



TITLE IX TRAINING

Legal Obligations and Roles®

CAMPBELL
SHATLEY PLLC

ATTORNEYS AT LAW

PREVIEW



Section One: Title IX
Fundamentals



Section Two: Title IX
Personnel



Section Three:
Compliance



Section Four:
Responding to
Allegations



Section Five:
Investigations

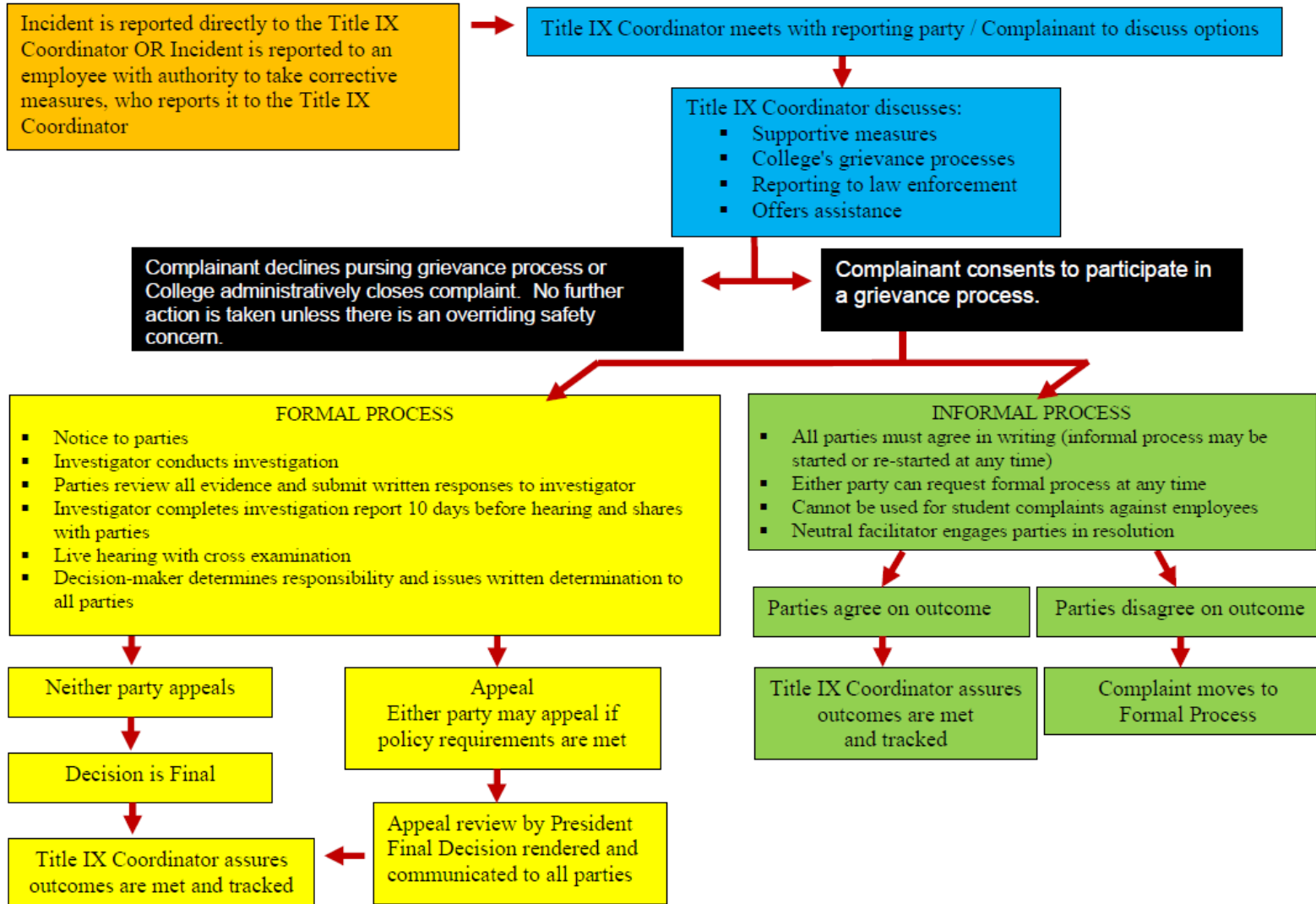


Section Six:
Hearings



Section Seven:
Determinations and
Appeals

SEXUAL HARASSMENT / MISCONDUCT REPORTING PROCESS





SECTION ONE

TITLE IX FUNDAMENTALS

TITLE IX OVERVIEW

- Title IX of the Education Amendments of 1972 is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities.
- All public and private elementary and secondary schools, colleges and universities receiving any federal financial assistance must comply with Title IX.
- The United States Department of Education Office for Civil Rights (OCR) is the entity responsible for monitoring compliance with Title IX.

SEX-BASED DISCRIMINATION

- What is sex-based discrimination?
 - The term is not defined in Title IX.
 - “The Department follows the Supreme Court’s approach in interpreting conduct ‘on the basis of sex’ to include conduct of a sexual nature or conduct referencing or aimed at a particular sex.”

A BRIEF HISTORY OF GUIDANCE

- OCR periodically explains its interpretation of Title IX, by issuing official guidance documents, Q&As, and “Dear Colleague” letters.
- Timeline of recent guidance:
 - January 2001: Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties
 - July 2003: First Amendment: Dear Colleague
 - January 2006: Dear Colleague – Sexual Harassment Issues
 - April 2011: Dear Colleague – Sexual Violence
 - April 2014: Q&A Title IX Sexual Violence

REGULATIONS V. GUIDANCE

- Timeline of recent guidance:
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 - July 2003: First Amendment: Dear Colleague
 - January 2006: Dear Colleague – Sexual Harassment Issues
 - ~~April 2011: Dear Colleague – Sexual Violence~~
 - ~~April 2014: Q&A Title IX Sexual Violence~~
 - September 2017: Q&A Campus Sexual Misconduct
 - May 2020: Regulations/Final Rule
 - September 2020: Q&A Regarding the Final Rule

TITLE IX'S FINAL RULE

- November 29, 2018 – Secretary DeVos announces intention to restructure Title IX
- November 29 – January 30 – Public comment period
- May 6, 2020 – Final Title IX rules announced
- August 14, 2020 – Effective/implementation date

WHAT CONDUCT IS COVERED?

- Allegations of *sexual harassment* that occur in an *education program or activity* located within the United States and of which the recipient has *actual knowledge*.
- If a person alleges misconduct that fits in the above description, institutions have a duty to respond. The Title IX Final Rule sets out your legal obligations in responding to such allegations.

- *Actual Knowledge* – notice of allegations of sexual harassment by the Title IX Coordinator or any college official who has authority to institute corrective measures on behalf of the college.
- *Sexual Harassment - quid pro quo* harassment; unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity, including conduct based on sex stereotyping; or any instance of sexual assault, dating violence, domestic violence, or stalking.
- *Education Program or Activity* – any locations, events, or circumstances over which the College exercised substantial control over a Respondent and the context in which the alleged sexual harassment occurs, including any building owned or controlled by a recognized student organization.



KEY DEFINITIONS

SEXUAL HARASSMENT DEFINITION

- Quid pro quo harassment – conditioning the provision of an aid, benefit, or service of the school on a person’s participation in unwelcome sexual conduct
- Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity, including conduct based on sex stereotyping
- Sexual assault, as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in VAWA

SEXUAL HARASSMENT DEFINITION

Does *quid pro quo* harassment need to be severe, pervasive, and objectively offensive? How about Clery/VAWA offenses?

- No. Only the “unwelcome conduct” prong of the sexual harassment definition must be severe, pervasive, and objectively offensive.

HYPOTHETICAL – ACTUAL KNOWLEDGE

- An adjunct accounting professor was approached by one of his students who asked if she could transfer to another section of his course. When asked why, the student explained that another student in the class has made several comments about her body during class lectures and that she cannot concentrate in class. The student asked the professor to keep their conversation confidential because the other student is in a romantic relationship with her co-worker at the one campus library.
- **Does the student's report to the adjunct professor trigger a response by the College under Title IX?**

SCOPE: EDUCATION PROGRAM OR ACTIVITY

- “Education Program or Activity”
 - All the operations of a College, University or other post-secondary institution
 - Includes: locations, events or circumstances over which the recipient exercised substantial control over both the Respondent and the context in which the harassment occurs
 - Includes: Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

EDUCATION PROGRAM OR ACTIVITY

Which circumstance, if any, does NOT constitute an “education program or activity”?

A. A student alleges she was sexually harassed by another student during their culinary class.

B. A student alleges his professor sexually harassed him during an off-campus, clinical rotation.

C. A student alleges she was sexually assaulted at an off-campus apartment by another student.

RETALIATION IS PROHIBITED

- Individuals, departments, and colleges may not intimidate, threaten, coerce, or discriminate against an individual
 - for the purpose of interfering with their Title IX rights; or
 - because the individual filed a complaint, testified, participated, or refused to participate in a Title IX proceeding.
- The exercise of First Amendment rights does not constitute retaliation.

OTHER
MISCONDUCT
THAT
MAY BE IN
POLICY

- Sexual Exploitation
- Bullying/Cyberbullying
- Hazing
- Threatening or causing physical harm
- Discrimination
- Intimidation

WHAT ABOUT ONLINE CONDUCT?

“Education program or activity” encompasses all of a recipient’s operations, which may include internet networks, digital platforms, and computer equipment owned or controlled by the recipient. Sexually harassing conduct is not contingent on the method by which the conduct is perpetrated.

SCENARIO – ONLINE CONDUCT

- A student uses a personal phone to perpetuate online sexual harassment during class time. Does the college exercise “substantial control” over –
 - The student?
 - The context in which the sexual harassment occurs?

COVERED GROUPS

- What groups are covered under Title IX?
 - Student-v-Student
 - Employee-v-Student
 - Employee-v-Employee
 - Applicants for admission and employment
 - Student organizations
 - Third parties participating in an education program or activity
- A College's obligation to respond appropriately to Title IX complaints is the same irrespective of the sex of the parties involved.

DOES IT MATTER IF THE PERSONS ARE THE SAME SEX?

- No
- Title IX and Title VII protect all covered persons from discrimination based on sex regardless of the sex, gender identity, or sexual orientation of the individuals involved.
- Claims of discrimination based on gender identity are investigated by OCR.

DO DISABLED STUDENTS NEED SPECIAL CONSIDERATION?

- Yes
- The information made available to the student body should also be accessible to students with disabilities.
- The school may need to consider counseling or psychological services to assist a student in understanding their rights in the event of an investigation.
- Reasonable accommodations may need to be made in the event of an informal resolution or formal grievance process.



SECTION TWO

TITLE IX PERSONNEL

TITLE IX COORDINATOR

- Title IX Coordinator
 - A Title IX Coordinator's core responsibilities include overseeing the College's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints.
 - **This means that the Title IX Coordinator must have knowledge of the requirements of Title IX, of the College's own policies and procedures on sex discrimination and of all complaints raising Title IX issues throughout the College.**

TITLE IX COORDINATOR

- Coordinate the College's duty to PREVENT / INVESTIGATE / REMEDY
 - ensure policy / grievance procedures are updated
 - ensure notices are given to staff and students
 - ensure formal complaints are investigated
 - ensure appropriate steps to prevent immediate harm
 - ensure investigators are appointed and trained
 - ensure decision-makers are appointed and trained
 - ensure that appeals officers are appointed and trained
 - ensure proper record keeping
 - ensure proper interaction with law enforcement

INVESTIGATOR S

Can be anyone, but must not be someone with a conflict of interest, bias, or preconceived notion of the issue and/or parties

Must be trained in how to conduct a Title IX investigation

Must be trained in how to create an investigation report, including issues of relevance

DECISION-MAKERS

- Again, can be anyone, but must not be someone with a conflict of interest, bias, or preconceived notion of the issue and/or parties
- Must be trained in the College's hearing process, including how to facilitate and maintain order during a hearing
- Must be trained in issues of relevance of questions and evidence offered at hearings

APPEAL DECISION-MAKERS

- Model Policy provides that the President is the Appeal Decision-Maker
- Appeal decision-makers should be well-versed in the College's Title IX policy, including the bases for appeal and the available options on appeal

BIAS, CONFLICTS OF INTEREST, AND RECUSALS

- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
 - Pre-determined outcome
 - Partisan approach by investigators in questioning, findings, or report
 - Partisan approach by decision-maker in questioning, findings, or sanction
 - Intervention by senior-level institutional officials
 - Improper application of institutional policies or procedures
 - Confirmation bias
 - Implicit bias
 - Animus of any kind

REAL LIFE CASE STUDIES

- John Doe v. Rhodes College
 - Details: A former fraternity member and football player sued the college after he was expelled for allegedly raping a female student. The student contended that wide news coverage of the incident influenced the college's decision.
 - Significance: A U.S. district court stopped the college from enforcing the expulsion pending the outcome of the lawsuit. In that order, the judge indicated that the student's due process rights were likely violated.

REAL LIFE CASE STUDIES

- Doe v. Columbia University
 - Details: A male student sued the university after he was disciplined for alleged non-consensual sex with a female student. The male student alleged the university did not follow its own procedures in disciplining him and the university was prejudiced due to pressure to take sexual assault complaints seriously.
 - Significance: A federal Court of Appeals refused to dismiss the former student's lawsuit, explaining that allegations of disciplinary errors combined with assertions the university was subject to intense criticism for not taking sexual assault complaints seriously gave rise to a valid claim of gender bias.

TRAINING FOR EMPLOYEES

- Who is the Title IX Coordinator?
- Training for those employees who participate in Title IX matters (Title IX personnel).
- All employees should know where to direct students or employees who want to make a Title IX report or complaint.

TITLE IX TRAINING FOR TITLE IX PERSONNEL

- Annual training must be provided to Title IX Coordinators, investigators, decision-makers, and those involved in informal resolution.
- Training in the following topics is mandatory:
 - The definition of sexual harassment for Title IX purposes
 - The scope of education programs and activities
 - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution
 - How to serve impartially
 - Technology to be used at hearings
 - Issues of relevance of questions and evidence at hearings
 - Issues of relevance in creating investigation reports



COMPLIANCE REQUIREMENTS

All training materials must be posted on Colleges' websites.



SECTION THREE

TITLE IX COMPLIANCE REQUIREMENTS

MAINTAINING RECORDS

- Reports and Formal complaints, including the basis for why the institutional response was not deliberately indifferent;
- Any actions taken in response to the report or formal complaint, including any supportive measures implemented;
 - If supportive measures were not provided, reasons for why that was not clearly unreasonable in light of the known circumstances and
 - Records must show measures taken are designed to restore or preserve equal access to education programs and activities
- Investigation records, such as investigator notes, documentary evidence collected, and the investigative report;
- Written determinations, sanctions, and remedies;
- Any recordings or transcripts from any live hearings;
- Appeals;
- Informal resolutions; and
- Training materials.

WHERE CAN STUDENTS/EMPLOYEES FIND THIS INFORMATION?

- College Policy
- College website and all student and employee handbooks:
 - A statement of the College's policy of nondiscrimination on the basis of sex
 - Title IX Coordinator's contact information
 - A statement that Title IX inquiries may be referred to the Title IX Coordinator or to the Assistant Secretary for Civil Rights

COLLEGE WEBSITE

- The College does not discriminate on the basis of sex in its education programs or activities and is required by Title IX of the Education Amendments Act of 1972 and federal regulations to not discriminate in such a manner. This requirement extends to admission and employment.
- Inquiries about the application of Title IX and its implementing federal regulations may be referred to the Title IX Coordinator and/or the Assistant Secretary for Civil Rights in the Office for Civil Rights at the U.S. Department of Education.
- The Title IX Coordinator's contact information is: _____.
- All training materials.



SECTION FOUR

RESPONDING TO ALLEGATIONS

WHEN TO ACT

- When a College has “actual knowledge” of possible sexual harassment, it must undertake immediate and appropriate steps to offer supportive measures and determine if an investigation is required or requested.
- College will be deemed to have actual knowledge if the Title IX Coordinator or any College official with authority to institute corrective measures has notice of allegations of sexual harassment.
- College must not be “deliberately indifferent”.

WHEN TO ACT

- Other sources of notice:
 - Community: social media, print/television, community members.
 - “Credible reports” of sexual harassment, particularly a pattern of acts against multiple students.
 - “Widespread, openly practiced, or well-known” among students/employees.

WHEN TO INVESTIGATE

- Do the allegations as stated constitute a violation of College policy? (including whether the alleged conduct occurred in an education program or activity, located within the US, of which the College has actual knowledge)
 - If yes, does Complainant want to pursue a formal investigation?
 - If yes, investigate.
 - If no, are the allegations of the type that the College must investigate regardless of Complainant's wishes?

WHEN TO INVESTIGATE

- Factors to consider if a Complainant does not want an investigation:
 - The more serious the conduct, the higher need to investigate (e.g., one instance of rape).
 - The more frequent the conduct, the higher the need to investigate (e.g., widespread behavior against multiple victims).

ACTING v. INVESTIGATING

- Immediate Steps:
 - Communicate with individual who reported conduct
 - Implement supportive measures
 - Share College policy and procedure
 - Determine whether allegations fall within Title IX Policy

FORMAL COMPLAINTS

- May only be initiated/submitted by Complainant or Title IX Coordinator.
- Should include:
 - Name and address of Complainant
 - Description of alleged sexual harassment
 - Request to investigate
 - Signature of Complainant

CONSOLIDATION OF FORMAL COMPLAINTS

- Provided the allegations arise out of the same facts or circumstances, schools are permitted to consolidate formal complaints that are:
 - Against more than one Respondent
 - By more than one Complainant against one or more Respondents
 - By one party against the other party

CLOSING A REPORT OR COMPLAINT

MANDATORY

- Allegations, even if proven, would not constitute a violation of Title IX Policy
- Alleged sexual harassment did not occur in an education program or activity or in the U.S.

PERMISSIVE

- Complainant requests withdrawal
- Respondent is no longer enrolled or employed by the College
- College is prevented from gathering sufficient evidence

PROCEDURE TO CLOSE A REPORT OR COMPLAINT

- Title IX Coordinator must notify parties, including:
 - The reason(s) for closure;
 - Parties' rights to appeal; and
 - Directions to an appropriate College office or department to resolve the report or complaint, if any.

INFORMAL RESOLUTION

- Informal resolution may not be used for a student's allegations against a College employee.
- Voluntary – parties must provide written consent.
- Independent, neutral person facilitates informal resolution (not the Title IX Coordinator).
- Process may end at any time prior to resolution agreement.

INFORMAL RESOLUTION

- Title IX Coordinator provides notice to parties of:
 - Allegations of sexual harassment;
 - Requirements of the informal resolution process; and
 - Potential outcomes resulting from participating in the informal resolution process.
- Resolution is concluded only when all parties have signed a written agreement.
 - Agreement is non-revocable and non-appealable.

HYPOTHETICAL

- The parties to a Title IX Complaint have both consented to engaging in an informal resolution process. The parties engaged in mutual discussions for approximately 2 hours. After the conclusion of the meeting the parties agreed to resolve the complaint through informal resolution. Following a lunch break, the Respondent informed the Title IX Coordinator that they changed their mind and wanted the opportunity to have a live hearing.
- **Is the Respondent entitled to a live hearing?**

REMOVAL/LEAVE

- College is permitted to remove a Respondent from school on an emergency basis, provided the College:
 - Undertakes an individualized safety and risk analysis;
 - Determines an immediate threat to the physical health or safety of any person arising from the allegations justifies removal; and
 - Provides the Respondent with notice and an opportunity to challenge the decision immediately following the removal.
- College is permitted to place an Employee-Respondent on administrative leave with pay during the pendency of its grievance process.



SECTION FIVE

INVESTIGATIONS

OVERVIEW

- *When* to investigate?
- *Who* investigates?
- Elements of an Investigation
- Intersections with Criminal investigations/proceedings
- Conducting the Investigation
- Collecting & Analyzing Evidence/Relevance
- Advisors
- Written Investigative Report

GENERAL EQUITABLE PRINCIPLES

Evidence must be evaluated objectively.

Both parties have opportunity to have Advisor present in any meeting, interview, or decision-making process.

Supportive measures should be offered to both parties.

Respondent is presumed not responsible for alleged conduct.

Written notice of any meeting, interview, or hearing must be provided to parties.

Burden of proof and gathering of evidence rests on the College.

WHEN TO INVESTIGATE

- After the receipt of a Formal Complaint by the Title IX Coordinator.
- Title IX Coordinator appoints a trained investigator & provides written notice to the parties about rights and responsibilities during the investigation.



WHO INVESTIGATES

- Who?
 - Title IX Coordinator cannot conduct the investigation but still oversees the process.
 - Title IX Coordinator must be completely informed of any complaints.
 - Conflicts of interest? Title IX Coordinator must choose a neutral investigator.


ELEMENTS OF INVESTIGATION

- Purpose: A fact-finding process to determine
 - 1) whether the Respondent violated College policies prohibiting sexual harassment; and if so,
 - 2) what steps the College will take to end the sexual harassment/violence, eliminate the hostile environment, and prevent recurrence.
- Investigations must be prompt, thorough and equitable
- Investigation may include (but is not limited to):
 - Conducting interviews with the parties and witnesses.
 - Reviewing law enforcement investigation documents.
 - Reviewing student and/or personnel files.
 - Gathering and examining relevant documents and evidence.

ELEMENTS OF INVESTIGATION


Title IX Coordinator: Written Notice of Investigation to Parties

- Sufficient details to allow parties to respond and prepare for initial interviews;
- Identity of the parties involved;
- Conduct alleged to be sexual harassment;
- Date and location of alleged incidents;
- **Statement that Respondent is presumed not responsible and responsibility determination is made at conclusion of process;**
- Parties' right to an Advisor;
- Parties' right to review evidence; and
- Notice that College prohibits making knowingly false statements or submitting false information




INTERSECTION WITH CRIMINAL INVESTIGATION S

- Title IX does not require the College to report alleged criminal incidents to law enforcement
- College should inform alleged victim of their right to make a criminal report and not dissuade an alleged victim from making a criminal report.
- Evidence obtained in a criminal investigation may be used by the College as source of fact-finding.



INTERSECTION WITH CRIMINAL INVESTIGATION S

- College may not wait for the conclusion of a criminal investigation to act under Title IX.
- However, the College may need to delay an investigation during the law enforcement/criminal investigation.
 - If the College does delay, the College still must offer supportive measures to the parties.
 - The College should update the parties on the status of the matter during any delay.



INTERSECTION WITH CRIMINAL INVESTIGATION S

- OCR Advice: The College should seek a Memorandum of Understanding (MOU) with local law enforcement regarding concurrent criminal and Title IX investigations.
 - The MOU must allow the College to meet its Title IX requirements.
 - The MOU must also recognize student FERPA-based rights (i.e., no sharing of student information from the College to law enforcement unless properly subpoenaed).

HYPOTHETICAL

- Scenario – It's Monday morning and you're heading to your desk as the Title IX Coordinator. Your cell phone rings and it's the Dean of Students, notifying you that on Friday evening, she received a report of alleged conduct that might violate the College's Title IX policy.
- On Friday, the women's soccer team held their regular practice. After practice, a few of the female students showered in the locker room. One of the female students screamed and yelled, "there's a hand in the ceiling!"
- The female student swears she saw a hand with a cell phone filming the other students from a huge hole in the ceiling. On Friday evening, the Dean of Students and President of the College were notified and the College/local law enforcement responded to the scene.
- As the Title IX Coordinator, what are your next steps? How should you work with law enforcement in this scenario?

CONDUCTING THE INVESTIGATION

- Investigations must be prompt, thorough, and equitable
- College aims to bring all investigations to resolution within 30 business days from the date the Title IX Coordinator determines an investigation should commence
- Extensions of this timeframe allowed for “good cause”:
 - Complexity or number of allegations;
 - Severity and extent of alleged misconduct;
 - Number of parties, witnesses and other evidence involved;
 - Availability of the parties;
 - A request by a party to delay an investigation;
 - Effect of a concurrent criminal investigation or proceeding;
 - Intervening holidays, College breaks, or other closures;
 - Good faith efforts to reach a resolution; or
 - Other unforeseen circumstances

CONDUCTING THE INVESTIGATION

- Conducting Interviews
 - Typically the Complainant; Respondent; & any witnesses
 - A party's Advisor may be present during an interview
 - Written Notice to the parties
- Recordings
 - Interviews may be recorded by the College
- What if a party or a witness refuses to participate?

HYPOTHETICAL - INTERVIEWS

- You have interviewed the Complainant and Respondent during your investigation. You left two voicemails for Witness #1 to schedule an interview but have not heard back. You were scheduled to meet with Witness #2 last week but received an email that they had a test and needed to reschedule and that they were going on a trip out of state for a week after that. **How should the investigator proceed?**

CONDUCTING THE INVESTIGATION

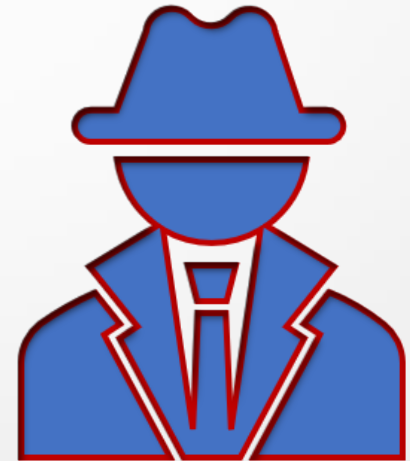
- Advisors:
 - During investigation
 - Role limited to advice, guidance and support for a party
 - May be present at all stages of investigation but may not participate/advocate in the interview
 - Must maintain privacy of records shared
 - Expected to refrain from interfering with investigation
 - Discipline:
 - One warning
 - Advisor who continues to disrupt or overstep limits of role will be asked to leave
 - Title IX Coordinator will determine whether they may return or be replaced

HYPOTHETICAL – ADVISORS

- The College’s investigator is preparing to interview the Complainant during a Title IX investigation. The investigator receives an email from the Complainant that she would like her neighbor to serve as her Advisor. Two days prior to the hearing, the Title IX Coordinator receives an email from the Respondent stating that he doesn’t have an Advisor and requests that the College appoint an attorney to serve as his Advisor at the hearing.
- **Can the Complainant’s neighbor serve as an Advisor during the interview?**
- **Does the College have to appoint an attorney to serve as the Respondent’s Advisor at the hearing?**

EVIDENCE

Investigator should objectively evaluate all physical, documentary, or other evidence as appropriate and available.



STANDARDS OF EVIDENCE

Standard of Evidence	Level of Proof
Beyond a Reasonable Doubt	Highest standard of evidence; used in criminal law; facts of the case lead to only one reasonable conclusion
Clear and Convincing	Hybrid; proof that a particular fact or event was highly and substantially more likely than not to have occurred
Preponderance of Evidence	Civil standard; proof that a fact or event was more likely than not to have occurred

EVIDENCE

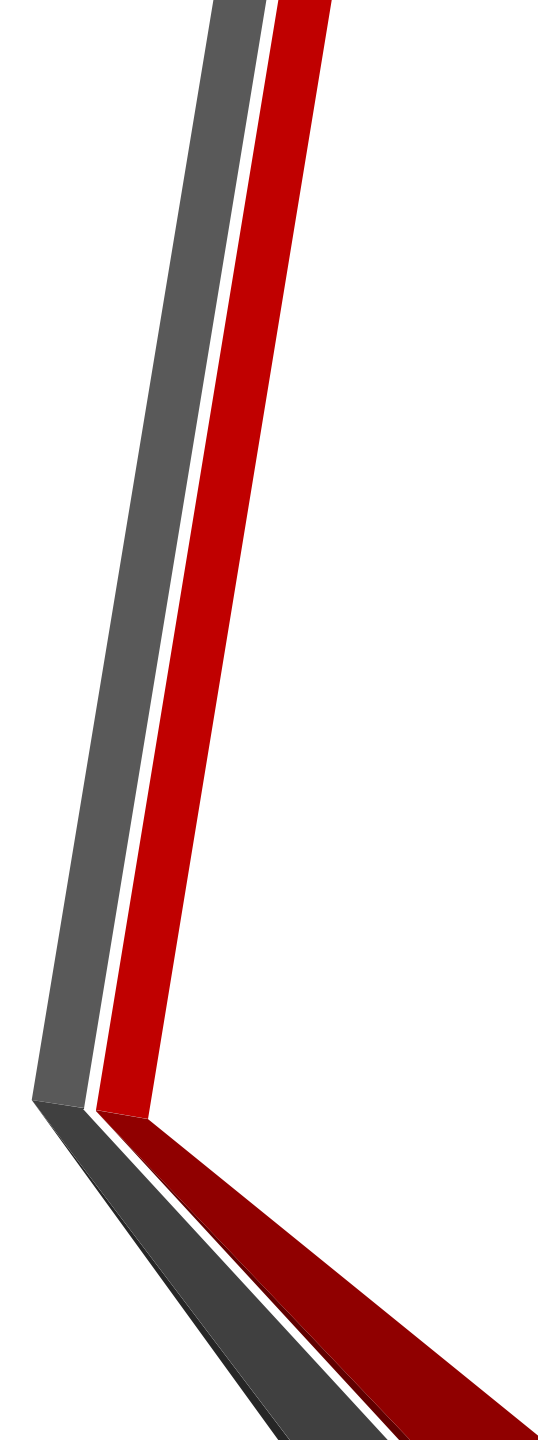
- No person acting on behalf of the College may rely upon or otherwise use questions or evidence that seek disclosure of information protected under a legally recognized privilege, unless the privilege is waived.
 - Attorney-Client
 - Healthcare Provider-Patient (G.S. 8-53, -53.3, -53.5, -53.13)
 - Agents of rape crisis centers and domestic violence programs-Victim (G.S. 8-53.12)

INVESTIGATIVE REPORT

- At the conclusion of the Investigation, Investigator must provide all parties equal opportunity to review evidence obtained during the investigation that is directly related to the allegations – **even evidence upon which the College does not intend to rely.**
- Parties may submit written responses to the Investigator regarding the evidence obtained.
- The Investigator must receive and consider the parties written responses, if any, prior to the submission of the Investigative Report
- Investigator submits the Investigative Report to the parties that “fairly summarizes relevant evidence,” including a summary of the allegations and responses; a summary of investigative steps taken; and a summary of the evidence relevant to a determination.

INVESTIGATIVE REPORT

- Typically, there is going to be a menu of options that will be available to the investigator in finalizing their report:
 - Option 1: Respondent committed some or all of the alleged sexual violence/misconduct.
 - Option 2: Respondent did not commit any of the alleged sexual violence/misconduct.
 - Option 3: Evidence is inconclusive (In other words: “I can’t figure out who is being truthful.”)
 - May prevent a remedy but does not prevent the College supporting the Complainant.



Evidence is generally considered relevant if it has value in proving or disproving a fact at issue:

Alleged policy violation

A party or witness' credibility

The investigator makes initial relevance "decisions" by including a summary of evidence in the investigation report

But relevance is ultimately up to the decision-maker, who is not bound by the investigator's judgment

WHAT IS CREDIBILITY?

- Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness
- Accuracy and reliability of information
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility

HYPOTHETICALS- ISSUES OF RELEVANCY

- The Investigator interviews one of the witnesses to the alleged incident identified by the Respondent. At the end of the interview the Witness reads back through their text messages with the Respondent on the evening of the incident. **Are these text messages relevant? What should the investigator do?**
- During an investigation, the Complainant shows the Investigator copies of social media posts made by the Respondent on the evening of the alleged incident that have since been deleted by the Respondent. **Are these posts relevant? What should the investigator do?**
- In your interview with the Respondent, the Respondent denies leaving campus with the Complainant at 11pm. **What can the investigator do to investigate this assertion?**

Soft report
writing

Omitting
credibility
assessments

Serving as a
cross-
examiner

Incomplete
policy analysis



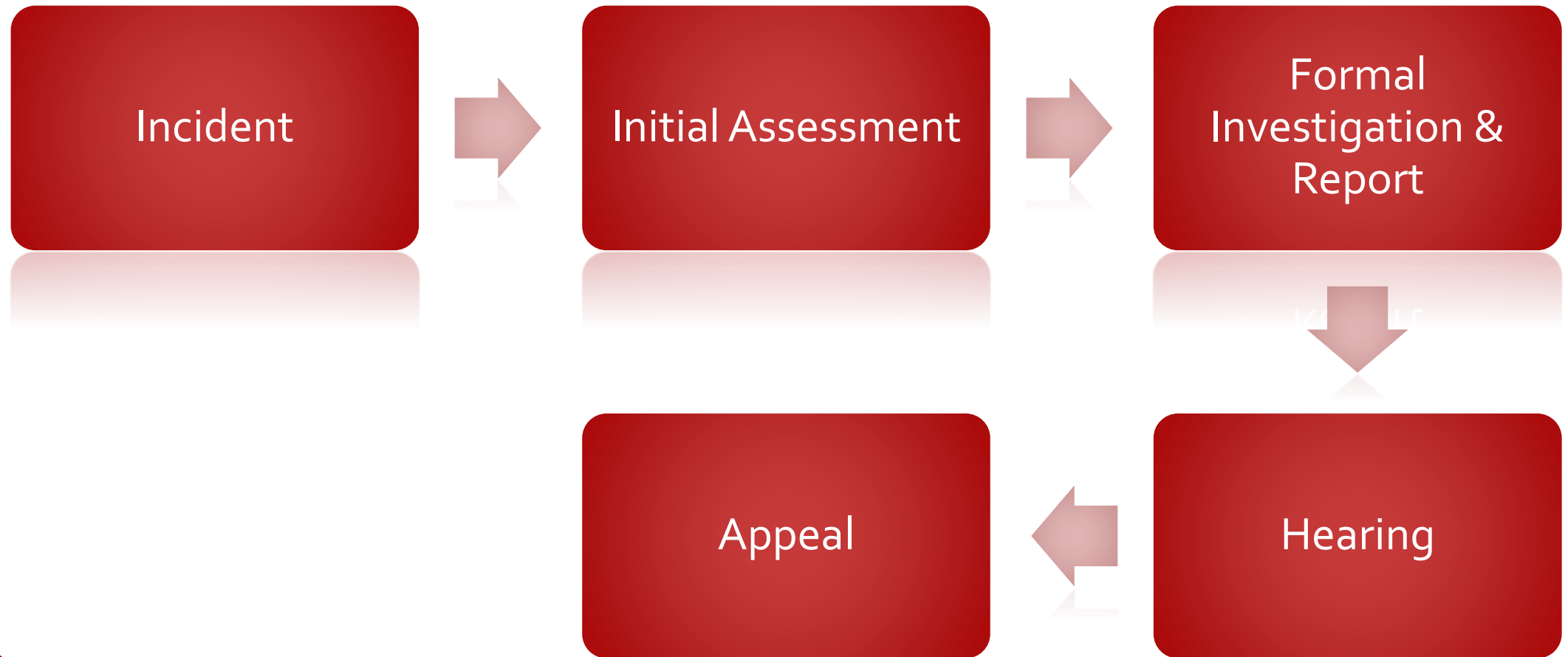
TIPS TO
AVOID
COMMON
REPORT
WRITING
ERRORS



SECTION SIX

**TITLE IX
HEARINGS**

THE PROCESS



- So what happens after an investigator gives the parties an investigative report?
 - College must choose a separate, independent “decision-maker” (cannot be the investigator or the Title IX Coordinator).
 - At least 10 days after issuing the investigative report, the College must hold a “live” hearing in front of the decision-maker to determine a Respondent’s responsibility

HEARINGS?

DECISION-MAKERS

Decision-makers have no side other than the integrity of the process. And decision-makers represent the College's process.

Remember that the burden of proof and the burden of gathering evidence sufficient to reach a determination rests on the College and not on the parties.

PRE- HEARING PREPARATIO N

Should include:

- “Motions” hearing
- Meeting of panel, if any
- Review of investigation report
- Review of evidence
- Preparation of questions

Must include:

- Conflicts check
- Recusal protocol

What About?

- Meeting with investigators?
- Ensuring rules of the hearing are followed?

PRE-HEARING PREPARATION

Always Review:

- Written notice of allegations
- Policy(-ies) alleged to have been violated
- Investigative report

Always Think:

- What do I need to know?
- Why do I need to know it?
- Who is the best person to get this information from?

STANDARDS OF EVIDENCE

Standard of Evidence	Level of Proof
Beyond a Reasonable Doubt	Highest standard of evidence; used in criminal law; facts of the case lead to only one reasonable conclusion
Clear and Convincing	Hybrid; proof that a particular fact or event was highly and substantially more likely than not to have occurred
Preponderance of Evidence	Civil standard; proof that a fact or event was more likely than not to have occurred

HEARINGS!

“Live” hearing – in-person or virtual

Requirements:

- All parties must be able to see and hear questioning.
- All parties must be able to present witnesses.
- Parties’ advisors are permitted to cross-examine parties and witnesses.
- College must provide an advisor(s) to parties that do not have one at a hearing.
- College must provide either an audio recording, audiovisual recording, or transcript of the hearing to all parties.
- Legal Rules of Evidence do not apply at hearings.

HEARINGS: GENERAL LOGISTICS

- Recording
 - How, by whom, etc.
- Attendance by parties and witnesses
- Location and room set-up
 - Comfort items
 - Privacy concerns
- Seating arrangements
- Materials
- Access to administrative support if needed
 - Phones, copiers
- Advisors
- Parties and witnesses waiting to testify
- Breaks
- Use of A/V

RULES FOR HEARINGS

- So long as all rules comply with the final regulations and apply equally to both parties, Colleges can adopt rules concerning:
 - Rules of decorum.
 - Timing and length of breaks.
 - Prohibition on disturbing the hearings.
 - Prohibition on badgering witnesses.

TIPS FOR DECISION-MAKERS

- Recognize the need for flexibility with the order of statements and questioning
- Be familiar with your institution's hearing procedures
- If a procedural question arises that must be addressed immediately, take a break to seek clarification
- Will you have legal counsel available by phone/text/in person?



HEARING TESTIMON Y

Determine

Determine the relevance and appropriateness of questions.

Pause after each question to “rule” on relevance. State your rationale for the record.

Provide

When necessary, provide directives to disregard a question or information deemed irrelevant, abusive, or repetitive.

Manage

Manage advisors as necessary.

Recognize

Recognize your authority and maintain professionalism.

QUESTIONING SKILLS AND GUIDELINES

- Your goal is to ensure you understand information contained in the Investigation Report:
 - Relevant facts about what happened
 - Any related events
 - Any corroborating information
- Use questions to elicit details, eliminate vagueness, or fill in the gaps
- Your goal is not:
 - Satisfying your curiosity
 - Chasing the rabbit into Wonderland
- Do not expect a “Gotcha” moment. You are not prosecutorial.

IF YOU THINK YOU HAVE TO ASK A QUESTION, ASK YOURSELF

- **Is the answer already in the report or documentation I have been provided?**
 - If not, why not? (Ask the Investigator!)
- **What do I need to know?**
 - Who is the best person to ask? Usually it will be the Investigator, first, and then the original source, if available
- **Why do I need to know it?**
 - If it is not going to help you decide whether a policy was violated, then it is not a good question
- **What is the best way to ask the question?**
- **Are you the best person to ask this question?**

ASKING GOOD QUESTIONS

- Generally use open-ended questions (tell us... who, what, how...)
- Try to avoid close-ended questions (did you... were you...)
- Don't ask compound questions
- Don't ask multiple choice questions
- Avoid suggesting an answer in your question



DECISION-
MAKING
SKILLS

Understanding evidence

Relevance

Reliability/credibility

Cross-examination

Analyzing information

UNDERSTANDING EVIDENCE

- If information helps to prove or disprove a fact at issue, it should be admitted.
- If credible, it should be considered.
 - Evidence is any kind of information presented with the intent to prove what took place.
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly.

UNDERSTANDING EVIDENCE

- No restriction on parties discussing case or gathering evidence.
- Equal opportunity to:
 - Present witnesses, including experts
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered except that it must be relevant.

RELEVANC E

Evidence is generally considered relevant if it has value in proving or disproving a fact at issue:

Alleged policy violation

A party or witness' credibility

The investigator will have made initial relevance "decisions" by including evidence in the investigation report...

But relevance is ultimately up to the decision-maker, who is not bound by the investigator's judgment.

UNDERSTANDING EVIDENCE

- Decision-maker may consider and assign weight to different types of evidence:
 - Documentary (diary, journal)
 - Electronic (photos, text messages)
 - Real/physical (clothes)
 - Direct or testimonial (personal observation)
 - Circumstantial (not eyewitness, but compelling)
 - Hearsay (statements made outside the hearing)

- Evidence of a Complainant's prior sexual behavior or predisposition is **not relevant** except when:
 - Offered to prove that someone other than the Respondent committed the alleged conduct, or
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition



SPECIFIC EVIDENCE ISSUES



ADDITIONAL EVIDENCE RESTRICTIONS

- Specific, written permission required in advance of a hearing for records made or maintained by a physician, psychiatrist, or psychologist

WHAT IS CREDIBILITY?

- Accuracy and reliability of information
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness

WHAT IS CREDIBILITY?

- Inherent plausibility
 - Does this make sense?
 - Be careful of bias influencing sense of “logical”
- Motive to falsify
 - Do they have a reason to lie?
- Corroboration
 - Independent, objective authentication
- Past record
 - Is there a history of similar behavior?

WHAT IS (NOT) CREDIBILITY?

- Clothing
 - “Just look at what she was wearing.”
- Appearance
 - “She is so unattractive. I don’t believe anyone would do that to her.”
- Flirting behavior
 - “She’s always flirting, what did she expect?”
- Male accuser
 - “He should have realized she meant it as a compliment.”
- Sexual orientation of accuser
 - “He came out of the closet and told everyone – he should have expected people would act like this.”



Character witnesses

"I've known him for 15 years, he wouldn't do that."



Popularity

"Everybody likes him, I just don't believe he would do that."



No history of past problems

"She's never been in trouble before."



Academic performance

"But he's a really good student."



Importance to a team or program

"She's our best tutor."

WHAT IS
(NOT)
CREDIBILITY?

CASE STUDY

- June

June is the dean of the college. Her son, Rob, just took a job as a maintenance technician. Rob works the night shift and rarely sees June at work. Most people don't even know they are related. A month after Rob started, June was accused of sexually harassing an employee in her office. Rob happened to be in the outer office working on ventilation at the time the incident allegedly occurred. June denies the allegation, and Rob is a critical witness.

QUESTIONING & CROSS-EXAMINATION

What is an Advisor's role during a live hearing?

Who can serve as an Advisor?

- Employees on campus
- External individuals (attorneys, retired judges, etc.)
- Employees of other colleges

How will the College designate Advisor(s) for parties that do not have their own?

QUESTIONING & CROSS- EXAMINATION



If a person does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that person in reaching a determination regarding responsibility.



The decision-maker cannot draw an inference about the determination regarding responsibility based solely on a person's absence from a hearing or refusal to answer cross-examination questions.

QUESTIONING & CROSS-EXAMINATION

What does “submit to cross-examination” mean?

- Answering cross-examination questions that are relevant.

Does the same “exclusion of statement” rule apply to a person’s refusal to answer questions posed by the decision-maker?

- No, because questions posed by a neutral decision-maker is not cross-examination.

QUESTIONING & CROSS-EXAMINATION

What does “statements” mean?

- “Statements” has its ordinary meaning but would not include evidence that does not constitute a person’s intent to make factual assertions, such as a video.
- Police reports, SANE reports, medical reports, and other records may not be relied on to the extent they contain statements of a person who has not submitted to cross-examination.

QUESTIONING & CROSS-EXAMINATION

If an Advisor asks a party one question only about their statements, are all statements now admissible?

- Yes. The Title IX regulations do not *require* a party's Advisor to ask cross-examination questions, but rather each party's Advisor must be *permitted* to ask all relevant cross-examination questions.



SECTION SEVEN

TITLE IX DETERMINATIONS AND APPEALS

ANALYZING INFORMATION POST-HEARING

- Decision-maker determines the greater weight of credibility on each key point in which credibility is at issue.
- First, narrow to the contested facts, and then make a credibility analysis by the standard of proof for each.
- Then, weigh the overall credibility based on the sum total of each contested fact.
- When you write the final, written determination, focus on what facts, opinion, and/or circumstantial evidence supports your conclusion. Offer a cogent and detailed rationale.

ANALYZING INFORMATION POST-HEARING

- Parse the Policy again, remind yourself of the elements that compose each allegation.
- Determine whether it is more likely than not that Policy has been violated or determine whether highly probable if clear & convincing standard applies.
- Do not turn to “outside” evidence.

DETERMINATION OF RESPONSIBILITY

- Within 10 days of a live hearing, the decision-maker must issue a written determination of responsibility, including:
 - Summary of allegations;
 - Procedural steps taken by College to investigate;
 - Findings of fact supporting the determination;
 - Conclusions regarding whether the alleged conduct occurred;
 - Rationale for the result as to each allegation;
 - Any disciplinary sanctions recommended or imposed on the Respondent;
 - Whether remedies will be provided to the Complainant; and
 - The College's appeal procedures.



Decision-maker should author the written determination.
(Who reviews?)



Written determination should be provided to parties
simultaneously.



Determination becomes final either on the date the College
provides the parties with the appeal result, or if an appeal is
not filed, the date on which an appeal would not be timely.



FERPA cannot be construed to conflict with or prevent
compliance with Title IX.

DETERMINATIO
N OF
RESPONSIBILIT
Y: LOGISTICS

SANCTIONING IN TITLE IX CASES

- Title IX and case law require:
 - Decision-maker should decide sanction if credibility will influence the sanction
 - Not act unreasonably to bring an end to the discriminatory conduct (Stop)
 - Not act unreasonably to prevent the future reoccurrence of the discriminatory conduct (Prevent)
 - Restore the Complainant as best you can (Remedy)

COMMON SANCTIONS

- Warning
- Probation
- Loss of privileges
- Counseling
- No contact
- Limited access to campus
- Service hours
- Online education
- Alcohol and drug assessment
- Suspension
- Expulsion
- Termination

POSSIBLE REMEDIES

- For the Complainant:
 - Escort on campus.
 - Separating Complainant and Respondent in classes or activities.
 - “Providing comprehensive, *holistic* victim services including medical, counseling, and academic support services, such as tutoring.”
 - Allowing Complainant to have additional time to complete or re-take a class or withdraw from a class without an academic or financial penalty.
 - Reasonable leave, if Complainant is employee.

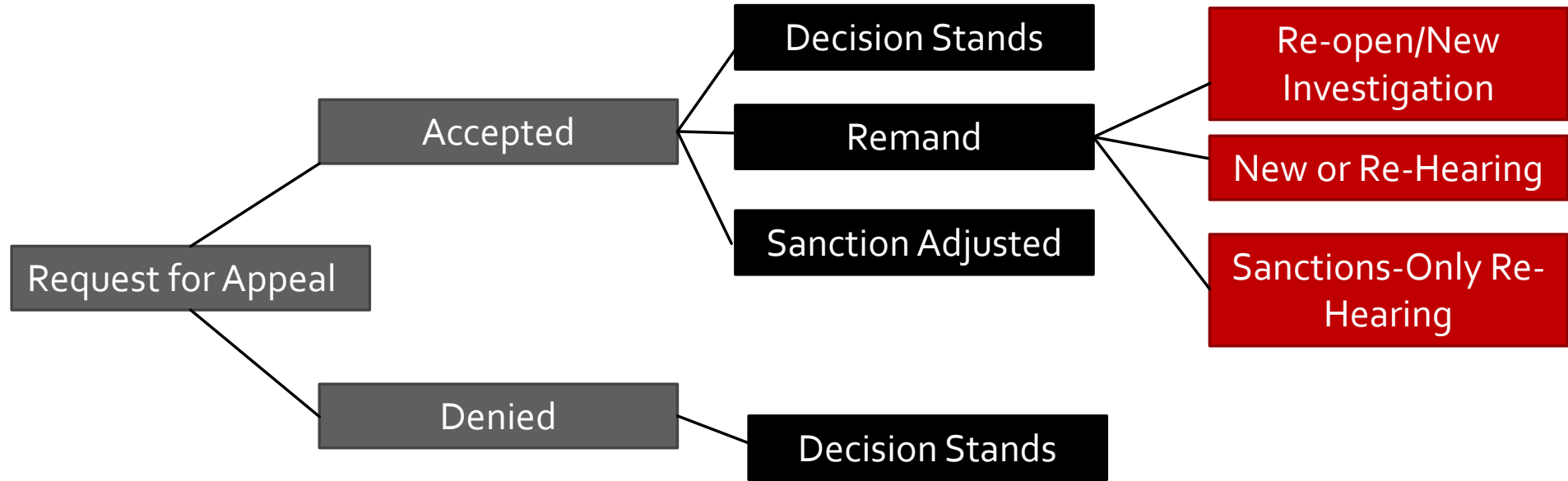
MORE POSSIBLE REMEDIES

- For the College:
 - Training (or retraining) on how to address sexual violence and misconduct.
 - Designating a counselor who is trained to provide comprehensive services to victims of sexual violence.
 - Developing material on sexual violence and misconduct to distribute to students (and staff!).
 - Issuing policy statements to students and staff.
 - Conduct a campus climate survey.
 - Targeted training for groups, clubs or areas where there is a hostile environment.
 - Developing a protocol to work with law enforcement.

APPEALS

- College must offer all parties the opportunity to appeal responsibility determination (and College's dismissal of a formal complaint) on these grounds:
 - Procedural irregularity that affected the outcome;
 - New evidence that was not reasonably available at the time the determination was made that could have affected the outcome; and/or
 - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome.
- Must provide notice to both parties when appeal is filed. Must provide both parties a chance to submit a written statement supporting or challenging the initial decision.
- Appeal decision-maker must be a different person from the Title IX Coordinator, investigator, or (initial) decision-maker.
- A written, final decision that describes the appeal result and its rationale must be provided to both parties.

APPEAL PROCESS





Show deference to initial decision.



Document-based and record review.



Appeals should not be automatic.



Standard of evidence for decision.

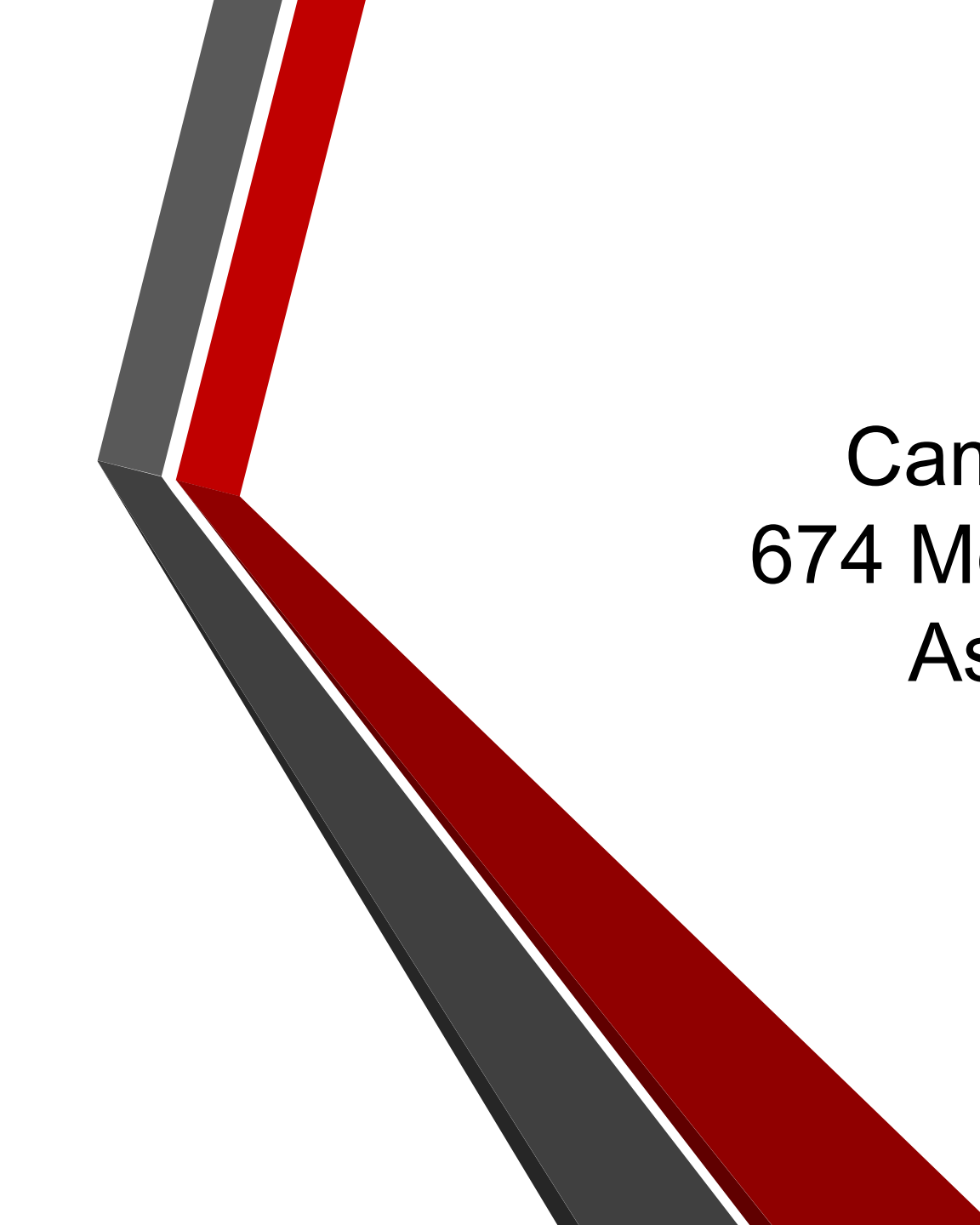
APPEALS – KEY ELEMENTS

APPEALS – BEST PRACTICES

- Remand. Your judgment is not better than that of others in the process. If there is a problem and you can send it back, do so.
- Problems with investigations can be repaired by re-opening investigations, or in rare cases, by re-investigating.
- Problems with hearings can often be fixed by limited re-hearing. Re-dos should be rare.

TITLE IX & FERPA

- 2001 Guidance-
 - If there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with Title IX's purpose of eliminating sex-based discrimination, the requirements of Title IX override any conflicting FERPA provisions.



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