPTNESS

- Recipient must provide reasonably prompt time frames for conclusion of the grievance process, including:
  - Reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the Recipient offers informal resolution processes, and
  - A process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the Complainant and the Respondent of the delay or extension and the reasons for the action.
    - Good cause may include considerations such as the absence of a party, a party's Advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities

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NOTICE REQUIREMENTS TO PARTIES REQUIRED PRIOR TO INVESTIGATION

After receiving a formal complaint, the Recipient must provide the following written notice to the parties who are known:

- Notice of the grievance process, including any informal resolution process
- Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview, including:
  - The identities of the parties involved in the incident, if known
  - The conduct allegedly constituting sexual harassment
  - The date and location of the alleged incident, if known

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NOTICE REQUIREMENTS TO PARTIES REQUIRED PRIOR TO INVESTIGATION

After receiving a formal complaint, the Recipient must provide the following written notice to the parties who are known (Cont.):

- A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
- Notice that the parties may have an Advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence

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NOTICE REQUIREMENTS TO PARTIES REQUIRED PRIOR TO INVESTIGATION

After receiving a formal complaint, the Recipient must provide the following written notice to the parties who are known (Cont.):

- Notice of any provision in the Recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- Notice of any additional allegations added after the initial notice to the parties whose identities are known.

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CONSOLIDATION OF FORMAL COMPLAINTS

- A Recipient may consolidate formal complaints against more than one Respondent, or by more than one Complainant against one or more Respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances
  - This requires clear policy/protocols
  - Consider how this practice may impact your advisee

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FAIRNESS AND DUE PROCESS

- The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the Recipient and not on the parties
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence
  - This has interesting implications for gag orders…

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EVIDENTIARY STANDARDS

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

- **Preponderance of the evidence**: "More likely than not."
  - The only equitable standard
  - 50.1% (50% plus a feather)
  - The "tipped scale"

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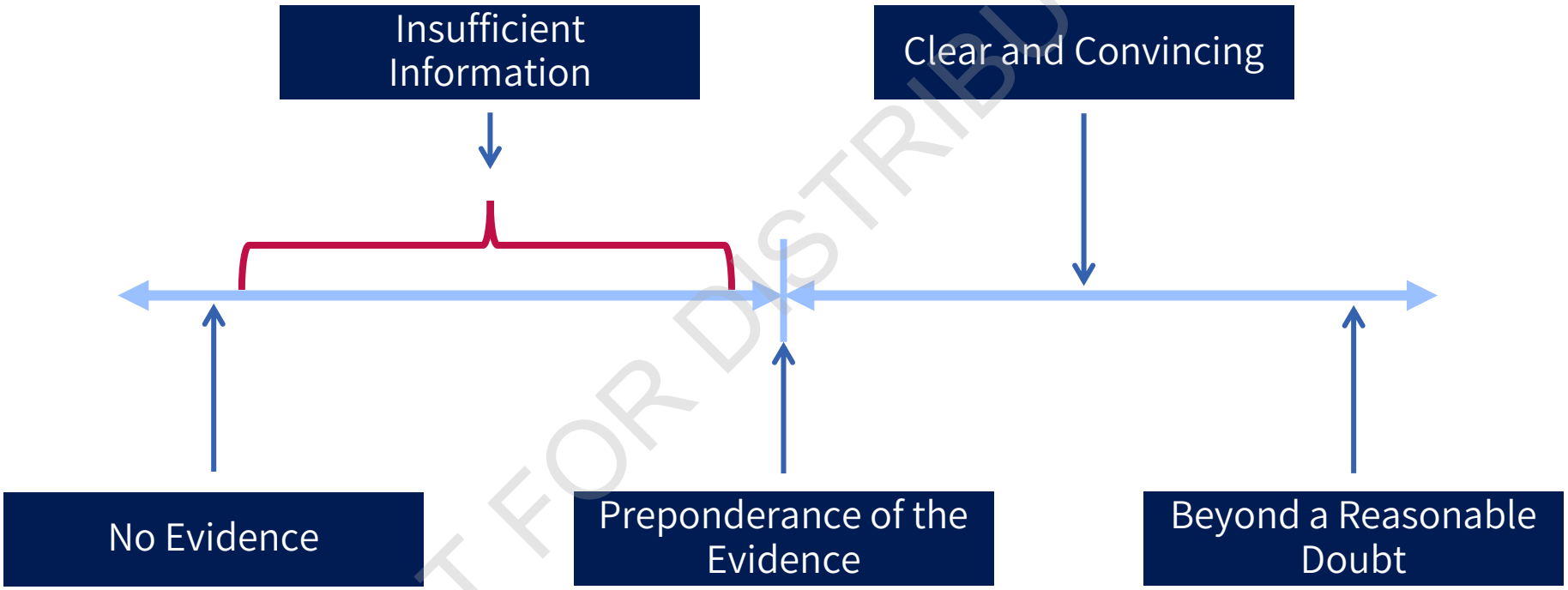
EVIDENTIARY STANDARDS



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RETALIATION

- Recipient must implement a policy that the Recipient itself or others may not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX,
  - or because the individual has made a report or complaint,
  - or has testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.

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RETALIATION (CONT.)

- Retaliation also includes intimidation, threats, coercion, or discrimination, including
  - charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or
  - a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX.
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination, or the institution may cover them within its Title IX § 106.45 regulations-compliant process

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RETALIATION (CONT.)

- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith during a grievance proceeding does not constitute retaliation if a policy recognizes that determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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THE ADVISOR'S ROLE PRIOR TO THE HEARING

- Intake and Dismissals
- Investigation and Investigation Report
- Pre-Hearing Interactions
- Informal Resolution

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PRE-HEARING STEPS

For most colleges and schools, the steps in the pre-hearing resolution process include:

- Intake/Formal Complaint
- Notice of Allegation/Investigation
- Initial/Dismissal Assessment
- Investigation
- Informal Resolution (potentially)
- Post-investigation report/evidence review
- Pre-hearing matters

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MANDATORY DISMISSAL – FOUR GROUNDS

The Title IX Coordinator MUST dismiss a complaint at any time during the investigation or hearing:

1. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX regulations even if proved, and/or
2. If the conduct did not occur in the Recipient's education program or activity,* or
3. If the conduct did not occur against a person in the United States, or
4. If at the time of filing a Formal Complaint, a Complainant is not participating in or attempting to participate in the Recipient's education program or activity, and based on the available information, the Title IX Coordinator has determined that they do not need to sign a Formal Complaint on behalf of the Recipient

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DISCRETIONARY OR PERMISSIVE DISMISSAL

The Title IX Coordinator MAY dismiss a complaint if at any time during the investigation or hearing:

- A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations; and/or
- The Respondent is no longer enrolled or employed by the Recipient; and/or
- Specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations.

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NOTICE OF DISMISSAL

- Upon a mandatory or permissive dismissal, the Title IX Coordinator should promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties
  - Dismissal is appealable
  - May reinstate the complaint under another provision of the Recipient's code of conduct or other applicable resolution procedures

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INTAKE TO INVESTIGATION

- Advisors may accompany advisees to any intake meetings
  - The institution can conduct intake without an Advisor present if the party agrees
- During the initial assessment (a formal or informal step in the process), the parties may wish to advocate for or against dismissal, and Advisors can help them to frame their arguments, and appeals of any dismissal (if any)
- Advisors can and should help advisees to understand the details of the Notice of Investigation and Allegations (NOIA)

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ADVISOR ROLE IN INVESTIGATIONS

- There should be clear institutional rules on the role of the Advisor during the investigation
- May accompany the party to all investigation interviews
- Role is typically limited to interacting with (and coaching) advisee during the interview
- Clarify with Investigator(s) whether you need to take a break or sidebar with your advisee or can speak directly to them during the interview
- Clarify whether you can address the Investigator(s), and under what circumstances

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INVESTIGATION REPORT

- The Investigator(s) will write an investigation report appropriately summarizing the investigation and all relevant evidence gathered
  - OCR has created a two-step vetting process for review of the evidence and the report
    - This is intended to allow the parties and Advisors to comment on the report prior to finalization and then to prepare for the hearing with the final report in hand

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 1

Prior to the completion of the investigation report:

- Evidence directly related to allegations must:
  - Be sent to each party and Advisor
  - Be in an electronic format or hard copy
  - Include evidence upon which the Recipient does not intend to rely
  - Include exculpatory and inculpatory evidence
- After sending the evidence, the Investigator(s) must:
  - Allow 10 days for written response
  - Consider response prior to completion of report

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Source: 34 C.F.R. § 106.45(b)(5)(vi)

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PARTY ACCESS TO EVIDENCE/REPORT

- Whether included as relevant in the investigation report or not, all such directly related evidence is subject to the parties' inspection and review and must be available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination

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PRE-HEARING INTERACTIONS WITH THE INVESTIGATOR(S)

During the 10-day period when the report is being finalized, the advisee and Advisor may:

- Suggest new witnesses
- Suggestion additional questions to be asked of parties or witnesses
- Comment on the evidence
- Offer new evidence
- Challenge Investigator determinations of what is relevant (evidence to be relied upon by the Decision-maker) versus what is directly related (evidence not to be relied upon by the Decision-maker)

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 2

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

- The final investigation report summarizing relevant evidence must be sent:
  - To each party and Advisor
  - In an electronic format or hard copy
  - For the parties' review and written response
- A separate file of all directly related evidence will also be shared (this evidence is excluded from the report)
- This right of access for the Advisor to the investigation report is direct and unencumbered (though a Non-Disclosure Agreement (NDA) can be required)

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Source: 34 C.F.R. § 106.45(b)(5)(vii) and § 106.45(b)(6)(ii)

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PRE-HEARING INTERACTIONS WITH THE PANEL, CHAIR, OR DECISION-MAKER

- Although not explicitly required or even mentioned in the Title IX regulations, the Chair or Decision-maker may conduct pre-hearing meetings for each party (in writing, or in person)

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PRE-HEARING INTERACTIONS WITH THE PANEL, CHAIR, OR DECISION-MAKER (CONT.)

- Pre-hearing meetings can provide an opportunity to:
  - Answer questions about the hearing and its procedures
  - Clarify expectations regarding logistics, decorum, the role of Advisors, and technology
  - Discern whether parties intend to ask questions of any or all witnesses (in order to evaluate which witnesses should be invited to attend the hearing), or whether a party intends not to testify at the hearing
  - Can invite parties to submit questions in advance, but this is not required
  - Discern any conflicts of interest/vet recusal requests
  - Consider any questions regarding relevance of evidence or proposed questions and may make pre-hearing rulings

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INFORMAL RESOLUTION

- Informal resolution, that does not involve a full investigation and/or adjudication, may be offered at any time prior to reaching a determination regarding responsibility.
  - May not be a condition of enrollment or employment
- Participation is voluntary and can only be offered when a formal complaint is filed. If successful, it can avoid a hearing. If not, the hearing will usually proceed.
- Title IX Coordinator must obtain the parties' voluntary, written consent to the informal resolution process
- Recipient may not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student, in situations that fall under the Title IX regulations.

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REQUIREMENTS OF INFORMAL RESOLUTION OPTIONS

Written notice to parties disclosing:

- The allegations
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations
- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

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THE ADVISOR'S ROLE AT THE HEARING

- Hearing Overview
- Questioning & Cross-Examination
- Determination of Responsibility
- Written Determinations

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LIVE HEARINGS

- Higher education institutions must provide for a live hearing
- At the live hearing, the Decision-maker(s) must permit each party's Advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility
- Only **relevant** cross-examination and other questions may be asked of a party or witness

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PROVISION OF AN ADVISOR

- If a party does not have an Advisor of choice present, the Recipient must provide, without fee or charge to that party, an Advisor of the Recipient's choice, who may be, but is not required to be an attorney, to conduct cross-examination on behalf of that party
- A party and Advisor can strategize for the hearing and collaborate on preparation such as questions, opening and closing statements, impact statements, etc.
- Advisors can prepare witnesses, including expert witnesses, and prepare exhibits and visuals
- Advisors should be aware of any institutional policies or procedures that limit the last-minute introduction of new evidence at the hearing, rather than during the investigation

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HEARING TECHNOLOGY

- At the request of either party, the live hearing can occur via technology with the parties located in separate rooms, or located remotely, as long as the Decision-maker(s) and parties can see and hear the party or the witness answering questions.
- The Recipient must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

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QUESTIONING & CROSS-EXAMINATION

- Cross-examination of the other party and all witnesses, if any, must be conducted directly, orally, and in real time by the party's Advisor and never by a party personally
- The Chair or Decision-maker must permit relevant questions and follow-up questions, including those challenging credibility
- Once a question is posed, the Chair or Decision-maker must first determine whether a question is relevant and then, if so, will direct the party or witness to answer
  - Must explain any decision to exclude a question as not relevant
- The relevance determination is final (though it could become an issue raised on appeal)

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- In August 2021, a federal district court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a Decision-maker from relying on statements that are not subject to cross-examination during the hearing:
  - "If a party or witness does not submit to cross-examination at the live hearing, the [D]ecision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility…."
- If a party or witness does not appear at the hearing, the Decision-maker may rely upon their earlier statements and assess their credibility and weight based on the totality of the information provided*

*Public institutions in the Sixth Circuit may not be able to find a policy violation if a Complainant does not attend the hearing and their credibility is at issue

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- An advisee could choose to appear, choose not to appear, choose to appear and answer all questions, or choose to appear and answer some but not all questions
- If an advisee will rely upon a witness's testimony or evidence, it is recommended that the Advisor help to ensure the witness attends the hearing to aid the Decision-maker in fully assessing their credibility and the credibility of the evidence provided
- The Decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- Golden Rule
- Ask direct questions. Don't try intimidation tactics. They will likely backfire.
- Don't try to trick or confuse others, either, for the same reasons.
- Remain seated while questioning. A hearing is not a courtroom.
- Respect the rules and boundaries of the process, even if you don't agree with them (unless they violate the regulations).
- Pause after asking each question to allow the Chair/Decision-maker to determine the relevance.
- Avoid multi-part or confusing questions.

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QUESTIONING & CROSS-EXAMINATION (CONT.)

How many questions should an Advisor prepare to ask?

- Our advice is to ask witnesses (through direct examination or cross-examination) about every significant statement they have made (use the investigation report and interview transcripts as a roadmap)
- Advisors should prepare with their advisee so that they know what to ask of each witness and what their advisee wants them to ask
- Stick to what is relevant, which means the evidence would tend to prove or disprove an issue in the complaint

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- Expect that the panel or Decision-maker may ask many questions as well, and that it may do so before an Advisor has a chance. If so, the Chair or Decision-maker may disallow an Advisor's question if it duplicates a previously asked question.
- Keep track of what has been asked and be prepared to explain why a question is relevant or may produce a different answer than was already provided.

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- Advisors should be supportive when their advisee is being questioned. If an advisee is uncomfortable or emotional, the Advisor can ask for a break.
- If a question is abusive, the Advisor should ask the Decision-maker to rule on it.
- If an Advisor thinks their advisee doesn't understand a question, they may ask the Decision-maker for it to be repeated or clarified, or they may repeat it for the advisee.
  - Thus, you need to pay close attention to the question being asked.
- An advisee may find it helpful to pause before answering, pose the question again to themselves in their head, make sure they understand what is being asked, compose their thoughts in response, and then answer.

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- If an advisee wants to pause to discuss a question or answer with their Advisor, they can do so, and the Advisor can also make a request to pause or confer before the advisee answers.
- There is no obligation to conduct cross-examination if the advisee determines that it is not necessary or could be counter-productive. The Advisor should respect that decision by the advisee.

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- What will happen if an Advisor refuses to conduct cross-examination?
  - The institution will replace them with an Advisor who will do so.
- What if an advisee is uncooperative?
  - Get up to speed on the complaint as best you can, and make sure you have thoroughly reviewed the investigation report.
  - An Advisor must be willing to conduct cross-examination for their advisee, even if they don't cooperate with their Advisor, unless they have directed the Advisor not to conduct cross.
- Only engage in discussion with the Chair or Decision-maker about relevance if invited to do so. This practice may or may not be permitted by institutional rules.

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PRIOR SEXUAL HISTORY

- Questions and evidence about the Complainant's sexual **predisposition** are never relevant, per the regulations.
- Questions and evidence about the Complainant's prior sexual **behavior** are not relevant, unless:
  - offered to prove that someone other than the Respondent committed the conduct alleged, or
  - 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.

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PRIVILEGED INFORMATION AS EVIDENCE

Permission required for:

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

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FORMAL RESOLUTION FOR K-12 SCHOOLS AND OTHER RECIPIENTS

- K-12 schools, and other Recipients that are not postsecondary institutions (e.g., scouting organizations), may, but need not, provide for a live hearing (some already must under state or district rules, and will continue to do so)
- With or without a live hearing, after the Recipient has sent the investigation report to the parties and before reaching a responsibility determination, the Decision-maker(s) must provide each party with an opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party

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SANCTIONS

- The Recipient's policy must describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the Recipient may implement following any determination of responsibility
  - Mirrors Clery Act language for higher education

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DETERMINATION OF RESPONSIBILITY

- After the conclusion of the hearing, the Decision-maker(s) will deliberate, determine responsibility, and issue a written determination applying the standard of evidence
  - A detailed Notice of Outcome will be prepared and provided to the parties simultaneously in writing
  - The determination regarding responsibility becomes final either on the date that the Recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely

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WRITTEN DETERMINATIONS

The written determination regarding responsibility includes the following:

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

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WRITTEN DETERMINATIONS

The written determination regarding responsibility includes the following (cont.):

- Sanctions imposed on Respondent (if any)
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the Recipient to the Complainant
- When the outcome is considered final, and any changes that can occur prior to finalization
- Procedures and bases for any appeal

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THE ADVISOR'S ROLE POST-HEARING

- Appeals
- Recordkeeping

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BASES FOR APPEAL

- All parties may appeal a determination regarding responsibility, and from a dismissal of a formal complaint, on the following bases:
  - Procedural irregularity that affected the outcome
  - New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome
  - Title IX Coordinator, Investigator, or Decision-maker had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome
- Recipients may offer additional bases for appeal so long as they are offered equally to the parties

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APPEALS

- The Recipient must notify the other party in writing when an appeal is filed and implement appeal procedures equally for all parties
- The Decision-maker(s) for the appeal cannot be the same person as the Decision-maker(s) that reached the determination regarding responsibility or dismissal, the Investigator(s), or the Title IX Coordinator
- The parties must be given a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Appeals are decided by a written exchange; they are not in person or re-hearings

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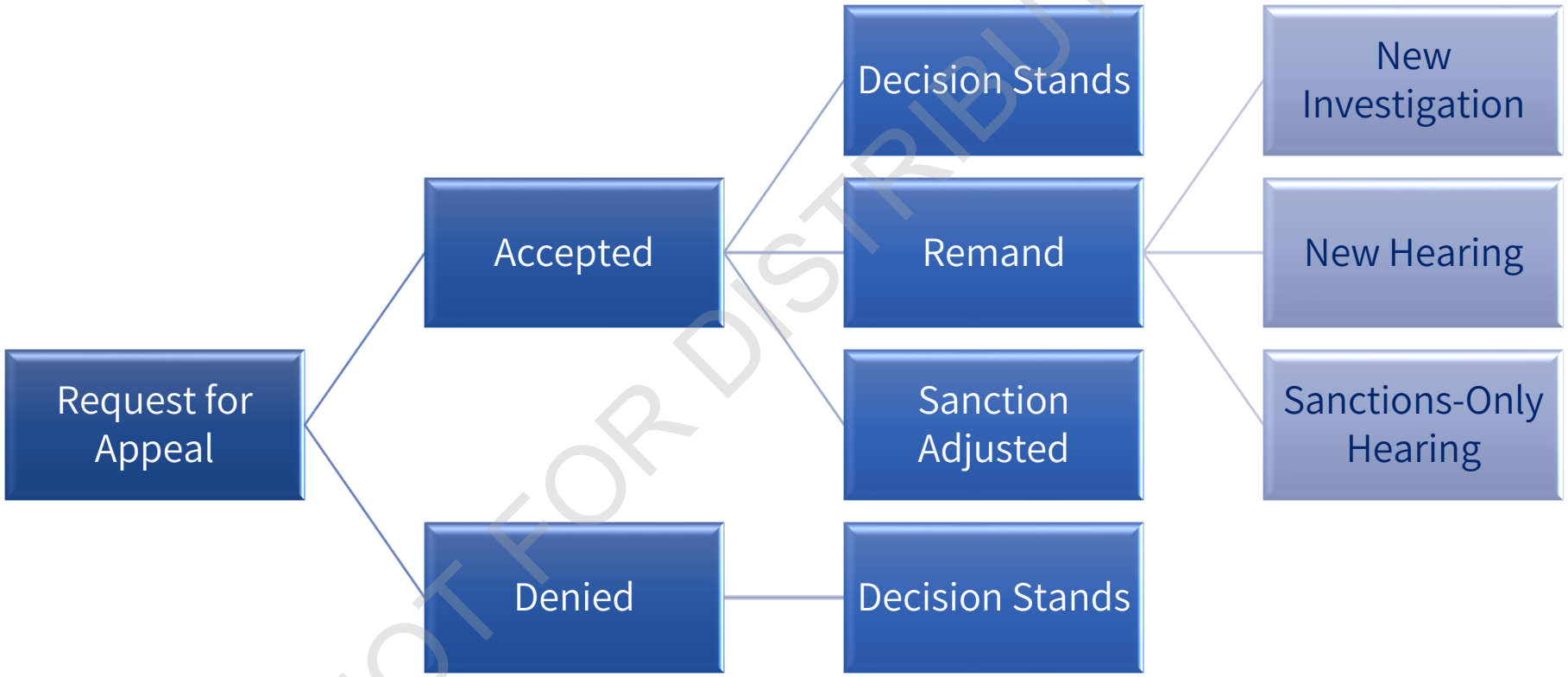
APPEALS: THE PROCESS



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RECORDKEEPING

Recipient records must be maintained for a period of seven years, including:

- Each sexual harassment investigation including any determination regarding responsibility
- Any hearing audio or audiovisual recording or transcript
- Any disciplinary sanctions imposed on the Respondent
- Any remedies provided to the Complainant designed to restore or preserve equal access to the Recipient's education program or activity
- Any appeal and the result therefrom
- Any informal resolution and the result therefrom

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TITLE IX TEAM EXPECTATIONS

- Conflict of Interest and Bias
- Training Minimums and Materials
- Confidentiality and Privacy

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NEUTRALITY, CONFLICT OF INTEREST, AND OBJECTIVITY

- Institutional officials must objectively evaluate all relevant evidence – including both inculpatory and exculpatory evidence – and determine credibility without respect to a person's status as a Complainant, Respondent, or witness
- The Recipient must implement a process to ensure that the Title IX Coordinator, Investigator, Decision-maker, or any person designated to facilitate an informal resolution process does not have a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent

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CONFLICT OF INTEREST

- Conflicts of interest are expressly prohibited in the 2020 Title IX regulations
- Types of conflicts:
  - Wearing too many hats in the process
  - Legal counsel as Investigator or Decision-maker
  - Decision-makers who are not impartial
  - Biased training materials; reliance on sex stereotypes
- Conflicts of interest can be situational or positional
  - Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity is not compromised
  - Previously disciplining a student or employee is often not enough to create a conflict of interest

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BIAS

There are many forms of bias and prejudice that can impact decisions and sanctions:

- Pre-determined outcome
- Partisan approach by Investigators in questioning, findings, or report
- Partisan approach by hearing board members in questioning, findings, or sanction
- Intervention by senior-level institutional officials
- Not staying in one's lane
- Improper application of institutional procedures
- Improper application of institutional policies
- Confirmation bias
- Implicit bias
- Animus of any kind

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BIAS (CONT.)

- Advisors should be prepared to recognize and raise issues of bias
- Advisors should pay attention to recusal procedures and how to request recusal by a participant in the process on the basis of bias or conflict of interest
- During the investigation, an Advisor (or their advisee) should raise issues of bias with the Title IX Coordinator
- Questions about bias of an Investigator or witness can be asked at the hearing, if relevant
- If bias appears at the hearing, an Advisor should request a recess to raise it with the Decision-maker and raise it on appeal if not satisfied with the response

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TRAINING MINIMUMS

Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process must be trained on:

- The definition of sexual harassment
- How to apply definitions used by the Recipient with respect to consent (or the absence or negation of consent) consistently and impartially
- The scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
- How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

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TRAINING MINIMUMS (CONT.)

- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Issues of relevance to create an investigation report that fairly summarizes relevant evidence

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TRAINING MATERIALS

- Any materials used to train Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process must promote impartiality and not rely on sex stereotypes
- Advisors should ask to review these materials (they are required to be posted publicly on the Recipient's website) and address any concerns that arise
  - The most recent materials used to train the Title IX Team should be posted
  - Although seven years of materials need to be maintained, only most recent need to be posted
  - This requirement is not retroactive; seven years started August 14, 2020

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CONFIDENTIALITY AND PRIVACY

- Recipients must maintain the confidentiality of the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any Complainant, any individual who has been reported to be the perpetrator of sex discrimination, any Respondent, and any witness, except as may be permitted by the FERPA statute, or as required by law, or to carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding.
- As a result, the Recipient may ask all Advisors to sign NDAs regarding the resolution process and any materials shared with Advisors

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WHEN THINGS DON'T GO ACCORDING TO PLAN

- Addressing Procedural Defects

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ADDRESSING PROCEDURAL DEFECTS

- What should an Advisor do when:
  - Policies/procedures are non-compliant with federal law or regulation, or the laws of the Recipient's jurisdiction
  - The institution is not following its own policies
- Considerations for how and when to address defects:
  - Is the Advisor an institutionally appointed Advisor or an attorney or other Advisor "from the outside?"
  - Raise objection at the time or raise concern post-process?
  - Account for the wishes or preferred approach of their advisee?
  - Do Advisors have a responsibility to raise the question?

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ADDRESSING PROCEDURAL DEFECTS (CONT.)

Communication Considerations:

- Timing
  - Pre-emptive
  - Contemporaneous
  - On Appeal
- Form (written, verbal)
- Appropriate messenger (Advisor or advisee)
- Appropriate recipient

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Questions?

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